

3-15-2005

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### Recommended Citation

Stephanie Rudell, *Cross-Border Trucking: An Analysis of the Limited Extent of Agency Authority and the Potential for Detrimental Environmental Results as Illustrated by Department of Transportation v. Public Citizen*, 25 J. Nat'l Ass'n Admin. L. Judges. (2005) available at <http://digitalcommons.pepperdine.edu/naalj/vol25/iss1/8>

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# **Cross-Border Trucking: An Analysis of the Limited Extent of Agency Authority and the Potential for Detrimental Environmental Results as Illustrated by *Department of Transportation v. Public Citizen***

**By Stephanie Rudell\***

“I believe strongly we can have safety on our highways without discriminating against our neighbors to the south.”<sup>1</sup>

“NAFTA may be a blank check to corporate America, but we must not sacrifice our health and clean air to cash it.”<sup>2</sup>

“NAFTA has always struck me as a huge gift from the people of the United States to the people of Mexico, if a gift that not all Americans wished to give.”<sup>3</sup>

## I. INTRODUCTION

Imagine the following scenario: You are a resident of the United States who has chosen to live in Los Angeles, CA, a city near the U.S.-Mexico border. You wake up each morning and check the local

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\* J.D. candidate, 2006, Pepperdine University School of Law. B.A., English Literature, 2003, California State University, Northridge. I would like to express my gratitude to those unlucky few who had to be near me during the drafting of this case note. Thank you so much for your seemingly endless patience.

1. George W. Bush, *quoted in* David G. Savage, *Bush Wants U.S. Roads Opened to Mexican Trucks, Buses*, News from the Border (April 22, 2004), available at [http://www.thebta.org/syndicate/news/archives/2004\\_04.html](http://www.thebta.org/syndicate/news/archives/2004_04.html).

2. James P. Hoffa, Teamsters General President, *quoted in* Press Release, Teamsters Online, Supreme Court Hears Oral Arguments on Cross Border Trucking (April 21, 2004), available at [http://www.teamster.org/04news/nr\\_040421\\_1.htm](http://www.teamster.org/04news/nr_040421_1.htm).

3. Gregg Easterbrook, *quoted in* Jonathan Fox, *The Politics of North American Integration*, 39 LATIN AM. RESEARCH REV. 254 (Jan. 1, 2004).

television news or the Internet to see what the daily smog conditions will be. You are forced to make this daily smog assessment because recently your city has become inundated with motor vehicles from Mexico that are not regulated by United States emissions laws. These foreign vehicles have high emissions rates and contribute more than their fair share of smog to your city's air. On mornings with particularly high smog levels, you are forced to limit your family members' outdoor activities to protect their well-being.

While United States residents may have become accustomed to checking smog levels and limiting outdoor activities in the 1960s and 1970s, recent decades have seen a change with the implementation of the Clean Air Act and strict emissions laws. Not wishing to impede this fairly recent progress, many environmental groups and private citizens are opposed to allowing Mexican motor carriers to commence cross-border operations, fearing that such operation will again force United States citizens indoors due to a drastic increase in poor air quality.

The Court's decision in *Department of Transportation v. Public Citizen*,<sup>4</sup> however, did just that – it allowed the Department of Transportation to register Mexican motor carriers, thereby allowing commencement of cross-border operations, without considering the environmental effects of the carriers' United States operations. This case note examines the *Department of Transportation* decision and its implications. Part II details the historical background, including the legislative and judicial history, of the case.<sup>5</sup> Part III discusses the factual and procedural background of the case.<sup>6</sup> Part IV analyzes the Court's unanimous opinion by Justice Thomas, focusing on the Court's analysis of the facts as they pertain to the National Environmental Policy Act and the Clean Air Act.<sup>7</sup> Part V explores the social, administrative, and legislative impacts of the Court's decision.<sup>8</sup> Lastly, part VI concludes the discussion of *Department of Transportation* and the analysis of its implications.<sup>9</sup>

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4. Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204 (2004).

5. See *infra* Part II and accompanying notes.

6. See *infra* Part III and accompanying notes.

7. See *infra* Part IV and accompanying notes.

8. See *infra* Part V and accompanying notes.

9. See *infra* Part VI and accompanying notes.

## II. HISTORICAL BACKGROUND

### A. Legislative History

In an effort to preserve both the natural and political environments of the United States and protect the country's citizens and residents, Congress has enacted statutes and regulations and created administrative agencies.<sup>10</sup> Promoting the general welfare of the nation has also required national leaders to enter into agreements with other countries to further the trade industry, while at the same time attempting to maintain the integrity of the environment.<sup>11</sup>

In 1963, Congress enacted the Clean Air Act (CAA)<sup>12</sup> to reduce air pollution and enhance the quality of the Nation's air.<sup>13</sup> In enacting the CAA, Congress noted "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments."<sup>14</sup> The Environmental Protection Agency (EPA) establishes national air quality standards pursuant to section 109 of the CAA.<sup>15</sup> To maintain these national standards, the EPA enacted the conformity rule, which placed the responsibility on federal agencies to analyze the emissions resulting from their actions, thereby ensuring that government entities were not supporting activities that were not compliant with air quality standards.<sup>16</sup> The CAA "prohibits federal agencies from approving, accepting, or funding any transportation plan, program, or project unless such plan, program, or project" conforms with the CAA.<sup>17</sup>

In 1969, Congress enacted the National Environmental Policy

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10. See *infra* notes 12-44 and accompanying text.

11. See *infra* notes 45-57 and accompanying text.

12. Clean Air Act, codified at 42 U.S.C §§ 7401-7671 (2004).

13. *Id.* The purpose of the CAA is to protect the general population and stimulate research and prevention of air pollution. *Id.* at § 7401(b)(1)-(4).

14. § 7401(a)(3).

15. See 42 U.S.C. § 7409 (2004).

16. See William B. Johnson, Annotation, *Conformity Requirements of § 176(c) of Clean Air Act*, 42 U.S.C.A. § 7506(c), 157 A.L.R. Fed. 217 (2004). The conformity rule was enacted in the 1970s and strengthened by amendments in the 1990s. *Id.* at 229-30.

17. *Id.*

Act (NEPA)<sup>18</sup> to further regulate the effects of human living on the environment.<sup>19</sup> Congress declared the purpose of NEPA as follows:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.<sup>20</sup>

In keeping with its intended purpose, NEPA attempts to secure a positive future for the environment by mandating that agency administrators fully evaluate the ramifications of agency decisions before taking “major Federal action” by preparing an Environmental Impact Statement (EIS).<sup>21</sup> This evaluation, in the form of an EIS, should include the impact of the action, unavoidable adverse effects, alternatives, a discussion of the relationship between use of the environment and productivity, and “irreversible and irretrievable commitments of resources” if the action is implemented.<sup>22</sup> Compliance with NEPA is achieved if analysis and disclosure methods and procedures are followed.<sup>23</sup> Of course, what constitutes “major Federal action” is usually an issue for the courts to decide, as it is not defined in the statute.<sup>24</sup>

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18. 42 U.S.C. § 4321 (2004).

19. See *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1010 (9th Cir. 2003).

20. 42 U.S.C. § 4321.

21. *Id.* § 4332(C) (2004). Proposals for legislation or other “major Federal action” that will “significantly [affect] the quality of the human environment” require a detailed statement of how the action will impact the environment. *Id.*

22. *Id.* “Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.” Protection of Environment, 40 C.F.R. § 1500.2(b) (2004).

23. See Kevin Priester & James A. Kent, *Using Social Ecology to Meet the Productive Harmony Intent of the National Environmental Policy Act*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 235, 236-37 (2001).

24. See Annotation, *Necessity and Sufficiency of Environmental Impact Statements under § 102(2)(c) of National Environmental Policy Act of 1969* (42 U.S.C.A. § 4332(2)(c)) in *Cases Involving Regulation of Private Enterprise*, 76

NEPA established the Council of Environmental Quality (CEQ) to issue regulations interpreting NEPA and guide agencies in determining what actions are subject to NEPA's requirements.<sup>25</sup> CEQ allows an agency to initially forego preparing an EIS and prepare an Environmental Assessment (EA), which is a much less detailed document, if the agency is unsure of whether or not a full EIS is required.<sup>26</sup> An EA is a "concise public document" providing an analysis to determine "whether to prepare an environmental impact statement or a finding of no significant impact."<sup>27</sup> If the agency determines through preparation of the EA that no EIS is required, then the agency is required to prepare a "Finding of No Significant Impact" (FONSI) and make this FONSI available to the public.<sup>28</sup> A FONSI is a brief document stating that the action in question "will not have a significant effect on the human environment" and "an [EIS] therefore will not be prepared."<sup>29</sup>

The Federal Motor Carrier Safety Administration (FMCSA) was created in January 2000, as an administration of the Department of Transportation (DOT).<sup>30</sup> The purpose of FMCSA is to further the safety of highway transportation.<sup>31</sup> In particular, Congress stated that the purpose of FMCSA is "to reduce the number and severity of large-truck involved crashes through more commercial motor vehicle and operator inspections and motor carrier compliance reviews, stronger enforcement measures against violators, expedited completion of rulemaking proceedings, scientifically sound research, and effective commercial driver's license testing, recordkeeping and sanctions."<sup>32</sup> FMCSA is responsible for setting minimum safety

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A.L.R. Fed. 902 (2004). Some guidance is given to agencies on what constitutes federal action: "Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations." 40 C.F.R. § 1502.4(b) (2004).

25. *Dep't of Transp.*, 124 S. Ct. at 2209-10.

26. *Id.* See also 40 C.F.R. § 1501.4(b)-(c) (2004).

27. 40 C.F.R. § 1508.9 (2004). The EA also helps ensure compliance with the Act if no EIS is necessary and assists in preparation of EIS if required. *Id.*

28. *Id.* § 1501.4(e)(1)-(2).

29. *Id.* § 1508.13.

30. See 49 U.S.C. § 113(a) (2004).

31. See *id.* § 113(b).

32. Motor Carrier Safety Improvement Act of 1999, P.L. 106-159 § 4, 113 Stat. 1749 (1999).

standards for commercial vehicles, including standards for vehicle maintenance, loading, equipping, and the capabilities and financial responsibilities of vehicle operators.<sup>33</sup> It follows, then, that FMCSA, must also oversee inspections to ensure that these standards are met.<sup>34</sup> Although FMCSA is responsible for creating regulations and enforcing inspections, it was given “limited discretion” in the registration department.<sup>35</sup> The FMCSA is required to register any applicant who is willing and able to comply with the safety regulations and requirements and demonstrates adequate financial responsibility.<sup>36</sup>

In 1982, in response to concern over the negative treatment of United States motor carriers in Canada and Mexico,<sup>37</sup> Congress imposed a two-year moratorium on grants of operating authority through the Bus Regulatory Reform Act.<sup>38</sup> The President had the authority to renew this moratorium every two years as necessary.<sup>39</sup> This moratorium provided that the United States would “not issue any certificate to any motor common carrier, or any permit to any motor contract carrier, domiciled in any contiguous foreign country or owned or controlled by persons of any contiguous foreign country in the two-year period.”<sup>40</sup> The President also had the authority to remove the moratorium if determined to be “in the national interest;”<sup>41</sup> however, the President extended the moratorium at every opportunity.<sup>42</sup> In 1996, the moratorium was made permanent by the

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33. 49 U.S.C. §§ 31136, 31139 (2004).

