

No. 04-16610

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. HALL,

Appellant-Plaintiff

Versus

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

Appellees-Defendants

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 REPLY BRIEF

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Robert W. Hall

I. STATEMENT OF THE CASE REBUTTAL

Appellant Hall objects to Federal Appellees “Statement of the Case” on the basis that it is misleading. Brief of Federal Appellees (“BFA”) at 2-9. Within its four corners, Appellant’s Opening Brief (“AOB”) describes an entirely different judicial review than the judicial review Appellant Hall has requested.

Congress enacted a trio of environmental laws, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f, the Clean Air Act (“CAA”), 42 U.S.C.A. §§ 7401 to 7671q, the Administrative Procedures Act (“APA”), 5. U.S.C. §§ 551-553. and their corresponding Code of Federal Regulations sections. The intent of Congress was to achieve cleaner air, the air we all breathe. The three acts were meant to work together in harmony. This action is about the disharmony approach the Federal Appellees have taken to obstruct the language, spirit and intent of our nation’s environmental laws.

NEPA is basically a reporting requirement. NEPA in its simplest form in this instance, is a requirement to disclose the amount of air pollution the Federal Appellees’ agency is responsible for permitting and funding in Clark County and the Las Vegas Valley serious non-attainment areas for particle matter ten microns or less (PM-10) and carbon monoxide (CO).

Plaintiff Hall and everyone else has a right to see and challenge to the extent necessary, Federal Appellees’ full disclosure of their totals, the total amount of

direct and indirect, cumulative air pollution the Federal Appellees' federal agency is required by NEPA to report. Without publicly noticed and available totals on a regular basis, the Federal Appellees are able to hide what they are doing from the public, other state agencies, local agencies, federal agencies, the court below and now this Court. As long as the courts go along with a little piece of the big picture air pollution picture here and a little piece there scheme, the courts are making their own tidal wave of environmental litigation. The NEPA, CAA and APA statutes do not make any sense if the data reported are not direct and indirect, cumulative impact data or worse, if the data are not reported at all. 40 C.F.R. § 93.153.

The tactics used by the Federal Appellees are well honed. Their tactics work primarily because environmental law is complex. Few have the knowledge and environmental law experience to challenge them. Fewer yet are able to keep their eye on the big picture. The Federal Defendants have become so skilled at parsing words, sentences and paragraphs that just, meaningful, relevant decision exist but they are rare. They rely on deference and the fact that they are the government in order to pull off their scheme.

The Federal Appellees cannot produce a federal agency, NEPA compliant, direct and indirect, cumulative impact statement that clearly discloses how much air pollution the federal agency's actions and funding are causing in the Las Vegas

Valley. That statement has been true from the time NEPA was first promulgated and signed into law into 1970. The Federal Appellees have not produced any such NEPA direct and indirect, cumulative environmental impact document at any time. Their well honed scheme involves a series of local, site specific, parsed, “little piece” environmental assessments (EA) that reveal air pollution data that is never a part of a grand total. The local agency will occasionally complete a site specific environmental impact statement (EIS) resulting in air pollution data that also will not be part of grand total. That is how Federal Appellees have successfully shielded the projects they permit and fund from APA review.

Despite the fact that NEPA applies only to federal agencies, the Federal Appellees’ scheme involves the use of local and state documents that shield the Federal Appellants from NEPA compliance. An environmental impact statement is not a NEPA, direct and indirect, cumulative environmental impact statement until and unless it is exposed to public notice, hearing and if necessary, APA review. The scheme involves not exposing a state or county EA or EIS to APA review.

In this instance they tucked a TIP that is not a direct and indirect, cumulative environmental impact statement under the protective wing of a long range planning document. The TIP is then claimed by reference, as the support for all of the projects listed in a local or state TIP for the purpose of permitting and funding. When challenged, they call the document “exempt.” Slick!

A lawful NEPA document a federal agency may rely upon is an APA reviewable document that is a direct and indirect, cumulative environmental impact statement. All one has to look for is a total of that agency's air pollution emissions for the area involved. If there is no total, if no one certifies the document, if the entire process was not subject to public notice and public involvement, the entire process is legally insufficient for any lawful purpose. The entire process is a sham, Federal Appellees' argument notwithstanding.

