

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

FORT ATTAWAY PRESERVATION
SOCIETY; and DAVID FOWLER,

Plaintiffs,

v.

FEDERAL HIGHWAY
ADMINISTRATION; and ROBERT M.
CALLAN, in his official capacity
as Federal Highway Administration
Division Administrator,

Defendants.

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* Civil Action No. 4:05-CV-013-HLM
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COMBINED MEMORANDUM IN SUPPORT OF DEFENDANTS’
OPPOSITION TO PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT
AND CROSS-MOTION FOR SUMMARY JUDGMENT

COME NOW the Federal Highway Administration (“FHWA”) and Robert M. Callan, in his official capacity as FHWA Division Administrator, Georgia Division (hereinafter “Defendants”), by and through the undersigned counsel and respectfully submit the following memorandum of law in opposition to Plaintiffs’ Motion for Summary Judgment and in support of Defendants’ Cross-Motion for Summary Judgment. Defendants also incorporate by reference their memorandum of law in opposition to Plaintiffs’ Motion for Preliminary Injunction, filed on March 18, 2005. See Docs. 4, 9.¹

¹ “Doc. ____” refers to the number assigned to the documents listed on the District Court’s docket sheet in this case, and the pages within those documents.

I. INTRODUCTION

The FHWA is an agency within the United States Department of Transportation which administers federal-aid programs to states for highway construction, road rehabilitation and other transportation projects. As such, the FHWA is the agency responsible for approving state transportation projects for federal funding, and ensuring compliance with a myriad of federal statutes and regulations including, but not limited to, NEPA, Section 4(f) and the NHPA.

One of the proposed transportation projects, if constructed, would consist of the widening and reconstruction of a portion of State Route ("SR") 1/US 27 in Rome, Georgia.² AR Doc. 5, p. 1.³ Also included in the proposal is the reconstruction of the Southern Railway overpass bridge, and the implementation of turning radius improvements at two historically congested intersections. *Id.* The purpose of the project is to provide a safer and more efficient multi-lane

² The total roadway length of the project is approximately 0.24 mile, all within the north city limits of Rome, Georgia. *Id.* The need for the project was recognized almost twenty-five years ago, when the project was recommended to be included in the Floyd-Rome Urban Transportation Study. *Id.* at 4-5. Because of the study and need for increased capacity and improved operational conditions along this stretch of SR 1/US 27, the project's addition to the area's adopted transportation plan was approved by officials of the City of Rome and Floyd County in May of 1981. *Id.* at 5. The proposed project is, therefore, an integral part of Rome/Floyd County's transportation network. *Id.* at 5.

³ Defendants will be relying on the Administrative Record compiled by Federal Highway Administration ("FHWA") in this matter. Defendants refer to those portions of the Administrative Record as ("AR Doc., p._").

facility along SR 1/US 27 for the citizens of Floyd County and its travelers. *Id.* at 4.

Despite the longstanding needs and anticipated benefits of the proposed project, Plaintiffs have filed suit against FHWA seeking declaratory relief and a permanent injunction to halt its construction. In their Complaint⁴, Plaintiffs alleged statutory violations of Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303, the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470, et seq., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq.⁵

Plaintiffs now seek summary judgment asserting that they have established statutory violations of Section 4(f), the NHPA and NEPA. However, Plaintiffs rely on immaterial facts and unsound environmental alternatives to the proposed construction that were considered, but rejected by Defendants. Defendants' preferred alternative - widening SR1/US 27, and building a new bridge at a

⁴ Plaintiffs' Complaint also alleges that Plaintiff David Fowler owns Fort Attaway. Complaint, ¶ 5 at p. 3. It should be noted, however, that Plaintiff Fowler owns only part of the property upon which Fort Attaway sits. The other part of the property located immediately adjacent to Plaintiff Fowler's property was sold to allow for commercial development; namely, a Sumo Japanese Steakhouse.

