NATIONAL ENVIRONMENTAL POLICY ACT

"INDEPENDENT UTILITY ANALYSIS"

FOR

THE WIDENING OF THE GARDEN STATE PARKWAY
FROM MILE POST 30 TO MILE POST 80

SUBMITTED TO:

UNITED STATES ARMY CORPS OF ENGINEERS
PHILADELPHIA DISTRICT

PREPARED FOR:

THE NEW JERSEY TURNPIKE AUTHORITY

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DATED: FEBRUARY 16, 2006
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PRELIMINARY STATEMENT

The New Jersey Turnpike Authority is proposing to widen the Garden State Parkway from Mile Post 30 (Somers Point, New Jersey) to Mile Post 80 (South Toms River, New Jersey), by adding one lane and wider shoulders in each direction northbound and southbound.

The proposed widening will require federal approvals from the United States Coast Guard under Section 9 of the Rivers and Harbors Act, and the United States Army Corps of Engineers (ACOE) under Section 404 of the Clean Water Act as well as New Jersey Pinelands Commission approval and several State-issued permits. Agency consideration of these federal permitting actions necessitates an environmental review in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., that can require the generation of either an Environmental Assessment or an Environmental Impact Statement.

The Authority’s stated purpose for the proposed widening is:

The purpose of this project is to respond to the increasing development growth of the Central New Jersey Shore Region as it relates to traffic demands imposed upon the Garden State Parkway between Interchanges 30 and 80. The widening of the Garden State Parkway addresses a number of major areas of need: 1) existing traffic congestion relief in the corridor (Parkway and Route 9), 2) improvement of public safety in the corridor, including increasing the capacity of the N-S evacuation route in this area, 3) provide adequate access to Atlantic City and Central Jersey Shore region in support of New Jersey’s second largest industry (tourism), and 4) allowing for the replacement of the Bass River and Mullica River viaducts that carry the combined Parkway and Route 9, the sole N-S route in this area of the State.

However, as a result of funding availability, the Authority does not anticipate completing the entire proposed widening simultaneously. Thus, the Authority intends, as a first step, to obtain all permits and approvals needed for the entire proposed widening. The Authority’s second step would be to complete all permit and approval-related work and requirements during the life of said permits and approvals. Such permit and approval-related work would include the filing of wetlands, the mitigation of wetland impacts, the extension of bridges and culverts on waterways, and constructing of the foundations, substructures and superstructure
of the new Bass River, Mullica River and Patcong Creek Bridges. Completion of these activities will allow, but not require, the Authority to commit funding to the proposed widening on an incremental basis.

Although the proposed widening project is being presented to all permitting agencies for review in its entirety, the Authority views the proposed widening, from a planning perspective, as multiple stand-alone segments each capable of functioning properly and addressing a specific need independently of each other segment. The segments composing the proposed widening are listed on page 8 herein. Each segment is listed in order of priority based upon actual annual average daily traffic data, traffic demand growth data and safety concerns. When completed each segment would be opened to the public and utilized independently of the other segments. In addition, it should be noted that the completion of each section, in the order described herein, does not require or commit the Authority to undertake or complete any of the remaining segments.

As part of the NEPA scoping process for the proposed widening, the lead federal agency will, in consultation with other interested and involved agencies, determine whether some or all of the segments identified herein have “Independent Utility” or whether the scope of the EA or EIS should include a group of segments of the entire proposed widening.

The Authority anticipates that the ACOE will be the lead federal agency for the proposed widening. The following analysis demonstrates that each segment identified herein meets the “Independent Utility” test and each is a “single and complete project” in accordance with the ACOE’s regulations.

If the Authority were to seek permits and approvals incrementally for each segment of the proposed widening, the various State and federal agencies involved would be forced to process numerous applications with associated environmental documents over a number of years resulting in a considerable expenditure of public resources by both the Authority and State and federal agencies. In an effort to prevent the unnecessary expenditure of such resources, and in an effort to provide both State and federal agencies with a clear and complete picture of the Authority’s plan for the Parkway, the Authority believes it would be in the best interests of the permit/approval agencies, as well as the public, to address the permits and approvals for each of the independent segments simultaneously, even though each segment is planned to be constructed and will operate independently of each other.

