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CONNECTICUT STATUTE LIMITING RUNWAY LENGTH PREEMPTED

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Tweed-New Haven Airport Authority (Airport), seeking to lengthen its main runway, sued to invalidate a Connecticut statute that limited the runway's length (the Runway statute), contending that it was preempted by the Federal Aviation Act, 49 U.S.C. §40101 et seq. (the FAA Act). The district court ruled that the Airport lacked standing, and that the statute was not preempted. The Second Circuit reversed on both issues.

The Airport serves an area of over one million people and has the shortest runway of any airport serving an area of that size. Consequently, it lacks service to several major East Coast cities. Because the runway length impacts a plane's allowable weight load, commercial airlines cannot fill planes to capacity. Lengthening the runway would allow the safe use of larger aircraft and allow service to more destinations. As required by the Federal Aviation Administration (FAA), the Airport prepared a Master Plan that included lengthening the runway. The FAA and the State approved the plan; however, several years later, the State changed its position and enacted legislation limiting the runway to its current length.

The trial court concluded that the Airport had not shown an injury-in-fact caused by the Runway statute, and that even if it had standing, the statute was not preempted. The trial court rejected the State's contention that as a political subdivision of the State, the Airport could not sue the State.

On appeal, the Second Circuit readily concluded that the Airport had established an injury-in-fact and had standing to challenge the Runway statute, which "directly targets Tweed and prevents it from expanding." Threatened enforcement of the statute was enough to support the Airport's standing. Unless the State had disavowed an intent to enforce the statute, the intent to enforce would be presumed.

The appellate court rejected the State's argument that because other obstacles to the project remained, such as securing funding, the statute was not the sole or but-for cause of injury. The court recognized that a complex project involves "contingencies or uncertainties." The court cited previous authority holding that evidence of "diligent efforts" to obtain funding and other approvals is enough. The Airport established that it has a "sufficient nexus to the challenged action" to satisfy the case or controversy requirement of Article III. Lastly, the court found that that a favorable decision would redress the Airport's fear of the Runway statute's enforcement, thus satisfying all requirements for Article III standing.

The court rejected the State's argument that it could not be sued by one of its own political subdivisions, relying on Supreme Court precedent holding that "[l]egislative control of municipalities, no less than other state power" is subject to constitutional limitations, particularly in cases involving the Supremacy Clause. "[A] state is not free to enforce within its boundaries laws preempted by federal law." The court thus held that a political subdivision may sue its state under the Supremacy Clause but noted that there is a split among circuits on this issue.

The court also held that the Runway statute is preempted by the FAA Act. Based on the FAA Act's objectives, the court had previously held that it impliedly preempts the entire "field of air safety" and that this preemption applies to runways. Relying on the facts presented at the trial, such as the current weight limitations on airliners and the types of planes that could use the runway, the court concluded that the Runway statute fell within the scope of this preemption because of its "direct impact on air safety." Federal preemption was also supported by the FAA's level of involvement with the Airport and the fact that it is a "primary commercial service airport" with a FAA operating certificate. The court noted the difference between "conflict preemption" and "field preemption," holding that the FAA Act occupies the entire field of air safety, including runway length.

Tweed-New Haven Airport Authority v. Tong (2nd Cir. #17-3481, July 9, 2019)

NEW ENDANGERED SPECIES ACT REGS COULD PROVIDE PREDICTABILITY FOR TRANSPORTATION PROJECTS

Submitted by

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As those within the transportation sector are keenly aware, navigating Endangered Species Act (ESA) compliance can be a time-consuming and costly affair. Projects often become mired in endless back-and-forth between the project proponent and federal wildlife agencies, suffer the threat or commencement of lawsuits due to potential effects a project may (or may not) have on ESA-listed species or habitat, or are forced to undergo the time-consuming and costly permitting procedures associated with securing authorization under the ESA, often including the provision of mitigation.

On July 25, 2018, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively, Services)3 published proposed revisions to certain ESA implementing regulations (Proposed Regulations). More than 200,000 comments were received by the Services during the public comment period on the Proposed Regulations, many of which claimed that the changes would remove or water down key ESA provisions.

