No. 03-358

In The Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners,

v.

PUBLIC CITIZEN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, ARIZONA, ILLINOIS, MASSACHUSETTS, NEW MEXICO, OKLAHOMA, OREGON, WASHINGTON AND WISCONSIN IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, under the National Environmental Policy Act, 42 U.S.C. § 4332, agency action that Congress made a prerequisite to allowing Mexico-domiciled trucks to operate throughout the United States is subject to an Environmental Impact Statement that will disclose and evaluate the serious environmental effects caused by such trucking.

2. Whether, under the conformity provision of the Clean Air Act, 42 U.S.C. § 7506(c)(1), that agency action requires an analysis into the extent to which permitting Mexico-domiciled trucks to operate throughout the United States will make it difficult for states to comply with federal air quality standards.

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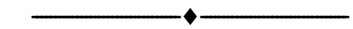
INTEREST OF *AMICI* STATES

Amici States submit this brief in support of Respondents because regulations adopted by the Federal Motor Carrier Safety Administration in purported furtherance of the North American Free Trade Agreement would allow Mexican diesel trucks that lack the full range of air pollution controls found on trucks that meet U.S. EPA and State of California emissions standards to enter already polluted air basins, raising the level of ozone and toxic pollutants that potentially millions of *amici* States' residents must breathe. *Amici* States do not know the full extent of the environmental damage FMCSA's regulations may cause, because FMCSA has not complied with NEPA and made the analysis and full public disclosure that would provide that information. They are sure that the impacts will be serious enough to require mitigation, but cannot know what level of mitigation to plan for, because the federal agency here has not complied with its obligations under NEPA. Neither has it complied with its obligations under the Clean Air Act to perform a "conformity analysis" to determine whether registering Mexican-domiciled trucks and allowing them to operate across the country would violate or conform to state clean air plans. *Amici* States urge the Court to affirm the judgment of the Court of Appeals.



STATEMENT OF THE CASE

NAFTA was signed by then-President Clinton in 1992, and enacted by a majority vote of each house of Congress in 1993. 19 U.S.C. §§ 3301-3473. One part of NAFTA was an agreement between the United States and Mexico to address a long standing dispute between those two

countries regarding the ability of trucks owned by Mexican carriers to operate in the United States. In 1980, in response to unfair competition concerns, Congress passed the Bus Reform Act. 49 U.S.C. § 10922(l)(1) (repealed). That law banned Mexican-domiciled trucks from operating in the U.S. beyond a narrow (usually 20 miles) zone at the U.S. border. Congress later specifically gave authority to the President to lift the ban if he made certain findings. 49 U.S.C. § 13902(c)(3), reprinted in Appendix to FMCSA brief at 10a-11a. President Bush lifted the moratorium in response to a decision by a NAFTA arbitration panel.

Before the President lifted the moratorium, Congress enacted Section 350 to the DOT Appropriations Act of 2002; it subsequently renewed Section 350 for 2003 and 2004. *See* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 419; Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130. Section 350 (reprinted in the Appendix to FMCSA's brief at 12a-20a) sets out truck-safety requirements that FMCSA must ensure before it may expend any funds to register trucks for operation outside the border area.

In response to Section 350, FMCSA issued regulations. The agency also prepared an Environmental Assessment (EA) for the regulations, as called for by the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1508(18). The EA examines air quality emission impacts for only a one-year fixed period, 2002. The EA did not assess the air quality impacts of increased emissions and increased ambient pollutant levels resulting from operation of the Mexican-domiciled trucks on any *local* areas in the U.S. Nor did the EA make a localized analysis of air quality impacts on any areas

that currently do not comply with existing federal air quality standards, or more stringent state air quality standards, *see* EA, at C-1 to C-10, despite the fact that compliance with state and federal air quality standards is analyzed under the Clean Air Act on an air-basin level, not the national-average level assessed by the EA. JA 316. The independent report submitted to FMCSA by the California Attorney General did a localized analysis of the potential impacts on California's Imperial Valley from the operation there of Mexican-domiciled trucks, and that analysis showed an increase of nearly one-third of a ton per day of oxides of nitrogen from these trucks. JA 402. The Mexican-domiciled trucks currently emit, on average, about 1.3 times as much oxides of nitrogen, nearly twice as much particulate matter, and twice as many volatile organic compounds as the average U.S.-domiciled truck. The disparity will increase with time, so that in 2020 the average Mexican-domiciled truck will emit about 6.7 times as much oxides of nitrogen and about four times as much particulate matter as its U.S. counterpart. JA 426. In addition, the EA did not assess cancer or other health risks from the increased pollutant emissions of the Mexican-domiciled trucks.

FMCSA also did not include, as part of its rule-making process, an analysis of the conformity of its regulations with State Implementation Plans ("SIPs") prepared and adopted by the States under the Clean Air Act to meet the national ambient air quality standards. 42 U.S.C. § 7410.