⁵ In their original Complaint, Plaintiffs alleged that FHWA failed to properly consider the project's impacts on Fort Attaway, an historic resource in Rome, Georgia. *See generally Plaintiffs' Complaint*. On February 24, 2005, Plaintiffs amended their Complaint to include another historic resource, the railroad bridge which crosses SR 1/US 27. *See generally Plaintiffs' Amended Complaint*.

different location without affecting the historic integrity of the old bridge – is the most prudent and feasible alternative. Defendants’ decision is consistent with the statute, the applicable regulations and well supported by the record.

II. FACTS

The Defendants respectfully refer the Court to the Statement of Undisputed Material Facts which accompanies and is filed contemporaneously with this memorandum. The Statement of Undisputed Material Facts details those facts within the administrative record which were relied upon in making the final agency decision.⁶

III. STANDARD OF REVIEW

Plaintiffs seek redress pursuant to the Administrative Procedures Act, (“APA”) 5 U.S.C. §§ 702, 704,⁷ which governs judicial review of challenges under

⁶ The declaration of Jennifer L. Giersch, Georgia Division, FHWA, is submitted herewith, attached as Exhibit 4, and in full compliance with Rule 56, *Fed. R. Civ. P.* Its limited purpose is to address the consideration given Plaintiffs’ alternatives prior to commencement of this civil action along with evidence in the administrative record demonstrating Defendants’ compliance with NEPA, the NHPA and Section 4(f).

⁷ The APA applies only to the final actions of a federal agency. It allows judicial review for persons suffering legal wrongs because of agency action, or adversely affected or aggrieved by agency action, and defines agency as each authority of the Government of the United States...5 U.S.C. 701(b), 702. By its own terms, the APA does not apply to state agencies or its counties. *See, e.g., Southwest Williamson County Community Association v. Slater*, 173 F.3d 1033, 1035-36 (6th Cir. 1999); *Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1055 (5th Cir.), *cert denied*, 510 U.S. 820 (1993); *Gilliam v. Miller*, 973 F.2d 760, 764

NEPA. See, e.g., *Wilderness Society v. Alcock*, 83 F.3d 386, 389 n. 5 (11th Cir. 1996) (noting that unless the statute being challenged provides for judicial review of agency action, judicial review is obtained pursuant to the APA). In reviewing final agency action under the APA, the relevant facts, with few exceptions, are limited to those presented in the administrative record of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 419 (1971); *Preserve Endangered Areas of Cobb's History ("PEACH") v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1246 (11th Cir. 1996) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)); *United States v. Guthrie*, 50 F.3d 936, 944 (11th Cir. 1995).

As the Eleventh Circuit has held in a NEPA case:

The fact-finding capacity of the district court is...typically unnecessary. The court is to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review.

PEACH, 87 F.3d at 1246 (citations and quotations omitted). Consequently, the issues presented here are issues of law, and summary judgment is "particularly appropriate" to resolve Plaintiffs' claims. *Florida Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455, 1459 (11th Cir. 1985), cert. denied, 475 U.S. 1112 (1986); *Richards v. INS*, 554 F.2d 1173, 1177 n. 28 (D.C. Cir. 1997).

In addition to the scope of judicial review, the APA provides a highly deferential standard for review of a challenge to an informal agency action, such

(9th Cir. 1992); *Clark Construction v. Pena*, 930 F.Supp. 1470, 1475 (M.D. Ala. 1996).

as the one at issue here. In examining such a challenge, a reviewing court must determine whether the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973). In determining whether an agency’s decision violates the deferential “arbitrary or capricious” standard set forth in the APA, “the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park*, 401 U.S. at 416 (citations omitted).

In APA review cases, the Court must give the agency action great deference. *PEACH*, 87 F.3d at 1246 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)); *United States v. Guthrie*, 50 F.3d 936, 944 (11th Cir. 1995). While the considerable deference provided to the agency does not shield the decision from a “thorough, probing, in-depth review,” the question is not whether the Court itself would have made the same decision, because “the court is not empowered to substitute its judgment for that of the agency.” *Overton Park*, 401 U.S. at 415-16. Rather, the Court must uphold the decision if the agency followed required procedures, evaluated relevant factors, and reached a reasoned decision which did not constitute a clear error of judgment or exceed the bounds of its statutory authority. *Id.*

It is the Plaintiffs' burden to prove that these criteria are not met and that the agency's decision was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). As will be shown below, Plaintiffs clearly have not met their burden in this case.

