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## **CLUE Case Law Database**

**FHWA and FTA NEPA Case Law: 2014 Year in Review**

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Washington, DC**

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## Preface

This paper summarizes the key findings from federal court decisions issued in 2014 in cases involving environmental reviews for highway and transit 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 describes key holdings on a topic-by-topic basis.

The summaries in this paper are organized into the following groupings:

- National Environmental Policy Act (NEPA)
- Section 4(f) of the U.S. Department of Transportation Act
- Clean Air Act
- Endangered Species Act (ESA)
- Title 23 of the U.S. Code
- Title VI of the Civil Rights Act
- Litigation Issues (statute of limitations, administrative record, etc.)

Under each heading, the issues are organized by sub-topic - for example, purpose and need is a sub-topic under NEPA. Within the sub-topics, individual issues are identified by separate headings.

For ease of reference, this paper refers to individual cases based on the name of the project, rather than the names of the parties to the lawsuit. Hyperlinks to the CLUE summaries are provided in the text of this paper. Appendix A to this paper includes a completing listing of the cases, with full case names and legal citations.

Please note that this paper is intended for a general audience, and therefore it does not fully capture the legal analysis in the court decisions. In addition, 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. Lastly, this paper includes only a sub-set of the issues addressed in the court decisions; for more detailed summaries of the decisions, and copies of the decisions themselves, refer to the CLUE website.

It also is important to note that 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.

## Notable Cases

Below are some examples of notable decisions covered in this report:

- Cases upholding purpose and need statements that call for improvement to a specific transportation mode (transit). See Part I.A.
- Cases upholding the elimination of alternatives based on studies carried out in the transportation planning process, prior to initiation of the NEPA process. See Part I.B.1.
- A case holding that FTA had not adequately considered alternative construction methods (involving tunneling) because the documentation was solely in technical reports and was not referenced in the EIS. See Part I.B.1.
- A case holding that that FHWA was not required to conduct a quantitative greenhouse gas emissions analysis for a highway project. See Part I.C.3.
- A case upholding a “phased ROD” - i.e., a ROD that approved only a portion of an alternative studied in an EIS. See Part I.F.2.
- A case holding that FHWA had not adequately supported its decision to apply the “joint planning exception” under Section 4(f). See Part II.D.
- A case holding that a Biological Assessment was inadequate because it did not clearly articulate the agency’s basis for determining that formal consultation was not required under the ESA. See Part IV.A.
- A case holding that an open-house format satisfies the public hearing requirement under 23 USC 128. See Part V.A.
- A case dismissing a Title VI challenge to a toll road project, where the plaintiff had shown a disproportionate impact but had not shown intentional discrimination. See Part VI.

## I. NEPA

### A. Purpose and Need

#### *Defining a purpose that calls for a specific mode*

Challenges to the agency's purpose and need statement are frequently raised in NEPA litigation. These challenges typically allege that the purpose has been defined too narrowly - thus excluding alternatives that otherwise would have been considered. In 2014, this type of claim was raised in two cases involving transit projects. In each case, the purpose and need statement was upheld. An important factor in both cases was the agency's reliance on goals defined in the transportation planning process.

The [Honolulu Transit case](#) involved a challenge to FTA's EIS for a proposed 20-mile, high-speed rail system from the western portion of Oahu through the downtown area of Honolulu.<sup>1</sup> The purpose and need called for providing "high-capacity rapid transit" and "an alternative to private automobile travel" in the study corridor. Plaintiffs argued that the purpose was defined too narrowly, because it did not allow for consideration of other alternatives such as managed lanes. The U.S. Court of Appeals for the 9th Circuit held that FTA had properly relied upon objectives defined in the region's metropolitan long-range transportation plan, which is specifically authorized by 23 USC 139:

The purpose was defined in accordance with the statutorily mandated formulation of the transportation plan that preceded the FEIS. That plan was the 2004 Oahu Metropolitan Planning Organization, Regional Transportation Plan .... The stated objectives comply with the intent of the relevant federal statutes. Specifically, [SAFETEA-LU] provides that a federally-funded transportation plan's purposes may include "achieving a transportation objective identified in an applicable ... metropolitan transportation plan." See 23 U.S.C. § 139(f)(3). The 2004 ORTP had concluded that a high-capacity, high-speed transit project connecting west Oahu with downtown Honolulu was necessary to implement Oahu's land use policies. It also identified a Fixed Guideway system as a central

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<sup>1</sup> The lawsuit challenging FTA's ROD for the Honolulu Transit project was filed in federal district court in Honolulu. In a decision issued in 2012, the federal district ruled in FTA's favor on the majority of issues, but found that FTA's Section 4(f) evaluation was not sufficient in several respects. The plaintiffs appealed the district court's decision; at the same time, FTA prepared a Supplemental EIS and Section 4(f) evaluation to address the shortcomings identified by the district court. FTA then filed a motion in the district court seeking a finding that it had remedied the deficiencies in the Section 4(f) evaluation. These events resulted in two separate decisions, both issued on the same day, February 18, 2014: (1) a decision by the U.S. Court of Appeals for the 9th Circuit, which affirmed the district court's decision in favor of FTA on a range of NEPA and Section 4(f) issues; and (2) a decision by the federal district court holding that FTA had properly remedied the deficiencies in its Section 4(f) evaluation.

component of that plan. Moreover, the statute authorizing the federal New Starts transportation program states that it is in the interest of the United States to foster transportation systems that maximize safe, secure, and efficient mobility of individuals, minimize environmental impacts, and minimize fuel consumption, 49 U.S.C. § 5301(a), and that one of the purposes of the program is to provide financial assistance to state and local governments in order to improve mobility for elderly and economically disadvantaged individuals, 49 U.S.C. § 5301(f)(4). The Project's stated objectives are consistent with all these purposes.

Viewed in its statutory context, the Project's objectives are not so narrowly defined that only one alternative would accomplish them....

The [West Eugene Bus Rapid Transit \(BRT\) case](#) involved a proposed extension of an existing BRT system in Eugene, Oregon. The purpose and need was "to implement high-capacity public transportation service, in the West 11th Corridor (east/west), utilizing the adopted high-capacity transit mode identified in the Regional Transportation plan." The plaintiffs argued that the purpose was defined too narrowly, because it identified a specific transit mode and corridor. The district court upheld the purpose statement, citing the 9th Circuit's decision in the Honolulu Transit case:

This statement, like the one at issue in *Honolulutraffic.com*, is broad enough to allow for a wide range of alternative routes, and multiple alternative routes were in fact considered throughout the analysis. Furthermore, the decision to restrict the project to high-capacity transit, and specifically to BRT, was the result of a long, careful, deliberative process. The WEEE Purpose and Need Statement is reasonable.

## **B. Alternatives Analysis**

### **1. Screening of Alternatives**

#### *Reliance on pre-NEPA planning studies*

In the [Honolulu transit case](#), the plaintiffs claimed that FTA improperly relied on an Alternatives Analysis - which was completed prior to the NEPA process - as the basis for eliminating alternatives during the screening stage of the NEPA process. The plaintiffs claimed that FTA had improperly eliminated a "managed lanes" alternative, which would have involved building dedicated highway lanes for transit vehicles and high-occupancy passenger vehicles, as well as a light-rail transit alternative. The U.S. Court of Appeals for the 9th Circuit held that, under federal laws and regulations, it is

appropriate for the federal lead agency to rely on a pre-NEPA planning study as long as (1) the federal lead agency furnished guidance in its preparation and independently evaluated the document, (2) and the planning study was conducted with public review and a reasonable opportunity to comment. The court held that those requirements had been met and therefore upheld FTA's elimination of the managed-lanes and light-rail transit alternatives.

### *Elimination of alternatives that do not meet the need for "redundancy"*

The [Detroit River Bridge case](#) involved a proposed new crossing of the Detroit River connecting the Detroit, Michigan area to Ontario; the project was known as the Detroit River International Crossing (DRIC). As defined in the EIS, the purpose and need for the project included providing increased "redundancy" in international bridge crossings - defined as providing "adequate alternative pathways in order to avoid or minimize disruptions to the border and security of both countries, and to facilitate the uninterrupted flow of people and goods across the border in the Detroit-Windsor area in the event that other roadways, plazas, and crossings in the corridor become unavailable." FHWA relied on the need for redundancy when it rejected an alternative that solely involved improvements to the existing international bridge. The court found that the administrative record clearly showed that "crossing system redundancy was identified early in the process as a necessary component to accomplishing the DRIC project purposes ...." The court upheld FHWA's reliance on this factor as the basis for eliminating an alternative that did not provide redundancy.

