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CLUE Case Law Database

NEPA Case Law for Highway, Transit, and Airport Projects
2021 Year in Review

March 2022

Preface

This report presents a sampling of federal court decisions issued in 2021 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. This report focuses on environmental reviews conducted by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Aviation Administration (FAA), 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.[2] For a complete listing of the 2021 court decisions on the CLUE website, refer to the appendix to this report.

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 report 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.

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[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), the Endangered Species Act, Section 404 of the Clean Water Act, Section 14 of the Rivers and Harbors Act of 1899, the Urban Park and Recreation Recovery 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 2021. The CLUE website also has year-in-review reports from 2014 through 2021. *See* https://environment.transportation.org/laws-agreements/case-law-updates-on-the-environment-clue/.

Key Holdings in 2021 Court Decisions

Alternatives

An environmental impact statement (EIS) must evaluate reasonable alternatives to the proposed action. For alternatives that the agency eliminated from detailed study, the EIS should briefly discuss the reasons for their elimination.[3] An environmental assessment (EA) also must discuss alternatives.[4] Courts generally defer to an agency's screening of alternatives if the agency's methodology and decisions are reasonable and supported by the administrative record.

- Agency's Authority and Project Applicant's Objectives. In the case involving the Obama Presidential Center, the court held that the federal agencies reasonably limited their consideration of alternatives to those over which they had control and that would meet the project applicant's objectives. In that case, the City of Chicago and a private foundation decided to locate the presidential center in a park in the neighborhood where President Obama had lived and worked. The court held that the federal agencies were not required to consider alternative locations for the presidential center. The court explained that the range of alternatives for the NEPA process was limited by the scope of the federal agencies' authority and by the city's objective of building the presidential center in that specific location: "The Center is a local project, and the federal government has no authority to fix its location. . . . The agencies must take the objectives they are given and consider alternative means of achieving those objectives, not alternative objectives."[5]

- Agency's Authority and Project Purposes. In the case involving the Mid-Currituck Bridge, the court rejected the plaintiffs' argument that the EIS should have considered an alternative that involved staggering check-in times for vacation rentals in order to reduce traffic during peak periods. The court held that the EIS adequately explained why this alternative was eliminated from detailed study: (1) it was not feasible because FHWA and the project sponsor had no legal authority to implement it, and (2) it would not meet the project purposes because it would not meaningfully reduce traffic congestion or travel times and it would not improve hurricane evacuations.[6]

- Cost Effectiveness and Public Opposition. In the case involving the Frank J. Wood Bridge replacement project, the plaintiffs argued that the EA should have considered rehabilitating the existing bridge to extend its service life by 35 years. The EA explained that the agencies had considered and eliminated this alternative because (1) it was not cost-effective compared to alternatives with a longer service life of 75 or 100 years, and (2) public comments (including from the plaintiffs) earlier in the

[3] 40 C.F.R. § 1502.14(a).
[4] 40 C.F.R. § 1501.5(c).
[5] *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758 (7th Cir. 2021).
[6] *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014, 2021 WL 5893973 (E.D.N.C. Dec. 13, 2021).

NEPA process supported rehabilitating the bridge to extend its service life by 75 years over a rehabilitation alternative with a 30-year service life. The court held that the agencies were not required to analyze this alternative in detail in the EA because they provided a reasonable explanation for rejecting it.[7]

- Multiple Screening Criteria. In the case involving the Oak Hill Parkway, the plaintiffs asserted that the EIS should have considered an additional alternative that had been eliminated because it did not have frontage roads. The Texas Department of Transportation (which was both the project sponsor and the federal lead agency under the NEPA assignment program) initially developed 12 alternative concepts and then eliminated many of them through two rounds of screening, ultimately carrying forward two build alternatives and the no-action alternative for evaluation in the EIS. The screening criteria included: ability to meet the project's purpose and need, travel times, ability to add bicycle and pedestrian elements, ability to provide transit opportunities, ability to upgrade facilities to current design standards, ability to serve as a reliable emergency response route, ability to provide detours during accidents, right-of-way requirements, displacements, impacts on transit, access modifications, and preliminary cost estimates. The court held that the EIS adequately explained the alternatives screening criteria and the reasons for eliminating alternatives from detailed study. The court also held that the EIS adequately explained why the plaintiffs' preferred alternative was eliminated: it did not have frontage roads, and frontage roads were necessary to provide acceptable local connectivity and a reliable emergency response route.[8]