34. *Id.* § 31142 (2004). “On the instruction of an authorized enforcement official of a State or of the United States Government, a commercial motor vehicle is required to pass an inspection of all safety equipment required under the regulations issued under section 31136.” *Id.* § 31142(a).

35. *Dep’t of Transp.*, 124 S. Ct. at 2210.

36. 49 U.S.C. § 13902 (2004).

37. *Dep’t of Transp.*, 124 S. Ct. at 2210.

38. *See* Bus Regulatory Reform Act of 1982, Pub. L. 97-261, 1982 H.R. 3663 (1982) [hereinafter Reform Act].

39. *Id.* § 6(g)(1).

40. *Id.* Since Mexico is a contiguous foreign country, this moratorium applied to Mexican motor carriers attempting to enter the United States.

41. *Id.* § 6(g)(2).

42. *In the Matter of Cross Border Trucking Servs.*, Secretariat File No. USA-MEX-98-2008-0 ¶ 41 (2001), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_20/USA/ub98010e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub98010e.pdf).

Interstate Commerce Commission Termination Act of 1995 (ICCTA), which provided that the restrictions were to remain in effect until rescinded by the President, who could modify or remove the moratorium if “consistent with the obligations of the United States under a trade agreement or with United States transportation policy.”<sup>43</sup> This moratorium remained in place as it pertained to Mexican motor carriers until 2001 when President Bush modified the moratorium to allow certain Mexican motor carriers to operate in the United States.<sup>44</sup>

In 1992, Canada, Mexico, and the United States, entered into the North American Free Trade Agreement (NAFTA).<sup>45</sup> In creating this agreement, the nations stated the following purposes:

STRENGTHEN the special bonds of friendship and cooperation among their nations;  
CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;  
CREATE an expanded and secure market for the goods and services produced in their territories;  
REDUCE distortions to trade;  
ESTABLISH clear and mutually advantageous rules governing their trade;  
ENSURE a predictable commercial framework for business planning and investment;  
BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;  
ENHANCE the competitiveness of their firms in global markets;  
FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;

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43. 49 U.S.C. § 13902(c)(3). *See also Pub. Citizen*, 316 F.3d at 1012.

44. Memorandum of June 5, 2001, 66 Fed. Reg. 30, 799 (June 7, 2001). *See also infra* notes 55-57, 153 and accompanying text.

45. Canada-Mexico-United States: North American Free Trade Agreement, 32 I.L.M. 605 (1993) [hereinafter NAFTA].



CREATE new employment opportunities and improve working conditions and living standards in their respective territories;  
UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;  
PRESERVE their flexibility to safeguard the public welfare;  
PROMOTE sustainable development;  
STRENGTHEN the development and enforcement of environmental laws and regulations; and  
PROTECT, enhance and enforce basic workers' rights.<sup>46</sup>

With the adoption of NAFTA, a peaceful method of dealing with disputes related to international trading was also created.<sup>47</sup> Under NAFTA, any disagreements are to be resolved through various dispute resolution methods rather than through the court systems.<sup>48</sup>

In keeping with the aforementioned ideals to promote unrestrained trading between the nations, NAFTA provided that the United States would begin to dispose of the restriction against Mexican motor carriers, and would permit Mexican motor carriers to operate in the interior of the United States by the year 2000.<sup>49</sup> However, when the year 2000 arrived, such access was not yet granted, and Mexican motor carriers were still limited to commercial areas near the border.<sup>50</sup> According to the United States, Mexican

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46. NAFTA, *supra* note 45, at 297.

47. David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481 (2000).

48. *Id.* at 484-85. There are six dispute resolution mechanisms described in NAFTA, divided by subject matter to handle various disputes. *Id.* It was agreed that dispute resolution was the best method, given that "[n]ational courts do not have or cannot exercise effective jurisdiction over most disputes between private individuals and foreign governments, and among governments, due to the sovereign immunity doctrine, act of state doctrine, concepts of comity, or other legal barriers." *Id.* at 487.

49. *Dep't of Transp.*, 124 S. Ct. at 2211. See also NAFTA, *supra* note 45 at Ch. 12, Arts. 1201-12.

50. Sean D. Murphy, *Contemporary Practice of the United States Relating to*

motor carriers were not in compliance with United States safety regulations, and the United States was thereby justified in precluding access to the interior.<sup>51</sup> Since Mexico believed that the United States was not acting consistently with the terms of NAFTA by arbitrarily restricting Mexican motor carriers to border areas, Mexico brought the situation to the attention of a NAFTA arbitration panel.<sup>52</sup> This arbitration panel determined that the United States was not justified in refusing to process applications of Mexican motor carriers to operate in the United States.<sup>53</sup> After finding the United States in

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*International Law: U.S.-Mexico Dispute on Cross-border Trucking*, 97 AM. J. INT'L L. 194 (2003). Mexican carriers were also granted access if en route to Canada, or if the motor carrier was transporting passengers for international touring purposes. *In the Matter of Cross Border Trucking Servs.*, USA-MEX-98-2008-01 at ¶ 44.

51. *In the Matter of Cross Border Trucking Servs.*, USA-MEX-98-2008-01 at ¶¶ 77-79. It has been noted that trade agreements, such as NAFTA, can create significant environmental concerns, as is illustrated by the concern regarding cross-border trucking. *See Trade in Services and E-Commerce: the Significance of the Singapore and Chile Free Trade Agreements*, 108th Cong. (2003) (Statement of Mr. David Waskow, International Policy Analyst & Trade Policy Coordinator, Friends of the Earth - U.S.), available at <http://energycommerce.house.gov/108/hearing/05082003Hearing914/waskow1457.htm>.

52. *In the Matter of Cross Border Trucking Servs.*, USA-MEX-98-2008-01 at ¶ 41. In its complaint, Mexico asserted that "there is no valid justification for the refusal to allow cross-border service on the basis that Mexico has not adopted a domestic motor carrier safety regulation system compatible to that of the United States." *Id.* at ¶ 113. The United States responded by stating:

[t]he Mexican safety regime lacks core components, such as comprehensive truck equipment standards and fully functioning roadside inspection or on-site review systems. In light of these important differences in circumstances, and given the experience to-date with the safety compliance record of Mexican trucks operating in the U.S. border zone, the United States decision to delay processing Mexican carriers' applications for operating authority until further progress is made on cooperative safety efforts is both prudent and consistent with U.S. obligations under the NAFTA.

*Id.* at ¶ 153.

53. *Id.* at ¶ 259. The panel stated:

[T]he Panel unanimously determines that the U.S. blanket refusal to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains a breach of the U.S. obligations under

violation of NAFTA, the arbitration panel recommended that “the United States take appropriate steps to bring its practices with respect to cross-border trucking services and investment into compliance with its obligations under the applicable provisions of NAFTA.”<sup>54</sup>

After the arbitration panel issued this decision, President Bush determined that the moratorium, in effect as a result of the ICCTA, had to be modified to ensure that United States transportation policies were consistent with NAFTA.<sup>55</sup> President Bush modified the moratorium through the following provisions:

First, enterprises domiciled in the United States that are owned or controlled by persons of Mexico will be allowed to obtain operating authority to provide truck services for the transportation of international cargo between points in the United States. Second, enterprises domiciled in the United States that are owned or controlled by persons of Mexico will be allowed to obtain operating authority to provide bus services between points in the United States.<sup>56</sup>

These modifications opened the door for DOT to approve registration applications for Mexican motor carriers, which would then allow Mexican motor carriers to operate in the interior of the United States.<sup>57</sup>

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Annex I (reservations for existing measures and liberalization commitments), Article 1202 (national treatment for cross-border services), and Article 1203 (most-favored-nation treatment for cross-border services) of NAFTA.

*Id.* at ¶ 295.

54. *Id.* at ¶ 299.

55. Memorandum of June 5, 2001, *supra* note 44.

56. *Id.*

57. *Id.* President Bush stated in the memorandum:

Effective today, the Department of Transportation will accept and expeditiously process applications, submitted by enterprises domiciled in the United States that are owned or controlled by persons of Mexico, to obtain operating authority to provide truck services for the transportation of international cargo between points in the United States or to provide bus services between points in the United States.

*Id.*

### B. Judicial History

As previously mentioned, the courts often have the job of determining what constitutes a major Federal action under NEPA.<sup>58</sup> If an action is deemed to be a major Federal action, then the agency must prepare an EIS detailing the effects the action will have on the environment. While agencies are not always correct in determining that a full EIS is not required under NEPA, the courts give the agency decision a great deal of deference in determining how detailed the EIS should be. This is probably due to the fact that an agency's determination regarding an EIS will be overturned only if the agency acts in an arbitrary and capricious manner in making the decision.<sup>59</sup> In several cases that have gone as far as the Supreme Court, the Court has balanced the purposes of NEPA against the burden to the agency, while still considering the extent of the agency's authority. After balancing these issues, the Court often finds that the agency's pre-action considerations are sufficient under NEPA.

In *Aberdeen & Rockfish Railroad Company v. Students Challenging Regulatory Agency Procedures*,<sup>60</sup> the Court determined that the Interstate Commerce Commission's (ICC's) environmental analysis was sufficient under NEPA, and that an additional EIS was unnecessary.<sup>61</sup> In this case, the ICC directed the United States railroads to prepare an EIS and serve the EIS on affected parties after the railroads determined, and the ICC agreed that a rate increase was necessary.<sup>62</sup> The railroads received numerous comments from affected parties in response to its EIS, and the ICC delayed the rate increase until after it prepared and served its own EIS, which determined that the rate increase would not have a substantial impact on the environment.<sup>63</sup> Students Challenging Regulatory Agency Procedures (SCRAP), and other environmental groups, became

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58. See *supra* note 24 and accompanying text.

59. 5 U.S.C. § 706(2)(A) (2004). See also *Dep't of Public Transp.*, 124 S. Ct. at 2213; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 275-76 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

60. *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975).

61. *Id.* at 327.

62. *Id.* at 297.

63. *Id.* at 297-98.

concerned over the rate increases and asserted that an EIS was required because the increased rates encouraged use of virgin materials, as opposed to recycled material.<sup>64</sup> The ICC issued a final report, declaring the rate increase lawful, established that the railroads were in considerable need of additional revenue, and identified two potential areas where the rate increase could affect the environment:

First, the increase in rail rates might divert traffic to trucks, which are allegedly heavier polluters than trains. Second, the increase in rates for recyclables might discourage their use resulting in increased solid waste - disposal of which creates environmental problems - and an accelerated depletion of the country's natural resources.<sup>65</sup>

Both of these potential impacts were deemed insubstantial compared to the railroads' need for additional revenue.<sup>66</sup> The ICC initially determined that an EIS, in addition to this final report, was unnecessary but eventually prepared an expanded draft EIS, followed by a final impact statement.<sup>67</sup> SCRAP, seeking to prevent the rate increases, filed a motion for a preliminary injunction, which was granted by the trial court and vacated by the Supreme Court.<sup>68</sup> In the trial court, SCRAP filed a motion for summary judgment, alleging that the ICC's EIS was inadequate.<sup>69</sup> The trial court, holding that the ICC failed to comply with NEPA because no hearing was held and the ICC did not consider the environmental impact of the increases in

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64. *Id.* SCRAP is a group of interested law students. *Id.* at 298.

