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April 30, 2015

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Re: Notice of Intent to Sue to Remedy Violations of the Maryland Environmental Policy Act: Purple Line Project

Dear Sirs:

I write on behalf of the Friends of the Capital Crescent Trail ("FCCT") and the following Montgomery County residents: John M. Fitzgerald, Esq., Christine Real de Azua, Deborah Ingram, Ph.D., John Bickerman, Esq., Charlotte Bonilla, Pamela Browning, Debra and Howard Feldman, Esq., Professor Edward J. Finn, Beth Kelves, Lewis Leibowitz, Esq., Brenda Lizzio, Theresa Lukas, The Honorable John Milden, Esq., Glenn A. Mitchell, Esq., Robert Posner, Guatam and Anjali Prakash, Julia Brabson Randall, Steven R. Rivkin, Esq., Professor Mary Rivkin, Joanne L. Rood, Esq., Jim Roy, Rolf Sinclair, David and Parviz Steeds, Deborah A. Vollmer, and Seroun M. Wang. Their addresses are set forth in **Attachment A**.

The purpose of this letter is to provide notice of violation pursuant to §1-505(b) Natural Resources Article, Md. Ann. Code with respect to the Final Environmental Impact

Statement (“FEIS”) for the Purple Line Project in Montgomery and Prince Georges Counties, Maryland (“Project”).

The FEIS, issued on August 28, 2013, is a joint product of the Federal and Maryland Transit Administrations (FTA and MTA, respectively). Such an undertaking appears to be within the scope of the Guidelines for Implementation of the Maryland Environmental Policy Act, §1-301 to §1-305, Natural Resources Article (the “Act”). See COMAR 34.01.02.06. The Act requires the preparation of an environmental effects report for any proposed State action significantly affecting the quality of the environment. *Id.* §1-304(a).¹ The Act imposes requirements separate and independent from those in the federal National Environmental Policy Act NEPA (“NEPA”). It was enacted several years after NEPA for the primary purpose of ensuring that Maryland’s decisions affecting the environment are guided by reports that assess potential effects in relation to state standards and requirements, not just federal standards and requirements. Accordingly, even if the FEIS were at some point deemed adequate in relation to federal standards and requirements, it is not necessarily sufficient under the Act. In this instance, since there has been no separate environmental effects report under the Act, if the FEIS is deficient under federal law, it is deficient under state law as well.

Under § 1-304(a) of the Act, and the General Policy in the Guidelines, COMAR 34.01.02.03, the MTA and the Department of Planning were obliged to consider and report on the adverse environmental effects that are reasonably likely from implementation of the Project, measures that might be taken to minimize those potential effects, and reasonable alternatives to the Project that might have less adverse environmental effects. For the reasons set forth below, the FEIS is inadequate under federal law and it does not satisfy the requisites for an acceptable environmental effects report under Maryland law.

The State’s failure to publish a full and fair environmental effects report, as required by law, has left Maryland’s elected leadership, communities and affected citizens with a false impression of nearly every important element of the viable, less expensive and more efficient alternatives to the Project, and most importantly, the likely very serious impacts that going forward with the Project will visit upon the environment, Maryland citizens, and the public interest generally. What follows are the major reasons why the FEIS does not comply with the Act.

¹ Section 1-304(a) of the Act requires State agency preparation of such a report “in conjunction with each proposed State action significantly affecting the quality of the environment...” In turn, “proposed State action” is limited to “requests for legislative appropriations or other legislative actions that will alter the quality of the air, land or water resources.” §1-301(d). The Court of Appeals has made clear that, in this context, the only legislature to which such requests will trigger the Act’s report requirements is the General Assembly. *Pitman v. WSSC*, 279 Md. 313, 368 A.2d 473 (1977). The Act is properly invoked here because construction of the Purple Line is completely dependent upon appropriation requests that required General Assembly approval.

