UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Lakes and Parks Alliance of Minneapolis, a Minnesota non-profit corporation Plaintiff, vs. Federal Transit Administration, an agency of the United States; and the Metropolitan Council, a public corporation and political subdivision of the State of Minnesota. Defendants.	File No. 0:14-cv-03391-JRT-SER **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

These facts are undisputed: (1)The Metropolitan Council has selected a plan to dig a tunnel and operate the Southwest Light Rail Transit ("SWLRT") line through the Kenilworth Corridor in the City of Minneapolis' Chain of Lakes parks system; (2) it has obtained municipal consent from the local governments along the proposed route for that plan; (3) it did not complete the environmental review required by federal and state laws before municipal consent was obtained; and (4) the Federal Transit Administration ("FTA") was informed of these facts but did nothing to stop the municipal consent process. Because these actions clearly violate federal and state environmental laws, Plaintiff Lakes and Parks Alliance of Minneapolis ("Lakes and Parks Alliance") is entitled to summary judgment on its claims under the National Environmental Policy Act

("NEPA"), the Minnesota Environmental Policy Act ("MEPA"), and the Minnesota light rail statute against the Metropolitan Council and the FTA.

For more than forty years, federal and state statutes have provided critical protection for the nation's natural resources by requiring that a full environmental review be performed for any government project that has the potential to cause significant environmental effects. To make this protection meaningful, NEPA and MEPA require that reasonable alternatives to a proposed project be evaluated and their environmental impacts and potential mitigation measures be identified *before* any decision is made or any action is taken. This required analysis enables decision makers—and the public—to review relevant environmental information when the full range of options is still available. In the case of the SWLRT project, however, the Metropolitan Council and the FTA have disregarded the requirements and eviscerated the purpose of NEPA and MEPA by selecting a particular plan for the project before having the environmental information available for review.

The undisputed facts listed above establish unequivocally that the Lakes and Parks Alliance is entitled to judgment as a matter of law. NEPA and MEPA regulations prohibit any actions during the pendency of the environmental review that would limit the choice of reasonable alternatives for a project. The defendants' actions in pursuing municipal consent for a single plan before finishing the environmental review have not simply limited the number of options for the SWLRT project—they have narrowed the options down to one and reduced the ongoing environmental review to a meaningless formality. An after-the-fact environmental review of the SWLRT plan already chosen

not only contravenes state and federal law but also violates the rights of the members of the Lakes and Parks Alliance, who were unable to participate in a fully informed manner during the decision making process. In addition, the Metropolitan Council's actions in seeking municipal consent before the completion of even a draft environmental impact statement for the specific light rail facilities proposed is a violation of the Minnesota light rail statute. Accordingly, the Lakes and Parks Alliance asks the Court to grant its motion for summary judgment and declare that the defendants have violated federal and state law, that the municipal consent obtained for the SWLRT is null and void, and that the defendants must comply with NEPA, MEPA, and the Minnesota light rail statute.

STATEMENT OF UNDISPUTED FACTS

A. The Southwest Light Rail Transit Project and the Kenilworth Corridor.

The SWLRT project is a proposed light rail line that would run from downtown Minneapolis for more than 15 miles through the communities of St. Louis Park, Hopkins, Minnetonka, and Eden Prairie. (Affidavit of Joy R. Anderson (cited herein as "Anderson Aff.,") Ex. 5, p. ES-2.) The project is intended to improve access and mobility to downtown Minneapolis and along the entire length of the transit corridor. (*Id.,* p. ES-4.) The estimated budget for the project is $1.65 billion, which is being provided by the FTA, the state of Minnesota, the Counties Transit Improvement Board (which has Anoka, Dakota, Hennepin, Ramsey, and Washington counties as its members), and the Hennepin County Regional Railroad Authority. (Anderson Aff., Ex. 1.)

Current plans for the SWLRT call for the light rail to pass through the Kenilworth Corridor, an environmentally sensitive area approximately one and a half miles long

between Cedar Lake and Lake of the Isles in Minneapolis. (Anderson Aff., Ex. 22, p. 3 (showing SWLRT route).) The Kenilworth Corridor "is a significant part of the City's chain of lakes park system, one of the most prized, highly used recreational attractions in the region." (Anderson Aff., Ex. 15, ¶ 3.) Presently, a popular bicycle and pedestrian trail, used by several thousand people each day, runs through the Kenilworth Corridor. (Anderson Aff., Ex. 10, p. 17.) Freight rail tracks used by the Twin Cities and Western Railroad ("TC&W") run adjacent to the bicycle/pedestrian trail. (Anderson Aff., Ex. 5, p. ES-2.) The plan currently approved by the relevant local governmental bodies for the SWLRT route calls for keeping both the freight rail tracks and the bicycle/pedestrian trail in the corridor while adding tracks for the SWLRT. South of the Kenilworth Channel, the SWLRT tracks will be in a shallow tunnel, with freight rail and the bicycle/pedestrian trail above it at-grade. Both the LRT trains and the freight trains will cross the Kenilworth Channel above-grade on a pair on new bridges. Then, north of the channel, the SWLRT, freight rail service, and the bicycle/pedestrian trail would be placed next to each other, or co-located, at-grade. (Anderson Aff., Ex. 15.)

