

GLOBAL WARMING NEPA CHALLENGES LIKELY TO INCREASE

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Introduction

Over the years there have been relatively few cases under the National Environmental Policy Act (NEPA) challenging an agency's obligation to assess a proposed action's potential impacts on global warming, but their volume is certain to grow. The Eighth Circuit issued an important NEPA global warming decision on Dec. 28, 2006, and several others are proceeding through the courts now. Thus far, some courts have been willing to compel fuller consideration of global warming impacts, but none has required mitigation. That may change as the number of cases increases, the scientific consensus solidifies, public interest increases and the new Congress actively considers global warming bills. More specific to the courts, global warming arrived at the U.S. Supreme Court last November when the Court heard *Massachusetts v. EPA*, No. 05-1120 (U.S.). That case is certain to fuel more NEPA lawsuits, as activists demand the government consider the direct, indirect and even cumulative global warming impacts of proposals for major federal action.¹

The Bases for Global Warming NEPA Lawsuits

Greenhouse gases (GHGs) are those components of the atmosphere that tend to trap solar heat within the atmosphere. Increasing their volume and proportion within the atmosphere leads to an increase in the planet's temperature. The scientific consensus is that this global warming leads to climate change, which has and will have major impacts such as rising ocean levels, melting snowpacks and the increased frequency and

intensity of storms in certain areas such as the Caribbean. The most common GHGs are carbon dioxide (CO₂), methane and nitrous oxide. By far the greatest volume of GHG emissions consists of CO₂; indeed, the other GHGs are usually measured in terms of CO₂ equivalents. CO₂ concentrations in the atmosphere have increased from an estimated 280 parts per million by volume (ppmv) to an estimated 373 ppmv in 2002—an increase of some 33 percent that most scientists agree has been caused by CO₂ emissions from fossil fuel burning by humans. GHG emissions are ubiquitous, as the world's economies largely run on fossil fuels. Many proposed federal actions have the potential to produce CO₂ emissions. Plaintiffs seeking to block federal actions increasingly are including a NEPA challenge to the adequacy of an agency's analysis of a project's potential to increase GHG emissions either directly or indirectly.

NEPA requires that federal agencies must prepare an environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Major actions generally include issuing permits for large development projects. The Council on Environmental Quality (CEQ) regulations provide that agencies may comply with this core requirement of NEPA by preparing an environmental assessment (EA), which is typically a more concise document than an EIS, to determine if the major action at issue will have “significant” environmental impacts thereby triggering the preparation of a full EIS. 40 C.F.R. §§ 1501.4(b) and 1508.9. The CEQ regulations explain that the term “[s]ignificantly” as used in NEPA requires considerations of both context and intensity,” 40 C.F.R. § 1508.27, and they also clarify that impacts include “direct,” “indirect” and “cumulative” effects. 40 C.F.R. § 1508.8.

Following production of an EA, if the agency determines that the action will not have any significant environmental effect, then it issues a finding of no significant impact (FONSI), which ends the process. 40 C.F.R. §§ 1501.4(e) and 1508.13. This is the result in the vast majority of the cases. Only the smallest fraction of federal actions trigger an EIS from the outset or result in an EIS after an agency concludes

in the EA that the action or project at issue will have significant environmental impacts. 40 C.F.R. §§ 1501.4(c) and 1502.4.² An EIS usually results in a more in-depth analysis of a project's impacts, requires greater involvement by the interested public, more consideration of alternatives, and must “include appropriate mitigation measures.” 40 C.F.R. § 1502.14(f); *see also id.* at §§ 1502.16(e)(f) and (h), and 1508.20.

Lawsuits are filed seeking to compel federal agencies to consider in an EIS the allegedly significant impact that the major action at issue will have on global warming, and to compel the inclusion of mitigation measures. Major federal actions that have been the subject of such challenges include the National Highway Traffic Safety Administration's (NHTSA) approval of automobile corporate average fuel economy (CAFE) standards and the approval of major energy and transportation projects by the Department of Energy and the Surface Transportation Board. Before considering the legal issues specific to the NEPA cases we consider the issue that those cases share with all the other global warming cases: standing.