1. Undisclosed Runaway Stormwater Would Wash Hazardous Materials Downstream with No Containment or Compliance Plan

Many months after promulgation of the FEIS, my clients obtained, by way of a Maryland Public Records Act request, copies of documents not referenced in the FEIS but highly relevant to an informed and complete report. One was a Stormwater Management Concept Study that for the first time revealed the massive extent to which the MTA and its future Private Partner for the Purple Line could not or would not comply with the general requirement of state law that stormwater in a new project be contained on site. The Study discloses that there will be dozens of points along the route where large quantities of water, along with pollutants of all kinds, will rush downstream or into the groundwater. The FEIS does not address this problem, nor the prospect that this runoff is likely to contain pollution from the Project's 573 hazardous materials sites, over 200 of which the FEIS acknowledges contain seriously hazardous materials, in significant amounts, such as "large PCB stains."

Instead, the FEIS deferred the presentation and analysis of an environmental compliance plan, noting that it would be developed later. Also unmentioned in the FEIS is that Montgomery County and the MTA have deferred decisions about how the clear-cutting required for construction of the Project, and the replacement hiker-biker trail, can be done without violating (a) the Clean Water Act's stormwater and related requirements as they pertain to Rock Creek and its watershed, and (b) other environmental laws, including the federal and State Endangered Species Acts. Also not addressed in the FEIS is the extent to which using a Private Partner as the lead builder and operator of the Project adds another layer of difficulty, cost, and uncertainty regarding compliance with the substantive limits of state and federal law.

2. An Individual Dredge and Fill Permit Requires Further Assessment By MTA to Provide Meaningful Information for the Army Corps and Public

Construction of the Project's two new bridges across Rock Creek will require one or more permits under Section 404 of the Clean Water Act from the Corps of Engineers as well as compliance with other laws protecting natural resources. But the FEIS provides virtually no information on what additional steps, design changes or costs may be necessary to ensure such compliance. Seeking the necessary permit from the Corps is likely to trigger the need for a new or supplemental EIS, especially when the lead agency has not met the standards required by the Corps for a proper environmental assessment.

3. The FEIS and DEIS Assessments of the Benefits and Costs of the Project and Alternatives to It Are Inadequate and Misleading, Require A New or Supplemental Assessment Is Required

a. Benefits. Information that has come into the public domain since promulgation of the FEIS suggests that the Project will fail in its proclaimed goal of relieving major transportation and traffic congestion problems faced by the geographic area

to be served by the Project. On all the following topics, discussion of Project benefits in the FEIS is limited, significantly outdated, and in need of revision.

i. Current transportation priorities for the region start with improving the Metrorail system, including adding cars to Metro trains (a cost that will be shared by Maryland, DC, and Virginia). The Washington Post recently concluded that "[p]ractically everybody involved in transportation -- pro-transit and pro-highway, business and labor -- agrees that investing in eight-car trains ought to be the region's No. 1 priority."² (The Project, in spite of its misleading name, "Purple Line," would not be a part of Metro but would consist of a suburban above-ground light rail operated by a private concessionaire. Metro riders would have to exit the Metro system to ride the Purple Line, and vice versa.

ii. Regional Roadway congestion relief priorities start with a focus on the most congested roads. In Montgomery County, the top 25 most congested roadways are almost entirely north-south arteries, according to a Montgomery County transportation mobility report.³ The Project, with its focus on east-west transportation, would not alleviate the heaviest roadway congestion. In fact, the Project would worsen congestion by enabling a wave of residential and commercial development and traffic at critical points along some of the most congested roadways (e.g., Connecticut Avenue at Chevy Chase Lake).

iii. The Project will not transport people to the areas where jobs are now most concentrated. Most of Montgomery County's growth in population and development is now occurring north of the proposed Purple Line corridor. Public statements by developers suggest that they regard the White Flint/Twinbrook area as the center of the County for future development purposes. Jobs are not coming to downtown Bethesda (the western terminus of the Purple Line). In fact, there is excessive empty office space in Bethesda, with over 10 per cent of existing office space unrented and more under construction. The Project would do little or nothing to serve people in the fast-growing areas of Montgomery County or people in Prince Georges County who need to reach jobs in these areas. Nor is the Purple Line well situated to serve the fastest growing areas of Prince Georges County.

