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CLUE Case Law Database

NEPA Case Law for Highway, Transit and Rail Projects
2015 Year in Review

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Preface

This paper summarizes federal court decisions issued in 2015 in cases involving environmental reviews for highway, transit, and passenger rail projects.

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

Please note a few caveats:

- This paper is intended for a general audience, and therefore it does not fully capture the legal analysis in the court decisions.
- Each case involves a unique set of factual circumstances; the outcome in one case cannot necessarily be used to predict what a court would decide in a similar case.
- This paper includes only a sub-set of the issues addressed in the court decisions. For more detailed summaries and copies of the decisions themselves, refer to the CLUE website.
- This paper and the summaries on the CLUE website do not constitute legal advice. Practitioners seeking legal advice regarding a specific project should consult their legal counsel.

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

Highlights

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

- Cases involving challenges to an agency's consideration of "hybrid" alternatives or other concepts that were proposed in comments on a Draft EIS.

- Cases involving challenges to traffic forecasts, with some cases upholding the forecasts and others finding the forecasts flawed. Specific issues included:

    - Whether the proposed project was included in the growth projections that were used to develop the No Build traffic forecasts;

    - Whether it was necessary to have different growth forecasts for the No Build and Build alternatives;

    - Whether the traffic forecasting methodology was adequately explained.

    - Whether it was permissible for FHWA to adopt traffic forecasts that differed from an MPO's forecasts.

- Cases involving allegations that an EIS failed to consider a project's inconsistency with land use plans, with one EIS being found inadequate and another being upheld.

- Cases involving allegations of bias and predetermination, with several courts holding that evidence of an agency's preference or expectation regarding a particular outcome did not necessarily demonstrate predetermination or bias.

- Cases involving challenges to FHWA's use of "(d) list" CEs, with courts reaching differing conclusions on whether FHWA can apply those CEs to projects that are not specifically included within the scope of a CE on that list.

- A case upholding FHWA's decision to issue an FEIS and ROD as a single document under Section 1319 of MAP-21.

- A case holding that approval of a reevaluation is a separate decision for purposes of determining the statute of limitations.

- Cases reaching opposite conclusions on whether businesses (e.g., local property owners) have sufficient "environmental" interests to bring a NEPA lawsuit.

- A case holding that a NEPA lawsuit can be filed against a project sponsor during the NEPA process in order to prevent actions that could bias the outcome of the process.

- A case holding that a plaintiff that prevailed in a NEPA lawsuit cannot obtain attorneys' fees against a State DOT that has been assigned FHWA's responsibilities under a NEPA assignment program (23 USC 327).

Key Cases

All Aboard Florida.[1] This case involved a proposal to establish express passenger rail service, known as All Aboard Florida, on an existing freight and passenger rail line between Miami and Orlando, Florida. FRA initiated an EIS for the project because the project sponsor, a private company, sought financing under an FRA-administered loan program. While the NEPA process was ongoing, the project sponsor also sought an allocation of Private Activity Bonds under a separate USDOT program. The project sponsor described bonds as "the linchpin for completing our project." The USDOT authorized issuance of the bonds before FRA's NEPA process was completed. The plaintiffs claimed that USDOT's approval of the PAB allocation violated NEPA because it would bias FRA's ongoing NEPA process. The plaintiffs sought a preliminary injunction to prevent the bonds from being issued until the NEPA process was concluded. The court found that the project would go forward regardless of whether the bonds were issued, so the issuance of the bonds was not the cause of any harm to the plaintiffs. Therefore, the court denied the injunction.

Baltimore Red Line.[2] This case involved the proposed construction of a 14.1–mile light rail transit line that would extend from the western suburbs of Baltimore into and through the downtown core. The plaintiff, an individual who had participated extensively in the NEPA process, filed a lawsuit challenging the adequacy of the EIS. During the NEPA process, the plaintiff had argued against light-rail transit and in favor of other alternatives involving various combinations of heavy-rail transit and bus service. In the lawsuit, the plaintiff claimed that the EIS violated NEPA because the EIS did not specifically consider the combination that the plaintiff had advocated in his comments. The plaintiff also argued that FTA had violated NEPA's public participation requirements by failing to respond adequately to the plaintiff's comments. The court ruled that FTA had adequately considered the plaintiff's alternatives and responded to comments.

Crenshaw/LAX Transit Corridor.[3] This case involved a proposal to construct an 8.5–mile light-rail line connecting two existing subway lines in Los Angeles. The proposed line would bring subway service to the Crenshaw Transit Corridor, a north-south corridor that extends through much of Central Los Angeles. The project, which was under study for decades, was intended to improve mobility in a congested corridor while also spurring economic development. FTA and the local transit agency, Metro, prepared a joint EIS/EIR under NEPA and CEQA. The Draft EIS/EIR considered a range of BRT and light-rail alternatives, and Metro then selected a light-rail alternative as the Locally Preferred Alternative (LPA). The LPA included an at-grade segment along a portion of Crenshaw Boulevard known as Park Mesa Heights. After selecting the LPA, Metro prepared a separate analysis of a potential below-grade alignment in Park Mesa Heights in response to public comments opposing the at-grade alignment. Based on that additional analysis, FTA ultimately approved the project with the at-grade alignment. The plaintiff, a non-profit

[1] *Indian River County v. Martin*, 110 F.Supp.3d 59 (D.D.C. 2015).
[2] *Cutonilli v. FTA*, 2015 WL 1431251 (D. Md. March 30, 2015). This decision was later vacated because the State chose not to build the project and FTA then withdrew its ROD. *See* 623 Fed.Appx. 616 (4th Cir. 2015).
[3] *Crenshaw Subway Coalition v. Los Angeles County Metropolitan Transportation Authority*, 2015 WL 6150847 (C.D. Cal. Sept. 23, 2015).

group, filed suit under NEPA and CEQA, claiming that the EIS did not adequately consider grade-separated alternatives, understated the impacts of at-grade alternatives, and did not sufficiently consider design changes made to the preferred alternative. The court ruled in favor of FTA on all issues.

Crosstown Parkway Extension.[4] This case involved the proposed construction of a bridge and highway across the St. Lucie River in St. Lucie, Florida. The project was intended to alleviate traffic congestion on two other bridges, one to the north and one to the south of the proposed crossing location. The city's population had tripled between 1990 and 2010 and was projected to continue growing at a rapid pace, requiring additional river-crossing capacity. After preparing a DEIS and FEIS, FHWA issued a ROD approving an alternative that used three Section 4(f) resources, including an aquatic preserve. FHWA determined that there was no feasible and prudent avoidance alternative, and that the project included all possible planning to minimize harm. The plaintiffs, a non-profit group, claimed that Section 4(f) required FHWA to select a different alternative, which had lower impacts on the aquatic preserve. The court upheld FHWA's determination that the selected alternative caused the "least harm" and therefore was properly selected under Section 4(f).

Garden Parkway (Gaston East-West Connector).[5] This case involved the proposed construction of a new limited-access toll road in the vicinity of Charlotte, North Carolina. The plaintiffs challenged the EIS on several grounds, focusing primarily on the socio-economic growth assumptions underlying the definition of the No Build alternative. The plaintiffs claimed that the EIS was flawed because the same socio-economic growth assumptions were used in developing the traffic forecasts for the No Build and Build alternatives. The court agreed with the plaintiffs, and found that the EIS did not comply with NEPA. The court therefore vacated the ROD, which meant that the project could not move forward until a supplemental EIS is prepared.

Highway 23.[6] This project involved the proposed widening of State Highway 23, which connects the City of Sheboygan to the City of Fond du Lac, Wisconsin. The project would expand a 20-mile segment of Highway 23 to four lanes, creating a consistent four-lane road between the two cities. The plaintiffs challenged the adequacy of a Supplemental EIS, claiming that the traffic forecasts overstated the amount of growth on Highway 23 and that the alternatives analysis did not sufficiently consider the alternative of adding passing lanes rather than expanding Highway 23 to four lanes. They also claimed that the EIS did not sufficiently consider the impacts of "induced travel" and did not adequately respond to comments made by two Wisconsin state agencies. The court ruled in favor of the plaintiffs on the traffic forecasting issues, and ruled in favor of FHWA and WisDOT on the other claims. Because the court found the traffic forecasts flawed, the court vacated FHWA's ROD and remanded the project to FHWA for further consideration.

