IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

COALITION TO PRESERVE MCINTIRE PARK *et al.*,	)	
Plaintiffs,	)	Civ No. 3:11-cv-0015 (NKM)
v	)	
MENDEZ, *et al*.	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs move for summary judgment Planitiffs' motion seeks a declaration that Defendants' approval and funding of the proposed Rt. 250 Bypass at McIntire Road Project was unlawful under §4(f) of the Transportation Act of 1966 and the National Environmental Policy Act, 42 U.S.C. §§ 4321-70(f). It also seeksto enjoin Defendant from funding the proposed project unless and until its errors are corrected..

This motion is supported by the accompanying memorandum of law and exhibits thereto.

Respectfully submitted,

Dated: October 17, 2011

/s/ James B. Dougherty, Esq.
709 3rd St. S.W.
Washington, D.C. 20024
Tel: 202-488-1140
Email: JimDougherty@aol.com

/s/ James D. Brown, Esq.
Law Office of James D. Brown
P.O. Box 2921
Charlottesville VA 22902
Va. Bar. No. 81225
Tel.: 434-218-0891
Email: jd@lawofficejdb.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2011, I will cause the foregoing Motion to be served, via the Court's CM/ECF filing system, on counsel for the Defendant.

/s/ James B. Dougherty

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

COALITION TO PRESERVE MCINTIRE PARK *et al.*,	)	
Plaintiffs,	)	Civ No. 3:11-cv-0015 (NKM)
v	)	
MENDEZ, *et al*.	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

James B. Dougherty, Esq.
709 3rd St. S.W. 3rd St. S.W.
Washington, D.C. 20024
Tel: 202-488-1140
Email: JimDougherty@aol.com

Pro Hac Vice Counsel for Plaintiffs

James D. Brown, Esq.
Law Office of James D. Brown
P.O. Box 2921
Charlottesville VA 22902
Va. Bar. No. 81225
Tel.: 434-218-0891
Email: jd@lawofficejdb.com

Counsel for Plaintiffs

October 17, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION AND SUMMARY

Plaintiffs submit this memorandum in support of their motion for summary judgment, filed herewith. In this case Plaintiffs seek injunctive and declaratory relief preventing construction of the "Route 250 Bypass Interchange at McIntire Road," (hereinafter "the Project") a highway project slated to be built part way through McIntire Park in Charlottesville, Virginia. Specifically, Plaintiffs challenge the validity of the decision of Defendant United States Federal Highway Administration ("FHWA") to approve and provide federal funding for the Project. As depicted and described more fully below, the Project would dramatically expand the existing Rt. 250 Bypass/McIntire Road intersection in a way that would needlessly compromise or destroy many acres of McIntire Park and McIntire Skate Park (hereinafter collectively "the Park"), as well as many of the historic and natural features found therein and nearby.

Plaintiffs contend that the FHWA'S selection of an alignment which called for the paving of a 775-foot-long stretch of the Park – "Alternative G1" – violated Section 4(f) of the Department of Transportation Act, 23 U.S.C. § 138, 49 U.S.C. § 303 ("§4(f)"). This law required the FHWA to select an alternative alignment (possibly "Avoidance Alternative 2") that would have substantially accomplished the Project's transportation objectives while having no significant adverse impact on the Park or other protected resources. Second, Plaintiffs contend that the environmental impacts of the Project are so substantial that FHWA was required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., to prepare not an "environmental assessment," but rather an environmental impact statement. Finally, Plaintiffs contend that even if an EIS was not mandated by NEPA, the FHWA unlawfully constrained the scope of its Environmental Assessment and Section 4(f) Evaluation by (1) failing to evaluate the Project, along with an adjacent project ("McIntire Road Extended") as part of a single,

federalized project, (2) improperly constraining its consideration of alternative project designs, in violation of both NEPA and §4(f).

FACTUAL BACKGROUND

The Project's "preferred alternative" (G1) would construct a new, grade-separated interchange with signalized ramps at the existing intersection of the Route 250 Bypass ("the Bypass") and McIntire Road (see Figure 1), AR # 37. [1/] According to the Final §4(f)

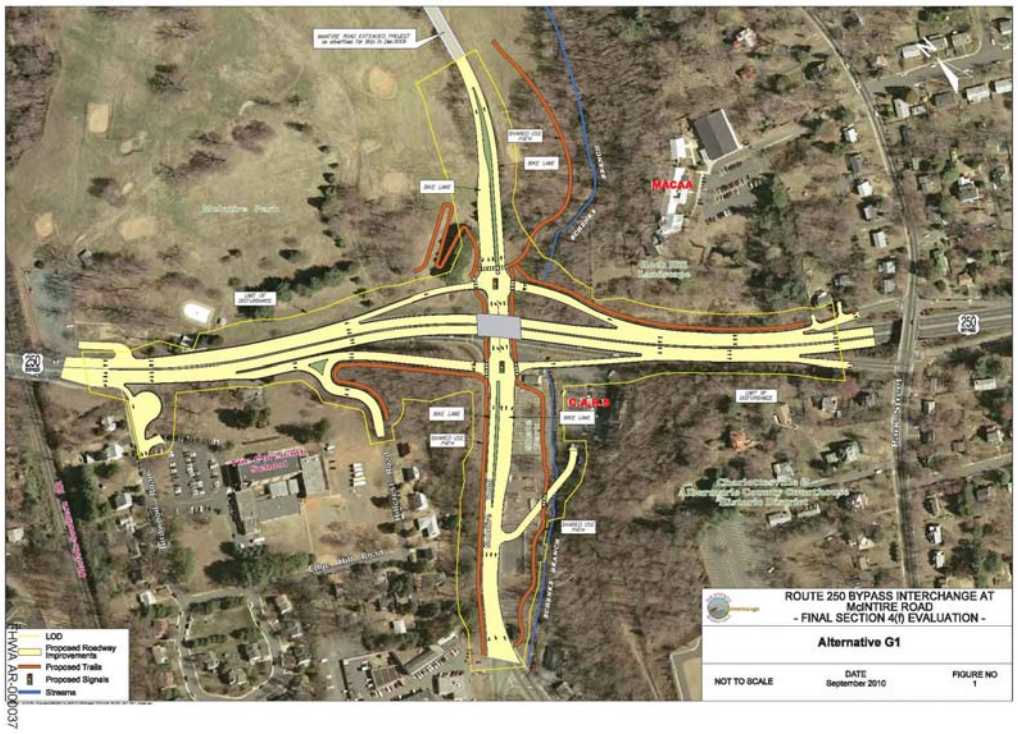


Figure 1

Evaluation, "[t]he purpose of this project is to address roadway and operational deficiencies that exist now and that will result from future traffic conditions at the Route 250 Bypass and McIntire Road intersection; safely accommodate future traffic; and improve community mobility, including bicycles and pedestrians." AR # 42.

