

Kentucky. I have been employed by FHWA for 16 years and have been responsible for ensuring compliance with the National Environmental Policy Act ("NEPA") on Federal actions and Federal-aid projects in various FHWA offices since 1991. Among the duties of my Office is the responsibility for those environmental decisions delegated to the Division Administrator, FHWA, including those involving compliance with NEPA, the National Historic Preservation Act ("NHPA") and Section 4(f) of the Department of Transportation Act ("Section 4(f)"). *See generally*, 49 C.F.R. § 1.48, Delegations to Federal Highway Administrator. I was personally involved in the planning, preparation, and approval of the environmental documents for the Georgia Department of Transportation ("GDOT") project to widen and reconstruct a portion of State Route ("SR") 1/US 27 in Rome, Floyd County, Georgia that is before the Court. I approved project re-evaluations under the direction of the Division Administrator, Georgia Division Office, FHWA.

2.

The statutory and regulatory scheme for Federal-aid highway funding is elaborate and intricate. Title 23, United States Code sets the legal framework for the Federal-aid highway program which is, in reality, a federally assisted state highway program. *See* 23 U.S.C. § 145 (1988). The development of federally

approved highway projects in each of the United States has been delegated within FHWA and the Division Administrators in each state are primarily responsible for the program. *See* 49 C.F.R. § 1.48.

3.

States like Georgia plan, design, construct, and maintain their highways within state or locally owned right-of-way, including the federally assisted roads and highways within their respective borders. To be constructed with Federal-aid funding, a state or locally funded project must comply with applicable federal requirements, including but not limited to NEPA, the NHPA and Section 4(f). *See* 23 C.F.R. § 630.114 (1995); 23 C.F.R. Part 771 (1995). Projects come within the provisions of one of three classes of actions envisioned by NEPA; a Categorical Exclusion (“CE”), an Environmental Assessment (“EA”)/Finding of No Significant Impact (“FONSI”), or an Environmental Impact Statement (“EIS”). *See* 23 C.F.R. Part 771.

4.

I have reviewed the Plaintiffs’ Amended Complaint and can address their concerns specifically regarding the alleged arbitrary and capricious decisions regarding the selected alternative and alleged non-compliance with NEPA, Section 106 of the NHPA and Section 4(f) by referring to that which was done in

preparation of the subject project's environmental analysis which ultimately led to Federal-aid funding for the project. The environmental documents within the submitted administrative record contain the requisite procedural and substantive inquiry under all applicable federal statutes and regulations and contain clear expressions of the impacts of construction of this project. The environmental documents reveal the procedural methods and means generally employed by State Departments of Transportation and FHWA Division Offices to identify and evaluate those very issues that are the Plaintiffs' challenge here.

5.

The project's EA, F-017-3(36), *Purpose and Need*, pages 4-7, shows the following facts: The concept for the project has been in existence for nearly 25 years. As early as 1981, there were recommendations to increase capacity and improve operational conditions along the subject section of SR 1/US 27. In May of 1981, the project's addition to the adopted transportation plan was approved by officials of the city of Rome and Floyd County.

The purpose of the project is to provide a safer and more efficient multi-lane facility along SR 1/US 27. Specifically, the project will increase roadway capacity by correcting levels of service ("LOS") deficiencies and will enhance

safety by reducing accident and injury rates.² Currently, the LOS along this stretch of SR 1/US 27 ranges from LOS D to LOS F.³

It has long been recognized that SR 1/US 27 in the project area possesses many unacceptable design characteristics, resulting in serious operational deficiencies. The 40-foot roadway from the railroad overpass just south of John Davenport Drive to North Fifth Avenue consists of 4 substandard width 10-foot lanes. North of the overpass the roadway widens out to provide an exclusive left turn lane at John Davenport Drive. However, because of the narrow opening between the existing railroad overpass bridge, where there is currently only room for 4 substandard width 9-foot lanes, the left turn lane can only accommodate one or two vehicles and does not operate efficiently. The railroad bridge imposes, quite literally, a “bottleneck” on the roadway below. The bridge’s ends, or abutments, are placed too close together to allow for safe lane widths consistent with accepted design standards as required by the American

²Roadways are capable of carrying a certain number of vehicles based on the number and types of vehicles traveling on the road, number of lanes and geometric characteristics of the facility. A letter is assigned to various traffic congestion conditions in order to describe the road’s level of service (“LOS”). LOS “A” is considered the optimum condition and LOS “F” is the worst. Anything below LOS “C” is considered an unacceptable LOS by the Georgia Department of Transportation.

