

**Center for Sustainable Economy • Center for Biological Diversity  
Friends of the Capital Crescent Trail**

***VIA ELECTRONIC AND EXPRESS CERTIFIED MAIL***

June 25, 2014

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**Re: Notice of Violations of the Endangered Species Act Regarding the “Purple Line Project” And Request for a Meeting**

On behalf of the Center for Biological Diversity (“Center”), the Center for Sustainable Economy, the Friends of the Capital Crescent Trail and the following individuals—John Fitzgerald, Christine Real de Azua, and Deborah Ingram—we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. §1540(g)(2)(A)(i), that the Federal Transit Administration (“FTA”) and the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service, (“Service”) are in violation of the ESA in connection with the Purple Line Project in Montgomery and Prince Georges Counties, Maryland (the “Project”).<sup>1</sup> In an effort to avoid litigation over this matter, we also request an opportunity to meet with representatives of the Service in the near future to discuss recently obtained information bearing

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<sup>1</sup> The Purple Line Project was approved on March 19, 2014 with the publication of a Record of Decision from the Federal Transit Administration (<http://www.purplelinemd.com/en/about-the-project/studies-reports/record-of-decision>). The Project is a proposed 16-mile light rail train that would run east to west inside the Washington, D.C. Capital Beltway between Bethesda, in Montgomery County, and New Carrollton, in Prince George’s County Maryland. The Project will have 21 planned stations that would provide direct connections to D.C. Metrorail’s Orange Line, Green Line, and two branches of the Red Line, as well as the MARC Brunswick, Camden and Penn Lines. A combination of federal, state and local funding will be used for the projected \$2.2 billion project cost, with the private sector expected to invest between \$500 and \$900 million.

directly on the potential impacts of the Project on the federally endangered Hay's spring amphipod (*Stygobromus hayi*) and the Kenk's amphipod (*Stygobromus kenki*), which is a formal candidate for Federal listing and will very likely be listed as endangered by the Service in the near future pursuant to a Settlement Agreement with the Center.

As discussed below, while the Service has stated that the Project will have "no effect" on either species, *see* 1/7/14 Letter from Genevieve LaRoche, U.S. Fish and Wildlife Service, to Daniel Koenig, Federal Transit Administration (Attachment A) — and that determination has evidently been relied on by the FTA as a basis for avoiding formal section 7 consultation— new research conducted by a leading expert on the species, Dr. David Culver at American University, calls that conclusion into serious question and, at the very least, warrants further scrutiny by the Service before irreversible damage may be done to the habitat of these two highly imperiled species. We would therefore like to meet with representatives of the Service to discuss this recent research; what additional relevant information may be obtained in the near future; and the Service's willingness to conduct an on-site review of some of the pertinent sites so that the agency may gain a better understanding of the impacts and risks entailed by the project.

We urge the Service to revisit this issue in light of recent developments but, if it does not do so, we are putting you on formal notice that FTA and the Service violated the ESA by failing to consult, in the manner required by Section 7 of the ESA and implementing regulations, on the likely negative effects of the Project on the federally endangered Hay's spring amphipod (*Stygobromus hayi*). The Corps of Engineers would also likely violate the ESA because some amphipod habitat that will be degraded or destroyed by the project are jurisdictional wetlands that cannot be adversely affected without a section 404 permit under the Clean Water Act. If the Corps fails to enter into Section 7 consultations during the 404 permit review process for potential impacts to these amphipod species, it would also violate the ESA.

Furthermore, the Service has failed to comply with its mandatory duty in Section 4(b)(3)(C)(iii) of the ESA to effectively monitor the federal candidate species, Kenk's amphipod (*Stygobromus kenki*), in order to "prevent a significant risk to the well being" by failing to consider the potential impacts of the Project on this critically endangered candidate species.<sup>2</sup>

The Washington D.C. area contains one of the richest biological assemblages of amphipod species anywhere on the planet. Unfortunately, decades of habitat degradation and habitat loss have greatly reduced amphipod populations to the point that the Hay's spring amphipod was protected as an endangered species in 1982. The Kenk's amphipod, which occurs in D.C. and in Maryland, has waited for listing since 2010 as a "warranted-but-precluded" candidate species—meaning that the Service has already compiled sufficient information to determine that the species does indeed deserve protection under the ESA.

The Project and/or development resulting from it will likely destroy or degrade seeps and springs that are likely to be occupied by Hay's spring amphipod, Kenk's amphipod, or both species.<sup>3</sup> The Project will likely degrade forest habitat conditions in and around these creeks, and may cause additional damage in the Rock Creek drainage, potentially degrading additional

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<sup>2</sup> 16 U.S.C. § 1533(b)(3)(C)(iii).

