

TRANSPORTATION RESEARCH BOARD COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (AL050)

THE NATURAL LAWYER

Volume 16

July, 2009

Number 4

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EPA PROPOSES CHANGES TO TRANSPORTATION CONFORMITY RULES

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On May 15, EPA published a proposal modifying the Transportation Conformity Regulations (74 *Federal Register* 23024-23043, 5/15/09). Comments were originally due 30 days from publication, but, since a public hearing was requested, on June 8, the deadline was extended to June 29.

The proposed changes serve two purposes: First, they provide necessary updates in light of the October 2006 rule which strengthened the 24-hour PM_{2.5} standard and revoked the annual PM₁₀ standard. Second, they clarify the regulations in light of the D.C. Circuit's 2007 opinion concerning hot-spot analyses.

In short, the first set of changes provide guidelines as to how to show conformity with the revised (2006) PM NAAQS. EPA is not proposing any changes to the existing requirements for areas designated nonattainment for the 1997 PM_{2.5} NAAQS, since those designations were not affected by the 2006 changes. The proposal makes clear that areas designated as nonattainment only as a result of the 2006 PM_{2.5} NAAQS need not comply with the conformity requirements associated with the 1997 PM_{2.5} NAAQS. Existing transportation models will be sufficient to make the new conformity showing, as will existing consultation (and other) processes. Analysis years will be the same for both sets of NAAQS.

Project-level conformity requirements for the 1997 PM2.5 NAAQS remain unchanged.

The second set of changes is really not a set of substantive changes at all, but clarifications as to the import of the existing regulations. In response to the D.C. Circuit's 2007 hot-spot opinion, EPA is clarifying that federally-funded and approved projects must meet CAA Section 176(c)(1)(B)(iii) requirements (that the project not delay timely attainment) within the local area affected by the project (as opposed to any other interpretation of "area.") Also, EPA is confirming that a hot-spot showing requires that projects be included in a regional emissions analysis. No changes in the method for showing project-level conformity are proposed and no reduction in PM emissions need be evidenced to make a conformity showing. However, EPA is clarifying that the Section 176(c)(1)(B)(iii) requirement can be met if a project is consistent with a SIP's motor vehicle emissions budget and control measures.

**BACK TO THE FUTURE: OLD ENDANGERED SPECIES
CONSULTATION RULES REINSTATED**

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On April 28, 2009, the Secretaries of the Departments of Interior and Commerce announced that the Obama administration would revoke a rule promulgated at the end of the Bush administration seeking to revise Section 7 consultation under the Endangered Species Act (*74 Federal Register 20421-20423, 5/4/09*). The Bush rules would have allowed agencies, like the Department of Transportation, to bypass reviews at the Fish & Wildlife Service and/or the National Oceanic and Atmospheric Administration in certain circumstances. According to one's views of the eleventh-hour Bush rule, it either sought to streamline a process that often times becomes bogged down in lengthy reviews and administrative delays or it sought to undermine fundamental protections for threatened or endangered species. Thus, as of now, the Section 7 consultation rules in effect prior to January 14, 2009 have been reinstated.

This revocation might not be the end of the story. The new administration has committed to a comprehensive review of the consultation process and has requested public comment, available through August 3, 2009, on any potential changes to the current regulations. Among the topics that the agency has encouraged input include: "the applicability of Section 7, the definitions of 'jeopardy' and 'adverse modification', the definition of 'effects of the action', the definition of 'action area', the appropriate standard of causation, the informal consultation process, methods to streamline both formal and informal consultation, and consideration of effects related to global climate change." Thus, transportation agencies with expertise in handling potential adverse effects determinations should take advantage of this comment period to explain how or why efforts to streamline the consultation process could be accomplished without negatively affecting plant or animal species of concern.

As further proof that the new administration will struggle in finding an appropriate balance in ESA reform and administration, on May 8, 2009 the Department of the Interior retained the “Polar Bear Special 4(d) Rule,” also published at the end of the Bush administration. Thus, while the polar bear will remain listed as a threatened species, no additional permits under the ESA will be required for activities authorized under the Marine Mammal Protection Act. Secretary Salazar also echoed a Bush administration conclusion that the “ESA is not the proper mechanism for controlling our nation’s carbon emissions.” At least for the short term, therefore, parties challenging federal transportation actions cannot argue that a project’s potential to increase carbon emissions will further reduce polar bear habitat, thereby creating an adverse effect under the ESA.

