IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DISTRICT OF COLUMBIA

FRIENDS OF THE CAPITAL CRESCENT TRAIL, *et al*.,	No. 1:14-cv-01471-RJL
Plaintiffs,	
v.	Hon. Richard J. Leon
FEDERAL TRANSIT ADMINISTRATION, *et al*.,	
Federal Defendants,	
-and-	
MARYLAND TRANSIT ADMINSTRATION,	
Defendant-Intervenor.	

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR TO AMEND THE COURT'S AUGUST 3, 2016 ORDER [ECF NOS. 96-97] UNDER RULE 59(e)

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INTRODUCTION

On August 3, 2016, the Court granted in part Plaintiffs' motion for summary judgment and denied in part Federal Defendants' cross-motion for summary judgment, reserving judgment on the remaining claims. ECF Nos. 96 ("Mem. Op."), 97 ("Order") (collectively the "Decision"). In its Decision, the Court found "that the recent revelations regarding Washington Metropolitan Area Transit Authority's ("WMATA") ridership and safety concerns merit a supplemental Environmental Impact Statement [("SEIS")] under NEPA."[1] Mem. Op. 2; *see also id*. at 5. Based on this finding, the Court vacated the Federal Transit Administration's ("FTA") Record of Decision ("ROD") for the Maryland Transit Administration's ("MTA") Purple Line Project and remanded to FTA with instructions to prepare a supplemental Environmental Impact Statement ("SEIS") on this limited issue "as expeditiously as possible." Mem. Op. 9, Order 2, 9.

The Court's Decision is based on fundamental and clear errors of law and the Court should alter or amend it to prevent manifest injustice. First, in light of the Court's finding that that FTA failed to adequately consider "WMATA's ridership and safety issues," the Court erred in directing the FTA to prepare an SEIS rather than remanding to FTA for further consideration consistent with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and its implementing regulations. *See, e.g.*, 23 C.F.R. § 771.129-130. Further, the Court erred in substituting its judgment for that of FTA in holding that the WMATA issues merit preparing an SEIS, *see* Mem. Op. 2, 5, when that determination must first be made by FTA itself.

Second, the Court erred in vacating the ROD without evaluating the seriousness of the deficiency in FTA's decision or the disruptive consequences of vacatur under *Allied-Signal, Inc.*

[1] In stating the standard for preparing an SEIS, the Court incorrectly cites to the Nuclear Regulatory Commission's NEPA regulation. *See* Mem. Op. 4 (citing 10 C.F.R. § 51.92(a)(1)-(2). FTA's SEIS regulation is codified at 23 C.F.R. § 771.130, and although the provisions are similar, FTA's regulation is controlling here.

v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Remand without vacatur is appropriate where, as here, there is a "serious possibility," *id*. at 151, that when FTA more fully articulates the rationale for its conclusion that an SEIS is not warranted by ridership issues in a neighboring transit system, *see* AR5_00004, the conclusion will be justified because any modest decrease in WMATA Metrorail ridership does not call into question the Purple Line's long-term ridership projections or affect the Project's viability. *See e.g.*, Decl. of Lucy Garliauskas ¶¶ 7-16 ("Garliauskas Decl.") (attached as Ex. 1).

And while the Court noted that a "temporary halt in the project is not ideal," Mem. Op. 9, the Court made no inquiry into the serious disruptive consequences of stalling this important public transit project before concluding that vacatur was warranted and effectively enjoining the Project from proceeding. Indeed, in its supplemental summary judgment brief, MTA explained that the "complex contractual arrangements" in place create "the potential for a seemingly modest delay to have cascading consequences on the project schedule and financing arrangements." ECF No. 93. The Court, however, did not consider these factors before summarily concluding that proceeding with the Project during remand would "cause even more disruption." Mem. Op. 9.

The Court's Decision, if the Court does not reconsider and correct it, is contrary to law in that it impermissibly constrains the method that FTA may use to comply with NEPA. Moreover, the remedial order has dramatic and practical consequences on the Purple Line Project—which has been determined by the agencies to meet a pressing transportation need and in the public interest by providing faster, more reliable access to major employment and activity centers in the corridor—that the Court did not consider. For these reasons, Federal Defendants are requesting the Court to correct clear error and prevent manifest injustice by reconsidering its Decision.

