An International Dispute Reveals Weaknesses in Domestic Environmental Law:

NAFTA, NEPA, and the Case of Mexican Trucks (Department of Transportation v. Public Citizen)

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This Note explores the significance of the Supreme Court’s 2004 decision in Department of Transportation v. Public Citizen, commonly referred to as “The Mexican Trucking Case.” The case drew attention as an example of the tension between trade liberalization and environmental protection. The Supreme Court’s decision interprets the National Environmental Policy Act of 1969 (NEPA) and the Clean Air Act as not requiring environmental review of the consequences of opening American borders to the Mexican fleet of trucks and buses, which is older and more polluting than the American fleet.

This Note explores the consequences of the judiciary’s continuing hostility toward NEPA and the growing irrelevance of NEPA in an era of increased international trade. NEPA’s substantive provisions are aspirational rather than prescriptive, which makes the statute highly vulnerable to judicial narrowing. This Note argues that there was room in this case for a different interpretation, but admits that the Court’s narrow interpretation was predictable given prior judicial reluctance to give force to NEPA’s grand vision. Furthermore, NEPA turns out to be particularly weak in the trade context. This Note argues that we cannot ignore this
statutory failure. The Note concludes with some proposed judicial and legislative solutions to both the specific problem of the truck pollution and the larger problems of statutory inadequacy.

Introduction ...........................................................................................................493

I. Legal Background: The Conflicting Values of the Relevant Statutes .................494
   A. National Environmental Policy Act .................................................................494
      1. A Neglected “Environmental Constitution” .................................................494
      2. Council on Environmental Quality Regulations .........................................495
      3. Judicial Interpretation of NEPA .................................................................496
   B. The Clean Air Act ..........................................................................................497
   C. The North American Free Trade Agreement ...............................................498
   D. The Federal Motor Carrier Safety Administration ......................................501

II. Factual Background: The Trucking Moratorium, the NAFTA Arbitration Decision, Section 350, and FMCSA’s Regulations ....502

III. Department of Transportation v. Public Citizen .............................................508
   A. The Parties .....................................................................................................508
   B. The Ninth Circuit Demands Environmental Review ....................................508
   C. The Petition For and Granting of Certiorari ...............................................510
   D. The Evidence Presented to the Supreme Court ...........................................512
   E. The Supreme Court: A Holding Limited to Statutory Interpretation ..........513

IV. An International Dispute Reveals the Weaknesses of Domestic Law ...............516
   A. The Decision Reveals the Inadequacies of NEPA ........................................517
      1. NEPA is Particularly Vulnerable to Judicial Narrowing .........................517
         a. The Goals of NEPA ..............................................................................517
         b. The Purpose of Environmental Impact Statements ................................519
         c. NEPA’s Lackluster Performance in the Higher Courts .........................521
         d. Narrow Judicial Construction in Action ..............................................524
            i) An avoidable but predictable result .................................................524
            ii) A recipe for pollution ..............................................................526
      2. NEPA Does Not Apply to the President ......................................................527
         a. Origins of the Problem ........................................................................528
         b. The Presidential Loophole Encompasses Trade Agreements .................528
         c. The Balance of Environmental Power ..................................................529
         d. NEPA Substitutes .............................................................................530
   B. Proposed Solutions .......................................................................................532
      1. Addressing the Outcome of the Mexican Trucking Dispute .......................532
INTRODUCTION

When the President and Congress make foreign trade decisions with serious environmental consequences, do our domestic laws require anyone to review the environmental impacts of the action so that the public can proceed with an informed debate? The Supreme Court addressed this issue in 2004, but the opinion in *Department of Transportation v. Public Citizen*¹ did not discuss the trade-environment debate. Instead of acknowledging the larger context, the Court focused on the concept of "legally relevant cause."² The case involved the administrative agency charged with the regulation of thousands of Mexican trucks and buses set to enter the United States under the North American Free Trade Agreement (NAFTA).³ Because the President, not the agency, had the power to decide whether or not the trucks would be admitted, the agency was not the legal cause of any resulting pollution.⁴ Thus, environmental reviews were not required under the National Environmental Policy Act (NEPA) or the Clean Air Act, because presidential decisions are exempt from those statutes.⁵

