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

COALITION TO PRESERVE MCINTIRE PARK, DANIEL BLUESTONE, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, VIRGINIA DEPARTMENT OF TRANSPORTATION, Defendants.	)	Civ. No. 3:11-cv-0041

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINARY INJUNCTION

James B. Dougherty, Esq.
709 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

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INTRODUCTION

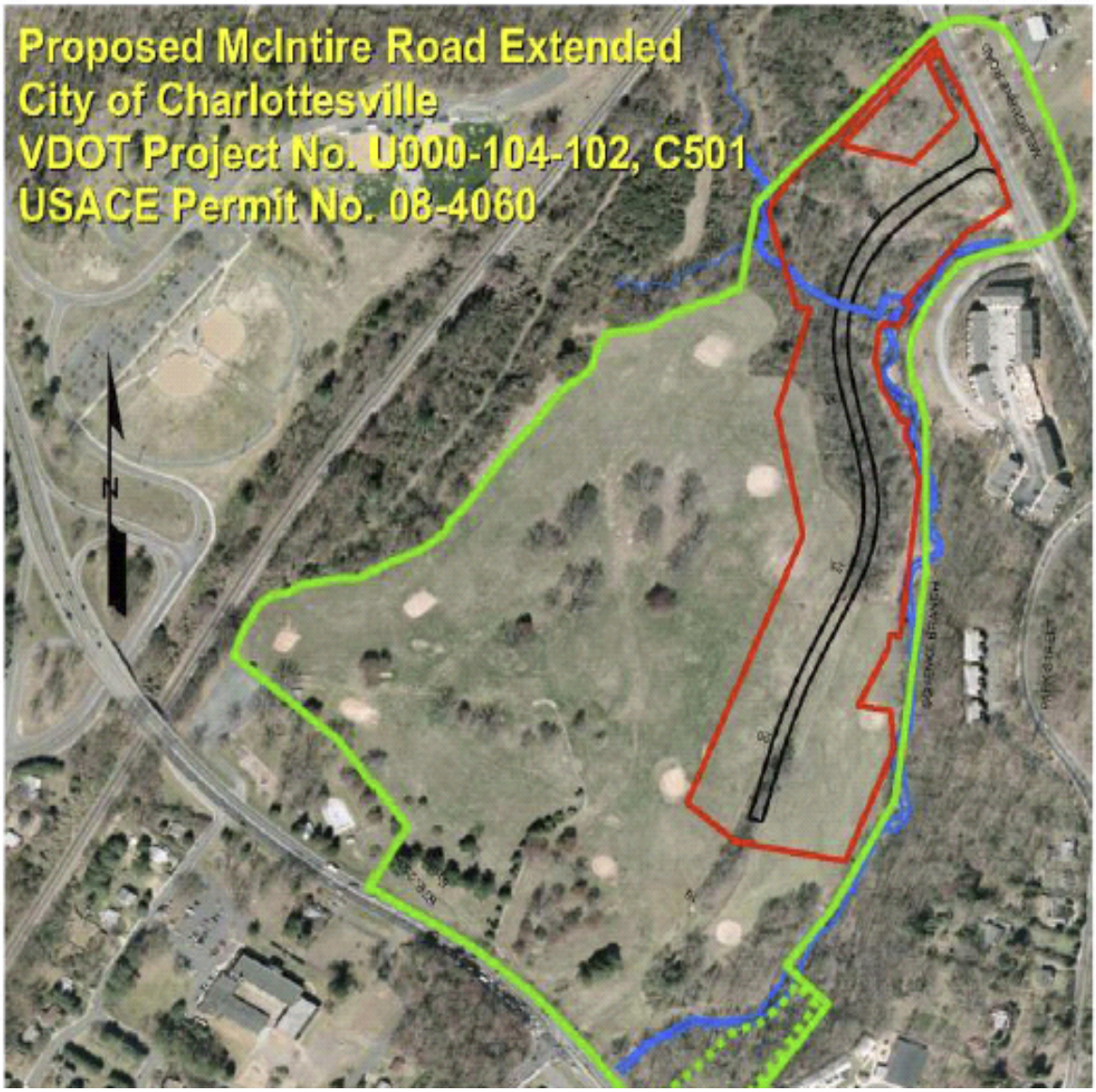
Plaintiffs submit this memorandum in support of their application for a temporary restraining order and/or a preliminary injunction barring construction of the McIntire Road Extended ("the MRE"), a highway project slated to be built part way through McIntire Park ("the Park"), in Charlottesville, Virginia. Specifically, Plaintiffs challenge the validity of the United States Army Corps of Engineers' ("Corps") May 25, 2011 authorization, issued under § 404 of the Clean Water Act, which permits Defendant Virginia Department of Transportation ("VDOT") to construct the MRE, and request this Court to issue an order preserving the status quo until legal issues raised by Plaintiffs can be resolved.

Below, Plaintiffs demonstrate that they have satisfied all of the elements that must be satisfied in order to obtain expedited injunctive relief according to the standards set forth by the Fourth Circuit Court of Appeals in *Real Truth About Obama v. Fed. Election Comm'n,* 575 F.3d 342 (4th Cir. 2009), to wit: (1) whether Plaintiffs are likely to succeed on the merits; (2) whether Plaintiffs are likely to suffer irreparable harm in the absence of injunctive relief; (3) whether the balance of the equities tips in Plaintiffs' favor; and (4) whether an injunction would be in the public interest.

FACTS

As approved by the Corps, the MRE would be a two-lane thoroughfare of approximately 2,100 feet in length; it would extend south from Melbourne Road to a point inside McIntire Park. The MRE is depicted in the Memorandum of Agreement ("MOA") prepared for the project under the National Historic Preservation Act – *see* Plts' Exh. 1, pp. 18, 60. In the following closeup, the black line depicts the actual features of the proposed road:

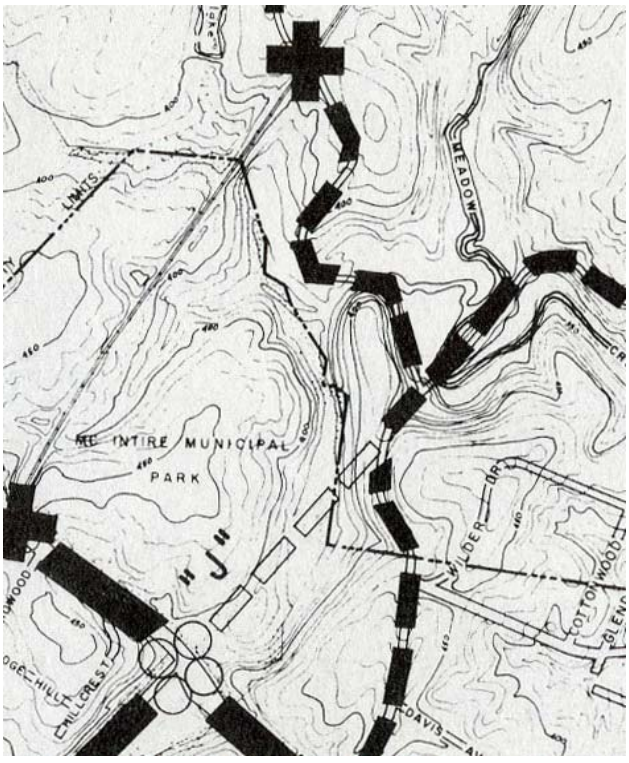
ATTACHMENT C
AREA OF POTENTIAL EFFECTS OF UNDERTAKING



As shown in the graphic, the MRE will not reach all the way south to the proposed Rt. 250 Bypass Interchange ("Interchange"). Rather, its planned southern terminus lies some 775 feet north of the Interchange. As discussed below in the Argument, this 775-foot gap has important implications as to the legal merits of both of Plaintiffs' substantive claims, and as to the lack of urgency in completing the MRE unless and until the Interchange has been (1) successfully defended in court, (2) put out to bid and (3) actually constructed.

