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 **OPPOSITION TO MET COUNCIL'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF LPAM'S S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In its brief, the Met Council brazenly asserts that "LPA has no avenue left to challenge the outcome of the SWLRT Project." (Met Council Br., p.24.) To accept such an assertion as true, the Court must entirely discount the compelling results of the discovery the Court allowed LPA to undertake, which decisively show that the Met Council eliminated alternatives for the SWLRT Project before the end of the environmental review.

While the Met Council argues there are three separate bases for denying LPA's motion for summary judgment, the foundation for each rests on whether an improper predetermination occurred. No wonder, then, that the Met Council dismisses the

communications uncovered by LPA through discovery as "political discussions" not entitled to or worthy of consideration by the Court.

In its mootness argument, the Met Council concedes that a declaratory judgment action can be undertaken so long as "there is an actual, ongoing case or controversy." (Met Council Br., p. 24.) Certainly that is the case here. Whether the environmental review process complied with the National Environmental Protection Act ("NEPA") is still of critical importance. As one example, construction of the SWLRT Project is dependent on the federal government entering a full funding grant agreement. The date for entering such an agreement has been set back by the Federal Transit Administration ("FTA") on several occasions and is now scheduled for late 2017. On at least one occasion, we now know that the date was deferred because of the FTA's concern over the outcome of the LPA litigation; proof positive of an ongoing controversy with real consequences. This concern is expressed in one of the emails uncovered through LPA's discovery, evidence which would not be available in the Administrative Procedure Act ("APA") action the Council continues to argue that the LPA was required to assert.

In its second argument, the Met Council asserts that LPA cannot show the Council limited the choice of reasonable alternatives prior to issuance of the federal Record of Decision ("ROD"). To support this argument, the Council shifts the timeframe for analyzing the evidence. According to the Council, the relevant period for the Court's analysis is the time between the Court's order denying LPA's motion for summary judgment and the issuance of the FTA's ROD. No such limitation is imposed by the Court's order or other case law. And such a limitation makes no sense. The most

relevant period for determining whether an improper predetermination occurred is the time before and after the various MOUs were entered and municipal consent was obtained, as the decision to commit to the Co-location/South Tunnel plan was solidified during this period. The evidence uncovered clearly shows that during this time, while the Met Council was trying to hide the NEPA-related significance of the MOUs in its public documentation of the agreements, behind the scenes it was communicating to the parties that potential alignments other than co-location were off the table. Additionally, the Met Council's actions subsequent to the Court's summary judgment order demonstrate that the parties were following through on the commitments made in the MOUs and the municipal consent process. Perhaps the strongest evidence is that the FEIS analyzes only one route—the Co-location/South Tunnel Plan all parties agreed upon two years prior to the issuance of the ROD.

Finally, the Met Council argues that the FTA's "independent" review of the environmental review process ensures that there are no deficiencies in that process. This argument, like the previous two, assumes that the Court accepts that the Co-location/South Tunnel Plan was not chosen until after the completion of the environmental review. The LPA, however, has presented substantial evidence that the Met Council, driven by fear of falling out of the local and federal funding queues, worked out a political solution to the route alignment so that the SWLRT Project could move forward to obtain funding. This fact could not help but prejudice the environmental review. With the result already determined, the EIS process could have no outcome other than supporting the Co-location/South Tunnel Plan—as it indeed did.

Notably, the Met Council states on two occasions in its opening brief (pp. 32 and 37) that the "ultimate point" of the law suit is whether "the objectivity and integrity of the NEPA process were unaffected by the alleged predetermination." Of course they were. Simply consider this: The DEIS supported relocation of freight rail as environmentally superior to co-location when the physical design of the locally preferred alternative called for relocating freight rail through St. Louis Park, but an opposite conclusion was reached in the SDEIS ***following*** the political decision to co-locate freight and light rail within the Kenilworth Corridor. The entire environmental review following the MOUs and municipal consent process was intrinsically slanted toward justifying the predetermined route, and it must be re-performed. As there are no genuine issues of material fact presented by this case—notably, the Met Council does not challenge any of the LPA's facts—the LPA should be granted summary judgment and the SWLRT environmental review process should be declared null and void.