On August 27, 2019, the Services announced they had completed the much-anticipated revisions to the ESA implementation regulations (Final Regulations). These Final Regulations do not work a major overhaul of the prior ESA rules they amend. Many of them simply formalize what previously had been long-standing informal policies and guidance developed by the Services over decades of ESA implementation. The Final Regulations also alter the prior rules where necessary to reflect more recent binding judicial decisions, including the recent U.S. Supreme Court (SCOTUS) decision in *Weyerhaeuser v. U.S. Fish and Wildlife Service* (*Weyerhaeuser*).4

The purpose of this article is to describe some of the regulatory changes made by the Final Regulations that may be of particular interest for those within the transportation sector, and to provide a perspective different from the views of those who have claimed that the regulations "gut" key provisions of the ESA.

In order to properly describe the Final Regulations, we first begin with a very basic overview of relevant portions of the ESA.

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3 The Services administer the ESA, with USFWS having responsibility for terrestrial and freshwater species, and NMFS having jurisdiction over marine and anadromous species.

4 *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 138 S. Ct. 924, 200 L. Ed. 2d 202 (2018).

I. Background on the Revised Regulations

The Final Regulations include revisions to the Services' regulations governing species listings and critical habitat designations (Final Listing Rule),5 to the Services' regulations governing consultation under ESA section 7(a)(2) (Final Consultation Rule),6 and to USFWS's regulations governing take of fish and wildlife species listed as threatened (Final 4(d) Rule).7 The Final Regulations have an effective date of September 26, 2019.

II. Final 4(d) Rule

Under the Final 4(d) Rule, USFWS removed the blanket take prohibition for species listed as threatened after September 26, 2019. Thus, for species listed as threatened after that date, no take prohibition will apply unless USFWS promulgates a species-specific 4(d) rule describing what activities do, or do not, constitute take of that species.

As a result, for transportation projects without a federal nexus, in the absence of a species-specific 4(d) rule, take of the relevant threatened species will not be prohibited, and the project proponent may proceed without USFWS involvement—even where adverse effects to the species are certain.

Where a species-specific 4(d) rule has been issued, the project proponent will know whether or not the activity is of the type that could cause prohibited take, and likely will have the benefit of specific provisions that may be followed in order to avoid take liability. Such provisions could range from simple setbacks around species locations or important habitat features, to a need to obtain an incidental take permit under ESA section 10.

For transportation projects with a federal nexus, consultation still will be required where a project may affect any threatened species; however, for species without a species-specific 4(d) rule, USFWS would no longer be obliged to issue an ITS authorizing incidental take, and the federal action agency would no longer be obliged to implement mandatory RPMs in connection with the same. Removal of the need to implement RPMs could reduce the costs associated with transportation projects.

III. Final Listing Rule

While there are many changes in the Final Listing Rule, we focus on changes governing the circumstances in which the Services may designate unoccupied habitat as critical habitat. In February 2016, the Obama administration promulgated rules that essentially removed the distinction between occupied and unoccupied critical habitat. Multiple organizations and states challenged the 2016 rule, and the lawsuit settled in 2018 when the Trump administration agreed to revisit the rule.

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5 Final Listing Rule, 84 Fed. Reg. 45,020 (Aug. 27, 2019).

6 Final Consultation Rule, 84 Fed. Reg. 44,976 (Aug. 27, 2019).

7 Final 4(d) Rule, 84 Fed. Reg. 44,753 (Aug. 27, 2019).

Meanwhile, the propriety of designating unoccupied critical habitat was taken up in the *Weyerhaeuser* case, where SCOTUS ultimately overturned USFWS's designation of critical habitat for the dusky gopher frog because the designated area neither contained the species nor actual habitat for the species.