STANDARD OF REVIEW

Federal Rule of Civil Procedure ("Rule") 59(e) is discretionary and allows district courts to alter or to amend a judgment if there is a "need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (citations omitted). "[M]otions pursuant to Rule 59(e) are rarely granted and should not be 'simply an opportunity to reargue facts and theories upon which a court has already ruled.'" *Defs. of Wildlife v. Salazar*, 842 F. Supp. 2d 181, 184 (D.D.C. 2012) (citing *State of New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995)). Identification of a clear error is sufficient to merit relief under Rule 59(e). *See Comm. of 100 on the Fed. City v. Foxx*, 106 F. Supp. 3d 156, 160 (D.D.C. 2015).

ARGUMENT

I. The Court Erred in Ordering a Supplemental Environmental Impact Statement.

The Court's Decision found that FTA's adoption of MTA's "barebones explanation," Mem. Op. 6, as to why the WMATA Metrorail system's ridership and safety issues do not warrant an SEIS was arbitrary and capricious. *Id*. at 5. The Court's finding, however, merely holds that the explanation in the record does not adequately support that conclusion; it did not identify any insurmountable flaw in FTA's conclusion that an SEIS is not warranted. The Court, therefore, erred in directing FTA to prepare an SEIS on remand to address the identified flaw, *see* ECF No. 96 at 9 (ordering "that the Record of Decision be vacated and remanded to the defendants for the preparation of an SEIS as expeditiously as possible"); ECF No. 97 at 2 (ordering "that the defendants prepare a supplemental Environmental Impact Statement ("SEIS") as expeditiously as possible"), because it both dictates the scope of NEPA analysis on remand and makes a finding of significance without first allowing FTA to make that initial determination. In so doing, the Court impermissibly substituted its own judgment regarding the significance of issues that fall within the agencies' technical expertise.

First, the proper course is to remand to FTA for further consideration and articulation of its conclusion rather than dictating the scope of NEPA analysis and specifically requiring an SEIS. The Court's Decision ignores the well-established tenet "that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Fed. Power Comm'n v. Idaho Power Co*., 344 U.S. 17, 20 (1952). It is well-settled that if the Court determines the agency's explanation is not sufficient, the proper course of action, "*except in rare circumstances*, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co.*, 470 U.S. 729, 744 (1985) (emphasis added); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 657 (2007) ("[I]f the [agency's] action was arbitrary and capricious . . . the proper course would have been to remand to the Agency for clarification of its reasons." (citing *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam))); *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) ("[R]emanding to the agency in fact is the preferred course." (citing *Florida Power & Light Co.*, 470 U.S. at 744)); *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1047 (D.C. Cir. 2002), *opinion modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) ("Under the APA reviewing courts generally limit themselves to remanding for further consideration an agency order wanting an explanation adequate to sustain it." (citing *Geller v. FCC*, 610 F.2d 973, 980 (D.C.Cir.1979))); *Tourus Records, Inc. v. Drug Enf't Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001) ("When an agency provides a statement of reasons insufficient to permit a court to discern its rationale . . . the usual remedy is a 'remand to the agency for additional investigation or explanation.'" (quotation omitted)); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 26 (D.D.C. 2008) (explaining that the proper relief "would be in the form of setting aside the original permit decision and remanding to the [agency] for reconsideration in light of applicable law").

In a NEPA case such as this, the level of analysis required to remedy the identified flaw will depend upon whether the further consideration reveals potentially significant environmental impacts that present a "*seriously* different picture of the environmental landscape." *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (citing *City of Olmsted Falls, OH v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002)). In order for FTA to make that initial determination, the Court should amend its Decision requiring an SEIS and permit FTA to consider the information consistent with NEPA and its implementing regulations, and arrive at its own determination as to the appropriate course of action to follow. 23 C.F.R. § 771.129-130; *see* 23 C.F.R. § 771.130(c) ("Where [FTA] is uncertain of the significance of the new impacts, the applicant will develop appropriate environmental studies . . . to assess the impacts of the . . . new information . . . . If, based upon the studies, [FTA] determines that a supplemental EIS is not necessary, [FTA] shall so indicate in the project file."); *N. Idaho Cmty. Action Network v. DOT*, 545 F.3d 1147, 1157 (9th Cir. 2008) ("To assist the agency in determining whether a SEIS is required, an agency may prepare an environmental report (such as a reevaluation) or an [Environmental Assessment]."); *Price Rd. Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1512 (9th Cir. 1997) ("The NEPA-implementing regulations authorize the [Federal Highway Administration] to use the reevaluation procedure to determine whether a project change will cause significant or uncertain environmental impacts.").

