Consolidated Cases Nos.
06-71891, 06-72317, 06-72641, 06-72694, 06-73807 and 06-73826

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CENTER FOR BIOLOGICAL DIVERSITY, *et al.,*

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.,*

Respondents.

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# RESPONSE OF PUBLIC INTEREST PETITIONERS TO NHTSA'S PETITION FOR REHEARING

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## I. INTRODUCTION

After thoroughly reviewing the evidence in the record and meticulously applying the applicable legal criteria, the Court in this case found that "Petitioners have raised a substantial question as to whether the Final Rule [setting fuel economy standards for light trucks] may have a significant impact on the environment." Center for Biological Diversity v. National Highway Traffic Safety Administration, 508 F.3d 508, 552-58 (9th Cir. 2007). Consistent with the well-established precedent of this Circuit and others across the country, the Court therefore ordered NHTSA to prepare an environmental impact statement ("EIS") as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. Where, as here, the record is sufficiently developed for the reviewing court to determine that an agency's decision not to prepare an EIS is arbitrary and capricious because the evidence demonstrates a potentially significant impact, the proper remedy is to set aside the agency's "finding of no significant impact" and order preparation of a full EIS. In the petition for rehearing and suggestion for rehearing en banc, Respondents (hereinafter "NHTSA") do not cite a single case – in this Circuit or elsewhere – that contradicts this long-standing rule of NEPA jurisprudence. Accordingly, NHTSA's petition does not satisfy the criteria of Federal Rule of Appellate Practice 35 and should be denied.

## II. ARGUMENT

### A. Because NEPA Requires Preparation of an EIS for Proposed Actions Significantly Affecting the Environment, the Courts Have Authority to Enforce this Mandate.

Section 102(2) of NEPA provides that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement" describing the environmental impacts of the proposed action, as well as its unavoidable adverse effects, alternatives to the proposed action, the relationship between short-term uses and long-term productivity, and any irreversible and irretrievable commitment of resources caused by the proposed action." 42 U.S.C. § 4321(2)(C) (emphasis added). Collectively, the components of this "detailed statement" have become known as an "environmental impact statement" or EIS. The Presidents' Council on Environmental Quality ("CEQ") has issued binding regulations that implement this "action-forcing" provision to ensure that "federal agencies act according to the letter and spirit of the Act." 40 C.F.R. §§ 1500.1(a), 1500.3. The purpose of CEQ's regulations is to "tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act." Id. § 1500.1(a).

Although NEPA itself does not define what constitutes an action

"significantly" affecting the quality of the environment, for which an EIS must be prepared, CEQ's binding regulations do provide guidance. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (noting that Court relies on CEQ regulations to guide review of agency's determination of significance). The regulations direct agencies, and ultimately the courts, to consider both the "context" of the proposed action and its "intensity." 40 C.F.R. § 1508.27 (listing several factors that should be considered in evaluating intensity). If it chooses, an agency may first prepare an "environmental assessment" to aid in determining whether a full EIS is required. Id. §§ 1501.3, 1508.9. However, the ultimate question for judicial review in a challenge to an agency's decision not to prepare a full EIS is whether the "significance" threshold of NEPA is triggered. See Blue Mountains, 161 F.3d at 1212.

Literally for decades, this Court has consistently and repeatedly held that "[a]n EIS must be prepared 'if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'" Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 864 (9th Cir. 2005) (emphasis in original; quoting Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1154 (9th Cir. 1998)). See also, National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (holding that "an EIS must be

prepared" where the agency action "may have a significant effect upon the . . . environment"); Blue Mountains, 161 F.3d at 1212 (same); Greenpeace Action v. Franklin, 14 F.3d 1324 (9th Cir. 1992) (same); LaFlamme v. F.E.R.C., 852 F.2d 389, 397 (9th Cir. 1988) (same); Found. for North American Sheep v. U.S. Dep't of Agriculture, 681 F.2d 1172, 1178 (9th Cir. 1982) (same). Consistent with NEPA's purpose to ensure that agencies "carefully consider" the environmental impacts of their decisions, see Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989), the threshold "significance" trigger is not overly burdensome. "A plaintiff need not show that significance effects will in fact occur." Idaho Sporting Congress, 137 F.3d at 1149 (emphasis in original) (quoting Greenpeace Action, 14 F.3d at 1332 ). "It is enough for the plaintiff to raise 'substantial questions whether a project may have a significant effect on the environment.'" Blue Mountains, 161 F.3d at 1212. See also Ocean Advocates, 402 F.3d at 846.

