

No. 04-16610

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. HALL,

Plaintiff and Appellant,

Versus

UNITED STATES DEPARTMENT OF TRANSPORTATION, NORMAN Y.
MINETA, WILLAIM H. KAPPUS, RANDY J. BELLARD AND
LESLIE T. ROGERS,

Defendants and Appellees.

Appeal from a Judgment of the
United States District Court for the District of Nevada,
Case No. CV-S-03-0477 (RLH),
Honorable Roger L. Hunt, United States District Judge

APPELLANT'S OPENING BRIEF

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I. ISSUES PRESENTED

In this environmental law appeal of a district court judicial review action arising from a Federal Highway Administration (“FHWA”) March 21, 2003 Conformity Finding regarding the Clark County Regional Transportation Commission (“RTC”) January 9, 2003 Transportation Improvement Program and Plan (TIP”) without regard to Appellees-Defendants’ non-discretionary requirements pursuant to the National Environmental Policy Act (“NEPA”), the Clean Air Act (“CAA”) and the Federal Administrative Procedures Act (“APA”), did the district court enter an order and judgment that is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law when it granted federal Appellees’ motion for summary judgment? (CR #12 & 29) [ER 00089-99; 00223-26.]¹ Did the district court enter an Order and judgment that is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law when it denied Appellant’s motion for summary judgment? (CR #7 & 27) [ER 00032-71; 00188-222].

II. STATEMENT OF JURISDICTION

Appellant Robert W. Hall is a resident of Clark County, Nevada, City of Las Vegas. The Ninth Circuit Court of Appeals has jurisdiction over all appeals from all final decisions of the United State District Court for the District of Nevada. See 28 U.S.C. § 1291.

III. INTRODUCTION

Appellant commenced this action pursuant to the Administrative Procedures

¹ Court Record (“CR”) and Excerpts of Record (“ER”).

Act (“APA”), 5 U.S.C. § 701 *et seq.*, seeking judicial review of the Appellees’ funding and approval of direct and indirect air pollution projects in the Las Vegas Valley serious non-attainment area (Hydrographic Area 212). Appellant alleged that Appellees have unlawfully ignored compliance with the NEPA, CAA, and APA federal agency requirements regarding the air pollution associated with their federally funded projects. Appellant has alleged among other claims that facts claimed by the Appellees and repeated by the district court are not facts at all, they are misleading statements interposed for an improper purpose. Appellant has also alleged that Appellees ignored Fed. R. Civ. P. 11 when making their legal arguments.

IV. FACTUAL AND PROCEDURAL BACKGROUND

It is in the public interest to have federal agencies comply with the NEPA, CAA and APA requirements regarding environmental statutory and regulatory compliance. Instead of compliance, Appellees have worked against the public interest in an attempt, successful thus far, to evade NEPA, CAA and APA requirement compliance with a barrage of misleading legal and factual representations that they either knew or should known were misleading.

The Las Vegas Valley serious non-attainment area (Hydrographic Area 212) for PM10 and CO has no finally, EPA approved, pollution specific SIPs and has not had one since 1979 and amended in 1981. The State of Nevada and Clark County have submitted SIPs since the 1990 amendments to the CAA. Each submittal was either returned to the Clark County by the EPA, failed to survive judicial review or in the case of some PM10 SIPs, was withdrawn by Clark County

and the State of Nevada.

At the end of the federal agency, environmental compliance road in this review, even the environmental law well educated will not have two very important pieces of information. The first is the amount Las Vegas Valley direct and indirect air pollution (by pollutant) the Defendants are responsible for and must compute and disclose pursuant to NEPA. The second is the amount of each pollutant that is legally too much in the Las Vegas Valley serious non-attainment area for PM10 and CO. The area has not had finally approved SIPs since 1979/81. There are many more NEPA, CAA and APA compliance requirements that Appellees' simply ignore. No matter how hard the court looks, it will not find that information. Appellant filed the district court judicial review because among other facts, Appellees admit they did not comply with NEPA. Instead of leading the way to environmental law compliance, Appellees' are pursuing a scheme of environmental non-compliance and are defending the scheme.

V. ARGUMENT

It should be obvious that in a Federal Highway Agency review regarding a serious non-attainment area in the fastest growing urban area of the country, an absence of evidence of compliance and conformity to NEPA, CAA and APA is a red flag. It should be obvious that claims of "exempt" from compliance and conformity to NEPA, CAA and APA are a red flag. It should be obvious that the absence of evidence of a finally approved, 1990 CAA amendments compliant, pollution specific state implementation plan ("SIP") is a red flag. It should be obvious that an absence of compliance and conformity to NEPA, CAA and APA

regarding legally sufficient public involvement and public notices is a red flag. Appellant could go on and on. This judicial review is characterized by the absence of anything significant regarding NEPA, CAA and APA compliance. In making their defense, Appellees crossed the Rule 11 line again and again. The Appellees lack credibility.

Appellant Hall made it clear that “the allegations of the complaint are not limited to the most recent conformity finding.” See, CR #27, ¶ (h) & (i) and ¶ (l). [ER 00199, 200 & 203.]

A. The District Court Orders

The first was the October 8, 2003 Order that granted Appellees their Motion to Dismiss on Appellant’s First, Second, Third, and Fourth Claims for Relief while denying dismissal of the Fifth Claim for Relief. Appellant’s Motion for Summary Judgment was denied. Defendants did not file the Administrative Record (“AR”) until December 30, 2003.² The district court issued its first and most important order well before Appellees filed the Administrative Record (“AR”).

