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FHWA/ FTA UPDATE NEPA RULES

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On March 24, 2008, FHWA and FTA issued a final rule revising their NEPA compliance regulations (74 *Federal Register* 12518, March 24, 2009). The new rules are in line with those proposed by the agencies in August 2007 and accomplish the following major changes:

First, the new rules clarify the roles of the federal and state governments and interested private parties. There are new definitions for “participating agency” and “project sponsor.” The former is a “Federal, State, local, or federally-recognized Indian tribal governmental unit.” The latter includes the same entities but also includes any “other entity, including any private or public-private entity that seeks an Administration action.”

Under this clarification, any State or local governmental applicant that is, or is expected to be, a direct recipient of federal funds is required to serve as a joint lead agency. That entity may prepare environmental review documents if the Administration furnishes guidance and independently evaluates the documents. In contrast, the role of a project sponsor that is a private institution or firm is limited to providing technical studies and commenting on environmental review documents. Moreover, any public agency with statewide jurisdiction (or a local unit of government acting through a statewide agency), may prepare the environmental review documents, regardless of its interest in the project, so long

as it meets the requirements of NEPA section 102(2)(D) and the Administration furnishes guidance, participates in the preparation, and independently evaluates the document. Finally, the rules confirm that, for Federal-aid projects, the State highway agency bears the responsibility of ensuring that “the project is constructed in accordance with and incorporates all committed environmental impact mitigation measures.”

Next, the rules now formally allow that the information and results produced by, or in support of, the transportation planning process may be incorporated into environmental review documents.

Third, State public involvement/public hearing procedures must now provide for: (1) an opportunity for public involvement in defining the purpose and need and the range of alternatives and (2), for highway projects, public notice and an opportunity for public review and comment on Section 4(f) *de minimis* impact findings.

Fourth, the rules establish a new categorical exclusion (CE) and conditional CE. The new CE is for the deployment of electronics or information processing to improve the efficiency or safety of a surface transportation system or to enhance security or passenger convenience. The new conditional CE is for the acquisition of pre-existing railroad right-of-way pursuant to 49 U.S.C. 5324(c). For this CE, no project development on the acquired railroad right-of-way may proceed until the NEPA process is complete.

Fifth, it is no longer true that an FTA applicant may circulate an environmental assessment prior to Administration approval. Sixth, the public comment period on a Draft Environmental Impact Statement is still at least 45 days, but now may be no longer than 60 days. Finally, the rules codify the 180 day period for limitation of actions on Records of Decision.

REVISED ENDANGERED SPECIES ACT CONSULTATION REGULATIONS ON THE WAY OUT

Submitted by Peggy Strand
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In December, 2008, the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) published revised regulations governing interagency consultation under Section 7 of the Endangered Species Act, 73 *Fed. Reg.* 76272 (Dec. 16, 2008), amending 50 C.F.R. Part 402. The status and meaning of these regulations has been changed by the Obama Administration, and the rules themselves may be rescinded before May 10, 2009.

The December 2008 final revised Section 7 consultation regulations addressed several topics. Climate change, that is, impacts of projects on atmospheric gases that play a role in climate change, was addressed by changes to the definitions of "cumulative effects" and "effects" to exclude activities not "physically located within the action area" of the activity subject to consultation. See 402.02 (definitions). Similarly, changes to 402.03 (applicability) stated that federal agencies need not consult where the "effects of such action are manifested through global processes" and the measurements of such effects are uncertain or very small. The revised rule also allowed federal agencies to avoid formal consultation with the FWS or NOAA upon concluding, based on a biological assessment and informal consultation, that "the proposed action is not likely to adversely affect any listed species or critical habitat". In that case, the FWS or NOAA only need to agree that informal consultation has been completed, and do not need to concur in the conclusion regarding adverse effects. See 402.13 (informal consultation) and 402.14 (formal consultation).

Recent steps by the Obama Administration and the Congress call into question the remaining vitality of the revised Section 7 regulations.

On March 3, 2009, President Obama issued a Memorandum to Heads of Executive Departments and Agencies essentially suspending the Section 7 regulations. In pertinent part, the memorandum stated:

I hereby request the Secretaries of the Interior and Commerce to review the regulation issued on December 16, 2008, and to determine whether to undertake new rulemaking procedures with respect to consultative and concurrence processes that will promote the purposes of the ESA.

