

Case No. 07-74819
(Consolidated with Case Nos. 07-74836 and 08-70807)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**PEOPLE OF THE STATE OF CALIFORNIA, ex rel. EDMUND G.
BROWN JR., ATTORNEY GENERAL, et al.;**

Petitioners,

v.

**U.S. DEPARTMENT OF ENERGY, SAMUEL B. BODMAN, Secretary,
U.S. Department of Energy, et al.**

Respondents.

On Petition for Review of Final Action of U.S. Department of Energy

**REPLY BRIEF OF THE GOVERNMENT PETITIONERS STATES OF
CALIFORNIA, NEW YORK, CONNECTICUT, AND NEW JERSEY,
AND CITY OF NEW YORK**

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PRELIMINARY STATEMENT

Petitioners States of California, New York, Connecticut, and New Jersey and City of New York (“Government Petitioners”) submit this brief to reply to the brief submitted by respondent U.S. Department of Energy (“DOE” or “the Department”) in Government Petitioners’ challenge to DOE’s Final Rule setting energy efficiency standards for electricity distribution transformers (“transformers”).^{1/} Government Petitioners join in the arguments presented in the Natural Resources Defense Council (“NRDC”) and Sierra Club’s reply brief and in the interest of judicial economy, will not repeat them here.

INTRODUCTION

As Government Petitioners set forth in their opening brief, DOE employed flawed environmental and economic analyses to justify adopting minimally stringent energy efficiency standards for transformers on a Finding of No Significant Impact (“FONSI”), in violation of the National Environmental Policy Act, 42 U.S.C. Sections 4321-4370f (2008) (“NEPA”). Government Petitioners have established that the Department failed to take the requisite hard look at the cumulative climate change impacts associated with the standards and, in fact, minimized the standards’ impacts by discounting future carbon dioxide (CO₂)

1. The brief of Intervener National Electrical Manufacturers Association (“NEMA”) largely tracks DOE’s brief. Government Petitioners’ reply therefore applies equally to NEMA’s brief.

pollution. Moreover, in evaluating whether the standards were economically justified under the Energy Policy and Conservation Act, 42 U.S.C. Sections 6201-6422 (2008) (“EPCA”), DOE refused to place any value on the reduction in CO₂ emissions associated with more stringent standards.

In response, DOE argues that: Government Petitioners’ NEPA arguments are waived; NEPA does not apply because the impacts of the standards are beneficial; and including discounted pollution in its environmental analysis (“EA”) had no effect on the Department’s decision. In addition, DOE argues that Government Petitioners’ EPCA argument is waived and that the Department’s failure to place a value on avoided CO₂ emissions under EPCA is justified by a 1996 policy memorandum. As set forth below, none of these arguments effectively counters Government Petitioners’ showing that the Department’s decision was arbitrary and capricious.

ARGUMENT

I. DOE Violated NEPA by Failing to Prepare an EIS And by Supplying Decisionmakers And The Public With an Inadequate Cumulative Climate Change Analysis in Its EA.

A. The Deficiencies in DOE’s NEPA Analysis Are Properly Before This Court.

In an effort to avoid addressing Government Petitioners’ NEPA arguments, DOE contends that these arguments have been waived. DOE Br. 34-38. The Department’s position is without merit.

1. There Is No Rule That The Party Bringing a NEPA Challenge Must Have Participated in the Notice and Comment Process.

Government Petitioners did not submit comments related to climate change during the transformer standards rulemaking.^{2/} DOE implies that a party challenging federal agency action must participate in the notice and comment process before it may challenge that action. DOE Br. at 34-35. However, this Circuit has “declined to establish a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision[.]” *Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir. 1984); *see also Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006); *Northwest Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1534-35 (9th Cir. 1997). Rather, the rule is that a party can raise a NEPA issue for the first time in court, as long as the agency had independent knowledge of the issue or received comments sufficient to allow the agency to give the issue meaningful consideration. *IlioUlaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092-1093 (9th Cir. 2006); *Great Basin Mine Watch*, 456 F.3d at 971 (citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (“*Public Citizen*”)).

