

September 11, 2014

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And

Matthew Brown  
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**RE: Final Environmental Impact Statement and Pending Record of Decision,  
CSX Transportation Inc. Virginia Avenue Tunnel Reconstruction  
FHWA-DC-EIS-13-01-F**

I write on behalf of my client, The Committee of 100 on the Federal City, to bring to your attention numerous issues we have identified with the above-referenced June 2014 Final Environmental Impact Statement for the Virginia Avenue Tunnel (VAT) Reconstruction.

Chief among our concerns is evidence that the District of Columbia Department of Transportation (DDOT) prejudged the outcome of the FEIS and entered into several agreements with CSXT that rewarded DDOT for ensuring that the FEIS endorsed one of the “build alternatives” – each of which involve enlarging the current Virginia Avenue Tunnel.

Documents included in the appendices to the FEIS demonstrate that: CSXT and DDOT agreed to cooperate to achieve funding and all necessary permits and approvals for rebuilding and enlarging the tunnel within the VAT right of way; CSXT funded other road improvements that DDOT initially agreed to credit to CSXT’s liabilities under the VAT project; DDOT issued permits and granted a right of way in advance of the issuance of the Record of Decision (ROD); and CSXT agreed to grant DDOT an option to acquire

the Shepherd's Branch right of way on condition that the District grant CSXT all permits required for the applicable VAT build alternative.

The documentary evidence includes:

- 1) The August 23, 2010 Memorandum of Agreement between CSXT and DDOT (Exhibit 1, attached here) in which DDOT and CSXT agreed that:
  - a. The VAT Expansion Project was "critical" to rail transportation and agreed to "work together" to effectuate the project, including submitting grant applications for the project (Exhibit 1, p. 1, "Whereas" clauses; and Art. II (B); Art. III);
  - b. DDOT would provide support for CSXT's National Gateway Initiative, which included the VAT expansion project, including a letter of support to U.S. DOT and supporting lobbying efforts to secure federal funding (Exhibit 1, Art. II (A)) and submitting a TIGER II grant application for a planning grant that includes the Virginia Avenue Tunnel expansion project (Exhibit 1, Art. II (B));
  - c. DDOT would "expedite approvals of the required public space permits for the Virginia Avenue Tunnel Expansion Project" (Exhibit 1, Art. III (D));
  - d. CSXT would pay DDOT \$4,171,044 for design and construction costs associated with adjustments to a different project (the 11<sup>th</sup> Street Bridge Project<sup>1</sup>) (Exhibit 1, Art. IV (C)), which DDOT agreed to credit to CSXT (the CSXT Credit) toward repairing and resurfacing Virginia Avenue following the tunnel expansion (Exhibit 1, Art. III (B)). Under the agreement DDOT was required to pay for the CSXT Credit from federal funds (Exhibit 1, Art. III (B));<sup>2</sup> and
  - e. In reliance on DDOT's obligations in the MOA, CSXT would agree to negotiate with DDOT over DDOT's use and development of CSXT's Shepherd's Branch Property. (Exhibit 1, Art. VII).
- 2) The December 21, 2012 Term Sheet Agreement between DDOT and CSXT (Exhibit 3), by and through which:

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<sup>1</sup> These adjustments consisted of redesigning and reconstructing one of the access ramps of the 11th Street bridge to accommodate CSXT's plans for an enlarged, two track tunnel that was ultimately selected in the FEIS as the preferred alternative.

<sup>2</sup> The CXST Credit agreement was modified in an April 21, 2014 amendment. Pursuant to the amendment, DDOT was not permitted to apply the \$4 million credit to the VAT; instead DDOT and CSXT agreed to "work together to identify an eligible project for the use of the CSXT Credit Amount" on or before October 21, 2014 and to fund the credit "using traditional federal appropriations and obligations for resurfacing of Federal Aid facilities." Exhibit 2, ¶ 1.

- a. DDOT agreed to issue the required public space permit that CSXT would require in the event that the FHWA Record of Decision (ROD) endorsed one of the “build alternatives” (Exhibit 3, ¶ 4 and Exhibit 4, Exhibit B to Term Sheet and Terms and Conditions thereto);
  - b. DDOT agreed to “continue to provide oversight of the EIS process for the VAT as co-lead agency with FHWA” and to “partner” with CSXT to “manage the EIS process” (Exhibit 3, ¶ 5); and
  - c. DDOT granted CSXT a permanent right of way for the space occupied by the expanded Virginia Avenue Tunnel (Exhibit 4, and Terms and Conditions attached thereto, at Art. I (A) and Art. IV (A)).
- 3) The October 29, 2013 “Amendment No. 1 to Term Sheet Agreement [dated December 21, 2012]” (Exhibit 5) in which CSXT agreed to give DDOT an option to acquire the Shepherd’s Branch right of way (Exhibit 5, ¶ II (B)), but on condition that “CSXT shall have obtained from the District of Columbia the necessary permits and approvals needed from any agency of the District of Columbia to commence and construct the VAT Project in accordance with the build alternative ...”(Exhibit 5, ¶ II (B)(7).
  - 4) The March 30, 2014 revised Public Right of Way Occupancy Permit (Exhibit 6), in which DDOT revised the terms of the 2012 Occupancy Permit and permanent right of way to expand the territory of the right of way (Exhibit 6).

