



September 28, 2022

U.S. Army Corps of Engineers Baltimore District
Attn: Mr. Nicholas Ozburn
2 Hopkins Plaza
Baltimore, MD 21201

Maryland Department of the Environment
Attn: Mr. Steve Hurt
Wetlands and Waterways Program
1800 Washington Blvd.
Suite 430
Baltimore, MD 21230-1708

Re: MDOT I-495/I-270 Managed Lane Study : USACE Application Number NAB-2018-02152 and MDE Tracking Numbers 20-NT-0114/202060649

Dear Mr. Ozburn and Mr. Hurt

I write on behalf of the Northern Virginia Citizens Association to object to the proposed Clean Water Act ("CWA") §401 Water Quality Certification and the Joint Federal/State Application for the Alteration of any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland (JPA).

In brief, development of the I-495/I-270 Managed Lane Study ("MLSO") by Maryland and Virginia together has been a giant "BAIT-AND-SWITCH" scheme whereby extreme adverse effects on the Live Oak Drive community in Northern Virginia are hidden, with both Virginia and Maryland using each other as cover so that the environmental impacts to this community need never be considered or addressed.

In so doing, the agencies have violated multiple federal laws including, but not limited to, the Clean Water Act, the National Environmental Policy Act, the Bald and Golden Eagle Protection Act¹, the National Historic Preservation Act and the Administrative Procedure Act. We urge you to deny the JPA and the CWA §401 Water Quality Certification Applications unless and until Maryland thoroughly analyzes **and mitigates** the impacts of its planned construction in Northern Virginia.

For example, the specific regulatory action at issue here illustrates the problem – and how the residents of Live Oak Drive have been prevented any opportunity to have our concerns addressed. ***The JPA and the CWA §401 certification address only impacts in Maryland. But Maryland is building the portion of the MLS I in Virginia that will impact the Live Oak Drive community in Virginia***, as evidenced by documentation in the JPA permit file.²

Virginia claims no responsibility for this construction because it will be done by Maryland. But because the activity is occurring in Virginia, and not Maryland, MDOT too neglects to consider the impacts.

The problem facing our neighborhood is amply illustrated by a review of Appendix A to the CWA §401 Certification Request: “Names and Addresses of Adjacent Property Owners.”³ That 16-page list includes hundreds (perhaps thousands) of properties that may be impacted by the project – ***but not a single address in Virginia, even though Maryland will be constructing giant flyover ramps in Virginia that will impact the Live Oaks community.***

We have previously endeavored to persuade MDOT and VDOT to meet with our community and to address our concerns, to no avail. Accordingly, we reiterate our concerns here and again request mitigation to address clear Clean Water Act violations, as well as other environmental issues. We offer specific recommendations that would address these concerns. And we welcome the opportunity to meet with you to discuss these issues.

¹ With respect to the Bald and Golden Eagle Protection Act, we note that the statute authorizes both civil and criminal penalties, including for employees of state agencies or their contractors. See 50 C.F.R. §22.6 (definition of “person”).

² See, e.g., JPA Appendix A at pp. 3-7 (showing wetlands impacts in the Live Oak Drive community of Northern Virginia) (Available at [ArcGIS \(oplanesmd.com\)](https://www.oplanesmd.com/ArcGIS)).

³ Available at [Appendix-A_Names-and-Addresses-of-Adjacent-Property-Owners_20220711.pdf \(oplanesmd.com\)](https://www.oplanesmd.com/Appendix-A_Names-and-Addresses-of-Adjacent-Property-Owners_20220711.pdf).

Below, we provide a more detailed discussion of our concerns, and the reasons why the JPA and the CWA §401 Water Quality Certification should be denied.

Clean Water Act. We assume that both VDOT and MDOT are fully aware of – and will be in compliance with – all of their obligations to mitigate stormwater pollution from major construction projects. See, e.g., 33 U.S.C. §1342(p) (requiring permits for certain types of stormwater discharges); 40 C.F.R. §122.26(a)(1)(ii) (requiring permits to discharge stormwater “associated with industrial activity”); 40 C.F.R. §122.26(b)(14)(x) (defining “storm water discharge associated with industrial activity” to include construction projects that will disturb more than five acres of land); EPA, 2022 Nationwide Construction General Permit for Stormwater Discharges from Construction Activities (requiring, among other things, a Stormwater Pollution Prevention Plan (SWPPP); erosion and sediment controls and pollution prevention practices throughout the entire construction project; and regular inspections by a “qualified person” to verify compliance with permit) (available at <https://www.epa.gov/npdes/2022-construction-general-permit-cgp>).