B. The Initial Environmental Review for the SWLRT Project.

For major governmental actions that create a potential for significant environmental effects, NEPA and MEPA require a thorough environmental review before the project may be approved. 42 U.S.C § 4332(C); Minn. Stat. § 116D.04, subd. 2a. The SWLRT is a major governmental action that has the potential to cause significant

environmental effects, and accordingly the preparation of an Environmental Impact Statement ("EIS") pursuant to NEPA and MEPA regulations is required for the project. (Anderson Aff., Ex. 6, p. 1-7.) In 2008 an environmental review was commenced by the FTA, the federal lead agency under NEPA; and the Hennepin County Regional Railroad Authority, the initial state lead agency under MEPA. (Anderson Aff., Ex. 4, p. 1; Ex. 5, p. ES-1.) Later in the process, the Metropolitan Council succeeded the Hennepin County Regional Railroad Authority as the lead agency for environmental review and project sponsorship. (Anderson Aff., Ex. 5, p. ES-1.)

1. The Scoping Process for the SWLRT Project.

The first step in the preparation of an EIS is the Scoping Process. The purpose of the Scoping Process is to obtain public input on the project purpose and need, to identify appropriate alternatives for addressing the purpose and need, and to identify those environmental issues associated with the proposed project that require detailed analysis in the next stage, the draft environmental impact statement ("DEIS"). (Anderson Aff., Ex. 4, pp. 2-3.) The Scoping Process culminates in a Scoping Decision by the responsible governmental unit, which sets forth the potential environmental impacts and reasonable alternatives to be addressed in detail through the EIS process. (*Id*.)

A DEIS Scoping Process for the SWLRT project was commenced by the Hennepin County Regional Railroad Authority in fall 2008. (*Id*., p. 1.) The results of the Scoping Process were included in a Scoping Summary Report dated January 2009, which was unanimously adopted by the Hennepin County Regional Railroad Authority as its Scoping Decision. (*Id*.) The Scoping Report set forth the alternatives to be studied

and analyzed in the next phase of environmental review—the DEIS phase. (*Id*., pp. 4-9.) Those six alternatives included a no-build alternative, an enhanced bus alternative, and four potential routes for the SWLRT, two that ran through the Kenilworth Corridor and two that took a different route through the Midtown Corridor in Minneapolis. (*Id.*) *None of the alternatives proposed for study at that time included the construction of any tunnels in the Kenilworth Corridor.* (*Id.*)

2. The Draft Environmental Impact Statement.

As the next step in the environmental review process, the alternatives in the Scoping Report were analyzed and a DEIS was prepared. A DEIS analyzes the alternatives determined through the Scoping Process and documents their potential social, economic and environmental benefits and impacts, along with proposed measures to mitigate any adverse impacts in compliance with NEPA and MEPA. (*Id*., p. 1.) An integral part of the DEIS process is obtaining public comment through public hearings and an open period for written public comments. (Anderson Aff., Ex. 5, pp. ES-1 – ES-2.)

The DEIS for the SWLRT project was released to the public in October 2012 ("|2012 DEIS"). (*Id*.) This was several years later than initially anticipated—the Scoping Report called for the DEIS to be published in December 2009. (Anderson Aff., Ex. 4, p. 2.) The 2012 DEIS considered seven alternatives: a no-build alternative; an enhanced bus alternative; two alternatives re-locating the existing freight rail service to the MN&S line in St. Louis Park and running the SWLRT through the Midtown Corridor instead of the Kenilworth Corridor (LRT 3C-1 and LRT 3C-2); two alternatives rerouting the

existing freight rail traffic to the MN&S line in St. Louis Park to provide adequate room for the SWLRT tracks to run at-grade through the Kenilworth Corridor (LRT 1A and LRT 3A); and, lastly, an alternative co-locating the SWLRT, freight rail, and bicycle/pedestrian trail at grade through the entire Kenilworth Corridor (LRT 3A-1) ("Co-location Alternative"). (Anderson Aff., Ex. 5, pp. ES-5–ES-7.) *None of these alternatives provided for the construction of any tunnels in the Kenilworth Corridor.* (*Id.*)