As in the Other Global Warming Cases, Standing is a Major Issue

To date, the NEPA cases have not received the same attention as the high profile lawsuits brought by a number of states and environmental groups under the Clean Air Act and the public nuisance doctrine, but they share with them the jurisdictional issue of standing.³ To establish the “irreducible constitutional minimum of standing,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), challengers must show (1) imminent injury; (2) causation; and (3) redressability. All three of these elements can implicate the merits. How the Supreme Court resolves these issues in *Massachusetts v. EPA* will be instructive for all the global warming cases, including those in the NEPA context.

Standing is a central issue in *Massachusetts v. EPA*, in which the plaintiffs seek a determination that the Clean Air Act covers CO₂ emissions. At the outset of the oral argument in November 2006, Justice Scalia made

clear his skepticism about all three prongs of the standing requirement. Touching on the first prong's requirement of imminent injury, he asked "when is the predicted cataclysm"? When plaintiffs responded that global warming is an "ongoing harm," including rising sea levels in Massachusetts, and one that "plays out continuously over time," Justice Scalia turned to the second prong, causation, responding that there is "not a consensus on how much of that [harm] is attributable to human activity." When plaintiffs acknowledged that carbon dioxide emissions from automobiles in the United States constitute about only six percent of the total CO₂ emissions, Justice Scalia questioned whether the alleged imminent harm was attributable to this six percent and whether Environmental Protection Agency (EPA) regulation to reduce it could have any real impact on global warming. *See Mass. v. EPA*, Tr. at 4:20 - 7:11. That in a nutshell is the standing argument that challengers face in all global warming cases.

Somewhat ironically, it was Justice Ginsburg that sought to save plaintiffs' counsel from this line of questioning. She asked whether plaintiffs' position would apply to the regulation of carbon dioxide emissions from power plants as well, which would increase the impact of the actions by EPA that plaintiffs were seeking. *See id.* at 7:12-21. The irony is that it was Justice Ginsburg who, when on the D.C. Circuit Court of Appeals, participated in one of the seminal global warming NEPA decisions—and one generally relied upon by those seeking to defeat NEPA challenges, *City of Los Angeles v. NHTSA*, 912 F.2d (D.C. Cir. 1990). In that case, causation and redressability were key to the challengers' defeat. Causation and redressability have been the central issues in all of the subsequent NEPA cases, though the courts have been divided. In essence, the fundamental issue in all of them is: how great a percentage of the world's CO₂ emissions must be at stake in order to be significant enough to compel the preparation of an EIS? The apparent evolution of Justice Ginsburg's thinking may be emblematic of the trend in these decisions, as a review of the NEPA cases to date suggests.

The Global Warming NEPA Cases to Date

City of Los Angeles v. NHTSA, 912 F.2d 482 (D.C. Cir. 1990). This was the first major global warming NEPA case and remains perhaps the most important. In it the D.C. Circuit considered a challenge to NHTSA's decision in an EA that its rule setting the CAFE standards for model years 1987-1988 at 26.0 mpg and model year 1989 at 26.5 mpg rather than at the 27.5 mpg standard prescribed by the Energy Policy and Conservation Act of 1975 would not have a significant impact upon the environment, and thus it did not trigger preparation of an EIS. The petitioners sought to compel NHTSA to prepare an EIS, contending that the cumulative effect of NHTSA's roll-back of the CAFE standards by 1.0 mpg would be an increase in greenhouse gases. In a *per curiam* decision, the court held that the petitioners had standing to sue but that their challenges failed on the merits. Judge Ruth Bader Ginsburg cast the deciding vote on each issue, siding with Chief Judge Wald on the issue of standing and with Judge D.H. Ginsburg on the merits. Her brief concurrences on each are instructive.

With respect to the first issue, the Court held that because of "the procedural and informational thrust of NEPA" the standing analysis in the NEPA context is more relaxed: "a litigant is 'aggrieved' by the agency's failure to prepare an EIS, when he can show that failure 'creat[es] a risk that serious environmental impacts will be overlooked.'" 912 F.2d at 492 (Wald, C.J.) (*citing City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)). Judge R.B. Ginsburg agreed, and quoted a D.C. Circuit decision which noted that the "[s]tanding analysis is different under the NEPA, which confers a *procedural* right to have the environmental impacts considered." 912 F.2d at 504 (Ginsburg, R.B., J., concurring) (*citing Public Citizen v. NHTSA*, 848 F.2d 256, 269 n.2 (D.C. Cir. 1988) (Silberman, J., dissenting in part) (emphasis original)).

