# TRANSPORTATION RESEARCH BOARD

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

# THE NATURAL LAWYER

Volume 13 April, 2007 Number 2



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## CORPS REISSUES NATIONWIDE PERMITS, LITIGATION TO FOLLOW


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On March 12, 2007, the Corps released the reissuance and revisions of its Nationwide Permits (NWP's). Many Corps Divisions also released regional conditions or regional general permits. NWP's have a 5-year term, and must be reissued or the permit will lapse. This summary addresses only a few of the major items in the new NWP's; anyone using a NWP must carefully check the text of the permit and applicable general conditions. A summary chart of the NWP's is provided as an additional document along with this issue of *The Natural Lawyer.*

The 2007 NWP's did not modify all permits, but made changes to a number of permits related to transportation activities. For many years, revised and reissued NWP's have been immediately challenged in litigation. The most controversial activities under the NWP's have been surface coal mining and other mineral extraction. As a general matter, the environmental community maintains that some of these NWP's authorize activities that warrant individual permit review. The regulated community, on the other hand, has long argued that the increased

complexity and small acreage limits of most NWP's fails to meet the statutory standard and fails to minimize regulatory burden.

Transportation projects regularly use NWP's 3, 12, 13, 14, 18 and 23, which are summarized here. The NWP package is lengthy and the permits themselves are complex. It will be very important for project managers and attorneys to (1) carefully check and document eligibility for a NWP and (2) follow the expected litigation on NWP's. Although the transportation-related NWP's may not be the focus of such litigation, those permits could none the less be impacted by any litigation.

NWP 3 covers maintenance of existing structures. The permit allows activities to restore a structure to pre-existing conditions. Temporary structures, fills and work needed to conduct the maintenance are allowed under this permit, which does not have an acreage limit. This permit may be used to remove accumulated sediment. In this round of NWP's, there were proposals to modify and combine this permit with others. The Corps moved certain activities that were under NWP 3 to new NWP 45 which authorizes repair of uplands damaged by discrete events. This activity was previously covered by NWP 3.

NWP 12 addresses utility line activities. After considering various changes, the reissued permit has a 1/2 acre limit and requires pre-construction notification under most circumstances, including discharges impacting more than 1/10 acre.

NWP 13 for bank stabilization has limits of 500 linear feet (of work) and one cubic yard per running foot.

NWP 14 for linear transportation projects generated many comments. The basic approach of this permit is that a water crossing (or crossings at one location) is the project. This means NWP 14 can be used for each crossing of separate water bodies, without violating the principle that NWP's normally cannot be "stacked" to exceed acreage limitations. Thus the permit is available multiple times for a road, at different water crossings. The Corps retained the 1/2 acre limit and declined to impose a linear foot limit for stream impacts.

NWP 18 for minor discharges was modified to provide a 1/10 acre limit.

NWP 23 addresses activities under approved categorical exclusions. In response to a specific comment, on whether this would cover activities undertaken by a State that was delegated FHWA NEPA authority, the Corps responded that it would.

NWP 27 for aquatic restoration has no acreage limit. A variety of restoration projects, including mitigation banks, may be eligible for this permit. The permit now requires additional reporting on restoration activities.

A number of NWP's not normally used by transportation projects remain controversial. In addition to NWP 21 for surface coal mining, housing and land development activities continue to generate controversy. Previously, NWP 29 addressed 1/2 of impacts on single owner residential property and NWP 39 addressed both residential and commercial land development. The Corps has kept the two permits, but now NWP 29 covers all residential developments, and NWP 39 covers all commercial developments. Under new NWP 29, any residential development may use the 1/2 acre/300 linear feet permit. It is likely that these three permits – 21, 29 and 39 – will remain the focus of controversy and possible litigation.

While the NWP's hit the *Federal Register* on March 12 (72 *FR* 11092), it is likely that there will be an additional notice with clarifications within a number of weeks or months.

