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# A Necessary Negative: Analysis of the Tidewater Virginia Surry-Skiffes Creek Transmission Tower Litigation

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# A NECESSARY NEGATIVE: ANALYSIS OF THE TIDEWATER VIRGINIA SURRY–SKIFFES CREEK TRANSMISSION TOWER LITIGATION

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## INTRODUCTION

The historic value of the Hampton Roads Peninsula is unmeasurable. This area holds the site of the first permanent English settlement in all of Colonial British America as well as Virginia's first and second colonial capitals.[1] It is therefore an understatement that the historical value of this span of territory is inherently valued as a result.[2] Tourism remains a major economic driver for the Peninsula, for every year, thousands of people come to witness and observe the historically unique beauty of Tidewater Virginia: the very same shores that Captain John Smith disembarked upon in 1607.[3] Since its humble seventeenth century beginnings, the population of the Hampton Roads Peninsula has grown exponentially. For example, Williamsburg, Virginia, according to United States Census estimates, "[grew] an estimated 10.1 percent" resulting in an addition of "15,052 residents in 2015—all but besting the state's average growth rate of 4.8 percent."[4] This expansive growth in population has triggered a heightened demand on the power grid, necessitating the need to supply adequate electrical power to the Peninsula, a task that has proved especially difficult in recent years.[5]

Virginia uses more energy than it produces: "more than two and a half times greater than the state's energy production."[6] Furthermore,

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[1] *See generally* CHARLES RIVERS, JAMESTOWN AND WILLIAMSBURG: THE HISTORY AND LEGACY OF COLONIAL VIRGINIA'S CAPITALS (2016).

[2] *Id.*

[3] *Id.*

[4] Elias O'Neal, *3 Peninsula communities among the region's fastest-growing*, DAILY PRESS (Mar. 26, 2016), http://www.dailypress.com/news/dp-nws-census-estimates-0326-20160325-story.html [https://perma.cc/57JK-GPWY].

[5] WAVY TV 10, *Dominion's Plan for Life After Coal Plant Closure: Controlled Blackouts*, YOUTUBE (Jan. 13, 2017), https://www.youtube.com/watch?v=J1HmniKe_YY [https://perma.cc/348T-37MT] (reported by WAVY TV 10 correspondent Matt Cooper).

[6] *Virginia State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (Aug. 16, 2018),

Virginia receives additional power from the PJM Interconnection, "a regional transmission organization ("RTO") that coordinates the movement of wholesale electricity in all or parts of thirteen states and the District of Columbia,"[7] to meet these energy demands.[8] The Hampton Roads Peninsula is fully within the fold of PJM, further demonstrating the lack of the state's energy self-sufficiency.[9] Further exacerbating Virginia's energy troubles, Department of Energy rulings forced the closure of the Yorktown Coal plant in April 2017,[10] a power plant previously capable of powering as many as 285,000 homes.[11] This closure represented a gap in the availability of power to which Hampton Roads needed a solution to adequately supply electrical energy to the Peninsula.[12] In order to provide enough power, Dominion Energy proposed the construction of seventeen transmission towers from their Surry Power Plant across the James River to the Hampton Roads Peninsula.[13] Predictably, this project was sure to rally environmental and historical groups alike towards the preservation of the James River.

This Note will analyze the fallout of the Dominion Energy Skiffes Creek transmission tower project, the struggle in court over this issue, the effects of the judicial outcome at the district court level, and the *necessary* "negative" consequences of building these transmission towers. Dominion Energy's transmission tower solution originally spawned a large degree of public outcry, prompting the environmental and historical preservation groups, The National Trust for Historic Preservation and Preservation

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https://www.eia.gov/state/analysis.php?sid=VA [https://perma.cc/GWT3-WQ9K] [hereinafter *Profile Analysis*].

[7] *About PJM*, PJM, https://www.pjm.com/about-pjm.aspx [https://perma.cc/7X7E-5HXB] (last visited Dec. 3, 2019).

[8] *Profile Analysis*, *supra* note 6.

[9] *Id.*

[10] Sarah Fearing, *No More Coal: Yorktown Power Station Units 1, 2 Shut Down After Power Line Energizes*, WILLIAMSBURG YORKTOWN DAILY (Mar. 18, 2019), https://wydaily.com/local-news/2019/03/18/no-more-coal-yorktown-power-station-units-1-2-shut-down-after-power-line-energizes/ [https://perma.cc/C6CB-UCLQ].

[11] *Yorktown Power Station*, DOMINION ENERGY, https://www.dominionenergy.com/company/making-energy/coal-and-oil/yorktown-power-station [https://perma.cc/PX6F-U4Y7] (last visited Dec. 3, 2019).

[12] Dave Ress, *Corps Still Sees Power Needs, Few Alternatives to Skiffes Creek Line*, DAILY PRESS (Apr. 14, 2016), https://www.dailypress.com/news/politics/dp-nws-skiffes-creek-0414-20160413-story.html [https://perma.cc/QXR8-9GGY].

[13] *James River Transmission Line Proposal by Dominion Energy—Latest Update November 6, 2017: Construction to Begin*, VA. WATER CENT. NEWS GROUPER (Nov. 6, 2017), https://vawatercentralnewsgrouper.wordpress.com/2017/11/06/james-river-transmission-line-proposal-by-dominion-energy-latest-update-november-6-2017-construction-to-begin/ [https://perma.cc/2JVH-UX8X].

Virginia, to launch efforts to prevent the construction of the proposed transmission towers.[14] Both environmental and historical preservation groups argued that constructing these transmission towers threatened significant loss of historic, environmental, and aesthetic value, including other negative ecological effects to the local sturgeon populations, for example.[15] Pursuant to the National Environmental Policy Act ("NEPA"), Dominion Energy commissioned the Army Corps of Engineers, who filed an Environmental Assessment ("EA") under NEPA, 42 U.S.C. §§ 4321–4370m.[16] Ultimately, the Army Corps of Engineers wrote a Finding of No Significant Impact ("FONSI") which eliminates the need to file a more thorough Environmental Impact Statement ("EIS"), a "detailed written statement[] that [is] required by section 102(2)(C) of NEPA for a proposed major Federal action significantly affecting the quality of the human environment."[17] Writing a FONSI, and not an EIS, is met with disdain by environmentalists and scholars who consider it an attempt to "avoid[] NEPA's information production and disclosure requirements."[18]

NEPA maintains that an independent agency will conduct a review of such a project and whether such construction will "significantly [affect] the quality of the human environment."[19] If that independent agency finds a "significant" effect, there must be an EIS.[20] If that agency finds no "significant" impact, they may issue a mitigated FONSI and no EIS is therefore necessary.[21] In the suit against the Army Corps for not taking the

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[14] Complaint at 2–5, Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350 (D.D.C. 2018) (No. 1:17-cv-01361); Press Release, Joint Statement by the National Trust for Historic Preservation and Preservation Virginia, Federal Appeals Court Denies Dominion Energy's Request for Rehearing RE: Vacated Permit for James River Transmission Towers (May 31, 2019).

[15] Complaint, *supra* note 14, at 2–3, 40.

[16] *Id.* at 3–4.

[17] *NNSA NEPA Reading Room*, NAT'L NUCLEAR SEC. ADMIN., https://www.energy.gov/nnsa/nnsa-nepa-reading-room [https://perma.cc/NV9J-L5MP]; *see also* Complaint, *supra* note 14, at 10.

[18] *See, e.g.*, CATHERINE BARNARD ET AL., LAW AND NEW GOVERNANCE IN THE EU AND THE US 305 (Grainne Burca & Joanne Scott eds., 2006).

[19] 42 U.S.C. § 4332(2)(C) (2012).

[20] § 4332(2)(C)(i) ("[A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action.").