Judge R.B. Ginsburg's concurrence with Judge D.H. Ginsburg on the merits turned on causation and redressability. Indeed, while she classifies her decision as one on the merits, she relies solely upon his dissent on standing. *See* 912 F.2d at 504 (Ginsburg, R.B., J.,

concurring) (*citing* 912 F.2d at 484 (Ginsburg, D.H., dissenting). She agreed that the apparent “maximum theoretical increase of less than one percent in greenhouse gases” was insufficient to be a cause of global warming; she also agreed that the redressability element had not been met as petitioners had failed even to allege that a 1.0 mpg increase in the CAFE standards ““would produce any *marginal* effect on the probability, the severity, or the imminence’ of the global warming disaster petitioners project.” *Id.* (emphasis original).

Border Power Plant Working Group v. DOE, 260 F. Supp. 2d 997 (S.D. Cal. 2003). In this case the court considered a multi-pronged NEPA challenge to a Department of Energy (DOE) decision to grant rights-of-way for power transmission lines to connect new power plants in Mexico with the U.S. electricity grid. The plaintiffs challenged DOE’s decision not to prepare an EIS (it prepared an EA and issued a FONSI), contending that DOE had failed, amongst other things, to consider the indirect effects of the new power plants’ CO₂ emissions. As in *City of Los Angeles v. NHTSA*, the Court held that the plaintiff had standing to sue under the relaxed standards of NEPA standing, explaining that “‘procedural rights’ are special and should be accorded different treatment under the standing analysis.” 260 F. Supp. 2d at 1009 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)).

The *Border Power Plant* case is the first decision to hold that the federal action’s potential to increase GHG emissions constitutes a significant environmental impact requiring consideration in an EIS. The court found that the agency’s decision in the EA to not consider CO₂ emissions was arbitrary and capricious. It rejected as “inapposite” the agency’s citations to “‘authority for the proposition that it need not evaluate ‘questionable’ effects’ or ‘imaginary horrors.’” 260 F. Supp. at 1028. Instead, the Court held that “[t]he record shows that carbon dioxide is one of the pollutants emitted by a natural gas turbine and that it is a greenhouse gas,” *id.* (citation omitted), and that “‘the EA’s failure to disclose and analyze [the CO₂ emissions’] significance is counter to NEPA.” *Id.* at 1029. The Court also found “‘that the analysis of

alternatives in the EA was inadequate,” *id.* at 1031, for a number of reasons, including that it failed to consider the plaintiff’s proposal that the transmission line permits be conditioned upon the project proponents’ implementation of various emission control systems and mitigation through offsets. *See id.* at 1029. The Court remanded the matter to the agency to prepare an EIS.

In December 2004 DOE issued a lengthy final EIS that contained a brief discussion of GHG emissions. *See* 69 Fed. Reg. 75,535 (Dec. 17, 2004) (available on the DOE Web site at <http://www.eh.doe.gov/nepa/eis/eis0365/toc.html>). The EIS noted that climate change had “‘become the subject of much scientific and political debate.” EIS at 4-57. Drawing upon the data of the Energy Information Agency (EIA), it stated that “‘the percentage increase in CO₂ emissions contributed by [the power plants that will be connected by the transmission lines at issue] under the proposed action is approximately 0.088% compared with total U.S. emissions from fossil fuel combustion and 0.023% compared with global emissions.” EIS at 4-59. On this basis the EIS concluded that “[t]he expected impacts to global climate change would be negligible.” *Id.* In light of this, the alternatives discussed in the EIS did not include conditioning the permits on the implementation of various measures to reduce or mitigate GHG emissions. The plaintiff challenged the EIS in 2005, and thus this court may yet address whether an estimated increase in global CO₂ emissions of 0.023 percent is sufficiently significant under NEPA to require more than the agency’s consideration of the issue in its 2004 EIS.

Mid States Coalition for Progress v. STB, 345 F.3d 520 (8th Cir. 2003). Five months after the *Border Power Plant* decision above the Eighth Circuit issued this decision considering a variety of NEPA challenges to a decision by the Surface Transportation Board (STB) to approve the extension of railroad lines that would connect Wyoming’s Powder River Basin coal fields with power plants in the Midwest—a multi-billion dollar project that the Court called “‘one of the largest ever to have come before the Board.” 345 F.3d at 556. The STB had prepared an extensive EIS, but that EIS had not considered the effects on air quality that an increase in low-sulfur coal to power plants

