



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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To: The Maryland-National Capital Park and Planning Commission

Date: October 19, 2020

From: Carol S. Rubin, Special Project Manager
I-495 & I-270 Managed Lanes Study

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Subject: Briefing and Discussion for October 21, 2020, Full Commission Meeting:
I-495/I-270 Managed Lanes Project - Comments to DEIS and Joint Permit Application

Recommendation

For the reasons described further below, we recommend that the Maryland-National Capital Park and Planning Commission (Commission or M-NCPPC) authorize the Chair, Vice-Chair, designated officers, staff and/or counsel to transmit correspondence necessary and appropriate to:

- (a) Express the substantive and technical comments developed by Commission staff detailing the deficiencies in the Draft Environmental Impact Statement (DEIS) issued by the Federal Highway Administration (FHWA) and Maryland Department of Transportation's State Highway Administration (MDOT SHA) in connection with the I-495 and I-270 Managed Lanes Study (Project); and,
- (b) Contest the approval of any joint permit application (JPA) made by FHWA and MDOT SHA to the U.S. Army Corps of Engineers (USA-COE) and the Maryland Department of Environment (MDE) for alteration of a floodplain waterway tidal or nontidal wetland in Maryland.

Background

Current Status. As we have previously reported during Commission briefings, our agency staff has identified a number of serious deficiencies in FHWA/MDOT SHA plans for the Project, and invited the responsible authorities to cure or ameliorate those deficiencies several times – most recently during Chair Anderson's testimony during the public hearing convened by the MDOT SHA hearing officer on August 18, 2020.

At this juncture, MDOT SHA and FHWA issued the Draft Environmental Impact Statement (DEIS) and, in addition, to pursue approval of a joint federal/state permit for the alteration of a floodplain, waterway, tidal or nontidal wetland. Even though FHWA/MDOT SHA have elected to conflate the two processes, and several of the environmental issues do indeed overlap, the environmental impact statement is

required by the National Environmental Policy Act (NEPA) and the permits are mandated by Section 404 of the Clean Water Act, and a number of interrelated federal statutes. Public comments are due, respectively on November 9, 2020 and November 6, 2020, and the balance of this memorandum outlines our recommendations separately – to correlate with each of the distinctive processes at issue.

Disparate Scopes of Pending Activities. Although the Board of Public Works (BPW) authorized MDOT SHA to move forward with procurement activities to establish a P3 with a private concessionaire, it is for a limited segment of the Project Study Area referred to as Phase 1 (from the Virginia side of the American Legion Bridge north on I-495 and up the western spur of I-270 to I-370, then combining that segment with the northern extension of I-270 from I-370 north to I-70 in Frederick).

Even so, the DEIS as part of the NEPA process and the JPA address the entire Project area including I-495 east of I-270 to MD 5 in Prince George’s County.

Once again, to allow sufficient time for your discussion, we are prepared to address the major comments/issues as identified for the DEIS and the JPA that we believe need your greatest attention, that are consistent with the Commission’s role and responsibility for comment to both the DEIS and the JPA, and preserve the Commission’s interests with regard to the Final Environmental Impact Statement (FEIS), the Record of Decision (ROD), and the noted permits, if issued. However, we will include all of our continuing technical comments as an Appendix to the formal comment letters for appropriate response and inclusion in the ROD.

MDOT SHA plans to recommend a Preferred Alternative after it has received and considered all public comment to the DEIS. We continue to object to MDOT SHA’s omission of the MD 200 Diversion Alternative as well as transit options having advanced for further detailed study. And as we have indicated previously, MDOT SHA continues to rely on the private concessionaire to be responsible for the design, engineering and construction of the highway improvements. Therefore, the impacts presented in the DEIS are rudimentary and based on a limit of disturbance (LOD) as determined by MDOT SHA’s preliminary planning and design without detailed engineering and constructability analyses, adding layers of complexity and nuance to staff’s review and analysis of the DEIS. In that vein, many of the major issues we brought forth in July are still applicable as we prepare the Commission’s formal comments.