Background: Five Decades of Stop-and-Go Planning

The MRE is part of a larger government endeavor, more than 50 years in the making, to construct a highway starting at Rio Road on the north and extending south through the length of McIntire Park, to the Interchange. *See* p. 2 of Pltfs' Exh. 2, a 1959 City of Charlottesville street plan, in which a boxed dotted line (□□□□) depicts a proposed two-lane road, running along the southeast side of "McIntire Municipal Park." Also depicted (OOOO) is the proposed new traffic interchange at the southern terminus of the proposed new road.



At that time,

and until fairly recently, the MRE and the Interchange were considered parts of a unified proposal – the "Meadow Creek Parkway."

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"[1/] for the proposed project. However, the proposed road 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. 3 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. 4 at 1.

[1/] Section 4(f) of the Department of Transportation Act of 1966 prohibits federal approval or funding of a transportation project that requires "the use of publicly owned land of a public park, recreation area, or . . . land of an historic site of national, State, or local significance," unless (1) "no prudent and feasible alternative" exists, and (2) the agency engages in "all possible planning to minimize harm" to protected property. 49 U.S.C. § 303(c). *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412-13 (1971).

Even the Commonwealth of Virginia, through its Department of Conservation and Historic Resources, 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. *See* Pltfs' Exh. 6 at 2. Even the City of Charlottesville turned its back on the project out of concerns that an influx of vehicular traffic into the Downtown would have unacceptable adverse effects.[2/]

These comments, particularly those of the Department of the Interior (the official defender of all "§ 4(f) resources"[3/]), effectively terminated the idea of a highway through the Park, at least for several years. But in 1992 the City changed its mind and joined with Albemarle County in asking the FHWA to reconsider federal funding for the MRE.[4/] Two years later, the FHWA initiated another NEPA process – recirculating a version of the DEIS that had been published in 1985. Pltfs' Exh. 8 at 2. But the agency ultimately determined that a full EIS was not required for the MRE, and that an "environmental assessment" ("EA") would suffice. A final EA was released in 1995. *Id*.

It was around this time when the proponents of the MRE came up with a new approach designed to circumvent the restrictions of §4(f): the project would be bifurcated. Federal funding would be obtained for the Interchange, and the highway-through-the-park, renamed the

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[2/] "Shortly after the public hearing in 1986, the McIntire Road Extension project was dropped due to concerns of the city management about traffic impacts to the downtown area..." *See* Pltfs' Exh. 7 at 2.

[3/] *See Stop H-3 Assn. v. Coleman*, 533 F. 3d 434, 441 (9th Cir. 1976) (describing jurisdiction of Department of the Interior in identifying local park properties deserving of federal protection).

[4/] In a VDOT memorandum dated December 1, 2008, Pltfs' Exh. 8, a detailed history of the MRE is set forth.

MRE, would be developed without the federal funding that it had enjoyed since 1983.[5/] But without federal funding the project languished for another decade or so, until federal funding was secured for the Interchange and state funding secured for the MRE.

Twenty-five million dollars in federal funding for the Interchange was secured by then-Senator John Warner in 2005.[6/] Thus the third major initiative since 1979 to build this now-bifurcated project was again underway. The Route 250 Bypass Interchange was approved by the FHWA in October, 2010, *see* 75 Fed. Reg. 62,919 (Oct. 13, 2010). Litigation over that project is pending before this Court. *See* Civ. No. 3:11CV0015.

A Corps permit was required for each project because each involved construction in and around a tributary to Schenk's Branch, a "water of the United States" that runs through the park, thus requiring a "dredge and fill" permit under § 404 of the Clean Water Act, ("CWA"), 33 U.S.C. § 1344. The Corps' consideration of a "404 permit," in turn, triggers its duty to evaluate the likely impacts on the environment generally under NEPA, and on historic resources under the National Historic Preservation Act, 16 U.S.C. § 470 ("NHPA").

Under the NHPA, the Corps conducted an extensive review of the adverse impacts that each would impose on historic properties in the construction area, including most notably

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[5/] *See* letter from John Simkins, FHWA, to Carol Legard, Advisory Council on Historic Preservation, May 28, 2009, Pltfs' Exh. 5 ("In the case of the McIntire Road Extended Project, the Virginia Department of Transportation (VDOT) made a decision over twelve years ago to not use Federal-aid funds to develop the project."). *See also* Pltfs' Exh. 8 at 3 (indicating that federal funding was abandoned in 1995).

This approach had been employed successfully elsewhere. *Compare Named Individual Members of The San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5 Cir. 1971) (rejecting federally-funded trans-park highway on § 4(f) grounds) *with Named Individual Members of The San Antonio Conservation Society v. Texas Highway Department*, 496 F.2d 1017 (5th Cir. 1974) (upholding same trans-park highway because federal funding had been withdrawn and replaced with state funding).

[6/] *See* the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users," Pub. L. No. 109-59 (119 Stat. 1144, Aug. 10, 2005), Subtitle G, § 1701 – High Priority Project #5044.

McIntire Park itself. After years of data-gathering, analysis, inter-governmental consultation and public participation, the Corps created a "Memorandum of Agreement" for each of the two projects. *See* Pltfs' Exh. 1 at 18; *see also* Pltfs' Exh. 9 at p. 24 of 55. The Corps also produced an EA for the Interchange.

Under the CWA, the Corps had three possible ways of issuing permits for the two projects. It could have issued "individual permits" under § 404; it could have issued "letters of permission;"[7/] or it could have issued authorizing letters under the "State Program General Permit," 07-SPGP-01 ("SPGP"). On May 25, 2011, the Corps selected the latter option, *ee* Pltfs' Exhs. 1 (at 14), 9. On information and belief, the Corps released no environmental review of these actions under NEPA.