<sup>3</sup> Kenk's and Hay's spring amphipods often occur in the same seeps and springs.

amphipod habitat along Rock Creek itself and along the Coquelin Run tributary. Because any further loss of spring/seep habitat along Rock Creek would likely preclude the recovery of these species, the FTA and Service's determination that the Project would have "no effect" on these species is patently unlawful as well as arbitrary and capricious.

## LEGAL BACKGROUND

The ESA was enacted, in part, to provide a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...[and] a program for the conservation of such endangered species and threatened species...."<sup>4</sup>

The ESA vests primary responsibility for administering and enforcing the statute with respect to terrestrial and freshwater species to the Secretary of the Interior. The Secretary of the Interior has delegated this responsibility to the U.S. Fish and Wildlife Service.<sup>5</sup>

Section 2(c) of the ESA establishes that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."<sup>6</sup> The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."<sup>7</sup>

Section 7(a)(1) requires that all federal agencies shall "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species..." Section 7(a)(1) also directs the Service to review "...other programs administered by him and utilize such programs in furtherance of the purposes of the Act."<sup>8</sup>

In order to fulfill the substantive purposes of the ESA, all federal agencies must consult with the Service to "insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species...determined...to be critical...."<sup>9</sup>

Section 7 consultation is required for "any action [that] may affect listed species or critical habitat."<sup>10</sup> Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or

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<sup>4</sup> 16 U.S.C. §§ 1531-1544; 16 U.S.C. § 1531(b)

<sup>5</sup> 50 C.F.R. § 402.01(b). The Department of Commerce through the National Marine Fisheries Service (NMFS) is responsible for implementing the ESA with respect to marine and anadromous species. Collectively the "Services" implement the ESA through regulations and policies discussed below. Since only the FWS is at issue here, any reference to the "Service" will be a reference to the U.S. Fish and Wildlife Service.

<sup>6</sup> 16 U.S.C. § 1531(c)(1)

<sup>7</sup> 16 U.S.C. § 1532(3)

<sup>8</sup> 16 U.S.C. § 1536(a)(1)

<sup>9</sup> 16 U.S.C. § 1536(a)(2) ("Section 7 consultation")

<sup>10</sup> 50 C.F.R. § 402.14

air.”<sup>11</sup> In engaging in section 7 consultation, both the Service and “action agencies” must “use the best scientific and commercial data available.”<sup>12</sup>

As courts have repeatedly held, the “‘may affect’ standard triggering the consultation requirement is low.”<sup>13</sup> The Service has defined the “may affect” inquiry in the joint consultation handbook as follows: “the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat. When the Federal agency proposing the action determines that a ‘may affect’ situation exists, then they must either initiate formal consultation or seek written concurrence from the Services that the action ‘is not likely to adversely affect’ listed species.”<sup>14</sup> A “may affect” determination is required when any “*possible* effect, whether beneficial, benign, adverse, or of an undetermined character” occurs.<sup>15</sup> Further, in determining whether any such “effects” may occur, the Service and action agencies must consider not only the “direct” effects of the action, but also the “indirect effects,” which are defined as those that are “caused by the proposed action and are later in time, but still are reasonably certain to occur.”<sup>16</sup>

Although an action agency may request assistance from the Service in determining whether an action will have “no effect” or “may affect” a listed species,<sup>17</sup> both an action agency and the Service must take care not to conclude “no effect” based merely on the superficial assumption that a species is not currently present in the action area for a proposed project. First, given the difficulties inherent in studying rare and endangered species, an ESA-listed species may well be present, but the agencies failed to detect it at the action area location or failed to properly assess the project impacts. Second, even if a species is, in fact, not present at the action area, this does not mean that the action agency or the Services can simply make a “no effect” determination. Rather, the prospect that a species’ habitat—especially the presence of habitat needed for recovery—is within an action area can be sufficient to trigger the full consultation requirements of Section 7.<sup>18</sup> Accordingly, requiring that a species be present with certainty within the action area to move beyond the “no effect” determination is arbitrary and capricious,<sup>19</sup> contrary to the Service’s own implementing regulations and Section 7 Handbook, and flies in the face of the ESA’s overarching purpose to give the “benefit of the doubt to the species.”<sup>20</sup>

Once an action agency makes a “may affect” determination, the agency may elect to enter informal consultations with the Service. The action agency then is required to complete a Biological Assessment and make one of two determinations—a “not likely to adversely affect”

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<sup>11</sup> 50 C.F.R. § 402.02

<sup>12</sup> 16 U.S.C. § 1536(a)(2).

<sup>13</sup> *Colorado Env’tl Coalition v. Office of Legacy Management*, 819 F. Supp. 2d 1193, 1221-22 (D. Colo. 2011) (citing cases).

