

Updates

January 04, 2018

D.C. Circuit Upholds FTA Approval of Purple Line Light Rail Project

Reversing a district court decision that had delayed work on the \$2.4 billion Purple Line light rail transit project in Maryland, the U.S. Court of Appeals for the District of Columbia Circuit has held that the Federal Transit Administration (FTA) and Maryland Transit Administration (MTA) fully complied with the National Environmental Policy Act when approving the project. The decision in [*Friends of the Capital Crescent Trail v. Federal Transit Administration*, No. 17-5132 \(D.C. Cir. Dec. 19, 2017\)](#) allows ongoing construction of the Purple Line to continue.

With this decision, the D.C. Circuit reaffirms the principle of deference to agency decisions on issues that implicate agency expertise, and also addresses several important issues under NEPA:

- Whether an agency can be required to prepare a supplemental environmental impact statement based on new information that relates to the purpose and need of a project but does not directly alter the project's environmental impacts;
- Whether an agency can limit the range of alternatives considered in a final environmental impact statement solely to the alternatives that remain under consideration—in this case, a single build alternative and the No Action alternative;
- Whether indirect effects on land use—"induced growth"—can be analyzed qualitatively rather than quantitatively; and
- Whether the elimination of a mitigation measure requires a Supplemental EIS, where there is evidence that equally effective measures will be implemented due to state regulations.

Purple Line Light Rail Project

The Purple Line is a 16.2-mile light rail transit project in the Maryland suburbs of Washington, D.C. The project will provide east-west transit service connecting several major activity centers, including two employment hubs and the state's flagship university campus. It would also provide connections to four stations on the region's Metrorail subway system.

The NEPA process for the Purple Line began in 2003. Both MTA and FTA issued a Draft EIS in 2008, examining eight alternatives. The state identified light rail as its "locally preferred alternative" in mid-2009. FTA and MTA issued a Final EIS in 2012, comparing the light rail alternative and a No Action alternative. FTA issued a Record of Decision approving the light rail project in March 2014.

Following the Record of Decision, the state entered into a public-private partnership agreement with a developer team, under which the developer is responsible for completing the design, financing and building the project, and then operating and maintaining the project for 30 years.

Litigation in District Court

Plaintiffs—an environmental organization and two individuals—challenged the Record of Decision in August 2014, bringing claims under NEPA, the Endangered Species Act, the Migratory Bird Treaty Act, Section 4(f) of the U.S. Department of Transportation Act and other laws. Plaintiffs later filed two amended complaints claiming that FTA was required to prepare a Supplemental EIS based on various design changes to the project and other new information, including the potential effects of declining Metrorail ridership on Purple Line ridership forecasts.

In August 2016, the district court ruled that FTA should have prepared a Supplemental EIS on the Metrorail ridership issue and vacated the March 2014 Record of Decision on that basis. The district court reserved judgment on all other issues. With the court's permission, MTA and FTA submitted an additional analysis of the Metrorail ridership issue. This analysis examined five hypothetical scenarios involving varying degrees of Metrorail ridership decline, each with a corresponding decline in Purple Line ridership. The agencies found that under any of those scenarios, the Purple Line's direct environmental impacts would remain the same, and its operating impacts may be slightly reduced. The agencies also found that the Purple Line would still meet its purpose and need, even at lower ridership levels, and found that any changes in ridership would not alter the underlying basis for selecting light rail over other modes.

In May 2017, after considering this additional analysis, the district court again held that a Supplemental EIS was needed on the Metrorail ridership issue. Shortly thereafter, the district court ruled in favor of MTA and FTA on all other issues.

In June 2017, MTA appealed the district court's decision on the Metrorail issues and sought a stay of the district court's decision. FTA also appealed, and plaintiffs cross-appealed. On July 19, 2017, the D.C. Circuit granted MTA's motion for a stay pending appeal, thereby reinstating the Record of Decision and allowing construction to begin. The D.C. Circuit issued its opinion on the merits on December 19, 2017, ruling in favor of MTA and FTA on all issues.

Issue #1: Whether a Supplemental EIS Can Be Required Based on New Information Regarding the Project's Purpose and Need

Plaintiffs claimed that FTA, in deciding not to prepare a Supplemental EIS, had incorrectly assumed that a Supplemental EIS is only required when new information changes the environmental impacts of the project. Their claim, in essence, was that a Supplemental EIS also can be required when there is new information that calls into question the project's ability to meet its purpose and need or that calls into question the agency's basis for selecting one alternative over another.

In upholding FTA's decision on this issue, the D.C. Circuit found that FTA had, in fact considered whether the new information about Metrorail ridership would alter the Purple Line's ability to meet its purpose and need or the basis for selecting light rail. In particular, the court pointed to the agencies' analysis of the five Metrorail ridership scenarios, which the court noted was "central to our resolution of these challenges." Based on that analysis, the court found that FTA and MTA had performed sufficient analysis to support FTA's determination that even if Metrorail ridership did decline, the Purple Line project would still meet its purpose and need, and the agencies' basis for selecting light rail remained valid.

