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4

5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE DISTRICT OF NEVADA
7

8
9 ROBERT W. HALL,)

CV-S-03-0477-RLH-RJJ

10 Plaintiff,)

11 vs.)

12 UNITED STATES DEPARTMENT OF)
13 TRANSPORTATION *et al.*,)

14 Defendants.)
15

16 **REPLY POINTS AND AUTHORITIES RE:**
17 **PLAINTIFF’S MOTION TO RECONSIDER**

18 **FEDERAL AGENCIES MUST COMPLY WITH NEPA, CAA AND APA**

19 All federal agencies must comply with NEPA, CAA and APA in addition to DOT
20 regulations. “Terms used but not defined in this subpart shall have the meaning given to them by
21 the CAA, titles 23 and 49 U.S.C., other Environmental Protection Agency (EPA) regulations or
22 other DOT regulations, in that order of priority.” 40 C.F.R. § 93.101 Definitions. (2003 at 545.)
23 DOT definitions are secondary in priority to Clean Act (“CAA”) definitions. EPA regulation
24 definitions prevail over DOT definitions. Plaintiff Hall objects to Defendants’ use of DOT
25 definitions without citing CAA and EPA definitions first.
26

27 None of the statutes and regulations cited by the Defendants deal with the facts of this
action where the only EPA approved SIP is a 1979 SIP, promulgated at a time that preceded

1 requirements for emissions budgets. None of the statutes and regulations cited by the Defendants
2 deal with the facts of this action where emissions budgets based on a submitted SIP were vacated
3 and remanded to the EPA and the EPA did nothing subsequently regarding the remand. None of
4 the regulations cited by the Defendants deal with a situation where there is no EPA approved
5 CAA 1990 amendments SIP. The regulations cited by the Defendants assume there is a 1990
6 CAA amendments, EPA approved SIP. Not only is there no EPA approved CAA 1990
7 amendments SIP before this Court, Defendants have failed and refused to file the administrative
8 record (“AR”) herein, Defendants have not filed the 1979 EPA approved SIP in judicial review.
9
10

11 The Court’s Order has granted dismissal on four of five Hall’s complaint claims for relief
12 in this judicial review. The Court has based its Order on a series of assumptions and allegations
13 that the Defendants made regarding Hall’s complaint and subsequent documents which involve
14 issues of fact without bothering to file an AR. Plaintiff Hall is pro se and no hearing was held.
15 Defendants argue a case that is not before this Court according to the facts and the citations to
16 law in the court record.
17

18 Defendants are attempting to obfuscate the fact that there is no Clark County and State of
19 Nevada EPA approved, Clean Air Act 1990’s amendment state implementation plan (“SIP”). In
20 addition, Clark County and the State of Nevada are currently in a SIP and conformity lapse.
21 Plaintiff Hall’s complaint is not only a CO transportation complaint, it is also a PM10 general
22 federal action, air pollution complaint.
23

24 **DEFENDANTS NEPA ADMISSIONS**

25 The Court correctly cited the statute as, “Section 134(o) then states that, ‘[s]ince plans
26 and programs described in this section are subject to a reasonable opportunity for public
27 comment, **since individual projects included in the plans are subject to review under**

1 [NEPA], ... any decision by the Secretary concerning a plan or program actions in this section
2 shall not be considered to be a Federal action subject to review under [NEPA].” (Emphasis
3 added.) The reverse of that is that Hall may challenge a major federal action that was not subject
4 to legally sufficient review under NEPA, one of Hall’s claims. More important, the Order is
5 deficient in failing to understand that DOT statutes and regulations apply regardless.
6

