**CONNECTICUT SITING COUNCIL**

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| **IN RE:** | | |
| **THE UNITED ILLUMINATING COMPANY (UI)** | : | |
| **APPLICATION FOR A CERTIFICATE OF** | : | |
| **ENVIRONMENTAL COMPATIBILITY AND PUBLIC** | : | **DOCKET NO. 516** |
| **NEED FOR THE FAIRFIELD TO CONGRESS** | : | |
| **RAILROAD TRANSMISSION LINE 115-KV** | : | |
| **REBUILD PROJECT THAT CONSISTS OF THE** | : | |
| **RELOCATION AND REBUILD OF ITS EXISTING** | : | |
| **115-KILOVOLT (KV) ELECTRIC TRANSMISSION** | : | |
| **LINES FROM THE RAILROAD CATENARY** | : | |
| **STRUCTURES TO NEW STEEL MONOPOLE** | : | |
| **STRUCTURES AND RELATED MODIFICATIONS** | : | |
| **ALONG APPROXIMATELY 7.3 MILES OF THE** | : | |
| **CONNECTICUT DEPARTMENT OF** | : | |
| **TRANSPORTATION'S METRO-NORTH RAILROAD** | : | |
| **CORRIDOR BETWEEN STRUCTURE B648S** | : | |
| **LOCATED EAST OF SASCO CREEK IN FAIRFIELD** | : | |
| **AND UI'S CONGRESS STREET SUBSTATION IN** | : | |
| **BRIDGEPORT, AND THE REBUILD OF TWO** | : | |
| **EXISTING 115-KV TRANSMISSION LINES ALONG** | : | |
| **0.23 MILES OF EXISTING UI RIGHT-OF-WAY TO** | : | |
| **FACILITATE INTERCONNECTION OF THE** | : | |
| **REBUILT 115-KV ELECTRIC TRANSMISSION** | : | |
| **LINES AT UI'S EXISTING ASH CREEK, RESCO,** | : | |
| **PEQUONNOCK AND CONGRESS STREET** | : | **JANUARY 11, 2024** |
| **SUBSTATIONS TRAVERSING THE** | : | |
| **MUNICIPALITIES OF BRIDGEPORT AND** | : | |
| **FAIRFIELD, CONNECTICUT** | : | |

## POST-HEARING BRIEF OF THE SCNET INTERVENORS

The intervenors, Sasco Creek Neighbors Environmental Trust Incorporated, Stephen Ozyck, Andrea Ozyck, Karim Mahfouz, William Danylko, David Parker, 2190 Post Road LLC, Invest II, International Investors, Southport Congregational Church, Pequot Library Association, Trinity Episcopal Church and Sasquanaug Association for Southport Improvement, Inc. (collectively, the "SCNET Intervenors"), respectfully submit this post-hearing brief in opposition to the subject application (Docket No. 516) submitted by The United Illuminating Company ("UI" or the "Applicant") for a certificate of environmental compatibility and public need for its

Fairfield to Congress Railroad Transmission Line 115-kV Rebuild Project (the "Project"). UI failed to establish a public need for the Project. It also failed to satisfy its statutory obligation to adequately consider alternatives that would have fewer adverse effects on the environment and local historic and cultural resources. Accordingly, UI's application should be denied. To the extent the Council finds a need for this Project, the denial should be without prejudice to permit UI to file a new application with a revised proposal to bury the transmission lines under public roads, or to make substantial modifications to any overhead proposal that would eliminate its need to acquire easements.

## I. INTRODUCTION AND BRIEF DESCRIPTION OF PROJECT

On or about March 17, 2023, UI filed an application (the "Application") with the Connecticut Siting Council (the "Council") for the issuance of a Certificate of Environmental Compatibility and Public Need (the "Certificate") in connection with the Project. The Project consists of the relocation and rebuild of the existing 115-kilovolt ("kV") overhead transmission lines that extend for approximately 7.3 miles within the Connecticut Department of Transportation ("CTDOT") and Metro-North Railroad ("MNR") corridor in the Town of Fairfield and the City of Bridgeport. The Project entails removing the existing 115-kV lines from UI-owned bonnets fastened on the top of the railroad catenary structures and rebuilding the 115-kV lines on one hundred and two (102) new independent single and double-circuit steel monopoles, ranging in height from ninety-five feet (95') to one hundred and ninety-five feet (195'), located predominantly south of the MNR track, partially within and partially outside of the MNR-CTDOT corridor. (UI App. Ex. 1, ES-5).

UI claims that the Project is based solely on asset condition.[1] The Project is *not* necessitated by current or anticipated demand or load capacity. (Tr. 12/12/23 p. 105; A-SCNET 1-21). According to UI, the Project is a straightforward "replacement" project to address age-related physical limitations of the railroad catenary structures. However, UI is proposing to upgrade the existing 1590 aluminum conductor steel reinforced (ACSR) "Lapwing" conductors with 1590 kcmil aluminum conductor steel supported (ACSS) "Lapwing" conductors. (UI Ex. 1, p. 2-13). The 1590 kcmil ACSS "Lapwing" conductors have a significantly higher ampacity rating than the existing 1590 ACSR "Lapwing" conductors, and thus provide more capacity and constitute a considerable transmission upgrade. (Tr. 12/12/23, p. 184-185).

1590 kcmil ACSS "Lapwing" conductors also have lower mechanical (i.e., tensile) strength and are heavier than UI's existing conductors. As a result, the Project requires taller monopoles to account for sag and larger monopole foundations with average caisson diameters of eight feet (8') and depths ranging from fifteen to forty feet (15'-40').[2] Due to UI's decision to upgrade to larger conductors, the Project cannot be rebuilt entirely within the CTDOT-MNR corridor. The Project requires the acquisition, via agreement or eminent domain, of 19.25 acres

[1] UI performed a needs and solution assessment in 2018, independent of ISO-New England ("ISO-NE"), and concluded that its existing transmission line exhibited age-related physical limitations. UI's 2018 assessment has not been updated. Neither CTDOT, PURA, FERC nor ISO-NE has directed UI to remove its transmission lines off the existing catenary structures. (UI Ex. 20, response to SCNET 1-26; see also A-CSC-5).

[2] UI's monopoles are designed to accommodate 2156 kcmil ACSS "Bluebird" conductors, which are significantly heavier and wider in diameter than both the existing 1590 ACSR "Lapwing" conductors and the proposed 1590 kcmil ACSS "Lapwing" conductors—even though there is no expected need for this capacity now or into the future. The proposed 1590 kcmil ACSS "Lapwing" conductors have an ampacity rating of 2543 amperes, which represents an 88% increase in ampacity over the existing 1590 ACSR "Lapwing" conductors. The 2156 kcmil ACSS "Bluebird" conductors have an ampacity rating of 3130 amperes, which equates to a 22% increase over the 1590 kcmil ACSS "Lapwing" conductors. (Tr. 12/12/23, p. 190).

of permanent easement and an additional 10 acres of temporary construction easement.[3] (UI Ex. 1, p. 1-16).

This unprecedented taking of private property will adversely affect the Southport Historic District, which is listed on both the National and State Registers of Historic Places ("NRHP" and "SRHP"). In addition, the taller steel monopoles will directly and indirectly affect three National Historic Landmarks ("NHL") located within half a mile of the Project corridor.[4]

The permanent easement required by the Project will have a direct adverse effect on multiple NRHP and SRHP-listed resources, including, *inter alia*, the Pequot Library, Southport Congregational Church, Trinity Episcopal Church, 275 Center Street and 170 Pequot Avenue. Additionally, the Project will directly and adversely affect properties potentially eligible for designation on the SRHP and NRHP, including 92 Pequot Avenue, 122 Pequot Avenue, 132 Pequot Avenue, 142 Pequot Avenue and 156 Pequot Avenue (along with 170 Pequot Avenue, the "Bulkley-Alvord-Northrop Houses"). There is also substantial evidence in the record indicating that, absent considerable modification, the Project will substantially burden Southport Congregational Church's and Trinity Episcopal Church's exercise of religion in violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and Connecticut

[3] The intervening parties testified, without exception, that they will not voluntarily grant UI an easement over their respective properties. (see e.g., Tr. 12/12/23, pp. 53, 110, 112; SCNET Ex. 18; SCNET Ex. 19; SCNET Ex. 20; SCNET Ex. 22).

[4] National Historic Landmarks are buildings, sites, districts, structures, and objects that have been determined by the United States Secretary of the Interior to be of national significance under one or more of six NHL criteria and retain a high degree of integrity. National Historic Landmarks are the highest level of designation by the United States and require a higher level of review under federal law. See 54 U.S.C. § 306107.

Additionally, a fourth property, the Pequot Library located at 720 Pequot Avenue, Southport, CT, is in the process of applying for NHL designation. (SCNET Ex. 22, p. 4, A13).

General Statutes ("C.G.S.") 52-571b. (See SCNET Ex. 21, Pre-Filed Testimony of P. Whitmore; SCNET Ex. 23, Pre-Filed Testimony of H. Schmitz).

UI purports to have considered project alternatives in accordance with C.G.S. § 16-50l, including an underground alternative that would be consistent with the legislative goal of minimizing damage to scenic, historic and recreational values. UI, however, dismissed the underground option as cost prohibitive. It estimated that undergrounding the entire Project would cost over $1 billion and that a hybrid alternative (undergrounding the transmission line from P648S to Ash Creek Substation) would cost approximately $488 million. (UI Ex. 16, Attachment 1).[5] These estimates amount to a cost per mile of approximately $100 million; a figure entirely inconsistent with the findings of the Council's latest Life Cycle Costs Report, which found an average underground construction cost of approximately $21 million per mile. (UI Ex. 21, A-SCNET 2-35; see also Siting Council Life-Cycle 2022). There is substantial evidence in the administrative record, including the testimony of Refat ("Ray") Awad and Henri ("Harry") Orten, electrical engineers with substantial expertise in the field of underground cabling and project cost-estimation,[6] to find that UI's estimates are grossly excessive. (See Tr. 12/12/23, p. 156 (R. Awad: "the project…estimate is *astronomical*…"). UI's cost per mile and project

[5] UI summarily rejected an underground option under U.S. Route 1 (Post Road) based upon the existence of a 345-kV transmission line situated beneath the Post Road. UI claimed that 10 to 12 feet of separation between its 115-kV cable and the 345-kV cable is required. However, it is undisputed that UI did not conduct a thermal analysis. Accordingly, its required 10 to 12 foot separation argument is entirely unsupported. (Tr. 12/12/23, p. 55).

[6] It cannot be disputed that both Mr. Orton and Mr. Awad possess significantly more experience in the field of underground cabling and in developing budgets for large and small-scale underground distribution and transmission line projects than anyone made available by UI on its witness panel. In fact, at one point during the undersigned's cross-examination of UI's engineer, Meena Sazanowicz, regarding its underground transmission cost estimates, UI's counsel objected and stated that, "Ms. Sazanowicz is an employee and engineer at the United Illuminating Company. *I don't know that she's been presented as an expert.*" (Tr. 11/16/23 p. 139) (emphasis added).

duration estimates reflect its acknowledged lack of understanding and experience with underground cable technology.[7]

The Council held an evidentiary hearing on UI's Application over the course of six days (i.e., July 26, 2023, August 29, 2023, October 17, 2023, November 16, 2023, November 28, 2023 and December 12, 2023). Both the Town of Fairfield and the City of Bridgeport intervened in the proceedings, as did a number of local businesses, property owners and concerned citizens and neighborhood organizations. The Project has drawn opposition from local, state and national elected officials.[8]

The intervening parties introduced substantial evidence indicating that there is no public need for the Project and that the Project, as proposed, is designed to accommodate an electric load substantially greater than UI's current and projected demand. As noted, Mr. Awad and Mr. Orton testified that UI's underground cost and timing estimates are grossly excessive. Both testified that the Project could be constructed underground and within the public right of way at an exponentially lower cost. (SCNET Ex. 24, Pre-Filed Testimony of H. Orten). While marginally more expensive upfront, the benefits of underground transmission include little to no risk of outage; little to no safety risk associated with weather conditions; lower fault rates and greater system reliability; less environmental impact; no adverse visual impact to above-ground historic and cultural resources; less impact on property values; fewer EMF concerns; and less

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[7] Per the Council's "2022 Life-Cycle Cost Analysis of Overhead and Underground Electric Transmission Lines" Report "UI has not constructed any 115-kV XLPE, 115-kV HPFF, 345-kV XLPE or 345-kV HPFF [underground] transmission lines" since, at least, 2017. See CSC Life Cycle 2022, available at https://portal.ct.gov/-/media/CSC/1_Dockets-medialibrary/LifeCycle/2022LifeCycle/Lifecycle2022finalmemoandreport_s.pdf

Additionally, UI's engineer, Meena Sazanowicz, admitted on cross-examination that her experience undergrounding transmission lines is limited to three projects. Of these three projects, one occurred in 2012 and involved a different type of cabling, the other involved a total length of less than a mile (i.e., the Pequonnock Project) and the third was a "conceptual level study" that had not advanced to the cost analysis stage. (Tr. 11/16/23 p. 142-144).

[8] See Public Official Comments 1-5.

taking of private property for permanent and temporary easements. (Town Ex. 7, Pre-Filed Testimony of R. Awad).

Additionally, the intervening parties introduced expert testimony indicating that UI significantly undercounted the number of above-ground historic and cultural resources impacted by the Project (particularly within the Southport Historic District). UI also purposefully dismissed the national significance of existing resources and understated their exceptional architectural and historic integrity and the degree to which they will be adversely affected by the Project. (SCNET Ex. 17, Pre-Filed Testimony of David Scott Parker; Town Ex. 9, Pre-Filed Testimony of Wes Haynes).

A recurring theme of the evidentiary hearing was UI's refusal to produce relevant load projection and cost data associated with its rejected underground Project alternative.[9] In response to multiple Intervenor requests, UI alleged, without providing any substantiation, that the information sought was "confidential and proprietary." Over the undersigned's repeated objection, the Council permitted UI to avoid the requested disclosures. Chairman Morrisette confirmed that the Council's position was to rely "on the assumptions and the value that UI has provided" and "not [to] compel [UI] to provide the raw data." (Tr. 11/16/23 p. 130).

As discussed in greater detail in section V(a) of this post-hearing brief, UI's refusal to disclose relevant and material information (and the Council's refusal to order disclosure) violated the Intervenors' right to a fundamentally fair proceeding. Nonetheless, the administrative record contains substantial evidence that there is no public need for the Project and that there are project alternatives which result in significantly less environmental impact. UI, however, either

[9] Ironically, much of the same information that UI objected to providing to the SCNET Intervenors was requested by, and provided to, UI's counsel during his cross-examination of Ray Awad and Harry Orten. (Tr. 12/12/23, p. 183-84).

neglected to address these project alternatives (for example, the use of trapezoidal cable or another smaller and lighter overhead conductor which could be sited entirely within the existing CTDOT-MNR corridor and would not necessitate the taking of private property, or an underground route beneath the Post Road, U.S. Route 1) or provided the Council with grossly and artificially inflated (and, frankly, indefensible) cost figures in support of its claim that alternatives are cost prohibitive.

