TRANSPORTATION RESEARCH BOARD

COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (AL050)

THE NATURAL LAWYER

Volume 13 January, 2007 Number 1

Richard A. Christopher
Editor
HDR Engineering, Chicago
Richard.Christopher@hdrinc.com

This newsletter is available by e-mail free of charge. Anyone who wishes to be added to the circulation list or would like to change an address should send a message to the Editor at the address listed above.

REMOVAL OF GRAVES FOR AIRPORT EXPANSION NOT FEDERAL ACTION UNDER RFRA

Submitted by Jim Thiel, Wisconsin DOT
Jim.Thiel@dot.state.wi.us

Proposed expansion of O'Hare International Airport required relocation of a church cemetery. Two Chicago suburbs, a church and several individuals challenged the expansion as a violation of the Religious Freedom Restoration Act (RFRA), 42 USC 2000bb, as other options were available that did not burden their sacred site of worship and belief in the physical resurrection of the bodies therein. In a 2-1 decision, the Court found FAA's approval of the City of Chicago's airport layout plan did not render Chicago's implementation of the plan a federal action burdening religious exercise implicating RFRA. FAA approved the layout plan as a major federal action under NEPA and prepared an EIS. FAA approved the alternative that allowed one, but not both potentially affected cemeteries to remain in place. FAA issued a non-binding letter of intent to provide federal funding. Relying on Supreme Court precedent, however, the Court held RFRA was unconstitutional as applied to the States and did not restrict Chicago. It further held there was an insufficient nexus between FAA approval of Chicago's layout plan, FAA's non-binding letter of intent (LOI) to provide federal funding and the actual movement of the bodies by Chicago to trigger FAA compliance with RFRA. The City was responsible for the religious burden, not FAA, and the LOI was not a final order of FAA. Petition for review of FAA action dismissed. *Village of Bensenville, et al. v. FAA and City of Chicago,* 457 F. 3d 52 (D.C. Cir. 2006)

DEMONSTRATORS ON HIGHWAY OVERPASS CAN BE STOPPED

Submitted by Jim Thiel, Wisconsin DOT
Jim.Thiel@dot.state.wi.us

Ovadal sued the City of Madison and its police officers for violating his constitutional rights of free speech and religion, 42 USC 1983. Ovadal and other demonstrators were required on more than one occasion to leave a pedestrian overpass of a Madison beltline freeway because their signs and demonstrations were causing a traffic hazard. Ovadal argued that a policy that restricts speech based on its effect on traffic is not content-neutral. There is no heckler's veto. The signs expressed opposition to homosexuality. At the time of the police action, there was no general Madison ordinance prohibiting signs or demonstrations on pedestrian overpasses of freeways. The trial court found that motorists reacted by looking up at the band of protesters and tapped on their brakes, whether in agreement or opposition, did set off a chain reaction: traffic became increasingly more dangerous, near collisions, and many drivers were left angry. The Court concluded that as a matter of law Madison's actions were content-neutral, served a compelling government interest of motorist safety, and left ample alternatives to Ovadal and others to demonstrate and express their beliefs. If the finding of fact had been that drivers were merely rabble fuming at the content of Ovadal's rabble-rousing message, the police must permit the speech and control the crowd/traffic. However, the evidence showed that on several other occasions Ovadal had been allowed to demonstrate on the freeway overpasses, had interacted with police, and had not been forced to leave because there had been no adverse effect on traffic. Subsequent passage of an ordinance prohibiting all signs and demonstrations from the freeway pedestrian overpasses made injunctive relief moot and the previous police actions were not content-based restrictions on speech. No damages, no injunction. *Ovadal v. City of Madison,* 2006 U.S. App. LEXIS 28682, No. 05-4723 (7th Cir. 2006)

FHWA/FTA ISSUE GUIDANCE ON SAFETEA-LU ENVIRONMENTAL REVIEW PROCESS GUIDANCE

Submitted by Jim Thiel, Wisconsin DOT
Jim.Thiel@dot.state.wi.us

This notice announces the availability of final guidance on the application of section 6002 of SAFETEA-LU to projects funded by FTA and FHWA, or both. Section 6002, which went into effect on August 10, 2005, adds requirements and refinements to the environmental review process for highway and public transportation capital projects. The 6002 guidance describes how the FTA and FHWA will implement the new requirements within the environmental review process required by the NEPA and other Federal laws. The final guidance is

available at the following URL: http://www.fta.dot.gov/environment/guidance/ for FTA and at http:// http://www.fhwa.dot.gov/hep/section6002/ for FHWA. Effective Date**:** November 15, 2006. 71 *Federal Register* 66576

AIRPORT LESSEE CAN RECOVER FROM U.S. FOR WARTIME CLEANUP COSTS

Submitted by Tom Roth
Law Office of Thomas D. Roth, San Francisco, CA
rothlaw1@comcast.net

Using an "implied right of contribution" theory under section 107, Raytheon Aircraft Company prevailed against the United States under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for cost contribution from the U.S. Army Corps of Engineers for World War II activities.

From 1942 through 1946, the United States Army constructed and the Army Air Corps operated the Herington Army Airfield (HAAF). During that time period, the Army Air Corps processed bombing crews and aircraft. The Army Air Corps also performed maintenance on B-29 aircraft, using volatile organic compounds and chlorinated degreasing solvents, including trichloroethylene (TCE). The Army Air Corps' employees spilled, poured and released these solvents, including TCE, onto the ground at HAAF. In 1948, the United States quitclaimed HAAF to the City of Herington, Kansas, which in turn leased portions of it to Raytheon.

In September 2004, the EPA, pursuant to CERCLA section 106, issued a unilateral administrative order (UAO) to Raytheon and the City of Herington, in which it directed Raytheon to excavate TCE-contaminated soils, even though Raytheon argued that this was in an area that was contaminated by Army activities. Raytheon filed suit to recover from the Army Corps of Engineers the costs that Raytheon incurred performing work required by EPA.

The government argued that Raytheon was precluded from recovering from any other PRPs under section 107 because any claim for contribution necessarily must be brought pursuant to section 113(f). But the government also contended that Raytheon was precluded from asserting such 113(f) claims because a UAO is not a civil action under that section.

