



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

6611 Kenilworth Avenue • Riverdale, Maryland 20737

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DRAFT

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

Tim Smith
Administrator
Maryland Department of Transportation
State Highway Administration
Mailstop C-400
MDOT State Highway Administration
PO Box 717
Baltimore, MD 21203-0717

Re: I-495 & I-270 Managed Lanes Study – Supplemental Draft Environmental Impact Statement

Dear Ms. Mar and Mr. Smith:

On behalf of the Maryland-National Capital Park and Planning Commission (“M-NCPPC” or “the Commission”), the Montgomery County Planning Board submits the following comments regarding the Supplemental Draft Environmental Impact Statement (“SDEIS”) prepared by the Maryland Department of Transportation State Highway Administration (“MDOT SHA”) and the Federal Highway Administration (“FHWA”) (collectively the “Lead Agencies”) for the I-495 & I-270 Managed Lanes Study (the “Project”). Through this letter, the Commission shares its concerns with the Lead Agencies' updated analysis underpinning the SDEIS, including, among others, concerns resulting from the limited scope of the Project's current National Environmental Policy Act (“NEPA”) analysis, potential impacts to protected parkland and natural resources subject to M-NCPPC's jurisdiction, equity and cultural considerations, transportation and local roadway impacts, and generally inadequate mitigation measures. Although the Lead Agencies narrowed the scope of their preferred alternative (the “Preferred Alternative”) in response to comments to the Draft Environmental Impact Statement (“DEIS”), significant issues remain that require further review and potential adjustments to the Project's planning and design, along with

commitments to ensure that the Lead Agencies comply with NEPA and all other applicable federal laws, including the Capper-Cramton Act (the “CCA”).

M-NCPPC does not intend for its comments to express a decision to oppose or support the Project or the Lead Agencies’ Preferred Alternative. Rather, as the governing body of this Cooperating Agency, the Commission is carrying out its responsibilities as the planning agency for Montgomery and Prince Georges Counties and as the parkland steward in these counties. M-NCPPC has made the Lead Agencies aware of its concerns regarding the environmental review process, attributable largely to the Lead Agencies’ failure to undertake a comprehensive analysis of reasonable alternatives, impacts, and mitigation measures, and failure to incorporate best practices in transportation, environmental protection, and land use planning.

The Lead Agencies' approach remains at odds with M-NCPPC's statutory obligation to make well-reasoned and informed decisions regarding parkland, cultural resources, and historic resources. Still, M-NCPPC is, as it has been throughout this process, committed to collaborating with the Lead Agencies as they continue their environmental review of the Project and proceed through the NEPA review process. The Commission remains optimistic that the Lead Agencies will consider changes to the Project that minimize impacts to parkland, streams, and protected cultural and historic resources. M-NCPPC is also hopeful that the Lead Agencies will take meaningful steps to responsibly address the unavoidable impacts to parkland that could result from the Project, notwithstanding its narrower scope compared to the build alternatives initially proposed.

I. Background

A. The Maryland-National Capital Park and Planning Commission

The Maryland General Assembly created M-NCPPC in 1927 to plan for the orderly development, acquisition and maintenance of parkland and open space, and to protect natural resources in Prince George's and Montgomery Counties.¹ Since that time, M-NCPPC has acquired several hundred parks in the two counties, including parks requiring special protection due to their acquisition with funds made available from the federal government and state of Maryland pursuant to the CCA.

¹ The Maryland Court of Appeals has outlined M-NCPPC's regional functions as follows:

The [M-NCPPC], as its name suggests, administers parks, public recreation, and, in conjunction with the governments of Prince George's and Montgomery counties..., participates in the planning of development within the [Maryland-Washington Regional District]. Among other things, [a Maryland statute] authorizes the MNCPPC to: (1) acquire property for parks, forests, roads, and other public spaces; (2) rename streets and highways and number and renumber houses within the district to fix mistakes, remove confusion, and establish uniformity; (3) acquire, improve, and manage land for flood control purposes; (4) establish road grades in Montgomery County; and, (5) recommend amendments to the zoning laws and subdivision regulations.

Cly. Council of Prince George's Ciy. v. Zimmer Dev. Co., 120 A.3d 677, 699 (2015) (internal citations omitted).

The parkland acquired with CCA funds includes areas in the vicinity of the Clara Barton Parkway covered by agreements between M-NCPPC, the National Capital Planning Commission (“NCPC”), and the federal government that require the land to be used for park purposes and give M-NCPPC authority to approve or reject its use for other purposes.

The Lead Agencies engaged M-NCPPC as a Cooperating Agency to provide input regarding the environmental impacts of the Project. To fulfill its role as a Cooperating Agency, M-NCPPC must ensure that the Project is undertaken in compliance with NEPA and that M-NCPPC complies with its own mandates under state and federal law. As a Cooperating Agency, M-NCPPC staff has taken its responsibilities seriously by fully engaging with the Lead Agencies and the Interagency Working Group established by the Lead Agencies during every stage of review of the Project.