- Minor Variation of Rejected Alternatives. In the case involving the Mid-Currituck Bridge, the court held that FHWA was not required to prepare a supplemental EIS to consider a new alternative suggested by the plaintiffs because that new alternative was a minor variation of other alternatives that were considered in the EIS and ultimately rejected.[9]

Impacts Analysis

Many NEPA cases involve challenges to the agency's methodology for analyzing impacts or allegations that environmental impacts were not considered in sufficient detail. Courts generally defer to an agency's methodology choices and technical analysis if the agency provided a rational explanation for its decisions.

- No-Action Alternative. In the case involving the Mid-Currituck Bridge, the court rejected the plaintiffs' challenge to the analysis of the no-action alternative. In the EIS for the project, the traffic forecasts for all alternatives (including the no-action alternative) were based on the same amount of future development, which reflected

[7] *Historic Bridge Foundation v. Chao*, 517 F. Supp. 3d 9 (D. Maine 2021).
[8] *Save Barton Creek Association v. Texas Department of Transportation*, No. 1:19-cv-00761, 2021 WL 7183951 (W.D. Tex. Sept. 13, 2021).
[9] *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014, 2021 WL 5893973 (E.D.N.C. Dec. 13, 2021).

full build-out of local land use plans. A technical report in the record also stated that full build-out of land use plans under the no-action alternative was unlikely because future traffic congestion without the project would constrain development. The plaintiffs claimed that the analysis of the no-action alternative improperly assumed the existence of the project because the traffic forecasts assumed full build-out of local land use plans. The court held that the agencies complied with NEPA with respect to the no-action alternative, explaining that the EIS adequately disclosed the underlying assumptions, responded to public concerns, and analyzed the indirect and cumulative effects of additional development induced by the project relative to the no-action alternative.[10]

- Baseline for Analysis of Impacts. In the case involving the Sacramento International Airport flight procedure amendments, the court held that FAA appropriately limited the scope of its environmental analysis to considering the incremental effects of the *amendments* to the flight procedures as compared to the existing flight procedures.[11]

- Methodology – Study Area. In the case involving the Eastgate Air Cargo Facility, the court upheld the study areas used for analyzing the project's environmental effects. The court found that the EA provided a reasonable explanation for the parameters of the study areas: they were based on the project footprint, the surrounding area that would be affected by noise, the area through which project-related traffic was expected to travel, and the air basin. Furthermore, the court noted that the plaintiffs did not articulate reasons why the study areas were inadequate for any resource topics. The court also rejected the plaintiffs' claim that the analysis was flawed because the study areas did not conform to the FAA's manual for environmental impact analysis (FAA Order 1050.1F Desk Reference), explaining that the manual was nonbinding guidance and thus FAA was not required to comply with it.[12]

- Methodology – Traffic Estimates. In the case involving the Eastgate Air Cargo Facility, the plaintiffs argued that the EA was deficient because FAA's estimate of truck trips generated by the project was different than the number of truck trips estimated in the environmental impact report that the project sponsor prepared to comply with a state environmental review law. The court held that the EA adequately explained FAA's methodology: the total number of packages arriving at the facility each day was divided by the average package size and by the number of packages that could fit in each truck. The court concluded that the plaintiffs did not demonstrate that FAA's calculations relied

[10] *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014, 2021 WL 5893973 (E.D.N.C. Dec. 13, 2021).
[11] *City of Sacramento v. Federal Aviation Administration*, No. 20-72150, 2021 WL 5150043 (9th Cir. Nov. 5, 2021).
[12] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).

on erroneous data.[13]