- A. **JPA Comments:** To obtain a Clean Water Act, Section 404 permit from the USA-COE, MDOT SHA and FHWA must show that it has taken reasonable and practicable steps to avoid impacts to wetlands, streams and other aquatic resources; potential impacts have been minimized; and appropriate mitigation will be provided for all remaining unavoidable impacts. Regulations implementing Section 404 require the USA-COE to ensure that the project will not cause any significantly adverse effects to human health or welfare; aquatic life, and aquatic ecosystems; or recreational, aesthetic or economic values. Maryland law spells out similar preconditions for nontidal wetland permits to be issued by MDE. MDOT SHA must show that “practicable alternatives have been analyzed and that the regulated activity has no practicable alternative.”

The USA-COE and MDE should not approve the requested permits for the following reasons:

1. MDOT SHA and FHWA have eliminated alternatives from detailed study, including the MD 200 Diversion Alternative, transportation demand management and transit alternatives, that are practicable and would be much less damaging to the environment.

MDOT SHA rejected the MD 200 Diversion Alternative as not meeting the Project's Purpose and Need of accommodating long-term traffic growth, enhancing trip reliability, or improving movement of goods and services. However, based on information provided in the DEIS, and as acknowledged by MDOT SHA staff during a briefing to the Commission about why that Alternative was not advanced as an Alternative Retained for Detailed study (ARDS), the MD 200 Diversion Alternative does in fact meet Purpose and Need, *perhaps just not as well as some of the other Build Alternatives*. MDOT SHA found that although the MD 200 Diversion Alternative would require a public subsidy of approximately \$310 million, it acknowledged that public subsidies of up to \$1 billion may be needed for other Build Alternatives.

The Section 404(b)(1) Guidelines prohibit the issuance of permits where there is an alternative available that has less adverse impact on the aquatic ecosystem and is capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. The failure of MDOT SHA to advance the MD 200 Diversion Alternative with sufficient analysis to determine whether it meets these factors fails to meet Section 404.

Maryland law spells out similar preconditions for nontidal wetland permits. MDOT SHA must show that "practicable alternatives have been analyzed and that the regulated activity has no practicable alternative." MDOT SHA acknowledges that the MD 200 Diversion Alternative is in a less vulnerable part of the aquatic ecosystem.

The Public Notice for the JPA notes that the six alternatives studied in detail in the DEIS all have substantial direct impacts to streams, wetlands and floodplains. However, the MD 200 Diversion Alternative would avoid impacts to environmental resources and property relocations within this area. Although the MD 200 Diversion Alternative would include improvements to I-95 that would result in some environmental impacts (i.e., to Paint Branch, Paint Branch Park, Little Paint Branch, and Little Paint Branch Park), those impacts are not "significant" compared to the impacts along the topside of I-495 under any Build Alternative. Furthermore, those improvements to I-95 are not necessary to meeting the Project's Purpose and Need, so the impacts to the MD 200 Diversion Alternative would be even less.

Furthermore, Alternative 15—a dedicated bus managed lane network—would also avoid environmental impacts compared to the Build Alternatives. The LOD would be relatively small because the alternative would use the existing roadway (as opposed to the other transit alternatives) and add only one lane in each direction. And, as the DEIS acknowledges, "[a] dedicated managed bus lane would result in higher operating speeds than a bus traveling in a [general purpose] lane." Despite these recognized benefits, the lead agencies concluded the alternative did not meet other aspects of Purpose and Need and elected not to retain it for further study. Finally, all transit options have been taken off the table.

2. The limits of disturbance (LOD) in the DEIS do not adequately address the likely impacts of the project on aquatic resources.

As discussed in the DEIS, MDOT SHA made efforts to minimize the LOD for each of the Build Alternatives. As an example that staff presented at the July 15 briefing, MDOT SHA shifted the LOD closer to I-495 to avoid the need to relocate segments of Rock Creek at Rock Creek Park between Rockville Pike and Stony Brook Drive, opting instead for a retaining wall to protect the creek from the Beltway. However, staff is concerned that the proposed change will require removal of all vegetation along the stream edge. Because MDOT SHA will not finalize the design until after it awards a contract to a private partner to engineer, design and construct, there is significant risk that the LOD will be much larger than what is reflected in the DEIS. For example, stream impacts identified on the Impact Plates¹ severely underestimate the true impacts that will be required to address the existing drainage channels and waterways surrounding the proposed project. Staff expects the LOD to increase in many areas to allow for work to restore, stabilize, and protect natural resources, as well as for construction access, staging, grading, and materials storage. An important aspect of avoidance and minimization is minimizing the roadway footprint while keeping a larger LOD to address environmental issues and adequately restore disturbed areas to ensure that they can handle the increased drainage pressures that would result from a Build Alternative. Ongoing design of this project must ensure stable tie-in for outfalls, protection and restoration of stream banks, and improvements to resources on-site that are impacted by the project. Based on the limited information available, M-NCPPC has identified numerous locations where the LOD does not appear adequate for construction of these outfalls, necessary perennial stream stabilization, and roadway infrastructure.

