

STORMWATER PARTNERS NETWORK OF MONTGOMERY COUNTY MARYLAND ADVOCATES FOR SUSTAINABLE TRANSPORTATION & OTHER GROUPS

September 29, 2022

U.S. Army Corps of Engineers Baltimore District
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SUBJECT: USACE Application Number (NAB-2018-02152), MDE Tracking Numbers 20-NT-0114 / 202060649; Public comments on Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland, also known as the Joint Federal/State Permit Application (JPA) for the I-495 & I-270 Managed Lanes Study.
<https://oplanesmd.com/environmental/jpa/>

Dear Mr. Ozburn and Mr. Hurt:

We, members of the Stormwater Partners Network (SWPN) of Montgomery County¹, Maryland Advocates for Sustainable Transportation (MAST)², and other groups, oppose constructing the I-495 & I-270 Managed Lanes Project (Op-Lanes). **Without conceding that the project should move forward at all**, we appreciate the opportunity to comment on the Joint Permit Application (JPA) before the Army Corps of Engineers and the Maryland Department of the Environment, and our comments raise our concerns with the current avoidance, minimization, and compensatory mitigation proposals. We also raise issues and concerns in the public interest, which the Army Corps is obligated to consider.

Our primary concerns, each of which will be discussed in more detail below, are:

- Constructing the Op-Lanes does not best serve the general public interest nor fit the missions of the two permitting agencies.

¹ The Stormwater Partners Network is composed of organizations and individuals who support more effective stormwater policies and management in Montgomery County, MD, with the goal that our waterways are clean, pollution-free, and resilient to the climate crisis, providing healthy, equitable, safe, and thriving green spaces for communities, families, and wildlife. We have worked collaboratively with county and state agencies and legislators to modify existing policies and practices so that they foster water infiltration rather than runoff. A full list of our current 31 organizational members can be found on our website, www.stormwaterpartnersmoco.net.

² MAST is a coalition of advocates concerned by Governor Hogan's plan to expand I-495 & I-270. We believe Maryland's future relies on sustainable transportation, not new highways. <https://mastcoalition.org/>

- The Purpose & Need statement for the project is inappropriately defined in overly economic terms, leading to summary or no consideration of non-highway alternatives such as increased transit investments.
- Cumulative impacts of the Op-Lanes project, including the inevitable desire to develop future planned phases along I-495 in Maryland as well as suburban sprawl induced by additional highway capacity, are inadequately addressed in the Final Environmental Impact Statement and should be considered in the JPA.
- The framework of mitigation (avoid, minimize, compensate) is fundamentally flawed by an early refusal to consider alternatives that would avoid the majority of wetlands, waterways, and forest impacts.
- The compensatory mitigation options proposed in the JPA package are grossly inappropriate to the needs of the impacted resources. Compensatory mitigation is inappropriate in kind (too great a reliance on in-stream restoration of only moderately damaged streams) and in geography (occurring far away from the sub-watersheds that would sustain the most damage, particularly Cabin John Creek).

I. Constructing the Op-Lanes does not best serve the general public interest nor fit the missions of the two permitting agencies.

Interstates 495 and 270 cross many sensitive environmental areas, including extensive streams, wetlands, and significant acreage of floodplain forest and forest buffers, much of which falls in Montgomery County. Because I-495 and I-270 were built before the necessity of managing stormwater runoff was recognized and relevant regulations created by federal, state, and local jurisdictions, these highways now contribute to major flooding when significant precipitation occurs. Additionally, increased noise and air pollution, increased urban heat island effect, along with increased localized flooding, erosion, and poison runoff, are examples of the consequences borne by adjacent communities if these already-huge highways are expanded. When climate disruption such as hotter summers and more-intense precipitation events hits the larger band of pavement that the Op-Lanes project would create, the double-whammy will hit hard on communities. The exacerbation of these issues due to the proposed Interstate expansions must be factored into any consideration of this project.

To have any chance of avoiding increased climate and flooding impacts from new pavement, any new lanes added to either interstate should trigger redevelopment requirements for the existing portions of those road decks. The Stormwater Partners demanded in a 2019 letter to the Maryland General Assembly³ that any comprehensive addition and/or modification of the Beltway and I-270 mitigate stormwater from existing structures as well as any new construction, at least to meet the 50% state mitigation standard. In Montgomery County, construction should meet the “same requirements as new development” standard. This standard has not been met in the FEIS: existing lanes will not have enhanced stormwater mitigation except in small instances negotiated by Montgomery Parks for stormwater outfall enhancements. Therefore the existing roadways will continue to pollute our streams and communities for decades more to come, plus the increased volume of thunderstorms due to climate

³ Stormwater Partners Urges Legislators to Fully Consider Impacts of Stormwater in Beltway & 270 Expansion Planning. February 26, 2019. Available at <https://www.stormwaterpartnersmoco.net/current-recent-campaigns/2019/2/26/stormwater-partners-urges-legislators-to-fully-consider-impacts-of-stormwater-in-beltway-amp-270-expansion-planning>.

change means that even the new segments will frequently overwhelm their stormwater treatment capacity.

