



## Beverly Hills Finally Loses Its Crazy, Stupid Subway Battle



PHOTOGRAPH BY AOMAZUL / SHUTTERSTOCK.COM

January 4, 2017 | Neal Broverman | 7 Comments

After losing numerous lawsuits in its fight against the Westside subway, Beverly

change.org

Start a petition Browse Become a member

### Sign this petition

1,176 supporters

324 needed to reach 1,500



Route 66 does not belong to Albuquerque. It belongs to America. Route 66 is the "Mother Road" of America, America's Highway. The 10 or 11 historical locations on Route 66 in Albuquerque will

# Environmental Litigation & Capital Projects

## Panelists

Fred Wagner, *Venable, LLP*

Tiffany Wright, *Remy Moose Manley, LLP*

Jay Fox, *Federal Transit Administration*

## Moderator

Minming Wu Morri,

*Federal Transit Administration*



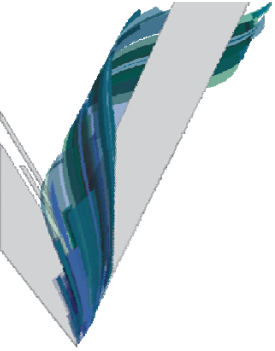


Environmental Litigation and  
Capital Projects Session

Overview of Section 4(f) and Section 106:  
The Crucial Role of Parkland and Historic  
Resources in the Environmental Analysis of  
Transit Projects

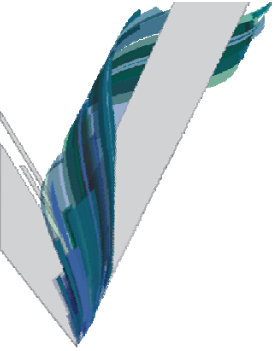
February 27, 2017

By Fred R. Wagner  
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## **BASICS OF SECTION 4(f) OF THE TRANSPORTATION ACT**

- Besides the Endangered Species Act, perhaps the most stringent of all environmental/natural resources laws
- Codified at 49 U.S.C. §303 and 23 U.S.C. §138; implemented by regulations at 23 C.F.R. 774
- Adds a “substantive” requirement to a “procedural” regulatory system

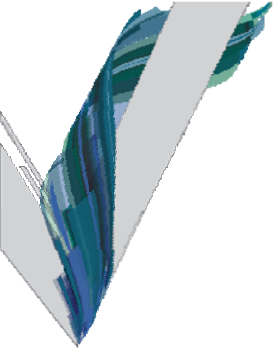


## PURPOSE OF SECTION 4(f)

- Protect parkland and historic sites from proposed transportation projects
- Applies to all projects that receive USDOT funding or require USDOT approval

## Overton Park

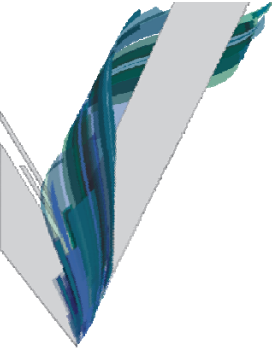




## WHAT ARE SECTION 4(f) RESOURCES?

- Section 4(f) properties include **publicly owned public parks**, recreation areas, and wildlife or waterfowl refuges, or any **publicly or privately owned historic site** listed or eligible for listing on the National Register of Historic Places.

