ORAL ARGUMENT NOT YET SCHEDULED

Nos. 17-5132, 17-5161, 17-5174, 17-5175 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE CAPITAL CRESCENT TRAIL, *et al.*,

Plaintiffs-Appellees/Cross-Appellants,

v.

FEDERAL TRANSIT ADMINISTRATION, *et al.*,

Defendants-Appellants/Cross-Appellees,

STATE OF MARYLAND,

Defendant-Intervenor-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF OF APPELLEES/CROSS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a), the following is a statement of the parties, amici, rulings, and related proceedings in this case:

1. **Parties and amici**: The Rule 28(a) Certificates in the briefs filed by Federal Defendants and Maryland are complete except that Prince George's County, Maryland, and Montgomery County, Maryland, and the American Road and Transportation Builders Association have now also moved to participate as amicus in this this Court.

2. **Rulings under review:** The Rule 28(a) Certificates in the briefs filed by Federal Defendants and Maryland are correct.

3. **Related cases**: Other than the consolidated appeals pending before this Court, counsel is unaware of any related cases pending in this Court or any other court.

/s/Eric R. Glitzenstein
Eric R. Glitzenstein

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STATUTES

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GLOSSARY

APA	Administrative Procedure Act
EIS	Environmental Impact Statement
FTA	Federal Transit Administration
JA	Joint Appendix
NEPA	National Environmental Policy Act
WMATA	Washington Metropolitan Area Transit Authority

STATEMENT OF JURISDICTION

This Court has jurisdiction for the reasons set forth in the briefs of Federal Defendants ("Fed.Br.") and Intervenor State of Maryland ("Md.Br.").

STATEMENT OF ISSUES

1. Whether the district court correctly held that a Supplemental Environmental Impact Statement ("Supplemental EIS") is warranted in connection with the Federal Transit Administration's ("FTA") proposed funding of the Purple Line light rail project ("Project"), where (a) due to declining ridership in connection with the Metrorail system, the justification for the Project has been called into question and less environmentally harmful alternatives may be able to satisfy the Project's purported objectives; and (b) when the Metrorail issue was remanded to FTA for further consideration, the agency disregarded detailed expert declarations submitted by Plaintiffs bearing directly on the remanded issue, in contravention of this Court's ruling in *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016) ("*Public Employees*").

2. Whether FTA complied with its obligation under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, to analyze all reasonable alternatives when the Final EIS only compared the benefits and environmental impacts of two courses of action: Maryland's preferred Project and maintaining the status quo.

3. Whether FTA complied with its obligation under NEPA to analyze the indirect effects of the Project where FTA and Maryland anticipate and intend that the Project will trigger significant development along the Project route, but the Final EIS contains no meaningful analysis of the adverse environmental impacts associated with such development.

4. Whether Maryland's decision to eliminate a Project requirement for "Green Track," a measure designed to reduce Project-related pollution of area water ways and lessen other adverse environmental impacts, triggers the need for a Supplemental EIS.

5. Whether the district court abused its discretion by finding that the standard Administrative Procedure Act ("APA") remedy of vacatur is appropriate relief for FTA's violation of NEPA.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions not included in the briefs of Federal Defendants and Maryland are in the Addendum.

STATEMENT OF THE CASE

Plaintiffs Friends of the Capital Crescent Trail and two conservationists challenge the environmentally destructive, fiscally irresponsible, and unnecessary Purple Line light rail project on the grounds that the federal government's review of the project violates NEPA. If allowed to proceed, the project will jeopardize the

natural and human environment in myriad ways, including by clearcutting at least 48 acres of area forests; destroying more than 5,000 feet of stream habitat; unearthing more than 200 hazardous materials sites; displacing many low-income residents and businesses; posing significant risks to public health and safety; and eviscerating a major segment of the irreplaceable Capital Crescent Trail (the "Trail")—an extraordinary urban green space enjoyed by thousands of Washington-area residents each day as well as a home for migratory birds and other area wildlife.

According to FTA, the Project will cost $2.5 billion to construct and billions more to operate and maintain, and federal taxpayers are being asked to foot nearly two billion dollars of that bill through a $900 million grant along with a $900 million loan. This is in spite of the fact that FTA and Maryland have conceded there are far more cost-effective (and less environmentally harmful) options for enhancing travel in the places the Project is intended to serve.

After extensive briefing and argument, the district court entered partial summary judgment for Plaintiffs, holding that a Supplemental EIS must be prepared to take into consideration the precipitous ridership declines, financial peril, safety lapses, and other extraordinary problems that have recently plagued the Metrorail system. The court reasoned that the Purple Line (as its name implies) was expressly designed to interconnect with Metrorail and, according to experts

whose views have been disregarded by FTA, the declining ridership and related Metrorail problems call into serious question the underlying rationale for an exorbitantly expensive, environmentally damaging light rail system, especially in view of many other gaping holes and inconsistencies in the ridership projections on which the Project justification has long been predicated.

Plaintiffs' cross-appeal raises additional reasons why the Record of Decision must be set aside while further analysis is pursued. First, even in its underlying NEPA analysis, FTA did not, in the manner required by NEPA, analyze a reasonable range of less environmentally harmful (and less expensive) alternatives for accomplishing the purported objectives of the Project. Indeed, the Final EIS did not compare *any* alternatives other than Maryland's preferred Project and a "no action" alternative.

Second, although an explicit rationale for the Project is that it will generate substantial development along the 16.3-mile Project route, neither FTA nor Maryland has ever taken the requisite "hard look" at the indirect but inevitable environmental impacts of such Project-related development—on, e.g., wetlands, streams, forests, wildlife, air pollution, and the overall quality of life of current residents.

Third, Maryland's Governor, who opposed the Project before taking office, conditioned his support for it on Project changes that reduce the cost to Maryland

but have significant environmental implications that have never been analyzed, or subject to public scrutiny, in a Supplemental EIS, as required by NEPA.

For all of these reasons, Plaintiffs contend that additional NEPA analysis is required and that FTA's Record of Decision must be vacated pending completion of that analysis.

STATEMENT OF FACTS

A. NEPA'S STATUTORY FRAMEWORK

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The statute is "designed to ensure 'fully informed and well-considered decision[s]' by federal agencies" regarding the environmental impacts of proposed actions and alternative means of accomplishing agency objectives while avoiding or minimizing such impacts. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309-10 (D.C. Cir. 2014) (internal quotation omitted). NEPA "'declares a broad national commitment to protecting and promoting environmental quality,' and brings that commitment to bear on the operations of the federal government." *Sierra Club v. FERC*, __F.3d __, No. 16-1329, 2017 WL 3597014, at *4 (D.C. Cir. Aug. 22, 2017) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)).

"One of the most important procedures NEPA mandates is the preparation, as part of every 'major Federal action[] significantly affecting the quality of the

human environment,' of a 'detailed statement' discussing and disclosing the environmental impact of the action," as well as alternatives with less environmental impact. *Id*. (quoting 42 U.S.C. § 4332(C). This statement—the EIS—must describe the "environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," and "alternatives to the proposed action." 42 U.S.C. § 4332(C).

The EIS "has two purposes. It forces the agency to take a 'hard look' at the environmental consequences of its actions, including alternatives to its proposed course." *Sierra Club*, 2017 WL 3590714, at *4 (citation omitted). In addition, the EIS "also ensures that these environmental consequences, and the agency's consideration of them, are disclosed to the public." *Id.*

The Council on Environmental Quality ("CEQ") has promulgated regulations implementing NEPA, 40 C.F.R. §§ 1500-1508, that are "binding on all Federal agencies . . . ." *Id*. § 1500.3. The CEQ regulations emphasize that the consideration of alternatives is the "heart of the [EIS]" and hence that the EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives . . . ." *Id*. § 1502.14(a).

The CEQ regulations define "environmental effects" that must be analyzed in an EIS as encompassing "ecological . . . aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8.

"Effects" include both "[d]irect effects, which are caused by the action and occur at the same time and place," and "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* §§ 1508.8(a), (b). In addition to direct and indirect effects foreseeably resulting from the action itself, EIS's must also analyze the "cumulative impact," which is the "impact on the environment which results from the incremental impact of the action when added to other past, present, and future actions regardless" of who undertakes the action. *Id.* § 1508.7.

The CEQ regulations further require that federal agencies "[s]hall prepare supplements" to EISs if the "agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "[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). As with EISs, the public has a right to comment on a Supplemental EIS before it is finalized. *Id.* § 1502.9(c)(4); *see also id.* § 1506.6(a) ("Agencies shall . . .make diligent efforts to involve the public in preparing and implementing their NEPA procedures.").

At the "time of its decision" on the proposed action, "each agency shall prepare a concise public record of decision." 40 C.F.R. § 1505.2. The Record of Decision must "[s]tate what the decision was" and "[i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or

alternatives which were considered to be environmentally preferable." *Id.* §§ 1505.2(a), (b).

FTA has also issued its own regulation implementing NEPA, which "supplements the NEPA regulation of the [CEQ]." 23 C.F.R. § 771.101; *id.* ("Together these regulations set forth all . . . FTA . . . requirements under NEPA for the processing of . . . public transportation projects."). The regulation authorizes a State seeking federal funds to participate in the NEPA process, but mandates that FTA "independently evaluate [] the documents." *Id.* § 771.109(c)(2).

FTA's NEPA regulation recognizes that a "light rail" project is within the category of actions that "significantly affect the environment" and therefore ordinarily requires consideration in an EIS. *Id.* § 771.115(a)(3). The regulation also provides that "[a] draft EIS shall be prepared when [FTA] determines that the action is likely to cause significant impacts on the environment." *Id.* § 771.123(a).

Congress has incorporated NEPA requirements into FTA's process for deciding whether to provide "New Starts" funding for a particular project. *See* 49 U.S.C. § 5309(d)(1)(B). A "new fixed guideway capital project may advance to the engineering phase" only "upon completion of activities required under [NEPA], as demonstrated by a record of decision with respect to the project," and, among other criteria, "only if [FTA] determines that the project" is "selected as the locally

preferred alternative at the completion of the process required under [NEPA]." *Id.* §§ 5309(d)(2)(A)(i)-(iv).[1]

B. FACTUAL BACKGROUND

1. Public Comments Severely Criticized the Draft EIS for Failing to Objectively Analyze Alternatives and for Failing to Disclose Critical Information Necessary to Evaluate the Project's Costs, Environmental Impacts, and Purported Benefits.

a. FTA's Scoping Notice and Draft EIS

FTA issued a "scoping notice" in 2003 which stated that FTA, along with Maryland, intended to prepare an EIS on the "proposed Bi-County Transitway Project in Montgomery and Prince George's Counties," extending "from the western branch of the Metrorail Red Line in Bethesda to the New Carrollton Metrorail Station." 68 Fed. Reg. 52,452, 52,452 (Sept. 3, 2003) (JA-1074). The scoping notice stated that the "EIS will develop and evaluate alternatives that are cost-efficient and beneficial," and that the "goals" of the project included "improv[ing] system connectivity and increase[ing] transit usage by providing an essential link to the Metrorail radial lines" and "support[ing] economic

[1] When FTA decides to award funding, the culmination of the grant process is a Full Funding and Grant Agreement ("Grant Agreement"). *See* 49 U.S.C. § 5309(k)(2)(A). No such Grant Agreement had been entered into at the time this case was resolved in the district court. Subsequently, Maryland and FTA signed such an Agreement. Plaintiffs have filed in the district court a challenge to that separate agency action, raising claims that are distinct from the NEPA-based claims at issue in this appeal.

development and revitalization through improved connections to central business districts and activity centers." *Id*. at 52,453 (JA-1074, 1075).

The draft EIS, issued in 2008, stated that FTA and Maryland were considering eight alternatives for a "16-mile rapid transitway" that "would provide direct connection to the Metrorail Red, Green, and Orange Lines; at Bethesda, Silver Spring, College Park, and New Carrollton." JA-1077. The draft EIS stated that the "purpose of the Purple Line is to address mobility and accessibility issues in the corridor between Bethesda and New Carrollton" and that the project was designed to increase "transit oriented development" as well as "help the region address air quality issues" and meet other objectives enumerated by Maryland. JA-1077.

The draft EIS represented that the "alternatives under consideration include[d] the No Build Alternative, the Transportation Systems Management alternative [], and six Build alternatives," including three "Bus Rapid Transit" and three "light rail" options. *Id*. The "No Build alternative assumes that no new improvements would be made to the transportation system in the corridor, other than those that are currently in local and regional transportation plans and for which funding for implementation by 2030 has been planned." JA-1078. The Transportation Systems Management "alternative would include improved bus service in the corridor" by altering some existing bus routes and adopting "selected

intersection and signal improvement strategies" but, in contrast to the Build alternatives, would avoid new construction activities in area parks and natural areas, and would rely on "[s]tandard buses" to meet project objectives. *Id*.

Bus Rapid Transit is a "versatile, rubber-tired rapid transit mode that combines stations, vehicles, services, and guideway into an integrated system with a strong positive image and identity." JA-1078. Bus Rapid Transit's "system of facilities, services, and amenities collectively improve the travel time, reliability, and identity of traditional bus transit," but at potentially much lower cost and environmental impact than construction of a new light rail system. *Id*. FTA stated that "Low, Medium, and High Investment [Bus Rapid Transit] alternatives" were under consideration. *Id*. One option—"Low Investment Bus Rapid Transit"—would largely avoid operation on the Georgetown Branch right-of-way, i.e., the portion of the Capital Crescent Trail that will be destroyed by the light rail approach adopted by Maryland. *Id*. Instead, this bus alternative "would operate on Jones Bridge Road, directly serving the National Institutes of Health and the National Naval Medical Center at Rockville Pike and Jones Bridge Road." *Id*.