[21] *Id.* ("In reviewing agency's decision to issue finding of no significant impact rather than perform environmental impact statement, court must determine whether agency took 'hard look' at project's effects and whether decision was arbitrary or capricious; agency takes sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from

necessary steps to identify a "significant impact" of building these transmission towers across the James River, plaintiffs foremost argue that "the Corps minimized the significance of the anticipated impacts by labeling all aesthetic, cultural, historic, and/or recreational impacts as 'subjective' and thus insignificant since they are particular to the individual."[22] Litigation, however, yielded a victory for Dominion Energy.[23] The district judge ruled in favor of the Army Corps, thereby dismissing the May 2018 lawsuits, and held that the mitigated FONSI was in fact sufficient.[24] The court further held that the Army Corps' determination was not "arbitrary or capricious," and an EIS was unnecessary, therefore allowing Dominion Energy to continue with the construction of their first transmission tower later that year.[25] As of February 2019, the new 500-kV line was 100 percent complete, the switching station being about 98 percent complete, with the rest of the project to be completed by summer of 2019.[26] While there seemingly was no going back, the United States Court of Appeals for the District of Columbia reversed and remanded the case back to the district court on March 1, 2019.[27]

This Note will analyze the discretion afforded to the Army Corps of Engineers' rationale in filing a FONSI determination in the district court holding of *National Parks Conservation Association v. Semonite*. Despite reversal,[28] the ultimate holding of the district court was entirely rational, and despite the negative perceived consequences of the Skiffes Creek transmission tower project, the end result yielded the best course of action for the Hampton Roads Peninsula. Part I will describe the basics of NEPA, EISs, and mitigated FONSIs, as well as the positive effects that come with the discretionary authority agencies hold in filing these mitigated FONSIs. Part II will analyze the controversy of the district court's holding in *National Parks Conservation Association v. Semonite*. While there certainly remain very negative historical, aesthetic, and environmental consequences of this project, the court readily and rationally addressed the Army Corps of Engineers' reasoning with brevity and clarity.

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experts outside agency, gives careful scientific scrutiny, and responds to all legitimate concerns that are raised.").

[22] Complaint, *supra* note 14, at 4.

[23] Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350, 356–57 (D.D.C. 2018).

[24] *Id.* at 356–58.

[25] *Id.* at 357.

[26] Jack Jacobs, *Surry–Skiffes Creek transmission line towers*, VA. GAZETTE (Feb. 15, 2019), https://www.dailypress.com/virginiagazette/news/va-vg-dominion-surry-skiffes-towers-0216-story.html [https://perma.cc/59ML-4FMD].

[27] Nat'l Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1089 (D.C. Cir. 2019).

[28] *Id.*

Part III will argue the positive effects the Army Corps' mitigated FONSI actually yielded in the case at bar. In conclusion, contrary to most preservationist opinions, the ultimate result of this litigation remains that the mitigated FONSI in this case yielded positive effects evolving out of a very contentious issue. The outcome of the district court in *National Parks Conservation Association v. Semonite* was positive, practical, and most importantly, necessary.

## I. NEPA, EIS, & MITIGATED FONSIS: THE RIGHT COURSE OF ACTION?

This section will describe an overview of NEPA, how it was created and the intended goals of the Act. Furthermore, this section will then outline the steps taken under the regulatory scheme of NEPA in filing an Environmental Assessment with a FONSI or an Environmental Impact Statement.

### *A. What Is NEPA?*

The multitude of ways mankind has impacted the environment remains an immediate concern even to this day, but in the years leading up the 1969 Act, there remained very little litigation that served to protect the environment.[29] There was, however, a consensus at the end of the 1960s of a "widespread belief among environmentally concerned and politically active citizens that federal agencies and programs were themselves leading factors in environmental degradation," an understanding that further presented a catalyst in passing the Act.[30] When NEPA was eventually passed in 1970,[31] that noble goal was then set in stone, that it was in no small part of the federal government to set policy and regulate the future of large scale projects across the United States of America so as to:

> declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage

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[29] LINDA LUTHER, CONG. RESEARCH SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 1–6 (2008).
[30] *See* Lynton K. Caldwell, *Is NEPA Inherently Self-Defeating?*, 9 ENVTL. L. REP. 50,001 (1979), https://elr.info/sites/default/files/articles/9.50001.htm [https://perma.cc/PT66-GVKT].
[31] *See Welcome*, NEPA.GOV, https://ceq.doe.gov/ [https://perma.cc/TE3E-2WS9] ("President Nixon signed NEPA into law on January 1, 1970.").

> to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[32]

NEPA became the "cornerstone"[33] of our nation's means to protect the environment, essentially because of the implementation of standards and procedures by the Council on Environmental Quality ("CEQ") holding back the environmental floodgates of unlimited construction that potentially may affect the nation's environmental treasures.[34] Foremost, NEPA is characteristically a "planning tool to integrate environmental, social, and economic concerns directly into projects and programs."[35]

Since the enactment of NEPA, agencies must identify all possible environmental effects resulting from proposed governmental or private projects to which these agencies report their findings.[36] These reports detail how the construction of such projects then significantly alter or affect the environment, where "a detailed statement by the responsible official on . . . the environmental impact of the proposed action" is undertaken.[37] Under NEPA, federal agencies additionally are required to consider input from the public, as well as state and local governments.[38] This Act therefore created a system leading to the creation of an "Environmental Assessment"[39] that ultimately supplies the analysis to whether the Army Corps, for example, enters upon one path of environmental regulation: drafting a Finding of No Significant Impact within

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[32] 42 U.S.C. § 4321.

[33] *NEPA Purpose and Implementation*, U.S. GEOLOGICAL SURVEY (Feb. 10, 2016), https://water.usgs.gov/eap/ne pa.html [https://perma.cc/VP2C-7RJ3].

[34] *See* 40 C.F.R. §§ 1500–1508 (2019) ("The CEQ has promulgated regulations to assist federal agencies in complying with NEPA."). *See generally Regulations for Implementing The Procedural Provisions Of The National Environmental Policy Act*, COUNCIL ON ENVTL. QUALITY, EXECUTIVE OFF. OF THE PRESIDENT, https://www.energy.gov/sites/prod/files/NEPA-40CFR1500_1508.pdf [https://perma.cc/R7P3-HN94].

[35] COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 11 (Jan. 1997), https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf [https://perma.cc/53FG-YJY6].

[36] *See National Environmental Policy Act Review Process*, EPA, https://epa.gov/nepa/national-environmental-policy-act-review-process (last updated Jan. 24, 2017).

[37] 42 U.S.C. § 4332(C)(i).

[38] COUNCIL ON ENVTL. QUALITY, *supra* note 35, at ix–6 ("In 1978 the CEQ issued binding regulations which implement the procedural provisions of NEPA.").

[39] *See DOE Environmental Assessments (EA)*, OFF. NEPA POL'Y & COMPLIANCE, https://www.energy.gov/nepa/doe-environmental-assessments [https://perma.cc/4HRG-CA6Y] (last visited Dec. 3, 2019).

the original EA, or completing an entirely new document titled an Environmental Impact Statement.[40]

### *B. EIS or FONSI?*

EA drafters ardently maintain the power to determine whether further analysis of a project's environmental impact is necessary through the creation of an EIS.[41] The Army Corps analyzes the baseline impact of a project, first "requiring a regulatory permit using a narrow scope of analysis."[42] Second, the Army Corps then evaluates the permit, to which a district or division engineer is directed to "establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a Department of the Army permit and those portions over which the district engineer has sufficient control and responsibility to warrant federal review."[43]

Therefore, during this process, the Army Corps may decide against writing an EIS if the facts of the case would not warrant a "significant" impact to the environment.[44] Drafted EISs remain the preferred route for most environmental proponents,[45] being a generally more thorough and rigorous document analyzing all environmental aspects in-depth.[46] First, a detailed statement must be made with (1) "the environmental impact of the proposed action," (2) "any adverse environmental effects which cannot be avoided should the proposal be implemented," (3) "alternatives to the proposed action," (4) "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and (5) "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be

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[40] U.S. GEOLOGICAL SURVEY, *supra* note 33.