The court held that Raytheon could not bring a claim for contribution under section 113(f)(1) because the administrative order issued by the EPA did not qualify as a civil action under that section, and that Raytheon could not bring a claim for contribution under section 113(f)(3)(B), because the EPA's administrative order was unilateral and did not constitute an administrative settlement. The court also dismissed Raytheon's claim for cost recovery under section 107(a) because it was a PRP. But the court also held that "in the unique circumstances of this case where it is precluded from seeking recovery under section 113(f), [Raytheon] does have an implied right to contribution [from the

Army] under section 107(a) despite its status as a PRP. *Raytheon Aircraft Co. v. U.S.,* 435 F. Supp. 2d 1136 (D. Kansas 2006)

AIRPORT AUTHORITY CANNOT RECOVER CLEANUP COSTS FROM PRIOR OWNER

Submitted by Tom Roth
Law Offices of Thomas D. Roth, San Francisco, CA
rothlaw1@comcast.net

The Sixth Circuit upheld a district court ruling that the Regional Airport Authority of Louisville and Jefferson County ("the Authority") could not recover costs under CERCLA against the previous property owner LFG, LCC ("LFG").

In 1988, the Authority sought to expand Louisville International Airport. As part of the runway expansion, the Authority sought to condemn hundreds of parcels of private property including the former LFG site which had been subject to heavy industrial use for 50 years. The Authority knew the area was contaminated before it proceeded with the condemnation action. Environmental studies estimated that the cost to remediate the site would cost some $9.5 million.

The Authority brought the CERCLA lawsuit against LFG and alleged two separate claims, one under section 107(a) and one under section 113. However, since a section 113 can be pursued only by those parties that have been sued, and since the Authority had not been sued, the court analyzed only the Authority's section 107(a) claim.

The Sixth Circuit concluded that the Authority had failed to establish that the release had caused it to incur “necessary costs of response” that are “consistent” with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), as a required part of the prima facie case under section 107(a). The Court ruled that the Authority's response in this case was not “necessary.” The runway construction technique controlled any likely release of the contaminant. No CERCLA liability existed where there was no presence of a threat to public health. Thus, the “response costs” and the runway construction costs were one and the same. Allowing the Authority to recoup its “response costs” would be tantamount to a reimbursement of its runway construction costs. Recovery was therefore denied. *Regional Airport Authority of Louisville v. LFG, LLC,* 460 F. 3d 697 (6th Cir. 2006)

UPDATE ON FEDERAL WETLANDS JURISDICTION
***RAPANOS* AND BEYOND**

Submitted by Peggy Strand
Venable LLP, Washington, D.C.
mstrand@venable.com

In divided opinions, in 2001 and 2006, the Supreme Court has concluded that Congress intended some limits on federal jurisdiction under the Clean Water Act, based on use of the term "navigable waters" in defining the coverage of the law. Currently, the limits of that jurisdiction are unclear, awaiting further definition by the courts or by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers in administration of the law. In sum, under governing Supreme Court precedence, wholly isolated intrastate waters or wetlands are not covered under the Clean Water Act; navigable interstate waters, non-navigable perennial tributaries and wetlands adjacent to navigable waters or non-navigable perennial waters are covered. The jurisdictional issues arise for non-navigable streams and wetlands adjacent to non-navigable waters that might be described as intermittent or ephemeral. In those instances, and perhaps others, the Supreme Court decisions have raised serious issues of the basis for federal jurisdiction.

The June 2006 Supreme Court decisions in *Rapanos v. United States* and *Carabell v. United States,* address how and when wetlands adjacent to non-navigable tributaries of navigable waters might come under federal jurisdiction. *Rapanos* involved appeal of civil enforcement actions for filling of wetlands that abutted ditches or man-made drains in which water eventually flowed to traditional navigable waters. The district court held Rapanos liable for filling without a permit, agreeing with the federal government that the wetlands at issue (four separate sites) were adjacent to tributaries of navigable waters, as described in the regulations. 33 C.F.R. 328.3(a)(7). In *Carabell*, the plaintiffs were denied a permit to fill wetlands that were separated from a man-made drainage ditch by a man-made berm. Water in the drainage ditch eventually flowed to navigable waters. The district court agreed with the government that these wetlands were within Clean Water Act jurisdiction under the regulatory standard of wetlands adjacent to a tributary. Under the regulations, "adjacent" is defined as "bordering, contiguous, or neighboring" and includes, by example, wetlands behind a man made berm. 33 C.F.R. 328.3(c). The Sixth Circuit upheld the federal government in each case. In the Supreme Court consolidated review of the two cases, the high court did not expressly set aside any part of the regulation, but did reverse the application of the regulation in the two cases.

The Supreme Court divided 4-1-4 in *Rapanos*, with a plurality and a concurring Justice agreeing that the decisions should be reversed, but failing to agree on the reasons for reversal. At issue was the statutory term, "waters of the United States", which is the definition of "navigable waters" as used in the Clean Water Act. The plurality opinion, authored by Justice Scalia (joined by Roberts, Alito, and Thomas), expressed the position that "waters of the United States" required, at a

minimum, “relatively permanent water." After reviewing prior precedent, the plurality summarized: "on its only plausible interpretation, the phrase ‘waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams [,] . . . oceans, rivers, [and] lakes.’ See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." The plurality relied on defining the word "waters" rather than the qualifiers "of the United States" or "navigable." This part of the decision addressed the kinds of water bodies that could qualify as tributaries. In addressing the matter of wetlands adjacent to tributaries, the plurality also emphasized water flow, holding that the Clean Water Act requires two findings: "First, that the adjacent channel contains a "wate[r] of the United States," (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins."

Concurring in the judgment to send both *Rapanos* and *Carabell* back to the lower courts, Justice Kennedy's separate opinion established a different standard for defining "waters of the United States." Justice Kennedy felt that to be consistent with prior Supreme Court decisions "and with the need to give the term ‘navigable’ some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." Justice Kennedy found the plurality's focus on level of water and flow "inconsistent with the Act's text, structure and purpose." Rather, the concurring opinion indicated that criteria other than water level and flow could constitute a "significant nexus" between a wetland or tributary and traditionally navigable waters, drawing on the purposes of the Clean Water Act. "Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’"

The four Justices dissenting (Stevens, Souter, Ginsberg, Breyer) would have upheld the government and its interpretation of the regulations. Justice Breyer's separate dissent, and Justice Kennedy's concurring opinion, admonished the federal agencies to promulgate regulations refining the definition of waters of the United States. Chief Justice Roberts, concurring with the plurality, also commented that if the Corps had promulgated regulations, it would have been eligible for the "generous leeway" granted by reviewing courts. He admonished the Corps for, in essence, ignoring the Supreme Court's 2001 *SWANCC* decision which explained that the federal authority was not limitless.