These outcomes of the highway expansion project of more pavement, more tree-clearing, and more stormwater runoff are in direct opposition to the primary purposes of both the Army Corps of Engineers and the Maryland Department of the Environment. The mission of the Army Corps is to "deliver vital public and military engineering services; partnering in peace and war to strengthen our nation's security, energize the economy and reduce risks from disasters." Under Section 404 of the Clean Water Act and its historic interest in protecting the Nation's navigable waterways, the Corps has jurisdiction over wetlands & waterways permits nationwide. In Maryland, it shares that jurisdiction with MDE, whose mission is to "protect and restore the environment for the health and well-being of all Marylanders."

Recommendation: The US Army Corps of Engineers and MDE have an obligation to deny the JPA because the proposed project will contribute to more greenhouse gas emissions (which contributes to greater disasters) and more flooding from stormwater runoff, which is contrary to both your agencies' missions.

II. The Purpose & Need for the project is inappropriately defined in overly economic terms, leading to summary or no consideration of non-highway alternatives such as increased transit investments.

The US Army Corps of Engineers has an obligation to only approve the Least Environmentally Damaging Practicable Alternative (or LEDPA) of a project proposal. The Preferred Alternative proposed by MDOT and the Op-Lanes project simply doesn't fit that requirement. In the FEIS the project's Purpose and Need highlighted many notable things, such as improving trip reliability and reducing congestion. These are all admirable goals that we support. However, by including "additional roadway travel choices" in the purpose and need statement, the Agencies foreclosed the possibility of meeting the broader Project goals by other reasonable means, such as transportation system management, transportation demand management (including increased telework), mass transit or multimodal strategies. The purpose and need statement 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 Notice of Intent to prepare the EIS illustrates this problem by stating that "[m]anaged lanes are needed," and "[a]dditional roadway management options are needed."⁴ Based on the purpose and need statement, 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 NEPA process merely a foreordained formality. Rather than study the best way to address congestion and reliability and pursuing those potential solutions, MDOT decided it would pursue private financing and then narrowed the solutions to those that would attract investors. MDOT got it backwards.

We are also quite concerned that 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." FEIS at ES-21. In fact, in the Draft EIS, numerous alternatives were simply excluded from full environmental analysis because they didn't fit that specific *financial*

⁴ Notice of Intent to Prepare Environmental Impact Statement, I-495 & I-270 Managed Lanes Study, 83 Fed. Reg. 11,812 (March 16, 2018).

purpose and need requirement. Exploring options like active traffic management, reversible lanes, encouraging telework, and transit alternatives were all ignored by MDOT from the outset because a concessionaire would not foot the bill for those improvements. However, the financial assumptions that underlie the preferred alternative's purpose and need are inaccurate and 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.⁵ Moreover, the \$1 trillion federal Infrastructure Investment and Jobs Act provides additional resources for transportation infrastructure for Maryland.⁶

In contrast to the FEIS, the JPA does not mention financial viability in the project's purpose and need, which is defined as "to develop a travel demand management solution(s) that addresses congestion and improves trip reliability...and enhances existing and planned multimodal mobility and connectivity." We absolutely agree with that assessment. We should be looking at this project from the lens of improving trip reliability and reducing congestion alone, not predicating the entire conversation around financial viability. Broader objectives were used in some past Maryland studies. For example, the 2004/2005 Capital Beltway Study purpose and need included objectives such as: improve regional mobility; provide enhanced safety; maximize travel operational efficiencies; provide cost-effective transportation infrastructure; and support the area's economic growth and the environment.⁷ When the US Army Corps of Engineers looks at this project through the JPA's purpose and need statement, they will find that the Record of Decision's chosen Preferred Alternative is not the Least Environmentally Damaging Practicable Alternative. Rather, a combination of several solutions, including transit improvements, traffic management, and more, would accomplish this need without the proposed toll lanes.

Recommendation: The US Army Corps of Engineers has an obligation to deny the JPA on the grounds of not considering or achieving the LEDPA, and return the issue to MDOT to re-propose an alternative that does so.

⁵ 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

⁶ *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.mdcountries.org/2021/11/08/heres-what-the-infrastructure-bill-means-for-maryland/>.

⁷ MDOT SHA, *Capital Beltway Study Public Display Boards* (May 6, 2004), https://web.archive.org/web/20170202174503/http://apps.roads.maryland.gov/WebProjectLifeCycle/AW518_11/H_TDOCS/Documents/Informational_Public_Workshop/AW518%20Display%20Boards.FINAL.5-6-04a.pdf

III. Cumulative impacts of the Op-Lanes project are inadequately addressed in the Final Environmental Impact Statement and should be considered in the JPA.

