UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE CAPITAL CRESCENT TRAIL, *et al*.	:	
	:	**Case No. 1:14-cv-01471-RJL**
Plaintiffs,	:	
v.	:	
FEDERAL TRANSIT ADMINISTRATION, *et al*.	:	
Federal Defendants,	:	
MARYLAND TRANSIT ADMINISTRATION,	:	
Defendant/Intervenor.	:	

PLAINTIFFS' RULE 59(e)
MOTION FOR RECONSIDERATION OR CLARIFICATION

Plaintiffs submit this Rule 59(e) Motion to Alter or Amend the May 30, 2017 judgment entered in this action, granting summary judgment in part to plaintiffs and defendants, and thereby dismissing certain of plaintiffs' claims under NEPA, as set forth in Count I of the Amended Complaint (ECF #142). Plaintiffs seek clarification or confirmation that the Court has concluded that certain claimed NEPA deficiencies not addressed in the Court's subsequent Opinion of June 9, 2017 (ECF # 149) ("Opinion") lack merit, or, alternatively, based upon this motion, reconsideration of those claims under Rule 59(e). In support of this motion, Plaintiffs are filing a Memorandum in Support of the motion and a proposed order.

Respectfully submitted,

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June 26, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Federal Defendants,	:	
MARYLAND TRANSIT ADMINISTRATION	:	
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MEMORANDUM IN SUPPORT OF PLAINTIFFS' RULE 59(e) MOTION FOR RECONSIDERATION OR CLARIFICATION

Plaintiffs submit this Memorandum in Support of Plaintiffs' Rule 59(e) Motion to Alter or Amend the May 30, 2017 judgment entered in this action, granting summary judgment in part to plaintiffs and defendants, and thereby dismissing certain of plaintiffs' claims under NEPA, as set forth in Count I of the Complaint (ECF #142). Plaintiffs' motion is limited to seeking clarification or confirmation that the Court has concluded that certain claimed NEPA deficiencies not addressed in the Court's subsequent Opinion of June 9, 2017 (ECF # 149) ("Opinion") lack merit, or, alternatively, based upon this motion, reconsideration of those claims under Rule 59(e).

INTRODUCTION

The Opinion notes that plaintiffs raised a number of issues concerning the adequacy of the AA/DEIS and the FEIS, and that the Court has reviewed the administrative record carefully in light of them. Opinion at 6. The Opinion does "not discuss in detail each discrete issue that plaintiffs raised." *Id.* at 7. Rather, the Court advises that it is "convinced that the FTA . . . has

carefully considered the environmental impacts of the project." *Id.* The Opinion concludes that plaintiffs' "claims boil down to an argument that the agencies did not consider certain issues with the level of detail they would have liked, or did not reach the substantive conclusion they would have desired . . . ." *Id.* Using plaintiffs' claims about the analysis of the stormwater effects of the project as an example, the Opinion concludes that "defendants did consider and explain the project's stormwater effects . . . [and the] law only requires that defendants take a 'hard look' at the project's environmental impacts during the NEPA process." *Id.*

This motion is directed not at the Court's resolution of the stormwater issue or other issues discussed in the Opinion, but rather at two other "discrete issues" not analyzed in the Opinion, i.e., noise pollution and air pollution. These are adverse impacts that the Department of Transportation's own regulations and procedures implementing NEPA specifically require to be afforded serious consideration. *See, e.g.* ECF # 47 at 6. Plaintiffs' pollution concerns are grounded in what plaintiffs regard as very significant adverse effects of the Project that were not afforded adequate analysis by Defendants in accordance with the minimum legal requirements under NEPA. The Court may conclude that these concerns were indeed adequately addressed, but, particularly in recognition of the voluminous motion papers and extensive record and the extraordinary temporal demands made upon the Court by the State of Maryland's to "expedite" the decision process, plaintiffs respectfully seek clarification that the Court has indeed concluded that NEPA requirements were satisfied as to these discrete pollution issues.

Plaintiffs acknowledge and do not contest the correctness of the Opinion in stating that the EIS must contain a "full and fair discussion of the project's significant environmental impacts," *id.* at 5, and that the Court's role is to take a "hard look" at whether the agency itself "has adequately considered and disclosed the environmental impact of its actions." *Id.* If, with respect

to noise and air pollution, the Court makes clear that it has indeed taken the requisite hard look at these pollution impacts, and has nevertheless concluded that defendants' NEPA documents adequately addressed plaintiffs' concerns, this motion should be denied on that basis. Recognizing the narrow grounds on which Rule 59(e) relief may be afforded, Plaintiffs are not seeking such relief to reargue what has already been definitively considered and decided. On the other hand, because the Court's opinion did not discuss the noise and air pollution issues, this motion highlights the inadequate evaluation of pollution concerns that were detailed by plaintiffs both in support of the need for an SEIS and to explain the deficiencies in the AA/DEIS and FEIS. Should the Court agree, as to either or both of the pollution concerns raised, an amended judgment should clarify that these are additional matters warranting federal defendants' consideration on remand.