ARGUMENT

A. The LPA's NEPA Claim is Not Moot, as There Is Still a Substantial Controversy that Can Be Addressed by this Court.

Throughout this case, the Met Council has repeatedly argued that the LPA was required to bring a claim under the APA upon completion of the environmental review. The Met Council's assertion that the LPA's claim is now moot because the ROD has issued is yet another reiteration of this argument. It should again be rejected. Despite the completion of the environmental review, there is still a substantial controversy that needs to be addressed by this Court, even though the LPA did not bring an APA claim. The

SWLRT Project has not yet been fully funded by the federal, state, or local government, it has not yet received the permits necessary to begin construction, and construction work has not yet commenced. None of these things may occur if this Court issues a declaratory judgment finding the EIS process null and void. The controversy is still live.

This is the sixth time that the Met Council has returned to the argument that the LPA needed to bring a claim under the APA after the completion of the environmental review, based on the administrative record, rather than the claim it brought under NEPA. The argument was rejected by the Court in the context of the denial of the motion to dismiss, the denial of the motion for summary judgment, the denial of the motion for protective order, the order affirming the denial of the protective order, and the denial of the Met Council's request to defer the scheduling conference for the completion of the compilation of the administrative record. (*See* Dkt. Nos. 69, 78, 98, 104, 109, 110.) The Court has repeatedly informed the Met Council that the LPA has brought a valid claim and that it is entitled to discovery on that claim, regardless of the status of the environmental review.

1. This Case is Not Moot Because the Court May Still Order Effective Relief.

The very case quotations cited by the Met Council undermine its argument that this case is moot. As explained by the Met Council, a case becomes moot when there is no remaining substantial controversy because "an event occurs while a case is pending that heals the injury and only prospective relief has been sought" or because "the act sought to be enjoined has occurred." (Met Council Br., p. 19 (citing *S. Utah Wilderness*

Alliance v. Smith, 110 F.3d 724, 727 (10th Cir. 1997) and *Bacon v. Neer*, 631 F.3d 875, 877 (8th Cir. 2011).) In this case, no event has occurred that has healed the LPA's injury. The SWLRT Project continues to move forward based on an EIS process that does not comply with NEPA, the very injury that the LPA cited in its complaint. Nor has the "act sought to be enjoined" already occurred—the LPA is seeking an injunction ordering compliance with NEPA, and the Met Council has not yet complied with NEPA's requirements.

Clearly, there is still a controversy between the parties, and the Court may address this controversy by granting the relief requested in the Amended Complaint, with slight modifications. Parties are allowed to modify or add to their requests for relief based on changes of circumstances during the course of a case. *See, e.g., Lang v. City of Minneapolis*, No. CIV. 13-3008 DWF/TNL, 2014 WL 2808918, at *6 (D. Minn. June 20, 2014) (allowing plaintiff to add request for adverse inference instruction when alleged spoliation was discovered in course of case). Here, the LPA has not changed the basic nature of the relief it is requesting. It has slightly changed the wording of the declaratory judgment and injunction it is requesting, simply because the environmental review has progressed during the three years this case has been active. (Compare Proposed Order to Amended Complaint, Prayer for Relief.) The Met Council seems to be asserting that the LPA was seeking an injunction ***preventing*** the issuance of the ROD, or that the requested relief could be granted only ***prior*** to the issuance of the ROD, and now that the ROD has issued, there is no further controversy. But the LPA did not request such relief—its requests for declaratory judgment and an injunction were focused on ensuring a fair

environmental review process was undertaken, and nothing has occurred that would prevent the Court from so ordering, even though the tainted environmental review process is now complete. *See Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (ordering environmental assessment process to be re-started, with an "objective evaluation free of the previous taint"); *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 181 (4th Cir. 2005) (requiring SEIS to be completed because of deficiencies in first EIS process, even though that process was complete).

The requested relief certainly would have an effect on the SWLRT Project. The Met Council will not be able to obtain federal funding or the required permits[1] to begin construction once a federal court has declared that the EIS process for the project violated federal law and ordered the Met Council to remedy that violation. The FTA already delayed issuing a full funding grant agreement at least once because of the risk of the lawsuit alone. In an email to Gov. Dayton in January 2016, Met Council Chair Adam Duininck reported, "[T]he reason the FTA refused to move the schedule [for the full funding agreement] up is that they are concerned that the litigation risk is still there until Judge Tunheim rules on the Lakes and Parks Alliance case." (Anderson Aff. III, Ex. B.) When the FTA would not fund the project just because of the risk of a potential finding by the Court that the environmental review was Under such circumstances, the Met

[1] For the project to move forward, numerous permits will have to be issued by various public bodies. Permits relating to public waters and surface water quality, alone, will need to come from 14 permitting bodies. (Aff. of Joy R. Anderson in Support of Second Motion for Summary Judgment ("Anderson Aff. III," Ex. A.)

