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4  
5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE DISTRICT OF NEVADA

7 ROBERT W. HALL, )  
8 Plaintiff, )

9 vs. )

10 UNITED STATES DEPARTMENT OF )  
11 TRANSPORTATION an Agency of the )  
12 United States, NORMAN Y. MINETA, as )  
13 Secretary of Transportation, WILLIAM H. )  
14 KAPPUS, as Acting Administrator Nevada )  
15 Division, Federal Highway Administration, )  
16 RANDY J. BELLARD, as FHWA Planning )  
17 and Research Engineer, and LESLIE T. )  
18 ROGERS, as Regional Transit Administrator, )  
19 Nevada Division, Federal Transit )  
20 Administration, )

CV-S-03-0477-RLH-RJJ

21 Defendants. )  
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**PLAINTIFF'S RULE 60(b) MOTION FOR RELIEF FROM FINDINGS AND ORDER**

TO: DANIEL G. BOGDEN  
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601 D Street NW  
Washington, DC 200026-3986

1 PLEASE TAKE NOTICE of the filing of this motion by Plaintiff Robert W. Hall for  
2 F.R.C.P., Rule 60(b)(1)(2) and (6) and L.R. 7-2 for relief from the October 8, 2003 Order of the  
3 Court. The Court's Order was filed in response to Defendants' Motion to Dismiss filed July 15,  
4 2003 and Plaintiff's Cross Motion for Summary Judgment or, in the Alternative for Summary  
5 Adjudication of Defenses filed August 4, 2003. The Court also considered plaintiff's opposition  
6 filed August 4, 2003, as part of Plaintiff's motion, Defendants' reply thereto and opposition to  
7 Plaintiff's motion filed August 18, 2003, and Plaintiff's reply to Defendants' opposition to  
8 Plaintiff's motion filed August 26, 2003.

9  
10  
11 This motion is supported by the above-named documents, Plaintiff's May 15, 2003, First  
12 Amended Complaint for Judicial Review and to Enjoin, the points and authorities attached  
13 hereto, and the Declaration of Robert W. Hall attached thereto.

14 The motion is brought in order to correct errors, excusable neglect, and in the interests of  
15 justice order to prevent a manifestly unjust result.

16  
17 Dated: Las Vegas, Nevada, October 21, 2003.

18 Respectfully submitted,

19 /s/ Robert W. Hall  
20 ROBERT W. HALL, Plaintiff, pro se

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CV-S-03-0477-RLH-RJJ

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21 **PLAINTIFF'S POINTS AND AUTHORITIES**  
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1 **ERRATA**

2 Plaintiff's Cross-Motion P&A dated August 4, 2003 has an error at 9. The date "1993" in  
3 the last paragraph should read "2003." Plaintiff's Objections and Reply to Defendants'  
4 Opposition to Plaintiff's Motion for Summary Judgment dated August 26, 2003 has an error on  
5 p. 2. "USDPT" should be "USDOT." The Court made an inadvertent error in using "Protection"  
6 in place of "Policy" regarding the National Environmental Policy Act.  
7

8 **APA REVIEW STANDARDS**

9 Pursuant to the federal Administrative Procedures Act (APA), the reviewing court shall  
10 hold unlawful and set aside agency action, findings and conclusions found to be ... arbitrary,  
11 capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to  
12 constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority,  
13 or limitations, or short of statutory right; without observance of procedure required by law;  
14 unsupported by substantial evidence in a case ... reviewed on the record of an agency hearing  
15 provided by statute; or unwarranted by the facts to the extent the facts are subject to trial de novo  
16 by the reviewing court. See, 5 U.S.C. § 706(2); *Oregon Natural Resources Council v. Marsh*, 52  
17 F.3d 1485, 1488 (9<sup>th</sup> Cir. 1995).  
18  
19

20 Plaintiff has brought the motion in order to correct errors, excusable neglect, and in the  
21 interests of justice in order to prevent a manifestly unjust result.  
22

23 **BEST EVIDENCE RULE**

24 Plaintiff Hall pleads the best evidence rule regarding what Plaintiff Hall wrote, intended  
25 or intends. That evidence may be found in the Court Record of this action and consists of the  
26 Am. Complaint, motions, memoranda and exhibits he has filed herein.  
27

**MATTERS OUTSIDE THE RECORD ARE DISREGARDED**

1 In ruling on the merits of a petition for review the court generally will not consider  
2 materials which are not part of the administrative record (AR). See, *Gomez-Vigil v. I.N.S.*, 990  
3 F.2d 1111, 1113 (9<sup>th</sup> Cir. 1993). Defendants could have filed the AR before their motion to  
4 dismiss and chose not to file the AR. Defendants have waived their right to file before their  
5 motion. For that reason, consideration of any administrative record (AR) document by the Court  
6 was at a minimum, error. Defendants had the responsibility to file the AR. They are bound by  
7 that decision, particularly where the decision not to file the AR was highly prejudicial to the  
8 Plaintiff. Plaintiff Hall objects to any reference to any document not in the AR which currently  
9 stands as having zero documents. Plaintiff's references in this action to documents that should be  
10 in a properly filed AR are without prejudice in the alternative and for the purpose of  
11 impeachment.

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13  
14 **NO DEFERENCE**

15 The Court will not defer to an agency interpretation of a statute the agency is not charged  
16 with administering. *United States v. Corey*, 232 F.3d 1166, 1183 (9<sup>th</sup> Cir. 2000). Further, when a  
17 statute is administered by more than one agency, a particular agency's interpretation is not  
18 entitled to deference. Agency interpretations developed informally (i.e., not through formal  
19 adjudication or notice-and-comment rulemaking) do *not* warrant deference. See, *Scales v. I.N.S.*,  
20 232 F.3d 1159, 1165-1166 (9<sup>th</sup> Cir. 2000). The EPA is charged with administering the National  
21 Environmental Protection Act (NEPA) and the Clean Air Act (CAA). The court may refuse to  
22 defer to an agency's interpretation of a particular statute (even though within the agency's  
23 expertise) if the agency has not consistently interpreted the provisions issue. See, *State of Oregon*  
24 *v. BLM*, 876 F.2d 1419, `425 (9<sup>th</sup> Cir. 1989).

25  
26  
27 **MOTION TO DISMISS**

1 The Court erred in not considering that “all allegations in the complaint are considered  
2 true and are construed in the Plaintiff’s favor. ... The court should not dismiss a complaint, thus  
3 depriving the Plaintiff of an opportunity to establish his claims at trial, ‘unless it appears beyond  
4 doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him  
5 to relief.’” See, Plaintiff Robert W. Hall’s Cross-Motion for Summary Judgment or in the  
6 Alternative for Summary Adjudication of Defenses filed August 4, 2003 at 2.  
7

8 **Review of a Rule 12(b) dismissal is limited to whether liability exists under the facts**  
9 **alleged in the complaint, not whether those facts are true.** *Davis v. Monroe County Bd. of Ed.*,  
10 526 U.S. 629, 631, 119 S.Ct. 1661, 1666 (1999). The Court erred in granting Defendants’  
11 Motion to Dismiss as to Plaintiff’s First, Second, Third, and Fourth Claims for Relief where in  
12 each instance, the Court found facts and ignored the requirement to consider the facts in Plaintiff  
13 Hall’s complaint as true.  
14

15 **ANSWER AND ADMINISTRATIVE RECORD**  
16

17 The Court erred by failing to note that Defendants have not answered or served a copy of  
18 the Administrative Record (“AR”) on the Court or Plaintiff Hall. See, Plaintiff Robert W. Hall’s  
19 Cross-Motion for Summary Judgment or in the Alternative for Summary Adjudication of  
20 Defenses (Pl. Cross-Motion) at 2 and Def. Response at 2, ¶3. Defendants’ failure to file the  
21 Administrative Record (“AR”) before moving to dismiss severely limits Plaintiff Hall’s ability to  
22 respond to the dismissal motion and protects Defendants’ misleading statements in moving for  
23 dismissal. Defendants’ statements cannot be substantiated without an AR. Plaintiff Hall must  
24 depend upon the Defendants for the AR. He cannot file it for them.  
25

26 **STANDARD OF REVIEW**  
27

On reading the Court’s Order, there is no evidence that the Court considered the case  
cited by the Plaintiff in the Am. Complaint ¶ 23, *Public Citizen v. Department of Transportation*,

1 315 F3d 1002 (9<sup>th</sup> Cir. 2003). “The leading, on-point, recent case that clearly and carefully  
2 explains most of the legal issues herein is *Public Citizen v. Department of Transportation*, 315  
3 F3d 1002 (9<sup>th</sup> Cir. 2003). See attached appendix copy.” See, Pl. Cross-Motion P&A at 4-5 & 16.  
4 Plaintiff Hall was shocked to realize that there is no sign in the Order that the Court read any of  
5 that case. The following are excerpts from the applicable provisions of *Public Citizen* (Westlaw)  
6 modified to the facts and allegations herein. Plaintiff Hall adopts this argument and adapts them  
7 to the facts herein as the most recent, carefully written Ninth Circuit Court of Appeals decision  
8 on the almost identical issues herein. The instant action does not involve the adoption of “rules”  
9 but it does involve the Defendants “interpretation” of rules, issues that are legally similar.  
10 Substitutions and deletions have been made for clarity. As we have noted, Plaintiff included the  
11 original text of this decision as an Appendix attached to Pl. Cross-Motion. Plaintiff Hall adopts  
12 the following modified argument herein and makes it a part hereof for all purposes.

