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Preface

This paper summarizes federal court decisions issued in 2016 in cases involving environmental reviews for highway, transit, and passenger rail projects.

This paper accompanies the case law summaries posted on the Case Law Update (CLUE) website of the AASHTO Center for Environmental Excellence. On CLUE, each case is summarized separately. This paper provides a brief summary of each case, followed by summaries of key holdings on a topic-by-topic basis.

Please note a few caveats:

- This paper is intended for a general audience, and therefore it does not fully capture the legal analysis in the court decisions.

- Each case involves a unique set of factual circumstances; the outcome in one case cannot necessarily be used to predict what a court would decide in a similar case.

- This paper includes only a sub-set of the issues addressed in the court decisions. For more detailed summaries and copies of the decisions themselves, refer to the CLUE website.

- Many of the cases covered in this paper remain in litigation. Outcomes reported in this paper could be changed during future appeals and/or future proceedings in the district court.

- Issues related to litigation procedure – e.g., whether a legal claim is ripe for review, or whether a party has standing to bring a claim – are addressed in the summaries on the CLUE website, but are covered only briefly in this report.

- This paper and the summaries on the CLUE website do not constitute legal advice. Practitioners seeking legal advice regarding a specific project should consult their legal counsel.

This paper was prepared by Perkins Coie LLP on behalf of the AASHTO Center for Environmental Excellence.
Highlights of 2016 Case Law

In 2016, courts issued more than two dozen rulings in cases involving environmental reviews for federal highway, transit, or rail projects. Notable issues addressed in these decisions include:

**Applicability of NEPA**

- Applicability of NEPA when USDOT approves issuance of Private Activity Bonds.

**Planning-Environmental Linkage; Purpose and Need**

- Reliance on goals established in a long-range transportation plan as the basis for defining a highway project’s purpose and need.

**Impacts Analysis**

- Disclosure of catastrophic risks involved in tunneling (e.g., risk of explosion from methane gas deposits).
- Disclosure of uncertainties associated with a seismic risk analysis.
- Consideration of near-roadway air quality impacts and impacts on children’s health.

**Cumulative Impacts**

- Consideration of “past actions” that continue to have effects on minority and low-income communities, such as the effects of building an elevated section of Interstate highway through an urban area.

**Segmentation**

- Determination regarding independent utility of highway projects that are located in close proximity to one another and are being implemented in the same time period.
- Determination regarding the need for an SEIS with respect to one portion of a highway project, without determining whether an SEIS may be needed for another portion of the same project.

**Predetermination and Bias**

- Allegations of improper predetermination or bias in the NEPA process.

**Adequacy of EA/FONSI and CE Determinations**

- Range of alternatives considered in detail in an EA (whether it is sufficient study only a No Build alternative and a single Build alternative).
• Basis for determination to issue a FONSI.
• Basis for determination to issue a CE.

Reevaluation and Supplementation

• Determination regarding the need for an SEIS to address issues such as:
  o New information relating to ridership forecasts;
  o Changes in project cost estimates, including costs of rejected alternatives;
  o New information regarding impacts to endangered species; and
  o Changes in project design that increase the project ‘footprint’.

Section 4(f)

• Applicability of Section 4(f) to privately owned property that is subject to an easement that requires the property to be made available for public use.
• Applicability of Section 4(f) to tunneling underneath a Section 4(f) property.
• Adequacy of reasons given for determining that avoidance alternatives for a Section 4(f) property are not feasible and prudent.

Section 106

• Adequacy of support for of “no adverse effect” finding under Section 106.
• Adequacy of public outreach during Section 106 consultation.

Section 404

• Scope of Section 404 permit decisions in relation to the scope of FHWA’s NEPA analysis for a lengthy highway project.
• Basis for determining that the ‘LEDPA’ requirement has been met.

Section 7

• Reliance on mitigation measures that are required under separate authority and therefore would occur regardless of whether the proposed action is implemented.
• Level of detail required in specifying mitigation measures in a Biological Opinion.
Key Cases

Albuquerque Rapid Transit (ART) Project (NM). This case involved the proposed construction of a bus rapid transit system, known as Albuquerque Rapid Transit (ART), within the street median on Central Avenue in Albuquerque, New Mexico. The project required several changes to Central Avenue, including a reduction in the number of general-purpose lanes, changes in traffic signal timing to prioritize buses, and a reduction in the number of intersections at which left turns and U-turns were allowed. The project area included four historic districts and more than 100 individual historic properties. FTA determined that the project qualified for a CE under NEPA and also determined that the project would have no adverse effect on historic properties. The plaintiffs in this case – primarily businesses and property owners affected by the project – challenged both determinations. In July 2016, the district court issued an order denying the plaintiffs’ request for a preliminary injunction, finding that plaintiffs were unlikely to succeed on the merits of their case. In December 2016, the U.S. Court of Appeals for the 10th Circuit upheld the district court’s decision denying the preliminary injunction.¹

All Aboard Florida (FL). This project involves establishing passenger rail service between Miami and Orlando, Florida, over an existing freight rail corridor. The private sponsor of the project applied for a $1.6 billion loan from the FRA under the Railroad Rehabilitation and Improvement Financing (RRIF) program; the sponsor also requested that USDOT authorize $1.75 billion in Private Activity Bonds (PABs). FRA initiated a NEPA review in connection with the proposed RRIF loan. Prior to completion of the FRA’s NEPA process, USDOT approved issuance of the PABs. Two counties filed this lawsuit against USDOT, claiming that USDOT’s authorization of the PABs violated NEPA, Section 106, and Section 4(f), because the PAB authorization occurred before the NEPA process was completed. The district court held that USDOT’s authorization to issue PABs was equivalent to other forms of financial assistance provided by USDOT. Therefore, the court held USDOT was required to comply with NEPA and other laws before approving issuance of PABs.²

Bigelow Gulch Urban Connector (WA). This project involves the expansion of an 8.5-mile section of Bigelow Gulch Road in Spokane County, Washington. The project was intended to increase vehicle capacity and improve safety by widening and realigning the two-lane rural roadway. Together with Washington State DOT and Spokane County, FHWA prepared an EA and then issued a FONSI. The plaintiffs challenged the agencies’ decision not to prepare an EIS and challenged the adequacy of the EA. The district court ruled in favor of FHWA in 2010. The plaintiffs then appealed. In this ruling, the appellate court upheld the district court’s decision in favor of FHWA.³

Fulton Mall Reconstruction Project (CA). This project involves reintroducing vehicle traffic lanes to the Fulton Street Pedestrian Mall in downtown Fresno, California. The pedestrian mall had been created in the early 1960s to revitalize the downtown, but it had become economically depressed. Nonetheless, the mall area was designated as a historic

¹ Coalition of Concerned Citizens To Make Art Smart v. FTA, 843 F.3d 886 (10th Cir. 2016).
³ Hamilton v. USDOT, 651 F. App’x 586 (9th Cir. 2016).
landscape and a historic district, in part based on its pedestrian-only design. To spur retail growth and economic revitalization, Caltrans proposed to re-introduce vehicle traffic to the mall. The preferred alternative involved adding two lanes of traffic along the entire length of the mall, as well as on-street parking spaces and pedestrian walkways, and required the use of the Fulton Street historic landscape and historic district. Caltrans prepared an EA and then issued a FONSI approving the project. In this lawsuit, the plaintiffs alleged that the EA did not adequately evaluate environmental impacts and that the agencies should have prepared an EIS. They also claimed that the Section 4(f) analysis was inadequate. The district court rejected all of the plaintiffs’ claims.4

Gaston East-West Connector (NV). This case involved the proposed construction of a new toll road, the Gaston East-West Connector, in North Carolina. The project would connect I-85 west of Gastonia to I-485 near the Charlotte-Douglas Airport, a distance of approximately 22 miles. FHWA and NCDOT issued a Draft EIS for the project in April 2009 and a Final EIS in December 2010; FHWA issued a ROD approving the project in March 2012. The plaintiffs claimed that the traffic forecasts were flawed because the same socio-economic growth assumptions had been used for the No Build and Build alternatives. The district court agreed with the plaintiffs and therefore vacated (invalidated) the ROD, which meant that the project could not move forward until a supplemental EIS is prepared. After the district court’s ruling, the project was removed from the local and state transportation plans, and therefore no longer had any funding. In December 2016, the U.S. Court of Appeals for the 4th Circuit held that the case had become moot due the withdrawal of funding, and it therefore vacated the district court’s decision.5

