IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, Plaintiff, v. TODD T. SEMONITE, *et al.*, Defendants, and VIRGINIA ELECTRIC & POWER COMPANY, Defendant-Intervenor.	)	Civil Action No. 1:17-cv-01361-RCL
NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES and ASSOCIATION FOR THE PRESERVATION OF VIRGINIA ANTIQUITIES, Plaintiffs, v. TODD T. SEMONITE, *et al.*, Defendants, and VIRGINIA ELECTRIC & POWER COMPANY, Defendant-Intervenor.	)	Civil Action No. 1:17-cv-01574-RCL

MEMORANDUM IN SUPPORT OF VIRGINIA ELECTRIC AND POWER COMPANY'S MOTION FOR REMAND WITHOUT VACATUR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Federal Regulations

Other Authorities

I. INTRODUCTION

This case perfectly illustrates why courts in the D.C. Circuit and elsewhere consider the *Allied-Signal*[1] factors when fashioning a remedy under the Administrative Procedure Act ("APA"). Vacating the U.S. Army Corps of Engineers ("Corps") Permit (the "Permit") at issue in this case could lead to unnecessary, wasteful, and extremely disruptive adverse effects that are contrary to the public interest.

From prior proceedings, the Court is well aware of the electrical emergency that existed in the North Hampton Roads Load Area ("North Hampton Area"). The Surry-Skiffes Creek-Whealton transmission line project (the "Project) at issue here was the solution identified by the state utility regulators and the independent transmission system operator. While the Project was under construction by Virginia Electric and Power Company (d/b/a Dominion Energy Virginia) ("Dominion"), the Department of Energy ("DOE") issued a series of emergency orders requiring two aging and rapidly deteriorating coal-fired units at Dominion's Yorktown station to run when necessary to maintain the North Hampton Area's power supply, despite those units' inability to meet emissions limits under the Clean Air Act. Dominion placed the Project into operation in February 2019, thereby resolving the emergency. The North Hampton Area now has a reliable supply of electric power.

The Corps has already begun the process of preparing an Environmental Impact Statement ("EIS") in accordance with the decision by the U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") on the merits of Plaintiffs' claims under the National Environmental Policy Act ("NEPA"). A decision by this Court to vacate the Permit before the Corps completes its supplemental NEPA review and reconsiders the Permit on remand would put

[1] *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993).

electric reliability at risk once again and could prompt an extraordinarily wasteful and pointless expenditure of resources. Vacatur of the Permit would create serious uncertainty about the fate of the portion of the Project that crosses the James River (the "River Crossing Line"). If a court were to order Dominion to take down the River Crossing Line, there is no alternative means of ensuring electric reliability for the North Hampton Area. Even if DOE were willing to consider issuing an order directing the aging units at Yorktown to restart and run, operating those units is no longer an option. As Dominion advised the Court in 2017 and again in 2018, the Yorktown coal units were degrading precipitously and had already suffered critical failures when directed to run for grid reliability. They are four years past their scheduled deactivation, and it is not feasible to keep these units reliably operational for another two to seven years while (i) the Corps prepares the EIS and reconsiders the Permit and/or (ii) an alternative means of supplying electricity for the North Hampton Area is permitted and constructed. At the same time, because the Corps may very well reach the same conclusion and issue the same permit for the River Crossing Line after completing the EIS, any remedy that could conceivably force Dominion to dismantle it while the Corps reconsiders its permitting decision on remand—only to rebuild it shortly thereafter—would be an enormous waste of resources and needlessly detrimental to the environment.

Remand without vacatur is plainly the appropriate remedy here. It will eliminate uncertainty over electric reliability in the North Hampton Area without compromising the Corps' reconsideration of the Permit following completion of an EIS, and at the same time preserve the Court's authority to create an appropriate remedy if needed following the Corps' action on remand.

Confronted with this compelling case for remand without vacatur, Plaintiffs have sought instead to foreclose any analysis under *Allied-Signal*. In response to the rehearing petitions in the Court of Appeals, Plaintiffs claimed that Dominion forfeited the chance to advocate for a remedy of remand without vacatur by allegedly failing to raise this issue earlier in the case and by allegedly taking an inconsistent position in persuading this Court and the Court of Appeals to deny multiple requests for injunctions. Dominion did neither of these things.

Under the rules applicable to rehearing petitions, Dominion had no opportunity to respond to these baseless accusations in the Court of Appeals, and it welcomes the opportunity to rebut them here. Dominion briefed the question of remedy in this Court during the summary judgment proceedings, advocating for the same position it does now. And that position is entirely consistent with its prior arguments in opposition to Plaintiffs' requests for preliminary injunctions. What Dominion previously stated in the injunction proceedings (and stands by today) is that the courts *could* order Dominion to remove the River Crossing Line (and that the towers could in fact be removed), but that is a far cry from saying that the courts *must* or *should* vacate the Permit and order the River Crossing Line removed before the Corps has reconsidered its permitting decision on remand. Indeed, Dominion argued in this Court on summary judgment that vacatur would not be an appropriate remedy even if the Court found an error in the Permit.[2]

This brief recounts every instance in which Dominion argued that Plaintiffs would not suffer irreparable harm if the courts denied their request to enjoin the construction of the River Crossing Line. Dominion argued consistently that the purported harm to Plaintiffs' view would not be permanent and irreversible because the courts have the power to order the River Crossing

[2] Plaintiffs did not apprise the Court of Appeals that Dominion had made precisely the same argument in this Court as it was making in its Petition for Rehearing.

Line removed. There is no tension between that position and Dominion's argument now that the courts should not exercise that power. Remand without vacatur at this stage of the case does not foreclose the courts from later exercising their equitable power to order removal if appropriate at that time. Judicial estoppel has no place here.

II. FACTUAL BACKGROUND

A. A Critical Electricity Shortage Necessitated Bringing the River Crossing Line into Service As Soon As Possible.

In 2012, Dominion and PJM Interconnection, L.L.C. ("PJM") first projected a severe shortage of electricity in a large swath of the North Hampton Area, AR672-73, which comprises over 600,000 people and a mix of defense, emergency, health care, industrial, water treatment, educational, and other facilities. AR735; Allen Decl. ¶ 5. The planned 2015 deactivation of two 1950s-era coal-fired generating units at Dominion's Yorktown Power Plant, whose air emissions could not comply with new limitations under the federal Mercury and Air Toxics Standards ("the Mercury Rule"), would lead to violations of mandatory federal grid reliability criteria and high risk of rolling blackouts during peak electricity demand periods. AR673-75; Rowe Decl. ¶ 4.

To head off this emergency, Dominion analyzed system needs and identified potential solutions. AR672-75. Dominion, PJM, and the Virginia State Corporation Commission (the "SCC") (the agency charged with evaluating and approving transmission facilities in Virginia) all concluded that the Project, a new overhead transmission line, part of which crosses the James River, and associated infrastructure was necessary to meet all reliability criteria and concerns. *Id*. The Corps ultimately agreed, following its own nearly five-year-long independent review.

Construction of the River Crossing Line began as soon as Dominion received the Permit in July 2017. The construction was technically difficult, involving work from barges and helicopters, and constrained by several factors, including the imposition of time-of-year

restrictions on certain construction work to avoid impacts to protected species in the river. McGuire Decl. ¶ 20, ECF No. 22-7 (deep water work for 5 of 17 towers limited to November-February timeframe); Second McGuire Decl. ¶ 7, *NTHP, v. Semonite*, No. 17-1574 (hereinafter "*NTHP*") (D.D.C. Sep. 13, 2017), ECF No. 29-18 (pile driving for 12 towers and related fender protection systems limited to June-February timeframe). All construction activities on the River Crossing Line are complete with the exception of the installation of protective fiberglass jackets, for maritime safety purposes, around approximately half of the 416 pipe piles for the tower foundations located in the James River.[3] Allen Decl. ¶ 6.

The River Crossing Line was energized and placed into operation on February 26, 2019, thereby resolving the electric reliability emergency. Rowe Decl. ¶ 5. It has been in continuous operation since that time, and is now a critical component of the electric transmission system serving the North Hampton Area. Allen Decl. ¶ 5.

