UNITED STATES DISTICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO STATE OF MARYLAND'S MOTION FOR STAY PENDING APPEAL AND REINSTATEMENT OF RECORD OF DECISION

INTRODUCTION

In moving for a "stay pending appeal and reinstatement" of the Record of Decision ("ROD") vacated by the Court, ECF No. 145, intervenor State of Maryland ("State") asks the Court, in effect, to completely nullify its prior rulings on the need for further analysis under the National Environmental Policy Act ("NEPA") and to instead allow the State to proceed with Purple Line construction in flagrant violation of NEPA. That request makes no legal or logical sense. In addition, Maryland has not satisfied *any* of the "stringent standards" that must be met for the Court to issue the "extraordinary remedy" of a stay pending appeal, let alone all of them. *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 71-72 (D.D.C. 2008). The State has little if any likelihood of prevailing on the merits; its motion completely disregards the extreme injury that will be visited upon Plaintiffs and many others if Purple Line construction proceeds in the absence of the further NEPA analysis that the Court has deemed warranted; and the State's assertion of economic injury – supported by a declaration that is no longer even current – is both

entirely self-inflicted and, in any case, legally inadequate to support a stay pending appeal under Circuit precedent. Accordingly, the State's motion should be denied.[1]

BACKGROUND

Because the Court is very familiar with the background of this litigation, Plaintiffs will simply highlight those aspects of it that bear directly on the State's stay request.

The Defendant Federal Transit Administration ("FTA") issued a Record of Decision ("ROD") on March 19, 2014, stating that the agency had completed NEPA and other environmental reviews for the proposed Purple Line. However, FTA did not at that time announce any of the *substantive* findings that the agency must make under federal law, *see* 49 U.S.C. § 5309, in order to provide Maryland the nearly billion dollars in federal funds that the State has requested to complete the project.

Plaintiffs promptly filed suit challenging the ROD, within the very short statute of limitations Congress has established for such challenges. *See* 23 U.S.C. § 139(l)(1) (establishing a 150-day limitations period for seeking judicial review of the FTA's ROD). Importantly, the contractual commitments and other arrangements on which Maryland is relying for its assertions of economic injury were entered into *after* Plaintiffs' filed their timely challenge to the ROD.[2]

[1] Maryland requests that its motion, which was filed late in the day on Friday, June 2, 2017, be resolved within one week (by June 9), thus affording Plaintiffs all of four working days to file a response. *See* ECF No. 145 at 1. As with regard to other deadlines the State has asked the Court to impose on itself, *see* ECF No. 138 at 2 (noting that the State had "set forth no justification for the April 28 deadline" that it had urged the Court to impose on itself for the resolution of summary judgment motions), Maryland has provided no rationale whatsoever for the June 9 deadline. Nonetheless, to facilitate the Court's resolution of the State's motion by the requested date, should the Court desire to do so, Plaintiffs are filing this response on an extremely expedited basis.

[2] The commitments on which the State relies are primarily made in the "P3 Agreement" entered into between the Maryland Transit Administration ("MTA") and Purple Line Transit Partners. According to the State's declarant, the P3 Agreement was executed on April 7, 2016. *See* ECF No. 145-2 at ¶ 38. That date occurred *while* the parties were in the midst of summary

The Court held a summary judgment hearing in June 2016. During the hearing the Court made no secret of its concern that Defendants had given short shrift to the myriad safety and reliability problems of the Metrorail system and their relationship to the ridership projections for the Purple Line, *see*, *e.g.*, 6/15/16 Tr. at 57 ("THE COURT: "Well, you would think, at a minimum, that the Secretary of Transportation might be concerned about the impact of the recent safety issues with the Metro system and how that would impact Purple Line ridership. You would think that [a] Supplemental EIS addressing that very issue and those very problems might be important to get to the bottom of before $ 900 million is committed of federal funds."). Also of particular relevance to the State's motion for a stay, the federal government's counsel represented unequivocally to this Court that the FTA had not, at that time, made the substantive section 5309 findings necessary for federal funding and hence no such findings were even available for judicial review. *Id*. at 37-38 (contention by government counsel that section 5309 requires a "separate finding" that had not yet been made).[3]

The Court issued its partial summary judgment ruling on August 3, 2016, granting summary judgment and vacating the ROD. *See Friends of the Capital Crescent Trail v. FTA*, 200 F. Supp. 3d 248 (D.D.C. 2016). The Court held that "defendants' failure to adequately consider WMATA's ridership and safety issues was arbitrary and capricious, and that these conditions create the 'seriously different picture' that warrant an SEIS" under the NEPA implementing regulations. *Id*. at 252 (quoting *Nat'l Comm'n for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004)). The Court further explained that that it could not "turn a

judgment briefing, *see* ECF Nos. 54-59, and a little more than a month before this Court issued an order scheduling a summary judgment hearing. *See* 5/25/16 Minute Order.

[3] Accordingly, although all parties agree that the section 5309 findings must be made before a Full Funding Grant Agreement ("FFGA") can be entered into committing the federal government to any funding, the existing record reflects no such section 5309 findings.

blind eye to the recent extraordinary events involving seemingly endless Metrorail breakdowns and safety issues" – issues that continue unabated to this day, along with ever-escalating questions about how Metrorail will even be funded *Id*. at 253-54. The Court vacated the ROD and ordered preparation of an SEIS so that the FTA could assess whether "another alternative is preferable" in view of the recent information that "calls into question, at a minimum, whether nearly a billion dollars in federal funding should ultimately be committed to a project for which serious questions have been raised as to its future viability." *Id.* at 254. In doing so, the Court explained that "[p]ursuant to the case law in this Circuit, vacating a rule or action promulgated in violation of NEPA is the standard remedy," *id*. at 254 (internal quotation omitted), and, applying the vacatur analysis endorsed by the Court of Appeals, the Court explained that "it would make little sense and cause even more disruption if defendants were to proceed with the project while the SEIS was being completed, only to subsequently determine that another alternative is preferable." *Id*. (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

Defendants could have responded to that ruling by promptly embarking on preparation of the SEIS the Court found was called for. Had they done so, the new analysis required by the Court could likely have been completed by now. Instead, Defendants opted to move for reconsideration, arguing that they should be afforded another opportunity to consider, in the first instance, the need for an SEIS and that the ROD should be reinstated in the meantime. In November 2016, while reaffirming that the "agencies' categorical decision not to evaluate the significance of WMATA's new safety and ridership issue was arbitrary and capricious," the Court modified its summary judgment holding in "one limited respect" by affording Defendants an additional opportunity to assess on remand whether an SEIS should be prepared. *Friends of*

the Capital Crescent Trail v. FTA, 218 F. Supp. 3d 53, 57-58 (D.D.C. 2016). At the same time, the Court "decline[d] to reinstate the Purple Line ROD" because of the "disruptive consequences of allowing [the project] to proceed without the necessary NEPA analysis" and because "[v]acatur ensures that the project will proceed only with the benefit of a *fully fleshed out consideration of the issues required by NEPA*." *Id*. (emphasis added).

Again, Defendants could have responded to *that* ruling by promptly embarking on an SEIS, informed by public and independent expert opinion as required by the NEPA implementing regulations. They did not. Instead, Defendants prepared and submitted to the Court a patently result-oriented justification for *not* engaging in any further NEPA analysis notwithstanding the breakdown in the Metrorail system with which the Purple Line is expressly designed to integrate. Worse, Defendants completely disregarded three expert declarations that Plaintiff submitted to FTA and MTA and that explained in detail how the extraordinary Metrorail problems were directly relevant to any reasonable analysis of alternatives, particularly in view of longstanding questions that have been raised concerning the basis for, and integrity of, the ridership projections on which the entire project justification is based. *See* ECF No. 138 (5/22/17 Memorandum Opinion) at 9; *id*. at 5 ("Unfortunately, defendants did not provide any written evaluation of the expert declarations submitted by plaintiffs in the days following [the Court's] November 22, 2016 Order.").

On May 22, 2017, the Court again granted partial summary judgment for Plaintiffs, holding that Defendants' response to the remand and refusal to prepare an SEIS was arbitrary and capricious. ECF No. 138. As explained by the Court, in view of a new ridership analysis prepared by MTA and adopted by FTA, Defendants had

> boldly concluded that there is no need for an SEIS, and the Purple Line will meet its established purposes, *no matter what* happens to WMATA Metrorail. To say the least,

> this is a curious conclusion when one considers that one of the three explicit purposes identified for the Purple Line was to '[p]rovide better connections to Metrorail services[,] and given that FTA itself concedes that this purpose 'is directly implicated by potential ridership declines in the WMATA Metrorail System.'

Id. at 8-9 (internal citations omitted; emphasis in original). The Court further held that, in any event, "FTA failed to consider relevant information when making its decision not to prepare an SEIS," explaining that "Plaintiffs' expert declarations provide additional information and raise questions about the impact that WMATA's ridership trends could have on the Purple Line and the issues at the heart of MTA's technical and FTA's memorandum declining to prepare an SEIS." *Id*.

The Court also explained that the "facts here could not be more similar" to those in *Public Employees for Envt'l Resp. v. Hopper*, 827 F.3d 1077, 1079 (D.C. Cir. 2016) ("*Public Employees*"), which held that it was arbitrary and capricious for a federal agency, on remand, to entirely disregard the plaintiffs' submission of expert analyses bearing on the remanded issue. ECF No. 138 at 11. In relying on *Public Employees*, the Court concluded that:

> [h]ere, plaintiffs' expert declarations, at minimum, raise serious questions about the defendants' assumptions about WMATA Metrorail and its future impact on the Purple Line. By failing, yet again, to grapple with plaintiffs' submissions, the FTA failed to take a *hard look* at all of the information in the administrative record that could inform the agency about the impact that WMATA Metrorail's ridership issues could have on the Purple Line Project. As such, the FTA's resulting refusal to prepare an SEIS was arbitrary and capricious. Accordingly, it is hereby ordered that, consistent with NEPA's procedural requirements, the defendant shall prepare an SEIS addressing them as expeditiously as possible.

Id. (emphasis in original).[4]

[4] On May 30, 2017, the Court indicated that it was granting Defendants' motions for summary judgment on two other claims in Plaintiffs' Amended Complaint, and that the Court's opinion addressing those matters would be forthcoming. ECF No. 142.

ARGUMENT

In seeking a stay pending appeal, it is the State's "obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). "In determining whether to stay an order pending appeal, the Court considers the same four factors as it would in resolving a motion for preliminary injunction: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the say will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.'" *In re Special Proceedings*, 840 F. Supp. 2d 370, 372 (D.D.C. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Particularly in view of the Court's rulings that the underlying justification for, and alternatives to, the Purple Line must be revisited in an SEIS, Maryland has not – and cannot – demonstrate that any of these rigorous standards are satisfied, let alone all of them.[5]

[5] Maryland is wrong in asserting that it need only "establish that a serious legal question is presented" in order to obtain a stay. *Id.* "Typically, a movant must show a likelihood of success on the merits to achieve a stay." *In re Special Proceedings*, 840 F. Supp. 2d at 372. Under longstanding Circuit precedent, that showing could be relaxed "only when the other three factors tip sharply in the movant's favor," *id.* (*quoting Wash. Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 842 n.1 (D.C. Cir. 1977), which is not the case here. Moreover, even the "viability of the sliding scale approach is questionable" in light of recent Supreme Court rulings. *Daily Caller v. U.S. Dep't of State*, 152 F. Supp. 3d 1, 6 (D.D.C. 2015) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)); *see also Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanagh, J., concurring) (expressing the view that, after *Winter*, "the old sliding-scale approach to preliminary injunctions – under which a very strong likelihood of success could make up for a failure to show a likelihood of irreparable harm, or vice versa – is no longer controlling, or even viable"); *Kingman Park Civic Ass'n v. Gray*, 956 F. Supp. 2d 230, 241 (D.D.C. 2013) (explaining that the "District of Columbia Circuit has suggested, without holding, that a likelihood of success on the merits is an independent, free-standing requirement for a preliminary injunction").

A. The State Is Not Likely To Prevail On The Merits.

Maryland asserts that its appeal "is likely to succeed on at least two grounds." Mot. at 4. In reality, however, the State has little if any prospect of prevailing given the patently arbitrary and capricious manner in which the issue remanded by the Court was addressed, and especially in view of the fact that the Court relied on squarely controlling Circuit precedent in deeming the FTA's response on remand legally inadequate.[6]

In fact, far from demonstrating that it is likely to prevail on appeal, Maryland has simply doubled down on the identical arguments that the Court has already rejected. Astonishingly, the State repeats its contention that the FTA's position on remand (based on the MTA's analysis) that a "reduction in Metrorail ridership, no matter how severe, would not alter the *physical* impacts of the transit line, ***which would have the same footprint regardless of the number of riders using it.***" Mot. at 5 (first emphasis added; second emphasis in original). As the Court has already recognized, however, this line of analysis merely proves the sheer arbitrariness of the analysis on remand, rather than demonstrating its rationality. Under the State's "reasoning," information available since preparation of the EIS could prove beyond question that the federal government is being asked to spend nearly a billion dollars on an environmentally destructive ghost train – i.e., that no one will ride – and that *still* would not trigger the need for an SEIS to

[6] It is doubtful that the State can even appeal the Court's remand and vacatur. Under Circuit precedent, although a federal agency may generally appeal a district court's remand for further analysis, other parties, and particularly intervenors on the side of the agency, ordinarily are precluded from doing so when the federal agency itself has not appealed. *See, e.g.*, *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653 (D.C. Cir. 2013) (holding that a defendant-intervenor could not appeal the district court's remand of an agency action for further NEPA review). However, given all of the other compelling reasons for rejecting the State's motion and the fact that the Court of Appeals is in the best position to assess its own jurisdiction, this Court need not address the jurisdictional issue to deny the stay motion.

explore reasonable alternatives. That is an utterly nonsensical interpretation of NEPA and the statute's implementing regulations – as evidenced by the fact that the State's motion does not even *cite* the controlling standards for preparation of an SEIS embodied in the Council on Environmental Quality ("CEQ") regulations implementing NEPA, which FTA has unequivocally admitted must be followed. *See* ECF No. 125 at 5 ("Any suggestion that FTA could follow its own regulations, but deviate from CEQ's regulations lacks support as a matter of law.").

Nor is there any validity to the State's anomalous assertions that the "choice" to select the Purple Line rather than less expensive and environmentally destructive alternatives is entirely the "State's to make," and that even if *no* Purple Line riders transferred from Metrorail, the State would still be "justified going forward with the Project." Mot. at 6. As before, the State has conveniently ignored the fact that the "choice" it made was to *federalize* its project (and hence the decisionmaking process for it) by requesting that federal taxpayers foot much of the bill for the exorbitantly expensive undertaking. Having made *that* decision, the State must accept all that goes with it, including compliance with NEPA, which requires a full and fair consideration of less environmentally destructive and expensive alternatives before the *FTA* can decide whether to spend federal money on the project. *See, e.g.*, 40 C.F.R. § 1502.14 (explaining that consideration "of the proposal and alternatives in comparative form" is the "heart of the [EIS]"); *see also* ECF No. 145-2 at ¶ 21 (concession by State's declarant that because the State has sought federal funds for the project it "required an environmental review under [NEPA] and other laws and was subject to a comprehensive financial analysis as required by the New Starts Program" administered by FTA).[7]

[7] In addition, regardless of the *timing* of the section 5309 findings, the FTA must also ascertain, as a *substantive* matter, that those findings can be made in a manner that is compatible with the State's preferred "choice."

As for whether the State would be "justified" in "going forward with the Project" notwithstanding a dramatic decline in Metrorail ridership, Mot. at 6, as the Court's opinion establishes, that also completely sidesteps the relevant issue. The legal question is not whether, as a matter of policy, the State considers the project to be "justified"; indeed, every time that a state (or anyone else) asks the federal government for money to pursue its preferred course of action that entity presumably believes that its undertaking is "justified." However, the pertinent question under *NEPA* and that statute's implementing regulations is whether the State, either explicitly or implicitly, has now *modified the ostensible purpose for the project* in a manner that necessitates a fresh consideration of alternatives in a supplemental NEPA analysis.

As the Court's ruling makes clear, in this case, both Maryland and FTA have as much as *conceded* that, by asserting that it no longer matters whether even a *single* Metrorail rider would use the Purple Line, they have significantly modified the purpose for the project as set forth in the original EIS and ROD – which (as the very name of the project demonstrates) made interconnectedness with Metrorail a centerpiece of the project's justification. *See* ECF No. 139 at 9-10 & n.3. Although the State is free to dramatically shift its rationale for the project, it cannot do so without complying with federal law – which, as the Court has correctly held, requires an SEIS to address whether far cheaper and less environmentally destructive alternatives may satisfy the State's *modified* objectives, which evidently now may be met with *far lower ridership projections* than the State previously proffered as critical to the initial "choice" of the Purple Line relative to other alternatives. *See* Mot. at 6 (asserting that even if the "projected

ridership on the Purple Line" would fall to "50,000 passengers every day" – far lower than was assumed in the EIS – the project would still be "justified").[8]

Maryland is on equally shaky ground in arguing that the Court somehow misapplied Circuit precedent in holding that it was arbitrary and capricious for FTA to say nothing whatsoever about the extensive expert declarations submitted by Plaintiffs when the SEIS issue was remanded. *See* Mot. at 8-10. To begin with, the State is simply inventing a straw man when it asserts that "Plaintiffs have expressed throughout this litigation that the Court should give their 'experts'" [sic] views more credence and weight when reviewing the issues Plaintiffs raise as part of their case." *Id*. at 8. Plaintiffs have never argued any such thing, as evidenced by the fact that the State's assertion is unaccompanied by any citation to any brief Plaintiffs have filed in this case.[9]

What Plaintiffs *have* argued – and what, as this Court has recognized, is an unassailable principle of administrative law in this Circuit – is that expert declarations such as those submitted to FTA on remand must at least be afforded *some* consideration by a federal agency

[8] In a futile effort to distinguish the NEPA precedents on which Plaintiffs have relied, the State, in what can only be characterized as revisionist history, asserts that the "fundamental rationale for building the Purple Line" had nothing to do with "volume requirements, *i.e.*, ridership levels." Mot. at 7. In truth, as the Court has recognized and as Plaintiff's expert Dr. Frank Lysy has explained in the declarations that the State and FTA have elected to disregard, the selection of the Purple Line over more cost-beneficial projects was heavily dependent on projected ridership, including those riders using Metrorail. *See, e.g.*, ECF No. 119-1 at ¶ 8 (Dr. Lysy's 1/4/17 Declaration).

[9] The State's placement of quotation remarks around their reference to "experts" is evidently designed to cast doubt on the credentials of Plaintiffs' declarants, although neither the State nor FTA has *ever* actually called their expertise or credentials into question. And for good reason. Independent experts such as Dr. Lysy, a highly credentialed economist who worked at a very senior level for the World Bank group for decades reviewing major public works projects, and who has no interest in this matter other than to see that public funds are properly spent, are *exactly* the kinds of people whose views should at least be afforded a "hard look" in a decisionmaking process that has heretofore relied almost entirely on the State's hand-picked consultants and others with a vested interest in seeing the project proceed.

when it reopens an administrative record in response to a judicial decree. *See* ECF No. 138 at 9 (explanation by the Court that "FTA failed to consider relevant information when making its decision not to prepare an SEIS" on remand). In attempting to address that issue, the State advances two contradictory propositions in the same paragraph – that "FTA *did* consider Plaintiffs' submittal," *and* that FTA was completely free to ignore Plaintiffs' experts' declarations because FTA was under no obligation to "seek or accept comments or analysis from anyone other than the applicant" with a self-interest in obtaining federal money. Mot. at 9. Both of these assertions cannot be correct; either the FTA considered Plaintiffs' experts' views or it did not.

Even putting aside the internal inconsistency in the State's own position, this Court was clearly correct in holding that the "facts here could not be more similar" than those in *Public Employees*, which held in no uncertain terms that it is arbitrary and capricious for an agency to reopen an administrative record on remand and then fail to address in any manner expert submissions made by the plaintiffs to the agency. *See Public Employees*, 827 F.3d at 1089-90. If anything, the facts here are even stronger than those in *Public Employees*. In this case, in contrast to that one, the FTA actually included Plaintiffs' experts' declarations *in the administrative record* for the SEIS decision on remand – thus undermining any notion that FTA believed it was free to disregard them – *and then proceeded to say nothing whatsoever about them* when deciding whether an SEIS should be prepared. This is the quintessence of what the D.C. Circuit characterized as arbitrary and capricious agency behavior in addressing a matter remanded by a court.[10]

[10] The State's only other argument on the merits – that the Court somehow misapplied the *Allied-Signal* test when it vacated the ROD – is entirely contingent on the State's contention that FTA correctly concluded on remand that no SEIS is necessary. *See* Mot. at 11. Since the State's

In short, far from demonstrating that it is likely to prevail on appeal, the State has only succeeded in reinforcing why this Court was entirely correct in its merits disposition. Even under Maryland's own (questionable) formulation, the State must at minimum establish that it has raised a "serious legal question" as a threshold prerequisite to obtaining a stay pending appeal. Mot. at 4. Because it has failed to do so, the Court must deny the stay request on this ground alone.

B. The State's Self-Inflicted Economic Injury Does Not Constitute Irreparable Harm Sufficient To Support A Stay Pending Appeal.

Although Maryland's unpersuasive and internally contradictory merits arguments are a more than sufficient basis for denying the stay request, the State has also failed to establish that it will suffer any irreparable injury of the kind that could, in any event, support a stay pending appeal. Indeed, the State's principal assertion of "irreparable" injury is that it will suffer economic losses if it cannot proceed with the project on its preferred schedule. *See* Mot. at 12-13. There are multiple problems with that argument.

To begin with, it is well-established that "economic loss does not, in and of itself, constitute irreparable harm" sufficient to support emergency equitable relief. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Mexichem Specialty Resins, Inc. v. U.S. Envt'l Prot. Agency*, 787 F.3d 544, 555 (D.C. Cir. 2015) ("Where the injuries alleged are purely financial or economic, the barrier to providing irreparable injury is higher still"); *Va. Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("Mere injuries,

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premise is wrong, so is its conclusion. The Court properly recognized that vacatur of an arbitrary agency decision is the standard remedy for a NEPA violation and has correctly applied the *Allied-Signal* standards in concluding – twice – that vacatur is appropriate while further NEPA analysis is conducted. *See supra* at 2-5.

however substantial, in terms of money, time, and energy expended in the absence of a stay, are not enough" for a stay).

Moreover, Maryland's assertion of economic injury is especially weak where, as here, the injury is *entirely* self-inflicted. As the State has admitted, the Purple Line has been under consideration for well more than a decade. *See* ECF No. 145-2 at ¶ 22 (explaining that FTA and MTA initiated the preparation of an EIS for the project in 2003). As noted earlier, when FTA issued its ROD, Plaintiffs initiated their legal challenge to what the State knew was a highly controversial and hotly contested project within the short limitations period prescribed by Congress. *See supra* at 2. Consequently, the State could certainly have allowed litigation in this Court to be resolved *before* entering into contracts and making the other commitments on which it now depends for its assertions of injury. Not only did the State fail to hold off on making such commitments but it flatly concedes that *even after the Court vacated the ROD*, it opted to "advanc[e] State dollars in lieu of federal funding while anticipating the timely resolution of this litigation *and reinstatement of the ROD and the reimbursement of those advances*." ECF No. 145-2 at ¶ 57 (emphasis added).

While Maryland's admitted willingness to gamble with public funds in this fashion even *after* this Court issued its August 2016 ruling vacating the ROD surely raises some serious questions about the State's fiscal responsibility, it hardly justifies a stay pending appeal. To the contrary, it has long been established that a litigant cannot "be heard to complain about damage inflicted by its own hand," which is precisely what the State's assertion of injury reduces to here. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam); *see also Taylor v. F.D.I.C.*, 132 F.3d 753, 767 (D.C. Cir. 1997) (rejecting injunctive relief claim by plaintiffs "seek[ing] a remedy for injury that is in large part self-inflicted"); *Lee v. Christian Coal. of Am., Inc.*, 160 F.

