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NEPA Case Law for Highway and Transit Projects
2020 Year in Review

April 2021

Preface

This report presents a sampling of federal court decisions issued in 2020 in cases involving the National Environmental Policy Act (NEPA) and other environmental laws for surface transportation projects.[1] The goal of this report is to provide NEPA practitioners, both lawyers and non-lawyers, with a general understanding of how courts have handled the types of issues that frequently arise in NEPA litigation. The report focuses on environmental reviews conducted by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), as well as states that have been assigned FHWA's responsibilities for compliance with environmental laws.

This report accompanies the case law summaries posted on AASHTO's Case Law Updates on the Environment (CLUE) website. For a complete listing of the 2020 court decisions on the CLUE website, refer to the appendix to this report.[2]

Please note a few caveats:

- This report 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 report includes only a subset of the issues addressed in the court decisions. For more detailed summaries and copies of the decisions themselves, refer to the CLUE website.
- Some of the cases remain in litigation, either in the district court or on appeal, and therefore the outcomes described in this report could change.
- 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 report was prepared by Perkins Coie LLP on behalf of the AASHTO Center for Environmental Excellence.

[1] Other laws addressed in court decisions this year include Section 4(f) of the Department of Transportation Act of 1966 (Section 4(f)), Section 106 of the National Historic Preservation Act (Section 106), Section 404 of the Clean Water Act, the Endangered Species Act, and the Administrative Procedure Act.

[2] The CLUE website includes case summaries for more than 300 court decisions involving NEPA and other environmental laws for transportation projects from the early 2000s through 2020. The CLUE website also has year-in-review reports from 2014 through 2020. *See* https://environment.transportation.org/clue/.

Key Holdings in 2020 Court Decisions

NEPA

Purpose and Need

An environmental impact statement (EIS) must discuss the purpose and need for the proposed action. Courts generally defer to an agency's purpose and need statement if it is reasonable, has support in the administrative record, and does not unreasonably limit the scope of alternatives considered. This principle was demonstrated in one case this year.

- Consideration of Data and Public Comments. In the Headquarters Road Bridge case, the plaintiffs alleged that the purpose and need was defined too narrowly to exclude reasonable alternatives. The plaintiffs also claimed that the purpose and need was based on inaccurate data regarding the safety and design of the existing bridge. The purpose and need statement was supported by reports on the bridge's structural condition, turning movement studies, and traffic counts. The agencies solicited public comments on a draft purpose and need statement and made changes based on those comments. The court ruled that the purpose and need statement complied with NEPA, explaining that the agencies' definition of the project's purpose and need was entitled to deference: The administrative record "demonstrates an apparently thoughtful and data-driven process" based on scientific evidence and public input, and "it is not the court's role to re-weigh the facts and evidence that Defendants considered in developing the Project's purpose and need statement."[3]

Alternatives

An EIS must evaluate reasonable alternatives. For alternatives that the agency eliminated from detailed study, the EIS should briefly discuss the reasons for their elimination. Courts generally defer to an agency's screening of alternatives if the agency's methodology and decision are reasonable and supported by the administrative record. In one case this year, the court upheld an agency's elimination of an alternative based on documents that were not in the administrative record.

- Reasonableness of Agency's Elimination of an Alternative. In the Westside Purple Line Extension Project case, the plaintiff claimed that the agencies did not adequately assess an alternative site for construction staging (a vacant lot on which a large development project was planned). The court initially agreed with the plaintiff, but allowed the agencies to supplement the administrative record with additional documents concerning their decision to reject the site. After reviewing these supplemental materials, the court held that the agencies reasonably eliminated the site from further study based on its expected unavailability and infeasibility. These documents supported the agencies' finding that the site would be unavailable during project construction because of the planned development on the

[3] *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020).

site. They also supported the agencies' determination that using the site would be infeasible because the property owner stated that it would vigorously oppose attempts to use the property for construction staging for the project.[4]

Scope of NEPA Analysis

In two cases this year, courts held that the NEPA analyses of the transportation projects did not need to include nearby projects that had some relationship to the transportation projects but did not receive federal funding and were not under a federal agency's control.

- Adjacent Development by Project Sponsor. In the case involving the BART Silicon Valley Phase II Extension Project, the plaintiff asserted that the project analyzed in the EIS (a rapid transit extension) should have included mixed-use development that the project sponsor was considering building adjacent to the new stations. The court held that the effects of the potential development were appropriately considered as future actions in the cumulative impacts analysis in the EIS, rather than as part of the proposed action. The court explained that the development—which would not receive any federal funding—was not "sufficiently intertwined" with the proposed federal action: "Here, the [transit-oriented development] was a proposed independent action by [the project sponsor] alone and was placed outside the scope of the federal SEIS. The [transit-oriented development] has independent utility and may be constructed simultaneously with or after the Extension Program dependent on the availability of funding and subject to market forces."[5]