The Co-location Alternative was not included as an alternative in the Scoping Report for further study. (Anderson Aff., Ex. 4, pp. 4-9.) This alternative was added to the 2012 DEIS analysis only because the City of St. Louis Park requested that such an alternative be studied in the 2012 DEIS. (Anderson Aff., Ex. 7, p. 2-8.) Under all the other build alternatives, freight rail traffic would have been rerouted through St. Louis Park to make room for the SWLRT. Many St. Louis Park residents did not want this additional rail traffic, and they vociferously made their safety concerns known to public officials and the media. (*See, e.g.*, Anderson Aff., Ex. 11.) Later the FTA, in response to public comments received, also requested that a co-location alternative be included in the 2012 DEIS so that a full range of alternatives would be considered. (Anderson Aff., Ex. 7, p. 2-9.) This was despite an earlier analysis by the Hennepin County Regional Railroad Authority that concluded co-location was not feasible. (*Id*., p. 2-8.)

After analysis of this added alternative, the 2012 DEIS concluded that the Co-location Alternative would not adequately preserve the environment and protect the

quality of life in the area. (Anderson Aff., Ex. 5, p. ES-23.) The problems with the Co-location Alternative, according to the 2012 DEIS, included the following:

- high construction-related impacts because of the complex construction staging required to rebuild the freight rail tracks;
- pedestrian safety at several stations would be adversely affected by the need to cross the freight rail tracks between parking and SWLRT stations;
- more than 60 units of primarily high quality, high income multi-family housing would have to be acquired to accommodate the construction of one of the stations;
- retention of freight rail operations in the Kenilworth Corridor would divide neighborhoods, while its removal would bring areas together and improve community cohesion; and
- the need to acquire .81 acres of Cedar Lake Park owned by the Minneapolis Parks and Recreation Board for co-location of the freight rail tracks would constitute a Section 4(f) use.[1]

(Anderson Aff., Ex. 8, p. 11-12.)

Instead, the 2012 DEIS recommended as the environmentally preferred alternative option LRT 3A, which rerouted the existing TC&W freight rail traffic to the MN&S line in St. Louis Park to provide adequate room for the SWLRT tracks to run at-grade through the entire length of the Kenilworth Corridor. The 2012 DEIS stated that this option best met the project's purpose and need statement "as expressed by the goals of improving mobility, providing a cost-effective and efficient travel option, preserving the environment, protecting quality of life, supporting economic development, and

[1] Under Section 4(f) of the U.S. Department of Transportation Act of 1966, a project that requires the use of publicly owned park land cannot be approved unless (a) there is no feasible and prudent alternative to the use of the land; and (b) the action includes all possible planning to minimize harm to the property resulting from such use. (Anderson Aff., Ex. 8, p. 11-12.) Because the DEIS presented other feasible and prudent alternatives, it concluded that the Co-location Alternative could not be recommended. (*Id.*)

developing and maintaining a balanced and economically competitive multimodal freight system." (*Id*., p. 11-15.)

There was a significant amount of public interest in the 2012 DEIS and the project—nearly 1,000 public comments were received during the two-month public review and comment period on the 2012 DEIS. (Anderson Aff. Ex. 2.) Based in part on these comments, in July 2013, the Metropolitan Council and the FTA gave notice that they intended to publish a Supplemental Draft Environmental Impact Statement ("SDEIS"), which would evaluate potential environmental impacts resulting from changes in the proposed design that were not documented in the 2012 DEIS. (Anderson Aff. Ex. 9, p. 5.) The notice stated that the scope of the SDEIS would include, but would not be limited to, examining the following areas: Eden Prairie LRT alignment and stations; the location of the LRT operations and maintenance facility, freight rail alignments (i.e., relocation and co-location in the Kenilworth Corridor) and other areas where the FTA and the Metropolitan Council determined additional information was needed. (*Id.*)

After the notice of the scoping for the SDEIS, however, some St. Louis Park residents and the St. Louis Park City Council increased their objections to the alternatives in the 2012 DEIS that rerouted rail traffic through that city. (Anderson Aff., Ex. 11.) Accordingly, in 2013 and early 2014, new options were discussed for the Kenilworth Corridor that would avoid rerouting the freight rail traffic—including options that would move the SWLRT into shallow or deep tunnels through the corridor while keeping the freight rail tracks and the bicycle/pedestrian trail on the surface. (Anderson Aff., Ex. 12.)

The tunnel plans were not analyzed in the 2012 DEIS and were not included in the notice of scoping for the SDEIS because they came under consideration after both had been released.