The Final Listing Rule re-draws a distinction between the standards for designating occupied and unoccupied critical habitat that existed for more than thirty years prior to the Obama administration's rule change. Under the Final Listing Rule, the Services may designate unoccupied critical habitat only where there is a reasonable certainty that the area will contribute to the conservation of the relevant species and where the area contains habitat for the species.8

Importantly, neither *Weyerhaueser* nor the Final Listing Rule define what constitutes "habitat" under the ESA; however, a regulatory definition of "habitat" may be proposed in the coming year.

The presence of critical habitat within a project footprint can have significant impact on projects with a federal nexus, and may trigger consultation under ESA section 7(a)(2). To the degree that the Final Listing Rule limits the scope of critical habitat designations, there may be an attendant decrease in the number of projects that must undergo consultation.

IV. Final Consultation Rule

A. Time limits on Informal Consultation

One of the most significant updates to ESA implementation regulations is the Services' newly established deadline for completion of informal consultation, including identifying a specific trigger for starting the informal consultation clock.

The Final Consultation Rule provides both a deadline for completion of informal consultation and, importantly, a specific trigger that starts the clock for that deadline. Upon the Services' receipt of an action agency's written request for concurrence on the action agency's determination that an activity may affect, but is not likely to adversely affect listed species or critical habitat, the Services have 60 days to concur or not. The 60-day informal consultation deadline may only be extended with the mutual consent of the relevant Service, action agency, and applicant (where applicable), and may in no event exceed 120 days.9

While it is possible, if not probable, that the new deadline for informal consultation will be missed due to the agency workloads and other constraints, the existence of the deadline is important and should reduce the number of instances in which the conclusion of informal consultation is significantly delayed.

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8 Final Listing Rule at 45,053.

9 Final Consultation Rule at 45,016.

B. New standard for considering existing facilities and ongoing activities

The Final Consultation Rule clarifies that the consequences of past or ongoing activities or existing facilities should be considered as part of the environmental baseline rather than as effects of the federal agency action under consultation (e.g., federal permitting or funding of a transportation project) where the federal action agency has no discretion to modify the existing activity or facility. In the preamble to the Final Consultation Rule, the Services explained that in a consultation, a species should not be found to already be in an existing state of Jeopardy. Rather, the Services must analyze whether the effects of the federal agency action under consultation, when added to the environmental baseline, results in Jeopardy.10

The Final Consultation Rule has the potential to reduce the risk that the Services will determine a given transportation project will jeopardize the continued existence of listed species or result in destruction of adverse modification of designated critical habitat because of impacts flowing from an existing and related transportation facility.

C. Analyzing effects to critical habitat as a whole

The Final Consultation Rule makes clear that when the Services analyze whether a proposed activity may destroy or adversely modify critical habitat, the Services must analyze effects of the action on critical habitat as a whole, rather than on smaller portions of critical habitat.

For transportation projects with the potential to adversely affect all or a portion of a solitary critical habitat *unit* but not the entire area covered by a critical habitat designation, the above clarification is extremely important and may guard against the risk of an Adverse Modification call.

D. Expedited Consultations

The Services included in the Final Consultation Rule a new section titled "Expedited consultations," which allows, but does not require, the Services and federal action agencies to agree upon a shorter timeline for formal consultation where the effects of a project are either known or predictable, and where such effects are unlikely to cause Jeopardy or Adverse Modification.

While the new section allowing for expedited consultations does not obligate action agencies or the Services to engage in the same, it does empower the agencies to streamline consultations for projects with predictable effects—including transportation projects.

V. Final Thoughts

10 *Id*. at § 44,987-88.

While many of the regulatory changes adopted in the Final Regulations have the potential to streamline the ESA compliance process for transportation projects, the true impact of the Final Regulations remains to be seen. The various field offices of the Services often work independently from one another, and methods of implementing the ESA can vary widely, even where regulations are in place to guide such implementation.

Nevertheless, the Final Regulations provide the kind of detail and frameworks that could be helpful in creating predictability across the Services' field offices, which could, in turn, streamline transportation planning.

84 FR 44976 Interagency Consultation, 84 FR 45020 Listing Species and Designating Critical Habitat, 84 FR 44753 Prohibitions to Threatened Wildlife and Plants.

