N.C. Construction Law, Policy & News

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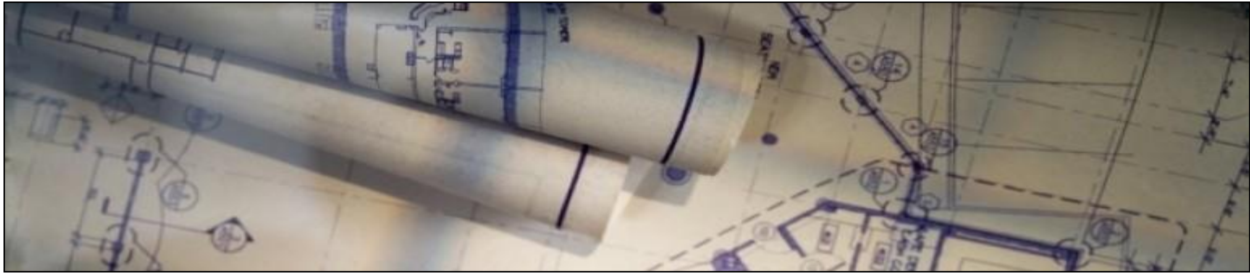

Fourth Circuit, Flawed NEPA Review Process Cast Doubt on the Future of the Monroe Connector Bypass Project

MAY 9, 2012

On March 12, 2012, I posted an article to my blog about the Monroe Connector Bypass (or just the Monroe Bypass, for short).

The headline to that post suggested that the legal saga surrounding the proposed $725 million highway construction project was nearing "the end of the road."

On second thought, not so much.

The road has taken an unexpectedly sharp turn, and there's no telling how long the project may now be delayed. Why? Because according to the Fourth Circuit Court of Appeals ("4th Circuit") in its May 3, 2012 decision in *N.C. Wildlife Federation v. N.C. Department of Transportation*, the North Carolina Department of Transportation ("NCDOT") and the Federal Highway Administration ("FHA") (collectively, the "Agencies") failed to conduct a clear, transparent environmental review process that permitted meaningful public comment under applicable principles of federal environmental law.

The National Environmental Protection Act ("NEPA") requires a detailed environmental impact statement for every "major federal action" significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Agencies did not dispute that the Monroe Bypass project represented "major federal action," and commenced the NEPA review process in 2007. Key to that process was an "alternatives study," one which, by federal law, required the Agencies to compare its preferred alternative -- building the road -- against a "no action" or "no build" alternative. 40 C.F.R. § 1502.14(c)-(d); *Theodore Roosevelt Conserv. P'Ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011).

As the 4th Circuit's decision makes clear, the Agencies' "no build" alternative was deeply flawed, preventing the Court from concluding that a proper NEPA process had been conducted. Trouble began when the Agencies relied on socioeconomic modeling developed by the Mecklenburg-Union

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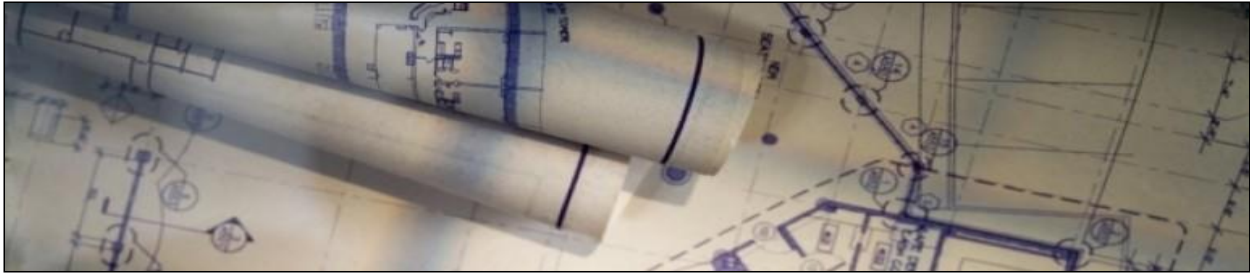

Metropolitan Planning Organization ("MUMPO"), which calculated projected growth in the affected area using a number of "land development factors," including (among several other factors) travel time to employment, anticipated population change and water/sewer availability. Data for travel time to employment depended on MUMPO's anticipated roadway network in the region. MUMPO's anticipated network, however, included the Monroe Bypass.

Think about that for a second -- the "no build" baseline required by NEPA included an assumption that the Monroe Bypass would actually be built. Such an assumption had a provocative effect on the Agencies' traffic volume estimate, which concluded that the 2035 "build" traffic volume would be *less* than the 2035 "no build" baseline. During the public comment period, the conservation groups that ultimately asserted the lawsuit (the N.C. Wildlife Federation, Clean Air Carolina and the Yadkin Riverkeeper, all represented by the Southern Environmental Law Center) asked the Agencies whether this counterintuitive conclusion might be the result of the "no build" data actually assuming that the Monroe Bypass would be built. Without answering that discrete question and without further explanation, the Agencies simply issued a correction to their initial estimate lowering the 2035 "no build" traffic projection baseline to below the "build" levels.

Making matters worse, the Agencies continued to be less than forthcoming in answering subsequent questions about its modeling. The U.S. Fish and Wildlife Service asked if MUMPO's projections assumed construction of the project, but rather than answer that question directly, the Agencies simply issued a memorandum drafted by their consultant concluding that the Agencies' methodology was appropriate. It wasn't until the lawsuit was filed that the Agencies expressly acknowledged the flawed assumption underlying MUMPO's analysis. Indeed, during oral argument at the 4th Circuit, the Agencies conceded that the flawed assumption came to their attention during the review process.

