

October 29, 2013

Irene Rico, Division Administrator
Edward S. Sundra, Director of Program Development
Federal Highway Administration – Virginia Division
400 North 8th Street, Suite 750
Richmond, VA 23219

Re: Significant New Information on Wetlands Impacts of Proposed US Route 460

Dear Ms. Rico and Mr. Sundra,

We are writing to follow-up on our previous letters of November 7, 2012 and January 9, 2013 in light of new information we recently received from the Virginia Department of Transportation showing a substantial increase in the already significant amount of wetlands that would be impacted by VDOT's proposed U.S. Route 460 Corridor Improvements Project. This new data makes clear the need for a comprehensive reconsideration of alternatives and their impacts, and it raises a serious question about whether the project can even proceed consistent with Section 404 of the Clean Water Act.

Significant New Wetlands Impact Information

We recently received copies of two VDOT documents—VDOT's September 30, 2013 Joint Permit Application to the U.S. Army Corps of Engineers, and a September 2013 VDOT report entitled *U.S. Route 460 CBA-2 Tolled: Supplement to EIS Alternatives Analysis*—containing the results of recent, more detailed investigations of the wetland impacts of the proposed new Route 460 project. VDOT prepared the *Supplement to EIS Alternatives Analysis* to support its Clean Water Act Section 404 permit application to the Corps of Engineers.

These documents show that expected wetlands impacts from the new Route 460 will be far greater than previously presented in the Draft EIS, the Final EIS, and the additional analysis that VDOT's consultant, HDR Engineering, performed last fall and which was referenced in the 2012 reevaluation of the Final EIS. VDOT's Joint Permit Application ("JPA") reports that the Project Area for the new Route 460 project (corresponding to the EIS's 500-foot "Planning Corridor") contains 939 acres of wetlands, compared to just 289.5 acres reported in the Draft EIS.¹ Within the project's right-of-way (roughly corresponding to the EIS's 230-foot "Design Corridor"), the JPA now reports that the project will impact 479.1 acres of wetlands—an astonishing 270% increase over the 129.4 acres of wetlands impacts reported in the Final EIS.²

¹ See JPA at 6-1; Draft EIS at 4-83 (note that the Final EIS did not include wetland numbers for the 500-foot Planning Corridor, instead focusing only on impacts within the 230-foot Design Corridor); see also *Supplement to EIS Alternatives Analysis* at 23-24.

² See JPA at 7-1; Final EIS at 4-39; see also *Supplement to EIS Alternatives Analysis* at 23-24.

The magnitude of these wetlands impacts calls into doubt whether the project can possibly be found to be consistent with Section 404 of the Clean Water Act. The amount of wetlands it would impact is significantly greater than other proposals that have been rejected largely due to the severity of their aquatic resource impacts. Indeed, the proposed new Route 460, if built, would to the best of our knowledge represent the largest destruction of wetlands ever permitted in Virginia under the Clean Water Act.

A particularly pertinent example is the Southeastern Parkway and Greenbelt that was proposed in Chesapeake and Virginia Beach Cities. The Southeastern Parkway would have impacted approximately 170 acres of wetlands—roughly $\frac{1}{3}$ of the wetlands impacts of the Route 460 proposal.³ FHWA terminated the environmental review process for that project in 2010 after finding that there was no reasonable assurance that the requirements of Section 404 could be met in light of the project’s aquatic resource impacts and concerns voiced by the Corps of Engineers and the U.S. Environmental Protection Agency.⁴ In the Corps’ comments on the 2005 Draft EIS for that project, it noted that “the construction of the [Southeastern Parkway] would result in the direct loss of far more wetlands than any roadway project constructed in Virginia in modern times,” with the next closest being the Battlefield Boulevard (Chesapeake Expressway) project at 48 acres.⁵ At 479 acres, the proposed new Route 460 would impact *ten times* more wetlands than the Battlefield Boulevard project, and nearly *three times* more wetlands than the rejected Southeastern Parkway proposal.⁶

Similarly, in 1989 the EPA exercised its Clean Water Act Section 404(c) authority to veto the Section 404 permit for the proposed Ware Creek Water Supply Impoundment Project in James City County, Virginia,⁷ based in large part on the fact that the project would have resulted in the loss of 425 acres of wetland and open water habitat.⁸ And the King William Reservoir Project—ultimately abandoned by the City of Newport News in 2009—would have resulted in the loss of 403 acres of wetlands,⁹ which would have been the single largest authorized

³ See “Termination of Environmental Review Process Cities of Chesapeake and Virginia Beach, VA,” 75 Fed. Reg. 70351 (Nov. 17, 2010).

⁴ *Id.*

⁵ Letter from J. Robert Hume, III, Corps of Engineers to Kenneth Myers, FHWA and Earl Robb, VDOT (July 22, 2005).

