National Capital Region Transportation Planning Board
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TPB TECHNICAL COMMITTEE
July 6, 2007
Item #7

Memorandum

DATE: **July 6, 2007**

TO: **TPB Technical Committee**

FROM: **Ronald F. Kirby**
Director of Transportation Planning

Re: **Dismissed Complaint Against TPB in the Inter-County Connector (ICC) Lawsuit**

At the June 20, 2007 meeting of the TPB, I reported that the ICC lawsuit against COG and the TPB had been dismissed on June 13. The TPB asked for a brief review of the key issues in the lawsuit at its next meeting on July 18.

I have prepared this summary memorandum as a basis for briefing the TPB on July 18. The memorandum provides a chronology of the legal filings, and then uses excerpts from those filings to highlight the key claims and responses. Longer excerpts are provided as attachments to the memorandum. I have tried to provide as simple a review as possible without using my own words on any of the key claims or responses. I have also prepared a PowerPoint presentation that simplifies the wording even further.

Chronology

(1) On December 20, 2006, plaintiffs Environmental Defense and Sierra Club, Inc. filed a 105-page, 592-paragraph complaint against the United States Department of Transportation (USDOT), the Federal Highway Administration (FHWA), the Metropolitan Washington Council of Governments (COG), and the National Capital Region Transportation Planning Board (TPB) and their respective representatives regarding actions taken concerning the Inter-County Connector (ICC) highway in Maryland. Of the 39 counts included in this complaint, seven were against COG and TPB: Counts 9 through 13; Count 15, and Count 37. (Attachment I.)

(2) On March 8, 2007, defendants COG and TPB filed a Motion to Dismiss the seven counts against them. (Attachment II.)

(3) On April 27, 2007, defendants USDOT and FHWA filed a Motion to Dismiss counts 14 and 15 of the Complaint. (Attachment III.)

(4) On May 8, 2007, plaintiffs Environmental Defense and Sierra Club, Inc. filed a consolidated response in opposition to the COG/TPB and USDOT/FHWA motions to dismiss (Attachment IV.)

(5) On June 6, 2007, defendants COG and TPB filed a reply memorandum in support of COG/TPB Motion to Dismiss, and a request "that the court expeditiously set a date for oral argument on this Motion to Dismiss" (Attachment V.)

(6) On June 13, 2007, plaintiffs Environmental Defense and Sierra Club, Inc. gave notice of their dismissal of Counts 9 through 13, Count 15, and Count 37 against COG and TPB (Attachment VI.)

Summary of Key Claims and Responses

The key claims and responses in Counts 9 through 13, Count 15, and Count 37 against COG and TPB may be summarized as follows:

(1) Counts 9 through 12

Claim (see Attachment I):

"333. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA-LU"), identifies four statutory objectives in the national interest that must be considered and accomplished by and though the adoption and implementation of metropolitan transportation plans and programs, including meeting mobility needs of people and freight, fostering economic growth and development, minimizing fuel consumption, and minimizing air pollution. 23 U.S.C. § 134 (a); 23 C.F.R. §§ 450.316, 450.322.

334. SAFETEA-LU requires that MPOs and states "accomplish" the "objectives" in 23 U.S.C. § 134 (a). 23 U.S.C. §§ 134 (c), 135 (a)."

341. "The MPO violated 23 U.S.C. §§ 134(a), (c) by including in the Metropolitan TIPs and CLR Plans the ICC project without considering how the CLR Plan and Metropolitan TIPs accomplish the statutory objective of ….."

(i) "meeting the mobility needs of people or freight described in the 1998 TPB Vision Plan, Prince George's County General Plan of 2002, and the Montgomery County General Plan Refinement of 1993," (Count 9)

(ii) "fostering regional economic growth and development described in the Prince George's County General Plan of 2002", (Count 10)

(iii) "minimizing transportation-related fuel consumption in the area affected by the ICC." (Count 11)

(iv) "minimizing air pollution, including, but not limited to:

a. Particulate matter:
b. Mobile Source Air Toxics; and
c. Greenhouse gases. " (Count 12)

Response (see Attachment V):

"Congress recognized that regional transportation planning of necessity involves social, economic and policy considerations best left to local, state and regional political entities. Congress did not provide for federal court judicial review of metropolitan planning organization ("MPO") regional planning under 23 U.S.C. § 134 (hereinafter Section 134), and courts have uniformly concluded that there is no implied cause of action to enforce this section. In 1998, Congress amended Section 134 to expressly confirm that body of case law, enacting a bar on judicial review of transportation planning."

(2) Count 13

Claim (see Attachment I):

"354. It was unlawful for the MPO to amend the MTIP and CLR Plan to include the ICC project without first preparing a major investment study in accordance with the requirements of C.F.R. § 450.318 (a), including an evaluation " of the effectiveness and cost-effectiveness of alternative investments or strategies in attaining local, state and national goals and objectives."

Response (see Attachment V):

"Not only should this Count be dismissed because it is a Section 134 claim barred from judicial review, but in 1998 Congress eliminated the MIS regulations issued under the Federal-Aid Highway Act ("FAHA"). Since 1998, the U.S. Department of Transportation ("DOT") has not required preparation of a MIS prior to completion of Plans or TIPs."

(3) Count 15

Claim (see Attachments I and IV):

"360. The combination and cumulative impact of the failures of, and omissions by, the MPO described above in Counts 9-14 make its approval of the Metropolitan TIPs and CLR Plans arbitrary and capricious or otherwise not in accordance with law. 5 U.S.C. § 706.

