

Environmental Impact Assessment Committee Newsletter

Vol. 1, No. 1

April 2005

WELCOME FROM THE CHAIR

Karen Bryan
Chair, EIA Committee
P.E. LaMoreaux & Associates, Inc.
Tuscaloosa, Alabama

This is a year of “firsts” for the Environmental Impact Assessment (EIA) Committee.

As the first chair of the recently established EIA Committee, I have the pleasure to be the first to greet you, the charter members, in the initial issue of our newsletter, spearheaded by the talented Joan Drake with Modrall, Sperling, Roehl, Harris & Sisk P.A., Albuquerque, New Mexico. As with any periodical, it takes a key person working diligently behind the scenes to identify writers, set and monitor deadlines, and organize and proof all the pieces before rushing it to press. I would like to thank Joan for the tireless effort that she has made to launch this publication. I know we will all look forward to receiving the newsletter in the years ahead.

On another front, our first program committee comprised of R.J. Lyman with Goodwin Procter LLP in Boston, Massachusetts; Nick Yost with Sonnenschein Nath & Rosenthal, LLP, San Francisco, California; Norman F. Carlin with Pillsbury Winthrop Shaw Pittman LLP, San Francisco, California; and Michael Gerrard with Arnold & Porter LLP have been meeting regularly to bring you a special one-day “Little NEPA” conference to be held in Cambridge, Massachusetts, on May 30, 2005, cosponsored by the

International Association for Impact Assessment (IAIA) on the occasion of its 25th Anniversary. Approximately 20 states have their own “little NEPA” programs for preparing environmental impact assessments of proposed governmental and private actions. In the aggregate, these programs are responsible for the preparation of far more impact assessments than are created under the National Environmental Policy Act. The conference will provide a unique opportunity to compare the impact assessment practices in different states, identify best practices, highlight emerging analysis techniques and understand the role of courts in the impact assessment system. Other important cosponsors of the program are the environmental law sections of New York, Connecticut, Virginia, Minnesota, Hawaii and the City of New York and The Environmental Law Institute. These impressive, hard working committee members have devoted countless hours to bringing together some of the most knowledgeable practitioners in the United States in the little NEPA area. My hat is off to them. Please mark your calendars and be sure to attend. For more information and to register for the conference please go to <http://www.abanet.org/enviro/programs/nepa/NepaFlyer.pdf>. We have also included further information on the conference in this issue of the newsletter.

Another notable first will be the appearance of an EIA Committee report in *The Year in Review 2004*. This valuable contribution was made possible by Norman Carlin with the able assistance of several associates at Pillsbury Winthrop Shaw Pittman LLP who simply

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Committee Newsletter
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Joan E. Drake, Editor**

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



refused to be stumped by the almost impossible last minute deadline that I gave them. I am indebted to them for their rapid response to my call for help.

Our vice chair of Technology, Laura Beveridge with Stoel Rives, LLP in Seattle, Washington, has also been quick to respond. In short order she has set up the first EIA Committee Web site. Laura’s responsive “can do” attitude is a real asset to our committee. Please feel free to explore with her your ideas as she expands this important committee resource tool in the months ahead.

Anyone who has spoken to Christina Wisdom of Brown McCarroll, LLP in Austin, Texas, our vice chair for Membership, knows that she has never met a stranger. In a few short months she has helped us to reach our goal of 50 charter EIA members. As you browse through this and subsequent issues of the newsletter you will see our members featured in the “About You” column in each issue. Note how fortunate we are to have a diverse membership base that comes from a wide variety of geographic, cultural, ethnic and practice settings. Christina’s enthusiasm is contagious, which makes her the perfect person to head our membership initiative and to author these short but interesting pieces for the newsletter.

In future issues I will be introducing you to others of our leadership team, including Jomar Maldonado, vice chair for Public Service; J.B. Ruhl, vice chair for *Trends*; and Margret (that’s right Margret) Kim, our liaison to the Energy Facilities and Siting Committee. Each of these individuals has work in process that will be highlighted in our next issue.

As you see these first few months have been busy and productive thanks to the collective hard work of so many. There is always room for more volunteers, however, so please let me know if you have any interest in being active. I am always glad to tailor a niche for someone who has a specific interest or time restriction. If not, sit back and enjoy the newsletter and *The Year in Review 2004*. But be sure to come join us in Cambridge in May!

WELCOME TO THE NEWSLETTER

Joan E. Drake

***EIA Committee Newsletter Vice Chair
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Albuquerque, New Mexico***

Welcome to the first newsletter of the newly formed Environmental Impact Assessment Committee! In keeping with the diverse interests of the members of the Committee, the newsletter includes articles on a variety of fronts. In this first issue, we offer two articles on recent U.S. Supreme Court decisions that addressed NEPA. Our third article provides perspective on a state case from California that addressed the application of CEQA Guidelines. As a final treat, this issue includes the first of a two-part series on the international front. The first part addresses Mexico's environmental impact process and provides a comparison to the U.S. process. The second part of the series will appear in our next newsletter and will address Canada's environmental impact assessment process.

Please consider authoring a short piece (500 to 2000 words, no footnotes, few citations) for the newsletter. We hope to publish the newsletter four times each year, but we will publish as often as we have material. We welcome short articles on subjects related to environmental impact assessment:

- Local level, state level, federal level, international processes and issues.
- Cases of interest.
- Agency decisions, rulemakings, procedures, people, and policies.
- Legislative efforts, trends, enactments.
- Subject area issues.
- Perspectives on people, projects and issues that helped shape the EIA process.

