IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CITY OF ALEXANDRIA, a Municipal Corporation, et al.,

Plaintiffs,

v.

ELIZABETH HANFORD DOLE, Secretary of Transportation,

Defendants.

FEB 28 1984

Consolidated Civil Action Nos. 83-747-A, 83-737-A

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,

Plaintiff,

v.

FEDERAL HIGHWAY ADMINISTRATION, et al.,

Defendants.

ORDER

This matter comes before the Court on the motions of all parties for summary judgment. For reasons stated in the accompanying memorandum opinion, the Court GRANTS defendants' joint motion for summary judgment and DISMISSES the suit. Plaintiffs' motions for summary judgment are DENIED.

Let the Clerk send a copy of this order and accompanying memorandum opinion to all counsel of record.

DATE: 2/28/84

Richard L. Williams
UNITED STATES DISTRICT JUDGE

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MEMORANDUM OPINION

This suit grows out of the Virginia Department of Highways and Transportation's effort, undertaken with federal approval and funding, to construct and operate a highly sophisticated traffic management system (TMS) on interstate freeways into the District of Columbia. The TMS contemplates a series of physical improvements on I-395 and a ramp metering system on several entrances to I-66 and I-395..

The metering system is the source of controversy in this lawsuit. Through the use of video monitors, computers and

traffic lights, the metering system is designed to regulate the rate of access to the freeways, thereby increasing average travel speed and reducing congestion. The plaintiffs in this lawsuit, the City of Alexandria and Fairfax County, challenge the Federal Highway Administration's decision not to prepare an environmental impact statement (EIS) or environmental assessment with respect to the ramp metering system.

In 1981, several years after planning on the TMS had begun, the Federal Highway Administration (FHWA) determined that the TMS qualified as a "categorical exclusion", a classification that obviates the need for the FHWA to prepare an environmental assessment. 23 C.F.R. §771.115. Plaintiffs argue that FHWA misapplied its regulations in making this determination or, alternatively, that the regulations on which it relied are invalid. According to them, the TMS will cause potentially significant adverse environmental effects and the matter must accordingly be remanded to the FHWA for further consideration.

For reasons stated below, the Court declines to overturn FHWA's decision not to prepare an environmental assessment or an EIS.

I. STANDARD AND SCOPE OF REVIEW

The Administrative Procedure Act provides that a reviewing court shall set side agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. §706(2)(A). The National

Environmental Policy Act is silent on the standard of review courts must apply in reviewing the administrative decisions that the Act requires. In reviewing NEPA decisions, most courts have applied the arbitrary and capricious standard derived from the APA. Some courts, however, have held that the policies underlying NEPA necessitate a more searching "reasonableness" standard of review. See, e.g., Winnebago Tribe v. Ray, 621 F.2d 269 (8th Cir. 1980); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).

The parties dispute the standard of review that this Court must apply in reviewing the FHWA's decision. The plaintiffs maintain that the Fourth Circuit has not squarely decided whether agency decisions not to prepare an EIS must be reviewed under the arbitrary and capricious standard or the reasonableness standard. They urge the Court to employ the more stringent reasonableness standard.

Plaintiffs misread the applicable Fourth Circuit precedent. In Providence Road Community Association v. EPA, 683 F.2d 80, 82 (4th Cir. 1982), the Fourth Circuit reviewed a decision not to prepare an EIS under the APA's arbitrary and capricious test. The court mentioned but declined to decide whether to adopt the reasonableness test employed by some circuits because both tests yielded the same result. 683 F.2d at 82 n.3. The Fourth Circuit's decision in Webb v. Gorsuch, 699 F.2d 157, 159 (4th Cir. 1983), however, removes any ambiguity left by Providence Road as to the appropriate standard of review. There the Fourth Circuit held that an agency's decision not to prepare an EIS must

be upheld unless arbitrary and capricious. In light of Webb's unequivocal holding, the Court rejects plaintiffs' suggestion that the FHWA's decision must be scrutinized for reasonableness.

The APA's arbitrary and capricious standard requires a reviewing court to make a "searching and careful" inquiry into the facts before the agency. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The ultimate standard of review is nevertheless a narrow one. "The court is not empowered to substitute its judgment for that of the agency." Id. Rather, it must simply insure that the agency considered the relevant factors and that its decision was not irrational. Id.

