



**National Trust for  
Historic Preservation**

*Save the past. Enrich the future.*

February 3, 2022

By Email to: [sarcher@mdot.maryland.gov](mailto:sarcher@mdot.maryland.gov)

Steve Archer  
Cultural Resources Team Leader  
Maryland Department of Transportation State Highway Administration  
Environmental Planning Division  
707 North Calvert Street  
Baltimore, MD 21202

**Re: I-495 and I-270 Managed Lanes Study  
Section 106 Comments on Draft PA and No Adverse Effect Finding for  
Morningstar Tabernacle No. 88 Moses Hall and Cemetery,  
Cabin John, MD**

Dear Mr. Archer,

The National Trust for Historic Preservation appreciates the opportunity to comment on the Section 106 findings and Draft Programmatic Agreement (PA) for the I-495 and I-270 Managed Lanes Study. We strongly support the comments submitted today by the Friends of Moses Hall, the Maryland National Capital Park and Planning Commission, the Cabin John Citizens Association, and the Sierra Club Maryland Chapter. In addition, many of the comments that we submitted on November 30, 2021 in response to the Draft Supplemental Environmental Impact Statement are directly relevant to the Section 106 issues (e.g., cumulative impacts) and remain unresolved.

**We Strongly Disagree with the “No Adverse Effect” Determination for the Morningstar Tabernacle No. 88 Moses Hall and Cemetery.**

We join the chorus of other consulting parties who have objected vehemently to the proposed determination that the project will have no adverse effect on the Morningstar Tabernacle No. 88 Moses Hall and Cemetery.

At the very least, the finding of no adverse effect to the cemetery site is premature, because additional archeological research needs to be conducted. As we commented in our November 30 letter, and as many other parties have commented, additional archaeological investigation needs to include the use of Ground Penetrating Radar (GPR) to search for additional evidence of potential burials.

The other primary basis for the widespread disagreement with the agencies’ proposed no adverse effect determination is the cumulative impacts of the project. As you know, the



Section 106 regulations explicitly require consideration of cumulative impacts, 36 C.F.R. § 800.5(a)(1), and cumulative impacts are defined as

the impact on the environment which results from the incremental impact of the action when added to other *past*, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (1978) (emphasis added).

Given the overwhelming disagreements with this proposed no adverse effect determination, by a number of different consulting parties, it will be necessary for the Federal Highway Administration (FHWA) to refer this issue to the Advisory Council on Historic Preservation (ACHP) pursuant to 36 C.F.R. § 800.5(c)(2)(i). That referral to the ACHP carries with it the substantial risk that the issue could be elevated to the Administrator of the FHWA. *See id.* §§ 800.5(c)(2)(ii), 800.5(c)(3). Rather than pursuing this dispute resolution process, we urge the FHWA to adopt the much more efficient and responsive approach by modifying its determination to acknowledge the potential adverse effects to this important historic site.

### **We Strongly Disagree with the New Argument That Cumulative Impacts Analysis Can Ignore Past Impacts Prior to the Passage of NEPA and the NHPA.**

During the January 4, 2022 consultation meeting, the highway agencies articulated a new argument regarding cumulative impacts analysis that we have never heard before. The argument is that, when looking to the “past” component of cumulative impacts (quoted above), the agency can put on blinders and disregard any past adverse impacts that occurred prior to the passage of NEPA (1970) or the NHPA (1966) – even when the agency that caused those past adverse impacts is the *same agency* as the current project proponent.

In response to this disturbing new argument, we reviewed guidance on cumulative impacts analysis issued by the FHWA and by the Council on Environmental Quality (CEQ), and we could find no reference whatsoever to any support for this rationale. *See, e.g.,* CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* ([https://ceq.doe.gov/publications/cumulative\\_effects.html#:~:text=Considering%20Cumulative%20Effects%20Under%20the,additional%20information%20and%20background%20data](https://ceq.doe.gov/publications/cumulative_effects.html#:~:text=Considering%20Cumulative%20Effects%20Under%20the,additional%20information%20and%20background%20data)). In fact, one of the examples featured in the CEQ guidance itself involved a cumulative impact analysis of roads in the vicinity of Bandelier National Monument in New Mexico. The time period used for the cumulative impact analysis was 1935 to 1981. *See id.*, Chapter 3, at pp. 31-32 & Fig. 3-3. In short, there is absolutely no basis in law or precedent for this attempt to exclude the original construction of the highway from the analysis of cumulative impacts on the Morningstar Tabernacle No. 88 Moses Hall and Cemetery.

This new argument also flies in the face of the administration’s policy on environmental justice, as reflected in Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) (“Where



the Federal Government has failed to meet that commitment in the past, it must advance environmental justice.”)