B. Development of the Preferred Alternative

The stated purpose of the Project is to develop travel demand management solutions that address congestion, improve trip reliability on I-495 and I-270 within the Project limits, and enhance existing and planned multimodal mobility.² The stated needs for the Project are: accommodating existing traffic and long-term traffic growth, enhancing trip reliability, providing additional roadway travel choices, enhancing homeland security, and facilitating the movement of goods and the ability of businesses to provide services.³ The Project limits are: I-495 from south of the George Washington Memorial Parkway in Virginia, including improvements to the American Legion Bridge (“ALB”) over the Potomac River, to the west of MD 5 in Maryland and along I-270 from I-495 to north of I-370, including the east and west I-270 spurs in Montgomery and Prince George’s Counties.⁴

The Lead Agencies issued their DEIS and Draft Section 4(f) Evaluation for the Project and published a Notice of Availability in the Federal Register on July 10, 2020. The Lead Agencies considered a range of 15 preliminary alternatives and retained and analyzed seven alternatives in the DEIS. The DEIS noted that after circulating the DEIS and receiving comments, the Lead Agencies would issue a Final Environmental Statement (“FEIS”) that would identify the Preferred Alternative as well as respond to substantive comments. M-NCPPC, as a Coordinating Agency, provided comments to MDOT SHA by letter dated November 9, 2020, raising concerns about the effect of the alternatives on parkland, traffic and historic resources, wetlands, and environmental justice communities. In January 2021, the Lead Agencies announced Alternative 9 as their Preferred Alternative based on the results of public comment and the ongoing traffic, engineering, financial, and environmental analyses.⁵ Alternative 9 envisioned the addition of two priced, managed lanes in each direction on I-495 and the conversion of one existing high-occupancy

² SDEIS at 1-2.

³ SDEIS at 1-2, 1-3.

⁴ SDEIS at 1-2.

⁵ SDEIS at 1-1.

vehicle lane to a price-managed lane and addition of one priced, managed lane in each direction on I-270.⁶

After Coordinating Agencies and other stakeholders raised concerns about the impacts of Alternative 9 and in particular those on and around I-495 east of the I-270 spur to MD 5, the Lead Agencies decided to change the Preferred Alternative to Alternative 9 – Phase 1 South, which would consist of building a new American Legion Bridge and delivering two high-occupancy toll managed lanes in each direction on I-495 from the George Washington Memorial Parkway in Virginia to east of MD 187 on I-495, and on I-270 from I-495 to north of I-370 and on the I-270 eastern spur from east of MD 187 to I-270.”⁷ The Lead Agencies issued their SDEIS on October 1, 2021 describing the change in the Preferred Alternative and seeking comments from interested parties.

While M-NCPPC appreciates that the Lead Agencies have narrowed the Project to avoid the most significant impacts, the newly envisioned Preferred Alternative should be adjusted to have the fewest practicable impacts. Through this letter, M-NCPPC provides comments focused on that purpose.

II. Discussion

A. The Preferred Alternative must reflect the “No-Build Alternative” outside of Phase 1 and should include both transportation demand management (formerly Alternative 2) and transit (formerly Alternative 14).

The Lead Agencies should clarify their obligation to conduct a new or updated NEPA analysis when considering improvements outside of Phase 1 of the Project. Although the area outside Phase 1 (i.e., I-495 east of Old Georgetown Road) is neither specifically included as part of the Preferred Alternative nor included in the upcoming 2022 update to the Visualize 2045 Long Range Plan being advanced by the National Capital Region Transportation Planning Board (“TPD”), the SDEIS does not indicate clearly that I-495 east of Old Georgetown Road is now excluded from the NEPA analysis.⁸ To the contrary, the SDEIS states, “There is no action or no improvements on I-495 east of the I-270 east spur to MD 5. While the Preferred Alternative does not include improvements to the remaining parts of I-495 within the scope of this Study, *improvements on the remainder of the interstate system may still be needed in the future* and would advance separately, subject to additional environmental studies, analysis and collaboration with the public, stakeholders and local agencies.”⁹ While the Lead Agencies correctly acknowledge that future environmental studies and analysis would be needed prior to future phases, the Lead Agencies should clarify in the FEIS that a new *NEPA* study is required by law prior to any development in the area of I-495 east of Old Georgetown Road.

⁶ DEIS at ES-8.

⁷ *Id.*

⁸ SDEIS at 1-2.

⁹ SDEIS at ES-1 (emphasis added).

The Lead Agencies' state in the SDEIS that all of the parkland outside of the Phase 1 area is now "avoided." Should the Lead Agencies determine to build future phases, it stands to reason that they would be required to conduct a new study to determine the impacts of the future alignments on natural resources.¹⁰ This must be the case even if the Preferred Alternative reflects the "No-Build Alternative" for future phases, since the NEPA analysis to date did not adequately consider all potential impacts to protected parkland and natural resources, such as local waterbodies.¹¹ The Lead Agencies also must ensure that their selection of the Preferred Alternative does not commit them to a course of action that they have not fully analyzed.¹²

With that said, even the Preferred Alternative requires further analysis. For example, if the portion of I-495 outside of Phase 1 is no longer part of the Managed Lanes Study, the transition areas to I-495 on the east spur travelling south and north from the ALB to Old Georgetown Road from the "split" may not be necessary. Creating the transition in this manner would encourage vehicle travel to continue on I-495, as described in the Commission's SDEIS Comment #6.¹³ Therefore, as MDOT Secretary Slater noted during the Washington Council of Government's Transportation Planning Board (TPB) July 21, 2021, meeting, TDM such as dynamic signage is necessary to direct traffic to use the I-270/MD 200 combination for travel along the I-95 corridor.¹⁴ Encouraging vehicle travel on that route will provide additional capacity on the topside of I-495 for local travel needs. All of these impacts must be properly assessed, especially if the Project will include future phases.¹⁵

Project-related mitigation also should include travel demand management and transportation system management ("TSM") measures, such as improvements along impacted corridors outside the project limits, including I-495 between the I-270 western spur and US 50. The Lead Agencies should consider incorporating into the Project TSM improvements, such as those being implemented along I-370 as part of the I-270 Innovative Congestion Management project, including variable message signage and ramp metering. FHWA's NEPA regulations are designed to facilitate this type of analysis before FHWA commits to an alternative.¹⁶ The Lead Agencies

¹⁰ See SDEIS at ES-13 ("The Preferred Alternative, with build improvements only within the limits of Phase 1 South, avoids over 100 acres of parkland and hundreds of wetland and stream features.").

