Response:
As your letter correctly notes, MDOT has made financial commitments to certain transit improvements or investments as part of Phase 1 of the P3 Program. MDOT stands firm on its commitment to advance certain transit improvements as part of Phase 1 of the P3 Program to further address the significant congestion on the study corridors and to enhance multimodal connectivity and mobility within the study area. Each of the listed transit improvements or investments were identified as priorities in consultation and coordination with local jurisdictions, including Montgomery County.

Additionally, these commitments are related to part of the National Capital Region Transportation Planning Board’s (TPB) regional planning efforts and were captured in the TPB Resolution R2-2022. The construction of the New American Legion Bridge I-270 to I-70 Traffic Relief Plan (Project) was restored to the air quality conformity analysis as part of this resolution. As noted in the “WHEREAS” or the basic facts and reasons for the resolution:

- TPB’s action on June 21, 2021 to exclude the Project removed the private sector revenues that supported the Project thus disrupting the fiscal constraint of the projects submitted by MDOT and, as a result, additional projects (transit and/or highway) would have needed to be removed to reestablish the fiscal constraint;
- Many TPB member jurisdictions in Maryland and Virginia expressed an interest to amend the project input list by restoring the Project and the private sector revenues associated with the Project; and
- It was noted and understood that MDOT was proposing to deliver the Project fully with private funding through a public-private partnership (P3).

While MDOT committed to the improvements at the Shady Grove Metrorail Station and the Westfield Montgomery Mall Transit Center as part of the Preferred Alternative for the MLS, the other transit commitments in Resolution R2-2022 were clearly based on an understanding that the Project would be delivered with private funding and as a P3. Characterization of these other transit commitments as public funding would be contrary to TPB Resolution R2-2022 and disrupt the fiscal constraint of the projects in the approved plan.

Through correspondence with the Montgomery County Council President on January 10, 2022 and with TPB on June 8, 2022, MDOT clearly articulated that these transit commitments were part of a P3 delivery and all funding and future agreements for these transit commitments were contingent upon the financial close of a P3 agreement with the Developer.

A Record of Decision (ROD) issued by the Federal Highway Administration (FHWA) does not mandate a particular project delivery method or form of project financing. Rather, an FHWA ROD ensures that the mitigation and commitments related to regulatory actions and permit decisions for the project, not its financing or delivery method, are captured in the project approval. Because MDOT has been clear that it intends to deliver Phase 1 South as a P3 fully with private funding, it would not be appropriate to include the other transit commitments from TPB Resolution R2-2022 as MDOT SHA commitments for the MLS in the ROD.
Requested Corrective Action in the ROD

I respectfully request that the ROD for this project correctly reflect the transit commitments for Phase 1 South of the project. For your convenience, we have provided proposed corrections to Section 7.2 of the FEIS, items 122 and 123, and ask that these corrections be carried through to all other instances where these commitments are described in the FEIS through appropriate language in the ROD.

Table 1
Transit Commitment Corrections for FEIS Section 7.2

<table>
<thead>
<tr>
<th>Item</th>
<th>Requested Action</th>
<th>FEIS Description</th>
<th>Corrected Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Combine 122 &amp; 123 and revise</td>
<td>Combine items 122 and 123 and replace the FEIS phrasing with the phrasing from the TPB Resolution R2-2022 Item 3.d. See also the January 10, 2022 letter Page 1, Paragraph 3. This correction will reinstate MDOT’s commitment to provide a bus maintenance facility equipment and fleet, and will reflect the agreed upon timing of the investments and the usage of the facilities.</td>
<td>122. Increase the number of bus bays at Washington Metropolitan Area Transit Authority’s Shady Grove Metrorail Station. 123. Increase parking capacity at the Westfield Montgomery Mall Transit Center</td>
<td>REVISIED 122. MDOT will construct new bus bays at Shady Grove Station; increase parking capacity at the Westfield Montgomery Park and Ride; provide the necessary bus fleet; and construct and equip the Metropicon Grove Bus Operations and Maintenance Facility. These resources should be provided for use early in the construction period to support expanded local transit operations for the long term.</td>
</tr>
<tr>
<td>Replace 123.</td>
<td>Incorporate MDOT commitment to provide financial support to high priority transit projects to Montgomery County from TPB Resolution R2-2022 Items 1.b. and 1.c. See also the January 10, 2022 letter Page 2, Paragraph 1. These commitments are missing from FEIS Section 7.2 and inappropriately characterized elsewhere</td>
<td>N/A</td>
<td>REVISIED 123. After financial close of the Phase 1 South Section P3 Agreement, MDOT will commit to fund not less than $60 million from the Development Rights Fee for design and permitting of high priority transit investments in Montgomery County. As Part of Phase 1 South, MDOT will commit to provide not less than $300 million of additional transit investment funding exclusive of the phase developer’s proposed transit investment to implement high priority transit projects in Montgomery County.</td>
</tr>
</tbody>
</table>
**Hon Peter Buttigieg, Secretary**  
June 30, 2022  
Page 3

**Justification for the Corrections**

The highway capacity provided by this project is demonstrated to lead to increased traffic (FEIS Table 4-2, 4-9, 4-10), increased greenhouse gas emissions (FEIS Appendix K, Table 3-4) and is likely to reduce Non Auto Driver Mode Share (NADMS), which is contrary to local transportation policies. MDOT has made transit commitments that are essential mitigation actions required to partially offset the negative transportation and environmental consequences of the project. Further, as noted in the FEIS, the transit commitments are a component of the project’s attempt to address equity. Unfortunately, the transit mitigation commitments contain omissions and are inaccurately and insufficiently described in various sections of the FEIS (Sections 3.2.1, 7.2 and 7.3).

The bifurcated description of the transit mitigation commitments in the FEIS between project actions and uncertain concessionaire actions is inconsistent with the principles of impact mitigation. Additionally, it does not comport with MDOT’s representations to Montgomery County in its correspondence and does not satisfy the stipulations within the TPB resolution for this project. Furthermore, a commitment intended to mitigate an adverse impact cannot be conditioned on a third-party's willingness to honor it.

Before the TPB and in correspondence to the County, MDOT has committed to provide these transit mitigation elements, should the project proceed, without additional contingency related to the level of third-party financial participation. While it is possible that the concessionaire participation may offset MDOT’s obligations, which is acknowledged in the reference documents, the commitments are those of MDOT, the public agency advancing this project. Montgomery County is not party to any agreements between MDOT and its potential concessionaire for the OpLanes project and it is the duty of the MDOT to ensure that the project’s mitigation is provided. The Record of Decision (ROD) for this project must clearly state that fulfillment of these commitments is unambiguously the responsibility of the project sponsor, MDOT, independent of possible actions by other parties and how MDOT chooses to contract with third parties to fulfill them.

To highlight the discrepancy, compare the statement from page 2 of the January 2022 MJD1 letter to the Montgomery County Council President regarding a portion of the transit commitments, which states (emphasis added),

> "MDOT will commit $350 million of transit service investment inclusive of the Phase Developer's transit commitment. The total transit investment by MDOT for Phase 1 South is estimated between $350 and $610 million, not including any additional funding committed by MDOT or VDOT for interstate transit in the American Legion Bridge Corridor."

with the language in the FEIS Section 7.3 on page 7-22, which states,
Hon Peter Buttigieg, Secretary  
June 30, 2022  
Page 4

“As part of its proposal, the Developer has proposed an estimated $800 million over the operating term for Phase 1 South. The exact investments would be determined as part of the Section 3A Agreement for Phase 1 South.”

The FEIS clearly falls short of MDOT’s commitments by using non-specific and non-committal language that is inconsistent with the clear and committal statements MDOT made in July 2021, January 2022 and reaffirmed in June 2022, just days before the FEIS was released for public review.

Further, the transit commitments are an issue of significant public interest covered in extensive correspondence throughout the NEPA review. It is inappropriate to change the characterization of the commitments in the FEIS and then refer final resolution of the mitigation to private negotiation that is not subject to public scrutiny and is opaque to the affected communities.

We respectfully request that the ROD accurately and completely reflect the full scope of MDOT’s transit commitments. We thank you very much for your consideration of this issue and for your action to correct these errors. We believe that appropriate characterization of the transit mitigation commitments in the ROD is essential to serve the public interest in this matter as the presentation in the FEIS is erroneous and misleading. Should you wish to talk about this matter further, please feel free to contact me by phone at 240-777-7777 or by email at christopher.conklin@montgomerycountymd.gov.

Sincerely,

Christopher Conklin, P.E., Director  
Montgomery County Department of Transportation

Enclosures  
A. Resolution R2-2022 (Air Quality Inputs Table Omitted)  
B. Resolution R15-7077  
C. January 10, 2022 Letter from MDOT to Montgomery County

c: Stephanie Polak, FHWA  
Gregory Murrill, FHWA  
Jitesh Parikh, FHWA  
Jim Poris, MDOT  
Tim Smith, Administrator MDOT/SHA  
Jeffrey Folden, MDOT/SHA  
Kanti Srikanth, MWCOG  
Hon. Jamie Raskin, US House of Representatives, Maryland 8th District
RECORD OF DECISION

TPB R2-2022
July 21, 2021

NATIONAL CAPITAL REGION TRANSPORTATION PLANNING BOARD
777 North Capitol Street, N.E.
Washington, D.C. 20002

RESOLUTION ON INCLUSION OF PROJECT SUBMISSIONS IN THE CONSTRUCTED ELEMENT FOR THE MARYLAND PORTION OF THE UPDATE TO VISUALIZE 2045 AND THE FY 2023-2026 TRANSPORTATION IMPROVEMENT PROGRAM (TIP)

WHEREAS, the National Capital Region Transportation Planning Board (TPB), as the federally designated metropolitan planning organization (MPO) for the Washington metropolitan area, has the responsibility under the provisions of Fixing America’s Surface Transportation (FAST) Act for developing and carrying out a continuing, cooperative and comprehensive transportation planning process for the metropolitan area; and

WHEREAS, the federal metropolitan planning regulations (23 CFR 450) assign TPB the responsibility to cooperatively develop the long range metropolitan transportation plan (LRTP) and transportation improvement program (TIP) specified in Sections 450.324 and 450.326; and

WHEREAS, the TIP is required by the Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA) as a basis and condition for all federal funding assistance to state, local and regional agencies for transportation improvements within the metropolitan Washington, D.C. planning area; and

WHEREAS, the Statewide and Metropolitan Transportation Planning rule as published in the May 27, 2016 Federal Register by the FTA and FHWA requires that the LRTP and the TIP be reviewed and updated at least every four years; and

WHEREAS, federal conformity regulations, originally published by the Environmental Protection Agency in the November 24, 1993 Federal Register and with latest amendments published in April 2012, based on the federal Clean Air Act (CAA Section 176(c)), require that the metropolitan transportation plan, program and projects in metropolitan areas not in attainment of national ambient air quality standards, demonstrate conformity to the area’s state implementation plan; and

WHEREAS, federal conformity regulations require that the conformity analysis of the plan, program and projects be reviewed and updated at least every four years; and

WHEREAS, on October 17, 2018, the TPB adopted resolution R4-2019 determining that the Visualize 2045 Plan and FY 2019-2024 TIP conform with the requirements of the Clean Air Act Amendments of 1990, resolution R5-2019 approving the Visualize 2045 Plan, and resolution R6-2019 approving the FY 2019-2024 TIP. and the Visualize 2045 Plan and FY 2019-2024 TIP were approved by the FTA and FHWA on December 13, 2018; and

reduction of greenhouse gas emissions, and will be based on the concept of ‘zero-based budgeting’ where all projects, including those currently included in the Plan, must be resubmitted for consideration in such Plan, provided that projects currently under construction or currently funded with federal, state, regional, local or private funds shall be exempt from such requirement; and

WHEREAS, the project submissions approved on June 16, 2021 by the TPB excluded the Maryland I-270/I-495 HOT Lanes project while approving the remaining Maryland transit and highway projects listed in Attachment A; and

WHEREAS, on June 21, 2021, the Maryland Department of Transportation (MDOT) notified the TPB that the package of projects submitted was supported by a financial plan, and the TPB’s June 16, 2021 action to exclude the I-270/I-495 HOT Lanes project removed the private revenues that supported that project, thus disrupting the fiscal constraint for the projects MDOT has submitted and as a result, MDOT would need to remove additional projects (transit and/or highway) projects to reestablish the fiscal constraint for its project submission; and

WHEREAS, since the June 21, 2021 MDOT notification of the unintended consequences of the June 16, 2021 action to exclude the I-270/I-495 HOT Lanes project from conformity inputs, which also affected other projects that MDOT was funding on account of the receipt of private funding, many TPB member jurisdictions form Maryland have expressed an interest to amend the Maryland project input list by restoring the I-270/I-495 HOT Lanes project and the private sector revenues associated with the project; and

WHEREAS, since the June 16, 2021 TPB action to exclude the I-270/I-495 HOT Lanes project from the conformity inputs, a number TPB member jurisdictions from Virginia have articulated the significant adverse impact this action will have on the performance outcomes from Virginia projects and the mobility/accessibility improvements anticipated from the I-270/I-495 HOT Lanes project, and have expressed an interest to amend the Maryland project input list by restoring the I-270/I-495 HOT Lanes project and the private sector revenues associated with the project; and

WHEREAS, MDOT notes that it substantially changed the scope of the I-270/I-495 HOT Lanes project as part of this round of conformity analysis by downgrading the proposed construction of HOT lanes on I-495 from the I-270 Spur to Woodrow Wilson Bridge so as to better coordinate this proposal with the local jurisdictions and notes that MDOT remains committed to work with all TPB member jurisdictions to better understand and address any outstanding concerns they may have with the current recommended preferred alternative (Phase 1, North and South) and

WHEREAS, MDOT is proposing to deliver Phase 1 of the I-270/I-495 HOT Lanes project fully with private funding through a public-private partnership (P3); and

WHEREAS, MDOT and Montgomery County are committed to deliver transit improvements through establishing and maintaining a collaborative, coordinated effort for developing the transit improvements during the predevelopment work of the Phase 1 P3 Agreement.
Reduction of greenhouse gas emissions, and will be based on the concept of ‘zero-based budgeting’ where all projects, including those currently included in the Plan, must be resubmitted for consideration in such Plan. Provided that projects currently under construction or currently funded with federal, state, regional, local or private funds shall be exempt from such requirement; and

WHEREAS, the project submissions approved on June 16, 2021 by the TPB excluded the Maryland I-270/I-495 HOT Lanes project while approving the remaining Maryland transit and highway projects listed in Attachment A; and

WHEREAS, on June 21, 2021, the Maryland Department of Transportation (MDOT) notified the TPB that the package of projects submitted was supported by a financial plan, and the TPB’s June 16, 2021 action to exclude the I-270/I-495 HOT Lanes project removed the private revenues that supported that project, thus disrupting the fiscal constraint for the projects MDOT has submitted and as a result, MDOT would need to remove additional projects (transit and/or highway) projects to reestablish the fiscal constraint for its project submission; and

WHEREAS, since the June 21, 2021 MDOT notification of the unintended consequences of the June 16, 2021 action to exclude the I-270/I-495 HOT Lanes project from conformity inputs, which also affected other projects that MDOT was funding on account of the receipt of private funding, many TPB member jurisdictions from Maryland have expressed an interest to amend the Maryland project input list by restoring the I-270/I-495 HOT Lanes project and the private sector revenues associated with the project; and

WHEREAS, since the June 16, 2021 TPB action to exclude the I-270/I-495 HOT Lanes project from the conformity inputs, a number TPB member jurisdictions from Virginia have articulated the significant adverse impact this action will have on the performance outcomes from Virginia projects and the mobility/accessibility improvements it anticipated from the I-270/I-495 HOT lanes project, and have expressed an interest to amend the Maryland project input list by restoring the I-270/I-495 HOT Lanes project and the private sector revenues associated with the project; and

WHEREAS, MDOT notes that it substantially changed the scope of the I-270/I-495 HOT Lanes project as part of this round of conformity analysis by downgrading the proposed construction of HOT lanes on I-495 from the I-270 Spur to Woodrow Wilson Bridge so as to better coordinate this proposal with the local jurisdictions and notes that MDOT remains committed to work with all TPB member jurisdictions to better understand and address any outstanding concerns they may have with the current recommended preferred alternative (Phase 1 North and South); and

WHEREAS, MDOT is proposing to deliver Phase 1 of the I-270/I-495 HOT Lanes project fully with private funding through a public-private partnership (P3); and

WHEREAS, MDOT and Montgomery County are committed to deliver transit improvements through establishing and maintaining a collaborative, coordinated effort for developing the transit improvements during the predevelopment work of the Phase 1 P3 Agreement.

NOW, THEREFORE, BE IT RESOLVED THAT: the National Capital Region Transportation Planning Board amends the projects to be included in the air quality conformity analysis for the proposed 2022 Update to Visualize 2045 by adding Maryland’s construction of the American Legion Bridge I-270 to I-70 Relief Plan - Phase 1 of the Traffic Relief Plan:

- Phase 1 South, starting in the vicinity of the George Washington Parkway in Virginia including the American Legion Bridge, provides two HOT lanes in each direction from I-495 to I-270 and then I-270 from I-495 to I-370, with an anticipated completion by 2025;
- Phase 1 North, a related part of the project that is in Pre-NEPA, constructs two HOT lanes in each direction on I-270 from I-370 to I-70, with an anticipated completion by 2030; and

NOW, THEREFORE, BE IT FURTHER RESOLVED THAT:

1. MDOT, in accordance with commitments made at the Maryland Board of Public Works (BPW), will:
   a. Identify additional transit investments that will be fully developed through ongoing coordination with the affected counties;
   b. After financial close of the Phase 1 South Section P3 Agreement, MDOT will commit to fund not less than $60 million from the Development Rights Fee for design and permitting of high priority transit investments in the Montgomery County, such as Phase I of the Corridor Cities Transitway, Bus Rapid Transit in the MD 355 Corridor, or other high priority projects. MDOT will work collaboratively with Montgomery County to develop plans for construction, final delivery, and operation, funded through ongoing toll revenue;
   c. As Part of Phase 1 South, MDOT will commit to provide not less than $300 million of additional transit investment funding inclusive of the phase developer’s proposed transit investment to implement high priority transit projects in Montgomery County. The funds will be provided over the operating term of Phase 1 South within a schedule developed through collaboration on a plan for the construction, final delivery, and operations of the project(s) in conjunction with the managed lane development and financing;
   d. Additionally, as mitigation and as part of Phase 1 South highway improvements, MDOT will construct new bus bays at Shady Grove Station; increase parking capacity at the Westfield Montgomery Park and Ride; provide the necessary bus fleet; and construct and equip the Metropolitan Grove Bus Operations and Maintenance Facility. These resources should be provided for use early in the construction period to support expanded local transit operations for the long term. MDOT will brief the TPB on these plans prior to TPB adoption of the updated Visualize 2045 Plan in 2022; and
e. Additional and appropriately scaled transit investments will be made by MDOT for Phase 1 North to fulfill its commitment to complete major transit improvements concurrent with all sections of Phase 1. MDOT shall seek concurrence with the affected counties on these transit investments and will report to and brief TPB on these investments prior to TPB adoption of the inputs for the next Long Range Transportation Plan and air quality conformity analysis update expected in 2024.

2. Only after this collaboration and completion of a Final Environmental Impact Statement and Record of Decision for a build alternative, would MDOT seek BPW approval of the Section Agreement for Phase 1 South or Phase 1 North.

As revised and adopted by the Transportation Planning Board at its regular meeting on July 21, 2021

TPB R15-2022
June 15, 2022

NATIONAL CAPITAL REGION TRANSPORTATION PLANNING BOARD
777 North Capitol Street, N.E.
Washington, D.C. 20002

RESOLUTION APPROVING THE 2022 UPDATE TO THE VISUALIZE 2045 LONG-RANGE TRANSPORTATION PLAN FOR THE NATIONAL CAPITAL REGION AND THE FY 2023–2026 TRANSPORTATION IMPROVEMENT PROGRAM (TIP)

WHEREAS, the National Capital Region Transportation Planning Board (TPB), as the federally designated metropolitan planning organization (MPO) for the Washington region, has the responsibility under the provisions of the Fixing America’s Surface Transportation (FAST) Act, reauthorized November 15, 2021 when the Infrastructure Investment and Jobs Act (IIJA) was signed into law, for developing and carrying out a continuing, cooperative and comprehensive transportation planning process for the metropolitan area; and

WHEREAS, the Federal Planning Regulations of the Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA) implementing the FAST Act, which became effective June 21, 2019, specify the development and content of the long-range transportation plan and of the transportation improvement program and require that it be reviewed and updated at least every four years; and

WHEREAS, on October 17, 2018, the TPB approved a new long-range transportation plan, called “Visualize 2045,” that meets federal planning requirements, addresses the federal planning factors and goals in the TPB Vision and the Regional Transportation Priorities Plan, and included a new “Aspirational Element” as specified by TPB Resolution RB-2018-1; and

WHEREAS, the TIP is required by FHWA and FTA as a basis and condition for all federal funding assistance to state, local and regional agencies for transportation improvements within the Washington planning area and the TPB approved the FY 2021-2024 Transportation Improvement Program (TIP) on March 20, 2020, which was developed as specified in the Federal Planning Regulations; and

WHEREAS, on December 16, 2020, TPB staff issued a Technical Inputs Solicitation Submission Guide, which is a formal call for area transportation implementing agencies to submit technical details, including information necessary to perform the required air quality analysis of the 2022 Update to the Visualize 2045 long-range transportation plan, and for projects and programs to be included in the FY 2023-2026 TIP that will meet federal planning requirements, and will address the federal planning factors and goals in the TPB Vision and the Regional Transportation Priorities Plan; and

WHEREAS, the transportation implementing agencies in the region provided project submissions for the 2022 Update to Visualize 2045 and the FY 2023-2026 TIP, and the TPB Technical Committee and the TPB reviewed the project submissions at meetings in April, May, June and July 2021 meetings; and
WHEREAS, at its June and July 2021 meetings, the TPB approved the projects submitted for inclusion in the Air Quality Conformity Analysis of the 2022 Update to Visualize 2045 and the FY 2023-2026 TIP; and

WHEREAS, MDOT made certain transit commitments associated with the I-270/1-495 Traffic Relief Plan in Resolution R2-2022 and is required to brief the TPB on the transit commitments related to Phase 1 South of the I-270/1-495 Traffic Relief Plan; and the TPB will provide a formal statement for inclusion in the public docket of the FEIS for the I-270/1-495 Traffic Relief Plan referencing TPB’s requirement that the transit commitments be met; and MDOT will report to TPB on the status of the transit commitments to Montgomery County bimonthly until a transit commitments agreement is reached with Montgomery County for Phase 1 South of the project; and

WHEREAS, on June 15, 2022, upon adopting on-road greenhouse gas reduction goals and strategies, to be appended to the 2022 Update to Visualize 2045; and

WHEREAS, on April 1, 2022, the draft FY 2023–2026 TIP was released for a 30-day public comment and inter-agency review period along with the draft 2022 Update to Visualize 2045, and the Air Quality Conformity Analysis; and

WHEREAS, the FY 2023-2026 TIP has been developed to meet the financial requirements in the Federal Planning Regulations; and

WHEREAS, during the development of the 2022 Update to Visualize 2045, the FY 2023-2026 TIP, and the Air Quality Conformity Analysis, the TPB Participation Plan was followed, and several opportunities were provided for public comment: (1) a 30-day public comment period on project submissions for the air quality conformity analysis of the 2022 Update to Visualize 2045 and the FY 2023-2026 TIP and the air quality conformity analysis scope of work was provided from April 2 to May 3, 2021. (2) the TPB Community Advisory Committee (CAC) was briefed on the project submissions at its April 15, 2021 meeting, (3) an opportunity for public comment on these submissions was provided at the beginning of the April, May, June and July 2021 TPB meetings; (4) on April 1, 2022 the draft 2022 Update to Visualize 2045, the FY 2023-2026 TIP, and the draft Air Quality Conformity Analysis were released for a 30-day public comment period which closed on May 1, 2022. (5) on April 6 and 7, 2022, a virtual open house was held where staff shared results of the plan analysis and provided an opportunity for questions and answers; (6) on April 14, 2022, a Public Forum was held on the development of the FY 2023-2026 TIP. (7) an opportunity for public comment on these documents was provided on the TPB website and on the Visualize 2045 website, and at the beginning of the April, May and June 2022 TPB meetings; and (8) the documentation of the 2022 Update to Visualize 2045, the FY 2023-2026 TIP, the Air Quality Conformity Analysis includes summaries of all comments and responses; and

WHEREAS, the TPB Technical Committee has recommended favorable action on the 2022 Update to Visualize 2045, the FY 2023-2026 TIP, and the Air Quality Conformity Analysis by the Board; and

WHEREAS, on June 15, 2022, the TPB passed Resolution R16-2022, determining that the 2022 Update to Visualize 2045, the FY 2023-2026 TIP conform with the requirements of the Clean Air Act Amendments of 1990; and

WHEREAS, the FY 2023-2026 TIP projects are consistent with the 2022 Update to Visualize 2045, and are selected in accordance with the Federal Planning Regulations; and

NOW, THEREFORE, BE IT RESOLVED THAT the National Capital Region Transportation Planning Board approves the 2022 Update to Visualize 2045 and the FY 2023-2026 Transportation Improvement Program.

Adopted by the Transportation Planning Board at its regular meeting on June 15, 2022.
January 10, 2022

The Honorable Gabriel Albornoz
Council President
Montgomery County Council
100 Maryland Avenue
Rockville MD 20850

Dear President Gabriel Albornoz:

Thank you for your letter regarding the priority transit project related to the New American Legion Bridge I-270 to I-70 Traffic Relief Plan and moving forward with identification of the transit project. I appreciate the opportunity to respond.

The Maryland Department of Transportation (MDOT) is committed to advancing this project in collaboration with Montgomery County, ensuring the solutions are multi-modal and advancing transit systems as part of it that help achieve the regional land use goals. As part of the project and the public-private partnership (P3) delivery model, MDOT has committed to provide significant transit improvements and investment as part of the Phase I South of the project from vicinity of the George Washington Memorial Parkway in Virginia to I-370. The project itself will include a high-occupancy toll (HOT) lane network for the corridor that will provide new opportunities for reliable transit travel in the corridor that does not currently exist.

Connections will be provided between the HOT lanes and roads South of I-370 near transit centers and local activity centers such as I-370, Wootton Parkway, and Westlake Terrace to improve access to transit and jobs.

In just the early project development, MDOT has committed to provide capital improvements for transit by providing new bus bays at the Shady Grove Metro Mall Station, expanding parking capacity at the Westfield Montgomery Mall Transit Center, and constructing and equipping the Metropolitan Grove Bus Operation and Maintenance Facility including providing the necessary bus fleet. While these capital improvements need to be further developed with Montgomery County and other stakeholders, our current estimate for these improvements is $200 to $250 million. Additionally, we are currently working with the Virginia Department of Transportation (VDOT) on additional transit funding commitments for the American Legion Bridge corridor to support interstate transit operations.

The Honorable Gabriel Albornoz
Page Two

As part of the P3 delivery, MDOT is also committed to funding not less than $60 million from the upfront payment for Phase I South to support the design and permitting of Montgomery County’s high priority transit projects, such as the Corridor Cities Transitway, bus rapid transit in the MD 355 corridor, or other high priority projects. The MDOT is also committed to continuing to work collaboratively with Montgomery County and other stakeholders to develop plans for construction, operation, and final delivery of this transit project in conjunction with the managed lane development and financing. During the operating term of Phase I South, MDOT will commit $300 million of transit service investment inclusive of the Phase Developer’s transit commitment. The total transit investment by MDOT for Phase I South is estimated between $560 and $610 million, not including any additional funding committed by MDOT and VDOT for interstate transit in the American Legion Bridge corridor.

We agree it is important that we have collaboration between MDOT, Montgomery County, the City of Rockville, and the City of Gaithersburg. The MDOT will move forward with establishing a work group with these parties. We will reach to each stakeholder to identify its representative and request that you provide the Montgomery County Council’s designee for this work group. Additionally, an investment to support these coordination activities will be included in MDOT’s Final Fiscal Year 2022 to 2027 Consolidated Transportation Program (CTP) to be released later this month.

Thank you again for contacting me. We look forward to partnering with Montgomery County to advance new travel options and opportunities for our citizens. If you have any additional questions or concerns, please feel free to contact Jeffrey T. Folden, P.E., DBIA, MDOT State Highway Administration (MDOT SHA) I-495 and I-270 P3 Office Deputy Director, at 410-637-3321 or jfolden1@mdot.maryland.gov. Mr. Folden will be happy to assist you.

Sincerely,

Gregory Slater
Secretary

cc: The Honorable Jud Ashman, Mayor, City of Gaithersburg
The Honorable Marc Elrich, County Executive, Montgomery County
Montgomery County Councilmembers
The Honorable Bridget Donnell Newton, Mayor, City of Rockville
Ms. Holly Arnold, Administrator and CEO, MDOT Maryland Transit Administration (MDOT MTA)
Jeffrey T. Folden, P.E., DBIA, Director, I-495 and I-270 P3 Office, MDOT SHA
Tim Smith, P.E., Administrator, MDOT SHA Ms. Kate Sylvester, Acting Deputy Administrator and Chief Planning, Programming, and Engineering Officer, MDOT MTA
Maryland Transit Opportunities Coalition
5 Lochness Court, Rockville MD 20850
TransitForMaryland@gmail.com

July 11, 2022

Ms. Polly Trottenberg, Deputy Secretary
U.S. Dept. of Transportation
1200 New Jersey Ave. SW
Washington, DC 20590

Subject: I-495 & I-270 Managed Lanes Study
Evidence of scientific fraud in FEIS traffic model

Dear Ms. Trottenberg:

As you know, on June 17 FHWA and the Maryland DOT issued a Final Environmental Impact Statement for the I-495 & I-270 Managed Lanes Study. This project now awaits a Record of Decision.

Last October 18, we wrote to FHWA Administrator Pollack pointing out errors in the traffic model presented in the SDEIS. The FEIS acknowledges that our criticisms “have merit,” and in response the FEIS presents new traffic forecasts that are substantially different.

However, the FEIS offers no explanation of what was wrong with the SDEIS model or how the errors were corrected. Moreover, when input and output data and documentation were requested from MDOT, the agency replied that the inquiry would be treated as a Public Information Act request (Maryland’s version of FOIA) and no data would be provided in time to review the FEIS.

Examination of the FEIS traffic modeling technical appendix raises even greater concerns. Anomalies in the FEIS traffic forecasts create serious doubt whether the new traffic forecasts could have been generated by correcting previous errors and suggest possible falsification of model outputs.

The clearest evidence we have found of possible scientific fraud is in the modeling of the 2045 No-Build alternative. Changes occur from the SDEIS to the FEIS in patterns that are inconsistent with correction of errors in model inputs, coding, or numerical methods, but would be consistent with arbitrary adjustment of intermediate or final outputs.

Response:

The concerns and claims raised in your letter regarding MLS final traffic forecasts and modeling results are not based in fact and appear to be based on a misunderstanding of how data was updated and refined between publication of the Supplemental Draft Environmental Impact Statement (SDEIS) and publication of the FEIS and its supporting documents. The Federal Highway Administration (FHWA) and the Maryland Department of Transportation State Highway Administration (MDOT SHA) followed accepted practices and processes for considering how project design refinements or other relevant new information would impact traffic forecasts. FHWA and independent experts from the USDOT Volpe Center have reviewed the traffic analyses and indicated the modifications between the SDEIS and the FEIS meet a professional standard of care and did not find scientific integrity fraud. FHWA’s concluding memorandum, the Volpe Center’s Information Memorandum, and MDOT SHA’s response memo to questions in the Volpe Information Memorandum are attached at the end of this response.

As explained below, the analysis reflected in the FEIS is sound. The FEIS discloses the changes that were made to the traffic forecasts and analysis between the time the SDEIS and FEIS were published. Refer to FEIS, Chapter 4, and FEIS Appendix A. The differences highlighted in your letter focus on the detailed support materials included in the FEIS appendices. The changes that caused some of the detailed results to differ between the SDEIS and FEIS are the consequence of several different factors, which are generally performed in the ordinary course of NEPA reviews by technical traffic forecasting professionals between the availability of a draft and final document. These factors include: (1) responding to public comments/questions; (2) updating modeling based on refinements to the alternatives analysis and/or identification of the preferred alternative; (3) reviewing or “validating” previous modeling results prior to publication of an FEIS.

MDOT SHA team carefully reviewed comments from the public and stakeholders and we appreciated the input provided. Some comments requested MDOT SHA review the data from the SDEIS to ensure its reliability and others requested refinements to the Preferred Alternative. It is best practice to review and double-check data outputs based on those changes and to refine modeling to reflect the most recent facts available to the agency. As described below, MDOT SHA determined that certain details within the overall results needed to be refined as a result of the refinements to the Preferred Alternative.

Finally, routine reviews and checking of the modeling results was performed following publication of the SDEIS. That process is designed to further validate modeling results and to resolve any perceived anomalies in traffic forecasting data. As described below, MDOT SHA pinpointed some very narrow concerns and modified a small number of data inputs to be as accurate as possible.

As described, MDOT SHA updated its analysis as a result of these factors. It would have been inconsistent with best practice if traffic modeling results from the SDEIS did NOT change in some ways. Ultimately, the issues identified and then resolved by MDOT SHA in the FEIS did not fundamentally alter the results within the six key metrics or the overall conclusions of the study related to the performance of the Preferred Alternative.
Traffic Metrics:
The major findings reported in Chapter 4 of the FEIS related to the six key traffic metrics identified at the beginning of the NEPA process, with input from stakeholders and the public. These metrics were used in evaluating the alternatives and they did not change throughout the Study:

1. Average Speed in General Purpose Lanes
2. Average Delay per Vehicle (System-wide)
3. Travel Time Index (TTI)
4. Level of Service (LOS)
5. Throughput
6. Local Network Delay

The table below shows a comparison of the results for each of these six key metrics for the Preferred (Selected) Alternative presented in the SDEIS and the FEIS.

<table>
<thead>
<tr>
<th>Key Traffic Metric</th>
<th>Results Presented in SDEIS</th>
<th>Results Presented in FEIS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Speed (GP Lanes)</td>
<td>No Build 24 mph</td>
<td>Build 28 mph</td>
</tr>
<tr>
<td></td>
<td>Build 29 mph</td>
<td></td>
</tr>
<tr>
<td>Average Delay Savings</td>
<td>AM Peak 18%</td>
<td>PM Peak 38%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TTI (GP Lanes Average)</td>
<td>No Build 2.36</td>
<td>Build 2.0</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percent of Segments Failing (LOS F)</td>
<td>No Build 41%</td>
<td>Build 28%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Throughput (veh/hr)</td>
<td>No Build 15,600</td>
<td>Build 17,700</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Local Network Delay</td>
<td>Build Savings 3.5%</td>
<td></td>
</tr>
</tbody>
</table>

As shown in the table, the results presented in the FEIS for all key metrics were either the same as reported in the SDEIS or very similar. In all cases, the Preferred Alternative performed better than the No Build Alternative in the SDEIS and FEIS with a similar magnitude of benefits. This demonstrates that the changes made between the SDEIS and FEIS did not fundamentally alter the overall findings of the traffic study.
The following addresses your specific concerns:

**Travel Forecasting Response:**

The traffic volume forecast was refined between the SDEIS and FEIS based on a review of the post-processed model forecasts to confirm that the no build and build travel trends were in alignment with the Metropolitan Washington Council of Governments (MWCOG) model trends, identified post-pandemic and post-SDEIS. The following bullets explain the refinements:

- Some roadway design changes were made to the Preferred Alternative between the SDEIS and FEIS that were incorporated into the MWCOG model. These changes included the addition of at-grade exchange ramps for ingress and egress between the high-occupancy toll (HOT) lanes and general purpose lanes in both directions along the I-270 west spur and consolidation of the exchange ramps along I-495 between Virginia and Maryland in the vicinity of the George Washington Memorial Parkway, as noted on page 3-7 of the FEIS.