[41] EPA, *supra* note 36 ("Generally, the EA includes a brief discussion of: The need for the proposal, [a]lternatives (when there is an unresolved conflict concerning alternative uses of available resources), [t]he environmental impacts of the proposed action and alternatives, [and a] listing of agencies and persons consulted.").

[42] David E. Hoskins, *Judicial Review of an Agency's Decision Not to Prepare an Environmental Impact Statement*, 18 ENVTL. L. REP. 10,331, 11,335 (1988).

[43] *Id.*

[44] *Id.*

[45] John F. Shepherd et al., *Key Issues Affecting Oil and Gas Development on Federal Lands*, 37 ROCKY MOUNTAIN MIN. L. INST. 15-1, 15-1 (1991) ("Environmental groups are more likely to challenge EAs than EISs, and courts are more inclined to reverse a decision based on an EA (even a comprehensive one) than to overturn a decision based on an EIS (even a relatively skimpy one).").

[46] *See generally* CHARLES H. ECCLESTON, NEPA AND ENVIRONMENTAL PLANNING 189–230 (2008).

implemented."[47] Therefore, with an EIS, there is great certainty that an issue is analyzed to its best degree,[48] for the results yield not only better environmental decisions generally, but also simply longer thought out responses and scenarios undertaken by an agency.[49]

On the other hand, while EISs generally yield the best results, they remain plagued by high societal costs.[50] EIS reports are extremely time consuming, whereas for example, a 2003 report from the NEPA Task Force to the Council on Environmental Quality (CEQ) maintained that an EIS "took an average of one to six years to complete, and cost an average of $250,000 to $2,000,000."[51] Multiple studies vary on the length and cost to prepare a study; for example, "the time to prepare an EIS ranged from 51 days to 6,708 days (18.4 years)" and the "the average time for all federal entities was 3.4 years."[52] Another study concluded that it takes an average of five years to complete an EIS.[53] Regardless of the study, it is consistently shown that it takes a substantially long period for an EIS to conclude.[54] This lengthy process inevitably requires additional resources, which in turn due to the constant stream of public forum contribution, plagues agencies and draws the process out even longer.[55] With an always steady stream of public forum contribution regarding hotly contested issues, even more time is added to the clock where there is always a desire for "'full disclosure [of the] law' for the environment."[56] In short, the average EIS remains mired in constant revisions based on public input, expected to last at least twelve months to complete in a best-case scenario.[57]

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[47] 42 U.S.C. § 4332(C).
[48] *Id.*
[49] Daniel J. White, *When There Are No Adverse Effects: Protecting the Environment From the Misapplication of NEPA*, 7 A.F. L. REV. 107, 114 (2014).
[50] Shepherd et al., *supra* note 45, at 15-1 ("Normally, EISs should be less than 150 pages; for projects of unusual scope or complexity, they should be less than 300 pages.").
[51] White, *supra* note 49, at 109–10.
[52] *See* Piet DeWitt & Carole DeWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?*, 10 ENVTL. PRAC. 164, 164–74 (2008).
[53] *NAEP Annual National Environmental Policy Act (NEPA) Report for 2016*, NAT'L ASS'N ENVTL. PROFS. (2016), https://www.naep.org/index.php?option=com_content&view=article&id=285:NEPA_2016_Annual_Report&catid=19:site-content&Itemid=241 [https://perma.cc/2PDM-QNCW].
[54] *Id.*
[55] *Id.*
[56] Shane McGuire, *Environmental Impact Statements: A Necessity for Texas*, 38 TEX. TECH L. REV. 159, 162 (2005).
[57] Shepherd et al., *supra* note 45, at 15-2.

Conversely, NEPA does not require an EIS in all cases, where "Congress [ensures] . . . agencies will not prepare an unnecessary or fruitless EIS."[58] Therefore, during the drafting of an EA, if there is a conclusion of no significant environmental impact, a FONSI is issued instead,[59] and the result is an arguably "more concise and less expensive document that contains a brief discussion of the need for the proposed action, its environmental impact, and possible alternatives to the action."[60] Therefore, while an EIS draws out the process exorbitantly, a mitigated FONSI gets to the heart of the matter, where brevity and concise clarity remain an advantage over the bloated EIS.[61] Therefore, with a FONSI, one receives both a sort of "informal agency decisionmaking," ultimately "subject to judicial review."[62] EIS proponents deride the idea of such informal decisionmaking;[63] however, judicial review of such action remains the key to why a mitigated FONSI remains a valid means of environmental planning and enforcement, as further evidenced in the forthcoming Part II of this Note.

A FONSI within an EA describes specific reasons why there remains no real significant impact on the environment,[64] therefore satisfying any environmental concerns within some detail. The second key point of validity within a FONSI lies with mitigation measures.[65] Important to note, mitigation under NEPA maintains any "avoiding or minimizing environmental impacts; rectifying impacts by repairing, restoring, or rehabilitating the affected environment; reducing or eliminating impacts over time through preservation or maintenance; and compensating for impacts by providing substitute resources."[66] The case with a mitigated FONSI remains that during the process of drafting an EA, mitigation measures become relevant to offset possible environmental harm from the start, "measures that reduce adverse effects below significant levels,"[67] as further elaborated on in the forthcoming Part III of this Note.[68]

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[58] McGuire, *supra* note 56, at 162 (citing 42 U.S.C. § 4321).
[59] 40 C.F.R. § 1508.13.
[60] Amy L. Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, 81 U. COLO. L. REV. 473, 480 (2010).
[61] *See id.*
[62] Albert J. Herson, *Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation*, 13 ECOLOGY L.Q. 51, 53 (1986).
[63] *Id.*
[64] 40 C.F.R. § 1508.13.
[65] Herson, *supra* note 62, at 51–52.
[66] *Id.* (citing 42 U.S.C. § 1508.20).
[67] COUNCIL ON ENVTL. QUALITY, *supra* note 35, at 19.
[68] Herson, *supra* note 62, at 52.

Staunch opposition to FONSIs generally remains, where "[c]ritics charge that mitigated FONSIs violate NEPA's spirit of full disclosure."[69] With the brevity of a mitigated FONSI, many could see such brevity as simply cutting corners.[70] Arguably the greatest reason to oppose a FONSI remains the fact that there are not as many environmental analyses or public comments as seen in an EIS; therefore, a FONSI is seen as inferior because of the swiftness of the procedure.[71] Additionally, mitigation measures may not sufficiently justify a FONSI, or simply receiving funds may remain too taboo.[72] Further, critics claim that "agencies are largely free to pursue less environmentally protective alternatives so long as they have met their procedural obligations to consider the impacts."[73] Once again, the brevity of FONSIs easily draws the collective ire of staunch environmental groups.[74]

### *C. EIS Regulation Remains a Bloated Mess?*

While proponents of EISs certainly maintain the advantages of the thoroughness of an EIS, there remains an argument that a system bereft of mitigated FONSIs would lead to extreme bloat and over-regulation; therefore, mitigated FONSIs are needed because of their brevity and clarity. Arguably,

> agencies may sometimes confuse the purpose of NEPA. Some act as if the detailed statement called for in the statute is an end in itself, rather than a tool to enhance and improve decision-making. As a consequence, the exercise can be one of producing a document to no specific end. But NEPA is supposed to be about good decision-making—not endless documentation.[75]

First, the efficiency of a mitigated FONSI is not to be underestimated, as one may see, "[p]reoccupation with NEPA procedures has diverted attention

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[69] Bradley C. Karkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 903–04 (2002).
[70] *See id.*
[71] Peter J. Eglick & Henryk J. Hiller, *NEPA's Legacy Beyond the Federal Government*, 20 ENVTL. L. 773, 776 (1990).
[72] *See* Herson, *supra* note 62, at 52.
[73] Stein, *supra* note 60, at 475.
[74] Karkkainen, *supra* note 69, at 903–04.
[75] COUNCIL ON ENVTL. QUALITY, *supra* note 35, at iii.

