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February 13, 2009

Mr. Roberto Fonseca-Martinez
Division Administrator
Federal Highway Administration - Virginia Division
400 N. Eighth Street
Richmond, VA 23240

Re: Route 250 Bypass Interchange and McIntire Road Extended

Dear Mr. Fonseca-Martinez:

These comments are submitted on behalf of the Coalition to Preserve McIntire Park concerning the Draft Environmental Assessment ("EA")/Section 4(f) Evaluation circulated by the Federal Highway Administration ("FHWA") and the Virginia Department of Transportation (VDOT) for the Route 250 Bypass Interchange at McIntire Road. In my opinion, the FHWA has unlawfully constrained the scope of the EA and Section 4(f) Evaluation by failing to evaluate McIntire Road Extended and the Interchange as part of a single, federalized project, in violation of both the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. and Section 4(f) of the Department of Transportation Act ("Section 4(f))." 23 U.S.C. § 138; 49 U.S.C. § 303.

As you know, from its inception in the 1970s, the Meadow Creek Parkway has historically been developed as a single facility running from Rio Road, through the McIntire Park and golf course to the Route 250 Bypass, for which an Environmental Impact Statement ("EIS") was contemplated. However, in 1997, VDOT decided to subdivide the Meadow Creek Parkway into separate "projects." Funding for a new interchange at the Route 250 bypass was later earmarked by Congress as part of the 2005 transportation re-authorization funding act. As a result, the Meadow Creek Parkway is now characterized is consisting of the following segments: (1) the federally-funded Route 250 Bypass Interchange at McIntire Road, including a 775-foot segment of a new highway --- McIntire Road Extended -- north of Route 250 Bypass; (2) McIntire Road Extended, a two-lane highway extending 2100 feet north from the end of the 775-foot segment of McIntire Road Extended to Melbourne Road; and the (3) Meadow Creek Parkway, from Melbourne Road to Rio Road. As segmented, only the Route 250 interchange, plus the 775-foot segment of McIntire Road Extended, is characterized as a major federal action, to which NEPA applies.

The scope of the Draft EA/Section 4(f) Evaluation for the Route 250 bypass interchange is confined to the impacts of the interchange itself. This document does not

evaluate the impacts of or alternatives to the full McIntire Road Extended under either NEPA or Section 4(f). This is particularly troubling, since McIntire Road Extended will use 13 acres of land from McIntire Park and the golf course, both of which are resources protected by Section 4(f). As the EA for the Route 250 interchange itself acknowledges, "McIntire Road Extended will introduce features into the park that are incompatible with the qualities that make the resource historic, including one of McIntire Park's contributing historic elements, the McIntire Park Golf Course, which will be altered by both projects. These two projects will result in a larger incremental impact on the historic resource than what has occurred from past development, and is thus considered a cumulative effect." Route 250 Bypass Interchange at McIntire Road, EA, § 3.11.3, at 42. While the EA further acknowledges that cumulative impacts 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," (*id.* § 3.11.3, at 45), the EA fails to evaluate whether or not there are any prudent and feasible alternatives to the construction of McIntire Road Extended under Section 4(f)'s stringent standard.[1] Instead, the EA considers only a series of alternative design options for the interchange itself.

While NEPA and Section 4(f) are triggered only by major federal actions, such as funding, "[t]he absence of federal funding is not necessarily dispositive in determining whether a [transportation] project is imbued with a federal character." Historic Preservation Guild of Bay View v. Burnley, 896 F.2d 985, 990 (6th Cir. 1989). Rather, "[i]n order to determine when a group of segments should be classified as a single project for purposes of federal law, a court must look to a multitude of factors, including the manner in which the roads were planned, their geographic locations, and the utility of each in the absence of the other." Id. at 991 (citing River v. Richmond Metropolitan Authority, 359 F. Supp. 611, 635 (E.D. Va. 1973)). The FHWA's regulations codify this standard by requiring that the action evaluated in any NEPA document "shall: (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope; (2) Have independent utility or independent significance, i.e. be usable and be a reasonable expenditure *even if no additional transportation improvements in the area are made*." 23 C.F.R. § 771.111(f) (emphasis added)

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

[1] .Section 4(f) states that the Secretary of Transportation "shall not approve any program or project" which requires the "use" of land from a park, wildlife or waterfowl refuge, recreation area, or historic site, unless (1) there is no feasible and prudent alternative to the use of the site, and (2) the project incorporates all possible planning to minimize harm to the protected site. 23 U.S.C. § 138; 49 U.S.C. § 303.