iv. A factor critical to both benefit and cost evaluations is anticipated ridership on the Purple Line. Ridership numbers projected by the MTA for the FEIS, and the lack of transparency behind those numbers, have come under scrutiny, as detailed in a Wall Street Journal article of June 27th, 2014, by Mary Anastasia O'Grady,

² See http://www.washingtonpost.com/local/post-silver-line-dc-region-should-buy-rail-cars-for-metro-add-a-potomac-crossing/2014/07/26/c7d8e3ec-1467-11e4-9285-4243a40ddc97_story.html).

³

<http://montgomeryplanningboard.org/agenda/2014/documents/MobilityAssessmentReport2014-DRAFT4-9-2014000.pdf>

entitled "Maryland's Incredible Purple People Mover -- How the State's Proposed \$2.4 Billion Light Rail Could Take Taxpayers for a Ride."⁴

Since FEIS promulgation, the Town of Chevy Chase has sought explanations from MTA regarding their ridership calculation methodology, but has thus far received from MTA only unusable and encrypted data. There are also unanswered questions about whether the assumptions used by MTA are "objective and reasonable", according to Sam Schwartz Engineering (SSE), a transportation consulting firm that reviewed the materials delivered by MTA.⁵ For example, according to the SSE report, MTA is now reporting longer running times for the Project, but as SSE noted, these are inexplicably coupled with *higher* ridership projections.

As the Town of Chevy Chase made clear in its comments on the draft EIS and FEIS, comments made with the assistance of SSE, the ridership estimates for the Project, and hence the costs and benefits of it, and of reasonable alternatives, were highly suspect and not compatible with industry standards. Thus, the assessment of alternatives in the EIS and the very limited assessment of the no-build alternative in the EIS, are suspect, given, for example, that alternatives of equal or lower true cost could well provide much greater enhancements in transportation options, with greatly reduced environmental and public health losses. As the Town comments noted, all design elements of the Preferred Alternative were not presented in the FEIS, which means the public was not allowed the opportunity to review and comment on all aspects of the proposed action, as required. In addition, the FEIS does not allow for full assessment of the Preferred Alternative, as some significant design element modifications have been proposed, and some continue to be proposed since the publication of the FEIS.

The Town sought from MTA the basis for the estimates with which its consultant SSE disagreed, and was told that the estimates were based on a propriety formula that could only be made accessible at considerable expense. This was starkly inconsistent with established NEPA practice or, indeed, any public assessment practice -- that of public and timely accessibility to relevant information. Such information must be "reasonably available for inspection by potentially interested persons within the time allowed for comment." 40 C.F.R. § 1502.[?] In addition, "[m]aterial based on proprietary data which is itself not available for review and comment shall not be incorporated by reference." 40 C..F.R. § 1502.21. The actions of the MTA in this instance were even worse than that prohibited by regulation, in that the computer software and program used for estimating the ridership do not appear to have been openly named, described and incorporated as such by reference in the FEIS.

b. Costs. Project costs are underestimated in the FEIS and in need of revision. First, the Project's most recently announced \$2.45 billion price tag exceeds by

⁴ <http://online.wsj.com/articles/mary-anastasia-ogrady-marylands-incredible-purple-people-mover-1403910560>.

⁵ <http://www.townofchevy Chase.org/CivicAlerts.aspx?AID=78>

\$300 million the \$2.15 billion cost estimate used for the FEIS. The Project's projected cost is increasing monthly (as are the expected costs of its operation and maintenance). The latest increase appeared in a period of only just one year and three months (between the August 2013 FEIS and the November 2014 FTA summary sheet).⁶ For such a timeframe, this 15% cost increase is not a small change for a project that should already be quite mature in design at the FEIS stage.