The court rejected plaintiffs' attempt to rely on subtle differences in wording between provisions in the Council on Environmental Quality regulations and FTA's own regulations (23 CFR Part 771) regarding the standard for preparing a Supplemental EIS. The court held that, regardless of which regulations are applied, an agency's decision on whether to prepare a Supplemental EIS is governed by the D.C. Circuit's decision in *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002), where the court held that a Supplemental EIS is required only if the new information presents a "seriously different picture of the environmental landscape." The court also noted that such decisions "implicat[e] substantial agency expertise" and thus are entitled to deference."

The court also rejected the plaintiffs' reliance on *Alaska Wilderness Recreation and Tourism Association v. Morrison*, 67 F.3d 723 (9th Cir. 1995), where the U.S. Court of Appeals for the Ninth Circuit held that a Supplemental EIS was required based on new information showing that the need for a timber sale no longer existed because the contract calling for that sale had been canceled. The D.C. Circuit distinguished that case, holding that it involved "a basic change that undercut the rationale upon which the agency action depended,"

whereas FTA had found that the rationale for the Purple Line remained intact.

Lastly, the court also rejected Plaintiffs' argument that FTA and MTA had not responded sufficiently to criticisms of the agencies' ridership forecasts, holding that "[a]gencies are not always required to give 'point-by-point responses' to every objection raised."

Issue #2: Whether the Final EIS Can Be Limited to Single Build Alternative and No-Action

Plaintiffs claimed that the range of alternatives in the Final EIS was too narrow because the only alternatives considered in detail in that document were the state's locally preferred alternative—the light rail transit project—and the No Action alternative. They claimed that the Final EIS should have fully reexamined all eight of the alternatives that had been studied in detail in the Draft EIS, rather than summarizing that analysis and incorporating it by reference.

In upholding FTA's approach, the D.C. Circuit noted that "[t]he reasonableness of the analysis of project alternatives in a Final EIS is resolved not by any particular number of alternatives considered, but by the nature of the underlying agency action." Further, the court noted that, under FTA's New Starts process as it existed at that time, it was the state's responsibility to select a locally preferred alternative—and once it had done so, that choice "narrowed FTA's role" to deciding whether to approve that alternative.

Given that statutory scheme, the court held it was permissible for the Final EIS to summarize the previous alternatives analyses and focus solely on comparing the state's preferred light rail alternative to the No Action alternative. The court explained that:

This "funneling approach" adopted by Maryland and FTA, narrowing alternatives over a period of years, was in accord with NEPA's "rule of reason" ... and common sense: Agencies need not reanalyze alternatives previously rejected, particularly when an earlier analysis of numerous reasonable alternatives was incorporated into the final analysis and the agency has considered and responded to public comment favoring other alternatives. Requiring more detail on rejected alternatives would elevate form over function.

Issue #3: Whether a Qualitative Analysis of "Induced Growth" Is Sufficient

Plaintiffs claimed that FTA and MTA had not adequately examined the potential indirect effects resulting from induced growth, particularly around transit stations; they claimed that additional development could increase stormwater run-off and adversely affect low-income and minority populations. In support of this claim, plaintiffs sought to rely upon a recent D.C. Circuit decision requiring a quantitative analysis of greenhouse gas emissions as an indirect effect of a natural gas pipeline project. See *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

The D.C. Circuit noted that, as recognized in *Sierra Club v. FERC*, "[t]he required indirect effects analysis is thus limited to what is reasonably foreseeable, with *reasonable* being the operative word." (emphasis in original). By contrast to that case, where it was found that the amount of GHG emissions could be easily quantified, the court found in this case "[l]ocal land use planning documents are inherently less concrete than numerical estimates based on pipeline capacity and contractual usage commitments." Given these factual distinctions, the court concluded that it was sufficient for FTA and MTA to address induced growth qualitatively.

Issue #4: Whether Eliminating a Mitigation Measure Requires a Supplemental EIS

Plaintiffs claimed that a Supplemental EIS was required because MTA had decided, after completing the NEPA process, to allow the project developer the flexibility to determine appropriate stormwater mitigation through the state's permitting process, rather than specifically requiring the contractor to use "green track"—a vegetated

track-bed that would help to limit stormwater run-off. In support of this claim, plaintiffs claimed that eliminating the green-track requirement violated the Record of Decision, which included a statement that green track "will be" used.

The D.C. Circuit rejected this claim as well, finding that "[a]lthough breaking a promise to use green track mitigation may present a political issue, the Friends fail to show the change is legally significant enough to require preparation of an SEIS." In reaching this conclusion, the court relied on a technical report prepared by MTA, which showed that the same state stormwater management regulations will apply regardless of whether green track or another stormwater mitigation measure is used, such that the elimination of green track would not change the project's effects on stormwater.

© 2018 Perkins Coie LLP

Explore more in

[Environment, Energy & Resources](#) [Environmental Litigation](#) [Infrastructure Development](#)

Related insights

Update

[Delaware Significantly Narrows Scope of Stockholder Inspection of Corporate Books and Records](#)

Update

[DOJ Launches Deregulation Task Force](#)