³When traffic counts were estimated for the project in 1983, the predicted average annual daily traffic (“AADT”) for the design year of 2005 was 19,125 vehicles per day (“vpd”). See AR doc. 5, p. 6. However, data recorded by the Georgia Department of Transportation for the year 2004 showed that existing AADT was 33,600 vpd, a substantial increase over the predictions made in the project’s EA.

Association of State Highway and Transportation Officials (“AASHTO”). AASHTO’s requirements provide state of the practice standards for sound engineering and roadway design. State Departments of Transportation design policies must, at a minimum, meet these standards in order to qualify for Federal funding. However, many states such as Georgia often go above and beyond these requirements to employ even stricter standards for themselves.

In order to comply with both AASHTO and GDOT standards, 12-foot lanes are needed for the type of road facility found in the project area at issue in this lawsuit. The 9-foot lanes that currently exist under the railroad bridge, along with the substandard 10-foot lanes found elsewhere in the project area, are unacceptable given that the roadway is on a State and US Route with high volumes of traffic including substantial truck traffic.

Additionally, the railroad bridge overpass is of substandard vertical clearance and must be heightened. The underside of the bridge beams have numerous scars indicating that there are vertical clearance problems associated with the bridge. AASHTO standards allow an existing bridge to retain a clearance of 14' only if there is an alternate route with 16' clearance, which does not exist in this case. Additionally, new or reconstructed bridge structures should provide a minimum of 16' clearance, with additional clearance provided

for future resurfacing of the underpassing road. Given the facts that the roadway in question is a State and US Route carrying high traffic volumes and substantial truck traffic, along with the evidence of collisions due to the low bridge clearance, sound engineering judgment dictates that a new bridge must provide for 16' clearance in order to be eligible for Federal funding.

To the south of the bridge overpass, an exclusive left-turn lane onto North Fifth Avenue results in another constriction. Because of this lane designation, through-traffic headed south on SR 1/US 27 is limited to one lane only. This restriction is also heightened by the narrow 40-foot roadway width encountered at this location. Due to steep terrain along the roadside and the visual obstruction of the narrow railroad bridge, the "sight distance," or the distance a driver can see ahead to facilitate safe driving, is also substandard. These limitations, along with traffic flow problems caused by turns to and from commercial establishments along this segment of the road result in poor operating conditions for existing traffic. These conditions will worsen in the future as traffic volumes increase.

The project will also improve safety along this roadway segment. Data furnished by GDOT to FHWA and documented in the EA indicated that accident rates along this stretch of SR 1/US 27 were above statewide averages for this type

of urban facility. *AR doc. 5, p. 6-7.* Analysis of this data indicates that the proposed project will result in a safer facility and it is expected to reduce accident and injury rates. *Id.*

6.

It is my judgment and that of the Administration that Plaintiffs' preferred alternatives have been given ample consideration throughout the environmental process for this project. As early as 1983, when the EA was being developed, the Administration considered both a roll-in place structure on existing alignment and a bridge on new location just north of the existing location. *See AR doc. 5, p. 8.* This was done even before the railroad and its associated bridge were determined to be eligible for the National Register of Historic Places ("NRHP"). *Id.* However, high cost and anticipated construction difficulties ruled out the roll-in place structure, and increased flood plain involvement and required additional business displacements ruled out the shift to the north from further consideration. *Id.* As will be shown below, Plaintiffs' preferred alternatives were repeatedly considered throughout the project's development in compliance with the NHPA and Section 4(f).

7.

