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ARIZONA SOUTH MOUNTAIN FREEWAY SURVIVES CHALLENGES BASED ON NEPA AND SECTION 4(f)

Submitted by

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In a case addressing a wide range of NEPA and Section 4(f) issues, the U.S. District Court for the District of Arizona rejected challenges to the Federal Highway Administration's (FHWA) approval of the 22-mile South Mountain Freeway in Phoenix, Arizona. *Protecting Arizona's Resources & Children v. Federal Highway Administration*, No. CV-15-00893 (D. Ariz. Aug. 19, 2016). The decision has implications for other transportation projects because it affirms that transportation agencies may (1) define a project's purpose and need and the range of alternatives based on the objectives described in an approved regional transportation plan, and (2) in certain circumstances, rely on the socioeconomic projections created by the metropolitan planning organization to form the basis of both the Action and No-Action Alternatives.

FHWA approved the project in 2015 after a 14-year environmental process and after several decades of public discussion regarding solutions to mobility challenges in metropolitan Phoenix.

In May of 2015, two sets of plaintiffs filed lawsuits challenging FHWA's approval of the project under NEPA and section 4(f) of the Department of Transportation Act. In the summer of 2015, the District Court denied a motion for preliminary injunction filed by several community and environmental organizations.

In August 2016, the District Court granted the motions for summary judgment submitted by FHWA and the Arizona Department of Transportation (ADOT), and denied the plaintiffs' motions for summary judgment. The Court first addressed several NEPA issues, beginning with whether a project's purpose and need can be defined or informed by Regional Transportation Plans and statutory objectives. In concluding that reliance on a Regional Transportation Plan to inform the objectives of a project is permissible under NEPA, the Court relied upon the Ninth Circuit's decision in *Honolulutraffic.com v. Federal Transit Administration*, 742 F.3d 1222 (9th Cir. 2014) as well as the Department of Transportation's "linkage" rule, which requires federally funded projects to be derived from the Regional Transportation Plan. The Court further held, relying on both *Honolulutraffic.com* and *Laguna Greenbelt, Inc. v. Department of Transportation*, 42 F.3d 517 (9th Cir. 1994), that a federal agency is not required to discuss or consider alternatives that have been eliminated in prior state studies. In so holding, the Court confirmed that ADOT and FHWA's multi-tiered screening process, which considered both freeway and non-freeway modes of transportation, complied with NEPA and that the resultant determination that one build alternative in the Eastern Section was appropriate likewise complied with NEPA.

Importantly, the Court addressed the use of socioeconomic studies conducted by Metropolitan Planning Organizations (MPOs) and their use in NEPA analysis for freeway projects. While the Plaintiffs argued that utilizing MPO-generated socioeconomic projections as the basis for both the No Action and Action alternatives tainted the No Action Alternative analysis, the Court found that, due to the circumstances of this case and the highly developed character of the Phoenix Metropolitan Area, use of the same underlying MPO-generated socioeconomic projections for both the No Action and Action alternatives was reasonable. Finding that the facts here are similar to the facts in *Laguna Greenbelt, Inc*., the Court noted that an agency's use of the same underlying socioeconomic projections for both the Action and No Action alternatives is reasonable where the area is highly developed and where growth is constrained both in the presence and absence of the proposed project. The Phoenix Metropolitan Area is highly developed and one of the fastest growing metropolitan areas in the United States, with a significant portion of the existing land already developed or dedicated to future development and more intensive land uses, regardless of whether the South Mountain Freeway is built.

The Court additionally addressed whether NEPA requires transportation projects to use greater than a 15% level of design, whether it is appropriate to analyze a project's

impact on a Study Area wide basis, and whether a project's compliance with the Clean Air Act's National Ambient Air Quality Standards (NAAQS) also demonstrates compliance with NEPA.

With regard to a project's use of 15% level of design, the Court found that use of a 15% level of design complies with NEPA because NEPA only mandates that the level of design be sufficient to allow the agency to provide a full discussion of the project's impacts and likely mitigation measures. The Court noted that transportation projects are expressly constrained to preliminary design until after completion of the NEPA process.

Upholding FHWA and ADOT's decision to address impacts on a Study Area wide basis, the Court found that the Gila River Indian Community (GRIC) plaintiffs had the burden to show "how and why the analysis of . . . impacts should have differentiated between GRIC members and the population in general" and that GRIC had not done so. In part, the Court's determination that addressing project impacts on a Study Area-wide basis was permissible in this case resulted because the concerns noted by GRIC were included and addressed in the EIS and GRIC was involved in and consulted with during the project development process nearly from its inception.

