

TESTIMONY OF JOSEPH M. O'CONNOR
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FEDERAL HIGHWAY ADMINISTRATION
BEFORE THE SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS
AND HUMAN RESOURCES
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

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Good morning, Mr. Chairman and members of the Subcommittee. I am Joseph M. O'Connor, Associate Administrator for Right-of-Way and Environment, Federal Highway Administration (FHWA). I am pleased to appear before you today to discuss the Westway Highway Project in New York City. With me this morning are our Division Administrator for New York, Victor E. Taylor, Regional Counsel for Region 1, Richard H. Thomas, Ali F. Sevin, Director of the Office of Environmental Policy, which is a division of my office, and Edward V. A. Kussy, Assistant Chief Counsel of the Right-of-Way and Environmental Law Division in the FHWA Office of Chief Counsel. Let me begin by expressing Administrator Barnhart's strong interest in the subject of this hearing. He would have been here himself, except that he is one of the presiding officials at a ceremony downtown to honor the outstanding employees of the Department. That ceremony was planned several months ago and includes hundreds of people from all over the country and could not be rescheduled.

BACKGROUND

The Westway project was approved by the Secretary of Transportation in 1977, and is a designated Interstate segment (I-478). It is to be a 6-lane facility, 4.2 miles in length, built through Manhattan's west side from the Brooklyn-Battery Tunnel to 42nd Street. More than half the highway (2.6 miles) will be below grade in a covered section of landfill between the bulkhead and pierhead lines in the Hudson River, thus creating some 234 acres of new land

for commercial, residential, parkland, and recreational development areas, and the land needed for the highway. The project replaces the existing West Side Highway, large portions of which are now closed to traffic. Preliminary engineering for portions of this project has been underway since 1971. Location and design approval was given by the Department of Transportation in 1977. The section 404 permit, required under the Clean Water Act for the landfill in the Hudson River, was issued by the Army Corps of Engineers on February 18, 1981. The FHWA approvals and the Corps permit were vacated in 1982, as the result of a lawsuit challenging the Westway project.

The estimated cost of Westway, as per the 1983 Interstate Cost Estimate, is \$1.8 billion. The Federal share of this total is about \$1.6 billion. \$207 million has been spent to date of which the Federal share is \$185 million. More than half of this amount has been spent for right-of-way acquisition and demolition.

In March 1981, the Sierra Club and Action for Rational Transit brought two actions against the Corps of Engineers, the State of New York and the Department of Transportation. In late 1981, both actions were dismissed, except for one issue in the Sierra Club suit, concerning whether or not FHWA and the Corps of Engineers properly considered new information about the impact of the 234-acre landfill on fish, particularly the striped bass.

In a complex series of rulings, the district court vacated FHWA's location and design approval and the Corp's 404 permit, pending preparation of a supplemental environmental impact statement (EIS) and enjoined other activities not directed at further environmental studies, including the payment of right-of-way reimbursement by the State to New York City.

In February 1983, the Second Circuit Court of Appeals affirmed the District Court's decision to vacate the Corps and FHWA approvals and to require a supplemental EIS as to fisheries impacts. The Court also vacated the injunction preventing the right-of-way payment.

CURRENT STATUS

The FHWA and the Corps have been working on the new draft supplemental EIS. The Corps is responsible for fisheries issues while nonfisheries issues are FHWA's responsibility.

- The FHWA has finished its work on the nonfisheries issues to be considered in the draft supplemental EIS, and addressed a broad range of topics.

- In December 1982, the Corps determined that no further fish studies were required to decide if a new section 404 permit could be issued, but rather a "worst case" analysis in the supplemental EIS would suffice. In March 1983, the Corps became aware of a potential conflict of interest concerning the Corps District Engineer who decided not to require further fish studies, and vacated the decision regarding fish studies. The Corps has taken up the question of additional fish studies again, under the direction of a new district engineer, and a decision is now expected this month.

With the approval of the District Court, certain demolition work on the piers and ongoing engineering work is continuing. The State has petitioned the

Court for authorization to spend an additional \$37 million on work it feels must be accomplished in the next 15 months to keep the project on schedule. The FHWA has told the Court that it will authorize only the work necessary for the supplemental EIS, activities to complete work underway, or work that is usable even if Westway is not built.

FEDERAL APPROVAL PROCESS

With this brief description of the Westway project and its status, I would now like to outline the Federal role generally in the highway project development process, so as to illustrate the Federal involvement in the Westway project to date, as well as what the remaining steps of Federal approval would be if the project proceeds to construction.

