



Friends of the Capital Crescent Trail - PO Box 5803 - Bethesda, MD 20824

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Via Electronic Submission (FEIS@purplelinemd.com)

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Re: *Purple Line – Final Environmental Impact Statement and Draft Section 4(f) Evaluation*

Ladies and Gentlemen:

We appreciate the opportunity to respond to the request by the Maryland Transit Administration (“MTA”) and the Federal Transit Administration (“FTA”) for comments in connection with the above-referenced final environmental impact statement (“FEIS”). The FEIS describes and summarizes certain transportation and environmental impacts of building the Purple Line, a proposed east-west light rail transit service in Montgomery and Prince George’s Counties, Maryland. The purported purpose of the Purple Line is to: (1) provide faster, more direct, and more reliable east-west transit service connecting the major activity centers in the Purple Line corridor at Bethesda, Silver Spring, Takoma/Langley Park, College Park, and New Carrollton; (2) provide better connections to Metrorail services located in the corridor; and (3) improve connectivity to the communities in the corridor located between the Metrorail lines.

This comment letter is submitted on behalf of the Friends of the Capital Crescent Trail (“FCCT” or “we”) and other individuals and groups that support our cause.¹ The FCCT is a non-profit organization dedicated to preserving park land, open space and quality of life in Montgomery County, Maryland. We are *not* against mass transit and, in fact, fully support mass transit projects that are cost-effective, provide real benefits and do not irrevocably destroy park land uniquely situated in intensely developed residential and commercial areas. The Purple Line – in its *current* form – fails these three objectives, and we believe

¹ We have also submitted, in separate correspondence, the signatures of approximately 5,500 citizens that oppose the Purple Line in its current form.

the selection of the “preferred alternative”² has been an outcome-driven process without serious consideration of other, more cost effective forms of mass transit, including bus rapid transit (“BRT”) with traffic signal priority and dedicated and/or exclusive bus lanes.

We also believe that the FEIS fails to adequately assess, or fully and fairly discuss, the environmental and health impact of the Purple Line on the portion of the Capital Crescent Trail (“CCT”) between Bethesda and Lyttonsville, also known as the Georgetown Branch Trail (the “Georgetown Branch Trail” or the “Trail”), and the adjoining neighborhoods and their citizens. Nor has the FEIS adequately informed “decision-makers and the public of the reasonable alternatives which would avoid or minimize [these] adverse impacts or enhance the quality of the human environment.”³ For these and other reasons discussed in more detail below, the FEIS has failed to satisfy the legal requirements of the National Environmental Policy Act of 1969 (“NEPA”).

We strongly urge the MTA and FTA to reconsider the Purple Line in its current form. To that end, we request that the MTA issue a supplemental FEIS that corrects the deficiencies identified in this letter and provides a full and fair comparison of the attributes and deficiencies of the Preferred Alternative, No Build Alternative and Medium Investment BRT Option 1 (as defined below).

ABOUT THE TRAIL

The CCT is a linear park – a park utilized by over one million citizens each year, from Montgomery and Prince George’s Counties and other counties in surrounding areas.⁴ The CCT spans 11 miles, from Georgetown, DC to Silver Spring, MD. Montgomery County also identifies the CCT as a “special park” which is “heavily used at all times.”⁵ The Georgetown Branch Trail is a section of the CCT that runs for three miles between Bethesda and Lyttonsville. The Purple Line – in its *current* form – would *fundamentally* change the character of this magnificent park, and *irrevocably* destroy the mature forest and tree canopy that line a significant portion of the Georgetown Branch Trail.

The FEIS states that, as part of the Preferred Alternative, a permanent trail would be constructed within the Georgetown Branch Trail, along the Purple Line, and that the paved trail would “generally” be 12 feet wide with two-foot shoulders, “except that it may be narrower in locations where the width is constrained.”⁶ Of course, variations in topography along the Trail, as well as other physical impediments, would reduce the already limited space for a trail and guarantee that these measurements would not be maintained for the duration of the Trail. These changes would *fundamentally* affect the quantity or

² For purposes of this comment letter, the “Preferred Alternative” refers to the MTA’s current proposal (*i.e.*, the Purple Line in its current form).

³ 40 C.F.R. §1502.2.

⁴ See Capital Crescent Trail/Georgetown Branch Trail Survey Report, Maryland-National Capital Park & Planning Commission Department of Parks, May 2007, at 1 (“Over one million people use the popular Capital Crescent (CCT) and Georgetown Branch Trails each year.”) (the “2007 Survey”).

⁵ See MontgomeryParks.org, Trail Maps, Capital Crescent Trail, *available at* http://www.montgomeryparks.org/PPSD/ParkTrails/trails_MAPS/Crescent.shtm; see also MontgomeryParks.org, Park & Trail Directory, Capital Crescent Trail Special Park, *available at* http://www.montgomeryparks.org/parks_facilities_directory/capitalcrescenttrailsp.shtm.

⁶ FEIS, at p. 2-27.

quality of use of the Trail, depriving citizens of a nature sanctuary and an important buffer between commercial areas and adjoining residential neighborhoods. These changes could also introduce serious safety concerns for users of the Trail by, for example, forcing Trail users to cross Wisconsin Avenue – a busy six-lane road – to make the connection to the other portion of the Trail.

Before 1985, the CCT was a single-track freight line with a slow-moving train running once a day on the old Baltimore and Ohio Railroad right-of-way between Georgetown, Bethesda and Silver Spring. In 1988, Montgomery County purchased a portion of the right-of-way under the National Trails Systems Act, often called the “Rails-to-Trails Act.” Although this portion was purchased by the county for the purpose of providing both a trail *and* transitway, times, circumstances and priorities have changed. The seven-mile section of the CCT from Georgetown to Bethesda was built and formally dedicated in December 1996. Development of the Georgetown Branch Trail was approved by Montgomery County in August 1995 and dedicated in January 1997. In August 1998, the segment of trail passing through the tunnel underneath the Air Rights building, Wisconsin Avenue, and the Apex building entered into service to connect the two trail sections. In May 2003, repairs were completed to the historic Rock Creek Trestle and it was dedicated for trail use, closing the last major gap in the interim trail along the Georgetown Branch Rail Line Corridor.

The CCT, including the Georgetown Branch Trail, helps create and support the region’s culture of healthful living, outdoors enjoyment, and environmental awareness. These immeasurable benefits have already been bestowed on an entire generation and should remain for generations to come. The Trail should remain a first-class park encouraging recreation and respite from two thriving urban centers, Bethesda and Silver Spring, and afford citizens alternative forms of transportation by being able to run, walk or bike safely between these two locations.

ALTERNATIVES ANALYSIS

1. *Outcome-driven process without serious consideration of other, more cost effective forms of mass transit.*

We believe that the selection of the Preferred Alternative has been an outcome-driven process without serious consideration of other, more cost effective forms of mass transit, including BRT with traffic signal priority and dedicated and/or exclusive bus lanes. The regulations adopted by the Council on Environmental Quality (“CEQ”) implementing NEPA require that the alternatives discussion “rigorously explore and objectively evaluate all *reasonable* alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”⁷ The regulations emphasize that the alternatives section “is the heart of the environmental impact statement,”⁸ and must “present the environmental impacts of the proposal and the alternatives *in comparative form*.”⁹ Moreover, the regulations adopted by the FTA and the Federal Highway Administration (“FHWA”) implementing NEPA also require that “the final EIS shall identify the preferred alternative and evaluate all *reasonable* alternatives considered.”¹⁰

In response to, and in anticipation of, the Alternatives Analysis and Draft Environmental Impact Statement (“AA/DEIS”), several commenters, including the Town of Chevy Chase, expressed concerns with respect to the alternatives considered and methodologies used by the MTA and FTA and recommended that the MTA and FTA consider other alternatives. One alternative – referred to in the FEIS as the “Medium Investment BRT Option 1” – would use BRT on Jones Bridge Road, between Bethesda and Jones Mill Road. According to the FEIS, the Medium Investment BRT Option 1, although providing a more direct service between Walter Reed National Military Medical Center (“WRNMMC”), would result in longer travel time and a loss of more than 2,000 daily riders.¹¹ The FEIS also claimed that the “travel market ... of downtown Bethesda is almost twice the size of the WRNMMC travel market.”¹² On this basis, the Medium Investment BRT Option 1 “was not carried forward” and was not sufficiently evaluated in the FEIS. However, we understand that a transportation engineer has raised serious concerns with respect to the methodology used by the MTA and FTA in the AA/DEIS, and requested the background data upon which they relied to support their conclusions.¹³ In addition, the AA/DEIS assessment was made *before* the full implementation of the Base Realignment and Closure (“BRAC”), and population and employment growth along the Jones Bridge Road alignment is expected to be higher

⁷ 40 C.F.R. §1502.14(a) (emphasis added).

⁸ 40 C.F.R. §1502.14.

⁹ *Id.* (emphasis added).

¹⁰ 23 C.F.R. §771.125(a)(1) (emphasis added).