Furthermore, the LOD may also be inaccurate for other reasons as more fully discussed during the July 15 briefing².

- a. The LOD does not adequately address likely environmental impacts to natural; resources, some that occur outside the limits of the LOD;
- b. Inventory of cultural and historic resource impact is incomplete;
- c. Access decisions are flawed; and
- d. Constructability concerns have not been appropriately addressed.

Finally, to the extent the LOD minimization efforts in the DEIS were too ambitious or optimistic in an attempt to downplay the Project's impacts, the final design may not reflect the DEIS LOD due to funding, engineering, and/or safety concerns.

3. The JPA and supporting documents fail to adequately address required mitigation.

¹ As a general matter, the layout of the supporting documents, particularly the impact plates, makes it extremely difficult to accurately review the quantity and type of impacts for each location. Currently, one has to search for the plate, the impact quantities, the Wetlands and Waterways Features Table, the Impact ID Designation Key, and the Wetland Delineation Data Sheets in multiple separate locations. The Corps and MDE should revise the impact plates such that impacts are shown on the applicable plate itself.

² Please refer to issue #2 in the Memorandum dated June 8, prepared for the June 15 briefing.

The DEIS states that the USA-COE and MDE will not issue their permits until a detailed compensatory mitigation package, including final mitigation design, is developed and approved. Since the private partner will be responsible for developing a Final Mitigation Plan as part of its final design of the project, the USA-COE and MDE should delay their JPA review until after MDOT SHA and FHWA produce an acceptable mitigation package.

Second, staff objects to the proposed on-site stream mitigation strategy which outlines a credit ratio for impacts to stream resources classified as having “medium” function value. The impacted streams are classified as less than high quality primarily because of degradation caused by lack of stormwater and environmental treatment from existing runoff from I-495, as well as inadequate and inconsistent maintenance of the current outfalls. MDOT SHA cannot cause the degradation, then use the degradation it caused to suggest that less mitigation is needed. The stream features should be treated in the same way as the high quality resources are treated. The highly urbanized nature of the Project area must be accounted for and the extremely high functional value ecosystem functions of these resources must be appropriately mitigated.

Finally, all mitigation sites and privately-owned mitigation bank credits that the USA-COE or MDE requires must be located within M-NCPPC jurisdictions.

4. The JPA and supporting documents do not comply with Section 106 of the National Historic Preservation Act.

Prior to the issuance or authorization of any permit under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act, the USA-COE, in consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation must consider the effect the permit may have on Historic Properties, which include historic districts, sites, buildings, structures, objects, sacred sites, and traditional cultural places that are included in, or eligible for inclusion in, the National Register of Historic Places (NRHP). But first, the USA-COE must go through a rather detailed and arduous process, including identification, consultation, and determination of eligibility for the NRHP. The USA-COE must also define the Area of Potential Effect (APE) and assess the effects of any permits on Historic Properties to establish if they are adverse. The USA-COE must resolve adverse effects by developing and evaluating alternatives that could avoid, minimize, or mitigate these impacts on historic resources.

As indicated at the July 15 briefing³, MDOT SHA and FHWA have not even completed the identification phase of Section 106. And once fully identified, the impacted sites will require additional evaluation.

The permits MDOT SHA and FHWA are seeking from the USA-COE and the MDE would negatively impact Rock Creek Park, Sligo Creek Park and Cabin John Stream Park, parkland administered by M-NCPPC. While Rock Creek Park and Sligo Creek Parkway have officially been designated as historic resources in the NRHP, Cabin John Stream Valley Park should also be eligible for designation within the broader park system that includes Rock Creek Park and Sligo Creek Parkway. These parks are part of the same cultural landscape system that M-NCPPC created to preserve the watersheds of the

³ Please refer to issue #8 in the Memorandum dated June 8, prepared for the June 15 briefing.

Anacostia and the Potomac Rivers and will be negatively impacted if the proposed permits are granted.