- Trend-check spreadsheets were developed, which are a series of comparisons between MWCOG model volumes and the post-processed/balanced forecasted volumes for the daily and peak hour scenarios. The trend reviews/comparisons included the following: (1) growth rates between existing versus future year scenarios and no build versus build scenarios for all mainline and arterial roadway segments within the study area, and (2) comparing the proportions of average daily traffic that occurs during the peak periods. The trend checks were also used to help identify locations that were showing growth rates that are either higher or lower than typical levels of growth, so that those locations could be reviewed to determine if the growth rates in the post-processed forecasted volumes were reasonable and explainable (e.g., development growth, diversions to parallel routes, shifts between general purpose versus managed lanes, etc.). The forecasting process incorporated assumptions and volume projections from prior studies as noted in FEIS Appendix A (e.g., Greenbelt Metro station), which were further refined in the FEIS forecasts, as discussed in the next bullet.

- In the SDEIS model, the traffic volumes in the Greenbelt area were showing significantly higher growth between existing and future compared to the MWCOG model trends. This increase was likely due to the process which was based on MWCOG trip tables being assigned to the VISUM model network, with additional trips from the Greenbelt Metro Station added on top. While this is not an uncommon practice, it resulted in forecasted volumes that well exceeded the capacity of the roadway. Therefore, in the FEIS, both the no build and build forecasts in the Greenbelt Metro Station area were reduced to better align with MWCOG model trends along both the interstate and the crossroads.

As part of post processing efforts, traffic adjustments related to the Greenbelt area were made based on the appropriate origins and destinations – and therefore only impacted certain ramps and movements. After post-processing, additional trend checks were used to ensure growth trends aligned with the regional travel demand model. After the forecasting adjustments were completed, and validated against MWCOG model trends for the FEIS, the VISSIM model was updated and rerun. MDOT SHA did not add traffic on specific ramps in the forecast without rerunning the model to obtain updated results. The adjustments impacted the AM and PM forecasts on the I-495 Inner Loop, including through movements from Virginia and major ramp volumes.
Evidence of Possible Scientific Fraud in Toll Lane Traffic Model

On October 18, 2021, MTOC, CABLE, and DonWiden270 wrote to FHWA Administrator Stephanie Pollack regarding errors in Maryland DOT’s traffic model for the I-270/I-495 toll lane project. This letter was also submitted as a formal comment on the SDEIS.

The FEIS, issued June 17, concedes (buried on page 828 of Appendix T) that the letter’s criticisms of the model “have merit” and that changes were made in response:

- Trend checks were completed to confirm that the FEIS forecast trends matched the MWCOG model trends. The SDEIS Build forecasts were updated and refined at the noted 9 interchanges to better reflect the differences that were shown in the MWCOG model for the Build and No-Build scenarios. For example, at the noted US 29, MD 193, MD 650, I-95, US 1, MD 201, MD 295, and MD 450 interchanges MWCOG showed less than 1% difference between the No-Build and Build scenarios, and the MWCOG showed approximately 1.5% decrease at the US 50 interchange. The FEIS forecast was updated to reflect these trends.

- The travel time results are reflective of less congestion on the Inner Loop through the Greenbelt area, which no longer spilled back into the west side of the Beltway, as discussed above. The demand volume for the I-495 Inner Loop to Northbound I-95 ramp in the PM peak was not impacted by the Greenbelt Metro Station area reductions. As a result, the no build volumes did stay the same between the SDEIS and FEIS for this movement. However, the SDEIS to FEIS build ramp volumes increased to better reflect the MWCOG trends between the no build and build. Overall, mainline I-95 volumes decreased between the no build and build, which is a trend that is consistent with the MWCOG model results.

- The crossroad forecasts discussed starting on page 2 of your letter were refined to better align with MWCOG trends between the no build and build in response to SDEIS comments. The volume differences between the SDEIS and FEIS shown on page 3 of the letter are small—generally less than 100 vehicles per hour difference and will not have any significant impact on the overall results and conclusions. Generally, volumes were adjusted at spot locations to better reflect MWCOG trends in the FEIS forecasts. This was done to more closely align with existing to No-Build trends and No-Build to Preferred Alternative trends from the travel demand models. These adjustments were made outside of the travel demand model runs—this is considered post-processing, a common industry-wide practice used to develop traffic volume forecasts. As volume adjustments at one location may impact an upstream or downstream location in the system, additional forecast refinements were needed at select locations to result in a balanced system that still aligned with MWCOG model trends.

However, the FEIS fails to identify the cause of the errors in the SDEIS model or describe the changes that were made. In addition, MDOT refuses to let expert outside reviewers see the input and output data files while the Record of Decision is pending. Consequently, there can be no confidence that the model has been fixed correctly, and the results in the FEIS continue to lack demonstrated validity.

Moreover, comparison of model results from the SDEIS and FEIS technical appendices reveal new anomalies. The changes in the reported results for the 2045 No-Build model are inconsistent with correction of errors in model inputs, coding, or numerical methods and consistent with arbitrary adjustments of intermediate or final outputs made to obtain a desired result.

A basic concept of traffic modeling is that drivers tend to choose the fastest route from the origin of each trip to its destination. In the models as in real life, if traffic on a highway moves faster, drivers will switch to it from other routes. The FEIS model results violate this principle.

Connecticut Avenue (Beltway exit 33) and Rockledge Drive (I-270 exit 1B) are the main access points to the Beltway for eastbound traffic from the two major employment centers in southwest Montgomery County, Bethesda/NIH/Walter Reed Medical Center and Rock Spring Park. Predicted evening rush-hour travel times from these interchanges to the -1.
Traffic Analysis Simulation Model response:

The same base VISSIM simulation models from the SDEIS were used in the FEIS. The FEIS models had the same limits, used the same version of VISSIM software, evaluated the same time periods, and received the same driver behavior inputs as the models developed for the SDEIS. The results presented in the FEIS differ because of the following refinements made to the simulation models between the SDEIS and FEIS:

- The demand volumes were updated to match the refined forecasts described in the previous section. This applied to both the no-build and build models. The forecast adjustments in the Greenbelt area impacted the travel time results reported in the FEIS because there was less congestion on the Inner Loop through the Greenbelt area, which no longer spilled back into the west side of the Beltway. Because this change was related to background development, it affected both the No Build results and the Build results. While both the No Build and Build travel times reduced in the FEIS, the net difference between No Build and Build remained approximately the same and therefore this change did not fundamentally alter the overall benefits of the Preferred Alternative reported originally in SDEIS Chapter 3 and updated in FEIS Chapter 4.

- The geometry of the Preferred Alternative was updated in the build model to reflect the latest roadway alternative designs summarized in Chapter 3 of the FEIS.

- Coding changes were made to address discrepancies in the results at a few locations identified during review of SDEIS public and agency comments. The following changes made were:
  - Fixing signal timing on MD 121 in the no build model,
  - Updating the vehicle routing through the collector-distributor roads within the Arena Drive interchange to be consistent between the no build and build models,
  - Updating the vehicle routing of HOVs using the Outer Loop in the PM no build model to provide a congestion pattern more consistent with the calibrated existing conditions model, and
  - Updating the vehicle routing through the express and local lanes within the I-295 interchange approaching the Woodrow Wilson Bridge to provide more consistent results between the no build and build for AM Inner Loop speeds between US 50 and MD 337.

- Travel times for the PM Outer Loop trip towards the American Legion Bridge (ALB) increased in the FEIS, compared to the SDEIS. This change is due to the correction of a coding error in the SDEIS No Build VISSIM PM peak model that was identified and corrected during development of the FEIS. The issue was related to the routing of HOVs traveling from the top side Outer Loop to I-270 northbound, which caused severe congestion on the Outer Loop approaching the east spur to I-270 by sending too many vehicles north towards I-270 and not enough along the Outer Loop towards the ALB. This change did not significantly alter the overall network-wide results for the No Build Alternative, but rather shifted some of the congestion from one area to another. Therefore, the coding issue was not initially apparent when reviewing the overall findings presented in the SDEIS. Upon closer review of the SDEIS models following the comment period, this issue was identified and corrected. This change affected the travel times in the No Build PM model in a couple of locations. Travel times on the top side Outer Loop approaching Connecticut Avenue decreased between the SDEIS and the FEIS, while travel times on the west side Outer Loop approaching the ALB increased between the SDEIS and the
Let us examine in more detail how the predicted outbound traffic changed in and around these 8 interchanges from the SDEIS No-Build model to the FEIS No-Build model.

On US 29, MD 193, MD 650, and US 1, the two reports predict exactly identical traffic volumes outside the Beltway for each of the four hours, while the traffic volumes on the same road inside the Beltway are smaller in the FEIS than in the SDEIS. (The difference is less than 1% on US 29, MD 193, and MD 650, and 2% to 3% on US 1.) On I-95, which only exists outside the Beltway, predicted traffic volumes are identical.

On MD 201, MD 295, MD 450, and US 50, this pattern is reversed. The two reports predict exactly identical traffic volumes inside the Beltway for each of the four hours, and the traffic volumes outside the Beltway are smaller in the FEIS than in the SDEIS. The decreases are 6% or 7% at MD 201 and much smaller at the other three interchanges. To illustrate these patterns, the SDEIS- and FEIS-predicted traffic volumes on US 1 and MD 201 for the four pm rush-hour intervals are shown in the adjoining table.

This is not how the model should behave. Under conditions of pervasive traffic congestion – a safe assumption near the Beltway during the pm rush hour – an increase in traffic volumes on any stretch of highway will cause additional delay. This, in turn, will cause some drivers to switch to alternative routes.

Thus, if the FEIS model run puts fewer drivers on northbound MD 201 north of the Beltway, it will predict that some drivers switch to MD 201 from other highways. In other words, removing northbound vehicles from MD 201 north of the Beltway will induce an increase in predicted northbound traffic on that road south of the Beltway. Changes elsewhere in the model might counteract that effect, but it is extremely unlikely that independently determined changes in traffic volume would add up exactly to zero in each of four hours. And essentially impossible for that to occur at each of eight interchanges.

This pattern could, however, arise from ad hoc alteration of model outputs for the purpose of generating a desired conclusion. For example, the Greenbelt Metro Interchange,

FEIS. But as noted above, the overall No Build travel times and delays were not significantly affected by the change. This coding change was applied to the No Build model only, and therefore did not affect the Build results.

The changes refined the analysis in response to public, stakeholder, and agency comments and did not fundamentally alter the overall findings of the MLS.

It should be noted that the No-Build MWCOG models were not changed – the only changes in the No-Build forecast were done in the post-processing steps for the Greenbelt interchange area (as discussed previously).

In reference to comments made in the MTOC letter for MD 201 as an example, the demand volumes along MD 201 Northbound (outside the Beltway) were adjusted as part of the Greenbelt area reductions, which were done in the post-processing step. However, demand volumes along MD 201 Northbound (inside the Beltway) were not impacted by the Greenbelt area reductions. The movements directly impacted by the Greenbelt area reductions are movements with origins/destinations to the Greenbelt area, based on the trip tables within the MWCOG model.

Your letter questions how the results for the no build and build could be different on the east side of I-495, including at the US 50 and Baltimore-Washington (B/W) Parkway interchanges, if no capacity improvements are proposed in this section as part of the Preferred Alternative. The following two bullets address the question:

• A review of the VISSIM simulation model results presented in the FEIS for the I-495 Outer Loop PM peak shows a slight improvement in operations between MD 5 and I-95 under build conditions. The reason for this improvement is due to the reduced traffic demand in this section (approximately 2 percent reduction) related to changes in regional traffic patterns that are affected by the Preferred Alternative.

• Under no build conditions, through traffic between Virginia and Maryland is more likely to use the east side of I-495, US 50, and B/W Parkway to avoid the severe congestion at the American Legion Bridge. Under build conditions, some of these regional trips would be expected to shift to the west side of I-495, as shown in the MWCOG model outputs and reflected in the FEIS forecasts.
mentioned briefly on page 4-1 of the FEIS, might have been incorporated into the FEIS No-Build alternative results by adding traffic on some but not all Beltway ramps, without rerunning the model. We have not identified any other reasonable explanation of this pattern of changes in predicted traffic volumes from SDEIS to FEIS, and MDOT certainly has not offered any.

Predicted vehicle movements within the interchanges exhibit anomalous patterns as well. Not only do the northbound and southbound traffic volumes on each cross highway change between SDEIS and FEIS on only one side of the Beltway, but the hourly changes in traffic on the highway typically are equal to the changes on a single ramp. Traffic volumes on the other ramps of the interchange are mostly unchanged, with a few small changes of 5, 10, or at most 15 vehicles per hour.

The Baltimore-Washington Parkway (MD 295) interchange provides a clear example of this. The figure shows evening rush-hour traffic volumes from the SDEIS modeling1 with changes from SDEIS to FEIS listed beneath in red. Where there are no red numbers, the SDEIS and FEIS numbers are identical.

The change in traffic on northbound MD 295 outside the Beltway exactly matches the change in traffic entering from Ramp 1; there is no change in through traffic or on the other three connecting ramps. The change in southbound traffic approaching the Beltway exactly matches the change in traffic on ramp 7 onto the eastbound Beltway. The change in southbound traffic beyond the interchange matches the change in traffic on Ramp 8 from the eastbound Beltway in 3 of 4 one-hour intervals; there is a 15-vehicle discrepancy in the 3:00-4:00 hour.

A column of erroneous numbers in the FEIS chart for the MD 201 interchange gives further support to the hypothesis that numbers were generated by ad-hoc adjustments. The northbound traffic volume exiting the interchange (the column labeled NB) should equal the traffic turning right off Ramp 2 (WBR) plus the northbound through traffic at the Ramp 2 intersection (NBT). The numbers do not add up because the numbers shown for the through traffic are incorrect.2 The discrepancies for the four hours are 80, 80, 80, and 75. An error of this nature could easily be made by someone adjusting previously obtained results by hand, but would be unlikely to arise in the output of a regional traffic model.

These anomalies come on top of MDOT’s failure to explain the changes made to correct admitted errors in the modeling and its resistance to release of input and output data files. It is impossible to rely on the FEIS traffic modeling report for any purpose, pending a thorough inquiry that rules out the possibility of scientific fraud, identifies the errors in the SDEIS model, and demonstrates that the modeling errors have been corrected.

---

1The times of the four hourly intervals are incorrectly labeled as 6-7A, 7-8A, 8-9A, and 9-10A in numerous evening peak figures for the No-Build Alternative in both SDEIS and FEIS.

2That the error is in the through traffic, and not the turning traffic or the sum, can be verified by adding up traffic volumes on the other legs of the interchange, which are shown in the FEIS figure from which this detail was taken.

---
Memorandum

Subject: ACTION: Maryland Transit Opportunities Coalition July 1, 2022 Evidence of Scientific Fraud in the FEIS Traffic Model Letter

From: Gregory Murrill
Division Administrator
Baltimore, Maryland

To: File

Date: August 22, 2022

In Reply Refer To:
HAD-MD

Consistent with the National Environmental Policy Act (NEPA) 40 CFR §1500 et seq., as implemented by Federal Highway Administration (FHWA) at 23 CFR §771 et seq., FHWA considered all substantive comments received between publication of the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD). Thus, on July 1, 2022, Maryland Transit Opportunities Coalition (MTOC) transmitted a letter to the Department of Transportation (DOT) with an attachment entitled “Evidence of Possible Scientific Fraud in Toll Lane Traffic Model.” As a result of MTOC’s comments, FHWA, as the lead federal agency, engaged DOT/Volpe Center (Volpe) to conduct an independent review of the issues raised in MTOC’s comments. Volpe is a resource providing world-renowned multidisciplinary, multimodal transportation expertise on behalf of DOT, other federal agencies, and external organizations. In completing the independent review, DOT/Volpe Center reviewed the Supplemental Draft Environmental Impact Statement Chapter 3 Traffic (SDEIS), SDEIS Appendix A (Traffic Evaluation Memorandum: Alternative 9 - Phase 1 South), FEIS Chapter 4 Traffic and FEIS Appendix A Traffic Analysis Tech Report regarding traffic modeling. In addition, Volpe reviewed all the other comments in the letter from MTOC. Volpe did not find scientific integrity fraud in the Toll Lane Traffic Model. Volpe attributed most of the differences between the traffic modeling results for the project reported in the SDEIS and FEIS to minor changes in the analyses conducted for those two documents and inherent limitations of the modeling process used by Maryland Department of Transportation (MDOT) (the project sponsor) to analyze the project’s impacts on traffic volumes and travel times. Attached are the results of the independent review conducted by Volpe.
Memorandum

MTOC Response Attachment 2: USDOT Volpe Center Memorandum

July 1, 2022, including attachment entitled “Evidence of Possible Scientific Fraud in Toll Lane Traffic Model”
2. Proposed response to MTOC (“MTOC Letter Follow-Up,” August 9, 2022)

As part of this review, we consulted the following publicly available documents:
1. Sections of the Supplemental Draft Environmental Impact Statement (SDEIS), dated October 2021 and downloaded on 11 August 2022
   a. Chapter 3, Traffic
   b. Appendix A, Traffic Evaluation Memo
2. Sections of the Final Environmental Impact Statement (FEIS), dated June 2022 and downloaded on 11 August 2022
   a. Chapter 4, Traffic
   b. Appendix A, Traffic Evaluation Memo

Findings:
1. Differences in projected traffic volumes and travel times on selected roadway segments between the SDEIS and FEIS appear to result from three main sources:
   a. Minor changes in the modeled representation of the road and highway network mostly outside the immediate area of the project, which affect the baseline VISSIM calibration of link-level traffic volumes under the No-Build alternative (see p. 6 of proposed response to MTOC)
   b. Minor changes in the representation of the Preferred or Build Alternative in the MWCOG regional travel demand model network (pp. 4-5 of the proposed response to MTOC, referring to FEIS p. 3-7)

1 Metropolitan Washington Council of Governments

I-495 & I-270 Managed Lanes Study, review of MTOC comments and proposed response

i. Addition of at-grade ramps for ingress and egress between the high-occupancy toll (HOT) lanes and general-purpose lanes in both directions along the west spur of I-270
ii. Consolidation of exchange ramps along I-495 between Virginia and Maryland in the vicinity of the George Washington Memorial Parkway

1. Reconciliation process of forecast travel volumes from the MWCOG regional travel demand model with those used in localized VISSIM modeling of traffic volumes, particularly in area approaching the BWI Thurgood Marshall Airport. This process, which inherently entails manual adjustment of forecast volumes, presumably affects the traffic simulation results for both the No-Build and Build alternatives.

2. These adjustments to the modeled representation of the highway network and to forecast travel volumes produced different results in the traffic modeling conducted for the SDEIS and FEIS, as follows:
   a. Overall differences in average daily traffic volumes under the No-Build alternative reported in the SDEIS and FEIS, which are a proxy for regional travel demand patterns, are generally minor (see Differences in demand section, below)
   b. In some locations, overall trip volumes were identical in the SDEIS and FEIS, which could explain the identical volumes on many individual network links in the detailed traffic simulations conducted for the two documents
   c. Although differences in modeled overall travel demand and simulated link-level traffic volumes are generally minor, these could nevertheless lead to significant differences in modeled travel times on specific links, as the area is highly congested during peak travel periods and delay increases non-linearly as traffic volumes grow.

3. Detailed simulations of traffic volumes on individual network links are generally conducted using fixed traffic volumes produced as part of the traffic assignment stage of a larger-scale, less detailed regional travel demand model as inputs. Because these detailed simulations generally do not entail rerouting of trip flows assigned by the regional demand model, they can sometimes predict changes in delay without accompanying changes in traffic volumes. This is a limitation of detailed traffic simulation modeling that can be addressed by repeated “iterative” solution of a regional travel demand model and the traffic simulation models used for more detailed analysis of localized traffic patterns and travel times, but this process is time-consuming, resource-intensive, and it may be difficult to reconcile the differing temporal and spatial resolutions of the two models.
   a. Some traffic simulation results reported in the SDEIS showed extremely high localized delays on individual links near the project area, under both the No-Build and Build alternatives. While in practice some traffic would be expected to re-route around these areas to avoid encountering extreme delays, the traffic simulation model cannot by itself produce this expected result, and the modeled delays were not adjusted manually in an effort to replicate such “real world” behavior.
   b. In response to the changes described in item 1 above, traffic simulation reported in the FEIS shows significantly lower delays on these same facilities. Conversely, the changes incorporated in the FEIS modeling reduce delays to seemingly more realistic levels under both the No-Build and Build alternatives (see Congestion results section, below), so avoiding the extreme delays evident in the SDEIS modeling is not claimed to result from implementing the Build alternative.

4. Major road improvement projects can often affect the performance of other area roads outside their immediate area. While these are often beneficial— for example, moving traffic from a congested arterial to a freeway where the project indirectly improves performance — adverse impacts are also possible, such as worsening bottlenecks on roads carrying additional traffic toward the freeway.

15 August 2022

2
I-495 & I-270 Managed Lanes Study, review of MTOC comments and proposed response

a. The SDEIS modeling apparently provided an example of worsening bottlenecks, where failing to adjust signal timing at intersections on a roadway carrying increased traffic to the major route the project would affect results in extreme queuing and delays.

b. To identify these impacts and understand their sources, it is often necessary to feed the traffic volumes and travel times estimated by the more detailed traffic simulation model back to a model that offers the capability to change trip routings in response to resulting changes in the travel times used as the basis for the initial route assignments, such as the VISUM routing model or the MWCOG model.

c. As indicated above, the process described in 4b is often a complex and time-consuming effort, given the differences in these models’ temporal resolution of daily travel demand and in the detail with which they represent the road network. It appears that this feedback step was not part of the analysis conducted for the FEIS (See FEIS Appendix A, Figure 2-11: Modeling Methodology).

d. Both the SDEIS and the FEIS presented detailed traffic volume and delay modeling for the local network in the project area (see SDEIS Table 3-13 and FEIS Table 4-11), which consistently showed the preferred alternative leading to a reduction in delay on arterial streets in the surrounding area. While this result seems plausible, it is unclear how it was obtained—was it the product of feeding travel times (initially estimated by the traffic simulation model into a routing-type model (or even into the larger MWCOG regional model) and using the adjusted routings it produced to revise the traffic simulation results, or of some other process? Furthermore, the reported changes in local network delays are identical in the SDEIS and FEIS, suggesting that whatever process generated this result in the SDEIS analysis was not revised as part of the more recent FEIS modeling.

5. We could not find a detailed explanation of the adjustments to projected future travel demands that were made between the SDEIS and FEIS (see 1.c. above), so we cannot assess their plausibility or validity.

6. MTOC makes two major points in its letter that MD SHA should probably address in detail as part of its response letter.

a. Predicted evening rush-hour travel times on the Beltway from Connecticut Avenue (exit 33) and Rockledge Drive (exit 11B) eastbound to its junction with I-95 dropped by 15 and 30 minutes from the SDEIS to the FEIS, but traffic volumes on the ramp from the eastbound Beltway to I-95 during each of the four evening peak hours are identical in the SDEIS and FEIS. Some re-routing of both evening commute and through trips would have been expected to occur in response to such large changes in travel time, and while it’s possible that such responses did occur, it’s unlikely that they would have left travel volumes unaffected.

b. Differences between the No-Build and Build alternatives in outbound traffic volumes on some (4 out of 8) routes carrying traffic from DC toward the northeast during the evening rush hour changed from the SDEIS to the FEIS in ways that are difficult to reconcile with the changes in travel speeds the project is expected to produce. In addition, the Build vs. No-Build differences in traffic volumes on ramps connecting these routes with the Beltway changed between the SDEIS and FEIS in ways that seem inconsistent with the expected impact of the project on through and connecting traffic at those interchanges.

I-495 & I-270 Managed Lanes Study, review of MTOC comments and proposed response

Differences in demand

Table 1: ADT Differences between the SDEIS (Table 3-2 and 3-3) and FEIS (Table 4-2)

<table>
<thead>
<tr>
<th>Corridor</th>
<th>Segment</th>
<th>Existing ADT (2017)</th>
<th>SDEIS (2045 Projected)</th>
<th>FEIS (2045 Projected)</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-270</td>
<td>L-370 to MD 78</td>
<td>256,000</td>
<td>254,000</td>
<td>227,000</td>
</tr>
<tr>
<td></td>
<td>MD 28 to I-270</td>
<td>309,000</td>
<td>308,000</td>
<td>131,000</td>
</tr>
<tr>
<td></td>
<td>American Legion Bridge</td>
<td>235,000</td>
<td>285,000</td>
<td>309,000</td>
</tr>
<tr>
<td></td>
<td>MD 150 to I-270</td>
<td>255,000</td>
<td>289,000</td>
<td>317,000</td>
</tr>
<tr>
<td></td>
<td>Between I-270 &amp; I-95</td>
<td>119,000</td>
<td>129,000</td>
<td>135,000</td>
</tr>
<tr>
<td></td>
<td>MD 355 to I-95</td>
<td>235,000</td>
<td>256,000</td>
<td>267,000</td>
</tr>
<tr>
<td></td>
<td>I-95 to US 50</td>
<td>230,000</td>
<td>248,000</td>
<td>250,000</td>
</tr>
<tr>
<td></td>
<td>US 50 to MD 214</td>
<td>235,000</td>
<td>256,000</td>
<td>258,000</td>
</tr>
<tr>
<td></td>
<td>MD 214 to MD 4</td>
<td>221,000</td>
<td>249,000</td>
<td>251,000</td>
</tr>
<tr>
<td></td>
<td>MD 4 to MD 5</td>
<td>198,000</td>
<td>223,000</td>
<td>224,000</td>
</tr>
</tbody>
</table>

The detailed no-build travel demands SDEIS (Appendix A, page 118) and FEIS (Appendix A, page 737) are similar, but not identical, consistent with the summarized comparison in Table 1.

Conclusion results

There are some extremely high travel time indices (calculated as the ratio of peak-period to off-peak travel time) in the SDEIS, with significant differences in the PM Peak.

Table 2: Selected travel time indices, from SDEIS (Table 3-8) and FEIS (Table 4-5)

<table>
<thead>
<tr>
<th>PM Peak Hour</th>
<th>SDEIS (2045 Projected)</th>
<th>FEIS (2045 Projected)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No-Build</td>
<td>Build</td>
</tr>
<tr>
<td>Inner loop VA193 to I-270</td>
<td>6.6</td>
<td>6.9</td>
</tr>
<tr>
<td>Inner loop I-270 to I-95</td>
<td>4.8</td>
<td>3.0</td>
</tr>
</tbody>
</table>

Model predicted travel times are contained in Table 2 (p 10) in SDEIS appendix A, and Table 5-2A in FEIS Appendix A.

15 August 2022
Memorandum Comment

Predicted evening rush-hour travel times on the Beltway from Connecticut Avenue (exit 33) and Rockledge Drive (exit 18) eastbound to its junction with I-95 dropped by 15 and 30 minutes from the SDEIS to the FEIS, but traffic volumes on the ramp from the eastbound Beltway to I-95 during each of the four evening peak hours are identical in the SDEIS and FEIS. Some re-routing of both evening commute and through trips would have been expected to occur in response to such large changes in travel time, and while it’s possible that such responses did occur, it’s unlikely that they would have left travel volumes unaffected.

Response

The concern regarding predicted evening rush-hour travel times was addressed on page 7 of the MTOC Letter Follow-Up dated August 9, 2022, but additional detail/clarification is provided below:

The changes to the travel time results between the SDEIS and FEIS for evening rush hour travel times on the Beltway from Connecticut Avenue and Rockledge Drive eastbound to its junction with I-95 are the result of less congestion on the entire Inner Loop approaching the Greenbelt area during the evening rush hour in both the no build and build models in the FEIS. Upon review of the SDEIS models following the comment period, it was determined that the Greenbelt forecast projections were not consistent with the MWCOG model trends and therefore needed to be adjusted. The volumes serving the background development at the Greenbelt Metro Interchange were reduced accordingly for both the no build and build condition during development of the FEIS.

These changes did not affect the project traffic demand for vehicles traveling from the eastbound Beltway to I-95 because only trips with origins and destinations within the Greenbelt Metro Interchange (located approximately 2.5 miles east of the I-95 exit) were adjusted (see below graphics). However, it did affect the travel times for trips between Connecticut Avenue and Rockledge Drive eastbound to I-95 because congestion on the Inner Loop through the Greenbelt area no longer spilled back as far into the top side of the Beltway once the forecasting changes were applied for the FEIS. While both the No Build and Build travel times reduced in the FEIS, the net difference between

Section 6b:

Memorandum Comment

Differences between the No-Build and Build alternative in outbound traffic volumes on some (4 out of 8) routes carrying traffic from DC toward the northeast during the evening rush hour changed from the SDEIS to the FEIS in ways that are difficult to reconcile with the changes in travel speeds the project is expected to produce. In addition, the Build vs. No Build differences in traffic volumes on ramps connecting these routes with the Beltway changed between the SDEIS and FEIS in ways that seem inconsistent with the expected impact of the project on through and connecting traffic at those intersections.

Response

Trend-checks were completed to confirm that the FEIS forecast trends matched the MWCOG model trends. The Build forecasts were updated for the FEIS and reconciled to better reflect the differences that were shown in the MWCOG model for the Build and No-Build scenarios. However, the volume differences between Build and No Build are small – generally less than 30% per hour difference and will not have any significant impact on the overall results/conclusions. For example, at the rated US 29, MD 193, MD 650, I-95, US 1, MD 201, MD 295, and MD 450 interchanges, the MWCOG model showed less than 1% difference between the No-Build and Build scenarios, and the MWCOG model showed approximately a 1% decrease at the US 50 interchange. The FEIS forecast was updated to reflect these trends. Related to changes in travel speeds, there was no feedback between the VISSIM traffic model speeds and the MWCOG model which generates the forecasted demand volumes inputted into the VISSIM model.
Response:

While a personal rapid transit (PRT) alternative, which uses automated vehicles on a network of fixed guideways, was not specifically considered, it is similar in concept to other standalone transit alternatives that were considered during the Study. These standalone transit alternatives which also included fixed guideways such as separated lanes or rail, were found to not meet the Study’s Purpose and Need.

During the alternatives development process, several standalone transit alternatives were considered but were dismissed from further consideration based on a number of factors, the most significant of which was the inability of standalone transit to address long-term traffic growth along only I-495 and I-270. No standalone transit alternative would be able to attract and carry sufficient ridership to address the severe congestion on I-495 and I-270, and would not accommodate Homeland Security. It would be anticipated that a PRT alternative with limited capacity of three to six passengers per automated pod, would also be unable to carry sufficient ridership to address long-term traffic needs. A PRT alternative would likely have very limited ability to improve the movement of goods and services as movement of freight or services that require vehicular movement (i.e., truck freight carriers, mechanical, electrical, services, etc.) would not be addressed with a PRT alternative.

Although standalone transit alternatives were found to not meet the Study’s Purpose and Need, multiple transit elements have been incorporated into the Study to address the multimodal and connectivity needs in the study area as a complement to the congestion relief offered by the proposed highway improvements. These include allowing toll-free bus transit use of the high-occupancy toll managed lanes to provide an increase in speed of travel, assurance of a reliable trip, and connection to local bus service/systems on arterials that directly connect to urban and suburban activity centers.

For a discussion of the standalone transit alternatives considered in the Study refer to DEIS, Appendix B, as well as FEIS, Chapter 7, Section 9.3.2.B.

A PRT vehicle is also similar to a connected and automated vehicle, which was considered in the traffic analysis for the Study. MDOT SHA participates in a statewide CAV working group (https://mva.maryland.gov/safety/Pages/MarylandCAV.aspx) to stay up to date on the latest research and industry projections. The analysis found that at this time, there are too many unknowns regarding how CAVs could affect demand and capacity to include CAVs directly in the traffic forecasts. Capacity will likely increase as vehicle spacing decreases, but the magnitude of the capacity increase is difficult to quantify based on the current research. Also, the benefits of more vehicles per lane may be offset by a potential increase in demand on the transportation network for some types of auto trips, including “mobility as a service” trips (people that could call an autonomous vehicle for a solo trip, rather than owning their own car) and “deadhead” trips (trips where the autonomous vehicle is empty, traveling to a parking lot or to the next pickup point). For a discussion on connected and automated vehicles refer to FEIS, Chapter 4, 4.1.3.G and FEIS, Appendix A.

Regarding the Section 4(f) Evaluation, due to the presence of linear, mostly north-south oriented, Section 4(f) properties adjacent to I-495 and I-270 it is unlikely that the implementation of a PRT alternative would avoid all Section 4(f) property impacts, as the PRT alternative would still require physical space for a fixed guideway. In consideration of a feasible and prudent alternative, as stated on page 149 of the Draft Section 4(f) Evaluation, DEIS Appendix F: A feasible and prudent avoidance alternative is one that avoids using any Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the Section 4(f) property (23 CFR 774.17). In assessing the importance of protecting Section 4(f) properties, it is appropriate to consider the relative value of the resource to the preservation purpose of the statute. The preservation purpose of Section 4(f) is described in 49 U.S.C. § 303(a), which states: “It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.”

An alternative is not feasible if it cannot be built as a matter of sound engineering judgement.

An alternative is not prudent if:
It compromises the project to a degree that is unreasonable to proceed with the project in light of its stated Purpose and Need;
It results in unacceptable safety or operational problems;
It causes severe social, economic, or environmental impacts even after reasonable mitigation; severe disruption to established communities; severe disproportionate impacts to minority or low income populations; or severe impacts to environmental resources protected under other Federal statutes;
It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
It causes other unique problems or unusual factors; or
It involves multiple factors above that while individually minor, cumulatively cause unique problems; or impacts of extraordinary magnitude.

As a PRT alternative would likely not meet the Study’s Purpose and Need, mainly addressing existing and long-term traffic growth, it would not be considered a feasible and prudent alternative for the Managed Lanes Study.
Because some portion of PRT guideway vehicles can also be driven on surface roads, PRTs support both the travel demand most automobile occupants while supplying the best benefits of transit.

It is assumed that MCDOT and FHWA have concluded that:

- no "feasible and prudent avoidance alternative exists as the mode of conventional transit alternatives to do not provide adequate access to the travelers in the study area.
- The 2045 project traffic flow was significantly improved by the preferred alternative virus the no build alternative (see comment).

I found no evidence that personal rapid transit was included in any of the previous studies.

Elevated autonomous PRT guideways would use 1% of the land area of the preferred alternative.

A PRT alternative would not only eliminate the 82.8 acre right of way requirement but could so reduce traffic on the existing lanes, two to four lanes could be removed and reclaimed for park or recreation and other public uses.

As PRTs use electric vehicles and can be powered by solar roofs, air qualify and impacts on Forest Canopy are eliminated.