### *Elimination of non-tolled alternatives*

The [Ohio River Bridges case](#) involved an EIS and a Supplemental EIS prepared by FHWA for the proposed construction of two new tolled bridges connecting the Louisville, Kentucky area to southern Indiana. The EIS examined a wide range of alternatives, including construction of a light rail transit system, and resulted in a ROD approving the selection of two *non-tolled* bridges. Later, an SEIS was prepared, and FHWA then issued a revised ROD approving the selection of two *tolled* bridges - one downtown, which added capacity at an existing bridge and one in the "East End," which filled a missing link in a circumferential route. The plaintiffs argued that reasonable non-tolled options were improperly excluded from the SEIS. The U.S. Court of Appeals for the 6th Circuit upheld the rejection of non-tolled bridge alternatives based on analysis in the record showing that toll revenues were needed to help pay for the project:



Although plaintiff claims defendants arbitrarily excluded reasonable non-tolled alternatives, it offers no record citation to identify an alleged option that was reasonable but ignored by defendants. And, in any event, it is apparent that no non-tolled alternative was both financially feasible and able to meet the Project's Purpose and Need Statement.

*Reliance on draft studies that were not referenced in the EIS*

The [Los Angeles Metro case](#) involved a challenge to an EIS prepared by FTA for a proposed extension of the Los Angeles Metro subway system. FTA selected a cut-and-cover tunnel for a section of the project. The plaintiffs claimed that FTA should have considered two additional tunneling methods, known as Sequential Excavation Method (SEM) and Open-Face Shield. FTA conceded that those methods were not addressed in the EIS, but maintained that they were not required to consider them in the EIS itself because they were determined to be infeasible in draft studies that were included in the administrative record. The plaintiffs argued that FTA could not rely upon those studies because they were never referenced in the EIS or made available to the public during the NEPA process. The court held that the EIS was inadequate because it did not include even a brief explanation of the reasons why those tunneling methods were not considered:

The Defendants offer the Draft Tunneling Studies to demonstrate that it was not necessary for them to have considered SEM or Open Face Shield tunneling as a separate alternative in the FEIS. ... Had Defendants addressed and rejected any form of open-face tunneling in the FEIS, they might later be able to rely on the Draft Tunneling Studies as part of an explanation for a failure to address SEM or Open-Face Shield tunneling in detail in the FEIS. However, as discussed below, the Draft Tunneling Studies cannot cure the failure of the FEIS to address SEM or Open-Face Shield Tunneling. Neither of these alternatives nor other, similar open-face tunneling possibilities, were mentioned in the FEIS.

...

In the FEIS, Defendants were required, 'for alternatives which were eliminated from detailed study ... briefly [to] discuss the reasons for their having been eliminated.' ... Here, the FEIS fails to address why neither Open-Face Shield nor SEM tunneling was considered for the Lower Flower Segment. Thus, the FEIS did not include any discussion, even a summary one, of 'the reasons for their having been eliminated.' ... And ...

the FEIS did not address a similar alternative. SEM or Open-Face Shield Tunneling is materially different from the closed-face tunneling alternative that was briefly addressed and rejected in the FEIS. That alternative was rejected because of the inability of TBMs to cut through tiebacks, an issue that may be remedied by SEM or the Open-Face Shield Method. Therefore, a separate discussion of SEM or Open-Face Shield was required.

## 2. Definition of No-Build Alternative

### *Assumptions about potential future improvements under the No Action Alternative*

As noted above, the [Detroit River Bridge case](#) involved the proposed construction of a new six-lane bridge - the DRIC - connecting the Detroit, Michigan area to Canada. A key issue in that case involved FHWA's assumptions about what additional capacity would be provided under the No Action Alternative at the location of an existing, four-lane, privately owned bridge, known as the Ambassador Bridge.

At the time the EIS was prepared for the DRIC, the owner of the Ambassador Bridge (the "Bridge Company") had proposed to construct a new six-lane span adjacent to the existing Ambassador Bridge. The plaintiffs argued that the No Action Alternative should have assumed that the Bridge Company would complete its new six-lane bridge *and* retain the existing four-lane Ambassador Bridge, resulting in 10 lanes of capacity at the existing location. Instead, FHWA assumed that the Bridge Company would build the new 6-lane bridge and then take the existing four-lane bridge out of service; therefore, the EIS assumed a total of 6 lanes of capacity at the existing location.

The court upheld FHWA's definition of the No Action Alternative, finding that FHWA was not required to accept the bridge owner's assertions at face value:

[T]he Bridge Company's own statements regarding the future of the Ambassador Bridge are vague, ambiguous, and inconsistent with respect to when and how many lanes of traffic would actually be available if the Bridge Company constructed the new six-lane bridge. The FHWA could not reasonably be expected to rest its analysis of a 'no build' alternative on assumptions and likelihoods and inconsistent statements from the Bridge Company about what it might-or might not-do with the Ambassador Bridge in the future. Even if the Bridge Company stated with certainty that the Ambassador Bridge would remain open to vehicular traffic, there is no certainty that the second span would be built at all, given the many agreements, permits, and approvals required, and numerous other factors.

Based on the AR, it was not unreasonable or an abuse of discretion for the FHWA to assume that the proposed privately built six-lane second span would replace the existing four lane Ambassador Bridge when defining the specifics of a 'no build' alternative.

### **3. Traffic Forecasts**

#### *Reliance on traffic counts alleged to be "stale"*

The plaintiffs in the [Detroit River Bridge case](#) challenged the traffic forecasts used in the EIS, arguing that the forecasts relied on traffic counts that were several years old at the time the Final EIS was issued, and that more recent traffic data showed that traffic growth trends had reduced. They claimed that reductions in traffic growth undermined the need for the project. The court found that "FHWA did not ignore current actual data, but extensively evaluated that information in the context of the DRIC project's purpose and needs, earlier projections, and factors affecting traffic volume." The court also noted that "traffic capacity was not the only justification for additional crossing capacity. Economic security, national security, redundancy and connectivity were also purposes and needs for the DRIC project identified by both the United States and Canada." Therefore, FHWA's traffic forecasts were upheld.

### **C. Impacts Analysis**

#### **1. Air Quality Impacts**

#### *Consideration of potential violation of new NAAQS*

The [SR 47 Expressway case](#) involved the proposed construction of an elevated expressway, approximately 1.7 miles long, connecting the Ports of Los Angeles and Long Beach to the I-405 freeway in southern California. The plaintiffs claimed that the air quality impacts analysis in the EIS was inadequate because it failed to address whether the potential increase in PM 2.5 concentrations would violate new national ambient air quality standards (NAAQS) issued for PM2.5 in 2006. The new standards were not required to be used for the conformity determination, because the new standards did not go into effect until 2010, after the conformity determination had been completed. But the plaintiffs argued that the EIS should have included an analysis of the project's potential to violate those standards. The U.S. Court of Appeals for the 9th Circuit rejected this argument, finding that the EIS adequately addressed the new standard:

... Defendants correctly contend that the EIS was forthright in discussing the new standard. For example, the EIS acknowledged that even though PM 2.5 levels were below the old NAAQS standard in the two preceding years, “the current federal 24-hour PM 2.5 standard of 35 [micrograms per cubic meter] was exceeded each year in the past 3 years.” The EIS also discussed at length the results of Defendants’ air quality study, and concluded that any localized increase in PM 2.5 would be offset by reduced vehicle congestion and idling in the project area as a whole. The EIS also incorporated Defendants’ response to NRDC’s comment on this point.

### *Consideration of “ultra-fine particulate matter”*

In the [Ohio River Bridges case](#), the plaintiffs claimed that a supplemental EIS was needed to assess the project’s contributions to emissions of “ultra-fine particles” - a type of fine particulate matter. The U.S. Court of Appeals for the 6th Circuit rejected this argument for two reasons: (1) “Plaintiff cites no guidance document, case law, agency comment, or other authority to suggest that such an analysis is required under NEPA or is even technically feasible.”; and (2) “the record shows that defendants consulted with the EPA throughout the preparation of the Supplemental Final EIS regarding the methodologies for various impact analyses—including air quality—and at no time did EPA suggest that defendants should analyze ‘ultra-fine’ particulates.”

## **2. Environmental Justice**

### *Selection of alternative with lower higher EJ impacts*

In the [Detroit River Bridge case](#), the plaintiffs claimed that FHWA had failed to give sufficient consideration to alternatives that would have reduced impacts to a minority and low-income neighborhood. The plaintiffs claimed that “downriver” alternatives, which were in predominantly affluent and white neighborhoods, were eliminated due to political pressure. The court held that FHWA had complied with its obligation to consider alternatives under NEPA, because the record adequately documented the reasons for eliminating the downriver alternatives. The court explained that “Just as the FHWA is not required to select an alternative with the least environmental impact under NEPA, the FHWA is not required to select an alternative with the least environmental justice impact. NEPA requires only that the FHWA consider the environmental impacts of its projects in making its decisions.”