5. The Clean Water Act Section 401 Water Quality Certification and the Coastal Zone Management Act (CMZA), Section 307 consistency should be reviewed prior to the FEIS.

Prior to issuance of the Section 404 permit, the Corp must receive Clean Water Act, Section 401 certification from MDE that any discharge into the impacted waters (Rock Creek, Sligo Creek, etc.) will comply with applicable effluent limitations and water quality standards. Also, federal actions that have reasonably foreseeable effects on coastal uses or resources must be consistent with the policies of an approved coastal management program. MDOT SHA expects to apply for both the 401 certification from MDE and the CZMA consistency finding concurrent with publication of the FEIS with public comment being requested at that time. This is contrary to law and established practice.

MDOT is required to request a Section 401 Water Quality Certification before the Corp may issue an individual Section 404 permit because the authorization process must be completed concurrently with the NEPA process. Delaying these applications until publication of the FEIS would increase the likelihood that the outcome of each certification is predetermined.

Furthermore, the JPA and its supporting documents do not follow MDE's Nontidal Wetlands and Waterways Checklist Guidelines for a complete permit application in several other respects: i) no identification whether temporary or permanent impact, ii) maps omit key details, and iii) construction access and methodology must be described.

- B. **DEIS Comments:** As the regional planning agency and the steward of the natural and built environments in Montgomery and Prince George's Counties, M-NCPPC is responsible for making well-reasoned and informed decisions with regard to any impact from the Project on parkland, including the cultural and historic resources held in trust for the residents of both Counties. Both under the Transportation Act, Section 4(f) analysis, and in accordance with Park Policy, M-NCPPC must hold MDOT SHA to the highest standards to first avoid such impacts; and if avoidance cannot reasonably meet the Purpose and Need (P&N) of the project, by minimizing impact to the greatest extent practicable, and only then is mitigation appropriate. Mitigation must be at equal or greater natural, cultural or recreational value. Therefore, M-NCPPC fully expected MDOT SHA to provide a comprehensive analysis of the proposed project that includes best practices in transportation and land use planning.

Many of the comments to the DEIS and the JPA overlap, and although they will be included in each of the official comment letters, we will not repeat them. Also, since there was no significant change from the Administrative Draft of the DEIS in response to our comments, many of the same issues remain from the July 15 briefing to you. We refer you to the July 8 memorandum prepared for that briefing and sent to you for review on October 16, which included the following issues:

1. **Insufficient Accounting for the ICC.** MD 200 Diversion Alternative should be studied in more detail as a reasonable and practicable technique to avoid impact to critical environmental resources.

Various modeling assumptions should be considered in the analyses with and without the I-95 segment.

2. **LOD Modifications after FEIS and ROD.** The LOD as currently proposed by MDOT SHA is unrealistic to depend on to understand impacts to parkland as it is a preliminary planning tool.
 - a. The LOD does not adequately address likely environmental impacts to natural, resources, some that occur outside the limits of the LOD.
 - b. Inventory of cultural and historic resource impact is incomplete.
 - c. Access decisions are flawed.
 - d. Constructability concerns have not been appropriately addressed.
 - e. The final design may not reflect the DEIS LOD due to funding, engineering, and/or safety concerns.
3. **Making Parks Whole Again.** Environmental responsibility must expressly address both the Federal Transportation Act Section 4(f) requirements and the Montgomery County Parks Policy for Parks - Park, Recreation and Open Space (PROS) Plan 2017. They require that if avoidance of an impact is deemed unreasonable – minimization of an impact must be explored. Once minimization of an impact has been reasonably exhausted, mitigation at equal or greater natural, cultural or recreational value must be sought and agreed upon.
4. **Adherence to the Capper-Cramton Act.** M-NCPPC will need a complete understanding and commitment from MDOT SHA regarding parkland impacts and mitigation before approval from NCPC is sought for change in use or ownership of Capper-Cramton parkland.
5. **Social Equity.** The DEIS does not sufficiently address impact to economically challenged populations or social equity as required under NEPA.
6. **Alternative Modes of Travel.** The DEIS does not meet the stated goal of leveraging other modes of transportation.
7. **Non-auto driver mode share (NADMS).** NADMS is a primary performance metric and a goal in many Montgomery County master plans, particularly for the urban centers, yet the DEIS does not address how the project will impact those goals or how negative impacts to these goals will be mitigated.
8. **Non-Conformance with the Historic Preservation Act.** The DEIS does not adequately fulfill the Historic Preservation Act, Section 106 requirements as part of the NEPA process.
9. **Inadequate stormwater treatment.** The storm water management (SWM) approach presented in the DEIS is insufficient and ignores decades of degradation that the existing highways have inflicted on local land.