The agency's decision is ordinarily reviewable solely on the basis of the administrative record made by the agency. Camp v. Pitts, 411 U.S. 138, 142-43 (1973). Where, however, the agency's record explanation of its action is unilluminating, the court may require any additional explanation needed to facilitate judicial review. The necessity of looking beyond the administrative record is especially likely where the record does not contain a contemporaneous explanation of agency's action. Id.

Although the administrative record here does include what can be construed as a contemporaneous explanation of the FHWA's decision to classify the project as a categorical exclusion (CE), that explanation is unhelpful. John Humeston, a FHWA environmental enginer who oversaw the federal involvement in the project, initialed, and thereby adopted, a letter from VDHT proposing the CE classification. The letter, however, merely states legal conclusions, without indicating their basis.

Because these conclusory statements do not provide an adequate basis for judicial review, the Court deems it appropriate to look beyond the administrative record for an explanation of the agency's action.

II. CATEGORICAL EXCLUSION

For purposes of complying with NEPA, the FHWA has, by regulation, developed three categories of federal actions. One type of action such as the construction of a controlled access freeway requires preparation of an EIS because it is clear that such action may significantly affect the environment. 23 C.F.R. §771.115(a). Another type of action, described in the regulations as a "categorical exclusion (CE), does not require the preparation of an environmental assessment or an EIS because it is apparent, without extensive and formalized investigation, that these actions do not have a significant effect on the environment. 23 C.F.R. §771.115(b). Actions that fall into neither of these two categories, that is, actions "in which the significance of the impact on the environment is not clearly established", require the preparation of an environmental assessment. 23 C.F.R. §771.115(b). The FHWA then uses the environmental assessment to determine whether an EIS is required.

In 1981 FHWA determined that the TMS fell within the specifically enumerated categorical exclusions for "[m]odernization of an existing highway" and for "[h]ighway safety or traffic improvement projects . . . ." 23 C.F.R.

§771.115(b)(13) & (14). Consequently, no environmental assessment was prepared and the VDHT went ahead with construction of the TMS, now 95% complete. Plaintiffs, who assert that they did not receive notice of the FHWA's action until sometime in 1983, argue that FHWA misapplied its regulations in classifying the TMS as a CE.

A. Substantial changes in access control

FHWA regulations permit the agency to use a CE classification for highway modernization or for highway traffic improvement projects. 23 C.F.R. §771.115(b)(13) & (14). A CE classification is, however, improper where such projects require "substantial changes in access control." Plaintiffs contend that because the ramp metering system is designed to regulate access onto I-66 and I-395, the TMS clearly contemplates "substantial changes in access control" within the plain meaning of that phrase.

Plaintiffs' argument overlooks the technical meaning that the regulations give to the phrase "access control". FHWA regulations nowhere explicitly define "access control. They do, however, approve certain engineering standards, policies, guidelines and references for application on federally funded projects. 23 C.F.R. §625.3. Among the approved references are two documents authored by the American Association of State Highway Officials (AASHO): A Policy on Design of Urban Highways and Arterial Streets and AASHO Highway Definitions. 23 C.F.R §625.3(a)(2), (e)(1). Exhibits 6 & 7 to federal appellant's

brief for summary judgment. Both documents define access control as:

> The condition where the right of owners or occupants of abutting land or other persons to access, light, air, or view in connection with a highway is fully or partially controlled by public authority.

AASHO, A Policy on Design of Urban Highways and Arterial Streets at 141; AASHO, Highway Definitions at 15. In light of the facts that the regulations do not themselves expressly define "access control" and that they incorporate the AASHO documents by reference, the Court holds that the regulations adopt the AASHO's definition of "access control."[1]

The TMS does not involve access control, so defined. As defined by the AASHO, access control involves governmental regulation of the rights of property owners whose land abuts the highway. This occurs when the number of access points to a highway is restricted, thus impinging on the right of abutting landowners to enter the highway via a private driveway. The TMS does not deprive any abutting landowners of a right to enter the highways that he would otherwise have had. FHWA's determination that the TMS does not involve substantial access control is clearly within the bounds of reasoned decisionmaking.[2]

