THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
6611 Kenilworth Avenue • Riverdale, Maryland 20737

July 22, 2019

Ms. Jeanette Mar
Environmental Program Manager
Federal Highway Administration
Maryland Division
George H. Fallon Federal Building 31 Hopkins Plaza
Suite 1520
Baltimore, MD 21201

Ms. Lisa Choplin, Director
Maryland Department of Transportation
State Highway Administration
1-495 & 1-270 P3 Office
707 North Calvert Street
Mail Stop P-601
Baltimore, MD 21202

Re: I-495/I-270 Managed Lanes Study – Issues with NEPA Process to Date and Request for Principals Meeting

Dear Mses. Choplin and Mar:

We are in receipt of your June 28, 2019 letter (the "June 28 Response") that purports to respond to concerns we raised in our June 12, 2019 letter regarding our basis for declining to concur with the Maryland Department of Transportation State Highway Administration's ("MDOT SHA") Alternatives Retained for Detailed Study ("ARDS") for the I-495 & I-270 Managed Lanes Study ("Study"). We also acknowledge the second letter dated July 9, 2019, (the "Follow Up Response") authored by Ms. Choplin and addressed to our Vice-Chairman Anderson only; however, we note that your Follow Up Response actually was not delivered to Chairman Hewlett despite the indication that a copy was transmitted to her attention. Therefore, she was not able to review it before late last week.

As discussed in more detail below, nothing in the June 28 Response or Follow Up Response palliates the fact that MDOT SHA has eliminated alternatives that would have no impacts to property subject to the Capper-Cramton Act ("CCA") or, in any event, fewer impacts than the retained alternatives. Eliminating alternatives that would have no impacts or fewer impacts than retained alternatives is also inconsistent with the National Environmental Policy Act ("NEPA") and Section 4(f) of the Department of Transportation Act ("Section 4(f)"). As we stated in our

June 12 letter, the Maryland-National Capital Park and Planning Commission's ("M-NCPPC") objections to the NEPA process and review of alternatives does not represent a decision on our part to support or oppose the project. M-NCPPC is simply carrying out its statutory duties to protect and enhance the parks and recreation land within its constituent agencies' jurisdiction. To that end, M-NCPPC also requests a principals meeting to discuss these important issues.

**Right-of-Way Acquisition in Furtherance of the Project Will Likely Violate the Capper-Cramton Act**

The Capper-Cramton Act authorized the federal government to acquire land in Maryland and Virginia for development of a comprehensive park, parkway, and playground system in the National Capital area. M-NCPPC is charged with protecting and being the steward of CCA-acquired property in Maryland, in accordance with plans approved by the National Capital Planning Commission ("NCPC").[1] M-NCPPC is, therefore, justified in its concern that all of the so-called "build alternatives" retained for detailed study would require the acquisition of property purchased with federal funds authorized under the CCA. Property acquired under the CCA and managed by M-NCPPC's constituent departments is governed by the "Basic Agreement" in 1931 between M-NCPPC and NCPC. Section 5 of the Basic Agreement states as follows:

> It is further understood and agreed, in accordance with the [CCA and Maryland enabling legislation] that the title to all lands acquired under the provisions of this Basic Agreement or any Supplementary Agreement shall vest in the State of Maryland, and that *no part of any land purchased for park or recreational purposes* with the funds provided by the [NCPC], in whole or in part, *shall at any time be conveyed, sold, leased, exchanged, or in any manner used or developed for other than park purposes* by the [M-NCPPC], and the development and administration of said lands shall be under the [M-NCPPC] but the development thereof shall

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[1] As the Maryland Court of Appeals recently described this statutory role of M-NCPPC:

> MNCPPC is responsible for protecting lands under the Capper-Cramton Act, which was enacted by Congress in 1930 to "protect land on both sides of the Potomac River as an integrated park and parkway system known as the George Washington Memorial Parkway." Land Use § 15-302(3) provides MNCPPC with the authority to act as the representative of this State in fulfilling the mandate of the Capper-Cramton Act in Maryland. The Act enables MNCPPC to enter into agreements with the National Capital Park and Planning Commission ("NCPPC") for extending and developing protected lands in Maryland. Therefore, the Capper-Cramton Act provided for cooperation between NCPPC and MNCPPC, enabling MNCPPC to act as administrator over preserved lands.