## FTA SETS OUT P3 PILOT PROGRAM

Submitted by Scott Biehl
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SAFETEA-LU Section 3011(c) authorizes FTA to establish and carry out a pilot program to demonstrate the advantages and disadvantages of public-private partnerships for design and construction of certain capital transit fixed guideway projects. On 19 January 2007 the FTA Chief Counsel announced the definitive terms of FTA's Public-Private Partnership Pilot Program ("Penta P," in FTA parlance), and solicited a first round of applications for the program by the end of March. 72 *Fed.Reg.* 2583-91. In short, the pilot program is designed to study whether, in comparison to conventional procurements, public-private partnerships might reduce and better allocate the risks associated with construction of transit infrastructure; accelerate project delivery; improve the reliability of cost estimates and projected benefits; and enhance transit performance. Applicant projects might include, specifically, the operation and maintenance of transit through evolving procurement approaches such as "design-build with a warranty," "construction manager at risk," "design-build-operate-maintain," "design-build-finance-operate," and "build-operate-transfer." Moreover, FTA is interested in understanding the extent to which the private sector's incentives for financial returns and assumption of risks for costs and benefits may permit FTA to relax certain Federal requirements or accelerate approvals necessary for major capital projects funded by the agency. Accordingly, FTA's decision to recommend Federal funding or grant regulatory relief to a particular project will turn on whether the commercial terms between the project sponsor and the private partner allocate risks and create incentives and liabilities in a way that safeguards the Federal interest, rather than a limited review of costs and benefits.

Readers of *The Natural Lawyer* may be especially interested in subsection 3(l) of the "Definitive Terms" of the pilot program, which addresses compliance with

NEPA for projects chosen to participate in the pilot program. *See,* 72 *Fed.Reg.* at 2590-91. Any questions can be addressed to the FTA Chief Counsel, David B. Horner, at 202.366.4040 or David.Horner@dot.gov.

## FTA ISSUES STATEMENT OF POLICY ON JOINT DEVELOPMENT

Submitted by Scott Biehl
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Consistent with the SAFETEA-LU amendment that expanded the definition of an eligible "capital project" at 49 U.S.C. § 5302(a)(1)(G), on 7 February 2007 FTA issued a statement of policy that affords grantees maximal flexibility to undertake joint development of Federally-funded assets with private and other third-party partners, consistent with good business practice and arms-length negotiations. 72 *Fed.Reg.* 5788-5800. *Inter alia,* FTA expects this policy to facilitate the development of intercity bus and rail stations and terminals, and it is framed such that the agency will generally defer to the decisions of a grantee as a lead project sponsor in pursuing any type of transit-oriented development. The policy sets forth in some detail how FTA intends to apply the following statutory clauses to determinations of eligibility: "enhances economic development or incorporates private investment"; "enhances the effectiveness of a public transportation project"; "related physically or functionally" to a public transportation project; "new or enhanced coordination between public transportation and other transportation"; and "provides a fair share of revenue...for public transportation." This policy also addresses FTA's intentions for ensuring *satisfactory continuing control* of Federally-funded assets, and the precautions a grantee must take to guard against premature disposition of those assets. Finally, the guidance sets forth the procedure by which an FTA regional office will set forth the eligibility of a joint development project. Any questions can be addressed to FTA staff attorney Jayme L. Blakesley at 202.366.0304 or Jayme.Blakesley@dot.gov.

## FTA ISSUES POLICY ON HO/T LANES AS FIXED GUIDEWAY MILES UNDER FORMULAE PROGRAM

Submitted by Scott Biehl
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On 27 December 2006 the FTA Chief Counsel issued a statement of policy setting the terms and conditions under which the agency will continue to count High Occupancy Vehicle (HOV) lanes converted to High Occupancy/Toll ("HO/T") lanes as *fixed guideway miles* for purposes of the 49 U.S.C. §§ 5307 Urbanized Area and 5309 Fixed Guideway Modernization programs, and the circumstances in which FTA will not count HO/T lanes as *fixed guideway mileage* for purposes of these two formulae programs. 71 *Fed.Reg.* 77862-8. FTA's policy now jibes with USDOT's policy of encouraging HOV-to-HO/T lane conversion, and aligns FTA practice with Federal-aid highway funding for HO/T lanes per SAFETEA-LU Section 112, in support of States' and cities' efforts to reduce congestion and maximize throughput using excess HOV lane capacity—while ensuring that

Federal Transit formula funding is not fundamentally reallocated amongst FTA grantees or transferred from existing grantees to new grantees. In brief, the FTA policy requires that the following three conditions be met for a HO/T lane facility to be counted as *fixed guideway miles* for the Sections 5307 and 5309 formulae: the HO/T lanes must previously have been reported as HOV lanes in the National Transit Database; the HO/T lanes must be continuously monitored and deemed to meet specified performance standards to preserve free flow for transit vehicles; and the program income from the HO/T lanes, including all toll revenue, must be expended solely for "permissible uses" (*e.g.,* debt service, reasonable return on investment of private financing, and the costs of operation and maintenance of the facility). Any questions can be addressed to the FTA Chief Counsel, David B. Horner, at 202.366.4040 or David.Horner@dot.gov.

