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The Potential Impact of Recent Greenhouse Gas Emission Cases on Aviation Expansion Projects

In 2007, two courts issued high-profile decisions finding a scientific consensus regarding the tie between greenhouse gas ("GHG") emissions and global warming, and rejecting Federal Agency attempts to avoid GHG review. These decisions will require a significantly enhanced GHG emission analysis for airport expansion and other transportation enhancement projects.

First, in April, the Supreme Court ruled in *Massachusetts v. Environmental Protection Agency* that, contrary to EPA's assertions, the Agency did have the authority to regulate GHGs. In 2003, when it initially refused to issue a rule, EPA argued that GHGs were not air pollutants and that, even if they were, there was no "unequivocal" link between GHG emissions and global climate change. In 2007, the Supreme Court found there was no dispute about that link. The court also noted that the U.S. "transportation sector. . . accounts for more than 6% of worldwide carbon dioxide emissions." "To put this in perspective: Considering just [those] emissions . . . the United States would still rank as the third-largest emitter of carbon dioxide in the world."

Then, in November, the Ninth Circuit Court of Appeals decided *Center for Biological Diversity v. National Highway Traffic Safety Administration*, which rejected NHTSA's rule setting light truck fuel economy standards. Among other things, the Court rejected NHTSA's National Environmental Policy Act ("NEPA") analysis, which determined that the standards would not cause any significant impacts. The Court found that NHTSA inadequately analyzed the incremental impact that the increased CO2 emissions under the rule would have on climate change. The Court went so far as to hold that the impacts would undoubtedly be significant and mandated the preparation of an Environmental Impact Statement. In so doing, the court stressed that "[t]he impact of greenhouse gas emissions is precisely the kind of cumulative impacts analysis that NEPA requires an agency to conduct."

The *NHTSA* decision is extremely significant because of the court's focus on cumulative impacts. Prior to *NHTSA*, the only published decisions regarding NEPA review of GHGs (*Friends of the Earth v. Watson* and *Mid States Coalition For Progress v. Surface Transportation Board*) focused on the direct impacts of the challenged projects (energy and coal, respectively). Each had extraordinarily large, direct GHG emissions. Since the cumulative impacts analysis required under *NHTSA* focuses on the joint impact with other projects, even projects with small GHG emission increases will require discussion of large cumulative impacts. This is particularly true given the large overall GHG emissions from the air transport industry as a whole. The *NHTSA* decision means more extensive NEPA analysis for all projects.

Historically, airport expansion projects have not been stopped by claims of inadequate NEPA review. Indeed, unlike in the highway context, few such projects have even been slowed down by injunctions pending litigation or reanalysis of NEPA documents. This is particularly so given the environmental streamlining provisions in the 2005 Vision 100 Century of Aviation Reauthorization Act. However, GHGs were not covered by the 2005 Act and, arguably, the need for NEPA analysis of GHGs was not even foreseen by the bill's authors. As a result, there is little doubt that GHG emission analysis will expand for airport projects. Whether this leads to litigation and project delay remains to be seen.

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