Those requirements for construction activities, however, are not the only Clean Water Act (CWA) requirements applicable here. As MDOT and VDOT should know, the waterbodies near and over which the I-495 expansion project will occur are on the Maryland CWA “Section 303(d)” list of impaired water bodies that do not meet applicable Water Quality Standards (WQS).⁴ See 33 U.S.C. §1313(d) (“identification of areas with insufficient controls”). Maryland has identified the region of the Potomac River by the American Legion Bridge as being “water quality-impaired” for Total Suspended Solids (sediments or “TSS”, which come primarily from erosion), nutrients (nitrogen and phosphorus, which come primarily from fertilizers and wastewater treatment systems, including septic systems), chlorides and sulfates (which can come from road de-icing and roadway runoff). See Maryland Department of the Environment, Maryland Water Quality Assessment Interactive Map (available at [Water Quality Assessments \(IR\) and TMDLs \(state.md.us\)](https://www.mde.state.md.us/WaterQualityAssessments/IRandTMDLs)). Although Maryland in 2012 issued Total Maximum Daily Loads (TMDLs, regulations limiting the amount of pollutant loadings allowed in a specific area) for sediments and nutrients for this segment of the Potomac, this area still has not come into compliance with the applicable WQS. See Maryland Department of the Environment, TMDLs and Water Quality Plans for the Potomac River Montgomery County (available at [Potomac River Montgomery County \(maryland.gov\)](https://www.mde.state.md.us/WaterQualityAssessments/PotomacRiverMontgomeryCounty)); Maryland Department of the Environment, Maryland Water Quality Assessment

⁴ As you are aware, jurisdictionally, the Potomac River belongs to Maryland. The Maryland-Virginia State border is at the Virginia side of the banks of the Potomac.

Interactive Map (showing that, in 2022, this area of the Potomac is still listed as “303(d)-impaired” for sediments and nutrients). Moreover, Maryland has not yet developed TMDLs for chlorides and sulfates.

The Potomac River drains directly to the Chesapeake Bay, which is itself severely water quality-impaired and subject to its own TMDLs – which in turn reach upstream to where the I-495 expansion will take place, and beyond. Indeed, the CWA itself established the Chesapeake Bay Program, based in part upon the “diminished” water quality of the Bay that resulted from “pollution” and “excessive sedimentation.” See 33 U.S.C. §1267. Both Maryland and Virginia are members of the Chesapeake Bay Program partnership, and are subject to its Accountability Framework should they fail to meet the pollutant loadings mandated in their jurisdictions. By 2025, that framework requires, among other things, a 25% reduction in nitrogen loadings and a 20% reduction in sediment loadings, as compared to 2009. See, e.g., Chesapeake Bay TMDL Fact Sheet (available at <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-fact-sheet>); EPA, Chesapeake Bay TMDL (available at <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document>).

Unfortunately, the current VDOT-MDOT plan for the Live Oak Drive community portion of the I-495 expansion project will only exacerbate the water quality issues in the area – as well as making it highly unlikely that either state can achieve its obligations under the Chesapeake Bay Program partnership.

The Project will more than double the current square footage of impervious surface as compared to the existing eight-lane Beltway. Yet VDOT has exempted the existing Beltway from its stormwater mitigation requirements and traded 80% of the credits for the new surface mitigation – using credits from elsewhere in the Commonwealth that will provide *no actual pollutant mitigation in the area actually affected* – notwithstanding the fact that surface water in the area of the American Legion Bridge is already impaired. To be clear, what VDOT has done is to trade away most of the mitigation for water quality in this area, such that mitigation will only be required for 20% of the volume flowing from the doubling of the impervious area around the American Legion Bridge. And the addition of ramps at the interchange will only increase surface water runoff. Moreover, the current preliminary figures indicate that Virginia has already exceeded its allowable pollutant loadings on the 20% of the roadway they are required to address. Indeed, Fairfax County is already recording a 2% increase in salinity annually in streams and watershed adjacent to the project – *before project construction has even begun*. Nor have we located anything in the administrative record for this action to demonstrate that MDOT has done **anything**

beyond what VDOT has done (*i.e.*, virtually nothing) to address these stormwater impacts.