Highway 1 (CA). The project involves widening part of Highway 1 in Pacifica, California, adjacent to two units of Golden Gate National Recreation Area (GGNRA). Acting in the capacity of FHWA under an assignment program, Caltrans consulted with USFWS under the ESA to ensure the project would not jeopardize listed species or their critical habitat. Caltrans prepared a Biological Assessment (BA) that described the project’s mitigation measures, and USFWS issued a Biological Opinion (BiOp) with a ‘no jeopardy’ determination. Caltrans and USFWS later learned that one of the mitigation measures included in the BA – preservation of a habitat parcel within the GGNRA – would be implemented independently of this project, but the agencies did not reinitiate consultation in response to that new information. The plaintiffs alleged that Caltrans and USFWS violated the ESA by relying upon a BA that overstated the mitigation that would be provided by the project. The district court ruled in favor of plaintiffs on the ESA claims and directed the agencies to reinitiate consultation, revise the BA with accurate information, and issue a new BiOp.6

Highway 23 (WI). This project involves widening a 19-mile section of Wisconsin State Highway 23, between Sheboygan and Fond du Lac, from two to four lanes. FHWA and WisDOT a Final EIS and FHWA then issued a ROD approving the project. After this lawsuit was filed, FHWA prepared a limited-scope SEIS to address new traffic projections and then

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issued an SEIS and revised ROD. In 2015, the district court ruled that the agencies failed to fully explain their traffic forecasts and vacated the revised ROD. On remand, the agencies prepared a technical memorandum to cure the defects in the SEIS and then moved to reinstate the revised ROD. In this ruling, the court denied the agencies’ motion to reinstate the revised ROD, holding that the agencies (1) did not follow their stated methodology for traffic forecasts and (2) did not conduct a reasoned evaluation to consider whether to update the traffic forecasts in light of new population data.\(^7\)

**Highway 164 Reconditioning Project** (WI). This project involves rebuilding, widening, and resurfacing 7.5 miles of State Highway 164 (formerly known as Highway J), a two-lane rural highway in southeast Wisconsin. Highway 164 did not meet current construction standards and had higher crash rates and injury rates compared to similar highways in the state. The Wisconsin Department of Transportation (WisDOT) published a draft “environmental report,” which found that the project would have no significant impacts. WisDOT then determined, and FHWA agreed, that the project qualified for a categorical exclusion (CE) for roadway modernization projects. The plaintiffs sued WisDOT and FHWA, challenging the agencies’ decision to not prepare an EA or EIS. In August 2016, the district court granted FHWA’s motion to exclude certain documents that the plaintiffs had asked the court to consider. In September 2016, the court denied the plaintiffs’ motion for a preliminary injunction to halt construction during the litigation.\(^8\)

**Highway 290** (TX). The project involves reconstructing a 38-mile section of Highway 290 in Houston, Texas. FHWA and TxDOT issued a Final EIS, and FHWA then issued a ROD approving the project. After the ROD, TxDOT completed four reevaluations of the EIS. In the fourth reevaluation, TxDOT updated the analysis of noise impacts using FHWA’s most recent traffic-noise model. FHWA issued a revised ROD approving the fourth reevaluation. In this lawsuit, the plaintiff challenged the noise impact analysis for the Highway 290 project. After five years of litigation, the only issue that remained in the lawsuit was the plaintiff’s claim that the agencies violated Section 4(f) by failing to assess the project’s noise impacts on a nearby park and arboretum. The district court held that the plaintiff lacked standing to bring his claim and, moreover, that even if he did have standing, his claim failed on the merits.\(^9\)

**I-59/I-20 Central Business District Bridge** (AL). This project involved the proposed replacement of an elevated highway section, known as the Central Business District (CBD) Bridge, on Interstate 59/20 in downtown Birmingham, Alabama. The total length of this elevated section was approximately 1.25 miles. The Alabama DOT initially proposed to reconstruct the existing bridge, but after further investigation, determined that that full replacement was needed. FHWA and Alabama DOT jointly prepared an EA for the proposed replacement, and FHWA then issued a FONSI approving the project. The EA analyzed the No Build Alternative and a single Build Alternative; it also documented two previous iterations of the build alternative that had been considered and rejected. After the

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FONSI was issued, eight individuals filed suit against FHWA and Alabama DOT, claiming that the EA and FONSI violated NEPA. The district court granted summary judgment in favor of FHWA and Alabama DOT, upholding FHWA’s decision to issue the FONSI.\textsuperscript{10}

**I-69, Evansville to Indianapolis, Section 4 (IN).** The project involved the extension of Interstate 69 from Evansville to Indianapolis, Indiana. FHWA and INDOT prepared a Tier 1 EIS for the entire project, and FHWA issued a Tier 1 ROD approving the project. The agencies then began preparing a series of Tier 2 EISs for six individual sections of the project. This lawsuit primarily involved a challenge to the Tier 2 EIS and ROD for Section 4 of the project. The plaintiffs filed this lawsuit prior to issuance of the ROD for Section 4; the lawsuit challenged the adequacy of the Tier 2 FEIS and the agencies’ failure to prepare an SEIS for that section. After the ROD for Section 4 was issued, the plaintiffs amended their complaint to challenge that ROD. The district court dismissed the plaintiffs’ claims, holding that they were unripe because they were filed before the ROD was issued. The district court also granted summary judgment for the agencies on all other issues, including the claim that an SEIS should have been prepared. In this appeal, the U.S. Court of Appeals for the 7\textsuperscript{th} Circuit affirmed the district court’s ruling.\textsuperscript{11}

**Monroe Connector/Bypass (NC).** The Monroe Connector/Bypass Project involves constructing a 20-mile toll road linking Mecklenburg and Union Counties in western North Carolina. FHWA and NCDOT prepared an EIS, and FHWA issued a ROD approving the project. The U.S. Court of Appeals for the Fourth Circuit vacated the ROD because of concerns with the agencies’ failure to disclose critical assumptions underlying their traffic forecasts. To comply with that decision, the agencies rescinded the ROD and reinitiated the NEPA process. The agencies published a new draft EIS, and then issued a combined Final EIS and ROD. The new EIS included updated traffic forecasts that were based on updated socioeconomic projections. The plaintiffs filed a lawsuit challenging the new EIS and ROD. In 2015, the district court issued a ruling upholding the new EIS and ROD. The plaintiffs then appealed to the U.S. Court of Appeals for the 4\textsuperscript{th} Circuit, which affirmed the district court’s decision.\textsuperscript{12}

**MoPac South and SH 45 West (TX).** This case involves three distinct projects that involving expanding Texas State Highway 1 Loop (“MoPac South”) and State Highway 45 West (“SH45 SW”). Two of the three projects involved federal funding. The two federally funded projects were addressed in separate NEPA documents; a state environmental document was prepared for the non-federally funded project. The plaintiffs filed a lawsuit claiming that the agencies impermissibly segmented their NEPA review by failing to prepare a single NEPA document for all three projects. The district court held that the plaintiffs’ segmentation issue was ripe for review, but denied the plaintiffs’ request for a preliminary injunction; the U.S. Court of Appeals for the 5\textsuperscript{th} Circuit upheld that decision,

\textsuperscript{11} Citizens for Appropriate Rural Roads v. Foxx, 815 F.3d 1068 (7\textsuperscript{th} Cir. 2016).
\textsuperscript{12} Clean Air Carolina v. North Carolina DOT, 651 Fed. Appx. 225 (4\textsuperscript{th} Cir. 2016).
holding that an injunction should not be issued because plaintiffs were not likely to succeed on the merits of their segmentation claim.\textsuperscript{13}

**Northern Beltline (AL).** The Northern Beltline Project involves the proposed construction of a 52-mile interstate highway around Birmingham, Alabama. FHWA and Alabama DOT completed a FEIS in 1997, and FHWA issued a ROD in 1999. Alabama DOT completed a reevaluation of the project in 2012 to assess the impacts of alignment changes since the FEIS was published. FHWA approved the reevaluation solely for the eastern portion of the project, agreeing that an SEIS was not needed for that section, while deferring a decision on whether an SEIS was needed for the western section. In 2013, the Army Corps of Engineers issued a Section 404 permit for a 1.86-mile section of the Northern Beltline, which was within the eastern section. The plaintiff filed suit against FHWA and Alabama DOT, as well as the Corps, claiming that a single SEIS was needed for the entire Northern Beltline and that the entire Northern Beltline should be covered in a single Section 404 permit. The district court granted summary judgment for the agencies on all claims.\textsuperscript{14}