### 3. Greenhouse Gas Emissions

#### *Need for quantitative GHG emissions analysis*

In the [Ohio River Bridges case](#), the plaintiffs claimed that a quantitative GHG emissions analysis was required by NEPA. The U.S. Court of Appeals for the 6th Circuit upheld FHWA's conclusion that such an analysis was not required because the effects of GHG emissions cannot be usefully analyzed at the project level:

Although defendants acknowledged that greenhouse gases, including those emitted by cars burning fossil fuels, contribute to climate change, the Supplemental Final EIS explained that it did not analyze the emission changes that would result from each proposed alternative in exhaustive detail because: (1) the EPA has the authority to regulate greenhouse gases and has chosen to execute that authority by directly regulating emissions from vehicles, rather than imposing requirements on transportation projects; (2) given the global nature of climate-change, decisionmakers would not be better informed by a discussion of how the proposed alternatives might vary in their relatively small contribution to a world-wide problem; and (3) the federal defendants are engaged in other efforts to help reduce greenhouse gas emissions. In short, defendants cannot usefully evaluate greenhouse gas emissions on a Project-specific basis because of the non-localized, global nature of potential climate impacts.... Plaintiff offers nothing to rebut this rational conclusion. Accordingly, defendants' approach to greenhouse gas emissions was not arbitrary and capricious.

### 4. Public Health Impacts

#### *Adequacy of health risk assessment*

As noted above, the [SR 47 Expressway case](#) involved the proposed construction of an elevated expressway connecting the Ports of Los Angeles and Long Beach to the I-405 freeway. Given its connection to the ports, the proposed expressway would carry a high volume of freight trucks. The plaintiffs were concerned about air quality impacts of diesel trucks, and contended that the EIS failed to disclose the project's impacts on public health. The U.S. Court of Appeals for the 9th Circuit found that the EIS adequately addressed public health impacts because it included a health risk assessment that took into account the effects of PM2.5 emissions:

The EIS included a Health Risk Assessment that was subject to the public comment and review process. In the Health Risk Assessment, Defendants disclosed that the Project would lead to increased PM10 and PM2.5 concentrations in the immediate vicinity of the Project, and how those increased concentrations could have adverse health effects for local residents. The Health Risk Assessment also acknowledged that this type of transportation project usually leads to increased PM 2.5 concentrations in the area immediately adjacent to the project.

Defendants also conducted detailed studies based on 2006–2007 meteorological data, where they estimated cancer- and other health-risk increases at thousands of residences, schools, parks, and other areas in the immediate vicinity of the Project. Defendants explained the study results with color-coded diagrams illustrating the precise locations where adverse health effects would be the greatest. They also included statistical discussions and tables illustrating that roughly 97% of the adverse health effects would be due to diesel particulate matter concentrations. Additionally, Defendants determined that a heating, ventilation, and air conditioning retrofit program for residences within the vicinity of the significant impact zone would be a feasible mitigation measure.

#### **D. Mitigation**

##### *Reliance on mitigation commitments as the basis for a FONSI*

In the [West Eugene BRT case](#), FTA issued an EA followed by a FONSI, which was based in part on commitments to implement mitigation measures that would avoid significant impacts. The plaintiffs argued that the mitigation measures were not sufficiently specific or enforceable to support the FONSI. The court upheld the EA's discussion of mitigation measures because specific, detailed commitments were made for measures that were intended to reduce significant impacts to insignificance:

Plaintiffs take issue with the EA's use of qualifying language such as 'where feasible' or 'where practicable,' but these qualified measures are mitigating impacts not deemed significant. Where potentially significant impacts have been identified, the EA includes specific detailed mitigation measures. The Court holds that the EA's discussion of mitigation measures is reasonable and adequately evaluates potential impacts and benefits of the two alternatives and possible measures to mitigate adverse impacts.

## *Deferring development of detailed mitigation plans until after NEPA*

In the [Los Angeles Metro case](#), FTA's EIS described a set of mitigation measures that would be included in the project. Some of the measures involved commitments to development more specific mitigation plans in the future. The plaintiffs claimed that FTA had inappropriately deferred development of mitigation measures by failing to include specific, concrete mitigation commitments for each impact in the EIS. The court rejected this argument: "In essence, Plaintiffs contend that any mitigation measure that includes plans for future analysis or development of a plan is inadequate under NEPA. This is incorrect. Mitigation plans may be 'conceptual' and remain 'flexible to adapt or future problems.'"

### **E. Supplementation**

#### *Change in hours of construction*

In the [Los Angeles Metro case](#), the plaintiffs claimed that various changes to the project after the completion of the NEPA process required preparation of a supplemental EIS, including changes in the construction times (to allow night-time construction). The court held that the change in construction time was not significant new information because the EIS had acknowledged the possibility of night-time construction, and any change in impacts was not significant.

#### *Preparation of a Supplemental EA in lieu of SEIS*

In the [Los Angeles Metro case](#), the plaintiffs also claimed that a Supplemental EIS was required because of a change in the project's route. The court noted that FTA had prepared a Supplemental EA for the shift, and the EA had shown that the shift "is qualitatively within the spectrum of alternatives that were discussed in the [EIS]" and "eliminates certain adverse impacts and leaves only impacts that have already been fully considered." Therefore, the court determined that a supplemental EIS was not required.

#### *New threats to an endangered species*

The [I-69 Section 4 case](#) involved the proposed construction of a section of the I-69 Evansville-to-Indianapolis project in Indiana. A Tier 1 EIS was prepared for the entire project, followed by a separate Tier 2 EIS for each of six sections. At both Tier 1 and Tier 2, FHWA has engaged in Section 7 consultation under the ESA regarding impacts to the endangered Indiana bat. The U.S. Fish and Wildlife Service issues a Biological



Opinion (B.O.) for the entire project during Tier 1, followed by B.O.'s for each section of the project during Tier 2.

In a challenge to the Tier 2 study for Section 4 of I-69, plaintiffs claimed that FHWA was required to prepare a SEIS because of new information regarding the effects of white nose syndrome - caused by a fungus - on the Indiana bat. The court found that the existence of white nose syndrome did not warrant preparation of an SEIS because this issue had been thoroughly considered in multiple rounds of Section 7 consultation, which confirmed the original 'no jeopardy' finding for the Indiana bat:

In 2011, in response to the phenomenon of white-nose syndrome, the agencies initiated formal consultation for a third time. FHWA's Amendment to the Revised Tier 1 Bop concluded once again that, even taking into account the new disease, the project would have none but acceptable levels of impact on the bats. ... Bat surveys conducted as part of preliminary work for Section 5 of the project (north of Section 4) prompted the agencies to re-initiate consultation yet again in 2012. The result of this fourth round of analysis with respect to the Indiana bat was another Amendment to the Tier 1 Bop, issued on July 24, 2013. ... These consultations occurred in parallel with preparation of the agencies' EIS for Tiers 1 and 2, all of which reflect the consultations' results.

... Here, the evidently comprehensive nature of the consultations—and the absence of any evidence that the end result was unreasonable—impel us to the conclusion that the agencies' decision not to issue a SEIS was not "arbitrary and capricious."

### *Contractor's violation of mitigation commitments*

In the [I-69 Section 4 case](#), the plaintiffs also claimed that a Supplemental EIS was required because a construction contractor had felled a potential Indiana bat roost tree outside of the season during which tree removal was allowed under the Biological Opinion - in effect, violating one of the conditions of the B.O. The court found that the felling of a single tree had "minimal or non-existent" impact on the Indiana bat, and that INDOT had taken sufficient steps to ensure that further violations did not occur, including firing the supervisor responsible for the felling of the tree; therefore, the court also found that the out-of-season tree-removal did not require preparation of an SEIS.



## F. Other NEPA Issues

### 1. Federalization

The [North Eufaula Avenue case](#) involved the proposed widening of a 0.8 mile stretch of a two-lane road running through a historic district in a small town, with old houses lining each side and a 30-to-50-foot-wide tree-lined median. The project involved widening the street to four lanes, as part of a larger effort to upgrade a state route leading to the Gulf Coast beaches. This project was being undertaken solely with State funds, so FHWA treated it as a non-federal project and did not prepare a NEPA document.