2. However, a number of Government Petitioners and their state agencies submitted comments during the rulemaking encouraging DOE to adopt more stringent standards. City of New York Comment No. 139 (NRDC Excerpts of Record (“ER”) 574), New York State Energy Research and Development Authority Comment No. 136 (NRDC ER 571), California Energy Commission Comment Nos. 98 (ER 166) and 108.6 (ER 143).

The Department cites *Vermont Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 553 (1978) for the proposition that “[a]gency rulemaking should not be a game of ‘gotcha,’ where stakeholders withhold their concerns . . . then later sue the agency and attempt to overturn the decision. . . .” DOE Br. at 36. In *Vermont Yankee*, the Court found that a challenger’s comments related to the alternatives considered by the agency were insufficient to permit the challenger to bring a claim in court, where the comments were “cryptic” and where the challenger had declined the agency’s continual invitations for clarification. *Vermont Yankee*, 435 U.S. at 553-554. However, as this Court has recognized, *Vermont Yankee* does not change the normal rule that where an agency is on notice of an issue, it can be raised in court. *IlioUlaokalani Coalition*, 464 F.3d at 1092-1093; *Great Basin Mine Watch*, 456 F.3d at 971. “The rationale of *Vermont Yankee* has been limited to instances in which an interested party suggests that certain factors be included in the agency analysis but later refuses the agency’s request for assistance in exploring the party’s contentions.” *Kunaknana*, 742 F.2d at 1148.

Accordingly, Government Petitioners were not required to submit comments in order to challenge DOE’s decision provided that the arguments raised in their challenge were properly known or presented to the agency during the rulemaking process.

2. DOE Had Independent Knowledge And Was Made Aware of The Defects in Its NEPA Analysis.

a. DOE Had an Obligation to Disclose And Analyze Climate Change-Related Impacts Whether or Not This Obligation Was Specifically Brought to Its Attention.

DOE further asserts that Government Petitioners' arguments are waived because the Department did not receive comments setting out in detail the precise failures asserted in this litigation. DOE Br. at 34-38. DOE argues that no commentators specifically reminded the agency of its obligation to consider cumulative effects; to provide sufficient information on the effects of avoiding future CO₂ emissions; and to prepare an EIS where, as here, there are potentially significant environmental impacts. *Id.* In a nutshell, DOE's argument is that it is the duty of the commenting public to tell the agency in detail how it must comply with its legal obligations under NEPA. The Court should reject this argument.

“Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.” *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir.1975). “[T]he Supreme Court in *Public Citizen* reminds us of the rule that the primary responsibility for NEPA compliance is with the agency: ‘the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA’s or EIS’ flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to

challenge a proposed action.” *IlioUlaokalani Coalition*, 464 F.3d at 1092 (quoting *Public Citizen*, 541 U.S. at 765). Flaws meet this “so obvious” standard where the agency had independent knowledge of the issue that concerns the parties to the litigation. *Id.* (Where agency had independent knowledge of the very issue that concerned plaintiffs in the litigation, plaintiffs could raise the issue in court.).

In this case, DOE recognized that the standards’ “main environmental impact is decreased [greenhouse gas] emissions from fossil-fueled electricity generation” (FONSI, 72 Fed. Reg. 63563 (Nov. 9, 2007) (ER 1)) and that greenhouse gases contribute to climate change. Final Rule EA at EA-15 (ER 73.) Even though the Department understood the significance of the standards on CO₂ emissions, it gave short shrift to climate change impacts in its EA.

