



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

I-30 Widening – Reconstruction/National Environmental Policy Act: U.S. District Court (E.D. Arkansas) Addresses Request for Preliminary/Permanent Injunction

09/08/2020

United States District Judge James M. Moody (“Court”) addressed in a September 3rd Order a July 10th Motion filed by Plaintiffs seeking a preliminary and permanent injunction (“Motion”) to prohibit commencement of:

... any construction on any portion of the proposed reconstruction of a 7.3 mile section of Interstate 30 in Little Rock and North Little Rock, Arkansas, more particularly described herein, pending a final hearing for a permanent injunction based on the merits of the First Amended Complaint or any subsequent amended Complaint filed ...

Several individual and community/neighborhood organizations (collectively “Plaintiffs”) filed the Motion.

The Defendants include:

- Arkansas Department of Transportation (“ArDOT”)
- Federal Highway Administration (“FHWA”)
- United States Department of Transportation
- Certain Individuals in Their Official Capacity

The Plaintiffs’ July 10th Motion indicated that in regards to the previous proceedings there was an agreement for a stay to allow Defendants the opportunity to “complete a Re-evaluation of the I-30 Project to determine whether the approved Finding of No Significant Impact (FONSI) for the project remains valid in light of the agreed-upon project scope.” A re-evaluation is stated to have been filed by the Federal Defendants on June 1, 2020, indicating certain modifications and proposed changes in the scope and design of the project that require no additional environmental assessment. (See previous post [here](#).)

Plaintiffs’ Motion stated that Defendants intend to commence construction on the project (referencing certain utility and telecommunication relocation work) on July 21st and July 28th. As a result, they argued that commencement of construction would “constitute irretrievable commitment of resources to the

Defendants' preferred alternatives, possibly frustrating judicial review and foreclosing consideration of other viable alternatives." Consequently, they asked for a Preliminary/Permanent Injunction.

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.

As opposed to an EIS, which is a much more detailed document, the Environmental Assessment ("EA") provides sufficient evidence and analysis for determining whether a FONSI for an EIS should be prepared. Neither an 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 the federal agencies and are described actions which have been determined to not involve significant environmental impacts.

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. Nevertheless, the failure of an agency to follow NEPA's procedural mandates can be a basis for a court to enjoin an action.

Plaintiffs contended in their Motion that the Defendant's EA and subsequent re-evaluation of the EA have not:

... adequately considered those and other impacts; that the Defendants have single-mindedly and doggedly promoted a preconceived plan for the development of a gargantuan swarth of concrete through Little Rock and North Little Rock that will halt development of the thriving downtown areas in both cities and further racially divide the communities.

The Court in its September 3rd Order undertakes a review of what it refers to as the "Project." This includes a review of Project planning involving the Arkansas Department of Transportation and Federal Highway Administration (collectively "Agencies"). Such activities are stated to have included a process denominated "Planning and Environmental Linkages ("PEL") processes. This included:

- Four public meetings
- Development of three separate workgroups representing civic leaders, local business persons and residents in the Project area
- Creation of a report

An EA (as opposed to an EIS) is stated to have been prepared following the completion of the PEL report.

A Draft EA is stated to have discussed the Project purpose and several alternatives. It is also stated to have addressed the effects of the Project on:

- Economic conditions
- Cultural resources
- Parks and recreation areas
- Noise level
- Utilities
- Railroads
- Views
- Hazardous materials
- Water and other natural resources (including flooding and wetlands)
- Protected species
- Air quality

- Indirect and cumulative effects

The Draft EA is stated to have not identified any significant impacts to the natural and social environment as a result of the Action Alternatives or No-Action Alternative.

The Discussion includes the alternative proposed by ArDOT and accepted by FHWA and the rationale for such choice. A subsequent location, design public hearing and the issuance of the Draft EA are referenced. Comments on the EA were stated to have been received and a final document issued on December 20, 2018. Such a finding meant that no EIS would be prepared.

Bids were stated to have been received by ArDOT and a design-build contract entered into with Kiewit Massman Construction (“KMC”). Under these contracts, the designer-builder was allowed to incorporate innovation into the final design:

. . . as long as the project purpose and need, environmental commitments, and contractual obligations are met. . . .

ArDot and KMC entered into an agreement for a reduced scope for the first phase of the Project to keep it on budget. This is stated to focus on a 1.6 mile expanse covering the I-30/I-630 interchange and the I-30/East Broadway Bridge interchange (including the Arkansas River Bridge).