The FEIS also ignores the Project's "opportunity cost." The Project drains away funding that would otherwise be available for much-needed transit investments in the State and Montgomery County. Montgomery County is particularly strapped for funds for a variety of transit needs, including Metro access upgrades, development of Bus Rapid Transit, additional regular bus routes, road upgrades, and biking and pedestrian options. Montgomery County's Metro priority is Shady Grove, which is the busiest Metro station in Montgomery County, and where parking spaces overflow by 7:30am.⁷

4. Adding a Private Partner to Carry Out the Project Undercuts Commitments and FEIS Cost Estimates

The fundamental nature of the Project, (that is, the "Preferred Alternative"), has changed since adoption of the FEIS over a year ago. The Project, once exclusively a government-run enterprise, will now be administered under a Private-Public Partnership (PPP) approach, in which the lines of authority, responsibility, and contractual duties will differ from those in place during the drafting of the FEIS. The likelihood of a PPP is mentioned in the FEIS executive summary (p. ES 9) where the MTA asserted that, "Under any method of constructing and operating the Purple Line, MTA will remain responsible for the Purple Line and will be responsible for honoring all commitments made as part of this NEPA process." That assertion however, does not and cannot excuse the absence of an accurate, full and fair assessment of the likely environmental effects of the Project and its alternatives in the FEIS. Further, the Maryland Secretary of Transportation has asked the prospective Private Partners to cut project costs in their proposals. These cuts may result in an even greater scope of changes in project design, raising the possibility of significant increases in health, safety and environmental risks and predictable rates of injury. Thus, under the Act, any existing environmental effects report must be re-evaluated

⁶ The most recent estimate, from the November 2014 FTA summary (http://www.fta.dot.gov/documents/MD_Maryland_National_Capital_Purple_Line_Profile_FY16.pdf), is \$2,448.22 million, in terms of year-of-expenditure dollars. The capital cost estimate in the FEIS (Volume III, Technical Report - Capital Costs, see http://www.purplelinemd.com/images/studies_reports/feis/volume_03/02_PL-Tech-Report_Capital%20Costs_August%202013.pdf), is \$2,151.66 million in year-of-expenditure dollars (and \$1,846.54 in terms of constant 2012 dollars). See the table shown as Attachment A, immediately following page 22.

⁷ <http://greatergreaterwashington.org/post/16797/which-metro-stations-are-busiest/>

after the PPP-induced changes are more clearly defined and integrated into the Project. In particular, the changed nature of the Project may require much more precise terms and conditions for enforcement by those in the State government responsible for the Project's compliance with environmental standards and requirements.

5. Changes in Project Design Require a Separate Effects Report or a Supplemental Environmental Impact Statement (SEIS).

As of the issuance of the FEIS on August 28, 2013, the design of the Project and its environmental mitigation measures were continuing to change in such substantial and material ways that a Supplemental EIS (SEIS) is needed. It has not been done.

On October 7, 2014, the MTA informed the Chair of the Mitigation Advisory Group of the Town of Chevy Chase by email (attached) that the MTA wanted the Town's agreement on rerouting the cycle and foot traffic from the hiker-biker trail to streets through the Town by October 24th to accommodate preparation of the replacement Trail next to the two railway tracks of the Project. Expecting the Town and its residents, as well as the users of the trail to adjust on so little notice to the diversion of very large numbers of riders onto its small streets during peak traffic hours is, in and of itself, a threat to public health and safety. The Town and several residents have since insisted upon additional information as to the needs, purpose and timing before any such decisions can be made. To the best of our knowledge, they have not received such information. That deadline was postponed, once until January 2015, and then partially again, but it would appear that this full trail displacement action could occur at almost any time, with relatively little notice.

