



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

June 12, 2019

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

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

Re: I-495/I-270 Managed Lanes Study - Alternatives Retained for Detailed Study

Dear Mses. Choplin and Mar:

On May 22, 2019, the Maryland Department of Transportation State Highway Administration (“SHA”) issued the list of *Alternatives Retained for Detailed Study – Revised* (“ARDS”) for the I-495/I-270 Managed Lanes Study (“Study”) and requested concurrence from the Cooperating Agencies by June 12, 2019. The Maryland-National Capital Park and Planning Commission (“M-NCPPC”), as a Cooperating Agency, has reviewed the ARDS and does not concur with the document for the reasons presented herein.

Before turning to the merits of this notice, however, our Commission members want to assure SHA that our agency’s substantive objections to the proposed ARDS should not be mistaken as a decision by this body to oppose or to support the project itself. Rather, as the governing body of this Cooperating Agency, we have carefully focused our attention on the key park and planning policies, and related opportunities for public recreation, that are within our jurisdiction and at stake in this process. Toward that end, we look forward to engaging SHA in a sincere, respectful and productive collaboration to address appropriately our comments and the reasons we cannot concur today.

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SHA has previously been advised of M-NCPPC's many issues with the ARDS.¹ In M-NCPPC's experience, these concerns are attributable mostly to SHA's approach that omits a comprehensive analysis; fails to incorporate best practices in transportation, environmental protection, and land use planning; and also works at odds with M-NCPPC's statutory obligation to make well-reasoned and informed decisions regarding parkland, cultural resources, and historical resources held in trust for residents of Montgomery and Prince George's Counties. The ARDS also represents SHA's imprudent narrowing of the scope of environmental review—which contravenes the revised Purpose and Need Statement that must guide and inform its review—such that further environmental review will not adequately assess the impacts of the project on protected parkland managed by M-NCPPC, including parkland protected under the Capper-Cramton Act of 1930 (“CCA” or “Act”).

Without in any way limiting M-NCPPC's right to comment and raise objections further in the National Environmental Policy Act (“NEPA”) process, this letter outlines M-NCPPC's concerns with the ARDS at this time. M-NCPPC remains committed to assisting the lead agencies as they continue their environmental reviews for this project.

M-NCPPC

The Maryland General Assembly created M-NCPPC in 1927 to plan for the orderly development, acquisition and maintenance of parkland and open space, and to protect natural resources in Prince George's and Montgomery Counties.² Because of M-NCPPC's integral role as a planning agency and steward of the natural and built environments, SHA and the Federal Highway Administration (“FHWA”) have engaged M-NCPPC as a Cooperating Agency to provide input on both the Study and ARDS. To fulfill its role as a Cooperating Agency, M-NCPPC must ensure that the Study and ARDS reflect a comprehensive and reasonable list of alternatives that SHA and FHWA will further evaluate in the draft Environmental Impact Statement (“EIS”). As a Cooperating Agency, M-NCPPC staff has taken its responsibilities seriously, having engaged fully with SHA and the Interagency Working Group (“IAWG”) during every stage of review in the Study.

Purpose and Need

NEPA requires the lead agency to publish a Purpose and Need Statement that specifies “the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”³ The Purpose and Need Statement informs the entire NEPA

¹ See, e.g., Letter from Carol S. Rubin, Special Project Manager, M-NCPPC Montgomery County Planning Department, and Debra Borden, Principal Counsel, M-NCPPC Office of the General Counsel, to Lisa Choplin, Director, MDOT SHA I-495 & I-270 P3 Office, Jeffrey T. Folden, Deputy Director, MDOT SHA I-495 & I-270 P3 Office, and Caryn Brookman, Environmental Program Manager, MDOT SHA I-495 & I-270 P3 Office (May 1, 2019) (on file with M-NCPPC); Letter from Carol S. Rubin, Special Project Manager, M-NCPPC Montgomery County Planning Department, and Crystal S. Hancock, Acting Planning Supervisor, Prince George's County Planning Department, to Caryn Brookman, Environmental Program Manager, MDOT SHA I-495 & I-270 P3 Office (May 29, 2019).

² Md. Code Ann., Land Use § 15-101.

³ 40 C.F.R. § 1502.13.

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process, serving as a “cornerstone of whether an alternative is reasonable.”⁴ The proposed alternatives must be consistent with and flow from the Purpose and Need.⁵

The lead agencies issued the Study’s Purpose and Need Statement in or around July 2018, revising it in November 2018 to reflect comments received from M-NCPPC and others.⁶ The November 2018 revision includes an additional purpose: “enhance[ment of] existing and planned multimodal mobility and connectivity.”⁷ However, the ARDS fails to adequately address these key purposes; simply allowing buses to use the Managed Lanes is inadequate and insufficient under NEPA.

