

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

2019 JUN -6 PM 4: 21

Docket No. 54
BY DEPUTY CLERK

5:19-cv-95

FRIENDS OF PINE STREET d/b/a
PINE STREET COALITION,
Plaintiff,

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
(National Environmental Policy Act, 42
U.S.C. §§ 4321 et seq.; Administrative
Procedure Act, 5 U.S.C. §§ 701-706)

v.

THOMAS D. EVERETT, in his capacity as
Executive Director of the Federal Highway
Administration,

and

JOE FLYNN, in his capacity as Secretary
of the State of Vermont Agency of
Transportation,

and

MIRO WEINBURGER, in his capacity as
Mayor of the City of Burlington,
Defendants.

COMPLAINT

INTRODUCTION

1. The Burlington MEGC M5000 (1), Southern Connector/Champlain Parkway project (henceforth, "Champlain Parkway" or "project") is a proposed highway project running from Route 7/I-189 to the intersection of Main Street and Pine Street. The

proposed project bisects the City's vibrant South End communities and historic districts, and would involve new roadway construction as well as dead-ending numerous local through-streets, undergrounding a segment of Englesby Brook, and altering signalization through one of Burlington's poorest and most ethnically diverse neighborhoods. The Champlain Parkway, a project of the City of Burlington, Vermont Agency of Transportation, and Federal Highway Administration, has been on the drawing board since the 1960's, during which time both the project and the natural and human communities through which it passes have significantly changed. The pace and magnitude of those changes has increased in the last ten years since this project last went through NEPA review.

2. The Pine Street Coalition herein challenges Defendants' decision, as expressed in Defendants' May 2/May 6 FSEIS Reevaluation, to proceed with the Champlain Parkway project on the basis of the ROD for the 2009 "Final Supplemental Environmental Impact Statement" for project MEGC-M5000(1) (Southern Connector/Champlain Parkway Project), rather than to prepare a Supplemental FSEIS or new EIS, where that 2009 FSEIS is functionally obsolete and legally stale.

3. The 2009 FSEIS utilizes and relies upon data, policies, regulations and statutes, data, methodology, and facts on the ground, relevant to NEPA concerns, which are no longer accurate or applicable due to substantial changes which have occurred in the intervening ten years. Those changes are detailed in a table below and include: changes

in data and methodology (the 2009 FSEIS relies on the 2000 census data, for example, and uses outdated traffic models); changes in land use patterns (with the South End becoming a vibrant city hub); environmental changes including those related to climate change (such as the changed designation of Englesby Brook from a coldwater to a warmwater fish habitat, with resultant changes in stormwater management prescriptions); statutory and regulatory changes (such as the new TMDLs for Lake Champlain and Englesby Brook, and new stormwater and wetlands regulations); and policy changes (such as FHWA's traffic safety highway design standards calling for roundabouts, and new environmental justice guidance for NEPA consideration of projects in qualifying communities like Burlington's Maple-King neighborhood).

4. Many of these changes have occurred on several interrelated and synergistic levels, underscoring their substantiality. For example, since the 2009 FSEIS, policy and regulatory changes have occurred that require far more robust outreach and review of environmental justice concerns, while at the same time, current demographic data demonstrates that minority and low income populations in the project corridor have risen during this same time period. The project will remove habitat of the long-eared bat, which was designated as a threatened or endangered species since the 2009 FSEIS. Water quality concerns over the last ten years have intersected with Lake Champlain pollution, flooding events like Tropical Storm Irene, and climate change information, resulting in substantially overhauled floodplains, wetlands, and stormwater statutes, regulations and policy in Vermont; at the same time, the TMDL management

prescriptions for Lake Champlain and Englesby Brook have changed, part of the project area is now designated by FEMA as a floodplain, and rare aquatic species have been identified in habitat affected by the project. Furthermore, current data and trends regarding traffic and demographics in the proposed project area demonstrate that the Purpose and Need statement of the 2009 FSEIS and prior NEPA review documents for this proposed project is inaccurate and unwarranted.

