

## CURRENT ISSUES IN NEPA LAW AND LITIGATION

March 24, 2011

### I. CLIMATE CHANGE: EFFECTS OF PROPOSED ACTIONS AND EFFECTS ON PROPOSED ACTIONS UNDER NEPA

- A. Agencies should analyze the effects of their proposed actions on climate change, but also, very importantly, the effects of climate change on their proposed actions and the affected environment.
- B. The Federal courts have unequivocally held that agencies have a responsibility to assess the effects of large federal actions on climate change under NEPA.

Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508 (9<sup>th</sup> Cir. 2007), amended at 538 F.3d 1172 (9<sup>th</sup> Cir. 2008).. Challenge to NHTSA's CAFÉ rulemaking. NHTSA relied on *DOT v. Public Citizens* decision to argue that it did not have to consider the effect of its rule on climate change; that its hands were tied up the statutory requirement for technologically feasible and economically practicable standards. Held – wrong; NHTSA “clearly has statutory authority to impose or enforce fuel economy standards . . . and it could have, in exercising its discretion, set higher standards if an EIS contained evidence that so warranted.” NHTSA points to its discretion under EPCA for every other argument in the case, but when it gets to NEPA, NHTSA claimed it had no discretion. The EA identified emissions but not their effects. Court views effects as cumulative effects, and found the EA's cumulative effects analysis inadequate. “*The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.*” Any given rule setting a CAFÉ standard might have an ‘individually minor’ effect on the environment, but these rules are ‘collectively significant actions taking place over a period of time.’ 40 C.F.R. § 1508.7.

The EA also considered “a very narrow range of alternatives.” Environmental Defense had submitted a detailed appendix including cost benefit analysis suggesting another alternative. The Court ordered either a revised EA or an EIS.

Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520 (8<sup>th</sup> Cir. 2003). There was reasonably foreseeable increase in coal consumption as a result of railroad expansions intended to transport low-sulfur coal. Characterizes climate change impacts as indirect effect. “Contrary to DM & E's assertion, when the *nature* of the effect is reasonably foreseeable but its *extent* is not, we think that the agency may not simply ignore the effects.” The agency then has a responsibility to comply with 40 CFR 1502.22, the CEQ regulation on “incomplete and unavailable information”. Also, the

court rejected argument that further study wasn't warranted because the CAA caps sulfur dioxide emissions. *Revised EIS upheld in Mayo Foundation v. STB*, 472 F.3d 545 (8<sup>th</sup> Cir. 2006). STB modeled national and regional effects and used 1502.22 for local effects.

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*Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997 (S.D. Cal. 2003): DOE needed to analyze GHG emissions from turbines in Mexico into the U.S., even though the pollutants in question, ammonia and carbon dioxide, were not regulated as a hazardous or toxic pollutant under either federal or California state law. Original document was EA; EIS prepared as a result of the court's decision was upheld at 467 F. Supp. 2d 1040 (S.D. Cal. 2006).

C. But not a universal view in all Federal courts:

*Sierra Club v. Federal Highway Administration*, No. H-09-0692 (U.S. Dist. Ct., S.D. Texas, May 19, 2010) and *North Carolina Alliance for Transportation Reform v. U.S. Department of Transportation*, Nos. 1:99:cv134, 1:08cv570 (U.S. Dist. Ct. M.D.N.C.). Both cases, while unrelated, were decided on May 19, 2010. Both held, in very similar findings, that there was no obligation for FHWA to analyze the effects of greenhouse gas law or regulation showing that defendants' failure to consider greenhouse gas emissions makes the FEIS inadequate, or makes the decision of the FHWA arbitrary or capricious." The North Carolina court noted that FHWA "clearly examined the issue of climate change and acknowledged their decision not to evaluate greenhouse gas emissions in the EIS", citing again a lack of a specific requirement and their inability to evaluate any impact on a project-level basis such as this "given the interactions of the elements of the transportation system." The court concurred, finding that FHWA "provided a rationale basis for their decision not to quantitatively analyze the potential effects greenhouse gas emissions may have on global change", thus holding that the omission of further analysis of greenhouse gases did not violate NEPA.

