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NO PREDETERMINED OUTCOME IN NORTH CAROLINA

OUTER BANKS BRIDGE DECISION

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Plaintiff environmental groups challenged this bridge construction project as being in violation of NEPA, section 4(f), and the National Historic Preservation Act. The district court dismissed claims that the agencies should have prepared a supplemental EIS after determining that the agencies took a hard look at the environmental consequences of the project changes, and that their action was not arbitrary and capricious. The Fourth Circuit affirmed the trial court's order on summary judgment.

The bridge project had been the subject of several rounds of environmental review, including a 2008 EIS that analyzed a set of reasonable alternatives; a 2010 EA that further developed those alternatives; a 2013 EA that addressed changes since 2010, including the effects of a recent hurricane; and a 2016 EA that analyzed the impacts, including construction impacts, of a particular bridge alternative. The 2016 EA focused on a bridge design that the agencies had agreed to designate as the preferred alternative in a settlement of a claim by another environmental group. The agencies had agreed to present the preferred alternative to a larger group of agencies and seek their concurrence that it was the "least environmentally damaging practicable alternative" (LEDPA) under section 404 of the Clean Water Act. The agency group was

a “merger team” comprising NCDOT, FHWA, and multiple state and federal regulatory agencies. 913 F.3d 213, 219-20 (4th Cir. 2019).

The court noted circuit precedent holding that in order for project changes to require an SEIS, the changes “must present a seriously different picture of the environmental impact of the proposed project.” *Id.* at 221. The court reviewed the decision not to prepare an SEIS in two steps: (1) determining whether the agencies took a hard look at the environmental consequences of the project changes, and (2) reviewing whether the agencies’ decision not to prepare an SEIS after taking that hard look was arbitrary and capricious. Finding considerable detail in the agencies’ discussion of the similarities and differences between the bridge versions analyzed in the 2008 EIS and the subsequent EAs, the court concluded that the agencies had taken a hard look at the changes. *Id.* at 222-23. Because neither this analysis nor the plaintiffs identified a need for an SEIS, the court concluded the decision not to prepare an SEIS was not arbitrary and capricious.

The court also addressed the plaintiffs’ contention that the 2015 settlement with another environmental group, in which the agencies agreed to identify the preferred alternative, was a “predetermination” of the outcome of the 2016 environmental review. First, the court noted that under Fourth Circuit precedent, the court looks only at the environmental review itself to determine whether the outcome was predetermined, and not at other evidence such as agency internal documents and e-mail. “[O]ur analysis focuses on whether an agency’s objective environmental analyses demonstrate evidence of predetermination.” *Id.* at 225. The court noted that other circuits differ on this approach. The court concluded that the EAs and the EIS did not show evidence of predetermination. *Id.*

Even in reviewing the evidence regarding the settlement, the court concluded that the evidence did not show that the outcome was predetermined. The settlement required only that the agencies designate the particular bridge design as the preferred alternative and seek the concurrence of the merger team that it was also the LEDPA. It did not require the agencies to select it as the final approved alternative. *Id.* at 226. Because there was no evidence that the agencies had acted in bad faith, the court affirmed the district court’s denial of the plaintiffs’ request to supplement the administrative record with the records regarding the settlement.

Finally, the court affirmed the district court’s denial of the plaintiffs’ request to supplement their complaint to add claims under section 4(f) and the National Historic Preservation Act, based on newly discovered information regarding a historic ship wreck area under the proposed bridge. The court concluded that an amendment would have been futile, because the proposed claims would have been subject to dismissal on the grounds that they were not ripe for review as the agencies had not yet made a final decision based on the new information. *Id.* at 228.

Save Our Sound OBX, Inc. v. North Carolina Department of Transportation and Federal Highway Administration, 914 F.3d 213 (4th Cir. 2019)

HIGHLIGHTS FROM 2018 COURT DECISIONS ON NEPA REVIEWS

FOR TRANSPORTATION PROJECTS

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Court decisions in National Environmental Policy Act ("NEPA") cases typically are heavily fact-dependent; cases that set important legal precedent tend to be rare. Yet even relatively routine cases can provide useful insights for NEPA practitioners. In that spirit, this article gathers some noteworthy nuggets from 2018 court decisions involving NEPA reviews for transportation projects. For more detailed information, refer to AASHTO's Case Law Updates (CLUE) website. The CLUE website is updated annually and includes case law summaries for published NEPA cases involving FHWA, FTA, and FRA projects since 2008 (and some FAA cases, too).