ARGUMENT

Four factors are to be applied in determining whether to issue a preliminary injunction: (1) whether the Plaintiff is likely to succeed on the merits; (2) whether the Plaintiff is likely to suffer irreparable harm in the absence of injunctive relief; (3) whether the balance of the equities tips in the Plaintiff's favor; and (4) whether an injunction would be in the public interest. *Real Truth About Obama v. Fed. Election Comm'n,* 575 F.3d 342, 346-47 (4th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7 (2008)).[8/]

The issuance of a preliminary injunction is entrusted to the district court's discretion. *See In re Microsoft Corp. Antitrust Litig.,* 333 F.3d 517, 524-25 (4th Cir. 2003). "The traditional office of a preliminary injunction is to protect the *status quo* and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful

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[7/] 33 C.F.R. § 325.2(a)(4).

[8/] The standard for granting either a TRO or a preliminary injunction is the same. *Rum Creek Coal Sales, Inc. v. Caperton,* 926 F.2d 353, 359 (4th Cir. 1991).

judgment on the merits." *Id.* at 525 (citing *Omega World Travel, Inc. v. Trans World Airlines,* 111 F.3d 14, 16 (4th Cir. 1997) ("The purpose of interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends it was or will be harmed through the illegality alleged in the complaint.").

Plaintiffs will discuss these four criteria to show that Plaintiffs satisfy each, and that a preliminary injunction should be issued (1) invalidating the Corps' work authorization and (2) preventing VDOT from beginning construction of the MRE pending briefing on the full administrative record and a hearing on the full merits of the case.

1. Plaintiffs have Demonstrated A Substantial Likelihood of Success on the Merits

The first element of the four-part test for preliminary injunctive relief requires the Court to assess the merits of the moving party's claims. Plaintiffs are highly likely to prevail on their dual claims that the Corps violated the CWA wrongly authorizing construction of the MRE pursuant to the SPGP, and that NEPA required some kind of advance environmental review.

A. The Corps Violated the Clean Water Act by Permitting the MRE pursuant to the State Program General Permit

Statutory Background

The Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a). Under the CWA, dredged or fill materials are pollutants. 33 U.S.C. § 1362(6). Section 404 of the CWA authorizes the Corps to issue permits "after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters," including wetlands. 33 U.S.C. § 1344.

> Pursuant to § 404, the Corps is empowered to issue individual permits for these discharges under § 404(a), or it may issue general permits for them on a nation-wide,

> regional or state-wide basis under § 404(e). General permits are used to authorize certain categories of discharge activities when they are similar in nature and will cause only minimal adverse environmental effects, individually and cumulatively. 33 U.S.C. § 1344(e).

Md. Native Plant Soc'y v. United States Army Corps of Eng'rs, 332 F. Supp. 2d 845, 848 (D. Md. 2004). General permits provide for fast-track permission to proceed; once a general permit has issued, one who seeks to conduct activities in conformity with a general permit's terms need only secure an "authorization" from the Corps before beginning dredge and fill activities." *See Sierra Club v. United States Army Corps of Eng'rs*, 464 F. Supp. 2d 1171, 1178 (M.D. Fla. 2006).

However, there are carefully circumscribed limits on the availability of this fast-track process. First and foremost, the SPGP provides that it may not be invoked where "more than minimal individual or cumulative adverse environmental impacts" will result. Pltfs' Exh. 1 at 6, § V(2). **This standard was not and cannot be met in this case**. As discussed below in the context of "irreparable harm," construction and operation of the MRE will impose substantial adverse impacts on local neighborhoods and historic resources, the Park, and the ecological systems of which it is an integral part. *See* discussion at pp. 18 and 23-24. Second, the MRE and the Interchange will have profound and extensive "cumulative adverse environmental impacts," as documented in many federal and state agency analyses. *See* discussion at pp. 5-6.

This leads to the single most important legal defect in the Corps' reliance on the SPGP: it is available only to authorize "single and complete projects." *See* § V(4):

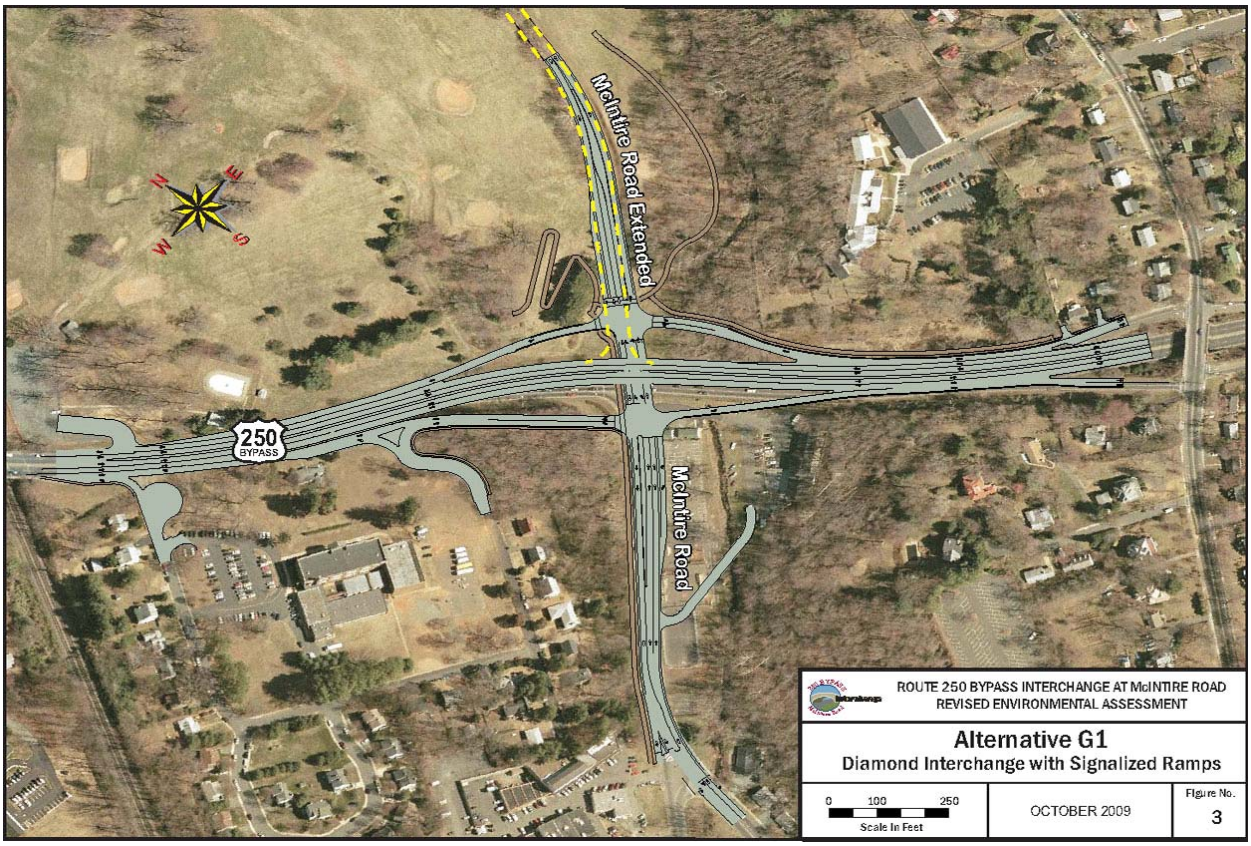
> **Single and complete projects.** 07-SPGP-01 shall only be applied to single and complete projects. For purposes of 07-SPGP-01, a single and complete project means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers and which has independent utility. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility.

