TRANSPORTATION RESEARCH BOARD

**COMMITTEE ON ENVIRONMENTAL ISSUES
IN TRANSPORTATION LAW (AL050)**

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CLEAN WATER ACT JURISDICTION UPDATE

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The already-murky question of what waters are subject to Federal jurisdiction under the Clean Water Act became even more muddied by a series of developments which occurred since the last *Natural Lawyer.*

First, in response to a 2008 District Court decision, on November 26, 2008, EPA issued a final rule amending 40 CFR Part 112 to revise the definition of "navigable waters." http://edocket.access.gpo.gov/2008/pdf/E8-28123.pdf. This regulatory definition is based on Section 311 of the Clean Water Act, the Oil Pollution Control Act (OPCA). Under the revised definition, Navigable Waters include:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92-500), and tributaries of such waters;
(2) Interstate waters;
(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce.

This revised definition only applies to Spill Prevention, Control and Countermeasure ("SPCC") plans under the OPCA.

Less than a week later (December 1, 2008), the Supreme Court expressly denied to help clarify the jurisdictional issue by denying *cert.* in the case of *U.S. v. McWane*. *McWane* is a criminal prosecution for alleged Clean Water Act (not wetland) violations. The Company's conviction for discharging pollutants to a water of the United States was overturned on appeal after the 11th Circuit determined that the district court had failed to issue a jury instruction on the question of federal jurisdiction that followed the *Rapanos* decision (which was handed down after the trial.) The Solicitor General had expressly requested that the Court grant *cert.*, asking the Court to decide whether the significant nexus standard is the only way to determine whether particular streams are jurisdictional (or whether the Plurality's "perennial and intermittent waters" test also applies). The Supreme Court's refusal to reconsider the case leaves it to lower federal courts to continue to try to answer the question over the how to interpret *Rapanos*. Meanwhile, the *McWane* case returned to the District Court in Birmingham for a new trial.

The next day (December 2, 2008), EPA and the Corps amended their joint guidance regarding how they intend to apply the Supreme Court's *Rapanos* and *Carabell* rulings. http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf. Those cases addressed jurisdiction under section 404 of the Clean Water act (the wetland program), although the language used to describe federal jurisdiction is the same under sections 404 and 402 (the latter being the traditional "point source" water pollution program). EPA and the Corps' earlier guidance, issued in June 2007, (http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf) had laid out the types of circumstances in which the government (1) generally would assert jurisdiction, (2) generally would not assert jurisdiction, and (3) would undertake a case-by-case evaluation, as well as the kind of information that would be used in the case-by-case situations. The 2007 Guidance also maintained federal jurisdiction over traditional navigable waters and wetlands adjacent to such waters, as well as wetlands adjacent to relatively permanent waters, which are identified as flowing at least three months of the year.

The December 2008 Guidance document supplemented the June 2007 Guidance with additional information regarding the meaning of the terms "traditional navigable water" and "adjacent." Under the Guidance, "traditional navigable waters" include waters that

(1) are subject to sections 9 or 10 of the Rivers and Harbors Act;

(2) a federal court has determined are navigable-in-fact under federal law;
(3) are currently being used for commercial navigation, including commercial water-borne recreation (such as boat rentals and guided fishing trips); or
(4) are susceptible to future commercial navigation, including commercial water-borne recreation

This definition is notably more broad than the definition under the OPCA, as it includes waters that are susceptible to future commercial purposes, not just currently used for commercial purposes. This is despite the fact that, if anything, the 404 definition should be more narrow than the OPCA definition. (The 404 definition is of "traditionally navigable waters" which is presumably a subset of the "navigable waters" defined in the OPCA rulemaking).

Moreover, the 2008 Guidance did not change the government's view that it has jurisdiction over the waters deemed jurisdictional under both Justice Kennedy's test and the Plurality's test. This view, expressed first in the June 2007 guidance, is the most expansive reading of *Rapanos* available, stating that, if either of the two tests applies, a majority of the Supreme Court will find that jurisdiction exists. It is very questionable whether the government's position remains valid in the 11th Circuit in light of the denial of cert in *McWane*,.

