

Case Law Updates on the Environment (CLUE): 2015 Year-in-Review

March 22, 2016

This webinar will be recorded. The recording and a copy of the presentation slides will be posted on the Center for Environmental Excellence website:

<http://environment.transportation.org/>



Welcome!

- Introductions
 - Lexie Albe, AASHTO
 - Bill Malley, Perkins Coie LLP
- The Center for Environmental Excellence by AASHTO
- CLUE Database
- Presentation: 2015 Case Law Highlights
- Q&A



The Center for Environmental Excellence

Center Products and Services Highlights:

- Website – environment.transportation.org
- Practitioner's Handbook Series
- Peer Exchanges
- Webinars
- Communities of Practice
- Transportation Environmental Research
- Programmatic Agreement Library

The screenshot shows the homepage of the Center for Environmental Excellence by AASHTO. The header includes the organization's name, tagline "One Stop Source of Environmental Information for Transportation Professionals", a search bar, and navigation links for CEE Home, Contact Us, Site Directory, and AASHTO Home. A secondary navigation bar features dropdown menus for Environmental Topics, Disciplines, The Center, Research, and Resources, along with buttons for Meetings & Events and Get Center Updates. The main content area is divided into several sections: a featured article titled "TRADITIONAL NEIGHBORHOOD DEVELOPMENT HANDBOOK" from the State of Florida Department of Transportation, a "New on the Website" section with updates from March 18, 2016, including reports from the Alliance for Bicycling and Walking, APTA, and FHWA, a "Center Products & Programs" section listing resources like the CLUE and TERI databases, a "Find It Fast" search bar, a "Make the latest news come to you" email sign-up section, a "Practitioner's Handbooks" section, and a "Webinars" section.



The CLUE Database

CLUE: “Case Law Updates on the Environment”

- What is it?
 - Searchable database of case law summaries
 - For a broad audience of environmental practitioners
- What kinds of cases?
 - Mainly cases involving FHWA, FTA, FRA projects
 - Under NEPA and related laws
 - Covers decisions from 2007 through Dec. 2015
- What does it include?
 - 1-page case summaries
 - Full text of court decision (PDF)

The CLUE Database

- Search options:
 - Environmental topics list
 - e.g., air quality
 - Legal Issues List
 - e.g., purpose and need

- Filtering options:
 - Project type
 - State
 - Court
 - Year

<http://environment.transportation.org/clue/>

Search Filters

Case Date: From To

State:

Legal Issues:

Court:

Environmental Topic:

Project Type:

Select any column heading to re-sort listing in ascending or descending order

New	Case Title	Project	State	Case Date
NEW	Conservation Alliance of St. Lucie County v. USDOT	Crosstown Parkway Extension	FL	11/05/2016
NEW	Committee of 100 v. Foxx	Virginia Avenue Tunnel	DC	10/22/2015
NEW	Crenshaw Subway Coalition v. LACMTA	Crenshaw/LAX Transit Corridor	CA	09/23/2015
	Clean Air Carolina v. NCDOT	Monroe Connector/Bypass	NC	09/10/2015
	Maiden Creek Associates v. USDOT	Route 222	PA	08/20/2015
	Lakes and Parks Alliance v. Metropolitan Council	Southwest Light Rail Transit	MN	08/04/2015
	RB Jai Alai LLC v. Florida DOT	US 17-92 Flyover Project	FL	06/30/2015
	Cutonilli v. FTA	Baltimore Red Line	MD	06/26/2015
	Openlands v. USDOT	Illiana Corridor	IL	06/16/2015
	Indian River County v. Rogoff	All Aboard Florida	FL	06/10/2015

Before we begin ...

A few cautionary notes:

- NEPA decisions are highly fact-dependent.
 - Slightly different facts can lead to a completely different result.
- Different judges can view the same facts differently.
 - Few 'bright lines' in NEPA cases.
- District court decisions have limited precedential effect.
 - They may be considered persuasive, but are not binding.
 - All of the cases covered in this presentation are by district courts.
- Litigation remains ongoing in some of these cases.
 - Future proceedings (e.g., appeals) could alter the outcomes.

