

ORAL ARGUMENT NOT YET SCHEDULED

**United States Court of Appeals
for the District of Columbia Circuit**

No. 06-5059

KARST ENVIRONMENTAL EDUCATION AND PROTECTION, INC., *ET AL.*,
Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Appellees,

and

INTER-MODAL TRANSPORTATION AUTHORITY, INC., *ET AL.*,
Appellees-Intervenors

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:05-cv-01190-RMU

The Honorable Ricardo M. Urbina, Judge

OPENING BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Intervenors

Appellants

The following parties appear as appellants in this case:

Karst Environmental Education and Protection, Inc.

Warren County Citizens for Managed Growth, Inc.

Gayla Cissell

Jim Duffer

Roger Brucker

Appellants will be referred to collectively as “Citizens” in this Brief.

Appellees

The following parties appear as appellees in this case:

The United States Environmental Protection Agency

The United States Housing and Urban Development Agency

The Tennessee Valley Authority, an agency of the United States Government

Appellee-Intervenors

The following parties appear as appellee-intervenors in this case:

The Inter-Modal Transportation Authority, Inc.

The Fiscal Court of Warren County, Kentucky

The Board of Commissioners of the City of Bowling Green, Kentucky

B. Ruling Under Review

Appellants seek review of the final order and memorandum opinion of Justice Ricardo M. Urbina, United States District Judge, issued on December 15, 2005 granting

appellees and appellee-intervenors motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

C. Related Cases

There are no related cases currently pending.

FOR APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Appellants state as follows:

Appellant Karst Environmental Education and Protection, Inc. (“KarstEEP”) is a non-profit Kentucky corporation whose grassroots work is conducted entirely by volunteer effort. The organization’s mission is to educate and advocate towards the goal of protecting, conserving, and defending karst, karst systems, and karst landscapes. There is no parent corporation and no publicly held corporation that has an ownership interest in the organization.

Warren County Citizens for Managed Growth, Inc. is a non-profit Kentucky corporation whose grassroots work is conducted entirely by volunteer effort. It is registered with the Kentucky Secretary of State as Citizens for Managed Growth, Inc. and doing business as Warren County Citizens for Managed Growth (“WCCMG”). WCCMG’s purpose is to support development that follows established principles and practices generally referred to as “smart growth” and to oppose development that meets the criteria of “sprawl.” There is no parent corporation and no publicly held corporation that has an ownership interest in the organization.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

ACHP	Advisory Council on Historic Preservation
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FRCP	Federal Rules of Civil Procedure
HUD	Housing and Urban Development
ITA	Inter-Modal Transportation Authority, Inc.
KarstEEP	Karst Environmental Education and Protection, Inc.
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
TVA	Tennessee Valley Authority
WCCMG	Warren County Citizens for Managed Growth
WKU	Western Kentucky University

JURISDICTIONAL STATEMENT

On June 15, 2005, Citizens filed a Complaint in the U.S. District Court for the District of Columbia against the U.S. Environmental Protection Agency (“EPA”), Housing and Urban Development (“HUD”), and Tennessee Valley Authority (“TVA”) for failure to comply with the National Environmental Policy Act (“NEPA”) and National Historic Preservation Act (“NHPA”) with respect to the Kentucky Trimodal Transpark. Citizens asserted jurisdiction under 5 U.S.C. Sec. 704 (Administrative Procedure Act), (agency actions reviewable), 28 U.S.C. Sec. 1331(a) (federal question), 28 U.S.C. Sec.1361 (action against agency of the U.S. for failure to perform a duty), and 28 U.S.C. Secs. 2201-2202 (declaratory judgment).

This is an appeal from the District Court's December 15, 2005 final order and memorandum opinion granting the motions to dismiss of appellees and appellees-intervenors, Inter-Modal Transportation Authority, Inc. (“ITA”), Fiscal Court of Warren County, Kentucky (“Warren County”), and Board of Commissioners of the City of Bowling Green, Kentucky (“City of Bowling Green”).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1291 and Sec. 1295(a) for review of final decisions of a federal district court. Citizens timely filed this appeal on February 10, 2006.

ISSUES PRESENTED

- I. Did the District Court properly dismiss on a Rule 12 motion a complaint alleging that pervasive federal agency financing, permitting, and planning of an \$80 million multi-modal, industrial development project sufficiently “federalized” the

project for purposes of the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA") on the grounds that such actions did not constitute "final agency action"?

- II. Did the District Court properly dismiss on a Rule 12 motion a complaint that federal action, such as a financially assisted industrial plant, presents a justiciable challenge under NEPA and the NHPA even though construction is complete because ongoing operation of such plant poses risks of environmental and other harms for which relief can be granted?

STATUTES AND REGULATIONS

The relevant provision of NEPA is 42 U.S.C. Sec. 4332(C). The relevant provision of the NHPA is 16 U.S.C. Sec. 470f.

STATEMENT OF THE CASE

The District Court dismissed this action in an opinion that misunderstood Appellants' claim. Appellants' Complaint clearly asserted that the Transpark proposal would not exist "but for" substantial federal involvement in the collective form of federal funding, federal permitting and approvals, and federal planning and consultations. This collective and substantial federal involvement has "federalized" the Transpark from inception, rendering the project a "major federal action." Appellants also complained that EPA, HUD, and TVA had each taken individual "final agency action" sufficient to trigger judicial review of the adequacy of their respective NEPA and NHPA compliance. The District Court decided the second category of complaints, but completely overlooked the first category.

The first category of Citizens' Complaint is based on a long-established legal doctrine in this jurisdiction. This doctrine recognize that local government and private projects, such as the Transpark, can constitute a "major federal action" when predicated from inception on substantial federal involvement. Nowhere in the opinion of the District Court does that court consider the sufficiency of Appellants' Complaint that the Transpark was "federalized" from inception. The second category, based upon individual agency assessment, was decided by the District Court. Appellants appeal only the individualized assessment of the sufficiency of the complaint as to TVA, the second issue on appeal.

On June 15, 2005, Citizens filed a complaint and motion for preliminary injunction in the U.S. District Court for the District of Columbia against the EPA, HUD, and TVA for failure to comply with NEPA and the NHPA with respect to the Transpark. On June 24, 2005, as owners and developers of the Transpark, the ITA, Warren County, and City of Bowling Green moved to intervene and the District Court joined the three parties as defendant-intervenors on July 7, 2005. On July 11, 2005, Citizens filed notice of withdrawal of their motion for preliminary injunction and filed an amended complaint on July 29, 2005.

The Amended Complaint for Declaratory and Injunctive Relief alleges that \$17.5 million federal dollars have already been spent or appropriated for the Transpark by five (5) different federal agencies: EPA (\$3.75 million, Complaint, paragraph 8); HUD (\$1.75 million, Complaint, paragraph 9); TVA (\$500,000, Complaint, paragraph 29); FHWA (\$8.7 million, Complaint, paragraph 30); and FAA (the sale of the existing local

airport, recipient of at least \$2.8 million in federal funding, is necessary for the Transpark and must be approved by FAA, Complaint, paragraph 31).