Foremost, it is important to understand that the Federal-aid highway program is a federally assisted, State administered program, under which the States retains the initiative in constructing roads while Federal involvement occurs through a series of review and approval actions and authorizations to proceed with the next stage of development. This Federal-State cooperative relationship was defined by statute as early as the Federal-Aid Road Act of 1916 and the Federal Highway Act of 1921, and specifically reaffirmed by legislation as recent as the Federal-Aid Highway Act of 1973.

Each State, through its highway agency, has the primary responsibility for planning and developing its individual projects. The States decide whether an individual project which is on the Federal-aid highway system will be developed using Federal-aid highway funds. If Federal funds are to be used, then the FHWA is responsible for review and approval at key stages of the project's development.

The development of a highway project in metropolitan areas generally is a lengthy process, often taking many years to proceed through several major stages from planning to completion of construction. Certain usual steps are involved.

A project originates in the ongoing transportation planning process which is conducted at both the State and metropolitan area levels. The initial technical work on a project is called preliminary engineering. It involves identification and analysis of technically feasible locations for a project, which may include many specialized investigations.

Under provisions of the National Environmental Policy Act of 1969, each proposed highway project must be evaluated to determine its impact on the environment. The FHWA, in consultation with the State highway agency, determines whether the project will have significant impacts on the human environment. If there will be significant impact, a draft EIS is prepared in consultation with FHWA and is distributed for comment to the Environmental Protection Agency, State agencies, and other Federal agencies. It is also made available for comment to the public during public hearings on the proposed project.

Moreover, if a proposed highway project affects areas protected by specific legislation or causes impacts which are within the expertise of other agencies, then the FHWA and State must coordinate with the public agencies enforcing that legislation or having this expertise. In some instances, it is necessary to obtain the concurrence of another agency or obtain a permit. For

example, because Westway would require landfill in the Hudson River, a permit was required from the Army Corps of Engineers under section 404 of the Clean Water Act and section 10 of the River and Harbors Act. Special coordination was also required with the Environmental Protection Agency under the Clean Air Act, as well as other similar contacts with other Federal agencies.

State highway agencies are responsible for developing a public involvement program for the location and design stages of a highway project to ensure that final project decisions are made in the best overall public interest. This includes opportunities for public hearings on all major projects.

After comments from the reviewing agencies and from the public hearings are made available, a "final" version of the EIS is prepared. Only after the final EIS has been processed and adopted by FHWA can the route location be approved. Further project advancement, i.e., design and construction, is not permitted without completion of this stage.

This stage had been reached for the Westway project in 1977, when the Department of Transportation first "approved" the Westway project. The litigation which finally resulted in an injunction in April 1982, rescinded, in part, those 1977 approvals because the Court found that new information regarding fish which was developed after 1977 had not been properly considered. A supplemental EIS to consider the new fish data was ordered. That supplemental EIS will also consider other new information. The Corps is still considering what further studies are necessary to properly evaluate fish related impacts. In contrast to normal procedures, the Corps and FHWA have

agreed to prepare the supplemental EIS jointly and to not permit the State Department of Transportation to participate as a joint lead agency. Nevertheless, the State continues to be an important contributor of information, especially to FHWA.

After a location for the project has been selected and agreed upon, actual project design begins. As in the location process, the design stage may include review of several alternative designs, in order that a serviceable product is obtained. Here again, FHWA approval of the project design is necessary before later steps in project development are undertaken.

Once FHWA has approved the project design, the State may begin acquiring the land necessary for highway right-of-way.

The final activities by the State in preparation for actual construction are the completion of final detailed construction plans, project specifications to guide the contractor, and an accurate estimate of construction costs. This group of items is known collectively as the PS & E and is submitted to FHWA for approval.

The PS & E represents the culmination of the many separate but related decisions made earlier in the project development process, such as location and design selections. After a PS & E is approved, the State advertises for bids on the work and, with the concurrence of FHWA, awards a contract for construction.

During the actual construction, usually performed by a contractor, the State highway or transportation agency supervises the work to ensure that contract plans and specifications are met and that work proceeds satisfactorily. Periodic inspections are also conducted by FHWA field engineers.

The approval of Westway to its current stage of development was made in accordance with the prescribed project development process, and further development of Westway as a highway construction project will track the approval process described above, subject to any judicial decree.

Since we are now preparing a supplemental EIS, we will, in accordance with the Court's order, fully reconsider our prior approval once that supplemental EIS is finalized. Until that occurs, work on the Westway project is limited by the injunction described above and by applicable FHWA regulations.