13 [16][17] Review of agency action to determine its conformity with NEPA and the  
14 CAA provisions at issue is governed by the judicial review provisions of the  
15 APA, 5 U.S.C. § § 701-706. See *Hells Canyon Alliance v. United States Forest*  
16 *Serv.*, 227 F.3d 1170, 1176-77 (9th Cir.2000) (NEPA); *City of Olmsted Falls v.*  
17 *FAA*, 292 F.3d 261, 269 (D.C.Cir.2002) (CAA); see also *City of S. Pasadena v.*  
18 *Slater*, 56 F.Supp.2d 1106, 1134-35 (C.D.Cal.1999) (CAA review uses same  
19 standard as NEPA review). The reviewing court must determine that agency  
20 actions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in  
21 accordance with the law." 5 U.S.C. § 706(2) (A). In considering whether an  
22 agency acted in an arbitrary and capricious manner, a court "must determine  
23 whether the agency articulated a rational connection between the facts found and  
24 the choice made." *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife*,  
25 273 F.3d 1229, 1236 (9th Cir.2001). Furthermore, courts must "carefully review  
26 the record to 'ensure that agency decisions are founded on a reasoned evaluation  
27 of the relevant factors,' " *id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S.  
360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)), and may not " 'rubber-stamp  
... administrative decisions that they deem inconsistent with a statutory mandate  
or that frustrate the congressional policy underlying a statute,' " \*1021 *id.*  
(quoting *NLRB v. Brown*, 380 U.S. 278, 291-92, 85 S.Ct. 980, 13 L.Ed.2d 839  
(1965)) (omission in original).

13 [18][19] In the context of the procedural environmental requirements imposed by  
14 NEPA and CAA, "[t]he arbitrary and capricious standard requires a court to  
15 ensure that an agency has taken the requisite hard look at the environmental  
16 consequences of its proposed action, carefully reviewing the record to ascertain  
17 whether the agency decision is founded on a reasoned evaluation of the relevant  
18 factors." *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222

1 [F.3d 1105, 1114 \(9th Cir.2000\)](#) (internal quotation marks omitted), *cert. denied*,  
2 [534 U.S. 815, 122 S.Ct. 41, 151 L.Ed.2d 14 \(2001\)](#). A reviewing court is not  
3 permitted to substitute its judgment for that of the agency, but rather must "  
4 'simply ... ensure that[the agency] has adequately considered and disclosed the  
5 environmental impact of its actions.'" [Am. Rivers v. FERC, 201 F.3d 1186, 1194-](#)  
6 [95 \(9th Cir.1999\)](#) (quoting [Ass'n of Pub. Agency Customers, Inc. v. Bonneville](#)  
7 [Power Admin., 126 F.3d 1158, 1183 \(9th Cir.1997\)](#)). This means that we "must  
8 defer to an agency's decision that is fully informed and well-considered," [Blue](#)  
9 [Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 \(9th Cir.1998\)](#)  
10 (internal quotation marks omitted), but "need not forgive a 'clear error of  
11 judgment,' " *id.* (citing [Marsh, 490 U.S. at 378, 109 S.Ct. 1851](#)), or credit  
12 "conclusions that do not have a basis in fact," [Ariz. Cattle, 273 F.3d at 1236](#).

## 13 **V. ENVIRONMENTAL ANALYSIS UNDER NEPA**

### 14 **A. DOT's Decision Not to Prepare an EIS**

15 [\[20\]](#) We next determine whether DOT acted in an arbitrary and capricious manner  
16 when it failed to prepare an Environmental Impact Statement on the basis of its  
17 Environmental Assessment. By its own terms, NEPA intended to reorganize the  
18 priorities of the federal government, to integrate "environmental amenities and  
19 values" alongside more traditional "economic and technical considerations." [42](#)  
20 [U.S.C. § 4332\(2\)\(B\)](#). Congress directed that the statute and its implementing  
21 regulations be used toward this end in government decisionmaking "to the fullest  
22 extent possible." *Id.* [§ 4332](#).

23 [\[21\]](#) To achieve its goal of including environmental concerns in government  
24 decisionmaking, NEPA requires that an EIS be prepared for all "major Federal  
25 actions significantly affecting the ... human environment." *Id.* [§ 4332\(2\)\(C\)](#). In  
26 certain circumstances, agencies may first prepare an EA to make a preliminary  
27 determination whether the proposed action will have a significant environmental  
effect. See [Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 \(9th](#)  
[Cir.2001\)](#) (citing [40 C.F.R. § 1501.4](#)), *cert. denied*, [534 U.S. 1104, 122 S.Ct. 903,](#)  
[151 L.Ed.2d 872 \(2002\)](#). "If the EA establishes that the agency's action 'may have  
a significant effect upon the ... environment, an EIS must be prepared.'" *Id.*  
(quoting [Found. for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d](#)  
[1172, 1178 \(9th Cir.1982\)](#)) (emphasis and alteration in original). "If not, the  
agency must issue a Finding of No Significant Impact (FONSI), accompanied by  
'a convincing statement of reasons to explain why a project's impacts are  
insignificant.'" *Id.* (quoting [Blue Mountains, 161 F.3d at 1212](#)) (internal citations  
and quotation marks omitted).

[\[22\]](#) Thus, to decide whether an EIS is required, we must determine: (1) whether  
the challenged ... [site specific actions individually and as a group listed in the  
TIP herein] constitute "major" federal actions; and (2) whether they may  
significantly affect the environment. We find that DOT's ... [site specific actions  
individually and as a group listed in the TIP herein] are major federal actions that

1 may significantly affect the \*1022 environment, and thus we hold that DOT acted  
2 in an arbitrary and capricious manner in failing to prepare an EIS for the  
3 challenged regulations.

4 (Note: Plaintiff herein has substituted [site specific actions individually and as a  
5 group listed in the TIP herein] for the word "rules" throughout. The legal issue is  
6 the same either way. The issue is whether the federal agency's action constitutes a  
7 "major" federal action. The word "interpretations" could also be substituted since  
8 DOT's claim of "exempt" is an "interpretation" of a statute that amounts to the  
9 adoption of a rule without legally sufficient APA notice to the public. DOT's  
10 interpretation of the statutes cited herein also amounts to a "major" federal action.  
11 The reason is that DOT's interpretation is a decision that all DOT air pollution  
12 actions in the Valley nonattainment area are exempt from environmental law  
13 compliance, and extraordinary and unprecedented act on the part of federal  
14 agency that may well be a major reason for the Valley's nonattainment status  
15 from the outset.)

16 1. "*Major Federal Action*"

17 [\[23\]](#) *The Council on Environmental Quality ("CEQ")*, a body established by  
18 NEPA, [42 U.S.C. § § 4342-4347](#), has issued regulations implementing NEPA. We  
19 rely on these regulations to "guide our review of an agency's compliance with  
20 NEPA," [Native Ecosystems Council v. Dombeck, 304 F.3d 886, 894 n. 1 \(9th  
21 Cir.2002\)](#), and the Supreme Court has held that they are entitled to substantial  
22 deference, [Marsh, 490 U.S. at 372, 109 S.Ct. 1851](#). The relevant CEQ regulations  
23 implementing NEPA define "major Federal action[s]" as "actions with effects that  
24 may be major and which are potentially subject to Federal control and  
25 responsibility," including "[a]doption of official policy, such as rules, regulations,  
26 and interpretations." [40 C.F.R. § 1508.18](#). DOT, of course, does not dispute that  
27 its actions are "federal," but does dispute Petitioners' allegations regarding the  
28 regulations' "effects." ... This novel parsing of the regulations' effects fails to  
29 meet NEPA standards.