Purpose and Need

Several cases in recent years have acknowledged that a Purpose & Need statement can be based on goals established in transportation plans. This trend continued in 2018.

- Basing Purpose on Transportation Plan. In a case involving the West Waukesha Bypass in Wisconsin, the project's purpose was based in part on goals established in decades-old transportation plans. In upholding the purpose statement, the court noted that FHWA and the State DOT had "considered more than just the project's history in defining their purpose and need." The court also noted that the agency "rejected the two-lane alternatives for many reasons, not just because they did not comport with old transportation plans."[1]

Screening of Alternatives

Several cases in 2018 involved challenges to an agency's methodology for screening alternatives or to the basis for eliminating alternatives proposed by commenters. A few examples:

- "Best in Family" Method for Screening. In a case involving improvements to US-95 in Idaho, FHWA considered multiple routes in three separate corridors and advanced the highest-ranked route in each corridor for detailed study in the EIS (i.e., a "best in family" approach). The plaintiff argued that FHWA should have selected the highest-ranked routes *overall*, rather than the highest-ranked route

[1] *Waukesha County Environmental Action League v. USDOT*, 348 F.Supp.3d 869 (E.D. Wis. 2018).

in each corridor. The court upheld the use of the "best-in-family" method, finding that "NEPA 'does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives considered, or which have substantially similar consequences.'"[2]

- Hybrid Alternatives. In the West Waukesha Bypass case, the plaintiffs argued that FHWA erred by failing to consider whether a combination of rejected alternatives (i.e., a combination of improving existing roads, expanding transit, and adjusting signal timing) could meet the project's purpose. The court held that FHWA did not need to evaluate a combination of rejected alternatives because there was no evidence in the administrative record that a combination of rejected alternatives would meet the project's purpose. [3]

- Minor Variations. In a case involving the Brightline passenger rail project in Florida, a county in the project corridor claimed that FRA should have given detailed consideration to an alternative alignment proposed by the county. In the ROD, FRA explained that the county's proposed alignment was not feasible for the same reasons that FRA had rejected another alternative considered in the EIS. The court explained that FRA was not required to further analyze the county's proposed alternative because it shared dispositive features with the other alternative that FRA had already rejected. 4

- Permitting Obstacles. In a case involving the Bonner Bridge project in North Carolina, FHWA rejected an alternative based in part on its concern that the U.S. Fish and Wildlife Service might not issue a permit for that alternative, which ran through a wildlife refuge managed by the Service. The court upheld that rationale: "Although NEPA requires the Agencies to assess all reasonable alternatives, NEPA does not require the Agencies to apply for a permit in spite of reasonable belief that such permit is likely to be denied nor include detailed analysis for a likely unsuccessful alternative in an EIS."[5]

Impacts Analysis - Level of Detail

Most NEPA cases involve allegations that certain environmental impacts were not considered in sufficient detail or that a different impact assessment methodology should have been used. Courts tend to be deferential to agencies on such claims, and this year was no exception.

- Construction Impacts - Haul Routes. In the Bonner Bridge case, the plaintiffs argued that FHWA did not adequately consider environmental impacts from

[2] *Paradise Ridge Defense Coalition v. Hartman*, 2018 WL 6434787 (9th Cir. 2018).
[3] *Waukesha County Environmental Action League v. USDOT*, 348 F.Supp.3d 869 (E.D. Wis. 2018).
[4] *Indian River County v. USDOT*, 348 F.Supp.3d 17 (D.D.C. 2018).

[5] *Save Our Sound OBX, Inc. v. North Carolina DOT*, 324 F. Supp. 3d 597 (E.D.N.C. 2018).

transporting construction materials to the project site. The court held that FHWA was not required to conduct a detailed comparative analysis of impacts from hauling construction materials where there was no basis to conclude that the alternatives differed with respect to those impacts. The court also explained that FHWA had discretion to determine the methodology for analyzing such impacts, and NEPA did not require the agency to consider hauling impacts separately from other construction impacts.[6]

- Air Quality - MSATs. In a case involving improvements to I-70 in Denver, the plaintiffs argued that FHWA should have evaluated specific health effects from Mobile Source Air Toxics (MSATs). The court agreed with FHWA that, because all alternatives would have substantially the same MSAT emissions, FHWA's decision-making would not be materially enhanced by additional analysis of health effects. [7]

