

PERSPECTIVES FROM THE FIELD

The Federal Highway Administration's "Every Day Counts" Initiative: Finding a Path to Better Environmental Outcomes within Existing NEPA and Agency Regulations

Fred R. Wagner

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Not long after I was sworn in as the Federal Highway Administration's (FHWA) Chief Counsel, I attended a meeting of top Barack Obama Administration environmental officials. One colleague pulled me aside and whispered, somewhat conspiratorially, "You know about 'Every Day Counts [EDC],' don't you?" (see FHWA, n.d.).

I obviously knew about the initiative—it was the centerpiece of the FHWA's agenda during President Obama's first term, but the speaker's tone clearly indicated they were hoping I'd somehow put a damper on the thinking that motivated EDC.

Nothing doing. Besides its focus on the use of innovation to help deliver transportation projects more efficiently, EDC also stressed the importance of concluding the National Environmental Policy Act (NEPA) process more expeditiously. However, EDC was not simply about getting to final project decisions more quickly—the FHWA refused to compromise when it came to producing better environmental outcomes.

To prove that "faster" could also mean "better," the FHWA worked diligently with its federal resource and state transportation agency partners to improve NEPA and permitting processes and, at the same time, identify strategies to enhance sensitive ecological or human resources.

How did the FHWA win over its skeptics? By adhering to several commonsense principles.

First, government must make all reasonable efforts to front-load the NEPA and permitting processes. Agencies too often consider project mitigation or even planning to avoid or minimize harm in the first place only after alternatives have been identified and shared with the public. This happens because permitting agencies are used to taking up their task after the lead agency completes NEPA. By contrast, concurrent NEPA review and project permitting enables engineers to adjust their work product before the proverbial "irretrievable commitment of resources." And, by revealing the types and quantities of mitigation that it deems acceptable, a resource agency provides the project proponent some certainty that a permit will be issued.

Second, the sorts of highway project features most effective at protecting and enhancing the surrounding environment are no secret. Therefore, EDC encouraged programmatic agreements with resource agencies and local governments to incorporate state-of-the-art storm-water management systems, build buffers between the highway and neighboring resources, and purchase sensitive lands in the same watershed/ecosystem as the proposed or improved facility.

Third, programmatic agreements can be equally effective at reforming processes. For example, Nebraska developed a protected-species matrix as a result of collaboration with the FHWA, the Nebraska Department of Roads, and state and federal species officials that facilitates compliance with the Endangered Species Act. According to the FHWA, this matrix "identifies a list of potential effects based on the type of construction activity and the known species and habitats at the site" (*Public Roads*, 2013). The process reduces the chance that a proposed project would adversely affect endangered or threatened species.

Fourth, it is never too early to involve legal counsel. Once an agency issues a Record of Decision (ROD) or a Finding of No Significant Impact, it is too late to bolster the agency's

Affiliation of authors: Fred R. Wagner, Principal, Beveridge & Diamond, PC, Washington, DC; and JD, University of Virginia School of Law, Charlottesville, Virginia

Address correspondence to: Fred R. Wagner, Beveridge & Diamond, PC, 1350 I Street, NW, Washington, DC 20005; (phone) 202-789-6041; (e-mail) fwagner@bdlaw.com.

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administrative record. Based on that black letter law concept, FHWA lawyers made a deal with its clients along the lines of “Get us involved early in the NEPA process and when a full document is ready for circulation (e.g., the draft or final EIS [Environmental Impact Statement]), we will deliver our finding of legal sufficiency in no more than 15 days.” Given the volume of material involved in a complex NEPA record, that’s fast. But it makes sense. If the project team and counsel work together during NEPA to ensure that the record supporting key decision points is adequate, review of the final product should be greatly simplified. More important, sensitive environmental issues and legal challenges go hand in hand. Solve one and you likely can defeat the other.

Since 2009, EDC’s track record of success is truly impressive. Through early coordination with permitting agencies and environmental stakeholders, the FHWA helped New York State complete the complex Tappan Zee Bridge EIS in approximately 18 months. Highlighting permitting requirements early in the Tappan Zee NEPA review resulted in substantial environmental benefits, such as reductions in the dredging necessary to build the new bridge and the incorporation of smaller pilings into project design. Programmatic agreements between the FHWA and numerous resource agencies promoted both impact avoidance and regional or watershed-based mitigation measures known to address construction and operational impacts successfully. The negotiation of memoranda of agreement with key permitting agencies helped reduce duplicative reviews and elevate environmental concerns into preliminary engineering designs. EDC did all this without new legislation or amendments to existing regulations. The Council on Environmental Quality (CEQ) regulations and the FHWA’s own implementing NEPA regulations contained ample authority to support the action EDC promoted. After all, CEQ regulations state clearly that better NEPA documents are not the prime objective of complying with the statute—the process should result in better decisions. We knew full well that new legislation, even proposals that just nibbled around the edges of established NEPA practice, would be unpopular. Thus, to achieve desired results, we relied largely on the tools already in our possession.

Even though the FHWA consciously decided to work within existing legal frameworks, many of the program’s

successes found their way into the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21) (US Congress, 2012) and, more recently, into various pending proposals for surface transportation reauthorization. As a result, EDC paved the way for legislative reform that heretofore had been unthinkable. Collapsing the final EIS and the ROD into one document had been discussed for years. But EDC proved that early and effective coordination and active participation by the lead and permitting agencies could render the traditional NEPA cooling-off period meaningless. Encouraging the advanced purchase of right-of-way prior to a NEPA decision had always been believed to prejudice the decision-making process. Now, programmatic agreements demonstrate that advanced planning can equate to good planning. Forcing permitting agencies to act on a deadline was never seriously considered. Yet, even a liberal senator with an impeccable environmental voting record (Sen. Barbara Boxer, CA) was one of the leading advocates of including permitting deadlines in MAP-21. EDC proved that all these could be done without sacrificing environmental protection.

Environmental consultants and natural resources lawyers now face the challenge of promoting these reforms in industry sectors beyond transportation. Limited budgets and deteriorating American infrastructure demand nothing less. EDC’s promise will be fulfilled, however, only if project proponents and government agencies remain committed to environmental stewardship as a companion to more compressed NEPA and permitting reviews. Through EDC, the FHWA demonstrated that “streamlining” is not a dirty word so long as the public sees that protection of our natural resources and communities actually enables more efficient project delivery.

References

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