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A New Mandate for Federal CAFE Standards from the Ninth Circuit

INTRODUCTION

In *Center for Biological Diversity v. National Highway Traffic Safety Administration*[1], the Ninth Circuit reviewed the National Highway Traffic Safety Administration's (NHTSA's) Final Rule setting new corporate average fuel economy (CAFE) standards for light trucks. The petitioners challenged the standards under the Energy Policy and Conservation Act (EPCA) and the National Environmental Policy Act (NEPA).[2] The court found a number of problems with the standards as adopted, and held that NHTSA should have included the impacts of climate change in its analysis.[3] The court remanded to NHTSA to promulgate new standards "as expeditiously as possible" and to prepare an Environmental Impact Statement (EIS).[4] This victory for the environmental groups and states bringing the suit may lead to the first increase in overall fuel efficiency since 1987.[5]

FUEL EFFICIENCY

Fuel efficiency has steadily increased in importance since it first became a major national issue in the 1970s.[6] Oil consumption in the United States has increased from 16.3 million barrels per day in 1975 to 20 million barrels per day in 2003.[7] The percentage of this oil that is imported has increased from 35.8 to 56 percent over the same time period.[8] Though these trends are cause for concern on multiple fronts, climate change has emerged as one of the most

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1. 508 F.3d 508 (9th Cir. 2007).
2. *Id.* at 527, 545.
3. *Id.* at 514.
4. *Id.*
5. *Id.* at 517.
6. *See id.* at 514.
7. *Id.* (citing the Natural Resources Defense Council's comments on the new standards); U.S. DEPARTMENT OF ENERGY, TRANSPORTATION ENERGY DATA BOOK 274, ENERGY EFFICIENCY AND RENEWABLE ENERGY, at Table 1.4, 1.7 (27th ed. 2008), *available at* http://cta.ornl.gov/data/download27.shtml [hereinafter ENERGY DATA BOOK].
8. *Center for Biological Diversity*, 508 F.3d at 514; ENERGY DATA BOOK, supra note 5, at Table 1.4, 1.7 (27th ed. 2008), *available at* http://cta.ornl.gov/data/download27.shtml.

pressing.[9] Since light trucks (also referred to as "non-passenger automobiles") account for eight percent of total annual greenhouse gas emissions in the United States, and since all United States automobiles account for about five percent of the world's greenhouse gas emissions, more stringent CAFE standards, particularly for light trucks, have significant potential to help mitigate climate change.[10]

Although scientists, public interest and environmental groups, and others raised climate change as a concern in their public comments to NHTSA during the rulemaking period, NHTSA's Final Rule relied solely on a traditional cost-benefit analysis. This analysis, which was based on the manufacturers' product plans, evaluated the costs of new technologies and the benefits of fuel savings over the vehicle's lifetime.[11] Citing uncertainty in calculating the potential damage from climate change, NHTSA failed to assess in monetary terms the benefits of reducing carbon dioxide emissions and, thus, did not incorporate these into its analysis.[12] The resulting standards for light trucks in the Final Rule required only a 1.3 miles per gallon (mpg) increase from 2007 to 2010 and remained well below the standard for passenger automobiles.[13] The Final Rule set CAFE standards for light trucks for model years 2008 to 2010 at 22.5 mpg for 2008, 23.1 mpg for 2009, and 23.5 for 2010 (Unreformed CAFE standards).[14] The Rule set up a transition in 2011 to Reformed CAFE standards where fuel economy would be based on a truck's footprint—vehicles having larger footprints would be held to lower CAFE standards.[15] From 2008 to 2010, manufacturers were permitted to choose to comply with Unreformed or Reformed CAFE.[16]

STATUTORY BACKGROUND

The court evaluated the new CAFE standards in light of two statutes: EPCA and NEPA.[17] In enacting EPCA, Congress's goals included promoting

9. *Center for Biological Diversity*, 508 F.3d at 517 (citing a 2002 National Academy of Sciences (NAS) report calling the accumulation of greenhouse gases in the atmosphere the "most important" reason to improve fuel efficiency).

10. *Id.* at 522 (citing numerous scientists, groups, and reports).

11. *Id.* at 524; *see, e.g.*, Comment Letter from Attorneys General, Comments on Proposed Light Truck Corporate Average Fuel Economy Standards for MY 2008-2011 and on Draft Environmental Assessment [DOT DMS Docket Number 2005-222231], *available at* http://ag.ca.gov/globalwarming/pdf/Fuel_Economy_Rule.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/4225d31a-e1dd-4a1c-b267-ce43420e1806/4/hilite/.

12. *Center for Biological Diversity*, 508 F.3d at 524. In its decision to remand, the court also noted that NHTSA failed to set a backstop, failed to close the SUV loophole, and failed to set fuel economy standards for the 8,500 to 10,000 gross vehicle weight rating (GVWR) class of vehicles. *Id.* at 514.

