

September 28, 2022

Mr. Nicholas Ozburn
U.S. Army Corps of Engineers
Baltimore District
2 Hopkins Plaza
Baltimore, MD 21201
Nicholas.R.Ozburn@usace.army.mil

Mr. Steve Hurt
Maryland Dept. of the Environment
Wetlands and Waterways Program
1800 Washington Blvd., Suite 430
Baltimore, MD 21230-1708
MDE.SHAprojects@maryland.gov

Dear Mr. Ozburn and Mr. Hurt:

Citizens Against Beltway Expansion and DontWiden270.org urge the U.S. Army Corps of Engineers and the Maryland Dept. of the Environment to deny the Joint Permit Application (JPA) submitted for the I-495 and I-270 Managed Lanes Study (USACE Application Number NAB-2018-02152, MDE Tracking Numbers 20-NT-0114/202060649). We have many concerns about the environmental review and impacts of this project, including damage to waterways and wetlands and inadequate mitigation. Many of our concerns are highlighted below.

Statement of Purpose and Need

The purpose and need statement in the JPA reads: “The Phase 1 South project is to develop a travel demand management solution(s) that addresses congestion, and improves trip reliability on I-495 and I-270 within the project area and enhances existing and planned multimodal mobility and connectivity.” However, in the environmental impact statement, the statement of purpose and need included additional detail. The purpose and need statement in the Environmental Impact Statement (EIS) includes the need to “provide additional roadway travel choices” and the goal of “the use of alternative funding approaches for financial viability.”

The need to provide additional roadway travel choices and the goal of using alternative funding approaches unreasonably narrowed the project’s goals and precluded the possibility of addressing congestion by other means. Agencies may not define a project’s “objectives in unreasonably narrow terms.” *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). A purpose and need statement must allow an EIS to be more than a “foreordained formality.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

The U.S. Army Corps of Engineers has an obligation to approve the “least environmentally damaging practicable alternative” of a project proposal. The preferred alternative is not the least environmentally damaging practical alternative to achieve the goals stated in the JPA purpose statement. Rather, a combination of several solutions, such as transit improvements, traffic system management and traffic demand management, including incentives for telework, would achieve the JPA’s purpose and need statement without the environmental damage that would be caused by the proposed toll lanes.

Instead, the purpose and need statement in the EIS improperly limits alternatives to travel demand solutions that are financially profitable to a private sector investor and thereby unlawfully adopts the private interests of potential P3 investors and excludes alternatives that do not meet their specific private objectives. The build alternatives studied as part of the traffic analysis for the EIS included managed lanes to the exclusion of other alternatives and made the environmental review process merely a foreordained formality. Rather than study the best way to address congestion and reliability and pursue those potential solutions, the Maryland Department of Transportation (MDOT) decided it would pursue private financing for additional roadway lanes and then narrowed the solutions to those that would attract investors. An agency “may not circumvent the proscription” against defining its objectives in unreasonably narrow terms “by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives.” *Nat’Parks Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010).

The financial assumptions that underlie the preferred alternative’s purpose and need are inaccurate. The FEIS includes the claim that a P3 is needed because the State “does not have the funds to construct improvements of this magnitude with an estimated cost of approximately \$3.75 to 4.25 billion,” and that the State “does not have enough bonding capacity to take out loans to pay for the improvements.”¹ MDOT has also previously justified eliminating other alternatives based on these claims. But these claims are contradicted by statements made by MDOT State Highway Administration (SHA) indicating that the State can indeed issue new bonds backed by transit revenue streams, like tolls or transit fares, and can seek low-interest federal loans similar to those which concessionaires have access to.² Moreover, the \$1 trillion federal Infrastructure Investment and Jobs Act provides additional resources for transportation infrastructure for Maryland.³ A purpose and need statement premised on false or inaccurate information, such as inaccurate financial assumptions, fails to provide a basis for “informed

¹ [Final Environmental Impact Statement, Executive Summary](#), page ES-21.

² Bruce DePuyt, *Purple Line Will be Delayed as MDOT Seeks Management Solution*, WTOPnews, Sept. 23, 2020,

<https://wtop.com/maryland/2020/09/purple-line-will-be-delayed-as-mdot-seeks-management-solution/>
Katherine Shaver, *Maryland Would Have to Divert Money from Other Projects if Purple Line Builders Quit, State Transit Chief Tells Court*, Washington Post, Sept. 8, 2020,
https://www.washingtonpost.com/local/trafficandcommuting/maryland-would-have-to-divert-money-from-other-projects-if-purple-line-builders-quit-state-transit-chief-tells-court/2020/09/08/85dd149a-ee22-11ea-99a1-71343d03bc29_story.html

³ *Maryland Lawmakers, Bay Advocates React to Late-Night Passage of \$1.2 Trillion US Infrastructure Bill*, Maryland Matters, Nov. 6, 2021,

<https://wtop.com/maryland/2021/11/maryland-lawmakers-bay-advocates-react-to-late-night-passage-of-1-2-trillion-us-infrastructure-bill/> Kevin Kinnally, *Here’s What the Infrastructure Bill Means for Maryland*, Maryland Association of Counties, Nov. 8, 2021,
<https://conduitstreet.mdcounties.org/2021/11/08/heres-what-the-infrastructure-bill-means-for-maryland/>.

evaluation or a reasoned decision,” and therefore does not satisfy NEPA’s requirements. *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983).

