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

COALITION TO PRESERVE MCINTIRE PARK, *et. al.* **Plaintiffs,**	)	
vs.	)	**Civil No. 3:11cv-00015**
VICTOR M. MENDEZ, ADMINISTRATOR FEDERAL HIGHWAY ADMINISTRATION Defendant	)	

DEFENDANT'S BRIEF IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs challenge the Federal Highway Administration's, ("FHWA") issuance of a Finding of No Significant Impact, ("FONSI") and the Final Section 4(f) Evaluation for the Route 250 Bypass Interchange at McIntire Road project as issued on September 29, 2010.

The purpose and need for the Route 250 Bypass Interchange at McIntire Road project as determined from federal, state and local initiatives include the following:

- To improve roadway and operation deficiencies in the form of traffic congestion limited capacity, and inefficient traffic operations at the existing Route 250 Bypass/McIntire Road intersection and within the project area;
- To improve unsafe motorist, bicycle, and pedestrian conditions for those passing through the project area;
- To improve deficiencies in community mobility for automobiles, pedestrians and bicyclists;

- To address social demands for creating a context sensitive gateway into the City of Charlottesville that will benefit nearby recreational facilities; and
- To address Congressional desires as represented by their earmark for the project in SAFETEA-LU.

(AR 7, Bates # 000042.)

The Final Section 4(f) evaluation[1] announced that the alternative chosen by FHWA that met the purpose and need for the Route 250 Bypass at McIntire Road Project is Alternative G1, as depicted in Figure 1 of the Final Section 4(f) Evaluation. (AR 7, Bates #000036.) The action would construct a traditional diamond interchange with signalized ramps at the existing intersection of the Route 250 Bypass and McIntire Road. The Route 250 Bypass would be carried over McIntire Road.

The McIntire Road Extended project is a separate, state/city funded project that would extend McIntire Road to Melbourne Road at the City limit. (AR 7, Bates # 000036.) . The McIntire Road Extended project was advertised for bids by VDOT in December 2009 and is now under construction. At issue in this law suit is the proposed construction of an interchange at the existing "T" intersection of the Route 250 Bypass and McIntire Road in the City of Charlottesville in the Commonwealth of Virginia

Plaintiffs allege that the FHWA violated Section 4(f) of the Department of Transportation Act by rejecting one or more "feasible and prudent" alternatives and failing to conduct all possible planning to minimize harm on Section 4(f) property in violation of the Administrative Procedure Act. Compl. ¶ 50. However, it is Defendant's

[1] Section 4(f) of the U.S. Department of Transportation Act of 1966, as amended, 49 U.S.C. §303 and 23 U.S.C. §138.

position that there were no feasible and prudent avoidance alternatives, and after conducting all possible planning to minimize harm, an alternative was selected in accordance with all federal regulations.

Plaintiffs further allege that FHWA violated the National Environmental Policy Act by failing to consider alternative alignments for the Project that would have taken little or no parkland and/or caused less harm to historic resources. Compl. ¶ 54. Plaintiffs claim that the conclusions of the Environmental Assessment are based on faulty assumptions regarding the future status and likely alignment of the McIntire Road Extended, and are therefore invalid as well as arbitrary and capricious within the meaning of the APA. Compl. ¶ 55. Also, Plaintiffs allege that the scope of the environmental review presented within the Environmental Assessment is illegally truncated. Compl. ¶ 56. However, the record does not support these claims. As the record shows, Defendant considered every avoidance alternative, eliminating each after a thorough analysis. The Defendant's actions were not arbitrary or capricious. It is also Defendant's position that the information contained of the Environmental Assessment is not illegally truncated but instead establishes that the Defendant took the requisite "hard look" all at environmental consequences.

Finally, Plaintiffs allege the environmental impacts of the Project exceed the statutory threshold of "significance," thus triggering the duty to prepare an Environmental Impact Statement. Compl. ¶ 58-59. This too is without merit. It is Defendant's position that the decision to prepare an Environmental Assessment as opposed to Environmental Impact Statement was appropriate given the absence of key factors that would trigger an Environmental Impact Statement.

STATEMENT OF FACTS

The Route 250 Bypass is a key east-west, four lane (two lanes in each direction) urban principal arterial roadway for the City of Charlottesville that allows travelers to bypass the downtown area and city neighborhoods. The Route 250 Bypass includes grade-separated interchanges; at-grade signalized intersections, and unsignalized intersections. Interchanges occur at the major primary arterial route of Emmet Street (U.S. 29) as well as at local routes such as Rugby Avenue and Dairy Road to the west of McIntire road. (AR 7, Bates # 000040.) In 2004, FHWA authorized preliminary engineering for the Route 250 Bypass Interchange at McIntire Road project. It was then added to the Statewide Transportation Improvement Program (STIP), which is approved by the FHWA annually in accordance with 23 CFR Part 450. (AR 7, Bates # 000038) (AR 534, Bates # 004688). The Route 250 Bypass Interchange at McIntire Road project was resolved to be a City of Charlottesville project and was initiated in 2004. (AR 7, Bates # 000038) (AR 534, Bates # 004688.)

To address the purpose and need of the project, multiple alternatives were then considered. Using the existing site, consideration was then given to upgrading the intersection to twenty-four lanes. *Id.* Even with twenty-four lanes, on all approaches of the t-intersection, the result would be LOS F and twenty-nine lanes would be needed to reach LOS D. Even a 29-lane intersection would not meet all of the elements of the purpose and need. *Id.* Level of Service (LOS) is an engineering measurement that analyzes traffic conditions of a particular highway or intersection. If the intersection were left untouched, 2030 traffic conditions would result in failing LOS grades for both morning and evening peak hours whether or not McIntire Road Extended was built. (AR 7, Bates # 000042; AR

534, Bates # 004692.) Other alternative considerations included: additional interchange configurations, a transportation system management (TSM) alternative, and mass transit. (AR 534, Bates # 004694.) However both were dismissed as alternatives for not meeting the needs of the project and because planned mass transit improvements by the city would be insufficient. *Id.*

A no-build alternative and three interchange concepts were presented to the public in 2006. *Id.* This led to the development of thirteen different interchange alternatives. (AR 534, Bates # 004694-95.) These interchange alternatives were narrowed down to two as a result of public meetings and environmental analyses. The City endorsed Alternative G1 as the preferred alternative. *Id.* The No-Build Alternative and the preferred alternative were carried forward for additional analysis. (AR 534, Bates # 004696.)

Upon analyzing the preferred alternative, it was determined that five Section 4(f) properties would be used by the project; therefore, a Final Section 4(f) Evaluation was prepared (AR 7, Bates # 000043.) The impacted properties would be: McIntire Park; McIntire Skate Park; Rock Hill Landscape; Charlottesville and Albemarle County Courthouse Historic District ("Historic District"); and McIntire/Covenant School. *Id.* The impacts on the Historic District and McIntire/Covenant School would be *de minimis*. (AR 7, Bates # 000053.) For McIntire Skate Park, though, the whole park would be used. (AR 7, Bates # AR 000054.) For McIntire Park, a portion of the park would be used, but contributing elements, namely Dogwood Vietnam Memorial, would not be displaced. *Id.* For Rock Hill, an outer rock wall and plantings would be removed for the project, but the inner rock walls and gardens would remain intact. *Id.* Next, consideration went to three avoidance alternatives along with the No-Build Alternative.