In April 2014, despite the recommendation of a different plan in the 2012 DEIS, the Metropolitan Council approved as the "locally preferred alternative"[2] a plan that routed the SWLRT through the Kenilworth Corridor in two shallow tunnels through the length of the Corridor, with trains emerging from the tunnels only to pass over the historic channel between Cedar Lake and Lake of the Isles ("Tunnel Plan"). (Anderson Aff. Ex. 13.) *The Tunnel Plan has never been referenced in any Scoping Notice or Decision, nor has any part of the environmental review required by NEPA and MEPA been completed that analyzes the Tunnel Plan.*

C. The Metropolitan Council Obtains Municipal Consent.

After the selection of the Tunnel Plan as the locally preferred alternative, the Metropolitan Council did not wait for the next steps in the EIS process—the drafting and release of the SDEIS and the later release of the final environmental impact statement ultimately required by federal and state regulations. Instead, it commenced the municipal consent process.

"Municipal consent" is required for light rail transit projects by Minnesota Statute § 473.3994, which states that each city and county in which a light rail transit route is

[2] The "locally preferred alternative" identifies the option the agency believes best fulfills the project's purpose, but it does not does not replace or override the requirement to fully examine alternatives and determine the adverse impacts that must be avoided or mitigated under MEPA and NEPA. (Anderson Aff., Ex. 5, p. ES-22; Ex. 7, p. 2-12.)

proposed to be located must hold a public hearing and vote to approve or disapprove the physical design component of the preliminary design plans for the project. As defined by statute, the preliminary design plans must include a DEIS for the light rail transit facilities proposed. Minn. Stat. 473.3993, subd. 2.

Despite the lack of a DEIS for the specific light rail transit facilities proposed, in late April 2014 the Metropolitan Council submitted the Tunnel Plan to Hennepin County and to the cities of Minneapolis, St. Louis Park, Hopkins, Minnetonka, and Eden Prairie for public hearings and approval. (Anderson Aff., Ex. 14, pp. 1 and 6.) Although several cities voted to approve the Tunnel Plan, the City of Minneapolis and the Metropolitan Council entered negotiations regarding potential changes to the project. (Anderson Aff., Ex. 16.) After multiple mediation sessions, in July 2014 the City of Minneapolis and the Metropolitan Council announced an agreement under which the tunnel south of the historic Kenilworth Channel would remain in place, but the tunnel north of the Channel would be eliminated ("South Tunnel/Co-location Plan"). (*Id.*; Ex. 15.) Under the South Tunnel/Co-location Plan, the SWLRT, freight rail service, and the bicycle/pedestrian trail would all be co-located at-grade north of the Kenilworth Channel. (*Id.*) In other words, the South Tunnel/Co-location Plan combines part of the Tunnel Plan, which was not analyzed in the 2012 DEIS, with part of the Co-location Alternative, which was rejected by the 2012 DEIS.

The City of Minneapolis held the required public hearing on the proposed South Tunnel/Co-location Plan on August 19, 2014. (Anderson Aff., Ex. 3.) No DEIS

analyzing the proposed project as modified was available for City Council or public review before or at the public hearing, as none had been completed.

By August 29, 2014, all six local governments had approved the proposed SWLRT plan, with the City of Minneapolis approving the South Tunnel/Co-location Plan modification to the proposed SWLRT design. (Anderson Aff., Ex. 15; Ex. 20.) The City of St. Louis Park approved the proposed SWLRT plan with the caveat that "no further study of the feasibility of rerouting freight traffic to the MN&S Route in St. Louis Park will be undertaken, except as required for any continuing environmental review of the SWLRT project." The Metropolitan Council agreed to this condition. (Anderson Aff., Ex. 17.)

D. Letter to the FTA and Metropolitan Council

Concerned about the lack of proper environmental review and particularly the commencement of the municipal consent process before the completion of that review, the Lakes and Parks Alliance wrote to the FTA in July 2014 to inform the FTA that the SWLRT environmental review process did not meet the requirements of federal and state law. The letter, a copy of which was sent to the Metropolitan Council, asked the FTA to refuse to provide further federal funding for the SWLRT project unless and until the Metropolitan Council appropriately supplemented the environmental review and fully complied with all applicable environmental laws and regulations. (Anderson Aff., Ex. 18.) The FTA replied to the Lakes and Parks Alliance stating that it monitors all federally assisted projects for NEPA compliance and that no cessation of funding was

warranted for the SWLRT under the circumstances. (Anderson Aff., Ex. 19.) No actions were taken by the Metropolitan Council or the FTA in response to the letter.