Paragraphs 13, 14, and 15 of the Amended Complaint chronicle the evidence that this project was “federalized” from inception, that Warren County (and the other intervenors) “voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law.” [See discussion of *San Antonio Conservancy v. Texas Highway Dept.*, *infra.*]

13. The ITA was incorporated on October 23, 1998, with the “power to apply for and receive grants from all governmental bodies and agencies including, without limitation, the Federal Aviation Administration.” One of the first actions taken by the ITA Board of Directors was the hiring of a consultant with FAA funds, as per the minutes of the March 22, 1999 meeting.

14. The minutes of the September 22, 1999 Board of Directors meeting record that the ITA President and Board Chair met with Kentucky Transportation Cabinet officials, and that “The land acquisition process will involve adherence to the U.S. Department of Transportation guidelines.” These minutes also report on a meeting with TVA Vice President of Economic Development, Katie Rawls, and other TVA representatives, and “TVA has a strong interest in our project.”

15. ITA’s March 16, 2000 Benefit-Cost Analysis included a financial analysis based upon each of the three aspects: 1) an airport; 2) an industrial park; and 3) a new I-65 interchange. The new interstate interchange was estimated at \$25 million, the new airport at \$43-\$110 million, the sale of the existing airport (funded by FAA) at \$13 million.

On August 30, 2005, defendants and defendant-intervenors moved to dismiss, and the District Court granted these motions in a final order and memorandum opinion entered on December 15, 2005. The District Court held that HUD, individually, has not taken final agency action because Congressionally earmarked funding for the Transpark has not yet been transmitted from HUD (Memorandum Opinion, p. 9). The Court also

held that “advice” from EPA, individually, to the Transpark proponents was not a major federal action (*Id.*, p. 8). The District Court held the EPA, individually, has not taken final agency action because EPA had only given advice to the defendant-intervenors and no earmarked funds had been transmitted from EPA yet. (*Id.*, pp. 8, 10). Finally, the Court held that since TVA, individually, had already granted monies to the Transpark’s first tenant, any NEPA and NHPA claims were moot (*Id.*, p. 11).

Citizens timely appealed to this Court on February 10, 2006.

STATEMENT OF FACTS

I. The Kentucky Trimodal Transpark

In 1998, Warren County (pop. 43,236 exclusive of Bowling Green), and the City of Bowling Green, the county’s largest town (pop. 49,296), proposed an \$80 million multi-modal project (the “Transpark”) integrating air, highway, and rail transport on a 4,000-acre rural, historic, and environmentally sensitive area outside municipal boundaries, without municipal services (e.g., water, sewer, fire), without interstate highway access, and 8 miles from the existing general aviation Bowling Green-Warren County airport.

The Transpark proposal (Figure 1) consists of the integrated operation of 2,644 acres for an industrial park, with new interstate highway access to I-65 and new rail hub on an existing rail line, with 1,435 acres for a new commercial service airport featuring a 7,000-foot runway.

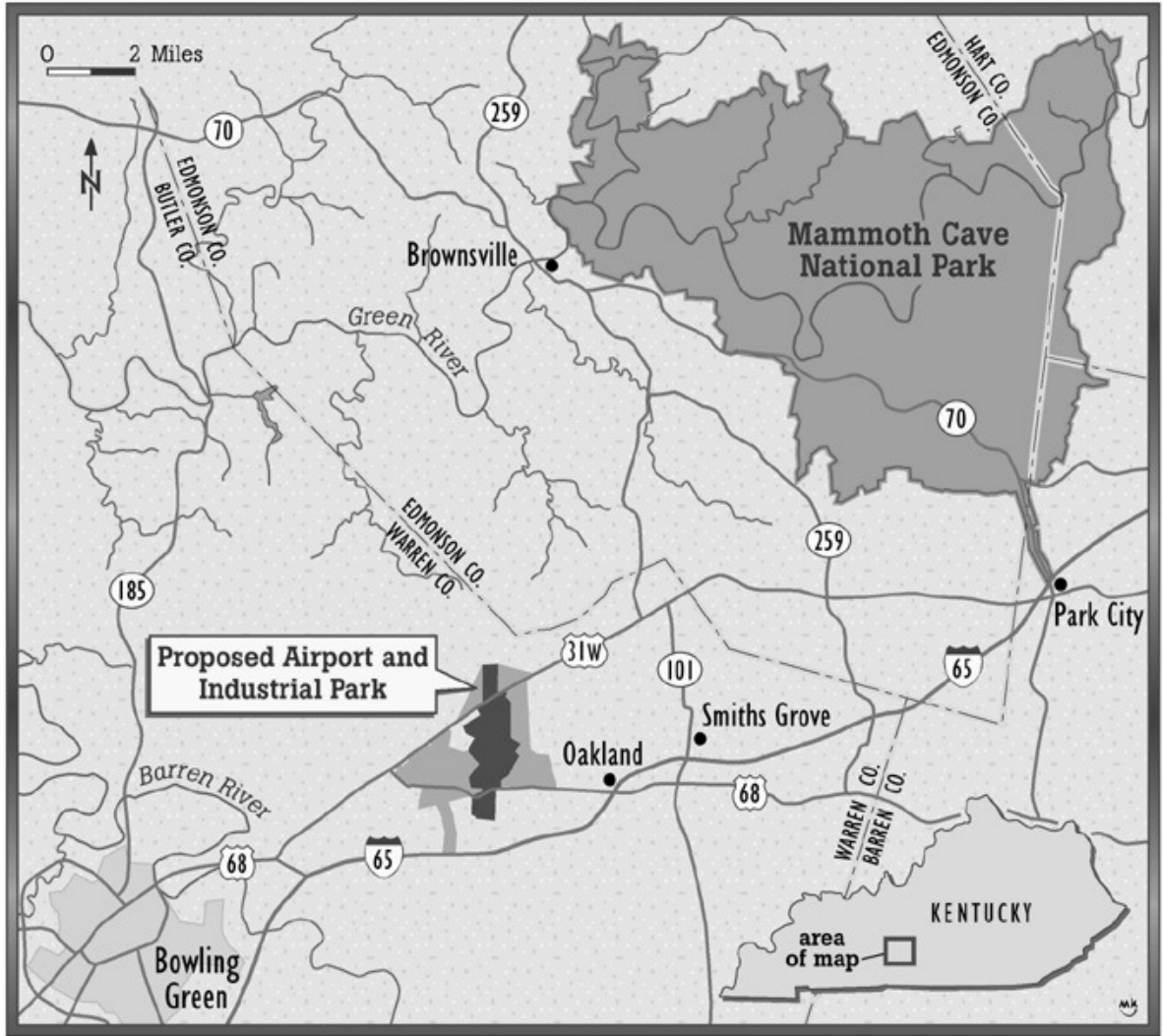


Figure 1. The Kentucky Trimodal Transpark

Map © 2001, National Parks Conservation Association.
Used by permission.