IV. ARGUMENT

I. THE FHWA' DECISION TO APPROVE THE FEDERAL AID HIGHWAY PROJECT IS A REASONABLE ACTION AMPLY SUPPORTED BY THE ADMINISTRATIVE RECORD.

The administrative record demonstrates that the FHWA fully considered the relevant factors, and offered a rational explanation for its decision. *See Citizens to Preserve Overton Park*, 401 U.S. at 416; AR 805. The FHWA carefully and extensively considered the impact of, and alternatives (including those submitted by Plaintiffs) regarding the project before it rendered its decision. FHWA's decision is fully consistent with the statute and applicable regulations, and for the reasons below, it should be upheld as a matter of law.

A. Defendants Did Not Violate The NHPA.⁸

Section 106 of the NHPA and Section 4(f) are two distinct Congressional statutes, but overlap in the application of FHWA's duties regarding historic sites.⁹

⁸ Because the NHPA and Section 4(f) are regularly intertwined within FHWA environmental documents, as allowed by FHWA regulation 23 C.F.R. § 771.105, and the procedural aspects of both statutes overlap, Defendants will address Plaintiffs' NHPA claims first in an effort to better assist the Court in understanding the environmental procedures taken in this case.

⁹ Section 4(f) is substantive in nature but contains a procedural element; namely, the preliminary process of identifying those sites to which the

Completion of the Section 106 process satisfies the procedural aspect of Section 4(f). *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999) (compliance with Section 4(f) is predicated upon completion of Section 106).

The NHPA was enacted by Congress in 1966 to implement a congressional policy to encourage the preservation and protection of America's historic and cultural resources. Pursuant to 16 U.S.C. § 470(s) the Advisory Council has promulgated administrative regulations to govern the implementation of this review process. See 36 C.F.R. §§ 800.1-800.16 (2001). These regulations, known as the Section 106 regulations, outline a four-step review process, and are discussed below.

First, the action agency must determine whether the proposed federal action is an "undertaking" which has the potential to affect historic properties. 36 C.F.R. § 800.3(a). If so, the action agency must next initiate consultation with the appropriate State Historic Preservation Officer ("SHPO") and/or Tribal Historic Preservation Officer ("THPO"). The action agency must also plan to involve the public and identify other consulting parties. 36 C.F.R. § 800.3(e-f). The action

substantive protections apply. Section 106 of the NHPA is entirely procedural and as stated above, overlaps the procedural aspect of Section 4(f). Both concern themselves solely with properties listed on or eligible for listing on the National Register of Historic Places ("NRHP"). Section 106 establishes essentially the same process as Section 4(f) for determining a site's eligibility for listing on the NRHP, including the requirement that the FHWA, "in consultation with the State Historic Preservation Officer ("SHPO")/Tribal Historic Preservation Officer ("THPO")...take the steps necessary to identify historic properties within the project's area of potential effects ("APE)." 36 C.F.R. § 800.4(b).

agency must coordinate its 106 compliance with the preparation of any necessary documents under NEPA. 36 C.F.R. § 800.3(b) and (c).

In the second step, the action agency must consult with the SHPO to determine the project's area of potential effects ("APE"). 36 C.F.R. § 800.4(a)(1). Once the APE has been defined, the regulation requires the action agency to review existing information on historic properties within the APE and to seek information from consulting parties with regard to identifying historic properties within the APE. *Id.*, at § 800.4(a)(2-3). If the action agency finds that historic properties may be affected by the undertaking, the agency official must notify consulting parties and invite their views on the effects. *Id.*, at § 800.4(d)(2).

The third step in the Section 106 process is for the action agency to determine whether effects to historic properties will be adverse, using the criteria specified in the regulations, in consultation with the SHPO. 36 C.F.R. § 800.5(a). If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to 36 C.F.R. § 800.6. *Id.*, at § 800.5(d)(2).

Fourth, the action agency must attempt to reach agreement with other consulting parties in developing and evaluating alternatives to avoid, minimize, or mitigate adverse effects. 36 C.F.R. § 800.6. Although all consulting parties participate in this step, in most cases, only the action agency and the SHPO must actually reach agreement, as expressed in a Memorandum of Agreement ("MOA"). *Id.*, at § 800.6(b)(1).