**Purple Line Light Rail (MD).** The Purple Line is a proposed 16.2-mile light rail transit project in the Maryland suburbs of Washington, DC. The Purple Line would be owned and operated by the Maryland Transit Administration (MTA), an agency of the State of Maryland, and would connect at four points to the region’s Metrorail system, which was operated by a separate regional authority. The FTA and MTA prepared an EIS for the project, and FTA issued a ROD approving the project. Plaintiffs brought a number of NEPA claims against the agencies. The district court issued a decision addressing only one of the plaintiffs’ claims: it held that recent Metrorail ridership and safety issues called the Purple Line ridership forecasts into question and were conditions that warranted an SEIS for the Purple Line. The court vacated the ROD and remanded to the agencies for preparation of an SEIS on the Metrorail ridership and safety issues in relation to the Purple Line. The court reserved judgment on all other issues. The court later modified its order to allow FTA to conduct a new assessment of whether the Metrorail ridership and safety issues required an SEIS.\textsuperscript{15}

**Rampart Spur Streetcar (LA).** This project involves the restoration of a streetcar line along North Rampart Street and St. Claude Avenue in New Orleans. The project would be constructed by the Regional Transit Authority of New Orleans (RTA). Previously, FTA had provided grant money to RTA to conduct preliminary studies for a different streetcar project that would have been located in the same area. The RTA suspended work on that project in 2005 and withdrew its request for federal funding for that project. The plaintiffs sued USDOT, FTA, and the Federal Emergency Management Agency (FEMA) in 2015, alleging that the Rampart Streetcar project had been “federalized” based on the federal funding used in the planning stage for the previous project, and therefore required compliance with NEPA, Section 106, and Section 4(f). In this decision, the district court

granted the agencies’ motion for summary judgment, holding that the federal funds used in the planning stage for a previous project were not enough to convert the Rampart Spur Streetcar into a federal action for purposes of NEPA and other laws.\footnote{Bring Our Streetcars Home, Inc. v. USDOT, 2016 WL 1110237 (E.D. La. Mar. 22, 2016).}

**Regional Connector Transit Corridor Project** (CA). This project involves constructing a new subway line in Los Angeles as part of an existing system operated by the Los Angeles County Metropolitan Transportation Authority (Metro). While much of the project would involve underground construction using a tunnel boring machine, a portion – the Lower Flower Segment – would be built with a cut-and-cover technique. In this lawsuit, the plaintiff claimed that FTA had not adequately considering options to avoid cut-and-cover construction on the Lower Flower Segment. In 2014, the district court enjoined the agencies from commencing cut-and-cover construction in the Lower Flower Segment until they completed an SEIS examining alternative tunneling methods for that segment. The plaintiffs appealed that decision to the U.S. Court of Appeals for the 9th Circuit. While the appeal was pending, the agencies prepared an SEIS in which they analyzed the two tunneling alternatives and concluded that neither would be feasible. On February 5, 2016, the district court dissolved the injunction, finding that the agencies had satisfied their obligations to analyze the two tunneling alternatives.\footnote{Today’s IV, Inc. v. FTA, 2016 WL 741685 (C.D. Cal. Feb. 5, 2016).} In December 2016, the 9th Circuit ruled against the plaintiffs on all issues raised in their appeal.\footnote{Japanese Village, LLC v. FTA, 843 F.3d 445 (9th Cir. 2016).}

**Route 222** (PA). The project involved proposed improvements to Route 222 in Berks County, Pennsylvania. The improvements included widening the roadway from two lanes to five lanes (two lanes in each direction with a center turn lane), improving an existing traffic signal, constructing two dual-lane roundabouts, and constructing two stormwater detention basins. FHWA and PennDOT approved the project and determined that it qualified for a CE. The plaintiffs—a company that owned land adjacent to the highway that it hoped to develop into a shopping center, and the Board of Supervisors of the township—filed this lawsuit challenging the agencies’ determination that the project qualified for a CE. The district court granted the agencies’ motion to dismiss on the grounds that the plaintiffs lacked standing. The district court also denied the plaintiffs’ motion for leave to amend their complaint. The plaintiffs appealed, and, in this ruling, the U.S. Court of Appeals for the 3rd Circuit affirmed the district court’s order dismissing the case for lack of standing.\footnote{Maiden Creek Associates, L.P. v. USDOT, 823 F.3d 184 (3rd Cir. 2016).}

**Southwest Light Rail Transit Project** (MN). This project would connect downtown Minneapolis to the southwestern Twin Cities. The project was sponsored by the Metropolitan Council (Met Council), a regional transportation planning organization, with funding from a program administered by FTA. Under state law, Met Council was required to obtain the consent of each municipality through which the transit line would run. While the NEPA process was under way, Met Council sought and obtained the consent of all six local governments of the municipalities through which the project would pass. The plaintiffs filed this lawsuit in March 2015, prior to completion of the NEPA process, claiming that Met Council’s actions under State law - obtaining municipal consent – had
impermissibly biased the NEPA process. The district court rejected the plaintiff’s claims and dismissed the case, finding that Met Council’s actions did not bias the NEPA process.\(^{20}\)

**South Mountain Freeway** (AZ). This project involves construction of an eight-lane, 22-mile highway in the vicinity of Phoenix, Arizona. The project has been included in regional plans for many years and was intended to alleviate current and future traffic problems as a result of projected economic and population growth. The proposed route ran adjacent to the boundary of an Indian reservation, the Gila River Indian Community (GRIC), and would cut through three acres of Phoenix South Mountain Park Preserve, which included cultural resources used by GRIC religious practitioners. The plaintiffs sued FHWA and Arizona DOT, challenging the statement of purpose and need, the range of alternatives, the analysis of impacts, and the discussion of mitigation measures, as well as compliance with Section 4(f). The district court ruled for the agencies on all claims.\(^{21}\)

**State Route 135 Road Improvement Project** (GA). This project involves widening and reconstructing nearly three miles of State Route 135 in Georgia. As part of the project, the Georgia DOT (GDOT) planned to reroute the northbound and southbound lanes of the road onto the property of an affordable housing complex with predominantly low-income and minority residents. After the NEPA process, GDOT initiated eminent domain proceedings in state court to condemn part of the housing complex property for the project. Residents of the complex filed suit against GDOT, alleging that the routing of the project violated the residents’ civil rights under federal laws and the U.S. Constitution. The district court decided to abstain from hearing the case so as not to interfere with the ongoing eminent domain proceedings in state court. In addition, the district court held that all of plaintiffs’ claims should be dismissed for failing to state legally cognizable claims.\(^{22}\)

**West Side Subway Extension** (CA). The West Side Subway Extension would extend the Los Angeles subway nine miles and add seven new stations. The project would also involve tunneling under Beverly Hills High School (a historic property) and would have air quality and noise impacts on the school during construction. FTA and the project sponsor issued an FEIS in 2012, and FTA issued a ROD approving the project later that year. Plaintiffs filed suit challenging the ROD on various grounds under NEPA, the Clean Air Act, and Section 4(f). In February 2016, the district court issued a tentative ruling in which it preliminarily rejected the majority of the plaintiffs’ claims but indicated that it would remand to the agencies for further analysis of health impacts, seismic risks, the risk of a methane explosion, and the potential for a constructive use of the high school. In August 2016, the court finalized the conclusions in its tentative ruling and remanded to the agencies to prepare additional analyses. To avoid disruptive consequences for the project, the court declined to vacate the ROD while this additional work was done.\(^{23}\)


Topical Summaries

I. NEPA Issues

A. Applicability of NEPA

In the Rampart Spur Streetcar case, the plaintiffs claimed that NEPA review was required because federal funding had been used in the planning stage of a previous streetcar project in the same area. The court held that, in the absence of federal involvement in the Rampart Spur Streetcar project itself, the project was not federalized and NEPA review was not required. Similarly, the court held that Section 106 and Section 4(f) did not apply, because there was no evidence of federal funding or approval with respect to the Rampart Spur.