Part II of this Note summarizes the legal and factual background of the case. After a brief look at the Ninth Circuit decision, Part III of this Note examines the high rhetoric of the government’s petition for certiorari and the arguments over the significance of the case that characterized the parties’ briefs. These arguments contrast starkly with the narrow rationale for the Supreme Court’s decision. Part IV discusses the flaws in NEPA that the decision reveals: it is vulnerable to narrow interpretations, and it does not apply to the President. Finally, the Note concludes with possible solutions to the specific pollution problem stemming from the entry of the Mexican trucks, as well as some proposals

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¹. 541 U.S. 752 (2004).
². *Id.* at 767-69.
³. *Id.* at 758-60.
⁴. *Id.* at 769.
⁵. *Id.* at 770-73.
for judicial and legislative action that could address the larger problems exposed by this case.

This Note’s analysis of the Mexican trucking decision will show that this case highlights the inadequacies of our aging environmental laws. The judiciary has never held much respect for NEPA, and this decision’s narrow understanding of legal cause does further damage to the integrity of the statute. While judicial distaste for NEPA has remained constant over time, shifting international relations have further undermined NEPA. NEPA proves particularly inadequate when confronted with the challenges posed by the nation’s increasingly numerous and complex free trade agreements such as NAFTA. Our current statutory framework for making environmental decisions will prove less and less effective as more domestic environmental decisions are made by the President in his foreign relations capacity. This outcome cries out for legislative and judicial attention. This Note explores some remedial actions that can be taken in Congress, in state legislatures, and in judicial chambers.

1. LEGAL BACKGROUND: THE CONFLICTING VALUES OF THE RELEVANT STATUTES

This section provides background information for those readers unfamiliar with the statutes, treaties, and regulatory bodies that came into conflict in Department of Transportation v. Public Citizen.

A. National Environmental Policy Act

1. A Neglected “Environmental Constitution”

Congress enacted the National Environmental Policy Act (NEPA) in 1969 with the broad and ambitious goals of expressing the nation’s commitment to environmental protection and injecting environmental considerations into government decision-making.6 Section 101 of NEPA is the congressional declaration of national environmental policy.7 This broad policy declaration has proved difficult to implement, but it is worth considering here to understand the scope of Congress’s goals at the time of the statute’s enactment. NEPA declared that the continuing policy of the Federal Government would be “to use all practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony.”8

7. Id. § 4331 (“Congressional declaration of national environmental policy”).
8. Id. § 4331(a).
In order to carry out the national policy, it would be the “continuing responsibility of the Federal government to use all practicable means” to, among other commitments, “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.” Thus, the substantive goal of NEPA was to change the environment “for the better.” One of the bill’s main sponsors, Senator Henry “Scoop” Jackson, stated that NEPA’s environmental policy would “serve a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values.” Although NEPA “is the closest thing we have to a framework environmental law,” federal agencies and courts have largely ignored the “environmental constitution” function of NEPA.

NEPA section 102 has proved more important than its ideological counterpart discussed above. Section 102 requires “all agencies of the Federal Government” to compose a “detailed statement” on the environmental impact of any proposed “major Federal actions” that “significantly affect[]” the quality of the human environment. The document must also discuss the environmental impacts of alternatives to the proposed action, including the alternative of taking no action at all. The statute’s congressional sponsors intended this “detailed statement” to be an action-forcing mechanism that would allow the government to realize NEPA’s substantive policy objectives. The Environmental Impact Statement (EIS), as this document has come to be known, is now a widely used and critical component of national environmental protection.