<sup>14</sup> U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (hereafter JOINT CONSULTATION HANDBOOK) at xiv (emphasis in original).

<sup>15</sup> *Center for Biological Diversity v. BLM*, 698 F.3d 1101 (9<sup>th</sup> Cir. 2012) (emphasis added).

<sup>16</sup> 50 C.F.R. § 402.02.

<sup>17</sup> JOINT CONSULTATION HANDBOOK at 3-12

<sup>18</sup> *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, No. CV 97-666 TUC JMR, 2001 LEXIS 25027 (D. Ariz. Mar. 30, 2001).

<sup>19</sup> *Id.* at \*67-\*68.

<sup>20</sup> H.R. Conf. Rep. No. 697, 96<sup>th</sup> Cong., 2d Sess. 12 (1979).

(“NLAA”) determination or a “likely to adversely affect” (“LAA”) determination. If the action agency arrives at an LAA determination, then formal consultations are required.<sup>21</sup> If the Service does not concur with a “not likely to adversely affect” determination, or if the action agency elects to bypass the informal consultation process and initiate formal consultations, then the Service works towards the completion of a biological opinion for that proposed action. If the Service issues a biological opinion that concludes the agency action is likely to jeopardize the species, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action.<sup>22</sup> The Service may also “suggest modifications” to the action (called reasonable and prudent measures) during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even when not necessary to avoid jeopardy.<sup>23</sup>

Section 7(d) of the ESA provides that once a federal agency initiates consultation on an action under the ESA, the agency, as well as any applicant for a federal permit, “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”<sup>24</sup> The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat. Section 7(d) is not triggered where an agency makes a “no effect” determination.

Even where formal consultation has been properly conducted, it must be reinitiated if, among other reasons, “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,” or “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.”<sup>25</sup>

## FACTUAL BACKGROUND

### A. Endangered Amphipods of Rock Creek

The Hay’s spring amphipod (*Stygobromus hayi*) is a small (5-10 millimeters in length), shrimp-like crustacean that lives in shallow interstitial habitats primarily near groundwater seeps and springs. The amphipod spends most of its life in voids among rock, gravel and the leaf-litter near these springs and seeps feeding off of biological detritus—dead leaves and insects. Like many underground species, the Hay’s amphipod is blind and colorless, and is extremely vulnerable to human activities. When it was first listed as an endangered species in 1982, the entire world population was thought to have been reduced to a single, one-meter-wide spring inside the Smithsonian National Zoological Park.<sup>26</sup> Since then, four additional springs and seeps

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<sup>21</sup> JOINT CONSULTATION HANDBOOK at 2-6.

<sup>22</sup> 16 U.S.C. § 1536(b)

<sup>23</sup> 50 C.F.R. § 402.13

<sup>24</sup> 16 U.S.C. § 1536(d)

<sup>25</sup> 50 C.F.R. § 402.16.

<sup>26</sup> *Listing Hay’s Spring Amphipod as an Endangered Species*, 47 Fed. Reg. 5425 (Feb. 5, 1982).

inside Rock Creek Park in Washington D.C. have been confirmed to be occupied by Hay's spring amphipods, and three additional locations in the park are probable sites for the species.

Similar to Hay's spring amphipod, Kenk's amphipod (*Stygobromus kenki*) is slightly smaller (up to 6 millimeters in length). It also inhabits groundwater, seeps, and springs in and around Rock Creek Park and connected areas in Maryland, and its life history is very similar to the Hay's spring amphipod in that it spends most of its life in underground/interstitial habitats close to springs and seeps, feeding on biological detritus.<sup>27</sup> Kenk's amphipod may actually be rarer and more endangered than the Hay's spring amphipod. Kenk's amphipod was first petitioned for listing and protection under the ESA in 2007, and became a candidate species in 2010.<sup>28</sup> The U.S. Fish and Wildlife Service is committed to reviewing the Kenk's amphipod in fiscal year 2016 for potential listing under the ESA and making a final determination by the end of fiscal year 2017.<sup>29</sup> Kenk's amphipod is currently known only from five locations—four in Rock Creek Park and one along Coquelin Run, a tributary to Rock Creek within Montgomery County that runs parallel to much of the proposed project route from Bethesda to Rock Creek.

Many types of human activities have and continue to degrade amphipod habitat, including “intensive development and associated increases in impermeable surfaces, which may decrease water quality and quantity in the springs.”<sup>30</sup> Loss of mature and intact forest canopy alters and reduces forest leaf-litter, which in turn reduces food availability for the amphipod and increases surface temperatures. Increasing impervious paved areas due to additional development alters the hydrology of the shallow-water seeps and springs, potentially putting the entire spring-ecosystem at risk due to increased flooding and runoff.