VDOT and MDOT further exacerbate the water quality issues in the Scotts Run/Live Oak Drive community by consolidating the stormwater infrastructure down to a mere three pond locations, ponds which are indisputably inadequate to handle the increased runoff from the doubling of impervious surfaces. The net result is that all of this additional stormwater runoff will drain directly into the Scotts Run/Live Oak Drive community. Yet Live Oak Drive is one of the few remaining areas of McLean that still relies on septic systems for wastewater treatment. Indeed, much of the non-wooded area in the community is comprised of the septic fields needed to treat the residential sewage. These additional stormwater loadings, to the extent that they do not simply runoff and contaminate nearby streams and the Potomac, will infiltrate in and around the septic fields, shortening the life of those systems (at a bare minimum) and, more significantly, risking system failure with accompanying heightened nutrient loadings to nearby streams and the Potomac itself. Of course, any such heightened nutrient loadings will also reach the Chesapeake Bay, further hindering the restoration of the Bay.⁵ Nowhere in the administrative record does MDOT acknowledge or propose to mitigate these impacts.

The Live Oak Drive community already experiences significant stream erosion from I-495 runoff, which in turn has caused substantial tree loss. *Moving Live Oak Drive, eliminating all trees from the border between Live Oak Drive and I-495, and moving the flyover ramps closer to Live Oak Drive*, will result in the bulk of the project's increased stormwater loadings channeling into and through the community. In so doing, VDOT and MDOT will significantly exacerbate the erosion that already contributes significant TSS loadings to the Potomac. It is undisputed that, "The majority of runoff from the new lanes will be piped directly to Scotts Run stream or the Potomac River with no detention, worsening downstream flooding and erosion along Scott's Run." Letter from Leanna H. O'Donnell, Fairfax County Department of Planning and Development to Martha Coello, Fairfax County Department of Transportation, "I-495 Express Lanes Northern Extension Project Environmental Assessment), p. 2 (February 12, 2021).

VDOT responds with the unsupported – and illogical – assertion that "The proposed drainage features will result in a reduction in water quantity as water leaves the 495

⁵ We acknowledge that VDOT has purchased mitigation credits which may partially offset the nutrient impacts to the Chesapeake Bay. These offsets, however, come from a different part of the state and thus will do *nothing* to mitigate the water quality impacts of this project on the Potomac, which also fails to meet WQS and is subject to TMDLs.

roadway, as well as improvement in water quality, when compared with conditions that exist today.” *Id.* That is absurd. As noted above, the addition of **four** new express lanes along with five new flyover ramps will double the amount of impervious surface in the area as compared to existing conditions. The addition of the new stormwater retention basins cannot begin to hold the new influx of water. The only way VDOT could reach such a conclusion – particularly with respect to Scotts Run and the Live Oak Drive community – was by completely ignoring the impact that **MDOT’s** construction will have in **Virginia** – or perhaps by pretending, notwithstanding all factual evidence to the contrary, that buying mitigation credits elsewhere in Virginia will somehow improve water quality here. But VDOT cannot simply wish away its obligations under the CWA by pretending that they are solely MDOT’s responsibility (and, for the reasons discussed above and in Appendix B, ignoring these cumulative impacts was a blatant violation of NEPA).

Absurd though their response is, at least VDOT responded. **MDOT has offered no response at all.** We are not surprised. MDOT’s constituents do not live in Virginia, and MDOT has made it abundantly clear that it cares not one bit about the impacts its actions will impose on Virginia residents.

Indeed, when the County pointed out that the project will generate **3,000** feet of stream impacts, much of it in the Scotts Run area, and requested mitigation, VDOT cavalierly and dismissively responded that “Scotts Run is already significantly degraded.” *Id.* And MDOT, of course, did not respond at all. The CWA, however, requires that states take measures to ensure the “**restoration** and maintenance of the ‘chemical, physical, and biological integrity of the Nation’s waters.’” 33 U.S.C. §1251 (emphasis added). The entire structure and requirements of the CWA make clear that states may not simply claim that a waterbody is degraded and use that as an excuse not to take measures to improve water quality – let alone use existing degradation as an excuse to make water quality worse. See, e.g., 33 U.S.C. §1313(d)(4) (antidegradation requirement); 40 C.F.R. §131.12(a)(1) (implementing the CWA antidegradation requirement by mandating that “the level of water quality necessary to protect the existing uses shall be *maintained* and protected”) (emphasis added); EPA, *Water Quality Standards Handbook*, Chapter 4, p. 1) (available at [eCFR :: 40 CFR 131.12 -- Antidegradation policy and implementation methods.](#)) (**the maintenance and protection of existing uses is the “absolute floor” or “minimum level of protection to all waters”**).