*Town of Forest Heights v. Maryland-Nat'l Capital Park & Planning Comm'n*, 463 Md. 469, 518–19, 205 A.3d 1067, 1096 (2019). (Internal citations omitted.)

> be in accordance with plans approved by the [NCPC], or the necessary approval of the Congress of the United States.

(emphasis added).

In February 1951, NCPC and M-NCPPC entered into their first Amendatory Agreement to the Basic Agreement, which, among other things, increased funding available for parkland acquisition, amended the General Park Plans, and limited M-NCPPC's ability to issue bonds. The Amendatory Agreement also restated and clarified the 1931 agreement's restriction on the disposition and use of parkland acquired pursuant to the CCA. The amendatory agreement stated that where M-NCPPC acquires, prior to advance funding by the NCPC, parcels included in the General Park Plans and threatened by encroaching subdivision development that would greatly increase the expenses incurred in acquiring such parcels, such parcels "must ... be acquired under the Capper-Crampton program ... so as to eliminate any possibility that any such unit may in the future be rendered incomplete by the sale, disposition or use of any such parcels by the [M-NCPPC] for other than park purposes ... to the end that all such parcels shall be subjected to the limitations and restrictions contained in said Capper-Cramton Act and in said Basic Agreement."

Maryland Law reinforces the federal requirement to protect CCA land from development. Section 17-205 of the Land Use Article provides that M-NCPPC "may transfer any land that it holds under this title and determines is not needed for park purposes or other purposes authorized under this title," indicating that only M-NCPPC may transfer park property and that it can only do so when the property is no longer "needed for park purposes." Similarly, section 17-206(b)(1) allows M-NCPPC to exchange playground or recreational land held or acquired by the M-NCPPC for other public land that it determines to be more suitable for playground and recreational purposes, "[e]xcept for parkland acquired under an agreement with the [NCPC]."

Furthermore, it is a longstanding principal that a government agency cannot "override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."[2] Indeed, using lands for purposes other than those provided by law is actionable.[3] Relevant to the matter at hand, the Maryland Court of Appeals ruled that a subdivision plat in which land was dedicated to public use as part of a large regional park by M-NCPPC could not be abandoned because the developer seeking abandonment could not show that abandonment would not damage the public interest.[4]

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[2] *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (citing *Burfenning v. Chi., S. P., M. & O. R. Co.*, 163 U.S. 321 (1896)).

[3] *See, e.g., Sportsmen's Wildlife Def. Fund v. Romer*, 73 F. Supp. 2d 1262, 1274 (D. Colo. 1999) (placing rock quarry, signs, and motion detectors on public lands constituted misuse under 50 C.F.R. § 80.14(b)(2) and the Pittman-Robertson Act, since the land was purchased with federal funds for wildlife purchases).

[4] *Md.-Nat'l Capital Park & Planning Comm'n v. McCaw*, 246 Md. 662, 686-87 (1967).

In light of the CCA restrictions on property that MDOT SHA would need to take under the alternatives it has retained for further study, MDOT SHA should consider alternatives that would have no or fewer impacts on the property.