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[4] *Conservation Alliance of St. Lucie County v. USDOT*, 2015 WL 7351544 (S.D. Fla. Nov. 5, 2015).
[5] *Catawba Riverkeeper Foundation v. NCDOT*. 2015 WL 1179646 (E.D.N.C. March 13, 2015).
[6] *1000 Friends of Wisconsin v. USDOT*, 2015 WL 2454271 (E.D. Wis. May 22, 2015).

Highway 101.[7] This case involved the proposed widening of U.S. Highway 101 through Richardson Grove State Park in California. Acting in place of FHWA under a NEPA assignment agreement, Caltrans prepared the NEPA document for the project. In a previous decision, the court had held that Caltrans had not complied with NEPA. Based on that outcome, the plaintiffs filed a motion for attorneys' fees pursuant to the Equal Access to Justice Act (EAJA), a federal law that requires federal agencies to pay attorneys' fees to plaintiffs who prevail in civil litigation against the agency. The court held that Caltrans was not required to pay attorneys' fees under EAJA, even though it was acting in FHWA's capacity, because the attorneys' fee provision in EAJA applies only to federal agencies.

Highway 290/610.[8] This case involves a challenge to a project in Houston, Texas, involving improvements to 38 miles of Highway 290/610. FHWA issued a ROD in August 2010 and subsequently approved four separate reevaluations for the project. In September 2014, after the fourth reevaluation, FHWA issued a revised ROD. The plaintiffs filed this lawsuit in March 2011, challenging the FHWA's initial ROD for the project, and amended their complaint several times to include challenges to the reevaluations and revised ROD. Their claims focused primarily on the noise impacts analysis and noise mitigation. FHWA asked the court to dismiss all of the plaintiffs' claims because of the vagueness of the allegations. The court agreed that the plaintiffs' allegations were "vague, often rambling, and confusing" and dismissed all but one of the claims.

I-69 Section 4.[9] This case involves "Section 4" of the I-69 project in Indiana. In 2004, FHWA issued a Tier 1 ROD approving I-69 from Evansville to Indianapolis, a distance of approximately 140 miles. It then began preparing Tier 2 EISs for six individual sections of the project. This lawsuit primarily involved a challenge to the Tier 2 EIS for Section 4, which connected I-69 to the city of Bloomington. The plaintiffs filed a lawsuit challenging the Tier 2 EIS before the ROD for that section was issued. The lawsuit claimed a Supplemental EIS was necessary due to new information, including the effects of the white nose syndrome on the endangered Indiana bat. The plaintiffs repeatedly missed court deadlines, which caused numerous delays in the case. On January 14, 2015, the court granted summary judgment against the plaintiffs on all issues.

Illiana Corridor.[10] This case involved the proposed construction of a new toll highway, known as Illiana Corridor, connecting I-65 in Indiana to I-55 in Illinois. FHWA prepared a Tier 1 EIS for the project. The Tier 1 EIS considered a range of alternative corridors for constructing the project within a study area that encompassed approximately 950 square miles. The Tier 1 ROD approved a corridor for further analysis in Tier 2. The plaintiffs, a coalition of environmental groups, challenged the Tier 1 FEIS and ROD, focusing primarily on FHWA's approach to developing the traffic forecasts. The court rejected several of the plaintiffs' challenges, but held that the No Build forecast was flawed because it "may or does" assume completion of the Illiana Corridor project. Based on that finding, the court held that the direct and indirect impacts analysis also was flawed.

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[7] *Bair v. Caltrans*, 2015 WL 1516913 (N.D. Cal. March 31, 2015).
[8] *Crabb v. FHWA*, 2015 WL 1033235 (S.D. Tex. March 9, 2015).
[9] *CARR v. Foxx*, 2015 WL 179571 (S.D. Ind. Jan. 14, 2015) (on appeal as of March 2016).
[10] *Openlands v. USDOT*, 2015 WL 4999008 (N.D. Ill. June 16, 2015).

Monroe Bypass.[11] This case involved the proposed construction of a limited-access toll road, known as the Monroe Bypass, in the vicinity of Charlotte, North Carolina. The plaintiffs in this case included the same environmental organizations that had filed a previous lawsuit successfully challenging the original EIS for the Bypass. In this lawsuit, the plaintiffs again challenged the adequacy of the traffic forecasts, claiming that the forecasts had not adequately reflected the differences in growth between the No Build and Build conditions. The plaintiffs also claimed that FHWA had violated NEPA by providing "misinformation" that undermined the NEPA process and by issuing the SFEIS and ROD as a single document. The court ruled in favor of FHWA on all issues.

North Eufaula Avenue.[12] This case involved the proposed widening of a 0.8 mile stretch of North Eufaula Avenue in Eufaula, Alabama. North Eufaula Avenue is a two-lane street with a wide median and is lined with historic houses. It also is part of Alabama Highway 431, which leads to the Gulf Coast beaches. The plaintiffs claimed that, even though the North Eufaula Avenue project did not include federal funding, the project required review under NEPA and other federal laws based on past federal involvement in this project and in other projects along Highway 431. The court denied the plaintiffs' request for a temporary restraining order, and subsequently denied their motion for a preliminary injunction, finding that they were unlikely to be able to show that this project involved a federal action.

Route 222.[13] This case involved proposed improvements to U.S. Route 222 in Berks County, Pennsylvania. The proposed improvements included widening the roadway to two lanes in each direction and adding a center turning lane, improving an existing traffic signal, and constructing two dual-lane roundabouts. In August 2014, FHWA determined that the project qualified for a CE. The plaintiff, a local business, filed this lawsuit, claiming that the CE was based on inaccurate and incomplete information and that the project required an EIS. FHWA moved to dismiss the lawsuit based on a lack of standing, arguing that the plaintiffs' interests were solely economic. The court agreed and dismissed the lawsuit.

Route 29 Bypass.[14] This case involved the proposed construction of a grade-separated interchange and roadway widening on U.S. Route 29 in Charlottesville, Virginia. These improvements were included within a larger project for which FHWA issued an EIS in 1993. Many of the improvements studied in the 1993 EIS were implemented over the following decades, but in 2014, FHWA determined that a Supplemental EIS would be needed to assess changes that had occurred since the 1993 EIS was issued. In response, VDOT sought to proceed with the grade-separated interchange and road widening as projects with independent utility. In September 2014, after providing an opportunity for public comment, FHWA approved categorical exclusions for the grade-separated interchange and the road widening. This lawsuit was filed by two companies that owned commercial property adjacent to the project. The court held that, even though the plaintiffs were business owners, they had demonstrated a sufficient environmental interest to have

[11] *Clean Air Carolina v. NCDOT*, 2015 WL 5307464 (E.D.N.C. Sept. 10, 2015) (on appeal as of March 2016).
[12] *Eufaula Heritage Association v. Alabama DOT*, 2015 WL 404534 (M.D. Ala. (Jan. 29, 2015).
[13] *Maiden Creek Associates v. USDOT*, 2015 WL 4977016 (E.D. Pa. Aug. 20, 2015) (on appeal as of March 2016).
[14] *Rio Associates v. Layne*. 2015 WL 3546647 (W.D. Va. June 8, 2015).

standing to bring the lawsuit. The court then considered the merits of the plaintiffs' claims regarding segmentation and applicability of CEs used for the project. The court found that the plaintiffs were unlikely to succeed on the merits of their claims and therefore denied the plaintiffs' request for a preliminary injunction.

Southwest Light Rail Transit.[15] This case involved a proposed transit project connecting downtown Minneapolis to the southwestern Twin Cities. The project was sponsored by the Metropolitan Council, a regional transportation planning organization. Under state law, the Council was required to obtain the consent of each municipality through which the transit line would run - a process known as "municipal consent." The FTA served as federal lead agency in the NEPA process. After the DEIS was issued, the Council identified its Locally Preferred Alternative, and FTA began preparing an SDEIS for that alternative. While the SDEIS was in progress, the Council undertook the municipal consent process and obtained the consent of all six local governments. Before FTA issued the FEIS, the plaintiffs filed a lawsuit claiming that the municipal consent process pre-determined the outcome of the NEPA process. The court dismissed the NEPA claim against FTA, finding those claims to be premature because FTA had not issued a final decision. But the court allowed the NEPA claim to proceed against Council, finding that a cause of action is available under NEPA against a non-federal agency when necessary to preserve the integrity of the NEPA process. In a subsequent ruling, the court found that the Council had not violated NEPA.