E. The Remaining Steps in Environmental Review Process.

The Metropolitan Council currently is working on the SDEIS, which is scheduled to be published in early 2015. (Anderson Aff., Ex. 22, p. 1.) The SDEIS will analyze additional potential impacts caused by the SWLRT—including, presumably, the impacts caused by the South Tunnel/Co-location Plan, even though the plan has not been included in any Notice of Scoping for the SDEIS—and possible actions to reduce or mitigate these impacts. (*Id.*)

After public input on the SDEIS has been received and further environmental analysis has been performed, the Metropolitan Council will complete and release a final environmental impact statement ("FEIS"), which will analyze additional issues based on the comments on the 2012 DEIS and SDEIS and identify the environmentally preferred alternative for the project. (*Id.*; Ex. 23.) This is expected to occur sometime later in 2015. (*Id.*) When completed, the FEIS must be deemed adequate by the Metropolitan Council, and thereafter it will be submitted to the FTA for consideration. As a final step, the FTA will then prepare and issue a Record of Decision regarding environmental clearance for the project (Anderson Aff., Ex. 4, p. 2.) The Metropolitan Council's current schedule calls for the Record of Decision to be issued before the end of 2015. (Anderson Aff., Ex. 2.)

While the environmental review progresses, the Metropolitan Council intends to continue other work on the project. The Metropolitan Council has already begun the RFP

process for advanced design and engineering work for the project. (Anderson Aff., Ex. 21.) Advanced design and engineering, which is scheduled to take place in 2015, will move the project from 30 percent to 100 percent design and engineering detail on track features, roadway details, bridges and tunnels, system elements, station design, park-and-ride facilities, freight rail features, public art, streetscape and utility relocation. (Anderson Aff., Ex. 22.) Construction is slated to begin in 2016, with passenger service commencing in 2019. (Anderson Aff., Ex. 2.)

ARGUMENT

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted where "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." To demonstrate that there are genuine issues of material fact, the non-moving party "may not rest upon the mere allegations or denials" in its pleading, but instead, in affidavits or otherwise, must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In this case, the material facts are undisputed—nearly all of the facts cited by the Lakes and Parks Alliance to support its position are from documents written and published by the Metropolitan Council, and the remainder are facts from documents in the public domain. As there is no genuine issue as to any of the material facts, it simply remains for this Court to apply the law to those facts. As the defendants clearly have violated NEPA and MEPA regulations and the Minnesota light rail statute, the Lakes and Parks Alliance is entitled to judgment as a matter of law.

A. The Defendants Have Violated NEPA Regulations' Prohibition on Taking Actions that Limit the Choice of Reasonable Alternatives During the Environmental Review.

Under NEPA, for every major federal action that significantly affects the quality of the human environment, a detailed statement must be prepared that analyzes the environmental impacts of the proposed action and any alternatives to the proposed action. 42 U.S.C. § 4332(C). To ensure that the environmental review is fully performed before a course of action is chosen, the agency in charge must follow specific procedures required by federal regulations. First, a DEIS must be completed and circulated for comments. 40 C.F.R. §§ 1502.9(a), 1503.1. Then, a FEIS further analyzing the issues and responding to the comments must be issued. 40 C.F.R. §§ 1502.9(b), 1503.4. If changed circumstances or new information arise during the process, a supplemental DEIS or FEIS also must be prepared. 40 C.F.R. § 1502.9(c). Only after all of these steps may the applicable federal agency review the environmental analysis, make a decision on the proposed action, and publish a final Record of Decision. 40 C.F.R. § 1505.2.

While the NEPA review is pending, at any time before the issuance of the Record of Decision, federal regulations prohibit any actions concerning a proposal that would: "(1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives" for the project. 40 C.F.R. 1506.1(a). If a federal agency is considering an application for a proposal from a non-federal entity and becomes aware that the applicant is about to take an action that would have an adverse environmental impact or limit the choice of reasonable alternatives before the issuance of the Record of Decision, the

agency "shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved." 40 C.F.R. 1506.1(b).

The purpose of the NEPA process detailed in these regulations is two-fold: (1) it ensures that the relevant government agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). By focusing an agency's attention on the environmental impacts of a proposed project, NEPA ensures that adverse effects will not be overlooked only to be discovered after an agency has already committed to a project. *Id*. Ultimately, NEPA is intended to "require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives." *Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army*, 470 F.2d 289, 298 (8th Cir. 1972).