from broadening the environmental responsibilities of agencies" to instead having "focused agency energies on preparing and analyzing documents."[76] Furthermore, with such an elongated time frame taken to conclude the vast majority of EISs, NEPA is potentially used as a sword, instead of a shield, in such cases.[77] Organizations then present merely "procedural obstacles" that "may give project opponents leverage in the larger political bargaining that surrounds the decision, which they may use to force desired modifications in project design."[78] An entity might have to make "selective, tactical application of extreme transaction costs."[79] Forcing agencies to prepare a series of extremely long documents in such a way presents an unbalanced shift in bargaining power, potentially crippling businesses and infrastructure.[80] Due to such costly delays, projects remain stuck in the mire, "condemned with equal vigor on grounds that it imposes costly, dilatory, and pointless paper-shuffling requirements on federal agencies and, indirectly, on private parties."[81]

Because EIS processes are time consuming, opponents of any project development are afforded ample time to identify any and all contentious issues, leaving the simple explanation: nothing is ever good enough.[82] Essentially, the "background of ecological complexity also creates opportunities" to challenge any alternatives or solutions offered by an agency like the Army Corps of Engineers, "since they can often find some impact, alternative, or mitigation measure that the agency has failed to consider."[83] Therefore, while EISs maintain the means to bog down the system, mitigated FONSIs maintain very serious advantages with their brevity and conciseness.

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[76] *See* Caldwell, *supra* note 30, at 3.
[77] *See* Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 340–41 (2004); *see also* DeWitt & DeWitt, *supra* note 52, at 164–74.
[78] Karkkainen, *supra* note 77, at 340.
[79] *Id.* at 340–41.
[80] *See* White, *supra* note 49, at 109–10; *see also* James W. Coleman*, Fixing the National Environmental Policy Act,* HOUSE COMM. ON NAT. RESOURCES, U.S. HOUSE OF REPRESENTATIVES (Apr. 25, 2018), https://docs.house.gov/meetings/II/II00/20180425/108215/HHRG-115-II00-TTF-ColemanJ-20180425.PDF [https://perma.cc/JF9X-K4MY].
[81] Karkkainen, *supra* note 69, at 904; *see also* James Dao, *Environmental Groups to File Suit over Missile Defense*, N.Y. TIMES (Aug. 28, 2001), https://www.nytimes.com/2001/08/28/us/environmental-groups-to-file-suit-over-missile-defenses.html [https://perma.cc/QJ7G-M6TQ] (quoting an environmental activist as stating "the hope is that delay [occasioned by NEPA litigation] will lead to cancellation . . . . That's what we always hope for in these suits.").
[82] Karkkainen, *supra* note 77, at 345.
[83] *Id.*

## II. JUDICIAL REVIEW OF MITIGATED FONSIS

This section will break down the many concerns behind the Skiffes Creek transmission tower project and how judicial review supports and validates the rise of mitigated FONSIs, as evidenced in the district court's holding of *National Parks Conservation Association v. Semonite*. By addressing the concerns of environmental and historical advocates, this section will illustrate the very real environmental impacts potential construction projects have in Virginia. Furthermore, while critics claim that the courts are reticent to protect the environment and that the courts allow a flood of mitigated FONSIs to pass, judicial review does indeed provide a thorough avenue to seeing an unbiased assessment of the entirety of a project.

### *A. Concerns of the Tidewater*

Under the Skiffes Creek transmission tower project, Dominion Energy sought to build three key components.[84] First, a new 500kV overhead transmission line was arguably the most contentious aspect, crossing the James River from Surry to Skiffes Creek, a behemoth of steel lattice work that anyone could reasonably deem an eyesore against the natural scenic backdrop of the James River.[85] Second, a new electrical switching station at Skiffes Creek was proposed.[86] Third, Dominion sought to build a new overhead transmission line from Skiffes Creek to Whealton as well.[87] In opposition, the National Parks Conservation Association ("NPCA") built a persuasive argument stating how the overhead line would present a plethora of environmental, aesthetic, and historical problems for the area.[88]

Historical value is lost, for the transmission line itself mars the natural beauty of the James River and arguably lessens the value and "integrity" of sixty historic landmarks, including Historic Jamestown and the Colonial Parkway National Historic Park.[89] Very many of these

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[84] Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350, 351 (D.D.C. 2018), *rev'd*, 925 F.3d 500 (D.C. Cir. 2019).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Complaint, *supra* note 14, at 2–6.
[89] *Id.* at 2 ("[I]ncluding Historic Jamestowne (the first permanent English settlement in North America and a world-renowned archaeological site), Captain John Smith Chesapeake National Historic Trail (the nation's first and only Congressionally-designated water trail, which follows the expeditions of Captain John Smith from 1607–1609), Colonial Parkway National Historical Park (a scenic parkway connecting our nation's early historic sites

determinations remain rather subjective; however, the NPCA was not without actual evidence of value, relying too on legislation to prove their point.[90] In 2007, the House of Representatives passed H.R. 16, maintaining that the James River was "America's Founding River," further recognizing the "extraordinary historic, economic, and environmental importance of the James."[91] Further, aesthetic value is also lost, for the 295-foot-tall steel lattice of the transmission tower itself, "the height of the statue of liberty," arguably represents a serious scourge to "a relatively unspoiled landscape."[92] Furthermore, the NPCA argued that these were ultimately unmitigable,[93] and from purely historical or aesthetic perspectives, the construction of these transmission towers represents factors that cannot be fixed, harming "irreplaceable lands."[94] Argued in the Complaint, once the towers are built, no amount of mitigation dollars could, for example, hide the monstrous size of such towers, therefore demonstrating the irreparable harm done to the area.[95]

Environmentally, the Skiffes Creek transmission tower project's construction presented a variety of additional issues for Hampton Roads as well. For example, in order to construct the numerous physical structures across the James River, Dominion would have to dig deep into the bottom of the river, at least thirty feet,[96] affecting certain sediments, as well as releasing sedimented kepones throughout the river.[97] Kepones remain a highly toxic pollutant that evidence indicates would then negatively affect fish and other wildlife in the area.[98] Additionally, the transmission tower project also stood to cause potential harm to grounds that

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in a primitive setting), and Carter's Grove National Historic Landmark (listed on both the federal and state historic registers as one of America's most impressive examples of Georgian architecture).").

[90] H.R. Res. 16, 110th Cong. (2007).

[91] *Id.*

[92] Complaint, *supra* note 14, at 3.

[93] *Id.*

[94] Leslie Middleton, *Groups fight to save James River views from overhead power lines*, BAY J. (July 8, 2015), https://www.bayjournal.com/article/groups_fight_to_save_james_river_views_from_overhead_power_lines [https://perma.cc/J34C-AWHF].

[95] *Id.*

[96] *Endangered sturgeon at center of power lines battle*, WASH. POST (Dec. 6, 2015), https://www.newsadvance.com/endangered-sturgeon-at-center-of-power-lines-battle/article_fb7e42c3-85bd-5c33-88f1-6e8b16ddd845.html [https://perma.cc/6PQJ-XE8F].

[97] Complaint, *supra* note 14, at 35.