The NEPA direct and indirect, cumulative impact totals are the critical information necessary to complete a CAA state implementation plan. To the extent that federal agency NEPA totals are not a part of an EPA finally approved state implementation plan (SIP), there is no way to hold any federal agency responsible for the air pollution that agency is responsible for reporting within the Las Vegas Valley serious non-attainment area. Everything that follows is worthless because no one knows how much is too much.

The above discussion describes but one phase of the scheme. The Federal Defendants have an even more difficult problem with the fact that as of the filing of the instant first amended complaint on May 15, 2003, the State of Nevada had not successfully had an EPA finally approved SIP since the 1979 SIP approval, amended in 1981. That EPA SIP does not comply with the 1990 amendments to the CAA. As a result, there is no way the Federal Defendants can comply with the

CAA requirement for conformity, emissions budgets or no emissions budgets. That is why the Federal Appellees have claimed they are “exempt” from compliance. They know that emissions budgets are legally insufficient without EPA finally approved, air pollution specific SIPs. Doubly slick!

The Court could bring clarity to this judicial review by asking the following questions on review. Where is Federal Appellees’ NEPA direct and indirect, cumulative environmental impact air pollution total? What direct and indirect, cumulative impact NEPA document do Federal Appellees’ rely upon? What SIP did Federal Appellees’ rely upon? How much air pollution do Federal Appellees’ permit or propose to permit and fund in a serious non-attainment area? What is Federal Appellees’ legal authority for approving, permitting and funding annual or biannual projects? Aren’t Federal Appellees’ really arguing that they have the authority and jurisdiction to set aside the NEPA, CAA and APA statutes?

II. REBUTTAL

Appellant Hall requests that the appeals Court take judicial notice of all the ER documents he has filed herein as well as the court record documents he has filed on judicial review. That includes the Appellant’s Opening Brief and the accompanying Excerpts of Record with exhibits and declarations attached and Plaintiff’s Opposition to Federal Appellees’ Motion for Summary Affirmance dated December 9, 2004. The Hall declarations may be found at ER 00064-00068,

00141-00142 and 00218-00222.

On judicial review, the burden is on the Federal Appellees to show their compliance with the NEPA, CAA and APA statutes. Federal Appellees have argued that not only did they not comply there is no requirement for them to do so. Federal Appellees cannot carry their burden because they do not want the NEPA, CAA and APA process to work. Their goal is to thwart the process.

That means that in addition to their claims that some documents are not subject to the environmental review process and others are “exempt,” the Federal Appellees have a duty to disclose the location of the NEPA, CAA and APA statute documents that are not only not “exempt,” they are required.

The Brief of the Federal Appellees is an admission they have not and cannot produce the documents from the Administrative Record Appellant Hall has claimed are fatally missing. The missing documents if legally sufficient and if produced would have been evidence of Federal Appellees’ NEPA, direct and indirect, cumulative environmental impact statement compliance, an EPA finally approved post CAA 1990 amendments SIP, conformity to a lawful SIP that has not lapsed and APA compliance. The missing documents do not exist. Op. Br. at 1-2.

A. RE: FEDERAL APPELLEES’ ISSUES PRESENTED FOR REVIEW

Hall objects to Federal Appellees’ issues in favor of his own. Hall has not claimed that local transportation programs are subject to NEPA if and only if they

are not used for federal agency NEPA, CAA and APA compliance. Hall has claimed that Federal Appellees unlawfully hid their list of project approvals for funding in a Regional Transportation Commission (“RTC”) Transportation Implementation Plan (“TIP”) as part of a scheme to evade NEPA, CAA and APA compliance.

B. RE: FEDERAL APPELLEES’ SUMMARY OF ARGUMENT

The key document in this review is the March 3, 2003 “Conformity Finding.” [ER 00013.] The fact that the Federal-Aid Highway Act (“FAHA”) requires “continuous, cooperative, and comprehensive transportation planning process to be carried out by a metropolitan planning organization” is not relevant. BFA at 3. That is a straw issue.

The Complaint issues before the district court involve the **Federal Appellees’** failure to comply with National Environmental Policy Act (NEPA), the Clean Air Act (CAA) and the Administrative Procedures Act (APA) statutes. [ER 00002-00011.]

The issues before the appeals Court do not involve a metropolitan planning organization (“MPO”), Clark County’s Regional Transportation Commission (“RTC”), the Regional Transportation Plan (“RTP”) and its included Transportation Implementation Plan (“TIP”) or other local or State issues Federal Appellees claim are “exempt” except for purposes of impeachment and as evidence

of Federal Appellees' misleading scheme.