U.S. 17-92 Flyover.[16] This case involved conversion of an at-grade intersection to an elevated overpass on US 17-92 in Casselberry, Florida. In 2004, FHWA determined that the project qualified for a CE. In 2005 and 2012, FHWA approved reevaluations for various design changes. Construction began in October 2013. After construction was under way, a local business filed a lawsuit challenging FHWA's determination that the project qualified for a CE. The court held that the CE was invalid for a different reason - namely, that the Flyover project did not fall within any of the CEs in FHWA's regulations. Therefore, the court granted summary judgment in favor of the plaintiff.

Virginia Avenue Tunnel.[17] This case involved the proposed replacement of the Virginia Avenue Tunnel, a 111–year–old rail tunnel in Washington, DC. Because of its age, the tunnel is not wide enough to accommodate two parallel sets of tracks, nor is it tall enough to accommodate double-stacked shipping containers; in addition, trains must travel below their normal speeds through the tunnel due to its earthen floor. The plaintiff, a non-profit organization, filed a lawsuit alleging that FHWA had violated NEPA in several ways, including predetermination; contractor bias; segmentation; inadequate cumulative impacts analysis; and inadequate alternatives analysis. The court denied the plaintiff's request for a preliminary injunction, finding that the plaintiff was unlikely to succeed on the merits of its claims, and then denied the plaintiffs' request to supplement the administrative record. Shortly after that decision, the parties agreed to dismiss the case.

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[15] *Lakes and Parks Alliance v. Metropolitan Council,* 91 F.Supp.3d 1105 (D. Minn. 2015).
[16] *RB Jai Alai, Inc. v. Secretary of Florida DOT*, 112 F.Supp.3d 1301 (M.D. Fla. 2015).
[17] *Committee of 100 on the Federal City v. Foxx*, 87 F.Supp.3d 191 (D.D.C. April 7, 2015).

Topical Summaries

I. NEPA Issues

A. Range of Alternatives

Hybrid alternatives

In the **Baltimore Red Line** case, FTA considered a range of potential modes and alignments during the alternatives screening process, and carried forward both bus rapid transit (BRT) and light rail alternatives for detailed study. The plaintiff, an individual citizen, claimed that the EIS was inadequate because it did not include detailed study of a "hybrid alternative" consisting of bus rapid transit in suburban and residential areas together with heavy rail in the downtown area.

The court held that detailed analysis of this hybrid alternative was not required because (1) the agencies had addressed the plaintiff's alternative in responses to comments on the DEIS and FEIS, where they explained that it was unreasonable due to its much higher cost and lower transportation performance; and (2) the alternative was similar to other hybrid alternatives that had been specifically considered and dismissed in the alternatives screening analysis, and the rationale for dismissing those alternatives applied to the plaintiff's alternative.

The court also rejected the argument that FTA was obligated to develop a version of the plaintiff's alternative that would have been satisfactory:

> "Plaintiff suggests that, based on variations to his alternative, the Agencies could have created a satisfactory iteration of his proposal. In this respect, plaintiff mischaracterizes an agency's obligations under NEPA. NEPA does not require that agencies fashion a plan out of unfeasible alternatives or incomplete information."

Additional variations of other alternatives

The **Wisconsin Highway 23** project involved a proposal to convert an existing arterial highway to four lanes. In the EIS, FHWA considered an alternative that would involve adding passing lanes without converting the highway to a full four lanes. The plaintiffs claimed that the passing-lane alternative was too "bare bones" and that a more "comprehensive" passing-lane alternative should have been considered. The court noted that the EIS had considered three different versions of a passing-lane alternative, each involving different combinations of improvements that stopped short of widening the highway to four lanes. The court held that this analysis was sufficient to meet FHWA's obligation to consider a "comprehensive" passing-lane alternative.

The **Crenshaw/LAX Transit Corridor** case also involved a request to consider an additional variation of an alternative that was studied in the EIS. The EIS/EIR included four distinct alternatives, but did not include any alternative with an underground alignment in one specific location, known as Park Mesa Heights. In response to comments on the DEIS,

the project sponsor conducted an additional analysis and concluded that a tunnel in this location was not justified under the sponsor's grade-crossing policy. FTA explained and adopted that analysis in its responses to comments. The court held that FTA had adequately documented its consideration of this alternative in its responses to comments.

Consideration of cost in alternatives screening

For the **Virginia Avenue Tunnel** project, CSX proposed to replace an existing tunnel with a new, larger tunnel on the same alignment. In the alternatives screening process, FHWA initially considered a range of alternatives, including some that involved a major re-routing of the entire rail line so that it avoided Washington, DC entirely. The re-routing alternatives were eliminated, based on their much higher cost, as well as the additional complexity of managing a project that would run through multiple jurisdictions and require construction of a deep bore tunnel. The plaintiffs claimed that the additional benefits of re-routing would outweigh the costs, and argued that FHWA's reasoning was flawed because a full cost-benefit analysis was not performed as part of the alternatives screening process. The court upheld FHWA's decision, holding that NEPA "does it require a monetary cost-benefit analysis before rejecting an alternative scenario based on cost."

Previously eliminated alternatives

The NEPA process for the **Monroe Bypass** project took place over a period of many years. The initial ROD was challenged in court, resulting in an injunction halting construction. FHWA then prepared an SEIS, which also was challenged. In the original EIS and again in the SEIS, FHWA determined that the Transportation System Management (TSM) alternative was unreasonable because it would not meet the Purpose and Need. In their challenge to the SEIS, the plaintiffs contended that FHWA erred by eliminating the TSM alternative in the SEIS. In essence, they argued that travel conditions in the project corridor had improved, so that the TSM alternative could meet the Purpose and Need. The court found that FHWA had properly concluded that the TSM Alternative still did not meet the Purpose and Need:

> "Defendants' reliance on prior explanations for ruling out certain alternatives ... is not arbitrary and capricious or irrational when the basis for eliminating those alternatives remains valid. ... Defendants eliminated TSM improvements because they would not meet the project need of creating a high-speed corridor, with average speeds of at least 50 miles per hour. Although the average peak speed on U.S. 74 has improved considerably, the TSM improvements still have not met the project need, and defendants reasonably eliminated that alternative in the DSFEIS."

B. Traffic Forecasts

Explanation of forecasting methodology

In the **Wisconsin Highway 23** case, the plaintiffs challenged the traffic forecasts, claiming that traffic is unlikely to grow as much as projected. In support of this argument, they

pointed to recent data showing that traffic volumes on Highway 23 had peaked in 2005 and declined since that time. The court held that, while the forecasts may have been accurate, the EIS was deficient because it did not sufficiently explain how the forecast methodologies resulted in the specific projections shown in the FEIS:

> "One problem that the plaintiff identifies is that there is no comprehensive explanation in the administrative record 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. ...
>
> "In the present case, the defendants have not explained how they applied their methodology to Highway 23 in a way that is sufficient for either the court or the plaintiff to understand how they arrived at their specific projections of traffic volumes through the year 2035. ... This failure is not harmless. Rather, it has prevented the plaintiffs from being able to understand how the defendants arrived at traffic projections that seem at odds with current trends. Perhaps the defendants' projections are accurate, but unless members of the public are able to understand how the projections were produced, such that they can either accept the projections or intelligently challenge them, NEPA cannot achieve its goals of informed decisionmaking and informed public participation."

Consideration of recent growth trends

In several cases, plaintiffs challenged the traffic forecasts as overly optimistic, claiming that recent growth trends indicated that actual growth would be considerably less than the growth assumed in the forecasts.