[98] *See* MICHAEL A. UNGER & GEORGE G. VADAS, VA. INST. MARINE SCI., KEPONE IN THE JAMES RIVER ESTUARY: PAST, CURRENT AND FUTURE TRENDS 5–11 (2017). *See generally* Farida Y. Saleh & Fred Lee, *Analytical Methodology for Kepone in Water and Sediment*, 12 ENVTL. SCI. TECH. 297 (1978).

house the federally protected Atlantic Sturgeon, a species that had suffered overfishing, habitat alteration, and pollution.[99] As wildlife proponents claim, such construction would alter "habitat that is necessary to ensure this species' long-term survival and recovery."[100] Whether or not the sturgeon population were actually affected, such intrusion alone was enough to cast a shadow on the entire project itself.[101]

### *B. NEPA in the Courts*

Under NEPA, the courts were originally seen as the end-all buffer to curb abuse when issuing a FONSI, the lofty goal of judicial review to provide a "thorough, probing review" of the circumstances in every case.[102] However, the almost unanimous consensus among legal historians has held NEPA in the courts to be a failure, NEPA having been "'eviscerated' over the years by a string of narrowing Supreme Court interpretations that elevated procedure over substance."[103] Bleakly stated, critics claim NEPA has seen "'near obliteration of substance'" in the years since its inception.[104] As early as 1972, the Supreme Court found in *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission* that the current system allowed "room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances."[105] As of 2015, there has remained a perfect "17–0 record in the Supreme Court on issues involving NEPA compliance," where environmental groups have consistently lost.[106]

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[99] *Atlantic Sturgeon Restoration*, VCU RICE RIVERS CTR. (May 28, 2019), https://ricerivers.vcu.edu/re search/atlantic-sturgeon-restoration/ [https://perma.cc/YN67-T5SP] ("Atlantic Sturgeon is a biological and historical superlative. It is the largest and longest-lived aquatic organism in the Atlantic Slope rivers of North America, and played a critical role in the establishment of the Jamestown settlement.").

[100] Complaint, *supra* note 14, at 35.

[101] *Id.*

[102] *See* Benjamin E. Fountain, III, *Developments in the Law: Judicial Review of Agency Rulemaking and Adjudication*, 1982 DUKE L.J. 392, 393–94 (1982).

[103] Karkkainen, *supra* note 69, at 906.

[104] Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 246 (2000) (quoting Dinah Bear, *NEPA: Substance or Merely Process?*, 8 F. FOR APPLIED RES. & PUB. POL'Y 84, 85 (1993)).

[105] Calvert Cliffs' Coordinated Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

[106] Zachary Green, NEPA in the Supreme Court: A History of Defeat 35–36 (2015) (unpublished masters thesis, North Carolina State University) (on file with the North Carolina State University Libraries) (Table 3: Decision reached at various levels of federal courts cites all seventeen environmental organizations' losses in the Supreme Court).

The lower courts have seen similar results, with cases before Courts of Appeals holding against environmental groups 11–6,[107] this trend further evidenced in the case at bar.[108] Throughout all of these cases, it remains clear that one of the greatest critiques of the current system is that the courts rarely "reverse agencies . . . for neglect of reasonably foreseeable direct, indirect, or cumulative effects" of a project.[109] Conversely, it remains arguable that the courts undeniably do present a check against abuse; however, the system is "designed primarily to ensure that no arguably significant consequences have been ignored."[110] The question then remains, is such review enough? The NPCA argued that the EA failed to take a hard look at the project's impacts, a readily raised claim when evaluating any mitigated FONSI.[111] In the case at bar, the EA and mitigated FONSI was enough though.[112]

The District of Columbia Circuit in *National Parks Conservation Association v. Semonite* maintains the arbitrary and capricious standard,[113] utilizing a four-part test to review the need for an EIS,[114] addressing whether the agency:

> (1) has accurately identified the relevant environmental concern, (2) has taken a hard look at the problem in preparing its [FONSI], (3) is able to make a convincing case for its finding of no significant impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum.[115]

To justify not writing an EIS, the courts under the District of Columbia Circuit address *de novo* as a matter of law "significance" as applied to the

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[107] *Id.* at 36 (Decisions reached at various levels of federal courts cite all seventeen environmental organizations' losses in the Supreme Court).
[108] Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350, 380–81 (D.D.C. 2018), *rev'd*, 925 F.3d 500 (D.C. Cir. 2019).
[109] Karkkainen, *supra* note 69, at 917–18.
[110] Mayo v. Reynolds, 875 F.3d 11, 20 (D.C. Cir. 2017) (quoting Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1322 (D.C. Cir. 2015)).
[111] Complaint, *supra* note 14, at 35.
[112] *Nat'l Parks Conservation Ass'n*, 311 F. Supp. 3d at 380–81.
[113] Hoskins, *supra* note 42, at 10,335.
[114] Geoffrey Garver, *A New Approach to Review of NEPA Findings of No Significant Impact*, 85 MICH. L. REV. 191, 193 (1986).
[115] Sierra Club v. Van Antwerp, 661 F.3d 1147, 1154 (D.C. Cir. 2011).

four-part test above.[116] While the court does analyze the facts at hand to the best of its ability,[117] the court only "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision."[118] The ultimate problem remains that these tests run afoul on the softer phrasing, such as "hard look," "impact to a minimum," or "highly controversial."[119] Ultimately, the heart of many of these cases rests on interpreting and ruling on such soft terminology.

The malleability of such legal standards is observed full force in the case at bar. First, the NPCA claimed that the Army Corps held any environmental impacts as "insignificant."[120] In solving this dilemma of what makes a "significant impact," the court responded by introducing an even more malleable set of ten significance factors,[121] the court going in depth on the "highly controversial" factor first.[122] In this prong, one must ask: what does "highly controversial" actually mean? Indeed, the court only had one basis of law: that the "effects on the quality of the human environment are likely to be highly controversial."[123] Therefore, one can readily see how complicated these matters can be without clear instruction.[124] In addition, precedent is not helpful in some instances, for the "[c]ourts in this circuit have found that 'something more is required besides the fact that some people may be highly agitated and be willing to go to court over the matter.'"[125] In the case at bar, there was no solid guidance nor clear precedent staying the district judge's hand.[126] Ultimately though, the court held that the project was not "highly controversial," while then writing in the very next sentence that the "record is certainly replete with examples of [the National Parks Service] expressing its view that the project is highly controversial and that the Corps must undertake an EIS."[127] The court then placed a great amount of discretion

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[116] Hoskins, *supra* note 42, at 10,336.
[117] *See* Fountain, *supra* note 102, at 392–93.
[118] *Id.* at 393–94 (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970)).
[119] *See* Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350 (D.D.C. 2018).
[120] Complaint, *supra* note 14, at 4.
[121] *Nat'l Parks Conservation Ass'n*, 311 F. Supp. 3d at 362.
[122] *Id.* at 362–67.
[123] 40 C.F.R. § 1508.27(b)(4).
[124] *See id.*
[125] *Nat'l Parks Conservation Ass'n*, 311 F. Supp. 3d at 363 (quoting Nat'l Parks Conservation Ass'n v. United States, 177 F. Supp. 3d 1, 33 (D.D.C. 2016)).
[126] *See id.*
[127] *Id.* at 364.

in the Army Corps, in that they were "entrusted with the responsibility of considering the various modes of scientific evaluation and theory and choosing the one appropriate for the given circumstances."[128] The end result yielded a loss for environmental groups based on the findings of the Army Corps first and foremost.[129]

Second, it was alleged that the Army Corps did not take a "hard look" at the project, writing that any aesthetic, cultural, or historical impacts were merely "subjective," "particular to the individual," and therefore remained the reason why no EIS was written.[130] The court also responded by hinging its decision on its "significance" analysis and found that while there would be irreparable historic damage,[131] the work done by the Army Corps was simply enough, as evidenced by a 400 page Cultural Resources Effects Assessment ("CREA").[132] Ultimately, while there was no solid guidance or clear precedent, the court utilized the facts of the case to hold that the Army Corps "engaged in a reasoned analysis, consulted experts, responded to criticisms of both its methodologies and conclusions, took a hard look at the potential impacts, and concluded that the impact of the Project would be 'moderate at most.'"[133] Discretion afforded to the Army Corps and their findings remain the crux of the matter at hand;[134] however, one must ask if such discretion is fundamentally a bad outcome overall.