I. STANDARD OF REVIEW

"A Rule 59 (e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Ciralsky v. CIA,* 355 F.3d 661, 671 (D. C. Cir. 2004). Such a motion "is not simply an opportunity to reargue facts and theories upon which a court has already ruled." *New York v. United States,* 880 F. Supp. 37, 38 (D.D.C. 1995). However, Rule 59(e) is appropriate for seeking clarification of the judgment, *Birdsong v. Wrotenbery*, 901 F.2d. 1270, 1271-72 (5th Cir. 1990), and may be appropriately used to seek relief when the court has not explained the basis for dismissal of a particular claim with prejudice. *City of Dover v. U.S.E.P.A.,* 40 F. Supp. 3d 1, 6-7 (D.D.C. 2013).

II. THE NOISE ANALYSIS IN THE AA/DEIS AND FEIS IS DEFICIENT UNDER NEPA AND UNDER SECTION 4(f) OF THE HIGHWAY ACT

Plaintiffs' Summary Judgment Memorandum (ECF #47 at 6) makes clear that under DOT Regulations, FTA was required to document how the Project would comply not only with state

and local environmental laws, but also how it would affect the general "'attainment and maintenance of **any** environmental standards established by law or administrative determination (e.g., noise, ambient air quality, water quality).' (DOT Order 5610.1.C, Att. 2, ¶9.) (emphasis added)." Applying this standard to the environmental concern of noise emanating from Purple Line trains, plaintiffs pinpointed comments submitted by noise expert Stephen G. Thornhill on behalf of the Columbia Country Club, ECF #59 at 31-32, as well as the analysis by noise expert Donald MacGlashan conclusively demonstrating that the noise assessment and mitigation steps discussed in the FEIS as planned for the Purple Line were inadequate and not in accordance with FHA/FTA standards for rail transit noise assessment. (AR5-006678 to 6689) ECF #47 at 26. Mr. MacGlashan explained that under its own standards for evaluating transit noise and vibration impact, FTA should have evaluated "peak intermittent noise," not just a hypothetical average level of noise. *Id.* at 26 n.13. He also explained how the FEIS noise assessments were misleading, and how the FEIS failed to document the harmful noise levels pedestrians and cyclists who are expected to be heavy users of the trail adjacent to the tracks would experience. *Id.* Plaintiffs also explicitly noted that FTA's reliance on average noise levels was contrary to FTA guidance that **maximum** (Lmax) noise levels "be provided in environmental documents to supplement the noise impact assessment and help satisfy the full disclosure requirements of NEPA." ECF #47 at 32 n.18.

The FTA guidance referenced by plaintiffs is the FTA Transit Noise and Vibration Impact Assessment Manual, and specifically §3.2.2. of the Manual. Id. It could not be clearer in differentiating between rail transit and other modes of transit when it comes to assessing noise:

> [T]he maximum noise level (Lmax)…is a useful metric for providing a fuller understanding of the noise impact from some transit operations. Specifically, rail transit characteristically produces high intermittent noise levels which may be objectionable

> depending on the distance from the alignment. Thus, it is recommended that Lmax information be provided in environmental documents….

In this case, of course, the proximity of human ears to such rail car "Lmax" noise is extraordinary: for a considerable distance the Purple Line will be **directly adjacent** to the heavily used Capital Crescent Trail (by hikers and bikers).

Defendants' response confirmed rather than disputed the failure of the AA/DEIS and FEIS to include data on **maximum** noise levels. Defendants merely argued that reliance on 24-hour average noise levels was sufficient, as agencies "are afforded substantial deference in their choice of methodology." ECF #61 at 9. But lawful agency discretion does not extend to willful failure to take account of the obvious, or failure to follow the agency's own explicit guidance in the 2006 Transit Noise and Vibration Impact Assessment Manual at §3.2.2. Users of the Trail will not experience a 24-hour **average** of noise when a train goes by; they will experience something close to peak noise, especially if the train is crossing a street or coming into a station with its warning bells going full steam. Incredibly, defendants simply dismissed the noise impact on Trail users on the grounds that, being on the Trail, they were considered part of a "transportation facility" that was not "a noise-sensitive receptor in the noise analysis." Id. at 5. As plaintiffs argued in their summary judgment papers and stressed at the June 2016 oral argument, *see* 6/15/16 Tr., page 24 lines 7-24, this explanation does not constitute a "hard look" at the environmental facts set forth in the administrative record; it is a "nonsense look," one devoid of any rationality or common sense.