If you would like to author a short piece for the newsletter, please contact Joan Drake at jdrake@modrall.com or (505) 848-1850. We are looking forward to hearing from you!

COMMITTEE UPDATES

PROGRAMS UPDATE

R.J. Lyman

***EIA Committee Programs Vice Chair
Goodwin Procter LLP
Boston, Massachusetts***

The EIA Committee is hosting the first-ever conference devoted solely to state-level mini-NEPAs on May 30 in Boston. In over 20 states there are impact assessment programs modeled on the National Environmental Policy Act, some in place for a quarter-century and having a profound effect on their state's regulatory and public investment programs. Leading practitioners from around the country will discuss their experiences and learning on a wide variety of topics – from jurisdictional issues, to the details of document preparation, to litigation strategies and outcomes. The forum is expected to provide an unprecedented opportunity for those from different states to learn from others. See p.8 in this newsletter for additional information. We hope to see you there.

MEMBERSHIP UPDATE

Christina Wisdom

***EIA Committee Membership Vice Chair
Brown McCarroll, LLP
Austin, Texas***

As a new committee within the ABA Section of Environment, Energy, and Resources, the EIA Committee boasts a diverse and talented membership base of 45 members. However, our goal is to expand our membership to 50 charter members and solicit additional talent to add to our roster. We hope to do this by (1) identifying organizations made up of lawyers, professors, practitioners and individuals interested in the environmental impact assessment practice area from which to recruit more members; (2) reaching out to the members of the State and

Regional Environmental Cooperation Committee to identify the names of lawyers practicing in NEPA at the state level; and (3) maintaining a "Prospects" list of people that might be interested in joining the committee. Any committee members that know of colleagues who would be an asset to our team should contact Christina Wisdom, Vice Chair for Membership, at (512) 479-1105 or cwisdom@mailbmc.com. Please note that you must be a member of ABA Section of Environment, Energy, and Resources to join the committee.

PUBLIC SERVICE UPDATE

Jomar Maldonado
EIA Committee Public Service Vice Chair
Federal Emergency Management Agency
Washington, D.C.

Greetings fellow EIA Committee members! My name is Jomar Maldonado and I will be serving as the EIA Committee's vice chair for Public Service. In this position I will help the committee establish and implement public service projects in accordance with the proposals made by the ABA Section of Environment, Energy, and Resources' Public Service Task Force.

Public Service is an issue very personal to me because it is the main reason and motivation behind my choice to practice environmental law within the federal government. Up to this point in my professional career I have had the opportunity to serve the public by working in various wonderful federal agencies like the U.S. EPA, the White House's CEQ, the Department of Transportation and with FEMA at the Department of Homeland Security on several NEPA related issues. Now is time to reinforce my commitment to public service by coordinating and implementing public service projects through this great professional organization.

I hope you join me in this effort by participating in public service activities, offering ideas and providing your support throughout the upcoming years. If you want to have a more active role on these efforts or

want to provide new ideas on how to achieve our public service objectives, don't hesitate to contact me at Jomar.Maldonado@dhs.gov or (202) 646-2741. I will gladly use your help and make sure to convey your ideas to the Public Service Task Force.

YEAR IN REVIEW UPDATE

Norman Carlin
EIA Committee Year in Review Vice Chair
Pillsbury Winthrop Shaw Pittman LLP
San Francisco, California

Every spring, the ABA Section on Environment, Energy and Resources publishes a *Year in Review* volume covering federal and state law developments in some 30 subject areas in the previous year. The new EIA Committee's first appearance in this series will be in the forthcoming *Year in Review 2004* volume. As the EIA Committee vice chair for *The Year in Review*, I prepared our committee contribution to the 2004 volume and am already gathering material for next year's contribution. In order to ensure full coverage in the 2005 issue, I would welcome any suggestions from committee members of notable cases, new statutory developments, regulations and guidance, and any other items that may be worth including. In particular, as a California practitioner less familiar with the "little NEPA" statutes in other states, I would greatly appreciate news on state law developments. My e-mail address is norman.carlin@pillsburylaw.com.

LIAISON TO TRENDS

J.B. Ruhl
EIA Committee Liaison to Trends
Florida State University College of Law
Tallahassee, Florida

As our committee's liaison to *Trends*, please let me encourage you to volunteer to write for our Section's excellent bi-monthly newsletter, *Trends*, or to offer ideas on appropriate topics for which I can solicit authors. *Trends* allows authors to write relatively short articles (760 or 1,725 words) on cutting edge topics

that can be published rather quickly. If there is a case, regulation, policy or general theme that represents or portends a major turn in environmental impact analysis and for which you would like to author a short article or simply suggest the idea, please do not hesitate to contact me at jruhl@law.fsu.edu or (850) 644-1596.

TECHNOLOGY UPDATE

Laura Beveridge
EIA Committee Technology Vice Chair
Stoel Rives, LLP
Seattle, Washington

The Technology subcommittee is devoted to utilizing current technology to communicate and develop outreach efforts with EIA Committee members and others interested in NEPA and its state analogs. As vice chair of Technology, my responsibilities include maintaining the EIA Web site and managing the list serve. The EIA Web site is a work in progress. We welcome any suggestions and/or contributions as we develop the Web site's content. The link to the site is: <http://www.abanet.org/environ/committees/impactassess/home.html>.