¹¹ *See* FEIS, at p. 2-8; FEIS, Technical Report: Supporting Documentation on Alternatives (2013).

¹² *See* FEIS, at p. 2-8.

¹³ *See, e.g., Letter from Town of Chevy Chase to Diana Ratcliff, Director, Office of Planning, Maryland Transit Administration* (Jan. 13, 2009) (providing comments on the AA/DEIS); *Rebuttal to MTA’s White Paper Entitled “Medium Investment BRT Variations Serving Medical Center Purple Line AA/DEIS,”* Sam Schwartz Engineering (on file with authors); *Response to MTA’s White Paper entitled “Visitor Trips to the Walter Reed National Military Medical Center,”* Sam Schwartz Engineering (on file with authors).

than growth along the CCT alignment.¹⁴ Medium Investment BRT Option 1, a transit option that is less costly than the Purple Line and serves the travel needs of an area experiencing such tremendous growth, should have been given greater consideration by the MTA. All of these concerns and reasonable requests for additional information should have been addressed before circulation of the FEIS.

Without providing full and fair discussion of a reasonable alternative (*e.g.*, Medium Investment BRT Option 1), policymakers are denied the type of objective comparison that an environmental impact statement (“EIS”) must provide. This type of objective comparison is particularly critical considering: (1) the budgetary limitations of the federal government and the State of Maryland; and (2) that the cost of the Medium Investment BRT Option 1 is *substantially* less than the current estimated cost of the Purple Line, approximately \$2.2 billion.¹⁵ As most of our members are tax-paying citizens of the State of Maryland, we are also concerned that: (1) the cost of the Purple Line will continue to rise; and (2) the Purple Line will not generate sufficient revenue to cover annual operating expenses. Apparently, the FTA shares our concerns. According to the most recent “New Starts” project ratings, the Purple Line’s two lowest ratings – “medium-low” – relate to “Capital Cost Estimates, Assumptions and Financial Capacity” and “Operating Cost Estimates, Assumptions and Financial Capacity.” The FTA noted that: (1) “[r]evenue assumptions are optimistic when compared with historical data”; (2) “[t]he capital cost estimate is optimistic”; and (3) “[a]ssumed growth in operating expenses and farebox collections is optimistic when compared to historical experience.” The AA/DEIS and/or FEIS are further deficient in their failure to adequately assess potential revenue impacts with Medium Investment BRT Option 1 post-BRAC and the current expansion of WRNMMC and the National Institutes of Health (“NIH”), and the costs that could be avoided by implementing the Medium Investment BRT Option 1, including: (1) property acquisition costs; (2) tree removal and reforestation costs; (3) demolition of the Apex building; (4) construction of bridges over Connecticut Avenue and Rock Creek Park; and (5) the unnecessary risks to human health and safety by forcing Trail users to cross Wisconsin Avenue – a busy six-lane road – to make the connection to the other portion of the Trail.

2. *The FEIS fails to take the requisite “hard look” at the impact the Preferred Alternative will have on environmental resources.*

The FEIS fails to take the requisite “hard look”¹⁶ at the impact the Preferred Alternative will have on environmental resources because it fails to adequately consider other alternatives. The FEIS carried forward two alternatives from the AA/DEIS – the “Preferred Alternative” and the “No Build Alternative.” However, the FEIS omits detailed analysis or comparison of the No Build Alternative in the discussion of environmental resources, impacts and mitigation.

¹⁴ See Memorandum from Sam Schwartz, *Engineering to Town of Chevy Chase* (April 11, 2008) (citing Metropolitan Washington Council of Governments Round 7.1 Cooperative Forecasting: Employment, Population, and Household Forecasts by Traffic Analysis Zone (Jan. 9, 2008) (on file with authors).

¹⁵ See Maryland National Capital Purple Line Bethesda to New Carrollton, Maryland Project Development (Rating Assigned November 2012), available at http://www.fta.dot.gov/documents/MD_Maryl and_Purple_Line_Profile_FY14.pdf. We also note that the cost of the Purple Line has risen *significantly* since the selection of the Purple Line as the locally preferred alternative.

¹⁶ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).

The FEIS inadequately describes the No Build Alternative. For example, Chapter 2, which purports to discuss the alternatives considered, devotes less than one page to describing the No Build Alternative.¹⁷ Similarly, Chapter 4 provides only a cursory description of the impacts of the No Build Alternative in Section 4.1, “*Overview and Summary of Effects.*” The analysis of impacts in Chapter 4 lacks any discussion of the No Build Alternative, with the exception of Section 4.10 (comparing air quality effects of the Preferred Alternative to the No Build Alternative) and Section 4.17 (comparing energy use impacts of the Preferred Alternative to the No Build Alternative). This cannot satisfy the “detailed and rigorous consideration of alternatives” required by NEPA.¹⁸ The MTA apparently contends that such analysis is not required, because the FEIS instead states that “detailed assessment of the effects of the No Build Alternative projects will be the responsibility of each project sponsor at the time each project design is developed sufficiently to complete such an assessment.” Such an approach impairs the primary purposes of an EIS, which are to require an agency to consider the adverse environmental effects of a proposed project, and to ensure that the public has accurate information. Deferring responsibility for preparing a comparative analysis of the alternatives to some other entity to be performed at some later time fails to meet the “hard look” standard.¹⁹

What little discussion of the No Build Alternative does exist in the FEIS is fundamentally flawed. First, the FEIS states that the No Build Alternative has been updated since the publication of the AA/DEIS.²⁰ However, the FEIS fails to explain how the No Build Alternative has been updated, and it fails to explain what projects have been added or removed since the publication of the AA/DEIS. The documents included in the “*Technical Report: Supporting Documentation for Alternatives Development*” likewise do not detail how the No Build Alternative has been updated since the AA/DEIS. In particular, the “DEIS Re-Evaluation”²¹ prepared in 2012 purportedly evaluates the significance of new information or changed circumstances since the AA/DEIS was published in 2008. In fact, the DEIS Re-Evaluation only considers changes to the Preferred Alternative, and does not explain how the No Build Alternative has changed since the publication of the AA/DEIS.

The FEIS also claims that the No Build Alternative assumes all projects anticipated in the National Capital Region Transportation Planning Board’s (“TPB”) *Financially Constrained Long-Range Transportation Plan* (“CLRP”) (other than the Purple Line),²² yet elsewhere admits that unfunded

¹⁷ See FEIS, at pp. 2-18—2-20.

¹⁸ See, e.g., Rankin v. Coleman, 394 F. Supp. 6467 (E.D.N.C. 1975) (finding the alternatives analysis prepared in connection with an FHWA and North Carolina Department of Transportation project to be inadequate, because it was only 1-2 pages long and contained only conclusory statements).

¹⁹ See, e.g., Town of Matthews v. U.S. Dept. of Transportation, 527 F. Supp. 1055 (W.D.N.C. 1981) (finding that potential for a future development project cannot substitute for an analysis of its environmental effects in the EIS).

²⁰ See FEIS, at p. 2-18.

²¹ Under applicable law, if an acceptable final EIS is not submitted to the FTA within three years from the date of the circulation of the draft EIS, a written evaluation of the draft EIS must be prepared by the applicant, to determine whether a supplement to the draft EIS or a new draft EIS is needed. We understand that the MTA had prepared a re-evaluation of the AA/DEIS because of the passage of considerable time, which concluded that a supplemental EIS was not needed. We further understand that the FTA concurred with such findings. This finding is memorialized in, and is referred to herein as, the DEIS Re-Evaluation.

²² See FEIS, at p. 4-2.

“illustrative projects” included in the CLRP are excluded from the No Build Alternative.²³ Most significantly, the No Build Alternative does not include the proposed Montgomery County BRT network, which was approved by the Montgomery County Planning Board for transmittal to the County Council on July 11, 2013.²⁴ However, an FEIS’s no-action alternative must include a discussion of reasonably foreseeable development that would result from its adoption. In addition, CEQ has specified in guidance that where a choice of “no action” by the agency would result in predictable actions by others, this consequence of the “no action” alternative should be included in the analysis.²⁵ Despite this requirement, the FEIS does not consider at all whether the failure to construct the Purple Line would increase the likelihood that Montgomery County would adopt and fund the proposed BRT network, or the likelihood that the unfunded CLRP projects would proceed. This wrongly skews the comparison in favor of the Preferred Alternative.

Furthermore, the FEIS takes inconsistent approaches to including unfunded or unapproved projects, displaying another inappropriate bias in favor of the Preferred Alternative and a failure to provide a “full and fair” discussion of the alternatives.²⁶ The FEIS claims that the BRT network and “illustrative” CLRP projects should not be included in the No Build Alternative because they are unfunded or unapproved. On the other hand, the FEIS considers in the Preferred Alternative ancillary third-party development projects whose likelihood of beginning or continuing to completion are similarly uncertain.²⁷ The FEIS presents no discussion of the basis for including these planned developments in the analysis of the Preferred Alternative or the likelihood of construction or completion of these developments. Furthermore, the refusal to include the Montgomery County BRT network in the analysis of the No Build Alternative compromises the integrity of the data used to perform the comparison of air impacts and energy use in Sections 4.10 and 4.17 of the FEIS.