In order to achieve these purposes, the NEPA environmental analysis must be completed *before* any decisions are made that eliminate potential alternatives for the project, so that decision makers are apprised of potential disruptive environmental effects "at a time when they retain a maximum range of options." *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988). An environmental impact statement is intended to ensure that reasonable alternatives to the proposed action are considered. This analysis serves no purpose if, by the time the environmental analysis is finally prepared, some of the

alternatives are no longer available. *Id*. (holding that the government violated NEPA by selling oil and gas leases without preparing an EIS); *see Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972) (finding that if further investment in a proposed highway route were allowed to continue, the available options would be limited and the environmental review would become "a meaningless formality"). If an agency commits to one course of action before the environmental analysis is complete, that fact is almost certain to sway the environmental review toward the desired end, in violation of NEPA. *See Metcalf v. Daley*, 214 F.3d 1135, 1144 (9th Cir. 2000). Instead, NEPA requires that the review be undertaken "objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Id*. at 1142.

In *Metcalf v. Daley*, for example, before doing a NEPA analysis, a federal agency entered into a formal written agreement with the Makah Indian Tribe in which the agency agreed to "make a formal proposal to the [International Whaling Commission] for a quota of gray whales for subsistence and ceremonial use by the Makah Tribe." 214 F.3d at 1139. A year later, after several groups raised questions about the need for a NEPA review, the agency performed an environmental assessment and issued a finding of no significant impact, meaning that an EIS did not need to be prepared. *Id*. at 1140. The Ninth Circuit concluded that it was "highly likely" that the environmental assessment was slanted in favor of finding that the whaling proposal would not significantly affect the environment, because the decision to support the proposal had already been made in contract form. *Id*. at 1144. Accordingly, the court found that the agency had violated

NEPA, and ordered that a new environmental assessment, one that included an objective evaluation free of the previous taint, be conducted. *Id*. This case demonstrates that a NEPA analysis must be performed before a commitment has been made to one course of action is not valid and should be redone.

1. The Metropolitan Council Has Violated NEPA Regulations.

In violation of NEPA regulations, the Metropolitan Council eliminated reasonable alternatives for the SWLRT route by moving forward with the municipal consent process before the completion of the environmental review. *See* 40 C.F.R. 1506.1(a). In the municipal consent process, the Metropolitan Council obtained consent for one specific plan—the South Tunnel/Co-location Plan—from the local governments along the route of the SWLRT. As the culmination of a contentious public decision making process, the Metropolitan Council, Hennepin County, Minneapolis, and the other city governments are now committed to a single route and a single plan, for which advanced design and engineering work will now take place. (Anderson Aff., Ex. 22.) Although the FEIS presumably will analyze all of the options included in the 2012 DEIS, alternatives other than the agreed-upon South Tunnel/Co-location Plan clearly are no longer under consideration for implementation, and the environmental analysis of those alternatives has been reduced to a meaningless formality. In fact, the Metropolitan Council has promised the City of St. Louis Park that there will be no further consideration rerouting freight traffic through St. Louis Park, and that, in essence, any continuing environmental review of these options is merely performed to comply with the letter of NEPA but for no other reason. (Anderson Aff., Ex. 17.) In the words of the Ninth Circuit, the review will

be "a subterfuge designed to rationalize a decision already made." *See Metcalf*, 214 F.3d at 1142.

Not only has the Metropolitan Council violated NEPA by moving forward with one alternative prematurely, but a portion of the alternative it has selected has not been subjected to *any* part of the EIS process, and a portion that has been preliminarily analyzed was rejected by the 2012 DEIS as not providing sufficient protection for the environment. The south tunnel proposed for the Kenilworth Corridor has not been the subject of any Scoping Notice, Scoping Decision, DEIS, or SDEIS—and yet it has been chosen as the sole option for the SWLRT, the only route to be pursued through advanced design and engineering work. Perhaps even more egregious, the Co-location Alternative chosen for north of the Kenilworth Channel was rejected by the analysis in the 2012 DEIS as not providing sufficient protection for the environment. (Anderson Aff., Ex. 8, p. 11-12.) Yet that is the alternative the Metropolitan Council now is pursuing to the exclusion of all others.

It is inevitable that the municipal consent process—which involved considerable investment in time and resources by the Metropolitan Council, the counties and cities, and the public—will dictate the results of the SDEIS and FEIS still to come. Now that the Metropolitan Council has spent hundreds of hours on public hearings and comments, negotiations with local governments, and a lengthy mediation with the City of Minneapolis resulting in a highly contentious deal to approve the SWLRT route, it is implausible that the SDEIS and FEIS issued by the Metropolitan Council would conclude that the South Tunnel/Co-location Alternative has any serious environmental impacts that

could threaten its selection. Just as in *Metcalf*, the Metropolitan Council's commitment to one course of action before the completion of the environmental review is certain to slant the outcome of the analysis.