65. *Id.* at 299.

66. *Id.* The report noted that the danger of diversion of traffic to trucks was outweighed by the railroads' need for money and that the truck rates had similarly increased recently, which lessened the possibility of a huge shift from railroads to trucks. Regarding the recyclables, the report noted that the use of recyclables was not directly related to rate increases. *Id.*

67. *Id.* at 300-01. "The main difference between the October 4, 1972, report and the impact statement was that the latter substantially expanded on the discussion of the underlying rate structure and the effect of rate increases on each of the recycling industries." *Id.* at 301.

68. *Id.* at 303-04.

69. *Id.* at 304.

“good faith,” granted the motion and ordered the ICC to prepare a more adequate EIS, reevaluating the decision to authorize rate increases.<sup>70</sup>

On appeal, the Court determined that the ICC’s EIS was adequate under NEPA.<sup>71</sup> The Court noted that the major federal action being taken here was one to approve a general rate increase based on “the railroads’ claim of financial crisis.”<sup>72</sup> This type of action generally does not raise environmental issues.<sup>73</sup> While future proceedings based on rate challenges of individual commodities, such as recyclables, could potentially raise such environmental issues, those issues were not presently before the ICC.<sup>74</sup> The environmental issues addressed by the ICC were those that could possibly be related to a general rate increase, and the ICC’s EIS, therefore, was not inadequate.<sup>75</sup>

In *Metropolitan Edison Company v. People Against Nuclear Energy*,<sup>76</sup> the Court determined the extent to which NEPA required the Nuclear Regulatory Commission (NRC) to consider the risk of harm presented by a nuclear power plant to the health of the surrounding community, and concluded that the agency made sufficient considerations before taking action.<sup>77</sup> Metropolitan Edison Company (Metropolitan) owned two nuclear power plants (TMI-1

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70. *Id.* Because the ICC had held hearings in the past, they were required to continue in this tradition, as it had become an “existing agency review process.” *Id.* The trial court found the EIS deficient in that it failed to analyze industry price sensitivity and technology, and was therefore, not prepared in good faith. *Id.*

71. *Id.* at 319-26.

72. *Id.* at 323.

73. *Id.* at 324. The Court noted that “the entitlement of the railroads to some kind of a general rate increase - raises few environmental issues.” *Id.*

74. *Id.* The Court stated that these more specific rate increase requests are “involved in a general revenue proceeding,” such as this request for a rate increase, “only to a limited extent.” *Id.* Furthermore, even if it were required that the ICC’s EIS consider these specialized rate increase requests regarding recyclables, the ICC could not require the railroads to significantly discount the transportation costs of recyclables regardless of the environmental impact: “standard ratemaking criteria limit the power of the ICC to force railroads to transport recyclable materials at deficit rates no matter how much the environment would be benefited thereby and no matter how much environmental injury would be caused by not doing so.” *Id.*

75. *Id.* at 324-25.

76. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

77. *Id.* at 768-69.

and TMI-2), both of which were licensed by the NRC after EIS preparation, near Three Mile Island.<sup>78</sup> After TMI-1 failed, concern emerged for the safety of the citizens inhabiting the surrounding areas,<sup>79</sup> and NRC ordered the plant shut down until safety evaluations had been completed.<sup>80</sup> People Against Nuclear Energy (PANE) was in opposition to the continued operation of the nuclear reactors and submitted a brief detailing the potential harm to the population if the reactors were permitted to operate.<sup>81</sup> NRC opted not to consider PANE's brief, so PANE filed a petition for review with the court of appeals, asserting that NEPA required that the NRC consider PANE's concerns.<sup>82</sup> The NRC determined that a full EIS was not required for TMI-1 to resume operation.<sup>83</sup> The court of appeals held that NEPA did require the NRC to consider and "evaluate 'the potential psychological health effects of operating' TMI-1 which have arisen since the original EIS was prepared,"<sup>84</sup> but that PANE's specific contentions did not need to be addressed.<sup>85</sup> The court of appeals also found that a supplemental EIS considering both the individual and community health would be necessary if the NRC

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78. *Id.* at 768.

79. *Id.* at 769. During the period of concern, children and pregnant women were ordered to evacuate the area and other inhabitants left voluntarily until the situation was under control. *Id.*

80. *Id.* NRC published a notice of hearing, inviting public input on the issue of whether or not "to consider psychological harm or other indirect effects of the accident or of renewed operation of TMI-1." *Id.*

81. *Id.* The brief stated that the reactors had already caused damage to the inhabitants of the surrounding areas and would continue to do so if permitted to reopen. PANE alleged that the physical and emotional effects of the reactors included, "increased anxiety, tension and fear, a sense of helplessness and such physical disorders as skin rashes, aggravated ulcers, and skeletal and muscular problems." *Id.* at 769 n.2. PANE also alleged that the continued operation of the reactors would result in a weakening of community stability and would deter community growth. *Id.*

82. *Id.* at 770.

83. *Id.* at 770 n.4. The NRC determined that several repairs were necessary before operation of the plant could resume, but that the environmental impact assessment prepared was sufficient and that a full EIS was unnecessary. *Id.*

84. *Id.* at 771 (quoting *People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n*, 678 F.2d 222, 235 (D.C. Cir. 1982)).

85. *Id.* at 771.

noticed new circumstances congruent with PANE's concerns.<sup>86</sup>

The Supreme Court granted certiorari<sup>87</sup> and reversed, holding that NEPA did not require the NRC to specifically consider PANE's concerns regardless of their findings regarding the mental health of the community.<sup>88</sup> The Court reasoned that NEPA's goal is to ensure that the agency reaches a "fully informed and well-considered decision"<sup>89</sup> regarding the effect of the action on the environment, and is not to utilize or "[develop] psychiatric expertise" because doing so could spread agency resources too thin in performing a function not Congressionally assigned to the agency.<sup>90</sup> The Court concluded that NEPA was designed to compel agencies to consider "the future effects of future actions,"<sup>91</sup> and that in this case, forcing the NRC to consider PANE's contentions would be forcing them to consider the effects of past actions.<sup>92</sup>

In *Robertson v. Methow Valley Citizen's Council*,<sup>93</sup> the Court determined the extent to which NEPA required the National Forest Service to consider the impact of a ski resort on forest land, and once again determined that an agency took all necessary precautions under NEPA.<sup>94</sup> The Forest Service is authorized by statute to issue special use permits to ski resorts to allow them to operate on federal land.<sup>95</sup> Before the permit can be issued, however, an EIS must be prepared.<sup>96</sup> In *Robertson*, Methow Recreation, Inc. (MRI) applied for a special use permit to develop a ski resort on a "pristine" piece of property in the Washington Okanogan National Forest.<sup>97</sup> In response, the Forest

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86. *Id.*

87. *Id.*

88. *Id.* at 779.

89. *Id.* at 776.

90. *Id.*

91. *Id.* at 779.

92. *Id.*

93. *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332 (1989).

94. *See id.* at 336.

95. *Id.* These permits require the Forest Service to first consider the feasibility of a project, then select a developer, and finally review a final environmental analysis, which is followed by construction initiation. *Id.* at 336-37.

96. *Id.* at 336. Because issuing a permit is considered a major Federal action under NEPA, an EIS must be prepared before the Forest Service can issue the permit. *Id.*

97. *Id.* at 337



Service prepared an EIS<sup>98</sup> detailing the impact the resort would have on the surrounding area.<sup>99</sup> In particular, the EIS focused on the effect the resort would have on the air quality and inhabiting wildlife and noted that the project would have a significant impact on the air quality of the area, but that the effects could be mitigated during both the construction phase and normal operation.<sup>100</sup> The EIS recommended that MRI be issued a permit to build the resort, and the Regional Forester issued the permit, ordering mitigating measures to be undertaken.<sup>101</sup>

The decision to issue the permit was opposed by four organizations, which appealed to the Chief of the Forest Service.<sup>102</sup> The Chief affirmed the permit issuance, asserting that the special use permit only granted a license to develop the area, and did not yet specifically permit a ski resort.<sup>103</sup> The organizations then filed a petition for judicial review, claiming that the EIS failed to meet NEPA requirements.<sup>104</sup> The magistrate, however, disagreed and held that the requirements of NEPA were met.<sup>105</sup> The court of appeals reversed, holding that the mitigation strategies listed in the EIS needed to be more final before the permit was issued, and that the

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98. *Id.* at 338. The purpose of this EIS was to evaluate the potential for the resort and to aid the Forest Service in its decision of whether or not to issue the permit. *Id.*

99. *Id.* at 339.

100. *Id.* The EIS also specified certain actions that could be taken by the County and Forest Service to prevent deterioration of air quality. *Id.* at 339-41. Regarding the effect the resort would have on the wildlife, the EIS observed that several species of animal would be affected, with thirty-one species decreasing in population, twenty-four species increasing in population, and two species being eliminated completely over the following ten years. The EIS also detailed mitigation measures that could be taken by both state and local government. *Id.* at 341-43.

101. *Id.* at 344-45.

102. *Id.* These four organizations were the Methow County Citizens Council, Washington State Sportsmen's Council, Washington Environmental Council, and the Sierra Club. *Id.* at 345 n.11.

103. *Id.* at 345.

104. *Id.* at 345-46.

105. *Id.* at 346. The magistrate specifically found that the EIS sufficiently detailed the impact of the resort and that the EIS provided more than a "mere listing of mitigation measures." *Id.* The magistrate also noted that the Forest Service had not yet prepared a master plan, which would include more detailed mitigation strategies. *Id.*

agency could be required to prepare a worst-case scenario.<sup>106</sup> The Supreme Court reversed the court of appeals decision, holding that NEPA does not require an agency to prepare an EIS that details specific mitigation steps that will be taken and a worst-case scenario analysis is not required.<sup>107</sup>

In *Marsh v. Oregon Natural Resources Council*,<sup>108</sup> the companion case to *Robertson*,<sup>109</sup> the Court determined the necessity of a supplemental environmental impact statement as required by NEPA regarding the Army Corps of Engineers' (Corps) continued construction of a dam.<sup>110</sup> The dam was intended to control the water supply and flow and was proposed in response to frequent flooding.<sup>111</sup> The Corps prepared an EIS and began preparing for construction in 1971.<sup>112</sup> The EIS recommended further studies due to "incomplete information" and a supplemental EIS was prepared in 1975.<sup>113</sup> A final environmental impact statement supplement (FEISS) was prepared and released in 1980.<sup>114</sup> The FEISS concluded that the dam would impact the surrounding wildlife population, but that some of the effects could be mitigated.<sup>115</sup> The Corps decided to

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106. *Id.* at 346-47. The court also noted that a worst-case scenario was required if not enough information was available to the Forest Service at the time of statement preparation to make a reasoned decision. *Id.* at 346.

