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CATEGORICAL EXCLUSION ADEQUATE FOR WISCONSIN SAFETY IMPROVEMENT PROJECT

Submitted by Deborah Cade

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The U.S. Court of Appeals for the Seventh Circuit upheld the validity of a categorical exclusion for a highway safety project, holding that no EIS was required and that FHWA did not act arbitrarily in determining that the CE and the report on which it was based was an adequate response to a "substantial controversy on environmental grounds" under 23 C.F.R. §771.117(b)(2).

Wisconsin Department of Transportation proposed safety improvements to a seven and one-half mile segment of a two-lane highway, in a project that widened safety shoulders but did not add traffic lanes. WisDOT's environmental report concluded that the project would not have significant environmental impacts, but would reduce the accident and injury rate. The project included replacement for filled wetlands, and did not impact endangered species. FHWA accepted the report and concurred that the project was appropriate for a categorical exclusion.

Residents and environmental groups challenged FHWA's decision, contending that their opposition constituted "substantial controversy on environmental grounds" that required greater study under 23 C.F.R. §771.117(b)(2). The plaintiffs also contended that the report needed to have been prepared by FHWA, and that it failed to consider cumulative impacts.

The Seventh Circuit rejected the plaintiffs' arguments and affirmed the trial court's dismissal. The court held that FHWA's oversight in "commenting on drafts and making suggestions" evidenced its involvement in the report, and noted that no statute or rule requires that FHWA have written the document. In rejecting the cumulative impacts argument, the court noted that FHWA needed to consider cumulative effects when deciding whether a particular category of projects, in this case renovating highways, was appropriate for a categorical exclusion under 40 C.F.R. §1508.4. The only question for this particular project was whether it was properly treated as a CE under 23 C.F.R. §771.117(c)(26) or whether it failed the requirements of 23 C.F.R. §771.117(e), which sets out exceptions for the use of a CE for highway renovation projects. The court held that the CE was appropriate.

The plaintiffs had alleged that their own opposition to the project, along with that of other organizations, was a "substantial controversy on environmental grounds." The court appeared to accept that that opposition created a "controversy," and did not address what is required to establish a controversy or whether the opposition was based on environmental grounds. Rather the court concluded that regardless of the nature of the controversy, the environmental report was an adequate response by FHWA.

Highway J Citizens Group v. United States Dep't of Transportation, 891 F.3d 697 (7th Cir. 2018)

WASHINGTON STATE DOT REQUIRED TO MODIFY CULVERTS TO SATISFY NATIVE AMERICAN FISHING RIGHTS

Submitted by

Lance Hanf (FHWA, HCC-WE) and Jesse Carey (FHWA Law Clerk) with input from Kevin Moody (FHWA Resource Center)

On June 11, 2018, the Supreme Court handed down a *per curiam* opinion of an equally divided court (4-4 with Justice Kennedy recused), effectively affirming the Ninth Circuit's opinion in the case *Washington v. United States,* 827 F.3d 836 (9th Cir. 2016), *en banc denied* 853 F.3d 946 (9th Cir. 2017). *Washington v. United States*, No. 17-269, 584 US___138 S.Ct. 1832, 201 L.Ed.2d 200 (2018). Known informally as the "Culverts case," this decision was the latest in a line of cases stretching back to the 1970s between the State of Washington and the United States Government (acting in its trust capacity on behalf of the Native American Tribes). Twenty-one tribes also were plaintiffs in this litigation. All of these disputes have revolved around the Stevens Treaties, a set of nineteenth century treaties between the Native American Tribes and the U.S. government. The contested part of the Treaty is Article 3, which states in relevant part: "The rights of taking fish, at all usual and accustomed grounds and stations, is further secured to all Indians in common with all citizens of the Territory [Washington]."