Petitioners below brought a challenge in the Ninth Circuit Court of Appeals to the issuance of these regulations without adequate compliance with NEPA and the Clean Air Act. FMCSA contended that the President's action in lifting the moratorium was the sole effective

cause of all emissions from Mexican-domiciled trucks, and that the President was exempt from both NEPA and the Clean Air Act. The Court of Appeals held that both NEPA and the Clean Air Act's conformity requirements were applicable to FMCSA's regulations, and that FMCSA had failed to comply adequately with either statute.

SUMMARY OF ARGUMENT

The States are concerned about FMCSA's parsimonious view of the Clean Air Act and NEPA, two seminal statutes that represent sweeping federal commitments to the environment, to states, and to citizens. They are also concerned about FMCSA's unfounded attempt to justify its actions through portrayal of this case as a foreign affairs crisis of constitutional magnitude. This brief focuses on the harm that FMCSA's positions would cause to the law and to the federal government's commitment to help the States meet federal air quality mandates, rather than hinder them.

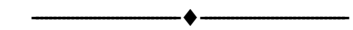
This case presents no constitutional issue, nor does it impinge upon the President's foreign affairs powers. Statutes, as this Court has squarely held, do not mean something different merely because they affect foreign commerce or foreign affairs. The Clean Air Act and NEPA apply to FMCSA with precisely the same meaning and vigor here as they would in any other situation. Moreover, because of its plenary power over foreign commerce, Congress is free to place conditions on the manner in which Executive Branch agencies implement trade agreements. Congress expressly preserved federal environmental laws when it passed NAFTA's authorizing

legislation. FMCSA is not being asked to review the effects of an action by the President, just its own action. This Court has already held that its sole task in such a case is to determine the scope of the federal agency's duties under the applicable statutes (here, the Clean Air Act and NEPA), using traditional rules of statutory construction, with no special deference to the Executive Branch's foreign affairs concerns.

FMCSA is required to perform an analysis, determine whether its action is in conformity with the States' clean air plans, and either mitigate, provide emissions offsets for, or abandon that action if the action is not in conformity. FMCSA's narrow view of the Clean Air Act would undermine the Act's purpose, structure, and effectiveness. The Clean Air Act has an ambitious goal: clean, healthy air in every community in the nation. Using a structure of cooperative federalism, Congress directed the States to meet federal air quality standards but gave them broad discretion on how to formulate plans to do so, *i.e.,* in their "State Implementation Plans" (SIPs). Congress also made an extraordinary pledge that no instrumentality of the federal government shall engage in, support in any way, permit, or approve any activity that does not conform to the applicable SIP. Thus, prior to taking any action that could do so, every federal agency must review the applicable SIP for conformity and make an affirmative finding that its activities will not hinder the state's efforts. FMCSA's issuance of the regulations at issue would remove a bar to Mexican-domiciled trucks – a discretionary decision that Congress vested in FMCSA. There is no question that the truck emissions will undermine state air quality implementation plans, particularly in those states where air is already heavily polluted – areas where huge

decreases, not increases, in emissions are vital to meeting the federal clean air standards. FMCSA must perform a conformity analysis for its regulations, and may be obligated to provide significant mitigation measures or offsetting reductions in existing pollutant emissions to compensate for the increased truck emissions that will occur if the Mexican-domiciled trucks operate nationwide.

Our discussion of the NEPA question focuses on the problems with FMCSA's proposed new causation rule. If adopted, FMCSA's rule could allow an agency to disclaim responsibility for the environmental effects of its own discretionary actions, based on a narrow reading of the "division of responsibilities" between federal agencies. Under NEPA, however, the effects for which an agency is responsible are primarily determined by the scope of the federal agency's discretionary action, not statutes that allocate agency responsibilities, such as authorizing statutes. If an agency has discretion to take action, it presumably also has authority to do so, and NEPA makes it liable for full disclosure of all of the foreseeable significant effects on the physical environment of its action. Moreover, this Court has held that NEPA requires federal agencies to interpret statutes broadly in favor of NEPA's purposes unless another statute renders compliance impossible, which is not the case here. Additionally, FMCSA offers no standards for courts to apply its rule, and none are evident in the language, purposes, or legislative intent of NEPA. Finally, FMCSA's proposed rule would undermine NEPA's informational purpose and deprive states and local communities of NEPA's benefits.



ARGUMENT

I. THIS COURT HAS HELD THAT ITS SOLE TASK IN A CASE LIKE THIS IS TO APPLY TRADITIONAL RULES OF STATUTORY CONSTRUCTION TO THE APPLICABLE STATUTES, WHICH HERE ARE THE CLEAN AIR ACT, NEPA, AND SECTION 350. THE PRESIDENT'S CONSTITUTIONAL FOREIGN AFFAIRS POWERS AND THE NAFTA – WHICH ITSELF ALLOWS THE U.S. TO ENFORCE ITS ENVIRONMENTAL STANDARDS – ARE IRRELEVANT TO THE MEANING OF THESE STATUTES.