The avoidance alternatives considered were designed to avoid all of the 4(f) properties listed above. Avoidance Alternative 1 would improve roadways northwest of McIntire Park. (AR 7, Bates # 000055.) Yet the improved roadways to the northwest would mean that approximately sixty residential properties would be impacted by front yard right-of-way acquisitions. (AR 7, Bates #000057.) Furthermore, Avoidance Alternative 1 did not meet all of the projects purpose and need elements. Avoidance Alternative 2 would shift the location of and improve the existing Route 250 Bypass/McIntire Road intersection to a total of twenty-four lanes on all approaches. (AR 7, Bates # 000057.) However, analysis determined that twenty-nine lanes would be required at the intersection to provide for satisfactory operations, and it still wouldn't meet all of the elements of the purpose and need. *Id.* Avoidance Alternative 3 would improve roadways east of the intersection. However, this alternative did not meet project purpose and need for similar reasons as Avoidance Alternative 1. *Id.*

After finding no feasible and prudent avoidance alternative, an analysis to determine which alternative caused the least overall harm was completed. (AR 7, Bates # 000059.) This analysis considered Location Avoidance Alternatives that avoided specific 4(f) properties; Interchange Alternatives that considered different geometric layouts of the intersection; and Historic Property Impact Minimization Alternatives that minimized harm to the historic properties. (AR 7, Bates # 000059, 000066-67.) A table compared all of the alternatives and the factors to consider in evaluating the least overall harm per 23 C.F.R. § 774.3(c)(1) and found Alternative G1 to cause the least overall harm to the 4(f) properties (AR 7, # 000076.) A few of the design features incorporated into Alternative G1 that minimized or avoided the impact to 4(f) properties included: shifting the mainline roadway

and interchange off- and on-ramps; adjusting the emergency services access road; construction of short retaining walls; and using steeper side slopes than customary practice. (AR 7, Bates # 000076-77.) Additional design considerations were not implemented due to safety concerns or other impacts; these design considerations included: replacing the raised median with striping or narrowing the roadway of the Route 250 Bypass; moving the westbound Route 250 Bypass on-ramp; and closing the gap between the north and south ramp intersections. (AR 7, Bates # 000077.) Although impacts caused by the multi-use trails and shared-use paths were recognized, they were considered to be countered by the increase in mobility and access points for the public. *Id.*

An additional step taken to minimize harm from Alternative G1 involved the signing of a Memorandum of Agreement (MOA) by the FHWA, the City of Charlottesville, the Virginia Department of Transportation, the Virginia State Historic Preservation Office, and the Advisory Council on Historic Preservation. (AR 95, Bates # 001605.) As part of the MOA, Rock Hill and the portions of McIntire Park eligible for the National Register of Historic Places are to be documented and photographed in accordance with the standards of the Historic American Landscape Survey. (AR 95, Bates # 001607.) From this information, two interpretive signs are to be installed at McIntire Park and Rock Hill. (AR 95, Bates # 001609.) Landscape design was also considered in the MOA and included provisions that landscape plans shall be developed for portions of McIntire Park and the Dogwood Vietnam Memorial, Rock Hill, and for the Historic District. (AR 95, Bates # 001609-12.) The MOA also called for research conducted for this project to be utilized in developing the McIntire Park master plan. (AR 95, Bates # 001610.)

The MOA also listed nine design minimization measures to be incorporated in the

project: (1) shortening the length of the interchange bridge by moving the north-south shared-use paths closer to McIntire Road; (2) lowering the profile of the bridge; (3) constructing a retaining wall near part of McIntire Park; (4) placing the off-ramp closest to Rock Hill as close to the mainline as practicable to avoid direct impacts to Rock Hill's inner stone wall; (5) minimizing ground disturbance and installing construction fencing at Rock Hill; (6) posting signage prohibiting trucks through McIntire Park; (7) posting a speed limit of no higher than thirty-five miles per hour within the interchange; (8) minimizing delay for emergency vehicles through signal optimization; and, (9) not affecting the portions of McIntire Park not directly affected by the project. (AR 95, Bates # 001610-11.)

The MOA was executed in June 2010. (AR 95, Bates # 001618.) The Revised Environmental Assessment and letter requesting the FONSI were prepared by the City of Charlottesville, reviewed by Virginia Department of Transportation ("VDOT"), and submitted to FHWA. The Revised Environmental Assessment was signed in October 2009 by FHWA, and made and available for review and comment. The letter requesting a FONSI addressed comments on the Revised EA, analyzed the significance of the impacts, and was submitted on August 17, 2010. Simkins Decl. ¶ 6. On September 29, 2010, Federal Highway Administration issued a Finding of No Significant Impact (FONSI) and a Final Section 4(f) Evaluation for the Route 250 Bypass Interchange at McIntire Road project. (AR 6, Bates # 000016) (AR 7, Bates # 00033). Because the City of Charlottesville is administering the Project, VDOT requested federal funds from FHWA and passed the funds through to the City for purposes of NEPA and Project development completion. (AR 7, Bates # 000039.)

STATUTORY FRAMEWORK

1. The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969, 42 U.S.C. §4321 et. seq., (NEPA) is designed to ensure that agencies consider the environmental impact of their decisions on "major federal actions," and requires agencies that propose projects likely to "significantly [affect] the quality of the human environment" to take a "hard look" at the environmental effect of the projects. 42 U.S.C. § 4332(2)(C); *Kleppe v. Sierra Club*, 427 U.S. 390, 409-410 (1976).[2] NEPA is "essentially procedural and does not mandate particular consequences." *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

Nor does NEPA pre-ordain any environmental result. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 548 (1978). If the decision is "fully informed" and "well-considered," it is entitled to judicial deference, and a reviewing court should not substitute its own policy judgment for the agency's. *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988).

NEPA requires federal 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." 42 U.S.C. § 4332(2)(E). An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" and

[2] Procedures for implementing NEPA are set forth in regulations promulgated by the Council of Environmental Quality, ("CEQ"), at 40 C.F.R. Part 1500. FHWA's NEPA regulations are set forth at 23 CFR § 771, and additional guidance for preparing NEPA documents is contained in FHWA's Technical Advisory T-6640.8A.

must explain why it has eliminated an alternative from detailed study, 40 C.F.R. § 1502.14(a); the agency must consider a "no action" alternative, *id.* § 1502.14(d); and the agency must designate a "preferred" alternative, *id.* § 1502.14(e).

The Court's task is to determine whether the agency considered the relevant factors and articulated "a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council*, 462 U.S. 87,105, 103 S.Ct. 2246, 76 L.Ed 2d 437 (1983); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.* 419 U.S. 281, 285-286 (1974).

2. <u>The Federal-Aid Highway Program</u>

The Federal-Aid Highway Act, codified at 23 U.S.C. § 101 et seq., provides the statutory basis for the Federal-Aid Highway Program ("FAHP"), a federally-assisted program of grants to states for the construction and maintenance of highway systems to provide for local and interstate commerce, provide for the national defense, and increase safety. 23 U.S.C. § 101(b). The FAHP requires Congressional enactment of multi-year authorization acts. The most recent authorization act is the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), which was enacted on August 11, 2005.

The FAHP, which is administered by FHWA, provides more than 30 billion dollars per year in funding assistance for eligible projects by reimbursing costs incurred by states based on various statutory apportionment formulas, as well as through discretionary programs. 23 U.S.C.§§ 101, 104. Federal funds participate in a percentage of the project cost, 23 U.S.C. § 120, and may also be used for bond-financing. 23 U.S.C. § 122. The FAHP includes numerous conditions and requirements that must be satisfied before the

FHWA can enter into a contractual obligation to fund a project. States seeking to use federal funds for a project, including demonstration projects, must first submit to the FHWA a list of proposed "programs," which the state wishes to pursue. 23 U.S.C. 105, 135; 23 C.F.R. 450.324(d),(e). Once a particular project is included in a state's list of proposed programs, the state may begin preliminary work, such as an environmental investigation under NEPA, on the proposed project. 23 C.F.R. 630.106(c)(2); 23 C.F.R. Part 771.