As described by the draft EIS, light rail is an "electric railway system characterized by its ability to operate single cars or short trains along rights-of-way at ground level, on serial structures, and in tunnels." JA-1079. FTA stated that it was considering three light rail alternatives—"Low, Medium, and High

Investment"—all of which "would operate on the Georgetown Branch right-of-way" and would differ based on the extent to which they would use "dedicated or exclusive lanes." *Id*.

The alternatives described in the draft EIS did not all involve the same footprints, and light rail has far more significant environmental impacts than others—including, e.g., on the amount of forest destruction, wildlife dislocation, loud noise, and safety risks along the Georgetown Branch portion of the Trail, among other locations. Nevertheless, the draft EIS erroneously declared that "all alternatives have very similar alignments and station locations and, as a result, the natural environment impacts are not appreciably different between alternatives." JA-1085.

The draft EIS did acknowledge that the Bus Rapid Transit alternatives "are more cost-effective" than the light rail options, JA-1112; *see also* JA-1181 (FTA report explaining that Bus Rapid Transit "aims to . . . emulate rail, but at a lower capital cost"), while the Transportation Systems Management alternative would be by far the least expensive approach to enhancing east-west travel. JA-1095 (explaining that this alternative "may cost tens of millions of dollars while guideway alternatives range up to several hundreds of millions or billions of dollars").

b. Public and Expert Critiques of the Draft EIS

Commenters took issue with the manner in which the document ignored or glossed over the substantial differences in environmental impacts among the alternatives, as well as many other aspects of the document. The National Capital Planning Commission commented that the draft EIS asserted "that the impacts to environmental resources are identical for the No Build, [Transit Systems Management], and Build Alternatives," but that "[t]his could not be possible since the No Build and [Transportation Systems Management] alternatives do not propose transit ways through the stream valley parks or federal lands, nor will these alternatives require any excavation for construction or aerial structures and tunnels, land acquisitions, property displacements and clearing of mature trees, as the Build Alternatives would require in varying degrees." JA-1557; *see also* JA-1838 (comments by Town of Chevy Chase explaining that the Draft EIS's assertion that the "natural environmental impacts are not appreciably different between alternatives" was "demonstrably incorrect" and that, in violation of NEPA and implementing regulations, the document "fail[ed] to conduct a separate analysis of the environmental impacts of each alternative, which prevents reviewers from understanding the *comparative* environmental effects of the various alternatives").

Many comments also explained that, while one of the objectives identified in the draft EIS was to increase development along a selected route, FTA and Maryland had failed to engage in any analysis of the *indirect* effects on natural resources resulting from the sought-after development that would be caused by each alternative. *See, e.g.*, JA-1570 (comments by Citizens Coordinating Committee for Friendship Heights stating that the Draft EIS "ignores the effect excessive development has on the livability of our communities . . . Since development is the justification, then the [draft EIS] should include an expanded study of the direct and secondary impact of transit related development . . . .").

In addition, commenters explained that, while purporting to afford alternatives equal-handed consideration, the draft EIS was skewed in favor of light rail, including by erroneously asserting that a light rail system was "called for" by a Montgomery County "master plan" issued two decades earlier. JA-1840-46.[2] Experts in transportation planning also explained that, based on their review of the Draft EIS and other documents, there were reasons to be deeply skeptical about

[2] Although Maryland's preference for light rail over other options has been justified for many years by its purported consistency with the 1990 Montgomery County master plan, commenters explained that the plan (which is not binding on a federal funding decision in any event) had recommended a modest one-track "trolley" that would allow for maintaining the Georgetown Branch portion of the Trail as a wooded wildlife habitat and recreational area. *See, e.g.*, JA-1897. This is a far cry from the two-track light rail system with a much larger footprint that would decimate the Trail.

both the benefits and costs predicted by Maryland's hired consultant, Parsons Brinkerhoff.

For example, William G. Allen, an expert in travel demand forecasting, explained that such "projects have a long history of overestimating ridership on new transit systems, as reported by FTA" itself, and that "[o]ne of the principal causes involves assumptions about future conditions that prove to be overly optimistic." JA-1682, 1684. Mr. Allen further explained that, while the draft EIS did not disclose important information about the methodology used to predict future ridership for the Purple Line, unwarranted assumptions that he could identify—such as an "unrealistically high forecast of ridership" on Metrorail in view of the limited availability of Metrorail parking—indicated that the "ridership figures" relied on by the draft EIS as a rationale for a light rail system "may be about 40% too high" so that a light rail system at most "will have about 40,000-45,000 riders per day, not the 59,000-68,000 that were estimated" by Maryland. JA-1687; *see also* JA-1899 (statement of transportation planning expert Sam Schwartz that Maryland "overestimated ridership" for a light rail system in "violation of accepted transportation planning practice," while significantly understating the benefits of the Low Investment Bus Rapid Transit option).

Similarly, on the cost side of the equation, Thomas Crowley, an economist who has specialized in "rail passenger and commuter rail service for the past four

decades," JA-1651, commented that Maryland "has not provided sufficient data within the [draft EIS] and its technical reports that allows me, or any member of the public, to reconcile each proposed transit alternative's cost estimates or to test the accuracy of key [operating and maintenance] and capital cost assumptions." JA-1629. Based on the information that was provided, Mr. Crowley explained that Maryland's consultant had "substantially understated" the capital and operating costs for a light rail project, including "through use of an improper discount rate to calculate annualized capital costs." JA-1635.

The World Resources Institute, a leading non-profit environmental analyst, came to a similar conclusion following a detailed analysis. In comments on the draft EIS, the Institute concluded that a light rail option would "very likely overrun cost projections" and, given the electricity needed to power the system, would also "*increase* [carbon dioxide] emissions." JA-1829 (emphasis added). Accordingly, the Institute recommended a Bus Rapid Transit "option based on our findings on cost-effectiveness and [carbon dioxide] emissions benefits." *Id*.

2. The Final EIS Compared Only Two Alternatives—Maryland's Desired Light Rail Project and Taking No Action

a. Maryland's Adoption of a "Preferred Alternative" and the Final EIS's Skewed Comparison of that Alternative to Taking No Action to Meet the Project's Stated Objectives.

In August 2009, Maryland announced that its "preferred alternative" is a light rail project that "will link both branches of the Washington Metrorail Red

Line at Bethesda and Silver Spring, to the Green Line at College Park, and the Orange Line at New Carrollton." JA-1196. Further touting the Project's close relationship to the Metrorail system, the State stated that the "Purple Line will improve connection to the regional Metrorail system" while also reinforcing that the Project is designed to promote "transit oriented development" along the 16-mile route. *Id*. In answering "Why Light Rail?" despite its admittedly "higher costs" than other options, including Bus Rapid Transit, Maryland specifically highlighted the ridership projections developed by the State's consultant—projections that had been critiqued by independent experts as both highly unrealistic and cloaked in secrecy. *See* JA-1199 (asserting that the Project was justified based on "ridership projections for light rail that are approximately 10,000 daily transit trips higher than for the [Bus Rapid Transit] alternatives" and because "light rail meets long term capacity concerns because of its ability to accommodate future ridership growth beyond what is projected for 2030").

Maryland also emphasized the "economic development" that the State said would be promoted better than with other options, *id*., while also representing that the Final EIS would include an "analysis of reasonable alternatives" to light rail, as required by NEPA. JA-1196. Maryland's announcement acknowledged that building a light rail project in the Georgetown Branch portion of the Trail "has been a highly contentious issue for many community members and trail users," but

the State insisted that its Project would "improve the trail and create a more appealing trail experience" without explaining how (or to whom) replacing a bucolic tree-lined corridor with a noisy train system would be "more appealing." JA-1200; *Compare* JA-1726-27 (photos of Trail segment in its present undeveloped state), *with* JA-1360 (illustration with tree canopy removed and adjacent to train tracks).

Nearly four years passed between Maryland's announcement of its preferred alternative and issuance of a Final EIS in August 2013. *See* JA-1205. During that time frame, FTA advised the State that, as predicted by independent analysts, Maryland's consultant had underestimated project costs, which FTA "believe[d] . . . to be in the range of $1.966 billion to $2.400 billion," JA-1202, an estimate that has since been revised upwards even more dramatically. *See* JA-2310 (explaining that since the draft EIS was prepared "the estimated cost of the alternative chosen . . . has close to doubled").

Yet despite this increase in costs for a light rail system the State acknowledges to be more expensive and less cost-effective than other options, the Final EIS contains a comparative analysis of only two options: Maryland's preferred alternative—which the Final EIS described as the "Medium Investment" light rail alternative, as defined in the draft EIS, "with elements of the High Investment [light rail] Alternative"—and the "No Build Alternative," i.e., taking

no additional action to meet the State's claimed need to improve east-west transportation between Bethesda and New Carrollton. JA-1208.

The Final EIS and supporting documents concede that the Project "would affect numerous environmental resources in the corridor," JA-1214, including, among other significant adverse effects, by:

- razing "a total of 48 acres of forested habitat," JA-1392;
- destroying a "closed [forest] canopy along the riparian corridor of Rock Creek," thereby fragmenting habitat deemed critical by the Maryland Department of Natural Resources for "Forest Interior Dwelling Species," JA-1389-92;
- causing the "permanent loss of approximately 5,152 linear feet of stream habitat," JA-1393;
- encroaching upon 573 hazardous waste sites, including 229 of "high" or "medium" "potential for concern," JA-1409;
- directly displacing more than 100 residents and businesses, including 88 in "environmental justice" communities, JA-1435;
- imposing a "high level of visual impact" on the many users of the Capital Crescent Trail because "much of the existing vegetation and most of the existing tree canopy would be eliminated," JA-1359-60;

- "result[ing] in substantial changes in the viewshed of Rock Creek Park users and local residents," JA-1360; and
- impairing a number of historic properties and area parks along the route, JA-1526.

However, the Final EIS contains no comparison, let alone a "[r]igorous[]" and "objective[]" one, 40 C.F.R. § 1502.14(a), between these resulting impacts from Maryland's Project and those that would be caused by alternate, albeit less destructive (and less costly), means of furthering the State's objectives. Rather, as the Final EIS acknowledges, the "No Build Alternative" is the sole "basis against which the Preferred Alternative is compared." JA-1276.

The Final EIS again stresses that the Project's relationship with Metrorail, and reliance on Metrorail ridership, was central to the rationale for the Project. Indeed, the Final EIS states that the "name 'Purple Line' was adopted in the *Capital Beltway/Purple Line Study* to be consistent with the Washington Metropolitan Area Transit Authority's [] practice of naming Metrorail routes by color and to emphasize the connections with the existing Metrorail system." JA-1219. The Final EIS specifically relies on projections of a large number of Metrorail riders who will use the Project as a justification for the selection of light rail. *See, e.g.*, JA-1270 ("In 2040, 27 percent of Purple Line boardings would be trips that also involve riding Metrorail, demonstrating the value of the Preferred

Alternative in providing connectivity to the Metrorail system."); JA-1210 ("[p]rojections show that the Preferred Alternative would have over 74,000 daily boardings in 2040" and that "[s]tations associated with [Washington Metropolitan Area Transit Authority's ("WMATA")] Metrorail stations would have the greatest number of daily boardings).

b. Public and Expert Critiques of the Final EIS, and FTA's Issuance of a Record of Decision

Many commenters on the Final EIS contended that comparing only Maryland's preferred light rail project to the status quo was a palpably "outcome-driven process without serious consideration of other, more cost-effective forms of mass transit, including [Bus Rapid Transit] with traffic signal priority and dedicated and/or exclusive bus lanes." JA-1965. Plaintiff Friends of the Capital Crescent Trail explained that such an "objective comparison" was especially critical in view of the fact that a Bus Rapid Transit approach would not only cost "*substantially* less than the current estimated cost of the Purple Line" and avoid serious environmental impacts resulting from light rail, but would better serve the National Institutes of Health and the National Naval Medical Center— which will have far greater transit needs than previously considered, given the recent transfer of functions from the Walter Reed Army Medical Center to those facilities. *Id.* Other commenters reinforced that that the skyrocketing of the estimated price tag for Maryland's Project since issuance of the draft EIS made it imperative that FTA

consider less environmentally destructive alternatives, including those previously rejected on cost grounds. JA-2055.

Many individual users of the Trail similarly urged FTA to consider viable alternatives, emphasizing that the irreversible impacts on the Trail and its many beneficiaries had never been afforded a hard look. *E.g.*, JA-1939, 1940, 1955, 1959, 1961, 1990-92, 1997, 1999, 2003. In addition to the loss of woods and wildlife habitat, commenters specifically stressed the unexamined safety and health risks that replacing a bucolic Trail with a high speed, noisy train will pose to trail users, including thousands of children attending nearby schools. *See, e.g.*, JA-1955-57 (comment by a children's health expert that the EIS "fails to mention the proximity" of three elementary schools and two day care centers and the fact that children attending these facilities frequently use the Trail for safe travel); JA-1939 ("[T]ons of people use [the Trail] daily for exercise, healthy well-being, recreational activities, and commuting. I want to be able to do these things SAFELY with my kids. The overground rail would not allow this and . . . [t]he [EIS] fails to recognize the noise disturbance a walker, runner or biker will endure alongside trains traveling 50 mph"); JA-1940 ("I do not live near the trail but I am willing to go about a mile on foot through Bethesda to get to it because of the peace and quiet to be had when I arrive there. If the train is built I will never again go that distance to what will then be a noisy sidewalk alongside a

train. It is not equivalent. It is shocking to find this reality is completely suppressed in the [Final] EIS."); JA-1945 ("The peaceful tranquil setting it is today will be harmfully impacted by a train sound 200 times a day. This is what an [EIS] is supposed to point out, but this one doesn't.").