Alternatives Selection Under NEPA

Proper selection and analysis of the ARDS is crucial to the environmental review process for the project. Following adoption of the ARDS, SHA, and FHWA will issue a draft EIS, which must “rigorously explore and objectively evaluate all reasonable alternatives” and “[d]evote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits.”⁸ Additionally, “for alternatives which were eliminated from detailed study, [the EIS should] briefly discuss the reasons for their having been eliminated.”⁹ While the lead agencies may study a “reasonable range” of alternatives in an EIS, the range must cover the “full spectrum” of potential reasonable alternatives.¹⁰ Reasonable alternatives include those that are

⁴ *Stand Up for Cal.!* v. *United States DOI*, 919 F. Supp. 2d 51, 78 (D.D.C. 2013)

⁵ *Id.* at 79 (“it was rational for the Secretary to reject potential alternatives if they would not...meet the purpose and need of the proposed action”).

⁶ *Welcome to the Public Workshop for the I-495 & I-270 Managed Lanes Study*, U.S. DOT FED. HIGHWAY ADMIN. AND MARYLAND DEPT. OF TRANSP. STATE HIGHWAY ADMIN. 4, <https://495-270-p3.com/wp-content/uploads/2019/04/I-495-I-270-Workshop-Handout-2019-4-10-Low-Res-FINAL.pdf>; Letter from Carol S. Rubin, Special Project Manager, M-NCPPC Montgomery County Planning Department, to Montgomery County Planning Board (May 20, 2019), <https://montgomeryplanningboard.org/wp-content/uploads/2019/05/MMCPB-5.23.19-Item-2.pdf>.

⁷ Letter from Carol S. Rubin, Special Project Manager, M-NCPPC Montgomery County Planning Department, to Montgomery County Planning Board (May 20, 2019), <https://montgomeryplanningboard.org/wp-content/uploads/2019/05/MMCPB-5.23.19-Item-2.pdf>.

⁸ 40 C.F.R. § 1502.14(b); *see also Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 109 (D.D.C. 2003) (agencies’ “painstaking” review not sufficient because no alternatives considered an entire facet of issue); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (proposed alternatives should be “measured by whether [they] achieve... the goals the agency sets out to achieve”); *Save Our Sound OBX, Inc. v. N.C. DOT*, 914 F.3d 213, 218 (4th Cir. 2019); *Mt. Lookout - Mt. Nebo Prop. Prot. Ass’n v. FERC*, 143 F.3d 165, 172 (4th Cir. 1998).

⁹ 40 C.F.R. § 1502.14(a); *see also Fund for Animals*, 294 F. Supp. 2d at 109.

¹⁰ Council on Environmental Quality; *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (Mar. 16, 1981) at Question 1b; *See also Sierra Club v. Watkins*, 808 F. Supp. 852, 872 (D.D.C. 1991) (agencies’ selection of port sites was “quite calculating and qualifies as an abuse of discretion” for not covering the “full spectrum” of possible site locations); *Cutonilli v. Fed. Transit Admin.*, Civil Action No. ELH-13-2373, 2015 U.S. Dist. LEXIS 39981, at *65 (D. Md. Mar. 30, 2015) (reversed on other grounds).

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“practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.”¹¹

The primary purpose of the alternatives screening process is to assess reasonableness; screening provides a means of separating unreasonable alternatives (which can be eliminated without detailed study) from reasonable alternatives (which must be carried forward for detailed study).¹² If there are many reasonable alternatives, the screening process also can be used as the basis for defining a reasonable range that represents the full spectrum of reasonable alternatives.¹³ In that same vein, it is well established by law that lead agencies may not define the objectives of their action “in terms so unreasonably narrow that only one alternative . . . would accomplish the goals” of their actions, rendering the EIS a preordained formality.¹⁴

The Capper-Cramton Act

The lead agencies must also consider legislation that may affect their alternatives screening and analysis.¹⁵ With respect to this project, SHA and FHWA must consider the Capper-Cramton Act since much of the land that may be needed for the project was acquired with federal funding appropriated under the Act. Congress passed the Act to provide for the acquisition of land in Maryland and Virginia for development of a comprehensive park, parkway, and playground system in the National Capital area. A subsequent 1931 Agreement between the National Capital Park and Planning Commission (“NCPC”)¹⁶ and the M-NCPPC provides that “no part of any land purchased for park or recreational purposes with the funds provided [under the Act], in whole or in part, shall at any time be conveyed, sold, leased, exchanged, or in any manner used or developed for other than park purposes by the [M-NCPPC], and the development and administration of said lands shall be under the [M-NCPPC] but the development thereof shall be in accordance with plans approved by the National Commission, or the necessary approval of the Congress of the United States.”¹⁷