## FTA ISSUES PROPOSED GUIDANCE ON NEW STARTS AND SMALL STARTS

Submitted by Scott. Biehl
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On 12 February 2007 FTA issued a notice of availability of "Proposed Guidance on New and Small Starts Policies and Procedures," which are designed to carry out both the SAFETEA-LU changes to the New Starts program authorized by 49 U.S.C. § 5309(d) and the enactment of the new Small Starts program at 49 U.S.C. § 5309(e). 72 *Fed.Reg.* 6663. (The full text of the proposed guidance is available on USDOT's electronic docket and FTA's public website; by issuing a notice of availability, only, FTA is saving printing costs in the *Federal Register*.) Of most interest to readers of the *Natural Lawyer,* the proposed New and Small Starts guidance would eliminate the current reporting requirements for environmental benefits; make optional the submission of information related to land use; require travel modeling to be validated by recent transit surveys; give credit to a promising congestion pricing strategy as an "other factor" for weighing the merits of a project against the New Starts project justification criteria; and set simplified criteria and an expedited funding procedure for "Very Small Starts" – projects costing less than $50 million and meeting certain threshold requirements. Any questions can be addressed to the FTA Deputy Chief Counsel, Scott Biehl, at 202.366.4011 or Scott.Biehl@dot.gov.

## FHWA REPORT ON CONFLICT RESOLUTION IN OUTDOOR ADVERTISING PROGRAM

Submitted by Janet Myers, Senior Attorney Advisor
FHWA Office of the Chief Counsel

The Federal Highway Administration (FHWA) reached a major milestone in its evaluation of the Federal Outdoor Advertising Control Program (OAC Program) with the February 6 issuance of an assessment report by the U.S. Institute for Environmental Conflict Resolution (the Institute). The report delineates OAC

Program issues and suggests options for collaboratively addressing conflicts in order to achieve program improvements. It is available through the U.S. Department of Transportation Docket Management System (http://dms.dot.gov, Docket Number FHWA-2006-25031) and on the FHWA Web site (http://www.fhwa.dot.gov/realestate/out_ad.htm).

The FHWA initiated the assessment because it recognized the continuing challenges the OAC Program presents. Federal statutes and regulations have seen only limited change since the enactment of the Highway Beautification Act, 23 U.S.C. §131, in 1965. State laws and regulations, which implement the OAC Program as a grant condition of the Federal-aid Highway Program, vary widely. The OAC Program has many different stakeholders and they hold substantially different perspectives on the core issues pertaining to the control of outdoor advertising signs. Apart from the FHWA, stakeholders include sign owners, advertisers, state and local regulators, landowners, elected and appointed officials at all levels of government, the traveling public, community and environmental groups.

The Institute and its contractor, The Osprey Group, carried out the assessment through extensive interviews, public meetings, focus groups, and solicitation of written comments from the public. The assessment identifies three types of conflict affecting the OAC Program: substantive, organizational and attitudinal. The report acknowledges that federal and state legislative actions would be necessary to address many OAC issues. Against that background, however, the assessors found that there is a reasonable potential for developing stakeholder agreement in several major, long-standing areas of conflict.

The assessors recommended that the FHWA and other stakeholders focus those issues identified as having the highest potential for agreement, which are: regulatory treatment of changes in sign technology (such as digital billboards); regulatory treatment of nonconforming signs; improved consistency in the administration of OAC laws and regulations; better enforcement of requirements relating to commercial or industrial activities that qualify a billboard for legal conforming status; maintenance of sign visibility through the control of vegetation in the highway right-of-way; and improvements to the FHWA OAC Program organizational structure.

On March 2, 2007, the FHWA published a request for comments on the assessment report in the *Federal Register* (72 *FR* 9592). Comments may be submitted electronically at http://dms.dot.gov under Docket Number FHWA-2006-25031. The comment period closes on May 1, 2007. The FHWA will consider the docket comments, together with the assessment report and other information, as it works with stakeholders and deliberates future actions relating to the OAC Program.