- Socio-Economic Effects - Geographic Scope. In the Bonner Bridge case, the plaintiffs claimed that FHWA had failed to consider socioeconomic effects on a specific community as a distinct unit, separate from other parts of the county or region in which the project was located. The court rejected this argument, explaining that "the Agencies have discretion to make policy judgments as to the proper geographic unit of analysis for economic and social effects." [8]

- Hazardous Materials - Potential Effects if Mitigation Fails. In a case involving improvements to I-70 in Denver, the plaintiffs claimed that the EIS did not adequately address the health effects of hazardous materials if mitigation measures failed. The court noted that the EIS extensively documented contaminated areas that would be disturbed during construction, as well as procedures for handling and removing contaminated soil. The court explained that the EIS did not need to evaluate potential health impacts that would occur if mitigation measures for handling contaminated soil were unsuccessful, because there was no reason to believe that the mitigation measures would fail. [9]

Segmentation

When two or more projects are undertaken simultaneously in close proximity to one another, plaintiffs commonly raise the issue of segmentation. For highway and transit projects, courts typically assess whether the agency properly applied the segmentation criteria in FHWA and FTA's joint NEPA regulations, at 23 C.F.R. 771.111(f). A notable case this year involved the issue of whether the agencies must also apply criteria in the Council on Environmental Quality's NEPA regulations, at 40 C.F.R. 1508.25(a).

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[6] *Save Our Sound OBX, Inc. v. North Carolina DOT*, 324 F. Supp. 3d 597 (E.D.N.C. 2018).
[7] *Sierra Club v. FHWA*, 2018 WL 1610304 (D. Colo. 2018).
[8] *Save Our Sound OBX, Inc. v. North Carolina DOT*, 324 F. Supp. 3d 597 (E.D.N.C. June 4, 2018).
[9] *Zeppelin v. FHWA*, 305 F. Supp. 3d 1189 (D. Colo. 2018).

- Segmentation Criteria. In a case involving an interchange project in Texas, the plaintiffs claimed that TxDOT (acting on behalf of FHWA under an assignment MOU) should have applied not only the segmentation criteria in FHWA's regulations but also the separate criteria in the CEQ regulations. The court held that it was sufficient simply to apply the criteria in FHWA's regulations, explaining that "we read § 771.111(f) as having tailored the general policy of § 1508.25(a) to the specific question of whether multiple highway projects are 'in effect, a single course of action.'"[10]

Categorical Exclusions

Challenges to Categorical Exclusion (CE) determinations generally turn on whether the agency adequately supported its finding that the criteria for a CE had been met. In 2018, courts considered several aspects of this issue, including whether FHWA can rely on a State's CE document and whether cumulative effects must be considered in making a CE determination.

- Reliance on State's CE Document. In a case involving a highway project in Wisconsin, the FHWA based its CE determination on an environmental report prepared by the State DOT. The plaintiffs claimed that FHWA violated NEPA by relying on a State DOT's "environmental report" without conducting its own independent analysis. The U.S. Court of Appeals for the 7th Circuit ruled that the lack of a separate explanation did not mean that FHWA failed to consider the project's impacts. In fact, the court noted, the administrative record demonstrated that FHWA was actively involved in reviewing drafts of the state's environmental report, and FHWA only signed off on the environmental report when it was satisfied with its content.[11]

- Consideration of Cumulative Impacts. In the same case involving a Wisconsin highway project, the plaintiffs claimed that the CE document was inadequate because it did not analyze cumulative impacts. The Seventh Circuit ruled that FHWA had already considered cumulative impacts when it created the CE, so it did not need to consider cumulative impacts for each individual project that met the definition of the CE.[12]

Predetermination

Claims of predetermination and bias are frequently raised in NEPA litigation, and typically target actions taken by the project sponsor that indicate the project sponsor's support for a specific alternative and/or the lack of federal agency oversight of the NEPA process. In reviewing such claims, courts tend to acknowledge that it is permissible for the sponsor to have a favored alternative, as long as the federal agency retains control of the NEPA process and the sponsor's preference does not undermine

[10] *Fath v. TxDOT,* 2018 WL 3433800 (5th Cir. 2018).
[11] *Highway J Citizens Group v. USDOT,* 891 F.3d 697 (7th Cir. 2018).
[12] *Highway J Citizens Group v. USDOT,* 891 F.3d 697 (7th Cir. 2018).

the integrity of the NEPA document. Court decisions in 2018 were consistent with this approach to predetermination issues.