D. Courts have yet to require analysis of climate change on agency actions.

*Harpner v. Tidwell*, D. Montana, 2008. Challenge to a Forest Service vegetation project. Plaintiffs argued that Forest Service should have considered whether climate change will cause droughts that could negate the fire suppression purposes of the project and that failure to do so failed the "hard look" test. Court held that NEPA does not require this; rather, NEPA only requires a "hard look" at the impacts of an action. Cites *CDB v. NHTSA* and distinguishes.

II. References and resources

- A. For comprehensive legal and political developments in the United States and around the world: Center for Climate Change Law, Columbia University Law School, <http://www.law.columbia.edu/centers/climatechange/resources>

The Center provides an extremely comprehensive summary of all federal, state and international cases and a myriad of other material. If you want to get on a list for monthly updates, If you would like to be added to or deleted from the list to receive these email updates, please send an email to [cullen.howe@aporter.com](mailto:cullen.howe@aporter.com). Please send additional material for inclusion in the chart, and updates to the "Current Status" column in the index, to the same email address.

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- B. For a case studies and other material related to adaptation measures being taken in the United States and around the world, see the Climate Adaptation Knowledge Exchange at <http://www.cakex.org/>
- C. For the latest on the science of climate change, especially as it pertains to the United States, see the U.S. Global Change Research Program at <http://www.globalchange.gov/>
- D. Department of the Interior resources: Adaptation and decision support tools, <http://www.doi.gov/whatwedo/climate/adaptation.cfm>; National Park Service Climate Change Response Strategy, [http://www.nps.gov/climatechange/docs/NPS\\_CCRS.pdf](http://www.nps.gov/climatechange/docs/NPS_CCRS.pdf); U.S. Fish and Wildlife Service and climate change, <http://www.fws.gov/home/climatechange/>
- E. Council on Environmental Quality, Office of Science and Technology Policy and National Oceanic and Atmospheric Administration Climate Change Adaptation Task Force, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/adaptation>
- F. California (California Environmental Quality Act):  
<http://www.ag.ca.gov/globalwarming/ceqa.php>
- II. CEQ Guidance documents – [www.nepa.gov](http://www.nepa.gov)
- A. Final guidance on promulgation and use of categorical exclusions:  
[http://ceq.hss.doe.gov/current\\_developments/new\\_ceq\\_nepa\\_guidance.html#exclusions](http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html#exclusions)

B. Final guidance on mitigation and monitoring: [http://ceq.hss.doe.gov/current\\_developments/new\\_ceq\\_nepa\\_guidance.html](http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html)

C. Draft guidance on climate change analysis in NEPA: [http://ceq.hss.doe.gov/nepa/regs/Consideration\\_of\\_Effects\\_of\\_GHG\\_Draft\\_NEPA\\_Guidance\\_FINAL\\_02182010.pdf](http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf) (also see letter from environmental groups to CEQ on draft guidance).

### III. Health impact assessment

A. National Academy Study should be in 2011

B. See <http://www.healthimpactproject.org> for information and case examples

C. Health analysis should be integrated into NEPA process

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### IV. Congressional challenges

A. “The Dismantling of Climate Regulation”, see blog on Columbia University Law School site, <http://blogs.law.columbia.edu/climatechange/2011/03/07>

B. Surface Transportation reauthorization

C. “Roads to Jobs” Act, <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1049ih/pdf/BILLS-112hr1049ih.pdf>

D. Budget cuts

### V. Ninth Circuit Court of Appeals ruling on intervenor status

A. *Wilderness Society v. U.S. Forest Service*, January 14, 2011,, available at: [http://www.eenews.net/assets/2011/01/14/document\\_pm\\_01.pdf](http://www.eenews.net/assets/2011/01/14/document_pm_01.pdf)

Allows other parties besides federal government to intervene in NEPA cases.  
Consistent with other circuits.