5. In addition to the stale EIS, the Pine Street Coalition herein asserts that with the recent reintroduction of components of the original Champlain Parkway Project, specifically the Railyard Enterprise Project, the Defendant's determination to proceed without re-integrating the full project scope in a Supplemental or new EIS comprises unlawful segmentation of project review and failure to consider cumulative impacts.

6. By failing to take into consideration these numerous changes in a public NEPA process, the Defendants' continued reliance on the 2009 FSEIS does not fulfill the NEPA mandate to take the requisite 'hard look' at the impacts of the proposed project on the natural and human environment, and further violates regulatory requirements regarding preparation of a Supplemental EIS.

JURISDICTION AND VENUE

7. This case arises under NEPA, 42 U.S.C. §§ 4321 et seq., and the APA, 5 U.S.C. §§ 701-706. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal

question), 28 U.S.C. § 1361 (mandamus), 28 U.S.C. §§ 2201-2202 (declaratory judgment), and 5 U.S.C. §§ 701-706 (APA).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because the proposed route for the Champlain Parkway runs through the City of Burlington in the State of Vermont. Therefore, a substantial part of the events or omissions giving rise to the claim occurred in this district and a substantial part of the property that is the subject of this action is situated in this district. In addition, Plaintiffs and two of the Defendants all reside in this district.

9. This Court has authority to issue the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 705-706. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

10. The requested relief would redress the actual, concrete injuries to Plaintiffs caused by the failure to comply with duties mandated by the APA, NEPA and its implementing regulations.

11. The challenged agency actions are final and subject to judicial review pursuant to 5 U.S.C. §§ 702, 704, and 706.

PARTIES and STANDING

12. The Friends of Pine Street, d/b/a the Pine Street Coalition, is a Vermont low profit LLC citizens organization.

13. Members of the Friends of Pine Street d/b/a Pine Street Coalition live throughout Burlington including within one block of the Champlain Parkway right-of-way; its members work, travel, socialize, attend business and community meetings and events, and engage in recreation including walking, biking and observing wildlife within the Champlain Parkway right-of-way and project corridor, and on properties abutting the right-of-way and project corridor, including doing so on foot, bicycle and by public and private transportation. Its mission statement is as follows:

The mission of the Pine Street Coalition is re-design of the Champlain Parkway by re-opening a new EIS process in order to incorporate "best practices" of today which include: (1) re-directing the "purpose and need" to meeting the needs of the South End neighborhood and away from facilitating the movement of cars to downtown; (2) reducing instead of increasing the number of roadway injuries to residents and visitors; (3) decreasing the environmental impacts, particularly in regard to the stressed Englesby Brook; (4) provision of separate and equal facilities for those who walk and bike along the corridor; and (5) utilize modern roundabouts to reduce injury rates to all users, cut global warming emissions and other pollutants, reduce gasoline use, reduce delay for all users, manage speeds and thereby reduce noise levels and add scenic quality.

14. The Pine Street Coalition brings this action on its own organizational behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy recreational, and business activities regarding the use and effects of the Champlain Parkway.

15. The Pine Street Coalition and its members would be directly and personally affected and suffer injury-in-fact should Defendants proceed with the Champlain Parkway project without supplemental or revised NEPA review. Such harms include demonstrably increased risk of injury as pedestrians and bicyclists traveling through the Champlain Parkway corridor, where that highway design is obsolete and does not comply with current statutes, regulations and guidelines regarding vehicular, pedestrian and bicycle transportation; loss of recreational opportunities and opportunities to interact with natural resources and view wildlife, due to the undergrounding of Englesby Brook and harms to Englesby Brook, Potash Brook, their related floodplains, wetlands, and Lake Champlain through failure to abide by current wetland, stormwater and floodplain regulation; and diminishment of visual and cultural values and characteristics of the community in which they live, work and recreate along the Champlain Parkway corridor by Defendant's failure to engage in required visual impact and environmental justice analysis.

16. Additionally, Plaintiffs would suffer the harm of living and interacting with the project which had been developed in contravention of the procedural requirements of NEPA, specifically the requirement to supplement and EIS when substantial changes have occurred.