2015 Year-in-Review

Overview of Reported Cases

Highway Projects

PROJECT	State	Type
Crosstown Parkway Extension	FL	New cross-river bridge
Garden Parkway*	NC	New toll road
Highway 101	CA	Highway widening
Highway 23	WI	Highway widening
Highway 290/610	TX	Highway widening
I-69 Section 4*	IN	New Interstate
Illiana Corridor	IN/IL	New toll road
Monroe Bypass	NC	New toll road
North Eufaula Avenue	AL	Highway widening (in town)
Route 17-92 Flyover	FL	New overpass
Route 222*	PA	Widening existing highway
Route 29 Bypass	VA	New interchange and widening

* Appeals are pending in the Garden Parkway and Route 222 cases. The I-69 decision was affirmed on March 3, 2016.

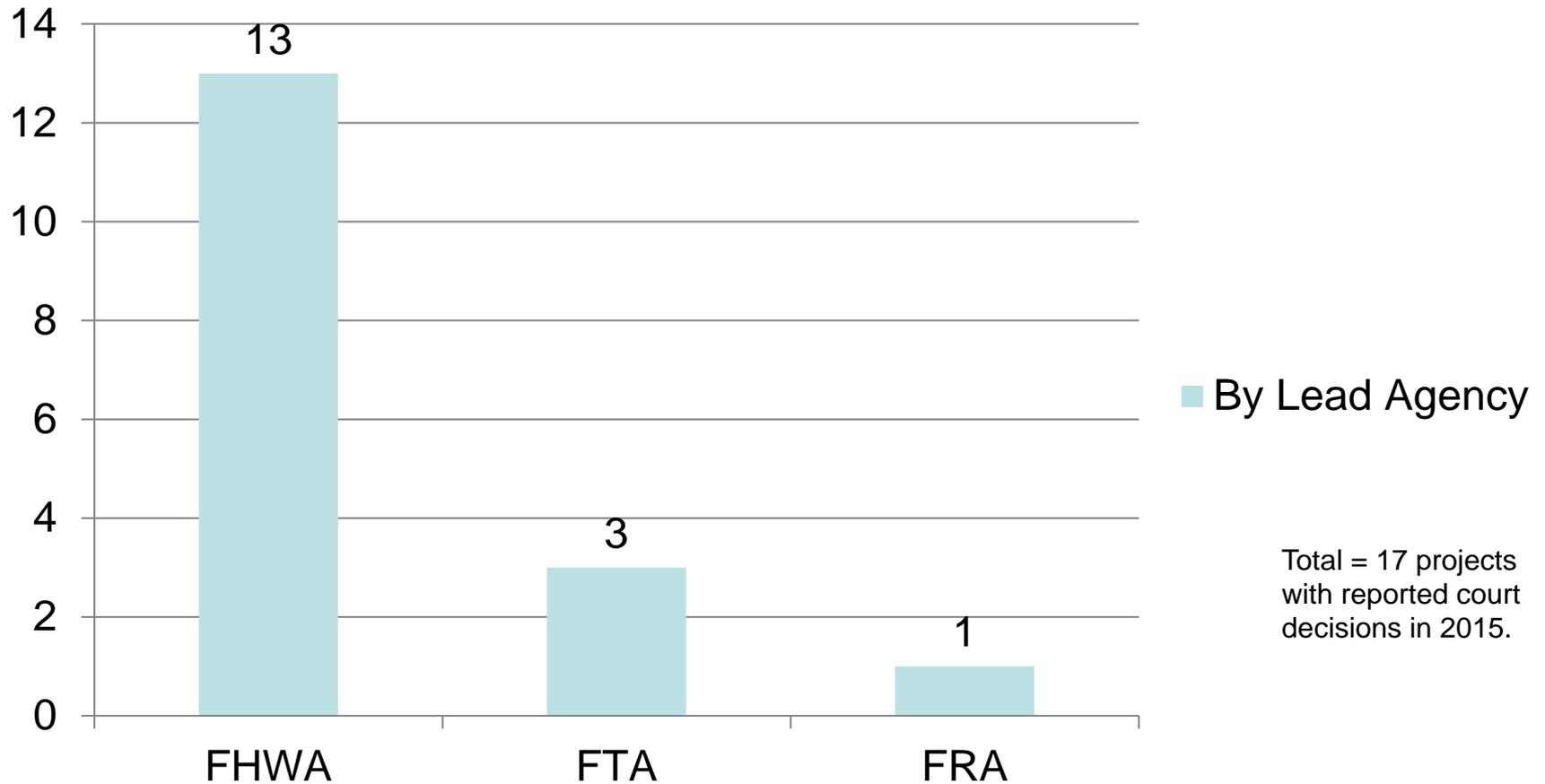
Public Transportation and Rail Projects

PROJECT	State	Type
All Aboard Florida	FL	Passenger rail on existing ROW
Baltimore Red Line*	MD	New light rail line
Crenshaw/LAX Transit Corridor	CA	Extension of Metro (subway)
Southwest Light Rail Transit	MN	New light rail line
Virginia Avenue Tunnel	DC	Replace freight rail tunnel

** The Baltimore Red Line decision was appealed, but while the appeal was pending, the State decided not to proceed with the project. FTA then withdrew its ROD, and the court of appeals then vacated the district court decision.*