- Private Development Conditioned on Completion of Project. In the case involving the I-89 Exit 16 Interchange Project, the plaintiffs claimed that the agencies should have analyzed how the project would facilitate construction of a nearby proposed gas station. The state environmental permit for the gas station required, as a condition of approval, either the completion of part of the Exit 16 project or the gas station developer's funding of traffic signal optimization. The court rejected the plaintiffs' assertion that this permit condition made the gas station an indirect effect of the Exit 16 project. The court noted that the permit application for the gas station was submitted before the agencies developed plans for the Exit 16 project, and the agencies had no control over the conditions placed on the gas station's permit. "The decision of a state regulatory body to condition its permit for the . . . service station on certain steps toward completion of the Exit 16 project does not make the service station the effect or result of the federal action." The court held that the gas station's effects were properly excluded from the NEPA analysis for the Exit 16 project.[6]

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[4] *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 125 (C.D. Cal. June 27, 2019), and ECF No. 149 (C.D. Cal. Aug. 20, 2019), *tentative rulings adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020).
[5] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020), *appeal filed*, No 20-16842 (9th Cir.).
[6] *R.L. Vallee, Inc. v. Vermont Agency of Transportation*, No. 5:18-cv-00104-gwc, 2020 WL 4689788 (D. Vt. July 8, 2020), *appeal filed*, No. 20-2665 (1st Cir.).

Impacts Analysis

Many NEPA cases involve challenges to the agency's methodology or allegations that environmental impacts were not considered in sufficient detail. Courts generally defer to an agency's methodology choices and technical analysis, and this year was no exception.

- Parking Impacts – Methodology. In the case involving the BART Silicon Valley Phase II Extension Project, the plaintiff challenged the agencies' methodology for analyzing parking impacts in the area around one of the new transit stations (Diridon Station). The agencies estimated parking demand at Diridon Station by using a "constrained" model, which accounted for available parking supply and assumed that riders generally would not drive to the station in the absence of available parking. The plaintiff argued that the agencies should have studied "unconstrained" parking demand (i.e., assuming a rider's decision to drive to the new station would not be affected by the availability of parking). The court found the agencies' methodology to be reasonable and adequately explained. The EIS stated that Diridon Station was expected to be a destination station rather than an origin station for commuters, the station would be well served by other transit modes, and the decision to not provide parking at the station was consistent with local and regional land use policies that discouraged parking and automobile trips in the area near the station. The court explained that these factors reduced the likelihood of riders parking near Diridon Station without additional available parking and supported the agencies' decision to use constrained mode-of-access modeling.[7]

- Parking Impacts – Adequacy of Analysis. In the case involving the BART Silicon Valley Phase II Extension Project, the plaintiff claimed that the EIS did not adequately consider the project's direct effects on parking near the new Diridon Station as well as indirect effects on traffic and air quality from transit riders looking for parking. The EIS described the number of existing public parking spaces near Diridon Station, the number of parking spaces that would be permanently removed for construction of the project, and the number of parking spaces that would be built at other new stations nearby. The EIS estimated that most park-and-ride riders would park at the nearby stations with parking structures, rather than trying to park near Diridon Station (which would not have a parking structure). Based on this analysis, the EIS determined that there would be no adverse traffic or air quality effects from riders looking for parking near Diridon Station. The EIS also estimated that building a parking structure at Diridon Station would shift some park-and-ride riders from nearby stations to Diridon Station but would have a negligible effect on total system ridership. In addition, the EIS described measures that could be implemented to control parking demand near Diridon Station. The court held that the EIS sufficiently analyzed the project's impacts related to parking.[8]

[7] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020), *appeal filed*, No 20-16842 (9th Cir.).
[8] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020), *appeal filed*, No 20-16842 (9th Cir.).

- Risks of Encountering Abandoned Oil Wells and Subsurface Methane. In the Westside Purple Line Extension Project case, the court held that the EIS adequately studied the risks of encountering abandoned oil wells and subsurface methane during construction of tunnels for the project. The court determined that the agencies adequately explained why these risks would be low based on soil samples, their experience tunneling in other areas with high concentrations of subsurface methane, their scientific and technical expertise, and the measures that would be implemented to minimize the migration of subsurface gases and to monitor gases.[9]

- Air Quality Impacts. In the Westside Purple Line Extension Project case, the court rejected the plaintiff's various arguments challenging the agencies' analysis of construction air quality impacts. The plaintiff asserted that the agencies should have used a lower exposure threshold for cancer risk from toxic air emissions, should have calculated cancer risk at different receptor locations, should have included more analysis of health impacts from particulate matter, should have used a different methodology for modeling emissions from construction equipment, and should have proposed more effective mitigation measures. The court explained that the agencies' methodology choices, assessment of scientific evidence, and technical opinions were entitled to deference and were reasonable.[10]

Mitigation

An EIS must include a reasonably complete discussion of possible mitigation measures. A case this year upheld the level of detail of an EIS's discussion of mitigation.