This is an action against the United States Department of Transportation ("USDOT"), its Federal Highway Administration ("FHWA") division and their related responsible officials regarding pursuant to their 5 U.S.C. failure and refusal to comply with the language, spirit and intent of NEPA, CAA and APA statutes. Federal Appellees' issues throughout its BFA are straw issues interposed solely for the purpose of obfuscation and misleading. The Complaint in its four corners as presented may be a case of first impression in this jurisdiction.

III. FEDERAL APPELLEES' FIRST CLAIM

A. EXEMPT

"First, dismissal of Hall's NEPA claims was proper because applicable federal laws unambiguously state that local transportation plans and programs under FAHA, as well as actions taken under the Clean Air Act, including conformity determinations, are exempt from NEPA." Brief of the Federal Appellees ("BFA") at 10.

See, Appellant's Opening Brief ("AOB") at 3-4. This is a straw issue. Hall does not have a problem with their "exempt" claim as long as the Federal Appellants do not try to use anything from those documents in defense of their Conformity Finding.

Not only is their claim a straw issue, it was interposed to mislead.

Transportation plans and programs are not exempt from lawful conformity determinations pursuant to 40 C.F.R. § 93.100-.160. By switching from Conformity Finding to NEPA, Federal Defendants mislead. A conformity determination must be supported by a missing direct and indirect, cumulative NEPA compliant EIS and a missing 1990 amendments SIP. Without these missing documents, there is no lawful way the Federal Appellants can comply with 42 U.S.C. § 93.100-.160 requirements.

Federal Appellees begin their straw issue arguments with Issues Presented for Review. “1. Whether the district court properly dismissed Hall’s claims that certain transportation plans, as well as USDOT’s conformity determination under the Clean Air Act, 42 U.S.C. §§ 7401-7671q are subject to the environmental review procedures set forth in the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347.” Id. at 1.

Federal Appellees failed to discuss 40 C.F.R. § 93.102(a)(1), (b) and the fact that “conformity determinations are required for” “all nonattainment and maintenance areas for transportation-related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.” If the Federal Defendants want to dismiss local and state plans and programs as “exempt” they are welcome to do so as long as they do not try to have it both ways.

Hall has claimed that because Federal Appellees have claimed that state and

local transportation plans and programs are exempt from NEPA, Federal Appellees had no business using them in place of NEPA compliance and that is what they have done. Federal Appellants have hid conformity determination approval and funding projects in the TIP. Federal Appellees are having it both ways.¹

The district court made the statement that “neither RTC’s Program nor the conformity determination process itself was subject to NEPA.” Order at 8. Fine. Where is the NEPA compliance?

Appellant never said that the TIP was subject to NEPA. The First Claim for Relief must be read in its entirety. The succeeding paragraphs continue the allegations of the claim including the requirement for a NEPA SIP. The “as structured” phrase referred to the fact that **the only list of air pollution FHWA actions is in the TIP**. To the extent that Federal Appellees reference the TIP at all, it must be by and through a NEPA compliant, direct and indirect, cumulative impact EIS. See, ¶¶ 24-37, particularly 35.

While making that statement, the district court failed to discuss the absence of federal agency NEPA EIS compliance. [ER 00004-00007.] If the Federal Appellees had filed a lawful, fully compliant NEPA, direct and indirect,

¹ Federal Defendants’ mistake was their failure to put more pressure on Clark County to comply with the trio of environmental laws as opposed to ignoring them since 1970. By trying to make something out of nothing, the Federal Appellants went along with a runaway growth policy that cannot be justified by NEPA, CAA or APA statutes.

cumulative impact EIS, the list of federally approved projects they were funding would have been in that document and Hall would not be forced to cite the only list of projects available, the list in the TIP.

Federal Appellants were hiding the list of projects from APA review and now have the chutzpah to claim that the only project list available was “exempt” from NEPA because the list was in the TIP. What are they conforming? Without a NEPA list of projects in a federal agency, APA reviewable document, Federal Appellees conform nothing.