7 Defendants’ 23 U.S.C. § 134(o) argument is absurd. Defendants’ argument left out the
8 important part of the statute that the Court included in its Order. Def. Rec. Opp. Mem. at 2-3.
9 Defendants left out the sentences that make it clear that **the acts of the Secretary assume prior**
10 **NEPA and CAA compliance**. That is an inexcusable omission. In the alternative, **Defendants’**
11 **23 U.S.C. § 134(o) argument is another admission that Defendants did not comply with**
12 **NEPA**. The first admission was noted in Pl. Rec. Mem. at 15 dated October 21, 2003. “In this
13 instance, Defendants have admitted there is no NEPA compliance herein, *infra*. See, Def. Facts
14 Response at 2.” Defendants’ actual statement is: “4. USDOT does not contest that no NEPA
15 cumulative impacts analysis was performed for the conformity determination under review.”
16 Defendants then went on to argue that the review was not required.
17
18

19 NEPA determines when and how NEPA applies, not the Defendants or the DOT. With
20 Defendants’ admissions that they did not comply with NEPA, the Court erred in not recognizing
21 that the case was over in favor of Hall.
22

23 Defendants continue to argue transportation statutes and regulations out of context while
24 ignoring the fact that NEPA, CAA and APA also apply and in most instances, precede
25 Department of Transportation (“DOT”) statutory and regulatory compliance. The result by
26 analogy may be compared with trying to hang a Christmas tree ornament (emissions budgets) on
27 a tree (an EPA approved, CAA 1990’s amendment SIP) that does not exist.

1 Defendants have avoided matching facts to their legal arguments, another reason the
2 Court's Order is in error. The dismissals herein were made on the basis of astonishingly
3 premature **assumptions** that assumed facts not in evidence. Environmental law action decisions
4 are fact driven.
5

6 **OBJECTION**

7 Agency actions are reviewed by examining the administrative record at the time the
8 agency made its decision. See Kunaknana v. Clark, 742 F.2d 1145, 1149 (9th Cir. 1984) (citing
9 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419-420 (1971)). Generally, agency
10 documents prepared during and in response to litigation are excluded from this review.
11

12 Hall has described these same objections from the outset.

13 This motion for summary judgment is based upon the absence of the
14 administrative record in this action.... Plaintiff requests that the court take judicial
15 notice of the absence of the documentary administrative evidence necessary to
16 support Defendants' claims. ... The absence of the documentary evidence
17 necessary to support Defendants' claims cannot be fairly disputed. Petitioner Hall
18 requests summary judgment in his favor on all issues.

19 See, August 4, 2003 Pl. Sum. Jud. Mot. at 2.

20 **IMPEACHMENT OF DEFENDANTS OPPOSITION RESPONSE MEMORANDUM**

21 One copy each of **Exhibit I**, the May 2, 2000 EPA-DOT Memorandum of Understanding
22 (MOU) on Transportation Conformity, **Exhibit J**, National Memorandum of Understanding
23 Between the U.S. Department of Transportation and the U.S. Environmental Protection Agency
24 (EPA420-F-00-20) and **Exhibit K**, Program Update, Transportation Conformity: Federal
25 Interagency Coordination are attached hereto.

26 Re: Appendix A attached to Exhibit J. This document reinforces the requirement that
27 EPA approval of SIPs is required in order to federally fund transportation projects. "The TCMs
can not proceed during a conformity lapse until they are contained in an EPA approved SIP with

1 identifiable emission reduction benefits.” Id. at 1, B. “New TCMs, not included in a previously
2 conforming plan or TIP, may be advanced during a conformity lapse provided they ... are
3 contained in an EPA approved SIP.... Id. at 2, C. “Areas which expect to return to conformity
4 earlier than 6 months should **concentrate on reestablishing conformity**, rather than embarking
5 on developing an Interim Plan and TIP, for new projects.” Id. at 2-3. (Emphasis added.)

7 We have also included a copy of the EPA’s January 12, 2000 EPA finding of inadequacy
8 regarding the motor vehicle emissions budgets in the Carbon Monoxide Air Quality
9 Implementation Plan for the Clark County Non-attainment Area (October 1999) as **Exhibit L**
10 attached hereto. Without prejudice, this MOU impeaches Defendants’ argument and
11 memorandum regarding transportation conformity. There are no regulations covering the unusual
12 facts of this action.