Commenters living in other portions of the Project corridor likewise stated that inadequate attention had been afforded to adverse impacts on children's health and safety, as well as the displacement of longstanding lower income residents that will result should the economic development sought by Maryland occur. *See, e.g.*, JA-2007-10 (comment explaining that the "Purple Line will run within 69 feet of [Rosemary Hills Elementary School] in Silver Spring," but that the Final EIS "fails to adequately analyze the direct, indirect and cumulative impacts of this project on [the school] and the surrounding neighborhood"); JA-2015-19 (comment by CASA De Maryland that "we are concerned that the Purple Line development will threaten our unique International Corridor community through upward pressure on housing and small business rents," but "these concerns have not been addressed and the [Final EIS] brings us no closer").

FTA issued its Record of Decision approving the Final EIS in March 2014. *See* JA-1027. FTA determined "that the requirements of [NEPA] have been satisfied for the Purple Line project" and that "[i]f FTA provides financial assistance for the final design and/or construction of the Project, FTA will require

[Maryland] to design and build the Project as presented in the [Final EIS] and this [Record of Decision]." *Id.*[3]

3. Maryland's Cost-Cutting Changes

In 2015, Maryland Governor Larry Hogan (who had opposed the Project on environmental and financial grounds when a candidate for office) announced "41 cost-saving changes" deemed necessary for the Project to proceed. JA-2145. Maryland specified that "[a]s a result, some requirements have been changed," including changes with environmental consequences. JA-2136. One such "change" specified that, "[w]here Green Track was previously required, crushed stone may be used." JA-2137.

"Green Track" is an environmental enhancement measure that consists of planting grass or similar vegetation alongside rail projects. Rail projects "increase impervious surfaces," thereby "increas[ing] the amount of surface runoff," including "organic molecules, and nutrients in the surface runoff" that will end up

[3] The 2014 Record of Decision did not make the substantive findings required by 49 U.S.C. § 5309 for approving a federal grant and Defendants argued below that FTA was not required to make those findings until after the NEPA process was complete and a Grant Agreement was to be signed. Consequently, the district court held that any section 5309-based challenge would not be ripe until approval of a Grant Agreement. Plaintiffs are not challenging that ruling in this Court, and hence this appeal does not raise any legal issue concerning FTA's compliance with section 5309. Rather, Plaintiffs recognize that any challenge to the Grant Agreement and/or the substantive section 5309 findings underlying the Grant Agreement must be brought in a separate case. *See supra* at n 1.

in area water ways. JA-2122. When the Record of Decision was issued, the public was told that Maryland "*will use green track* along the Georgetown Branch right-of-way and in locations in Prince George's County to minimize runoff," JA-1066 (emphasis added); *see also id*. ("The green track reduces stormwater runoff."), as well as to mitigate noise impacts because vegetation helps to absorb sound. JA-1067.[4]

4. Plaintiffs' Requests for Supplemental NEPA Analysis and FTA's Refusals

In July and October 2015, Plaintiffs petitioned FTA to prepare a Supplemental EIS in light of the Project changes adopted by Governor Hogan, as well as other developments and information raising further questions about the Project's environmental impacts and its justification. JA-2119-31, 2166-72. One of the developments highlighted by Plaintiffs concerned the extraordinary problems that have plagued the Metrorail system since FTA and Maryland last developed the ridership projections on which the rationale for light rail depends. JA-2167-68.

Plaintiffs explained that recent reports on the deteriorating state of the Metrorail system found that "due to interruptions, delays, accidents and the

[4] Other cost-saving "changes" announced by Maryland included a 25% reduction in the frequency of trains during peak periods; replacement of steel bridges designed to minimize wetlands impacts with "standard" bridges over Rock Creek; and eliminating "Leadership in Energy and Environmental Design" standards for Project-related buildings. JA-2138-39.

adoption of other means and patterns of travel or communication . . . ridership on the WMATA subway has declined every year since 2009," which was the "year after the [draft EIS] last reviewed ridership projections for the Purple Line and alternatives to it." JA-2168. Plaintiffs further explained that "[t]ransit experts have, from early on, critiqued those Purple Line projections as an artificial boosting of the projected performance to levels sufficient to qualify for FTA funding," and that the unplanned-for Metrorail dysfunction and declining ridership "casts a[n] additional shadow over the rosy projections of ever-increasing ridership for the Purple Line, which is inextricably linked to and dependent upon the use of several subway stops from beginning to end." *Id*.

FTA delegated to Maryland the task of "addressing issues raised by [Plaintiffs]," JA-2258, and Maryland, predictably, saw no need for a Supplemental EIS on its Project. With regard to Green Track, Maryland asserted that it had not committed to that mitigation measure, while simultaneously conceding that the public was told that "green track 'will' be used." JA-2159. As for the declining Metrorail ridership and its bearing on the Project's justification, Maryland stated that the "Purple Line is not part of WMATA's Metrorail system" and "[t]herefore, the financial or other issues currently being experienced by WMATA do not involve the Public Line, and they have no relationship to the environmental

impacts of the Purple Line." JA-2223. FTA "concur[red]" with these reasons for why additional NEPA review was unnecessary. JA-2258.

5. Proceedings in the District Court and on Remand

a. The District Court's Initial Ruling and Remand

In Plaintiff's district court challenge, filed within the short statute of limitations for challenges to FTA decisions, *see* 23 U.S.C. § 139(l), Plaintiffs argued both that the EIS had failed to take a hard look at adverse impacts and viable alternatives and that, in any case, new information and circumstances supported the need for a Supplemental EIS. In August 2016, the district court granted partial summary judgment for Plaintiffs, holding that FTA's failure to adequately consider the Metrorail ridership and related issues was arbitrary and capricious. JA-427-33. The court explained that FTA and Maryland had "skirt[ed] the issue entirely on the basis that the Purple Line is not part of WMATA," and that "this does not provide a rational basis for defendants' summary conclusion that a decline in ridership thereon has *no* effect on the Purple Line, given the previous projections estimated over one quarter of Purple Line riders would use the WMATA Metrorail as part of their trip." JA-433.

Concluding that the standards for preparation of a Supplemental EIS in the CEQ regulations were satisfied, the Court ordered that such an analysis be completed as "expeditiously as possible." JA-437. In addition, in deciding whether

to vacate the Record of Decision pending completion of the Supplemental EIS, the Court applied this Court's test in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993); *see* JA-434-35 (explaining that the "decision whether to vacate depends on the 'seriousness of the order's deficiencies' and 'the disruptive consequences of an interim change'") (quoting *Allied-Signal*, 998 F.2d at 150-51). The court vacated the Record of Decision because of the gravity of the NEPA violation the Court discerned, and because "it would make little sense and cause even more disruption if defendants were to proceed with the project while the [Supplemental EIS] was being completed, only to subsequently determine that another alternative is preferable." JA-435.[5]

Rather than prepare a Supplemental EIS, Defendants moved for reconsideration. In ruling on that motion, the district court reaffirmed that the "agencies' categorical decision not to evaluate the significance of WMATA's new safety and ridership issues was arbitrary and capricious" because the Project's justification was, in part, explicitly based on a particular level of Metrorail

[5] Maryland's assertion that the district court failed to afford the parties an opportunity to "address the likely consequences of vacatur," Md.Br.34, is baseless. The district court afforded the parties multiple opportunities to do so: in lengthy summary judgment briefing, at a summary judgment hearing held in June 2016, *see* JA-319-98, and even in a post-hearing brief that the court allowed the parties to file to address any issues they may have previously neglected. JA-396-98. For their part, Plaintiffs made clear that they were requesting the standard APA relief of vacatur, and they also explained in detail why the *Allied-Signal* test was satisfied. *See, e.g.*, JA-307, 414-15.

ridership. JA-665. However, the court modified its ruling in "one limited respect" by affording Defendants an additional opportunity to assess on remand whether the criteria for an SEIS were satisfied. JA-666.

At the same time, again applying the *Allied-Signal* test, JA-668-71, the Court "decline[d] to reinstate the Purple Line [Record of Decision]." JA-668. With respect to the "seriousness" of the issues, the court "point[ed] to the defendants' seemingly cavalier attitude towards WMATA's safety and ridership issues," explaining that "[a]lthough the Purple Line's [Final EIS] examined the close connection between WMATA and the Purple Line, the FTA and Maryland *summarily* disregarded new information about WMATA's safety and ridership numbers on the inexplicable ground that no such WMATA-Purple Line connection existed." JA-669.

With respect to the "second *Allied-Signal* factor," the court recognized the delay and costs that could be entailed in vacating the Record of Decision, but explained that:

> Defendants unfortunately discuss the potentially disruptive effects of vacatur as if they occur in a vacuum, without weighing the potentially disruptive effects that could flow from remand without vacatur. They do not seem to consider the disruptive consequences that could flow from allowing the project to proceed apace (and perhaps take irreversible steps towards completion) without completing all of the analysis required under NEPA, only to have the agency determine as a result of the required analysis that some other alternative is now preferable . . . Vacatur ensures that the project will proceed only with the benefit of a fully fleshed out consideration of the

> issues required by NEPA. For that reason, I decline to amend my prior judgment and reinstate the [Record of Decision].

JA-670-71.

b. Plaintiffs' Submission of Materials on Remand and FTA's Disregard of Those Materials

Three days after the court's ruling on reconsideration, in November 2016, Plaintiffs submitted to FTA extensive materials bearing on the issue remanded by the court. *See* JA-2375. Plaintiffs provided abundant evidence demonstrating that projections of Purple Line ridership made many years ago are completely unreliable, particularly as they relate to the Project's interconnection with Metrorail, because:

- Metrorail's ongoing extraordinary problems with safety, service, reliability, and financial stability are continuing unabated with no end in sight, *e.g.*, JA-2399, 2400, 2403, 2405;
- the decline in Metrorail ridership, far from abating, has recently been accelerating, *e.g.*, JA-2395 (graph reflecting that from 2010-2015 Metro ridership declined from 1% to 3% per year, while from 2015-16, it declined 9%);
- people have been traveling less on Metrorail while the population has increased, JA-2396; *see also* JA-2408 (Metrorail report showing that

"even as the region has grown, ridership declined by 5 percent from 2010 to 2015");

- in addition to the havoc engulfing Metrorail, additional factors—such as many more people telecommuting, moving closer to employment centers, and using alternative modes of transportation such as bicycling and shared driving—also contribute to long-term declines in Metrorail usage and would likewise affect ridership on any light rail system, *see* JA-2397, 2406-07;
- Metrorail's massive safety and financial problems have been building for decades and there is no basis for assuming that they will be resolved any time in the foreseeable future, JA-2398; and
- the Metrorail system is facing a budget shortfall of hundreds of millions of dollars that Metrorail's General Manager proposes to address through major service cuts, increasing fares, and layoffs, leading the President of Metrorail's largest union to opine that the system is in a "death spiral," JA-2402.

Plaintiffs also submitted to FTA three declarations from economic and transportation experts explaining in detail why these extraordinary Metrorail problems do in fact call into question the viability of and rationale for a light rail option and, by the same token, bear directly on whether less environmentally

harmful and costly alternatives to the Project warrant fresh consideration in a Supplemental EIS. *See* JA-2292-2330.

In December 2016, an FTA Regional Administrator responded to Plaintiffs' submission with a three-paragraph letter informing Plaintiffs that "FTA is cognizant of its obligations under NEPA." JA-2409. Plaintiffs never received any other response. However, a subsequent "Memorandum" setting forth the reasons for FTA's decision not to prepare a Supplemental EIS and filed with the district court asserted that the FTA had "considered and reviewed" Plaintiffs' submission, among other materials, although the expert declarations submitted by Plaintiffs were not even mentioned, let alone analyzed in any manner, in the Memorandum. JA-2420.

Instead, the Memorandum mirrors Maryland's position, as set forth in a "Technical Report" dated November 3, 2016, that no matter how grave and long-term the problems afflicting Metrorail, and regardless of the extent to which those problems may impact Purple Line riders projected to transfer to or from Metrorail, federal funding of the Project would remain justified. *Compare* JA-2420-27 (Memorandum), *with* JA-2339-73. The Memorandum asserts that "no new consideration of alternatives is warranted"—including alternatives that would accommodate lower ridership with far less environmental impact and cost to federal taxpayers—because the Project "still meets the Project's Purpose and

Need" and because no matter how many people would use light rail the environmental impact of the Project would be the same. JA-2423-25.

c. The District Court's Rulings Following Remand

After further summary judgment briefing, the district court again granted summary judgment for Plaintiffs, holding that FTA's response to the remand—particularly to Plaintiffs' submission—and the refusal to prepare a Supplemental EIS was arbitrary and capricious. JA-818-29. The court explained that FTA's finding that the Project "will meet its established purposes, *no matter what* happens to WMATA Metrorail" is impossible to reconcile with FTA's concession that one of the explicit purposes for the Project was to "[p]rovide better connections to Metrorail services and that "this purpose 'is directly implicated by potential ridership declines in the WMATA Metrorail system.'" JA-825-26 (internal citations omitted).

The court further held that FTA failed to address "relevant information when making its decision not to prepare a[] [Supplemental EIS]," because "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 [Maryland's] and FTA's memorandum declining to prepare" a Supplemental EIS. JA-826-27. The court also reasoned that the "facts here could not be more similar" to those in *Public Employees*, which held that it was arbitrary

and capricious for a federal agency, on remand, to disregard the submission of expert analyses bearing on the remanded issue. JA-828. The court ordered preparation of a Supplemental EIS "as expeditiously as possible," JA-830, and left intact its vacatur of the Record of Decision pending completion of supplemental NEPA analysis. In a subsequent ruling, the court rejected Plaintiffs' remaining challenges. *See* JA-929.