- Level of Detail – Parking and Traffic Mitigation. In the case involving the BART Silicon Valley Phase II Extension Project, the plaintiff claimed that the EIS did not contain sufficient details about construction management transportation plans and traffic control plans that would be implemented to mitigate parking and traffic impacts during project construction. The EIS described the components of the plans, explained how the plans would be implemented, and assessed the plans' effectiveness at mitigating adverse impacts. The court held that the EIS described the mitigation with an adequate level of detail.[11]

Environmental Assessments

One case this year upheld an agency's reliance on an environmental assessment (EA) and issuance of a finding of no significant impact (FONSI).

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[9] *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 125 (C.D. Cal. June 27, 2019), and ECF No. 149 (C.D. Cal. Aug. 20, 2019), *tentative rulings adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020).

[10] *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 125 (C.D. Cal. June 27, 2019), and ECF No. 149 (C.D. Cal. Aug. 20, 2019), *tentative rulings adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020).

[11] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020), *appeal filed*, No 20-16842 (9th Cir.).

- Traffic and Noise Impacts. In the U.S. 101 case, the plaintiffs argued that the EA did not adequately consider noise impacts resulting from additional truck traffic. The purpose of the project was to widen the highway to safely accommodate extra-long trucks, which were prohibited from using the existing highway due to its narrow width and tight curves. The California Department of Transportation (Caltrans) concluded that the project would not increase the total volume of truck traffic on the highway. This finding was based on a survey of regional businesses, traffic studies in nearby areas suggesting little latent demand for trucks using that route, the fact that the project would not increase highway capacity, and the fact that a parallel interstate highway provided faster travel times between major cities. The court held that Caltrans's conclusion regarding truck traffic was entitled to deference and was adequately supported by the record. Furthermore, the court held that Caltrans reasonably determined that truck noise would not increase based on its conclusion about truck traffic volumes and because there was no evidence in the record that extra-long trucks would be noisier than existing truck traffic on the highway.[12]

- Impacts of Construction and Paving over Tree Roots. In the U.S. 101 case, the plaintiff challenged Caltrans's conclusion that project construction—which would pave over the roots of old-growth redwood trees—would not have a significant impact on the trees. The plaintiff cited another state agency's guidance document that advised against construction activities in the root zones of protected trees. The court explained that this guidance document, from a different state agency, was not binding on Caltrans. The court held that Caltrans reasonably decided not to follow the guidance document's recommendation based on Caltrans's arborist's on-the-ground assessment of individual trees. The arborist had evaluated each tree in the project area to assess whether the construction activity and paving would limit roots' oxygen intake, introduce root disease, or otherwise harm the trees. Based on the arborist's analysis, as well as the project's use of a special paving material that allowed for greater oxygen diffusion to the soil than traditional asphalt, Caltrans determined that the project would not affect the health of the trees. The court concluded that Caltrans sufficiently analyzed the effects of construction activities and paving on the trees and explained why the trees would not be harmed.[13]

Categorical Exclusions

Two cases this year upheld an agency's reliance on a categorial exclusion (CE).

- No Significant Impact on Travel Patterns. In the case involving the I-89 Exit 16 Interchange Project, the plaintiffs asserted that the project was not eligible for a CE because it would have a significant impact on travel patterns. (FHWA's NEPA regulations (23 CFR 771.117(a)) define CEs as actions that do not have "significant impacts on travel patterns.") The plaintiffs argued that the project would have a significant impact on travel patterns because its purpose was to reduce congestion

[12] *Bair v. California Department of Transportation*, 982 F.3d 569 (9th Cir. 2020).
[13] *Bair v. California Department of Transportation*, 982 F.3d 569 (9th Cir. 2020).

and improve traffic flow at the Exit 16 interchange. The court held that "an improvement in traffic flow does not automatically disqualify a project from consideration as a CE." The court concluded that the project would not have a significant impact on travel patterns because the project would merely modify the design of the existing interchange and would largely take place within the existing right-of-way, without increasing roadway capacity, redirecting traffic, or otherwise causing wholesale changes in the use of roadways by the population.[14]

- Unusual Circumstances. In the Headquarters Road Bridge case, the plaintiff argued that the project was not eligible for a CE because it involved four unusual circumstances: substantial controversy on environmental grounds; significant environmental impacts; significant impacts on historic properties; and inconsistencies with federal, state, or local laws. (Under FHWA's NEPA regulations (23 CFR 771.117(b)), if an action that normally would be classified as a CE could involve one of these unusual circumstances, FHWA and the project applicant must conduct appropriate environmental studies to determine if a CE is appropriate.) The court explained that "the presence of unusual circumstances does not automatically trigger the need for an environmental assessment or an environmental impact statement." Rather, it "merely requires FHWA to conduct appropriate studies to determine if the categorical exclusion classification is proper." The court also explained that an agency can rely on a CE even where a project results in destruction of a historic resource, as long as the impact is not significant. The court noted that the agencies had prepared numerous reports concerning potential environmental effects, consulted with permitting agencies (who did not raise any concerns about the project's inconsistencies with applicable laws), used the Section 106 process to resolve adverse effects on historic resources by executing a memorandum of agreement with mitigation measures, made the Draft CE Evaluation and supporting documents available for public review and comment, provided detailed responses to public comments on the Draft CE Evaluation, and held public hearings even though they are not required for a CE. The court concluded that the agencies conducted appropriate studies and reasonably determined that they could rely on a CE based on the evidence in the record.[15]

Public Involvement

One case this year considered claims that the agencies did not provide adequate opportunities for public involvement in the NEPA process.