The committee's list serve is already established. If you are interested in sending a message to the list serve, the address is: environ-environ_impact_assess@mail.abanet.org. If you are on the list serve and would like your e-mail address to be changed or removed please e-mail me directly at ljbeveridge@stoel.com.

LIKE TO WRITE?

The Environmental Impact Assessment Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the editor, Joan E. Drake at (505) 848-1850 or jdrake@modrall.com.

ENERGY FACILITY SITING UPDATE

Margret J. Kim
EIA Committee Liaison to Energy
Facilities and Siting Committee
California Energy Commission
Sacramento, California

The Energy Facility and Siting Committee and the Environmental Impact Assessment Committee are developing a panel on energy facilities and siting/ environmental impact assessment for the 13th Section Fall Meeting in Nashville, Tennessee, Sept. 21-25, 2005. The panel will be entitled "Can We Talk? NEPA, Conflict Resolution, and Energy Facility Siting in the 21st Century." It is scheduled for Thursday, Sept. 22 from 1:30 p.m.-3:00 p.m.

Today's energy infrastructure is aging rapidly, and the Department of Energy predicts a national energy crisis by 2020. Proposals will go nowhere if they don't meet the simple policy criteria laid out in NEPA, particularly in section 101, or if careful consideration isn't given to the needs and concerns of affected parties. This lively panel discussion will discuss ways to include conflict resolution in siting new energy facilities through exploration of case studies. The panel will include energy producers, analysts, and members of the National Environmental Conflict Resolution Advisory Committee (NECRAC).

Please save Sept. 21-25, 2005 on your calendar for the 13th Section Fall Meeting. Additional meeting information and registration materials will be available this summer.

ABOUT YOU

Each newsletter, the EIA Committee will spotlight two of its members. This issue will feature Joan Drake and Fred Wagner.

Joan Drake:

Joan currently serves as the Committee's vice chair for the Newsletter. She is an attorney with the Modrall Sperling law firm in Albuquerque, New Mexico, where

she practices in the areas of environmental and water law and litigation, and represents both private and public clients on NEPA and Clean Water Act issues. Prior to becoming a lawyer, she served as an environmental specialist with the Corps of Engineers in Los Angeles and New England. In that role, she prepared numerous environmental assessments and environmental impact statements on the Corps' civil works projects as well as regulatory permits under the Clean Water Act. Joan has won awards from both the Corps and EPA for resolution of thorny environmental problems. When asked what she enjoys most about practicing law, she replied, "I enjoy applying the unique perspective of a private advocate and former federal regulator to the variety of issues that arise in the practice of environmental law." In her spare time, Joan enjoys watching her sons play viola, cello and other instruments in their various orchestras and Irish bands, supervising homework, attending science bowl competitions, and preparing to send her 17-year old to college.

Fred Wagner:

Fred is a principal at Beveridge & Diamond in Washington, D.C. Fred's practice involves counseling and litigation in a wide variety of land use and environmental matters, focusing on NEPA and related natural resources statutes. Prior to joining Beveridge & Diamond in 1991, he served for four and one half years as a trial attorney in the Environment and Natural Resources Division of the U.S. Department of Justice. While at Justice, he litigated matters under NEPA, the National Forest Management Act, the Section 404 Clean Water Act wetlands program, the Endangered Species Act, and the Quiet Title Act. When asked what he enjoys most about practicing law, Fred is impacted by the fact that he is "acutely aware that the decisions we make really matter to people." In his spare time, Fred is a fantasy baseball player and spends time coaching, educating and spending time with his two children, who are seven and nine. Fred and his firm are also the recipients of awards for work they have done on behalf of the Whitman-Walker Legal Clinic, a non-profit community-based health organization committed to ending the suffering of all those infected and affected by HIV/AIDS.

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

Calendar of Section Events

Key Environmental Issues in Region 6

May 26, 2005
Dallas

**The First Annual "Little NEPA
Conference"
State-Level Environmental Impact
Assessment**

May 30, 2005
Cambridge, Massachusetts
(Cosponsored with the International
Association for Impact Assessment, for
information see www.iaia.org)

Wetlands Law and Regulation

June 8-10, 2005
Washington, D.C.
(Cosponsored with ALI-ABA and ELI, for
information see www.ali-aba.org.)

ABA Annual Meeting

Aug. 4-9, 2005
Chicago

13th Section Fall Meeting

Sept. 21-25, 2005
Nashville, Tennessee

***For more information, see the Section
Web site at <http://www.abanet.org/environ>
or contact the Section at (312)988-5724.***



**NORTON V. SOUTHERN UTAH
WILDERNESS ALLIANCE:
NEPA OBLIGATIONS ONLY ATTACH
FOR PROPOSED OR ONGOING
AGENCY ACTIONS**

**Peter C. Mailhot
Pillsbury Winthrop Shaw Pittman LLP**

In *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004), the Supreme Court unanimously held that the requirement to supplement an EIS ends when the action contemplated by the agency is completed, regardless of what new and material information subsequently becomes available.

