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ARIZONA SOUTH MOUNTAIN EXPRESSWAY EIS/4F UPHELD IN 9TH CIRCUIT

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On December 8, 2017, the Ninth Circuit Court of Appeals unanimously rejected two National Environmental Policy Act (NEPA) and section 4(f) challenges to the long-debated 20-mile South Mountain Freeway Project in Phoenix, Arizona. *Protecting Arizona's Resources and Children v. Federal Highway Administration*, No. 16-16586 (9th Cir. Dec. 8, 2017).

Regional Transportation Plan May Inform NEPA Purpose and Need Statement. The decision follows the precedent established in *Honolulutransit.com v. Federal Transmit Admin.,* 742 F.3d 1442 (9th Cir. 2014) that transportation agencies may define a project's purpose and need statement and the range of alternatives based on the objectives described in an approved regional transportation plan (RTP).

Appellants claimed that the Federal Highway Administration's and Arizona Department of Transportation's (the Agencies) use of the RTP to shape the purpose and need for the project improperly sidestepped the NEPA review process. While the Agencies used the RTP to inform the Project's purpose and need, they examined projected population growth, housing demand, employment growth, transportation mileage, and transportation capacity deficiencies to establish the Project's underlying purpose and need and confirm that a freeway was still necessary as set forth in the RTP.

Agencies May Screen Alternatives from Detailed Review. Appellants argued that the Agencies failed to consider a reasonable range of alternatives and inappropriately screened a number of alternatives during the NEPA scoping process. The EIS examined in detail three alignment alternatives for the western section of the Project, one alignment alternative for the eastern section of the Project, and a No-Action alternative. The Court cited the Agencies "multivariable screening process" over the course of thirteen years, the examination of modal alternatives, and the fact that the Agencies provided reasons for elimination of each alternative from detailed study to conclude that this was a reasonable range of alternatives for detailed study.

Federal Highway Administration May Rely on MPOs Socioeconomic Projections Created for the No-Action Alternative So Long As EIS Explains That Choice. Appellants argued that reliance on the same socioeconomic projections as the basis for both the Action and No-Action Alternatives caused the environmental analysis to "assume the construction of the Project." The Ninth Circuit found that the Agencies' reliance on the same socioeconomic projections to form the Action and No-Action Alternatives complied with NEPA, because the No-Action Alternative assumed that "'[e]xisting residential land use patterns and trends would be maintained,' and then modeled the effects if the [Project] were not built." This analysis is in keeping with Ninth Circuit NEPA precedent that a federal agency may rely on socioeconomic projections generated by a metropolitan planning organization so long as the decision to do so and the reasoning behind that decision is disclosed.

Compliance with National Ambient Air Quality Standards Inherently Protects Children's Health. Appellants challenged the EIS on the basis that it did not sufficiently analyze the Project's potential Air Quality impacts to children's health. The Court concluded that because the Agencies conclusively demonstrated that the Preferred Alternative would not cause any new violations of National Ambient Air Quality Standards, would not exacerbate any existing violations, and would not delay attainment of any air quality standards or milestones, the EIS appropriately addressed children's health impacts.

MSAT Analysis Need Not Include a Health Effects Study to Comply with NEPA. The Court also found that the Agencies' Mobile Source Air Toxics (MSAT) analysis complied with NEPA, noting that the Agencies followed the latest FHWA guidance and an EPA model, documented the effects, and provided a detailed explanation of the determination that an analysis of near-roadway MSAT emissions was unnecessary.

A 15% Level of Design Is Sufficient So Long As Impacts Can Be Analyzed and Mitigated. Appellants argued that the 15% level of design used to evaluate the Project impacts was not sufficiently detailed to allow for proper analysis and mitigation of potential impacts. The Ninth Circuit concluded that the Agencies provided an appropriate analysis of the Project's potential impacts and a sufficiently detailed discussion of mitigation measures for those impacts in compliance with NEPA.