Most observers felt that the expected shelf-life of the Bush administration Section 7 rules was likely quite short. Although this prediction has proven correct, the possibility of further reforms in how the agencies address consultation procedures still exists.

FOURTH CIRCUIT REJECTS SOUTH CAROLINA DOT DIRECTOR IMMUNITY FROM NEPA ACTION

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The Director of the South Carolina Department of Transportation (SCDOT) was sued in his official capacity along with other federal and state agencies and agency directors by several environmental groups alleging NEPA violations. The plaintiffs sought an injunction and alleged that the final environmental impact statement (FEIS) and record of decision for a connector bridge project were improperly issued. The SCDOT director, moving to dismiss, asserted that he had sovereign immunity under the Eleventh Amendment. After the federal district court denied the motion, an interlocutory appeal was taken to the Fourth Circuit Court of Appeals. The decision in *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324 (4th Cir., Dec. 5, 2008), addressed standing and immunity issues and affirmed the district court decision.

The Fourth Circuit reviewed the standing of the South Carolina Wildlife Federation (SCWF) which other defendants challenged and which issue the SCDOT director raised on the appeal. Citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the court said a plaintiff must show: 1) it suffered an injury in fact which is an invasion of a legally protected interest that is concrete and particularized; 2) there is a causal connection between the injury and conduct complained of; 3) it is likely, not speculative, the injury will be redressed by a favorable decision of the court. General factual allegations of injury resulting from a defendant’s conduct may suffice to satisfy these elements as, on a motion to dismiss, the court will presume that “general allegations embrace specific facts necessary to support the claim.” Citing *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Fourth Circuit said SCWF alleged that construction of the project would harm its members’ ability to use and enjoy the area for educational, scientific, recreational, and aesthetic purposes for which their members currently use the land. Also, SCWF traced the injury to the project which the SCDOT director and others

planned, developed and intend to finance and construct, and SCWF showed that enjoining construction and requiring reexamination of the proposal per NEPA would redress SCWF's procedural and substantive concerns. Relying on Fourth Circuit precedent, the court held there is standing to assert procedural allegations under NEPA to preserve the environmental status quo pending federal review. Accordingly, the court upheld the district court finding of standing.

The review of the sovereign immunity issue began with the court stating that neither NEPA nor the Administrative Procedure Act provides a cause of action against state actors. Nevertheless, the court said it had previously concluded that "federal courts have a 'form of pendent jurisdiction . . . based upon necessity' over claims for injunctive relief brought against state actors in order to preserve the integrity of federal remedies." Therefore, a federal court may entertain suits against state actors "to preserve federal question jurisdiction in the application of federal statutes" where "the challenged activities" of state actors "would make a sham of the reconsideration required by federal law." Again, the court cited circuit precedent in holding that NEPA does provide a cause of action for private plaintiffs challenging compliance with its provisions and the "federal statute and our precedent permit suit against a state actor where a party seeks to preserve federal rights under NEPA pending the outcome of federal procedural review." (Footnote 5 notes that other circuits have said that NEPA does not create a private right of action and have required litigants to bring NEPA actions through the APA, even though the court says that only applies to federal agencies). The court said that, if state actors could significantly alter a project's environmental impact, a federal court may hear a suit for injunctive relief. Here, the court said the federal remedy is reconsideration of the FEIS and, even though the SCDOT director said he would not proceed with construction without FHWA approval, "actions taken by the state short of building the road could change the cost of proposed alternatives, thereby impacting the federal agency's review and reconsideration."

Next, the Fourth Circuit addressed the district court's holding that, under *Ex parte Young*, 209 U.S. 123 (1908), suits against state officers for prospective relief are allowed where there is an ongoing violation of federal law. The Fourth Circuit found that this suit sought a declaration that past actions did not comply with NEPA and alleged that planned construction should be enjoined prior to full NEPA compliance. Accordingly, the action complied with *Ex parte Young*. The court also found the requisite "special relation" to the federal violation required under *Ex parte Young* as both state and federal law impose duties on the SCDOT director regarding the preparation of the FEIS and in planning the construction project.