- Level of Detail – Construction Impacts. In the case involving the Oak Hill Parkway, the plaintiffs argued that the EIS did not adequately evaluate impacts of a concrete batch plant that would be needed during construction of the project. The court held that the EIS adequately addressed impacts of construction equipment even though it did not separately discuss impacts of the concrete batch plant. The EIS acknowledged that heavy construction equipment could be a major source of noise and that noise would be temporary and normally only during daylight hours. In addition, the EIS explained that construction equipment could cause temporary and transient air emissions, but these emissions would not have a significant impact on regional air quality. The court concluded that the EIS was not required to evaluate the specific impacts associated with the concrete batch plant separately from its analysis of impacts of construction equipment generally.[14]

- Level of Detail – Analysis of Individual Trees. In the case involving the Obama Presidential Center, the court held that the EA adequately analyzed impacts on trees and migratory birds. The EA contained a lengthy technical memorandum that identified the species, size, and health of each of the nearly 800 mature trees that would be removed. The EA also included detailed mitigation measures, which included replacing all trees that would be removed and banning tree removal during migratory bird breeding season.[15]

- Accuracy of Analysis. In the case involving the Eastgate Air Cargo Facility, the plaintiffs argued that the EA underestimated truck traffic emissions by half because the modeling was based on one-way trips, not round trips. The EA stated that FAA performed further analysis on the modeling outputs to calculate total round trip truck emissions, and that staff from the local air district reviewed the results and confirmed that FAA's calculations were correct. The court held that the plaintiffs did not demonstrate that FAA's emissions calculations and analysis were incorrect.[16]

- Cumulative Impacts – Quantified Data. In the case involving the Eastgate Air Cargo Facility, the court rejected the plaintiffs' argument that the EA should have included a quantitative cumulative impacts analysis. The court explained that a quantitative analysis is not always required; rather, a cumulative impacts analysis must include *either* quantified data or detailed information. The court held that the EA for the project provided adequately detailed information about cumulative impacts.[17]

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[13] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).
[14] *Save Barton Creek Association v. Texas Department of Transportation*, No. 1:19-cv-00761, 2021 WL 7183951 (W.D. Tex. Sept. 13, 2021).
[15] *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758 (7th Cir. 2021).
[16] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).
[17] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).

- Cumulative Impacts – Reasonably Foreseeable Future Projects. In the case involving the Obama Presidential Center, the court held that it was reasonable for the agencies to exclude the planned rehabilitation of nearby golf courses from the cumulative effects analysis. The EA explained that the golf course rehabilitation was not considered in the cumulative effects analysis because final plans and designs for the golf courses had not yet been approved. The court explained that NEPA does not require analysis of cumulative projects that cannot be meaningfully discussed.[18]

- Cumulative Impacts – Air Quality. In the case involving the Eastgate Air Cargo Facility, the court held that the analysis of cumulative air quality impacts was not required to include estimates of the combined emissions of the project and other nearby projects. The court held that it was adequate to assess cumulative impacts based on whether any of the projects individually would exceed the local air district's emissions thresholds for project-specific impacts.[19]

Environmental Assessments/Findings of No Significant Impact

An agency may prepare an EA when a proposed action is not likely to have significant environmental effects and a categorical exclusion does not apply.[20] An agency may issue a finding of no significant impact if the agency determines, based on an EA, not to prepare an EIS because the proposed action will not have significant environmental effects.[21]

- Adequacy of Mitigation to Avoid Significant Impacts. In two cases this year, courts held that EISs were not required because the projects included adequate mitigation to avoid significant environmental effects:

    - *Residential Noise Impacts.* In the case involving the Eastgate Air Cargo Facility, the court upheld the agencies' determination that residential noise impacts would not be a significant environmental effect because the project sponsor planned to acquire properties as mitigation for those noise impacts.[22]

    - *Impacts on Trees and Birds.* In the case involving the Obama Presidential Center, the court upheld the agencies' determination that replacing mature trees with saplings would be sufficient mitigation, explaining that the agencies' substantive judgment about the relative short-term and long-term impacts and benefits was entitled to deference. The court also held that the agencies' decision to restrict tree removal during migratory bird breeding season did not imply that removing the trees would significantly harm the birds, especially given that trees would be replaced and that a large portion

