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Lawsuit against ICC tells of government manipulation
by Wayne Goldstein

With the recent awarding of the first of five contracts to build the ICC, the campaign of the federal and state government to portray the decision to build the ICC as a "done deal" is at its peak. A recent mailing from the Maryland State Highway Administration (SHA) called "The Connector" bills itself as "A newsletter designed to inform, assist and engage the public during design and construction of the Intercounty Connector." It is full of news about the contract, the relocation of the Trolley Museum, an archaeological dig, and Maryland joining the lawsuit against the ICC "challenging the legality of the study process."

Reading the initial filing of this lawsuit, one of three filed so far, alleges much improper behavior about a number of federal and state agencies as they went about doing a legally-required objective evaluation of the need for the ICC and where to build it. None of the allegations make these agencies look like they followed the National Environmental Protection Act (NEPA) related to the research and preparation of the Draft Environmental Impact Statement (DEIS), Final EIS (FEIS) and Record of Decision (ROD), all of which are required in order to receive approval and funding.

The plaintiffs, the Audubon Naturalist Society, Maryland Native Plant Society, and a couple whose house would be taken by the ICC, criticized the Economic Impact Study because it "omitted any discussion of the economic or transportation impact of highway tolls, even though tolls have been a critical component of the proposed project since it was resurrected in 2002. Nor did the study consider economic costs alongside its consideration of economic benefits - even omitting the cost of constructing the highway that had been projected in the EIS - or include a discount rate in its benefits calculations." You will recall the response I received from SHA about the "cost" of tolls that I wrote about in last week's column. Now a judge will be evaluating the legal soundness and coherence of such statements.

The plaintiffs allege that the government defendants violated NEPA by narrowly deciding how to solve transportation problems in the area by deciding on building a toll road before objectively evaluating the problem and looking at all alternatives, not just a toll road. The defendants ignored the fact that such a road would generate additional traffic on both local roads and on parts of the Beltway. The defendants used outdated population projections in considering and rejecting alternatives to a toll road.

One allegation that I am very aware of concerns the claim by the government and ICC supporters that the number of crashes would decline with an ICC. Here's what the plaintiffs had to say about this: "Defendants acted illegally in their consideration of highway safety. To demonstrate that the ICC would satisfy the stated need of improving safety, the Final EIS claims the ICC would result in a mere ten fewer vehicle crashes per year in 2030 than the 5,085 crashes projected for the No-Build Alternative. Moreover, this statistically insignificant 0.2% improvement in the annual crash rates was said to satisfy the project's need to improve safety, even while recognizing that crashes on the high-speed ICC toll road likely would be far more severe: "[w]ith higher speeds, like those anticipated on the ICC, typically more severe accidents can occur compared to the local roads." Similarly, FHWA [Federal Highway Administration] improperly dismissed four Alternatives from further study in part because they were said to produce only minimal safety improvements."

As part of my continuous efforts throughout the DEIS and FEIS process to get truthful answers from SHA, I noted the following: "According to Table IV-104, in 2030, there would be 5085 crashes with the No-Build option, 5075 crashes with Corridor 1, 5002 crashes with Corridor 2, 5056 crashes with Corridor 1 truncated, and 4994 crashes with Corridor 2 truncated. The difference in crash rates between the No-Build option and the various Corridor 1 options is .2% to .6% and between the No-Build option and the various Corridor 2

options is 1.6% to 1.8%." Since Corridor 1 was chosen, this meant that there would be 10 fewer crashes per year with the ICC than if it was not built. SHA officials instead kept emphasizing that there would be fewer crashes on local roads than on the ICC. However, they also had to acknowledge that because the number of miles driven due to the ICC would increase by 20%, the result would be that the lower crash rate on the ICC would still result in enough extra crashes to make the crash rates almost identical.

In the real world, such a discovery would result in the crash rate argument being dropped. However, SHA instead dealt with this unalterable truth with statements like this: "An ICC would provide transit and highway users a safer choice in addition to potentially reducing the accident experience on the local roadways. Forecasts indicate that approximately 300,000 people would exercise this choice each day to avoid the crowded local roadways that in part experience these high crash rates because of the mix of local and longer distance trips." This statement also ignores the fact that crashes at higher speeds on an ICC cause more injury and damage than crashes on local roads.

The plaintiffs allege that the defendants contradicted themselves in numerous ways, using one standard in evaluating the preferred Corridor 1 of the ICC, and using different standards to evaluate competing routes and alternatives. For example, it was acknowledged in the FEIS that the chosen ICC route would not reduce Beltway traffic, yet one alternative was originally rejected for evaluation because it would not reduce Beltway traffic. FHWA chose the ICC route even though the FEIS showed that it would increase traffic on 17 segments of local roads even as it originally rejected evaluating another alternative "because it would increase traffic on a limited number of roads." The defendants claimed that bus service through express buses using the ICC would increase transit uses better than the No-Build alternative, yet they rejected evaluating a transit-only alternative.

While an expert panel showed that much additional growth would result from building the ICC, the defendants did not do an evaluation of the environmental impact of such ICC-generated induced and secondary growth to fully determine the total negative environmental impacts of all alternatives. However, the defendants did do an evaluation of the secondary, indirect impacts of development on the water quality of the Rocky Gorge Reservoir as an impact from Corridor 2, but then ignored evaluating such indirect water quality impacts for Corridor 1, the chosen ICC route.

It seems to me that if the judge in this lawsuit expects that there should always be a consistent application of Federal laws to any decision-making process, then it would seem likely that the judge will require the federal and state governments to redo much of their previous ICC work to meet the legal requirements of NEPA.