B. Prior to Energizing the River Crossing Line, Extraordinary Interim Actions Were Required to Address the Electrical Emergency.

Many extraordinary measures were necessary to ensure continued grid reliability during the lengthy time required for the Corps to complete its permit review process, and for Dominion to construct the River Crossing Line. First, the Virginia Department of Environmental Quality ("DEQ") and the U.S. Environmental Protection Agency ("EPA") granted Dominion one-year extensions for compliance with the Mercury Rule's air emissions limits, allowing Yorktown's coal-fired units to continue operating until April 2017. Letter from DEQ to Dominion at 1, ECF No. 24-19; EPA, *In the Matter of Virginia Electric and Power Company*, AED-CAA-113(a)-2016-0005, at 8-9, ECF No. 24-20.

[3] Vacatur of the permit may impede Dominion's ability to install these safety features.

Second, after all regulatory extensions available under the Mercury Rule were exhausted, PJM applied to DOE for an emergency order under the Federal Power Act. As the regional grid operator, PJM asked DOE for authorization to direct Dominion to operate its coal-fired units at Yorktown when necessary to assure grid reliability. Letter from DOE to PJM, ECF No. 24-21. DOE issued the first emergency order in June 2017, making the units legally available to operate for 90 days even though they could not meet the Mercury Rule's emission limits. Lazzaro Decl. ¶ 6, ECF No. 22-5. DOE renewed the emergency order on six separate occasions; the last of these orders expired on March 6, 2019, shortly after the River Crossing Line was energized. *See* Rowe Decl. ¶ 4; Second Lazzaro Decl., Exs. 2-5, ECF No. 114-2 (collecting orders). Each time, DOE found that an electric reliability emergency existed in the North Hampton Area "due to a shortage of electric energy and a shortage of facilities for the generation and transmission of electric energy." *E.g.*, Second Lazzaro Decl., Ex. 4, at 11, ECF No. 114-2. During this period, Yorktown Units 1 and/or 2 were called into operation by PJM pursuant to the DOE emergency orders for all or part of 89 days to address emergency reliability issues during periods of extreme hot or cold weather. Rowe Decl. ¶ 4.

Third, even with the potential to call upon the Yorktown units under DOE's emergency orders, on several occasions PJM authorized (or came close to authorizing) Dominion to arm an emergency load shedding protocol known as the Remedial Action Scheme. The Remedial Action Scheme is a last-resort emergency system to prevent cascading outages in the broader regional, state, and potentially national grid systems. Fourth Miller Decl. ¶ 6, ECF No. 114-4. Once armed, the Remedial Action Scheme automatically cuts power to several hundred thousand people if it detects a fault in the grid. *Id*. The automated system alone, without human involvement, chooses which customers to cut, irrespective of those customers' needs or status.

Given the serious consequences of arming the Remedial Action Scheme, numerous federal, state, and local authorities must be notified whenever that occurs. *Id.* ¶¶ 6-7. In this case, PJM authorized Dominion to arm the Remedial Action Scheme on a hot day in May 2018, when a blackout nearly occurred after demand outstripped grid capacity. *Id.* ¶ 7. Without the River Crossing Line in service, PJM came close to issuing such an authorization on several other occasions in May-June 2018. *Id.* ¶ 8.

C. Operating Yorktown's Coal-Fired Units is No Longer a Viable Option for Addressing Electrical Reliability Issues.

The Yorktown units can no longer provide a stopgap solution to the electric reliability needs of the region. Rowe Decl. ¶ 7 (aging units can "no longer be reliably operated for *any* extended period … without major repairs") (emphasis added). First, the Yorktown units were never a sufficient long-term solution given their failing state. One unit suffered a catastrophic failure in June 2018 when called on by PJM to operate, taking it out of commission for many months and increasing the risk to grid reliability. Lazzaro Decl. ¶¶ 7-9, ECF No. 114-2. In February 2019, the same unit unexpectedly tripped offline due to an electrical fault. Rowe Decl. ¶ 6. Moreover, problems such as these cannot be avoided by preventative maintenance, as certain corrosion, moisture build-up, leaks, and faults are only discovered when units are in operation. *Id.* ¶ 7.

Another critical component of aging infrastructure for the Yorktown coal units also is failing. The 325-foot tall common stack used to vent emissions from Units 1 and 2 has required numerous repairs over the past decade, and is currently wrapped with *42* steel reinforcing bands to limit and contain vertical cracks that have appeared in the concrete structure. Boyd Decl. ¶5. Most recently, in March 2019, an inspection by an outside engineer identified new cracks, a pronounced inward bulge in the top 20 feet of the stack's interior brick liner, and separation of

the top course of the liner brickwork. *Id.* The stack's potential for failure now poses a safety risk for workers at the site and threatens to cause damage to the remaining oil-fired unit at the Yorktown station. Accordingly, as an "immediately needed safety measure," demolition of the stack is currently scheduled to begin as soon as mid-August 2019. *Id.* ¶ 8.

Second, DOE's orders have since expired, rendering Yorktown legally unable to operate. PJM has given no indication that it would consider asking DOE to issue an emergency order authorizing the use of the Yorktown units given the availability of the cleaner, more reliable Project.

In sum, the Yorktown coal units can no longer be relied upon to prevent blackouts due to their age and deteriorated condition, even if DOE were to consider authorizing them to operate again on an emergency basis. Indeed, in just the time required to construct the River Crossing Line, the condition of the units continued to degrade to the point where it was questionable whether they could be called back into operation and run for the entire period during which they may be needed. Given the pace of deterioration (which accelerates when the units operate for only a day or two and then remain idle for extended periods), there was no question that these units could not continue to provide an emergency stopgap solution to the grid reliability risks over the next several years while the Corps conducts an EIS. *See* Rowe Decl. ¶ 7 ("the limited, intermittent operation dictated by the terms of the DOE orders" causes "general degradation" to the units). For this reason, Dominion has commenced the process of decommissioning the units, originally planned for 2015, including removing all remaining coal, as a standard fire safety measure, disconnecting and sealing fuel oil lines, and reassigning or retiring staff. *Id.* ¶¶ 6-7. To reverse these decommissioning efforts alone (to say nothing of the need to repair the common stack), would require at least three to four months. *Id.*

D. Removing the River Crossing Line Would Be a Time- and Resource-Intensive Process.

Removing the lines and towers for the River Crossing Line would involve numerous logistical and other challenges. Dominion would be required to review all requirements for working in a navigable waterway, wildlife habitats, and obtain new permits, where necessary. Allen Decl. ¶ 7. It would need to coordinate with multiple maritime authorities and other government agencies regarding project schedule and to secure approval to de-energize and remove the River Crossing Line from the grid. *Id.* The bidding and mobilization processes would also be complex due to the nature of the specialized equipment and workforce required to remove the River Crossing Line. *Id.* ¶ 8. The process of removing the conductors and towers would pose higher operational risks to workers and equipment than when they were constructed because more barge trips would be required, work that was previously done on the ground would need to be done in the air over the water, and it would not be possible to conduct test lifts to insure balanced movement of the pieces of the steel lattice towers as they are dismantled. *Id.* ¶ 10. It would take at least six months to plan for and mobilize to remove the lines and towers from the river, the removal work itself would take at least another 13 months, at a cost of approximately $46,000,000. *Id.* ¶¶ 11-12. It would cost approximately another $41,000,000 to reconstruct the towers and lines on the existing foundations in the river. *Id.* ¶12.

III. PROCEDURAL HISTORY

The Corps issued the Permit authorizing construction work in jurisdictional waters for the River Crossing Line on June 12, 2017. AR661. Over the next several months, Plaintiffs filed complaints alleging, among other things, that the Corps violated NEPA because it failed to prepare an EIS before issuing the Permit. Complaint at ¶¶ 73-77, ECF No. 1; Complaint at ¶ 5, *NTHP*, ECF No. 1. Plaintiffs also alleged the Corps violated the Clean Water Act, Rivers and

Harbors Act, and National Historic Preservation Act. Complaint at ¶¶ 78-80, ECF No. 1; Complaint at ¶¶ 68-78, *NTHP*, ECF No. 1.