A. The President's Foreign Affairs Powers Are Not Implicated By This Case.

As a threshold matter, it is necessary to dispose of two arguments that FMCSA makes as part of its attempt to inject foreign affairs concerns into this case. First, FMCSA claims that its statutory duties are altered by the President's *constitutional* foreign affairs powers. FMCSA Br. 20. Second, FMCSA obliquely suggests that a different rule of statutory construction applies in this case, i.e., the Clean Air Act and NEPA should be interpreted to avoid interference with the Executive Branch's foreign trade policies. FMCSA Br. 37. In an era of global trade, domestic statutes such as NEPA and the Clean Air Act will often affect foreign affairs and foreign commerce. But that fact does not change the meaning or scope of the statutes or encroach upon the President's constitutional foreign affairs powers.

This Court confronted a similar conflict between a congressional enactment and the Executive Branch's foreign policy in *Japan Whaling Association v. American*

Cetacean Society, 478 U.S. 221 (1986). Congress enacted a law that required the President to impose specific economic sanctions on a country if the Secretary of Commerce certified that the country had undermined an international convention that sets quotas on whale harvests. Japan violated a quota. But the Secretary did not make the certification, and, rather than impose sanctions, the Executive Branch negotiated an agreement with Japan. The question was whether the relevant statutes required the Secretary to make the certification. Two lower courts held that it did. In this Court, a group of Japanese petitioners attempted to convert the statutory issue into a constitutional one when they argued that the case presented a nonjusticiable political question because a decision against the Secretary would effectively require the Executive Branch to repudiate an agreement with a foreign country. *Id.* at p. 229.

This Court held that the foreign affairs implications were irrelevant. "We are cognizant of the interplay between [the statutes at issue] and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id*. at 230. Indeed, the case presented "a purely legal question of statutory interpretation," said the Court. *Id*. "The Court must first determine the nature and scope of the duty imposed on the Secretary by the [statutes], a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below." *Id*.

Here, too, the foreign affairs implications of FMCSA's compliance with the law are irrelevant. The Court must determine the nature and scope of the duty imposed on FMCSA by NEPA and the Clean Air Act. This is a purely legal question, and the relevant statutes must be interpreted according to traditional rules of statutory construction. The statutes apply to FMCSA with the same meaning and vigor that they would apply in any other situation.

Finally, FMCSA's concern that its compliance with the law would be expensive and time-consuming, or that it would impair trade with Mexico, is an issue for Congress, not the courts. Because Congress has plenary power over foreign commerce, U.S. Const., art. I, § 8, cl. 3, it is free to place conditions on Executive Branch agencies that implement trade agreements. If the President believes that the conditions interfere with his foreign trade agenda, his opinion is "merely precatory." *See*, *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 329-30 (1994). The President has no discretion to order FMCSA to "act contrary to the will of Congress when exercised within the bounds of the Constitution." *Japan Whaling*, 478 U.S. at 233; *see* also, *Dames and Moore v. Regan*, 453 U.S. 654, 669 (1981) ("when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions only by disabling the Congress from acting on the subject."); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953) (declaring void an executive agreement between the United States and Canada that conflicted with a congressional enactment), *aff'd*, 348 U.S. 296 (1955). The President's role is to "take Care That the Laws be faithfully executed." U.S. Const., art. II, § 3.

B. Congress Has Directed That NAFTA Compliance Should Not Change Or Diminish Federal Compliance With U.S. Environmental Statutes.

Congress, of course, has done nothing to suggest that FMCSA or any other agency may forgo compliance with federal environmental laws when they implement NAFTA. On the contrary, when it enacted NAFTA's implementing legislation, Congress expressly preserved federal environmental law: "Nothing in this Act shall be construed . . . to amend or modify any law of the United States, including any law regarding . . . the protection of the environment." 19 U.S.C. § 3312(a)(2)(A)(ii). Consequently, if this Court holds that FMCSA must prepare an EIS and comply with the Clean Air Act, the Court would merely be requiring an Executive agency to follow the will of Congress.[1]

In short, this case presents no constitutional issue, and no special deference is owed FMCSA merely because the Court's decision may have foreign affairs implications. The Court's task is to apply traditional rules of statutory construction to the Clean Air Act, NEPA, and Section 350. The President's constitutional foreign affairs powers and foreign trade goals are not relevant to the meaning of these statutes.

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[1] Moreover, we note that Congress appears less concerned with delay here than the Executive Branch, in light of the fact that Congress blocked Mexican-domiciled trucks through moratoria or funding restrictions no less than five times in the past 22 years, including three times after the President expressed his desire to allow the trucks. FMCSA Br. 4-5, 9-10.

II. FMCSA HAS VIOLATED THE CLEAN AIR ACT'S CONFORMITY REQUIREMENT BY FAILING TO ANALYZE THE AIR POLLUTION EFFECTS OF ITS REGULATIONS PRIOR TO ISSUING THE REGULATIONS.

A. The Conformity Requirement Is An Affirmative Responsibility Of Every Federal Agency, Intended To Ensure That Federal Actions Dovetail With And Do Not Undermine State Air Quality Plans.