The district court issued a second May 28, 2004 Order granting Appellees’ Motion for Summary Judgment and denying Plaintiff’s Cross-Motion for Summary Judgment. Judgment was entered on June 1, 2004. Judgment issued and this timely appeal followed. (CR #12, 29, 30 & 31.) [ER 00089-99; 00223-26; 00228; 00227.] See, District Court Record (“CR”) Docket, CV-S-03-0477-RLH [ER 1, 3-5]. (CR

² CR #13, 3:1-13. [ER 00104]. For this reason alone, the district court erred in filing an October 8, 2003 Order, eighty-three days before the AR was filed.

#7, 2:17-19.) [ER 00039.]

Throughout the review, Appellees filed three exhibits with their motion documents. The first is Chapter V, Model Documentation and Transportation Conformity Analysis, Regional Transportation Plan – 2003-2025, Transportation Improvement Program – 2003-2005. The Regional Transportation Plan (“RTP”) is a long range, programmatic plan. The Transportation Improvement Plan (“TIP”) is a short range Federal Highway Administration (“FHWA”) funding justification.³ The document was filed attached to Appellees motion to dismiss on July 15, 2003, *more than five months before the AR was filed*.

The two RTC documents are combined as a RTP/TIP. The combining of the two documents is not accidental; the documents were merged in order to evade NEPA, CAA and APA compliance. When a short range TIP is merged with a long range, programmatic RTP, Appellees protect the TIP from NEPA, CAA and APA scrutiny and compliance. The TIP discloses the projects Appellees intend to fund. The TIP is routinely and improperly used in place of NEPA environmental impact statement (“EIS”) compliance.

The second exhibit is an unpublished Ninth Circuit Memorandum, No. 00-70257. See, CR #28, 3:Fn. 2.

³ The documents were prepared by the local Metropolitan Planning Organization (“MPO”), the Regional Transportation Commission (“RTC”). RTC documents were not noticed to the public for public involvement and public review pursuant to the NEPA, CAA and APA. There was no opportunity for APA review prior to the district court review. The district court chose to side-step any possibility of judicial review of any RTC, FHWA or DOT document by claims of “exempt.”

The third exhibit is a second FHWA December 4, 2003 one page, three paragraph conformity finding. Appellant continues his objections to any reference to any document Appellees did not submit as an exhibit, included in the late filed Administrative Record or not. (CR 27.) [00188-222.]

B. The October 23, 2003 Order (CR #12)

Appellant declines to accept the responsibility for words, inferences or statements that are not his own. Appellant is not responsible for what the district court *takes* as a result of Appellees' argument, particularly when the Defendants misled the court by argument that is a classic example of obfuscation.

C. Deference

Consideration of the Appellant's facts, citations to law and argument regarding missing documents, questionable evidence or credible law argument that the TIP had the same long range, programmatic status as the RTP were misapprehended by the district court. Appellees have successfully thus far, had it both ways. They withheld the TIP from NEPA, CAA and APA public involvement, public scrutiny and compliance by claiming the TIP combined with the RTP was "exempt." There is no other CR document that lists FHWA short term, federal funding projects. There was no CR evidence of a NEPA environmental impact statement ("EIS") before the district court.

The TIP funding process lists projects that constitute a major federal agency action. Appellees argument is entirely circular. The district court's orders protect a major federal action from NEPA, CAA and APA compliance by going along with Appellees "exempt" argument on the *assumption* that there was a NEPA review.

There is no evidence that the *assumption* bears any relation to reality.

The district court's order also makes the *assumption* that the issue only involves carbon monoxide ("CO"). Appellant's complaint clearly includes both particle matter ten microns or less ("PM10") and CO. The district court ignored the PM10 portion of the complaint particularly regarding grading and construction dust and the fact that Appellees are also liable for general NEPA and CAA compliance, not just CO compliance. (CR #2, 3:¶ 15.) [AR 00003.]

D. Major Federal Actions

The first straw issue the district court relied upon is in the first paragraph of the first order. "Plaintiff Hall *essentially* asserts that Federal-Aid Highway Act-mandated Transportation Improvement Programs and Clean Air Act-mandated conformity determinations are 'major federal actions.' " (Emphasis added.) Appellant's claim is that the projects listed in that document constitute a major federal action. "Plaintiff further asserts that the Clean Air Act-mandated conformity determination was made incorrectly and that Appellees have failed to comply with NEPA requirements generally in the course of fulfilling their regulatory responsibilities." The statement misapprehends Appellant's allegations. (CR #12, 2:5-10.) [ER 00090.]

The district court repeats Appellees admissions including claims that they relied on a 1979 SIP for NEPA, CAA and APA purposes. (CR #12, 2:20-26; 3:1-7.) [ER 00090-91.]

The Court *understands* Plaintiff's legally-cognizable arguments to be essentially three-fold: first, NEPA applies to various of Defendants'

regulatory activities, specifically TIP approval, the conformity determination and more generally to the growth planning of the Las Vegas valley. Second, the conformity process itself did not conform with APA requirements and was based on a proposed SIP that was invalidated by the Ninth Circuit in Hall v. EPA. (Emphasis added.)

(CR #12, 4:8-13.) [ER 00092.] The site specific projects were his concern.