Council would be required to restart its environmental review process and complete it properly and in accordance with NEPA.[2]

2. The LPA Was Not Required to Bring an APA Claim in Order to Preserve its *Limehouse* Claim.

Nor did the LPA's case become moot when it did not bring an APA claim against the FTA challenging the ROD. Nothing in the Court's previous orders, or in *Limehouse* itself, indicates that the LPA had a cause of action under *Limehouse* only until the ROD was issued, and that after that the LPA would be required to bring an APA claim. If the LPA was required to bring an APA claim, the Court would have so stated at one of the five previous times the Met Council has made this argument. But the Court has always rejected this argument. It makes no sense to require the LPA to simultaneously bring a *Limehouse*-type claim against the Met Council under NEPA regulations, based on a full record compiled in discovery, and a separate claim against the FTA under the APA, based only on the administrative record. Perhaps that is why the Met Council is silent in its brief as to what it believes should actually happen with LPA's lawsuit, arguing only that LPA needed to pursue an APA action once the ROD issued.

Clearly the LPA should not be required to dismiss this lawsuit or incur the expense and burden of two lawsuits when this Court has repeatedly recognized the validity of its claim under *Limehouse*, and specifically the LPA's ability to bring the *Limehouse* claim

[2] The Met Council asserts, in a footnote, that it cannot be ordered to comply with NEPA because NEPA imposes obligations only on agencies of the federal government. This Court, however, has previously recognized that NEPA regulations, including 40 C.F.R. 1506.1, impose an obligation on state actors not to limit the choice of reasonable alternatives prior to the completion of environmental review. *LPA I*, p. 28-29.

regardless of whether a ROD had been issued. LPA I, p. 26 (noting that it did not matter that in *Limehouse*, a ROD had already issued, and in the LPA's case, final agency action had not occurred). Also, why would the Court allow the LPA to take discovery from the Met Council—an issue that was hotly contested between the parties and took many months to resolve—if the discovery would be useless, and the LPA would be forced to proceed with an APA claim on the administrative record alone as soon as the ROD was issued? Certainly the Met Council would prefer that the LPA be limited to the administrative record—which it compiled, and which does not include any of the email communications on which the LPA relies in solidifying its case. Simply arguing "mootness" because an APA claim became available during the pendency of LPA's lawsuit, does not undo the Court's repeated rulings that the LPA is entitled to take and use discovery to support its claims.

The timing of the Court's orders in this case also suggests that the Court expected this case to extend beyond the completion of the environmental review. The Court's order affirming Magistrate Judge Rau's denial of the Met Council's motion for protective order was issued just days after the publication of the FEIS, showing that the Court did not believe this major step forward in the environmental review process affected the LPA's right to discovery. (Dkt. No. 104.) In addition, the Court issued the amended pretrial scheduling order in this case ***after*** the issuance of the ROD and the Determination of Adequacy by the Met Council—again establishing that the Court did not believe that the completion of the environmental review process made a difference to the progression of this case. (Dkt. No. 113.) Despite the Met Council's arguments that more time for

discovery was unnecessary because the environmental review had been completed, the Court issued a scheduling order that provided for discovery, motion practice, and trial. (*Id*.) There would be no reason to have discovery, motions, or trial if the LPA's cause of action became moot immediately upon the completion of the environmental review. *Limehouse* itself supports this view.