Shortly after filing their Complaints, Plaintiffs filed motions for preliminary injunctions to enjoin construction of the River Crossing Line. Plaintiffs' Motions for Preliminary Inj., ECF No. 5; *NTHP*, ECF No. 22. Among other things, Plaintiffs argued that they, and their members, would suffer irreparable harm without injunctive relief because the River Crossing Line, especially the towers, would harm their members' observing and enjoying historical and cultural resources along the project corridor, harm their organizational missions, and create procedural harm by allowing the Project to continue without adequate environmental review. *See* Mem. in Support of Motion for Preliminary Inj. at 41-43, ECF No. 5-1; Mem. of Points and Authorities in Support of Motion for Preliminary Inj. at 32-36, *NTHP*, ECF No. 22-1.

After extensive briefing and a hearing, the Court denied Plaintiffs' requests for a preliminary injunction for several reasons. Memorandum and Opinion, ECF No. 60. Among other things, the Court found there was no irreparable injury because (1) construction on the towers, the source of Plaintiffs' alleged harm, would not begin for several months allowing the parties time to fully brief the merits of the case; (2) even if visible, the towers would not irreparably harm Plaintiffs' interests more than boats traveling on the river; and (3) the harm would not be "beyond remediation" because "[c]onstruction, by its very nature, is temporary" and the "Court [could] issue an injunction at a later stage and order construction to be halted." *Id.* at 6-8.

Subsequently, on cross motions for summary judgment, this Court ruled that the Corps had acted lawfully in issuing the Permit. Memorandum and Opinion at 2, ECF No. 102.

Plaintiffs appealed the Court's decision to the Court of Appeals, renewing their arguments that the Corps violated NEPA by not completing an EIS and that the Corps was arbitrary and capricious in finding that there were no "practicable" alternatives to the Project. Plaintiffs asked the Court of Appeals to reverse this Court's ruling, vacate the Permit, and order the Corps to complete an EIS.

Concurrent with its appeal, the National Parks Conservation Association ("NPCA") (but not the National Trust for Historic Preservation ("NTHP")) also sought an injunction pending appeal from this Court and then, when the Court denied that request, from the Court of Appeals. After another round of extensive briefing, this Court denied NPCA's request on "three independent bases." Order at 5-6, ECF No. 117. First, NPCA's case on the merits was not substantial because "[t]he Corps spent years analyzing the effects of this project, meticulously responded to comments, and addressed the methodological flaws identified by interested parties." *Id.* at 3. Second, the alleged harm to NPCA members' view was not irreparable because the Corps and Dominion "provided the Court with numerous cases indicating that the Court would have the authority to order the towers removed" if NPCA was successful on its appeal. *Id.* at 4-5. Finally, the public interest disfavored granting an injunction, given the "ample evidence demonstrating grid reliability concerns for the region." *Id.* at 5.

The Court of Appeals also denied NPCA's request for an injunction pending appeal in a short order stating that NPCA had failed to satisfy the "stringent requirements for an injunction pending appeal." Per Curiam Order at 1, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. July 31, 2018), ECF No. 1743198.

The Court of Appeals subsequently agreed with Plaintiffs on the merits, concluding that the Corps violated the procedural requirements of NEPA by issuing the Permit without preparing

an EIS. Opinion at 3, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. Mar. 01, 2019), ECF No. 1775491. The Court of Appeals therefore reversed this Court's earlier decision and remanded the case with instructions to vacate the Permit and order the Corps to prepare an EIS. *Id.* at 26.

Shortly thereafter, Dominion and the Corps each petitioned the Court of Appeals to reconsider the remedy of vacatur. Pets. for Reh'g, *NPCA, v. Semonite*, No. 18-5179 (D.C. Cir. Apr. 15, 2019), ECF Nos. 1782940, 1782986. Dominion and the Corps argued that the Court of Appeals failed to consider well-settled legal principles, outlined in *Allied-Signal* and *Public Employees*, addressing whether vacatur is the appropriate remedy in cases such as this one. Dominion stressed the significant disruptive effects vacatur could have on grid reliability, as well as the availability of adequate remedies after the Corps completes the EIS. Dominion argued that no extraordinary relief is warranted until after the Corps completes its EIS because, as this Court held on two separate occasions after considering evidence, the visual impacts of the River Crossing Line is not "beyond remediation" and the towers could be removed from the river if the Corps were to conclude after the EIS that the River Crossing Line should not be permitted, and the visual intrusion would be completely remedied. Pet. for Reh'g at 12, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. Apr. 15, 2019), ECF No. 1782940 (citing Memorandum and Opinion at 8, ECF No. 60 and Order at 4-5, ECF No. 117, (D.D.C. July 3, 2018). Dominion and the Corps, therefore, asked the Court of Appeals to amend its order and instruct this Court to apply *Allied-Signal* and *Public Employees* in deciding whether to vacate the Permit while the EIS process moves forward.

NTHP and NPCA opposed the petitions for rehearing. NTHP argued against application of *Allied-Signal* because the Court of Appeals was not required to consider *Allied-Signal* before ordering vacatur, the ordinary remedy for an APA violation is vacatur, and, in any event, the

Allied-Signal factors favor vacatur. Response of NTHP to Appellees' Reh'g Pets. at 2-4, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. May 6, 2019), ECF No. 1786323.

NPCA raised similar arguments, but also claimed Dominion (and the Corps) had waived or were judicially estopped from arguing in favor of remand without vacatur based on allegedly inconsistent positions taken during prior stages of this litigation. NPCA Response to Appellees' Reh'g Pets. at 7-9, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. May 6, 2019), ECF No. 1786133.

On rehearing, the merits panel of the Court of Appeals recognized, "without expressing a view as to the appropriate outcome," that "the best course of action [would be] to remand the case to the district court to consider, in view of [Plaintiffs'] arguments, whether vacatur remains the appropriate remedy, including whether [Dominion and the Corps] have forfeited or are judicially estopped from now opposing vacatur." Opinion at 5-6, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. May 31, 2019), ECF No. 1790348. The Court of Appeals stressed that this Court "is best positioned to order additional briefing, gather evidence, make factual findings, and determine the remedies necessary to protect the purpose and integrity of the EIS process." *Id.* at 5.

On June 24, 2019, this Court ordered briefing on the issue of an appropriate remedy "consistent with the Court of Appeals' mandate…." Order at 2, ECF No. 124. The remedy question is now before this Court, which must decide whether to vacate the Permit while the Corps proceeds with the EIS process.

IV. ARGUMENT

Vacating the Permit would be contrary to the public interest. This Court should thus remand the Permit to the Corps without vacatur, while the agency undertakes the process of preparing an EIS. In APA cases, mandatory vacatur "is simply not the law," *Sugar Cane*

Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002); and is it not appropriate here.

Dominion is not estopped from advocating for remand without vacatur. Indeed, such a remedy is entirely consistent with Dominion's position at each stage of this litigation. Dominion's acknowledgment that the court *could* order the towers to come down was not a concession that the court *should* do so. Likewise, nothing in Dominion's prior statements to the courts can be construed a waiver of Dominion's right to argue for a remedy that leaves the River Crossing Line in place pending further consideration by the Corps on remand.

The law in this circuit has long recognized that, where an agency action has been found unlawful under the APA, courts are obliged to consider the equities in selecting the proper remedy. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir.1991) ("[W]hen equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy."). This precedent gives effect to the APA's reservation of a court's "power or duty" to "deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702(1); *see also Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 536 (D.C. Cir. 2018) (quoting 5 U.S.C. § 702(1)) (Garland, C.J.).

Two related tests guide this Court's equitable consideration in determining an appropriate remedy. *See Allied-Signal*, 988 F.2d 146; *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016). Applying these tests, the Court should find that remand without vacatur is the proper remedy in this case.