B. CONFORMITY DETERMINATION UNDER THE CAA

Each State is required to adopt and submit for EPA approval a State Implementation Plan (“SIP”) for each pollutant. 42 U.S.C. § 7410(a)(1). In non-attainment areas SIPs must contain emissions limitations and other measures designed to bring “nonattainment” areas into attainment. 42 U.S.C. § 7410(a)(2).²

To ensure compliance with these plans, the CAA contains a “conformity” requirement, mandating that “[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit any activity which does not conform to [a SIP].” 42 U.S.C. § 7506(c)(1). Most federal actions affecting levels of pollutants in non-

² As of the date of the filing of the Complaint in this review, the State of Nevada and Clark County Nevada had not successfully met either requirement since 1979, revised in 1982.

attainment areas require that the responsible agency conduct a “conformity determination.” 40 C.F.R. § 93.150-.160.³

The conformity status of a Federal action automatically lapses 5 years from the date a final conformity determination is reported under 40 C.F.R. § 51.855. 40 C.F.R. § 51.857, Subpart W. There is no evidence of a final conformity determination reported in the AR. If after the conformity determination is made, the Federal action is changed so that there is an increase in the total of direct and indirect emissions above the levels in 40 C.F.R. § 51.853 (b), a new conformity determination is required. 40 C.F.R. § 51.857 (c).⁴

Federal Appellees’ March 5, 2003 “Conformity Finding” is a final document that leads to the funding of Federal Appellees’ projects. A list of those federal actions at issue is included in the responsible local agency’s Transportation Improvement Plan (“TIP”). The list of agency actions was not mentioned in the Conformity Finding. There was no Federal Highway Administration (“FHWA”) action list attached to the Conformity Finding.

³ All C.F.R. citations are as of July 1, 2002.

⁴ Both 40 C.F.R. part 51, subpart T and 40 C.F.R. § 51.853 subpart W would apply if Nevada and Clark County had pollution specific SIPs by 2003 that met the 1990 amendments to the CAA. They did not. As a result, the more stringent rules of the EPA approved 1979/82 SIP apply. The point is somewhat moot since the 1979/81 SIP does not meet the 1990 amendments to the CAA and as a result, Nevada and Clark County were in a SIP lapse in 2003. See, 40 C.F.R. § Part 51, Subpart T.

C. THE “CONFORMITY” FINDING

Federal Appellees’ have attached as AR “SER” excerpts the March 3, 2003 “Conformity Finding” and nineteen pages from the RTC’s 2003-20025 Regional Transportation Plan (“RTP”) and 2003-2005 Transportation Improvement Plan (“TIP”). The inclusion of RTP/TIP misleads to the extent that Federal Appellees’ cannot lawfully transfer their NEPA, CAA and APA burden and responsibilities to a local or state agency.

The responsible federal official who uses information prepared by others must **independently** satisfy himself or herself of the validity of that information. The reason is that the official is expected to use the information in making decisions. The official is expected, in turn, to require valid information in making decisions. Failure to validate information in a lawful NEPA EIS process that is properly noticed to the public is strong evidence that the decision maker has not given significant weight to such information in the decision process, contrary to the goals of NEPA. That evidence is not before this Court.

Instead we have the following statement. “Based on our evaluation of the Metropolitan Planning Organization’s finding of conformity and related documentation, and coordination with the Environmental Protection Agency, we have determined that the Las Vegas urbanized area has met the requirements of the conformity regulations. A finding of conformity is hereby made with respect to the

Transportation Improvement Program & Plan approved by the RTC on January 9, 2003 and by NDOT on January 15, 2003.” These are the same plans Federal Appellees have claimed are “exempt.”

There is no other justification for the finding. There is no Finding of No Significant Impact (“FONSI”). There is no mention of a lawful NEPA EIS process. There is no evidence of a proper public notice or public participation. The result is strong evidence that the decision maker has not given significant weight to such information in the decision process, contrary to the goals of NEPA. For all practical purposes, the Federal Appellees ignored every requirement except a one page shadow of a Conformity Finding. [ER 00013.]

Federal Appellees conformity determination is fatally deficient. One issue is that Federal Appellees failed to include RTC’s data and determinations in a NEPA compliant, direct and indirect, cumulative impact EIS. Without that EIS process there was no federally sufficient citizen participation and opportunity for an APA review. The allegations of the instant Complaint are limited to federal agency duties and responsibilities. The duty to prepare a SIP lies squarely with the responsible federal agency and its officials, not with any local, state or other federal agency.

Federal Appellees based their Conformity Finding on “our evaluation of the Metropolitan Planning Organization’s finding of conformity and related

documentation....” [ER 00013.] By that act, Federal Appellees unlawfully transferred their burden to the local MPO and then claimed the RTP and TIP were “exempt” regarding the instant Conformity Finding. That act had the advantage of evading both NEPA and the APA since as we have noted, there is no NEPA EIS.