¹¹ See 40 C.F.R. § 1502.9(c)(1)(i), (ii) (requiring a supplemental EIS if an agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts").

¹² *Defs. of Wildlife v. N.C. DOT*, 762 F.3d 374, 397 (4th Cir. 2014).

¹³ M-NCPPC's SDEIS Comment/Response Errata dated November 4, 2021.

¹⁴ mwkog.org/events/2021/7/21/transportation-planning-board/

¹⁵ See *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 426 (4th Cir. 2012) (quoting *Coal. on W. Valley Nuclear Wastes v. Chu*, 592 F.3d 306, 311 (2d Cir. 2009)) (prohibiting agencies from engaging "in segmentation, which involves 'an attempt to circumvent NEPA by breaking up one project into smaller projects and not studying the overall impacts of the single overall project'").

¹⁶ See 23 C.F.R. § 771.111(f) (purpose of FHWA's NEPA regulations is to "ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated").

should consider incorporating TSM/TDM and transit into the Project as part and parcel of the Preferred Alternative, not as ancillary components.

While the Lead Agencies considered these elements as alternatives early in the NEPA process, they quickly eliminated them from further consideration, finding that they do not “support long-term traffic growth” or “would not enhance trip reliability.”¹⁷ After dropping these alternatives, MDOT SHA promised that “transit solutions are part of the overall traffic relief plan” and would play a role in the Preferred Alternative. The SDEIS’s brief discussion of “transit-related elements”—which describes the ability of transit buses to use high-occupancy travel lanes without charge, connections to existing transit stations, and regional transit improvements (e.g., new bus bays and parking capacity in two areas)—contemplates transit improvements that fall considerably short of the type necessary to have a real impact on traffic congestion in the area.¹⁸ In order to follow through on transit commitments the Lead Agencies made to Montgomery County during the early stages of the NEPA process, which are integral to the Project’s success, the Lead Agencies should designate transit as a contributing alternative, as opposed to an ancillary improvement.

B. The SDEIS, does not consider adequately environmental justice, equity, and historic resource preservation concerns.

The Lead Agencies must identify impacts to all resources of environmental, cultural, and historic significance, as opposed to evaluating these concerns in a piecemeal approach.¹⁹ NEPA requires the Lead Agencies, in consultation with the Coordinating Agencies, to “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”²⁰ The consulting parties must consult with one another to find ways to avoid, minimize, or mitigate adverse effects on historic property and summarize their agreed-upon course of action in a memorandum of agreement.²¹ This consultation process should occur early in the NEPA review process to allow adequate time for the agencies to consider all potential impacts on historic properties and alternatives to avoid, minimize, or mitigate such impacts.²² In other words, the Lead Agencies must take steps now, before promulgation of the FEIS, to conduct a comprehensive evaluation of these properties or historic and cultural significance.

M-NCPPC also notes that while the Lead Agencies have taken steps to consider environmental justice and features of cultural and historic significance, they must take more significant action to ensure that minority and low-income populations are not disparately impacted by the Project. Of note, the Lead Agencies have consulted with local stakeholders and conducted a ground-

¹⁷ “Screened Alternatives,” MDOT SHA, <https://oplanesmd.com/environmental/alternatives/screened-alternatives/> (last visited Oct. 29, 2021).

¹⁸ SDEIS at 2-22 to 2-23.

¹⁹ *See, e.g.*, 54 U.S.C. § 306108; 36 C.F.R. 800 *et seq.* (requiring agencies to consider a federal project’s effects on historic resources and consult with parties having jurisdiction over the same).

²⁰ 36 C.F.R. §800.6(a).

²¹ 36 C.F.R. § 800.6(c).

²² 36 C.F.R. § 800.8(a)(2).

penetrating radar survey to identify *some* areas of potential disturbance to the impacted historic cemeteries, such as the Morningstar Tabernacle No. 8 Moses Hall and Cemetery. While this effort is a good first step, the Lead Agencies’ assessment of impacts needs to include *all* of the cemetery property (including *all* potential grave sites), the results of which should inform specific mitigation measures that the Lead Agencies tailor appropriately to reduce or avoid those impacts to the maximum extent possible.

Furthermore, the SDEIS indicates that environmental justice issues omitted from the SDEIS will be remedied in the FEIS. This is far from a best practice since it obstructs public comment and community input. Requiring the impacts for minority communities to “take a back seat” until after selection of a preferred alternative means that disproportionate impacts are excluded from consideration in formulating the preferred alternative and, thus, do not receive the attention by the Lead Agencies that NEPA and Title VI of the Civil Rights Act of 1964 (“Title VI”) demand.²³ This course of action also runs afoul of Department of Transportation Order 5610.2(a), which commits the Department to promote the principles of environmental justice “by fully considering environmental justice principles *throughout planning and decision-making processes* in the development of programs, policies, and activities, using the principles of the National Environmental Policy Act of 1969 . . .” FHWA Order 6640.23A espouses a similar theme, committing FHWA to “identify and prevent discriminatory effects . . . to ensure that social impacts to communities and people are recognized early and continually throughout the transportation decision-making process—from early planning through implementation.” Acting later, after the Lead Agencies have already responded to stakeholder concerns and continued designing the Project, would violate Title VI, these orders, and fundamental environmental justice principles.

