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

Presentation to the TPB Technical Committee

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Complaint

On December 20, 2006, Environmental Defense and Sierra Club file 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)
- The National Capital Region Transportation Planning Board (TPB)

regarding actions taken concerning the Inter-County Connector (ICC) Highway in Maryland.

- Of the 39 counts included in this complaint, seven are against COG and TPB: Counts 9 through 12, Count 13, Count 15 and Count 37.

Chronology of Responses to Complaint

- March 8, 2007, COG and TPB file a Motion to Dismiss the seven counts against them.
- April 27, 2007, USDOT and FHWA file a motion to Dismiss two of the counts.
- May 8, 2007, Environmental Defense and Sierra Club file a consolidated response in opposition to the COG/TPB and USDOT/FHWA motions to dismiss.
- June 6, 2007, COG and TPB file 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"
- June 13, 2007, Environmental Defense and Sierra Club voluntarily dismiss all counts against COG and TPB.

Complaint: Counts 9 through 12

- Section 134 of 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.

- SAFETEA- requires that MPOs and states “accomplish” the four statutory objectives.

Complaint : Counts 9 through 12 (continued)

- The MPO violated Section 134 of SAFETEA-LU by including in the Metropolitan TIPs and CLR Plans the ICC project without considering how the Plan and TIPs accomplish the statutory objectives of …….

  (i) "meeting the mobility needs of people and 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 to Counts 9 through 12

- 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 (Section 134). In 1998, Congress amended Section 134 enacting a bar on judicial review of transportation planning.

Complaint: Count 13

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 (MIS), including an evaluation "of the effectiveness and cost-effectiveness of alternative investments or strategies in attaining local, state and national goals and objectives".

Response to Count 13

- In 1998 Congress eliminated the MIS requirement. Since 1998, the U.S. Department of Transportation ("DOT") has not required preparation of a MIS prior to completion of Plans or TIPS.

- Because this is a Section 134 claim, it is barred from judicial review.

Complaint: Count 15

- The combination and cumulative impact of the failures of, and omissions by, the MPO make its approval of the Metropolitan TIPs and CLR Plans arbitrary and capricious of otherwise not in accordance with law.

- 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.

Response to Count 15

- In 1998 Congress enacted a bar on judicial review of transportation planning (see response to counts 9 through 13).

- The TPB is a regional entity, and not a federal agency subject to review under the Administrative Procedure Act ("APA"). The TPB does not exercise federal government authority, and Congress did not "delegate" or "authorize" MPOs to perform federal functions.

Count 37

- The Clean Air 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.

Response to Count 37

- Under the Clean Air Act and governing regulations, the MPO performs the conformity determination for TIPs and Plans. Other entities (e.g. the state) are responsible for any project-level requirements, including conformity determinations.

- The TPB is not required to conduct or await project-level conformity determinations for individual projects before including them in metropolitan TIPs and Plans.

Is Regional Transportation Planning Subject to Federal Court Review?

Plaintiffs Claim:

Dismissal of their complaint would offend public policy by denying a remedy against the MPO.

Response:

- Congress enacted a complete system, respect 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.

Is Regional Transportation Planning Subject to Federal Court Review?

Response (Continued):

- 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 Administrative Procedure Act (APA).

- Judicial review of federal actions approving specific projects like the ICC is clearly available.