The plaintiffs acknowledged that the project was being built solely with State funds, but claimed that the project had been “federalized” - and thus required federal environmental review - because it is part of a larger project that the federal government had helped to develop and execute. The court held that the North Eufaula Avenue project had not been federalized, and therefore NEPA review was not required. This decision was based on three factors:

- First, the court found that “[p]retex is not present in this case” because “Alabama did not apply for federal funds and then decide against using them once the federal government expressed reservations about its environmental-impact statement.” It held that the “pretext problem arises only when States obviously tip their hand that they believe a road is part of a federal project by submitting an environmental impact statement and then insist it is a state project after failing the federal standards.”
- Second, the court considered the degree of federal involvement in the project. It found that, while FHWA had funded an environmental study of a potential bypass around Eufaula about a decade earlier, there had been no additional federal involvement since that time. The court found that the previous federal involvement was not enough to federalize the project.
- Finally, the court considered “whether the segment at issue forms part of a larger coherent project.” The court noted that the project did have some connections to other widening projects on Highway 431, but held that “this project is more discrete than those found to be major federal projects in other cases. It did not receive a single source of funding at one time, but has been funded in parts. These discrete parts have also occurred over nearly four decades rather than within a short time span. It is also not a bypass or a wholly new project, but rather improvements on an existing road.”

## 2. Segmentation

### *Studying one section of a larger project*

The issue of segmentation arose in two cases - one involving a portion of a circumferential highway in Alabama, known as the Northern Beltline, and another involving replacement of the Bonner Bridge on the Outer Banks of North Carolina. In both cases, the courts found the agency had not improperly segmented its NEPA review.

The [Northern Beltline case](#), as a whole, involve the planned construction of a 51-mile-long circumferential route around Birmingham, Alabama. FHWA prepared an EIS for the entire project in 1997, followed by reevaluations in 2006 and 2012. The U.S. Army Corps of Engineers adopted FHWA's environmental analysis, including the 2006 and 2012 reevaluations, and issued a Section 404 permit for the 1.86-mile project. The plaintiffs argued that the Corps had improperly segmented the 1.86-mile section from the Northern Beltline as a whole. The court held that the Corps had not improperly segmented the project because the 1.86-mile section had independent utility, connected logical termini, and did not limit consideration of alternatives for future sections of the Northern Beltline project.

- Regarding independent utility, the court noted that “the regulations only require independent utility, not maximum utility.” The court found that the project had independent utility because it “increases the utility of the existing roadway network by providing access between well-traveled highways” and “will relieve traffic on arterial and city streets.”
- Regarding logical termini, the court noted that “it is not for the court to determine what is the most logical termini, only that the termini chosen by the agency are logical and that the agency did not act arbitrarily and capriciously in choosing the project termini.” The court found that this requirement was met because “because the termini are located at nodes of commercial and traffic activity.”
- Regarding the project's effect on consideration of alternatives for future projects, the court noted that the initial 1.86-mile section was only 3.71% of the total project's length and that “the remaining 48.24 miles are unconstrained as to locus as will be determined by future planning.” Therefore, the court held that the Corps' approval of the initial 1.86 mile section would not foreclose consideration of alternatives for the remaining sections of the Northern Beltline.

### *Issuing a ROD for a portion of an alternative studied in an EIS*

The [Bonner Bridge case](#) involved improvements to NC 12, a highway that runs along the Outer Banks in North Carolina. FHWA prepared an EIS that included improvements to a 12.5-mile section of NC 12, which included a 2.5-mile bridge across an inlet. The on-land portion of the project passed through a wildlife refuge. Because of unresolved issues involving the on-land portion, and because of the urgency of replacing the bridge, FHWA issued a ROD that approved only the bridge-replacement portion. The plaintiffs argued that this approach constituted illegal “segmentation” of the project, because building the bridge replacement would effectively commit FHWA to approving significant future construction of a road and bridges through the refuge. The U.S. Court of Appeals for the 4th Circuit held that it was permissible for FHWA to issue a ROD approving only a portion of an alternative, as long as the alternatives considered in the EIS had independent utility:

Illegal segmentation is distinct from approving only a portion of a project that has been fully and adequately studied. We agree with the Eleventh Circuit that NEPA does not require an agency to authorize all stages of a project in one [ROD]. Nothing in NEPA prohibits Defendants from authorizing only one part of the Project so long as doing so does not commit them to a course of action that has not been fully analyzed. ... [T]hey are not required to approve the entire Project in a single Record of Decision so long as their NEPA documents adequately analyze and disclose the impacts of the entire Project—including those portions that have yet to be approved.

An important factor in the court’s analysis was that the EIS itself disclosed the impacts of the full project, and the ROD put the public “clearly on notice” that construction on NC 12 through the refuge would occur in the future.”

### *Studying related improvements in one EIS to avoid a segmentation claim*

In the [Ohio River Bridges case](#), FHWA decided to prepare a single EIS that included consideration of two new bridges - one downtown (adjacent to an existing bridge), and one in the “East End” (where no bridge existed). The plaintiffs argued that FHWA had improperly combined two separate projects into a single project, rather than addressing each separately. The U.S. Court of Appeals for the 6th Circuit held that it was within FHWA’s discretion to decide that these projects should be addressed in the same EIS. An important factor in the court’s analysis was FHWA’s explanation of its reasoning in response to a comment on this issue. FHWA’s response stated that “Because these needs are interrelated, and have arisen at the same time and in the same geographic

area, evaluation of the full range of potential solutions, or combinations of solutions, in one EIS achieves the intent of NEPA. That evaluation properly included various one- and two-bridge combinations, as well as the no action alternative.”

## II. Section 4(f)

### A. Avoidance Alternatives

#### *Finding that an alternative is “not prudent”*

In the [Honolulu Transit case](#), the plaintiffs opposed construction of a new high-capacity transit line and advocated instead for a “managed lanes” alternative and a bus rapid transit (BRT) alternative. In addition to challenging the alternatives analysis in the EIS, the plaintiffs claimed that the managed lanes and BRT alternatives should have been selected as feasible and prudent avoidance alternatives for impacts to Section 4(f) resources. The U.S. Court of Appeals for the 9th Circuit held that the record supported FTA’s conclusion that these alternatives did not meet the project’s purpose and need and therefore were not prudent:

The MLA [managed lanes alternative] failed to meet the purposes of the Project because, according to the City and FTA’s expert analysis, it would actually increase transit times, would not improve corridor mobility or travel reliability, and would not reduce congestion, support planned concentrations of future population and employment growth, or substantially improve service or access to transit for transit-dependent communities.” ...

Buses would still have to operate in mixed traffic, and would not alleviate roadway congestion. Moreover, there was no identified funding source for bus rapid transit.

The plaintiffs claimed that some of the evidence in the record contradicted these conclusions, and claimed that FTA’s decision was flawed because FTA had not specifically documented its conclusions regarding all of the contrary evidence. The court held that “The FTA was not required to further document its determination that the MLA and bus rapid transit alternatives were imprudent. It did not have to make explicit findings as to all the data presented.”

#### *Design assumptions underlying a potential “avoidance alternative”*

In the [Honolulu Transit case](#), FTA rejected a tunnel alternative because that alternative required the direct use of a historic property for the Ka’aahi Street rail station, and thus was not an avoidance alternative. The plaintiffs challenged the definition of this

alternative, claiming that the Ka'aahi Street station was not needed because it was located close to another planned Station. The federal district court upheld FTA's definition of the alternative:

In any case, Plaintiffs do not challenge the location of the Ka'aahi Street Station on any basis other than their belief that it would fall within 1,500 feet of the Iwilei Station. Because the Iwilei Station would not be built if the Tunnel Alternative were implemented, and because Plaintiffs have not challenged Defendants' apparently reasonable conclusion that the Ka'aahi Street Station could not be relocated, the court finds no basis on which to overturn the agency decision.

## **B. Least Overall Harm**

In the [Honolulu Transit case](#), FTA compared the tunnel alternative (favored by the plaintiffs) to the elevated-rail (the project sponsor's preference) and found that the elevated-rail alternative would cause the "least overall harm." The federal district court rejected each of the plaintiffs' challenges to the least-overall-harm determination:

- The plaintiffs claimed FTA had improperly skewed the cost comparison by assuming that the tunnel alternative would include an additional segment that extended beyond the terminus of the elevated-rail alternative. The court held that FTA's comparison was appropriate because FTA had determined that a "short" tunnel - ending at the same terminus as elevated rail - would not meet the Purpose and Need. Therefore, the court upheld FTA's cost analysis, even though it compared two alternatives with different termini.
- The plaintiffs challenged FTA's determination that the elevated rail alternative would cause less harm to Section 4(f) properties; they pointed out that the elevated rail alternative would use a greater number of Section 4(f) properties. The court held that FTA had properly balanced harm to the Section 4(f) properties by considering the quality, not just the quantity, of harm.
- The plaintiffs challenged FTA's consideration of construction impacts as part of the analysis of harm to non-Section 4(f) resources. The court held that construction impacts "still qualify as 'harms' that disproportionately affect the Tunnel Alternative and that Defendants may rightly consider as part of the 'least overall harm' analysis."