In its Opinion, the Court did not discuss plaintiffs' claim that the FEIS failed to adequately address noise impacts and, in particular, that FTA failed to address the **maximum** noise levels that trail users and others will experience, notwithstanding Defendants' own directives regarding such

disclosure. Rather, the Court's only reference to the noise issue was in the context of plaintiffs' request for an SEIS, and in that context the Court simply stated that in reference to the MacGlashan Declaration (along with several other expert Declarations on which plaintiffs had relied in seeking an SEIS) defendants "already considered the issues or criticisms in the declarations, and therefore they do not constitute 'new information'" Opinion at 11. However, as plaintiffs argued in their summary judgment memoranda, the critical issue highlighted in the MacGlashan Declaration—FTA's failure to abide by its **own** guidance for how noise impacts must be considered—was ***not*** addressed in the agency's underlying NEPA process, even though comments on the EIS specifically maintained that the noise issue had not been adequately considered. Accordingly, on the record before the Court, the underlying NEPA process is fatally defective insofar as the noise issues are concerned and, in addition, defendants acted arbitrarily in dismissing the MacGlashan Declaration because the issues he raised had never previously been addressed by FTA (i.e., the maximum noise issue and the agency's own directives on noise), although they most assuredly should have been. Consequently, Plaintiffs respectfully request that the Court expressly address this discrete NEPA violation and amend its judgment to provide that Federal Defendants must afford the project's noise impacts further consideration.

As a related matter, plaintiffs also argued in their summary judgment papers that defendants' failure to adequately address the noise issue violated section 4(f) of the Highway Act, 23 U.S.C. § 138(a). The Court dismissed this claim on the grounds that plaintiffs failed to "articulate any clear legal theory as to how the FTA's analysis of noise impacts demonstrates a violation of section 4(f) . . . ." Opinion at 14 n.2. Plaintiffs respectfully submit that they did indeed set forth such a "legal theory," one that the Court did not discuss in its ruling: namely that the extensive, repeatedly intermittent noise impacts resulting from the project "constitute a permanent

use of these parks in violation of the Highway Act, § 4(f)." ECF #59 at 33; ECF #47-1 at 42-44. Plaintiffs pointed out that, in direct contravention of DOT Order 5610.1C Att. 2, Paragraph 4 (Parks and Historic Sites) and Paragraph 7 (Pedestrians and Cyclists), the FEIS failed to address the **permanent** effects the project would have on Elm Street Park and the several other protected sites, as well as the pedestrians and cyclists who use them. Plaintiffs further explained that

> according to expert comments received at all stages of the EIS process and afterward, the Project will result in the loud noise of trains as often as every 3.5 minutes within ten or twenty feet of the [Elm Street] Park, with half of them braking as they come into the Bethesda Station and sounding bells as required each time, and using warning horns loud enough to damage hearing if any human or pet is near the track. **By any reasonable yardstick, this constitutes a direct and harmful set of 'uses' that will indeed interfere with the protected activities . . . that Project alternatives would not require . . . In short, Defendants' insistence that the Project will not 'use' Elm Street Park within the meaning of § 4(f) is clearly arbitrary and capricious and contrary to law**.

ECF No. 59 at 34-35 (emphasis added). Plaintiffs also specifically addressed this issue at the June 2016 summary judgment hearing. *See* 6/15/16 Tr. at 24.

Plaintiffs' claim is that highly disruptive, repeated, intermittent but frequent noise immediately adjacent to a park constitutes a "use" of that park according to any reasonable understanding of that term (and the purpose of the Highway Act to minimize the impact of transportation projects on parks). Accordingly, this requires FTA to consider "feasible and prudent alternatives" that do not require the "use of any publicly own land from a public park," 23 U.S.C. § 138. Plaintiffs are therefore entitled to judgment on noise impacts on this basis as well. In any event, Plaintiffs request that the Court, in addition to addressing the noise pollution issue as it bears on defendants' NEPA obligations, also address plaintiffs' related argument that the extensive, significantly detrimental, **permanent** noise impacts that will directly interfere with the use and enjoyment of Elm Street Park (and other parks, *see* ECF No.47 at 43, Table 5 ARl-003580, ARl-000956) plainly constitutes a "use" of parks, thereby triggering section 4(f) responsibilities.