The **Illiana Corridor** case involved a proposal to construct a new east-west toll road on the southern edge of the Chicago metropolitan area, connecting north-south Interstate highways in Indiana and Illinois. The traffic forecasts for the Tier 1 EIS were based on population and employment forecasts that assumed future growth would continue at a steady pace consistent with long-term historical trends. The plaintiffs argued that the traffic forecasts were flawed because growth rates had slowed in recent years. In particular, they pointed to recent Census data showing that the one county in the study area has experienced "virtually no growth" from 2007 to 2013. The court found that the agencies had considered Census data and that the recent lack of growth in one county did not make the overall forecasts invalid:

> "[T]he Agencies' population forecasts project growth over a thirty-year period, starting in 2010 and ending in 2040. The fact that there was little or no growth in Will County in the first few years of that period does not necessarily invalidate the thirty-year projection as a whole. It would, perhaps, have been more prudent for the agencies to acknowledge the fallow period and explain its effect, if any, on the overall forecast. But, prudent or not, the Agencies' failure to account explicitly for

> the lack of growth in the early part of the forecast period does not make the forecast arbitrary."

On a different issue, however, the court found that the Illiana Corridor forecasts were flawed; see "Traffic forecasts for No Build condition" below.

The **Wisconsin Highway 23** also involved a challenge to traffic forecasts based on data showing a recent decline in growth rates. In that case, the plaintiffs pointed to new population growth projections showing a lower rate of growth that had been released by a Wisconsin state agency shortly before publication of the SFEIS/ROD for the project. The court noted that the updated projections "showed that the population in the area of Highway 23 would grow only about one-third as quickly as ... previously projected." The court found that the SFEIS was flawed because, while it acknowledged the new projections, it did not update the traffic analysis to take into account the lower rate of growth:

> "In the final impact statement, the defendants disclose the updated population projections and acknowledge that such projections indicate that growth in the region will be lower than the defendants thought when they prepared the impact statement. .... However, nothing in the impact statement (or in anything else in the record) indicates that the defendants revisited their traffic projections in light of the recently updated population projections. Yet, because a key input into the [travel demand] model is population growth, it would seem that a drastic reduction in expected population growth would likely produce a significant reduction in expected traffic growth. A significant reduction in traffic growth could, in turn, make one of the previously rejected passing-lane alternatives feasible. However, there is no indication that the defendants reexamined the passing-lane alternatives in light of the new population data.

In the **Monroe Bypass** case, the plaintiffs raised a different issue based on recent growth trends: they claimed that the alternatives analysis in the SEIS was flawed because the SEIS continued to use the 2007 No Build conditions rather than updating the No Build to reflect 2012 conditions. FHWA explained that, because there was data showing no growth in traffic volumes between 2007 and 2012, it was reasonable to assume that an updated No Build forecast "would generally be equal" to the 2007 No Build forecast. While the court expressed some skepticism about this assumption, it found that that "defendants repeatedly tested their forecasts with sensitivity analyses using new data and concluded that their forecasts remained valid." Further, the court found that FHWA had responded to an expert's comments in which the expert challenged the use of the 2007 No Build forecasts. Based on this record, the court upheld the use of the 2007 No Build forecasts.

Modeling of induced travel

The plaintiffs in the **Wisconsin Highway 23** case also claimed that the EIS did not sufficiently consider the impacts of induced travel - that is, the additional trips and/or longer trips that would result from providing additional capacity on Highway 23. On this issue, the court held that the EIS was sufficient. The court held that, while the travel

demand model did not take account of induced travel, "the plaintiff does not identify any established methodology that WisDOT could have used to quantify the amount of induced travel associated with expanding Highway 23." Therefore, the court held that modeling of induced travel was not required.

Traffic forecasts for No Build condition

The **Garden Parkway** case involved a new, limited-access toll road in the metropolitan area of Charlotte, NC. The plaintiffs argued that traffic forecasts in the EIS were flawed because the same assumptions had been used in developing the traffic forecasts for the No Build and Build alternatives, and in particular, that the No Build forecasts assumed the presence of the project. The district court agreed:

> "Nonetheless, defendants violated NEPA and the APA [Administrative Procedure Act] 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. ... Simply put, defendants' 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, and their use of the gravity model to reallocate assumed growth in the No Build condition constitute clear error and violates NEPA and the APA."

In reaching this conclusion, the court noted that the "administrative record establishes that the defendants' growth and impact projections in the No Build scenario explicitly relied on socioeconomic data that assumed construction of the Garden Parkway." The court held that FHWA violated NEPA by "simply assum[ing] that the total regional growth will be equivalent in both scenarios rather than use their 'scientific, economic, and technological resources' to independently predict future growth under both alternatives ...."

The **Illiana Corridor** case also involved a claim that FHWA's socio-economic growth forecasts for the No Build scenario improperly assumed the existence of the proposed project. This argument was based on a statement in a technical report that documented the basis for the socio-economic growth forecasts for the No Build and Build alternatives. The report listed "a number of significant projects which should benefit virtually all portions of Will County," including Illiana Corridor, when listing factors considered in developing the growth projections. The court held that "[b]ecause the record shows that the 'no build' population forecast may or does include the 'build' condition, the record does not support the EIS' statement that the purpose and need for the Illiana Corridor is to accommodate the anticipated population boom in Will County."

The **Monroe Bypass** case involved a similar claim, but the court reached a different result. In a previous lawsuit involving this project, a court had held that the EIS was flawed because it did not disclose that the Build and No Build forecasts were based on the same underlying growth projections. FHWA then prepared an SEIS. As part of that process, FHWA developed growth forecasts for the No Build alternative, then analyzed the extent to which additional growth would be induced by the proposed project, and concluded that the

differences in growth between the No Build and Build scenarios would be insignificant; therefore, the same growth forecasts were used for the No Build and Build alternatives. The plaintiffs challenged the SEIS, again claiming that the forecasts were flawed because the same growth forecasts were used for the No Build and Build alternatives. The court found that the traffic forecasts were not flawed because FHWA had not simply assumed that growth was identical under both scenarios, but instead had undertaken an analysis, which concluded that any difference between the two scenarios would be insignificant:

> "[D]efendants changed the analysis in the DSFEIS with a new roadway network that did not include the Monroe Bypass and concluded that the growth-allocation results were the same. This new analysis, and its later use in the updated ICE [indirect and cumulative effects] analysis, properly represented the No Build scenario."
>
> "To create a Build scenario, defendants estimated the growth that the Monroe Bypass project would induce. To produce an estimate, defendants analyzed improvements in accessibility and travel time, development around potential interchanges, and development potential based on access to sewer and water lines and local jurisdictions' interest. Defendants then added this induced-growth estimate to the growth expected under the No Build scenario to create the Build scenario. The results of defendants' analysis of the travel-time-to-employment factor showed that, for purposes of the bottom-up approach, the existence of the Monroe Bypass was insignificant.
>
> "Defendants adequately created and compared No Build and Build scenarios, corrected the flaw identified in [the previous decision in this case], and avoided the flaw in Catawba [the Garden Parkway case]. In this case, defendants' use of a single set of socioeconomic data to represent the No Build scenario, which they then supplemented with additional data to create a Build scenario, for use in the ICE analysis was not arbitrary and capricious and did not violate NEPA or the APA."

Reliance on MPO's Forecasts

In addition to their other challenges to the traffic forecasts, the plaintiffs in the **Illiana Corridor** case contended that FHWA had erred by developing its own population growth forecasts, which were different from the forecasts adopted by the MPOs for use in the metropolitan planning process. FHWA explained that it adopted its own forecast in response to a decision by the MPOs to adopt "policy-based" growth forecasts, which reflect the MPO's policy goals for future development; FHWA chose to adopt "market-based" forecasts, which were intended to reflect the most likely future growth patterns. The plaintiffs claimed that FHWA was required to use the MPOs' forecasts or, at least, that FHWA had not provided sufficient reasons for choosing not to use the MPOs' forecasts. The court expressed some skepticism of FHWA's position, but held that it was permissible under NEPA:

> "Given the MPOs' legal mandate to develop long-range transportation plans for their areas and the influence they wield over local land use decisions through those

transportation plans, it would seem unwise for the Agencies to reject the MPOs' population forecasts. But plaintiffs cite no authority requiring the Agencies to accept the MPOs' forecasts, and the question for the Court is not whether the Agencies' refusal to do so was unwise, but whether it was 'arbitrary' or 'capricious.' Because the Agencies have articulated reasonable, if not persuasive, reasons for their decision not to use the MPOs' forecasts, that decision is not arbitrary within the meaning of the [Administrative Procedure Act]."