These factors substantiate that PRTs are a "feasible and prudent avoidance alternative" and that therefore FHWA is prohibited from providing a Record of Decision without first conducting a supplemental.

Comments:

The FEIS claims the preferred alternative will support 2000 more vehicles per hour than the no-build alternative in 2045.

This projection ignores the impact of emerge autonomous vehicles. San Francisco and Phoenix have approve fully autonomous taxi service in their cities. It is more likely than not that, autonomous vehicles will be fully deployed by 2045.

With 23 years of improvements like quantum computing, self driving vehicles provide optimal a near mix of shared and private use and traffic flow.

The advance of "de-materialization" and the fact that cars no longer crash will reduce the weight and size of passenger vehicles from several thousand pounds to a few hundred pounds.

Together with the reduced vehicle footprints and headways, passenger throughput can be 15 times that current traffic on the same 12 foot highway lane.

Previous a stated goal of the Managed Lanes project was to enhance public safety by providing fast mass evacuation in the case of public emergence. With a potential of 15 times the capacity on the existing I-270 footprint, large scale evacuation become possible.
One of the first PRTs built in 1975 in Morgantown, WV has not had a single crash in 47 years. Maryland has a Vision Zero law professing to design its highways to eliminate deaths and serious injuries by 2030 on its highways. PRTs are the rail proven transportation mode that has achieved this goal.

Respectfully submitted,
Peter James
19204 Gadlin Dr
Gaithersburg, MD 20879
301 916-5722
Response:

In accordance with the National Environmental Policy Act (NEPA), the Federal Highway Administration (FHWA) as the lead federal agency and the Maryland Department of Transportation State Highway Administration (MDOT SHA) as the co-lead agency, prepared the updated analyses in the FEIS after considering input from many stakeholders. The Preferred Alternative was identified after reviewing all comments on the Draft Environmental Impact Statement (DEIS) and further refined after publication of the Supplemental DEIS (SDEIS) and review of additional stakeholder input, including input from the Friends of Moses Hall and those with interest in this community and its resources. The analyses presented in the FEIS, including those addressing environmental justice and visual impacts, were final evaluations and determinations that were made in consideration of the comments received on the draft analyses presented in both the DEIS and SDEIS. Your comments in the July 15, 2022 letter were carefully considered prior to issuance of the Record of Decision (ROD).

Concurrently, FHWA and MDOT SHA, along with the Maryland Historical Trust and Advisory Council on Historic Preservation, finalized the Programmatic Agreement (PA) in compliance with Section 106 of the National Historic Preservation Act (NHPA) of 1966, for which the Friends of Moses Hall was a consulting party. Development and finalization of the DEIS, SDEIS, FEIS and the Section 106 PA were done in close coordination and consultation with numerous stakeholders, the public, and multiple local, state, and federal agencies over a four-year period. During that time, FHWA and MDOT SHA provided extensive opportunity for public and stakeholder review and input into all aspects of the National Environmental Policy Act (NEPA) and Section 106 processes. This input led to identification of the Preferred Alternative that significantly minimized and avoided impacts to sensitive resources, including the Morningstar Tabernacle No. 88 Moses Hall and Cemetery. Based on additional investigations and consultation with the Friends of Moses Hall, agencies, and other stakeholders, MDOT SHA was able to avoid all direct impacts to the current historic Morningstar Tabernacle No. 88 Moses Hall and Cemetery boundary, including all known or suspected burials as identified through field investigation. We remain committed to the additional investigation and evaluation of the cemetery as described in the PA.

To date, MDOT SHA has conducted a reasonable and good faith effort to identify interments using noninvasive methods of surface survey and ground penetrating radar (GPR) within the known cemetery as well as adjacent right-of-way. Regarding your request for additional GPR, in the final report for the Morningstar property attached to the FEIS, Dr. Tim Horsley determined the remaining areas along the current highway and adjacent to the cemetery have significant impediments for conducting further meaningful GPR work and have a limited potential for identifying further possible burials (FEIS Cultural Resources Technical Report Vol. 9, Appendix G, p 15-16). Nonetheless, in the draft treatment plan shared with the Friends of Moses Hall, MDOT SHA has committed to attempt additional GPR work in this area and share the results with appropriate consulting parties including the Friends of Moses Hall, before using any invasive methods to identify potential burials in these low-probability areas adjacent to, but outside the known cemetery boundary. As affirmed by the Advisory Council on Historic Preservation per their letter rejecting your request for a pre-decisional referral to the Council on Environmental Quality (CEQ) and consistent with 36 CFR 800.14(b), the PA provides an ongoing, legally binding mechanism to continue consultation, continue evaluating effects to historic properties as additional evaluation and design information is developed, as well as provides a mechanism to resolve adverse effects and disputes.
The MDOT SHA and FHWA properly evaluated the Preferred Alternative’s potential for cumulative effects, including at the Morningstar Cemetery. In conducting this analysis, MDOT SHA has acknowledged that the early 1960s construction of I-495 and other aspects of the Eisenhower Interstate System caused disruption to the Gibson Grove community and other communities, particularly communities of color. Indeed, these types of community impacts formed the historical context and impetus for passage of NEPA and NHPA. The MDOT SHA, during years of extensive research (discussed in more detail below), has not identified any evidence that I-495 construction in the 1960s impacted burials at Morningstar Cemetery. That research assisted MDOT SHA in determining whether the MLS proposed action would contribute to cumulative effects to the Morningstar properties and related resources in the context of past, present, and reasonably foreseeable actions as required by the NEPA CEQ regulations.

To provide further detail supporting the FEIS conclusions, MDOT SHA confirmed that in 1992, construction work was performed on I-495. This work was done within the median of I-495 near this area and avoided impact to the cemetery property. As documented in the SDEIS and FEIS, and as concluded in the ROD, the Selected Alternative avoids impacts to the cemetery property as well as to the area of the MDOT SHA owned right-of-way adjacent to the cemetery property where there could be the potential for unmarked graves. Lastly, our review did not identify any reasonably foreseeable future projects in the vicinity of the cemetery. We also note that based on commitments included in the ROD and PA, established in part based on coordination with stakeholders with interest in the Morningstar resource, the Selected Alternative will provide several benefits to the property by reducing stormwater and noise effects over existing conditions.

The MDOT SHA and FHWA also evaluated the potential for indirect effects including visual, noise, and vibration. This information was presented to and discussed with Friends of Moses Hall in January 2022. A noise barrier is proposed along the cemetery boundary that will reduce the current noise level by half. The MDOT SHA has also committed to designing the barrier in a context sensitive manner with options including vegetation screening, artistic form liner panels, and/or memorial plaques commemorating the names of known and unmarked interments. No aspects of the property were determined to be at risk from vibration.

Regarding drainage concerns on the cemetery, MDOT SHA has completed drainage investigations and various assessments of other complaints regarding current damage or disrepair to the cemetery. It was determined that these concerns were not caused by MDOT SHA’s current highway operations. At this time, MDOT SHA and FHWA have taken significant measures to avoid all known impacts to the property for the MLS and have not identified impacts that require mitigation. The MDOT SHA and FHWA are committed to developing and implementing the cemetery treatment plan identified in the Section 106 PA and implementing additional investigations, out of an abundance of caution, to identify any human remains and archaeological potential near the cemetery within the ROD limits of disturbance. The MDOT SHA will continue to offer the Friends of Moses Hall opportunities to consult and accommodate reasonable requests as the treatment plan is developed and implemented. Under the terms of the PA, if the results of the investigations provide additional information suggesting impacts are possible, then MDOT SHA will continue efforts to avoid such impacts and mitigate if impacts are unavoidable.
It was also noted that MDOT SHA has committed to “gifting” certain land to the Morningstar Tabernacle No. 88 Moses Hall and Cemetery. The term “gifting” is used to indicate that the MDOT SHA will convey this land without seeking anything in return.

Regarding your comments on the environmental justice (EJ) analysis, we note that the initial analysis of potential EJ impacts were included in the DEIS. At this stage of the study, the analysis focused on the entire study area, reflecting a broad geographic area surrounding the 48-mile study limits for the Build Alternatives assessed in the DEIS. The DEIS study area included I-495 from south of the George Washington Memorial Parkway in Fairfax County, Virginia, including the American Legion Bridge (ALB) across the Potomac River, to west of MD 5 in Prince George’s County, Maryland; and I-270 from I-495 to I-370 in Montgomery County, including the east and west I-270 spurs north of I-495.

As a result of comments on the potential impacts, especially to those disclosed in the DEIS to EJ populations, MDOT SHA and FHWA took a fresh look at the alternatives and presented a revised alternative in the SDEIS, Alternative 9 – Phase 1 South, which substantially reduced the number and location of potentially impacted EJ populations. The Selected Alternative Phase 1 South has identified No Action for some 34 miles and with build improvements now 14 miles long focusing on the west side of I-495, including the ALB and I-270 from I-495 to I-370.

The SDEIS disclosed impacts to the EJ populations in comparison to non-EJ populations. The FEIS summarized the final technical analyses on impacts to both EJ and non-EJ populations and considered mitigation and community enhancements. Both beneficial and/or adverse impacts to EJ populations were considered in the EJ analysis. Based on the reasoning documented in the SDEIS and FEIS, FHWA and MDOT SHA have determined that no disproportionately high and adverse impacts to EJ populations would occur as a result of the I-495 and I-270 Managed Lanes Study Preferred Alternative. As intended by NEPA/Section 106 and Executive Order on EJ, a review of the entire record shows that impacts to EJ populations were presented, identified by the public as a result of the public outreach process, and were not only considered but resulted in a change to the Selected Alternative.
The attachments included with this FEIS comment letter are included on the following pages.
This letter was included as an attachment with the FEIS Comment Letter and therefore the copy of the letter is included here. However, MDOT SHA acknowledges receipt of this letter is related to the Section 106 process and has addressed the comments raised through the Section 106 Consulting Parties process.

May 2, 2022

By Email to: 

Mr. Steve Archer
Cultural Resources Team Leader
Maryland Department of Transportation
State Highway Administration
Endangered Species Division
767 North Calvert Street
Baltimore, MD 21202

Re: I-495 and I-270 MD Section 106 Materials, PA Third Draft - Archeological Treatment Plan (Attachment 5) and Cultural Resources Treatment Plan (Attachment 4)

Dear Mr. Archer:

Thank you for the opportunity to review the additional Section 106 materials released on March 31, 2022. Our comments below are intended to supplement our comments that we submitted on April 14, 2022, but will specifically focus on the Cultural Resource Treatment Plans (“Cemeteries Treatment Plan” - Attachment 4) and the Archeological Treatment Plan (Attachment 5). Our comments to these documents are limited to their pertinence to Morningstar Tabernacle No. 98 Moses Hall and Cemetery (BL 35-212 - hereafter “Morningstar Moses”).

To put our comments and concerns into perspective, we have included a graphic map (See Attachment 2) based on the Report of Geophysical Survey (GPS) conducted July, 2021 by esteemed archaeologist Dr. Tim Horsey. As previously stated, Dr. Horsey’s GPS survey covered only a portion of the Morningstar Moses property and a limited area of the state’s I-495 Right-of-Way. Dr. Horsey’s Report Summary stated that “the total of 377 probable and possible burials is likely lower than the actual total number of graves present.” Dr. Horsey went on to state:

"Importantly, these results reveal that subsurface anomalies interpreted as graves continue into the Maryland Department of Transportation State Highway Administration Right-of-Way (MDOT SHA ROW) to the north of the enclosed cemetery. While the exact number is difficult to define from these data, some 14 probable unmarked burials are indicated in this area. As many as 94 burials are suggested in total, however, most of the anomalies suggesting these likely have alternative, natural explanations.”

The area of the MDOT SHA ROW where graves are indicated has already been subjected to significant ground
disturbance from construction and earth-moving when I-495 was originally constructed and again when the highway was widened in the 1990s. Additionally, decades of stormwater runoff, as well as highway use and maintenance, have further impacted burials.

It is therefore reasonable to conclude that human remains have been disturbed and desiccated, and that it is likely that human remains will be discovered within the LOD area adjacent to Morningstar Moses. Therefore, treatment plan and mitigation commitment must require the restoration of human remains on the Morningstar Moses site. Prior to any such restoration, a thorough archaeological survey of the Morningstar Moses property would be required to identify locations for restoration. We emphasize that Order of Moses Tabernacle No. 88 members paid to bury their family members at Morningstar Moses and it is vital that this community of dead remain together.

We restate our rejection of SHA’s convenient definition of the boundary of the cemetery. SHA is, in fact, now using the cemetery boundary on a 2017 arial map that was shared in consulting party meetings. The 2017 aerial was used as a graphic underlay during a Consulting Party meeting with SHA on January 4, 2022, for the depiction of grave shafts revealed in the limited area where GPR was conducted. We reject SHA’s assumption and interpretation of the 2017 survey as such sufficient to establish the extent of the boundaries of the Morningstar Moses Cemetery. Historical research and the absence of burial records for most of the 277 GPR-detected probable and possible graves in the limited survey area points to the distinct possibility that the cemetery is older and larger than originally thought. The historical evidence supports that this could be a Reconstructor-era cemetery. Most graves were marked by stones and not inscribed markers, and it is likely that landowners and descendants present in 1957 would not have been able to identify the specific boundaries of the cemetery.

Archaeological and Cultural Monitoring

We reiterate our previous requirement that the monitoring of ground-disturbing and archaeological activities at the Morningstar Moses site, including areas of the adjacent LOD, must be carried out by an appropriate, qualified professional. Morningstar Moses’ cultural and historic importance requires that a professional supervising ground-disturbing and archaeological investigations at the site have extensive experience in African American cemetery archaeology. The Archaeological and Cemetery Treatment Plans should include the following provision:

The archaeological studies of Morningstar Moses cemetery required under the terms of the RA shall be carried out by a cultural resources management (CRM) firm with extensive experience in African American archaeology, community archaeology, and oral history selected by the Board of Trustees of Morningstar Tabernacle Number 88, Incorporated (MT88) and Friends of Moses Hall (FMH), and under the direct supervision of a qualified professional approved by MT88 and FMH. The cultural monitor approved by MT88 and FMH is required to be on site at the Morningstar Moses project location at all times to monitor archaeological project activity. MDOT SHA shall cover the cost of the archaeologist and cultural monitor.

Archaeological Treatment Plan

The Morningstar Moses site is NRHP eligible under Criterion A and C, but the Maryland Historical Trust (MHT) has recommended that this site also be considered eligible under Criterion D. As previously stated, we concur with MHT that this site be deemed eligible under Criteria A, C, and D. Accordingly, the Archaeological Treatment Plan should be updated to include the Morningstar Moses site.

The Cemetery Treatment Plan limits archaeological investigations to the presence of human remains and funerary objects, and does not consider that there is potential for significant archaeological remains at the edge of the LOD and the northern cemetery boundary, including areas of the cemetery within the existing I-495 Right-of-Way, and along the access footprint that have not been subject to archaeological investigations.

Additionally, the Morningstar Moses site holds the only remaining extant foundation of a once-thriving Order of Moses building in Montgomery County. The close proximity of the rail to the LOD and the history of significant past disturbance of the Morningstar Moses site from the original I-495 construction and subsequent widening — and highway traffic impacts in general — further supports that the site should be included in the Archaeological Treatment Plan.

Turning our attention to the Archaeological Treatment Plan document, we have the following preliminary comments, but reserve the right to review and comment further on this document once the Morningstar Moses site is included.

Human Remains Protocols During Archaeological Investigations (Appendix 1)

We take issue with the following language:

“We, Maryland, pursuant to State of Maryland Criminal Code § 10-402, the State’s Attorney must authorize movement or removal of any remains until determined to be archaeological.”

It is our understanding of the statute that unless the removal is temporary, the authorization of the State’s Attorney is required for the removal of any remains for any reason, regardless of whether they are considered archaeological or for any other consideration. The section also requires publication of “a notice of the proposed relocation in a newspaper of general circulation in the county where the burial site is located.” There is no exception to this requirement for archaeology. The statute does allow for remnants to be reinterred in the presence of “a trained anthropologist or archaeologist” rather than “a mortician, professional cemetery, or other individual qualified in the interim of human remains” or “a minister, priest, or other religious leader.” This language should be corrected to accurately reflect State of Maryland Criminal Code § 10-402.

Cemetery Treatment Plan

Site Treatment Plan Research Methods - Previously Conducted Research

MDOT SHA appears to have accurately crafted its language in this section to support its assumptions and/or deplorables findings — in some cases descriptively so. For example, we point to the mischaracterization of Dr. Tim Horsley’s GPR survey findings at the top of Page 5.

“The study identified 14 subsurface anomalies interpreted as possible graves within the MDOT SHA ROW to the north of the enclosed cemetery; an additional 30 anomalies in this area were thought more likely to be related to natural soil variations [Falsetti et al. 2021]. Although the GPR reflections in this area are weaker than other parts of the survey area, as a result of this study, the area of possible burial features within the MDOT SHA ROW has been included within the NRHP eligible boundary of the property.”

We urge for emphasis the precise language from Dr. Tim Horsley’s Report Summary:

“Importantly, these results reveal that subsurface anomalies interpreted as graves continue into the Maryland Department of Transportation State Highway Administration Right-of-Way (MDOT SHA ROW) to the north of the enclosed cemetery. While the exact number is difficult to define from these data, some 34 probable unmarked burials are indicated in this area. As many as 34 burials are suggested in total, however, most of the anomalies suggesting these likely have alternative, natural explanations.”

MDOT SHA’s characterizations in this document and elsewhere appear aimed to convince consulting parties and the public to trust its version of a “revised cemetery boundary” and that “MDOT SHA developed an alternative design and LOD configuration that eliminates all Project impacts within the revised property boundary and avoids associated potential burial features within the MDOT SHA ROW adjacent to the cemetery boundary.” We regret and take offense to MDOT SHA’s characterizations and attempts to downplay
impacts to the Morningstar Moses site.  

With reference to Page 5, Paragraph 2, we have twice submitted corrections to the MDD Variation of Eligibility (DOE) form submitted by MDOT SHA and again state that errors and omissions still exist. We also reemphasize that this site should be deemed eligible under Criteria C, A, and D.

Site Treatment Plan Research Methods - Defining Areas that Require Archaeological Investigation

We believe that MDOT SHA again mischaracterizes Dr. Tom Horony’s GPR Report in stating that “Given the weak nature of feature signals identified on the nearby high ground, it may be impossible to confidently identify potential graves in this area.” We also object to MDOT SHA’s use of the word “potential graves” as misleading in certain places in the document. We look to Dr. Tom Horony’s GPR report for his interpretations of “probable” and “possible” burials as follows:

“For ease of interpretation, burials are divided into “probable burials” and “possible burials” depending upon the confidence that such an interpretation can be made. This distinction is based on several characteristics of the geophysical anomaly (i.e., size, dimensions, depth, and orientation), as well as its associated grave marker or other similar anomalies. In the case of possible burials, other explanations are possible and cannot be ruled out, although it is more likely that the anomaly is burial related.”

We again point to Dr. Horony’s GPR report for his findings related to burials within the MDOT SHA ROW and, more specifically, to the cause of “weak signals” in this area:

“While the absolute number of burials within the ROW is impossible to determine with confidence, there is strong evidence that graves continue into this area. 14 probable burials are identified in Figure 12, with an additional 23 possible burials highlighted. However, other burials and/or disturbances are possible in the area. Together, this suggests that section A of the ROW, however, could be an underestimate. In general, the GPR reflections in this area are weaker than other parts of the survey area, given the sensitivity of the GPR, great care has been taken to identify all potentially significant anomalies. It is quite possible that many of the possible burials are caused by other subsurface disturbances or natural soil variations, as well as other feature disturbances; however, it is impossible to rule out the presence of an unmarked burial in each case.

The difficulty in confidently identifying burials in this area might in part related to a change in soil type. As described in Section 1.5 and Figure 2, Brinklow-Bloacktown cherty silt loam are present in this corner of the cemetery (although it should be cautioned that the soil map may not be accurate at the scale shown). Cherty soils produce increased noise levels due to the greater concentration of clay minerals; however, the GPR data from this area are not discernibly noisier than the rest of the cemetery. The weaker reflections here indicate a lower physical contrast (primarily conductivity) between the causative features and the surrounding soil. Several factors could cause such a reduction in contrast, including (a) changes in the soil type; (b) variations in soil moisture (that can be related to soil type and/or topography) and/or ash thickness; (c) the nature of the burial (i.e., casket vs. shroud), and (d) the state of preservation of the inhumation. While identifying these factors are the most significant is not usually possible solely based on the geometric data in this instance it is likely a combination of at least (a), (b), and (c). As Falchiesta et al. note, the top of the hill may have been higher be the site of the earliest burials and consequently those associated anomalies would be expected to be weaker due to more advanced decomposition.

The GPR reflections suggesting probable and possible burials in this area begin at a depth of around 1’ (0.3m) and extend to at least 4’ (1.2-1.5m). While the remains of any inhumations are likely below 4’, distinct soil variations associated with the grave shafts can be expected at a depth of 1’ (0.3m).

Environmental Context - Land Use History and Current Conditions

We wish to clarify the following sentence: “The central portion of the path was a bay road and was constructed on top of fill piles, instead the path along that portion of the path by way of a culvert. Some work on the map in Attachment 2 is undetermined, but the presence of large chunks of clay brick indicate that the path may have been associated with highway construction. We wish to clarify that the Bay Road did not create the fill piles, but simply created steps in the artificial berm to allow pedestrian access to the cemetery. It should be noted that MDOT SHA’s perpetual stormwater easement is also located in this area and the fill piles could have been associated with construction of the stormwater drain. MDOT SHA’s lack of maintenance of their stormwater easement on the property has contributed to soil erosion and physical degradation of the site.”

Treatment Goals - Additional Non-destructive Survey/Archaeological Fieldwork

The document states that “No further ground disturbing investigations will be conducted within the identified cemetery boundary at this time. A series of further steps, including additional GPR and examination of the LOD to identify burials outside the understood boundary of the cemetery will be conducted to evaluate avoidance impacts to the Morningstar Cemetery as a result of the SKS Project activities.”

We point out that only non-destructive field investigations have been conducted at the site to date. GPR was conducted on a portion of the Morningstar Moses cemetery property and a portion of the MDOT SHA ROW. The areas where the GPR survey was conducted are shown on Attachment 2. In the likely event that human remains are present in the LOD, they shall be retained within the Morningstar Cemetery. Prior to any such retrieval, a proper archaeological survey of the Morningstar Moses property, at the sole cost and expense of MDOT SHA, would be required to identify locations for reinterment.

MDOT SHA further states that, “The primary goal of the archaeological investigations is to understand that no interments are located within the M5L Project LOD that should be impacted by the proposed construction in this area.”

MDOT SHA’s proposed areas within the LOD for additional GPR study seem to presume the end results of the investigation before they are carried out and do not demonstrate to us that the MDOT SHA is prospectively working to avoid impacting all Morningstar Moses burials. MDOT SHA seems committed to their arbitrary definition of the boundary of the cemetery and does not consider that graves and artifacts could be present along the entire length of the LOD adjacent to the Morningstar Moses site.

Machine and Hand Striping of the LOD (P.10)

This paragraph should be revised to read:

Following the GPR effort, LOD will be reduced to the maximum extent feasible while still accomplishing the purpose and need of the Project. If the GPR has indicated a potential for additional burials within the LOD. At this time, substantial harm vegetation will be removed from the LOD in the vicinity of the Morningstar Cemetery as depicted in Figure 2.3 with an appropriate qualified archaeologist and cultural monitor present for all ground disturbance. The area to be cleared encompasses the area between the roadway and the stabilized LOD. The mechanical removal of the topsoil in these areas will be accomplished with a backhoe, trailer, or similar vehicle with a bucket fitted with a smooth (not toothed) blade, and the soil removed will proceed, directed by the archaeologist and cultural monitor. In a slow and careful manner removing only a few inches at a time – as noted in the GPR study, distinct soil variations associated with the grave shafts can be expected at a depth of 1’ - 1.5’. The topsoil will be sampled by screening for artifacts and will be removed under the direction of the archaeologist and cultural monitor, and the interface between...
the topsoil and subsoil will be cleared by trowel, trowel, or a combination thereof to evaluate any features or artifacts indicative of interments and/or archaeological remains.

Summary of Expected Stages of Coordination and Fieldwork

As the document states, "The community has expressed a preference for re-interment of remains within Morningstar Cemetery, and the MDOT SHA will accommodate this to the extent practicable and permissible.

We repeat that prior to any such re-interment, a thorough archaeological survey of the Morningstar Moses property, at the sole cost and expense of MDOT SHA, would be required to identify locations available within the Morningstar Moses site for re-interment.

Respectful Treatment of Human Remains

The following paragraph should be revised to read:

The MDOT SHA archaeologists and archaeological consultants will treat any human remains encountered during the Project in a manner guided by the relevant federal and state laws and guidelines. In addition, human remains will be treated with the utmost dignity and respect at all times. Human remains and/or associated artifacts (including grave markers,asket/urn materials, or funerary objects) will be left in place where possible and not disturbed unless necessary, and no personal or media photographs or filming will be allowed of human remains other than what is needed for technical documentation, and consultant Project and MDOT SHA personnel will be restrained from posting or disseminating information, videos, or photographs on social media or other venues. The MDOT SHA and FHA will be the only authorized sources to disseminate information to consulting parties or media. However, in no event shall photographs or videos of skeletal remains or funerary objects be released to the media or press without the express written consent of The Board of Trustees of Morningstar Tabernacle Number 88, Incorporated. No skeletal remains or remains associated with the remains will be collected or removed until appropriate consultation has taken place. All personnel involved with the discovery will maintain confidentiality concerning the remains, and any press contacts will be referred to the MDOT SHA.

We appreciate your consideration of these comments.

Sincerely,

Friends of Moses Hall and
The Board of Trustees of Morningstar Tabernacle Number 88, Incorporated

Alexandra Jones, PhD, RPA
Trustee, Morningstar Tabernacle Number 88, Incorporated
Executive Director and Founder, Archaeology in the Community

Austin L. White
Trustee, Morningstar Tabernacle Number 88, Incorporated
Descendant

Charlotte Troup Leighton
Trustee and Chair, Friends of Moses Hall Committee,
Morningstar Tabernacle Number 88, Incorporated
Vice President of Advocacy, Cabin John Citizens Association

L. Paige Whitley
Chair, Research Committee, Morningstar Tabernacle Number 88, Incorporated
Independent Researcher

Sondra Raspberry
Descendant

Sharon L. Stewar
Descendant

Christopher Waynes
Descendant

Austin White II
Descendant

Nathan White II
Descendant

Pamela White
Descendant
A letter dated July 13, 2022 from ACHP was sent to the Friends of Moses Hall in response to this comment.

June 15, 2022

Ms. Jaime Loachinger
Assistant Director
Advisory Council on Historic Preservation
400 4th Street, NW, Suite 508
Washington, DC 20001

By email to: loachinger@achp.gov

Re: Maryland I-495/I-270 Managed Lanes Study – Request for Pre-Decisional Referral to CEQ
Morningstar Tabernacle No. 88 Moses Hall and Cemetery (MBRP: 35-212)

Dear Ms. Loachinger:

Thank you for participating in Monday’s consulting party meeting led by the Federal Highway Administration (FHWA) in response to our June 8 letter to Transportation Secretary Bumpass (attached for reference). We especially appreciated your acknowledgement that federal agencies have an obligation to consider cumulative impacts and environmental justice.

During the meeting you indicated that the Programmatic Agreement (PA) was already in your office for execution. We learned yesterday that the ACHP has since executed the PA. This is unfortunate in our view, because it undermines FHWA’s repeated assurances on Monday that there would still be a comment opportunity on both the PA and the Final Environmental Impact Statement (FEIS).

We continue to have great concerns that the I-495/I-270 Managed Lanes Study FEIS will soon be released by the FHWA and Maryland Department of Transportation (MDOT SHA) as a deeply flawed environmental review document that fails to meet the requirements of the National Environmental Policy Act. Further, as emphasized in our letter to Secretary Bumpass, MDOT SHA’s failure to look for buried in the IOD before the FEIS is an egregious and potentially very harmful violation of the agency’s Section 106 and NEPA obligations.

One of the primary legal flaws in the FEIS is an issue that has significant implications for the Section 106 regulations as well – the FHWA’s stated intention to maintain its unprecedented argument that the consideration of cumulative impacts does not include adverse impacts prior to 1979 or 1980, regardless of whether those earlier adverse impacts were caused by the same agency and the same infrastructure. The purpose of this letter is to urge the Advisory Council on Historic Preservation (ACHP) to initiate a
pre-decisional referral to the Council on Environmental Quality (CEQ), pursuant to 40 C.F.R. Part 1504, to address the FHWA’s attempt to revise the definition of cumulative effects in a manner inconsistent with prior precedent. Since the Section 206 regulations themselves rely on the consideration of cumulative effects, 36 C.F.R. 500.19(c)(2), this issue has enormous importance for the ACHP. Unless the FHWA changes its position, this issue is expected to be one of the central challenges raised in litigation opposing the project. We urge the federal agencies to involve CEQ in reviewing this issue before it goes to the courts.

The ACHP’s execution of the PA (although disappointing, and inconsistent with FHWA’s assurances) does not preclude the ACHP from initiating this pre-decisional referral. The PA essentially kicks the can down the road, and defers any determination regarding adverse effects – cumulative or otherwise. Therefore, resolving the inconsistent definitions of cumulative effects will be helpful, if not essential, to successful implementation of the PA.

In our view, the transportation agencies’ refusal to consider the cumulative impacts of building the highway back in the 1950s is one of the most egregious compliance deficiencies and has dangerous implications for both Section 106 and NEPA as a matter of precedent. Therefore, we urge the ACHP to reconsider the matter to CEQ. The window for submitting a CEQ referral is a mere 25 days after the FEIS has been issued. If the FEIS is released as scheduled on June 17, the deadline for CEQ referral would be July 12. It is critical for the FEIS (or a Supplemental D/E) to reopen the consideration of cumulative impacts, so that a meaningful evaluation and resolution of those impacts can be achieved, without the artificial wall being imposed by the FHWA.

Thank you for considering our comments and our plea for your support and intervention.

Sincerely,
Friends of Moses Hall
and The Board of Trustees of Morningstar Tabernacle Number 88, Incorporated

Diane E. Barder
President, Morningstar Tabernacle Number 88, Incorporated
Descendant

Dr. Charles W. Harik
Vice President, Morningstar Tabernacle Number 88, Incorporated
Descendant

Eileen McGlacken
Secretary, Morningstar Tabernacle Number 88, Incorporated
Descendant

Montgomery Crawford
Treasurer, Morningstar Tabernacle Number 88, Incorporated
Descendant

Alexandra Jones, PhD, BPA
Trustee, Morningstar Tabernacle Number 88, Incorporated
Descendant

Executive Director and Founder, Archaeology in the Community

Friends of Moses Hall June 15, 2022 Page 2 of 3

Aurie E. White
Trustee, Morningstar Tabernacle Number 88, Incorporated
Descendant

Charlotte Groves-Brighton
Trustee and Chair, Friends of Moses Hall Committee,
Morningstar Tabernacle Number 88, Incorporated
Vice President of Advocacy, Cabin John Citizens Association

L. Paige Whaley
Chair, Research Committee, Morningstar Tabernacle Number 88, Incorporated
Independent Researcher

Sandra Raspberry
Descendant

Shawn M. Steward
Descendant

Christopher Waynes
Descendant

Aurie White II
Descendant

Nathan White II
Descendant

Pandora White
Descendant

Enclosure:
Friends of Moses Hall letter to Secretary Buttigieg, June 8, 2022

cc:
David Clarke, Federal Preservation Officer, FHWA
Reid Nelson, Manny Sarik, Javier Marquez, and Kelly Fantozzi, ACHP
Elizabeth S. Merritt, Deputy General Counsel, National Trust for Historic Preservation
Reminda Mabary, Chair, White House Council on Environmental Quality
Stephan Nevelovitch, NEPA Program Manager, Region 3, US-EPAPresent Heavey, Director, NRECA - Region 3, Office of Communities, Tribes, and Environmental Assistance, US-EPAL

Friends of Moses Hall June 15, 2022 Page 3 of 3
For a response to the cumulative effects comments raised in this letter refer to the response to the July 15 FEIS comment, on pages 27-29 above.

Friends of Moses Hall
7540 Seven Locks Road
Cabin John, Maryland 20818

June 9, 2022

The Honorable Pete Bumpeg
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Ave. SE
Washington, DC 20590

Re: Maryland I-95/I-270 Managed Lanes Study
Morringer Tabernacle No. 58 Moses Hall and Cemetery (MHMP: 35-212)

Dear Mr. Secretary:

We write to you with great concern that the I-95/I-270 Managed Lanes Study Final Environmental Impact Statement (FEIS) will soon be released by the Maryland Department of Transportation (MDOT SHA) as a deeply flawed environmental review document that fails to meet the requirements of the National Environmental Policy Act, and most notably, the policies and priorities placed by the Biden administration on protecting and remedying historic wrongs to disadvantaged communities.

We refer to Assess Cumulative Effects or to Substantively Address Racial Equity and Environmental Justice

Friends of Moses Hall (FMH) has copied your office on our detailed comment letters related to this project and we encourage you to consider these communications carefully. Most distressingly, we believe that MDOT SHA and the Federal Highway Administration (FHWA) have failed in concluding that there are no clear cumulative effects at the historic Morringer Moses site. The history of this site shows that MDOT SHA (formerly the Maryland State Roads Commission) has repeatedly engaged in activities that have both cumulatively and negatively affected conditions at this historic African American cemetery.

The FHWA and MDOT SHA have taken a position in this case that is absolutely unprecedented. When evaluating the cumulative impacts of the beltway widening project on this historic African American community, they argue that they do not have to consider the cumulative impacts of originally bulldozing the beltway through this site in the first place, because the Beltway was built prior to the enactment of the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). There is absolutely no legal basis for excluding the original construction of I-95 from the analysis of cumulative impacts to this site — especially since the original highway construction was funded and carried out by the same agencies as those proposing the current project.
In addition, there has been a dramatic contradiction between the unlawfully restricted scope of the agencies’ environmental review and some of the agencies’ public statements. For example, on September 21, 2021, The Washington Post ran a story covering FHWA’s efforts to avoid impacts to the Morningstar site. In that story, Julie M. Schmidtlein, chief environmental officer for the Maryland Department of Transportation, stated, “We own the faults of the Maryland Roads Commission impacting the community 60 years ago. It’s our responsibility now to repair the damage and come in and do the right thing.” Of course, we were encouraged to hear this important statement. By contract, however, on January 4, 2022, SHA concluded that it did not have to consider cumulative effects to the site because “impacts to the Goshen Grove community occurred with original I-495 construction, prior to the passage of NEPA and NHPA (Section 106).”

FHWA states that the original I-495 construction had significant and lasting economic, physical, and social impacts on this historic community through land takings and the splitting of this once vibrant African American community in Calumet. Conceiving the cumulative effects of racial inequity inherent in the original land takings, FHWA drafted a report of findings following our examination of Maryland State Roads Commission (MCSR) records pertaining to the construction of I-495 from the late 1950s through the early 1960s. This document can be found on our website: [https://www.friendsofmoseshall.org/press/releases](https://www.friendsofmoseshall.org/press/releases).