The district court deferred to Appellees' argument and for that reason, the district court misapprehended Appellant's claims.

The district court granted Appellees' motion to dismiss regarding Appellant's First, Second, Third, and Fourth Claims for Relief, and Denied Appellees' motion as to Appellant's Fifth Claim for Relief while denying Appellant's cross-motion for summary judgment, "finding that issues of fact preclude such a grant at this juncture in the litigation." (CR #12, 4:17-22.) [ER 00092.] There was no subsequent discovery or hearing.

The district court did not take Appellant's factual allegations set forth in the complaint as true and did not construe them in the light most favorable to the Appellant.

'Under his first claim for relief (and as an element of other claims), plaintiff alleges that "as structured and when all of the Valley's air pollution activities of the Defendants are considered, the Transportation Plan ("TIP") constitutes a major federal action and a significant source of air pollution subject to the cumulative impact, environmental impact statement ("EIS") requirements of NEPA as defined by CEQ regulations.' Plaintiff's complaint ¶ 17. As a result, Plaintiff asserts, the TIP is deficient for having failed to consider NEPA requirements, and the subsequent CAA conformity determination.

(CR #12, 5:17-24.) [ER 00093.] The issue is not the RTP, it is the TIP.

When Appellees include the TIP in the RTP, they do so apparently to avoid NEPA and CAA compliance as well as APA review. Appellees are using the TIP as a SIP. If they did a SIP, they would have to comply with NEPA, CAA and APA and the public would have to be involved by federal statute. By joining the TIP with the RTP they claim “exempt” on the basis that the RTP is a long range, programmatic planning document. The TIP is not a long range, programmatic planning document. Busy courts do not catch the violation of federal law. When a busy court defers to the federal government and the federal government is engaged in a misleading scheme like the scheme described in the CR, bad law will result.

When a TIP is used for an improper purpose, it is no longer a TIP regardless of what it is called. It is the funding document for Defendants’ site specific projects that are the focus of Appellant’s complaint. It is also the cover for runaway air pollution. Without reliance on two statutes that have absolutely nothing to do with the facts and law of this review, the CR is void of evidence of NEPA, CAA and APA compliance.

E. The district court’s 23 U.S.C § 134(o) legal argument

...this Court finds that congressional intent, as expressed *clearly* in 23 U.S.C. § 134(o), controls in this action and the applicable TIP, as a matter of law, is not a major federal action. Section 134 creates Metropolitan Planning Organizations (§ 134(g)) and Transportation Improvement Programs (§ 134(h)), and then defines the nature and scope of such plans. Section 134(o) than states that, “*[s]ince plans and programs described in this section are subject to review under [NEPA], ... any decision by the Secretary concerning a plan or program action described in this section shall not be considered to be a Federal action subject to review under [NEPA].*” Given that § 134 clearly discusses TIP review in the context of NEPA EIS and

cumulative impact requirements, TIP determinations are exempt from NEPA's requirements so long as they are approved by "the Secretary.

CR #12, 5:26; 6:1-11. [ER 00093-94.] **The district court ignored the NEPA prerequisite.** There is no evidence of NEPA compliance. The district court ignored the fact that a TIP is not the same as a long range, programmatic RTP. The district court ignored the NEPA, CAA and APA when it cited 23 U.S.C. § 134(b), (g), (h) and (o), Metropolitan Planning Organizations. "Given that § 134 *clearly discusses TIP review in the context of NEPA EIS cumulative impact requirements*, TIP determinations are *exempt* from NEPA's requirements so long as they are approved by 'the Secretary.'" [Emphasis added.] (CR #12, 3:8-18; 5:15-26; 6:1-11.) [ER 00091; 00093; 00094.]

That statement is evidence that the district court allowed Appellees' to use the TIP as a proxy EIS without NEPA compliance. The administrative trick of including the TIP as a part of an RTP results in a merged document aids in avoiding NEPA, CAA and APA compliance. An RTP is "exempt" if "individual projects" are actually subject to NEPA, CAA and APA review. The caveat that "individual projects are subject to review" cannot be denied. Appellees made no effort to comply or conform to the caveat. For that reason Appellees argue for the improper purpose of obfuscation. "The Secretary" has no jurisdiction or authority to set aside NEPA, CAA and APA compliance no matter what he or she approves without evidence that all NEPA, CAA and APA compliance is complete. Appellant does not oppose the premise that the compliance need not be done twice. That should have been intuitive to the district court.

Appellant discussed the Title 23 issue as a “straw issue.” In that discussion Appellant made it clear that Appellees’ issue is “absurd and unreasonable.” In the first motion document Appellant filed, Appellant made it clear that “*Plaintiff has not brought a complaint against long range planning. The issue involves the site specific projects listed in a Transportation Improvement Plan (“TIP”) and the timing of a CAA conformity determination.*” Appellant made it clear that it was the “*site specific projects*” listed in the TIP that *were the “major federal action”* subject of his complaint. The entire discussion was entitled “V. Plaintiff’s *Rebuttal of Defendants’ Statutory and Regulatory Background, Facts and Argument.*” Any doubt about Appellant’s intent was erased in the first motion document Appellant filed after his complaint. (Emphasis added.) (CR #7, 19:17-26; CR #12, 5:15-26, 6:1-11.) [ER 00044; 00093; 00094.] “Plaintiff’s amended complaint is not a complaint regarding planning or program issues.” (CR #7, 23:3-5.) [ER 00059.]