C. Land Use

Consistency with local land use plans

In addition to their challenges to the traffic forecasts, the plaintiffs in the **Illiana Corridor** case challenged the EIS's discussion of consistency with land use plans, citing the requirement in the CEQ regulations for a discussion of "[p]ossible conflicts between the proposed action and the objectives of ... regional ... land use plans" and "any inconsistency [between] a proposed action [and] any approved ... local plan." The court held that the EIS was deficient in this regard as well:

> "The Agencies acknowledge that the market-based population forecasts that undergird their choice of [Alternative] B3 for the Illiana Corridor conflict with the policy-based forecasts contained in the MPOs' long-range transportation plans, which seek to limit outward growth. The Agencies do not, however, acknowledge that the growth induced by construction of the B3 corridor would also conflict with those plans."

A similar issue arose in the **Crenshaw/LAX Transit Corridor** case, but the facts were somewhat different, and the court found the analysis sufficient. In this case, the plaintiffs argued that the EIS was inadequate because it did not analyze the project's consistency with a local land use plan; the plaintiff pointed to a comment letter that seemed to imply that the project was inconsistent with the local land use plan. The court held that the CEQ regulations (40 CFR 1502.16(c)) require only a discussion of *inconsistency* with local land use plans, and found no evidence that the light rail project was actually inconsistent with the local lands. The court also held that, because the CEQ regulation only required a discussion of inconsistency with land use plans, it was not necessary to "address their purposes, specific policies, and how a proposed project might further them."

D. Environmental Justice

Ability to challenge environmental justice analysis in a NEPA document

The **Crenshaw/LAX Transit Corridor** project was located primarily in a low-income and minority community. The EIS included an environmental justice analysis, which the plaintiffs claimed was inadequate. The court noted that the Executive Order on environmental justice (E.O. 12898) does not create a right of judicial review, but held that a

plaintiff *can* bring a lawsuit *under NEPA* challenging the adequacy of the environmental justice analysis in a NEPA document.

Standard for determining "disproportionate" impacts

The environmental justice analysis for the **Crenshaw/LAX Transit Corridor** project found that the project's impacts were not disproportionate because 94% of the affected area consisted of minority populations. The court criticized this approach, holding that the "proper measure of comparison" when determining proportionality is "between the communities affected and unaffected by the Project." However, the court found that, in their responses to comments, the agencies had considered the impacts and benefits of the project in a broader context by recognizing that "in planning transit projects to serve the access of minority communities, those very communities may bear the construction and other Project-related impacts disproportionately." On balance, the court found this analysis adequate under NEPA.

E. Responses to Comments

Level of detail in responses

The plaintiff in the **Baltimore Red Line** case was an individual who had participated extensively in the NEPA process, submitting comments on the DEIS and FEIS. The plaintiff claimed that the responses given to his comments were insufficient because they did not include citations to sources backing up the agencies' reasons for deciding not to study the plaintiff's proposed alternative. The court found that FTA responded adequately to his comments, even though the responses did not contain citations to other reports or documents: "Although the MTA did not cite to particular authorities, it did articulate with clarity the basis for its decision not to carry forward [the plaintiff's] alternative for further study -- namely, the projected cost of the alternative, its operational challenges, and the effect on ridership resulting from the need with his plan to transfer between modes of transportation."

Omission of comments

In the **Wisconsin Highway 23** case, the plaintiffs claimed that FHWA had violated NEPA by failing to respond specifically to comments from a State agency, the Wisconsin Department of Agriculture, which advocated consideration of a passing-lane alternative. The court held that FHWA had responded to similar comments made by another State agency, and had thoroughly addressed issues regarding passing-lane alternatives. Therefore, the court found that the failure to respond specifically to the Department of Agriculture's comments did not make the EIS deficient.

In the **Baltimore Red Line** case, the FEIS included the plaintiff's oral comment on the DEIS, but his written comment was not included. The plaintiff claimed that omission of the written comment made the FEIS insufficient. The court found that omission of the written comment was not a violation of NEPA because (1) "the thrust of [the plaintiff's] proposed

alternative is captured in the oral testimony" and (2) "summaries of comments are adequate when the primary concerns raised by the comments are addressed."

F. Supplementation

New threats to an endangered species

The **I-69 Section 4** project involved construction through a wooded area that included habitat for the Indiana bat, a federally listed endangered species. While the NEPA process was under way, the USFWS determined that "white nose syndrome," a fungal disease, had spread into the Indiana bat populations in the project area. FHWA reinitiated Section 7 consultation on two occasions, specifically to address the effects of white nose syndrome on the Indiana bat, and both times the USFWS re-affirmed its "no jeopardy" finding for the bat. Nonetheless, the plaintiffs claimed that the presence of white-nose syndrome was new information that required an SEIS. In light of the additional Section 7 consultation that had occurred, as well as the USFWS's re-affirmation of the no-jeopardy finding, the court found that white nose syndrome did not trigger the need for an SEIS.

The plaintiffs in the **I-69 Section 4** case also claimed that an SEIS was needed because a construction contractor had engaged in tree-clearing in violation of the terms of the Incidental Take Statement for the Indiana bat in the USFWS's Biological Opinion. The court noted that a contractor had indeed removed a single tree in violation of the Incidental Take Statement, but found that evidence in the record "makes clear that the incident's impact on Indiana bats was minimal or nonexistent." Further, the court noted that INDOT "took steps to ensure that further tree-removal in violation of the FEIS did not occur, including: firing the supervisor responsible for the felling of the tree, re-training of contractor employees on the Indiana bat issue, and additional mapping of trees with diameter greater than three inches within the project area to ensure their protection." Based on all of these facts, the court found that effects on the contractor's actions did not require preparation of an SEIS.

Design changes and new information after the Draft EIS

In the **Crenshaw/LAX Transit Corridor** case, the plaintiffs claimed that a Supplemental EIS was required to address (1) a proposal to include fencing in the median of a city street where the light rail line was to be constructed at-grade; and (2) new information about traffic impacts at a congested intersection.

- With regard to the fencing, the court noted that the concept of fencing had been discussed in the Draft EIS/EIR and the specific fencing proposed in the Final EIS/EIR had been adopted in response to public comments. The court reasoned that "agencies must be given some breathing room to modify alternatives in the DEIS/R in order to properly reflect this public input. If an agency must file a supplemental draft EIS every time any modifications occur, agencies as a practical matter may become hostile to modifying the alternatives to be responsive to earlier public comments. "

- With regard to the traffic impacts, the court noted that the Draft EIS/EIR had included a detailed traffic analysis, which concluded that the light-rail alternative would have a negative impact on the intersection in question. This analysis was updated in the Final EIS/EIR based on more detailed engineering and additional intersection counts. The court found that the design presented in the Final EIS/EIR was "at most a minor modification" and did not require an SEIS to be prepared

G. Federalization

The **North Eufaula Avenue** case involved the widening of a street through a historic neighborhood as part of a larger effort to convert a State route (Highway 431) to four lanes. FHWA and Alabama DOT concluded that NEPA review was not required for this project because it was being implemented solely with non-federal funds and did not involve any federal permits or approvals. The plaintiffs filed a lawsuit claiming that this project in fact was a federal action and therefore did require NEPA review. The issue before the court was whether the project had become "federalized" such that it would require NEPA review. The court considered several distinct arguments for federalization, and ultimate concluded that the project was *not* a federal action and therefore did not require NEPA review.

The plaintiffs argued that the North Eufaula Avenue project was federalized because of the extent of the federal "influence" on the project, even if federal funds were not being used. They cited the use of federal funds for projects on adjoining sections of Highway 431, the inclusion of North Eufaula Avenue on the federally designated Strategic Highway Network, and previous use of federal grants for landscaping on this section of North Eufaula Avenue. The court held that none of these factors caused the state-funded project on North Eufaula Avenue to be a "federal action" for purposes of NEPA:

- First, the use of federal funds on *other* sections of Highway 431 over a period of several decades did not cause *this* project to become a federal action.

- Second, the fact that this project was part of a federally designated network did not make this project a federal action: "it cannot be that every project on Highway 431 (and a large number of highways running through the country) is federalized because it is part of the strategic highway corridor network."

- Third, the fact that federal grants had been used for landscaping on this section of road in the past did not make this project a federal action: "A State can make improvements using only state funds to a road originally built with federal dollars, and vice versa."