M-NCPPC’s review focuses on protecting the character and setting of the parks and ensuring that any improvements are compatible with existing park use. Projects that provide public benefits

¹¹ See *id.* at Question 2a (interpreting 40 C.F.R. § 1502.14); see also *Sierra Club v. Marsh*, 714 F. Supp. 539, 574 (D. Me. 1989) (MDOT’s preferred expansion plan for a terminal facility does not warrant exclusion of otherwise reasonable alternatives unless the agency’s preference bears a “rational relationship to the technical and economic integrity of the project”).

¹² *AASHTO Practitioner’s Handbook*, AM. ASS’N OF STATE HIGHWAY AND TRANSP. OFFICIALS 5-6 (Aug. 7, 2007), <http://www.environment.transportation.org/pdf/programs/PG07.pdf>; see also *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 83 (D.D.C. 2006) (“The scoping analysis is, in substance, an abbreviated assessment of environmental impacts to screen out insubstantial topics from the . . . analysis.”).

¹³ *AASHTO Practitioner’s Handbook*, *supra* note 7, at 5-6.

¹⁴ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

¹⁵ *Cf. Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1454 (9th Cir. 1984).

¹⁶ Among other things, the National Capital Planning Act, 40 U.S.C.A. §§ 8701 et seq., renamed the “National Capital Park and Planning Commission” as the “National Capital Planning Commission.”

¹⁷ Basic Agreement between Nat’l Capital Park and Planning Comm’n and the Maryland-Nat’l Capital Park and Planning Comm’n at § 5 (Oct. 16, 1931) (attached hereto as Exhibit A).

such as improving the water quality of streams along with improving park accessibility and park resources are encouraged. Examples of compatible improvements include improving pedestrian and bike connections and incorporating pedestrian and bike lanes into improvements for the American Legion Bridge.

Elemental Reasons Supporting M-NCPPC's Non-Concurrence

1. Segmentation and Phasing

Identifying the need and scope of improvements to the constrained portion of I-495 east of I-270 to I-95 is dependent upon addressing whether by-pass or through traffic can be diverted to I-270 and drawn off of that constrained area of I-495. Phasing is an important factor because diverting traffic to use the Inter-County Connector ("ICC") requires completion of the I-270 Managed Lanes expansion and south on I-495 through the bottleneck over the American Legion Bridge before the expansion to the constrained areas of I-495. The projected traffic volumes for 2018, 2025, and 2040 are consistently higher on I-270 than on I-495. Furthermore, the American Legion Bridge is the destination for approximately 30% of I-270 southbound passenger vehicles and approximately 20% of southbound I-95 vehicles (via I-495).

We requested at each stage of the Study that SHA pursue a revised approach to the segmentation and phasing of the Study, and we continue to do so. SHA's approach to segmenting the project demonstrates inadequate accounting for the local transportation problems, travel demands and constraints on I-495 and I-270. When viewed from a long-range need, the I-270 section of this Study with the addition of the northern portion of I-270 from the Frederick County line and connection along I-495 between the I-270 Western Spur and over American Legion Bridge is the priority corridor in Montgomery County (Western Corridor).

In Prince George's County, the segmented approach being advanced by SHA fails to account for significant land use and transportation plans that already exist within the development pipeline and, for example, how those plans will impact SHA's interchange locations. One such development is the new University of Maryland Capital Region Medical Center, located in Largo Town Center with access from the Arena Drive exit off I-495. The Center will have 205 private rooms, a Level 2 Trauma unit with 45 treatment bays and include the Mount Washington Pediatric Hospital with an additional 15 beds. The ability to access this new facility from a Managed Lane under any Alternative is of paramount importance to first responders, patients, visitors and staff, and must be addressed directly in any Alternative considered.

2. The Study Area

The Study Area in Montgomery County omits I-270 north of I-370 (from Rockville to Frederick), and in Prince George's County omits I-495 from MD-5 to the Woodrow Wilson Bridge. The eventual EIS for the project must "succinctly describe the environment of the area(s) to be affected

or created by the alternatives under consideration.”¹⁸ The EIS must discuss “the environmental impacts of the alternatives including the proposed action,” as well as direct, indirect, and cumulative effects.¹⁹ By not considering impacts to these stretches of the project at this stage in their NEPA review, the eventual EIS will include incomplete conclusions of environmental impact.