Until such review is completed, I request the heads of all agencies to exercise their discretion, under the new regulation, to follow the prior longstanding consultation and concurrence practices involving the FWS and NMFS.

The Presidential memorandum was announced at a Department of Interior anniversary celebration, and explained as a return to basing decisions on "sound science."

The upshot of the Presidential Memorandum: federal agencies have been directed to ignore the December 2008 regulation and follow pre-existing practice. Under that practice, a federal agency must obtain the concurrence of the FWS or NOAA in the conclusion that a proposed action will not adversely affect a listed species or critical habitat.

At the same time as the Presidential memorandum, Congress enacted the Omnibus Appropriations Act (for fiscal year 2009) which contained a provision

addressing the Section 7 regulations. Section 429 of the Appropriations Act provided that FWS and NOAA could withdraw or reissue the Section 7 regulation "without regard to any provision or statute or regulation that establishes a requirement for such withdrawal" if they do so within sixty (60) days of enactment of the legislation. The bill passed March 10, 2009, so FWS and NOAA have until May 10, 2009 to withdraw the Section 7 rule without providing an opportunity for notice and comment, or any other procedures. Section 429 specifies that if the regulation is withdrawn, the law in effect immediately prior to the regulation will govern, unless specifically modified.

The upshot of the Federal Legislation: Congress did not revoke the December 2008 Section 7 regulation, but it sent a loud and clear message that it would like to see the Obama Administration revoke the regulation. Combined with the Presidential memorandum that had (1) directed the FWS and NOAA to review the regulation and (2) directed other federal agencies to largely ignore the regulation, it seems highly likely that the revised Section 7 regulations will be withdrawn, rescinded or otherwise modified in the near future.

**FIRST CIRCUIT APPROVES BRIDGES OVER WILD AND SCENIC RIVER
ADMINISTERED BY STATE OF MAINE**

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In *Fitzgerald v. Harris*, 549 F. 3d 46 (1st Cir. December 5, 2008), No.08-1306, <http://www.ca1.uscourts.gov>, plaintiffs sought to prevent the State of Maine from maintaining six permanent bridges over the Allagash Wilderness Waterway [AWW]. In 1970 the AWW was designated part of the national wild and scenic rivers system, pursuant to 16 USC 1273(a)(ii) upon application of the State of Maine to the Secretary of Interior. The AWW is about eighty-five miles long, connects a series of lakes, ponds, and streams in northern Maine and is classified as a "wild river area" pursuant to 16 USC 1273(b)(1). As a result of this manner of state-requested designation, the AWW is a "state-administered" wild river. In 2006, Maine amended its statute relating to its state administration of the AWW to allow the reconstruction of six bridges across the waterway that existed prior to designation as part of the national wild and scenic rivers system.

Plaintiffs argued that the 2006 amendment was void as preempted by the federal Wild and Scenic Rivers Act [WSRA], 16 USC 1271 et. Seq. Plaintiffs alleged the bridges and other access activities allowed by the 2006 amendment would "degrade the value which caused the AWW to be included in the National Wild and Scenic Rivers System" and erode the AWW's wild condition, contrary to the purpose of the WSRA.

The First Circuit upheld the dismissal of plaintiffs' "conflict preemption" complaint that (1) the Maine statute was an obstacle to accomplishing the purposes of the WSRA, (2) it was impossible to comply with both the Maine statute and the

language of 16 USC 1273(b)(1) requiring "wild" rivers to be "generally inaccessible except by trail," and (3) the Maine management plan embodied in the statute was contrary to Maine's duties to protect the "wild" river under the WSRA.

The First Circuit held that:

- (1) The WSRA does not mandate that states adopt management plans with specific standards for state-administered rivers, but rather expressly allows state flexibility depending on the special attributes of each river, as is provided by 16 USC 1281(a) and the Departments of Interior and Agriculture guidelines;
- (2) The federal government has a limited role to cooperate and assist states in management of state-administered rivers pursuant to 16 USC 1281(e), 1282(a), and 1283; and
- (3) The contemplated remedy is not federal preemption of the state's discretionary administration of the river, but only potential state loss of any federal benefits consistent with the river's designation.

