US Environmental Laws Increasingly Lead to Litigation Concerning the Siting and Construction of New Infrastructure Projects

As new infrastructure projects begin to sprout across the United States in response to new government grants, incentives and stimulus plans, those seeking to capitalize on what President Obama calls "the largest new investment into the nations infrastructure since Eisenhower built an interstate highway system in the 1950s" are running into legal roadblocks. More specifically, they are finding that the complex web of US environmental laws not only makes it difficult to progress swiftly on infrastructure projects, but also enables project opponents to halt, delay or force changes in projects by filing lawsuits alleging non-compliance with environmental laws. Many infrastructure projects, in particular greenfields projects, are often sited in areas containing rare flora and fauna, cultural resources or protected wetlands. Failure to address proactively the environmental issues that arise as a result can easily lead to government- or citizen-initiated litigation or agency action that interferes with a project's completion.

For example, on January 19, 2010, a group of community organizations and individuals—including a Minnesota branch of the National Association for the Advancement of Colored People — sued three government agencies over their decision to construct a light rail transit (LRT) system through a historically black community, saying the plan violates National Environmental Policy Act (NEPA).[1] More specifically, the complaint alleges that the US Department of Transportation (DOT), the Federal Transit Administration (FTA) and the local Metropolitan Council's plan to build an 11-mile light rail transit line through St. Paul's Rondo Neighborhood violates NEPA in that it "failed to prepare an adequate environmental impact statement that adequately addresses the direct, indirect and cumulative adverse impact of the LRT project or adequately considers mitigation of the adverse impacts of the LRT project." The complaint requests both an order vacating the FTA's decision approving the report as well as an injunction barring any agencies from proceeding with the project until their alleged NEPA violations have been corrected.

Infrastructure investors, lenders and developers are well advised to take special care to ensure early in a project that they understand, and comply with, the many facets of federal, state and local environmental laws, and also make an assessment of the risk and cost of litigation. Federal stimulus funding often comes with deadlines for obligation of funds, and thus delays can endanger the availability of those funds. Moreover, a violation of certain environmental laws can lead to severe civil and criminal penalties/fines, and in some cases, even imprisonment.

This update outlines some of the key areas in which environmental litigation is a significant risk for infrastructure projects.

National Environmental Policy Act

NEPA should be considered any time the federal government takes action. Projects on federal land, involving federal funding or involving federal agency action (e.g., a right of way from the US Bureau of Land Management, a Clean Water Act permit to fill wetlands or approval from the Federal Highway Administration (FHWA) to connect to the Interstate Highway System) generally mandate compliance with NEPA's review provisions. NEPA requires completion of an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."[2] Every EIS must provide a "full and fair discussion of significant environmental

impacts" of the proposed agency action and often takes months, if not years, to complete.[3]

The fact that NEPA review is required does not necessarily mean a full-blown EIS will be mandated. The Council on Environmental Quality regulations set forth a process by which agencies determine whether an action requires an EIS. This process usually begins with an agency decision on whether a proposed action should be categorically excluded.[4] If an action is not categorically excluded, the agency may then decide to prepare an "environmental assessment."[5]

An environmental assessment is a "concise public document" that determines whether the federal action is "significant" enough to require an impact statement.[6] If it is not sufficiently significant, the agency prepares a "finding of no significant impact" and the NEPA process is generally complete.[7] If, on the other hand, the environmental assessment leads to the conclusion that an EIS is necessary, the lead agency must prepare a Notice of Intent to prepare an EIS and proceed with the EIS process. A supplemental environmental impact statement may be required when new information of changed circumstances requires one.

NEPA, if triggered, requires a public process. State and federal agencies, Native American tribes, local residents, environmental groups and other interested parties all have the right to comment on a proposed EIS. Significant delays in a project may result. In addition, NEPA decisions (including a finding of "no significant impact" that eliminates the need to prepare an EIS), the adequacy of the EIS itself and a decision not to prepare a supplemental EIS are all subject to judicial review.[8]

Judicial review under NEPA is conducted pursuant to the Administrative Procedures Act. As a result, NEPA litigation is focused on whether the agency followed the procedural requirements of NEPA. The substantive decision, such as the selection of a specific alternative, cannot be challenged, even if the court disagrees with the decision or with the agency's conclusions about environmental impacts.[9] "NEPA itself does not mandate particular results," but rather "imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions."[10]

Many states have their own versions of NEPA. NEPA litigation is commonplace and is often used by opponents to thwart private projects. Courts have held that NEPA reviews can be held inadequate if they fail to include an analysis of an action's impact on greenhouse gas emissions as well as climate change.[11] Consequently, the infrastructure industry needs to consider potential greenhouse gas emissions and climate change impacts associated with infrastructure projects, issues which are certain to become a bigger focus in the future.