WESTWAY: INTERSTATE CONSTRUCTION PROGRAM

Because Westway is an Interstate highway project, I would like next to outline recent significant changes made to the Interstate highway program by the Congress and indicate FHWA's position on the eligibility of Westway project costs for Federal-aid Interstate funding. The Federal-Aid Highway Act of 1981 included provisions which reduced the cost of completing the overall Interstate System from about \$54 billion to a level just below \$39 billion -- a savings of almost \$15 billion. These savings were achieved through redefinition of system completion to eliminate nonessential features and by minimizing future changes in design, location, geometrics, and other construction features. This measure

will limit further Federal cost increases. The 1981 Act also expanded the Interstate 3R program to a 4R program by adding reconstruction. Projects no longer eligible for Interstate construction funds under the redefinition of completion are eligible for Interstate 4R funds.

The total cost for the Westway project eligible for Interstate construction funding, as shown in the 1983 Interstate Cost Estimate, is \$1.8 billion; of which the Federal share is about \$1.6 billion. This cost includes highway work necessary to meet essential environmental requirements, estimated at \$25.2 million, but does not include environmental enhancement work on the highway project to develop new parkland and park facilities which do not exist at the site now. However, the environmental enhancements are eligible for Interstate 4R funding.

All categories of work on the Interstate portion of the Westway project are eligible for Interstate funding at a 90 percent Federal share.

The FHWA's position is to fund the Westway project with mostly Interstate construction funds (\$1,786 million), with a very small remaining cost of \$24.5 million to be met by Interstate 4R funds. We approved Westway in 1977 as a complete package, including park development and park placement components. Those components are a necessary part of the project and will have to be provided with 4R or other funds, since they are no longer eligible for Interstate funding.

WESTWAY: INTERSTATE WITHDRAWAL AND SUBSTITUTION PROGRAM

I would next like to briefly discuss the trade-in opportunity available for the Westway project.

In 1973, the Interstate highway "withdrawal and substitution" provision, 23 U.S.C. 103(e)(4), was enacted into law. The "withdrawal and substitution" provision, also called the "Interstate transfer," the "turnback," or the trade-in provision, permits States to forgo completion of Interstate segments not yet open to traffic and use the construction funds for substitute highway and mass transit projects, serving the area or areas of the withdrawn Interstate segment.

Section 103(e)(4), most recently amended by the Surface Transportation Assistance Act of 1982, provides that upon joint request of the State governor and the local governments concerned, the Secretary may withdraw her approval of any route or segment on the Interstate System, if she determines that:

- (1) such route or segment is not essential to completion of a unified and connected Interstate System,

and if she receives assurances that:

- (2) the State does not intend to construct a toll road in the traffic corridor of the withdrawn Interstate route or segment.

When the Secretary withdraws her approval of an Interstate route, funds once earmarked for Interstate construction become available for substitute highway and mass transit projects.

Since 1973, no less than 28 cities in 20 States have traded-in unneeded Interstate highway funds, including Washington, D.C., for \$2 billion and Boston for \$1.2 billion.

The decision to submit a withdrawal request is entirely a State and local matter.

The Westway trade-in deadline, originally subject to the established deadline of September 30, 1983, for the trade-in program, was extended to September 30, 1985, in the Surface Transportation Assistance Act of 1982. If the conditions described above concerning toll roads are met, the primary Federal decision would be whether the segment is considered essential to completion of a unified and connected Interstate System. Based on the information we have, we consider Westway nonessential to a unified and connected system. If these circumstances are met, in accordance with the law, we would therefore approve a withdrawal request if one were submitted. I would like to emphasize that the decision is entirely a State and local matter.

SECTION 404 PERMIT REGULATION

Finally, I would like to state that the Federal Highway Administration supports the direction taken by the Corps of Engineers' May 12, 1983, Notice of Proposed Rulemaking on changes to the section 404 permit regulations. The final promulgation of this proposed change will be a major step toward a one-stop environmental process which FHWA has long advocated. Through the Corps of Engineers' proposal, the environmental aspects of section 404 permits would be integrated into other environmental aspects of a proposed undertaking

under the umbrella of the National Environmental Policy Act requirements. By unifying these environmental requirements, rather than applying them in sequential fashion, the Federal Government could achieve increased efficiency in operations, obtain a balanced consideration of all aspects of an undertaking, and provide the desired consideration of environmental impacts.

CONCLUSION

This concludes my prepared statement. My associates and I would be happy to answer any questions you may have.