USDOT ISSUES INTERIM POLICIES TO STREAMLINE ENVIRONMENTAL REVIEWS

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The U.S. Department of Transportation (DOT) recently issued two new interim policies aimed at reducing lengthy environmental documents prepared pursuant to the National Environmental Policy Act (NEPA) and adopting guidance for DOT implementation of Executive Order (EO) 13807.

Interim Policy on Page Limits for NEPA Documents and Focused Analyses

The new interim DOT policy on page limits largely reconciles DOT policy with existing Council on Environmental Quality (CEQ) regulations originally adopted in 1978. It states that, to the extent possible, Originating Agencies (OAs) should limit the text of the draft and final environmental impact statement (EIS) to no more than 150 pages, or 300 pages for proposed actions of unusual scope or complexity. *See* 40 CFR 1502.7. The record of decision (ROD) does not count toward that limit where the OA prepares a combined Final EIS/ROD. For environmental assessments (EAs), the new policy states a general limitation of 75 pages, or 150 pages where the OA commits to mitigation measures as part of a Mitigated Finding of No Significant Impact.

DOT's new interim policy makes certain allowances where the OAs are complying with the DOT's policy favoring One Federal Decision (i.e., a single EIS and ROD for every involved agency), provided the OA follows a new "accountability process." This accountability process requires that, where an OA determines a document should

exceed the specified page limits, the OA must obtain concurrence from its Administrator. Requests for concurrence on exceeding page limits are deemed approved where the Administrator makes no determination within 10 business days of the request.

Finally, the new interim policy on page limits specifies a number of "best practices" to achieve the specified limits, including: (1) using the pre-scoping/scoping process to identify significant issues that will be addressed in detail in the document, (2) using annotated outlines developed from the scoping process for preparing the environmental document, (3) using a tiered EIS where appropriate, (4) requiring contractors to meet page limits for documents, (5) using a concise writing style, (6) making appropriate use of appendices and incorporation by reference, and (7) using an EIS summary that does not exceed 15 pages (40 CFR 1502.12) and highlights only major conclusions, areas of controversy, and issues to be resolved. DOT already utilizes a number of these best practices, with the goal of generating succinct NEPA documents that meet all applicable regulatory requirements. This is the first federal agency policy to formally adopt and implement the CEQ guidance on page limitations for NEPA documents.

Interim Policy on One Federal Decision

The new interim DOT policy on One Federal Decision implements the provisions of EO 13807 for DOT projects. It addresses how DOT will carry out the new EO 13807 policies for efficient review for major infrastructure projects (MIPs). The lengthy policy largely summarizes the requirements of One Federal Decision, but includes a number of DOT-specific provisions.

- **"Reasonable Availability of Funds".** One Federal Decision only applies to MIPs, which are infrastructure projects for which multiple authorizations by Federal agencies will be required, an EIS will be required, and the project sponsor has identified the reasonable availability of funds sufficient to complete the project. The project sponsor bears the burden of demonstrating the reasonable availability of funds. Supporting documentation to demonstrate such availability includes letters of commitment from the project sponsor and any private or public entity that has committed to provide financial support necessary to complete the project. The OA may rely on financial information provided by the applicant, including anticipated sources of funding that are dependent in part on anticipated Federal financial assistance program funding, tolling, future appropriations, and other future sources to the extent there is a reasonable basis to conclude that such sources will be available to construct the project if the build option is selected. The Federal Highway Administration and Federal Transit Administration may rely on inclusion of the project in long-range transportation plans in making their determinations.