Both amphipod species are very difficult to study and monitor because of their small size (5-10 millimeters in length) and because they live most of their lives underground in interstitial groundwater. As a result, little is known about the natural history of these species. In general, amphipods in the genus *Stygobromus* tend to occur in caves or areas where there are permanent groundwater habitats that contain low levels of organic matter such as decomposing leaf litter and dead insects, on which they feed.<sup>31</sup> More recent research suggests that the amphipods may also be able to live in a few other valley floor habitats within the Rock Creek watershed that have shallow subsurface groundwater that are high in organic matter and may even be seasonally dry. These hypotelminorheic habitats occur when groundwater seeps to the surface from underlying bedrock to flow up through sediments and vegetative litter.<sup>32</sup>

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<sup>27</sup> Pavék, Diane. 2002. ENDEMIC AMPHIPODS IN OUR NATION'S CAPITAL. *Endangered Species Bulletin*. January/February 2002. Volume 27 (1): 8-9.

<sup>28</sup> *Review of Native Species That Are Candidates for Listing as Endangered or Threatened*, 75 Fed. Reg. 69221 (Nov. 10, 2010).

<sup>29</sup> U.S. Fish & Wildlife Service, 2014. ESA Listing Workplan, [http://www.fws.gov/endangered/improving\\_esa/listing\\_workplan.html](http://www.fws.gov/endangered/improving_esa/listing_workplan.html) (last visited June 1, 2014).

<sup>30</sup> USFWS. 2013. Hay's Spring amphipod (*Stygobromus hayi*) 5-year Review: Summary and Evaluation. Annapolis, MD: Chesapeake Bay Field Office, U.S. Fish and Wildlife Service.

<sup>31</sup> Pavék, D. 2001. URBAN REFUGE FOR RARE AMPHIPODS IN THE NATIONAL CAPITOL REGION, in National Park Service, 2001. *Natural Resource Year in Review-2001* May 2001 (publication D-2255).

<sup>32</sup> Culver, D.C., T. Pipan, and S. Gottstein. 2006. *Hypotelminorheic—a unique freshwater habitat*. *Subterranean Biology* 4:1-8.

The Hay's spring amphipod can be found in both the hyporheic and hypotelminorheic zones. Both of these habitats exist in Rock Creek, however the hypotelminorheic zone periodically dries out near the surface, making sampling difficult during dry periods. The most successful sampling technique for amphipods cannot be used in areas with high amounts of fine sediment making detection more difficult. A 2004 study on amphipods in Rock Creek Park demonstrated the relative success rate in detecting amphipods by seasons, showing that amphipods could be found in springs at some months of the year even when none were detected just a few months prior. Simply put, the inability to locate either amphipod species at a given time does not indicate they are not present in those habitat since it is characteristic of the amphipods (even more so than many other endangered species) to be difficult to find.

Research conducted by Dr. Culver *since* the Service's January 7, 2014 letter, indicates that there are seven springs and seeps close to the projected path of the Project, as well as two small wetland areas, that may provide suitable habitat for Hay's spring and/or Kenk's amphipod.<sup>33</sup> Two of these seeps are just east of Rock Creek and below the Capital Crescent Trail and are immediately adjacent to the Project. These would be destroyed completely if the Project were to move forward as planned. Four additional seeps are all within 300 feet of the Project footprint. Wetland GB-8 is also less than 300 feet from the Project footprint.

These springs/seeps and wetlands may be presently occupied—additional research is essential to ascertain whether these seeps are likely to be occupied—but even if they are unoccupied, they would provide habitat that is essential for the recovery of one or both of these amphipod species, which have extremely restrictive ranges due to past and ongoing human impacts. Dr. Culver has recently received a collection permit to assess amphipod occurrence within these seeps and plans to conduct survey work in the fall of 2014, thus making it especially timely and appropriate for the Service to now take a fresh look at the important issues raised by the Project.

## B. Adverse Impacts of The Purple Line Project And Resulting Development

The proposed Project is a major transportation infrastructure project that would consist of a 16.2-mile east-west, above-ground double track rail system traversing parks, streams, forested areas and other open spaces between the Bethesda Metrorail station in Montgomery County and the New Carrollton Metrorail/MARC/Amtrak station in Prince George's County. Some, but not all, of the environmental impacts of the Project are described in Chapter 4 of the Final Environmental Impact Statement (FEIS) prepared by the Maryland Transit Administration and the Federal Transit Administration.<sup>34</sup>

According to the FEIS, the Project will result in the clearing of at least 24 acres of forest in and around Rock Creek and close to the seep/spring locations and wetland locations recently

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<sup>33</sup> Dr. Culver's report is attached to this Notice letter.

