

I-630 Widening/National Environmental Policy Act: Eighth Circuit Court of Appeals Addresses U.S. District Court Decision Denying Motion for TRO



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The United States Court of Appeals for the Eighth Circuit (“Eighth Circuit”) addressed in a December 6th opinion an appeal from a United States Court of the Eastern District of Arkansas (“District Court”) decision that denied a request for a temporary restraining order (“TRO”) for an alleged violation of the National Environmental Policy Act (“NEPA”). *George Wise, et al. v. Department of Transportation, United States, et al.*, No. 18-3016.

The District Court action involved an allegation that the widening of Interstate Highway 630 in Pulaski County, Arkansas, was being undertaken by the United States Department of Transportation (along with the Federal Highway Administration [“FHWA”] and Arkansas Department of Transportation [“Arkansas DOT”]) without complying with applicable NEPA requirements.

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 Environmental Impact Statement (“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.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard.

Neither an Environmental Assessment (“EA”) nor an EIS need be prepared if a particular federal action falls within the scope of a NEPA categorical exclusion. Categorical exclusions are promulgated by federal agencies (such as FHWA) and are described actions which have been determined to not involve significant environmental impacts. The FHWA categorical exclusions are found at 23 C.F.R. §771.117.

Tracing back to the roots of the instant dispute, in October 2016 the defendants reported that the I-630 project qualified for a categorical exclusion from NEPA’s environmental assessment or environmental

impact statement requirements. The Arkansas DOT announced the commencement of the project on July 13, 2018, announcing that construction would begin on July 16th.

Five individuals (collectively “Wise”) filed the lawsuit in the District Court on July 18th addressing what they described as construction involving the widening of Interstate Highway 630 (“I-630 Project”). See *Wise, et al. v. United States Department of Transportation, et al.*, 4:18-cv-466-BRW.

The two pleadings filed included:

- Complaint for Declaratory Judgment, for Temporary Restraining Order and Preliminary and Permanent Injunctive Relief
- Motion for Temporary Restraining Order

As to the NEPA count, Wise argued that the I-630 Project did not qualify for the use of a NEPA categorical exclusion. Instead, the plaintiffs argued that an EA or EIS should have been prepared to assess environmental impacts of the proposed federal action. They contended that the agencies’ action in commencing construction activities based upon a document entitled “Tier 3 Categorical Exclusion” was improper.

The categorical exclusion at issue with the I-630 Project was for those that take place “entirely within the existing operational right-of-way.” See § 771.117(c)(22). The FHA argued that neither an EA nor EIS was required because the I-630 Project did not require any additional permanent right-of-way.

Wise filed a motion for a TRO seeking to enjoin work on the I-630 Project. During a status conference with the District Court, Wise is stated to have characterized the demolition of an overpass as “the harm that would be done between now and Monday, when the hearing on Wise’s motion for a TRO would be held.” The District Court was asked to disallow demolition of the overpass and immediately enjoin the FHA from working on the I-630 Project.

Testimony during the TRO hearing from an Administrator of the Arkansas Department of Transportation was explained to include:

. . . an existing operational right-of-way included traffic lanes and clear zones, “which, in laymen’s terms, [are the areas] outside of the shoulder of the roadway, [and] . . . in this case its 30 feet beyond the edge of the travel way.”

Nevertheless, the same witness testified that the existing operational right-of-way was not limited to those areas. Instead, it was stated to also include “mitigation areas, drainage areas, interchange ramps, anything that was maintained or used for transportation purposes.” As a result, the witness testified that the right-of-way was property line to property line (i.e., the entire 200 to 400 expanse owned by Arkansas Department of Transportation).

In summer 2018, the District Court subsequently concluded that Wise failed to establish that any part of the I-630 Project would go outside of the existing operational right-of-way. Therefore, it was concluded that it was reasonable for the FHA and other defendants to conclude that the Project qualifies for the categorical exclusion. Wise was therefore determined unlikely to succeed on the merits of the NEPA claim. An appeal to the Eighth Circuit ensued in September 2018.

The Eighth Circuit ruled on two threshold arguments.

First, the defendants urged the Eighth Circuit to decline to hear the interlocutory appeal for lack of jurisdiction. This contention was dismissed rather quickly, the Court stating that jurisdiction was proper because the District Court’s order had the practical effect of denying a preliminary injunction.

Second, the Arkansas Department of Transportation argued that the appeal was moot. The Eighth Circuit rejected that argument as well calling it “misguided,” explaining that this was based on too narrow a reading of the relief that Wise sought. After ruling on those issues, the Court moved on to assess the merits of Wise’s case.

Wise argued that the District Court rested its decision on an “erroneous legal conclusion.” The Eighth Circuit rejected the contention, explaining that Wise’s reading of the law conflicted with the definition in the regulation. The Court repeatedly applied the plain language of the regulation, rejecting Wise’s multiple attempts to instead place meaning on his mathematical calculations, and the explanatory text accompanying the notice of the final rule. Finally, Wise argued that the I-630 project does not qualify for a categorical exclusion. The Eighth Circuit rejected that argument as well, explaining that Wise had failed to show that such a determination was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

The Eighth Circuit ultimately concluded that no error had been committed by the District Court, and the lower court ruling was affirmed. Now the case has returned to the District Court in Little Rock where Wise can continue pursuing the lawsuit that seeks to enjoin any further work on the I-630 project.

While this ruling was only an intermediate one and it is within Wise’s rights to continue prosecuting the case, the practical effect of this ruling is that injunctive relief has become practically infeasible. This case started with Wise seeking to stop the I-630 project in its infancy. Now almost a year-and-a-half a year later, and with the project scheduled for completion in early 2020, injunctive relief will not halt anything, at least not using the current legal theory of the case.

A copy of the Decision can be downloaded [here](#).