A. Cumulative and indirect effects are not adequately considered in the FEIS

The FEIS does not provide any useful or meaningful evaluation of indirect or cumulative impacts. Many impacts are simply dismissed by statements such as “regulations will minimize impacts” with no further explanation.

Under 32 CFR § 651.16, “NEPA analyses must assess cumulative effects, which are the impact on the environment resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” The I-495 and I-270 P3 managed lane expansion is ONE project, and the ICE analysis boundary map clearly defines the project analysis area from 495 north to I-70. Agencies are required to discuss cumulative effects of a project in the same EIS. The FEIS fails NEPA requirements by focusing on only one phase and ignoring or dismissing other *reasonably foreseeable future* phases of the project.

The FEIS also fails to properly evaluate all other past, present and future impacts from other actions within the ICE analysis area. Numerous transportation projects are listed in the FEIS, but are then dismissed from discussion by stating that no analyses are needed because analyses are included in respective individual studies for those projects. This fails the NEPA requirement to evaluate cumulative impacts of *all past, present and reasonably foreseeable future actions*. Other existing or proposed projects in the ICE such as Watkins Mill Interchange, Newcut Road (Little Seneca Pkwy), Observation Drive, Goshen Road, Muncaster Mill, Snouffer School Road, Wightman Road, Brink Road, and the Metropolitan Grove MDOT facility all should be evaluated for past, present and future effects.

Wetland and stream impacts from the project will require mitigation. SHA has requested possible mitigation sites at numerous forested areas in the Seneca Creek and Muddy Branch watersheds. Recent stream restoration projects in these watersheds have caused extensive deforestation; however, even a well-designed mitigation project causes temporary and permanent environmental impacts. The FEIS cites an unnamed, and possibly incomplete, mitigation bank to provide offsets. It is not clear if this bank exists. The project’s dependence on mitigation banks creates demand for more banks. This effect is not discussed.

Other cumulative and indirect impacts are omitted, or only briefly mentioned. The increase of road surface area will require more road salt, but impacts to freshwater streams, aquifers and drinking water is not mentioned. Trash impacts to surface waters, aquatic life, wildlife, public and private land, and taxpayers is not mentioned. Non-native invasive plants proliferate with land and construction disturbance and increased sunlight exposure, and the loss of over 400 acres of tree canopy shade will invite invasive plant proliferation. This problem is not evaluated except to mention that the developer will create a management plan. The loss of over 400 acres of forest will significantly impact the region’s climate change resilience. Planting young trees cannot replace the carbon sink provided by mature forest. The FEIS acknowledges that flooding from floodplain encroachment, plus increased stormwater runoff from impervious surfaces, could result in more severe flooding, then dismisses impacts as unlikely. Although flooding threatens life and property, the FEIS fails to fully evaluate this threat.

Recommendation: The Army Corps has an obligation to consider the future and cumulative impacts from construction of other pending and reasonably foreseeable infrastructure projects in this permit consideration.

B. This is just Phase I

As many organizations have commented before, MDOT and Federal Highways incorrectly state in the FEIS, and those incorrect statements are repeated in the JPA, that the preferred alternative eliminates a large portion of impacts to national parks, waterways, wetlands, forests, and more. They accomplish this, they claim, by reducing the scope of the proposed highway widening and stopping the project at the 495/270 spur, instead of continuing around I-495. This is a falsehood. MDOT's own website continues to show the widening of 495 from the 270 spur to the Potomac River crossing east of Washington DC as "future phases." These are not eliminated impacts, as they are viewed and discussed in the JPA, but rather future impacts. Approval of one leg of this expansion will eventually predicate the approval of those future phases.

Recommendation: The Army Corps has an obligation to consider the future and cumulative impacts from construction of later Op-Lanes phases in this permit consideration.

C. Additional highway capacity will induce additional sprawl development

Numerous studies have shown that additional highway capacity is strongly correlated with additional highway traffic. One important recent study found a near perfect 1:1 correlation - 10% more highway capacity results in 10% more traffic, with congestion relief vanishing after only 5 years.⁸ The Washington region has already experienced this phenomenon before. Only 8 years after I-270 was widened in 1991, traffic on some segments already exceeded the levels projected for 2010 and one official called it "a rolling parking lot."⁹ Much of the so-called "induced demand" comes from the new ability of home buyers and renters to live farther away from the urban core and have predictable commutes, at least for those first five years, so new sprawl-oriented development projects get greenlit and built, paving away more of our forests, farms, and wetlands for an unsustainable housing model. The induced demand, not only of traffic, but of home-building, is a "reasonably foreseeable" consequence of approving the Op-Lanes project.

Recommendation: The Army Corps has an obligation to consider the future and cumulative land-use impacts from induced sprawl development patterns made possible by temporarily shorter commute times to suburban and exurban regions in this permit consideration.

IV. The framework of mitigation (avoid, minimize, compensate) is fundamentally flawed by an early refusal to consider alternatives that would avoid the majority of wetlands, waterways, and forest impacts.