Worse, there is no Conformity Finding mention of EPA, finally approved, pollution specific SIPs that meet the 1990 amendments to the CAA. There is no Conformity Finding mention of any specific SIP. There isn’t any mention of the only Nevada, Clark County SIP the EPA has ever finally approved, the 1979/81 SIP.⁵ There is no mention that the Clark County portions of the 1979 Nevada SIP are lawfully much more stringent than the federal standards they claim for conformity purposes. There is no mention of serious non-attainment areas. There is no mention of a NEPA direct and indirect, cumulative impact determination. There is no basis for a federal Conformity Finding.

NEPA, CAA and APA require more from a federal agency than simply accepting an “exempt,” long range, programmatic, planning document from a local or state agency that is hiding the air pollution permitting and funding actions. There is no evidence of a NEPA, CAA or APA mandated public notice, comment period or any other APA federal agency compliance that would provide the public

⁵ The SIP not mentioned in the Conformity Finding was an Appellant exhibit. [ER 00160-00169.]

including Hall with his federal public participation rights. The alleged Conformity Finding misleads. See, ER 00005, ¶¶ 18-25. 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 00094-98, 00199-00203.] There is no evidence of a Finding of No Significant Impact (“FONSI”). With these evidence omissions, Federal Appellees cannot legally comply or conform to NEPA, CAA and APA.

IV. FEDERAL APPELLEES’ SECOND CLAIM

“Second, dismissal of Hall’s claim that USDOT’s conformity determination had to satisfy the rulemaking requirements of the APA was proper because conformity determinations are not rules.” BFA at 10-11. “The district court properly dismissed Hall’s assertion that USDOT’s conformity determination ‘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.’” BFA at 17-18; Complaint ¶ 27 (ER 6). As the district court correctly notes, ER 96, Hall subsequently ‘appear[ed] to disavow such an assertion’ by stating in his own words, he had ‘not claimed that a that a conformity determination was a rule.’” ER 62. Dismissal of this claim was therefore appropriate.” BFA at 17-18.

Hall knows that conformity determinations are not subject to NEPA for that

would put the cart before the horse. NEPA comes first. The issue is a straw issue. The issue is that of Federal Defendants issuing a Conformity Finding without having complied with the NEPA, CAA and APA statutes. Hall dealt with the issue in the AOB 12-20. The rule making issue is a contrived issue interposed by the Federal Appellees solely for the purpose of obfuscation.⁶ After making that allegation, Federal Appellees admitted that Hall had previously disavowed the allegation.

In addition to his AOB 12-20 argument, Hall actually stated in his First Amended Complaint, CR #2 the following:

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

¶ 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 1979/81 SIP.

[ER 00006.] (Emphasis added.) The statement was limited to the Conformity Finding. It is a fact that Federal Appellees did not name either the 1979/81/82 SIP or any other SIP in the Conformity Finding. **The Conformity Finding reader has**

⁶ The district court deferred to and relied upon the Federal Appellees' credibility. The result is this appeal.

no idea what SIP Federal Appellees used. (Emphasis added.) [ER 00005-06, 00013.]

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.

See, FPA at 17-18 [ER 00062-63]. In his August 2003 points and authorities in support of his cross-motion for summary judgment, Hall stated the following at 26-27 [ER 00062-63]:

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

According to the Defendants the applicable APA section is 5 U.S.C. § 553. The applicable sections are 5 U.S.C. §§ 702, 704, and 706. § 702 covers the right of review. § 704 covers actions reviewable. § 706 covers the covers the scope of the review. The three sections are applicable regarding judicial review. Plaintiff has not said that a conformity determination is a rule. The issue herein is Defendants' final decision prior to their approval and funding of the site specific projects listed in the TIP, both of which have already commenced.⁷

⁷ The district court erred and abused its discretion with its "appeared" statement.

Appellant Hall could not have been clearer. Appellees' argument is factually incorrect.

A. NEPA AND CAA REVIEW STANDARDS

In a review of an agency action to determine its conformity with NEPA and the CAA provisions of the APA, 5 U.S.C. §§ 701-706, the CAA review uses the same standard as the NEPA standard. Hells Canyon Alliance v. United States Forest Serv., 227 F.3d. 1170 (9th Cir. 2000) (NEPA).

