

"Federation Corner" column
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Court blesses corrupt ICC process

by Wayne Goldstein

On November 8th, U.S. District Judge Alexander Williams, Jr. ruled against groups which filed two lawsuits to try to stop construction of the ICC. Although the groups could appeal the decision to the federal appellate court, full-scale construction started this week. While the judge made a number of reasonable interpretations of relevant administrative procedures, laws, and case law, he completely missed the most important reasons why the ICC process has been corrupt from beginning to end. Time and again the judge wrote variations of this statement: "Generally, the role of a reviewing court is limited, and the standard of review of an agency action is one that is highly deferential to the agency."

Apparently, the judge mistook deference for admiration when he wrote statements like this: "The Court agrees with Defendants that the five needs articulated in the purpose and need statement are the product of a thoughtful, deliberative interagency and public participation process that balanced transportation needs with environmental concerns... In addition to the mitigation measures, Defendants have undertaken an extensive package of environmental stewardship projects... Also, it is worth reiterating that environmental stewardship is an element of the ICC's purpose and need statement."

While the judge claims that he and his clerks "thoroughly reviewed the incredibly voluminous record produced in this case," they could not have reviewed the same manipulated facts and lack of facts that I did that were used to justify the Purpose and Need (P&N) Statement, the document whose requirements must be met for a project to be approved. Here is the actual P&N Statement and my "edited version" that I believe is all that is supported by the record.

Official Version:

- (1) To increase community mobility and safety;
- (2) to facilitate the movement of goods and people to and from economic centers;
- (3) to provide a cost-effective transportation infrastructure to serve existing and future development patterns reflecting local land use planning objectives;
- (4) to help restore natural, human, and cultural environments from past development impacts; and
- (5) to advance homeland security.

My version:

- (1) To increase vehicle distances traveled;
- (2) to facilitate the movement of goods and people to and from future economic centers;
- (3) to provide a road infrastructure to serve future development patterns.

Readers may recall a column I wrote last April where I went into some detail about safety, specifically the number of crashes with and without an ICC. That the judge would consider 10 fewer crashes out of 5075 crashes with the ICC as supporting the goal of community safety in the P&N Statement only makes a mockery of the document, the process, his review and his decision. The same is true of the fact that absolutely no information was provided to show that the ICC would advance homeland security. The paltry 3% of the total ICC cost provided for Environmental Stewardship projects doesn't entitle it to a meaningful place on the P&N Statement despite the judge's claims to the contrary.

At one point, the judge wrote: "An agency's action would be arbitrary and capricious if the agency relied on 'factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

implausible that it could not be ascribed to a difference in view or the product of agency expertise'." Apparently, repeatedly answering questions with gibberish designed to conceal an inability to tell the truth does not rate as being arbitrary and capricious according to this judge.

I used the following excerpt in another ICC column I wrote in April. It so perfectly captures the corruption of the entire ICC process that it deserves repeating, especially as it is about the ICC tolls that have been so underplayed that most potential ICC users still do not know that the ICC will be a toll road. It was the answer given to my question as to why tolls were not included in the cost calculations of the equally-corrupt economic study done by the University of Maryland designed solely to trumpet the benefits of the ICC.

"The economic study that was conducted by the University of Maryland consisted of an overall economic assessment of constructing various alignments of the ICC. Therefore, the cost of tolls becomes economically neutral because it never "leaves" the economic balance sheet. In other words, the tolls are collected and assumed to be redistributed to the transportation system and therefore are not included in this type of economic analysis.

"Tolls calculated by an operating agency for the use of a public infrastructure facility, such as a highway, represent a transfer between economic agents. On one hand, users incur an out-of-pocket cost, which in principle, offsets or pays for part of the benefit they receive from the facility. On the other hand, the government entity experiences a benefit, in the form of the collected funds. These costs and benefits, in aggregate, cancel each other. The net result for society or for the economy of that transfer is zero. Just as an economic analysis of highways does not consider the revenues collected by the operating agency as (benefits) it also does not consider the tolls incurred as (costs). For this reason, tolls do not directly enter in the economic computation of total benefits."

One final piece of this farce that will never be openly acknowledged, discussed or resolved are the whispers of stories of federal, state and local officials who were bullied, threatened with firing, or otherwise intimidated to go along with this defective process. While greater efforts were made this time to legitimately overcome the previous rejections by environmental agencies, I will never be certain that the approvals were justified by the facts.

Unfortunately, the beginning of the construction of the ICC is not the end of this fight, but is merely the end of the beginning of the fight. There may be people who will continue to fight the ICC even as it is being constructed, whether by legal appeals or by other means. There will also be a need for others to fight to closely monitor how the ICC is built, because there is a deep suspicion that the sincere promises made to protect important environmental resources during construction will be casually and callously broken. So great is this concern that the County Council is soon expected to provide an additional \$200,000 to supplement M-NCPPC environmental staff so that they will be better able to keep up with an avalanche of hundreds of pages of construction change orders that could easily worsen the environmental impact to adjacent parkland without anyone able to knowledgeably exercise oversight of this activity.

Should the ICC be built, there may then be a need for a new phase of vigilance by a much larger audience, the users of other Maryland toll facilities, who may have to pay much more in tolls for the ICC if the ICC tolls do not pay the bills in what may likely be an era of \$5 to \$6 per gallon gas in just a few years.