

National Environmental Policy Act (NEPA)

The National Environmental Review Act (NEPA) was the first national environmental legislation. NEPA requires federal agencies to evaluate and mitigate the environmental impacts of major federal projects.

Federal courts have required agencies to consider GHG emissions under NEPA but usually have deferred to the agencies' climate change assessments. For example, in *Border Power Plant Working Group v. Department of Energy*,¹ the Southern District of California initially invalidated an Environmental Impact Statement ("EIS") by the Department of Energy ("DOE") involving a proposal to connect the southern California power grid with two coal-fired plants in Mexico but subsequently approved a modified EIS that calculated the project would increase global GHG emissions by 0.088 percent, and the United States' GHG emissions by 0.023 percent but concluded that the expected impacts to global climate change would be "negligible."

Mayo Foundation v. Surface Transp. Bd.,² involved approval of new railroad lines for transporting low-sulfur coal from the Powder River Basin in Wyoming to power plants in the Midwest. The Eighth Circuit initially ruled that increased coal consumption, and associated GHG emissions were a reasonably foreseeable consequence of the project, and Surface Transportation Board (the "Board") should have considered air quality issues in its EIS. However, the court upheld a supplemental EIS in December 2006 concluding that project would not have significant environmental impacts. DOE stated in the EIS that the project would increase global GHG emissions by 0.088%, and the United States' GHG emissions by 0.023%, and concluded that the expected impacts to global climate change would be negligible.

In *Friends of the Earth v. Mosbacher*,³ the plaintiff alleged that the Overseas Private Investment Corporation and Export-Import Bank failed to comply with NEPA when the federal agencies provided funding and loan guarantees to overseas projects without assessing impact of GHG emissions from the energy-intensive projects. The court initially denied the government's motion to dismiss but then held that the agencies were not required to prepare an EIS because the foreign energy projects were not federal actions. However, in a nod to the plaintiffs, the court said it would be difficult to conclude that there was a genuine dispute that GHGs do not contribute to global warming, and suggested that future NEPA climate change litigation could be focused on whether a particular agency's action was the "but-for" cause of effects on the domestic environment. This case could serve as a precedent for future litigation involving federally-financed projects such as airports, highways, rail projects, ports, or marine terminals that fail to analyze the climate impacts of those projects.

In *Montana Environmental Information Center v. Johanns*,⁴ a group of environmental organizations have asked the United States District Court for the District of Columbia to enjoin the Rural Utilities Service ("RUS"), a branch of the U.S. Department of Agriculture ("USDA") from lending billions of dollars to private developers and utilities across the country to build new coal-fired power plants until climate-related impacts of these projects are evaluated under NEPA. The RUS facilitates the electrification of rural areas by making direct loans and issuing loan guarantees to electric utilities to finance the construction of electric distribution, transmission, and generation facilities. The complaint charged that the RUS has already elected to participate

in the funding of a 250 megawatt coal plant near Great Falls, Montana and was considering funding an additional seven coal plants located across the country that will accelerate climate change and eliminate the market for clean power. The plaintiffs estimated that the RUS funded projects will account for a “significant share” of U.S. GHGs yet never took a “hard look” at the consequences of proposed major federal actions. Specifically, the plaintiffs alleged that the RUS failed to consider the cumulative or incremental impacts of GHG emissions from the seven other coal plants that it was considering funding, that the actual energy needs were significantly less than what was claimed in the EIS, that RUS failed to consider a reasonable range of alternatives, and that RUS should have prepared a supplemental EIS based upon new information that was received after the issuance of the EIS. The case was settled when EPA agreed to withdraw a letter issued to an industry consultant that owners of new power plants did not have to consider use of Best Available Control Technology (“BACT”)

¹ 260 F.Supp.2d 997 (S.D. Cal. 2003)

² 472 F.3d 545 (8th Cir. 2006)

³ 2007 WL 962949 (N.D. Cal. Mar. 30 2007)

⁴ No. 07-CV-01311 (D.D.C. July 20, 2007)