FHWA May Reject Alternatives that Avoid Use of Section 4(f) Properties Where They Fail to Meet the Project's Purpose and Need. The Court rejected Appellants' section 4(f) claim that the Agencies improperly rejected feasible and prudent alternatives. The Final EIS identified all Section 4(f) Properties within the Study Area, described avoidance alternatives, and documented that all alternatives avoiding the Section 4(f) Properties are not feasible and prudent. The Ninth Circuit upheld the Agencies elimination of a number of alternatives that failed to meet the Project's purpose and need.

Agencies May Rely on Future Planning to Minimize Harm to Section 4(f) Resources During the Design Phase. Finally, the Ninth Circuit concluded that the Agencies conducted all possible planning to minimize harm to the Section 4(f) Resources impacted by the Project. Rejecting Appellants' argument that the Project's "15% level of design" was deficient, the court noted that the cited level of design did not hinder the Agencies from conducting the necessary planning. The EIS detailed measures to minimize harm, including consulting with the Gila River Indian Community during the Project design phase to continue to attempt to reduce harm to the South Mountains.

DC CIRCUIT DISMISSES CHALLENGES TO CONFORMITY GUIDANCE

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Sierra Club challenged EPA's modification of its guidance for measuring the impacts of transportation projects on PM 10 and PM 2.5 levels under the conformity provisions of the Clean Air Act, 42 U.S.C. section 7506(c)(1)(B). EPA had modified its recommended methodology for PM 10 and PM 2.5 hot spot analysis without providing for notice and comment.

The Ninth Circuit determined that the petitioners lacked standing to challenge the EPA guidance on PM 2.5 as they could not establish that the change in the guidance would have any effect on the challenged three highway projects. Two of the three projects were not in nonattainment or maintenance areas for PM 2.5, and although the third was in a nonattainment area, the petitioners could not show that the new guidance methodology had been used in analyzing that project.

The court then held that it lacked statutory jurisdiction under the federal Administrative Procedure Act to hear the challenge to the new PM 10 guidance. A guidance is not reviewable unless it is actually a binding legislative rule. Because the recommended methodology in the 2010 and 2015 guidances was merely a recommendation and was not binding, it was not reviewable as a final agency action. EPA had issued the 2010 guidance after notice and comment. However, EPA's use of the notice and comment procedures did not convert the recommended methodology into a legislative rule.

Sierra Club v. EPA, D.C. Circuit No. 16-1097 (October 24, 2017)

SAN DIEGO MPO EIR FOR PLAN TO REDUCE GHG EMISSIONS REJECTED BY CALIFORNIA APPELLATE COURT

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In the most recent chapter of the complex and contentious debate regarding the evaluation of greenhouse gas emission (GHG) impacts of transportation plans and projects in California, the California Court of Appeal concluded that a metropolitan planning organization (MPO) did not adequately substantiate the rejection of mitigation measures and alternatives to reduce GHG emissions of a regional transportation plan. The Court determined that elements of a climate action strategy adopted by San Diego County were relevant to the MPO's choice of mitigation measures and alternatives, and should have been considered by the MPO. The decision is based on state law, and the impact of the decision is limited to California. It may, however, portend similar challenges to transportation plans in other states under NEPA.

Unlike NEPA, the California Environmental Quality Act (CEQA) includes a substantive mandate that agencies adopt mitigation measures or alternatives to avoid significant environmental impacts where it is "feasible" to do so. While state law provides agencies with fairly broad discretion to determine whether mitigation measures or alternatives are feasible, the determination must be supported by substantial evidence. Like NEPA, CEQA requires the evaluation of a reasonable range of alternatives to address significant impacts.

The California Attorney General and several environmental groups challenged the regional transportation plan for San Diego County on the grounds that the intersection of California climate change law and CEQA required the MPO to evaluate additional measures and alternatives to achieve the state's aggressive 2050 GHG reduction goals (80% reduction below 1990 levels). State law establishes quantitative GHG reduction targets for transportation plans to achieve by 2020 and 2035. The state has not yet adopted regulations requiring MPOs to achieve the 2050 goal.