The December 2008 Guidance also expounded on the definition of "adjacency." As a general rule, the guidance provides that the government will not assert jurisdiction over swales and erosional features or ditches constructed in uplands without relatively permanent water flow. However, it also indicates that the government does not believe it need show that waters abut in order for them to be "adjacent." For wetlands that are "reasonably close" to jurisdictional waters, a significant nexus to those waters is presumed

NEPA AND 4(F) CHALLENGES TO TEXAS ROAD PROJECT DISMISSED UNDER 180 DAY STATUTE OF LIMITATIONS

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A Texas federal district court found that it had no jurisdiction to adjudicate a NEPA and Section 4(f) lawsuit by citizen plaintiffs challenging a federally and state-approved roadway. The planned 4.7-mile stretch of road in Denton County, the product of over two decades of study and public debate, was intended to connect two existing roads and relieve congestion along nearby routes. Plaintiffs sued both federal and state transportation agencies, alleging that the EA and FONSI insufficiently considered air and noise pollution from traffic, eschewed alternatives that would have lesser 4(f) impacts, and warranted preparation of a full EIS.

At the outset, the court held that plaintiffs could not maintain suit against the state agency, the Texas Department of Transportation ("TxDOT"). The court explained that NEPA suits must proceed under the APA, which by its terms only applies to federal entities.

Next, claims against the remaining federal agencies were barred as untimely under the 180-day SAFETEA-LU statute of limitations, 23 U.S.C. § 139(l) ("Section 139(l)"). Defendants prevailed in arguing that Section 139(l) should apply, rather than the longer six-year period contained in 28 U.S.C. § 2401, even though the former statute was signed into law on August 10, 2005, five days *after* FHWA's adoption of a FONSI. Looking to analogous Fifth Circuit precedent regarding intervening statutes of limitations, the court held that the effective provision when the complaint was filed should govern. The court reasoned that its reading of the statute would not assign it a genuinely "retroactive" effect given that it only affected the filing of the complaint rather than any rights or duties of the parties. Moreover, there was no inequity because the *Federal Register* notice, issued on July 31, 2006 (and over a year after the FONSI), stated that the 180-day period applied. Since plaintiffs delayed filing their lawsuit until December 10, 2007, well after the expiration of the 180 days on January 29, 2007, the complaint was dismissed with prejudice.

Finally, TxDOT's subsequent reevaluation of the 2005 FONSI did not revive plaintiffs' claims, notwithstanding Section 139(l). In June 2007, pursuant to Section 4(f) regulations, 23 C.F.R. § 771.129(c), TxDOT examined new information concerning the project's use of new rights of way and 5.7 additional acres of Section 4(f) land. TxDOT concluded, and FHWA concurred, that the FONSI remained valid. Noting that "not every datum can possibly justify the reopening of prior valid agency judgments" lest agency decision-making become "intractable," the court found that the reevaluation did not create a basis for a suit. Specifically, the changes implicated only minor design elements left open in the EA, and the additional used 4(f) land was largely due to compensatory mitigation. Plaintiffs' attack on the new analysis of mobile source air toxics ("MSAT") in the reevaluation was also unavailing. While indicating some agreement with the merits of plaintiffs' position, the court held that plaintiffs instead should have challenged the earlier EA which had purportedly failed to consider MSATs and the claim was now time-barred.

Highland Village Parents Group v. FHWA, 562 F. Supp. 2d 857 (E.D. Tex. 2008).

SECTION 4(F) DOES NOT APPLY TO EVERGLADES HIGHWAY PROJECT

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On August 7, 2008, the United States District Court for the Southern District of Florida refused to enjoin the proposed Tamiami Trail Modification Project after

finding that FHWA was not arbitrary or capricious in determining that the proposal did not require Section 4(f) analysis.

The ruling is the latest in a string of lawsuits by the Miccosukee Tribe over efforts to restore the health of Everglades National Park, which has deteriorated after a century of human impacts. To address these impacts, in 1989 Congress passed the Everglades National Park Protection and Expansion Act, directing the federal government to, among other things, work to improve water deliveries to the Park and restore its natural hydrologic conditions. Standing in the way of this restoration, however, is the Tamiami Trail – otherwise known as U.S. Highway 41 – which lies at the edge of the Park, disrupting the natural water flow within. To achieve Congress' goal, the U.S. Army Corps of Engineers determined that a one-mile stretch of the Tamiami Trail should be reconstructed for better drainage and relocated on federal lands inside the Park. But to accomplish this, the U.S. Department of the Interior ("DOI") would have to convey a sliver of land to the Florida Department of Transportation for the relocated roadway.