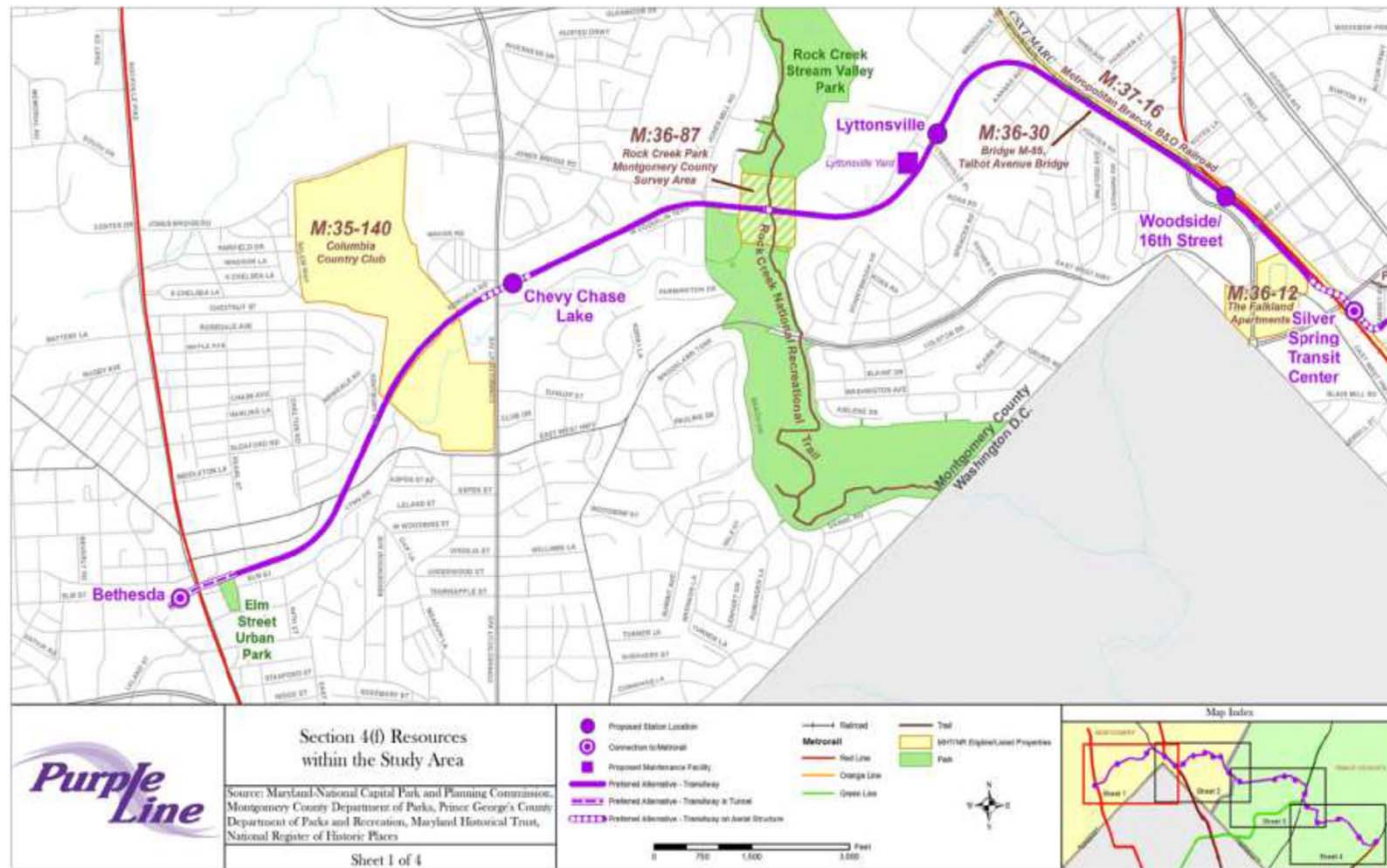


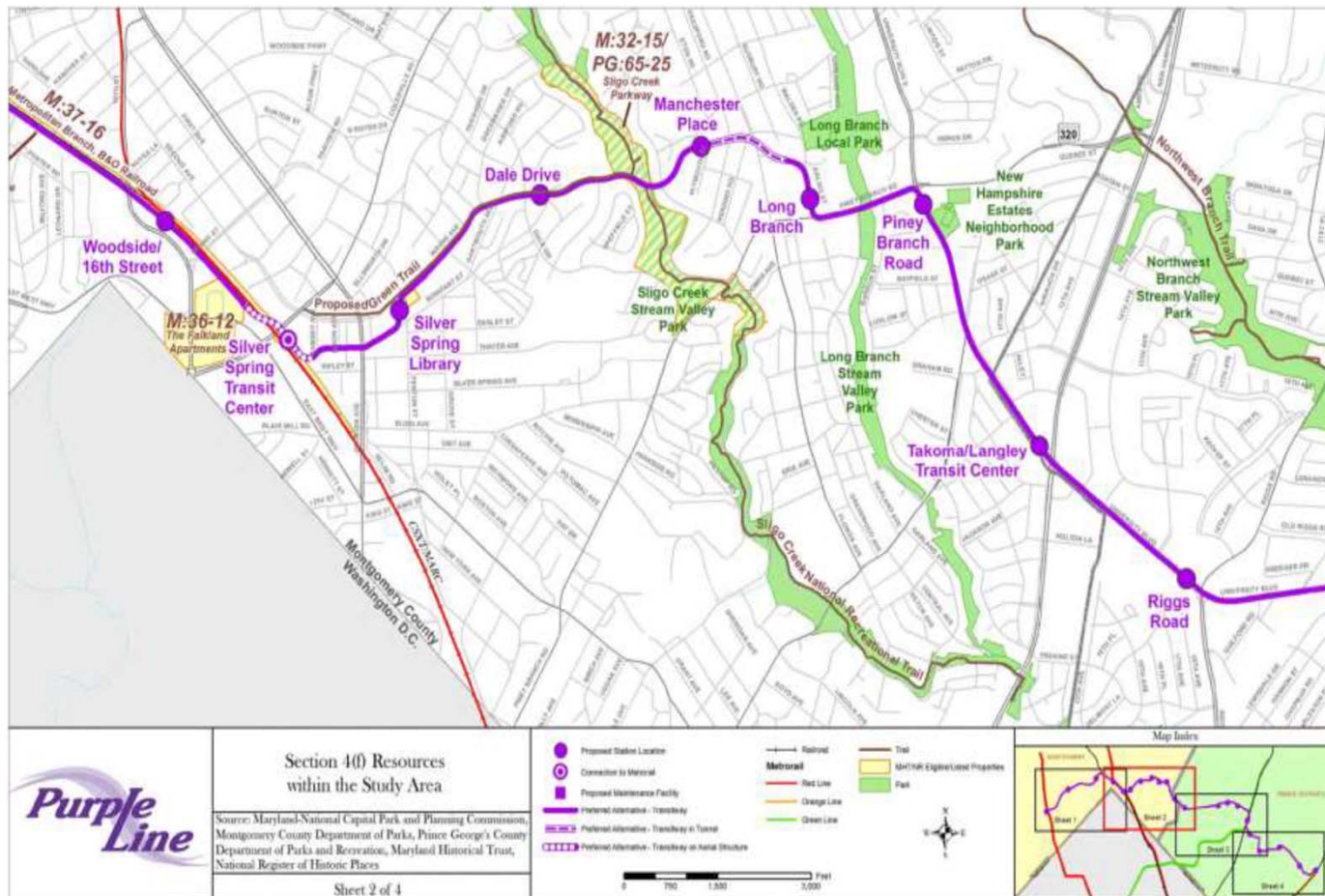
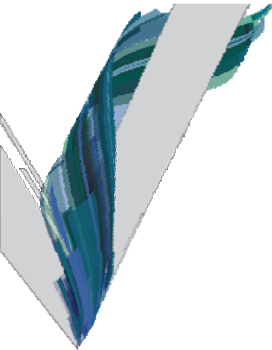


## SECTION 4(f) SUMMARY OF RESOURCES FOR PURPLE LINE

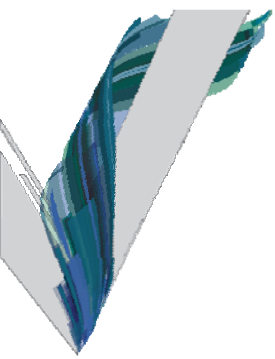
- <http://www.montgomeryplanningboard.org/agenda/2013/documents/ITEM3AttachmentB--ParksDepartmentMemo.pdf>

