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The New Frontier Of NIMBYism

Law360, New York (April 14, 2011) -- *"The needs of the many outweigh the needs of the few." —Spock (Star Trek)*

As the U.S. looks to recover from the Great Recession, the need to expand and upgrade its energy and transportation infrastructure has been identified as a key stimulus for job growth and domestic reinvestment. The federal government is focused on accelerating the development of necessary transportation and infrastructure projects, and figuring out how to finance them through innovative strategies like the "America Fast Forward" initiative. While preparing for full speed ahead, national and local leaders need to anticipate dealing with a major potential roadblock: NIMBYism.

Project opponents nicknamed "NIMBYs" (Not In My Back Yard) have become skilled at using environmental laws, such as the National Environmental Policy Act and the California Environmental Quality Act to delay and stop traditional development projects. Moreover, NIMBYs are increasingly battling transportation and infrastructure projects under the guise of environmental concerns.

In doing so, NIMBYs are challenging and delaying public projects whose benefits extend well beyond their "backyards." If the country is committed to modernizing its infrastructure, NIMBY groups must be prevented from torturing the environmental review process in a way that defeats the acceleration of necessary new projects.

The National Environmental Policy Act

Projects on federal land, involving federal funding or requiring federal agency approval generally trigger NEPA review.[1] An environmental review under NEPA usually starts with an Environmental Assessment to determine whether an Environmental Impact Statement ("EIS") or a Finding of No Significant Impact ("FONSI") is appropriate.[2]

A FONSI is prepared for projects with no significant environmental effects. An EIS must be prepared for "major federal actions significantly affecting the quality of the human environment."[3]

A challenge to a NEPA document is filed under the Administrative Procedure Act, which ordinarily has a six-year statute of limitation.[4] Recently adopted legislation has shortened this period to 180 days for actions related to transportation projects.[5]

Until recently, it was unclear whether project proponents could assist the federal lead agency in defending a NEPA document in court.[6] Earlier this year, the Ninth Circuit abandoned its 20-year application of the "federal defendant" rule, which restricted defendants in a NEPA lawsuit the federal lead agency and allowed a private party to intervene as a real party in interest.[7] This landmark ruling has opened the doors for project proponents to vigorously defend their projects from NIMBY attacks.

The California Environmental Quality Act

Under California law, CEQA review is triggered by a "project" — any activity with the potential to have a physical impact on the environment that requires a discretionary governmental approval.[8] If the project is subject to CEQA, an Initial Study is prepared to determine whether a Negative Declaration ("ND"), a Mitigated Negative Declaration ("MND") or an Environmental Impact Report ("EIR") should be prepared.

An ND is prepared when the project will have no significant impacts and an MND is prepared if potentially significant impacts are identified, but mitigation measures incorporated into the project will lessen the impacts to below a level of significance.[9] An EIR is required when potentially significant impacts are identified despite the incorporation of feasible mitigation measures.[10]

After responding to public comments, a lead agency will certify the EIR and normally files a Notice of Determination, which starts CEQA's quick 30-day statute of limitation.[11] If a Notice of Determination is not filed, the statute of limitation is 180 days.[12] CEQA cases are given priority over other civil lawsuits to ensure that they move quickly through the courts.[13]

The Traditional Use of CEQA by NIMBYs

Historically, NIMBYs have used CEQA litigation to challenge traditional development projects in their surrounding neighborhoods, such as a residential apartment building or a "big box" commercial store.[14] These lawsuits often stem from concerns about property values, aesthetics or other neighborhood preservation issues. NIMBYs in California often couch their objections as CEQA claims and have been successful in stopping these projects.

New Attacks On Public Projects

NIMBYs are increasingly using CEQA and NEPA to prevent or delay energy, infrastructure and transportation projects. These lawsuits often impede environmental and economic goals and while, they may be asserted based on local concerns, they often impact an entire region.