would produce, including CO₂ emissions that contribute to global warming. Relying upon the CEQ's inclusion of "indirect effects" in the definition of environmental impacts, the Court held that it was "reasonably foreseeable . . . that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal." *Id.* at 549. The Court explained that "when the *nature* of the effect is reasonably foreseeable but its *extent* is not, . . . the agency may not simply ignore the effect." *Id.* (emphasis original). The Court remanded the matter to the STB to address the indirect effect that the project would have on air quality, including GHG emissions. Like the *Border Power Plant* court, the Eighth Circuit recognized GHG emissions as a more standard resource requiring detailed consideration under NEPA ("the *nature* of the effect") but gave no indication as to what level of increase in GHG emissions (the "*extent*" of the effect) might be sufficient to compel further steps such as the consideration of mitigation measures.

Sierra Club; Mid States Coalition for Progress v. STB, No. 06-2031 (8th Cir. Dec. 28, 2006). On remand, the STB prepared a supplemental EIS using the EIA's National Energy Modeling System to estimate the extent of the project's indirect effect of increased coal consumption. Its conclusion that because the effect would be a less than one percent increase in CO₂ and other emissions "it was not necessary to impose additional mitigating conditions on the project" was upheld by the Eighth Circuit on Dec. 28, 2006. The Court dismissed the petitioners' challenge, stating that "[t]he Sierra Club's argument is meritless" because the STB's decision and supporting studies "extensively discuss the potential impacts on air quality that may result from the implementation of the project." *Id.* at 18. NEPA's procedural requirement therefore was met. As in its 2003 decision, the Court did not address the quantitative issue of how great an increase in GHG emissions might compel the imposition of mitigation measures. However, as in *City of Los Angeles v. NHTSA*, it would appear that a 1 percent increase still is not sufficient for the Eighth Circuit.

Friends of the Earth, Inc. v. Watson, No. 02-4106 (JSW), 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. 2005). This case concerns a NEPA challenge brought by several environmental groups and municipalities against two federal agencies, the Export Import Bank (Ex-Im) and the Overseas Private Investment Corporation (OPIC). OPIC provides financing and Ex-Im provides political risk insurance for major projects overseas, primarily in lesser developed countries. The challengers contend that the agencies' underwriting of these projects constitute major federal actions under NEPA, and that they must prepare EISs for them because the projects will result in significant increases in GHG emissions. The Court's 2005 decision held that the challengers had standing; the Court is currently considering cross motions for summary judgment on the merits that were argued at a hearing on March 31, 2006.

The Court's discussion of the standing issue in the global warming context is one of the most detailed to date. It's also one of the most pro-plaintiff. The Court stated that "[i]n cases asserting a procedural challenge, once a plaintiff establishes an injury in fact, the causation and redressability standards are relaxed." 2005 U.S. Dist. LEXIS 42335 at *13 (citing *Defenders of Wildlife*, 504 U.S. at 572 n.7). The Court found that the challengers had shown an injury because while the *extent* of the impact of the underwritten projects' GHG emissions was not known, the nature of GHG emissions was known. Moreover, the Court cited evidence submitted by the challengers "demonstrating that projects supported by OPIC and Ex-Im are directly or indirectly responsible for approximately . . . eight percent of the world's [CO₂ and methane] emissions." *Id.* at *11. That amount was sufficient to meet the "relaxed" standards for causation and redressability under NEPA, even here where the agencies' actions are much more attenuated than in those of DOE and the STB in the cases above. The chain of causation that connects the indirect effects at issue—*e.g.*, GHG emissions from development projects in Africa—and the challenged federal action of partially underwriting those projects is longer and looser than those at issue in permits for rail or power lines that connect with power plants. We now await the Court's decision on the pending summary judgment motions on the merits.

Center for Biological Diversity v. NHTSA, No. 06-71891 (9th Cir.). This case presents a similar challenge to that at issue in the 1990 *City of Los Angeles v. NHTSA* case: a challenge to NHTSA April 2006 updated CAFE standards for light trucks. The agency concluded in an EA that the new standards would have no significant impact on the environment and so did not prepare an EIS. The agency contends that because the fuel economy standards have become more stringent since it prepared an EIS on the 1987 CAFE standards, the net effect on the environment will only be beneficial. Challengers contend that increased information about global warming since 1987 compels a more thorough consideration in a full EIS, and that some methodological changes in the new standards might actually increase GHG emissions by providing incentives to build larger, less fuel-efficient vehicles. The petitioners filed their opening brief on November 2006 and a decision may be forthcoming from the Ninth Circuit by year end.