SUMMARY OF ARGUMENT

1. The district court correctly held that a Supplemental EIS is required in view of the declining Metrorail ridership, that system's fiscal crisis, and other Metrorail-related problems. From the outset, the project's interconnectedness with Metrorail has been a principal justification for the Project. The declining Metrorail ridership raises serious questions concerning whether the Project is necessary to satisfy Maryland's long-term ridership projections and, if not, whether less environmentally harmful and cost-effective alternatives should be considered. In addition, as the district court held, FTA disregarded expert declarations detailing the need for a Supplemental EIS, in contravention of this Court's ruling in *Public Employees*. For these reasons, the standard for preparation of a Supplemental EIS is satisfied because there 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)(1)(ii).

2. The Final EIS violates NEPA because it does not "[r]igorously explore and objectively evaluate all reasonable alternatives" to Maryland's preferred Project. 40 C.F.R. § 1502.14(a). To the contrary, the Final EIS purports to compare the benefits and environmental impacts of only two options: the Project as Maryland desires to pursue it and merely maintaining the status quo. Such a result-oriented EIS cannot be harmonized with NEPA's purposes.

3. The Final EIS violates NEPA because the EIS does not take a hard look at the Project's indirect effects. One of Maryland's and FTA's justifications for the Project is that it will stimulate significant development along the Project route. Yet the EIS contains no meaningful analysis of the adverse environmental impacts—e.g., on wetlands loss, wildlife habitat, air and water pollution, and human displacement—that will foreseeably result from such development.

4. A Supplemental EIS is required because of Maryland's decision to jettison the requirement for Green Track. When FTA issued its Record of Decision, the public was told that Green Track would in fact be used along the Georgetown Branch right-of-way and in other Project locations to reduce environmental impacts, including by ameliorating the significant amount of polluted stormwater runoff that will flow into and degrade wetlands, streams, and other area water ways. Maryland's decision, on cost-cutting grounds, to abandon

that measure has potentially significant environmental impacts that are required to be analyzed in a Supplemental EIS.

5. Defendants' argument that the district court lacked authority to vacate the Record of Decision because the reasons why a Supplemental EIS is necessary arose after the Final EIS and Record of Decision is moot because the Final EIS itself also violates NEPA. In any event, the district court did have authority to vacate the Record of Decision and, in doing so, the court did not abuse its discretion in applying the vacatur test in *Allied-Signal*.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's grant[] of summary judgment, and appl[ies] the arbitrary and capricious standard" of the APA, 5 U.S.C. [§ 706] to determine whether the government complied with federal law." *Public Employees*, 827 F.3d at 1081 (internal quotations and citations omitted). Under the APA, the Court reviews federal agency action for whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A).

Accordingly, the Court's role in reviewing Federal Defendants' NEPA compliance is limited but, at the same time, vital to ensuring that the statute's objectives are met. As the Court has recently emphasized, the Court is "responsible

for holding agencies to the standard the statute establishes. An EIS is deficient, and the agency action it undergirds is arbitrary and capricious, if the EIS does not contain 'sufficient discussion of the relevant issues and opposing viewpoints,' or if it does not demonstrate 'reasoned decisionmaking.'" *Sierra Club*, 2017 WL 3597014, at *5 (internal quotations and citations omitted).

The Court "review[s] the district court's decision to vacate" the Record of Decision based on the court's finding of a NEPA violation for "abuse of discretion." *Nebraska Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006).

II. THE DISTRICT COURT CORRECTLY HELD THAT, GIVEN MARYLAND'S HEAVY RELIANCE ON INTERCONNECTEDNESS WITH THE METRORAIL SYSTEM AND METRORAIL RIDERSHIP AS JUSTIFICATION FOR THE PROJECT, THE DECLINING RIDERSHIP AND EXTREME PROBLEMS WITH METRORAIL WARRANT PREPARATION OF A SUPPLEMENTAL EIS.

The district court's ruling that a Supplemental EIS is warranted in view of the extraordinary financial, safety, and reliability problems afflicting the Metrorail system and the declining ridership that has been affecting that system for many years now is correct and should be affirmed. These developments, which FTA and Maryland admittedly did not address either in the draft or Final EISs, necessarily call into question a central justification for the Purple Line as presently envisioned—i.e., that a light rail project was needed to interconnect with Metrorail and would accommodate Maryland's inflated ridership projections whereas less

environmentally harmful alternatives (such as Bus Rapid Transit or simply improving the existing bus system) might not. The fact that previously rejected alternatives with far less environmental harms and far lower costs than Maryland's "preferred" Project may be viable—including an option that would avoid devastating much of the Trail—*does* "provide[] a *seriously* different picture of the environmental landscape," *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (citation omitted), thus necessitating preparation of a Supplemental SEIS, as the district court held. Defendants' contrary arguments are unpersuasive.

A. Defendants Do Not Even Address The Relevant CEQ Regulation Defining When A Supplemental EIS Is Required.

Before turning to what Defendants do argue, it is important to highlight what they fail to address. Neither Federal Defendants nor Maryland make any effort to apply the standard for preparation of a Supplemental EIS set forth in the CEQ regulations. *See* 40 C.F.R. § 1502.9(c). Federal Defendants do not even *cite* the pertinent CEQ regulation, let alone seek to apply it, whereas Maryland cites the regulation once in passing, *see* Md.Br.21, but never quotes its language or endeavors to apply it.

This omission is telling. Although the pertinent CEQ regulation substantially overlaps with FTA's own NEPA regulation delineating when a Supplemental EIS is necessary—which Federal Defendants and Maryland do discuss, *see* Fed.Br.23,

32 (quoting 23 C.F.R. § 771.130(a)); Md.Br.21 (same)—they are not identical. Rather, they diverge in a manner that, at least insofar as Defendants' position in this case is concerned, is critically important.

Defendants emphasize that the pertinent FTA regulation provides that "a[] [Supplemental EIS] is required only if new information or changes to the project 'would result in significant *environmental impacts* not evaluated in the EIS.'" Fed.Br.23 (emphasis in original) (quoting 23 C.F.R. § 771.130(a)). According to the government, this language means that, regardless of any new circumstances or information, a Supplemental EIS is "never required to confirm that a project *still adequately meets the purpose and need*" that may have justified the project's selection over other options with fewer harmful environmental impacts—options that were rejected because they did not meet the purpose and need as well as the project selected. Fed.Br.23 (emphasis added).

This remarkable position means that even if new circumstances or information may render a project with severe environment impacts completely unable to accomplish its objectives, or may render a previously rejected option with far fewer harmful impacts equally or even better able to meet the stated objectives, there would still be no need for a Supplemental EIS. That approach to the Supplemental EIS requirement is not only irreconcilable with "NEPA's core focus on improving agency decisionmaking" to eliminate or reduce unnecessary

environmental harm, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769 (2004), but it conflicts with the plain terms of the CEQ regulation defining when a Supplemental EIS is required. *See* 40 C.F.R. § 1502.9(c).

This explains why neither the Federal Defendants nor Maryland ever quote or apply the CEQ regulation. Again, that regulation provides, in pertinent part, that a Supplemental EIS is required when "[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)(1)(ii) (emphasis added). Accordingly, significant developments that undermine a proposed project's ability to meet its stated purpose and need and/or render viable more environmentally benign alternatives that were previously rejected are certainly "relevant to environmental concerns" and "bear[] on the proposed actions or its impacts." Hence, they trigger the need for a Supplemental EIS under the plain terms of the CEQ standard, even if not under the government's and Maryland's cramped reading of the FTA's regulation. *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 728-31 (9th Cir. 1995) ("*Alaska Wilderness*") (holding that where new developments "opened for consideration" less environmentally harmful alternatives previously rejected on the grounds that they would not satisfy the project's purpose and need, this constituted "new circumstances or information relevant to environmental concerns" within the meaning of the CEQ regulation).

Defendants cannot (and do not) argue that FTA is under no obligation to comply with the CEQ regulation along with the FTA's own NEPA regulation. In the district court FTA flatly conceded that it is required to comply with the CEQ regulation defining when an SEIS is required. *See* ECF No. 125 at 5 (concession by FTA during renewed summary judgment briefing that "[a]ny suggestion that FTA could follow its own regulations, but deviate from CEQ's regulations *lacks support as a matter of law*") (emphasis added). Defendants had no choice but to make this concession because FTA's NEPA regulation states that it "supplements" rather than supplants the CEQ regulation, 23 C.F.R. § 771.101, and that the CEQ regulations in fact "apply to" FTA's grant decisions. *Id*. § 771.109(a)(1); *see also Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 681 (D.C. Cir. 2004) (explaining that the CEQ regulations "are binding on Federal agencies"). Consequently, the district court correctly invoked the CEQ standard in its May 2017 ruling requiring preparation of a Supplemental EIS. *See* JA-823.[6]

In short, although Defendants cannot make (and have not made) any argument that the district court was wrong in applying the Supplemental EIS standard in the CEQ regulations, they nevertheless neglected even to address the standard in their opening briefs. Defendants' failure even to *discuss* what they have

[6] Elsewhere in its brief the government relies on another CEQ regulation, *see* Fed.Br.3 (citing 40 C.F.R. § 1502.13), so that its disregard of the regulation defining when an SEIS is necessary is intentional and selective.

conceded is a binding standard is fatal to their challenge to the district court's grant of partial summary judgment on this basis.

B. The Standards For Preparation Of A Supplemental EIS Are Satisfied.

In any event, the district court correctly held that the CEQ standard for a Supplemental EIS is satisfied here. Accommodating substantial Metrorail ridership was in fact a central objective of the project from the outset, and one of the reasons why light rail was selected over other options—so much so that the very "name 'Purple Line' was adopted . . . to be consistent with [WMATA's] practice of naming Metrorail routes by color and to emphasize the connections with the existing Metrorail system." JA-1219. The Final EIS further emphasizes that the Purple Line was designed specifically to overlap with various Metrorail stations, *see* JA-1224 (map reflecting relationship between Metro system and Purple Line), and the Final EIS justifies the project based on data reflecting now-outdated public use of those specific Metro stations. *See* JA-1227 (Table 1-4 reflecting "Daily Metrorail Boardings in Purple Line Corridor, 2010," with data on boardings at the Bethesda, Silver Spring, College Park, and New Carrollton metro stations); *see also* JA-1269 (explaining that "many transit trips" on which the Project justification depends "commonly use the Metrorail Red, Green, and Orange Lines"); *see also* JA-1196 (Maryland's explanation that it selected light rail because of its "connections to the regional Metrorail system").

Moreover, notwithstanding Defendants' *post hoc* effort to downplay the importance of projected Metrorail ridership to the Project rationale, both the draft and Final EISs explicitly relied on the assumption that a very large percentage of the project's ridership would in fact come from people using Metrorail. As noted earlier, the 2008 draft EIS "forecast that there would [be] 27,700 boardings of daily riders combining their Purple Line journey with Metrorail, accounting for *43% of ridership*." JA-2306-7 (emphasis added). Because the draft EIS served as the basis for Maryland's selection of its preferred light rail alternative, *see* JA-1196, and the Final EIS only compared that alternative to taking no action—another violation of NEPA, *see infra* at 57-65—the nearly decade-old assumption that almost half of all Purple Line users would be riders connecting with what has since become an increasingly chaotic, unreliable, and less-traveled Metrorail system was critical to the selection of light rail over other options that were conceded to be more cost-effective and less environmentally harmful. *See* JA-755-60.

Although the Final EIS, without any public explanation for the change, lowered the daily projected Purple Line ridership to "only" 27% of Metrorail users, *see* JA-1270-71 ("In 2040, 27 percent of the Purple Line boardings would be trips that also include riding Metrorail, *reflecting the ability of the Preferred Alternative to provide connectivity to the Metrorail system*") (emphasis added)—this is still more than a quarter of the projected ridership on which the project justification was

ultimately grounded. *See also* JA-1271 (Table 3-3 setting forth projected "Year 2030/2040 Daily Purple Line Boardings," including 17,224 projected boardings for "Purple Line and Metrorail" in 2030, and 18,972 Projected boardings for "Purple Line and Metrorail" in 2040); JA-1273 ("The Bethesda, Silver Spring Transit Center, College Park/UMD Metro, and New Carrollton stations have the highest [projected] boardings of the stations, *demonstrating the connectivity the Purple Line would have with the Metrorail system*") (emphasisis added).[7]

Whether nearly a half or more than a quarter of the Project's projected ridership is tied to Metrorail, "the very substantial decline in Metrorail ridership over the past eight years," which was not anticipated let alone analyzed when either the draft or Final EIS was issued, necessarily raises important questions concerning the selection of light rail in lieu of other, less environmentally destructive and concededly more cost-effective options, such as enhancing existing bus service or Bus Rapid Transit. JA-2305. When Maryland announced in 2009

[7] As explained by Dr. Frank Lysy, one of the experts whose views FTA disregarded when the Supplemental EIS issue was remanded, the discrepancy between the 43% projected ridership coming from Metrorail and the 27% figure in the Final EIS raises important questions that have never been addressed by Maryland or FTA. *See* JA-2306-7. While lowering the Metrorail-related ridership, as well as that related to the MARC commuter system, the Project's projected *total ridership* "did not change much between the [draft EIS] and the [Final EIS]" because Maryland inexplicably increased by *38%* the number of Purple Line users who would purportedly reach the system by walking or some other means. JA-766-67. This is just one of a number of important unanswered questions going to the core of the rationale for light rail that a Supplemental EIS would address. *Id*.