After a state receives the FHWA's final approval of the environmental investigations conducted under the FHWA's NEPA regulations, 23 C.F.R. Part 771, the state is required to submit the project's plans, specifications and estimates (PS&E), for FHWA approval. 23 U.S.C.106, 109; 23 C.F.R. 630 Subpart B. Once a state project receives PS&E approval, the FAHA requires that the approval be formalized in a "project agreement." 23 U.S.C. 110; 23 C.F.R. 630 Subpart A. As a final requirement, the FAHA requires the FHWA's issuance of an "authorization to proceed." 23 C.F.R. 630 Subpart A. It is only when, and if, PS&E approval is obtained, a project agreement is executed, and an authorization to proceed is issued, that the FHWA is legally obligated to provide federal highway funds for the construction of a state highway project. 23 U.S.C. 106; 23 C.F.R. 630 Subparts A-C.

3. Section 4(f) of the U.S. Department of Transportation Act of 1966

Section 4 (f) of the U.S. Department of Transportation Act of 1966 as amended (49 U.S.C § 303) and codified (23 C.F.R § 774.3) stipulates that the Administration may not approve the use of Section 4(f) property that is a significant publicly owned public park, recreation area, wildlife or waterfowl refuge, or any significant historic site unless the Administration determines:

(1) There is no feasible and prudent avoidance alternative to the use of land from the property and the action includes all possible planning to minimize harm to the property resulting from such use; or

(2) The use of the Section 4(f) properties, including any measures to minimize harm (such as avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a de minimis impact on the property.

Before a protected resource may be "used" by a project, FHWA must determine that there is no feasible and prudent alternative to using that resource. *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 401, 416 (1971); *Hickory Neighborhood Defense League* v. *Skinner*, 893 F.2d 58, 60 (4th Cir. 1990). If and when this occurs, the Administration may approve, from among the remaining alternatives that use the 4(f) property, only the alternative that causes the least overall harm in light of the statue's preservation purpose and the alternative selected must include all possible planning, as defined in 23 C.F,R § 774.17, to minimize harm to Section 4(f) property. The least overall harm is determined by balancing a number of factors. Those factors include:

(1) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
(2) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
(3) The relative significance of each Section 4(f) property;
(4) The views of the official(s) with jurisdiction over each Section 4(f) property;
(5) The degree to which each alternative meets the purpose and need for the project;
(6) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
(7) Substantial differences in costs among the alternatives.

STANDARD OF REVIEW

Judicial review is not specifically provided for under NEPA. The Court's review of this case is, therefore, under the APA. The standard of review "is a narrow one" and focuses on whether the agency actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989). The Court must ask "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* In the context of NEPA, this review prohibits a court from "substitut[ing] its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

A court is only to assess whether the agency's decision is "within the bounds of reasoned decision making." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983). *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 555 (1978).

As the Fourth Circuit has explained:

> In reviewing [agency] action, we bear in mind that the Act, like other environmental statutes, requires balancing conflicting priorities-in this case, water conservation, private compliance costs, state regulatory interests, and the safety of public water systems. Accordingly, we do not "sit as a scientific body, meticulously reviewing all data under a laboratory microscope." *Natural Res. Def. Council*, 16 F.3d at 1401. Nor is it "for the judicial branch to undertake comparative evaluations of conflicting scientific evidence." *Natural Res. Def. Council v. EPA*, 824 F.2d 1211, 1216 (D.C.Cir.1987). Rather, [the agency] must "explain its course of inquiry, its analysis, and its reasoning," and show a

> rational connection between its decision-making process and its ultimate decision. *Natural Res. Def. Council*, 16 F.3d at 1401; see also *Natural Res. Def. Council*, 824 F.2d at 1216, ("Our review aims only to discern whether the agency's evaluation was rational.").

Manufactured Housing Institute v. U.S. Environmental Protection Agency, 467 F.3d 391, 398-99 (4th Cir. 2006). *See also Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) ("Although our inquiry into the facts is to be searching and careful, this court is not empowered to substitute its judgment for that of the agency.").

Summary judgment is appropriate if there is no genuine issue regarding any material fact and if the moving party is entitled to judgment as a matter of law, Fed. R. Civ. P. 56(c), and is appropriate in a case seeking review of agency action under the APA. The "merit of the administrative decision is to be determined exclusively on the administrative record" *Lun Kwai Tsui v. Attorney General*, 445 F. Supp. 832, 835 (D.D.C. 1978), and the Court need not, indeed, may not, "find" underlying facts. Rather, the only issues presented are issues of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

ARGUMENT

Route 250 Bypass Interchange at McIntire Road project is a separate, federally funded project. Only major federal actions are to be subject to NEPA procedures. In this case, that major federal action is the Route 250 Bypass Interchange at McIntire Road project. The Route 250 Bypass Interchange at McIntire Road project is the only project receiving Federal aid, while the McIntire Road Extended ("MRE") project is not and will

not be receiving Federal aid. The McIntire Road Extended project is state funded and is funded for construction in the MPO's CLRP. It is currently under construction.

It is also important to note, that Plaintiffs have indicated their intent to request that exhibits be added to the administrative record. (Pls. Mem. Supp. Summ. J. 3) If and when Plaintiffs do so, Defendant will timely oppose that request. [3]

I) Defendant did not Violate §4(f) by Concluding that Avoidance Alternative 2 was not a Feasible and Prudent Alternative.

Section 4(f) of the Department of Transportation Act of 1966 (hereinafter "Section 4(f)") is codified at 49 U.S.C. §303 and 23 U.S.C. §138. The FHWA's implementing regulations for Section 4(f) state that the Administration "may not approve the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge unless (1) there is no feasible and prudent alternative to the use of such land, and (2) the action includes all possible planning to minimize harm to the property from such use or the Administration determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact, as defined in §774.17, on the property." 23 C.F.R. §774.3.

[3] This matter has been pending since February 2011. Since that time, the Scheduling Order has been filed and amended; the Administrative Record was filed on June 30, 2011; and, on August 12, 2011, Plaintiffs filed Notice as to Their Lack of Objections to the Scope of the Administrative Record. In filing such, Plaintiffs have effectively waived their opportunity to object to the scope of the Administrative Record. Furthermore, the exhibits Plaintiffs intend to have added to the Administrative Record are historical in nature and were not included in the Administrative Record because the scope and purpose of the project as well the environmental resources considered have changed, thus deeming and preferences based on those historical considerations irrelevant. (Plfs. Mem. Supp. Summ. J. 3.)

When confronted with the potential use of 4(f) resources, the FHWA must consider alternatives that avoid the 4(f) resources. These avoidance alternatives become the preferred alternative unless they are shown to not be feasible and prudent. Non-feasible avoidance alternatives are those that "cannot be built as a matter of sound engineering judgment." 23 C.F.R. § 774.17. An avoidance alternative is imprudent if:

> (i) It compromises the project to a degree that is unreasonable to proceed with the project in light of its stated purpose and need;
> (ii) It results in unacceptable safety or operational problems;
> (iii) After reasonable mitigation, it still causes:
> (A) Severe social, economic, or environmental impacts;
> (B) Severe disruption to established communities;
> (C) Severe disproportionate impacts to minority or low income populations; or
> (D) Severe impacts to environmental resources protected under other Federal statutes;
> (iv) It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
> (v) It causes other unique problems or unusual factors; or
> (vi) It involves multiple factors in paragraphs [(i)] through [(v)] of this definition, that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

23 C.F.R. § 774.17.

The above-mentioned regulatory language states no requirement that FHWA's selection of an alternative that uses 4(f) property must be supported by information which demonstrates that there are "unique problems of impacts of extraordinary magnitudes" as stated by Plaintiffs. (Plfs. Mem. Supp. Summ. J. 9.) The quoted terminology simply relates to the definition of imprudent. Though Plaintiffs attempt to rely on subsection (f) of 23 C.F.R § 774.17, section 774.17 does not support the proposition set forth by Plaintiffs; it is merely a section of defined terms, and subsection (f), does not exist. *Id.*

The purpose and need of a project is essential in establishing a basis for the

development of the range of reasonable alternatives required and assists with the identification and eventual selection of a preferred alternative. The following items may be listed and described in the purpose and need statement for a proposed action. These are by no means all-inclusive or applicable in every situation. They are intended as a guide.