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of the Medium Investment BRT Option 1 that clearly discloses the methodology used to assess ridership and all other assumptions relied upon, and addresses the impact of BRAC and the substantial expansion of WRNMMC and NIH;
- A full and fair evaluation of the cost of the Purple Line and anticipated revenues from the Purple Line, addressing the concerns identified by FTA in the latest “New Starts” project ratings; and
- A full and fair evaluation of the No Build Alternative that clearly discloses the changes to the No Build scenario since the AA/DEIS was issued, applies the same assumptions regarding unfunded

²³ *Id.* at p. 2-18.

²⁴ See FEIS, at pp. 2-18—2-19, referencing the *Master Plan of Highways Bus Rapid Transit Amendment*, Montgomery County Planning Department, M-NCPPC (September 2011). The *Countywide Transit Corridors Functional Master Plan* (Planning Board Draft) (July 2013) was transmitted to the Montgomery County Council on July 11, 2013.

²⁵ See Council on Environmental Quality, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” Question 3, 46 Fed. Reg. 18026 (1981), available at <http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>.

²⁶ See 40 C.F.R. §1502.1.

²⁷ See FEIS, at p. 4-19 (Table 4-2).

projects as used to tout the assumed benefits of the Preferred Alternative, and addresses the reasonably foreseeable impacts of the Montgomery County BRT network.

NOISE

1. *The FEIS fails to take the requisite “hard look” at noise impacts.*

The FEIS fails to take the requisite “hard look”²⁸ at the noise impacts caused by the Preferred Alternative. In its response to comments on the AA/DEIS, the MTA confirmed that the Trail is “an important community asset” and that the Preferred Alternative would “add more noise.”²⁹ However, the FEIS (including the Noise Technical Report) includes no discussion of the noise impact of the Preferred Alternative to Trail users. Moreover, the MTA’s noise assessment included no measurement of ambient noise or estimation of the project-related noise along the Trail. This is surprising since comments submitted in response to the AA/DEIS expressed concern about noise along the Trail and the FTA’s noise assessment methodology cautions that “outdoor areas which are considered to be particularly noise-sensitive by the community” should be included as receivers of interest in the assessment.³⁰ Remarkably, despite having or presenting no data regarding existing or expected noise along the Trail, the FEIS audaciously responds to citizen concerns about noise impacts by stating: “the Preferred Alternative does not exceed FTA’s noise criteria along the Georgetown Branch right-of-way.”³¹ Apart from this falsehood, if the FEIS does not present existing noise measurements along the Trail, estimate the noise impact from the Preferred Alternative on those using the Trail, and compare such impacts to the FTA’s noise criteria, then it cannot have taken a “hard look” at the noise impacts caused by the Preferred Alternative.

This deficiency, alone, suffices to confirm the failure of the FEIS to comply with applicable law. A court will – and should – overturn an agency’s decision as arbitrary and capricious under the “hard look” review if the agency “failed entirely to consider an important aspect of the problem.”³² Nevertheless, the FEIS’s noise assessment fails to take the requisite “hard look” in several other respects. The FTA’s noise assessment methodology requires categorization of noise receptors.³³ Category 1 receptors are those tracts of land “where quiet is an essential element in their intended purpose.”³⁴ FTA recognizes that parks in urban areas can be “valued as havens from the noise and rapid pace of everyday city life and should be treated as noise-sensitive.”³⁵ While the FEIS failed to evaluate the noise impact of the Preferred Alternative on the Trail – the closest park/urban “haven” to the Preferred Alternative – it did offer noise information for 13 “park” receptors.³⁶ However, it categorized each of these 13 parks as Category 3,

²⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976).

²⁹ *See* FEIS, at Appendix A, pp. 11, 14.

³⁰ Transit Noise and Vibration Impact Assessment (FTA 2006), p. 6-5.

³¹ *See* FEIS, at Appendix A, p. 14.

³² *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1216 (11th Cir. 2002) (citing *Motor Vehicle Mfrs.*, 463 U.S. 29, 43 (1983)).

³³ *See* Transit Noise and Vibration Impact Assessment (FTA 2006), p. 3-7.

³⁴ *Id.* at p. 3-5.

³⁵ *Id.* at p. 3-8.

³⁶ *See* FEIS, Noise Technical Report, p. 18 (2013).

rather than Category 1.³⁷ Category 3 receptors are “institutional land uses with primarily daytime and evening use,” with FTA’s noise criteria set 5 decibels higher than for Category 1 and Category 2 (residential) receptors.³⁸ Category 3 receptors are considered “less sensitive to noise” than Category 1 and Category 2 receptors.³⁹ The FTA’s noise assessment methodology recognizes that parks “are a special case” where noise-sensitivity depends on how the park is used and requires that each park’s noise sensitivity should “be determined on a case-by-case basis after carefully considering how each [park] is used.”⁴⁰ However, the FEIS fails to provide any explanation for why the MTA chose to treat each of these 13 parks as Category 3 receptors subject to more-forgiving FTA noise criteria. In fact, it offers no information concerning how each of the 13 parks is used and offers no rebuttal to the hypothesis that some or all of the 13 parks function as noise-sensitive urban “havens” “where quiet is an essential element in their intended purpose” (*i.e.*, Category 1 receptors). This omission demonstrates MTA’s failure to take a “hard look” at noise impacts.

This failure is compounded by evidence of an apparent attempt by the MTA to bias the results of its noise assessment in favor of the Preferred Alternative. Specifically, the FEIS re-categorizes parks along the Preferred Alternative from Category 1 to Category 3, without acknowledging that such re-categorization had occurred or providing a shred of information supporting the re-categorization. The AA/DEIS identified the entire Purple Line study area corridor as characterized by Category 2 residential use and “Category 1 land uses where quiet is an essential element,” noting that Category 3 uses were “interspersed along the alignments” but were “not differentiated from the more-sensitive residential uses.”⁴¹ Moreover, the AA/DEIS identified all of the seven (7) park receptor sites where noise impacts were evaluated as Category 1 parks “where quiet is an essential element in their intended use.”⁴² The seven (7) parks listed in the AA/DEIS as Category 1 receptors are among the 13 park receptors treated as Category 3 by the FEIS, with no explanation. The failure of the FEIS to provide any mention, let alone any justification, for the re-categorization can only lead to the conclusion that the MTA sought to bias the results of its noise assessment by comparing noise impacts at these parks to the less-stringent Category 3 criteria.

In the AA/DEIS, the ambient noise measured at the seven (7) park receptor sites ranged from 51 to 63 Leq (1hr) (dBA).⁴³ In the FEIS, the ambient noise measured at locations within these same seven (7) parks ranged from 60 to 69 Leq (1hr) (dBA).⁴⁴ The FTA’s noise assessment methodology acknowledges that as “the existing level of ambient noise increases, the allowable level of transit noise increases.”⁴⁵ Thus, the increase in ambient noise measured at these parks results in an increase in the amount of noise the Preferred Alternative may generate without exceeding the FTA’s noise criteria. The FEIS offers no

³⁷ *Id.*

³⁸ Transit Noise and Vibration Impact Assessment (FTA 2006), p. 3-5.

³⁹ *Id.*

⁴⁰ *Id.* at p. 3-8.

⁴¹ See AA/DEIS, Noise and Vibration Technical Report, p. 2-4 (2008).

⁴² *Id.* at p. 2-5.

⁴³ *Id.*

⁴⁴ See FEIS, Noise Technical Report, p. 18 (2013).

⁴⁵ Transit Noise and Vibration Impact Assessment (FTA 2006), p. 3-6.

explanation for why the ambient noise levels reported in the FEIS differed so greatly from those reported in the AA/DEIS. The FEIS does not even mention the difference.

2. *The FEIS fails to demonstrate the adequacy and impartiality of the noise assessment.*

A reader of the FEIS can only speculate as to the reason for the significant change in measured ambient noise. It might be attributable to where in each park the ambient noise was measured. FTA requires that the “basis for selecting measurement sites should be documented,” that the “[m]easurement procedures should be fully described,” and that the “[m]easurement periods, including time of day and length of time at each site should be shown to demonstrate adequate representation of ambient conditions.”⁴⁶ The FEIS Noise Technical Report provides the date of measurement and the distance of the measurement point from the center line of the proposed light rail tracks, but fails to describe the basis for selecting each site, the measurement procedures used, the length of measurement time at each site or the time of day when noise was measured.⁴⁷

FTA requires that for “parks and other significant outdoor use,” the criteria should be applied at the property line.⁴⁸ It also requires that for an urban park the noise measurement site should be the “closest point of active noise-sensitive use.”⁴⁹ Despite these requirements, the FEIS Noise Technical Report reflects that ambient noise at the 13 park receptor sites was measured at locations between 30 and 285 feet from the centerline of the proposed light rail tracks. For the park receptors also addressed in the AA/DEIS, the FEIS noise measurement distance ranged from 52 to 238 feet from the centerline of the Preferred Alternative tracks. A brief look at a map will confirm that for certain parks running perpendicular to the Preferred Alternative alignment, the noise receptor chosen by MTA could not possibly have complied with FTA’s requirement that the receptor be located at the “closest point of active noise-sensitive use.” For example, Rock Creek Park crosses the path of the Preferred Alternative, yet the FEIS noise measurement in Rock Creek Park was collected 233 feet away from the centerline of the light rail tracks. As noted above, FTA requires that an FEIS noise assessment provide a “[j]ustification for all assumptions used in the analysis, such as selection of representative measurement sites and all baseline conditions.”⁵⁰ The FEIS provided no such justification. These FEIS deficiencies confirm that the MTA failed to take the requisite “hard look” at noise impacts from the Preferred Alternative.