[18] *Protect Our Parks, Inc. v. Buttigieg*, No. 1:21-cv-02006, 2021 WL 3566600 (N.D. Ill. Aug. 12, 2021).
[19] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).
[20] 40 C.F.R. § 1501.5(a).
[21] 40 C.F.R. § 1501.6(a).
[22] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).

of the park would not be affected by the project and would continue to provide habitat for birds.[23]

- Greenhouse Gas Emissions. In the case involving the Eastgate Air Cargo Facility, the plaintiffs argued that an EIS should have been prepared because the project's greenhouse gas emissions exceeded the local air district's significance threshold. The court held that it was reasonable for the EA to conclude that greenhouse gas emissions would be negligible—and not a significant environmental effect under NEPA—because they would comprise less than 1 percent of U.S. emissions. The court also rejected the plaintiffs' argument that the EA should have assessed the project's potential to violate state laws and executive orders setting statewide greenhouse gas targets, explaining that the record suggested there was no risk of violations and the plaintiffs did not specifically articulate how the project would cause any violations.[24]

- Relationship of Significance to General Conformity. In the case involving the Eastgate Air Cargo Facility, the court upheld FAA's determination that the project's criteria pollutant emissions would not cause a significant environmental effect because the project complied with general conformity requirements, even though emissions would exceed the local air district's significance thresholds. The court also held that the EA adequately analyzed the project's potential to violate federal ozone standards by explaining the project's compliance with general conformity requirements: the EA stated that the project would not jeopardize timely attainment of the National Ambient Air Quality Standards because the local air district had notified FAA that the project's emissions were within the general conformity budget in the state implementation plan required under the Clean Air Act.[25]

- Relationship of Significance to State Environmental Review. In the case involving the Eastgate Air Cargo Facility, the plaintiffs argued that FAA should have prepared an EIS because an environmental impact report that the project sponsor had prepared to comply with the California Environmental Quality Act (CEQA) concluded that the project would have "significant and unavoidable impacts." The court rejected this argument, explaining that the finding of significant impacts under CEQA did not necessarily mean the project would have significant impacts under NEPA: "CEQA and NEPA are different statutes with different requirements."[26]

- Intensity Factors. The Council on Environmental Quality's former NEPA regulations (40 C.F.R. § 1508.27 (1978)) defined significance as based on an action's context and ten factors of intensity. Although the regulations were revised in 2020, agencies are

[23] *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758 (7th Cir. 2021).
[24] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).
[25] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).
[26] *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592 (9th Cir. 2021).

not required to apply the revised regulations to NEPA processes that began before the revised regulations took effect.[27] Thus, some cases this year involved the former regulations. In a few cases this year, courts rejected plaintiffs' claims that an EIS should have been prepared instead of an EA based on assertions that one or more of these intensity factors were present.

- *Controversy Over Costs.* One of the intensity factors is the degree to which the effects on the quality of the human environment are likely to be highly controversial.[28] In the case involving the Frank J. Wood Bridge replacement project, the court held that a dispute regarding the cost estimates for the different alternatives did not require preparation of an EIS. The court explained that controversy over the project's cost had no bearing on its environmental effects: "The relative intensity of the environmental impact of bridge replacement is the same regardless of the accuracy of cost estimates."[29]

- *Adverse Effects on Historic Resources.* Another intensity factor is the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.[30] In the case involving the Frank J. Wood Bridge replacement project, the court held that adverse effects on historic properties do not always require preparation of an EIS if the adverse effects are adequately addressed through the consultation process under Section 106 of the National Historic Preservation Act. The plaintiffs argued that an EIS should have been prepared because the existing bridge—which was listed on the National Register of Historic Places and was a contributing resource to a historic district—would be demolished. The court held that the adverse effects on the bridge did not require preparation of an EIS because historic preservation issues had been addressed through the Section 106 process: "NEPA is a procedural statute and mandatory production of an EIS would not advance the NEPA procedural interest in historic preservation beyond what the [National Historic Preservation Act] already dictate[s] in the way of procedure."[31]