The MRE fails this test abjectly. In reality, it is a "road to nowhere," as its southern terminus lies at a remote spot in the middle of the forest in McIntire Park. This is best demonstrated by

the Corps's own documentation – a letter it sent to the Virginia Department of Historic Resources on April 21, 2009 - Pltfs' Exh. 21. As shown by the graphic images contained in that letter, it is clear the the MRE has no logical terminus:

Images reproduced from Pltfs' Exh. 21 at p. 4

Without any doubt, the MRE would be nothing more than a strip of pavement leading south from Melbourne Road to a desolate, isolated patch of forest – unless, that is, someone were to build another road some 775 feet north from the Interchange to the MRE's southern terminus. This, of course is exactly what is proposed in the plans for the Interchange, as shown in this reproduction of Figure 3, from p. 12 of the EA for the Interchange, Pltfs' Exh. 7:



Turning back to the limiting language of the SPGP, the MRE would manifestly **not** "be constructed absent the construction of other projects in the project area." It is, undeniably, a "[portion] of a multi-phase project that depend[s] upon other phases of the project," meaning that it does not have independent utility and was not legitimately approvable under the SPGP.

Indeed, the dependency of the Corps' work authorization for the MRE on the completion of the Interchange is evident in its very language, which provides:

> This permit is being authorized with the understanding that the MRE's southern end will connect to the Route 250 Bypass Interchange (grade-separated), which was concurrently reviewed and approved by our office. However, **if for any reason the Interchange is not constructed, this permit will not be valid**, and you must contact our office concerning authorization for the MRE project. (emphasis added). *Id*. at 1.

It therefore appears that this work authorization is not actually a work authorization, but rather a **conditional** work authorization that can be rendered invalid by the acts of third parties not under the permit holder's control. The document leaves unanswered the question whether VDOT is to await construction of the Interchange until it begins construction of the MRE, or whether it enjoys immediate authority to begin construction, but might be required to halt (or reverse) construction of the MRE if the Interchange doesn't advance. (*i.e.*, "Please contact this office if you build the MRE but the City doesn't build the Interchange.")

Plaintiffs submit that the Corps' employment of a conditional work authorization must lead the Court to one of several legal conclusions:

1 - the authorization is invalid on its face. Nothing in the CWA or the Corps' regulations allows it to issue permits that may become effective in the future, depending on the acts of third persons and/or courts. If the intent of the authorization was to allow construction of the MRE to proceed on the **hope** that the Interchange, which now faces a legal challenge, is constructed, this represents arbitrary and capricious decisionmaking;

2 - the MRE and the Interchange are interdependent and inseparable. The Corps therefore lacked authority to issue the authorization under the plain terms of the SPGP, which applies only to projects that are "single and complete;"

3 - the conditional nature of the authorization awarded to VDOT means that VDOT would not suffer harm if this Court were to order it to delay construction pending

consideration of Plaintiffs' arguments on the merits, as there is substantial doubt as to whether VDOT now enjoys authority to proceed with construction.

For these reasons, and because authorization was also issued in violation of § V(1) of the SPGP, which may be used to authorize only projects that will have "minimal ... cumulative adverse environmental impacts..."[9/] this Court should vacate and remand the Corps action in question.

B. The Corps Violated NEPA by Failing to Prepare an Action-specific Environmental Review of Some Kind

NEPA established "a national policy of protecting and promoting environmental quality." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). It is well established that Army Corps' permitting decisions must be made in compliance with NEPA. *Maryland Native Plant Society v. Army Corps of Engineers*, 332 F. Supp.2d 845, 849 (D. Md. 2004). Under NEPA, the Corps is required to take a "hard look" at the environmental implications of all of its permitting decisions - even those implications that fall outside the purview of its specialized expertise in the area of water quality. *Ohio Valley Envtl. Coal. et al. v.*

[9/] Elsewhere in this brief Plaintiffs document the array of cumulative environmental effects that would be caused by the construction and operation of the MRE. *See infra* at pp. 23-24. For example, according to the EA for the Interchange,

> 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.

Pltfs' Exh. 7 at 47.

Aracoma Coal Co. et al. ("Aracoma Coal"), 556 F.3d 177, 191 (4th Cir. 2009).[10/] *See also* *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976) ("hard look" required in all cases).

NEPA requires the preparation of an EIS in connection with any proposal for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2)(C).[11/] 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.[12/] *See* 40 C.F.R. § 1508.27(b)(1)–(10):

> Significantly as used in NEPA requires considerations of both context and intensity:
> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action.

[10/] Standard of Review: when reviewing a claim that an agency has violated NEPA, the Court is bound by the "arbitrary and capricious" standard of the Administrative Procedure Act. *See* 5 U.S.C. § § 706(2)(A),(C). Under that standard, a decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 287 (4th Cir. 1999).

NEPA requires the reviewing court to "make a searching and careful inquiry into the facts and review whether the decision . . . was based on consideration of the relevant factors and whether there has been a clear error of judgment." *National Audubon Society v. Dept. of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (citing Fourth Circuit precedent).

[11/] 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 174, 184 (4th Cir. 2005). Second, it "ensures that the public and government agencies will be able to analyze and comment on the action's environmental implications." *Id.*

[12/] 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").

> For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (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:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (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.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
>
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (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.
>
> (8) 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.
>
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Predicting the adverse environmental consequences of the construction of a highway through McIntire Park is intuitive. In the section of this memorandum addressing the "irreparable harm" that they will suffer if injunctive relief is not granted promptly, Plaintiffs below set forth, in detail, based on written declarant testimony as well as extensive documentation from government documents pertaining to this case, the array of significant

adverse environmental impacts of the MRE. They include:

• Permanent destruction of approximately 13 acres of park land;

• Noise and light pollution – from heavy equipment during the construction phase and from the passage of 19,500 vehicles per day during the (perpetual) operational phase;

• Permanent – and in many cases unmitigated – damage to federally-protected historic properties, principally McIntire Park itself;

• The creation of a new funnel for expediting vehicular traffic into downtown Charlottesville, thus inevitably altering the character of the City.

VDOT itself recognized that construction and operation of the MRE would result in an array of adverse environmental impacts, including "conversion of recreational land to transportation uses, removal of golf course holes, increased traffic and noise, and impacts to habitat and wildlife." Pltfs' Exh. 17 at 13.

Notably, several of these categories of adverse effects jibe with the CEQ's ten "significance" criteria, including damage to historic properties (Criterion 8) and violations of federal law (Criterion 10) due to the Corps' failure to subject the MRE to "individual permitting" under the CWA, as discussed below.