In 2017, the California Supreme Court rejected the California Attorney General's claim that the environmental impact report on the transportation plan failed to discuss the plan's consistency with the 2050 GHG emission reduction goal. The Supreme Court

remanded the case back to the Court of Appeal to address other issues, including whether substantial evidence supported the MPO's rejection of mitigation measures and alternatives as infeasible.

Prior to the Supreme Court's decision, the MPO had adopted an updated transportation plan and new EIR with an expanded evaluation of GHG impacts. Nevertheless, on remand, the Court of Appeal rejected the MPO's argument that the challenge to the superseded transportation plan and EIR was moot.

The EIR evaluated three GHG mitigation measures that the MPO rejected as infeasible: (1) requiring all vehicles to be zero emission vehicles or to be powered by renewable energy; (2) requiring all future construction to be net zero energy use; and (3) requiring all future construction activity to include only equipment retrofitted to significantly reduce GHG emissions. The Court of Appeal characterized the three rejected mitigation measures as "unrealistic," and faulted the MPO for not considering more realistic measures. "Missing from the EIR is what CEQA required: a discussion of mitigation alternatives that could both substantially lessen the transportation plan's significant [GHG] emissions impacts and feasibly be implemented." Slip Op. at 21. The examples of such potentially feasible mitigation cited by the Court included potential measures identified in the county's Climate Action Strategy. These potential alternatives identified in the Climate Action Strategy include supporting the planning and development of smart growth areas through transportation investments and other funding decisions; offering incentives for transit-oriented developments in smart growth areas; coordinating the funding of low carbon transportation with smart growth development; and encouraging parking management measures that promote walking and transit use in smart growth areas.

The Court also determined the range of project alternatives evaluated in the EIR to be inadequate. The EIR evaluated seven project alternatives. The Court faulted the range of alternatives for focusing on congestion relief, and for failing to include an alternative that would significantly reduce vehicle miles travelled. The Court once again relied on the county's Climate Action Strategy – pointing to the Climate Action Strategy's emphasis on "[l]owering vehicle miles traveled means providing high-quality opportunities to make trips by alternative means to driving alone such as walking, bicycling, ridesharing, and public transit, and by shortening vehicle trips that are made." Slip Op. at 25-26.

Finally, the Court concluded that the record did not include substantial evidence supporting the MPO's determination that it could not reasonably provide additional baseline information regarding toxics air contaminants. The case is remanded to the trial court to determine a remedy.

Cleveland National Forest Foundation v. San Diego County Assn. of Governments, Cal. Court of Appeal No. D063288 (November 16, 2017)

FTA DECISION NOT TO DO SEIS, FUNNELING APPROACH TO ALTERNATIVES, AND ANALYSIS OF INDIRECT EFFECTS OF MARYLAND TRANSIT PROJECT UPHELD

Submitted by

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A group of Plaintiffs challenged FTA's decision to proceed with a light rail project, the Purple Line, which would connect communities in Montgomery and Prince George Counties in Maryland and provide connections with other transit providers, such as Metrorail and WMATA. The District Court had ordered FTA to do a Supplemental Environmental Impact Statement (SEIS) because safety problems had undercut future ridership projections. On appeal the DC Circuit of Appeals held that no SEIS was necessary. The Court accepted FTA's analysis of demand and FTA's decision that changes in demand would not change the environmental impact of the project.

The Court also accepted FTA's analysis of indirect effects of development near the new transit stations. The analysis was based on the conclusion that future zoning and development would be very difficult to specifically ascertain.

The Court endorsed the process FTA used to analyze eight alternatives in the DEIS, select the preferred alternative, and then analyze the preferred alternative and the no action alternative in the FEIS. The Court held that this "funneling approach" followed NEPA's rule of reason.

The Court also accepted the changes in the project that abandoned the "Green Track" concept of planting vegetation along the right of way to reduce impacts of runoff. The Court acknowledged that although this was a cost saving change, other measures such as the use of crushed stone would minimize impacts due to the change.

Friends of the Capital Crescent Trail, et al. v. FTA, et al. D.C. Circuit No. 17-5132, December 19, 2017