**CONCLUSIONS OF LAW**

NEPA requires federal agencies to prepare a detailed statement on “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332. The statement must address the environmental impact of the proposed action, unavoidable environmental impacts if the action is approved, alternatives to the proposed action, the relationship between local short term uses of the environment and the long-term productivity, and any irreversible commitments of resources if the proposed action is implemented. 42 U.S.C. 4332(C). The Council on Environmental Quality (CEQ) was created in the Executive
Office of the President to, among other things; assist in the development of national policies to meet the purposes of NEPA. 42 U.S.C. 4342 and 4344.

The CEQ has promulgated regulations establishing the NEPA environmental review process. 40 CFR 1500 to 1508. The CEQ regulations provide that an agency may prepare an “environmental assessment” (EA) to determine whether a proposed “major federal action” is likely to have a significant effect on the environment and whether an EIS is necessary. 40 CFR 1501.3, 1501.4 and 1508.9. If the agency determines that the proposed action does not require the preparation of an EIS, a “finding of no significant impact” (FONSI) is prepared and published. 40 CFR 1501.4(b), 1508.13. If the preparation of an EIS is required, the agency publishes a “notice of intent” (NOI) to prepare an EIS and conducts a scoping process to identify the interested parties and the significant issues to be analyzed in the EIS. 40 CFR 1501.7. The scope “consists of the range of actions, alternatives, and impacts to be considered” in the EIS. 40 CFR 1508.25

Most federal agencies have likewise promulgated regulations, based on the CEQ regulations, to implement NEPA for their respective agencies. The ACOE has promulgated regulations governing its implementation of NEPA procedures at 33 CFR 230 and 325. The ACOE applies the NEPA implementation regulations to permits or approvals issued by the ACOE pursuant to Section 404 of the Clean Water Act for the discharge of dredged or fill material in Waters of the United States, and Section 10 of the Rivers and Harbors Act regulating work and structures in waters of the United States, and Section 103 of the Ocean Dumping Act.

The CEQ regulations provide a definition of “scope” at 40 CFR 1508.25 that instructs agencies to consider three types of actions (connected, cumulative, similar), three types of alternatives (no action, other reasonable courses of action, mitigation), and three types of impacts (direct, indirect, cumulative). One of the primary purposes of the scoping process is to identify the significant issues to be analyzed in the EIS and the degree or extent that those issues will be examined. 40 CFR 1507.1. The ACOE adopted this rationale at 33 CFR 230.12, specifically referencing the CEQ scoping provision.

The first aspect of the scoping process – consideration of three types of action (connected, cumulative, and similar) – has been the subject of significant litigation to determine whether one or more actions should be considered in the same EA or EIS. For purposes of this analysis, the most important factor is whether the projects are “connected.” Actions are connected when there is a clear nexus between them. When the actions justify and depend on each other, they are considered to be connected.

For example, in Thomas v. Peterson, 753 F.3d 754 (9th Cir. 1985), the court rejected separate EAs for timber sales and a road to be built to access the timbered areas. The court found that the road would not be built without the timber sale, and the timber sale would not happen without the construction of the road. However, the court in Neighbors Organized v. Engen, 665 F.Supp. 537 (M.D. Tenn. 1987); vacated as moot 878 F.2d 174 (6th Cir. 1989), found the construction of an airport terminal and runway were not connected when construction of a new terminal did not depend on subsequent construction of a new runway.
The U.S. Supreme Court has held that preparation of a comprehensive region-wide environmental impact assessment of federally owned or controlled coal reserves was not required before proceeding on the approval of specific pending coal extraction proposals. Kleppe v. Sierra Club, 427 U.S. 390, 96 S.Ct. 2718 (1976). In Sylvester v. USACOE, 884 F.2d 394 (5th Cir. 1989), the court upheld the ACOE determination that an environmental review of a golf course and the 11 acres of fill on the course did not need to include within the scope the impact of the entire resort project.