30 DOT's argument here echoes its earlier causation argument in the standing  
31 context. It is equally unavailing here for a similar reason. The CEQ regulations  
32 make clear that the "effects" of federal actions include "[i]ndirect effects, which  
33 are caused by the action and are later in time ... but are still reasonably  
34 foreseeable," *id.* § 1508.8(b), as well as "[c]umulative impact ... which results  
35 from the incremental impact of the action when added to other ... reasonably  
36 foreseeable future actions regardless of what agency (Federal or non-Federal) or  
37 person undertakes such other actions," *id.* § 1508.7.

38 We have already concluded that ... was "reasonably foreseeable" at the time the  
39 EA was prepared and the decision not to prepare an EIS was made. *Cf. Native  
40 Ecosystems, 304 F.3d at 896* (holding that a memorandum that "evidences a  
41 decision to consider ... seriously" taking certain actions renders those actions  
42 "reasonably foreseeable"). To restrict consideration of the regulations' "effects" in

1 the way DOT proposes would contravene not only the plain language of the CEQ  
2 regulations, but also the statutory command of NEPA, that environmental effects  
3 of government action be considered "to the fullest extent possible." [42 U.S.C. §  
4332](#).

4 As for the requirement that the federal action be "major," the CEQ regulations tell  
5 us that "[m]ajor reinforces 734 but does not have a meaning independent of  
6 significantly," [40 C.F.R. § 1508.18](#), meaning that a federal action is "major"  
7 whenever it has "significant" environmental effects. See [City of Davis v. Coleman,  
521 F.2d 661, 673 n. 15 \(9th Cir.1975\)](#).

## 8 2. "Significantly Affecting the Human Environment"

9 The CEQ regulations also define the crucial term "significantly," to clarify the  
10 situations in which an agency must prepare an EIS: "Significantly" as used in  
11 NEPA requires considerations of both context and intensity:

12 \*1023 (a) Context. This means that the significance of an action must be analyzed  
13 in several contexts such as society as a whole (human, national), the affected  
14 region, the affected interests, and the locality. Significance varies with the setting  
15 of the proposed action. For instance, in the case of a site-specific action,  
16 significance would usually depend upon the effects in the locale rather than in the  
17 world as a whole. Both short- and long-term effects are relevant.

18 (b) Intensity. This refers to the severity of impact. ... The following should be  
19 considered in evaluating intensity: ....

20 (2) The degree to which the proposed action affects public health or safety. ....

21 (4) The degree to which the effects on the quality of the human environment are  
22 likely to be highly controversial.

23 (5) The degree to which the possible effects on the human environment are highly  
24 uncertain or involve unique or unknown risks. ....

25 (10) Whether the action threatens a violation of Federal, State, or local law or  
26 requirements imposed for the protection of the environment.

27 [40 C.F.R. § 1508.27](#). If DOT's action is environmentally "significant" according  
to any of these criteria, then DOT erred in failing to prepare an EIS. See [Nat'l  
Parks, 241 F.3d at 731](#). An examination of these criteria reveal that the challenged  
regulations are environmentally "significant," and an EIS should have been  
prepared.

### (a) Context

The CEQ regulations explain that the proposed federal action must be analyzed  
with regard to several contexts--national, regional, and local--as well as by

1 looking at the short- and long-term effects of the proposed action. Measured  
2 against this standard, DOT's EA is woefully inadequate. ... It dismisses those  
3 increases as insignificant, however, because they are "very small relative to  
4 national levels of emissions." It does not conduct any analysis regarding whether  
5 these increases may be localized in certain areas ....

6 ...

7 Once again, DOT received this very criticism in public comments during its  
8 rulemaking process. ... This alone should have prompted DOT to conduct a long-  
9 term analysis, as required by the CEQ regulations, or at the very least, to  
10 "convincing[ly] ... explain" its absence. [Nat'l Parks, 241 F.3d at 730.](#)

11 (b) *Intensity*

12 (i) *Effect on Public Health and Safety*

13 Petitioners contend that DOT must prepare an EIS, in part due to the potential  
14 effect of the challenged regulations on public health and safety. Although we have  
15 never discussed this requirement in the context of air pollution, other courts have  
16 considered "even [the] marginal degradation of drinking water" to be  
17 environmentally significant for purposes of this regulation. See [United States v.  
18 27.09 Acres of Land, 760 F.Supp. 345, 353 \(S.D.N.Y.1991\)](#). The same could  
19 easily be said of a "marginal degradation" of the quality of the air we breathe.

20 The pollutants at issue are oxides of nitrogen ("NOx") and airborne particulate  
21 matter ("PM-10"). These compounds are emitted into the air as part of the exhaust  
22 fumes of diesel trucks, such as those that are the subject of the challenged  
23 regulations. Petitioners-Intervenors have pointed to a wealth of government and  
24 private studies showing that diesel exhaust and its components constitute a major  
25 threat to the health of children, contribute to respiratory illnesses such as asthma  
26 and bronchitis, and are likely carcinogenic. While these studies were not placed in  
27 the administrative record, that does not excuse DOT's failure even to consider  
whether any negative health effects could be associated with increased diesel  
exhaust emissions.

(ii) *Uncertainty*

[24] If the environmental effects of a proposed agency action are uncertain, the  
agency must usually prepare an EIS:

Preparation of an EIS is mandated where uncertainty may be resolved by further  
collection of data, or where the collection of such data may prevent "speculation  
on potential ... effects. The purpose of an EIS is to obviate the need for  
speculation by insuring that available data are gathered and analyzed prior to the  
implementation of the proposed action."

1 [Nat'l Parks, 241 F.3d at 732](#) (quoting [Sierra Club v. United States Forest Serv., 843 F.2d 1190, 1195 \(9th Cir.1988\)](#)) (internal citation omitted) (omission in  
2 original).

3 ... \*1025 ...\*1026 ...

4 Our law mandates that an agency complete an EIS "where uncertainty may be  
5 resolved by further collection of data, or where the collection of such data may  
6 prevent 'speculation on potential ... effects.' " [Nat'l Parks, 241 F.3d at 732](#)  
7 (quoting [Sierra Club, 843 F.2d at 1195](#)) (internal citation omitted) (omission in  
8 original). ...

8 (iii) *Threat of Illegality*

9 The ... asserts that DOT failed to take account of ... [Nevada's] emissions  
10 regulations, which are "more stringent than the federal standards." In its  
11 determination of whether its proposed action is significant, an agency must  
12 consider "[w]hether the action threatens a violation of Federal, State, or local law  
13 or requirements imposed for the protection of the environment." [40 C.F.R. § 1508.27\(b\)\(10\)](#);  
14 accord [Sierra Club, 843 F.2d at 1195](#). In [Sierra Club](#), we faulted  
15 the Forest Service's EA for its failure to consider, or even mention, California's  
16 water quality standards, which might have been threatened by proposed timber  
17 sales. See [Sierra Club, 843 F.2d at 1195](#). The same fault is present here....  
18 ["Nevada" was substituted for "California" for clarity in this discussion.]

16 The [Plaintiff] also points out that DOT's actions could violate the CAA, thus  
17 further triggering the illegality\*1027 prong of the significance analysis. Because  
18 [the court in Public Citizen found] that DOT violated the CAA, *see infra*, this  
19 further strengthens our conclusion that DOT's actions are environmentally  
20 significant for NEPA purposes. ["Plaintiff" was substituted for "California  
21 Attorney General" and "the court in Public Citizen" was added "we find" for  
22 clarity in this discussion.]

21 (iv) *Controversy*

22 [\[26\]\[27\]](#) "Controversy" sufficient to require preparation of an EIS occurs "when  
23 substantial questions are raised as to whether a project ... may cause significant  
24 degradation of some human environmental factor, or there is a substantial dispute  
25 [about] the size, nature, or effect of the major Federal action." [Nat'l Parks, 241](#)  
26 [F.3d at 736](#) (internal citations omitted and alterations in original). The evidence  
27 establishing such a controversy must be brought to the agency's attention while  
the agency is conducting its deliberations, not *post hoc*. See *id.* Thus, the  
controversy requirement is two-fold: Petitioners must show that there was a  
"substantial dispute" about DOT's actions and that this dispute raised "substantial  
questions" about their validity. The burden then shifts to DOT to provide a  
"convincing" explanation why no controversy exists. See *id.*

... [Note: In the instant action, there is no evidence of FHWA, APA, legally

1 public notices regarding the Defendants "interpretation" that exempted them from  
2 environmental law compliance. The public was not told what was happening.]