The plaintiff, South Utah Wilderness Alliance (SUWA), sought to compel the Bureau of Land Management (BLM) to change its management of certain lands in Utah that were designated as Wilderness Study Areas (WSAs), and to prepare a Supplemental Environmental Impact Statement (SEIS) to address the fact that the use of off-road vehicles had increased substantially, jeopardizing the quality of the WSAs and calling into question the adequacy of the BLM's land use plan.

Most of the Court's opinion dealt with the allegedly inadequate management of the lands. The Court rejected SUWA's claims, finding that there was no specific discrete action that the BLM could be required by law to take. The Court did not want to empower courts to compel agency compliance with general mandates, leading to excessive judicial oversight of agency decisions. The Court also rejected SUWA's second claim, finding that the BLM had in fact complied with its own land use plan in certain instances, while in other instances the plan was not sufficiently binding upon the BLM to justify a judicial decree.

In addition, the Court rejected SUWA's NEPA argument. SUWA had claimed that the increased use of off-road vehicles on the lands in question constituted "significant new circumstances or information" pursuant to 40 CFR § 1502.9(c)(1)(ii) and that the BLM should therefore be compelled to prepare a SEIS with respect

to its already-enacted land use plan for the WSAs. Citing its discussion of SEISs in *Marsh v. Oregon Resources Council*, 490 US 360 (1989), the Court held that no SEIS is required where the agency action has already been taken. In this case the BLM had already adopted its land use plan; therefore there was no "proposed action" before the agency under NEPA, and thus no basis for an SEIS.

This case reinforces the rule that the obligation to prepare an EIS only attaches when agency actions are pending or proposed. (Interestingly, the logic behind this rule is similar to that discussed in the Supreme Court's other 2004 decision on NEPA, *Department of Transportation v. Public Citizen*, 541 U.S. 752.) Where the agency has already acted, the increased information contained in the SEIS will not be of use to the agency because a final decision has already been made. Only when discretionary actions remain to be taken can the information contained in an EIS actually influence the decision-maker. Although a post-hoc SEIS could encourage the agency to take a new action, the Court apparently did not feel that this was required under NEPA. The Court did, however, note that a SEIS might be required if the plan were amended or revised.

VISIT US ON THE WEB!

To learn more about the ABA, Section and Committee, please visit:

American Bar Association:

<http://www.abanet.org>

Section of Environment, Energy, and Resources:

<http://www.abanet.org/environ>

Environmental Impact Assessment Committee:

<http://www.abanet.org/environ/committees/environimpactassess/home.html>

**ABA Section of Environment, Energy, and Resources
Environmental Impact Assessment Committee and the
International Association for Impact Assessment**

present

**The First Annual "Little NEPA Conference"
State-Level Environmental Impact Assessment**

**May 30, 2005
Hyatt Regency Cambridge
Cambridge, Massachusetts**

Approximately twenty states have their own programs for preparing environmental impact assessments of proposed governmental and private actions. These are often called "little NEPAs" but in the aggregate, they are responsible for the preparation of far more impact assessments than are created under the National Environmental Policy Act.

This one-day program will provide a unique opportunity to compare the impact assessment practices in the different states, to identify best practices, to highlight emerging analysis techniques, and to understand the role of the courts in the impact assessment system. Environmental impact assessment issues will be examined in the context of the mini – NEPAs with NEPA itself as a basis for comparison.

The program is designed to appeal to lawyers and environmental professionals from the United States and from other countries working in the environmental impact assessment field.

Learn more about the this program at
<http://www.abanet.org/environ/programs/nepa/home.html>
and register today!

**DEPARTMENT OF TRANSPORTATION V.
PUBLIC CITIZEN: REDUCED NEPA AND
CLEAN AIR ACT OBLIGATIONS FOR
AGENCIES WITH LIMITED DISCRETION**

**Peter C. Mailhot
Norman F. Carlin
Pillsbury Winthrop Shaw Pittman LLP**

**Jomar Maldonado
Federal Emergency Management Agency**

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court addressed the issue of what analysis is required under the National Environmental Policy Act (NEPA) and the Clean Air Act's (CAA) conformity mandates, when the agency lacks discretion to execute, alter or address the effects of a particular action. In a unanimous decision, the Court held that an agency that lacks discretion on how to execute an action, and has no authority to address the effects of that action, is not required to analyze the action's impacts under these statutes.

The case involved the Federal Motor Carrier Safety Administration's (FMCSA) statutory duty to promulgate and enforce safety regulations governing the operation of foreign motor carriers in the United States and to issue permits for such operation. Since 1982, a moratorium had been in effect barring the FMCSA and its predecessor, the Interstate Commerce Commission, from granting permission to any Mexican motor carrier to operate within the United States. In 1992 Canada, Mexico and the United States signed the North American Free Trade Agreement (NAFTA), which provided for the elimination of this moratorium, the elimination of discriminating practices based on national origin, and promoting the equal treatment of laws among foreign and national motor carriers. In 2001 Mexico took the United States before a NAFTA arbitration panel due to the U.S.'s failure to lift the moratorium. The international arbitration panel ruled that the moratorium violated NAFTA's non-discrimination provisions. Following this ruling, the president announced that he would lift the moratorium on Mexican trucks once the FMCSA prepared new regulations to govern the registration of these carriers.

Congress members, concerned that there would be a decrease in safety because of lax safety controls in Mexico for their motor carriers, enacted legislation with a list of requirements, including application procedures and audit requirements, that FMCSA had to incorporate in its regulations before it could grant any permits to Mexican motor carriers to operate within the United States.