## Overview map of all parks in 4(f) study area

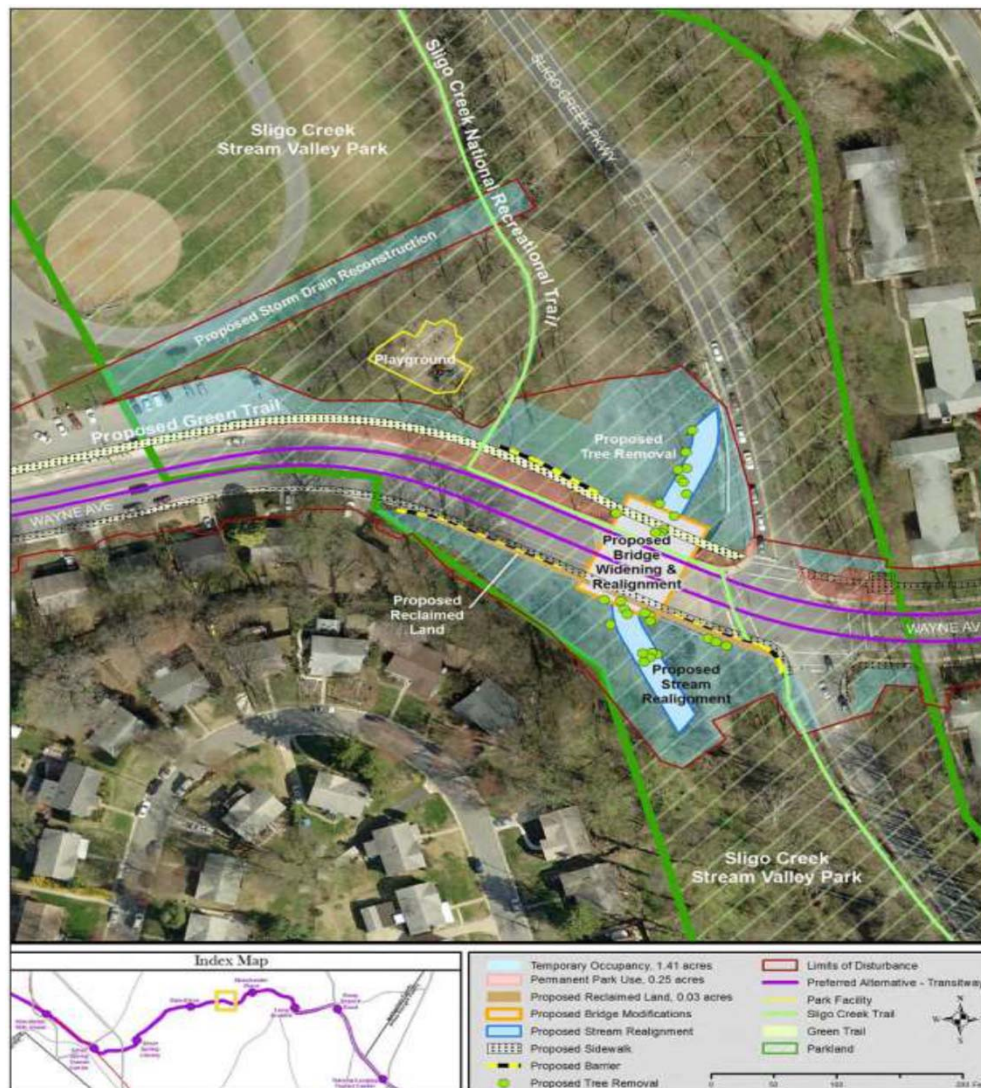




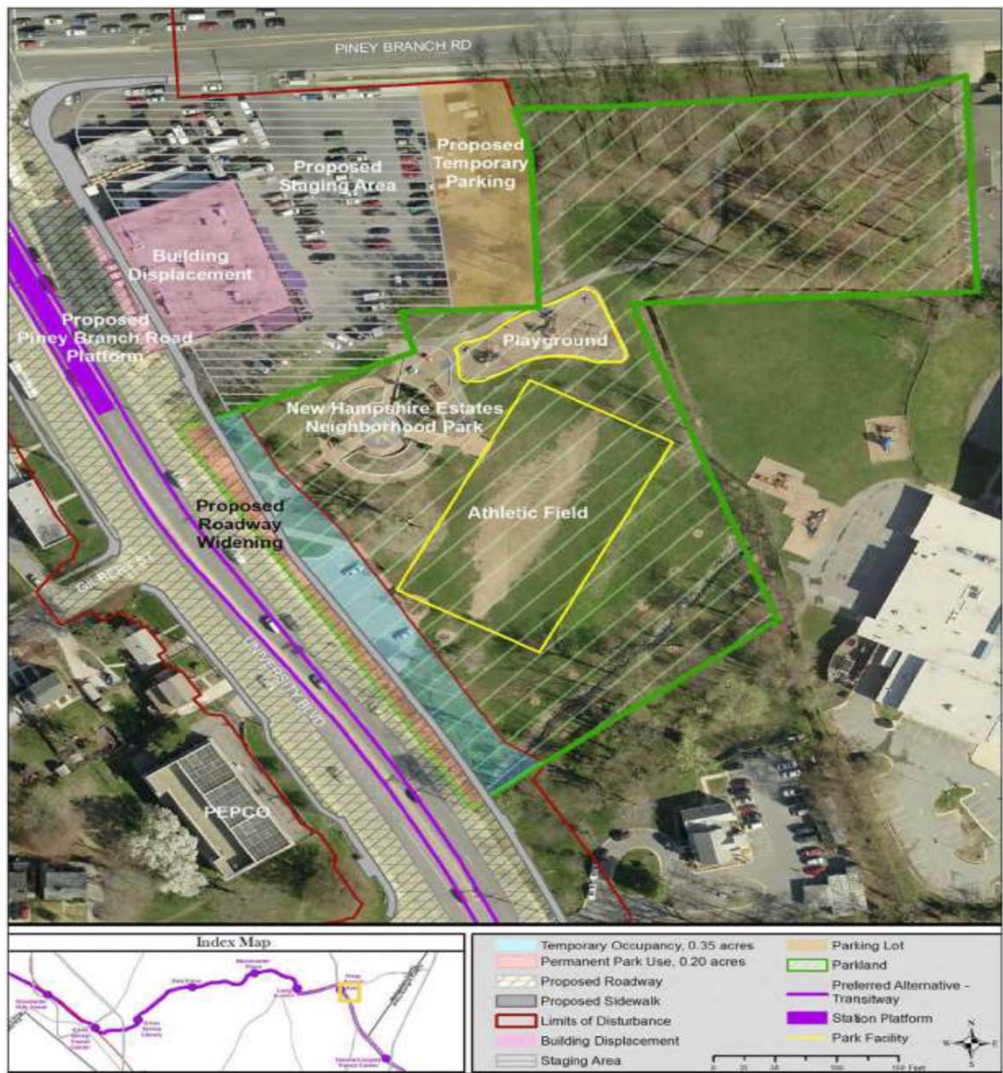




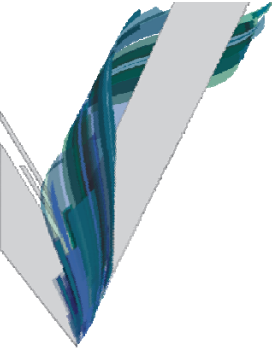
## Map of Sligo Creek SVP from FEIS



Map of New Hampshire Estates Neighborhood Park from FEIS

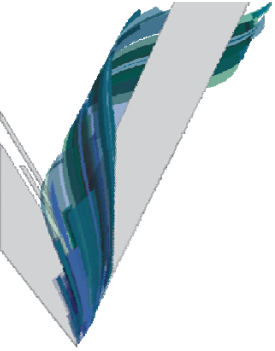






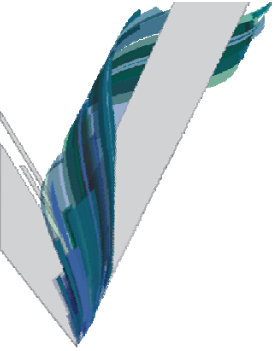
## BASIC PROHIBITION

- Cannot “use” a 4(f) property unless USDOT finds that:
- There is no “feasible and prudent” alternative that avoids the use of 4(f) properties
- The project includes “all possible planning” to minimize harm to 4(f) properties



