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7TH CIRCUIT UPHOLDS EIS for SOUTHERN INDIANA PORTION OF I-69

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In the latest in a series of cases involving the extension of I-69 through southern Indiana, the U.S. Court of Appeals for the 7th Circuit affirmed a district court decision that upheld FHWA's Tier 2 Environmental Impact Statement (EIS) for "Section 4" of the I-69 project. The case is *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068 (7th Cir. 2016). A motion for rehearing was denied on May 17, 2016.

Background

The proposed extension of I-69 from Indianapolis to Evansville, Indiana, was identified by Congress in 1991 as part of a "high-priority corridor" extending from Canada to Mexico. In 2000, FHWA and the Indiana Department of Transportation (INDOT) initiated a Tier 1 EIS that examined a range of potential routes for completing I-69 between Evansville and Indianapolis. In March 2004, FHWA issued a Tier 1 Record of Decision (ROD) for the project; the Tier 1 ROD approved the project's general location, defined as a corridor approximately 2000 feet in width connecting Evansville to Indianapolis. The Tier 1 ROD divided the selected corridor into six sections and required a Tier 2 EIS to be prepared for each section. After the Tier 1 ROD was issued, FHWA and INDOT began preparing all six of the Tier 2 EISs.

In previous lawsuits, the plaintiffs challenged the Tier 1 ROD for the entire project as well as the Clean Water Act Section 404 permit for Section 3 of the project. Those lawsuits were resolved in favor of FHWA and INDOT.[1]

In this lawsuit, the plaintiffs primarily challenged FHWA's ROD for Section 4 of I-69. Section 4 involved construction of I-69 on new location through rolling terrain, which was heavily forested and contained a variety of sensitive resources, including habitat for the endangered Indiana bat, historic and archeological properties, and karst formations. After issuing a Tier 2 EIS, FHWA issued a Tier 2 ROD approving Section 4 in September 2011. In addition, the U.S. Fish and Wildlife Service (USFWS) issued a Biological Opinion for the project, with a "no jeopardy" finding for the endangered Indiana bat and other species. After the Tier 2 ROD was issued, FHWA and INDOT re-initiated Section 7 consultation to consider "White Nose Syndrome," an illness that had become widespread among Indiana bats and other bat species in the project area. The USFWS issues a revised Biological Opinion, confirming its no-jeopardy finding.

The District Court Litigation

The plaintiffs filed suit in August 2011, shortly before FHWA issued the Tier 2 ROD for Section 4; with the court's consent, the plaintiffs filed an amended complaint in March 2012, several months after the Tier 2 ROD was issued. The plaintiffs raised 18 separate claims alleging violations of NEPA, the Clean Air Act, and other laws. While the lawsuit primarily challenged the Tier 2 ROD for Section 4, it also raised claims purporting to challenge the Tier 2 RODs for other sections.

Early in the case, the federal defendants filed a motion to dismiss some of the plaintiffs' claims on ripeness and other grounds; the plaintiffs did not respond, and the court granted the motion. Subsequently, because of the plaintiffs' delay in prosecuting the case, including many missed deadlines, the district court ordered the plaintiffs to show cause why the case should not be dismissed. The district court ultimately decided not to dismiss the case and went on to consider the parties' cross-motions for summary judgment. In March 2014, the district court granted the defendants' motion for summary judgment on all issues. The district court also rejected the plaintiffs' request for discovery and their claims of 'fraud on the court.'

The 7th Circuit Decision

In a decision issued on March 3, 2016, the 7th Circuit upheld the district court's decision on all issues raised on appeal.