At its November 2014 meeting, the Town Council of the Town of Chevy Chase was presented by the County Department of Transportation with two tentative design options for rerouting bicycle traffic permanently through Elm Street Park and across Wisconsin Avenue, in anticipation of the displacing cyclists and hikers from the safety of their current route through the tunnel under Wisconsin Avenue (both of which above ground routes would result in fatalities, according to John Bickerman, Town Councilman and regular trail cyclist). An essential purpose of an environmental effects report or any federal EIS that would meet State requirements is to provide an opportunity for notice and comment on just such important local and state decisions.

6. State and Federal Agencies That Were By-Passed in the FEIS Should Become Fully Collaborating Agencies In A New EIS or SEIS if the Project Goes Forward

a. The Surface Transportation Board.

When assessing the impact of railroads, especially those using banked rail lines, federal law provides for the Surface Transportation Board (STB) of the U.S. Department of Transportation to take a leading role. Therefore, to fully satisfy both State and federal laws, any assessment should include such expertise at the outset as a Collaborating Agency.

The STB has procedures for environmental assessments at the stage of formal abandonment of line and when non-abandoned banked lines are returned to any rail service. The STB is likely to bring to any assessment in which it participates substantive expertise on environmental concerns, such as the hazardous materials legacy of any former railway use of a right-of-way. The STB may also have expertise on the existing conditions of right-of-way abandonment or interim use that could materially affect the ability of the Project to go forward as envisioned. It does not appear that the STB has been involved in the assessments of the Purple Line and its alternatives to date. Recent cases before the STB have demonstrated the relevance of this process, as they have involved passenger as well as freight rails.

b. The Army Corps of Engineers

By not inviting the Army Corps of Engineers to be a Collaborating Agency in preparing the draft EIS and FEIS, MTA, which took the lead for the FTA and itself, failed to use the correct scope of analysis for watersheds, failed to evaluate in any meaningful way the effect of the Project on aquatic ecosystems or aquatic species, and overshot the maximum number of linear feet (2000) by which Maryland is permitted to affect streams that are among the waters of the U.S. under the State's general permit by more than twice the limit.

c. The Department of Natural Resources, the Department of the Environment and the County and Capital Area Parks and Planning Commissions.

Instead of seeking the help of the agencies responsible for the health of the regional parks and natural resources in designing and conducting the impact assessments and statements, the MTA avoided and is now continuing to avoid, these agencies. MTA is instead seeking to wrest authority from several of them in order to act as the approval authority on stormwater control as well as erosion and sediment control. This is detailed in Part 2 of the Technical Provisions accompanying the Request for Proposals. See ¶ 14, *infra*.

7. Revolutionary Changes in Travel and Transit Require a New Report or SEIS.

Changes in transit mode options in Montgomery County have rendered the draft EIS and FEIS obsolete. These include, among others:

- the arrival in Bethesda and in the greater Washington, D.C. area of Uber and of several competing private jitney and motorized "rickshaw" services, and, in Bethesda, the establishment of a regional headquarters of Uber;
- the doubling of cycle commuting in the past five years,
- an increased commitment to bus transit in Montgomery County, and

- the on-going repairs to the Silver Spring Metro station and other increased Metro expenses to which the affected Counties must contribute.

The effect of these changes is that the FEIS comparison of alternatives, outdated by mid-2013, is now even more severely outdated. The review of alternatives in the draft EIS was not updated in the FEIS. For example, the net increase in cost for a deep underground passage between Silver Spring and Bethesda or more modern, clean, and well-advertised buses⁸ augmented by private services including Uber, UberX, Swift, Lyft and Lyft's bus-like service, Lyft-Line, are not properly evaluated in the FEIS. The District of Columbia has enacted legislation allowing these services⁹ and Montgomery County is expected to do the same. Meanwhile cyclists make up 4.5 % of commuters in D.C., double the percentage just five years ago,¹⁰ and a similar increase in the adjacent jurisdictions is likely.