Finally, we note that the project lies six miles upstream from the Little Falls pumping plant that flows to the Dalecarlia Reservoir in the District, providing drinking water for much of McLean. Excess loadings of pollutant from this stormwater contamination may

well result in exceedances of Maximum Contaminant Levels (MCLs) in McLean residents' drinking water – and thus cause the County and the Commonwealth to be in violation of the Safe Drinking Water Act. See 42 U.S.C. §300f *et seq.*

For the foregoing reasons, we believe that if MDOT and VDOT move forward with the current system design, absent significant additional stormwater mitigation measures, the agencies will be in violation of their obligations under the Clean Water Act – and potentially the Safe Drinking Water Act as well. Accordingly, we believe that the JPA and the §401 Water Quality Certification application should be denied.

While perhaps not directly relevant to the administrative actions at issue here, below we outline additional illegalities with MDOT and VDOT's actions. We also discuss certain mitigation measures that would help to mitigate the unaddressed water quality impacts being imposed on the Live Oak Drive community, the Potomac River and the Chesapeake Bay by MDOT and VDOT's actions.

National Environmental Policy Act. As outlined in the document provided to MDOT and VDOT on June 7, 2022 entitled "Questions for VDOT and MDOT: Concerned Citizens Following the June 6, 2022 Public Meeting at Langley High School (attached as Appendix A), we believe that MDOT and VDOT have violated the National Environmental Policy Act (NEPA, 42 U.S.C. §§4321 *et seq.*) in multiple respects. To the extent that the Army Corps and MDE rely on these flawed environmental assessments, they compound and amplify the errors, and result in your agencies being complicit in these NEPA violations. These flaws include the following:

- Failure to discuss in VDOT's Environmental Assessment, as a "connected action," the MDOT construction that will occur in Virginia;
- Failure to discuss in VDOT's Environmental Assessment, as a "cumulative action," the MDOT construction that will occur in Virginia;
- Failure to discuss in VDOT's Environmental Assessment, as "cumulative effects," the environmental impacts of the MDOT construction that will occur in Virginia;
- Unlawful segmentation by both VDOT and MDOT in separately analyzing clearly connected and cumulative actions;
- Failure by MDOT to provide adequate notice to Virginia residents that it – a state agency in an entirely different state – would be taking actions with a Significant Environmental Impact in Virginia;

- Failure by VDOT to provide adequate public notice to its affected residents that an entirely different state (Maryland) would be taking actions with a Significant Environmental Impact in their neighborhood; and
- VDOT making an illegal “irretrievable commitment of resources” in closing on the contract with Transurban before completing the required environmental analyses under NEPA.

In addition, however, and as detailed further below, we believe that in developing their “coordinated but separate” projects for expanding I-495, VDOT and MDOT have also failed to ensure compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. §§668-668c), the Clean Water Act (CWA, 33 U.S.C. §§1251 *et seq.*), the National Historic Preservation Act (54 U.S.C. §§100101 *et seq.*) and the Administrative Procedure Act (5 U.S.C. §§500 *et seq.*).

Bald and Golden Eagle Protection Act. Members of the community have personally seen – and taken photographs and videos – of bald eagles (and potentially nests) in and around Scott’s Run Nature Preserve, including in the vicinity of the Langley Swim Club.⁶ The proposed I-495 expansion Project, as currently designed, will include significant land disturbance in and around the Langley Swim Club, including removal of trees, moving Live Oak Drive, and significant encroachment onto the property of the Langley Swim Club, and Scott’s Run Nature Preserve. Yet we are aware of *no* efforts by VDOT or MDOT to catalogue the presence of bald eagles or their nests, nor to undertake mitigation to ensure compliance with the Bald and Golden Eagle Protection Act.

Accordingly, we believe that the current project design may result in VDOT, MDOT and/or their contractors violating the Bald and Golden Eagle Protection Act.

For reference, the Bald and Golden Eagle Protection Act imposes *civil or criminal* penalties on persons (*including* employees of state agencies or their contractors) who “take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part (including feathers), nest, or egg thereof.” 16 U.S.C. §668(a), (b).⁷ The

⁶ We would be happy to provide these photographs and videos upon request.

⁷ Under the regulations, “*Person* means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of any State or political subdivision of a State.” 50 C.F.R. § 22.6.