**Note: The views expressed here are solely those of the author and do not necessarily represent the views of the Federal Highway Administration or the United States Department of Transportation.**

## NO TRO AGAINST HIGHWAY BYPASS OVER IMPACTS TO HISTORIC DRAIN TILES

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The court denied plaintiff's motion for a temporary restraining order against the United State Army Corps of Engineers for that agency's decision to grant the City of Concord's construction permit for a connector road.

Plaintiff's chief concern was that the road construction would damage an underlying tile drainage system. The system was part of the White Farm complex, which was registered on the National Register of Historic Places for its significance in New Hampshire development. The complex's tile drainage system as a whole was integral to the historic significance of the farm and the City acknowledged that construction work would affect a portion of the tile drainage system.

The court found that the U.S. Army Corps of Engineers' decision to grant the City's construction permit was not arbitrary and capricious. The Corps had considered the impact and the construction was planned to minimize the impact. The construction would affect only one drain tile line and the City designed a drainage system that will alleviate any damage to that line. The court was persuaded that the system would be protected even though the City's commitment regarding the tile drainage system was not included in the formal Memorandum of Agreement between the Corps and the City since the City affirmatively represented to the Corps that it would act to protect the system. *Northwest Bypass Group v. United States Army Corps of Eng'rs,* 453 F. Supp. 2d 333 (D.N.H. 2006)

## EXTRA RECORD MATERIAL OK TO OVERTURN POST KATRINA NAVIGATION EIS

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In a challenge to an environmental impact statement ("EIS") examining the impacts of a $600 million canal lock improvement project under the National Environmental Policy Act ("NEPA"), the court determined it was authorized to

look outside the administrative record in order to determine adequacy of the environmental review.

Holy Cross Neighborhood Association and other groups sued the United States Army Corps of Engineers ("Corps") to overturn its approval of an EIS studying the construction of a more modern lock in the Inner Harbor Navigational Canal, located just east of New Orleans in the navigational system that connects the Gulf Intracoastal Waterway and the Mississippi River.

The defendant Corps asked the court not to consider post-decision, extra-record materials submitted by the plaintiffs. The court ruled, however, that if an agency has left technical scientific information outside of the record, the court can still look to that information to determine whether the review is adequate. The court felt the information provided shed light on the "real issue" in the case: the Corps' plan to dispose of the contaminated sediments in confined disposal sites that would be built to standards that were acceptable before Hurricane Katrina, but not in light of that disaster. "Hurricane Katrina has exposed the inadequacies of the EIS and raised questions about the importance and priority of the whole project." "In light of Hurricane Katrina, the underlying purpose of NEPA will not be served if the Corps moves forward with the Industrial Canal Project according to a plan devised almost a decade ago." The court thus enjoined the project pending further environmental review. *Holy Cross v. United States Army Corps of Eng'rs,* 455 F. Supp. 2d 532 (D. La. 2006)

## CHALLENGE TO CALIFORNIA GREENHOUSE GAS AUTO EMISSION STANDARDS CAN PROCEED

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Car dealerships sued the California Air Resources Board (CARB) to prevent enforcement of state greenhouse gas emission standards for motor vehicles, which are based on "fleet average" emissions.

The dealerships claimed that the state regulations are preempted by the Energy Policy and Conservation Act of 1975 (EPCA), 49 U.S.C. § 32902 et seq. EPCA established federal fuel economy standards for new vehicles via the well known corporate average fuel economy ("CAFE") mechanism for a manufacturer's fleet of new vehicles. Plaintiffs argued that the EPCA preempts the entire field of fuel economy regulations, which could be impacted by the new California emission standards. The court ruled that plaintiffs have stated a claim for EPCA preemption and thus the court denied defendants' motion for judgment on the pleadings on this preemption claim.

The court also held that the dealerships have stated a claim for preemption of the regulations based on foreign policy.