After complying with Congress's mandate and incorporating the language in the safety rules, the FMCSA prepared a programmatic Environmental Assessment (EA) and issued a Finding of No Significant Impact (FONSI) in accordance with NEPA. The EA considered air pollutant emissions from the roadside inspections of trucks as required by the regulations, concluding that any resulting environmental impact would be minimal. The EA did not consider the impacts of increased air emissions resulting from the increase in the volume of Mexican truck traffic in the United States due to increased trade, even though promulgation of the regulations was necessary in order for Mexican motor carriers to be allowed to operate in the United States. FMCSA attributed these potential future increases in emissions to the president's decision to lift the moratorium, an action exempted from NEPA review, and to NAFTA's effect of increasing trade. The agency did not consider these environmental impacts as an effect of its decision to promulgate safety regulations that would apply to the Mexican trucks in order to operate within the United States. The FMCSA took a similar approach in its compliance with the Clean Air Act (CAA). The agency considered only the emissions related to roadside safety inspections and determining that these emissions were likely to be below EPA thresholds for analysis of conformity with CAA state implementation plans.

Plaintiff Public Citizen challenged the FMCSA's decision not to consider the emissions resulting from the foreseeable increase in the number of Mexican trucks operating in the United States, claiming violations of both NEPA and the CAA. The Court of Appeals agreed with Public Citizen and ordered the FMCSA to prepare an EIS and perform conformity analysis based on the expected increase in Mexican

truck traffic. The Supreme Court granted certiorari and reversed.

First, the Court quickly rejected Public Citizen's claim that the EA failed to consider alternatives that might mitigate the emissions of trucks entering the country, noting that this issue had not been raised properly during the comment period and that this was not so obvious a flaw that the agency should have been on notice.

The Court then addressed the claim that an EIS was required. Assessing whether the increased truck traffic was an effect of the FMCSA regulations for the purposes of NEPA, the Court noted that something more than "but for" causation is required. Referring to *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), the Court declared that the causal relationship between an action and an environmental effect must be reasonably close, similar to the concept of proximate cause in tort. The Court also invoked NEPA's "rule of reason," considering the usefulness of the information to the decision-making process. Combining these two concepts, the Court found that the basic causal link between the FMCSA's promulgation of regulations and emissions increases due to the increased truck traffic was insufficient to require consideration of these emissions in the EA. Specifically, although the increase in truck traffic was a foreseeable result of the new regulations, the FMCSA had neither the authority to refuse categorically to register motor carriers nor the authority to promulgate regulations governing truck emissions. Because FMCSA's discretion was limited to the content of the safety regulations and the application and inspection procedures, the agency would not have been able to address emissions by altering its regulations based on any information that an EIS might have contained on increased cross-border truck emissions. Such information would not be useful for public comment purposes either, since the agency's discretion was so limited. Thus NEPA's statutory purpose of ensuring that agencies have sound environmental information upon which to base their decisions would not be served by rejecting the EA and requiring an EIS, where the agency would not be able to change its decision based on such information.

The Court was similarly unconvinced by Public Citizen's cumulative impact argument, noting that the only impact required to be considered in a cumulative analysis was the incremental impact of the safety rules, which the FMCSA had already considered in its EA. Rather than considering the environmental effects of the president's lifting of the moratorium, the FMCSA was correct to consider only the emissions related to its roadside inspection program.

The Court also agreed with the EA's determination that conformity analysis under the CAA was unnecessary. The Court found that, although "but for" causation suffices under conformity regulations, the FMCSA was not required to consider the emissions from increased truck traffic because the emissions were neither direct nor indirect emissions. The emissions were not direct since they were not occurring at the same time or place as the promulgation of the regulations. They were not indirect emissions because the FMCSA had no authority to impose emissions standards and did not otherwise control or maintain control over the emissions due to its limited discretion on this matter.

Some commentators view this decision as greatly expanding *Metropolitan Edison's* shield for agency actions and severely curtailing the application of NEPA and the CAA conformity process. Others consider that the Court only enunciated a commonsense principle that agencies with limited authority need not study every possible tangential environmental effect related to their actions, when they would not be authorized to react to such information in any event. Just how tangential an effect needs to be, in order to escape NEPA review under the Court's new "proximate cause" standard, remains to be elucidated in future cases. However, the Court focused closely on the specific facts of the case – in particular, the FMCSA's limited discretion and its obligation to register motor carriers willing to comply with the safety regulations. Accordingly, it would be difficult to find no "proximate causation" in the traditional NEPA situation, when an agency can modify or mitigate its action to avoid or reduce environmental impacts. In addition, it is worth noting that the Court did not hold that an EIS or conformity analysis will never be required where an agency has limited discretion. Instead, the Court left

open the possibility that, in another case, the incremental environmental effects specific to the agency's action might be substantial enough to warrant further consideration, provided that the agency would have the authority to address these effects if necessary.

CALIFORNIA AGENCIES MAY USE REGULATORY STANDARDS AS REBUTTABLE THRESHOLDS OF SIGNIFICANCE TO IDENTIFY AND ANALYZE PROJECT IMPACTS

Mathew J. Swain
Pillsbury Winthrop Shaw Pittman LLP

In *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099 (2004) (*Amador*), the Court of Appeal, Third District, revisited its holding in *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98 (2002) (*CBE*). *CBE* was an important case in which the court struck down several regulations under the California Environmental Quality Act (CEQA), referred to as the CEQA Guidelines (14 Cal. Code Regs. §§ 15000 *et seq.*). One of the CEQA Guidelines at issue in *CBE* was a provision that permitted an agency to use compliance with regulatory standards as a “threshold of significance.”