Supp. 2d 14, 33 (D.D.C. 2001) ("The case law is well-settled that '[a] preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted.'") (citation omitted).[11]

Maryland's assertion of injury, in addition to being self-inflicted, also improperly assumes the outcome of the supplemental NEPA process that this court has now (twice) held to be necessary – and that likely could have been completed by now if the State and FTA had not instead expended their time and resources seeking reconsideration of the Court's August 2016 ruling that an SEIS was called for. A central focus of the required SEIS will be on whether previously rejected alternatives (such as improved bus service) that are now clearly viable can be accomplished with far less environmental damage than the Purple Line (which will, e.g., destroy many acres of forest, degrade water ways, and harm parks, wildlife, and historic sites, among many other adverse impacts, *see* ECF No. 100-4) and at a fraction of the overall cos*t* to taxpayers. *See, e.g.*, ECF No. 119 at 4-5 (explanation by former World Bank group economist Frank Lysy that since FTA's own earlier NEPA analysis assumed that much of the Purple Line's

[11] As for the State's assertion that a private concessionaire working with the State has taken "several major steps to begin implementing its obligations under the agreement" entered into after this case was filed, ECF No. 145-2 at ¶ 39, that entity of course also knew that this litigation was pending and that it was therefore proceeding with the risk of an adverse ruling from the Court. Indeed, the Court made this precise point at the very first status hearing held in the case – *before* Maryland entered into commitments on which it now relies. *See* 7/15/15 Transcript of Status Hearing, at 21 (observation by the Court that "[t]his lawsuit is no secret" to potential contractors who have "known about this suit now for months" and have to "work within that context"). Similarly, Maryland's assertion that a stay is justified because the State itself *elected* to put "on hold" certain "maintenance or replacement" work pending construction of the Purple Line, including work on a bridge that was "recently closed to vehicular traffic," Mot. at 13, is yet another form of self-inflicted injury. In any event, absolutely *nothing* in the Court's vacatur of the ROD, or any other aspect of this case, precludes the State from immediately repairing *any* bridges in need of such work, particularly those that might be needed for "school buses and emergency vehicles." *Id.*

ridership would come from Metrorail users, the significant decline in such ridership makes it necessary to reassess less expensive and environmentally damaging alternatives).

If, at the end of that process, it is determined that such an alternative *is* available, then not only will many of the serious environmental harms associated with the Purple Line be avoided, but the federal government *as well as the State* will have *saved* an enormous amount of money that otherwise would have been expended on the project. And, since the core purpose of the NEPA process mandated by the Court is to ensure that federal agencies take a "hard look" at project impacts and alternatives "as part of the agency's process of deciding whether to pursue a particular federal action," *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983), the Court must *assume* that the end result of the NEPA process may well be a decision that the project, under present circumstances, is ill-advised and should be shelved in lieu of other less costly and environmentally disruptive options.[12]

The assumption that the end result of the NEPA process ordered by the Court may indeed be that federal funds are better spent (if at all) on less costly and disruptive alternatives (as well as, e.g., on repairing the existing dysfunctional Metrorail system) is especially reasonable in view of recent policy declarations from the Executive Branch. In fact, the federal government has recently declared that projects like the Purple Line should, as general matter, not even receive federal funding. *See* ECF No. 134 at Ex A p. 2 (OMB budget document providing that funding for "New Starts" projects should be limited to projects "with existing full funding grant

[12] On the other hand, if at the end of the supplemental NEPA process, it is determined that the Purple Line remains an appropriate project for the federal support that Maryland seeks, then the purported benefits Maryland asserts will be accrued at that time. In other words, Maryland's contention that a project that has concededly been on the drawing board since *2003* must be built *now* rather than following completion of an SEIS not only undermines the entire point of NEPA review, but also makes no logical or practical sense.

agreements only," because "[f]uture investments in new transit projects *would be funded by the localities that use and benefit from these localized projects, rather than the federal government*") (emphasis added). Particularly in view of this recent statement of federal policy, Maryland's premise that the end result of an SEIS process would merely be rubber-stamping of the State's request for federal funding is unwarranted, as is the State's assumption that it would inevitably receive a federal grant but for the project's legal difficulties. Indeed, under current circumstances, it is difficult to understand how FTA could make and support the *substantive* section 5309 findings that must be satisfied to support federal funding – including that *existing* transportation systems are receiving adequate funding to repair, operate, and maintain them – even apart from the SEIS process that the Court has ordered. *See, e.g.*, ECF No. 59 at 18-21.[13]

C. In Light Of The Court's Ruling That Further NEPA Analysis Is Required, The Irreparable Injury That Plaintiffs And Other Members Of The Public Will Suffer If The Project Proceeds In The Absence Of An SEIS Counsels Strongly Against A Stay, As Does The Public Interest As A Whole.

Although Maryland concedes that the Court's stay analysis requires the Court to find that "other parties would not be substantially harmed by a stay," Mot. at 4, the State's motion does

[13] In addition to all of these fatal flaws in its irreparable injury argument, the Declaration on which the State relies for its assertion of injury is both outdated and dependent on a host of caveats and unsupported assertions. As for timeliness, the Declaration, which was executed *nearly a month ago* (on May 12), is based heavily on potential project "suspension" activities that the State's declarant said the State was seeking to avoid at that time. *See* ECF No. 145-2 at ¶¶ 61-65. On May 31, however, the State announced that it had in fact suspended "key elements" of the project's "pre-construction activities." *See* https://www.washingtonpost.com/news/dr-gridlock/wp/2017/05/31/mayrland-suspends-key-elements-of-Purple-Line-work. Plainly, the State cannot base an irreparable injury argument on activities that have now already occurred. As for caveats and unsubstantiated assertions, the Declaration is not only based on self-serving characterizations of documents – such as the P3 agreement – that the State has not even filed with the Court, but even those characterizations are qualified by assertions as to financial harms that, e.g., the State "could" incur, ECF No. 145-2 at ¶ 74, and how the P3 Agreement *might* be implemented. *Id*. at ¶ 70 (MTA has not yet made a determination regarding PLTP's claim of a Relief Event under the P3 Agreement.").

not even make a pretense of making that showing, which alone necessitates its rejection. The Purple Line project will concededly have significant adverse environmental impacts – indeed, that is why an EIS was prepared in the first instance. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004) (explaining that NEPA requires an agency to prepare an EIS "*only* if it will be undertaking a 'major Federal actio[n]' which 'significantly affect[s] the quality of the human environment.'") (quoting 42 U.S.C. § 4332(C)).

Plaintiffs have previously set forth in sworn, uncontested declarations the plethora of ways in which proceeding with construction of the Purple Line project will severely and irreversibly harm them and their members personally – as well as many other members of the public – through, e.g., impairment of the Capital Crescent Trail, destruction of many acres of forests, degradation of park land and historic sites, increases in air and water pollution, adverse effects on wildlife Plaintiffs enjoy, and exposure to harmful noise pollution, among many other adverse effects. *See* ECF Nos. 47-2, 47-3, 48, 101. Along with this opposition, Plaintiffs are submitting yet another Declaration documenting the myriad "irreparable injuries that the Plaintiffs would face and the harmful consequences for the public if the stay requested by Maryland is granted and the [ROD] is reinstated." 6/17/16 Declaration of Christine Real de Azua at ¶ 3 (attached as Ex. 1); *see, e.g., id*. at ¶ 6 ("In all, 48 acres of forest inside the Beltway as tallied by the MTA itself in its FEIS, including 20 acres of forested trail, would be clear-cut and lost if the [ROD] is reinstated and the Stay is granted in order to make way for the Purple Line."); *id*. at ¶ 8 ("The permanent loss of 48 acres of forest and linear forest buffer inside the Beltway also means the loss of the clean air, clean water, public health, recreation and wildlife habitat, and other public benefits of these forested areas, as described in my earlier declarations.

These losses, for local natural ecosystems, as well as for people and local communities, including Plaintiffs, are irretrievable.").

Rather than dispute that Plaintiffs (and many others) will be irreparably harmed as a result of the environmental damage caused by the project, the States advances the *non sequitur* that "'NEPA itself does not mandate particular results,'" and only "imposes procedural requirements to 'ensure that that the [federal] agency, in reaching its decision will have available, and will carefully consider, detailed information'" regarding a project's impacts and potential alternatives. Mot. at 15 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). But that is precisely *why* Plaintiffs' interests, and the public interest as a whole, will be irreparably impaired should the Purple Line proceed *without* the SEIS that the Court has deemed necessary. While NEPA does not guarantee any particular substantive outcome, it *is* designed to fully inform the FTA's decision on whether to spend nearly a billion dollars in federal funds on a project with a multitude of adverse impacts. *Id*.

On the other hand, the State's bizarre suggestion that the SEIS should be "delay[ed]" until *after* the project is built, Mot. at 15, "makes a mockery of the EIS process, converting it from analysis to rationalization." Leslye A. Hermann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. Chi. L. Rev. 1263, 1289 (1992)). Indeed, what the State is proposing in the guise of requesting a stay is to deny any meaningful relief at all for the NEPA violation the Court has discerned and, in effect, to eviscerate all of the Court's prior rulings on the need for FTA to take a "hard look" at the new information bearing on the need for the project under current circumstances.[14]

[14] If the Court is correct that an SEIS is required (and it is) then it would not only be a violation of NEPA, but also a violation of section 5309 of the Transportation Act for project construction to proceed before the SEIS process is completed – even under the State's own

Along similar lines, Maryland's argument that the "public interest" somehow supports allowing the project to proceed in violation of NEPA disregards Congress's judgment that NEPA compliance *serves* the public interest in ensuring fully informed agency decisionmaking. *See Pub. Citizen*, 541 U.S. at 768-69 ("NEPA's purpose is not to generate paperwork – even excellent paperwork – *but to foster excellent action*.") (internal quotation omitted). The State's argument is also based on a blatantly one-sided conception of where the public's interest lies. Surely, if, as Plaintiffs' experts maintain – and as has thus far been ignored by the agency decisionmakers – a massively expensive and environmentally destructive project is now demonstrably unnecessary to meet more realistic ridership projections, then the public interest would hardly be served by proceeding with the project in the absence of the "hard look" NEPA demands.

Further, the State's unadorned assertion that there is "broad public support" for the project, Mot. at 15, ignores the widespread and vehement opposition that the project has engendered on many grounds and in many quarters. For example, while the State's touts the purported economic benefits in the affected counties (benefits that will largely be absorbed by the major developers who have been the prime advocates for the project), in February 2017 a resident of Prince George's County submitted to FTA a request for an SEIS – which remains pending – that "seeks to have the FTA evaluate the potential adverse indirect or cumulative impacts of the proposed Purple Line on existing local transit centers within Prince George's County, in light of Prince George's County's conclusions in its most recent comprehensive plan that 'too many centers undermine economic growth' and that the county did not have enough

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interpretation of the law. *See* ECF No. 93 at 15 n.12 (Maryland's brief arguing that "under the statute, FTA makes its section 5309 determination *only after the NEPA process is completed*") (emphasis added).

projected growth through 2035 to develop properly the rail transit areas it already has." Declaration of Bradley E. Heard at ¶ 5 (attached as Ex. 2).[15]

In short, while the State maintains that the project is in the "public interest," many adversely affected members of the public strongly believe the opposite. In such a situation, it is of course not the role of the Court to take sides but, rather, to ensure that the law is followed. That is precisely what the Court's rulings requiring an SEIS and vacating the ROD accomplish, and the State has proffered no persuasive, let alone compelling, reasons for staying this relief during the State's appeal.

CONCLUSION

For the foregoing reasons, the State's motion for a stay and reinstatement of the ROD should be denied.

[15] Other ways in which the "public interest" will be disserved by the project have also recently come to the fore or been reinforced with new information, including a study conducted in February of this year demonstrating that project construction and operation may have significant adverse noise impacts on schools that are in close proximity to the project route, including an elementary school that is only 65 feet away. *See* 6/7/17 Declaration of Donald W. MacGlashan, at 10-13 (attached as Ex. 3); *see also* 6/8/17 Declaration of Michael V. Nixon (attached as Ex. 4) (discussing recent evidence bearing on projects impacts to historic properties); 6/8/17 Declaration of John Bickerman (attached as Ex. 5) (explanation by a former member of the Town of Chevy Chase as to the project's adverse impacts on users of the Capital Crescent Trail, students of Bethesda-Chevy Chase High School, and other residents of Montgomery County); 6/6/17 Declaration of Dr. Albert Manville (attached as Ex. 6) (explanation by the former lead migratory bird biologist with the U.S. Fish and Wildlife Service regarding recent evidence of barred owl use of forest areas slated for destruction if the project proceeds).

Respectfully submitted,

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing is being served, this 8the day of June, 2017, on counsel of record, through filing on the Court's electronic filing system.

/s/Eric R. Glitzenstein
Eric R. Glitzenstein

EXHIBIT 1

Civ. No. 14-01471 (RJL)

DECLARATION OF CHRISTINE REAL DE AZUA

1. My name is Christine Real de Azua, a Plaintiff in this action and a member of the Board of Directors of Plaintiff Friends of the Capital Crescent Trail. I have lived on Elm Street in Chevy Chase, Maryland, since 1991. I am submitting this Declaration on behalf of myself as well as the Friends of the Capital Crescent Trail in support of Plaintiffs' opposition to Maryland's motion for stay pending appeal and reinstatement of the Record of Decision.
2. As I stated in my declaration of September 2016 and in my Standing declaration filed in this case, both of which I incorporate here by reference, I use the Georgetown Branch of the Capital Crescent Trail (CCT) almost daily and fairly often use the full CCT as well as Metro. As further stated and detailed in these declarations, my professional background includes over twenty years of work on energy and environmental policy and improved accounting for the environment in decision-making.
3. This declaration addresses the irreparable injuries that the Plaintiffs would face and the harmful consequences for the public if the stay requested by Maryland is granted and the Record of Decision is reinstated.

MARYLAND'S REQUEST IGNORES THE EXISTING ENVIRONMENT

4. The public interest encompasses the welfare of the public as well as natural resources such as green space, clean water and healthy air on which people and life depend. In the case of the Purple Line as proposed, the environmental impacts and costs of the project are severe. Yet Maryland's

request totally ignores this fact even as it claims that the "balance of the harms and public interest favor a stay." To the contrary, if the project were allowed to go forward and construction to proceed, it would immediately have environmental impacts that would be significant and irretrievable, and would preclude alternatives that should be analyzed in the SEIS ordered by the Court and that would both avoid or significantly reduce adverse environmental impacts while also costing far less than the Purple Line.

5. In Montgomery County and Prince George's Counties, which are rapidly urbanizing, preserving critical green connective corridors and "lungs" are part and parcel of responsible planning that is in the public interest. Tools, such as I-Tree, quantifying some of the many public benefits of urban forests, are now widespread. For example, the Montgomery Department of Parks has recently posted in Elm Street Park - one of the canopied parks that would be impacted and 'used' by the Purple Line and its Bethesda Terminal station - report cards on the "Stormwater Filtered, Carbon Dioxide Removed, Energy Conserved, Air Pollutants Removed" benefits of individual trees in that park. The signs also explain that it is important to "help trees life a long life" as "larger trees provide more benefits."
6. In all, 48 acres of forest inside the Beltway as tallied by the MTA itself in its FEIS, including 20 acres of forested trail along the Georgetown Branch section of the Capital Crescent trail, would be clear-cut and lost if the Record of Decision is reinstated and the Stay is granted in order to make way for the Purple Line.

7. The value of such green corridors is increasingly recognized in scientific research and increasingly valued in regional and local planning, as examples show from the Queensway in New York to Washington DC. Just this week, in a story on a new book, "The Nature Fix," the *Washington Post* reported how "studies show the beneficial effects of spending time in nature: People who live near green areas live longer, healthier lives than people who do not, even when adjusting for income. Walking in nature has been shown to have more benefits than taking the same walk in a city."[1]
8. The permanent loss of 48 acres of forest and linear forest buffer inside the Beltway also means the loss of the clean air, clean water, public health, recreation and wildlife habitat, and other public benefits of these forested areas, as described in my earlier declarations. These losses, for local natural ecosystems, as well as for people and local communities, including Plaintiffs, are irretrievable.
9. Wetlands are another natural resource that would be irretrievably harmed. Indeed, the project would "permanently impact approximately 0.27 acre (11,937 square feet) of forested nontidal wetlands, 0.22 acre (9,552 square feet) of emergent nontidal wetlands, 1.64 acres (71,328 square feet) of25-foot nontidal wetland buffer, 0.13 acre (5,598 square feet) of palustrine open water, 1,304 linear feet (15,346 square feet) of perennial stream, 3,450 linear

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[1] "Hunting for a moment of awe in an urban jungle," *Washington Post*, June 6, 2017.
[2] Petition to the U.S. Department of Interior and the U.S. Fish and Wildlife Service for

feet (19,851 square feet) intermittent stream, and 315 linear feet (1,461 square feet) of ephemeral stream" according to the permit application submitted in October 2016 to the US Army Corps of Engineers. The impact is so large that a "general" permit cannot be issued and instead the Corps must give the project the additional scrutiny of an "individual" permit.

10. Some of these wetlands and forest areas have been identified as essential for the survival and recovery of endangered amphipods. These amphipods are also indicators of water quality and health. The Center for Biological Diversity, in its petition for Critical Habitat Designation for Nine Northeast Species, included the federally listed and critically endangered Hay's Spring Amphipod.

11. The map below[2] shows that the habitat identified as critical to the survival of the Hay's Spring amphipod, for which the Center petitioned, includes, in the northwestern part of the red area, the forested areas along Coquelin Run and Rock Creek, immediately along the path of the Purple Line, as it would run on the Georgetown Branch Trail and through the Maryland section of Rock Creek park.

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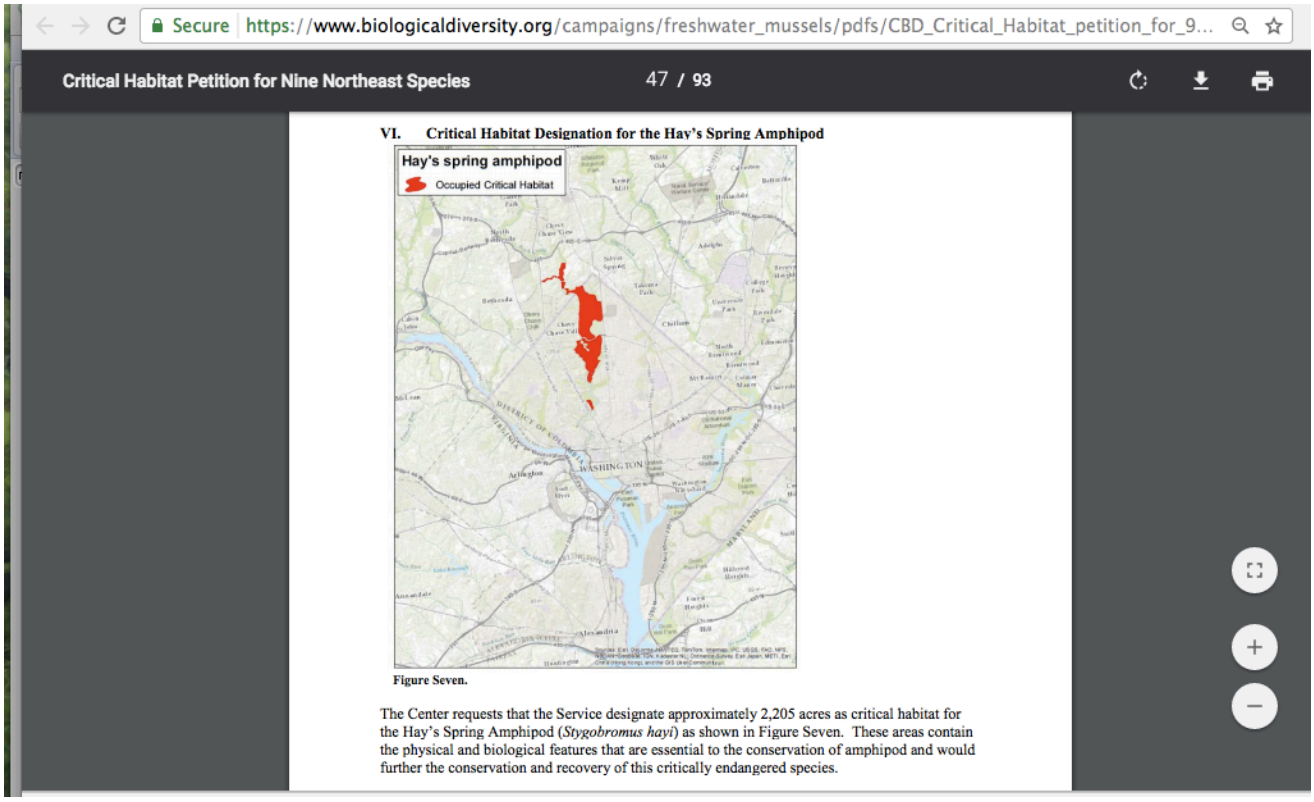
[2] Petition to the U.S. Department of Interior and the U.S. Fish and Wildlife Service for Rulemakings Designating Critical Habitat for Nine Northeast Species, Page 77. https://www.biologicaldiversity.org/campaigns/freshwater_mussels/pdfs/CBD_Critical_Habitat_petition_for_9_northeast_species.pdf



12. In February 2017, the Hay's Spring amphipod was declared the official amphipod of the District of Columbia and provided with potential further protection via the enactment of enhancements to the District's wildlife law that same month, entitled the Fisheries and Wildlife Omnibus Amendment Act of 2017. The new law requires the Mayor to issue regulations protecting and enhancing critical natural resource protection areas, including water recharge areas, for the protection of the waters and wildlife of the District,

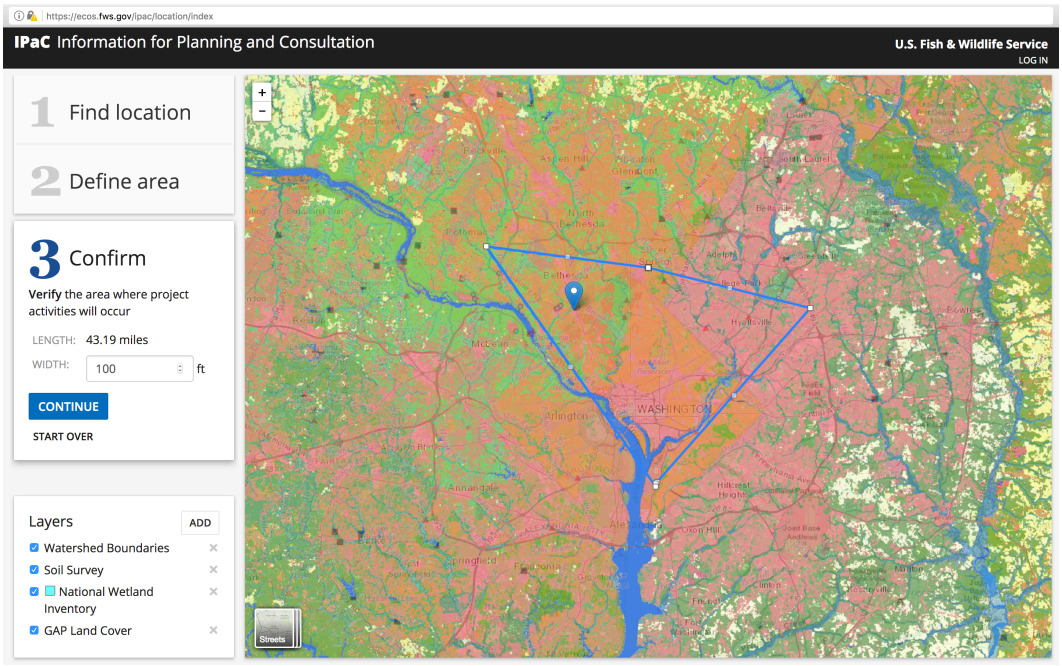
including the Hay's Amphipod.[3] Below is a photo of DC Mayor Muriel Bowser at the ceremony:

13. The second species of amphipod, the Kenk's amphipod, has been proposed for federal listing as endangered by the U.S. Fish and Wildlife Service, as of September 29, 2016 - three years after the FEIS was concluded. According to the Service, Kenk's amphipod "is found in wooded areas where ground water emerges to form seepage springs [...] The shading, hydrologic conditions, and organic matter found in these woodlands are probably factors in maintaining suitable habitat for the species." Known occupied sites within the Rock Creek drainage area include three within Rock Creek Park in Washington,

D.C., and the fourth (Coquelin Run Spring) in Montgomery County, Maryland, in the Chevy Chase Lake area (at Connecticut Avenue) through which the Purple Line would run and would have a station and related development.

14. Purple Line construction would effectively degrade and foreclose options for designating and protecting both federal critical habitat and D.C. "critical areas" given the harmful effects in and immediately north of the areas among the most essential for the conservation and recovery of these two species. As the FEIS noted, aquatic invertebrates would be the species most at risk from construction of the Purple Line as they cannot swim far enough out of the way of polluted runoff, and as they depend on wooded areas and freshwater seeps. Paragraph 15, below, contains a triangle that approximates the watershed most likely to be most heavily affected by the Purple Line construction, operation and permanent degradation of habitats, as developed using the US FWS endangered species mapping tool.

15.



16. What's more, new, previously unassessed impacts from the Purple Line have since surfaced.
17. On March 2, 2017, Plaintiffs Friends of the Capital Crescent Trail and John Fitzgerald sent a letter to US Transportation Secretary Elaine Chao. In this letter we documented nine continuing or new developments, from reductions in service in Metrorail and diversion of funds showing the region does not have the resources to recapitalize and maintain its transportation network, to impending violation of Historic Preservation provisions of the Highway Act, that further strengthened the need for the Federal Transit Administration to prepare a Supplemental Environmental Impact Statement and to carefully review whether federal funds for the Purple Line project were justified.
18. The letter to Secretary Chao and its appendices is attached in Appendix A to this declaration.
19. One of these new developments is the request by the "Purple Line Transit Constructors" on August 3, 2016 for a permit from the Maryland Department of the Environment to appropriate and redirect underground spring water in order to make possible the construction of the underground "Purple Line Station" in conjunction with the South Bethesda Metro station. Since January 2017, as detailed in part in the letter to Secretary Chao, it has become evident that it was not the 30,000 gallons applied for, but rather 50,000 gallons a day on average and 100,000 gallons a day in peak months that would be

redirected for a period of at least four years, and away from Coquelin Run, in order to lower the water table.