However, the court rejected the car dealers argument that the regulations are impermissible under the U.S. Constitution's Dormant Commerce Clause because they burden "the production and sale of new motor vehicles" while providing "no local environmental benefit, or insubstantial benefits at best." U.S. EPA has granted a waiver for the regulations which contradicts a Commerce Clause challenge. Finally, the court rejected arguments that the California regulations violate the Sherman Act antitrust prohibitions. *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160 (E.D.Cal.2006)

## NO OIL COMPANIES' CONSPIRACY ON LUST'S

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A United States District Court in Alabama granted defendant oil companies' motion for summary judgment on the issue of whether they conspired together to avoid liability for the prevention, detection, and clean-up of leaking underground storage tanks (USTs) in violation of several state torts, including fraudulent concealment, trespass, and nuisance. The plaintiffs owned property in Alabama and Massachusetts that was adjacent to or near sites where gasoline had been stored in now failing USTs. Confronted with the potential liability from leaking USTs, the defendants adopted strategies to reduce their costs and liabilities. However, the court found that plaintiffs failed to establish the existence of a conspiracy because they failed to offer evidence that tended to exclude the possibility that the conduct at issue was independent. The evidence only showed that the defendants were all faced with the problem of leaking USTs and there was no evidence excluding the possibility that when confronted by similar problems, they independently adopted convergent strategies or solutions. The defendants' acts against their economic interest, meetings discussing UST leak issues, participation in the creation of industry, legislative, and regulatory standards, and communication and exchange of information do not support the conclusion that defendants reached an agreement or acted jointly with regard to the alleged conspiracy. *Buddy Lynn, et al. v. Amoco Oil Co., et al.*, 459 F. Supp. 2d 1175 (D. Ala. October 10, 2006).

## CORPS EA/FONSI AND 404 PERMIT OK FOR RESTORATION OF MASSACHUSETTS COMMUTER RAIL

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The plaintiffs alleged that the U.S. Army Corps of Engineers ("Corps") violated federal environmental statutes by issuing a permit pursuant to the Clean

Water Act to the defendants to the Massachusetts Bay Transportation Authority ("MBTA") to restore commuter rail service on the Greenbush Line between Braintree and Scituate, Massachusetts. The Corps had conducted an environmental assessment ("EA") and made a finding of no significant impact ("FONSI"). The court examined the factors raised by the plaintiffs to determine if the degree of human and environmental impacts were significant and thus required the preparation of an EIS, and found that the Corps did not unlawfully balance positive and negative impacts on human health and the environment. While there were public health and safety impacts, the degree of those impacts were not significant. The Corps adequately identified uncertain risks and reasonably concluded that they are not highly uncertain based on the probable results of the MBTA's mitigation measures and construction plans. The impacts upon federal jurisdictional wetlands would be mitigated through other recreational opportunities by the MBTA. While a number of historic properties would be impacted by the Greenbush Project, none of these impacts rises to the level of NEPA significance. The court thus concluded that the FONSI was neither arbitrary nor capricious, and granted defendants' motion for summary judgment.

The plaintiffs also alleged that the FONSI was procedurally inadequate because the Corps improperly determined the practicable alternatives and failed to seek public comment on the EA and FONSI. Though it was undisputed that other alternatives would have resulted in less environmental impact than the Greenbush Commuter Rail alternative, the Corps' practicable alternatives analysis was reasonable. The regulations regarding public comment on the EA and FONSI do not apply to Section 404 permit applications. The EA and FONSI do not meet the limited circumstances outlined in the NEPA regulations for circulation of public review and comment. Finally, the record revealed that the Corps sufficiently considered and analyzed the impacts of the alternatives on historic resources. *Advocates for Transportation Alternatives, Inc. v. Massachusetts Bay Transportation Authority,* 453 F. Supp. 2d 289 (D. Mass. September 26, 2006).

## FHWA ISSUES FINAL MAJOR PROJECT GUIDANCE

Submitted by Patrick Jacobi and Fred Wagner
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The previous issue of *The Natural Lawyer* summarized the Federal Highway Administration's ("FHWA") proposed Major Project Guidance from January 27, 2006. FHWA finalized the Major Project Guidance on January 19, 2007, with one significant change. For all major NEPA projects, the proposed guidance requires the completion of a Project Management Plan ("PMP"), which serves as a roadmap to ensure efficient completion within budgetary limits and defines the roles of involved parties and agencies. The proposed guidance required submission of the PMP at the beginning of the NEPA phase, subject to revisions up until the authorization of federal funds. The final guidance, however, requires submission of the PMP at the end of the NEPA phase. FHWA posits that this

change will allow time for a project to be better defined through the NEPA decision-making process before the preparation of a formal document, such as an EIS.