### *C. Policy: Are the Courts Enough Though?*

Ultimately, the discretion afforded to the courts and the Army Corps arguably presents favorable policy goals. First, the fact remains that utilizing the arbitrary and capricious standard focuses on the facts of a case foremost, "thus warranting greater deference to agency discretion."[135] Therefore, one must ask: is agency discretion necessarily a negative

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[128] *Id.* at 365 (citing Sierra Club v. U.S. Dep't of Transp., 753 F.2d 120, 129 (D.C. Cir. 1985)).
[129] *Id.*
[130] Complaint, *supra* note 14, at 4.
[131] *Nat'l Parks Conservation Ass'n*, 311 F. Supp. 3d at 367–68 ("There is no doubt that the geographic area in question is unique and that the Project will impact historic places.").
[132] *Id.* at 363–65 ("CREA—a more than 400 page document—contains photographs of the Project from key vantage points, line of sight analyses, and photo-simulations prepared by an expert consultant, Truescape, demonstrating how the River Crossing would appear to the human eye.").
[133] *Id.* at 368 ("The Corps also studied historical data and found that "there is no correlating variation in visitor ship when compared to past [infrastructure] events.").
[134] *See id.*
[135] Garver, *supra* note 114, at 204.

outcome? Dr. Geoffrey Garver argued that judicial review in the District of Columbia Circuit remained an improvement over the national standard because of such discretion.[136] First, the "hard look" test is reasonably valuable, for use of the full record closed any holes within the court's analysis, so the agency could not make "bald conclusions."[137] Second, use of such fact-specific deference forces the agency to present a "convincing case" of every factor that led to their FONSI.[138] Ultimately, as Dr. Garver claimed, the end result yields a step-by-step analysis of the agency's decision that "avoids substitution of the court's judgment for that of the agency, while exposing flaws in the agency's consideration of environmental concerns."[139] This fact-intensive analysis remains simply impartial and neutral, the goal of judicial review, barring the inherent ambiguity of such terms in Section II.B of this Note.[140]

Such deference presents a very real advantage to the court: the protection of "the integrity of agency decisionmaking and to spare courts from lengthy proceedings on highly technical matters."[141] The whole point of NEPA was to be about strategic decision-making, not drawing out the process without an end in sight; therefore, the courts should apply such logic as well.[142] Such agency discretion remains an advantage in *National Parks Conservation Association v. Semonite*, having defaulted to hard facts in its holding, where the court acknowledged very specific opposition to writing a FONSI while offering the very rationale the Army Corps utilized in its analysis.[143] For example, during the "highly controversial" analysis, the court cited predominantly the Army Corps of Engineers' 400-page CREA, containing "photographs of the Project from key vantage points, line of sight analyses, and photo-simulations prepared by an expert consultant," with simulations "demonstrating how the River Crossing would appear to the human eye."[144] While the CREA was

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[136] *Id.* at 208–09.
[137] *Id.* at 208.
[138] *Id.* at 209.
[139] *Id.*
[140] *See id.*
[141] Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 931 (1993).
[142] *See* COUNCIL ON ENVTL. QUALITY, *supra* note 35, at iii.
[143] Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350, 364–65 (D.D.C. 2018), *rev'd*, 916 F.3d 1075 (D.C. Cir. 2019) (The court acknowledged that "NPS was not alone in its opposition to the project and its belief that an EIS was necessary under NEPA. The Advisory Council on Historic Preservation ("ACHP") and CEQ independently raised concerns at various points over the years.").
[144] *Id.* at 365.

critiqued by the National Parks Service,[145] the court indicated that the Army Corps seriously addressed and took into account such alternate considerations, "even though it ultimately did not agree with them."[146] Therefore, the court analyzed the Army Corps of Engineers' arguments, all the while not being bogged down any further than the court had to,[147] adhering to the neutral goal of judicial review.[148]

Second, the "hard look" test in the case at bar too required a full look at the record.[149] The Army Corps concluded:

> In many landward areas, such as the vast majority of Jamestown Island, the project will not be visible due to existing tree cover and vegetation. Where the project will be visible, it is generally at such a distance that it is on the horizon (e.g., from Black Point on Jamestown Island). We note that from the vantage points closest to the project, (limited areas of Colonial Parkway, Grounds at Carters Grove, Jamestown Island—Hog Island—Captain John Smith Trail Historic District) the project will be a modern intrusion on the view, but we emphasize that it is not a blockage to viewing the river or the surroundings. Due to the distances from important vantage points, we conclude that the project will not dominate the view.[150]

Once again during this "hard look" analysis, the court put forth the hard findings of the CREA, having considered updated photo-simulations, including pictures from the vantage point of those on the river itself.[151] Once again, this fact intensive analysis remained simply impartial and neutral, the goal of judicial review.[152] Ultimately, while there certainly are very negative historical, aesthetic, and environmental consequences of this project, the court readily and rationally addressed the Army Corps of Engineers' reasoning behind their analyses without being stuck in the mire.

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[145] *Id.* at 366 ("It is true that NPS sent a detailed letter in January 2017—only a few months prior to NPS granting the permit—in which it pointed to 'fundamental flaws' with the decisionmaking process that 'remain unresolved.'").
[146] *Id.*
[147] *See* French, *supra* note 141, at 931.
[148] *See* Garver, *supra* note 114, at 209.
[149] *See id.* at 208–09.
[150] *Nat'l Parks Conservation Ass'n*, 311 F. Supp. 3d at 367–68.
[151] *Id.* at 367.
[152] *See* Garver, *supra* note 114, at 209.

## III. ALTERNATIVES AND MITIGATION

Ultimately, this Note strongly argues that the district court's end result in *National Parks Conservation Association v. Semonite* was truly the best-case scenario for the Hampton Roads Peninsula. First, it remains clear that there were no practical alternatives to building seventeen transmission towers across the James River, and the current iteration of the project inherently remained the best option for Hampton Roads. Second, the swath of mitigation measures provided by Dominion Energy remains absolutely a benefit to local historical and environmental groups that truly need the immediate funding as well. As discussed in Parts I and II of this Note, there surely are negative implications of filing a mitigated FONSI; however, contrary to the critical analysis of the Skiffes Creek transmission tower project, there certainly remain positive aspects that come from a necessary negative.

### *A. No Practicable Energy Alternatives*

NEPA generally maintains that agencies include any alternatives to a project that present a significant impact on the environment.[153] Writing an EA is no different and must include such alternatives,[154] as well as means to move forward with a project so as to either reasonably avoid or reduce the impact that a project might have upon the environment.[155] Simply, if there remains a better opportunity to protect the environment, an EA with a mitigated FONSI should arguably address those means.[156] In the case at bar, however, the NPCA argued that the Army Corps of Engineers merely dismissed a number of alternatives in its analysis without cause,[157] predictably arguing that an EIS utterly remains the superior option because it is extensively more detailed.[158] Where an EIS must "'rigorously explore and objectively evaluate' the environmental impacts

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[153] Rachael Rawlins, *Institutionalizing the Mitigated FONSI: A Precautionary Tale*, 37 ENVTL. L. INST. 10,666, 10,667 (2007).
[154] 40 C.F.R. § 1508.9.
[155] *EA Reviewer's Tips*, RESERVATION INST., https://www.npi.org/ea-reviewers-tips [https://perma.cc/AV5W-9L3F] (last visited Dec. 3, 2019).
[156] *Id.*
[157] Complaint, *supra* note 14, at 5 ("The cursory alternatives analysis the Corps undertook in the EA failed to consider the comparative benefits and impacts of each alternative, including each alternative's anticipated impacts and benefits to tourism, the local economy, visitor safety, and wildlife, thereby impairing the Corps' ability to make a well-informed decision on the basis of all pertinent information.").
[158] *See id.* at 10–11.

of '*all* reasonable alternatives' to the proposed action,"[159] an EA is required to only include a "brief discussion[]" of any alternatives.[160] Precedent has further solidified the standard to address alternatives in an EA, deferring to agency discretion,[161] that all the agency need do according to precedent is "'briefly discuss the reasons' why rejected possibilities were not 'reasonable alternatives.'"[162] While not as rigorous as an EIS, an EA must still address alternatives, even if at a lesser degree.[163]