Respectfully, UI's Application must be denied. Neither the Town of Fairfield, the City of Bridgeport nor the impacted property and business owners, neighborhood associations and religious institutions should be subjected to the large-scale disruption and substantial adverse environmental effects associated with the Project. UI ratepayers should not be forced to incur the financial burden of this invasive and unnecessary transmission upgrade Project.

## II. NO DEMONSTRATED PUBLIC PURPOSE

The SCNET Intervenors hereby adopt and incorporate the Post-Hearing Brief of the Town of Fairfield. As set forth more fully in the Town's brief, UI has (i) failed to establish a "public need" for its Project; (ii) failed to adequately consider overhead and underground alternatives to the Project; (iii) failed to establish that the existing condition of the railroad catenary structures necessitates removal of the transmission line; (iv) designed the Project to increase transmission capacity with heavier and wider conductors which require taller poles, larger foundations and greater taking of private property; (v) purposefully exaggerated the costs associated with its underground alternatives; and (vi) pushed for this unnecessary Project in order to further its own profit motive.

The SCNET Intervenors would simply add that absent a "public need," UI lacks authority under PUESA and Connecticut law to exercise its power of eminent domain. The SCNET

Intervenors have, without exception, testified that they will not voluntarily grant UI any easement over their respective properties.

## III. PUBLIC UTILITIES ENVIRONMENTAL STANDARDS ACT

The Project requires a certificate of environmental compatibility and public need (a "Certificate") from the Council in accordance with the Public Utilities Environmental Standards Act ("PUESA"), C.G.S. § 16-50g, et seq.[10] The introductory portion of PUESA sets forth the General Assembly's legislative findings and the purpose of the act. In pertinent part, it states: "[t]he legislature finds that power generating plants and transmission lines for electricity and fuels...have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and towers, if not properly planned and controlled, could adversely affect the quality of the environment, the ecological, scenic, historic and recreational values of the state. The purposes of this chapter are to provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to *protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values*." C.G.S. § 16-50g (emphasis added).

C.G.S. § 16-50p(a) (3) provides, in relevant part, that the Council shall not grant a Certificate, either as proposed or as modified by the Council, unless it finds and determines:

(A)...a public need for the facility and the basis of the need; (B) The nature of the probable environmental impact of the facility...including a specification of every significant adverse effect, including, but not limited to, (i) electromagnetic fields that, whether alone or cumulatively with other effects, impact on, and conflict with the policies of the state concerning the natural environment, (ii) ecological balance, (iii) public health and safety, (iv) scenic, historic and recreational values, (v) agriculture, (vi) forests and parks, (vii) air and water purity, and (viii) fish,

[10] C.G.S. § 16-50k(a) provides that "no person shall exercise any right of eminent domain in contemplation of, commence the preparation of the site for, commence the construction or supplying of a facility, or commence any modification of a facility, that may, as determined by the council, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need."

aquaculture and wildlife; (C) Why the adverse effects or conflicts referred to in subparagraph (B) of this subdivision are not sufficient reason to deny the application; (D) In the case of an electric transmission line, (i) what part, if any, of the facility shall be located overhead... and (iii) that the overhead portions, if any, of the facility are consistent with the purposes of this chapter, with such regulations or standards as the council may adopt pursuant to section 16-50t, including, but not limited to, the council's best management practices for electric and magnetic fields for electric transmission lines and with the Federal Power Commission "Guidelines for the Protection of Natural Historic Scenic and Recreational Values in the Design and Location of Rights-of-Way and Transmission Facilities" or any successor guidelines and any other applicable federal guidelines and are to be contained within an area that provides a buffer zone that protects the public health and safety, as determined by the council. In establishing such buffer zone, the council shall consider, among other things, residential areas, private or public schools, licensed child care centers, licensed youth camps or public playgrounds adjacent to the proposed route of the overhead portions...."

Based upon the Act's express legislative findings and plain and unambiguous language, PUESA requires the Council to afford the protection of the environment, including historic and cultural preservation, substantial weight when deciding an application for a Certificate. See also FairwindCT, Inc. v. Connecticut Siting Council, 313 Conn. 669, 698, 99 A.3d 1038 (2014) ("[T]he mission of the council is to balance public need and environmental impact."). It is clear in this case that UI has failed to satisfy its statutory burden under PUESA.

## IV. BURDEN OF PROOF

It is well established that UI, as the Applicant, bears the burden of proof. Samperi v. Inland Wetlands Agency, 226 Conn. 579, 593 (1993) (The applicant to an administrative agency bears the burden of proof). It is an elementary rule that whenever the existence of any fact is necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact." (Internal quotation marks omitted) Zhang v. Omnipoint Communications Enterprises, Inc., 272 Conn. 627, 645 (2005), quoting Nikitiuk v. Pishtey, 153 Conn. 545, 552 (1966); *see also,* Komondy v. Zoning Board of Appeals, 127 Conn. App. 669, 678 (2011) ("the burden rests with the applicant to demonstrate its entitlement to the requested relief."); C. Tait, Connecticut Evidence (3d Ed.2001) § 3.3.1, p. 136 ("whoever asks

the court to give judgment as to any legal right or liability has the burden of proving the existence of the facts essential to his or her claim or defense").

Accordingly, UI carries the burden of proving that it is entitled to a Certificate under PUESA. The statutes governing the Council's consideration of applications for a Certificate are silent as to the evidentiary standard that the applicant must meet in order for its application to be approved. "In the absence of state legislation prescribing an applicable standard of proof ... the preponderance of the evidence standard is the appropriate standard of proof in administrative proceedings .... " Goldstar Medical Services, Inc. v. Dept. of Social Services, 288 Conn. 790, 821 (2008).

## V. DUE PROCESS AND FUNDAMENTAL FAIRNESS

In addition, the requirements of fundamental fairness and due process apply to Council proceedings. Concerned Citizens of Sterling v. Connecticut Siting Council, 215 Conn. 474 (1990); Rosa v. Connecticut Siting Council, Superior Court, Judicial District of New Britain, Docket No. HHB-CV-05-4007974-S (March 1, 2007), 2007 WL 829582; Torrington v. Connecticut Siting Council, Superior Court, Judicial District of Hartford, Docket No. CV90-0371550-S (September 12, 1991), 1991 WL 188815.

"In all its proceedings, a regulatory agency must act strictly within its statutory authority, within constitutional limitations, and in a lawful manner." (Internal quotations omitted; citation omitted.) Huck v. Inland Wetlands & Watercourses Agency, 203 Conn. 525, 536 (1987). "Hearing before administrative agencies," such as this Council, "although informal and conducted without regard to the strict rules of evidence, must be conducted so as not to violate the fundamental rules of natural justice...Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant

evidence, and an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence." (Internal quotations omitted; citations omitted.) Id. A fundamental principle of due process is that each party has the right to receive notice of a hearing, and the opportunity to be heard at a meaningful time and in a meaningful manner. Harkless v. Rowe, 232 Conn. 599, 627 (1995). "An integral premise of due process is that a matter cannot be properly adjudicated 'unless the parties have been given a reasonable opportunity to be heard on the issues involved ....'" Bryan v. Sheraton-Hartford Hotel, 62 Conn. App. 733, 741 (2001), quoting Bloom v. Zoning Board of Appeals, 233 Conn. 198, 205 (1995).

In Grimes v. Conservation Commission, 243 Conn. 266, 273-4 (1997), the Supreme Court defined the parameters of "fundamental fairness" in administrative proceedings:

> Although no constitutional due process right exists in this case, we have recognized a common law right to fundamental fairness in administrative hearings. "The only requirement [in administrative proceedings] is that the conduct of the hearing shall not violate the fundamentals of natural justice." *Miklus v. Zoning Board of Appeals*, 154 Conn. 399,406, 225 A.2d 637 (1967). Fundamentals of natural justice require that 'there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary .... ' *Parsons v. Board of Zoning Appeals*, 140 Conn. 290, 293, 99 A.2d 149 (1953), overruled on other grounds, *Ward v. Zoning Board of Appeals*, 153 Conn. 141, 146- 47,215 A.2d 104 (1965). Put differently, "[d]ue process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act ... and to offer rebuttal evidence." *Pizzola v. Planning & Zoning Commission*, 167 Conn. 202, 207, 355 A.2d 21 (1974); see also *New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospitals & Health Care*, 226 Conn. 105, 149-50,627 A.2d 1257 (1993) (administrative agency "cannot properly base its decision ... upon [independent] reports without introducing them in evidence so as to afford interested parties an opportunity to meet them"); *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 536, 525 A.2d 940 (1987) (administrative due process requires due notice and right to produce relevant evidence); *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, 249, 470 A.2d 1214 (1984) (same). The purpose of administrative notice requirements is to allow parties to "prepare intelligently for the hearing." *Jarvis Acres, Inc. v. Zoning Commission*, supra, 163 Conn. [41] at 47, 301 A.2d 244. (Footnotes omitted.) Id.

## VI. ARGUMENT

### a. THE COUNCIL'S PROCEEDING WAS FUNDAMENTALLY UNFAIR

#### i. UI's withholding of Evidence Violated the Intervenors' Right to Fundamental Fairness.

Throughout the proceeding, UI purposefully withheld pertinent information from the SCNET Intervenors and the Council. Specifically, UI objected to twenty-two (22) of the Intervenors' initial thirty-nine (39) interrogatories and requests for production. (UI Ex. 20, A-SCNET 1-1 through A-SCNET 1-39). UI objected on the grounds that the information sought was irrelevant to the Council's hearing on UI's Application; confidential and propriety; or Critical Electric Infrastructure Information ("CEII"), otherwise exempt from disclosure pursuant to federal law. UI provided no factual or legal justification whatsoever for any of its three classes of objections. The Council improperly chose not to engage in a substantive, interrogatory by interrogatory, review of UI's objections nor did it exercise its right to examine contested documents in camera. Instead, Chairman Morrisette stated that the Council was electing to rely "on the assumptions and value that UI has provided" and confirmed that the Council would "not compel [UI] to provide the raw data." (Tr. 11/16/23 p. 130). In doing so, the Council failed to require UI to sustain its burden of proving that the requested information was confidential or proprietary by providing "more than general or conclusory statements in support of its contention." Department of Info. Technology of Greenwich v. Freedom of Information Commission, 274 Conn. 179, 194 (2005).

Likewise, during the Council's evidentiary hearing, UI repeatedly objected to the Intervenors' attempts to examine its witness panel on issues material to UI's load projections for the rebuilt circuit and its cost analyses for project alternatives, particularly its undergrounding alternative, even though this evidence is directly relevant and required to be considered under

PUESA. During the November 16, 2023 continued evidentiary hearing, UI's principal engineer, Meena Sazanowicz, repeatedly objected to the undersigned's line of questioning and alleged, without providing any support whatsoever, that the information requested was "protected and proprietary" or "proprietary and confidential." (Tr. 11/16/23, p. 134-136).[11]

As noted, Council proceedings are governed by the Connecticut Uniform Administrative Procedure Act, C.G.S. § 4-166 et seq. ("UAPA") and the Council's rules of practice, Regs., Conn. State Agencies § 16-50j-1 et seq. It is well established, however, that "[h]earings before administrative agencies…although informal and conducted without regard to the strict rules of evidence, must be conducted so as not to violate the fundamental rules of natural justice…Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and *an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence*." (Emphasis added; citations omitted; internal quotation marks omitted) Giaimo v. New Haven, 257 Conn. 481, 512-13, 778 A.2d 33 (2001).

The UAPA unambiguously provides that, "[i]n a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes…" C.G.S. § 4-177c(a)(1).

The UAPA also affords parties to contested cases "the opportunity…at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and

[11] The Council's regulations specifically provide that "the council shall give effect to the rules of privilege recognized by law in Connecticut." Regs., Conn. State Agencies § 16-50j-28(a). The Council failed to adhere to its regulations by allowing Ms. Sazanowicz to not respond to the undersigned's line of questioning.

argument on all issues involved." C.G.S. § 4-177c(a)(2). C.G.S. § 4-178 defines the scope of cross-examination required in a contested case under the UAPA as that "required for a *full and true disclosure of the facts*." C.G.S. § 4-178(5) (emphasis added). The Council's regulations similarly provide for cross-examination where required for a "full and true disclosure of the facts." Regs., Conn. State Agencies § 16-50j-28(c). The information and associated documentation requested by the Intervenors by way of written discovery and cross-examination was relevant and material to the Council's review and consideration of UI's Application. The requested information and/or documentation was not otherwise in the possession of the Intervenors or the Council.

UI failed to produce anything substantiating its claim that any of the requested information was confidential, proprietary or qualified as CEII. Furthermore, UI did not demonstrate that the public interest in preserving confidentiality, in this instance, outweighed the benefit of discovery. See generally Office of Consumer Counsel v. Dept. of Public Utility Control, 44 Conn. Supp. 21, 27, 665 A.2d 921 (1994). In accordance with its own regulations, "[t]he council shall give effect to the rules of privilege recognized by law in Connecticut." Regs., Conn. State Agencies § 16-50j-28(a). It is a general tenet of state and federal law that confidentiality does not equate to privilege. The U.S. Supreme Court has observed that "orders forbidding any disclosure of...confidential information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel...or to the parties." Federal Open Market Committee v. Merrill, 443 U.S. 340, 362 n. 24 (1979); see also Hartford Life and Acc. Ins. Co. v. Wiggin, 1997 WL 280157, 19 Conn. L. Rptr. 522 (Conn. Super. Ct., May 15, 1997) ("Even if the documents at issue did contain confidential information, that would not render them undiscoverable. Generally, documents containing trade secrets or proprietary information

are subject to discovery."). Furthermore, Connecticut law provides that materials obtained, created and/or relied upon by expert witnesses are not privileged, confidential or otherwise exempt from disclosure. See Murchie v. Hurwitz, Et. Al., 1992 WL 91675 (Conn. Sup., JD of Stamford-Norwalk at Stamford, J. Rush, April 8, 1992) (An opposing party "has a right to investigate the factual basis of any opinions, expressed by the expert, the nature of any facts that may have been disregarded by the expert as not being relevant to his opinion, and the nature of the request being made to the expert.").