As an offset to this shift in timing and to ensure proper management of projects prior to the formulation of a PMP, FHWA requests that FHWA Division Offices engage in project management discussions with State Transportation Agencies based on a document entitled *Risk Management Tool for Managing the Planning/Environmental Phases of Prospective Major Projects*, available at http://www.fhwa.dot.gov/programadmin/mega/rmtools.cfm. This document is an updated and refined version of the *Checklist of Major Project Questions for DAs to Use during Planning/Environment Stages*, which FHWA issued in January 2006 along with the proposed Major Project Guidance. FHWA suggests that the following issues be considered as part of project management for major projects: any planning and environmental issues that could affect the scoping, schedule, and cost of the project; whether all facets of the project meet the FHWA/FTA fiscal restraint requirements for planning; strategies for public and media engagement and involvement; staff capability; relationships with other key agencies and personnel; multimodal issues; documentation; FEIS integrity; and lessons learned from other projects. The updated version of the document provides discussion of these issues for a sample major project. http://www.fhwa.dot.gov/programadmin/mega/011907.cfm

## ENVIRONMENTAL GROUPS BRING CLEAN WATER ACT SUIT AGAINST MASSHIGHWAY FOR FAILURE TO OBTAIN STORM WATER PERMITS

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On July 27, 2006, three environmental groups, the Conservation Law Foundation, the Charles River Watershed Association, and the Leominster Land Trust, filed a complaint against the Massachusetts Highway Department ("MassHighway") in the United States District Court of Massachusetts, alleging that MassHighway operates, and has operated, in violation of the storm water management requirements of the Clean Water Act ("CWA"). The citizen suit named the Commissioner of MassHighway, the Massachusetts Secretary of Transportation, and Governor Mitt Romney, and sought an order requiring MassHighway to come into compliance with the CWA as well as civil penalties.

The groups allege that MassHighway had not obtained the required storm water runoff permits because the state's required management plan to control storm water runoff is inadequate. In August of 2004, EPA indicated that MassHighway's drainage system meets the definition of Small Municipal Separate Storm Sewer Systems (MS4s), which require permit coverage under Part V of a General Permit. EPA also notified MassHighway that its failure to submit a complete Notice of Intent ("NOI") was a violation of the CWA. The

environmental groups alleged that since the notification from EPA, MassHighway had failed to obtain approval for its NOI, which in turn has prohibited EPA from granting the needed NPDES permits for storm water runoff from the 4,132 miles of road in Massachusetts. According to the groups, these facts demonstrated that MassHighway operates, and has operated, in violation of sections 301(a) and 402(p)(4)(B) of the CWA, as well as various federal regulations.

In September, 2006 the defendants filed a motion to dismiss. In October, 2006 Judge William G. Young denied the motion, provided that EPA did not act by mid-November and thereby moot the case. EPA did not take action, and, on November 27, 2006, the defendants filed an answer. As of this writing, the case is scheduled for mediation before Magistrate Judge Marianne B. Bowler in late April, 2007. The case could go to trial in late 2007 or early 2008.

## FHWA ISSUES CSS ACTIVITIES REPORT

Submitted by James Auslander and Fred Wagner
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FHWA recently issued a Context Sensitive Solutions (CSS) Current Activities Report documenting the agency's progress in developing and integrating CSS into national, state, and local transportation planning processes. CSS embodies a collaborative, interdisciplinary approach to transportation projects, aimed at early involvement of broadly defined stakeholders and better environmental results through identification of sensitive resources and facilitation of cooperative interagency relationships. The Report highlights several of FHWA's ongoing CSS-related efforts (spearheaded by several FHWA Offices) intended to train practitioners, consolidate relevant experience, raise CSS awareness, and foster a national CSS dialog. These efforts include various training and education programs; integration of CSS principles into university curricula; creation of a "toolbox" of CSS guidance, case studies, and fact sheets to assist states and communities; a "lessons learned" video; publication of a "CSS Primer," "CSS Self Assessment Guide," and other outreach material; various conferences and Webinars; and a CSS Clearinghouse at http://www.contextsensitivesolutions.org.

The Report is available at http://www.fhwa.dot.gov/csd/activities.cfm. Contact persons are identified for each project. For more information on CSS, visit http://www.fhwa.dot.gov/csd.