Air Quality. The plaintiffs claimed that the air quality analysis violated both NEPA and the Clean Air Act because FHWA used the vehicle fleet-mix data from 2004, rather than the 2009 data, which was available at the time the Final EIS was issued; they argued that the 2009 showed an older mix of vehicles, which led to higher pollution levels. The record showed that FHWA had considered using the 2009 data, but found it has

[1] Hoosier Envtl. Council v. U.S. Dep't of Transp., No. 1:06-CV-1442-DFHTAB, 2007 WL 4302642, at *1 (S.D. Ind. Dec. 10, 2007) (upholding Tier 1 ROD for I-69); Hoosier Envtl. Council v. U.S. Army Corps of Engineers, 722 F.3d 1053 (7th Cir. 2013) (upholding Section 404 permit for I-69 Section 3).

"systematic deficiencies" and decided that it should not be used until it had been quality-assured. The court upheld that decision, finding that it was "not unreasonable" to rely upon the 2004 data. Therefore, the 7th Circuit rejected the plaintiffs' challenges to the air quality analysis under both NEPA and the Clean Air Act.

Endangered Species. The plaintiffs claimed that a Supplemental EIS was needed to consider the effects of White Nose Syndrome on the endangered Indiana bat. In support of this argument, they cited a journal article regarding the effects of this illness on the bat. The court rejected this argument, finding that the journal article itself was not "new information" requiring a Supplemental EIS. The plaintiffs also argued that a Supplemental EIS was needed because one of INDOT's contractors had engaged in tree-clearing in violation of an environmental commitment; the court found that only one protected tree had been cut in violation of the commitment, and an investigation had confirmed that the tree was not in use as a maternity colony. Therefore, the 7th Circuit found these issues did not warrant a Supplemental EIS.

Information Disclosure. The plaintiffs claimed that FHWA and INDOT concealed information in violation of NEPA. Noting that summary judgment is "the 'put up or shut up' moment in a lawsuit," the 7th Circuit found that Plaintiffs had failed to produce sufficient evidence that FHWA and INDOT had concealed information and therefore upheld the District Court's grant of summary judgment against the plaintiffs on this claim.

Waiver. In the District Court, the plaintiffs failed to respond at all to the defendants' motion for summary judgment on four of the counts in the plaintiffs' complaint. The District Court found the plaintiffs had waived those claims and granted summary judgment against to the defendants. The 7th Circuit agreed with the District Court that "by failing to respond in any way to the arguments advanced by Defendants" regarding these claims, the plaintiffs had waived the claims.

Ripeness. The District Court had ruled that the plaintiffs' challenge to the Tier 2 ROD for Section 4 was unripe because the lawsuit challenging that ROD was filed before the ROD was issued; the District Court also held that the filing of an amended complaint *after* the ROD was issued did not cure the ripeness problem. The 7th Circuit agreed that a claim filed prior to the ROD was unripe, and did not become ripe even if an amended complaint was filed after the ROD was issued:

> "[B]ecause Count 8 was filed before the ROD was issued, it predated the final agency action and is therefore unripe. This is true even though Plaintiffs amended their complaint after the issuance of the ROD. Federal Rule of Civil Procedure 15(c)(1)(B) notes that an amendment to a complaint relates back to the date of the original pleading when 'the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out–or attempted to be set out–in the original pleading.' Because Count 8 of the amended complaint presented the same claim as Count 8 in the original complaint, Count 8 relates back and the amended complaint does not cure the ripeness issue."

Further, the 7th Circuit rejected the plaintiffs' argument that this claim was ripe at the time the original complaint was filed, prior to issuance of the Tier 2 ROD. The plaintiffs argued that allegations of bad faith with regard to an EIS were ripe at the time the bad faith occurs, without needing to wait for the NEPA process to conclude. The 7th Circuit disagreed, finding that a claim alleging bad faith in preparing an EIS can only be brought after the NEPA process ends.

"Fraud on the Court." The plaintiffs alleged that the defendants had committed "fraud on the court" by "hiding evidence" related to the defendants' decision to use the 2004 rather than 2009 vehicle fleet mix data. The 7th Circuit noted that the only evidence supporting these allegations was an affidavit from the plaintiffs' own attorney, which contained inadmissible hearsay evidence. The court also noted that the administrative record itself included documents related to the defendants' decision not to use the 2009 data. The 7th Circuit concluded that "Simply put, Plaintiffs have produced no evidence that would warrant a belief by a reasonable person that Defendants engaged in fraud or inappropriate behavior."