20. Neither the diversion nor the permit for it, were listed in the FEIS nor was the impact of such a major withdrawal and diversion assessed. Yet, immediately nearby and presumably dependent on such waters, are, the green and tree-covered Elm Street Park - and the headwaters of Coquelin Run, the tributary to Rock Creek whose banks, downstream, harbor a seep with the Kenk's amphipod.
21. Significant and irretrievable and environmental impacts go well beyond forests and wetlands. Stormwater runoff impacts, potential pollution from harzardous material sites dug up during construction, loss and fragmentation of bird habitat including that of Forest Interior Dwelling Species, noise and vibration impacts including on Trail users, residences, nearby schools and more, safety, the "attractive nuisance" hazard of train tracks, and public health impacts have been described in this case and my previous declarations.

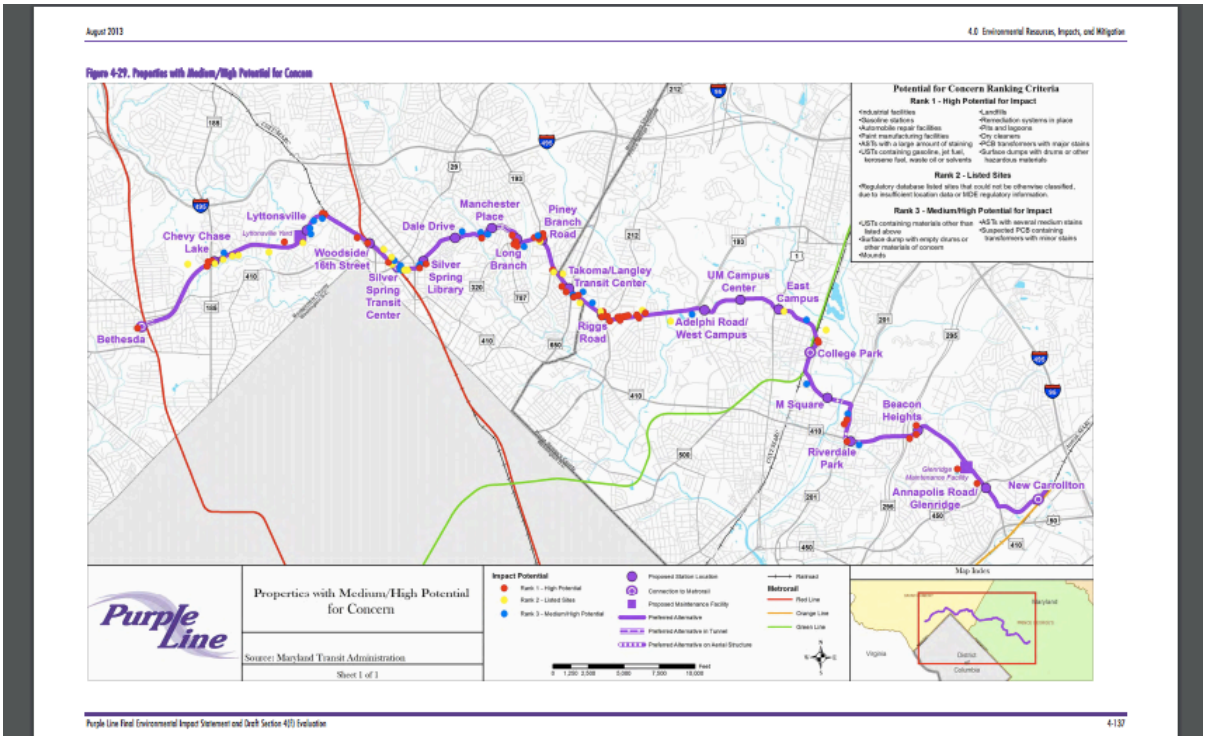
THE PURPLE LINE FAILS TO SERVE THE MANY

22. The Purple Line is not in the public interest, not only because of its harmful and irretrievable environmental impacts, but also because it hurts other forms of transit. It would also fail to serve the most people, at the lowest cost, not only within the selected corridor but also over a wider region, including those who need transit the most.

23. Proceeding with the Purple Line contract and construction would siphon away financial and technical resources - and also riders - from existing systems including WMATA and bus systems. Indeed, MTA itself estimates in its FEIS that over 70% of Purple Line riders would be people who already use public transit. These findings, laid out in detail in our letter to Secretary Chao, and combined with the documented continuing dearth of resources and management solutions for WMATA, show that proceeding with the Purple Line construction as Maryland requests would run counter to the public interest and to the common sense provision of transportation law (49 U.S.C. § 5309(f)) requiring that before federal funding is spent on such new "fixed guideway" projects, sufficient resources be available to recapitalize, maintain, and operate the overall existing and proposed public transportation system, without any reduction in service.
24. The Purple Line would be likely to have a discriminatory impact on minority and low-income communities, even if the intent is not discriminatory, as the letter to Secretary Chao also points out. Such impacts include and go beyond diverting essential public resources and investment away from solving Prince George's County's transit and economic development inadequacies, the question that is the focus of the request for a Supplemental Environmental Impact Statement by Bradley Heard mentioned in our letter to Secretary Chao.
25. Already gentrification is pricing people out of their homes, not only in PG County but in Montgomery County as well - in which case, what good will the

Purple Line be to those who cannot afford to live along its path? Government-mandated or subsidized affordable housing may not be sufficient to staunch that loss.

26. The Purple Line rail would also cut off pedestrian access to shops and schools, inflict harmful noise pollution on homes, schools and businesses without sufficient noise insulation, and pose risks on those communities, including safety risks from collision, and from hazardous substances at many sites that would be unearthed during construction, and for which the P3 contract required evacuation plans and routes. The map below shows the location of "Rank 1 - High Potential" (red), "Rank 2 - Listed Sites" (yellow) and "Rank 3 - Medium-High Potential" (blue) for some of the hazardous materials sites along the Line.



27. These environmental justice impacts are impacts that Maryland has failed to fully and fairly assess for the Purple Line (as FCCT pointed out in its comments on the FEIS) - and may be overlooking across all of Maryland as well. The US DOT Office of Civil Rights has opened a compliance review, announced in a letter to the Maryland Governor in January of 2017, of Maryland's entire transportation decision-making process, as we point out in our letter to Secretary Chao. The objective of the compliance review is to determine whether that process complies with Title VI of the Civil Rights Act of 1964 and DOT's regulations implementing it.
28. More generally, ridership numbers and composition even further diminish Maryland's claim that the project is in the "public interest." MTA's untransparent and flawed ridership projections - ever since the AA/DEIS in 2008 - are a core reason why the project is currently suspended and the court has required an SEIS. The flaws and unanswered questions regarding this basic performance metric, are described in detail in expert declarations, previous filings and in our complaints in this case, and in turn raise questions about meeting the criteria to justify project Ratings under Section 49 U.S. Code § 5309 when seeking federal funding, such as "cost-effectiveness per rider" and "congestion relief associated with the project."

29. Whatever the projections regarding the total, MTA's own numbers[4] show that a large proportion - over 70% - of Purple Line riders would be composed of people who already use public transit, as already noted above. Merely shifting most riders from one transit form to another - at such a high cost - further undermines a claim to "public interest." It also explains why the project is acknowledged by MTA to take few cars off the road and not be designed to reduce congestion.

MARYLAND BEARS THE BLAME FOR HARM TO THE PUBLIC INTEREST BY PUTTING TRANSPORTATION AND SAFETY IMPROVEMENTS ON HOLD PENDING THE PURPLE LINE

30. Maryland's memorandum (page 13) and Declarant Rahn's declaration at 77 both cite as an example of harm to the public interest the fact that major maintenance or replacement work on eight bridges, which would be replaced by Purple Line construction, was put on hold pending the Purple Line. As a result "one bridge was recently closed to vehicular traffic, causing school buses and emergency vehicles to take longer routes to reach their destinations." This is inexcusable - one does not put off vital maintenance work waiting for a controversial project to comply with the law.

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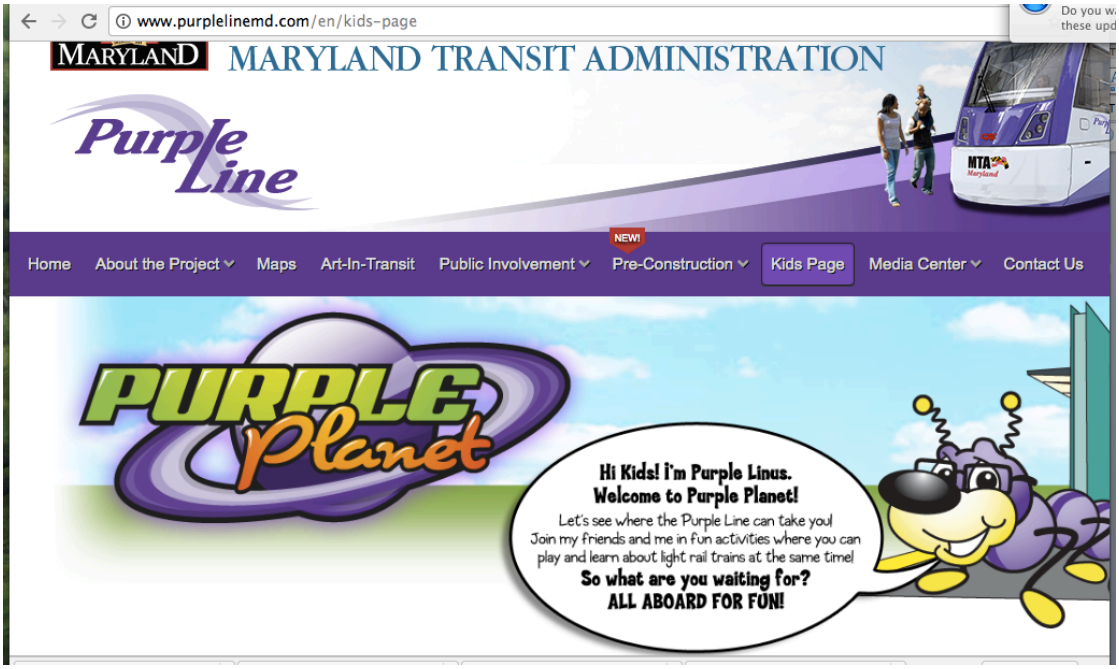
[4] FEIS, Volume 3, Travel Forecasts Technical Report, Table 17 showing 19,700 Regional Total new riders, out of 74,160 projected in 2040.

31. Meanwhile, the costs incurred by Maryland related to the Purple Line, at taxpayer expense, instead of tending to critical services and repairs, helped pay for "Kid's pages" and proposed art work contests. The following is an example of a webpage that, when clicked, leads to coloring and other "fun":

32. 

33. If Maryland is serious about the bridge repair work that it claims is essential, the money spent on Purple Line promotions should instead be spent on bridge repairs while the State and federal governments analyze whether proceeding with the environmentally destructive and exorbitantly expensive Purple Line is indeed necessary or appropriate, as the Court has ordered.

Pursuant to 28 U.S.C. § 1746, I, Christina Real de Azúa, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on June 7, 2017.

Friends of the Capital Crescent Trail

March 2, 2017

By Electronic Mail

The Honorable Elaine Chao
Secretary of Transportation
Office of the Secretary
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590
elaine.chao@dot.gov

Re: **Maryland Purple Line—**
(1) Failure of the Proposed Maryland Purple Line to Meet Highway Act Requirements and Other Criteria for Federal Funding, and
(2) Request for a Supplemental Environmental Impact Statement Based on New Circumstances and New Information.

Dear Madam Secretary:

We extend our deep congratulations to you on your taking the helm as the new Secretary of the US Department of Transportation.

On behalf of the Friends of the Capital Crescent Trail and ourselves as individuals, we write to you regarding the proposed Purple Line for the Maryland suburbs of Washington, D.C., the risks that the project raises, and the project's failure to meet the criteria of the Trump Administration and of the law for the proper use of public and private funds for transportation infrastructure. These failures warrant a finding by your Department precluding any award of funds for the project.

The Purple Line "light" rail[1] project in Maryland is a very costly project, at $6.2 billion and rising. The independent Cato Institute has characterized it as a boondoggle. The Wall Street Journal has described it as a "colossal waste of taxpayer money," and MarketWatch economist and columnist Diana Furchtgott-Roth as "wasteful and

[1] The “light” in light rail refers not to weight but to capacity: light rail weighs the same as heavy rail, but because trains are much shorter the capacity for moving people is much lower. See Randal O'Toole, Cato Institute Fellow, https://www.cato.org/publications/testimony/ftas-capital-investment-grants

unnecessary." (Attachments 1 and 2) The flaws in this controversial project are deep and many, as we have explained in letters to the previous Administration and argued in court, and as we explain further in this letter based on new developments. The project has already run afoul of one Federal law and is quite likely to violate more.

At present, federal approval and funding for the project has been put on hold by virtue of a ruling by U.S. District Court Judge Richard Leon that the Department of Transportation ("DOT") and Federal Transit Administration ("FTA") acted in an unlawful and arbitrary and capricious manner by **failing to consider in any fashion the implications for the Purple Line of the extraordinary dysfunction that has plagued the existing Metrorail system.** The claimed justification for the Purple Line - and for federal funding for it - is heavily dependent on highly questionable projections of future ridership engineered at the request of former Governor Martin O'Malley in order to overcome the much lower ridership estimates calculated by the Administration of his predecessor, Gov. Ehrlich.[2] Aware of the project's suspect history, and of the serious problems and ridership declines of the Metro system (from which the Purple Line would take from 27% to 40% of its riders), Judge Leon ordered further review and set aside DOT and FTA's Record of Decision ("ROD"). In his August 2016 decision, he admonished the defendant agencies that "FTA's **cavalier attitude toward these developments raises troubling questions about their competence as stewards of nearly a billion dollars of federal taxpayers' funds.**" *Friends of the Capital Crescent Trail v. FTA*, ___ F. Supp. 3d ___, 2016 WL 4132188, at *3 (D.D.C. Aug. 3, 2016) (emphasis added).

The new Administration and, in particular, your leadership of DOT present a unique opportunity to take a fresh, objective look at the Purple Line and, in the process, to demonstrate far better stewardship of federal taxpayer money than was shown by the past Administration. Indeed, in addition to the Metrorail issue addressed in Judge Leon's ruling – and which remains pending before him, along with a number of other important questions concerning compliance with federal environmental law and the statutes governing DOT/FTA's funding decisions – there are several recent developments bearing on the serious environmental and economic impacts[3] of, and less harmful, and quite reasonable alternatives to, construction of the Purple Line.

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[2] That the Line's projected ridership increased without explanation under the O'Malley Administration in order to qualify for the massive federal grant and loan package is recounted in an expose by The Wall Street Journal's Mary Anastasia O'Grady (attachment 1). Throughout the process of evaluating the Purple Line against less costly and less environmentally damaging alternatives, MTA's ridership projections for the Purple Line have been derived from undisclosed assumptions, inputs, and proprietary software that produced results that, as independent experts explained in their formal comments in the litigation, were highly suspect. We further note that the AA/Draft EIS ridership projections were dependent on 40% of the riders coming from Metro and in the Final EIS 27%. Now, in its recent, December 2016 filing with Judge Leon, the MTA made the astonishing claim that the Purple Line would need **no Metro riders at all** to be a "robust" transit system.

[3] NEPA regulations define impacts or effects as including economic impacts and the Purple Line would have serious and numerous (negative) economic effects that have not been properly assessed. 40 C.F.R. §1508.8.

These developments, in particular those relating to WMATA's lack of funding, decline in riders, and reductions in service, and the fact that the Purple Line, a prime example of "transit that hurts transit", would draw away yet more riders from WMATA reveal that there is essentially no legally or factually plausible way in which DOT/FTA can make the findings required by 49 U.S.C. § 5309(f) – findings that are a prerequisite to any federal funding decision for the project. This common sense provision of transportation law requires that sufficient resources be available to recapitalize, maintain, and operate the overall existing and proposed public transportation system, without any reduction in service, before such funding can be approved.

Of additional concern is the fact that the so-called Public Private Partnership ("P3") for the Purple Line is not a proper P3 at all; it merely masquerades as one. The Purple Line contract in fact does not leverage significant private funds. On the contrary, it is a contract in which the public bears virtually all the risk and costs.

The proper use of private investment is critical to the success of President Trump's signature infrastructure initiative. In this case, however, the colossally wasteful and ill-conceived Purple Line would badly taint the term "P3" and this initiative. Had the Purple Line contract been structured as a true P3, the private sector would have insisted on taking an independent, sharp look at the questionable ridership (and, hence, revenue) projections and other major project risks before deciding whether to enter into such a costly venture. Instead, the usual incentive, and indeed, fiduciary duty, to apply sharp scrutiny by the private sector was eliminated by having the contract guarantee the same generous payment to the contractor for over 30 years regardless of the number of actual riders and actual fare revenue, and having the taxpayer and the public shoulder virtually all the costs.

In light of these concerns, and others presented in our letters to the previous Administration but still not satisfactorily answered, therefore, a decision now by your Department to deny funding for failure to meet the common sense requirements of 49 U.S.C. § 5309(f) or to freeze the grant application pending careful review by the new Administration, and not spend more scarce executive and judicial resources defending the indefensible, would be most efficient.

Such a decision to deny or set aside funding may also allow you and OMB to reprogram those appropriated funds to meet the real needs of the nation and its capital.

If you do not choose to end the Purple Line project's application for federal funding, the law requires that your agency undertake a new or Supplemental Environmental Impact Statement based on the new circumstances and new information presented below. This information includes developments and analysis that have occurred since, and that build on, our previous petitions to DOT under the Obama Administration.

I - DOT/FTA CANNOT IN GOOD FAITH MAKE THE SECTION 5309 FINDINGS THAT ARE A PREREQUISITE TO FEDERAL FUNDING.

The federal statute governing "fixed guideway capital investment grants" - such as the Purple Line - lists several criteria for eligibility for federal funding and, in particular, provides that, "[i]n determining whether a project is supported by an acceptable degree of local financial commitment and shows evidence of stable and dependable financing sources," the DOT Secretary

> "shall require that . . . local resources are available to recapitalize, maintain, and operate the overall existing and proposed public transportation system, including essential feeder bus and other services necessary to achieve the projected ridership levels ***without requiring a reduction in existing public transportation services or level of service to operate the project***." (49 U.S.C. § 5309(f)(1) (emphasis added).)

Events of the past year and a half have made clear that, in this case, to the contrary, existing public transportation services in this area and into which the Purple Line would connect, including WMATA's Metrorail and bus system, are in serious decline, with no clear remedy that is either in place or at all likely to be successful within the period applicable here.[4] (**See discussion and documentation in II.1. below.**)

Also deeply foreboding is the very significant negative impact that the Purple Line would have on the ridership and fare receipts of the region's existing transit network and of Metrorail and Metro-bus systems in particular. This was admitted in the Final Environmental Impact Statement of the Purple Line thus making the Purple Line "transit that hurts transit". According to the projection in the Final Environmental Impact Statement (FEIS, issued in August 2013), almost 60% of the Purple Line riders would be riders shifted from other transit. With this shift in ridership, fares on the exiting transit systems are forecast to fall by an average of $36 million per year (based on the figures in the FEIS on net fare revenues, plus the Purple Line forecasts of its fares). Over 30 years, this adds up to over $1 billion.[5]

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[4] See, e.g., the long-running series of articles in the *Washington Post* about Metrorail, continuing, for example, with "Metro facing big cash crunch, Official: Agency risks insolvency" Robert McCartney and Faiz Siddiqui, page B1 (Feb. 24, 2017) (online under the title "Metro scramble to fill budget hole" (attachment 3).

[5] These figures are in the 2013 Final Environmental Impact Statement (FEIS), Chapter 3: http://www.purplelinemd.com/images/studies_reports/feis/volume_01/07_PL%20FEIS_Vol-I_Ch%203%20Transportation.pdf . Table 3-1 on page 3-4 provides figures for the expected total transit ridership in the region, for 2030 and 2040 and with and without the Purple Line (the "Preferred Alternative") being built. The table needs to be read in conjunction with Table 3-3 on page 3-5. These tables reveal that those taking transit other than on the Purple Line for a portion of their trip is forecast to fall by 37,884. This summary of the FEIS calculation of ridership lost to Metro and other local transit due to the Purple Line was developed in February 2017 by Frank Lysy, Ph.D., former Chief Economist of the Multilateral Insurance Guarantee Association of the agency within the World Bank Group providing political risk insurance to private investments.

Put simply, federal law forbids federal funding of a project that will, in effect, rob Peter to pay Paul. Yet that is precisely what the Purple Line is doing and will inevitably continue to do, especially in light of the unprecedented fiscal, safety, and reliability problems already plaguing the WMATA system. Instead of putting nearly a billion dollars of federal taxpayer funds into this unnecessary (and unlawful) endeavor, DOT/FTA should direct any available funds to higher priorities. Clear, documented local needs include, for example, repairing Arlington Memorial Bridge, now closed to heavy vehicles; equipping buses with traffic signal changing technology; and, of course, extricating the *existing* transit system from the "death spiral" it is presently in, so that the Nation's Capital and its Metro passengers can receive the safe, reliable, and efficient service to which they are entitled.

These developments and information alone are sufficient to support, and indeed warrant, your finding under 49 U.S.C. § 5309(f)(1) that such resources are **not** available. Such a finding would be sufficient for the DOT to suspend federal funding for this harmful and wasteful project now.

II - RECENT INFORMATION AND CIRCUMSTANCES REQUIRE A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT AND ALTERNATIVES ANALYSIS.

Not only does transportation law require a finding under Section 5309 of the Highway Act before federal funds can be disbursed, but the regulations implementing the National Environmental Policy Act (NEPA) require that agencies must supplement their prior NEPA analyses when the "agency makes substantial changes in the proposed action that are relevant to environmental concerns," or where "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." (40 C.F.R. § 1502.9(c)) The definition of impacts or effects includes "economic effects" and a major reason for supplementing an EIS in such cases is to make sure that decisionmakers have up to date information on the relative costs, effectiveness and public health impacts of a reasonable range of alternatives.

In petitions for supplemental NEPA analysis previously sent to DOT/FTA on July 14 and October 8, 2015 (and incorporated herein by reference), we exposed multiple flaws and set forth multiple reasons why the process of analyzing environmental impacts and project alternatives, from costs per rider to risks to the public, was heavily biased towards the approval of the much more expensive and harmful rail alternative ultimately selected by Governor O'Malley. Assumptions and models used to run ridership projections that were key to securing federal funding remained withheld from the public, and produced only in illegible form to the court, in spite of public comments and requests for their disclosure. The project would destroy a forested trail, adversely affect historic sites, and use parks and playgrounds even though reasonable alternatives were clearly available, all contrary to DOT policy and law as explained in our previous comments and

filings in court. In our October 2015 petition to the previous Administration, we also highlighted developments and information that had come to the fore since the 2013 Record of Decision (ROD) that even further reinforced the need for an SEIS – such as the extraordinary problems plaguing the Metrorail system, which is inextricably intertwined with the Purple Line.

Now, sixteen months after our October 2015 petition, additional salient information and changed circumstances add yet another layer of compelling reasons why DOT/FTA must prepare an SEIS, one that should include a new Alternatives Analysis. The law requires that this analysis, incorporating public comment and, critically, independent expert review – which has been effectively foreclosed in prior project assessments – be completed ***before*** any federal funds or any contingent state and local funds are committed and before any irretrievable harm is done on the ground.