Additionally, MDOT has admitted, based on an incomplete site investigation, that there may be burials in the project’s Limits of Disturbance (LDC). Evidence of up to 54 burials has been found by ground penetrating radar (GPR) in the current I-495 right-of-way and it should be noted that only a small portion of the adjacent state right-of-way was surveyed prior to the FEIS. While MDOT has committed to additional GPR investigation of the project’s adjacent LDC, the agency has refused to conduct these investigations prior to the FEIS and has instead elected to do so just prior to construction, when design changes may not be possible. MDOT has disregarded our reasonable concern regarding the location of the project’s LDC in relation to the known burial sites, which raises substantial questions about physical avoidance. The updated LDC still appears to be immediately adjacent to graves.

FHWA greatly appreciates the Biden administration’s promise — and your personal commitment — to usher in a new era of racial equity in transportation projects. While FHWA has not taken a position on the viability of the I-495/I-70 Managed Lanes project as a whole, we are committed to advocating for this historic African American resource, which was named one of America’s 11 Most Endangered Historic Places in 2021 by the National Trust for Historic Preservation.

This site is important to descendents and others who consider it a sacred place and one whose role matters in an accurate history of the area. FHWA hopes that someday the site will not only be a place of interest and reflection honoring those who passed on but will also be a site used to educate students and visitors of the role African American Beneficiary societies played during a period of legal and social segregation in Maryland.


2 MDOT, “Morningstar/Moseshall Cemetery Decision,” January 4, 2022. [Available at Maryland SRO and Virginia SRO] Link to full document: [https://docs.google.com/file/d/1UbG5Lb7-b9nECSzYg8yeo8aPteZ4 ksKo/edit?usp=sharing](https://docs.google.com/file/d/1UbG5Lb7-b9nECSzYg8yeo8aPteZ4 ksKo/edit?usp=sharing).
This page is intentionally left blank.
OFFICE OF THE COUNTY EXECUTIVE, MONTGOMERY COUNTY

July 18, 2022

Marc Elrich
County Executive

The Honorable Pete Buttigieg
Secretary of Transportation
US Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

DOTSec2Sec@dot.gov

Dear Secretary Buttigieg,

As County Executive for Montgomery County, the most populous jurisdiction in Maryland and one of the leading urban areas of the Northeastern United States, I am writing in regard to the I-495 & I-270 Managed Lanes Final Environmental Impact Statement (FEIS). I ask that you delay the issuance of a Record of Decision for at least an additional 90 days to allow the public to review the document and identify issues that require resolution. I also ask that you require the Maryland Department of Transportation to respond to all substantive issues in a meaningful and constructive way before finalizing the National Environmental Policy Act process for this project.

The FEIS and appendices total 26,500 pages in 74 separate files, and it was released on June 17 for 90-day review. This is an enormous amount of information to review in a short time period. These comments about the timeline have been raised by many members of our legislative State delegation, the Maryland chapter of the Sierra Club, and other organizations. As noted in the letter from our state legislators, the extension is needed at least partly because the Maryland Department of Transportation (MDOT), did not release the federally mandated analyses and other meaningful information until issuance of the FEIS. This has meant that the public and reviewing agencies could only review the environmental justice and greenhouse gas emissions analyses, mitigation plans, the recently changed traffic model, and MDOT’s response to the 5,000 comments it received during the public comment periods for the Draft Environmental Impact Statement (DEIS) and Supplemental DEIS.

OFFICE OF THE COUNTY EXECUTIVE, MONTGOMERY COUNTY

Response:

On June 17, 2022, the FEIS was published in the federal register and made available for a 30-day period on the US Environmental Protection Agency’s (USEPA) EIS Database website, on the Op Lanes Maryland webpage and at 17 public library locations in Maryland, Virginia and Washington D.C. The FEIS was prepared to present the final analyses completed for the Preferred Alternative, design refinements to address public comments, operational considerations and to further avoid and minimize impacts, and to respond to over 5,000 comments received on the DEIS and SDEIS.

From the outset of the Study’s NEPA process, the Federal Highway Administration (FHWA) as the lead federal agency, and the Maryland Department of Transportation (MDOT SHA) as the co-lead agency, developed a comprehensive public involvement and engagement strategy designed to obtain input from stakeholders around the entire MLS study area. This strategy combined traditional opportunities for commenting on the Draft Environmental Impact Statement (DEIS) and Supplemental DEIS (SDEIS) in addition to wide-ranging outreach to community organizations (e.g., church groups, homeowners’ associations, public interest groups, and governmental entities), with particular sensitivity and outreach to identified Environmental Justice communities. Refer to FEIS, Chapter 8. The public involvement and engagement process, starting in early 2018 and continuing for over four years, considered the vast diversity of community resources. Despite a global pandemic, MDOT SHA’s public involvement strategy ensured the safety of the public while still providing the same opportunities for meaningful participation by the public in the NEPA process.

The DEIS was published on July 10, 2020 and was made available on the I-495 & I-270 P3 Program webpage (https://oplanesmd.com/deis/), on the USEPA EIS Database webpage and at multiple public locations in hard copy in Montgomery and Prince George’s counties, Maryland, Fairfax County, Virginia and Washington DC. Following publication of the DEIS, FHWA and MDOT SHA provided a 90-day comment period, which is twice the minimum time required by the CEQ regulations. Based on input from the general public, community partners, stakeholders, and local and federal officials, however, MDOT SHA supported extending the DEIS comment period and made a formal request to FHWA, which has authority to grant any extension. FHWA approved this request and granted a 30-day extension of the public comment period for the DEIS. All in all, the DEIS was made available for comment and review from July 10, 2020 through and including November 9, 2020, a total of four months. During this extended comment period, the agencies received close to 3,000 comments.

The SDEIS published on October 1, 2021 was prepared to consider new information relative to the Preferred Alternative, Alternative 9 - Phase 1 South. Building off the analysis in the existing DEIS, the SDEIS disclosed new information relevant to the Preferred Alternative while referencing the DEIS for information that remained valid. The SDEIS also described the background and context in which the Preferred Alternative, Alternative 9 - Phase 1 South was identified. The SDEIS was available for the public to review and comment on the Preferred Alternative during a 45-day comment period, which was later extended an additional 15 days. The SDEIS was also made available on the I-495 & I-270 P3 Program webpage (https://oplanesmd.com/sdeis/), on the USEPA EIS Database webpage and at multiple public locations in hard copy in Montgomery and Prince George’s Counties, Maryland, Fairfax County, Virginia and Washington DC.
In addition to a combined six-month EIS public comment review period, MDOT SHA has held 16 large public workshops, 7 public hearings including virtual and in-person, and over 200 individual, elected official, community, stakeholder, and business owner meetings. Refer to DEIS, Chapter 7 and Appendix P; SDEIS, Chapter 7; and FEIS Chapter 8 and Appendix R for detailed information on public involvement.

As a result of this continued public involvement and engagement effort, the Preferred Alternative, as described in the FEIS, reflected changes made since the SDEIS. Consistent with the NEPA process, a FEIS should include responses to substantive comments that can take place in the form of changes from what was presented in the DEIS such as factual corrections and/or new or modified analyses or alternatives. This is precisely what was done and clearly reflected in the FEIS. Refer to FEIS, Executive Summary. The MLS FEIS includes responses to more than 5,000 comments received on the DEIS and SDEIS and the Preferred Alternative reflects changes to address many of the comments including design modifications and adjustments, finalizing technical analyses, continued application of avoidance and minimization efforts and finalizing mitigation for unavoidable impacts.

As mentioned above, the FEIS was made available for a 30-day Notice of Availability through various and widely accessible means before the Record of Decision (ROD) was approved. Public involvement and engagement will continue as the project advances to final design and construction. As a requirement in the P3 Agreement, the Developer must provide a public outreach and engagement plan. The Developer will coordinate with MDOT SHA to facilitate an early and ongoing collaborative dialogue to engage stakeholders, local communities, and property owners though final design and construction. MDOT SHA, jointly with the Developer, would be responsible for implementing strategies, such as public meetings and community events, with the goal of maintaining an open dialogue with stakeholders.

The attachment included with the FEIS comment letter is included on the following pages.
Local Road Impacts:

The SDEIS should, but does not, carefully consider traffic conditions at interchange ramps, cross-streets, or along local roadways. The analysis of local roadways groups all roadways together, which averages those that may benefit (such as MD 605 outside the Beltway) with those that may worsen (such as the radial arterials within the Beltway). The analysis also uses daily values, which overlooks issues associated with peak hours and peak directions. Averages are not good indicators for those with potential to have meaningful impact on the public.

Delays, speeds, and travel time information for local network is extremely important information that needs to be known at this stage of the SDEIS. Delaying availability of and consideration of this specific level of information until the FEIS does not allow the public the opportunity to review and comment on this fundamental information that could have substantial impacts on these other roadways.

Transportation Analysis Inconsistencies:

Based on the State's analysis, multiple core components of the Purpose and Need do not appear to be achieved by the proposed Project. The Purpose and Need references 'efficiency moving 'good service, and people' but the SDEIS does not appear to address freight movement and the State has expressly refused to evaluate that movement.

There are multiple segments where the General Purpose Lanes worsen significantly, particularly due to the shifting of bottlenecks on segments of L-270 and L-495 beyond the Project limits. Legal precepts have been established that the National Environmental Policy Act (NEPA) requires mitigation measures to be considered for these adverse impacts. The SDEIS appendix contains numerous examples of significant traffic impacts that are not mentioned in the main document, which means that these impacts are unlikely to be noticed or understood by the public in a review of the SDEIS.

Several performance metrics combines the General Purpose Lanes and Opportunity Lanes together or are missing metrics for the Opportunity Lanes entirely, again limiting the capabilities of public review. A review of Appendix A reveals multiple other apparent errors and inconsistencies that were detailed in the County's November 2021 comments.

Transportation Alternatives:

The absence of an analysis of Project alternatives in the SDEIS fails to meet the requirements of NEPA and prevents consideration of alternatives that could better reduce congestion and greenhouse gas emissions. The Project prematurely eliminated transit alternatives and alternatives focused on Transportation System Management and Travel Demand Management. The County has consistently contested that these alternatives were
I-495 and I-270 Opportunity Lanes / Managed Lanes Study
Supplemental Draft Environmental Impact Statement (SDEIS)
March 10, 2022
Page 3 of 5

Eliminated based on flawed reasoning, as noted also in our November 2020 comments on the DEIS.

A 2011 report by the National Capital Region Transportation Planning Board found that the most effective measure to reduce congestion would be traffic demand management, including road management. While the SDEIS reports on levels of traffic during the pandemic, it did not explore how public policies encouraging telework could be an alternative to constructing toll lanes. The Project did not give any consideration of the federal government’s decision to permanently increase telework and flexible work schedules. As the largest single employer in the metropolitan region, this policy change could have significant effects on the region. Employee incentives and other policies that encourage telework in the private sector could reduce congestion and should be considered more seriously in the consideration of potential alternatives.

Environmental Justice: Equity

This corridor has a highly diverse population, with 23% of census tracts (5 of 39 tracts) immediately adjacent to the corridor designated as Equity Emphasis Areas or Equity Focus Areas by the Metropolitan Washington Council of Governments and the Montgomery County Planning Department. Many additional Equity Emphasis/Focus Areas are located a short distance away from the corridor.

Department of Transportation Order 5610.7(a) states that environmental justice principles shall be fully considered throughout the planning and decision-making processes. Guidance issued by FHWA in December 2021 as well as Executive Order 13988 both similarly emphasize the importance of environmental justice analysis and considerations of equity impacts. The worsened General Purpose lanes as well as the physical impacts of the Project’s construction prompt environmental justice considerations that do not appear to be considered in the SDEIS. Deferring these analyses to the FEIS does not comply with Federal requirements as it deprives the public the opportunity to review and provide feedback on these impacts or any proposed mitigation measures. An environmental justice analysis needs to be included in the SDEIS.

Environmental Impacts:

The consideration of many other environmental impacts and associated mitigation resulting from the construction and operation of the Project are similarly deleted from the FEIS. The analysis is therefore missing significant information on emissions and other air & water quality metrics, despite the policy under Executive Order 13950 to “reduce greenhouse gas emissions” and a requirement to achieve the Order’s policies by including “input from the public and stakeholders, including State, local, Tribal, and federal agencies, scientists, labor unions, environmental advocates, and environmental justice organizations.” This requirement was reiterated by the Council on Environmental Quality (CEQ) when it published in the February 10, 2021 Federal Register its notice of.

OST-810-220718-008
June 30, 2022

The Honorable Pete Buttigieg
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Secretary Buttigieg,

On Friday June 17, the Maryland Department of Transportation (MDOT) and the Federal Highway Administration (FHWA) released a 30-day availability period the I-495 & I-270 Managed Lanes Final Environmental Impact Statement (FEIS) and appendices, totaling 26,500 pages in 74 separate files. The undersigned organizations request an additional formal 60-day review period be provided, up to and including September 17, 2022, to allow the public and commenting agencies a meaningful opportunity to review this new document – which most notably includes a revised traffic model that was used to evaluate key alternatives and estimate various impacts – that have not previously been released to the public.

The FEIS, when added to the over 19,000 page draft environmental impact statement (DEIS) and over 8,000 page supplemental draft environmental impact statement (SDEIS) that it incorporates by reference, represents 53,500 pages, which is roughly equal to almost four full 2022 sets of the World Book Encyclopedia. It is simply not possible to meaningfully review much less comment on four encyclopedias sets worth of information over 18 work days in a 30-day availability period. We therefore ask that you reconsider the early decision by the FHWA division office not to provide a longer review period. More time is necessary to carry out NEPA’s core goal of ensuring meaningful public participation.

1 After years-long review process, final report on I-495/I-270 widening project is released. Nearly 500-page “environmental impact statement” has more than 26,000 pages of appendices, Louis Peck, June 18, 2022, https://berthedsamagazine.com/berthedsa-best-transportation/after-years-long-review-process-final-report-on-i-495-i-270-widening-project-is-released/
According to MDOT’s own FEIS press release, it has "modified analysis methodologies, conducted new analyses, studied new or modified existing alternatives, refined design ... and identified ... mitigation ... [and] unavoidable impacts." The FEIS also includes a new environmental justice analysis never before released to the public. This is not the subject matter of a final EIS but of a supplemental DEIS, which must have a meaningful and proportional public comment period. Finally, with 5,000 comments submitted on the project and MDOT’s responses to those comments of varying length and complexity, it is a substantial effort to review those responses for sufficiency and technical accuracy and merit.

With those kinds of significant changes entailing voluminous new material, with new questions about Maryland constructing toll lanes in Virginia, and with a contentious two-state project that will open up Maryland to 70+ miles of privatization of public transportation infrastructure, it is imperative that the FHWA exercise its oversight role to require that this document receive no less than an additional 60+ day review period as was provided for the SDEIS.

As underscored by the MDOT press release, federally required analyses were not presented to the public with a formal comment period. Some key analyses previously presented were incorrect, and the current versions presented as correct do not explain how the previous errors occurred or how they were fixed. So, the public has no basis on which to verify their accuracy.

The National Environmental Policy Act (NEPA) and relevant DOT and FHWA Orders require accurate environmental analyses and meaningful public participation throughout the NEPA process. These requirements can only be met if

---

2 MDOT’s Plan to Build Toll Lanes in Fairfax is an Unwelcome Surprise to Some Virginians, Bruce DePuyt, June 16, 2022, https://www.marylandmatters.org/2022/06/16/mdots-plan-to-build-toll-lanes-in-fairfax-is-an-unwelcome-surprise-to-some-virginians/

3 In a notice of actions following the issuance of President Biden’s Executive Order 13990 on January 20, 2021, the Council on Environmental Quality made clear that decisions must consider environmental effects of proposed actions, including greenhouse gas emissions, and must involve the public in the decision-making process. The SDEIS for this project did not include a GHG emissions analysis, deflecting it to the FEIS, seven months after the close of the formal public comment process.

the document issued on June 17 is re-designated to be an interim rather than final document and allotted a meaningful and proportional comment period. As noted before, an FEIS for this project should also have a public comment period of at least 60–90 days. Adequate formal public review periods are needed for both an interim document and for an FEIS to ensure that the public has adequate time for meaningful review of the project’s impacts.

The undersigned urge you to uphold federal regulations and provide a meaningful review period that will afford the public an adequate opportunity to review and comment on the new information prior to the issuance of a Record of Decision. This issue has been flagged for FHWA and MDOT repeatedly since January 2022 in letters from Sierra Club Maryland Chapter, Mayor and Council of Rockville, 82 legislators in the Maryland General Assembly, 10 Prince George’s County mayors, the Montgomery County Executive, 32 civic and environmental groups, and multiple members of Congress, and now dozens more groups.

We look forward to your prompt action on this critical, time-sensitive issue.

Sincerely,

---

6 Mayor and Council of Rockville letter to FHWA and MDOT, January 26, 2022, https://static1.squarespace.com/static/5b7276e8da0e0b71d572bfae/56b879f87b8f68288166/5a1c5498dc0f98039f4584395a1067bca0c5975c/1643687911579/FHWA-Letter-FINAL-1926-22-2815%282.pdf
7 Maryland General Assembly letter to FHWA and MDOT, February 22, 2022, https://securecontent.com/599c9da72f23eb0e189f9/files/9216e527-1f6c-5b38-b1ac-0a08e97a9f18/FHWA_Letter.pdf
8 10 Prince George’s County mayors letter to FHWA and MDOT, February 26, 2022, https://cchbzb8b.-9095-2318-98ce-152808b@usrfiles.com/9d7bcb7d27a7723519b8f779e9f1d59e1f6151.pdf
9 Montgomery County Executive letter to FHWA and MDOT, March 10, 2022, https://cchbzb8b.-9095-2318-98ce-152808b@usrfiles.com/9d7bcb7d27a7723519b8f779e9f1d59e1f6151.pdf
10 Montgomery County Executive letter to FHWA and MDOT, March 10, 2022, https://cchbzb8b.-9095-2318-98ce-152808b@usrfiles.com/9d7bcb7d27a7723519b8f779e9f1d59e1f6151.pdf
11 32 civic and environmental groups letter to Secretary Buttigieg, June 3, 2022, https://www.cabec93.com/files/9d7bcb7d27a7723519b8f779e9f1d59e1f6151.pdf
12 Letter addressed to Secretary Buttigieg.
Sierra Club Maryland Chapter
Anacostia Watershed Community Advisory Committee
Audubon Mid-Atlantic
Audubon Naturalist Society
Beaverdam Creek Watershed Watch Group
Biodiversity for a Livable Climate
Brandywine TB Southern Region Neighborhood Coalition
Cabin John Citizens Association
Canoe Cruisers Association
Carderock Springs Citizens Association
Cedar Lane Ecosystems Study Group
Central Maryland Transportation Alliance
Chesapeake Climate Action Network
Citizens Against Beltway Expansion
Clean Water Action
Climate Xchange
Coalition for Smarter Growth
Defensores de la Cuenca
Delegate Lorig Charkoudian, Maryland General Assembly
Don'tWiden270.org
DoTheMostGood
Downtown Residents Advocacy Network (Baltimore)
Environmental Justice Ministry Cedar Lane Unitarian Universalist Church
Friends of Moses Hall and The Board of Trustees of Morningstar Tabernacle
Number 88, Incorporated
Friends of Sligo Creek
Greensbelt Climate Action Network
Glen Echo Heights Mobilization
Greater Farmland Civic Association
HoCo Climate Action
Indivisible Howard County
ISCA - Do Not Expand 495
Maryland Coalition for Responsible Transit
Maryland Conservation Council
Maryland League of Conservation Voters
Maryland Legislative Coalition
Maryland Native Plant Society
Mauj Wow
Mayor Bridget Donnell Newton, City of Rockville
Mayor Patrick Wojahn, City of College Park
National Parks Conservation Association
Neighbors of the Northwest Branch
North Hills of Sligo Creek Civic Association
Our Revolution Maryland
Prince George’s County Peace and Justice Coalition
Promenade Towers Mutual Housing Corporation
Rock Creek Conservancy
Rock Creek Hills Citizens’ Association
Rogue Tulips LLC
Save BARC
Strong Future Maryland
Takoma Park Mobilization Environment Committee
The Climate Mobilization, Montgomery County Chapter
The Ocean Foundation
Transform Maryland Transportation Coalition
Transit Choices
Union of Concerned Scientists
Unitarian Universalist Legislative Ministry of Maryland
Urban Breezes
Washington Area Bicyclist Association
Washington Biologists' Field Club
Well Mind Association of Greater Washington
Woodside Forest Civic Association

Cc:
Ms. Polly Trottenberg, Deputy Secretary, U.S. Department of Transportation
Ms. Stephanie Pollack, Acting Administrator, Federal Highway Administration
Mr. Gregory Murrill, Division Administrator, Federal Highway Administration
Mr. James Ports, Maryland Secretary of Transportation
Mr. Adam Ortiz, Division Administrator, U.S. Environmental Protection Agency
Ms. Tammy Stidham, Deputy Associate Area Director – Lands and Planning, National Park Service
U.S. Congressman Anthony Brown
U.S. Congressman Jamie Raskin
U.S. Senator Ben Cardin
U.S. Senator Chris Van Hollen
RECORD OF DECISION

APPENDIX D – FEIS COMMENTS & RESPONSES

AUGUST 2022

PAGE 50

SIERRA CLUB MARYLAND CHAPTER (JULY 18, 2022)

July 18, 2022

Ms. Jeanette Mar and Mr. Jitesh Parikh
Environmental Program Manager
Federal Highway Administration, Maryland Division
George H. Fallon Federal Building
31 Hopkins Plaza, Suite 1520
Baltimore, MD 21201
jitesh.parikh@dot.gov
jeanette.maryland@fha.gov

Mr. Jeffrey Folden, P.E., DBIA
Maryland Department of Transportation State Highway Administration
I-495 & I-270 P3 Program Deputy Director
707 North Calvert Street, Mail Stop P-601
Baltimore, MD 21202
MJX-NEXPA-P3@mdot.maryland.gov
opleanesMLX@mdot.md.gov

Re: Comments on I-495 & I-270 Managed Lane Study Final Environmental Impact Statement and Final Section 4(f) Evaluation

The National Environmental Policy Act ("NEPA") mandates environmental impact statements for projects of the type and scale of the I-495 & I-270 Managed Lanes Study ("Project"). In an environmental impact statement, NEPA requires that the relevant agencies disclose significant impacts and that the public have a meaningful opportunity to review and comment on those impacts before major decisions are made. On June 17, 2022, the Federal Highway Administration ("FHWA") and the Maryland Department of Transportation State Highway Administration (the "Agencies") issued a final environmental impact statement ("FEIS") for the Project and opened a 30-day review period for the FEIS.

The FEIS describes the Agencies’ preferred alternative and appears to formally conclude the NEPA and Transportation Act (42 U.S.C.) reviews of the Agencies’ environmental review process. Despite its length, and despite two rounds of public comments identifying flaws in the prior drafts, the FEIS and its appendices present incomplete and inadequate analyses of environmental impacts and fail to achieve the fundamental objectives of NEPA. The undersigned Organizations oppose the preferred alternative put forth in the FEIS and support the no build alternative.

We provide the comments below to address issues raised by the FEIS. Where new information has become available since the supplemental draft environmental impact statement ("SDEIS"), it has been included and discussed. The comments provided below refer specifically to the FEIS and supplement the comments on the draft environmental impact statement ("DEIS") and SDEIS that were provided to the Agencies on November 9, 2020, and November 30, 2021, respectively, by the Maryland Chapter of the Sierra Club and other organizations. Unfortunately, the FEIS largely disregards the technical and procedural issues raised in the previous comments. Collectively, our comments present failures of the Agencies’ environmental review process that, if not addressed, constitute violations of NEPA and other governing statutes that will render any record of decision invalid.

The comments identify the Organizations’ key concerns regarding the FEIS, including the FEIS’s failure to:

Response:

The following is a response to the Sierra Club, et al. (hereafter "Sierra Club") comments on the I-495 & I-270 Managed Lanes Study (Study) Final Environmental Impact Statement (FEIS), dated July 18, 2022. The cover letter and executive summary portion of the comment letter summarizes specific comments offered in the rest of the comment. Because all topics summarized in the introductory statement are covered separately below, as well as in responses to common themes raised by other parties, this portion of the comment letter does not require a specific response. The Federal Highway Administration (FHWA) and Maryland Department of Transportation State Highway Administration (MDOT SHA), co-lead agencies for this Study, have also reviewed Exhibits A-M that were included with the comment letter, but are addressed in the topics below and do not require a specific response either.

Throughout these comments, the Sierra Club cites to and/or summarizes various statutes, regulations, federal agency guidance, and case law regarding the National Environmental Policy Act (NEPA) process or other substantive areas of law. These comments generally reflect commenters’ interpretations and legal conclusions. The Lead agencies have considered these comments but this response does not require the Lead agencies to specifically address the commenters’ interpretation of the law and its application. The following responses focus on the contents of the environmental data and analysis reflected in the FEIS. It follows the table of contents and main issues listed in the comment letter.

Responses to the Sierra Club’s comments on the Draft Environmental Impact Statement (DEIS) can be found in FEIS, Appendix T, Section T.2.A, Volume 3 and responses to the Supplemental DEIS (SDEIS) comments can be found in FEIS, Appendix T, Section T.2.B, Volume 2.

I. The Sierra Club’s letter stated that the Agencies’ Environmental Review Process Fails to Satisfy Public Participation Requirements

FHWA and MDOT SHA responded to the Sierra Club’s letter dated June 30, 2022; refer to page 39 of this ROD, Appendix D. The June 30th letter raised the same issues as the July 18, 2022 Sierra Club letter. These comments questioned whether a 30-day availability period was adequate to meaningfully review and comment on the material in the FEIS including supporting appendices. Based on the Council on Environmental Quality (CEQ) regulations, no formal comment period on a FEIS is required and no final decision can be made sooner than 30 days after the FEIS is published in the Federal Register. An extension of the FEIS availability period was not granted by FHWA as there has been extensive opportunity for the public to review and comment on the Project documents including the DEIS and SDEIS over a four-year period. The FEIS was prepared in support of the normal progress of a NEPA Study. That is, after reviewing and considering the many comments received on DEIS and SDEIS the agencies took another hard look at its prior analyses, evaluated accumulated data, refined the Preferred Alternative design to further address operational considerations and most notably to further minimize impacts. The FEIS outlined the changes made since the SDEIS to aid in review of new or updated information. Supporting technical reports appended to the FEIS were analyses presented in the DEIS, updated in the SDEIS, and finalized for the FEIS. For the more detailed response to comments related to the request to extend the FEIS availability period, refer to the FHWA and MDOT’s response to the June 30, 2022 Sierra Club comment in page 39 of this ROD, Appendix D.
The July 18, 2022 letter also claims the Agencies ignored opposing viewpoints, declined to tally the number of comments opposing the project in the FEIS, responded to public comments after the public could formally reply, and responded to similar comments in an inconsistent manner. In total, over 5,000 comments were received during the study comment periods for the DEIS and SDEIS. These comments were organized into relevant comment themes and summarized in respective reports. To be fully transparent and to ensure all comments were able to reach other citizens, the comment summary reports, including the individual submissions, were made publicly available on the Program website. The FEIS, Appendix T includes a response to every comment received on the DEIS and SDEIS. There is no requirement to tabulate the comments because every comment and response is available. FEIS, Appendix T includes a table of contents and an index to aid readers in finding both a response to their DEIS and SDEIS comments as well as the copy of their comments received. The index is organized first by the commenting entity (i.e. community organization, business, etc.) or individual, then alphabetically by the commenter’s last name or organization. The DEIS Comment and Response Index can be found on Page 2 of Appendix T, Index and the SDEIS Comment and Response Index on Page 67 of Appendix T, Index.

Refer to Appendix T, Section T.1 for agency comment responses, T.2 for community organization comment responses, T.3 for elected official comment responses, T.4 for business comment responses, T.5 for form letter comment responses, and T.6 for individual comment responses. For thematic comment responses, refer to Chapter 9 of the FEIS.

All Study documents posted on the website are compliant with Section 508 of the Rehabilitation Act of 1973 and follow federal and state accessibility requirements. The files can be read by a computer program to someone who is visually impaired. As included in Exhibit C, MDOT SHA sent a response to Mr. Gallant regarding the protection of files on the website. The files can be printed, they are accessible to the visually impaired in a manner which fully complies with 508 but content is produced in pdf format in an effort to maintain the integrity of the content.

II. The Sierra Club’s letter states that Traffic Models Used in the FEIS Are Deeply Flawed

FEIS comments questioned the Study’s final traffic forecasts and modeling results. These comments are not based in fact and appear to be based on a misunderstanding of how data was updated and refined between publication of the SDEIS and publication of the FEIS and its supporting documents. FHWA and MDOT followed accepted practice and processes for considering how or if the Preferred Alternative design refinements or other relevant new information would impact traffic forecasts. Any changes to the traffic forecast results in the FEIS properly reflect appropriate and relatively minor updates to modeling inputs based on information available to MDOT SHA following completion of the SDEIS.

The Sierra Club has indicated that the FEIS’s traffic model appears to be inconsistent with the traffic model used to predict revenue. Both modeling efforts are based on the Metropolitan Washington Council of Governments (MWCOG) regional travel demand model. However, updates and enhancements to the MWCOG models vary by use and purpose associated with the particular modeling exercise. Per AASHTO’s Practitioners’ Handbook, Managing the NEPA Process for Toll Lanes and Toll Roads (August 2016): “The NEPA traffic forecasts are intended to provide the basis for an informed Federal decision about the project. For projects involving a PPP or bond financing, it also will be necessary at some point to prepare investment-grade traffic and revenue (T&R) forecasts. The T&R forecasts serve a different purpose from the NEPA forecasts: they provide assurances to investors that traffic levels will be sufficient to support the toll revenues..."
In general, Toll and Revenue modeling is performed for financial planning. It is used in part to generate traffic forecasts that can help identify and evaluate any potential financial risks or uncertainties associated with the project over time. CDM Smith is a company that performs Toll and Revenue studies using proprietary algorithms, data, and analysis, which they performed for the financial planning efforts for this project and to support toll setting. As noted in their report, their work included refinements to the MWCOG model – including adjustments to the population and employment projections, among other things. In addition, the Developer, as MDOT's P3 partner, will perform their own independent Traffic and Revenue studies to support their project financing. Neither Toll and Revenue models are used to evaluate the traffic operations of freeway segments, ramp segments, and intersections within the study area and they do not provide traffic performance measures needed to support NEPA and IAPA evaluations and documentation. When using information from the Toll and Revenue studies, it is also important to keep in mind that, “CDM Smith made qualitative judgments related to several key variables in the development and analysis of the traffic and revenue estimates that must be considered as a whole; therefore, selecting portions of any individual result without consideration of the intent of the whole may create a misleading or incomplete view of the results and the underlying methodologies used to obtain the results,” as stated in the Final Toll Rate Setting Report.

The traffic modeling and analysis used to support traffic analysis for NEPA and IAPA, as well as engineering design, is also based on traffic forecasts developed from use of the MWCOG travel demand model, but the refinements and post-processing assumptions and methodologies differ from those used in Toll and Revenue model. Based on the MWCOG model and refinements completed as part of the NEPA process, the traffic forecast can then be used to develop VISSIM microsimulation models, the results of which are evaluated to identify the project’s traffic impacts and potential areas for design refinements. More specifically, the traffic forecasts in the FEIS were not used to determine when the soft cap would potentially be exceeded; that information would come from the Toll and Revenue studies. Rather, as part of the forecasting assumptions for the NEPA efforts, it was assumed that the maximum throughput in the managed lanes would be capped (by use of toll rates) in order to maintain the minimum operating speed requirement. As stated in FEIS Appendix A, “It should be noted that toll rates are unknown at this point, but they will be dynamic to manage traffic demand in the HOT lanes. For the purposes of this analysis, volumes in the managed lanes were assigned to provide the maximum throughput while maintaining speeds of at least 45 mph in the managed lanes (the federal requirement). This threshold occurs at 1,600 to 1,700 vehicles per hour per lane in the highest demand segment, which equates to a maximum of 3,200 to 3,400 vehicles per hour in the two-lane managed lane network.”

The description above helps explain why specific numbers from the Toll and Revenue studies should not be compared to specific numbers from the FEIS forecasts. Nonetheless, it should be noted that despite the differences in modeling purposes, assumptions and methodologies, MDOT’s traffic modeling team did coordinate with the ongoing CDM Smith and P3 Developer modeling efforts to compare traffic volume forecasts to confirm relative consistency.
In addition, the FEIS comment questioned the number of traffic model runs used in the analysis reported in the NEPA documentation. As part of MDOT SHA’s Draft Application for Interstate Access Point Approval (IAPA), the IAPA Framework Document notes that “Five (5) runs will be performed for each model scenario,” (page 24). This approach was approved by FHWA and is consistent with MDOT SHA Guidelines. Refer to FEIS, Appendix B for additional details on MDOT SHA’s Draft Application for IAPA Approval.

The FEIS comment highlights specific travel time values, noting differences between the SDEIS and FEIS in a series of tables starting on page 18. The concerns are similar to those raised by the Maryland Transit Opportunities Coalition (MTOC) in a letter to FHWA dated July 11, 2022. MDOT’s response to the MTOC comments is included in ROD, Appendix D. That response includes a list of specific forecasting and coding changes that were made by MDOT between the SDEIS and FEIS in light of the new recommended Preferred Alternative, and as part of the normal course of action for a NEPA study. The changes refined the analysis in response to public, stakeholder, and agency comments concerning the scope of the proposed action, as well as other issues. The updated analysis did not fundamentally alter the overall findings of the MLS. The following explains in greater detail how these refined analyses affected the specific travel time numbers cited by the Sierra Club.

Table 1 on page 18 shows travel time results for three northbound trips on the west side of the study area. The table correctly notes that the travel time results for all three of these trips decreased between the SDEIS and FEIS in both the No Build condition and in the Build condition. The reason that these travel times decreased is due to residual impacts from forecasting changes that were made in the Greenbelt area on the northeast side of the study area related to planned background development at the Greenbelt Metro interchange. The forecasts used in the SDEIS were overly conservative and projected peak period volumes that far exceeded the capacity along the Inner Loop and the ramps serving the Greenbelt Metro interchange. In the 2045 SDEIS models, severe congestion formed on the Inner Loop during the PM peak period approaching Greenbelt. The congestion was so severe that it backed up through the top side of the Beltway and into the west side of the Beltway, which increased travel times for northbound trips, including those shown in Table 1.

Upon review of the SDEIS models following the comment period, it was determined that the Greenbelt forecast projections were not consistent with the MWCOG model trends and therefore needed to be adjusted. The volumes serving the background development were reduced accordingly during development of the FEIS. This change impacted the travel time results reported in the FEIS because there was less congestion on the Inner Loop through the Greenbelt area, which no longer spilled back into the west side of the Beltway. Therefore, travel times improved in the FEIS for the northbound trips listed in Table 1. Because this change was related to background development, it affected both the No Build results and the Build results. While both the No Build and Build travel times reduced in the FEIS, the net difference between No Build and Build remained approximately the same and therefore this change did not fundamentally alter the overall benefits of the Preferred Alternative reported originally in SDEIS Chapter 3 and updated in FEIS Chapter 4, and the general conclusions are the same.