"Why Light Rail" instead of other options, and particularly improved bus service, Maryland specifically relied on the rationale that, "[d]espite its higher costs" and "highly contentious" environmental impacts, light rail would better "meet[] long term capacity concerns because of its ability to accommodate future ridership growth beyond what is projected for 2030." JA-1199-200; *see also* JA-2309-12 (explaining that the "bus alternatives were more cost effective than any of the light rail options, and substantially so" but were rejected because of ridership projections made before the "extraordinary Metrorail problems" came to the fore).

Under these circumstances, the case for a fresh "hard look" in a Supplemental EIS is compelling, as the district court correctly held. That environmentally superior (and less expensive) alternatives may now be able to "accommodate future ridership growth," JA-1199, plainly constitutes "new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii); *see also Alaska Wilderness*, 67 F.3d at 728-31 (holding that where, due to changed circumstances, a forest plan was no longer required to "meet volume requirements" for timber removal, "other alternatives eliminated from the

[original] EISs because they did not meet volume requirements" had to be addressed in a Supplemental EIS).[8]

On the other hand, Defendants' reasons for avoiding preparation of a Supplemental EIS do not pass muster even aside from Defendants' fatal failure to apply the CEQ regulation. Defendants argue that FTA "explained why a continued decline in Metrorail ridership would not significantly alter the environmental impact of the Purple Line" because even under a "'zero-transfer' scenario in which *no* Purple Line riders transfer to or from Metrorail, such a decline would not change the physical footprint of the project or the impacts of construction . . . ." Fed.Br.22 (emphasis in original); *see also* Md.Br.22-23. Of course, even a light rail project with *no ridership whatsoever* would have the same "physical footprint" and "construction" impacts as one that is filled to capacity.

Once again, however, such a narrow focus on when a Supplemental EIS is required violates the plain terms of the CEQ regulation and also overlooks that the "heart of the [EIS]" process is the consideration of "reasonable *alternatives*" that

[8] Maryland argues that *Alaska Wilderness* is distinguishable because "[u]nlike the situation [in that case], there is no fundamental change in factual underpinnings for assessing how different alternatives achieve, or do not achieve, the Project's Purpose and Need." Md.Br.26. But that is *exactly* the situation here, because the Project's justification was not only tied explicitly to operation of a fully functioning Metrorail system, but was based on the ability of different alternatives to satisfy ridership projections that have been called into question for years and are now especially suspect in view of the declining use of Metrorail.

may avoid or reduce significant environmental impacts that would otherwise occur. 40 C.F.R. § 1502.14(a) (emphasis added). Here, for example, expert submissions made to FTA on remand—and disregarded by the agency, *see infra* at 49-57—explained in detail how declining ridership projections associated with Metrorail difficulties, on top of preexisting questions concerning Maryland's projections, invited reassessment of less impactful (and less expensive) alternatives. *See, e.g.*, JA-2313-15. Yet the FTA concededly engaged in "no new consideration of alternatives" in rejecting the need for a Supplemental EIS. JA-2426.

Defendants also argue that "FTA reasonably found that the Purple Line *would* continue to meet the purpose and need even if Metrorail ridership continues to decline," although they acknowledge at the same time that such a decline "would implicate" one central "element of the purpose and need: providing better connections to Metrorail," Fed.Br.24; *see also* Md.Br.23 ("[E]ven if Metrorail ridership were to continue to decline, the Project would still improve east-west transit, connect communities along the corridor, and connect major activity centers in and between Bethesda, Silver Spring and New Carrollton."). However, asserting that a Project that was explicitly designed to be integrated with a robust Metrorail system (even to the extent of its nomenclature) will somehow meet its "purpose and need" regardless of what happens to that system—and even if "*none* of the trips on the Purple Line are transferring to/from Metrorail," JA-2426 (emphasis

added)—is not only illogical, but effectively redefines the project's raison d'etre. This is by definition a "substantial change[] in the proposed action that is relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1).

Even more important, Defendants' argument avoids the principal rationale for a Supplemental EIS in view of declining Metrorail ridership, i.e., it may significantly affect the *overall ridership* projected for the Project—a projection that was integral to Maryland's selection (and FTA's support) of the Project as the "preferred alternative." Thus, the critical point is not, as characterized by the government, that FTA had to "prepare [a Supplemental EIS] to account for the far-fetched possibility that Metrorail *would not* remain part of the Washington area transportation network," Fed.Br.24; *see also* Md.Br.27 (emphasis in original)—although how "far-fetched" that scenario (or at least a drastically reduced Metrorail) might be is open to debate. *See* JA-2402 (statement by the President of Metrorail's largest union that in light of Metrorail's fiscal problems, and apparent inability to solve them, the system is in a "death spiral").

Rather, the essential point is that a significant decline in projected Project ridership stemming from the previously unanticipated Metrorail decline bears on the rationale for selecting light rail instead of *less environmentally harmful and more cost-effective alternatives* that were rejected based on Maryland's unrealistic ridership projections. Indisputably, *all* of the options initially considered by FTA

and Maryland—except for the no-action alternative—"would still improve east-west transit, connect communities along the corridor, and connect major activity centers in and between Bethesda, Silver Spring, College Park and New Carrollton." Md.Br.23. Yet in "prefer[ing]" light rail, despite its admittedly "higher costs" and "contentious" impacts on the Trail and other resources, Maryland assumed that light rail was needed to "provide higher passenger-carrying capacity" and "accommodate future ridership growth" over the long term. JA-1199-200.

Because that assumption has necessarily been called into question by declining ridership on a Metrorail system that Maryland itself expected to account for a very large percentage of the Project's projected ridership, there are in fact "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)(1)(ii). Accordingly, taking a hard look at such circumstances and information is not simply an "exercise [that] might be useful for FTA policymakers," Fed.Br.26, but it is an exercise that NEPA and its implementing regulations require in a Supplemental EIS.

C. FTA's Disregard Of Plaintiffs' Expert Submissions On Remand Is Arbitrary and Capricious And Conflicts With This Court's Holding In *Public Employees.*

The district court also correctly held that that "FTA failed to consider relevant information when making its decision on remand not to prepare" a

Supplemental EIS and, in particular, that FTA's "wholesale failure to consider plaintiffs' expert declarations was arbitrary and capricious." JA-827. As the court explained, although FTA included Plaintiff's submission in the administrative record, thereby conceding that it was properly before the agency when it decided not to prepare a Supplemental EIS, FTA's memorandum "included no analysis, nor even a mention of plaintiffs' expert declarations and their criticisms of [Maryland's] and FTA's Metrorail ridership assumptions" and their relationship to the rationale for the Project. *Id*.

The district court also correctly held that "the facts here could not be more similar" to those in *Public Employees*, in which the district court remanded to the Fish and Wildlife Service that agency's determination of whether to require certain mitigation measures for a wind power project. *See* 827 F.3d at 1089. On remand, the Fish and Wildlife Service reopened the record to consider more recent information but it said nothing about submissions made by the plaintiffs, including expert reports comparable to the declarations here, regarding the feasibility of those measures. *Id*. This Court held that the "agency's decision to disregard plaintiffs' submissions was arbitrary and capricious" because the agency "reopened the record and [hence] was required" to address the plaintiffs' materials. *Id*. at 1090.

Likewise, in this case, FTA indisputably "reopened the record" on remand but, as in *Public Employees*, the agency's decision not to prepare a Supplemental EIS said not a word about Plaintiffs' expert declarations, let alone demonstrate in any manner that FTA had afforded them any actual consideration. As a result, *Public Employees* is squarely controlling precedent.

In an effort to avoid that conclusion, Defendants contend that "FTA did not ignore any *material* new information proffered by [Plaintiffs'] declarants." Fed.Br.27. And to demonstrate that purported lack of materiality, Defendants' counsel provide their *own* responses to *some* of the many points raised by the experts. *Id*. at 27-32; *see also* Md.Br.28-31. However, it is elementary administrative law that appellate counsel's arguments cannot compensate for FTA's omissions; rather, such "*post hoc* rationalizations" of counsel have long been held "to be an inadequate basis for [judicial] review" of agency action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971) (emphasis added) (internal quotation omitted); *see also Public Employees*, 827 F.3d at 1090 (remanding to agency for consideration of expert submission without reaching the merits of Plaintiffs' challenge).

In any event, Defendants' *post hoc* claims that the experts' detailed submissions did not raise any "material" matters are groundless. The declarations were submitted by undisputed economic and transportation experts who raised not

only "material," but extremely salient, points that were simply disregarded in FTA's one-sided reiteration of Maryland's position.

In particular, Plaintiffs submitted to FTA a 16-page declaration by Dr. Lysy, a Stanford-trained economist who for many years reviewed major development projects for the World Bank Group and has also closely analyzed the ridership and other data justifying the Project. JA-2302. Dr. Lysy's declaration pinpointed multiple flaws in Maryland's consultant's assessment of Metrorail's impact on the Purple Line, including rudimentary mistakes in the figures used to calculate Metrorail ridership declines. *See* JA-2303. He also explained why the premise on which FTA and Maryland had previously relied (although they now disclaim such reliance) that Metrorail ridership would grow in the future has no basis in reality, particularly because the recent steep ridership decline had "not been anticipated by WMATA or other analysts" and "began well before the recent systemic safety and reliability issues became evident." JA-2304.

Dr. Lysy furthered explained why the ongoing Metrorail dysfunction and ridership decline may have an enormous bearing on the stated justification for the Project and, specifically, on the need to consider far less expensive and environmentally destructive alternatives that were previously rejected on the basis of dubious long-term ridership projections. In particular, Dr. Lysy highlighted the fact that even the 27% figure used in the Final EIS as a projection of the number of

Purple Line users who would "combine their journey with Metrorail" is "dramatically different"—without explanation—from the 43% used in the draft EIS, which was the basis on which Maryland selected its "preferred alternative." JA-312-13. FTA has never suggested that the overarching rationale for a light rail project would be unaffected by even a 43% reliance on Metrorail ridership. Hence, this discrepancy takes on far greater import in view of the Metrorail issues. Plainly, therefore, Dr. Lysy raised, at minimum, a "material" issue.

Dr. Lysy provided additional reasons why the Metrorail-related problems have significant implications for whether more modest alternatives (from both an environmental and fiscal standpoint) now warrant reconsideration. *See* JA-2307-15. In response to Maryland's contention that any change in forecast Metrorail ridership will affect all of the light rail transit and bus "alternatives 'in the same relative degree,' and thus would not affect the decision to build the Purple Line as a light rail line rather than one of the other alternatives," Dr. Lysy explained that this is "not correct" in light of the reasons previously given for rejecting the more cost-effective bus options. JA-2307. In addition, he explained why the uncertainty compounded by the Metrorail situation pointed to another reasonable alternative that should be considered in a Supplemental EIS, i.e., enhancing the existing bus system while *deferring* consideration of the more environmentally harmful and

expensive light rail system until and unless the demand for such a system "actually materializes." JA-2314.

Moreover, Dr. Lysy pointed out that not only do the Metrorail problems raise serious questions about the need for and viability of light rail relative to less destructive options, but that the Purple Line could well *aggravate* Metrorail's increasingly desperate situation by "effectively cannibaliz[ing] [the Purple Line's] ridership from the existing public transit systems in the area." JA-2311. "This cannibalization of fares from existing transit systems, including WMATA's Metrobus and Metrorail systems, would come at a time when it is increasingly being recognized that unless the WMATA budget is increased substantially"—which there is no factual basis for predicting will occur—"the now clear Metrorail difficulties will not be resolved" and, to the contrary, the Purple Line would "make it more difficult to ensure WMATA will receive the funds it needs." *Id.*[9]

While Dr. Lysy's declaration is more than sufficient to establish that Plaintiffs' experts raised "material" matters on remand, Plaintiffs also submitted to

[9] This concern that the Project will actually contribute to Metrorail's ridership and financial woes is not only "material," it is reinforced by Defendants' own briefs. Defendants contend that the Project will "improve east-west transit," including by allowing passengers to avoid more "lengthy trips into and out of Washington, D.C." on Metrorail," e.g., by taking the light rail between Bethesda and Silver Spring instead of the Metrorail Red Line. Md.Br.23-24. That scenario will further depress Metrorail ridership on top of the system's present difficulties—the fare "cannibalization" addressed in the Lysy Declaration that has been disregarded by FTA. JA-2311.

FTA and MTA Declarations from two experts in transportation planning—Mr. Allen, who had commented on the draft EIS, *see supra* at 14-15, and Martin Saggese, who served for many years as Vice President for Management & Financial Services with the Long Island Railroad, the largest passenger railroad in the U.S., and who has also carefully studied the proposed Purple Line for many years. *See* JA-2292-301, 2318-36. Mr. Saggese opined that a Supplemental EIS "is absolutely essential so that the effect of the recent Metro problems can be taken into consideration in conjunction with the as yet unanswered questions about the serious flaws and omissions that have been incorporated into the unrealistic ridership projections from the outset." JA-2295-6.

Mr. Saggese described FTA and General Accounting Office studies demonstrating that "overstated, unrealistic ridership data at the planning stage of transit projects in the U.S. turns out to be more the rule than the exception" given project proponents' tendency to overstate project benefits and understate their costs. *Id.* In addition, he explained that, particularly in view of the declining Metrorail ridership, the Purple Line projections are plagued by the very factors that have empirically led to vast overstatements of ridership for other projects. *Id*.