3 (c) *Convincing Statement of Reasons*

4 In sum, Petitioners have successfully demonstrated that DOT's proposed  
5 regulations may have a "significant" environmental impact, mandating the  
6 preparation of an EIS. DOT has failed to demonstrate that its EA contains  
7 anything close to the statutorily required "convincing statement of reasons"  
8 sufficient to support a decision not to prepare an EIS. We are similarly  
9 unpersuaded by DOT's last-ditch argument that, as an agency with no jurisdiction  
10 over environmental matters, it need not consider the environmental consequences  
11 of its actions. This argument flies in the face of the text of NEPA, which requires  
12 that "*all* agencies of the Federal Government shall .... include in every ... major  
13 Federal action[ ] significantly affecting the quality of the human environment, a  
14 detailed statement by the responsible official on ... the environmental impact of  
15 the proposed action." [42 U.S.C. § 4332\(2\)](#) (emphasis added).

16 ... \*1028 ... [NEPA requires a] "detailed statement ... on ... alternatives to the  
17 proposed action." [42 U.S.C. § 4332\(2\)\(C\)](#); *see also* [40 C.F.R. § 1508.25\(b\)\(2\)](#)  
18 (defining "[a]lternatives" to include "[o]ther reasonable courses of actions [sic]").  
19 Indeed, the CEQ regulations state that consideration of alternatives "is the heart of  
20 the environmental impact statement." [40 C.F.R. § 1502.14](#). "The rule of reason  
21 guides 'both the choice of alternatives as well as the extent to which the  
22 Environmental Impact Statement must discuss each alternative.'" [Am. Rivers, 201](#)  
23 [F.3d at 1200](#) (quoting [City of Carmel-by-the Sea v. United States Dep't of Transp.,](#)  
24 [123 F.3d 1142, 1155 \(9th Cir.1997\)](#)). "[F]or alternatives which were eliminated  
25 from detailed study, [an agency must] briefly discuss the reasons for their having  
26 been eliminated." *Id.* (quoting [40 C.F.R. § 1502.14\(a\)](#)) (emphasis omitted). Thus,  
27 in preparing its EIS, DOT should explore a wider range of alternatives.

**B. Categorical Exclusion of the Certification Rule**

28 [\[29\]](#) We next must determine whether DOT acted arbitrarily and capriciously in  
29 failing to conduct any NEPA environmental analysis at all for [their interpretation  
30 of the statutes or their list of site specific air pollution actions in the TIP.] ... DOT  
31 contends that this rule falls within an exception to the generally applicable  
32 requirements of NEPA. The CEQ regulations allow categorical exclusion of  
33 actions "which do not individually or cumulatively have a significant effect on the  
34 human environment *and* which have been found to have no such effect in  
35 procedures adopted by a Federal agency in implementation of these regulations."  
36 [40 C.F.R. § 1508.4](#) (citing [40 C.F.R. § 1507.3](#)) (emphasis added). For such  
37 actions, "neither an environmental assessment nor an environmental impact  
38 statement is required." *Id.*

...

1 **VI. CONFORMITY DETERMINATION UNDER THE CAA**

2 [31] Petitioners also contend that DOT acted arbitrarily and capriciously in failing  
3 to conduct a conformity determination under the CAA. The CAA requires EPA to  
4 establish air quality standards for certain pollutants, [42 U.S.C. § 7409](#), and it has  
5 done so with respect to [CO] ... and PM-10, the pollutants most at issue here, [40](#)  
6 [C.F.R. § 50.6, .7, .11](#). Each state, in turn, is required to adopt and submit for EPA  
7 approval a State Implementation Plan ("SIP") for each pollutant. [42 U.S.C. §](#)  
8 [7410\(a\)\(1\)](#). Each state is divided into "air quality control regions," which are  
9 classified as "attainment" or "nonattainment" with respect to each pollutant for  
10 which there exists an air quality standard. *Id.* [§ 7407](#). SIPs must contain emissions  
11 limitations and other measures designed to bring "nonattainment" regions into  
12 attainment. *Id.* [§ 7410\(a\)\(2\)](#). ([CO] was substituted for NOx for clarity in this  
13 discussion.)

14 [32] To ensure compliance with these plans, the CAA contains a "conformity"  
15 requirement, mandating that "[n]o department, agency, or instrumentality of the  
16 Federal Government shall engage in, support in any way or provide financial  
17 assistance for, license or permit, or approve, any activity which does not conform  
18 to [a SIP]." *Id.* [§ 7506\(c\)\(1\)](#). Most federal actions affecting levels of pollutants in  
19 nonattainment regions require that the responsible agency conduct a "conformity  
20 determination." [40 C.F.R. § 93.150-.160](#). ... \*1030 ...

21 The CAA mandates that each state be divided into "air quality control regions,"  
22 which are evaluated individually as to their compliance with air quality standards.  
23 [42 U.S.C. § 7407](#). Thus, proper CAA analysis must be conducted at the local and  
24 regional levels. The national emissions analysis in DOT's EA is inadequate to  
25 comply with the CAA. Because DOT is required to perform a new, more  
26 thorough region-by-region environmental analysis to achieve compliance with  
27 NEPA, it should also determine, as a result of its new analysis, whether the  
emissions resulting from its actions will truly fall below the levels established in [§](#)  
[93.153\(b\)\(1\)](#). *Cf. Olmsted Falls, 292 F.3d at 270-73* (holding that petitioners did  
not meet their burden of proof on whether a conformity determination was  
required by simply suggesting that it was an "open question" whether the  
emissions limits would be exceeded).

Second, DOT claims that by listing "[r]ulemaking" as a type of "[a]ction [ ] which  
would result in no emissions increase or an increase in emissions that is clearly de  
minimis," [40 C.F.R. § 93.153\(c\)\(2\)](#), the EPA intended to exempt *all federal*  
*regulations* from the requirements of the CAA. Petitioners respond that the  
exception encompasses only the process of rulemaking itself, but not the agency's  
implementation and execution of validly promulgated regulations. A careful  
reading of the EPA regulations, keeping the statutory purpose in mind, dispenses  
with DOT's erroneous, albeit novel, assertion.

The first striking element is that "rulemaking" is listed as a type of "[a]ction[ ]  
which would result in no emissions increase or an increase in emissions that is

1 clearly de minimis." *Id.* If the EPA drafters truly intended to exempt all federal  
2 regulations from the conformity determination requirement, they certainly would  
3 have been aware that some federal regulations do in fact result in an increase in  
4 emissions (or an increase that is not merely de minimis). Indeed, the EPA  
5 regulations specify that there are two kinds of emissions, "direct emissions" and  
6 "indirect emissions." *Id.* § 93.152.

7 Indirect emissions are defined as: those emissions ... that ... [a]re caused by the  
8 Federal action, but may occur later in time ... from the action itself but are still  
9 reasonably foreseeable; and ... [t]he Federal agency can practicably control and  
10 will maintain control over due to a continuing program responsibility of the  
11 Federal agency. \*1031 *Id.* "Caused by" was used to refer to "emissions that would  
12 not otherwise occur in the absence of the Federal action." *Id.*

13 Using the but-for analysis suggested by the EPA regulations, a substantial number  
14 of federal regulations would result in emissions above de minimis levels. If the  
15 EPA had wished to exclude *all* federal regulations from the scope of this  
16 requirement, it easily could have made a bolder statement exempting all federal  
17 regulations, *regardless* of whether they cause direct or indirect emissions.

18 Another clue as to the proper interpretation of the de minimis exception is the fact  
19 that the exception is for "rulemaking and policy development and issuance." *Id.* §  
20 [93.153\(c\)\(2\)\(iii\)](#). This juxtaposition strongly suggests that Petitioners are correct  
21 in arguing that the "rulemaking" exception should apply only to the process of  
22 developing and issuing federal regulations, as opposed to the substantive result  
23 produced by the actual implementation of the final rules.

24 [\[33\]\[34\]](#) Finally, it is relatively easy to imagine federal regulations or "policies"  
25 that could have drastic effects on emissions of regulated substances. Even  
26 assuming that it is possible the EPA intended these regulations to exclude such  
27 actions from the ambit of the CAA's statutory requirements, such a reading would  
conflict with the basic command of the statute: "No department, agency, or  
instrumentality of the Federal Government shall engage in, support in any way or  
provide financial assistance for, license or permit, or approve, any activity which  
does not conform to [a SIP]." [42 U.S.C. § 7506\(c\)\(1\)](#). "A federal regulation in  
conflict with a federal statute is *invalid* as a matter of law." *Watson v. Proctor (In*  
*re Watson)*, 161 F.3d 593, 598 (9th Cir.1998) (citing *Chem. Mfrs. Ass'n v. Natural*  
*Res. Defense Council, Inc.*, 470 U.S. 116, 126, 105 S.Ct. 1102, 84 L.Ed.2d 90  
(1985)) (emphasis in original). Consequently, the Supreme Court has held that an  
agency's interpretation of a regulation that conflicts with the plain language of the  
statute is entitled to "no deference." *Pub. Employees Ret. Sys. v. Betts*, 492 U.S.  
[158, 171, 109 S.Ct. 2854, 106 L.Ed.2d 134 \(1989\)](#). Thus, we read the EPA  
regulation, to preserve its validity, so that the categorical exception encompasses  
only the "development and issuance" of federal regulations, not the substantive  
results of their promulgation and implementation.