17. Plaintiffs have standing to assert their claims and, to the extent required, have exhausted all applicable administrative remedies. The requested injunctive and

declaratory relief would prevent or redress the injuries-in-fact to Plaintiff organization and its members by ensuring compliance with NEPA and the APA.

18. Defendant THOMAS D. EVERETT is Executive Director of the Federal Highway Administration ("FHWA"), and is named solely in that official capacity. FHWA is the responsible agency for the Champlain Parkway; in his official capacity, THOMAS D. EVERETT or his subordinates are responsible for deciding whether to initiate and proceed with the Champlain Parkway project, and must ensure that the FHWA and the Champlain Parkway project comply with NEPA and the APA, among other federal and state statutes and regulations.

19. Defendant JOE FLYNN is Secretary of the State of Vermont Agency of Transportation ("VTrans"), and is named solely in that official capacity. VTrans is, together with the City of Burlington, the project applicant, and, in cooperation with the City of Burlington, is responsible for preparation of the NEPA environmental review documents; in his official capacity, JOE FLYNN or his subordinates are responsible for deciding whether to initiate and proceed with the Champlain Parkway project, and must ensure that the VTrans and the Champlain Parkway project comply with NEPA and the APA, among other federal and state statutes and regulations.

20. Defendant MIRO WEINBURGER is Mayor and thus the chief executive officer of the City of Burlington ("City"), a Vermont municipal corporation, and is named solely in

that official capacity. The City is, together with VTrans, the project applicant, and responsible for preparation of the NEPA environmental review documents; in his official capacity, MIRO WEINBURGER or his subordinates are responsible for deciding whether to initiate and proceed with the Champlain Parkway project, and must ensure that the City and the Champlain Parkway project comply with NEPA and the APA, among other federal and state statutes and regulations.

STATUTORY AND REGULATORY BACKGROUND

The National Environmental Policy Act (NEPA)

21. The National Environmental Policy Act (NEPA) is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Congress enacted it in 1969 “to promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

22. NEPA’s goal is to ensure “that environmental information is available to public officials and citizens before decisions are made and before actions are taken” and to “help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(b), (c). When the government acts in violation of its NEPA obligations, courts may enjoin the project construction until the parties comply with NEPA.

23. The Council on Environmental Quality (CEQ) is an agency created by NEPA and housed within the Executive Office of the President. 42 U.S.C. § 4342. CEQ has

promulgated general regulations implementing NEPA. 40 C.F.R. §§ 1500-1508. The State Department has adopted NEPA regulations that incorporate and supplement the CEQ regulations. See 22 C.F.R. §§ 161.1-161.12.

24. NEPA requires all federal agencies to prepare a “detailed statement” for any “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement—commonly known as an environmental impact statement (EIS)—must describe the environmental impacts of the proposed action. *Id.* § 4332(2)(C)(i), (ii). The EIS is an “action-forcing device” that ensures NEPA’s goals “are infused into the ongoing programs and actions” of the federal government. 40 C.F.R. § 1502.1.

25. An EIS must include a “full and fair discussion” of the “direct,” “indirect,” and “cumulative” effects of the action, as well as a discussion of “[m]eans to mitigate adverse environmental impacts.” *Id.* §§ 1502.1, 1502.16(a), (b) & (h), 1508.25(c). Direct impacts are “caused by the action and occur at the same time and place.” *Id.* § 1508.8(a). Indirect impacts are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8(b). Cumulative impacts are the “incremental impact[s] 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.” *Id.* § 1508.7. Cumulative impacts

“can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

26. Agencies must include analysis of any “connected” actions in the same EIS. *Id.* § 1508.25(a)(1). Connected actions are those that “automatically trigger other actions which may require environmental impact statements,” “[c]annot or will not proceed unless other actions are taken previously or simultaneously,” or “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.*

27. The EIS must also inform federal agency decision-makers and the public of the “reasonable alternatives” that would “avoid or minimize adverse impacts or enhance the quality of the human environment.” *Id.* § 1502.1. This analysis of alternatives is the “heart” of the EIS—i.e., where the agency should “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options.” *Id.* § 1502.14. The EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives,” including the alternative of “no action.” *Id.* § 1502.14(a), (d). 37.