The district court’s Order *assumes* NEPA compliance. The Order *assumes* NEPA compliant public notice. The district court’s discussion, “since individual projects included in the plans and programs are subject to review under [NEPA]” *assumes* there was any opportunity for a NEPA review. The district court’s order supports Appellees’ conscious decision not to comply with NEPA. There is no evidence when, where and how there was NEPA, CAA and APA compliance TIP or no TIP.

By claiming “exempt” Appellees took a risk. They convinced the district court they could rely on an “exempt” document without producing anything else. They have a NEPA, CAA and APA obligation to produce the missing compliance

documents. They did not produce them. An analysis of what the federal agency should have provided may be found at CR #7, 4-11. [ER 00041.]

F. CAA Conformity

The district court dealt with Appellant's Fifth Claim in its second dispositive order. The following are the first five paragraphs from the Fifth Claim for relief from Plaintiff's complaint. (CR #2, 9-10.) [ER 00009-10.]

FIFTH CLAIM FOR RELIEF

Paragraphs 1-44 are incorporated herein by reference.

45. Plaintiff alleges that from May 11, 1999, Defendants approved and *funded projects* in Nevada and the Las Vegas Valley serious non-attainment area *on the basis of a submitted but not finally approved SIP submittal. See the three letters attached hereto, one dated March 6, 2003 (P. Exhibit "C") and two dated March 17, 2003 (P. Exhibits "D" and "E").*

46. Plaintiff alleges that at least from August 29, 2001, Defendants knew (because Hall told them) and should have known that the May 11, 1999 submitted SIP approval was vacated and remanded to the EPA by the Ninth Circuit Court of Appeals in Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001).

47. Plaintiff alleges that either from May 11, 1999 or at the latest, August 29, 2001, Defendants knew and should have known that the basis for all of their Nevada, Clark County funding and approvals of actions that caused any direct or indirect air pollution during that period was at best misleading. The basis for the approvals and funding was misleading from May 11, 1999 and doubly misleading from August 29, 2001. The Defendants knew or should have known that the preliminary approval of the SIP was subject to public comment, Ninth Circuit Court of Appeals judicial review and the vacating and remand of the submitted SIP that actually occurred.

48. Plaintiff alleges that from at least May 11, 1999 Defendants

cooperated with local, state and other federal authorities to fund, permit and approve air pollution projects that kept the Las Vegas Valley in serious non-attainment in violation of the National Ambient Air Quality Standards (“NAAQS”) which are less stringent than the EPA approved 1979/81 SIP.

49. Plaintiff alleges that the people of the Valley including him, are entitled to an order requiring Defendants a disclosure to the court and Hall of all of the air pollution activities Defendants approved and funded by and through Conformity findings and a subsequent order rolling back each and every action Defendants took that is expressly prohibited in 42 U.S.C. § 7506(2), CAA § 176(c). The legal basis for this request includes but is not limited to misleading federal funding Conformity Findings as early as May 11, 1999 and as late as August 29, 2001.... (Emphasis added.)

See, CR #2 for two of the three letters described in ¶ 45. [ER 00014-31.]

The district court made an error in its summary judgment discussion. On the fifth claim, the district court stated; “Unfortunately, none of the discussion involving these contentions addresses the only question still before the Court: did Defendants base the 2003 EPA conformity determination on the proposed 1999 SIP deemed insufficient by the Ninth Circuit in its 2001 opinion? ... All other arguments are moot to this litigation.” That statement overlooks and misapprehends the fact (a) there is no SIP that meets the 1990 CAA amendments and (b) Appellees have failed to produce any credible evidence that they can conform to a 1979/81 SIP that does not meet the 1990 CAA amendments.

“The Court finds that Plaintiff has failed to provide sufficient evidence to this Court that would justify granting him Summary Judgment on his claim that Defendants relief upon an invalidated SIP in making a 2003 conformity

determination.” ... “Defendants have provided this Court with unrebutted⁴ explanation and evidence that the 2003 conformity determination was not based upon an invalidated by the Ninth Circuit in Hall.” Explanation! The district court did not provide information regarding where the Defendants’ “explanation and evidence” resides or what it was. The issues were thoroughly discussed in Plaintiff’s Cross-Motion for Summary Judgment dated March 10, 2004 as but one of many examples. (CR #27.) [00188-222.]

G. Conformity Determination and NEPA

2. Conformity Determination and NEPA. In similar fashion, Plaintiff asserts that Defendants made FAHA-regulated approval and funding commitments on the basis of the Conformity Finding before preparing any legally sufficient NEPA documents, and that ‘[t]he Conformity Finding at issue herein was made without reference to any NEPA environmental document.’ Pl.’s Compl. ¶¶ 24-25. The Court *takes* these allegations to be an assertion by Plaintiff that the conformity process itself is a major federal action, since the requirement that NEPA statements and determinations be created is triggered by an agency’s ‘major federal action.’ See 42 USC § 4332(C). Again, federal statute invalidates such a claim. 15 U.S.C. § 793(c)(1) states that ‘[n]o action taken under the [CAA] shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of the [NEPA].’ It is hard to imagine clearer statutory language intended to remove CAA actions from the purview of NEPA’s ‘major federal action’ requirements, and the

⁴ The district court overlooked Plaintiff’s CR factual evidence and arguments on the SIP issue. At the same time, the district court claimed that Plaintiff was “rehashing old arguments.” Old, new or rehashed, Appellant’s allegedly missing discussions are in the Court Record documents that are the Excerpts of Record. After producing the rebuttal it was time to stop in the interest of judicial parsimony. The “unrebutted” finding was rebutted and the evidence is in the ER. Appellant requests that the appeals court take judicial notice of all of it.