Here, the preferred alternative for the proposed Route 250 Bypass interchange clearly does not have logical termini. The northern ramp of the interchange extends 775 feet north of the Route 250 bypass, and terminates in the middle of McIntire Park, without connecting to any existing roadway, crossroad, or traffic generators. Absent the planned construction of McIntire Road Extended in its entirety, there would be no need for the 775-foot piece of McIntire Road Extended, since this highway stub would end "literally in the middle of the woods." Patterson v. Exon, 415 F. Supp. at 1283; see also Swain v. Brinegar, 542 F.2d 364, 270 (7th Cir. 1976) (Court held that a highway had been improperly segmented where "[t]he northern terminus ends in the country at no logical or major terminus.").

Moreover, it is clear that the interchange as a whole, and most particularly the 775-foot stub of McIntire Road Extended, would not "be a reasonable expenditure even if no additional transportation improvements in the area are made." 23 C.F.R. § 771.111(f). To the contrary, as the EA concedes, the current signalized, at-grade intersection at McIntire Road and the Route 250 Bypass currently operates at a satisfactory level of service for most traffic movements. EA, at 2. The EA makes no attempt to determine whether or not a grade-separated interchange would be needed at McIntire Road and the Route 250 Bypass purpose "even if no additional transportation improvements in the area are made." 23 C.F.R. § 771.111(f). Instead, the need for the massively over-designed interchange depends almost entirely on the traffic volumes generated under "Future Conditions," which are based on 2030 traffic projection for "the future intersection of the Route 250 Bypass, McIntire Road, and McIntire Road Extended." EA, at 2. Clearly, there would be no need for the interchange --- and certainly no need for the massive interchange proposed here – but for the construction of McIntire Road Extended.

In determining whether a highway has been unlawfully segmented, the courts have looked at whether the segments were planned as a single project or whether the segments were "planned to be constructed if at all at different times in the future over a period of years." Save Barton Creek Ass'n, 950 F.2d at 1141; see Village of Los Ranchos de Albuquerque v. Barnhard (finding no segmentation where "the [federal and state-funded] projects are, at best, only peripherally related"); Historic Preservation Guild of Bay View v. Burnley, 896 F.2d at 990 (finding no unlawful segmentation where federally funded segment was built 25 years before state-funded segment). In determining whether such segmentation is unlawful, courts have also looked at whether the state and federal segments served different or similar purposes. See River v. Richmond Metropolitan Auth., 359 F. Supp. at 992 (federally funded road provided commuter access between residential areas west of Richmond, while the state-funded segment connected two highways and provided access to residential area north of the city); Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d at 441 ("projects were separately proposed to accomplish independent purposes").

Here, as noted above, the Route 250 Bypass interchange and McIntire Road Extended were and continue to be planned as a single facility. The EA's insistence that "[t]he purpose and need of the proposed interchange project is independent of the

purpose and need for the McIntire Road Extended" (EA, at 4) is completely belied by the EA itself, which demonstrates that the need for the interchange is predicated on the future traffic volumes that will be generated by construction of McIntire Road Extended. Indeed, the two projects are so wholly intertwined that, as the FHWA acknowledges, "VDOT and the City [of Charlottesville] intended to issue construction contracts for the McIntire Road Extension project and the Route 250 Bypass interchange project as closely together as project development activities." Letter to Peter Kleeman from Mr. Fonseca-Martinez, FHWA (Sept. 4, 2008).

The FHWA's claim that the Route 250 interchange is "independent" of McIntire Road Extended, and that the two projects are being simply constructed jointly "in order to minimize disruption to the environment, adjacent communities and the traveling public" (*id.)* cannot be squared with the record here. Rather, the opposite is true: the City of Charlottesville has made it clear that it will not move forward with construction of McIntire Road Extended unless the grade-separated Route 250 Bypass interchange is funded and advanced by the FHWA and VDOT.