3. Transit and Transportation Demand Management

The purpose of the Study—to develop a travel demand management solution that addresses congestion and trip reliability and enhances existing and planned multimodal mobility and connectivity—requires solutions for both regional and local travel needs. The ARDS must include meaningful transit elements that serve both needs. Simply allowing buses to use the Managed Lanes is insufficient to address a NEPA required multimodal solution²⁰ or a publicly desired local-serving transit alternative. Reducing I-495 and I-270 congestion can and should be handled through a combination of added capacity where appropriate and providing the means to reduce the number of vehicles travelled. Accommodating existing traffic and long-term traffic growth is about moving people, not just moving vehicles.

Express buses on the Managed Lanes are limited in their service in the same way that other vehicles are limited by the Managed Lanes. Direct access on and off the Managed Lanes, and access between the Managed and general-purpose Lanes, indicate that the Managed Lanes are applied more as a regional traffic solution than a solution for local highway users. Therefore, in addition to addressing the deficiencies in appropriate access to and from the Managed Lanes, each of the selected ARDS should incorporate a local serving transit system, both as a critical element to the overall design and as a supplementary component for detailed study of the ARDS as the Study moves toward a Preferred Alternative. These elements could include planning and funding planned route service such as the Corridor City Transitway and the MD-355 bus rapid transit (BRT), and a meaningful commitment of a portion of the toll revenue to fund public transit investments. To similar effect, Prince George’s County has developed a series of Sector Plans and Master Plans to anticipate parallel roadways and accommodations for multimodal uses in an effort to help alleviate congestion, as required by the Purpose and Need Statement.²¹

¹⁸ 40 C.F.R. § 1502.15.

¹⁹ *Id.* § 1502.16; *id.* § 1508.8; *id.* § 1508.9.

²⁰ See *Audubon Naturalist Soc’y of the Cent. Atl. States, Inc. v. United States DOT*, 524 F. Supp. 2d 642, 663 (D. Md. 2007) (noting the need for proposed development areas between the I-270 and I-95/US-1 corridors within Montgomery and Prince George’s Counties to feature “a state-of-the-art, multimodal, east-west highway that limits access and accommodates passenger and goods movement”); see also *Twp. of Belleville v. Fed. Transit Admin.*, 30 F. Supp. 2d 782, 804 (D.N.J. 1998) (describing FHWA’s policy of using “FHWA planning and research funds to meet highway and multimodal transportation planning”).

²¹ See Letter from Carol S. Rubin, Special Project Manager, M-NCPPC Montgomery County Planning Department, to Montgomery County Planning Board (May 20, 2019), <https://montgomeryplanningboard.org/wp-content/uploads/2019/05/MMCPB-5.23.19-Item-2.pdf> (identifying “develop[ment] of a travel demand management solution(s) that addresses congestion”); see also *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 672 (D.C. Cir. 2011) (NEPA requires agencies to evaluate “alternatives that would reasonably and feasibly accomplish [the] purpose and need”).

4. Parkland Management

The public value in parkland extends to both passive and active impacts—recreation, stormwater management, water quality, etc. The ARDS narrows the scope of the Managed Lanes Study to the point that these impacts are ignored early in the NEPA process. It is imperative that the lead agencies consider both M-NCPPC's parkland—whether acquired under the CCA or otherwise—and its statutory obligations to improve, develop, maintain, and operate parks, forests, roads, and other public ways, grounds, and spaces,²² when developing the Alternatives. As currently drafted, the ARDS have nearly identical impacts to parkland and natural resources, which effectively removes consideration of these impacts from future evaluation of the build alternatives. The ARDS should be expanded to provide alternatives with a range of environmental impacts such that the ARDS can reasonably address the Purpose and Need's goals of improving traffic management *and* protecting the environment.

Other Comments and Concerns

In addition to the four elemental reasons for non-concurrence enumerated above, M-NCPPC also has identified other substantive comments and concerns pertaining to the ARDS proposed. In the interest of full disclosure, those additional comments are included in the Appendix attached and incorporated as part of this letter. We are hopeful that the lead agencies will be able to address these concerns during this process as well.

* * *

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

Sincerely,



Elizabeth M. Hewlett
Chair



Casey M. Anderson
Vice-Chair

²² Md. Code Ann., Land Use § 17-101.

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Appendix

cc: Adrian R. Gardner, General Counsel
Andree M. Checkley, Director
Prince George's County Planning Department
Darin D. Conforti, Director
Prince George's County Department of Parks and Recreation
Michael F. Riley, Director
Montgomery County Department of Parks
Gwen Wright, Director
Montgomery County Department of Planning
Debra S. Borden, Principal Counsel
Carol S. Rubin, Special Project Manager
Montgomery County Planning Department