8. Inadequate and Misleading Assessment of the Means of Avoiding, Minimizing and Mitigating Negative Effects

Readily available measures that would avoid or minimize harm were given short shrift and rejected in the FEIS, as detailed below.

a. Noise

As the FCCT asserted in its comments, the FEIS failed to take the requisite “hard look” at, and to provide the requisite “full and fair discussion” of, the noise impacts posed by the Preferred Alternative, including inadequate assessment of alternatives. The alternatives include not only whole transportation alternatives but also design alternatives within the Preferred Alternative. MTA has rejected implementing reasonable noise mitigation measures including

- i. installation of higher and better walls to keep noise away from neighborhoods, parks and the hikers and bikers who use the trail, and
- ii. using better and longer lasting rubber tires on the trains and changing them more frequently.

⁸ “To Save Money on Building Rail, Save Money on Marketing Buses,” New York Times Feb. 10, 2015, discussing conclusions of a 2009 FTA study.

⁹ November 2, 2014, Washington Post, Metro Section, p. C2. See also, <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/10/28/d-c-council-okays-bill-to-legalize-lyft-sidecar-uberx-type-services-in-the-district/>

¹⁰ http://www.washingtonpost.com/local/trafficandcommuting/as-the-dc-mayoral-campaign-nears-end-there-is-no-clear-winner-on-transportation/2014/10/31/b7e136e8-5f84-11e4-91f7-5d89b5e8c251_story.html

b. Environmental Injustice to Minority and Low-Income Communities

As the FCCT also noted in its comments, the FEIS reported that 69 percent of the Purple Line corridor is located within Environmental Justice areas. Pursuant to an executive order, the U.S. Department of Transportation and the FTA are required “to make environmental justice (EJ) part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and/or low-income populations” (See Environmental Justice Policy Guidance for Federal Transit Administration Recipients FTA Circular 4703.1, Federal Transit Administration (Aug. 15, 2012). The FEIS failed to take the requisite “hard look” at, and to provide the requisite “full and fair discussion” of, the adverse impacts posed by the Preferred Alternative to Environmental Justice communities.

9. Changes in Federal, State and Local Law Require a new Report or SEIS

As indicated by the President's Climate Action Plan of June 2013, issued before the FEIS, it is now clear that well before Purple Line partners are chosen or construction begins, the Federal Flood Risk Management Standard will require FTA to reject or at least seek to avoid subsidizing or permitting new construction within or affecting a much larger (higher and wider) area of each flood plain than that required under the previous standard as embodied in the former Ex. Order. 11988, amended formally by Executive Order in January 2015. The Project and related development would directly affect the Rock Creek and Coquelin Run flood plains and wetlands therein. An environmental effects report should be prepared to address the impact of these requirements on the plans for the Project and its alternatives if an SEIS does not do so first.

10. Inadequate and Misleading Assessment of the No-Action Alternative Requires a new Report or SEIS

The assessment of the no-action alternative means there should be an assessment of the Opportunity Costs of building and operating the Project. That is, there must be a review of the other needs that might be met with the use of similar funds, in the transportation sector in particular, by the State. As noted above, recent studies by Montgomery County of its transportation needs demonstrate that the top 25 such needs do not include east-west transit, but rather north-south transit and highway improvements. The estimated cost of constructing the Project, currently \$2.45 billion, and the billions more that will have to be spent to operate it, represent lost opportunities to improve north-south transportation by all means of travel, from buses to bicycles to improvements of the Metro Rail system. The FEIS also failed to discuss modern means of addressing any east-west transportation needs that exist – needs that could be met with part of the funds saved from not building and operating the Purple Line.

11. Court Ruling Finding Montgomery County in Violation of the Clean Water Act

After issuance of the FEIS, the Maryland Court of Special Appeals ruled in MDOE v. Anacostia Riverkeeper, No. 2199 Sept. Term 2014, that Montgomery County's stormwater permit violated the Clean Water Act, filed April 2, 2015. This affirmed a December 2013 Circuit Court ruling that ordered Montgomery County to develop a more stringent and well-monitored stormwater permit. On July 30th 2014, the head of the County Department of Environmental Protection (DEP) wrote Rolf Sinclair of Chevy Chase, telling him that the MTA continued to change the Project's designs, making estimates of stormwater runoff impossible, and that the MTA had also rejected his request that the MTA obey County run off standards, which are stricter than those of the State. This ruling makes a change in design of the Project all but inevitable, necessitating either an SEIS or an environmental effects report.