Because an agency has a statutory mandate to prepare an EIS when the NEPA threshold of significance is crossed, compliance with that mandate is reviewable and enforceable under the Administrative Procedure Act ("APA"), 5 U.S. C. § 552 et seq. The APA authorizes courts to both "set aside" an unlawful finding of no significant impact and "compel" an unlawfully withheld EIS. 5 U.S.C. §§ 706(1)-

(2). Moreover, in the absence of a statutory limitation on the exercise of their equitable discretion, courts retain inherent authority to fashion a remedy that ensures agency compliance with a statutory duty. See, e.g., Owner Operator Independent Drivers Ass'n, Inc. v. Swift Transportation Co., Inc., 367 F.3d 1108, 1112 (9th Cir. 2004) (affirming that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied").

Consistent with this authority, this Court can and regularly does direct agencies on remand to undertake missing or inadequate NEPA analyses. Where the Court finds that an EA or EIS fails to adequately address an environmental impact or issue as required by NEPA, it routinely orders the agency to consider that impact. See, e.g., Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 1001 (9th Cir. 2004) (ordering agency to provide reasonably thorough assessment of project's cumulative impacts). Likewise, where the NEPA "significance" threshold is exceeded and an agency fails to prepare an EIS, the Court routinely orders the agency to prepare one. See, e.g., 'Ilio'ulaokalani Coalition v. Rumsfeld, 464 F.3d 1083, 1102 (9th Cir. 2006) (ordering supplemental EIS); Ocean Advocates, 402 F.3d at 875 (remanding for preparation of full EIS); National Parks & Conservation Ass'n, 241 F.3d at 737 (holding that "preparation of an EIS

is mandated by the 'controversy,' as well as by the 'uncertainty,' factor of the intensity provision"); Idaho Sporting Congress, 137 F.3d at 1154 (ordering agency to prepare EIS); Forelaws on Board v. Johnson, 743 F.2d 677, 686 (9th Cir. 1984); City of Davis v. Coleman, 521 F.2d 661, 682 (9th Cir. 1975) (same). Contrary to NHTSA's suggestion, these judicial directives do not improperly "substitute" the Court's judgment for that of the agency or "make the decision" for the agency. Petition for Rehearing at 7. Rather, they simply require that the agency comply with the minimal procedural requirements of NEPA.[1]

**B. The Petition for Rehearing Portrays an Intra-Circuit Split Where None Exists.**

NHTSA wrongly argues that an "intra-circuit split" exists, citing four decisions where the panel did not direct preparation of an EIS. These four cases are not evidence of a conflicting line of authority within the Circuit, however. Rather, they are illustrative of, and entirely consistent with, the general approach followed by this Court and other circuits in shaping NEPA relief: Where the reviewing court is asked and able to determine from the agency record that a

[1] This is not a case where it would be appropriate for the Court merely to set aside the offending discretionary decision documents and allow the agency to decide whether to carry out the project at all. NHTSA concedes that it is required by law to promulgate new corporate average fuel economy standards. The panel's decision thus properly directs the agency to comply with NEPA and prepare an EIS before it makes a new decision on the standards.

substantial question of significant impact exists, it can and should order the agency to prepare an EIS. Where, however, that issue is not yet ripe for consideration or the agency's record is not sufficiently developed to allow the reviewing court to make the "substantial question" determination, the court orders the agency to consider the issue further on remand. Each of the Ninth Circuit cases cited by NHTSA in its petition adheres to this general approach; there is thus no "intra-circuit" split of any kind.