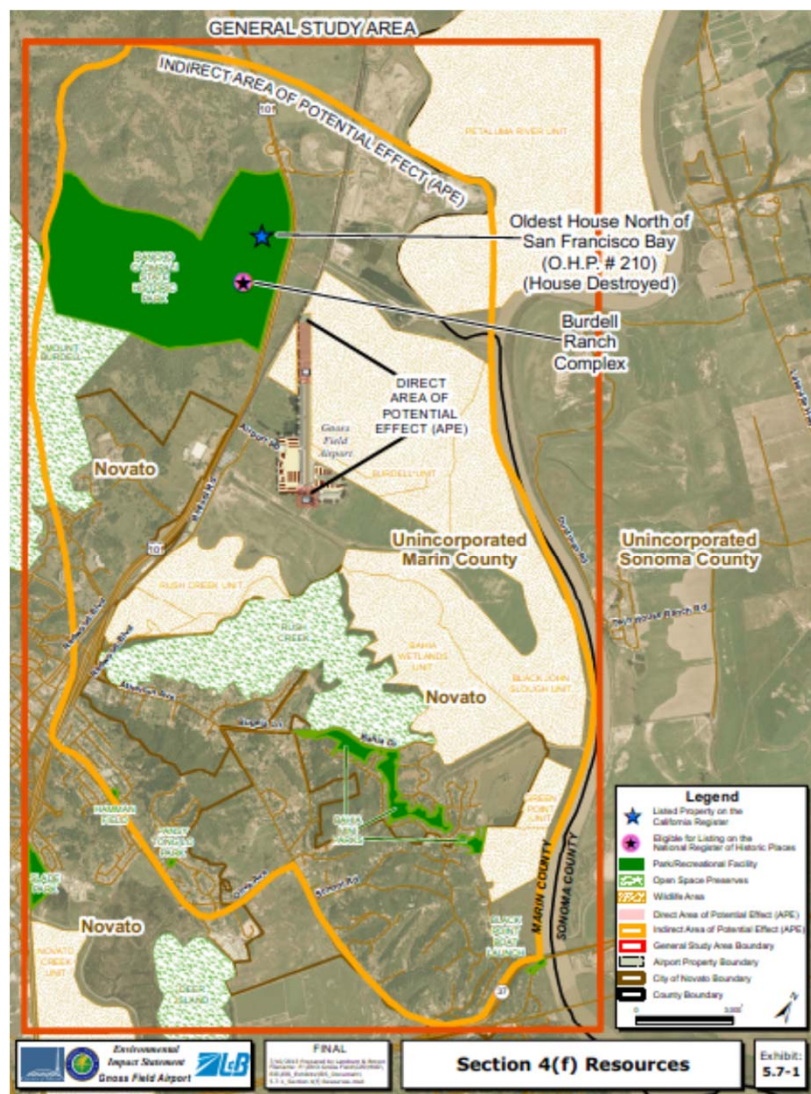
## EXCEPTIONS

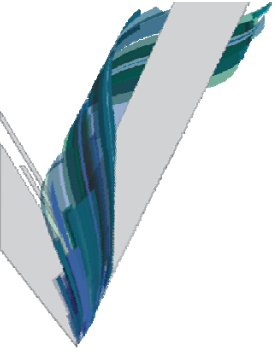
- De Minimis Impact – 23 C.F.R. Part 774.17
- ‘No Adverse Effect’ on a Section 4(f) property, BUT
- Different requirements for historic sites, recreations areas, and wildlife and waterfowl refuges



## WHAT'S THE “USE”?

- Permanent – physical taking
- Temporary – usually during construction
- Constructive – external impacts that can be serious enough to result in a “substantial impairment” of the resource





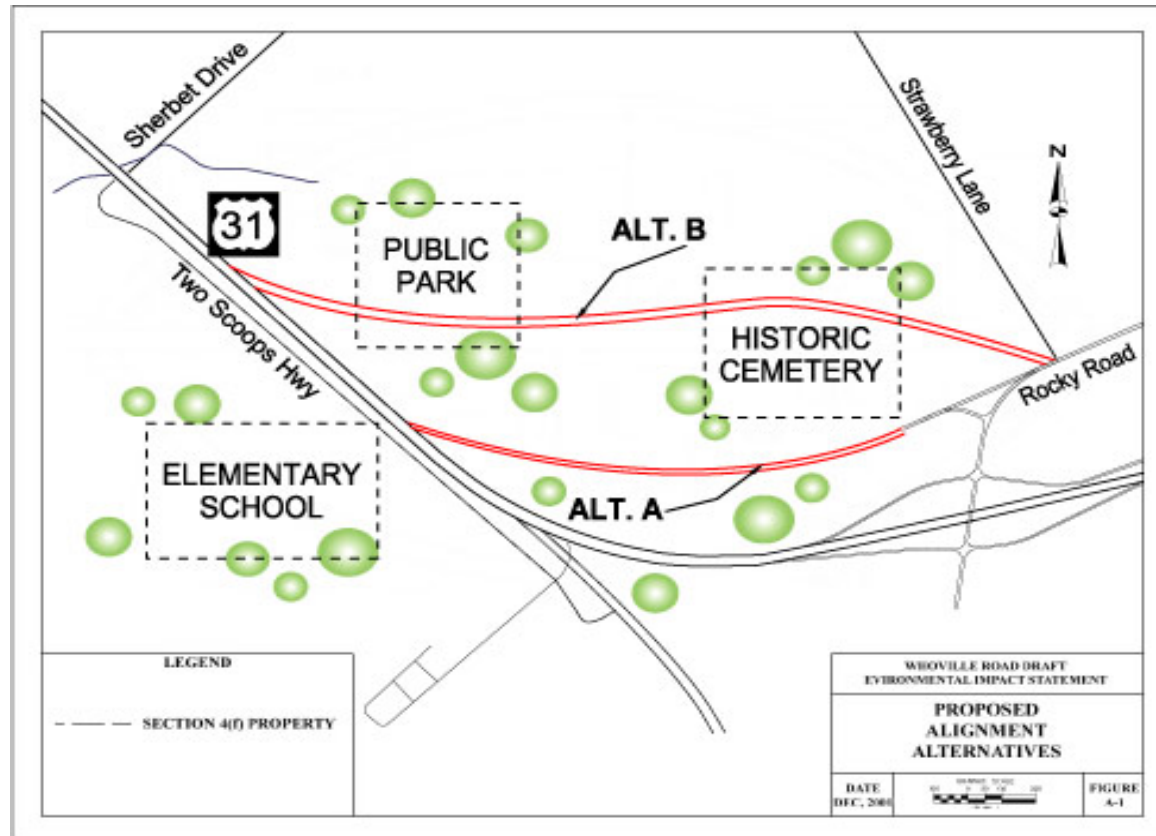
## **“FEASIBLE AND PRUDENT”** **(perhaps the key term in** **Section 4(f) analysis)**