361. As a result, federal approval of the ICC project must be set aside because the project does not come from a properly approved Metropolitan TIP or CLR Plan. 23 U.S.C. § 134 (j)(5).

362. Federal approval of the State TIP must also be set aside because the State TIP planning process was not consistent with 23 U.S.C. § 134." (Attachment I)

"Plaintiffs' claims are actionable under Section 134 as a private right of action, or under the Administrative Procedure Act ("APA"), because either the MPO is a federal agency or has sufficient ties to the federal government to constitute a quasi-federal agency, thereby triggering APA review of its actions." (Attachment IV)

Response (see Attachments II and V):

"Count 15 is a summation of allegations, in which Plaintiffs allege that the violations set forth in Counts 9-13 are separately enforceable as "arbitrary and capricious" under the APA. Count 15 must also be dismissed because Counts 9-13 have no merit". (Attachment II)

"Nor can Plaintiffs keep their claims alive by asserting that the TPB qualifies as a federal agency subject to review under the Administrative Procedure Act ("APA"). It is undisputed that the TPB is a regional entity, and not a part of the U.S. Government. The TPB does not exercise federal governmental authority, and Congress did not "delegate" or "authorize" MPOs to perform federal functions". (Attachment V)

(4) Count 37

Claim (see Attachments I and IV):

"587. The MPO unlawfully adopted the Metropolitan TIPs in 2004 and 2005 and the CLR Plans allocating federal funds for the ICC project before the project had been found to conform under the Clean Air Act." (Attachment I)

"The Clean Air Act provides, in no uncertain terms, that an MPO may not approve a project that does not conform to a state implementation plan. The plain language of the Act requires that project-level conformity determinations occur prior to MPO approval of the project by adding it to the CLR Plan and Metropolitan TIP." (Attachment IV)

Response (see Attachment V):

"The MPO performs the conformity determination for TIPs and Plans, but does not "approve" individual projects within those plans. Other entities (e.g. the state) approve specific projects when they go forward to fund and construct them, and they are responsible for any project-level requirements, including conformity determinations."

Attachment I

Excerpts from Complaint
filed by Environmental Defense and Sierra Club, Inc.

December 20, 2006

SAFE, ACCOUNTABLE, FLEXIBLE, EFFICIENT TRANSPORTATION EQUITY ACT: A LEGACY FOR USERS VIOLATIONS

332. Plaintiffs incorporate by reference the allegations set forth above.

333. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users ("SAFETEA-LU"), identifies four statutory objectives in the national interest that must be considered and accomplished by and through the adoption and implementation of metropolitan transportation plans and programs, including meeting mobility needs of people and freight, fostering economic growth and development, minimizing fuel consumption, and minimizing air pollution. 23 U.S.C. § 134(a); 23 C.F.R. §§ 450.316, 450.322.

334. SAFETEA-LU requires that MPOs and states "accomplish" the "objectives" in 23 U.S.C. § 134(a). 23 U.S.C. §§ 134(c), 135(a).

335. SAFETEA-LU requires MPOs to approve regional transportation plans which contain, at a minimum, "multimodal capacity increases based on regional priorities and needs." 23 U.S.C. § 134(i)(2)(E).

336. SAFETEA-LU also requires the MPO to approve transportation plans and programs only after "due consideration of other related planning activities within the metropolitan area" and a variety of national transportation planning factors. 23 U.S.C. § 134(g)(3); 23 C.F.R. § 450.316(a).

337. SAFETEA-LU requires that the approved Metropolitan TIP be included without modification in the State TIP after the required conformity findings are made. 23 C.F.R. § 450.216(a).

338. Projects must come from and implement the objectives of the approved Metropolitan TIP and CLR Plan. 23 U.S.C. §§ 134, 135; 23 C.F.R. § 450.324(f)(2).

339. Federally funded projects in metropolitan areas must be carried out from an approved Metropolitan TIP. 23 U.S.C. § 134(j)(5).

COUNT 9

340. SAFETEA-LU requires that the MPO adopt a long range plan and transportation improvement program that accomplish each of the four statutory objectives, including meeting the mobility needs of people and freight. 23 U.S.C. §§ 134(a), (c).

341. The MPO violated 23 U.S.C. §§ 134(a), (c) by including in the Metropolitan TIPs and CLR Plans the ICC project without considering how the CLR Plans and Metropolitan TIPs accomplish the statutory objective of meeting the mobility needs of people or freight described in the 1998 TPB Vision Plan, Prince George's County General Plan of 2002, and the Montgomery County General Plan Refinement of 1993, as required by 23 U.S.C. § 134(a).

342. As a result, the MPO unlawfully approved the Metropolitan TIPs and CLR Plans which include the ICC project because they fail to accomplish the national transportation objective required by 23 U.S.C. §§ 134(a), (c).

COUNT 10

343. SAFETEA-LU requires that the MPO adopt a long range plan and transportation improvement program that accomplish each of the four statutory objectives, including

fostering economic growth and development within and between urbanized areas. 23 U.S.C. §§ 134(a), (c).

344. The MPO violated 23 U.S.C. §§ 134(a), (c) by including in the Metropolitan TIPs and CLR Plans the ICC project without considering how the CLR Plans and Metropolitan TIPs accomplish the statutory objective of fostering regional economic growth and development described in the Prince George's County General Plan of 2002, and as required by 23 U.S.C. 134(a) .