Contrary to requirements, MDOT defined the purpose and need in unreasonably narrow terms. The preferred alternative was a foreordained formality that adopted private interests and was based on inaccurate information about the ability to finance the project through traditional public means.

Least Environmentally Damaging Practicable Alternative

MDOT failed to consider policies to increase telework as an alternative to adding private toll lanes, despite studies showing that telework would be effective in reducing congestion. A 2017 study by the Metropolitan Washington Council of Governments determined that incentives to employers to increase telework would have the greatest impact in reducing regional congestion, compared to other alternatives, including the construction of a network of express lanes.⁴ In a study of traffic in the region during the pandemic in 2020, the Maryland Transportation Institute reported that a 5% increase in telework during peak periods would reduce traffic congestion by 32 to 58 percent.⁵

A very small reduction in the number of vehicles on the road during rush hour would substantially reduce congestion. Yet, MDOT dismissed telework stating that commuting trips only made up 20% of DAILY TRAVEL. Not 20% of RUSH HOUR TRIPS, but 20% of ALL TRIPS in a day. MDOT failed to report what share of rush hour trips are commuting trips, but it is no doubt much higher than 20% as it is the period when most people are traveling to and from work. Because MDOT had pre-determined that private toll lanes would be the alternative, it failed to study and provide an honest assessment of the impact that policies to encourage telework would have on reducing congestion and improving trip reliability. Telework incentives combined with the expansion of the MARC train as well as bus rapid transit projects proposed by Montgomery County could be implemented with much less damage to our environment.

Cumulative Impacts

MDOT states in the Final EIS that it has substantially eliminated impacts to parks, waterways, wetlands, forests and other resources because it has scaled back the project. However, this statement is not accurate.

On the opening page of MDOT’s OpLanes website, MDOT presents a map showing the future phases of the I-495/I-270 toll lanes. The map shows that MDOT plans to extend the toll lanes on I-270 from I-370 to I-70 and on the Beltway from the I-270 spur through Prince George’s

⁴ [An Assessment of Regional Initiatives for the National Capital Region, Executive Summary](#), Metropolitan Washington Council of Governments, Transportation Planning Board, December 2017.

⁵ [Analysts: More Telework, Change in Habits Could Dramatically Ease Congestion](#), *Maryland Matters*, Aug. 14, 2020.

County, MD to the Woodrow Wilson Bridge.⁶ In fact, MDOT and the Virginia Department of Transportation (VDOT) are already collaborating on a study of the proposed I-495 Southside Express Lanes which would add toll lanes on I-495 from Springfield, VA to Route 210 in Prince George's County.⁷ Under this plan, VDOT is conducting an Environmental Assessment, rather than a more comprehensive EIS. This reduced level of study could become the template for the extension of the toll lanes in future phases in Prince George's County.

It is clear that MDOT plans to add toll lanes beyond Phase I South. Moreover, as noted by Supplemental Draft EIS comments submitted by the Maryland-National Capital Park and Planning Commission, Phase I South would make congestion more severe on I-270 North, on the inner loop of the top side of the Beltway and on the inner loop of the Beltway in Prince George's County.⁸ These bottlenecks will create pressure to continue to extend toll lanes to relieve this worsened congestion.

MDOT states that it has eliminated impacts to parkland, streams, wetlands, forests and historic resources by scaling the project back to the Phase I South parameters. But the more extensive environmental impacts are not eliminated, they are merely delayed, and must be considered.

Water Impacts

The construction of Phase I South would degrade water quality in Montgomery County. However, the mitigation plan would allow mitigation to take place in the broader HUC 8 watershed level, across all of the Middle Potomac-Catoctin watershed. As a result, impacts of the project could be offset by stream restoration as far away as Jefferson County, WV or Clarke County, VA. The proposed compensatory mitigation measures included in the plan rely heavily on the purchase of credits for the restoration of streams in Frederick County, MD, providing no benefit to streams that will be degraded by the toll lanes. Similarly, the two Montgomery County mitigation projects offered are the Cabin Branch Stream Restoration and Wetland Mitigation Site and the Unnamed Tributary to Great Seneca Creek Restoration Site. Both are located in the Middle Potomac-Catoctin HUC 8 watershed, but not within the Cabin John watershed where the impacts would occur.

The cost of restoration in the watersheds immediately adjacent to the highways may be more expensive. But the concessionaire should pay for improvements to these watersheds rather than making improvements elsewhere.

⁶ <https://oplanesmd.com/>, Maryland Department of Transportation

⁷ [Megaprojects: I-495 Southside Express Lanes Study](#), Virginia Department of Transportation

⁸ [SDEIS Comments submitted by the Maryland-National Capital Park and Planning Commission](#), Nov. 30, 2021, pages 8-9.