Table 2 reprints some of the values from Table 1, while Tables 3 and 4 highlight the travel time results for some additional trips on the west side of the study area. The explanation for why the travel times decreased between the SDEIS and the FEIS is the same as described above. The letter also highlights these specific...
trips because they are examples of trip pairs in which the projected travel time in the general purpose lanes under Build conditions is higher than for the same trip under No Build conditions. This topic has been brought up before and is addressed in Section XI.B.6 of the ROD. The FEIS shows that the travel times for some Inner Loop trips are “longer” in the Build general purpose lanes than No Build. The reason is that the backups would be so bad in Virginia under the No Build condition that fewer vehicles would actually get across the American Legion Bridge (ALB) during the peak hour. This makes some trips in Maryland under the No Build look better than they are. The Build condition serves much more throughput during the peak hour and there is naturally some increase in travel time during the peak when looking at certain segments. While this affects some trip pairs, including the ones highlighted in the Sierra Club letter, most (76%) of the trip pairs show a benefit from traveling in the general purpose lanes under Build versus No Build, and the average PM travel time change between No Build and Build is a net improvement of 8 minutes of savings when looking at the entire system.

Table 5 and Table 6 show the travel time results for two trips that start on the top side of I-495 and follow the Outer Loop towards the ALB during the PM peak period. The tables highlight a large change in projected travel times for these trips between the SDEIS and FEIS in the No Build model. These travel time increases detailed in the FEIS resulted from correction of a coding error in the SDEIS No Build VISSIM PM peak model that was identified and corrected during development of the FEIS. The issue was related to the routing of HOVs traveling from the top side Outer Loop to I-270 northbound, which caused severe congestion on the Outer Loop approaching the east spur to I-270 by sending too many vehicles north towards I-270 and not enough along the Outer Loop towards the ALB. This change did not significantly alter the overall network-wide results for the No Build Alternative, but rather shifted some of the congestion from one area to another. Therefore, the coding issue was not initially apparent when reviewing the overall findings presented in the SDEIS. Upon closer review of the SDEIS models following the comment period, this issue was identified and corrected. This change affected the travel times in the No Build PM model in a couple of locations. Travel times on the top side Outer Loop approaching Connecticut Avenue decreased between the SDEIS and the FEIS, while travel times on the west side Outer Loop approaching the ALB (such as those highlighted in Table 5 and Table 6) increased between the SDEIS and the FEIS. But as noted above, the overall No Build travel times and delays were not significantly affected by the change. This coding change was applied to the No Build model only, and therefore did not affect the Build results for these trips.

As shown in Table 5, the Build travel times are similar between the SDEIS and the FEIS. However, Table 5 and Table 6 show the incorrect values for the general purpose lane travel times for the Build condition. The values for the SDEIS and FEIS appear to be transposed in the Sierra Club letter – for the trip from Connecticut to GWP (Table 5), the reported travel time in the SDEIS is 9.8 minutes (not 10.1 minutes), while the reported travel time in the FEIS is 10.1 minutes (not 9.8 minutes). A similar error was made in the Sierra Club letter in Table 6 for the trip from Connecticut to River Road. The reported travel time in the SDEIS is 6.6 minutes (not 7 minutes) and the reported travel time in the FEIS is 7 minutes (not 6.6 minutes). This error is carried over into the “Difference” row, and therefore the “Increase Time” values shown in the yellow box in Table 5 and Table 6 are incorrect. If the proper values were used, the calculated increase time would be 440% (not 470%) in Table 5 and 586% (not 656%) in Table 6. As with the other changes described above, the coding change made by MDOT between the SDEIS and FEIS did not fundamentally alter the overall benefits of the Preferred Alternative reported originally in SDEIS Chapter 3 and updated in FEIS Chapter 4, and the general conclusions are the same.
The July 18, 2022 comment letter also suggested that MDOT SHA should be using empirical data from other projects in Virginia and Maryland. MDOT SHA did look at similar projects in Virginia, Maryland, and around the country, and those projects showed system wide benefits to constructing managed lane facilities. FHWA has been promoting the use of the managed lanes for many years, as noted in the example from 2004: https://highways.dot.gov/public-roads/novemberdecember-2004/managed-lanes.

For additional information refer to the following documents: FEIS Chapter 4; FEIS, Appendix A, Final Traffic Analysis Technical Report; FEIS Appendix B, and MDOT SHA’s Draft Application for Interstate Access Point Approval. Responses to the Sierra Club’s comments on the DEIS can be found in FEIS, Appendix T, Section T.2.A, Volume 3, page CO-535 and responses to the SDEIS comments can be found in FEIS, Appendix T, Section T.2.B, Volume 2, page CO-826.

III. The Sierra Club’s letter states the FEIS Fails To Address Impacts to Public Health

The FEIS comment claims that public health was not addressed and ties it to a need for air quality and traffic safety analyses. This is not accurate as these analyses have been conducted for the Study. Specifically, the FEIS addresses comments received on public health in a response found on page 9-56 of the FEIS, Chapter 9. In addition, air quality and traffic safety analyses have been completed and documented.

While safety was not identified as a need for the Study, a safety analysis was conducted as part of MDOT SHA’s Draft Application for IAPA Approval; refer to FEIS, Appendix B for additional details. That safety evaluation included a thorough review of existing crash data; an evaluation of crash rates and the identification of high crash locations; a qualitative assessment of how key design elements would be expected to influence safety; and a quantitative analysis that provides relative comparison results of predictive crash analysis for the No Build and Preferred Alternative. The safety results demonstrate that the Preferred Alternative should not have a significant adverse impact on the safety of the study corridors.

The air quality analysis is thoroughly documented in the DEIS, SDEIS, and FEIS; refer to DEIS, Chapter 4, Section 4.8; DEIS Appendix I; SDEIS, Chapter 4, Section 4.8; FEIS, Chapter 5, Section 5.8; FEIS, Appendix K, and FEIS, Chapter 9, Section 9.3.4.F. As stated in the FEIS, the Study is located in an attainment area, as defined by US Environmental Protection Agency (USEPA), for carbon dioxide (CO2), and particulate matter (PM10 and PM2.5); therefore, transportation conformity requirements pertaining to these criteria pollutants do not apply to this project and no further emissions analysis were evaluated. Montgomery County, Maryland and Fairfax County, Virginia are listed by USEPA as non-attainment for the 2015 8-hour ozone standard. However, the National Capital Region Transportation Planning Board updated the Visualize 2045 plan in 2022 and the design concept and scope for the Selected Alternative is included in the Air Quality Conformity analysis accompanying the update. As the Study is included in the conforming long-range plan and the Air Quality Conformity analysis, the Selected Alternative would not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant national ambient air quality standards including ozone.
As documented in the FEIS and in accordance with the latest mobile source air toxics (MSAT) guidance, the Study is best characterized as one with “higher potential MSAT effects” since the projected Design Year traffic is expected to reach the 140,000 to 150,000 average annual daily traffic (AADT) criteria.\(^1\) Therefore, a quantitative MSAT emissions analysis was conducted. The results of the MSAT analysis show that all of the MSAT pollutant emissions are expected to increase slightly for the Preferred Alternative when compared to the No Build condition for 2025 and 2045. All MSAT pollutant emissions are expected to significantly decline in the Opening (2025) and Design years (2045) when compared to existing conditions (2016). These long-term reductions occur despite projected increase in vehicle miles traveled (VMT) from 2016 to the 2025 and 2045 Build scenarios. Refer to FEIS, Chapter 5, Section 5.8 and FEIS, Appendix K, Section 3.3.3 for additional detail on the MSAT results.

As documented in the FEIS, to date, no national standards for greenhouse gas (GHG) emissions have been established by the USEPA under the Clean Air Act and there is no regulatory requirement that has been established to analyze these emissions at a project level for transportation projects. Consistent with the 2016 CEQ Final GHG NEPA guidance,\(^2\) a quantitative GHG analysis was conducted on the six Build Alternatives and the Preferred Alternatives as documented in the DEIS and FEIS, respectively. Since there is no approved methodology for conducting a project-level quantitative GHG emissions analysis, there are numerous parameters that could be applied to conduct such a review. Consistent with FHWA guidance on developing an affected network to analyze project-related pollutants, such as MSATs, MDOT SHA analyzed GHG emissions using the same affected network as the MSAT analysis. Refer to FEIS, Appendix K, Section 3.4.1 for the GHG results.

Air quality considerations during construction are documented in FEIS, Chapter 5, Section 5.23.3 and FEIS, Appendix K. The results of the analysis of operational emissions of GHGs during construction using FHWA’s Instructure Carbon Estimator can be found in Appendix B of the Final Air Quality Technical Report (FEIS, Appendix K).

While no significant increase in GHG emissions from the Preferred Alternative was noted, MDOT SHA has committed to implementing a Greenhouse Gas Reduction Program to reduce emissions during construction. Refer to ROD, Appendix A, Table 1.

As documented in the FEIS and in accordance with the latest mobile source air toxics (MSAT) guidance, the Study is best characterized as one with “higher potential MSAT effects” since the projected Design Year traffic is expected to reach the 140,000 to 150,000 average annual daily traffic (AADT) criteria.\(^1\) Therefore, a quantitative MSAT emissions analysis was conducted. The results of the MSAT analysis show that all of the MSAT pollutant emissions are expected to increase slightly for the Preferred Alternative when compared to the No Build condition for 2025 and 2045. All MSAT pollutant emissions are expected to significantly decline in the Opening (2025) and Design years (2045) when compared to existing conditions (2016). These long-term reductions occur despite projected increase in vehicle miles traveled (VMT) from 2016 to the 2025 and 2045 Build scenarios. Refer to FEIS, Chapter 5, Section 5.8 and FEIS, Appendix K, Section 3.3.3 for additional detail on the MSAT results.

As documented in the FEIS, to date, no national standards for greenhouse gas (GHG) emissions have been established by the USEPA under the Clean Air Act and there is no regulatory requirement that has been established to analyze these emissions at a project level for transportation projects. Consistent with the 2016 CEQ Final GHG NEPA guidance,\(^2\) a quantitative GHG analysis was conducted on the six Build Alternatives and the Preferred Alternatives as documented in the DEIS and FEIS, respectively. Since there is no approved methodology for conducting a project-level quantitative GHG emissions analysis, there are numerous parameters that could be applied to conduct such a review. Consistent with FHWA guidance on developing an affected network to analyze project-related pollutants, such as MSATs, MDOT SHA analyzed GHG emissions using the same affected network as the MSAT analysis. Refer to FEIS, Appendix K, Section 3.4.1 for the GHG results.

Air quality considerations during construction are documented in FEIS, Chapter 5, Section 5.23.3 and FEIS, Appendix K. The results of the analysis of operational emissions of GHGs during construction using FHWA’s Instructure Carbon Estimator can be found in Appendix B of the Final Air Quality Technical Report (FEIS, Appendix K).

While no significant increase in GHG emissions from the Preferred Alternative was noted, MDOT SHA has committed to implementing a Greenhouse Gas Reduction Program to reduce emissions during construction. Refer to ROD, Appendix A, Table 1.

IV. The FEIS’s Discussion and Evaluation of Plummers Island, Certain NPS Lands, the Potomac River, and Impacts to the Northern Long-Eared Bats and Other Bats Is Incomplete and Contrary to Applicable Legal Requirements

The FEIS comments stated that the FEIS failed to acknowledge the full scope of impacts to Plummers Island, including the long-term research plots and sensitive research sites that will be destroyed by the project. This is not accurate. FEIS Appendix T, Section T.2A Volume 2, page CO-347 includes MDOT SHA’s responses to comments from the Washington Biologist Field Club (WBFC) including specific responses that address these impacts to Plummers Island and the research plots. In addition, Plummers Island is discussed in the FEIS, Chapter 5, Sections 5.4, 5.7, 5.12, 5.17, and 5.19; FEIS, Appendix G, Final Section 4(f) Evaluation; FEIS, Appendix M, Natural Resources Technical Report; and FEIS, Appendix N Final Avoidance, Minimization and Impacts Report.

---

The FEIS comments stated that MDOT SHA failed to respect WBFC’s role on Plummers Island throughout the planning process and provide appropriate advanced notice for disturbances to the island. FHWA and MDOT SHA have met with the WBFC representatives directly 3 times during the NEPA process for the Study. For access to Plummers Island, MDOT SHA secured permits with the National Park Service (NPS), the property owner, for all work done on NPS land and coordinated as agreed upon with NPS for all access to the properties. In addition, NPS has coordinated directly with WBFC several times.

Plummers Island is part of the Chesapeake and Ohio Canal National Historical Park and is owned by the NPS. As part of the Section 106 coordination for the Study, MDOT SHA completed the National Register of Historic Places (NRHP) determination of eligibility (DOE) form, included in FEIS, Appendix I and as Exhibit J in the Sierra Club FEIS comment letter. Plummers Island is a recognized ecologically sensitive and an NRHP-eligible historic property in addition to being part of the larger Chesapeake and Ohio Canal National Historical Park. The WBFC is a Section 106 Consulting Party for the Study and in this role they have had opportunities to comment on the project, the adverse effects and mitigation for impacts to Plummers Island. The specific comments from the WBFC on the Programmatic Agreement (PA), which were included as Exhibit M in your comment letter, were responded to by MDOT SHA. All of the consulting party comments on drafts of the PA were responded to and distributed to the consulting parties.

The FEIS comments state that the FEIS does not sufficiently explain why the west shift option for the American Legion Bridge (ALB) was rejected. This is not accurate. The FEIS includes this explanation in FEIS Appendix N, pages 6 through 10 and 17.

The FEIS comments state that mitigation for impacts to Plummers Island should have been evaluated in the NEPA process from the beginning and not just the Section 106 Process that will conclude after the comment period is over and the ROD is signed. The DEIS, SDEIS and FEIS document the mitigation that has evolved through the NEPA process in consultation with the regulatory agencies and with feedback from stakeholders and public comments. The public had an opportunity to review the final mitigation and commitments during the FEIS availability period. FEIS, Chapter 7 and Appendix A of the ROD, document the mitigation and commitments developed during the NEPA process. Specifically, there is a commitment with the NPS to evaluate additional options for the ALB during final design that would further minimize or avoid physical impacts to Plummers Island.

The FEIS comments stated that the natural resource mapping is inaccurate. MDOT SHA does not agree with this assertion and believe the mapping to be complete. FEIS Appendix T DEIS and SDEIS Comments and Responses Section T.2A Volume 2, page CO-351 includes comment responses that describe what is included in the project mapping.

The FEIS comments stated that the FEIS fails to accurately describe the likely impacts of the Preferred Alternative due to risks of catastrophic flooding to Plummers Island, and further states that the flooding issues from the planned caisson and pier emplacements of the ALB and leveling or trimming of the Plummers Island rock ridge were not fully addressed in the FEIS. This is not accurate. FEIS Appendix T DEIS and SDEIS Comments and Responses, Section T.2,B, Volume 1, page CO-717 addresses these concerns and indicate that full...
hydrologic and hydraulic analysis (H&H) will be completed during final design to ensure that adverse flooding impacts due to the ALB construction are reduced to the maximum extent practicable. The rock ridge will not be trimmed or leveled as part of the project. The issue of potential flooding impacts were minimized to the extent possible during preliminary design of the Preferred Alternative.

In addition, the FEIS comments stated that the data being used to evaluate construction impacts from 100-year floods is outdated and understates the risks to Plummers Island. The current regulatory requirement for flood consideration is to use the rainfall intensity associated with a 100-year flood event. FEIS Appendix T, DEIS & SDEIS Comments and Responses, Section T.2.B, Volume 1, page CO-717 discusses the 100-year storm and how the project will address flooding. Should the 100-year event volumes be updated during final design, the project will use the revised regulatory volumes for H&H analysis.

MDOT SHA has made a commitment to maintain access to Plummers Island for construction purposes by bridging over the oxbow of the Potomac River without placing any materials or fill within the stream channel. An additional commitment to implement best management practices during the replacement of the ALB crossing the Potomac River such as extensive in-stream work and using coffer dams and temporary construction trestles to avoid and minimize impacts to the river and its aquatic biota. Refer to FEIS, Chapter 7 and ROD, Appendix A, Table 1.

FEIS comments stated that that the Potomac River and the drinking water drawn from the Potomac River would be negatively impacted by runoff from the ALB. The primary drinking water intake in the Potomac River is located above Great Falls and outside the project. The water intake at Little Falls Dam is only used intermittently. The NRTR does acknowledge the potential to increase contaminants to the raw water drawn from the Potomac River prior to being treated and distributed as drinking water.

The FEIS comment states there is no stormwater management planned for the ALB, and claims this may run afoul of Clean Water Act requirements. As explained in FEIS, Chapter 3, Section 3.1.6, direct discharge at the ALB qualifies for a waiver from quantity management because the runoff from a bridge will enter the major waterway significantly before the peak in the waterway elevation and therefore will not affect downstream flooding. Additionally, the NPS has jurisdiction over the land on both sides of the river and has determined that no SWM will be permitted in the circumstances presented.

The FEIS comments stated that the level of tree impacts on NPS lands is unacceptable and that there is no mitigation proposed. This is inaccurate. MDOT SHA has worked closely with NPS to avoid and minimize impacts to forests and trees on NPS property to the greatest extent practicable. FHWA and MDOT SHA have coordinated closely to develop acceptable levels of mitigation for impacts to NPS property and resources on their property. Separately, the Department of Interior and NPS have concurred with the FEIS and its proposed level of impacts and mitigation. FEIS, Chapter 5, Section 5.16.4 page 5-110 summarizes the forest and terrestrial vegetation components of the comprehensive ecological restoration plan for mitigation of impacts to NPS property.

1 OpLanes Maryland. Environmental 1-495 & 1-270 Managed Lanes Study Final Environmental Impact Statement (FEIS), last accessed on July 9, 2022 at https://oplanesmd.com/fews/
2 Letter from the Sierra Club Maryland Chapter, et al. to Secretary Buttigieg (June 30, 2022), available at https://www.suarealshb.org/sites/www.suarealshb.org/files/suarealshb寰 島章y.pdf and attached as Exhibit A. We will be providing other materials referenced in these comments under separate cover.
The FEIS comment states further investigation and justification required into whether it is legal without Congress's review and approval to de-federalize Capper-Crampton lands and transfer to states for transportation use. FHWA and MDOT SHA have coordinated with the NPS and National Capital Planning Commission throughout the NEPA process on potential impacts to park property acquired with Capper-Crampton funding. This coordination and impacts are described on page 5-29 and 5-30 of the FEIS, Chapter 5. As stated, after the conclusion of the NEPA process and if NPS agrees to the use of the impacted lands, FHWA would officially request the land for the highway purposes via execution of a highway deed easement, which does not require Congressional review.

The FEIS comment information on recreational use of the Potomac River during construction was not addressed and that the Canoe Cruisers Association comments were dismissed. A response to the Canoe Cruisers Association SDEIS Comment letter can be found in FEIS, Appendix T, Section T.2.B, Volume 1, which includes a response on river access during construction.

Furthermore, the Sierra Club letter states, the EIS lacks identification and Section 4(f) analysis on impacts to Potomac River. This a false statement. The Potomac River is a natural feature, rivers are not subject to Section 4(f) requirements, and it is not a district, site, structure, building, or object and not considered a historic property under Section 106 of NHPA. While the river was not evaluated under Section 4(f) or Section 106, it was considered as a drainage basin, watershed and for surface water quality in FEIS, Section 5.13 and MDOT SHA has committed to consult with NMFS and MDNR when construction plans are developed for roadway crossings of the Potomac River and Cabin John Creek, the two known anadromous fish use areas, to ensure that impacts due to construction and permanent fill are minimized to the extent practicable. Refer to FEIS, Chapter 7 and ROD, Appendix A, Table 1.

FEIS comments state that the project failed to properly survey for rare, threatened, and endangered bat species and that the methodology used was not sufficient. Refer to the FEIS, Chapter 5, Section 5.19.2.A for a summary of the survey information conducted for the Study on the Northern Long-eared Bat (NLEB); additional details are documented in FEIS, Appendix M. The bat survey methodology used for the Managed Lanes Study is in keeping with the US Fish and Wildlife Service (USFWS) survey protocol, Range-wide Indiana Bat Summer Survey Guidelines, 2020. USFWS requested that MDOT SHA not conduct mist netting due to the risk of listed bats contracting COVID. The Study's bat survey plan was approved by USFWS prior to the commencement of the acoustic survey. Acoustic surveys were conducted in the vicinity of the ALB on both sides of the Potomac River. The results of bridge surveys for the presence of roosting bats and evening emergence surveys for bats potentially roosting on the ALB and Northwest Branch Bridge in 2019 were also provided in Appendix P of the Final Natural Resources Technical Report (FEIS, Appendix M) and the Bridge Survey Report for the Northern Long-eared Bat (Myotis septentrionalis) and Indiana Bat (Myotis sodalis), of the Final Natural Resources Technical Report (Appendix P of FEIS, Appendix M).

The FEIS comments indicated that the FEIS should have considered and addressed the effects of the U.S. District Court for the District of Columbia determination that the designation of the NLEB as threatened, rather than endangered, was arbitrary and capricious and the project should not have relied upon the 4(d) Rule to determine adequate species protection. FHWA and MDOT SHA have coordinated closely with the
USFWS throughout the NEPA process regarding the NLEB. MDOT SHA went above and beyond federal requirements and agreed to a voluntary time of year restriction for tree clearing from May 1 to July 31 of any year within a 3-mile buffer of the positive acoustic detection of the NLEB to protect the NLEB. USFWS provided a SDEIS comment indicating that the project would need to reinitiate Section 7 consultation if the NLEB listing status changes. Until the NLEB status is changed by USFWS, the current Section 7 coordination stands and is complete.

The FEIS comments stated that the proposed construction in Fairfax County, Virginia associated with the Preferred Alternative was not presented to the public until the FEIS was released in June 2022. This is not accurate. Throughout the NEPA process, MDOT SHA has coordinated closely with Virginia Department of Transportation (VDOT) and Fairfax County. Public outreach to Fairfax County residents has included direct meetings as well as multiple indirect notifications, including newspaper advertisement, radio spots, and email blasts. The DEIS, SDEIS and FEIS have been publicly available online and in a Fairfax County Public Library. All alternatives considered throughout the NEPA process have included proposed construction in Fairfax County, Virginia.

The FEIS comments stated that the public did not learn about the potential impact to Virginia state-endangered Little Brown Bat and Tri-colored Bat until the FEIS was released in June 2022. MDOT SHA requested a list of potentially affected species from Virginia Department of Wildlife Resources (DWR) prior to the DEIS publication. DWR provided a response after the DEIS was published that these two bat species could potentially occur within the Virginia portion of the study corridor. MDOT SHA completed bat survey data analysis and included its results in the FEIS. Presence of the tri-colored bat was confirmed, but no Little Brown Bats were identified. Virginia DWR agreed to the time of year restriction for tree clearing within the Virginia portion of the Preferred Alternative from April 1 – October 31 of any year to avoid impact to tri-colored bat roost trees during roosting season.

V. The Sierra Club’s letter states the FEIS Fails to Meet the Agencies’ Environmental Justice Obligations Despite Numerous Commenters’ Efforts in Identifying Deficiencies in the Agencies’ Analysis

The comments stated that the environmental justice (EJ) analysis had not been previously released to the public for review and comment. This is not accurate. The DEIS, SDEIS, and FEIS all documented the EJ analysis completed for the Project; refer to DEIS, Chapter 4, Section 4.21; DEIS Appendix E; SDEIS, Chapter 4, Section 4.21; FEIS, Chapter 5, Section 5.21; and FEIS, Appendix F. The EJ analysis and methodology is discussed in DEIS, Chapter 4, Section 4.21.2; FEIS, Chapter 5, Section 5.21.2.

As stated in the DEIS, SDEIS, and FEIS, the strategies developed under EO 12898, USDOT Order 5610.2C, FHWA Order 6640.23A, and FHWA memorandum Guidance on Environmental Justice and NEPA (2011) set forth the appropriate and necessary steps to identify and address disproportionately high and adverse effects of federal transportation projects on minority and low-income populations. Based on these strategies, the first four steps, below, were documented in the DEIS EJ analysis, updated in the SDEIS EJ analysis and updated and enhanced where necessary for the FEIS EJ analysis:
1. The identification of minority race and ethnicity populations and low-income populations (EJ populations) along the 48-mile study corridor for the DEIS, Chapter 4, Sections 4.21.2.A-B and then an update on the identification of EJ populations for the Preferred Alternative, Alternative 9 - Phase 1 South limits in the SDEIS, Chapter 4, Section 4.21.2.B;

2. The review of demographic data to determine the existing environmental and community conditions of the EJ populations, documented in the DEIS, Chapter 4, Section 4.21.3 and enhanced in the SDEIS, Chapter 4, Section 4.21.2.C;

3. The documentation of public outreach as planned, conducted and refined throughout the study in consideration of the demographic and community data to ensure meaningful involvement in EJ populations, documented in the DEIS, Chapter 4, Section 4.21.4 and updated in the SDEIS, Chapter 4, Section 4.21.2.D; and

4. The identification of potential beneficial and/or adverse impacts to EJ populations under the No Build and Screened Alternatives in the DEIS, Chapter 4, Section 4.21.5, and the identification of potential beneficial and/or adverse impacts to EJ populations under the No Build and Preferred Alternative, Alternative 9 - Phase 1 South updated in the SDEIS, Chapter 4, Section 4.21.3.

Steps #2, 3, and 4 are updated and Steps #5 through #8, below, are documented in this FEIS EJ Analysis in consideration of the Preferred Alternative:

5. The consideration of mitigation or community enhancement measures if unavoidable adverse effects are expected to occur under the Preferred Alternative (throughout FEIS, Section 5.21.5);

6. A comparison of adverse effects to all EJ populations under the Preferred Alternative versus adverse effects to a non-EJ population reference community (FEIS, Chapter 5, Table 5-51);

7. A determination of whether disproportionately high and adverse impacts would occur to EJ populations under the Preferred Alternative (FEIS, Chapter 5, Table 5-51); and

8. A final conclusion of whether disproportionately high and adverse effects would occur to EJ populations, based on unmitigated adverse effects and whether public feedback has been addressed (FEIS, Chapter 5, Section 5.21.7).

The public had sufficient opportunity to review and comment on the EJ analysis conducted for the Project. The public participation elements of the NEPA process were an opportunity to promote equity and EJ concerns by ensuring minority and low-income communities (EJ populations) have access to and receive information concerning the proposed action and the potential impacts on those communities. With even more concentrated outreach, project efforts effectively identified community concerns and informed...
agency decision-makers regarding project elements and potential enhancements specifically geared to protected communities. In this regard, MDOT SHA implemented a robust plan to meet and exceed federal policies and best practices for outreach to and engagement with EJ populations within and adjacent to the study area to engage meaningfully and directly with underserved communities to identify improvements needed in their communities. These commitments are documented in the ROD, Appendix A, Table 1.

The FEIS comment states the FEIS fails to quantify impacts to the Gaithersburg EJ Area. This statement is false. Census block groups in the Gaithersburg area were identified and included in the EJ analysis for the study and documented in the DEIS, SDEIS, FEIS, DEIS, Appendix E and FEIS, Appendix F. As noted in Chapter 5, Section 5.21.4, Table 5-49, eight block groups met the EJ population criteria of minority race/ethnicity and/or low income. In addition, MDOT SHA had targeted outreach to underserved communities in the Gaithersburg area in the Fall of 2021. The consideration of air quality impacts from the Preferred Alternative on EJ Populations in the study area is documented on page 5-155 of the FEIS, Chapter 5 and in FEIS, Appendix F.

The FEIS comments claim that cumulative impacts to Morningstar Moses Hall and Cemetery site have been disregarded and dismissed, unlawfully preventing an “adverse effects” determination for a nationally-recognized 4(f) protected resource. The MDOT SHA and FHWA properly evaluated the Preferred Alternative’s potential for cumulative effects, including at the Morningstar Cemetery. In conducting this analysis, MDOT SHA has acknowledged that the early 1960s construction of I-495 and other aspects of the Eisenhower Interstate System caused disruption to the Gibson Grove community and other communities, particularly communities of color. Indeed, these types of community impacts formed the historical context and impetus for passage of NEPA and NHPA. The MDOT SHA, during years of extensive research (discussed in more detail below), has not identified any evidence that I-495 construction in the 1960s impacted burials at Morningstar Cemetery. That research assisted MDOT SHA in determining whether the MLS proposed action would contribute to cumulative effects to the Morningstar properties and related resources in the context of past, present, and reasonably foreseeable actions as required by the NEPA CEQ regulations.

To provide further detail supporting the FEIS conclusions, MDOT SHA confirmed that in 1992, construction work was performed on I-495. This work was done within the median of I-495 near this area and avoided impact to the cemetery property. As documented in the SDEIS and FEIS, and as concluded in the ROD, the Selected Alternative also avoids impacts to the cemetery property as well as to the area of the MDOT SHA owned right-of-way adjacent to the cemetery property where there could be the potential for unmarked graves. Lastly, our review did not identify any reasonably foreseeable future projects in the vicinity of the cemetery. In addition, based on commitments included in the ROD and Programmatic Agreement, established in part based on coordination with stakeholders with interest in the Morningstar resource, the Selected Alternative will improve existing stormwater and noise effects over the existing conditions. Refer to FEIS, Chapter 7 and ROD, Appendix A for the commitments and mitigation details.

A formal response to the Friends of Moses Hall FEIS comment letter was prepared and included on page 20 of this ROD, Appendix D. Refer to this response for additional details.
VI. The Sierra Club’s letter states the FEIS Fails To Disclose the Socioeconomic and Societal Impacts of Private Concessionaire Contracts and Their Influence on Future Land Use Policies

Comments and concerns raised on the State’s plans to develop the Project through a public-private partnership (P3) have been addressed in FEIS, Chapter 9, Section 9.5.3. As stated, MDOT has determined it is financially infeasible to construct improvements of the magnitude associated with the Selected Alternative. Additionally, MDOT does not have enough bonding capacity to take out loans to pay for the improvements, even with the promise of tolls to pay them back. Therefore, MDOT elected to use a P3 approach to fund the project. MDOT SHA has adequately evaluated its funding and delivery method.
In reply to the comments that started with, “I oppose the toll lane plan and support the no-build option,” the Agencies ignored the opposition and “replied” with an unsubstantiated explanation of why the no-build option is not feasible. See, e.g., FEIS App’x T.2.A Vol. 1 at CO-76.

4. The Agencies’ Response to the Sierra Club’s Comments on DSS.

The Agencies’ response to the Sierra Club’s comments on the FEIS and DSS is disappointing. The Sierra Club’s comments on DSS, which is a separate document from the FEIS, were not considered.

In their response to the Sierra Club’s comments, the Agencies misleadingly state that the public input on the preliminary NEPA documents was not considered because the Agencies did not receive all the comments. This is incorrect. The Agencies received all the comments and failed to provide a response. See the Agencies’ response to the Sierra Club’s comments on DSS.

In contrast, the Agencies’ response to the FEIS is more detailed and comprehensive. The Agencies state that the public input was considered and that the Agencies have provided a response to each comment.

The Agencies’ response to the Sierra Club’s comments on DSS is a failure to properly consider public input and to respond to the Sierra Club’s comments. The Agencies should have provided a more detailed and comprehensive response to the Sierra Club’s comments on DSS.

The Agencies’ response to the Sierra Club’s comments on DSS is disappointing and does not meet the requirements of NEPA. The Agencies should provide a more detailed and comprehensive response to the Sierra Club’s comments on DSS.
The Agencies’ response to the Sierra Club’s comments says: “Support for or opposition to the project and/or the Preferred Alternative as stated in all public comment is accurately reflected in the NEPA record and available for review.”

Since the FEIS does not tabulate support or opposition, how and where are “support for or opposition to the project and/or the Preferred Alternative” accurately reflected in the NEPA record? Does the Agencies’ reply assume the reviewing federal agencies are creating their own tabulations from the raw public comments?

The Agencies’ response to Dave Widen’s comment makes a different point about support and opposition: “...a comment stating support or opposition is not a yes/no vote for the project.”

Yet the Agencies’ treatment of comments from the first three public comment periods indicates the opposite: the Agencies clearly tabulated support and opposition to the Project, albeit in a biased and misleading manner.

II. The Traffic Models Used in the FEIS Are Deeply Flawed.

A. The Traffic Modeling in the FEIS Fails to Address Critical Errors Identified by Commenters and Introduces New Errors.

In our comments on the DEIS, we explained that the traffic modeling supporting the DEIS had serious errors. The DEIS’s traffic model presents a simplistic traffic story that, if the preferred alternative is not constructed, travel traffic volumes will grow significantly and delays will grow exponentially. Based on this model, the DEIS claims that the preferred alternative will reduce congestion on the general purpose lanes and alleviate congestion on other roads relative to traffic conditions today. But that simple story relied on flawed modeling. See DEIS Comments at 1-8; see generally id. at 9-65.

As described more fully in the attached expert report by Norman Marshall, President of Smart Mobility, Inc., (July 2023) (hereinafter “Marshall Report”), the revised traffic modeling used in the DEIS does not remedy the acknowledged errors with the previous traffic model used in the DEIS. To the contrary, the new model results are, instead, rife with evidence that the Agencies “have failed to comply with their own Agency Guidance concerning traffic modeling” such that “the output is seriously compromised as a result of these modeling errors.” See Marshall Report at 2.

Mr. Marshall’s ability to thoroughly critique the traffic model was hampered because MDOT has refused to release the underlying data and model files, in violation of NEPA’s public disclosure requirements. See Marshall Report at 4-5; id. App. A-B, see also Section I.A of these comments. Even so, Mr. Marshall and others identified serious deficiencies in the FEIS traffic modeling. The Marshall Report details several categories of errors, some of which persist from the


23 The Smart Mobility, Inc. Report is attached as Exhibit B.
As in the SDEIS, the FEIS traffic modeling invalidly shows future throughput to be much lower than existing throughput. This error was not addressed in the FEIS responses to comments. Id. at 17-18.

As in the SDEIS, the FEIS continues to falsely insist that there is some increasing "demand" that exists independently from actual traffic volumes. Imputing unrealistic "demand" into the traffic model causes gridlock in the model and produces unrealistically low throughput. Id. at 18-20.

Unlike the SDEIS, the FEIS adds a third model to its sequenced modeling approach, but this newly introduced model suffers from the same inherent problems as the other models. Id. at 20-22.

As we explained in our SDEIS comments, see SDEIS Comments at 19-20, rather than relying on flawed models, the Agencies should examine empirical data from Virginia and Maryland to understand the reasonably foreseeable impacts of constructing managed lanes on I-495 and I-270, which include the following:

1) Expanding I-495 and I-270 will shift traffic from the shoulder hours into the peak hours and create and/or exacerbate bottlenecks. As bottlenecks are most likely at the termini of the managed lanes, phasing is critically important as well as the final extent of the Project.

2) An improvement in general-purpose lane speed is unlikely because constructing the managed lanes will shift traffic from the shoulder hours into the peak hours, and the general-purpose lanes will be just as congested during the peak hours as they would have been otherwise. The foundational premise of this Project is that extreme congestion in the general-purpose lanes is needed to justify the high tolls that will be required to fund the preferred alternative.

3) Constructing the I-495 and I-270 managed lanes is likely to make existing congestion worse. No trip begins or ends on a limited access highway, and traffic does not significantly switch between limited access highways and arterials despite what is presented in the SDEIS. Any shifts between these roadway classes enters traffic increases on some arterials and traffic decreases on others. As managed lanes concentrate traffic in the peak hour, arterial roads at I-495 and I-270 interchanges will be severely impacted, and these impacts are likely to outweigh the congestion benefits of traffic diversion from other arterials. The SDEIS models are incapable of calculating these impacts.