107. *Id.* at 359. The Court held that NEPA relies on procedural mechanisms and therefore does not require agencies to create a fully developed mitigation plan before agency action can occur. *Id.* at 353. The Court also held that requiring the agency to prepare a worst-case scenario would take the focus away from the issues of greatest concern and relevance and focus on "highly speculative harms," which is not the intent of the statute. *Id.* at 357.

108. *Marsh*, 490 U.S. at 360.

109. *Id.* at 363.

110. *See id.*

111. *Id.* at 364.

112. *Id.* To prepare, the Corps relocated residents, roads, and utilities, and acquired land. *Id.*

113. *Id.* at 364-65. This supplemental EIS was never filed due to a request to suspend the construction. After an analysis of an already completed dam was finished, the project was again pursued. *Id.* at 365.

114. *Id.* This FEISS detailed the effect the dam would have on the water quality, temperature, turbidity, and fish life. *Id.* at 365-66.

115. *Id.* at 366-67. Specifically, the dam would displace deer and elk, eliminate acres of forestland, and interfere with fish spawning. The report noted that the latter consequence could be mitigated by the creation of a hatchery. *Id.*

continue construction of the dam, and four Oregon corporations filed an action to enjoin construction, claiming that the Corps had violated NEPA.<sup>116</sup> The district court judge denied relief on all NEPA claims, finding that the agency's actions in preparing the EIS and the supplemental EIS were reasonable.<sup>117</sup> The court of appeals reversed using the same standard of reasonableness, holding that the Corps erred in not preparing a second supplemental EIS.<sup>118</sup> The Supreme Court reversed, holding that while NEPA does sometimes call for a supplemental EIS,<sup>119</sup> the Corps' decision here was well-reasoned and not arbitrary and capricious.<sup>120</sup>

In *Kleppe v. Sierra Club*,<sup>121</sup> the Court determined how extensive the Department of the Interior's (Department) EIS regarding coal reserves was required to be, ultimately determining that practicality considerations outweighed thoroughness.<sup>122</sup> Officials of the Department were "responsible for issuing coal leases, approving mining plans [and enabling parties] to develop coal reserves" on federal land.<sup>123</sup> Environmental groups were concerned with the coal industry's interest in the "Northern Great Plains Region," and asserted that the Department could not allow any further

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116. *Id.* at 368. These corporations claimed that NEPA had been violated because the Corps failed to prepare a comprehensive EIS considering "the cumulative effects" the dams would have on the basin, failed "adequately to describe the environmental consequences" of the dam construction, failed "to include a 'worst case analysis' of uncertain effects," and failed "to prepare a second supplemental EIS to review information developed after 1980." *Id.*

117. *Id.* at 368-69.

118. *Id.* at 369-70. The court found that a second EIS should have been prepared given that recent documents revealed new information, which the Corps failed to review "with sufficient care." *Id.* at 370. The court of appeals also reversed on the basis of all the other NEPA claims, but the Supreme Court did not address these findings in its opinion. *See id.* at 369-70.

119. *Id.* at 371. NEPA was created to prevent environmental damage by ensuring agencies act only after being fully informed. *Id.* Supplemental EIS may be required where "remaining governmental action would be environmentally 'significant.'" *Id.* at 372.

120. *Id.* at 385. After looking at the new information presented, the Corps had the discretion to either accept it as significant or reject it. Since the agency based its decision to reject the information after "careful scientific analysis," it did not violate NEPA by failing to prepare a second supplementary EIS. *Id.*

121. *Kleppe*, 427 U.S. at 390.

122. *See id.* at 394.

123. *Id.* at 395.

development unless an EIS was first prepared.<sup>124</sup> The trial court granted summary judgment for the Department, finding no claim for relief in the complaint.<sup>125</sup> The environmental groups appealed, and the court of appeals reversed and issued an injunction against the development of a small section of the contested region.<sup>126</sup> After the court of appeals refused to remove the injunction, the Department appealed to the Supreme Court to stay the injunction - which the Court did - and the Court granted certiorari.<sup>127</sup> The Supreme Court then reversed, holding that an EIS is not required for the entire region.<sup>128</sup> The Court found that it would be impractical for the Department to prepare an EIS for the entire region,<sup>129</sup> and a comprehensive EIS is not required by statute.<sup>130</sup>

As these cases demonstrate, the Court has a history of interpreting agency action regarding NEPA requirements in favor of agencies, given that the agencies prudently consider the relevant issues presented. This is the precedent under which *Department of Transportation* was decided.

### III. FACTUAL AND PROCEDURAL BACKGROUND

After the President demonstrated his desire to lift the moratorium on Mexican motor carrier certification (effected by a recent arbitration panel decision stating that the United States had breached NAFTA by precluding Mexican motor carriers from entering the country),<sup>131</sup> FMCSA published proposed rules for comment,

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124. *Id.* The groups claimed that the Department was required to prepare a detailed EIS on the entire region. *Id.*

125. *Id.*

126. *Id.* The court issued the injunction despite the fact that an EIS had been prepared regarding this small region. That EIS, however, was not presented to the trial court or the court of appeals. *Id.*

127. *Id.* at 396.

128. *Id.* at 414-15

129. *Id.* at 401. The Court noted that the entire area had not been slated for development yet, and an EIS can only be prepared after a plan has been formed and the level of "coal-related activity" can be determined. *Id.* at 401-02.

130. *Id.* at 401. The Court points out that an EIS preparation is required "only in the event of a proposed action." *Id.*

131. Mexico became increasingly agitated at the ban of Mexican motor carriers from American soil, and in February 2001, an international arbitration

including the Application Rule and the Safety Monitoring Rule,<sup>132</sup> regarding safety regulations of the Mexican motor carriers.<sup>133</sup> However, in December 2001, Congress passed the Department of Transportation and Related Agencies Appropriations Act (Appropriations Act),<sup>134</sup> which specified regulation requirements

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panel determined that the United States had breached NAFTA obligations by wide denial of Mexican motor carrier applications. *Dep't of Transp.*, 124 S. Ct. at 2211. The President then initiated the creation of safety regulations to direct “grants of operating authority to Mexican motor carriers.” *Id.*

132. These rules were proposed in May 2001. *Id.* The Application Rule “addressed the establishment of a new application form for Mexican motor carriers that seek authorization to operate within the United States” and the Safety Monitoring Rule “addressed the establishment of a safety-inspection regime for all Mexican motor carriers that would receive operating authority under the Application Rule.” *Id.*

133. *Id.*

134. *See* Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, § 350, 115 Stat. 833, 864-68 (2001) [hereinafter Appropriations Act]. This Act also required a safety examination of all motor carriers to be performed as a condition for authorization to operate in the United States. This safety examination was to include:

(i) verification of available performance data and safety management programs; (ii) verification of a drug and alcohol testing program consistent with part 40 of title 49, Code of Federal Regulations; (iii) verification of that motor carrier's system of compliance with hours-of-service rules, including hours-of-service records; (iv) verification of proof of insurance; (v) a review of available data concerning that motor carrier's safety history, and other information necessary to determine the carrier's preparedness to comply with Federal Motor Carrier Safety rules and regulations and Hazardous Materials rules and regulations; (vi) an inspection of that Mexican motor carrier's commercial vehicles to be used under such operating authority, if any such commercial vehicles have not received a decal from the inspection required in subsection (a)(5); (vii) an evaluation of that motor carrier's safety inspection, maintenance, and repair facilities or management systems, including verification of records of periodic vehicle inspections; (viii) verification of drivers' qualifications, including a confirmation of the validity of the Licencia de Federal de Conductor of each driver of that motor carrier who will be operating under such authority; and (ix) an interview with officials of that motor carrier to review safety management controls and evaluate any written safety oversight policies and practices.

Appropriations Act, § 350(1)(B)(i)-(ix).

more exhaustive than those proposed by FMCSA.<sup>135</sup> Because no applications could be approved until FMCSA enacted regulations,<sup>136</sup> FMCSA began to modify the previously proposed rules<sup>137</sup> and prepared an EA for the Application and Safety Monitoring Rules pursuant to NEPA requirements.<sup>138</sup>

In preparing the EA, FMCSA assumed, even while noting that no

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135. *Dep't of Transp.*, 124 S. Ct. at 2211. These conditions extended to appropriations for Fiscal Years 2003 and 2004. *Id.* These requirements included:

Safety exams by the DOT of all Mexican motor carriers before they are granted conditional operating authority, [a] full safety compliance review, with a satisfactory rating, before any Mexican motor carrier is granted permanent operating authority, [f]ederal and state inspectors at the border to electronically verify the validity of drivers' licenses, [a]ll Mexican motor carriers, granted authority to operate in the United States, to undergo safety inspections at least every 90 days, [t]he 10 highest volume border crossings to be equipped with weigh-in motion systems, [t]he Department of Transportation to issue final safety-related regulations and policies, [and] [t]he DOT Inspector General to conduct a follow-up review at least 180 days following the first review cited above and then annually thereafter.

Joint Council 7, News, *Congress Acts to Restrict Cross Border Trucking*, at <http://www.Teamstersjc7.org/congress%20acts.htm> (last visited Mar. 7, 2005) [hereinafter Joint Council 7].

Furthermore, the Appropriations Act prohibited the following:

Mexican motor carriers from crossing into the United States at any border crossing where a certified motor carrier safety inspector is not on duty, [v]ehicles that are owned or leased by a Mexican motor carrier, and that carry hazardous materials to operate beyond the commercial zone, until Mexico initiates a criminal-background-checks program for drivers carrying hazmat, [and] [a]ny Mexican motor carrier from operating beyond the commercial zone until the Department of Transportation Inspector General first conducts a comprehensive review of the DOT's ability to ensure safety on U. S. Highways.

*Id.*

136. Section 350 of the Appropriations Act specified that until FMCSA enacted these regulations, "no funds appropriated under the Appropriations Act could be obligated or expended to review or to process any application by a Mexican motor carrier for authority to operate in the interior of the United States . . ." *Dep't of Transp.*, 124 S. Ct. at 2211. These conditions extended to appropriations for Fiscal Years 2003 and 2004. *Id.*

137. *See Pub. Citizen*, 316 F.3d at 1013.

138. *Dep't of Transp.*, 124 S. Ct. at 2212.

motor carriers could operate without the regulations, that the volume of trade between Mexico and the United States would not be affected by its issuance of regulations.<sup>139</sup> The EA considered the environmental effects of the regulations in the context of three different scenarios: first, “where the President did not lift the moratorium;” second, “where the President” did lift the moratorium “but where . . . FMCSA did not issue any new regulations;”<sup>140</sup> and third, “where the President . . . modif[ied] the moratorium and where FMCSA . . . adopt[ed] the proposed regulations.”<sup>141</sup> FMCSA determined that the influx of Mexican motor carriers into the United States would not be a result of the issuance of FMCSA regulations, but of the President’s lifting of the moratorium.<sup>142</sup> Therefore, FMCSA did not deem it necessary to evaluate the impact the Mexican motor carriers would have on the environment.<sup>143</sup> The EA focused on FMCSA’s proposed safety and application regulations and the potential environmental impact those regulations would create,<sup>144</sup> and concluded that the effects were minor and could be mitigated or avoided.<sup>145</sup> Because FMCSA concluded the regulations created no significant environmental impact, a FONSI was issued on the same day as the EA.<sup>146</sup>

On March 19, 2002, FMCSA issued the two interim rules,<sup>147</sup>

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139. *Id.*

140. *Id.* at 2211. Legally speaking, this scenario was not even possible. *Id.*

141. *Id.*

142. *See id.* at 2212.