- *Project Status* — Briefly describe the action's history, including measures taken to date, other agencies and governmental units involved, action spending, schedules, etc.
- *Capacity* — Discuss the capacity of the present facility and its ability to meet present and projected traffic demands. Discuss what capacity and levels of service for existing and proposed facilities are needed.
- *System Linkage* — Discuss if the proposed action is a "connecting link" and how it fits into the transportation system.
- *Transportation Demand* — Discuss the action's relationship to any statewide plan or adopted urban transportation plan. In addition, explain any related traffic forecasts that are substantially different from those estimates of the 23 U.S.C. 134 (Section 134) planning process.
- *Legislation* — Explain if there is a Federal, state, or local governmental mandate for the action.
- *Social Demands or Economic Development* — Describe how the action will foster new employment and benefit schools, land use plans, recreation facilities, etc. In addition, describe projected economic development/land use changes that indicate the need to improve or add to the highway capacity.
- *Modal Interrelationships* — Explain how the proposed action will interface with and serve to complement airports, rail and port facilities, mass transit services, etc.
- *Safety* — Explain if the proposed action is necessary to correct an existing or potential safety hazard. In addition, explain if the existing accident rate is excessively high and why, and how the proposed action will improve safety.
- *Roadway Deficiencies* — Explain if and how the proposed action is necessary to correct existing roadway deficiencies (e.g., substandard geometrics, load limits on structures, inadequate cross-section, high maintenance costs, etc.) In addition, explain how the proposed action will correct these deficiencies.

The purpose of the Route 250 Bypass at McIntire Road project is to address roadway and operational deficiencies that exist now and that will result from future traffic conditions; safely accommodate future traffic; and improve community mobility, including bicycles and pedestrians. (AR 534, Bates # 004692.) Existing conditions at the current intersection of Route 250 Bypass and McIntire Road present five specific needs to be

addressed by this project: 1) roadway and operational deficiencies in the form of traffic congestion, limited capacity, and inefficient traffic operations at the existing Route 250 Bypass/McIntire Road intersection and within the project area; 2) unsafe motorist, bicycle, and pedestrian conditions for those passing through the project area; 3) deficiencies in community mobility for automobiles, pedestrians, and bicyclists; 4) social demands for creating a context sensitive gateway into the City of Charlottesville that will benefit nearby recreational facilities; and 5) consideration of U.S. Congressional desires as represented by their earmark for the project in SAFETEA-LU. (AR 534, Bates # 004690.) The project is designed as a gateway to the City and McIntire Park that is sensitive to the context of its surroundings, minimizes impacts to the environment, supports existing and planned recreational development, and is consistent with the Congressional earmark established in SAFETEA-LU. (AR 534, Bates #004692.)

The purpose and need was developed with the aid of a very extensive Steering Committee process as described in the Revised EA, which was attended by at least one of the Plaintiffs. (AR 534, Bates # 004688.) These purpose and need elements were part of the 2007 EA, the 2009 Revised EA, and the 2009 Revised Section 4(f) Evaluation. (*See e.g.*, AR 1626, AR 533, AR 534.) Those documents were made available for public review, and all comments were addressed. At no point did Plaintiffs articulate their preference for Avoidance Alternative 2.

These purpose and need elements have been included since the beginning of the NEPA process and they have not changed. It should also be noted that neither the United States Department of Interior nor the Section 4(f) officials with jurisdiction (SHPO, ACHP, and the City of Charlottesville) had any adverse comments on the Revised Draft Section

4(f) Evaluation that was transmitted to them. (AR 6, Bates #000030.) In fact, the City's Department of Parks and Recreation (the owner of McIntire Park), had very positive and supportive comments on the document. (*See e.g.*, AR 133, Bates # 1854-55.)

A Section 4(f) evaluation was required for this project because numerous 4(f) properties were identified in the project area. The Selected Alternative G1 will use small portions of five properties, two of which were deemed to be *de minimis* impacts. (AR 533, Bates # 004646.) Several total avoidance options were considered but eliminated because they were not prudent. The 4(f) Evaluation describes a total of twenty-four (24) alternatives, including both design and location alternatives, that were considered for this interchange project. All alternatives were subjected to the test as described at 23 C.F.R 774. All avoidance alternatives were evaluated to determine if they were feasible and prudent. None were feasible and prudent. All alternatives that used Section 4(f) property were evaluated to determine which one would have the least overall harm to Section 4(f) property.

Plaintiffs take issue with Alternative G1 being selected because of the effects that this alternative will have on the McIntire park land. (Plfs. Mem. Supp. Summ. J. 5.) To support this assertion, Plaintiffs misleadingly state that the Route 250 Bypass Interchange at McIntire Road project will "dramatically expand the existing Rt. 250 Bypass/McIntire Road Intersection in a way that will needlessly compromise or destroy many acres of McIntire Park and McIntire Skate Park." (Plfs. Mem. Supp. Summ. J. 1.) Specifically, Plaintiffs assert that the Route 250 Bypass Interchange at McIntire Road project will destroy 7.8 acres of McIntire park land. (Plfs. Mem. Supp. Summ. J. 5.) However, Plaintiffs fail to clarify that the roadway impacts are only 5.5 acres, which represents 4.1 %

of the entire park land. Trails make up the other 2.3 acres, and trails are seen by most as amenities and positive features of a park. (AR 533, Bates # 004647.) The City is expected to move the McIntire Skate Park's skate ramps to another location prior to construction of the project. *Id.*

The Plaintiffs challenge a single aspect of our 4(f) compliance: claiming that Avoidance Alternative 2 should have been selected because it is a feasible and prudent avoidance alternative. (Plfs. Mem. Supp. Summ. J. 11.) This statement, however, is factually deficient. Simply put, Avoidance Alternative 2 was rejected because it does not meet three of the five elements of the purpose and need statement. As set forth in the Revised EA, this alternative was eliminated for not meeting the purpose and need of the Route 250 Bypass Interchange at McIntire Road project. (*See* AR 534). Avoidance Alternative 2 would have created safety concerns and operational problems, was inconsistent with the congressional earmark, and did not result in a context sensitive solution for McIntire Park. (AR 534, Bates # 0046490-50.) The safety or operational concerns associated with Avoidance Alternative 2 stem from the increased number of lanes. *Id.* While insufficient in number to handle future traffic volumes, these lanes would have increased the crossing distance and the number of pedestrian and vehicular conflict points. *See id.* Furthermore, Avoidance Alternative 2 posed potentially severe impacts to properties protected under Section 106. *Id.*

Plaintiffs state that Avoidance Alternative 2 would have achieved "most of the Project's needs with minimal damage to McIntire Park." (Plfs. Mem. Supp. Summ. J. 11.) What Plaintiffs fail to realize is that the fundamental problem with their preferred alternative, Avoidance Alternative 2, is that it fails to meet the purpose and need of the

project. Avoidance Alternative 2's inability to meet three of the five purpose and need elements renders this alternative imprudent as is defined in 23 C.F.R. § 774.17(i). It is well-established that alternatives can be rejected if they fail to fulfill the purpose and need of a project. *Druid Hills Civic Ass'n v. Federal Highway Admin.*, 772 F.2d 700, 715 (11th Cir 1985; *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 873 (D.C.Cir.1999). Plaintiffs state that Avoidance Alternative 2 "was noted to exact NO adverse effects on parkland or other protected resources." (Plfs. Mem. Supp. Summ. J. 13.) While this statement is only partially true, this factor fails to remedy the fact that Avoidance Alternative 2 is infeasible and imprudent for the aforementioned reasons. It is the Agency's decision to choose the alternative from the remaining alternatives that use Section 4(f) property in accordance with federal regulations. That alternative is Alternative G1.