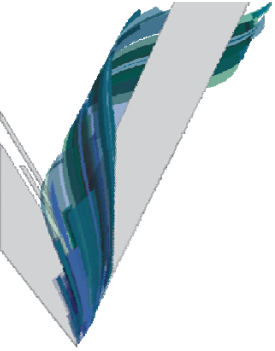
- Lengthy FHWA Policy Paper
- Complex regulations
- Bottom Line? There IS some flexibility, but protection of Section 4(f) resources is paramount



# SECTION 4(f) FHWA Tutorial:

<https://www.environment.fhwa.dot.gov/section4f/default.aspx>





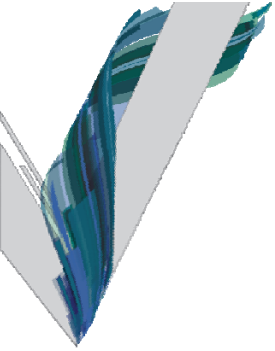
# BEST PRACTICES

- Early ID
- Avoidance through engineering, other methods
- De Minimis findings



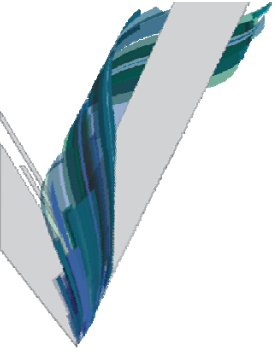
## **SECTION 106 of the NATIONAL HISTORIC PRESERVATION ACT**

- More like NEPA than Section 4(f) in that analysis, public participation, and documentation in most cases leads to compliance
- Key Players:
  - Advisory Council on Historic Preservation
  - SHPO/THPO
  - “The Keeper”



# CONSULTATION

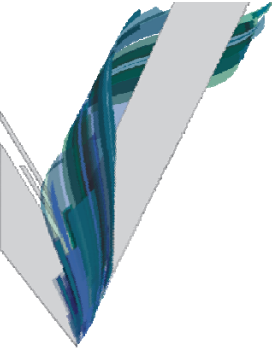
- IF undertaking could affect historic properties, the appropriate SHPO must participate, along with the public and other “consulting parties”
- Goal: reach consensus whether undertaking will create adverse effects on identified properties



# MEMORANDA OF AGREEMENT

- Result of consultation process
- What measures can be taken to avoid, minimize or mitigate adverse effects?
- Adverse effects MAY BE accepted if no successful mitigation measures are possible





# DISPUTE RESOLUTION

- Key role of Advisory Council
- Be cognizant of historic preservation advocacy organizations

# Metro Projects in Litigation

- ▶ Westside Subway Extension
- ▶ Regional Connector Transit Corridor
- ▶ Crenshaw/LAX Transit Corridor



# Westside Subway Extension





## Westside Subway Extension

### The Issues

- Local air quality and related public health impacts
- Risk of methane migration and explosion due to tunneling
- Failure to analyze alternative routes that do not tunnel under BHHS
- “Predetermination” of the Century City Station location
- Completeness of the seismic data regarding the Santa Monica and Constellation stations
- Re-opening the NEPA process given new seismic studies produced after FTA published the FEIS
- Conformity requirements for construction emissions/Standing
- Section 4(f) - Whether a “use” will occur at BHHS facilities

## Westside Subway Extension

# The Ruling

### NOx:

FTA did not have a sufficiently robust discussion of potential public health impacts of NOx emissions during construction

### Methane:

FTA failed to disclose the risks of an explosion under 40 CFR 1502.22 and *San Luis Obispo Mothers for Peace*

### Seismic Issues:

FTA took the required “hard look” at seismic risks, but failed to disclose incomplete information under 40 CFR 1502.22



Westside Subway Extension

## The Ruling

Seismic Issues:

FTA failed to circulate new, significant seismic information

Section 4(f):

FTA failed in its obligation to perform a sufficient Section 4(f) analysis concerning “use” of BHHS due to tunneling

## Westside Subway Extension

# The Remedy

In August 12, 2016 Remedy Order:

- ▶ Court orders FTA to prepare a supplemental DEIS to analyze deficiencies identified by the court
- ▶ Court does NOT vacate the ROD or enjoin construction
- ▶ Court balances the equities, and determines harm to the project and the public outweighs any harm to plaintiffs