The Department “has a duty to address cumulative action regardless of whether plaintiffs complain of violations.” *Sierra Club v. Bosworth*, 199 F.Supp.2d 971, 990 (N.D. Cal. 2002) (citing *Northwest Environmental Defense Center v. Bonneville Power Administration*, 117 F.3d 1520, 1534-35 (9th Cir. 1997) (holding judicial review proper even though plaintiff did not raise objection during public comment process, because agency has duty to comply with regulation “regardless of whether participants complain of violations.”)). It is the Department, not Government Petitioners, that has a “continuing duty to gather and evaluate new information relevant to the environmental impact of its actions[.]”.

Friends of the Clearwater v. Dombeck, 222 F.3d 552, 559 (9th Cir. 2000) (citing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980)).

It was not Government Petitioners' or any commentator's responsibility to call out DOE's fundamental and obvious failures in addressing climate change impacts during the administrative process.

b. The Record is Replete With Specific Comments Raising The Defects at Issue in Government Petitioners' Challenge.

Even if NEPA required commentators to describe in detail the deficiencies in DOE's analysis, the record in this case contains comments that were entirely sufficient to allow DOE to meaningfully consider the issue of cumulative climate change impacts. Contrary to DOE's assertions (*see* DOE Br. at 37) commentators brought their concerns about the treatment of reduced greenhouse gas emissions to DOE's attention after the notice of proposed rulemaking ("NOPR") was released.

As noted in Government Petitioners' opening brief, a number of commentators took issue with DOE's decision to discount CO₂ emissions, because it minimized the significance of the avoided greenhouse gas emissions that would result from more stringent standards. Opening Br. at 34-36, citing Comment Nos. 98 (ER 171), 99 (ER 181), 108.6 (ER 159.) Though DOE's response was inadequate, the Department acknowledged and responded to these comments in the Final Rule - making clear that it was on notice of the issues. 72 Fed. Reg. at

58190, 58209 (October 12, 2007). (ER 23.)

Other comments alerted DOE to its obligation to put its raw CO₂ data into a context that would help to explain why even relatively small incremental contributions of greenhouse gases may cause real harm. For example, in its written comments to the NOPR, NRDC noted that the U.S. is a signatory to the United Nations Framework Convention on Climate Change and is thus obligated to “heed the objective of ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.’” Comment No. 117 (ER 131.) The comment explained that setting strong efficiency standards for transformers would aid the country in meeting this requirement. *Id.* It further stated that DOE could not justify its decision to adopt the standard proposed in the NOPR, which would sacrifice 100-200 million tons of CO₂ emissions reductions available under more stringent standards. *Id.* Throughout its comment, NRDC admonished DOE not to reject standards that would have the substantial benefit of reducing greenhouse gas emissions without demonstrating that the burdens associated with the higher standards would outweigh their benefits. *Id.* (ER 131-132, 134-135.)

Similarly, the National Association of Regulatory Utility Commissioners (“NARUC”) emphasized the environmental benefits associated with more stringent standards, urging DOE to adopt standards that would eliminate 85.2 million metric tons more global warming pollution than the standards proposed

in the NOPR. Comment No. 106 (NRDC ER 492.) The comment included a Resolution in Support of U.S. Department of Energy's Efforts to Upgrade National Appliance and Equipment Energy Efficiency Standards, which discussed the cumulative potential CO₂ emissions reductions associated with stringent efficiency standards for commercial air conditioners and heat pumps, residential furnaces and boilers, and distribution transformers. *Id.* (NRDC ER 495.) Additionally, the Midwest Energy Efficiency Alliance recognized DOE's ability to eliminate 75 million additional metric tons of global warming emissions from adoption of more stringent standards than the level proposed in the NOPR. Comment No. 126 (ER 112.) Even with this notice, however, DOE continued to present only raw data about projected emissions devoid of any context.^{3/}