B. Alleged adverse environmental effects

Even though a project may satisfy the literal description of one of the enumerated examples of CEs, FHWA regulations provide that a CE may not be used where the project is likely to involve significant impacts on the environment. 23 C.F.R. §§771.115 (1 -

29), 771.117(c)(1). Plaintiffs argue that the ramp metering system possibly will have two adverse environmental effects. First, they contend that the TMS will cause a possibly significant diversion of traffic to local routes, thereby disrupting local neighborhoods and altering the distribution of air and noise pollution. Second, they maintain that the TMS, by increasing the average speed on vehicles traveling in non-HOV (high occupancy vehicle) lanes, will result in a potentially significant decrease in use of HOVs. As discussed below, however, the FHWA considered both factors and reasonably determined that neither was potentially significant.

First, the FHWA rationally concluded that the TMS was not likely to cause any significant diversion of traffic to local routes. In his affidavit, John Humeston states that in making his decision to approve the CE classification, he considered a July 1979 report prepared by Howard, Needles, Tammen and Bergendorff for the VDHT. Based on this report, he concluded that the metering system would have to be operated so as to minimize diversion.

There is ample support in the report for this conclusion. The report explained that a ramp metering system operates in a diversionary fashion where traffic is metered onto the highway so slowly that the highway does not accomodate the previous level of traffic demand. To avoid the increased delay, drivers divert onto local routes. Non-diversionary use occurs where the metering rates are quickened when the capacity of the entrance ramp to store waiting vehicles has been reached. If the ramp

remains full, the rate is progressively increased. And, if the backlog is not to some extent dissipated, the metering system is ultimately turned off. The report went to explain that diversionary use of the system is appropriate only where there are good alternate travel routes available. The report studied the availability of alternate routes in the I-395 and I-66 corridors. It concluded that there are virtually no effective primary alternates, that is, alternates suitable for major freeway diversions. It found some secondary alternates -- routes suitable for limited diversions -- along portions of I-66 and few secondary alternates along I-395. In light of the lack of effective primary alternates and the fact that many of the secondary alternates extend between metered entrances, Humeston could rationally conclude that the metering system would have to operate in a non-diversionary manner.

Based on this understanding, Humeston's further concluded that the TMS would cause no significant diversion of traffic. The record also supports this conclusion. Federal officials involved in overseeing the TMS understood that the metering system would be shut down when, despite the progressively increased metering rate, a ramp remained at capacity. Also, Humeston knew that TMS called for an increase in the storage capacity of some ramps. Finally, an air and noise quality study commisioned by the FHWA determined that in the year 2005 only 5% of vehicles traveling along the I-66 and I-395 corridors would be diverted. In light of all of these factors, the Court holds that

Humeston's determinations with respect to the significance of diverted traffic were reasonable.

Second, the Court is satisfied that FHWA rationally considered the possibility that the TMS would decrease use of HOV lanes. In his deposition, Humeston stated that before making the CE determination he considered the TMS's effect on use of HOV lanes. Deposition of John Humeston at 104-06. He concluded that the TMS would not cause a significant reduction of HOV traffic, reasoning that the difference between the average speeds in HOV and non-HOV lanes would remain fairly dramatic. This conclusion is not arbitrary. He did not know precisely the expected increase in average non-HOV travel speed due to the TMS. But he did know that the average travel speed on HOV lanes approaches 60 m.p.h., that without the TMS the average travel speed in non-HOV lanes during peak hours is less than half of this figure, and that the TMS would be operated in a non-diversionary fashion. Based on these facts, he reasonably concluded that the difference in average travel speeds would remain substantial, that there would be no significant decrease in use of HOV lanes, and that the environmental effects associated with any decrease would not be substantial.

Everett Carter, one of the plaintiffs' transportation experts, disagrees with these conclusions. He asserts, by affidavit, that the reduction in use of HOV trafffic and the attendant increases in air and noise pollution could be substantial. The Court need not decide whether Mr. Carter is correct. The purpose of judicial review is not to insure that

the agency has discovered scientific truth. A reviewing court need only insure that the agency has considered all relevant factors and has reached a defensible conclusion.