[1] Herein Plaintiffs will use the abbreviation "AR #" to indicate pages from the Bates-numbered documents in the administrative record supplied by Defendants.

The Project is part of a larger federal/state/local government effort, some 52 years in the making, to construct a highway of approximately three miles in length, starting at Rio Road on the north and extending southward to and through the length of McIntire Park, to and south of the Rt. 250 Bypass.[2/] In its early decades, the proposed "Meadow Creek Parkway" proceeded under the aegis of several governmental agencies, including the Federal Highway Administration ("FHWA"), which in 1985 prepared a draft environmental impact statement ("EIS") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332, ("NEPA") as well as a "Section 4(f) Statement" for the proposed project. However, the proposed road project ran into considerable controversy, confrontation and delay. The draft EIS prepared by the FHWA was roundly criticized by citizens groups and, more importantly, by federal agencies. The U.S. Department of the Interior, expressing concerns about the project's likely adverse effects on cultural resources, water quality in Schenks Creek, and wildlife habitat, objected formally to the building of any road through the Park:

> "We recommend the selection of Alternative B, which... completely avoids McIntire Park."

Pltfs' Exh. 2 at 1. *See also id*. at 3 ("We object ... to Section 4(f) approval of [the trans-park alternatives]."). The Interior Department's opposition was echoed by the Department of Housing and Urban Development, which wrote:

> "In examining the 4(f) Statement, however, we note that both Alternatives A and D require the taking of land from McIntire Park. Alternative B would not require the taking of any park land.... Based on the above considerations, it would appear that under the requirements of Section 4(f), Alternatives A and D would not be approvable ..."

Pltfs' Exh. 3 at 1.

---

[2] *See* Pltfs' Exh. 1. Plaintiffs intend to move to have several documents added to the administrative record. Reference will be made herein to those documents as "exhibits," but they will not be presented to the Court unless and until they are made a part of the record.

The Commonwealth of Virginia, through its Department of Conservation and Historic Resources, similarly opposed the construction of the highway through the Park. In its comments of January 27, 1986, the Department observed that the highway would not only consume many acres of park land, but would effectively destroy an undetermined number of additional acres of adjacent lands.

Controversy swirled around the proposed highway because of the anticipated damage to the Park. Opponents argued that the use of federal funds for the taking of park land was prohibited by §4(f). On or about January of 1995, the Virginia Department of Transportation ("VDOT") withdrew its request for federal funding for the "McIntire Road Extension project" or "Meadowcreek Parkway," and on October 6, 1997 FHWA determined that §4(f) was no longer applicable for that reason. AR # 16718. For at least the past six years the FHWA has deemed the MRE exempt from the requirements of §4(f) and NEPA, as it is not receiving federal funding. AR # 67031.

In 2005 $27 million in funding was earmarked by Congress for the Interchange project. AR # 35108. This was a "clean" earmark; *i.e.*, nothing in the legislative authorizing language limited, guided, or otherwise shaped the purpose or nature of the Project. *Id.*

At about the same time, the FHWA began to plan and develop the Project. It conducted the regulatory reviews mandated by NEPA, §4(f), and the National Historic Preservation Act. The NEPA review culminated in a "Revised Environmental Assessment," dated October 6, 2009, AR # 5561, and a "finding of no significant impact," September 29, 2010, AR # 16 – determining that no EIS would be prepared. On the same day the FHWA released its "Final Section 4(f) Evaluation," ("§4(f) Evaluation"), AR # 33 – documenting the agency's

determination to proceed with the “G1" alternative as opposed to the “Avoidance Alternative 2" approach favored by Plaintiffs.

The project is being proposed for an area that is extraordinarily rich in historic resources. In the vicinity of the Project, one can scarcely plant a spade in the ground without triggering federal regulatory mandates, as National-Register listed or National Register eligible properties are located in every quadrant of the Interchange. AR # 47, 1846. These include the McIntire School/Covenant School, the Rock Hill Landscape, the Hard Bargain property, private properties located at 501 and 501 Park Hill, not to mention historic McIntire Park and the golf course located thereon. AR # 44.

In the §4(f) Evaluation the FHWA acknowledged that Alternative G1 would destroy approximately 7.8 acres of McIntire park land and harm several acres of other statutorily-protected parks and historic resources. *See* Figure 5, AR # 47, Table 4, AR # 53. Avoidance Alternative 2, on the other hand would take **no** land from McIntire Park because it lacks the “northern extension” that would connect the MRE to the Bypass. *See* Fig. 2, below. Nevertheless, Alternative G1 was chosen over Avoidance Alternative 2. Indeed, Avoidance Alternative 2 was not merely rejected, but **denied plenary consideration** because it would, according to the FHWA, 1) not accomplish “the project’s stated purpose and need; and 2) result in unacceptable safety or operational problems.” AR # 57.