345. As a result, the MPO unlawfully approved the Metropolitan TIPs and CLR Plans which include the ICC project because they fail to accomplish the national transportation objective required by 23 U.S.C. §§ 134(a), (c).

COUNT 11

346. SAFETEA-LU requires that the MPO adopt a long range plan and transportation improvement program that accomplish each of the four statutory objectives, including minimizing transportation-related fuel consumption. 23 U.S.C. §§ 134(a), (c).

347. The MPO violated 23 U.S.C. §§ 134(a), (c) by including in the Metropolitan TIPs and CLR Plans the ICC project without considering how the CLR Plans and Metropolitan TIPs accomplish the statutory objective of minimizing transportation-related fuel consumption in the area affected by the ICC.

348. As a result, the MPO unlawfully approved the Metropolitan TIPs and CLR Plans which include the ICC project because they fail to accomplish the national transportation objective required by 23 U.S.C. §§ 134(a), (c).

COUNT 12

349. SAFETEA-LU requires that the MPO adopt a long range plan and transportation improvement program that accomplish each of the four statutory objectives, including minimizing air pollution. 23 U.S.C. §§ 134(a), (c).

350. The MPO violated 23 U.S.C. §§ 134(a), (c) by including in the Metropolitan TIPs and CLR Plans the ICC project without considering how the CLR Plans and Metropolitan TIPs accomplish the statutory objective of minimizing air pollution, including, but not limited to:

a. Particulate matter;

b. Mobile Source Air Toxics; and

c. Greenhouse gases.

351. As a result, the MPO unlawfully approved the Metropolitan TIPs and CLR Plans which include the ICC project because they fail to accomplish the national transportation objective required by 23 U.S.C. §§ 134(a), (c).

COUNT 13

352. The metropolitan transportation planning process requires that a major investment study be considered by the MPO before it amends a Metropolitan TIP or CLR Plan. 23 C.F.R. § 450.318(a).

353. No major investment study was prepared in accordance with the requirements of 23 C.F.R. § 450.318(a) by the MPO, or prepared by the Maryland State Highway Administration for consideration by the MPO, at any time prior to adoption of the amendment to the Metropolitan TIP and CLR Plan to include the ICC project.

354. It was unlawful for the MPO to amend the MTIP and CLR Plan to include the ICC project without first preparing a major investment study in accordance with the

requirements of 23 C.F.R. § 450.318(a), including an evaluation "of the effectiveness and cost-effectiveness of alternative investments or strategies in attaining local, State and national goals and objectives."

COUNT 14

355. SAFETEA-LU requires that the State Transportation Improvement Program ("State TIP") adopt a project identical to the project or phase of the project as described in the approved Metropolitan TIP. 23 U.S.C. § 135(g)(4)(D).

356. SAFETEA-LU requires that the approved Metropolitan TIP be included without modification in the State TIP after the required conformity findings are made. 23 C.F.R. § 450.216(a).

357. SAFETEA-LU requires that the Secretary find that the transportation planning process, through which statewide transportation plans and programs are developed, is consistent with 23 U.S.C. § 134, containing the national planning objectives, 23 U.S.C. 134(a). 23 U.S.C. § 135(g)(7).

358. The federal defendants violated 23 U.S.C. § 135(g)(7) by approving the State TIP, including the faulty Metropolitan TIP, because the Metropolitan TIP planning process is not consistent with 23 U.S.C. § 134(a), (c) as the process did not evaluate the impact of the project on the national planning objectives.

359. As a result, the federal defendants unlawfully approved the State TIP containing the ICC because the planning process did not ensure compliance with the national planning objectives required by 23 U.S.C. §§ 134(a), (c).

COUNT 15

360. The combination and cumulative impact of the failures of, and omissions by, the MPO described above in Counts 9-14 make its approval of the Metropolitan TIPs and CLR Plans arbitrary and capricious or otherwise not in accordance with law. 5 U.S.C. § 706.

361. As a result, federal approval of the ICC project must be set aside because the project does not come from a properly approved Metropolitan TIP or CLR Plan. 23 U.S.C. § 134(j)(5).

362. Federal approval of the State TIP must also be set aside because the State TIP planning process was not consistent with 23 U.S.C. § 134.

COUNT 37: The MPO Unlawfully Included the ICC project in the Metropolitan TIP Before the Project Was Found to Conform

585. Section 176(c)(1) of the Clean Air Act prohibits the U.S. Department of Transportation from granting any approval, funding or "support in any way" for an activity such as a highway project before a determination has been made that the

project conforms to the applicable implementation plan in accordance with the criteria established by law.

586. Section 176(c)(1) of the Clean Air Act prohibits the MPO from giving its "approval to any project, program or plan which does not conform."

587. The MPO unlawfully adopted the Metropolitan TIPs in 2004 and 2005 and the CLR Plans allocating federal funds for the ICC project before the project had been found to conform under the Clean Air Act.

588. The USDOT, when acting on the State TIP that contained the Metropolitan TIPs allocating funds to the ICC, unlawfully approved the State TIP because it allocated funds to the ICC project before the project had been found to conform.