The SCNET Intervenors filed a Motion to Compel Disclosure, which indicated that to the extent any requested cost information or documentation was determined to be confidential or proprietary, the Intervenors were, and still are, willing to execute binding confidentiality agreements with UI and the Council. Past precedent, including this Docket, provides that withheld information may be submitted under seal. The Council denied the Intervenors' Motion to Compel by a four to one vote and instead elected to accept "the assumptions and the value that UI has provided..." (Tr. 11/16/23, p. 130). As a practical matter, the Council's ruling permitted UI to reject an entire project alternative as cost-prohibitive without being required to disclose to the Council or to the public how it reached its exorbitant, and likely indefensible, cost estimate. UI's withholding of material information and the Council's denial of SCNET's Motion to Compel Disclosure, disadvantaged the Intervenors and rendered the Council's proceeding fundamentally unfair.

**ii. The Council's decision to impose an arbitrary time limit on Cross-Examination violated the Intervenors' right to fundamental fairness.**

On December 8, 2023, the Council issued an order allotting "a total of **one hour** for cross examination by the other parties/intervenors to the proceedings and the Council." (Emphasis in original) (the "Order"). While the SCNET Intervenors acknowledge the Council's authority to

exclude "irrelevant, immaterial or unduly repetitious evidence, see C.G.S. § 4-178(1), the Order did not impose content specific limitations. Rather, it imposed a *time specific* limitation. Notably, the Council imposed no such arbitrary time limitation on the presentation of evidence by the UI witness panel—which took place over the course of *five* (5) hearing days. By limiting the amount of time permitted for all other witnesses to testify, the Council set up a different set of rules for any party or intervenor who did not support the Application.

"Although time, per se, does not reflect the adequacy of cross-examination, it is one factor to consider in determining whether the [parties'] right to cross-examination was violated." Pet v. Department of Health Services, 228 Conn. 651, 663 (1994). Only "[w]hen the absolute right of cross examination has been fully and fairly exercised, [does] its extent become subject to the sound discretion of the [presiding official who] may exercise a reasonable judgment in determining when the line of inquiry has been exhausted…The [presiding official] has broad discretion in deciding the *relevancy of evidence* as it pertains to cross-examination…" Id. (citing State v. Jones, 167 Conn. 228, 232-33 (1974)); see also Pet v. Department of Health Services, 228 Conn. 651, 688-89 (1994) (Berdon, J. Dissenting) (explaining that presiding official or judge "has wide discretionary control over the *extent* of cross-examination upon particular topics, but the denial of cross-examinations altogether, or its *arbitrary curtailment* upon a proper subject of cross-examination will be ground for reversal.") (Emphasis in original).

The Council's decision to limit cross-examination during its December 12, 2023 continued evidentiary hearing was arbitrary, capricious and an abuse of its discretion. The order prejudiced the Intervenors, and, conversely, not the Applicant, by precluding the Intervenors' pursuit of relevant, material lines of questioning on cross-examination. During the SCNET Intervenors' cross-examination of the Town of Fairfield's witnesses, the Council informed the

undersigned that "Your time is running out. We've been at it for some time now." The undersigned stated, "I have a lot more questions to ask, but I'm aware of the time limit imposed by the Council, and I'm trying to abide by that." (Tr. 12/12/23, p. 235-36). Shortly thereafter, the undersigned ended his cross-examination while noting, for the record, that "I do actually [have further questions at this time], but I'm being respectful of the one-hour time limit. *So based on that*, I am finished." (Tr. 12/12/23, p. 239-40).

### b. THE PROJECT WILL HAVE SIGNIFICANT ADVERSE ENVIRONMENT EFFECTS

As discussed, the purpose of PUESA and this Council's review is to balance the need for adequate and reliable public utility service with the need to "protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values." Conn. Gen. Stat. § 16-50g. Although PUESA specifically provides for preserving historic values, it is likewise undisputed that the preservation of historic and cultural resources is an integral and inherent component of environmental protection under Connecticut law.[12] The Project, as proposed, will have significant, direct and indirect adverse impacts on environmental, historic and cultural resources in Southport, Fairfield and Bridgeport.

#### i. UI Submitted an Inadequate Phase IA Cultural Resources Report.

Heritage Consultants prepared a Phase IA Cultural Resources Report (the "Phase IA") on behalf of UI. (UI App. Volume 1A, Appendix D). The purpose of a Phase IA is to evaluate a project area's sensitivity for the presence of cultural and historic resources to guide field investigations and to identify project alternatives where appropriate. Best practices require, at

[12] See e.g., Connecticut Environmental Protection Act, C.G.S. § 22a-19a ("The provisions of [the Connecticut Environmental Protection Act ("CEPA")] shall be applicable to the unreasonable destruction of historic structures and landmarks of the state..."); see also Smith v. Zoning Board of Appeals, 227 Conn. 71, 85, 629 A.2d 1089 (1993) (State "environmental statutes make it clear that historical factors are a recognized element of environmental law.").

minimum, thorough background research, a comprehensive literature review and preliminary fieldwork prior to completing a Phase IA. A completed Phase IA should contain an inventory and history of the resources located, or likely to be discovered, within the project area. (Town Ex. 9, Pre-Filed Testimony of Wes Haynes, p. 5).

The Phase IA completed by Heritage Consultants is woefully inadequate. It fails to properly identify or catalogue the historic and cultural resources located in Southport (as well as Fairfield and Bridgeport) and diminishes the historic significance of the Southport Historic District. The Phase IA identifies only twenty-one (21) NRHP-listed, SRHP-listed or locally-designated historic properties in Southport. It omits entirely one hundred and seventy-four (174) NRHP-listed, SRHP-listed or locally-designated historic properties in Southport. (SCNET Ex. 17, Pre-Filed Testimony of David Scott Parker, p. 8).[13]

The omissions inherent in the Phase IA can be attributed to Heritage Consultants' failure to engage in a meaningful, let alone thorough, review of readily-available historic resource inventories. Wes Haynes, a historic preservationist retained by the Town of Fairfield, reviewed UI's Phase IA and identified fourteen (14) omitted historical, architectural and archeological resources pertaining to Southport alone. (Town Ex. 9, Pre-Filed Testimony of Wes Haynes, Ex. B, p. 2-4). On cross-examination, David George, of Heritage Consultants, confirmed that he did not review the inventories cited by Mr. Haynes nor did he consult local universities, local museums, local historical societies or the Bridgeport or Fairfield Historic District Commissions prior to preparing UI's Phase IA. (Trans. 11/16/23 p. 34-35).

[13] UI's Phase IA twice stated that the Project would have no "Visual Impacts" ["None"] on the Pequot Library. The Project proposes to place a one hundred and fifteen foot (115') tall steel monopole **directly** on the Library's property and to remove the vegetative screening separating the Library from the CTDOT-MNR corridor. This twice-repeated misrepresentation illustrates the blatant and woeful inadequacy of UI's report. (Phase IA, p 17; Feb. 2023 Addendum Table 1; SCNET Ex. 17, p. 9, Ex. O, P).

The Phase IA additionally understates the historic significance of Southport. It provides, in pertinent part, "the Southport Historic District is considered significant because it was the center of trade and commerce in the town of Fairfield in the eighteenth and nineteenth centuries." (UI App. Vol. 1A, Appx. D, p. 10). This description implies local significance. This, however, was not the case. The Southport Historic District was nominated for and designated on the NRHP in 1971, prior to the National Park Service adopting formalized and thematic criteria. The narrative text of the District's NRHP nomination, however, provides that "more shipping was owned in Southport in proportion to its size than in any port between Boston and New York" in the early nineteenth century. (Town Ex. 9, Pre-Filed Testimony of Wes Haynes). Mr. Haynes testified that Southport was "historically significant at the national level as an important port between Boston and the southern coast. The description...provided in the Phase IA said that basically it was an important commercial center within the Town of Fairfield which suggested it has limited local significance, but the significance is much broader than that." (Tr. 12/12/23, p. 222).

The District was nominated not only for its role in trade and commerce, but also for its exceptional architectural integrity. The Southport Historic District's concentration of Greek Revival and Victorian structures "retain *exceptional integrity*...compared to other National Register historic districts." (Emphasis added) (Town Ex. 9, Pre-Filed Testimony of Wes Haynes, Ex. B, p. 5). The iconic view of Southport from its historic harbor and its interrelationship to the "more than 150 buildings within the district" was noted as a major contributing factor in the Statement of Significance on the 1971 nomination of Southport to the NRHP. UI's Project will permanently impact this critically important vista; however, it was inexplicably omitted from the Phase IA report. (SCNET 17, Pre-Filed Testimony of David Parker, p. 10, Ex. S,T).

In addition to its flawed and incomplete assessment of the Southport Historic District, the Phase IA also failed to adequately address the "unique aggregation" of nationally-significant historic and cultural landmarks located within half a mile of, and impacted by, the Project. (Town Ex. 9, Pre-Filed Testimony of W. Haynes, Ex. B, p. 7). The Project corridor is exceptional in that three National Historic Landmarks ("NHL") are located within half a mile. Specifically, the Birdcraft Sanctuary, located at 314 Unquowa Road, Fairfield,[14] the Jonathan Sturges Cottage, located at 449 Mill Plain Road, Fairfield, and the Barnum Institute of Science and History, located at 820 Main Street, Bridgeport will suffer adverse visual impacts as a result of the Project. In addition, within half a mile of the Project corridor, there are 647 properties locally listed or listed on the SRHP or NRHP in the City of Bridgeport, 130 properties locally listed or listed on the SRHP or NRHP in the Town of Fairfield, and 195 properties locally listed or listed on the SRHP or NRHP in the Village of Southport. The region boasts a remarkable concentration of historic and cultural resources. (SCNET Ex. 17; Town Ex. 9; UI App. Vol. IA-Appx. D. (Table 1)).

The Phase IA omitted the highly significant Mary and Eliza Freeman Houses, located at 352-54 and 358-60 Main Street in Bridgeport, from its individual listing of NRHP and SRHP properties located within half a mile of the Project corridor. Built in 1848, the Freeman Houses are the oldest remaining homes in the State of Connecticut built by, and for, free people of color. Mr. Haynes testified that, these structures "are extremely rare…An estimated 2 to 3 percent of all properties on the National Register are associated with Black Americans. And they're even rarer in terms of properties that predate the Civil War…" (Tr. 12/12/23, p. 244). In 2018, the Freeman

[14] Birdcraft is the oldest private songbird sanctuary in the United States and is listed in the NRHP and designated as a National Historic Landmark. UI's Project Drawings and Mapping identify Birdcraft as a SRHP resource, but do not identify it as a cultural resource. Rather it is referred to as "recreational/open space." This is a significant and glaring mischaracterization.

Houses were recognized on the National Trust for Historic Preservation's "List of the 11 Most Endangered Places in America." (SCNET Ex. 17, Pre-Filed Testimony of David Scott Parker). As a result, the Freeman Houses received federal funding for their preservation and restoration in September 2023 and were saved from demolition. (SCNET Ex. 17, p. 11-12). The Project proposes a one hundred and twenty-five foot (125') tall steel monopole within three hundred and twenty feet (320'), and within the direct viewshed, of the Freeman Houses. (SCNET Ex. 17, Pre-Filed Testimony of David Scott Parker).

The Phase IA's omission of readily available sources of information critical to an objective assessment resulted in its flawed and woefully incomplete conclusions regarding the severity and extent of adverse physical and visual impacts to existing above-ground cultural resources. As a result, in violation of PUESA, UI's Phase IA fails to provide a substantive assessment of the direct and indirect impacts associated with the Project and does not present credible observations or recommendations for further investigation or consideration of feasible Project alternatives. Concerns regarding the sufficiency of UI's Phase IA report prompted the State Historic Preservation Office ("SHPO") to recommend that "a decision of approval be postponed until additional information can be provided, to better make informed/additional recommendations." (Emphasis in original) (SHPO Comments, 11/17/23).

Consistent with PUESA's clear purpose, UI bears the burden of providing sufficient evidence for the Council to find and determine "the nature of the probable environmental impact" of the Project, "including a specification of every significant adverse effect," and "why the adverse effects...are not sufficient reason to deny the application." C.G.S. § 16-50p(a)(3)(A)-(C). Given the inadequacy of the Phase IA, it is not possible for UI to have satisfied its statutory burden.

### ii. The Project will Result in Indirect and Direct Impacts to Historic and Cultural Resources

It is uncontested that the Project will result in adverse visual impacts to historic and cultural resources adjacent to, and within 0.5 miles of, the CTDOT-MNR Corridor. Findings of adverse visual impacts were made by SHPO and confirmed by UI's witness panel. (See e.g., State Historic Preservation Office Comments, 11/17/23). However, during the Council's evidentiary hearing, UI repeatedly asserted that the Project would result in "*indirect* impacts" only. (See e.g., UI Ex. 21, A-SCNET 2-9 ("The Project will not cause any direct impacts to above-ground historic resources.")).

UI's determination of no direct impacts can be attributed, in part, to its fundamental misunderstanding of what constitutes a 'direct,' as opposed to an 'indirect,' impact. During the Council's November 16, 2023 continued evidentiary hearing, the undersigned engaged in the following dialogue with UI's consultant, David George:

> *M. Coppola: does that reiterate your prior testimony that unless the project is actually... **physically impairing the building**, that it's not—it doesn't have a direct impact on that historic resource?*
>
> *The Witness (George): That's correct. It would be an indirect impact – effect.*

(Tr. 11/16/23, p. 59-60 (Emphasis added).

The United States Court of Appeals, however, recently confirmed that direct impacts to historic properties under Sections 106 and 110(f) of the National Historic Preservation Act ("NHPA") may, in fact, be visual, auditory, or atmospheric. See National Parks Conservation Association v. Semonite, 916 F.3d 1075 (D.C. Circuit, May 31, 2019). In the Semonite case, a public utility applied for a permit from the Army Corps of Engineers to construct a new electrical switching station and two overhead transmission lines. Four miles of the proposed overhead transmission line would cross the James River and transect historic districts including Jamestown

and other historic properties. Id. at 1078. The Army Corps of Engineers prepared an environmental assessment and determined that since the project would not *physically intrude* on resources, most notably, Carter's Grove, an eighteenth-century Georgian-style plantation designated as a National Historic Landmark ("NHL"), it had no direct effect.[15]

The U.S. Court of Appeals, for the D.C. Circuit, disagreed with the Corps and concluded that the meaning of the term "directly" in Section 110(f) of the NHPA refers to the causality, and not the physicality, of the effect. Id. at 1088-1089. The Court of Appeals referenced the dictionary definition of "direct" to find the meaning, "free from extraneous influence" or "immediate." It further noted that Congress could have easily restricted the reach of the statute by using the word "physically" as opposed to "directly" (i.e., "*physically* and adversely affect any National Historic Landmark"). Lastly, the Court acknowledged that the agencies responsible for administering the NHPA, the National Park Service and the Advisory Council on Historic Preservation ("ACHP"), disagreed with the Army Corps of Engineers' interpretation; both agencies "understand 'directly' to refer[] to causation and not physicality." Id. at 1088-89. A copy of the Semonite decision as well as a related Memorandum issued by the Office of the General Counsel of the ACHP is attached hereto.[16]

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[15] The Army Corps of Engineers confirmed that several towers would be visible from Carter's Grove Plantation.