Prior Decisions

Three cases provide context for this decision. In *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash 1974), known more commonly as the Boldt decision (named after the Judge in the decision), the U.S. Government argued that Article 3 of the Treaty gave Native Americans the right to fifty percent of the salmon population in the Olympia Watershed. Judge Boldt agreed with this argument. This imposed a substantive duty on Washington State to allow Native Americans unfettered access to fishing grounds contemplated in the treaty. Subsequently, in *United States v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the U.S. Government argued that Article 3 did not merely guarantee fifty percent of the existing Salmon population but that there should be an adequate supply of salmon to allow for a "moderate living." Using canons of construction that construed the treaty interpretation in favor of the Native American Tribes, the Supreme Court concurred, finding plenty in the contextual history of the treaty to support this proposition. Thus, the duty imposed in the Boldt decision was expanded to not merely protect the Tribes' share of fish, but to also include a protection of the Tribes' supply of fish. Finally, in 1983 the U.S. Government sought declaratory judgment on the environmental issue, arguing, *inter alia*, that the Stevens Treaty imposed a duty to prevent the despoliation of the salmon habitat itself and was successful at the trial court. This litigation was known as Phase II. On appeal the Ninth Circuit disagreed, in part, finding that declaratory judgment was not a sound use of judicial discretion on the basis that the issue of protecting the salmon habitat was too broad to be resolved without litigating disputes in a particularized, specific manner. *United States v. Washington*, 506 F. Supp. 187, 191 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1983).

United States v. Washington: The Culverts Case

The present "Culverts case" grows out of Phase II of these cases and its requirement for a particularized issue or impact. The U.S. Government argued that the widespread use of barrier culverts under roads in the Olympia Watershed was a significant source of degradation to the salmon population and requested permanent injunctive relief in the form of Washington State replacing the barrier culverts. Washington argued that there was no substantive duty in the Treaties that would force it to protect the salmon populations. It also argued that because some of the culverts involved Federal Highway Administration's (FHWA) culvert guidelines, Washington believed that the culverts complied with the Treaties. Additionally, Washington filed a cross request on the basis that the U.S. Government had also violated the treaty rights through FHWA's Federal-aid funding of some of these projects.

The district court dismissed this motion on the basis that the U.S. had not waived sovereign immunity and denied a motion to amend on the grounds that Washington had no standing to sue the U.S. Government on violation of Treaty rights finding that only the Native American Tribes had that authority given it was a party to the Treaty. The court granted the U.S. Government's motion for summary judgment on the basis that

there were discrete facts establishing that 1) the Stevens Treaty guaranteed the Tribes' supply of fish and 2) the State of Washington operated culverts in contravention of that guarantee.

The District Court issued a permanent injunction in 2010 ordering the following:

- Washington, in consultation with the Tribes and the U.S. Government, was to prepare a list within six months of all state-owned culverts;
- Washington State DNR, State Parks, and Washington Department of Fish and Wildlife were to correct all their culverts on the list by October 2016;
- Washington Department of Transportation (WSDOT) was to replace those culverts with more than 200 linear meters of salmon habitat upstream within seventeen years;
- WSDOT was to replace those culverts with less than 200 linear meters of salmon habitat upstream at the end of those culverts' natural life or where there would be independent road construction work undertaken by WSDOT.

On appeal to the Ninth Circuit, Washington once again asserted that there was no substantive right in the Treaty that would give rise to a duty to protect the salmon population. The Ninth Circuit disagreed, pointing to the decision in Fishing Vessel as well as the history of the Treaty negotiations in which Governor Stevens indicated that the treaty would ensure that the Native Americans would have food and drink forever as proof of a substantive right.

Additionally, Washington argued that because the FHWA had failed to object to the culvert plan prior to implementation, Washington reasonably concluded that there was no violation of Treaty rights and therefore the United States had waived the argument. The Ninth Circuit disagreed with this argument as well, finding that there could be no waiver of Treaty rights unless Congress had explicitly revoked the Treaty. The FHWA found itself in the odd position of funding some projects with its partner the WSDOT, the Defendant, and also being part of the U.S. Government.

Finally, the Ninth Circuit affirmed the district court's denial of the motion for cross request on the basis of both sovereign immunity and standing, finding that Washington could not sue the U.S. Government on behalf of a third party's Treaty rights.

Potential Future Consequences

In addition to the timing and costs of WSDOT's requirement to ameliorate the historic culvert impacts on fish passage in the Olympia Watershed, another major question will be how this holding affects new projects in both the State of Washington and other parts of the country that have Native American Treaties with similar language guaranteeing fishing and therefore fish passage to allow that fishing.