The new information and circumstances necessitating a Supplemental EIS (and, in the case of 1. below, also affecting a 49 U.S.C. § 5309(f)(1) finding), include the following:

1. Reductions in Metrorail and regional transit service, diversion of funds, increased need for capital and operational funds, and other recent developments underscore that resources that would be used to build the Purple Line are instead vitally needed to preserve and rehabilitate existing transportation infrastructure in the region.

a. Permanent or long-term reductions in service that have taken place over the past year and one half in bus and Metrorail service and the additional reduction and/or elimination of three dozen bus routes by WMATA. These reductions include the very route that the Purple Line is supposed to serve (the J4 east-west route). They are taking place in order to maintain Metrorail service at what is itself an admittedly reduced schedule (See *Washington Post* article from the front page of the Metro Section of February 1, 2017 -- "A rallying cry: 'Leave bus lines alone'", page B1; and "Regional transit ensnared in Metro penalty- Federal action aimed at local agency has impact on others "caught in the middle," *Washington Post*, February 19, 2017, attachments 4,5).

b. The Maryland Office of Legislative Services has determined that Maryland's DOT failed to comply with the directions of the Joint Chairs of its Committees of Jurisdiction in calculating the assets of the State's Transportation Trust Fund and thus is expected to have $1.7 billion less than previously projected.[6]

[6] Fiscal Briefing, Office of Legislative Services, January 2016, stating: "MDOT did not use the five-year average annual increase in operating expenses to calculate out-year operating expenses as directed in the 2016 Joint Chairmen's Report. As a result, MDOT's forecast likely understates operating expenses by $585 million over the forecast period, or just under 5%, and overstates the amount available for the capital program by $1.7 billion."
http://mgaleg.maryland.gov/Pubs/BudgetFiscal/2016rs-operating-budget-fiscal-briefing.pdf

c. WMATA has requested an additional $50 Million per County (Montgomery and Prince George's) on top of the increases already agreed to in WMATA's budget for the coming year, neither of which was in place when the project FEIS and ROD were completed. (See Post article cited in a. above p. B3)

d. WMATA is continuing its practice of diverting tens of millions of dollars of its Federally provided capital funds intended for repairs and long-term maintenance to be used instead for daily operations to help make up for a $125 million revenue shortfall for the current fiscal year and anticipated $290 million shortfall for the next fiscal year -- a practice the FTA has repeatedly warned WMATA not to do.[7] What's more, current repairs and upgrades that are made (instead of being diverted) place additional stress on the aging system and the demand on it, according to a December 2016 FTA report. For example, introducing eight-car trains to serve more passengers tax the current electrical wiring beyond its capacity and trigger more problems such as power shutdowns and the need for another iteration of repairs and investment.[8] WMATA seems to have concluded that raising fares to cover the shortfall would result in lost ridership, and that in turn would result in lost revenue, compounding what has been called the "Death Spiral" of Metro's current conundrum. **This alone is a per se admission of the fact that the region does not have the resources to recapitalize and maintain its transportation network.**

e. Maryland has made clear it would use MARC fare revenue to pay Purple Line debt,[9] thus depleting a key component of the regional transit system, one that reaches West Virginia as well as Baltimore, key corridors in Maryland, and Washington DC.[10] In Montgomery County, MDOT has diverted federal TIGER funds that had been obtained to install signaling and other improvements to reduce bus travel times on University Blvd, and Veirs Mill Rd., and instead used those funds to plug cost overruns for the Langley Transit Center, a transit center that would be one of the Purple Line stops--thus depriving transit users of some of the mobility improvements they could have had today. As one transit user told Maryland Delegate Al Carr: " I wish our government could be more pro-active in using the solutions that are readily at hand (such as adjusting signal timing) to optimize the infrastructure that we already have." The TIGER grant revision occurred in 2014 and was brought to our attention in December 2016. (Revision Request Letter from MD DOT under Governor O'Malley, attachment.7).

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[7] "U. S. withholds millions of dollars until Metro Safety Commission is created", By Lori Aratani and Martine Powers, posted February 10 at 8:08 PM on www.washpost.com and in *The Washington Post*, p. C1, Sunday February 12, 2017 (attachment 6), and "Metro's SafeTrack is eating into this year's ridership revenue," by Martine Powers, *Washington Post*, February 9, 2017,

[8] "Another manic Monday on Metro, with lengthy delays-Power shutdown, other problems irk riders on morning commute," *The Washington Post, February* 7, 2017

[9] "Maryland Will Use MARC Fare revenue to Pay Purple Line Debt, Officials Say," Washington Post, April 4, 2016, https://www.washingtonpost.com/local/trafficandcommuting/maryland-will-use-marc-fare-revenue-to-pay-purple-line-debt-officials-say/2016/04/04/7f2fa850-fa8f-11e5-80e4-c381214de1a3_story.html?utm_term=.8921e6ba00e1#comments

[10] Maryland Area Regional Commuter Service, WV Statewide Rail Plan.

f. The February 2017 release of the Montgomery County Mobility Assessment Report confirms that the existing highway network has in effect declined in the service that it provides due to increased congestion and slower traffic since the 2014 assessment (and the previous one), primarily on north-south commuter routes which account for all of the top ten most congested roadways in the County[11] (attachment 8). That amounts to a decrease in transportation service provided by the roadway portion of the region's transportation network just as much as a reduction in bus or train schedules or transit speeds. This decline is further compounded by Metro's own declining service, which drives more people to drive. Another aspect of declining network is that the Memorial Bridge to Arlington and its National Cemetery has become so weak and in need of repair that heavy vehicles may no longer use it regularly.

2. The Purple Line will "frustrate Prince George's growth and land use goals and hinder WMATA's ability to coordinate and deliver effective regional transportation services", as stated in a recently filed petition to the FTA from attorney and smart growth transit blogger and analyst Bradley Heard, who is based in Prince George's County. The petition explains that the Purple Line will **create too many transit centers depleting the several existing and planned transit lines and systems of the funds, population density and ridership needed to sustain them in Prince George's County**.

The EIS process failed to consider the fact that the WMATA and Prince George's Plans both noted that there appeared to be an excessive number of transit centers or hubs in P.G. County and that the addition of the Purple Line was likely to undercut the planned growth at the previously existing Metro stops in particular and undercut the combination of existing Metro-bus and Metrorail transit.

This case was set forth with great precision by Attorney Bradley Heard of Prince George's County in his February 20, 2017 letter and APA petition to Ms. Terry Garcia Crews, the Regional Administrator of Region 3 of the FTA, calling for an SEIS. [12] (Attachment 9) The information and analysis provided in that petition also have bearing on the criteria and requirements of Section 5309 of the Highway Act, including availability of local resources to recapitalize, maintain, and operate the overall existing and proposed public transportation system (f).

3. The US DOT Office of Civil Rights has opened a compliance review, announced in a letter to the Maryland Governor in January of 2017, of Maryland's entire transportation decision-making process. The objective is to determine whether that process complies with Title VI of the Civil Rights Act of 1964 and DOT's regulations implementing it.[13] A central issue of such reviews should be whether both the

[11] February 2017, Montgomery County Mobility Assessment, Table 1 (attachment 8).
[12] We hereby incorporate Mr. Heard's letter by reference in this petition and attach it hereto.
[13] "Md. transportation decisions draw scrutiny", Michael Laris, *The Washington Post*, B1, January 24, 2017.

allocation of resources and the impact of projects that are funded have a discriminatory impact on minority communities, even if the intent is not discriminatory.

Three points are salient here:

a) Comments made by Friends of the Capital Crescent Trail and others in the EIS process and reports published thereafter highlighted the likely negative impacts of the Purple Line on "Environmental Justice Communities". These comments were inadequately addressed with only non-binding agreements resulting from any such concerns.

b) Withdrawing funds for the Purple Line and reallocating or reprogramming the resources can more effectively address the real transportation and development needs of minority and middle and low incomes communities in Maryland. These needs can be met with far less harm (such as not causing unmitigated gentrification and impacts on affordable housing[14], not cutting off pedestrian access to shops and schools, and not inflicting harmful noise pollution for 30+ years of operations on homes, businesses and schools without sufficient noise insulation) and posing much lower risks (e.g., from hazardous substances at many sites that would be unearthed during construction requiring evacuation plans and routes, and the risks of collision during years of operation) on those communities.

c) Prince Georges' County and the Purple Line route there in particular, is also the home of many "Environmental Justice Communities" which did not receive the careful, focused attention required by both NEPA/CEQ and DOT Civil Rights Act regulations all along the route, as explained in comments filed by Friends of the Capital Crescent Trail in their comments on the FEIS.

As noted in point (2) above, the EIS process has failed to consider the fact that the WMATA and Prince George's Plans both noted that the Purple Line will create too many transit centers depleting the several existing and planned transit lines and systems of the funds, population density and ridership needed to sustain them, and thus "Frustrate Prince George's Growth and Land Use Goals" and "Hinder WMATA's Ability to Coordinate and Deliver Effective Regional Transportation Services" in a County with many minority and recognized environmental justice communities.

4. The Purple Line requires a new, previously unassessed, permit application for a massive "appropriation" and redirection of waters of the United States that was never assessed or disclosed in the EIS process. It has only recently become known to local residents and office holders that the "Purple Line Transit Constructors" applied on August 3, 2016 for a permit from the Maryland Department of the Environment to appropriate and redirect as many as 30-40,000 gallons of underground spring water per

[14] "Report: Purple Line threatens affordable housing in Langley Park," The Washington Post, January 24, 2017, https://www.washingtonpost.com/news/dr-gridlock/wp/2017/01/24/report-purple-line-threatens-affordable-housing-in-langley-park/?utm_term=.a2167fd79307

day for a lengthy period in order to make possible the construction of the "Purple Line Station." (See application and one-page analysis, and comments by Friends of the Capital Crescent Trail et al., attachments 10,11,12). Neither the diversion nor the permit for it, were listed in the FEIS nor was the impact of such a major withdrawal and diversion assessed. The only anticipated permit of a similar withdrawal of water mentioned in the FEIS was for a diversion to build the only tunnel discussed in the FEIS, which was for Silver Spring.

This Bethesda spring which the Purple Line project would redirect appears to be the very spring that inspired residents to call the town "Bethesda", which means "the place of healing waters" in Hebrew. Bethesda, according to the Gospel of John (Chapter 5, verse 2 and following) was the pool where, on the Sabbath, Jesus healed a man who had lain lame for 37 years. Thus it is altogether ironic - as well as illegal - for the USDOT under this or any Administration to be driving the unassessed appropriation of waters from the very spring that appears to be the namesake and inspiration of the Town of Bethesda and its national institutions of healing. Bethesda includes many thousands who serve the nation daily and hundreds whose service has left them in need of healing at Bethesda's National Naval and Army Medical Centers and the National Institute of Health. In fact, independent transit experts have all along commented in the EIS process on the Purple Line that the NIH/Naval Medical Center complex (which is not on the Purple Line route) needs better transit service more than Bethesda.[15]

It is as yet unknown which of the three Bethesda area watershed(s) will be most affected by this withdrawal and diversion and to what extent it may affect Elm Street Park one block away and three imperiled amphipod species downstream that are protected by State and Federal law[16]. **Furthermore, in January it became evident that not 30,000 but 50,000 gallons a day on average and up to 100,000 gallons a day in peak months would be redirected for a period of four years.** This is all in order to

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[15] The Navy was incredulous in its comments filed during the EIS process that only a tiny fraction of its employees who lacked parking were expected by the MTA to use an additional bus route to the National Naval Medical Center (an alternative suggested by experts but dismissed by the MTA).

[16] Former Army Corps of Engineers regulatory affairs officer, Harold S. Collinson, explained in a previously filed declaration that the MTA had already used the wrong watershed scale and utterly failed to assess the impact of the Purple Line on the aquatic ecosystem that it is the Army Corps' duty to protect.

As explained in our letter of October 2015, in light of this and other changes in the project, section 7 of the Endangered Species Act as well as state law also requires new reviews by DOT/FTA, in conjunction with the U.S. Fish and Wildlife Service and the Army Corps of Engineers, of impacts on amphipods protected by federal and state law.

On Friday, February 24, 2017 D.C. Mayor Muriel Bowser signed into law amendments to the D.C. code naming the endangered Hay's Spring Amphipod as the official amphipod of the District and providing her with additional authority to conserve the critical areas and water recharge zones that these amphipods require for their recovery. This water recharging function may be seriously undercut by the diversion of water and the clear-cutting of trees for the Purple Line just a relatively short distance upstream of their habitats of which just a few exist on earth. (See notice, email about amphipod and photo of the event, attachment 13)

lower the water table to what appears to be the depth of nearly two stories underground for elevator construction to serve what would be the deeply buried Bethesda Metro Station's South Entrance and Purple Line Station passageways.

5) In addition to the unassessed diversion of waters of the United States, described above, the Purple Line fails to meet the standards of the NEPA, the Clean Water Act and the Endangered Species Act because of its entirely avoidable impact on large streams and wetlands. Since our last petition of October 2015, additional information has and changed circumstances have arisen that require the Department to revisit its ability to comply with all three of these bedrock laws if it intends to continue to consider funding the Purple Line.

a) A new NEPA analysis must examine not only the previously unconsidered significant impact on local water resources outlined in item 2) above, but, moreover, explain how the Purple Line will comply with Section 404 of the Clean Water Act and the Endangered Species Act due to rare aquatic invertebrates downstream that are dependent on steady supplies of clean, cool water. Explaining how the agency intends to comply with the substantive standards of other laws helps the other agency staff, the public and the ultimate decisionmakers to understand the impact of the project as a whole. Instead, the MTA and FTA for the most part merely asserted that it would comply with a list of laws without any serious explanation as to how. (See the cosigners' Comments of December 2016 on the application of the MTA for a dredge and fill permit from the Army Corps of Engineers, attachment)

b) Removing and redirecting as many as 100,000 gallons a day and greatly lowering the water table for four years expressly for the Purple Line by its agents cannot be permitted without a formal biological assessment and opinion. That is because that stream appears to be the headwaters of a stream, Coquelin Run, whose valley hosts a species listed as endangered by Maryland, proposed for listing this year as endangered by the US Fish and Wildlife Service, (the Kenk's amphipod), just hundreds of yards above the habitat of another state endangered amphipod (Sextarius) and also not far upstream of the District of Columbia's official amphipod, the federally endangered Hay's amphipod. (16 U.S.C. §1536(a)(1) and (2).)

c) Even without the presence of endangered species, to obtain a permit under Section 404 of the Clean Water Act requires a finding that no alternative to the proposed project is available that would not dredge and fill wetlands and waters of the U.S. - that is most certainly not the case for the Purple Line and its many less destructive and less expensive alternatives.

6) The Purple Line is causing an impending violation of Historic Preservation Provisions of the Highway Act: The Montgomery County Historic Preservation Commission has approved the moving of the only remaining 19th Century commercial building in Bethesda (attachment 14). This is the registered historic Community

Hardware and Paint Store, which formerly served as the Bethesda Post Office and General Store. It would be moved several blocks from its current location on the property above the proposed Purple Line terminal station near the spring described in paragraph 5) above, next to which it was originally built. The Commission reached its decision in order to "expedite the benefits of the Purple Line", according to the staff report of the Commission. This action would adversely affect the historic context and integrity of the building and would thus appear to violate Section 4(f) of the Highway Act, as it is commonly known.[17] The NEPA process must demonstrate how the proposed project complies with all the applicable historic preservation laws of each jurisdiction - and yet DOT/FTA somehow neglected to address this building, and its historical context, at all. (See comments, attachment 15.)

7) The Purple Line is making permanent and detrimental Use of Parks in violation of Section 4(f) of the Highway Act and posing unassessed risks to pedestrians and cyclists in violation of NEPA. It has recently become apparent that the long-promised plan to maintain and provide a safe tunnel passage for cyclists and pedestrians has no budget to provide safe passage for those now walking, running and cycling unimpeded down the popular Capital Crescent Trail under Wisconsin Avenue. [18] In short, there is no State or County budget for the section of the tunnel that would run under Wisconsin Avenue, even after several changes in plans since the FEIS that promised the public such passage would be secured along with the Purple Line Train tracks in the same current tunnel[19] (attachment 16). Thus the commuter bike traffic that now flows through the tunnel under Wisconsin would be diverted over the current toddlers' soccer and free play area in Elm Street Park and then across Wisconsin Avenue, one of the busiest commuter routes in the County. Furthermore, the four year water withdrawal and lowering of the water table by many feet described above would be almost certain to starve Elm Street Park of the ground water needed to keep its many trees alive. This further illustrates the cavalier attitude towards pedestrians and cyclists, apparent throughout the Purple Line process. There is virtually no assessment of the Purple Line's impact on pedestrians and cyclists in the EIS process, which is itself a violation of NEPA and DOT's foundational NEPA Order.[20]

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[17] 49 U.S.C. §303, as Section 4(f) is now codified, bars the Secretary from approving any transportation project unless there is no reasonable and prudent alternative if that project would use (directly or indirectly, by way of noise or other impacts upon it) a park, recreation area, or adversely affects any historic site of local significance (such as moving the 19th Century Hardware Store, and former Post Office, an officially registered historic building still within a few feet of its original location and the spring by which it was located on purpose many blocks away out of sight of that location.)

[18] http://www.bethesdamagazine.com/Bethesda-Beat/2017/Planning-Board-Chairman-Frustrated-by-Lack-of-Progress-on-Bethesda-Capital-Crescent-Trail-Tunnel/.

[19] Montgomery County Planning Department, Review of County Executive's Recommended FY18 Capital Budget and FY17-22 Capital Improvements Program, pages 4-5 (attachment 16).

[20] 5610.1(C) Attachment 2 paragraph 7, on p. 11.

8) The Project will have greater impacts than expected on birds protected by the Migratory Bird Treaty Act. Plans to cut nesting trees should be put on hold until September, since early nesting birds, such as the Barred Owl, have already arrived in the Bethesda-Chevy Chase sector of the Purple Line route. Barred and other owls are presently occupying the project area and have been heard from at least two residences located directly on the Trail calling on different dates within the month of February 2017. (See Declaration of Brian Detwiler, Esq., listserv post of Dedun Ingram, Ph.D., and web sources, attachments 17,18,19) The current April to September period planned for avoiding the removal or trees or limbs is therefore not sufficient to prevent a violation of the MBTA, since for the Barred Owl and other early-nesting, protected species, nesting season starts in February, as the MD Department of Natural Resources has warned. In addition, broad winged hawks, red shouldered hawks, red tailed hawks, and other raptors as well as migratory birds in general have, within the last five or six years, been changing their seasonal behaviors in the Washington D.C. area, with nesting occurring as early as January. Consequently, assumptions made in the prior environmental review process as to when trees could be cut without affecting the nesting of migratory birds in potential violation of federal law must be revisited. (See February 2017 request to MD DNR and USFWS not to cut trees in area due to Barred Owls (attachment 20), and DNR letter to MTA of October 26, 2011, re Environmental Review for Proposed Purple Line, stating (attachment 21):

> "2. Do not remove or disturb forest habitat during April-August, the breeding season for most FDIS. This seasonal restriction may be expanded to February-August if certain early nesting FIDS (e.g. Barred Owls) are present."

Replies from the office of Maryland Attorney General Brian Frosh (OAG reply as sent to Mr. Gautam Prakash and Mr. Jim Roy, attachment 22) to citizens inquiring in late February 2017 about the protection of the barred owls and other early nesting birds along the Trail did not dispute or deny a possible violation of the MBTA but simply asserted that citizens should ask the U.S. Fish and Wildlife Service to ensure that the Maryland Transit Administration does not violate or cause a violation of that Federal law since the Maryland Department of Natural Resources has a more limited ability to enforce the law. The letter from DNR to MTA did not indicate any such limitations.

9) Revolutionary changes in transportation technology over the past near decade outdate the 2008 Alternatives Analysis and Draft EIS. The great recession of late 2008 ushered in a new mind-set and an array of technologies, **led by the private sector**, for sharing cars, houses, and other items or services. This in turn has caused the automobile, hi-tech, and transportation industries at large to develop entirely new offerings. These include shared transport in single cars and small buses along with the communication technologies to maximize the efficiency with which they are dispatched and allocated. Since we pointed out this change in circumstance and new information in our earlier petitions to DOT, innovations have continued unabated, further strengthening the need for a fresh look at alternatives that will better serve people's needs.

As reported in January 2017, self-driving minivans could steer the car industry, and open myriad new opportunities. These innovations include driverless cars, vans and shuttles being tested now from Pittsburg to Finland and scheduled to be sold to the public by Ford and others by 2021. These new technologies will greatly reduce the cost and increase the efficiency of bus service, for example - even before the Purple Line would begin its 30+ years of operation [21], thus guaranteeing that the Purple Line technology would be out of date at the start, and increasingly so for its entire lifespan. This is a classic case of a change in circumstances requiring a new assessment of alternatives.

CONCLUSION: FEDERAL FUNDING SHOULD BE REJECTED OR, AT MINIMUM, A NEW NEPA ANALYSIS, WITH A COMPREHENSIVE LOOK AT ALTERNATIVES, MUST BE PREPARED.

Under these circumstances, DOT/FTA has more than ample reason to deny the request for federal funding for the ill-conceived, wasteful and harmful Purple Line. The current reality and official record offer no support for granting it, and Section 49 U.S.C. § 5309(f)(1) offers a common sense reason and obligation why not to.

At bare minimum, moreover, for the foregoing reasons as well as those we have previously provided, DOT/FTA must prepare an SEIS or a new full EIS that comprehensively analyzes all of the project's environmental impacts that have previously been afforded little or no attention, and that also takes a new "hard look" at the availability of reasonable and far less expensive and less destructive alternatives. To ensure full compliance, these reviews should be completed before any federal funds or any contingent state and local funds are committed and before any irretrievable harm is done on the ground.

We appreciate your consideration of this request and what we hope will be your willingness to engage in a desperately needed fresh assessment of the important issues raised by the proposed Purple Line. However, if we do not hear from you within 15 business days, we will assume that our request for a supplemental NEPA analysis is being denied and will proceed accordingly.

Sincerely,

Ajay Bhatt
President
Friends of the Capital Crescent Trail
P.O. Box 5803
Bethesda MD 20824

[21] "Self-Driving Minivan Could Steer Car Industry", Bill Vlasic, The New York Times, B1, January 9, 2017.

Attorney & Advocate
John M. Fitzgerald
4502 Elm Street
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Consultant in Environment & Energy
Christine Real de Azua
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cc:

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U.S. Department of Transportation -- yvette.rivera@dot.gov

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State of Maryland:

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johnmfitzgerald@earthlink.net

Appendices -- 1 through 22:

1 - *Wall Street Journal,* "Maryland's Incredible Purple People Mover
How the state's proposed $2.4 billion light rail could take taxpayers for a ride."
By Mary Anastasia O'Grady, June 27, 2014 7:09 p.m. ET

2 - MarketWatch, "Opinion: Why the Washington D.C. suburbs need to rethink this light-rail project," By Diana Furchtgott-Roth, Aug 15, 2016 8:51 a.m. ET

3 - Washington Post, "Metro facing big cash crunch, Official: Agency risks insolvency" Robert McCartney and Faiz Siddiqui, page B1 (Feb. 24, 2017) (online under the title "Metro scramble to fill budget hole"

4 - "A rallying cry: 'Leave bus lines alone", Washington Post, February 1, 2017

5 - "Regional transit ensnared in Metro penalty- Federal action aimed at local agency has impact on others "caught in the middle," Washington Post, February 19, 2017

6 - "U. S. withholds millions of dollars until Metro Safety Commission is created", Washington Post, by Lori Aratani and Martine Powers, posted February 10 at 8:08 PM on www.washpost.com and in The Washington Post, p. C1, Sunday February 12, 2017

7 - TIGER grant revision request from MD DOT.

8 - Montgomery County Mobility Assessment Report 2017, Table 1. showing top ten most congested roadways (also showing the Purple Line, which has been designed for an east-west "corridor" does not address top congestion and mobility priorities).

9 - February 20, 2017 letter and APA petition from Attorney Bradley Heard of Prince George's County to Ms. Terry Garcia Crews, the Regional Administrator of Region 3 of the FTA, calling for an SEIS for the Purple Line.

10 - Application by Purple Line Construction Partners "To Appropriate and Use Waters of the State."

11- "Preliminary Impact Analysis Summary" of application, drafted by "Assigned WMA Project Manager" (sic).

12 - Comments by Friends of the Capital Crescent Trail et al., on the Purple Line Application to Appropriate and Use Waters of the State.

13 - Hay's Spring Amphipod and Fisheries and Wildlife Omnibus Amendment Act, February 2017 - photo, email and notice about amphipod and event.

14 - Montgomery County Historic Preservation Commission approval to move the historic Community Hardware and Paint Store in Bethesda.

15 - Testimony by John Fitzgerald et al. on Historic Preservation Commission decision to move the historic Community Hardware and Paint Store in Bethesda.

16 - *Montgomery County Planning Department, Review of County Executive's Recommended FY18 Capital Budget and FY17-22 Capital Improvements Program*, pages 4-5, showing there is no State or County budget for the section of the tunnel that would run under Wisconsin Avenue.
(https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=Montgomery+County+Planning+Department+Review+of+County+Executive+Recommended+FY18+Capital+Budget+and+FY17-22+Capital+Improvements+Program&*)

17 - Declaration of Brian Detwiler, on presence of Barred Owls, February 27, 2017.

18 - Listserv post of Dedun Ingram, Ph.D, re Owls Calling and presence of owls.

19 - Barred Owl location resources - web sites and resources.

20 - February 22, 2017 request by John Fitzgerald to MTA and County not to cut trees dues to Barred Owls in area.

21 - Maryland DNR letter to MTA of October 26, 2011, re Environmental Review for Proposed Purple Line, specifying expansion of seasonal restriction.

22 - Email response from Office of Maryland Attorney General Brian Frosh to residents inquiring about presence of barred owls and Purple Line construction.

