



SIERRA CLUB

MARYLAND CHAPTER

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January 4, 2022

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Dear Ms. Mar and Mr. Folden,

We write in regard to the I-495 & I-270 Managed Lanes Study Supplemental Draft Environmental Impact Statement (SDEIS). The SDEIS deferred required evaluations of key impacts and failed to identify or discuss mitigation measures for many significant adverse impacts. Therefore, proceeding directly to a Final Environmental Impact Statement (FEIS) with no additional formal review period will not be adequate to fulfill statutory requirements of several agencies and would run afoul of several federal laws.¹ A revised SDEIS is needed due to the deferral of impact analyses and lack of discussion of mitigation measures. Additionally, a 90-day public review period on the FEIS is needed to allow the EPA and other stakeholders to discharge their statutory responsibilities.²

Regarding the SDEIS, the EPA on November 30, 2021 stated: "EPA looks forward to reviewing project details that were deferred to the Final EIS and seeing development of mitigation to offset unavoidable impacts." Concerns about the

¹ Including NEPA, Clean Air Act, and Section 4(f) of the U.S. Department of Transportation Act of 1966, as raised by multiple agencies and groups, including M-NCPPC and Sierra Club et al. in their 2021 SDEIS comments.

² Stakeholders have relied on FHWA's statement in the SDEIS that it "does not intend to issue a combined FEIS/ROD." SDEIS at PDF p.2. However, FHWA should also commit to an adequate public review period on an FEIS.

deferral of analyses and mitigation measures have been raised as issues by other agencies and stakeholders.³

The EPA is charged under Section 309 of the Clean Air Act to review the environmental impact statements of other federal agencies and to comment on the adequacy and the acceptability of the environmental impacts of the proposed action. EPA's recently issued draft strategic plan commits the Agency to "promote robust consideration of climate change mitigation, adaptation, and resilience in review of proposed actions, such as . . . transportation projects" and "promote robust consideration and mitigation of environmental impacts on overburdened communities with environmental justice concerns in the review of . . . transportation related projects," two areas of which evaluation was particularly deficient in the Draft Environmental Impact Statement (DEIS) and SDEIS.⁴

EPA's statutory functions cannot be discharged with an insufficient comment period on a megaproject whose key safety, environmental justice, and impact evaluations and mitigation measures had been deferred to the FEIS and even later (in the case of safety). The mandated 30-day review period before issuance of a Record of Decision (ROD) is not sufficient. Without issuance of either another SDEIS or a longer formal review period on the FEIS, EPA may need to refer the project to the Council on Environmental Quality, potentially causing larger delays. The Nov. 30, 2021 SDEIS comment letter of the Maryland-National Capital Park and Planning Commission (M-NCPPC) has also warned that lack of progress in key identified deficiencies in the SDEIS could "endanger the aggressive schedule" set forth for the project.

Serious concerns have been raised in the comments submitted by Sierra Club et al. regarding the accuracy of the traffic modeling, the results of which bear on impact estimates pertaining to safety, air quality, and environmental justice, all areas that the EPA has a statutory requirement and special interest⁵ in reviewing. The traffic model issues have also been raised by multiple stakeholders,⁶ including the

³ M-NCPPC SDEIS Comment Letter, Nov. 30, 2021, https://montgomeryplanningboard.org/wp-content/uploads/2022/01/SDEIS-MNCPPC-Comment-Cvrltr_11.30.21.pdf; Sierra Club et al. I-495 & I-270 SDEIS comments, Nov. 30, 2021, <https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/maryland-chapter/2021-12-27%20-%20Sierra%20Club%20et%20al.%20SDEIS%20comments.pdf>.

⁴ FY 2022-2026 EPA Strategic Plan Draft, EPA, at 11, 23, Oct. 1, 2021, <https://www.epa.gov/system/files/documents/2021-10/fy-2022-2026-epa-draft-strategic-plan.pdf>.

⁵ Laurie A. Shuster, What does infrastructure have to do with social justice and equity? ASCE, Nov. 1, 2021, <https://www.asce.org/publications-and-news/civil-engineering-source/civil-engineering-magazine/issues/magazine-issue/article/2021/11/what-does-infrastructure-have-to-do-with-social-justice-and-equity>; see also footnote 4.

⁶ Bruce DePuyt, Seizing on MDOT's Own Analysis, Toll Lane Foes Urge Feds to Reject Project Study, Maryland Matters, Oct. 21, 2021,

majority of the Montgomery County Council⁷ and U.S. Senators Ben Cardin and Chris Van Hollen and U.S. Representatives Anthony Brown and Jamie Raskin.⁸ Without a valid traffic model, it is impossible to determine the extent to which the project satisfies the purpose and needs identified in the SDEIS and therefore the extent to which project alternatives meet those needs.