**RADIO TOWER DOES NOT CONSTITUTE COMMERCIAL OR INDUSTRIAL LAND
USE UNDER ILLINOIS BILLBOARD LAW**

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The Illinois Supreme Court reversed circuit and district appellate court decisions to reinstate an Illinois DOT decision applying the provisions of Illinois law that implemented

the Federal Bonus Act. The Bonus Act, which preceded the Highway Beautification Act, generally prohibited billboards outside of urban areas on interstate highways with a few exceptions. Illinois law incorporates one of those exceptions, which permits a billboard on land outside of 1959 municipal boundaries that has been continuously used as a commercial or industrial site since 1959.

Outcom applied for a permit to erect a sign on a piece of farmland on which a radio tower and transmitter structure had been erected prior to 1959 and that had remained in place over the years. After receiving the permit application, Illinois DOT gave the sign company an additional opportunity to provide evidence that the site met the definition of "commercial or industrial" property. Outcom simply responded that any radio activity is necessarily for business purposes and that the trailer it used as a transmitter station was permanently affixed to the land and that the tower and transmitter trailer are both an essential part of the radio station's business.

IDOT denied on the grounds that the radio tower and trailer did not alter the basic agricultural character of the property. It likened the presence of the radio tower and trailer to utilities crossing the property (The presence of the "business" use of providing electricity or telephone service, for example, does not transform a residential site to a commercial one.). IDOT reviewed the matter in the same fashion adopted by the Manual of the American Planning Association which categorizes radio towers separately from residential, commercial or industrial categories. Because no industrial or commercial uses besides the tower were cited as a basis for the application, IDOT denied the application. That denial had been reversed by two reviewing courts.

Most of the decision focuses on the proper procedural methodology to be used to challenge such a decision in Illinois. In the end the Illinois Supreme Court concluded that IDOT's decision was subject to review under a "clearly erroneous" standard. The court concluded IDOT's decision was not clearly erroneous and reversed the lower courts to reinstate the IDOT decision on the matter.

Holding: Radio towers and transmitters do not change the essential character of farmland to "commercial or industrial" for purposes of billboard regulation under state laws complying with the Federal Bonus and Highway Beautification Acts. (At least IDOT decision to that effect is not clearly erroneous.)

Import: This ruling may have some impact off of interstate highways in unzoned areas where cell phone towers have been erected. Under the Federal Highway Beautification Act, and conforming state laws, billboards may be permitted in unzoned areas that are commercial or industrial in nature. Under the IDOT approach, a cell phone tower's presence would not transform the underlying basic character of the land in such situations to "commercial or industrial."

Outcom, Inc. v. Illinois Department of Transportation, Illinois Supreme Court No. 106260, May 21, 2009, 2009 WL 1416077 (Ill.)

SON OF MICCOSUKEE: 11TH CIRCUIT GIVES DEFERENCE TO EPA'S NPDES RULE FOR FLORIDA WATER TRANSFER

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The legal battle over whether water transfers require a Clean Water Act permit crossed another threshold with the June 4, 2009 decision by the United States Court of Appeals for the Eleventh Circuit in *Friends of the Everglades v. So. Fla. Water Mgmt. Dist.*, No. 07-13829 (11th Cir. June 4, 2009) ("*Friends I*"). The opinion is the first to consider a challenge to a permit-less water transfer in light of EPA's Final Water Transfers Rule exempting from the permit requirement "activity that conveys or connects waters of the United States without subjecting the transferred water to any intervening industrial, municipal, or commercial use." 73 *Fed. Reg.* 33697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). In a very thorough and often amusing opinion, the Eleventh Circuit found that a permit was not needed, deferring to EPA's rationale in the Rule. EPA's Final Rule itself remains subject to pending litigation in lawsuits pending in the Eleventh Circuit (as well as other courts), which were stayed pending resolution of *Friends I*. See *Friends of the Everglades v. U.S. EPA*, No. 08-13652-CC (11th Cir. consolidated Sept. 10, 2008) (*Friends II*). The outcome of *Friends I* provides insight into how the Eleventh Circuit will approach the direct challenge to the Final Rule in *Friends II*.