The SDEIS’s community and environmental justice analysis of the Morningstar Tabernacle No. 88 Moses Hall and Cemetery and the Poor Farm Cemetery acknowledges that the Project may impact culturally significant sites. However, the SDEIS’s environmental justice discussion relates primarily to *current* minority population concentrations and fails to address how the Project may exacerbate the historical and ongoing injustice to small African American communities displaced by construction of the Beltway.²⁴ The National Trust for Historic Preservation explicitly acknowledged this issue as key to social justice by selecting the Moses Cemetery as one of the 11 most endangered historic sites in the United States in 2021.²⁵ To their credit, the Lead Agencies

²³ See 2 U.S.C. § 2000d *et seq.* (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”); Promising Practices for EJ Methodologies in NEPA Reviews, FED. INTERAGENCY WORKING GROUP ON ENVIRON. JUSTICE & NEPA COMM. (March 2016), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf (“Agencies may wish to consider which alternative(s) have the least impact to minority populations and low-income populations and alternatives that would minimize or mitigate disproportionately high and adverse impacts as a factor when identifying reasonable alternatives and the preferred alternative”).

²⁴ SDEIS at 4-33.

²⁵ “Discover America’s 11 Most Endangered Historic Places for 2021,” NAT’L TRUST FOR HIST. PRESERVATION (June 3, 2021), <https://savingplaces.org/stories/11-most-endangered-historic-places->

promised to “fully investigate areas to be impacted by construction.” A “full investigation,” however, means complete ground-penetrating radar surveys of all potential historic grave sites, as well as robust and frequent communication with local community members. The Lead Agencies must ensure that their analysis is fulsome and exhaustive prior to approving any further development in these historically and culturally significant areas that already faced significant disruption in the past.²⁶

Additionally, neither the DEIS nor the SDEIS reference any cumulative effects to specific cultural resources. For instance, additional historical research conducted subsequent to the DEIS in Cabin John related to the Morningstar Tabernacle No. 88 Moses Hall and Cemetery and associated Gibson Grove community show that the construction of the Beltway divided the fraternal hall and cemetery from the neighboring church, physically fragmented the community, and contributed to the decline of these institutions.²⁷ The community’s decline, in turn, contributed to the closure and loss to fire of the Moses fraternal hall. As currently designed, the Preferred Alternative will result in a “long-term diminishment of the property’s setting and feeling due to construction impacts on a small sized property.”²⁸ This “diminishment” is just the latest in a series of diminishments beginning with the Beltway that the Lead Agencies do not appear to account for or seek to mitigate. By failing to account for cumulative impacts on cultural resources, the Lead Agencies risk violating NEPA and Title VI.²⁹

C. The Preferred Alternative’s design will shift bottleneck issues instead of relieving traffic congestion at the ALB.

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²⁶ On August 10, 2021, the U.S. Senate passed what may become, if enacted, a once-in-a-generation investment in infrastructure throughout the country with bipartisan support. Included in the measure is a commitment to “Reconnecting Communities,” a concept not even mentioned in the SDEIS. “Too often, past transportation investments divided communities or it left out the people most in need of affordable transportation options. In particular, significant portions of the interstate highway system were built through Black neighborhoods. The Federal Infrastructure Bill creates a first-ever program to reconnect communities divided by transportation infrastructure. The program will fund planning, design, demolition, and reconstruction of street grids, parks, or other infrastructure through \$1 billion of dedicated funding.” Fact Sheet: Historic Bipartisan Infrastructure Deal, THE WHITE HOUSE (July 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/28/fact-sheet-historic-bipartisan-infrastructure-deal/>. While this is a grant program that does not bear directly on the Project, the Lead Agencies should take notice of Congress’s focus on restoring divided communities and commitment to considering these communities in future transportation planning.

²⁷ See generally Alexandra Jones, *Gibson Grove Gone But Not Forgotten: The Archaeology of an African American Church*, Univ. of Cal., Berkeley (2010), https://escholarship.org/content/qt8z67f3ns/qt8z67f3ns_noSplash_ef033302034ec0876e83c89c1b0c66f0.pdf.

²⁸ SDEIS at 4-36.

²⁹ See *Te-Moak Tribe of W. Shoshone of Nev. v. United States DOI*, 608 F.3d 592, 607 (9th Cir. 2010) (Bureau of Land Management’s environmental assessment inadequate because the agency failed to conduct a proper analysis of a project’s cumulative impacts on cultural resources).