The Department of Transportation (DOT) Act of 1966: Section 4(f)

The DOT Act of 1966 states that the FHWA and other DOT agencies cannot approve the use of land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites unless there is no feasible and prudent alternative to the use of land and the action includes all possible planning to minimize harm to the property resulting from the use.[12] Section 4(f) of the DOT Act is independent of NEPA and only applies to projects that receive funding from or require approval by an agency of the DOT. That being said, Section 4(f) determinations are typically coordinated with NEPA and, at times, are made part of the public record.

Before approving a project that uses Section 4(f) property, the FHWA must either: (i) determine that the impacts are *de minimis* or (ii) undertake a Section 4(f) evaluation. If the Section 4(f) evaluation identifies a feasible and prudent alternative that completely avoids Section 4(f) properties, it must be selected. If there is no feasible and prudent alternative that avoids all Section 4(f) properties, the FHWA has some discretion in selecting the alternative that causes the least overall harm. The FHWA must also find that all possible planning to minimize harm to the Section 4(f) property has occurred.[13]

Use of a Section 4(f) property occurs: (i) when land is permanently incorporated into a transportation facility; or (ii) when there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose; or (iii) when there is a constructive use (a

project's proximity impacts are so severe that the protected activities, features or attributes of a property are substantially impaired). The regulation lists various exceptions and limitations applicable to this general definition.[14]

The FHWA is ultimately responsible for making all decisions related to Section 4(f) compliance.[15] These include whether Section 4(f) applies to a property, whether a use will occur, whether a *de minimis* impact determination may be made, assessment of each alternative's impacts to Section 4(f) properties, and determination of whether the law allows the selection of a particular alternative after consulting with the appropriate officials with jurisdiction. Like NEPA, Section 4(f) does not provide an independent cause of action, but judicial review is available through the Administrative Procedures Act. Consequently, project opponents can use Section 4(f) to enjoin or stall a project. In one example, injunctive relief was found appropriate when the administrative record failed to establish that all possible planning was done to minimize harm prior to FHWA approving a federal highway project.[16]

Reviewing courts conduct a "three tiered inquiry" into Section 4(f) determinations: (i) whether the Secretary of Transportation acted within the scope of his authority under 4(f); (ii) whether the Secretary's ultimate decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; and (iii) whether the Secretary's action followed the necessary procedural requirements.[17]

Historic Preservation And National Monument Designations

Section 106 of the National Historic Preservation Act (NHPA) requires agencies taking action with respect to a certain projects to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."[18] A National Register listing may be initiated by a private party opposed to a project for idiosyncratic reasons—yet such a listing comes with the potential for delays and increased costs and may threaten the ability to develop at all.

Like NEPA, the NHPA is a procedural law prescribing a public process that an agency must follow to identify, evaluate and assess the effects of a proposed undertaking on historic properties. Additionally, individuals cannot bring a lawsuit against an agency for violation of the NHPA based on disagreement with the agency's substantive decision. To have a cause of action under NHPA, the plaintiffs must allege a flaw in the process the agency followed in identifying or evaluating historic properties and/or considering the effects of the undertaking on eligible historic properties.

There is some overlap between Section 4(f) and Section 106 when historic properties are involved. A key difference is that Section 106 is essentially a consultative procedural requirement, while Section 4(f) precludes project approval if certain findings are not made.

The Endangered Species Act

More than 1,250 animals and plants across the United States are listed by the federal government as "endangered" or "threatened," which gives them special protection under the Endangered Species Act (ESA). These creatures or plants can vary substantially and include miniscule subsurface invertebrates, flies that appear for a few weeks each year, coastal butterflies, invertebrates that breed in evanescent ponds and washes, nesting or migrating birds, or wolves with huge hunting ranges, to mention only a few that our lawyers have dealt with in ESA actions during recent years. The need to revitalize our nation's infrastructure often collides with the desire to protect these endangered species.