[16] The ACHP memorandum notes, "This is not the first time Section110(f)'s applicability and the meaning of "directly" has come up in the course of a Section 106 review. In regard to the 2009 Section 106 review for the Cape Wind project in Massachusetts, the NPS stated that visual intrusions could, in certain circumstances, constitute direct and adverse effects to an NHL. Further, in 2017, and in the context of the Section 106 review for the Charleston Union Pier Terminal project, the NPS said, "[t]he NPS does not agree with the [Army Corps of Engineers'] position that Section 110(f) applies only when an undertaking may physically impact a National Historic Landmark. NPS staff has reviewed Section 110(f) and NPS guidance pertaining to Section 110(f), and has not found published guidance that specifically interprets the term 'directly' as used in Section 110(f). The NPS is, therefore, considering issuing additional published guidance regarding the interpretation of the term 'directly' in Section 110(f) to clarify this issue."

It is worth noting that the viewshed concerns for the transmission project proposed in the Semonite case ranged from approximately one (1) to two and one-half (2.5) miles from Carter's Grove, the NHL at issue. In the instant case, UI's Project will be sited within *five hundred feet* of two NHLs, Birdcraft Museum and Sanctuary (listed 4/19/93) and the Barnum Institute of Science and History (listed 12/11/23), and within two thousand feet of a third, the Jonathan Sturges House (est. 4/19/94).[17] Furthermore, Birdcraft is designated as a National Historic Landmark *District* – one of only five hundred and sixty (560) in the United States—yet, UI's Project Drawings and Mapping list it as only a "State Register" resource and do not identify this protected bird sanctuary as a "*Cultural Resource.*" (SCNET Ex. 17, p. 11, Ex U).

Based upon the foregoing authority, the Council cannot simply defer to UI's determination that visual impacts to a historic or cultural resource are always properly characterized as "indirect impacts." Nonetheless, UI's repeated assertion that the Project will result in no direct impacts to above-ground historic resources is demonstrably false. The record contains substantial evidence of direct visual and physical adverse impacts to a number of historic and cultural resources located in Southport, Fairfield and Bridgeport. A resource-by-resource assessment exceeds the scope of this Post-Hearing Brief.[18] This Brief will, however, address a handful of the more noteworthy, i.e., egregious, examples of the Project's significant adverse effect on historic or cultural resources.

### *A. Pequot Library – 720 Pequot Avenue, Southport, CT*

The Pequot Library is the "cultural heart of Southport and is important on a national level both for its exemplary manuscripts and document collections and architecturally as a pioneering

[17] Additionally, since 2018, the Pequot Library has been in the process of obtaining National Historic Landmark status. UI's Project will undoubtedly jeopardize the Library's chances of achieving NHL designation. (SCNET Ex. 22).

[18] Reference is made to the Pre-Filed Testimony of David Parker and Wes Haynes (SCNET Ex. 17; Town Ex. 9).

example of a subsequently much emulated library architectural form." (Tr. 12/12/23, p. 99). Completed in 1894, the Library was "designed in the Richardson Romanesque style by [the noted New York architect] Robert [H]. Robertson." (Tr. 12/12/23, p. 99; see also SCNET Ex. 22, Pre-Filed Testimony of Stephanie J. Coakley, p. 3).

The Library is listed in the NRHP and SRHP and was recognized for its national significance and recorded at the highest level of documentation with measured drawings prepared by the National Park Service's Historic American Building Survey in 1966-1979 and filed in the Library of Congress [HABS No. CONN-314]. The Library's 2007 interior restoration project received a Historic Preservation Award from the Connecticut Trust for Historic Preservation. It additionally received the 2018 Connecticut Treasures Award, sponsored by the CT Chapter of the American Institute of Architects. (SCNET 22, Pre-Filed Testimony of Stephanie J. Coakley). Since 2018, the Pequot Library has been in the process of seeking NHL status. Id.

The Project necessitates a twenty-five foot to forty foot (25'-40') permanent easement across the Pequot Library's northern property boundary. UI also proposes installing a one hundred fifteen-foot (115') steel monopole directly on the Library's three-acre property. (UI App. Vol. 2 Project Mapping and Drawings). The monopole will loom approximately seventy-five feet (75') above the Library's iconic 125-year-old red terra cotta tile roof. (SCNET 22, Pre-Filed Testimony of Stephanie J. Coakley). The imposition of the permanent easement and the installation of the monopole necessitate clear-cutting mature trees and landscaping, which have historically provided a buffer between the Library's bucolic grounds and the CTDOT-MNR corridor. Photographic renderings of the Project's direct visual and physical impacts on the

Pequot Library are attached as Exhibits O and P to David Scott Parker's Pre-Filed Testimony (SCNET Ex. 17).

The Library's executive director, Stephanie J. Coakley, testified that the Project "will adversely affect the historic integrity, use and potential expanded use of Pequot Library's property" and "will result in the property no longer having the available land coverage for [the Library's] proposed renovation/expansion plan..." (SCNET Ex. 22, Pre-Filed Testimony of Stephanie J. Coakley, p. 4-5). Additionally, the removal of mature trees and the installation of a one hundred and fifteen foot (115 ft) tall monopole will detract from the Library's characteristics of setting and feeling which are integral to its qualification for listing on the NRHP and its NHL eligibility. See generally, National Parks Conservation Association v. Semonite, 916 F.3d 1075, 1087 (2019). Ms. Coakley confirmed that the "towering industrial monopoles and transmission lines" are "[i]ncongruous to the park-like setting that we believe [the Library's] founders intentionally created" and "will impede [the Library's] ability to remain a serene and picturesque New England village Library." (SCNET Ex. 22, Pre-Filed Testimony of Stephanie J. Coakley, p. 4).

**B. *Bulkley-Alvord-Northrop Houses- 92- 170 Pequot Avenue, Southport, CT***

The Bulkley-Alvord-Northrop Houses are a group of six historic residences built between 1810 and 1888. One of the six, 170 Pequot Avenue, is currently listed on the SRHP, and all six are potentially eligible for state and national historic designation. The Bulkley-Alvord-Northrop Houses were recently submitted for nomination to the NRHP under National Park Service Criterion A and C. (SCNET Ex. 17). The Bulkley-Alvord-Northrop Houses are remarkably well-preserved examples of contemporary local architectural styles, namely, Federal, Greek Revival, and variations of the Queen Anne Style. In addition, 92 Pequot Avenue may be one of the oldest

houses in Southport and its central block could predate the British burning of Fairfield in 1779. A more thorough discussion of the residences' historic and architectural significance can be found in the Pre-Filed Testimony of David Parker, Exhibit Z (SCNET Ex. 17).

The Project necessitates a twenty to forty foot (20'-40') permanent easement along the northern property boundaries of the Bulkley-Alvord-Northrop Houses. The vegetative buffer shielding the historic residences from the CTDOT-MNR corridor will be removed and a steel monopole (P665S) will be installed within feet of 92 Pequot Avenue's eastern property border. (UI App. Vol. 2, UI Project Mapping and Drawings). The permanent easement will render four of the six Bulkley-Alvord-Northrop Houses zoning noncompliant and bisect the existing Greek Revival-style residence at 92 Pequot Avenue, as well as the SRHP-listed structure at 170 Pequot Avenue. Photographic renderings of the Project's direct visual and physical adverse impacts are attached as Exhibits B-H of the David Scott Parker's Pre-Filed Testimony (see SCNET Ex. 17).

### C. *Trinity Episcopal Church- 651 Pequot Avenue, 288 Center Street and 678 Pequot Avenue, Southport and Southport Congregational Church- 524 Pequot Avenue, Southport.*

Trinity Episcopal Church was founded in 1725. Its original church building was burned down during the British raid on Fairfield during the Revolutionary War. Trinity's second church was built in its present location in 1856, but subsequently destroyed by a tornado in 1862. The current church building was erected on the foundation of its predecessor and dedicated on December 11, 1862. (SCNET Ex. 23, Pre-Filed Testimony of Harold V. Schmitz). Trinity's adjoining chapel was constructed in 1871. Both the church and chapel are listed on the NRHP and recognized as nationally significant by recording at the highest level of documentation with measured drawings prepared by the National Park Service's Historic American Buildings Survey and filed in the Library of Congress [HABS No. CONN-312]. Trinity Episcopal Church's

Rectory, located at 678 Pequot Avenue, is similarly situated within the Southport Historic District and is noted for its unique and remarkably well-preserved architecture. The District's 1971 nomination form lists the Trinity Rectory as a contributing structure and acknowledges its "unique" design. It notes, "though built in the Greek Revival Style popular in the 1830's, [the Rectory] has five columns in front instead of four, and [has] matching pilasters against the exterior wall."

Southport Congregational Church was founded 1834. Its present stone church, located at 524 Pequot Avenue, Southport, was erected between 1874 and 1876 by prominent local architects. It is part of the Southport Historic District, a NRHP and SRHP-listed resource, and was also recognized individually as architecturally significant through additional photographic and historical documentation by the Historic American Buildings Survey of the National Park Service in 1979 [HABS No. CONN-311, Library of Congress].

UI's Phase IA inexplicably failed to identify either Trinity Episcopal Church or Southport Congregational Church and its parsonage, even though properties of both religious institutions directly abut the Project corridor. The Project proposes a permanent easement along the northern boundaries of both Churches' properties (i.e., 524 Pequot Avenue, 678 Pequot Avenue and 288 Center Street). As result, both historic Churches will lose vegetative screening, gain exposure to the CTDOT-MNR corridor and be forced to compromise critical spaces used for activities that enable and promote the Churches' religious missions. The Project proposes the installation of a one hundred and five foot (105') tall steel monopole within feet of Trinity Episcopal Church's Rectory. (UI App. Vol. 2 Project Mapping and Drawings). An additional description and visual renderings of the Project's direct adverse impact on both churches is attached to David Scott Parker's Pre-Filed Testimony (SCNET Ex. 17, Exhibits M, N, Q, and R).

## VII. RLUIPA and Conn. Gen. Stat. § 52-571(b)

UI's Project, as proposed, will substantially burden Southport Congregational Church's and Trinity Episcopal Church's religious exercise. Southport Congregational and Trinity Episcopal are located, respectively, at 524 and 651 Pequot Avenue in Southport.

Southport Congregational Church's membership is currently comprised of 750 active adults and 180 children, and the Church also operates a weekday preschool with over 100 children. (SCNET Ex. 21, Pre-Filed Testimony of Paul Whitmore). Paul Whitmore, the Church's Senior Minister, testified that "the UI transmission line will have serious adverse effects on the Church's operations, aesthetics, finances, ability to attract new members, ability to attract new preschool families, and ability to fulfill [the Church's] religious mission. As such, we believe the proposed project threatens our future as an ongoing religious institution." (SCNET Ex. 21,Pre-Filed Testimony of Paul Whitmore). Mr. Whitmore explained that a critical portion of the Church's property to be acquired by UI for its permanent and temporary easement, in which UI intends to place high voltage transmission lines and a construction work pad, respectively, is currently "used for funeral overflow seating...confirmation class, worship services...youth group activities, senior high and middle school, its used for church school activities...It's a space that's used for our mission service activities, preparing food to be served for homeless and hungry people. It's a staging area for the Southport blessing of the fleet...We have church picnics there. We have social events there. We hold religious holiday events there like our advent worship...and the preschool uses that area." (Tr. 12/12/23, p. 114-115).

Mr. Whitmore explained that Southport Congregational has been experiencing consistent growth in its membership over the past twenty-five years, but that UI's Project will inhibit the Church's ability to operate and its anticipated necessary expansion. (Tr. 12/12/23 p. 115-116).

He testified, that UI's easement "reduces [the Church's] buildable footprint by 6,800 square feet...so it's going to block our ability to freely grow and freely operate as a church, as a religious institution." (Tr. 12/12/23, p. 116). The Church's ability to grow its membership and continue its religious outreach are integral to its spiritual mission. (SCNET Ex. 21, Pre-Filed Testimony of Paul Whitmore). The Church's preschool is located just 0.04 miles, or 211 feet, from UI's proposed Project area. (CSC Application Table 5-9). Mr. Whitmore testified that parents of the Church's preschool students have expressed concerns about their children's health and safety in light of UI's proposal and have indicated that they do not wish to enroll their children in a preschool that has high-voltage transmission lines running over a part of the property. (Tr. 12/12/23 p. 113-114). Declining enrollment and the potential closure of the Church's preschool program would have a substantial, negative, and irreparable long-term impact on the Church's finances and its ability to fulfill its religious mission. (SCNET Ex. 21, Pre-Filed Testimony of Paul Whitmore).

Similarly, Harold V. Schmitz, the Senior Warden of Trinity Episcopal Church, testified that UI's "Application will irreparably infringe upon Trinity's right to own, rent and use land for worship and religious exercise. The application will substantially burden the exercise of religion by Trinity." (SCNET Ex. 23, Pre-Filed Testimony of Harold V. Schmitz). Mr. Schmitz confirmed that the Project will adversely impact the Church's nursery school, which currently serves approximately 130 children, as well as its vacation bible school. He testified that, "[t]he construction would have a lot of impact on where the children play...It would also affect the ability for parents to drop their children off because part of [the church's property that will be subjected to UI's temporary and permanent easements] includes a parking lot that is just across the street from the church...It would affect our school." (Tr. 12/12/23, p. 119-120). The

anticipated loss of income "would put [Trinity Episcopal Church] on a slope to closure." (Tr. 12/12/23, p. 120). Mr. Schmitz estimated that the Church's total loss of income as a result of UI's Project (i.e., loss of school income and income associated with leasing a portion of its parking lot) would amount "to over $100,000 a year." He emphasized "*[t]hat's significant.*" (Tr. 12/12/23 p. 121).