In the All Aboard Florida case, the FRA performed NEPA review for a passenger rail project in connection with the project sponsor’s application for a loan under the FRA’s Railroad Rehabilitation and Improvement Financing (RRIF) program. While FRA’s NEPA review was ongoing, the USDOT approved the issuance of tax-exempt Private Activity Bonds (PABs) for the project. USDOT’s position was that approval of the PABs did not require NEPA review. The court disagreed, holding that approval to issue tax exempt bonds—like approval of a loan—gave USDOT control over the project and therefore required compliance with NEPA, Section 106, and Section 4(f).

In the MoPac South/SH 45 case, a regional transportation authority in Texas undertook a project that relied solely on state and local funding and did not require federal permits. The plaintiffs contended that the project was a federal action because it was potentially subject to control by USFWS, citing an interlocal agreement in which the regional authority had committed to consult with USFWS to ensure that the project did not violate the ESA’s prohibition against taking threatened or endangered species. The court held that this interlocal agreement was not enough to render the project a federal action, because it did not give a federal agency the ability to exercise control over the project.

B. Purpose and Need

In the South Mountain Freeway case, the project’s purpose and need was based on the region’s long-range transportation plan, which called for construction of this project as part of a region-wide freeway network. The plaintiffs alleged that the purpose and need was unreasonably narrow in that it created a preordained outcome by calling for a freeway. The court rejected the plaintiffs’ argument:

Plaintiffs’ argument seems to suggest that the Agencies should have disregarded the thirty-plus years of work done by [the metropolitan planning organization] and began anew a comprehensive analysis of the area’s transportation needs before completing the EIS. That, however, is not what the law requires and Plaintiffs have not demonstrated otherwise. To the contrary, federal law requires states to develop long-range transportation plans from which federally-funded highway and transit projects must flow.
C. Alternatives

Range of Alternatives in an EIS

In the South Mountain Freeway case, the plaintiffs claimed that FHWA had violated NEPA by failing to study any of the alternatives that the plaintiffs had submitted for consideration during the NEPA process. FHWA had used a screening process to evaluate proposed alternatives; those that satisfied the purpose and need for the proposed action were analyzed in more detail in the EIS. The alternatives proposed by the plaintiffs did not make it past the screening process. The court held that the 70-page alternatives analysis in the EIS, which explained the screening process, demonstrated that “extensive work was performed to develop reasonable alternatives.” The court ruled, therefore, that the range of alternatives considered was sufficient under NEPA.

Range of Alternatives in an EA (No Build vs. Build)

In the I-59/20 Central Business District Bridge case, the plaintiffs claimed that the range of alternatives in the EA was inadequate, because the EA only studied two alternatives in detail: the No Build alternative and a single build alternative. They claimed that the EA also should have included detailed study of alternatives such as “sinking” the freeway below grade and re-routing the freeway out of downtown, as well as “fixing the road first and relocating it later.” The court found that the agencies had, in fact, considered other alternatives and documented the reasons for rejecting them – including greater expense and longer time to construct. The court held that the alternatives analysis was adequate, citing the following considerations:

- Excessive cost and delay are both permissible reasons to remove an alternative from further NEPA study.
- FHWA has discretion to determine the level of detail needed in analyzing alternatives.
- Alabama DOT has discretion to determine how to allocate limited funds among projects.

Alternatives Proposed After the FEIS

In the West Side Subway Extension case, the City of Beverly Hills alleged that FTA had not adequately considered alternative alignments that would have avoided tunneling under Beverly Hills High School. The city had submitted three alternative alignments after the agencies issued the FEIS but before FTA issued the ROD. The court held that FTA “had no obligation to analyze, or respond to, the City’s specific alternatives that were proposed many months after issuance of the FEIS.” (emphasis in original). Furthermore, the court noted that the DEIS and FEIS discussed multiple alignments for the area in question, including alignments that would avoid the high school.
Tunneling Methods as Alternatives

In the Regional Connector Transit Corridor case, the plaintiffs challenged the agencies’ analysis of tunneling methods for a segment of the project. They claimed that the agencies’ rejection of the “closed-face tunnel boring machine” (TBM) method in the FEIS was premised on assumptions that had been disproven by the time the FEIS was issued. The court found that FTA actually had relied upon multiple factors as the basis for eliminating the TBM alternative, and some of those factors remained valid at the time the FEIS was issued; therefore, the court found that FTA’s rejection of the TBM alternative in the FEIS was valid. The plaintiffs also pointed to statements made by the project sponsor after the FEIS was issued, which seemed to concede that a TBM alternative may be feasible. The court acknowledged those statements but held that they did not require a supplemental EIS to be prepared, noting that “if litigants could demand further analysis each time some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.”

D. Impacts Analysis

Air Quality

In the West Side Subway Extension case, the plaintiffs challenged FTA’s analysis of construction impacts on air quality, claiming that the analysis was flawed because the FEIS only reported gross air pollutant load and compared that projection to regional thresholds. The plaintiffs claimed that the agencies should have performed dispersion modeling to assess local air pollution near the construction site. The court stated that even though the agencies could have provided a more complete justification for their methodology, it would be inappropriate for the court to override the agencies’ technical judgment and to require the agencies to perform dispersion modeling. The court also held, however, that the agencies did not adequately discuss the health impacts associated with nitrogen oxide (NOx) levels that would exceed applicable thresholds during construction. The court explained that, notwithstanding the temporary nature of the NOx health impacts, a “more significant discussion” of public health impacts was required.

In the South Mountain Freeway case, the plaintiffs claimed that the EIS did not adequately consider impacts on children’s health. FHWA did not separately analyze the project’s impacts on children’s health. However, as a part of the air quality conformity analysis, FHWA determined that the project would not cause any violations or delay in NAAQS attainment. FHWA reasoned that the project would not disproportionately affect children’s health because it complied with the NAAQS, which are set at levels to protect sensitive populations, including children. The court agreed, following the holding of other courts that “NEPA’s requirements are per se satisfied by showing compliance with NAAQS.”

The plaintiffs in the South Mountain Freeway case also argued that FHWA did not adequately consider the impacts of mobile source air toxics (MSATs). The EIS estimated MSAT emissions in the broader study area but did not analyze near-roadway MSAT
emissions because FHWA found it was not possible with the model that the agencies used. The EIS explained why a localized MSAT emissions analysis was not conducted and also noted that MSAT emissions would be significantly reduced under either a build alternative or the no-action alternative. The court ruled that this approach was sufficient.

In the **Fulton Mall Reconstruction Project** case, the court upheld Caltrans’ finding that there would be no significant air quality impacts. The court noted that the project met regional conformity requirements and was not classified as a Project of Air Quality Concern (a classification that would have required a quantitative “hot-spot” analysis for particulate matter). The court also said that the plaintiffs had not provided any evidence to contradict Caltrans’ conclusion regarding air quality impacts.

**Community Impacts**

In the **Fulton Mall Reconstruction Project** case, the plaintiffs claimed that the community impacts analysis was flawed because the study area had been defined too narrowly, consisting of the three census blocks around the mall. The court rejected that argument, explaining that “it is a matter of common sense” that those in the immediate project area would be most impacted by the project. The court also concluded that Caltrans appropriately determined that the project would have minimal impacts on day users of the mall because the mall would retain many of its existing park-like features (including sculptures, benches, fountains, and trees). The court also noted that, while plaintiffs disagreed with Caltrans’ conclusions, “plaintiffs have not produced affidavits from experts identifying the EA’s inadequacies or evidence casting doubt on the reasonableness of Caltrans’ conclusion that the project would not significantly impact day users.”

In the **South Mountain Freeway** case, the plaintiffs – an Indian tribe with a reservation located adjacent to the project area – claimed that the EIS should have included a separate section specifically focused on impacts to the tribe. The court rejected that argument, holding that impacts on the tribe were adequately analyzed as part of the EIS’s general consideration of environmental impacts. The court also noted that the FTA and the project sponsor conducted over 100 meetings with tribes during the planning process to consider their concerns related to the project. The court concluded that the agencies adequately analyzed the project’s impacts on the tribe.

In the **Regional Connector Transit Corridor** case, the plaintiffs argued that the FEIS failed to assess the impacts resulting from the impacts of cut-and-cover construction, including the impacts of the completed project on traffic congestion and the effects on emergency vehicle access during construction. The plaintiffs acknowledged that these issues were addressed in the FEIS, but claimed the analysis was conclusory. The court found that, while the analysis was not detailed, it was “reasonably thorough” and therefore satisfied NEPA.

