

Coming Soon to an EIS Near You: NEPA and Climate Change

18th Annual RMLUI Land Use Conference

March 6, 2009



John E. Putnam
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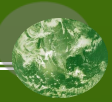
Larry Svoboda
**U.S. Environmental Protection
Agency**



KAPLAN KIRSCH ROCKWELL

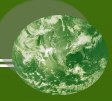


Overview



- **Current Status**
 - 30% of recent DEISs address climate
- **Clean Air Act: *Massachusetts v. EPA***
- **NEPA Litigation: *Center for Biological Diversity v. NHTSA* and *Friends of the Earth***
- **Agency Guidance**
- **Major Climate Issues under NEPA**
- **Region 8; Treatment in Current EISs**
- **Discussion/Questions**

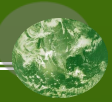
Types of Projects/Actions of Interest for Climate Impacts



- Water
- Energy
- Transportation
- Forest Service, including ski areas
- BLM land use
- Endangered Species

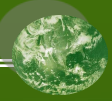


NEPA Overview



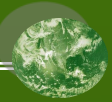
- **Must consider impact of major federal actions significantly affecting environment**
- **Includes cumulative impacts**
- **40 CFR 1502.22 provides standards for addressing uncertainty**
- **Must develop information**
 - **if essential to reasoned choice**
 - **if costs not exorbitant**
- **Otherwise, disclose uncertainties and their significance**

U.S. Supreme Court: *Massachusetts v. EPA*



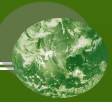
- **Challenge to EPA's denial of rulemaking petition for cars and trucks**
- **Court found EPA's denial was improper**
- **Determined that GHGs constitute air pollutants under Clean Air Act**
- **EPA failed to justify denial of petition to regulate**

Post-*Massachusetts* Events



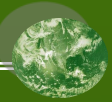
- Numerous rulemaking petitions from environmental groups
- Advance Notice of Proposed Rulemaking (July 30, 2008)
- News reports of probable “endangerment finding”
- Clean Air Act developments fuel NEPA urgency and compliance

Center for Biological Diversity v. NHTSA



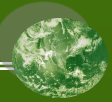
- **November 2007 decision from 9th Circuit**
- **Found NHTSA EA for fuel economy rules inadequate**
- **EA quantified CO₂ effects**
 - **NHTSA rule reduced GHG emissions (0.2%)**
- **Court found that NHTSA failed to show why these effects were insignificant**
- **Focus on cumulative impacts**

NHTSA Decision



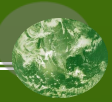
- “[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of [the agency’s] control ... *does not release the agency from the duty of assessing the effects of its actions on global warming* within the context of other actions that also affect global warming.”

NHTSA (continued)



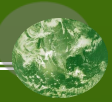
“The impact of greenhouse gases on climate change is *precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.*”

***NHTSA* and NEPA**



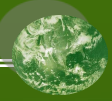
- **No strong precedent following *NHTSA***
- **However, failure to address climate issue creates significant risk**
- ***NHTSA* has included enhanced discussion in EIS**
- **Litigation pending around the country**
 - **Focus for litigation**
 - **New Climate Law Institute**
- **Frequent subject of comments on NEPA documents**

Friends of the Earth Settlement



- Boulder and others sued Ex-Im Bank and Overseas Private Investment Corp.
- NEPA analysis of overseas projects
- Court rejected defendants' summary judgment motion in 2007
- Parties agreed to settle in Feb. 2009
- Defendants agreed to subject certain projects to review of climate impacts. *E.g.*, OPIC:
 - 100,000 tons per year threshold
 - Reduce project GHG emissions by 20 percent

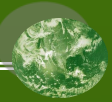
Agency Guidance: 1997 CEQ Draft



- **Circulated for comment but never finalized**
- **Acknowledged climate covered under NEPA**
- **Suggested that focus should be on programmatic review**
- **Said project-level review less helpful**

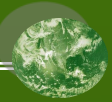
Agency Guidance:

January 2009 USFS Guidance



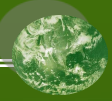
- “Climate Change Considerations in Project Level NEPA Analysis”
- <http://www.fs.fed.us/climatechange>
- Consider effects of project on climate and vice versa
- “not currently feasible to quantify the indirect impacts ... on global climate change”
- “determining significant effects ... cannot be made at any scale”

USFS Guidance, Continued



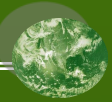
- **Impacts may be quantifiable for large emitters like oil and gas**
- **Examples of effects of climate on projects:**
 - **Decreased snow fall for ski areas**
 - **Reforestation after timber harvest**
- **“Some project[s] may present ... quantifiable differences in carbon storage and GHG emissions...”**

Climate Change: Major NEPA Issues



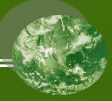
- **Effects on purpose and need/alternatives**
 - How will climate change affect projects?
 - Do alternatives have better GHG performance?
 - Are alternatives better able to cope with climate change?
- **Effects of project on climate**
 - Threshold for significance
 - Quantification
 - Understanding context and impacts
 - Non-linear impacts

Climate Change: Major NEPA Issues, Continued



- **Cumulative Impacts**
 - Scope of cumulative impact analysis
 - Context and significance
- **Mitigation**
 - Must be considered
 - NEPA does not require implementation
 - Other laws may compel
 - *E.g.*, Clean Air Act after endangerment finding?