3. DOE relies on *Public Citizen*, 541 U.S. at 764 in support of its argument that Government Petitioners have waived their right to challenge the Department's compliance with NEPA because of allegedly inadequate comments in the record. DOE Br. at 35-37. The *Public Citizen* Court examined whether the agency had been given adequate opportunity to consider rulemaking alternatives beyond those evaluated in the EA, which would mitigate the environmental impact of the agency's proposed action (authorization of cross-border operations by Mexican motor carriers). *Id.* at 764. The alternatives examined by DOE are not at issue in the present case. Rather, Government Petitioners have challenged the adequacy and accuracy of the Department's discussion of climate change impacts examined in the EA. As discussed above, DOE recognized that the standards' primary environmental impact would be its effect on greenhouse gas emissions and a number of commentators brought climate change to the Department's attention during the NOPR phase. While the agency in *Public Citizen* was faced with entirely new proposed alternatives that had never before been examined, in this case, DOE was aware of the significance of the climate change impacts discussion during the rulemaking process.

In *Great Basin Mine Watch v. Hankins*, the Court found that comments in the record were sufficient to permit plaintiffs to raise a NEPA claim related to the adequacy of the agency’s cumulative impacts analysis. 456 F. 3d at 971. The Court pointed to one comment stating the agency should look at other related projects in the region and another addressing the inadequacy of the air pollution evaluation in the EIS. *Id.* The Court held that “the comments were sufficient ‘to allow the agency to give the issue meaningful consideration.’” *Id.* Similarly, in this instance, the NARUC comment specifically identified the potential cumulative CO₂ emissions reductions available from three of DOE’s appliance and equipment standards, including transformers. And a number of commentators expressed concerns about the Department’s analysis of the standards’ climate change impacts. Accordingly, under the rule in *Great Basin Mine Watch v. Hankins*, the comments submitted in the present case were more than sufficient to alert DOE to the need for careful consideration of climate change in its environmental analysis.

For the foregoing reasons, Government Petitioners have not waived their right to challenge the sufficiency of DOE’s climate change analysis.

B. The Standards’ Potential Environmental Impacts Triggered The Need For an EIS.

As Government Petitioners’ opening brief demonstrates, even the limited information presented in DOE’s EA shows that there is a substantial question that

the transformer standards may have a cumulatively significant impact on future CO₂ emissions and thus, on climate change. Opening Br. at 26-29. It was therefore, arbitrary and capricious for DOE to prepare a FONSI instead of an EIS. *See Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1183 (9th Cir. 1982) (holding that EA failed to take the requisite “hard look” at the environmental consequences of the proposed action and that agency’s decision to prepare a FONSI was unreasonable).

In response, the Department argues that, “[w]hen, as here, DOE’s action has only a beneficial effect in the form of decreased carbon dioxide emissions, DOE acted reasonably in concluding that preparation of an EIS was not justified.” DOE Br. at 40; *see also* NEMA Br. at 64-68. This assertion is based on assumptions that are incorrect as a matter of fact and law.

First, to be clear, even with new transformer efficiency standards in place, CO₂ levels will continue to rise, contributing to the problem of climate change. Existing transformers produced without federal efficiency standards will continue to exist and continue to contribute CO₂ emissions to the atmosphere. New transformers produced under DOE’s standards, whatever their emissions, will only add to the emissions from existing transformers, and to emissions associated with electricity use as a whole. As DOE notes in its brief, CO₂ emissions resulting from electricity production will continue to increase due to increased consumption. DOE Br. at 43. As a result, the adopted transformer standards “will not actually

result in a decrease in carbon emissions, but potentially only a *decrease in the rate of growth* of carbon emissions.” See *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1217 (9th Cir. 2008) (“*CBD v. NHTSA*”) (emphasis added) (holding EA’s cumulative climate change impacts analysis inadequate and remanding to the agency to address this deficiency).