Likewise, Mr. Allen demonstrated in his declaration that Maryland's assurances that there will be sufficient ridership to sustain a light rail system notwithstanding the declining Metrorail ridership suffers from methodological

problems that FTA never addressed. JA-2318. For example, he explained that the baseline figure used by Maryland to assess the impact of a Metrorail-related decline in ridership—a figure that Defendants continue to rely on in their briefs here, *see* Fed.Br.24 (citing the Final EIS's projected ridership of 69,299 in 2040)—is an "outdated Purple Line ridership forecast" even according to FTA's and Maryland's *own* public pronouncements. JA-2320-22 (explaining that in a November 2015 publication, FTA and Maryland provided a much lower daily ridership projection of 56,100 riders and that this is a "significant decline in ridership compared to the figures in the [draft EIS] and [Final EIS] and the reasons for this change have not been publicly documented or subjected to objective review"). If the lower, more recent baseline figure is used, then a significant ridership decline resulting from Metrorail further "cause[s] the viability of the Purple Line light rail project to be questioned," and lends additional support to the need for a Supplemental EIS to consider less environmentally injurious alternatives that would meet far more realistic projections. JA-2324.

In short, as the district court correctly held, this case is functionally indistinguishable from *Public Employees*. As in that case, FTA reopened its record on remand and yet its decision not to prepare a Supplemental EIS did not even mention, much less analyze, detailed expert submissions that raised highly material issues relating directly to the remanded issue. And as in that case, there is no

concrete evidence in the record that FTA afforded Plaintiffs' timely submission of these materials any substantive consideration whatsoever, while at the same time adopting virtually verbatim the project proponent's position (as also occurred in *Public Employees*). Accordingly, the district court's ruling requiring preparation of a Supplemental EIS should be affirmed.[10]

[10] The utility of the Supplemental EIS ordered by the district court is reinforced by the fact that, from the beginning of the NEPA process, transportation experts have opined that Maryland failed to disclose information necessary to understand and comment on the underlying methodology Maryland used to derive its ridership projections. *See supra* at 14-15; *see also* JA-1681 (Mr. Allen's comment on the draft EIS explaining that there was "virtually no documentation of the travel forecasting methodology in the materials that have been made publicly available," thus "making it impossible" for independent experts "to evaluate the procedures that were used"); JA-1678 (stating that "[m]ost of the supporting technical details concerning the travel forecasting methodology cannot be evaluated because this information has not been provided by [Maryland]" and "an objective evaluation of the ridership estimates cannot be performed without these documents and data"). Maryland argued below that it merely declined to provide "proprietary software" that members of the public could purchase on their own, JA-936, but the record reflects that far more data were withheld that experts said was essential to understand the forecasting methodology, including "electronic data files" that were needed to determine whether Maryland's results were valid and could be replicated. *E.g.*, JA-1790-99; *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) ("in order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions" under review) (quoting *Conn. Power & Light Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982)).

III. THE FINAL EIS IS ARBITRARY AND CAPRICIOUS BECAUSE IT DOES NOT CONTAIN AN OBJECTIVE AND RIGOROUS COMPARISON OF A REASONABLE RANGE OF ALTERNATIVES.

In specifying the contents of EISs, Congress mandated that such documents must, "*to the fullest extent possible*," include a "detailed statement" on "alternatives to the proposed action." 42 U.S.C. § 4332(C)(iii) (emphasis added); *see also id*. § 4332(E) (requiring agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). In consideration of Congress' emphasis on analyzing alternatives that may adequately promote an agency's objectives while avoiding or reducing environmental impacts, the NEPA implementing regulations stress that such analysis is the "heart of the environmental impact statement." 40 C.F.R. § 1502.14.

Accordingly, each EIS must "[r]igorously explore and objectively evaluate *all* reasonable alternatives." *Id*. § 1502.14(a) (emphasis added). To ensure such a "rigorous" and "objective" evaluation, the CEQ regulations further provide that the EIS "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." *Id*. § 1502.14. Further, each EIS "shall . . . [d]evote substantial treatment to each alternative considered in detail including the proposed action *so that reviewers may evaluate their comparative merits*." *Id*. § 1502.14(b) (emphasis

added). To ensure such an evaluation, each EIS must also "[i]nclude reasonable alternatives not within the jurisdiction of the lead agencies." *Id*. § 1502.14(c).

FTA's own NEPA regulations likewise emphasize that an analysis of of alternatives is essential, stating that it is the "policy" of the agency that "[a]lternative courses of action be evaluated and decisions made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals." 23 C.F.R. § 771.105; *see also id*. § 771.111(f) (requiring a "meaningful evaluation of alternatives"). FTA's NEPA regulations also specify that *both* draft and final EISs must analyze reasonable alternatives to the proposed action. *See id*. § 771.123(c) ("the draft EIS shall evaluate all reasonable alternatives to the action"); *id* § 771.125 ("The final EIS shall identify the preferred alternative *and evaluate all reasonable alternatives considered*.") (emphasis added).

The Final EIS issued by FTA violated these requirements and, in doing so, undermined the fundamental purpose of NEPA review. As explained, the Final EIS compared the benefits and impacts of only two "alternatives": implementing Maryland's "preferred" Project or taking no additional action to further the State's objectives to enhance east-west travel in Montgomery and Prince George's

Counties. *See supra* at 20. Indeed, the Final EIS's "Evaluation of Alternatives" acknowledged unequivocally that only Maryland's "Preferred Alternative and the No Build Alternative are evaluated based on their ability to meet the purpose and need, the balance between benefits and impacts, and equity." JA-1478-84; *see also* JA-1276-452 (comparing the environmental impacts of only Maryland's preferred alternative and the "No Build Alternative"); JA-1276 ("The No Build Alternative provides the basis against which the Preferred Alternative is compared."); JA-1211 ("The value of these benefits of the Preferred Alternative is evident in the projected increases in daily transit trips and projected passenger boardings over the No Build Alternative."); JA-1212 ("[The] No Build Alternative incurs relatively fewer impacts to the natural and built environment, but it does not meet the project purpose and need.").

Comparing only the costs and benefits of Maryland's own preferred approach for spending nearly a billion dollars in federal funds to, in effect, doing nothing violates the plain language of NEPA—which, again, expressly mandates that all EISs include a "detailed statement" on "*alternatives* to the proposed action," 42 U.S.C. § 4332(C)(iii) (emphasis added)—and cannot satisfy the CEQ requirement to "[r]igorously explore and objectively evaluate *all reasonable alternatives*" to a proposed action. 40 C.F.R. § 1502.14(a) (emphasis added); *see*

also id. § 1502.14(d) (providing that EIS's must "*[i]nclude* the alternative of no action") (emphasis added).

Defendants cannot maintain that no "reasonable" alternatives to Maryland's preference for light rail exists, thereby precluding the need for a "rigorous" and "objective" comparative analysis in the Final EIS. Indeed, even as characterized by Defendants themselves, the "purpose and need" for federal funding—i.e., to help the State "provide faster, more direct, and more reliable east-west transit service connecting major activity centers" between Bethesda and New Carrollton; "[t]o provide better connections to Metrorail services in the corridor"; and "[t]o improve connectivity to the communities in the corridor between the Metrorail lines," Md.Br.23; *see also* Fed.Br.23-24—would *also* indisputably be furthered by the Bus Rapid Transit options, as well as the Transportation Systems Management approach to enhancing bus service in the corridor. *See supra* at 10-11.

That these options do not comport precisely with how Maryland would *prefer* to pursue its objectives does not render them *unreasonable* for the purposes of FTA's statutory obligation to scrutinize alternatives that may reduce or minimize environmental impact. If it did so, Congress' mandate that all EISs address "alternatives to the proposed action" to the "fullest extent possible" would be rendered meaningless. 42 U.S.C. § 4332(C)(iii); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (explaining that "an

agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goal of the agency's action, and the EIS would become a foreordained conclusion") (citation omitted).

Although Maryland has explained why it "prefer[s]" light rail, it has never suggested that other options would be infeasible. To the contrary, the State has admitted that bus alternatives would be considerably *less* expensive. *See* JA-1199. Nor has the State suggested that every other option would be technically impracticable or otherwise unreasonable. Even in selecting its preferred alternative, Maryland suggested otherwise, representing that the Final "EIS *will include analysis of reasonable alternatives* . . . ." JA-1196 (emphasis added).

Yet the Final EIS failed to do so. It did not set forth any detailed *comparison of the benefits and environmental costs* of various alternatives for improving east-west travel—which is how an EIS is supposed to facilitate environmentally sound decisionmaking. *See Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 577 (D.C. Cir. 2016) (explaining that comparing alternatives to a proposed project "'inform[s] both the public and the decisionmaker'[] by 'sharply defining the issues and providing a clear basis *for choice among options*'") (emphasis added) (quoting *Citizens Against Burlington*, 938 F.2d at 195 and 40 C.F.R. § 1502.14).

Instead, as commenters pointed out, the Final EIS contained only a comparison (and not even a legally adequate one, *see infra* at 65-70) between the benefits and costs of implementing Maryland's preference and, on the other hand, merely maintaining a status quo that both Maryland and FTA said was unacceptable. *See, e.g.*, JA-2018 (comments of CASA De Maryland explaining that the EIS "does not include any analysis of any reasonable alternatives; it compares the selected alternative only to [] 'no action'" and that "plainly does not achieve the project's purpose and need"). Such a patently result-oriented Final EIS is the antithesis of the analysis of a "reasonable range of alternatives" that NEPA mandates. *Union Neighbors United*, 831 F.3d at 577 (holding that the Fish and Wildlife "failed to consider a reasonable range of alternatives and violated its obligations under NEPA" when its EIS regarding a permit for taking an endangered bat failed to "examin[e] a reasonable alternative that could potentially take fewer bats than [the permit applicant's preferred] plan").

Nor can Defendants rely on the *draft* EIS as a justification for failing to compare a reasonable range of alternatives in the Final EIS. The CEQ regulations provide that the "[r]igorous[]" and "objective[]" evaluation of "all reasonable alternatives" must be included in *both* draft and final EISs, 40 C.F.R. §§ 1502.14(a), (e), and, if anything, that a final EIS must be *more* comprehensive than draft documents, *id*. § 1502.9(a) ("The draft statement must fulfill and satisfy to

the extent possible *the requirements established for final statements in section 102(2)(C) of the Act*.") (emphasis added). Likewise, FTA's own NEPA regulations mandate that the "*final* EIS shall identify the preferred alternative *and evaluate all reasonable alternatives considered*." 23 C.F.R. § 771.125(a)(1) (emphasis added).

Further, any reliance on the draft EIS to discharge FTA's obligation to address alternatives in the Final EIS would be particularly improper in this case. First, the draft EIS was prepared five years before the Final EIS and before FTA determined that costs for the light rail project would be far higher than Maryland had predicted, JA-1202—which has an obvious bearing on the "reasonableness" of alternatives.

Second, the draft EIS *itself* did not contain any "rigorous" and "objective" comparison of the environmental impacts associated with various alternatives; it did the opposite by wrongly declaring that the "natural environment impacts are not appreciably different between alternatives." JA-1085. Multiple commenters, including the National Capital Planning Commission, pointed out that this could not possibly be true—including, e.g., because some options would decimate the Trail while others would not, some options (such as light rail) would have far greater impacts on the Rock Park watershed than others, and light rail would cause more greenhouse gas emissions than Bus Rapid Transit. *See supra* at 13; JA-1838 (Town of Chevy Chase comments explaining that "unlike the [light rail proposals],

Low Investment [Bus Rapid Transit] does not use the Trail west of Jones Mill Road" and that "[a]s a consequence, the environmental effects of this one alignment differ in important respects from the [light rail] alternatives, yet [the draft EIS] has failed to identify and analyze those differences"); JA-1858 (explaining that the light rail alternatives, in contrast to other options, would result in the destruction "of mature trees and the canopy they provide along a three-mile stretch of the Georgetown Branch—a resource "used and enjoyed by nearly a million people annually" which the Montgomery County Planning Commission recognized as a "critical link between the Capital Crescent Trail in Bethesda and the Metropolitan Branch Trail in Silver Spring" and an "'urban oasis for wildlife that has roamed outside of Rock Creek Park").

Instead of rectifying this fundamental flaw, FTA and Maryland compounded it by issuing, five years later, a Final EIS that contains no meaningful comparative analysis of alternatives at all but, rather, sets up a classic straw man by only comparing the benefits and (some of the) environmental costs of Maryland's preferred approach for spending nearly a billion dollars in federal grant money with what Maryland and FTA contend is the unacceptable status quo. This does not comport with the letter or purpose of NEPA.

IV. ALTHOUGH MARYLAND HAS JUSTIFIED THE PROJECT BY MAINTAINING THAT IT WILL SIGNIFICANTLY INCREASE ECONOMIC DEVELOPMENT THORUGHOUT THE AFFECTED CORRIDOR, THE EIS DOES NOT TAKE A HARD LOOK AT THE INDIRECT ENVIRONMENTAL IMPACTS OF SUCH DEVELOPMENT.

NEPA requires that, along with direct effects, EISs must take a hard look at all "[i]ndirect effects and their significance." 40 C.F.R. § 1502.16(b). Indirect effects are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. § 1508.8(b). Of particular relevance here, the CEQ regulations define such impacts to "include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." *Id*.

This Court has held that indirect effects are "reasonably foreseeable" within the meaning of the CEQ regulations "if they are sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *Sierra Club*, 2017 WL 3597014, at *8 (internal quotations omitted) (holding that because the "'reasonably foreseeable' effects of authorizing a pipeline that will transport natural gas to Florida power plants" was that the gas would be burned, thereby releasing greenhouse gases, an EIS was defective for having neither "given a quantitative estimate of the downstream greenhouse emissions that will result" nor explaining why it could not have done so).