**The Environmental Review Process Undertaken by MDOT SHA Has the Potential to Violate NEPA and Section 4(f)**

As stated in its June 12 letter, MDOT SHA has taken the position is that its decision to phase the Project satisfies NEPA because the Project "has logical termini, independent utility and does not preclude consideration of additional transportation enhancements either along the I-270 corridor, the Capital Beltway or elsewhere in the surrounding transportation network." This position may subject the agency to a future NEPA or 4(f) challenge since MDOT SHA may not be able to satisfy the requirement to fulfill its NEPA obligations "to the fullest extent."[5] A lead agency must consider reasonable alternatives that meet the project purpose and need, cumulative project impacts, and transportation systems management alternatives. Without limiting M-NCPPC's right to comment and raise objections later in the NEPA process and in the interest of satisfying our duties as a cooperating agency and facilitating MDOT SHA's satisfaction of its duties as a co-lead agency, M-NCPPC outlines below certain deficiencies in MDOT SHA's review in the hope that MDOT SHA will make the necessary adjustments prior to and during the draft environmental impact statement ("DEIS") stage.

1. MDOT SHA has construed the purpose and need so narrowly as to exclude from consideration a number of reasonable alternatives.

Lead agencies must consider all reasonable alternatives that could meet the purpose and need outlined at the inception of the NEPA review process.[6] Although MDOT SHA enjoys deference in determining the project's purpose and need and need not study alternatives that are not consistent therewith, NEPA requires MDOT SHA to define the purpose and need broadly enough to ensure that the review does not eliminate from consideration otherwise reasonable alternatives.[7] This is particularly important at the early (pre-DEIS) stage of the NEPA review process when agencies must consider all alternatives that are "practical or feasible from a technical and economic standpoint."[8] Despite this statutory mandate, MDOT SHA has defined

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[5] *Calvert Cliffs' Coordinated Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971) (quoting 42 U.S.C. § 4332(a)).

[6] Council on Envtl. Quality; Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 16, 1981) at Question 1b. *See also* 49 U.S.C. §303(c)(1) (Secretary of Transportation must consider all "prudent and feasible alternatives"); *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 432 (10th Cir. 1996) ("An agency decision concerning which alternatives to consider is necessarily bound by a rule of reason and practicality"); *Sierra Club v. Watkins*, 808 F. Supp. 852, 872 (D.D.C. 1991) (agencies' selection of port sites was "quite calculating and qualifies as an abuse of discretion" for not covering the "full spectrum" of possible site locations).

[7] *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (finding it is a violation of NEPA to "contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration").

[8] Council on Environmental Quality; Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 16, 1981) at Question 2a. *See also Sierra Club v.*

the project's purpose and need so narrowly as to exclude from consideration a number of reasonable alternatives. As a result, MDOT SHA has reduced its evaluation of alternatives such that it is giving serious consideration only to six build alternatives and a no-build alternative and ignoring alternatives that are reasonable, could have fewer environmental impacts, and warrant further consideration at the DEIS stage.[9] Although not exhaustive, MDOT SHA has failed to grant sufficient consideration to reasonable alternatives that include the following elements:

a. Local serving public transit systems (beyond simply allowing buses to use the Managed Lanes), such as planning and funding route service via the Corridor City Transitway and the MD-355 bus rapid transit, as well as committing a meaningful portion of toll revenue to fund public transit investments;

b. Parallel roadways and accommodations for multimodal uses to alleviate congestion in Prince George's County;

c. Additional access locations that would better accommodate Managed Lane traffic demands by increasing safety, reducing weaving congestion, supporting major economic development initiatives, addressing short-distance commuting needs, and providing efficient entry points for popular destinations, including medical centers, institutional facilities, and transit stations;[10]

d. Easy access to the Managed Lanes from the Metropolitan Washington Council of Governments' Equity Emphasis Areas;

e. Reduced fare E-ZPass programs and toll or tax rebates for motorists of qualifying incomes;

f. Differential (including reduced) impacts to protected parkland and natural resources, particularly Rock Creek Stream Valley Park, Cherry Hill Road Community Park, Southwest Branch Stream Valley Park, Douglas Patterson Park, and Andrews Manor Park;

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*Marsh*, 714 F. Supp. 539, 574 (D. Me. 1989) (MDOT's preferred expansion plan for a terminal facility does not warrant exclusion of otherwise reasonable alternatives unless the agency's preference bears a "rational relationship to the technical and economic integrity of the project").