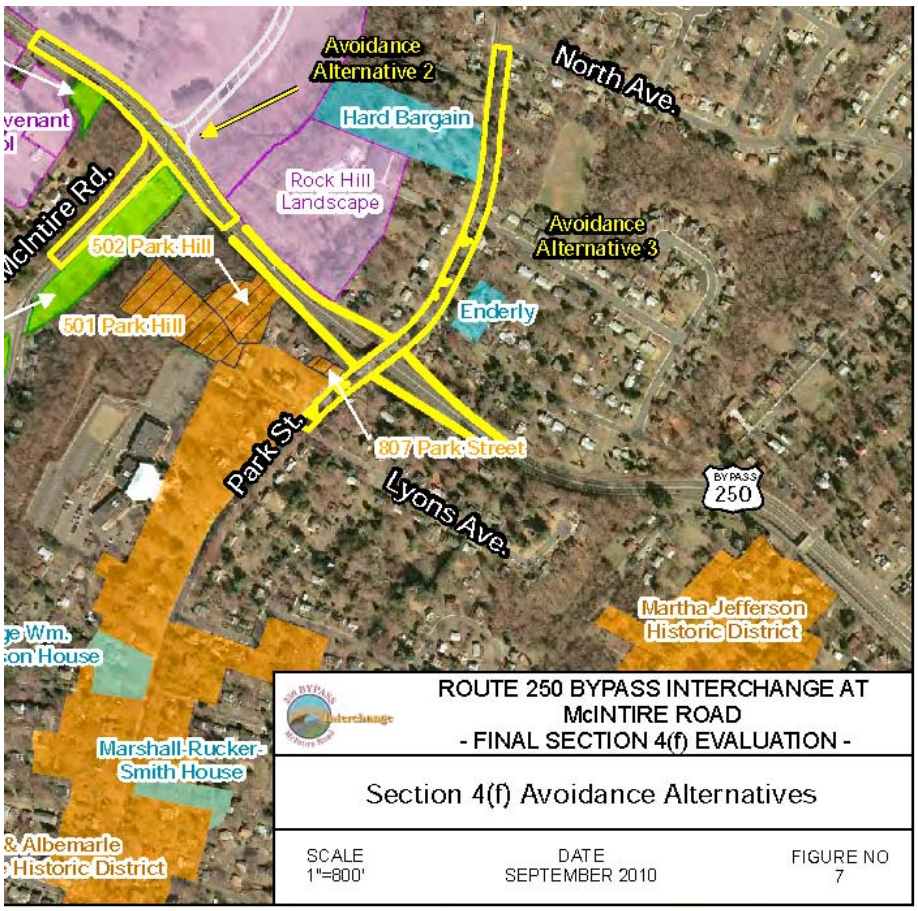


Figure 2 - inset from §4(f) Evaluation Fig. 7, AR # 56.

LEGAL STANDARDS

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, see Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co.*,

Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed. R. Civ. P. 56(e)).

The claims in this case are reviewed pursuant to the Administrative Procedure Act, 5 U.S.C. §706 ("APA"). Under the APA, courts set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). An action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

In cases where FHWA decisions have been challenged under §4(f), a stricter standard of review has been applied. In these cases, a "reasonableness," rather than an "arbitrary and capricious" standard has been applied. *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803, 810 (11th Cir. 1988), citing *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 441 (5th Cir. 1985); *Adler v. Lewis*, 675 F.2d 1085, 1092-93 (9th Cir. 1982).

In a case such as this the court's focus should be on the administrative record. Review of the administrative record is primarily a legal decision, readily resolvable by summary judgment. *Citizens for Scenic River Bridge, Inc. v. Skinner*, 802 F. Supp. 1325, 1332 (D. Md. 1991). The court must "ensure that the agency has adequately considered and disclosed the environmental impacts of its actions and that its decision was not arbitrary and capricious." *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980).

STATUTORY BACKGROUND

Section 4(f) of the Department of Transportation Act

Section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)"), 49 U.S.C. § 303, provides, in relevant part, that the Secretary of Transportation:

> may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance . . . only if –
>
> > (1) there is no prudent and feasible alternative to using that land; and
> > (2) the program or project includes all possible planning to minimize the harm . . . resulting from the use.

49 U.S.C. § 303(c). Section 4(f) property is "used":

> (1) When land is permanently incorporated into a transportation facility;
> (2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose . . .; or
> (3) When there is a constructive use of a Section 4(f) property as determined by the criteria in § 774.15.

23 C.F.R. § 774.17.

Consistent with same, where a proposed transportation program or project "uses" property protected by Section (f), an evaluation must be prepared that considers the two factors set forth above (*i.e.*, whether (1) all "prudent and feasible" alternatives to using the Section (f) property have been favored and (2) whether FHWA has conducted "all possible planning to minimize . . . harm"). *See Hickory Neighborhood Def. League v. Skinner*, 910 F.2d 159, 163-64 (4th Cir. 1990). *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971) and § 4(f) make clear that the ultimate public interest is in the preservation of parklands unless and until it is shown that parklands unavoidably must be used for highway purposes. *Coalition for Responsible Regional Dev. v. Brinegar*, 518 F.2d 522, 527 (4th Cir. 1975).

Unlike NEPA, §4(f) imposes **substantive** limits on the discretion of the Secretary of Transportation to approve a federally-funded transportation project that uses park land or other "§4(f) resources." The potency of this mandate was underscored by the Supreme Court in *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971):

> "Despite the clarity of the statutory language, respondents argue that the Secretary has wide discretion. They recognize that the requirement that there be no "feasible' alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route. Respondents argue, however, that the requirement that there be no other "prudent' route requires the Secretary to engage in a wide-ranging balancing of competing interests. They contend that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent.'
>
> "But no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another, there will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.
>
> "Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems." 401 U.S. at 411-413.

Therefore, if the FHWA selects an alternative that uses §4(f) property, that selection must be supported by information which demonstrates that there are "unique problems or impacts of extraordinary magnitudes. 23 C.F.R. § 774.17(f).

The National Environmental Policy Act

NEPA established "a national policy of protecting and promoting environmental quality." *Hodges v. Abraham*, 300 F.3d 432, 438 (4th Cir. 2002), quoting *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). As the Fourth Circuit has noted, "the purpose of NEPA is to sensitize all federal agencies to the environment in order to foster precious resource preservation." *National Audubon Society v. Department of the Navy*, 422 F.3d 174, 184 (4th Cir. 2005), citing *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

It is well established that FHWA decisions authorizing highway projects must be made in compliance with NEPA. *Audubon Naturalist Society of the Central Atlantic States, Inc., v. United States Department of Transportation*, 524 F. Supp. 2d 642 (D. Md. 2007). Under NEPA, every federal agency is required to take a "hard look" at the environmental implications of all of its regulatory decisions. *Ohio Valley Envtl. Coal. et al. v. Aracoma Coal Co. et al. ("Aracoma Coal")*, 556 F.3d 177, 191 (4th Cir. 2009). *See also Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("hard look" required in all cases).