The Clean Air Act is a paradigm of cooperative federalism, *Connecticut v. Environmental Protection Agency*, 696 F.2d 147, 151 (2d Cir. 1982), with state and federal governments working together to protect public health. However, although Congress gave to the federal government the lead role in deciding how clean the air must be to assure protection of the public health, it gave to the state governments the lead role in deciding how the air will actually be cleaned and kept clean. *American Trucking v. Whitman*, 531 U.S. 457, 470 (2001) ("It is to the States that the Act assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources.")

As part of that commitment to respect and assist the primary role of the States in controlling air pollution, Congress enacted the "conformity" requirement, 42 U.S.C. § 7506. It provides, in pertinent part:

> No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to a [State] implementation

> plan after it has been approved or promulgated under Section 7410 of this title.

42 U.S.C. § 7506(c)(1). Congress' intent in the conformity requirement is simple and two-fold. First, having assigned to the States the task of meeting federal clean air standards, Congress has simultaneously forbidden the federal government and all its agencies and instrumentalities from taking, approving, or supporting actions that would get in the way of the States as they endeavor to meet this congressional mandate. Second, Congress has specified the method that federal agencies must use to ensure that they do not get in the States' way: They must ensure that federal actions are consistent – that they "conform" to – the mix of strategies, emissions control measures, percentages of required emissions reductions, land use controls, and other regulations and requirements that make up the State's SIP. *Id.*

A finding of conformity with the SIP is an affirmative duty of the head of the federal agency *prior* to undertaking the action. 42 U.S.C. § 7506(c)(1); *EDF v. EPA*, 167 F.3d 641, 643 (D.C. Cir. 1999). Congress defined conformity to a SIP, in pertinent part, as a finding by the federal agency:

> (B) that [federal] activities will not –
>
> (i) cause or contribute to any new violation of any [federal air quality] standard. . . . "
>
> (ii) increase the frequency or severity of any existing violation of any standard . . . ; or
>
> (iii) delay timely attainment of any standard or any required interim emission reduction or other milestones in any area."

42 U.S.C. § 7506(c)(1). This definition is very broad. The new pollutant emissions will not be in conformity with a SIP if they will either cause *or contribute to* any new violation of a federal air quality standard, and if they will merely *delay*, not actually prevent, attainment of a federal standard.

Federal agencies whose actions would not conform to the applicable SIP can bring those actions into conformity by mitigation measures that reduce the emissions, or by providing or obtaining offsetting reductions in some source of current emissions, so that the total of emissions in the affected area does not rise because of the federal action. 58 Fed.Reg. 63214, 63238 (Nov. 30, 1993).

B. A Conformity Analysis Is Required For FMCSA's Regulations, Because They Are Likely To Worsen Violations Of The Federal Air Quality Standards, In Direct Contravention Of The Clean Air Act.

FMCSA failed to prepare any conformity analysis for its regulations. However, evidence submitted to FMCSA by the State of California, and to the Ninth Circuit by respondents, shows that such a conformity analysis is required under the Clean Air Act and that FMCSA acted in an arbitrary and capricious manner by not performing one. As that evidence shows, many of the areas through which the Mexican-domiciled trucks would be driving have ambient air pollutant concentrations that currently far exceed the health-based federal air quality standards for oxides of nitrogen and particulate matter, pollutants that heavy-duty diesel trucks produce. JA 330. In such areas, the air is already so bad that *any* additional pollutant emissions must and will "increase the frequency or severity of any

existing violation of any standard," and may also "contribute to" new violations of the standards. An analysis and prediction of the increased emissions that can be expected from these trucks was done by both California and respondents. JA 332-339, 397-403. The increased emissions will also almost certainly "delay timely attainment" of "required interim emission reduction or other milestones" in areas where federal clean air standards are already exceeded by wide margins, and huge decreases in emissions are needed to meet even interim goals on the way to meeting the federal standards. *See* Brief of *amicus curiae* South Coast Air Quality Management District. In such States as California, Arizona, and Texas, where the trucks would drive through areas designated as having "serious," "severe," or "extreme" ozone pollution, JA 100, 319-320, the additional contribution from the trucks would worsen an already critical air pollution problem. In addition, the particulate emissions from diesel vehicles are carcinogenic, Cal. Code of Regs., tit. 22 § 12000, and have been estimated to be responsible for up to 70% of the cancer risk from air pollution in the greater Los Angeles area. JA 405. According to a prominent toxicologist who has served as a consultant to the EPA's Clean Air Scientific Advisory Committee, the increased diesel emissions could cause actual cancers and deaths; this is a real and not an academic problem. JA 445-446.

FMCSA does not dispute that the Mexican carrier trucks will further pollute already critically polluted areas. Rather, FMCSA argues that its regulations are not covered by the conformity requirement because the agency

has insufficient control over the emissions of the trucks that would be registered under its regulations.[2] FMCSA misreads the statute and applicable regulations.

1. FMCSA's Regulations Support And Approve The Mexican-domiciled Trucks' Increased Pollution, Because The Regulations Permit And Enable The Trucks To Operate In The United States Beyond The Border Area.