The Purple Line Final EIS does not take the requisite hard look at the "reasonably foreseeable" indirect effects of the Project on the environment, although commenters specifically put FTA on notice that such an analysis is required. *See supra* at 14. In fact, the EIS hardly affords such indirect effects a sideways glance while conceding that they are not only foreseeable but fully anticipated.

As noted, both FTA and Maryland have repeatedly justified the Project on the grounds that it will engender substantial economic development throughout the Project corridor. *See supra* at 9-10. The Final EIS states that Maryland's "Preferred Alternative *would have substantial short-term and long-term economic development benefits*." JA-1279 (emphasis added). The Record of Decision states that the Project will "induce[] development in approximately 11 station areas" along the Project route. JA-1035. Maryland's brief in this Court also stresses that "'support[ing] economic development and revitalization'" is a project objective. Md.Br.4 (quoting JA-1075).

Yet despite the fact that increasing development "is not just 'reasonably foreseeable,' it is the project's . . . purpose," *Sierra Club*, 2017 WL 3597014, at *8, the EIS contains no meaningful consideration of the indirect environmental impacts—on water, wildlife, air, and other natural resources—that such anticipated economic development will entail. Although the Final EIS has a chapter called

"Indirect and Cumulative Effects," JA-1454-70, it consists of little more than an itemization of various locations where FTA and Maryland expect the Purple Line will trigger significant development, without any analysis of the environmental impacts that may result.

For example, the Final EIS states that the Project "can be said to induce" over "one million square feet of new mixed-use development in remaining Town Center properties" in Chevy Chase Lake Station. JA-1464. However, while asserting that the "positive effects of this development would be to improve the quality of life and the economy of Chevy Chase Lake," the *entirety* of the analysis of adverse environmental effects that may result from this massive development is a single sentence: "It is anticipated that any negative impact to water quality from the increased development would be avoided through the requirements of state and federal water quality regulations and the stated intent of the community to restore Coquelin Run." *Id*.

The Final EIS does not even begin to actually *analyze* the threats that Project-related "increased development" would pose to "water quality," particularly with regard to Coquelin Run, an important area water body that "parallels the south side of the Georgetown Branch and is a major tributary of Rock Creek." JA-1853. In addition, the "existence of [water quality] permit requirements overseen by another federal agency or state permitting authority

cannot substitute for a proper NEPA analysis." *Sierra Club*, 2017 WL 3597014, at *11 (citing *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971)). And while the Final EIS makes only the barest of mentions of water quality impacts potentially resulting from the "induce[d]" development at Chevy Chase Lake Station, JA-1464, it says nothing at all about other consequences for natural resources, such as wildlife impacts.[11] *See also* JA-1469 (acknowledging that a "potential indirect effect of redevelopment in this station area [Riverdale Park Station] is to increase pressure on the Northeast Branch floodplain," which has the "potential to increase the amount of runoff the floodplain handles as well as directly impact the floodplain by encroachment," but

[11] For instance, in the portion of the Final EIS addressing direct impacts of the Project, the EIS acknowledges that the Maryland Department of Natural Resources has "indicated that there is a waterbird (heron) colony *located within the floodplain of Coquelin Run, in close proximity to the study area*" and that this colony is a "rare resource that should be protected." JA-1392 (emphasis added). However, the EIS asserts that the Project itself will not impact the heron colony because it is "approximately *one-quarter mile* from the proposed transitway alignment and is buffered by an intervening roadway and residences." JA-1393 (emphasis added). But as dubious as is the notion that extensive construction and subsequent operation of a loud train system a quarter of a mile from nesting herons will not impact them, the EIS says nothing at all regarding the *indirect* effects on this colony (or any other wildlife) of the extensive economic development that Maryland *intends* to promote with the Purple Line. *See also* JA-2113 (explanation by the Fish and Wildlife Service that the Kenk's amphipod, which has been proposed for federal listing as an endangered species, has been found in Coquelin Run Spring).

merely suggesting "[f]urther studies" of such impacts without analyzing their likelihood or severity).

Likewise, the Final EIS ignores or, at best, glosses over other indirect effects on the "human environment," 40 C.F.R. § 1508.14, while touting the economic benefits that will flow for some segments of the community from Project-related development. CASA De Maryland and other commenters explained that the "*negative impact* of Purple Line-spurred land use and development will be felt most acutely by the low income and minority populations who have made the International Corridor the culturally diverse place that it is today," but who will be displaced when such development causes "increases in residential real estate values" and rents. JA-2014-15 (emphasis added). Yet while acknowledging that "economic effects can be both a benefit and a burden" and that the "diversity and economic needs of the entire community must be considered," JA-1470, the EIS contains no actual analysis of such indirect effects.

That Maryland, FTA, and their *amici* believe that, on balance, the extensive development that they believe will flow from the Project is beneficial does not excuse FTA from taking a genuinely hard look at the other side of the coin. An EIS must address impacts "resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8. "In other words, when an agency thinks the good

consequences of a project will outweigh the bad, the agency still needs to discuss both the good and the bad." *Sierra Club*, 2017 WL 3597014, at *10. Insofar as analyzing indirect impacts is concerned, FTA has fallen far short of doing so.

V. MARYLAND'S ABANDONMENT OF THE GREEN TRACK REQUIREMENT NECESSITATES PREPARATION OF A SUPPLEMENTAL EIS.

As explained previously, Governor Hogan made his approval for the Project contingent on numerous "changes" in the project as it had been described in the final EIS and ROD. *See supra* at 24-25. One such change announced to the public involved the elimination of a "requirement" for "Green Track" along certain stretches of the Project route, including the Georgetown Branch portion of the Trail. *Id.* Green Track is a measure that involves planting thick vegetation along a train route so as to confer a number of environmental benefits, including reducing stormwater runoff into streams and other water ways—a significant adverse impact on water quality when impervious surfaces replace natural ones, as will occur in many locations along the 16-mile Project route—as well as alleviating some wildlife impacts and public exposures to loud noise. *Id*; *see also* JA-1402 (statement in Final EIS that the "Project would increase impervious surfaces in the study area, which could increase the amount of surface runoff and potentially increase the level of contamination such as heavy metals, salt, organic molecules, and nutrients in the surface runoff").

As Defendants conceded in the district court, when the Record of Decision was issued the public was told in no uncertain terms that Maryland "*will use green track* along the Georgetown Branch right-of-way, and in locations in Prince George's County, which would allow for some water absorption, thereby reducing the movement of contaminants to surface water bodies, reducing impervious cover, and reducing stormwater runoff." JA-1066 (emphasis added). Moreover, this commitment was specifically made in the section of FTA's decision document that responded to public concerns regarding the Project's impacts on water quality and quantity. *See* JA-1063. FTA and Maryland responded to these concerns by telling the public that Maryland "will use green track along the Georgetown Branch right-of-way, and in locations in Prince George's County." *Id.*[12]

However, in his announcement that various "requirements have been changed to provide more flexibility and achieve cost savings"—which was preceded by no public notice or comment—Governor Hogan instructed that less

[12] The U.S. Fish and Wildlife Service also relied on the Green Track commitment in concluding that the Project would not adversely affect two highly imperiled species of "amphipods"—the Hay's spring amphipod, which is federally listed as endangered, and the Kenk's amphipod, which has been proposed for listing. *See* JA-2214. These are tiny water-dependent creatures that reside in Rock Creek Park and in Montgomery County, in close proximity to where the Project will be built. *See id.* (August 2014 Fish and Wildlife Service letter explaining the Service's "understanding" that the "fill to be used . . . is to be covered in green track") (citing Maryland's "Water Resources Technical Report" and a December 2013 meeting of "project engineers").

expensive track surfaces could be used "where Green Track was previously *required*." JA-2139 (emphasis added). This cost-cutting change triggers the need for a Supplemental EIS. It entails "substantial changes in the proposed action that are relevant to environmental concerns," as well as "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)(1); *see also* 23 § CFR 771.130 (FTA's NEPA regulations providing that an SEIS "may be necessary for major new fixed guideway capital projects proposed for FTA funding *if there is a substantial change in the level of detail on project impacts during project planning and development*") (emphasis added); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 782-84 (11th Cir. 1983) (holding that the alteration of a mitigation plan associated with a permit for wetlands destruction required preparation of an Supplemental EIS).

The district court held that, although the elimination of Green Track is indeed "related to the environmental consequences of the project," it did not "present significant new circumstances" warranting a Supplemental EIS because it was not a "required, essential element *of the [Final] EIS*." JA-938 (emphasis added). However, while the Final EIS also pointed to the use of Green Track, it is, in any case, the federal agency's Record of *Decision*, prepared following issuance of the EIS and public comment on it that commits the agency, as a final matter, to

the steps that will be taken to address environmental impacts analyzed in the EIS. *See* 40 C.F.R. § 1505.2.

The Final EIS must "rigorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14(a), including alternatives for reducing adverse impacts, but it is the Record of Decision that serves the legal function of "[s]tating *what the decision was*," including "*whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted* and, if not, why not." 40 C.F.R. §§ 1505.2(a), (c) (emphasis added). Here, the Record of Decision informed the public, as well as other federal and state agencies, that FTA and Maryland had made the "decision" to reduce harmful stormwater runoff and alleviate other adverse impacts by requiring Green Track, particularly along certain sections of the Project route of particular concern to Plaintiffs. JA-1063, 1066. The elimination of that requirement is the textbook example of a project change with potentially significant impacts that must be analyzed, and subject to public scrutiny, in a Supplemental EIS.

VI. GIVEN THE SERIOUS DEFICIENCIES IN THE NEPA PROCESS, VACATUR IS THE APPROPRIATE REMEDY.

Defendants contend that the district court exceeded its authority by granting the "ordinary" remedy of vacatur after finding that FTA had unlawfully failed to comply with NEPA. *Compare* Fed.Br.33-35; Md.Br.39-41, *with Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)

(explaining that vacatur is the "ordinary result" in APA cases); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (stating that setting aside agency action is the "normal[]" approach to remedying APA violations). According to Defendants, because the district court held that a Supplemental EIS was required rather than finding any defect in the initial NEPA analysis underlying the Record of Decision, the district court had no choice but to leave the Record of Decision in place while the Supplemental EIS is prepared. Fed.Br.33-35; Md.Br.34-36.

The Court need not consider this argument for two reasons. First, if the Court agrees with Plaintiffs that the Final EIS *itself* failed to adequately address reasonable alternatives and/or environmental impacts, then even Defendants would presumably agree that there is a fundamental "flaw in the Final EIS or Record of Decision" that warrants setting aside the Record of Decision and Final EIS. Md.Br.36.

Second, Defendants have waived the argument that the district court had no legal authority to set aside the Record of Decision. In the district court, Federal Defendants and Maryland argued that application of the *Allied-Signal* test for vacatur counseled in favor of the district court exercising its *discretion* to leave the Record of Decision in place during remand, but no party argued that the district court lacked any legal *authority* to vacate. *See* ECF No. 99-1 at 7-13 (Federal

Defendants Rule 59(e) motion; ECF No. 98-1 at 6-16 (Maryland's Rule 59(e) motion); ECF No. 116-1 at 15 (Maryland's Renewed Cross-Motion for Summary Judgment). Because an argument that was "not raised in the district court" is "not properly before" this Court, the argument is "forfeited." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 439 (D.C. Cir. 2012) (internal quotations omitted); *see also Benoit v. Dep't of Agric.*, 608 F.3d 17, 21 (D.C. Cir. 2010).

Moreover, even if the argument had been properly raised below, it is baseless. Defendants' newly minted position is that regardless of the reason why a Supplemental EIS is required—e.g., even if is because the entire justification for the federal action has been called into question by subsequent events, or a devastating environmental impact will result that was not previously anticipated (such as an earthquake)—the agency's Record of Decision *must* nevertheless be kept in place (thus allowing the action to go forward) *while* the legally required Supplemental EIS is prepared.

That is an absurd approach to NEPA that does precisely what the Supreme Court has said reviewing courts should not do: turn NEPA compliance into a "paperwork" exercise that can have no impact on actual decisionmaking. *Public Citizen*, 541 U.S. at 768-69 (internal quotation omitted); *see also Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 560-63 (9th Cir. 2006) (setting aside a species management plan based on court's determination that agency had failed to

prepare an Supplemental EIS or adequately explain why one was unnecessary); *Bundorf v. Jewell*, 142 F. Supp. 3d 1133, 1137 (D. Nev. 2015) (vacating a Final EIS and Record of Decision while agency prepared a Supplemental EIS addressing new information regarding project's impacts on golden eagles).

Defendants' convoluted argument that Congress' establishment of a statute of limitations for challenges to FTA decisions somehow means that Congress intended to foreclose courts from exercising their traditional discretion to craft appropriate relief for NEPA violations, including for failure to prepare a Supplemental EIS addressing new circumstances or information bearing on the validity of the agency's underlying decision, also makes no sense. *See* Fed.Br.34. Defendants cite no authority in which any court has suggested that Congress intended to tie reviewing courts' hands in this self-defeating manner. On the other hand, it is well-established that "we do not lightly assume that Congress has intended to depart from established principles" that courts have broad latitude to remedy legal violations, particularly for violations of environmental statutes. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).[13]

[13] Defendants' unduly restrictive view of the district court's authority is also impossible to harmonize with FTA's own stated policy on whether actions should go forward notwithstanding the need for a Supplemental EIS. In adopting its NEPA regulations, FTA explained that, although Supplemental EISs of "limited scope" would not invariably require the suspension of project activities, in

Also untenable is Maryland's assertion that the district court abused its discretion in twice applying the *Allied-Signal* standards. Md.Br.36-38. First, contrary to Maryland's characterization, a plaintiff requesting vacatur of agency action based on an APA violation does not have to satisfy the stringent standards required to obtain a "preliminary injunction." Md.Br.38. The APA provides that reviewing courts "shall" set aside agency action when the court determines that the agency has acted contrary to law, 5 U.S.C. § 706(2), and this Court routinely vacates agency decisions that fall afoul of the APA without applying the "extraordinary" standards that apply to the crafting of preliminary injunctions. Md.Br.38. Consequently, Maryland's effort to conflate these separate forms of relief should be rejected. *See also FCC v. NextWave Personal Commc'ns*, 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law,' which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering.") (emphasis in original; internal citation omitted).