A detailed technical transportation review of the SDEIS concludes that the Preferred Alternative will relieve congestion at the ALB. However, the Preferred Alternative does not eliminate congestion entirely and instead shifts it from the vicinity of the ALB (e.g., McLean and Potomac) to other areas in Maryland. While some of these bottleneck shifts were expected, the degree of congestion resulting from the proposed project is severe on I-270 north of I-370, on the Inner Loop on the top side of the Beltway, and on the Inner Loop in Prince George’s County. These bottleneck shifts are Project-related impacts, and so the Lead Agencies should address mitigation measures to minimize these projected deficiencies in the SDEIS and incorporate them into the Project design. NEPA requires the Lead Agencies to consider mitigation measures that address adverse impacts, including, among others, areas of traffic congestion points.³⁰

Specifically, Phase 1A and 1B (also known as the I-270 Pre-NEPA Study) should be constructed concurrently to reduce or eliminate bottlenecks on I-270. For the other bottleneck issues, M-NCPPC recommends the following design changes to the Preferred Alternative:

- Eliminate the managed lanes from the I-270 Eastern Spur between I-270 and I-495 because I-270 traffic headed south to the eastern spur would not use the managed lane network. The managed lanes would provide minimal travel time benefits for drivers from Gaithersburg and Rockville to most Montgomery County destinations.
- Eliminate the managed lanes and exit/entrance ramps from I-495 between the two spurs.
- Managed lane traffic destined to and from the Inner Loop should enter/exit the managed lane network at the River Road crossover interchange.

D. The FEIS must address impacts to the local road network during this phase of Project planning.

Because the SDEIS lacks travel time index (“TTI”) results from areas extending beyond the Managed Lanes Study area, it is critical that the Lead Agencies address impacts to the local road network in the FEIS in order to incorporate appropriate considerations into the Project design. To do this, the Lead Agencies must extend the Interchange Access Point Approval (“IAPA”) study now under development beyond a single intersection, since the increased congestion on I-270 and I-495 undoubtedly will lead both to peak spreading effects and local traffic diversions that the Lead Agencies have not considered adequately to date.

A simple example demonstrates the issue that the Lead Agencies need to consider. While it can take over 30 minutes to travel two to three miles on some segments of the Beltway, as presented in this SDEIS, this is not always the case. Traffic will vary on a daily basis, and some travelers will identify shorter travel time routes, regardless of the impact to local streets. The scope therefore agreed upon by FHWA for the IAPA (i.e., performing traffic operational analyses at ramp terminal intersections and one adjacent intersection on both sides of the road beyond service interchanges

³⁰ See *O'Reilly v. United States Army Corps of Eng'rs*, 477 F.3d 225, 233-34 (5th Cir. 2007) (environmental assessment failed to demonstrate that mitigation measures adequately address and remediate adverse impacts to traffic and transportation patterns).

that the Managed Lane Study will modify) is inadequate in areas where either I-270 or I-495 exhibit high TTIs and extreme congestion. In those areas, the Managed Lane Study area should follow all significant diversionary traffic that switches to the local road network, defined as all non-interstate roads. The Lead Agencies can determine the extent of this additional study area by adding routes on parallel roads with travel times equal to the general purposes lane travel time.

Courts have found that, where impacts on local road networks are possible, FHWA and its state partners must address these issues prior to or in the FEIS. In *Sierra Club v. United States DOT*, plaintiffs successfully challenged a FHWA decision to build a toll road across an Illinois river without adequately evaluating the extent to which the road would alleviate local transportation problems.³¹ There, FHWA decided to wait for additional studies to demonstrate that the selected alternative would improve travel times, but the court required FHWA to produce additional studies evaluating the degree to which various alternative would meet current transportation needs and improve travel times.³² In another case where FHWA and the New Hampshire Department of Transportation proposed a highway expansion to address traffic congestion, FHWA’s traffic sensitivity analysis failed to account for the project’s indirect effects on secondary road traffic.³³ Finding that the EIS process “guarantees that the relevant information will be made available to the larger audience that may also play a role both in the decision making process and the implementation of that decision,” the court remanded the FEIS to the lead agencies.³⁴ FHWA must expand the scope of the IAPA in order to avoid relying on a study with similar deficiencies.

E. The Preferred Alternative’s bicycle and pedestrian improvements are inconsistent with local master plans, particularly related to design.

The Lead Agencies made commitment during prior coordination meetings with Commission staff to construct the new high-occupancy travel lanes in accordance with local master plans. The SDEIS indicates that the FEIS will include an “updated review of the county and local master plans,” but the document does not contain any statements reflecting this commitment.³⁵ Courts generally expect agencies to honor commitments made prior to or during the NEPA review process, even if a Project otherwise complies with NEPA.³⁶ Accordingly, M-NCPPC respectfully requests that the Lead Agencies memorialize this commitment and take steps to implement it in the FEIS.

³¹ 962 F. Supp. 1037, 1044 (N.D. Ill. 1997).

³² *Id.*

³³ *Conservation Law Found. v. FHA*, 630 F. Supp. 2d 183, 213 (D.N.H. 2007) (quoting *Robertson v. Methrow Valley Citizen's Council*, 490 U.S. 332, 349 (1989)).

³⁴ *Id.* at 216.

³⁵ SDEIS at p. 4-106.

³⁶ *Saint Paul Branch of the NAACP v. United States DOT*, 764 F. Supp. 2d 1092, 1109 (D. Minn. 2011) (“The Court hopes and expects that the Agencies will continue to honor their commitment to resolving community concerns going forward, despite their technical compliance to NEPA.”); *see also Cty. of Rockland v. FAA*, 335 F. App'x 52, 55 (D.C. Cir. 2009) (suggesting in dicta that an agency’s “firm commitment” to undertake an initiative during the NEPA process may be binding upon the agency).

F. The Cooperating Agencies have not completed their analysis of the parkland limit of disturbance, and so the FEIS will need to resolve potential parkland impacts.