Second, in light of the Court's conclusion that FTA failed to adequately consider the WMATA Metrorail's ridership and safety issues, the Court then oversteps by concluding that an SEIS is warranted. Mem. Op. 2, 5. Even if the Court's Decision can be read to imply that the agencies must conclude that WMATA Metrorail's ridership and safety issues have significant environmental impacts that warrant preparing an SEIS, such a ruling is improper on this record

because, under the Court's reasoning, FTA "wholly failed to evaluate the significance of the documented safety issues and decline in WMATA ridership, skirting the issue entirely . . . ." Mem. Op. 7.

The Administrative Procedure Act ("APA") allows a court to "hold unlawful and set aside" agency action that it finds arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376 (1989). The Act, however, does not authorize a court to "substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). It is a basic principle of administrative law that a court sits only to review an agency's determinations, not to make determinations for it. *SEC v. Chenery Corp*., 318, U.S. 80, 88 (1943). Indeed, "[t]he reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to *reach its own conclusions* based on such an inquiry." *Fla. Power & Light Co.*, 470 U.S. at 744 (emphasis added). But that is precisely what the Court has done here.

Instead, "the initial decision whether a supplemental EIS is required should be made by the agency." *Friends of the River v. F.E.R.C.*, 720 F.2d 93, 109 (D.C. Cir. 1983); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (explaining that the significance determination "requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agenc[y]."); *Nat'l Ass'n of Home Builders*, 551 U.S. at 658 (noting that the Ninth Circuit impermissibly "jumped ahead to resolve the merits of the dispute" rather than remanding to the agency for further consideration); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985) ("[U]ntil [the agency] completes such an evaluation the question whether the experiment requires an EIS remains open"); *Nat'l Audobon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997) ("The district court overstepped the narrow confines of judicial review

of an agency's decision when it . . . ordered the agency to prepare an EIS."); *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 240 (5th Cir. 2007) (reversing district court order requiring EIS); *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1024 (9th Cir. 1980) ("When new information comes to light *the agency* must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require [supplementation]") (emphasis added).

Here, the Court first found that FTA "wholly failed" to consider the WMATA Metrorail ridership and safety issues, Mem. Op. 7, and then proceeded to draw a conclusion—based on a record the Court had held to be inadequate—that those issues "warrant an SEIS." *Id*. at 5. Indeed, on remand, FTA should be permitted to have its experts consider whether, and to what extent, WMATA Metrorail's ridership and safety issues and the "recent events," the Court references, Mem. Op. 5, are relevant to the potential environmental impacts of the Purple Line and make its findings with respect to the need to prepare an SEIS.

At bottom, the Court erred when it prescribed the level of NEPA analysis required on remand. The Court's leap from the finding that FTA failed to adequately consider the WMATA Metrorail ridership and safety issues to the ultimate conclusion that FTA must prepare an SEIS deprived the agency of the opportunity to make its own determination, in violation of APA precedents stating that remand to the agency is the proper remedy. FTA moves the Court to alter its Decision to permit FTA to conduct its analysis—consistent with FTA's NEPA regulations—to determine whether the information regarding WMATA Metrorail's ridership and safety issues warrants preparation of an SEIS.

II. The Court Should Remand the ROD to FTA Without Vacatur.

In addition, FTA submits that the Court should remand the ROD to FTA without vacatur in order to avoid unnecessary disruption to this important public project. A court need not vacate

every agency decision that violates a law. *See Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) ("Appellants insist that we have no discretion in the matter; if the [agency] violated the APA—which it did—its actions must be vacated. But that is simply not the law."). When a plaintiff prevails on claims brought under the APA, vacatur of the challenged agency action is not automatic. *See id*. Indeed, courts may leave in place flawed decisions while the agency corrects its action. *See N. Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (explaining that "a remand without vacatur is appropriate" in some cases); *Anacostia Riverkeeper, Inc. v. Jackson*, 713 F. Supp. 2d 50, 52 (D.D.C. 2010) (explaining that "a district court has discretion to order a remand without vacatur" and collecting cases).