In *Limehouse*, the plaintiff brought a lawsuit after completion of the environmental review of the proposed bridge project, with both the FEIS published and the ROD issued. *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 328 (4th Cir. 2008). Nevertheless, the Fourth Circuit found that the plaintiff had a cause of action under NEPA against state agents pending the outcome of further federal review. *Id.* at 331. Even though the environmental review was complete, the Court found that the "federal remedy to be protected is reconsideration of the FEIS." *Id.* Here, similarly, the possibility for federal consideration of a new FEIS, one that comports with NEPA regulations and is not biased by the Met Council's predetermination of a route for the SWLRT Project still exists and needs to be protected. The Court may still declare the environmental review process noncompliant with NEPA and order the Met Council to undertake a new process that meets the requirements of the law and its regulations. If no avenue for federal reconsideration of the new process exists, the LPA's federal remedy will be eviscerated and rendered meaningless. This is the very reason why this Court found that the LPA had a cause of action against the Met Council, and nothing relating to the Court's original reasoning has changed. There is no reason for this case to be considered moot, and it should continue to move forward, despite the completion of the environmental review.

B. The Met Council Limited the Choice of Reasonable Alternatives Prior to the Issuance of the ROD for the SWLRT Project.

The Met Council, in asserting that the LPA has not proven that the Met Council limited the choice of reasonable alternatives for the SWLRT Project, does not challenge any of the facts presented in the LPA's brief—which clearly set forth the process by which the Met Council deliberately eliminated other routes for the SWLRT and ensured that it, and all the municipalities along the proposed line, committed solely and exclusively to one route. Instead of denying these damning facts, the Met Council attempts to either ignore them or insist that they do not matter. This Court, however, already determined that the facts do matter in this case when it ruled that discovery must go forward to assist the Court in determining whether an improper predetermination occurred. As the undisputed facts support this conclusion, the LPA is entitled to summary judgment.

1. The Met Council Cannot Simply Ignore Facts that Establish Its Limitation of Reasonable Alternatives.

Importantly, the Met Council does not attempt to assert that there are any genuine issues of material fact in this case or assert that the facts as set out by the LPA in its brief are untrue—which would be difficult, since those facts are almost entirely based on the Met Council's own documents. The Met Council nowhere denies that its own representatives stated on numerous occasions stated specifically that the Co-location/South Tunnel Plan was the only plan under consideration or that other plans had been eliminated as possible choices. (*See* LPA Br., p. 8 (Susan Haigh of the Met Council); p. 10 (Adam Duininck of the Met Council); p. 10-11 (Mark Furhmann, Metro

Transit program director for light rail and CMC member), p. 11 (Jake Spano, St. Louis Park councilmember and CMC member); p. 18 (Furhmann)). Nor does the Met Council deny that Minneapolis, St. Louis Park, and the MPRB all indicated in some way that they believed the MOUs they signed were binding and meant the Co-location/South Tunnel Plan was the only plan under consideration. (*See* LPA Br, p. 16 (Minneapolis); p. 18 (St. Louis Park); p. 20 (MPRB).) And the Met Council does not try to deny that its FEIS analyzed only one route for SWLRT—the Co-location/South Tunnel Plan—very plainly indicating that no other plans were under consideration once the co-location alignment was agreed upon.

The Met Council tries to ignore all of these facts—apparently pretending this case is an APA claim, to be decided on the administrative record, instead of a case with full discovery. For example, it provides almost no explanation of how its preferred alternative changed from re-location to co-location, and fails to address any of the correspondence or negotiations leading up to the execution of the MOUs with Minneapolis, St. Louis Park, and the MPRB. This reluctance to address the crucial facts in this case is extremely telling. The Met Council does not want to acknowledge these facts because it knows they show it eliminated reasonable alternatives before the completion of the environmental review.

Nor does the Met Council want to address the reason for its frantic scramble to achieve a consensus on the SWLRT Project. The environmental review simply took much longer than the Met Council initially expected—the original schedule called for work on the FEIS to start at the beginning of 2013 and the issuance of the ROD in mid-

2014. (Anderson Aff. III, Ex. C, p. 2.) Municipal consent was supposed to be obtained in late 2013, when the FEIS would be almost complete. (*Id*.) But the process fell far behind schedule, and the FEIS was not even started until mid-2015 (Anderson Aff. II, Ex. 41, p. ES-24), and the ROD not issued until July 2016 (*id*., Ex. 44). Meanwhile, the Met Council clearly was concerned that if all parties did not commit to one route quickly, despite the delay in the environmental review, the project's federal and local funding would be compromised. (Anderson Aff. II, Exs. 24 and 25.) There was cause for this concern—for example, in 2014, the Counties Transit Improvement Board threatened to divert the SWLRT Project's funding to other projects if SWLRT did not advance in the second quarter of 2014. (Anderson Aff. III, Ex. D, p. 22.) Municipal consent was therefore pushed through in 2014, before the SDEIS analyzing the route to be approved was even finished. Ultimately, municipal consent did increase the project's chances of federal funding—after all the municipalities had agreed upon the route, the Met Council announced that the FTA had increased the SWLRT Project's rating to "medium-high" in the federal funding queue, "in large part due to the project's ability to achieve municipal consent from all five corridor cities and the county last year," according to the Met Council's press release. (Anderson Aff. III, Ex. E.)