14 **2. Conformity Determination and NEPA, Order at 6.**

15 The following 1979/81 EPA approved SIP regulation excerpts are attached hereto as
16 **Exhibit M**. Contrary to Defendants’ argument that the 1979 SIP applies only to new source
17 reviews, § 15.13.1 (11/17/81) Applicability, from that SIP states in part, “This section also
18 applies to sources inside the non-attainment areas which may cause significant impact in the
19 attainment areas for particulate, carbon monoxide and volatile organic compounds.” The cover of
20 the documents states “Clark County, Nevada Air Pollution Control Regulations, State
21 Implementation Plan, Prepared by the Environmental Protection Agency, Region IX, December
22 1998.” Re: other sections, § 1.14 (9/18/79), “Baseline Area” in the document; § 1.23 (9/18/79),
23 “Commercial Off-Road Vehicle Racing; § 1.53, “Motorcross Race Course; § 1.57, “New
24 Gasoline Station” and § 1.70 “ ‘Point Source’ means any source that emits in excess of 22.7
25 metric tons (25 tons) per year of any air contaminant.” The charge to the Air Pollution Control
26
27

1 Board at 2.3.16, Establish fuel standards for both stationary **and mobile sources** of air
2 contaminants. (Emphasis added.) § 8.1, applies to all persons owning, operating, or in control of
3 any equipment or property who shall cause, permit, or participate any violation of the
4 Regulations. Section 11 – establishes stringent **Ambient Air Quality Standards**. Defendant’s
5 statement is not borne out by the facts.
6

7 The 1979 SIP is much more stringent than federal standards. CAA §§ 110 and 116
8 combined do not allow the EPA to approve subsequent SIP submittals as amendments that are
9 not at least as stringent as the 1979 SIP. CAA § 116 specifically requires that “each State or
10 political subdivision may not adopt or enforce any emission standard or limitation which is less
11 stringent than the standard of limitation under such plan or section.”
12

13 Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect
14 before August 7, 1977), 7543, 7543m 7545(c) (4) and 7573 of this title
15 (preempting certain State regulation of moving sources) nothing in this chapter
16 shall preclude or deny the right of any State or political subdivision thereof to
17 adopt or enforce (1) any standard or limitation respecting emissions of air
18 pollutants or (2) any requirement respecting control or abatement of air pollution;
19 except that if an emission standard or limitation is in effect under an appealable
20 implementation plan or under section 7411 or section 7412 of this title, each State
21 or political subdivision may not adopt or enforce any emission standard or
22 limitation which is less stringent than the standard of limitation under such plan or
23 section.

24 CAA § 116. The only EPA approved SIP the State of Nevada and Clark County have
25 ever had is the 1979 SIP. There is no mention of the EPA approved 1979 SIP much less an
26 explanation as to how Defendants conform to that SIP. Def. Opp. Rec. Mem. at 4-8.
27

Defendants are arguing as though there is an EPA approved SIP that meets the 1990
amendments to the CAA that consists of regulations that are no more stringent than federal
standards. There is no such SIP and if there was such a SIP, it would be precluded by CAA §§
110 and 116.

In its conformity discussion, the Court referenced “the CAA mandated SIP” without

1 specifying the SIP, an indication that the Court did not know what SIP was involved. Order at 3
2 at ln. 22. Defendants carefully avoid applying their legal argument to the 1979 SIP. The SIP they
3 wish for does not exist.