It is my judgment and that of the Administration that Section 106 was properly complied with when it was determined that the railroad and associated bridge were eligible for listing to the NRHP. In compliance with Section 106 of the NHPA of 1966 and amendments thereto, an initial survey was conducted in an attempt to determine whether any archaeological and/or historic resources either on or eligible for listing on the NRHP existed within the project's area of potential effects ("APE"). *AR doc. 1; AR doc. 20, p. 2-3.* No 106 resources were found in the initial survey. However, because of the age of the survey, the 106 process was re-opened in May of 2001 and a new survey was conducted to attempt to identify potentially eligible 106 resources and to invite anyone interested to become a consulting party in the 106 process. *AR doc. 20.* The 106 surveys consisted of background research, a pertinent literature search, and field surveys of all accessible portions of the project area. The surveys were conducted in accordance with "GDOT Archaeological Survey Guidelines" developed by GDOT staff archaeologists and agreed upon by FHWA, the State Historic Preservation Office ("SHPO") and the State Archeologist and "GDOT/FHWA Cultural Resource Survey Guidelines" which were established as a result of past interaction with the SHPO and were agreed upon by FHWA and the SHPO. In

determining the project's APE, factors such as physical proximity to a resource, visual intrusion into a landscape and potential for other direct and indirect impacts were taken into consideration in accordance with 36 C.F.R. § 800.16(d).

It was through the re-opening of the 106 process in May of 2001 that it was determined that the railroad bridge overpass was a contributing element of the former Selma, Dalton & Rome Railroad and eligible for listing on the NRHP. GDOT therefore conducted an Assessment of Effects ("AOE") for the railroad and bridge that resulted in a determination of adverse effect (due to the proposed reconstruction of the bridge and realignment of the track approaches to the bridge), analyzed alternatives to avoid the adverse effect, including the no-build alternative, and included planning to minimize harm and proposed mitigation. *AR doc. 26.* GDOT submitted all its findings and determinations to FHWA and the SHPO as required by the NHPA. The SHPO subsequently concurred with GDOT's conclusions with respect to the railroad and bridge. *AR doc. 27.*

8.

It is also my judgment and that of the Administration that Section 4(f) was properly applied to the historic railroad bridge.⁴ Once it was determined that the

⁴Section 4(f) applies *only* if the project takes or constructively uses parks, recreational areas or historic structures and districts. 23 C.F.R. § 771.135(a)(1) & (p). The statute is triggered only when a project involves land in one of four specified categories. A park, recreation area, or wildlife and waterfowl refuge is protected against use by a transportation project only if the land is publicly owned. However, both publicly and privately owned historic sites are

railroad and its associated bridge were considered eligible for listing on the NRHP and the 106 adverse impact rose to the level of a “use” of the resource under Section 4(f), it then became necessary to determine whether a feasible and prudent alternative existed to avoid the use of the bridge and thus comply with Section 4(f).⁵ See FHWA’s Section 4(f) regulations found at 23 C.F.R. § 771.135. This required GDOT to go back and reexamine alternatives previously considered as well as look at new alternatives not previously considered to avoid and minimize the impacts to the resource.

Not many options existed, given the constraints associated with the bridge. The bridge was determined to be structurally deficient. See *Programmatic Section 4(f) Evaluation, attached to Defendants’ Memorandum of Law as Exhibit 4*. Due to this and the unsafe conditions the bridge imposed on the roadway below, rehabilitation of the historic bridge was determined not to be a feasible and prudent alternative. *Id.* In order to consider an alternative to replace the bridge on existing alignment, it was important to consider several factors. The revenue

protected.

⁵The term “use,” within the meaning of Section 4(f), is the permanent incorporation of protected land into the transportation facility, the temporary occupancy of land that is adverse to the preservationist purposes of the statute, or the constructive use of Section 4(f) protected land. 23 C.F.R. § 771.135(p)(1). A “constructive use” of protected land is defined as those instances where “the project’s proximity impacts are so severe that the protected activities, features or attributes that qualify a resource for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features or attributes of the resource are substantially diminished.” 23 C.F.R. § 771.135(p)(2).

generated by the railroad company and the services provided to their customers made it unacceptable to close this portion of the track for an extended period of time to build the project. *See AR doc. 39.* Although roll-in construction has been used effectively under certain conditions, this alternative was found not to be feasible and prudent in this case for the following reasons.