28. An EIS must also “specify the underlying purpose and need to which the agency is responding” in proposing the action the EIS describes and the alternatives the EIS identifies. *Id.* § 1502.13.

29. Any federal agency that is considering approving an activity that may significantly affect the environment must first prepare a draft EIS. The agency must make diligent efforts to involve the public in preparing and implementing NEPA review. *Id.* § 1506.6. The agency must solicit comments from the public, any other federal agency that has jurisdiction or special expertise on the subject matter, and Indian Tribes when the project may affect a reservation. See *Id.* §§ 1502.9(a), 1503.1(a). The agency must then prepare a final EIS based on its consideration of those comments. *Id.* §§ 1502.9(b), 1503.4(a). The agency must respond to comments by either making changes to the EIS or explaining why the comments do not warrant further agency response. *Id.* §§ 1502.9(b), 1503.4(a). At the conclusion of the EIS process, an agency must issue a record of decision pursuant to 40 C.F.R. § 1505.2.

30. If, after the EIS is prepared, the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, the agency **must** prepare a supplemental EIS. *Id.* § 1502.9(c)(1). A supplemental EIS must be prepared and distributed in the same way as the draft EIS and final EIS. *Id.* § 1502.9(c)(4).

31. The CEQ has established a 'rule of thumb' of five years for an EIS to be 'stale' and require a supplemental EIS. In its *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 10836 *Federal Register* Vol. 46 No. 55, to question #32, "Under what

circumstances do old EISs have to be supplemented before taking action on a proposal?" the CEQ responds: "As a rule of thumb, if the proposal has not yet been implemented ... EISs that are more than five years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement. If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decision regarding the proposal."

32. FHWA NEPA implementation regulations require a written re-evaluation to be done for the purposes of determining whether a supplemental EIS or new EIS is required where a final EIS is not issued within three years of the issuance of a draft EIS, *23 CFR §771.129(a)*, or where major steps to advance the project have not occurred within three years of issuance of the final EIS, *23 CFR §771.129(b)*. After approval of an ROD, the applicant is required to consult with the agency to determine if the final NEPA document remains valid prior to proceeding with major steps in the development of the project. *23 CFR §771.129(c)*.

33. FHWA NEPA implementation regulations mandate that a supplemental EIS shall be prepared when changes to the proposed action would result in significant impacts that

were not evaluated in the EIS, 23 *CFR* §771.130(a)(1); or where new information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS. 23 *CFR* §771.130(a)(2). When the agency is uncertain of the significance of new impacts, the applicant is required to develop appropriate environmental studies or an EA, from which the agency will determine whether to prepare a supplemental EIS. 23 *CFR* §771.130(b)(3).

The Administrative Procedure Act (APA): Standard of Review

34. The Administrative Procedure Act ("APA") governs judicial review of federal agencies' and officials' compliance with NEPA. Under the APA, courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 *U.S.C.* §706(2), and "compel agency action unlawfully withheld or unreasonably delayed," *Id.* §706(1), or made "without observance of procedure required by law." 5 *U.S.C.A.* §§ 706(2)(A), (D), *Senville v. Peters*, 327 F. Supp. 2d 335, 344 (D. Vt. 2004)

35. Although a "court may not substitute its judgment for that of the agency," an agency decision may be set aside where the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important part of the problem, offered an explanation for its decision that runs counter to the evidence before the

agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Senville v. Peters*, 327 F. Supp. 2d 335, 344 (D. Vt. 2004)

36. Review of an agency's decision not to supplement an EIS is controlled by the arbitrary and capricious standard of §706(2)(A). In the Second Circuit, this review has two steps. First, the court considers "whether the agency took a 'hard look' at the possible effects of the proposed action." Second, if the court is satisfied that the agency took a hard look, the court must determine "whether the agency's decision was arbitrary or capricious." *Id.* Courts will not automatically defer to the agency "without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance or lack of significance of the new information". *Senville v. Peters*, 327 F. Supp. 2d 335, 344 (D. Vt. 2004)

FACTS

37. The Champlain Parkway project is a proposed transportation project in Burlington, Vermont. Planning for this project began in 1965.