3. *The FEIS ignores the FTA’s recommendation to discuss maximum noise levels.*

Pursuant to the FTA’s methodology, the FEIS compares the expected noise impact from the Preferred Alternative to the FTA’s criteria in terms of Leq and Ldn, both of which describe the total amount of noise over a specified period of time, rather than the loudest noise (*e.g.*, a train whistle) during that period. However, the FTA acknowledges that although “the maximum noise level (Lmax) is not used in this manual as the basis for the noise impact criteria for transit projects, it is a useful metric for providing a fuller understanding of the noise impact from some transit operations.”⁵¹ For this reason, the FTA

⁴⁶ *Id.* at p. 13-2.

⁴⁷ *See* FEIS, Noise Technical Report, Table 3 & Table 5 (2013).

⁴⁸ Transit Noise and Vibration Impact Assessment (FTA 2006), p. 3-10.

⁴⁹ *Id.*, Appendix. C, p. C-3.

⁵⁰ Transit Noise and Vibration Impact Assessment (FTA 2006), p. 13-1.

⁵¹ *Id.* at p. 3-9.

recommends that maximum noise information “be provided in environmental documents to supplement the noise impact assessment and to help satisfy the ‘full disclosure’ requirements of NEPA.”⁵² For rail projects, in particular, FTA considers it desirable to include the maximum noise impact (Lmax) “because the noise from an individual train passby is quite distinguishable from the existing background noise” and “people can relate this metric with other noise experienced in the environment.”⁵³ However, the FEIS fails to include any information about the expected maximum noise impact from the Preferred Alternative. The FTA reports that the noise from rail transit at grade (50 mph) would be approximately 80 dBA, which is louder than a food blender or an air compressor.⁵⁴ FTA also reports that the noise from a rail transit horn would be 90 dBA, which is louder than a jack hammer.⁵⁵ Despite FTA’s recommendation, the FEIS fails to mention the maximum expected noise that will be experienced due to the Preferred Alternative. As elsewhere, this demonstrates MTA’s failure to take the requisite “hard look” at noise impacts.⁵⁶

Not only does the FEIS ignore the FTA’s recommendation to consider and discuss the maximum noise impact (Lmax) of the Preferred Alternative, it appears to rely on inaccurate hourly equivalent noise levels (Leq). Specifically, the Noise Technical Report reflects that the Leq was calculated using the following assumed train frequency:

Total daily operations were determined based on 6-minute headways during peak periods of the day (6 AM to 9 AM and 3:30 PM to 6:30 PM), 10-minute headways during off-peak periods (9 AM to 3:30 PM and 6:30 PM to 9 PM), and 12-minute headways during the late night and early morning periods (9 PM to 1:00 AM and 5 AM to 6 AM). This service frequency was used to predict future noise levels under the Preferred Alternative.⁵⁷

The FEIS Glossary clarifies that the term “headway” refers to the time between transit vehicles operating in the same direction.⁵⁸ Thus, the train frequency relied upon in the FEIS noise assessment appears to be only one-way. If so, the Leq estimated by the FEIS would only account for half the number of trains during the relevant hour period. In addition, the FEIS failed to account for the combined noise when two trains pass each other in opposing directions. Thus, the FEIS “failed entirely to consider an important aspect of the problem”⁵⁹ as required by law.

⁵² *Id.*

⁵³ *Id.* at p. 6-29.

⁵⁴ *Id.* at p. 2-16.

⁵⁵ *Id.*

⁵⁶ The maximum noise presents a safety concern for Trail users since it could prevent Trail users from hearing bikers’ alerts (*e.g.*, bell ringing or “on your left”).

⁵⁷ *See* FEIS, Noise Technical Report, p. 15 (2013).

⁵⁸ *See* FEIS, Appendix E.

⁵⁹ *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1216 (11th Cir. 2002) (citing *Motor Vehicle Mfrs.*, 463 U.S. 29, 43 (1983)).

4. *The FEIS fails to adequately assess mitigation of noise impacts.*

The FTA requires that the mitigation section of the Noise Technical Report “begin with a summary of all treatments considered, even if some are not carried to final consideration.”⁶⁰ The MTA’s FEIS Noise Technical Report fails to comply with this requirement. The long-term noise mitigation section of that report consists of only four sentences:

MTA’s analysis found that the further minimization and mitigation of operational noise at impacted sites is not reasonable. Much of the noise impact is derived from use of transit warning horns at stations and crossings, and eliminating the transit horn is not possible due to safety concerns. Another common noise-reduction measure – construction of noise walls – is not feasible for this project because these barriers would block driveway access and pedestrian walkways, as well as introducing visual impacts. Therefore, these additional measures are not proposed.⁶¹

The FEIS fails to discuss whether any of the following mitigation methods described by FTA were evaluated and, if rejected, the basis for such rejection:

1. Resilient or damped wheels (can reduce rolling noise by 2dB and wheel squeal by 10-20 dB);
2. Rail lubricators; and
3. Use of wayside horns for at-grade crossings.⁶²

The FEIS also fails to explain why the proposed four-foot high walls will not be placed between the tracks and the Trail or why the walls will only be four-feet high when higher walls could provide greater noise mitigation. In addition, FTA indicates that certain maintenance measures (*e.g.*, spin-slide control, wheel truing and rail grinding) are necessary to prevent the noise generated by a rail project from increasing up to 10 dB due to use, but the FEIS fails to indicate whether these maintenance measures will be employed for the Preferred Alternative.⁶³ If they are not employed, the actual noise from the LRT could be 10 dB louder than predicted by the FEIS.

As quoted above, the FEIS claims that transit warning horns cannot be eliminated due to safety concerns. However, the FEIS provides no basis or supporting evidence for that conclusion. In fact, FTA guidance discusses the use of “supplemental safety measures” (*e.g.*, gates) and “alternative safety measures” instead of sounding horns.⁶⁴ The FEIS fails to explain whether these measures were considered and, if rejected, the basis for that decision.

⁶⁰ Transit Noise and Vibration Impact Assessment (FTA 2006), p. 13-3.

⁶¹ FEIS, Noise Technical Report, p. 22 (2013).

⁶² Transit Noise and Vibration Impact Assessment (FTA 2006), p. 6-37

⁶³ *Id.* at p. 6-37.

⁶⁴ *Id.* at pp. 6-39 & 6-40.

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of the noise impact from the project on users of the Trail that recognizes the Category 1 noise-sensitivity of the Trail and includes the results of new ambient noise measurements along the Trail;
- A full and fair evaluation of the noise impact from the project on the other affected parks and recreational spaces that: (1) clearly discloses and supports with sufficient evidence the classification of such parks and recreational spaces as either Category 1 or Category 3; (2) provides a reasonable and supported explanation for the accuracy of the significant difference between the noise levels measured prior to the AA/DEIS and those levels measured after the AA/DEIS; and (3) clearly describes the bases for selecting each measurement site, the measurement procedures used, and the measurement periods (including time of day and length of time at each site);
- A full and fair evaluation of maximum noise levels (Lmax) expected at each receptor site (including along the Trail) from the project;
- A full and fair evaluation of the hourly equivalent noise levels (Leq) expected at each receptor site (including the Trail) that includes and accounts for passing trains in both directions;
- A commitment to employ Green Tracks along the Trail;
- A commitment to employ spin-slide control, wheel truing and rail grinding to prevent the actual noise from the project increasing by up to 10 dB above the Leq predicted by the FEIS;
- A commitment to move the proposed four-foot walls on the north side of the tracks to a location between the tracks and the Trail;
- A commitment to employ, or a reasoned and supported discussion of why there is no reasonable need to employ, the following additional mitigation measures:
 - Resilient or damped wheels;
 - Rail lubricators;
 - Use of wayside horns for at-grade crossings;
 - Supplemental safety measures and/or alternative safety measures in lieu of transit warning horns; and
 - Walls higher than four feet.