A. Avoidance and minimization efforts were flawed

Avoidance and minimization efforts, even within the scope of the trimmed-down (and misleading) Phase I, have been woefully inadequate. Why was a double-decker American Legion Bridge not considered? That could have avoided and minimized most of the significant forest and wetland impacts on Plummer's

⁸ Kent Hymel, If you build it, they will drive: Measuring induced demand for vehicle travel in urban areas, Transport Policy, Volume 76, 2019, Pages 57-66, ISSN 0967-070X, <https://doi.org/10.1016/j.tranpol.2018.12.006>. (<https://www.sciencedirect.com/science/article/pii/S0967070X18301720>);

⁹ Alan Sipress. "MD's Lesson: Widen the Roads, Drivers Will Come." Washington Post, page B1. January 4, 1999.

Island, the Potomac River itself, the C&O Canal, and both the Virginia and Maryland approach areas, which impacts are further described below. **Without adequately examining such an option, the Corps and MDE have no basis to evaluate the sufficiency of avoidance and minimization in that area of the project.**

1. Impacts to the northern long-eared and tri-colored bats

The highway expansion project would impose detrimental impacts to the northern long eared bat. In the Avoidance, Minimization, and Impacts Report (FINAL AMR_ JULY 2022 - PAGE 20)¹⁰ under section 2.3.3 it mentions that the “northern long eared bat (NLEB) is a federally threatened species” and would be impacted by the Limits of Disturbance. Although 11 areas have been excluded which are habitat of the bat, this still poses a risk to the long-term survival of the species, which is already threatened by white-nose syndrome, climate change, and habitat loss.¹¹ Because of the summer habitat loss, the US Fish and Wildlife Service announced on March 22, 2022¹² a proposal to reclassify the northern long eared bat from threatened to endangered under the US Endangered Species Act which means the species is “currently in danger of extinction.”¹³

Furthermore, there is a second bat in the area, the tri-colored bat, that the US Fish and Wildlife Services is proposing to reclassify from threatened to endangered.¹⁴ The FEIS notes that the tricolor bat was detected in surveys in Virginia. The FEIS p 5-126 states that there is a high likelihood of roost trees for this species within the LOD. Removal of these trees outside of roosting season will indirectly impact the species through permanent loss of habitat.

2. Impacts to tree and forest ecosystems

The highway expansion project would impose irreversible damage by the projected and unavoidable tree and forest ecosystem loss. In appendix C of the JPA’s Natural Resources Inventory Map it shows significant forest loss around the American Legion Bridge (ALB) on both the MD and VA sides; in total, 11 to 13 acres of forest canopy would be lost.^{15,16} Most of this forest canopy is part of the very important migratory bird routes which use forests along stream and forest banks as safety flyways and habitat zones. The Potomac River / C&O Canal and surrounding forested areas are one of the region’s Important Bird Areas (IBA)¹⁷ for forest interior dwelling species (FIDS).

¹⁰ Avoidance, Minimization, and Impacts Report. OpLanes MD. July 2022. Available at:

https://oplanesmd.com/wp-content/uploads/2022/07/Final_AMR_July2022.pdf

¹¹ Northern Long-eared Bat. US Fish & Wildlife Service. Other sources of mortality: Available at:

<https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis>

¹² Northern Long-eared Bat. US Fish & Wildlife Service. Available at:

<https://www.fws.gov/species/northern-long-eared-bat-myotis-septentrionalis>

¹³ Northern Long-eared Bat Uplisting Proposed Rule. US Fish & Wildlife Service. Available at:

<https://www.fws.gov/media/frequently-asked-questions-northern-long-eared-bat-uplisting-proposed-rule>

¹⁴ Tri-colored bat uplisting proposed rule. US Fish & Wildlife Service Available at:

<https://www.fws.gov/press-release/2022-09/proposal-list-tricolored-bat-endangered>

¹⁵ Avoidance, Minimization, and Impacts Report. OpLanes MD. July 2022. Page 7. Available at:

https://oplanesmd.com/wp-content/uploads/2022/07/Final_AMR_July2022.pdf

¹⁶ Appendix C – Natural Resources Inventory Map. OpLanes MD. July 2022. Page 7. Available at:

<https://oplanesmd.com/wp-content/uploads/2022/07/App-C-Natural-Resources-Inventory-Mapbook.pdf>

¹⁷ Maryland Important Bird Areas. Available at: <https://www.audubon.org/important-bird-areas/state/maryland>