- **Existing Legal Authorities/Requirements.** One Federal Decision does not preempt or affect the OAs legal responsibilities under NEPA.
- **Pre-Scoping.** DOT has developed a One Federal Decision Coordination Plan Outline for OAs to use as a resource for developing a coordination plan for public and agency participation in the NEPA process that incorporates key concept from the One Federal Decision policy. (https://www.transportation.gov/transportation-policy/permittingcenter/one-federal-decision-coordination-plan-outline)
- **Project Initiation.** The Notice of Intent (NOI) is the start of the two-year review process for MIPs. The OA should issue the NOI once it determines the project proposal is sufficiently developed to allow scoping and meaningful public input. This should include a proposed purpose and need and a description of reasonable alternatives to the MIP.
- **Concurrence Points.** Cooperating agencies should afford substantial deference to the lead DOT agency's determination of purpose and need, which defines the scope for alternatives carried forward. To avoid disagreements at the three major concurrence points (purpose and need, alternatives to be evaluated, and preferred alternative), the OA is encouraged to resolve concerns and consider cooperating agencies' needs for meeting their authorization decisions as early as possible to ensure they can use the Final EIS for their own review.
- **Elevation of Issues.** If a dispute between agencies is anticipated to cause delays or results in a missed or extended permitting timetable deadline, the OA should notify the Director of the Infrastructure Permitting Improvement Center (IPIC). If the dispute cannot be resolved within 30 days from identification, the Director of IPIC will elevate the issue to the DOT Chief Environmental Review and Permitting Officer (CERPO). The guidance provides a process for elevating issues that cannot be resolved between the OA and concurring agencies.
- **Combined Final EIS/ROD.** DOT OAs are required by law to issue combined a Final EIS/ROD to the maximum extent practicable. The combined Final EIS/ROD serves as the cooperating agencies' Final EIS, and the OA should coordinate the development of a single ROD for all other cooperating agencies with authorization decisions, to be signed at least 30 days after the combined Final EIS/ROD is published.

The guidance also clarifies that DOT is updating its guidance documents and training materials to incorporate the One Federal Decision process for MIPs. The goal is to ensure a coordinated approach to NEPA documentation for MIPs that enhances consistency, transparency, accountability, and efficiency and ensures consistent implementation across DOT agencies. 84 FR 44351, August 23, 2019

TENNESSEE AND PENNSYLVANIA HIGHWAY OUTDOOR ADVERTISING LAWS HELD UNCONSTITUTIONAL IN CONFLICTING CIRCUIT COURT OPINIONS

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Adams Outdoor Advertising, Ltd. v. Pennsylvania Department of Transportation, et al., 930 F. 3d. 199 (3rd Cir, 2019) (Adams decision).

This case involves a number of First Amendment challenges to the Pennsylvania law passed to comply with the requirements of the Highway Beautification Act (HBA), 23 U.S.C. §131. See 36 Pa. Stat. §§2718.101 et.seq. The primary issues involve the exemptions for on-premise and "for sale or lease signs."

The HBA requires states to regulate outdoor advertising signs adjacent to Interstate, Primary and National Highway System highways as a condition of receiving the full federal aid highway apportionment. The HBA requires states to prohibit signs adjacent to these highways but allows states to permit signs in commercial and industrial areas to the extent that they comply with a federal/state agreement regarding the size, spacing, and lighting of signs. The agreements also spell out areas where signs are not allowed, typically within a certain distance of interchanges. See 23 U.S.C. §131(c). Also certain types of signs are exempted from the federal prohibition, including signs which advertise activities conducted on the property on which they are located and signs that advertise the sale or lease of the property on which they are located. Federal regulations require states to have criteria for determining exemptions. See 23 C.F.R. §750.709(c). Federal law and regulations do not have any further requirements nor is there a justification spelled out in either law or regulation.

Pennsylvania has long complied with the HBA. Its statutes closely mirror the federal law. See the Outdoor Advertising Control Act of 1971, as amended, 36 Pa. Stat. §§2718.101, et seq. Indeed, compliance with federal law is the stated reason for the enactment of the Pennsylvania law. See §2718.102. The statute provides exemptions for official, on-premise, and for sale or lease signs. See §2718.104(i),(ii), and(iii). Pennsylvania regulates certain on-premise signs located adjacent to the Interstate System because it participates in the program commonly known as "the Bonus Act." See 67 Pa. Code §445.5. This federal law provided incentive payments to states willing to regulate signs adjacent to Interstate highways constructed with federal aid funds.