## Westside Subway Extension

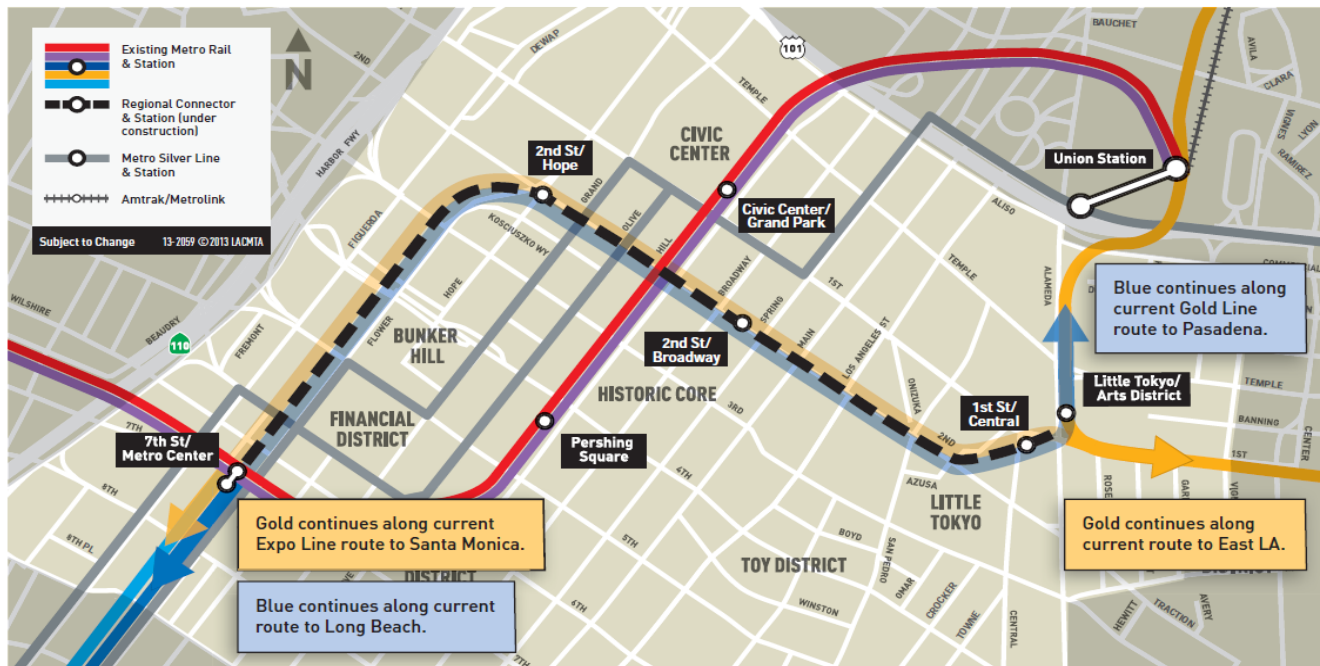
### Round Two

- Three months later, BHUSD files a new NEPA lawsuit against Metro
- Moves for “preliminary” injunctions in both lawsuits
- Metro moves to dismiss new lawsuit
- District court dismisses new lawsuit, denies “preliminary” injunction motions
- Ninth Circuit denies emergency motions in both cases



# Regional Connector Transit Corridor

## Regional Connector Transit Project



## The Issues

- ▶ Analysis of alternative construction methods on Flower Street
- ▶ Whether feasibility analysis required supplemental EIS
- ▶ Analysis of geotechnical risks
- ▶ Mitigation for geotechnical impacts
- ▶ Analysis of vibration impacts on historic buildings
- ▶ Analysis of street decking during construction
- ▶ Analysis of emergency ingress and egress during construction
- ▶ Construction noise from cut-and-cover construction



## Regional Connector Transit Corridor

### The Issues

- ▶ Whether nighttime construction was a change to project
- ▶ Analysis and mitigation of ground-borne noise and vibration during construction (tunneling)
- ▶ Analysis and mitigation of ground-borne noise and vibration during operation
- ▶ Analysis of parking impacts during operation
- ▶ Analysis of impacts on potential future development

## Regional Connector Transit Corridor

### The Issues

- ▶ Analysis of potential subsidence impacts from tunneling
- ▶ Deferral of analysis
- ▶ Post-FEIS changes to project
- ▶ Adoption of mitigation measures

## The Ruling

- ▶ The FEIS failed to adequately explain why open-shield tunneling and sequential excavation method tunneling on Flower Street are infeasible



## Regional Connector Transit Corridor

### The Remedy

- ▶ Court partially vacates the ROD
- ▶ Remands to agency to prepare supplemental environmental review
- ▶ Enjoins cut-and-cover construction on Flower Street