The foregoing constitutes substantial evidence that the Council's approval of the Project, absent *substantial modifications*, will violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. ("RLUIPA"), as well as Connecticut General Statutes § 52-571b. RLUIPA is a federal civil rights statute designed to remedy a pattern of unconstitutional restrictions on religious exercise through highly discretionary or patently discriminatory land-use laws. RLUIPA provides in relevant part that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; *and* (B) is the *least restrictive means* of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1) (emphasis added).[19] The "government" for this purpose includes a state, county, municipal, or other government entity created under state authority, or any branch, department, instrumentality, or agency thereof." See Id. § 2000cc-5(4). RLUIPA provides that the "religious exercise" not to be burdened includes "any exercise of religion, whether or not compelled by, or central to, a system

[19] "Land use regulation" is defined in 42 U.S.C. § 2000cc-5(5) as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." The Second Circuit Court of Appeals has recognized that a state's use of an environmental statutory review process can constitute application of a zoning law that falls within RLUIPA's purview. See Fortress Bible Church v. Feiner, 694 F.3d 208, 216 (2d Cir. 2012). "Claimant" is defined in 42 U.S.C. § 2000cc-5(1) as "a person raising a claim or defense under [RLUIPA]."

of religious belief," and includes, "[t]he use, building, or conversion of real property for the purpose of religious exercise." Id. § 2000cc-5(7).

RLUIPA's substantial burden provision applies when the government has made an "individualized [assessment] of the proposed [use]." 42 U.S.C. § 2000cc(a)(2)(C); see also Cambodian Buddhist Soc. Of Connecticut, Inc. v. Planning and Zoning Commission, 285 Conn. 381, 419, 941 A.2d 868 (2008). While RLUIPA does not define the term "substantial burden," it does state that all of its provisions "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted" by its terms and the Constitution. 42 U.S.C. § 2000cc-3(g). The Second Circuit Court of Appeals has held that "[a] substantial burden is one that 'directly coerces the religious institution to change its behavior.'" Fortress Bible Church v. Feiner, 694 F.3d 208, 218-19 (2d Cir. 2012) (quoting Westchester Day Sch. V. Vill. Of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007)).

Similarly, Connecticut's Religious Freedom Restoration Act provides in relevant part: "(a) The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section; (b) The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest..." C.G.S. § 52-571b(a)(b).

Clearly, UI's Project will substantially burden the Churches' religious exercise by, inter alia, forcing them to cease or limit operations and activities critical to their religious missions and impeding their ability to expand their memberships and perform important outreach work.

Even assuming that the Council's interest in approving UI's Application is compelling, which UI has failed to demonstrate, RLUIPA requires that it must be pursued through the *least restrictive means*. 42 U.S.C. § 2000cc(a)(1)(B). That is, if there is another way that the Council could achieve the same compelling interest that would impose a lesser burden on religious exercise, it must choose that way rather than the more burdensome option. Relocating the Project underground and within the public right-of-way would clearly impose a lesser burden on the religious exercise of Southport Congregational Church and Trinity Episcopal Church than would sanctioning a permanent easement involving obtrusive, overhead high-voltage transmission lines and temporary construction easements that would disrupt daily activities and religious services.

## VIII. UI Significantly Underestimates the Cost of Acquiring Easements for its Overhead Proposal

UI both grossly overestimates the cost of rebuilding its 115-kV transmission line underground and underestimates the costs associated with its preferred overhead Project. UI estimates the total cost of its Project at approximately $255 million, $30 million of which is allocated to the cost of acquiring necessary easements.[20] (UI Ex. 3, A-CSC-10; UI Ex. 23, A-Fairfield 16). This $30 million estimate is neither supported by an appraisal report nor substantiated by the testimony of a licensed commercial or residential appraiser. In fact, during the Council's November 16, 2023 continued evidentiary hearing, UI's legal counsel confirmed that no one on UI's panel "held themselves out as an appraisal expert." (Tr. 11/16/23, p. 80). Instead, it was stated that UI's estimate is based on a "high-level estimate per acre." (Tr. 7/25/23, p. 25).

[20] Moreover, the $30 million does not include the legal and appraisal fees associated with UI's acquisition of the easements. During the November 28, 2023 hearing, Annette Potasz confirmed that "[t]he basis for the estimate is for the compensation and impacts to the customers' property. So legal and appraisal is, I believe, separate from that." (Tr. 11/28/23 p. 167).

To determine the cost of acquiring easement rights it is necessary to engage in a property-by-property analysis. The Town of Fairfield's expert appraiser, Peter Vimini, MAI, confirmed that "the ordinary measure of damages is to determine the difference between the market value of the whole property as it lay before the taking or imposition of the easement and the market value of what remains of the property after the taking or the imposition of the easement." (Town Ex. 5, Pre-Filed Testimony of P. Vimini). This approach requires a determination of the impacted property's highest and best use, any future uses contemplated, and/or the probable stigmatization of the property. UI did not conduct this required property-by-property analysis. In fact, it did not consider any site-specific details that would be relevant to the cost of acquiring an easement, such as whether condemnation proceedings would be required or whether applicable zoning regulations would render certain properties nonconforming.

The testimony of Thomas Schinella illustrates the inadequacy of UI's "high level estimate." Mr. Schinella is a principal of 2190 Post Road, LLC, the owner of 2190 Post Road in Fairfield. The Project necessitates the acquisition of a permanent easement over 2190 Post Road, varying in depth from six feet (6') to twenty-one feet (21'), and the installation of three steel monopoles ranging in height from one hundred and five feet (105') to one hundred and twenty-five feet (125') along the northern property line. (SCNET Ex. 18, p. 2). Mr. Schinella testified that as the result of UI's Project he has lost two substantial development deals for the property. (Tr. 12/12/23 p. 106). Unlike UI, Mr. Schinella "consulted a very experienced and capable commercial appraiser with significant knowledge of the market as well as [the] property at 2190 Post Road." He testified that "[t]he value [of the easement] we have come up with is between 9 and 9 and a half million dollars." (Tr. 12/12/23 p. 108).

Mr. Vimini testified that UI's "high-level estimate per acre" does not meet the standards expected of an appraiser and is "an inadequate methodology for evaluation of damages...for property values, and therefore...[it] really minimizes the effect." (Tr. 12/12/23 p. 232-233). Mr. Vimini estimated that the actual cost of acquiring the easements required for the Project "is probably three to five times higher" than UI's estimate." (Tr. 12/12/23 p. 232-233). Therefore, a more realistic cost estimate for the acquisition of UI's easements is between ninety and one hundred and fifty million dollars ($90,000,000 and $150,000,000). Id.[21] Mr. Vimini's cost estimate is sixty million dollars ($60,000,000) to one hundred and twenty million dollars ($120,000,000) higher than UI's cost estimate.

## IX. Additional Environmental Concerns

During the Council's evidentiary hearing, much of the opposition focused on the Project's adverse impact to historical and cultural resources, and justifiably so. However, the record contains substantial evidence of additional adverse environmental impacts that warrant denial of UI's Application. Given the Project's proximity to the CTDOT-MNR corridor, it is anticipated that some, if not all, of the soils excavated for the installation of new monopoles may contain potentially harmful concentrations of pollutants, including PAHs, PCBs, oil-derived products, pesticides and heavy metals. (SCNET Ex. 14, p. 4). The disturbance of these contaminants poses an undue risk to the ecosystem, including adjacent wetland and coastal resources, and to the public health. Based upon the Application, SCNET's professional engineer, Steven D. Trinkaus, estimated that the average volume of soil to be excavated per monopole ranges from thirty (30) to seventy-five (75) cubic yards. UI's Application fails to provide an adequate assessment or characterization of these potentially contaminated soils. Nor does it

[21] Resulting in a total project cost of approximately $315 million to $375 million for UI's overhead proposal.

addressed how the soils will be removed from the Project corridor or where it will be stored or disposed. (SCNET Ex. 14, p. 4).

The Town's professional wetland scientist, Matthew Schweisberg, confirmed that Project construction, specifically the excavation of soil and installation of monopoles, "could intercept [these] contaminated soils and resuspend material in the waterways…including Long Island Sound" threatening flora and fauna that inhabit downgradient resources, including waterfowl, "ducks and geese and shore birds and wading birds [like egret, heron and teal] that use these areas... would clearly be at risk." (Tr. 12/12/23, p. 238; Town Ex. 7, p. 7). Mr. Schweisberg also testified that lighting and construction activities associated with the Project would likely disturb waterfowl nesting and rearing young, as well as native bat species (e.g. little brown). (Town Ex. 7, p. 7-8).

In certain instances, UI's monopole foundations will extend seven to thirty-two feet (7'-32') below the existing groundwater table. Mr. Trinkaus expressed his concern regarding the potential for contamination of the groundwater based upon the presence of the aforementioned historic contaminants associated with the MNR. He additionally testified that, "UI has not demonstrated that the foundation of its monopoles will not impact the groundwater regime (i.e., groundwater level and flow)." (SCNET Ex. 14, p. 5).

UI estimates that construction associated with the Project will result in the removal of approximately 6.5 acres of trees. Trees provide numerous environmental benefits, including converting carbon dioxide into oxygen through photosynthesis, providing rainfall interception, wildlife habitat and shade. (SCNET Ex. 14, p. 3). Although UI's Application lacks a sufficiently-detailed planting plan, it is evident that the replanting of vegetative ground cover within the

proposed easement areas will not adequately compensate for the loss of 6.5 acres of mature trees. (SCNET Ex. 14, p. 3).

## X. CONCLUSION

For the foregoing reasons, UI's Application should be denied.

**RESPECTFULLY SUBMITTED BY:**

**SASCO CREEK NEIGHBORS ENVIRONMENTAL TRUST INCORPORATED, STEPHEN OZYCK, ANDREA OZYCK, KARIM MAHFOUZ, WILLIAM DANYLKO, DAVID PARKER, 2190 POST ROAD LLC, INVEST II, INTERNATIONAL INVESTORS, SOUTHPORT CONGREGATIONAL CHURCH, PEQUOT LIBRARY ASSOCIATION, TRINITY EPISCOPAL CHURCH AND SASQUANAUG ASSOCIATION FOR SOUTHPORT IMPROVEMENT, INC.**

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## CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was electronically mailed and/or deposited in the United States mail, first-class, postage pre-paid this 11th day of January, 2024 to the individuals on the Service List for this Docket, as of January 11, 2024.

Mario F. Coppola, Esq.

# ATTACHMENTS

KeyCite Yellow Flag - Negative Treatment
Amended on Rehearing in Part by National Parks Conservation Association v. Semonite, D.C.Cir., May 31, 2019

916 F.3d 1075
United States Court of Appeals,
District of Columbia Circuit.

NATIONAL PARKS CONSERVATION ASSOCIATION, Appellant
v.
Todd T. SEMONITE, Lieutenant General, et al., Appellees

No. 18-5179
|
Consolidated with 18-5186
|
Argued December 7, 2018
|
Decided March 1, 2019

**Synopsis**

**Background:** Non-profit historic and national parks conservation organizations brought action against Lieutenant General of Army Corps of Engineers, Acting Secretary of the Army, and public electric utility, alleging that Army Corps of Engineers' approval of permit authorizing planned electrical infrastructure project violated the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the Clean Water Act (CWA). The United States District Court for the District of Columbia, Royce C. Lamberth, J., 311 F.Supp.3d 350, granted summary judgment in favor of defendants. Plaintiffs appealed.

**Holdings:** The Court of Appeals, Tatel, Circuit Judge, held that:

[1] degree to which effects on quality of human environment were controversial supported finding that production of environmental impact statement (EIS) was required under NEPA;

[2] impact of project on unique geographic area and historical places supported finding that production of environmental impact statement (EIS) was required under NEPA;

[3] adverse affect on historically significant sites listed in or eligible for listing in the National Register of Historic Places supported finding that production of environmental impact statement (EIS) was required under NEPA; and

[4] project directly and adversely affected national historic landmark.

Reversed and remanded.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (7)

[1] **Federal Courts** Summary judgment

Court of Appeals reviews a district court's decision to grant summary judgment de novo.

[2] **Environmental Law** Assessments and impact statements

Role of Court of Appeals in reviewing decision not to prepare an environmental impact statement (EIS) pursuant to NEPA is a limited one, designed primarily to ensure that no arguably significant consequences have been ignored. National Environmental Policy Act of 1969 § 101, 42 U.S.C.A. § 4331(a).

7 Cases that cite this headnote

[3] **Environmental Law** Duty of government bodies to consider environment in general

NEPA's primary function is information-forcing, compelling federal agencies to take a hard and honest look at the environmental consequences of their decisions. National Environmental Policy Act of 1969 § 101, 42 U.S.C.A. § 4331(a).

1 Case that cites this headnote

[4] **Environmental Law** Electricity, generation and transmission; nuclear

Effects on quality of human environment resulting from Army Corps of Engineers' approval of planned electrical infrastructure project, which involved overhead transmission lines across river and through historically significant sites, were likely to be "highly controversial," so to support finding that production of environmental impact statement (EIS) was required under NEPA, where Corps's assessment of scope of project's effects drew consistent and strenuous opposition, often in form of concrete objections to Corps's analytical process and findings, from agencies entrusted with preserving historic resources and organizations with subject-matter expertise. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. §§ 1501.6(a)(2), 1508.27(b)(4).

6 Cases that cite this headnote

[5] **Environmental Law** Electricity, generation and transmission; nuclear

Army Corps of Engineers' approval of planned electrical infrastructure project, which involved overhead transmission lines across river and through historically significant sites, significantly impacted unique geographic area and historical places, so as to support finding that issuance of finding of no significant impact (FONSI), rather than environmental impact statement (EIS), violated NEPA, where Congress had consistently recommitted itself to protecting and restoring river for enjoyment and prosperity of current and future generations, unlike project, existing modern visual intrusions in area were low-density intrusions relatively lost within overall landscape, and project would have resulted in only overhead crossing of river in a 51-mile stretch. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.27(b)(3).

3 Cases that cite this headnote

[6] **Environmental Law** Electricity, generation and transmission; nuclear

Degree to which Army Corps of Engineers' approval of planned electrical infrastructure project, which involved overhead transmission lines across river and through historically significant sites, may have adversely affected historically significant sites listed in or eligible for listing in the National Register of Historic Places supported finding that issuance of finding of no significant impact (FONSI), rather than environmental impact statement (EIS), violated NEPA, where project's close proximity to eighteenth-century Georgian-style plantation would have detracted from plantation's characteristics of setting and feeling which were integral to its qualifications for listing on the National Register. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.27(b)(8).

6 Cases that cite this headnote

[7] **Environmental Law** Other particular activities

Army Corps of Engineers' approval of planned electrical infrastructure project, which involved overhead transmission lines across river and through historically significant sites, directly and adversely affected national historic landmark, namely, an eighteenth-century Georgian-style plantation, within the meaning of the National Historic Preservation Act; although Corps argued that because project did not "physically" intrude on plantation's grounds, but was only visible, Act did not apply, Act was not limited to physical impacts. 54 U.S.C.A. § 306107.

***1076** Appeals from the United States District Court for the District of Columbia (No. 1:17-cv-01361) (No. 1:17-cv-01574)

**Attorneys and Law Firms**

Matthew G. Adams, San Francisco, CA, argued the cause and filed the briefs for appellants National Trust for Historic Preservation, et al.