Lacking statutory authority to convey the needed land, DOI requested FHWA to act as the land transfer agent under the authority of 23 U.S.C. § 317. In its request, DOI explained the transfer would help bring about environmental restoration by allowing the proposed modifications to the relocated Tamiami Trail. DOI also raised the potential applicability of Section 4(f) and asked FHWA whether the transfer and modification project were excluded from a 4(f) evaluation because they did not constitute a "transportation project." FHWA agreed, concluding that the proposal was best categorized as an environmental restoration project and its own involvement in the land transfer would not implicate Section 4(f) concerns. The Miccosukee Tribe balked and sought to enjoin the transfer and any project construction until FHWA completed a 4(f) evaluation.

Siding with FHWA, the court held the Tribe failed to demonstrate that FHWA's decision not to perform a Section 4(f) analysis was arbitrary and capricious. The court reasoned that simply because the Tamiami Trail is a frequently used highway and the proposed project involves construction of a new highway segment under FHWA's jurisdiction and a land transfer under its statutory authority does not automatically make the proposal a transportation project under Section 4(f). In fact, the administrative record reflected that the proposal is an environmental restoration project rooted in the congressional mandate to restore the ecological health of the Everglades and natural hydrologic conditions in the Park. Conversely, nothing in the record suggested the proposal was designed to improve transportation on the Tamiami Trail. Because the highway already exists and the proposed transfer and modifications appeared to be unrelated to traffic flow over the roadway, the court determined FHWA was not arbitrary and capricious in not analyzing the proposal under Section 4(f). Congress reserved such analysis primarily for construction of new highways and other transportation

facilities or major changes to these facilities. Consequently, the court denied the Tribe's motion for preliminary injunction.

Miccosukee Tribe of Indians of Florida v. United States, 571 F. Supp. 2d 1280 (S.D. Fla. 2008).

NEW RULES ADOPTED FOR ENDANGERED SPECIES CONSULTATION

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On December 16, 2008, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service ("Services") published a final rule amending regulations governing interagency cooperation under Section 7(a)(2) of the Endangered Species Act ("ESA"). This rule, effective January 15, 2009, clarifies those circumstances in which agency action triggers consultation under Section 7(a)(2). Of particular interest, the new regulations seek to limit consultation requirements for the effects of individual sources of greenhouse gas ("GHG") emissions and their contribution to global climate change. The new rule also codifies several aspects of informal consultation, which may serve to streamline and provide increased predictability to the process. Finally, certain clarifications to the definition of direct, indirect, and cumulative effects should help federal agencies and applicants to determine the applicability of the Section 7 requirements to specific federal actions, and identify and evaluate project impacts on listed species and critical habitat.

The revised "Applicability" section of the regulations defines several categories of actions for which the Services believe consultation would not be necessary or beneficial. The existing "may affect" trigger for consultation is retained except in cases where no take is anticipated and any one of the following conditions is met:

i. The action has no effect on listed species or critical habitat.

ii. The effects of the action on listed species or critical habitat cannot be measured or detected in a manner that permits meaningful evaluation or are wholly beneficial.

iii. The effect of the action is manifested through global processes, such as global climate change for which current models cannot quantitatively link an individual action to localized climate impacts relevant to Section 7 consultation.

Although the rule seeks to limit analysis of a project's effects via climate change, the exception does not preclude all consideration of climate change in the consultation process. The effects of climate change on environmental conditions within the action area and/or the status of the species may need to be considered

in the environmental baseline. Also, it will be important for federal agencies that determine an action fits under one or more of the applicability exceptions to the rule to develop an administrative record that supports the determination.

The Center for Biological Diversity has filed a complaint in U.S. District Court for the Northern District of California challenging the rule as violating the ESA as well as a number of other procedural and environmental laws. And the incoming Obama Administration will undoubtedly be under pressure to rescind or re-visit the rule. For these reasons, the ultimate fate of the rule is uncertain..