Roll-in place construction is most effective when the new bridge is built at the same length and placed on the existing abutments, or ends, of the bridge at the same grade, or level. In this ideal situation, no additional track work is necessary and track outages can be as low as 24 hours to “lift” away the old bridge and put the new bridge into place. However, as I explained earlier in describing the substandard conditions of both the railroad bridge and the roadway, the new bridge in this case must be longer in order to span and accommodate the wider roadway beneath, and the bridge must be elevated to provide safe, adequate clearance for large vehicles below. This requirement to raise the bridge also requires raising the elevation of the track approaching the bridge to tie into the new alignment. In this situation, new tracks would have to be built to meet the new grade and elevation of the higher bridge. This would require much longer track outages which were found to be unacceptable by the owners of the railroad in this case, thus rendering the concept of roll-in construction infeasible. *AR doc. 39.*

Finally, building a new temporary bridge and approaching tracks to accommodate rail traffic while the bridge and track are reconstructed on the existing alignment would still constitute a Section 4(f) "use" for both the bridge and track approaches, would be substantially more costly to build, and would not constitute a reasonable expenditure of Federal funds. *AR doc. 46, p. 4-5.*

The Administration properly determined that because the selected alternative for the project will "use" the railroad bridge overpass, Section 4(f) was applicable in this case. It is my judgment and that of the Administration that the selected alternative represents the most feasible and prudent alternative in this case based on sound engineering judgment. The selected alternative will include reconstruction of the railroad bridge to the south of the existing bridge, demolition of the old bridge, and the realignment of approximately 2,130 feet of railroad tracks to the south to meet the new bridge. In compliance with Section 4(f), it was determined that the selected alternative minimized relocation impacts, did not involve additional environmental impacts in relation to floodplain involvement, minimized impacts to Fort Attaway and was the only prudent and feasible alternative given the engineering constraints of the project. Additionally, there existed the need to bring the roadway and railroad bridge up to current design and safety standards *and* comply with Section 4(f)'s requirement to include all possible planning to minimize harm. The selected alternative proved,

through much environmental analysis, to be the only viable alternative and the one that best balanced transportation and safety needs and impacts to the human and natural environment. Its selection was based upon sound engineering judgment, public input, and compliance with all of the laws and regulations incorporated into both Section 106 and Section 4(f).

9.

It is my judgment and that of the Administration that Section 106 was properly applied to Fort Attaway. When the existence of Fort Attaway was brought to GDOT's attention, the 106 process was re-opened again and GDOT conducted a 106 Addendum for the Fort, analyzing it as an archeological site. *AR doc. 29*. In this Addendum, GDOT documented its findings with respect to the NRHP-eligible boundary of the Fort and determined that there would be a finding of no adverse effect because the Fort's boundaries were located outside of the project's proposed right-of-way and no physical destruction of the site would occur as a result of the project. *Id.* However, because the Fort's boundaries came very close to the project's APE in several places and to ensure the protection of the resource, special stipulations were added to the construction contract to protect the resource. *See Contract Stipulations, attached to Defendants' Memorandum of Law as Exhibit 2*. GDOT again submitted all of its findings and determinations to FHWA and the SHPO in compliance with the NHPA and the SHPO

subsequently concurred with GDOT's conclusions with respect to Fort Attaway. *AR doc. 31.*

Through further consultation and coordination with the SHPO, it was determined that Fort Attaway was eligible for the NRHP as both an archeological site and a historic structure. Thus, a second 106 Addendum was completed by GDOT to take into consideration the adverse visual effects, which were determined to be the only adverse effect of the project on the Fort. *AR doc. 46.* It was determined that a finding of adverse effect would be anticipated and therefore, Addendum #2 included an analysis of alternatives to avoid the adverse effect, including the no-build alternative, construction of a new railroad bridge on the existing location, relocation of the railroad line and bridge north of the existing location *and* construction of a temporary detour south of the existing alignment while reconstructing the railroad bridge on existing alignment. *Id., at 3-5.* The Addendum also included planning to minimize harm to the Fort and proposed mitigation. *Id., at 5-7.* Once this additional information was submitted to the SHPO, their concurrence with GDOT's conclusions was again received. *AR doc. 53.*