The Met Council's avoidance of all of these facts does not mean they do not exist. As set forth clearly in the LPA's opening brief, these new facts demonstrate that the Met Council did eliminate alternatives prior to the completion of the environmental review.

2. The New Facts Uncovered by the LPA Are Relevant and Establish that the Met Council Eliminated the Choice of Reasonable Alternatives before the End of the Environmental Review.

The Met Council's second strategy is to insist that the facts uncovered by the LPA simply do not matter. First, the Met Council asserts that the Court's Order on the LPA's first summary judgment motion, issued in August of 2015, forecloses the LPA from arguing that any acts prior to the issuance of that Order can be used to establish that the Met Council eliminated reasonable alternatives. The Order does not provide any support for this theory. In fact, the Court specifically qualified its decision that summary judgment was inappropriate "on the facts available ***at this point***" and invited the LPA to bring a second motion for summary judgment when it had additional facts. *LPA II*, p. 27 (emphasis added). The Court recognized that "the record—specifically the negotiation process and agreements between the Met Council and various cities and other public entities, and public statements regarding those agreements—shows that, throughout much of this process, the Met Council has had a clear favorite route for the SWLRT" and that the agreement with St. Louis Park "all but guarantees freight rail will stay in the Kenilworth Corridor." *LPA II*, p. 30-31. As the Court focused on those issues, the LPA focused on them as well, and found additional evidence supporting its contention that the MOUs and municipal consent processes committed the Met Council to the Co-location/South Tunnel Plan. This new evidence certainly is relevant to the LPA's motion.

In addition, the Met Council asserts that the repeated comments by Met Council representatives along with the indications that the MOUs were enforceable simply do not

matter because they do not bind the Met Council.[3] (Met Council Br., at 27-30.) In support of this assertion, the Met Council cites *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692 (10th Cir. 2010). In *Forest Guardians*, the court found that e-mail correspondence by biologists working for the agency conducting the environmental review did not bind the agency or commit it to predetermination. *Id*. at 718. Although these emails stated that the outcome of the review was a "done deal," such comments merely constituted "stray comments of a low-level scientist or two," and could not be said to express the position of the agency. *Id*. at 719.

Here, the evidence gathered by the LPA does not constitute a few "stray comments" by low-level employees. As set forth in detail in the LPA's initial brief, the evidence establishes a deliberate effort by Met Council leadership to ensure that all relevant players were committed to one SWLRT route before the environmental review was complete. The simple fact is that after the selection of the route through the Met Council recommendation, municipal consent, and the MOUs, the route for the SWLRT Project was not going to change. The Met Council knew this, and kept moving forward with design and engineering, despite the slowdown in the environmental review. By the time the FEIS was issued, ***90% of the design and engineering work had been completed***. (*See* https://metrocouncil.org/Transportation/Projects/Current-Projects/Southwest-LRT/Environmental/Final-EIS.aspx?source=child, FEIS, under Design Plans dropdown.)

[3] This again suggests that the Met Council continues to think of this case as an APA claim, in which only the administrative record—and none of the emails, correspondence, or statements outside it—are relevant. But this is not an APA claim, and the discovery submitted by the LPA is just the kind that the Court encouraged it to submit in support of a new summary judgment motion.

This is far beyond the preliminary "development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance" allowed by NEPA regulation. *See* 40 C.F.R. § 1506.1(d). Certainly when 90% of the engineering for one route has been completed, another route is not going to be chosen.