FTA PROPOSES GUIDANCE ON RAILROAD RIGHT-OF-WAY CORRIDOR PRESERVATION

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On December 22, 2008, the Federal Transit Administration (FTA) published a notice of availability of proposed guidance on a provision in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) that allows FTA to participate in the purchase of railroad right-of-way (ROW) prior to compliance with the National Environmental Policy Act (NEPA) for a project that will later use that ROW. This provision is codified at 49 U.S.C. 5324(c). FTA's notice of availability contained a deadline of January 21, 2009 for public comment, but due to delays over the holidays in posting the actual proposed guidance to the docket at www.regulations.gov and to FTA's website, FTA posted a notice to the docket on January 2, 2009 that states that all comments submitted by February 1, 2009 will be treated as timely and that FTA will consider comments received after that date to the extent possible. The guidance document provides FTA's proposed interpretation of the statutory language, including references to the various requirements applicable to the purchase of railroad ROW under the statutory provision. FTA hopes to publish final guidance after considering any public comment it receives.

NO EA OR EIS NEEDED FOR AIRCRAFT REROUTING NEAR LOGAN AIRPORT

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After five years of study, the Federal Aviation Administration (FAA) adopted phase I noise measures for rerouting aircraft to increase use of Logan Airport approaches and departures over the ocean with shoreline crossings at higher altitudes. The FAA determined these phase I measures were within an FAA categorical exclusion for various departure, routing and approach procedures. Except for one point with a minimal 0.2 dB increase, all other noise levels would decrease and would be far below the 65 DNL threshold, and therefore, no Environmental Assessment or Environmental Impact Statement was required.

The Town of Marshfield, Massachusetts opposed the phase I measures on the grounds that the new flight patterns would adversely affects its residents. The primary National Environmental Policy Act (NEPA) issue was the noise impacts, including the computer modeling conducted by the FAA. The court concluded that "neither side has shed much light" on the matter, and in those situations, the court would fault the appellant as the party bearing the burden to "identify the defects in evidence and faults in reasoning." Because the FAA's assessment of impacts was not implausible and there was an adequate basis for its findings, the court agreed that a categorical exclusion was appropriate.

Another NEPA issue was cumulative impacts from future phase 2 or later phases. The court concluded that the specific phase 2 measures were speculative, and phase 1 measures were independently valuable and could move ahead since they "posed no significant threat to the environment."

The case also included challenges under the National Historic Preservation Act (NHPA) and Federal Advisory Committee Act (FACA). The court agreed with the FAA that no consultation was required under the NHPA because the preservation officer did not object to the finding that there was no potential for effects on protected historic or cultural resources. FACA only applies to "committees that are under the actual management or control of the agency," so claims of meeting laws violations were denied.

Town of Marshfield v. Federal Aviation Administration, 2008 U.S. App. LEXIS 25410, 2008 WL 5251104, No. 07-2820 (1st Cir. 12/18/08).

CLEAN WATER ACT CITIZEN SUIT ALLOWED FOR AIRPORT CONSTRUCTION NPDES VIOLATION

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In May 2008, the Northern District Court of Alabama held that a Clean Water Act ("CWA") citizen suit was not barred as a result of an administrative enforcement action resulting in consent orders between a state regulatory agency and defendants. *Black Warrior Riverkeeper, Inc. v. Birmingham Air-Port Authority*, 561 F.Supp.2d 1250 (N.D. Ala. 2008) ("*Riverkeeper*").

The environmental group plaintiff in the *Riverkeeper* case alleged that an airport runway extension project was causing discharges of pollutants in violation of the National Pollutant Discharge Elimination System ("NPDES") General Construction Site Permit issued by the Alabama Department of Environmental Management ("ADEM") under the CWA. The plaintiff filed suit under the CWA citizen suit provision against the owner of the site and the construction firm operating the project alleging that the defendants had violated the permit and that the violations were ongoing.

The defendants moved to dismiss the complaint arguing that the citizen suit: 1) was not proper under the CWA because of the consent orders issued by the ADEM; 2) should be dismissed because ADEM and not the court had primary jurisdiction over the alleged discharges; and 3) the suit was administratively barred by plaintiff's withdrawal of its administrative appeal of the consent orders. The court rejected these theories and held the citizen suit was proper.