The *Friends I* dispute involved a pumping station operated by the South Florida Water Management District that moved water from certain canals into Lake Okeechobee, part of the complex system of water distribution and management in Florida. The appeal arose after a lengthy lower court trial, and the opinion does not question the fact that the agricultural canal water being pumped uphill into the Lake is "more polluted" than the Lake receiving water. Rather, the Court's opinion reviews the litigation history concerning water transfers, including the *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (*Miccosukee*) decision, where the Supreme Court had reversed the Eleventh Circuit determination on permits for water transfers and remanded the matter for consideration of the government's "unitary waters" theory. As reflected in EPA's Final Rule, and its litigating position in these cases, the federal position is that the Clean Water Act does not require a permit for movement of possibly polluted water within or among other waters of the United States. In over simplified terms, there is one, "unitary" water of the United States into which persons may need a permit to discharge "new" pollutants but moving water within that system – even dirty water -- does not add any new pollutants.

As thoroughly summarized in the Eleventh Circuit opinion, the "water transfer" litigation has generated mixed results over the years. For example, the lower court in *Friends I* soundly rejected the unitary waters theory, holding a permit was required. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, 2006 U.S. Dist. LEXIS 89450 (S.D. Fla. 2006). Litigation in New York and the Second Circuit has also resulted in opinions holding that inter-basin water transfers that add pollutants require a discharge permit. See *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (*Catskill I*); *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of*

New York, 451 F.3d 77 (2d Cir. 2006) (*Catskill II*). The issue is emerging with a possible clear split among the circuits.

The *Friends I* opinion is worth a read for pleasure alone, as it is drafted in a conversational, amusing style. For example, an issue on appeal was 11th Amendment immunity of the Water District. In disposing of this matter as unimportant since the Executive Director of the Water District had no such immunity, the opinion offered this humorous summary:

We begin with the cross-appeal, which contests the dismissal of the Water District on Eleventh Amendment immunity grounds. The parties disagree mightily about this issue and had gotten so wrapped up in the arguments about it that none of them had stepped back to ask why it matters. We asked that question of the attorneys at oral argument, and once they got past the deer-in-the-headlights moment they could offer no good reason why we, or they, should care if the Water District is in or out of this lawsuit. We believe that it does not matter at all.

Similarly, the opinion summarized the "unitary waters" theory using the "pot of soup" analogy:

The unitary waters theory holds that it is not an "addition . . . to navigable waters" to move existing pollutants from one navigable water to another. An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters. The metaphor the Supreme Court has adopted to explain the unitary waters theory is: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Miccosukee*, 541 U.S. at 110, 124 S. Ct. at 1545–46 (alteration and quotation marks omitted). Under that metaphor the navigable waters of the United States are not a multitude of different pots, but one pot. Ladling pollution from one navigable water to another does not add anything to the pot. So no NPDES permit is required to do that.

Reviewing the history and prior cases on this legal issue, the opinion notes that "The unitary waters theory has a low batting average." However, the Eleventh Circuit ultimately concludes that EPA's Final Rule made all the difference. The court decided that (1) the statutory provision was ambiguous, such that EPA's regulation was entitled to *Chevron* deference, and (2) EPA's interpretation was a reasonable one. The opinion summarizes the ambiguous term as follows:

The question is whether "addition . . . to navigable waters"—meaning addition to "the waters of the United States"—refers to waters in the individual sense or as one unitary whole.

With respect to whether the EPA Final Rule was a permissible construction of this ambiguous term, the court again used a colorful analogy:

Sometimes it is helpful to strip a legal question of the contentious policy interests attached to it and think about it in the abstract using a hypothetical. Consider the issue this way: Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting “any addition of any marbles to buckets by any person.” A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble mover “add[ed] any marbles to buckets”? On one hand, as the Friends of the Everglades might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, as the Water District might argue and as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever position we might take if we had to pick one side or the other of the issue, we cannot say that either side is unreasonable.

Bottom line: Whether you think the Court “lost its marbles” or not, under current EPA regulations and in the Eleventh Circuit, at the moment, inter-basin water transfers do not require a Clean Water Act permit.

**EIS FOR FLORIDA REPLACEMENT AIRPORT UPHELD, NO SUPPLEMENT
NEEDED FOR IVORY-BILLED WOODPECKER**

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In *Natural Resources Defense Council v. Federal Aviation Administration (Osmus)* 564 F. 3d 549, decided May 1, 2009, the Court of Appeals for the Second Circuit upheld a National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) and a “no possible and prudent alternative” finding under the Airport and Airway Improvement Act (AAIA) for an airport in Florida.