For the environmental practitioner, one question is how to incorporate a Treaty right like this into a National Environmental Policy Act (NEPA) document. Likewise, even without a Treaty, Tribes may assert similar claims for spiritual and cultural features that are spread across their ancestral home or a Traditional Cultural Property (TCP). The consideration of these rights and claims are compatible with longstanding best practices for environmental impacts, and, for any of the statutory decisions that require environmental analysis. Best practices on relevant Resources, Ecosystems, and Human Communities (RECs) evaluate the action-focused direct and indirect effects; input those into a resource-focused consideration of total effects or consequences to the REC; consider mitigation; and document the expected consequences to the REC that will satisfy both a NEPA and Treaty requirement. The fishery issue in the recent *Culverts case* and Boldt decisions, underscore the idea of cumulative impacts where the incremental effect on fish passage and fishing spots and access to those spots are notable REC's. Culverts and road-related water diversion structures, such as erosion countermeasures, are almost always limiting factors that substantively influence the trends and conditions of the REC. As with all NEPA documents, an honest and thorough evaluation of these culvert impacts on fish passage goes a long way towards satisfying the requirement and arguably complying with a Native American Treaty with this purpose.

CEQ ISSUES ANPRM ON NEPA RULES

Submitted by

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On June 20, 2018, the White House Council on Environmental Quality (CEQ) issued an Advance Notice of Proposed Rulemaking (ANPRM), "Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act." 83 FR 28591. CEQ requested comments on potential revisions to its implementing regulations for the National Environmental Policy Act (NEPA). The comment period was extended once and closed on August 20, 2018. 83 FR 32071 (July 11, 2018).

CEQ's action signals the first time in decades that stakeholders and the public will have the opportunity to shape implementation of the law that requires federal agencies to conduct an environmental review for projects involving federal funding or other federal approvals. If CEQ does revise its NEPA regulations, the impact would be government-wide. Federal agencies rely on and must be consistent with CEQ's NEPA regulations when developing their own agency-specific NEPA procedures. Since CEQ first issued regulations in 1978, it has routinely issued guidance documents and policy statements to provide clarifications of its regulations to agencies, project sponsors, and the public.

Nevertheless, the world has changed dramatically since the regulations were first issued. Gone are the days when an interested citizen had to scour the local newspaper for a public notice and personally attend a meeting to learn about an issue. Typewriters and pens are rarely used these days to write a comment. And, agencies no longer receive comments by post. The Internet, smart phones, and social media are just a few examples of our daily reality that are not reflected in CEQ's regulations; nor are the advances in science and technology that agencies can now use to conduct environmental reviews and prepare NEPA documentation. Coupled with this general need for modernization are the numerous court decisions, laws mandating expedited procedures for environmental review and permitting, executive orders, and agency policies and guidelines that have implemented or altered the procedures required under CEQ's NEPA regulations. The rulemaking process could allow CEQ to codify aspects of this decades-long effort to improve environmental outcomes while reducing the burden, time and cost involved in environmental reviews under NEPA.

Notwithstanding suggestions from NEPA practitioners both inside and outside the federal government, CEQ has not undertaken a broad revision of its NEPA regulations, until now. This article provides a brief history of CEQ's NEPA regulations and then summarizes the themes, topics and issues identified for comment by CEQ.

A Brief History of CEQ Rulemaking

NEPA was passed by Congress in 1969 and signed into law by President Nixon in 1970. 42 U.S.C. 4321 *et seq.* NEPA sets forth a national policy "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. 4321. The statute articulates a set of goals that serve as a national charter for the protection of the environment and natural and cultural resources. 42 U.S.C. 4331(a) and (b). Section 102 of NEPA contains provisions directing federal agencies to act in accordance with the letter and spirit of the Act. 42 U.S.C. 4332. NEPA also established CEQ as an agency within the Executive Office of the President. 42 U.S.C. 4342. Although NEPA established the basic framework for integrating environmental considerations into federal decision-making, it did not provide the details of the process by which it would be accomplished. As described very briefly here, developing the fundamental components of compliance with the statute's broad mandate has been the purview and responsibility of CEQ.