In examining the inter-relationship and dependency issue of actions, the courts fashioned the concept of "independent utility". The independent utility concept was borne out of early NEPA litigation and case law addressing whether a particular EIS prepared as part of a federal action satisfied NEPA. The concept originates primarily from a series of cases concerning transportation projects and whether the NEPA review was adequate when applied to portions or segments of a larger transportation project. See Daly v Volpe, 514 F.2d 1106, 1109-11 (9th Cir. 1975); Movement Against Destruction v. Volpe, 361 F. Supp. 1360, 1379-85 (D. Md. 1973), aff'd, 500 F.2d 29 (4th Cir. 1974); Indian Lookout Alliance v. Volpe, 484 F.2d 11, 18-19 (6th Cir. 1973). Although federal agencies are given considerable discretion in defining the scope of an EIS, connected actions must be considered together in order to preclude an agency from dividing a project into "several smaller actions, each of that might have an insignificant environmental impact when considered in isolation, but that taken as a whole have a substantial impact." Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv., 56 F.3d 1060, 1068 (9th Cir. 1995).

Oftentimes, cases that examined the issue were cases that involved whether an EIS was avoided by separately reviewing segments of a highway project that alone did not present a significant environmental impact, but when viewed in its entirety should have resulted in the preparation of an EIS. One of the factors considered by the courts in reviewing the so-called segmentation cases was whether the separate segments had "independent utility" – whether the segment had a purpose or function even if no further transportation projects were constructed. Daly v Volpe, 514 F.2d 1106; Movement Against Destruction v. Volpe, 361 F. Supp. 1360; Indian Lookout Alliance v. Volpe, 484 F.2d 11. The "independent utility" concept was subsequently adopted by the Federal Highway Administration in 1980 as part of its NEPA review requirements and is currently codified at 23 CFR 771.111(f).

The courts have also held that independent utility exists for a single phase of a multi-phased project provided that the phase under consideration is not dependent on subsequent phases. Wetlands Action Network v. United State Army Corps of Eng'rs, 222 F.3d 1105, 1119 (9th Cir. 2000), (upholding the ACOE decision to issue an EA for Phase 1 of a project for construction of five million square feet of office space, 13,000 dwelling units, a hotel and retail space had independent utility because it was not dependent on later phases of the project.). The court in Protect Our Water v. Flowers, 377 F.Supp.2d 844 (ED Calif. 2004), likewise found that an EA addressing Phase 1 of a multi-phase project with a 20-25 year build out was rational because Phase 1, that included 2,000 homes, a town center, hotel and conference center, shopping center and public services, was not dependent on later phases of the project.
The ACOE has likewise incorporated the "independent utility" concept into its permit application review process for Nationwide Permits for discharges of dredge or fill material into the Waters of the United States. The ACOE is authorized to issue general permits on a nationwide basis pursuant to Section 404(e) of the Clean Water Act and has issued 44 Nationwide Permits. As part of the Nationwide Permit process, the ACOE has also established General Conditions and Definitions applicable to the general permits. The ACOE definitions of "single and complete project" and "independent utility" are particularly relevant to this review.

As part of the Nationwide Permit Program regulations, the ACOE defines "single and complete project" as:

the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. For example, if construction of a residential development affects several different areas of a headwater or isolated water, or several different headwaters or isolated waters, the cumulative total of all filled areas should be the basis for deciding whether or not the project will be covered by an NWP. For linear projects, the "single and complete project" (i.e. single and complete crossing) will apply to each crossing of a separate water of the United States (i.e. single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies. 33 CFR 330.2(i) (emphasis supplied.)

The "single and complete project" definition is also included in the Definitions section of the Nationwide Permit Program and includes references to the regulatory definition at 33 CFR 330.2(i). In practice, in order to determine whether a particular project meets the definition of "single and complete project," the ACOE examines whether the project has "independent utility." As part of the Nationwide Permit Program, the ACOE has promulgated a definition of "independent utility" that provides:

Independent Utility - A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility. 67 Fed. Reg. 2020, 2094.
ARGUEMENT

A. INDEPENDENT UTILITY

An independent utility analysis focuses on whether a particular project is a “stand alone” project, that is, assuming that no other project is contemplated, the project serves a distinct purpose or function. The CEQ regulations use the term “unconnected single actions” to describe this concept. 40 CFR 1508.25(a). If an action (a) does not automatically trigger other actions potentially requiring an EIS, (b) is not an interdependent part of larger actions on it depends for its justification, and (c) does not require prior or simultaneous actions to be taken for the action to proceed, then the action should be said to demonstrate “independent utility” and the scope of the environmental impact assessment should be for the direct, indirect and cumulative impacts of that proposed action only. 40 CFR 1508. The ACOE expresses this “stand alone” concept through the use of the terms “independent utility” and “single and complete project”.