The Court also held that a project's demonstration that it complies with NAAQS is per se demonstration that the project complies with NEPA. Because NAAQS inherently consider and protect sensitive populations, such as children, the Court reasoned that compliance with NAAQS per se demonstrates that a project will not disproportionately impact sensitive populations.

Plaintiffs also argued that, with respect to the South Mountain Park/Preserve, FHWA and ADOT violated Section 4(f) of the Department of Transportation Act by improperly rejecting feasible and prudent alternatives that avoided impacts to the South Mountain Park/Preserve because, Plaintiffs claimed, the alternatives failed to meet the project's purpose and need. The Court disagreed. Noting that FHWA and ADOT conducted an extensive alternatives screening process, and that each of the allegedly "feasible and prudent" alternatives rejected failed to meet the system deficiencies, socioeconomic needs, or impermissibly required use of GRIC land, the Court concluded that there were no feasible and prudent alternatives that would avoid impacting the South Mountain Park/Preserve.

The Plaintiffs also raised a variety of arguments regarding the sufficiency of mitigation measures for the South Mountain Freeway and the sufficiency of responses to comments prepared by FHWA and ADOT. As it did with the NEPA and Section 4(f) issues above, the Court upheld FHWA and ADOT's mitigation measures as sufficient under NEPA and the responses to comments as sufficient under NEPA.

SOUTHERN CALIFORNIA TRANSIT PROJECT REMANDED FOR SEIS BUT PROJECT ALLOWED TO PROCEED

Submitted by Judith Carlson

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In this final decision, the U.S District Court for the Central District of California resolves three motions for summary judgment and provides a final ruling as to remedies concerning a challenge to environmental documents for Phase two of the Westside Subway Extension Project in Beverly Hills, California.

On February 1, 2016, the Court issued a tentative ruling granting in part and denying in part three motions for summary judgment filed by Plaintiff Beverly Hills Unified School District (BHUSD), Plaintiff City of Beverly Hills (City), and Defendant Federal Transit Administration (FTA).[1] The Court ruled as follows on February 1:

> "[1] [T]he FTA failed its disclosure/discussion obligations under 40 C.F.R. §§ 1502.9(b) and 1502.22 (and under *San Luis Obispo Mothers for Peace*) in connection with BHUSD's comments concerning the effects of tunneling through gassy ground and the risk of explosions; [2] that it failed its disclosure obligations regarding incomplete information concerning seismic issues; and [3] that it should have issued both a SDEIS [supplemental draft environmental impact statement] and a SFEIS [supplemental final environmental impact statement]. The Court also concludes [4] that the FTA failed to properly assess 'use' of the High School under Section 4(f) due to the planned tunneling. In all other respects, the Court rules in favor of the FTA." (*Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. CV 12-9861-GW(SSX), 2016 WL 4445770, at *1 (C.D. Cal. Aug. 12, 2016) (*Beverly Hills.*)

On February 4, 2016, at the hearing on the motions, the Court ordered further briefing concerning the nature of appropriate remedies should the Court adopt the tentative ruling as its final decision, as well as other issues. The supplemental briefing revealed that the Plaintiffs were seeking five remedies: 1) vacatur of the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD); 2) remand to the FTA to perform additional NEPA and Section 4(f) analysis; 3) a declaratory judgment that after completing this analysis the FTA must issue a new ROD before moving ahead with the project; 4) a declaratory judgment that the FTA must ensure that its local partner, the Los Angeles Metropolitan Transportation Authority (Metro), would not take any action that would pre-determine the course of construction for Phase 2; and 5) a narrow

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[1] The Slip Opinion also states that the date of the Tentative Ruling is February 2, 2016; however, a review of the docket indicates that this appears to be an error. The correct date is February 1, 2016.

injunction that would require updates be provided to plaintiffs regarding Metro's progress in moving ahead with Phase 2. Based on its review of the briefing provided, the Court concluded that FTA had conceded that remand to FTA would be required and that some form of declaratory relief would be appropriate. The Court further concluded that the FTA indicated its belief that the additional analysis required pursuant to the remand could be completed prior to the start date for construction of Phase 2. At this point in the proceedings, then, the remaining major issue was whether a vacatur of the FEIS and or the ROD for Phase 2 should be ordered.