This is exactly the result that NEPA is intended to prohibit. The statute and its regulations require that government bodies fully study all alternatives *first*, and then make a decision about which option to pursue. As the 2012 DEIS itself acknowledges, NEPA regulations "ensure that information on the social and environmental impacts of any federally funded action is available to public officials and citizens *before decisions are made and before actions are taken*." (Anderson Aff., Ex. 5, p. ES-1 (emphasis added).) Instead, in this case, the information on environmental impacts will be provided long after the important decisions have already been made—"a classic Wonderland case of first-the-verdict, then-the trial." *Metcalf,* 214 F.3d at 1146.

Because the Metropolitan Council's actions violate NEPA regulations as a matter of law, the Lakes and Parks Alliance is entitled to summary judgment on this count.

2. The FTA Has Violated NEPA Regulations.

The FTA also has violated NEPA regulations, as it was notified that the Metropolitan Council was about to take an action that would limit the choice of reasonable alternatives for the SWLRT before the issuance of the Record of Decision, and yet it did not take appropriate action to insure that NEPA objectives and procedures were achieved. *See* 40 C.F.R. § 1506.1(b). The Lakes and Parks Alliance informed the FTA in a letter dated July 24, 2014 that the Metropolitan Council's actions with respect to the SWLRT environmental review process did not meet the requirements of federal

and state law. (Anderson Aff., Ex. 18.) The FTA was then required by NEPA regulations to take action to ensure that NEPA procedures were properly complied with. However, the FTA failed to take any such action. Instead, it simply sent a reply to the Lakes and Parks Alliance stating that no cessation of funding for the SWLRT was warranted. (Anderson Aff., Ex. 19.) It took no further public actions in response to the letter, and did nothing to halt the municipal consent process from moving forward, even though the sole purpose of that process was to select a particular project design for implementation, thereby directly and definitively limiting the choice of reasonable alternatives for the SWLRT project.

For these reasons, the FTA has also violated NEPA regulations as a matter of law, and the Lakes and Parks Alliance is entitled to summary judgment on this count.

B. The Metropolitan Council has Violated MEPA Regulations by Taking Actions that Will Prejudice the Ultimate Decision on the Project During the Pendency of the Environmental Review.

Pursuant to MEPA, any major governmental action that has the potential for significant effects must be preceded by "a detailed environmental impact statement prepared by the responsible governmental unit." Minn. Stat. § 116D.04, subd. 2a. When an environmental impact statement is required, "a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project until … the environmental impact statement has been determined adequate." *Id.*, subd. 2b. The MEPA requirements for an environmental impact statement mirror those of NEPA—first the DEIS and subsequent comment period (Minn. R. 4410.2600), then an FEIS (Minn. R. 4410.2700), and an SEIS if needed based on substantial changes or new

information (Minn. R. 4410.3000). Finally, the FEIS must be deemed adequate by the responsible governmental unit (Minn. R. 4410.2800). Until the FEIS has been determined adequate, the governmental unit that will carry out the proposed project "shall not take any action with respect to the project, including the acquisition of property, if the action will prejudice the ultimate decision on the project." Minn. R. 4410.3100, subp. 2. An action prejudices the ultimate decision "if it tends to determine subsequent development or to limit alternatives or mitigative measures." *Id*.

As with NEPA, the MEPA process is intended "to force agencies to make their own impartial evaluation of environmental considerations *before* reaching their decisions." *Allen v. City of Mendota Heights*, 694 N.W.2d 799, 803 (Minn. Ct. App. 2005) (emphasis added) (quoting *No Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 327 (Minn. 1977)). MEPA case law indicates clearly that the required environmental review process must occur in its entirety before a political subdivision (like the Metropolitan Council) approves a proposal, grants a permit, or takes other actions that allow a development project to move forward. *See Allen*, 694 N.W.2d at 803 (finding that MEPA required the environmental review process to occur before a city could act on requests for rezoning, conditional use permits, variance, and preliminary plat for a development, despite a statute requiring cities to take action on a request within 60 days); *Carl Bolander & Sons Co. v. Minneapolis*, 488 N.W.2d 804, 809 (Minn. Ct. App. 1992) (holding that an environmental assessment had to be completed before the city could issue a permit for a recycling center). A decision made by a political subdivision before the completion of the environmental review required by MEPA should be vacated.

See Baker v. County of Itasca (In re Conditional Use Permit & Preliminary Planned Unit Dev. Applications), 2008 Minn. App. Unpub. LEXIS 640, at *8-9 (Minn. Ct. App. 2008) (holding that a planning commission's approval of a conditional use permit and planned unit development must be reversed and reconsidered after the required environmental assessment was completed).

