Considering Climate Change Under NEPA

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The New Reality

- Climate change should be considered in NEPA documents

NEPA

- Purpose
  - Informed decision making
  - Informed public comment
- Requires preparation of an EIS for major federal actions with significant environmental effects

Contents of an EIS

- Purpose and Need
- Proposed Action and Alternatives
- Description of Affected Environment
- Potential Effects
- Mitigation Measures

Environmental Effects

- Direct – Occur in same time and place
- Indirect – Later in time or farther removed, but reasonably foreseeable
- Cumulative – Incremental effects of action when added to other past, present, and reasonably foreseeable actions (regardless of who undertakes)

CEQ Draft Guidance

- Never adopted or finalized, but recognized significance of climate change
- Each agency should exercise independent judgment in considering climate change
- Agencies should consider
  - Potential for actions to influence climate change
  - Potential for climate change to affect federal actions

Climate Change Litigation

- Two kinds of cases
  - Complete failure to consider climate change
  - Inadequate discussion of climate change effects

Failure to Consider Climate Change

- *Border Power Plant Working Group v. Dept. of Energy* (S.D. Cal. 2003)
  - Rights-of-way for transmission lines from two gas-fired power plants in Mexico

Border Power, Cont. . . .

- Does agency have to consider effects of emissions from power plants outside the United States?
  - Yes – if sufficient causal link to indirect effects
- Does the agency have to consider "questionable effects" or "imaginary horribles"?
  - GHG emissions were not imaginary

Failure to Consider Climate Change

- *Mid States Coalition for Progress v. Surface Transportation Board* (8th Cir. 2003)

Mid States Coalition, Cont. . . .

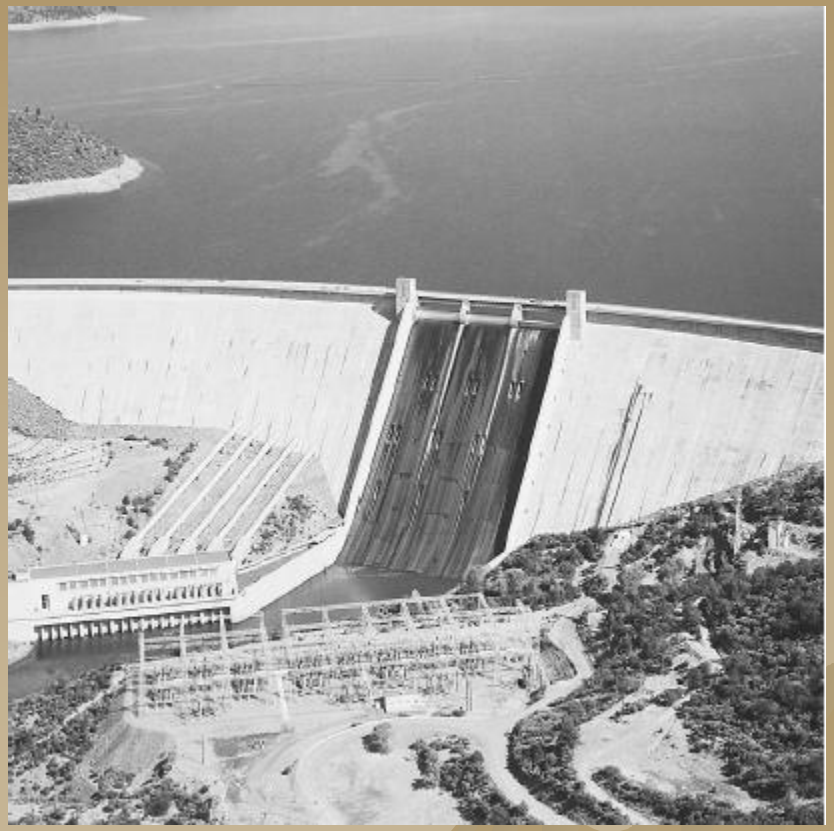
- New rail line would lead to increased demand for lower sulfur Powder River Basin coal
- Though "extent" of impact was not certain, the "nature" of the potential impact was <u>reasonably foreseeable</u>
- Court suggested modeling air quality impacts

Mid States Coalition on Remand

- STB modeled potential changes to coal supply and demand and calculated increased emissions
  - Less than 1% increase in national emissions
- Local effects not modeled
  - Could not be estimated with confidence
  - STB followed procedure for addressing unavailable information

Adequacy of Climate Change Impact Analysis

- Association of Public Agency Customers, Inc. v. Bonneville Power Administration (9th Cir. 1997)
  - Renegotiation of power sales contracts
  - Table quantifying carbon dioxide emissions sufficient



CBD v. NHTSA (9th Cir. 2008)

- Challenge to final rule setting corporate average fuel economy (CAFE) standards for light trucks

CBD v. NHTSA, Cont. . . .

- EA calculated likely effect to GHG emissions
- Concluded new standards would cause a slight decrease compared to no action

CBD v. NHTSA, Cont. . . .

- Brief discussion of climate change
- EA inadequate because
  - Failed to address cumulative impacts of CAFE standard + other actions on climate change
  - Failed to explain why GHG emissions would not have a significant effect on the environment

CBD v. NHTSA, Cont. . . .

- "The fact that 'climate change' is largely a global phenomenon that includes actions that are outside of the agency's control . . . does not release the agency from the duty of assessing the effects of its actions on global warming."

Recent NEPA/Climate Change-Related Documents

- Petition to CEQ to Include Climate Change in NEPA Documents
  - Include climate change analysis in NEPA documents
  - Issue guidance memorandum for including climate change analysis
- New DOI Regulations
  - Do not include specific climate change requirements
  - DOI believed best left to discretion of responsible agency

Lessons Learned

- Disclose reasonably foreseeable GHG emissions
- Quantify emissions when possible
- Translate emissions to climate change effects
- Consider cumulative effects

Lessons Learned

- Consider using models to estimate effects
- Where information is incomplete or unavailable, say so, and why the agency has not obtained the information
- The framework may differ depending on nature of the proposed action

Questions Left Unanswered

- How to address cumulative impacts
- How does climate change affect the need for and environmental baseline for your NEPA analysis?
- How to address mitigation measures