Since the first global warming NEPA against NHTSA nearly 20 years ago to the one now pending before the Ninth Circuit the underlying legal issues have remained essentially the same. However, as the scientific and political debate have increasingly become a consensus, the courts appear to be increasingly willing to take action. Judge R.B. Ginsburg labeled the merits issue in *City of Los Angeles v. NHTSA* a “close question.” 912 F.2d at 504 While an estimated increase in GHG emissions of less than one percent was insufficient for her in 1990 to meet the causation and redressability requirements, it would appear from her questioning at the *Massachusetts v. EPA* oral argument that today a six percent increase would be sufficient. The NEPA cases turn on this root question of what constitutes a “significant” increase in GHG emissions that may be caused by the federal action at issue. The apparent evolution in Justice Ginsburg’s thinking is reflective of a broader societal evolution. The Supreme Court’s decision on this issue in *Massachusetts v. EPA* will have a tremendous impact on all of the global warming litigation, including those in the NEPA context.

NEPA has always been attractive to environmental activists as a vehicle for advancing new trends. Thus, one can expect many more global warming lawsuits

under NEPA. The courts’ thinking as to what constitutes a “significant” environmental impact may well evolve along with the growing scientific and social consensus such that some of these new lawsuits might prevail where those to date have not. And just as California has taken the lead with the adoption of AB 32 (*see* note 1, *supra*), it may well be the California courts that take the lead on this issue as well. We should have rulings this year in the two cases now pending before the Northern District and the Ninth Circuit.

Notes:

1. This article does not consider litigation under state laws that are analogous to NEPA, such as the California Environmental Quality Act, Cal. Public Resources Code § 21000 *et seq.* (CEQA). The same logic applies, however, and we are likely to see an increase in this litigation in the state courts as much as in the federal courts. In California, global warming challenges under CEQA received a major boost in the form of the state’s adoption last September of the California Global Warming Solutions Act (known as “AB 32”). In its wake the California Resources Agency reportedly is preparing new CEQA guidelines that may require consideration of GHG emissions during project-planning phases. Many will not wait for those regulations before filing suit though. Challengers likely will contend that AB 32’s legislative findings regarding global warming, *see* Cal. Health & Safety Code § 38501, mandate that state and local agencies covered by CEQA prepare environmental impact reports (EIRs) considering the global warming impacts of the projects before them. At least one such lawsuit was filed last August. *See NRDC v. The Reclamation Bd. of the Resources Agency of the State of California.*, No. 06-CS-01228 (Sacramento Sup. Ct.) (seeking to compel an EIR considering the global warming impact of major levee modifications). More such suits are a virtual certainty in California.

2. Some agencies have established procedures bypassing the EA stage for those projects for which, based upon specified criteria, EISs are “normally required.” 40 C.F.R. § 1507.3(b). However, no agency has stated that a project’s high likelihood of

increasing CO₂ emissions would, in and of itself, trigger preparation of an EIS.

3. One major legal issue in the other global warming cases that the NEPA cases generally do not share is the question of judicial authority, which has been the primary issue in the public nuisance cases. The case garnering the most attention after *Massachusetts v. EPA* is the public nuisance case brought against major electric power generators by a similar coalition of states, cities and environmental groups, *Connecticut v. American Electric Power*, 406 F. Supp. 265 (S.D.N.Y. 2005) (now pending before the Second Circuit; oral arguments were heard in June 2006). Relying on *Baker v. Carr*, 369 U.S. 186 (1962), the district court dismissed the case on the grounds that it lacked the authority to consider it under the “political question” doctrine, which provides that courts lack jurisdiction to hear cases that are “impossib[le to decide] without an initial policy determination of a kind clearly for nonjudicial discretion.” *Id.* at 217. The Court held that global warming was just such a political question, noting that it was being addressed in legislatures across the country as well as other fora. In September 2006, California brought a similar public nuisance global warming suit against six of the largest auto manufacturers, *California v. General Motors Corp.*, No. 3:06-CV-05755 (N.D. Cal., filed Sept. 20, 2006), and in December 2006 the defendants in that case filed a motion to dismiss that asserts the political question argument. The doctrine does not arise in the NEPA context because plaintiffs generally are not asking the courts to make an initial policy determination but only to compel the executive branch to comply with the procedural requirements of the act.