Impacts to Moses Hall and Cemetery

In the joint permit application, MDOT claims that the preferred alternative completely avoids the Morningstar Tabernacle No. 88 Moses Hall and Cemetery. This statement is not true.

In its February 2022 comment letter for the Section 106 process, the National Trust for Historic Preservation stated that it joined, “the chorus of other consulting parties who have objected vehemently to the proposed determination that the project will have no adverse effect on the Morningstar Tabernacle No. 88 Moses Hall and Cemetery.”⁹ In its comment letter, the Friends of Moses Hall characterized MDOT’s ground penetrating radar (GPR) investigation as “incomplete.”¹⁰ The Friends of Moses Hall called for a more thorough investigation of the area including further investigation northward to the edge of the highway as well as further east and west. Their comments note that the presences of bamboo and other physical obstacles prevented MDOT from completing the GPR investigation in some areas on the day the investigation was done, but noted that the obstacles could be addressed to allow a more thorough investigation.

MDOT acknowledged that more studies are needed to determine if there are additional burials. In the Section 106 Programmatic Agreement dated May 17, 2022, MDOT SHA commits to conduct further studies prior to final design and construction adjacent to the cemetery. In the Cemeteries and Human Remains Treatment Plan in the Programmatic Agreement, MDOT SHA acknowledges, “there is some potential for human remains associated with the historic properties to be present in at least two areas of the LOD,” (limit of disturbance) including the area adjacent to Morningstar Tabernacle No. 88 Moses Hall and Cemetery.¹¹

In Appendix T of the Final Environmental Impact Statement, MDOT’s response to SDEIS comments submitted by Friends of Moses Hall is that, “The project will be governed by a programmatic agreement, including a treatment plan that specifies the methods, limits and consultation procedures for further investigation of areas with the potential for additional burials outside of the current historic boundary, no specific determination of effects to the Morningstar Tabernacle No. 88 Moses Hall and Cemetery will be made at this time, and will be made following completion of the additional investigations specified in the programmatic agreement and treatment plan.”¹²

As stated at the start, MDOT’s permit application certifies that impacts to Moses Cemetery are avoided. But the truth is that MDOT has not fully investigated the presence of burials and acknowledges this in the Programmatic Agreement of May 17, 2022 and in its response to comments by Friends of Moses Hall in the Final EIS.

⁹ [Section 106 comment letter submitted by the National Trust for Historic Preservation](#), Feb. 3, 2022, page 1.

¹⁰ [Section 106 comment letter submitted by Friends of Moses Hall](#), Feb. 3, 2022, page 1.

¹¹ [Section 106 Programmatic Agreement](#), page 16.

¹² [FEIS Appendix T.2.B, Volume 1](#), page CO-615

MDOT has also made the determination that it is not required to consider cumulative impacts on Moses Hall and Cemetery caused by the original construction of the Beltway, because it occurred prior to the passage of the National Environmental Policy Act and the National Historic Preservation Act. In its February 3 comment letter, the National Trust for Historic Preservation argued that MDOT's unprecedented claim was not consistent with guidance by the Council on Environmental Quality. They went on to state that, "In short, there is absolutely no basis in law or precedent for this attempt to exclude the original construction of the highway from the analysis of cumulative impacts on the Morningstar Tabernacle No. 88 Moses Hall and Cemetery."¹³

Impacts on Plummers Island

The Washington Biologists' Field Club has testified about the impact that the toll lanes project would have on Plummers' Island, a unique 12-acre natural area within the Potomac River Gorge, where numerous rare plant and animal species, and four globally rare plant communities are documented. In their January 19, 2022 letter to the U.S. Army Corps of Engineers, the scientists described adverse impacts to aquatic wildlife, the destruction of a low-forested ridge of bedrock outcrops and rare flora, stream bank and floodplain erosion and destruction of several natural communities and habitats. The toll lanes would have harmful impacts on this island of great scientific interest.

The Toll Lanes Would Not Work

A review of the travel time matrices in Appendix E of Appendix A of the Final EIS shows that those traveling in general purpose lanes during the evening rush hour from the George Washington Memorial Parkway to I-370 will experience a longer commute under the preferred alternative compared with the no-build alternative.¹⁴ In fact, it will take 8 minutes and 54 seconds longer to travel this stretch of the general purpose lanes during the evening peak period. Only those who pay to use the toll lanes will experience a quicker commute. This is not cherry-picked data. This is the actual result for the length of the corridor where construction is planned. After enduring 5 to 6 years of delays from construction, drivers will be rewarded with a worse commute under the preferred alternative. Surely, the least environmentally damaging practicable alternative cannot be one that would actually worsen congestion and reduce trip reliability for the vast majority of commuters.

Concluding Comments

We urge you to deny permits for the I-495/I-270 toll lanes for all the reasons outlined in this letter.

¹³ [Section 106 comments submitted by the National Trust for Historic Preservation](#), Feb. 3, 2022, page 2.

¹⁴ [Appendix E of Appendix A of the Final EIS](#), travel time matrices, electronic pages 723 to 729.

Sincerely,

Barbara Coufal, Co-Chair
Citizens Against Beltway Expansion

Janet Gallant, Co-Coordinator
DontWiden270.org