In the D.C. Circuit, courts decide whether to vacate an agency action depending on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed. *Allied-Signal, Inc.*, 988 F.2d at 150-51; *see also Sugar Cane Growers Co-op. of Fla.*, 289 F.3d at 98. The *Allied-Signal* factors are fact-specific and require the Court to consider the nature of any deficiency identified and the state of affairs at the time the Court issues its decision. *See Shands Jacksonville Med. Ctr. v. Burwell*, No. 14-cv-1477, 2015 WL 5579653, at *21 (D.D.C. Sept. 21, 2015) (noting that the *Allied-Signal* inquiry "will, of course, vary with context"). Both Federal Defendants and Defendant-Intervenor requested supplemental briefing on remedy in the event that the Court found any flaw in the agencies' analysis. *See* ECF Nos. 55 at 67; 61 at 31; 93 at 18; 94 at 15; *see also Sierra Club v. USDA, Rural Utils. Serv.*, 841 F. Supp. 2d 349, 352 (D.D.C. 2012) (after ruling in plaintiffs' favor on NEPA claim, the court "ordered the parties to submit supplemental briefing on the appropriate remedy"). The Court, however, did not permit supplemental briefing and then mentioned—but failed to apply—the

Allied-Signal factors before vacating the ROD.[2] *See* Mem. Op. 8-9, Order 2.

Federal Defendants request the Court to alter or amend its Decision to consider the seriousness of the identified violation and the disruptive consequences of vacatur, and to balance the equities—taking into account the important public interest in the Purple Line proceeding. The Purple Line is anticipated to provide faster, more reliable transit service in the corridor and improve access to employment and activity centers. Garliauskas Decl. ¶¶ 2-6. These benefits are particularly important for the "transit dependent populations who rely on transit for access to those centers of employment and economic activity." *Id*. ¶ 6.

An evaluation of the *Allied-Signal* factors will reveal that vacatur is not warranted during remand.

A. Vacatur is Not Warranted Because There is a Serious Possibility that the Agencies Will Substantiate Their Conclusions on Remand.

Under the D.C. Circuit's *Allied-Signal* test, "[t]he decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) . . . .'" *Allied-Signal, Inc.*, 988 F.2d at 150-51 (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin*., 920 F.2d 960, 967 (D.C. Cir. 1990)). The Court may remand the agency's decision without vacatur if "'there is at least a *serious possibility*

[2] By deciding only one issue raised in the fully submitted summary judgment briefs, the Court has, in effect, issued an injunction halting the Purple Line from proceeding. It has done so without any motion by Plaintiffs or any consideration of the balance of the equities or the public interest by the Court. *See* Pls.' Mem. in Supp. of Mot. for Summ. J., ECF No. 47-1; Pls.' Reply Mem. in Supp. of Mot. for Summ. J. and in Opp'n to Defs.' Mot. for Summ. J., ECF No. 59; *see also Black Warrior Riverkeeper, Inc.*, 781 F.3d at 1290 (11th Cir. 2015) ("In deciding whether an agency's action should be remanded without vacatur, a court must balance the equities."); *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1369 (11th Cir. 2008) (Kravitch, J., concurring in part and dissenting in part) ("[I]n deciding whether to remand without vacatur, it is appropriate to consider the balance of equities and the public interest, along with the magnitude of the agency's errors and the likelihood that they can be cured." (citing *Cent. Maine Power Co. v. FERC*, 252 F.3d 34, 47 (1st Cir. 2001))). The Court should consider these equitable factors, which weigh against vacatur during remand.

that the [agency] will be able to substantiate its decision' given an opportunity to do so, and when vacating would be 'disruptive.'" *Haw. Longline Ass' v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 11–12 (D.D.C. 2003) (quoting *Radio–Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999); *see also Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied–Signal* counsels remand without vacatur."); *Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 434 (D.D.C. 2014) ("Here, the Court finds it plausible—indeed, likely—that the [the agency] will be able [to] comply with its obligations . . . 'while reaching the same result.'" (quoting *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (citing *Delta Air Lines, Inc. v. Exp.-Imp. Bank*, 718 F.3d 974, 978 (D.C. Cir. 2013); *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013))).

Here, the Court found that the recent WMATA Metrorail ridership and safety issues may signal a "possible decline in future ridership." Mem. Op. 5. The Court's speculation is not supported by any evidence in the administrative record. Nor will that conclusion likely withstand analysis when the Agencies further articulate their rationale during remand. *See generally* Garliauskas Decl. In fact, the Purple Line ridership forecasts are long-term projections that are made independent of the types of short-term fluctuations that WMATA Metrorail's system may be experiencing as a result of the recent safety issues. *Id*. ¶ 14. Any short-term changes in ridership on WMATA Metrorail's system are expected to have a negligible impact on the ridership forecast included in the FEIS. *Id*. ¶ 15.