This conclusion does not conflict with [Environmental Defense Fund, Inc. v. EPA](#),

1 [82 F.3d 451 \(D.C. Cir.\)](#) (per curiam), *as amended*, [92 F.3d 1209 \(D.C.Cir.1996\)](#).  
2 In *Environmental Defense Fund*, the D.C. Circuit examined the validity of EPA  
3 regulations nearly identical to those here, [\[FN7\]](#) and specifically concluded that  
4 the "de minimis" exceptions were "an appropriate exercise of the EPA's authority,  
5 inherent in the statutory scheme." *Id.* at 467. In examining the regulations, the  
6 court considered the conclusion "that the categorical exemptions are de minimis  
7 [to be] entirely self-evident; the EPA has concluded that these activities 'would  
8 result in no emissions increase or an increase in emissions that is clearly de  
9 minimis,' and we neither see nor would expect to find any evidence to the  
10 contrary." *Id.* (quoting [40 C.F.R. § 51.853\(c\)\(2\)](#)). Had the D.C. Circuit been  
11 reading the EPA regulations in the manner DOT suggests, it certainly "would  
12 expect to find" at least *some* evidence tending to contradict such a premise.  
13 Though \*1032 it did not discuss the "rulemaking" exception specifically, the D.C.  
14 Circuit suggests that it would have invalidated the EPA regulation as conflicting  
15 with the CAA had the language or context suggested such a broad reading of the  
16 regulation. Thus, we decline DOT's suggestion to read the EPA regulation in a  
17 way that would tend to under-mine its validity.

18 ...

## 19 **VII. CONCLUSION** (in *Public Citizen*)

20 We have jurisdiction over the petitions for review. ... The only question before us  
21 is whether a federal agency failed to comply with our nation's long- established  
22 environmental laws. We hold that the Department of Transportation acted  
23 arbitrarily and capriciously in failing to prepare a full Environmental Impact  
24 Statement under the National Environmental Protection Act, as well as a  
25 conformity determination under the Clean Air Act. Therefore, we grant the  
26 petitions, and remand this matter to the Department of Transportation so that it  
27 may prepare a full Environmental Impact Statement and Clean Air Act  
conformity determination for all three regulations.

## 28 **THE FACTS AND ARGUMENT IN THE INSTANT ACTION**

29 Defendants are claiming that EPA approved emissions budgets give them the authority to  
30 ignore the APA, NEPA and the CAA. That claim is absurd. Defendants' interpretation of an EPA  
31 administrative act is that they can forget about APA, NEPA and CAA compliance. Defendants  
32 by analogy are claiming that if the EPA approved a bank heist plan, they are free to go out and  
33 rob a bank. The FHWA gets its marching order from Congress, not the EPA.

34 Defendants know that the 1979 approved state implementation plan (SIP) for Clark  
35 County is more stringent than the EPA approved submitted SIP budgets. Defendants have no

1 choice other than to comply with the most stringent SIPs or sets of SIP regulations. An EPA  
2 approval is not a mandate. Permission from the EPA must be considered in light of  
3 Congressional constraints. Just because they have emissions budgets from a submitted SIP does  
4 not mean that other SIPs do not have more restrictive requirements as they do herein.  
5

6 The issues involve four separate Congressional Acts all of which apply. The Acts  
7 interrelate but none of them cancel the other. An Act's requirements may require that compliance  
8 must precede another Act. More stringent State requirements may not be ignored. See, CAA §  
9 116. Generally, NEPA is the first federal agency compliance requirement. Only rarely does  
10 NEPA compliance proceed in parallel with CAA compliance. Congress intended that NEPA  
11 applies to all federal agencies. The public notice provisions of the APA apply at any time they  
12 are relevant starting with public notice requirements. The FAHA applies to transportation issues  
13 in coordination with transportation provisions in the CAA. All are constrained by NEPA  
14 cumulative impact compliance in the form of an environmental impact statement. Later, the  
15 Defendants must conform to the State's EPA approved state implementation plans (SIPs).  
16  
17

18 There are some key questions that must be asked in the environmental law process. The  
19 first is the issue of NEPA compliance. NEPA is a critical disclosure requirement. NEPA requires  
20 full disclosure of all of a federal agency's direct and indirect cumulative impacts in an  
21 environmental impact statement. That is especially true regarding particle matter ten microns or  
22 less (PM10) and carbon monoxide (CO) in this serious nonattainment area. See Exhibit F  
23 attached to Pl. Cross-Motion. In this instance, Defendants have admitted there is no NEPA  
24 compliance herein, *infra*. See, Def. Facts Response at 2. Summary judgment should have been  
25 granted on the basis of that admission alone. If there is no NEPA compliance, the entire process  
26 is legally insufficient.  
27

1           The second question that involves conformity to all of the State's EPA approved state  
2 implementation plans (SIPs). See CAA § 110(k) (3) and (l), 42 U.S.C. § 7410(k) (3) and (l). In  
3 the case of transportation actions, the Department of Transportation (DOT) statutes and  
4 regulations apply in parallel with the environmental statutes and regulations. The most stringent  
5 environmental statutes and regulations apply.  
6

7           Without the data from NEPA, submitted SIP budgets are not based upon data that is  
8 credible or real. The State's submitted SIPs cannot be lawfully approved as submitted (and have  
9 routinely not been approved and in one case vacated) since without exception, they are not at  
10 least as stringent as the State's EPA approved SIP which cannot be ignored in the approval  
11 process. The EPA makes mistakes. Defendants must get their own conservative legal advice. A  
12 serious warning to the Court is the claim of conformity to the "applicable SIP or SIPs." No one  
13 should be left to guess what the "applicable" SIPs are. See Pl. Cross-Motion P&A at 9.  
14

15           The point is that if a jurisdiction cannot reach cleaner air attainment on the basis of no  
16 emissions budgets or budgets of zero, that jurisdiction is not going to reach cleaner air attainment  
17 with less budgets much less stringent than zero. The data from NEPA should resolve the issue.  
18 There is also a tendency to concentrate on CO air pollution regarding transportation issues.  
19 PM10 is a factor that is at least as important as CO.  
20

21           The Court erred in not requiring Defendants to explain how they claim conformity to a  
22 twenty-four year old SIP that does not include emissions budgets for PM10 or CO.  
23

24           The Court erred in not requiring Defendants to explain how they rely on the PM10 and  
25 CO emissions budgets that they know are less stringent than those of the 1979 SIP. See, CAA §  
26 110(k) (3) and § 116. Without that disclosure, they must deal with the CAA § 176(c), 42 U.S.C.  
27 § 7506(c) prohibitions.

1 “Hall has been harmed by the failure of defendants to fully disclose the part that DOT  
2 plays in the serious, air pollution non-attainment status of the Valley.” Am. Complaint at 4, ¶ 15.  
3 Defendants’ memoranda describe a process of hiding and keeping information from the public.  
4 The APA, NEPA and CAA are processes of full disclosure. On the basis of Defendants’  
5 misleading statements, the Court has erred in a very fundamental way.  
6

### 7 **THE COURT’S ADMINISTRATIVE PROCEDURES ACT (APA) ASSUMPTIONS**

8 The Court erred by allowing the Defendants to mislead by citing statutes and case law  
9 that have nothing to do with the issues herein. “Defendants point the Court to 5 U.S.C. §§ 551  
10 and 553 for the proposition that the APA is inapposite to a conformity determination, and further  
11 urge the Court to follow the Northern District of Georgia’s decision that a conformity  
12 determination is not a rule subject to notice and comment.” Plaintiff Hall never said it was. At  
13 Am. Complaint ¶ 24, Hall alleged as follows:  
14

15 24. Hall alleges that the DOT made a commitment of Federal Highway  
16 Administration approvals and funding as a result of its Conformity Finding  
17 **before it prepared any legally sufficient NEPA document and before it**  
18 **complied with CAA conformity requirements, while avoiding APA**  
19 **compliance.** (Emphasis added.)