## COURT SET TO RULE IN CHALLENGE TO MASS/NH I-93 WIDENING PROJECT

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The U.S. District Court for the District of New Hampshire held a hearing on

March 16, 2007 pertaining to summary judgment motions in *Conservation Law Foundation v. Federal Highway Administration and New Hampshire Department of Transportation*. The case involves an environmental challenge brought almost a year ago against a $480 million FHWA and NHDOT project to construct four additional highway lanes on the southernmost 19.8-mile segment of Interstate 93 (I-93), between Salem and Manchester. CLF brought NEPA, FAHA, APA, and FOIA claims seeking declaratory and injunctive relief, including preparation of a Supplemental EIS. Among the key contested issues in the case are alleged induced growth and air impacts from widening I-93, mitigation and alternatives analyses (including exclusion of rail), and supplementation of the administrative record. Plaintiffs and both federal and state defendants have moved for summary judgment. The case docket number is No. 1:06-cv-00045-PB; the presiding judge is Judge Paul Barbadoro.

At the hearing, CLF highlighted the non-pursuit of commuter rail as viable alternatives to widening I-93. Federal and State defendants replied that the project purpose is to improve congestion and reduce safety concerns, addressing specific I-93 shortcomings rather than general transportation needs. Judge Barbadoro indicated some agreement with defendants, rejecting CLF's claim that the project approval process was tainted because it was focused from the beginning on a highway widening project, rather than construction of commuter rail. However, Judge Barbadoro ultimately took the matter under advisement. A decision is expected within the next few months.

**MISSOURI CITY SUES TO STOP NOISE WALLS THAT RESIDENTS WANT**

Submitted by Gregory W. Schroeder, Senior Administrative Counsel
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An appeal is pending in the Eighth Circuit Court of Appeals after the District Court ruled in favor of MHTC/MoDOT. The appeal concerns the placement of Type I sound or noise walls to reduce the noise of a state highway expansion from two to four lanes (or more) in the City of Clarkson Valley. The case is made more complex by the fact that MoDOT (and FHWA) failed (for reasons unknown) to perform the Type I noise analysis, and construct the sound walls, when the state highway expansion took place. Thus, the Type I noise reduction is being retrospectively performed that should have been done earlier, under the mandate of 23 U.S.C. 109.

The plaintiffs/appellants, the City of Clarkson Valley and its mayor, are contending that the cost of the sound walls exceeds the cost limitation per receptor stated in MoDOT's sound wall policy, which has been approved by FHWA. The appellants are contending that the gross or aggregate construction costs must be used to compute the sound wall costs per receptor. However, the Administrative Record clearly shows that as a Type I noise wall, only the net costs attributable to the sound wall construction itself, exclusive of all other construction contract costs apply to the determination of the acceptable sound wall cost per receptor under 23 CFR Part 772. The case will be argued in the Eighth Circuit at 9:00 a.m. on April 12.

It is interesting to note that while the City of Clarkson Valley is suing to block the noise wall construction, the impacted residents of that city who live along the State highway, Route 340, Clarkson Road, want the noise walls to be built along their property by a nearly unanimous count. That factor, among others, led MoDOT and FHWA to proceed with the sound wall construction under the criteria in 23 CFR Part 772, despite the belated opposition of the municipal corporation as an entity itself. *City of Clarkson Valley, et al. v. Norman Mineta, et al.*, 8th Circuit #06-3613.

## MISSOURI CITY SUES OVER INTERSTATE RECONSTRUCTION

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This suit was filed March 24, 2006 by the City of Richmond Heights, Missouri (City) against officials of USDOT, FHWA, and the Missouri Department of Transportation (MoDOT) in two counts. Count I is founded in NEPA, Section 4(f) and Section 106 of the National Historic Preservation Act, as amended. It seeks judicial review of the joint MoDOT-FHWA decision in a Final EIS and Record of Decision to keep, but reconfigure, the I-64/Highway 40 interchanges in the City at Bellevue Avenue and Big Bend Boulevard. Count I claims that as proposed in the FEIS and ROD, these interchanges take too many historic properties (5 total), when there were other reasonable and prudent alternatives available. Thus, the FEIS and ROD decision violates Section 4(f).

[The City of Richmond Heights, as a "cooperating party", fought against retaining an interchange at Bellevue throughout the pre-FEIS period, even though it is needed for a hospital in Richmond Heights. Some City officials also do not like the reconfigured Big Bend Boulevard, because it changes local access to and traffic flow on that street. Those issues were not raised directly in Count I.]