4) If the managed lanes are constructed, it is likely that there will be significant traffic growth (unassisted travel) and induced land use impacts.

5) Managed lane proponents stress "choice." In fact, the choice is between two bad options: extreme congestion vs. extremely high tolls. Only about 1/6 of the daily traffic is carried by the Virginia I-495 Express Lanes despite the Express Lanes having 1/3 of the roadway capacity. This is an inefficient use of infrastructure. The other 5/6 of traffic is carried by the general-purpose lanes. The toll lanes are "chosen" primarily by high income travelers and/or travelers who are leaving the tolls reimbursed. This elite group will remain small because increasing in demand by other users will prompt the tolls to increase further, becoming even less affordable.

6) The managed lanes will benefit only the few who are able to cut the majority of travelers. There will be no benefits for non-users of the toll lanes. Non-users of the toll lanes (most travelers) will face continued high congestion in the general-purpose lanes and increased congestion on arterial roadways accessing I-495 and I-270 interchanges. Nevertheless, a portion of these taxes likely will go toward subsidizing the private toll lanes as has occurred in Virginia.

7) The MDOT toll-setting scenarios was shrouded to modify a deceptive public. The rates are too high that the private operator will be able to maximize revenue through algorithms that cynically have been labeled "jam and harvest." These algorithms intentionally increase congestion in the general-purpose lanes prior to traffic peaking to justify charging higher tolls during the traffic peak. It’s the public that gets "jammed" as their money gets "harvested."

The flawed traffic models used in the FEIS, like those in the SDEIS, continue to overestimate future congestion to justify the preferred alternative. The proposed managed lanes in Maryland will make congestion worse for most peak period drivers and push drivers to choose between extreme congestion and extremely high tolls that are set to make the lanes profitable.

As a result of these flawed models, the evaluation of numerous impacts that rely on traffic modeling, including air quality and environment impacts, noise, even flawed, and the consideration of reasonable, prudent, and feasible alternatives under NEPA and Section 4(f) is tainted. As one court observed, "In the area of the need for the subject highway segment…predictions of traffic volumes in various target years of the several alternative transportation systems studied are crucial. Errors in traffic volume projections most likely would result in errors in conclusions based on traffic volume projections." Movement Against Discrimination v. Zimmerman, 300 F. Supp. 2d 233, 248 (D. Md. 1975) (emphasis added). See also 49 C.F.R. § 1505.103 ("Accurate scientific analysis, expert sense comments, and public scrutiny are essential to implementing NEPA."); accordingly, a new draft NEPA document must be issued based on a revised and corrected traffic model.

B. The U.S. DOT Must Re-Examine the Traffic Modeling in the FEIS To Ensure Its Integrity and the Agencies Must Address Possible Inconsistencies Between the FEIS’s Traffic Model and the Traffic Modeling Used to Support Revenue Models for the Project.

1. MTOC has identified inconsistencies in the traffic model that warrant an investigation into the integrity of the model.

After the FEIS was released, Dr. Benjamin Ross, President of Maryland Transit Opportunities Coalition ("MTOC"), asked U.S. DOT Deputy Secretary Polly Trottenberg...
to examine evidence of possible scientific fraud in the FES traffic model. We incorporate by reference MTOC’s letter to U.S. DOT21 and additional information revealed in the subsequent articles.22

Dr. Ross found that “[t]he numbers [from the traffic model] simply do not look like what a computer model would produce.”23 Further, the FEIS modeling for the 2045 no build alternative appears inconsistent with correction of errors in model inputs, coding, or numerical methods, but would be consistent with arbitrary adjustment of intermediate or final outputs.24

In MTOC’s letter, Ross explains that the FEIS’s traffic model predicted that certain evening rush-hour travel times for the 2045 no build alternative would be less than predicted by the SDEIS models, even though the traffic counts in many spots are the same in both models. For example:

the predicted evening rush-hour travel time from Connecticut Avenue to I-695 on the Bel Air Inner Loop is 15 minutes faster in the FEIS than in the SDEIS. The travel time from Rock Spring Park to I-695 is half an hour faster. Yet, in the two reports, the number of vehicles exiting the inner Loop onto I-695 is exactly identical in each of the four peak hours: 5:00 to 6:00, 6:00 to 7:00, 7:00 to 8:00, and 8:00 to 9:00.25

Based on these predicted results, the FEIS model outputs do not appear to be consistent with traffic modeling principles that, as commuting times decrease on a particular route, vehicles will switch from other routes to save time.

21 Letter from MTOC to Deputy Sec’y Polly Trottenberg, USDOT (July 11, 2022), available at https://transit.state.md.us/sites/default/files/scientificintegrityletter.pdf, and attached to Exhibit D.


23 Sturce, Maryland Toll Lane Critics Cite ‘Possible Scientific Fraud’ in Traffic Study, Washington Post.

24 See MTOC Letter.

25 Letter from MTOC to Deputy Sec’y Polly Trottenberg, at 2.
Transportation Infrastructure Finance and Innovation Act funding, this model, like the FEIS model, will be submitted to U.S. DOT.

The FEIS fails to acknowledge or discuss an apparent inconsistency between its traffic model and the traffic models used to predict revenue. Using one traffic model to predict environmental impacts and an inconsistent traffic model to predict revenue is unacceptable. It is as dishonest as keeping two sets of financial records and showing numbers to lenders that are inconsistent with the numbers shown to tax collectors. Both the environmental impact traffic model and MDTA’s revenue traffic model were used to project 2045 traffic conditions for the preferred alternative. However, the Preliminary Toll Rate Due Diligence Report that was made public by MDTA includes only 2025 numbers, and only a very limited number of those. Thus, we are not able to directly compare results of the two models. Nor results whatsoever of the developer’s traffic model have been publicly released, so the public is unable to comment on any possible inconsistencies between that model and the FEIS model.

Nevertheless, the very sparse information in the Preliminary Toll Rate Due Diligence Report suggests a possible inconsistency between its model and the FEIS model. Table 7 of the toll rate report predicts that an 2025, average traffic in the two-lane tollway reaches the soft cap threshold (variably defined as $300 or 3300 cars per hour) only in one roadway segment: northbound immediately north of River Road (MD 190). That segment forks between I-70 and the Beltway; the threshold is exceeded on the I-70 fork from 4:00 to 7:00 pm and on the Beltway fork between 6:00 and 7:00 pm. In the northbound segment immediately south of Montrose Road, it predicts that the soft cap will be hit frequently despite falling short of it under average conditions.

The FEIS forecast for 2045, twenty years later, shows the toll lane traffic volume exceeding 3300 cars per hour only in the northbound segment between River Road and the I-70 fork, between 3:00 and 6:00 pm. It predicts toll lane traffic volumes between 3200 and 3300 cars per hour only in one other segment, the segment immediately south of Montrose Road.

The forecasts in the Preliminary Toll Rate Due Diligence Report assume a steadily increasing demand for automobile travel due to population and job growth, and a more rapidly growing demand for toll lane travel due to increasing average income levels. The growth in travel demand should be reflected in rising traffic volumes and increasing toll rates. Thus, one would expect the report to predict tolls reaching the soft cap more frequently in 2045 than in 2025. However, the FEIS traffic model does not predict traffic volumes sufficient to activate the soft cap. The FEIS failed to grapple with this issue and explain or correct the inconsistencies between the two models.

The reliance on inaccurate data—even in the face of explicit warnings about its inaccuracies—demonstrated the required consideration of alternatives and therefore violates NEPA.
<table>
<thead>
<tr>
<th></th>
<th>NB</th>
<th>GP</th>
<th>NB</th>
<th>GP</th>
<th>% Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>NB</td>
<td>10.4</td>
<td>16.7</td>
<td>4.9</td>
<td>13.3</td>
<td></td>
</tr>
<tr>
<td>Diff</td>
<td>6.3</td>
<td>8.4</td>
<td>33%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 4. Trip times from River Road to Democracy - PM

<table>
<thead>
<tr>
<th></th>
<th>SDEIS</th>
<th>FEIS</th>
<th>% Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>NB</td>
<td>16.4</td>
<td>10.1</td>
<td></td>
</tr>
<tr>
<td>GP</td>
<td>39.4</td>
<td>29.6</td>
<td>470%</td>
</tr>
</tbody>
</table>

Table 5. Trip from Connecticut to GWP - PM minutes

<table>
<thead>
<tr>
<th></th>
<th>SDEIS</th>
<th>FEIS</th>
<th>% Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>NB</td>
<td>10.9</td>
<td>32.2</td>
<td></td>
</tr>
<tr>
<td>GP</td>
<td>32.2</td>
<td>22.6</td>
<td>560%</td>
</tr>
</tbody>
</table>

Table 6. Trip from Connecticut to River Road - PM minutes

While there is a clear advantage for the no-build in the PM trips, reducing the travel times of the GP portion of the toll road minimizes the degrading effects of the PM Beltway Chokepoint by giving the appearance that the speeds will be acceptable.

Figure 1. Map of project area with labeled interchanges and Chokepoint.

Table 3 and 6 illustrate another unacceptable change between the SDEIS and FEIS. For trips from Connecticut Ave to the GWP Parkway (Table 3) and Connecticut to River Road (Table 6) there is a 470% and 650% increase in the projected travel time advantage for the FEIS versus the SDEIS for GP lanes over the no build lanes in the PM travel time. The Connecticut to GWP Parkway and Connecticut to River Road No Build travel time changes between the SDEIS and the FEIS are 240% and 205%. It is puzzling that such a mismatch could occur and not explained.

Table 3. Trip from Connecticut to GWP - PM Minutes

<table>
<thead>
<tr>
<th></th>
<th>SDEIS</th>
<th>FEIS</th>
<th>% Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>NB</td>
<td>16.4</td>
<td>10.1</td>
<td></td>
</tr>
<tr>
<td>GP</td>
<td>39.4</td>
<td>29.6</td>
<td>470%</td>
</tr>
</tbody>
</table>

Table 7. % Change Between SDEIS and FEIS for Connecticut to GWP - PM Minutes

<table>
<thead>
<tr>
<th></th>
<th>SDEIS</th>
<th>FEIS</th>
<th>% Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>NB-SDEIS</td>
<td>16.4</td>
<td>32.2</td>
<td></td>
</tr>
<tr>
<td>GP-SDEIS</td>
<td>32.2</td>
<td>22.6</td>
<td>560%</td>
</tr>
</tbody>
</table>

Table 8. Trip from Connecticut to River Road - PM minutes

As explained more fully in the attached report, taken together these types of changes that clearly favor the Agencies’ desired outcome require detailed and independent analysis that cannot be produced in 30 days for 26,000 pages with limited resources of outside groups. Changes of this magnitude should not happen after two rounds of analysis before the FEIS, and they certainly should not completely throw MDOT’s desired outcome.

III. The FEIS Fails To Address Impacts to Public Health.

The FEIS fails to disclose serious public health risks and impacts and suffer from deficiencies in its analysis of the public health impacts of the undesired alternatives. Throughout the NEPA process for this Project, we have requested that the Agencies conduct a full analysis of

12 See Katz Report, attached as Exhibit H.
public health impacts, including, for example, an analysis of localized air quality impacts or health impacts from traffic safety issues. The Agencies have declined to do so.

Based on their close review of the FEIS and its appendices, several health experts—

including a public health expert, air quality expert, traffic safety and crash analysis expert, and an epidemiologist—have provided letters and reports explaining where the FEIS has failed to disclose or analyze serious public health impacts of the Project.

Rosie Bliedt, Sc.D., and Ronald Bliedt, MPP, explain that the FEIS suffers from a
deficient analysis of impacts including a failure to address traffic-related injuries and deaths from an increase in vehicle miles traveled, adverse health impacts and deaths from increased mobile source air toxics and other sources of air pollution, and adverse health impacts from construction- and traffic-related noise. As Bliedt notes, the FEIS fails to acknowledge or discuss the links between, for example, increased air pollution from traffic and high rates of asthma or heart disease. 23 As Bliedt highlights, these health impacts are likely to be disproportionately higher in EI populations, given historic inequities. 34

The report by ZAMURS AND ASSOCIATES, LLC, explains that the FEIS’s air quality discussion lacks a discussion of the preferred alternative’s impacts on criteria pollutants and other pollution emissions and also fails to address air quality concerns in environmental justice communities, despite previous comments identifying those missing analyses. 35 Further, the FEIS fails to fully evaluate the effects of bottlenecks that will be created under the preferred alternative and, importantly, the air quality impacts from the bottlenecks that may concentrate around the end points of the preferred alternative, in areas where EI populations live. See ZAMURS AND ASSOCIATES Report at 5-6.

Further, as discussed below, Byron Bloch, a long-time expert in traffic safety, discusses failures to address the public health impacts of traffic safety issues from the preferred alternative and from respirable silica dust caused by highway construction.

Impacts to public health are an important part of any “hard look” analysis required by NEPA. Many of the proposed actions under the preferred alternative will cause significant, adverse public health impacts, whether directly, indirectly, or cumulatively. For all the reasons explained in the experts’ letters and reports as well as those explained in our prior comments, this FEIS fails to take that hard look. As a result, the preferred alternative is likely to cause significant, adverse health impacts, unaddressed in the FEIS.

23 See Letter of Rosie Bliedt to Sierra Club, attached as Exhibit E.
24 See Letter from Ronald Bliedt to Sierra Club, attached as Exhibit F.
25 See ZAMURS AND ASSOCIATES, LLC Report, attached as Exhibit G.
26 See Bloch Report, attached as Exhibit H.
Toxic crystalline silica dust is a known carcinogen, it is very light and can drift hundreds of feet and even miles, and it causes multiple lung and breast cancers and even death. Byron Bloch, a longtime expert in traffic safety, states that the Project’s FEIS is “inadequate and fraught with cautions on such critical areas as: The generation of toxic silica construction dust that will adversely cause asthma, silicosis, and lung cancer to many residents.”

He continues:

It is outrageous that this FEIS does not adequately address concerns for the toxic and carcinogenic crystalline silica construction dust that will be generated daily during at least the six years of road demolition and reconstruction, including the multiple bridges and soundwalls. The FEIS ignores any concern that thousands of our children through season will be affected with asthma, silicosis, COPD, and lung cancer. In their response, MDOT simply refers to “regulatory dust” and then mentions that they “may” use some measures to minimize or mitigate dust.

Contrary to this evasive and dissembling response with the evidence presented by the National Cancer Institute about silica construction dust being toxic and carcinogenic, and by the American Public Health Association about road reconstruction projects causing silicosis. Yes, there are OSHA requirements to help protect the on-site workers from breathing respirable silica dust, but what about the nearby citizens and neighborhoods and schools? One of the MDOT measures is that they “may use” water trucks...but that means a fleet of daily tanker trucks and spraying huge amounts of water to hopefully capture enough of the silica dust, etc., and then how and where is it safely dispersed (without adversely affecting our public water supply). This is a Michigan? Mitigation techniques are only minimalized in broad brush terms, and that they “may” be used...and that these measures are only partially effective at best.

For these reasons and those Mr. Bloch presents more fully in his report, the Agency’s failure to disclose and meaningfully grapple with the impacts of silica dust in the FEIS denies the public and decisionmakers the needed understanding of this Project’s health impacts for populations living, working, and going to school near the highways.

B. The FEIS Fails To Address the Health Impacts of Traffic Safety Issues from the Preferred Alternative.

The FEIS fails to address how the preferred alternative road design will lead to more vehicle crashes, including the lethal truck-on-car crashes. It also fails to address the safety impacts of the severe bottleneck the Project creates where seven lanes will funnel down to two north of Gaithersburg.

Traffic collisions on the widened highways are likely to increase under the preferred alternative. The FEIS does not, however, fully evaluate these impacts. As the FEIS explains, “safety was not one of the specific elements identified in the study’s Purpose and Need.” FEIS at 60.

If the preferred alternative is built, there will be seven northbound and seven southbound lanes on I-270, with two central toll lanes. This proposed road design is likely to create multiple safety problems. Vehicles will be required to shift to and from the central toll lanes to the outer lanes to exit. According to Byron Bloch, a longtime expert in traffic safety, this configuration “will lead to many severe collisions.”

Further, the road configuration proposed under the preferred alternative will cause more frequent truck versus car crashes. For example, the proposed design does not address the need for safety shoulder or breakdown lanes. FHWA recommends at least 12-foot shoulders adjacent to the outer travel lanes on roads, like I-270, with heavy truck traffic. Instead, the road design for the preferred alternative:

look like an artist’s concept, and [46] do not include any technical details to describe such necessary features as entry and exit ramps, how the traffic will enter and exit the toll lanes, how the traffic on the central toll lanes will transition to the exits, and other details.33

Shoulders less than 12 feet adjacent to outer travel lanes carry safety risks. The FEIS talks about “typical sections” of highway but is not clear about where and how frequently a 12-foot shoulder for the general purpose lanes will be maintained. For example, it was disclosed in the final 4(d) evaluation that next to the Montgomery Cemetery:

The width of the right shoulder is reduced from 12 feet to 6 feet wide (measured between the edge of traveled lane and face of concrete barrier) for a total length of approximately 400 feet including tapers. The total length of the narrow right shoulder excluding the tapers is approximately 235 feet.

This FEIS does not disclose how the risk is managed between toll lanes and general purpose lanes and whether when the general purpose lane shoulder is less than 12 feet, the toll lane shoulder is also proportionately narrower or if the general purpose lane has the entire of the safety sides associated with a narrower shoulder adjacent to the outer lane.

In addition, Mr. Bloch opines, the preferred alternative will exacerbate the traffic backup bottlenecks as the seven lanes heading north on I-270 will funnel to two lanes just north of...
Gaithersburg. There are already bottlenecks in the Gaithersburg area from a less severe funneling from five lanes to two. As addressed more fully elsewhere in this Section, bottlenecks cause localized air pollution. Gaithersburg hosts several EJ populations who should not be asked to bear this additional environmental burden.

Based on his review of the FEIS, Mr. Bloch concludes:

The FEIS fails to address how the Alternative S road design will lead to more vehicle crashes, including the lethal truck-on-car crashes (which I have analyzed for many years as a national auto safety expert analyzing many such actual collision accidents). The lane shifting and cross-overs to and from the toll lanes to entry and exit locations will exacerbate such collisions with severe to fatal consequences for the occupants of passenger vehicles.

The FEIS should have, but did not, thoroughly evaluate these safety issues and corresponding impacts to public health while analyzing the effects of the alternatives. Instead, it includes a proposed alternative that is likely to cause significant health impacts from increased road conditions.

IV. The FEIS’s Discussion and Evaluation of Plummers Island. Certain NPS Lands, the Potomac River, and Impact to the Northern Lon Laredo Belt and Other Belt: Inconsistent and Contrary to Applicable Legal Requirements.

A. Throughout the Environmental Review Process, the Agencies Have Failed to Consider the Full Scope of Impacts to Plummers Island.

Plummers Island is a unique natural resource area that hosts many rare plant species while at the same time being close to a highly populated urban area. It is of critical importance, long-term scientific studies conducted by the Washington Biologists’ Field Club (“WBFC” or “Club”), a non-profit organization comprised of influential and accomplished scientists and charged by the National Park Service with the care and maintenance of the Island. The Island also serves as the meeting place for the Club’s members. WBFC has documented the rich ecosystem and biodiversity on Plummers Island through over 120 years of research. Plummers Island is entitled to protection under Section 4(f), both in part of the C & O Canal Historical Park and as a significant historic resource that is individually eligible for listing in the National Register of Historic Places as the Washington Biologists’ Field Club on Plummers Island.

In the preferred alternative, the Agencies plan to take part of Plummers Island, place piers for the highway on the Island, undertake construction of the Project from the Island, destroy important research plots of rare plant species and habitat, and overwhelm the Island and its significant research areas by as much as 30 feet with muddy new bridge lanes. All of these impacts constitute a use of Plummers Island that must be evaluated under Section 4(f).

WBFC was a consulting party in the Agencies’ Section 106 process, but in spite of WBFC’s attempts to protect the Island through its consulting role, the Agencies have failed to do so. Nonetheless, the Agencies appropriately recognized the Island’s historic significance and have agreed to nominate Plummers Island to the National Register of Historic Places. Yet, the Agencies have failed to protect the whole of the property, including the upriver areas outside the ordinary high water mark, or evaluate feasible and prudent alternatives that would avoid or minimize harm to the protected features of Plummers Island.

Under the 1959 agreement between WBFC and the National Park Service, the parties memorialized their intent to “preserve this natural wild area as a sanctuary and scientific research preserve,” and WBFC gave the Island to the federal government, who agreed to ensure that any improvements on the Island “shall not be inconsistent with the use to which the island has been dedicated by the [WBFC],” or change for WBFC’s continued maintenance and research on the Island as a wild natural area, so long as WBFC consents and complies with certain obligations. WBFC’s extensive studies of the Island make it a rare and precious part of the cultural and scientific natural heritage of the National Park system.

As we now discuss, the failure to acknowledge the full scope of the impact of the Project on Plummers Island, including the long-term research and sensitive research sites that will be destroyed by the Project, and the failure to evaluate feasible and prudent alternatives that would avoid or minimize harm to the protected features of Plummers Island, violates Section 4(f).

1. The Agencies Violated Section 4(f) of the Transportation Act by Failing To Mitigate All Proposed Impacts to the Island.

The Agencies’ failure to avoid or minimize impacts to Plummers Island violate Section 4(f) of the Department of Transportation Act. The Act bars the FHWA from approving any transportation project that “requires the use of...any land from an historic site of national, State, or local significance as so determined by such officials [under (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such... historic site resulting from such use.” 23 U.S.C. § 138(3), 90 U.S.C. § 350(3).

See NDEA Comments at 116. FHWA determinations under Section 4(f) must be made as the ROD and cannot be forwarded to 23 C.F.R. § 774.7(e)(3). See generally Sierra Club, Section 106 Comment Letter (Apr. 12, 2021).

The Agencies have now missed their opportunity to adopt an alternative to using Plummers Island as part of the Project or to adopt mitigation in compliance with Section 4(f). Understanding that the Agencies were unsafe to select an alternative that avoided the Island entirely, WBFC proposed mitigation efforts on many different topics in the Section 106 process. See supra. The Agencies rejected some of those proposals. They also failed to treat effects to wetlands and waterways as Section 4(f) issues. Now the FHWA has run out of time to formally agree to any meaningful mitigation to comply with its Section 4(f) responsibilities in the ROD because they deferred a final determination on Section 106 mitigation until the execution of the programmatic agreement after the NEPA process. The FHWA does not propose to include reasonable alternatives

See WBFC Section 106 Comments on the MLS Programmatic Agreement, App’x A (Feb. 3, 2023) (attaching 1959 Agreement between WBFC and NPS).
that would avoid or mitigate harm to the island in the preferred alternative, suggesting that it is very unlikely that the full mitigation required by Section 4(f) will be approved in the ROD.

The preferred alternative will cause irreparable harm to Plummers Island. Environmental damage to Plummers Island cannot be fixed by any form of post-bid mitigation, as is apparently contemplated by the programmatic agreement. Plummers Island is a research site that hosts a multigenerational study of long-term ecological processes. Destruction of, or serious damage to, the habitat stops the ecological processes whose progress WBFC has been studying for over a century and ends the long-term study. The Agencies’ proposed “comprehensive ecological restoration plan” on NPS land to address impacts from the preferred alternative, FEIS at 5-110, is not a solution. Instead, it disrupts long-term research begun in 1951 and forces the WBFC to start a new study from scratch. The denial of consideration of these long-term impacts violates Section 4(f). See Corridor M Alternatives, Inc. v. Slater, 106 F.3d 368, 371 (D.C. Cir. 1999) (because the historic properties protected by Section 106 and Section 4(f) are similarly defined, “it follows that the [Federal Highway Administration] must complete its Section 106 determinations before it can comply with section 4(f)

2. Areas Within the Riparian Zones of the Island Must Be Considered When Evaluating Impacts to the Island.

In the FEIS and the Section 106 process, the Agencies improperly ignored impacts to Plummers Island beyond the Island’s ordinary high water mark. For over 120 years, as part of its overall research, WBFC has studied the wider, riparian margins of Plummers Island. This ecosystem-wide approach to the Island is part of the legacy of WBFC on Plummers Island. However, MDOT continues to say the Island ends at the ordinary high water mark because it failed to recognize the characters-defining features of the historic property that justify a different boundary. The Agencies also arbitrarily declined to treat Plummers Island as a separate historic site of national significance worthy of special protection within the larger Chesapeake & Ohio Canal National Historical Park, despite the clear determination of eligibility for the WBFC at Plummers Island made by the Maryland Historical Trust during the course of the Section 106 process.

The FHWA’s failure to recognize this use of WBFC at Plummers Island for purposes of Section 4(f) is contrary to the historic record and inconsistent with the purpose of the proposed designation of Plummers Island as the National Register of Historic Places. Because of the legacy of the WBFC and its research, the federal government determined Plummers Island to be eligible for the Maryland Historical Trust and the National Register of Historic Places, and historic designation requires protecting the Island as a whole.

3. WBFC Was Not Properly Included in the Planning Process and the Agencies Improperly Rejected its Recommendations to Minimize Impact to Plummers Island.

WBFC, despite its historic relationship with Plummers Island, was not originally included in the National Historic Preservation Act Section 106 process. Once WBFC was included as a consulting party to the Section 106 process, the Agencies met with WBFC and agreed to a five-year study of impacts from the Project with photographic documentation. Despite the fact that WBFC at Plummers Island and its parcels and its research sites will be substantially damaged by the Project, the Agencies have not agreed to WBFC’s mitigation requests, including proposals for long-term monitoring of invasive species and the effects of the shadow from the bridge or WBFC’s request for NPS funding for research using NPS standard plots employed for 20 years to capture impacts more fully. WBFC’s suggestions were either ignored or disputed with no engineering and cost grounds. For example, under the preferred alternative, the Agencies plan to build a shared use path on the bridge in a manner that would overwhelm Plummers Island, despite WBFC’s objections and suggestions of where else to place it.

Moreover, WBFC’s recent notice of MDOT’s field visits to Plummers Island so that WBFC could oversee the work to avoid damage to certain plots and rare species. MDOT’s contracted crews have already hacked down seven fringe trees (NPS was notified and fixed the company, but that doesn’t change the fact that the trees had already been cut down). MDOT has failed to respect WBFC’s role on the Island throughout the planning process and provide appropriate advance notice for disturbances to Plummers Island.

WBFC should have been included in the Section 106 process from the beginning, and its reasonable mitigation requests should have been honored. Instead, the Agencies have pushed forward with a plan that will contravene WBFC’s goals and permanently damage this important resource. More importantly, in doing so, the FHWA has violated its responsibilities under Section 4(f) to avoid or minimize harm to WBFC at Plummers Island in a stand-alone Section 4(f)-protected historic site.

4. Mitigation for Impacts to Plummers Island Should Have Been Evaluated in the NEPA Process from the Beginning Instead of Being Channeled into a Section 106 Process that Will Conclude after the Comment Period Is Over and the ROD Is Signed.

The Agencies’ failure to fully consider impacts to Plummers Island as part of the NEPA and Section 4(f) review is an affront of their decision to avoid impacts to the Island in a Section

43 Proposed mitigation included the following: Nomination of WBFC on Plummers Island to the National Register of Historical Places; bike & pedestrian lane employment; flooding potential; pier and causeway replacement; ALB construction platforms; channel impacts from construction and vegetation removal; research duration; invasive species, removal of toxic moss; statement of active pollution; rains; expanded online content; financial support for inventories of understudied groups on the Island; access during construction; and long-term research. See WBFC, Section 106 Comments on the MLS Programmatic Agreement at 14-18 (Feb. 3, 2023).

44 At minimum, however, as required by the Section 106 process, MDOT and NPS should consult with WBFC before and during any proceeding “test actions.”

See Maryland Historical Trust Determination of Eligibility Form for Washington Biologists’ Field Club on Plummers Island (Aug. 20, 2023), attached as Exhibit J.
106 programmatic agreement that will not be executed until after the NEPA and Section 404 processes have concluded. The decision to rely on a programmatic agreement for Plummers Island in error. Section 106 regulations provide that a programmatic agreement is appropriate in certain limited situations, including “[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking.” 36 C.F.R. §800.14(b)(1)(iii). Here, however, there was no reason to defer all identification of historic properties within the area of potential effects or the assessment of adverse effects and any measures to avoid and mitigate. WBSC and other commenters provided fruitful comments about possible adverse effects to the Island and numerous suggestions for proposed mitigation.

Because the decision to proceed with a programmatic agreement, the Agencies claimed that they could not fully consider impacts to Plummers Island as the NEPA and Section 404 processes and declined to consider reasonable alternatives to avoid impacts (such as project scope, number of new lanes, and road alignment). But deferring consideration of the impacts to the site during alternative selection under NEPA and Section 404 undermined discussion of potential mitigation measures for any adverse effects. See Sierra Club Section 106 Comments of October 8, 2021.

For example, in the FEIS, the Agencies essentially state that disrupting the continuity of WBSC’s research is unavoidable, by ignoring reasonable alternatives that avoid impacts to Plummers Island. The no-build option was dismissed without sufficient consideration. In addition, the ALB Strike Team considered a construction approach with a “west shift” of the LOD to entirely avoid impacts to Plummers Island. FEIS at 5-28, and determined it a viable option. The FEIS does not sufficiently explain why this west shift was developed, particularly because “[a]n additional goal of the ALB Strike Team was to develop and evaluate alternatives for the avoidance and minimization of [impacts to Plummers Island] as it is a recognized ecologically sensitive and an NRHP eligible historic property in addition to being part of the larger Chesapeake & Ohio Canal National Historical Park.” FEIS at 5-28.

Damage to the Island was not irreparable. Allowing construction of the Project to impact the Island demonstrates the Agencies’ error in failing to explore reasonable, prudent, and feasible alternatives under NEPA and directly violates the FHWA’s substantive obligations under Section 404.

5. The Agencies Violated NEPA by Failing To Fully Account for Toxic Runoff, Water Quality Impacts, and Other Likely Impacts to the Island.

 Despite WBSC’s and other commenters explaining the likely impacts of the Project on Plummers Island, the FEIS does not provide NEPA’s required “hard look” with respect to the Island.

First, by limiting their consideration to areas landward of the ordinary high water mark on the Island, the Agencies claim that the preferred alternative will impact less of the Island than would have been indicated if those areas had been properly included. The area that was considered is partly under the expanded ALB and the extended shadow will shade it out. Additional rare communities within the area of potential effects and bordering on the LOD include the Potomac River Bikeway Towpath Hardpan Forest, Floodplain Towpath Forest (with woodland bedrock pools), and the Central Appalachian / Piedmont Basic Music Forest with many sensitive species that are restricted to these habitats on the Island, including several that are rare. Plants cannot move out of the way and natural habitat is already being lost throughout the region. The rocky headland of the Island preserves a bit of the Potomac River Rivernacle Outcrop Barren plant community (globally and state rare) and possibly the eastmost extent of this vegetation unit in the Gorge.

Second, the FEIS includes incomplete maps of the Island, which adds to the Agencies’ failure to consider the full extent of the impacts from the preferred alternative. In previous MDOT slides, the positions of piers from the post-construction ALB appears to be wider and overlapping Plummers Island more than illustrated in the FEIS. The Agencies have not explained this discrepancy between MDOT’s slides and information in the FEIS. WBSC remains concerned that the FEIS underestimates anticipated impacts to Plummers Island. Further, the destruction and disturbance of Chesapeake & Ohio Canal National Historical Parkland and riparian and pond wetlands is not considered to be contained within the LOD. In addition, in the maps of Plummers Island, the FEIS fails to completely catalogue the Island’s water resources. For example, the Agencies did not fully maps the bog water pools in the area of potential effects. There is a pool northeast of the mapped pools not shown on the map and there is further pooling northeast of the mapped pools that should be mapped as wetlands. The Agencies cannot fully evaluate impacts to the Island if they cannot even accurately describe its current state.

Third, the FEIS fails to consider toxic runoff onto the Island or reasonable mitigation to address it. Most bridges studied for toxic runoff rise up from the surrounding land in roads (curves). The ALB is conceived to match as a half mile in either direction from Maryland and Virginia land-use highways. The lowest point in the curve is between the bend in Plummers Channel and the adjacent upland. Current drainage runs onto the NPS mainline channel and the land edge under the bridge on both sides. The expanded I-495 and ALB would substantially increase surface runoff from the ALB, including toxic pollutants onto NPS land and into Plummers Channel. In addition, the lowest point on the ALB drains through catchers and culverts onto NPS land, creating erosion gully and then draining into Plummers Channel. See WBSC Comments on Section 100 at 10T (Feb. 3, 2022). The Potomac River waterway may show little increase in pollutants due to its disproportionately large volumes. In contrast, Plummers Channel does not flow much of the time, and runoff accumulates in the water there until the surface flow threshold...
Even the FEIS recognizes that the "temporary" construction impacts may cause permanent damage to certain important plant species that are being studied on Plummers Island. Even some impacts to RTE (or rare, threatened, and endangered) plants will occur on Plummers Island, though most will occur in areas that will be temporarily disturbed during construction of the new ALB. RTE plants potentially affected within the area of temporary disturbance on Plummers Island include a thousand of horse-tail crown grass plants, about a dozen pale dock plants, 30-50 baltic-linaceae quillwort plants, and 10-50 Rand’s goldenrods. All of these plants occur either along the Plummers Island shoreline of the outlet of the Potomac River or along the Plummers Island shoreline of the Potomac River. As noted above, because of the duration of construction of the new ALB and potential shading effects from the expanded ALB, the plant impacts are likely more permanent than temporary, even though they occur outside of the permanent footprint of the bridge. The RTE plant impacts resulting from the bridge pier footprints on Plummers Island would be to a few dozen horse-tail crown grass plants along the edge of the outlet of the Potomac River.

FEIS at 5-127. The FEIS does not, however, acknowledge that many other "temporary" impacts are permanent disruptions to the integrity of the Island. Plummers Island is currently managed for scientific research to study long-term trends with no disturbance. The preferred alternative is identical to that purpose and the FEIS fails to acknowledge the full impacts to Plummers Island and to WBFC’s mission. These acknowledged impacts also increase the severity of the use of Plummers Island under Section 401, and the MWPA’s violation of its substantive obligation under Section 401 to consider prudent and feasible alternatives that would avoid or minimize harms to the important research sites that will be destroyed by the Project.

6. The Agencies also Do Not Address Concerns to Plummers Island from Flooding.

The FEIS fails to accurately describe the likely impacts of the preferred alternative due to the risk of catastrophic flooding to the Island. As noted above, the Agencies improperly limited consideration of impacts to Plummers Island to those that occur within the Island’s ordinary high-water mark.

The FEIS’s evaluation of construction and long-term impacts to the Island from flooding is also inadequate. In the FEIS, the Agencies state that hydrologic analysis will not be completed until final design but, while full hydrologic analysis is incomplete. See FEIS 5-84 (explaining that a general assessment of hydrologic effects for the Project will be completed once final limits of cut and fill are determined the final plant of engineering design). Now in the

---

32. The measures above are based on WBFC member Robert S. Sorong’s estimates from having crossed to the Island many times. Dr. Sorong notes that even with the recent big rains the river level has been very low below 4.3 ft.