38. The Champlain Parkway project, if built, would reassign north-south vehicular access between I-189/Route 7-Shelburne Road and Lakeside Avenue to a newly constructed limited-access roadway, while dead-ending numerous local streets including the southerly end of the present predominant north-south route of Pine Street. Once the newly constructed roadway reached Lakeside, the nominal Champlain

Parkway would then comprise modifications in the roadway and signalization for Lakeside Avenue and Pine Street to Main Street. In other words, the southerly portion of the project will move traffic over one block to a new roadway until it reaches Lakeside, then will return all traffic to the presently existing City streets of Lakeside and Pine Street.

39. In 1979, a Final Environmental Impact Statement (FEIS) was approved and a Selected Alternative chosen for the Champlain Parkway. That project began where I-189 meets Shelburne Street (U.S. Route 7), north and west to the intersection of Battery and Main Streets, in the City Center District, and comprised three sections: C-1, C-2 and C-8. At that time, FHWA's NEPA regulations did not require a Record of Decision ("ROD").

40. One section of the project has been built but remains unopened to vehicles (the C-1 section). A new bicycle path adjacent to the C-1 Section is in use, although not completed. The C-2 Section was previously designed to a four-lane cross-section. The C-8 Section runs through a hazardous waste Superfund Site which was identified after the 1979 FEIS. This is known as the Pine Street Barge Canal Site. The Pine Street Barge Canal Site was designated a Superfund Site by the US Environmental Protection Agency (EPA) after the Champlain Parkway project Selected Alternative had been approved. This finding delayed project construction significantly. VTrans decided the project should go forward anyway.

41. In March, 2002, the City decided to modify the project. Specifically, the roadway section would be reduced from a four-lane roadway to a two-lane roadway. The City and VTrans also agreed to formally abandon the C-8 Section through the Pine Street Barge Canal Superfund Site, and designate the C-1 Section, C-2 Section and C-6 Section as the permanent alignment for the Champlain Parkway.

42. In 2003, the City, Vtrans and FHWA initiated a new Supplemental FSEIS addressing this modified project.

43. In 2005, VTrans recommended further modifications, reducing the project to Sections C-1 and C-2, with the C-6 section transformed to comprise modifications to the existing City streets of Lakeside and Pine Street.

44. In 2006, the City, Vtrans and FHWA circulated a Draft Supplemental EIS. A public hearing was held during the review period for the 2006 DSEIS. This was the last public hearing held on the Champlain Parkway relative to the NEPA process. Members of the Pine Street Coalition attended and commented at this public hearing.

45. The Final Supplemental Environmental Impact Statement ("FSEIS") was distributed for public and agency review on September 24, 2009. In January, 2010, the Federal Highway Administration identified the Selected Alternative for the Champlain Parkway with the issuance of the Record of Decision.

46. In April 2018, the Pine Street Coalition delivered to the Defendants a demand letter packet, detailing through an extensive memoranda a wide array of statutory, regulatory, and policy changes that had occurred relative to the Champlain Parkway project and its impacts since the 2009 FSEIS, including the 'sea change' in federal and state highway law and policy to emphasize safety (a word which appears only ten times in the FSEIS, and each of those times only in passing rather than as a focus of discussion), non-motorized travel, and environmental justice. The packet further informed Defendants, through a detailed photographic inventory, of the extensive changes on the ground which had occurred in the Champlain Parkway corridor since the 2009 FSEIS. Noting that public comment had not been solicited since 2006, and that the affected community had long since changed dramatically, the Pine Street Coalition demanded that Defendants engage in fresh NEPA review to ensure that agency decision-making regarding the Champlain Parkway was informed by current information, public comments from the present affected community, and review accounting for present laws, policies, data and methodologies.