B. NEPA ENVIRONMENTAL IMPACT REPORTING COMPLIANCE

By its own terms, the intent of NEPA was enacted to reorganize the priorities of the federal government, to integrate “environmental amenities and values” alongside more traditional more traditional “economic and technical considerations.” 42 U.S.C. § 4332(2)(B). To achieve this goal of including environmental concerns in governmental decisionmaking, NEPA requires that an EIS be prepared for all “major federal actions significantly affecting the ... human environment.” 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality (“CEQ”) defines “major federal action[s]” as “actions with effects that may be major and which are potentially subject to Federal control and responsibility,” including “[a]doption of official policy, such as rules, regulations, and **interpretations.**” (Emphasis added.) 40 C.F.R. § 1508.18. “Major” reinforces but does not have a meaning independent of “significantly,” meaning that a federal

action is “major” whenever it has “significant” environmental effects. 40 C.F.R. § 1508.18. City of Davis v. Coleman, 521 F.2d 661, 673 n. 15 (9th Cir. 1975). 42 U.S.C. § 4332(2)(C), NEPA 102(2)(C), 40 C.F.R. 1501.4, 1508.9 (2001). NEPA reporting disclosures form the basis for CAA conformity certifications. Where there is no NEPA compliance, there is no federal agency administrative sunshine.

NEPA EIS requirements include strong public notice, public involvement and public hearing requirements. The federal agency pattern in the West is that whenever a federal agency wants to by-pass NEPA and the problem of reporting a “major federal action,” agencies simply find ways around NEPA compliance. This review is a classic example of federal agency environmental law avoidance, and is also a classic example of the importance of citizen oversight.

Local agencies can and do legally stuff their TIP into any document. The issue is the federal agency’s burden when a local agency hides serious air pollution actions from the public and other agencies by making the TIP a part of a long range, programmatic planning (“exempt”) document. Local agencies are not required to do that. The scheme is then that of ignoring the EIS requirement. Appellant Hall’s claims have concentrated on federal agency compliance with the language, spirit and intent of NEPA, CAA or APA. Instead of complying, Federal Appellees misled the public, other agencies, the district court and now this honorable Court.

The only legally sufficient course Federal Appellees had available was to prepare a NEPA compliant, direct and indirect, cumulative impact EIS. They knew that their approval actions for highway construction listed in the TIP constituted a “major federal action.” Instead of complying, they hid the information. Public scrutiny was avoided by simply ignoring federal public notice requirements. The entire scheme to mislead is described in the Complaint starting with the First Claim for Relief and progressing through a total of five claims for relief. The document must be read in its four corners in order to reach a just conclusion. [ER 00003-00010.]

C. THE ADMINISTRATIVE PROCEDURES ACT (“APA”)

The court below had responsibilities pursuant to the Administrative Procedures Act (“APA”), 5 U.S.C., §§ 701-706. Section 706 (2) of the APA authorizes courts to 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 or “short of statutory right.” (Emphasis added.) See, 5 U.S.C. § 706 (2)(A) and (C). Jurisdiction under section 706(2) is appropriate here because the petitioner has identified a final “agency action” as defined by the APA. 5 U.S.C. § 706 (1) of the APA authorizes judicial review to compel agency action unlawfully withheld or unreasonably delayed. See, 5 U.S.C. § 706 (1). Judicial review is appropriate as a result of petitioner’s showing of agency recalcitrance . . .

in the face of clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility. (Emphasis added.) ONRC Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1137 (9th Cir. 1998) (quoting Public Citizen Health Research Group v. Comm’r, Food & Drug Admin., 740 F.2d 21, 32 (D.C. Cir. 1984). See, 5 U.S.C. § 706 (1) – (2), (A) – (F).

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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.

The CAA and the APA provide more than a mere policy statement or general guidance. Both acts establish a management directive requiring the Federal Appellees to administer the CAA in order to reach cleaner air attainment as expeditiously as practicable. That duty is a nondiscretionary, mandatory duty that

the Federal Appellees may be compelled to carry out under 5 U.S.C. § 706 (1). Federal Appellees citation of 5 U.S.C. §§ 551 and 553 misleads to the extent that Federal Appellees did not include Hall's 5 U.S.C. § 701-706 claims. [ER 00118-00119.]