The NHPA created the Advisory Council on Historic Preservation (“ACHP”), which advises the reviewing federal agency on relevant historic considerations, but does not dictate the outcome of the review process. *See Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 695-96 (3rd Cir. 1999) (stating that the Advisory Council’s comments during the NHPA review process are only advisory because Section 106 is merely a “stop, look and listen” provision).

1. Defendants complied with section 106 of the NHPA.

Plaintiffs rely on the provisions of the NHPA to support their assertions that Defendants failed to properly determine Fort Attaway’s boundaries. *See generally Plaintiffs’ Complaint*. They contend: (1) that GDOT’s report prepared in compliance with stipulation #4 of the MOA did not resolve the location of Fort Attaway’s boundary; (2) that no independent analysis of the Fort was undertaken by FHWA or GDOT; and (3) that FHWA did not make a reasonable effort to determine whether the Fort’s boundary extends to the existing railroad tracks. *See Plaintiffs’ Memorandum in Support of Summary Judgment (“Plts’ Mem.”)*, at 12-16.

Plaintiffs base their claims of statutory violation upon Section 106 of the NHPA. 16 U.S.C. § 470 et seq. Section 106 provides, in relevant part:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking, in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the

National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f. In relation to this section of the Act, Plaintiffs allege in their Amended Complaint that Defendants did not accurately identify Fort Attaway's boundaries. *See Plaintiffs' Amended Complaint*, at 25-30. Plaintiffs completely ignore, however, the evidence in the administrative record demonstrating Defendants' compliance with Section 106.

Throughout the entire process of approving Federal-aid funding for this project, Defendants complied with Section 106 of the NHPA. *See Exhibit 4, Giersch Declaration*, pp. 8-10; 14-17. As required by the implementing regulations of Section 106, Defendants used standard guidelines and procedures to assess the project's impacts on Fort Attaway once its existence was discovered. As evidenced throughout the administrative record, the SHPO concurred with GDOT's boundary delineations of the Fort at every step of the 106 process.

When the environmental process for this project began in 1982, Defendants were not aware that Fort Attaway existed, nor did they know that the railroad overpass bridge due to be impacted by the project was eligible for listing on the NRHP. The initial 106 process had been based on an old Floyd County survey concluding that no 106 properties existed within the project's APE. Accordingly, Defendants re-opened the 106 process in May of 2001 to update the administrative record. AR Doc. 20.

It was through this re-initiation of the 106 process that it was determined that the railroad and its associated overpass bridge were eligible for listing on the NRHP. AR Doc. 22. Because of this finding and in order to comply with the NHPA, GDOT subsequently prepared an Assessment of Effects (“AOE”) for the railroad and bridge. AR Doc. 26. The AOE concluded there would be an adverse effect to the resource and therefore analyzed alternatives to avoid the adverse effect and included planning to minimize harm and proposed mitigation.¹⁰ *Id.* Plaintiffs’ preferred alternatives were included among the alternatives analyzed by Defendants.¹¹ Because no feasible alternatives existed to avoid the adverse effect to the railroad and bridge, an MOA was prepared in order to address the adverse effects and thus comply with the NHPA.¹² On August 21, 2001, the SHPO concurred with GDOT’s findings with respect to the railroad and its associated bridge and deemed Section 106 of the NHPA satisfied with respect to that resource. AR Doc. 27.

¹⁰ Alternatives analyzed at this step of the 106 process included the no-build alternative, the roll-in place alternative and replacing the bridge to the north of the existing structure. None were found to be feasible for various reasons stated in the document. AR Doc. 26, p. 4-5.

¹¹ Evidence in the administrative record actually shows that Plaintiffs’ preferred alternatives; namely, the ‘roll-in’ place alternative and replacing the bridge to the north alternative were first examined by Defendants as far back as 1983, during the development of the Environmental Assessment for the project. *See* AR Doc. 5, p. 8.

¹² This MOA was later retracted and revised. The revised version of the MOA appears in the Administrative Record at Doc. 61.