If nothing else, the decades of intense public fighting over the MRE should have signaled to the Corps that this was an atypical dredge-and-fill permit. "Charlottesville's Civil War," as described by the Charlottesville Weekly 14 years ago, Pltfs' Exh. 14, has long pitted citizens, neighborhoods and politicians against one another in anguished debate and conflict. State-court litigation over the project made headlines two years ago, just as a statewide preservation organization named the Park an "endangered site." Pltfs' Exh. 20. Large-scale protests against the project continue to the present day. *See Parkway Foes Join Hands in Demonstration in McIntire Demonstration*," Charlottesville Daily Progress, front page, Sept. 28, 2009 – Pltfs' Exh.

15. As shown in this 2009 article, former Mayors Fife and Cox stood opposed to the MRE, just as current Mayor David Norris remains defiantly opposed, though his faction consistently remains one vote short of the majority needed to terminate the project. Pltfs' Exh. 16 at 5 (minutes of City Council vote on the project). And, as pointed out above, back when federal funding had been earmarked for the MRE, federal agencies took consistent, unified and strong stands in opposition to the contemplated destruction of park land, as had the City of Charlottesville itself. *See* discussion at p. 6, above. This is exactly the kind of controversy which, under "significance criterion #4" of the CEQ regulations, triggers the Corps' duty to prepare an EIS.

If, arguendo, the Corps was not required to prepare an EIS in connection with its permitting action, it was required, at a minimum, to prepare an environmental assessment which (1) demonstrated that it had taken the requisite "hard look" at the MRE's environmental pros and cons, and (2) justified its decision not to prepare an EIS. The CEQ regulations provide that an agency shall prepare an EA to determine whether to prepare an EIS. 40 C.F.R. §§ 1501.3, 1501.4, 1508.9 (An EA is a "concise public document for which a Federal agency is responsible that serves to: . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement.") The Corps' procedures for implementing NEPA state that "[m]ost permits will normally require only an EA." 33 C.F.R. § 230.7(a).

In some cases, however, neither an EA nor an EIS is required. The CEQ regulations authorize an agency to use a "categorical exclusion" to avoid written environmental reviews for "... actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4; *see also* 40 C.F.R. §

1500.4(p). Neither an EIS nor an EA is required for actions categorically excluded from NEPA review. 40 C.F.R. § 1507.3(b)(2)(ii).

The Corps has promulgated such regulations. *See* 33 C.F.R. § 230.9 (listing actions which "when considered individually and cumulatively do not have significant effects on the quality of the human environment and are categorically excluded from NEPA documentation.") 33 C.F.R. Part 325, Appendix B, § 6 provides in relevant part:

> The following activities are *not* considered to be major Federal actions significantly affecting the quality of the human environment and are therefore categorically excluded from NEPA documentation:
>
> 1. Fixed or floating small private piers, small docks, boat hoists and boathouses;
> 2. Minor utility distribution and collection lines including irrigation;
> 3. Minor maintenance dredging using existing disposal sites;
> 4. Boat launching ramps;[and]
> 5. All applications which qualify as letters of permission (as described at 33 C.F.R. 325.5(b)(2)).

On their face these regulations do not provide the Corps with a legal excuse for not complying with NEPA in this case. Nothing exempts actions taken pursuant to the SPGP from NEPA. In other words, some kind of contemporaneous environmental review was required.[13/]

[13/] Plaintiffs acknowledge that the Corps prepared an EA in connection with the issuance of the SPGP. *See* Norfolk District Regional Permits, Letters of Permission, and State Program General Permit, http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/RBregional.asp (page last viewed July 1, 2011). However, this document, by its own terms, "only authorizes specific activities in waters of the United States within the Commonwealth of Virginia that would cause no more than **minimal adverse environmental effects**, individually and cumulatively, subject to the terms and conditions of this general permit." (emphasis added). For reasons described below, Plaintiffs contend that the environmental impacts of the MRE, especially when considered cumulatively with those of the Interchange, substantially exceed the Corps's prescribed threshold of "minimal."

Prominent among these considerations is the 25-year history of public battles over this highway project, as described below. Controversy like this impels the Corps to conduct some kind of environmental review. *See Arkansas Nature Alliance, Inc. v. United States Army Corps of Engineer*s, 266 F. Supp. 2d 876, 886-87 (E.D. Ark.), modified, 266 F. Supp. 2d 895 (E.D. Ark. 2003) (enjoining project that had been authorized via a Letter of Permission. Held: Letters of Permission may not be issued where a project generates "substantial controversy." *See* 33 C.F.R. § 325.2(e)(1)(i).)

Even if the Corps action challenged in this case were to fall within the scope of a categorical exclusion, some kind of action-specific environmental review was required nevertheless. This is because Corps regulations contain an important exception: any action that nominally falls within the scope of a categorical exclusion will require a plenary, action-specific environmental review where there are "extraordinary circumstances."[14/] A categorical exclusion cannot be invoked when a highway construction project is intended to have substantial impacts on regional traffic movements. *West v. Secretary of Department of Transportation*, 206 F.3d 920, 928-29 (9th Cir. 2000) (reversing District Court; rejecting FHWA's reliance on categorical exclusion for new highway interchange).[15/] Below, *see* pp. 23-24, Plaintiffs set forth the range of significant environmental impacts that will flow from construction of the MRE, above and beyond the destruction of a significant portion of the Park. Because of the array of substantial adverse environmental impacts that will be caused by construction and operation of the MRE, NEPA required the Corps to conduct some kind of site-specific environmental review.

Therefore, the Corps' generic, four-year-old EA does not give it regulatory *carte blanch*e in this case.

[14/] *See* 33 C.F.R. § 230.9. "Actions listed below when considered individually and cumulatively do not have significant effects on the quality of the human environment and are categorically excluded from NEPA documentation. However, district commanders should be alert for extraordinary circumstances which may dictate the need to prepare an EA or an EIS."

See also Wildlaw v. U.S. Forest Serv., 471 F. Supp. 2d 1221, 1241 (D. Ala. 2007) ("When an agency determines that a proposed action falls within a CE, it must also assess whether there are any extraordinary circumstances that render the proposed action likely to have a significant impact on the human environment despite fitting into a CE.")

[15/] *See also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 15 (D.D.C. 2009). (Categorical exclusions may be invoked only after careful analysis of "all direct, indirect, and cumulative impacts that were foreseeable as a result" of the action.) (emph. in original). Failure to analyze foreseeable consequences "is sufficient by itself to render [a CE decision] arbitrary and capricious." *Id.* at 17 (footnote omitted).

1. The Corps Failed to Consider Whether Construction of the MRE Would Result in Cumulatively Significant Impacts.

In making the threshold determination as to whether a project will have a significant impact on the environment, an agency must consider "[w]hether the action is related to other actions with individually insignificant but **cumulatively** significant impacts." 40 C.F.R. § 1508.27(b)(7). (emphasis added). "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." *Id.* The CEQ regulations define "cumulative impact" as "the impact on the environment which results from the incremental impacts of the action when added to other past, present, and reasonably foreseeable future action . . . ." 40 C.F.R. § 1508.7. The "cumulative impacts rule" is mirrored in the Corps' NEPA implementing regulations, which require that, where the activity requiring a permit is "merely one component of a larger project," the Corps must "address the impacts of the specific activity requiring [a] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. Part 325, Appendix B § 7(b).[16/]

The Corps' implicit determination that an EA was not required in this case reflects its conscious disregard of the sister highway project that it approved on the very same day - the Interchange.[17/] In reality, the two project have been inseparable components of the same concept for over 50 years. The permitting paperwork for the two project proceeded through bureaucratic

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[16/] *See also Kleppe v. Sierra Club*, 427 U.S. 390 (1976), in which the Court held that "when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." 427 U.S. at 410.