[9] 49 U.S.C. §303(c)(1) (Secretary of Transportation must consider all "prudent and feasible alternatives"); *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 432 (10th Cir. 1996) ("An agency decision concerning which alternatives to consider is necessarily bound by a rule of reason and practicality"); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174-75 (10th Cir. 1999).

[10] In our previous letters, we have identified several locations at which access points would be viable and address our concerns: I-270 between Gude Drive and Montrose Road; I-495 between MD-185 (Connecticut Avenue) and US-29 (Colesville Road); I-495 between US-29 (Colesville Road) and I-95; and I-495 between US-50 and Ritchie-Marlboro Road.

g. The study of portions of I-270 and I-495, including I-270 north of I-370 (from Rockville to Frederick) in Montgomery County and I-495 from MD-5 to the Woodrow Wilson Bridge in Prince George's County;

h. Expanded stormwater management control to treat existing conditions along highway corridors;

i. Alternative right-of-way acquisitions, such as bolstered noise barriers and conformance with existing environmental impact and zoning restrictions;

j. Elimination of the collector-distributor lane system without accompanied Managed Lane improvements;

k. A pedestrian/bicycle connection or a future heavy/light rail structure on the American Legion Bridge;

l. Joint participation with the Virginia Department of Transportation in designing and implementing the transition between the existing I-495 local and through lanes from the Woodrow Wilson Bridge and the terminus of the Managed Lanes south of MD-5; and

m. Pedestrian and bicycle crossings at new interchanges, existing interchanges, state and local roads that cross I-495 and I-270 outside of interchanges, and independent master-planned bicycle and pedestrian infrastructure alignments.

2. MDOT SHA should continue to evaluate transit, travel demand management, and transportation systems management alternatives.

In its June 28 letter, MDOT SHA states that it will consider transit elements in the Study but that it is not required to evaluate stand-alone transit alternatives since those alternatives do not meet the project's purpose and need. However, MDOT SHA must, at the very least, include transportation systems management ("TSM") and travel demand management ("TDM") alternatives where applicable, including ridesharing, signal synchronization, and other actions.[11] Also, a lead agency should consider mass transit options where appropriate.[12] With the exception of high-occupancy vehicle lanes, the ARDS do not reflect adequate consideration of TSM and TDM elements.

Similarly, Section 4(f) requires that the lead agencies provide "compelling reasons for rejecting . . . proposed alternatives as not prudent."[13] Put another way, Section 4(f) property "may not be put to non-park uses unless there is no feasible and prudent alternative to the non-park use of the

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[11] FED. HWY. ADMIN., NEPA IMPLEMENTATION: PROJECT DEVELOPMENT AND DOCUMENTATION OVERVIEW (1992), *available at* https://www.environment.fhwa.dot.gov/legislation/nepa/overview_project_dev.aspx.

[12] *Id.*

[13] *Hickory Neighborhood Def. League v. Skinner*, 910 F.2d 159, 163 (4th Cir. 1990).

land."[14] MDOT SHA's restricted review will not satisfy Section 4(f)'s "substantive restraints on agency action."[15]

3. MDOT SHA's unreasonably narrow purpose and need statement and ARDS will prevent full consideration of the project's direct, indirect, and cumulative impacts.