EXHIBIT 2

Civ. No. 14-01471 (RJL)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE CAPITAL CRESCENT TRAIL, *et al.*, *Plaintiffs,* v. FEDERAL TRANSIT ADMINISTRATION, *et al.*, *Defendants.*	CIVIL ACTION NO. 1:14-CV-1471-RJL

DECLARATION OF BRADLEY E. HEARD

Pursuant to 28 U.S.C. § 1746, I, Bradley E. Heard, make the following declaration:

1. My name is Bradley E. Heard. I am over the age of 18 and otherwise competent to make this Declaration. I make this Declaration based on my personal knowledge, and the facts stated herein are true and correct to the best of my knowledge, information, and belief.

2. I am a resident of Prince George's County, Maryland. I live within one-half mile of the Addison Road Metrorail station and within one mile of the Capitol Heights Metrorail station, both of which are operated by the Washington Metropolitan Area Rapid Transit Authority (WMATA).

3. Both the Addison Road and Capitol Heights Metrorail station areas are designated by Prince George's County as "Local Transit Centers," and the combined geographic area is designated by the Metropolitan Washington Area Council of Governments (MWCOG) as one of 141 "Regional Activity Centers," which are defined as "the locations that will accommodate the majority of the region's future growth."

4. On or about February 20, 2017, I submitted a letter to the Federal Transit Administration (FTA), requesting that the agency prepare a Supplemental Environmental Impact Statement (SEIS) relating to the Purple Line light rail project proposed by the Maryland Transit Administration (MTA). A true and correct copy of my SEIS request is attached as **Exhibit A** to this Declaration.

5. In general, my SEIS request seeks to have FTA evaluate the potential adverse indirect or cumulative impacts of the proposed Purple Line on existing local transit centers within Prince George's County, in light of Prince George's County's conclusions in its most

recent comprehensive plan that "too many centers undermine economic growth" and that the county did not have enough projected growth through 2035 to develop properly the rail transit station areas it already has. My request also seeks to have FTA evaluate the potential adverse indirect or cumulative impacts of the proposed Purple Line on WMATA's ability to coordinate and deliver regional transportation services effectively and without undue influence or duplication in Prince George's County, in accordance with the mission set forth in its governing interstate compact.

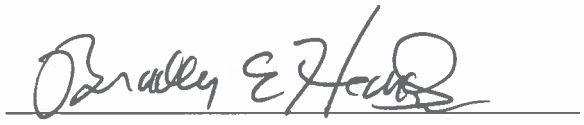
6. My letter requested that FTA issue its final written determination as to whether it would prepare an SEIS within 15 business days of my letter, or by March 13, 2017. FTA acknowledged receipt of my SEIS request on or about February 22, 2017. A true and correct copy of FTA's acknowledgment letter is attached as **Exhibit B** to this Declaration.

7. Having not heard anything further from FTA since its initial acknowledgment letter, I sent a follow-up letter on or about May 31, 2017, requesting that FTA issue a final written determination on my SEIS request forthwith. A true and correct copy of my follow-up letter is attached as **Exhibit C** to this Declaration.

8. As of the date of this Declaration, I have not received a final determination from FTA as to whether it will prepare an SEIS, as requested in my letter of February 20, 2017.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 2017.



BRADLEY E. HEARD

Exhibit A

Bradley E. Heard
415 Zelma Avenue
Capitol Heights, MD 20743
(240) [redacted]
[redacted]@[redacted]

February 20, 2017

VIA ELECTRONIC MAIL

Ms. Terry Garcia Crews
Regional Administrator (Region 3)
Federal Transit Administration
1760 Market Street, Suite 500
Philadelphia, PA 19103-4124

Re: Purple Line (Maryland) Light Rail Project—Request for Supplemental Environmental Impact Statement

Dear Ms. Crews:

Pursuant to 23 C.F.R. § 771.30, I am writing to request that the Federal Transit Administration (FTA) prepare a Supplemental Environmental Impact Statement (SEIS) relating to the Maryland Transit Administration's (MTA) proposed Purple Line light rail project in Montgomery and Prince George's counties. An SEIS is necessary so that FTA can consider whether new information and circumstances relevant to environmental concerns and bearing on the proposed Purple Line project or its impacts would result in significant environmental impacts not previously evaluated in the September 2008 Alternatives Analysis/Draft Environmental Impact Statement (AA/DEIS) or the August 2013 Final Environmental Impact Statement (FEIS).

Specifically, since the drafting and publication of the AA/DEIS, Prince George's County has adopted a new comprehensive plan, *Plan Prince George's 2035*,[1] and the Washington Metropolitan Area Rapid Transit Authority (WMATA) has adopted a new strategic plan, *Momentum: The Next Generation of Metro*.[2] Although both of these plans positively acknowledge, anticipate, and incorporate the planned Purple Line into their analytical frameworks, the plans nevertheless raise serious questions and issues relating to potentially significant adverse environmental effects or impacts arising out of the construction of the Purple Line.[3] These issues have not previously been

[1] A copy of *Plan Prince George's 2035* is available at http://www.pgplanning.org/Resources/Publications/Plan_Prince_George_s_2035.htm (last accessed Feb. 18, 2017).

[2] A copy of the *Momentum* plan is available at https://www.wmata.com/initiatives/strategic-plans/upload/momentum-full.pdf (last accessed Feb. 18, 2017).

[3] "Effects" and "impacts" are used synonymously in the NEPA implementing regulations to refer to the direct, indirect, and cumulative consequences of proposed actions, regardless of whether those consequences are ecological, aesthetic, historic, cultural, economic, social, or health-related. *See* 40 C.F.R. § 1508.8. These effects include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate." *Id.* Economic and social impacts are relevant to the NEPA process to the extent that they interrelate with the human environment—i.e., the natural and physical environment and the relationship of people with that environment. *See* 40 C.F.R. § 1508.14.

addressed by FTA in either of the previous environmental impact statements. *Cf.* FEIS at 4-21, Table 4-3 (identifying the planning documents analyzed).

Purple Line Stations May Frustrate Prince George's Growth and Land Use Goals

Plan Prince George's discusses the somewhat enviable dilemma that the county currently faces by having *too many* "centers," which the plan defines as "focal points of concentrated mixed-use and pedestrian-oriented (re)development to capitalize on public investments in *existing infrastructure and transportation facilities, in particular mass transit*." *Plan* at 39 (emphasis added). While these existing centers—most of which are oriented around existing rail transit stations—provide the county with a veritable cornucopia of locations to grow and develop for the foreseeable future (i.e., well beyond 2035), the plan contends that having too many centers can actually "undermine economic growth" by spurring scattered development that will make it difficult "to achieve the density, intensity, and form necessary to support successful mixed-use, walkable communities and economic generators" at any one center. *Id.* at 103-04.

The plan identifies 28 existing centers within the county, including fifteen WMATA Metrorail stations and four stand-alone MTA MARC commuter rail stations. *Id.* The proposed Purple Line would create an additional six centers, bringing the total number to 34.[4] Using then-current data from the Metropolitan Washington Council of Governments (MWCOG), which projected that the county would see an increase of only 63,000 new household units and 114,687 new jobs by 2035,[5] the plan concludes that the projected growth "cannot be spread…over the 28 centers envisioned by Plan 2035." *Id.* Rather, the plan recommends "concentrating the bulk of future growth and development [50%] in eight Regional Transit Districts," three of which are in or near the Purple Line corridor: Prince George's Plaza, College Park—UMD, and New Carrollton. *Id.* at 104, 110. The plan envisions only 15% of future growth occurring at fifteen of the twenty remaining centers currently in existence.[6] If the Purple Line is constructed, five additional centers would be added to those existing fifteen. In other words, using the more favorable MWCOG projections that existed at the time *Plan Prince George's* was adopted, twenty transit centers (instead of fifteen) would be vying for 9,450 new housing units and 17,100 new jobs—which equates to an average of merely 472.5 new housing

[4] Five of the eleven proposed Purple Line stations in Prince George's County would be co-located at existing Metro and MARC stations.

[5] Current MWCOG cooperative forecasts for Prince George's County are much more conservative, projecting an increase of only 55,600 new household units and 63,600 new jobs by 2045. *See* MWCOG, *Growth Trends to 2045: Cooperative Forecasting in Metropolitan Washington (November 2016), available at* https://www.mwcog.org/documents/2016/11/16/growth-trends-cooperative-forecasting-in-metropolitan-washington-cooperative-forecast-growth--development/ (last accessed Feb. 19, 2017).

[6] Those 15 centers include eight Metrorail station areas (Addison Road, Capitol Heights, Cheverly, Landover, Morgan Boulevard, Naylor Road, West Hyattsville, and Southern Avenue) and four MARC station areas (Muirkirk, Riverdale, Seabrook, and Bowie). *Plan* at 108. The other five currently-designated centers (Bowie, Brandywine, Konterra, Landover Gateway, and Westphalia) are automobile-oriented suburban centers that the plan does not envision to be served by transit (*id.*); therefore, they are not likely to be impacted one way or the other by the proposed Purple Line.

units and 855 new jobs per center.[7] Those numbers are far below the densities necessary to support viable rail transit station areas.[8]

In addition to the above data, *Plan Prince George's* notes that the county's "transportation infrastructure is aging and requires significant investment to sustain its network of roads, highways, trails, and sidewalks," and that "[f]inancial constraints…will continue to restrict the scale and scope of transportation improvements." *Plan* at 147. At the same time, the plan also lauds the $2.2 billion Purple Line as an opportunity to "enhance mobility and reduce travel times" and to "serve as a critical economic driver by linking existing employment centers to emerging development areas and leveraging public investment." *Id.* at 149. FTA needs to prepare a SEIS that takes a hard look at all of these potential positive and negative impacts, as identified in *Plan Prince George's*. *Cf.* 40 C.F.R. § 1508.8 ("Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial."); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996) ("NEPA requires agencies to take a hard look at the environmental consequences of their proposed projects even after an EIS has been prepared.").

Purple Line May Hinder WMATA's Ability to Coordinate and Deliver Effective Regional Transportation Services

WMATA was chartered to provide regional transportation services to the core Washington metropolitan area—including in Maryland's Montgomery and Prince George's counties—and to plan and coordinate the operation of public and private transit facilities in a manner that does not unnecessarily duplicate or interfere with WMATA's delivery of regional transportation services. *See* Md. Code Ann., Transp. § 10-204 (WMATA Compact Article 2). WMATA's board adopted its current strategic plan, *Momentum*, on June 27, 2013. It was the authority's first such plan in more than a decade. Because the *Momentum* planning process began well after the preparation of the Purple Line AA/DEIS and the plan was not adopted until just prior to the issuance of the FEIS, FTA has not yet had an opportunity to address it in connection with this action.

Momentum presents a great deal of information relevant to environmental concerns bearing on the proposed Purple Line project. In particular, FTA must consider and address whether

[7] Using the current 2045 MWCOG forecasting, the numbers would reduce to an average of 417 households and 477 jobs per center.

[8] *See, e.g.*, Robert Cervero and Erick Guerra, *Urban Densities and Transit: A Multi-dimensional Perspective* (Sep. 2011), *available at* http://www.its.berkeley.edu/sites/default/files/publications/UCB/2011/VWP/UCB-ITS-VWP-2011-6.pdf (last accessed Feb. 19, 2017) (concluding that "light rail systems need around 30 people per gross acre around stations [≈ 10.5 dwelling units per acre (DU/Ac) at 2.86 persons per household ≈ 5,250 households in the half-mile station area] and heavy rail systems need 50 percent higher densities than this to place them in the top one-quarter of cost-effective rail investments in the U.S."); Reconnecting America/Center for Transit-Oriented Development, *Station Area Planning: How to Make Great Transit-Oriented Places* at 8-11 (Feb. 2008), *available at* http://www.reconnectingamerica.org/assets/Uploads/tod202.pdf (last accessed Feb. 19, 2017) (target density for a "transit neighborhood" served by light-rail transit is 20-50 DU/Ac and 1,500-4,000 housing units in the half-mile station area; targets for a "mixed-use corridor" served by light-rail transit are 2,000-5,000 housing units, 25-60 DU/Ac, and 750-1,500 jobs in the half-mile station area; transit neighborhoods and mixed-use corridors are the least dense of the eight station area typologies discussed).

WMATA's proposed Metrobus Priority Corridor Network (PCN)[9] and other recommended improvements to WMATA's bus fleet, as discussed in *Momentum*, present reasonable alternative means of addressing the need and accomplishing the purposes articulated by MTA in connection with the proposed Purple Line project. FTA must also consider whether the planned Purple Line project may result in unnecessary duplication or degradation of WMATA's existing or planned regional transit services in the Purple Line corridor, in derogation of the public policy as set forth in the WMATA Compact.

The Metrobus PCN plan is designed to "improve bus service, travel speeds, and reliability on 24 regional corridors, which serve half of Metrobus ridership." *Momentum* at 59. Many of the existing Metrobus routes in the Purple Line corridor are within WMATA's Metrobus PCN. *Id.* at 59-60. Among other components, the PCN plan proposes to use improved operational strategies such as transit signal priority and exclusive bus lanes; increase the frequency and span of service; add limited-stop service; enhance bus stops and facilities; and add over 100,000 new daily boardings to the regional bus network. *Id.* In addition to the PCN, WMATA proposes to increase its regular bus fleet by 400 buses to improve current services and accommodate the projected increased need. *Id.* at 65-66.

One of the implementation challenges that WMATA raises in *Momentum* is that the National Capital Region Transportation Planning Board's Constrained Long Range Plan (CLRP),[10] which currently includes the $2.4 billion Purple Line Project, "has insufficient funding to fully support Metro's projected renewal needs beyond 2020, as well as no funding for Metro core capacity improvements," including the full funding of the PCN. *Momentum* at 53, 74-75. FTA must consider the potential adverse environmental impacts of the Preferred Alternative—an extensive, expensive, and potentially duplicative light rail transit project in an area already well served by regional heavy rail, commuter rail, and buses, as well as local buses—on WMATA, particularly in the current climate, in which Metrorail and other rail transit services nationwide are experiencing significant declines in ridership and budget shortfalls.[11]

In light of the foregoing, I urge FTA to prepare an SEIS that addresses, among other things:

The extent to which the Preferred Alternative results in potentially adverse environmental impacts (directly, indirectly, or cumulatively) within the Purple Line corridor and the broader inner-Beltway portion of Prince George's County by:

---

[9] Additional information on the PCN is available at https://www.wmata.com/initiatives/plans/priority-corridor-networks.cfm (last accessed Feb. 19, 2017).

[10] More information on the CLRP is available at http://old.mwcog.org/clrp/ (last accessed Feb. 19, 2017).

[11] *See, e.g.*, Martin Di Caro, *Metro Continues Steep Ridership Decline Amid Nationwide Trend Of Transit Losses*, WAMU (Sep. 7, 2016), available at http://wamu.org/story/16/09/07/metro_continues_steep_ridership_decline_amid_nationwide_trend_of_transit_losses/ (last accessed Feb. 19, 2017); Robert Thompson, *Metro ridership continues to plummet along with service*, Washington Post (Feb. 9, 2016), *available at* https://wpo.st/upqc2 (last accessed Feb. 19, 2017). A federal district court has already ruled that FTA acted arbitrarily and capriciously by not considering the significance of WMATA's ridership and safety issues in relation to the proposed Purple Line project. *See Friends of the Capital Crescent Trail v. FTA*, No. 1:14-cv-1471-RJL (D.D.C.), Orders of Aug. 3 and Nov. 22, 2016 (ECF Nos. 96, 109).

1. Increasing the number of rail transit stations in Prince George's County and thereby undermining economic growth prospects at existing, already-constructed WMATA Metrorail and MTA MARC stations in the county;

2. Inducing population, housing, and employment growth away from existing regional and local transit centers in Prince George's County;

3. Taking away ridership, fare revenue, and needed federal and state financial resources from the existing regional transit system, WMATA, and thereby further contributing to its decline and instability.

Whether reasonable alternatives exist to mitigate the above-described adverse impacts while still addressing the identified purpose and need as expressed in the Purple Line project, including but not limited to some combination of the following:

1. The Transportation Systems Management (TSM) alternative previously considered in the AA/DEIS but not carried forward for further study in the FEIS;

2. A modified TSM alternative using High-Occupancy Vehicle (HOV) or High-Occupancy Toll (HOT) lanes on the Capital Beltway and rush-hour bus-only lanes on other existing state highways and county arterials in the Purple Line Corridor;

3. Full implementation of the WMATA Metrobus Priority Corridor Network (PCN);

4. Enhancing and improving Prince George's County's existing local bus system ("TheBus");

5. Construction of only the western portion of the Preferred Alternative (i.e., Bethesda to Takoma/Langley Crossroads).

I request that FTA make its final written determination as to whether it will agree to prepare an SEIS, as requested herein, **within 15 business days**. Thank you in advance for your attention to this matter, and I look forward to your reply.

Sincerely yours,

/s/ Bradley E. Heard

Bradley E. Heard

Cc: Paul W. Comfort, Esq., Administrator, Maryland Transit Administration (via email)

Exhibit B

U.S. Department
of Transportation

**Federal Transit
Administration**

REGION III
Delaware, District of
Columbia, Maryland,
Pennsylvania, Virginia,
West Virginia

1760 Market Street
Suite 500
Philadelphia, PA 19103-4124
215-656-7100
215-656-7260 (fax)

February 22, 2017

Bradley E. Heard
415 Zelma Avenue
Capitol Heights, MD 20743

Dear Mr. Heard:

Thank you for your letter dated February 20, 2017, requesting that the Federal Transit Administration prepare a Supplemental Environmental Impact Statement (SEIS) for the Maryland Transit Administration's Purple Line Project.

The subject of your letter involves a matter that is currently in litigation. Because of this, the FTA is referring your letter to the U.S. Department of Justice (USDOJ) for a response, since it is representing the FTA's interests in the litigation. It is agency policy that USDOJ handles all inquiries related to active litigation. The USDOJ's Office of Public Affairs will be responding to your inquiry.

Sincerely,

Terry Garcia Crews
Regional Administrator

cc: U.S. Department of Justice,
Office of Public Affairs

Exhibit C

Bradley E. Heard
415 Zelma Avenue
Capitol Heights, MD 20743
(240) [redacted]
[redacted]@[redacted]

May 31, 2017

VIA ELECTRONIC MAIL

Ms. Terry Garcia Crews
Regional Administrator (Region 3)
Federal Transit Administration
1760 Market Street, Suite 500
Philadelphia, PA 19103-4124

Re: Purple Line (Maryland) Light Rail Project—Request for Supplemental Environmental Impact Statement

Dear Ms. Crews:

I am writing to follow up on my February 20, 2017, letter requesting that the Federal Transit Administration (FTA) prepare a Supplemental Environmental Impact Statement (SEIS) relating to the Maryland Transit Administration's (MTA) proposed Purple Line light rail project in Montgomery and Prince George's counties. I have included another copy of that letter for your reference.

I received your February 22 letter acknowledging my initial correspondence; however, I have not received any substantive response from FTA relating to my request for the preparation of an SEIS. As you know, I had requested that FTA issue a final written determination relating to my request within 15 business days of my initial correspondence, or by March 13, 2017. Given the time sensitivities relating to this project, I am now urging FTA to issue its final decision forthwith, so as to avoid unreasonable delay.

Thank you, once again, for your attention to this matter, and I look forward to your reply.

Sincerely yours,

/s/ Bradley E. Heard

Bradley E. Heard

Enclosure
Cc: Paul W. Comfort, Esq., Administrator, Maryland Transit Administration (via email)

EXHIBIT 3

Civ. No. 14-01471 (RJL)

Declaration
of
Donald W. MacGlashan

1. I am Donald W. MacGlashan. I live in Chevy Chase, Maryland.

2. On behalf of the plaintiffs in *Friends of the Capital Crescent Trail, et al., v. Federal Transit Administration, et al.,* I am submitting this declaration that includes a revised version of the affidavit I provided for the record on December 8, 2014. This revised affidavit includes new information on the impact of the Purple Line Project on nearby schools.
3. Donald W. MacGlashan, received a B.E.E. from the University of Virginia in 1957. He worked for the Bendix Corporation for 19 years in the areas of research and development in both radar and low noise microwave technology. He received patents in both technologies. He delivered technical papers at engineering conferences in the U.S. He received his Professional Engineer license from the state of Maryland in 1968.
4. He then worked at Booz Allen Hamilton for 14 years as a consultant in systems engineering. Clients were: the U.S. Navy, Air Force, Marines, Army, and FAA. Technical papers were given in the U. S. and Europe. He retired in 1991.
5. In 1994, he became a board member of the non-profit organization, Citizens for the Abatement of Aircraft Noise, Inc. CAAN provides technical and noise information on National and Dulles Airports, and promotes ways to reduce aircraft noise in the Metropolitan Washington D.C. area. He attended conferences and delivered papers on community noise impacts and twice testified before the U.S. House of Representatives on the effect of aircraft noise. He was appointed by the Governor of Maryland to the Citizens Advisory Committee of the Metropolitan Washington Airports Authority (MWAA). In his second term on this committee, he was elected vice president and then became president three months later when the committee president resigned. During his term as president, he and other committee members convinced MWAA management to publish quarterly reports on the noise levels at each of its 32 noise-monitoring stations so each community could see what the aircraft noise environment was for their community. He was later designated the CAAN representative to the Washington D.C. Council of Governments (COG) committee on aircraft noise (CONANDA). In this time period, he was appointed chair of a subcommittee to monitor the FAA redesign of the region's airspace to ensure that communities were not unfairly overburdened with aircraft noise.

Donald W. MacGlashan

Title: Impact of Noise from the Purple Line Project

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Major Sections:

Length of report: 16 pages

I. Introduction

The issue of noise represents a major impediment for the communities living along the proposed Purple Line Project. The MTA FEIS Technical Report on Noise (Volume III) for the Purple Line glossed over many aspects of the noise issue and these missing issues are important to understanding the full impact that this project will create.

It should be noted, that after the FEIS and ROD were issued, Governor Hogan made major changes to reduce the project cost. One of these changes was the elimination of "green track," that is, short vegetation between the rails, which the Governor's office said would have helped reduce noise and runoff.

One way to discuss the FEIS issues is to look at seven separate areas of noise impact:

1. Impact of not adequately addressing the issue of noise
   a. average noise as defined by the FTA
   b. transient noise – not discussed by MTA.
2. Impact of LRT noise on people's health
   a. increased awareness by scientists of the impact of transient noise on health
   b. numerous studies now relate noise to various health issues, e.g. coronary heart disease, blood pressure, sleep disturbance, insomnia and depression.
   c. Appendix 1-Impact of Transient Noise on Nearby Schools.

3. Impact of noise on users of the trail
   a. Purple Line FEIS Technical volume barely acknowledges the existence of the Trail
   b. no noise impact analysis offered on the trail itself
   c. noise measurements were often taken hundreds of feet from the tracks with no adjustment for impact on trail users
   d. LRT horn usage.
4. Impact of noise on the parks
5. Impact of inadequate analysis of sound barrier walls
6. Other impacts on the residential communities; loss of wildlife due to LRT noise and transformer hum and location.
7. Construction Noise

II. Two types of Noise to consider

a. Average noise

MTA addressed average noise in FEIS Tables 2, 3, and 5. These values represent the average noise energy over a 24-hour period for each of the 53 locations that were measured. This average is expressed as the equivalent noise energy or L_{eq}. Additionally, the MTA applied the day-night level 10 dB penalty to the measured ambient noise level (L_{eq}), known as DNL or $L_{dn,}$ to adjust for the fact that between 10 P.M. and 7 A.M. external noise more easily disturbs people's sleep. And then MTA used the FTA (Federal Transit Administration) Land use Categories (FEIS to determine what is an acceptable noise impact on residential communities for each level of ambient noise corrected for L_{dn}, i.e. no impact, moderate impact, or severe impact. Based on all these *average* values and using Category 2 of the land use table, FTA posits that communities should be able to endure an increase of ambient noise of 10 - 15 dB. FEIS Table 2 shows the results of applying that criterion. Based on the ambient noise and DNL values, Table 5 shows that the proposed LRT noise level, also a 24-hour noise level, meets the Category 2 criteria for every location.

b. Transient Noise

However, MTA omitted the effect of transient noise and its impact on people's health. This is unfortunate because it is transient noise that is the main issue for light rail transit (LRT) systems. Transient noise, like that made by any LRT, occurs when there is a sudden rise in noise for a short time. This can be from many sources, a car or motorcycle speeding by, or a jackhammer. In the case of an LRT, a person standing near the LRT tracks will hear a sometimes gradual, sometimes rapid increase in noise level, depending on the speed of the LRT. At higher speeds, the noise peak can be 20 dB higher[1] than the ambient noise. As it passes the person, it decreases back into the ambient noise level. For LRT systems, this is the type of noise people hear. It is the reality of an LRT system or any other type of transient noise situation. Figure 1 shows the general waveform that an LRT can make. Transient noise, unlike the 24-hour $L_{eq\,,}$ which is taken as a RMS measurement, uses SEL (Sound Exposure Level – shown in Figure 1). SEL enables one to ascertain the peak value of the noise for one second, which is a federal and industry standard. Figure 1 also shows the peak noise level, L_{max}, the noise level that people hear, over the time interval that it takes the LRT to pass by.