[17/] *See Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-16 (9th Cir. 1998) (holding that related projects approved on same day should have been evaluated for cumulative impacts.)

channels in parallel. More important, the two projects will, when viewed cumulatively, cause cumulative harms to the Park, the environment, and the surrounding neighborhoods that substantially exceed those of either project, viewed independently.

This is demonstrated by documents in the file:

1. When VDOT requested that FHWA prepare an EA (not an EIS) for the Interchange,[18/] it stated that the MRE:

> "would have an additive effect such as conversion of recreational land to transportation uses, removal of golf course holes, increased traffic and noise, and impacts to habitat and wildlife. Thus, the context of the **cumulative impacts** is one whereby past, present and reasonable forseeable future actions have affected, and are planned to continue to affect, McIntire Park, and therefore, the Preferred Alternative would cause incremental and **cumulative impacts** on the park.

Pltfs' Exh. 17 at 13-14. (emphasis added).

2. According to the EA for the Interchange,

> Construction of the new interchange would introduce additional features into the setting, location, and feeling of the park. ... Likewise, 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.

Pltfs' Exh. 7 at 47. *See also id*.:

> A draft plan, submitted to City Council in 2004 and shown on the City's McIntire Park website at www.charlottesville.org/index.aspx?page=367, recognizes that McIntire Golf Course would be affected as a result of the **cumulative effects** of the interchange project and McIntire Road Extended.

See also id. at 49:

> [the MRE and the Interchange] 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." (emphasis added).

[18/] Letter from R. Wofford, VDOT, to I. Rico, FHWA, August 17, 2010 (Pltfs' Exh. 17).

3. Similarly, in comments submitted with regard to the Interchange just two years ago, the federal Advisory Council on Historic Preservation just two years ago, remarked:

> As we understand, the new Interchange will diminish the character-defining features of McIntire Park .... **The effects of the Interchange on McIntire Park are compounded by the extension of McIntire Road to the north**, which will likely further contribute to changes to the character of this National Register-eligible property.

Pltfs' Exh. 19 at 2, ¶ 2 (emphasis added).

In short, it is obvious that the MRE and the Interchange are, as they have always been, parts of a larger transportation initiative. Plaintiffs need not belabor this argument; this observation has been made repeatedly by federal agencies. It was therefore arbitrary and capricious for the Corps to ignore the cumulative impacts of the MRE and the Interchange when it decided that no environmental review was called for under NEPA.[19/]

2. The Corps Illegally Failed to Recognize that the MRE and the Interchange are "Connected Actions" Requiring Joint Environmental Review

In their work to set forth the proper scope of an EIS, the CEQ regulations call for analysis of "connected actions." Proposed agency actions are "connected" to other actions, thus requiring collective consideration, if the proposed actions: (i) automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). Although this requirement exists in the contexts of preparing EISs, courts often apply it in other contexts; *e.g.*, evaluating EAs or judging whether the Corps has unlawfully "segmented" its consideration of

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[19/] *See Sierra Club v. Dept. of Energy*, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) (vacating agency decision and issuing preliminary injunction; reliance on categorical exclusion reversed for failure to weigh cumulative impacts); *accord, Center for Biological Diversity v. Stahn*, (D. Az. 2008) (unpublished opinion) (reproduced in Pltfs' Exh. 22 at 2-4).

the action in question in defense of a determination not to provide any kind of action-specific environmental review. *See, e.g., Save the Yaak Committee v. Block*, 840 F.2d 714, 720 (9th Cir. 1988) ("road reconstruction, timber harvest, and feeder roads are all 'connected actions' that must be analyzed by the Forest Service in deciding whether to prepare an EIS or only an EA")*; Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 401 F. Supp. 2d 1298, 1313-14 (S.D. Fla. 2005) (invalidating EA due to Corps' disregard of connected actions); *Sierra Club v. Dept. of Energy*, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) (vacating agency decision and issuing preliminary injunction; reliance on categorical exclusion reversed for failure to recognize connected actions); *Washington Trails Ass'n v. United States Forest Serv.*, 935 F. Supp. 1117 (W.D. Wash. 1996) (rejecting invocation of categorical exclusion because of agency disregard of connected actions).

The MRE and the Interchange are quintessential examples of "connected actions." This is so because the MRE, in its current configuration, can serve no useful purpose if the Interchange is not built. Its southern terminus is a point 775 feet north of the Interchange. Pltfs' Exh. 1 at 1 ¶ 2; *see* also Pltfs' Exh. 21 at 2, ¶ 1. Terminating a highway in the middle of a forest in absurd. The MRE is nothing without its siamese twin - the Interchange.

2. Failure to Issue the Requested Injunction will Result in Immediate and Irreparable Harm to Plaintiffs and to the Environment

The "likelihood of irreparable harm to the plaintiff" is the first equitable factor that a court should consider when ruling on a motion for a preliminary injunction. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). As the United States Supreme Court has emphasized, "Environmental injury, by its nature, seldom can be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U. S. 531,

545 (1987) (emphasis added). "Consequently, when environmental injury is 'sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.'" *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000), (reversing District Court failure to issue injunctive relief; quoting *Sierra Club v. United States Forest Service*, 843 F.2d 1190, 1195 (9th Cir. 1988)); *accord, Catron County v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1440 (10th Cir. 1996) ("An environmental injury usually is of an enduring or permanent nature, seldom remedied by moneydamages and generally considered irreparable."

In this case, there is no question that the environment will be harmed in the event that construction of the MRE begins. Indeed, the building of a highway through a park is the epitome of irreversible environmental destruction. *See generally Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 406 (1971) (describing Supreme Court's issuance, in that case, of a stay to halt construction of highway that would have destroyed 26 acres (including a golf course) of an urban park in Tennessee). It scarcely needs to be argued that once the bulldozers have gone in and done their work, the harms cannot be undone – at least without great additional harm and at great expense. *See Lands Council v. Martin*, 479 F.3d 636, 643 (9th Cir. 2007) (logging of old-growth trees is a permanent environmental injury).

Constructing a highway in an urban park does more than simply destroy parkland -- and the associated wildlife habitat – forever. It also generates a substantial amount of noise pollution, thus diminishing the quality of the user experience for McIntire Park visitors anywhere within earshot of the proposed MRE. *See* Pltfs' Exh. 11 (Declaration of Daniel Bluestone) ¶ 12. Why would park users choose to picnic, or to bring their children for play, next to a bustling highway? Certainly playing golf next to a road is less pleasant than playing golf in

a secluded park setting. Adverse effects like these represent harm to the environmental interests of Plaintiffs. As the Corps itself has acknowledged:

> Current measured and modeled noise levels near the southern terminus of the [MRE's] project area, 775 feet north of the Route 250 Bypass, are predicted to rise to 61 dBA.... This difference should be readily perceptible to the human ear...