3. Impacts to Cabin John and Seneca Creek watersheds

The highway expansion will impose irreversible impacts to both Cabin John Creek (where the majority of the forest, stream, and wetland impacts from construction will take place) and Seneca Creek's forests and watersheds, where part of the compensatory mitigation projects will take place. Forests are critical natural infrastructure that have multiple co-benefits. Forests purify our air and water, reduce urban heat, serve as habitats for wildlife, reduce stormwater run-off, reduce stress levels, connect communities, and much more. The 401 Water Quality Certification Request document on page 23 says that the "forest impacts in Maryland would total 461.85 acres within the Washington Metropolitan Watershed (MDE 6-Digit Watershed 021402)" and there will be "unavoidable impacts to forests."¹⁸ In an era of climate change where we need to protect our last remaining forests to reduce run off, lower temperatures, filter our air and water, and overall improve the health and well-being of people and wildlife,^{19,20} it simply does not make sense to take down trees to put up roads and pave away our health and future. Maryland would not be able to meet its ambitious greenhouse gas reduction goals of reducing its emission to 60% by 2031 and becoming carbon neutral by 2045 if it moves forward with the Beltway highway expansion.²¹ Similarly, if Maryland keeps taking down its trees it will not meet its ambitious goal of planting 5 million trees by 2031.²²

Besides trees and forests, the waterway impacts to Cabin John Creek in particular are egregious and will deliver a horrible blow to an already struggling, but highly valued, stream. The most recent Montgomery County Watershed Assessment for Cabin John Creek²³ finds that the watershed is currently 26% impervious and identifies several Priority Catchments (for restoration and stormwater management) and Priority Conservation Areas ("these areas could potentially benefit from certain restoration techniques or could potentially be areas to avoid, to minimize disturbance and protect the resources present."²⁴). A map of these priority areas is included on the following page of these comments.

There are 19 restored streams in the Cabin John Creek Watershed, per the Cabin John Creek Watershed Assessment Summary Document.²⁵ About one-third (6) of these are downstream from impacts that would be caused by the highway expansion. These restorations will be at risk of being damaged or destroyed by stormwater runoff from the highway expansion, especially in cases where the new runoff is not being fully treated on-site.

¹⁸ 401 Water Quality Certification Request. OpLanes MD. July 2022. Page 23. Available at: https://oplanesmd.com/wp-content/uploads/2022/07/P1S_WQCert_20220628_final.pdf

¹⁹ Eliza Cava. 2019. Climate change makes the pavement problem worse...trees are the best medicine! ANS Conservation Blog. Available at: <http://conservationblog.anshome.org/blog/climate-change-makes-the-pavement-problem-worse-trees-are-the-best-medicine/>

²⁰ ANS Naturalist Quarterly Autumn 2020. Available at: <https://anshome.org/wp-content/uploads/2020/09/NQ-Autumn-2020.pdf>

²¹ Climate solutions Act of 2022 (SB528). April 2022. Available at: <https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/sb0528?ys=2022RS>

²² Tree solutions Now Act of 2021 (HB991). April 2021. Available at: <https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB0991>

²³ Montgomery County Department of Environmental Protection. October 2018. Cabin John Creek Watershed Assessment Summary Document. Available at: <https://www.montgomerycountymd.gov/water/Resources/Files/stormwater/implementation-strategy/cabin-john-summary.pdf>

²⁴ Id at 5.

²⁵ Id at 11, figure 2.3.

The Cabin John Creek Watershed has Total Maximum Daily Loads for sediment and fecal bacteria, and the county is required to reduce levels of each under the state’s MS4 permit. The highway expansion impacts are highly likely to increase sediment loads in the watershed, undermining efforts by the county and watershed residents to reduce sediment in these streams.²⁶

Two of our signatories, Audubon Naturalist Society and Friends of Cabin John Creek, have been conducting community-science macroinvertebrate monitoring at Cabin John since 2019. We have seen its Benthic Index of Biotic Integrity scores improve from 1.29 (Poor) to 2.14 (Fair) over that time period. The dedicated citizens of Friends of Cabin John Creek have received thousands of dollars in state and county grants to install and promote rain gardens, green roofs, and bioswales to better manage stormwater and protect the health of their stream and the Chesapeake Bay. Now, with nearly all of the stream, wetland, and buffer impact from the highway expansion taking place in the Cabin John watershed, that progress and those investments will be at grave risk.