Under NEPA, MDOT SHA must consider the project's impacts—direct, indirect, and cumulative—on the environment, urban quality, historic and cultural resources, and the built environment, among others.[16] By narrowly defining the project's purpose and need and ARDS, MODT SHA will not be able to evaluate the alternatives' impacts, including impacts to the following:

a. The area surrounding I-270 north of I-370 (from Rockville to Frederick) in Montgomery County;

b. The area surrounding I-495 from MD-5 to the Woodrow Wilson Bridge;

c. Existing and future origin-destination patterns;

d. Planned land use;

e. Economic development;

f. Social equity and environmental justice;

g. Access to emergency services;

h. Safe and efficient access to major transit centers;

i. Protected parkland;

j. Protected natural, historical, and cultural resources;

k. Local streams and waterways;

l. Property uses under current environmental and zoning laws, both state and local;

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[14] *Defs. of Wildlife v. N.C Dep't of Transp.*, 762 F.3d 374, 399 (4th Cir. 2014) (quoting *Coal. for Responsible Reg'l Dev. v. Brinegar*, 518 F.2d 522, 525 (4th Cir. 1975)).

[15] *Defs. of Wildlife*, 762 F.3d at 398.

[16] 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. *See also Davis v. Mineta*, 302 F.3d 1104, 1110 (10th Cir. 2002) (FHWA's single-traffic study to analyze the impacts from the phased construction of a highway project was not sufficient to satisfy the agency's burden to take a "hard look" under NEPA because, among other reasons, the study did not consider the cumulative impacts of transportation systems management and mass transit together in conjunction with an alternative road expansion as a means of meeting project goals); *Defs. of Wildlife*, 762 F.3d at 384 (upholding segmentation with respect to five studied parallel bridge alternatives because agency properly analyzed cumulative impacts).

m. Local road networks that feed onto and off of both I-495 and I-270;

n. Noise levels at homes located near the project;

o. Traffic congestion chokepoints;[17]

p. Congestion during peak and off-peak hours;

q. Commercial, recreational, and entertainment interests at the MGM casino-hotel and National Harbor; and

r. Bicycle, pedestrian, and trail crossings of the corridors.

M-NCPPC recognizes that MDOT SHA will complete additional analysis at a later stage in the NEPA process and does not expect MDOT SHA to conduct EIS-stage analysis at this stage in the process. However, by failing to consider the lack of differential impacts in the ARDS, MDOT SHA risks foreclosing its obligation to undertake a meaningful evaluation of the project's imminent and far-reaching impacts in the later stages of the NEPA process.

4. MDOT SHA has failed to consider the project's impacts from phasing.

In its June 28 letter, MDOT SHA contends that "[p]roject or construction phasing is irrelevant to the analysis of whether alternatives should be retained for detailed study in the DEIS." We disagree. "The potentially significant impacts from phasing . . . must be adequately studied" during the NEPA process, particularly for projects such as this one that may span many years from start to finish.[18] In addition, when the planning of future phases progresses beyond the "speculative" or "mere proposal" stage, lead agencies have reason to consider impacts from phasing.[19]

Here, MDOT SHA's approach to phasing the project does not adequately account for local transportation issues, travel demands, and constraints on I-495 and I-270 in Montgomery County. It also fails to account for Prince George's County's land use and transportation plans, such as the development of the University of Maryland Capital Region Medical Center off of I-495. As MDOT SHA's planning process moves towards completion, so must the lead agencies' consideration of the phased project's impacts from diverting traffic to use the Inter-County Connector, which requires the completion of the I-270 Managed Lanes expansion and south on I-

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[17] In particular, the ARDS fail to consider adequately the Project's impacts on traffic congestion chokepoints at key interchanges and intersecting cross streets that currently experience extremely congested conditions, including I-495 at MD-355, MD-185, MD-97, MD-650, I-95, US-50, MD-4, and MD-5; the area surrounding the Bethesda BRAC facility on MD-355, MD-185, and Jones Bridge Road; and the I-495 Inner Loop at MD-450, MD-202, MD-4, MD-337, and MD-5.

[18] *Davis v. Mineta*, 302 F.3d at 1123-24, *abrogated on other grounds by Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016).

[19] *See, e.g., O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 237 (5th Cir. 2007).

495 through the bottleneck over the American Legion Bridge before the project can expand to the constrained areas of I-495.

5. MDOT SHA's analysis fails to satisfy the burden imposed on projects that impact parkland and other protected areas, including those protected by the CCA.