2. Council on Environmental Quality Regulations

Several of the most important legal concepts in the Mexican trucking case come from the regulations implementing the NEPA statute that are briefly explained here. NEPA established the Council on Environmental Quality (CEQ), which promulgated official regulations in 1978. CEQ pronounced that NEPA applies to all federal agencies, not just those with

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9. Id. § 4331(b).
11. Id. at 5820.
15. Id. § 4332(C)(iii).
ECOLOGY LAW QUARTERLY

This requirement accords with the conception of NEPA as an environmental constitution that guides all government decisions when environmental values come into conflict with other values. Each federal agency must comply with section 102 “to the fullest extent possible... unless existing law ... expressly prohibits or makes compliance impossible.”

CEQ regulations set up the steps involved in preparing an EIS. Initially, agencies have the option of preparing an environmental assessment (EA) to determine whether the action will significantly affect the environment. If the EA predicts no significant impacts, the agency declares a Finding of No Significant Impact (FONSI). If the EA predicts significant impacts, the agency must prepare the more detailed EIS. The EIS must be completed, circulated to other governmental bodies, and made available to the public early enough in the decision-making process for comments to meaningfully affect the decision.

When deciding whether its proposed action significantly affects the environment, an agency must take into account both direct and indirect effects. Direct effects are “caused by the action and occur at the same time and place,” such as the pollution generated during the construction of a project. Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” For example, indirect effects may include changes in an area’s population and land use patterns.

3. Judicial Interpretation of NEPA

This Note explores the consequences of narrow judicial interpretations of NEPA, so it is important to have some familiarity with

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19. Id. § 1500.6 (“Agency authority”).
20. The CEQ regulations allow some “categorical exclusions” from environmental review, but that process is inapplicable to the topic of this Note. See id. §§ 1501.4 (“Whether to prepare an environmental impact statement”), 1508.4 (“Categorical exclusion”).
21. Agencies can also choose to skip the EA and proceed directly to an EIS.
22. Id.
23. Id. § 1500.4(q) (“Reducing paperwork”).
24. Id. § 1503.1(b) (“Inviting comments”).
25. Id. § 1508.8(a) (“Effects”).
26. Id. For more discussion on direct and indirect effects, see Davis v. Coleman, 521 F.2d 661, 676-77 (9th Cir. 1975), quoting the Fifth Annual Report of the Council on Environmental Quality, 410-11 (December 1974): “A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also induce residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. For many projects, these secondary or induced effects may be more significant than the project’s primary effects.”
27. 40 C.F.R. § 1508.8(b).
28. Id.
the most important of these interpretations. Part IV(A)(1)(c), *infra*, provides a more in-depth analysis. First, the Supreme Court concluded soon after its enactment that NEPA contains no substantive environmental law. Court do not require agencies to make environmentally favorable decisions, as long as the decision-making process complies with NEPA section 102. Second, reviewing courts are highly deferential to agency decisions. Because NEPA does not contain a specific provision regarding judicial review, courts use the Administrative Procedure Act (APA) to settle disputes. The APA standard applicable to NEPA provides for deference to the agency’s decision unless that decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” This inquiry must “be searching and careful,” but “the ultimate standard of review is a narrow one.”

**B. The Clean Air Act**

The potential violation of the Clean Air Act (CAA) was also an issue in the Mexican trucking case. The CAA exemplifies the cooperative federalism that characterizes modern environmental law. The federal government sets National Ambient Air Quality Standards (NAAQS), while states have the primary responsibility for achieving and maintaining the NAAQS within each air quality control region (AQCR). States develop State Implementation Plans, outlining how to achieve and enforce NAAQS for each pollutant regulated under the CAA. The federal government reciprocates by prohibiting its agencies from interfering with states’ ability to comply with the national standards. Thus, before taking action, federal agencies are generally required to make an affirmative demonstration that their regulations comply with the State Implementation Plans in a conformity determination.

30. *See id.*
32. Id. § 706(2)(A).
34. Id. at 416.
37. 42 U.S.C. § 7506(c)(1).
38. *Id.*
that federal action does not burden areas that already have the worst air pollution problems with more pollution.