A. Neither Waiver, Forfeiture, Nor Judicial Estoppel Constrains Dominion or the Corps From Advocating for Remand Without Vacatur.

The Court of Appeals' Amended Judgment directs this Court to determine whether Dominion and the Corps are precluded, either by waiver or judicial estoppel, from arguing for

remand without vacatur. Opinion at 5, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. May 31, 2019), ECF No. 1790348. This directive is based on claims by Plaintiffs that Dominion and the Corps convinced this Court not to enjoin construction of the River Crossing Line by arguing that it "could be—and almost certainly would be—dismantled if NPCA prevailed on the merits," and then took "the opposite tack" after Plaintiffs prevailed on appeal. NPCA Response to Appellees' Reh'g Pets. at 7, 9, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. May 6, 2019), ECF No. 1786133. NTHP asserted that Defendants "asked the Court to disregard sworn statements made earlier in this case." Response of NTHP to Appellees' Reh'g Pets at 2, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. May 6, 2019), ECF No. 1786323. Under the rules, Dominion had no opportunity to respond to these spurious allegations in the context of the rehearing proceedings at the Court of Appeals, and it welcomes the opportunity to set the record straight.[4]

1. Dominion has Neither Waived nor Forfeited its Ability to Contest Vacatur.

Waiver is the "'intentional relinquishment or abandonment of a known right.'" *Keepseagle v. Perdue*, 856 F.3d 1039, 1053 (D.C. Cir. 2017), *reh'g en banc denied* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). And "forfeiture is the failure to make the

[4] For its part, the Corps raised the issue of remand without vacatur in prior stages of litigation. *See* Mem. In Support of Federal Defendants' Cross Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment at 74-75, ECF No. 79 (stating "NPCA's assertion that vacatur is an appropriate remedy is speculative and premature" and "[e]ven if the Court were to rule against the Corps on some claim, vacatur is not the default remedy" (citing *Allied-Signal*)); *see also* Federal Appellees' Opposition to Motion for an Inj. Pending Appeal at 22-23, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. July 11, 2018), ECF No. 1740184 (stating "[t]he district court correctly concluded that because it has the power to order the towers removed, NPCA's alleged injury is not 'beyond remediation'" and "[t]his possibility of 'corrective relief [that could] be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm'"). Accordingly, like Dominion, the Corps is not precluded by any notions of estoppel, forfeiture, or waiver from advocating for remand without vacatur now.

timely assertion of a right." *Id.* These doctrines stem from the well settled principle "that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *Id.* (quoting *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984)). Nonetheless, "in 'exceptional circumstances,' an appellate court may exercise discretion to address an issue that is subject to forfeiture. *Id.* at 1055 (quoting *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5, (D.C. Cir. 1992)). Courts are always empowered to address issues neither pressed nor passed upon before, "where injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Dominion neither waived nor forfeited its right to question whether vacatur is the appropriate remedy in this case. It briefed the question of remedy in this Court during the summary judgment proceedings, advocating for the same position it does now.

Dominion's summary judgment reply brief responded to NPCA's argument that "NEPA and other APA violations ordinarily compel the presumptive relief of vacatur and remand." Plaintiffs' Combined Opposition to Defendants' Cross-Motions for Summary Judgment and Reply In Support of Plaintiff's Motion for Summary Judgment at 67, ECF No. 86. Dominion asked the Court to bifurcate any consideration of remedy from consideration of the merits, while also stating the position that, if there were a need to consider remedy, the matter should be remanded to the Corps for further proceedings "without vacating the Corps permit," in accordance with *Allied-Signal.* Dominion's Reply in Support of its Cross Motion for Summary Judgment at 42-43, ECF No. 87.

On appeal, Dominion again specifically addressed the question of remedy, stating:

> The district court's decision upholding the Permit should be affirmed. But if the Court finds prejudicial error—which it should not—it should order further proceedings under *Allied-Signal, Inc.*

> *v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), in lieu of vacating the Permit.

Dominion's Final Response to Appellants' Opening Briefs at 43, *NPCA v. Semonite,* No. 18-5179 (D.C. Cir. Oct. 30, 2018), ECF No. 1757694.

In their responding briefs, Plaintiffs asked for vacatur of the Permit, but offered no argument and cited no legal authority to question the applicability of *Allied-Signal* to the circumstances of this case. *See* Plaintiff-Appellants' Final Reply Briefs at 15-16, *NPCA v. Semonite,* No. 18-5179 (D.C. Cir. Oct. 30, 2018), ECF Nos. 1757847, 1757688. When the Court of Appeals ordered the Permit to be vacated without conducting an *Allied-Signal* analysis, Dominion filed a petition to address this oversight. Pet. For Reh'g, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. Apr. 15, 2019), ECF No. 1782940.

Dominion's prior briefing in both courts on the question of remedy is more than sufficient to preserve its right to contest vacatur now. Moreover, relying on a dubious waiver argument to prevent consideration of the public interest in reliable power would result in manifest injustice. If the Permit is vacated, over 600,000 residents in the North Hampton Area are at risk of losing electricity. This is an "exceptional circumstance" and "extraordinary situation … in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process." *Roosevelt,* 958 F.2d at 419, n.5.

2. Dominion is Not Judicially Estopped from Arguing that Remand Without Vacatur is the Appropriate Remedy.

a. Judicial Estoppel Applies in Isolated Circumstances.

Judicial estoppel precludes a party from taking a position in one stage of litigation that is inconsistent with a position on which it prevailed in an earlier stage. *New Hampshire v. Maine,* 532 U.S. 742, 749 (2001). It is an equitable doctrine invoked in the court's discretion. *Id.* at 750. But it is an extreme remedy that is applied only in exceptional circumstances. *E.g.*,

Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir. 1980) (other tools are usually better than "suppression of truth"); *Chao v. Roy's Constr., Inc.*, 517 F.3d 180, 186 n.5 (3d Cir. 2008) (remedy is "extreme"); *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1176 (7th Cir. 2017) (*en banc*) (doctrine applicable where court "finds that the plaintiff intended to make a mockery of the judicial system").

There is no rigid formula for determining when to apply judicial estoppel. *New Hampshire*, 532 U.S. at 750-51. Courts typically consider three factors when considering its application in a particular case: (i) whether a party's later position is "clearly inconsistent" with an earlier position; (ii) whether a party successfully persuaded a court to accept its earlier position in such a manner that if a court accepts an inconsistent position in a later proceeding, it would create the impression that either court was misled; and (iii) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party…." *Id.* Other considerations also "may inform the doctrine's application in specific factual contexts." *Id.* at 751.

None of the three factors specified in *New Hampshire* is met here, and additional considerations—particularly the paramount public interest in reliable electricity—weigh heavily against judicially estopping Dominion from arguing for remand without vacatur.

The rarely invoked doctrine of judicial estoppel has no place here. First and foremost, there is no inconsistency (let alone the required "clear inconsistency") in the position Dominion has maintained throughout this litigation on the question of remedy. Dominion has consistently stated that Plaintiffs could not meet the "beyond remediation" standard for injunctive relief because the courts *could* order the River Crossing Line torn down if appropriate. Dominion never said the court *must* vacate the Permit upon any finding of error in the Corps' permitting

decision, much less *automatically* order the River Crossing Line removed. The lack of inconsistency alone defeats any claim for judicial estoppel.

Second, there is no risk of inconsistent judicial determinations if the Court adopts Dominion's position on the appropriate remedy. The prior judicial determination is separate and distinct from the pending one. No court has yet considered the *Allied-Signal* factors in the context of this Permit. This Court previously ruled that Plaintiffs could suffer no irreparable harm from construction of the River Crossing Line because the Court ultimately "could" order deconstruction. This remains true. If the Court applies *Allied-Signal* and remands the Permit without vacatur, the Court will retain the power to consider the additional question of whether the River Crossing Line should be removed after the EIS process if the circumstances so dictate.

Third, Dominion gains no unfair advantage from the opportunity to plead its case on remedy. Dominion must establish that maintaining the status quo while the EIS process plays out is consistent with *Allied-Signal*, and Plaintiffs are free to argue otherwise.