It was not until June 13, 2001 that GDOT was notified via e-mail that reputed remains of the Fort existed in the vicinity of the project. AR Doc. 26, *Appendix A*. Upon notification of this information, GDOT subsequently prepared a Section 106 Addendum for Fort Attaway assessing it as an archeological site. AR Doc. 29. In the Addendum, GDOT documented its findings with respect to the Fort, including its boundary determinations. *Id.*, at 3. It was determined nonetheless that although the Fort was eligible for listing in the NRHP, a finding of no adverse effect was anticipated for the site because its boundary was found to be located outside of the project's proposed right-of-way and no physical destruction of the Fort would occur as a result of the project. *Id.*

However, the project limits were found to come close to the Fort's boundary in three areas and therefore GDOT prepared special provisions to be included in the construction contract to ensure its protection and compliance with Section 106. *See Special Provisions for Construction Contract, attached hereto as Exhibit 1*. Once this information, along with the special contract provisions, was forwarded to the SHPO, GDOT received SHPO's first concurrence with their findings concerning Fort Attaway. AR Doc. 31.

Because Fort Attaway had been found to be eligible for the NRHP as both a historic structure and an archeological site, GDOT subsequently prepared a second Addendum in order to comply with the NHPA and assess the only adverse effect found, the potential visual effects of the project on the Fort. AR Doc. 46. Because this Second Addendum found there would be an adverse visual

effect to the Fort, it accordingly analyzed alternatives to avoid the adverse effect and included planning to minimize harm and proposed mitigation.¹³ *Id.*

Plaintiffs' preferred alternatives were again included among those analyzed by Defendants.

By this time, two site visits had already been conducted at Fort Attaway. *See* AR Docs. 37 and 44. GDOT subsequently submitted all of its findings with respect to Fort Attaway again to the SHPO in compliance with Section 106 and on March 27, 2003, the SHPO concurred with GDOT's conclusions thus confirming GDOT's boundary determinations for a second time. AR Doc. 53. Because an adverse visual effect to Fort Attaway had been found through the 106 process, the previously retracted MOA for the railroad was revised to include stipulations to address the impacts to both the Fort and the railroad. *See* Revised MOA, attached hereto as Exhibit 2. All signatories to the revised MOA approved its stipulations, including the SHPO, and it was subsequently filed with the ACHP, thus satisfying Defendants' obligations under the NHPA. AR Doc. 63.

In this case, Plaintiffs attempt to rely upon Section 106 to allege that since Defendants never properly determined Fort Attaway's boundaries or rather, never agreed with Plaintiffs' preferred boundary determinations, that Defendants

¹³ Alternatives analyzed included the no-build alternative, constructing the new railroad bridge on existing location, relocation of the railroad line and bridge north of the existing location *and* construction of a temporary railroad detour south of the existing alignment while reconstructing the railroad bridge on existing alignment. AR Doc. 46, p. 3-5.

violated the NHPA. Plts' Mem. at 12, 15. However, as shown above, the administrative record in this case clearly refutes Plaintiffs' claims of violations of the NHPA.

Plaintiffs allege that GDOT's narrative prepared in compliance with stipulation #4 of the MOA never resolved the Fort's boundary issue and that no independent analysis of the Fort was ever taken by Defendants. Plts' Mem. at 13. In so arguing, Plaintiffs conveniently ignore the evidence in the administrative record. However, as the record shows, neither of these things were required of Defendants. *See* Exhibit 2, p. 2. The purpose of GDOT's narrative was not to resolve any boundary issue, but rather, to document the Fort's significance in Rome's Civil War history. *Id.* As demonstrated above, the boundaries of the Fort had already been determined and agreed upon by Defendants and the SHPO through the 106 process. Additionally, once the SHPO considered GDOT's narrative, Plaintiffs' response to the narrative *and* GDOT's rebuttal to Plaintiffs' response, the SHPO deemed that all the documentation, taken together, satisfied stipulation #4 of the MOA. *See* AR Doc. 88. This determination also negated the SHPO's previously made suggestion that GDOT retain an outside historian to prepare the narrative. *Id.* Once stipulation #4 was considered satisfied by the SHPO, nothing more was required of Defendants. There was no boundary issue left to be resolved.