If taken to its logical conclusion, DOE’s argument suggests that where a project slows the rate at which a negative impact occurs, the impact is beneficial, and does not require any analysis under NEPA. However, as this Court explained in *CBD v. NHTSA*, NEPA requires an agency to examine the cumulative climate change impacts associated with efficiency standards that decrease the rate of growth of CO₂ emissions, because “[a]ny given rule setting a [fuel efficiency] standard might have an individually minor effect on the environment, but these rules are collectively significant actions taking place over a period of time.” 538 F.3d at 1216 (internal quotations omitted).

Second, that the Department has characterized the transformer standards as “beneficial” is immaterial to its responsibility to comply with NEPA. As Government Petitioners’ opening brief explains, NEPA regulations specifically recognize that beneficial impacts may trigger the need for an EIS. 40 C.F.R. § 1508.27(b)(1); Opening Br. at 23-24. Case law supports this plain language interpretation of the regulation. “[E]ven if the Federal agency believes that on balance the effect [of the action] will be beneficial,’ regulations promulgated by

the Council on Environmental Quality (CEQ) nonetheless require an impact statement.” *Catron County Bd. of Com'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996) (quoting 40 C.F.R. § 1508.27(b)(1)); *see also Environmental Defense Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir.1981) (“beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all significant environmental effects, not merely adverse ones.”).

In fact, DOE itself took the position that a beneficial impact can trigger the need for an EIS in a case related to efficiency standards under EPCA. In *NRDC v. Herrington*, the Circuit Court for the District of Columbia recognized, “DOE is correct in pointing out that both beneficial and adverse effects on the environment can be significant within the meaning of NEPA, and thus require an EIS.” 768 F.2d 1355, 1431 (D.C. Cir. 1985). Moreover, DOE’s own NEPA guidelines acknowledge that a beneficial impact may be significant. U.S. Department of Energy, Office of NEPA Policy and Compliance, December 2004 at 16-17 (“An impact may be adverse or beneficial, and the overall impacts of an alternative may be significant even if on balance the impacts would be beneficial.”).^{4/}

Finally, DOE suggests that NEPA does not “impose a duty on federal

4. Available at <http://www.eh.doe.gov/nepa/guidance.html>.

agencies to prepare EISs for environmentally beneficial actions simply because the agency theoretically could have chosen to take a more beneficial action.” DOE Br. at 41 (emphasis in original). However, as this Circuit has recognized:

The importance of the EIS in the decision-making process cannot be underestimated; the EIS “seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.”

Lathan v. Brinegar, 506 F.2d 677, 690-691 (9th Cir. 1974) (quoting *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C.Cir. 1971)); see also *Oregon Natural Desert Ass'n v. Bureau of Land*, 531 F.3d 1114, 1120 (9th Cir. 2008). By failing to adequately evaluate the environmental benefits of more stringent standards in an EIS, DOE lost the opportunity to adopt optimally beneficial efficiency standards for this equipment.

If the Court accepted the Department’s argument that an EIS is improper where the rate of pollution is reduced, agencies such as DOE and NHTSA which are charged with increasing efficiencies over time would never be required to comply with NEPA. Such an outcome would contravene NEPA’s purposes of public disclosure and informed decisionmaking and has been rejected by this Court. *CBD v. NHTSA*, 538 F.3d at 1216-1217.

C. The EA Does Not Adequately or Accurately Inform The Public And Decisionmakers About The Standards' Climate Change Impacts.

DOE asserts that the cumulative climate change evaluation in the EA was sufficient and that it adequately informed decisionmakers about the standards' environmental impacts. DOE Br. 38-46. However, as Government Petitioners noted in their opening brief, bare data presented out of context do not constitute an adequate cumulative climate change impacts analysis. Opening Br. at 30. Moreover, even the data in the EA were misleading in that they were presented alongside discounted emissions figures. Opening Br. at 32-38.

DOE argues that in addition to the data showing the CO₂ emissions reductions associated with each standard, “the EA provided other information on the effects of carbon dioxide emissions.” DOE Br. at 44. But none of the references to the EA cited by the Department actually address the actual effect of each of the standards on climate change.