12. Potential Violations of State and Federal Laws Protecting Endangered and Other Species Require an SEIS or a new FEIS

Two species of imperiled amphipods that are listed and protected under Maryland's Non-Game and Endangered Species Act, the Kenk's and Sextarius amphipods, may be affected by the Purple Line. The federal and State Endangered Species Acts forbid harming listed species of which there are three in the areas affected by the Project – including the amphipod *Stygobromus Sextarius*, which occurs in Maryland just downstream from where the Project's new bridges will span Rock Creek.

Despite the warning of the Department of Natural Resources' leading amphipod biologist, Dan Feller, that "washout" is likely to cause amphipod mortality in spring seeps, and despite his recommendation that hydrological or hydrogeological analysis be done, none has been done or presented by the responsible agencies to support the conclusion that protected amphipods such as the *Sextarius* population (twenty feet above and about that far away from Rock Creek at normal flow levels) will not be affected by the sewage (and other pollution) that is admittedly¹¹ present where the bicycle and train bridges will be built to cross Rock Creek and numerous other sites in the Rock Creek drainage along the right of way.¹² None of the agencies thus far appear to have fully assessed the likely cumulative effects of development related to the Purple Line and replacement trail, such as the increased load on old and frequently bursting water and sewer mains in the area and

¹¹ Memorandum of Dan Feller to Gregory Benz of MD DNR, August 19th, Attachment 3 to MTA letter of September 4 to David Brown. The FEIS map also shows three light green circles indicating hazardous materials sites in the area to be affected by the Purple Line and bike trail crossing near Connecticut Avenue upstream of Rock Creek.

¹² The Hazardous Materials Technical Appendix notes over 500 sites along the route of which over 200 are serious risks containing PCBs and other highly dangerous substances.

increased stormwater runoff. Therefore, a full or supplemental assessment of these elements is warranted.

Buffer zones for potentially affected endangered species, critical habitat designations, and plans for their survival and recovery and interagency consultation to avoid and reduce harm and enhance recovery have not been undertaken let alone completed by either state or federal agencies despite the obligation to do so under federal and state law. An environmental effects report should be prepared to address these issues; they will only intensify over the course of Project construction and construction of any Project-induced development.

The FEIS also failed to assess the Project's effects on protected birds in sufficient detail. The FEIS merely notes the presence of one heron colony, thereby ignoring the other protected birds that nest and feed in, hunt from, fly with forest cover from larger park to larger park, and otherwise use and need this habitat.¹³ These birds are protected under the Migratory Bird Treaty Act, which is a criminal liability statute that applies to State and federal agencies alike.

13. No Health Impact Assessment

Not included in the above list is the core issue of basic deficiency of the FEIS at the outset, even without new information. This point is reflected in several elements above, but extends beyond those to human health effects. These range from the impact of frequent exposure to electromagnetic radiation and direct sunlight to the sub-acute stress effects of noise. The prospect of impact on elementary school children has gone unmentioned in the FEIS, even though Rosemary Hills Elementary School in Silver Spring backs up directly to the Project right-of-way. More generally, at no stage in the Project was a thorough assessment of the impact on human health made. In fact MTA and the Montgomery County Executive specifically denied requests to conduct a Health Impact Assessment.

The safe hiker-biker routes between Silver Spring and Bethesda promised by MTA have been dropped or substantially changed since issuance of the FEIS. The revised routes and crossings raise serious public safety issues not assessed in the FEIS.