Finally, preventing Dominion from arguing for the most equitable remedy here is not consonant with the orderly administration of justice or the public interest.

These factors are discussed in more detail below.

b. Dominion's Positions are Clearly Consistent.

Plaintiffs have the burden to show that Dominion's positions are "directly inconsistent" with one another. *Dunellen LLC v. Getty Props. Corp.*, 557 F. Supp. 2d 263, 269 (D.R.I. 2008). They cannot meet that burden. At no point in this litigation has Dominion asserted inconsistent positions regarding the deconstruction of the River Crossing Line.

As part of its opposition to Plaintiffs' various requests for injunctive relief, Dominion argued that Plaintiffs could not establish their entitlement to injunctive relief because their

alleged harm was not "beyond remediation." *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (to obtain an injunction, party must show that it will suffer *irreparable* harm, *i.e.*, harm that is "beyond remediation") (internal citation omitted). Not only could the River Crossing Line be taken down if necessary, but courts have equitable authority to order Dominion to take it down if appropriate.

What Dominion said, and did not say, about dismantling the River Crossing Line is best ascertained by reference to the actual text of Dominion's filings. Each of Dominion's statements to this Court and to the Court of Appeals on this matter is set out below. As the Court will see, Dominion never said—as Plaintiffs now contend—that the Court would be required to order the River Crossing Line removed immediately upon finding an error in the Permit. At no point did Dominion take a position on whether, when, or how the Court's power should be exercised.

- "…the alleged harm to Plaintiff's members – consisting solely of impacts to the viewshed from the Sites – is not irreparable. *If necessary*, the [River Crossing Line] towers *could be removed* from the river, restoring the existing view." Dominion's Mem. in Opp. to Plaintiff's Motion for Preliminary Inj. at 3, ECF No. 22 (emphasis added).

- "…regardless of how one may characterize the magnitude of the visual impacts from the River Crossing, such impacts do not constitute irreparable injury. The visible infrastructure *could be removed* and the existing views fully restored." *Id.* at 39 (emphasis added).

- "…the harm is by no means 'beyond remediation.' The D.C. Circuit has made clear that courts have the authority to order removal of completed infrastructure projects upon finding violations of the National Environmental Policy Act ("NEPA"), *if equity so requires*." Dominion's Mem. in Opp. to Plaintiff's Emergency Motion for an Inj. Pending Appeal at 3, ECF No. 114 (emphasis added).

- "The simple fact is that the towers *can be removed*, restoring completely any preexisting views." *Id.* at 10 (emphasis added).

- "Without the permit, Dominion would not be authorized to maintain the towers within the river and, *absent express authority from a court or otherwise*, likely would have no choice but to remove the towers. If Dominion did not do so, it

would be *within the Court's authority* to order Dominion to take down the towers." *Id.* (emphasis added).

- "This purported and purely subjective harm, however, is not 'beyond remediation.' As the district court found, the towers *can be removed* and the view completely restored *if necessary*." Dominion's Response to Plaintiff-Appellant's Emergency Motion for an Inj. Pending Appeal at 1, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. July 11, 2018), ECF No. 1740196 (emphasis added).

- "…the alleged harm to the view of NPCA's members is not irreparable, because the Corps and Dominion 'provided the Court with numerous cases indicating that the Court *would have the authority to order* the towers removed' if NPCA is successful on its appeal." *Id.* at 8-9 (emphasis added).

- "But the towers can be removed, and any preexisting views restored completely. As the district court recognized below, *courts have the authority* to undo the alleged harm entirely by ordering removal of the towers if NPCA prevails on appeal." *Id.* at 16-17 (emphasis added).

- "As the district court held on two separate occasions after considering evidence, the [River Crossing Line] is not 'beyond remediation'…. The towers could be removed *if the Corps were to conclude after the EIS that the [River Crossing Line] should not be permitted*, and the visual intrusion would be completely remedied." Pet. For Reh'g at 12, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. Apr. 15, 2019), ECF No. 1782940 (emphasis added).

- "Dominion has noted throughout this litigation that courts have the *equitable power* to require the [River Crossing Line's] removal *if appropriate*." *Id.* at 13 n.6 (emphasis added).

Read together and in context, the foregoing statements accurately describe this Court's equitable authority to remedy Plaintiffs' harm by ordering the towers for the River Crossing Line to be taken down if appropriate. Those statements concern the Court's equitable power to issue a mandatory restorative injunction at the end of this litigation—an extraordinary remedy that *does not* issue as a matter of course.

There is no inconsistency at all between any of the foregoing statements and Dominion's current position that the Court should not vacate the Permit at this time. The *Allied-Signal*

analysis is separate from the equitable inquiry into whether a court should issue a restorative injunction.

As the Court of Appeals has observed, the APA expressly preserves the "power" and "duty" of the courts to deny otherwise available relief on equitable grounds. *Oglala Sioux Tribe*, 896 F.3d at 536 (quoting 5 U.S.C. § 702) (Garland, C.J.). Nothing in Dominion's prior statements suggests that the Court must as a matter of course, and contrary to the APA, equity, and well-established case law, order vacatur of the Permit, let alone take the further step of ordering the deconstruction of the River Crossing Line pending completion of the Corps' EIS process. *See, e.g.*, *Sugar Cane Growers Coop.*, 289 F.3d at 98 (mandatory vacatur under the APA "is simply not the law"); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008) ("A court concluding that the Navy is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS *rather than the Navy's training in the interim*.") (emphasis added).

Indeed, this Court's own decisions on judicial estoppel provide a useful guide to what constitutes "clearly inconsistent" positions in the context of judicial estoppel. It *is* clearly inconsistent, for instance, to hold oneself out as a proper plaintiff in a civil lawsuit, after having denied the existence of civil claims or lawsuits on bankruptcy schedules. *See Marshall v. Honeywell Tech. Sys., Inc*., 73 F. Supp. 3d 5, 9-10 (D.D.C. 2014) (Lamberth, J.), *aff'd*, 828 F.3d 923, 928 (D.C. Cir. 2016), *cert denied*, 137 S. Ct. 830 (2017); *see also Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 799 (D.C. Cir. 2010) (same). It *is not* clearly inconsistent, however, to take different legal positions under formally and functionally different standards. *United States v. Kellogg Brown & Root Servs., Inc.*, 856 F. Supp. 2d 176, 180-81 (D.D.C. 2012) (KBR not estopped from seeking review of military's decisions in contract action, even though it succeeded

in preventing review of military's decisions in tort action on ground of nonjusticiability) (Lamberth, J).

To the extent there could be any remaining doubt about the consistency of Dominion's statements, it "should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits." *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) (quoting 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4477, at 594 (2d ed. 2002)); *Shea v. Clinton*, 880 F. Supp. 2d 113, 118 (D.D.C. 2012) (Lamberth, J.) (where inconsistency was "tenuous at best," resolving against inconsistency).[5]

c. There is No Risk of Inconsistent Judicial Determinations.

The second judicial estoppel factor cautions against the "risk of inconsistent court determinations." *New Hampshire*, 532 U.S. at 750-51. The Court of Appeals has explained the concern as follows: "a party should not be allowed to convince unconscionably one judicial body to adopt factual contentions, only to tell another judicial body that those contentions were false …. It follows that judicial estoppel should not be applied if no judicial body has been led astray." *Konstantinidis*, 626 F.2d at 938-939.