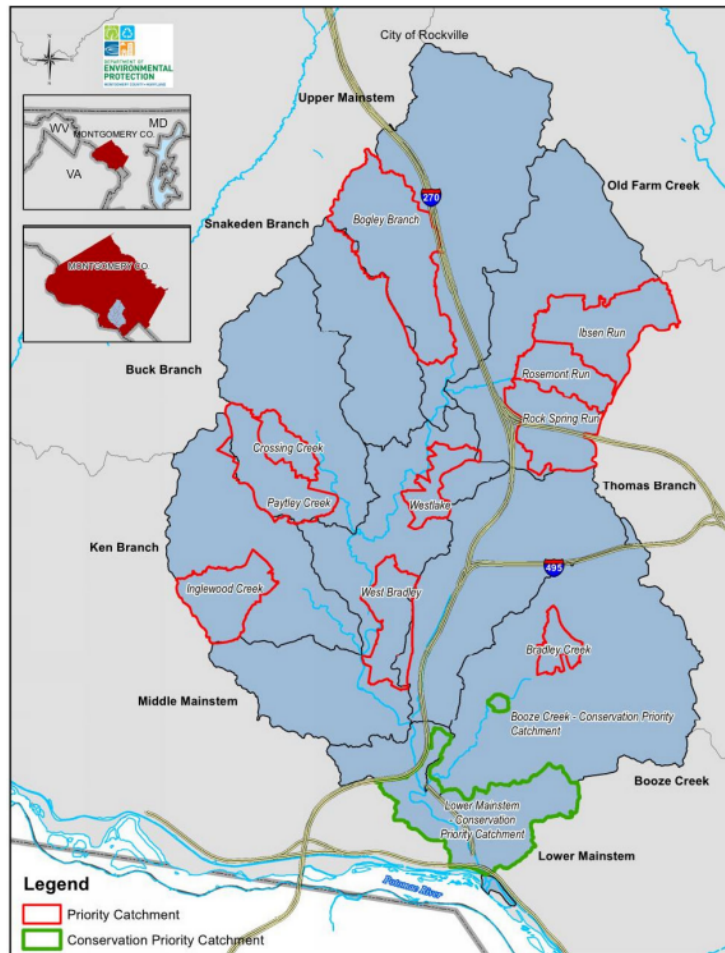


Figure 2.2: The Cabin John Creek Watershed Priority Catchments and Conservation Priority Catchments

Recommendation: These impacts, and MDOT’s refusal to consider non-highway alternatives that would have avoided and minimized them, mean that the compensatory mitigation framework is fundamentally flawed. The Corps and MDE should not approve the JPA without adequate consideration of a full range of alternatives in the NEPA process, which has not yet been done.

V. The compensatory mitigation options proposed in the JPA package are grossly inappropriate to the needs of the impacted resources.

A. The compensatory mitigation package relies too heavily on “in-kind” stream and wetland restorations and should instead prioritize upland stormwater management to address the root causes of stream degradation

For “unavoidable” impacts in Cabin John Creek watershed, the JPA package proposes compensatory mitigation projects of stream and wetland restoration at three sites: RFP-2 (referred to in the JPA as

²⁶ Id. at 17.

“Cabin John Branch”, but running through the Montgomery Village former golf course and a tributary of Great Seneca Creek), CA-5 (Quince Orchard Regional Park, referred to as “Unnamed tributary to Great Seneca Creek”), and the RES “Evenflow mitigation site” located on 100 acres of the North Fork of Linganore Creek in Frederick County.²⁷ All have both wetland and stream mitigation credits associated with them. These mitigation options do not adequately compensate for the impacted resources.

1. Stream restoration may or may not be an appropriate mitigation tool at all

While our signatories have differing opinions on whether stream or wetland restoration projects are ever appropriate, we all agree they should a) be done only within the context of a watershed management plan that prioritizes alternative approaches to address the root causes of stormwater management, b) they should minimize tree loss, and c) should not equate rural with urban or suburban streams. The proposed stream mitigation projects appear to violate each of those principles.

- a) As described above in Section IV of this letter, Cabin John Creek, where the impacts will take place, has a watershed implementation plan and recent watershed assessment in place. Impacts within that HUC-12 watershed should be mitigated in accordance with its own watershed implementation plan, no matter who is proposing the impacts and mitigation. Not doing so violates our first shared principle.
- b) Tree loss is an unavoidable element of most stream restoration projects, and in our experience in the Seneca Creek watershed (e.g. the [Solitaire Court stream restoration](#)) it has been disproportionate to the potential value of the restoration. One member of West Montgomery Citizens Association visited both the RFP-2 and CA-5 sites. He found that the stream valleys were nicely wooded and found that while there was bank erosion, it was not worse than other area streams, typical for suburban streams, and could be better addressed by out of stream valley storm water mitigation rather than through stream restoration. **Seneca Creek Watershed Partners do not recommend singling these areas out for restoration.**
- c) The Evenflow site in Frederick County is rural, with its stream banks disconnected from their floodplains due to “high channel incision” and situated in a “highly agricultural watershed.”²⁸ While no doubt credits can be generated much more cheaply by excluding livestock from streams, stabilizing banks, and reconnecting the channels to their floodplains in a largely deforested/old field environment, these credits do not benefit the impacted suburban Cabin John Creek watershed at all. We discuss this issue further in Section V.B., below.

2. Stream restorations without significant upland stormwater management may not be self-sustaining, violating the Federal Mitigation Rule

In addition to the principles of whether or how stream restorations may be appropriate to attempt, there are other problems with them in this case. According to the Federal Mitigation Rule, “(2) ...mitigation banks and in-lieu fee project sites must be planned and designed to be self-sustaining over

²⁷ Army Corps of Engineers, 2020. Public Notice 20-35 NAB-2020-00172 (RES MD UMBI - Even Flow Mitigation Bank) Frederick. Available at: <https://www.nab.usace.army.mil/Missions/Regulatory/Public-Notices/Public-Notice-View/Article/2219960/pn-20-35-nab-2020-00172-res-md-umbi-even-flow-mitigation-bankfrederick/>.