For instance, in Steamboaters v. F.E.R.C., 759 F.2d 1382 (9th Cir.1985), cited at page 9 of the petition, the reviewing panel found that the agency had failed to complete any environmental analysis at all. Thus, the panel ordered the agency to prepare an initial EA. Id. at 1392-93.[2] Additionally, despite its failure to prepare an EA, the agency claimed that mitigation would reduce the environmental impacts below the level of significance, but it did "not specifically address" how it would do so. Accordingly, the court could "not determine whether the imposition of the conditions adequately supports the decision not to prepare an EIS." Id. at 1394. In the absence of sufficient information to determine whether there was a substantial question of significant impact requiring completion of an EIS, the

[2] Under the theory advanced by NHTSA in its petition for reheaing, the Steamboaters panel should not have ordered even the preparation of an EA, but rather simply remanded the matter for further consideration.

Court appropriately remanded to the agency for completion of an EA and development of a record.

Similarly, in Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986), also cited at page 9 of the petition, the agency had failed to prepare any NEPA analysis in connection with its issuance of a permit to collect marine mammals, believing that NEPA was in conflict with the Marine Mammal Protection Act and therefore inapplicable. Id. at 825. Finding this argument to be erroneous, the Court then examined the agency's contention that its proposed action was, nevertheless, categorically exempt from NEPA. Noting that the agency had "failed to explain adequately its decision not to prepare an environmental impact statement," id. at 828, the panel remanded with direction that the agency "consider the requirements of NEPA and regulations thereunder, and . . . provide a reasoned explanation of whatever course it elects to pursue." Id. at 829. Like Steamboaters, the panel in Jones v. Gordon could not independently determine whether a substantial question of a significant impact existed because the agency had not done any environmental analysis at all. Thus, it properly remanded the matter for further development of the record.

In Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000), also cited by NHTSA in its petition, the question before the Court was not whether the EA was inadequate

or whether an EIS should be prepared, but whether the EA was timely. The panel concluded that because the agency had predetermined and committed itself to pursuing a course of action before the EA was prepared, the NEPA analysis was untimely. Id. at 1145 ("We hold that by making such a firm commitment before preparing an EA, the Federal Defendants failed to take a "hard look" at the environmental consequences of their actions and, therefore, violated NEPA."). Because the Court's analysis focused on the belated timing of the EA, the panel did not assess whether there was a substantial question of significant impacts sufficient to trigger an EIS. Thus, the appropriate remedy was remand for a new EA "under circumstances that ensure an objective evaluation free of the previous taint." Id. at 1146.

Finally, in San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n., 449 F.3d 1016 (9th Cir. 2006), cited briefly at page 8 of the petition, the agency's EA for a storage project at the Diablo Nuclear Power Plant specifically declined to consider the potential environmental impacts from a terrorist attack. The Court rejected each of the four bases offered by the agency for failing to consider these impacts in the EA, id. at 1031-35, and thus remanded the matter "for the agency to fulfill its responsibilities under NEPA . . . consistent with its statutory and regulatory obligations. Id. at 1035. Because the panel only

addressed the legality of the agency's categorical refusal to address potential terrorist impacts, the record before the Court did not provide a basis for determining whether there was a substantial question of significant impacts. Remand for development of an EA that considered those impacts in the first instance was therefore proper, and consistent with the rule followed by the panel in this case.

Reviewed in the context of the rule consistently applied by Ninth Circuit panels, NHTSA's cited cases establish nothing other than the propriety of the remedy ordered by the panel in this case; no rehearing is required to resolve any "intra-circuit" split.

**B. There Also Is No Split of Authority Among the Circuits on this Issue**.

NHTSA also miscasts similar cases from other circuits as creating an inter-circuit split in authority. But again, the out-of-circuit cases cited by NHTSA merely follow the same approach as this Court, declining to order preparation of an EIS where the agency has not properly considered, or developed a sufficient record to analyze, the "substantial question" issue.