**Disclosure of Catastrophic Risks (Tunneling)**

In the **West Side Subway Extension** case, the plaintiffs claimed that the FEIS had failed to disclose the potential presence of subsurface methane deposits and abandoned oil wells, along with the potential for explosions to occur when tunneling through methane deposits
located in abandoned oil wells or seismic faults. The court rejected the argument that the agencies had failed to disclose sufficiently the presence of abandoned oil wells, finding that such information was not “essential to a reasoned choice among alternatives” because the agencies had concluded that they could safely tunnel through such areas if they existed. Nonetheless, the court found that the agencies had not sufficiently considered the potential risk of a methane explosion and had not properly responded to the school district’s comments on this issue, noting that agencies are required in some circumstances to consider “events with potentially catastrophic consequences even if their probability of occurrence is low.”

**Seismic Risks**

In the **West Side Subway Extension** case, there was much dispute throughout the NEPA process over the seismic risk studies for two possible station locations. The plaintiffs claimed that the FEIS did not properly discuss the incompleteness and scientific uncertainty of the information underlying its seismic risk analysis. The court held that the agencies had conducted a reasonably thorough investigation of seismic risks, sufficient to meet the “hard look” standard under NEPA – but the court also found that the agencies did not adequately discuss the uncertainties associated with this analysis and the incomplete nature of the information regarding seismic risks. In reaching this conclusion, the court noted that while an agency is not required to disclose every uncertainty, the “uncertainties surrounding seismic risks would be key uncertainties with regard to the subway siting decision in Century City.” The court also noted that “the Agencies certainly knew that additional seismic studies were in the pipeline and knew that the seismic conditions in the area were a key driver of the ultimate decision as to the proper station location.”

**Hazardous Materials Transportation**

In the **South Mountain Freeway** case, the plaintiffs challenged the agencies’ decision not to analyze the impacts of trucks carrying hazardous materials. The agencies had concluded that, given existing state and federal regulations, any hazardous materials incidents were speculative. The court agreed with the agencies, holding that their conclusion was reasonable and that they did not need to analyze the impacts of trucks carrying hazardous materials.

**E. Traffic and Ridership Forecasts**

**Definition of No Build**

In the **South Mountain Freeway** case, the plaintiffs claimed that the analysis of the no-build alternative in the EIS was flawed because the agencies assumed the same employment and population growth would occur with or without the freeway project. The plaintiffs argued that when evaluating the impacts of the no-build alternative, the agencies should have used a different model of projected growth. The court, however, found that the study area had already experienced significant population growth without the freeway project, and projections of future growth and development were expected to occur whether
or not the freeway project was built. Thus, the court rejected the plaintiffs’ argument that the agencies should have used different projections to evaluate the no-build alternative.

**Forecasting Methodology**

In the **Highway 23** case, the plaintiffs challenged the explanation of the traffic forecasting methodology in the EIS and, in addition, claimed that Wisconsin DOT had not actually followed the methodology prescribed in its guidance. In a previous decision, the district court agreed that the explanation of the methodology in the EIS was unclear and therefore vacated FHWA’s ROD. In response to that decision, FHWA and Wisconsin DOT prepared a technical memorandum explaining the methodology that had been used and then submitted that analysis to the court. The court found that the explanation itself was sufficiently clear, but also concluded that WisDOT’s explanation for how it reached its forecasts was not supported by its stated methodology and appeared to be an after-the-fact rationalization. The court therefore declined to reinstate the ROD.

**Consideration of New Information**

In the **Highway 23** case, the plaintiffs also argued that the agencies should have updated the traffic forecasts with new population data that was released shortly before the NEPA process concluded. The updated population data showed a lower growth rate than was previously forecasted. WisDOT stated in a technical memorandum that the updated population projections would not affect its final traffic forecasts because its traffic forecasting model did not use general population data as a direct input. The court held that WisDOT’s explanation did not support its conclusion for two reasons. First, even though general population data was not a direct input, the record showed that household population was a variable in the traffic forecasting model; the court reasoned that “[i]f the growth rate for the general population declines significantly, then presumably the growth rate for households will as well.” Second, even though the updated population data may not affect the type and location of developments, the court held that it was likely to affect the amount of development that was expected to occur. Thus, the court concluded that the agencies did not appropriately consider whether to supplement the EIS with updated traffic projections based on new population data.

In the **Purple Line** case, the plaintiffs submitted a letter to FTA, more than a year after completion of the NEPA process, asking FTA to prepare an SEIS addressing new information involving (among other things) recent safety and ridership issues on the regional subway system, known as Metrorail, which would connect to the proposed Purple Line light rail system at four stations. The court found that the agencies had provided only a “barebones” response to the plaintiffs’ letter and concluded that the agencies “wholly failed to evaluate the significance” of Metrorail’s declining ridership and recent safety issues. Initially, the court directed FTA to prepare an SEIS to address these issues. Subsequently, at FTA’s request, the court modified its order to allow FTA to conduct a more detailed assessment of the Metrorail safety and ridership issues and determine whether those issues require an SEIS.
F. Segmentation

In the Northern Beltline case, the FHWA and Alabama DOT had prepared an EIS for the entire 52-mile beltline project, a new circumferential freeway in the vicinity of Birmingham, Alabama. Years after that EIS was approved, Alabama DOT prepared a reevaluation for the entire project. Based on the reevaluation, FHWA determined that an SEIS was not needed for the eastern portion, while deferring a decision on whether an SEIS was needed for the western portions. The plaintiffs challenged this approach, arguing that it was improper segmentation for FHWA to make a determination regarding the eastern portion without deciding whether an SEIS was needed for the entire Northern Beltline. The court found that it was permissible for FHWA to determine the need for a reevaluation on the eastern portion by itself – essentially treating the eastern portion as a stand-alone project – because that portion met FHWA’s segmentation criteria (logical termini, independent utility, not restricting future consideration of alternatives).

The plaintiff in the Northern Beltline case also argued that the Corps improperly segmented the project by preparing an EA/FONSI that only encompassed the 1.86-mile section for which the Corps issued a Section 404 permit. The court concluded that the Corps had not violated NEPA because the 1.86-mile section would connect logical termini, had independent utility even if the remainder of the Northern Beltline was not constructed, and would not pose any meaningful restriction on future consideration of alternatives for the remainder of the Northern Beltline. The court also held that the Corps complied with its own NEPA regulations and had adequately considered the indirect and cumulative effects of approving a permit for the 1.86-mile section.

The MoPac South/SH 45 case involved three distinct projects on existing highways in the vicinity of Austin, Texas. Two of the projects were federally funded and therefore required NEPA review. At the time of this lawsuit, the agencies had completed the NEPA document for the first federally funded project, known as the Intersections Project; it involved construction of crossing bridges over an existing highway to eliminate signalized intersections. The plaintiffs challenged the FONSI for the Intersections Project, claiming that FHWA had segmented its NEPA analysis by failing to prepare a single NEPA document for all three projects together.

• The court first considered whether the segmentation issue should be decided based solely on the segmentation criteria in FHWA’s regulations or whether the court also needed to consider additional criteria set forth in the CEQ’s regulations. The court concluded that meeting the criteria in the FHWA regulations was sufficient; FHWA did not need to make a separate finding that the criteria in the CEQ regulations were met. The court also noted that, for projects within a single metropolitan area, courts focus primarily on the second factor – whether the project has independent utility.

• The court held that the Intersections Project met all three criteria in the FHWA regulations, stating that “[t]he court does not find it difficult to recognize the utility of raising a roadway to avoid having a signalized intersection with traffic on a four-
lane highway. The court concludes that the Intersections project has independent justification in the increased safety and efficiency for traffic.”

G. Mitigation

In the South Mountain Freeway case, the plaintiffs also claimed that mitigation measures were not developed in enough detail. The agencies responded that federal law prohibited them from conducting any further project designs before completing the NEPA process. The court agreed that NEPA does not require a fully developed mitigation plan; rather, agencies only need to discuss mitigation in sufficient detail to ensure that environmental impacts are fully evaluated. The court concluded that the EIS sufficiently discussed mitigation measures and ruled against the plaintiffs on this claim.

In the Regional Connector Transit Corridor case, the plaintiffs challenged various aspects of the mitigation plan for the cut-and-cover tunnel portion of the project, in particular mitigation for noise impacts, subsidence, and parking impacts. The plaintiffs also disputed whether mitigation measures had been properly adopted, and disputed the agencies’ rationale for rejecting mitigation measures that the plaintiffs preferred. The court noted that NEPA requires a discussion of mitigation measures, but NEPA does not include any substantive requirement that the agencies actually mitigate impacts. The court held that the agencies had complied with NEPA because they adequately discussed the extent to which adverse effects can be avoided.