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situations "[w]here the supplemental EIS requires a comprehensive reexamination of the entire project or more than a limited portion of the project, then the Administration *would suspend any activities that may have an adverse environmental impact or prejudice the selection of reasonable alternatives*." 52 Fed. Reg. 32,646, 32,657 (Aug. 28, 1987) (emphasis added). This is the same approach that the district court took in exercising its discretion to find that vacatur was appropriate. JA-668-71.

Second, not only did the district court consider and apply the correct *Allied-Signal* criteria rather than a preliminary injunction standard that had no applicability to a final disposition of an APA claim on the merits, but the court's explanation for its vacatur was entirely sensible given the court's ruling that a Supplemental EIS was necessary to reassess the underlying justification for the project as a whole in light of new information and developments. JA-668-71.

Finally, Maryland's criticism of the district court for "fail[ing] to mention the *Allied-Signal* factors or considering whether they favored continuing the vacatur" after the court "again concluded in its May 2017 Opinion that FTA needed to prepare a supplemental EIS," Md.Br.39, is disingenuous. When Maryland renewed its motion for summary judgment following the district court's initial remand, it did *not ask* the court to reapply the *Allied-Signal* factors. Rather, Maryland simply argued that the Record of Decision should be reinstated because FTA had correctly determined that no Supplemental EIS was necessary. *See* ECF No. 116-1 at 15; ECF No. 120 at 10. The court disagreed on the merits, ordered preparation of an SEIS, and refrained from revisiting the *Allied-Signal* issue when no one even asked the court to do so. *See* JA-1006-7. There was no "abuse of discretion" in that, and Maryland waived any argument to the contrary by failing even to mention *Allied-Signal* in its renewed summary judgment papers.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed in part and reversed in part, the ROD and EIS should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted,

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Dated: September 8, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by the Court. It contains 18,312 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally spaced typeface using Word in 14-point Times New Roman Style.

/s/ Eric R. Glitzenstein
Eric R. Glitzenstein
Dated: September 8, 2017

CERTIFICATE OF SERVICE

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

/s/Eric R. Glitzenstein
Eric R. Glitzenstein

STATUTORY AND REGULATORY ADDENDUM

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5 U.S.C. § 706 — Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

[Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.]

23 C.F.R. § 771.101 — Purpose.

This regulation prescribes the policies and procedures of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) for implementing the National Environmental Policy Act of 1969 as amended (NEPA), and supplements the NEPA regulation of the Council on Environmental Quality (CEQ), 40 CFR parts 1500 through 1508 (CEQ regulation). Together these regulations set forth all FHWA, FTA, and Department of Transportation (DOT) requirements under NEPA for the processing of highway and public transportation projects. This regulation also sets forth procedures to comply with 23 U.S.C. 109(h), 128, 138, 139, 325, 326, 327, and 49 U.S.C. 303, 5301, and 5323.

[74 FR 12527, Mar. 24, 2009, as amended at 78 FR 8982, Feb. 7, 2013]

23 C.F.R. § 771.105 — Policy.

It is the policy of the Administration that:

(a) To the fullest extent possible, all environmental investigations, reviews, and consultations be coordinated as a single process, and compliance with all applicable environmental requirements be reflected in the environmental review document required by this regulation.

(b) Alternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goals.

(c) Public involvement and a systematic interdisciplinary approach be essential parts of the development process for proposed actions.

(d) Measures necessary to mitigate adverse impacts be incorporated into the action. Measures necessary to mitigate adverse impacts are eligible for Federal funding when the Administration determines that:

(1) The impacts for which the mitigation is proposed actually result from the Administration action; and

(2) The proposed mitigation represents a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measures. In making this determination, the Administration will consider, among other factors, the extent to which the proposed measures would assist in complying with a Federal statute, Executive Order, or Administration regulation or policy.

(e) Costs incurred by the applicant for the preparation of environmental documents requested by the Administration be eligible for Federal assistance.

(f) No person, because of handicap, age, race, color, sex, or national origin, be excluded from participating in, or denied benefits of, or be subject to discrimination under any Administration program or procedural activity required by or developed pursuant to this regulation.

23 C.F.R. § 771.115 — Classes of actions.

There are three classes of actions which prescribe the level of documentation required in the NEPA process.

(a) *Class I (EISs).* Actions that significantly affect the environment require an EIS (40 CFR 1508.27). The following are examples of actions that normally required an EIS:

(1) A new controlled access freeway.

(2) A highway project of four or more lanes on a new location.

(3) Construction or extension of a fixed transit facility (e.g., rapid rail, light rail, commuter rail, bus rapid transit) that will not be located within an existing transportation right-of-way.

(4) New construction or extension of a separate roadway for buses or high occupancy vehicles not located within an existing highway facility.

(b) Class II (CEs). Actions that do not individually or cumulatively have a significant environmental effect are excluded from the requirement to prepare an EA or EIS. A specific list of CEs normally not requiring NEPA documentation is set forth in §771.117(c) for FHWA actions or pursuant to §771.118(c) for FTA actions. When appropriately documented, additional projects may also qualify as CEs pursuant to §771.117(d) for FHWA actions or pursuant to §771.118(d) for FTA actions.

(c) *Class III (EAs).* Actions in which the significance of the environmental impact is not clearly estabilished. All actions that are not Class I or II are Class III. All actions in this class require the preparation of an EA to determine the appropriate environmental document required.

[52 FR 32660, Aug. 28, 1987, as amended at 74 FR 12529, Mar. 24, 2009; 78 FR 8983, Feb. 7, 2013]

23 C.F.R. § 771.123 — Draft environmental impact statements.

(a) A draft EIS shall be prepared when the Administration determines that the action is likely to cause significant impacts on the environment. When the applicant, after consultation with any project sponsor that is not the applicant, has notified the Administration in accordance with 23 U.S.C. 139(e) and the decision has been made by the Administration to prepare an EIS, the Administration will issue a Notice of Intent (40 CFR 1508.22) for publication in the FEDERAL REGISTER.Applicants are encouraged to announce the intent to prepare an EIS by appropriate means at the local level.

(b) After publication of the Notice of Intent, the lead agencies, in cooperation with the applicant (if not a lead agency), will begin a scoping process which may take into account any planning work already accomplished, in accordance with 23 CFR 450.212 or 450.318. The scoping process will be used to identify the purpose and need, the range of alternatives and impacts, and the significant issues to be addressed in the EIS and to achieve the other objectives of 40 CFR 1501.7. For the FHWA, scoping is normally achieved through public and agency involvement procedures required by §771.111. For FTA, scoping is achieved by soliciting agency and public responses to the action by letter or by holding scoping meetings. If a scoping meeting is to be held, it should be announced in the Administration's Notice of Intent and by appropriate means at the local level.

(c) The draft EIS shall be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The draft EIS shall evaluate all reasonable alternatives to the action and discuss the reasons why other alternatives, which may have been considered, were eliminated from detailed study. The draft EIS shall also summarize the studies, reviews, consultations, and coordination required by environmental laws or Executive Orders to the extent appropriate at this stage in the environmental process.

(d) Any of the lead agencies may select a consultant to assist in the preparation of an EIS in accordance with applicable contracting procedures and with 40 CFR 1506.5(c).

(e) The Administration, when satisfied that the draft EIS complies with NEPA requirements, will approve the draft EIS for circulation by signing and dating the cover sheet.

(f) A lead, joint lead, or a cooperating agency shall be responsible for printing the EIS. The initial printing of the draft EIS shall be in sufficient quantity to meet

requirements for copies which can reasonably be expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the draft EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The draft EIS shall be circulated for comment by the applicant on behalf of the Administration. The draft EIS shall be made available to the public and transmitted to agencies for comment no later than the time the document is filed with the Environmental Protection Agency in accordance with 40 CFR 1506.9. The draft EIS shall be transmitted to:

(1) Public officials, interest groups, and members of the public known to have an interest in the proposed action or the draft EIS;

(2) Federal, State and local government agencies expected to have jurisdiction or responsibility over, or interest or expertise in, the action. Copies shall be provided directly to appropriate State and local agencies, and to the State intergovernmental review contacts established under Executive Order 12372; and

(3) States and Federal land management entities which may be significantly affected by the proposed action or any of the alternatives. These copies shall be accompanied by a request that such State or entity advise the Administration in writing of any disagreement with the evaluation of impacts in the statement. The Administration will furnish the comments received to the applicant along with a written assessment of any disagreements for incorporation into the final EIS.

(h) The FTA requires a public hearing during the circulation period of all draft EISs. FHWA public hearing requirements are as described in §771.111(h). Whenever a public hearing is held, the draft EIS shall be available at the public hearing and for a minimum of 15 days in advance of the public hearing. The availability of the draft EIS shall be mentioned, and public comments requested, in any public hearing notice and at any public hearing presentation. If a public hearing on an action proposed for FHWA funding is not held, a notice shall be placed in a newspaper similar to a public hearing notice advising where the draft EIS is available for review, how copies may be obtained, and where the comments should be sent.

(i) The FEDERAL REGISTER public availability notice (40 CFR 1506.10) shall establish a period of not fewer than 45 days nor more than 60 days for the return of comments on the draft EIS unless a different period is established in accordance with 23 U.S.C. 139(g)(2)(A). The notice and the draft EIS transmittal letter shall identify where comments are to be sent.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005; 74 FR 12529, Mar. 24, 2009; 78 FR 8984, Feb. 7, 2013]

23 C.F.R. § 771.125 — Final environmental impact statements.

(a)(1) After circulation of a draft EIS and consideration of comments received, a final EIS shall be prepared by the lead agencies, in cooperation with the applicant (if not a lead agency). The final EIS shall identify the preferred alternative and evaluate all reasonable alternatives considered. It shall also discuss substantive comments received on the draft EIS and responses thereto, summarize public involvement, and describe the mitigation measures that are to be incorporated into the proposed action. Mitigation measures presented as commitments in the final EIS will be incorporated into the project as specified in paragraphs (b) and (d) of §771.109. The final EIS should also document compliance, to the extent possible, with all applicable environmental laws and Executive Orders, or provide reasonable assurance that their requirements can be met.

(2) Every reasonable effort shall be made to resolve interagency disagreements on actions before processing the final EIS. If significant issues remain unresolved, the final EIS shall identify those issues and the consultations and other efforts made to resolve them.

(b) The final EIS will be reviewed for legal sufficiency prior to Administration approval.

(c) The Administration will indicate approval of the EIS for an action by signing and dating the cover page. Final EISs prepared for actions in the following categories will be submitted to the Administration's Headquarters for prior concurrence:

(1) Any action for which the Administration determines that the final EIS should be reviewed at the Headquarters office. This would typically occur when the Headquarters office determines that (i) additional coordination with other Federal, State or local governmental agencies is needed; (ii) the social, economic, or environmental impacts of the action may need to be more fully explored; (iii) the impacts of the proposed action are unusually great; (iv) major issues remain unresolved; or (v) the action involves national policy issues.

(2) Any action to which a Federal, State or local government agency has indicated opposition on environmental grounds (which has not been resolved to the written satisfaction of the objecting agency).

(d) The signature of the FTA approving official on the cover sheet also indicates compliance with 49 U.S.C. 5324(b) and fulfillment of the grant application requirements of 49 U.S.C. 5323(b).

(e) Approval of the final EIS is not an Administration action as defined in paragraph (c) of §771.107 and does not commit the Administration to approve any future grant request to fund the preferred alternative.

(f) The initial printing of the final EIS shall be in sufficient quantity to meet the request for copies which can be reasonably expected from agencies, organizations, and individuals. Normally, copies will be furnished free of charge. However, with Administration concurrence, the party requesting the final EIS may be charged a fee which is not more than the actual cost of reproducing the copy or may be directed to the nearest location where the statement may be reviewed.

(g) The final EIS shall be transmitted to any persons, organizations, or agencies that made substantive comments on the draft EIS or requested a copy, no later than the time the document is filed with EPA. In the case of lengthy documents, the agency may provide alternative circulation processes in accordance with 40 CFR 1502.19. The applicant shall also publish a notice of availability in local newspapers and make the final EIS available through the mechanism established pursuant to DOT Order 4600.13 which implements Executive Order 12372. When filed with EPA, the final EIS shall be available for public review at the applicant's offices and at appropriate Administration offices. A copy should also be made available for public review at institutions such as local government offices, libraries, and schools, as appropriate.

[52 FR 32660, Aug. 28, 1987, as amended at 70 FR 24470, May 9, 2005; 74 FR 12530, Mar. 24, 2009]

40 C.F.R. § 1500.1 — Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

40 C.F.R. § 1500.3 — Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

40 C.F.R. § 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 which 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.

40 C.F.R. § 1502.16 — Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under §1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in §1502.14. It shall include discussions of:

(a) Direct effects and their significance (§1508.8).

(b) Indirect effects and their significance (§1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See §1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under §1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under §1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

40 C.F.R. § 1505.2 — Record of decision in cases requiring environmental impact statements.

At the time of its decision (§1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. § 1506.6 — Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor.* An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

40 C.F.R. § 1508.8 — Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. 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.

40 C.F.R. § 1508.14 — Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.