With annual general operating revenues of \$12-\$13 million, Warren County recognized from inception that this project was beyond its means. In 1999, it created the Inter-Modal Transportation Authority, Inc. (“ITA”), to serve as agent for Warren County in the planning, design, and development of the Transpark, including raising the funds needed for this project. The ITA realized that federal funding (including the sale of the existing federally supported airport) is the only realistic source for the millions of dollars necessary to build the Transpark. In fact, but for federal funding and approvals, the Transpark simply would not exist. That federal money was necessary for this project was recognized as early as 1998, when the Kentucky General Assembly appropriated \$6 million to Warren County for the Transpark as “seed money,” noting that “It is expected that the project will access FAA funds eventually.” Memorandum in Opposition to Motion to Dismiss, Ex. 7 [J.A. ____]. In January 2001, the ITA issued a *Business and Finance Plan* for the Transpark which provides that “ITA’s primary sources of revenue are expected to be incremental county and city revenues from a proposed development area, land sales, land rentals along with state and federal grants to help fund the development and operations of the KTT.” Motion for Preliminary Injunction, Ex. 12 [J.A. ____]. Specifically, the *Plan* states that “The Organization plans to finance this project by obtaining bond anticipation notes of approximately \$43,500,000, approximately \$18,350,000 in state and federal grants and approximately \$17,390,000 net proceeds from the sale of the existing Bowling Green-Warren County Regional Airport.” As noted, Appellants’ Complaint alleges that FAA has funded the existing airport in the amount of \$2.8 million dollars and must approve the sale and reinvestment of those federal funds at the Transpark. FAA’s approval of the

alternative use of federal funds already invested in this community has been central to the viability of the Transpark from inception. (*Id.*).

Since 2001, ITA has sold \$25 million in tax-exempt bonds for the Transpark. Motion for P.I., Ex. 13 [J.A. ____]. The Official Statement for the last issue of the series (2005) cites the ITA's *Business and Finance Plan* for documentation of the project's economic feasibility and the expectation that debt service payments will be met by, among other revenues, governmental grants. *Id.* at p. 8.

Since its inception in 1998, the Transpark has attracted only one business tenant, Bowling Green Metalforming, LLC, a company which makes the frames for sports utility vehicles. ITA conducted the site preparation work for the 132-acre facility, including the demolition in spring 2005 of five farm houses and related outbuildings (barns, silos, dairy equipment) [J.A. ____]. Construction of the industrial plant began in early summer 2004 and was completed in fall 2005.

As discussed herein, TVA funded \$500,000 worth of capital equipment for Bowling Green Metalforming. TVA exempted the industrial plant from review under NEPA without public notice, and did not conduct a Section 106 review and consultation process under the NHPA.

The Transpark now includes two technical training centers, one completed for adult workers and another, under construction, for high school students. The City of Bowling Green applied for HUD funding (\$1.75 million from a Congressional earmark specifically for the Transpark) for equipment for the adult technical training center. After Citizens filed their complaint in District Court, the City of Bowling Green applied for, and HUD approved, a NEPA categorical exclusion for "the Transpark Training

Facility.” Memorandum in Opposition to Motion to Dismiss, Ex. 19 [J.A. ____]. HUD claims the funding has not yet been provided.

The Warren County Water District (“Water District”), on behalf of the ITA, has requested a water and sewer grant from the EPA (\$2 million from a Congressional earmark for ITA and the Transpark) for infrastructure construction at the Transpark. *Id.*, Ex.17 [J.A. ____]. The Water District was advised by the EPA sometime in late 2005/early 2006 that a NEPA categorical exclusion for the funding was denied and that a complete environmental assessment of the Transpark should be conducted, likely to take 2-4 years . *Id.*, Ex. 17 at p. 5 [J.A.____]. EPA claims the funding has not yet been provided.¹

The Federal Highway Administration (“FHWA”) and Kentucky Transportation Cabinet began an EIS process in 2003 for federal funding (\$1.7 million from a Congressional earmark) of a new Transpark internal access road but the ITA and Warren County then declined the money and allege that the now-completed road was built with state funds. Brief in Support of Motion for PI, p.9 and Exs. 18,19 [J.A. ____]. A Congressional earmark of \$2 million was used to widen a portion of existing U.S. 68/80 which bisects the Transpark site to provide access to the Bowling Green Metalforming plant, with no NEPA or NHPA process conducted. *Id.* at pp.9-10, Ex.20 [J.A. ____].

With a \$5.25 million Congressional earmark for the Transpark, the FHWA is currently preparing an EIS for a new interchange on I-65 to provide direct access to the

¹ However, the July 2006 Revised Bowling Green-Warren County Regional Wastewater Facilities Plan identifies the Transpark’s wastewater infrastructure (sewer main) as federally “funded” (p.9-4). This newly discovered information was secured through an Open Records Act request to the state.

site, though the FHWA's current project definition does not include the portion of the Transpark that is now under construction. *Id.* at p.10, Exs.20, 21 [J.A. ____].

The FAA funded ITA to conduct a risk analysis study in 2001 and a cost-benefit analysis in 2004 to examine the feasibility of closing the existing general aviation services airport and replacing it with a new regional commercial service airport at the Transpark. *Id.* at p.11 [J.A. ____]. FAA will also have to approve the closure and sale of the existing federally funded Bowling Green-Warren County airport.

II. Controversial Siting of the Transpark

The Transpark is located in rural north Warren County, Kentucky. In 2001, after a "scoping" process which included substantial federal agency involvement, the ITA issued an "environmental assessment" for various runway alignments for the proposed airport. That document served as the focal point for the brewing controversy over the site selection, and received substantial criticism and questions from the National Park Service, U.S. Fish and Wildlife Service, EPA, national, regional and state environmental and historic preservation groups as well as citizens. The ITA ultimately shelved the assessment.

The siting of the Transpark has engendered substantial controversy, primarily because of its location on a vast karst and sinkhole plain within miles of Mammoth Cave National Park. Karst is a type of topography that is formed on limestone, gypsum, and other rocks, primarily by dissolution, and that is characterized by sinkholes, caves, underground streams, rivers, and groundwater. Sinkholes on site are acres in size, not square feet or yards. There are no streams, creeks or rivers at the Transpark site. All drainage and run-off from the 4,000-acre site enter sinkholes and other karst features and

discharge to an underground system of streams and rivers, some of which are navigable in fact. In the normal course of weather, these underground waters discharge to Graham Springs, a collection of springs emerging as surface waters off the Transpark site, which flow into the Barren River located 3.5 miles from the Transpark.

Scientific controversy over the Transpark location was expressed by 19 karst experts from across the United States in a July 26, 2001 letter to ITA responding to its initial “environmental assessment.” Memorandum in Opposition to Motion to Dismiss, Kuehn Declaration [J.A. ____]. The specific concern of these scientists is the need to study whether underground flow mechanisms exist in the Graham Springs karst groundwater basin below the 4,000-acre Transpark site, such as flow reversal and spillover, especially during high rainfall events. This unresolved issue is significant because such flow mechanisms could result in the Transpark contaminating the Mammoth Cave groundwater basin and associated Green River surface water system.

Mammoth Cave National Park, the world’s largest known cave system, is the heart of the south-central Kentucky karst, an integrated set of subterranean drainage basins covering more than 400 square miles. On the surface (including the Green River) is a biologically diverse set of ecosystems inextricably linked with the ecosystems underground. This physiographic province, with Mammoth Cave National Park at its core, was declared by the United Nations as an International Biosphere Reserve and World Heritage Site in 1990. The Park is home to more than 70 federally threatened or endangered or state listed species.