In 1971, CEQ published "guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act," as directed by President Nixon in Executive Order (EO) 11514, "Protection and Enhancement of Environmental Quality." 35 FR 4247 (March 5, 1970). Shortly thereafter, in 1973, CEQ revised the original guidelines.

In 1977, President Carter amended EO 11514 to direct CEQ to issue regulations providing uniform standards for the implementation of NEPA and to require agency compliance with the CEQ regulations. Executive Order 11991, "Relating to Protection and Enhancement of Environmental Quality," 42 FR 26967 (May 24, 1977). CEQ promulgated its "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act" (CEQ's NEPA regulations) at 40 CFR parts 1500-1508. 43 FR 55978 (November 29, 1978). These regulations contain the requirements for the elements of NEPA compliance that we so readily recognize today, such as scoping, purpose and need, alternatives analysis, and a Record of Decision. CEQ has amended its NEPA regulations only twice since 1978 -- once, substantively, to eliminate the "worst case" analysis requirement of 40 CFR 1502.22 and a second time in 2005 to update its postal address. 51 FR 15618 (April 25, 1986) and 70 FR 41148 (July 18, 2005), respectively.

On August 15, 2017, President Trump issued EO 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects." 82 FR 40463 (August 24, 2017). Section 5(e) of EO 13807 directed CEQ to develop an initial list of actions to enhance and modernize the Federal environmental review and authorization process. Following that direction, CEQ published an initial list of actions including an intention to review its existing NEPA regulations to identify changes needed to update and clarify its regulations. 82 FR 43226 (September 14, 2017). This ANPRM is a step in that process.

Summary of the ANPRM

CEQ asked for comments on specific aspects of the regulations through a set of 20 questions, grouped under three general themes: NEPA Process; Scope of NEPA Review; and General Topics. Taken as a whole, the questions cover nearly every aspect of NEPA compliance.

Questions #1-3, grouped under the heading "NEPA Process," invited comments on topics related to coordination among multiple agencies. For example, CEQ solicited input about facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions to promote a more efficient process. Evincing a strong reflection of the "One Federal Decision" mandate of EO 13807, Question 1 asked whether CEQ's NEPA regulations should be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient.

Questions #4-13 addressed topics under the heading of "Scope of NEPA Review." These questions solicited comments about fundamental NEPA requirements such as page limits, focusing analysis on significant issues, public involvement, definitions of terms, the timing of decisions, programmatic analysis, and analysis of a range of alternatives. For example, CEQ invited comments about how to improve the clarity and

readability of NEPA documents. Notably, CEQ asked for comments on "time limits for completion" of NEPA documents. CEQ's NEPA regulations do not currently set or recommend time periods for completing the NEPA process. CEQ asked for comments on whether the current provisions of its regulations should be revised to be "more inclusive and efficient" for public involvement. Included in this grouping of questions was the request for comments regarding "key NEPA terms" such as "major federal action," "effects," "cumulative impact," "significantly," and "scope." CEQ also invited comment on whether any new key NEPA terms should be added to its regulations, providing "alternatives," "purpose and need," "reasonably foreseeable," and "trivial violation" as possible terms. Addressing a topic that has often been the topic of litigation, CEQ solicited comment on the range of alternatives considered in NEPA reviews and which alternatives could be eliminated without detailed study.

The remaining questions, #14-20, covered "General" topics, such as obsolete provisions, new technologies, coordination of environmental review and authorization decisions, the effectiveness of NEPA implementation, tribal involvement, mitigation, and the reduction of unnecessary burdens and delays in the process.