After *Rapanos,* the U.S. Army Corps of Engineers and the Environmental Protection Agency announced they would issue guidance for applying the decisions "soon." The guidance has not yet been issued.

In the meantime, several lower courts have address the *Rapanos* decision. In *U.S. v. Chevron Pipeline Company*, 437 F.Supp.2d 605 (N.D. Tex. 2006), the court found there was no jurisdiction under the Oil Pollution Act, which uses the same definition of "navigable waters" as the CWA, where an oil spill occurred in a dry wash. The Court reviewed the *Rapanos* opinions, but noted that Justice Kennedy's opinion did not elaborate on "significant nexus", so it was appropriate to follow Fifth Circuit precedent on what constituted a significant nexus to navigable waters. On the facts, the court concluded that the unnamed tributary, which was dry at the time of the spill and clean up, and rarely carried water, did not provide a significant nexus to navigable waters.

In contrast, in *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006), the Ninth Circuit upheld CWA jurisdiction over a pond separated from the Russian River by a berm, based on the flow of groundwater between the pond and the navigable river. Applying CWA Section 402, rather than 404, the court upheld the district court's judgment in favor of citizen suit plaintiffs who argued that the City needed a CWA permit to discharge its waste treatment sewage water into the pond. The Ninth Circuit found that the seepage of water from the pond into the river provided a significant nexus. The decision emphasized the evidence, which showed increased chloride from the pond in the river. While there was also a periodic surface connection, when the Russian River overflowed, the decision rested primarily on the fact that the sewage discharges into the pond could seep into the river.

In September, 2006, the Seventh Circuit remanded *U.S. v. Gerke Excavating*, ___ F.3d ___ (7th Cir. 9/22/06) for the trial court to address *Rapanos.* The Seventh Circuit provided some guidance, saying that Justice Kennedy's test (the concurrence) should be applied because it is the most narrow. In October, 2006, the First Circuit remanded *U.S. v. Johnson,* ___ F. 3d __ (1st Cir., 10/31/06) with a lengthy analysis of how to construe a Supreme Court plurality decision. The First Circuit decided that the United States could use either the plurality test or the concurrence test to prove jurisdiction. In November, 2006, a petition for certiorari to the Ninth Circuit was filed in *Baccarat Fremont Developers LLC v. U.S. Army Corps of Engineers* (U.S. No. 06-619) asking for review of the Ninth Circuit's decision not to reconsider its 2005 decision upholding jurisdiction where the alleged tributary connection involved man-made ditches and man-made berms.

FHWA ISSUES GUIDANCE ON MAJOR PROJECTS

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

SAFETEA-LU included a provision that altered the definition of Major Projects and established the requirement that a Project Management Plan (PMP) be completed. On January 27, 2006, the Federal Highway Administration (FHWA) issued interim guidance.

SAFETEA-LU reduced the monetary threshold for triggering major project status from an estimated total cost of $1 billion to $500 million. To determine whether the $500-million threshold is met, FHWA will examine the cost set forth in the ROD or final environmental determination, with cost-basis dependent on the defined scope of the project. NEPA projects may be excepted even when the threshold is met "if the 'NEPA-defined' project scope is comprised of distinct and operationally independent elements," such as "non-concurrent" phases of construction or projects not fully dependent on other NEPA-approved projects. FHWA, in conjunction with the Major Project Team, will make determinations with careful judgment and an appreciation for delivery, cost, and deadlines.

PMP's now must be completed for all Major Projects. Conceptually, the PMP serves as roadmap to ensure efficient and effective completion within budgetary limits and defines the roles and responsibilities of the involved parties. Prepared by the State Transportation Agency and reviewed by the FHWA Division Office, the PMP will be a living document subject to revisions for effective management. Revisions will occur "prior to issuing the environmental decision, prior to authorization of Federal-aid funds for right of way acquisition, and prior to authorization of Federal-aid funds for construction." Perhaps most important, prospective NEPA-applicants should consider PMP requirements effective immediately using the current guidance on the FHWA Major Project Web site (http://www.fhwa.dot.gov/programadmin/mega/megaiii.htm), with updates forthcoming. *See* http://www.fhwa.dot.gov/programadmin/mega/012706.cfm.

CEQ PROPOSES GUIDANCE ON CATEGORICAL EXCLUSIONS

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

On September 14, 2006, the Council on Environmental Quality (CEQ) issued guidance on "Establishing, Revising, and Using Categorical Exclusions Under the National Environmental Policy Act."

CEQ first addressed the methods for substantiating new CE's, including examining the elements of the CE, gathering the information necessary to substantiate the CE, and refining proposed CE's. In considering whether a CE has the necessary elements, CEQ recommends defining any physical factors

(i.e., distance) and environmental factors (i.e., particular seasons in habitat areas or regional limitations) that limit the use of the CE. CEQ proposes that agencies substantiate CE's with information gathered by evaluating an agency's implemented actions, such as comparing pre- and post-CE data or using adaptive management (Environmental Management Systems), by conducting impact demonstration projects that adequately replicate the proposed environmental and operational conditions, by consulting expert opinion and scientific analyses; and by benchmarking public and private entities experience, provided the actions are adequately similar in methodology, characteristics, frequency, standards, and environmental settings. Although public comment is not required, CEQ recommends that agencies go further than mere notice publication in the Federal Register requesting comment. Specifically, CEQ advises that notice shall include the proposed CE and its text, a history and summary of agency rationale, as well as definitions and explanations of extraordinary impacts and cumulative impacts.

Despite "strongly discourage[ing] procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded," CEQ now advises that when an existing CE will be used, "[e]ach Federal agency should decide if a categorical exclusion determination warrants preparing additional paperwork." Circumstances warranting documentation occur when "there are reasonable questions regarding the existence of extraordinary circumstances" that may potentially call the CE into question. In such circumstances, the agency should demonstrate how much the action resembles the class of actions in the CE and whether any extraordinary circumstances would remove the action from the CE.