Recent NIMBY challenges include the CEQA and NEPA lawsuits over the Phase II of the Los Angeles Exposition Light Rail Transit Line ("Expo"). The Expo line will provide an alternative mode of transportation running parallel to the heavily congested I-10 freeway and have the ability to carry residents between downtown Los Angeles and Santa Monica in less than 50 minutes, a drive that can take hours. It took over two years to prepare the EIR for Phase II, which was certified on Feb. 4, 2010.[15]

After complaining about the train's potential to block traffic at grade crossing and increase crime at station parking lots, on March 5, 2010, a group of residents filed a lawsuit challenging the project under CEQA and NEPA.[16] Among the NIMBYs' stated goals was the delay of the Expo Line design and construction.[17] On Feb. 22, 2011, after nearly a year in litigation, a superior court judge upheld the CEQA review and ruled against petitioners on all claims.[18]

NIMBY groups (Community Coalition on High-Speed Rail and the Midpeninsula Residents for Civic Sanity) have filed a similar lawsuit challenging the second EIR/EIS for the Bay Area-to-Central Valley segment of California's high speed rail project.[19]

In August 2008, a programmatic EIR/EIS for the segment was certified but successfully challenged by many of the same petitioners in the current litigation.[20] Among the complaints of the NIMBY groups were "financial, aesthetic and in quality of life" losses from the rail.[21] Following that lawsuit, a second EIR/EIS was certified on Sept. 2, 2010 —

which led to the recent lawsuit.[22]

Additional examples of the new wave of NIMBYism include attacks on renewable energy projects. NIMBY challenges to the Cape Cod Wind project off of the Nantucket Sounds are probably the most notorious. Despite strong opposition by a residents' group, the Alliance to Protect Nantucket Sound, the project was approved on April 28, 2010.[23]

A data tower developed in connection with the project was subject to an unsuccessful NEPA challenge filed by the Alliance.[24] An additional pending case challenges the project under NEPA.[25] On Oct. 6, 2010, a lease for the project was issued; with additional federal permits required, more litigation will likely ensue.[26]

On the Road to Reform?

As NIMBYs expand their opposition to public transportation, energy and infrastructure projects, government decision-makers are facing threats to the causes they have championed. State and local governments have called for legal reform in reaction to NIMBYs' abuse of CEQA and NEPA. For example, several Bay Area agencies have pled with the state "to address the unintended consequences of its actions that discourage smart growth, including the ironic use of CEQA reviews as a tool for NIMBYs."[27]

When former California Governor Arnold Schwarzenegger signed two CEQA reform bills, he stated that he was disappointed that the bills did not stop the "widespread and rampant abuses plaguing the CEQA process."[28] In addition, he protested that the "opportunists use [CEQA] to prevent reasonable management of environmental resources while simultaneously forcing huge expenditures of taxpayer dollars." Despite the call for reform, to date there has been no broad and sweeping change to CEQA.

Until such reform, a project proponent's best course of action is to actively engage in public outreach to identify and nullify NIMBY threats early. If a threat of a NIMBY lawsuit arises, developers should work with the public agency to ensure that the project's CEQA/NEPA document and the administrative record are sufficient to withstand a lawsuit. As a last resort, project proponents must exercise their rights under CEQA and NEPA to vigorously defend those lawsuits to keep critical transportation, energy and infrastructure projects on track.

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[1] 42 U.S.C. § 4332(2)(c); 40 C.F.R. §§ 1502.4, 1508.18(a).

[2] 40 C.F.R. § 1508.9.

[3] 42 U.S.C. § 4332(2)(C).

[4] 5 U.S.C. §§ 706 et seq.

[5] 23 U.S.C. § 139(l)(1) (adopted in 2005).

[6] 40 C.F.R. § 1506.6(b).

[7] The Wilderness Society v. U.S. Forest Service, Case No. No. 09-35200 (2011 9th Cir.).

[8] Cal. Pub. Res. Code § 21065; 14 Cal. Code Regs. §§ 15004, 15378, 15357.

[9] 14 Cal. Code Regs. § 15070.

[10] Cal. Pub. Res. § 21100; 14 Cal. Code Regs. § 15081.