Plaintiffs have offered nothing else to prove arbitrary or capricious conduct on the part of the Defendants in determining Fort Attaway's boundaries.

Plaintiffs have therefore failed to meet their burden of proof. Defendants were clearly ‘reasonable’ in assessing the Fort’s boundaries and their actions in complying with the NHPA were neither arbitrary nor capricious. The final agency action was fully supported by the administrative record and made in accordance with federal law. There has been no violation of the NHPA and Defendants are entitled to judgment as a matter of law.

B. Defendants Fully Complied With Section 4(f.)

Similarly, Plaintiffs’ claims brought under Section 4(f) must also fail. *See* Plts’ Br. at 6. Section 4(f) of the Department of Transportation Act provides that the Secretary of Transportation may approve a transportation project requiring the “use” of publicly owned land of a public park or land of an historic site of national, state or local significance only if: (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm resulting from the use.¹⁴ 49 U.S.C. § 303. *See also* Section 4(f) found at 23 C.F.R. § 771.135 (FHWA’s implementing regulations)

1. Defendants complied with section 4(f)

Plaintiffs attempt to argue that because Defendants improperly determined Fort Attaway’s boundaries, Defendants violated Section 4(f) by failing to apply the statute because the project will, in fact, “use” the Fort. Plts’ Mem. at 8, 9. Plaintiffs also maintain that their preferred alternatives are prudent and feasible

¹⁴ Defendants respectfully refer the Court to Mrs. Giersch’s declaration for an explanation regarding what constitutes a “use” under Section 4(f). *See* Exhibit 4, p.10-11.

alternatives as opposed to the alternative selected by Defendants. Plts' Mem. at 8-11. However, as the evidence in the administrative record shows, this is clearly not the case. Throughout the entire process of approving Federal-aid funding for this project, Defendants complied with Section 4(f). *See* Exhibit 4, Giersch Declaration, pp. 10-14; 17-18.

Fort Attaway will not be "used," either directly or indirectly, by this project and therefore Defendants correctly made the determination that Section 4(f) did not apply to the resource. *See generally* AR Docs. 29, 46 & 96; Exhibit 4, Giersch Declaration. Fort Attaway's historic integrity has already been substantially impacted. Although an adverse visual impact was found through the 106 process to the Fort's *immediate* setting, this impact did not rise to the level of substantial impairment required in order for there to be a "use" of an historic resource because the visual character of the area *surrounding* the Fort has already been compromised due to modern residential and commercial development. *See* AR Doc. 29, p. 7; Doc. 46, p. 2-3. Because the character of the setting of the Fort outside of the NRHP-eligible boundary has been so drastically changed due to development, the setting was found not to be a NRHP qualifying characteristic of the resource. AR Doc. 29, p. 7. Therefore, since no substantial impairment will occur, Defendants properly made the determination that Section 4(f) did not apply to Fort Attaway.

As in this case, if FHWA determines that the project will not involve a "use" of a Section 4(f) resource, the agency's duties with respect to the statute are met

and Section 4(f) is deemed not to apply. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. 402, 91 S.Ct. 814. Hence, when there is no “use,” there is no need to perform additional analysis to determine whether a prudent and feasible alternative exist (since there is no use) or to determine if the project includes all possible planning to minimize harm. 49 U.S.C. § 303. In the instant case, because the project will not “use” Fort Attaway, Defendants’ responsibilities with regards to Section 4(f) have been met.

On the other hand, it was determined that the project will “use” the railroad bridge overpass by requiring a physical take of the bridge; therefore Section 4(f) was properly applied. *See* Exhibit 3 (Programmatic Section 4(f) Evaluation). Alternatives to avoid the use of the bridge, including those proposed by Plaintiffs, were examined by Defendants, however none were found to be prudent or feasible. *Id.* Because the bridge is too structurally deficient to maintain without affecting its historical integrity and due to the engineering constraints of the project, among other concerns, the alternative selected by Defendants – build on the new location without using the old bridge --was found to be the only prudent and feasible alternative. *See* Exhibit 2; Exhibit 4, Giersch Declaration. The selected alternative includes all possible planning to minimize harm to both Fort Attaway and the railroad bridge. *See generally* AR Docs. 26, 29, 46, 61 & 81.