Attachment II

Excerpts from Motion to Dismiss
Counts 9 through 13, Count 15, and Count 37
filed by COG and TPB

March 8, 2007

Summary of Argument

Even taking Plaintiffs' allegations as true, the claims against Moving Defendants should be dismissed. Counts 9-13 under 23 U.S.C. § 134 fail for several reasons. First, Congress explicitly precluded from judicial review the MPO's balancing of the factors and transportation policies enumerated under Section 134 and recited in Counts 9-12. Plaintiffs cannot avoid the bar on judicial review by invoking Section 134(a) rather than 134(h), since only 134(h) imposes any direct obligations on the MPO. Second, even without the express bar on judicial review, FAHA does not provide a private right of action, and the aspirational, precatory provisions of Section 134 relied upon by Plaintiffs do not support the Court finding an implied private cause of action.

Plaintiffs' Count 13 must be dismissed because Congress has eliminated the MIS requirement that Plaintiffs seek to enforce. Moving Defendants had no enforceable obligation to prepare an MIS during the relevant time period and no such requirement currently exists. Count 15 is a summation of allegations, in which Plaintiffs allege that the violations set forth in Counts 9-13 are separately enforceable as "arbitrary and capricious" under the APA. Count 15 must also be dismissed because Counts 9-13 have no merit and because the APA expressly does not apply to Moving Defendants.

Count 37 fails to state a claim since Moving Defendants were not required to conduct or await a conformity determination for the ICC project before approving TIPs and CLRPs. The law offers no support for Plaintiffs' claim that the project-level conformity determination must come before CLRP and TIP approval. Under CAA § 176(c), 42 U.S.C. § 7506(c), and governing regulations, the MPO conducts conformity assessments of its *plans*, not of specific projects. Plans are reviewed and approved first, then specific projects are derived from approved plans.

Each of the seven counts brought against Moving Defendants should be dismissed with prejudice and Moving Defendants should be dismissed from this action.

Argument

I. Judicial Review for the Claims in Counts 9-13 and 15 is Barred

A. How the MPO Balances Broad Planning Goals is Not Subject to Review

Plaintiffs cite section 23 U.S.C. § 134(a) and (c) in support of their claims that the TPB did not properly consider certain factors when it approved the CLRP and TIP in 2004 and 2005. In fact, the statutory sections cited by Plaintiffs impose no duties on the TPB. Subpart (a) of Section 134 sets out broad, general objectives for planning.[11] 23 U.S.C. § 134(a). Subpart (c) of Section 134 states that the MPO should meet the broad 134(a) objectives through the development of CLRPs and TIPs.[12] The development of those CLRPs and TIPs is governed,

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[11] Sec. 134(a) lays out findings and goals for metropolitan planning:

> (a) POLICY.—It is in the national interest to.—
> (1) encourage and promote the safe and efficient management, operation, and development of surface transportation systems that will serve the mobility needs of people and freight and foster economic growth and development within and between States and urbanized areas, while minimizing transportation-related fuel consumption and air pollution through metropolitan and statewide transportation planning processes identified in this chapter; and
> (2) encourage the continued improvement and evolution of the metropolitan and statewide transportation planning processes by metropolitan planning organizations, State departments of transportation, and public transit operators as guided by the planning factors identified in subsection (h) and section 135(d).

23 U.S.C. § 134(a). The language under TEA-21 was similar:

> (1) Findings. - It is in the national interest to encourage and promote the safe and efficient management, operation, and development of surface transportation systems that will serve the mobility needs of people and freight and foster economic growth and development within and through urbanized areas, while minimizing transportation-related fuel consumption and air pollution.

23 U.S.C. § 134(a)(2004).

[12] Section 134(c) provides, in relevant part, that "[t]o accomplish the objectives in subsection (a), metropolitan planning organizations . . . shall develop long-range transportation plans and transportation improvement programs[.]" 23 U.S.C. § 134(c)(1). The equivalent provision under TEA-21 was found at then Section 134(a)(2)(2004).

among other things, by the specific provisions of Section 134(i) and (j).[13] In particular, Section 134(h) addresses the range of goals for planning which need to be considered and balanced by MPOs. In Section 134(h), Congress has explicitly barred judicial review of the application of those factors.

Section 134(h) sets out important and sometimes contradictory public policies that mirror the precatory planning goals stated in Section 134(a):

> (1) IN GENERAL.—The metropolitan planning process for a metropolitan planning area under this section shall provide for consideration of projects and strategies that will—
>
> (A) support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;
>
> (B) increase the safety of the transportation system for motorized and nonmotorized users;
>
> (C) increase the security of the transportation system for motorized and nonmotorized users;
>
> (D) increase the accessibility and mobility of people and for freight;
>
> (E) protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns;
>
> (F) enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;
>
> (G) promote efficient system management and operation; and
>
> (H) emphasize the preservation of the existing transportation system.

23 U.S.C. § 134(h)(1).[14]

The section further provides: "[t]he failure to consider any factor specified in paragraph (1) shall not be reviewable by any court under this title or chapter 53 of title 49, subchapter II of chapter 5 of title 5 [The APA], or chapter 7 of title 5 in any matter affecting a transportation

[13] Section 134(i) provides requirements for development of long range plans (the CLRP) while Section 134(j) addresses requirements for transportation improvement plans (the TIP). Plaintiffs do not invoke any provisions of these provisions likely because the text therein is unrelated to any of their allegations.