Attempting to manufacture a "split" of authority, NHTSA selectively quotes and confuses holdings in cases from the Second, Fifth and D.C. Circuits. For example, NHTSA's discussion of the Fifth Circuit cases O'Reilly v. U.S. Army

Corps of Engineers and Fritiofson v. Alexander leaves out crucial language that shows the consistency of the Fifth Circuit's approach with the rule followed by the Ninth Circuit:

> [A] decision to forego preparation of an EIS may be unreasonable for at least two distinct reasons: (1) the evidence before the court demonstrates that, contrary to the FONSI, the project may have a significant impact on the human environment, or (2) the agency's review was flawed in such a manner that it cannot yet be said whether the project may have a significant impact. The appropriate relief, moreover, depends upon which of these findings the district court makes. If the court finds that the project may have a significant impact, the court should order the agency to prepare an EIS. If the court finds, on the other hand, that the EA is inadequate in a manner that precludes making the determination whether the project may have a significant impact, the court should remand the case to the agency to correct the deficiencies in its analysis.

O'Reilly v. U.S. Army Corps of Engineers, 477 F.3d 225, 239 (5th Cir. 2007) (emphasis added; citations omitted) (citing Fritiofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir 1985). The O'Reilly court remanded for preparation of an EA because the agency's review was so flawed that it had not properly considered whether an EIS was indeed required. 477 F.3d at 240. Further, the O'Reilly court did not find, as this Court expressly did, the existence of any significant impact requiring an EIS in the record. Id.

The Second Circuit, despite misleading dicta quoted in O'Reilly and copied into NHTSA's petition at page 10, used the same standard in National Audubon

Soc. v. Hoffman. 132 F.3d 7, 18 (2d Cir.1997). There, gaps in the record precluded the agency, and the reviewing court, from determining whether impacts would be significant.[3] As in O'Reilly, the National Audubon court held that because the record was not sufficient to determine the possibility of significance, neither the agency nor the court could reasonably decide whether an EIS was required. National Audubon, 132 F.3d at 18.

Similarly, in Found. on Economic Trends v. Heckler, 756 F.2d 143, 153-54 (D.C. Cir. 1985), the D.C. Circuit used the same clear standard applied by the panel in this case: "In light of this complete failure to address a major environmental concern, NIH's environmental assessment utterly fails to meet the standard of environmental review necessary before an agency decides not to prepare an EIS . . . . Simple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." The court found that the agency "never directly addressed the question whether an EIS should be prepared. Such an inquiry is, of course, the ultimate purpose of an environmental assessment." Id. Accordingly, the court required the agency to start at the beginning of the NEPA

[3] Notably, petitioners do not explain National Audubon itself. Instead, they rely on a quote from a footnote in O'Reilly that mischaracterized dicta in National Audubon as being its holding. Because National Audubon is a case where the reviewing panel found the record inadequate, any discussion of appropriate remedy when the record demonstrates a significant impact is entirely dicta.

process with a new EA.

Finally, the Fifth Circuit followed the same path in Louisiana Wildlife Fed. v. York, 761 F.2d 1044 (5th Cir. 1985), where the question at issue before the court was whether the agency was required to prepare a supplemental EIS in light of certain changed circumstances. The court declined to order preparation of a supplemental EIS because there was still an open question as to the environmental impacts of those changed circumstances that the agency had not yet analyzed. Id. at 1053.

Thus, despite NHTSA's best efforts to illustrate a split between the circuits, none exists. The Ninth Circuit's rulings, and the ruling in this case, are consistent with the holdings of the other federal courts across the nation that have addressed this issue. No rehearing or rehearing en banc is necessary or appropriate.

### C. NHTSA's Citation to a Recent Supreme Court Ruling on The Endangered Species Act is Inapposite and Does Not Affect the Established NEPA Law of This Circuit.