²⁸ RES and RK&K, 2020. Final Prospectus: UMBI Addendum No. 1. RES Even Flow Mitigation Site. Available at: https://ribits.ops.usace.army.mil/ords/f?p=107:0:5019783087497:APPLICATION_PROCESS=AP_DB_DOC:::AI_STRIN_G,AI_ID:inline,80181.

time...” (Mitigation Rule, p. 19680²⁹). Where the proposed mitigation projects are in-stream “traditional” stream restoration projects without extensive upland stormwater management designed in accordance with a watershed plan, they are neither permanent nor self-sustaining projects since the root cause of the stream erosion, which is stormwater fire-hosing into streams from upland, is not addressed.

3. Biological uplift is necessary, yet extremely difficult to achieve and document

The Mitigation Rule requires that “the measure of aquatic functions is based on the resources restored, established, enhanced, or preserved”³⁰ and the JPA package purports to demonstrate that through the purchase of credits and restoring of specific acres and linear feet, uplift of these functions will be achieved. However, the scientific literature has not shown that “in-kind” activities can fully recreate the lost biological functionality of destroyed or degraded streams and wetlands. These projects and claims should be approached with great care and skepticism to ensure that only the places *most* in need of restoration, and *most* proximate to the sites of impact, are restored.

And these sites should be monitored for a very long time, however the vendor, in RFP-2 Mitigation Plan (p.7) states that “...starting in Year 5 if the site meets all final performance standards for at least two (2) consecutive years the Permittee may request termination of addition monitoring.” In CA-5 Mitigation Plan (p. 20), the vendor states the same thing. **MDE and The Corps should reject this out of hand and explicitly require that the Permittee will be required to monitor for the full ten years.**

Recommendation: Instead of only “in-kind” stream restoration projects, the Corps and MDE should require the vendor to propose “out-of-kind” upland stormwater control mitigation projects that are consistent with watershed management plans. A complete list of out-of-stream stormwater control practices, including bioretentions, permeable pavement, conservation landscaping, etc., can be found in MDE’s Accounting Guidance³¹ for MS4 Permits. The preferred primary locations for upland stormwater control should be in the same HUC-12 subwatershed or HUC-10 watershed as the project. Suboptimal locations would be in different watersheds or at the HUC-8 scale.

B. Compensatory mitigation plans are too far removed from the watersheds where impacts would occur

We have significant concerns about the amount of proposed compensatory mitigation that would be situated far from the impact it’s meant to mitigate. The Op-Lanes project has decided to manage its mitigation at the HUC-8 watershed level, across all of the Middle Potomac-Catoctin watershed. This means that impacts from this project – nearly all of which are in Montgomery County – could be offset by restoration work in places as far away as Jefferson County, WV or Clarke County, VA. In fact, the proposed suite of compensatory mitigation relies heavily on the purchase of credits from a stream

²⁹ Federal Register, Thursday, April 10, 2008, Part II, Department of Defense, Department of the Army, Corps of Engineers: 33 CFR Parts 325 and 332; Environmental Protection Agency: 40 CFR Part 230; Compensatory Mitigation for Losses of Aquatic Resources; Final Rule (aka Federal Register / Vol. 73, No. 70 / Thursday, April 10, 2008 / Rules and Regulations) (hereafter referred to as the “Mitigation Rule”) (https://www.epa.gov/sites/default/files/2015-03/documents/2008_04_10_wetlands_wetlands_mitigation_final_rule_4_10_08.pdf)

³⁰ Id at §332.2.

³¹

<https://mde.maryland.gov/programs/water/StormwaterManagementProgram/Documents/Final%20Determination%20Dox%20N5%202021/MS4%20Accounting%20Guidance%20FINAL%2011%2005%202021.pdf>

restoration bank in Frederick County's Lower Monocacy watershed.³² From a watershed perspective, the places where the highway will create degradation to water quality will derive no benefits from mitigation that occurs in the Catoctin watershed. These watersheds in Montgomery County will continue to decline, while restoration is offered to areas in Frederick County.

Similarly, the two in-county mitigation projects offered are Cabin Branch Stream Restoration and Wetland Mitigation Site (RFP-2) and the Unnamed Tributary to Great Seneca Creek Stream Restoration Site (CA-5). Both mitigation sites are located in the Middle Potomac-Catoctin HUC-8 (02070008) watershed in Montgomery County, but not within either the Difficult Run-Potomac River HUC-10 (0207000810) or Cabin John Creek HUC-12 (020700081003) where the impacts will occur as described in the section above. **Stormwater Partners Network has always advocated strongly that mitigation investments should occur as close as possible to the point of impact, in the smallest possible same watershed, ideally HUC-12.**

Due to higher cost of land and the amount of infrastructure already enmeshed with our watersheds, the cost of restoration is often greater in the watersheds impacted by this project, and we understand that that higher cost likely resulted in the permit applicant's striking a number of down-county mitigation options. But when considered as a portion of the entire project cost – estimated at billions – the cost is miniscule. An expanded I-270's significant stormwater runoff and damage to Montgomery County's streams will inevitably create flooding here, will further degrade stream quality, and diminish the beautiful stream valleys that have drawn so many of us to this area. Why should we all bear that cost down the line, rather than expecting the private operator of this massive project to make a small investment now to seek to avoid that?