Act defines “take” as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” 16 U.S.C. §668c (emphasis added). The United States Fish and Wildlife Service has clarified in regulations that “disturb” includes “to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.” See 50 C.F.R. § 22.6.

Of particular relevance here, the Fish and Wildlife Service has interpreted its definition of “disturb” to include “human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle's return, such alterations agitate or bother an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, and causes injury, death or nest abandonment.” U.S. Fish and Wildlife Service, *National Bald Eagle Management Guidelines*, pp. 2, 17 (2007) (available at <https://www.fws.gov/sites/default/files/documents/national-bald-eagle-management-guidelines.pdf>).

The National Historic Preservation Act. We understand that as part of its Cultural Resources Survey, VDOT identified a Civil War encampment that could be impacted by the I-495 expansion project.⁸ Subsequently, however, we were unable to locate any reference to that Civil War encampment in subsequent documentation, nor can we locate any references or documentation to support a conclusion that VDOT complied with its consultation obligations under the National Historic Preservation Act (NHPA). Accordingly, it appears that VDOT (and DOT) may have violated the NHPA.

For reference, Section 106 of the NHPA requires identification and assessment of the potential effects on historic buildings and structures before initiation of a “federal undertaking.” See 54 U.S.C. § 306108. A “federal undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including: (1) those carried out by or on behalf of a federal agency; (2) those carried out with federal financial assistance; (3) those requiring a federal permit, license or approval; and (4) those subject to state or local regulation

⁸ Compare Commonwealth Heritage Group, *Cultural Resources Survey for the Interstate 495 Express Lanes Northern Extension Project*, (June 2019); with VDOT, *Final Environmental Assessment for the Interstate 495 Express Lanes Northern Extension Project* (February 2020).

administered pursuant to a delegation or approval by a federal agency.” 30 C.F.R. §800.16(y). Where potentially historic properties have been identified and could be impacted by the project, the project proponents must initiate consultation with the Advisory Council on Historic Preservation (ACHP), State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and other consulting parties. See 54 U.S.C. § 306108.

The Administrative Procedure Act. Members of our community have been closely following the I-495 expansion project for many years, regularly visiting the VDOT website and attending both virtual and in-person public meetings. Yet it was only in May of 2022 that we discovered that MDOT would be constructing major portions of the expansion project in Virginia – and that five large flyover ramps would be built adjacent to the Live Oak Drive neighborhood. While we have requested responses from both VDOT and MDOT as to what specific steps it has taken to inform the affected communities that MDOT would be undertaking major construction in and around our Virginia neighborhood, it appears obvious that neither agency provided anywhere near the level of public notice that is required to satisfy their obligations under the Administrative Procedure Act (APA).

For reference, the APA requires federal agencies to provide adequate public notice and an opportunity for affected persons to comment on many types of agency actions. See, e.g., 5 U.S.C. §§552, 553. NEPA expressly provides that those notice and comment obligations apply to issuance Environmental Assessments and Environmental Impact Statements. 42 U.S.C. §4332(c) (*referencing* 5 U.S.C. §552). Although VDOT and MDOT are not federal agencies, the NEPA (and APA) requirements apply to them here. See 42 U.S.C. §4332(D) (an Environmental Assessment or Environmental Impact Statement “for any major federal action funded under a program of grants to the States shall not be deemed legally insufficient solely by reason of having been prepared by a State agency or official if (i) the State agency or official has statewide jurisdiction and has the responsibility for such action, [and] (ii) the responsible Federal official furnishes guidance and participates in such preparation.”). As a cooperating agency, the Army Corps may also be legally liable for MDOT’s and VDOT’s respective failures to provide adequate notice and comment (as well as for the substantive inadequacies of the NEPA documentation, as outlined above and in the attachment).

* * *

We have previously identified for MDOT and VDOT the two key mitigation measures that are necessary for our community. To date, neither MDOT nor VDOT has had the courtesy even to respond to us. While we believe that the Least Environmental Damaging Practicable Alternative (“LEDPA”) is to deny the JPA as others have noted in their comment letters, any permit issued by the Army Corps must include these necessary measures to mitigate the impacts of the new flyover ramps on the Live Oak community:

1. *First*, the community needs **adequate sound and light mitigation**.
 - a. Specifically, we need high quality sound and light barriers between Live Oak Drive and *all* I-495 and George Washington Parkway ramps.
 - b. These ramps must be high enough to block truck light from the community (*i.e.*, at least ten feet higher than the highest ramp).
 - c. The barriers must be of sufficient quality to block at least 80% of the sound from I-495 and George Washington Parkway traffic, and they should be as compatible with residential aesthetic as possible (*e.g.*, accommodating “green walls”). We understand that Whisper Walls would meet these criteria (as well as being partially made from recycled used tires, thereby providing an additional environmental benefit). There may be other alternatives that would provide sufficient sound and light protection that would work in lieu of, or in combination with, Whispers Walls.
 - d. The community strongly prefers that the highest flyover ramp or ramps have the barriers installed on the ramps themselves.
2. *Second*, the community needs **adequate stormwater mitigation**. We note that, separate and apart from our request, VDOT and MDOT have an independent legal obligation to mitigate stormwater pollution to comply with the Clean Water Act, including provisions relating to protection of the Chesapeake Bay. As discussed above, this obligation arises not just in the construction phase of the project, but also subsequently, when the expanded lanes are operational.
 - a. The community believes that the most efficient and cost-effective way to address the stormwater issues would be to move (at least) one of the

flyover lanes to the opposite side of I-495, where it was originally designed to be located. Specifically, the flyover lane designed to move traffic from the northbound toll lanes to the George Washington Parkway should not veer over towards Live Oak Drive, but instead should take the more direct route to the Parkway (See Appendix B. Prior design dated October 2020 versus current design dated June 2022).

- i. Because this original design requires fewer feet of elevated roadway, we anticipate that it is a less expensive design than the current design.
- ii. This approach would sufficiently mitigate the stormwater issues. Rather than channeling the bulk of the project's increased stormwater loadings into and through Scott's Run and the Live Oak Drive community, a portion of the stormwater will channel to the other side of the Beltway, thus increasing opportunities for stormwater infiltration and reducing overall stormwater pollution and erosion. Further, not moving Live Oak Drive, and not eliminating the trees buffering the community from I-495 will also promote stormwater infiltration and improve water quality. Finally, even a moderate reduction in stormwater flow through the Live Oak Drive community will reduce erosion and improve water quality.
- iii. This approach has the added benefit of not requiring the relocation of portions of Live Oak Drive, thereby further reducing costs. We anticipate that the cost savings from partially reverting to the earlier design would more than amply cover any cost of for the sound and noise barriers discussed above, to the extent that the cost of those barriers might exceed what has already been budgeted by VDOT and MDOT.
- iv. This approach similarly resolves concerns regarding violation of the Bald and Golden Eagle Protection Act, as it dramatically reduces disturbances to the Langley Swim Club and nearby areas of Scotts Run Nature Preserve.

- v. Moreover, this approach provides significant benefits to the Langley Swim Club and to the numerous users of Scotts Run Nature Preserve by not eliminating much of the Swim Club/Nature Preserve parking. We understand, for example, the Langley Swim Club is in discussions with Fairfax County to purchase a portion of the Nature Preserve to compensate for parking that will be lost as a result of the I-495 expansion project.
 - vi. This approach similarly offers significant safety benefits, as the proposed narrowing of Live Oak Drive, coupled with the elimination of much of the parking at Langley Swim Club, poses significant risks for the many walkers, hikers and bikers who use this area for recreation – not to mention all of the children who use the Langley Swim Club throughout the summer months.
 - vii. Finally, this approach preserves much of the tree canopy that VDOT would otherwise remove, providing addition stormwater mitigation – and aesthetic – benefits.
- b. Should VDOT and MDOT not be willing to accommodate this partial reversion to the earlier design, then the VDOT and MDOT engineers will need to develop a stormwater engineering solution that sufficiently reduces the runoff such that polluted runoff (beyond the limited amounts that will be captured in the retention basins): (1) receives sufficient treatment to meet applicable water quality standards and Total Maximum Daily Loads; (2) does not cause significant stream erosion in the Live Oak Drive neighborhood (thereby increasing Total Suspended Solids loadings in the Potomac, as well as the damaging benthic communities and reducing Total Dissolved Oxygen in the Potomac); and (3) does not damage neighborhood septic systems such that the Potomac receives even higher loadings of nitrogen and fecal coliform. (Needless to say, VDOT and MDOT would also have an independent obligation to ensure that their actions do not impact any eagle nests in the area, should the agencies choose not to revert to the earlier design.) We are not certain what these mitigation measures might look like (or cost) but we would welcome further discussions if VDOT and MDOT are not interested in our preferred solution.

We appreciate your consideration of our concerns. You can reach me at novacitizensassociation@gmail.com.