See http://ceq.eh.doe.gov/ntf/Proposed_CE_guidance_91406.doc; 71 *Fed. Reg.* 54816 (Sept. 19, 2006 request for comments).

CEQ PROPOSES GUIDANCE ON ALIGNING EMS WITH NEPA

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

On July 17, 2006, CEQ announced that it was accepting comment on a proposed guide for aligning Environmental Management Systems (EMS) with NEPA. The proposed guide, "Aligning the Complementary Processes of Environmental Management Systems and the National Environmental Policy Act," was developed to assist agencies in recognizing the complementary relationship between EMS and NEPA, as well as integrating EMS into section 101 and 102 of NEPA and integrating the requirements of NEPA into the establishment and maintenance of EMS.

"An [EMS] is a structure of procedures and policies used to systematically identify, evaluate, and manage environmental impacts" sometimes on a week-to-

week or month-to-month basis. In general, CEQ envisions the EMS-inherent framework for monitoring and improving environmental performance as a means to implement, track, and monitor commitments and mitigation measures in NEPA decisions. EMS practices will also assist in training, internal auditing, problem-solving, and communications with interested parties, especially the public.

CEQ believes that EMS will cure the problem of case-by-case decision making inherent in the NEPA process because EMS addresses all environmental impact, as opposed to just "significant" impact, and seeks to continually minimize impact. EMS also eases agencies' burden in gathering information for conducting a NEPA analysis because a pre-existing EMS would provide a platform of information from which the NEPA process could begin. The data provided from continuous monitoring would also improve the predictions of environmental impact needed for any NEPA documentation. EMS can also assist agencies in updating and adjusting impact measurements throughout the process. Finally, according to CEQ, "adaptive management," a component of EMS which allows for necessary adjustments, would greatly aid agencies in the NEPA process where the impacts or outcome of a project are uncertain or where effectiveness of a mitigation technique is in question.

See http://ceq.eh.doe.gov/ntf/Proposed_NEPA_EMS_Guide_for_FR.pdf; 71 *Fed. Reg.* 40520.

NEVADA'S CLAIMS ON NUCLEAR WASTE TRANSPORT NOT RIPE

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

On August 8, 2006, the United States Court of Appeals for the District of Columbia Circuit denied the State of Nevada's petition for review of the FEIS and that portion of the ROD issued by the Department of Energy (DOE) governing the transportation of nuclear waste from production sources to an underground repository to be built at Yucca Mountain, Nevada. The FEIS analyzed truck and rail alternatives as means to transport the waste to Yucca, designated the rail scenario as DOE's preferred alternative, and reviewed two options by which the waste would be transported by rail to Yucca. The first option was to construct an intermodal transfer station at a point on the main rail line where the waste would be transferred from rail cars to trucks. The second option was to build a branch line from the main line to Yucca. The FEIS identified five corridors for the branch line. The DOE issued a ROD that identified the rail option as DOE's choice for transporting the waste, provided for construction of a branch line through the Caliente Corridor, and noted that, if the repository became active before the branch line was completed, waste would be transported to Nevada by rail and subsequently transferred to trucks at an intermodal transfer station on the main rail line for delivery to Yucca (hereinafter "the interim transportation plan").

Among other claims, Petitioner alleged that DOE's adoption of the interim transportation plan was arbitrary and capricious and required DOE to prepare an SEIS, and that the selection of the Caliente Corridor without approval of the Surface Transportation Board (STB) was improper. The court rejected Petitioner's claims regarding the interim transportation plan and STB as unripe. The court stressed that the ROD was clear on its face that the interim transportation plan was provisional in nature and not DOE's final determination on the issue, and therefore, the plan was unripe for review. As to the STB, the court determined that Petitioner's claim was speculative because STB's jurisdiction would be triggered only if DOE were to operate the branch line as a common carrier, which DOE had not yet decided to do. Finally, the court rejected Petitioner's remaining NEPA claims, finding that (i) DOE requested comments from the Nevada State Engineer and made copies of those comments available to the President, CEQ, and the public in a manner consistent with NEPA's implementing regulations; (ii) DOE's failure to identify the Caliente Corridor as its preferred alternative in the FEIS was harmless error because the public had sufficient information to comment on the Caliente Corridor; (iii) DOE acted within its discretion in utilizing a tiered approach, rather than a single EIS, to determine rail corridor selection and alignment; and (iv) DOE's analysis of the environmental impacts of rail corridor selection in the FEIS was adequate. *State of Nevada v. Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006).

TRANSPORTATION CONFORMITY REGS STRUCK DOWN, UPHELD

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

On October 20, 2006, the United States Court of Appeals for the District of Columbia Circuit granted in part petitioners' motion for review of three sets of regulations promulgated by EPA governing how states are to bring their transportation plans into conformity with the requirements of the Clean Air Act (the Act). As an initial matter, the court agreed with EPA that it did not have jurisdiction to review petitioners' challenge to 40 C.F.R. §§ 93.118(b), (d), and (e)(6) because petitioners did not file their petition for review of this regulation within the statutorily-prescribed time period of 60 days and rejected petitioners' arguments that (i) they filed a petition for EPA to amend this regulation, and (ii) EPA created an opportunity for renewed comment on and objection to this regulation. Under D.C. Circuit caselaw, either of petitioners' arguments, if correct, would have been an independent cause for the court to hear their challenge notwithstanding the fact that petitioners failed to file their petition for review within the statutorily-prescribed time limit.

The second set of regulations at issue, 40 C.F.R. § 93.109(e)(2)(v), establish interim tests in place of current SIP's for demonstrating conformity to newly-revised ground-level ozone NAAQS. Petitioners argued that this set of regulations violated the Act's requirement that transportation plans conform to an

approved SIP. EPA countered that the interim tests were more stringent than vehicle emissions budgets in the approved SIP's that are based on previous NAAQS, and therefore, the interim rule was justified. The court rejected EPA's arguments, finding that the Act does not provide for interim tests, but rather, requires that current SIP's remain in force until EPA grants formal approval to a revision. As a result, the court granted the parties' petition for review, held that 40 C.F.R. § 93.109(e)(2)(v) was unlawful, and remanded this section for the EPA to align the regulation with the Act.