20 Hall’s APA compliance reference referred to Defendants’ avoidance of NEPA and APA  
21 compliance. The avoidance alleged involves environmental law compliance that should have  
22 occurred but did not occur long before the Conformity Finding. Conformity cannot occur without  
23 full NEPA compliance under the facts and allegations of the Am. Complaint.

24 Plaintiff responds to Defendants’ arguments by claiming that Defendants have  
25 both mischaracterized his assertion and pointed to the wrong law.” Amen.  
26 “Plaintiff alleges that the APA compliance to which he was referring related to  
27 the EIS that, Plaintiff asserts, should have been completed in conjunction with the  
conformity determination. Pl. Cross-Motion P&A at 26-27.

Order at 7. Hall was referring to public notice issues regarding the NEPA requirement for  
an environmental impact statement (EIS). The following is what Plaintiff Hall actually said at Pl.

1 Cross-Motion P&A at 26-27.

2 This is another straw issue. **Plaintiff has not claimed that a conformity**  
3 **determination is a rule.** Plaintiff has claimed no compliance with NEPA  
4 regarding an absence on a cumulative impact determination in an Environmental  
5 Impact State “EIS.” An EIS is subject to public notice, a comment period and any  
6 judicial review that may follow. 40 C.F.R. § 1503.1(4). There is no question that  
7 ignoring the NEPA requirements cuts down on the necessity for public notices.  
8 The statement is misleading. By the simple expedient of ignoring NEPA, the  
9 cumulative air pollution caused by a federal agency’s direct and indirect actions  
10 will never be revealed to the public or other agencies. Clark County will never  
11 achieve cleaner air attainment as long as federal agencies such as the ones the  
12 Defendants represent continue evading NEPA compliance.

13 According to the Defendants the applicable APA section is 5 U.S.C. § 553. The  
14 applicable sections are 5 U.S.C. §§ 702, 704, and 706. §702 covers the right of  
15 review. § 704 covers actions reviewable. § 706 covers the scope of review. The  
16 three sections are applicable regarding judicial review. **Plaintiff has not said that**  
17 **a conformity determination is a rule. The issue herein is Defendants’ final**  
18 **decision prior to their approval and funding of the site specific projects listed**  
19 **in the TIP, both of which have already commenced.** (Emphasis added.)

20 This is an action by a resident of the Clean Air Act, serious non-attainment area for  
21 PM10 and CO to compel Federal Defendants to comply with and to conform to the  
22 environmental laws of this country in order to protect and retain his environmental quality of life.

23 Plaintiff Hall was very clear in stating that he had not said that a conformity  
24 determination was a rule. The issues are “interpretation” not “rule” and site specific TIP projects.  
25 “To the extent that Plaintiff **might be suggesting** that the APA’s notice and comment  
26 requirements apply to the conformity process itself, the Court agrees with the Defendants’  
27 arguments and proffered authority that conformity is not a rule, and, hence is not subject to  
notice and comment.” Order at 7-8. Plaintiff Hall made no such suggestion. NEPA is subject to  
notice and comment.

## 28 **THE COURT’S CONFORMITY ASSUMPTIONS**

29 “The Court **takes these allegations** to be an assertion by Plaintiff that the conformity  
30 process itself is a major federal action, since the requirement that NEPA statements and

1 determinations be created is triggered by an agency’s ‘major federal action.’ ” There are two  
2 errors here. The first is the mixing of conformity, a Clean Act issue with NEPA, a separate Act  
3 that usually precedes and occasionally runs parallel with Clean Air Act requirements. Second,  
4 the Court’s “take” is in error. Plaintiff Hall’s allegations are those in his Am. Complaint, not  
5 those Defendants would like the Court to believe.  
6

## 7 **DEFENDANTS’ CONTRADICTIONS**

8       There is another example where the Defendants directly contradict themselves.  
9 Defendants filed Chapter V, Model Documentation and Transportation Conformity Analysis  
10 from the Regional Transportation Plan 2003-2025 and Transportation Improvement Program  
11 2003-2005.

13       In accordance with the Clean Air Act Amendments of 1990 and related Federal  
14 Regulations, both the Transportation Plan and the Transportation Improvement  
15 Plan (TIP) **must be found to be in conformity with the requirements of those**  
16 **Regulations and with all applicable State Implementation Plans (SIPs) before**  
17 **the TIP may be approved by the MPO.** The analysis described in this section  
18 has resulted in a finding that the projects and programs included in the draft FY  
19 2003-2005 TIP **conform to the relevant sections of the Federal Conformity**  
20 **Rule to the applicable sections of the Nevada SIPs for air quality.** (Emphasis  
21 added.)

22       Id. at 126. Defendants admit they must conform to the Clean Air Act Amendment of  
23 1990 and related Federal Regulations. Defendants admit they must be in conformity with the  
24 requirements of those regulations and all applicable State Implementation Plans (SIPs) before the  
25 TIP may be approved by the MPO. Defendants have taken both sides of the conformity issue in  
26 this Court.

27       Defendants as the responsible federal agency, not the RTC, are responsible for  
conformity and compliance. The burden is on the federal agency to decline to approve TIPs that  
cannot conform to all State Implementation Plans (SIPs).

Defendants admit that a list of the transportation projects is included in the TIP at

1 Chapter 6. That admission provides evidence that is as close as the Defendants ever came to  
2 identifying the transportation projects they have included in their conformity determination in  
3 this action. There is no AR. Without evidence of the list of transportation projects they claim  
4 conform, the conformity determination is legally insufficient. The Court has no way to know  
5 what that projects are on the list until and unless Defendants file the list with their AR  
6 certification. There is no evidence that the public was ever notified what the Defendants (not the  
7 RTC) were approving. Without proper public notice the public has no way of knowing whether  
8 the Defendants approved all or only a part of a submitted TIP. That burden cannot be shifted to  
9 the RTC or to Plaintiff Hall. That burden remains with the federal agency. The public is not  
10 made up of mind readers. The federal agency cannot certify anything is has not described in  
11 reasonable detail to the public. Plaintiff Hall has repeatedly requested mailed notices and still has  
12 to beg for final administrative act documents.

13  
14  
15       The key phrases herein directly contradict Defendants’ statements regarding whether a  
16 NEPA cumulative impact analysis is required or not. A NEPA cumulative impact analysis also  
17 must comply with all state SIPs. What are the relevant sections of the Nevada SIPs for air  
18 quality? The Defendants do not have any idea. Plaintiff Hall has not seen an instance where  
19 Defendants have identified the “applicable sections of the Nevada SIPs for air quality” in the  
20 context of a conformity determination. Defendants are always as general as possible, hoping that  
21 no one will notice. If the Defendants cannot and do not identify an EPA approved SIP that has  
22 survived appeals court review and complies with the 1990 amendments to the Clean Air Act, this  
23 action is factually over. The reason is that they are left with a twenty-four year old, very stringent  
24 SIP they know they cannot claim they conform to or with.

## 25 **CONFORMITY**

1           “The Court **takes these allegations** to be an assertion by Plaintiff that the conformity  
2 process itself is a major federal action, since the requirement that NEPA statements and  
3 determinations be created is triggered by an agency’s ‘major federal action.’ ” The Court cited  
4 Pl. Compl. ¶¶ 24-25. (Emphasis added.)  
5

6           24. Hall alleges that the DOT made a commitment of Federal Highway  
7 Administration approvals and funding as a result of its Conformity Finding before  
8 it prepared any legally sufficient NEPA document and before it complied with  
9 CAA conformity requirements, while avoiding APA compliance.

10           25. The Conformity at issue herein was made without reference to any NEPA  
11 environmental document.

12           The Conformity Finding described in the two paragraphs cited refers to the final FHWA  
13 decision prior to funding highway projects in the Las Vegas Valley. All Hall said was that a  
14 conformity finding cannot be made prior to NEPA and CAA compliance. Hall did not say that  
15 the conformity process itself is or was a major federal action. Plaintiff Hall knows better than to  
16 make an allegation like that.