NEPA demands more than unelaborated emissions data in a cumulative impacts analysis. As the Court in *CBD v. NHTSA* recognized, “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” 538 F.3d at 1217. For such an analysis, “NEPA requires an agency to consider the environmental impact that ‘results from the incremental impact of the action when added to other past, present and reasonably foreseeable actions[.]’ *NRDC v. U.S. Forest Service*, 421

F.3d 797, 814 (2005) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999) (per curiam)). NEPA documents “must include ‘a useful analysis of the cumulative impacts of past, present and future projects’ in sufficient detail to be ‘useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts.’” *Id.* (quoting *Muckleshoot*, 177 F.3d at 810). Here, DOE made no attempt to evaluate, or even to describe any past, present or future projects or to prepare an analysis in sufficient detail to be useful to the public or decisionmakers.

The information presented in the EA in *CBD v. NHTSA* and that offered by the Department are flawed for the same reason – they did not represent the *actual* cumulative climate change impacts associated with the proposed standards. As the *CBD v. NHTSA* Court explained:

While the EA quantifies the expected amount of CO₂ emitted from light trucks MYs 2005-2011, it does not evaluate the “incremental impact” that these emissions will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions such as other light truck and passenger automobile CAFE standards. The EA does not discuss the *actual* environmental effects resulting from those emissions or place those emissions in context of other CAFE rulemakings. 538 F.3d at 1216 (emphasis in original). As Government Petitioners explained in their opening brief, the EA at issue in this case quantifies the expected CO₂ emissions, but fails to consider the *actual* cumulative climate change impacts resulting from those emissions or to place those emissions in context of other DOE rulemakings. Opening Br. at 30-32.

Not only did DOE fail to analyze the impacts of emissions, but it also presented misleading data by applying a discount rate to the emissions figures. An agency violates NEPA where it prepares a document that is so misleading that decisionmakers and the public cannot make an informed comparison of the alternatives reviewed by the agency. *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005). As Government Petitioners explained in their opening brief, the only possible effect of including discounted emissions in the EA was to minimize the significance of the impact of allowing the undiscounted tons of CO₂ to escape into the atmosphere. Opening Br. at 33-38; *see also* NRDC Br. at 38-41. As pointed out by a number of commentators, this exercise was illogical and unethical. Opening Br. at 34-36, citing Comment No. 98 at 4 (ER 171), Comment No. 99 at 10 (ER 181), Comment No. 108.6 (ER 159.)^{5/}

DOE's EA did not sufficiently or accurately examine the cumulative climate change impacts associated with the transformer standards.

5. The Department's only response to Government Petitioners' assertion that including discounted CO₂ emissions in its EA misled the public is that Government Petitioners were obligated to point to a reference in the record demonstrating that the decisionmakers or public were *actually* misled by the discounted data. DOE Br. at 45-46. Such evidence is not required by NEPA. *See Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 448 (4th Cir. 1996) (Agency violated NEPA by preparing an EIS that had the *potential to mislead* the public.). Government Petitioners offered sufficient evidence in the record to show that the information presented in the EA had the potential to mislead the public and decisionmakers about the significance of the CO₂ emissions associated with the standards. Opening Br. at 34-35, citing Comment No. 98 (ER 171); Comment No. 99 (ER 181); Comment No. 108.6 at 113:17-114:6 (ER 159.)

II. DOE Violated EPCA by Arbitrarily Valuing the Environmental Benefit of Reduced CO₂ Emissions at Zero.

A. DOE's Failure to Value Reduced CO₂ Emissions Is Properly Before This Court.

As with its arguments against Government Petitioners' NEPA claims, DOE again attempts to avoid confronting the issues raised in the EPCA claim by asserting waiver. This time, DOE argues that "Petitioners have waived the argument that carbon dioxide emissions should be monetized [under EPCA] by failing to present it to the agency in the first instance." DOE Br. at 21. However, as noted in Government Petitioners' and NRDC's opening briefs, commentators did bring this issue to DOE's attention. Opening Br. at 12-13, citing Comment No. 108.6, at 239:20-240:10 (ER 162-163) and 42:21-24 (ER 148), NRDC Opening Br. at 32-33, citing Comment No. 108.6 at 42-43 (NRDC ER 503-504.) The Final Rule recognized these comments and dismissed them (72 Fed. Reg. at 58210-58211 (ER 24-25)); therefore, there is no debate that the issue was before DOE during the rulemaking. Opening Br. at 25.