Before the Lead Agencies finalize the FEIS and any work can occur on parkland, M-NCPPC must review and approve the limits and nature of the work and grand permission for construction to commence, consistent with the CCA.³⁷ The CCA authorized federal funding for M-NCPPC to acquire land in Maryland for the development of a comprehensive park, parkway, and playground system in the National Capital area. Congress charged M-NCPPC with representing the State of Maryland in protecting and stewarding CCA-acquired property in the state, in accordance with plans approved by NCPC.³⁸ At the time of its enactment, the CCA's drafters recognized that the law's purpose is "to preserve for all time to come the natural scenic beauty of the upper and lower Potomac River valleys, to insure a continuous flow of water into Rock Creek, and to enable the National Capital Park and Planning Commission to procure many delightful wooded areas and charming valleys in the District of Columbia before they are destroyed by building or some other operation."³⁹ That purpose continues to be of paramount importance today, nearly one hundred years later, as the Lead Agencies plan to make significant changes to the highway infrastructure surrounding these critical protected areas.

Over time, M-NCPPC acquired various properties for parkland and parkway purposes. Properties acquired under the CCA and managed by M-NCPPC's constituent departments are governed by a series of agreements between M-NCPPC and NCPC. These include, among others, a September 15, 1939 agreement (the "1939 Agreement") through which M-NCPPC acquired the Clara Barton Parkway (formerly the George Washington Memorial Parkway) in Montgomery County, which

³⁷ Act of May 29, 1930 (46 Stat. 482), as amended by the Act of August 8, 1946 (60 Stat. 960), Section 3 of the Act of July 19, 1952 (66 Stat. 781, 791), and the Act of August 21, 1958 (72 Stat. 705) at § 1(b) ("The title to the lands acquired hereunder shall vest in the State of Maryland. The *development and administration thereof shall be under [M-NCPPC]* and in accordance with plans approved by [NCPC].") (emphasis added).

³⁸ The Maryland Court of Appeals recently described M-NCPPC's role with respect to the CCA as follows:

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 NCPC 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).

³⁹ CR-1930-0127, 2414, 2456 (Jan. 27, 1930).

the Project will impact. The 1939 Agreement allocated CCA funding for the acquisition of “that portion of the George Washington Memorial Parkway within that portion of the Maryland-Washington Metropolitan District located in Montgomery County, bounded by the Maryland-District of Columbia line, the Potomac River, the Conduit Road, and the Northwest boundary of the said Maryland-Washington Metropolitan District.” The 1939 Agreement included a map, known as “Plan No. 105.31-455,” identifying the land acquired. Although title of the land vested in the United States, the 1939 Agreement contained a key provision relevant to the Project:

That except as provided in this agreement, the property shall be acquired only for park and parkway purposes and that the United States will never use the land so acquired for any other purpose except with the consent of the Maryland Commission. It is further agreed that the National Commission will use its best efforts to see that the areas acquired under this agreement are developed and maintained in a manner similar to other comparable park areas of the National Capital and environs.

(emphasis added). The 1939 Agreement was signed by M-NCPPC, NCPC, and the President of the United States.

On October 1, 1941, M-NCPPC and NCPC entered into another agreement (the “1941 Agreement”), which governed the acquisition “of units of park lands needed for said George Washington Memorial Parkway in the Maryland-Washington Metropolitan District.” Consistent with the CCA and the 1939 Agreement, this Agreement vested title in the lands acquired in the United States. The 1941 Agreement also granted M-NCPPC authority over the use of the land: “[N]o part of any land acquired by the National Commission for said George Washington Memorial Parkway, pursuant to this Agreement or any agreement supplementary hereto shall at any time be conveyed, sold, leased or exchanged by the National Commission except upon the consent of the Maryland Commission first had and obtained . . .” Notably, this Agreement contained a similar prohibition on the use of the acquired land for anything other than park or parkway purposes by providing that “no part of the lands so acquired for the George Washington Memorial Parkway shall in any manner be used or developed by the National Commission or by the United States of America for other than park or parkway purposes.”⁴⁰

M-NCPPC and NCPC then entered into a February 12, 1951, agreement that referenced the 1941 Agreement and approved the acquisition of “the balance of the land in Montgomery County needed for said George Washington Memorial Parkway.” Not only does the CCA and M-NCPPC’s enabling law limit disposition of M-NCPPC-administered parkland for purposes inconsistent with their use as parkland, but the agreements described above give M-NCPPC authority to approve or reject the use of land subject to such agreements for purposes other than park purposes. While

⁴⁰ The 1941 Agreement contains a limited exception on the park/parkway restriction by referencing subsection 1(a) of the CCA. That subsection provides a limited exception for “such works as Congress may in the future authorize for the improvement and the extension of navigation, including the connecting of the upper Potomac River with the Ohio River, or for flood control irrigation or drainage, or for the development of hydroelectric power.”

there are circumstances in which M-NCPPC-administered parkland can be used for legitimate, non-park purposes with M-NCPPC’s consent, the CCA’s underlying presumption is that this land should be prioritized for protection and, where complete protection is not possible, appropriate mitigation.⁴¹

