SELECTED NEPA CLIMATE CHANGE CASES

1. *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).

2. *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003). There was reasonably foreseeable increase in coal consumption as a result of railroad expansions intended to transport low-sulpfur coal. Characterizes 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." Go to Section 1502.22. Also, court rejected argument that further study wasn't warranted because the CAA caps sulphur dioxide emissions. *Revised EIS upheld in Mayo Foundation v. STB*, 472 F.3d 545 (8th Cir. 2006). STB modeled national and regional effects and used 1502.22 for local effects. Upheld.

3. *Friends of the Earth v. Watson*, N.D. California, 2005. Denied government's motion for summary judgment. OPIC and Ex-Im.'s grounds were standing, no final agency action and the argument that OPIC was not subject to either NEPA or judicial review. This case was restyled as *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Ca. 2007) and the court held that OPIC is subject to NEPA. Plaintiff's claims are not extraterrorial. But plaintiffs did not make the case that either agency had an "energy program." Moreover, they did not successfully make the case that the individual loan guarantees were "federal actions" for purpose of NEPA. "Where non-federal activity is involved, the court must look to whether an agency that provides financing to a project can influence or does possess actual power to control non-federal activity." Here, plaintiffs' failed to show this existed and the record is in conflict. Set for further briefing.

CASE SETTLED: In February, 209, FOE, along with Greenpeace, Boulder, Colorado and others who had joined the suit, settled the case against both agencies. Under the settlement Export-Import Bank will begin taking carbon dioxide emissions into account in evaluating fossil fuel projects and create an organization-wide carbon policy. OPIC will establish a goal of reducing greenhouse gas emissions associated with projects by 20% over the next 10 years. Both agencies will commit to increasing financing for renewable energy. Does not settle NEPA issues.

5. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007). 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 it's 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. 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.

6. *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.

7. *Center for Biological Diversity v. DOI*, 39 ELR 20091 (D.C. CA 2009), challenge to 5 year leasing program. Plaintiffs' substantive theory of standing fails. In *Massachusetts v. EPA, the Supremes were careful to distinguish right of a State to bring a claim on its behalf (as opposed to its citizens). Here, claims are general and are on behalf of citizens. And allegations of climate change and first stage of leasing program are too tenous.* There is procedural standing but NEPA claims fail as unripe. Must wait until actual leasing stage.

8. *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 ay 19, 2010. Both held, in very similar findings, that there was no obligation for FHWA to analyze the effects of greenhouse gas emissions because, in the words of the Texas court, "The plaintiffs have not . . . pointed to any 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 quanitatively 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.