Looking Forward

Prior to taking further action, CEQ will review the comments it received. Under the Administrative Procedure Act, CEQ cannot revise its regulations without issuing a proposed notice of rulemaking. 5 U.S.C. 551 *et seq*. However, to date, based on a check of Regulations.gov and CEQ's website, CEQ has not made publicly available any of the comments it received. Therefore, analysis of CEQ's next steps or the revisions it may propose would be speculative. Nonetheless, in its deliberations, CEQ should be mindful of established case law and the numerous environmental streamlining statutes that have been enacted since 1978, such as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) in 2005, the Moving Ahead for Progress in the 21st Century Act (MAP-21) in 2012 and the Fixing America's Surface Transportation (FAST) Act in 2015. P.L. 109-59 (August 10, 2005), P.L. 112-141 (July 6, 2012), and P.L. 114-94 (December 4, 2015), respectively. Although NEPA has its supporters and its detractors, it is likely they all would agree that revisions to CEQ's NEPA regulations present an unparalleled opportunity to modernize NEPA practices while continuing to fulfill the law's mandate to balance the environmental, social, and economic needs of present and future generations.

DC CIRCUIT OVERTURNS EPA IMPLEMENTATION RULES FOR 2008 OZONE STANDARD AND REINSTATES CONFORMITY REQUIREMENTS FOR REVOKED 1997 OZONE STANDARD

Submitted by

Bill Malley and Al Ferlo, Perkins Coie LLP[1]

In a decision with potentially significant implications for transportation planning and project approvals across the country, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the U.S. Environmental Protection Agency ("EPA") regulations that were intended to provide a smooth transition to a stricter air quality standard for ozone. The practical impact of the decision was to reinstate the requirement to make transportation conformity decisions for the revoked ozone standard. Recently, the D.C. Circuit granted a partial stay of its decision, which avoids much of the immediate impact on transportation planning and project development. But the decision has potentially significant consequences going forward, and its practical effects will depend heavily on how it is interpreted by EPA in guidance that remains under development.

The case is *South Coast Air Quality Management District v. Environmental Protection Agency*, 882 F.3d 1138 (D.C. Cir. 2018).

Background

The Clean Air Act directs EPA to establish national ambient air quality standards ("NAAQS") setting minimum allowable concentrations of pollutants that have the potential to endanger human health. Geographic areas in which air quality falls short of a NAAQS are designated as "nonattainment areas." When an area comes into compliance with a NAAQS, it remains subject to "maintenance" requirements under the Clean Air Act, typically for a period of 20 years.

The Clean Air Act imposes numerous requirements on nonattainment areas and maintenance areas, including "transportation conformity" requirements. A finding of transportation conformity means, in essence, that a transportation plan, program, or project is consistent with applicable State plans for achieving or maintaining a NAAQS. A transportation conformity determination is required when a metropolitan planning organization ("MPO") updates or amends a transportation plan or transportation improvement program ("TIP") in a nonattainment area. A transportation conformity determination also is required when the Federal Highway Administration ("FHWA") or Federal Transit Administration ("FTA") approves a transportation project.

Importantly, EPA is required to review and, if appropriate, update each NAAQS every five years. As a result, EPA periodically replaces an existing NAAQS with a new NAAQS for the same pollutant. Typically, the new NAAQS is stricter. When a new

[1] The authors served as counsel to AASHTO in the case discussed in this article.

NAAQS is issued, new nonattainment designations are made for the new standard. When the new standard comes into effect, EPA may repeal the previous standard, but - at least under some circumstances - EPA must impose "anti-backsliding" requirements with regard to the revoked standard.

The 2015 Implementation Rule for the 2008 Ozone Standard

In 2008, EPA issued a final rule establishing a new NAAQS for ozone. The 2008 ozone NAAQS was stricter than the previous ozone NAAQS, which had been adopted in 1997. Following adoption of the 2008 standard, States and EPA engaged in a lengthy process to designate nonattainment areas for that new standard. Finally, in March 2015, EPA issued a final rule - known as the "2015 implementation rule" -- setting forth the process for transitioning from the 1997 standard to the 2008 standard. Among other things, the 2015 rule revoked the 1997 standard. It also included various "anti-backsliding" requirements for that standard.

At the time the 2015 rule was issued, dozens of metropolitan areas that had achieved the 2008 standard - and thus were designated as attainment for that standard - remained technically in non-attainment or maintenance status for the less-strict 1997 standard. Logically, of course, it is impossible to be in attainment status for the stricter 2008 standard and be in non-attainment for the less-strict 1997 standard. But the process for redesignation is lengthy and requires EPA approval, so in fact dozens of areas remained in nonattainment status for the 1997 standard when the 2008 standard went into effect. In addition, because maintenance requirements last for 20 years, many areas that had achieved the stricter 2008 standard remained in maintenance status for the 1997 standard.