33. Plummers Channel is identified in the DEIS as the "Rock Run Culvert," although it is neither Rock Run nor a culvert, and in the FEIS as a "Potomac River 'outflow,'" although it is now officially named Plummers Chanul by the USGS Board of Geographic Names.

34. MDOT did not respond to comments about runoff from spills onto the Island from accidents. Several recent accidents have caused spills.

35. See Letter from Shannon L. Browne, PhD to Sierra Club Maryland Chapter (July 18, 2022), attached as Exhibit K.
channel will be affected simply by removing the old piers at the river’s edge, let alone by flooding adding to this impact, but the FEIS does not address these impacts.

The flooding issues from planned erosion and pier replacements (creating perfect conditions for logjams) and leveling or trampling the rough edge that constrains the channel overflow from flooding the island are major and reasonably foreseeable adverse issues that require prompt attention and avoidance, minimization, or mitigation and were not fully addressed in the FEIS.

Similarly, the Agencies indicate that the construction process will be designed to address 100-year floods, but those floods now come more frequently than historic 100-year floods. The FEIS must acknowledge that the data it is using to evaluate construction impacts is outdated and underestimates the risks to the Island. Given the increasing frequency of more extreme rains, there is a potential for catastrophic flooding at the ALB in Malheur Gorge narrows.

In sum, throughout this process, the Agencies have continued to undervalue both Plummers Island and WBFPC's important role in protecting it. As a result, they have recommended an alternative that will, among other things, permanently impact RTE plants, destroy WBFPC long-term research, demote, overshadow, and remove the upper end of the Island, and increase the risk that stormwater runoff or catastrophic flooding will cause large-scale damage to the Island. The Agencies still lack smart-growth-forward thinking to address climate change, and instead of coming up with smart-growth solutions, they plan to permanently damage the irreplaceable natural resource that Plummers Island represents.

B. The FEIS Fails to Address Several Outstanding Issues Pertaining to National Park Service Land Around the American Legion Bridge, Including on Both the Maryland and Virginia Sides of the Potomac River.


With no plan for stormwater treatment on the ALB, water will flow directly from the Bridge into the Potomac River. While original plans included stormwater management on National Park Service (“NPS”) properties to address runoff from the Bridge, this control measure has been eliminated because the Agencies claim the NPS will not allow stormwater management facilities on their properties except in narrow circumstances not applicable here. See FEIS at 3-18. 33

However, as stated in the FEIS at E5-10, Maryland Water Quality Standards, and likely Virginia Water Quality Standards as well, require onsite treatment of all new impervious areas and for stormwaters to leave a site in equal or better condition that it arrived. That requirement applies to most if not all of the ALB, yet nothing is being done to comply with it.

Observers of the Project involved in the Section 106 process have suggested that several of the scarps on the American Legion Bridge will drain directly onto Plummers Island (National Park Service property), which would seem counter to the Agency’s interpretation of NPS’s policy regarding stormwater management on their property. This proposed stormwater drainage exacerbates the harms to this Section 404-protected property discussed above.

Even beyond the legal requirements, it is highly concerning that no stormwater management is planned for an area that is in close and receives stormwaters from large amounts of impervious surface at both Maryland and Virginia. Moreover, that stormwaters flows directly into the Potomac River, a source of drinking water for 6 million people.

The Potomac River Keeper Network states:

The Potomac River provides clean, safe drinking water to almost 6 million people within the river basin. Close to 100 million gallons of water are taken from the river and transported to homes, schools, restaurants, hospitals, and dozens of other businesses and amenities daily. This water is used for drinking, cooking, cleaning, showers, and removing waste. 34

According to the Potomac River Basin Drinking Water Source Protection Partnership, 35 pollution in the Potomac River from deicing materials, hazardous spills, and stormwater are challenges to providing a reliable and safe supply of drinking water. These challenges will significantly increase the Agencies presented with the preferred alternative of widening I-495 and the ALB by adding toll lanes without addressing increased stormwater runoff spills into the Potomac. The FEIS should have addressed these stormwater issues given their extensive health and safety ramifications. No project should be cleared to move forward with such poor planning.

2. Over 1,000 Trees Will Be Removed from National Park Service Land, Which Remains an Unacceptable Number from the Perspective of the National Park Service Association, National Capital Planning Commission, and Most Likely the National Park Service At All.

According to the FEIS, in July 2021, the National Park Service objected to the removal of 838 trees on NPS property, including along the C&O Canal. FEIS App’x S at 14. Under the preferred alternative, 835 trees will be removed from the C&O Canal, 370 removed along the Chanh

33 Potomac River Keeper Network, https://www.potomackeekeeper.org/imagine-a-day-without-water-cycles/
3. Further Investigation Is Required into Whether it Is Legal Without Congressional Review and Approval to De-Federalize Copper Creek Tidal Lands and Transfer Them to the States for Transportation Use.

A November 19, 2021, letter from the National Capital Planning Commission to MDOT SHA stated:

Regarding the two federal parkway lands, NPS has advised NCPC of its intent to “transfer” project-related George Washington Memorial Parkway land to the State of Virginia and project-related Clara Barton Parkway and Chesapeake & Ohio National Historic Park land to the State of Maryland. These rezoning changes would negate NCPC’s Copper Creek jurisdiction over Clara Barton Parkway land and our Planning Jurisdiction over George Washington Memorial Parkway and C&O Canal National Historic Park lands. Given these facts, NCPC has no formal review authority over any aspect of the Alternative 9 – Phase 1 South Alternative. However, please note that NCPC would still be legally obligated to comply with the CCA requirements and 1941 and 1951 Agreements until such time as the land transfers are complete. This includes ensuring that the NCPC consults with the transferees and obtains compensation for its contributions to the land purchase.

Yet, two years earlier, there were concerns about the legality and optics of taking this course of action. Meeting notes obtained by FOIA state:

There was a discussion on de-federalizing CC lands. NCPC was not sure if that is allowed but were concerned with optics and risks associated with it even if it [sic] allowed. NCPC talked about [sic] 1963 perpetual easement agreement between the State and M-NCPC due to the widening and construction of the Capital Beltway.161

---


162Meeting notes from Federal Highway Administration (FHWA) and National Capital Planning Commission (NCPC) Meeting, Location NCPC Headquarters, November 3, 2019, attached as Exhibit E.
For example, the Maryland Historic Preservation Office concluded that the Potomac River under the ALB is not an historic resource covered by the National Historic Preservation Act. Even though the National Park Service has designated the Potomac as part of the Potomac Heritage Trail and the Captain John Smith Chesapeake Bay National Historic Trail, NPS did not echo the Cane Creekers Association’s concern about adverse impacts to those waterway trails in its comments during the EIS or historic preservation reviews.

In their response to comments on the FEIS, the Agencies stated that, during construction, no obstacles or large stones will be placed in the Potomac except around the new piers supporting the ALB. Further, they expect to construct the new bridge using “trestles” for the heavy equipment.

During construction, it is anticipated that causeways, trestles and barges will be utilized to access the ALB corridor for demolition and construction. It is not anticipated that rocks will be placed across the Potomac due to its [sic] depth and that off the banks, the contractor will utilize steel trestles supported on temporary pilings that will be removed at the completion of construction as well as barges to obtain access. During the heavy construction operations, it is anticipated that water users will have temporary disbursement and vary [sic] requirements to access around the construction (emphasis added). These are anticipated to be intermittent during construction. Permanent riprap for stream protection is anticipated to be placed around the pier footings but not across the entire channel between piers.

FEIS App’x T.2.B. Vol.1 at CO-557. Construction is expected to take up to 5 years and the proposed construction zone across the Potomac is about 600 feet long. The Agencies provide no information about where the “transshipment and re-entry” points will be at and no details on how frequently these “intermittent” disruptions will occur.

The Agencies further conclude that, “[w]hile the Potomac River has a recreational use, it is not a park as defined under Section 4(f) or the US Department of Transportation (USDOT) Act of 1996 as amended. Construction of the new ALB shall not prohibit the navigability of the main channel of the Potomac River and construction will be limited to the shorelines.” FEIS App’x T.2.A. Vol.1 at CO-508 (emphasis added).

Construction will certainly interfere with or impede the navigability of the Potomac for several years, even though it may not “prohibit” it, except intermittently.

More still needs to be disclosed to the recreational users of the Potomac and the public about how the Potomac will be impacted by the proposed demolition of the current American Legion Bridge and by its rebuilding and approximate doubling in size.

2. The Agencies Should Have Considered Whether the Potomac River is a Section 4(f) Resource Due to its Inclusion Within the C & O Canal Historical Park.

The Agencies should have considered whether the Potomac River is a Section 4(f) recreational resource due to its location within the C & O Canal Historical Park, the fact that it is part of the Potomac Heritage Trail and the Captain John Smith Chesapeake Bay National Historic Trail, and possibly due to its designation as a state wild and scenic river.

FHWA’s Section 4(f) policy paper states:

These portions of publicly owned rivers, which are designated as recreational trails are subject to the requirements of Section 4(f). Of course, Section 4(f) would also apply to lakes and rivers, or portions thereof, which are contained within the boundaries of a park, recreation area, refuge, or historic site to which Section 4(f) otherwise applies.93

Based on these criteria, the Potomac River should qualify as a Section 4(f) recreational resource. The River flows through the 4(f)-protected C & O Canal National Historical Park, passes around the 4(f)-protected resource Plummers Island within the C & O National Historical Park, and is part of the Potomac River Heritage Trail and the Captain John Smith Chesapeake Bay National Historic Trail, both of which are recreational resources.

Additionally, the Potomac River is designated by the state of Maryland as a “wild waterway” under the state Department of Natural Resources’ Suisun and Wild Rivers System, which underscores its importance as a recreational resource within Maryland. Given this designation, the FHWA should have consulted the state’s Wild Rivers Advisory Council as stated whether the state’s management plan designates the river as a “significant park, recreation area, or wildlife and waterfowl refuge” and is therefore protected under Section 4(f).

D. The FEIS’s Analysis of Impacts to the Northern Long-Eared Bat and Other Bats is Inadequate and Even More Obtuse than Before.

G. Recent Regulatory Developments and New Revelations About the Scope of Construction.

Throughout the NEPA process, we have emphasized that the Agencies’ analysis of potential impacts to the Northern Long-Eared Bat relies on an outdated, 2016 Endangered Species Act (“ESA”) Section 4(d) Rule, dated, e.g., SDEIS Comments at 118, and fails to sufficiently analyze the threat to bats, see DDEIS comments at 74. We incorporate by reference the points made in those comments in these entirety and note that the Agencies have responded to them in the FEIS.

The Agencies’ assessment is now even more outdated in light of the U.S. Fish and Wildlife Service’s recent proposed classification of the Northern Long-Eared Bat as endangered and the fact that, with construction extending into Virginia, even more bats, and potentially more bat species, will be impacted. These impacts were not properly evaluated by the Agencies’ bat surveys.

1. The FEIS Fails To Consider A Court Decision Invalidating the Fish and Wildlife Service’s Listing for the Northern Long-Eared Bat as Threatened and the Agency’s New Proposal To List it as Endangered.

As noted in our SDEIS comments, the U.S. District Court for the District of Columbia held that the designation of the Northern Long-Eared Bat as threatened, rather than endangered, was arbitrary and capricious. That opinion was issued before the DEIS was released for comment. Center for Biological Diversity v. Browner, 435 F. Supp. 3d 69 (D.D.C. 2020).

The Agencies added new comments to the April 2022 to discuss their conclusions and address the comments. These comments are included in the DEIS. The Agencies argue that the designation of the Northern Long-Eared Bat as threatened, rather than endangered, was arbitrary and capricious. That opinion was issued before the DEIS was released for comment. Center for Biological Diversity v. Browner, 435 F. Supp. 3d 69 (D.D.C. 2020).

Correspondence from the Fish and Wildlife Service indicates that the decision to rely on the 4(d) Rule was made in 2019, before the D.C. District Court determined that the reasoning for the threatened status was arbitrary and capricious. FERC App’x M, Sub-App’x N at 37. This letter also indicates that, in 2019, the Fish and Wildlife Service understood that a change in the Northern Long-Eared Bat’s status would limit the Project’s flexibility and even indicated a willingness to consider exceptions from the ESA’s prohibition on “taking” endangered species, including potentially “nonmass[ively] taking associated with tree removal during the active season, but outside of the peak season, in known occupied habitat.” FERC App’x M, Sub-App’x N at 37. MDOT SHA and FHWA were also aware of the impacts of a change in the ESA listing status: in a letter to MDOT, the Fish and Wildlife Service wrote that, because the Indiana Bat, a species found near the corridor study boundary, was endangered, there was “not as much flexibility” as there was when constructing around the Northern Long-Eared Bat’s habitat when that bat species was listed as only threatened. FERC App’x M, Sub-App’x P at 33. Further, the Agencies knew early on that forest clearing “may affect” the Northern Long-Eared Bat. FERC App’x M, Sub-App’x P at 33. Despite that knowledge, the Agencies have not changed or even discussed possible changes to the Project in response to the changing status of the Northern Long-Eared Bat.

Important: the FEIS does not consider the Fish and Wildlife Service’s recent proposal to list the Northern Long-Eared Bat as an endangered species under the ESA. If finalized, this would change the 4(d) Rule, U.S. Fish and Wildlife Service, Proposed Listing, 87 Fed. Reg. 16442 (Mar. 23, 2022). None of the Agencies’ correspondence even acknowledges this proposal or its implications, and the Agencies have failed to undertake any conference procedures to address how the Project will be modified if the bat is ultimately listed as endangered. 44

44 On July 5, a federal district court in California vacated several ESA rules issued in 2019, returning the ESA consultation process to the regulatory regime that governed before 2019. The Agencies should ensure that their consultation is consistent with that applicable law and acknowledge that any consultation conducted under the now-vacated rules is invalid.
118. For bridges in particular, the Agencies have now determined that the project area has several areas that "support or could support nesting bats," including the Northern Long-Eared Bat: the American Legion Bridge, Chess Barton Parkway Eastbound bridge (which was not surveyed), the McArthur Boulevard-Chase Barton Parkway Westbound bridge, and Seven Locks Road Bridge. FEIS App's M at 117.

Yet, nowhere does the 26,500-page FEIS respond to our concerns with the incomplete bat surveys, FEIS App's T at 826-31 (FEIS response to comments). Because the bat surveys were inadequate, the FEIS's assertion that there are no Northern Long-Eared Bats within the LOD, FEIS App's M at 118, is inadequate for the same reasons that assertion fell short in the SDEIS. See SDEIS Comments at 118-19.

The Agencies' failure to consider and address new information, in this case regarding the likely endangered status of the Northern Long-Eared Bat, failure to consider impacts to Virginia bats, and reliance on incomplete habitat studies all resulted in a deficient analysis, in violation of NEPA and the ESA, 40 C.F.R. §§ 1506.1(b), 1502.3. The FEIS should also have analyzed reasonably foreseeable future actions like the likely listing of the Northern Long-Eared Bat as endangered, but it did not, in violation of NEPA regulations, 40 C.F.R. §§ 1506.7, 1508.25.

V. The FEIS Fails to Meet the Agencies' Environmental Justice Obligations Despite Numerous Commenters' Efforts in Identifying Deficiencies in the Agencies' Analysis.

A. Delaying the EJ Analysis Until the FEIS's Preceded Meaningful Public Review Including, Most Importantly, Review and Comment by EJ Populations: The FEIS's failure to address environmental justice considerations during the public comment period is consistent with the SDEIS's failure to consider EJ impacts. As explained in our previous comments, by delaying an analysis of EJ impacts until the FEIS, the Agencies presented full and fair participation by all potentially affected communities. See SDEIS Comments at 122-23. These procedural failures violate NEPA, Title VI, Executive Order 12298, USDOT Order 5610.2(a), and FHWA Order 6640.23A, among others. USDOT Order 5610.2(a) requires the Department of Transportation to "fully consider[] environmental justice principles throughout planning and decision-making processes." Waiting until the FEIS to disclose key analyses violates this order and fundamental environmental justice principles. As the Maryland-National Capital Park and Planning Commission wrote, waiting to analyze certain EJ issues in the FEIS is "as far from a best practice since it obstructs public comment and community input. Waiting until after the selection of a preferred alternative to evaluate impacts to minority communities means that disproportionate impacts will not be considered in the formulation of the preferred alternative and thus do not receive the attention NEPA and Title VI of the Civil Rights Act of 1964 demand from the Lead Agencies.

M-NCPCC Comments on the SDEIS at 7 (Nov. 30, 2021). Similarly, by waiting until the FEIS to disclose these impacts and present the proposed mitigation for the preferred alternative, the Agencies impair the ability of the public—and EJ populations—to have meaningful input into ways to reduce impacts to EJ communities from the preferred alternative.
According to 32 C.F.R. § 651.16 (cumulative impacts), “(a) NEPA analyses must assess cumulative effects, which are the impact on the environment resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”

All aspects of this definition apply to the Morningtime site. The past impacts are listed above, the current impact is four proposed new lanes of highway to be added right next to it, and the future impacts are the rest of the phases of this toll lane project, which will result in the highway becoming saturated with more and more car and tractor trailer traffic and resulting noise, dust, and air pollution with each new toll lane expansion in the overall plan. MDOT SHA’s March 31, 2022, Section 106 letter explains the future impacts:

The [I-495 & I-270 Managed Lanes Study] is the first element of the broader Op Lanes Maryland program, which considers improvements along the entire length of I-495 (Capital Beltway) in Maryland, connecting into Virginia’s portion of I-495, as well as the entire length of I-270 (Dwight D. Eisenhower Memorial Highway) up to L70 in Frederick County, Maryland.87

The cumulative impacts to this site are clearly an adverse effect to Moses Hall that should have been acknowledged for this important Section 408-protected historic resource. Montgomery Tabernacle No. 88 Moses Cemetery and Hall was named by the National Trust for Historic Preservation as one of America’s “11 Most Endangered Historic Places” in 2021. Failure to acknowledge this adverse effect has deprived Moses Hall of the protections that it is entitled to under Section 408 that would have allowed it to have a say in determining the mitigation measures for the adverse, cumulative impacts still accruing to it from the highway expansion and reasonably foreseeable future actions.

The cumulative impacts on Moses Hall from past actions are undeniable and have been fully acknowledged by the Agencies. In a Washington Post article entitled “Maryland will award Moses Montgomery Cemetery when widening Beltway,” Julie Schabtchy, the Chief, Cultural Resources Section and Chief Archaeologist at MDOT, is quoted as follows:

“We own the facts of the Maryland Roads Commission impacting this community 60 years ago,” Schabtchy said during a recent visit to the cemetery. “It’s our responsibility now to repair that damage and come in and do the right thing.”88

87 Section 106 Letter from Snow Anchor to Elizabeth Hughes and Julie Langes, March 31, 2022 at 1. Notably, the FEIS itself never mentions this fact, that this is just one small part of a larger plan for putting toll lanes along the entire Beltway and beyond. Similarly, the FEIS does not consider cumulative impacts of the clearly reasonably foreseeable much larger overall toll lane expansion plan.


MDOT’s public position took a sharp turn on January 4, 2022, when the Agencies asserted “[d]espite the 1960s impacts of the original Beltway construction the impact is now less than the impact of historic area which includes the present proposal to widen the Beltway.”89

This conclusion is wrong as a matter of law. There is absolutely no support in the Section 106 regulations for this arbitrary cut-off date for consideration of cumulative impacts. On the contrary, they unconditionally state that: “[c]umulative effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be further removed in distance or be cumulative.” 36 C.F.R. § 100.36(c)3. Nor is there any authority for this arbitrary cut-off date in the Council on Environmental Quality’s cumulative impact regulations or in related regulatory guidance or cumulative impact analyses.

Furthermore, not only were those past cumulative impacts significant, they had a significant disproportionate impact on an environmental justice community and its most central community facility, the historically very busy hall and cemetery that bordered the community. As even the Agencies agree to acknowledge, a grave injustice was done when the Beltway was constructed. The imperative to consider past wrongs to environmental justice communities is confirmed by Executive Order 13900 (Jan. 20, 2021).80 which applies to projects such as this one, that would utilize federal funding. The Executive Order cites the nation’s commitment to “conserve our national treasures and monuments, places that secure our national memory. Where the Federal Government has failed to meet that commitment in the past, it must advance environmental justice.” (emphasis added). The Agencies’ acknowledgment of this past wrong but refusal to consider these past impacts in the FEIS clearly violates NEPA and has the effect of depriving these historic resources of the protections to which they are entitled under Section 408.

In other words, rather than redress these past wrongs, the Agencies have doubled-down on them and compounded the harm.

While the FEIS acknowledges the past harms resulting from the Beltway’s original construction, MDOT’s January 4, 2022, letter asserted, without any substantiation, that no impacts to the cemetery occurred from the 1992 Beltway widening. That position is not credible. Basic math indicates that when a highway is widened, it increases throughput (which translates to more noise, dust, and pollution) and impervious surface, causing greater stormwater runoff, to which this site is particularly vulnerable by the site’s own admission.

89 MDOT SHA Section 106 letter from Julie M. Schabtchy to Elizabeth Hughes and Julie Langes dated Jan. 4, 2022 at 3.
The response from consulting parties to the Agencies’ flawed argument that they could apply a cutoff date to their analysis of cumulative effects was swift and curt. The National Trust for Historic Preservation, Friends of Moses Hall, St. John’s Club and other consulting parties raised legal objections to the Agencies’ arbitrary and incorrect argument that no cumulative effects prior to 1966 and 1970 could be considered.

Still set on avoiding an adverse effects determination, the Agencies deferred and reframed the argument to focus on direct impacts to burial, claiming that an adverse effects determination depends on whether there are direct impacts to burial. And instead of taking a closer look to determine if there were grave shifts beyond the area surveyed, they asked for the determination of effect to be deferred until after the Project’s Record of Decision.

The refinements went thus:

In [Maryland Historical Trust’s (“MHT”) letter of February 4, 2022, the rationale for not considering the specific effect findings the Monumental Cemetery was due to potential for additional burials outside the defined boundaries of the property that may exist or be impacted. MDOT SHA and FHWA note that based on the specific issues raised by MHT, in the absence of other project changes not contemplated at this time, the potential for adverse effects is narrowly limited to the issue of the possibility of unburied burials outside the defined boundary of the property that cannot be further avoided. FHWA finds that the issues related to atmospheric, muudal, visual, and cumulative effects to the property, have been addressed. No diminishment of location, design, setting, materials, craftsmanship, feeling or association has been found in these areas, and there has been no specific disagreement expressed by MHT on these assessments.]

In this statement, not only do they deny any adverse effects, they misrepresent the comment of MHT to justify their commitment to a position of “no adverse effect.”

Despite the Agencies’ firmly maintained commitment to that unreported legal argument, the Agencies themselves provide information within the FEIS that undermines the argument. MDOT acknowledges cumulative adverse effects to the property. Examples include (emphasis added):

71 Section 106 Letter from Steve Archer to Elizabeth Hughes and Julie Langen, March 31, 2022.
72 The MHT February 4, 2022 letter states regarding the Monumental use that: “Given the sensitivity of the resource, the potential for the presence of additional burials that may be impacted, and the overwhelming expression of concern for this resource expressed by multiple consulting parties, it is our opinion that the finding of adverse effect remains valid for this historic property.”

45

“Understanding that the Belvedere was constructed adjacent to these sensitive resources, MDOT SHA has committed to construct the following pedestrian connections between the Gibson Grove A.M.E. Zion Church and the Monumental Cemetery: No. 88 Moses Hall Cemetery to restore the historic connection along Seven[sic] Locks Road. . . .”

Commitment to “Constructing a new sidewalk along the west side of Seven Locks Road under I-495 to reestablish the historic connection between Gibson Grove Church and the Moses Hall Cemetery.”

Commitment to “Querfing land owned by MDOT SHA with potential power to back to Trustees of Moses Hall Cemetery.”

If mapping data provided by USEPA and University of Maryland (UMD) indicates that the concentration of communities with the greatest levels of risk are located along the study corridor. Today’s concentration of communities at the greatest levels of risk along the highway is directly related to the history of highway construction before national environmental policy.

Today’s racially and economically segregated conditions in urban and metropolitan areas can be traced directly to decades of neighborhood destruction and residential displacements caused by highway projects plus housing policy and other racially-marginalizing actions undertaken by local, state, and the federal government throughout the 20th century.

But then, remarkably, the FEIS fails to acknowledge that these impacts will be adverse. The FEIS states the Agencies’ position:

Based on the current historic boundary, the Preferred Alternative will avoid direct impacts to the Monumental Tabernacle No. 88 Moses Hall and Cemetery. Additionally, no atmospheric, muudal, or visual effects to the property have been identified from the Preferred Alternative. No diminishment of location, design, setting, materials, craftsmanship, feeling or association has been found in these areas, and there has been no specific disagreement expressed by MHT on these assessments.

74 FEIS at 3-135
design, setting, materials, workmanship, feeling or association has been found in these areas.77

Cumulative impacts from past Bel Air construction are indisputably adverse. This site has been subject to longstanding, historic race-based discrimination in transportation planning in the past. The conclusion that there will be no use of Moses Hall for purposes of Section 4(f) is premature given that the serious legal issues regarding cumulative effects have been ignored.

The Agencies’ wrongful dismissal and disregard of cumulative effects and other adverse effects to the site, as described above, is exacerbated by their denial of the determination of impacts for the site through their decision to proceed with a Section 106 Programmatic Agreement.78

After walking back their initial determination of adverse effects and then making a contested determination of no adverse effect, the Agencies are postponing effects determination for the Morningstar Tabernacle No. 83 Hall and Cemetery in the historic Black community of Gibson Grove in Calumet, Maryland. This approach violates FHWA’s obligations to avoid and minimize harm to these historic resources under Section 4(f). See Corridor H Alternative, Inc. v. Slater, 166 F.3d 368, 371 (D.C. Cir. 1999) (Because the historic properties protected by Sections 106 and Section 4(f) are similarly defined, “it follows that the Federal Highway Administration must complete its Section 106 determinations before it can comply with section 4(f).”)

The contentious issue surrounding the adverse effect determination for Morningstar Tabernacle No. 83 site cannot be denied. In a letter to Dr. Julia M. Schabtach of MDOT, the NGTA clearly stated on February 4, 2022, that “it is our opinion that the finding of adverse effect remain valid for this historic property.”

Sierra Club objects to MDOT’s definition of the adverse effect determination for several additional specific reasons:

1. MDOT’s new proposed plan to defer a determination of adverse effect for Morningstar Tabernacle No. 83 site until after issuance of the Record of Decision will foreclose major options for alternatives and mitigation.

2. Adverse effects can be determined now since, inter alia, there are over two dozen probable or possible grave shafts in the right-of-way abutting the land where the roadway will be widened and heavy construction equipment will be used. The probable and possible grave shafts conform to the same patterns observed in the rest of the cemetery.

78 See more detail on this in Sierra Club’s April 14, 2022 Section 106 comment letter, available at: https://www.sierrachclub.org/sites/www.sierrachclub.org/files/oea-authors/673561/MDSierraClub-Section106Comments-14April2022final.pdf

3. These effects, when added to the noise, vibration, and other proximity impacts of the Project and the cumulative impacts from past Bel Air construction, are indisputably adverse and will substantially interfere with the use and enjoyment of this site; hence, even assuming some degree of post-EOG mitigation, there is no basis for assuming that there will be no adverse cumulative effects to this important historical site, which has been subject to longstanding, historic race-based discrimination in transportation planning in this state.

4. The FHWA’s obligations to avoid or minimize harm to this site under Section 4(f) is clear, and the FHWA’s failure to recognize the full scope of the significant uses and harms to the site violates Section 4(f).

In summary, while the full extent of the adverse effect can be addressed as part of the programmatic agreement, the adverse effect determination must be made now. The Agencies’ failure to consider the cumulative impacts associated with discriminatory and destructive post actions perpetuates and exacerbates a green injustice, and violates both NEPA and Sections 4(f).
2. Possible and Probable Burials in the State Right of Way Adjoining the Morningstar Cemetery and Hall Site Are at Risk from the Project and Have Not Been Sufficiently Investigated to Instill Confidence in the Cemetery Boundaries Determined by the Agencies.

Next to what is known as the “current historic boundary” of the Morningstar Tabernacle No. 88 Moses Hall and Cemetery are potential burials extending into the state highway right of way. No ground-penetrating radar was done around the currently known area of graves to determine how much further they extend. MDOT SHA and FHWA were unable to gain concurrence from Maryland Historical Trust for a “no adverse effects determination” in large part due to these potential graves, and thus the Agencies requested that the effects determination be deferred, depriving the Friends of Moses Hall and other descendants and supporters of a Section 406 adverse effects determination during the decision-making window that would have allowed the site to have further avoidance and mitigation measures.

MDOT SHA owns land from the original Beltway construction with potential graves. The graves in a parcel of MDOT right of way are not just potential but, based on ground-penetrating radar, are “possible” and “probable” and number several dozens. This indicates that the “current historic boundary” that MDOT SHA uses today is inaccurate and smaller than the true historic boundary of the cemetery.

The Agencies have claimed that there is no adverse effect to the Morningstar cemetery based on their “current historic boundary,” even in the face of evidence that the boundary is likely not the site’s accurate historic boundary. Of interest in this regard, a Maryland Public Information Act request for documents from the time of the original construction of the Beltway revealed a state payout to a McGowen Funeral Services, Inc. for a burial site located on the true historic boundary (but outside of MDOT’s “current historic boundary”). See Figure 4 at right. The most likely reason for this payout was for reburials from the cemetery due to the Beltway construction.

Further reinforcing the issues with the boundary of the cemetery are the ground-penetrating radar data reported on by the Washington Post. Says the article, “The outer edges of the construction site will be about five feet from the closest area where radar found a possible burial, a project spokesman said. Previous plans had showed the Beltway expanding into the gravy area and about one-third of the 1.5-acre cemetery.”

In the same article, Illinois archaeologist Tim Horley, who undertook the ground-penetrating radar, expressed that “most of the anomalies appeared in adjacent rows. The total of 377 probable or possible burials in the cemetery is probably artificially low, he wrote, because his equipment couldn’t reach the entire cemetery.”

Given this likely location of burials, a five-foot buffer from the edge of where graves were found in a ground-penetrating radar study that failed to reach the entire cemetery is insufficient to ensure that additional graves will not be disturbed.

The FEIS states:

- Through additional investigation and survey including ground-penetrating radar (GPR), MDOT SHA identified potential unmarked graves within state-owned right-of-way adjacent to I-495.
- MDOT SHA acknowledges there is some potential for human remains associated with historic properties to be present adjacent to the Morningstar Tabernacle No. 88 Moses Hall and Cemetery, which are not currently assessed for the types of thorough archaeological investigation necessary to definitively identify remains.

Yet the Agencies still maintain:

1. Based on the current historic boundary, the preferred alternative will avoid direct impacts to the Morningstar Tabernacle No. 88 Moses Hall and Cemetery. Additionally, no atmosphere, audible, or visual effects to the property have been identified from the preferred alternative. No diminishment of location.

---

53 49
55 At CO-244.
Given the implicit acknowledgement that subsequent studies under the programmatic agreement may reveal adverse effects on Moses Hall and Cemetery, the following conclusions in the FEIS are both uncharacterized and presumed:

"There are no indirect or cumulative adverse effects to historic properties specifically caused by the undertaking." 86

"The Preferred Alternative avoids ground disturbance of the Morantin Tabernacle No. 88 Moses Hall and Cemetery," 87

"MDOT SHA has completed extensive ... archaeological research that thoroughly documents the Morantin Tabernacle No. 88 Moses Hall Cemetery and its significant features." 88

"The lead agencies have far exceeded the obligation to consider and address potential project EJ concerns." 89

For further information in support of these points, see relevant additional information and arguments in Sierra Club Section 106 comments dated February 3, 2022, and February 5, 2022.

April 14, 2022. We incorporate by reference the FEIS comment letter of Friends of Moses Hall dated July 15, 2022.

C. In Violation of Title VI, the Agencies Failed to Provide Meaningful Opportunities for Review and Comment on Agency Plans by Non-English Speaking Populations by Directing Limited English Proficiency Commenters to an Inaccurate SDEIS Executive Summary.

As we explained in our comments on the SDEIS, for weeks, the executive summary of the SDEIS incorrectly downplayed some of the environmental impacts of the preferred alternative. See SDEIS Comments at 17-18. The Agencies belatedly corrected these errors in the English version on November 29, 2021, less than three weeks before comment deadline (although many commenters had downloaded the SDEIS already, had already completed their review, and even had already submitted their comments). But the Agencies did not change the SDEIS Executive Summaries in Arabic, Chinese, French, Korean, and Spanish, leaving non-English speakers with inaccurate environmental impacts to review and comment until November 17, 2021, fewer than 13 days before the comment period closed, when they received these summaries without public notice. This omission violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, 80 Fed. Reg. 90,123 (Aug. 16, 2000), which requires that project sponsors be certain that Limited English Proficiency populations have meaningful access to review and comment on agency plans.

In the FEIS, the Agencies summarized their outreach to communities with limited English proficiency and explained that "translated versions of the SDEIS Executive Summary were posted to the project website," SDEIS at 5-146, without noting the error in that summary. In their response to comments in the FEIS, the Agencies downplayed the SDEIS errors as "minor" and do not mention the delay in addressing errors in the non-English versions.

88 FEIS T.J.A vol.2 at CO-244
89 FEIS T.J.A vol.2 at CO-245
90 FEIS App f 2 Vol. 2 at CO-820
92 The FEIS comment letter of Friends of Moses Hall, July 15, 2022.
93 Some time on or after November 17, 2021, fewer than 13 days from the public comment deadline, MDOT and/or FHWA styled posted new Arabic, Chinese, French, Korean, and Spanish Executive Summaries that corrected the inaccuracies. Members of the public who relied on those translated versions and somehow became aware of the corrections therefore had a very limited time in which to comment. Compare https://web.archive.org/web/20211117115324/http://oplanemd.com/id85 (capture of SDEIS website from 3:35 PM on November 17 with links to old and incorrect Executive Summaries), with https://oplanemd.com/id85 (current SDEIS website with links to new Executive Summaries that include "FINAL UPDATED-11_V6-2021" in the same titles).
MDOT SHA promptly corrected a minor error in the environmental impacts summary chart, Table E5-1 of the SDEIS, upon notification by the Sierra Club Maryland Chapter. The document was updated on the project website and a replacement chart was provided at all locations where the document was publicly accessible. The minor error in the summary chart, Table E5-1 of the SDEIS, does not require withdrawal and republication of the SDEIS.

Further, the Agencies underestimated their own outreach efforts to populations with limited English proficiency populations because the flyers distributed at grocery and notions, in newspapers targeting non-English populations, and FEIS at 5-147.3.1.189, unfortunately directed people to the online versions of the SDEIS at OpLanLanesMD.com SDEIS, and the SDEIS had errors for most of the comment period. This failure to connect the website for weeks since non-English speakers violate the Agencies’ Title VI obligations.

D. The Agencies’ EJ Analysis Suffers from Serious Deficiencies by Failing to Analyze Cumulative Impacts to EJ Populations.

In the FEIS, the Agencies have failed to produce a determination of whether the preferred alternative has disproportionately high and adverse effects to environmental justice populations. The conclusion that the preferred alternative will not have disproportionate adverse effects on EJ populations is wrong and the analysis suffers from serious deficiencies.