### **C. Identification of Archeological Sites**

#### *Level of detail needed in surveys for Native American burial sites*

The plaintiffs in the [Honolulu Transit case](#) claimed that FTA had violated Section 4(f) by failing to complete the identification and evaluation of Native Hawaiian burial sites prior to the completion of the NEPA process. The U.S. Court of Appeals for the 9th Circuit held that FTA had met its obligation to undertake a “reasonable and good faith investigation” by assessing the potential presence of archeological resources during the NEPA process and entering into a Programmatic Agreement under which sub-surface investigations would be completed after the NEPA process:

Defendants commissioned an Archeological Resources Technical Report, which used soil survey data, archeological records, land survey maps, and field observations to identify unknown burial sites and predict the likelihood of finding additional burial sites during different phases of the Project. Additionally, Defendants entered into a programmatic agreement with the State Historic Preservation Officer, the Advisory Council on Historic Preservation, and other federal entities outlining the procedures for burial sites that are discovered during construction, including requiring archaeological inventory surveys prior to the final engineering and design phase of the Project and providing specific protocols for addressing burials or other archaeological resources that are discovered. .... Defendants have made a good faith and reasonable effort to identify known archaeological sites along the proposed Project route and have developed an appropriate plan for dealing with sites that may be discovered during construction.

### **D. Joint Planning Exception**

#### *Reliance on after-the-fact documentation to demonstrate joint planning*

The [Bonner Bridge case](#) involved improvements to an existing route that ran through a the Pea Island National Wildlife Refuge. FHWA determined that Section 4(f) did not apply to the project’s use of land from the refuge, because the refuge and the road had been jointly planned - that is, the presence of the road was assumed when the refuge was created. The plaintiffs claimed that the right-of-way for NC 12 was not reserved through the refuge at the time the refuge was created, but rather was created years later, after the refuge was in existence. The U.S. Court of Appeals for the 4th Circuit found that FHWA had erred by considering after-the-fact evidence in making its determination:

Because the joint planning exception applies only when a transportation facility is ‘formally reserved ... before or at the same time,’ as a Section 4(f) property, 23 C.F.R. § 774.11(i), the only relevant evidence is that which sheds light on the status of NC 12 on or before April 12, 1938, the date of the executive order establishing the Refuge. Yet some of the evidence on which the district court relied in deeming the joint planning exception applicable—the 1942 Coast Guard map, the North Carolina highway maps from 1944 and 1949, the 1951 Senate debate, the public law from 1951 authorizing DOI to grant an easement to North Carolina, the 1954 quitclaim deed, and the 1954 easement—prove nothing about the status of NC 12 when the Refuge was established. In other words, this evidence is wholly insufficient to support the application of the joint planning exception here.

Therefore, the court of appeals remanded the case to the district court with instructions to “examine the record to determine whether Section 4(f)’s joint planning exception applies.” This decision leaves open the possibility of a finding that the joint-planning exception applies, but only if that finding can be made based on evidence that existed at the time the refuge was established.

### **III. Clean Air Act**

#### **A. PM2.5 Hot-Spot Analysis**

##### *Use of “surrogate monitor” in qualitative hot-spot analysis*

In the [SR 47 Expressway case](#), the plaintiffs claimed that the Clean Air Act (CAA) required FHWA to use a surrogate monitor located within the immediate vicinity of the project, rather than one located five miles outside the project area. After a detailed review of the conformity regulations, the U.S. Court of Appeals for the 9th Circuit determined that “regulations do not decisively answer whether the CAA required qualitative hot-spot analysis within the immediate vicinity of the project area during the time period at issue.” Given the ambiguity in the regulations, the court then assessed the reasonableness of EPA and FHWA’s interpretation of those regulations, as expressed in a guidance document jointly issued by EPA and FHWA in 2006. The court noted that the 2006 guidance document “neither mentions a distance requirement nor requires installation of new air monitors; rather, it only requires project sponsors to use nearby air monitors at ‘locations similar to the proposed project.’” The court found that this interpretation was reasonable, and that the monitor location used in the analysis



complied with the guidance. Therefore, the court upheld the qualitative hot-spot analysis:

#### **IV. Endangered Species Act**

##### **A. Adequacy of Biological Assessment**

###### *Support for determination that formal consultation is not required*

The [Route 197 & 199 Widening case](#) involved a proposal to widen existing roads bordering a river within a national recreation area in California.<sup>2</sup> The river is the last remaining undammed river in California, and approximately 300 miles of the river are designated as wild and scenic under the Wild and Scenic Rivers Act; the river also is designated as critical habitat for the endangered Coho salmon. The California Department of Transportation (Caltrans) issued an EA and FONSI for the project, along with a Biological Assessment under the ESA.<sup>3</sup>

The plaintiffs challenged the adequacy of the BA prepared by Caltrans for a species of Coho salmon, focusing on inconsistencies among various statements regarding the need for formal consultation. The court noted that the initial BA had stated in several places that formal consultation would be required because of adverse impacts to critical habitat for the Coho salmon, but later Caltrans decided that informal consultation would suffice based on correspondence received from NMFS. In its May 2, 2014 decision granting a preliminary injunction, the federal district court held that it was unclear what decision had been made and what rationale supported that decision:

At this point, after Caltrans' submission of the initial BA and NMFS's correspondence with Caltrans, it is simply not clear what Caltrans' conclusion was with respect to potential impacts on the coho salmon or its critical habitat, or what the agencies' reasoning was in reaching whatever conclusions they thought they had agreed on. It is also unclear why and on what reasonably explained basis Caltrans' determination of the need for formal consultation was abandoned.

Because of these ambiguities in the record, the court found that plaintiffs had raised "a serious question about the adequacy of the ESA review and consultation process." This conclusion supported the court's decision to issue a preliminary injunction.

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<sup>2</sup> The CLUE database includes two separate decisions involving the Route 197 & 199 Widening Project. On February 26, 2014, the federal district court issued a decision granting Caltrans' motion to dismiss some of the plaintiffs' claims. On May 2, 2014, the same court granted the plaintiffs' motion for a preliminary injunction.

<sup>3</sup> Caltrans has been assigned FHWA's authority for compliance with NEPA and related federal laws pursuant to the assignment program in 23 U.S.C. § 327.



## V. Title 23 of the U.S. Code

### A. Public Hearing Requirements

#### *Use of an open-house format for a public hearing*

The [Highway 51 case](#) involved proposed improvements at an at-grade intersection connecting Highway 51 with a county road. Because of numerous accidents, the Wisconsin Department of Transportation (WisDOT) proposed to install an overpass, without access to the county road. Local businesses and residents advocated for a full interchange with access to the county road. As part of the NEPA process, WisDOT held a public hearing using an open-house format. The plaintiffs claimed that the “public hearing” requirement in 23 USC 128 required WisDOT to use a traditional public-hearing format in which attendees have an opportunity to speak to an audience.

The court found that the opportunity provided within the open-house format was enough to satisfy 23 USC 128:

While the record demonstrates that defendants structured the hearing as an open house, without contemplating public input, it is undisputed that plaintiffs and other individuals of the public were allowed to and did speak at the event, albeit on a more limited basis than plaintiffs desired. In particular, the undisputed record indicated that attendees—including plaintiff Raj Bhandari—publicly voiced concerns to and asked questions of the WisDOT officials in attendance. According to the administrative record, public questions and comments lasted approximately 30 minutes. On this record, the court finds “substantial compliance” with the public hearing requirement.

The court also held that, even if the open-house hearing did not satisfy 23 U.S.C. § 128, the plaintiffs “cannot demonstrate that they were prejudiced by this, nor that requiring a do-over would be anything except an empty victory.” The court noted that plaintiffs had multiple opportunities for input throughout the process, “ensuring that the planners took close account of the objectives and desires of individual citizens affected by the projects during the planning process.” Therefore, the court rejected plaintiffs’ challenge to WisDOT’s compliance with 23 U.S.C. § 128.