C. Substantial Planning

The regulations provide that a CE is inappropriate for actions that involve "substantial planning, time or resources." 23 C.F.R. §771.117(a). Citing the several years of planning and the $20,000,000 cost of the TMS, plaintiffs argue that the TMS clearly involves "substantial planning, time or resources" within the meaning of FHWA's regulation. The Court declines to overturn FHWA's interpretation of its own regulation.

A reviewing court must give a measure of deference to an agency's interpretation of its own regulations. E.g., U.S. v. Larionoff, 431 U.S. 864 (1977); Ashland Exploration v. Federal Engery Regulatory Commission, 631 F.2d 1018 (D.C. Cir. 1980). This case illustrates the rationale for this general principle. Reasonably interpreted, the term "substantial" does not refer to some unspecified absolute figure. Rather, "substantial" is a relative term. Whether the planning and resources involved in a given project are "substantial" depends on how they compare with the amount of planning and resources involved in other federally funded highway projects. The FHWA is obviously in a much better position than this Court to compare the planning involved in the TMS with other projects subsidized by FHWA. Thus, the Court adheres to the general rule that the agency's interpretion of its own regulation is of controlling weight unless plainly erroneous. Ashland Exploration, 631 F.2d at 1022.

FHWA's determination here is not plainly erroneous. The TMS clearly involves substantially less planning and fewer resources than those involved in construction of a highway and other types of actions for which an EIS is required. See 23 C.F.R. §771.115(a)(1 - 4). Moreover, the committment of resources here is within the range one might expect of some of the enumerated examples of CEs. See 23 C.F.R §771.115(b)(10, 15, 21, 22, 25). In short, FHWA's interpretation and application of its regulation is within the bounds of its authority.[3]

III. VALIDITY OF FHWA'S REGULATIONS

FHWA regulations provide that a CE is inappropriate where the FHWA determines that the project is likely to involve significant environmental effects. 23 C.F.R. §771.117(c)(1). Plaintiffs argue that this regulation conflicts with other NEPA regulations which require further study for actions that may have a significant environmental impact.

This argument is without merit. There is no evidence that the difference is other than semantic. Nothing in the record suggests that the FHWA is interpreting its regulations in a manner that is inconsistent with other NEPA regulations.

DATE: 2/28/84

Richard C. Kittinger
UNITED STATES DISTRICT JUDGE

FOOTNOTES

1. Plaintiffs argue that the regulation is unlawfully vague if construed in this fashion. This argument is frivolous. The AASHO documents precisely define "access control".

Alternatively, plaintiffs contend that the implicit distinction between physical and nonphysical constraints on access to a highway is arbitrary. Both types of control, they argue, can have a significant environmental effect. While this might be true of particular cases, regulations must cover classes of cases. The determination that physical restraints on access generally effect the environment more significantly than do nonphysical restraints is not arbitrary, as plaintiffs seem to suggest, arbitrary on its face. The regulations, moreover, have sufficient flexibility in particular cases. Even though a particular nonphysical restraint on access does not involve "access control", a CE classification is inappropriate if, for example, the restraint is likely to have significant environmental consequences or induce significant forseeable alterations in land use or development patterns. 23 C.F.R. §771.117.

2. Plaintiffs contend that the FHWA officials who made the CE decision did not interpret the term "access control" in accordance with the technical AASHO definition. Assuming arguendo the factual validity of their argument, plaintiffs are not entitled to any relief. Given the definition contemplated by the regulations, the only rational conclusion is that the TMS does not involve substantial "access control". Thus, even assuming that FHWA officials relied on an erroneous understanding of "access control", their legal error was entirely harmless. See Alabama Hospital Association v. Beasley, 702 F.2d 955, 958 (11th Cir. 1983)(applying harmless error rule in context of administrative decision).

3. According to the regulations, a CE is improper if the project is likely to involve "substantial controversy on environmental grounds." 23 C.F.R. §771.117(c)(2). Plaintiffs argue that the CE determination is improper in light of the substantial controversy that has developed. The propriety of FHWA's must be judged as of the time the decision was made. Cf. Camp v. Pitts, supra (emphasizing the importance of a contemporaneous explanation of the agency's decision). It is undisputed that at the time the CE determination was made the FHWA had no indication that the TMS was likely to generate a substantial environmental controversy.