[1] FTA Transit Noise and Vibration Impact Assessment, Table 6-3 page 6-10 shows that for electric locomotives, the L_{max} noise level is 86 dBA, which is about 20 dB above the average ambient noise level.

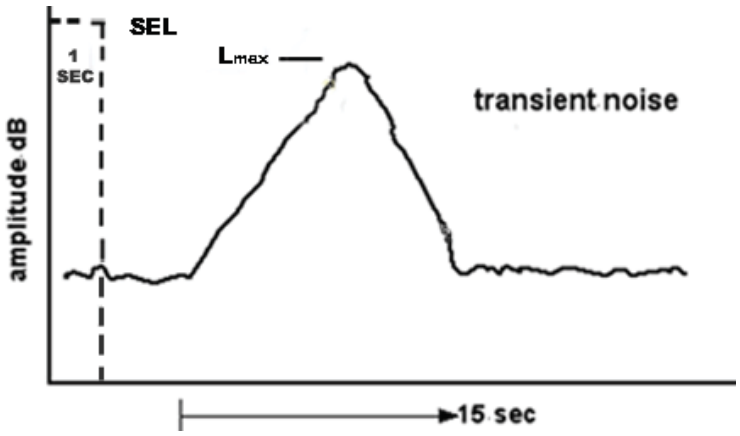

Figure 1

Most LRT vehicles use steel wheels and, of course, steel rails. At higher speeds, like 40 mph, that combination generates more high frequency noise, some call it screeching, as the wheels round corners rubbing harder against the rails. This means the speed of an LRT will impact the peak noise level, the higher the speed, the higher the peak noise level. Conversely, the lower the speed, the quieter the LRT vehicles are. The Purple Line trains will be designed to run at speeds as high as 50 mph.

Because transient noise was not considered by MTA, it is important to show how the LRT transient noise peak level affects the Category 2 impact levels (FEIS Table 2) for communities. Using a modest transient peak noise level, it shows that even a 12 dB peak noise level above the ambient level enters the severe impact area – meaning that people will find this level of noise highly annoying – for nearly every level of measured ambient noise. Obviously, higher peak levels will make the noise level worse and higher into the severe impact area. The 24-hour L_{dn} masks the effect of a 10 to 20 second noise peak so that it is never seen. It is this 10 to 20 second peak time in the severe impact category, recurring as often as three and half minutes, that people will hear as they try to sleep at night, not the average L_{dn}. This is implicitly acknowledged in the document, FTA Transit Noise and Vibration Impact Assessment, paragraph 6.5 shown below:

> The assessment of noise impact in this manual utilizes either the Ldn or the Leq descriptor. As such, in determining impact it is not necessary to determine and tabulate the maximum levels (Lmax). **However, it is often desirable to include computations of Lmax in environmental documents, particularly for rail projects, because the noise from an individual train passby is quite distinguishable from the existing background noise.** The Lmax is also the descriptor used in vehicle specifications. Because Lmax represents the sound level heard during a transportation vehicle passby, people can relate this metric with other noise experienced in the environment. Particularly with rail transit projects, it is representative of what people hear at any particular instant and can be measured with a sound level meter. A comparison of Lmax with other sources can be made by referring to Figure 2-11. Thus, although Lmax is not used in this manual as a basis for assessing noise impact, it can provide people with a more complete description of the noise effects of a proposed project and should be reported in

environmental documents. Equations for computing Lmax from SEL are given in Appendix F.

Why did the MTA not address this critically important aspect of noise?

III. Impact of LRT trains on the health of people

Although steady *continuous* high-level noise can damage the health of a person, it is not the issue in an LRT system. A transient peak noise environment is what scientists are now concerned about and how it affects a person's physiological and psychological health. Their understanding, although slow in coming because of its complexity, is well advanced, aided by many studies over the past thirty years. These studies often used different methodologies, but their conclusions are basically the same, that transient noise can be injurious to many people living near an LRT line or airport. The health conditions cited are:

- coronary heart disease
- high blood pressure
- sleep disturbance
- insomnia and
- depression.

Below are comments by three researchers. The reader will note that the last comment deals with aircraft passing over communities. This type of transient noise has the same effect on people as LRT rail noise:

1. "…Subjectively evaluated sleep quality decreased and reaction time increased [to transient noise] gradually with noise levels, whereas most physiological variables revealed the same reactions to both the lower and considerably stronger reactions to the highest noise load. Aircraft noise, rail and road traffic noise caused similar after effects but physiological sleep parameters were most severely affected by rail noise. The equivalent noise level seems to be a suitable predictor for subjectively evaluated sleep quality but not for physiological sleep disturbances."
Barbara Giefahn, Anke Marks, and Sibylle Robens Journal of Sound and Vibration Volume 295 issues 1-2, 8 August 2006.

2. "…Sleep disturbance Insomnia and broken sleep are unpleasant experiences and they can lead, the day after, to drowsiness, lower mood and poor performance, including slower reaction times. Sleep disturbance has been associated with coronary heart disease, but it is also possible that people affected by this illness are susceptible of being woken by noise."
Lambert & Vallet, 1994, Comment from Effects of environmental noise on human health, by D. Petri, November 2013

3. "… A recent review concluded that there is evidence that aircraft noise can cause disrupted sleep as evidenced by increased number and length of awakenings, reduced slow‑wave sleep and REM sleep, increased heart rate and blood pressure, as well as effects on subjective sleep quality and increased noise annoyance but with only a small effect on task performance the next day (Hales Swift, 2010). These

> conclusions mirror those of an earlier synthesis of field studies which concluded that there was sufficient evidence that nocturnal noise exposure (defined as rail, road, and aircraft noise) was causing direct biological responses, at approximately 40dB SEL, as well as affecting well-being and quality of sleep (HCN, 2004). This report also found that evidence was weaker for an effect of nocturnal noise on social interaction, task performance, and on specific disease symptoms. Recent evidence from the laboratory and field, confirms that nocturnal aircraft noise assessed as both average noise exposure during the night in the home (Leq) and the number of noise events impairs cognitive performance the following morning, as evidenced by slower reaction times and lower accuracy on cognitive tasks (Elmenhorst et al., 2010). These effects whilst small, were consistent and statistically significant, and could indicate an important public health implication of nocturnal aircraft noise exposure potentially influencing occupational performance."
> **Charlotte Clark & Stephen A Stansfeld, Barts & the London School of Medicine, Queen Mary, University of London, September 2011**

The MTA may think that its use of the 24-hour average noise level standard is correct and sufficient to describe all noise impacts on health, but it is clearly not if scientific research is to be believed. The effects of a 10 to 20 seconds burst of noise during the sleeping hours obviously does have health consequences and should be considered as part of a noise analysis to protect people subjected to it.

The appendix of section X lists other studies that address the nighttime-noise sleep issue, some dealing with nighttime aircraft noise as more studies have been done in that field than with rail noise. However, both have the equivalent effects on health.

It is also interesting to note that in recent years some European airports are placing nighttime restrictions on flights from 11 P.M. to 5 A. M. (or in some cities, 7 A.M.) in recognition that the noise from arriving and departing aircraft at night are causing health problems for nearby communities (see section X1, Nos. 15 and 16).

An additional investigation for this declaration was made in February 2017 regarding the impact of the Purple Line LRT on schools that were close to the Purple Line tacks. It is discussed in Appendix 1.

IV. Impact of noise on users of the trail

The FEIS Technical Report acknowledges that there is a trail, but after that it only mentions it in regards to the sound barrier walls. There is no mention of the fact that the present Capital Crescent Trail is a pristine, quiet, tree-shaded park-like pathway for hikers and bikers. Nor was there any discussion offered on what the noise levels might be for trail users when the Purple Line is completed, or whether the noise levels would meet Federal sound level safety standards for trail users. Consequently, no noise measurements were made in the LRT's right-of-way. Indeed, all measurements were made some distance away from the right-of-way, often hundreds of feet away. Even though Montgomery County will be responsible for building the new trail, it will need to know what the projected LRT sound levels will be within 14 feet of the LRT vehicles. None of this data were provided. There is no discussion in the FEIS whether the trail should be outside or inside the sound barrier walls. Logic would say that the trail should be outside the walls, otherwise, the trail users would be bombarded with noise as the sound bounces between wall and LRT.

Subsequent to the FEIS, the Town of Chevy Chase received a letter (April 14, 2017) from the MTA Purple Line Project Director, William E. Parks, in which he states that the "*average* [emphasis added] noise levels emanating from the LRV (light rail vehicles)

passbys shall not exceed 75dBA Lmax as indicated in Exhibit 12.2." This noise would be measured at 50 feet from the centerline of the tracks. If the trail is placed 12 to 14 feet from the Purple Line vehicles, the level of noise when translated from the 50 foot point to the 12 foot point will be about 87dBA. This will not be a pleasant noise level for people on the trail as that level is just an average, meaning that there will be higher noise peaks – as well as lower noise peaks – depending on the speed of the train and whether the train is rounding a corner.

Since the FEIS was released, Maryland Governor Hogan has modified the design conditions, replacing the "green track" bed with heavy gravel; and Montgomery County will construct the new trail with a concrete pathway. Both changes will increase the noise level for trail users. This is because there will be less absorption of sound from between the rails (no "green track") and the present trail media (gravel, grass and packed dirt). The sound will now be bouncing off the concrete pathway.

In the FEIS pages 15 and 16, the MTA addresses the issue of warning devices that are used to warn people and auto traffic at grade-level crossings. In one place, MTA refers to bells with maximum sound levels at 78 dBA at 50 feet, but in another part it refers to a horn being used but with no maximum sound level specified. In a May 2014 communications between the Town of Chevy Chase and the MTA, the Town asked at what sound level would the horn be used. The MTA reply in early July (2014) stated that that question would not be answered until the end of that month. It is over two years later, and this question has yet to be answered. If the MTA is required to follow Federal Railroad Administration (FRA) regulations for all railed vehicles, the sound level when approaching a highway intersection at grade level must be between 91 dBA and 110 dBA at 100 feet. Normally, its level is about 98 dBA. For a trail user, not noticing a train coming up behind him or her, this sound level would be frightening, *and at 12 to 14 feet* from the train, where the trail pathway is expected to be, the sound level (translated from 100 feet) could be close to the threshold of pain (120 dBA). As this sound level may exceed the safety standards, MTA should have stated whether it must comply with the stated FRA regulation or not. Further, use of the horn when going through residential areas during sleeping hours is highly likely to wake many homeowners. The MTA should have resolved this question as part of its FEIS effort.

V. Impact of having only a four-foot high sound barrier walls

MTA initially claimed that only a 12-inch wall was needed to dampen the LRT noise and only when pressed by the Town of Chevy Chase and other communities did it agree to install four-foot walls along the south side of the Purple Line from Bethesda to the Rock Creek Stream Valley Park (FEIS page 16). On the north side of the Purple Line, the trail would be four feet above the tracks or would have a four-foot sound wall between the trail and the adjacent community. MTA stated these walls would dampen the noise by 4 dB.

However, no data were given on the composition of these walls. Are they concrete, masonry, wood, AFTEC panels or are they sound absorbent material like Acoustiblok? The fact that the wall is only four feet tall indicates that MTA seems to lack understanding on how to construct sound barrier walls. Sound can and does bounce in all directions and will certainly bounce from a hard-surface four-foot wall back to the LRT vehicle and then from there into the community. Sound barrier walls must be designed to minimize reflected sound, and must consider whether community homes are lower or higher than the LRT vehicles themselves. Figure 2 shows how sound can bounce not just from one side of the LRT, but from both sides. In the Town of Chevy Chase and other communities, there are homes that are higher than the Purple Line right of way. Therefore, it is imperative that

sound barrier walls be sufficiently high to block reflected noise. A hard-surface four-foot wall is unlikely to be too useful.

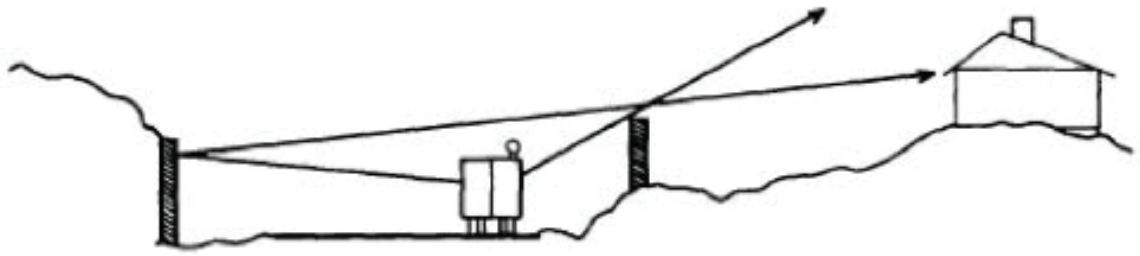

Figure 2 (FHWA Illustration.)

An example of a more effective noise wall being planned in Sydney, Australia to help reduce the noise from its light rail system will be five meters (16.4 feet) high, and may also be augmented with large trees. The Sydney wall will be adjacent to a transit storage and repair yard, such as the one planned for the Purple Line at Lyttonsville, Maryland where rail lines and a storage and repair facility would overlook Rock Creek Regional Park. In the case of Lyttonsville, not only residents but park users and wildlife will also be affected by this permanent and non-minimal or non-de minimis "use" of the park that will continue throughout the days and into the late evenings. Rock Creek Regional Park is only one of many, from Elm Street Park to the eastern end of the line that would be significantly affected on a permanent basis by noise from the project as currently planned.

The MTA FEIS (pg.16) also pledges to put sound absorbing skirts, covering the sides of the wheel trucks to dampen the sound. What evidence does MTA have that these skirts will reduce wheel noise by 8 dB? What is the material used to achieve this noise reduction? These questions are unanswered in the FEIS or the Record of Decision to the best of my knowledge. Indeed, to the extent that they were answered, the removal of the requirement to use “green track” from the project by the decision of the Governor as announced in late June and formally in the revised Requests for Proposals on July 15, 2015 would negate the accuracy of any assessment of noise done before then.

VI. Noise Impact to the Parks

The Purple Line will be passing through, over, or skirting by the borders of 12 different parks in going from Bethesda to New Carrollton, and therefore noise is very much an issue.

In the Draft EIS, these parks were considered in FTA Land Category 1, meaning that the parks were to be kept as quiet as possible and every effort should be made to stay outside their boundaries. In the Final EIS, however, all the parks were classified as Category 3 and that category adds 5 dB (more than 3 times the noise level) to account for land considered less sensitive to noise even though the “de minimus use” methodology implies that parks should be treated differently. This begs the question of why this change? Table 3-2 of the FTA Transit Noise and Vibration Impact Assessment document does not include in Category 3 a description called “active parks” as stated in the FEIS. But, even with this inappropriate classification, the transient noise on park environments also exceeds the FTA criteria values for moderate impact (FEIS Table 5) and therefore will severely impact the environment of these parks. There may not be people sleeping there, but a three-to-four-minute blast of noise is not what people expect in a park.

Maryland Governor Hogan has initiated changes to the Purple Line and one of these changes may be the elimination of the skirts that reduce noise covering the wheels of the Purple Line vehicles. It will be difficult to know about this or other variables until after the four proposals are received in November, or after the State has concluded its negotiations and chosen the final proposal and private partner in early 2016. According to the FEIS, however, these skirts would reduce the noise by 8 dB. The loss of these skirts, of course, will increase the peak noise by this amount, and make the park environments that much more unpleasant, creating a permanent impact on, or "use of" these parks for 30+ years or as long as the line operates. Also, as of June 2017, neither the Federal Government nor the Montgomery County regional park department, to my knowledge, approved a Special Use permit for the Purple Line to cross Rock Creek Park, and the fact that the LRT noise level through this park is so high may make it problematical that they will.

VII. Other impacts on the residential communities

1. The loss of all the trees on the trail will diminish the wildlife population, and increase the noise from the LRT that will affect areas beyond the line itself. That noise is likely to scare off sensitive wildlife, including sensitive bird species that may remain nearby in neighboring backyards and green spaces. Communities will be the ones to pay the price as many of its residents are bird watchers and animal lovers.

2. MTA will be putting traction power substation (TPSS) buildings every mile or so to power the Purple Line. These buildings will house high power transformers that normally emit a humming sound. If these stations are placed in a community, will the hum be reduced to a level that a person cannot hear it three feet from these buildings? Also, nothing was said in the FEIS (pg. 17) about whether substations will be encroaching onto homeowner property or whether homeowners will have to turn over property to the state for these stations. Also not mentioned in the FEIS was the size of these buildings. Some people have reported that post-FEIS, the MTA said that they were about the size of an 18-wheeler truck trailer. If true, homeowners forced to have one on their property would find this to be unreasonable.

VIII. Construction Noise

Construction noise is perhaps the worse kind of noise because it encompasses not only transient noises, but multiple, continuously operating loud equipment noises. The MTA, in FEIS section 4.2, mentioned construction noise, but only superficially. It did list some of the typical equipment that it expected would be used and some of the activities, bridge construction, tunneling, and pile driving. It also listed general types of mitigation it would impose on the concessionaire, but without any specificity in *how* much noise reduction should be expected for mitigation technologies like:

- sound barrier walls
- sound baffling on generator and compressors engines
- moveable sound reduction screens for activities like jackhammers.

MTA also mentioned that it would “employ the best available control technologies to limit excessive noise when working near residences”, but without offering how it would do that. It did not even list the maximum noise levels that Montgomery and Prince Georges Counties or other affected jurisdictions, such as the Town of Chevy Chase, impose on construction work, the hours of the day when permitted noise levels change and the extent to which these limits would bind the project. The FEIS also expected the entire project to take five years, but again without breaking down the schedule in any meaningful way. For example, in a given

residential area, how long should residents expect the construction work to go on, six months, one year, or longer? Commercial businesses as well as residents need to know what to expect. An estimated schedule would have been helpful.

Now that Governor Hogan has cut the funding for the project, it is not clear what the concessionaire will actually be required to provide from what was published in the FEIS. Many of the environmental aspects of the project have been eliminated. The Governor's June announcement and the amendments to the Request for Proposals since June have also indicated that normal limitations on the hours of the day allowed for construction would be expanded or waived to reduce the costs of construction. That by definition is an unusual increase in the impact of construction noise on the lives of residents, workers, park visitors and wildlife but its effects, potential mitigation and committed mitigation for them have not been assessed or confirmed despite the requirements in the regulations and guidance on mitigation for Environmental Impact Statements[2].

The 2011 CEQ Guidance on Mitigation and Monitoring appears not to have been followed in the 2013 FEIS -
https://ceq.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf

IX. Appendix 1 – Impact of Transient Noise from the Purple Line on Nearby Schools

The Maryland Transient Administration in writing its Environmental Impact Statement for the Purple Line Project was required to assess the environmental impacts on many aspects of installing a light rail transient system that passes through rural, small business areas, commercial business areas, city areas, and parks. MTA has not addressed this issue well.

One area MTA completely neglected to assess was the Purple Line Project noise impact on schools. A survey found that there are five schools that the Purple Line passes by: The Rosemary Hills Elementary School, North Chevy Chase Elementary School, Sligo Creek Elementary School, Silver Spring International Middle School and The Excel Academy Charter School.

This omission is of particular concern as noise, either continuous noise, and especially transient noise, affects the learning ability of young children[3]. Studies have been

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[2] § 1502.14 Alternatives including the proposed action.
This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker
and the public. In this section agencies shall:
(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
(c) Include reasonable alternatives not within the jurisdiction of the lead agency.
(d) Include the alternative of no action.
(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
(f) **Include appropriate mitigation measures not already included in the proposed action or alternatives.**

[3] From the American Psychological Association article; *Silence, Please; Psychologists are increasing aware{ness] of the harmful effects noise has on cognition and health*. By Amy Novotney, 2011 vol. 42, No. 7.

done that show that children who are subjected to a noisy environment do not learn as well as those who do not have a noisy environment. Four of the five above mentioned schools are elementary schools, the schools whose children are the most affected. Added to this is the fact that all of the schools were built before the ANSI (S12.60-2002) classroom noise standard was published, so none of them have this noise reduction advantage. Given these facts, it was even more important for the Purple Line Project to avoid passing near these schools. Unfortunately, MTA did not consider that in it's EIS process.

A study was done in February 2017 to ascertain the physical environment of these five schools located in Montgomery and Prince Georges Counties; that is, how close the Purple Line vehicles would be passing by these schools (see Table 1) and whether other facilities like Purple line Transit stations would add to the noise environment. The proximity would tell us if there could be a problem with noise and if the noise would be track noise or FRA horn noise or both. We found that the Purple Line would be exceedingly close to one school.

ROSMARY HILLS ELEMENTARY SCHOOL

The primary reason this investigation was hearing that teachers at Rosemary Hills Elementary School were having difficulty conducting classes when the CSX or MARC trains passed by. The CSX trains, especially, are often long and take minutes to pass by. When the Purple Line is added to this mix of noise, the impact may become intolerable for the teachers and students. We wanted to look at the physical situation and judge for ourselves what would be the main issues. Here is what we found.

Although noise data for the Rosemary Hills School are listed in the FEIS technical Volume (page20), the data are not useful as the MTA never considered transient noise, only average noise over 24 hours. Also, even though MTA knew the CSX rail line was about 150 feet from the rear of the school, they did not report the noise levels from the CSX or MARC trains passing by so that the Montgomery County Department of Education could determine what the impact might be on classroom activities.

The Purple Line will be passing much closer to the school. There is presently a rail siding southward of the CSX and MARC lines from Brookville Road area that passes by the Rosemary Hills School to a switch located south of the school property. The FEIS shows that this track will be eliminated and replaced with the Purple Line tracks that will travel along side them for about one half mile before it crosses over the CSX tracks. This half-mile will pass directly behind the Rosemary Hills School.

However, the space occupied by the present siding track, will not provide enough width to accommodate the two-track Purple Line. To install two tracks for the Purple Line, it will be necessary to cut back the 8 to 10 foot high bank nearly to the edge of Talbot Avenue, which passes directly behind the school, and then build a fixed wall to support the remaining bank. If the wall is concrete or other impervious material, the noise from the Purple Line and CSX/MARC trains will bounce off this wall into the community on the northern side of the CSX tracks, increasing its noise level from what it is presently from just the earthen bank. To prevent this bounce-back from happening, it would be necessary to use something like AFTEC panels as the barrier or Acoustiblok panels attached to a concrete wall to reduce the noise. The construction drawings, however, do not say if this is a noise barrier wall or just a wall to hold the soil bank in place. Why didn't the MTA address this issue in its FEIS?

Cutting the bank back will bring the Purple Line closer to the school, thereby increasing the noise level to the facing classrooms and possibly disrupting classroom

activities. Further, if the CSX/MARC trains and two Purple Line trains or some combination of them converge at the school location at the same time, noise levels will be even greater.

The Rosemary Hills School was built in the middle nineteen fifties and remodeled in 1988. Classroom noise standards were not yet in place so the present-day standard – still optional – of having an empty classroom noise level at 35 dBA (ANSI S12.60-2002) from outside activities was not in place. Therefore, without proper external sound barriers, placing the Purple Line only about 65 feet behind the school, although at a somewhat lower elevation, is likely to disrupt teaching in the rear school classrooms. The noise expected from the Purple Line vehicles is based on examples of other light rail transit systems and range from 75 to 85 dBA at normal speeds. The fact that the Purple Line Trains will pass by Rosemary Hills School at intervals as often as every 3.5 minutes will only aggravate the classroom disruptions from these trains.

Although the impact of train noise inside the classrooms is important, the noise outside the classrooms is also important. When the children are outside playing, to what extent will the outside noise from the Purple Line and CSX/MARC trains and air pollution from the CSX trains carrying coal affect the children's health? That, also, does not appear to have been addressed or assessed in the EIS process.

There is also a question whether vibrations from the Purple Line trains may cause a deleterious effect within the rear school classrooms. The fact that the Purple Line trains would, according to the FEIS construction drawing, be passing within about 65 feet of the school raises that issue. If the vibrations are sufficient to be felt by the students each time the train passes, all the school year, then they could create health problems for some of the students. And yet MTA has not addressed this potential vibration issue in its FEIS. Furthermore, vibration *and* noise issues may be a more serious issue during Purple Line construction phase when heavy equipment is being used.

NORTH CHEVY CHASE ELEMENTARY SCHOOL

The North Chevy Chase Elementary School is about 900 feet from the Purple Line tracks. From a track noise standpoint, the distance should reduce the noise from the Purple Line train to an acceptable level. For example, if the worse case Purple Line transient noise were 85 dBA at 50 feet, then the noise level at the school would be down to about 55 dBA. To reduce it to the standard of 35 dBA, the building insulation would have to provide another 22 dB noise reduction to meet this standard. Was there that much sound insulation put into the school construction to meet the ANSI standard? This is not known.

Although the sound from the train vehicles may not be the issue for this school, the 98dBA horn blast from the train as it approaches the at-grade crossing at Jones Mills Road and Jones Bridge Road could cause classroom disruptions, especially when the trains come as often as three and half minutes.