Design changes made to the KMC contract after the EA and FONSI are stated to have included:

1. the eastbound I-630 to northbound I-30 ramp will be restriped to two lanes as in the Selected Alternative but the alignment of the ramp will not be shifted west and the ramp bridge will not be replaced;
2. the northbound I-30 to northbound frontage road ramp will be widened to two lanes as in the Selected Alternative but the alignment of the ramp will not be shifted west; and
3. the right lane exit from I-40 eastbound to Hwy. 67 northbound will be eliminated and the current left exit will be maintained.

The FHWA was required to complete a re-evaluation of the Project to determine whether the FONSI remained valid (i.e., because of the potential environmental impacts related to the modifications). A Re-Evaluation Report was developed. It concluded that the FONSI remained valid.

The Defendants advised the Court that if a funding issue to be voted on by the voters was enacted in November 2020, ArDOT intended to increase funding by another \$350 million to complete the funding for the remaining 5.7 miles of the Project.

The Court in its Order first notes that the parties stipulated that the Plaintiffs had standing to bring the action. It then applied the factors for whether a preliminary injunction should be granted.

In terms of “likelihood of success” the Court concluded that the administrative record demonstrated that the Agencies “efforts to involve the public in this process were diligent” (referencing the various public meetings).

The Plaintiffs had argued they were denied their procedural rights to be involved in the process, arguing the Agencies:

1. denied Plaintiffs the right to comment on the Project being completed in phases rather than in its entirety;
2. failed to provide a notice and comment period after the issuance of the Finding of No Significant Impact;
3. did not give the public opportunity to comment on new material they argue was presented in response to public comments to the Draft EA;
4. failed to respond to significant public comments; and

5. misled the public about the availability of the Draft EA for comment.

The Court concludes that the Plaintiffs had not shown a likelihood of success on such claims, stating:

- the Project being completed in phases was addressed in the Draft EA
- the Council on Environmental Quality regulations do not require notice and comment after the issuance of a FONSI except in certain limited circumstances
- Plaintiffs failed to establish that certain new material was presented in response to public comments (i.e., was new material)
- the administrative record refutes Plaintiff's claim that the Agencies failed to respond to significant public comments
- updated forms were provided prior to a public hearing that clarified the Draft EA mistakenly included a directive to provide comments on the "preferred alternative" rather than the Draft EA

The Court also rejected the Plaintiffs' argument that FHWA failed to comply with NEPA's procedural requirements. These included a challenge to the:

- definition of "purposes and needs" section;
- length of the EA and perceived incomprehensibility of the Draft EA;
- lack of an EIS;
- use of PEL created documents in the EA;
- assessment of the Action Alternatives and No Action Alternative;
- analysis of the direct and indirect impacts of the Selected Alternative;
- perceived failure to address the indirect impact on minority and low-income residential areas;
- insufficient identification and analysis of the health effects of Mobile Source Air Toxics;
- assessment of the indirect impact on the wetlands, water quality, flooding;
- failure to address the direct and indirect impacts on the River Market, Clinton Presidential Park and other areas; and
- cumulative impacts of the Project.

The Court states that is required to affirm FHWA's decision if it finds that the agency took a "hard look" at the Project, identified the relevant areas of environmental concern, and made a convincing case for its FONSI. It found the EA to be "clearly understood, thorough, and adequately address the identification and analysis of the environmental and social impacts raised by Plaintiffs." As a result, the Court determines that there was not a likelihood of success on the merits.

In addressing "irreparable harm," the Court concluded that the Plaintiffs failed to establish they would suffer irreparable harm if work on the Project commenced as planned. It determined that there had not been a showing that a violation of NEPA was likely.

As to "Balance of Equities," testimony was provided that the Project would be significantly impacted by even a short delay. Referenced was the limited window of ambient temperature relative to the Project and high water on the Arkansas River each year. The Court found that the Plaintiffs had not established they were likely to suffer irreparable harm and the balance of equities favored Defendant.

The Court reviewed the factor of "public interest" and found the Project will:

... likely benefit the public by reducing congestion, enhancing safety, and improving the quality of life for thousands of people who will use the expanded roadway every day.

The Court also noted issues that would impact public interest because of delays that would cause loss to the taxpayers.

In summary, the Court found that all the factors weighed in favor of the Defendants and denied the Motion.

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