Court has no difficulty in deciding that, as a matter of law, the conformity process is exempt from NEPA requirements. (Emphasis added.)

(CR #12, 6:13-25.) [ER 00094.] The district court misapprehended the statute. Title 15, Commerce and Trade, Energy Supply and Environmental Coordination is an Environmental Protection Agency (“EPA”) statute. Section 793(c)(1) and the rest of that sub-section apply only to the EPA in relation to fuel distribution. Appellants and the district court either knew or should have known that when they cited the statute. The statute has no application regarding the issues and facts of this action. Appellants have essentially argued that 15 U.S.C. § 793(c)(1) supersedes NEPA, a bizarre reading and application of a statute that does not apply to this review’s facts and legal argument.

(n) CONFORMITY

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 an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of Title 23, shall give its approval to any project, program, or plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency or instrumentality.

42 U.S.C. § 7506(c)(1). See, 42 U.S.C. § 7506. Conformity does not apply to local or state agencies, only federal agencies.

(CR #27, 18.) [ER 00205.]

The following is from Plaintiff's March 10, 2004 Cross-Motion for Summary Judgment.

(q) FEDERAL DEFENDANTS CLAIM OF CONFORMANCE TO A 1979/81 SIP

“The result of the decision in Hall 2001 is that Clark County must continue to comply with its previously approved new source review permitting regulations until EPA approves revised regulations.” Fed. Def. Mot. S. J. 20. There is no Federal Register notice supporting that claim.

“EPA's approval of the revised permitting regulations was based on the Agency's conclusion that the revised regulations were no less stringent than the preexisting regulations.” Fed. Def. Mot. S. J. 20. See, 273 F.3d 1155. The words “less stringent” are not at 1155. There is no definition of “preexisting regulations.”

The Ninth Circuit did not overturn this determination, but held that, given that the Las Vegas area had failed to achieve attainment using the preexisting regulations, a determination that the revised regulations were equivalent to the old ones was not sufficient for EPA to meet its statutory obligation to determine that a proposed SIP revision would not interfere with achieving attainment. 273 F.3d at 1160-61. Mr. Hall contends that the revised permit regulations are less stringent than the preexisting regulations, Addendum to Exhibit C to First Amended Complaint at paragraph 6 (page 2), a question that the Court did not reach.

Fed. Def. Mot. S. J. 21. The Court did reach that question. 273 F.3d at 1152 (Opinion). See, legal quote from 273 F.3d at 1152 *supra*. The first sentence in the above paragraph is misleading. It is contradicted by the Opinion quote, *supra*. Federal Defendants are attempting to claim that emissions budgets and adequacy determinations that are part of a vacated SIP somehow survive the vacatur. Worse, there is no evidence that the EPA ever approved any emissions budgets or any adequacy determination in connection with the 1979/81 SIP.

“Because the 1981 permitting rules are at least as stringent as the revised rules, requiring the continued use of the 1981 permitting rules (which is the result of the Hall 2001 decision) does not undermine EPA’s determination that the submitted motor vehicle emissions budgets are adequate for conformity.” Fed. Def. Mot. S. J. 21. This king crowns himself. There is no supporting evidence for that claim in law or the AR.

Federal Defendants have failed to produce more than empty claims that the demise of the 1999 submitted SIP is an act “requiring the continued use of the 1981 permitting rules.” There must be evidence that is so. There is none. For that reason alone Federal Defendants’ claims of “requiring the continued use of the 1981 permitting rules” rings hollow.

(CR #27, 20-21.) [ER 00207-08.]

“Because the stationary source budget in the submitted attainment demonstration does not change, and because the submitted attainment demonstration shows that compliance with the budgets (including the motor vehicle emissions budget) results in attainment, nothing in the Hall 2001 decision undermines EPA’s conclusion that the motor vehicle emissions budget can be used for conformity.” (#24) Def. Mot. S. J. 21. There is no reference to a statute or regulation supporting that statement. The basis for that statement is entirely circular without legally sufficient support. Federal Defendants may use preliminary motor vehicle emissions budgets that are a part of a SIP until and unless that SIP is not approved, vacated or withdrawn.

Federal Defendants have not carried their initial burden of certifying and filing a complete AR record. There is no 1979/81 SIP in the AR. There is no AR evidence regarding anything in the 1979/81 SIP. There is no document that claims compliance with and conformity to the 1979/81 SIP.

Federal Defendants have not provided any evidence or citations to law that “previous review rules” support the claim that “Vacatur of EPA’s approval meant that Clark County’s previous review rules continue to apply.” (#24) Def. Mot. S. J. 17. The issue of whether Clark County’s

twenty-two year old EPA approved 1979/81 SIP rules continues to apply without amendments after the 1990 amendments to the CAA. That issue was not an issue before the Ninth Circuit Court of Appeals in Hall 2001. Instead of falling on their sword a long time ago, Federal Defendants are now trying to sell the idea that the very old, 1979/81 SIP rules apply after the 1999 SIP submittal was vacated on them and all PM10 SIP submittal date prior to December 5, 2000. That is an absurd argument.