### *Failure to prepare a public-hearing transcript*

In the [Highway 51 case](#), the plaintiffs also argued that WisDOT had violated 23 USC 128 by failing to prepare a transcript of the public hearing and submit it to FHWA. The court said it was “troubled” by the failure to prepare a transcript, but held that plaintiffs had failed to show that they were prejudiced by the lack of a transcript. In reaching this conclusion, the court noted (1) WisDOT had entered into an agreement with FHWA, under which responsibility for oversight of compliance with 23 USC 128 had been assigned to WisDOT, and (2) WisDOT officials responsible for overseeing compliance with the public hearing requirement had personally attended the hearing. The court also noted that “record also shows more generally that WisDOT officials were well aware of and considered public opposition to the project, including to the lack of on and off ramps from U.S. Highway 51 after construction of an overpass at the former, four-way intersection with County Highway C.” Therefore, the court found that the lack of a transcript did not result in a violation of 23 USC 128.

### **B. Interchange Approvals**

The plaintiffs in the [Highway 51 case](#) argued that WisDOT’s interchange spacing guidelines did not provide a sufficient basis for WisDOT’s decision to deny their request for an interchange, pursuant to 23 U.S.C. § 111, because WisDOT had allowed interchanges in other locations that did not comply with the guidelines. The court noted that the guidelines generally require at least two miles between interchanges, and in this instance the closest interchange was 1.5 miles away. The court held that “the fact that WisDOT may have allowed ramps within two miles with respect to a different, ten-year-old highway construction project does not mean that it acted arbitrarily in following its guideline with respect to this Project.”

## **VI. Title VI of the Civil Rights Act**

### *Legal standard for demonstrating discrimination under Title VI*

In the [Ohio River Bridges case](#), the plaintiffs alleged that the project sponsors - the Kentucky and Indiana DOTs - had violated Title VI of the federal Civil Rights Act by participating in a process that resulted in selection of a tolled alternative that would have disproportionate impacts on low-income and minority populations. Title VI prohibits recipients of federal funds - including State DOTs - from engaging in discrimination on the basis of race, color, or national origin. The U.S. Court of Appeals for the 6th Circuit noted that, under applicable precedent, a violation of Title VI occurs only when there is *intentional* discrimination; a disparate impact is not enough to

establish a violation of Title VI. The court held that “the record demonstrates that the need for tolling arose from funding shortfalls, not because defendants intentionally discriminated against Title VI populations. No rational factfinder could conclude otherwise.” Therefore, the court ruled in favor of the Kentucky and Indiana DOTs on these claims.

## **VII. Litigation Issues**

### **A. Statute of Limitations**

#### *Applicability of 6-year statute of limitations when 150-day notice is not issued*

The [North Main Street case](#) involved upgrades to existing city street in Franklin, Indiana. FHWA issued a Categorical Exclusion for the project on September 8, 2005. FHWA did not issue a Federal Register notice initiating the 150-day statute of limitations under 23 USC 139.

The court held that, when a 150-day statute of limitations notice is not issued, the applicable statute of limitations period is the six-year time limit in 28 U.S.C. § 2401(a):

Although the Seventh Circuit has not ruled directly on the issue, numerous courts have ruled that the six-year time limit in 28 U.S.C. § 2401(a) applies to NEPA claims and that a complaint under the APA [Administrative Procedure Act] for review of an agency action is a “civil action” within the meaning of § 2401(a).

The court also held that the six-year period began to run on the date the CE was issued by FHWA - i.e., the date of signature on the CE document. Because that date was more than six years before the lawsuit was filed, the court found that the plaintiff had missed the statute of limitations deadline.

#### *Applicability of 6-year statute of limitations to separate decisions on the same project*

The [SR 15/600 Interchange case](#) involved the proposed construction of a highway overpass in Seminole County, Florida. In 2004, the Florida Department of Transportation (FDOT) prepared a pre-NEPA environmental and engineering report. Based on that report, FHWA and FDOT determined that the project qualified for a CE. In 2012, FHWA and FDOT prepared a reevaluation under NEPA and determined that the classification as a CE remained valid.

As in the North Main Street case, the court held that, when a 150-day statute of limitations notice is not issued, the applicable statute of limitations period is the six-year

time limit in 28 U.S.C. § 2401(a). The court also held that the 2004 and 2012 reevaluations were separate actions, each of which constituted a “final agency action” that was subject to challenge in federal court. The court determined that challenges to the 2004 decision were time-barred because the six-year deadline had passed, but that challenges to the 2012 decision were timely. Therefore, the plaintiffs were allowed to proceed with their challenges to the 2012 decision.

## **B. Administrative Record**

### *Consideration of documents outside the federal agency's administrative record*

In the [Ohio River Bridges case](#), the plaintiffs sought to introduce information outside the administrative record, based on a legal principle that allows courts to consider extra-record documents if there was an indication of bad faith by the defendants in preparing the record. The district court rejected that request. On appeal, the plaintiffs argued that the district court had erred. The U.S. Court of Appeals for the 6th Circuit upheld the district court's decision, citing three reasons:

First, plaintiff provides no explanation for why this late-discovered material could not have been submitted for consideration during the NEPA process, which lasted about fourteen years. Second, plaintiff had an opportunity to review the draft Administrative Record before it was finalized and did not identify any information that was missing at that time. Third, the district court properly rejected plaintiff's numerous examples of 'bad faith' because the evidence offered could not support a finding that defendants engaged in misconduct during the NEPA process.

The [Detroit River Bridge case](#) involved the proposed construction of an international toll bridge, which was developed through an environmental review process carried out jointly with the Canadian government. The plaintiffs sought to supplement FHWA's administrative record by introducing an investment-grade traffic forecast that had been by the Canadian government, and had not been used by FHWA in the NEPA process. The U.S. Court of Appeals for the 6th Circuit held that the study was properly excluded from the record:

The IGTF [investment-grade traffic forecast] was not a study commissioned by the FHWA ... for the DRIC project, but a proprietary document commissioned by the Canadian government for the purpose of determining how Canada would meet its financial responsibilities for the DRIC project, not whether or how the DRIC project should proceed. Further, the IGTF was not the only source of updated traffic data; updated

traffic data was available from other studies and that data was thoroughly considered by the FHWA .... The FHWA's decision not to include the IGTF in the AR was not arbitrary or capricious or an abuse of discretion.

## C. Defenses

### 1. Standing

#### *Reliance on economic interests to establish standing*

In the federal courts, a plaintiff must demonstrate 'standing' in order to bring a lawsuit. To have standing, a plaintiff generally must identify some specific injury that the plaintiff has suffered, or would suffer, as a result of the defendant's actions. In addition, a plaintiff generally needs to show that the nature of the alleged injury falls within the "zone of interests" protected by the statute under which the lawsuit is filed. Defendants in NEPA lawsuits frequently raise standing as a defense - for example, when a lawsuit is filed by a plaintiff with little or no connection to the affected area, or when the lawsuit is filed by a private company whose interest is primarily economic.

The [SR 15/600 Interchange Project](#) involved the proposed construction of an elevated highway overpass project in Seminole County, Florida. The plaintiffs - a jai alai business and its employees - alleged that, if the project were constructed, they would be harmed because the new traffic flows created by the project would decrease customer access to the business and, therefore, would result in negative economic impacts to the business and its employees, and also because construction would release contaminants into the environment and increase air and noise pollution around the business. The defendants argued that the plaintiffs lacked standing, because the risk of harm was too speculative and because the plaintiffs' interests were purely economic, not environmental, and thus were outside the "zone of interests" protected by NEPA.

The court held that, while "purely economic injuries with no connection to the environment" would be insufficient to establish standing, the plaintiffs in this case had standing because "their interests in their workplace environment, their individual health and safety, and their respective business or employment interests in Jai Alai all fall within NEPA's zone of interests."

The [Los Angeles Metro case](#) involved a challenge brought by two property owners whose properties would be affected during construction of a cut-and-cover tunnel. In this case, too, the defendants claimed that the plaintiffs lacked standing because their interests were economic, not environmental. The court held that the first company had standing as an adjacent landowner, because the project would have noise, dust,

vibration, and other impacts to the company's properties. The court held that the second company had standing as a tenant, because construction impacts would interfere with its activities as property manager, including "its ability to provide its officers, visitors and consultants with a "clean, quiet, and safe work place" and its mission to "maintain attractive, clean, and vibrant public spaces and streetscapes adjacent to and near the [plaintiff's property]."

Finally, the [Detroit River Bridge case](#) also involved a NEPA lawsuit brought by a company - in this case, the company that owned the existing international bridge in the Detroit area. The defendants, FHWA and MDOT, challenged the company's standing, arguing that the company's alleged injuries were purely economic, not environmental, and therefore were outside the zone of interests protected by NEPA. The court held that the company had sufficient environmental interests to establish standing, because it owned property in the area that would be affected by the project.

Taken together, these cases show that, while purely economic interests are not sufficient to establish standing to bring a NEPA claim, a private company may be able to establish standing by articulating its interests in environmental terms.