Runway Safety Standards adopted by the Federal Aviation Administration (FAA) impose certain requirements on runway safety for all airports receiving federal funding. By 2015, airports must meet either safety area size minimums or deploy an Engineered Materials Arresting System. An EIS was prepared to address alternatives for meeting the runway standard and other size requirements for particular aircraft at the Panama City Airport. Several alternatives were screened and, after eliminating some alternatives, seven remained for detailed consideration. Alternatives involving expansion of the existing airport would involve re-routing highways, displacing homes and filling in the bay waters of Goose Bayou. The bay waters were designated Florida Class II waters and the Florida Department of Environmental Protection “viewed projects affecting such waters as unacceptable.” The FAA’s Record of Decision (ROD) approved relocating the airport to an alternative site in West Bay County that would fill 596 acres of jurisdictional wetlands for the first phase and ultimately impact 1,513 acres of wetlands.

On the issue of alternatives, the FAA concluded “projects affecting Goose Bayou did not present workable alternatives because they were unlikely to secure permit approval from the Florida Department of Environmental Protection.” The Court held this was reasonable.

On the issue of indirect and cumulative analysis, the court concluded the following: 1) where the FAA has no notice of a freeway proposal which would provide transportation to the airport, and petitioners did not comment on indirect and cumulative effects of the freeway, the FAA is not required to analyze such a proposal as an indirect effect of the airport. 2) NEPA does not require separate analysis of induced impacts and cumulative impacts, only that such impacts be considered, and 3) by evaluating “cumulative impact study areas” based on drainage basins, Sector Plan boundaries, census boundaries, noise contours, drive time contours and consultation with other agencies, the cumulative analysis complied with NEPA’s procedural requirements.

Just eleven days after the FAA issued its ROD, the ivory-billed woodpecker (a species previously thought to be extinct) was detected about 20 miles from the West Bay site. The FAA’s Biological Assessment determined that the proposed airport would not likely adversely affect the ivory-billed woodpecker and the U.S. Fish and Wildlife Service concurred, agreeing with the FAA that no further study was needed under NEPA or the Endangered Species Act. The Court upheld the decision not to prepare a Supplemental EIS, finding the FAA had taken a hard look at the new information and had adequately supported its findings.

The court then turned to the challenges under the AAIA, which requires a “prudent and feasible” alternatives finding for airport projects with a significant adverse effect on natural resources. The Petitioners objected to FAA’s consideration of non-environmental factors, which implicated the scope of “prudent” under the AAIA. The court considered the following: 1) the Airport Environmental Handbook interpreted “prudent” to permit consideration of non-environmental factors when considering alternatives, 2) the Handbook warranted a “great deal of persuasive weight,” under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1984), and 3) there are “different considerations involved in airport projects” as compared to highway projects, and under the AAIA, “prudent” is not defined the same way it is under Section 4(f) of the Department of Transportation Act for highways. The court concluded that the FAA was permitted to consider social impacts in assessing whether alternatives were prudent. The court also upheld the FAA’s approach to Purpose and Need, which included consideration of the FAA’s own mandates and policies, in particular safety, minimizing noise impacts and flexibility to meet demand and new aircraft types.

**LEAVING LAS VEGAS: FAA FONSI AND CONFORMITY EXEMPTION
UPHELD FOR MODIFICATION OF FLIGHT PATH**

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The Court of Appeals for the Ninth Circuit upheld a Federal Aviation Administration (FAA) Finding of No Significant Impact (FONSI) based on an Environmental Assessment for changes in flight departure paths at the Las Vegas McCarran International Airport. (*City of Las Vegas v. Federal Aviation Administration (Peters)* 2009 DJDAR 8511, June 12, 2009)

The FAA changed the flight departure paths from runways at Las Vegas McCarran International Airport in 2001 and proposed another change in 2005. In late 2005, the FAA published a Draft Supplemental Environmental Assessment for the proposed flight paths. Prior to issuing the Record of Decision (ROD), the FAA Air Traffic Division learned that they would have to obtain a waiver for the proposed flight path from the FAA Flight Technologies and Procedures Division. The FAA issued the Final Supplemental Environmental Assessment, and concurrently issued the FONSI/ROD in November of 2006, prior to issuance of the waiver.