ENVIRONMENTAL JUSTICE

1. *The FEIS overstates the assumed benefits of and understates the expected adverse effects of the Preferred Alternative on the Trail.*

The FEIS reports that 69% of the Purple Line corridor is located in Environmental Justice areas.⁶⁵ It also acknowledges that the Environmental Justice populations within the study area would experience “some

⁶⁵ See FEIS, at p. 4-160. Pursuant to an executive order, the U.S. Department of Transportation and the FTA are required “to make environmental justice (EJ) part of [their] mission by identifying and addressing, as

adverse effects from implementation of the Preferred Alternative.”⁶⁶ However, the FEIS fails to take the requisite “hard look” at the adverse effects of the Preferred Alternative on the Environmental Justice population. Moreover, it fails to provide the required “full and fair discussion” of those adverse effects.⁶⁷ This deficiency is most glaring in the context of the Trail. The FEIS admits that portions of the Trail are located in Environmental Justice communities,⁶⁸ but then overstates the assumed benefits of and understates the expected adverse effects of the Preferred Alternative on the Trail.

The FEIS overstates the assumed benefits of “replacing the existing Georgetown Branch Interim Trail between Bethesda and Stewart Avenue” and “providing a permanent trail, separate from the roadways, from Stewart Avenue into downtown Silver Spring.”⁶⁹ The FEIS assumes that this will lead “to increased physical activity” providing an “opportunity to improve the overall health of the users of the Purple Line corridor.”⁷⁰ However, the FEIS fails to provide any evidence supporting this assumption. In particular, it fails to explain and defend the assumption that clear-cutting the existing canopy of trees along the Trail and locating a noisy train immediately adjacent to the Trail will result in an increase in Trail usage, particularly by Environmental Justice populations. As elsewhere in the FEIS, the discussion of Environmental Justice fails to mention the significant difference between: (1) a trail through a serene natural environment with a tree canopy; and (2) an unshaded trail buffeted by train noise many times per hour. It also fails to address the extent to which Environmental Justice populations rely on the Trail as an antidote to urban environmental stimuli. As noted above, the FTA recognizes that parks in urban areas can be “valued as havens from the noise and rapid pace of everyday city life.”⁷¹

The FEIS also overstates the assumed benefits of the Preferred Alternative and fails to provide the “full and fair discussion” required by applicable regulation,⁷² by relying exclusively on the assumption that the Trail will be extended *off-street* beyond Stewart Avenue. Although the FEIS acknowledges that such off-street extension will require the acquisition of property rights from CSXT,⁷³ the FEIS fails to evaluate whether the assumed benefits of the Preferred Alternative would outweigh the adverse effects if CSXT decided not to grant those rights. In such case, a portion of the Trail would consist of a bike route on streets. The Environmental Justice section of the FEIS discloses this fact in a footnote, but does not attempt to determine or evaluate whether use of the Trail by the Environmental Justice community would

appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and/or low-income populations” See Environmental Justice Policy Guidance for Federal Transit Administration Recipients FTA Circular 4703.1, Federal Transit Administration (Aug. 15, 2012), *available at* www.fta.dot.gov/documents/FTA_EJ_Circular_7.14-12_FINAL.pdf.

⁶⁶ *Id.* at p. 4-155.

⁶⁷ 40 C.F.R. §1502.1.

⁶⁸ See FEIS, at p. 4-158.

⁶⁹ *Id.*

⁷⁰ *Id.* at p. 4-159.

⁷¹ Transit Noise and Vibration Impact Assessment (FTA 2006), at p. 3-8.

⁷² 40 C.F.R. §1502.1.

⁷³ See FEIS, at p. 4-158.

be affected by that difference. The “hard look” standard requires more than “researching in a cursory manner” and “sweeping negative evidence under the rug.”⁷⁴

In addition to overstating the assumed benefits, the FEIS understates the expected adverse impacts from the Preferred Alternative on the Environmental Justice population. For example, the FEIS declares that the Preferred Alternative “would not result in a major change in ... neighborhood quality.”⁷⁵ This unsupported declaration ignores the “quality” enhancement to the Environmental Justice population of having ready access to a peaceful, natural trail. In addition, the FEIS mischaracterizes the results of the visual impact assessment in an apparent attempt to bias the Environmental Justice assessment. The FEIS admits that: (1) portions of the Trail are located in Environmental Justice communities⁷⁶; (2) “much of the existing vegetation would be removed and most of the existing tree canopy would be eliminated”⁷⁷; and (3) this destruction of natural resources would result in a “high level of visual impact.”⁷⁸ The FEIS then contradicts the admission that portions of the Trail are located in Environmental Justice communities by concluding that the visual impact will not affect an Environmental Justice population.⁷⁹

The FEIS reports that the “extent of adverse impacts must ... be weighed against the benefits.”⁸⁰ The FEIS cannot be said to have complied with the regulatory obligation to provide a full and fair discussion of impacts if it tips the scales by overstating assumed benefits and understating expected adverse impacts. In addition, the FEIS fails to adequately explain why it concludes that the Preferred Alternative “would not have ‘disproportionately high and adverse effects’ on [Environmental Justice] populations.”⁸¹ Disproportionately high and adverse effects are those that are either: (1) predominantly borne by a minority population and/or a low-income population; or (2) suffered by the minority population and/or low-income population and are appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or non-low income population.⁸² Of the 53 residential displacements that will be caused by the Preferred Alternative, 41 (77%) will be in Environmental Justice areas.⁸³ Of the 60 commercial business displacements resulting from the Preferred

⁷⁴ National Audubon Soc’y v. Dept. of the Navy, 422 F.3d 174, 194 (4th Cir. 2005).

⁷⁵ See FEIS, at p. 4-159.

⁷⁶ *Id.* at p. 4-158.

⁷⁷ *Id.* at pp. 4-84, 4-85.

⁷⁸ *Id.*

⁷⁹ *Id.* at p. 4-162. The Environmental Justice section of the FEIS states, in relevant part: “Section 4.9 identified 10 [visual assessment units (“VAUs”)] within the corridor, based on cohesiveness of land use and development patterns. ... Three of the VAUs were identified as experiencing high visual effects. Of these, two include EJ populations. ... *The only VAU with a uniform high effect was not in an EJ population.*” *Id.* (emphasis added). The one VAU with a uniform high effect identified in Section 4.9 is the area of the Trail. (“VAU 1 is comprised of moderately to heavily developed urban land along the Georgetown Branch right-of-way from downtown Bethesda ... to Stewart Avenue in Lyttonsville, the eastern terminus of the Georgetown Branch Interim Trail”) *Id.* at 4-79.

⁸⁰ See FEIS, at p. 4-155.

⁸¹ *Id.* at p. 4-169.

⁸² *Id.* at p. 4-167.

⁸³ *Id.* at p. 4-160.

Alternative, 35 (58%) will be in Environmental Justice areas.⁸⁴ Five of the six areas (83%) where the Preferred Alternative is expected to produce noise impacts will be in Environmental Justice areas.⁸⁵ However, the FEIS fails to explain to the Environmental Justice audience why these expected impacts are not deemed to be “predominantly borne” by them.

2. *The MTA declined to commission a Health Impact Statement to identify the health effects of the Preferred Alternative.*

While the FEIS offers unsupported and superficial conclusions regarding the beneficial health effects of the Preferred Alternative, it does not reflect that the MTA conducted any actual investigation of those assumed health effects. The MTA was asked to commission a Health Impact Assessment (“HIA”), as was completed for the Red Line in Baltimore, but the MTA declined to do so.⁸⁶ While an HIA is not required by NEPA, the Environmental Protection Agency acknowledges that the “steps in an HIA can identify health disparities, which are a prime indicator of the existence of a disproportionate impact to minority, tribal or low-income communities.”⁸⁷ Even without a HIA, the MTA could have conducted a statistically significant survey of Trail users to determine whether and how their use would change based on implementation of the Preferred Alternative. Such survey could have assessed the impact on trail usage of the following: (1) refusal by CSXT to provide the property rights necessary to permit the Trail to continue on the CSXT corridor; (2) elimination of the tree canopy, related loss of natural habitat and proximity to the expected train noise; and (3) elimination of direct backyard access to the Trail from certain properties. NEPA requires “that the agency both investigate and acknowledge the impacts” of its proposed action.⁸⁸

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of the assumed benefits and expected adverse impacts to the Environmental Justice community from the following proposed changes to the Trail that clearly discloses and accounts for any assumptions regarding Trail usage: (1) the impact of complete tree canopy loss; and (2) the noise impacts to Trail users;
- A full and fair evaluation of the impact on MTA’s assumption of health benefits deriving from an extended off-street Trail if CSXT will not grant the land rights necessary to extend the Trail off-street beyond Stewart Avenue; and
- A Health Impact Assessment.

⁸⁴ *Id.*

⁸⁵ *Id.* at p. 4-162.

⁸⁶ See Letter from Mary S. Rivkin, Ph.D., Education Department, University of Maryland, Baltimore County to Michael D. Madden, Purple Line Manager, MTA (Feb. 2, 2013) and undated response from Mr. Madden (available on file from FCCT).

⁸⁷ See Environmental Justice Considerations in the NEPA Process, Environmental Protection Agency, available at <http://www.epa.gov/oecaerth/nepa/nepaej/>.

⁸⁸ See *National Audubon Soc’y v. Dept. of the Navy*, 422 F.3d 174, 194 (4th Cir. 2005).