NHTSA's selective citation to National Association of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518 (2007), is misplaced. The petition for rehearing argues that the Supreme Court's Endangered Species Act holding in that case prevents this Court from remanding for an EIS. That argument confuses the substantive requirements of the ESA with the procedural requirements of NEPA.

A remand under NEPA, for either an EA or an EIS, does not dictate the outcome of the agency's environmental review process; it merely forces the agency to follow the appropriate procedure mandated by the statute and regulations. Here, when Petitioners successfully showed that the agency had arbitrarily and capriciously issued a finding of no significant impact in spite of evidence in the record of significant impacts, the only available remedy for the Court was to remand for proper NEPA procedure, as it did. Petitioners did not seek to use NEPA to "add another factor" to the considerations of the agency in making its final rule, as the plaintiffs in Home Builders did with the ESA. Center for Biological Diversity, 508 F.3d at 547, n.68 (citing Nat'l Assoc. of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518, 2535 (U.S. 2007)). Instead, Petitioners sought, and the Court ordered, appropriate procedural relief under NEPA: "NEPA imposes the obligation on every agency to evaluate the environmental impacts of its major actions so that there can be informed agency and public decisionmaking." Id. The holding in National Homebuilders does not in any way affect or alter this proper result.[4]

[4] The underlying case, Gonzales v. Thomas, 547 U.S. 183 (2006) (per curiam), is also inapt. In that case, the lower court had granted an asylum petition that it determined was arbitrarily denied by the agency. The Supreme Court overruled, holding instead that the proper remedy was to remand to the agency for further review. Id. at 126. The remedy ordered by this Court is entirely consistent with Gonzales: the fuel economy standards rule and finding of no significant impact

### D. The New Fuel Economy Statute Does Not Preempt NEPA.

Finally, NHTSA incorrectly claims that because Congress has established a new goal for fuel efficiency, preparation of an EIS should no longer be required. Petition for Rehearing at 17. In the new legislation, Congress sought only to force an increase in fuel economy standards. Acting in the aftermath of the Court's decision in this case, Congress notably did not address NHTSA's NEPA obligations in any way. As NHTSA itself notes, Congress did "not change the EPCA statutory factors" or undermine NHTSA's discretion with regard to fuel economy. Id. at 16. Nor does the new statute in any way reduce the significance of the impact of fuel economy standards on global warming, as found by the panel. Moreover, the legislation in no way affects the decision of this Court with regard to the appropriate NEPA procedural remand. Unless the agency ignores the undeniable impact of fuel economy standards on the climate, the impact of the new rule will be no less significant. Thus, an EIS remains the appropriate remedy.

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were set aside, and the agency was directed to complete an EIS to better inform the new rule it must promulgate. Center for Biological Diversity, 508 F.3d 536. Here, unlike in Gonzales, the remedy ordered by the Court in no way supplants the agency's substantive judgment; NHTSA must still evaluate environmental impacts and determine fuel economy standards. By ordering preparation of EIS, the panel merely followed the clear rule of this Court and other circuits that requires an agency to undertake the procedural step of completing an EIS where there is evidence on the record that shows a substantial question of significant impact.

## III. CONCLUSION

For the forgoing reasons, Petitioners respectfully urge the Court to deny the petition for rehearing in its entirety.

Dated: March 7, 2008

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 3,684 words, exclusive of tables and cover sheet.

Date: March 7, 2008

Deborah A. Sivas

PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On March 7, 2008, I served the foregoing **RESPONSE OF PUBLIC INTEREST PETITIONERS TO NHTSA'S PETITION FOR REHEARING** on all parties to this action named below by placing two true and correct copies thereof in a sealed envelope, with postage fully prepaid, in the United States Mail at Stanford, California, addressed as follows:

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I declare under penalty of perjury (under the laws of the State of California)

that the foregoing is true and correct, and that this declaration was executed March 7, 2008 at Stanford, California.

Lynda F. Johnston

LYNDA F. JOHNSTON