Groundwater flow in this area has been reported as high as *1,300 feet per hour*. At that velocity, if the karst scientists’ claims about flow reversal and spillover are

correct, contaminants from construction and operation of the Transpark could impact Park resources in a matter of hours or days. The National Park Service's official position remains that "...the possibility for a spillover or flow reversal [does exist]" and that "...the [ITA's] existing data does not adequately answer the fundamental questions...". Memorandum in Opposition to Motion to Dismiss, May Declaration, p.8 [J.A. ____].

The multi thousand-acre site remains primarily rural in nature and use. The majority of it is "prime farmland" under the federal Farmland Policy Protection Act. Unincorporated Reconstruction-era African-American settlements exist in and adjacent to the site. The City of Oakland, a rural historic district listed on the National Register of Historic Places, is on the eastern border of the Transpark.

The National Park Service and U.S. Fish and Wildlife Service have documented their concerns that the Transpark may harm federally designated threatened and endangered species. Memorandum in Opposition to Motion to Dismiss, Ex. 14. [J.A. ____].

In a 2001 written response to the "environmental assessment," the Smithsonian Institution warned ITA of the likelihood of significant prehistoric sites within the Transpark, including "ancient human societies" found in the "often elusive karst and cave cultural deposits in the region." The Smithsonian urged the ITA to assemble a well-qualified research team to identify these resources before construction. This warning went unheeded. On December 27, 2004, ITA's contractor for a stormwater retention basin next to the adult technical training center punched into a 2,000-ft. long cave

containing the skeletal remains of two prehistoric Native Americans - dated as early as 3,000-1,000 B.C.- and petroglyphs. Motion for P.I., Ex.4,5 [J.A. ____].

On August 27, 2000, the U.S. Army Corps of Engineers warned ITA of the likelihood of jurisdictional wetlands on the multi-thousand acre site. Motion for P.I., Ex. 10 [J.A. ____] ITA’s consultants subsequently identified at least 79 wetland areas in sinkholes, Memorandum in Opposition to Motion to Dismiss, Ex. 13 [J.A.____], a fact that EPA noted in an October 24, 2000 letter to ITA. *Id.* However, Citizens have not been able to find any federal permits issued for Transpark activities under the Clean Water Act.

SUMMARY OF ARGUMENT

Citizens pled and offered sufficient evidence to establish subject matter jurisdiction for the District Court to hear their challenge that the Kentucky Trimodal Transpark is a “major federal action” because it was “federalized” from inception. The District Court’s dismissal of the cause of action was erroneous because it failed to address Citizens’ complaint and evidence that collective federal funding, planning, approvals and licenses required for the Transpark project from the outset of the proposal meet the legal tests of “substantiality” of federal involvement established by this Court in *Macht v. Skinner* and other cases cited *infra* that render projects “major federal actions” for purposes of NEPA and NHPA. The proposed Transpark is an \$80 million project undertaken by a Kentucky county with an annual general operating revenues of \$12-13 million, that requires new interstate highway infrastructure, the sale of the existing local federally funded airport, at a 4000-acre rural site featuring federally protected

environmental, historic and archaeological resources, proximate to Mammoth Cave National Park.

Instead, the District Court individually analyzed each defendant federal agency's actions in isolation and concluded that the cause of action was not ripe against EPA and HUD (because there had not been no "final agency action" in the form of actual transmission of funds) and was moot as to TVA (because construction of the first industrial tenant's facility, partially funded by TVA, has been completed).

Citizens also pled and offered sufficient evidence that their cause of action against TVA for funding a Transpark tenant without complying with NEPA and NHPA was justiciable because operation of the industrial tenant - a plant which stamps and coats metal frames for sports utility vehicles – presents risks of environmental contamination and harm to archaeological resources, particularly from spills of hazardous chemicals. The District Court also failed to address this element of Citizens' Complaint. This Court does not appear to have ruled upon issues of justiciability and mootness under NEPA and NHPA in the context of operation and use of federally assisted and approved projects. Other federal appellate circuits, cited *infra*, have uniformly recognized a cause of action in such cases where relief can be granted in the form of environmental and historic property reviews and/or mitigation to minimize or avoid such harms from ongoing operations and use of the facility.

Citizens respectfully request that this Court reverse and remand this cause of action to the District Court for further action in accordance with this Court's opinion.

ARGUMENT

I. CITIZENS' COMPLAINT CLEARLY PLED THAT THE TRANSPARK WAS FEDERALIZED FROM INCEPTION AND THAT, "BUT FOR" SUBSTANTIAL FEDERAL FUNDING, PERMITTING AND APPROVALS,, THERE WOULD BE NO TRANSPARK; THE DISTRICT COURT OVERLOOKED THIS CLAIM, MAKING FRCP 12 DISMISSAL CLEAR ERROR.

A. Standard of review.

This Court's standard of review of the District Court's dismissal of Citizens' Complaint is *de novo*. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Caribbean B.C. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085 (D.C. Cir. 1998). When ruling on a motion to dismiss, a court is to accept factual allegations as true and construe the facts in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, at 236. Whether the motion is based on FRCP Rule 12(b)(1) or Rule 12(b)(6), the District Court may dismiss a complaint for lack of subject matter jurisdiction only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief (emphasis added)." *El-Hadad v. United States*, 377 F.Supp.2d 42, 45 (D.D.C. 2005).

B. This Court has long recognized that private or local government projects can be "major federal actions" requiring compliance with NEPA and the NHPA.

Citizens sued EPA, HUD and TVA claiming that the Transpark is a "major federal action" requiring compliance with NEPA and the NHPA because the project was federalized from inception. The District Court's memorandum opinion dismissing Citizens' claims fails to consider this cause of action, the specific probative facts, and this Court's previous holdings that projects similar to the Transpark may be considered major federal actions when they entail substantial federal involvement.

In *Macht v. Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990), this Court recognized that “federal involvement in a nonfederal project may be sufficient to ‘federalize’ the project for purposes of NEPA.” Noting that the cases fall into two categories, this court described the second category of cases as those in which:

“The issue...is whether state or private action on an entire project should be enjoined until the federal agencies that must approve particular portions of the project have complied with NEPA. The question in these cases is whether the federal participation in the project is *so substantial* that the state should not be allowed to go forward until all the federal approvals have been granted (emphasis added).”

Further explanation of the legal test which may give rise to a finding of substantial federal involvement in projects is provided by Judge Huvelle in *Citizens Alert Regarding the Environment v. United States Environmental Protection Agency*, 259 F. Supp. 2d 9, 20 (D.D.C. 2003) (*CARE II*) in which the court observed that “...a project may be deemed a major federal action even where federal money has not actually been provided. This happens most often in circumstances where federal entities have sufficient authority over the local project so as to control or influence its outcome.”

Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039, 1042 (4th Cir. 1986), cited by this Court in *Macht*, recognized that a “non-federal project is considered a ‘federal action’ if it cannot ‘begin or continue without prior approval of a federal agency’.” A key factor in this analysis is whether the federal agency has the authority to influence or control the non-federal activity. *Id.*

This Court has also cited cases which establish that federal involvement may be so suffused throughout the project that, in essence, an informal or formal partnership or joint venture is established. *Biderman v. Morton*, 497 F.2d 1141, 1147 (2nd Cir. 1974)

and *Sierra Club v. Hodel*, 544 F.2d 1036 (9th Cir. 1976), cited in *Macht* at 20 and 19, respectively. This test is based on the notion that the private and/or public developer has consented to federal jurisdiction. *See also, Individual Members of San Antonio Conservancy Society v. Texas Highway Dept.*, 446 F.2d 1013, 1028 (5th Cir. 1971) (“the State, by entering into this [highway] venture, voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law.”).