On the issue of the propriety of vacatur, however, consideration of the applicable laws appeared to prevent a straightforward conclusion. While the Ninth Circuit had held that the normal remedy under the Administrative Procedures Act (APA) was to set aside, or vacate, an agency's action and remand the matter to the agency to comply with the applicable statutes, that Court had also held that "[w]hether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed'" (*Beverly Hills* at *2, internal citations omitted.) The District Court here therefore ordered the parties to provide a Joint Statement re Remedy in which they were to indicate their agreement and disagreement concerning the areas that would have to be covered in a Supplemental Environmental Impact Statement (SEIS). The parties thereafter provided the agreed-upon topics, described briefly as follows:

> 1) An analysis of the potential public health impacts of NOx emissions during construction of Constellation Station and tunneling for Subway Phase 2, with appropriate mitigation;
>
> 2) An analysis of the potential risks of soil gas migration from tunneling or other construction activities related to Subway Phase 2, with appropriate mitigation;
>
> 3) A discussion of the completeness of the available seismic risk information related to Subway Phase 2;
>
> 4) A discussion of post-DEIS seismic and ridership studies available to the FTA and related to Subway Phase 2; and
>
> 5) Identification of the direct and any constructive "use" of the Beverly Hills High School campus from Subway construction and operation on, beneath, or near the campus, along with an evaluation of "prudent and feasible alternatives" and "all possible planning" to minimize harm under Section 4(f). (*Beverly Hills* at *3, paraphrased.)

In addition, the parties indicated the following two areas of disagreement:

> "(1) 'Public Health Impacts for La Cienega Station (Phase 1). The City and District assert that the remand should include an analysis of the potential public health impacts of NOx emissions during construction of La Cienega Station and, depending on the results of that analysis, an assessment of the feasibility and efficacy of mitigation measures and alternatives to address such potential impacts. Federal Defendants assert that nothing in the Court's Tentative Ruling would require analysis of NOx emissions at La Cienega Station on remand.' " (*Beverly Hills* at *3.)

> "(2) 'Seismic Information. The City and District assert that the assessment of the completeness of the seismic information may warrant re-evaluation of the alignment of the Subway tunnels. Federal Defendants disagree.' " (*Beverly Hills* at *3.)

The FTA asserted that consideration of the topic of particulate matter was not required by the Tentative Ruling, but agreed to address it on remand, as stated below:

> "Particulate Matter. The City and District assert that the remand should include an analysis of the potential public health impacts of Subway construction dust and diesel particulate matter emissions (PM10 and PM2.5) and, depending on the results of that analysis, an assessment of the feasibility and efficacy of mitigation measures and alternatives to address such potential impacts. [¶] Federal Defendants assert that nothing in the Court's Tentative Ruling would require analysis of dust and diesel particulate matter emissions on remand. Nonetheless, the Federal Defendants state that the FTA would analyze the impacts of particulate matter emissions from Constellation Station construction in any supplemental NEPA analysis the FTA may complete on remand." (*Beverly Hills* at *3.)

Based on its consideration of the matter and the Joint Statement re Remedy, the Court subsequently adopted its February 1, 2016, Tentative Ruling as its final decision, with the exception of the issue of remand with or without vacatur, as discussed in the remainder of that decision and as more fully set forth below.

Initially, the Plaintiffs argued that the Court should adopt the presumptive remedy for an unlawful agency action, which it claimed was " 'to vacate the agency's action and remand [the matter] to the agency to act in compliance with its statutory obligations.' " While the Court agreed that there was Ninth Circuit case law to support Plaintiffs' position, it also noted that "that position may be erroneous." (*Id.* at *5.) Citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (*Geertson*), the Court noted that the Supreme Court had held that the issuance of an injunction pending the completion of a new EIS (and the consequent project delay) should not be the presumptive remedy, but

that such an injunction "should issue only if the traditional four-factor test is satisfied." The Supreme Court continued: "In contrast, the statements quoted above appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scale is warranted." (*Beverly Hills* at *5, citing *Geertson,* 561 U.S. 139, 157-158.) Accordingly, the District Court found, "In light of *Monsanto*, to the extent that the vacatur currently sought by Plaintiffs, would have the effect of injunctive relief, it cannot be held that a vacatur is the presumptive remedy where a NEPA (or other environmental review) violation is found," and that in NEPA cases an injunction should only issue where the four-factor test is satisfied. (*Beverly Hills* at *5.)

Moreover, the Court found that prior to the *Monsanto* decision, the Ninth Circuit had already recognized that there was no requirement that every unlawful agency action should be set aside. In *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012), the Ninth Circuit held that "A flawed rule need not be vacated…. Indeed, when equity demands, the regulation can be left in place while the agency follows the necessary procedures to correct its action…. Whether agency action should be vacated depends on how serious the agency's errors are "and the disruptive consequences of an interim change that may itself be changed." (*Beverly Hills* at *6, internal citations and quotation marks omitted). Accordingly, the Court determined that an analysis based on this Ninth Circuit rule was appropriate, and turned to an evaluation of 1) the seriousness of the FTA's errors, and 2) the disruptive consequences of vacatur and remand in this case.