William S. Eubanks II, Washington, DC, argued the cause for appellant National Parks Conservation Association. With him on the briefs was Eric R. Glitzenstein.

J. Blanding Holman, Charleston, SC, was on the brief for amici curiae The Lawyer's Committee for Cultural Heritage Preservation, et al. in support of appellant.

Tyler Joseph Sniff, Atlanta, GA, was on the brief for amici curiae 18th Director of the National Park Service Jonathan B. Jarvis, et al. in support of appellant National Parks Conservation Association.

Dustin J. Maghamfar, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With him on the brief were Jeffrey H. Wood, Acting Assistant Attorney General, Eric A. Grant, Deputy Assistant Attorney General, and Andrew C. Mergen, Mark R. Haag, and Heather E. Gange, Attorneys.

Elbert Lin, Richmond, VA, argued the cause for appellee Virginia Electric and Power Company. With him on the brief were Eric J. Murdock, Washington, DC, Harry M. Johnson, III, and Timothy L. McHugh, Richmond, VA.

Michael J. Thompson and Brett K. White, Washington, DC, were on the brief for amici curiae PJM Interconnection, L.L.C. in support of appellees.

Before: Garland, Chief Judge, and Tatel and Millett, Circuit Judges.

**Opinion**

Tatel, Circuit Judge:

***1077** ****436** In order to "create and maintain conditions under which man and nature can exist in productive harmony," the National Environmental Protection Act (NEPA), 42 U.S.C. § 4331(a), requires any federal agency issuing a construction permit, opening new lands to drilling, or undertaking any other "major" project to take a hard look at the project's environmental consequences, *id.* § 4332(2)(C), including the impacts it may have on "important historic ... aspects of our national heritage," *id.* § 4331(b). To this end, the agency must develop an environmental impact statement (EIS) that identifies and rigorously appraises the project's environmental effects, unless it finds that the project will have "no significant impact." 40 C.F.R. § 1508.9(a)(1). And that is what happened here. The U.S. Army Corps of Engineers ("Corps") granted a permit allowing a utility company to build a series of electrical transmission towers across the historic James River, from whose waters Captain John Smith explored the New World, and it did so without preparing an EIS because it found that the project would have "no significant impact" on the historic treasures along the river. As explained below, however, the Corps's "no significant impact" finding was arbitrary and capricious: important questions about both the Corps's chosen methodology and the scope of the project's impact remain unanswered, and federal and state agencies with relevant expertise harbor serious misgivings about locating a project of this magnitude in a region of such singular importance to the nation's history. Accordingly, we reverse the district court's decision to the contrary and remand with instructions to vacate the permit and direct the Corps to prepare an environmental impact statement.

**I.**

Over 400 years ago, Captain John Smith arrived on the shores of what is now known as the Chesapeake Bay. Keen on learning more about the unfamiliar land, Captain Smith voyaged up the winding James River, passing through lush forests and under open skies. During his voyages, Smith produced "maps and writings [that] influenced exploration and settlement in the New World for over a century." 152 Cong. Rec. 22,282 (2006) (statement of Rep. Davis). These journeys came to symbolize our nation's founding and to serve as an equally important reminder of one of the darkest episodes in our history—the settlers' devastation of Native American populations, including the "eventual collapse of the Powhatan polity." John S. Salmon, Project Historian, National Park Service, Captain John Smith Chesapeake National Historic Water Trail Statement of National Significance 2 (2006).

Long after Smith's voyages, the river "serv[ed] as a strategic transportation corridor that shaped the settlement and commerce of the region." H.R. Res. 16, 110th Cong. preamble (2007). Indeed, "the economic, political, religious, and social institutions that developed during the first [nine] decades" of the corridor's settlement "have profound effects on the

United States" to this day. Jamestown 400th Commemoration Commission Act of 2000, Pub. L. No. 106-565, § 2(a)(3), 114 Stat. 2812, ***1078** ****437** 2812. The same region commanded center stage through the nation's infancy, bearing witness to "the British surrender that marked the end of the American Revolution." Colonial National Historical Park Amendments, S. Rep. No. 104-30, at 2 (1995).

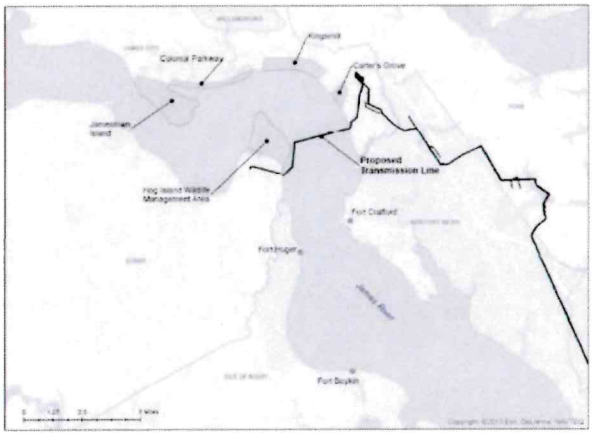
Honoring these ties to our nation's past, Congress and several federal agencies have established a series of "historic resources" in and around the Chesapeake Bay, including Jamestown, Carter's Grove National Historic Landmark, and the Captain John Smith National Historic Trail ("Historic Trail"), the nation's only congressionally-protected water trail. Due to the James River's "extraordinary historic, economic, recreational, and environmental importance," Congress recognizes it as " 'America's Founding River.' " H.R. Res. 16 §§ 1, 2. According to one representative, Congress "[d]esignat[ed] this [H]istoric [T]rail ... to spur efforts to protect and restore the region's historic and environmental assets." 152 Cong. Rec. 22,283 (2006) (statement of Rep. Castle). Other members of Congress observed that the region "represents a lasting tribute to the American spirit of discovery and exploration," *id.* at 22,282 (statement of Rep. Davis), affording visitors "the opportunity to marvel at some of the same sites that Captain Smith and his crew beheld 400 years ago," *id.* at 22,283 (statement of Rep. Hoyer).

The National Park Service, an agency of the Department of the Interior, pursuant to its obligation "to conserve the scenery [and] natural and historic objects" of our national parks, 54 U.S.C. § 100101(a), acts as steward of these resources, striving to "offer[ ] visitors an opportunity to vicariously share the experience of Smith and his crew" through views "evocative of the seventeenth century," Park Service, A Conservation Strategy for the Captain John Smith Chesapeake National Historic Trail Introduction 3 (2013). To this end, and in accordance with its conservation "management plan" for the Historic Trail, the Service seeks to "[m]aximize the visual and historical integrity of the visitor experience" by, among other things, ensuring that all new utility lines are underground. Park Service, General Management Plan: Colonial National Historical Park 19, 34 (1993) ("Management Plan").

Enter the demands of modernity. Although the approximately fifty-mile leg of the James River involved in this case has retained its seventeenth-century charm, the rest of Virginia has kept apace with modern development, which means it depends on electricity. Following the 2012 issuance of an Environmental Protection Agency rule requiring power generation facilities to reduce certain air pollutant emissions, *see* 77 Fed. Reg. 9304 (Feb. 16, 2012), Virginia Electric and Power Company ("Dominion") determined that, in order to comply with the rule, it would have to retire two coal-fired power generators. To compensate for the resulting electricity shortfall, Dominion applied in 2013 to the Corps, which has jurisdiction over certain projects concerning "waters of the United States," *see* 33 C.F.R. § 328.1 (internal quotation marks omitted), for a permit to construct a new electrical switching station and two transmission lines. Supported by seventeen 250-or-so-foot steel-lattice transmission towers, the line at issue here would stretch for eight miles, four of which would cross the James River and cut through the middle of the historic district encompassing Jamestown and other historic resources. *See* Figure 1.

*Figure 1: Overview Map of Project and Historic Properties (created by Industrial Economics, Inc.), Joint Appendix (J.A.) 495*

***1079** ****438**




Before it could greenlight the undertaking, known as the Surry-Skiffes Creek-Whealton project ("Project"), the Corps had to satisfy several statutory obligations. First, as relevant here, NEPA required the Corps to consider alternatives to the Project and to prepare an "environmental impact statement" if the Project would "significantly affect[ ] the quality of the human environment," 42 U.S.C. § 4332(2)(C)—an analysis which must take into account effects on

historic resources, 40 C.F.R. § 1508.8. But the Corps could bypass preparation of an EIS if, based on a preliminary "environmental assessment," it determined that the Project would have "no significant impact" on the environment. 40 C.F.R. § 1508.9. Second, the Clean Water Act required the Corps to determine that no "practicable alternative" existed that "would have less adverse effect on the aquatic ecosystem." *Id.* § 230.12(a)(3)(i). Third, the National Historic Preservation Act ("Preservation Act") required the Corps to "take into account the effect of the undertaking on any historic property," 54 U.S.C. § 306108, and, if the project might "directly and adversely affect any National Historic Landmark," to take steps "to minimize harm to the landmark," *id.* § 306107.

Pursuant to these obligations, the Corps studied the Project's environmental impacts and considered nearly thirty alternatives. In doing so, the Corps relied on a Cultural Resources Effects Assessment prepared by Dominion and its consultants, which included a series of photo simulations that superimposed mockups of the proposed towers over the existing landscape. In its initial environmental assessment, the Corps determined that the Project would adversely but non-significantly affect historic resources, rendering an EIS unnecessary.

At various points throughout the process, the Corps, as required by Preservation Act regulations, reached out to "consulting parties," which include local governments and other "individuals and organizations with a demonstrated interest in the undertaking." 36 C.F.R. § 800.2(c). It also invited other federal agencies and the public to comment on its NEPA process. *See* 42 U.S.C. § 4332(2)(C) (requiring an agency to "consult with ... any Federal agency ***1080 **439** which has jurisdiction by law or special expertise" and to provide any resulting statements "to the public").

And comment they did, to the tune of 50,000 submissions, many of which urged the Corps to prepare an EIS. Condensing the gist of thousands of comments into one simple but clear proposition, the Advisory Council on Historic Preservation ("Advisory Council")—the independent federal agency tasked with the "preservation of historic propert[ies]," 54 U.S.C. § 306101(a)(1)—warned that the Project "threaten[s] to irreparably alter a relatively unspoiled and evocative landscape that provides context and substance for the historic properties encompassed within." Letter from Advisory Council Chairman 1 (May 2, 2017), J.A. 414.

Quite a few commenters also pointed to perceived errors in the Corps's determination that the Project would not significantly impact, in the Advisory Council's words, "historic properties of transcendent national significance." Letter from Advisory Council Director 1 (May 2, 2017), J.A. 411. Writing to the Corps fully twenty times, the Park Service warned that the Project "would forever degrade, damage, and destroy the historic setting of these iconic resources." Letter from Park Service Director 1 (Dec. 11, 2015), J.A. 1829. The Virginia Department of Historic Resources feared "irreparabl[e] alter[ation] [of] the character of the area." Letter from Virginia Department of Historic Resources Director 2 (Nov. 13, 2015), J.A. 1855. Others, including then-Interior Secretary Sally Jewell, the Council on Environmental Quality, and many non-governmental organizations, sounded similar alarms.

Other commenters identified what they viewed as serious flaws in the Corps's methodologies. To give a flavor of these concerns, a specialist at the Department of Energy's Argonne National Laboratory ("Argonne") found the Corps's analyses "scientifically unsound" and "completely contrary to accepted professional practice." Response from Robert Sullivan ¶ 1 (Jan. 10, 2017), J.A. 534. The Park Service, the Advisory Council, and others critiqued the Corps's socioeconomic, visual, and cumulative effects analyses.

Still other commenters criticized the Corps's evaluation of alternatives. Summarizing several such concerns, the Advisory Council wrote that the "alternatives analysis was extremely problematic," that the National Parks Conservation Association ("Conservation Association") had funded a study "that challenged the accuracy of the data and assumptions used by Dominion," and that the engineering firm retained by the National Trust for Historic Preservation ("National Trust") had developed alternatives that "would cost less to construct, be built more quickly, and meet all relevant reliability standards." Letter from Advisory Council Chairman 3 (May 2, 2017), J.A. 416. According to one of the Corps's own specialists, Dominion could yet "take a harder look at the alternatives" and the company's cost estimates for the alternatives were "bloated and excessive." Sustainable Program Manager Review 3–4, J.A. 540–41.

While this deluge poured in, the Corps consulted with various agencies, conducted site visits, and twice directed Dominion to revise its photo simulations. Upon reviewing these amended analyses, the Corps and Dominion still

believed that the Project, alone among all options, met the requisite reliability, cost, and timing parameters.

Commenters remained unsatisfied. Several agencies warned that the revised analyses, as the Park Service put it, still contained "fundamental flaws" that, though "repeatedly identified," nonetheless "remain[ed] unresolved." Letter from Park Service Acting Regional Director 1 (Jan. ***1081** ****440** 12, 2017), J.A. 475. Indeed, the "majority of the consulting parties" found Dominion's amendments "superficial and inadequate." Letter from Advisory Council Chairman 3 (May 2, 2017), J.A. 416. Underscoring that such concerns endured past the final round of revisions, the Park Service director during this process submitted an amicus brief in his now-private capacity, emphasizing that, since the Project will "forever ... destroy the historic setting of these iconic resources," the Park Service, were it the agency with permitting authority, could not approve the Project "because its adverse impacts are so significant." 18th Director of the National Park Service Jonathan B. Jarvis Br. 7 (internal quotation marks omitted).

The process reached a temporary denouement in 2017. Following the change in administration, then-newly appointed (now-former) Interior Secretary Ryan Zinke met with the Corps, acknowledged its "thoughtful and thorough consideration of the issues," and announced that he "st[ood] ready to sign a final agreement as a concurring party." Letter from Ryan Zinke 1 (Mar. 30, 2017), J.A. 420. Shortly thereafter, the Corps issued a permit to Dominion. In the accompanying Memorandum for the Record ("Memo"), the Corps acknowledged that the Project would "intrude upon the viewsheds of historic properties and on a unique and highly scenic section of the James River." Memo § 10.3.8, J.A. 257. Nonetheless, the Corps concluded, the effects on these "national treasure[s]" were "moderate at most" and "inherently subjective." *Id.* §§ 10.3.8, 12.3, J.A. 257, 266 (internal quotation marks omitted). Where visible at all, it explained, the transmission towers would not "block[ ]" or "dominate" the view and would join existing "modern visual intrusions," such as the Busch Gardens amusement park and recreational boat traffic. *Id.* § 10.3.8, J.A. 257–58.

The Corps also executed a Memorandum of Agreement with Dominion, in which the company agreed to offset the harm to historic resources by, among other things, periodically reviewing the continued need for the Project and investing in Virginia's historic preservation efforts. Although a few other participants, including Interior, signed this Memorandum, most declined to do so because they remained concerned "that the adverse effects resulting from this undertaking [could not] be mitigated." Letter from Advisory Council Chairman 2 (May 2, 2017), J.A. 415.