<sup>34</sup> U.S. Federal Transit Administration, Maryland Transit Administration, and U.S. Department of Interior. 2014. FINAL ENVIRONMENTAL IMPACT STATEMENT AND DRAFT SECTION 4(F) EVALUATION (FEIS) FOR THE PURPLE LINE (hereinafter PURPLE LINE FEIS) at Chapter 4. Available at: <http://www.purplelinemd.com/en/about-the-project/studies-reports/feis-document>

identified by Dr. Culver.<sup>35</sup> The loss of 24 or more acres of forest could potentially have significant impacts on spring/seep ecology in that area by altering surface and groundwater recharge patterns, and the composition of leaf-litter and other detritus that the amphipods depend upon. In general the construction of the Project will likely have a negative impact on stream health at a time when most streams are already rated near the “very poor” end of the scale on aquatic health. Rock Creek is currently rated as “very-poor” to “fair” for aquatic macroinvertebrates,<sup>36</sup> and the FEIS anticipates that short-term impacts to aquatic biota and habitat resulting from project construction “include physical disturbances or alterations to habitat, accidental spills either directly into water resources or indirectly through surface runoff, and sediment releases that could affect aquatic life. Earth-moving activities would expose soils that, if left in an unstable condition, could enter waterways during storms.”<sup>37</sup>

Furthermore, the Project will potentially impact at least one wetland, Wetland GB-8, which is also identified by Dr. Culver as potential habitat for the Hay’s spring amphipod. This wetland was recognized as the “least affected and highest functioning wetland in the study area” by the FEIS. Wetland GB-8 is likely to be jurisdictional under the Clean Water Act given that it is immediately adjacent to Rock Creek and has a clear, surface hydrological connection to the creek.<sup>38</sup>

Long term, the project will increase impervious surfaces in the study area, which is likely to increase the amount of surface runoff and increase the level of contaminants such as heavy metals, salt, organic molecules, and nutrients in this runoff.<sup>39</sup> The installation of infrastructure, culvert extensions and closed drainage systems, would result in the permanent loss of significant stream habitat, which could reduce fish and other aquatic biota within the construction zone and would permanently alter the localized habitat. The FEIS additionally notes that “Benthic organisms, such as macroinvertebrates, would be impacted by in-stream construction more so than fish, as they are relatively stationary.” Forest cover will also be reduced in and around where Coquelin Run crosses Connecticut Avenue, further altering the hydrology of Coquelin Run and potentially changing the ecology of that system. While some of these impacts are distributed throughout the project area, many will occur within the drainages that feed into habitat that is essential for the recovery of the Hay’s spring and Kenk’s amphipods.

The project will also result in indirect adverse effects as defined in the ESA implementing regulations, because residential, commercial, road access, and other development will be triggered by the Project and will have impacts on amphipod habitat, including additional loss of forest cover, additional erosion, scouring and pollution of Coquelin Run and local streams from runoff, and impacts on groundwater and seep replenishment patterns.

As noted, on January 7<sup>th</sup> 2014, the Service, without conducting any on-site investigation and based on materials submitted to it at a meeting with project proponents, wrote a letter to the

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<sup>35</sup> PURPLE LINE FEIS at 4-117.

<sup>36</sup> This water quality rating only evaluates habitat suitability generically for macro-invertebrates. It does not evaluate habitat suitability or habitat quality for the Hay’s spring amphipod or Kenk’s amphipod.

<sup>37</sup> PURPLE LINE FEIS at 4-119.

<sup>38</sup> PURPLE LINE FEIS at 4-121.

<sup>39</sup> PURPLE LINE FEIS at 4-127.



FTA stating its conclusion that the Project would have “no effect” on the Hay’s spring amphipod or the Kenk’s amphipod (Appendix A).<sup>40</sup> The letter concludes:

Following our discussion with you and the project engineers concerning project construction methods and measures to minimize siltation and other effects of the project, it remains our conclusion that the project will have no effect on the Hay’s Spring Amphipod (*Stygobromus hayi*). This species occurs in seeps and springs fed by groundwater coming from small, localized aquifers on the slopes adjacent to Rock Creek within Rock Creek Park in Washington, DC. The nearest (northernmost) spring known to support the species is West Rapids Spring, near Rock Creek approximately 4.5 miles downstream of the Purple Line crossing of Rock Creek. No effect on the groundwater systems supporting the Hay’s Spring Amphipod is expected because of the miles separating these systems from the project construction area. We also do not anticipate any adverse effects on this species from changes in the flow or water quality in Rock Creek related to the Purple Line construction.