The foregoing demonstrates that DDOT “irreversibly and irretrievably commit[ed] itself to a plan of action that [was] dependent upon the NEPA environmental analysis producing a certain outcome.” *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 70 (D.D.C. 2012). Issuing permits and entering into agreements prior to the issuance of an FEIS or ROD is strong evidence of unlawful predetermination. *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 230 (D.D.C. 2003); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 718 (10th Cir. 2010); *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). Indeed, Parsons Brinckerhoff and Clark Construction, separately and in collaboration, prepared numerous studies underpinning the EIS and drafted numerous portions of the FEIS, and we believe that both Parsons and Clark have been contracted to perform the construction of the tunnel.

Additionally, among other things, the FEIS: (1) fails to consider relevant information, such as the lack of any District Agency with jurisdiction for ensuring rail safety or the adverse environmental and consequences that would result from a spill, derailment or other rail safety incident; (2) fails to consider that the District of Columbia will launch a Rail Plan study in Fiscal Year 2015; (3) improperly “segments” the impacts from the VAT from other CSXT Gateway Initiative and/or similar rail construction and upgrade projects; (4) fails to consider the cumulative impacts of other rail construction and improvements in the District and surrounding States; and (5) fails to consider the environmental and other impacts of increased rail volumes, traveling at increased speed and instead is limited to assessing the impacts only of the construction associated with enlarging the tunnel.

The FEIS, furthermore, was not conducted sufficiently early in the planning process “so that it [could] serve ... as an important contribution to the decisionmaking process and [would] not be used to rationalize or justify decisions already made.” *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988). To wit, DDOT and CSXT began planning the VAT expansion project at least as early as 2010 (*supra*), but the notice of intent to prepare the Draft EIS was not announced until two years later, in May 2012. *See* 77 Fed. Reg. 25781 (May 1, 2000). Lastly, the EIS contains material misstatements, including an exaggerated account of the degree to which the VAT impedes freight rail on the eastern seaboard.<sup>3</sup>

A The foregoing constitute violations of District of Columbia law and regulation governing Environmental Impact Statements. Moreover DDOT has also violated D.C. Law, including D.C. Code § 8-109.3(a) and 20 DCMR § 7200.1, among other things, by issuing CSXT a right of way permit.

In addition to the NEPA violations discussed above, the VAT project involves violations that are likely to result in a delay of any action on the project. For example, the project includes granting CSXT a right of way for the land on which the new tunnel is to be constructed under the “Preferred Build Option.” Similarly, Virginia Avenue will have to be closed for all or part of the construction phase. Notwithstanding these actions, the procedures for closing and disposing of right of ways and roads, found at D.C. Code § 9-201.01 *et seq.* have not been followed. Consequently, the required right of way grant and road closures are subject to challenge pursuant to D.C. law.

I look forward to the opportunity to discuss this matter with you at your earliest convenience.

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<sup>3</sup> *See* FEIS, Section 2.1.1 at 2-2 (“The single railroad track within Virginia Avenue Tunnel represents the single greatest constraint on rail headway ... on CSX’s mainline freight rail network. It is a bottleneck to the eastern seaboard freight rail corridor because only a single freight train can pass through the tunnel at any one time.”); *See also* FEIS Section 2.1.2, at 2-3 (“this inadequate vertical clearance of Virginia Avenue Tunnel effectively prevents CSX from operating double-stack intermodal container freight trains along its eastern seaboard freight rail corridor.”).

Respectfully Submitted,



Leslie D. Alderman III

Enclosures (Exhibits 1-6)

cc: Hon. Vincent Gray, Mayor  
Del. Eleanor Holmes Norton

D.C. Council Members:

Phil Mendelson, Chairman  
Mary Cheh, Chair Transportation Committee  
Tommy Wells, Ward 6  
David Grosso, At Large  
David Catania, At Large  
Anita Bonds, At Large  
Vincent Orange, At Large  
Charles Allen

D.C. Office of Risk Management (for the purposes of D.C. Code § 12-309)