143. *Id.*

144. *See id.* The “environmental effects” considered “were those likely to arise from the increase in the number of roadside inspections of Mexican trucks and buses due to the proposed regulations.” *Id.* Note that the EA evaluated only the environmental effects likely to arise from the regulations themselves and their enforcement, and did not consider the effects of the entry and operation of Mexican motor carriers in general.

145. The effects noted in the EA included “slight increase in emissions, noise from the trucks, and possible danger to passing motorists.” *Id.* FMCSA concluded that these effects would be “offset” by the reduction of trucks resulting from the new safety regulations. *Id.*

146. *Id.*

147. Three interim rules were actually published on March 19, 2002. The Safety and Application Rules were joined by the Certification Rule, which, although also challenged by Public Citizen, was not discussed by the Supreme Court. *See Public Citizen*, 316 F.3d at 1014.

which were published in the Federal Register,<sup>148</sup> as amended to satisfy the Appropriations Act, delaying the effective date to allow for public comment.<sup>149</sup> In the regulatory preambles, FMCSA claimed it complied with the NEPA, relying on the EA and the FONSI, and the CAA, relying on threshold emissions levels.<sup>150</sup> However, national and international trucking alliances (the Teamsters), various environmental groups, and Public Citizen challenged the FMCSA's compliance with both NEPA and the CAA on May 2, 2002 by filing a petition seeking judicial review of the regulations.<sup>151</sup> Public Citizen is self-described as:

[A]n organization whose "members include residents who reside along the Mexican border area in the United States and will be negatively affected by increases in emissions" from Mexico-domiciled trucks if they are allowed into this country. This includes "2,567 . . . members [who] live in greater Los Angeles, 1,205 [who] live in the San Diego area, . . . [and] 1,094 [who] live in the greater Houston area."<sup>152</sup>

In November 2002, to comply with the terms of NAFTA, President Bush lifted the moratorium to allow cross-border busing and truck services by Mexico-domiciled motor carriers, but retained the moratorium on permits allowing services between points within the United States, thereby maintaining some limits on the Mexican motor carriers' United States operations.<sup>153</sup> The lifting of the

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148. *Id.*

149. The effective date on these rules was delayed until May 3, 2002. *Id.*

150. *See id.* The FMCSA determined that, under the CAA, a "conformity review" of the regulations was not required "because the increase in emissions from these regulations would fall below the Environmental Protection Agency's (EPA's) threshold level needed to trigger such a review." *Id.*

151. *Dep't of Transp.*, 124 S. Ct. at 2212. *See also Pub. Citizen*, 316 F.3d at 1014. A second petition was filed on May 14, 2002 challenging the Certification Rule. *Id.* at 1014. The Ninth Circuit Court of Appeals only considered the standing of Public Citizen in its analysis of standing. *Id.* at 1015-16.

152. *Id.* at 1015. The court noted that these areas are the "most likely to be affected by increased truck traffic from Mexico." *Id.*

153. Memorandum of November 27, 2002, 67 Fed. Reg. 71, 795 (Nov. 27, 2002). *See also Pub. Citizen*, 316 F.3d at 1014.



moratorium, along with FMCSA's issuance of mandatory regulations, made it possible for Mexican motor carriers to apply for and commence cross-border operations.<sup>154</sup>

The United States Court of Appeals for the Ninth Circuit granted the petitions for review, and determined that FMCSA acted in an arbitrary and capricious manner in not preparing an Environmental Impact Statement, thereby setting aside the regulations.<sup>155</sup> According to the court, because the regulations were environmentally significant, FMCSA was required to consider the environmental effects the regulations would cause.<sup>156</sup> The court held that FMCSA's EA failed to address the impact that the President's lifting of the moratorium would have on the environment, which was an impact that NEPA required FMCSA to consider.<sup>157</sup> Regarding the CAA, the court held that FMCSA was attempting to undermine the EPA through its determination that its rulemaking actions were exempt from the CAA requirements because they resulted in de minimus emissions, and furthermore, the conclusion that the emissions would be de minimus was flawed because it was based on FMCSA's insufficient EA.<sup>158</sup> The court then remanded the case to the DOT to prepare a full EIS and to evaluate regulation conformity with the

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154. See *Pub. Citizen*, 316 F.3d at 1019.

155. See *id.* at 1032.

156. The court noted that FMCSA should have considered the long-term effects that the regulations would have on the areas closest to the border. *Id.* at 1024.

157. The court scoffed at FMCSA's reasoning in not considering the effects when it stated: "[FMCSA]'s analysis goes on to suggest that even if such an increase might occur, its effects would not require consideration because it would be a result of presidential rescission of the moratorium, not the regulations themselves. This novel parsing of the regulations' effects fails to meet NEPA standards." *Id.* at 1022. The lifting of the moratorium was a "reasonably foreseeable" occurrence and FMCSA was therefore required to consider its effects because NEPA requires "that environmental effects of government action be considered 'to the fullest extent possible.'" *Id.* (citing 42 U.S.C. § 4332 (2004)).

158. See *id.* at 1030-32. The Court noted that the appellate court rejected FMCSA's conclusion that the regulations were in conformity with the CAA because that conclusion "reflected the 'illusory distinction between the effects of the regulations themselves and the effects of the presidential recession of the moratorium on Mexican truck entry.'" *Dep't of Transp.*, 124 S. Ct. at 2213 (quoting *Pub. Citizen*, 316 F.3d at 1030).

CAA.<sup>159</sup> FMCSA then filed a petition for certiorari to the United States Supreme Court for review of the Ninth Circuit's decision.

#### IV. ANALYSIS

##### A. *Background*

Justice Thomas delivered the unanimous opinion for the Court.<sup>160</sup> He begins his analysis by briefly explaining the statutory history leading up to this case with a discussion of NEPA, the CAA, and the creation of the FMCSA.<sup>161</sup> Borrowing language from *Robertson*, Justice Thomas describes NEPA as a statute that prescribes procedural requirements, but does not "mandate particular results."<sup>162</sup> Justice Thomas then briefly details NEPA's requirements for preparing an EIS, an EA, and a FONSI, clarifying when each is to be prepared.<sup>163</sup> In discussing the CAA, Justice Thomas describes the history of the CAA and significant amendments, such as the 1970 conformity requirement, that affect this case.<sup>164</sup> Justice Thomas then describes the creation of FMCSA and its responsibilities as

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159. *Pub. Citizen*, 316 F.3d at 1032.

160. *Dep't of Transp.*, 124 S. Ct. at 2209-19.

161. *See id.* at 2209-10.

162. *Id.* at 2209 (quoting *Robertson*, 490 U.S. at 350). Justice Thomas states "NEPA establishes a 'national policy [to] encourage productive and enjoyable harmony between man and his environment,' and was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Id.* (quoting 42 U.S.C. § 4321).

163. *Id.* at 2209-10 (citing 40 C.F.R. §§ 1500.3, 1501.4(a)-(b), 1508.9(a), 1501.4(e), and 1508.13 (2005)).

164. *Id.* at 2210. Justice Thomas describes the conformity amendment as a safeguard of the CAA:

The definition of "conformity" includes restrictions on, for instance, "increas[ing] the frequency or severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard . . . in any area" [citation omitted]. These safeguards prevent the Federal Government from interfering with the States' abilities to comply with the CAA's requirements.

*Id.* (quoting 42 U.S.C. § 7506(c)(1)(B) (2004)).

authorized by statute.<sup>165</sup> Although FMCSA has many responsibilities such as “ensur[ing] safety, establishing minimum levels of financial responsibility for motor carriers, and prescribing federal standards for safety inspections of commercial motor vehicles,” Justice Thomas notes that FMCSA has “limited discretion” when it comes to registration<sup>166</sup> and lacks “statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.”<sup>167</sup>

Justice Thomas continues his analysis by explaining the factual and procedural backgrounds of the case.<sup>168</sup> Beginning with the 1982 moratorium, Justice Thomas explains the history of the preclusion of Mexican motor carriers and the role NAFTA played in the modification of the moratorium.<sup>169</sup> Justice Thomas then continues to describe FMCSA’s actions in creating and publishing the new Application and Safety Monitoring Rules and FMCSA’s preparation of an EA and a FONSI, and FMCSA’s reliance on those documents in its determination of compliance with NEPA and the CAA.<sup>170</sup> Justice Thomas concludes his discussion of the facts with a brief summary of the Ninth Circuit Court of Appeals proceedings and holding.<sup>171</sup>

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165. *Id.* at 2210.

166. *Id.* (internal citations omitted). *See also supra* notes 35-36 and accompanying text.

167. *Dep’t of Transp.*, 124 S. Ct. at 2210. Because FMCSA has only the power and authority to either grant or deny registration applications based on safety, FMCSA has no control over other aspects of the applicants’ qualifications.

168. *Id.* at 2210-13.

169. *Id.* at 2210-11. Justice Thomas describes the 1982 moratorium and the Presidential extensions of the moratorium. Justice Thomas notes that the moratorium was partially lifted in 1994 when NAFTA was implemented to allow for some Mexican bus services, but that the moratorium was not lifted as quickly as NAFTA prescribed. *Id.* The arbitration panel proceedings and President Bush’s final decision to modify the moratorium and allow new regulations to govern the operation of Mexican motor carriers were also discussed. *Id.* at 2211. *See also* notes 48-56 and accompanying text.

170. *Dep’t of Transp.*, 124 S. Ct. at 2211-12. *See also supra* notes 132-149 and accompanying text.

171. *Dep’t of Transp.*, 124 S. Ct. at 2212-13. *See also supra* notes 155-59 and accompanying text.

### B. Compliance with NEPA

In beginning his application of the facts to the law, Justice Thomas notes that the Court will only set aside FMCSA's decision not to prepare an EIS if the Court determines that FMCSA's decision was "arbitrary and capricious."<sup>172</sup> Public Citizen argues that the FMCSA acted in an arbitrary and capricious manner by issuing a FONSI that was based on a flawed EA.<sup>173</sup> In response to this argument, Justice Thomas first points out that NEPA requires an EIS to be prepared only where the agency "will be undertaking 'a major Federal actio[n],' which 'significantly affect[s] the quality of the human environment.'"<sup>174</sup> A "major Federal action" is an action with potentially major effects that are "potentially subject to Federal control and responsibility."<sup>175</sup> Justice Thomas defines two different types of effects that can cause an action to be deemed a "major Federal action": "'(a) Direct effects, which are caused by the action and occur at the same time and place,' and '(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.'"<sup>176</sup> Consequently, Justice Thomas concludes that if the increase in Mexican motor carriers and emissions was not "an effect of FMCSA's issuance of the Application and Safety Monitoring Rules," then FMCSA was not required by NEPA to address the issues in the EA, and "FMCSA's issuance of a FONSI cannot be arbitrary and capricious."<sup>177</sup>

Before answering the question of whether or not the increase in Mexican motor carriers and emissions was an effect of FMCSA's rules, Justice Thomas points out that Public Citizen has forfeited the

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172. *Dep't of Transp.*, 124 S. Ct. at 2213. Justice Thomas states: "An agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)).