Discovery. The 7th Circuit upheld the District Court's decision to quash the plaintiffs' subpoenas and to deny the plaintiffs' request for additional discovery related to an alleged whistleblower's testimony. The 7th Circuit held that the plaintiffs had failed to show the additional discovery was needed and had been "anything but diligent in their pursuit of discovery" during the District Court proceedings. The 7th Circuit held that "A party who fails to comply with deadlines related to discovery or otherwise forestalls prosecution of their own case is not entitled to seek additional discovery when the opposing side moves for summary judgment."

Evidentiary Hearing. The 7th Circuit also upheld the District Court's to deny the plaintiffs' request for an evidentiary hearing, holding that the District Court did not err in holding that the plaintiffs are not entitled to evidentiary hearings in APA cases.

OREGON WIND FARM HALTED DUE TO FAULTY BASELINE ASSESSMENT OF SAGE GROUSE HABITAT

Submitted by Lawson Fite

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The Ninth Circuit's May 26, 2016 decision in *Oregon Natural Desert Ass'n v. Jewell*, No. 13-36078 (2016 WL 3033674), begins with a warning that renewable energy projects "can have significant adverse environmental impacts, just as other large-scale developments do." With that principle in mind, the court went on to hold that BLM did not adequately address sage-grouse impacts in its EIS for a wind project with transmission lines crossing public lands.

Private developers proposed the Echanis Wind Energy Project to construct 40-69 wind turbines, producing up to 104 MW, on southeast Oregon's Steens Mountain. The developers obtained a FLPMA Right-of-Way from BLM for the associated transmission line, and BLM then prepared an EIS. The Oregon Natural Desert Association and the

Audubon Society of Portland (ONDA) sued, and the district court held in the government's favor. The key issue was impact on sage-grouse foraging territory. The ridges with high wind energy potential are also, due to wind, a significant location for exposed sagebrush in the winter.

On appeal, the Ninth Circuit found the EIS insufficient because it failed to assess "actual" baseline conditions at the project site. Relying on *N. Plains Resource Council v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011), a case rejecting STB licensing of three railroad lines, the court held that the agency had a duty to "assess, in some reasonable way, the actual baseline conditions" at the project site. BLM failed in this duty as, lacking survey data, it used a faulty assumption that sage-grouse did not use the project site. The assumption was flawed, the court pointed out, because it relied on a conclusion that a nearby site was not used by sage-grouse. However, the record indicated, directly contrary to statements in the FEIS, that four birds had been found at a nearby site.

The court concluded this faulty assumption also violated the "accurate scientific analysis" required by 40 C.F.R. § 1500.1(b) and the requirement in 40 C.F.R. § 1502.24 that agencies insure the "scientific integrity" of their analysis. Recognizing the tension between its holding and deference principles, the panel clarified, "we do not hold that habitat extrapolations from one site to another are impermissible. Instead, our holding is that any such extrapolation must be based on accurate information and defensible reasoning." The court rejected arguments regarding harmless error and mitigation, noting that under BLM management guidelines, if the area were determined to be occupied, the project could not go forward.

In a rare nod to exhaustion principles, the panel found that ONDA failed to administratively address its claim that BLM failed to address impacts on genetic connectivity in its comments on the draft EIS. Although ONDA mentioned habitat connectivity in its comments, and pointed to genetic evidence in support of habitat connectivity impacts, the court found these comments inadequate to raise issues of genetic connectivity. "ONDA did not use the phrase 'genetic connectivity' . . . nor did it raise any distinct concern regarding genetic interchange…" The court was careful to note that its exhaustion analysis "is unusual" since genetic connectivity "is a technical, specific issue that in this context required clear differentiation from the general habitat connectivity issue."