MDOT SHA stated in its June 28 letter that "impacts to sensitive resources including parkland and the means to avoid and minimize those impacts is of utmost importance." M-NCPPC appreciates MDOT SHA's desire to work collaboratively to identify appropriate avoidance and mitigation measures. Nevertheless, M-NCPPC reiterates its position that the appropriate time to identify avoidance and mitigation measures is before eliminating reasonable alternatives that have fewer environmental impacts than the retained alternatives, not after. NEPA requires—and courts have recognized—that agencies must take a "hard look" at impacts to sensitive resources throughout the environmental review process, even prior to rejecting alternatives.[20] To satisfy its NEPA obligations, MDOT SHA must consider alternatives with a range of environmental impacts that meet the project's purpose and need, regardless of which build alternative it eventually chooses.

6. MDOT SHA's analysis uses vague, unsupported conclusions and inadequate, incomplete analysis.

NEPA's mandate to consider reasonable alternatives to meet the project's purpose and need requires lead agencies to base their evaluation on concrete, complete, and adequate analyses.[21] To date, however, MDOT SHA's analysis has relied on flawed premises, inaccurate data, and incomplete information, as follows:

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[20] *See Davis v. Mineta*, 302 F.3d at 1120 (NEPA review failed to take a "hard look" by rejecting avoidance alternatives and failing to consider transportation systems management, mass transit, and various build alternatives by simply concluding that they were unfeasible); *see also Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp.*, 153 F.3d 1131 (10th Cir. 1998) ("§4(f) requires the problems encountered by proposed alternatives to be truly unusual or to reach extraordinary magnitudes if parkland is taken." (internal quotation marks and citation omitted)); *Ass'n Concerned About Tomorrow, Inc. (ACT) v. Dole*, 610 F. Supp. 1101, 1113 (N.D. Tex. 1985) (requiring supplementation of a NEPA analysis when a road would have traversed public parkland containing relatively unique vegetation); *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 584 (6th Cir. 2014) (NEPA review must consider the unique characteristics of a region); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 479 F. Supp. 2d 607, 634 n.33 (S.D. W. Va. 2007) (same), *rev'd and remanded on different grounds sub nom. Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).

[21] *Davis v. Mineta*, 302 F.3d at 1118-19; *see also N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (remanding NEPA review of Monroe Connector toll road because the North Carolina Department of Transportation and FHWA failed to disclose assumptions in their data, provided the public with erroneous information, and improperly assumed that the project already existed in assessing the no-build alternative); *Hwy. J Citizens Grp. v. U.S. Dep't of Transp.*, 656 F. Supp. 2d 868, 887 (E.D. Wis. 2009) (finding NEPA review deficient because it did not include a "thorough analysis" of the indirect effects of highway expansion project on growth).

a. MDOT SHA has failed to incorporate into the Study a comprehensive local road analysis, including consideration of impacts from stormwater which may be exacerbated by the impervious surfaces of the Managed Lane roadways;

b. MDOT SHA has failed to refine the ArcGIS Mapping Tool to allow homeowners to locate their properties and determine whether and what impacts are proposed on their properties;

c. The ARDS' transportation results fail to detail how MDOT SHA simulated the Managed Lanes Study, rendering it impossible for any participating agency or the public to replicate the Study or assess its accuracy;

d. MDOT SHA has not provided sufficient detail on the noise impact evaluation process, such as a description of how it conducted the analysis and the circumstances under which state or federal law require noise mitigation;

e. The ARDS reflect a bias toward build alternatives without an independent analysis of transportation benefits, leaving it unclear whether the Managed Lanes will simply address artificially created congestion due to elimination of the connector/distributor lanes system or instead address already existing congestion;

f. The Traffic Operations Evaluation does not explain how MDOT SHA has simulated existing traffic congestion or calibrated congestion at key interchanges and intersecting cross streets;