See Pltfs' Exh. 13 at 5.

Construction and operation of the MRE will have a highly negative effect on the quality of life of those Charlottesville residents who reside adjacent to or near the park. Previously the views from their porches and windows were of a pastoral woodland landscape. If the MRE is built, the views will be permanently degraded by the thousands of cars that pass by each day. This will be particularly true in the evenings and during the winter, when seasonal vegetation disappears – and with it any natural screening of the annoying sounds and sights of a busy highway.

In 1995, when FHWA was contemplating funding the "McIntire Road Extension," it deemed the likely environmental impacts sufficiently serious to prepare an EA under NEPA. *See* Pltfs' Exh. 10. Noise impacts (for what was then planned to be a four-lane road) were a key focus of that environmental review. FHWA predicted "substantial increases in noise impacts" for people within the park and for nearby residents, to the point that the agency actively considered erection of sound-blocking walls. *Id.* at 16-17. According to FHWA, such barriers, which are notoriously expensive, were "not reasonable." *Id.*

All new roads, of course, attract vehicular traffic. Indeed, the average daily traffic volume on the MRE is projected to rise to 19,500 vehicles per day by 2030.[20/] This generates several kinds of adverse effects on neighborhoods, cities, and the environment. First, existing

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[20/] Federal Highway Administration, Virginia Department of Transportation, *Revised Environmental Assessment, Route 250 Bypass Interchange of McIntire Road*, at 4 (Oct. 2009), Pltf's Exh. 7.

traffic tends to relocate from existing routes to the new route – along the path of least resistence, or most convenience. Second, when construction of a new road makes it easier to drive into a city, more drivers will do so. Third, when driving into a city is made more convenient from a certain direction – in this case the north – people will preferentially seek new housing in that general area, leading to growth in population density, increasing property values and increased housing construction – and ultimately increased traffic congestion. Courts have regularly recognized that roads tend to induce additional growth by increasing access to cities and residential areas, in accordance established principles of supply and demand. *Mullin v. Skinner*, 756 F. Supp. 904, 921 (E.D.N.C. 1990); *Sierra Club v. U.S. DOT*, 962 F. Supp. 1037, 1043 (N.D. Ill. 1997); *Conservation Law Found. v. FHWA*, 630 F.Supp. 2d 183, 209-16 (D.N.H. 2007).

In addition, construction and operation of the MRE will have highly deleterious effects on the great number of historic properties situated in the immediate vicinity of the MRE, including most notably the Park itself, relevant portions of which have been determined to be eligible for listing on the National Register of Historic Places. Pltfs' Exh. 13 at 3, 4.

> The Corps has determined that its undertaking will alter important characteristics of McIntire Park that will diminish the property's integrity of design, setting, and feeling as a result of land disturbance within the golf course landscape and the introduction of incompatible visual and auditory elements.

Id. at 4. "The integrity of the broader historic setting of the golf course will also be diminished." *Id.* at 5.

3. Because Defendants Will Suffer No Significant Harm in the Event Injunctive Relief is Granted, the Balance of Harms Tips Strongly in Plaintiffs' Favor

In contrast to the magnitude and certainty of Plaintiffs' irreparable injury, the Corps will suffer no harm from an order from this Court suspending the legal validity of the CWA authorization that the Corps issued to VDOT pending a determination as to the merits of

Plaintiffs' legal claims. It stands on the sideline, in its limited role as a regulator.

VDOT is likely to claim harm in the form of potential increased costs or other economic factors as weighing against an injunction. In reality, it can suffer little, if any, harm from an order restraining its road-building plans for a few additional months while the court reaches a final decision on the merits. This project has been on the drawing board for over 50 years already. During this odyssey, it has been started and stopped, expanded, shrunk, subdivided and renamed countless times. There can be no argument that time does not permit some opportunity for judicial review of this project.

VDOT may also argue that it is a state agency rather a federal agency, and that the MRE enjoys no federal funding; it would therefore be unfair for VDOT to be penalized by a federal court injunction when any violations of federal law were committed not by VDOT, but by the Corps. Such an argument would misperceive NEPA's requirements. Proposals to build highways through parks are often propounded by an admixture of federal, state and municipal entities – and indeed even private entities. But the law does not permit the non-federal actors to construct their particular segments without full compliance on the part of the federal regulators with the requirements of the CWA or NEPA. "Non-federal actors may not be permitted to evade NEPA by completing a project without an EIS and then presenting the responsible federal agency with a *fait accompli*." *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986).

Increased costs associated with the additional time needed to conduct any review required by NEPA is not irreparable harm, as NEPA contemplates that proper environmental study will often take considerable time. *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 780 (9th Cir. 1980). Accordingly, interlocutory injunctions are frequently issued to prevent

the construction of highways based on a failure to examine adequately the adverse effects on the environment.[21/]

4. Considerations of the "Public Interest" Weigh Heavily in Favor of the Issuance of Injunctive Relief

The final equitable factor that the Court must consider in determining whether to issue the injunction requested by Plaintiffs is whether it will serve the public interest. The Fourth Circuit has made it clear that courts of equity may go to greater lengths to give equitable "relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *E. Tenn. Natural Gas Co. v. Clanton*, 361 F.3d 808, 826 (4th Cir., 2004), (citing *Va. Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937).

Generally speaking, the public interest is synonymous with environmental conservation. *See Sierra Club v. Marsh*, 714 F. Supp. 539, 593 (D. Me. 1989), in which the court, in discussing the public interest consideration, stated: Absent a showing that environmental harm is likely if an injunction does issue …, or that an injunction would cause other public hazards …, or that significant irreparable harm would be caused to innocent third parties … , the public interest is not adversely affected by enjoining actions likely to cause irreparable environmental harm.

Additionally, there is a powerful alignment between considerations of "the public interest" and the duty of compliance with federal law. *See Conservation Law Foundation v. Watt*, 560 F. Supp. 561, 583 (D. Mass) ("It is plain that the public interest calls upon the courts to require strict compliance with environmental statutes"), *aff'd sub nom. Commonwealth of Massachusetts v. Watt*, 716 F. 2d 946, 953 (1st Cir. 1983). "Refusal of administrative agencies

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[21/] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Named Individual Members of The San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5 Cir. 1971); *Steubing v. Brinegar*, 511 F.2d 489, 497 (2d Cir. 1975) ("compliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that these costs must be discounted"); *see also I-291 Why? Association v. Burns*, 372 F. Supp. 223 (D. Conn. 1974), *aff'd mem.*, 514 F.2d 1077 (2d Cir. 1975).

to comply with environmental laws "invokes a public interest of the highest order the interest in having government officials act in accordance with law." *Seattle Audubon Society v. Evans,* 771 F. Supp. 1081, 1096 (W.D. Wash. 1991)(citation omitted), *aff'd in part and rev'd on other grounds*, 952 F.2d 297 (9th Cir. 1991). Indeed, the Tenth Circuit has suggested that "harm to the environment may be presumed when an agency fails to comply with the required NEPA procedure." *Davis v. Mineta*, 302 F.3d 1104, 1114 (10th Cir. 2002).