47. Defendants did not provide any substantive response to the Pine Street Coalition's communication. Instead, they stated that these comments would be considered during internal re-evaluation.

48. On May 7, 2019, Defendant FHWA provided to Pine Street Coalition a copy of a March 2019 re-evaluation document prepared by a consulting firm for FHWA, Vtrans and the City of Burlington. It was accompanied by a cover letter from Vtrans to FHWA seeking FHWA concurrence, dated May 2, 2019. FHWA signed off on the reevaluation on May 6, 2019.

49. The reevaluation document does not make any mention whatsoever of the demand letter packet or information provided to Defendants by the Pine Street Coalition, and does not respond in any way to effectively all of the Pine Street Coalition's concerns and documentation of changes since the 2009 FSEIS.

50. The reevaluation was conducted with no public notice, public outreach or public comment (other than the unsolicited packet presented by Pine Street Coalition). The reevaluation document was not publicly published.

51. The reevaluation acknowledges some changes that have occurred in the project design as well as a few on-the-ground and regulatory changes that have occurred since 2009, but makes no mention whatsoever of numerous other statutory, regulatory, policy, data, methodology, and on-the-ground changes. The reevaluation also mischaracterizes several of the changes it addresses.

52. The Table of Significant Changes, appended to this Complaint and incorporated herein by reference, sets out substantial changes which have occurred since 2009, and includes indication of which of these changes were mentioned, ignored, or mischaracterized in the reevaluation document. These include changes to statutes, regulations, policies, data, methodology, and changes on the ground.

CAUSE OF ACTION

COUNT I:

VIOLATION OF NEPA AND IMPLEMENTING REGULATIONS AND POLICIES AND THE APA: FAILURE TO PREPARE SUPPLEMENTAL EIS

53. Plaintiffs repeat and reallege paragraphs 1 through 52 above as though more fully recounted herein.

54. The contents of the Table of Significant Changes appended to and incorporated into this Complaint comprise changes to the proposed action which would result in significant impacts that were not evaluated in the EIS, 23 *CFR* §771.130(a)(1); or alternatively comprise new information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts that would result in significant environmental impacts not evaluated in the EIS. 23 *CFR* §771.130(a)(2).

55. Defendants have violated NEPA by failing to prepare a supplemental EIS where significant changes have occurred related to the project and affecting environmental concerns since issuance of the FSEIS in 2009, rendering that FSEIS stale. Defendants'

decision to proceed with the Champlain Parkway project without preparing a supplemental EIS is arbitrary and capricious, an abuse of discretion, and contrary to law, or made without observance of procedure required by law in violation of the APA.

56. Unless and until Defendants prepare NEPA-compliant documents and provide for public comment on those documents, Plaintiff and its members will be irreparably harmed. The relief Plaintiff seeks will redress these injuries by requiring Defendants to comply with NEPA and the APA.

COUNT II:
VIOLATION OF NEPA AND IMPLEMENTING REGULATIONS AND POLICIES
AND THE APA: FAILURE TO TAKE A "HARD LOOK" AND FAILURE TO MAKE
A REASONED DECISION

57. Plaintiffs repeat and reallege paragraphs 1 through 56 above as though more fully recounted herein.

58. NEPA and its regulations require that federal agencies take a hard look at the potential environmental impacts of a proposed project.

59. In failing to engage in additional NEPA process, including engaging public comment, in light of the extensive changes in statutes, regulations, policies and information since 2009, as described in the contents of the Table of Significant Changes appended to and into this Complaint, including but not limited to failure to apply or consider the impacts of Defendants' own new regulations, guidelines and policies

pertaining to transportation safety, Defendants have failed to take a hard look at the environmental consequences of the proposed action.

60. Defendants have violated NEPA by failing to take a hard look at the environmental consequences, impacts of significant changes which have occurred related to the project and affecting environmental concerns, without considering substantial new information which has become available since issuance of the FSEIS in 2009 including substantial changes to statutes, regulations, guidelines and policies, rendering that FSEIS stale. Defendants' decision to proceed with the Champlain Parkway project without taking a hard look at the impact of changes and newly available information is arbitrary and capricious, an abuse of discretion, and contrary to law, or made without observance of procedure required by law in violation of the APA. Defendants have also failed to make a reasoned decision in light of substantial new information affecting or affected by the proposed project; failure to make a reasoned decision is arbitrary and capricious an abuse of discretion and otherwise contrary to law, in violation of the APA.