FMCSA claims exemption from the conformity requirement because its regulations are not the cause of the increased air pollution that the trucks would add to California's and other States' air. It argues that only the act of the President's lifting of the moratorium, in purported furtherance of the NAFTA trade agreement, is responsible for these increased emissions. FMCSA Brief at 42-43. FMCSA is wrong.

The Clean Air Act conformity provision is not predicated on actual "but-for" causation. Rather, Section 7506(c)(1) is much broader; it forbids federal agencies from "support[ing] *in any way* . . . licens[ing] or permit[ting], or approv[ing]" any activity that does not conform to a SIP. 42 U.S.C. § 7506(c)(1) (emphasis added). FMCSA's registration of the trucks falls within the conformity requirement because it *supports* their operation by enabling the Mexican-domiciled trucks to operate where they otherwise

[2] In the Ninth Circuit, FMCSA argued that it also qualified for an exemption for rule-making activities. It has explicitly waived that argument here. FMCSA Brief at 14, note 6.

cannot. FMCSA's registration of the trucks is also covered by the prohibition on licensing, permitting, or approving new pollution sources that are not accounted for in the applicable SIP. Under the plain words of the statute, FMCSA's discretionary decision to adopt regulations falls squarely within the conformity requirement, because the regulations support and approve the operation of these trucks.

Both the President's action in lifting the moratorium *and* FMCSA's action in carrying out Section 350 are necessary before Mexican-domiciled trucks can operate throughout the United States. The President's lifting of the moratorium did not itself cause any truck emissions, since his lifting of the moratorium did not allow the trucks to enter the U.S. beyond the border area. Congress made the FMCSA's assurance of truck safety a separate and independent requirement that must be met before the trucks can enter. As such, FMCSA's activities support and approve the truck operation and emissions, and fall within the ambit of the conformity provision.

Section 350 is also more than the imposition of a duty; it is a grant of discretion. Congress did not require FMCSA to adopt regulations applicable to Mexican-domiciled trucks, indeed, it did not order FMCSA to act at all.[3]

[3] FMCSA suggests that it was required to issue regulations in light of the President's decision to lift the moratorium and that Congress did not intend section 350 to bar trucks in the event that the President chose to do so. FMCSA Br. 35. Not so. Congress relied upon FMCSA and the Department of Transportation to determine, for example, whether the Mexican government had the adequate information infrastructure and law enforcement resources for an effective program; whether there is sufficient border capacity to permit meaningful inspections; and

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Rather, Congress required that if the trucks were to operate beyond the border area, they could do so only if FMCSA could ensure their safety through safety inspections, verification of safety management practices, insurance, and other means. And Congress forbade FMCSA to process any applications for permission to operate outside the border zone until it has ensured that safety. Appendix to FMCSA's Brief at 12a-13a. The means by which FMCSA was to perform its verifications and reviews, as well as how it was to carry out many more general standards, such as an "evaluation" of a carrier's safety practices, were not specified by Congress, but were left to FMCSA's discretion. The agency's choice to carry out Section 350 through adoption of regulations, as well as the form, content, and scope of those regulations, was an exercise of discretion by FMCSA. FMCSA exercised that discretion in its regulatory choices as to the precise requirements, timing, methods of showing compliance, and so on, by which generalized congressional standards were to be met. *See* 40 C.F.R. § 1508.23 (federal action subject to NEPA arises "at the stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal. . . . ") FMCSA could also use that same discretion to limit the operation of the oldest and most polluting trucks beyond the border area, reducing emissions. By not doing so, it is supporting,

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whether, overall, "the opening of the border does not pose an unacceptable safety risk to the American public." Pet. App. 20a. It did not specify how FMCSA was to carry out these responsibilities. When Congress definitely intends that an agency adopt regulations, it knows how to say so unambiguously. 42 U.S.C. §§ 7411(d), 7412(d).

permitting, licensing, and approving these new sources of toxic air contaminants without determining whether applicable SIPs account for such sources.

2. Under Its Regulations, FMCSA Will Have Continuing Program Responsibility For The Emissions Of The Mexican-domiciled trucks, Rendering Them Subject To The Conformity Regulations.

FMCSA further disclaims any obligation to perform a conformity analysis for its regulations because: (1) the emissions from the trucks it registers ands regulates do not occur at the time of registration, and are therefore not "direct" emissions under the EPA conformity regulations; and (2) the emissions of trucks after registration are not sufficiently within FMCSA's control to fit the definition of "indirect emissions" that are covered under U.S. EPA's conformity regulations. This is a misreading of the EPA regulations.[4]

EPA's conformity regulations provide that the emissions caused by a federal action must be included in the conformity analysis as "indirect emissions" if the emissions are "reasonably foreseeable," and the agency has "continuing program responsibility" relating to those emissions, and can "practicably control" them in some

[4] While FMCSA is entitled to deference from the courts for reasonable interpretations of its own statute, interpretation of the conformity requirement is entrusted to EPA, not FMCSA. Accordingly, FMCSA's interpretation of the Clean Air Act and the EPA regulations are not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1115-16 (D.C. Cir. 2001).

fashion. 40 C.F.R. § 93.152. FMCSA does have continuing program authority over the trucks under the regulations at issue here. Those regulations allow FMCSA to register the trucks, and they provide that the agency will regulate and verify inspections of the trucks on a continuing basis as part of its regular responsibilities for regulating motor carrier safety. 49 C.F.R. § 365.511; 49 C.F.R. Parts 382, 383, 384, 391, 393, 395. Further, as discussed previously, actions that will directly affect the amount of pollutants that will be emitted by the trucks are fully within FMCSA's control. FMCSA can control the stringency of the safety standards it prescribes in its regulations, and the degree of stringency it chooses will directly affect which trucks are given permission to operate outside the border area and which are not. This is sufficient control to bring the truck emissions within the definition of "indirect emissions."