173. *Id.* Public Citizen claims that the EA was flawed because FMCSA did not analyze the effects the increased operation of Mexican motor carriers would have on the environment, basically asserting that an EIS should have been prepared. *Id.*

174. *Id.* (quoting 42 U.S.C. § 4332(2)(C)).

175. *Id.* (quoting 40 C.F.R. § 1508.18).

176. *Id.* (quoting 40 C.F.R. § 1508.8).

177. *Id.*

opportunity to object to FMCSA's EA on the basis that the EA failed to address alternatives to issuing the regulations.<sup>178</sup> Because Public Citizen did not mention any rulemaking alternatives and did not suggest that FMCSA consider alternatives, FMCSA had no opportunity to evaluate or implement any alternatives to the issued regulations.<sup>179</sup> Although blatant flaws in an ES are not required to be declared to maintain the opportunity to oppose proposed actions, there are no blatant flaws here.<sup>180</sup> Furthermore, any possible alternatives, such as indirectly regulating emissions through more rigorous inspection or application processes, would most likely not make a significant impact on the air quality, illustrating the weak connection between "environmental harms" and the "enforcement of motor carrier safety."<sup>181</sup>

Justice Thomas then considers Public Citizen's remaining complaint: "[The EA] did not take into account the environmental effects of increased cross-border operations of Mexican motor carriers."<sup>182</sup> Public Citizen argues that FMCSA was required to consider the environmental effects because Mexican motor carriers were prohibited from operating within the United States until FMCSA issued its regulations.<sup>183</sup> FMCSA could not, under the terms of Section 350 of the Appropriations Act, expend any funds with regards to the applications unless and until the FMCSA issued the Application and Safety Monitoring Rules.<sup>184</sup> Therefore, Public Citizen contends that FMCSA's issuance of the regulations would

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178. *Id.* at 2213-14.

179. *Id.* When challenging compliance with NEPA, persons "must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions' in order to allow the agency to give the issue meaningful consideration." *Id.* at 2213 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978)).

180. *Id.* at 2214.

181. *Id.* Justice Thomas notes that even if such alternatives would be effective, FMCSA's limited statutory mandates might not allow the agency to "impose on Mexican carriers standards beyond those already required in its proposed regulations." *Id.*

182. *Id.*

183. *Id.*

184. *Id.* In following Public Citizen's logic, Justice Thomas states: "This expenditure bar makes it impossible for any Mexican motor carrier to receive authorization to operate within the United States until FMCSA issued the regulations challenged here." *Id.*

cause the entry of Mexican motor carriers and accompanying emissions, making the entry of the Mexican motor carriers “reasonably foreseeable,” which would require FMCSA to consider the effects in the EA.<sup>185</sup> Justice Thomas, however, points out the flaw in Public Citizen’s logic: “FMCSA has no ability to countermand the President’s lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States.”<sup>186</sup> While the Appropriations Act restricted FMCSA’s authority to authorize registration of Mexican motor carriers until regulations were created, none of FMCSA’s statutory mandates were in any way modified.<sup>187</sup> In fact, FMCSA was still required to approve registration to anyone in compliance with the registration requirements, and was only prevented from approving the registration of qualified Mexican motor carriers by the moratorium.<sup>188</sup> Justice Thomas notes that had FMCSA denied authorization to a qualified Mexican motor carrier after the moratorium was lifted, FMCSA would have been in violation of its authorizing statute.<sup>189</sup> In a footnote, Justice Thomas responds to

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185. *Id.*

186. *Id.* Justice Thomas’ reasoning is similar to the Court’s logic in *Aberdeen & Rockfish R.R. Co.*, where the Court noted that the issue of recyclable rates specifically was not before the ICC at the time of EIS preparation, and, furthermore, the ICC did not have exclusive control over the rates the railroads assigned to recyclables as opposed to the rates assigned to virgin materials. Therefore, the fact that the ICC’s EIS did not fully consider the environmental effects of the rate increase in regards to recyclables did not make the EIS inadequate under NEPA. See *Aberdeen & Rockfish R.R. Co.*, 422 U.S. at 323-24; *supra* notes 71-75 and accompanying text.

187. *Dep’t of Transp.*, 124 S. Ct. at 2214.

188. *Id.* Justice Thomas states:

FMCSA remains subject to the mandate of 49 U.S.C. § 13902(a)(1), that FMCSA “shall register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with” the safety and financial responsibility requirements established by the Department of Transportation. Under FMCSA’s entirely reasonable reading of this provision, it must certify *any* motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility contained in DOT regulations.

*Id.* at 2214-15 (emphasis in original).

189. *Id.* at 2215. FMCSA’s authorizing statute is 49 U.S.C. 13902(a)(1).

Public Citizen's contention that Congress backed the court of appeals' decision when it reenacted Section 350 by asserting that this case is about NEPA and CAA interpretations, not Section 350 interpretation.<sup>190</sup> Regarding NEPA and the CAA, the legal issues disputed in this case, "Congress has been entirely silent."<sup>191</sup> Justice Thomas then states that since it is feasible for FMCSA to comply with both Section 350 of the Appropriations Act and Section 13902(a)(1), then FMCSA must comply with both statutory mandates.<sup>192</sup>

Therefore, Public Citizen must rely on "but for" causation, which is insufficient under NEPA to make an agency responsible for a particular effect.<sup>193</sup> This particular causation occurs when an agency lacks authority to prevent an environmental effect from occurring, yet agency action is still considered the cause of the environmental effect.<sup>194</sup> NEPA requires more than but-for causation – NEPA requires a "reasonably close causal" connection "between the environmental effect and the alleged cause."<sup>195</sup> Here, the causal

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190. *Dep't of Transp.*, 124 S. Ct. at 2217 n.4. After the court of appeals decision, Congress "reenacted [section] 350 in two appropriations bills." Justice Thomas notes that Congress usually ratifies a court's statutory interpretation by reenacting that statute without modification. *Id.* (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

191. *Id.* at 2217. The requirements of section 350 are not disputed in this case and were not disputed in the case at the court of appeals level. *Id.*

192. *Id.* at 2215. In explaining FMCSA's obligation to comply with both statutes, Justice Thomas states how this can be accomplished: "It can issue the application and safety inspection rules required by [section] 350, and start processing applications by Mexican motor carriers and authorize those that satisfy [section] 13902(a)(1)'s conditions." *Id.* Justice Thomas also notes that if it were not possible for FMCSA to comply with both statutes, there would be "an irreconcilable conflict of laws" and section 350, being the later enacted statute, would most likely override section 13902(a). *Id.*

193. *Id.*

194. *Id.* Here, the environmental effect is the increased emissions and the agency action is the issuance of regulations. FMCSA has no authority to prevent the increased emissions, yet FMCSA's issuance of regulations is deemed to be the cause of such emissions.

195. *Id.* (quoting *People Against Nuclear Energy*, 460 U.S. at 774). Justice Thomas uses language from *People Against Nuclear Energy* and states that in order to determine whether an agency's actions are the cause of an environmental effect "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible

connection between the cause (the regulations) and the effect (the entry of Mexican motor carriers) is insufficient to place responsibility for the effects on FMCSA.<sup>196</sup> Under NEPA, an agency need only prepare an EIS if the agency determines, “based on the usefulness of any new potential information to the decisionmaking process,” that an EIS is necessary to assist in making a decision.<sup>197</sup> This principle is known as the “rule of reason” and it ensures that an EIS is prepared only if it would serve a purpose.<sup>198</sup> NEPA requires an EIS for two purposes:

First, “[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts” [internal citation omitted]. Second, it “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”<sup>199</sup>

Here, neither purpose would require that FMCSA prepare an EIS considering the environmental effects of the entry of Mexican motor carriers because FMCSA has no authority to prevent the entry of Mexican motor carriers.<sup>200</sup> Since FMCSA has no authority to

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for an effect and those that do not.” *Id.* (quoting *People Against Nuclear Energy*, 460 U.S. at 774 n.7).

196. *Id.* at 2215.

197. *Id.*

198. *Id.* Justice Thomas states that “[w]here the preparation of an EIS would serve ‘no purpose’ in light of NEPA’s regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS.” *Id.* Obviously, Justice Thomas is stressing the point that NEPA does not require agencies to create an EIS for every decision the agency is faced with making; rather, an EIS is necessary only where it would assist the agency in sorting out new information that would help the agency with the decision-making process.

199. *Id.* at 2215-16 (quoting *Robertson*, 490 U.S. at 349).

200. *Id.* at 2216. Regarding the first purpose, it is irrelevant to FMCSA what the detailed information regarding the environmental effects of Mexican motor carrier entry entails because FMCSA must authorize registration for anyone in compliance with the registration requirements. Regarding the second purpose, even if the “larger audience” does become informed of the potential environmental effects as a result of an EIS preparation, FMCSA most likely will still lack



preclude Mexican motor carrier operation, considering the environmental impact of such operation “would have no effect on FMCSA’s decisionmaking.”<sup>201</sup> Justice Thomas then stresses the informational purpose of an EIS by stating that an EIS serves to “‘giv[e] the public the assurance that the agency ‘has indeed considered environmental concerns in its decisionmaking process,’ [internal citation omitted] and, perhaps more significantly, provid[e] a springboard for public comment’ in the agency decisionmaking process itself,’” and maintains that that purpose would not be served here.<sup>202</sup> Regardless of the level of public awareness of the cross-border trucking issue and its effects, public input cannot impact FMCSA’s decisionmaking in this case because FMCSA is so limited in its exercise of authority.<sup>203</sup> Therefore, the “rule of reason” would dictate that an EIS is not required, for the entry of Mexican motor carriers is due to the actions of those other than the FMCSA.<sup>204</sup> In fact, the effect (entry of Mexican motor carriers) is the result of the President’s lifting of the moratorium, Congress’s grant of authority to the President to do so, and Congress’s limitation of FMCSA’s authority.<sup>205</sup> After establishing that NEPA’s purposes in creating an

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authority to act on whatever suggestions the “larger audience” may have. *See id.*

201. *Id.* Justice Thomas again asserts that FMCSA “simply lacks the power to act on whatever information might be contained in the EIS,” again demonstrating his belief that FMCSA’s preparation of an EIS is unnecessary. *Id.*

202. *Id.* (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983)).

203. *Id.* at 2216. Justice Thomas notes the statutory purpose of NEPA is to assist the government and public officials in making excellent decisions that have a positive effect on the environment, and that purpose is lost on a situation like this, making preparation of an EIS futile. *Id.* (citing 40 C.F.R. §§ 1500.1(c), 1502.1 (2003)).