M-NCPPC has also flagged numerous concerns with the traffic model that require action prior to issuance of the FEIS:

Additionally, there are a number of inconsistent conclusions and assumptions in the SDEIS's transportation modeling and forecasts. The Project claims to improve traffic congestion, but its analysis finds that there are significant segments where the General Purpose lanes worsen significantly as a result of this Project. While the cause of these issues may be subject to debate, **MDOT SHA surely has a responsibility to explain or reanalyze the transportation model, its assumptions, and conclusion to resolve these inconsistencies.** The purpose and need cannot be achieved if the very basis of the Project, to relieve congestion, is called into question.⁹

The absence from the SDEIS of a valid traffic model made it impossible for agencies and the public to comment meaningfully on (1) whether the preferred alternative satisfies the purpose and need and the extent to which project alternatives meet those needs; and (2) impacts that are dependent on traffic

<https://www.marylandmatters.org/2021/10/21/seizing-on-mdots-own-analysis-toll-lane-foes-urge-feds-to-reject-project-study/>. Sierra Club et al. I-495 & I-270 SDEIS Comments, Nov. 30, 2021, at 18-84,

<https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/maryland-chapter/2021-12-27%20-%20Sierra%20Club%20et%20al.%20SDEIS%20comments.pdf>; Letter from MTOC, CABE, and DontWiden270 to Acting FHWA Administrator S. Pollack, Oct. 18, 2021, attached to the SDEIS comments submitted by MTOC and ten other organizations, <https://transitformaryland.org/sites/default/files/pollackletter.pdf>.

⁷ Letter from Montgomery County Council to FHWA and MDOT, Oct. 27, 2021,

<https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/maryland-chapter/Extension%20Letter.pdf>. Quoting from the letter: "Serious questions have been raised about the validity of the traffic modeling that underpins the SDEIS, which focuses on the new project scope (Phase 1 South). The traffic modeling feeds into toll rate assumptions, financial assumptions, and congestion, air quality, and noise impacts, so errors in the traffic modeling affect determination of impacts across a wide range of types. We need time for our county's transportation and planning staff to independently analyze the traffic effects of this project."

⁸ Letter to FHWA and MDOT from U.S. Sens. Ben Cardin and Chris Van Hollen and U.S. Reps. Anthony Brown and Jamie Raskin, Oct. 28, 2021,

https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/maryland-chapter/270_495%20Comment%20Extension%20%20Letter_Final_10.28.21.pdf. The letter references "traffic model issues" needing to be addressed by the agencies (FHWA and MDOT).

⁹ M-NCPPC SDEIS Comment Letter, at 9-10 (emphasis added) (footnotes omitted).

volumes and speed, including road safety, air quality, climate emissions, and environmental justice. These issues are at the heart of an environmental impact analysis.

In addition, the comments of M-NCPPC, a cooperating agency, identify several other topics on which agencies and the public were unable to make meaningful comment because the analysis was deferred to the FEIS.

In its November 30, 2021 letter, M-NCPPC cites the “Lead Agencies’ failure to undertake a comprehensive analysis of reasonable alternatives, impacts, and mitigation measures.”¹⁰ The letter states: “The SDEIS does not consider adequately environmental justice, equity, and historic resource preservation concerns.”¹¹ It goes on to say,

Consistent with its statutory duties, M-NCPPC will require a thorough and implementable mitigation package to include park enhancements, extensive parkland replacement, and consideration of the valuable natural, cultural, and historic resources present in the Project’s vicinity. As currently drafted, meaningful mitigation commitments and progress are absent from the SDEIS.¹²

Environmental justice is a specific issue identified in the M-NCPPC letter that requires further formal review:

[T]he SDEIS indicates that environmental justice issues omitted from the SDEIS will be remedied in the FEIS. This . . . obstructs public comment and community input. Waiting until after selection of a preferred alternative to evaluate impacts to minority communities means that disproportionate impacts will not be considered in the formulation of the preferred alternative and thus do not receive the attention NEPA and Title VI of the Civil Rights Act of 1964 (“Title VI”) demand from the Lead Agencies. This course of action also runs afoul of Department of Transportation Order 5610.2(a), which commits the Department to promote the principles of environmental justice “by fully considering environmental justice principles throughout planning and decision-making processes in the development of programs, policies, and activities, using the principles of the National Environmental Policy Act of 1969 . . .” FHWA Order 6640.23A espouses a similar theme, committing FHWA to “identify and prevent discriminatory effects . . . to ensure that social impacts to communities and people are recognized early and continually throughout the

¹⁰ M-NCPPC SDEIS Comment Letter, Nov. 30, 2021, at 2.

¹¹ M-NCPPC SDEIS Comment Letter, Nov. 30, 2021, at 6.

¹² M-NCPPC SDEIS Comment Letter, Nov. 30, 2021, at 17.

transportation decision-making process—from early planning through implementation.” Acting later, after the Lead Agencies have already responded to stakeholder concerns and continued designing the Project, would violate Title VI, these orders, and fundamental environmental justice principles.¹³

Another important issue in the M-NCPPC comments relates to project-caused bottlenecks, which are a major safety issue.¹⁴ M-NCPPC makes the following observations on the lack of analysis and proposed mitigations for the new traffic bottlenecks the project would create.