## 2. Laches

The doctrine of laches allows courts to dismiss a lawsuit based on the plaintiffs' delay in bringing the lawsuit, even in situations where the lawsuit is not barred by a statute of limitations.

### *Laches as a basis for opposing a preliminary injunction*

In the lawsuit challenging the [Route 197 & 199 Widening project](#) in California, the defendants argued that the motion for a preliminary injunction should be denied under the doctrine of laches because the plaintiffs waited seven months to file their motion for preliminary injunction. In its May 2, 2014 decision granting a preliminary injunction, the federal district court noted that laches is "to be invoked sparingly in environmental cases because the plaintiff is not the only party to suffer harm by alleged environmental damage." By comparison to another environmental case in which laches had been invoked, the court found that the plaintiffs in this case "have shown reasonable diligence in retaining experts and gathering facts for their case" and "have not slept on their rights." Therefore, the court found that the plaintiffs' delay did not preclude granting the motion for a preliminary injunction.

### 3. Ripeness

The doctrine of ripeness requires courts to dismiss a case that is brought prematurely. Ripeness is often raised as a defense when a plaintiff attempt to challenge an agency's decision before the decision-making process is concluded.

The [Inner Loop Project](#) involved the proposed extension of a circumferential route around Shreveport/Bossier City in Louisiana. At the time the lawsuit was filed, FHWA had not completed (or even begun) the NEPA process for the project. Because the NEPA process had not been completed, the court found that there was no final agency action and therefore dismissed the case.

In the [I-69 Section 4 case](#), the plaintiffs filed their lawsuit before the ROD was issued. The court held that "[t]he claims challenging the decisions embodied in the Section 4 ROD were thus unripe at the time of their filing, depriving this court of jurisdiction even if the agency decision became final in the intervening time."

In the [Route 197 & 199 Widening case](#), the plaintiffs challenged the Essential Fish Habitat Assessment (EFHA) submitted by Caltrans as part of an ongoing consultation process under the Magnuson–Stevens Fishery Conservation and Management Act. In its February 26, 2014 decision granting Caltrans' motion to dismiss, the court held that the EFHA itself was not a final agency action and therefore could not be challenged in federal court.

### 4. Mootness

The doctrine of mootness requires courts to dismiss a case if there is no longer an active controversy. Mootness is often raised as a defense in NEPA cases when the challenged decision has been fully implemented, or when the challenged decision has been withdrawn.

The [Sakonnet River Bridge project](#) involved the proposed replacement of a 56-year-old bridge connecting two towns in Rhode Island. Initially, FHWA issued a ROD approving construction of a toll-free bridge. The bridge was constructed and opened without tolls. Later, the state legislature passed a law directing that tolls be imposed on the bridge. FHWA prepared a reevaluation examining the impacts of tolling, and then issued a revised ROD approving tolling on the new bridge. Later, the state legislature passed another law, prohibiting tolling on the bridge. The court then dismissed the case as moot, finding that "there is no reasonable expectation that [the toll agency] will attempt to impose tolls on the Bridge when this litigation is terminated."



## 5. Venue

When a case is filed in federal district court, any party to the case can request that the case be transferred to a different federal district court - which is known as a change of venue. When such a request is made, the court's decision on whether to transfer the case typically hinges on several factors, including convenience to the parties, the ability to resolve the case quickly and efficiently, and the public's interest in having a case resolved 'at home' rather than in a distant court.

In 2014, the issue of venue arose in two cases, both involving highway projects in North Carolina. In both cases, the case was transferred to a different federal district court within the state.

The [Monroe Connector-Bypass](#) case involved the proposed construction of a limited-access toll road in the metropolitan area of Charlotte, North Carolina. The first lawsuit challenging this project was filed in the federal district court in Raleigh, where the FHWA Division Office is located. In that case, the district court ruled in FHWA's favor, but later the U.S. Court of Appeals found that FHWA had not complied with NEPA. FHWA then prepared a Supplemental EIS and issued revised ROD, which was challenged in a second lawsuit. The second lawsuit was filed in federal court in Charlotte. At the defendants' request, the federal district court in Charlotte agreed that the case should be transferred to the court in Raleigh, based on that court's greater familiarity with the facts of the case:

After a thorough review, the Court agrees that there are substantial efficiencies in having this case heard by the Eastern District of North Carolina [in Raleigh] because of the unique nature of the facts surrounding this case and the substantial record with which that court is already familiar.... The administrative record in this case is burdensome, and the pertinent facts are unique and highly technical. Becoming familiar with those facts would require substantial time and effort—time and effort that has already been expended by the Eastern District of North Carolina. It makes little sense to have this Court reexamine those facts now.

The court also noted that, while a plaintiff's choice of forum is ordinarily given deference, the plaintiffs in this case had chosen to file the original lawsuit in Raleigh, and that choice resulted in the Raleigh court gaining knowledge of the case. The court found that any deference owed to the plaintiffs' choice of forum "is outweighed here by the substantial efficiencies in having this case heard in [Raleigh]."



The [Gaston East-West Connector](#) case also involved the proposed construction of a limited-access toll road in North Carolina. This case was also filed in the federal district in Charlotte; the court transferred the case to the federal district court in the Raleigh because of the overlap with the issues raised in the Monroe Connector/Bypass case (discussed above). The court’s rationale for transferring the case was based on the efficiency of having similar issues decided by the same court, as well as the benefit of avoiding conflicting decisions by two different district courts:

Although this is a separate toll road project with its own extensive administrative record, the process criticisms are the same. Indeed, rarely does parallel litigation involve such an overlap of facts, parties, attorneys, legal theory and asserted controlling circuit precedent. Plaintiffs’ “build to build” criticism, and their repeated reliance on [the previous decision in the Monroe Connector/Bypass case] warrant assessment of that critique in the same forum. Plaintiffs weave and re-weave their arguments about NEPA non-compliance around and through [the Monroe Connector/Bypass case] to such an extent that pulling the threads apart is attempting to untie the ancient Gordian knot.

## 6. Waiver

### *Ability to raise issues in litigation that were not raised in the NEPA process*

The doctrine of waiver allows a court to dismiss claims that were not properly raised in the environmental review process prior to the agency’s decision. This issue often arises in NEPA cases when plaintiffs seek to challenge a NEPA document based on issues that were not raised in public comments during the NEPA process.

In 2014, this issue arose in two cases - one involving a challenge to FHWA’s assessment of floodplain impacts for a road project in Kentucky, and one involving a challenge to FTA’s assessment of alternative tunneling methods for a transit project in Los Angeles.

The [Kentucky Trimodal Transpark Project](#) involved the proposed construction of a connector road between two existing highways, I-65 and U.S. 31, in Bowling Green, KY. The project was located in the Graham Springs Basin, an approximately 180-square mile ecosystem characterized by karst features such as sinkholes, caves and subterranean waters. The plaintiffs argued that FHWA had violated NEPA by failing to conduct its own study to identify 100-year floodplains in the project area. FHWA contended that it was sufficient to rely on existing floodplain maps prepared by the Federal Emergency Management Agency (FEMA), and the district agreed. The U.S. Court of Appeals for

the 6th Circuit found that the plaintiffs had not properly raised this issue in their comments during the NEPA process:

We have previously discussed the obligations of a party challenging agency action to raise its challenge before the agency 'at a time when the [agency] could have taken any necessary corrective action without undue delay ...' The time to complain is at the comment stage, not after the agency has completed its decision making process. Not only must the claim be presented during the administrative process, it must be presented 'in sufficient detail to allow the agency to rectify the alleged violation.' ...

Significantly, Karst Environmental does not ... claim that it or anyone else ever, at any point during the administrative process, made the argument that FHWA had a legal obligation to determine whether the project area includes 100-year floodplains and, if so, perform follow-up analysis. ...

Karst Environmental's comments are not of sufficient clarity to alert FHWA that these concerns still needed to be assessed through a separate 100-year floodplains study by FHWA or that the law required FHWA to do so. We conclude, therefore, that Karst Environmental did not raise the issue in the present litigation with sufficient clarity' to allow FHWA to understand and address the specific issue raised.

In the [Los Angeles Metro case](#), the plaintiffs claimed that FTA had failed to consider a tunnel boring machine (TBM) as an alternative to the selected cut-and-cover tunneling method. FTA argued that the plaintiffs had waived their right to challenge the range of alternatives for tunneling methods, because they had not specifically challenged the adequacy of the tunneling analysis in their comments on the DEIS. The court agreed that the plaintiffs had not raised this issue, but found that they still had not waived their ability to raise the issue in litigation - because the issue had been raised by other commenters:

Plaintiffs' comments regarding TBM were not sufficient to alert the Defendants of the need to analyze open-face tunneling methods. However, Metro had independent knowledge of the issue [based on reports from Metro's own experts].... Furthermore, the issue of the use of openface methods was raised by other stakeholders during the FEIS comment period. Thus, the issue was not waived.