In considering the seriousness of the FTA's errors, the Court pointed out that only two of the four errors were "pressing and substantial." As to those two errors, the Court noted that it had not found that the FTA had made the wrong decisions, but rather that the problems with the FTA's determinations were that they "arose from the agency's procedural deficiencies and/or questions as to the sufficiency of its analysis." The Court had further found that there was "no indication that the FTA would be unable to offer better and/or more complete reasoning for its challenged decisions herein," and that it had not found "that the FTA had engaged in any improper 'pre-determination' or bad faith in its treatment of the issues arising from Phase 2 of the Project." (*Beverly Hills* at *7.) In this final order, the Court reiterated and upheld these determinations. (*Beverly Hills* at *12.)

Turning to the issue of disruptive consequences to the Project and the public, the Court noted that there was "no dispute that the Project will result in improvements to the environment, the economy and the quality of life in Los Angeles County," because congestion was bound to increase and travel speeds would become lower, resulting in increased pollution, time wasted in traffic, and other negative effects. (*Beverly Hills* at *8.) The Court then discussed the funding of Phase 2, indicating that a remand and

vacatur of the ROD could jeopardize the FTA's ability to seek and obtain funding, which would in turn render Metro without funding to award the Phase 2 Design-Build contract. To keep the Project on schedule, Metro had to obtain the appropriate funding before the close of the fiscal year. The Court therefore concluded:

> "[T]he issuance of a vacatur to overturn the ROD (and/or those portions of the FEIS which would cause Metro to be unable to secure the FFGA for the 2016 and 2017 fiscal years for Phase 2 of the Project or which would bar Metro from engaging in necessary pre-construction preparatory endeavors) would pose the type of dire consequences which the Ninth Circuit in *Cal. Cmtys. Against Toxics* found to be sufficient to justify *not* ordering a vacatur – even in the face of findings in that case of both procedural and substantive violation of the [law]…." (*Beverly Hills* at *10.)

Further, the issuance of a vacatur would delay the needed emissions reductions, thereby "exacerbating the levels of environmental degradation," and would result in "serious economic problems" including loss of funds, contracting with and paying workers, and paying for materials and equipment. (*Beverly Hills* at *11.)

In addition, in considering the disruptive consequences to the Plaintiffs, the Court found that none of Plaintiffs contentions rose to the level of seriousness at this time to indicate that they would suffer adverse consequences. (*Beverly Hills* at *12.)

Finally, the court determined that "Pursuant to *Cal. Cmtys. Against Toxics* analysis, in deciding '[w]hether agency action should be vacated,' this Court must consider 'how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed.' In considering those factors as discussed above, the Court would find that a vacatur is not required at this time." (*Beverly Hills* at *13.)

The Court concluded its decision with an analysis of the issuance of vacatur under the traditional four-factor test, opining that issuance of a vacatur is "akin to ordering preliminary injunctive relief." (*Beverly Hills* at *13.) Following consideration of the four factors – 1) likelihood of success on the merits, 2) irreparable harm, 3) balancing the equities, and 4) the public interest – the Court concluded that the factors weighed against issuance of a vacatur. Accordingly, the Court remanded the matter to the FTA with instructions to prepare a SDEIS under NEPA and Section 4(f), as well as a SFEIS consistent with its holdings on the tentative ruling, and declined to issue a vacatur. (*Beverly Hills* at *14.)

Beverly Hills Unified School District v. Federal Transit Administration, et al. [CV 12-9861-GW(SSx)];

The City of Beverly Hills v. Federal Transit Administration, et al. [CV 13-1144-GW(SSx)];

Beverly Hills U.S.D v. Federal Transit Administration, et al. [CV 13-8609-GW(SSx)]; and

The City of Beverly Hills v. Federal Transit Administration, et al. [CV 13-8621-GW(SSx)]

(C.D. Cal. Aug. 12, 2016)

FHWA GUIDANCE ON DIGITAL BILLBOARDS UPHELD

Submitted by

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The Highway Beautification Act ("HBA"), 23 U.S.C. § 131, requires FHWA and each state to develop and implement individual federal-state agreements, detailing, among other things, "size, lighting and spacing" standards for the billboards along interstate highways and other controlled routes. One of those adopted standards, included in most states' agreements which were signed between 1965 and 1972, prohibits those states from allowing any billboard to be erected with "flashing, intermittent or moving" lights. This prohibition is supposed to be a reflection of customary use. Customary use is not defined in the HBA. As billboard technology changed, states began considering or passing laws that permitted digital off-premise billboards to be displayed along the controlled routes. These billboards typically use LED lights to display a static advertisement that remains on the screen for a specified period of time before quickly transitioning to a different static advertisement. Advertisements typically remain visible for around ten seconds, and usually take approximately two seconds to transition to the next ad. Anyone who has driven on a large highway in an urban area in the recent past has seen at least one of these billboards. They are hard to miss.