The challenged issues primarily focused on the adequacy of the analysis in the Environmental Assessment given that the waiver had not been approved yet. The court concluded:

- 1) Safety: the FAA did take a “hard look” at the safety of the proposed flight path and conducted tests which found equivalent safety levels, even with the waiver.
- 2) Noise and air quality: the FAA analyzed the flight path with the waiver where the changes would have some impact on noise and air (a waypoint and a speed restriction). No further noise and air analysis was necessary.
- 3) Supplemental Environmental Assessment: a supplement is only required “when the environmental impact is significant or uncertain and the EA/FONSI is no longer valid.” Here, the modifications were not significant, as evidenced by analysis of the modifications in the final document.

On the Clean Air Act challenge, the court concluded that changes in departure paths are categorically exempt and no conformity determination or applicability analysis was required. Although there was some evidence that the EPA might be in the process of changing this exemption, the court based its finding on the exemption as it existed at the time.

**USFS WINS CHALLENGE TO PROGRAMMATIC EIS
FOR SUPERIOR NATIONAL FOREST**

Submitted by Jim Thiel, Wisconsin Department of Transportation

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In another Administrative Procedures Act NEPA challenge, the Sierra Club unsuccessfully challenged decisions of the United States Forest Service (USFS) of the

federal Department of Agriculture. It claimed USFS violated NEPA, in revising the *Forest Plan* for the Superior National Forest. *Sierra Club v. Kimbell*, 595 F.Supp.2d 1021(D.MN 2009) The Superior National Forest is an area of over three million acres located in Northern Minnesota. The Boundary Waters Canoe Area Wilderness is located within the Superior National Forest and takes up about one-third of the forest's total area. Various timber industry and user interests intervened in the case in support of USFS.

In this case, rather than attacking a particular project, the Sierra Club attacked the programmatic *Forest Plan* itself. The Administrative Record in the proceeding contained the FEIS on the plan, ROD, and the selected preferred alternative *Forest Plan*. In brief, Sierra Club argued USFS did not adequately consider the effects of the *Forest Plan* on the unique, pristine Boundary Waters Canoe Area Wilderness and used faulty data and an undisclosed methodology. The *Forest Plan* is a general planning document that provides guidelines and methods by which individual forest management decision are to be made.

The Court agreed that the FEIS needed to give sufficient consideration to the effects of the *Forest Plan* on the Boundary Waters, but could not find any precise standard by which to evaluate whether consideration was sufficient in the FEIS for such a general planning document. The Court stated it made sense that the programmatic FEIS for the *Forest Plan* should assess the plan's effects on the Boundary Waters at a similarly general level. The Court concluded that the statements in the FEIS regarding the effects on the Boundary Waters were somewhat conclusory, but were sufficient for a programmatic FEIS, whereas in a subsequent site-specific plan, such conclusory statements would not pass muster. The USFS decision was not arbitrary or capricious under the APA.

The Plaintiffs also challenged the Forest Service's methodology on maintaining its inventory of roads and trails in the National Forest. Since the roads and trails are constantly changing, the Forest Service maintained a digital record and printed out a map whenever it was needed. With regard to faulty data and undisclosed methodology arguments, the Court approved the legal principle that, under NEPA, the Court need not decide whether an EIS is based on the best available scientific methodology, but only whether the choice of methodology is not arbitrary or without foundation. And as to adequacy or timeliness of data, the Court stated it is not reasonable to expect a federal agency to revise its NEPA work yet again on the basis of data that became available only a few months before the FEIS was issued.

Perhaps of greatest interest in the case is the Court's discussion of the general legal principle that a party cannot raise an issue on judicial appeal that was not raised during the NEPA agency process or that relies on something that is not part of the Administrative Record. Hence, in my opinion, it appears self-serving contents of affidavits of individual members of an organization presented by a plaintiff to support organizational standing for the Court's Article III purposes as required by *Summers v. Earth Island Institute*, 129 S.Ct. 1142 (2009) may NOT be considered in evaluating the merits of an APA challenge to an agency decision under NEPA:

“...the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties.” Id. at 1152

THE SAGA CONTINUES: UPDATE ON ST. CROIX RIVER CROSSING HISTORIC STILLWATER BRIDGE LITIGATION

Submitted by Jim Thiel, Wisconsin Department of Transportation
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A replacement highway crossing of the Lower St. Croix River between MN and WI in the Stillwater and Oak Parks Heights, MN and Houlton, WI boundary has been studied for more than 25 years. This is an abbreviated chronology with the status of the current litigation at the end.