The federal stimulus package, as well as state and local incentives, encourages investment in US infrastructure projects. But the US Supreme Court has long held that in adopting the ESA in 1973, "Congress intended endangered species to be afforded the highest of priorities" and aimed to "halt and reverse the trend toward species extinction, *whatever the cost*."[19]

There is no exemption from the ESA for infrastructure projects. The clash between them typically comes to a head in the application of Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), which makes it unlawful to "take" any endangered species. A "take" is broadly defined to include any action that will "harass," "harm," "wound" or "kill" any member of a protected species.[20] Federal regulators have interpreted this

provision to bar any action that "disrupt[s] normal behavioral patterns" with regard to "breeding, feeding, or sheltering."[21] Prohibited acts include any "modification or degradation" of habitat that "actually kills or injures wildlife" by interfering with "essential behavioral patterns"—a far-reaching limitation on "habitat modification" that has been endorsed by the Supreme Court.[22]

Accordingly, any project that impinges on the life of an endangered species—whether by destroying or disrupting habitat, or injuring protected creatures during construction—triggers Section 9. Litigation examples include *NAHB v. Babbitt*, which required costly modification of a public hospital complex and access road to avoid disturbing habitat of the Delhi Sands flower-loving fly, and *GDF Realty Investments v. Norton*, which halted development due to the presence of six species of nearly microscopic subterranean invertebrates in caves and sinkholes.[23] And the cost of engaging in a take without following the proper procedures is high: civil fines up to $25,000 *per violation*, criminal fines of $50,000 and one year's imprisonment. Magnifying the risks, it is not only government regulators that may sue to enforce the ESA: "any person" with standing, such as local residents or environmental groups, may initiate a civil suit to allege that an unlawful take has occurred or to enjoin a take.[24] Such environmental litigation has become a standard tool for those opposed to a particular development.

If a project is likely to involve a take, the developer should obtain an "incidental take permit" from the federal Fish & Wildlife Service (FWS). Obtaining a permit requires preparing a "Habitat Conservation Plan" that sets out steps to minimize and mitigate the harm to endangered species. Negotiations with the FWS and other interested federal and state agencies about the proposed plan may result in significant modifications of a project being required (assuming it is allowed to proceed at all), as well as costly steps such as creating or preserving off-site habitat as mitigation. The FWS will continue to monitor compliance with the final plan—as may neighbors and environmental organizations, which can sue if they believe violations have occurred.

For many listed species, the federal government has designated (sometimes very large) areas of "critical habitat." For example, the government has recently proposed designating 70,000 square miles of critical habitat off the West Coast for the endangered leatherback sea turtle. Whenever projects in those areas involve federal land, federal funding or federal agency approval—as is commonly the case with infrastructure projects—modifications may be required even if no take will occur as a result of the project.

The Clean Water Act

Large-scale infrastructure projects are likely to run into the requirements of the federal Clean Water Act (CWA). The CWA protects all waters and wetlands that are connected—even very remotely—to navigable rivers and waterways. Although the Supreme Court has held that isolated ponds are beyond CWA jurisdiction, the meaning of "isolated" is open to interpretation and the subject of much litigation, requiring that the developer of any project touching on ponds, wetlands, saturated soils or land that is habitat for wetland plants proceed with caution and in consultation with counsel and wetland experts.[25] Proposed federal legislation would define covered waters even more broadly. As with the ESA, heavy civil penalties, criminal fines and imprisonment are possible for violations, and civil enforcement against any person may come at the hands of private plaintiffs, such as neighbors and environmental groups, as well as state or federal regulators.[26]

The most pertinent provision of the CWA for infrastructure investors and developers is Section 404, 33 U.S.C. § 1344, which prohibits disturbing jurisdictional waters or wetlands in such a way that fill material is added to them. "Addition" of "fill" material is very broadly defined. Regulators have taken the position that even bicycling through a wetland, or plowing it, is a violation.

Any fill is unlawful unless it is covered by a Section 404 permit, which must be obtained from the US Army Corps of Engineers and state environmental agencies. As with ESA incidental take permits, CWA fill permits may be conditioned on project modifications, construction requirements and the provision of

mitigation—and may involve a lengthy and costly process that, as noted, includes the risk of government or private litigation.