Categorical Exclusions

Agencies may identify categories of actions that normally do not have significant environmental effects and therefore do not require preparation of an EA or EIS. If a categorical exclusion covers a proposed action, the agency must evaluate the action for extraordinary circumstances that may result in a significant environmental effect; if an

[27] 40 C.F.R. § 1506.13.
[28] 40 C.F.R. § 1508.27(b)(5) (1978).
[29] *Historic Bridge Foundation v. Chao*, 517 F. Supp. 3d 9 (D. Maine 2021).
[30] 40 C.F.R. § 1508.27(b)(8) (1978).
[31] *Historic Bridge Foundation v. Chao*, 517 F. Supp. 3d 9 (D. Maine 2021).

extraordinary circumstance is present and significant effects cannot be avoided, the agency must prepare an EA or EIS.[32]

- Documentation. In the case involving the Southern California Metroplex flight procedure amendments, the court held that FAA violated NEPA by failing to document any evaluation of the environmental effects of the project before it approved the project. In support of its argument that the project qualified for a categorical exclusion, FAA cited to two documents that it prepared *after* it approved the project: a 63-page Initial Environmental Review and a memo concluding that a categorical exclusion was appropriate. The court explained that post-decision documents "cannot constitute the FAA's NEPA review."[33]

- Significant Impact on Travel Patterns. FHWA's NEPA regulations (23 CFR 771.117(a)) define categorical exclusions as actions that do not have any significant environmental impacts, including no "significant impacts on travel patterns." In the case involving the I-89 Exit 16 interchange project, the plaintiffs asserted that the project would have a significant impact on travel patterns—and thus was ineligible for a categorical exclusion—because the project's purpose was to reduce congestion and improve traffic flow at the interchange. The court held that there was no evidence that the project would have a significant impact on travel patterns. The court concluded that it was reasonable for FHWA to find that congestion relief alone is not a significant impact on travel patterns.[34]

- Extraordinary Circumstances – Highly Controversial Environmental Effects. Under FAA's NEPA procedures, an extraordinary circumstance precluding application of a categorical exclusion is when a proposed action "is likely to be highly controversial on environmental grounds," meaning that "there is a substantial dispute over the degree, extent, or nature of a proposed action's environmental impacts." In the case involving the Southern California Metroplex flight procedure amendments, the plaintiffs claimed that there was a substantial dispute over the project's noise and other environmental impacts because there was significant controversy about the extent to which aircraft flew below the minimum altitudes in the existing flight procedures. The court held that FAA's application of a categorical exclusion violated NEPA because FAA did not address evidence about this dispute.[35]

- No Impacts. In the case involving the Sacramento International Airport flight procedure amendments, the court upheld FAA's reliance on a categorical exclusion because the flight procedure amendments merely reflected the renumbering of the airport's runways, and it was undisputed that these changes would have no noise or

[32] 40 C.F.R. § 1501.4(b).
[33] *City of Los Angeles v. Dickson*, No. 19-71581, 2021 WL 2850586 (9th Cir. July 8, 2021).
[34] *R.L. Vallee, Inc. v. Vermont Agency of Transportation*, No. 20-2665, 2021 WL 4238120 (2d Cir. Sept. 17, 2021).
[35] *City of Los Angeles v. Dickson*, No. 19-71581, 2021 WL 2850586 (9th Cir. July 8, 2021).

safety impact.[36]

Supplementation

A supplemental EIS is required when there are substantial changes to the proposed action relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[37]

- New Information About Project Need and Viability. In the case involving the Mid-Currituck Bridge, the plaintiffs claimed that a supplemental EIS was required due to updated traffic forecasts, development projections, and sea level rise predictions that allegedly undermined the need for the project and its viability. The court held that information about the project's need and feasibility did not require a supplemental EIS because the information did not relate to the project's environmental impacts.[38]

- New Information About Rejected Alternative. In two cases this year, courts rejected plaintiffs' claims that a supplemental EIS was required due to new information about an alternative that had been rejected.