The impetus for the replacement crossing includes traffic congestion in downtown historic Stillwater, delays caused by the raising, lowering and associated closing of the existing historic Stillwater vertical lift bridge, safety and geometric concerns, and the deteriorated structural condition and maintenance cost of the existing lift bridge that was completed by the two States in 1930. It acts as a functionally obsolete and structurally deficient bottleneck at the wrong place in the National Highway System.

In early 1976, the lower 25 mile stretch of the Lower St. Croix River was added to the existing National Wild and Scenic Rivers System by the Secretary of Interior upon the application for such designation by the Governors of Minnesota and Wisconsin as a State-Administered River pursuant to 16 USC 1273(a)(ii). Both the existing Stillwater vertical lift bridge and the approved replacement bridge are in the State-Administered Zone of the river.

In December 1996, a year and a half after approval by FHWA of the FEIS for the then proposed replacement bridge in its Record of Decision, considerable expenditures of public funds, and acquisition and relocation of many homes and businesses in reliance on that determination; the federal National Park Service of the Department of Interior (NPS) determined that the then proposed replacement bridge between Wisconsin and Minnesota across the St. Croix River (1) constituted a “water resources” project and (2) would have a direct and adverse effect on the scenic and recreational values of the river. The FHWA failed to object or support its own approval in court. Hence the belated NPS determination effectively vetoed the then proposed crossing and caused a great waste of public funds and unnecessary displacement of families, businesses and even endangered mussels. No Federal agency could fund or permit such a “water resources” project. 16 USC §1278(a) [7(a) of the Wild and Scenic Rivers Act]

In April 1998, the U.S. District Court found that the NPS was well within its authority to interpret the bridge as a “water resources” project and upheld the NPS decision that prevented construction of the then proposed bridge.

In 2000-2001 Minnesota, Wisconsin and FHWA retained the US Institute for Environmental Conflict Resolution to complete a conflict assessment report, including a summary of stakeholders' issues and recommended next steps. The Institute was established by Congress to assist parties in resolving environmental, natural resource, and public lands conflicts and expedite the settlement of federal environmental lawsuits.

In 2002 the Governors of Wisconsin and Minnesota praised the federal government for including this St. Croix River Crossing Project, as one of seven projects nationally to receive accelerated environmental review by the federal government. The accelerated environmental review resulted from a Presidential executive order issued in September, 2002 on environmental stewardship. It called for a Cabinet-level task force to ensure that projects are not held up by inefficient review procedures.

Also, in 2002, the managing States in consultation with NPS published a new Master Plan for the Lower St. Croix River that clearly spelled out the active social recreational classification of the exclusively State managed water area of the river where the existing historic bridge and all alternative crossings are located in developed land areas.

In May 2006, the Supplemental FEIS was completed and approved by FHWA, after a long, thorough and searching process, involving all affected interests and agencies, including the Sierra Club, that considered a host of alternatives and an estimated mitigation package costing in excess of \$15 million and other firm commitments including preserving the historic lift bridge as part of a pedestrian/bicycle trail loop and closing it to all motor vehicle traffic. The SFEIS incorporated a concurrent and coordinated October 2005 NPS determination under 7(a) of the Wild and Scenic Rivers Act that the new preferred alternative when taken with its mitigation package in its entirety would not have a direct and adverse effect on the values for which this segment of the river was designated.

In November 2006 the Secretary of USDOT signed the ROD for the new St. Croix River Crossing consensus bridge project preferred alternative. The 180-day notice certifying that all final federal actions had been taken was published in the *Federal Register* on December 5, 2006, indicating the deadline for any judicial challenge was June 6, 2007.

The Sierra Club filed suit on June 5, 2007 against the USDOT/FHWA and NPS alleging primarily violations of the Wild and Scenic Rivers Act by NPS, and 4(f) and NEPA by FHWA, seeking to enjoin construction of the approved project. Sierra Club's arguments focus on visual impacts of the bridge to the exclusion of all other targeted and protected resources and ignore the public transportation purposes and need for the project.

USDOJ eventually filed and briefed a motion to dismiss alleging untimeliness as 23 USC § 139(l)(1) provides that a claim must be filed within 180 days of publication of the cut off notice in the *Federal Register*. 180 days from December 5, 2006 was Sunday, June 3, 2007, which meant that the deadline set by the statute was Monday, June 4, 2007. The federal notice misstated the statutory deadline by two days.