Examples of Climate Discussion in Recent EISs



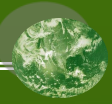
- **Larry Svoboda, NEPA Program Director, U.S. EPA Region 8**

Climate Change in NEPA: EPA Region 8 Recommendations



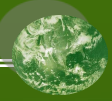
- **Changing rapidly**
- **No National guidance**
- **CEQ guidance expected soon**
- **Continued evolution expected**
- **Region 8 experience**

Region 8 NEPA Program



- **Authority based on Section 309 of CAA**
- **Requires EPA review of EISs**
- **Comments must be made public**
- **Unsatisfactory Impacts referred to the Council on Environmental Quality**

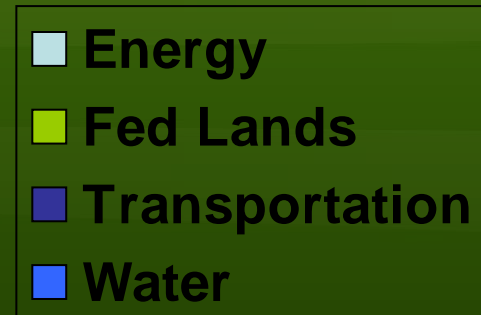
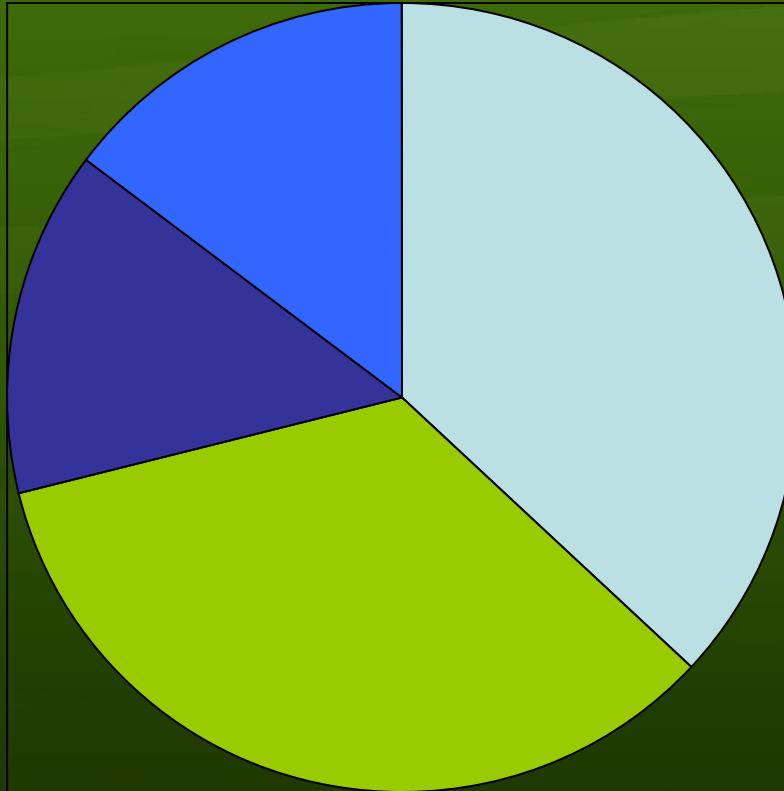
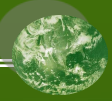
Region 8 NEPA Program



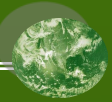
- **One of largest EIS workloads**
- **Public lands**
- **Energy extraction**
- **Many GHG emitting projects**
 - **Coal mines**
 - **Power plants**
 - **Oil and gas production**
 - **New industrial facilities**

R8 NEPA Program in 2008

305 Actions

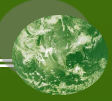


Region 8 Response to Climate Change in NEPA documents



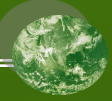
- 1) Discuss the Climate change issue
- 2) Disclose the GHG emissions from the proposed federal project/decision
- 3) Compare emissions to another known source of GHG emissions
- 4) Calculate the radiative forcing of the new emissions
- 5) Identify ways of reducing GHG emissions from the project
- 6) Discuss impediments to acting

Examples of recent EISs



- **New Coal Mine or expansions**
- **New rail lines for coal transport**
- **New Petroleum refinery**
- **Oil and gas development**
- **Water supply projects**

Discussion and Questions



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