In the case at bar, the court too deferred to the Army Corps again and found that of the twenty-eight proposed alternatives addressed in a 111 page memorandum,[164] only two entered the realm of practicability.[165] Various other alternatives were outlined based on electricity compliance, "estimated construction cost," "constraints," and a final conclusion if the alternative was "practicable."[166] For example, continued operations of the Yorktown Power Station were nixed because they violated federal law, as mentioned previously.[167] In various other alternatives, constraints on time remained a very serious factor.[168] As reiterated from the introduction of this Note, Virginia's lack of energy self-sufficiency presents an extremely troublesome problem.[169] Time was crucial in these findings because adequate power is immediately needed.[170] Dominion estimated, without quick action, "80 days a year in which rolling blackouts are possible," where "the number of days when demand is so heavy that faults in the system could force it to cut some customers off in order to avoid a widespread

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[159] *Id.* (quoting 40 C.F.R. §§ 1502.13, 1502.14 (emphasis added)).
[160] 40 C.F.R. § 1508.9.
[161] Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (quoting Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 72 (D.C. Cir. 2011) ("An alternative is 'reasonable' if it is objectively feasible as well as 'reasonable in light of [the agency's] objectives.'")).
[162] Tongass Conservation Soc'y v. Cheney, 924 F.2d 1137, 1141 (D.C. Cir. 1991) (quoting 40 C.F.R. § 1502.14(a)).
[163] *Id.*
[164] *See* Randy L. Steffy, *Department of the Army Environmental Assessment and Statement of Findings for the Above-Referenced Standard Individual Permit Application*, USACE MEMORANDA FOR THE RECORD 40–59 (June 12, 2017), https://www.energy.gov/sites/prod/files/2017/09/f36/USACE%20Memorandum%20for%20the%20Record.pdf [https://perma.cc/8BNS-9PSJ].
[165] Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350, 373 (D.D.C. 2018).
[166] Steffy, *supra* note 164, at 49.
[167] *Id.*
[168] *Id.* at 54 (noting a hybrid alternative, for example, was "[u]nreasonably more costly" and would take "8 [y]ears to [c]onstruct").
[169] *Profile Analysis*, *supra* note 6.
[170] *Id.*

blackout."[171] While blackouts are generally considered bad, "[i]magine trying to operate a vital defense base with rolling blackouts. These defense bases must be ready 24/7 with no exceptions. Threat of power going out is unacceptable and could result in agencies and armed services moving elsewhere."[172]

On the other hand, the final iteration of the Skiffes Creek transmission tower project is estimated to be completely finished by the summer of 2019, preventing such energy outages.[173] Therefore, such evidence indicates that a vast number of alternatives were eliminated as a result of practicality, not arbitrarily or capriciously without cause.

Ultimately, the first of two feasible alternatives was to build an underwater line,[174] where Dominion would lay a 230kV double circuit line across the bottom of the James River.[175] The Army Corps explained that while this option would lessen the historical and aesthetic depreciation of the surrounding area, the line would take twice as long to build, would cost triple the amount of the current transmission tower project, and would be incredibly hard to repair therefore leading to longer outages as a result.[176] The court then held that the recommended final option would comply with NERC Reliability Standards for approximately ten more years than the underwater line would.[177] Further, there remains a similar result for the second feasible option, the Chickahominy 500kV project, for this option would cost approximately $35 million more than the current Skiffes Creek line,[178] but would then impact more area of untouched,

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[171] Dave Ress, *Dominion Virginia Power sets plan for emergency blackouts*, DAILY PRESS (Jan. 13, 2017), https://www.dailypress.com/government/dp-nws-dominion-ras-20170112-story.html [https://perma.cc/63V3-KBNK].

[172] *Dominion Virginia Power Response to Comments Made at the Public Hearing Held on October 30, 2015 Concerning the Surry–Skiffes Creek–Whealton Project*, USACE NORFOLK DISTRICT REGIONAL OFF. 7 (Mar. 30, 2016), https://www.nao.usace.army.mil/Portals/31/docs/regulatory/Skiffes/Comment%20Summary/03.30.2016DVP_SKIFFES%20-%20Public%20Hearing%20(Oct%20%2030%202015)%20Response%20Document.pdf [https://perma.cc/Z5G9-48SU].

[173] *See* Jacobs, *supra* note 26.

[174] *See* Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350, 373 (D.D.C. 2018).

[175] *See* Steffy, *supra* note 164, at 41.

[176] *Nat'l Parks Conservation Ass'n*, 311 F. Supp. 3d at 373.

[177] *Id.* (The underwater "option would only achieve electrical compliance with NERC Reliability Standards until 2032 (about ten years less than the proposed Project), be 'cost prohibitive,' take '5 years to construct,' and have greater aquatic resource impacts"). *See generally Reliability Standards*, NORTH AM. ELECTRIC RELIABILITY CORP., https://www.nerc.com/pa/Stand/Pages/ReliabilityStandards.aspx [https://perma.cc/75HR-3GGN] (last visited Dec. 3, 2019) (describing mandatory, filed, and pending standards subject to enforcement).

[178] Steffy, *supra* note 164, at 50.

"pristine," inland conservation lands than the recommended final project.[179] Ultimately, in regard to these few alternatives, the Army Corps addressed their concerns with articulable recommendations as to the inferiority of these alternatives.[180] While such considerations in an EA need not to be as exhaustive as an EIS,[181] the Army Corps arguably provided an extensive analysis of all alternatives in their 111-page finding.[182] Further, the Army Corps also consulted with Tabors, an independent consulting agency that NPCA utilized as well.[183] Therefore, it remains clear that the Skiffes Creek transmission tower project, as it ultimately unfolded before the district court, was both well founded on overall cost, logistics, and impact on the environment compared to the other alternatives and remained *the* best option for the Peninsula.[184]

### *B. Mitigation Dollars in Use*

Arguably one of the greatest results yielded from the criticized transmission tower project is the use of mitigation measures and dollars. Virtually all FONSIs maintain appropriate mitigation measures for a proposed project, in some cases citing something as simple as an amount of money within the entire project's budget offered to offset any environmental impact.[185] With the rise of mitigated FONSIs in recent years,[186] there certainly is an argument that such mitigation is made so as to not cross the threshold to claim a "significant impact" that then triggers the necessity of an EIS.[187] One must ask: should mitigation offset any potential

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[179] USACE NORFOLK DISTRICT REGIONAL OFF., *supra* note 172, at 7 ("[The Chickahominy option] impacts nine conservation lands and clears over 400 acres of pristine forest, also has significant historical, wildlife, and cultural areas impacts.").

[180] Steffy, *supra* note 164, at 56 ("Dominion's Proposed Project and the Chickahominy–Skiffes Creek 500kV alternative are comparable when considering endangered species and cultural resource impacts. However, when considering aquatic resources the Chickahominy route by far surpasses the proposed project with its 62 acres of conversion. Based on aquatic resource impacts and overall cost comparisons, the Surry–Skiffes 500kV Overhead (Dominion's Proposed Project) is the least environmentally damaging practicable alternative.").

[181] Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (quoting 40 C.F.R. § 1508.9(b)).

[182] Steffy, *supra* note 164, at 40–59.

[183] Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350, 374 (D.D.C. 2018).

[184] Steffy, *supra* note 164, at 56–59; *see also* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 198 (D.C. Cir. 1991) (where alternatives "would mean technological problems and extravagant costs," the court held their elimination as valid).

[185] COUNCIL ON ENVTL. QUALITY, *supra* note 35, at 20.

[186] *Id.*

[187] Marc R. Bulson, *Off-Site Mitigation and the EIS Threshold: NEPA's Faulty Framework*, 41 J. URB. CONTEMP. L. 101, 105 (1992).

damage?[188] While such methodology may remain inherently seen as a damaging loophole to avoid lengthy EIS drafting,[189] mitigation remains implicit in the NEPA scheme.[190]

In the case at bar, Dominion expressly adapted a wide assortment of mitigation measures, where even the NPCA conceded there was so much mitigation offered that it signified that there was significant impact, to which the court ultimately held such measures were not indicative of a significant impact.[191] Towards mitigation, Dominion advanced the least impactful techniques of construction as a mitigation technique,[192] placing the transmission towers the "maximum span lengths in the James [R]iver," therefore lessening aesthetic loss.[193] Further, implementing "the use of bubble curtains during pile driving activities to protect sturgeon" then offsets environmental degradation of wildlife habitats, with "an approved avoidance plan for underwater and terrestrial archaeological sites" as well.[194] In these circumstances, Dominion accepted the undeniable consequences of such a project, proposing further means to reduce its footprint on the environment, "[c]ompensating for an impact by replacing or providing substitute resources or environments."[195] In the end, such measures remain important to assuage the fears of environmental proponents like the NPCA, as addressed previously.