61. Unless and until Defendants prepare NEPA-compliant documents and provide for public comment on those documents, Plaintiff and its members will be irreparably harmed. The relief Plaintiff seeks will redress these injuries by requiring Defendants to comply with NEPA and the APA.

COUNT III:
VIOLATION OF NEPA AND IMPLEMENTING REGULATIONS AND POLICIES
AND THE APA: FAILURE TO ENGAGE IN ENVIRONMENTAL JUSTICE
REQUIRED ACTIONS

62. Plaintiffs repeat and reallege paragraphs 1 through 61 above as though more fully recounted herein.

63. As referenced in the Table of Significant Changes appended to and incorporated into this Complaint, in implementation of Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”, high-level cross-agency changes have been developed since 2009, including within USDOT, the parent agency of FHWA.

64. The most recent USDOT Environmental Justice order, 5610.2(a) was published in May of 2012. This Order states, “This will be done by fully considering environmental justice principles throughout planning and decision-making processes in the development of programs, policies, and activities, using the principles of the National Environmental Policy Act of 1969 (NEPA), Title VI of the Civil Rights Act of 1964 (Title VI), the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (URA), the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Public Law 109-59; SAFETEA-LU) and other USDOT statutes, regulations and guidance that address or affect infrastructure planning and decision-making; social, economic, or environmental matters; public health; and public

involvement.”¹ “The updated Order maintains the original Order's general framework and procedures and U.S. DOT's commitment to promoting the principles of environmental justice in all USDOT programs, policies, and activities.”²

65. There has been extensive procedural development throughout the USDOT order guidance documents. In 2015, FHWA published its Environmental Justice Reference Guide intended to encompass all orders and create a place for local authorities to go to ensure compliance with environmental justice goals.³ This guidance includes the three major principles of environmental justice which are, “(1) To avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority and low-income populations. (2) To ensure the full and fair participation by all potentially affected communities in the transportation decision making process. (3) To prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.” This reference guide puts emphasis on public involvement especially in vulnerable areas. This memo also includes an overview of the interceding requirements of Title VI, NEPA, and Executive Order 12898. It then goes on to discuss techniques for crews on the ground to determine areas which will require environmental justice analysis.

¹ https://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/orders/order_56102a/

² https://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/orders/order_56102a/

³ https://www.fhwa.dot.gov/environment/environmental_justice/publications/reference_guide_2015/fhwahep15035..pdf

66. The next section of the reference guide goes on to discuss more details on how to relate environmental justice to highway safety and specifics, requiring that FHWA officials "relate Environmental Justice principles to the phases of transportation project development: planning, environmental review, design, right-of-way (ROW), construction, and maintenance and operations. This includes a discussion of public involvement, another important overarching activity."⁴

67. The 2015 FHWA Environmental Reference Guide mandates that, in areas vulnerable to environmental justice concerns, the Agency is required to affirmatively engage in public outreach so that minority and low-income community members are allowed a voice. Defendants here have not engaged in that affirmative outreach in the Maple-King neighborhood to be bisected by the project, or taken other steps required by FHWA's own guidance documents pertaining to Environmental Justice.

68. Defendants have violated NEPA by failing to fulfill environmental justice mandates that have been adopted since issuance of the FSEIS in 2009. Defendants' decision to proceed with the Champlain Parkway project without compliance with new environmental justice mandates is arbitrary and capricious, an abuse of discretion, and contrary to law, or made without observance of procedure required by law in violation of the APA.

⁴https://www.fhwa.dot.gov/environment/environmental_justice/publications/reference_guide_2015/fhwahep15035..pdf

69. Unless and until Defendants prepare NEPA-compliant documents and provide for public comment on those documents, Plaintiff and its members will be irreparably harmed. The relief Plaintiff seeks will redress these injuries by requiring Defendants to comply with NEPA and the APA.