The cases cited by DOE do not support its waiver argument. First, in *Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. 1991), the court rejected plaintiffs' challenge to one of the scores used by EPA to list Tex Tin on the National Priorities List (NPL) for hazardous waste sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.* That rejection was based on plaintiff's failure to object to one of the studies used to

develop the score. *Id.* During the administrative process, plaintiffs failed to object to the study at issue in the case; therefore, the objections could not be raised for the first time in court. *Id.* By contrast, here, commentators alerted DOE to the need to monetize the benefits of reduced CO₂ emissions and DOE rejected the comments “because of uncertainties in the forecast of the economic value of such emissions reductions.” 72 Fed. Reg. at 58211 (ER 25.) Petitioners are entitled to question DOE’s decision and its response to comments. Opening Br. at 40-47.

In the second case cited by DOE, *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), the Court found that a procedural defect in an administrative process was required to have been brought to the administering agency’s attention before it could be raised in court. There is no analogous assertion of a problem with the procedure followed by DOE in its rulemaking for the transformer standards; instead, Petitioners argue that the substantive EPCA evaluation was skewed by DOE’s failure to account for the economic value of reduced CO₂ emissions. Opening Br. at 40-47, NRDC Br. at 31-37.

Other than these two inapposite cases, DOE offers no support for its EPCA waiver argument.

B. DOE Has Not Provided And Cannot Provide a Reasonable Explanation for Its Failure to Monetize The Benefit of Reduced CO₂ Emissions.

DOE improperly relies on an internal guidance document, the 1996 Process Rule, 61 Fed. Reg. 36974 (July 15, 1996), as the basis for its decision not to

monetize reduced CO₂ emissions. DOE Br. at 18-19.^{6/} First, the Process Rule is not binding on the agency. *Moore v. Apfel*, 216 F.3d 864, 868-869 (9th Cir. 2000) (holding that internal practices manual did not bind agency staff); *Herrington*, 768 F.2d at 1413 (concluding that DOE could not rely on order from Office of Management and Budget to excuse its deficient response to comments.); *see* Opening Br. at 37.

Second, as explained in Government Petitioners' opening brief, the Process Rule permits DOE to deviate from its provisions on a case-by-case basis. Opening Br. at 43 n. 14 (citing 61 Fed. Reg. at 36979). In fact, DOE has deviated from this guidance document in its recent rulemaking for its NOPR for Packaged Terminal Air Conditioner and Packaged Terminal Heat Pump Energy Conservation Standards, 73 Fed. Reg. 18858 (April 7, 2008) ("Packaged AC NOPR"), which offers a range of monetary values for reduced CO₂ emissions associated with the proposed standards. Opening Br. at 44-45, citing 73 Fed. Reg. at 18901. In a footnote, DOE acknowledges the existence of the Packaged AC NOPR, but ignores its significance as evidence of the Department's ability not only to deviate from the Process Rule, but to develop its own estimates of the value of reduced CO₂ emissions. DOE Br. at 22 n.3. DOE could have, and should have, evaluated

6. DOE recognizes that its own NEPA guidance document is not binding on the agency (DOE Br. at 44, n.10), yet the Department suggests that the Process Rule, another internal guidance document, prevents DOE from monetizing environmental benefits. DOE Br. 18-19.

whether continued adherence to the eleven-year-old Process Rule was appropriate and supported by the evidence at the time of its rulemaking in 2007.