The First Circuit added that the WSRA expressly disclaims preemption of a state's right to access the beds of component rivers under 16 USC 1284(f) and 1277(a)(1), does not require that a water resources project enhance the wilderness character of a wild river area, and reflects an overarching federal respect for a state's authority over its own designated rivers.

"The State of Maine is responsible for deciding how to best administer the Allagash Wilderness Waterway to protect and enhance the values which caused it to be designated...."

LOCAL REGULATION OF AIRPORT EXPANSION PREEMPTED BY FAA

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In October 2008, a federal district court held that local land use regulation of an airport runway project was impliedly preempted by the Federal Aviation Act, 49 U.S.C. § 40101 et seq. ("Aviation Act"). *Tweed-New Haven Airport Authority v. Town of East Haven*, 582 F. Supp. 2d 261 (D. Conn. 2008) ("New Haven").

In *New Haven*, the New Haven Airport Authority ("Authority") was undertaking an improvement project in order to comply with Federal Aviation Administration ("FAA") regulations related to runway safety areas. The Authority presented its project to the East Haven Town Council ("Town Council"), which rejected the Authority's development application. In addition, the East Haven Inland Wetland and Watercourse Commission ("Wetlands Commission") asserted its regulatory

jurisdiction over wetlands impacted by the Authority's runway project and issued a cease and desist order barring further action on the Authority's project. The Authority then filed a lawsuit on the basis that the actions of the Town Council and Wetlands Commission to block the runway project were preempted by federal and state law, including the Aviation Act.

The court agreed with the Authority holding that although the local land use regulations were not expressly preempted by the Aviation Act they were impliedly preempted because Congress intended to fully occupy and regulate the field of airline safety, and the Authority's project was being implemented in order to meet FAA safety standards and was being undertaken within the boundaries of the existing airport. As such, the court permanently enjoined actions of the Town Council and Wetlands Commission to block the Authority's runway project.

NOTES FROM THE CHAIR

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Spring has sprung in Washington, D.C., with Congressional and agency action on environmental and transportation issues joining the Cherry Blossoms and tulips. Among the ongoing and upcoming events, I direct your attention to the following:

- **See you in Denver.** The July 2009 Legal Workshops are scheduled for Denver Colorado, July 19-22. You will be receiving an early program and registration information within about a month – the program (currently in draft) looks to be exciting for all transportation attorneys. The new agency General Counsels will participate, as well as speakers from across the transportation law sector. Join your friends and colleagues for training and networking in the mile high city. Our regular committee meeting will be during the July Workshops.
- **Wild and Woolly West Virginia.** The 2009 Meeting and workshops for Environmental Analysis in Transportation Committee (ADC10) will be in Shepherdstown, West Va. July 13-16, 2009. If you can't make it to Denver, or even if you can, think about attending this program of our "client committee", the folks who have to live under the environmental laws. While focused on policy rather than law, this particular program is co-sponsored by federal environmental agencies, such as the Fish and Wildlife Service and the Environmental Protection Agency. Information is available at <http://www.itre.ncsu.edu/ADC10/default.htm>
- **Climate change groupies.** Check out the US DOT Climate Change website, <http://climate.dot.gov/index.html> which serves as a clearinghouse for information on this important topic, including a link to the agency's

climate change newsletter,

<http://www.fhwa.dot.gov/hep/climatechange/newsletter/index.htm> a succinct source of information on policy and science. And if you can't get enough of climate change, you will find a very good legal summary at <http://www.climatecasechart.com/>, assembled by Arnold and Porter.

- ***The Natural Lawyer on line***. Remember that *The Natural Lawyer*, current and archived issues, is now available on the ADC10 website, <http://www.itre.ncsu.edu/ADC10/default.htm>. Many thanks to the Environmental Analysis in Transportation committee for hosting *The Natural Lawyer*.

I hope to see many of you at the July Legal Workshops.

NEXT DEADLINE FOR SUBMISSIONS IS JUNE 15, 2009

Anyone who would like to submit a case summary or other news for the July, 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 June 15, 2009.