⁶ Also worth noting is the fact that EPA’s comments on the 2005 Draft EIS for the Route 460 project mentioned that despite the new Route 460’s large *overall* wetlands impacts (then estimated at 138 acres), its *per mile* wetlands impacts would be far less than those of the Southeastern Parkway proposal. Letter from William Arguto, EPA to Kenneth Myers, FHWA (Aug. 4, 2005). However, in light of the new impact data, the proposed new Route 460 would have a greater per mile impact than the Southeastern Parkway. According to the 2008 Final EIS for the Southeastern Parkway, the Preferred Alternative would have impacted approximately 173 acres of wetlands over its 21.4 mile length. See FHWA & VDOT, *Southeastern Parkway & Greenbelt Location Study Final Environmental Impact Statement* at S-2, 4-32 (Dec. 2008). This correlates to roughly 8.1 acres per mile. By comparison, the 55-mile new Route 460 would impact 479 acres, or approximately 8.7 acres per mile.

⁷ 33 U.S.C. 1344(c) grants EPA the authority to prohibit, deny, or restrict a Section 404 permit when the proposed project will have “unacceptable adverse effect” on aquatic resources.

⁸ See EPA, *Final Determination of the U.S. Environmental Protection Agency’s Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Ware Creek Water Supply Impoundment James City County, Virginia* at 31 (July 10, 1989).

⁹ Corps of Engineers, Norfolk District, *Record of Decision Memorandum for Permit Application Number 93-0902-12 (Norfolk District) by the City of Newport News, Virginia for the King William Reservoir Project* at 23 (July 29, 2005) (stating that “[t]he proposed 1,526-acre King William IV Reservoir Project would result in the direct loss or

destruction of wetlands in the mid-Atlantic since Congress passed the Clean Water Act in 1972. Yet both of these proposed projects would have destroyed significantly less than the 479 acres of impacts that would result from the proposed new Route 460.

Thus, the amount of wetlands that would be impacted by this proposal is on a level all its own. Projects in Virginia that would have destroyed significantly fewer wetlands than the proposed new Route 460 have been terminated or abandoned by FHWA, EPA, and in one case even the applicant itself.

Supplemental EIS Alternatives Analysis

We understand that FHWA has changed the position voiced in your responses to our November 7, 2012 and January 9, 2013 letters, and that you will be preparing a Supplemental EIS for this project and working with the Corps of Engineers on that effort. Given the extent of these new wetlands impacts, and the fact that jurisdictional wetlands and streams are widely dispersed along the entire proposed route,¹⁰ it is crucial that the upcoming Supplemental EIS include not only further analysis of the potential impact of this project on wetlands and other aquatic resources, but that it also contain a comprehensive reevaluation of alternatives to this project as a whole, including the No Build Alternative.

Of particular importance is an updated analysis of the alternatives that focus on upgrading the existing Route 460, including the Draft EIS's Candidate Build Alternative 2 ("CBA-2"), which would expand much of the existing Route 460 to five lanes. Notably, the Draft EIS determined that CBA-2 and other options for improving the existing Route 460 would meet the project's purpose and need. Further, based on the analysis in the Draft EIS showing that the aquatic resource impacts of CBA-2 would be less than building a new Route 460, both the Corps of Engineers and EPA stated in comment letters on the Draft and Final EIS—and reiterated these comments as recently as 2012—that CBA-2 likely constituted the "least environmentally damaging practicable alternative" ("LEDPA") for purposes of the Corps of Engineers' Clean Water Act Section 404 permit review.¹¹

As you know, the Corps may only issue a Section 404 permit to the LEDPA. In an effort to address the Corps' concerns that the proposed new Route 460 may not constitute the LEDPA for this project, VDOT submitted its September 2013 "*Supplement to EIS Alternatives Analysis*," which contains VDOT's recent determination that the Draft EIS's CBA-2—upgrading existing Route 460 to five lanes—must now be an *eight*-lane, partially tolled, limited access facility. VDOT also includes a new comparison of aquatic impacts between the proposed new Route 460

substantial hydraulic modification of approximately 437 acres of jurisdictional waters of the United States, consisting of 403 acres of freshwater wetlands and 34 acres of open water, inclusive of 21 miles of streams").

¹⁰ See JPA at Exhibit 7C: Waters of the US Impact Summary Table (by Area). This table shows that the project will cause significant wetlands and stream impacts in nearly all of the 12 Areas comprising the proposed new Route 460.