Plaintiffs take issue with Avoidance Alternative 2 being eliminated due in part to social demands for a gateway in to the park and downtown Charlottesville. (Plfs. Mem. Supp. Summ. J. 14.) In fact, in a rhetorical question, Plaintiffs cynically ask, "Since when can 'social demands' be considered legitimate support for a major administrative consideration…?" *Id.* However, FHWA addressed this very comment in responding to comments on the 2007 EA by stating, "The citizens and City of Charlottesville have expressed the social need of having a transportation solution that acts as a gateway to the downtown area. McIntire Road is a gateway corridor noted in Chapter Nine of the City's 2001 Comprehensive Plan. Social demands are valid project needs as described in the FHWA guidance at the website above." (AR 534, Bates # 004844.) Furthermore, the ability to meet purpose and need is part of the feasible and prudent test set out in 23 C.F.R § 774.17.

Plaintiffs also sarcastically suggest that it is not reasonable for FHWA to include Congressional Intent as a part of the purpose and need. (Plfs. Mem. Supp. Summ. J. 14.)

The plaintiffs are wrong. FHWA's interpretation of Congressional Intent and the inclusion of Congressional Intent as an element of the purpose and need of a project has been recognized by the court, and accepted as reasonable. *Virginians for Appropriate Roads v. Capka*, Civ. Case No. 7:07-cv-00587-JCT, 2009 WL 2160454 at *3 (W.D. Va. July 20, 2009).

The Plaintiffs also fault the brevity of the analysis within the 4(f) Evaluation for Avoidance Alternative 2, stating that Avoidance Alternative 2 was not given rigorous or even moderate scrutiny. (Plfs. Mem. Supp. Summ. J. 12.) NEPA however, requires neither. NEPA does not guarantee a particular outcome, but only requires methods for determining the result. *Friends of Marolt Park v. U.S. Dept. of Transp.* 382 F.3d 1088, 1096 (10th Cir. 2004) (citing *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1987)).

> Unlike other statutes designed to protect the environment, (e.g. the Clean Air, Clean Water, and Endangered Species Acts), NEPA imposes no substantive environmental rules. Instead, it creates a somewhat cumbersome procedure whereby executive branch officials are required to assess and consider the environmental consequences of their proposed actions and, where prescribed, to invite and consider the views of the public at large. It *does not* require the executive branch to choose the least environmentally intrusive option. In fact, once the executive branch has complied with NEPA, the final decision on whether or how to go forward with a project is the executive's alone. Consequently, while we have the authority and duty to review agency compliance with NEPA, we may not review the wisdom of the agency's ultimate substantive decision. *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980); *State of North Carolina v. Hudson*, 665 F.Supp. 428, (E.D.N.C. 1987), *aff'd sub nom Roanoke River Basin*

> *Ass'n v. Hudson*, 940 F.2d 58, (4th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992).

New River Valley Greens v. U.S. Dept. of Transp., 1998 WL 633959, *2 (4th Cir. 1998).

> [NEPA] is procedural in nature and does not require "that agencies achieve particular substantive environmental results" but it is " action-forcing" in that it compels agencies to collect and disseminate information about the environmental consequences of proposed actions that fall under their respective jurisdictions. *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 371 (1989).

Southwest Williamson County Community Ass'n, Inc. v. Slater, 243 F.3d 270, 278 (6th Cir. 2001).

In this case, Defendant met all NEPA obligations by considering a range of reasonable alternatives. Plaintiffs are simply incorrect to contend that Defendant eliminated Avoidance Alternative 2 without proper consideration. While Defendant is "not required to consider and evaluate every conceivable alternative to the proposed roadway," *South Trenton Residents Against 29 v. Federal Highway Admin.*, 176 F.3d 658, 667, (3rd Cir. 1999), Defendant did thoroughly evaluate Avoidance Alternative 2. Defendant took the requisite "hard look" at Avoidance Alternative 2, the alternative preferred by Plaintiffs, before making a decision not to carry it forward. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976), ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of action to be taken.'").

Plainly stated, Plaintiffs disagree with Defendant's chosen alternative. They seek a decision from this Court that would, in essence, substitute their judgment for FHWA's. The Administrative Record establishes that Defendant has not acted arbitrarily nor capriciously, and demonstrates that Defendant not only took the requisite "hard look"

before reaching a decision, but have also adequately supported that decision and otherwise complied with NEPA and all other required regulations.

II.) Defendant's Decision to Prepare an Environmental Assessment as Opposed to an Environmental Impact Statement was Appropriate.

Ultimately, it is within FHWA's discretion and authority to prepare an EA instead of an EIS. Plaintiffs assert that because of aggregate environmental impacts, an EIS should have been prepared. However, this type of project is not the type that is normally an EIS per 23 CFR 771.115(a). (AR 6, Bates # 000029.)

An EIS is to be prepared for a major federal action that significantly affects the environment. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11. The FHWA has adopted the same rubric for EISs—the action must be likely to cause significant impacts. *See* 23 C.F.R. § 771.115(a). As is noted in the CEQ, significance is further defined to require the consideration of both the context and intensity of the impact. 40 C.F.R. § 1508.27. Council on Environmental Quality ("CEQ") regulations, interpreting NEPA, help agencies determine which actions require an EIS. *See* 40 CFR § 1500.3 (2003). They permit an agency to prepare a more limited document (an Environmental Assessment or "EA"), if the agency's proposed action is neither categorically excluded from the requirement to produce an EIS nor would clearly require the production of an EIS. *DOT v. Public Citizen*, 541 U.S. 752, 757-58 (2004); *see* 40 C.F.R. §§ 1501.4(a)-(b). An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a). If, pursuant to an EA, an agency determines that an EIS is not required, it must issue a "finding of no significant impact" ("FONSI"), which briefly presents the reasons why the proposed action will not have a significant impact on

the human environment. *Public Citizen*, 541 U.S. at 758 (citing 40 C.F.R. §§ 1501.4(e), 1508.13).

A) Defendant Considered Each of the Ten Factors Relevant to Triggering an EIS.

In a futile effort to establish that the Route 250 Bypass Interchange at McIntire Road project will yield significant impacts to the environment, Plaintiffs offer a lengthy dissertation regarding the ten-factor criteria considered in deciding whether to prepare EIS. (Plfs. Mem. Supp. Summ. J. 17.) As is evidenced in the administrative record, FHWA included a discussion about each of the ten factors in the FONSI.[4] Of the ten factors cited, Plaintiffs emphasize criteria 3, 4, and 8. (Plfs. Mem. Supp. Summ. J. 18-19.)

Criterion 3 requires consideration of "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." 40 C.F.R 1508.27(b)(3). Plaintiffs assert that McIntire Park would be "skewered" as a result of the 250 Bypass Project . Plaintiffs also assert these "damaging effects" will "become substantial." (Plfs. Mem. Supp. Summ. J. 18.) However, the administrative record establishes otherwise. In regard to McIntire Park, a substantial amount of measures have been incorporated into the project to minimize and mitigate the impact to McIntire Park. The cumulative effects on McIntire Park are not significant. (AR 6, Bates # 000026.) As the Revised EA explains, 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

[4] It should also be note that the letter requesting the FONSI considered the ten (10) factors, and that FONSI referenced that letter and indicated that it supplemented the City's/VDOT's analysis of significance in the letter. (AR 37, Bates #000406-19.)

the Route 250 Bypass project. Alternative G1 would contribute to the incremental impact on the park. (AR 534, Bates # 004734.) As previously stated, roadway impacts are a mere 5.5 acres, which represents 4.1 % of the entire park land. (AR 6, Bates # 000020.)