These cases are also consistent with the NEPA-implementing regulations promulgated by the Council on Environmental Quality (“CEQ”) which specifically state that a “major federal action” includes actions with effects that may be major and actions which are *potentially* subject to federal control and responsibility, 40 CFR Sec.1508.18, recognizing that NEPA is fundamentally a planning statute. Similarly, under the Section 106 regulations promulgated by the Advisory Council on Historic Preservation to implement the NHPA, an “undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including...those carried out with Federal financial assistance, and those requiring a Federal permit, license or approval.” 36 C.F.R. Sec. 800.16(y).

C. Citizens pled sufficient facts under the *Macht* test to establish subject matter jurisdiction for this NEPA and NHPA challenge to the Transpark.

Determining whether a project initiated by a non-federal entity has been federalized since inception involves very case-specific factual analyses of these legal tests. *Macht v. Skinner*, 916 F.2d at 18-20, citing, *inter alia, Dalsis v. Hills*, 424 F. Supp. 784, 787 (W.D.N.Y. 1976) (“a factual analysis must be undertaken to determine if a sufficient interrelationship exists” between the developer and the federal agency).

Citizens pled in the lower court that “but for” substantial federal participation - in the collective form of funding, approvals, and involvement - the Transpark could not have been initiated or exist (Complaint, Count I, para. 43; Count II, para. 48; Count III, para. 50).

The facts submitted by Citizens to the District Court at the pleading stage demonstrate the Transpark was fundamentally predicated on federal involvement from its inception, first, because air transport and U.S. interstate highway infrastructure, essential elements of this logistics project, are *federal investments* that cannot occur without substantial federal involvement and federal assistance. Citizens complained that rural Warren County, the City of Bowling Green, and the ITA could not possibly undertake a multi-modal project at a cost of \$80 million and involving the sale of an existing U.S. airport without a partnership with federal agencies. Citizens complained that the Intervening Defendants recognized this necessary partnership, their business plan recognizes this requirement, and they have sold \$25 million worth of bonds on the representation that federal grants and approvals that are essential to the project would be obtained. The Kentucky General Assembly recognized this requirement in its 1998 seed funding for the ITA.

These are the types of federal actions and involvement upon which the *Gilchrist* court predicated its decision that a non-federal project is considered a federal action if the project cannot “begin or continue without prior approval of a federal agency.” *Gilchrist* at 1042. A key factor in this analysis is whether the federal agency has the ability to influence or control the non-federal activity. *Id.* With respect to the modal aspect of the Transpark, FWHA and FAA funding and approval decisions would

inevitably be influenced by the commencement of construction of the Transpark. In the FHWA's case at least, it has been influenced already since this federal agency proposes, but has not yet constructed, a new interchange at I-65 to directly serve the Transpark. The Transpark owners and developers have presented the site as a *fait accompli* to the federal agencies to influence their decision making, outside the bounds of NEPA and the NHPA.

The facts submitted by Citizens in District Court at the pleading stage further demonstrate the Transpark was fundamentally predicated on substantial federal participation from its inception due to ***federal approvals and involvement*** because of the existence of ***federally protected*** historic and environmental resources at and proximate to the Transpark site, facts known to Warren County, the City of Bowling Green, and ITA from the start. During 1999-2000, the ITA's own technical work on the selected 4,000-acre north Warren County site revealed the existence of historic properties eligible for listing in the National Register of Historic Places; unincorporated African-American settlements, raising environmental justice concerns; prime farmland under the federal Farmland Policy Protection Act; Clean Water Act jurisdictional wetlands in at least 79 different sinkholes on the site; and the potential for federally protected endangered species.

Additionally, the site's proximity to Mammoth Cave National Park, and the scientific controversy over the potential for Transpark activities to contaminate the natural resources of this internationally and nationally recognized public park, has been recognized by the Transpark proponents since the project's inception. See Complaint, paragraph 3 and Amended Complaint, paragraph 3, describing the interest of Appellant,

KarstEEP. [JA _____ and JA _____]. See Exhibit 4, filed with Motion for Preliminary Injunction, where park officials were quoted that they continue to be “concerned about the indirect and cumulative effects of the Transpark development and its operations” on the national park, according to spokeswoman Vickey Carson.

The facts that were the basis for Citizens’ Complaint, and Amended Complaint closely parallel the facts in *Gilchrist*. Both cases involved a prior investment of federal funds in a local government project- in *Gilchrist*, the Secretary of Interior had invested federal funds in a local park, and here the FAA has invested \$2.8 million in the existing Bowling Green airport. In both cases, the proposed “local” action will impact the prior federal investment, and require federal approval – in *Gilchrist*, a road to be locally financed was planned to go through the park, and here, the ITA business plan includes the sale of the existing airport. In both cases, allowing the local government portion of the project to proceed prior to NEPA and NHPA compliance would improperly foreclose the options and alternatives that would be available for the federal agency consideration. This was the holding of the *Gilchrist* court, and this court should reach the same conclusion. Finally, it is noteworthy that the Secretary of the Interior was not a party in *Gilchrist*, yet when considering a claim that a project was federalized from inception, that court took an comprehensive look at all aspects of federal government involvement. Citizens complaint that the Transpark was federalized from inception required the district court to take the same comprehensive review of federal government involvement that the *Gilchrist* court took.

The facts in the *Macht* case are distinguishable from the instant case and that of the *Gilchrist* case. In *Macht*, the district court and this Court found that the Army Corps

of Engineers had permitting discretion over only “a negligible portion of the entire project”and no other federal activity is required for the Project’s construction.” *Macht* at 19. This Court concluded that “This case is distinguishable from *Gilchrist* where several federal agencies had discretion over substantial portions of the project.” *Id.*

In the instant case, federal highway and airport funding and approvals are essential elements of the viability of the Transpark, as is the provision of funding by EPA, HUD, TVA, and the federal approvals and involvement of the EPA, Army Corps of Engineers, National Park Service, U.S. Fish and Wildlife Service, and U.S. Department of Agriculture. What is more, many of these agencies themselves have acknowledged the need to comply with NEPA and the NHPA for the entire Transpark. The EPA told the Warren County Water District that a comprehensive environmental analysis was required for the entire Transpark. Memorandum in Opposition to Motion to Dismiss, Ex. 17, p.5 [J.A. ____], while the Kentucky Transportation Cabinet wrote a citizen that the FHWA and FAA would get together to designate a lead agency for the Transpark. *Id.*, Ex. 18, p. 6 [J.A. ____].

The opinion in *Macht*, with its reference to *Gilchrist*, requires this Court of Appeals to reverse and remand where the District Court dismissed on the pleadings but failed to consider the nature of the pleading.