204. *Id.* at 2216. The “rule of reason” would not force an agency to prepare an EIS where the agency has no control over the result. The FMCSA cannot refuse to authorize registration, so the legally relevant cause of the entry of Mexican motor carriers is the actions of the President and Congress. *Id.*

205. *Id.* During oral argument, Justice Scalia presented to Public Citizen’s counsel the following hypothetical:

Suppose there was a “mad millionaire” who applied for a broadcasting license from the Federal Communications Commission and threatened to unleash millions of trucks across the United States if he did not get it. The mad millionaire’s actions, like the president’s actions, would be the cause of the increased emissions. Would the FCC be required to file an

EIS would not be served in this case, Justice Thomas points out that Public Citizen is now left with arguing for an EIS solely for informational purposes that would have no effect on FMCSA's decisionmaking process.<sup>206</sup> This is not what NEPA intended when it imposed the EIS requirement.<sup>207</sup>

Justice Thomas then discusses the "cumulative impact" regulation and its relation to the FMCSA's situation.<sup>208</sup> Cumulative impact is the total impact of the agency's action, including the agency's direct action and the reasonably foreseeable actions of others that have affected, either directly or indirectly, the agency's action.<sup>209</sup> FMCSA, therefore, was required to consider the proposed Application and Safety Monitoring Rules in the context of the reasonably foreseeable actions of others, such as the President's lifting of the moratorium, and the "incremental impact" those rules would have as a result.<sup>210</sup> FMCSA did comply with the "cumulative impact" regulation, as FMCSA's EA considers the impact the lifting of the moratorium, and the accompanying increase in Mexican motor carriers, would have on its proposed safety rules.<sup>211</sup> Justice Thomas notes that, while FMCSA was required to consider the impact of associated actions, FMCSA was not required to treat the lifting of the

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environmental impact study before denying the application?

Michael Kirkland, *Analysis: Mexican Trucks, Clean Air*, United Press International (April 21, 2004).

Counsel for Public Citizen responded that the FCC might be required to do so (as was expected considering that this hypothetical clearly paralleled the facts of the present case). Justice Scalia scoffed at this response and countered with a simple statement: "That's absurd." *Id.*

206. *Dep't of Transp.*, 124 S. Ct. at 2216 n.2.

207. *Id.* Such a purpose "overlooks NEPA's core focus on improving agency decisionmaking." *Id.* (citing 40 C.F.R. §§ 1500.1, 1500.2, 1502.1 (2003)).

208. *Id.* at 2216.

209. *Id.* More succinctly defined, cumulative impact is: "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* (quoting 40 C.F.R. § 1508.7 (2003)).

210. *Id.*

211. *Id.* FMCSA's EA considered three scenarios: first, where the moratorium remained in place; second, where the moratorium was lifted but no regulations were issued; and third where the regulations were adopted and the moratorium was modified to allow Mexican motor carriers. *Id.* at 2211. *See also supra* notes 140-41 and accompanying text.

moratorium and its consequences as the result of the issuance of the Application and Safety Monitoring Rules.<sup>212</sup> Justice Thomas remarks in passing that the other errors alleged by Public Citizen and noted by the court of appeals are irrelevant given that FMCSA was not required to consider “the increased cross-border operations of Mexican motor carriers.”<sup>213</sup>

In conclusion of his NEPA discussion, Justice Thomas states the Court’s holding: “Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”<sup>214</sup> Therefore, neither NEPA nor CEQ requires the agency to “consider these effects in its EA when determining whether its action is a ‘major Federal action.’”<sup>215</sup> Justice Thomas then reasons that since FMCSA lacked authority and discretion to prevent Mexican motor carriers from entering the United States, FMCSA was, therefore, not required to consider the environmental effects caused by that entry in its EA.<sup>216</sup>

### C. Compliance with CAA

Justice Thomas begins his CAA analysis by noting that Federal agencies are sometimes required to make a conformity determination before taking action to ensure that the action is consistent with the CAA.<sup>217</sup> No conformity determination, however, is required of the agency if the action would not cause emissions exceeding the prescribed “threshold emission rates.”<sup>218</sup> The relevant section provides: “a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or

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212. *Dep’t of Transp.*, 124 S. Ct. at 2216-17.

213. *Id.* at 2217 n.3.

214. *Id.* at 2217.

215. *Id.*

216. *Id.* at 2216-17.

217. *Id.* at 2217. An agency cannot take action “that violates an applicable State air-quality implementation plan.” *Id.* (citing 42 U.S.C. § 7506 (c)(1), 40 C.F.R. § 93.150). Therefore, a conformity determination must sometimes be undertaken by the agency to ensure compliance. *Id.* (citing 40 C.F.R. §§ 93.150(b), 93.153(a)-(b)).

218. *Id.* These threshold emissions rates are set forth in 40 C.F.R. § 93.153(b). *Id.*

maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.”<sup>219</sup> Direct emissions are covered emissions “caused or initiated by the Federal action and occur at the same time and place as the action.”<sup>220</sup> Indirect emissions, on the other hand, are covered emissions that are “reasonably foreseeable” but are removed in time and/or place from the Federal action and are emissions that the agency can and will control.<sup>221</sup> An emission is caused by the agency action if “the ‘emissions . . . would not . . . occur in the absence of the Federal action.’”<sup>222</sup>

FMCSA determined that the increased inspections of Mexican motor carriers as a result of the proposed regulations would not create emissions exceeding the threshold levels prescribed by statute, “and therefore concluded that the issuance of its regulations would comply with the CAA.”<sup>223</sup> This CAA conformity determination did not include potential emissions caused by the increased presence of Mexican motor carriers in the United States.<sup>224</sup> Justice Thomas establishes that, while the issuance of the regulations is a “but for” cause of the entry of Mexican motor carriers, the resulting emissions are neither direct nor indirect.<sup>225</sup> The emissions are not direct because the resulting emissions will occur in a place and time

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219. 40 C.F.R. § 93.153(b) (2004).

220. *Dep’t of Transp.*, 124 S. Ct. at 2217-18 (quoting 40 C.F.R. § 93.152).

221. *Id.* at 2218 (quoting 40 C.F.R. § 93.152). These are emissions that the agency “can practicably control and will maintain control over due to a continuing program responsibility.” 40 C.F.R. § 93.152. The Court discussed indirect effects from a psychological standpoint in *Metropolitan Edison Co. v. People Against Nuclear Energy*, where it ruled that the agency did not have to consider such effects in its environmental evaluation, but has not before addressed the issue in this type of context. See Katharine G. Shirey, 2003 *Ninth Circuit Environmental Review: International Implications: The Elephant in the Living Room in Public Citizen v. Department of Transportation*, 34 ENVTL. L. 961, 973 (2004). See also *supra* notes 79-90 and accompanying text.

222. *Dep’t of Transp.*, 124 S. Ct. at 2218 (quoting 40 C.F.R. § 93.152). Therefore, “but for” causation is sufficient to establish causation in determining conformity. See *id.*

223. *Id.* at 2217.

224. *Id.* Justice Thomas compares this exclusion to FMCSA’s exclusion of this same effect in its NEPA analysis. *Id.*

225. *Id.* at 2218.

different than that of the issuance of the regulations.<sup>226</sup> The emissions are not indirect because, while the emissions are removed in both time and place from the issuance of the regulations, the FMCSA cannot maintain control over them through any means.<sup>227</sup> FMCSA lacks the authority to prevent registration and entry of Mexican motor carriers, and furthermore would lack authority to deny entry based on high emissions or regulate vehicle emissions once entry is gained.<sup>228</sup> Justice Thomas highlights the fact that FMCSA also lacks control over registered Mexican motor carriers: “FMCSA cannot determine whether registered carriers actually will bring trucks into the United States, cannot control the routes the carriers take, and cannot determine what the trucks will emit.”<sup>229</sup> Therefore, if any of FMCSA’s actions caused a reduction in emissions, it “would be mere happenstance.”<sup>230</sup> Since FMCSA’s proposed regulations did not lead to either direct or indirect emissions, FMCSA did not violate the CAA by failing to consider the emissions from Mexican motor carriers in its determination of whether or not “to perform a full conformity determination.”<sup>231</sup>

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226. *Id.*

227. *Id.* Justice Thomas supports this contention by citing to an EPA document that states that the EPA “prohibitions and responsibilities” were not intended to extend to necessary agency decisions that produced unavoidable consequences over which the agency maintained no control. *Id.* The relevant language reads:

The EPA does not believe that Congress intended to extend the prohibitions and responsibilities to cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity, either because there is no continuing program responsibility or ability to practicably control. For that reason, EPA believes it is not reasonable to conclude that the Federal agency “supports” that later activity, within the meaning of section 176(c) of the Act.

*Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63, 214 (Nov. 30, 1993).

228. *Dep’t of Transp.*, 124 S. Ct. at 2218.

229. *Id.*

230. *Id.*

231. *Id.*

### *D. Opinion Conclusion*

FMCSA's failure to consider the environmental effects of cross-border trucking in its EA did not violate NEPA and its determination that a full conformity review was unnecessary did not violate the CAA.<sup>232</sup> Therefore, because the Court determined that FMCSA did not violate NEPA or the CAA, Public Citizen's challenges to FMCSA's procedures in issuing the Application and Safety Monitoring Rules were rejected.<sup>233</sup> Justice Thomas concluded the Court's opinion by ordering reversal of the order of the Ninth Circuit Court of Appeals and remanding the case back to that court for further determination consistent with the Court's analysis.<sup>234</sup>

## V. IMPACT

### *A. Social Impact*

#### 1. American Trucking Industry (the Teamsters)

The American trucking industry has been, and will continue to be, greatly impacted by the Court's decision. While the Teamsters are not opposed to sharing the roads with the Mexican motor carriers, they are opposed to the notion that the two groups will not be treated equally and held to the same standards.<sup>235</sup>

It has been estimated that only "about half of all Mexican trucks crossing the U.S. border comply with current emissions standards."<sup>236</sup> This implies that while all American trucks must comply with emissions standards, only half of the Mexican motor carriers will be forced to comply. This issue will prove increasingly burdensome on the American truckers in 2007 when the emissions

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232. *Id.*

233. *Id.* at 2218-19.

234. *Id.* at 2219.

235. Joint Council 7, *supra* note 135. Labor groups feel that under NAFTA, all countries should have to comply with pollution regulations equally. Justin Scheid, *Court Rules Mexican Truck Operations Must Conform to State, Local Laws; U.S. Court of Appeals; Environmental Considerations*, NATION'S CITIES WKLY., Feb. 10, 2003, No. 6, vol. 6, at 26.

236. Scheid, *supra* note 235, at 6.

standards will become even stricter.<sup>237</sup> Many Mexican trucks, however, are still believed to use a diesel fuel that is the equivalent of “bunker” oil, which, if true, means that their operation poses a serious threat to the environment (far more serious than the threat posed by their American counterparts).<sup>238</sup> Furthermore, since the lower quality diesel lacks the degree of refinement the diesel American trucks will be required to use, the American trucking industry will be operating at costs much higher than the Mexican motor carriers.<sup>239</sup> These issues will linger until there is some regulation (beyond the basic safety regulation of FMCSA) of Mexican motor carriers operating in the United States.

## 2. United States relations with Mexico

Although the Court’s opinion failed to fully analyze NAFTA’s role in the case, the Court’s decision has an obvious impact on the United States’ international relations. Mexico had a very real interest in the Court proceedings because the Mexican economy benefits from being able to engage in trade within the United States – undoubtedly one of the reasons Mexico agreed to enter into NAFTA with the United States in the first place. In fact, Mexico claimed that the moratorium had cost the country more than two billion dollars.<sup>240</sup> By initiating the arbitration panel proceedings, Mexico demonstrated its interest in the issue,<sup>241</sup> and continued demonstrating its interest by maintaining a presence at, and providing extensive media coverage of, the Supreme Court hearings.<sup>242</sup> The Court’s decision, therefore, is a victory for Mexico, and undeniably, will serve to improve America’s relations with its southern neighbor.