[14] The equivalent provision under TEA-21 was Section 134(f)(1)(2004); it contained essentially the same text, combining the "safety and security" provisions of 134(h)(1)(B) and (C) into one subpart and did not contain the text in section 134(h)(1)(E) that appears after the phrase "quality of life."

plan, a TIP, a project or strategy, or the certification of a planning process." 23 U.S.C. § 134(h)(2). *See also* 72 FED. REG. at 7270 (to be codified at 23 C.F.R. § 450.306). Perhaps recognizing the inherently political nature of the balancing and consideration of these kinds of factors, Congress precluded any judicial review based on such factors.[15] As stated by the Fifth Circuit, "Section[] 134 . . . delineate[s] the scope of planning and provide[s] a list of planning factors, several of which are relevant to this case; but they also protect that planning, and the planners' failure to consider a factor, from judicial review." *Lundeen v. Mineta,* 291 F.3d 300, 305 (5th Cir. 2002)

It is clear that even though Plaintiffs did not cite Section 134(h), their allegations seek to enforce against the Moving Defendants the responsibilities created only under that subsection. Comparison of the alleged failures identified by Plaintiffs[16] with Section 134(h) confirms that they are seeking to enforce actions taken under that subsection:

1. Count 9 alleges Moving Defendants failed to consider "meeting the mobility needs of people and freight." Complaint ¶ 340. This is identical to the language of 23 U.S.C. § 134(h)(1)(D), which requires consideration of projects and strategies that will "increase the accessibility and mobility of people and for freight."
2. Count 10 alleges Moving Defendants failed to consider "fostering economic growth and development within and between urbanized areas." Complaint ¶¶ 343-44. This is essentially the same as the language of 23 U.S.C. § 134(h)(1)(A), which requires consideration of projects and strategies that will "support the economic vitality of the

[15] Preclusion of judicial review of how an MPO considers the seven planning goals is consistent with the policy behind Congress's assurance that the planning process is not subject to the National Environmental Policy Act, 23 U.S.C. 134(p) ;72 FED. REG. at 7280 (to be codified at 23 C.F.R. § 450.336).

[16] In each of these counts, Plaintiffs have identified certain specific documents (e.g., 1998 TPB Vision Plan) that they allege should have been considered by the TPB. Proof concerning these allegations is irrelevant to this Motion to Dismiss. Put simply, regardless of the record of what and how TPB considered the Section 134(h) factors, judicial review is precluded.

metropolitan area, especially by enabling global competitiveness, productivity and efficiency."

3. Count 11 alleges Moving Defendants failed to consider "minimizing transportation-related fuel consumption." Complaint ¶ 346. This is essentially the same as the language of 23 U.S.C. § 134(h)(1)(E), which requires consideration of projects and strategies that will "promote energy conservation."

4. Count 12 alleges Moving Defendants failed to consider "minimizing air pollution." Complaint ¶ 350. This is encompassed within the language of 23 U.S.C. § 134(h)(1)(E), which requires consideration of projects and strategies that will "protect and enhance the environment."

Since the claims in Counts 9 through 12 seek to enforce the same obligations as contained in Section 134(h)(1), they are precluded from judicial review under Section 134(h)(2). As that bar on judicial review specifically references the APA, Count 15 must be dismissed to the extent it relies on the allegations of Counts 9-12.

B. Section 134 Does Not Provide a Private Cause of Action in Any Event

Assuming that Plaintiffs could avoid the judicial review bar of Section 134(h) by relying on Section 134(a) or (c), their claims nonetheless should be dismissed on well established precedent. FAHA Section 134 does not provide an express private cause of action. Numerous courts have found there is no implied private right of action to enforce Section 134.

Attachment III

Excerpts from Motion to Dismiss
Counts 14 and 15
filed by USDOT and FHWA

April 27, 2007

PRELIMINARY STATEMENT

There are pending before this Court the opposed motion of the federal defendants to transfer this action to the District of Maryland, Southern Division, for consolidation with an identical challenge to the Inter-County Connector project, and the opposed motion of the Metropolitan Washington Council of Governments, the National Capital Region Transportation Planning Board, and their respective chairpersons (collectively, the "MPO defendants") to dismiss Counts 9 - 14 and 37 of this action. The claims against the MPO defendants, and the virtually identical Counts 14 and 15 that are the subject of this, the federal defendants' motion to dismiss, are discrete claims challenging the metropolitan and state planning processes. These processes are not at issue in the remainder, which constitute the bulk, of plaintiffs' claims, which challenge the project decision itself. See Complaint, passim. In Federal Defendants' Reply Memorandum in Support of Motion to Transfer, federal defendants advised the Court that were the Court to determine to retain jurisdiction over the claims against the MPO defendants, the federal defendants were willing to have those claims severed from the remaining claims, and the remaining claims could then be transferred for consolidation with the Maryland action, as the interests of justice require. Reply Memorandum, Docket # 18, at p. 5 fn. 4. Federal Defendants advised the Court at the same time that it would be filing this motion to dismiss Counts 14 and 15, which are based on the identical factual and legal allegations made against the MPO defendants.

By now moving to dismiss Counts 14 and 15, federal defendants do not waive any of their arguments supporting transfer of this entire action to the District of Maryland. However, because Counts 14 and 15 are inextricably connected with the claims sought to be dismissed by the MPO defendants, federal defendants believe that it is in the interests of judicial efficiency to go forward with their motion. In doing so they make the same suggestion to the Court regarding severance with respect to Counts 14 and 15 that they previously made with respect to the claims against the MPO defendants: to wit, that in the event that the Court were to determine to retain jurisdiction over Counts 14 and 15, these claims may, along with the claims against the MPO defendants, be severed from the remaining claims and those remaining claims be transferred for consolidation with the Maryland action in the interests of justice. Fed. R. Civ. P. 21; 28 U.S.C. 1404(a); In re Vitamins Antitrust Litigation, 270 F. Supp. 2d 15, 35 -38 (D.D.C. 2003).