17           Plaintiff did not cause the Court to “take these allegations to be an assertion” of a major  
18 federal action in the conformity context. The confusion lies with the Defendants, not Hall.  
19 Plaintiff Hall categorically denies the assertion. Plaintiff does claim that the conformity finding  
20 process attributed to the Defendants in his Am. Complaint is a misleading process. That has  
21 nothing to do with conformity being a “major federal action” in the NEPA context.  
22

23           In Plaintiff Hall’s amended Complaint, Nature of the Action, Plaintiff Hall stated:

24           16. Hall alleges that before legally sufficient compliance and conformity with and  
25 to NEPA, CAA and APA requirements, before providing Hall with his repeatedly  
26 requested administrative due process and his Fourteenth Amendment to the  
27 Constitution of the United States due process rights, the DOT noticed Hall with a  
Letter dated March 21, 2003 and a March 3, 2003 Conformity Finding for RTC’s  
January 9, 2003 Transportation Improvement Program and Plan. The Conformity  
Finding was signed by Leslie T. Rogers. FTA Regional Administrator and Randy  
J. Bellard, FHWA Planning and Research Engineer. William H. Kappus is Mr.  
Bellard’s senior level supervisor in Nevada. See attached letter dated March 21,

1 2003 (Plaintiff's Exhibit "A") and the March 3, 2003 Conformity Finding (P.  
2 Exhibit "B").

3 17. Plaintiff alleges that as structured and when all of the Valley air pollution  
4 activities of the Defendants are considered, the Transportation Improvement Plan  
5 ("TIP") constitutes a major federal action and a significant source of air pollution  
6 subject to the cumulative impact, environmental impact statement ("EIS")  
7 requirements of NEPA as defined by CEQ regulations.

8 This is a qualified statement, "as structured and when all of the Valley air pollution  
9 activities of the Defendants are considered." Plaintiff Hall was discussing the site specific actions  
10 listed in Chapter 6 of the TIP. "Chapter 6 contains a list of the transportation projects included in  
11 the TIP." Attached to Def. Mo. to Dismiss, Chapter V, Model Documentation and Transportation

12 Conformity Analysis at 126. The following are some other relevant excerpts from Chapter V.

13 The specific procedures for reaching this goal are those established under Federal  
14 law for ensuring conformity between transportation plans and air quality  
15 improvement plans. This process of conformity is intended to ensure that the  
16 projects and programs proposed in the Transportation Plan, TIP and TIP  
17 amendments conform to the purpose of the Clean Air Act Amendments of 1990  
18 and the State Implementation Plans. As stated in the CAAA, this means  
19 "...conformity to the (implementation) plan's purpose of eliminating or reducing  
20 the severity and number of violations of the national ambient air quality  
21 standards and achieving expeditious attainment of such standards...."

22 Id. at 126-127. That is not a rousing basis for an exemption argument. Then we have this  
23 one.

24 5.6 Finding of Conformity. It is a requirement of Federal and State Conformity  
25 Regulations that the projected mobile source emissions for the Nonattainment  
26 Area for both pollutants should be lower than the Budgets contained in the State  
27 Implementation Plans.

28 Id. at 171. Defendants solved that problem by not naming all of the "plans" involved in  
29 Las Vegas Valley conformity. There is no question that eliminating the most troublesome SIP by  
30 ignoring it relieves the Defendants of a major problem. If they meet the zero budget in the 1979  
31 EPA approved SIP, the budget answer is sub-zero.

32 Indicate the date that the MPO has officially adopted, accepted or approved the

1 transportation plan and/or program and has made a conformity determination.  
2 ANS. RTP: Fiscal years 2000-2025 and Air Quality Conformity Determination –  
3 adopted January 2000. TIP: Fiscal Years 2000-2002; Adopted January 2000.

4 Id. at 175. Defendants must conform to both the PM10 and CO SIPs. The 1999 PM10  
5 SIP submittal was vacated by the Ninth Circuit Court of Appeals in *Hall v. EPA*, 273 F.3d 1146  
6 (9<sup>th</sup> Cir. 2001). Defendants have difficulty conforming to anything as one by one their submitted  
7 SIPs disappear on them. None have ever been finally approved.

8 The EPA is expected to provide final approval for both the 2000 CO SIP and the  
9 2001 PM10 SIP by the end of the 2002 calendar year.

10 Id. at 176. It is now a year later and the submitted SIPs still have not been approved.

11 The TIP lists the projects Plaintiff Hall has alleged have never seen legally sufficient  
12 APA, NEPA and CAA compliance. Defendants filed their motion to dismiss while withholding  
13 the TIP project list by refusing to file the AR prior to making their motion. It is the Defendants'  
14 responsibility to file the AR. By law, Plaintiff cannot file the AR for the Defendants. The  
15 Defendants must certify the AR. Plaintiff Hall was entitled to summary judgment on that issue  
16 alone.

17  
18 The final decision regarding NEPA that is subject to judicial review is the FHWA final  
19 TIP approval decision with the clear understanding that we are concerned about the projects  
20 contained in the TIP and the direct and indirect air pollution these projects will cause. Plaintiff  
21 Hall's allegation is that individual projects included in plans or programs have not been subject  
22 to legally sufficient, NEPA review. There is no other point where Plaintiff Hall or anyone else  
23 may raise the APA, NEPA and CAA judicial review issues. There is nothing in the FAHA that  
24 gives the Department of Transportation a free pass regarding NEPA. Defendants must comply  
25 with all four Congressional Acts.  
26  
27

**“FIND OF NO SIGNIFICANT IMPACT”**

1 Plaintiff's Am. Complaint must be read in its entirety and in its four corners. The absence  
2 of a FONSI and its EA provides evidence of a lack of prior NEPA compliance, not to mention  
3 Defendants' admissions of no NEPA compliance. Defendants absolutely must produce an EIS  
4 pursuant to the facts of this action and compliance with that requirement must precede any  
5 "conformity" discussion. The absence of an EA and FONSI (or NEPA compliance) is the tip of  
6 an environmental "iceberg" of considerable moment and merit.  
7

### 8 **CONFORMITY BASED UPON PROPOSED SIP**

9 The argument on both sides is moot as long as there is no NEPA compliance. Defendants  
10 are legally dead in the water on the NEPA issue alone. We do not have to go to the CAA  
11 conformity issue except to prove that Defendants have misled. We never get to conformity issues  
12 in this action as a result of Defendants' admissions that they have not complied with NEPA.  
13

14 In the alternative, when Defendants do comply with NEPA, we will know from NEPA  
15 EIS data and information whether Defendants have been misleading all along regarding  
16 conformity to all EPA approved Southern Nevada SIPs. In the meantime, Defendants have only  
17 the EPA approved, much more stringent 1979 SIP.  
18

19 The more stringent of the two SIPs, the EPA approved 1979 SIP or the submitted SIP  
20 prevails. See, CAA § 116. A facially less stringent submitted SIP interposed for the purpose of  
21 delay is misleading and the Defendants may not rely upon it for any lawful purpose whether the  
22 EPA approves emissions budgets from it or not. In this instance, there is no EPA approved SIP  
23 that meets the 1990 amendments to the Clean Air Act. Clark County has never met that  
24 requirement.  
25

26 The reasons include the fact that the requirements in the six minimum criteria in 40  
27 C.F.R. § 93.118(e) and its subparts, the authority cited by the Court, cannot be met by the

1 Defendants. Data regarding “all other emissions sources” must come from NEPA EIS  
2 compliance. See, 40 C.F.R. § 93.118(e) (4) (iv). The Fred Ohene memorandum provides  
3 evidence that Defendants cannot comply with 40 C.F.R. § 93.118(e)(4)(vi). Defendants also have  
4 a compliance problem with 40 C.F.R. § 93.118(e)(6).

5  
6 When the motor vehicle emissions budget(s) used to satisfy the requirements of  
7 this section are established an implementation plan submittal that has not been  
8 approved or disapproved by EPA, **the MPO and DOT’s conformity  
9 determination will be deemed to be a statement that the MPO and DOT are  
10 not aware of any information that would indicate that emissions consistent  
11 with the motor vehicle emissions budget will cause or contribute to any new  
12 violation of any standard: increase the frequency or severity of any existing  
13 violations of any standard or delay timely attainment of any standard or any  
14 required interim emission reductions or other milestones.** (Emphasis added.)

15 According to 40 C.F.R. § 93.118(e)(6), Defendants mislead if they accept and fund TIP  
16 programs on the basis of submitted SIP emissions budgets. They admit that have not complied  
17 with NEPA. The Fred Ohene memorandum is a shocking admission. They know they cannot  
18 certify that they are not aware of any information that would indicate that emissions consistent  
19 with the motor vehicle emissions budget will cause or contribute to any new violation of any  
20 standard: increase the frequency or severity of any existing violations of any standard or delay  
21 timely attainment of any standard or any required interim emission reductions or other  
22 milestones. See Pl. Cross-Motion P&A at 11.

23 Plaintiff Hall’s complaint was clearly and unambiguously filed on the basis of the facts  
24 that exist in this action. The Court was correct in deferring a finding on this issue along with  
25 Plaintiff Hall’s fifth claim. For that he is grateful.