The CWA bars citizen suits if the "state has commenced and is diligently prosecuting an action under a state law comparable to [the CWA]." 33 U.S.C. § 1319(g)(6)(A)(ii). However, there is an exception to this provision that applies with respect to any violation for which notice was properly given prior to commencement of a state enforcement action and the citizen suit is filed within 120 days of such notice. 33 U.S.C. § 1319(g)(6)(B)(ii). The *Riverkeeper* court held that the case was properly within this exception because there was no official administrative enforcement proceeding pending when the notice was given, when the action was filed there was no binding consent order in place, and the plaintiff complied with the CWA notice requirements and filed suit within 120 days of the date on which such notice was given. *Id*. at 1253-1254. The court also held that because the administrative proceeding conduced by ADEM was not a "civil or criminal action" the citizen suit was not barred by 33 U.S.C. § 1365(b)(1)(B). *Id*. at 1255.

The *Riverkeeper* court also rejected defendants' arguments regarding primary jurisdiction and administrative bar. With respect to the primary jurisdiction argument, the court noted that the statutory language clearly contemplates a situation where an administrative enforcement action is commenced between the 60-day notice and the filing of a citizen suit, and that if Congress had been concerned with the doctrine of primary jurisdiction in the context of CWA citizen suits it would not have provided a way for a plaintiff to file a citizen suit if an administrative agency had commenced an enforcement action. *Id*. at 1255. The court also rejected the argument that plaintiff's withdrawal of its administrative appeal of the consent orders issued by ADEM resulted in a bar to enforcement through a citizen suit, noting that the CWA "makes no mention of exhaustion of state remedies as a prerequisite for bringing a CWA citizen suit." *Id*. at 1255.

Black Warrior Riverkeeper, Inc. v. Birmingham Air-Port Authority
561 F.Supp.2d 1250 (N.D. Ala. 2008)

SUMMER CONFERENCE ANNOUNCED BY TRB COMMITTEE ON WASTE MANAGEMENT AND RESOURCE EFFICIENCY

TRB Committee ADC 60 has scheduled its summer environmental conference for July 13-15, 2009 in New York City at the MTA New York City Transit offices. The conference will include presentations, tours of various outstanding transit facilities, and a reception in the world famous Transit Museum. To register,

please visit www.trb-adc60.org. For more information contact Thomas Abdallah at 646/252-3500, thomas.abdallah@nyct.com or Steven Eget at 732/417-5829, steven.eget@westonsolutions.com

NOTES FROM THE CHAIR

Submitted by Peggy Strand
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Many thanks to the members and friends who braved the frigid weather in Washington, D.C. to participate in the TRB Annual Meeting, and our committee meeting.

Our committee program on "Climate Change Law 101," as well as several other legal programs given at the Annual Meeting, were recorded by TRB and are available as "e-sessions." Go to www.trb.org, click on Annual Meeting, and the drop menu has "e sessions."

Our committee meeting had great participation and ideas from 25 members and friends. These ideas can form the basis for upcoming newsletter articles or presentations. Some of the "hot topics" raised during the meeting included:

- FTA has guidance pending regarding railroad right-of-way acquisition and corridor preservation. Watch for promulgation of the final guidance.
- There was a notice of proposed rulemaking to modify the joint NEPA regulations, which may either be supplemented or finalized in 2009.
- Maryland recently concluded an agreement under EPA's audit policy involving resolution of enforcement claims and establishment of environmental management systems ("EMS"). This is a landmark settlement for a transportation agency.
- Scope of administrative record. We discussed FHWA's position that it need not supplement an administrative record, as addressed in certain pending cases. Several folks are working on this issue.
- California's relatively new law, SB 375, links "smart growth" land use planning with transportation and environmental analysis, opening many issues for transportation environmental documents.
- ADC 60, Waste Management committee, asked for assistance in programs on the EPA audit policy and on the "all appropriate inquiry" standard, raising traditional issues of compliance and management for state DOTs. Some of our members will work with this committee, and with other TRB committees to provide legal input to environmental issues.

- Climate change issues continue as a TRB focus, with multiple committees. And we can expect action on this front from the new Administration.

The **July Legal Workshops** are in Denver, Colorado, July 19-22, 2009. Please let me know if you are **willing to serve on a program planning subcommittee**. In addition to presentations in July, we can use TRB services to present short teleconferences or webinars. I welcome suggestions for the July program or other committee activities.

Best regards for the New Year

NEXT DEADLINE FOR SUBMISSIONS IS MARCH 16, 2009

Anyone who would like to submit a case summary or other news for the April, 2009 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 16, 2009.