C. FMCSA Is Fully Able To Comply With The Conformity Requirement. If It Finds That Requirement Too Onerous, Its Remedy Lies With Congress, Not The Courts.

FMCSA also argues that it should be excused from complying with the Clean Air Act's conformity mandate because compliance is too burdensome:

> If FMCSA were required to complete [a conformity] analysis, and if it concluded that the President's decision to open United States markets to Mexican carriers will cause an increase in air [pollutant] emissions above regulatory thresholds in any of the studied regions, then FMCSA would not be able to promulgate its safety rules – and the President's efforts to bring the United States into compliance with its obligations under NAFTA and the arbitration decision of February

> 2001 would be further delayed – unless "conformity" to state air-quality plans somehow could be achieved.

FMCSA Brief, at 47.

FMCSA here asks this Court to choose among the statutes it will enforce, and asks the Court to allow the agency to help carry out NAFTA at the expense of the Clean Air Act. But as the District of Columbia Circuit has said, "[i]f this legislative scheme [i.e., conformity] is too onerous, it is up to Congress to provide relief, not this court." *EDF v. EPA*, *supra*, 167 F.3d at 651.

Congress specifically directed that "*no* department, agency, or instrumentality of the Federal government" can undertake, support, permit, or approve any action that is not in conformity with the applicable SIP. 42 U.S.C. § 7506(c)(1) (emphasis added). Congress did not provide an exemption for actions that forward compliance with NAFTA or, indeed, with any other federal goals.[5]

FMCSA is not without a means of assuring conformity, since it can do what a private business in a similar

[5] By contrast, Congress did provide a compelling national interest exemption in its waiver of federal sovereign immunity in the Clean Air Act. Section 118(b) of the Clean Air Act allows the President to exempt any federal agency's own emissions sources from the Act's waiver of sovereign immunity "if he determines it to be in the paramount interest of the United States to do so." 42 U.S.C. § 7418(b). That Congress provided an exemption to another federal-government-wide requirement in the Clean Air Act, but provided no such exemption to the conformity provision, is textual evidence that Congress intended no such exemption. *American Trucking v. Whitman*, 531 U.S. at 467.

situation would do: It can obtain offsets for the pollutant emissions its actions will cause. That is, FMCSA can obtain decreases in existing emissions from other federal agencies in the areas where such decreases are needed, or can pay existing private sources of pollutant emissions to reduce their emissions in an amount that offsets the increases from the Mexican-domiciled trucks, to the point where the emissions expected from these trucks do not exceed what was planned for in the applicable SIPs. This alternative is already required of businesses that wish to build a new source of pollution in an area that currently violates federal air quality standards. *See* 42 U.S.C. §§ 7503 and 7511a(a)(4), (b)(5), (c)(10), (d)(2), (e)(1).

III. FMCSA ALSO VIOLATED NEPA WHEN IT FAILED TO PREPARE AN EIS.

FMCSA proffers a new causation rule for assessing the agency's obligations under NEPA. FMCSA urges that a "manageable line" be drawn between the environmental effects for which it is responsible and those for which the President is responsible, based on each one's statutory and constitutional responsibilities, FMCSA Br. 34, and the "structure of the government." FMCSA Br. 37. FMCSA's proposed NEPA rule could apply broadly in other cases where an agency would ordinarily have a duty to prepare an EIS – i.e., where the agency has discretion to take action, and the action would cause significant effects on the physical environment.[6] Its rule would allow an agency to disclaim

[6] FMCSA argues separately that it lacks discretion. FMCSA Br. 38-40. It concedes that its action is at least a but-for cause of the emissions. FMCSA Br. 33-34.

responsibility for effects caused by its own discretionary action on the grounds that another entity is more "responsible" for the effects.

This approach has no basis in NEPA or its implementing regulations; it would undermine NEPA's informational purpose, and it would deprive states and local communities of NEPA's benefits. Federal agencies are responsible for all the significant effects on the physical environment caused by their own discretionary decisions.