Plaintiffs are merely trying to improperly substitute their own judgment for that of the agency’s. The alternative selected in this case was the result of the public process and sound engineering judgment expected of FHWA and GDOT.

It satisfies the standard of any decisional authority and extends clearly beyond the statutory minimum required. *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1540 (11th Cir. 1990). The agency's analysis in an area of its technical expertise, such as safety, is precisely the issue that is most fit for judicial deference.

See Exhibit 4, Giersch Declaration¹⁵; see also *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F.2d 60, 67 (D.C. Cir. 1987) (declining to overturn FHWA's travel demand forecasting); *North Buckhead*, 903 F.2d at 1542 (noting that courts should decline to act as a super professional transportation analyst); accord *Laguna Greenbelt v. U.S. Dept. of Trans.*, 42 F.3d 517, 524-525 (9th Cir. 1994). Plaintiffs ignore these decisions in asserting that the Secretary erred in not accepting their judgment on the engineering required for the project. Plts' Mem. at 8. The design alternative of Plaintiffs is contrary to the best engineering judgment of the Secretary. Exhibit 4, Giersch Declaration.

There has been no violation of Section 4(f). Plaintiffs have pointed to nothing in the record to show that Defendants were arbitrary or capricious in selecting their preferred alternative. Defendants' decision was fully supported by the administrative record and made in accordance with federal law. Defendants are entitled to judgment as a matter of law.

¹⁵The declaration of Jennifer L. Giersch clearly explains the engineering judgment in the selected design and that proffered by Plaintiffs. See Exhibit 4.

C. Defendants Did Not Violate NEPA.

Lastly, Plaintiffs' claims brought under NEPA also fail. Plts' Mem. at 16. The principal focus of Plaintiffs' NEPA claim is that FHWA failed to prepare a supplemental Environmental Assessment ("EA") for the project. Plts' Mem. at 18. Plaintiffs' argument is in direct conflict with FHWA regulations governing the preparation of environmental documents. *See generally* 23 C.F.R. Part 771.

As demonstrated in Mrs. Giersch's declaration, no supplemental EA was required in this case. *See* Exhibit 4, Giersch Declaration, pp. 18-19. Moreover, with regard to the original environmental document, 23 C.F.R. § 771.129© allows for a post approval re-evaluation when the applicant (GDOT) consults with the Administration (FHWA) prior to requesting any major approvals or grants to establish whether or not the approved environmental document remains valid. In this case, after each re-evaluation it was concluded that changes in the project design and/or the environment warranted a Finding of No Significant Impact ("FONSI"). In other words, the changes in the project design and/or the environment did *not* result in significant environmental impacts not previously evaluated. Consequently, the original EA/FONSI remained valid and no supplemental EA was required. *See Price Road Neighborhood Ass'n, Inc. v. U.S. Dept. of Transp.*, 113 F.3d 1505 (9th Cir. 1997) (holding that a re-evaluation is an appropriate vehicle to determine whether design changes will produce significant or uncertain impacts calling for further assessment).

Plaintiffs note the FHWA's conclusions, but argue that a supplemental EA was still necessary. *See* Plts' Mem. at 19-20. However, applicable regulations require an environmental document to be supplemented *only* if: (1) changes to the proposed action would result in significant environmental impacts not previously evaluated in the approved environmental document; or (2) new information or circumstances would result in significant impacts not previously evaluated. 23 C.F.R. § 771.130. Because neither of these two circumstances exists (and Plaintiffs have not shown otherwise), a supplemental EA was not necessary.

There has therefore been no violation of NEPA. Plaintiffs have not satisfied their burden of demonstrating that Defendants were arbitrary or capricious in determining a supplemental EA was not required in this case. Defendants' decision not to supplement the EA was amply supported by the administrative record and made in accordance with federal law. Defendants are entitled to judgment as a matter of law.