Depending where the children live, they may have to cross the Purple Line tracks at Jones Bridge Road and Jones Mill Road. The MTA FEIS did not describe what type of crossing guards would be used, especially as some very young children may be crossing there to reach their homes.

SILVER SPRING INTERNATIONAL MIDDLE SCHOOL AND SLIGO CREEK ELEMENTARY SCHOOL

Both the Silver Spring International Middle School and Sligo Creek Elementary School are located within the same complex, and will be directly adjacent to the Wayne Avenue Transit Station. The middle school is the closest to the transit station while the elementary school is at the rear of the middle school building complex. The construction drawing for this station shows a retaining wall around the middle school. The height and composition of the wall is not known at this time. If it is not a sound suppression wall, then the noise level may be high enough to cause classroom disruptions while the Sligo Creek school noise level would be lower as it is behind the Middle School. However, if the Purple Line LRT uses its horn to announce its entry to the station, then the noise level could be as high as 68dBA for both schools.

As the school complex was built before 2002, it is not likely that it has sufficient sound insulation to meet the ANSI standard? Again, MTA did not address this issue.

EXCEL ACADEMY PUBLIC CHARTER SCHOOL

The Excel Academy School is located about 600 feet from the elevated Riverdale Park Station on Riverdale Road, but only about 200 feet from the Purple Line tracks as it passes by the school. The train track noise level at the school would be about 60dBA while the horn noise if used when entering the station would be about 65dBA. Both noise levels can be disruptive to student studies.

Both tracks have a retaining wall, but again we do not know the nature of the walls to be built as MTA did not describe in the FEIS whether they are sound barriers or just retaining walls with little noise suppression. Nor do we know the quality of the school's construction. Because the county did not build the building being used, little attention may have been paid to noise.

Table 1 Distance to Purple Line Tracks

SCHOOL	Distance Feet
Rosemary Hills	65
North Chevy Chase Elementary	892
Silver Spring International Middle and	200
Sligo Creek Elementary	292
Excel Academy Public Charter	200

Pursuant to 28 U.S. C. Section 1746, I, Donald W. MacGlashan, declare under penalty of perjury that the foregoing is true and correct. Executed on June 7, 2017.

Donald W. MacGlashan

X. Appendix – Additional Studies on Transient Nighttime Noise

• **A field study of effects of road traffic and railway noise on polysomnographic sleep parameters**, Gunn Marit Aasvang, Britt Øverland, Reidun Ursin and Torbjørn Moum, The Journal of the Acoustical Society of America, 129,3716 (2011)

• Marks, A.; Griefahn, B.; Basner, M. **Event-related awakenings caused by nocturnal transportation noise,** Noise Control Engineering Journal, Volume 56, Number 1, 1 January 2008, pp. 52-62(11)

• Muzet A. **The need for a specific noise measurement for population exposed to aircraft noise during nighttime**. Noise Health [serial online] 2002 [cited 2015 Sep 2]; 4:61-4. Available from: http://www.noiseandhealth.org/text.asp?2002/4/15/61/31787

• **Hypertension and Exposure to Noise Near Airports: the HYENA Study**

Lars Jarup,[1] Wolfgang Babisch,[2] Danny Houthuijs,[3] Göran Pershagen,[4] Klea Katsouyanni,[5] Ennio Cadum,[6] Marie-Louise Dudley,[1] Pauline Savigny, [1] Ingeburg Seiffert,[2] Wim Swart,[3] Oscar Breugelmans,[3] Gösta Bluhm,[4] Jenny Selander,[4] Alexandros Haralabidis,[5] Konstantina Dimakopoulou, [5] Panayota Sourtzi,[7] Manolis Velonakis,[7]and Federica Vigna-Taglianti,[6] on behalf of the HYENA study team

1Department of Epidemiology and Public Health, Imperial College London, St Mary's Campus, Norfolk Place, London, United Kingdom; 2Department of Environment and Health at the Federal Environmental Agency (UBA), Berlin, Germany; 3National Institute of Public Health and Environmental Protection (RIVM), Bilthoven, the Netherlands; 4Institute of Environmental Medicine (IMM), Karolinska Institutet, Stockholm, Sweden; 5Department of Hygiene and Epidemiology, National and KapodistrianUniversity of Athens, Athens, Greece; 6Environmental Epidemiologic Unit, Regional Agency for Environmental Protection (ARPA), Piedmont Region, Grugliasco, Italy; 7Laboratory of Prevention, Nurses School, National and Kapodistrian University of Athens, Athens, Greece, **Environmental Health Perspectives • Volume 116, Number 3, March 2008**

• **Aircraft Noise, Air Pollution, and Mortality From Myocardial Infarction,** Huss, Anke; Spoerri, Adrian; Egger, Matthias; Röösli, Martin; for the Swiss National Cohort Study Group, Epidemiology: Volume 21, Issue 6, pp 829-836, November 2010

• Babisch W, Kamp Iv. Exposure-response relationship of the association between aircraft noise and the risk of hypertension. Noise Health [serial online] 2009 [cited 2015 Sep 2];11:161-8. Available from: http://www.noiseandhealth.org/text.asp?2009/11/44/161/53363

• Frank P. Schmidt, Mathias Basner, Gunnar Kröger, Stefanie Weck, Boris Schnorbus, Axel Muttray, Murat Sariyar, Harald Binder, Tommaso Gori, Ascan Warnholtz, Thomas Münzel, **Effect of nighttime aircraft noise exposure on endothelial function and stress hormone release in healthy adults**, European Heart Journal, First published online 2 July 2013

• Tomoyuki Kawada[a] & Shosuke Suzuki**, Change in Rapid Eye Movement (REM) Sleep in Response to Exposure to All-Night Noise and Transient Noise, ' Archives of Environmental Health: An International Journal, Volume 54, Issue, 1999. Authors Affiliation:** Department of Public Health , Gunma University School of Medicine , Maebashi, Japan

X1. References

1. **Federal Government's Method of Assessing Noise Impacts;** Section 4: Assessing Aviation Noise; The following text is an excerpt from the FAA's proposed noise abatement policy, published in the Federal Register, July 14, 2000.

2. **Final Environmental Assessment for Northern California Optimization of Airspace and Procedures in the Metroplex;** Prepared by: **United States Department of Transportation Federal Aviation Administration; Appendix E Basics of Noise; July 2014**

3. **Airport Noise Law; Statutes and Regulations; U.S.,** Revised February 27, 2011

4. **L_{eq}, SEL, What? Why? When? By** Pierre Bernard, Bruel&Kjaer

5. **Health Effects Caused by Noise: Evidence in the Literature from the past 25 years: by H. Ising, and B. Kruppa;** Federal Environmental Agency (retired), Berlin, Germany, **Noise and Health, Volume 2, Issue 6, pp. 5– 13, 2004**

6. **Sound levels – decibels, intensity and distance; SchoolPhysics, 2012**

7. **Noise Ordinances – Tools for Enactment, Modification and Enforcement of a Community Noise Ordinance: Robert C. Chanaud, Ph.D. 2014**

8. **What causes transformer noise, and how can it be eliminated?. Acme Electric; May 4, 2012**

9. **Understanding Transformer Noise; Federal Pacific Electric; ISO 9001:2008**

10. **Audible Landscape, 4 physical Techniques to Reduce Noise Impacts; U.S Department of Transportation; Federal Highway Administration,**

11. **Maryland State Highway Administration; Sound Barriers Guidelines; Highway Traffic Noise**

12. **Sound Walls; Noise FAQ; Noise Walls; Washington State Department of Transportation**

13. **The New Generation of Highway Sound Barrier Walls; AFTEC [Corporation]**

14. **Acoustiblok.com [Corporation]; sound walls**

15. **Noise ban provides nightmares for German airports and airlines but better sleep for campaigning residents**: Greenaironoline.com 20 Apr. 2012

16. **Night time restrictions at Amsterdam-Schiphol:** By: Frenk Wubben and Jurgen Busink **,** March 2004**, Under contract of** Ministry of Transport, Public works and

Water affairs Directorate General of Civil Aviation**,** P.O. Box 90771 2509 LT The Hague, The Netherlands

17. **FTA Transit Noise and Vibration Impact Assessment, May 2006**

EXHIBIT 4

Civ. No. 14-01471 (RJL)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE CAPITAL CRESCENT TRAIL, et al.,	*	
Plaintiffs,	*	
v.	*	
FEDERAL TRANSIT ADMINISTRATION, et al.,	*	**Civil Case No. 14-01471 (RJL)** **Hon. Richard J. Leon**
Defendants,	*	
and	*	
The STATE OF MARYLAND,	*	
Defendant – Intervenor.		

* * * * * * * * * * *

DECLARATION OF MICHAEL V. NIXON IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT-INTERVENOR STATE OF MARYLAND'S MOTION FOR STAY PENDING APPEAL AND REINSTATEMENT OF RECORD OF DECISION

I, Michael V. Nixon, submit this Declaration in support of Plaintiffs' opposition to Maryland's motion for stay pending appeal and reinstatement of the Record of Decision ("ROD").

1. This declaration addresses some of the irreparable injuries that the plaintiffs would face and the harmful consequences of those injuries for the public, if the stay requested by the State of Maryland would be granted and the ROD reinstated.

2. I am familiar with some of the cultural resources and historic properties in the Bethesda Central Business District, particularly those within the area of potential effects of the proposed Purple Line rail transportation project, and the proposed location of its Bethesda Station, and some of the direct and indirect adverse effects the proposed project may have – and presently, is having – on those cultural resources and historic properties, such as the historic Bethesda Community Paint and Hardware Store, and the historic springs and stream headwaters that emerge in the immediate vicinity (which may be directly related to the naming of Bethesda).

3. I have a B.A. in Anthropology from the University of Pittsburgh, and a J.D. from the Northwestern School of Law at Lewis & Clark College, with a Certificate in Environmental & Natural Resources Law, in 1989. I was admitted to practice law by the Oregon Supreme Court in 1989, and have been subsequently admitted to practice in the U.S. Court of Appeals for the Ninth Circuit, the U.S. District Court for the Western District of Pennsylvania, and the U.S. District Court for the District of Columbia.

4. Since 1989, much of my career has had an emphasis as a public interest historic preservation lawyer, litigator, and consultant, including policy, regulation, and enforcement of local, state, and federal cultural resources protection and historic preservation laws nationwide. I have been an instructor at professional

environmental and historic preservation conferences and given Continuing Legal Education presentations and workshops on historic preservation around the United States, including at the University of Oregon School of Law, the Idaho State Bar annual convention, the Malheur Field Station Research Center, the Te-Moak Tribe of Western Shoshone, the Sokaogon Chippewa Community, and the annual conference of The National Trust for Historic Preservation.

5. The federal, state, and local undertakings on which I have worked have included various infrastructure, transportation, and transportation corridor planning and construction projects. My work has involved the avoidance, minimization, or mitigation of potential and actual adverse effects of those undertakings on cultural and historic resources. My work has also included consultations to create mitigation solutions as a post-hoc remedy for unlawful, illegal or permitted damage to – or demolitions or obliterations of – cultural and historic resources and structures. Sometimes in such situations mitigation is impossible. That is why the primary principle of cultural resource protection and historic preservation is to plan and design agency actions and undertakings to avoid any adverse effects.

6. For example, the impact of the Purple Line and its Bethesda station on forcing or leading to the removal of the historic Bethesda Community Paint and Hardware Store building – and alternatives that would not require that removal – were not

assessed in the EIS process and, furthermore, the Final EIS did not include the explanation required by the President's Council on Environmental Quality (CEQ) stating how the undertaking agencies (the FTA/MTA) planned to comply with the relevant parts of applicable historic preservation provisions of Section 4(f) of the U.S. Department of Transportation Act of 1966 and other applicable federal, state and local historic preservation and cultural resources protection laws.

7. In regard to Section 4(f) duties, the undertaking agencies of the proposed Purple Line have apparently omitted or neglected consideration of cultural resources and historic properties other than parklands. For example, see FEIS Appendix I, "Section 4(f) Evaluation Materials," Purple Line National Capital Planning Commission (NCPC) Coordination Meeting (2/22/2012), Meeting Minutes (February 24, 2012), at pp. 2-3, "Discussion" Item 7 and "Summary of Action Items," No.4:

> *Section 106 was discussed. NCPC has already been formally requested as a Consulting Party under Section 106. NCPC will seek signatory status to any Memorandum of Agreement (MOA) prepared for the project.*
>
> - *ACTION: NCPC would like request Cooperating Agency status-FTA to prepare letter.*

- *ACTION: Purple Line Cultural Resource Lead (John Martin) and NCPC Cultural Resource Lead (Jennifer Hirsch) to discuss Section 106 and set up Consulting Party meeting once effects have been determined.*

****

Purple Line Cultural Resource Lead (John Martin) and NCPC Cultural Resource Lead (Jennifer Hirsch) to discuss Section 106 and set up Consulting Party meeting once effects have been determined.

http://www.purplelinemd.com/images/studies_reports/feis/volume_01/023_PL%20FEIS_Vol-I_App%20I%20Sec%204(f)%20Materials.pdf (accessed June 7, 2017) (emphasis added).

8. Among the fundamental errors and problems with that process are that: 1) the consultation requirement of the federal historic preservation law referenced therein ("Section 106" of the National Historic Preservation Act) was not followed at the outset in *first* locating, identifying, and evaluating historic properties that may be adversely affected by the proposed undertaking, and 2) the consultation was only begun "once effects have been determined." That is backwards and unnecessarily sets up the process for gross errors, omissions, and ultimate failures. Consultation, including with the general public and members of an affected community, is an essential step at *the beginning* of the earliest planning stages of an undertaking.

9. Attempting to determine the effects on a community's cultural resources and historically significant properties without first consulting to locate, identify, and evaluate all of those properties and resources in that community, is negligent if not reckless. It is akin to flying blindfolded. The risk of harm is high, and almost certain.

10. To emphasize how egregious that is in the case of the proposed Purple Line project, there is no recognition in the FEIS of the historic Bethesda Community Paint & Hardware Store – which in a long-known historic structure revered in the community and listed as a protected historic resource in the Montgomery County Bethesda Central Business District Master Plan since at least July 1994, and recognized by the Maryland Historical Trust and the Maryland Historic Preservation Commission since at least 1983:

> *[T]he earliest building in the [Bethesda commercial] district still standing and perhaps the only building which could be considered truely [sic] reflective of the initial development of the Bethesda Commercial District is the Community Paint & Hardware Store at 7252 Wisconsin Ave. Now covered with stucco, it is the last of the frame structures which had comprised most of the early development of Wisconsin Avenue. In addition, with its decorative cornice and extending display front, it is the only building in the*

district still influenced by the late Victorian architecture. The building is believed to have been built by Alfred Wilson circa. 1900, but may be as early as 1891. The building was used to house Wilson's general store and post office.

See, Catherine Crawford, "Maryland Historical Trust, State Historical Sites Inventory Form," Item 8, "Significance," Montgomery County Historic Preservation Commission, Rockville, Maryland, Survey Number M: 35-14 (November 1983), at pp.5-6. (Wilson's Store & Post Office (Community Paint & Hardware), 7250 Wisconsin Avenue, Bethesda, MD, Maryland Historic Preservation Commission, Historic Property Inventory Survey Number: 35/14-7). (https://mht.maryland.gov/secure/medusa/PDF/Montgomery/M;%2035-14.pdf) (accessed June 7, 2017)

Probably the earliest commercial building left standing in the district and the only surviving structure truly reminiscent of the initial development of the area is Community Paint and Hardware. Thus, its importance to the present business district cannot be disputed. Its architectural detailing, with its decorative bracketed cornice, is reflective of the late Victorian styling which has not been found elsewhere in the district.

This building was originally the 1890's general store and post office of Alfred Wilson. It was Bethesda's only store in 1900 and then contained a post office, grocery counter, dry goods, hardware and a fuel and feed supply. The building is now covered with stucco which was probably added

during the early 20th century when it became a popular means of updating the look of buildings - especially commercial buildings. This, however, does not detract from the authentic appearance of this turn-of-century general store.

From "Preliminary Draft Amendment to the Master Plan for Historic Preservation: Bethesda CBD Multiple Resource/Thematic Historic District," The Maryland-National Capital Park and Planning Commission (August 1985), at p.4 (The Community Paint and Hardware was noted therein to be "presently listed in the Locational Atlas and Index of Historic Sites in Montgomery County.") (https://mht.maryland.gov/secure/medusa/PDF/Montgomery/M;%2035-14.pdf) (accessed June 7, 2017).

11. The Community Paint and Hardware Store (aka Wilson's Store & Post Office) has been listed as a Montgomery County historic resource in the Montgomery County Bethesda Central Business District Master Plan since at least July 1994. See Bethesda Central Business District Master Plan, Chapter 9, Historic Resources Plan, p.223, and at Figure 9.1, p.224 & Table 9.1, p.227 (1994) (http://montgomeryplanning.org/document-viewer/#http://www.montgomeryplanning.org/community/plan_areas/bethesda_chevy_chase/master_plans/bethesda_cc/ch9_bethcbd.pdf ; http://montgomeryplanning.org/planning/communities/area-1/bethesda-cbd-1994/) (accessed June 7, 2017):

This Chapter....describes historic sites currently designated on the Master Plan for Historic Preservation, those historic resources currently on the Locational Atlas and Index of Historic Sites in Montgomery County, Maryland....Properties which this Plan acts to designate as historic are added to the Master Plan for Historic Preservation and are placed under the jurisdiction of the Historic Preservation Ordinance.

12. Furthermore, the Master Plan's Historic Resources Plan Objectives are stated thusly:

9.1 Plan Objectives

1. Highlight the values that are important in maintaining the character of Bethesda.

2. Protect and enhance Bethesda's historic and architectural heritage for the benefit of present and future residents.

3. Integrate historic sites into new and existing development.

13. And, there has been no consideration by the undertaking agency of the direct and indirect adverse effects that the proposed Purple Line development would have – and is already having – on that significant historic property. See "Stop-Work Order Issued For Digging Activity Around Foundation of Community Paint and

Hardware," Bethany Rodgers, *Bethesda Magazine* (June 5, 2017)("Building owners barred from exterior work until county approves historic area work permit") (http://www.bethesdamagazine.com/Bethesda-Beat/2017/Stop-Work-Order-Issued-For-Digging-Activity-Around-Foundation-of-Community-Paint-and-Hardware/) (accessed June 5, 2017).

14. The December 12, 2016 decision by the Montgomery County Historic Preservation Commission to allow the removal of the historic Community Paint and Hardware Store located at 7250 Wisconsin Avenue, Bethesda, is based on the Purple Line project ROD. This is just one glaring example of the harms to cultural resources and historic properties at risk under this FEIS & ROD. See, Montgomery County Historic Preservation Commission Memorandum of Decision (December 12, 2016), from Scott Whipple, Historic Preservation Supervisor, to Alison Wertzler, CP 7272 Wisconsin Avenue, re: Historic Area Work Permit #778187: Relocation of historic structure at 7250 Wisconsin Avenue, Bethesda:

> *The Montgomery County Historic Preservation Commission (HPC) reviewed your application for a Historic Area Work Permit (HAWP) at the December 7, 2016, HPC meeting. After giving careful consideration to all information entered into the record, the HPC made the following findings of fact:*
>
> *1.* ***Relocation of the store is consistent with the Purple Line Station Plan. The relocation is necessitated by the plans for the redevelopment of the***

***Apex site, including provision of public infrastructure as called for in the PLS Plan**, thereby serving the interests of the public [24A-8(b)(6)].*

****

*7. **The project is only necessary if the Apex redevelopment project proceeds as proposed**, yielding public benefit from the broader project, and tangible progress should be demonstrated before this HAWP is issued.*

Having made these findings of fact the HPC voted 6-2 (Barnes and Legg) to Approve with conditions the application under the Criteria for Issuance in Section 24A-8(b)(2), (3), and (6).

****

(emphasis added).

15. An SEIS would provide another opportunity for consideration by the undertaking agency of the direct and indirect adverse effects that the proposed Purple Line development would have – and is already having – on the historic Community Paint and Hardware Store and other significant historic properties and cultural resources that have been neglected or overlooked, or are presently unknown, to the undertaking agencies. Granting the stay requested by the State of Maryland would foreclose any consideration of avoidance of adverse effects to the historic building and its location, and would also prejudice the minimization or

mitigation (if adequate mitigation is even possible), to the harm of the public and the public's interest.

16. Another important issue is whether there are alternative options which could avoid, minimize, or mitigate such adverse effects to significant cultural resources and historic properties. For example, upgraded bus services would not have such adverse effects to cultural resources and historic properties that a new constructed rail line would, with or without accepting the Purple Line project's dubious ridership projections. An SEIS would enable such an examination to be done, with proper consultation as intended under NEPA, NHPA and Section 4(f).

17. There are important issues and specific cultural and historic resources for an SEIS to identify, review, consider, and analyze in consultation with the respective interested parties – including members of the public. The undertaking agency must uphold its statutory duties and regulatory obligations in the public's interest. There are serious concerns and legal interests at stake regarding potential and actual impacts and adverse effects to local, state, and national historic properties and cultural resources that have been heretofore unlawfully neglected or omitted in error by the undertaking agency.

18. An SEIS is necessary, therefore, and should be required. Granting the stay requested by the State of Maryland and reinstating the ROD would foreclose any

consideration of avoidance of adverse effects to the historic building and its location – as well as the historically significant associated and adjacent springs – and would also prejudice or foreclose the minimization or mitigation (if adequate mitigation is even possible in some instances), to the harm of the public and the public's interest.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, as signed on June 8, 2017.

/s/ Michael V. Nixon

EXHIBIT 5

Civ. No. 14-01471 (RJL)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE CAPITAL CRESCENT TRAIL, et al.,	)	
Plaintiffs,	)	
v.	)	
FEDERAL TRANSIT ADMINISTRATION, et al.,	)	Civil Case No. 14-01471 (RJL)
Defendants,	)	
and	)	Hon. Richard J. Leon
The STATE OF MARYLAND,	)	
Defendant – Intervenor.	)	

Declaration of John Bickerman

I, John Bickerman, state as follows:

1. I have been a resident of the Montgomery County, Maryland since 1992 and of the Town of Chevy Chase since 2007. In addition, I was a member of the Town Council of the Town of Chevy Chase from May, 2013 until December, 2016. In my capacity of Town Council member, I chaired the Town's Purple Line Committee from June 2015 until May 2016.

2. The discussion pertains to the inadequacy of the Maryland Transit Authority ("MTA") or the United States Department of Transportation ("DoT") efforts to address the very real and substantial risk of environmental harm to the residents of the Town of Chevy Chase and the danger that will be visited on bicyclists that have regularly used the Capital Crescent Trail ("Trail") to transit to and from work or recreate, as described in the DoT and MTA

Environmental Impact Statement and subsequent statements made by officials and representatives of the State before the Town Council and in a public meeting with residents of the Town. I also have strong misgivings that the financial arrangement negotiated by the State of Maryland will put residents at substantial financial risk if the ridership numbers projected by the State fail to materialize, as the Town's expert and others have contended.

3. I have special expertise in the statements made herein because:

   a. I have been awarded a BS and MS (Economics) degrees from Cornell University and a J.D, *magna cum laude*, from Georgetown University Law Center. I clerked for District Court Judge William B. Bryant of this Court.

   b. For almost thirty (30) years, I have been an attorney specializing in environmental law. For the last twenty (20) years, I have been an environmental mediator and have extensive familiarity with federal law as it pertains to hazardous substances, especially the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Sec. 9601, *et seq.* ("Superfund"). I have mediated and continue to mediate and resolve Superfund liability matters throughout the United States that have involved billions of dollars of response costs.

   c. I have Masters of Science degree in Economics from Cornell University and for the first nine years of my professional career was a practicing economist. I specialized in federal budget and finance issues.

   d. I have been an active cyclist my entire life. I regularly commuted to work by bicycle beginning in 1979 when I moved to the metropolitan DC area for my first job and until a few years ago and since 1992 from the Chevy Chase / Bethesda area. I continue to be an active recreational cyclist. I have always taken a strong interest in bicycle safety.

4. I am familiar with the Environmental Impact Statements ("EIS") issued by the DoT based on information and analyses provided by the MTA and experts retained by the MTA.