Recommendation: Under the Mitigation Rule, the Army Corps has great latitude in where to require compensatory mitigation to occur. The Corps should require that the applicant mitigate their impacts in the same HUC-12 or, at largest, HUC-10 sub-watersheds where the impacts occur.

³² Note: We believe that the stream and restoration credits sold by the RES Even Flow mitigation site may have been improperly solicited and contracted by the State Highways Administration (SHA) as per agreement of the Board of Public Works (BPW). These credits were generated pursuant to public solicitation number AZ0485172, issued April 16, 2019. The solicitation RFP can be downloaded at https://emma.maryland.gov/bare.aspx/en/fil/download_public/F1A03550-6070-4D5B-93B3-EA782222735B?file_context%5Bbrfp%5D=14163. This RFP requested 91,000 linear feet (more than 17 miles) of stream restoration credits, as well as wetland mitigation credits. The RFP explicitly stated that it was NOT for P3 work at that time, but that some portion of the contracts let under the RFP may in the future be reassigned to the P3 (this is described in Section 2.2 Background and Purpose). However, the entirety of the watersheds described where credits might be needed encompass those where the original multi-phase P3 highway expansion would take place; and the RFP procurement officer was Lisa Choplin, Director of the I-495 & I-270 P3 Office at the time. However, in their June 5th vote in response to compromise amendments submitted by Comptroller Peter Franchot, the Maryland Board of Public Works specified that "No property acquisitions related to Traffic Relief Plan may take place before BPW final approval of the P3 agreement." June 5, 2019 BPW agenda, page 192, <https://bpw.maryland.gov/MeetingDocs/2019-Jun-5-Agenda.pdf>. **We believe that SHA violated the BPW's directive by a) closing this contract issuance after the June 5th vote and b) offering this RFP as SHA the agency, not the P3 the project, but with the option to transfer later to the P3.**

VI. Conclusion

The Army Corps and MDE should not approve the Joint Permit Application for wetlands & waterways for the Op-Lanes Project for the following reasons:

- Constructing the Op-Lanes does not best serve the general public interest nor fit the missions of the two permitting agencies.
- The Purpose & Need statement for the project is inappropriately defined in overly economic terms, leading to summary or no consideration of non-highway alternatives such as increased transit investments.
- Cumulative impacts of the Op-Lanes project, including the inevitable desire to develop future planned phases along I-495 in Maryland as well as suburban sprawl induced by additional highway capacity, are inadequately addressed in the Final Environmental Impact Statement and should be considered in the JPA.
- The framework of mitigation (avoid, minimize, compensate) is fundamentally flawed by an early refusal to consider alternatives that would avoid the majority of wetlands, waterways, and forest impacts.
- The compensatory mitigation options proposed in the JPA package are grossly inappropriate to the needs of the impacted resources. Compensatory mitigation is inappropriate in kind (too great a reliance on in-stream restoration of only moderately damaged streams) and in geography (occurring far away from the sub-watersheds that would sustain the most damage, particularly Cabin John Creek).

We thank the agencies for considering our comments.

If you have questions or comments about our position or concerns, please contact Eliza Cava, Director of Conservation, Audubon Naturalist Society, and co-chair of Stormwater Partners Network, at eliza.cava@anshome.org or 202-503-9141.

Sincerely,

Alice Ferguson Foundation
Audubon Naturalist Society (SWPN) (MAST)
Catoctin Land Trust
Chapman Forest Foundation
Chesapeake Legal Alliance
Citizens Against Beltway Expansion
Cleanwater Linganore Inc
Coalition for Smarter Growth (MAST)
Conservation Montgomery (SWPN)
DontWiden270.org
Friends of Cabin John Creek (SWPN)
Friends of Sligo Creek (SWPN) (MAST)
Honor the Earth
Indivisible HoCo MD
Maryland Conservation Council

Mattawoman Watershed Society
MLC Climate Justice Wing (MAST)
National Parks Conservation Association (MAST)
Neighbors of the Northwest Branch (SWPN) (MAST)
Potomac Conservancy (SWPN)
Rock Creek Conservancy (SWPN)
Seneca Creek Watershed Partners (SWPN)
Sierra Club Maryland Chapter (SWPN) (MAST)
Takoma Park Mobilization Environment Committee
TAME Coalition
Waterkeepers Chesapeake
West Montgomery County Citizens Association (SWPN)