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Quietly Releasing a Regulatory Beast

Norman A. Dupont

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On Nov. 15, a panel of the Ninth Circuit U.S. Court of Appeals struck down the Bush administration's proposed new guidelines for greenhouse gas-emitting vehicles, known as the Corporate Average Fuel Economy (CAFE) standards.

In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 07 C.D.O.S. 13077, Judge Betty Fletcher found that the NHTSA's CAFE standards didn't measure up to an obscure federal statute known as the Energy Policy and Conservation Act. This part of the opinion seemed to grab all the headlines.

But in a potentially much further-reaching aspect of the decision, the court also concluded that the new CAFE standards — which would have raised the minimum fuel efficiency requirements for some vehicles — failed to measure up to the National Environmental Policy Act (NEPA). That's because, Fletcher

explained, the National Highway Traffic Safety Administration failed to conduct an adequate analysis of climate-change implications. NEPA — like its California state analogue, the California Environmental Quality Act (CEQA) — requires that agencies developing big projects take a "hard look" at anything that might have a significant impact on the environment.

The Ninth Circuit's analysis suggests that climate change issues may well be the polar bear lurking in the NEPA and CEQA closet. (The polar bear has lately become a symbol for climate change, given that global warming threatens the ferocious animal's icy habitat.)

Indeed, the court's opinion implies that a federal or state agency can forget about the days when proposed projects could receive an easy "finding of no significant impact" or "mitigated negative declaration" under NEPA or CEQA. The fact that almost any new project could ostensibly be argued to have cumulative effects on global warming, NEPA and CEQA analyses have just gotten a whole lot more complicated.

In the Ninth Circuit opinion, Fletcher explained that the National Highway Traffic Safety Administration's perfunctory analysis of its CAFE regulations was simply not sufficient in light of concerns about the impact on overall levels of greenhouse gas (in this case, carbon dioxide) emissions. The NHTSA did a preliminary environmental assessment under NEPA and concluded that the CAFE standards would have little more than a minor beneficial impact on the environment because the standards would slow the rate of increase in greenhouse gas emissions.

Therefore, the NHTSA reasoned, a much more detailed Environmental Impact Statement (EIS) analysis under NEPA was not required. The agency argued that it could not measure or find that the CAFE rules had any significant impact on the environment, and therefore issued a "Finding of No Significant Impact" NEPA finding.

But, in a ruling that will send polar bear-sized chills up the spine of any federal or state regulator, the Ninth Circuit rejected the agency's analysis. Fletcher and the court ended up agreeing with the environmental activists and other challengers on three critical points.

First, the court agreed that the agency had failed to address why a "small decrease" in the growth rate of carbon dioxide emissions would *not* have a significant impact on the environment. Second, the court concurred that a continued increase in greenhouse gas emissions, albeit at a slower rate of increase, could still "change the climate in a sudden ... way."

In other words, the court found that even slowing the rate of greenhouse gas increases slightly might have a "significant impact" because there might be an unknown "tipping point" for climate change. Fletcher noted that the tipping-point issue raised a substantial environmental question "particularly

in light of the compelling scientific evidence concerning 'positive feedback mechanisms' in the atmosphere."

While the court did not specifically define a "positive feedback mechanism" in its opinion, it is a commonly understood scientific concept that suggests that as one factor changes (such as the total amount of total carbon dioxide gas in the atmosphere) it can lead to other changes that positively reinforce (or feed back to) overall global warming. The overall effects could show up as warmer ocean temperatures, for instance, which reduce the ocean's ability to absorb excess carbon dioxide from the air. Indeed, the court's opinion specifically cited a number of scientific studies, finding that: "The climate system involves many processes and feedbacks that interact in complex, non-linear ways." The troublesome implication of the opinion is that it makes it very difficult — if not impossible — to set a threshold beneath which no environmentally significant impact can be assumed.

Third, the Ninth Circuit found that the environmental public interest and state challengers (including the state of California) had demonstrated enough significant evidence of climate change and potential impacts upon humans to reject outright the federal agency's claim that the impact of its rule on global warming was "too speculative" to warrant full NEPA analysis in the form of an Environmental Impact Statement.

As the Center for Biological Diversity argued in its brief: "Greenhouse gas emissions present the classic cumulative impacts problem that NEPA was designed to address. Adding a small amount of greenhouse gases to the atmosphere may be relatively harmless, but adding a very large amount, as society continues to do, is already causing profound change and will result in catastrophic planetary alternations if emissions are not reduced."

In all, the opinion leaves behind a serious problem in that there is no clear dividing line between, say, a project that will only increase greenhouse gas emissions by a small amount and one that will potentially increase emissions by such a magnitude as to require a comprehensive analysis under NEPA or CEQA. Public agencies will need to proceed with caution on their environmental judgments, and watch out for that polar bear in the closet.

This is particularly true in California, where AB 32, the Global Warming Solutions Act of 2006, found that global warming gas emissions are a serious threat to this state's citizens, and that decreases in greenhouse gases are necessary to return the state to its 1990 level of emissions.

Thus, a California public agency faced with new projects — from affordable housing to highways to buildings to homes — must now consider how it will address the combined mandate of AB 32 and the impact of the Ninth Circuit's decision.

For state and local agencies in California, the "easy" days of environmental

impact conclusions may well be over.

Norman A. Dupont is of counsel at Richards, Watson & Gershon in Los Angeles and focuses his practice in the environmental law field. He is vice chair of the firm's environmental and energy department and chair of its climate change practice group.