The plaintiffs also argued that a project could be federalized if it was the "functional equivalent" of another project that the State previously had proposed to build with federal funds. The court agreed that FHWA "would be hard pressed to maintain that a new project occurring in the same time frame, having the same quality and dimensions, and having the same purpose as an original federal project becomes de-federalized if moved 'two feet to the east.'" But the court found that the North Eufaula Avenue was not the functional

equivalent of the previous Highway 431 bypass project, because the two facilities differed greatly in their design criteria, location, function, and cost.

H. Segmentation

The **Virginia Avenue Tunnel** project involved construction of a new rail tunnel to accommodate double-stacked trains, as part a larger package of improvements known as the National Gateway Initiative. The plaintiff claimed that FHWA had segmented the tunnel project from other components of the National Gateway Initiative, because double-stacked trains could not use the tunnel unless numerous other improvements were made beyond the limits of the tunnel project. The court held that the project has logical termini and independent utility because, even aside from double-stacking, the project addresses significant design and operational deficiencies of the current tunnel. Because it found that the project has independent utility, the court rejected the plaintiff's segmentation claim.

I. Predetermination and Bias

Predetermination

The **Southwest Light Rail** case involved a meshing of the federal environmental review process with a separate "municipal consent process" under State law. The Metropolitan Council complied with the State law by seeking and obtaining local governments' consent to the preferred alternative after the end of the DEIS comment period. The plaintiffs claimed that obtaining municipal consent process – even though it was not binding on FTA - had "irreversibly and irretrievably committed" FTA and the Council to a specific route, "such that the pending federal environmental review is nothing more than a *fait accompli* and any attempt to obtain relief after the review is complete would be in vain." The court concluded that "the Met Council's activities may express a preference for a certain route, but they do not unequivocally 'pre-commit' either the Met Council or the FTA to that route, with no way to reverse course and put the work the agencies have done to use for a different approach." Nonetheless, the court also stated that it "remains concerned that the Met Council has done more than express a preferred alternative, and has 'gone too far' and has effectively committed itself to a specific route." Therefore, while the court did not grant summary judgment in favor of the plaintiffs, it also refused to grant summary judgment in favor of the defendants. Instead, the case remained pending while the NEPA process continued.

The **Crenshaw/LAX Transit Corridor** case also involved allegations of predetermination and bias. In this case, the project sponsor conducted additional analysis of a tunneling alternative in response to public comments on the Draft EIS, but that analysis was done after the project sponsor had announced its Locally Preferred Alternative, which did not include tunneling in that location. The plaintiffs claimed that the tunneling analysis was predetermined because it was performed after the LPA was announced. The court held that held that the existence of a preference for a particular alternative did not mean that the outcome of the analysis was predetermined: "Predetermination is not shown simply because the agency's planning, or internal or external negotiations, seriously contemplated,

or took into account, the *possibility* that a particular environmental outcome would be the result of its NEPA review of environmental effects." (emphasis in original).

In the **Virginia Avenue Tunnel** case, the court reached a similar conclusion. The plaintiffs claimed that certain agreements between the District of Columbia and CSX effectively predetermined the outcome of the NEPA process. The court held that the test for predetermination hinges on "the practical effects of agency's conduct rather than whether the conduct suggests subjective agency bias in favor of the project." Under this standard, the court held that the District's agreements did not predetermine the outcome of the NEPA process. Specifically, the court held that it was permissible for the District to:

- Provide "general expressions of support" for CSX's National Gateway Initiative, which included the Virginia Avenue Tunnel project;
- Submit a federal planning grant application on CSX's behalf;
- Commit to issuing a permit for the project in the future, on the condition that the project receives NEPA approval;
- Agree to redesign a nearby project, where the redesigned project would have utility even if the CSX project did not go forward; and
- Acquire an option to purchase certain CSX property, where the agreement did not commit the District to exercising that option.

The court also noted that the District's bias -- even if it had been shown -- would not constitute a violation of NEPA unless that bias could be attributed to FHWA. The court found no evidence that FHWA had sought to manipulate the NEPA process or to obscure evidence of bias. The court also found that FHWA had independently considered the data underlying the EIS. The court concluded that "even if DDOT predetermined the NEPA outcome, the Committee has failed to identify sufficient evidence in the current record to attribute that predetermination to FHWA."

Misleading Information

The plaintiffs in the Monroe Bypass case claimed that FHWA "fostered a climate of misinformation and undermined the NEPA process." The court considered each of the alleged misstatements and found no evidence that FHWA and NCDOT had actively misled the public. Further, the court found that FHWA and NCDOT had responded in detail to public comments on the Supplemental DEIS. Therefore, the court rejected the plaintiffs' claim that the defendants had fostered a climate of misinformation in the NEPA process.

J. Combined FEIS and ROD

For the **Monroe Bypass** project, FHWA issued the Supplemental FEIS and ROD as a single document pursuant to the authority provided in Section 1319 of MAP-21, which required

the documents to be combined except under certain circumstances, including situations where "there are significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or the impacts of the proposed action."[18] The plaintiffs argued that, in this case, there were "significant new circumstances" -- namely, the availability of new socio-economic data -- and therefore a combined FEIS and ROD should not have been issued. Noting the absence of any case law interpreting this provision, the court held that "significant new circumstances" also is the standard for preparing a Supplemental EIS. Therefore, the court held that "significant new circumstances" preclude issuing a combined FEIS and ROD only if they "rise to the level of requiring a supplemental EIS." The court then considered the new information cited by the plaintiffs, and found that FHWA had a rational basis for concluding that the new information was not significant. The court also found that "substantial and widespread controversy" was simply one of five factors that FHWA recommended for consideration when deciding whether to issue a combined FEIS and ROD, and did not automatically preclude issuing a combined document. Therefore, the court held that it was permissible for FHWA and NCDOT to issue the FEIS and ROD as a single document.

K. Categorical Exclusions

Applicability of "(d) list" CEs

FHWA classified the **U.S. 17-92 Flyover** project as a CE under the "(d) list" in FHWA's regulations. (23 CFR 771.117(d)) FHWA explained that, while the project did not fit squarely within any of the CEs on the (d) list, the project "resembles" projects included on that list. The plaintiffs challenged the use of a CE for this project, arguing that a CE could not be used because the project did not fall within any of the designated CEs. The court agreed with the plaintiffs, holding that the "the Flyover Project is not even remotely similar in scope to those types of projects ... in § 771.117(d)." In particular, FHWA had sought to rely on the CEs in Section 771.118(d)(2), (d)(3), and (d)(1). The court found all of them to be inapplicable:

- Subsection (d)(2) applies to highway safety and traffic operations projects, such as the installation of ramp metering devices and lighting (i.e., street lights and traffic signals). The court held that "although the Flyover Project undoubtedly involves installing traffic signals and lighting, it cannot be said with any degree of sincerity that building a massive highway overpass is similar in scope."

- Subsection (d)(3) applies to projects involving the rehabilitation and/or reconstruction of existing bridges or construction of above-grade railroad crossings to replace existing at-grade crossings. The court found this CE inapplicable because "the Flyover Project does not involve the grade separation of an existing railroad crossing, but rather enlarging a highway interchange via a 375–foot–long elevated overpass and other roadway expansions on all sides."

[18] Following the enactment of the FAST Act in December 2015, the authority formerly provided in Section 1319 of MAP-21 is now provided in 23 USC 139(n)(2). The text of the provision is unchanged.

- Subsection (d)(1) applies to the resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes on an existing highway. The court found this CE to be FHWA's "best argument," but still held that the CE does not apply, because the project "does not primarily involve resurfacing" and "similarly does not involve restoration, rehabilitation, or reconstruction, which would entail placing the roadways back in the same or similar condition as when they were first constructed, prior to any sort of deterioration. Finally, the Flyover Project simply cannot be described as a project to add shoulders or auxiliary lanes."

Because the court found that the project did not resemble any of the projects on the (d) list, the court held that FHWA was required to prepare either an EA or an EIS. The court therefore set aside FHWA's approval of the CE for the Flyover Project.