[T]he Preferred Alternative does not eliminate congestion in the corridors studied but and instead shifts it from the vicinity of the ALB (e.g., McLean and Potomac) to other areas in Maryland. . . . **the degree of congestion resulting from the proposed project is severe on I-270 north of I-370, on the Inner Loop on the top side of the Beltway, and on the Inner Loop in Prince George’s County. These bottleneck shifts are Project-related impacts,** and so the Lead Agencies should address mitigation measures to minimize these projected deficiencies in the SDEIS and incorporate them into the Project design. NEPA requires the Lead Agencies to consider mitigation measures that address adverse impacts, including, among others, areas of traffic congestion points.

Specifically, if the construction of Phase 1A is likely to shift congestion in a way that logically requires construction of Phase 1B (currently the subject of the I-270 Pre-NEPA Study) in order to avoid creation of new bottlenecks, then it follows that any decision to proceed with Phase 1A must await completion of the NEPA analysis for Phase 1B. MDOT SHA should further consider the implications of language in the FEIS concerning the impact of Section 27.3 of the Phase Public Private Partnership Agreement (the “P3 Agreement”). Section 27.3 is entitled Financial Viability of an Uncommitted Section and it explicitly states that future phases may be cut based upon a financial viability formula applied to a prior phase of the project. . . . In other words, **the traffic analysis raises serious questions about how a decision on Phase 1A can or should be made in the absence of a comprehensive analysis that assesses the impact of building this segment on future phases.**¹⁵

¹³ [M-NCPPC SDEIS Comment Letter](#), Nov. 30, 2021, at 7 (emphasis added) (footnote omitted).

¹⁴ See [Sierra Club et al. SDEIS Comments](#) on bottlenecks and safety, Nov. 30, 2021, at 70-76 (emphasis added).

¹⁵ M-NCPPC SDEIS Comment Letter, Nov. 30, 2021, at 8-9 (emphasis added) (footnotes omitted).

In an interview with Transurban North American President Pierce Coffee published in *The Washington Post* on December 30, 2021, Coffee admits that bottlenecks will be created and that the remedy requires further construction beyond the project limits. Coffee states:

My former boss used to say that the worst thing about the express lanes is when they end. So that is a problem, and that's something we'll have to work on with Maryland. . . . When the 495 Express Lanes first opened, there was a choke point right before Georgetown Pike where the express lanes were coming into the regular lanes, and that was causing backups. . . . After the I-95 express lanes opened, relatively quickly it became apparent that two lanes going back into the regular lanes was causing a choke point. So [the Virginia Department of Transportation] and Transurban worked on a one-lane extension to the [I-95] express lanes that would allow that merge to be smoother.¹⁶

These comments indicate that the SDEIS was incomplete and insufficient in terms of both required analysis and information presented for agency and public review. For a controversial project of this magnitude and sensitivity, complete analysis and meaningful opportunity for agency and public review are essential.

That such project-critical analysis is incomplete and insufficient and not presented for public review and comment shows the need for a further formal review and comment opportunity for agencies and the public.

For all these reasons, moving forward on this project without an additional SDEIS and/or without a meaningful public review period on any FEIS would not allow EPA and other agencies to discharge their statutory functions or the project to meet statutory requirements under NEPA, the U.S. Department of Transportation Act of 1966, Section 309 of the Clean Air Act, and other laws and regulations.

Therefore, we ask the FHWA to confirm by February 15, 2022 that it will issue another revised SDEIS with a 60-day review period reconciling the conflicting information in the DEIS and SDEIS, providing the deferred impact analyses, revising the seriously flawed traffic model and all analyses that are reliant on traffic modeling, including the project's purpose and need and alternatives, and identifying and discussing mitigation measures. In any case, we ask that the FHWA confirm that any FEIS will be issued with a 90-day public review period before issuance of any ROD.¹⁷

¹⁶ Katherine Shaver, Transurban leader Pierce Coffee calls Maryland toll lanes 'transformative', *The Washington Post*, Dec. 30, 2021, <https://www.washingtonpost.com/transportation/2021/12/30/transurban-pierce-coffee-maryland/>.

¹⁷ Recent examples of 60-day or more FEIS review periods: FEIS for I-26 Connector, 2020, 60 days, <https://www.ncdot.gov/news/press-releases/Pages/2020/2020-02-04-i-26->

The EPA and other stakeholders must have an adequate formal opportunity to review and comment on ignored, deferred, and traffic model-associated project impacts and on proposed mitigation measures, including their adequacy and effectiveness. Affording only the regulatory minimum public review period is insufficient in the case of this complex and highly controversial project.

Respectfully,

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Cc:

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Senator Chris Van Hollen
Congressman Anthony Brown
Congressman Jamie Raskin
Delegate Marc Korman, District 16
Delegate Jared Solomon, District 18

[connector-feis.aspx](https://community.impact.com/houston/heights-river-oaks-montrose/transportation/2020/10/28/public-comment-period-extended-on-i-45-environmental-report/); FEIS for I-45, Sept. 25-Dec. 9, 2020, 75 days, <https://community.impact.com/houston/heights-river-oaks-montrose/transportation/2020/10/28/public-comment-period-extended-on-i-45-environmental-report/>.