A federal agency only needs to perform a conformity determination if the total direct and indirect emissions resulting from its action exceed a regulatory threshold.\textsuperscript{39} Environmental Protection Agency (EPA) regulations establish this threshold, which differs for every pollutant. Any emissions below the threshold are \textit{de minimis}, and the regulations assume that any federal action that produces such minor emissions will not endanger the state’s ability to meet national standards.\textsuperscript{40} Direct and indirect emissions are defined differently from the direct and indirect effects of a major federal action under NEPA. Direct emissions are “those emissions ... caused or initiated by the Federal action [that] occur at the same time and place as the action.”\textsuperscript{41} Indirect emissions are those emissions that “(1) [a]re caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and (2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.”\textsuperscript{42} As will be seen below, one of the issues in \textit{Department of Transportation v. Public Citizen} was whether the combined direct and indirect emissions resulting from the federal agency’s actions would require the agency to perform a CAA conformity determination.

C. The North American Free Trade Agreement

The Mexican trucking conflict came to a head when an arbitration panel concluded that the United States was violating its commitments under the North American Free Trade Agreement (NAFTA), which promotes free trade among the United States, Mexico, and Canada.\textsuperscript{43} The leaders of these three countries signed the agreement in December, 1992.\textsuperscript{44} Congress implemented NAFTA through the North American Free Trade Implementation Act, and NAFTA took effect on January 1, 1994.

The objectives of NAFTA include the elimination of barriers to trade, the promotion of fair competition, and the establishment of a

\textsuperscript{39} Conformity to State and Federal Implementation Plan, 40 C.F.R. § 51.853(b) (2005) (“Applicability”).
\textsuperscript{40} Id. §§ 51.853 (b), (c)(1).
\textsuperscript{41} Id. § 51.852 (“Definitions”).
\textsuperscript{42} Id.
\textsuperscript{44} Id.
framework for further international cooperation on trade issues. NAFTA creates a free trade zone encompassing the three countries by eliminating or reducing tariffs and other barriers to trade on thousands of items of commerce. For example, the agreement prohibits import and export restrictions. In addition, under the National Treatment provision, each country must treat the other countries' traded goods using the same policies it applies to domestic goods. The provisions pertaining to services are similar to those pertaining to tangible goods. Parties must provide either national treatment or most-favored-nation treatment, whichever is better, to each other's service providers. Thus, the government of each party nation must treat the service providers of other NAFTA parties as favorably as it treats service providers of any other country in similar circumstances.

The provisions regarding standards-related measures attempt to balance the competing interests of national sovereignty and free trade. The countries retain the right to set technical standards that establish an appropriate level of safety and protection for human, animal or plant life or health, the environment, and consumers. Each party can choose the level of protection it desires, but in setting this level parties are to avoid unjustifiable discrimination against the goods of another party. In other words, parties may not use standards-related measures as an unnecessary obstacle to trade. Furthermore, the countries must work together to make their standards as compatible as possible in order to facilitate trade.

NAFTA also establishes institutional arrangements and dispute settlement procedures. As stipulated in Chapter 20 of the agreement, the countries are supposed to attempt to resolve disputes first through cooperation and a formal consultation process, then by requesting a meeting of the Free Trade Commission, with an arbitral panel as a final resort. These panels are populated by independent experts in international law and trade. The panel issues its conclusions in an initial report and then, after an opportunity for comment, a final report. These

45. Id. art. 102. Other objectives included an increase in investment opportunities and the protection of intellectual property rights.
46. Id. art. 309.
47. Id. art. 301.
48. Id. arts. 1202-04.
49. Id.
50. Id. art. 904.
51. Id.
52. Id.
53. Id. art. 906.
54. Id. arts. 2003-08. The Free Trade Commission oversees the implementation of NAFTA.
55. Id. art. 2000.
56. Id. arts. 2016-17.
reports generally instruct the party in violation to remove the offending barrier to trade. If the violating party does not comply with the arbitral panel's ruling, the complaining party may suspend its NAFTA obligations— for example, by imposing tariffs and other trade barriers— until the other country comes into compliance.