By the terms of the four sentence conformity determination, the conformity finding is no longer in effect if there is a “state implementation plan revision.” Federal Defendants issued their conformity finding on the basis of a submitted SIP. After that SIP was vacated and all submitted PM10 SIPs prior to December 5, 2000 were withdrawn in a successful attempt to evade stiff EPA sanctions, Federal Defendants now claim that another SIP, the original, EPA approved 1979/81 SIP is the correct SIP. That constitutes a revision from the now vacated SIP and by the terms of the conformity finding, the conformity determination is no longer in effect. AR 1.

(CR #27, 21-22.) [ER 00208-09.]

Federal Defendants do not seem to realize that they have discussed two entirely different SIPs that are not lawfully interchangeable. There is no AR evidence of public involvement, public notice, hearing or EPA approval of adequacy determinations and motor vehicle emissions budgets that specify the 1979/81 SIP.

Clearly, whoever wrote that claim has never seen the 1979/81 rules. They did not cite any of them.⁵ With their “vacatur” statement at 17, Federal Defendants admit they proceeded on the basis of a SIP that is quite different from the EPA preliminarily approved, 1999 submitted SIP. Federal Defendants are arguing the legal status of the vacated SIP opposite ways. First they argue conformity on the basis of one SIP and now they claim conformity on the basis of another SIP without the benefit of a Federal Register citation.

⁵ Plaintiff included the relevant pages from the 1979/81 State Implementation Plan (CR #16, Exhibit M.) [ER 00160-69.]

Plaintiff Hall has raised issues of misleading conformity determinations. When the PM10 SIP was vacated or withdrawn, Federal Defendants' had a legal obligation to notify the agencies involved, the public and other agencies with full disclosure that the basis for their prior approvals and funding was gone. That did not happen. That did not happen after Plaintiff Hall sent certified letters requesting an approval and funding roll-back. Federal Defendants crow when they approve and fund highway projects. They cowered when they knew the basis for prior approvals and funding was vacated or withdrawn. Federal Defendants know their prior conformity determinations are worthless. They are knowing and willful false claims for approvals and funding.

As Federal Defendants have argued, they may go ahead with approvals and funding on the basis of preliminarily approved adequacy determinations and motor vehicle emissions budgets that rely on specific, submitted SIPs. Plaintiff Hall has raised the issue that even where adequacy determinations and motor vehicle emissions budget approvals are preliminarily approved, Federal Defendants must understand they are on shaky legal and false claims ground if they proceed prior to final approval. The continued legal sufficiency for any preliminary approval depends upon the reality of a finally approved SIP. There is no reason to bother with finally approving or not approving any SIP if the arguments Federal Defendants raise are legally sufficient. Plaintiff Hall's greatest concern is that he and other members of the public were misled in the process to the detriment of their quality of life and their pulmonary health. It should also be noted that a preliminary process neatly evades APA compliance.

(CR-27, 22-23.) [ER 00209-10.]

(r) THE CLEAN AIR ACT AND STATE IMPLEMENTATION PLANS

The following statement misleads. "Section 110 of the CAA, 42 U.S.C. § 7410, contemplates that the measures necessary to attain the NAAQS will be applied to individual sources through a SIP, which are developed by the States and submitted to EPA for approval. *Id.* § 7410(a)(1), (k)." (Emphasis added.) See Def. Mot. S. J. 4-5. The words

“individual sources” are not in the sections of the statute cited. For that reason they mislead.⁶ Plaintiff Hall objects to the misleading reference since the statement masks the unlawful parsing of federal agency actions to evade NEPA requirements.

Federal Defendants’ list of requirements from 42 U.S.C. § 7410(a)(2) misleads. There is no requirement for anything in “schematic form” in the statute. The list Federal Defendants provided is not a reasonable reading of § 7410(a)(2).

(CR #27, 23.) [ER 00210.]

H. Missing Evidence

The district court allowed the Appellees to sweep the entire environmental process into the TIP and then declared the TIP exempt. Appellant was arguing the direct and indirect air pollution from the projects listed in the TIP. The district court overlooked the fact that Appellees did not produce any of the documents Appellant has alleged are missing. Appellees produced only a portion of the TIP. When a federal agency produces only a small part of a TIP they claim is “exempt” and are unable to produce any other NEPA, CAA and APA mandated document, Appellees mislead.

Appellant’s ¶ 17 Complaint allegations are clear regarding what is missing.

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

⁶ The use of the words “individual sources” begins the misleading argument that it is acceptable to parse federal highway projects in order to evade compliance and conformity with NEPA, CAA and APA.

4:14-18. (Emphasis added.)

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

26. The Conformity Finding was made without reference to Nevada's and Clark County's only, finally approved State Implementation Plan ("SIP"), the EPA approved 1979/SIP.

27. Defendants' Conformity Finding was made without reference to any legally sufficient APA compliance including but not limited to public notice, a public comment period, hearings and an opportunity thereafter for judicial review.

28. The Conformity Finding does not mention any Finding of No Significant Impact or Decision Record.

29. Hall alleges that the DOT has never complied with NEPA, CAA or APA regarding any of its Las Vegas Valley air pollution activities since the federal agency requirements were first mandated.

30. Hall alleges that all Conformity Findings the DOT has issued in Nevada and Clark County are misleading and are legally insufficient for any lawful purpose.

CR #2, 6:1-17. [ER 00006.]