The 4th Circuit was unrelenting in its criticism of the Agencies' handling of the "no build" modeling:

> "[I]n calculating the 'no-build' baseline, the Agencies relied on data that assumed that the Monroe Connector existed. By doing so, the Agencies ... conflated the 'no build' and 'build' scenarios, making it impossible to accurately isolate and assess the environmental impacts of the Monroe Connector.

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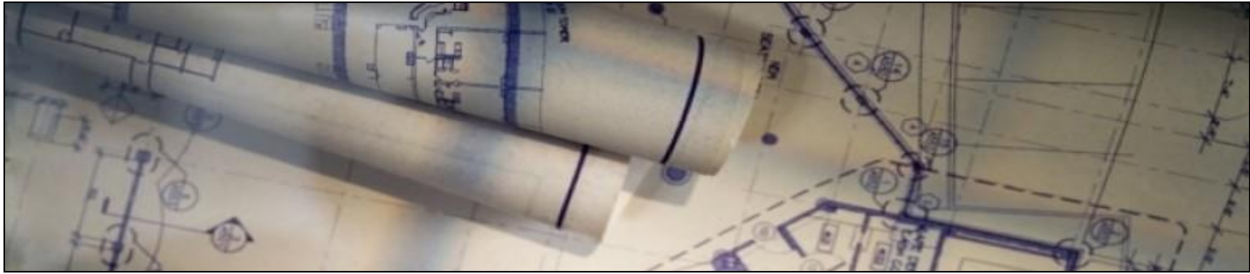

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> The very purpose of public issuance of an environmental impact statement is to provide a springboard for public comment. ... However, the Agencies' responses to the public comments contravened that purpose. In commenting, the Fish and Wildlife Service and a number of private parties, including the Conservation Groups, repeatedly raised questions ... rather than take these opportunities to make a candid acknowledgment of what they knew to be the truth, the Agencies maintained that the 'no build' data did not include the Monroe Connector.

. . .

> The Agencies now admit that the administrative record mischaracterizes the 'no build' data. Such an acknowledgement made during litigation does not change the fact that the NEPA process itself relied on those mischaracterizations."

Undoing the damage is likely to take several years, but NCDOT appears ready for the challenge. In response to the decision, NCDOT Secretary Gene Conti released this statement:

> "We have received the opinion from the United States Court of Appeals for the Fourth Circuit on the Monroe Bypass case. We are reviewing the ruling with our legal and environmental experts. Once we have reviewed this ruling, we will work on our legal and procedural options to advance the project by addressing the court's concerns as soon as possible. While this ruling will cause delays, it does not mean the project will not move forward. We hope to have a new plan and timeline developed and released to the public within the next few weeks."

What do I make of all this, including how the 4th Circuit's decision could affect planning and approval of the Bonner Bridge project on the Outer Banks and the Garden Parkway project in Gaston County? Believe it or not, I actually think there's a silver lining for NCDOT in the decision. As the 4th Circuit

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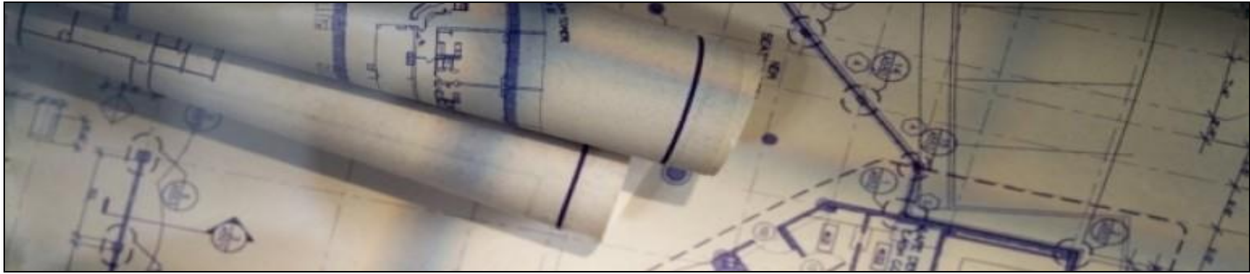

notes, the federal courts' role in reviewing agency decision-making on these types of major highway construction projects is actually quite limited. The judicial inquiry must be "searching and careful," but "the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). A reviewing court must ensure that the agency examined the relevant data and articulated a satisfactory explanation of its action. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

In other words, process matters. And based on the Agencies' lack of candor with respect to the flawed assumption underlying the MUMPO traffic projections, it's not difficult to understand why the 4th Circuit concluded that the Agencies' NEPA process fell below the standards articulate above. Going forward, however, and so long as NCDOT conducts a clear, transparent analysis allowing for meaningful public comment and discussion, I suspect the Monroe Bypass project -- and quite possibly the other projects mentioned in this blog post -- will ultimately pass judicial muster.

That's not to suggest opposition groups won't be able to muster enough *political* support to keep these projects from coming to fruition. It is to suggest, however, that this blogger would be quite surprised if the *courts* were to upend a project for anything other than the type of deeply flawed NEPA review process discussed at length in the *N.C. Wildlife* decision.

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