The 106 process for the project culminated in site visits to Fort Attaway by personnel from FHWA, GDOT, SHPO & the Civil War Commission ("CWC") to inspect the Fort's boundaries and the development of an approved

Memorandum of Agreement (“MOA”) which included several stipulations to address the adverse effects associated with the project. *See MOA, attached to Defendants’ Memorandum of Law as Exhibit 3.* The SHPO concurred with GDOT’s boundary determinations at every step of the process throughout the project’s development and ultimately signed off and approved the MOA, thus terminating GDOT’s 106 responsibilities.

Any debate over the Fort’s boundaries in the beginning of its 106 assessment was part of the routine initial Section 106 consultation process which takes place between the SHPO, GDOT & FHWA when the National Register eligibility and/or the boundaries of a possible historic property are in question and unresolved. It was the SHPO’s responsibility to ensure that GDOT & FHWA gave all due consideration to the identification of Fort Attaway once it was determined that it was potentially eligible for the NRHP and might be affected by the project. And in this case, the SHPO did just that. Any question from the SHPO as to the boundary determinations was only part of the standard, routine 106 consultation process. It was through the continuing consultation among all parties involved in this case that the SHPO ultimately determined that the Fort’s boundary determinations made by GDOT were accurate. Once the boundary had been put in question, subsequent information and analysis throughout the continuing consultation process led to the SHPO’s final recommendation

regarding the Fort. *See AR doc 88*. Therefore, it is my judgment that the Administration's approval of the selected alternative for the project was done in full compliance with Section 106 of the NHPA.

10.

Even though the selected alternative for the project was found to have an adverse visual effect on Fort Attaway, this effect did not rise to the level of a "use" of the Fort, either directly or indirectly, and therefore it is my judgment and that of the Administration that it was properly determined that Section 4(f) did not apply to the resource. *See 23 C.F.R. § 771.135*. It should be noted, however, that should the boundary of Fort Attaway have been determined to extend down to the railroad, the proposed project would have required a "use" under Section 4(f) of this resource. The avoidance and minimization alternatives that would have had to be considered would have constituted exactly those analyzed for the 4(f) "use" of the railroad and its associated bridge and for the adverse visual effect under Section 106 to Fort Attaway. As determined in our Section 4(f) evaluation for the railroad, no feasible and prudent alternative exists to impacting this resource. Therefore, had we assumed Plaintiffs' preferred boundaries of Fort Attaway, the selected alternative for this project would not have changed.

11.

It is my judgment and that of the Administration that the environmental documentation for this project was done in full compliance with FHWA's environmental impact and related procedure regulations found in 23 C.F.R. Part 771. Although FHWA regulations are written in very general terms regarding project re-evaluations, GDOT and the Georgia Division Office of FHWA have adopted a very formalized method of recordation in order to ensure that all elements of the affected environment are adequately reassessed to verify the validity of the original decision document, in this case the FONSI. A total of four separate re-evaluations were performed for this project during the years of 1999, 2000, 2003 and as late as 2004. *See AR docs. 17, 19, 81 & 96.* A supplemental EA was not required in this case because after each re-evaluation, it was found that changes in the project design and/or environment did *not* result in significant environmental impacts not previously evaluated. Therefore, a re-evaluation was proper at every stage of the project in which changes or new information had been discovered. 23 C.F.R. § 771.129© allows for a re-evaluation when after the approval of the original environmental document, in this case the FONSI, the applicant (GDOT) consults with the Administration (FHWA) prior to requesting any major approvals or grants to establish whether or not the approved environmental document remains valid for the requested Administration action.

Therefore, since in this case it was determined that the previously approved EA/FONSI remained valid after each re-evaluation, FHWA's regulations did not require that GDOT conduct a supplemental EA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Atlanta, Georgia, this the 2nd day of December, 2005.

s/ Jennifer L. Giersch

Jennifer L. Giersch