In *CARE II*, the citizen’s group sought summary judgment to enjoin construction of a sewer line being built with local government funds, based upon the expectation that federal funds would be awarded to reimburse these private loans **without** NEPA compliance. The Court agreed that EPA’s actually funding of \$1.7 million that Congress

appropriated for the sewer line would be a “major federal action,” triggering NEPA review. However, where that funding had not yet been provided, the District Court had to determine if the degree of federal involvement had been sufficient to convert the entire project into a major federal action that could not go forward until a NEPA analysis was completed.

The court noted the evidence that the EPA grant was not definite, that EPA was *reviewing* the Township’s application, and that since there was no “guarantee” that EPA would participate in this sewer line project, the Township’s request and expectation of funds would not, by itself, create the “financial partnership” or “joint venture” discussed in *Macht, supra*. The court continued, “That said, however, a project may be deemed major federal action even where federal money has not actually been involved. This happens most often in circumstances where federal entities have sufficient authority over the local project so as to control or influence its outcome.” *CARE II at 20*, citing *Southwest Williamson County Cmty Ass’n, Inc. v. Slater*, 243 F.3d 278 at 279-281. The court noted that this was often the case when federal approvals, such as permits, were required, but that cases involving only federal money may not fall into this category, where the non-federal actor retained the option of seeking funding from other sources. At Footnote 10, the *CARE II* court noted that when the amount of federal money “is sufficiently massive” or where the “non-federal entity has few viable alternative sources of funding [such facts] may be sufficient to convert such projects into major federal actions. *This, however, is not the case here* [emphasis added].”

Citizens here emphasize the above portion of the *CARE II* court’s finding to call attention to the determination that the court was able to make based upon a fully

developed record on the pending cross motions for summary judgment.² Citizens here were denied that opportunity by the District Court below.

In *CARE II*, the District Court then found that the Township was willing and able to go forward with the sewer line without EPA funding, that the share the Township hoped to receive from EPA was “a relatively modest portion of the total project cost,” and that Township’s construction would not limit EPA options to deny the funds or to impose conditions on the grant regarding environmental impacts. The *Gilchrist* decision was distinguished in the opinion as follows, “The decision of the Secretary of the Interior to approve the project...would inevitably be influenced if the County were allowed to construct major segments of the highway before issuance of a final EIS. It is precisely this sort of influence on federal decision-making that NEPA is designed to prevent.” *Gilchrist* at 1042.

At a minimum, the federal Defendants and the Intervening Defendants in this case must provide some probative evidence that the local entities have alternative funds available to finance the millions of dollars required for the transportation elements of this project and that federal permits, approvals and involvement are not required. Mere assertions, without some probative evidence entitles Citizens to prevail on a FRCP Rule 12 motion.

Compare this case to *Macht* (district court denied summary judgment to appellants and granted summary judgment to appellees), *CARE II*, (J. Huvelle denied

² On March 15, 2003, the *CARE II* District Court granted summary judgment to the defendants. This court affirmed in *CARE III*, 102 Fed.Appx. 167 (D.C. Cir. 2004). EPA completed an EA in August 2004 and disbursed the money in fall 2004. The *CARE IV* District Court ruled that the citizen group’s action to challenge the environmental document was moot because the funds had been disbursed. *CARE IV*, 355 F.Supp.2d 366 (D.D.C. 2005).

plaintiffs' motions for summary judgment and granted defendants' motions for summary judgment) and *Gilchrist* (district court granted defendants FRCP Rule 12(b)(6) motion to dismiss, the Court of Appeals first deciding not to treat the district court disposition as an award of summary judgment ["especially because the district court did not to purport to give notice to the parties that it would proceed under Rule 56"] and then reversing the district court as to the NEPA claim). Here, the District Court dismissed on the pleadings and in so doing failed to consider "as proved all the facts well pleaded" which included the cumulative facts well pleaded that a number of federal agencies have discretion over substantial portions of the Transpark project; failed to consider pleadings that there is a financial "partnership" from the inception of the Transpark project which has always involved the sale of the existing Bowling Green airport – which was funded with a substantial grant from the federal government (clearly parallel to the state park in *Gilchrist*); and where the District Court instead only looked at the involvement of each of the named Defendant federal agencies in isolation from the other agencies.

If NEPA and NHPA allowed the actions of each federal agency to be considered in isolation of all other federal agencies, and if this Court and other federal appellate courts had approved such a narrow focus to determine NEPA and NHPA compliance, *CARE II*, *CARE III*, and *CARE IV* cases might be precedent that would support the District Court dismissal of Citizens' claims below. If EPA is considered in isolation, it appears to parallel the facts in *CARE II* and *CARE III*. If TVA is considered in isolation, it appears to parallel the facts in *CARE IV*.

The complaint against HUD is different, because the proof before the District Court was that HUD exempted the City of Bowling Green's funding application for the

Transpark adult training technical center from further NEPA review, by granting a categorical exclusion. Citizens asked the District Court to find that this fact – if looked at in isolation of all other facts – constituted final agency action.

However, Citizens argue that the Transpark was federalized from inception because of the foreseeability and necessity of collective federal agency involvement. This Court should make clear that the *CARE* series of cases are not intended to invite agencies to make NEPA a “toothless” act that can be avoided just as the National Institute for Health sought to do in *Foundation on Economic Trends v. Heckler*, 756 F. 2d 143, 146 (D.C. Cir. 1985) and the Atomic Energy Commission sought to do in taking “an unnecessarily crabbed approach” in *Scientists’ Inst. For Pub v. Atomic Energy*, 481 F. 2d 1079, 1087 (D.C. Cir. 1973) . Citizens seek this Court’s affirmation of the cause of action recognized in *Macht* and *Gilchrist* which requires a very case-specific and fact-specific analysis by the initial reviewing court of Citizens’ pleadings and evidence that the cumulative substantial involvement of federal agencies in the Transpark federalized the project from its inception.

II. A JUSTICIABLE CASE IS PRESENTED BECAUSE OPERATION OF THE TRANSPARK’S FIRST INDUSTRIAL TENANT, FINANCIALLY ASSISTED BY TVA, POSES RISKS OF HARM FOR WHICH RELIEF CAN BE GRANTED.

A. Standard of review.

This Court’s standard of review of the District Court’s dismissal of Citizens’ Complaint against TVA on the grounds of mootness is *de novo*. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Caribbean B.C. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085 (D.C. Cir. 1998). As this Court recognized in *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980):

The doctrine of mootness concerns both the constitutional limitation of federal court jurisdiction to actual cases and controversies, and the exercise of a court's discretion in matters of remedy and judicial administration. *See Chamber of Commerce v. United States Department of Energy*, 627 F.2d 289 at 291-292 (D.C. Cir. 1980).

On a FRCP Rule 12 motion, a district court must “treat as proved all facts well pleaded.” *Gilchrist* at 1040, *supra*. Citizens “pleaded well” an actual case and controversy regarding TVA’s noncompliance with NEPA and NHPA, in which they have a continuing legally cognizable interest for resolution, and an effective remedy which the District Court failed to consider.

B. This Court has not addressed the justiciability of a NEPA/NHPA claim involving ongoing operation or use of a federally assisted action, though other jurisdictions have held such claims justiciable because relief can be granted.