    - In the case involving I-73, the court held that a supplemental EIS is not required when new information arises about a non-selected alternative. In that case, the plaintiff submitted expert reports that it claimed contained new information about a non-selected alternative; the court found, however, that the reports merely contained "repackaged versions of criticism" that the plaintiff had raised earlier in the NEPA process. Moreover, the court held that the "Plaintiff's argument for supplementation fails because it is premised on the reports containing new information not about the *chosen action*, but about impacts of alternatives FHWA *did not choose*. . . . If all it took to trigger a [supplemental EIS] was for a dissatisfied party to commission a study regarding a rejected or novel alternative, NEPA review would never be finished."[39]

    - In the case involving the Mid-Currituck Bridge, the court rejected the plaintiffs' claim that new information warranted a supplemental EIS to reconsider a previously rejected alternative. The court explained that a supplemental EIS was not required because the new information did not implicate the agencies' reason for rejecting that alternative. The agencies had previously rejected the alternative as infeasible because they lacked legal

[36] *City of Sacramento v. Federal Aviation Administration*, No. 20-72150, 2021 WL 5150043 (9th Cir. Nov. 5, 2021).
[37] 40 C.F.R. § 1502.9(c).
[38] *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014, 2021 WL 5893973 (E.D.N.C. Dec. 13, 2021).
[39] *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, No. 2:17-cv-03412, 2021 WL 3931908 (D.S.C. Sept. 2, 2021).

authority to implement it, and that reason remained valid despite the new information.[40]

- Consideration of Mitigation for New Impacts. In the case involving I-73, the plaintiff argued that a supplemental EIS was required because there would be additional noise impacts due to changed circumstances (new housing construction and greater forecasted truck traffic). In a reevaluation, FHWA considered these circumstances and identified additional noise impacts at residential receptors. FHWA concluded that noise barriers would not be cost-effective and that there was no other reasonable mitigation for these noise impacts. The court held that FHWA reasonably determined that the additional noise impacts were not so significant as to change the appropriate mitigation response, and therefore a supplemental EIS was not required.[41]

- Updated Wetlands Delineations. In the case involving I-73, the plaintiff argued that FHWA should have prepared a supplemental EIS because a reevaluation disclosed new wetlands impacts. The court held that the changes to aquatic resource impacts were not significant enough to warrant a supplemental EIS: while impacts increased in some areas, they decreased in other areas, and the total impacts actually decreased. Moreover, the changes were largely reflective of changes in how the wetlands were classified and delineated, rather than actual changes in the project or circumstances on the ground—such changes in the legal status of an environmental resource, as opposed to physical changes on the ground, did not constitute a changed circumstance requiring supplementation.[42]

- Uncertain Change to Project. In the case involving I-73, the court rejected the plaintiffs' assertion that a supplemental EIS was required because the agencies changed the project to potentially include tolling. The court held that a supplemental EIS was not required because FHWA had not made a final decision to authorize tolling as part of the project, and the project sponsor had not taken any steps to obtain final approval from FHWA after receiving conditional approval for tolling.[43]

NEPA Assignment

The NEPA assignment program allows states to assume the U.S. Department of Transportation's responsibilities for complying with federal environmental laws for certain

[40] *North Carolina Wildlife Federation v. North Carolina Department of Transportation*, No. 2:19-cv-00014, 2021 WL 5893973 (E.D.N.C. Dec. 13, 2021).
[41] *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, No. 2:17-cv-03412, 2021 WL 3931908 (D.S.C. Sept. 2, 2021).
[42] *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, No. 2:17-cv-03412, 2021 WL 3931908 (D.S.C. Sept. 2, 2021).
[43] *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, No. 2:17-cv-03412, 2021 WL 3931908 (D.S.C. Sept. 2, 2021).

transportation projects in the state.[44]

- Ability to Sue FHWA. In the case involving the Cortez Bridge replacement, the court held that FHWA could not be sued over projects for which it had assigned its NEPA responsibilities to a state department of transportation pursuant to the NEPA assignment program. In that case, the plaintiffs sued both the Florida Department of Transportation (FDOT) and FHWA to challenge FDOT's decision to approve the project based on a categorical exclusion. The court dismissed FHWA as a defendant because FDOT had assumed all of FHWA's responsibilities for compliance with NEPA and other environmental laws for highway projects in the state, including the Cortez Bridge replacement.[45]

[44] *See* 23 U.S.C. §§ 326, 327.
[45] *McClash v. Florida Department of Transportation*, No. 8:20-cv-00543, ECF No. 52 (M.D. Fla. May 26, 2021), *as modified*, ECF No. 62 (M.D. Fla. July 8, 2021).