## 26 **NEPA COMPLIANCE**

27 The DOT and its divisions must comply with NEPA. Re: August 15, 2003, Defendants’  
Response to Plaintiffs’ Statement of Facts Not in Dispute, Federal Defendants admit at 2 (1 & 4)  
that **“USDOT does not contest that no NEPA cumulative impacts analysis was performed**

1 **for the conformity determination under review.”** That is what Plaintiff Hall said and  
2 Defendants admit it. Defendants then claim that “no such analysis was required.”

3 **FEDERAL-AID HIGHWAY ACT (FAHA), 23 USC § 134(O)**

4  
5 The Court has misconstrued the Federal-Aid Highway Act (FAHA). The Regional  
6 Transportation Plan (RTP) is a long range, twenty-year, programmatic plan that is not at issue  
7 herein. See, 23 USC § 134(g). The issue the Transportation Improvement Plan (TIP), a short-  
8 term, site specific plan that is subject federal Administrative Procedures Acts (APA), National  
9 Environmental Policy Act (NEPA) and Clean Air Act Compliance (TIP) compliance. See, 23  
10 USC § 134(h). This is not an issue about comments which are not taken seriously by local  
11 planning organizations. This is an issue about the burden placed upon federal agencies by the  
12 Congress in four separate but related Acts. The TIP is the only point where all four Acts  
13 converge and the only point where the public has an opportunity for an APA judicial review.

14  
15 Re: 23 USC § 134(o), Continuation of Current Review Practice, Id. at 5. That section  
16 depends upon compliance with another Act, NEPA. 23 USC § 134(o) states in part, “and **since**  
17 **individual projects included in plans or programs are subject to review under the National**  
18 **Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)** ... any decision by the Secretary  
19 concerning a plan or program action described in this section shall not be considered to be a  
20 Federal action subject to review under [NEPA].” All this section does is keep a NEPA review  
21 already completed from being unnecessarily repeated. The converse of that section is that  
22 “individual projects included in plans or programs” that were not subject to NEPA review could  
23 cause any decision by the Secretary to be considered a major Federal action subject to review  
24 under NEPA. That section is a loud and clear statement that individual, site specific projects  
25 must be subject to NEPA review according to NEPA regulations, or decisions by the [DOT]  
26  
27

1 Secretary concerning plans or programs could be held subject to NEPA review by the statute  
2 Defendants claim allow them to by-pass NEPA compliance.

3 Far from excluding NEPA compliance, the section cited by the Defendants supports and  
4 strengthens mandatory NEPA compliance according to NEPA statutes and regulations. The place  
5 where “**individual projects included in plans or programs are subject to review under the**  
6 **National Environmental Policy Act of 1969**” is the FHWA’s approval of a TIP. This is the  
7 point in time when NEPA compliance must be certified. This is the point where funding is  
8 approved and this is the point where Plaintiff Hall must and did act. Statute 23 USC § 134(o) is  
9 an affirmation that NEPA compliance is not only required, the statute assumes that individual  
10 projects included in plans or programs were subject to review under NEPA before plans and  
11 program reached the [DOT] Secretary’s desk. The point where air pollution emissions from  
12 individual projects become both significant and a major federal action is at the TIP stage.  
13  
14

15 There is a very small window from the time the local or state authority hands a proposed  
16 TIP off to the FHWA and the FHWA makes a final decision to fund the TIP projects. All federal  
17 agencies have had a NEPA duty since 1970 to do an initial environmental impact statement (EIS)  
18 of all their Valley actions and the EIS must include a cumulative impact determination of all the  
19 federal agency’s direct and indirect air pollution emissions. All federal agencies have a duty to  
20 amend that EIS from time to time as regionally significant and major federal actions are added to  
21 TIP lists. Nothing in statute 23 USC § 134(o) conflicts with Plaintiff Hall’s allegations or claims.  
22 Plaintiff Hall is not concerned with plans or programs in the RTP regarding programmatic, long  
23 range planning. It is in the short range, here-now TIP stage where Plaintiff Hall has APA, NEPA  
24 and CAA review rights.<sup>1</sup>  
25  
26  
27

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<sup>1</sup> Under litigation pressure from Plaintiff herein Hall, the Bureau of Land Management (BLM)

1 Federal Defendants know all this. Their strategy all along has been that of obfuscating  
2 and misleading. That is a major reason why the Las Vegas Valley remains in serious  
3 nonattainment for PM10 and CO. That is why we will soon be in serious nonattainment for  
4 ozone.  
5

6 The following statement is also in error. “While Plaintiff evidently does not agree with  
7 the law as it has been formulated by Congress, this Court finds that congressional intent, as  
8 expressed clearly in 23 USC § 134(o), controls in this action and the applicable TIP, as a matter  
9 of law, is not a major federal action.” That is not a reasonable or just finding of what 23 USC §  
10 134(o) actually said. Plaintiff Hall’s complaint concerns the site specific projects listed in the  
11 TIP. Plaintiff Hall filed this action against FHWA approval of actions that immediately precede  
12 the federal funding of Valley projects. In this instance, the March 3, 2003 Conformity Finding  
13 was the last step in the FHWA approval process for funding.  
14

#### 15 **SUMMARY**

16 Congress enacted the APA, NEPA and CAA. The Court’s October 8, 2003 Order has the  
17 effect exempting the FHWA from all environmental law compliance. Barring a constitutional  
18 issue that has not been raised, the Court does not have the jurisdiction to find that any federal  
19 agency may ignore the APA, NEPA or CAA. The Court’s Order means that NEPA does not  
20 apply to the federal agency Defendants in Nevada. Only the D.C. Court of Appeals has the  
21 jurisdiction to set aside the requirement of NEPA compliance, an Act of Congress. The issues  
22 framed within Hall’s amended complaint are within this court’s jurisdiction.  
23  
24

#### 25 **RELIEF SOUGHT**

26 Plaintiff Hall requests that the Court rescind its Order in part. Hall requests that the  
27

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has just announced the commencement of a major environmental impact study in the Valley.  
Like the FHWA, the BLM is a major source of direct and indirect Valley air pollution.

1 following portions of the Order be rescinded. "IT IS HEREBY ORDERED that Defendants'  
2 Motion to Dismiss (#4) is GRANTED as to Plaintiff's First, Second, Third, and Fourth Claims  
3 for Relief" and "IT IS FURTHER ORDERED that Plaintiff' Motion for Summary Judgment or,  
4 in the Alternative, for Summary Adjudication of Defenses (#7) is DENIED."

5  
6 Las Vegas, Nevada, October 21, 2003.

7 /s/ Robert W. Hall  
8 ROBERT W. HALL, Plaintiff pro se

9  
10 IT IS SO ORDERED:

11  
12 UNITED STATES DISTRICT JUDGE

13 Dated: \_\_\_\_\_  
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4  
5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE DISTRICT OF NEVADA  
7

8 ROBERT W. HALL, )  
9 Plaintiff, )  
10 vs. )

11 UNITED STATES DEPARTMENT OF )  
12 TRANSPORTATION an Agency of the )  
13 United States, NORMAN Y. MINETA, as )  
14 Secretary of Transportation, WILLIAM H. )  
15 KAPPUS, as Acting Administrator Nevada )  
16 Division, Federal Highway Administration, )  
17 RANDY J. BELLARD, as FHWA Planning )  
18 and Research Engineer, and LESLIE T. )  
19 ROGERS, as Regional Transit Administrator, )  
20 Nevada Division, Federal Transit )  
21 Administration, )

22 Defendants )

CV-S-03-0477-RLH-RJJ

23 **CERTIFICATE OF SERVICE**

24 I hereby certify that a copy of each of the following documents was sent to the following  
25 as addressed this date by personal service to Mr. Welsh and by First Class U.S. Mail to Mr.  
26 Rave. They are Plaintiff's Rule 60(b) Motion for Relief From Findings and Order, Points and  
27 Authorities, and this Certificate of Service.

1 Norman L. Rave, Jr., T.A.  
2 Env. & Nat. Resource Div.  
3 U.S. Dept. of Justice  
4 P.O. Box 23986  
5 Washington, D.C. 20026-3986  
6 202-616-7568

7 Blaine T. Welsh  
8 Assistant United States Attorney  
9 United States Attorney  
10 333 S. Las Vegas Boulevard, #5000  
11 Las Vegas, NV 89101  
12 702-388-6336

13 DATED: Las Vegas, Nevada, October 22, 2003.

14 /s/ Robert W. Hall  
15 \_\_\_\_\_  
16 ROBERT W. HALL, Pro Se  
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