Regards,

Debra Butler
President
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cc:

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Appendix

Appendix A. Email to Office of Senator Barbara Favola, Virginia Delegate Kathleen Murphy, John Foust, Virginia Board of Supervisors, "495NEXT Construction - Press Coverage VDOT/MDOT bait & switch", dated June 7, 2022

Questions for VDOT and MDOT

Concerned Citizens Following the June 6, 2022 Public Meeting at Langley High School

1. Exactly how high are the five flyover lanes that are proposed for near Live Oak Drive?
2. Will the extended toll lanes be the same height as the existing highway, or will they be higher?
3. Exactly how high are the visual and sound barriers that are proposed to shield Live Oak Drive from the flyover lanes and the extended toll lanes?
 - a. Where VDOT proposes to replace the existing barriers, will the replacement barriers be sound barriers or merely visual barriers?
 - b. Where VDOT proposes to replace the existing barriers, will the barriers be the same height as the existing barriers or will they be higher?
 - c. Where VDOT proposes to replace the existing barriers, will the barriers be high enough to shield both the sound and the visual impacts from the highway expansion?
 - d. Please provide details on the materials proposed for the barriers shielding Live Oak Drive.
 - i. For example, will VDOT use "Whisper Walls" or will some other type of wall be used?
 - ii. Exactly how much sound protection will these barriers provide?
 1. Please provide the response both in terms of percentage reduction in sound impacts and in actual decibels with and without the barriers.

2. Please include in the response impacts for the MDOT and the VDOT portions of the project, both separately and combined.
4. When, exactly (month and year), was **VDOT first** informed that MDOT would be building five flyover lanes near Live Oak Drive?
 - a. Please explain what specific measures were taken, and when, to inform the affected communities that MDOT would be building five flyover lanes near Live Oak Drive.
5. Please identify exactly where in the public documentation **VDOT** explains to the public that MDOT will be building five flyover ramps (and taking other actions) in Virginia. Please also identify specifically **when** (month and year) that documentation was made available to the public.
6. What specific actions did **MDOT** take to inform the affected **Virginia** communities that it would be taking actions with Significant Environmental Impacts in those Virginia communities?
 - a. What specific actions did MDOT take to ensure that affected Virginia communities received notice that its Draft Environmental Impact Statement was available for public review and comment?
 - b. What specific actions did MDOT take to ensure that affected Virginia communities received notice that it would be holding public hearings on its Draft Environmental Impact Statement?
7. What specific measures did **VDOT** take to inform the affected **Virginia** communities that MDOT would be taking actions with Significant Environmental Impacts in those Virginia communities?
 - a. What specific actions did VDOT take to ensure that affected Virginia communities received notice that MDOT's Draft Environmental Impact Statement was available for public review and comment, and that that document would discuss specific and significant impacts in Virginia?
 - b. What specific actions did VDOT take to ensure that affected Virginia communities received notice that MDOT would be holding public

hearings on its Draft Environmental Impact Statement, and that MDOT construction would have specific and significant impacts in Virginia?

8. Please explain VDOT's rationale for **not** discussing in its Environmental Assessment, **as a "connected action,"** the MDOT construction that will occur in Virginia. For reference, "connected actions" are "closely related *and therefore should be discussed in the same impact statement*. Actions are connected if they ... are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1) (emphasis added).
9. Please explain VDOT's rationale for **not** discussing in its Environmental Assessment, **as a "cumulative action,"** the MDOT construction that will occur in Virginia. For reference, "cumulative actions" are "Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts *and should therefore be discussed in the same impact statement*." 40 C.F.R. § 1508.25(a)(2) (emphasis added).
10. Please explain VDOT's rationale for **not** discussing in its Environmental Assessment, **as "cumulative effects,"** the environmental impacts of the MDOT construction that will occur in Virginia. For reference, "cumulative effects" are "effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and *reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions*. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.1(g) (emphasis added).
11. Please explain the rationale for VDOT and MDOT not preparing a single, integrated Environmental Impact Statement, given that the regulations clearly mandate a single EIS for "connected" and "cumulative" actions.
12. Please explain why VDOT and MDOT believe that separately analyzing clearly connected and cumulative actions does not constitute **unlawful "segmentation"** under the National Environmental Policy Act (NEPA). For reference, unlawful segmentation occurs when agency artificially divides a major federal action into smaller components to avoid application of NEPA to some of its segments. See, e.g., *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F.2d 60, 68 (D.C.