A. FMCSA's Causation Rule Would Conflict With NEPA And CEQ Regulations.

1. Under NEPA, The Scope Of The Agency's Action, Not Its Authority, Determines The Action's Effects.

Under NEPA, the effects for which an agency is responsible are primarily determined by the nature and scope of the proposed action. *Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 318-19 and 322-28 (1975) ("*SCRAP II*"); 40 C.F.R. § 1508.18 (defining a major federal action), § 1508.25 (discussing scope of an action in EIS). NEPA mandates that "all agencies of the Federal Government shall . . . include in every recommendation [on] *major Federal actions* . . . a detailed statement [on] the environmental impact *of the proposed action*." 42 U.S.C. § 4332(C)(i) (emphasis added). Thus, the CEQ regulations define both direct and indirect effects as those effects "which are *caused by the action*," without regard for the authority of the agency that is taking the action. 40 C.F.R. § 1508.8 (emphasis added).

Nothing in NEPA supports FMCSA's attempt to inject authorization statutes into the causal relationship between an action and its effects. Congress need not continually think about NEPA, much less allocate NEPA responsibilities, when it passes authorizing legislation, because Congress has already provided that NEPA's duties are triggered by the agencies' discretionary actions.

Consequently, the key issue here is the scope of the major federal action. That issue turns largely on whether, under Section 350, FMCSA has discretion to issue the regulations. As explained above, Section 350 grants FMCSA that discretion. The NEPA analysis then becomes clear. The "major federal action" for NEPA purposes includes FMCSA's discretionary decision to issue regulations. *See* 40 C.F.R. § 1508.18(a) (major federal action includes new or revised regulations). The requisite causal link between the action and Mexican-domiciled truck emissions is manifest: No regulations, no emissions. *See*, *e.g., SCRAP II*, 422 U.S. 289, 299 (1975) (agency decision to increase railroad rates included effects of diverting "traffic to trucks, which are allegedly heavier polluters than trains"). That is simply the consequence of Congress's decision to bar Mexican-domiciled trucks until FMCSA chooses to take action.

FMCSA's remedy is to convince Congress to grant it an exemption. "Congress has shown that it is fully capable of expressing its desire to exempt projects from NEPA." *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 367 (D.C. Cir. 1981), *cert. denied*, *sub nom. Atchison, T. & S. F. R. Co. v. Marsh*, 454 U.S. 1092 (1981). The somewhat peculiar NEPA consequences of Section 350 are unlikely to pose a widespread problem in the future. They are not a reason for this Court to adopt a new causation rule that

will have broad and uncertain implications for future cases.

2. Under NEPA, Agencies Must Construe Their Authority Broadly In Favor Of NEPA's Purposes Unless Compliance Is Impossible.

By allowing an agency to rely on a statute outside NEPA to disclaim responsibility for the effects of its own actions, FMCSA's rule would conflict with Section 102 of NEPA, which directs agencies to interpret *all* public laws, regulations, and policies of the United States in support of NEPA's policies "to the fullest extent possible." 42 U.S.C. § 4332. Moreover, rather than permit an agency to claim, as FMCSA does here, that it is not responsible for air pollution because it is only authorized to consider truck safety, NEPA requires FMCSA to "interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in light of the Act's national environmental objectives," 40 C.F.R. § 1500.6; *see* 42 U.S.C. § 4335, and to develop "a systematic interdisciplinary approach" to environmental protection in its decision-making. 42 U.S.C. § 4332(A).

In fact, this Court has held that Section 102 requires agencies to comply with NEPA unless another statute makes compliance impossible. *Flint Ridge Dev. Co. v. Scenic Rivers Assn. of Oklahoma*, 426 U.S. 776 (1976). In *Flint Ridge*, an agency claimed that its duty to prepare an EIS conflicted with a statute that required it to act within 30 days (leaving insufficient time for an EIS). The Court observed, "NEPA's instruction that all federal agencies comply with the impact statement requirement and with all other requirements of § 102 'to the fullest extent

possible' is neither accidental nor hyperbolic." *Id*. at 787. Reconciling this broad mandate with the fact that NEPA does not repeal by implication any other statute, the Court held that NEPA gives way only "where a clear and unavoidable conflict in statutory authority exists. . . . " *Id*. at 788. Similarly, the CEQ regulations state: "The phrase 'to the fullest extent possible' in Section 102 means that each agency of the Federal Government shall comply with that section *unless existing law applicable to the agencies' operations expressly prohibits or makes compliance impossible*." 40 C.F.R. § 1500.6 (emphasis added). FMCSA's proposed rule invites both agencies and the courts to ignore their obligation to give effect to NEPA, absent a direct and inescapable conflict. *Flint Ridge*, 426 U.S. at 788; *cf. Watt v. Alaska*, 451 U.S. 259, 267 (1981).[7]

FMCSA mistakenly relies on a footnote in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) as authority for its proposed rule. In that decision, the Court acknowledged that tort concepts can be useful for examining causation under NEPA. *Id.* at 774. But, it then qualified this notion by explaining that