In 2007, FHWA issued to its Division Offices a memorandum entitled "Guidance on Off-Premise Changeable Message Signs" which provided that digital billboards would not violate the prohibition against flashing, intermittent or moving lights as long as the signs remain lit for a required period before changing to another message. Many States already allowed digital billboards before the guidance memorandum, and some division offices of FHWA did not allow them.

Scenic America brought suit against FHWA alleging two claims:

(1) the 2007 Guidance constitutes a legislative, not interpretive rule, thus violating § 553 of the Administrative Procedure Act (APA), because it was not promulgated using notice-and-comment procedures

(2) the Guidance violates § 706 of the APA because it creates a new lighting standard that is not "consistent with customary use," as required by the HBA.

The D.C. Circuit denied the first claim holding that Scenic America lacked standing. The Court held that the "irreducible constitutional minimum of standing" requires that a plaintiff demonstrate three elements: (1) injury in fact; (2) causation; and (3) redressability. The Court found that Scenic America failed to demonstrate that elimination of the Guidance would redress its alleged organizational injury – that it is forced to expend greater resources fighting digital billboards because the 2007 Guidance makes it easier for states to erect such billboards. Without providing any indication that elimination of the Guidance would diminish the number of billboards Scenic America has to fight, Scenic America failed to demonstrate that its requested remedy would prevent it from having to expend the same amount of resources fighting these billboards.

On the second claim the Court agreed with the District Court which held that "[b]oth Defendants and Scenic America recognize . . . that all [agreement] lighting provisions were established consistent with customary use." Thus, so long as the FHWA has merely interpreted in a reasonable fashion, rather than amended, those lighting standards, that interpretation must itself be "consistent with customary use," whether or not it is precisely the interpretation that would have been given to the standards at the time the FHWA and the states first agreed upon them. The Court also agreed with the District Court's conclusion that the FHWA's interpretation of the lighting standards is not one that "'runs 180 degrees counter to the plain meaning of the' [agreements]," and that it therefore "construes, rather than contradicts" the agreements. Because the FHWA's interpretation of the lighting provision was reasonable, the interpretation cannot be "contrary to customary use." As a result, the claim that the Guidance violates § 706 of the APA failed.

Scenic America, Inc. v. USDOT, D.C. Circuit No. 14-5195, September 6, 2016.

BOSTON HARBOR PROJECT STOPPED BASED ON

SECTION 6(F) OF THE LAWCON ACT

Submitted by

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Who wouldn't like to have a lobster roll and a craft beer at a new restaurant and bar in Boston Harbor? Apparently the National Park Service (NPS) would not . At least not until there is full compensation as mandated by Section 6(f) of the Land & Water

Conservation Act. For the first time this author has ever observed, a court has ruled in an intergovernmental dispute over how to determine the extent of property protected by a grant under Section 6(f) of the Land & Water Conservation Act.

In 1980 the Boston Redevelopment Authority (BRA) requested funds from the Land & Water Conservation Fund to assist in planning for commercial and recreation development of a wharf in Boston Harbor. A project boundary map was part of the request. The map showed the area to be protected from conversion to non-recreational use unless approval was obtained from the NPS. In 2006 BRA asked for permission to build a restaurant and bar in an area outside the boundaries described in a 1983 map but inside the boundaries of the 1980 map. Initially NPS said the development could proceed, but then retired NPS employees pointed out that NPS was looking at the wrong map. When NPS consulted the map that accompanied the 1980 grant request, the development was stopped. The District Court agreed with NPS.

On appeal, the 1st Circuit affirmed. The Court looked at the 1980 map, the conduct of the parties at the time of the grant application, and other factors and concluded NPS had ample ground to rely on the map that accompanied the grant application and not on the map that did not even exist when the grant was approved.

Boston Redevelopment Authority v. National Park Service, 1st Circuit No. 15-2270, September 23, 2016.

NEXT NEWSLETTER DEADLINE IS DECEMBER 15, 2016

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