**We Strongly Disagree with the Agencies’ Refusal to Include a Commitment in the PA to Convey to the Cemetery Trustees Portions of the Right-of-Way with Potential Burials.**

The SHA has offered to convey to the trustees of the cemetery a portion of the existing right-of-way where GPR has indicated the potential presence of burials. If carried out, this could be a very meaningful measure to minimize and mitigate adverse effects. However, the highway agencies have refused to include this proposed offer as a stipulation in the Programmatic Agreement. Since the commitments in the PA will be binding and enforceable, this unwillingness to include the proposed conveyance in the PA suggests that the agencies want to keep open the option to renege on this offer. We urge that it be added as a commitment.

**Additional Consultation is Needed to Avoid, Minimize, and Mitigate Potential Adverse Effects to Historic Resources.**

The goal of the Section 106 consultation process is to develop and evaluate alternatives and modifications to the project that could avoid, minimize, and mitigate the adverse effects. 36 C.F.R. §§ 800.1(a), 800.6(a). There are several historic properties that the highway agencies have acknowledged are likely to be adversely affected by the project. These include the Gibson Grove A.M.E. Zion Church, the Washington Biologists’ Field Club on Plummers Island, the C & O Canal National Historical Park, and the George Washington Memorial Parkway/Clara Barton Memorial Parkway. Yet the draft PA offers only token mitigation for these adverse effects, and does not include a process to develop alternatives and modifications to the project that could minimize those effects. The Section 106 consultation process should be used as the mechanism for developing much more robust mitigation, in addition to modifications that could minimize or avoid the effects entirely.

Thank you for considering the comments of the National Trust, and we appreciate the ability to continue our participation in the Section 106 consultation process, as many of these key issues are being further evaluated and resolved.

Sincerely,

A handwritten signature in cursive script, reading "Elizabeth Merritt".

Elizabeth S. Merritt  
Deputy General Counsel



cc:

Brenda Mallory, Chair, White House Council on Environmental Quality –  
[brenda\\_mallory@ceq.eop.gov](mailto:brenda_mallory@ceq.eop.gov)

David Clarke, Federal Preservation Officer, FHWA - [david.clarke@dot.gov](mailto:david.clarke@dot.gov)

April Marchese, USDOT – [april.marchese@dot.gov](mailto:april.marchese@dot.gov)

Colleen Vaughn, Federal Preservation Officer, USDOT – [colleen.vaughn@dot.gov](mailto:colleen.vaughn@dot.gov)

Emily Biondi, FHWA – [emily.biondi@dot.gov](mailto:emily.biondi@dot.gov)

Jeanette Mar, FHWA Maryland Division - [jeanette.mar@dot.gov](mailto:jeanette.mar@dot.gov)

Jaime Loichinger, ACHP - [jloichinger@achp.gov](mailto:jloichinger@achp.gov)

Mandy Ranslow, ACHP - [mranslow@achp.gov](mailto:mranslow@achp.gov)

Vivian Lee, NCPC – [vivian.lee@ncpc.gov](mailto:vivian.lee@ncpc.gov)

Samantha Beers, US EPA - [beers.samantha@epa.gov](mailto:beers.samantha@epa.gov)

Julie Schablitsky, MDOT SHA – [jschablitsky@mdot.maryland.gov](mailto:jschablitsky@mdot.maryland.gov)

Richard Ervin, MDOT SHA – [rervin@mdot.maryland.gov](mailto:rervin@mdot.maryland.gov)

Elizabeth Hughes, Maryland Historical Trust – [elizabeth.hughes@maryland.gov](mailto:elizabeth.hughes@maryland.gov)

Beth Cole, Maryland Historical Trust - [beth.cole@maryland.gov](mailto:beth.cole@maryland.gov)

Tim Tamburrino, Maryland Historical Trust - [tim.tamburrino@maryland.gov](mailto:tim.tamburrino@maryland.gov)

Rebecca Ballo, Montgomery County Planning Dep't,  
[rebeccah.ballo@montgomeryplanning.org](mailto:rebeccah.ballo@montgomeryplanning.org)

Brian Crane, Montgomery County Planning Dep't - [brian.crane@montgomeryplanning.org](mailto:brian.crane@montgomeryplanning.org)

Debra Borden, M-NCPPC – [debra.borden@mncppc.org](mailto:debra.borden@mncppc.org)

Charlotte Troupe Leighton, Friends of Moses Hall – [troupleighton@gmail.com](mailto:troupleighton@gmail.com)

Susan Shipp, Cabin John Citizens Ass'n – [jsishipp3@verizon.net](mailto:jsishipp3@verizon.net)

Paula Posas, Maryland Sierra Club – [paula.posas@mdsierra.org](mailto:paula.posas@mdsierra.org)

Kendra Parzen and Chris Cody, National Trust for Historic Preservation