- Public Review of FONSI. In the I-30 Crossing Project case, the plaintiff argued that the agencies should have made the FONSI available for public review and comment. A regulation in effect at the time (40 CFR 1501.4(e)(2) (1978)) required the lead agency to make a FONSI available to the public for 30 days in limited circumstances:

[14] *R.L. Vallee, Inc. v. Vermont Agency of Transportation*, No. 5:18-cv-00104-gwc, 2020 WL 4689788 (D. Vt. July 8, 2020), *appeal filed*, No. 20-2665 (1st Cir.).
[15] *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020).

when the proposed action is, or is similar to, an action that normally requires the preparation of an EIS under the agency's NEPA procedures, or when the nature of the proposed action is one without precedent. The court found that neither of these circumstances was present, "in part because the Project improvements will occur almost entirely within existing . . . right of way." Therefore, the court held, FHWA was not required to make the FONSI available for public review.[16]

- Public Review of Responses to Comments. In the I-30 Crossing Project case, the court held that the agencies did not need to provide an opportunity for public review and comment on supporting material—modeling information that supported the travel time estimates in the Draft EA—that was presented in response to comments on the Draft EA.[17]

Supplementation

A supplemental EIS (SEIS) is required when there are substantial changes to the project or significant new information or circumstances relevant to environmental concerns.

- Change in Construction Method. In the case involving the BART Silicon Valley Phase II Extension Project, the plaintiff argued that FTA should have prepared an additional SEIS because its decision to use tunnel boring construction rather than cut-and-cover construction for part of the project—which allegedly was made after publication of the Final SEIS—was significant new information. The court held that supplemental analysis was not required because FTA had already adequately analyzed that construction method in the SEIS. The court noted that the SEIS included detailed description and analysis of tunnel boring construction methods, their environmental effects, and mitigation measures. "Even if the decision of which tunneling method came after the publication of the Final [SEIS], information regarding the methodologies, possible adverse effects, and mitigation strategies was already available in the record. NEPA does not require the FTA to re-analyze an option that the FTA already analyzed."[18]

Predetermination and Bias

Claims of predetermination typically target actions that could indicate an agency's selection of an alternative before completing the NEPA process. Courts generally hold that it is permissible for the project sponsor to have a favored alternative, as long as the federal agency retains control of the NEPA process, the preference does not undermine the integrity and objectivity of the NEPA document, and the project sponsor or lead agency did not make an "irreversible and irretrievable commitment of resources" before completing

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[16] *Little Rock Downtown Neighborhood Association v. Federal Highway Administration*, No. 4:19-cv-00362-JM, 2020 WL 5259385 (E.D. Ark. Sept. 3, 2020).
[17] *Little Rock Downtown Neighborhood Association v. Federal Highway Administration*, No. 4:19-cv-00362-JM, 2020 WL 5259385 (E.D. Ark. Sept. 3, 2020).
[18] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020), *appeal filed*, No 20-16842 (9th Cir.).

the NEPA process. In several cases this year, courts rejected predetermination claims based on agency statements about a project and agencies' executing contracts for a project.

- Agencies' Statements About Project. In the case involving the BART Silicon Valley Phase II Extension Project, the plaintiff claimed that FTA and the project sponsor had predetermined their decision to not provide parking at one of the project's new transit stations. An earlier iteration of the project, which had been studied in an EIS, would have built a parking structure at that new station. The agencies then prepared a SEIS to study changes to the project, including the elimination of the parking structure. The plaintiff cited to documents from FTA and the project sponsor (a scoping report and a letter inviting other agencies to participate in the NEPA process for the SEIS) that stated parking was no longer proposed for that new station. The court concluded that neither document indicated that the agencies made an irreversible and irretrievable commitment of resources, and therefore their decision was not predetermined before completing the SEIS.[19]

- Project Sponsor's Statements About Project. In the Headquarters Road Bridge case, the plaintiff argued that replacement of the bridge was predetermined because the project sponsor (the Pennsylvania Department of Transportation (PennDOT)) referred to the project as a "bridge replacement project" in some documents before the NEPA process was completed. The court held that PennDOT's "early references to the project as a 'replacement' do not demonstrate that FHWA, the federal agency, failed to act with good faith objectivity." The court explained that NEPA did not apply to PennDOT because it is not a federal agency, and PennDOT's statements were made years before FHWA became involved in the project. In addition, the court noted that the Section 4(f) evaluation and other documents in the administrative record included analyses of non-replacement alternatives.[20]