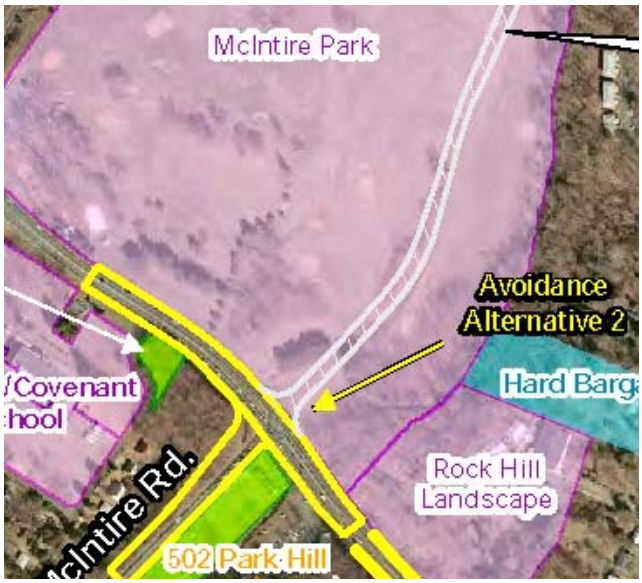
NEPA provides that an agency engaging in a major federal action may decline to prepare an EIS only if it concludes that the action will result in no significant adverse impact to the human environment. *Ohio Valley Environmental Coalition, supra*; 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1501.4(e). An agency must make a "convincing case" as to why an environmental impact statement is not necessary. *Maryland-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).

ARGUMENT

I. FHWA Violated §4(f) by Selecting Alternative G1 Instead of a Feasible and Prudent Alternative that Did Not Take Land from McIntire Park

As described above in the Factual Background, FHWA selected Alternative G1 for funding and construction. The case law under §4(f) places on FHWA the burden of showing that there was no feasible and prudent alternative that would not result in a taking of §4(f) resources. *See Overton Park, supra,* and progeny. FHWA cannot make such a showing on the present record because there was, in fact an alternative on the table that was feasible and prudent – and which would have achieved most of the Project's purposes with minimal damage to McIntire Park. As discussed below, FHWA first distorted the scale of this alternative, then dismissed it summarily, and never accorded it the plenary consideration demanded by §4(f).

Avoidance Alternative 2 is depicted in Fig. 7 of the §4(f) Evaluation, on p. 21. AR # 56. This is an inset of that Figure:



Avoidance Alternative 2 was described in the §4(f) Evaluation this way:

> Avoidance Alternative 2 would improve the Route 250 Bypass/McIntire Road intersection (proposed under No-Build conditions) to a total of 24 lanes including all four approaches. The intersection would be shifted to the southwest to avoid impacts to McIntire Park as well as impacts to McIntire Skate Park, Rock Hill Landscape, and the Charlottesville and Albemarle County Courthouse Historic District.
>
> Based on updated traffic projections, this alternative would need to be expanded to a 29-lane intersection to address future traffic needs at the Route 250 Bypass/McIntire Road intersection and improve vehicular safety. However, regardless of the number of lanes, the alternative does not meet the project's purpose and need because it would:
>
> • add more lanes of traffic in each direction, thus making the intersection less safe for pedestrians, bicyclists and motorists due to the increase in crossing distance and the number of conflict points;
> • not create a context sensitive setting that would benefit the Park or be in keeping with social demands for a gateway into the Park and downtown Charlottesville; and
> • not be consistent with the Congressional earmark in SAFETEA-LU.
>
> Avoidance Alternative 2 is not prudent because it would 1) be unreasonable to proceed with the alternative in light of the project's stated purpose and need; and 2) result in unacceptable safety or operational problems. Avoidance Alternative 2 is therefore not feasible and prudent and it is being eliminated because it causes other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) properties.

Indeed, the foregoing text represents **the entirety** of the FHWA's treatment of this alternative configuration for the Project. Rather than subjecting this alternative to rigorous or even moderate scrutiny via the agency's well-honed analytical procedures, the FHWA simply eliminated it at the threshold. Plaintiffs contend that this represents arbitrary and capricious decisionmaking and should be reversed, for the reasons set forth below.

Avoidance Alternative 2 is, on its face, a very appealing alternative means of improving east-west traffic flows along the Bypass at McIntire Road. It expands the traffic-moving capacity of the Interchange to 24 (or 29) lanes, which would certainly seem to be able to move a

large number of vehicles through the Interchange. In a previous draft of the §4(f) Evaluation, Avoidance Alternative 2 was noted to exact NO adverse effects on parkland or other protected resources.[3] And, unlike Avoidance Alternatives 1 and 3, this alternative would not require the relocation of any residences.

Why was it discarded at the threshold? The FHWA offered three reasons, specifically:

> a. add more lanes of traffic in each direction, thus making the intersection less safe for pedestrians and bicyclists;
>
> b. not create a context sensitive setting that would benefit the park or be in keeping with social demands for a gateway into the park and downtown Charlottesville;
>
> c. and not be consistent with the Congressional earmark in SAFETEA-LU.[4]

Each of these reasons can be shown to be frivolous:

a. All build alternatives create more lanes of traffic. But this creates hazard for pedestrians and cyclists only if they are **crossing** the street. However, with no "northern extension" on the other side of the street there will be very little non-motorized traffic moving northbound from McIntire Road into the Park. In any event, a well-timed traffic light could obviously address this concern satisfactorily.

b. The phrase "context-sensitive setting that would benefit the park" is vague jargon that begs the question of whether the Project would actually benefit – or, as Plaintiffs contend – virtually destroy lower McIntire Park. From a common person's vantage, McIntire Park will be benefitted if it is not partially destroyed by the construction of the "northern extension." FHWA evidently believed that the Park would be most benefitted by paving it.

---

[3] *See* draft of Sept. 20, 2007 at Table A-1, AR # 12593. This information is missing from the final version.

[4] Section 4(f) Evaluation at 22, AR # 57.

As for FHWA's rejection of Avoidance Alternative 2 based on the alleged "social demands" for a "gateway"[5/] into the park and the City, this project purpose seems ungrounded in the law or the administrative record. Since when can unwritten "social demands" be considered legitimate support for a major administrative determination in the context of judicial review? From a substantive standpoint, nothing in §4(f)'s text or judicial interpretations justifies wholesale park destruction as a tradeoff for such trifles. *See generally Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 413 (1971) ("...protection of parkland [is] to be given paramount importance.").

c. FHWA's use of the concept of "consistency with the Congressional earmark in SAFETEA-LU" is so ambiguous that it almost cries out for a citation to authority to lend it meaning. Does this mean that the Congress favored construction of the "northern extension?" Or any other configuration of the Project? Such a contention could only be honored by this Court if it were backed up by a solid citation to legislative history or statutory language. A review of the legislation and the administrative record produces no such language.[6/]

---

[5] Several possible "gateway" configurations are depicted at AR # 16032. All incorporate some kind of opening through which traffic can pass, such as a bridge underpass.