During the development of NAFTA, many people voiced concerns over its potential environmental effects and vigorous debate ensued. Environmentalists feared that NAFTA provisions prohibiting countries from unduly interfering with international trade by restricting imports or exports threatened U.S. domestic environmental laws. Similarly, parts of international environmental agreements seemed at risk because they relied on trade restrictions to achieve their goals. The NAFTA provisions instructing countries to work to harmonize their environmental standards produced speculation that Canadian and American laws would be forced towards lower levels of protection. Or, if large differences in environmental laws continued to exist, it seemed likely that places with lax rules would attract more industry, giving governments an incentive to relax laws and enforcement. Furthermore, many environmentalists pointed out that the growth-inducing power of free trade has a destructive side. Rampant growth along the United States-Mexico border had already caused serious health problems and environmental degradation. Lastly, some critics saw trade agreements as inherently biased against the environment, and unreceptive to public input.

The United States viewed the potential impacts of free trade on the environment as a critical aspect of the agreement that needed addressing before it would give its approval. In addition to including several environmental provisions in the NAFTA text itself, the countries signed a side agreement called the North American Agreement on Environmental Cooperation in 1993. This agreement institutionalizes

57. Id. art. 2018.
58. Id. art. 2019.
60. Id.
61. Id.
62. Id. at 4-5.
63. Id. at 5.
64. Id.
65. Id. at 6.
66. Id. at 13-14.
international environmental coordination through the creation of the Commission for Environmental Cooperation. The agreement also obligates each NAFTA country to enforce effectively its own environmental laws and regulations, to ensure that these laws and regulations provide for high levels of environmental protection, and to strive to improve that level of protection.

D. The Federal Motor Carrier Safety Administration

The controversy over the admission of Mexican-domiciled trucks into the United States ultimately focused on the role of the Federal Motor Carrier Safety Administration (FMCSA), so the reader should be familiar with the function of this federal agency. The FMCSA was established as a separate administration within the U.S. Department of Transportation (DOT) on January 1, 2000, pursuant to the Motor Carrier Safety Improvement Act of 1999. The term "motor carriers" refers to trucks and buses. The FMCSA carries out DOT's duties relating to motor carriers and motor carrier safety, such as enforcing safe operating requirements and registering motor carriers. FMCSA "shall register" those carriers "willing and able to comply with ... any safety regulations imposed by the Secretary [of Transportation] and the safety fitness requirements established by the Secretary ... and the minimum financial responsibility requirements established by the Secretary ...." The statute and the regulations specifically authorized by the statute set forth these specific requirements. Since only trucks that are registered by the FMCSA may operate within the United States, satisfaction of the FMCSA's safety and financial responsibility requirements determines whether or not a particular truck can enter and operate within the country.

This brief summary of the relevant statutes, federal agencies, and NAFTA provides the background necessary to understand the legal

68. Id. art. 8.
69. Id. arts. 3, 5.
71. References to "trucks" in this Note apply to all commercial motor carriers, whether they be trucks carrying cargo or buses carrying people.
issues in *Department of Transportation v. Public Citizen*. The following section explains the complex factual background of the case.

II. FACTUAL BACKGROUND: THE TRUCKING MORATORIUM, THE NAFTA ARBITRATION DECISION, SECTION 350, AND FMCSA’S REGULATIONS

The trucking dispute between Mexico and the United States has been ongoing for over twenty years, focusing at different times on economic, safety, and environmental issues. Prior to 1982, commercial motor carriers from Mexico could request authority to operate within the United States by applying to the former Interstate Commerce Commission (ICC).76 In 1982, however, Congress imposed a two-year moratorium on new grants of operating authority to Mexican-domiciled motor carriers.77 The congressional act was designed to respond to complaints that Mexico was not permitting American motor carriers the same access to its markets as Mexican motor carriers had to U.S. markets.78 Congress authorized the President to extend the moratorium if these concerns continued, or to lift it if he found that to serve the national interest.79 Legislative and executive extensions maintained the moratorium between 1982 and 1995.80 Through the ICC Termination Act of 1995, the moratorium became permanent. It was to remain in effect unless and until the President expressly rescinded it pursuant to a determination that the moratorium no longer served the national interest or had become inconsistent with U.S. obligations under a trade agreement.81