The National Trust, the Association for the Preservation of Virginia Antiquities, and the Conservation Association (collectively, the "Conservation Groups") sued in district court alleging that the Corps failed to satisfy its NEPA, Clean Water Act, and Preservation Act obligations. The district court found that the "Corps made a 'fully informed and well-considered' decision" and granted summary judgment to the agency. *National Parks Conservation Association v. Semonite*, 311 F.Supp.3d 350, 361 (D.D.C. 2018) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)).

**[1]** On appeal, the Conservation Groups present three arguments: that due to the significance of the Project's impacts, the Corps was required to prepare an EIS; that the Corps's alternatives analyses fell short of the requirements imposed by both NEPA and the Clean Water Act; and that the Corps failed to fulfill its obligations under section 110(f) of the Preservation Act, 54 U.S.C. § 306107, which requires an agency to minimize harm to any National Historic Landmark "directly and adversely" affected by a project. "We review the district court's decision to grant summary judgment de novo." *Aera Energy LLC v. Salazar*, 642 F.3d 212, 218 (D.C. Cir. 2011).

## ***1082** ****441** II.

**[2]** We begin with the Conservation Groups' argument that NEPA required the Corps to prepare an EIS because, as they see it, the Project will significantly impact historic resources. "Our role in reviewing [the Corps's] decision not to prepare an EIS is a limited one, designed primarily to ensure that no arguably significant consequences have been ignored." *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (internal quotation marks omitted). Responsible for determining whether the Corps's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), we ask whether the Corps is "able to make a convincing case for its finding" of no significant

impact. *Sierra Club v. U.S. Department of Transportation*, 753 F.2d 120, 127 (D.C. Cir. 1985).

**[3]** "NEPA's primary function is 'information-forcing,' compelling federal agencies to take a hard and honest look at the environmental consequences of their decisions." *American Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018) (internal citations omitted). To satisfy this "hard look" requirement, the Corps must prepare an EIS for any project "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Under NEPA's regulatory scheme, crafted by the Council on Environmental Quality, such effects can be, among others, historic, aesthetic, or cultural. 40 C.F.R. § 1508.8. Congress has declared that "preserv[ing] important historic, cultural, and natural aspects of our national heritage" constitutes an important goal of the statute. 42 U.S.C. § 4331(b)(4). And we in turn have recognized that protecting such resources is "an interest that NEPA's procedural mandate was intended to vindicate." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 896 F.3d 520, 529 (D.C. Cir. 2018). As mentioned earlier, if the Corps believes that a project may not require an EIS, it may first prepare an environmental assessment to determine whether a "no significant impact" determination might find support in the record. 40 C.F.R. § 1508.9(a).

During the NEPA process, the Corps must consult agencies with "special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.6(a)(2) (requiring agencies to use the resulting analysis "to the maximum extent possible"). But, as the lead agency, the Corps, which "b[ears] the ultimate statutory responsibility" for the Project, "does not have to follow [other agencies'] comments slavishly—it just has to take them seriously." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991).

Whether a project has significant environmental impacts, thus triggering the need to produce an EIS, depends on its "context" (region, locality) and "intensity" ("severity of impact"). 40 C.F.R. § 1508.27. Here, because all parties agree that the historically-saturated "context"—i.e., this 50-mile stretch of the James River—qualifies as significant, our inquiry focuses on the "intensity" element, which enumerates ten factors that "should be considered." *Id.* § 1508.27(b). Implicating any one of the factors may be sufficient to require development of an EIS. *See* *Grand Canyon Trust v. FAA*, 290 F.3d 339, 347 (D.C. Cir. 2002), *as amended* (Aug. 27, 2002) (granting a petition for review after finding a project implicated one factor, without reaching additional factors). The district court found that "none of the significance factors weigh in favor of [the] contention that an EIS is required." *National Parks Conservation Association*, 311 F.Supp.3d at 363. The Conservation Groups disagree, arguing that the Project implicates three ***1083** ****442** such factors: "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(b)(4); "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources," *id.* § 1508.27(b)(3); and the "degree to which the action may adversely affect districts [or] sites ... listed in or eligible for listing in the National Register of Historic Places," *id.* § 1508.27(b)(8). We consider each in turn.

### A.

**[4]** The first factor considers "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). The word "controversial," we held in *Town of Cave Creek v. FAA*, refers to situations where " 'substantial dispute exists as to the size, nature, or *effect* of the major federal action.' " 325 F.3d 320, 331 (D.C. Cir. 2003) (quoting *North American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1182 (9th Cir. 1982)) (emphasis in original). And as we explained in *Fund for Animals v. Frizzell*, "certainly *something more* is required" for a highly controversial finding "besides the fact that some people may be highly agitated and be willing to go to court over the matter." 530 F.2d 982, 988 n.15 (D.C. Cir. 1975) (per curiam) (emphasis added).

According to the Conservation Groups, "[w]here, as here, two federal agencies have argued for years over the 'size,' 'nature,' and 'effect' of the project on resources under [the Park Service's] jurisdiction (as have other agencies with 'special expertise' under NEPA), the Court's test for 'controversy' fits like a glove." Conservation Association Br. 22 (emphasis omitted). For its part, the Corps asserts that, under *Cave Creek* and *Frizzell*, it "reasonably concluded that comments demanding an EIS 'represent passion for the affected resources' ... rather than substantive dispute." Corps

Br. 38 (quoting Memo § 12.3, J.A. 266). The Conservation Groups acknowledge that a highly controversial finding must rest on more than passionate opposition, but they insist that the criticism of the Corps's NEPA process rises to the requisite "something more."

The Conservation Groups first point out that much of the disagreement centers on perceived defects in the Corps's methodology and that, as the district court observed, "[m]any courts have found 'something more' to be scientific or other evidence that reveals flaws in the methods or data relied upon by the agency in reaching its conclusions." *National Parks Conservation Association*, 311 F.Supp.3d at 363 (citing *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 736–37 (9th Cir. 2001)) (internal quotation marks omitted); *accord Biodiversity Conservation Alliance v. U.S. Forest Service*, 765 F.3d 1264, 1275 (10th Cir. 2014) ("A substantial dispute can be found, for example, when other information in the record cast[s] substantial doubt on the adequacy of the agency's methodology and data." (internal quotation marks and citation omitted)); *see, e.g.*, *Cave Creek*, 325 F.3d at 332 (no controversy where the petitioners "pointed to nothing casting serious doubt on [the agency's] preferred model"). An expert at Argonne labeled the Corps's analyses "scientifically unsound, inappropriate, and completely contrary to accepted professional practice," accusing the agency of conflating a cultural resource analysis with the very different visual resource analysis. Response from Robert Sullivan ¶ 1 (Jan. 10, 2017), J.A. 534. The Advisory Council voiced serious concerns about the photo simulations: "[T]here are flaws in the visual effects assessment. ... [C]onsulting parties have repeatedly suggested ***1084** ****443** that the Corps should require photographs and simulations from an adequate range of viewpoints ... to illustrate the extent and magnitude of the effects." Letter from Advisory Council Assistant Director 2 (Mar. 2, 2016), J.A. 1483. And the Park Service believed that the visual analyses "d[id] not meet [its] standards," questioning whether the Corps and Dominion completed "an adequate visual analysis," "evaluat[ed] ... socioeconomic impacts," and undertook a "sufficient cumulative effects analysis." Letter from Park Service Associate Regional Director 1 (Mar. 25, 2016), J.A. 1357; Letter from Park Service Acting Regional Director 2 (Jan. 12, 2017), J.A. 476. If such comments, representing just a small sample of the many criticisms in the record, do not "cast substantial doubt on the adequacy" of the Corps's methodologies, *Biodiversity Conservation Alliance*, 765 F.3d at 1275 (internal quotation marks omitted), then we are unsure what would.

According to the Conservation Groups, the controversy surrounding the Project is especially intense because many of those raising concerns—methodological and otherwise—are themselves government agencies with "special expertise" over historic resources. 40 C.F.R. § 1501.6(a)(2). And as they also point out, courts regularly find that such concerns demonstrate that a project qualifies as highly controversial. *See, e.g.*, *North American Wild Sheep*, 681 F.2d at 1182 (criticism from conservationists, biologists, two state agencies, and "other knowledgeable individuals" represented "precisely the type of 'controversial' action for which an EIS must be prepared"); *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F.Supp.2d 30, 43 (D.D.C. 2000) (project classified as "genuinely and extremely controversial" where three federal agencies, one state agency, and the public "all disputed the Corps evaluation").

Again, the Conservation Groups are correct. The Advisory Council questioned the Corps's "treatment of effects on historic properties of transcendent national significance." Letter from Advisory Council Director 1 (May 2, 2017), J.A. 411. Interior Secretary Jewell warned that the Project would "introduce a major intrusion into a landscape" like "no other preserved locale in the Nation." Letter from Sally Jewell 1 (Jan. 17, 2016), J.A. 473. The Park Service worried that the Project "would forever degrade, damage, and destroy the historic setting of these iconic resources," admonishing that "[t]his is not acceptable for resources designated by Congress to ensure their permanent protection." Letter from Park Service Director 1 (Dec. 11, 2015), J.A. 1829. As the Service observed, "[s]ince the 1930s, the visitor experience and interpretation of Jamestown has been a collective effort ... to shift [visitors'] sense of place back in time," and "[w]ithin the Historic District the James River is unblemished by any man-made physical crossing." Letter from Park Service Associate Regional Director 6 (July 5, 2016), J.A. 878; Letter from Park Service Associate Regional Director 3 (Jan. 29, 2016), J.A. 1494. The Service repeatedly communicated its concerns to the Corps, and its own management plan requires that the "visual and historical integrity of the visitor experience" be "maximize[d]" and that all new utility lines be installed underground. Management Plan at 19, 34.

And the list goes on. Industrial Economics, Inc., a consultant retained by the Park Service, feared that the Project could

"have implications for successful future designation [of Jamestown] as a UNESCO World Heritage Site." Industrial Economics, Inc. Report 9 (Jan. 2017), J.A. 499. The Virginia Department of Historic Resources warned of "irreparabl[e] alter[ation] [of] the character of the area." Letter from Virginia Department of Historic Resources ***1085** ****444** Director 2 (Nov. 13, 2015), J.A. 1855. Members of Congress, delegates to the Virginia Assembly, the Keeper of the National Historic Register, and the Council on Environmental Quality all voiced similar reservations. The non-profit Coalition to Protect America's National Parks, comprising current and former Park Service employees, pleaded, as did a bevy of other organizations, that "[t]he Corps owes ... to this and future generations of Americans to protect the place where 'America Began.' " Letter from Coalition to Protect America's National Parks 1 (Dec. 23, 2016), J.A. 464.

These are hardly the hyperbolic cries of "highly agitated," not-in-my-backyard neighbors "willing to go to court over the matter." *Frizzell*, 530 F.2d at 988 n.15. Instead, they represent the considered responses—many solicited by the Corps itself—of highly specialized governmental agencies and organizations. The Advisory Council, tasked as it is with preserving America's historic resources, merits special attention when it opines, as it did here, on "the treatment of effects on historic properties of transcendent national significance." Letter from Advisory Council Director 1 (May 2, 2017), J.A. 411; *see also* *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 858 (9th Cir. 1982) ("[J]udgments of historical significance made by the Advisory Council ... deserve great weight."). Of course, as lead agency the Corps owes no obligation to bend to the will of others. *See* *Citizens Against Burlington*, 938 F.2d at 201 (a lead agency must only "take [other agencies' comments] seriously"). But repeated criticism from many agencies who serve as stewards of the exact resources at issue, not to mention consultants and organizations with on-point expertise, surely rises to more than mere passion.

The Corps argues that because the Park Service is a component of the Interior Department, Secretary Zinke's letter approving the Project, in the district court's words, "effectively withdrew" the Service's "previous stance that an EIS was required." *National Parks Conservation Association*, 311 F.Supp.3d at 366. We disagree. For one thing, even if the Zinke letter did withdraw the Service's opposition, numerous other groups remained adamantly opposed. We are unsure, moreover, whether the Zinke letter actually responds to the Park Service's concerns. As the Conservation Association points out, the letter "never even reference[s] [the Park Service's] objections [or] longstanding methodological critiques." Conservation Association Reply Br. 10. And most important, the Zinke letter says little about the only question before us: whether the Corps acted arbitrarily and capriciously in declining to prepare an EIS. Regardless of Interior's stance, the Corps retained its NEPA obligation to "consider adequately" whether the Project is highly controversial. *Cave Creek*, 325 F.3d at 327. Because the facts underlying the Park Service's concerns changed not at all between the Jewell and Zinke letters, the Corps had to either confront those facts or explain why the Zinke letter rendered them irrelevant. *See* *Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S.Ct. 2117, 2125, 195 L.Ed.2d 382 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."). Indeed, in our view, that two Interior Secretaries had diametrically different views about the same project on the same facts simply reinforces its controversial nature.

The Corps next contends that it did acknowledge and try to address concerns raised during the NEPA process by, for example, instructing Dominion to revise its analyses to address the shortcomings identified by commenters. But that misses the point. The question is not whether the ***1086** ****445** Corps attempted to resolve the controversy, but whether it succeeded. Given that many critical comments, including those from the Advisory Council and the Argonne specialist, post-dated Dominion's revisions, the Corps obviously failed.

In short, the Corps's assessment of the scope of the Project's effects has drawn consistent and strenuous opposition, often in the form of concrete objections to the Corps's analytical process and findings, from agencies entrusted with preserving historic resources and organizations with subject-matter expertise. This demonstrates the "something more" needed to show that "the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4).

**B.**

**[5]** The next intensity factor the Conservation Groups cite examines the "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources." 40 C.F.R.

§ 1508.27(b)(3). According to the Conservation Association, "[t]he Corps-approved project entails putting giant modern transmission towers not only in close 'proximity to' numerous highly unique historic and cultural sites that are 'one-of-a-kind resources of national importance,' but putting them directly *in and across the nation's only Congressionally-designated historic water trail*." Conservation Association Br. 19 (emphasis in original) (citation omitted). The Corps responds that the Project " 'is not a blockage to viewing the river or the surroundings' and 'will not dominate the view.' " Corps Br. 27 (quoting Memo § 10.3.8, J.A. 258). Again, the Corps misses the point.