Because MDOT SHA does not plan to finalize the Project’s design until after it completes the NEPA review, there is significant risk that the Project’s limit of disturbance (“LOD”) will be much larger than what is reflected in the SDEIS. M-NCPPC described this issue at length in its November 9, 2020, DEIS comment letter, but some points are worth raising again here. Specifically, proper avoidance and minimization measures call for minimizing the roadway footprint while maintaining a larger LOD to account for environmental issues and to restore disturbed areas. A larger LOD is warranted to ensure that the Project will appropriately handle the increased drainage pressures that will result from advancing one of the build alternatives in the future. The Project’s ongoing design changes also must incorporate stable tie-ins for outfalls, protection and restoration of stream banks, and improvements to resources based on anticipated Project impacts. Although MDOT SHA has stated that “[a]ll possible planning to minimize harm will additionally involve an agreement document that outlines the process to continue coordination with the OWJs over Section 4(f) properties through the design phase of the project,” the impacts to parkland are not known at this time.⁴²

The Lead Agencies cannot fully address these impacts until the developer completes the Project’s design, and so need to build into the NEPA review a mechanism to account for these names by considering a larger LOD. A larger LOD that extends beyond the confines of Phase 1 of the Project should account for potential future impacts to parkland that will result after the NEPA process, including potential impacts on lands acquired with CCA funds that are not currently located in the immediate vicinity of the Preferred Alternative’s improvements. If the Lead Agencies decide that the Project should progress under the current LOD, M-NCPPC respectfully requests an opportunity for further consultation in the event additional disturbance is anticipated in the future as a result of the current scope of the Project or future phases.

G. The Project’s proposed stormwater management plans are inadequate.

Although the Preferred Alternative addresses stormwater management, the SDEIS ignores existing untreated impervious surfaces and requires a minimum of 50% treatment only if the roadway is fully reconstructed.⁴³ Additionally, the SDEIS only requires that 45% of the required water quality treatment occur on site. This is insufficient to protect the quality of local and downstream waters,

⁴¹ See CR-1930-0127, 2414, 2458 (Jan. 27, 1930) (“[T]his bill does not tie the hand of Congress. There is nothing in it to declare any priority policy, *but it does morally afford a priority for park purposes.*”) (emphasis added).

⁴² SDEIS at 5-51.

⁴³ SDEIS at 2-10.

which some stakeholders claim are among the worst water quality offenders in Montgomery County.⁴⁴ While M-NCPPC is pleased that the Lead Agencies have considered stormwater management issues in the SDEIS, the Lead Agencies must take greater responsibility for protecting downstream water resources, the quality of which will never improve and may be further degraded absent proper planning and implementation of the Project. M-NCPPC encourages the Lead Agencies to take this responsibility seriously and follow the example of other federal agencies that have addressed cumulative impacts of stormwater runoff by imposing stringent stormwater management standards that strive to exceed the minimum criteria required under state law.⁴⁵

To mitigate the Project’s anticipated impacts on water quality, the Lead Agencies should prioritize on-site stormwater quality treatment to a minimum of 80% of the environmental site design requirements, thereby allowing for a maximum of 20% to be treated with the use of compensatory stormwater management mitigation at off-site sources. The Lead Agencies also need to make specific commitments to incentivize the chosen developer to use innovative technologies and techniques to maximize on-site stormwater quality treatment. The situation involving untreated stormwater runoff entering our streams and rivers is an issue that will worsen due to climate change. This project presents a singular opportunity to address this issue, an opportunity which is unlikely to ever occur again. Requiring minimum standards for stormwater treatment under these circumstances is extremely short-sighted.

A similar issue arises in the Lead Agencies’ use of the Maryland Department of the Environment’s 6-digit watershed scale for off-site stormwater management water quality projects. This scale does not address the severe water quality impacts of the existing highways and proposed expansion. To account for those impacts, the Lead Agencies must consider off-site compensatory stormwater management mitigation within 1,500 feet of the LOD. By doing so, the Lead Agencies would make the realized mitigation benefits meaningful to the location of the impacts and the surrounding waterways. Moreover, a maximum of 25% of the off-site compensatory stormwater impervious area treatment should come from stream restoration in order to ensure that the most critical waterways surrounding the Project receive appropriate mitigation.

Lastly, the Lead Agencies should continue to consider stormwater management opportunities located on parkland. The SDEIS effectively eliminates any consideration of mitigation opportunities on parkland despite the copious amount of time M-NCPPC spent working with MDOT SHA to identify and review potential off-site compensatory stormwater management opportunities on parkland. These measures can have minimal or non-existent impacts on parkland

⁴⁴ Stormwater issues with I-495 and I-270 expansion, STORMWATER PARTNERS OF MONTGOMERY COUNTY, <https://www.sierraclub.org/sites/www.sierraclub.org/files/sc/m/maryland-chapter/Stormwater%20issues%20with%20I-495%20and%20I-270%20plan.pdf>.

⁴⁵ *E.g., Sierra Club v. United States Army Corps of Eng'rs*, 464 F. Supp. 2d 1171, 1222 (M.D. Fla. 2006).

and natural resources but provide an effective and feasible mechanism to address the off-site water quality concerns.

H. The Lead Agencies have not established an adequate Section 4(f) mitigation plan for natural resources or historic and cultural resources.