- Project Sponsor's Executing Contract for Project. In the Headquarters Road Bridge case, the plaintiff argued that replacement of the bridge was predetermined because PennDOT had entered into a contract to replace the bridge prior to completion of the NEPA process. PennDOT explained that the contract was necessary for obtaining the preliminary design and environmental studies for the NEPA process and for having a conservative assumption to program funding for the project. The court concluded that the contract was not improper predetermination because it "was not awarded to complete a specified course of action prior to the NEPA process. Indeed, even after the contract was awarded, PennDOT evaluated a multitude of alternatives. . . . The act of entering into a contract, in and of itself, does not violate NEPA, especially where, as PennDOT identifies, no final design or construction activities were completed and no rights-of-way were acquired for the Project before FHWA's NEPA decision." Furthermore, the court found that FHWA provided sufficient independent oversight to ensure an objective NEPA process: "FHWA

[19] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020), *appeal filed*, No 20-16842 (9th Cir.).
[20] *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020).

reviewed PennDOT's determinations, comments from consulting parties were sought throughout the entire Project development process, alternatives were considered, and supplemental analyses were ordered when needed."[21]

- Agency Actions Before Completion of SEIS. In the Westside Purple Line Extension Project case, the plaintiff alleged improper predetermination based on the project sponsor's execution of a full funding grant agreement with FTA, execution of a design-build contract, acquisition of properties, and completion of preconstruction work before publishing the SEIS. The court had previously ordered the agencies to prepare a SEIS, but the court did not vacate the Record of Decision and did not prevent the agencies from executing the grant agreement and design-build contract. The court held that the agencies did not make an irreversible and irretrievable commitment of resources. The court found it significant that even if the project sponsor had acquired properties that were not ultimately needed for the selected alternative, it would be able to sell any excess properties, and FTA likely could seek reimbursement for those ineligible expenditures under the grant agreement.[22]

NEPA Assignment

The NEPA assignment program (also known as the surface transportation project delivery program) allows states to assume the U.S. Department of Transportation's responsibilities for complying with federal environmental laws for certain transportation projects in the state. One case this year addressed whether FHWA could be sued over an assigned project.

- Project with Indirect Effects in Another State. In the U.S. 199/SR 197 case, the court held that FHWA could not be sued over the project because FHWA had assigned its environmental review and consultation responsibilities for the project to Caltrans. Pursuant to a memorandum of understanding, FHWA had assigned to Caltrans its responsibilities for complying with NEPA and other federal environmental laws for highway projects "within" California, excluding projects that crossed state boundaries. For the U.S. 199/SR 197 Project, Caltrans prepared an EA and issued a FONSI. The issue in this case was whether the U.S. 199/SR 197 Project was a highway project "within" California; if so, Caltrans was solely responsible and liable for complying with NEPA and other federal environmental laws for the project. The plaintiff argued that the project crossed state boundaries and was not within California because the project's purpose was to increase interstate traffic between California and Oregon and the project could have indirect effects in Oregon. The court disagreed, explaining that the project was entirely within California—and, therefore, covered by the assignment to Caltrans—because the project construction footprint and all the work for the project would be located in California.[23]

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[21] *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020).
[22] *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 125 (C.D. Cal. June 27, 2019), *tentative ruling adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020).
[23] *Friends of Del Norte v. California Department of Transportation*, No. 3:18-cv-00129-JD, 2020 WL 1812175

Section 4(f)

Applicability of Section 4(f)

Section 4(f) protects public parks and recreation areas, wildlife and waterfowl refuges, and historic sites of national, state, or local significance. One case this year addressed whether a non-contributing element to a historic district was a historic site protected by Section 4(f).

- Non-Contributing Element to Historic District. In the Headquarters Road Bridge case, the plaintiff claimed that a creek located in a historic district was protected by Section 4(f). FHWA treated the historic district and its contributing elements as Section 4(f) resources. FHWA did not treat the creek as a Section 4(f) resource because it was not designated as a contributing element to the historic district and a guidance document from the National Park Service stated that natural waterways generally are not eligible for the National Register of Historic Places. During the environmental review process, however, the National Park Service recommended treating the creek as a Section 4(f) resource. The court held that FHWA's position was entitled to deference, was adequately justified, and was reasonable: "FHWA took the NPS's recommendation under consideration and provided a thorough reply explaining its disagreement and providing the basis for that disagreement."[24]

De Minimis Impact

Section 4(f) allows an agency to approve the use of a Section 4(f) property if the agency determines that the use will have a *de minimis* impact on the property. One case this year considered a challenge to a *de minimis* impact determination.

- Reasonableness of *De Minimis* Impact Determination. In the Westside Purple Line Extension Project case, the court upheld the agencies' determination that tunneling would have a *de minimis* impact on a high school campus that was a historic site. The plaintiff cited a report from its expert suggesting that tunneling could damage historic buildings on the campus. The plaintiff also argued that the agencies did not adequately assess the risks of encountering abandoned oil wells or subsurface methane when tunneling. The court explained that the agencies were entitled to rely on the reasonable conclusions of their own studies and experts. The court also found that the agencies adequately explained why risks from abandoned oil wells and subsurface methane were extremely low, and therefore those risks did not undermine the *de minimis* impact determination.[25]

Constructive Use

A project has a constructive use when it does not incorporate land from a Section 4(f)

(N.D. Cal. Apr. 9, 2020).

[24] *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, 20 No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020).