On May 15, 2008, in my view not surprisingly, the Court rejected the federal timeliness motion to dismiss. *Sierra Club North Star Chapter v. Peters*, 2008 WL 2152199 (D MN 2008).

Thereafter, on July 8, 2008, MnDOT and WisDOT intervened in the case to protect their States' direct, immediate, and substantial interests in this estimated \$670 million project.

In April 2009 the entire massive Administrative Record was eventually completed and certified and made available on DVDs in various formats. One can understand the USDOJ desire to get the case dismissed on timeliness grounds considering the efforts that went into preparing the federal Administrative Record consisting of decades of detailed records of USDOT/FHWA, NPS, MnDOT, and WisDOT.

On May 29, 2009, motions for summary judgment were filed by the Sierra Club, USDOJ for FHWA and NPS, and independently by each State. Responses were filed by each party and separately by each intervening State on July 1, 2009. Replies are due July 22nd and the likely dispositive hearing is scheduled for August 28, 2009.

As readers of this newsletter know, on review of a decision of a federal administrative agency, a motion for summary judgment stands in a somewhat unusual light, in that the Administrative Record provides the complete factual predicate for the court's review. Sierra Club bears the ultimate burden of persuasion, so the burden on Sierra Club in proving its motion for summary judgment is similar to its ultimate burden on the merits. In APA reviews, summary judgment is simply the procedural vehicle for asking the court to decide, on the basis of the Administrative Record, the legal question of whether the federal agencies reasonably could have found as they did. Some streamlined environmental process, eh? Some economic stimulus urgency!

**INTERNATIONAL CONFERENCE ON ECOLOGY & TRANSPORTATION
SET FOR DULUTH, MN SEPTEMBER 13-17,2009**

Submitted by Richard A.Christopher
richard.christopher@hdrinc.com

A preliminary agenda has been posted for the ICOET at <http://www.icoet.net>. The agenda describes sessions on sustainability, climate change, integrating ecology in planning and construction, mitigation banking, wildlife habitat connectivity, stormwater management, and related topics. Information is available on registration, lodging and field trips.

NOTES FROM THE CHAIR

Submitted by Peggy Strand
MStrand@venable.com

Are you getting your full benefits from associating with TRB? The "portfolio" of our committee – Environmental Issues in Transportation Law – is active in a number of other "sister" TRB committees. I urge you to consider involvement within the broader

TRB community. Many of our members already do that, to the benefit of their professional work and enhancing the greater benefits in TRB.

Most of the environmentally related other TRB committees appear in Group D, Planning and Environment, within the Technical Activities Group of TRB's Standing Committees. You can find information at www.trb.org/ by scrolling through "Standing Committees" to "Technical Activities Group Council" or by direct link to http://www.trb.org/directory/comm_search.asp?sCode=AD . I can help any member who is interested in contacting one or more of those "client" committees.

I want to share with you a recent example of committees working together for their mutual benefit. Denise Ferguson, Assistant Attorney General and Principal Counsel for the Maryland Department of Transportation (MDOT), will be participating in the ADC60's Waste Management and Resource Efficiency conference that is scheduled for New York City July 13-15, 2009. She will be on a panel on environmental management systems on July 13th. Her presentation will address the Voluntary Self Audit Agreements that MDOT and the states' modal agencies entered last year. This opportunity arose when members of ADC60 attended our Committee meeting during the January TRB Annual Meeting and heard Denise report on this innovative settlement.

You are also aware that ADC10 is hosting *The Natural Lawyer*, including archived issues, on its website, <http://www.itre.ncsu.edu/ADC10/default.htm>. Several of our Committee members have attended and participated in events sponsored by ADC10. Others, including Fred Wagner, have participated in programs sponsored by other TRB "environmental" committees and cross-committee task forces as well. It is a great way to share our expertise and garner information about emerging environmental legal issues.

Many thanks to Rich Christopher and the volunteers who continue to publish *The Natural Lawyer*. We rely on them, and your help, to maintain this important service to our members and the TRB family.

NEXT DEADLINE IS SEPTEMBER 15, 2009

Anyone who wishes to submit material for the October, 2009 edition of this newsletter should send a draft to the Editor at richard.christopher@hdrinc.com by close of business, September 15, 2009. Please use Microsoft Word.