The plaintiffs in the Regional Connector Transit Corridor case also claimed that the proposed mitigation measures in the FEIS were too vague because many of the measures called for specific measures to be developed later. The court found that the agencies had properly adopted an “adaptive management” approach to mitigation in order to provide “flexibility in responding to environmental impacts through a regime of continued monitoring and inspection.” The court held that this approach is sufficient under NEPA.

H. Predetermination/Bias

In the West Side Subway Extension case, the plaintiffs claimed that the agencies had made a predetermined decision to locate a station near Beverly Hills High School. The court agreed that “the analysis certainly appears to have been slanted in one direction,” and stated that it was “troubled by certain aspects of the Agencies' decision-making process.” Nonetheless, the court held that the agencies’ apparent preference for a particular alternative did not violate NEPA because the agencies had not made a “binding commitment or irreversible commitment of resources” to the preferred alternative before completing the NEPA process.

In the I-59/20 Central Business District Bridge case, the plaintiffs claimed that FHWA and Alabama DOT had predetermined the outcome of the NEPA process by committing to issue a FONSI before the EA was completed. They cited project notes and schedules that referred to issuance of a FONSI. The court noted that a claim of predetermination “carries a high burden of proof,” and found that the evidence cited by the plaintiffs was not sufficient to demonstrate that the agencies had predetermined the outcome of the NEPA process.
I. Supplementation

Whether a Supplemental EIS is Needed

In the West Side Subway Extension case, the plaintiffs argued that the agencies should have prepared a supplemental EIS to address new seismic studies regarding a station location that was considered but not selected. The court agreed with the plaintiffs that the new information in the studies was significant because, while the DEIS had disclosed the seismic risks at that station location, it had not indicated that those risks were disqualifying – and in fact, that location was identified as part of the ‘base’ alignment for the project in the DEIS. The new information that became available following the DEIS confirmed the seismic risks at that location, and contributed to the agencies’ decision to select a different station location (one that required tunneling under Beverly Hills High School). Given the effect of this new information on the agencies’ decision-making, the court held that the studies constituted “significant new information” and thus required a Supplemental DEIS.

In the Northern Beltline case, Alabama DOT had prepared a reevaluation for the entire 52-mile Northern Beltline; FHWA then determined that an SEIS was not needed for the eastern portion of the project, while deferring a decision regarding the need for an SEIS on the western portion. The plaintiff raised a number of challenges to the reevaluation’s analysis of environmental impacts and claimed that an SEIS was needed for the entire Northern Beltline. The court rejected each of the plaintiff’s arguments:

- **Design Changes.** The plaintiff claimed that an SEIS was needed to assess the impacts of increasing the size of the highway from four lanes to six lanes, along with alignment shifts that would require crossing additional floodplains and relocating additional businesses and residences. In the reevaluation, the agencies explained that adding lanes would not increase the roadway footprint because the median width would be decreased. The court concluded that the plaintiffs did not put forth sufficient evidence to demonstrate that the agencies had failed to adequately analyze the impacts of the design changes.

- **Changed Circumstances – Environmental Impacts.** The plaintiff claimed that the agencies should have prepared an SEIS to analyze the environmental impacts from a variety of changed circumstances, including newly listed endangered species, worsening water quality in streams, and sewer infrastructure issues. The court noted that the USFWS concurred with the agencies’ finding that there would be no impacts on threatened and endangered species. The court held that the plaintiffs did not show that any of these changed circumstances would result in additional significant impacts that the agencies should have considered.

- **Changed Circumstances – Increased Project Cost.** The plaintiff also claimed that increased cost estimates for the project were a “new circumstance” that required preparation of an SEIS. The court observed that changes in project cost have the potential to require an SEIS, “insofar as the cost of the project is a factor in (1) the evaluation of the relative environmental and economic costs and benefits of
the project and in (2) the selection of project alternatives.” But the court found that the increased project cost in this case did not require an SEIS because cost had not been a significant factor in selecting the preferred alternative and, in any case, plaintiffs had not shown that the relative costs of the alternatives had changed significantly since the original EIS was prepared. The court also observed that agencies are not “obligated to perpetually and at every stage of environmental review create updated designs and cost estimates for the previously rejected alternative routes” for the entire project.

**Indirect and Cumulative Impacts on Water Quality.** The plaintiff also argued that the agencies should have prepared an SEIS to analyze the indirect and cumulative impacts of the entire Northern Beltline project. The court held that any challenge to the original EIS (issued in 1997) was barred by the statute of limitations. The court also cited numerous examples of the Corps’ consideration of indirect and cumulative impacts. Based on this evidence, the court concluded that the record makes it “painfully obvious” that the agencies had extensively considered indirect and cumulative impacts on water quality in the 2012 reevaluation.

In the **I-69** case, the plaintiffs argued that the agencies should have prepared a supplemental EIS based on new information related to air quality and endangered species. The district court had ruled that a supplemental EIS was not required, and the appellate court agreed.

**Air Quality.** The air quality analysis in the FEIS was based on 2004 vehicle fleet data. The plaintiffs argued that the agencies should have prepared an SEIS that used 2009 vehicle fleet data, which showed a higher estimate of air pollution levels per vehicle. The court concluded that the record demonstrated that the agencies made a reasoned determination not to use the 2009 data before it was finalized because of concerns about “systemic deficiencies” in that data. The court also noted that the relevant county had been updated from a maintenance area to an attainment area, which rebutted the plaintiffs’ argument that there was a significant negative change in air quality in the area that would require an SEIS.

**Indiana Bat.** The plaintiffs claimed that the agencies should have prepared an SEIS to consider impacts on the Indiana bat. In support of their argument, the plaintiffs cited a scholarly article about the impact of White-Nose Syndrome on the bat and evidence that INDOT’s contractor cut down a single tree in violation of the terms of the incidental take statement. The court held that the scholarly article was insufficient proof that a substantial change had occurred to justify an SEIS. The court also noted that a specialist investigated the fallen tree and determined that its impacts on the bat were minimal or nonexistent. Thus, the court determined that an SEIS was not necessary.

In the **Purple Line** case, the court held that FTA had “wholly failed” to assess the effects of recent safety and ridership issues involving the Metrorail subway system on the Purple Line Project. Initially, the court held that FTA must prepare an SEIS to address those
Metrorail issues. In subsequent decision, the court agreed with FTA and MTA that “a significance determination like this is the sort of decision that requires a high level of technical expertise that would benefit from the informed discretion of the responsible federal agencies.” Therefore, the court modified its earlier decision to allow FTA and MTA to assess new information regarding WMATA safety and ridership issues and to determine whether that new information requires preparation of an SEIS.

In the **Regional Connector Transit Corridor** case, the plaintiffs argued that a supplemental EIS was needed because the project sponsor applied for noise ordinance variances to allow for nighttime construction. The court found that the application for variances did not imply any change in plans, because the FEIS had acknowledged that nighttime construction may be needed and that noise variances would be required in order for nighttime construction to occur. Further, the court found that the noise and light impacts of nighttime construction had been addressed in the FEIS. Therefore, the court held that a supplemental EIS was not required.

**Adequacy of Supplemental EIS**

In the **Regional Connector Transit Corridor** case, the agencies prepared an SEIS that analyzed two tunneling alternatives that would avoid the need for cut-and-cover construction in one segment of the project. The SEIS concluded that both alternatives “were considered infeasible as a matter of sound public policy.” The agencies argued that this analysis met their obligations under the court’s prior injunction order, which required the SEIS to be prepared. The court agreed and dissolved the injunction, concluding that the agencies had remedied the “narrow NEPA violation” by preparing the SEIS.

**J. Adequacy of EA/FONSI**

In the **Northern Beltline** case, the plaintiff claimed that the Corps’ EA did not adequately analyze the impacts of issuing a Section 404 permit for the 1.86-mile section. The court rejected the plaintiff’s argument, holding that the plaintiff failed to explain what analysis was lacking from the EA, and that the plaintiff did not otherwise show that the Corps had failed to take a hard look at the project’s environmental impacts.