Criterion 4 addresses "the degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27 (b) (4). To support Plaintiffs' argument that Route 250 Bypass at McIntire project is in fact "highly controversial," Plaintiffs cite *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973). (Plfs. Mem. Supp. Summ. J. 18.) That case, however, establishes a precedent far more pertinent than the subject of what is meant by the term, "highly controversial." To elaborate, "the term [highly controversial] should properly refer to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use. Otherwise, to require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge would surrender the determination to opponents of a federal action, no matter whether major or not, nor how insignificant its environmental effect might be." *Rucker*, 484 F.2d at 162. Notwithstanding the court's position in *Rucker*, not only has there been no dispute regarding the size, nature, or effect from an agency in regard to the Route 250 Bypass Interchange at McIntire Road project, there has been no opposition whatsoever. No state or federal environmental resource agency or official with jurisdiction has expressed opposition to the project." (AR 6, Bates # 000030.) In addition, no agency indicated that the project would have a significant environmental impact. *Id.*

Plaintiffs also cite to *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007) to offer legal recourse, however, the precedent set forth in *Sierra* is inapplicable in relation to

the Route 250 Bypass Interchange at McIntire Road project. (Plfs. Mem. Supp. Summ. J. 18.) In *Sierra Club*, the comments of several federal and state agencies submitted in response to the CE raised substantial questions as to whether the project would cause significant environmental harm and expressed serious concerns about the uncertain risk, size, nature, and effects of actions under the CE. Those agencies included: The United States Fish and Wildlife Service, The Arizona Game and Fish Department and The California Resources Agency. No such attention or criticism has been given to the Route 250 Bypass Interchange at McIntire Road project, thereby making *Sierra Club* unpersuasive and highly distinguishable from the project in question. The Route 250 Bypass Interchange at McIntire Road project, which is in question in this lawsuit, is not the same project that agencies commented on back in the mid-1990s. However, the Plaintiffs go too far in stating that DOI "objected formally to the building of any road through the Park." (Plfs. Mem. Supp. Summ. J. 3.) The only documentation accessible to the DOI was the Draft EIS which contained the specific circumstances of the project the DEIS covered along with the information available at that point in time. Regardless, clearly Plaintiffs' statement is no longer true based on DOI's lack of adverse comments on the Route 250 Bypass Interchange at McIntire Road project, which does include a portion of a road in the park. (AR 6, Bates # 000030.)

B) Defendant did not Violate NEPA in Considering Cumulative Environmental Impacts to Determine whether an EIS Required.

An EA must include a "brief discussion[]…of the environmental impacts of the proposed action and alternatives…." 40 C.F.R. § 1508.9(b). Those impacts considered should be cumulative impacts which are defined as impacts that result from past, present,

and reasonably-foreseeable transportation project. 40 C.F.R. § 1508.7. In *Davis v. Mineta*, 302 F.3d 1104, 1109 (10th Cir. 2002), Davis sought to enjoin the defendants, transportation executives including the FHWA Administrator, from completing a two-phase project. The first phase would have involved the construction of a new freeway interchange and miscellaneous improvements, while the second would have expanded a road and built a new bridge across a river. *Id.* at 1110. Davis contended that the defendants had inadequately considered alternatives to the proposed action. *Id.* The court agreed with the plaintiffs and found only the preferred alternative and the no-build alternative were analyzed in detail for both the NEPA and Section 4(f) documents. *Id.* at 1120. Furthermore, the court determined that the defendants "summarily rejected…secondary avoidance alternatives such as 'minor alignment shifts, a reduced typical section, and restraining measures.'" *Id.* The documents also failed, according to the court, to analyze TSM, mass transit, and other build alternatives, other than to simply conclude they did not meet the purpose and need. *Id*. The court then pointed out that an engineering consultant's own report pointed out alternatives for the bridge crossing needed to "'be further evaluated…on [their] own merits.'" *Id.* at 1121 (internal citation omitted).

Here, the Revised EA's analysis is clearly distinguishable from that in *Davis*. The Revised EA considered the use of TSM strategies and mass transit, even discussing the existing implementations of these alternatives. Then, unlike the documents in *Davis*, the Revised EA and Section 4(f) Analysis discussed secondary avoidance alternatives and led to the implementation of design changes, alignment shifts, and a MOA to mitigate impacts. Unfortunately, Plaintiffs have misstated the consideration given to McIntrie Road Extended (MRE) project in the NEPA process.

At no point did FHWA state that the MRE project did not need to be considered. The MRE project is not a part of FHWA's action and therefore, is not included as a direct Impact. However, the MRE project was discussed extensively in the cumulative effects analysis section of the Revised Environmental Assessment. (AR 6, Bates # 004733-37.) In fact, FHWA included five (5) pages on cumulative effects in the Revised EA. (AR 6, Bates # 004733-37.) Within those pages FHWA discussed the MRE project's impacts to McIntire Park under subsections "Cultural Resources" and "Public Park and Recreational Facilities." *Id.*

As previously stated, the MRE project is a separate non-federally funded project. Federal action is typically present only when a project is wholly or partly federally funded. *River v. Richmond Metropolitan Auth.*, 359 F.Supp. 611, 628 (E.D.Va.), *aff'd,* 481 F.2d 1280 (1973). To determine scope of review for an EA or EIS, courts have considered whether or not the action will, in the end, also commit Federal funds to closely related projects. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987); *Save Barton Creek Ass'n*, 950 F.2d at 1140; *Village of Los Ranchos de Albuquerque*, 906 F.2d at 1483 (quoting *Piedmont Heights Civic Club, Inc. v. Moreland,* 637 F.2d 430, 439 (5th Cir. 1981).

While Defendant acknowledges precedent stating that the absence of federal funding is not necessarily dispositive in determining whether a highway project is imbued with a federal character, *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), in the spirit of inclusion, the additional factors the *Hawthorn* court used in determining whether a project is a federal

or a state project must also be highlighted. Those factors were: (1) whether the segmented portion is a mere extension of a federal road, or connective link; (2) whether, even if it is an extension or connection between two federal roads, it nevertheless has independent utility; (3) whether the segment has logical termini; (4) and whether the segment serves primarily local needs. *Id.* at 1100. Of these factors, the key factor that is applicable with regard to the 250 Bypass Interchange at McIntire Road project is factor (2); that is, the factor which requires independent utility. While this requirement is codified in 23 C.F.R. § 771.111(f), Plaintiffs overstate the applicability of this regulation in stating that 23 C.F.R. § 771.111(f) applies to "any NEPA document." (Plfs. Mem. Supp. Summ. J. 20, 28) In fact, 23 C.F.R. § 771.111(f) applies to EISs and FONSIs, not EAs.

C) Defendant did not Violate NEPA Because the Route 250 Bypass Interchange at McIntire Road Project and the McIntire Road Extension (MRE) Project are not Functionally and Environmentally Intertwined.

For projects resulting in an EIS or FONSI, the FHWA has promulgated regulations that require each project: (1) have logical termini; (2) have substantial independent utility, i.e. have substantial independent significance; (3) not restrict the availability of alternatives to other projects. *See* 23 C.F.R. § 771.111 (f).

In addition to this regulation, Plaintiffs assert that "segmentation" is responsible for the evasion of preparing an EIS. (Plfs. Mem. Supp. Summ. J. 21.) In support of this, Plaintiff offers Judge Merhige's factors to be evaluated when a project has been "segmented." (Plfs. Mem. Supp. Summ. J. 20.)[5] However, none of those factors nor 23

[5] "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." *River v. Richmond Metropolitan Authority*, 359 F. Supp. 611, 635 (E.D. Va. 1973).

C.F.R. § 771.111 (f) are present in the Route 250 Bypass Interchange at McIntire Road project. Any relevance or correlation between the above-mentioned factors and the Route 250 Bypass Interchange at McIntire Road project are overshadowed by Plaintiffs' mischaracterization of the administrative record and the facts contained therein.