A second rare amphipod species, Kenk’s amphipod (*Stygobromus kenki*), which is a candidate for Federal listing, does occur within a quarter mile of the Purple Line project. While candidate species have no legal protection under the Endangered Species Act, we do recommend that measures be taken to protect them, where appropriate. Therefore, we have taken a close look at the potential for this project to affect Kenk’s amphipod. This species is known to occur in a spring south of Coquelin Run near Chevy Chase in Montgomery County, Maryland. This spring is approximately 40 vertical feet above the level of Coquelin Run and is fed by a small catchment basin completely separated from the groundwater sources to the north of Coquelin Run, where the Purple line is to be constructed. Therefore, ground and surface water draining from the area where the Purple line is to be constructed is expected to have no effect on this spring site or Kenk’s amphipod.

Because of this letter’s conclusions, the FTA did not complete a Biological Assessment on the potential impacts of the Project on the Hay’s spring amphipod, as would be required with a “may affect” finding. Nor did the agencies engage in formal consultation, culminating in a Biological Opinion.

The Center for Sustainable Economy, Mr. Fitzgerald, Ms. Real de Azua and Dr. Ingram submitted comments on the Project’s Final Environmental Impact Statement highlighting the potential threats to the Hay’s spring amphipod, the need to enter into Section 7 consultations with the Service regarding the amphipod, the potential threats to the Kenk’s amphipod, and the need to take protective actions for these species under the Endangered Species Act.<sup>41</sup> The Federal Transit Administration responded to these comments as follows:

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<sup>40</sup> PURPLE LINE FEIS at 4-117; *See also* Purple Line FEIS at Appendix G.

<sup>41</sup> Federal Transit Administration, 2014. RECORD OF DECISION: PURPLE LINE PROJECT (hereinafter PURPLE LINE ROD) at Attachment C, Record 714.

**Response:** Consultation under Section 7 of the Endangered Species Act was conducted for the project in 2011 as part of the required NEPA process. The MTA solicited input from the Maryland Department of Natural Resources (MDNR) and U.S. Fish and Wildlife Service (USFWS) on the potential presence of state and federally listed endangered and threatened species that may be impacted by construction of the Purple Line. Neither agency indicated the potential presence of endangered or threatened species within or immediately adjacent to the project area. The USFWS and MDNR issued letters saying that no federally listed, state listed, or proposed threatened or endangered species are known to exist within the project impact area. By impact area, the USFWS takes into consideration both direct and potential secondary or indirect impacts associated with the project. In response to comments on the FEIS, MTA has conducted additional coordination with USFWS and MDNR regarding Hay's Spring Amphipod and Kenk's amphipod and received correspondence from USFWS on January 7, 2014 (see *Attachment E, Agency Correspondence*). In that letter, the USFWS confirmed its original conclusion that the project will have no effect on the Hay's Spring Amphipod. This conclusion was based on discussions with MTA concerning project construction methods and measures to minimize siltation and other effects of the project. No effect on the groundwater system supporting the Hay's Spring Amphipod is expected because of the 4.5 miles separating these systems from the project construction area. In addition USFWS does not anticipate an adverse effect on this species from changes in the flow and water quality in Rock Creek related to the Purple Line construction. In addition, the USFWS letter states that while Kenk's Amphipod has no legal protection under the Endangered Species Act, the USFWS has taken a close look at the potential for effect to the species. The species occurs in a spring approximately 40 vertical feet above the level of Coquelin Run, fed by a small catchment basin completely separated from the groundwater source to the north of Coquelin Run. Therefore ground and surface water draining from the area where the Purple Line is to be constructed is expected to have no effect on this spring site or Kenk's amphipod. With respect to other federally listed species that could be affected by the project, FTA and MTA rely upon the resource agencies, in this case the USFWS, to alert them of any potential occurrences of federally listed species within the project area. No such mention was made in the USFWS response letter.<sup>42</sup>

As explained, these assertions were made *before* Dr. Culver conducted research identifying additional areas of suitable and potentially occupied amphipod habitat in close proximity to or within the Project's footprint.

## **ESA VIOLATIONS**

Consultation under Section 7 of the ESA is required whenever a discretionary agency action "may affect" any listed species or its critical habitat, and the assessment of whether that

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<sup>42</sup> PURPLE LINE ROD at Chapter II, 109-110.

low threshold has been satisfied must be based on the “best available” science.<sup>43</sup> In this situation, the best available science dictates the conclusion that the project and related development “may affect” a presently listed endangered species, as well as a soon to be listed species, in myriad ways. Consequently, the FTA and the Service have arrived at an improper, unlawful, and arbitrary and capricious “no effect” determination. By doing so, the agencies have impermissibly bypassed the crucial safeguards of the section 7 process, particularly the preparation of a Biological Assessment by the FTA and/or a Biological Opinion by the Service.