As argued before the Court of Appeals, this case involved a number of First Amendment issues. Adams Outdoor Advertising (Adams) sought to erect a billboard within 500 feet of an interchange on U.S. 22 near Hanover, Pennsylvania. Accordingly, Adams filed a permit application with the Pennsylvania Department of Transportation

(PennDOT). PennDOT did not act on the application for more than a year. Adams sought relief from the District Court. Shortly thereafter, PennDOT denied the permit application. The District Court was confronted with a number of counts, but only three were before the Appellate Court. See *Adams. v. PennDOT*, 307 F.Supp. 3rd 380 (E.D. Pa., 2019), *rehearing denied* 321 F.Supp. 3rd 526. The first issue involved PennDOT's delay in acting on the permit application and the lack of any reasonable time period for acting on applications. The District Court ruled that the delay coupled with the lack of any time standard for resolving permit applications violated the First Amendment. The court enjoined the denial of the permit pending issuance of an appropriate standard. Adams sought to require the state legislature to enact a law establishing such a standard. However, the Court of Appeals agreed with the District Court and PennDOT did not contest the District Court injunction.

Second, Adams argued that the 500 foot standard was unconstitutionally vague. The appellate court agreed with the lower court that this was not the case and affirmed the lower court's decision to dismiss this count. The prohibition on erecting signs was not ambiguous. It should be noted that the federal/state agreements referenced above typically include a provision restricting signs from being placed adjacent to the right-of-way within a specified distance of an interchange.

Finally, Adams argued that the provision of the Pennsylvania Code establishing the 500 foot provision improperly exempted official, on premise and for sale or lease signs as content based exceptions. The HBA and the state/federal agreements do not attempt to regulate official, "on premise," and "for sale or lease" signs except for suggested criteria mentioned above. The district and appellate courts quickly dismissed challenges based on the official sign exemption.

The District Court had granted the defendants' motion for summary judgment with respect to on-premise signs. The District Court agreed with the Plaintiffs that the Commonwealth had failed to provide adequate justification for exempting for sale or lease signs. Thus, it extended its injunction pending a showing by PennDOT that exempting these signs fulfilled a compelling governmental interest.

While the appellate court agreed that on-premise and for sale or lease signs did not constitute a content based exemption, it found that the Commonwealth failed to establish a compelling governmental interest for exempting on premise and for sale or lease signs. Thus, it reversed the granting of summary judgment and remanded to provide the Department an opportunity to demonstrate such an interest for both types of signs.

The intersection of the First Amendment and the Highway Beautification Act, 23 U.S.C. §131, has been the source of considerable confusion. The appellate court found the leading Supreme Court case, *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), so splintered in its multiplicity of opinions that it fell back on its own decision in *Rappa v. New Castle County*, 18 F. 3rd 1043 (3rd Cir.,1994) as the basis for the *Adams* decision.

Rappa involved a challenge to both a county ordinance and a Delaware state law by Daniel Rappa, a candidate for Delaware's lone seat in the House of Representatives. Rappa was not allowed to erect some of the signs that announced his candidacy and his views of the issues in the election.[11]The Adams decision with respect to on-premise signs, although ostensibly relying on *Rappa,* seems to impose a greater burden on the Pennsylvania Secretary of Transportation. *Rappa* concluded that on-premise signs were so closely tied to activities allowed on the premises that no separate justification to allow their erection was required. The exception is not content based at all, and thus, regulations need only assure that the signs reflect on premise activities. *Rappa,* 18 F.3rd at 1066-1067. However, the Adams court required a more extensive showing of a compelling governmental interest for allowing these signs. The reference to *Rappa* seems incorrect, as the pages cited say nothing about on- premise signs. However, in *Adams*, the showing the court required should not be difficult.