INTRODUCTION

Plaintiffs, environmental organizations who are active nationally regarding traffic and growth issues, have filed a 105-page complaint alleging that the United States Department of Transportation ("DOT") through its component the Federal Highway Administration ("FHWA") has committed manifold violations of federal law in connection with its approval on May 29, 2006 of the Inter-County Connector Project (the "ICC" or "Project"), a combined highway, mass transit and recreational trail project located in Montgomery and Prince George's Counties, Maryland. Although the bulk of these claims are made under the National Environmental Policy Act and the Clean Air Act, plaintiffs have sought to augment their pleading with claims under the Federal-Aid Highways Act, as amended, which is codified at 23 U.S.C. 101 et seq. Certain of these latter are discrete claims born out of plaintiffs' unhappiness with the metropolitan and state transportation planning processes due solely to the inclusion of the ICC within those plans.

Regional transportation planning in the greater Washington, D.C. area is undertaken by the National Capital Region Transportation Planning Board, the metropolitan planning organization for the area; the Board is an arm of the Metropolitan Washington Council of Governments.[1] Statewide transportation planning in Maryland is undertaken by the State of Maryland through the Maryland Department of Transportation ("MDOT"), the Maryland State Highway Administration, and the Maryland Transit Administration.

The ICC is one of many projects contained in the MPO's Transportation Improvement Program for the National Capital Region ("Metro TIP"), which became a part of the Maryland Transportation Improvement Program ("State TIP"), which was approved by FHWA and the Federal Transit Administration (another component of the U.S. Department of Transportation) for consistency with the federally mandated transportation planning process. Plaintiffs allege that the MPO violated the Federal-Aid Highways Act, specifically 23 U.S.C. 134, by including the ICC in the Metro TIP. Complaint, Counts 9 - 13. Invoking the jurisdiction of this Court under the Administrative Procedure Act ("APA"), plaintiffs allege that the federal defendants, by approving the State TIP, violated 23 U.S.C. 134 and 135. Complaint, Counts 14 and 15.

As set forth below, judicial consideration of these claims is expressly precluded by the Federal-Aid Highways Act ("FAHA"), specifically 23 U.S.C. 134(h) and 23 U.S.C. 135(d), and these provisions mandate dismissal of Counts 14 and 15 under the Administrative Procedure Act ("APA"), 5 U.S.C. 701(a)(1). In the event that the Court were to find the FAHA preclusion provisions inapplicable, federal defendants will demonstrate that no APA review is available under 5 U.S.C. 701(a)(2), because the hortatory language relied on by plaintiffs provides no justiciable standard. Finally, no private right of action to pursue these claims can be implied

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[1] Both of these organizations, and their respective chairpersons, are named as defendants in this action. Most of the allegations are directed against the functions of the Planning Board, which will be referred to as the "MPO."

from FAHA, and Congress has eliminated the study requirement alleged to be missing from the process.

Attachment IV

Excerpts from Opposition
to COG/TPB and USDOT/FHWA
Motion to Dismiss
filed by Environmental Defense and Sierra Club, Inc.

May 8, 2007

Summary of Argument

Plaintiffs allege that the proposed ICC will undermine the statutory objectives in § 134(a) by substantially increasing transportation-related fuel consumption and air pollution, reducing user mobility by increasing vehicle miles traveled and vehicle hours delay, and undermining local planning efforts to ensure balanced regional economic development and growth, as compared to alternatives in the record. Plaintiffs allege that MPO Defendants violated § 134(c), and the implementing statutory provisions and regulations, by failing to demonstrate how: (1) adding the proposed ICC to the CLR Plan and Metropolitan TIP in 2004 and revising the CLR Plan and Metropolitan TIP in 2005 to add further funding for the proposed ICC will accomplish the statutory transportation objectives established in § 134(a)(1); and (2) any MIS supported the MPO Defendants' decision to add the proposed ICC to the CLR Plan and Metropolitan TIP. Plaintiffs allege that USDOT Defendants violated § 135(g)(7) when they concluded that the metropolitan planning process, through which the CLR Plan and Metropolitan TIP containing the proposed ICC were developed, complied with the requirements of 23 U.S.C. § 134.[8] MPO Defendants and USDOT Defendants have failed to meet their burden to demonstrate "beyond

[8] As USDOT Defendants correctly identify, USDOT Defs.' Br. at 7 n.5, Plaintiffs' claims under § 135(g)(7) depend on this Court concluding that MPO Defendants violated § 134.

doubt" that no set of facts would entitle Plaintiffs to relief.

Defendants' mandatory duties are sufficiently specific to allow judicial enforcement, and Plaintiffs' claims are actionable under § 134 as a private right of action, or under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, because either the MPO is a federal agency or has sufficient ties to the federal government to constitute a quasi-federal agency, thereby triggering APA review of its actions. Moreover, the limited preclusion of judicial review under § 134(h)(2) does not preclude judicial review of Plaintiffs' claims under § 134(c) because MPO Defendants' duty to design a CLR Plan and Metropolitan TIP to accomplish the national objectives under § 134(c)(1) is distinct from, and more specific than, their obligation to consider general planning factors listed in § 134(h)(1) in relation to projects and strategies.