[6] The statutory language reads as follows:

119 Stat. 1449:

Public Law 109-59
Aug. 10, 2005

SEC. 1702. PROJECT AUTHORIZATIONS.

Subject to section 117 of title 23, United States Code, the amount listed for each high priority project in the following table shall be available (from amounts made available by section 1101(a)(16) of this Act) for fiscal years 2005 through 2009 to carry out each such project:

Highway Projects
High Priority Projects

Notably, an earlier version of the §4(f) Evaluation did, in fact, contain a reference to "the language of the Congressional earmark in SAFETY-LU." *See* Draft Section §4(f) Evaluation, September 20, 2007, AR # 12581. As is evident from page 17 of that document, an FHWA official edited that phrase to eliminate the words "language of the," thus implying that there was,

---

No. 5044
Construct Meadowcreek Parkway Interchange, Charlottesville VA
$25,000,000

119 Stat 1506:

SEC. 1934. TRANSPORTATION IMPROVEMENTS.

(a) Authorization of Appropriations.--

(1) In general.--For each of fiscal years 2005 through 2009, there are authorized to be appropriated from the Highway Trust Fund (other than the Mass Transit Account) such sums as are necessary to make allocations in accordance with paragraph (2) to carry out each project described in the table contained in subsection (c), at the amount specified for each such project in that table.
(2) Allocation percentages.--Of the total amount specified for each project described in the table contained in subsection (c), 10 percent for fiscal year 2005, 20 percent for fiscal year 2006, 25 percent for fiscal year 2007, 25 percent for fiscal year 2008, and 20 percent for fiscal year 2009 shall be allocated to carry out each such project in that table.

(b) Contract Authority.--
(1) In general.--Funds authorized to be appropriated to carry out this subsection shall be available for obligation in the same manner as if the funds were apportioned under chapter 1 of title 23, United States Code, except that the funds shall remain available until expended.
(2) Federal share.--The Federal share of the cost of a project under this section shall be determined in accordance with section 120 of such title.

(c) Table.--The table referred to in subsections (a) and (b) is as follows:

Transportation Improvements

No. 408
Construct Meadowcreek Parkway Interchange, Charlottesville VA
$2,000,000

in fact, no actual legislative language conveying any sort of congressional intent as to how the Project was to be designed or the earmarked monies spent. *Id*.

In sum, FHWA's specious attacks on the viability of Avoidance Alternative 2 are easily seen through. This was a very attractive alternative from both transportation, environmental and probably financial perspectives – because at-grade intersections are generally less expensive. If the demands of projected future volumes in fact required construction of a grade-separated, there is certainly sufficient funding available to build.

This demonstrates that FHWA made a straw man out of Avoidance Alternative 2. It claimed that 24 or 29 lanes of pavement would be needed, but then concluded that these would be too much of a barrier for pedestrian crossings. It implied that a "gateway" (grade-separated junction) was demanded (by someone - Congress or society at large) but instead designed it as an at-grade intersection and rejected it for that reason. In short, FHWA gave short shrift to the facts, the engineering, and the law, and in so doing violated the letter and spirit of §4(f).

The FHWA's mishandling of this matter represents an egregious violation of §4(f). The Achilles heel of its action is the "northern extension." Even the least sophisticated observer imaginable can see, in one glance, that this odd appendage cannot possibly serve any legitimate transportation purpose – other than linking with and thus enabling construction of the MRE. It's decision is worse than arbitrary and capricious; it's a frontal assault on the core principle of §4(f). It must therefore be remanded.

II. Because of the Significance of the Aggregate Environmental Impacts of the Project, the FHWA was Required to Prepare an EIS Rather than an EA

NEPA requires the preparation of an EIS in connection with any proposal for "major Federal actions significantly affecting the quality of the human environment." If a project may have a significant impact on the environment, then an EIS must be prepared. *See National Parks*

& Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001); *Anderson v. Evans*, 350 F.3d 815, 831 (9th Cir. 2003), *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983).[7/]

The key concept here is the threshold of "significance." This is addressed in regulations issued by the Council on Environmental Quality ("CEQ"), *see* 40 C.F.R. § 1500, *et seq*.. As to whether the environmental impacts of a given agency action will be sufficiently "significant" to trigger the EIS requirement, CEQ has prescribed 10 criteria, *See* 40 C.F.R. § 1508.27(b)(1)–(10), several of which apply here:

> Significantly as used in NEPA requires considerations of both context and intensity:
>
> (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (3) Unique characteristics of the geographic area such as **proximity to historic or cultural resources, park lands,** prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be **highly controversial**.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8th Cir.) The degree to which the action **may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places** or may cause loss or destruction of significant scientific, cultural, or historical resources. (emphasis added).
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

---

[7] The EIS has a dual purpose. First, it serves "to sensitize all federal agencies to the environment in order to foster precious resource preservation." *National Audubon Society v. Dept. of the Navy*, 422 F.3d at 184. Second, it "ensures that the public and government agencies will be able to analyze and comment on the action's environmental implications." *Id.*

Notably, if an agency's action is "environmentally 'significant' according to *any* of these criteria," then the agency erred in failing to prepare an EIS. *Public Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1023 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004) (emphasis in original); *see also Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001) (assessing two criteria under intensity and determining that "[e]ither of these factors may be sufficient to require preparation of an EIS in appropriate circumstances").

Criteria 3, 4 and 8 are easily satisfied here:

(3) and (8th Cir.): It is hard to imagine a location in which a half-mile long highway project could overlap with more historic or cultural resources, park lands. Of five §4(f) properties that would be used by the project, (McIntire Park/McIntire Park Historic Site; McIntire Skate Park; Rock Hill Landscape; Charlottesville and Albemarle County Courthouse Historic District; and McIntire/Covenant School) some would be skewered (McIntire Park) and others merely grazed (the Courthouse Historic District). But when cumulated, these damaging effects become substantial.

(4): This highway project has dominated the news, public discourse, and political affairs for decades. Anti-project yard signs have littered nearby neighborhood for several years. As of this moment, proponents of the Project enjoy a one-vote margin on the City Council, meaning that the upcoming election could tilt the political balance.

Impacts are "highly controversial" when there is a "substantial dispute about the size, nature, or effect" of the action. *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973). Criticisms from state and federal agencies, can demonstrate "substantial questions as to whether the project would cause significant environmental harm," requiring preparation of an EIS. Sierra Club v. Bosworth, 510 F.3d 1016, 1031-32 (9th Cir. 2007). *See also National Parks Conservation Ass'n*

v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2000). As discussed above, federal and state agencies have often urged no highway building in McIntire Park.