In the **Bigelow Gulch** case, the plaintiffs argued that FHWA should have prepared an EIS because its regulations (23 CFR 771.115) “normally” require an EIS for Class I actions, which include four-lane highway projects in a new location. The court noted that the FHWA regulations do not mandate preparation of an EIS for every new four-lane highway project, but merely state that these projects normally require an EIS. The court held that it was permissible for FHWA to treat the project as not “in a new location” since 71% of the construction followed an existing road. It also held that the EA supported the agency’s conclusion that the project would not have a significant adverse environmental impact.

In the **Bigelow Gulch** case, the plaintiffs also challenged the alternatives analyzed in the EA. The final EA only evaluated two alternatives: the preferred project and a no-action alternative. The plaintiffs argued that FHWA should have considered other alternatives,
including a lower speed limit and various two-lane configurations. FHWA had previously determined that those other alternatives would not serve the project’s goals. The court upheld FHWA’s decision not to examine the alternatives in more detail given the agency’s expertise in road safety and traffic issues. The court explained that it defers to the agency “when resolution of a dispute comes down to factual disputes over technical issues within the agency’s expertise.”

In the Highway 1 case, the plaintiffs challenged the adequacy of the EA’s discussion of numerous environmental impacts, as well as the decision to issue a FONSI. Without discussing each impact individually, the court concluded that the EA’s consideration of impacts was “detailed enough,” and that the decision to issue a FONSI was not shown to be arbitrary or capricious. The court also noted that inaccurate information about a proposed mitigation measure was not fatal to the EA, even though it was fatal to the BA and BiOp prepared under ESA. The court explained that “[b]ecause NEPA allows proposed mitigation measures to be general and tentative rather than specific and definite, it does not matter that Caltrans’ proposed mitigation could not occur exactly as described in the Draft Environmental Assessment that it circulated to the public.”

In the I-59/20 Central Business District Bridge case, the plaintiffs argued that an EIS was required because of the project’s “social, economic and health” effects, the cumulative impacts of the project when combined with the effects of past actions, the “high degree” of controversy about the Project, and the regional significance of the Project. They argued that an EIS was needed, in part, due to adverse effects of the original bridge on minority and low-income communities when it was constructed in the 1960s. The court held that none of these issues required an EIS:

- Under NEPA case law, “potential socioeconomic impacts alone do not trigger a requirement to prepare an EIS.” Instead, the need for an EIS must be justified based on the project’s impacts on the physical environment.

- The cumulative impacts analysis took into account the “barrier effect” caused by the existing bridge, so the effects of past actions were considered in the cumulative impacts analysis. The court also observed that “As the Plaintiffs themselves acknowledge, NEPA does not create a remedial scheme for past federal actions.”

- Under NEPA case law, “public opposition, without more, does not constitute a substantial dispute about the ‘nature, size, or effect’ of the Project” and therefore does not trigger the need to prepare an EIS.

- Statements regarding the project’s regional significance related to the project’s potential *benefits* to the region, and significant benefits do not trigger the need to prepare an EIS.

**K. Applicability of CE**

In the Albuquerque Rapid Transit (ART) case, the plaintiffs challenged FTA’s determination that the project qualified for a CE, arguing that FTA had improperly relied on
documentation submitted by the project sponsor (the City of Albuquerque) and that “substantial controversy” about the project precluded the use of a CE. The court rejected both arguments, holding that (1) it was permissible for FTA to rely on submissions from a project sponsor as long as FTA independently reviews the submissions, as it did here, and (2) the “controversy” surrounding the project mainly involve concerns about socio-economic impacts, and it is well-settled in case law that “socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA.”

II. Section 4(f)

A. Applicability of Section 4(f)

In the Fulton Mall Reconstruction Project case, the plaintiffs contended that Caltrans violated Section 4(f) by failing to analyze the mall as a public park. Caltrans had cited two reasons for concluding that the mall was not a “park” for purposes of Section 4(f): it is not publicly owned, and its primary function is to serve as a commercial area, not as a park. The court addressed these issues as follows:

- **Public Ownership.** The mall area was privately owned, but the record indicated that the owners had granted the city an easement for public access through the mall. Citing FHWA's Section 4(f) Policy paper, the court noted that “[a]n easement interest in privately-owned land may be adequate for Section 4(f) to apply, especially when the easement is a conservation or historic preservation easement.” However, the court also found that “the record does not contain a copy of the easement or any evidence showing the easement’s purpose was to allow use of the land as a park.” The court did not specifically decide the issue of whether, on this record, the mall could be considered “publicly owned” for purposes of Section 4(f).

- **Primary Purpose.** The court concluded that the plaintiffs did not establish that the primary purpose of the mall was a park. The court noted that the historical context of the mall suggested that its primary purpose was to serve as a pleasant retail environment, rather than as an urban park. Although the plaintiffs cited the National Register of Historic Places’ description of the mall as “an important urban park,” the court held that the Register was only legally relevant to the mall’s status as a historic resource. Thus, the court held that Caltrans did not have to perform a Section 4(f) analysis for the mall as a park.

B. “Use” Determinations

*Whether Tunneling is a Direct Use*

In the West Side Subway Extension case, the FTA determined that the project would not ‘use’ the Beverly Hills High School, because the tunneling would be more than 55 feet underground and therefore would avoid any adverse effects to the property’s historically significant characteristics. FTA based this determination on FHWA’s Section 4(f) Policy Paper, which generally excludes subsurface tunneling activity from being treated as a “use” unless the tunneling “substantially impairs the historic values of the historic site.”
words, tunneling is normally considered as a potential constructive use. The court held that tunneling should have been considered as a direct use, which occurs whenever land within a Section 4(f) property is permanently incorporated into a transportation project:

[T]he Court also agrees with Plaintiffs that an interpretation that necessarily excludes tunneling from the definition of “use,” when one of those definitions specifically indicates that “use” occurs “[w]hen land is permanently incorporated into a transportation facility,” 23 C.F.R. § 774.17, is plainly at odds with regulatory guidance. As such, in reaching that conclusion here ..., the FTA acted arbitrarily and capriciously. The FTA’s explanations for why it believes the tunneling will not have a significant impact or substantial effect on the High School and its future plans is irrelevant (except as to the question of whether “all possible planning to minimize harm” has occurred) because a direct impact will be present here ....

Thus, the court held that FTA had failed to prepare a sufficient analysis of the potential for tunneling to result in a “use” of the Beverly Hills High School historic property.

Constructive Use

In the Highway 1 case, the plaintiffs alleged that the project would constructively use the adjacent Golden Gate National Recreation Area, in that it would risk spreading invasive species and would impact views and wildlife. The court noted that Caltrans had analyzed these potential impacts in the EA and reasonably determined that the impacts would not be significant. The court explained that this was sufficient for compliance with Section 4(f), even if the agency did not include its analysis and determinations in a separate chapter or document solely dedicated to Section 4(f).

In the Highway 290 case, the FHWA determined that noise levels from the project would not cause a constructive use of an adjacent park, because the projected noise levels were within the noise abatement criteria specified in FHWA’s noise regulations for “Category C” resources, which include parks. The plaintiffs challenged the noise analysis on which this finding was based and also challenged FHWA’s classification of the park, arguing that it should have been classified as Category A, which applies to lands “on which serenity and quiet are of extraordinary significance and serve an important public need.” The court rejected both arguments, finding that FHWA had adequately supported its determinations in the record.

C. Avoidance Alternatives

In the Fulton Mall Reconstruction Project case, the plaintiffs argued that Caltrans unreasonably rejected two alternatives that would have avoided using Section 4(f) historic sites, that Caltrans defined the purpose and need too narrowly, and that Caltrans should have considered an additional alternative. The court concluded that there was ample support for Caltrans’ conclusion that the other two alternatives would not accomplish the purpose and need of the project, noting that those alternatives would not be as effective in meeting the project’s goals of reversing urban decay and also would not be eligible for
TIGER grant funding. The court also held that there was sufficient support for Caltrans’ identification of purpose and need and that Caltrans did not inappropriately use the TIGER grant to preordain its preferred alternative selection, because alternatives were not eliminated based solely on their ineligibility for TIGER grant funding.