“A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.” CEQA Guidelines § 15064.7(a). The CEQA Guideline at issue in *CBE* essentially created an irrebuttable presumption that, if a project complies with a regulatory standard used by an agency as a threshold of significance, any remaining impacts *must* be considered to be less than significant. *CBE* struck down that irrebuttable presumption because it conflicted with CEQA’s plaintiff-favorable “fair argument” standard. Under CEQA, if there is evidence in the record supporting a “fair argument” that

a project may have a significant impact, the lead agency must prepare an Environmental Impact Report (EIR) even though the record also contains contrary evidence of no significant effect. CEQA Guidelines § 15064(f)(1). That is, in deciding whether to prepare an EIR in the first place, contrary evidence is disregarded, because the weighing of such evidence should take place in the EIR itself. In *CBE*, the court concluded that plaintiffs must be allowed to put forward evidence that significant impacts might occur despite compliance with regulatory standards.

However, *CBE* left open at least two questions: First, can agencies rely on compliance with a regulatory standard as a presumption that a project will avoid significant environmental impacts, so long as there is an opportunity to rebut? Second, does *CBE* apply once the decision is made to prepare an EIR? Since *CBE* relied on the “fair argument” standard to strike down the CEQA Guideline, perhaps an agency could still apply an irrebuttable presumption in an EIR that compliance with a regulatory standard (for example, as a mitigation measure) would result in insignificant environmental impacts. *Amador* answers both questions. First, it is permissible to use a regulatory standard as a rebuttable threshold of significance to determine if a project will have significant environmental impacts. Second, regulatory standards may be used as rebuttable thresholds of significance in EIRs.

The facts in *Amador* concerned whether the Amador Water Agency (Agency) abused its discretion under CEQA when it determined in an EIR that the hydrological and biological impacts of replacing the Amador Canal with a pipeline would not be significant. The Amador Canal is a 130-year old, 23-mile long, mostly unlined, earthen ditch used to transport water. The Agency determined that leakage from the canal contributed to the surface flow of several local streams. The EIR noted that replacing the canal with a pipeline would eliminate leakage. As a result, the flows in affected local streams would return to their original hydrological conditions, which meant that some streams would become intermittent in the dry months of summer and early fall. Nevertheless, the Agency concluded that “[t]he change in local hydrology associated with dewatering the Amador Canal and

eliminating all leakage is not considered to be a significant hydrological impact *per se*,” and that the impact on riparian habitat would not be significant because “vegetation would continue to thrive along local streamcourses, even if canal leakage is eliminated.” *Amador* at 1104. The lower court upheld the EIR and the plaintiff appealed.

Before addressing the facts of the case, the court discussed the use of thresholds of significance in the preparation of an EIR. The court clarified that its ruling in *CBE* did not preclude an agency from using regulation-based thresholds of significance to determine if an EIR must be prepared for a project. Rather, *CBE* precludes an agency from applying a threshold of significance “in a way that would foreclose the consideration of other substantial evidence showing that there might be a significant environmental effect from a project.” *Amador* at 1108. Thus, “agencies are still encouraged to develop thresholds of significance for use in determining whether a project may have significant environmental effects.” *Id.* However, “[i]n each instance, notwithstanding compliance with a pertinent threshold of significance, the agency must still consider any fair argument that a certain environmental effect may be significant.” *Id.* at 1109. In other words, an agency may use a regulatory standard as a rebuttable threshold of significance to determine if it must prepare an EIR for a project.

The court further stated that “[t]he use of thresholds of significance is not limited to the determination of whether an EIR must be prepared.” *Id.* Once an agency has determined that an EIR is required, it may use thresholds of significance to determine whether any of the *potentially* significant environmental impacts (which triggered the preparation of the EIR) will *actually* be significant. However, again, compliance with a “particular threshold cannot be used as an automatic determinant that the effect is or is not significant.” *Id.* Rather, the agency must consider “other substantial evidence tending to show the environmental effect to which the threshold relates might be significant.” *Id.*

In this case, the plaintiff contended that the Agency abused its discretion by adopting inappropriate

thresholds of significance for hydrological impacts. The Agency drew from questions contained in the “Environmental Checklist Form” found in Appendix G of the CEQA Guidelines to establish thresholds of significance. Appendix G is designed as a model for the initial study of whether a project may have significant environmental impacts (and thus require an EIR). The Appendix contains 17 categories of questions to guide the initial study, including “Biological Resources” and “Hydrology and Water Quality.” Plaintiff argued that the questions relied on by the Agency contained thresholds of significance that were “too narrowly focused” and “irrelevant” because they did not address the particular physical change that the pipeline project would have on the environment.