Citizens sued TVA claiming that a NEPA categorical exclusion for its funding of the first industrial tenant in the Transpark was unlawful and that the agency failed to comply with Section 106 of the NHPA. Amended Complaint, Count II [J.A. ____]. Citizens also “pleaded well” that the Transpark, and its single industrial tenant, have injured and will continue to be injure their aesthetic, recreational, cultural, historic, and ecological interests. Amended Complaint, Paras. 3, 4, 5, 6, 7 [J.A. ____]. The District Court dismissed Citizens’ complaint against the TVA for violations of NEPA and NHPA on the grounds of mootness, stating that since TVA awarded federal funding to the Transpark’s industrial tenant, Bowling Green Metalforming, LLC, in September 2004 and the industrial plant has been constructed, no effective relief is available. Memorandum Opinion, pp.10-12 [J.A.____].

Citizens agree that federal funding was awarded and that the first phase of the industrial plant is constructed and operating. However, the District Court erred in failing to consider Citizens' pleading, which claimed that the *ongoing use and operation* of an industrial plant poses risks of environmental and other harms for which relief can be granted [J.A. ____]. A live controversy—a justiciable case—is presented.

TVA is an agency of the United States and, as such, is subject to the provisions of NEPA and NHPA. The agency's current procedures for complying with NEPA are published in "Procedures for Compliance with the National Environmental Policy Act," published at 47 *Federal Register* 54586-54593 (December 3, 1982) and finalized at 48 *Federal Register* 19264 (April 28, 1983). These procedures incorporate the CEQ NEPA regulations at 40 C.F.R. Part 1500 *et seq.* TVA is also subject to the rules of the Advisory Council on Historic Preservation implementing Section 106 of the NHPA and found at 36 C.F.R. Part 800.

Citizens have found no case law in this Circuit regarding the issue of mootness in the context of a challenge under NEPA and NHPA to the ongoing use and operation of a federally approved or assisted project. Other jurisdictions have consistently recognized the legal principle that a justiciable case is presented in a NEPA and/or NHPA challenge involving a constructed project or project element when: 1) relief can be granted in the form of additional federal agency review regarding alternatives to and/or impacts from the project; and/or 2) mitigation can be imposed to address impacts, despite completion of construction.

In *West v. Secretary of the Department of Transportation*, 206 F. 3d 920 (9th Cir. 2000), citizen West challenged the sufficiency of a NEPA categorical exclusion (as

Citizens do in the instant case regarding TVA's actions) issued by the FHWA and the Washington Department of Transportation for a two-stage interstate highway interchange. On West's appeal from the District Court's dismissal of his claim and denial of a preliminary injunction, the federal and state transportation departments argued that the case was moot because construction of the first stage of the interchange had been completed. The 9th Circuit rejected the mootness claim. In so holding, the court first recognized that if completion of an action challenged under these statutes is enough to render a case nonjusticiable, entities could merely ignore statutory requirements, build the project before a case gets to court, and then hide behind the mootness doctrine, an unacceptable outcome. *Id.* at 925.

Secondly, in reversing the District Court's dismissal of West's claims, the appellate court reasoned that the key question in assessing whether a justiciable case is presented focuses on whether there can be effective relief based on the plaintiff's claims *Id.* The court noted that if there was a finding that the federal and state departments of transportation had failed to comply with NEPA, remedial power could include, among other things, remanding for additional environmental review. *Id.* at 925. Finding that the use of a categorical exclusion was insufficient for the first stage of the interchange, the 9th Circuit then remanded to the district court to order the requisite review for the completed first stage of the interchange.

Citizens in Long Beach challenged the sufficiency of an EIS by the Department of Defense concerning closure and commercial reuse of the Long Beach Naval Station in *Cantrell v. City of Long Beach*, 241 F. 3d 674 (9th Cir. 2001). The District Court had twice dismissed the citizens' complaint for lack of standing (the first with leave to

amend). By the time citizens filed their action, the Navy had demolished historic buildings and bird habitat on the site. The 9th Circuit reversed the District Court, rejecting the City's and Navy's claim that the NEPA challenge was moot, on the grounds that mitigation was available, that "if required to undertake additional environmental review, the defendants could consider alternatives to the reuse plan, and develop ways to mitigate the damage to the birds' habitat..." *Id.* at 678-679.

In *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436 (5th Cir. 1991), a New Orleans preservation group challenged the Army Corps of Engineers ("Corps") approval of nationwide permits under the Clean Water Act for a private development project—the riverfront aquarium located in the French Quarter—and the failure of the Corps to comply with the NHPA. The Corps argued that the District Court had correctly concluded that the case was moot because the project had been constructed and was open to the public. The Fifth Circuit disagreed and reversed. The Court noted that a "broad range" of remedies could conceivably emerge from NHPA review and that it would be inappropriate for it or the district judge upon remand to pre-judge those results by concluding that no relief is possible. *Id.* at 1447.

With respect to the district court's fears about "penalizing" private developers who completed projects that were subject to a federal approval, the Fifth Circuit held that "...we see no justification for allowing the interests of the non-party, nonfederal developers to supplant the legitimate interests of Vieux Carre and the public at large in having the Corps comply with the historic review process." *Id.* at 1445.

Other cases in accord include *Tyler v Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000) (homeowners' NEPA and NHPA claims against HUD and city agencies presented

a justiciable case, even though federally funded low-income housing had been constructed, when mitigation can be fashioned through external design changes to the structures); *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 427-428, (10th Cir. 1996) (despite construction expanding runway, court could consider whether FAA's EA/FONSI was adequate in light of citizens' claims that documentation did not address environmental and safety impacts from the increased use of the runway); and *National Parks and Conservation Association v. FAA*, 998 F. 2d 1523, 1525, fn.3 (10th Cir. 1993) (appellate court reversed dismissal of citizens' challenge to sufficiency of FAA EA/FONSI and Bureau of Land Management approval of new airport finding the NEPA analysis deficient and a justiciable case was presented despite completion of construction where *use* restrictions could be placed on new airport).

C. The operation of a heavy metal processing plant poses ongoing risks of harm that TVA failed to consider when it exempted the project from NEPA and the NHPA.

A volunteer with KarstEEP filed a Freedom of Information Act ("FOIA") request with TVA on July 10, 2004 seeking all records relating to authorization of and/or financial assistance to Bowling Green Metalforming and NEPA and NHPA compliance. Despite repeated inquiries after FOIA's statutory response time of 20 working days had expired, TVA responded 6 months later, on Dec. 11, 2004. Motion for P.I., Ex. 16 [J.A. ___].

The FOIA response revealed that on April 12, 2004, Bowling Green Metalforming applied for a "TVA Valley Advantage" grant and contractual agreement for the cost of capital equipment for a "900,000 sq. ft. manufacturing facility on 132 acres

in the Kentucky Transpark in north Warren County, Kentucky.” The grant application stated that:

“The facility will produce vehicle frames for the Ford Explorer. Processes at the facility will include heavy stamping of component parts, assembly of the components and coating of the finished frames. We expect to employ a workforce of approximately 600+ individuals at full production.” Id. [J.A. ____].

The December 2004 FOIA response also revealed that, on July 16, 2004, TVA prepared a NEPA categorical exclusion for its award of funding to Bowling Green Metalforming. Motion for P.I., Ex. 17 [J.A.____]. Public notice of this categorical exclusion exemption under NEPA was not issued. In September 2004, the funding was provided. TVA Memorandum in Support of Motion to Dismiss, p.5 [J.A.____].