The third and final set of regulations at issue, 40 C.F.R. §§ 93.119(b)(2)(d) and (e), provide that in certain non-attainment areas a conformity determination may be made using one of two interim tests. Under the build/no build test, if the total emissions in the area will remain the same whether an MPO builds or does not build the project in question, the project will be deemed conforming. Under the baseline year test, a plan or project conforms to the Act if the total emissions from an area, including emissions added by the proposed plan, will not exceed emissions limitations set in prior years (i.e., baseline years). According to petitioners, the Act requires that every transportation plan must result in mobile source emission reductions to show conformity to a SIP. Therefore, allowing an MPO to use only the build/no build test in any non-attainment area violates the Act because in some circumstances, that test allows transportation plans that do not reduce mobile source emissions to be deemed conforming. The court rejected petitioners' argument, finding that while the Act states that SIPs must reduce emissions, it is silent as to whether transportation plans, which are only one part of a SIP, must reduce emissions. The court agreed with EPA that in cases where a SIP could lower total overall emissions by reducing stationary source emissions while leaving mobile source emissions unchanged, the build/no build test would conform to a SIP's purpose of reducing overall emissions. Thus, the court denied the parties' petition to review 40 C.F.R. §§ 93.119(b)(2)(d) and (e). *Environmental Defense, et al. v. Environmental Protection Agency, et al.,* 2006 U.S. App. LEXIS 26000 (D.C. Cir. Oct. 20, 2006).

FHWA/FTA ISSUE 4F NPRM ON "FEASIBLE AND PRUDENT" AND *DE MINIMIS*

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

Section 6009(b) of SAFETEA-LU required USDOT regulations clarifying "the factors to be considered and the standards to be applied" in making Section 4(f) findings. On July 27, 2006, FHWA and FTA issued a joint notice of proposed rulemaking modifying the procedures for granting Section 4(f) approval. Section 6009(a) also simplified compliance where impacts to Section 4(f) properties from a proposed highway or transit project are determined to be non-adverse and

insignificant; *i.e., de minimis*. FHWA and FTA promulgated *de minimis* guidance on December 13, 2005, also incorporated in the above rule.

The primary benefit of the new rule is clarification and reorganization of existing code provisions, by revising confusing language and codifying Section 4(f) regulations separately from the agencies' NEPA regulations (yet with "continue[d] integrated implementation" of the two statutes). Substantively, the proposed rule adopts a holistic balancing approach that may render an alternative not "feasible and prudent" where impacts to non-Section 4(f) properties are "severe in nature and not easily mitigated." That is, Section 4(f) properties need not be avoided at all costs; rather, comparisons should be "in context," with a "sliding scale" approach to relative harms (with a "thumb on the scale" in favor of the Section 4(f) property). Seven factors are listed for this inquiry, based on agency experience and case law, including consistency with the stated purpose and need and "extraordinary" additional costs. Considered harms to non-Section 4(f) properties also need not be "unique." The proposed rule also sets forth eight factors to consider where all feasible and prudent alternatives will use Section 4(f) property. It also formalizes several statutory and "common-sense" use exceptions where Section 4(f) does not apply, including where recreational activities are permitted on rights-of-way formally reserved for future transportation use.

The proposed rule also defines "*de minimis* impact" and applicable procedures, incorporating the earlier interagency guidance. In essence, a FHWA or FTA *de minimis* finding, combined with a written concurrence by the responsible official(s) with jurisdiction over the resource and appropriate public involvement, renders the Section 4(f) evaluation process complete and further analysis of avoidance alternatives unnecessary. The FHWA Division Administrator or FTA Regional Administrator must ultimately ensure that the *de minimis* finding and concurrences are "reasonable," considering the supporting facts, compiled record, and "his or her own best judgment." All projects are eligible for *de minimis* findings, regardless of required NEPA document type. Notably, *de minimis* findings must be made for each individual Section 4(f) resource, rather than a project as a whole (associated concurrence and procedural requirements may be consolidated, however). Also, positive mitigation measures must be considered; while enhancing the likelihood of a *de minimis* finding, such mitigation becomes binding on the project sponsor.

Distinct (yet similar) *de minimis* requirements apply to historic properties and other Section 4(f) areas. For historic properties, the required NHPA Section 106 process (see 36 C.F.R. Part 800) must result in a determination of "no adverse effect" or "no historic properties affected; for parks, recreation areas, and wildlife and waterfowl refuges, the standard is "does not adversely affect the activities, features, and attributes that qualify the resource for protection under Section 4(f)." Written concurrence (though by different entities) and a further FHWA or FTA *de minimis* notice of intent are common to both area types. The provisions

for public involvement do differ. No separate public review process is necessary where NEPA documents are required, as NEPA-specific requirements will in most cases be sufficient to satisfy the public involvement requirement of a *de minimis* finding. Yet, where no NEPA documents are required (*e.g.*, categorical exclusions), separate public notice and comment (and inclusion of same in the administrative record) is necessary except for historic properties, where only Section 106 consulting parties' views must be considered. Finally, *de minimis* impact findings only satisfy Section 4(f), and other federal requirements applicable to such land must be independently met.

The *de minimis* guidance will be incorporated in a future version of the FHWA Section 4(f) Policy Paper (adhered to by FTA). FHWA and FTA will also prepare an initial three-year study report on the *de minimis* implementation process. The deadline for public notice and comment on the proposed rulemaking passed on September 25, 2006; several comments have been and continue to be submitted. There is no set date for further agency action. The *de minimis* guidance is available at: http://www.fhwa.dot.gov/hep/qasdeminimus.htm. The docket number for the notice of proposed rulemaking is FHWA-05-22884; 71 *Fed. Reg*. 42615.

Editor's Note: With a sliding scale and a "thumb on the scale," this rule could be the kind that only a lawyer could love.

NEW MERRITT PARKWAY INTERCHANGE FAILS 4F SCRUTINY

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

On March 31, 2006, the U.S. District Court for Connecticut held that the administrative record for a planned interchange project on the historic Merritt Parkway (MP) failed to demonstrate that FHWA and the Connecticut Department of Transportation (ConnDOT) complied with requirements to minimize harm to several Section 4(f) resources within the project area. The project was designed to improve traffic flow and safety along the MP by creating an interchange with full access in all directions between the MP and U.S. Route 7. The final EA analyzed only one build alternative and did not discuss how different designs for the project might vary impacts to the MP resources.