First, Plaintiffs state that the two projects (Defendant will assume they are referring to the MRE project and the Route 250 Bypass Interchange at McIntire Road project) were planned together. This is entirely inaccurate. The Route 250 Bypass Interchange at McIntire Road Project did not come into existence until the early 2000s. FHWA did not become involved until the authorization of preliminary engineering in 2004. As Plaintiffs state in page 9 of their own memorandum, "at about the same time [2005], FHWA began to plan and develop the Project."

Second, Plaintiffs state the projects "are actually overlapping." (Plfs. Mem. Supp. Summ. J. 21.) However, the Route to 250 Bypass Interchange at McIntire Road project and the MRE project do not overlap. The proposed interchange roadway and ramp typical sections would vary in width to meet the projected traffic volumes and have a closed system drainage design. (AR 534, Bates # 004688.) A network of sidewalks and multi-use trails would provide access for pedestrians and bicyclists to traverse the project area and access McIntire Park. The project area extends approximately 0.5 miles along the Route 250 Bypass and approximately 0.5 miles along McIntire Road. *Id.* To the north, the project would connect to the 2-lane McIntire Road Extended which is a separate project that will be constructed without federal funding. *Id.*

Third, Plaintiffs seem to be suggesting that just because these two projects have cumulative impacts on a particular resource that they need to be part of the same action.

(Plfs. Mem. Supp. Summ. J. 21.) "Cumulative impacts" is a term defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. 40 C.F.R §1508.7. The fact that both the MRE project and the Route 250 Bypass Interchange at McIntire Road project contribute to cumulative impacts on McIntire Park have no bearing on Criteria 3 of 23 C.F.R 771.111(f). In support of their argument, Plaintiffs cite to *Western North Carolina Alliance et al. v. N.C. Dept. of Transportation*, 312 F. Supp.2d 765 (W.D.N.C.2003). (Plfs. Mem. Supp. Summ. J. 22.) However, *Western North Carolina Alliance* does not address the issue of "significance" of cumulative impacts. This case simply faults the Defendant for issuing a FONSI which fails to assess, or even acknowledge the potential for, cumulative impacts from numerous surrounding projects. Conversely, the Defendant in this case did acknowledge and asses the cumulative impacts of all surrounding projects, including the MRE project.

Fourth, Plaintiffs assert that "the preferred alternative for the interchange Project (G1) clearly does not have logical termini" due to the "northern extension" of the interchange. (Plfs. Mem. Supp. Summ. J. 22.) In choosing the logical termini, consideration must be given to recognizing and reviewing the environmental impacts from the project. (AR 1986, Bates # 017118.) The selected logical terminus does not need to be the most logical terminus, just a logical terminus. *Village of Los Ranchos v. Barnhart*, 906 F.2d 1477, 1483 10th Cir. 1990). As the D.C. Circuit and the Fifth Circuit have found, transportation projects within a single metropolitan area may present "elusive" logical termini. *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987); *accord*

Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 440 (5th Cir. 1981). The courts have remedied this issue by assigning "modest weight" to the logical termini determination "and focusing more on 'independent utility.'" *Coal. on Sensible Transp.*, 826 F.2d at 69; *accord Piedmont Heights*, 637 F.2d at 440. Independent utility for a project means that it will "be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made…." 23 C.F.R. § 771.111(f)(2). In determining independent utility, the D.C. Circuit has stated that "[t]he proper question is whether one project will serve a significant purpose even if a second related project is not built." *N.C. Alliance for Sensible Transp. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 683 (D. Md. 2001) (quoting *Coal. on Sensible Transp.*, 826 F.2d at 69). Even if two projects are next to one another, or may join one another, the independent utility of one project may be determined, separate of the other project. *See Daly v. Volpe*, 514 F.2d 1106, 1111 (9th Cir. 1975) (finding that the independent utility of a segment of an interstate could be properly determined, even though the logical termini were not in dispute).

The Route 250 Bypass Interchange at McIntire Road project has independent utility with or without the construction of the MRE project. The Route 250 Bypass Interchange at McIntire Road project connects logical termini and is of a sufficient length to address environmental matters on a broad script. (AR 6, Bates # 000031-32.) The project has rational endpoints for a transportation improvement and rational endpoints for a review of the environmental impacts. *Id.* An interchange without the northern extension also would connect logical termini and be a sufficient length to address environmental matters on a broad scope. (AR 6, Bates # 000031.) Therefore, the Route 250 Bypass Interchange at McIntire Road project is an independent utility whether or not MRE is constructed. (AR 6,

Bates # 000032.)

Fifth, Plaintiffs claim that the Route 250 Bypass project was "deliberately segmented in order to evade NEPA's EIS requirement" by " deliberately scal[ing] back" the scope of the project. (Plfs. Mem. Supp. Summ. J. 23.) The plaintiffs are wrong. FHWA's decisions were not made arbitrarily. (AR 11670, Bates # 069007-08). Further, under the FAHP and 23 U.S.C. section 145, the State, not FHWA, selects the projects that will utilize federal funding. After the FONSI was issued in 1995, the State simply never requested funding from FHWA because the State decided to use state funds only. That was the State's decision, not FHWA's decision. The only relevant decision that FHWA made was that the project that was evaluated in FHWA's FONSI was no longer a federal project; the decision was documented via a letter from FHWA's Headquarters office (AR 1954, Bates # 016718), with the consent of legal counsel (AR 1951, Bates # 016687.) [6]

Sixth, Plaintiffs falsely contend that the MRE project and the Route 250 Bypass Interchange at McIntire Road project are "functionally interdependent." (Plfs. Mem. Supp. Summ. J. 23.) To support this, Plaintiffs cite the fact that the planning of the Route 250 Bypass Interchange at McIntire Road has been responsive to the construction of the MRE. *Id.* Additionally, Plaintiffs cite the coordination of contracts for both the Route 250 Bypass Interchange at McIntire Road project and the MRE, respectively. *Id.* Plaintiffs claim that this demonstrates that the two projects are "more closely intertwined or interdependent." (Plfs. Mem. Supp. Summ. J. 24.) While it may be true that the Route 250 Bypass Interchange at McIntire project has been reactionary to the MRE project,

[6] Also, it is important to note that subsequent to FHWA's determination the project evaluated in the FONSI was not a federal project, 1) VDOT scaled back the project from 4 lanes to 2 lanes, and 2) VDOT has developed it without the need for FHWA involvement since the late 1990s.

absent any intent to avoid an environmental requirement, that is solely from an impacts standpoint. Plaintiffs cite to no evidence that FHWA has coordinated the limits of the Route 250 Bypass Interchange at McIntire Road project with VDOT and their plans for the MRE project. Additionally, Plaintiffs cite to no evidence that FHWA was involved in any way in the development of MRE project. As Plaintiffs stated in their memorandum filed in the (now closed) case involving the MRE project, "the interchange, after all, **is only an interchange**. (emphasis in original) And it's not new -- it's merely an upgrade to an existing interchange. Common sense indicates that the environmental harms associated with beefing up an existing interchange can't compare with those of building a new highway through virgin parkland." *See* ,"Plaintiffs' Application for a Temporary Restraining order and / or a Preliminary Injunction" p.32.[7] Throughout the planning process, FHWA has simply been reactionary, without any intent to avoid an environmental requirement . No intentional segmentation has taken place. The Route 250 Bypass Interchange at McIntire Road project has had independent utility from its very inception. (AR 11518 Bates # 067167). In regard to the coordination of contracts, Plaintiffs' cite to the coordination of contracts for both the Route 250 Bypass Interchange at McIntire Road project and the MRE project have been taken totally out of context. (Plfs. Mem. Supp. Summ. J. 23.) In its entirety, the clause cited to by Plaintiffs on page 24 of their memorandum states, "Further, it has been FHWA's understanding that VDOT and the City intend 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 in order to minimize disruption to the environment, adjacent**

[7] *Coalition To Preserve McIntire Park et al v. United States Army Corps of Engineers et al.*, WDVA Civ. # 3:11-cv-00041.

communities, and the public. Therefore, common sense dictates that if VDOT and the City are going to work toward this goal, then they are not going to spend time and money to develop design plans and construct a project that would be replaced by another project scheduled to follow closely behind. We made it clear at the time that VDOT has the authority and discretion to design and construct projects as they deem fit; NEPA does not dictate how projects are designed or construction projects are let or the limits that those design plans and contracts cover...". [emphasis added] (AR 1291, Bates # 010588.)