In addition, we recommend raising the following additional major issues as comments to the DEIS as MDOT SHA moves forward toward a Final Environmental Impact Statement and Record of Decision. Ultimately, we strive to hold MDOT SHA accountable to address our concerns in the P3 Agreement, in addition to the P3 Concessionaire responsible for design and development of the Project accordingly.

10. **In addition to omitting the MD 200 Diversion Alternative from further study, MDOT SHA and FHWA have construed the purpose and need so narrowly as to exclude from consideration a number of reasonable alternatives.**

M-NCPPC raised this concern as part of the reason it did not concur with the selection of the ARDS, either as initially proposed, or as revised. Although the MDOT and FHWA as the Lead Agencies enjoy deference in determining the Project's purpose and need and do not need to advance alternatives for detailed study that are not consistent therewith, NEPA requires the Lead Agencies to define the purpose and need broadly enough to ensure that the review does not eliminate from consideration otherwise reasonable alternatives. Agencies must consider all alternatives that are "practical or feasible from a technical and economic standpoint." Despite this statutory mandate, the Purpose and Need has been defined so narrowly as to exclude from consideration a number of reasonable alternatives such as the MD 200 Diversion Alternative, transit options and transportation demand management. As a result, Alternatives that are reasonable and could have fewer environmental impacts have been given the short shrift. More than the six Build Alternatives warrant further consideration at the DEIS stage

11. MDOT SHA and FHWA have failed to consider the Project's impacts from phasing.

If a Build Alternative is selected, the Project construction will take place in phases. Yet MDOT SHA and FHWA refuses to align the NEPA review process with the State's procurement process under the P3 Act, and the DEIS does not consider the impacts that phased construction will have. The DEIS does not adequately account for local transportation issues, travel demands, and constraints on I-495 and I-270 in Montgomery County. It also fails to account for Prince George's County's land use and transportation plans, such as the development of the University of Maryland Capital Region Medical Center off of I-495. As MDOT SHA's planning process moves towards completion, so must consideration of the phased project's impacts from diverting traffic to use the Inter-County Connector, which requires the completion of the I-270 Managed Lanes expansion and south on I-495 through the bottleneck over the American Legion Bridge.

NEPA requires that potentially significant impacts from phasing must be adequately studied during the NEPA process with the impacts from the planned phasing addressed, particularly for projects such as this one that may span many years from start to finish, particularly since the implementation phasing that must be approved by the Board of Public Works leaves so much about the Project in question.

12. Lack of financial viability and incomplete project costs.

The revenue model as presented in the DEIS demonstrates that toll roads, much like transit can't be paid for without some level of government subsidy. Not only are the financial assumptions on which MDOT SHA relies too speculative, but the basic project costs are omitted, such as a lack of consideration to relocate utilities and water and sewer lines, likely project delays due to litigation, design difficulties and land acquisition challenges— similar to what has happened with the Purple Line.

The DEIS states the financial analysis considered preliminary capital costs, initial revenue projections, preliminary operations and maintenance costs, and construction methods, masking the true costs of adding managed lanes both in absolute terms, and in comparison to transit and the MD 200 Diversion Alternative. Furthermore, projected revenues are likely to be overestimated due to changes in travel behavior as a result of the pandemic.

The DEIS shows it will be difficult or impossible for this project to be delivered without a significant source of public contribution. MDOT SHA is not considering transit because transit will not pay for itself without a significant source of revenue to cover the cost. However, as demonstrated in the DEIS, neither can the addition of toll lanes to I-495 and I-270 pay for itself. The analysis in the DEIS demonstrates that the cost of building and operating the managed lanes is likely to exceed the toll revenue generated by the project, making the state's decision to exclude transit and other alternatives that would require outside sources of funding arbitrary and capricious.

Anticipated NEPA and Procurement Schedules:

- **9/2020: Notice of Intent to begin NEPA process for I-270 North portion of the project**
- **5/2021: FEIS and ROD for Project**
- **5/2021: Final selection of Private Partner for Phase 1**