For example, the Agencies do not apply the appropriate definition of “adverse effects” as that term is used in the relevant USDOT EJ orders. “Adverse effects” is defined in USDOT Order 5610.2(a) as requiring a cumulative analysis of a list of possible effects on EJ populations:

- the totality of individual or cumulative human health or environmental effects, including interrelated social and economic effects, which may include, but are not limited to: bodily impairment, injury, illness or death, air, noise, and water pollution and soil contamination; destruction or disruption of community cohesion or a community’s economic vitality; destruction or disruption of the availability of public and private facilities and services; vibration; adverse employment effects; displacement of persons, businesses, farms, or nonprofit organizations; increased traffic congestion, isolation, or separation of minority or low-income individuals within a given community or from the broader community; and the denial of, reduction in, or significant delay in the receipt of, benefits of DOT programs, policies, or activities.

USDOT Order 5610.2(a), App’n. A.

This Order requires the Agencies to analyze the “totality of individual or cumulative” effects. NEPA also requires a cumulative analysis of impacts to EJ populations. Rather than evaluating the effects cumulatively, however, in the FEIS, the Agencies evaluate each environmental stressor to EJ populations (i.e., noise, displacement, air quality, etc.) in isolation and conclude that because the impacts from individual environmental stressors do not disproportionately impact EJ populations compared to non-EJ populations, there is no overall disproportionate impact. See FEIS at 5-155.5-169. For example, as to hazardous materials sites of concern, the FEIS lists the number of affected communities with hazardous materials sites for EJ versus non-EJ populations.

EJ populations contain 37 low, 4 moderate, and 2 high risk sites of hazardous materials sites of concern, while non-EJ populations contain 37 low, 56 moderate, and 9 high risk sites of hazardous materials sites of concern. As such, EJ populations would not be any more or less adverse to EJ populations under the Preferred Alternative.

FEIS at 5-157. The analysis does not address cumulative adverse effects to EJ populations by aggregating all impacts to each EJ population, i.e., it does not examine whether each EJ and non-EJ population is affected by additional noise, hazardous waste impacts, and water pollution from the preferred alternative. The Agencies thus failed to evaluate whether, once cumulative impacts are considered, EJ populations are disproportionately affected as compared to non-EJ populations.

As EPA stated in its comments on the FEIS, a proper EJ analysis requires looking at multiple impacts at the same time:

In a preliminary review, the [EJSCREEN tool] demonstrates that the MLS alternative performers may now face various disproportionate environmental challenges in the context of EJ, including concerns with air toxics and hazardous waste (involving treatment storage disposal facilities and large quantity generators).


In addition, the Agencies’ analysis in the FEIS does not thoroughly evaluate the historical and existing environmental burdens borne by EJ populations together with the predicted impacts from the preferred alternative. EJ populations have already experienced high levels of air pollution as well as other harmful environmental stressors and a proper analysis must account for EJ populations’ existing exposed susceptibility to environmental impacts. The EPA highlighted this point when reviewing the EJ analysis in the SDEIS:

Table 4-45 indicates that block groups which the project characterizes as EJ and Non-EJ may face similar environmental consequences from certain hazards (e.g., air pollution). EPA notes that certain populations (e.g., low-income and/or people of color populations) may face elevated susceptibility of impacts that may affect other populations less severely. Thus the EPA encourages the project to address the potential for adverse impacts in areas of potential EJ concerns even if less vulnerable areas may face similar conditions.


Most importantly, the FEIS completely ignores the egregious cumulative impacts resulting from past actions by MDOT, namely the original construction of the beltway in the 1960s that intentionally targeted and discriminated against EJ populations. See discussion above. As this
and has failed to address dozens of studies and journal articles finding causal links between, for example, increased air pollution from traffic and high rates of asthma or heart disease. As Shalek highlights, these health impacts are likely to be disproportionately higher in EJ populations, given historic inequities.

Likewise, the FEIS fails to fully evaluate the effects of bottlenecks that will be created under the preferred alternative and, importantly, the air quality impacts from the bottlenecks that may concentrate around the end points of the preferred alternative, in areas where EJ populations live. See ZAMURS AND ASSOCIATES Report at 5-6; see also SDEIS Comments at 124-25. As also noted in the attached report by Norm Marshall, the primary flaws in the traffic model affect the movement of air quality impacts in general, and therefore the evaluation of air quality impacts on EJ populations is also flawed. As discussed below, these air quality impacts result in significant public health impacts across the board that were also ignored in the FEIS, and these public health impacts will disproportionately affect EJ populations, particularly children.

In short, the Agencies have failed to appropriately describe and, as a consequence, mitigate the disproportionate air quality impacts on minority and low-income communities, despite their obligation to do so—and to make the information available to the public for review and comment—under NEPA, UDOT Order 5010.2(a), and UDOT Order 6460.23A, before moving forward with the preferred alternative.

F. The FEIS Fails to Quantify Impacts to the Gaithersburg EJ Area.

In the FEIS, the Agencies finally recognize that several census tracts in the Gaithersburg area have EJ populations, and impacts to those areas should be fully evaluated. However, even with the Agencies’ new analysis, they have failed to acknowledge real air quality and other health impacts from the preferred alternative, impacts that will disproportionately affect EJ populations, including those in the Gaithersburg area.

In our comments on the SDEIS, we listed different health assessments and air quality and other environmental impact analyses that the Agencies should have performed to accurately and quantitatively describe the potential impacts of the Project on the environmental concerns most negatively affecting the Gaithersburg community, as shown by EPA’s ESSCREEN tool. SDEIS Comments at 113-14. These analyses and health risk assessments were not performed. In their expert report, ZAMURS AND ASSOCIATES, LLC explain that the “the pollutants that cause the greater health impacts, PM2.5, PM10, and NOx, remain unquantified and unconsidered, despite the legal obligation to assess these pollutants under NEPA.” ZAMURS AND ASSOCIATES Report at 3. Thus, the true impacts to the EJ populations in the Gaithersburg community remain unquantified in the FEIS.

G. The EJ Analysis Ignored Impacts to EJ Populations East of the I-270 Spur.

In our SDEIS comments, we explained that the Agencies were improperly segmenting the Project by limiting their environmental review to exclude the significant environmental impacts anticipated from later phases of the Project to expand I-495 east of the I-270 spur and the northern portions of I-270. See SDEIS Comments at 12 (comparing proposed environmental impacts).
Based on public statements by Project proponents, the Agencies will ultimately seek approval for lane widening and toll lanes on I-495 from the American Legion Bridge to the Woodrow Wilson Bridge in Virginia and the northern portions of I-270, exactly as originally proposed. See SDEIS Comments at 8-17.

This improper segmentation of the Project also affects the Agencies’ EJ analysis. The Agencies cannot avoid their obligations to evaluate impacts to EJ populations throughout the area, including in majority-minority Prince Georges County, that will be impacted by the later phases of the Project. A proper EJ analysis requires an evaluation from the American Legion Bridge to the Woodrow Wilson Bridge in Virginia—the scope of the Project initially proposed. By deferring a full EJ analysis until after the first phase of the Project is approved, the Agencies are attempting to bias approval of the Project by making the highway expansion east of the I-270 spur seem inevitable and essentially “showing under the rug” the likely significant impacts to EJ populations anticipated in later phases of the Project. We remain concerned that the Agencies will also attempt to streamline the environmental review process for that next phase by relying on the (incomplete) analysis performed for the first phase of the Project and even further curtailing the public comment process, thus denying opportunities for the community to engage in review of the Project.

H. The FEIS Fails to Fully Access Construction and Post-Construction Impacts to the Julian West Middle School and Other Sensitive Sites Next to the Highway.

As described in Section IV of these comments and in the attached expert comment letter by Rossale Bright, the generation of silica dust during road construction is a significant health hazard that the FEIS fails to adequately discuss. As the I-270 and I-495 road and bridge construction takes place, there will be continuous generation of harmful silica dust, and precautions (i.e., sealing indoors, keeping all windows closed, and washing frequencts to go outside) may be needed to protect sensitive populations at schools (Julian West Middle School, Fairwood Elementary, Carderock Springs Elementary, and Walter Johnson High) and other sites close to the highways.

In general, the FEIS fails to adequately identify, describe, and quantify the health impacts to these sensitive populations that will be impacted by silica dust under the preferred alternative.

I. The FEIS Fails to Consider Impacts to Environmental Justice Communities from New Bottlenecks and Increased Traffic Created by the Preferred Alternative.

As explained in our previous comments, the SDEIS recognizes that the preferred alternative would create bottlenecks outside the preferred alternative limits. SDEIS at ES-12, 2-6, but the SDEIS does not accurately analyze these bottlenecks nor the attendant congestion that the preferred alternative would cause at the terminus of the managed lanes. These bottlenecks and additional congestion will create additional air quality impacts in the areas where they occur and cause travel delays for EJ populations living beyond the ends of Project development and, as noted below, for EJ populations who must continue to use the general purpose lanes due to the unaffordability of tolls in the managed lanes.

Travel delays cause disproportionate impacts to EJ populations who face long commutes and inflexible work environments whose late arrivals can mean dismissal. By failing to acknowledge these real impacts of bottlenecks, the FEIS fails to sufficiently evaluate impacts to EJ populations.

J. The FEIS Fails Not Adequately Address the Environmental Justice Impacts of Adding Toll Lanes

The SDEIS did not provide a full picture of the costs of toll lanes on EJ communities. As noted in our SDEIS comments, an analysis of the dynamic toll pricing revealed that driving in toll lanes could cost up to $30 per passenger on an 2021 salaries, for certain routes. See SDEIS Comments at 86-87, 126-27. These tolls are high, are expensive, and discriminatory. Toll lanes will not be accessible to working families. Lower income environmental justice populations who cannot afford the toll lanes will disproportionately rely on the free general-purpose lanes. In addition, as discussed above, the Agencies’ traffic models are still flawed and still fail to acknowledge the new and worsened bottlenecks around the end points of the toll lanes that will disproportionately harm EJ populations living beyond the limits of the proposed new toll lanes.

Yet, the FEIS returns misguided statements from the SDEIS that fail to address the regressive impacts of predicted high tolls and overstate the benefits of eliminating peak-commuting-time HOV lanes in favor of HOV 3+ lanes. See SDEIS Comments at 126-128. The FEIS even echoes the claim in the SDEIS that “populations at both EJ block groups and non-EJ block groups would have the opportunity to experience [toll] operational benefits.” From the toll lanes and HOV 3+ lanes in the preferred alternative. SDEIS at 4-102 & 4-104, see, e.g., FEIS at 3-182 (describing the HOV 3+ lanes as part of “affordable multimodal travel options”).

These statements mischaracterize the likely impacts of the preferred alternative on EJ populations. As we have explained, the predicted benefits of the preferred alternative in reducing traffic times overall are overstated. Further, all of the aforementioned benefits will not reach EJ populations, who will be priced out of the toll lanes and required to rely on limited general purpose travel lanes. As the M-NCFPC explained, “[t]he simple conclusion that everyone is benefiting with travel time savings when the project design does not provide equitable access to the managed lanes creates another layer of inequity.” M-NCFPC Briefing and Discussion for July 15, 2020, Full Commission Meeting I-495 & I-270 Managed Lanes Study – SDEIS Comments at 8 (June 8, 2020).

Further, the general purpose lanes, as configured after building toll lanes will become less safe relative to today due to additional traffic and congestion. New and worsened bottlenecks with end-of-the-line congestion; loss of the multi-lane shoulder lane; sluggish congestion of 18-wheelers that now keep off the toll lanes; and whose numbers are increasing following the COVID-19 pandemic; removal of an existing non-toll lane in each direction of I-270, opening more traffic into fewer general purpose lanes; and slower maintenance of the five lanes compared to the toll lanes and poorer safety during emergencies and slower access to emergency
response owing to space constraints and loss of the inside shoulder lane. See SDEIS Comments at 71-85; see also supra Section II.

Although the Agencies have now proposed realignations related to the toll lanes, the realignment is not focused on making toll lanes more affordable for low-income and EI populations or making the general-purpose lanes safer, but rather focused on transit line subsidies and toll-free lanes. FEIS at 1-161-164, actions that do not remove the inequity of the fee-lane system that would be created by the toll lanes.

That the preferred alternative is inequitable is not surprising. Transurban is on record saying its goal in our region is to “maximize the tolls” and admitted that “[a]n increase in the number of improvements in quality of alternative roads, public transportation or mass transit options, and their relative convenience, affordability and efficiency, could reduce traffic volumes on our toll roads and therefore reduce our earnings.”

That the Agencies have failed to grapple with the inequities of the preferred alternative in their FEIS is, however, disappointing and, more importantly, violates NEPA and Title VI.

VI. The FEIS Fails To Disclose the Socioeconomic and Societal Impacts of Private Concessionaire Contracts and Their Influence on Future Land Use Policies

Legal expert Ellen Dannin (2011) describes how infrastructure privatization of the type being proposed for the I-495 and I-270 project impacts socioeconomic and security even impacting future legislation and land use policies.

Provisions commonly found in infrastructure privatization contracts make the public the guarantor of private contractors’ expected revenues. Indeed, says it if not for provisions that protect contractors from diminution of their expected returns, the contracts would be far shorter and much less complex. An effect of these contract provisions is to give private contractors a quasi-governmental status with power over new laws, judicial decisions, propositions voted on by the public, and other government actions that a contractor claims will affect toll roads and revenues. Giving private contractors such a role may well violate the non-delegation doctrine that bars private entities from exercising powers that is inherently governmental.

These impacts result from provisions commonly found in infrastructure contracts, including compensation events, non-compensation provisions, and the contractor’s right to object to and receive compensation for legislative, administrative, and judicial decisions.

“The operation of these provisions gives private contractors greater control over decisions that affect the public interest and are normally made by public officials and subject to oversight, disclosure, and accountability—none of which apply to private contractors.”

Such provisions are fundamental to the I-495 and I-270 project and written into the terms sheet. The project’s 20 compensation events whereby the state monetarily compensates the developer include “Discriminatory Change in Law,” and “construction or expansion of a Competing Facility.” These fund come from taxpayers. This law has all been described in earlier comments.

The P3 process ensures and protects that the developer’s private interest in avoiding any conflicting facilities near its toll lanes, regardless of what would serve the public interest. As of September 2020 Transurban prospects explains, “An increase in the number or improvement in quality of alternative roads, public transportation or mass transit options, and their relative convenience, affordability and efficiency, could reduce traffic volumes on our toll roads and therefore reduce our earnings.”

Greater mobility and transportation options that are good for Marylanders and for addressing the climate crisis are not in the developer’s or their shareholder’s interest.

Maryland taxpayer funds are even required to compensate the developer for “physical damage to the Work caused by other MDOT capital works projects” or “VDOT capital works projects within the immediate vicinity of the Section (excluding work undertaken by a Section Developer Related Entity.)” So Maryland taxpayers pay the developer Transurban if VDOT capital works projects damage the toll lanes.

The terms sheet clarifies in relation to compensation and relief events:

58 See supra socio-economic impacts in “Questions for Donald Cohen of the Public Interest.”
59 Dannin, Infrastructure, Infrastructure Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance.
60 Transurban, Prospects, September 16, 2020, page 13, publicly available on the website of the Singapore Stock Exchange

APPLENDIX D – FEIS COMMENTS & RESPONSES  AUGUST 2022  PAGE 89
To the extent a Compensation Event or a Relief Event directly causes an adverse cost or schedule impact on the Section Developer, the Section Developer may claim an extension to applicable deadlines for performance or relief from compliance with its obligations. Notice of such claim must be provided within 30 days after the date the Section Developer first becomes aware (or should reasonably have become aware) that the relevant Compensation Event or Relief Event had occurred.

If such adverse impact is caused by a Compensation Event, the Section Developer may also claim compensation which places the Section Developer in a “no better/no worse” position, as compared to immediately prior to the occurrence of the Compensation Event.

The developer is protected from risks, it is the state that is taking the risk from 50 compensation and relief events.

The Damar article says that study of a proposed toll highway made clear that “the 'free' money comes at the very high cost of eliminated highway capacity, increased congestion and degradation of highway safety.”

[Degraded roadway conditions and increased traffic congestion are an essential aspect of the I-95/97/99 beltway project. Without these existing conditions, little traffic would be induced to use the expensive Jefferson Parkway. . . . By sharing I-695 and Arundel roadways as necessary improvements, I-95/97 would ensure congestion and push some traffic to its road. However, what is good for a road is not good for drivers. The goal of state highway access should be to promote mobility, not to impair mobility to promote the ability to toll a road. . . . (Damar, 2014)]

In this case, degraded roadway conditions will occur from the majority of the heavy truck traffic concentrated in the general-purpose lanes degrading the infrastructure more quickly. Roadway conditions will also worsen due to removal of the left lane shoulder from the general-purpose lanes and likely more accidents. Increased congestion will occur during peak hours due to developer toll algorithms, because of new bottlenecks created at the ends of the toll lanes, and because of I-270 having two of its existing lanes converted to toll lanes (reducing publicly available road and increasing traffic into fewer general-purpose lanes).

To avoid being taken advantage of and protect the public interest in an infrastructure privatization deal, six principles are recommended, none of which appear to have been prioritized for this project:

1. Protecting the public welfare;
2. Ensuring value for money;
3. Taking all contingencies into account;
4. Establishing principles to justify the inclusion of each contract term;
5. Demonstrating the superiority of privatization over public provision;

Damar, 2011, p. 82

6. Establishing a process that ensures all relevant information is presented and properly evaluated.

Egregiously, alternatives other than toll lanes were not seriously considered and no value for money analysis was done.

Negative financial and societal impacts have not been adequately reflected in discussions and debate for at least two reasons. First, the state treasurer was not able to have the necessary—support to secure the Phase 1A agreement contract to understand its costs and risks. Second, the fee-related negative impacts are environment and not a direct part of the state or developer's narrative that toll roads will happen "at no net cost" to the taxpayer. Far from no-net-cost, the private toll roads will subsidize the interests of taxpayers and the public to the private toll operator's interest in maximizing toll revenue. By failing to disclose the foreseeable negative impacts of an intended large-scale privatization of state infrastructure, the FEIS tainted the consideration of alternatives for not only this project but future projects.

VII. Conclusion

Despite a review process where thousands of public comments, elected officials, and state and federal agencies have tried to steer the Agencies onto the path of equity, justice, climate resilience, and smart growth, the preferred alternative as proposed in the FEIS will have significant, irreversible negative impacts on Maryland, its air, water, land, climate, residents and communities, historic resources, ecosystems, flora, and fauna.

As seen in the SEIS and DEIS, these impacts are either ignored or underestimated in the FEIS, contrary to the Agencies' legal requirements. The limited benefits of the preferred alternative, meanwhile, are routinely overstated in the FEIS, and in some cases, like the traffic models, appear to be the result of improper manipulation rather than data and science.

When considering the cost of widening the American Legion Bridge and both the Maryland and Virginia I-495 projects, there is virtually no benefits provided to the traveling public except for

---

102 Damar, 2011.
marginal benefits for toll plazas that evaporate when they too will be faced with heavy traffic congestion at the terminus of the toll lanes. Variances in toll lanes, now constructed, demonstrate the likely impacts of the project on traffic patterns and congestion. As we have noted throughout this process, the tradeoffs and harms to the environment, climate, taxpayers, Section 402-protected properties, and communities at large far outweigh the project's benefits.

This $3-to-$7 billion-dollar first phase of a project that will not relieve congestion and will worsen bottlenecks does not fulfill its purpose and need. If the project is to go forward, it should be rethought entirely, constructed as a public project with public money, and scaled to the needs and constraints of the affected region of Maryland. It must show significant impacts to comprehensible resources like Plummer Island and Maryland Tidal Waters as the historic Black community of Gibson Grove in Colton John, Maryland, rather than cut a path with ripple impacts that signal disrespect to the communities that cherish them.

The Agencies must pause this process by withdrawing the FEIS and analyzing less costly, less detrimental alternatives to improve mobility in the region that do not come with significant harm to human health and the environment. The Agencies must also provide the public with a meaningful opportunity to review and comment on these options prior to undertaking a new FEIS.

At a minimum, the Agencies must move forward with the preferred alternative or any of the fundamentally flawed build alternatives without considering additional new alternatives, the many analyses that have been ignored or improperly deferred, and a new review process that addresses the failures identified in these comments and prior comments.
These exhibits generally reflect commenters’ interpretations and legal conclusions. The Lead agencies have considered these exhibits but this response does not require the Lead agencies to specifically address the commenters’ interpretation of the law and its application.

This page is intentionally left blank.
Response:
On June 17, 2022, the FEIS was published in the federal register and made available for a 30-day period on the US Environmental Protection Agency’s (USEPA) EIS Database website, on the Op Lanes Maryland webpage and at 17 public library locations in Maryland, Virginia and Washington D.C. The FEIS was prepared to present the final analyses completed for the Preferred Alternative, design refinements to address public comments, operational considerations and to further avoid and minimize impacts, and to respond over 5,000 comments received on the DEIS and SDEIS.

From the outset of the Study’s NEPA process, the Federal Highway Administration (FHWA) as the lead federal agency, and the Maryland Department of Transportation (MDOT SHA) as the co-lead agency, developed a comprehensive public involvement and engagement strategy designed to obtain input from stakeholders around the entire MLS study area. This strategy combined traditional opportunities for commenting on the Draft Environmental Impact Statement (DEIS) and Supplemental DEIS (SDEIS) in addition to wide-ranging outreach to community organizations (e.g., church groups, homeowners’ associations, public interest groups, and governmental entities), with particular sensitivity and outreach to identified Environmental Justice communities. Refer to FEIS, Chapter 8. The public involvement and engagement process, starting in early 2018 and continuing for over four years, considered the vast diversity of community resources. Despite a global pandemic, MDOT SHA’s public involvement strategy ensured the safety of the public while still providing the same opportunities for meaningful participation by the public in the NEPA process.

The DEIS was published on July 10, 2020 and was made available on the I-495 & I-270 P3 Program webpage (https://oplanesmd.com/deis/), on the USEPA EIS Database webpage and at multiple public locations in hard copy in Montgomery and Prince George’s counties, Maryland, Fairfax County, Virginia and Washington DC. Following publication of the DEIS, FHWA and MDOT SHA provided a 90-day comment period, which is twice the minimum time required by the CEQ regulations. Based on input from the general public, community partners, stakeholders, and local and federal officials, however, MDOT SHA supported extending the DEIS comment period and made a formal request to FHWA, which has authority to grant any extension. FHWA approved this request and granted a 30-day extension of the public comment period for the DEIS. All in all, the DEIS was made available for comment and review from July 10, 2020 through and including November 9, 2020, a total of four months. During this extended comment period, the agencies received close to 3,000 comments.

The SDEIS published on October 1, 2021 was prepared to consider new information relative to the Preferred Alternative, Alternative 9 - Phase 1 South. Building off the analysis in the existing DEIS, the SDEIS disclosed new information relevant to the Preferred Alternative while referencing the DEIS for information that remained valid. The SDEIS also described the background and context in which the Preferred Alternative, Alternative 9 - Phase 1 South was identified. The SDEIS was available for the public to review and comment on the Preferred Alternative during a 45-day comment period, which was later extended an additional 15 days. The SDEIS was also made available on the I-495 & I-270 P3 Program webpage (https://oplanesmd.com/sdeis/), on the USEPA EIS Database webpage and at multiple public locations in hard copy in Montgomery and Prince George’s Counties, Maryland, Fairfax County, Virginia and Washington DC.

In addition to a combined six-month EIS public comment review period, MDOT SHA has held 16 large public workshops, 7 public hearings including virtual and in-person, and over 200 individual, elected official, community, stakeholder, and business owner meetings. Refer to DEIS, Chapter 7 and Appendix P; SDEIS, Chapter 7; and FEIS Chapter 8 and Appendix R for detailed information on public involvement.

As a result of this continued public involvement and engagement effort, the Preferred Alternative, as described in the FEIS, reflects changes made since the SDEIS. Consistent with the NEPA process, a FEIS should include responses to substantive comments that can take place in the form of changes from what was presented in the DEIS such as factual corrections and/or new or modified analyses or alternatives. This is precisely what was done and clearly reflected in the FEIS. Refer to FEIS, Executive Summary. The MLS FEIS includes responses to more than 5,000 comments received on the DEIS and SDEIS and the Preferred Alternative reflects changes to address many of the comments including design
As mentioned above, the FEIS was made available for a 30-day Notice of Availability through various and widely accessible means before the Record of Decision (ROD) was approved. Public involvement and engagement will continue as the project advances to final design and construction. As a requirement in the P3 Agreement, the Developer must provide a public outreach and engagement plan. The Developer will coordinate with MDOT SHA to facilitate an early and ongoing collaborative dialogue to engage stakeholders, local communities, and property owners through final design and construction. MDOT SHA, jointly with the Developer, would be responsible for implementing strategies, such as public meetings and community events, with the goal of maintaining an open dialogue with stakeholders.
Response:
Thank you for your letter regarding the Transportation Planning Board’s action to update Visualize 2045. Refer to ROD Section VI, Air Conformity, to see reference to TPB’s approval.
American Legion Bridge, along I-270 all the way up to Maryland I-370. This segment is listed for construction with an anticipated open to traffic date of 2025.

2. Phase 1 Northern segment: Construct two managed lanes, in each direction, of I-270 from I-370 to I-70 in Frederick. That segment is listed for construction with an anticipated open to traffic date of 2030.

3. Phase 2 Eastern segment: This is a study of building managed lanes on I-495 in Maryland, starting at the I-270 spur to the east and up to the vicinity of the Woodrow Wilson Bridge. This study segment is not included in the plan for construction.

The financial plan submitted by MDOT for all its transportation projects included in Visualize 2045 and its air quality conformity analysis indicates that funding is reasonably expected to be available for the above three activities. The TPB's regional air quality conformity analysis includes both Phase 1 segments of the project above, with the Phase 2 segment excluded since no changes to the transportation system capacity has been proposed at this time.

Lastly, as part of the TPB's identification of the above project MDOT identified a complementary set of other transportation projects that MDOT intends to fund. These projects and the commitment to implement them are outlined in a letter received by the TPB from MDOT in June of 2022 and is included in Attachment 2.

I trust your office will find the above information and the attachments documents relevant and informs your review of the FEIS.

Should you have any questions on the TPB activities in this regard, please do not hesitate to contact me at dparks@oplanes.org or 301-992-3257. Thank you for your consideration.

Sincerely,

Wah S. Sackrist
Director, Transportation Planning Board

CC:
Mr. Josh Parish, P/3/MLS Director, FHWA
Mr. R. Earl Lewis, Jr., Deputy Secretary for Policy, Planning & Enterprise Services
Mr. Tim Smith, Administrator, MDOT-State Highway Administration
Mr. Jeffrey T. Palen, I-495 & I-270 P3 Office Director, MDOT

ATTACHMENT 1

TPB RIS-0052
June 15, 2022

NATIONAL CAPITAL REGION TRANSPORTATION PLANNING BOARD
777 North Capitol Street, N.E.
Washington, D.C. 20002

RESOLUTION APPROVING THE 2023 UPDATE TO THE VISUALIZE 2045 LONG-RANGE TRANSPORTATION PLAN FOR THE NATIONAL CAPITAL REGION AND THE FY 2023–2026 TRANSPORTATION IMPROVEMENT PROGRAM (TIP)

WHEREAS, the National Capital Region Transportation Planning Board (TPB), as the federally designated metropolitan planning organization (MPO) for the Washington region, has the responsibility under the provisions of the Fiscal Year 2005 Surface Transportation Act (FAST Act), which became effective on November 15, 2015, where the Transportation Equity Act for the 21st Century (TEA-21) was signed into law, to prepare a continuing, cooperative, and comprehensive transportation planning process for the metropolitan area;

WHEREAS, the Federal Planning Regulations of the Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA) implementing the FAST Act, which became effective on January 27, 2016, specify the development and content of the long-range transportation plan and of the transportation improvement program and require that it be revised and updated at least every four years; and

WHEREAS, on October 17, 2016, the TPB approved a new long-range transportation plan called "Visualize 2045," that meets federal planning requirements, addresses the federal planning factors and goals in the TPB Vision and the Regional Transportation Priorities Plan, and includes a new "Transportation Plan" as specified by the TPB Resolution 16-0198 and

WHEREAS, the TPB is required by FHWA and FTA as a basis and condition for all federal funding assistance to state, local and regional agencies for transportation improvements within the Washington planning area and the TPB approved the FY 2022-2024 Transportation Improvement Program (TIP) on March 20, 2020, which was developed as specified in the Federal Planning Regulations; and

WHEREAS, on December 16, 2020, TPB staff issued a Technical Inputs Solicitation Submission Guide, which is a formal call for area transportation implementing agencies to submit technical details, including information necessary to perform the required air quality analysis of the 2022 Update to the Visualize 2045 long-range transportation plan, and for projects and programs to be included in the FY 2025-2026 TIP that will meet federal planning requirements, and will address the federal planning factors and goals in the TPB Vision and the Regional Transportation Priorities Plan; and

WHEREAS, the transportation implementing agencies in the region provided project submissions for the 2022 Update to Visualize 2045 and the FY 2025-2026 TIP, and the TPB Technical Committee and the TPB reviewed the project submissions of meetings in April, May, June and July 2021 meetings and
WHEREAS, at its June and July 2021 meetings, the TPB approved the projects submitted for inclusion in the Air Quality Conformity Analysis of the 2022 Update to Visualize 2045 and the FY 2023-2026 TIP; and

WHEREAS, MDOT made certain transit commitments associated with the I-270/I-495 Traffic Relief Plan in Resolution R2-2022 and is required to brief the TPB on the transit commitments related to Phase 1 South of the I-270/I-495 Traffic Relief Plan; and the TPB will provide a formal statement for inclusion in the public docket of the FEIS for the I-270/I-495 Traffic Relief Plan referencing TPB’s requirement that the transit commitments be met; and MDOT will report to TPB on the status of the transit commitments to Montgomery County biennially until a transit commitments agreement is reached with Montgomery County for Phase 1 South of the project; and

WHEREAS, on June 15, 2022, upon adopting on-road greenhouse gas reduction goals and strategies, to be appended to the 2022 Update to Visualize 2045; and

WHEREAS, on April 1, 2022, the draft FY 2023-2026 TIP was released for a 30-day public comment period and inter-agency review period along with the draft 2022 Update to Visualize 2045, and the Air Quality Conformity Analysis; and

WHEREAS, the FY 2023-2026 TIP has been developed to meet the financial requirements in the Federal Planning Regulations; and

WHEREAS, during the development of the 2022 Update to Visualize 2045, the FY 2023-2026 TIP, and the Air Quality Conformity Analysis, the TPB Participation Plan was followed, and several opportunities were provided for public comment: (1) a 30-day public comment period on project submissions for the air quality conformity analysis of the 2022 Update to Visualize 2045 and the FY 2023-2026 TIP and the air quality conformity analysis scope of work was provided from April 1 to May 3, 2021; (2) the TPB Community Advisory Committee (CAC) was briefed on the project submissions at its April 15, 2021 meeting; (3) an opportunity for public comment on these submissions was provided at the beginning of the April, May, June and July 2021 TPB meetings; (4) on April 1, 2022 the draft 2022 Update to Visualize 2045, the FY 2023-2026 TIP, and the draft Air Quality Conformity Analysis were released for a 30-day public comment period which closed on May 1, 2022; (5) on April 6 and 7, 2022, a virtual open house was held where staff shared results of the plan analysis and provided an opportunity for questions and answers; (6) on April 14, 2022, a Public Forum was held on the development of the FY 2023-2026 TIP; (7) an opportunity for public comment on these documents was provided on the TPB website and on the Visualize 2045 website, and at the beginning of the April, May and June 2022 TPB meetings; and (8) the documentation of the 2022 Update to Visualize 2045, the FY 2023-2026 TIP, the Air Quality Conformity Analysis includes summaries of all comments and responses; and

WHEREAS, the TPB Technical Committee has recommended favorable action on the 2022 Update to Visualize 2045, the FY 2023-2026 TIP, and the Air Quality Conformity Analysis by the Board; and
WHEREAS, the analysis reported in the Summary Report: Air Quality Conformity Analysis of the 2022 Update to Visualize 2045, dated June 15, 2022, demonstrates adherence to air mobile source emissions budgets for ground level ozone precursors Volatile Organic Compounds (VOC) and Nitrogen Oxides (NOx), and meets all regulatory, planning, and interagency consultation requirements, and therefore provides the basis for a finding of conformity of the 2022 Update to Visualize 2045 and the FY 2023-2026 TIP with the requirements of the CAAA; and

WHEREAS, as part of the TIP's interagency consultation process, the Metropolitan Washington Air Quality Committee (MWAC) concurs with the regional air quality conformity determination of the 2022 Update to Visualize 2045 and the FY 2023-2026 TIP, and provided other comments relating to the region's air quality;

NOW, THEREFORE, BE IT RESOLVED THAT the National Capital Region Transportation Planning Board determines that the 2022 Update to Visualize 2045 and the FY 2023-2026 Transportation Improvement Program conform to all requirements of the Clean Air Act Amendments of 1990.

Adopted by the Transportation Planning Board at its regular meeting on June 15, 2022.
The Honorable Pamela B. Sotnik
Chesapeake Transportation Planning Board
September 2022

Dear Chair Soetnik and Mr. Srircak,

I am writing to provide an update to the National Capital Region Transportation Planning Board (TPB) on transit improvements being developed as part of Phase I South of OP Lanes Maryland. This update was requested as part of resolution TPB 82-2022.

As part of Phase I South, the Maryland Department of Transportation (MDOT) is committed to encouraging carpooling and providing regional transit benefits consistent with the Aspirational Initiative incorporated in VTRANS 2045. Vehicles with three or more occupants and buses will be able to use the proposed high-occupancy toll (HOT) lanes for free. This will provide new options for carpools and new opportunities for free-flow traffic crossing the new American Legion Bridge, connecting people and jobs in Maryland and Virginia. A bike and pedestrian path will also be provided across the new American Legion Bridge connecting trails in Maryland and Virginia and providing the option of intermodal bicycle travel.

In addition to the above carpooling and transit benefits, MDOT committed to provide mitigation as part of the Phase I South highway improvements including increasing the number of bus bays at the Shady Grove Metro Replacement Station, increasing parking capacity at the Westfield Montgomery Mall Transit Center, and delivering the Metropolitan Green Grove Operations and Maintenance Facility. Since the TPB resolution, MDOT has further defined the scope and developed conceptual design for each of these transit improvements in collaboration with Montgomery County and other stakeholders. We remain committed to furthering the development of these transit benefits with stakeholders and delivering those mitigation resources as part of Phase I South to support expanded transit operations for the long term.

The MDOT has also committed to funding not less than $40 million for designing and permitting high-priority transit investments in Montgomery County. The specific projects were recently identified by Montgomery County and MDOT has allocated funding in fiscal years 2023 and 2024 to facilitate coordination with stakeholders and develop plans for final design and operations. An estimated $300 million in transit investment from toll revenues is currently proposed by the Developer over the operating term of Phase I South.

Sincerely,

R. Earl Lee, Jr.
Deputy Secretary

cc: Jeffrey Folden, Director, Office of Public Private Partnership, MDO T SHA
Mr. Heathcote, Assistant Secretary for Policy Analysis and Planning, MDOT
Mr. Heathcote, Director, Office of Planning and Capital Programming, MDOT
Mr. Karn Snyder, Regional Planner, Office of Planning and Capital Programming, MDOT