Dominion further demonstrated its mitigation commitment one step further when "repairing, rehabilitating, or restoring the affected environment" outside of the project's direct path.[196] Off-site and tangential to their project's effects, Dominion sought to improve the environment elsewhere to the real benefit of the Hampton Roads Peninsula, for example, with the proposed environmental stabilization of 6,000 linear feet of

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[188] *Id.* at 107 ("The proliferation and ready acceptance of off-site mitigation calls into question the thoroughness of agency decision-making.").
[189] Rawlins, *supra* note 153, at 10,666 (The current trend is "currently moving in a direction that threatens to stab at the heart of our premier environmental protection statute, the National Environmental Policy Act (NEPA)").
[190] Bulson, *supra* note 187, at 108–09.
[191] Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d 350, 371 (D.D.C. 2018) ("[I]t is entirely conjectural to argue that merely because Dominion plans to spend approximately $85 million in mitigation efforts that the impacts must be significant.").
[192] *See* Memorandum from Nancy H. Sutley, Chair, Council on Envtl. Quality, to the Heads of Fed. Dep'ts & Agencies 2 (Jan. 14, 2011), https://www.energy.gov/sites/prod/files/2017/06/f35/NEPA-CEQ_Mitigation_and_Monitoring_Guidance_14Jan2011.pdf [https://perma.cc/X7R3-Y9DW] [hereinafter Sutley Memo].
[193] *Nat'l Parks Conservation Ass'n*, 311 F. Supp. 3d at 372.
[194] *Id.*
[195] Sutley Memo, *supra* note 192, at 5.
[196] *Id.* at 4.

shoreline benefiting historical Carter's Grove and the National Colonial Parkway.[197] Additionally, for Historic Jamestown, Dominion proposed the "rehabilitation or replacement" of the seawall to prevent gradual erosion, the environmental restoration of Back Creek, and even launched an archaeological investigation in order to "support ongoing and future investigations including emergency excavation of threatened archaeological sites."[198] In these cases, while having already addressed the pitfalls of the transmission tower project on the environment and the Peninsula's historical value, these off-site mitigation measures lessen the cumulative impact on the environment while also benefitting sites that need immediate help.[199]

Finally, mitigation dollars funneled to environmental and preservation groups is absolutely beneficial to the Hampton Roads Peninsula. Dominion yielded a total of $85 million to be distributed over a ten-year period, half of those funds to be paid out within five years of the execution of the Memorandum of Agreement.[200] While it may seem callous to simply assume that money is the solution to combat environmental, historical, and aesthetic degradation at the hands of a proposed project, various projects that need funding are ultimately benefitting as a result of those funds.[201] The Chickahominy Indian Tribe will receive $1.5 million to expand a Tribal Cultural Center to preserve tribal history and artifacts, with funds further granted to research the "role of the Chickahominy Tribe in Virginia's shared history."[202] The Pamunkey Indian Tribe will too see $4.5 million to benefit cultural preservation, but will also receive 125

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[197] *See* Memorandum of Agreement Among Virginia Electric and Power Company, The Virginia State Historic Preservation Office, U.S. Army Corps of Engineers Norfolk District, and the Advisory Council of Historic Preservation: Issuance of U.S. Army Corps of Engineers' Permits for the Proposed Surry–Skiffes Creek–Whealton Transmission Line Project, Surry County, James City County, York County, Cities of Newport News and Hampton, Virginia 16–23 (Apr. 24, 2017), http://www.nao.usace.army.mil/Portals/31/docs/regulatory/Skiffes/MOAs/FINAL_MOA_4.24.2017.pdf?ver=2017-05-01-155150-290 [https://perma.cc/TEY4-C9J7] [hereinafter Memorandum of Agreement].

[198] *Id.* at 23.

[199] *See Nat'l Parks Conservation Ass'n*, 311 F. Supp. 3d at 372.

[200] *See* Memorandum of Agreement, *supra* note 197, at 12–13 (for example, an amount of $27,700,000 to be managed by the Conservation Fund (TCF); an amount of $25,000,000 to be managed by the Virginia Department of Conservation and Recreation (DCR); an amount of $4,205,000 to be managed by the Virginia Department of Game and Inland Fisheries (DGIF); an amount of $15,595,000 to be managed by the Virginia Environmental Endowment (VEE); and an amount of $12,500,000 to be managed by the Virginia Land Conservation Foundation (VLCF)).

[201] *Id.*

[202] *Id.* at 27.

percent fair share market value of the land subjected to any alteration due to the project.[203] In the end, while the point of NEPA is to prevent and eliminate environmental degradation,[204] people will actually see real benefits from the result of the mitigated FONSI.

## CONCLUSION

Mitigated FONSIs have been widely held as negative stains on the face of NEPA, seen as a means to loophole around writing an EIS, creating an even worse environment for future generations to inherit.[205] However, contrary to these mainstream holdings, a mitigated FONSI did indeed provide actual benefit to justify its use in *National Parks Conservation Association v. Semonite*. First, mitigated FONSIs do indeed provide necessary brevity and clarity in an extremely bloated system. Second, while the fallout of this project may certainly maintain negative historical, aesthetic, and environmental consequences, the court readily and rationally addressed the Army Corps of Engineers' reasoning in its holding, finding there was indeed a justifiably thorough analysis. Finally, the end result yielded the best course of action for the Hampton Roads Peninsula, providing much-needed and immediate power, while also effectively and methodically eliminating inferior alternatives and providing much-needed mitigation monies to the benefit of many.

Despite the positive, practical, and necessary effects yielded with this case's mitigated FONSI, the United States Court of Appeals for the District of Columbia Circuit ultimately reversed and remanded the holding of the district court.[206] While the March 2019 panel of three appellate judges held that the district court's determination was arbitrary and capricious,[207] the court only ordered a full EIS,[208] with no further remedy

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[203] *Id.* at 33.
[204] Sutley Memo, *supra* note 192, at 2 (citing 42 U.S.C. § 4321 (stating that the purposes of NEPA include promoting efforts which will prevent or eliminate damage to the environment)).
[205] *See* discussion *supra* Section III.B.
[206] Nat'l Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1089 (D.C. Cir. 2019).
[207] *Id.* at 1077, 1088 ("[I]mportant 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.").
[208] *Id.* at 1088 (An EIS would remain necessary to "revisit [the Corps'] theories about alternatives under NEPA, which in turn will require it to reevaluate its Clean Water Act and Preservation Act analyses").

offered.[209] As of March 2019, Dominion's transmission towers continue to provide much-needed electricity to the Hampton Roads Peninsula.[210] It remains evident that the quick demolition of these towers was foremost not found, as the "best course of action is to remand the case to the district court to consider."[211] While the district court will once again handle the fallout of this case and even the potential removal of the seventeen transmission towers, for the moment, the holding of the district court granted a much-needed necessary negative.

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[209] *See generally id.*

[210] Sarah Fearing, *Appeals court rules Dominion power line permit given outside of the law*, DAILY PRESS (Mar. 1, 2019), https://wydaily.com/local-news/2019/03/01/appeals-court-rules-dominion-power-line-permit-given-outside-of-the-law/ [https://perma.cc /XU7C-4ZZ6].

[211] Nat'l Parks Conservation Ass'n v. Semonite, 925 F.3d 500, 501–02 (D.C. Cir. 2019) (per curiam) (including the fact that "neither petitioner bothered to advise us that construction on the project had been completed and the transmission lines electrified the week before we issued our opinion.").