This is a case of first impression that will determine whether interstate MPOs may be held to account under federal law for adopting transportation plans and programs that do not accomplish the four national transportation planning objectives in § 134(a)(1), in violation of § 134(c)(1). Similarly, this is a case of first impression that will determine whether USDOT Defendants may be held to account for their approval of metropolitan planning processes, CLR Plans, and Metropolitan TIPs that do not meet the requirements of § 134. This case raises important public policy concerns because, if MPO Defendants and USDOT Defendants are correct, their actions as interstate and federal agencies implementing § 134 would not be reviewable in any court, state or federal. Public policy does not support this outcome, as it would enable states to circumvent judicial review of their federally delegated planning functions simply by shifting planning responsibilities to an interstate entity.

Plaintiffs' claim that MPO Defendants failed to demonstrate how an MIS affected their decision to add the proposed ICC to the CLR Plan and Metropolitan TIP also states a claim upon which relief can be granted. The TEA-21 amendments did not eliminate the MIS requirement. Rather, the MIS regulation remained in effect at the time the MPO added the proposed ICC to the CLR Plan and Metropolitan TIP and was consistent with the TEA-21 amendments until revised in 2007. MPO Defendants' reliance on administrative guidance that claims otherwise is inconsistent with the 1993 MIS regulation and unlawful.

Further, Plaintiffs' claim that MPO Defendants violated § 7506(c)(1) states a claim upon which relief can be granted. The Clean Air Act provides, in no uncertain terms, that an MPO may not approve a project that does not conform to a state implementation plan. The plain language of the Act requires that project-level conformity determinations occur prior to MPO approval of the project by adding it to the CLR Plan and Metropolitan TIP.

Attachment V

Excerpts from Reply Memorandum in support of COG / TPB Motion to Dismiss, and Request for Hearing filed by COG and TPB

June 7, 2007

INTRODUCTION

The Metropolitan Washington Council of Governments ("COG"), the National Capital Region Transportation Planning Board ("TPB"), Vincent C. Gray, in his official capacity as Board Chair of the COG, and Catherine Hudgins, in her official capacity as Chairperson of TPB, (collectively, "MPO Defendants") file this Reply to Plaintiffs' Response to their Motion to Dismiss. The instant Motion to Dismiss addresses Plaintiffs' claims concerning activities of the MPO Defendants in conducting regional transportation planning. On March 8, 2007, prior to transfer of this case to this Court, MPO Defendants moved to dismiss, under Federal Rule of Civil Procedure 12(b)(6), the seven Counts of the Complaint which address regional transportation planning (MPO Defendants' "Motion"). Subsequently, on April 27, 2007, the U.S. Department of Transportation, *et al.* ("Federal Defendants") also moved to dismiss certain counts against them that relate to regional transportation planning. Plaintiffs filed a single memorandum in Response to both Motions to Dismiss on May 8, 2007 (Plaintiffs' "Response"), to which MPO Defendants now reply.[1]

SUMMARY OF ARGUMENT

Congress recognized that regional transportation planning of necessity involves social, economic and policy considerations best left to local, state and regional political entities. Congress did not provide for federal court judicial review of metropolitan planning organization ("MPO") regional planning under 23 U.S.C. § 134 (hereinafter Section 134), and courts have uniformly concluded that there is no implied cause of action to enforce this section. In 1998, Congress amended Section 134 to expressly confirm

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[1] On May 16, 2007, the District Court for the District of Columbia extended the time for this reply brief to June 6, 2007 and granted an enlargement of page limits to 35 pages. *See* Docket, D.D.C. 1:06-cv-2176, Minute Order (May 16, 2007).

that body of case law, enacting a bar on judicial review of transportation planning. Thus Plaintiffs' Counts 9-13 and 15 must be dismissed.

Plaintiffs fail to establish that this Court should deviate from precedent and find an implied right of action under Section 134. Their view of Section 134 is incorrect. Under governing standards, this Court cannot find that Congress intended to allow federal review of MPO regional planning.

Nor can Plaintiffs keep their claims alive by asserting that the TPB qualifies as a federal agency subject to review under the Administrative Procedure Act ("APA"). It is undisputed that the TPB is a regional entity, and not a part of the U.S. Government. The TPB does not exercise federal governmental authority, and Congress did not "delegate" or "authorize" MPOs to perform federal functions. Plaintiffs' fail to overcome the weight of authority, including the Court of Appeals for the Fourth Circuit, that declines to treat regional entities as APA agencies.

Plaintiffs' Count 13 complains that a Major Investment Study ("MIS") should have been completed on the Inter-county Connector ("ICC") corridor in Maryland before the TPB included the ICC in any Constrained Long Range Plan ("CLRP" or "Plan") or Transportation Improvement Program ("TIP"). Not only should this Count be dismissed because it is a Section 134 claim barred from judicial review, but in 1998 Congress eliminated the MIS regulations issued under the Federal-Aid Highway Act ("FAHA"). Since 1998, the U.S. Department of Transportation ("DOT") has not required preparation of a MIS prior to completion of Plans or TIPs.