II. PLAINTIFFS' EXTRA RECORD MATERIALS SHOULD NOT BE ADMITTED AS PLAINTIFFS HAVE NOT DEMONSTRATED THAT THE MATERIALS FALL WITHIN ANY OF THE APPLICABLE EXCEPTIONS.

Plaintiffs argue that since Defendants improperly delineated Fort Attaway's boundaries, Plaintiffs' previously submitted exhibits filed in support of their motion for preliminary injunction should be admitted as evidence. *See* Plts' Mem. at 21-25. Recognizing the shortcomings in their argument, Plaintiffs note that generally the "focal point for judicial review should be the administrative record

already in existence” but insist that their extra record materials fall into one of the four exceptions articulated by the Eleventh Circuit in *PEACH*, 87 F.3d at 1247. Plts’ Mem. at 21. However, none of the four exceptions applies to Plaintiffs’ documents.

As a threshold matter, Plaintiffs’ argument that their exhibits should be admitted because they were submitted a little over a week after the last document in the administrative record was filed (Plts’ Mem. at 23) should be rejected as it is based on temporal proximity, and not any of the enumerated exceptions. *PEACH*, 87 F.3d at 1247. Likewise, Plaintiffs’ other argument that their reports (and other supporting documents should be admissible because of the “inadequate” record in this case (Plts’ Mem. at 24) is wholly defied by the record evidence in this case because FHWA adequately explained the rationale for its decision. Indeed, the boundary issue discussed by Plaintiffs (Plts’ Mem. at 24) was addressed in the administrative record, and discussed above. See supra at 12-17. It has also been established through Mrs. Giersch’s declaration that even if Defendants were to assume Plaintiffs’ preferred boundaries, the outcome of this project would remain the same given the engineering constraints encountered in and around the area surrounding the project. *See* Exhibit 4, Giersch Declaration, pp. 17-18. Therefore, even if the Court were to deem Plaintiffs’ extra record exhibits admissible, this evidence would not change the outcome of this project. *Id.*

By urging admission of their extra record materials, Plaintiffs are attempting to engage in a battle of the experts which represents another impermissible ground for admitting their exhibits. Courts have consistently rejected similar attempts by plaintiffs to engage in a battle of the experts with regard to impacts of a transportation project. In *Price Road Neighborhood Ass'n*, the Ninth Circuit noted that plaintiffs in that case were trying to engage in a battle of the experts with regard to the impacts of a transportation project. 113 F.3d 1505. The *Price* court then observed, “[W]e have consistently rejected such attempts, noting that ‘when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.’” 113 F.3d 1505 (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861 (1989)). This court should also reject Plaintiffs’ attempts.

In sum, Defendants fully complied with NEPA, the NHPA, and Section 4(f) in selecting an alternative which was the most prudent and feasible given the engineering circumstances of the project. In so doing, Defendants carefully and extensively considered the impact of, alternatives to, and Plaintiffs’ opinions regarding the project before it rendered its decision. Defendants’ decision is based on a reasoned evaluation of all of the evidence relevant to this case, and Defendants carefully explained its position. Accordingly, this Court should find

that the Defendants did not act arbitrarily or capriciously with regards to the project, nor should the court disturb the Defendants' decision as a matter of law. *Citizens to Preserve Overton Park*, 401 U.S. at 416; *City of Grapevine, TX v. Dept. of Transp.*, 17 F.3d 1502, 1505 (D.C. Cir.), *cert. denied*, 513 U.S. 1043 (1994) (where the agency has arrived at a selection of an alternative after an evaluation of the feasibility of other alternatives, its selection should be upheld); *see also, Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991).

IV. CONCLUSION

Defendants respectfully request this Court to deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment.

Respectfully submitted this 5th day of December, 2005.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in Local Rule 5.1B for documents prepared by computer.

S/Melaine A. Williams

MELAINE A. WILLIAMS
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I certify that on December 5, 2005, I electronically filed the within and foregoing Cross Motion for Summary Judgment with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Jonathan L. Schwartz

I hereby certify that I have also deposited a copy of said motion in the United States mail, first class postage prepaid, and properly addressed to ensure delivery upon the following:

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Respectfully submitted this 5th day of December 2005.

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