In essence, the failure to engage in formal consultation is arbitrary and capricious because, in a biologically unsound fashion, Service limited its analysis to the few “known” occupied Hay’s spring amphipod locations and ignored the fundamental biology of amphipods and the unfortunate reality of how little attention the Service has paid to the Hay’s spring amphipod over the past 30 years.

The Service’s “no effect” determination appears to be based solely on projected groundwater/hydrological impacts to the five known, occupied springs. This determination did not contemplate probable, likely or possible occupied habitat. There is no scientifically valid reason or legally supportable rationale for why only the known, occupied springs should be deemed the only areas of suitable habitat for the purposes of a Section 7 consultation; indeed, as revealed by Dr. Culver’s recent research, there are several additional spring/seep and wetland locations that were not taken into account in the Service’s perfunctory “no effect” determination, but where Hay’s springs amphipods are likely to occur. Some of these seeps, springs and wetlands will likely be impacted or destroyed by the Project and/or ensuing development. Furthermore, degraded forest conditions through the opening of the canopy, the further spread of invasive species, the changes in plant communities, and changes in surface ground/water temperatures all are likely to have a negative impact on Hay’s spring amphipods or Kenk’s amphipods. The cursory January 2014 “no effect” determination does not even address these myriad impacts, or consider whether these impacts will limit the recovery of these species. Nor does it address, at all, the *indirect* effects that will likely be associated with the project, although such consideration is mandated by the plain terms of the ESA regulations.<sup>44</sup>

The best available science makes clear that the Project is likely to have serious and long-term impacts on the hydrology of the spring-seep ecosystems that the Hay’s spring amphipod requires and will degrade suitable habitat of the species by degrading the forest ecosystems around Rock Creek. The Service and FTA failed to contact any of the world’s experts on subterranean invertebrates, despite the fact that one of these experts, Dr. Culver, works at American University—just a few miles away from the Project. A “no effect” determination

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<sup>43</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a) *see Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005); *Defenders of Wildlife v. Environmental Protection Administration*, 882 F.2d 1294 (8th Cir. 1989).

<sup>44</sup> The “no effect” determination also ignores “cumulative effects,” which are defined by the ESA regulations as “those effects of future State or private activities, not involving Federal activities that are reasonably certain to occur within the action area of the Federal action subject to consultation.” 50 C.F.R. §402.02. Here, in an effort to accommodate the project, Montgomery Council is moving forward with plans for tree clearing, earth moving, paving, placing concrete culverts, and other habitat alterations in the course of building a new twelve foot wide paved trail to parallel the Purple Line across Rock Creek and its watershed, including the headwaters of Coquelin Run near Elm Street Park. This related development unquestionably entails “cumulative” effects that may also adversely impact the amphipods, and hence must be considered in any legitimate “effects” assessment.

without any factual, scientific support or biological surveying effort cannot be sustained. The reality is that Hay's spring amphipod and Kenk's amphipod likely exist in the spring/seeps near the Project's proposed route, as well as in additional locations upstream of known occupied sites given similar habitat conditions. As succinctly explained by Dr. Culver, "It's not like there's a wall between D.C. and Montgomery County....The only reason not to look is if you don't want to find anything."<sup>45</sup>

While the "no effect" determination previously made is scientifically baseless, to the extent that the prior communications between the agencies can be deemed "consultation" at all within the meaning of Section 7, the Service and FTA have no possible justification for not reinitiating consultation in light of the recent research conducted by Dr. Culver. That research plainly constitutes "new information" reflecting potential effects never "previously considered." 50 C.F.R. §402.16(b). A renewed effort at consultation should also encompass the Corps since, as discussed previously, at least some of the areas that contain suitable, and potentially occupied, habitat for the amphipods are jurisdictional wetlands. Since work conducted in these areas will necessitate a Clean Water Act section 404 permit triggering the Corps' own Section 7 obligations, should the project move forward without formal consultation including the Corps, that agency will also be in default of its ESA obligations.

In addition to violating Section 7, the Service has violated Section 4(b)(3)(C)(iii) of the ESA by failing to implement a system to "monitor effectively the status [of candidate species] and make prompt use of [its emergency listing authority] to prevent a significant risk to the well being of any such species." Kenk's amphipod was added to the list of candidate species in 2010, and may be rarer than the Hay's spring amphipod, a species the Service has long-considered to be on the brink of extinction. According to the best available science, the Kenk's amphipod is found in only five springs, one of which is just above Coquelin Run, which itself is directly downstream from the Project, and at its closest point, is less than 100 feet away from the proposed route. The Project, along with indirect and cumulative effects, would have significant impacts on forest canopy and forest habitat conditions, and would also impact the hydrology of the Coquelin Run spring where Kenk's amphipod is likely to occur. The degradation or loss of one of five springs where a critically imperiled species is located as well as potentially occupied habitat of the amphipod in other locations around Coquelin Run would represent a potentially massive loss for that species, potentially putting it on a direct path to extinction. Given that the Service must evaluate this species for protection under the ESA within two years, the Service's cursory review is simply irrational, and arbitrary and capricious.