TVA was well aware of the entire Kentucky Trimodal Transpark proposal, having featured it in its economic development newsletter, “The Valley Connection” I Memorandum in Opposition to Motion to Dismiss, p.18 [J.A. ____] and by virtue of the involvement of the agency’s economic development division from the start of the proposal. Nevertheless, the agency’s July, 2004 NEPA categorical exclusion for the Bowling Green Metalforming Valley Advantage Agreement completely fails to analyze impacts from the first business tenant of the Transpark and the direct, indirect, and cumulative effects of the Transpark itself.

The NEPA exemption document consists of a checklist in which the TVA staff person perfunctorily checked that, among other considerations, the proposed action was not major in scope; involved a minor amount of land; was not part of a larger project proposal involving other federal agencies; was not opposed by another federal, state, or local agency; did not have environmental effects which are controversial; did not

potentially affect historic, cultural, or archaeological sites; did not potentially take prime farmland, did not potentially affect water flow or stream channels; did not potentially affect drinking water supplies or groundwater; did not affect potentially unique or important aquatic habitat; would not release air or water pollutants; would not involve the use of chemicals on the EPA Toxic Release Inventory list; and would not generate hazardous waste.

A Section 106 consultation and historic property and archaeology review process was not undertaken by TVA. The Kentucky State Historic Preservation Officer was not contacted by the agency about the potential for impacts to these resources, as required by the ACHP regulations. Memorandum in Opposition to Motion to Dismiss, Morgan Declaration [J.A. ____].

Citizens' claims against TVA are comparable to those of the New Orleans historic preservation association's in *Vieux Carre v. Brown, supra*, and those of citizen West's in *West v. Sec. of DOT, supra*. In *Vieux Carre*, the Corps failed to conduct a Section 106 consultation process in granting a federal permit for a privately developed riverfront complex, while in *West*, the FHWA issued a NEPA categorical exclusion that was found deficient by the 9th Circuit and remanded even though the first stage of the interstate interchange was open to traffic. As the *Vieux Carre* court noted, "the question is whether there can be *any* effective relief...as Vieux Carre has requested a declaration that the Corps must comply with the historic review process, the suit is moot *only* if the Corps presents evidence that compliance with the historic review process...could not minimize *any* of the adverse effects on (Vieux Carre) (emphases in original)." *Vieux Carre* at 1446.

Citizens pled and submitted probative evidence as part of that complaint that TVA failed to comply with NEPA and the NHPA. TVA exempted its action—funding the facility without a NEPA review—even though its own NEPA procedures prohibit a categorical exclusion if there is a substantial controversy over the environmental impacts associated with the proposed action or the proposed action could have a potentially significant impact on cultural or historic resources, important farmland, or other environmentally significant resources. TVA is also subject to the CEQ’s NEPA regulations which require, among other things, that an agency must analyze the direct, indirect, and cumulative impacts of an action on the environment when determining whether a federal action “significantly” affects the environment.” 40 C.F.R. Sec. 1508.27. The NHPA Section 106 regulations of the ACHP at 36 C.F.R. Part 800, applicable to TVA, requires that a federal agency assess indirect and cumulative effects in the consultation process with state and federal agencies and consulting parties to determine impacts to National Register-listed and eligible historic and archaeological properties from its undertaking.

Because of the NEPA exemption and failure to conduct a Section 106 process under NHPA, no indirect and cumulative impacts, including the Transpark, were analyzed by TVA, no scoping with other federal agencies was conducted, and no mitigation was imposed by TVA. Further, despite TVA’s NEPA policy “to encourage public participation in all of its decision making,” no public notice or opportunity to comment was provided.

Dr. Michael May, professor of geology at Western Kentucky University (“WKU”) and registered professional geologist in Kentucky, asserts that operation of the

heavy metal stamping and coating facility presents ongoing risks to the Graham Springs karst groundwater basin from the potential for spills, releases, and leaks of hazardous chemicals inside or outside the plant. Memorandum in Opposition to Motion to Dismiss, May Declaration, pp. 6-8 [J.A. ____]. Further, Dr. May, as well as Dr. Kenneth W. Kuehn, WKU professor of geology and registered professional geologist in Kentucky who has studied and professionally published on Kentucky karst since 1984, professionally conclude that the discharge of sediments from the excavation and filling of sinkholes during construction of the Bowling Green Metalforming plant impacted the Graham Springs karst groundwater basin and the Barren River. Id [J.A. ____]. The potential for spillover from sinkholes and flow reversal of the underground streams and rivers under the Bowling Green Metalforming site during heavy rainfall has still not been established and, therefore, the industrial facility's potential impact to the priceless natural resources of Mammoth Cave National Park has not been established.

As the courts noted in *Cantrell v. City of Long Beach*, and *Tyler v. Cuomo*, *supra*, a NEPA or NEPA challenge is justiciable if mitigation can be imposed to avoid, lessen, or minimize impacts from ongoing use or operation of a federally assisted project. In the instant case, a wide range of possible mitigation, as defined in 40 C.F.R. Sec. 1508.20 and 36 C.F.R. Sec. 800.1(a), could be imposed upon Bowling Green Metalforming or the Transpark owners and developers—the intervenors in this case. Possible mitigation includes, but is not limited to, groundwater monitoring, surface water monitoring at the Graham Springs discharge to the Barren River, investigation of sinkholes for archaeological deposits, air monitoring, and pollution prevention measures. The public and federal and state agencies can be involved in this process. TVA's NEPA

procedures provide that the agency will make the public aware of significant new information concerning action modifications, alternatives, or probable environmental effects and shall consider re-opening an EIS.. If the agency can do so for an EIS, there is no reason that it should not do so when it exempted from any review an action that presents ongoing risks to the environment and historic resources that are locally, nationally, and internationally significant.

TVA did not respond to or submit any facts or evidence disputing Citizens' claim and facts that the ongoing operation of Bowling Green Metalforming, which the agency funded in part, poses risks of environmental and other harms for which relief can be granted. TVA, therefore, has failed the *Vieux Carre* test for demonstrating mootness of federally assisted actions and the District Court erred in dismissing Citizens' complaint against TVA. This Court noted early in the life of NEPA that it faced the challenge of ensuring that the statute's "important legislative purposes, heralded in the halls of Congress, [were] not lost or misdirected in the vast hallways of the federal bureaucracy." *Calvert Cliffs' Coordinating Committee v. USAEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

Citizens respectfully request that this Court reverse the District Court and remand to ensure that NEPA and NHPA are not lost in the halls of the federal power agency's bureaucracy in the hills of Tennessee.

CONCLUSION

Citizens respectfully request that the Court reverse and remand the action to the U.S. District Court for the District of Columbia for further action in accordance with the Court's opinion.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 28(d)(1), I hereby certify that the foregoing brief contains 11,128 words as computed in accordance with the Rule by **Microsoft Word 2002 (Microsoft Windows XP)**

W. Henry Graddy, IV

CERTIFICATE OF SERVICE
D.C. Cir. No. 06-5059

I hereby certify that on July 24, 2006, I will cause to be served on each of the following counsel two true and accurate copies of the Opening Brief of Appellants by first class mail, postage prepaid:

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