Clean Air Act

Section 176(c) of the Clean Air Act provides in part that no federal department or agency shall "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to" an approved or promulgated State Implementation Plan (SIP) for National Ambient Air Quality Standards (NAAQS). It also provides that "[n]o metropolitan planning organization designated under section 134 of Title 23, shall give its approval to any project, program, or plan" which does not conform to the applicable SIP.[27]

"Conformity" means both conforming to the SIP's purpose of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of such standards, as well as ensuring that the activity in question will not cause or contribute to any new violation of any new standard in any area; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim reductions or other milestones in any area.[28]

There are two kinds of conformity: transportation conformity and general conformity. Under 40 C.F.R. § 93.102, transportation conformity determinations are required for "adoption, acceptance, approval or support" of a transportation plan or transportation improvement program (TIP) developed pursuant to certain laws or for the "approval, funding or implementation" of FHWA/FTA projects.

In general, transportation conformity determinations apply in all nonattainment and maintenance areas for transportation-related criteria pollutants, including ozone, carbon monoxide (CO), nitrogen dioxide (NO_2), PM_{10} and $PM_{2.5}$.[29] Project-level conformity determinations must be made for federal highway and transit projects to demonstrate that the project is reflected in a conforming transportation plan and TIP. Additionally, as part of these project level determinations that apply in carbon monoxide and particulate matter nonattainment and maintenance areas, localized analysis is required for federally funded or approved projects. This analysis is called "hot-spot" analysis.[30]

General conformity regulations apply to federal actions in nonattainment or maintenance areas that are not covered by the transportation conformity regulations where total direct and indirect emissions would equal or exceed certain *de minimis* threshold rates specified in the regulations.[31] Like the transportation conformity regulations, these provisions are intended to ensure that actions funded, approved or otherwise supported by the federal government do not violate SIPs. The regulations expressly exempt from the conformity determination requirement numerous activities that would result in no or *de minimis* emission increases as well as actions addressed by other environmental statutes/programs.

Opponents to infrastructure projects have used Section 176 as a weapon in the past. Examples include an environmental organization that challenged the FHWA's approval of a proposed highway project on many grounds, including the FWHA's conformity determination, and an environmental organization that challenged a conformity determination in connection with an Air Force base redevelopment project.[32]

CO_2 and other key greenhouse gases (GHGs) are not currently regulated under the Clean Air Act as criteria pollutants subject to NAAQS and SIPs.[33] However, the recent Endangerment Finding by the US Environmental Protection Agency (EPA), which held that GHGs constitute air pollution that endangers public health and welfare and that GHG emissions from motor vehicles contribute to this air pollution, sets the stage for GHGs to be designated as criteria pollutants, which in turn would lead to the development of NAAQS and SIPs.[34] From here, it is not a huge leap for the government to then require conformity determinations for FHWA/FTA projects with respect to GHGs. Recently, members of Congress have proposed bills aimed at preventing EPA from regulating GHGs under the Clean Air Act.

CERCLA/RCRA/Solid Waste

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[35]

owners and operators (among others) of contaminated property (even those who did not cause the contamination) can be ordered to remediate a contaminated site and/or held liable for the costs associated with remediating such a site as well as for natural resource damages.[36] Many states have their own versions of CERCLA.

Similarly, the Resource Conservation and Recovery Act (RCRA) authorizes the government to order generators of solid or hazardous wastes and owners and operators of solid or hazardous waste facilities (among others) to clean up such waste if it may present an "imminent and substantial endangerment to health or the environment."[37] RCRA also contains a similar citizen suit provision.[38]

These statutes should not be taken lightly. CERCLA and RCRA cleanups are often very time-consuming and exorbitantly expensive. To protect against this risk, developers often conduct Phase I Environmental Site Assessments for all property purchased and, in some instances, all property leased as part of the contemplated project. In general, a Phase I Assessment looks for conditions that indicate the presence or likely presence of any hazardous substances or petroleum products on a property (standards/goals for Phase I Assessments are published in the American Society for Testing and Materials (ASTM) Standard E-1527-05 and EPA's All Appropriate Inquiries Rule). A Phase I Assessment is intended to allow a user to qualify for certain defenses under CERCLA, including those that are aimed at protecting landowners that conduct adequate due diligence but yet still fail to discover the presence of environmental conditions. Phase II Assessments are often performed when the Phase I Assessment identifies a recognized environmental condition that needs further invasive investigation, such as soil or groundwater sampling.