## D. Remedies

### 1. Preliminary Injunction

Courts can issue a preliminary injunction to preserve the status quo while litigation is pending. In deciding whether to issue a preliminary injunction, courts consider the likelihood that the plaintiffs will eventually prevail in the litigation; the potential for “irreparable harm” to the plaintiffs if an injunction is not granted; the potential harm to the defendants if an injunction is granted; and the public interest. Plaintiffs often seek a preliminary injunction in NEPA cases when construction is expected to begin before the litigation is resolved.

In the [Northern Beltline case](#), the plaintiffs challenged the Corps’ approval of a Section 404 permit for a 1.86-mile-long section of a circumferential highway around Birmingham, Alabama. The court denied the plaintiffs’ request for a preliminary injunction because it found that the plaintiffs were not likely to prevail on the merits, but also because the plaintiffs had failed to show that they would be irreparably harmed by the 1.86-mile project and had failed to show that the harm from allowing that project to go forward would be outweighed by the harm from delaying the project. The court noted that:

[Plaintiff] assumes that the public interest is best served by not developing the Beltline Project. Not so; the public also has an interest in development that will promote job growth and economic stability, and Plaintiff does not establish a factual weight of harm to override the public interest in development.

Though not controlling, consideration must be given to the fact that substantial funds have already been expended to begin construction on the 1.86-mile project, including preparation for preliminary engineering, right-of-way acquisition, and utility relocation work. Delaying construction would have significant financial impacts on Defendants and the public treasury, especially if the bid process has to be repeated.

Ultimately, the public’s need for adequate transportation infrastructure outweighs Plaintiff’s desire to prevent any change to this 1.86-mile area of the Black Warrior River environment.

In the [Route 197 and 199 Widening case](#), the project involved a proposal to widen existing roads bordering a river within a national recreation area in California. IN its

May 2, 2014 decision, the court issued a preliminary injunction halting construction, based on both the plaintiffs' likelihood of success and the potential for irreparable harm if the injunction was not granted.

- On likelihood of success, the court found that the plaintiffs had "raised a serious question about the adequacy of the ESA review and consultation process" because of "contradictions and critical gaps in reasoning that give rise to serious questions about whether NMFS has discharged its obligation to rationally identify potential impacts, reasonably explain the basis for its conclusions or concurrence, and evaluate all the relevant factors and evidence."
- On irreparable harm, the court found that increased sedimentation in the river - which could occur during construction - "is irreparable because once sedimentation is deposited into the river, that damage cannot be reversed."
- On the harm to Caltrans and the public interest, the court gave little weight to the costs that Caltrans would incur if the project were delayed, and concluded that "the balance of equities tips sharply in favor of Plaintiffs and protecting the endangered salmon and their critical habitat pending a merits determination."

## 2. Permanent Injunction

Courts can issue a permanent injunction at the conclusion of litigation, as a remedy for a violation of law. In NEPA cases, a permanent injunction typically involves an order prohibiting an agency from carrying out a proposed action until the agency has completed additional NEPA review to correct the violations found by the court. While a permanent injunction is typically issued when a NEPA violation is found, it is not automatic; courts have discretion to determine the appropriate remedy.

In the [Los Angeles Metro case](#), the court ruled that FTA's EIS was inadequate because it did not consider some alternative tunneling methods that could have reduced impacts to the plaintiffs. The plaintiffs sought a permanent injunction prohibiting construction until after FTA had completed the additional analysis as required by the court. The court declined to issue the injunction, finding that "Plaintiffs have not shown that any immediate, alleged harm will result from the deficiencies in the conduct of the Defendants that are discussed in this Order because there is no showing that Defendants planned to commence construction immediately." The court directed the parties to meet and confer regarding the terms of a potential injunction, leaving open the possibility that an injunction would be issued in the future in order to preserve the status quo while additional NEPA documentation was prepared.

**Appendix A - Cross-Reference Table: 2014 Court Decisions in CLUE Database**

	<b>Project</b>	<b>Case Name</b>	<b>Date</b>	<b>State</b>	<b>Agency</b>	<b>Court</b>
1	Bonner Bridge	<i>Defenders of Wildlife v. NCDOT</i> , 2014 WL 3844086 (4th Cir. 2014)	8/6/2014	NC	FHWA	Appeals
2	Detroit River Bridge	<i>Latin Americans for Social and Economic Development v. FHWA</i> , 2014 WL 2782011 (6th Cir. 2014)	6/20/2014	MI	FHWA	District
3	Gaston East-West Connector	<i>Catawba Riverkeeper, Inc. v. NCDOT</i> , 2014 WL 7408645 (W.D.N.C. 2014)	12/31/2014	NC	FHWA	District
4	Highway 51	<i>Bhandari v. USDOT</i> , 2014 WL 204195 (W.D. Wis. 2014)	1/17/2014	WI	FHWA	District
5	Honolulu Transit	<i>HonoluluTraffic.com v. FTA</i> , 2014 WL 692891 (D. Haw. 2014)	2/18/2014	HI	FTA	District
6	Honolulu Transit	<i>HonoluluTraffic.com v. FTA</i> , 742 F.3d 1222 (9th Cir. 2014)	2/18/2014	HI	FTA	Appeals
7	I-69 Section 4	<i>Citizens for Appropriate Rural Roads, Inc. v. Foxx</i> , 2014 WL 1323189 (S.D. Ind. 2014)	3/31/2014	IN	FHWA	District
8	Inner Loop	<i>Willis-Knighton Medical Center v. LaHood</i> , 2014 WL 3749506 (W.D. La. 2014)	7/30/2014	LA	FHWA	District
9	Los Angeles Metro	<i>Today's IV, Inc. v. FTA</i> , 2014 WL 3827489 (C.D. Cal. 2014)	5/29/2014	CA	FTA	District

	<b>Project</b>	<b>Case Name</b>	<b>Date</b>	<b>State</b>	<b>Agency</b>	<b>Court</b>
10	Monroe Connector/Bypass	<i>Clean Air Carolina v. NCDOT</i> , 2014 WL 6387656 (W.D.N.C. 2014)	11/14/2014	NC	FHWA	District
11	North Eufaula Avenue Widening	<i>City of Eufaula v. Alabama DOT</i> , 2014 WL 7369783 (M.D. Ala. 2014)	12/29/2014	AL	FHWA	District
12	North Main Street Improvement	<i>Moody v. Cline</i> , 2014 WL 1323633 (S.D. Ind. 2014)	3/27/2014	IN	FHWA	District
13	Northern Beltline	<i>Black Warrior Riverkeeper, Inc. v. Alabama Dept. of Transportation</i> , 2014 WL 200578 (M.D. Ala. 2014)	1/17/2014	AL	FHWA	District
14	Ohio River Bridges	<i>Coalition for Advancement of Regional Transportation v. FHWA</i> , 2014 WL 3882677(6th Cir. 2014)	8/7/2014	IN, KY	FHWA	Appeals
15	Route 197/199 Widening	<i>Souza v. California Department of Transportation</i> , 2014 WL 793644 (N.D. Cal. 2014)	2/26/2014	CA	FHWA	District
16	Route 197/199 Widening	<i>Souza v. California Department of Transportation</i> , 2014 WL 1760346 (N.D. Cal. 2014)	5/2/2014	CA	FHWA	District
17	Sakonnet River Bridge	<i>Town of Portsmouth v. Lewis</i> , 2014 WL 6792065 (D.R.I. 2014)	12/3/2014	RI	FHWA	District

	<b>Project</b>	<b>Case Name</b>	<b>Date</b>	<b>State</b>	<b>Agency</b>	<b>Court</b>
18	SR 15/600 Interchange	<i>RB Jai Alai, LLC v. Secretary of Florida Department of Transportation</i> , 2014 WL 4683127 (M.D. Fla. 2014)	9/19/2014	FL	FHWA	District
19	SR 47 Expressway	<i>Natural Resources Defense Council v. USDOT</i> , 770 F.3d 1260 (9th Cir. 2014)	10/30/2014	CA	FHWA	Appeals
20	Kentucky Trimodal Transpark	<i>Karst Environmental Educ. and Protection, Inc. v. FHWA</i> , 2014 WL 943364 (6th Cir. 2014)	3/12/2014	KY	FHWA	Appeals
21	West Eugene Emerald Express BRT	<i>Our Money, Our Transit v. FTA</i> , 2014 WL 3543535 (W.D. Wash. 2014).	7/16/2014	OR	FTA	District