[7] FMCSA claims that *Flint Ridge* only concerns whether NEPA applies at all, not the scope of NEPA. FMCSA Br. 38 n.16. But it ignores how its rule would work. Fundamentally, FMCSA is relying on an alleged conflict between NEPA and other statutes (e.g., the moratorium statute). Without a conflict (that is, if it simply had no duty to prepare an EIS under the terms of NEPA itself), its rule would be unnecessary. *Flint Ridge* sets the standard for determining whether a statutory conflict relieves an agency of its duty to prepare an EIS. *Flint Ridge*, 426 U.S. at 788 ("the question we must resolve is whether assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict. . . . ")

causation under NEPA and causation under tort law are not identical. *Id.*, at 774, n.7. Courts must "look to the underlying policies and legislative intent in order to draw a manageable line" that marks the limits of causation under NEPA. *Id*. The Court simply meant that causation ultimately turns on Congress's intent, as expressed in NEPA's language and policies. *See id*. at 772 (examining NEPA's language and policies to resolve causation issue). FMCSA asks the Court to draw a line that is based, instead, on the "division of responsibility" between agencies. FMCSA Br. 34. If anything, *Metropolitan Edison* stands for a contrary proposition: NEPA's language and policies define its limits.

In any event, FMCSA offers no useful standards for courts to draw the manageable line that it urges – certainly, no standards that are evident in NEPA's text, legislative history, or objectives. FMCSA's reliance on the "'rule of reason' that is inherent in NEPA," FMCSA Br. 37, is an implicit admission that the rule cannot be found anywhere in NEPA's text. Indeed, FMCSA makes no serious attempt to reconcile its proffered rule with the "strong precatory language," "action-forcing procedures," and "sweeping policy goals" of NEPA itself. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989).

B. FMCSA's Causation Rule Would Deprive States, Local Governments, And The Public Of Information They Need To Mitigate The Harmful Effects Of Federal Actions.

The result of FMCSA's causation rule, if adopted, is that federal agencies will disclose fewer environmental effects of their actions, and they will prepare fewer

environmental impact statements. The effects that would trigger an EIS could be deemed to be somebody else's responsibility. When a federal agency fails to prepare an EIS, however, it deprives states, local governments and the public of an important means of protecting their interests and their communities, which is a key purpose of NEPA.

Although NEPA does not require the federal government to mitigate the environmental damage that its actions will cause, this Court unanimously explained in *Robertson* that an EIS "serves a larger informational role." *Robertson*, 490 U.S. at 352-53. It "provides a springboard for public comment." *Id*. at 349. It gives state and local governments "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Id*. at 350; *see* 40 C.F.R. § 1503.1 (requiring federal agencies to obtain comments from states, local governments, tribes, and affected or interested members of the public); 40 C.F.R. § 1502.9 (requiring federal agencies to address in final EIS opposing views not adequately addressed in draft EIS); 42 U.S.C. § 4331. And it requires the federal agency to discuss mitigation measures, even if the agency ultimately chooses not to adopt them. *See Robertson*, 490 U.S. at 352-53, 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c) and 1508.20.

"Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson*, 490 U.S. at 352. Without an EIS, states and interested groups do not have a legal forum to force the agency at least to consider alternative measures that would soften its effects on the environment or avoid impeding state and

local laws or projects. Without an EIS, States and interested groups do not have accurate information on the effects of the federal action to formulate their own mitigation measures. An EIS is the key to the action-forcing procedures that ensures NEPA's "broad national commitment to protecting and promoting environmental quality." *Id*. at 348.

Amici briefly highlight a few examples of what FMCSA's environmental assessment did *not* do. Its failures illustrate how an EIS would have served the crucial informational purposes that NEPA promises to state and local communities.

- *The EA fails to examine the air quality impacts on any actual community.*

The EA compared the emissions increases from the Mexican-domiciled trucks to *national* levels of emissions – a fictional national air, rather than the real, heavily polluted air that exists in actual communities. FMCSA made no distinction between areas that currently attain the federal standards and those that do not, but lumped them all together. JA 147-154. NEPA requires federal agencies to examine the significance of their action, not only on "society as a whole," but also on "the affected region" and "the locality." 40 C.F.R. § 1508.27(a). People breathe air locally, not nationally. FMCSA did not provide any state or local community a useful assessment of the effect of its action on the air that their citizens breathe.

- *The EA examines the air quality impacts for only a single year*.

Although the rules and their air quality effects may last years, FMCSA only examined emissions data for a single projected year, 2002. JA 152, 331-332. Consequently,

FMCSA provided no state or local community a useful assessment of how much, or in what manner, their air quality will deteriorate in future years.

- *The EA fails to examine state and local air quality standards or the applicable SIPs.*

NEPA requires an agency to consider "[w]hether the action threatens a violation of federal, State, or local law, or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10). California, for example, has its own air quality standards, which are more stringent than the federal standards. Cal. Health and Saf. Code § 39606; Cal. Code of Regs., tit. 17, § 70100. The emissions from Mexican-domiciled trucks may make it impossible for California to meet its standards. JA 324, 330, 410-412. The EA, however, does not attempt to evaluate the effect of the rules on any state or local standards.

Interested parties like the California Attorney General commented on the EA, pointed out these and other shortcomings, provided data and testimony, and requested that FMCSA prepare an EIS. JA 283-306, 372-386. Without an EIS, NEPA's informational purpose cannot be served.

CONCLUSION

Amici States respectfully ask this Court to affirm the judgment of the Court of Appeals.

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