(7) This criterion deserves special attention as this forms the crux of this claim; it is discussed immediately below.

A. Because the Interchange Project and the MRE are Functionally and Environmentally Intertwined, FHWA Violated NEPA By Failing to Consider Their Joint and Cumulative Environmental Impacts In Determining Whether an EIS was Required

There was a time (1985) when FHWA acknowledged that construction of the larger, non-divided Meadow Creek Parkway would have "significant" environmental impacts, thus triggering NEPA's EIS requirement. Accordingly, it prepared a draft EIS. AR # 70393. However, in 1995, when the project had been broken down into segments, the FHWA determined that because the impacts would be less, it was no longer required to prepare an EIS, and that an EA would be sufficient. AR # 69347.

In the EA, FHWA continued to insist that NEPA requires no consideration of the MRE because it and the Project are completely independent of one another. *See* the EA, AR # 5648: "The Route 250 interchange project is not dependent on the Meadowcreek Parkway project and is moving forward independently. They have separate schedules, funding sources, project sponsors, and environmental review processes."

The FHWA's reasoning is fatally flawed. Obviously, the schedules of the two projects are not separate, because if either one is built to a point 775 into McIntire Park before the other, it will stand there unused, a monument to bad planning (and park destruction). Granted, the funding sources (and thus the "sponsors") for the two projects are different. As to the separate environmental review processes, this begs the central question in this case; Plaintiffs contend that the processes should have overlapped or merged.

Dividing a planned highway project so that the park-destroying segment receives no federal funds is precedented. In *Thompson v. Fugate,* 347 F. Supp. 120 (E.D. Va. 1972), FHWA was funding a 75-mile beltway around Richmond; it argued that a single 8-mile segment which was state-funded was therefore exempt from the requirements of NEPA and §4(f) (it would adversely affect Thomas Jefferson's boyhood home). But the court rejected that reasoning and enjoined the project.

The cases make it clear that the absence of federal funding is not necessarily dispositive in determining whether a highway project is imbued with a federal character for purpose of NEPA's application. *Historic Pres. Guild v. Burnley*, 896 F.2d 985, 990 (6th Cir. 1989) (citing *Hawthorn Envtl. Preservation Ass'n v. Coleman*, 417 F. Supp. 1091, 1099 (N.D. Ga. 1976), *aff'd*, 551 F.2d 1055 (5th Cir. 1977).); *cf. Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972) (federal funding was withdrawn at the last minute; NEPA held applicable). In *River v. Richmond Metropolitan Authority*, 359 F. Supp. 611, 635 (E.D. Va. 1973), Judge Merhige affirmed this rule and set forth an analytical approach designed to determine when a project has been so "segmented" that NEPA requires concurrent evaluation:

> In order to determine, therefore, when a group of segments should be classified as a single project for purposes of federal law, a court must look to a multitude of factors, including the manner in which the roads were planned, their geographic locations, and the utility of each in the absence of the other. *Id.* at 635.

The FHWA's regulations codify this standard by requiring that the action evaluated in any NEPA document "shall:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements. 23 C.F.R. § 771.111(f)

Applying either or both of these formulations demonstrates that FHWA, by intentionally blinding itself to the impacts and implications of the MRE's construction and completion, is guilty of illegal "segmentation." Plaintiffs will now address the several "segmentation" factors set forth by Judge Merhige and the FHWA regulations and demonstrate why both the Project and the MRE must be evaluated as one under NEPA.

First, dating back at least to 1975, the two projects were planned together. *See* the discussion and authorities cited in the "Factual Background" section of this brief. *See also* AR # 69008.[8/]

Second, their geographic locations could not be closer – they are not merely adjacent but actually overlapping![9/]

Third, the two projects will have cumulative impacts. The EA acknowledges that:

> McIntire Road Extended would introduce additional features into the park. Therefore, the context of the cumulative impacts is one whereby past, present, and reasonably foreseeable future actions have affected, and are planned to continue to affect, McIntire Park independent of the interchange project. The Preferred Alternative would contribute to the incremental impact on the park. EA § 3.12.3, AR # 5611.[10/]

---

[8] Letter from R. Fonseca-Martinez, FHWA to K. Slaughter (Dec. 22, 1997).

[9] At times FHWA's documentation suggests that the MRE is assumed to proceed all the way south to the Bypass (*e.g.*, §4(f) Evaluation at Fig. 7, AR # 56), while at other times the plans for the two projects show them to overlap at the "northern extension." (*e.g.*, Revised EA at Fig. 3, AR # 5576).

[10] This is a watered-down version of the cumulative-impacts discussion in the 2007 EA: "Meadowcreek Parkway is planned to be constructed north of the Rt. 250 Bypass within McIntire Park. This project is not funded by the Federal Highway Administration, and as such is not regulated under Section 4(f). However, the Meadowcreek Park Project will have an additional cumulative effect with the Preferred Alternatives for this interchange project. Cumulative effects to McIntire Park would include conversion of park recreation land to transportation uses, increased traffic and noise throughout the park, increased use of park facilities and impacts to wildlife and habitat in the park." AR # 13564.

Because construction of the MRE is forseeable (and indeed foreseen by FHWA here), the cumulative environmental impacts of the two projects must be evaluated, **in the same equation**, in FHWA's determination of "significance." *Western North Carolina Alliance et al. v. N.C. Dept. of Transportation*, 312 F. Supp.2d 765, 771-73 (W.D.N.C. 2003), (vacating and remanding EA and FONSI due to FHWA's unwillingness to assess the highway project's environmental impacts cumulatively with those of other pending highway projects.)

Fourth, when viewed independently of one another, both highway projects lack "logical termini." In general, "courts should look to the nature and purpose of the project in determining which termini are logical." *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 18-19 (8th Cir. 1973)). In the highway context, the courts have looked at whether the segments terminated at "crossroads, population centers, major traffic generators, or similar highway control elements." *Id*. at 18. At a minimum, in order for a segment to possess logical termini, the terminus must be at a point where there is an opportunity for traffic to enter or exit. *See, e.g., Patterson v. Exon*, 415 F. Supp. 1276, 1283 (D. Neb. 1976).