4
5 **COURT'S ORDER ENTERED OCTOBER 8, 2003**

6 **B. Plaintiff's NEPA-based challenges.**

7 The instant complaint was filed pursuant to U.S.C. §§ 1331, 1361, **2201** and **2202**
8 (declaratory judgment) in addition to other applicable statutes. One of Hall's goals herein is to
9 clarify obfuscations. Defendants have argued throughout that Hall has some rights at some other
10 place, at some other time as they did in Hall v. Norton, 32 Fed. Appx. 920, 2002 WL 506108 (9th
11 Cir. 2002) (unpublished disposition). See, Ninth Circuit Rule 36-3 (b).¹ See Exhibit N attached
12 hereto.
13

14 **1. TIP and NEPA**

15 Hall has not claimed that a TIP is a major federal action. Hall has claimed that the list of
16 air pollution causing actions or projects contained in the TIP, individually and collectively,
17 constitute a major federal action. See, October 22, 2003 Pl. Motion P&A 20-23. Hall could not
18 have been clearer in his explanation. Hall followed the guidance of the appeals court in Hall v.
19 Norton, 32 Fed. Appx. 920, 2002 WL 506108 (9th Cir. 2002) (unpublished disposition). **Norton**
20 was Hall's challenge to a Bureau of Land Management ("BLM") programmatic, twenty-year
21 planning document which the appeals court found premature.
22

23 In Norton the appeals court's advice could not have been clearer.

24
25 By the same token, the issue is not ripe because Hall will not incur any hardship if
26 he is required to wait until the BLM proposes to take a specific action, the courts
27 would surely benefit from the development of a specific record regarding any

¹ Cited herein as relevant under the doctrine of law of the case, for factual purposes, sanctionable conduct and the existence of a related case.

1 specific action, and the agency might well refine its approaches when it focuses
2 on a specific problem. See Ohio Forestry, 523 U.S. at 732-37, 118 S.Ct. at 1670-
3 72. Should the BLM pursue some specific action in the future,⁵ the regulations
4 provide that Hall, and any other person “adversely affected by a specific action
5 being proposed to implement some portion of [the RMP] ... may appeal such acts
6 ... at the time the action is proposed for implementation.” 43 C.F.R. § 1610.5-
7 3(b). Fn. 5. E.g., the specific land transaction that it proposed in Hall I, 266 F.3d
8 at 972-74.

9 Hall has followed that universal advice herein. Claims that Hall is barred herein are
10 legally insufficient. The TIP review was signed off by a FHWA’s Nevada office executive
11 named herein as a Defendant in his official capacity. There is no evidence before this Court of
12 NEPA compliance.

13 Regarding the TIP list, Hall cannot by law file the certified AR for them. In the interim,
14 Defendants cannot lawfully or equitably benefit from citations to documents that do not exist in
15 the court record while Hall is denied access to them.

16 **HISTORICAL**

17 On September 28, 1999, the Nevada Division of Environmental Protection (“NDEP”)
18 submitted the serious CO attainment plan to the EPA for the years 2000, 2010 and 2020. The
19 EPA announced by letter that the plan was found inadequate on January 12, 2000. The effective
20 date was a short time later. The attached Transportation Conformity Adequacy Review noted;
21 “There was no previous adequate CO budget for the Clark County nonattainment area.” Exhibit
22 L at 3. E. The 2001 CO and PM10 SIP submittals were supposed to have EPA approval by the
23 end of 2002. It is now a year later. There is no EPA approved SIP other than the 1979 EPA
24 approved SIP that “has no previous adequate CO budget for the Clark County nonattainment
25 area.” There is no EPA approved SIP that meets the 1990 amendments to the CAA. The Nevada,
26 Clark County PM10 and CO SIPs are both lapsed. The 1999 PM10 SIP submittal was vacated
27 and remanded to the EPA in 2001.