Adams' essential argument is that the general prohibition of signs near an interchanges illogically excludes on-premise and for sale or lease signs. I think that this puts too fine on the scheme of the outdoor advertising control program. When Congress enacted the HBA in 1965, it simply concluded that certain types of signs were outside of the scope of necessary control. Thus, it recognized that it was illogical for the government to allow a business to operate at a certain location and then require the states to prohibit a sign announcing the presence of the business at that location. Congress also recognized the long practice of placing signs on properties that are for sale or for lease. In fact, the legislative history of the Act indicates that Congress viewed both types of signs in the same category ("on-premise signs"). See Pub. L. 89-285, 79 Stat. 1028 (1965) and House Rpt. 1084 (9/22/1965), which states:

"Signs, displays and devices advertising the sale or lease of property upon which they are located, and signs, displays, and advertising the activities conducted on the property on which they are located (**on-premise signs**) are specifically exempted from control." [emphasis added]

It is true that states are free to enact outdoor advertising controls more stringent than required by the HBA, 23 C.F.R. §750.701. Thus, Pennsylvania could impose constraints on for sale or lease signs beyond the general exemption. However, it is somewhat surprising that the Third Circuit now requires a separate justification for an exemption that has been well understood for more than 50 years.

Moreover, Adams seeks to challenge the exemptions only inside 500 feet of an interchange. This, or a similar, provision is part of the federal state agreement on

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[11] It should be noted that political campaign signs have long presented a problem under the HBA. There is no exception for these signs under the HBA, but attempts by states and local governments to prohibit (rather reasonably limit) these signs have generally been rejected by the courts. See, for example, *Baldwin v. Redwood City*, 540 F.2d 1360(9th Cir.,1976); *Whitton v. City of Gladstone*, 54 F. 3rd 1400 (8th Cir. 2006); and *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1999).

outdoor advertising control required under 23 U.S.C. §131(d). That agreement regulates the size, lighting, and spacing of signs permitted in commercial and industrial areas. The 500 foot limitation was obviously considered a safety measure. The on-premise exemptions more generally apply to the control measures required throughout a state. Does the Third Circuit suggest that general, logical exclusions must be justified separately at every point along a highway subject to control?

Thomas v. Bright, ___ F. 3d ___ (6th Cir. No. 17-6238, Sept. 11, 2019)(Petition for rehearing *en banc* pending)

This case involves a challenge to the Tennessee outdoor control advertising act, Tenn. Code Ann. §54-101, et seq. Thomas erected an off-premise sign supporting the U.S. Olympic team for the 2012 Olympics. Tennessee sought to remove the sign because it was erected in a non-conforming location. Thomas sued in the U.S. District Court, arguing that the Tennessee law violated the 1st Amendment. The District Court agreed because the on premise exclusion from the Tennessee law is content based, and thus violates the 1st Amendment.

Tennessee appealed. The panel hearing the state's appeal agreed with the District Court in a unanimous decision. The Court's ruling reversed a prior case, *Wheeler v. Commissioner of Highways*, 822 F. 2nd 586 (6th Cir. 1987). Wheeler has long provided a useful precedent sustaining the on premise exclusion, arguing that it was an integral part of allowing the underlying activity and should be allowed to announce its presence.

The 6th Circuit sees a clarity in the Supreme Court's decision in *Reed v. Town of Gilbert* that was not apparent to the 3rd Circuit in *Adams*. The 6th Circuit held that *any* sign law that imposed different standards on signs based on their content was unconstitutional unless the state could show that the provision met strict scrutiny (that is, the exclusion must serve a compelling governmental interest and must be narrowly tailored to serve this interest). The state did not provide evidence that this was the case. Tennessee did not challenge the finding that the "on premise" provision in its law was not severable from the remainder of the Act. Thus, the Court of Appeals found the entire law unconstitutional.

The 6th Circuit decision puts the state of Tennessee in a quandary. Ironically, a law prohibiting all signs in non-conforming areas, irrespective of their content, would probably have passed muster under the Court's ruling. The Highway Beautification Act allows states to exclude on premise signs from control, but does not require it, 23 U.S.C. §131(c). However, the on premise provision is an integral part of every state outdoor advertising control law across the country. Under the court's decision, the state could not allow a typical service station to erect a sign announcing it is an Exxon or Shell station without allowing virtually any sign in that area. This would fundamentally change the way businesses have operated. While the Tennessee legislature might be able to fashion an outdoor advertising control bill that complies with the *Thomas* decision, it would be almost impossible to enact or create havoc if it did.