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237. Teamsters Local 70 Online, *Local 70 Takes Cross-Border Trucking to Court*, at <http://www.teamsterslocal70.org/local%2070%20takes%20cross-border.htm>. In 2007, American trucks will be required to run on ultra-low sulfur diesel fuel. *Id.*

238. Joint Council 7, *supra* note 135.

239. *Id.*

240. Anne Gearan, *Supreme Court: Skip Study, Let Mexican Trucks Roll*, THE LEGAL INTELLIGENCER, June 8, 2004, Vol. 230, No. 110, at 4.

241. *See supra* notes 52-54 and accompanying text.

242. Kirkland, *supra* note 205.

### 3. The American Public

The Government estimated that the lifting of the moratorium would allow at least 34,000 Mexican motor carriers into the United States.<sup>243</sup> It has been pointed out that since the Court determined that FMCSA was not required to prepare an EIS, “the actual impact of these trucks on the nation’s air quality remains unknown.”<sup>244</sup> That number was an initial estimation. In reality, FMCSA’s statistics demonstrate that over 76,000 basic safety inspections on carriers domiciled in Mexico were performed in 2003 alone.<sup>245</sup> Because these numbers were released before the Court’s decision in *Department of Transportation*, so it would not be surprising if the statistics for 2004 (not yet released) show a significant increase. Although the actual impact of the increased emissions caused by Mexican motor carriers is unknown, it has been speculated that the states closest to the U.S.-Mexico border (Texas, California, and Arizona) will be unduly burdened with increased smog.<sup>246</sup> In fact, air pollution in these states has already increased significantly as a result of the cross-border operations.<sup>247</sup> Considering that many of the cities located in these states already boast some of the highest pollution rates in the country,<sup>248</sup> this increase poses a significant threat, and, as

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243. Michael Bhargava, *In Brief: Supreme Court Allows Mexican Trucks To Enter the United States Without Environmental Impact Assessments*, 31 *ECOLOGY L.Q.* 719, 724 n.49 (2004) (citing David G. Savage & Marla Dickerson, *Ruling Lets in Mexican Trucks*, *L.A. TIMES*, June 8, 2004, at A1).

244. *Id.* at 724.

245. See Federal Motor Carrier Safety Administration, Analysis & Information Online, NAFTA Safety Stats, available at <http://www.ai.volpe.dot.gov/International/border.asp> (last visited on March 28, 2005).

246. *Local 70 Takes Cross-Border Trucking to Court*, *supra* note 237.

247. *Id.*

248. Many cities and states in the United States already struggle with CAA compliance and improving the “quality of life” for residents. See Scheid, *supra* note 235. Los Angeles, CA, San Diego, CA, Dallas, TX, and Houston, TX rank among the nation’s fifty most polluted cities. See *Environmental Defense*, Air in Your City, available at [http://www.environmentaldefense.org/cleanairforlife.cfm?subnav=aiyc\\_50cities](http://www.environmentaldefense.org/cleanairforlife.cfm?subnav=aiyc_50cities) (last visited March 28, 2005); Anita Manning, *California has the USA’s Worst Air Quality*, *USA TODAY*, May 1, 2002, at 6D, at <http://www.usatoday.com/news/health/2002-05-01-air-quality.htm>.



of yet, no remedy has been presented. On the other hand, the American public can rest assured that the executive branch of government is working hard to ensure that international bonds are being maintained and strengthened to promote good will towards America and its citizens, and that United States treaty obligations are being fulfilled.

### *B. Administrative Impact*

While Congress attempts to maintain the integrity of the environment through the creation of agencies and by legislatively mandating that the agencies evaluate the environmental impact of their actions, it also limits the extent of the agencies' authority in acting on those evaluations. Generally, Congress has given the DOT, specifically FMCSA, the authority to oversee highway safety by performing safety inspections and certain limited competence determinations, and to register and license vehicles.<sup>249</sup> If Congress intended for FMCSA to be responsible for the regulation of vehicle emissions, then it would have statutorily granted FMCSA more authority. As of yet, *Department of Transportation* has not had a distinct legislative impact in this area. Obviously, if emission regulation and enforcement is something that Congress feels FMCSA should be considering in its approval of vehicle registration, then Congress must modify and expand FMCSA's enabling statute. As demonstrated by the great public outcry elicited by the entrance of Mexican motor carriers, an expansion of FMCSA authority may be in order. Absent this type of Congressional action, FMCSA will continue to lack control over the effects of the newly registered Mexico-domiciled vehicles on the environment.

Because FMCSA's duties and obligations remain the same, the Court's decision in *Department of Transportation* has not significantly affected FMCSA. Although criticized by Teamsters in the trucking industry, environmentalists, and concerned citizens, there is little FMCSA can do at this time to remedy the negative environmental effects of increased cross-border trucking operations. The ruling in *Department of Transportation* reaffirms that FMCSA's primary duty is to register vehicles that are in compliance with the

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249. See *supra* notes 31-36 and accompanying text.

regulations.<sup>250</sup> Although emissions are obviously a concern for United States citizens, emissions are outside the realm of FMCSA's concerns, as noted by Justice Scalia when he stated that emissions issues "ha[ve] nothing to do with this agency's job as a safety regulator."<sup>251</sup>

While FMCSA is required to follow guidelines to ensure the safety of the vehicles it registers, FMCSA is not vested with the authority to deny registration based on broad environmental concerns, regardless of the validity of those concerns. The Court's decision in *Department of Transportation*, therefore, leads to the conclusion that the public's concerns regarding the emission of the Mexican motor carriers will remain unaddressed unless and until Congress expands DOT's, and thereby FMCSA's, authority. While the executive branch of government has performed some sort of EIS,<sup>252</sup> there is no indication that presidential action will extend beyond this initial step. That is to say, there is no indication that the President will take the necessary steps to enforce emissions regulation among the Mexican motor carriers, thereby leaving the concerns of interested parties unaddressed.

The Court's decision illustrates the limited extent of agency authority in relation to presidential authority. Because the actions of President Bush, and not the actions of FMCSA, were ultimately responsible for the increased volume of cross-border traffic, FMCSA

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250. See *supra* notes 188-89 and accompanying text. Although required to register anyone meeting registration requirements, the FMCSA maintains a NAFTA safety statistics database, where interested parties can view the following information regarding motor carriers domiciled in the United States, Mexico, or Canada with an active DOT number: general statistics (which includes Census, Inspection, Compliance Review, Traffic Enforcement, and Crash data and border crossing data by state and port of entry), program measures (which includes information on Roadside Inspections, Compliance Reviews, and Traffic Enforcement), and carrier safety performance (which includes a summary of crash data). Federal Motor Carrier Safety Administration, Analysis & Information Online, NAFTA Safety Stats, *supra* note 245.

251. Doug Abrahms, *Justices Question Agency's Role in Mexican Truck Case*, News from the Border, available at [http://www.thebta.org/syndicate/news/archives/2004\\_04.html](http://www.thebta.org/syndicate/news/archives/2004_04.html) (last visited March 28, 2005).

252. *Local 70 Takes Cross-Border Trucking to Court*, *supra* note 246. This EIS was minimal and only considered information on Mexican motor carriers from the year 2000. *Id.*

was not required to consider the foreseeable environmental effects of the regulations even though the promulgation of the regulations immediately opened the border to Mexican motor carriers.<sup>253</sup> One can assume that FMCSA had no options other than to promulgate the new regulations allowing border crossing because the President ordered their promulgation. The President, similarly, had no choice other than to force reform of the country's registration policies to bring the United States into compliance with NAFTA.<sup>254</sup> This demonstrates that the agency must bow to the President's authority, which in turn must bow to the country's obligations regarding foreign policy. An agency must consider the environmental impact of its actions before making a decision; the President, however, is not required to do the same.<sup>255</sup> The issue has been stated: "Can the President's foreign affairs powers limit the scope of an EIS required by Congress?"<sup>256</sup> The Court indirectly resolved this issue in the affirmative, signaling that as long as it is the President's actions (and not the agency's) that will cause the feared environmental effects, the President's foreign affairs powers can indeed limit the scope of an otherwise required EIS.

### C. Legislative Impact

Interested parties fear that those taking action are sacrificing the sanctity of certain laws of the United States in order to comply with international treaties such as NAFTA. Although Congress initially opposed the opening of the border due to environmental and safety concerns and attempted to slow the progress of the President's attempts through enacting the Appropriations Act,<sup>257</sup> Congress has yet to address the President's environmental obligations in dealings with other countries. It has been noted that unless Congress acts to

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253. See *supra* notes 142, 205 and accompanying text.

254. See *supra* notes 50-59, 131 and accompanying text. In briefs filed with the Court, "the Bush administration noted that the president is not obligated to meet the air standards in dealing with a foreign country." Joe Cantlupe, *High Court Considers Mexican Trucking*, News from the Border, April 22, 2004, available at [http://www.thebta.org/syndicate/news/archives/2004\\_04.html](http://www.thebta.org/syndicate/news/archives/2004_04.html).

255. Kirkland, *supra* note 205.

256. Shirey, *supra* note 221, at 986.

257. *Id.* at 966-67.

remedy the situation, the laws of the United States will continue to come in second to international priorities:

As communication and transportation become faster, international ties become stronger, and interrelationships between domestic actions and international actions become more complex, the impacts of international obligations on the domestic environment will increase. Congress should face the issue squarely and amend U.S. environmental laws to take into consideration how these impacts should fit in the scheme of international commerce. Once Congress has spoken, treaty negotiators and others responsible for determining the United States's [sic] international obligations will know what their environmental constraints are.<sup>258</sup>

Congress must, therefore, perform a balancing test and determine which interest should come first: the integrity of the country's environment or the country's demonstration of good will towards its neighbors.<sup>259</sup> Obviously, both interests are crucial, and, ideally, Congress will recognize the need for action, and will then act for the benefit of both national concerns.

## VI. CONCLUSION

The Court's decision in *Department of Transportation* affects more parties than the DOT – the decision has far-reaching effects, which extend beyond our borders. As a result of this decision, Mexican motor carriers may be able to avoid United States emissions laws indefinitely. Agencies carrying out presidential orders relating

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258. *Id.* at 998.

259. It has been noted that the President's actions in lifting the moratorium without forcing Mexican motor carriers to comply with United States' laws is "nothing less than an attempt to sacrifice environmental laws for monetary gain." Teamsters Local 70 Online, *July 2004: Supreme Court Here We Come*, available at <http://www.Teamsterslocal70.org/local%2070%20takes%20cross-border.htm> (last visited March 28, 2005). That being a widely held view, this is undoubtedly an issue Congress should address.

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to foreign policy may not have to assess the environmental impacts of those actions. The President may be able to continue disregarding certain established laws, public concern, and the environmental implications of decisions executed in the interest of international relations. All of these results are possible and probable to some degree unless Congress takes the Court's decision in *Department of Transportation* as an indication that it is time for policy clarification and reformation.