Here, the preferred alternative for the interchange Project ("G1") clearly does not have logical termini. The "northern extension" of the interchange extends 775 feet north of the Bypass, and terminates in the middle of McIntire Park, without connecting to any existing roadway, crossroad, or traffic generators. Absent the planned construction of McIntire Road Extended in its entirety, there would be no need for the 775-foot piece of McIntire Road Extended, since this highway stub would end "literally in the middle of the woods." *Patterson v. Exon*, 415 F. Supp. at 1283; *see also Swain v. Brinegar*, 542 F.2d 364, 270 (7th Cir. 1976) (Court held that a highway had been improperly segmented where "[t]he northern terminus ends in the country at no logical or major terminus.").

Fifth, there is strong evidence that the project was deliberately segmented in order to evade NEPA's EIS requirement. Despite the fact that Meadow Creek Parkway was originally (and continues to be) planned as a single facility, after preparing a DEIS the FHWA deliberately "scaled back" the scope of the project so that "the potential significant adverse environmental impacts identified in the EIS and associated with the proposed project were eliminated." Letter from R. Fonseca-Martinez, FHWA to K. Slaughter at 1-2 (Dec. 22, 1997). AR # 69007-08. This decision was made intentionally and with advice of counsel. *Id.* FHWA could then proceed with the Project on the basis of merely an EA rather than an EIS.

Deliberate down-scaling of project segments trips the alarm of judicial review, for it smacks of evasion. As Judge Merhige wrote in *River v. Richmond Metropolitan Authority*, 359 F. Supp. 611 (E.D. Va. 1973):

> **Any acts of the defendants that suggest that they may have decided to treat the roads separately in order to avoid the requirements of federal law will weigh very heavily in support of the project splitting theory**. As to weighing the utility of each road in the absence of the other, the Court notes that it does not sit as a traffic expert to determine when one will be efficient if the other is not built. However, if the Court concludes that the two highways each have such little value in their own right that their separate construction could be considered arbitrary or irrational, the Court will find them to be a single project. *Id.* at 635 (emphasis added).

Sixth, the two projects are functionally interdependent. This is evidently not only from the fact that each of the projects has a stub that meets the other in the middle of the woods, but from the abundance of comments found in the administrative record demonstrating that each project was designed to accommodate the other, and that if a future change is made to one then responsive changes will be made in its sibling. For example, in a comment response the EA stated:

> If McIntire Road Extended were not completed then Alternative G1 could simply be modified to allow turns onto McIntire Road southbound only. Therefore, the limit of

> construction for the interchange and the environmental impacts could be reduced to the northern interchange signal. AR # 5717.

Similarly, in the (now closed) companion case to this one involving the MRE, [11] counsel for the government argued in a recent filing[12] that:

> Even if the Route 250 above grade interchange is not built, MRE will be built and tie into Route 250 probably with an at grade intersection **following submission of revised plans by the VDOT to the Corps of Engineers and the Corps' amending the present permit.** ... The present plans prudently call for the MRE to stop short of Route 250 until it is determined if the Route 250 interchange will be built.... (emphasis added).

In a 2009 letter to Plaintiffs' counsel, an FHWA official stated:

> If the circumstances surrounding the construction of the McIntire Road Extended project were to change, and VDOT decided that it would no longer construct the project, then we would take that new information into account the redevelop the interchange project accordingly.[13]

Further, from the outset the two projects have been so wholly intertwined that their proponents have done their best to coordinate their respective construction contracts, as the FHWA acknowledged:

> "VDOT and the City [of Charlottesville] intended to issue construction contracts for the McIntire Road Extension project and the Route 250 Bypass interchange project as closely together as project development activities would allow." Letter to Peter Kleeman from Mr. Fonseca-Martinez, FHWA at 1 (Sept. 4, 2008). AR # 10588.

These comments demonstrate that these two projects could not be more closely intertwined or interdependent. Indeed, the two projects are in essence a single organism, evolving jointly in response to changes in the other, and certain to continue to do so in the future. The FHWA thus has no basis for refusing to focus its NEPA evaluation on the impacts and implications of the

---

[11] *Coalition to Preserve Mcintire Park v. United States Army Corps of Engineers, et. al.*,, VAWD Civ. No.3:11-cv-00041.

[12] Response of Defendant Corps of Engineers to Plaintiffs' Application for Temporary Restraining Order and Preliminary Injunction, docket #21, filed July 18, 2011, ¶ 5.

[13] Letter from E. Sundra to A. Ferster, March 16, 2009, AR # 34735.

two projects when considered together. Had it properly embraced both projects within the scope of its NEPA evaluation and properly considered the wide range of forseeable environmental and social that are likely to result, it would have recognized that the law required preparation of an EIS. *See Mullin v. Skinner*, 756 F. Supp. 904 (E.D.N.C. 1990) (overturning refusal to prepare EIS where FHWA failed to give adequate weight to secondary impacts).

III. Even if the FHWA was Not Required to Prepare an EIS Rather than an EA, the EA was Legally Deficient

Plaintiffs assume, solely for the purpose of this argument, that FHWA correctly determined that the highway Project in question could be addressed, consistent with the requirements of NEPA, in an EA rather than an EIS. This assumption does not let FHWA off the hook, however, because the substantive requirements applicable to the contents of EAS are not very different from those used to measure the adequacy of EISs. Though an EA, by definition, entails a less penetrating inquiry than an EIS, at a minimum it must "provide sufficient evidence and analysis" supporting the agency's decision not to prepare an EIS and "include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E),[9] of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." *Friends of Congaree Swamp v. FHWA*, 2011 U.S. Dist. LEXIS 45925 (D.S.C. 2011), quoting 40 C.F.R. § 1508.9. Although the substantive EIS requirements of the CEQ regulations do not expressly apply to EAS, courts have used EIS regulations as guidance in evaluating EAS. *See, e.g., Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transportation*, 113 F.3d 1505 (9th Cir. 1997) (using regulation to determine whether an EA should have been supplemented); *D'Agnillo v. U.S. Dep't of Housing and Urban Development*, 738 F. Supp. 1443, 1447 (S.D.N.Y. 1990) ("While the regulations do not specifically address

how an agency is to determine the appropriate scope of an EA, some guidance may be found in the provisions that relate to the scope of EIS's.").

In the context of either an EA or an EIS, the agency must conduct "a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 185 (4th Cir. 2005). Mere conclusions, unsupported by evidence or analysis, that the proposed action will not have a significant effect on the environment will not suffice to comply with NEPA. *See Hodges v. Abraham*, 253 F. Supp. 2d 846, 854--55 (D.S.C. 2002) (citations omitted). *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1247 (9th Cir. 1984) (holding that an EA is the functional equivalent of an EIS when the EA serves as the decision document assessing environmental impacts, and therefore is subject to the same procedures as an EIS).