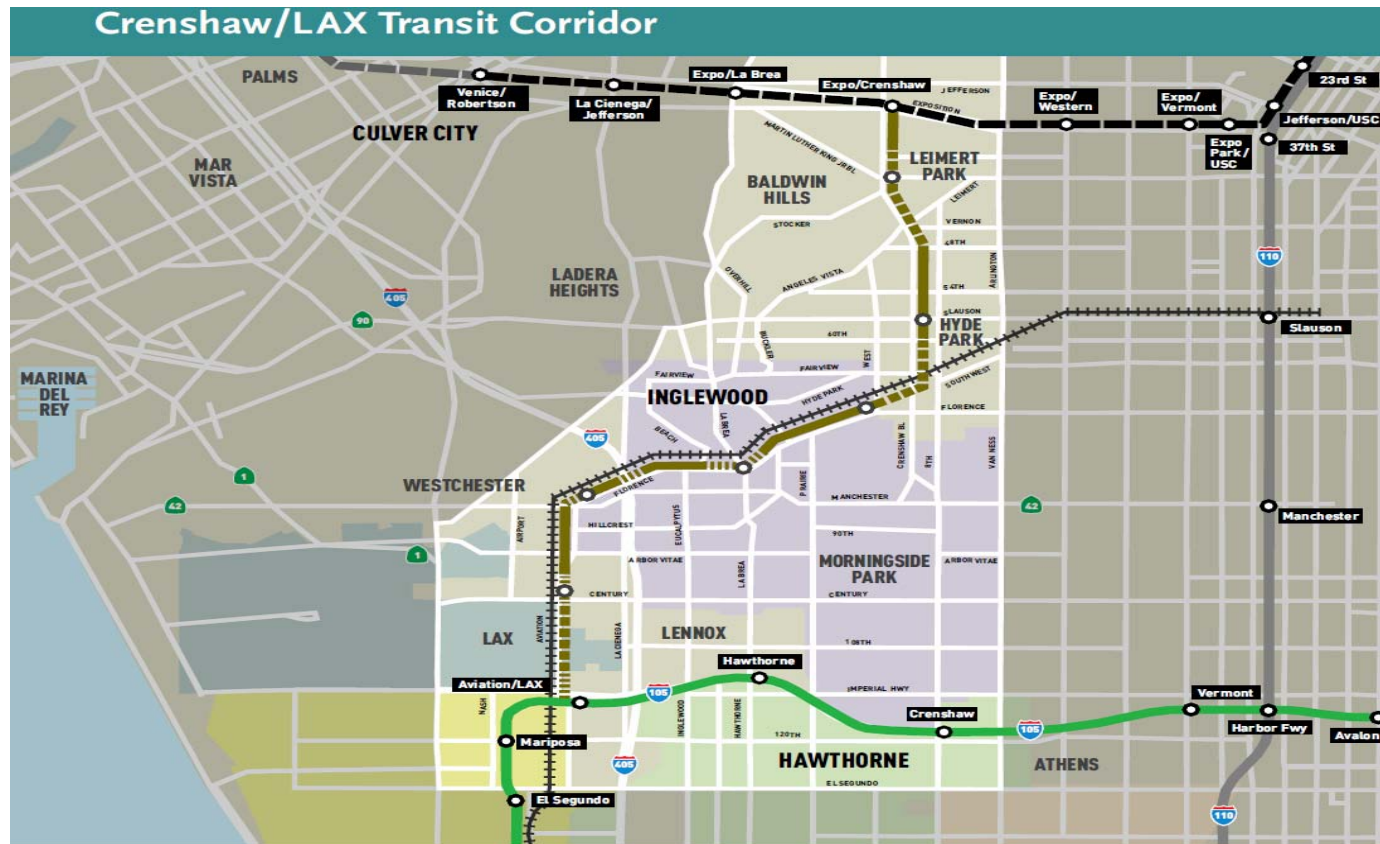
Regional Connector Transit Corridor

## The Ninth Circuit and Continuing Litigation

- ▶ *Japanese Village, LLC v. Federal Transit Administration* (9th Cir. 2016) 843 F.3d 445
- ▶ Ninth Circuit affirms district court
- ▶ Two new state court lawsuits and motion in district court



# Crenshaw/LAX Transit Corridor



## The Issues

- ▶ Whether the EIR was required to consider an alternative with a grade-separated section along Crenshaw Boulevard
- ▶ Pre-determination of at-grade configuration
- ▶ Analysis of land use impacts
- ▶ Analysis of community impacts, physical division of the community
- ▶ Analysis of parking impacts
- ▶ Analysis of public safety impacts
- ▶ Analysis of environmental justice impacts



Crenshaw/LAX Transit Corridor

## The Ruling

- ▶ Court upholds EIS/EIR
- ▶ Remands Public Records Act and Government Code claims to state court

# Lessons Learned

- ▶ Pay attention to the details.
- ▶ Don't dismiss comments, this is your chance to make your case.
- ▶ If it's not in the record, it didn't happen!
- ▶ At the same time, be careful what you put in writing.
- ▶ Deal with potential issues and problems candidly and on the record.
- ▶ Procedure is important in federal court, don't ignore it.

# FTA

FEDERAL TRANSIT ADMINISTRATION

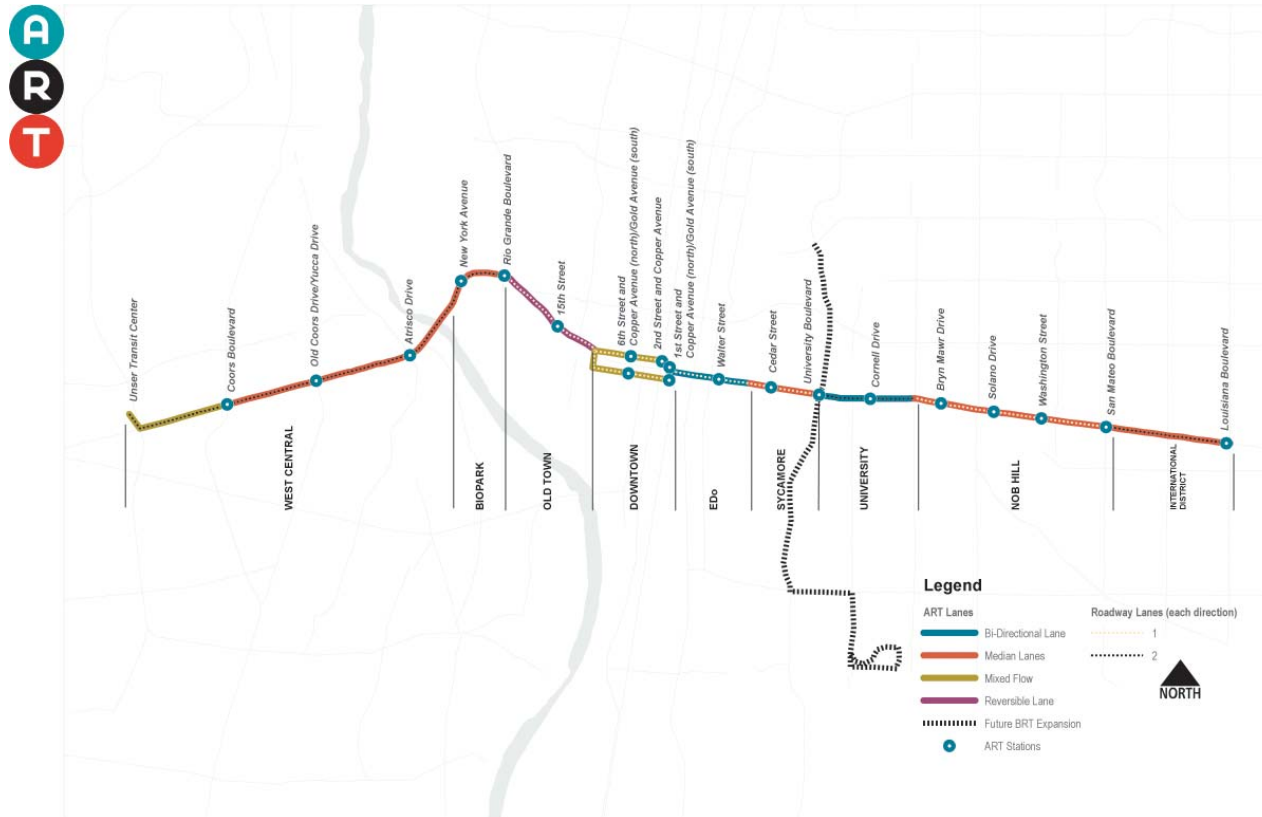
## **Albuquerque Rapid Transit and Purple Line Litigation**



U.S. Department of Transportation  
Federal Transit Administration



# Albuquerque Rapid Transit



# ART Facts

- All proposed construction within the Central Avenue ROW
- ART features 8.75 miles of exclusive rapid vehicle lanes
- Traffic signal system provides signal priority for ART vehicles
- Project passes through four distinct historic districts
- No historic buildings will be impacted or altered by the project
- Stations in historic districts are designed without canopies