In the South Mountain Freeway case, the plaintiffs (an Indian tribe) claimed that the agencies failed to consider feasible and prudent alternatives that would avoid using the South Mountain Park Preserve, which was located outside the tribe’s reservation but included cultural resources of significance to the tribe. The agencies argued that they evaluated other alternatives but concluded that they either did not meet the project’s purpose and need or were not feasible. In particular, the agencies found that (1) shifting the alignment south of the Preserve would place the alignment within the tribe’s reservation, and the tribe had declared its opposition to allowing the project to be located on reservation lands; (2) shifting the alignment far enough south to avoid the tribe’s reservation would not meet the purpose and need, because the alternative route would be too far away from the area to be served; and (3) shifting the alignment to the north of the Preserve would cause extensive residential and business displacements and also would not meet the purpose and need, because the alignment would adversely impact existing freeway facilities. The court ruled that the agencies acted reasonably in determining that no feasible and prudent alternatives exist that would avoid use of the Preserve.

D. Least-Harm Analysis

In the Fulton Mall Reconstruction Project case, the plaintiffs alleged that other alternatives would cause the least overall harm to historic sites. The court upheld Caltrans’ least-harm analysis. The court concluded that there was sufficient support for Caltrans’ findings that the preferred alternative would cause the least overall harm.

In the South Mountain Freeway case, the plaintiffs (an Indian tribe) argued that the agencies did not adequately plan to minimize harm to the South Mountain Park Preserve, and that the freeway project would destroy areas that the tribe’s members considered sacred. In response, the agencies cited a number of measures to mitigate and minimize impacts to the Preserve, which included acquiring land adjacent to the Preserve and implementing design measures to reduce the project’s impacts on noise, views, habitat, and cultural resources. The court noted that the plaintiffs failed “to propose any specific measures that they believe the Agencies should have addressed but did not,” and it concluded that the agencies complied with Section 4(f) by conducting all possible planning to minimize harm from the project.

III. Section 106 of the National Historic Preservation Act

In the Albuquerque Rapid Transit (ART) case, the FTA engaged in Section 106 consultation and made a no-adverse-effect finding for the project, with concurrence of the SHPO. The plaintiffs challenged FTA’s compliance with Section 106 on various grounds, primarily arguing that FTA had not adequately considered the potential indirect effects of the project on historic properties in downtown Albuquerque. The court rejected each of
the plaintiffs’ challenges to FTA’s Section 106 compliance, holding that FTA properly defined the area of potential effects (APE); considered the potential for traffic diversion to affect historic neighborhoods; supported its conclusion that Central Avenue — the city street on which the project was located — was not a historic property; and provided sufficient opportunities for public involvement in the Section 106 process.

IV. Section 404 of Clean Water Act

A. Scope of Section 404 Permit

In the Northern Beltline case, the plaintiff alleged that the Corps improperly segmented the project – in violation of Section 404 of the Clean Water Act – by granting a Section 404 permit for a 1.86-mile segment of the 52-mile Northern Beltline. The court noted that it was standard practice for the Corps to issue Section 404 permits for individual sections of large highway projects. Indeed, the court explained, it “would be impossible for Alabama DOT to apply for, and COE to review, a permit for the entire Northern Beltline at once – not only because of the time, logistics, and volume of information that would be involved in permitting every discharge at every point along the entire 52-mile-long Beltline at once, but also because much of the Beltline has not even reached the point in the design stage where COE could meaningfully review such a permit application.” Therefore, the court upheld the Corps’ determination to issue a Section 404 permit for the 1.86-mile section rather than the Northern Beltline as a whole.

B. Section 404(b)(1) Guidelines

In the Northern Beltline case, the plaintiff claimed that the Corps inadequately considered other practicable alternatives to the project. The plaintiff argued that the updated cost estimate for the project rendered the preferred alternative impracticable, and that the Corps did not adequately consider two-lane or four-lane alternatives. The court held that the updated cost estimate for the entire Northern Beltline did not require the Corps to reconsider the continuing validity of its alternatives analysis. In addition, the court cited extensive evidence from the record that the Corps had analyzed two-lane and four-lane alternatives and had concluded that they were not practicable and would not be less environmentally damaging. The court acknowledged that the U.S. EPA had recommended selecting a different alternative, with lower environmental impacts, but the court upheld the Corps’ decision to reject that alternative due to its impacts on a Section 4(f) property.

In the Northern Beltline case, the plaintiffs also claimed that the Corps’ public interest analysis was flawed because the Corps justified the Section 404 permit based on the need for and benefits of the entire Northern Beltline project, rather than the need for and benefits of the 1.86-mile section (which was the only section covered by the Corps’ permit). The court concluded that the plaintiffs did not provide sufficient support for the claim and, in fact, the Corps found that the 1.86-mile section had utility independent of the rest of the Northern Beltline. The court also held that the Corps had adequately considered the direct, indirect, and cumulative impacts of the Northern Beltline project in its public interest analysis.
C. Corps’ Compliance with NEPA

In the Northern Beltline case, the plaintiff claimed that the Corps itself had violated NEPA by segmenting its consideration of the 1.86-mile section from the larger Northern Beltline project. This argument was similar to the segmentation claim brought by the plaintiff against FHWA, except that it rested in part on the Corps’ own NEPA regulations, which required the Corps’ NEPA analysis to include not only the “specific activity” being permitted but also the “those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant Federal review.” The court held that the Corps had complied with this regulation because, in this context, the “entire project” consisted of the 1.86-mile section and not the entire Northern Beltline. The court found that the Corps’ NEPA regulations “[d]o not prevent COE from issuing permits for individual, manageable phases of massive highway projects that do not otherwise run afoul of other regulations that prohibit segmentation and overly narrow permit applications.”

V. Clean Air Act

In the I-69 case, the plaintiffs contended that the agencies violated the Clean Air Act when they decided to use 2004 vehicle fleet data instead of 2009 vehicle fleet data in making the conformity determination. The court held that the agencies were not required to use the 2009 data because the data had not been finalized at the time the agencies began their conformity analysis, nor even at the time FHWA issued the ROD. In addition, the court held that the record demonstrated the agencies made a rational decision not to use the 2009 data before it was finalized because of concerns about the quality of that data.

VI. Endangered Species Act

In the Highway 1 case, the plaintiffs claimed that Caltrans violated the ESA by including inaccurate information in the BA. The BA had proposed that, as “compensatory mitigation” for the project’s impacts on endangered species, “[a]n approximately 5.14-[acre] site owned by the City of Pacifica will be preserved in perpetuity.” The court found that preservation of the 5.14-acre parcel could not be considered a new mitigation measure that was part of the project because the “City of Pacifica, which owns the parcel, was already required to preserve it for reasons outside the scope of Caltrans’ project.” Because the BA had incorrectly assumed that this mitigation measure would only occur as part of the Caltrans project, the court held that Caltrans violated Section 7 of the ESA by overstating the actual mitigation measures in the BA.

The plaintiffs in the Highway 1 case also claimed USFWS violated the ESA by issuing a Biological Opinion based on the inaccurate information about the 5.14-acre parcel owned by the City. The court agreed with the plaintiffs that the BiOp was flawed because it relied on inaccurate information as the basis for assessing the net effects of the project. The court explained that:

[A] Biological Opinion assesses the net effect of the overall project, which includes not only adverse effects but also mitigation measures designed to offset them. If a mitigation measure is not actually part of the project, the net effect of the project
changes. If a benefit is not actually being provided to offset a cost (because the benefit would exist regardless), then the overall cost of the project is higher than assumed.

The court also held that the BiOp was flawed in its reliance on the proposed habitat enhancement on the 5.46-acre parcel in Golden Gate National Recreation Area. The court noted that a BiOp may not rely on proposed mitigation measures unless there are “specific and binding plans” to implement the measures, including a “clear, definite commitment of resources” to cover implementation cost. With respect to the proposed habitat enhancement site in the GGNRA, the court found that this mitigation measure was only “conceptual” and that there was no definite plan or committed funding to implement this mitigation measure. Therefore, the court held that the proposed plans to enhance habitat in GGNRA were too vague and speculative to be relied upon as the basis for USFWS’s findings in the BiOp.

The plaintiffs in the Highway 1 case also alleged that the agencies should have reinitiated consultation after learning that the 5-acre parcel, which they previously thought would be preserved as a mitigation measure, was already required to be preserved. The ESA requires that agencies reinitiate consultation if new information reveals that the project may impact listed species or critical habitat in a manner or to an extent not previously considered. The court held that this new information indicated that the project would impact listed species and critical habitat to an extent not previously considered, and thus triggered the agencies’ duty to reinitiate consultation.