[25] *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 125 (C.D. Cal. June 27, 2019), *tentative ruling adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020).

property but its proximity impacts are so severe that they impair the protected activities, features, or attributes that qualify the property for protection under Section 4(f). One case this year involved a claim that construction activities would be a constructive use of a nearby Section 4(f) resource that would also be permanently used by the project.

- Effectiveness of Mitigation. In the Westside Purple Line Extension Project case, the plaintiff argued that activities at a construction staging area would be a constructive use of public recreation facilities at a nearby school. The court held that the agencies were still required to analyze whether there would be a constructive use even though the agencies had already determined that a subsurface easement for a tunnel under the recreation facilities would be a use (as a permanent incorporation of land). The court also held that the agencies reasonably concluded that there would be no constructive use because mitigation measures would effectively address adverse impacts from the construction activities at the staging area.[26]

Prudent and Feasible Avoidance Alternatives

An agency may approve the use of a Section 4(f) property only if there is no prudent and feasible avoidance alternative. One case this year involved claims that a rejected alternative was a prudent and feasible avoidance alternative that should have been selected.

- Non-Avoidance Alternative. In the Headquarters Road Bridge case, the plaintiff argued that rehabilitating the existing historic bridge was a prudent and feasible avoidance alternative that the agencies should have selected instead of replacing the bridge. The court held that rehabilitating the bridge was not an avoidance alternative because it would require removing and replacing the bridge spans, which would be a use of the historic bridge under Section 4(f).[27]

- Non-Prudent Alternative. In the Headquarters Road Bridge case, the plaintiff challenged the agencies' determination that rehabilitating the existing bridge was not prudent. The agencies found that this alternative was not prudent because it would not meet state and AASHTO design standards, would not safely accommodate emergency response vehicles, and would require weight limits on the bridge. The plaintiff argued that the design standards were flexible, the width of the existing bridge was safe, and the agencies relied on questionable traffic data. The court held that the agencies reasonably determined that rehabilitation was not prudent (assuming that it was an avoidance alternative). The court explained that the agencies' decision was supported by studies and other evidence in the record and was entitled to deference, even though the plaintiffs offered conflicting evidence.[28]

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[26] *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 125 (C.D. Cal. June 27, 2019), and ECF No. 149 (C.D. Cal. Aug. 20, 2019), *tentative rulings adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020).
[27] *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020).
[28] *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020).

Least Overall Harm Analysis

If there is no prudent and feasible avoidance alternative, the agency must approve the alternative that causes the least overall harm, based on a balancing of multiple factors. Two cases this year involved challenges to agencies' least overall harm analyses.

- Reasonableness of Agency's Least Harm Analysis. In the Westside Purple Line Extension Project case, the court upheld the agencies' determination that the preferred alternative—which would require a subsurface easement for a tunnel under public recreation facilities at a high school—would have the least overall harm after considering ten other potential tunnel alignments. The court explained that the agencies' balancing of the various factors for the least overall harm analysis was entitled to deference and was reasonable. Some of the factors included:

    - *Purpose and Need:* The court held that it was reasonable for the agencies to conclude that the preferred alternative best met the project purpose and need because it had slightly shorter travel times than the other alternatives.

    - *Preference of Officials with Jurisdiction:* The plaintiff argued that the agencies should have selected the tunnel alignment preferred by the officials with jurisdiction over the high school's public recreation facilities. The court held that the agencies were not required to select the alternative preferred by the officials with jurisdiction. The court further held that the EIS showed that the agencies considered the views of officials with jurisdiction by explaining why the project would not harm recreation facilities at the high school.[29]

- Exclusion of Non-Prudent Alternatives from Analysis. In the Headquarters Road Bridge case, the plaintiff argued that a different alternative (rehabilitating, rather than replacing, the existing bridge) would cause the least overall harm. The court upheld the agencies' selected alternative, explaining that their balancing of the various factors as part of the least overall harm analysis was entitled to deference. The court noted that the agencies' decision was supported by studies in the record and was consistent with the approach agreed to by consulting parties in the project's Section 106 memorandum of agreement. The court also held that the least overall harm analysis did not need to consider alternatives that were not prudent: "It is irrelevant whether the rehabilitation alternatives would cause less harm to Section 4(f) resources because Defendants were not legally required to carry them forward into the least overall harm analysis. Once defendants determined that the rehabilitation alternatives were not prudent, those alternatives ceased to be part of the equation."[30]

[29] *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 125 (C.D. Cal. June 27, 2019), *tentative ruling adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020).
[30] *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020).

Litigation Procedure

Administrative Record

The administrative record for a project generally should include all documents that the agency directly or indirectly considered in making its decision. Several cases this year addressed the types of documents that should be included in the administrative record, supplementation of the administrative record with extra-record documents, and discovery.