Congress has consistently "recommit[ted] itself to protecting and restoring the James River for the enjoyment and prosperity of current and future generations." H.R. Res. 16 § 4. As one congressman put it, these efforts preserve "the opportunity [for visitors] to marvel at some of the same sites that Captain Smith and his crew beheld." 152 Cong. Rec. 22,283 (2006) (statement of Rep. Hoyer). Of course, when Captain Smith sailed up the James River in the seventeenth century, he beheld nothing either licensed by the U.S. Army Corps of Engineers or built by Dominion Energy. In other words, even without blocking the view or dominating the landscape from all angles, the Project undercuts the very purpose for which Congress designated these resources: to preserve their "unspoiled and evocative landscape[s]." Letter from Advisory Council Chairman 1 (May 2, 2017), J.A. 414.

Insisting that the Project is nothing new, the Corps points to existing "modern visual intrusions" in the same region that represent a "successful mix of progress and history." Corps Br. 28 (quoting Memo § 10.3.8, J.A. 257). This mischaracterizes the record. Although there is some modern development, including an amusement park, boat traffic, and resorts, the Corps itself described these as largely "low density intrusions that become relatively lost within the overall landscape." National Register of Historic Places Eligibility 4 (May 7, 2015), J.A. 2205. As the Conservation Association observes, "the record does not support the assertion ... that existing intrusions are remotely comparable in size, magnitude, or impact to this massive project that will be the *only* overhead crossing of the James River in a fifty-one-mile stretch." Conservation Association Br. 20 (emphasis in original).

The Corps maintains that the mitigation steps contained in its Memorandum of Agreement with Dominion "would reduce [the Project's] impacts to a minimum." Corps Br. 42. But the relevance of the Memorandum is dubious given that the Corps declined to rely on it when making its "no significance" findings. To the extent ***1087** ****446** the Corps leans on it now, the document offers little support. Except for requiring Dominion to "examine" alternative "coating and finishing materials" for the transmission towers, the enumerated mitigation measures the Corps cites relate not to reducing the significance of the Project's visual impacts on the historic resources along the James River, but rather to periodic evaluation of the continued need for the Project itself and to more general historic preservation efforts throughout the Commonwealth. Memorandum of Agreement § I.e.1, J.A. 293.

Finally, the Corps emphasizes that the Project's effects are visual and that the Seventh Circuit, citing our decision in *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1038–39 (D.C. Cir. 1973), stated that aesthetic "judgments are inherently subjective and normally can be made ... reliably on the basis of an environmental assessment." *River Road Alliance, Inc. v. Corps of Engineers of U.S. Army*, 764 F.2d 445, 451 (7th Cir. 1985). But "normally" is not the same as "always." And in *Maryland-National Capital Park*, we distinguished aesthetic judgment calls that entail "defining what is beautiful" from situations like this one where Congress's purpose in designating the resources was to preserve "an unencumbered view of an attractive scenic expanse." 487 F.2d at 1038 & n.5.

### C.

**[6]** The foregoing largely demonstrates why the Project implicates the final intensity factor invoked by the Conservation Groups: the "degree to which the action may adversely affect districts [or] sites ... listed in or eligible for listing in the National Register of Historic Places." 40 C.F.R. § 1508.27(b)(8). Indeed, the Corps itself gets us much of the way there. It concedes that the Project's "close proximity" to Carter's Grove, an eighteenth-century Georgian-style plantation, "would detract from the resource's characteristics of setting and feeling which are integral to the resource's qualifications for listing on the [National Register of Historic Places]." Cultural Resources Effects Assessment § 3.9.4 (Sept. 15, 2015), J.A. 2024. And it is hardly just Carter's Grove. By the Corps's own count, the region boasts fifty-

seven sites on the National Register or eligible for inclusion on it—a concentration of historic resources found "[i]n no other place in [the] United States." Letter from Park Service Regional Director 1 (Oct. 22, 2015), J.A. 1911.

The Corps's findings, paired with the record's "robust, well-supported analyses, from agencies with Congressionally-delegated authority and recognized expertise," National Trust Br. 16, satisfy this intensity factor. The out-of-circuit cases cited by the Corps—concerning the construction of a golf clubhouse near another, historic one, *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1156 (9th Cir. 1998), and the refurbishment of an existing railroad to provide commuter service, *Advocates for Transportation Alternatives, Inc. v. U.S. Army Corps of Engineers*, 453 F.Supp.2d 289, 294–95 (D. Mass. 2006)—are easily distinguishable, as they implicate neither comparably sized infrastructure nor equally august historic resources.

**D.**

The Corps has thus failed to make a "convincing case" that an EIS is unnecessary. *Myersville Citizens*, 783 F.3d at 1322. Three intensity factors demonstrate not only that the Project will significantly impact historic resources, but also that it would benefit from an EIS. Indeed, Congress created the EIS process to provide robust information in situations precisely like this one, where, following an environmental assessment, the scope of a project's ***1088** ****447** impacts remains both uncertain and controversial. *See, e.g.*, *Grand Canyon Trust*, 290 F.3d at 345–47 (remanding for further proceedings when an agency, analyzing noise impacts on a national park "identified [by the Park Service] as among the nine national parks of 'highest priority,' " considered those impacts "in a vacuum" without sensitivity to the park's "natural quiet"); *American Rivers*, 895 F.3d at 50 (ordering an EIS based on concerns that the agency "just shrugged off" potentially significant impacts based on "estimates entirely unmoored from any empirical, scientific, or otherwise verifiable study or source").

**III.**

**[7]** In preparing its EIS, the Corps will have to revisit its theories about alternatives under NEPA, which in turn will require it to reevaluate its Clean Water Act and Preservation Act analyses. Accordingly, we see no reason to address most of the remaining questions raised by the Conservation Groups. *See* *American Iron & Steel Institute v. EPA*, 115 F.3d 979, 1008 (D.C. Cir. 1997) ("see[ing] no profit" in addressing remaining argument where an agency was "already committed to agency revision"). Though taking no position on the adequacy of the Corps's alternatives analyses, we urge it to give careful consideration to its sister agencies' concerns that the prior iterations were "superficial," "inadequate," and "extremely problematic." Letter from Advisory Council Chairman 3 (May 2, 2017), J.A. 416.

There is, however, one issue whose resolution would facilitate further proceedings before the Corps. Specifically, the parties disagree about the meaning of section 110(f) of the Preservation Act, which provides that for any project "directly and adversely affect[ing] any National Historic Landmark," the agency must "to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark." 54 U.S.C. § 306107. The debate centers on the word "directly" as it relates to Carter's Grove, the National Historic Landmark at issue. According to the Corps and the district court, because the Project does not "physically" intrude on the plantation's grounds —several towers are instead visible from them—section 110(f) does not apply. *See* *National Parks Conservation Association*, 311 F.Supp.3d at 379 ("The Court is persuaded that the meaning of 'directly' in Section 110(f) refers to physical impacts ...."). The National Trust disagrees, equating "directly" with having "no intervening cause." National Trust Br. 9 (internal quotation marks omitted).

Because we "owe no deference to [the Corps's] interpretation of a statute it does not administer," *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1368 (D.C. Cir. 1999), "[w]e begin our analysis with the language of the statute," *United States v. Wilson*, 290 F.3d 347, 352 (D.C. Cir. 2002). Although section 110(f) clearly encompasses physical effects, nothing in the statute's text so limits its reach. According to the dictionary, both now and at the time section 110(f) was passed, "direct" means "free from extraneous influence" or "immediate." Black's Law Dictionary (10th ed. 2014); *see also* Black's Law Dictionary (5th ed. 1979) ("direct" defined as "without any ... intervening influence" or "[i]mmediate"). And had Congress wished to restrict section 110(f)'s reach to physical impacts, "it could have easily done so by using the word" physically. *Marx v. General Revenue Corp.*,

568 U.S. 371, 384, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013). Finally, although no agency has provided binding guidance, the two actually responsible for administering this statute—the Park Service, 54 U.S.C. § 306101(b), and the Advisory Council, *id.* § 304108(a)—both understand "directly" to "refer[ ] to causation and not physicality." Letter from Advisory ***1089** ****448** Council Assistant Director 4 (Mar. 2, 2016), J.A. 1485; *see also* Lawyers' Committee for Cultural Heritage Preservation Br. 19, Ex. A, Letter from Park Service Acting Associate Director 2 (Sept. 21, 2017) ("The [Park Service] does not agree with the Corps' position that Section 110(f) applies only when an undertaking may physically impact a National Historic Landmark."). On remand, therefore, the Corps must reconsider its Preservation Act analysis using this proper definition.

## IV.

For the foregoing reasons, we reverse and remand to the district court with instructions to vacate Dominion's permit and direct the Corps to prepare an environmental impact statement.

*So ordered.*

### All Citations

916 F.3d 1075, 439 U.S.App.D.C. 434

End of Document

Preserving America's Heritage

**June 7, 2019**

**Memorandum**

**To: ACHP Staff**

**From: ACHP Office of General Counsel**

***Re: Recent court decision regarding the meaning of "direct" in Sections 106 and 110(f) of the National Historic Preservation Act***

The purpose of this memorandum is to provide an update to staff on a legal development relevant to Sections 106 and 110(f) of the National Historic Preservation Act (NHPA). A recent decision by the D.C. circuit court has provided federal agencies with greater clarity on requirements for carrying out additional planning to minimize adverse effects to National Historic Landmarks (NHLs). Because the applicability of Section 110(f) is informed by a finding of adverse effect under Section 106 of the NHPA and the clear statutory intent for both provisions to address "effects" to historic properties, this decision also clarifies how effects in the Section 106 process may be defined as direct or indirect. Importantly for both Section 106 and Section 110(f), the court recognized that visual effects to historic properties can be direct effects under the NHPA.

Section 110(f) of the NHPA requires a federal agency to undertake such planning and actions as may be necessary to minimize harm to any NHL that may be directly and adversely affected by an undertaking.[1] While there is general consensus that the term "adversely" in this context has the same meaning it does in the regulations implementing Section 106,[2] there has been considerable debate in recent years over the meaning of "directly." This debate has prompted disagreement among federal agencies and stakeholders regarding when Section 110(f) applies to an undertaking.

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1 54 U.S.C. § 306107. The section states in full: "Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking."

2 See 36 CFR § 800.5(a)(1), stating, "An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.... Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative."

In Section 106, it is important that federal agencies determine whether an undertaking may have the potential to affect historic properties. "Affect" in this context includes both direct and indirect effects, and an "effect" is defined in the Section 106 regulations as an "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register [of Historic Places]."[3] When determining an undertaking's area of potential effects, a federal agency must consider both direct and indirect effects.[4] Further, in assessing effects, the regulations note that "[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property…".[5] However, the terms "direct effect" and "indirect effect" are not defined in the NHPA or in the Section 106 regulations.[6]

In March 2019, the D.C. circuit court issued an opinion in National Parks Conservation Association v. Semonite,[7] concluding that the meaning of the term "directly" in Section 110(f) refers to the causality, and not the physicality, of the effect. This means that if the effect comes from the undertaking at the same time and place with no intervening cause, it is considered "direct" regardless of its specific type (e.g., whether it is visual, physical, auditory, etc.). "Indirect" effects are those caused by the undertaking that are later in time or farther removed in distance but are still reasonably foreseeable.

To briefly summarize the salient points of the case, the Virginia Electric and Power Company retired 2 coal-fired power generators and applied in 2013 for a permit from the Army Corps of Engineers (Corps) to construct a new electrical switching station and 2 transmission lines. Supported by 17 250ft steel-lattice transmission towers, the line would stretch for 8 miles; four of those miles would cross the James River and transect the historic district including Jamestown and other historic properties. The Corps was responsible for complying with the National Environmental Policy Act (NEPA) and Section 106 for this project. The Corps prepared an environmental assessment under NEPA and developed a Memorandum of Agreement (MOA) to resolve the adverse effects under Section 106. While the ACHP signed the MOA, it also issued formal comments to the Corps, noting the agency's concerns with the Section 106 process and outcome. The Corps had determined that the project would not directly and adversely affect the Carter's Grove NHL and therefore, that Section 110(f) did not apply.

The Corps argued that because the project would not physically intrude on the plantation's grounds, rather several towers would be visible from the grounds, there was no direct effect to the NHL. However, during the Section 106 review, the ACHP and other consulting parties stated that "direct" in the context of the NHPA meant "having no intervening cause;" thus, visual effects could be direct effects and Section 110(f) should apply to this undertaking. While the district court agreed with the Corps, on appeal the circuit court found the Corps' position to be mistaken. It looked to the statutory language of the NHPA first and recognized that while Section 110(f) clearly includes physical effects, it is not limited to them. The court referenced the dictionary definition of "direct" to find the meaning, "free from extraneous influence" or "immediate." And the court noted that the Congress could have easily restricted Section

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3 36 CFR § 800.16(i).
4 36 CFR § 800.4(a)(1).
5 36 CFR § 800.5(a)(1).
6 As the term "effect" is also found in the National Environmental Policy Act, it is useful to review the definition in the Council on Environmental Quality's implementing regulations, which states, "[d]irect effects, which are caused by the action and occur at the same time and place" and "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 CFR § 1508.8(a)-(b).
7 USCA Case #18-5179, D.C. Cir. Mar. 1, 2019.

110(f)'s reach if it had intended to do so by using the word "physically" instead of "directly" in the statute. It is also important to note that the court recognized the deference that should be owed to the ACHP and the National Park Service (NPS) in interpreting the NHPA, as those are the agencies responsible for administering the statute. The court instructed the Corps to reconsider its historic preservation analysis using the "proper definition" of "directly."

This is not the first time Section110(f)'s applicability and the meaning of "directly" has come up in the course of a Section 106 review. In regard to the 2009 Section 106 review for the Cape Wind project in Massachusetts, the NPS stated that visual intrusions could, in certain circumstances, constitute direct and adverse effects to an NHL. Further, in 2017, and in the context of the Section 106 review for the Charleston Union Pier Terminal project, the NPS said, "[t]he NPS does not agree with the [Army Corps of Engineers'] position that Section 110(f) applies only when an undertaking may physically impact a National Historic Landmark. NPS staff has reviewed Section 110(f) and NPS guidance pertaining to Section 110(f), and has not found published guidance that specifically interprets the term 'directly' as used in Section 110(f). The NPS is, therefore, considering issuing additional published guidance regarding the interpretation of the term 'directly' in Section 110(f) to clarify this issue."

While the NPS has not yet published such guidance, it is clear from the circuit court's opinion that "directly" in the NHPA specifically refers to the causation of the effect, not its physical nature. This court decision clarifies when Section 110(f) applies and will have implications for how agencies' assess effects to NHLs. While it does not impact when Section 106 applies, it does instruct how effects should be categorized in Section 106 review. For many, this will change the approach to defining effects based on physicality and recognize instances when direct effects may be visual, auditory, or atmospheric. This clarification should inform an agency's efforts to determine areas of potential effects and consideration of how an undertaking may affect historic properties.