While the Court acknowledged the inherent difficulty of reconciling the public interest in a safer and more convenient MP with the public interest in preserving a historic resource, it found that increased costs to taxpayers to complete the needed interchange project were outweighed by the need to prevent irreparable harm to historic and natural resources. Specifically, the Court held that FHWA did not include "all possible planning to minimize harm" to the MP under Section 4(f)(2) (plaintiffs conceded that there was no full-avoidance prudent and feasible alternative).

Under the applicable deferential standard of review, the Court explained that it could rule in FHWA's favor if the administrative record tied FHWA's decision to facts showing that: (1) the feasibility and prudence of alternative construction designs with less impact on the Merritt Parkway had been evaluated; and (2) mitigation measures compensating for residual impacts had been complied with to the extent feasible. The administrative record failed both prongs. The Court found no indication that FHWA conducted more than a superficial analysis under Section 4(f)(2). In particular, the record lacked a detailed analysis of the Section 4(f) resources that would be impacted by the project, how different options for the design of the project would minimize impacts to the resources, and specific mitigation measures that would be implemented. The record also lacked any indication that FHWA followed up on commitments it made to analyze these impacts and implement appropriate minimization and mitigation measures. The Court noted that it "may not scour the record to reach conclusions that FHWA itself may or may not have made." The Court did not decide plaintiffs' related NEPA and NHPA claims instead ordering FHWA to take them into account on remand.

The Court also allowed ConnDOT to supplement the administrative record with documents from its own files, because they were created contemporaneously with documents in FHWA files and the record must contain all documents considered by the decision-maker, whether or not located in the files of the state partner agency. *Merritt Parkway Conservancy v. Mineta*, 424 F. Supp. 2d 398 (D. Conn. 2006)

BOSTON BACK BAY T STATION COMPLIES WITH ADA, 4F

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

During upgrades to Boston's Copley Square transit station to comply with the Americans with Disabilities Act (ADA), FTA and the Massachusetts Bay Transit Authority (MBTA) planned the installation of two elevators near the historic Boston Public Library and Old South Church, both within the Back Bay Historic District. The First Circuit examined the legality of that proposal under the ADA, the National Historic Preservation Act (NHPA) and Section 4(f) of the Department of Transportation Act. The court found that the proposal conformed with the ADA and sections 106 and 110(f) of the NHPA. It then turned to FTA's explanation for placement of the inbound elevator on 4(f) property, which was that no prudent alternative location existed. FTA argued that moving the elevator "would have created a segregated handicap entrance and [therefore] violate ADA regulations." The First Circuit held that FTA's rationale was neither arbitrary nor capricious and this should be upheld. The court also addressed the outbound elevator, which was not planned to be placed on 4(f) property but alleged by the Plaintiffs to constructively use 4(f) property. The court rejected that argument,

holding that there could be no constructive use in light of the NHPA Section 106 finding of "no effect." *Neighborhood Assoc. of the Back Bay v. FTA*, 463 F.3d 50 (1st Cir. 2006).

CUMULATIVE IMPACTS ANALYSIS FOR LNG DEEPWATER PORT OK'ED

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

On June 8, 2006, the Fifth Circuit Court of Appeals upheld the cumulative impact analysis DOT performed for a liquefied natural gas (LNG) deepwater port. At the time of DOT's analysis, the Agency had received applications for five other similar facilities. Nevertheless, DOT limited its cumulative impact analysis to the two facilities of the five for which there was already "an approved public draft NEPA document." DOT stressed that it only had to review "reasonably foreseeable" impacts under its cumulative impacts analysis. Under this standard, the Agency argued the line it drew was reasonable because it was too difficult to determine what the other three projects would look like once they were built, if they were built at all. The court agreed, noting several different events which could affect the eventual outcome of those projects. *Gulf Restoration Network v. DOT*, 452 F.3d 362 (5th Cir. 2006)

NRC EIS ON SPENT NUCLEAR FUEL MUST CONSIDER TERRORISM

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

The Ninth Circuit, in a highly controversial decision, rejected the position of the Nuclear Regulatory Commission (NRC) that NEPA does not require consideration of the environmental effects of a potential terrorist attack on a proposed interim storage facility for spent nuclear fuel. NRC had argued that "(1) the possibility of a terrorist attack is far too removed from the natural or expected consequences of agency action; (2) because the risk of a terrorist attack cannot be determined, the analysis is likely to be meaningless; (3) NEPA does not require a 'worst-case' analysis; and (4) NEPA's public process is not an appropriate forum for sensitive security issues." The court rejected all of these arguments, noting that, as to the first, NRC was undertaking a "'top to bottom' security review against this same threat." On the second, the court reasoned that, among other things, "[t]he numeric probability of a specific attack is not required in order to assess likely modes of attack, weapons, and vulnerabilities of a facility, and the possible impact of each of these on the physical environment, including the assessment of various release scenarios. Indeed, this is precisely what the NRC already analyzes in different contexts." As to the third, the court stated that examining the risk of a terrorist attack was not the same as a worst-case scenario. Finally, the court ruled that "[t]here is no support for the use of security concerns as an excuse from NEPA's requirements." *San Luis Obispo*

Mothers For Peace v. Nuclear Regulatory Commission, 449 F.3d 1016 (9th Cir. 2006).

