Litigation

Special Report: As Case Law Evolves, Agencies Should Consider Conducting GHG Emissions Analyses for Transportation Projects

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Transportation agencies increasingly are faced with determining how or whether to consider greenhouse gas emissions when planning and developing transit and highway construction projects. This article, written by Steve Higgs and Bill Malley of Perkins Coie LLP in Washington, D.C., reviews recent case law and notes that while there is no legal requirement to consider GHG emissions in environmental impact statements for such projects, it is possible - even likely - that future court decisions may require such analysis. The authors suggest that project sponsors give careful consideration to including a GHG emissions analysis as part of the environmental impact review for transportation projects.

Increasingly, state and federal agencies are considering greenhouse gas (GHG) emissions when planning and developing transit and highway construction projects. Examples of such analyses are in the environmental decision documents required under the National Environmental Policy Act (NEPA) for transportation projects involving the Federal Transit Administration (FTA) or the Federal Highway Administration (FHWA).

For example, FHWA's Draft Environmental Impact Statement (DEIS) for the Columbia River Crossing included an analysis of GHG emissions and climate change impact analysis for this multimodal project to improve safety, reduce congestion, and increase mobility of motorists, freight, transit riders, bicyclists, and pedestrians along a five-mile section of the I-5 corridor connecting Vancouver, Wash., and Portland, Ore. The DEIS concluded that, if transportation trends in the region continued, project improvements would be expected to reduce GHG emissions relative to the status quo. Potential physical effects from climate change were also considered with references to possible adaptation measures, such as ensuring that the design and materials used to build the crossing could withstand major storms and droughts. A panel of independent experts evaluated the GHG analysis, found it reasonable, and found that the locally preferred alternative would generate lower GHG emissions than the no build alternative.²

Transportation-Related Cases

For years, litigation has been used as a tool to try to force government agencies to perform similar GHG analyses in NEPA documents involving major federal projects or decisions. Sometimes these challenges have succeeded and a court has found an EIS failed to seriously address the GHG emissions associated with a project.² There have been relatively few published decisions involving transit and highway projects, and the ones that have been decided suggest that agencies are not necessarily required to analyze GHG issues.

One recent decision, NC Alliance for Transportation Reform v. USDOT, 713 F.Supp. 2d 491 (M.D. NC 2010), is a good example. This case involved the proposed construction of the Northern Beltway around Winston-Salem, North Carolina. Plaintiffs claimed that FHWA violated NEPA by, among other things, failing to include a GHG emissions analysis in the EIS. Plaintiffs argued that a quantitative GHG emissions analysis should have been performed because the project would
increase vehicle miles traveled and thus would increase GHG emissions, thereby contributing incrementally to global climate change.

The court upheld FHWA's determination that a quantitative GHG emissions analysis was not required based on at least three important considerations.

First, the court noted that NEPA does not expressly require GHG issues to be considered in an environmental impacts analysis. The court reasoned, "[NEPA] does not expressly refer to climate change or greenhouse gas emissions. Nor are Plaintiffs able to identify any case holding that NEPA requires analysis of the potential impact of greenhouse gas emissions on overall global climate change in connection with a proposed highway project."

Second, the court found it significant that the U.S. Environmental Protection Agency (EPA) did not even suggest the need to evaluate GHG emissions from the project. "EPA was consulted during the scoping of the project and allowed to comment upon the SFEIS/FEIS," the court said. "Under NEPA, EPA is the agency charged with determining whether a federal activity will adversely impact the 'public health or welfare or environmental quality.' At no time, however, did EPA suggest the need to study greenhouse gases," it added.

Third, the court was deferential to FHWA's judgment about the negligible effect of the project on GHG emissions. On this point, the court wrote:

Plaintiffs also contend that the SFEIS/FEIS projects that the Northern Beltway will increase vehicle miles traveled by 1.8 percent ... which, they argue, will increase greenhouse gas emissions. However, as Defendants point out, the increase in induced travel (defined as increased vehicle traffic due to increased roadway capacity) by the Northern Beltway alone is 1.05 percent; the 1.8 percent figure relied on by Plaintiffs encompasses the expected increase in induced travel from all reasonably foreseeable projects in the study area by 2025. Defendants also note that Plaintiffs' argument is based solely on vehicle miles traveled and fails to consider other important variables, including increased speeds on the Northern Beltway, improved vehicle fuel economy, and the use of cleaner fuels.... Defendants concluded that, based on their modeling, the amount of induced travel resulting from the Northern Beltway is 'not appreciable.' Where an agency is making predictions based on its expertise, a reviewing court is at its most deferential.