III. THE AIR POLLUTION ANALYSIS IN THE AA/DEIS AND FEIS IS DEFICIENT UNDER NEPA

The Court's Opinion does not discuss plaintiffs' arguments regarding air pollution from the power plants whose electricity will run the Purple Line. Again, however, the reality is that substantial concerns about air pollution were raised and then given short shrift both in the AA/DEIS and FEIS process and also in defendants' summary judgment papers in this action. Air pollution caused by the generating of electric power to propel the heavy cars of the Purple Line trains, running most hours of the day and night, as well as air pollution by alternative transport modes, is inextricably linked to the level and type of energy use by the mode of transport. In their Summary Judgment Memorandum, plaintiffs documented MTA's noncompliance with 40 C.F.R. § 1502.16(e), which requires the agency to "assess the levels of energy use and the resulting pollution by the Project and its alternatives." ECF #47 at 34. Plaintiffs pointed to record evidence showing that alternatives to the Purple Line were superior in reducing carbon dioxide and other emissions, compared to the use of coal-fired electric energy by the railcars. *Id.* The FEIS response from MTA was that it was allowed to disregard energy used in the manufacture of railcars, i.e., a relatively insignificant, one-time energy cost that the commenters were not asking to be counted in the first place. For air pollution assessment, however, the more important, long-term energy consumption factor is daily operational energy use, which was ignored. In fact, operational benefits to air quality were accounted for in relation to cars displaced by the Purple Line, while the Purple Line itself was nonsensically deemed to operate with zero air pollution emissions. *Id.* Plaintiffs pointed out that the Purple Line proponents had touted the Project for its contemplated

reduction in air pollution, yet the FEIS had not done the CEQ-required assessment of pollution associated with the production of the energy needed to run the railcars. *Id.* at 38-39.[1]

Plaintiffs' Summary Judgment Reply, ECF # 59 at 33, details the glaring failure of defendants in responding to these concerns. Defendants effectively admit their failure to measure the air pollution associated with electricity that will be used to run the railcars, asserting that such emissions do not count, as they came from "upstream sources." ECF #57 at 32. It is an "upstream source" in the sense that the Purple Line will not generate its own electricity. Rather, that electricity will come largely from "upstream" fossil fuel (coal and natural gas) power plants. But if, as defendants claim, it is appropriate to account, on the plus side, for the air pollution benefit of cars displaced by the Purple Line, why is it not appropriate to account, on the minus side, for the air pollution attributable to the electricity that runs the trains? Defendants never explained this double standard and just argued nonresponsively that, overall, the Project in operation would not use more energy than its alternatives. Id. at 31. In the end, defendants did not attempt to claim compliance with CEQ and DOT Orders in evaluation of air pollution, but rather with EPA guidance under the Clean Air Act. *Id.* at 33 n.20. But under NEPA, it is CEQ that regulates and guides all agencies, and DOT's additional NEPA Order supporting the CEQ regulations (5610.1.C) requires more detail on these points, not less, than the standard federal NEPA analysis. *Id.* Given that the air pollution issue is not discussed in the Opinion, plaintiffs respectfully request that the Court address the issue and amend its judgment accordingly.

[1] Plaintiffs further noted that the Project's dependence on coal-fired electric power, undercutting progress toward full compliance with Maryland's ambient air standards, was not made clear, leaving defendants in direct violation of the assessment standards in DOT Order 5610.1C ¶9 as well. *Id.* at 39.

CONCLUSION

Plaintiffs respectfully submit that the defendants' dismissive approach to the Purple Line noise and air pollution concerns, both during the AA/DEIS and FEIS process, and in this Court, as recounted above, does not constitute the minimally sufficient "hard look" that is required under the circumstances. In both cases, defendants were presented with detailed concerns from experts knowledgeably applying technical environmental standards regarding either noise or air pollution. At the least, plaintiffs were entitled to a cogent explanation from defendants that their concerns either lacked merit or why they were of no consequence here. They got neither, and that is a far more glaring failure than merely not considering the issue "with the level of detail [plaintiffs] would have liked" or not "reach[ing] the substantive conclusion [plaintiffs] desired." Opinion at 7. In sum, plaintiffs' Rule 59(e) motion should be granted, and the Court should amend its judgment accordingly.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 26th day of June 2017, a true and correct copy of Plaintiffs' 59 (e) Motion, Memorandum in Support of Plaintiffs' 59 (e) Motion, and proposed Order were electronically filed with the Clerk of the Court using the Cm/ECF system, which will send notification of such to the attorneys of record:

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