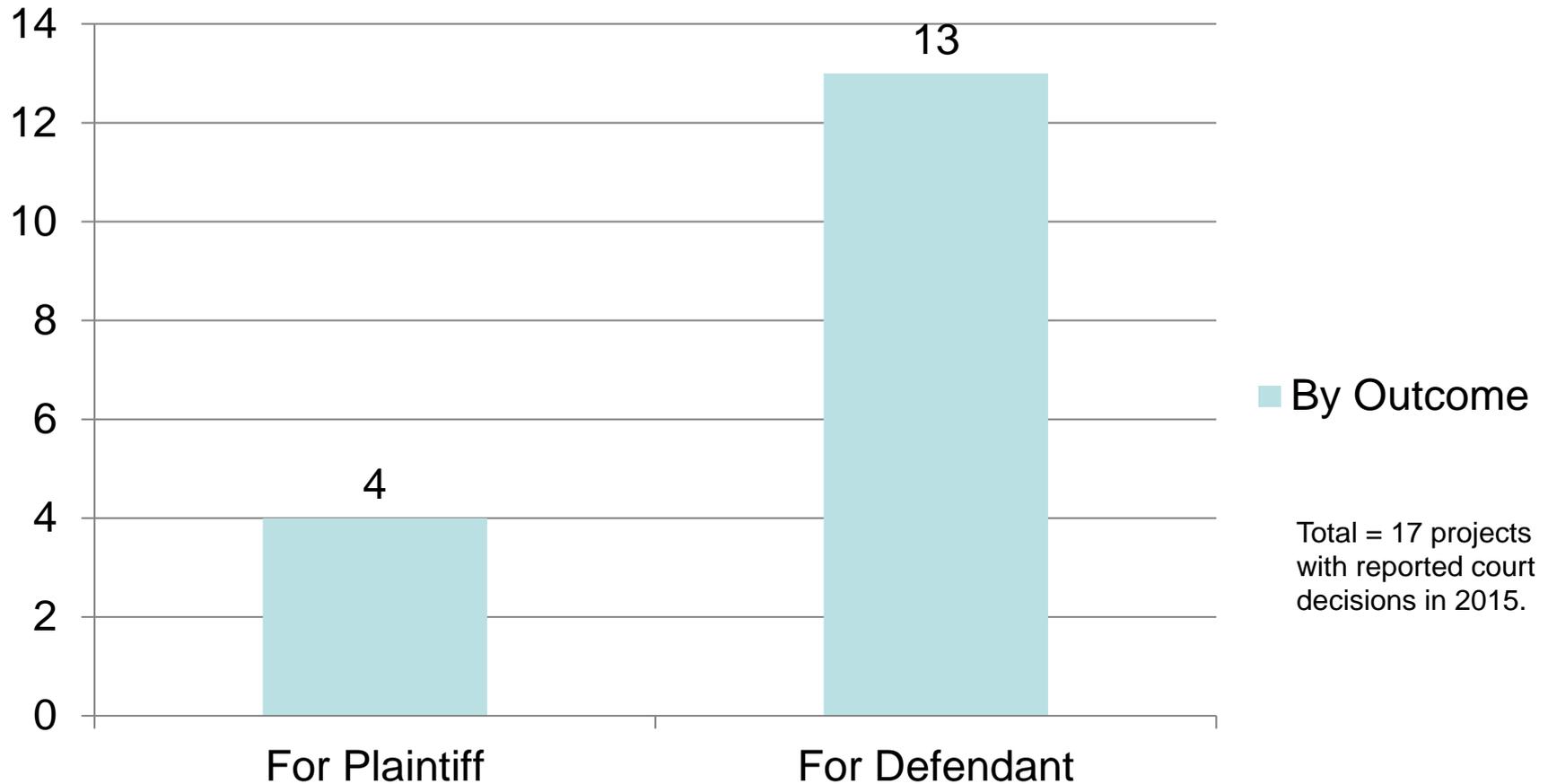
2015 Cases By the Numbers

By Lead Agency



2015 Cases By the Numbers

By Outcome



2015 Year-in-Review

Case Law Highlights

Notable Issues

- Alternatives Analysis
- Traffic Forecasts
- Allegations of Predetermination and Bias
- Applicability of CEs
- Environmental Justice
- Combined FEIS/ROD
- Litigation Issues
 - Attorneys' Fees under NEPA Assignment
 - Statute of Limitations
 - Administrative Record

Alternatives Analysis

- Legal Issues:
 - Hybrids, variations, sub-alternatives: How much is enough?
- Key Cases:
 - Baltimore Red Line – hybrid alternative (BRT/heavy rail)
 - Wisconsin Highway 23 – additional variations of passing-lane alt
 - Crenshaw/LAX Transit – sub-alternative (tunneling)
- Takeaways:
 - Litigation challenges often focus on some variant that was not extensively considered.
 - Even a relatively limited discussion may be enough – if the agency's reasoning is clear and documented in the EIS.
 - Responses to comments on the DEIS (or FEIS) can play a key role in filling in gaps in alts analysis.

Traffic Forecasts

- Legal Issues:
 - Explanation of methodology: is it clear enough?
 - Changing growth trends: is the data still valid?
 - No Build forecasts: do they assume completion of project?
 - MPO forecasts: can you depart from them? Must you use them?
- Key Cases:
 - Highway 23 – methodology; recent growth trends
 - Illiana – recent growth trends; No Build; deviation from MPO
 - Monroe Bypass – recent growth trends; No Build
 - Garden Parkway – No Build

Traffic Forecasts (cont'd)

■ Key Takeaways:

▪ Methodology

- Need for plain-English explanation and a high level of detail.
- Potential for statements in technical reports to be misconstrued.

• Changing growth trends

- Need to re-assess long-term forecasts in light of recent data
- Fundamental issue: are the long-term forecasts realistic?

• No Build

- Huge scrutiny on assumptions underlying No Build forecasts
- Need to *prove* definitively that project is not assumed in No Build

• MPO Forecasts

- MPO's forecasts are not necessarily a 'safe harbor'
- But major disagreements with the MPO can be harmful in litigation

Courts are bringing a skeptical eye to these forecasts

Traffic Forecasts - Methodology

Highway 23 case:

“[T]here is no comprehensive explanation ... of how [the models] were applied to arrive at the traffic projections for Highway 23. Although the defendants have provided the general discussion of [the models] discussed above, they have not shown how the raw data that they used resulted in the bottom-line numbers that appear in the impact statement for each of the project alternatives.”