Even if one assumes the worst-case scenario in WMATA Metrorail's ridership trends, the Purple Line is forecasted to have more robust ridership than other FTA-funded projects and a

modest decrease in ridership from passengers that would have connected to or from WMATA Metrorail stations would not undermine the viability of the Purple Line to meet its stated purpose and need. *Id*. ¶¶ 14, 16. Although 27 percent of Purple Line users are expected to connect to the WMATA Metrorail system as part of their trip, AR1_001973-74, a decline in WMATA Metrorail ridership does not necessarily equate to significant loss of ridership for the Purple Line. Garliauskas Decl. ¶ 12. This takes into account the notion that Purple Line riders will have access and egress options other than WMATA Metrorail to get to and from the Purple Line including taking the bus, walking, biking, or driving. *Id*. ¶¶ 9, 12.

Any reduction in Purple Line ridership below the 2040 projections as a result of WMATA ridership due to Metrorail's current safety issues would be negligible and fall far short of calling the Purple Line Project's viability into question. *Id*. ¶ 15; *see also* Md.'s Mem. in Supp. of Mot. to Alter or Amend the Court's Aug. 3, 2016 Mem. Op. and Order 8-11 ("MTA Mem.") (ECF No. 98-1); Decl. of Gregory P. Benz ¶¶ 19-26 ("Benz Decl.") (ECF No. 98-2). Therefore, with or without the potential decline in ridership related to WMATA Metrorail's safety concerns, the Purple Line will meet the purpose and need of the project, which is to improve east-west transit service in the Purple Line corridor. *Id*. ¶ 16.

Vacatur is not warranted where, as here, FTA has presented a "serious possibility" that it will be able to substantiate its conclusion that the WMATA Metrorail safety issues do not present significant environmental impacts constituting a "seriously different picture of the *environmental* landscape" relating to the Purple Line. *Nat'l Comm. for the New River*, 373 F.3d at 1330.

B. The Court Failed to Consider the Disruptive Consequences of Vacating the ROD.

The Court stated that "[w]hile a temporary halt in the project is not ideal, it would make little sense and cause even more disruption if defendants were to proceed with the project while

the SEIS was being completed, only to subsequently determine that another alternative is preferable." Mem. Op. 9. In weighing whether vacatur is appropriate, however, the Court must consider the "the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc.*, 988 F.2d at 150–51 (quoting *Int'l Union, United Mine Workers of Am.*, 920 F.2d at 967).

Here, the Court failed to conduct any inquiry into the disruptive consequences to the agencies before vacating the ROD. *See Shands Jacksonville Med. Ctr.*, 139 F. Supp. 3d at 267. Plaintiffs make no argument and present no evidence as to any adverse consequences to themselves from leaving the ROD in place while the agency completes the analysis. Pls.' Supp. Summ. J. Mem. 14-15 ("Pls.' Supp. Br.") (ECF No. 92). On the other hand, MTA explained in its supplemental summary judgment brief that the "complex contractual arrangements" create "the potential for a seemingly modest delay to have cascading consequences on the project schedule and financing arrangements." ECF No. 93 at 15. And MTA has provided the Court a further detailed explanation of the disruptive consequences to the Purple Line and anticipated costs of delay to both MTA and the public that the Court should consider in weighing whether vacatur is warranted here. MTA Mem. 11-16. Moreover, any delay in project construction will delay the important benefits of the Purple Line to the citizens of the Washington metropolitan region. *See* Garliauskas Decl. ¶¶ 2-6.

This factor weighs in favor of remanding the Purple Line ROD to FTA for further consideration without vacatur. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (noting that a significant expenditure of public resources constitutes an equitable concern weighing against vacating an agency's flawed decision during remand).

CONCLUSION

For the foregoing reasons, the Court should alter or amend its August 3, 2016 Order to

remand—without vacating the Purple Line ROD—to FTA so that it can consider whether the recent ridership and safety issues experienced by WMATA Metrorail warrant preparing an SEIS.

Respectfully submitted this 23rd day of August, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of August, 2016, I filed the foregoing document electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ *Tyler L. Burgess*
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U.S. Department of Justice