- Documents Cited in Environmental Studies. In the cases involving the Mid-Currituck Bridge and the BART Silicon Valley Phase II Extension projects, the courts held that documents cited in environmental studies (including an EIS and an alternatives study report) should be included in the administrative records because their citations were sufficient evidence that the agencies relied on and considered them.[31]

- Documents from Non-Federal Project Sponsor. In the case involving the BART Silicon Valley Phase II Extension Project, the court denied the plaintiff's motion to add various documents from the project sponsor to the administrative record. These documents included staff emails and presentations, studies prepared for the project sponsor, and documents on the project sponsor's website. The court held that although the project sponsor collaborated with FTA on preparing the EIS, there was no evidence that the emails or other internal documents had been sent to any FTA staff or officials. Moreover, the court held, there was no evidence that FTA considered the website documents when preparing the EIS. In sum, there was no evidence that FTA had considered any of these documents, either directly or indirectly, so they were properly excluded from the administrative record.[32]

- Internal Deliberative Documents. In the I-73 and Mid-Currituck Bridge cases, the courts held that agencies' predecisional deliberative documents should not be included in the administrative records without a showing of bad faith or improper behavior by the agencies. In these cases, the courts also denied the plaintiffs' requests for privilege logs (i.e., charts listing the internal agency documents that were excluded from the administrative record) because predecisional deliberative materials were not relevant to the litigation.[33]

- Deposition Testimony. In the case involving the BART Silicon Valley Phase II Extension Project, the court denied the plaintiff's request to supplement the administrative record with transcripts of depositions of agency staff and officials.

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[31] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 511998 (N.D. Cal. Jan. 31, 2020), appeal filed, No 20-16842 (9th Cir.); *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014-FL, 2020 WL 5044465 (E.D.N.C. Aug. 26, 2020).

[32] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 511998 (N.D. Cal. Jan. 31, 2020), appeal filed, No 20-16842 (9th Cir.).

[33] *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, No. 2:17-cv-03412-BHH, 2020 WL 858599 (D.S.C. Feb. 21, 2020); *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014-FL, 2020 WL 5044465 (E.D.N.C. Aug. 26, 2020).

The court held that the deposition testimony did not satisfy any of the four circumstances when it would be permissible to supplement the administrative record with extra-record materials. First, the testimony did not show that FTA failed to consider all relevant factors or failed to explain its decision. Second, although the deposition could have been used to identify whether FTA relied on documents that were not in the administrative record, the deposition testimony itself was not evidence on which FTA relied in making its decision. Third, the testimony was not necessary to explain technical terms or complex information. Fourth, the testimony did not support a showing of bad faith or improper behavior by FTA.[34]

- Post-Decision Letters Requesting SEIS. In the I-73 and Mid-Currituck Bridge cases, the courts allowed the administrative records to be supplemented with letters that the respective plaintiffs sent to FHWA requesting preparation of SEISs. In both cases, the letters were sent shortly after FHWA issued Reevaluations and decided not to prepare SEISs. The courts held that the letters were properly excluded from the administrative records because they could not have been considered by FHWA at the time it issued the Reevaluations, which represented FHWA's final decisions. The courts also found that the letters fell within an exception to this general rule, which allows for supplementation of the administrative record with extra-record evidence that could show whether the agency failed to consider relevant information. In these cases, the courts agreed to review the post-decision letters to evaluate whether FHWA failed to consider information relevant to its decisions not to prepare SEISs.[35]

Ripeness

Under the ripeness doctrine, courts will dismiss a case that is brought before the agency takes a final action that concludes its decision-making process.

- Supplementation Claim. In the I-405 Improvement Project case, the plaintiffs claimed that Caltrans should have prepared a SEIS based on proposed design changes to a stormwater drainage system for the project. The court held that the case was brought prematurely. The court explained that Caltrans had not yet decided whether to approve the proposed design changes and had not yet decided whether to prepare a SEIS for the proposed design changes. Therefore, the plaintiffs had not challenged a final agency action.[36]

[34] *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 511998 (N.D. Cal. Jan. 31, 2020), appeal filed, No 20-16842 (9th Cir.).
[35] *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, No. 2:17-cv-03412-BHH, 2020 WL 858599 (D.S.C. Feb. 21, 2020); *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014-FL, 2020 WL 5044465 (E.D.N.C. Aug. 26, 2020).
[36] *M. Westland, LLC v. California Department of Transportation*, No. 8:19-cv-01661-JVS-KES, 2020 WL 1652551 (C.D. Cal. Feb. 12, 2020).

Appendix: 2020 Court Decision in CLUE Database

The following 2020 court decisions are included in the case law summaries posted in the CLUE database on the AASHTO Center for Environmental Excellence website. The full text of the court decision is posted along with each case law summary on the CLUE website.

Highway

1. *Bair v. California Department of Transportation*, 982 F.3d 569 (9th Cir. 2020) (**U.S. 101 Project**; California).

2. *Cotz v. Gutierrez-Scaccetti*, No. 3:19-cv-22075-MAS-ZNQ, 2020 WL 1284755 (D.N.J. Mar. 18, 2020) (**SR 173 Bridge Replacement Project**; New Jersey).

3. *Delaware Riverkeeper Network v. Pennsylvania Department of Transportation*, No. 2:18-cv-04508-GEKP, 2020 WL 4937263 (E.D. Pa. Aug. 21, 2020) (**Headwaters Road Bridge Replacement Project**; Pennsylvania).