V. FEDERAL APPELLEES' THIRD CLAIM

“Third, dismissal of Hall’s claim that USDOT could not rely on motor vehicle emissions budgets that EPA has deemed adequate but that are a part of a proposed SIP was proper because the Clean Air Act and EPA’s regulations clearly allow such reliance.” BFA 10, 20 fn. 10.

There is no citation to any such straw claim. The Conformity Finding does not specify what SIP Federal Appellees used. While denying that they used the “1979/81 SIP” for their Conformity Finding, Federal Appellees referenced SER 7, 14-16; BFA at 20-21, fn. 11. The referenced numbered paragraphs do not state what SIP they used for conformity. There is a reference to the claim “However, the administrative record clearly states that the RTC and USDOT relied upon the motor vehicle emissions budgets and SIPs submitted to EPA in 2000.” The clear statement Federal Appellees claim is not at SER 7, 14-16.

For the first time and without citation to a certified AR document, Federal Appellees made the following statement. “This rule, published at 64 Fed. Reg. 25,210 (May 11, 1999), was a standalone SIP revision that EPA had approved in a

separate action.” That document and the references therein are not in the AR and were not referenced as being in the AR much less in the Conformity Finding. Federal Appellees cannot lawfully keep that information secret until April 15, 2005. Without prejudice, Federal Appellees admit that neither the CO or the PM-10 SIP were finally approved by the EPA as late as 2003, the year when Hall filed his Complaint and First Amended Complaint (May 15, 2003). That is the reason Federal Appellees did not name the SIP the Conformity Finding relied upon. There is no evidence of finally approved SIPs in the AR of this judicial review. As Federal Appellees have admitted, the PM-10 SIP is still subject to a pending judicial review (9th Cir. No. 04-73929). [ER 00013.]

Clark County was in a 1990 Clean Air Act amendments CO and PM-10 SIP lapse at all times relevant that was not resolved during the period at issue. [ER 00181-00183.] For the reasons given the Conformity Finding cannot lawfully move forward. [ER 00145-00152, 00155-00159.]

VI. FEDERAL APPELLEES’ FOURTH CLAIM

“Finally, the district court properly rejected on summary judgment Hall’s argument that USDOT improperly based its conformity determination on a proposed SIP allegedly invalidated by this Court in Hall v. EPA.”

Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001) has relevance since like all the other State of Nevada, Clark County SIP submittals after 1979, that submittal did

not survive EPA approval or judicial review. That action was also relevant since it was the latest SIP submittal to have a final, adverse adjudication after the 1990 CAA amendments. The point is that Federal Appellees have failed to come up with a finally approved SIP since the 1990 CAA amendments. All claims of emissions budget adequacy depend upon the reality of a finally approved 1990 amendments CAA SIP.

The central issue in this judicial review involves a direct and indirect, NEPA cumulative environment impact statement (“EIS”), finally approved, post 1990 Clean Air Act amendments CO and PM-10 SIPs no later than the date of the March 3, 2003 Conformity Finding and solid evidence of APA compliance. Until and unless those three issues are resolved, emissions budgets are at best a misleading issue that is not relevant to three successive, central issues, any one of which is fatal to the Conformity Finding. It is uncontroverted that whatever SIPs Federal Appellees relied upon, they are not in the AR. Plaintiff Hall cannot argue SIPs not specified or documents that are not before the Court. Nothing the Federal Appellees have claimed supports a contention that Plaintiff Hall must guess at what the Federal Appellees were doing. That issue supports Hall’s claim that public notices and public participation were not a high priority for the Federal Defendants.

All of the remaining issues were rebutted in Appellant’s Opening Brief.

VII. SUMMARY

No member of the public could follow what the Federal Appellees did and failed to do. That is not an accidental fact. Federal Appellees actions or lack thereof conveniently dispense with public oversight, the heart of environmental law enforcement. Federal Appellees like it that way. Unfortunately for them, they cannot follow what they did or failed to do either. The reason that the Federal Appellees do not publish NEPA totals is that they do not want to disclose the numbers.

VII. REQUEST FOR ORAL ARGUMENT

Pursuant to the Federal Rules of Appellate Procedure 34, Appellant Hall requests that oral argument be permitted. Not only are issues of first impression involved, the facts and argument raise serious issues of fact, law and credibility that should be the subject of further oral argument exploration by the appeals Court.

DATED: Las Vegas, Nevada, May 2, 2005.

Respectfully submitted.

/s/ Robert W. Hall
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