Interestingly, the court resolved on other grounds the question of whether the Agency abused its discretion with regard to the EIR’s analysis of hydrological impacts. The Court found that the EIR did not adequately justify its conclusion that “[t]he change in local hydrology associated with dewatering the Amador Canal and eliminating all leakage is not considered to be a significant hydrological impact *per se*.” *Amador* at 1111. Without an adequate statement of reasons for this conclusion, the court did not need to (nor could it) determine whether the Agency had in fact applied inappropriate thresholds of significance to evaluate the project’s hydrological impacts. Arguably, then, *Amador*’s holding on thresholds of significance is dicta. Nonetheless, it is likely to be an influential decision, because it represents the first attempt to reconcile the *CBE* decision with CEQA Guidelines Appendix G and the widespread practice of reliance on regulatory compliance to avoid impacts.



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TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT

PART I: MEXICO'S EIA PROCESS

Jomar Maldonado **Federal Emergency Management Agency**

In 1992, Canada, Mexico and the United States signed the North America Free Trade Agreement (NAFTA) to liberalize trade restrictions among them. *NAFTA*, 32 I.L.M. 289 (Dec. 17, 1992). A year later the Parties signed the North American Agreement on Environmental Cooperation (NAAEC), 32 ILM 1480 (Sept. 8, 1993), to address environmental concerns raised by NAFTA. The NAAEC allows for the creation of an agreement for the assessment by each Party of transboundary environmental impacts of projects and for notice and comment procedures to inform the other Parties of these impacts.

On Feb. 25, 1991, 29 countries, including Canada and the United States, signed the Convention on Environmental Impact Assessment in a Transboundary Context (Convention), 130 I.L.M. 800 (Feb. 25, 1991), in Espoo, Finland. The Convention established procedures for the creation and implementation of transboundary environmental impact assessments, giving notice to affected parties and allowing participation to affected countries. This agreement is not applicable to the NAFTA Parties because Mexico is not a Party to the Espoo Convention and the United States has failed to ratify the Convention.

The NAFTA Parties agreed to start developing a Transboundary Environmental Impact Assessment Agreement, or TEIAA, in 1997, but to date they have been unable to reach an agreement. A major obstacle in the negotiation of TEIAA is the differences in the nature of the environmental impact assessment (EIA) processes in Mexico, Canada and the United States. This article discusses the Mexican EIA process and how it differs from the U.S. process.

Legal Authority and Enforcement Agency

The Mexican legal instrument requiring the EIA process is the General Law on Ecology Equilibrium

and Environmental Protection. *Ley General del Equilibrio Ecologico y Proteccion del Medio Ambiente*, LGEEPA (2000). This law requires proponents of activities that fall within certain identified categories to obtain an environmental impact permit certifying compliance with the environmental impact assessment process and requires the Secretariat on Environmental and Natural Resources (SEMARNAT) to evaluate the adequacy of the document and analysis before granting the permit. Mexico has developed Rules on the Environmental Impact Assessment Process, which provide a detailed description of how the process works.

The SEMARNAT serves as Mexico's counterpart to the U.S.'s EPA and CEQ. Among its duties is ensuring that the EIA process is followed and issuing the appropriate EIA permit. The Environmental Risk and Impact Assessment General Office (DGIRA), is the agency within SEMARNAT that oversees the EIA process. The office is responsible for deciding whether to grant or to deny the EIA permit that certifies the adequacy of the EIA. Like SEMARNAT, the DGIRA has a Central Office in the Federal District of Mexico and Delegation Offices available in each state.

Mexico's EIA Process

Only those activities falling within 23 identified sectors are subject to the EIA process. These include, among others, certain hydraulic/hydrological activities, oil related activities, activities modifying or related to channels of communication (*e.g.*, transportation, telecommunications, etc.), cement industry related activities, iron and steel-industry related activities, tropical forest modification and hazardous materials management. The Rules describe in detail activities within these main sectors that presumptively impact the environment. In general the sections listed in Roman numerals (*e.g.*, I, II, III) indicate the activities that need EIAs, while those listed with letters (*e.g.*, a, b, c) indicate the projects that are exempt from the EIA process even though they are associated with the identified sector. Activities that need an EIA must not proceed without an EIA permit. Execution without the permit would constitute a violation of LGEEPA and can be enforced by Mexico's Environmental Attorney

General. The Environmental Attorney General also has authority to inspect facilities to determine if they are complying with the EIA rules. S/he also has the authority to order the necessary corrective measures for actions executed without the required permit, as well as to initiate administrative, civil and/or criminal actions.

Any person, agency or corporation can be a proponent if their action falls within the identified activities. Unlike the U.S. NEPA procedures, the project does not have to be proposed or adopted by a government agency to be subjected to the EIA process.

There are three types of documents in the Mexican EIA process. The first is the main EIA document, called a “Manifiesto de Impacto Ambiental,” available in two versions. A *regional EIA* is required when the project involves industrial or agricultural parks, nuclear energy plants, roads and railroads, or when the project may cause the destruction, fragmentation or isolation of ecosystems. This version includes an analysis of the *regional* environment that surrounds the project and the impacts it will likely cause, including a description of potential cumulative and residual environmental impacts. Any other project that does not need a regional EIA must have a *particular EIA*, a version that only takes into consideration the *local* ecosystem where the activity will take place regardless of its interaction with other ecosystems. Both EIA versions must include a description of the project, description of the environment, the environmental impacts, mitigation measures and a description of alternatives, when needed. Since the environmental information associated with each activity varies according to the sector, the law provides for the preparation of guidelines that accommodate these differences. SEMARNAT has created these guidelines by sector and type of EIA version needed.