Count 37 asserts that TPB was obligated to either conduct or have the results of a project-level Clean Air Act ("CAA") conformity determination for the ICC before including the ICC in a TIP or Plan. Plaintiffs misconstrue when a project is "approved" for purposes of transportation conformity. The MPO performs the conformity determination for TIPs and Plans, but does not "approve" individual projects within those plans. Other entities (*e.g.*, the State) approve specific projects when they go forward to fund and construct them, and they are responsible for any project-level requirements, including conformity determinations. Plaintiffs would turn this sequence on its head, apparently demanding that the detailed project-level conformity determination be performed before a project is included in a Plan or TIP. Plaintiffs' position is inconsistent with the statute, the regulations, and the position of both federal agencies – the DOT and the U.S. Environmental Protection Agency ("EPA") – which administer the transportation conformity programs.

Plaintiffs repeatedly claim that dismissal of their Complaint would offend "public policy" by denying a remedy against the MPO. To the contrary, there is no public policy that favors federal court review of actions by regional entities. Congress enacted a complete system, respectful of intergovernmental relations, under which State, regional and local entities are encouraged to work together for regional transportation planning and this political process of cooperation and balancing is not subject to federal court review. Periodic federal review and certification of the planning process, along with federal approval of State Transportation Improvement Programs ("STIPs") and conformity determinations, is the oversight and remedy that Congress provided. Federal action is also reviewable, as appropriate, under the APA. In particular, judicial review of federal actions approving specific projects like the ICC is clearly available.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ENVIRONMENTAL DEFENSE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Civil Action No.: AW-07-1480**
	)	
UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,	)	
	)	
Defendants.	)	
	)	

REQUEST FOR HEARING OF
DEFENDANTS METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS; VINCENT C. GRAY, in his official capacity as Board Chair of the Metropolitan Washington Council of Governments; NATIONAL CAPITAL REGION TRANSPORTATION PLANNING BOARD; and CATHERINE HUDGINS, in her official capacity as Chairperson of the National Capital Region Transportation Planning Board

On March 8, 2007, prior to transfer of this case to this Court, the Metropolitan Washington Council of Governments ("COG"), the National Capital Region Transportation Planning Board ("TPB"), Vincent C. Gray, in his official capacity as Board Chair of the COG, and Catherine Hudgins, in her official capacity as Chairperson of TPB, (collectively, "MPO Defendants") moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), the seven Counts of the Complaint which address regional transportation planning. Briefing of this Motion was completed by the filing of MPO Defendant's Reply on June 6, 2007.

MPO Defendants ask that the Court expeditiously set a date for oral argument on this Motion to Dismiss. As this Court is aware, this case involves, among other things, challenges by Plaintiffs to the decisions by the U.S. Department of Transportation ("Federal Defendants") regarding one specific transportation project, the Maryland Inter-County Connector ("ICC"). Plaintiffs' separate claims against MPO Defendants concern the long- and short-range range transportation planning conducted for the entire Washington Metropolitan Region. MPO Defendants understand that the Court has been requested to hold a status conference on June 18, 2007 to address scheduling and case management matters related to the claims against the Federal Defendants concerning their approval of the ICC.

Disposition of the pending Motion to Dismiss would assist overall case management by clarifying the scope of the litigation that will go forward; it would facilitate the scheduling for briefing and argument of the many counts of the Complaint that do not involve the MPO Defendants. For this reason, MPO Defendants request that the Court set oral argument on the pending Motion to Dismiss.

Respectfully Submitted,

Date: June 6, 2007

/s/ *Christopher R. Mellott*

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<u>Attachment VI</u>

Notice of Dismissal
of Counts 9 through 13, Count 15, and Count 37 against
COG and TPB
filed by Environmental Defense and Sierra Club, Inc.

June 13, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ENVIRONMENTAL DEFENSE and SIERRA CLUB, Inc., Plaintiffs, v. UNITED STATES DEPARTMENT OF TRANSPORTATION, et al., Defendants.	Civil Action No. 07-cv-1480-AW

PLAINTIFFS' NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE OF COUNTS 9-13, 15, AND 37 AGAINST MPO DEFENDANTS PURSUANT TO RULE 41(a)(1)(i)

Plaintiffs hereby give notice of their dismissal of Counts 9-13, 15, and 37 against Defendants Metropolitan Washington Council of Governments, Vincent C. Gray, National Capital Region Transportation Planning Board, and Catherine Hudgins (collectively, "MPO Defendants") pursuant to Federal Rule of Civil Procedure 41(a)(1)(i). Plaintiffs state as follows:

1. This case was transferred from the District Court for the District of Columbia on May 17, 2007.
2. This case was docketed in this Court on June 5, 2007.
3. MPO Defendants have not filed an answer to Plaintiffs' claims against them.
4. MPO Defendants have filed a motion to dismiss, but not a motion for summary judgment.

5. The filing of a motion to dismiss does not terminate Plaintiffs' right of dismissal by notice. In re Microsoft Corp. Antitrust Litig., 332 F. Supp. 2d 890, 895 (D. Md. 2004) (internal quotations omitted); see Finley Lines Jt. Prot. Bd. Unit 200, Broth. Ry. Carmen, a Div. of Transp. Communications Union v. Norfolk So. Corp., 109 F.3d 993, 995-97 (4th Cir. 1997) (concluding that a motion to dismiss in lieu of an answer or motion for summary judgment, even when supported by extraneous materials, does not terminate a plaintiff's right to dismiss his claims under Rule 41(a)(1)(i)).

6. Plaintiffs meet the requirements of Federal Rule of Civil Procedure 41(a)(1)(i) and are, therefore, entitled to dismiss voluntarily without prejudice their claims against MPO Defendants.

DATED: June 13, 2007

Respectfully submitted,

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