In essence, FHWA did exactly what Congress mandated when it enacted NEPA, by considering the environmental consequences of the proposed project on the Route 250 Bypass Interchange at McIntire Road project. 42 U.S.C. § 4321. Although NEPA establishes "significant substantive goals for the Nation," the duties it imposes upon agencies are "essentially procedural." *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978)); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193-94 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). Indeed, once the agency makes a decision subject to NEPA's procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken. *Strycker's Bay*, 444 U.S. at 227-228; *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976); *Citizens Against Burlington*, 938 F.2d at 194. FHWA followed the regulations implementing NEPA at 40 C.F.R. § 1500 et seq. and 23 C.F.R. § 771, et seq. Here FHWA, upon performing all procedural requirements decided to prepare an EA and FONSI as opposed to an EIS. Because the

agency has met all requirements outlined in NEPA's procedural requirements, the court should defer to the Agency's decision.

III.) The Environmental Assessment (EA) Prepared for the Route 250 Bypass Interchange at McIntire Road Project was Legally Sufficient.

As required by NEPA, the agency must take a "'hard look' at environmental consequences…." *Robertson*, 490 U.S. at 350 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)). In reviewing agency action for compliance with NEPA requirements, the reviewing court should overturn the decision of an administrative agency if the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Colorado Wild v. United States Forest Service*, 435 F.3d 1204, 1213 (10th Cir. 2006). The burden of demonstrating that the agency's decision was arbitrary, capricious, etc., rests upon the plaintiffs. *See, e.g., Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995).

When an agency prepares an EA, the EA must discuss "alternatives as required by section 102(2)(E) [of the NEPA; 42 U.S.C. § 4332(E)]." 40 C.F.R. § 1508.9(b). Per 42 U.S.C. § 4332(E), the agency must "study, develop, and describe appropriate alternatives" to the preferred alternative. Pursuant to the requirements of 40 C.F.R. § 1507.3, the FHWA codified its regulations concerning the NEPA in 23 C.F.R. § 771. The FHWA requires an EA to "identify alternatives and measures which *might* mitigate adverse environmental impacts…." 23 C.F.R. § 771.119(b) (emphasis added). For an EA, "the range of alternatives an agency must consider is smaller than in an environmental impact statement." *North Carolina v. FAA*, 957 F.2d 1125, 1134 (4th Cir. 1992). The agency, too, does not need to discuss or "consider alternatives which are 'infeasible, ineffective, or

inconsistent with the basic policy objectives' for the action at issue." *South Carolina ex rel. Campbell v. O'Leary*, 64 F.3d 892, 900 (4th Cir. 1995) (quoting *Headwaters, Inc. v. Bureau of Land Mgmt.*, 915 F.2d 1174, 1180 (9th Cir. 1990), *rehearing denied*, 940 F.2d 435 (1991)).

A.) The EA Sufficiently Disclosed and Analyzed the Cumulative Impacts of the Route 250 Bypass Interchange at McIntire Road Project.

The Revised EA provides a detailed analysis of the environmental impacts of the project while the FONSI provided a summary of the environmental impacts and the significance of the impacts. (AR 534, Bates # 004701-37; AR 6, Bates # 000017-30.) Numerous state and Federal agencies were provided a copy of the Revised EA; no comments in opposition to the Revised EA were received. (AR 6, Bates # 000030). Not only does FHWA contend that cumulative effects were considered, ACHP and SHPO also agreed that FHWA considered cumulative effects. The Section 106 MOA contains the following whereas clause: "Whereas, the McIntire Road Extended project (MRE) is being developed as a separate project in the same area as the FHWA undertaking that is the subject of this MOA, and while the MRE is not funded by FHWA or under its jurisdiction, the FHWA has, in consultation with the parties to this MOA, considered the contribution of FHWA's undertaking to the cumulative effects of transportation improvements on McIntire Park as a historic property." The MOA also states, "Whereas, FHWA and the City have consulted extensively with the Association for the Preservation of Virginia Antiquities (APVA), the North Downtown Residents Association (NDRA), Preservation Piedmont, Sensible Transportation Alternatives to the Meadowcreek Parkway-2025 (STAMP-2025), the Monticello Area Community Action Agency (MACAA), and the Dogwood Veterans

Memorial Committee regarding the effects of the undertaking on historic properties and have invited these other consulting parties to concur with this MOA pursuant to 36 C.F.R 800.6(c)(3)." In sum, FHWA included a detailed discussion of past, present, and future projects in the project area (*See e.g.* AR 534, Bates # 004683.)

Plaintiffs assert that the EA "neither describes nor attempts to quantify these potentially effects of running a road through eastern McIntire Park." (Plfs. Mem. Supp. Summ. J. 28.) However, that is wholly inaccurate. The EA specially states, "McIntire Road Extended will also be constructed north of the Route 250 Bypass within McIntire Park, resulting in additional impacts to McIntire Park. The loss of parkland from McIntire Road Extended has already been replaced by 49 acres of parkland in Albemarle County. These two roadways would have an additive cumulative effect that would include conversion of park recreational land to transportation uses, increased traffic, and noise through the park, and impacts to habitat and wildlife in the park." (AR 534, Bates #004736.) In addition to this, the EA explains, in great detail, the substantial beneficial effect of facilitating pedestrian and bicycle access and creating a new entrance to the currently underutilized eastern part of McIntire Park as was intended by those responsible for managing the park and its resources. *Id.* Simply put, the EA evaluated the correct project; the Route 250 Bypass Interchange at McIntire Road project.

B.) The Defendant's EA Sufficiently Evaluated Alternatives to Prior to Selection of Alternative G1.

In an effort to "study, develop, and describe appropriate alternatives," Defendant considered over 20 alternatives, including numerous alternatives suggested by plaintiffs during the Section 106 consultation process. There is documentation in the administrative

record of the consideration of all of the plaintiffs' suggestions. FHWA went above and beyond a reasonable range of alternatives. (AR 1368, Bates # 011163-65; AR 1452, Bates # 011628-29.)

Nevertheless, in a last-ditch effort to persuade the court that Defendant failed to sufficiently evaluate alternatives to Alternative G1, Plaintiffs assert that "FHWA impermissibly downplayed Avoidance Alternative in the §4(f) Evaluation" and the "EA barely mentions this compelling, environmentally benign alternative as a line-item." (Plfs. Mem. Supp. Summ. J. 29.) Lastly, Plaintiffs misguidedly argue "at no point does the EA disclose the existence of [Avoidance Alternative 2]." *Id.* What Plaintiffs fail to realize is "Avoidance Alternative 2" is the same alternative that is described in section 2.2.3 of the original EA and section 2.2.3 of the Revised EA, though it is not called "Avoidance Alternative 2" at those locations. (AR 533 Bates # 004634-35; AR 534; Bates # 004694). At that time, "Avoidance Alternative 2" was eliminated for not adequately addressing the purpose and need of the Route 250 Bypass Interchange at McIntire Road. *Id.* Contrary to what Plaintiffs contend, it was not just a line-item. This further demonstrates the extensive consideration under NEPA as it pertains to this alternative.

CONCLUSION

Based on the foregoing, the Defendant respectfully requests that the Court deny Plaintiffs' motion for summary judgment and grant summary judgment in favor of the Defendant.

Dated: November 17, 2010

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2010 I filed this memo of law with the Clerk this Court using the CM/ECF system which will electronically send notice of the filing and a true copy of the same to counsel for the plaintiffs.

/s/ Thomas L. Eckert
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