State and Local Environmental Laws

Across the country, states have erected a web of environmental regulations and permitting requirements, including state NEPA statutes, that may apply to a project and that have the potential to engender litigation. For example, Wyoming has designated more than 25 percent of that state as a "core area" of habitat for the greater sage grouse—which is not a federally listed endangered or threatened species—thereby imposing stringent habitat management requirements on developments within that area.

Common Law Torts

Even properly permitted projects are often the subject of nuisance suits from neighbors alleging that they would be adversely affected by pollution, noise and/or visual blight. Such claims are governed by state law, and some states have held them to be permissible. For example, a West Virginia court allowed a suit based on noise, unsightliness and diminished property values to proceed.[39]

Private tort claims are sometimes settled for their nuisance value, but plaintiffs have fared poorly in the courts when these claims have been litigated, with judges dismissing suits or juries returning defense verdicts. Nuisance suits are likely to continue to be a common reaction by neighbors to new projects.

Endnotes

1 42 U.S.C. § 4332.

2 42 U.S.C. § 4332(2)(C).

3 40 C.F.R. § 1502.1.

4 40 C.F.R. § 1501.4(a).

5 40 C.F.R. § 1501.3(a) (the agency can skip the EA and prepare an EIS); 1501.4(b).

6 40 C.F.R. § 1508.9; *Friends of Fiery Gizzard v. Farmers Home Admin*, 61 F.3d 501 (6th Cir. 1995).

7 40 C.F.R. § 1508.13.

8 *Department of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004) (decision not to prepare an EIS); *National Parks & Conservation Ass'n v. U.S. Dept. of Transp.*, 222 F.3d 677, 680 (9th Cir. 2000) (adequacy of EIS); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (decision not to supplement an EIS).

9 *National Parks & Conservation Ass'n*, 222 F.3d at 680.

10 *Public Citizen*, 541 U.S. at 756-757 (internal quotations and citations omitted).

11 *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008).

12 23 U.S.C. § 138; 49 U.S.C. § 303.

13 23 U.S.C. § 138(a), (b).

14 23 C.F.R § 774.13; 774.17.

15 23 C.F.R. § 774.1.

16 *Merritt Parkway Conservancy v. Mineta*, 424 F. Supp. 2d 396 (D. Conn. 2006).

[17] *Valley Community Preservation Comm'n v. Mineta*, 373 F.3d 1078, 1084 (10th Cir. 2004).

[18] 16 U.S.C. § 470f.

[19] *TVA v. Hill*, 437 U.S. 153, 174, 184 (1978).

[20] 16 U.S.C. § 1532(19).

[21] 50 C.F.R. § 17.3.

[22] *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995).

[23] *NAHB v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003).

[24] 16 U.S.C. § 1540(g).

[25] See *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

[26] 33 U.S.C. § 1365(a)(1).

[27] 42 U.S.C. § 7506(c)(1).

[28] *Id.* at (c)(1)(A), (B).

[29] 40 C.F.R. § 93.102 (b)(1).

[30] 40 C.F.R. § 93.116.

[31] 40 C.F.R. § 93.153.

[32] *Audubon Naturalist Society of the Central Atlantic States v. US DOT*, 524 F. Supp. 2d 642 (D. Md. 2007); *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250 (1st Cir. 1996).

[33] 42 U.S.C. §§ 7408, 7409.

[34] *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66496 (December 15, 2009)..

[35] 42 U.S.C. § 9601, *et seq.*

[36] 42 U.S.C. §§ 9606, 9607.

[37] 42 U.S.C. § 6973.

[38] 42 U.S.C. § 6972 (a)(1)(B).

[39] *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879 (W. Va. 2007).

This article can only touch the surface of the regulatory thicket that surrounds infrastructure development. The complex web of national and state statutes, rules and common law that may apply to any project provides opportunities for opponents to litigate, a situation that every investor and developer will want to avoid or mitigate.

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