VISUAL RESOURCES AND MITIGATION

With respect to visual resources, the FEIS acknowledges that the Georgetown Branch right-of-way would undergo a high level of visual impact: much of the existing vegetation would be removed, the tree canopy would be eliminated and the overall appearance of the right-of-way would be substantially changed from present conditions.⁸⁹ The FEIS also considers the Trail to be in an area with a high degree of visual sensitivity due to mature trees and the prominence of the natural environment.⁹⁰ However the FEIS inexplicably does not provide an analysis of strategies to mitigate the visual impacts the Preferred Alternative will have on the Trail in the section of the FEIS that discusses visual impacts, where a member of the public interested in visual impacts to the Trail would likely look for such analysis. CEQ regulations require that agencies include appropriate mitigation measures not already included in the proposed action or alternatives. More significantly, FHWA/FTA regulations specify that it is the policy of the agencies that “[m]easures necessary to mitigate adverse impacts be incorporated into the action.”⁹¹ These regulations further require that the applicant be responsible, in cooperation with the agency, “to implement those mitigation measures stated as commitments in the environmental documents prepared pursuant to this regulation.”⁹²

The FEIS, however, merely states that MTA will work with local stakeholders to identify minimization strategies and mitigation for visual impacts.⁹³ The failure of the FEIS to consider and discuss in reasonable detail any mitigation measures is a defect that is found throughout the document; it is particularly notable with respect to visual impacts on the Trail because the FEIS has designated that area as one of both high sensitivity and high impact. To claim that the MTA will continue to work with local stakeholders is misleading because it obscures the fact that the MTA cannot replace the canopy since it would interfere with the light rail tracks under the Preferred Alternative alignment. Such a statement furthermore does not meet the standard for a “full and fair” discussion of mitigation measures – the FEIS should, at a minimum, provide a more detailed discussion of the reforestation plan, and discuss other avoidance and minimization measures that may be taken. In addition, future coordination would be inadequate since it would occur *after* the issuance of a Record of Decision, leaving affected parties no clear mechanism to obtain binding commitments. This deficiency is compounded by the proposed use of a public-private partnership to finance the project, since the private partner will strive to minimize its costs and maximize its return by limiting any mitigation or other accommodations not set forth in the Record of Decision.

The FEIS cannot satisfy the “hard look” standard without a reasonably complete discussion of possible mitigation measures. Omission of such discussion “would undermine the ‘action-forcing’ function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.”⁹⁴ Even where mitigation measures may be outside the jurisdiction of the lead or cooperating agencies, such measures must be discussed if they are

⁸⁹ See FEIS, at pp. 4-84, 4-85.

⁹⁰ *Id.* at p. 4-80.

⁹¹ 23 C.F.R. §771.06(d).

⁹² *Id.* at §771.09(b).

⁹³ See FEIS, at p. 4-90.

⁹⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

reasonable, relevant and could improve the project. The probability that such measures will in fact be implemented must also be discussed.⁹⁵ While the MTA may prefer not to identify specific mitigation measures in order to avoid triggering additional responsibilities to actually implement such measures under the FHWA/FTA regulations, the failure to discuss such measures in a “full and fair” manner is a violation of NEPA standards.

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of potential mitigation strategies to address the visual impacts from the project; and
- A commitment to employ, or a reasoned and supported discussion of why there is no reasonable need to employ, specific, detailed mitigation strategies.

PARKS, RECREATIONAL LAND AND OPEN SPACE

1. *The FEIS fails to adequately discuss the impacts on parks, recreational land and open space.*

The discussion of impacts to parks, recreational land and open space is severely deficient because it fails to recognize that the Trail *functions* as a park, and thus lacks any meaningful evaluation and discussion of the impact of the Preferred Alternative on the use of the Trail as recreational land and open space. This omission is particularly remarkable because the MTA elsewhere admits recreational use of the Trail, and that the Trail is “an important community asset” used by pedestrians and bicyclists.⁹⁶ The MTA even points to so-called “improvements” to the Trail and connections between the Trail and other trails as positive impacts that would result from the Preferred Alternative with respect to parks, recreational land and open space.⁹⁷ In addition, other documentation produced by the MTA in connection with the FEIS explicitly refers to the Trail as a park.⁹⁸ The Purple Line runs parallel along a significant portion of the Trail,⁹⁹ and its construction has the potential to significantly impact the use of the Trail. The discussion of impacts to parks, recreational land and open space only briefly mentions the Trail, indicating that the MTA will coordinate with the National Capital Planning Commission (“NCPC”) regarding the proposed alignment of the Trail in Rock Creek Park.¹⁰⁰ The discussion also briefly mentions that widening of roadways along park boundaries “generally would require removing trees.” This is a tremendous

⁹⁵ See Council on Environmental Quality, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” Question 19a, 19b, 46 Fed. Reg. 18026 (1981), available at <http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>.

⁹⁶ See FEIS, at Appendix A, at pp. 11, 12, 50.

⁹⁷ See FEIS, at p. 4-51; FEIS, at Appendix A, p. 38.

⁹⁸ See, e.g., FEIS, Technical Report: Supplemental Hazardous Materials, at p. 9 (2013) (referring to the Trail as a “public park”); FEIS, Technical Report: Social Effects and Land Use Planning, at p. 52 (2013) (“The Lyttonville station area also contains parkland associated with the Georgetown Branch Interim trail and Rock Creek Park.”).

⁹⁹ See FEIS, at Figures 1-2 and 2.11.

¹⁰⁰ See FEIS, at p. 4-51.

understatement with respect to the Trail, where construction of the Purple Line will require clear-cutting of the existing tree canopy.¹⁰¹

The FEIS is elsewhere inconsistent or conclusory in its evaluation of the impact the Preferred Alternative will have on park resources. In its analysis of sites eligible for the National Register of Historic Places (“NRHP”), the FEIS concludes that with respect to Rock Creek Park, “[w]hile the Preferred Alternative would introduce new visual elements (*i.e.*, the transitway including its overhead contact system, the Capital Crescent Trail, and the bridges carrying the transitway and the trail across Rock Creek), it would not diminish the park’s location, design, setting, materials, workmanship, feeling or association.”¹⁰² There is absolutely no basis set forth in the FEIS for this conclusion. On the contrary, other sections of the FEIS admit that the construction of the transitway and trail “would result in substantial changes in the viewshed of Rock Creek Park users and local residents. . . . The trail connection from the Capital Crescent Trail to the Rock Creek Trail would be a switchback path on the northeast side of the Preferred Alternative; while designed to minimize tree removal, it would nonetheless result in visual changes due to tree removal.”¹⁰³ The FEIS fails entirely to consider the impact the Preferred Alternative will have on the Trail as a recreational space. In addition, the conclusions in the FEIS with respect to the impacts that construction will have on other parks, such as Rock Creek Park, is simply not supported by evidence provided in the FEIS. Courts will overturn an agency decision as arbitrary and capricious under “hard look” review where “the agency failed entirely to consider an important aspect of the problem . . . [or] the agency offers an explanation which runs counter to the evidence.”¹⁰⁴

¹⁰¹ *Id.* at p. 4-85.

¹⁰² *Id.* at p. 4-71.

¹⁰³ *Id.* at p. 4-85.

¹⁰⁴ *Sierra Club v. U.S. Army Corps of Engineers*, 295 F. 3d 1209, 1216 (11th Cir. 2002) (citing *Motor Vehicle Mfrs.*, 463 U.S. 29, 43 (1983)).

2. *The FEIS fails to adequately consider the effects of compliance with regulations governing parks.*

The brief reference to coordination with the NCPC in Chapter 4 of the FEIS fails to adequately explain the regulatory context of such coordination, the required review and approval by NCPC and the impact such review may have on the Preferred Alternative. According to the FEIS, any proposed development within Rock Creek Park is subject to review by NCPC and review and approval by the Maryland-National Capital Park and Planning Commission (“M-NCPPC”). The FEIS concludes that the Purple Line is generally consistent with the NCPC’s *Comprehensive Plan for the National Capital: Federal Elements (2004)*,¹⁰⁵ but fails to discuss the basis for this determination, criteria for approval by NCPC or M-NCPPC, whether approval is likely to be granted, how long such review and coordination will take, whether NCPC or M-NCPPC may impose any conditions on development of the Preferred Alternative in Rock Creek Park, the environmental effects any such conditions may have, whether the Preferred Alternative alignment may need to be revised based on comments from NCPC or M-NCPPC, the environmental effects that may result from such revisions to the Preferred Alternative, and mitigation that may be undertaken to address any such effects. Here again, the MTA has failed to “consider an important aspect of the problem” in violation of NEPA.¹⁰⁶

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of the impact of the project on the use of the Trail as park or recreational land;
- A full and fair evaluation of the impact of the project on the other parks studied, including Rock Creek Park, that adequately supports any conclusion that the project will not diminish the positive attributes of such parks; and
- A full and fair evaluation of the review by NCPC and M-NCPPC and the need to obtain approval from NCPC and M-NCPPC for the alignment across Rock Creek Park, including the criteria for approval, the likelihood it will be granted, and conditions that could be imposed.”