LAS VEGAS TOXIC HIGHWAY EMISSIONS SUIT SETTLED

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild,Venable, LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

Analyzing mobile source air toxics (MSAT's) under NEPA was at the heart of litigation over the proposed expansion of highway US 95 in Las Vegas, Nevada. The District Court had upheld the FHWA analysis, concluding that there was insufficient data and no accepted methodology for undertaking a comprehensive risk assessment of MSAT's for an individual road project. However, the Ninth Circuit enjoined construction of the project pending appeal. The parties settled the lawsuit while the case was on appeal, with some of the elements of the settlement having local, and others national, implications. Locally, NDOT agreed to monitor for MSAT's and MSAT filtration at three schools, assist in the relocation of certain modular classroom and play structures at another school, contribute to the redesign of a third school (to minimize MSAT exposure), and help reduce diesel emissions from school buses. Nationally, FHWA agreed to a major study of MSAT emissions at five locations across the country. This national study will analyze MSAT emission, transport, and dispersion and, given the current lack of information on these subjects, the new information obtained will almost certainly be significant. A copy of the settlement agreement is available at http://www.sierraclub.org/environmentallaw/downloads/us95settlementagreement_appendix.pdf; See also *Sierra Club v. U.S. Department of Transportation*, 310 F. Supp. 2d 1168, 1201 (D. Nev. 2004)

NEW RULE AND GUIDANCE ON CONFORMITY HOT SPOT ANALYSIS

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
Fwagner@bdlaw.com and lmrothschild@venable.com

On March 10, 2006, EPA issued a rule establishing the conformity criteria and procedures for determining the projects that receive hot spot analysis in PM2.5 and PM10 non-attainment and maintenance areas. 71 *Fed. Reg*. 12468. On March 29, DOT and EPA issued guidance to help implement that rule. The guidance stresses that it outlines how to conduct a qualitative analysis and that quantitative analysis is not required until "appropriate methods and modeling guidance are available." Analysis in both PM2.5 and PM10 areas is only required for "projects of air quality concern." These are defined at 40 C.F.R. 93.123(b)(1) as:

- New or expanded highway projects that have a significant number of or significant increase in diesel vehicles;

- Projects affecting intersections that are at Level-of-Service D, E, or F with a significant number of diesel vehicles, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes from a significant number of diesel vehicles related to the project;
- New bus and rail terminals and transfer points that have a significant number of diesel vehicles congregating at a single location;
- Expanded bus and rail terminals and transfer points that significantly increase the number of diesel vehicles congregating at a single location; and
- Projects in or affecting locations, areas, or categories of sites which are identified in the PM10 or PM2.5 applicable implementation plan or implementation plan submission, as appropriate, as sites of violation or possible violation.

The guidance provides two examples of how to undertake the qualitative analysis: comparison to another location with similar characteristics and air quality studies for the proposed project location. Factors to be considered include air quality; transportation and traffic conditions; the built and natural environment; meteorological, climactic and seasonal data; and retrofit, anti-idling or other adopted control measures. The analysis also requires fairly extensive documentation, listed in Section 4.2 of the guidance (on page 18). The guidance is available at http://www.epa.gov/otaq/stateresources/transconf/policy/420b06902.pdf.

FHWA ISSUES GUIDANCE ON SAFETEA-LU NEPA 180 DAY STATUTE OF LIMITATIONS

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

As part of its November 2006 SAFETEA-LU guidance, FHWA issued detailed guidance on application of the new statute of limitations. SAFETEA-LU Section 6002 created a 180-day statute of limitations for claims against most DOT projects. This limitations period only applies, though, if notification of the limitations period is published in the *Federal Register*. As a result of differences between the FHWA and FTA programs, the agencies developed different implementation processes. FHWA's detailed guidance covers almost 40 pages and provides guidance and sample forms. Among the topics covered are:

- what if the federal law under which the action is taken sets a different length of time for filing an appeal;
- which federal agency actions are included under the "permit, license, or approval" language of 23 U.S.C. §139(l);
- how FHWA determines whether a decision is "final" within the meaning of the SOL provision;
- what is required for the notice to apply to claims under federal laws other than NEPA;

- whether assignment of categorical exclusion (CE) responsibilities under SAFETEA-LU Sections 6004 or 6005, or assignment of other environmental responsibilities under Section 6005, changes the process for the use of the limitation on claims provision;
- if a federal agency can publish a SOL notice for a project that has no federal funding, but does require decisions by federal agencies as part of its permitting or review process;
- whether the SOL provision applies to permits, licenses, or approvals issued by state agencies that administer other federal programs, such as the Floodplain Permit program;
- whether the limitation on claims process can be used for tiered EIS's.;
- what information should be included in a SOL notice;
- how publication of SOL notices should be timed if Section 404 or other permits or approvals remain outstanding as of the date of the FHWA ROD, FONSI, or documented CE;
- how the SOL notice provision applies to a supplemental environmental impact statement;
- who pays for the notices.

This guidance is available at www.fhwa.dot.gov/hep/section6002/section6002.pdf and can also be found at http://www.fhwa.dot.gov/hep/section6002/appx.htm#Toc148770638.

EPA AND FHWA RELEASE MOBILE SOURCE AIR TOXIC PROPOSALS AND GUIDANCE

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

In February, FHWA and EPA released new guidance and proposed regulations, respectively, addressing mobile source air toxics (MSAT's) – FHWA on February 3, 2006 and EPA on February 28, 2006. FHWA's guidance attempts to describe how to assess MSAT impacts in NEPA documents. In so doing, FHWA divides projects into three categories, those with "no potential" for MSAT effects; those with a "low potential"; and those with a higher potential. The first category is to receive no MSAT analysis at all, the second will get a qualitative analysis, and the third a quantitative analysis. The qualitative analysis describes the general information about MSAT's, while the quantitative analysis attempts to project the volume of MSAT's attributable to the specific project (e.g., new road, new lanes) under consideration. The types of projects FHWA places in the "no potential" category include those that are categorically excluded from NEPA review, those exempt from CAA conformity requirements and "other projects with no meaningful impacts on traffic volumes or vehicle mix." Projects in which the planned roadway will have traffic levels lower than 140,000-150,000 annual average daily traffic fall into the second category; higher traffic volumes place a project in the third category.

For many years, EPA has been addressing MSAT's on two regulatory tracks: one concerning fuels/engines and one directly addressing MSAT's. EPA concludes in its new rule that existing regulation of diesel fuel, in conjunction with its proposed regulations for gasoline will "reduce exposure and predicted risk of cancer and non-cancer health effects, including in environments where exposure and risk may be highest, such as near roads, in vehicles, and in homes with attached garages." Nevertheless, the proposed regulations take some steps to further limit MSAT emissions. This proposal involves limiting the average annual benzene content of gasoline and setting hydrocarbon emissions standards for gas cans that would reduce evaporation, permeation, and spillage from these containers. It also includes standards to limit the exhaust hydrocarbons from passenger vehicles during cold temperature operation and evaporative hydrocarbon emissions standards for passenger vehicles. To date, EPA has not proposed to establish ambient standards for any MSAT. FHWA's guidance is available at http://www.fhwa.dot.gov/environment/airtoxic/02036guidmem.htm.