Given that the Service made no real effort to assess these risks or the possibility that Kenk's amphipods might be located in additional locations along Coquelin Run or where it intersects with Rock Creek, the Service violated its Section 4 mandate to effectively monitor the

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<sup>45</sup> Washington Post, November 29, 2013, "Purple Line's obscure obstacle: The endangered Hay's Spring Amphipod," [http://www.washingtonpost.com/local/trafficandcommuting/purple-lines-obscure-obstacle-the-endangered-hays-spring-amphipod/2013/11/29/1af11834-56a3-11e3-8304-caf30787c0a9\\_story.html](http://www.washingtonpost.com/local/trafficandcommuting/purple-lines-obscure-obstacle-the-endangered-hays-spring-amphipod/2013/11/29/1af11834-56a3-11e3-8304-caf30787c0a9_story.html)

The decision to give a green light to the project without engaging in any meaningful surveying or study of spring/seeps along the Purple Line Project's proposed route also contravenes Section 7(a)(1) of the ESA, which requires that "all other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act. See *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998).

species or to consider taking steps to avert a significant risk to the species' well being. It is not prudent for the Project to move forward at this time without the agencies taking a much more serious look at impacts on the Kenk's amphipod. Once the Kenk's amphipod is listed, that will trigger all of the ESA's protections. It is clearly in the interests of all concerned—and particularly the species—to seriously consider and, if possible, avoid impacts to this highly endangered species before extensive resources are irretrievably committed to the Project.<sup>46</sup>

### **A SUPPLEMENTAL EIS IS ALSO REQUIRED**

For many of the same reasons as set forth above, a supplemental EIS is also required in order for the FTA and other action agencies to take the requisite “hard look” at impacts on the amphipods. Indeed, in addition to the Hay's spring amphipod and the Kenk's amphipod, another three amphipod species, *Stygobromus sextarius*, *Stygobromus tenuis potomacus*, and *Stygobromus pizzinii* are found in Rock Creek Park and immediately north of the Park alongside the Creek and its tributary, Coquelin Run. An additional unnamed species *Stygobromus sp.* (Holsinger) also may occur in these areas. All of these species are vulnerable to habitat degradation, habitat fragmentation, and water pollution—all of which could be exacerbated by the development and completion of the Project, and the associated development that will ensue from the project.

Under the National Environmental Protection Act and implementing regulations, when a federal action or its impacts involve “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” the agency must supplement an EIS.<sup>47</sup> Further, the discovery of significant new circumstances or information must be made “available to public officials and citizens before decisions are made and before actions are taken,” because “public scrutiny [is] essential to implementing NEPA.”<sup>48</sup>

Here, in light of Dr. Culver's research and especially in view of the extremely cursory consideration afforded this issue in the existing NEPA documentation, a supplemental EIS is plainly required by NEPA and implementing regulations.<sup>49</sup>

### **CONCLUSION**

As noted at the outset, we would like to meet with you to discuss this urgent matter as there are significant time constraints on any challenge to the Project, and so that the issues discussed in this letter may be afforded attention before there is any irretrievable and irreversible commitments of resources.<sup>50</sup> We believe that there are solutions and alternatives available that

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<sup>46</sup> See also 16 U.S.C. §1536(d).

<sup>47</sup> 40 C.F.R. § 1502.9(c)(1)(ii).

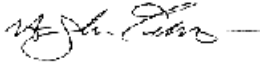
<sup>48</sup> *Id.* at §1500.1(b).

<sup>49</sup> This notice letter only addresses impacts on the amphipods. As set forth in comments submitted by signatories to this letter and others, there are many additional ways in which the NEPA process failed to take the requisite hard look at impacts and alternatives.

<sup>50</sup> Section 1305 of The Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) (July 6, 2012), 23 U.S.C. § 139(l) limits judicial review for any project approved pursuant to this law. The FTA announced that any challenge to the Purple Line Project after August 28, 2014 will be time-barred. See *Limitation on Claims Against a Proposed Public Transportation Project*, 79 Fed. Reg. 118113 (Mar. 31, 2014).

can allow the Project to move forward without harming any endangered species. However, if the Service and FTA do not act within 60 days to correct the violations described in this letter, we will have no choice but to consider pursuing litigation to address these failings. If you have any questions please do not hesitate to contact us.

Sincerely,



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