[11] Cal. Pub. Res. §§ 21108, 21152, 21167(e); 14 Cal. Code Regs. § 15094.

[12] Cal. Pub. Res. Code § 21167(a).

[13] Cal. Pub. Res. Code §§ 21177, 21167.6(a), (b)(2) (10 day notice for record preparation), Cal21167.6(b) (60 days to complete the administrative record), 21167.4(a), (c) (90-days for briefing), 21167.4(c) (hearing within 30 days after briefing).

[14] See Am. Canyon Comty. United for Responsible Growth v. City of Am. Canyon, 145 Cal. App. 4th 1062 (2006) (CEQA challenge to a Wal-Mart super center); Anderson First Coal. v. City of Anderson, 130 Cal. App. 4th 1173 (2005) (CEQA challenge of shopping center project); Save Strawberry Canyon v. U.S. Dep't of Energy, 613 F. Supp. 2d 1177 (N.D. Cal. 2009) (NEPA suit challenging research and laboratory facility).

[15] Exposition Metro Line Construction Authority, Scoping Information Packet, February 12, 2007, at 3, available at http://www.buildexpo.org/phase2/Phase%202%20Handout.pdf; Notice of Preparation (February 12, 2007).

[16] Petition for Wit of Mandamus, Neighbors for Smart Rail v. Exposition Metro Line Construction Authority et. al, Superior Court of the State of California, Los Angeles County (Case No. BS125233) (filed March 5, 2010). See also Neighbors for Smart Rail website at http://smartrail.org/smartrail.org/Page_2.html.

[17] Neighbors for Smart Rail Community Meeting Agenda, February 21, 2010, available at http://smartrail.org/smartrail.org/Page_8.html.

[18] Neighbors for Smart Rail v. Exposition Metro Line Construction Authority et. al, Superior Court of the State of California, Los Angeles County (Case No. BS125233) (filed March 5, 2010).

[19] Verified Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief, Town of Atherton et al. v. Cal. High Speed Rail Auth., Superior Court of the State of California, Sacramento County (Case No. 34-2010-80000679) (filed October 4, 2010) ("2010 High Speed Rail Petition").

[20] Town of Atherton et al. v. California High Speed Rail Authority, Superior Court of the State of California, Sacramento County (Case No. 34-2008-80000022) (2009).

[21] Community Coalition on High Speed Rail, About Us, last checked October 18, 2010, available at http://cc-hsr.org/about-us.shtml.

[22] See 2010 High Speed Rail Petition.

[23] U.S. Department of Interior, Minerals Management Service, Record of Decision, April 28, 2010, available at http://www.doi.gov/news/doinews/upload/Cape-Wind-ROD.pdf.

[24] Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64 (2003).

[25] Complaint for Injunctive and Declaratory Relief, Pub. Employees for Envtl. Responsibility v. Bromwich, United States District Court for the District of Columbia, Case No. 1:2010cv01067 (filed June 25, 2010).

[26] Another recently filed petition challenges six solar electricity generation projects on federal lands under several claims, including NEPA. La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee et al. v. U.S. Dep't of Interior et al. United States District Court for the Southern District of California, Case No. 10cv2664WQH (filed December 27, 2010). See also Roberts v. Manitowoc County Bd. of Adjustment, 721 N.W.2d 499 (Wis. Ct. App. 2006); Flint Hills Tallgrass Prairie Heritage Found. v. Scottish Power, PLC, No. 05-1025-JTM, 2005 WL 427503, *8 (D. Kan. Feb. 22, 2005), aff'd 147 Fed. App'x. 785 (10th Cir. 2005); Advocates for Prattsburgh, Inc. v. Steuben County IDA, 851 N.Y.S. 2d 759, 761 (App. Div. 2008).

[27] San Francisco Planning + Urban Research Association, Form and Reform: Fixing the California Environmental Quality Act, 2006, at 8.

[28] California Office of the Governor, Press Release, Legislative Update, September 29, 2010, available at http://gov.ca.gov/press-release/16089/ (link to signing message for AB 231 and SB 1456).