77. 49 U.S.C. § 13902(c) (2000) (“Bus Regulatory Reform”). Some Mexican trucks have been permitted to operate in the United States because they are not covered by the moratorium. The moratorium only applied to certificates of new operating authority for operations beyond the “border zone” adjacent to Mexico. Thus, motor carriers could receive authority to operate in the border zone, and those that had receiving unlimited operating authority before 1982 could continue to operate throughout the country. See FMCSA, Environmental Assessment, supra 76, at 50.

78. FMCSA, Environmental Assessment, supra 76, at 49.

79. Id.

80. See Memorandum for the Secretary of Transportation and the United States Trade Representative, 60 Fed. Reg. 12,393 (Mar. 2, 1995); Memorandum for the Secretary of Transportation, the United States Trade Representative, 57 Fed. Reg. 44,647 (Sept. 25, 1992); Memorandum for the Secretary of Transportation, the United States Trade Representative, 55 Fed. Reg. 38,657 (Sept. 17, 1990); Memorandum for the Secretary of Transportation, the United States Trade Representative, 53 Fed. Reg. 36,430 (Sept. 15, 1988); Memorandum for the Secretary of Transportation, the United States Trade Representative, 51 Fed. Reg. 34,079 (Sept. 23, 1986); and Memorandum for the Secretary of Transportation, the United States Trade Representative, 49 Fed. Reg. 35,001 (Aug. 30, 1984).

81. 49 U.S.C. § 13902(c)(3).
As part of the NAFTA negotiations, the United States promised to lift the moratorium on Mexican-domiciled motor carriers. This would proceed in stages: the United States would allow some trucks to enter in 1995 and then grant full privileges by 2001. When the time came to lift the moratorium, however, American officials did not begin to consider Mexican truck applications, citing concerns about the safety of the Mexican fleet. The Mexican government challenged this noncompliance with the timetable under NAFTA's dispute resolution provisions, and in February 2001 an arbitration panel decided that the United States had breached the agreement. The panel found that the "blanket refusal to review and consider" Mexican motor carrier applications for cross-border operating authority violated NAFTA, specifically the provisions ensuring national treatment and "most-favored-nation treatment for cross-border services." Mexico could have retaliated with trade sanctions, but chose to continue talks with the United States.

After the panel issued its finding that the United States was in violation of NAFTA, President Bush announced that he intended to exercise his statutory authority to lift the moratorium once new regulations existed to govern the registration of Mexican trucks. FMCSA entered the picture at this point, because this agency was responsible for composing and implementing the new registration regulations. FMCSA soon published for public comment several proposed rules that would govern the registration of the new Mexican-

83. Id.
84. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 760 (2004). Some of the specific American concerns about safety are described in the FMCSA's EA for the proposed regulations described in this section. FMCSA, Environmental Assessment, supra note 76, at 32. For example, a DOT Inspector General report found that Mexican trucks had 44 percent "out-of-service rate" in Fiscal Year 2000, compared to 24 percent for domestic carriers. The out-of-service rate measures the "frequency with which carriers' vehicles are placed out-of-service by safety inspectors due to the discovery of a serious safety defect," so it is a good way to measure the safety of trucking operations as a whole. Id. at 91-92. Later, before the NAFTA arbitration panel, the United States argued that "the Mexican safety regime lacks core components, such as comprehensive truck equipment standards and fully functioning roadside inspection or on-site review systems." The United States also cited the poor safety compliance record of Mexican trucks operating in the U.S. border zone and Mexico's lack of limits on driver hours. North American Free Trade Agreement, Arbitral Panel Established Pursuant to Chapter Twenty in the Matter of Cross-Border Trucking Services (Secretariat File No. USA-MEX-98-2008-01) available in Dep't of Transp. v. Pub. Citizen, 2003 U.S. Briefs 358, Joint Appendix, vol. II, 259, 266 [hereinafter Arbitral Panel].
85. See discussion of Chapter 20 dispute resolution procedures, supra Part I.C.
86. Arbitral Panel, supra note 84, at 258, 279.
87. Id. at 279. See also Part I.C supra for explanation of terminology.
88. FMCSA, Environmental Assessment, supra note 76, at 53. Refer to Part I.C, supra a country's right to retaliate with trade sanctions.
domiciled motor carriers. In order to allow FMCSA to determine if the applicant could meet safety standards, the "Application Rule" provided a detailed application form. The "Safety Monitoring Rule" established a safety oversight program designed to evaluate the safety fitness of Mexican carriers within eighteen months after receiving conditional operating authority.