Throughout the process, Met Council representatives indicated that the decision to move forward with the Co-location/South Tunnel Plan had been made and that other options had been eliminated—the comments at the CMC meetings recommending the Co-location/South Tunnel Plan are particularly telling. As another example, Susan Haigh, the Chair of the Met Council—and certainly not a low level employee—made a number of statements to this effect:

- As early as August 2013, Haigh told Gov. Mark Dayton that the route placing light rail in the Kenilworth Corridor had been "selected" by Hennepin County and the Met Council and that another route that had been analyzed in the DEIS (running through Nicollet Avenue and the Midtown Greenway Corridor) had been "rejected." (Anderson Aff. II, Ex. 8.) The process for choosing a route was "thorough, time consuming, and expensive," Haigh explained, and choosing a new route would cause the project to lose its standing in the group of 12 projects nationally competing for federal funding. (*Id*.)

- In March 2014, after the Dayton-ordered freight study had been completed, and the Met Council had reconfirmed that the Co-location/Tunnel Plan was the chosen route, Haigh stated in a press release: "We have a wealth of information about this project and now is the time to use that information to ***make a decision*** that moves this project forward." (Anderson Aff. III, Ex. F.)

- When the Minneapolis MOU was signed in July 2014, Haigh stated in a press release that the agreement, which confirmed that Minneapolis agreed to the Co-location/South Tunnel Plan, "serves as a path forward to accomplish our mutual goals and ***to ensure this project gets built*** as a critical component of our 21st century transit system." (Anderson Aff. II, Ex. 29 (emphasis added).)

These were not tossed-off, intemperate statements by a low-level staffer—they were official statements of the Met Council Chair. Notably, all of these statements were made two years or more before the issuance of the ROD.

In a similar case, *International Snowmobile Mfgrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1260 (D. Wyo. 2004), the court found that public statements by a senior agency official demonstrated that a predetermination had been made. In *International Snowmobile*, the plaintiffs challenged a rule by the National Park Service ("NPS") considering regarding the use of snowmobiles in national parks. Prior to the issuance of the FEIS or ROD, the Assistant Secretary for Fish and Wildlife and Parks sent a memo directing the NPS to prohibit snowmobile access in the parks, and then held a press conference in which he stated that generally there would be no future for snowmobiles in national parks. *Id.* at 1260. The court found that these comments "indicate a prejudged political conclusion to ban snowmobiles from the Parks, and that "[g]iven these definite statements … it does not seem that the NPS could have issued any other rule." *Id*. at 1261. After such statements, the court concluded, the issuance of the FEIS and ROD were nothing more than *pro forma* compliance with the requirements of NEPA. *Id*. The rule was therefore vacated and remanded to the NPS. *Id*. at 1266.

Similarly, in this case, Haigh and other Met Council representatives made comments demonstrating that the Met Council had reached a "prejudged political conclusion" about the route for the SWLRT, and given such public statements, it does not seem that the Met Council could have chosen any other route. Those statements should be considered to bind the Met Council. *Forest Guardians* itself acknowledges that

statements by "those who would be situated by virtue of their positions to effectuate an irreversible and irretrievable commitment of the agency regarding the matter at hand" are relevant to determining whether the agency predetermined an outcome. 611 F.3d at 718. Certainly, statements by Haigh and committee members—the very representatives involved in making the Met Council's decisions—commit the Met Council to one course of action. And the LPA's discovery found convincing evidence that Minneapolis, St. Louis Park, and the MPRB believed —based on the Met Council's words and actions—that the Met Council was committing to a single course of action—the Co-location/South Tunnel Plan.

3. Relocation Remained a "Reasonable Alternative" that Needed to Be Fully Evaluated in the Environmental Review Process.

The Met Council suggests two reasons for the elimination of relocation as one of the alternatives for the SWLRT—a letter from the U.S. Army Corps of Engineers raising concerns about the possible discharge of fill material into wetland and the TC&W Railroad's objections. Neither of these is sufficient to take relocation off of the list of "reasonable" options that needed to be fully evaluated in the EIS process.