A. The EA Failed to Disclose or Analyze the Cumulative Impacts of the Project

As they do in the context of EISs, courts review EAS to determine if they provide sufficient information to assess the "cumulative" environmental impacts of the proposed action. An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. General statements about impacts and risk do not constitute a "hard look" absent a justification why more definitive information could not be provided. Quantified or detailed information is required. Without such information, neither the courts nor the public ... can be assured that the agency provided the hard look that it is required to provide. *Te-Moak Tribe of Western Shoshone of Nev. v. United States DOI*, 608 F.3d 592, 603 (9th Cir. Nev. 2010) (citation omitted) (rejecting

EA for mineral exploration that had failed to include detailed analysis of cumulative impacts from nearby proposed mining operations).[14/]

But the EA in question contained virtually no such analysis. Though the Project is, in every sense, the linchpin that makes the MRE – and its associated park damage – physically possible, the EA merely makes some fluffy statements that happen to contain the word "cumulative."

> "Therefore, the context of the cumulative impacts is one whereby past, present, and reasonably foreseeable future actions have affected, and are planned to continue to affect, McIntire Park independent of the interchange project. The Preferred Alternative would contribute to the incremental impact on the park." AR # 5611.

This does nothing to inform the reader that if the interchange Project and the MRE move forward together, the southeast section of McIntire Park will be ruined in perpetuity – and if Alternative G1 does not move forward – McIntire Park will be preserved. And while the EA

---

[14] In *Kern v. United States Bureau of Land Management*, 284 F.3d 1062 (9th Cir. 2002), the court noted:

NEPA regulations contain only a brief description of the requirements for an EA, and do not specifically mention cumulative impact analysis. . . . We have held that an EA may be deficient if it fails to include a cumulative impact analysis or to tier to an EIS that has conducted such an analysis. *See Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001); *Blue Mountains Biodiversity Project*, 161 F.3d at 1214; *Idaho Sporting Cong. v. Thomas*, 137 F.32d 1146, 1152 (9th Cir. 1998). Other circuits have also recognized the requirement that, in appropriate cases, an EA must include a cumulative impact analysis. *See, e.g. Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 180 (3d Cir. 2000) ("[I]f the cumulative impact of a given project and other planned projects is significant, an applicant can not simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project . . ."); *Newton County Wild- life Ass'n v. Rogers*, 141 F.3d 803, 809 (8th Cir. 1998) (holding that an EA adequately addressed cumulative impacts where it covered a timber sale involving 1,871 acres but considered environmental impacts on 26,699 acres). The importance of analyzing cumulative impacts in EAs is apparent when we consider the number of EAs that are prepared. The Council on Environmental Quality noted in a recent report that "in a typical year, 45,000 EAs are prepared compared to 450 EISs. . . . Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully." Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act at 4, Jan. 1997, also available at http://ceq.hss.doe.gov/nepa/ccenepa/ccenepa.htm (last visited October 16, 2011) (emphasis added).

does acknowledge, AR # 5613, that cumulative impacts may be observed, it neither describes nor attempts to quantify these potentially catastrophic effects of running a road through eastern McIntire Park. This sentence is quickly following by praises of the "substantial beneficial effect" of paving this part of McIntire Park. \

At bottom, what the EA fails to do is explain that the Project will do much more than "improve the intersection." In fact, it will be the "one" in a "one-two" punch that will decimate McIntire Park and do substantial damage to an array of other park and historic resources located nearby. Because it does not reveal this important "cumulative effect," it does not meet the prevailing standards of adequacy for an EA.

Stated differently, the EA simply evaluated the wrong project. Under FHWA regulations, instead of tailoring the scope of the EA solely to the interchange Project, it was required to evaluate both the Project and the MRE as one. *See* 23 C.F.R. § 771.111(f), requiring that any action evaluated in any NEPA document "shall:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Because the Alternative G1 does not have logical termini, it cannot, by itself, be the subject of a single EA.

B. The EA Failed to Evaluate Reasonable Alternatives to Alternative G1

All EAS must contain complete analyses of the alternative courses of action that the agency considered and rejected in the context of every agency action. In part, this is so because

NEPA contains a separate provision requiring all agency proposals to go through an alternatives analysis.[15/]

"Any proposed federal action involving. . .the proper use of resources triggers NEPA'S consideration of alternatives requirement, whether or not an EIS is also required." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), *cert denied*, 489 U.S. 1066 (1988). "NEPA requires that in the EA an agency must evaluate a reasonable range of alternatives to the agency's proposed action, to allow decision-makers and the public to evaluate different ways of accomplishing an agency goal." Pacific Marine Conservation Council, 200 F. Supp. 2d at 1206. Accordingly, courts have frequently rejected attempts by agencies to exclude reasonable alternatives from an EA. *See, e.g., id* at 1206-07; *People ex rel. Van de Kamp v. Marsh*, 687 F. Supp. 495, 499 (N.D. Cal. 1988).

This brief argues, in section I of the Argument, that the FHWA impermissibly downplayed and obscured Avoidance Alternative 2 in the §4(f) Evaluation. But that analysis was far more penetrating than the scant attention paid to this alternative in the EA. Indeed, the EA barely mentions this compelling, environmentally benign alternative as a line-item in Table 5. AR # 5578. At no other point does the EA disclose the existence of this important alternative. This comes nowhere close to the prevailing standards for environmental assessments.

[15] *See* 42 U.S.C. § 4332(2)(E) (each agency must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

CONCLUSION

For the reasons set out above, Plaintiffs request that the decision on review be vacated and remanded.

Respectfully submitted,

Dated: October 17, 2011

/s/ James B. Dougherty, Esq.
709 3rd St. S.W. 3rd St. S.W.
Washington, D.C. 20024
Tel: 202-488-1140
Email: JimDougherty@aol.com

/s/ James D. Brown, Esq.
Law Office of James D. Brown
P.O. Box 2921
Charlottesville VA 22902
Va. Bar. No. 81225
Tel.: 434-218-0891
Email: jd@lawofficejdb.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2011, I will cause the foregoing Memorandum to be served, via the Court's CM/ECF filing system, on counsel for the Defendant.

/s/ James B. Dougherty