HABITAT AND WILDLIFE

1. *The FEIS fails to provide a full and fair discussion of impacts to habitat and wildlife.*

The FEIS admits that the Trail is characterized by “the prominence of the natural environment.”¹⁰⁷ It also admits that as a result of the Preferred Alternative “much of the existing vegetation would be removed and most of the existing tree canopy would be eliminated.”¹⁰⁸ Despite these admissions, the FEIS argues that since “the Preferred Alternative would be largely constructed within existing roadway and

¹⁰⁵ See FEIS, at p. 4-51.

¹⁰⁶ *Sierra Club v. U.S. Army Corps of Engineers*, 295 F. 3d 1209, 1216 (11th Cir. 2002) (citing *Motor Vehicle Mfrs.*, 463 U.S. 29, 43 (1983)).

¹⁰⁷ See FEIS, at p. 4-80.

¹⁰⁸ *Id.* at p. 4-84.

transportation rights-of-way, potential effects on natural resources have been minimized.”¹⁰⁹ This is patently false. Since much of the Preferred Alternative alignment relies on the use of the Georgetown Branch right-of-way and the consequent *permanent* destruction of the existing vegetation and tree canopy, potential effects on natural resources have been increased. This patently false conclusion violates NEPA requirements by “sweeping negative evidence under the rug”¹¹⁰ and by failing to provide a “full and fair discussion” of the impacts.¹¹¹

Remarkably, while other parts of the FEIS mention the need to permanently remove the trees and other vegetation along the Trail, the section ostensibly devoted to a “full and fair discussion” of impacts to habitat and wildlife fails to do so. Instead, the FEIS relies on the following cryptic explanation of the long-term effects: “The impact of the Preferred Alternative on forest and specimen trees would primarily take the form of partial property acquisitions at the edges of forested habitat, affecting a total of 48 acres of forested habitat and 194 specimen trees.”¹¹² Nowhere in this long-term effects section does the FEIS clearly disclose that the tree canopy present along the Trail will be permanently removed.¹¹³ Moreover, the FEIS relies on the results of the *Forest Stand Delineation Report for the Purple Line Rapid Transit Connection* (2011), but fails to provide a copy of that document. That failure hinders the ability of the affected community to evaluate the accuracy and completeness of conclusions drawn in the FEIS and represents a failure of the FEIS to demonstrate evidentiary support for such conclusions.

The FEIS uses similar obfuscating language to address the issue of the Preferred Alternative’s impact on a colony of heron in the forested floodplain of Coquelin Run. The FEIS notes that the colony exists “in close proximity to the study area,” that such heronries “are a rare resource of particular interest that should be protected” and that disturbing such heronries through cutting nesting trees, cutting nearby trees or nearby construction that causes abandonment of chicks by the adults violates the Migratory Bird Treaty Act.¹¹⁴ However, the FEIS then uses selective language to minimize the reader’s perception of the potential adverse impact to the heronry. In a letter dated October 26, 2011, the Maryland Department of Natural Resources (“MDNR”) wrote that it would likely require a time-of-year restriction on work within ¼ mile of the heron colony.¹¹⁵ By letter to the MDNR dated February 27, 2012, the MTA admitted that the heron colony was within ¼ mile from the project site. Specifically, the MTA wrote:

¹⁰⁹ *Id.* at p. 4-175.

¹¹⁰ *National Audubon Soc’y v. Dept. of the Navy*, 422 F.3d 174, 194 (4th Cir. 2005).

¹¹¹ 40 C.F.R. §1502.1.

¹¹² *See* FEIS, at p. 4-117.

¹¹³ In addition, although NEPA requires a “full and fair discussion” of impacts, the FEIS fails to discuss or even mention the positive attributes afforded by the trees that the Preferred Alternative plans to permanently remove. As publicized by Montgomery County, trees: (1) remove pollutants from the air; (2) provide many ecological services that support reduced energy use and benefit the environment; (3) provide cooling through shade and evapotranspiration; (4) remove atmospheric CO₂ by sequestration; (5) benefit watersheds; (6) reduce stormwater runoff; (7) help soil stability; (8) help recharge groundwater supply; (9) lower crime rates; (10) help children concentrate; (11) increase the amount of time neighbors spend outside mingling with other neighbors; and (12) help reduce physiological stress. (See <http://www6.montgomerycountymd.gov/dectmpl.asp?url=/content/dep/climatechange/treeoverview.asp>)

¹¹⁴ *Id.* at p. 4-117.

¹¹⁵ *See* FEIS, Appendix G.

The project is located *within ¼ mile of the colony* but is buffered by the community that is located along Chevy Chase Lake Drive to the north, substantially diminishing the potential for direct impacts.¹¹⁶

However, in the FEIS the MTA wrote:

The project also would not result in long-term impacts to the heron colony located within Coquelin Run because *the colony is located outside the LOD approximately one-quarter mile from the proposed transitway alignment* and is buffered by an intervening roadway and residences.¹¹⁷

Unlike the candid correspondence with the MDNR, the FEIS fails to clearly acknowledge that the heron colony is located within the ¼ mile distance identified by MDNR as possibly leading to time of year restrictions on construction of the Preferred Alternative.

2. *The FEIS fails to support its assumptions and conclusions related to habitat and wildlife impacts.*

In connection with adverse impacts to habitat and wildlife, the FEIS fails to take the “hard look” required by NEPA, offering conclusions unsupported by any evidence. For example, the FEIS states that the aquatic species “expected to be impacted are acclimated to disturbed settings and would be likely to recolonize temporarily disturbed areas, though the communities are unlikely to be identical to those present prior to construction.”¹¹⁸ The FEIS does not identify what species would be impacted. It does not offer any support for the conclusion that such species are acclimated to disturbed settings. It does not offer any support for the conclusion that such species are likely to recolonize temporarily disturbed areas. It notes that almost one mile of stream habitat will be *permanently* destroyed, but confuses the issue by then discussing the mitigation afforded by potential recolonization of *temporarily* disturbed areas. The FEIS neglects to address potential mitigation of the permanent loss of aquatic habitat. Without an express evaluation of potential mitigation, “neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.”¹¹⁹

Similarly, the FEIS fails to take a hard look at adverse impacts to terrestrial habitat and wildlife caused by the Preferred Alternative. The FEIS states that “[w]ildlife using terrestrial resources affected by the Preferred Alternative would be displaced (mobile species) or eliminated (non-mobile species) by the project.”¹²⁰ However, it does not offer any discussion of the extent and magnitude of the adverse impacts. It does not report that any effort was made to identify terrestrial wildlife populations in the study area. It does not estimate the severity of the impacts to those populations. It does not estimate how many terrestrial creatures will die or be displaced as a result of the Preferred Alternative. Moreover, as elsewhere, the FEIS turns a blind eye toward the natural habitat provided by the Trail. The FEIS

¹¹⁶ See FEIS, Appendix G (emphasis added).

¹¹⁷ See FEIS, at p. 4-118 (emphasis added).

¹¹⁸ See FEIS, at p. 4-118.

¹¹⁹ Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989).

¹²⁰ See FEIS, at p. 4-117.

concludes that “[e]xisting wildlife corridors within the stream valley parks crossed by the transitway would be maintained.”¹²¹ However, the FEIS fails to acknowledge that the Trail is, itself, a wildlife corridor connecting the stream valley areas it transects. Accordingly, the FEIS fails “entirely to consider an important aspect of the problem” and violates NEPA requirements.¹²²

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of the impact of the project on the Trail that recognizes the significant natural environment provided by the Trail as well as the significant and permanent destruction of that natural environment;
- A copy of the *Forest Stand Delineation Report for the Purple Line Rapid Transit Connection* (2011);
- A full and fair evaluation of the impact of the project on the heronry located in Coquelin Run, including a discussion of the impact of time-of-year restrictions that could be imposed by MDNR; and
- A full and fair evaluation of the impact of the project on aquatic and terrestrial species that identifies the affected species, provides estimates of the number of organisms that will be lost, discusses available mitigation strategies, and commits to employ or provides a reasoned and supported discussion of why there is no reasonable need to employ, specific, detailed mitigation strategies.

LAND USE, PUBLIC POLICY AND ZONING

The FEIS concludes that the Preferred Alternative would be compatible with the existing mixed urban and suburban character of the study area land use. The FEIS states that “[t]he Preferred Alternative would be located on or along existing roadways, railroad rights-of-way, and the Georgetown Branch right-of-way,” and concludes that, “[t]herefore, it is not expected to substantially change the current land uses within the study area.”¹²³ There is no evidence to support the conclusion that current land use along the Trail would not be changed. In fact, the FEIS undertakes no analysis of whether restriction of access to the Trail to the proposed twenty-one paved access points, the destruction of tree canopy along the length of the Trail and construction of the Purple Line immediately adjacent to the Trail, would affect the quantity or quality of use of the Trail.

