Litigation

Special Report: Climate Change Analysis in NEPA Documents: What Can We Learn from Recent Court Decisions in Non-Highway Cases?

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Case law interpreting the extent to which environmental documents for highway projects must include an analysis of greenhouse gas emissions has remain unchanged since a federal court ruling in 2010 upheld the Federal Highway Administration's approach. In this article, author Bill Malley, an attorney with Perkins Coie LLP, reviews recent case law involving other federal agencies' consideration of GHG emissions in NEPA documents. The article suggest that courts will be satisfied with a relatively low level of detail of GHG emissions in a NEPA document, as long as the federal agency explains the global nature of the problem and describes the project's GHG emissions in relation to that global problem. However, the direction of the case law could easily change in the coming years if federal agencies require more intensive analysis of GHG emissions.

In a series of cases decided between 2007 and 2010, federal district courts upheld environmental impact statements prepared by the Federal Highway Administration (FHWA) that contained little or no analysis of the impacts of greenhouse gas (GHG) emissions on global climate change (See Special Report, April 2011, AASHTO Climate Change Briefing). In one of these cases, North Carolina Alliance for Transportation Reform v. USDOT, 713 F.Supp.2d 491 (M.D.N.C. 2010), the court noted that:

NEPA requires an analysis of air quality. However, it 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. (713 F.Supp.2d at 519)

Today, more than two years later, there are still no cases in which a federal court has held that FHWA must include a GHG emissions analysis in a NEPA document for a highway project. Perhaps even more striking: the North Carolina Alliance decision, issued in May 2010, is still the most recent reported NEPA case involving FHWA's consideration of GHG emissions.

In the absence of recent FHWA case law on NEPA and climate change, this article reviews recent case law involving other federal agencies' consideration of GHG emissions. As the following summaries show, courts in non-highway cases also have been deferential to agencies' decisions about whether, and to what extent, to consider GHG emissions analysis.

Barnes v. U.S. Department of Transportation, 655 F.3d 1124 (9th Cir. 2011)

In Barnes, several individual plaintiffs challenged an order issued by the Federal Aviation Administration (FAA) approving a new runway at an airport near Portland, Oregon. They claimed that FAA had violated
NEPA by issuing an environmental assessment (EA) and finding of no significant impact (FONSI) rather than preparing an environmental impact statement (EIS).

In support of their claim that an EIS was needed, the plaintiffs argued that the project involved "unique or unknown risks." The court rejected this argument, finding that "there is ample evidence that there is a causal connection between man-made greenhouse gas emissions and global warming." Perhaps ironically, the court concluded in this instance that the growing acceptance of the link between GHG emissions and climate change hurt the plaintiffs' case, because it made it more difficult to conclude that the project involved "unique or unknown risks."

The plaintiffs also argued that the EA was inadequate because it sought to "dilute" the project's effects by presenting its GHG emissions as a percentage of global and U.S. emissions, rather than presenting the impacts on a more localized scale. The court rejected this argument as well. It held that, given the global nature of climate change, it was appropriate for FAA to discuss the project's effects as percentage of global and U.S. emissions.

**Takeaways:** This case indicates that GHG emissions, by themselves, may not tip the balance between preparing an EA and preparing an EIS. It also indicates that, when presenting GHG emissions in a NEPA document, it is permissible for an agency to present those emissions as a percentage of global and/or U.S. emissions.


In *Earth Island*, environmental groups filed suit against the U.S. Forest Service, challenging a proposed fire restoration project that included removal of dead and downed trees in an area that had been damaged by a forest fire. The Forest Service had prepared an EA and FONSI for the restoration project. The plaintiffs argued that an EIS should have been prepared, in part because of the project's potential direct and indirect GHG emissions.

The court held that, under NEPA, an agency is required to "focus on issues that are truly significant to the action in question," and to discuss environmental impacts "in proportion to their significance." 834 F.3d at 990. In this instance, the court found that the EA - which included a "computation of the estimated greenhouse gas emissions from the [project]" - was adequate because it discussed the issue of climate change "in proportion to its significance." The court also rejected the plaintiffs' challenge to the Service's methodology for estimating GHG emissions, holding that "the Forest Service's decision as to which sources of greenhouse gas emissions to consider in the final EA is entitled to deference, since the Forest Service does not have an accepted tool for analyzing all [GHG] emissions."

**Takeaways:** This case applies the principle that climate change, like any other issue, should be addressed in a NEPA document "in proportion to its significance." In determining the appropriate level of detail, the court seems to have given considerable weight to the Forest Service's conclusion that "it is not possible to determine the cumulative impact on global climate change from emissions associated with any number of particular projects. Nor is it expected that such disclosure would provide a practical or meaningful effects analysis for project decisions."


In *League of Wilderness Defenders*, an environmental group challenged the U.S. Forest Service's proposal for a timber sale. They alleged, among other things, that the EA prepared by the Service did not satisfy NEPA because it did not adequately consider the timber sale's potential to cause increased GHG emissions.