COUNT IV: VIOLATION OF NEPA AND IMPLEMENTING REGULATIONS AND POLICIES AND THE APA: SEGMENTATION and FAILURE TO CONSIDER CUMULATIVE IMPACTS

70. Plaintiffs repeat and reallege paragraphs 1 through 69 above as though more fully recounted herein.

71. As referenced in the Table of Significant Changes appended to and incorporated into this Complaint, at least one additional Burlington transportation project -- the Railyard Enterprise Project -- and several changes to the proposed Champlain Parkway project, including a new construction access using Electric Drive, have been introduced since 2009. These changes have not been subjected to the NEPA process of review, and Defendants have failed to consider the cumulative impacts of these changes.

72. Defendants have violated NEPA by failing to prepare a supplemental EIS including cumulative impacts where an integrally related project has been re-introduced since issuance of the FSEIS in 2009, comprising and unlawful segmentation of the project; and have further violated NEPA by failing to consider the cumulative impacts of both the

re-introduced Railyard Enterprise Project and other physical changes to the project including but not limited to the new construction access location. Defendants' decision to proceed with the Champlain Parkway project without preparing a supplemental EIS is arbitrary and capricious, an abuse of discretion, and contrary to law, or made without observance of procedure required by law in violation of the APA.

73. Unless and until Defendants prepare NEPA-compliant documents and provide for public comment on those documents, Plaintiff and its members will be irreparably harmed. The relief Plaintiff seeks will redress these injuries by requiring Defendants to comply with NEPA and the APA.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that Defendants' actions violated NEPA, its implementing regulations and policies, by failing to prepare a Supplemental EIS where the agency has made substantial changes in the proposed action that are relevant to environmental concerns, and/or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; and,

B. Declare that Defendants' actions violated NEPA, its implementing regulations and policies, where the responsible Agency failed to take a 'hard look' at the environmental

impacts of the proposed project, including but not limited to by Defendants' failure to consider the impacts of the proposed project in light of significant changes in statutes, regulations, policies, guidelines, data and methodology bearing on the project and relevant to the project's environmental impacts; and,

C. Declare that Defendants' actions violated NEPA, its implementation regulations and policies, where the responsible Agency failed to comply with environmental justice mandates relative to the NEPA process contained in its own regulations and guidance documents; and,

D. Declare that Defendants' actions violated NEPA, its implementation regulations and policies, where Defendants unlawfully segmented its review by failing to include cumulative impacts of other related projects, specifically the Railyard Enterprise Project; and,

E. Declare that Defendants' actions were arbitrary, capricious and otherwise in violation of law or made without observance of procedure required by law, in violation of the APA; and

F. Vacate and set aside Defendants' actions; and,

G. Issue an injunction requiring Defendants to comply with NEPA and the APA; and,

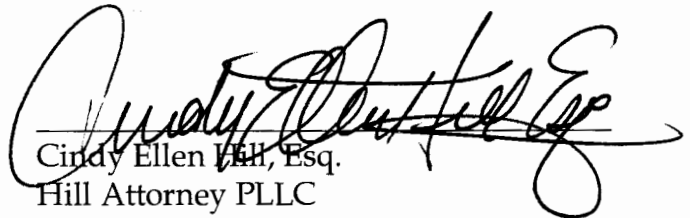
H. Issue an injunction enjoining any activity in furtherance of construction of the Champlain Connector until Defendants have demonstrated compliance with NEPA and the APA; and,

I. Retain jurisdiction over this matter until Defendants fully remedy the violations of law described herein; and,

J. Award Plaintiffs their fees, costs, and other expenses as provided by applicable law; and

K. Issue such other relief as the Court may deem just, proper, and equitable.

DATED: 6 June 2019



Cindy Ellen Hill, Esq.
Hill Attorney PLLC
144 Mead Lane
Middlebury VT 05753
802-989-6906
lawyerhill@yahoo.com VT 2751

Attorney for Plaintiffs