4. *Friends of Del Norte v. California Department of Transportation*, No. 3:18-cv-00129-JD, 2020 WL 1812175 (N.D. Cal. Apr. 9, 2020) (**U.S. 199/SR 197 Project**; California).

5. *Friends of Del Norte v. California Department of Transportation*, No. 3:18-cv-00129-JD, 2020 WL 4349811 (N.D. Cal. July 29, 2020) (**U.S. 199/SR 197 Project**; California).

6. *Little Rock Downtown Neighborhood Association v. Federal Highway Administration*, No. 4:19-cv-00362-JM, 2020 WL 5259385 (E.D. Ark. Sept. 3, 2020) (**I-30 Crossing Project**; Arkansas).

7. *M. Westland, LLC v. California Department of Transportation*, No. 8:19-cv-01661-JVS-KES, 2020 WL 1652551 (C.D. Cal. Feb. 12, 2020) (**I-405 Project**; California).

8. *Narragansett Indian Tribe v. Nason*, No. 1:20-cv-00576-RC, 2020 WL 4201633 (D.D.C. July 22, 2020) (**I-95 Providence Viaduct Project**; Rhode Island).

9. *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014-FL, 2020 WL 5044465 (E.D.N.C. Aug. 26, 2020) (**Mid-Currituck Bridge Project**; North Carolina).

10. *R.L. Vallee, Inc. v. Vermont Agency of Transportation*, No. 5:18-cv-00104-gwc, 2020 WL 4689788 (D. Vt. July 8, 2020), *appeal filed*, No. 20-2665 (1st Cir.) (**I-89 Exit 16 Interchange**; Vermont).

11. *Save Our Springs Alliance, Inc. v. Texas Department of Transportation*, No. 1:19-cv-00762-RP, 2020 WL 3490383 (W.D. Tex. June 26, 2020) (**Oak Hill Parkway Project**; Texas).

12. *Short v. Federal Highway Administration*, No. 1:19-cv-00285-DMT-CRH, 2020 WL 1932769 (D.N.D. Apr. 21, 2020) (**Little Missouri River Crossing Project**; North Dakota).

13. *Short v. Federal Highway Administration*, No. 1:19-cv-00285-DMT-CRH, 2020 WL 3259795 (D.N.D. June 16, 2020) (**Little Missouri River Crossing Project**; North Dakota).

14. *Sierra Club v. U.S. Army Corps of Engineers*, No. 8:20-cv-00287-CEH-JSS, 2020 WL 3268228 (M.D. Fla. Mar. 16, 2020) (**Ridge Road Extension Project**; Florida).

15. *Sierra Club v. U.S. Fish and Wildlife Service*, No. 2:20-cv-00013-SPC-NPM, 2020 WL 4815814 (M.D. Fla. Aug. 19, 2020) (**SR 29 Project**; Florida).

16. *Sierra Club v. U.S. Fish and Wildlife Service*, No. 2:20-cv-00013-SPC-NPM, 2020 WL 6161488 (M.D. Fla. Oct. 21, 2020) (**SR 29 Project**; Florida).

17. *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, No. 2:17-cv-03412-BHH, 2020 WL 858599 (D.S.C. Feb. 21, 2020) (**I-73 Project**; South Carolina).

18. *Williams v. Federal Highway Administration*, No. 1:19-cv-00631-LCB-JLW, 2020 WL 2198524 (M.D.N.C. May 6, 2020) (**East End Connector Project**; North Carolina).

Transit

19. *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 125 (C.D. Cal. June 27, 2019), *tentative ruling adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020) (**Westside Purple Line Extension Project**; California).

20. *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 149 (C.D. Cal. Aug. 20, 2019), *tentative ruling adopted as modified*, ECF No. 231 (C.D. Cal. May 18, 2020) (**Westside Purple Line Extension Project**; California).

21. *Beverly Hills Unified School District v. Federal Transit Administration*, No. 2:18-cv-00716-GW-SS, ECF No. 231 (C.D. Cal. May 18, 2020) (**Westside Purple Line Extension Project**; California).

22. *Fitzgerald v. Federal Transit Administration*, 815 Fed. App'x 548 (D.C. Cir. 2020) (**Purple Line Project**; Maryland).

23. *Friends of the Capital Crescent Trail v. U.S. Army Corps of Engineers*, 453 F. Supp. 3d 804 (D. Md. 2020), *appeal filed*, No. 20-1544 (4th Cir.) (**Purple Line Project**; Maryland).

24. *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 511998 (N.D. Cal. Jan. 31, 2020), *appeal filed*, No 20-16842 (9th Cir.) (**BART Silicon Valley Phase II Extension Project**; California).

25. *Sharks Sports & Entertainment LLC v. Federal Transit Administration*, No. 5:18-cv-04060-LHK, 2020 WL 4569467 (N.D. Cal. Aug. 8, 2020), *appeal filed*, No 20-16842 (9th Cir.) (**BART Silicon Valley Phase II Extension Project**; California).