For the same reasons that the municipal consent process violated NEPA regulations, it also violated MEPA regulations. Although the FEIS for the project has not yet been issued, let alone proceeded through the public hearing process and been determined adequate, the Metropolitan Council has moved forward with the municipal consent process and thereby prejudiced the ultimate decision on the project. In fact, the Metropolitan Council's actions go even farther—the ultimate decision has not just been prejudiced; it has already been made. Indeed, if the Metropolitan Council did not intend to move forward with the South Tunnel/Co-location Plan, the entire municipal consent process—with all of its public meetings, votes of public bodies, and intense negotiations—would have been a complete waste of public officials' and citizens' time. Although the FEIS may include a perfunctory evaluation of other options, the route and design of the project have been chosen already. But the singling out of one plan over others before a FEIS has been issued and determined adequate is not allowed under MEPA. Because the environmental review required by MEPA had not been completed at the time municipal consent was given, the municipal consent process should be vacated, and the Metropolitan Council should be required to resubmit the SWLRT plans to the local governments after the completion and approval of the FEIS.

Because the Metropolitan Council has violated MEPA regulations as a matter of law, the Lakes and Parks Alliance is entitled to summary judgment on its MEPA claim.

3. The Metropolitan Council Has Violated the Minnesota Light Rail Statutes by Carrying Out the Municipal Consent Process Before the Release of a DEIS for the SWLRT Facilities Proposed.

Minnesota statutes require that any proposed light rail transit project be approved through the municipal consent process, in which cities and counties along the proposed route hold a public hearing and approve or disapprove the physical design component of the preliminary design plans for the project. Minn. Stat. § 473.3994, subd. 3. The "preliminary design plans" are defined in the statutes as including a DEIS for "the light rail transit facilities proposed." Minn. Stat. § 473.3993, subd. 2. Accordingly, when the preliminary design plans are submitted to the local governments for approval, a DEIS for the specific light rail design being considered must be available for the local governments—and the public—to review.

Here, however, the Metropolitan Council initiated the municipal consent process and presented the preliminary design plans to the local governmental units before a DEIS for the proposed light rail transit facilities—i.e., the South Tunnel/Co-location Plan—was not available for review, as one did not exist. The 2012 DEIS did not analyze any design options including a tunnel in the Kenilworth Corridor, and no SDEIS analyzing the effects of tunnels had been completed. Accordingly, the preliminary design plans submitted to the local government units for approval were incomplete, and the statutory requirements for the municipal consent process were not met.

The lack of a DEIS actually analyzing the plan the local governments were being asked to prove was not a mere formality—it meant the county and cities were unable to make a fully informed decision about the project, including the effects it would have on the environmentally sensitive Kenilworth Corridor, an area used for recreation and travel by thousands of people each day. In addition, the lack of a DEIS meant that citizens, including the members of the Lakes and Parks Alliance, were unable to participate fully in the public hearing process. Without information about the environmental effects, citizens could not properly evaluate the SWLRT Plan and determine whether to support or oppose it—meaning that the public hearings required for the municipal consent process were materially flawed.

For these reasons, the Lakes and Parks Alliance is entitled to summary judgment on its claim under the Minnesota light rail statutes.

CONCLUSION

This case presents a rare occasion under which discovery is not needed, as all of the facts are undisputed. Based on those undisputed facts, the Metropolitan Council and the FTA cannot deny that the municipal consent process for the SWLRT went forward before a FEIS was deemed adequate and a Record of Decision was issued. Nor can they deny that the municipal consent process went forward while a DEIS for the light rail facility proposed—the South Tunnel/Co-location Plan—had not been completed and made available for review. These actions violate NEPA and MEPA regulations and the Minnesota light rail statutes as a matter of law. Accordingly, the Lakes and Parks Alliance is entitled to summary judgment on all of its claims.

For its relief, the Lakes and Parks Alliance requests declaratory judgment declaring the following: (1) The FTA and Metropolitan Council have violated and remain in violation of NEPA regulation 40 C.F.R. § 1506.1 by undertaking the municipal consent process before issuance of the record of decision on the FEIS; (2) The Metropolitan Council has violated and remains in violation of Minnesota Regulation 4410.3100 by undertaking the municipal consent process before the FEIS is completed and determined adequate; (3) The Metropolitan Council has violated and remains in violation of Minn. Stat. § 473.3994, subd. 3 by undertaking the municipal consent process without a DEIS for the light rail facility proposed; (4) the FTA and Metropolitan Council must comply with these statutes and regulations; and (5) the municipal consent obtained for the SWLRT design is null and void.

Dated: November 3, 2014

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