The Lead Agencies must comply with Section 4(f) of the Department of Transportation Act, which, like the CCA, protects the natural and built land the Project has the potential to impact. Section 4(f) and the statute’s implementing regulations require avoidance, minimization, and, lastly, mitigation of the Project’s impacts to parkland.⁴⁶ FHWA may not approve a transportation project that uses any Section 4(f) property unless it determines that: (1) there is no feasible and prudent avoidance alternative to the use of the property and the action includes all possible planning to minimize harm to the property resulting from such use; or (2) the use of the property, including any measures to minimize harm committed by the applicant, will have a *de minimis* impact on the use of the property.⁴⁷ If the avoidance analysis determines that there is no feasible and prudent avoidance alternative, then FHWA may approve the alternative that causes the least overall environmental harm.⁴⁸ The appropriate time to identify avoidance and mitigation measures is prior to the elimination of reasonable alternatives that have fewer environmental impacts than the retained alternatives. NEPA requires—and courts have recognized—that agencies must take a “hard look” at impacts to sensitive resources throughout the environmental review process.⁴⁹

The SDEIS’s Section 4(f) evaluation does not include enough specificity to allow M-NCPPC to review or comment on a “mitigation plan,” which, requires the Commission’s approval. As the Lead Agencies are well aware, the Project will impact land of significant value due to its geographic location in a largely developed area with little “unused” land. M-NCPPC appreciates that the Lead Agencies have evaluated potential impacts to some land under M-NCPPC’s jurisdiction, such as Cabin John Stream Valley Park Unit 2.⁵⁰ Unfortunately, the Lead Agencies

⁴⁶ 23 U.S.C. § 138; 49 U.S.C. § 303; 23 C.F.R. Part 774.

⁴⁷ 23 C.F.R. § 774.3(a), (b).

⁴⁸ 23 C.F.R. § 774.3(c).

⁴⁹ See *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) (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’n 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); *Assn 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).

⁵⁰ SDEIS at 5-19 to 5-21.

have yet to provide the Commission with a mitigation plan outlining, with specificity, what steps they plan to take to minimize and avoid impacts to all land under M-NCPPC’s jurisdiction. For example, MDOT SHA committed to identifying and pursuing the acquisition of replacement parkland or implementing other mitigation measures at Cabin John Stream Valley Park Unit 2, such as construction of visual barriers, stream bank and bed stabilization, and removal of concrete lined channels.⁵¹ M-NCPPC welcomes these discussions, but reiterates that those discussions must occur *before* the Lead Agencies finalize the EIS. As the Lead Agencies are well aware, land acquisition is a timely process. Therefore, mitigation properties to be acquired must be presented to M-NCPPC for approval before the FEIS and forthcoming Record of Decision. Consistent with the Supreme Court’s recognition that lead agencies must provide a “detailed discussion of possible mitigation measures” so that “interest groups and individuals can properly evaluate the severity of the adverse effects,” M-NCPPC simply will not consider any impact to be *de minimis* until it approves formally the chosen parkland mitigation requirements.⁵²

Similarly, Section 4(f) requires that the Lead Agencies avoid historic and cultural resources, unless they can demonstrate that other alternatives are infeasible and contrary to the purpose and use of the undertaking. To date, the Lead Agencies have not provided detailed design or schematic drawings demonstrating that they consider alternatives that avoid a Section 4(f) use of the Moses Hall Tabernacle and Cemetery, the Gibson Grove Church, and the Carderock Springs National Register Historic District. Further impacts to the Gibson Grove Church, a historic resource that has already suffered cumulative adverse effects from the first Beltway construction, should not be accepted as a 4(f) alternative to avoid impacts to Moses Hall Tabernacle and Cemetery. If the Lead Agencies plan to use this land for the Project, they must evaluate other design solutions and demonstrate avoidance is infeasible. On this point, M-NCPPC notes that a 4(f) use may be the most appropriate use of this land given the Project’s design; however, the Lead Agencies must undertake additional detailed design work in coordination with all stakeholders in the community to evaluate alternatives as required.

Lastly, M-NCPPC hopes that the conclusion of the Lead Agencies’ ongoing Section 106 review process under the National Historic Preservation Act (“NHPA”) yields strong commitments to avoid, minimize, and, if necessary, mitigate adverse effects to the historic properties described above and those additional properties identified in the SDEIS, including the Clara Barton Parkway.⁵³ Given the nature of these historic properties, which are important not just for historic

⁵¹ SDEIS at 5-21. As the M-NCPPC has recently notified MDOT SHA under separate cover, it no longer appears that Cabin John Stream Valley Park Unit 2 was acquired using CCA funding and, for that reason, is not subject to the state or federal requirements that apply to CCA properties. Nevertheless, the M-NCPPC Cabin John properties impacted by the Project remain subject to the panoply of requirements prescribed under Section 4(f), etc.

⁵² *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

⁵³ See 36 C.F.R. § 800.6(c) (requiring consulting parties to find ways to avoid, minimize, or mitigate adverse effects on historic property and summarize their agreed-upon course of action in a memorandum of agreement).

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purposes but also from an equity perspective due to their significance for minority communities, M-NCPPC expects the Lead Agencies to take every precaution to avoid impacts.

* * *

M-NCPPC appreciates the Lead Agencies' consideration of the comments provided above. The Commission will continue to work with the Lead Agencies to ensure that the Project's impacts to parkland, stream, and wetland resources are avoided, minimized, and mitigated to the maximum extent possible. M-NCPPC also would like to remind the Lead Agencies that it will not concur with the Preferred Alternative until the Lead Agencies present a thorough and reasonable mitigation package that includes park enhancements and extensive parkland replacement, as well as adequate consideration of alternatives to avoid impacts to properties of historic and cultural significance. The Commission welcomes the opportunity to engage further with the Lead Agencies to prepare mitigation and design plans and evaluate all of the Project's significant impacts.

Sincerely,

Elizabeth M. Hewlett
Chair

Casey Anderson
Vice Chair