48. Plaintiff alleges that from at least May 11, 1999 Defendants cooperated with local, state and other federal authorities to fund, permit and approve air pollution projects that kept the Las Vegas Valley in serious non-attainment in violation of the National Ambient Air Quality Standards ("NAAQS") which are less stringent than [sic] the EPA approved 1979/81 SIP.

(CR #2, 10:6-10.) [ER 00010.] "...Plaintiff has raised several valid and cognizable factual issues that make both Defendants' Motion to Dismiss and Plaintiff's Cross Motion for Summary Judgment or, in the Alternative, for Summary Adjudication of Defenses inappropriate at this stage in the litigation."

That was the last time the district court mentioned Appellant’s “valid and cognizable factual issues.” (CR #12, 11:3-6.) Some of the issues alleged are listed above. See, CR #27, 14: ¶ (j). [ER 00201]

I. Summary Judgment

The nature of the review that properly applies is the traditional one articulated in *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962), that courts should draw on factual inferences “in the light most favorable to the party opposing the motion.” Summary judgment is appropriate where only issues of law are involved. By the district court’s own admissions, Defendants “explanation” improperly served as evidence.

The district court did not review the petition according to APA standards and requirements. There is no evidence that the district court conducted the “Scope of Review” required by 5 U.S.C. § 706 or made the findings required thereby. “In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.” See, 5 U.S.C. § 706 (last paragraph).

The district court noted that Plaintiff had opposed Defendants’ motion “[i]n his Opposition to Defendants’ Motion.” (CR #29.) [ER 00225:11.] The district court switched from dismissal to summary judgment despite the fact that Appellant is pro se, without a hearing.

The error is two fold. First, the Appellees claimed they did rely upon the invalidated SIP and they then alleged the opposite. Second, there is no way any federal agency can conform and comply with a SIP that is so old it does not have a

provision for emissions budgets among other shortcomings. The burden is on the Appellees to show how they conform to the when and if they can find one that conforms to the 1990 amendments to the CAA.

VI. STANDARD OF REVIEW

The district court's decision to grant dismissal and finally summary judgment is reviewed *de novo* with all of the facts read in the light most favorable to the non-moving party. *Covington v. Jefferson County*, 358 F.3d 626, 641 n.22 (9th Cir. 2004). Pursuant to the Federal Administrative Procedures Act ("APA"), the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority, of limitations, or short of statutory right; without observance of procedure required by law; unsupported by substantial evidence in a case ... reviewed on the record of an agency hearing provided by statute; or unwarranted by the facts to the extent the facts are subject to trial *de novo* by the reviewing court. *Oregon Natural Resources Council v. Marsh*, 52 F.3d 1485, 1488 (9th Cir. 1995). See, 5 U.S.C. § 706(2).

The District Court's judicial review rulings on the grant and denial of cross summary judgment motions are reviewed *de novo*. *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). The *de novo* standard applies to the order granting summary judgment, the district court's interpretation and application of federal law, as well as the mixed questions of law and found herein. *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1992). Findings of

fact are usually reviewed for clear error.

The reviewing court must determine that agency actions are not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Review of agency action to determine its conformity with NEPA and the CAA provisions at issue is governed by the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. *See Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1176-77 (9th Cir. 2000) (NEPA); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002) (CAA); *see also City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1134-35 (C.D. Cal. 1999) (CAA review uses same standard as NEPA review).

We review an agency’s compliance with NEPA under the Administrative Procedures Act, 5 U.S.C. § 706 (1994) (internal citation omitted), which provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions” that are “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D); *see also Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citing *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc) (stating that the “without observance of procedure” standard applies when a party claims that an environmental impact statement fails to comply with the requirements of NEPA)).

Initially, it is the moving party's burden to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Rule 56(c) requires the moving party to show not only the

absence of a disputed issue of fact but also that he is entitled to judgment as a matter of law. Appellees' statements that there are no genuine issues of fact misrepresent.

This court must determine whether the evidence, considered as a whole and viewed in the light most favorable to the nonmoving party, can reasonably support the district court's summary judgment finding for the Appellees. The issues herein involve both questions of law and of fact. Summary judgment should not be granted if as in this instance, there is no record supporting the moving party's claims. See, *Zell v. Intercapital Income Securities, Inc.*, 675 F.2d 1041, 1045 (9th Cir. 1982).

The lack of a record supporting the moving party's claims supports Appellant's motion for summary judgment. *Jones-Hamilton Co. v. Beazer Materials & Serv.*, 973 F.2d 688, 694-695 (9th Cir. 1992). When the moving party's own evidence shows an undisputed material fact that bars the moving party's claims as a matter of law, the court may *sua sponte* grant summary judgment to the opposing party. In this instance, the moving party had a full and fair opportunity to ventilate the issues involved in the motion. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-312 (9th Cir. 1982).

Review of agency action to determine its conformity with NEPA and the CAA provisions at issue are governed by the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. *See Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1176-77 (9th Cir. 2000) (NEPA); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002) (CAA); *see also City of S. Pasadena v.*

Slater, 56 F. Supp. 2d 1106, 1134-35 (C.D. Cal. 1999) (CAA review uses same standard as NEPA review).

In a record review case, the reviewing court may direct that summary judgment be granted to either party based on the court's de novo review of the administrative record. *Cf. Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995) (“De novo review of a district court judgment concerning a decision of an administrative agency means we review the case from the same position as the district court.”) The *de novo* standard applies to the order granting summary judgment, the district court's interpretation and application of federal law, as well as the mixed questions of law and found herein. *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1992).