g. MDOT SHA has not provided the exact project phasing plan, preliminary capital cost estimates by roadway segment and general cost type, or detailed cost breakdowns by construction item;

h. The ARDS do not discuss the transition between the existing I-495 local and through lanes from the Woodrow Wilson Bridge and the terminus of the Managed Lanes south of MD-5; instead, MDOT SHA has apparently abdicated its responsibility to do so to the Virginia Department of Transportation despite the roadway's access to the most significant economic assets in Prince George's County; and

i. MDOT SHA's plan to use four-hour analysis periods—as opposed to a longer analysis period with more qualitative assessment tools than the VISSIM multi-modal traffic flow simulation software— to evaluate congestion is squarely at odds with the purpose and need's statement that both I-270 and I-495 remain congested for seven to ten hours each day.

Despite M-NCPPC raising the aforementioned points in previous correspondence, MDOT SHA has failed to consider our recommendations. Instead of developing more rigorous data analysis, MDOT SHA has eschewed the insight gleaned from the Intercounty Connector (MD-200) project, leaving the cooperating agencies and public without sufficient information to ensure that

the NEPA review process achieves the Study's goals and protects parkland and other sensitive resources.

Again, M-NCPPC acknowledges the necessarily more limited role of the initial stages of NEPA review and fully expects MDOT SHA to perform a complete and thorough alternatives and impacts analysis through the development of the EIS. Still, the groundwork for that full analysis should have been laid in defining the purpose and need and selecting the ARDS; MDOT SHA should employ a rigorous approach backed by accurate and reliable analysis prior to eliminating from further consideration alternatives that will have no or a lesser impact on parkland and other sensitive resources. Having retained for further study only alternatives with similar impacts to parkland, MDOT SHA has failed to meet its burden to take a "hard look" throughout the NEPA review process.[22]

7. MDOT SHA has withheld material information from cooperating agencies and the public.

By law, MDOT SHA must "make information available to the participating agencies as early as practicable in the environmental review process regarding the environmental and socioeconomic resources located within the project area and the general locations of the alternatives under consideration."[23] Congress has specifically recognized that, in the context of large transportation projects, the essential information that agencies may make available includes "geographic information systems mapping."[24] Despite statutory requirements and repeated requests by M-NCPPC staff, MDOT SHA has not provided the available geographic information systems mapping coordinates that are used to refine the project's limits of disturbance beyond the rudimentary map published on the project's website.[25] As a result, M-NCPPC staff and the public cannot identify the footprint of the project's disturbance with any meaningful degree of precision. Similarly, MDOT SHA has refused to provide origin/destination data that would allow M-NCPPC staff and the public to understand MDOT SHA's basis for studying the terminus at MD-5. By refusing to provide this essential information to M-NCPPC, other participating agencies, and the public, MDOT SHA has fallen woefully short in its duty to disclose promptly the information upon which it bases its major decisions.[26]

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[22] *See Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 170 (4th Cir. 2018) (Forest Service violated NEPA by failing to study alternative off-forest routes at the alternatives stage and failing to consider landslide risks, erosion, and degradation of water quality in FEIS); *see also Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1100 (9th Cir. 2016) (BLM failed to address plaintiff environmental groups' concerns throughout the NEPA review process, including concerns about impacts to water quality and funding for long-term mitigation and reclamation).

[23] 23 U.S.C. § 139(h)(2).

[24] *Id.*

[25] Md. Code Ann., Land Use § 15-304(a) (State officials are obligated to furnish the M-NCPPC with information required for its work "[w]ithin a reasonable time after the [agency] makes a request").

[26] *See Conservation Law Found. v. FHA*, 630 F. Supp. 2d 183, 214 (D.N.H. 2007) (agencies may not "withhold information from the public that leaves it with the mistaken impression that the selected alternative will be substantially more effective in achieving" a project goal than may actually be the case); *Sierra Nev. Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 992-93 (E.D. Cal. 2005) (agency's failure to "provide essential

8. MDOT SHA has not convened the required principals meeting with M-NCPPC in this case.

MDOT SHA insinuates in the Follow Up Response that a "Principals Plus One" meeting occurred recently on June 3. That characterization is untenable for several reasons.