In the **Route 29 Bypass** case, the plaintiffs also claimed that the project does not fit within any of the CEs listed in FHWA's regulations. But here, the court found that the project qualified for a CE under 23 CFR 771.117(d) even though the project did not fit squarely within any of the specific activities on that list. The court reasoned that the project qualified for a CE because it was analogous to a railroad grade-crossing project, which was one of the specific activities included on the (d) list. The plaintiffs also argued that "unusual factors" – the controversial nature of the project – prevented the use of a CE. The court rejected this argument as well, holding that there was no "environmental controversy" because the vast majority of the comments received during the NEPA process focused on economic issues. Based on these findings, the court upheld FHWA's decision to approve a CE for the project.

II. Other Laws

A. Section 4(f)

Rejection of an alternative as "imprudent"

In the **Crosstown Parkway Extension** case, the preferred alternative directly used land from three Section 4(f) resources, including an aquatic preserve. As part of its Section 4(f) evaluation, FHWA considered an alternative proposed by the plaintiffs, which involved a construction method known as "spliced beam construction" to avoid placing bridge piers in the aquatic preserve. FHWA found that this method was imprudent for several reasons, including substantially greater impacts to adjacent habitat and wetlands and "the most severe and unmitigatable social impacts to communities" on both sides of the river. The court upheld FHWA's determination because it found FHWA had considered the relevant factors and did not make a clear error in judgment.

Least-overall-harm determination

Because it found that there were no feasible and prudent avoidance alternatives for the **Crosstown Parkway Extension**, FHWA evaluated the remaining alternatives to determine

which one caused the "least overall harm." FHWA found that the preferred alternative would meet the purpose and need to a higher degree than any other alternative; would have relatively modest impacts to natural resources; included reconnecting 28 acres of degraded wetlands; and increased State ownership of lands by more than 100 acres within a state park in the project area. In addition, the State agency with jurisdiction over parks (including the aquatic preserve) concurred that the proposed mitigation plan fully compensated for the project's adverse impacts. Based on these factors, FHWA determined that the preferred alternative caused the "least overall harm" under the criteria provided in the Section 4(f) regulations. The court upheld FHWA's determination because it found FHWA had considered the relevant factors and did not make a clear error in judgment.

B. 23 USC 109 – Noise Standards

The **Highway 290/610** case involved improvements to a 38-mile-long section of an existing highway in Houston, Texas. The plaintiffs, seven individual residents, alleged that FHWA and TxDOT had violated 23 USC 109(i), which establishes noise mitigation requirements for federally funded highway projects. The court considered and rejected each of the plaintiffs' arguments as described below.

Disclosure of modeling assumptions

The plaintiffs claimed that FHWA and TxDOT had violated FHWA's noise regulations (23 CFR 772) by failing to disclose certain noise modeling assumptions, such as truck speed and counts. The court rejected this argument, holding that the defendants had no obligation to disclose every detail of the noise modeling analysis:

> "The plaintiffs cite no regulations requiring detailed public disclosure of all of the factors considered or all the assumptions the state agency used in applying the traffic-noise model. Nor do the plaintiffs sufficiently allege that the defendants violated specific regulations requiring that traffic noise be measured at specific times of day or locations, or under certain conditions. The defendants have filed a large administrative record in this case. The record includes significant information and disclosures about the traffic-noise model used. This claim is dismissed ...."

Adequacy of noise abatement measures

The plaintiffs also challenged the adequacy of the noise abatement measures, arguing that the noise abatement measures proposed for one neighborhood should have been adopted in another nearby neighborhood. The court noted that FHWA's regulations require an analysis of noise abatement measures for both feasibility and reasonableness, and found that FHWA and TxDOT had considered both of those factors in deciding which noise abatement measures to adopt in each neighborhood. Because the regulations had been followed, the court rejected the plaintiffs' challenges to the noise abatement measures.

III. Litigation Issues

A. Statute of Limitations

Applicability of statute of limitations to separate decisions on the same project

For the **U.S. 17-92 Flyover** project, FHWA made three separate decisions: the original CE determination in 2004; a reevaluation of that CE determination in 2005; and a second reevaluation in 2012. FHWA did not issue a statute of limitations notice in the Federal Register under 23 USC 139, which would have initiated a 150-day period for lawsuits to be filed. In the absence of such a notice, the FHWA's decisions were subject to a six-year statute of limitations period. More than six years had passed since the 2004 and 2005 decisions, so the court found that any challenges to those decisions were barred by the statute of limitations. But the court found that FHWA's approval of the 2012 reevaluation was a separate decision and was clearly within the six-year period, so it allowed the plaintiffs to proceed with a lawsuit challenging the 2012 decision:

> "[P]ursuant to Defendants' ongoing duty to ensure the lawfulness of their actions, they re-examined the Flyover Project in light of the changed circumstances, reconsidered the project's categorical exclusion, and determined that the CE classification remained appropriate. This conduct expressly re-opened the CE and constitutes final agency action that began a new six-year limitations period, thus allowing the initiation of the instant case until 2018. Because Plaintiffs filed their complaint in 2013, the statute of limitations will not act to bar their lawsuit."

The court also considered whether the plaintiffs' lawsuit was barred by the doctrine of laches (undue delay). The court held that "where Congress has acted to provide a statute of limitations, the laches doctrine affords no additional defense." Therefore, the court rejected the defendants' argument that the claims were barred by laches.

B. 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 lawsuit challenging the **Route 222** project was filed by a real estate company, which owned commercial property along Route 222. FHWA argued that the company lacked standing because it solely alleged economic injuries, which fell outside the zone of interests

protected by NEPA. The Court found that courts in other jurisdictions had reached conflicting decisions on the issue of whether an economic injury alone was sufficient to establish standing to bring a NEPA claim. After considering those other cases, the court held that an economic injury was not sufficient to establish standing and therefore dismissed the case:

> "Even if the plaintiffs were trying to preserve the 'character' and 'ambiance' of the Route 222 Corridor, they would be unable to establish standing because they would not be the ones whose recreational use or enjoyment of the environment would be impaired. MCA is a commercial entity, which by its very nature can't 'enjoy' the aesthetics of its surroundings."

The court also considered whether the company should be allowed to amend its complaint to include additional allegations focusing on environmental harms. The court denied that request, finding that it would be futile for the plaintiff to amend its complaint, because the additional allegations that the plaintiff sought to make would still be insufficient to establish standing. Therefore, the court dismissed the lawsuit.

The lawsuit challenging the **U.S. 17-92 Flyover** project involved a similar issue, but the court reached a different result. The lawsuit was filed by a company that owned a sports and entertainment facility located within the footprint of the proposed project; the company's owner and general manager also were named as plaintiffs. FHWA argued that the plaintiffs lacked standing because their interests were solely economic. The court found that the plaintiffs had environmental as well as economic interests – for example, they alleged that they would be harmed by "economic decay and blight" resulting from the elevated overpass, as well as health and safety concerns related to disturbance of contaminated sites. Therefore, the court found that the plaintiffs had standing.

In the **Route 29 Bypass** case as well, the court found that a local business had standing to bring a NEPA lawsuit. The plaintiff in this case was a company that owned commercial property adjacent to the project site. The court held that the company had sufficiently alleged environmental injuries and therefore had standing. The specific environmental injuries alleged by the company were not identified in the court's decision.

C. 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.

In the **I-69 Section 4** case, the plaintiffs filed their lawsuit before the ROD was even issued. While the lawsuit was pending, FHWA issued the ROD. Even so, the court held that the plaintiffs' challenges to the ROD were not ripe because there was no final agency action *at the time the lawsuit was filed*: "The 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."

The lawsuit challenging the **Southwest Light Rail** project also was filed while the NEPA process was still under way. The court dismissed the NEPA claims against FTA, finding that the claims were not ripe because FTA had not yet taken a final action. But, in an unusual twist, the court held that the plaintiffs were able to bring NEPA claims against the project sponsor, the Council while the NEPA process was still under way. The court reasoned that NEPA itself implicitly authorizes a lawsuit to be filed against a project sponsor in order to prevent the sponsor from taking actions that "may effectively limit and alter the choices available during the remaining stages of the environmental review for this project." (Note: This is a somewhat unusual decision, and is not necessarily representative of how other courts would decide this issue.)

