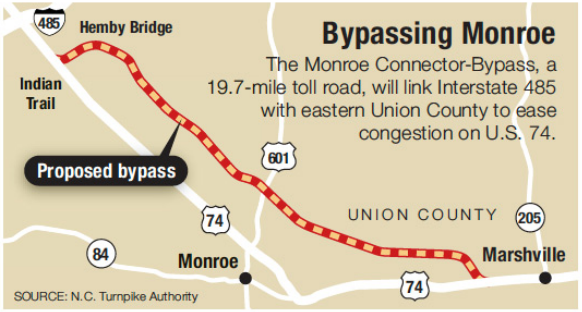

From the Charlotte Observer, http://www.charlotteobserver.com/2011/08/26/2554715/map-route-of-the-monroe-connector.html.

Cross-posted at CPRBlog.

You would think that by now federal agencies would have the NEPA process pretty well down. After all, it's been the law since 1970, requiring that every federal agency prepare an environmental impact statement before committing itself to environmentally harmful actions. And it's not that hard to do. Agencies just have to describe the action, alternatives to it, and their effects on the environment relative to not taking the action. Pretty straightforward, really, but a new decision from the 4th Circuit shows that there are still some agencies (and some federal judges) that don't, or won't, get it.

Back in the day, the architects of NEPA knew that some agencies would resist giving any real consideration to the environmental costs of their actions. So they designed the EIS requirement to force agencies not only to document the expected environmental impacts of proposed actions, but to release that information to the public, providing an opportunity for the political process to correct any overzealous pursuit of their primary missions.

With the help of citizens who were ready to litigate when NEPA's procedures were bypassed, most federal agencies learned relatively quickly that they now must own up to the environmental costs of their decisions. But not all, or at least not when they are trying to please state and local partners.

Consider North Carolina Wildlife Federation v. North Carolina Department of Transportation. The dispute involved the Federal Highway Administration's approval of construction of a toll road in North Carolina to bypass a traffic-choked section of US Highway 74. The state transportation agency prepared the environmental documents, under FHA supervision. To the surprise of environmentalists, and of the US Fish and Wildlife

Service, the EIS reported that the new road would actually *reduce* traffic volume over the baseline "no action" alternative. When directly queried about that calculation, the agencies jiggered the numbers a bit, but otherwise insisted that their analysis was accurate and complete.

Turns out that wasn't true. In fact, the "no action" baseline was calculated using a model created by a local metropolitan planning organization, which assumed that the toll road was constructed. So the baseline actually included the project the EIS was supposed to be evaluating. That's a big NEPA no-no, for obvious reasons. The no action alternative is supposed to serve as a measuring stick, highlighting the environmental consequences of the proposed action and allowing them to be compared to the project's benefits.

Luckily, several conservation organizations were paying better attention than the FHA was. They sued, asserting that because the no action alternative included the action, the EIS didn't accurately detail the relative environmental effects of the proposal.

Astonishingly, the state and federal agencies conceded the error in the model, but argued that admitting the mistake in litigation was enough to cure it. Even more astonishingly, they persuaded the district court to agree with them.

The Fourth Circuit, however, got it right. Noting that the point of NEPA is to allow the public to evaluate the agency's environmental choices, it ruled that NEPA is unequivocally violated if evaluation of the no action alternative improperly incorporates the proposed action. That sort of violation, the court left no doubt, cannot be cured by revealing the truth in the courtroom.

In one sense, this decision is completely unsurprising. It breaks no new legal ground. But in another sense I find it both surprising and troubling. The FHA should have learned this particular lesson long ago, as should the district court. That such a flub could make it past both the agency and the district court judge suggests the need for some serious NEPA re-education. And it highlights the importance of the NEPA process and of citizen suits. Next time someone complains to you that NEPA just means a lot of extra paperwork for time- and money-strapped agencies who already consider the environment, pull out this decision (or this blog post) to show them that NEPA still plays an important role in checking agencies which either don't care about the environment or can't be bothered to take an accurate look at the impacts. And next time someone tells you that citizens who sue under NEPA are just a bunch of NIMBYs, pull this one out to show them that agencies who get sued under NEPA are sometimes truly incompetent or devious (take your pick).