In considering whether an agency acted in an arbitrary and capricious manner, a court “must determine whether the agency articulated a rational connection between the facts found and the choice made.” *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001).

Furthermore, courts must “carefully review the record to ‘ensure that agency decisions are founded on a reasoned evaluation of the relevant factors,’ ” *id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)). In the context of the procedural environmental requirements imposed by NEPA and CAA, “[t]he arbitrary and capricious standard requires a court to ensure that an agency has taken the requisite hard look at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors.” *Wetlands*

Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1114 (9th Cir. 2000) (internal quotation marks omitted), *cert. denied*, 122 S. Ct. 41 (2001). A reviewing court is not permitted to substitute its judgment for that of the agency, but rather must “‘simply . . . ensure that [the agency]. has adequately considered and disclosed the environmental impact of its actions.’” *Am. Rivers v. FERC*, 201 F.3d 1186, 1194-95 (9th Cir. 2000) (quoting *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1183 (9th Cir. 1997)). This means that we “must defer to an agency’s decision that is fully informed and well-considered,” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (internal quotation marks omitted), but “need not forgive a ‘clear error of judgment,’” *id.* (citing *Marsh*, 490 U.S. at 378), or credit “conclusions that do not have a basis in fact,” *Ariz. Cattle*, 273 F.3d 1236. *Public Citizen v. Department of Transportation*, 316 F.3d 1002, 1020-21 (9th Cir. 2003).

While APA does not explicitly require, e.g., findings and reasons for actions taken other than after a trial-type hearing, courts have nevertheless refused to uphold agencies whose decisions lack reasoned support in the record compiled by the agency. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

The reviewing court must determine that agency actions are not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). In considering whether an agency acted in an arbitrary and capricious manner, a court “must determine whether the agency articulated a rational connection between the facts found and the choice made.” *Ariz. Cattle*

Growers' Ass'n v. United States Fish & Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001). [ER 175-177].

A. ADMINISTRATIVE RECORD

Findings of fact are usually reviewed for clear error. In ruling on the merits of a petition for review the court generally will not consider materials which are not part of the administrative record (AR). *Gomes-Vigil v. I.N.S.*, 990 F.2d 1111, 1113 (9th Cir. 1993). The issues herein involve issues of both law and of fact. Summary judgment should not be granted if there is no record supporting the moving party's claims. *Zell v. Intercapital Income Securities, Inc.*, 675 F.2d 1041, 1045 (9th Cir. 1982).

The lack of a record supports Appellant's motion for summary judgment. *Jones-Hamilton Co. v. Beazer Materials & Serv.*, 973 F.2d 688, 694-695 (9th Cir. 1992). When the moving party's own evidence shows an undisputed material fact that bars the moving party's claims as a matter of law, the court may *sua sponte* grant summary judgment to the opposing party. *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-312 (9th Cir. 1982).

B. CONTRARY TO EVIDENCE

An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983), or if the

agency's decision is contrary to the governing law. 5 U.S.C. § 706(2).

C. DEFERENCE

The court will not defer to an agency interpretation of a statute the agency is not charged with administering. *United States v. Corey*, 232 F.3d 1166, 1183 (9th Cir. 2000). Further, when a statute is administered by more than one agency, a particular agency's interpretation is not entitled to deference. Agency interpretations developed informally (i.e., not through formal adjudication for notice and comment rulemaking) do *not* warrant deference. *Scales v. I.N.S.*, 232 F.3d 1159, 1185-1166 (9th Cir. 2000). The court may refuse to defer to an agency's interpretation of a particular statute (even though within the agency's expertise) if the agency has not consistently interpreted the provisions issue. *State of Oregon v. FHWA*, 876 F.2d 1419, 425 (9th Cir., 1989).

VII. CONCLUSION

In this instance, the AR was not served on the Appellant until after the district court had already dismissed the first four claims of a five claim complaint. At that point the review was all but over and the major damage to the Appellant was already done. There was no summary judgment hearing despite the fact that the Appellant is pro se. There are no Court Record citations to law and evidence sufficient that support the district court's orders. The district court echoed Appellees' claims of "exempt" without any showing that either statute cited had any relation to the facts and law of this action. There is no indication that the district court had any concern about federal agency NEPA, CAA and APA compliance. The result is a *de facto* rescission of the nation's environmental law

protections and safeguards by a district court that had no jurisdiction to make that decision.

Appellees are continuing a longstanding scheme to evade the environmental will of Congress. Appellees argue positions they know to be false. Appellees repeatedly and shamelessly misled the Appellant and the district court in order to enhance their agency's contempt for our nation's environmental laws. Appellant requests the justice he was denied in the district court according to his complaint requests for relief.

Appellant and Appellees do not agree on the facts or the law in this review. The district court has made erroneous assumptions regarding what the Appellant actually wrote in his district court filings. Appellees' have re-stated and summarized Appellant's statements to the point they are no longer recognizable. As a result, the Appellant has no alternative other than to make all of the documents in the Excerpts of Record a part hereof for all purposes and ask the appeals Court to take judicial notice of all of them.

DATED: Las Vegas, Nevada, October 4, 2004.

Respectfully submitted.

/s/ Robert W. Hall
ROBERT W. HALL, Pro Se