13. *Id.* at 515, 524. The CAFE standard for passenger automobiles is fixed by statute at 27.5 mpg. *Id.* at 515.

14. *Id.* at 523–24.

15. *Id.* at 524.

16. *Id.*

17. *Id.* at 527, 545.

the efficient use of energy resources and decreasing dependence on foreign imports.[18] Congress enacted NEPA to ensure that federal agencies consider the impact of their actions on the environment.[19]

Title V of EPCA, which established CAFE standards, requires that passenger automobiles meet a statutory standard of 27.5 mpg, while light trucks must meet standards set at the "maximum feasible average fuel economy level that the Secretary [of NHTSA] decides the manufacturers can achieve in that model year."[20] In determining the "maximum feasible" efficiency standards, EPCA allows NHTSA to consider "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."[21] Historically, the CAFE standards for light trucks have been lower than those for passenger automobiles, creating the so-called "SUV loophole."[22] Initially, the lower light truck standard was intended for a limited number of large vehicles that were primarily used for purposes like hauling goods and property, transporting more than ten people, and off-road driving.[23] This disparity, however, has encouraged automobile manufacturers to invest in and promote sport-utility vehicles (SUVs) and minivans instead of more traditional large cars, or smaller cars.[24] Since the 1970s, the percentage of light truck sales has increased from twenty to fifty percent of new vehicles on the market, negatively impacting overall fuel economy as noted above.[25]

NEPA, on the other hand, requires federal agencies like NHTSA to prepare either an Environmental Assessment (EA) and/or an Environmental Impact Statement (EIS) for major federal actions that may affect the environment.[26] NEPA requires an EIS if there is a "substantial question" as to whether a proposed action "may have a significant effect" on the environment,[27] and it must contain a discussion of the environmental impacts and alternatives to the action.[28] Preparing an EA is an optional, preliminary step to help determine whether a proposed action requires an EIS,[29] which

18. S. Rep. No. 94-516 (1975) (Conf.Rep.), *as reprinted in* 1975 U.S.C.C.A.N. 1956, 1957.
19. 40 C.F.R. § 1500.1(c) (2008).
20. 49 U.S.C. § 32902(a) (2006).
21. 49 U.S.C. § 32902(f) (2006).
22. *Center for Biological Diversity*, 508 F.3d at 516, 526.
23. *Id*. at 515–16. EPCA defines a light truck as "an automobile other than a passenger automobile which is either designed for off-highway operation . . . or designed to perform at least one of the following functions: (1) Transport more than 10 persons; (2) Provide temporary living quarters; (3) Transport property on an open bed; (4) Provide greater cargo-carrying than passenger-carrying volume; or (5) Permit expanded use of the automobile for cargo-carrying purposes or other non-passenger-carrying purposes through [removable or foldable, stowable seats to create a flat floor]." *Id.* at 516.
24. *Id*. at 517 (citing National Academy of Sciences report, "Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards").
25. *Id*.
26. *Id*. at 517–18; 42 U.S.C. § 4332(C) (2006).
27. *Center for Biological Diversity*, 508 F.3d at 517–18.
28. 40 C.F.R. §§ 1502.1, 1502.14, 1508.7 (2008).
29. 40 C.F.R. § 1508.9(a)(1).

hinges on the "context" and "intensity" of the action.[30] Congress intended these NEPA requirements to ensure careful consideration of environmental impacts by federal agencies and the provision of such information to the public.[31]

ANALYSIS

The court found the new CAFE standards deficient in a number of ways, under both EPCA and NEPA.[32] Although the court held that the NHTSA could choose to use a marginal cost-benefit analysis to set the CAFE standards under EPCA, it sided with the petitioners on nearly every other count in their complaint and required the agency to promulgate new standards.[33]

Within its seven-point EPCA analysis, the court's explicit recognition of the importance of greenhouse gas emissions reduction is particularly notable given the general reluctance of federal courts to address this issue. For example, *Center for Biological Diversity* was decided only about six months after the Supreme Court acknowledged explicitly for the first time the importance of climate change in *Massachusetts v. Environmental Protection Agency*.[34] The Ninth Circuit referred to the reduction in carbon emissions as the "most significant benefit of more stringent CAFE standards" and explained the variety of valuation methods that NHTSA could have used for these benefits to incorporate them into its cost-benefit analysis rather than implicitly setting the value to zero.[35] The court held that NHTSA's refusal to determine the value of these benefits was "arbitrary and capricious,"[36] stating that "monetizing the value of carbon reduction would have affected the stringency of the CAFE standard," and explicitly required that NHTSA include such benefits in its cost-benefit analysis.[37] Additionally, the court required that NHTSA reconsider a backstop for the Reformed CAFE standards (applicable in model year 2011 and thereafter),[38] closing the "SUV loophole,"[39] and

30. 40 C.F.R. § 1508.27. "Context delimits the scope of the agency's action" whereas "[i]ntensity refers to the 'severity of impact,' which includes both beneficial and adverse impacts . . ." *Center for Biological Diversity*, 508 F.3d at 518 (citing Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731; 40 C.F.R. § 1508.27(b)).