- Obtaining Local Approvals in Parallel with NEPA. In a case involving a light rail project in the Minneapolis area, the plaintiff argued that the project sponsor - a public transit agency - had prematurely committed to a specific alternative by obtaining "municipal consent" under State law for a specific route before the NEPA process was completed. The court held that the completion of the municipal consent process did not constitute predetermination because the process was not binding, as demonstrated by the transit agency's having obtained a second round of consent after making changes to the proposed route.[13] (As an aside, it is noteworthy - and unusual - that the court found viable a cause of action against the project sponsor for a NEPA violation, separate from any cause of action that could be brought against the federal action agency.)

- Settlement Agreement Committing Agency to Seek Approval for a Specific Alternative. In the Bonner Bridge case, the plaintiffs alleged that FHWA's selection of a specific alternative was predetermined by a settlement agreement reached with environmental groups in previous litigation regarding the same project. In rejecting this claim, the court noted that the settlement agreement was "conditional in nature" and did not bind the agencies to approve a specific alternative. The court also noted that the administrative record demonstrated that FHWA and the State DOT had adequately evaluated environmental effects of various alternatives and had not made any physical commitment of resources to a specific alternative before FHWA issued the ROD. [14]

Title 23 Requirements

- Public Interest Determination - 23 USC 109(h). In addition to its obligations under NEPA itself, FHWA must comply with 23 U.S.C. § 109(h), which requires FHWA to ensure that "the final decisions on the project are made in the best overall public interest." The plaintiffs argued that Section 109(h) required the agencies to prepare additional health impact analyses. The court held that Section 109(h) did not create additional substantive requirements apart from FHWA's NEPA process, and that FHWA's compliance with its NEPA regulations could satisfy its obligations under Section 109(h).[15]

- Public Hearing Requirement - 23 USC 128. In the West Waukesha Bypass case, the plaintiffs claimed that the agencies violated the public hearing requirement in the Federal-Aid Highways Act (23 U.S.C. § 128) because the format of the public hearing allegedly diluted opportunities for members of the public to hear others' viewpoints. The court disagreed. The court explained that even though other

[13] *Lakes and Parks Alliance of Minneapolis v. Met. Council*, 310 F. Supp. 3d 992 (D. Minn. 2018).
[14] *Save Our Sound OBX, Inc. v. North Carolina DOT*, 324 F. Supp. 3d 597 (E.D.N.C. 2018).
[15] *Sierra Club v. FHWA*, 2018 WL 1610304 (D. Colo. April 3, 2018).

activities (the open house and an opportunity to provide private testimony to a court reporter) were occurring in other rooms at the same time as the formal hearing in the auditorium, the auditorium hearing allowed all members of the public an opportunity to provide public testimony to the agencies and to influence other interested individuals who chose to attend. The court held that this was all that was required by the Federal-Aid Highways Act.[16]

Administrative Records and Discovery

Challenges to federal agencies' NEPA compliance are brought under the Administrative Procedure Act (APA) and as such, judicial review is based on the agency's administrative record. NEPA cases commonly involves battles over the completeness of the administrative record, access to privileged documents, and whether there are "extraordinary circumstances" that justify allowing discovery on specific issues. Several decisions in 2018 addressed these issues:

- Allowing Discovery. In a case involving the I-70 improvements in Denver, the plaintiffs argued that discovery was needed to reveal how and why FHWA adjusted its air quality model between the FEIS and the ROD. The court agreed and allowed the plaintiff to serve five interrogatories on FHWA and/or the State DOT related to this modeling decision, and required FHWA to produce all non-privileged documents on this topic.[17] By contrast, in a case involving the Westside Subway Extension in Los Angeles, the court denied the plaintiff's request to conduct discovery because the plaintiff had not shown the extraordinary circumstances (e.g., bad faith) that would justify discovery.[18]

- Website Documents. In the I-70 case, the plaintiffs sought to add five documents from FHWA's website to the administrative record. The court held that the plaintiffs did not demonstrate that those documents were presented to or considered by FHWA. The court explained that the documents' mere existence on FHWA's website did not indicate that FHWA directly or indirectly considered the documents in its decision.[19]

- Privilege Log. Federal agencies normally do not provide a privilege log (i.e., a list of privileged documents excluded from its record) when submitting an administrative record in litigation. However, courts sometimes require submittal of such a log, as occurred in the Westside Subway Extension case. In that case, the court ordered FTA to submit a privilege log to "enable Plaintiff to provide the required specificity and/or challenge any assertion of privilege the defendants