Traffic Forecasts – No Build

Garden Parkway case:

“[D]efendants violated NEPA ... by using the same set of socioeconomic data that assumed construction of the Garden Parkway to assess the environmental impacts of the Build and No Build alternatives. ... [D]efendants’ fundamental assumption that the Garden Parkway would have no effect on overall growth in the Metrolina region, unsupported by any evidence showing complete saturation of the region ... constitute clear error and violates NEPA and the APA.”

Predetermination and Bias

■ Legal Issues

- Project sponsor's role – line between advocacy and bias?
- Local approvals in relation to NEPA – when is too soon?
- Perceptions of bias vs. proof of bias

■ Key Cases

- Virginia Ave. Tunnel – project sponsor commitments to developer
- Southwest Light Rail – “municipal consent” process
- Crenshaw/LAX Transit – alts analysis done after LPA announced

■ Takeaways

- *Preference* is not necessarily impermissible bias
- *Sponsor's* bias is not necessarily attributed to federal agency
- Be sensitive to perception of fait accompli
 - Make clear that interim steps do not pre-ordain outcome of NEPA.

Applicability of CEs

- Legal Issues:
 - (d)-list CEs – use for projects that don't fit within a specific CE?
- Key Cases
 - Route 29 Project: (d)-list CE used for interchange/road widening
 - US 17-92 Flyover: (d)-list CE used for flyover/road widening
- Takeaways
 - Cases with similar facts reached divergent conclusions
 - Route 29: Use of CE *upheld* because highway interchange was analogous to a railroad grade crossing, which was covered by a CE
 - US17-92: Use of CE *rejected* because project did not resemble any of the project types on the (d) list.
 - Differing results suggests need for caution in using (d) list for projects that do not fit neatly within any category on the list.

Environmental Justice

■ Legal Issues

- Is an EJ analysis subject to legal challenge at all?
- What frame of reference should be used to assess disproportionality of impacts?

■ Key Case

- Crenshaw/LAX Transit Corridor – entire project was located in a predominantly minority/low-income area

■ Takeaways:

- EJ analysis may be subject to challenge *under NEPA*
- Proportionality analysis involves comparison of impacts between the project area *and some broader area* – e.g., County, region.
- Consider benefits as well as impacts when potential for disproportionate impacts on EJ communities.

Combined FEIS/ROD

- Legal Issue:
 - When is issuance of a combined FEIS/ROD prohibited by “significant new circumstances or information”?
- Key Case:
 - Monroe Bypass: FHWA issued combined FEIS/ROD pursuant to Section 1319 of MAP-21
 - Considered new traffic data and found it was not ‘significant’
- Takeaways
 - Court held the language of section 1319 “tracks with no material differences, the language of NEPA regulations governing the issuance of a supplemental EIS” – and therefore, “to prohibit release of a single document containing the FEIS and ROD, the ‘significant new circumstances’ must rise to the level of requiring a supplemental EIS.”

Litigation Issues

■ Attorneys' Fees

▪ Highway 101:

- Held that attorneys' fees under federal law (EAJA) are not available against a State that assumes FHWA's role under a NEPA assignment program.

● Statute of Limitations

• US 17/92 Flyover:

- Held that a separate SOL period runs from the date of each reevaluation, so plaintiff could challenge most recent reevaluation.

■ Administrative Record:

▪ Virginia Avenue Tunnel:

- Rejected plaintiffs' request to add documents to the admin record b/c plaintiffs did not identify "specific, known additional documents"
- Refused request for discovery b/c no evidence of 'bad faith'

Q&A

You may submit questions using the text box in the GotoWebinar panel on your screen.



Thank You!

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