Preliminary approval in a Tier 1 EIS

The Illiana Corridor case involved an attempt to challenge a preliminary Section 4(f) finding made by FHWA in a Tier 1 EIS. The document included a finding that the project would not use a Section 4(f) resource "based on the information available at Tier One" but explicitly noted that "The potential for a constructive use will be further analyzed in the Tier Two NEPA studies." The plaintiffs sought to challenge these preliminary finding, but the court held that they were not ripe for review because the Final EIS "expressly states that the Agencies' determinations as to all 4(f) properties are preliminary."

D. 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 **I-69 Section 4** lawsuit included two claims alleging that INDOT had prematurely undertaken certain design, right-of-way, and construction activities prior to completion of the NEPA process. INDOT asked the court to dismiss these claims as moot, and the court agreed. The court held that these claims were moot because "they seek to enjoin activities—preliminary survey work, geotechnical studies, and land acquisitions—that have long since ceased".

In the **U.S. 17-92 Flyover** project, the flyover had been constructed and was open to traffic by the time of the case was presented to the court for decision. Construction of the project as a whole was 80% complete and 96% of the federal funds had been spent. Nonetheless, the court held that the case was not moot, because parts of the project remained under construction, and even for completed portions, the court still could require additional study and/or mitigation.

E. 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 **Virginia Avenue Tunnel** case, the plaintiffs sought a preliminary injunction to prevent construction from beginning. Construction was imminent, so it was a given that the impacts of construction would occur if the injunction was not issue. The court considered whether any of the impacts of construction would result in "irreparable harm" to the plaintiffs. The court found that:

- Noise, dust, and vibration impacts of construction would be "annoyances," but in the context of an urban setting, they did not constitute the type of harm that could justify an injunction.

- The potential for an increase in rail accidents, resulting from trains moving through a tunnel at higher speeds, was contradicted by the EIS, which found that the improved tunnel would reduce the risk of rail accidents.

- The potential reduction in property values, due to proximity to construction, would not be significant or permanent.

- The temporary closure of a park or recreation area is not the type of injury that constitutes irreparable harm.

- The removal of approximately 200 healthy, mature trees along a city street could constitute irreparable harm, even though mitigation included tree replacement, because it would take years for the new trees to grow to the size of the current ones.

While the court found that the tree removal could constitute irreparable harm, it denied the injunction because it found that the plaintiffs were not likely to succeed on the merits of their claims and that the public interest weighed against halting construction.

F. Attorneys' Fees

Availability of Attorneys' Fees Against State DOT with NEPA Assignment

In the **Highway 101 case**, the plaintiffs has prevailed against Caltrans on their NEPA claims, and then sought attorneys' fees under the Equal Access to Justice Act, a federal law that authorizes courts to award attorneys' fees in civil cases "brought by or against the United States" (i.e., the federal government). The plaintiffs argued that, because Caltrans had accepted assignment of FHWA's responsibilities under 23 USC 327, it should be treated as a federal agency for purposes of the attorneys' fee statute. The court disagreed, holding that "there is simply no authority to order the relief sought" because EAJA only authorizes courts to require federal agencies to pay attorneys' fees.

G. Administrative Record

Plaintiffs' attempt to supplement the record

In the Virginia Avenue Tunnel case, the plaintiff's legal claims focused heavily on allegations of predetermination and bias. To support those claims, the plaintiff sought to supplement the administrative record compiled by FHWA with five categories of additional documents, most of which involved written communications between the CSX and DDOT. The court rejected this request for two main reasons. First, the plaintiff did not identify "specific, known additional documents" but instead merely identified broad categories of documents that it believed *might* exist and could possibly support its claim. Second, the plaintiff did not provide any evidence that these additional documents were actually considered by FHWA during the NEPA process. The court held that "Because the Committee can provide no more than speculation that certain classes of unknown documents were considered by the actual FHWA decision-makers, it has not overcome the strong presumption that the agency properly designated the administrative record."

Plaintiffs' attempt to obtain discovery

The plaintiff in the **Virginia Avenue Tunnel** case also asked the court for permission to take discovery, which would involve document production requests and sworn witness interviews (depositions). The court noted that, in an administrative record case, discovery is not allowed unless the plaintiff makes a "strong showing" that the agency acted in bad faith in its decision-making process. Here, the plaintiffs sought to show bad faith by presenting emails and other documents indicating that certain District of Columbia officials had committed to approve the project before the NEPA process was complete, and that some officials at FHWA and DDOT had expressed misgivings about the effect of those actions on the NEPA process. The court considered those documents, but concluded that they did demonstrate bad faith, so the request for discovery was denied.

Appendix A: Table of 2015 Court Decisions

Project	State	Case Name	Court	Agency	Date
All Aboard Florida	FL	Indian River County v. Martin 110 F.Supp.3d 59	U.S. Dist. Ct., D.C.	FTA	6/10/2015
Baltimore Red Line	MD	Cutonilli v. FTA 2015 WL 1431251	U.S. Dist. Ct., Maryland	FTA	3/30/2015
Baltimore Red Line	MD	Cutonilli v. FTA 2015 WL 3953502	U.S. Dist. Ct., Maryland	FTA	6/26/2015
Crenshaw/LAX Transit Corridor Project	CA	Crenshaw Subway Coalition v. LACMTA 2015 WL 6150847	U.S. Dist. Ct., California	FTA	9/23/2015
Crosstown Parkway Extension Project	FL	Conservation Alliance of St. Lucie County v. USDOT 2015 WL 7351544	U.S. Dist. Ct., Florida	FHWA	11/5/2015
Garden Parkway	NC	Catawba Riverkeeper Foundation v. NCDOT 2015 WL 117964	U.S. Dist. Ct., North Carolina	FHWA	3/13/15
Highway 101	CA	Bair v. Caltrans 2015 WL 1516913	U.S. Dist. Ct., California	FHWA	3/31/2015
Highway 23	WI	1000 Friends of Wisconsin v. USDOT 2015 WL 2454271	U.S. Dist. Ct., Wisconsin	FHWA	5/22/2015
Highway 290/610	TX	Crabb v. FHWA 2015 WL 1033235	U.S. Dist. Ct., Texas	FHWA	3/9/2015
I-69 Section 4	IN	Citizens for Appropriate Rural Roads v. Foxx 2015 WL 179571	U.S. Dist. Ct., Indiana	FHWA	1/14/2015
Illiana Corridor	IL/IN	Openlands v. USDOT 2015 WL 4999008	U.S. Dist. Ct., Illinois	FHWA	6/16/2015
Monroe Bypass	NC	Clean Air Carolina v. NCDOT 2015 WL 5307464	U.S. Dist. Ct., North Carolina	FHWA	9/10/2015
North Eufaula Avenue Project	AL	Eufaula Heritage Association v. Alabama DOT 2015 WL 404534	U.S. Dist. Ct., Alabama	FHWA	1/29/2015
Route 17-92 Flyover	FL	RB Jai Alai, Inc. v. Secretary of Florida DOT 112 F.Supp.3d 1301	U.S. Dist. Ct., Florida	FHWA	6/30/2015

Project	State	Case Name	Court	Agency	Date
Route 222	PA	Maiden Creek Associates v. USDOT 2015 WL 4977016	U.S. Dist. Ct., Pennsylvania	FHWA	8/20/2015
Route 29 Bypass	VA	Rio Associates v. Layne 2015 WL 3546647	U.S. Dist. Ct., Virginia	FHWA	6/8/2015
Southwest Light Rail Transit	MN	Lakes and Parks Alliance v. FTA 91 F.Supp.3d 1105	U.S. Dist. Ct., Minnesota	FTA	3/6/2015
Southwest Light Rail Transit	MN	Lakes and Parks Alliance v. Metropolitan Council 2015 WL 4635934	U.S. Dist. Ct., Minnesota	FTA	8/4/2015
Virginia Avenue Tunnel	DC	Committee of 100 on the Federal City v. Foxx 87 F.Supp.3d 191	U.S. Dist. Ct., D.C.	FHWA	4/7/2015
Virginia Avenue Tunnel	DC	Committee of 100 on the Federal City v. Foxx 106 F.Supp.3d 156	U.S. Dist. Ct., D.C.	FHWA	5/26/2015
Virginia Avenue Tunnel	DC	Committee of 100 on the Federal City v. Foxx	U.S. Dist. Ct., D.C.	FHWA	10/22/2015