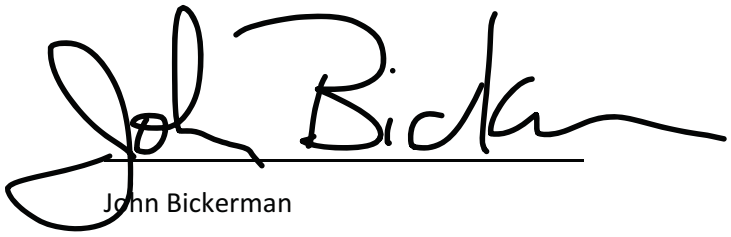
5. The DoT and MTA, as documented in the EIS, did an extremely poor job of characterizing the hazardous substances that may be present on the Trail. The Trail is an abandoned railroad line. It is a well established fact that the rail bed and the railroad ties are sources of hazardous substances. *See* Commonwealth of Massachusetts, Department of Environmental Protection, *Best Management Practices for Controlling Exposure to Soil During Development of Trails,* http://www.mass.gov/eea/docs/dep/cleanup/laws/railtrai.doc*;* Wilkomirski *et al.*, "Railway Transportation as a Serious Source of Organic and Inorganic Pollution," *Water, Air and Soil Pollution* (Jun 2011), 333-345; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3096763/#!po=4.16667. Heavy metals, petroleum products, coal ash, creosote from railroad ties and polynuclear aromatic hydrocarbons ("PAH's") have long been associated with railroad beds. Indeed, federal law requires railroads to submit an environmental report to the federal Surface Transportation Board prior to abandonment. Railroads are required to address and resolve environmental issues prior to abandonment. Remarkably, the EIS makes little mention of any of the hazardous substances that are commonly found in abandoned rail beds. No mention of environmental reports filed with the Surface Transportation Board were included in the EIS. More recently, during the planning and pre-construction stage of the Purple Line, the MTA's contractor took numerous soil borings along the trail. The results of these soil borings have never been made public. However, soil from these boring were indiscriminately dumped on or near the property of Town residents until the Town forced MTA to stop. In an email exchange the MTA's Mike Madden then informed the Town Manager that MTA's crews would continue to spread such material on the Trail nonetheless. (Appendix A.)

6. My concern regarding the inadequacy of the environmental assessment of the Trail that should have been included in the EIS is threefold. First, the characterization of hazardous substances appears to be woefully inadequate. It has not reported the types and quantities of substances that one would normally expect to find in an abandoned trail bed. Perhaps MTA lacked the data to accurately report the environmental risks or, perhaps it just didn't look hard enough. It is possible that the soil borings that have been taken after the filing of the EIS would more clearly delineate the risks on the Trail, but that data has not been shared with the public. It is inconceivable that more significant soil contamination is not present. Second, without knowing the true extent of hazardous substances, the MTA cannot accurately evaluate the risk posed to citizens of the Town of Chevy Chase and other communities if storm events were to create runoff that would cause these hazardous substances to invade off-site properties. Presently, almost all of the hazardous substances would be below surface. However, construction would unearth them and expose these substances where stormwater could carry them off site. Many of the contaminants are known serious carcinogens that are risks to human health. While the MTA has not shared its data, it is more than likely that there are many areas that have hazardous substances in the ground that are above the "action" levels set by the United States Environmental Protection Agency that require a response of either removal or containment. Third, the DoT and the MTA promised to provide evacuation plans as part of their EIS. These plans have never been made public if they have even been developed. The fact that the EIS recognized the need for evacuation plans underscores the awareness that in at least *some* places along the trail, the hazardous substances are so dangerous that if they moved off site people would need to be evacuated from their homes. It is impossible to weigh environmental alternatives without thorough and complete information.

7. As a former member of the Town Council, I was very concerned about both the noise and the speed with which the trains would pass next to the Town. As is the practice in preparing the noise projections, averages rather than peaks are presented. However, having grown up next to Kennedy Airport, I know firsthand that peak noise can stifle all conversation and be so loud as to deleteriously affect the well-being of those exposed to the noise. The Town Council was also very concerned about the risk posed the Town's high school students that have for a very long time taken a shortcut across the trail to attend Bethesda-Chevy Chase High School. While fences and other well intentioned barriers would be constructed to keep trespassers off the tracks, young people have a habit of going where they shouldn't. More than once, residents and officials from the Town, including myself suggested to officials from the MTA that they could slow the speed of the trains passing adjacent to the Town with little affect on their arrival schedules. In all cases, the MTA ignored these suggestions and refused to change its plan.
8. The construction of the Purple Line will greatly disrupt the ability of cyclists to go from points east of Bethesda to Bethesda and put them at significantly greater risk. As an avid cyclist, I have always been concerned with safety. I frequently ride on busy streets and trails are immeasurably safer. During the construction phase, cyclists will be redirected to town and county streets. Indeed the signs for the alternative routes have already been placed in Bethesda. At a Council meeting, the contractor hired by the MTA presented the alternative route on streets. Astonishingly, the route directed cyclists along routes that passed directly in front of several driveways to county parking lots, putting cyclist in close conflict with automobiles that would be exiting or turning into these lots. These are inevitable accidents waiting to happen as cars pull into the street past the line of parked cars to get a view of street traffic and smack into the oncoming paths of cyclists coming in both directions.

9. Lastly, I had an opportunity to examine closely the financial assumptions and premises of the Purple Line. If the assumptions are incorrect, as I believe they are, the taxpayers of the State of Maryland will pay a very heavy price for decades. The key assumption made by MTA is ridership. However, the ridership model and conclusions were hidden from public view and scrutiny because the contractor used proprietary software and neither the data nor the model were made publicly available. No analysis of the many underlying economic assumptions or modeling could be evaluated or critiqued. This is not the way NEPA is intended to be applied. As a former economist that modeled utilization of federal programs, I am acutely aware of how small changes in assumptions can have drastic effects on outcomes. As the professor at Cornell taught me in my econometrics class – "If you torture the data enough, it will confess!" I believe that the MTA have tortured the data to justify the outcome that they desire.
10. It is simply not in the public interest for this project to move forward without additional investigation, analysis and meaningful opportunity for public comment. The MTA and the DoT have not done the "hard look" analysis required by law.

Pursuant to 28 U.S.C. Sec. 1746, I John Bickerman, declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct. Executed on June 8, 2017.



John Bickerman

From: Todd Hoffman
Sent: Thursday, September 15, 2016 12:38 PM
To: Joy Hamilton
Cc: Mary Flynn
Subject: Soil Boring Work

Hi Joy,
I am writing to report residents' complaints regarding soil boring work on the Capital Crescent Trail along the Town's border. The Town's border that concerns us starts at Elm Street Park and ends where East West Highway crosses over the Capital Crescent Trail.

Several residents emailed the MTA in mid-August requesting under what authority soil boring testing was being conducted. In one of the email responses (August 17, 2016), MTA offered the following information:

Standard practice for geotechnical borings is to fill the bore hole created with the excavated soil so that no excess soil is left around the bore hole. The surface of interim trail will be restored to the original condition following any bores within the [sic] or along the trail alignment.

Town of Chevy Chase residents who regularly use the trail observe that crews are unable to return all excavated soil into bore holes. To compensate, they throw excess soil by the shovel-full into bushes above Coquelin Run (video footage will be sent in a separate email). We request that you develop and enforce a new plan to manage excess soil in order to protect adjacent areas, including Coquelin Run, from further sedimentation and possible contamination.

Thanks for your assistance with this matter, and I look forward to hearing from you soon.

Todd Mary,

This message is in response to your September 15, 2016 email (see below) regarding concerns about geotechnical borings that are being carried out along the Georgetown Branch right-of-way, and specifically along the Town of Chevy Chase's northern border, for the Purple Line project. Thank you both for bringing these concerns to the Maryland Transit Administration's (MTA) attention. MTA and our Concessionaire team (Purple Line Transit Partners), including our environmental and construction managers, have carefully considered your recent concerns and reviewed the video footage you provided.

Standard practice for these geotechnical investigative borings is to confirm utility locations prior to boring, to drill the bore holes, and after taking soil samples, to fill the holes with the same excavated material so minimal excess soil is left behind. However, as your residents observed, excess material may remain in some cases.

Moving forward, soil boring crews will responsibly spread any excess material around the area of the bored hole. No excess soil will be shoveled or spread into shrubs. Also, in accordance with best management practices for erosion and sedimentation control, the crews will stabilize the area by putting down straw, as needed. All boring crews will be reminded of these daily best management practices as work continues.

If you have any further questions or concerns, please contact us again.

Sincerely,
Michael D. Madden
Purple Line Deputy Project Director

Maryland Transit Administration
Office of Transit Development and Delivery (TDD)
100 S. Charles Street, Tower II, 7th Floor, Baltimore, MD 21201
Office: 443-451-3718 Cellphone: 410-948-9003 Fax: 410-685-2605
MMadden@mta.maryland.gov

EXHIBIT 6

Civ. No. 14-01471 (RJL)

Declaration of
ALBERT M. MANVILLE, II

1. I am Albert M. Manville, II. I live in Falls Church, Virginia.

2. On behalf of the plaintiffs in *Friends of the Capital Crescent Trail, et al., v. Federal Transit Administration, et al.*, I am submitting this Declaration that includes new and updated information to the affidavit I provided for the record on December 8, 2014. This includes new information about "active bird nests"; "nest destruction"; observations of territorially-active Barred Owls witnessed by 3 residents in good standing from Chevy Chase, Maryland, in January and February 2017; other likely nest activity and how to scientifically document it; and new information about tree cutting and bird "take."

3. I grew up and began elementary and middle school in Northern Virginia; have lived in Falls Church since 1986; did a site assessment of the Capital Crescent Trail/Georgetown Branch Trail (CCT/GBT) and Rock Creek Park (RCP) on October 24, 2014; and have frequently visited the immediate area over several decades, including weekend bicycling trips, hikes, and an overnight on Plummer's Island, Maryland. Additionally, I am a member in good standing of the Washington Biologists' Field Club where I attend annual meetings on Plummer's Island, Montgomery County, Maryland (adjacent to the C&O Canal towpath in the Potomac River), and not infrequently discuss migratory bird issues with ornithologists in the Club and guests invited to these meetings.

4. I am a certified wildlife biologist (The Wildlife Society) with a doctorate in wildlife ecology and management; have conducted extensive field research since the 1970s; and have published nearly 180 scientific papers, chapters, articles and reviews in the refereed and popular scientific literature. I retired from the U.S. Fish & Wildlife Service's Division of Migratory Bird Management in June 2014 as the Service's national agency lead for all things impacting migratory birds (e.g., impacts of collisions and radiation from structures, habitat destruction including tree cutting, fishing gear impacts, disturbance, and related issues all pertaining to the Migratory Bird Treaty Act). Since 2000, I have been an Adjunct Professor for Johns Hopkins University's Advanced Academic Programs, Krieger School of Arts and Sciences, Washington DC campus where I teach 3 different graduate conservation biology/ecology classes. I was contracted as a wildlife consultant by the Friends of the Capital Crescent Trail to investigate and submit an affidavit in December 2014 on migratory bird issues that would arise along the CCT/GBT and RCP should development of the Purple Line proceed. My consulting company is called *Wildlife and Habitat Conservation Solutions, LLC*, licensed in the Commonwealth of Virginia.

5. My Declaration herein is based on new information not previously included in the record about the likely, known, and imminent impacts to migratory birds in and around the CCT/GBT and RCP should the Purple Line be developed, built and operated.

Likely Additional Impacts to Avifauna and Their Habitats Along the CCT/GBT

6. ***Timber Cutting and "Nest Disturbance."*** In February 2017, residents of the CCT/GBT neighborhood noted new stakes placed by the Purple Line developers marking areas or groups of trees and acreage to be clearcut for planned Purple Line construction and development. Questions to Metropolitan Transit Authority (MTA), and a March 10 article in the *Washington Post* (Shaver 2017), raised further questions. An agreement (apparently part of or accompanying the Record of Decision and based on the October 26,

2011 Letter from the Maryland Department of Natural Resources [MDNR] to the MTA previously submitted for the record) between the U.S. Fish & Wildlife Service and MTA purportedly implements a seasonal ban on tree cutting when nest construction and use are "active" — in this case, designated to run from April until the end of August in the first construction year.

7. First, the noted presence and breeding calls of male **Barred Owls**[1] in CCT/GBT in at least January 2017 detailed in declarations provided by 3 neighbors for the record and attached to this Declaration as Appendices A-C, (i.e., Brian Detwiler in his 2/27/2017 declaration indicating he heard male calls on 3 separate evenings earlier in February, Deborah Ingram in her 3/5/2017 declaration having heard male Barred Owls calling twice in January 2017, and Sarah Richards in her 3/17/2017 declaration having heard a male calling on February 4, 2017) strongly indicate breeding activity before April 2017. Additionally, there is the likely presence and nesting of other birds of prey even earlier (e.g., Screech Owls, Broad-winged Hawks and Red-shouldered Hawks nesting in January — all species protected by the Migratory Bird Treaty Act where "take" of any "actives nests" has potential criminal liability).

8. Residents of the area inquired by email with the **Office of the Attorney General** of the State of Maryland as to whether Maryland and its agencies would adopt the longer protected season that the DNR had called for should early nesting birds such as the Barred Owls begin nesting in the area, as evidenced by the declarations of such witnesses as those noted in paragraph 7 above. The replies they received from the Office of Attorney General Brian Frosh were to the best of my knowledge and belief, identical to the one received by Jim Roy of the Town of Chevy Chase, which is attached to this Declaration as Appendix D. In essence, the reply from his office does not dispute the arrival and nesting of the early nesting birds, nor the requirement of the MBTA that their trees be protected during nesting season, but it says that the State cannot protect those birds in Montgomery County and that concerned citizens should contact the U.S. Fish & Wildlife Service and ask them to protect the birds and enforce the MBTA. This combination of facts and the response from the Attorney General, and the lack of any change having been adopted by the Maryland Transit Authority to my knowledge, has now become, in essence, a plan by the State to allow its agency and their agents or contractors to violate the MBTA. While special agents of the USFWS's Office of Law Enforcement may investigate and advise MTA and officials of the State of Maryland of potential "takings" under MBTA, it is the responsibility of Maryland officials, the MTA, and its agents and contractors to follow the "letter of the law" under MBTA in an effort to "avoid and/or minimize take" of these protected birds. This is the premise of the efforts with which I was involved for USFWS for 17 years regarding "take" under MBTA — i.e., the responsibility of the proponents, developers, contractors, State officials and other entities to follow the "letter and the spirit of the law." Otherwise, USFWS special agents will have to investigate, possibly fine and possibly criminally prosecute offenses (in coordination with prosecuting attorneys with the Department of Justice) which otherwise should have been avoided had they followed the law and "avoided or minimized take."

9. To credibly address the actual **breeding chronology** of owls, other raptors and all protected migratory birds for that matter, I strongly recommend that a detailed, scientific, ideally peer-reviewed **raptor nesting and survey protocol** be implemented. This protocol should be used to determine with scientific certainty the presence, use and active nesting of raptors in winter and spring in the CCT/GBT and RCP. Specifically, the protocol should include acoustic recordings with time and date noted, video monitoring

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[1] Barred Owls are indicator organisms, helping to validate the integrity of the ecosystem in which they reside — in this case, mixed forest stands of large, older, mature trees of maple, elm, hickory and beech. In the Washington, DC, area, they are year-round residents, prefer tree nest cavities near water (e.g., Rock Creek and Coquelin Run), but will use tree limbs and nest boxes where available. Barred Owls, like other predatory birds, provide important ecosystem services, in this case consuming mice, and invasive Norway and brown rats, which are known to carry diseases. The classic call of the male Barred Owls which sounds like someone calling, "who cooks for you," represents territorial defense — including active nests and mate reinforcement — and mate attraction and pair bonding (Cornell Laboratory of Ornithology website). The fact that neighbors have heard the calls of a Barred Owl as early as in January 2017 clearly raises the need for verification of active nesting during wintertime 2017 and beyond in the CCT/GBT and RCP area.

recordings, and raptor surveys of all possible nest trees and existing nest boxes in the proposed area of development. Otherwise, unless nesting activity is verified as occurring/not, as stated previously in my affidavit, "take" is likely to occur with potential criminal culpability. Once a documented chronology of nesting is determined, then USFWS and MDNR should revise the current "tree cutting ban" to better reflect actual breeding and nesting, then submit that chronology to MTA should that time line be needed.

10. The current **April through August nesting chronology is simply incomplete** and does not legally meet MBTA "muster" for avoiding "take," including for any re-nesting that may occur beyond August for species that exhibit multiple nesting where initial clutches are destroyed. The same proposed monitoring protocol should be implemented for fall nesting activity, meaning that nesting seasons have expanded in the region over the past 10 years given changing climate and weather patterns and this makes it likely that protected birds are tending active nests after August as well. Also, tree cutting doesn't apply simply to "forested bird habitat," but also to individual trees containing "active nests." As a branch chief with USFWS, I was successful in stopping similar tree cutting activities in Fairfax County, Virginia, in the late 1990s — including the cutting of individual nest trees not located in woodlots or green spaces. I also was involved in stopping the removal of a Great Blue Heron rookery in a woodlot in the Midwest during the late 1990s, this before nesting had occurred. Furthermore, I helped craft and publish voluntary guidelines specifying proper vegetation management "best practices" to "avoid or minimize take" of nesting migratory birds. These, for example, included the 2000 USFWS communication tower guidance, 2013 revised USFWS communication tower guidance, 2010 USFWS land-based wind energy guidelines, 2006 and 2012 Avian Power Line Interaction Committee (APLIC) vegetation management guidelines for migratory birds, and 2014 construction guidance for buildings — several of these efforts referenced in my previous affidavit. These guidelines call for sound scientific determinations of breeding and nesting activities[2].

Pursuant to 28 U.S. C. Section 1746, I, Albert M. Manville, II, declare under penalty of perjury that the foregoing is true and correct. Executed on June 6, 2017.

6/06/2017

Albert M. Manville, II, Ph.D., C.W.B.
Wildlife and Habitat Conservation Solutions, LLC

Appendices A-C: Declarations of Brian Detwiler, Deborah Ingram, and Sarah Richards
Appendix D: Response from the Office of [MD] Attorney General Brian Frosh

[2] A proper EIS evaluates all of these guidelines and best practice models as potential mitigation tools that might be used by the action agency or any other entity or agency with authority over the area or permitted action. The 2013 FEIS did not.

Declaration of

KATHRYN M. DETWILER

1. I am Kathryn M. Detwiler. I live in Chevy Chase, Maryland.

2. I am submitting this declaration in support of the proposition asserted in communications with the Federal and State agencies responsible for enforcing the relevant natural resource and transportation laws by plaintiffs in *Friends of the Capital Crescent Trail, et al., v. Federal Transit Administration, et al.,* that Barred Owls have begun nesting within the trees very near or along that Trail and are thus likely to suffer the loss of eggs or hatchlings if their nesting trees are cut or trimmed of hollowed sections during the period extending from February through August as stated in the letter from the Department of Natural Resources to the Maryland Transit Administration of October 2011 (attached).

3. I have lived immediately adjacent to the path of the proposed Purple Line for 6 years.

4. I am familiar with the likely impact of its construction and operation on the Trail and its environs.

5. On at least three separate evenings during the month of February 2017, while I was in my residence, I have heard a very prominent and distinctive bird call.

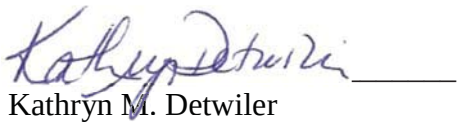
6. Having listened to reliable sources of bird calls on the internet, including:

- Audubon Guide to North American Birds – Barred Owl (http://www.audubon.org/field-guide/bird/barred-owl), and
- The Cornell Lab of Ornithology, All About Birds – Barred Owl (https://www.allaboutbirds.org/guide/Barred_Owl/sounds),

I am sure that what I have heard is the call of the barred owl.

Pursuant to 28 U.S.C. § 1746, I, Kathryn M. Detwiler, declare under penalty of perjury that the foregoing is true and correct.

Executed on March 21, 2017.



Kathryn M. Detwiler

Declaration of
Deborah D. Ingram

1. I am Deborah D. Ingram. I live in the Town of Chevy Chase, Maryland.

2. I am submitting this declaration in support of the proposition asserted in communications with the Federal and State agencies responsible for enforcing the relevant natural resource and transportation laws by plaintiffs in *Friends of the Capital Crescent Trail, et al., v. Federal Transit Administration, et al.*, that Barred Owls have begun nesting within the trees very near or along that Trail and are thus likely to suffer the loss of eggs or hatchlings if their nesting trees are cut or trimmed of hollowed sections during the period extending from February through August as stated in the letter from the Department of Natural Resources to the Maryland Transit Administration of October 2011 (attached).

3. I have lived immediately adjacent to the Georgetown Branch right-of-way (the location of the proposed Purple Line) for 30 years (my backyard abuts the right-of-way).

4. I submitted comments on the Final Environmental Impact Statement and have reviewed in detail other Purple Line documents since then, and am thus very familiar with the likely impact of its construction and operation on the Trail and its environs.

5. During 2016, while in my home or walking along the Capital Crescent Trail (CCT, located on the Georgetown Branch right-of-way)) at dusk or along streets near it, I heard bard owls calling on a number of occasions. In January 2017 (not February because I have been ill), I have heard bard owls calling on two occasions – once while I was walking on the CCT near the Lynn Drive path and once when leaving the Lawton Center from an evening meeting (the owl was calling from north of Elm Street, I do not know if it was in the back yard of an Elm Street home or on the Trail). I note that the Lawton Center is one block from the CCT and properties on the north side of Elm Street abut the CCT. A neighbor who lives near the Lawton Center has reported to me that she has recently heard barred owls in the middle of the night.

6. I am familiar with the calls of the barred owl, the Eastern screech owl, and the great horned owl. We have had Eastern screech owls and great horned owls in the neighborhood for many years now and when I first started hearing them I went to internet sites to identify them. We had barred owls in the woods behind my house when I was a child, but when I started hearing them near my home in Chevy Chase I did go to the internet to confirm which owl I was hearing. I used the Cornell Ornithology web site:

- The Cornell Lab of Ornithology, All About Birds – Barred Owl (https://www.allaboutbirds.org/guide/Barred_Owl/sounds),

I am sure that what I have heard is the call of the barred owl.

Pursuant to 28 U.S.C. § 1746, I, Deborah D. Ingram, declare under penalty of perjury that the foregoing is true and correct.

Executed on March 7, 2017.

Deborah D. Ingram
Deborah D. Ingram

Declaration of

Sarah Richards

1. I am Sarah Richards. I live in theTown of Chevy Chase, Maryland.

2. I am submitting this declaration in support of the proposition asserted in communications with the Federal and State agencies responsible for enforcing the relevant natural resource and transportation laws by plaintiffs in *Friends of the Capital Crescent Trail, et al., v. Federal Transit Administration, et al.*, that Barred Owls and Eastern Screech Owls have begun nesting within the trees very near or along that Trail and are thus likely to suffer the loss of eggs or hatchlings if their nesting trees are cut or trimmed of hollowed sections during the period extending from February through August as stated in the letter from the Department of Natural Resources to the Maryland Transit Administration of October 2011 (attached).

3. I have lived near the path of the proposed Purple Line for 13 years.

4. I am a volunteer at the nearby Audubon Naturalist Society at Woodend, and take an active interest in the welfare of wildlife in the Maryland suburbs.

5. Over the past six or seven years at least, during spring and summer, I have heard screech owls call through the night, and less frequently I have heard barred owls call. I have also seen both of these owl species in our yard on several occasions during daylight. The screech owls move into our yard from the direction of the trail. I identified a barred owl call on the evening of February 4 this year near the trail.

6. Having both seen and heard these birds I can certify that they nest habitually along, or in the close vicinity, of the Capital Crescent Trail between Bethesda and Connecticut Avenue.

Pursuant to 28 U.S.C. 1746, I, Sarah Richards, declare under penalty of perjury that the foregoing is true and correct

Executed on March 13, 2017.

Sarah Richards

From: Jim Roy <jim@luxmanor.com>
Subject: FW: Purple Line Construction
Date: February 28, 2017 at 3:18:10 PM EST
To: "John Fitzgerald (johnmfitzgerald@earthlink.net)" <johnmfitzgerald@earthlink.net>

FYI…

Jim Roy, Principal Broker
Realtor: Licensed in DC, MD, & VA
LUXMANOR REAL ESTATE, INC.

7315 Wisconsin Ave. Suite 110W
Bethesda, MD 20814
P: 301-986-9401 | F: 301-951-4997
Jim@LuxManor.com
www.LuxManor.com
Bio | Map | Facebook | Linkedin | Twitter | YouTube Videos

From: OAG [mailto:OAG@oag.state.md.us]
Sent: Tuesday, February 28, 2017 3:17 PM
To: OAG
Subject: Purple Line Construction

Thank you for contacting the Maryland Office of the Attorney General with your concerns about the construction of the purple line and its impact on the surrounding wildlife. We sincerely appreciate your activism and your input on this important matter.

Unfortunately, since the location at issue is outside of Maryland's Critical Area, the Maryland Department of Natural Resources does not have authority to intervene in such a matter relating to restrictions on

Forest Interior Dwelling Bird Species.

Additionally, the Migratory Bird Treaty Act (MBTA) and its associated regulations were enacted pursuant to a federal statute which falls under the jurisdiction of the U. S. Fish and Wildlife Service (FWS).
We suggest you contact the FWS directly at the Chesapeake Bay Field Office to convey a compliance or enforcement issue relating to the MBTA. For contact information please follow this link: https://www.fws.gov/chesapeakebay/contact.html

We hope this information proves helpful. Thank you again for contacting our office with your concerns.

Sincerely,

Office of the Attorney General