The Forest Service took the position that "the climatic effects of a small project such as [the] timber sale are unquantifiable and unnoticeable on a global scale" and "are not significant for the purposes of
NEPA." Without discussing the specific type of analysis performed by the Service, the court concluded that the Service had adequately addressed climate change impacts.

**Takeaway:** The relatively brief discussion of climate change in this court decision makes it difficult to draw conclusions from this case. However, it is noteworthy that the court cited the Service's finding "the climatic effects of a small project ... are unquantifiable and unnoticeable on a global scale." This holding echoes the findings that FHWA has made with regard to highway projects -- i.e., the project's effects are tiny in comparison to the global scale of the problem, and therefore are not significant for purposes of NEPA.


In *WildEarth Guardians*, an environmental group challenged the U.S. Forest Service's approval of a mine operator's plan for a coal mining operation on national forest land. The plan called for releasing methane from the coal mine. The environmental group argued that the Forest Service's EIS for the project was inadequate because, among other things, it did not adequately analyze the climate change impacts of releasing methane, which is a greenhouse gas.

The FEIS included an estimate of the total methane emissions, and concluded that methane emissions under the proposed plan would increase GHG emissions from fossil fuel combustion in Colorado by 1.3 percent. The FEIS also stated that it was "not possible to estimate or calculate the effect that methane emissions would have on global warming" because of the lack of models or research available to make such calculation. The court held that the Forest Service's analysis complied with the NEPA requirements for situations involving "incomplete or unavailable information" under 40 C.F.R. 1502.22, because "it provides a statement that the information regarding the precise impact on global warming is unavailable and its relevance, provides the information it determined could be credibly calculated, and states that the methane release will have some impact on global warming but that the pro rata effect of the mine expansion cannot be determined with precision."

The court also noted that "The EPA suggested that the EIS contain a more expansive discussion of the contribution of methane to greenhouse effects but the materials in the record do not provide any data or model establishing a threshold from which incremental changes can be determined as a result of particular greenhouse gas contributions."

**Takeaway:** This case provides another indication of the courts' willingness to accept an agency's conclusion that it is unnecessary to attempt to estimate a particular project's effect on the problem of global climate change. It also indicates that, at least in some instances, it is appropriate for an agency to frame this conclusion as a finding of "incomplete or unavailable information" under the Council on Environmental Quality (CEQ) regulations.


In *Amigos Bravos*, six environmental groups challenged a proposal by the Bureau of Land Management (BLM) to approve oil and gas lease sales in New Mexico. The heart of the plaintiffs' challenge was their contention that BLM had not adequately considered the potential climate change impacts of the oil and gas leases. They based their claims on NEPA as well as the Federal Land Policy and Management Act (FLPMA), which governs BLM's management of public lands.

The U.S. District Court for the District of New Mexico held that the plaintiffs did not have standing to challenge the proposed oil and gas leases, and therefore dismissed the case. To have standing, a plaintiff must show that it has suffered an "injury in fact" - in other words, some tangible harm; that the defendant was the cause of the injury; and that the injury is "redressable" by the court. In this case, the plaintiffs had attempted to base their standing solely on the harm that they could suffer as a result of a changing climate. The court found that this injury was too speculative to provide a basis for standing.
The court based its conclusion on two main points. First, it found that the plaintiffs had not demonstrated an “injury in fact” because they had not shown that climate change would cause harm to them. The court acknowledged a “generally accepted scientific consensus with regard to global climate change,” but found that “there is not the same consensus with regard to what the specific effects of climate change will be on individual geographic areas.” It also found that, even if the plaintiffs had shown that climate change would cause harm in New Mexico, the harm would occur “over the next century” and therefore may not affect the plaintiffs.

Second, the court found that the plaintiff had failed to demonstrate a sufficient causal connection between the oil and gas leases and the potential impacts of climate change. The court noted that “there are literally hundreds of millions, if not billions, of sources of GHGs spewing pollutants into the air and contributing to climate change.” In this context, the court found that the leases would not make “a particularly meaningful contribution to global emissions.”

Because it found that the plaintiffs lacked standing, the court dismissed the case, and never reached the issue of whether BLM's EIS adequately considered GHG emissions.

**Takeaways:** *This case indicates that it may be difficult for a plaintiff to establish standing based solely on the potential harm that might be caused by a project’s contributions to global climate change. However, plaintiffs who are concerned about climate change may be able to establish standing based on the project’s other impacts (noise, visual, habitat, etc.).*

**Conclusion**

Overall, the recent case law involving NEPA and climate change in non-highway cases is consistent with the earlier cases (from 2007 to 2010) involving highway projects. The recent non-highway cases suggest that courts will be satisfied with a relatively low level of detail of GHG emissions in a NEPA document, as long as the federal agency explains the global nature of the problem and describes the project's GHG emissions in relation to that global problem.

Notwithstanding this conclusion, it also is important to keep in mind that the case law on NEPA and climate change is still in its infancy. The direction of the case law could easily change in the coming years. In particular, it is possible that court decisions could begin to establish more stringent standards if the Council on Environmental Quality issues guidance calling for climate change analyses in NEPA documents, or if agencies voluntarily adopt policies and practices involving a more intensive analysis of GHG emissions in NEPA documents.

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