It is clear that (1) no court has been led astray in this case and (2) there is no risk of inconsistent determinations if the Court adopts Dominion's position that the Permit should not be vacated at this stage. In its decision on NPCA's motion for injunction pending appeal, the Court agreed with Dominion and the Corps that NPCA's alleged injuries were not "beyond

[5] *See also Connecticut v. DOI*, 344 F. Supp. 3d 279, 318 (D.D.C. 2018) ("Plaintiffs have demonstrated at most that Federal Defendants have taken strategic positions that are in tension, but not that their arguments made in *Stand Up* are clearly inconsistent with their arguments made here. Accordingly, the Court elects to resolve Federal Defendants' motion on its merits."); *Winmar Constr., Inc. v. Kasemir*, 233 F. Supp. 3d 53, 58-59 (D.D.C. 2017); *Contech Constr. Prods., Inc. v. Heierli*, 764 F. Supp. 2d 96, 106 (D.D.C. 2011).

remediation," because Dominion "*could be* compelled [to] remove the towers if the permit was ultimately found to be unlawful." Order at 4-5, ECF No. 117 (emphasis added) (citing *Columbia Basin Land Prot. Assn. v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) ("were this Court to find the EIS inadequate … the agency would have to correct the decision-making process, and *ultimately could be required to remove the [transmission] line from this route.*") (emphasis added).[6] There will be no inconsistency if the Court orders remand without vacatur while the Corps corrects the decision-making process, because the Court ultimately still could order the River Crossing Line removed. *Compare, e.g., Rogler v. Gallin*, 402 F. App'x 530 (D.C. Cir. 2010) (risk of inconsistent judgment did exist where plaintiff claimed in one case to be employer's common law employee and claimed in subsequent case to be independent contractor).

d. Dominion Would Gain No Unfair Advantage If Allowed to Argue for Remand Without Vacatur.

The third judicial estoppel factor is unfair advantage or detriment. This Court has stressed that this factor is "important" to the analysis "because such a determination sheds light on the opposing party's motives for taking contrary positions," going "directly to the public policy

[6] Though not necessarily a factor in the judicial estoppel analysis—although certainly one the Court can, in its discretion, consider—NPCA and its counsel have consistently recognized that the Court has a discretionary, and not mandatory, authority to require the River Crossing Line to come down. *See* NPCA Reply in Support of its Emergency Motion for an Inj. Pending Appeal at 8, *NPCA v. Semonite*, No 18-5179 (D.C. Cir. July 18, 2018), ECF No. 1741216 (acknowledging the "fact that a court *could* hypothetically order the dismantling of the towers") (emphasis in original); Reply Mem. In Support of NPCA's Motion for Preliminary Inj. at 23, ECF No. 34 (stating "[t]he notion that the towers … will be torn down *either by virtue of a Court order or a subsequent Corps permit decision* is beyond farfetched" for practicality reasons, not legal ones) (emphasis added); Transcript of Motion Hearing on Plaintiff's Motion for Preliminary Inj. at lines 13-17, 23-24, ECF No. 82 ("And we quite honestly just think it's disingenuous for Dominion to come in and say, well, Let us just start building these massive towers in the river, and then at the end of the case if we have to take them down, *or after the Court has us do an EIS*, then that's no problem.") (emphasis added).

underlying the doctrine: 'placing a restraint upon the tendency to reckless and false swearing.'" *Shea*, 880 F. Supp. 2d at 118 (Lamberth, J.) (quoting *Konstantinidis*, 626 F.2d at 937).[7]

For purposes of this *Allied-Signal* remedy proceeding, Dominion has secured no advantage—unfair or otherwise—by accurately stating in prior proceedings that the Court has the power to order the River Crossing Line removed if and when circumstances so dictate. The question before the Court now is whether the Permit should be vacated before the Corps corrects its decision-making process. There can be no unfair advantage because Dominion must establish that equity favors remand without vacatur irrespective of any prior statements about the Court's power. Plaintiffs suffer no unfair detriment from Dominion's prior accurate statements about the Court's authority.[8] They are free to fully develop and present their *Allied-Signal* arguments opposing remand without vacatur.

e. Additional Considerations, Such as the Public Interest, Weigh Strongly Against Judicial Estoppel.

The judicial estoppel analysis may also involve additional considerations that "inform the doctrine's application in specific factual contexts." *Shea*, 880 F. Supp. 2d at 118 (quoting *New Hampshire*, 532 U.S. at 750) (Lamberth, J.). Such additional considerations deemed relevant by this Court and others include:

- "the requested relief," *id.* (saying the Court "must" consider this);
- "the orderly administration of litigation and the effective delivery of justice," *In Def. of Animals v. USDA*, 589 F. Supp. 2d 41, 43 (D.D.C. 2008); and

[7] As shown in detail above, Dominion has taken no contrary positions, and it has not recklessly or falsely sworn anything.

[8] When this Court denied NPCA's Motion for an Injunction Pending Appeal, it did so on "three independent bases." Order at 5-6, ECF No.117. So, even if the Court had not accepted Dominion's "beyond remediation" argument, NCPA still would not have obtained an injunction. Because the outcome of that prior proceeding would have been the same, NPCA suffered no unfair detriment.

- whether the Court is left with the sense that a party "played fast and loose with the courts." *Shea*, 880 F. Supp. 2d at 116, *Moses*, 567 F. Supp. 2d at 69.

All of the foregoing additional considerations weigh against estopping Dominion from arguing for remand without vacatur. Plaintiffs seek to deny the Court the opportunity to weigh the equitable factors of *Allied-Signal*, including the public interest and significant disruptive effects of vacatur. As in *Shea*, judicial estoppel would not serve to protect the integrity of the judicial process because the requested relief would "give plaintiff a shortcut to the result he desires" and not allow the case to be disposed of on the merits—which the justice system favors. *Shea*, 880 F. Supp. 2d at 118-19.

Additionally, Dominion has been transparent throughout this litigation about construction of the River Crossing Line. It has kept the courts abreast of factual developments through status updates and declarations. *See* Updated Status Report on Tower Construction at 2, ECF No. 96 ("Tidal conditions in the James River have caused unforeseen changes in the construction techniques required. Consequently, construction and erection of steel towers on top of the foundations in the river will not begin until July 1, 2018, at the earliest."); Second Updated Status Report on Tower Construction at 2, ECF No. 112 ("Construction and erection of steel towers on top of the foundations in the river will not begin until August 1, 2018, at the earliest."); Attachment to Dominion's Response to NPCA's Emergency Motion for an Inj. Pending Appeal, Ex. 11, ¶ 7 (at 689), *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. July 11, 2018), ECF No. 1740196 ("[T]he Company is doing all it can to complete the River Crossing in the May/June 2019 timeframe to have it energized before the extreme loads of summer occur.").

Finally, the public interest alone outweighs any other considerations here. As discussed below, there are significant public interests at stake here—more than the mere private interests of Dominion, institutional interests of the Corps or organizational interests of Plaintiffs. Far from

protecting the integrity of the judicial process, invoking judicial estoppel would preclude the Court from considering the significant public interests implicated by any decision to vacate the Permit before the Corps completes its review on remand.

B. *Allied-Signal* and *Public Employees* Strongly Favor Remand Without Vacatur as the Appropriate Remedy Here.

In carrying out the Court of Appeals' directive to consider the appropriate remedy, this Court retains discretion to remand the matter to the Corps while leaving the Permit in place. It should exercise that discretion in this case.

Allied-Signal and its progeny guide this Court's deliberation of whether to vacate an agency action found to have been taken in violation of the APA. This precedent requires the Court to consider: (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)," and (2) "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d at 150-51. Either factor may be sufficient to determine that remand without vacatur is the appropriate remedy, and "a serious possibility that the [agency] will be able to substantiate its decision on remand" cautions in favor of leaving the agency action in place pending further consideration on remand. *Id*. at 151.

Similarly, a NEPA violation need "not necessarily mean that the project must be halted or that [the applicant] must redo the regulatory approval process." *Public Employees*, 827 F.3d at 1083-84 (internal citations omitted). Instead, a court's remedy determination should focus on a "particularized analysis" of the following factors: (1) "the violations that have occurred," (2) "the possibilities for relief," and (3) "any countervailing considerations of public interest," including "the social and economic costs of delay." *Id.* at 1084 (*quoting NRDC v. U.S. Nuclear Regulatory Comm'n*, 606 F.2d 1261, 1272 (D.C. Cir. 1979)).