PROPOSED RULE LINKS TRANSPORTATION PLANNING AND NEPA

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

The Proposed Rule for Statewide Transportation Planning and Metropolitan Transportation Planning was published in the *Federal Register* on June 9, 2006. One purpose of the proposed rule is to link the transportation planning and National Environmental Policy Act (NEPA) processes. Although they sometimes overlap, it is important to emphasize that the planning process is not NEPA compliance. The products of the transportation planning process can be supplemented by other information in an environmental impact statement or environmental assessment to meet NEPA requirements; however, the intent is not to require NEPA studies in the transportation planning process. Consistent with NEPA, the purpose and need statement should be a statement of a transportation problem, not a specific solution. The transportation planning process can be utilized to develop the purpose and need in several ways. Under certain conditions, the NEPA process can be initiated in conjunction with transportation planning studies. As early as possible in the transportation planning stage of a project, a consideration of alternatives should take place that will later become an integral part of the NEPA process. Alternatives that remain "reasonable" after the planning level analysis must be addressed in the environmental impact statement, even when they clearly are not the preferred alternative.71 *Fed. Reg*. 33510 (June 9, 2006).

PRIOR RULING STOPPING WHITE HOUSE LISTED VERMONT HIGHWAY PROJECT UPHELD

Submitted by Fred Wagner, Beveridge & Diamond and
Lowell Rothschild, Venable LLP, Washington, D.C.
fwagner@bdlaw.com and lmrothschild@venable.com

In 2004, a District Court in Vermont ordered that the FHWA violated NEPA by approving segments of a proposed circumferential highway extending approximately 15.8 miles in northwest Vermont. In 2006, the FHWA moved to alter or amend the District Court's Order that the project relied on FHWA's adoption of an unchanged 1986 FEIS that inadequately examined cumulative impacts and did not provide adequate justification for the use of Section 4(f) properties. FHWA argued that the Order was premature because FHWA's adoption of the FEIS did not authorize any further action, that the Court's analysis of cumulative impacts was in error, and that the District Court's findings on secondary agricultural impacts were in error. The court rejected all FHWA arguments. It found that the Order was not premature because the FEIS was unconditionally approved and there was no indication that the Section 4(f) analysis would be subject to additional review. It reiterated that the agency did not take a "hard look" at cumulative impacts. The FEIS had assumed land use regulation would control agricultural land conversion, but a subsequent Ag Land Study concluded that land use regulation alone would not be effective The court held that publication of secondary agricultural impacts should not be buried in a technical report or in state land use regulations post-EIS. Finally, the court repeated its earlier analysis that shortcomings in the agency's cumulative impacts and secondary agricultural impacts analysis warranted the conclusion that the FHWA failed to comply with NEPA. *Senville v. Peters*, 2006 U.S. Dist. Lexis 50789 (D. Vt., July 20, 2006).

ALL DISCHARGES NEED SECTION 401 CERTIFICATION

Submitted by Richard Christopher
HDR Engineering, Chicago
Richard.Christopher@hdrinc.com

The operator of five hydroelectric dams applied for a renewal of his FERC licenses. The dams are all located on the Presumpscot River in southern Maine. Each dam impounds water, runs the water through turbines, and returns it to the river. Section 401 of the Clean Water Act requires each applicant for a Federal license to obtain a certification from the State that indicates that any discharge associated with the license will comply with State water quality standards. In each case the State of Maine required that the applicant maintain a minimum flow in the river and allow passage for fish and eels. The applicant objected and claimed that he should not be required to obtain a certification unless he was adding a pollutant to the discharge. A unanimous US Supreme Court disagreed with the applicant. The Court held that the plain meaning of "discharge" should be applied which covers all discharges regardless of whether they include any

change to the affected waters. *S.D. Warren Co. v. Maine Board of Environmental Protection, et al.,* 547 U.S. ___, 126 S. Ct. 1843, 164 L. Ed. 2d 625 (2006)

SURFBOARD APPROVAL OF RAIL EXTENSION INTO POWDER RIVER BASIN UPHELD

Submitted by Richard Christopher
HDR Engineering, Chicago
Richard.Christopher@hdrinc.com

The Dakota, Minnesota and Eastern Railroad (DM&E) has been attempting to build a 280 mile extension of its rail system to reach the coal reserves in the Powder River Basin in Wyoming. In a previous decision the Eighth Circuit remanded the EIS/ROD for additional documentation on noise mitigation and the secondary impacts of increased coal combustion. In a new decision, the Court reviewed renewed objections on the same subjects and on alternative alignments based on acquisition of additional lines by DM&E. The Court concluded that DM&E's acquisitions of other lines did not create alternatives to the routing that had been selected for the coal trains, that there were other ways to establish quiet zones through municipalities, that there were problems with noise walls, and that the use of a computer model satisfied the need to analyze the secondary effects of increased coal combustion. *Mayo Foundation v. Surface Transportation Board,* 8th Circuit No. 06-2031, 2032, 2047, 2048; December 28, 2006

COMMITTEE CHAIR'S CORNER

Submitted by Peggy Strand
mstrand@venable.com

I hope to see many of you at the Transportation Research Board Annual Meeting, January 21-24, 2007. If you are attending the Annual Meeting, please join your colleagues at the Legal Resources Group reception in the Marriott, Truman Room, Tuesday January 23 at 6:00 p.m.

The Environmental Issues in Transportation Law Committee will meet Monday, January 22, 2007, 3:45 to 5:30 p.m. in the Marriott Hotel. The Agenda for the meeting will include the following:

I. Introduction
II. Committee Membership
III. Committee Description
IV. *The Natural Lawyer,* revived
V. July Legal Workshops
VI. TRB Information Update
VII. Open Forum

Regards for the New Year

NEXT DEADLINE FOR SUBMISSIONS IS MARCH 15, 2007

Anyone who would like to submit a case summary or other news for the April, 2007 edition of this newsletter should send the material to the Editor at Richard.Christopher@hdrinc.com and should use Microsoft Word. Submissions are due by the close of business on March 15, 2007.