In its 2015 rule, the EPA applied transportation conformity requirements solely to areas designated as nonattainment or maintenance for the new 2008 standard. It determined that transportation conformity would not be required for the 1997 standard, because that standard had been revoked and replaced with a stricter standard. This meant that conformity would no longer be required in any areas designated as attainment for the 2008 standard.

The *South Coast* Lawsuit

EPA's rule was challenged by the Sierra Club and other environmental groups and also was challenged in a separate lawsuit by the South Coast Air Quality Management District ("South Coast"). The environmental groups claimed, in part, that EPA had exceeded its authority under the Clean Air Act by allowing transportation conformity requirements to be made only for the 2008 standard. They claimed that transportation conformity requirements must remain in effect for the 1997 standard in all nonattainment and maintenance areas for that standard, unless and until those areas are formally re-designated to attainment for the 1997 standard.

The environmental groups used the term "orphan areas" to refer to areas that had attained the 2008 standard but remained in nonattainment or maintenance status for the 1997 standard. As used by the groups, the term "orphan" signified that these areas would be unprotected in the sense that transportation conformity requirements would no longer apply. The groups claimed that "anti-backsliding" requirements in the Clean Air Act compelled EPA to retain conformity requirements in those orphan areas.

In an opinion issued on February 16, 2018, the D.C. Circuit struck down the 2015 rule, agreeing with the environmental groups on most of their challenges to the rule. Among other things, the court agreed with the environmental groups that the Clean Air Act's anti-backsliding requirements require conformity determinations in areas that remain in "nonattainment" status for the revoked 1997 standard:

> "Although the Final Rule revoked the 1997 NAAQS, it cannot revoke the statutory status of orphan maintenance areas. Even after revocation of the 1997 NAAQS, an orphan maintenance area is 'an area that was designated as a nonattainment area but that was later redesignated ... as an attainment area.'
>
> It is irrelevant that this previous designation and redesignation occurred before the prior NAAQS was revoked because nothing in the Clean Air Act allows the EPA to waive this unambiguous statutory requirement. Moreover, the Act clearly contemplates new NAAQS being promulgated within ten years of an area's redesignation to attainment because the statute requires the EPA to review NAAQS every five years and to 'promulgate such new standards as may be appropriate.' § 7409(d)(1). Therefore, the revocation of the 1997 NAAQS does not waive the unambiguous mandate that conformity requirements apply to orphan maintenance areas. Accordingly, we grant Environmental Petitioners' petition as to the elimination of transportation conformity in orphan maintenance areas."[2]

EPA's Petition for Rehearing and Order Granting a Limited Stay

The D.C. Circuit's decision prompted immediate concerns among State DOTs and MPOs, as well as FHWA and FTA, about the practical implications of reinstating transportation conformity requirements for the revoked 1997 standard in areas that had fully attained both that standard and the stricter 2008 standard - and had not been making conformity determinations at all since the 2015 rule was issued. There was significant concern that the rule would cause transportation planning and project approvals in orphan areas to be halted until conformity determinations could be made for the new standard. AASHTO and the Association of Metropolitan Planning Organizations ("AMPO") sent a joint letter to EPA urging the agency to file a petition for rehearing of the D.C. Circuit's decision.

[2] 882 F.3d at 1155.

On April 23, 2018, EPA filed a petition for rehearing with the D.C. Circuit, arguing that the Court had erred in its interpretation of the Clean Air Act's anti-backsliding requirements. EPA's brief was accompanied by declarations from senior EPA, FHWA, and FTA officials outlining the practical ramifications of the court's decision, as well as an FHWA/FTA guidance memo. The FHWA memo listed the "orphan areas" - 82 in total - and expressly directed that plan, TIP, and project-level approvals "may not proceed" in those areas until a transportation conformity determination was made for the 1997 standard.[3] On April 30, 2018, AASHTO and AMPO filed a motion to appear as *amicus curiae* in the case, together with a brief in support of EPA's petition.