[16] *Waukesha County Environmental Action League v. USDOT*, 348 F.Supp.3d 869 (E.D. Wis. 2018).
[17] *Sierra Club v. FHWA*, 2018 WL 1695402 (D. Colo. 2018).
[18] *Beverly Hills Unified School District v. FTA*. (C.D. Cal, No. 2:18-cv-716, ECF #70, Sept. 17, 2018).
[19] *Sierra Club v. FHWA*, 2018 WL 1695402 (D. Colo. April 6, 2018).

believe applies to documents that would otherwise be included in the [administrative record]." [20]

- Mootness. In several cases, courts have held that a NEPA case does not become moot even after a project is complete, because a court still could provide some relief. In the Willits Bypass case, the court followed this reasoning: it held that the case was not moot because a portion of the project had not yet been built, and even if it had been, the court "could remand for additional environmental review and . . . 'however cumbersome or costly it might be' conceivably order the Willits Bypass closed or taken down." [21]

NEW JURISDICTIONAL DEFINITION PROPOSED FOR "WATERS OF THE UNITED STATES"

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On February 14, 2019, the Environmental Protection Agency and the United States Army Corps of Engineers ("the agencies") published for public comment a proposed rule defining the scope of waters federally regulated under the Clean Water Act ("CWA") (84 Fed. Reg. 4154). This proposal follows the process established in the February 28, 2017 Executive Order "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the `Waters of the United States' Rule."

This proposed regulation defines the scope of "waters of the United States" (WOTUS) federally regulated under the CWA. According to the agencies, the proposed definition revision is also intended to "clearly implement the overall objective of the CWA to restore and maintain the quality of the nation's waters while respecting State and tribal authority over their own land and water resources." This revised definition will impact CWA permits issued by federal agencies and state governments.

As background, on June 29, 2015, EPA and the Corps of Engineers published a final rule redefining the jurisdiction of WOTUS. 80 Fed. Reg. 37054. The 2015 WOTUS rule was subject to multiple court challenges, and is currently in effect in 22 states. The 2015 WOTUS rule is not applicable in the other 28 states, by order of federal district courts in Georgia, North Dakota, and Texas.

In their February 2019 proposal, the agencies propose to interpret the term "waters of the United States" to include traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands

[20] *Beverly Hills Unified School District v. FTA*. (C.D. Cal, No. 2:18-cv-716, ECF #70, Sept. 17, 2018).
[21] *Coyote Valley Band of Pomo Indians of California v. USDOT*, 2018 WL 1569714 (N.D. Cal. 2018).

adjacent to other jurisdictional waters. The agencies will eliminate the "significant nexus" test in order to minimize the need for case-by-case determinations.

The proposed rule includes several new definitions, and eliminates some longstanding concepts. Now, a tributary is proposed to be defined as a river, stream, or similar naturally-occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year. The contribution can occur either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes and ponds, jurisdictional impoundments, and adjacent wetlands or through other designated water features as long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. Ditches are generally proposed not to be "waters of the United States" unless they meet certain criteria, such as functioning as traditional navigable waters, if they are constructed in a tributary and also satisfy the conditions of the proposed "tributary" definition, or if they are constructed in an adjacent wetland and also satisfy the conditions of the proposed "tributary" definition.

The proposal defines "adjacent wetlands" as wetlands that abut or have a direct hydrological surface connection to other "waters of the United States" in a typical year. A "direct hydrologic surface connection" would occur "as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and jurisdictional water." Accordingly, wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent under this proposal.

The proposal would exclude all other waters or features from the definition of "waters of the United States." The proposed definition specifically clarifies that WOTUS does not "include features that flow only in response to precipitation; groundwater, including groundwater drained through subsurface drainage systems; most ditches; prior converted cropland; artificially irrigated areas that would revert to upland if artificial irrigation ceases; certain artificial lakes and ponds constructed in upland; water-filled depressions created in upland incidental to mining or construction activity; stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off; wastewater recycling structures constructed in upland; and waste treatment systems."

DEADLINE FOR NEXT ISSUE IS JUNE 17, 2019

The deadline for articles for the July, 2019 edition of *The Natural Lawyer* is June 17, 2019. Please submit articles to Richard.christopher@hdrinc.com and use Microsoft Word.