Many other signs could run afoul of the 6th Circuit decision, including signs erected before elections, other temporary signs announcing community festivals and the like, etc. Would these signs have to be prohibited to make the Tennessee constitutional under the 6th Circuit decision?

The split between the 3rd and 6th circuit is intriguing. One court sees flexibility that is not apparent to the other. The 3rd circuit decision sets forth a challenge to the state to better justify the provisions in its law. Thus, it provides the state with an opportunity to rescue its statute with a legitimate assertion of a compelling governmental interest. The 6th circuit simply rejects the Tennessee law and provides no reasonable path forward.

Editor's Note: While it is unfortunate to have conflicting decisions on something that many thought was settled, this outcome was inevitable. Many State DOT's allow and prohibit signs and advertising content based on the on-premise/off-premise distinction in a way that no longer makes any sense. The electronic changeable message signs have contributed to the confusion.

JOINT GUIDANCE ISSUED ON FHWA, FTA, FRA NEPA REEVALUATIONS

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This guidance does not change existing practice. It may influence how FHWA communicates what each State DOT puts in its manuals, how FTA interprets Standard Operating Procedure (SOP) 17, and how FRA administers the NEPA Reexamination Worksheet; but nothing will change right away. The guidance appears to be a summary of FTA SOP 17. This guidance is not legally binding in its own right and conformity with this guidance (as distinct from existing statutes and regulations cited in the guidance) is voluntary only.

For EISs, there are two circumstances that require a written re-evaluation:

1) When an acceptable final EIS is not received by the Agency within three years from the date of the draft EIS circulation (23 CFR 771.129(a)); and

2) When the project sponsor requests further approvals if major steps to advance the project (for example, authority to acquire a significant portion of right-of-way or to undertake final design) have not occurred within three years after the approval of the final EIS, final EIS supplement, or the last major Agency approval or grant.

A re-evaluation consultation is required after the NEPA decision has been rendered (that is, a final EIS/ROD, ROD, FONSI or CE determination), and an applicant needs any major approvals or grants to determine if the document or CE designation remains valid for the action. While this type of re-evaluation does not have to be in writing, it is best practice to document its determination.

The need for re-evaluation (usually a change in the approved project) and the content are the same as before. The project sponsor and lead Federal agency consult.

Re-evaluations generally do not require public involvement. However, public involvement may be required in situations where there are changes to the project or circumstances that involve other environmental review laws that have their own public involvement requirements (for example, Section 4(f) requirements and Section 106).

Although re-evaluations generally do not require public involvement, the Agency, in consultation with the project sponsor, may determine that some form of public involvement is appropriate. Note that re-evaluation documentation is treated as part of the project file and may be made available consistent with the Freedom of Information Act. Occasionally re-evaluations include public hearings such as for changes in interchange design.

The changes or circumstances that trigger a re-evaluation may require additional consultation with Federal resource agencies. The Agency will determine on a case-by-case basis whether consultation is warranted based on the context of the re-evaluation, type of project, the anticipated changes, or the environmental impacts. However, cooperating agencies under NEPA should be notified if there are changes to environmental issues under their jurisdiction or special expertise.

The guidance does not say whether a design-build contractor or P3 concessionaire can provide the information for the re-evaluation. FHWA leaves this up to each Division and project owner. The FTA Deputy Chief Counsel for FTA has verbally indicated that these entities cannot prepare the reevaluation. FRA has never addressed this topic. It is up to the project sponsor to provide the reevaluation to the Agency.

https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/environmental-programs/133526/nepa-re-evaluation-guidance-8-14-2019.pdf

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Articles for the next edition of *The Natural Lawyer* are due to the Editor at Richard.christopher@hdrinc.com by December 16, 2019. Please use Microsoft Word. Anyone may submit an article as long as the article addresses environmental issues in transportation law. Anyone who would like to be considered as an author for a matter suggested by the Editor should contact the Editor at the same address.