However, even before the lawsuit was filed, MoDOT was working with FHWA to reduce the footprint of The New I-64. On 11/16/2006, FHWA issued its Re-Evaluation under 23 CFR § 771.129, approving (among other changes) a narrower footprint at the Big Bend and Bellevue interchanges, so that only 1 historic property was affected, and MoDOT had already acquired that property. This was brought to the City's attention just before the parties were scheduled to file cross-briefs for summary judgment on Count I. The City is still determining what action it wants to take at this time.

The major activity in this case has been on Count II. The City claimed that MoDOT and the City, post-FEIS and post-ROD, had entered into an enforceable contract to compel a change in the ROD, to retain the current configuration of the Big Bend and Bellevue interchanges, through a one page "Agreement in Principle". The Agreement also called for sound abatement and instructed MoDOT to secure FHWA approval. In return, the City agreed to drop its suit.

The City requested full discovery of all records and witnesses on this as a breach of contract case, plus a federal court jury trial, and ultimately, a court order mandating compliance with MoDOT's "obligations" under this Agreement in Principle. MoDOT and FHWA filed a joint motion to dismiss Count II, contending that it was not enforceable since a necessary party, FHWA, was not a party to the agreement, and without FHWA's cooperation, the agreement could not be enforced; that the alleged agreement was executory, and therefore could not be enforced; that the agreement was contrary to NEPA policy and procedures, since the alleged agreement was result oriented and disregarded the NEPA process and considerations to date; plus other related arguments. Judge Webber granted the federal and state defendants' motion to dismiss, and then restated his position on a motion for reconsideration. His ruling focused on the fact that the ultimate actor and decision-making entity under NEPA is FHWA, and not MoDOT; MoDOT could not implement or enforce the terms of the Agreement in Principle without the active cooperation and participation of FHWA; and FHWA was not a party to the Agreement in Principle.

The City has taken no major action on the suit since Count II was dismissed under Rule 12(b)(6). Count I is now pending under a court continuance, awaiting further action by the parties.

The counsel on the City of Richmond Heights case are: for the United States, Assistant U.S. Attorney Jane Rund; for MoDOT, Regional Counsel Philip Morgan and myself. FHWA Midwest counsel Julie Dingle is also assisting and advising

the parties, but is not counsel of record. For Richmond Heights: DC attorney Andrea Ferster, and City Counselor Ken Heinz. *City of Richmond Heights, Missouri v. Norman Mineta, et al.*, U.S. District Court, Eastern District of Missouri, Case No. 4:06CV00511ERW (Honorable E. Richard Webber, Judge)

## ILLINOIS CORRIDOR PROTECTION STATUTE SURVIVES CONSTITUTIONAL CHALLENGE

A group of property owners opposed to a highway project in the early planning stages filed suit when Illinois DOT filed a corridor map to protect the future right of way. They claimed that the statute that IDOT used to file the map was facially unconstitutional. Neither the statute nor the map restricts use of the land on the corridor map. Once the map is recorded, the property owners are required to give notice when they intend to develop their property so IDOT can decide whether or not to acquire the property. IDOT can use eminent domain. Although each property owner giving notice may not develop the property for up to 165 days (the statutory period for IDOT to acquire), the Illinois Supreme Court ruled that this was not a long enough period to constitute a regulatory taking. The Court rejected the claim that the corridor protection statute violated separation of powers by doing away with the need to show necessity in eminent domain. IDOT would still have to show necessity in the event it took any property in the corridor by eminent domain. The statute did not violate due process since it was not enacted as a means to purposefully and improperly drive down the value of property. *Marvel Davis, et al. v. Brown, et al,* 221 Ill.2d 435, 851 NE2d 1198, 303 Ill.Dec.773, *cert den.* No. 06-302, 10/30/06.

## NOTES FROM THE CHAIR

Submitted by Peggy Strand
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Many thanks to Committee Members who were able to participate in our meeting in January, 2007. We are now planning for the TRB July Workshops and I hope many of you will be able to attend that session.

The TRB July Workshops are July 8-11, 2007 at the Courtyard Marriott in Philadelphia, Pennsylvania. There will be a full suite of educational programs, receptions, committee meetings and social outings. This year, the Federal Highway Administration plans to send all of its attorneys to the Workshops so we should have a terrific opportunity to meet and work with our federal counterparts.

At our Committee meeting in July, we will do planning for the January 2008 TRB Annual Meeting. Please come full of ideas and energy!

**NEXT DEADLINE FOR SUBMISSIONS IS JUNE 15, 2007**

Anyone who would like to submit a case summary or other news for the July, 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 June 15, 2007.