14. New Material Changes and Irregular Delegations of Authority

Review of the MTA's Public Private Partnership documents in the Request for Proposals, and other public records has uncovered significant changes in the Project since the FEIS was published that affect its sufficiency. These include a March 2014 Forest Stand Delineation Report (a 2011 FSDR was alluded to in the FEIS but never made

¹³ The FEIS also failed to discuss plans for compliance with a Memorandum of Understanding between the US Department of Transportation and the Fish and Wildlife Service under a 2001 Executive Order that was issued to require greater protection for affected bird habitat in such cases as this.

available for review to the public in the FEIS), and plans for numerous stormwater variances.

There has also been an unusual and fundamental change in the process, and probably the substance, of environmental regulation that may be applied to the Project. As detailed in Part 2 of the Technical Provisions accompanying the Request for Proposals, there are as yet unpublished or unwritten Memoranda of Agreement that are intended to delegate key regulatory authority to the MTA from environmental and park authorities of the State and the two affected counties. The apparent intention is for MTA to pass final judgment on environmental compliance by the Private Partner in the construction and operation of the Purple Line.

CONCLUSION

For these reasons among others, the FEIS is legally inadequate or misleading for nearly every protected resource or environmental value, from migratory birds to parks, and for nearly every limit that might be exceeded as noted in comments filed on the FEIS by FCCT, the Town of Chevy Chase, and individual Montgomery County residents.

Given the long list of serious deficiencies in the FEIS, it cannot fulfill the purposes and requirements of Maryland law. Therefore, before any further action is taken by the State or the County in furtherance of any part of the Project or reconstruction of the hiker-biker trail, including preparation for its construction such as tree-cutting, or re-routing of pedestrian or cycle traffic, a legally compliant environment effects report should issue, based on a detailed, settled Project design and environmental compliance plan. At a minimum, such a report should demonstrate how the Project will avoid violating such environmental laws as are clearly applicable to the Project. Neither the replacement trail nor the Project as a whole should move forward before such a report or an SEIS is completed and reviewed and approved by, the Department of Planning. My clients are hopeful that the State will promptly recognize and acknowledge that a new environmental assessment, or (at the least) a supplemental assessment, must be prepared, reviewed and approved first.

To this end, before any final decision is made on the issue of the sufficiency of the August 2013 FEIS in light of the foregoing, my clients would like to meet with responsible officials to discuss their specific concerns about the environmental impact of the Project in the watershed or vicinity of Coquelin Run, and the particulars of the FEIS deficiencies in this geographic area.

I further request that you advise me in writing two weeks in advance of any contemplated activity that would alter any area within 100 feet of the Capital Crescent Trail or the Georgetown Branch. Removal of trees, grading of land, and other common construction activities must be delayed pending decisions about these serious deficiencies in the FEIS since altering the habitat is to damage or destroy it.

Absent acknowledgement of the need for further dialogue and review, if not corrective action along these lines, my clients intend, *inter alia*, to seek declaratory and injunctive relief to prevent actions harmful to the environment, as provided for in §1-503(b) of the Act.

My clients and their environmental, economic and other experts look forward to the opportunity to meet with you to discuss this matter at your earliest convenience.

Sincerely yours,

A handwritten signature in black ink, appearing to read "David W. Brown", with a long horizontal flourish extending to the right.

David W. Brown

/enclosure – Attachment A

cc: Ike Leggett, Montgomery County Executive
Executive Office Building (EOB)
101 Monroe Street, 2nd Floor
Rockville, MD 20850

Chair Casey Anderson
Montgomery County Planning Board
M-NCPPC
8787 Georgia Ave.
Silver Spring, MD 20910

ATTACHMENT A

ADDITIONAL INDIVIDUALS JOINING THE NOTICE OF INTENT TO SUE UNDER MARYLAND'S ENVIRONMENTAL EFFECTS REPORT ACT

In addition to those names in the body of the letter, the following have asked to be included in the Notice of Intent to Sue:

John Bickerman, Esq.
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Chevy Chase, MD 20815

Charlotte Bonilla
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The Honorable John
Milden
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