SUPREME COURT HOLDS WOUS JURISDICTIONAL DETERMINATION FINAL AGENCY ACTION UNDER APA

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When a mining company applied for a permit under Section 404 of the CWA, the Corps issued a jurisdictional determination (JD) that concluded that a portion of the property to be mined was waters of the United States. The mining company sought review of the JD in Federal District Court, but the Court dismissed the action holding that the revised

JD was not a "final agency action for which there is no other adequate remedy in a court," The Eighth Circuit reversed. The Supreme Court affirmed.

The Court found that in general, two conditions must be satisfied for an agency action to be final under the APA. First, the action must mark the consummation of the agency's decisionmaking process, and second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

An approved JD satisfies the first condition. It clearly "mark[s] the consummation" of the Corps' decisionmaking on the question whether a piece of property does or does not contain waters of the United States. It is issued after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property and typically remains valid for a period of five years.

An approved JD also gives rise to direct and appreciable legal consequences, thereby satisfying the second condition as well. A "negative" JD—*i.e.*, an approved JD that concludes that property does not contain jurisdictional waters—contains a five year safe harbor agreement that prohibits the government from instituting civil enforcement proceedings and limits the potential liability a property owner faces for violating the Clean Water Act. Each of those effects is a legal consequence. It follows that an "affirmative" JD, like the one issued in this case, also has legal consequences: It deprives property owners of the five-year safeharbor that "negative" JDs afford. This conclusion tracks the "pragmatic" approach the Court has long taken to finality.

A "final" agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court. The Corps contended that respondents have two such alternatives: They may proceed without a permit and contend in a government enforcement action that a permit was not required, or they may complete the permit process and seek judicial review which the Corps contended is what Congress envisioned. The Court found that neither alternative is adequate. Parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties."

United States Army Corps of Engineers v. Hawkes, et al., No. 15–290, May 31, 2016

ECONOMIC HARM ALLEGED TO OCCUR FROM PENNSYLVANIA HIGHWAY IMPROVEMENT OUTSIDE NEPA ZONE OF INTERESTS

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Maiden Creek Associates ("MCA"), a limited partnership, owns 85 acres of land in Maidencreek Township that it hopes to develop into a 600,000 square-foot shopping center. The Board of Supervisors of Maidencreek Township (the "Board") has taken the public position that the shopping center is "vital" to the economic well-being of the Township residents. MCA and the Board claim, however, that the Pennsylvania Department of Transportation's (PADOT) plan to improve an adjacent highway, State Route 222, will impede what they hope to accomplish.

MCA and the Board alleged in their joint complaint that the Categorical Exclusion approval was based on inaccurate information supplied by PADOT that had not been adequately studied or investigated, and that the findings and conclusions contained therein were arbitrary and capricious. They argued that, in submitting and approving the Categorical Exclusion, "PADOT (i) failed to consider important aspects of the environmental issues associated with the Project; (ii) ignored material information supplied by MCA; and (iii) disseminated completely inaccurate information that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." These procedural "defects" notwithstanding, the defendants' response was that the crux of the issue, as initially pled, concerned only the economic impact of the planned highway improvement; that, "[a]side from some general allegations about increased traffic and the safety of motorists, all of the injuries alleged by MCA and the Board … were purely economic—neither alleged that the project would harm the environment."

The Third Circuit held that the economic damage alleged to occur by the Plaintiffs fell outside the zone of interests to be protected by NEPA. As a result, the Plaintiffs lacked standing to pursue their suit. The additional claims of damage from stormwater runoff were so remote and speculative that the Court declined to hear them.

Maiden Creek Assoc. v. USDOT, 3rd Circuit No. 15-3224, May 19, 2016.

NEXT DEADLINE SEPTEMBER 15, 2016

Anyone who would like to submit an article for the October, 2016 edition of this newsletter should submit the article to the Editor at richard.christopher@hdrinc.com by the close of business on September 15, 2016. Please use Microsoft Word.