Highway Project Repaving/National Environmental Policy Act: Is an Environmental Impact Statement Required?

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

06/19/2018

The United States Court of Appeals for the Seventh Circuit addressed in a June 5th opinion whether a proposed Wisconsin highway repaving project ("Project") should have gone through the National Environmental Policy Act ("NEPA") Environmental Impact Statement ("EIS") process.

The Project is described in the opinion as a:

. . . 7.5-mile stretch of highway 164 (formerly known as Highway J), a two-lane road in southern Washington County. It was built in the 1960s with 5 to 6.5 inches of asphalt, a pavement expected to last 22 years, and resurfaced in 2000 with another 2.5 to 3.5 inches, expected to extend the road's life by 12 years. The new project entails repaving, reconstruction near hill crests where drivers cannot see approaching traffic, widening the lanes, making the shoulders flatter and two feet wider, improving sight lines, updating guardrails, adding rumble strips, and introducing turn or bypass lanes at some intersections. A 141-page environmental report prepared between 2013 and 2015 concluded that the renovation would not cause any significant environmental effects but would reduce the accident and injury rate.

Opponents to the Project argued that the Federal Highway Administration ("FHA") should have prepared an EIS prior to providing federal funding.

NEPA requires federal agencies to include environmental values and issues in their decision making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed EIS. However, the requirement to produce this document is only triggered in the event of a major federal action, that will significantly affect the environment.

FHA approved federal funding for the Wisconsin Project in 2015. It also approved the environmental report.

The agency further determined that there was no need to prepare an EIS (citing 40 C.F.R. § 1508.4 [neither an environmental impact statement nor an "environmental assessment" . . . is needed for projects that do not individually or cumulatively have a significant effect on the human environment]). Also cited was 23 C.F.R. § 771.117(c)(26) which provides that highway-renovation projects are within the scope of the § 1508.4 exclusion.

Highway J Citizens Group and others (collectively "Plaintiffs") challenged FHA's conclusion that the Project did not require an EIS.

The United States District Court disagreed, granted summary judgment for FHA and the other agencies. The basis for the decision was the conclusion that the environmental report demonstrated the Project fit within the previously referenced categorical exclusion.

In considering the appeal, the Court noted the Plantiffs' two arguments:

1. FHA's failure to write a decision separate from the environmental report demonstrated that the Project was not given independent consideration
2. The environmental report did not analyze cumulative effects of multiple highway-renovation projects

The Court notes the two prerequisites to trigger a requirement to prepare a NEPA EIS:

1. Major federal action; which
2. Significantly affects the quality of the human environment

The Court states that renovating 7.5 miles of an existing two-lane road "does not stand out as a major cause of a significant effect." It also notes that 1508.4 (promulgated by the Council on Environmental Quality [which covers all federal agencies]) is an indication that such activities are categorically excluded.

The 141-page environmental report is considered by the Court. It concludes that the report was not intended to question the validity of the previously cited regulations. Instead, it's purpose was to determine whether the project (i.e., the renovation) warrants an evaluation because it would cause "significant environmental impacts" or exceed certain constraints found in the regulations. Findings from the environmental report are cited for the proposition that these issues were addressed and the conclusion that no significant environmental effect will occur is valid.

The Court also rejects the argument that FHA was required to write its own analysis. Rather, the question that FHA was required to address was whether the Project would have a significant environmental impact or "flunk the analysis under § 771.117(d)(13). This conclusion was deemed supported by the FHA staff's role in preparing the report, commenting on drafts and making suggestions. Further, FHA signed the report once it had been reviewed.

Finally, the Court acknowledged that the environmental report did not assess the cumulative effects of multiple different highway-repair projects. However, it deemed this fact irrelevant. This conclusion is based on a determination that the FHA was required to analyze cumulative effects when deciding whether the categorical exclusion (renovated highways) comes within the exclusion. Further, no basis is found for overturning FHA's finding that the categorical exclusion of § 1508.4 and § 771.117 apply to the Project. Also cited is Sierra Club v. United States Forest Service, 828 F.3d 402 (6th Cir. 2016) (an agency need not analyze cumulative effects when the categorical exclusion itself considers them).

The Court affirms the United States District Court decision granting summary judgment to the Defendants.

A copy of the opinion can be downloaded here.