As outlined above, the independent utility analysis evolved from judicial review of transportation projects for NEPA compliance. The various federal agencies that have subsequently addressed this issue have done so most explicitly with regard to transportation-related projects due to the frequent and regular application of NEPA review to transportation projects. The ACOE regulations specifically address the issue of independent utility for transportation projects and particularly bridges across Waters of the United States.

Based upon the results of a “Jurisdictional Determination” for the proposed widening obtained pursuant to 33 CFR 328 and 325.9, and dated October 7, 2002 (copy attached hereto as Exhibit ‘A’) the ACOE has jurisdiction over only small portions of the entire proposed widening. In light of the limited federal jurisdiction over the proposed widening, ACOE review should be limited to only those segments directly subject to federal regulation. Under such a review approach, the remaining segments should not be considered within the scope of ACOE’s NEPA review because the ACOE would not likely have “sufficient control and responsibility to warrant federal review.” 33 CFR 325, App. B, Para. 7b., “scope of analysis”.

The following is a list of the segments of the proposed widening in order of priority:

1. Interchange 63 to Interchange 80;
2. Interchange 44 to Interchange 52;
3. Interchange 30 to Interchange 38;
4. Interchange 52 to Interchange 63;
5. Interchange 38 to the Atlantic City Service Area;

6. Atlantic City Service Area to Interchange 44; and

7. Interchange 50 to Interchange 52

Two segments of the proposed widening are located within the ACOE regulatory jurisdiction ("non-assumed areas"). The limits of these segments are: Interchange 30 (Somers Point) to Interchange 38 (Atlantic City Expressway), and Interchange 44 (Route 561) to Interchange 52 (Little Egg Harbor).

The Interchange 30 to Interchange 38 segment of the proposed widening contains the Patcong Creek Bridge (MP 31.0) and will require the placement of fill or structures in Waters of the United States (including wetlands) that will be regulated by the ACOE under Section 404 of the Clean Water Act. This segment will also be regulated by the United States Coast Guard under Section 9 of the Rivers and Harbors Act because of the construction activities associated with the bridge crossing. Consideration of this permitting action requires an environmental review in accordance with NEPA.

The Interchange 44 to Interchange 52 segment of the proposed widening contains the Bass River (MP 49.0), Mullica River (MP 31.0) Bridges. This segment will be regulated by the United States Coast Guard under Section 9 of the Rivers and Harbors Act because of the construction activities associated with the two bridge crossings. In addition, this segment will require the placement of fill and structures in Waters of the United States (including wetlands) that will be regulated by the ACOE. Consideration of this permitting action will also require an environmental review in accordance with NEPA.

Each of the remaining five (5) segments of the proposed widening are located within "State assumed areas" outside of the ACOE or other federal agencies jurisdictions.

As part of the NEPA scoping process for the proposed widening, the federal lead agency will, in consultation with other interested and involved agencies, determine whether each segment of the proposed widening has "independent utility" or whether all or a group of the segments should be included within the scope of an EA/EIS.

As detailed herein, each segment of the proposed widening is a "stand alone" project and meets the definitions of "independent utility" and "single and complete project." Therefore, the scope of the EA for the proposed widening, or EIS if one is required, should provide an analysis of the environmental impacts associated with the construction of segments within federal jurisdiction and need not include the remaining segments. The scope of the EA/EIS should include alternatives (no action, other reasonable courses of action, and mitigation) and impacts (direct, indirect, and cumulative). 40 CFR 1508.25; 33 CFR 230.12.
I. EACH OF THE NON-ASSUMED SEGMENTS OF THE PROPOSED WIDENING HAS “INDEPENDENT UTILITY”

a. Priority Segment No. 2 – Interchange 44 to Interchange 52

This segment has independent utility for a number of reasons. First, the segment contains the Bass River and Mullica River Bridges. These long viaducts over navigable waterways are structurally and geometrically deficient. The decks of both bridges are in urgent need of replacement and the superstructure steel needs to be rehabilitated. The shoulders on the existing bridges are also substandard; well below current AASHTO Standards. The substandard bridge widths, coupled with the steel superstructure configuration, require a new parallel viaduct to be constructed at each site to provide the roadway capacity needed during reconstruction of the existing bridges.