In their response to EPA's petition, the environmental groups opposed rehearing, but offered a limited concession: they stated that they would not object to a stay of the court's decision for 12 months with respect to transportation conformity in orphan areas. They specified that the stay should run from the date of the opinion - February 16, 2018.

On September 14, 2018 the D.C. Circuit granted a stay of its decision, consistent in scope and duration with the environmental groups' proposal. As a result of this order, transportation conformity requirements for the 1997 standard will not come into effect in the 82 "orphan areas" until February 16, 2019. This period is intended to allow time for States and MPOs to carry out conformity determinations for the 1997 standard, so that plan, TIP, and project approvals are not delayed.

Next Steps

It is expected that EPA will issue guidance regarding implementation of the D.C. Circuit's decision, including instructions for carrying out the modeling needed to demonstrate conformity to the revoked 1997 standard. That guidance will play a key role in determining the practical impact of this decision on States and MPOs in orphan areas. Important issues include

> (1) What technical analysis is needed to demonstrate conformity for the revoked 1997 standard? For example, what modeling assumptions and emissions budgets should be used?
> (2) If an area is currently in (or is re-designated to) maintenance status for the 1997 standard, and is attainment for the 2008 standard, will conformity determinations for the 1997 standard be required for the full 20-year maintenance period?
> (3) If an area is subject to conformity requirements for both the 1997 standard and the 2008 standard (e.g., because the area is in maintenance status for both standards), will a conformity determination for the 2008 standard suffice to demonstrate conformity for the 1997 standard?

[3] W. Waidelich, FHWA, and M. Welbes, FTA, "Interim Guidance on Transportation Conformity Requirements for the 1997 Ozone NAAQS" (April 23, 2018).

(4) What are the practical implications of this ruling for the upcoming transition from the 2008 standard to the even stricter 2015 ozone standard?

The larger issue that remains is the inherent inflexibility of the Clean Air Act as interpreted by the court in the *South Coast* decision. This decision suggests that future transitions to new NAAQS - including the transition from the 2008 to 2015 ozone NAAQS - will require continued conformity determinations for the revoked standard even after the new standard has taken effect.

NO FEDERAL COURT JURISDICTION TO ENFORCE

PROGRAMMATIC AGREEMENT UNDER NHPA

Submitted by

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The Narragansett Indian Tribe (the Tribe) foresaw that a proposed I-95 bridge replacement project in Providence, RI would adversely affect the Providence Covelands Archaeological District, a historic property of importance to the Tribe. After consultation under the National Historic Preservation Act (NHPA), a programmatic agreement was signed by FHWA, RIDOT, the Tribe and others requiring RIDOT to transfer three parcels of land to the Tribe. When it came time to transfer the land, RIDOT insisted the Tribe waive sovereign immunity and allow Rhode Island civil and criminal law to apply to the parcels. The Tribe refused, and the agreement was terminated by RIDOT and FHWA. The Tribe, then, filed suit to enforce the agreement. The District Court ruled that the Federal Government had not waived sovereign immunity under the Declaratory Judgment Act, the Administrative Procedure Act, and the NHPA, the three bases for Federal jurisdiction, so the FHWA was dismissed. The District Court also ruled that the NHPA did not provide a private right of action to enforce the agreement. As a result, RIDOT was dismissed. On appeal, the Tribe contended that the NHPA had an implied right of action which enabled the suit to proceed. The Tribe did not invoke any provision of the NHPA which was being violated. The Tribe simply alleged breach of contract for failure to comply with the agreement. The Court of Appeal noted that programmatic agreements are not mentioned in the NHPA, only in the regulations. The Court held that the Tribe was not attempting to enforce the NHPA, and the NHPA had no provision to require that the Federal Government waive sovereign immunity. The Court also held that the NHPA does not put any requirements on State agencies, only Federal agencies. As a result, there was no basis for a claim against RIDOT.

Narragansett Indian Tribe v. Rhode Island DOT, et al., 1st Circuit No. 17-1951, August 30, 2018.

NEXT DEADLINE IS DECEMBER 17, 2018

The next deadline for submission of articles for the January, 2019 edition of this newsletter is December 17, 2018. Please send articles to Richard.christopher@hdrinc.com and use Microsoft Word.