First, MDOT SHA has never provided the M-NCPPC Chair and Vice-Chair with any notice that a Principal Plus One meeting was being scheduled or convened. To the contrary, as you are aware, the June 3 meeting was convened on a core premise that our staff would meet with MDOT SHA staff to accommodate your desires to discuss an informal "sneak preview" of the staff recommendations to the agency's governing body. Any *post hoc* attempt to re-characterize the significance of the June 3 meeting would run afoul of the mandate that M-NCPPC's participation in the scoping process must be meaningful.[27] Second, even during the meeting, Vice Chair Anderson and others attending it expressly disclaimed that they had any authority to attend a Principal Plus One meeting before M-NCPPC's governing body had taken a formal position. Third, given the context and extremely rushed timing of MDOT SHA's request to meet on June 3, it would have been unreasonable *per se* to expect the M-NCPPC to participate fully in a Principal Plus One meeting on such short notice and, for that reason alone, our staff would not have agreed to take the meeting under any such understanding.

Accordingly, this letter also constitutes our formal request that MDOT SHA convene a meaningful Principal Plus One meeting with M-NCPPC, and otherwise comply with its obligation to "[u]se the environmental analysis and proposals of [M-NCPPC] to the maximum extent possible consistent with [MDOT SHA's joint] responsibility as [a] lead agency."[28]

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Should you have any questions regarding the concerns raised above, please contact our agency liaisons designated for this project, Debra Borden and Carol Rubin, respectively. Also, please

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information, already in the hands of the agency" violated the requirement in 40 C.F.R. §1501.4(b) to "involve environmental agencies, the applicant, and the public, to the extent practicable."); U.S. DEPT. OF TRANSP., COLLABORATIVE PROBLEM SOLVING: BETTER AND STREAMLINED OUTCOMES FOR ALL 5.3, App'x F (rev. 2006), *available at* https://www.environment.fhwa.dot.gov/Pubs_resources_tools/resources/adrguide/adrguide.pdf (agencies should "[b]e open and forthcoming; [and] share information, ideas and concerns," while exercising "good faith" to "provide information and decisions when promised").

[27] *See e.g. International Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1263 (D. Wyo. 2004) (court rejected lead agency's "*pro forma* compliance with NEPA procedures [and] *post hoc* rationalizations as to why and how the agency complied with NEPA"). (Citations omitted.)

[28] 40 C.F.R. §§ 1501.6 (a)(2)-(3) and 1508.5; *see also, e.g., Colorado Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1215-16 (D. Colo. 2011) (recognizing that a state agency may be a cooperating agency), *amended on reconsideration*, No. 08-CV-01624, 2012 WL 628547 (D. Colo. Feb. 27, 2012); Council on Envtl. Quality, *Designation of Non-Federal Agencies to Be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act* (July 28, 1999), *available at* https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ceqcoop.pdf (same).

contact us regarding scheduling the appropriate Principals Plus One meeting as soon as possible. Thank you for your consideration in this matter.

Sincerely,

Elizabeth M. Hewlett

Elizabeth M. Hewlett
Chair

Casey M. Anderson
Vice-Chair

cc: Adrian R. Gardner, General Counsel
M-NCPPC
Andree M. Checkley, Director
Prince George's County Planning Department
Darin D. Conforti, Director
Prince George's County Department of Parks and Recreation
Michael F. Riley, Director
Montgomery County Department of Parks
Gwen Wright, Director
Montgomery County Department of Planning
Debra S. Borden, Principal Counsel
M-NCPPC
Carol S. Rubin, Special Project Manager
Montgomery County Planning Department
Diane Sullivan, Director,
Urban Design & Planning Review Div, , National Capital Planning Commission