A second document that must be submitted concurrently with the EIA is a Risk Study, which is necessary when hazardous activities are involved. It is a separate document that annexes information about preventive scenarios and measures in case an accident occurs. It also provides security measures and a full

description of the zone surrounding the action or facility. The third and final document required is a Preventive Report, which must be submitted where the only impacts of the activity are impacts already regulated by the various environmental laws and regulations. Thus, if the only impacts of the project are air emissions, the proponent must submit a Preventive Report indicating the applicable Mexican standard.

The proponent must pay a fee associated with the type of activity, sector of the activity and EIA version. The proponent must submit the application packet, which includes the EIA in the corresponding version, its annexes, receipts for the payment of the fees, and a Risk Study if necessary, to SEMARNAT’s DGIRA for review.

The consultation process starts after the application is submitted and checked for completeness by opening a record of the project at DGIRA’s office, in which every comment or data obtained will be incorporated and which will provide the basis of the final agency decision. The consultation process includes notice and comment opportunities to other federal agencies and to the public. SEMARNAT must consult with other federal agencies when it lacks the expertise in a particular subject (*i.e.*, forestry, energy, health) and include the information in the project’s record. SEMARNAT must also notify the public of all EIAs received by publishing a notice in the Official Federal Journal and in the Ecological Gazette. Once the notice is published the public may request a public participation to review the documents, which must be made at the SEMARNAT office or the corresponding delegation. Any community can request the start of a public participation procedure for the project. The requestor’s name, address, explanation of why he/she wants to start the participation process and other personal information must be submitted on a form for the record before the public participation process begins. The agency can request a public hearing if it considers that the project is controversial. Comments received must also be incorporated into the record.

The proponent must provide monetary guarantees and insurances if mitigation measures are required as a condition of getting the EIA permit. These guarantees

are based on the amount of money it will take to restore the ecosystems if an accident were to occur.

Federalism

The federal EIA process supersedes state laws on the subject for all activities identified in LGEEPA. The law allows the states to establish state EIA procedures to regulate those activities not identified in LGEEPA. Every Mexican state has identified activities they want to regulate in their state-LGEEPA and some of them are in the process of revising their laws to include more activities and to revise their whole process.

Differences with U.S. EIA Process

Various differences between the Mexican EIA process and the U.S. NEPA process stand in the way of an agreement on Transboundary Environmental Impact Assessment procedures for the NAFTA Parties. The main problem is the federalism differences in the EIA processes. In Mexico, unlike the United States, states and all proponents must follow the federal EIA process if the activity falls within the identified sectors, irrespective of whether it is a “major federal action.” Mexico has expressed its opposition to the TEIA agreement because it would not apply to U.S. state actions that are not “major federal actions.” *U.S., Mexico Will Need to Resolve Reciprocity Issues on Assessments*, 29 Env’t Rep. (BNA) No. 11, 572 (July 10, 1998). The U.S. position is that the agreement should apply only to federal actions and that the states may reach individual cooperative arrangements that would mirror the agreement. The problem with this approach is that it may be unconstitutional for states to sign and negotiate treaties with foreign countries or entities. U.S. Const. art. 1 § 10(1). On the other hand, the U.S. federal government is prohibited from intruding on state jurisdiction and thus, cannot constitutionally require states to comply with a Transboundary EIA agreement if the action is solely a state action with no federal connection. U.S. Const. amend. X.

A secondary problem is that Mexico’s EIA process applies to every activity identified by law, with or without the government participation. The difference

stems from the legal framework of each country. The Mexican Constitution establishes that the federal government owns the natural resources, allowing the government to delegate some of its ownership rights to private parties or to the states when it sees it fit. Thus, it can directly regulate their use and activities affecting them and has the authority to require any entity, private or public, to engage in a process that would ensure the proper use of these resources. In the United States, private individuals are the owners of the resources and the federal government can only regulate them in the interest of public health and safety and to the extent of its interstate commerce power. The federal government cannot infringe on the individual’s private property rights or the states’ rights. Only states can require the analysis of the environmental effects of purely private activities.

A final difference lies in the burden of informing the public about the projects to encourage participation. The United States places this burden on the lead agency. The agency must provide notice in the three stages of the process: scoping, draft EIS and final EIS, and must provide comment opportunities in the scoping and draft phases. The agency is responsible for providing the information and documents to the public and must even send the information to possible interested parties. The Mexican EIA process places the burden on SEMARNAT which must notify the public but does not have to engage in public outreach activities if the public does not request it. Thus, the public is responsible for finding the information and requesting the start of a formal public participation process. The public’s commenting process takes place after the EIA has been submitted, which hinders the public’s opportunity to get involved in the actual preparation of the document. The forms for public process must be filed at the SEMARNAT office, which might be far from the place where the citizens live. This hassle might provide a disincentive to start a public participation process, especially for low-income citizens who do not have the money or time to travel to the corresponding office.

In Part II of this series, I will provide a brief explanation of Canada’s EIA process and how it differs from the U.S. NEPA process.

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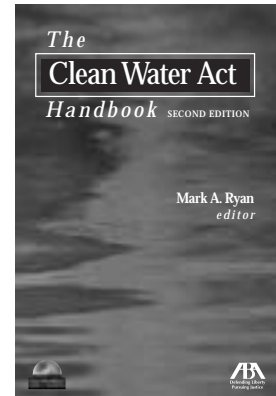
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