Other district courts have rejected similar efforts to force the FHWA to consider GHG emissions in its project decision-making. The following cases provide examples:

- **Audubon Naturalist Society of the Central Atlantic States, Inc. v. USDOT**, 524 F.Supp. 2d 642 (D. MD 2007), in which the court upheld FHWA's determination that it was not useful to conduct an analysis of GHG emissions as part of the NEPA process for a proposed highway approximately 18 miles long in Maryland, concluding that "Defendants did not act arbitrarily or capriciously in concluding that no particular mitigation is needed here for the supposed impacts of a single stretch of highway on the global problem of climate change.

- **Sierra Club v. FHWA**, 715 F.Supp. 2d 721 (S.D. TX 2010), in which the court upheld an EIS involving a planned 15-mile section of highway in northwest Houston, finding no evidence that the defendants considered the impact of the segment on GHG emissions, but concluding that "plaintiffs have not, however, 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."

- **Senville v. Peters**, 327 F.Supp. 2d 335 (D. VT 2004), motion to amend denied by 2006 WL 2585130 (D. VT 2006), in which plaintiffs asserted that an air quality analysis failed to consider new information on the relationship between CO2 emissions and global warming, but court found that, while CO2 is produced by congested vehicle miles traveled, the analysis concluded that the highway project would not alter overall congested vehicle miles traveled by a significant amount so specific studies on these emissions were not required.
While these cases all found that a GHG emissions analysis was not required, it is important to keep in mind that the decisions in these cases were based on specific factual circumstances - for example, the fact that no agency requested a GHG emissions analysis.

**Factors May Influence Future Decisions**

Going forward, however, there is increasing uncertainty as to how courts might rule on GHG analysis, based on a number of factors.

It is increasingly common for environmental agencies (as well as stakeholders) to submit comments recommending consideration of GHG emissions in NEPA documents for transportation projects. Therefore, in future cases, it may not be possible for a court to conclude that no agency ever requested a GHG emissions analysis.

In addition, the White House Council on Environmental Quality (CEQ) is expected to issue final guidance within the coming months requiring the consideration of GHG emissions under NEPA for at least some types of projects. While the guidance itself would be non-binding, the issuance of that guidance - in any form - would significantly increase the likelihood of future court decisions finding that a GHG emissions analysis is required in an EIS for a highway or transit project.

Improved technical models also may influence the direction of future case law. In particular, EPA has released a new air quality model, the Motor Vehicle Emissions Simulator (MOVES) model, which replaces MOBILE6. The MOVES model has significantly improved ability to forecast GHG emissions. Over time, courts may become more skeptical of the conclusion that agencies lack the ability to project GHG emissions.

Lastly, the state of NEPA practice is evolving. The Columbia River Crossing study is one example of an EIS that included a GHG emissions analysis for a transportation project, but there are many others as well. As this practice becomes more common, it may influence courts' decisions about whether a GHG emissions analysis is required.

**GHG Analyses Can Strengthen 'Defensibility'**

In light of these developments, it is prudent for lead agencies to consider including a GHG emissions analysis in a NEPA document for a highway or transit project, if the project has the potential to increase GHG emissions.

Typically, if this type of analysis is performed, it would include a projection of GHG emissions for each build alternative, as a way of demonstrating how much (if at all) each alternative would increase GHG emissions relative to baseline conditions. Even if the differences among the alternatives are minor or non-existent, the inclusion of this data can help to strengthen the defensibility of the NEPA document by demonstrating that GHG emissions have been considered.

In short, the recent case law trends indicate that FHWA and FTA do not need to include a GHG emissions analysis in a NEPA document for a highway project, but it is possible - even likely - that future court decisions will require a GHG emissions analysis for transportation projects in at least some cases. In light of this uncertainty, project sponsors should give careful consideration to the possibility of including a GHG emissions analysis in an EIS for a highway or transit project.


2 See, e.g., *Mid-States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003) (court found increased coal consumption and associated carbon dioxide emissions a reasonably foreseeable effect of an agency's proposed approval of new rail lines to transport coal in Wyoming to power plants; such effects should be considered during a NEPA analysis).

3 See CEQ, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*, [http://www.whitehouse.gov/administration/eop/ceq/initatives/nepa](http://www.whitehouse.gov/administration/eop/ceq/initatives/nepa). CEQ noted in its guidance that if a proposed action would be reasonably anticipated to cause direct emissions of 25,000 metric tons or more of carbon dioxide (CO2)-equivalent GHG
emissions on an annual basis, agencies should consider this an indicator that a quantitative and qualitative assessment may be meaningful to decision makers and the public.


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