The FEIS lists the Planning Areas and most recent applicable policies and plans adopted by local, regional, state and federal authorities in Table 4-3.¹²⁴ The Georgetown Branch right-of-way is not included in the list, despite the fact that local plans for the Georgetown Branch have been established. In fact, MTA acknowledges in the response to comments to the AA/DEIS that “[t]he consideration of the Georgetown Branch right-of-way in this study took place against the backdrop of more than two decades

¹²¹ *Id.*

¹²² *See* *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1216 (11th Cir. 2002) (citing *Motor Vehicle Mfrs.*, 463 U.S. 29, 43 (1983)).

¹²³ *See* FEIS, at p. 4-20.

¹²⁴ *Id.* at p. 4-21.

of planning by the County regarding the future use of that corridor” and that “[i]n January 1990, the Montgomery County Council approved the Georgetown Branch Master Plan Amendment, which officially designated the right-of-way for a combined transitway and trail.”¹²⁵ However, the FEIS misleadingly omits reference to the Georgetown Branch Master Plan Amendment in Table 4-3. Similarly, the Social Effects and Land Use Planning Technical Report cites the Master Plan Amendment in its list of references, but fails to include any discussion of the Master Plan Amendment.¹²⁶ These omissions loudly signal the failure of the MTA to “consider an important aspect of the problem” in violation of NEPA.¹²⁷

MTA repeatedly asserts in its response to comments on the AA/DEIS that the Trail was always intended to be used as both a trail and a transitway.¹²⁸ However, this oversimplification ignores the fact that the Georgetown Branch Master Plan Amendment explicitly recommended that there be no changes to the existing adopted land uses within 1,000 feet on either side of the Trail, and that “every effort possible be made to ensure that existing trees along the trolley/trail route are preserved wherever possible and that replacement of trees is of sufficient quantity and quality to preserve and enhance the environment.”¹²⁹ If the FEIS properly analyzed the Preferred Alternative in light of the Georgetown Branch Master Plan Amendment, it would: (1) evaluate whether the alignment selected is consistent with the Master Plan and discuss any inconsistencies; (2) analyze whether the displacement of existing commercial, residential and institutional uses caused by the Preferred Alternative¹³⁰ is consistent with the Georgetown Branch Master Plan Amendment; and (3) acknowledge that the Preferred Alternative, in contravention of the Master Plan Amendment, will require clear-cutting of trees along the Trail, and will not allow for replacement of trees in sufficient quantity and quality to preserve and enhance the environment, as required by the Master Plan Amendment. The FEIS provides no such analysis, and thus fails to provide a “full and fair” discussion of the impacts of the Preferred Alternative.¹³¹

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of how the project will change use of the Trail and the project’s inconsistency with the Georgetown Branch Master Plan Amendment.

AIR QUALITY

The discussion of the Preferred Alternative’s impacts on air quality in the FEIS is deficient in several respects. First, the FEIS relies on assumptions in concluding that the Preferred Alternative will have minimal impacts on air quality, without providing any evidence of a basis for these assumptions. For example, the FEIS concludes that Mobile Source Air Toxics (“MSATs”) emitted along the project

¹²⁵ See FEIS, at Appendix A, pp. 11, 14.

¹²⁶ See FEIS, Technical Report: Social Effects and Land Use Planning, at p. 74 (2013).

¹²⁷ *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1216 (11th Cir. 2002) (citing *Motor Vehicle Mfrs.*, 463 U.S. 29, 43 (1983)).

¹²⁸ See, e.g., FEIS, at Appendix A, pp. 11, 20, 55.

¹²⁹ *Id.* at p. 1, 3.

¹³⁰ See FEIS, at p. 4-35 (Table 4.7).

¹³¹ 40 C.F.R. §1502.1.

corridor in the future would be proportional to the total Vehicle Miles Traveled (“VMT”) predicted under each alternative, assuming the vehicle mix does not change.¹³² The FEIS fails to consider whether the vehicle mix may, in fact, change, and particularly how the vehicle mix may be impacted by the various alternatives.

The FEIS further fails to account for the impact that new development resulting from the Preferred Alternative, including the Chevy Chase Lake development, will have on air quality. The FEIS touts the positive impact that the Preferred Alternative would have on economic growth and development in the area.¹³³ CEQ regulations require that an EIS consider both direct and indirect environmental effects of alternatives.¹³⁴ “Indirect effects” include those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” specifically “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”¹³⁵ While the FEIS takes into account the growth inducing effects of the Preferred Alternative when recounting the benefits of such effects, it fails to take into account these effects in projecting the impact the Preferred Alternative will have on air quality. NEPA requires an agency to consider the “incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions.”¹³⁶ By ignoring the impact such foreseeable development may have on air quality, the FEIS fails to provide a “full and fair” discussion of air quality impacts.

Additionally, the FEIS concludes that because the construction duration of the project is not anticipated to exceed five years in any single location, any impact incurred during construction would be considered a temporary impact, and therefore hot-spot analyses are not required. However, the FEIS fails to consider several factors that would recommend performing analysis of air impacts. First, the region is designated as non-attainment for PM_{2.5},¹³⁷ which would be a primary air quality concern during construction as a result of localized increase in the concentration of fugitive dust, as the FEIS admits.¹³⁸ Even temporary impacts may have a significant detrimental effect on air quality in a non-attainment zone. Second, the FEIS fails to consider that delays may cause the construction duration to exceed five years. According to the FEIS, the average time required for heavy construction activity alone is more than four years.¹³⁹ The total construction timeline for the Preferred Alternative is more than five years (July 2015 to late 2020).¹⁴⁰ The FEIS does not specify in its discussion of air quality whether those estimates account for delays that may be caused by the construction itself or by outside factors. In particular, as discussed more above, the MDNR has indicated that it would likely recommend a time-of-year restriction on work that falls within

¹³² See FEIS, at p. 4-97; FEIS, Technical Report: Air Quality, at p. 36 (2013).

¹³³ See FEIS, at 4-4.

¹³⁴ 40 C.F.R. §1502.16(a) and (b).

¹³⁵ 40 C.F.R. §1508.8(b).

¹³⁶ National Audubon Soc’y v. Dept. of the Navy, 422 F. 3d 174, 196 (4th Cir. 2005).

¹³⁷ See FEIS, at p. 4-96.

¹³⁸ *Id.* at p. 4-100.

¹³⁹ *Id.* at p. 5-2.

¹⁴⁰ *Id.* at p. 5-1.

¼ mile of a heron colony. Since it is reasonable to assume that MDNR will impose time-of-year restrictions on certain construction activities, it is also reasonable to assume that construction could exceed five years. Accordingly, hot-spot analyses for construction-related activities should be performed.

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of air quality impacts from the project, including consideration of vehicle mix changes, the effect of new development resulting from the project, and the likelihood that construction will take more than five years to complete.

WATER

With respect to water quality impacts, the FEIS presents at least partially contradictory conclusions. The FEIS acknowledges that “the project would increase impervious surfaces in the study area, which could increase the amount of surface runoff and potentially increase the level of contaminants such as heavy metals, salt, organic molecules and nutrients in the surface runoff.”¹⁴¹ However, it then concludes that “[s]ince the study area is already developed and the Preferred Alternative includes proposed infrastructure to effectively manage stormwater runoff generated by the project, increases in nutrient and sediment levels from the project are unlikely to affect overall TMDL management.”¹⁴² As elsewhere, the issue here is the failure of the FEIS to acknowledge the significant loss of natural habitat (*i.e.*, the study area is *not* already developed) or to provide evidentiary support for its conclusions. It does not attempt to estimate what the increase in stormwater runoff will be, what the nutrient and sediment levels in that additional runoff will be, or what impact those nutrient and sediment levels will have on the Chesapeake Bay Total Maximum Daily Load compliance.

For these reasons, we request that the MTA issue a supplemental FEIS that corrects these deficiencies, by including:

- A full and fair evaluation of water quality impacts from the project, including recognition that the project would significantly increase surface water runoff and contaminant loads to area waterways;
- A commitment to employ Green Tracks; and
- A commitment to employ, or a reasoned and supported discussion of why there is no reasonable need to employ, other specific detailed mitigation strategies.

* * * * *

The Purple Line – in its *current* form – would *fundamentally* change the character of the Capital Crescent Trail and *irrevocably* destroy the mature forest and tree canopy that line a significant portion of the Georgetown Branch Trail. We strongly urge the MTA and FTA to reconsider the Purple Line in its current form. To that end, we request that the MTA issue a supplemental FEIS that corrects the deficiencies identified in this letter and provides a full and fair comparison of the attributes and

¹⁴¹ See FEIS, at p. 4-127.

¹⁴² *Id.* at p. 4-128.

deficiencies of the Preferred Alternative, No Build Alternative and Medium Investment BRT Option 1. No matter what is suggested by artist renderings and MTA assurances, constructing and operating the Purple Line over the Trail will destroy permanently a unique, priceless, irreplaceable linear park between two bustling urban centers, forever depriving Silver Spring and residents east of Silver Spring of the many benefits derived from having this continuous park with its hiking, walking and biking trail.

Respectfully submitted,



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President
Friends of the Capital Crescent Trail

cc: Roger Berliner, Councilmember, District 1, Montgomery County
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