31. *Center for Biological Diversity*, 508 F.3d at 517.

32. *Id*. at 514.

33. *Id*. at 527–545.

34. *See* Mass. v. EPA, 549 U.S. 497 (2007); *Center for Biological Diversity*, 508 F.3d at 531.

35. *Center for Biological Diversity*, 508 F.3d at 531. The court pointed to several sources which provided methods to value or monetize carbon emissions. *Id*. at 531–32.

36. *Id.* at 533. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

37. *Id.* at 535.

38. *Id.* at 538–39. In this context, a backstop refers to an overall fleet-wide average fuel efficiency requirement. *Id.* at 537. The intent of including a backstop in the Reformed CAFE standards, along with NHTSA's proposed individual fuel economy targets for vehicles of every footprint size, would be to "prevent manufacturers from upsizing their vehicles or producing too many large footprint vehicles, if the backstop were set high enough." *Id*. GVWR is "the value specified by the manufacturer as the loaded weight of a single vehicle." 49 C.F.R. § 523.2 (2008).

39. *Id.* at 545.

regulating vehicles between 8,500 and 10,000 lbs. gross vehicle weight rating (GVWR).[40]

The court also agreed with the petitioners' arguments regarding greenhouse gas emissions and emphasized the importance of reducing such emissions in its NEPA analysis.[41] The court began by noting that EPCA does not exempt NHTSA from executing the full NEPA-required environmental analysis, including considering more stringent alternatives.[42] The court again explicitly referred to the importance of including climate change-related impacts in any environmental analysis.[43] Turning to the sufficiency of NHTSA's EA, the court found the assessment of the cumulative impact of increased greenhouse gas emissions deficient and the evaluation of reasonable alternatives too narrow.[44] Based on the inadequacy of the EA and other evidence cited in the comments and by NHTSA itself, the court held that there remained a "substantial question as to whether the Final Rule *may have* a significant impact on the environment."[45] Therefore, the court rejected the EA's Finding of No Significant Impact and required NHTSA to draft a full EIS.[46] Once more, the court focused on greenhouse gases and the potential for incremental changes in emissions to have significant impacts on climate change and the environment, particularly given atmospheric positive feedback mechanisms.[47]

CONCLUSION

In *Center for Biological Diversity* the Ninth Circuit took a strong stance on climate change, remanding the new CAFE standards back to NHTSA with a clear mandate to consider greenhouse gas emissions and climate change impacts when it promulgates new standards. This holding has the potential to revolutionize the analysis that NHTSA must undertake before formulating CAFE standards for the 2008 to 2010 model years and beyond. NHTSA may yet construct rationales under a more comprehensive cost-benefit analysis for omitting a backstop from the Reformed CAFE standards, keeping the SUV loophole open, and not regulating vehicles between 8,500 to 10,000 lbs.

40. *Id.* at 540.
41. *Id.* at 545–58.
42. *Center for Biological Diversity*, 508 F.3d at 545.
43. *Id.* at 547.
44. *Id.* at 549, 551–52.
45. *Id.* at 553 (emphasis in original).
46. *Id.* at 557–58.
47. *Center for Biological Diversity*, 508 F.3d at 553–554. "Atmospheric positive feedback mechanisms" generally refers to changes in the climate can which can increase the risk of "abrupt and non-linear changes in many ecosystems, which would affect their function, biodiversity, and productivity." *Id.* at 554. For example, such changes could result in increased risk of terrestrial and marine extinctions, increased ocean temperature and the resulting death of certain corals, and increased climate variability and extreme weather events. *Id.* at 554–55. For more information on feedbacks, *see* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, THIRD ASSESSMENT REPORT (2001), *available at* http://www.davidsuzuki.org/Climate_Change/Science/IPCC/TAR/.

GVWR. Although the EIS may not prompt the NHTSA to reformulate these aspects of its strategy for setting fuel efficiency levels, the court's strong language regarding climate change should compel the agency to incorporate the benefits of greenhouse gas emissions reductions into its analysis.

Increased greenhouse gas emissions and other negative environmental impacts are just some of the consequences of increased fuel consumption. In addition to remedying these negative effects, more stringent CAFE standards can also help to address concerns about peak oil and national security. As with climate change, the importance of these concerns to the United States is rapidly increasing.

—Erica Schroeder

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