And contrary to DOE's assertion that the economic value of this environmental benefit is too uncertain to calculate, Government Petitioners have demonstrated by reference to *CBD v. NHTSA*, that monetizing reduced CO₂ emissions is feasible. Opening Br. at 42-43. In both the present case and *CBD v. NHTSA* the agencies recognized that one of the most important benefits of more stringent standards is a reduction in CO₂ emissions. *CBD v. NHTSA*, 538 F.3d at 1199-1200; FONSI, 72 Fed. Reg. at 63563 (ER 1.) And in both instances, undervaluing this benefit resulted in a biased decisionmaking process that led to the selection of less stringent standards.^{7/} *Id.* at 1200; Final Rule 72 Fed. Reg. at 58191-58192.

Where, as here, DOE's recent rulemaking practices and case law demonstrate the Department's ability to monetize CO₂ emissions, DOE's decision not to value this important benefit was arbitrary and capricious.

7. Here, DOE asserts that it need not monetize the value of reduced CO₂ emissions, because it performed a "qualitative assessment of emissions" in the EA. DOE Br. at 21. However, as discussed above, the environmental analysis in the EA was wholly inadequate. Moreover, as NRDC explains in its reply brief, nowhere in the record did DOE consider the *economic* benefits of CO₂ reductions either quantitatively or qualitatively.

C. DOE's Decision Not to Monetize Reduced CO₂ Emissions is Not Entitled to *Chevron* Deference.

DOE suggests that its decision not to monetize the benefit of reduced CO₂ emissions, and instead to carry out a “qualitative” analysis of this benefit, is entitled to *Chevron* deference. DOE Br. at 20-21. The two step *Chevron* test requires the Court to determine: 1) whether Congress has directly spoken to the precise question at issue; and 2) if the statute is “silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron v. NRDC*, 467 U.S. 837, 842-843 (1984).

DOE argues that EPCA does not expressly compel monetization, even though the “need for nation to conserve energy” factor is part of the overall *economic* justification analysis required by EPCA. As support for this interpretation of the statute, the Department cites to the statute’s 1978 legislative history, which recognized that, at that time - three decades ago - “the need for nation to conserve energy” factor could not be quantified. DOE Br. at 21. However, the quoted language was immediately followed by the following directive: “Where quantification is possible, it is expected that the Secretary will perform such quantification of individual factors to the greatest extent practicable.” H.R. Conf. Rep. No. 95-1751 at 116, reprinted in 1978 U.S.C.C.A.N. 8134, 8160, *see also* NEMA Br. at 42.

DOE cannot pick and choose which Congressional directive it will apply. *Chao v. Community Trust Co.*, 474 F.3d 75, 85 (3rd Cir. 2007) (“[w]hen it is possible for an agency to pick and choose between conflicting regulations, the agency should not be entitled to choose the convenient one and then receive *Chevron* deference.”). The Final Rule demonstrates that DOE has followed this Congressional directive to “perform . . . quantification . . . to the greatest extent practicable” by valuing the uncertain inputs for life cycle costs, including electricity price trends. 72 Fed. Reg. at 58206, Final Rule TSD Ch. 8, Appendix 8B (ER 20, 93); *see* Opening Br. at 43-44. Yet the Department chose not to place a value on the economic benefits associated with reduced CO₂ emissions, even though, as discussed above, recent rulemaking practices and case law demonstrate that it is entirely practicable for the Department to quantify and monetize these emissions. DOE’s decision not to monetize the benefit of CO₂ emissions reduction was arbitrary and capricious in that it “put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards.” *CBD v. NHTSA*, 538 F.3d at 1198.

CONCLUSION

Government Petitioners respectfully request that the Court remand the challenged final rule and EA, and order DOE to correct the deficiencies specified above within one year of this Court's decision.

DATED: October 6, 2008

Respectfully submitted,

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