Cir. 1987) (“Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components.”).

13. Please explain the basis for your belief that Virginia residents should have been on notice that the “Significant Environmental Impacts” to the Northern Virginia community would be undertaken by MDOT and thus would be addressed only in MDOT’s Draft Environmental Impact Statement, and neither identified nor discussed in VDOT’s Environmental Assessment.
14. We understand from the meeting on June 6, 2022 that VDOT and Transurban have reached financial close on the 495-NEXT expansion project. We also understand that VDOT has not yet completed its noise analyses as well as various other environmental impact studies. Please explain how financial close does not constitute an **illegal “irretrievable commitment of resources”** under NEPA. For reference, NEPA analyses *must* be prepared at the “feasibility analysis (go-no go) stage.” *Andrus v. Sierra Club*, 442 U.S. 347, 351 n. 3 (1979). As such, NEPA requires that the environmental analyses be conducted and completed “before any irreversible and irretrievable commitment of resources” occurs. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir, 2000); *see also Native Ecosystems Council v. Dombeck*, 304 F. 3d 886 (9th Cir. 2002).
15. Please explain VDOT’s legal rationale for not addressing the noise impacts of **both** its portion of the project and MDOT’s five flyover ramps, including why failure to do so does not violate NEPA’s prescriptions regarding connected actions, cumulative actions, cumulative impacts and unlawful segmentation.
 - a. Does VDOT’s **Analysis of Noise Abatement** include the noise impacts from the five flyover ramps being constructed by VDOT?
 - b. Does VDOT’s estimate of a 10 decibel increase in traffic noise in the Live Oak Drive neighborhood include the noise impacts of the flyover ramps or exclude those impacts?
 - c. If VDOT’s estimate of a 10 decibel increase in traffic noise in the Live Oak Drive neighborhood excludes the noise impacts of the flyover ramps, please explain how the MDOT and VDOT projects together meet the US Department of Transportation’s requirements for noise levels in

residential neighborhoods. See 23 C.F.R. §§ 772.11(c), 772.13 and Table 1 to Part 772.

16. Where in the public record can we find the following analyses:

- a. **Alternatives assessment** for the expanded project scope?
 - i. What other options were considered besides the new, expanded and elevated flyover ramps, and were those options discussed in the Environmental Assessment prepared by VDOT or only in the documents prepared by MDOT?
 - ii. On what basis did VDOT and MDOT conclude that these massive new ramps are the least environmentally-impactful alternative, and was that rationale discussed in the Environmental Assessment prepared by VDOT or only in the documents prepared by MDOT?
- b. **Assessment of mitigation measures** to address the impacts on the Live Oak Drive community and Scotts Run Nature Preserve that will result from the expanded project scope?
 - i. What specific mitigation measures were considered, and were those measures discussed in the Environmental Assessment prepared by VDOT or only in the documents prepared by MDOT?
 - ii. On what basis were those mitigation measures rejected and was that rationale discussed in the Environmental Assessment prepared by VDOT or only in the documents prepared by MDOT?
- c. **Noise impacts** that will result from the new project scope, including:
 - i. Traffic noise predictions in conformance with the **FHWA Traffic Noise Model (TNM)**, as required under 23 C.F.R. §§772.9 and 772.11?
 - ii. Analysis of Noise Abatement for Live Oak Drive, as required under 23 C.F.R. § 772.3?
- d. **Light pollution impacts** on the Live Oak Drive community that will result from the new project scope?
- e. **Air dispersion modeling analysis** that assesses both the criteria and the hazardous air pollutant emission impacts from the new project scope?

- f. **Visibility and noise impacts** on Scotts Run Nature Preserve that will result from the new project scope?
- g. Impacts on **water quality** from the increased traffic that will result from the new project scope?
- h. **Wetlands impacts** that will result from the new project scope?
- i. **Biological resources impacts** that will result from the new project scope?
- j. In light of the documented **health impacts to communities near major traffic sites, air quality impacts** on the Live Oak Drive community that will result from the new project scope?
- k. Calculated **climate change impacts** resulting from increased traffic resulting from the new project scope? (We assume that, in accordance with federal regulations and guidance, VDOT used the most current Social Cost of Carbon to calculate the monetary climate change impacts from the new project scope. What was the result of that analysis?)

ACTION: We request that VDOT and MDOT formally respond to these questions by June 30th.

Appendix B. Prior design dated October 2020 versus current design dated June 2022