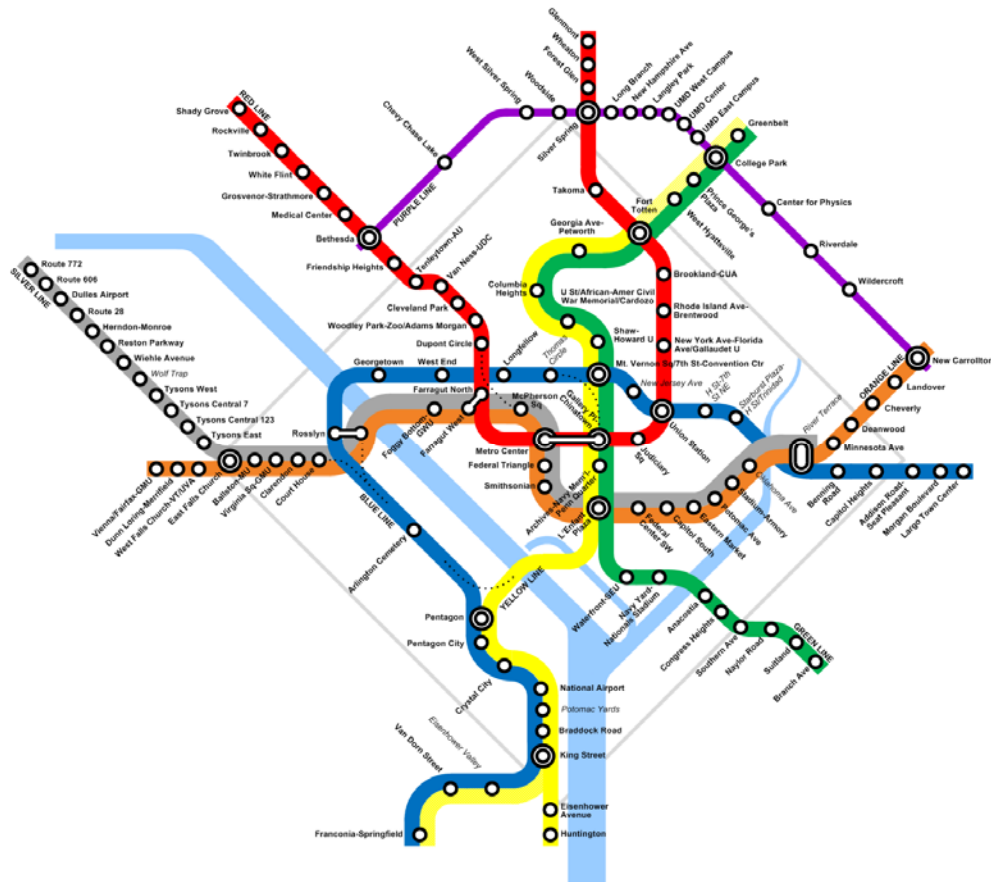


# WMATA Rail System





# MTA Purple Line



# Purple Line Facts

- 16.2 mile light rail line connecting Bethesda to New Carrollton
- DC transit connections to four WMATA stations
- Transportation connections to MARC, Amtrak and local bus
- Projected 2040 ridership – 74,000 daily riders
- Predominantly operates in exclusive lanes and dedicated ROWs
- Light rail will cross Rock Creek Park, home of the ...



## Hay's Spring Amphipod (*Stygobromus Hayi*)



← 10 mm →

**Only Listed Endangered Species  
in the District of Columbia**

# ART Litigation – District Court

- Complaint filed on April 4, 2016
  - Count I – Challenged FTA's decision to issue a Categorical Exclusion
  - Count II – FTA/City violated the NHPA
- Plaintiffs moved for a preliminary injunction
- District Court holds a three day evidentiary hearing on the motion
  - FTA's Director of Planning and Program Development testifies that his staff
    - Reviewed the draft and final CE documentation
    - \*\* Consulted with the SHPO (New Mexico Historic Preservation Department)
- Plaintiffs' motion is denied
  - FTA's CE and NHPA determinations were not arbitrary or capricious
  - Plaintiffs failed to show irreparable harm
  - No showing of projected business losses



# ART Litigation – 10th Circuit Decision

- Evidentiary Challenges
  - Striking plaintiffs’ expert declarations was abuse of discretion
  - Exclusion of the “de Garmo” email (funding not an issue)
- Substantive Challenges
  - FTA acted arbitrarily and capriciously in granting a CE
  - FTA violated NHPA by failing to consider the project’s impact on (a) the historical integrity of Route 66, and (b) the historic districts/resources

“[O]nly when an action will have primary impacts on the natural environment will secondary socio-economic effects be considered . . . comments cited by plaintiffs concerned cost, access to businesses, lost parking, removal of median, and preferred alignments, none of which concerned the impact of the ART Project on the natural environment.”

# Purple Line Litigation – District Court

- Complaint filed on August 14, 2014
  - Defendants – USDOT, FTA, USFWS, and DOI
  - Claims – Violations of NEPA and Endangered Species Act
- Early stages of litigation focus on the Amphipod
  - On January 7, 2014, USFWS concludes their ES review
    - Project will have no adverse effect on the Hay's Spring (or Kenk's) amphipod
  - The “Culver” search for the amphipod concludes in Spring 2015
- Focus shifts from ESA to a myriad of NEPA & funding issues
  - Stormwater, local funding, WMATA safety/ridership (affecting Purple Line ridership forecasts), wetlands analysis, noise and vibration analysis, and more!
- Oral argument and Supplemental Briefing on WMATA issue

# Purple Line Litigation – The Order

Decision: Record of Decision vacated / Defendants to prepare an SEIS

Opinion Excerpts:

“Defendants’ failure to adequately consider WMATA’s ridership and safety issues was arbitrary and capricious, and that these conditions create the seriously different picture that warrant an SEIS.”

“WMATA and the FTA’s cavalier attitude toward these recent developments raises troubling concerns about their competence as stewards of nearly a billion dollars of the federal taxpayers’ funds.”

“[D]efendants failed to engage in the requisite supplemental analysis with respect to . . . whether nearly a billion dollars in federal funding should ultimately be committed to a project for which serious questions have been raised as to its future viability.”

# Lessons Learned

- Pro Se, NIMBY, local business owners, local civic groups – these are all synonyms for HMPs – Highly Motivated Plaintiffs
  - Hard working and often well-funded
  - Panoramic vision when it comes to presenting issues for judicial review
- First question – how will the agency lose?
  - Know the landscape – external issues, player motives, other intangibles
- Second question – why didn't the public process resolve the plaintiff's concerns?
  - Mitigation can go beyond environmental impacts and adverse effects
- Embrace the Issues AND the Remedies
- Beware the litigation equivalent of “too many cooks in the kitchen”



# Potential New Directions and Questions and Answers