Appendix: 2021 Court Decision in CLUE Database

The following 2021 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

Bair v. California Department of Transportation, No. 3:17-cv-06419, 2021 WL 3861441 (N.D. Cal. Aug. 30, 2021) (**U.S. 101**; California).

Historic Bridge Foundation v. Chao, 517 F. Supp. 3d 9 (D. Maine 2021) (**Frank J. Wood Bridge Replacement**; Maine).

McClash v. Florida Department of Transportation, No. 8:20-cv-00543, ECF No. 52 (M.D. Fla. May 26, 2021), *as modified*, ECF No. 62 (M.D. Fla. July 8, 2021) (**Cortez Bridge**; Florida).

North Carolina Wildlife Federation v. North Carolina Department of Transportation, No. 2:19-cv-00014, 2021 WL 5893973 (E.D.N.C. Dec. 13, 2021) (**Mid-Currituck Bridge**; North Carolina).

Protect Our Parks, Inc. v. Buttigieg, No. 1:21-cv-02006, 2021 WL 3566600 (N.D. Ill. Aug. 12, 2021) (**Obama Presidential Center**; Illinois).

Protect Our Parks, Inc. v. Buttigieg, 10 F.4th 758 (7th Cir. 2021) (**Obama Presidential Center**; Illinois).

R.L. Vallee, Inc. v. Vermont Agency of Transportation, No. 20-2665, 2021 WL 4238120 (2d Cir. Sept. 17, 2021) (**I-89 Exit 16 Interchange**; Vermont).

Save Barton Creek Association v. Texas Department of Transportation, No. 1:19-cv-00761, 2021 WL 3849723 (W.D. Tex. Aug. 27, 2021) (**Oak Hill Parkway**; Texas).

Save Barton Creek Association v. Texas Department of Transportation, No. 1:19-cv-00761, 2021 WL 7183951 (W.D. Tex. Sept. 13, 2021) (**Oak Hill Parkway**; Texas).

Short v. Federal Highway Administration, No. 1:19-cv-00285, 2021 WL 6805702 (D.N.D. May 11, 2021), *report and recommendation adopted*, 2021 WL 6805703 (D.N.D. June 1, 2021) (**Little Missouri River Crossing**; North Dakota).

Sierra Club v. U.S. Army Corps of Engineers, No. 8:20-cv-00287, 2021 WL 2580198 (M.D. Fla. Feb. 24, 2021) (**Ridge Road Extension**; Florida).

Sierra Club v. U.S. Army Corps of Engineers, No. 8:20-cv-00287, 2021 WL 2580299 (M.D. Fla. Apr. 16, 2021) (**Ridge Road Extension**; Florida).

Sierra Club v. U.S. Fish and Wildlife Service, No. 2:20-cv-00013, 2021 WL 4478329 (M.D. Fla. Sept. 30, 2021), *objections overruled*, 2021 WL 5634131 (M.D. Fla. Dec. 1, 2021) (**State Route 82**; Florida).

Slockish v. Federal Highway Administration, No. 3:08-cv-01169, 2020 WL 8617636 (D. Or. Apr. 1, 2020), *report and recommendation adopted as modified*, 2021 WL 683485 (D. Or. Feb. 21, 2021) (**U.S. Highway 26**; Oregon).

Slockish v. U.S. Department of Transportation, No. 21-35220, 2021 WL 5507413 (9th Cir. Nov. 24, 2021) (**U.S. Highway 26**; Oregon).

South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers, No. 2:17-cv-03412, 2021 WL 3931908 (D.S.C. Sept. 2, 2021) (**I-73**; South Carolina).

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