As shown below, both tests support remand without vacatur. It is quite possible that the Corps could reach the same conclusion to issue the Permit for the River Crossing Line after completing an EIS. If the Corps (or a later court) were to reach a contrary conclusion, however, Plaintiffs would still have an adequate remedy because the River Crossing Line could be removed at that time. By contrast, vacatur would cause significant disruptive effects and jeopardize vital public interests. Residents of southeastern Virginia would face grave uncertainty in the wake of vacatur. This Court should order remand without vacatur.

1. The Deficiencies of the Corps' Permitting Action Do Not Support Vacatur.

On remand, the Corps may remedy its procedural error under NEPA by preparing an EIS, yet reach the same substantive determination to issue a permit for the River Crossing Line. Under both *Allied-Signal* and *Public Employees*, the court looks first to the particular violations found and the likelihood the agency will be able to cure the deficiencies that rendered its action unlawful. *Allied-Signal*, 988 F.2d at 150-51; *Public Employees*, 827 F.3d at 1084; *see also Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (considering whether agency could "reach[] the same result" on remand); *NRDC v. EPA*, 571 F.3d 1245, 1276 (D.C. Cir. 2009). If, on remand, an agency could affirm its substantive decision after addressing its procedural deficiencies, this initial factor does not warrant vacatur. *See, e.g., Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (remanding where agency "may be able to explain" its decision).

The Court of Appeals found that the Corps committed procedural error under NEPA by issuing the Permit for the River Crossing Line without preparing an EIS to address "important questions about both the Corps' chosen methodology and the scope of the project's impact" and respond to other agencies' "serious misgivings about" the project's location. Opinion at 3,

NPCA v. Semonite, No. 18-5179, (D.C. Cir. Mar. 01, 2019), ECF No. 1775491. NEPA is a procedural statute; it does not compel any particular substantive outcome of the agency's process. *Sierra Club v. Watkins*, 808 F. Supp. 852, 859 (D.D.C. 1991). The host of procedural requirements will be satisfied in the Corps' EIS process now underway. Thus, upon completing the EIS process and answering those questions, responding to those concerns, and reconsidering the other relevant permitting factors, the Corps may very well reach the same conclusion.[9]

Although the Corps will evaluate various alternatives as part of the EIS process, the Corps retains the legal authority to re-approve the River Crossing Line, and there is a plausible basis to expect that it may do so. *See, e.g., Allied-Signal*, 988 F.2d at 151 (finding a "serious possibility [agency] will be able to substantiate its decision on remand"); *Sugar Cane Growers Coop.*, 289 F.3d at 98 (remanding without vacatur where "it is as least possible" agency could reach the same conclusion again on remand); *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 451 (D.C. Cir. 2017) (remanding without vacating because agency "may be able to approve the Plan once again, after conducting a proper analysis on remand"). The Court of Appeals took "no position on the adequacy of the Corps' alternatives analysis." Opinion at 24, *NPCA v. Semonite*, No. 18-5179 (D.C. Cir. Mar. 01, 2019), ECF No. 1775491. This Court had already found the Corps' rejection of each of Plaintiffs' preferred alternatives reasonable following its thorough review of the significant record. Memorandum and Opinion at 32-33, ECF No. 102.

[9] The Court of Appeals held that the impacts from the River Crossing Line would be sufficiently significant to require the Corps to prepare an EIS instead of an Environmental Assessment. The finding that the project may have significant environmental impacts, however, does not preclude the Corps from issuing the Permit. *See Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58, 68 (D.D.C. 2010), *aff'd in part, rev'd in part*, 661 F.3d 1147 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012) (finding project impacts "significant enough to require preparation of an EIS," but stating "[i]t is important to note that the preparation of an EIS does not foreclose the CCTC project; it simply mandates the Corps to follow NEPA's procedures." The substantive permitting requirements remain the same.

It is a simple fact that no feasible alternative to the River Crossing Line has been identified. The Corps (and the Virginia SCC) reached that conclusion after years of review (including input from Plaintiffs and other interested parties), and the EIS is likely to confirm it. Because the Corps is in a position to cure its procedural defect and reaffirm its substantive decision on remand, the Court should find that this initial factor does not merit vacatur as the Corps proceeds with an EIS. *See, e.g.*, *Sierra Club*, 167 F.3d at 664.

2. The Potential For Adequate Relief Following Remand Favors Remand Without Vacatur.

Plaintiffs have the potential to obtain the full relief they seek following remand. They allege a purely aesthetic harm. The visual intrusion they complain of would be completely erased if the Corps were to decide, based on the EIS, not to authorize the River Crossing Line and the towers were ordered taken down. *See Sierra Club v. USACE*, 803 F.3d 31, 43 (D.C. Cir. 2015) (if further "NEPA analysis uncovered additional environmental harms" calling for removal of portions of pipeline, court could order their removal). The Corps could also determine that some form of further mitigation might be necessary and sufficient to address the aesthetic harm. Thus, Plaintiffs need not obtain their desired relief *now* to ensure that they can secure it *later*.

Nor will Plaintiffs' procedural interests in the NEPA process and obtaining a thorough permit analysis be compromised if the Permit remains in place in the meantime. The Corps has already issued notification of its intent to conduct an EIS and has commenced the process, which will consider a multitude of listed alternatives. U.S. Army Corps of Engineers, *Intent to Prepare a Draft Environmental Impact Statement for a Proposed: High Voltage Electrical Transmission Line and Its Associated Infrastructure, Known as Surry-Skiffes Creek-Whealton Aerial*

Transmission Line "Project," Notice of Intent, 84 Fed. Reg. 29177 (June 21, 2019).[10] Vacatur will provide Plaintiffs no additional procedural or substantive benefit in that respect. Remand without vacatur provides Plaintiffs the relief they sought in this litigation (an EIS) with the potential for removal of the towers from the river if the EIS prompts the Corps to deny the Permit.

3. The Disruptive Consequences and Countervailing Considerations of Public Interest Weigh Against Vacatur.

Vacating the Permit would cause substantial disruptive effects, not just to Dominion but to the public as well. *See Allied-Signal*, 988 F.2d at 150-51 (recognizing disruptive consequences of vacatur); *Public Employees*, 827 F.3d at 1084 (recognizing adverse impact to the public interest associated with vacatur, including "the social and economic costs of delay") (citation omitted).

Vacatur of the Permit would result in significant uncertainty as to the fate of the River Crossing Line and in turn the North Hampton Area's electrical reliability in both the near- and long-term. Without the River Crossing Line, the area would not have sufficient capacity to serve peak loads or accommodate significant unplanned system outages and would be at risk of rolling blackouts and activation of emergency measures that would cut power to customers. Allen Decl. ¶ 5. Regardless of these consequences, the Corps could opt to exercise its enforcement discretion to seek to require removal of the River Crossing Line towers pursuant to Section 10 of the Rivers and Harbors Act. 33 U.S.C. § 403. Vacatur would also lead to a near certainty of additional litigation by Plaintiffs seeking removal of the towers via court order.

[10] The Corps filed a copy of this notice with the Court on June 21, 2019, ECF No. 122-1.

Yet another uncertainty is whether and how DOE's emergency authority could be implicated if the Permit is vacated. There is no question, however, on one key point—DOE can no longer rely on its authority to order continued operation of Yorktown coal units to avert an electric reliability crisis as it has in the past. These Yorktown units no longer provide a reliable, or even viable, emergency alternative to operating the River Crossing Line. They were pressed into service for four years past their intended decommissioning date, and cannot operate any longer to resolve the reliability issue.

Dominion had planned to decommission the aging Yorktown coal units years before the Corps granted the Permit for the River Crossing Line, and certainly before this litigation commenced. Boyd Decl. ¶ 6. Those plans were postponed for several years by order of DOE while the Project was being constructed. Rowe Decl. ¶ 6. The continued operation of these units on an intermittent basis as a stopgap measure to address the electrical emergency in the North Hampton Area accelerated their deterioration to the point that, by time the last DOE emergency order expired in March of this year, they could no longer be reliably operated for any extended period, even if they were legally authorized to do so, without major repairs at significant costs and time. Rowe Decl. ¶¶ 6-7. These units would not have been able to remain in operation on an emergency basis for the additional two years that would have been required at an absolute minimum just for the Corps to completes its EIS, let alone another five to seven years to design, permit, and build a replacement project if Plaintiffs are correct that viable alternatives to the River Crossing Line exist and should be constructed in its stead.