¹¹ See Letter from Robert Hume, Corps of Engineers to Kenneth Myers, FHWA and Earl Robb, VDOT (Aug. 8, 2005); Letter from William Arguto, EPA to Kenneth Myers, FHWA (Aug. 4, 2005); Letter from Nicholas Konchuba, Corps of Engineers to Roberto Fonseca-Martinez, FHWA (Jan. 6, 2008); Letter from William Arguto, EPA to Kenneth Myers, FHWA (Sept. 2, 2008); see also Letter from William Walker, Corps of Engineers to Stephen Long, VDOT (Oct. 5, 2012); Letter from Jeffrey Lapp, EPA to John Simkins, FHWA and Angel Deem, VDOT (Aug. 6, 2012).

and this expanded version of CBA-2. Not surprisingly, presenting what essentially amounts to a *new* CBA-2 proposal with a dramatically larger footprint has resulted in much more extensive wetland and stream impacts for this alternative than previously indicated.

VDOT's decision to substantially redesign CBA-2 has significant bearing on the environmental impacts review and alternatives analyses for this project under both NEPA and the Clean Water Act. Yet VDOT and FHWA have not sought public review or input on this new information. Because this new version of CBA-2 has not yet been subject to public review or vetted in the NEPA process, the Supplemental EIS must include updated analysis of the CBA-2 that was presented in the Draft EIS, as well as other packages of improvements to the existing Route 460. Also, the Supplemental EIS must provide VDOT's analysis and justification for the significant modification it has proposed for CBA-2; public input on these new assertions and conclusions is essential.

Further, even if the Corps were to ultimately determine that VDOT's preferred route is the LEDPA—meaning that there is no way to build this project without destroying at least 479 acres of wetlands—the Corps would still have to decide whether granting a Section 404 permit for that level of impact is in the public interest. This proposal was of dubious public value even before the new wetlands information came to light; it is all the more untenable now.

Final Design and Construction

Finally, we are extremely concerned that VDOT appears to be continuing to proceed with final design and right-of-way acquisition on the new Route 460 prior to the completion of the Supplemental EIS and the updated alternatives analysis that must be a part of it. Just as problematic, VDOT's JPA to the Corps indicates VDOT's intent to start construction in non-jurisdictional areas prior to the Corps' issuance of a Section 404 permit (and as early as April 2014),¹² despite the fact that the Corps is clearly still evaluating project-wide alternatives such as improving the existing Route 460.

These activities, if not immediately halted, will prejudice the evaluation of alternatives in the Supplemental EIS and the Corps' Section 404 permit review,¹³ effectively pre-determine the outcome of these reviews, and undermine the value and purpose of the public's comments. In addition, they will potentially waste millions of taxpayer dollars and cause unnecessary environmental damage and loss of private property. Further, SAFETEA-LU and FHWA's design build regulations "preclude the design-build contractor from proceeding with final design or construction of any permanent improvement prior to the completion of the [NEPA] process."¹⁴ Thus, now that the NEPA process has been reopened on this design-build project—and given the magnitude of the new wetlands impact figures, the dispersal of impacts along the project route, and the resulting need to consider other alternatives including the No Build Alternative—it is inappropriate for final design and/or construction work to be occurring. It is imperative that FHWA require VDOT to refrain from further final design and right-of-way acquisition, as well

¹² See JPA at 5-1.

¹³ See CEQ's NEPA regulations at 40 C.F.R. § 1506.1(a) (stating that until an agency issues a record of decision, "no action concerning the proposal shall be taken which would...[l]imit the choice of reasonable alternatives").

¹⁴ 23 U.S.C. § 112(b)(3)(D)(iii); see also 23 C.F.R. § 636.109(a)(6), (b)(3), and (d).

as any construction work—and that FHWA require VDOT to direct US 460 Mobility Partners, VDOT’s design-build contractor, to refrain from such activities—on the proposed new Route 460 until the Supplemental EIS is completed, and unless and until a Section 404 permit is obtained.

Conclusion

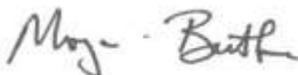
In summary, given the unprecedented magnitude of wetlands impacts now expected to result from the new Route 460, we believe this proposal warrants serious reconsideration. Because these impacts would occur along the entire proposed route for the new Route 460, the Supplemental EIS must include a careful reevaluation of alternatives to the project as a whole, as well as provide the public with sufficient opportunity to review and provide input on VDOT’s recent decision to present a dramatically expanded CBA-2. And in order to ensure that this Supplemental EIS and the Corps’ Section 404 review are not biased by any further irretrievable commitment of resources to the project or a particular route, we request that FHWA require VDOT to halt its work, as well as its design-build contractor’s work, on the new Route 460 proposal until these essential environmental reviews are complete.

Thank you for your consideration of this letter, and we look forward to your response.

Sincerely,



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Morgan Butler
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cc: Colonel Paul Olsen, Norfolk District Commander, Corps of Engineers
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