Specifically, as early as 1999, the City made the construction of a grade-separated interchange at U.S. 250 Bypass an express condition of its support for McIntire Road Extended**.** ***See, e.g.,*** Letter to Charles Rasnick, VDOT, from J. Blake Caravati, Mayor of Charlottesville (Dec. 11, 2000) (attached). Ultimately, the City approved the design for McIntire Road Extended only after the City determined that "it now appears that adequate funding will be available to fulfill the condition stated in paragraph 4 of Exhibit A, regarding the design and construction of a separate project at the intersection of U.S. Route 250, McIntire Road, and the Meadow Creek Parkway." Design Public Hearing Approval Resolution (Jan. 17, 2006). Paragraph 4 of that document expressly stated that: "any final design [for McIntire Road Extended] has to include a grade-separated interchange," to which VDOT responded "We remain committed to this project [i.e. the Route 250 interchange] as a necessary improvement to both the U.S. 250 Bypass and the Meadow Creek Parkway." Letter from David E. Brown, Mayor of Charlottesville, to Mr. Greg Whirley, VDOT, at 2 (Jan. 18, 2006) (attached).

For that reason, there is no support for the FHWA's bald assertion that McIntire Road Extended will be constructed regardless of whether the Route 250 interchange is constructed, and therefore the "no build" scenario should assume construction of McIntire Road Extended as a "predictable consequence" of no action alternative. Letter to Peter Kleeman from Mr. Fonseca-Martinez, FHWA (Nov. 4, 2008) (citing CEQ's "Forty Most Asked Questions Concerning CEQ's NEPA Regulations," Question 3a, 46 Fed. Reg. 188026 (1981). There is absolutely no evidence that McIntire Road Extended will be constructed ***as a result of*** a decision by the FHWA not to fund the Route 250 bypass interchange. Rather, as noted above, the record shows that the two projects are so interdependent that neither can proceed without the other.

The FHWA cannot have it both ways: the purpose and need for the Route 250 bypass interchange project cannot be predicated on the planned construction of McIntire

Road Extended-- a design that as a result encroaches substantially within McIntire Park – and at the same time have independent utility and logical termini "even if no additional transportation improvements in the area are made." 23 C.F.R. § 771.111(f). The reality is that the massive interchange footprints for each of the alternatives evaluated in the EA– and significantly greater impacts on Section 4(f)-protected resources -- are designed in order to accommodate McIntire Road Extended. As a result, the only way for the FHWA and VDOT to take advantage of the "efficiencies" of jointly constructing these plainly interrelated projects is to consider the Route 250 interchange and McIntire Road Extended as part of a single, inter-related federal project, which must be evaluated in a single NEPA and Section 4(f) document.

Finally, there is strong evidence that the project was deliberately segmented in order to evade federal environmental laws. Despite the fact that Meadow Creek Parkway was originally (and continues to be) planned as a single facility, the FHWA deliberately "scaled back" the scope of the project considered to be the "federal action" so that "the potential significant adverse environmental impacts identified in the EIS and associated with the proposed project were eliminated." Letter from Mr. Fonseca-Martinez, FHWA to the Mayor of Charlottesville (Dec. 22, 1997). Evidence that a project was deliberately segmented for the express purpose of evading federal environmental laws "will weigh very heavily in support of the project splitting theory." River v. Richmond Metropolitan Authority, 350 F. Supp. 611, 635 (E.D. Va. 1973). See also, Sierra Club v. Volpe, 351 F. Supp. 1002, 1007 (N.D. Ala. 1972) ("Waiver of federal aid . . . . at the last minute . . . should not be made a ground for disclaiming the federal nature of the project where it appears that the purpose is to avoid compliance with federal statutory environmental requirements); Save Barton Creek Ass'n, 950 F.2d at 1143-44 ("We recognize that if a state has segmented for the purpose of evading federal environmental requirements and without other valid justification, a holding of evasive violation would be justified").

Accordingly, unless the FHWA takes immediate steps to ensure that the impacts of and alternatives to the Meadow Creek Parkway, including both the Route 250 Bypass interchange and McIntire Road Extended, are evaluated in a single NEPA document of an appropriate scope, the Coalition to Preserve McIntire Park intends to pursue all available legal remedies, including but not limited to litigation to enforce NEPA and Section 4(f).

Sincerely,

Andrea C. Ferster,
Counsel for Coalition to Preserve McIntire Park

Enc.