In addition to problems with the generating units themselves, the common stack serving those units has become seriously degraded. The stack has required repeated repairs since 2007 to maintain stability, and a recent inspection by an outside engineer revealed new cracks and

bulging brickwork that raised additional safety concerns. Boyd Decl. ¶ 5. In light of the deteriorated condition of Yorktown Units 1 and 2, Dominion proceeded with the decommissioning process upon placing the River Crossing Line into operation in February of 2019. Boyd Decl. ¶¶ 6-7. The decommissioning process is well advanced, with all coal removed from bunkers to minimize fire risks, fuel lines cut and sealed, and lubricants and other liquids drained to prevent leaks and environmental hazards. *Id.*

Against this background, it is uncertain whether DOE could or would exercise its emergency authority to order continued operation of the River Crossing Line. DOE remains informed of the electric reliability situation in the North Hampton Area, but Dominion is not in a position to predict how DOE would react to resumption of the emergency faced with the prospect, following vacatur of the Permit, of an order by the Corps or a court to take the River Crossing Line down. Yet the possibility remains that DOE could ultimately seek to invoke its emergency authority to require the continued operation of the River Crossing Line, notwithstanding potential violations of environmental laws. This uncertainty represents another significantly disruptive effect that could be avoided by remanding the Permit without vacatur.[11]

On their own, these uncertainties would be disruptive. Depending on how events unfold, however, the people of the North Hampton Area could face far greater disruption—they could suffer the consequences of a renewed electric reliability crisis. If the Permit is vacated and that leads to an order that the River Crossing Line be taken down, nearly 600,000 people in the

[11] Vacating the Permit could also cause uncertainties about activities already completed pursuant to the Permit's requirements. For instance, Dominion has already completed its funding of tens of millions of dollars in mitigation required under the Memorandum of Agreement with numerous interested entities. Snead Decl. ¶ 6, ECF No. 22-6.

region would face risk of blackouts, just as they did before when DOE declared an electric reliability emergency in the area. Allen Decl. ¶ 5.

Courts have consistently recognized the public's interest in dependable access to electricity. *See, e.g., Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016); *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) (" [A] steady supply of electricity during the summer months, especially in the form of air conditioning to the elderly, hospitals and day care centers, is critical."); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (declining to vacate approval of an electric power plant in part due to public's interest in steady power supply); *Caballo Coal Co. v. Ind. Mich. Power Co.*, 305 F.3d 796, 801-02 (8th Cir. 2002).

The threat to that public interest and its potential adverse impacts here are well documented. Quigley Decl. ¶ 8, ECF No. 22-8 (Executive Director of Hampton Roads Military and Federal Facilities Alliance, a retired U.S. Navy Rear Admiral, explaining "the crippling impact the lack of reliable electric service would have on the region and its economy, particularly if military and federal facilities were forced to move away due to insufficient or unreliable power."); Diggs Decl. ¶ 6, ECF No. 22-9 (Sheriff of York County and the City of Poquoson, Virginia describing that "there is an immediate and urgent need for the Project to be built as soon as possible to prevent ongoing and serious risk of regular and sustained power outages in York County and Poquoson, as well as throughout the Virginia Peninsula…. The risk to public health and safety is very real and very serious."); Stephens Decl. ¶ 2, ECF No. 22-10 (President and Chief Executive Officer of the Hampton Roads Chamber explaining that "[t]he lack of reliable electricity in Hampton Roads (and on the Virginia Peninsula) that would result without [the Project] threatens the existence of over 2,600 businesses and 300,000 jobs. It also produces a climate that cannot attract, much less retain, businesses."); Weddle Decl. ¶ 3, ECF

No. 22-11 (President and Chief Executive Officer of Hampton Roads Economic Development Alliance stating that "[w]ithout [the Project], there is no predictable, reliable source of electricity for the Virginia Peninsula. . . . [and] the Virginia Peninsula and the localities and businesses in the Hampton Roads area face a constant threat of power outages. This threat greatly thwarts the . . . . ability to attract new business to the Hampton Roads area, and to retain current ones."); Mugler Decl. ¶ 4, ECF No. 22-12 (Commissioner of Revenue for the City of Hampton, Virginia explaining that "[b]eyond the immediate damage and chaos caused by regular and sustained power outages, without a solution in sight, I believe many residents, businesses, and institutions will be forced to move from Hampton (and the Virginia Peninsula) or close. The impact of such departures and closures will be to greatly reduce tax revenues. This, in turn, will only further hurt our community, as the City will be unable to provide its same level of services to its remaining residents, considering already tight budgets."); Funk Decl. ¶ 5, ECF No. 22-13 (former member and Chairman of the York County Board of Supervisors stating that "[t]he health, safety, and functioning of our society, from the individual family to the large business and military facility level, are built on the provision of reliable electricity. . . . [E]nsuring people have electricity in their homes for heat, cooling, preserving food, and washing their clothes; having electricity to power the buildings for their jobs; or ensuring the people are safe and that emergency services … are able to function at their top capacities" are of critical importance to the public interest).

Other "countervailing considerations of public interest" also favor remanding the Corps' permit without vacatur. *Public Employees*, 827 F.3d at 1084. This factor defers to the court's "sound discretion" to determine "whether halting a project pending revaluation of environmental factors warrants the social and economic costs of delay." *NRDC*, 606 F.2d at 1272. Little cost,

either social or economic, will result if the Court leaves the Permit in place while the Corps completes the EIS. Vacatur, on the other hand, would potentially result in a colossal waste of resources.

Tearing down the River Crossing Line would be a significant undertaking, involving the dismantling of 17 steel lattice towers down to the foundations in the river, and the removal of 37.8 miles of conductor, 8.4 miles of fiber optic shield wire, 32 solar panels and solar lighting systems, and associated hardware. Allen Decl. ¶¶ 7-10. It would take at least six months to plan for and mobilize the specialized manpower and equipment required for this work, and the process of removing the lines and towers from the foundations in the river would take at least another 13 months at a cost of approximately $46,000,000. *Id.* ¶¶ 11-12. After all that effort, the Corps may complete its EIS, cure its procedural defects, and ultimately reach the same substantive conclusion: the River Crossing Line as built is the only available alternative and the Permit should be re-issued. If that transpires after the River Crossing Line has been taken down, Dominion would have to spend another $40,000,000, and another one to two years, to re-install the lines and towers (assuming that the existing foundations are left in place). *Id.* ¶12. Years of time and nearly a hundred million dollars would have been wasted. *See, e.g.*, *Public Employees*, 827 F.3d at 1084 (declining to vacate all regulatory approvals while additional environmental studies were conducted because "[d]elaying construction or requiring Cape Wind to redo the regulatory approval process could be quite costly [and t]he project has slogged through state and federal courts and agencies for more than a decade.").

Removal of the towers from the river would also be detrimental to the environment, particularly if the River Crossing Line is later reconstructed. This work would produce air emissions from tugboats and heavy equipment and could pose the risk of potential impacts to

water quality from the construction work performed in the river and the associated movement of vessels. In addition, protected species may be disturbed to some extent as the towers are dismantled and removed. These effects may ultimately occur if the Corps selects another alternative to address the region's electrical needs following completion of the EIS. But remanding the Permit without vacatur now could avoid this disruption if the Corps ultimately reaffirms the Permit for the River Crossing Line.

V. CONCLUSION

Vacating the Permit at this time would cause tremendous uncertainties and potentially massive waste, all of which would be unnecessary if, as is entirely possible, the Corps reaches the same permitting decision on remand. This Court therefore should remand the Permit to the Corps without vacatur while the Corps' prepares the EIS and reconsiders its permitting decision in light of the findings of the EIS and other relevant information developed and evaluations conducted on remand. Any further consideration of the Permit by the Court should be deferred until after the Corps completes its permitting action on remand, and should be guided by the outcome of that action.

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Respectfully Submitted,

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