First, the letter from the Corps, which was submitted as a comment to the DEIS in December 2012, does not eliminate relocation as a reasonable option—it merely raises some questions that the Corps asks the Met Council to address regarding the discharge of fill into wetland area as the project moves forward. (Nauen Aff., Ex. 5.) The letter states that the Met Council should complete a wetland delineation for the project and adds, "[i]f you plan to move forward with alternative LRT 3A as the LPA [locally preferred

alternative] you will need to submit additional information to support your decision to eliminate alternative LRT 3A-1 from consideration." (*Id*.) Certainly the letter did not forbid the Met Council from moving forward with relocation. Noticeably, the Corps letter did not seem to be a factor in the Met Council or other bodies' decision making. No one on the CMC brought up the letter when discussing the decision to recommend the Co-location/South Tunnel Plan. (Anderson Aff. II, Exs. 14, 26.) Even St. Louis Park, with its many objections to relocation, did not seem to seize on the Corps letter as justification for its position. (Anderson Aff. II, Exs. 5, 14, 17, 26.)

Second, despite the TC&W's objections, there were two potential options for rerouting freight into St. Louis Park. First, the TranSystems report issued in March 2014 provided a potential route that met national railroad construction standards and, according to an experienced railroad consultant, was workable. (*Id.*, Ex. 19.) Although the TC&W stated that it had concerns with the plan, the Met Council could have asked the Surface Transportation Board for approval of the reroute. (*Id*. Ex. 21.) At a minimum, this route was a reasonable option that should have been further evaluated for its environmental effects. In addition, an alternative that the TC&W did not object to was also available—the Brunswick Central route. (Anderson Aff. III, Ex. G, pp. 34:22-36:17; 46:13-47:20.) This option, too, was dropped without further exploration, even though it remained a reasonable alternative.

While the Met Council was not required by NEPA to choose relocation, it was obligated to give it a "hard look" and a full, unbiased evaluation, and not to eliminate it before the end of the environmental review. The Met Council did not do this, however,

and it has given no good explanation for its rejection of this option before the issuance of the ROD.

C. The Met Council's Environmental Review Was Biased and Deficient.

Finally, the Met Council argues that it doesn't matter that it dropped reasonable alternatives from its environmental review because the review was not deficient in any way and because the FTA approved its review by issuing the ROD. This argument suggests that court review of an environmental analysis would never be appropriate, as long as a federal agency issued a ROD. This is clearly not the case.

First, the Met Council asserts that the LPA did not identify any alleged deficiency in the environmental review. This is clearly untrue. The LPA has argued throughout this case that the political predetermination in favor of the Co-location/South Tunnel Plan made the remainder of the environmental review deficient, as it was inevitable that the predetermination made the FEIS slanted in favor of finding that the chosen alternative did not significantly affect the environment. Courts have found that this predetermination, in itself, is a defect in the environmental review that can justify an order to perform additional environmental analysis. In *Metcalf*, for example, the Ninth Circuit determined that the agencies at issue had predetermined the outcome of an environmental analysis examining whaling by the Makah tribe, because the agencies had entered into contracts with the tribe regarding the whaling before the review was completed. 214 F.3d at 1146. Once it reached that conclusion, the court found that the environmental review "is demonstrably suspect because the process under which the EA was prepared was fatally defective—i.e., the Federal Defendants were predisposed to finding that the Makah

whaling proposal would not significantly affect the environment." *Id*. Accordingly, the environmental review had to be undertaken again, from the beginning, in an unbiased manner. Here, the same remedy should be ordered.

Second, the Met Council asserts that approval by the FTA cures any deficiencies that may have existed in its environmental review. If mere approval by a federal agency, and the issuance of a ROD, made every environmental review adequate, there would be no need for court review of federal agency decisions regarding NEPA. Even the Met Council would not deny that courts regularly review environmental analyses after the issuance of a ROD to determine whether they were done correctly. The Met Council cannot insulate itself from court review simply by asserting that the FTA approved its review. That is particularly true when, as here, there is evidence before the Court of a predetermination that would have been unavailable to the FTA. Notably, the ROD issued by the FTA nowhere mentions the LPA's lawsuit, or makes any attempt to analyze whether the Met Council made an improper predetermination of the route in advance of the completion of the environmental review. (Anderson Aff. II, Ex. 44.) This is despite the fact that the FTA was well aware of the LPA's lawsuit. Simply put, the ROD is not a substitute for Court review of Met Council's blatant violation of NEPA regulations.

CONCLUSION

For the foregoing reasons, the LPA asks the Court to deny the Met Council's motion for summary judgment, grant the LPA's motion, and issue declaratory judgment and injunctive relief as stated in the LPA's proposed order.

Dated: June 9, 2017

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