Finally, it is worth reemphasizing that the MRE is a "road to nowhere." Because it has been designed to terminate in the middle of the woods (with the hope that the Interchange will be completed at some unknown point in the future), the public transportation benefits that its proponents would tout cannot possibly be delivered until both the MRE and the Interchange have been completed and connected to one another. Unless and until it is known whether and when the Interchange is to be completed, the public interest will be served by **not** building the MRE, and **not** taking the chance that the Interchange is cancelled or delayed significantly.

5. No Bond Should Be Required

Rule 65(c) of the Federal Rules of Civil Procedure states that an applicant for preliminary relief should post a bond "...in such sum as the court deems proper..." This language is extremely permissive. "The amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all." *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 303 (5th Cir. 1978). *Accord, People ex rel. Van De Kamp v. Tahoe Regional Planning Agency,* 766 F.2d 1319, 1325 (9th Cir. 1985), *amended on other grounds,* 775 F.2d 998 (9th Cir. 1985).

As a general proposition of law, bond is disfavored in environmental cases. In some cases federal courts have recognized that nominal bond is sufficient and appropriate where public

interest groups seek enforcement of environmental laws. *See, e.g., West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) ($100). *See also Sierra Club v. Block*, 614 F. Supp. 488 (D.D.C. 1985) ($20); *Sierra Club v. Block*, 614 F. Supp. 134 (E.D. Tex. 1985) ($1); *Natural Resources Defense Council v. Morton*, 337 F. Supp. 167, 169 (D.D.C. 1971), *aff'd*, 458 F.2d 827 (D.C. Cir. 1972) ($100). **More typically the courts waive the bond requirement altogether.** *See, e.g., People ex rel. Van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319 (9th Cir. 1985) (no bond); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (no bond); *Colo. Wild, Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1230-31 (D. Colo. 2007) (no bond); *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999) (recognizing "general rule" against requiring bond in public interest cases); *Highland Co-op v. City of Lansing*, 492 F. Supp. 1372 (D. Mich. 1980) (no bond); *Citizens for Responsible Growth v. Adams*, 477 F. Supp. 994 (D.N.H. 1979) (no bond); *Wisconsin Heritages, Inc. v. Harris*, 476 F. Supp. 300 (E.D. Wis. 1979) (no bond).

There are sound public policy reasons for not requiring a bond. Open access to the courts is essential to the efficacy of virtually all federal environmental laws, and requiring plaintiffs to post a substantial bond would effectively deny them access to the courts and thus have a chilling effect on enforcement litigation. *See, e.g., Natural Resources Defense Council v. Morton*, above, 337 F. Supp. at 169; *Tahoe Regional Plan*, above, 766 F.2d at 1325; *Wisconsin Heritages*, above, 476 F. Supp. at 302; *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988); *Friends of the Earth v. Coleman*, 518 F.2d 323 (9th Cir. 1975).

Where plaintiffs have demonstrated a high likelihood of success on the merits, imposition of a surety bond is even more strongly disfavored. *See People ex rel. Van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319, 1325-26 (9th Cir. 1985) (upholding District Court's waiving of bond for non-profit environmental group where plaintiff was likely to succeed on merits and

requiring security would effectively deny access to judicial review), *amended on other grounds*, 775 F.2d 998 (9th Cir. 1985). *See also Utahns for Better Transp. v. United States Dept. of Transp.*, 305 F.3d 1152, 1192 (10th Cir. 2002) (countermanding District Court's imposition of bond where Plaintiffs had shown winning legal arguments).

The primary reasons for waiving bonds in these cases are the plaintiffs' lack of a financial interest in the outcome, lack of financial resources, and the chilling effect on litigation undertaken to serve the public interest. *Tahoe Regional Plan*, 766 F.2d at 1325. In the attached Declaration of John Cruickshank, Pltfs' Exh. 12, Mr. Cruickshank verifies that Plaintiff Coalition to Preserve McIntire Park, an unincorporated organization with no regular source of revenue, has almost no assets – only the few thousands of dollars that it has raised to pursue this case and the parallel case involving the Interchange. For these reasons Plaintiffs respectfully request that the Court follow the mainstream approach and grant the requested injunctive relief without a bond pursuant to Fed. R. Civ. P. 65.

CONCLUSION

If injunctive relief is not issued promptly, Plaintiffs' claims will effectively become moot and this case will effectively be concluded. Once the bulldozers have been let loose and the corpus of McIntire Park has been torn apart, the equities will have been shifted profoundly, if not irrevocably. As observed in the myriad of cases cited above, environmental damage is inherently irreparable.

This case is unlike many environmental cases, where plaintiffs seek to prevent or abate the generation of pollution. Pollution is, regrettably, a fact of modern life. It waxes and wanes; if it is not remedied this year, it can generally be remedied the next. Here, on the other hand, the environmental stakes are much higher. A park, once destroyed, can never be restored.

Highways built through parks are designed as permanent fixtures that endure through the centuries. Thus the tradeoffs that we strike now represent our legacy to future generations.

For these reasons the Corps should not have summarily glossed over the environmental consequences of its permitting actions under NEPA and the CWA. Its see-no-evil approach stands in stark contrast to the FHWA'S determination that NEPA required it to prepare an EA for the Interchange. The Interchange, after all, is **only an interchange**. 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. Yet the former benefitted from a NEPA review, and the latter did not. Only a lawyer could claim that this is not arbitrary and capricious decisionmaking.

This case is similarly unlike other environmental cases, where Plaintiffs attempt to "fly-speck" an agency's regulatory documentation by seizing on minor flaws and attempting to win injunctive relief until the judicially-identified flaws have been remedied. *See, e.g., National Audubon Society v. Dept. of the Navy*, 422 F.3d 174, 186 (4th Cir. 2005). In this case the Corps' disregard of the environmental was blatant and intentional. It turned its back on the larger environmental consequences of its action, utterly abdicating its environmental review responsibilities. It is therefore appropriate that this Court would vacate the Corps' action and order it to take the "hard look" required by law. Plaintiffs ask this Court to prevent construction of the MRE until the arguments of the parties on the merits, based on an administrative record, can be fleshed out.

Respectfully submitted this 7th day of July, 2011.

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

/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 7th day of July, 2011, I will cause the foregoing Motion for TRO And/or Preliminary Injunction, and the accompanying Memorandum of law in support thereof, to be served, via the Court's CM/ECF filing system, on the following:

Thomas L. Eckert
Assistant U.S. Attorney
P.O. Box 1709
Roanoke, VA 24008

Suzanne T. Ellison
Office of the Attorney General
900 E. Main St.
Richmond VA

/s/ James B. Dougherty