1 See Exhibit O attached hereto for confirmation of the following. The CO SIP lapse date is
2 confirmed as March 24, 1998 in an email from Karina O’Conner, EPA’s Nevada administrator to
3 Randy Bellard of FHWA. On November 15, 2000, Karina O’Conner sent a message to Rand
4 Bellard of the FHWA regarding the draft conformity analysis dated October 2000. In summary,
5 the message pointed out numerous reasons why the draft conformity analysis does not conform
6 to the SIP and could not be approved. Despite the clear admissions on non-conformity, a
7 November 20, 2000 message announced positive CO adequacy finding despite the SIP and
8 conformity lapses.
9

10 On January 24 and again on 25, 2001, Karina O’Conner of the EPA sent an email to
11 Randy Bellard of the FHWA. Ms. O’Conner wanted to know, “does the RTC realize that they
12 are in a conformity lapse?” We are required to inform our management of all conformity lapses –
13 so I have informed the conformity team at OTAQ of the Las Vegas situation – they wanted
14 assurance that RTC wasn’t moving forward with any projects or project components that need
15 federal approval. Any sense of how long RTC will need to respond to your letter?”
16
17

18 On January 25, 2001, Karina O’Conner sent another email to Randy Bellard. “Las Vegas
19 is in a [SIP] lapse because they haven’t updated their transportation plan in three years. My
20 records show it expiring early this month – since their last plan was adopted in January of 1998
21 (as stated by the RTP on page 1-3). Since they haven’t updated their plan in three years they
22 haven’t conformed in three years to a new planning horizon, assumptions, etc. Also your FHWA
23 HQ has them on a lapse list and is communicating that with EPA Headquarters. I believe that
24 RTC knows this – since they’ve been alerting us to the possibility if we couldn’t find the CO
25 budget adequate – but you should have probably communicated this to them in your comment
26 letter – so that they have formal notification.”
27

1 Mr. Bellard is a named Defendant herein in his official capacity. Defendants did not
2 include the above information in their memoranda herein. For that reason Defendants
3 memoranda statements are knowingly and willfully misleading. Defendants knew about the SIP
4 lapses and the conformity lapses. They kept that information from the Court and the public.
5 When Hall, the Sierra Club and others made inquiries, the lapse information was withheld.
6

7 **SUMMARY**

8 The Court erred in depending too much on the Defendants' version of the events. For that
9 reason, the dismissal of the four claims for relief in error at a minimum.
10

11 Dated: November 10, 2003 at Las Vegas, Nevada.

12 /s/ Robert W. Hall
13 ROBERT W. HALL, Plaintiff Pro Se
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9 Plaintiff,)
10 vs.)
11 UNITED STATES DEPARTMENT OF)
TRANSPORTATION, *et al.*)
12 Defendants)
13)
14

15 **DECLARATION IN SUPPORT OF PLAINTIFF'S REPLY POINTS AND**
16 **AUTHORITIES RE: PLAINTIFF'S MOTION TO RECONSIDER**

17 I, Robert W. Hall, declare as follows:

18 1. I am pro se in this action. I hereby certify as follows:

19 2. **Exhibit I** is a true and correct copy of the May 2, 2000 EPA-DOT Memorandum of
20 Understanding (MOU) on Transportation Conformity.

21 3. **Exhibit J** is a true and correct copy of the National Memorandum of Understanding
22 between the U.S. Department of Transportation and the U.S. Environmental Protection Agency
23 (EPA420-F-00-20) with Appendix A attached.

24 4. **Exhibit K** is a true and correct copy of the Program Update, Transportation
25 Conformity: Federal Interagency Coordination.
26

27 5. **Exhibit L** is a true and correct copy of the EPA's January 12, 2000 EPA finding of
inadequacy regarding the motor vehicle emissions budgets in the Carbon Monoxide Air Quality

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13 Defendants.)
14

CERTIFICATE OF SERVICE

15 I hereby certify that a copy of each of the following documents was sent to the following
16 as addressed this date by personal service to Mr. Welsh and by First Class U.S. Mail to Mr.
17 Rave. The documents are Reply Points and Authorities Re: Plaintiff's Motion to Reconsider,
18 Declaration in Support and this Certificate of Service.
19

20 Norman L. Rave, Jr., T.A.
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24
25 DATED: Las Vegas, Nevada, November 10, 2003.
26

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