Second, US Route 9 joins the Parkway at the Mullica River Bridge crossing, making the Parkway the only north-south link for this populated portion of the State. The capacity of this bridge was exceeded in 2004 and it is currently considered to be in failure. Failure is defined as congestion, delays and traffic movement at less than the posted speed limit occurring for more than hour every day. The next closest north-south link is located over 30 driving miles to the west of the Parkway. For these reasons, even if the Authority chose not to undertake any of the proposed widening, this segment would be constructed. The successful completion of this segment will ensure the safety and availability of a vitally important north-south link/coastal evacuation route. Once the parallel bridge and the reconstruction of the existing bridge is completed, this portion of the segment will have the capacity to accommodate existing and project Parkway and US Route 9 traffic demand. Construction of this segment will not require the Authority to undertake the widening of any other segment.

b. Priority Segment No. 3 – Interchange 30 to Interchange 38

This segment has independent utility because it serves as the Parkway link between the Atlantic City Expressway (east-west roadway) to the South Jersey Coastal Region. In the Mile Post 37 to Mile Post 38 section of this segment the current traffic volumes exceed the roadway capacity, and the roadway is in failure. The balance of this segment has sufficient through capacity for the next 10 to 15 years, except that the existing traffic coming from the Parkway and the Atlantic City Expressway exiting at Interchange 30, during peak summer hours, backs up the roadway shoulder and subsequently backs up the Atlantic City Expressway. Once the lower section of this segment is widened, this problem will be alleviated. Widening this segment would not necessitate the widening of any other segment.
II. EACH OF THE ASSUMED SEGMENTS HAS "INDEPENDENT UTILITY"

a. Priority Segment No. 1, Interchange 63 to Interchange 80

This segment has independent utility because it is an extension of previously completed widenings from Mile Post 80.8 to the North. This entire segment is failing to carry the existing traffic volumes at the posted speed limit. The upper end of this segment (Mile Post 74 to Mile Post 80.8) began failing in 1995. Over the intervening years, the segment failure extended south, with the lower end (Mile Post 63 to Mile Post 67) failing in 2004. In addition, the parallel US Route 9 is also suffering from severe congestion in the area of this segment, and the solution recommended by the New Jersey Department of Transportation, in its Route 9 Corridor Study, was to improve the east-west connections between US Route 9 and the Parkway and widen the Parkway to provide the needed capacity in the corridor.

b. Priority Segments No. 4 through 7, Interchange 52 to Interchange 63, Interchange 38 to Atlantic City Service Area, Atlantic City Service Area to Interchange 44, Interchange 50 to Interchange 52

Each of the remaining segments also exhibit independent utility. As indicated herein, each segment is designed to address a specific traffic congestion concern. See Neighbors Organized v. Engen, 665 F.Supp 537. An EIS need not address growth-inducing impacts when a highway or other project is planned only to meet existing needs. In Morongo Band of Mission Indians v. Fed. Aviat'n Admin., 161 F.3d 569, 580 (9th Cir. 1998), the court found that expansion of a runway was being implemented in order to deal with existing problems even though it might facilitate additional flights. The court in City of Carmel-by-the-Sea v. USDOT, 123 F.3d 1142 (9th Cir. 1997), likewise upheld the scope of an EIS for a project intended to relieve local traffic congestion, reduce emergency vehicle response times and improve intersection crossings. Each segment of the proposed widening is premised on addressing the existing traffic limitations currently affecting each segment. Each segment can operate independently of the rest and none of the segments, if constructed, would require the construction of any of the remaining segments. There is a significant range in years within which traffic demands will make it necessary to undertake each segment of the proposed widening. This temporal distance between the necessity for each segment further demonstrates the independent nature of each segment. Therefore, EA or EIS prepared for the proposed widening should view each segment as a "stand-alone" project and should focus upon those limited areas of federal jurisdiction.

CONCLUSION

Based on the above discussion, each of the segments of the proposed widening addressed herein represents a "stand-alone" project and each demonstrates "independent
utility". Two of the segments of the proposed widening exhibit federal jurisdiction (i.e., Interchange 30 to Interchange 38 and Interchange 44 to Interchange 52). Therefore, the ACOE can and should focus its review on these segments where it can exert “sufficient control and responsibility to warrant federal review.” (33 CFR 325, App. B, Para. 7b., “scope of analysis”).