When FMCSA published these initial proposed rules in the Federal Register in 2001 without any associated environmental review, it began to receive comments from groups that would be affected by pollution from Mexican motor carriers. Already heavily polluted and struggling to comply with National Ambient Air Quality Standards, California saw the future entry of new heavy-duty vehicles into its borders as a serious threat to both public health and its ability to comply with the CAA. The emissions from the trucks would include nitrogen oxides (a precursor to ozone pollution, or smog) and toxic particulate matter from diesel exhaust. California expressed concerns that the Mexican commercial carrier fleet was comprised of mostly older, higher-emissions trucks. Mexican trucks "were not subject to emissions controls prior to 1993," and when old trucks are rebuilt they are not required to meet modern standards. Other differences between the two countries' standards, such as the fuel used and the frequency of in-country inspections, also worried Californians. The California Attorney General argued that because of these projected impacts the project required a full EIS and a CAA conformity determination. Similarly, environmental groups claimed in their comments to FMCSA that Mexican trucks produce higher levels of nitrogen oxides, volatile organic compounds, carbon monoxide, particulate matter, and carbon dioxide. They also pointed out the comparative weaknesses of Mexico's regulations on the transportation

94. Id. at 234-35.
95. Id. at 239-40.
96. Id. at 240-41.
97. Id. at 242-43.
98. Id. at 234.
and handling of hazardous substances. The environmentalists echoed California's call for full review under NEPA.

At this point, Congress, motivated by safety rather than environmental concerns, intervened and placed a hold on the registration of Mexican trucks. Congress accomplished this by inserting a provision into the Department of Transportation and Related Agencies Appropriations Act of 2001 ("Appropriations Act"). This funding rider, section 350, directed FMCSA to follow a different process in registering Mexican motor carriers than it had originally planned to do and laid out specific heightened safety requirements for the Mexican trucks. The rider provided that that FMCSA could not spend any funds to process applications by Mexican motor carriers until the proposed application and safety rules were modified accordingly. "While the appropriations hold [was] in effect, any presidential" modification of the moratorium would produce no practical results "since FMCSA would still be prohibited from processing” Mexican motor carrier applications. Thus, section 350 made FMCSA’s promulgation of Congress’s safety rules a prerequisite to the entry of new Mexican motor carriers.

FMCSA started modifying the Application and Safety Monitoring Rules to comply with the congressional demands of section 350 of the Appropriations Act, and prepared a programmatic Environmental Assessment (EA) to accompany these rules. The EA concluded that the proposed regulations would require an increased number of roadside inspections of trucks, and that these inspections would cause certain minor environmental impacts, such as a slight increase in truck emissions.

Crucial to the litigation that would follow, FMCSA did not include all of the environmental impacts of increased cross-border trucking in its calculations. The agency stressed its limited statutory authority, stating

100. Id.
101. Id. at 287.
103. Id. § 350(a).
104. Id. This funding rider directed the FMCSA to require of Mexican motor carriers, among other things, proof of insurance, a satisfactory safety audit before issuing provisional operating authority, and a vehicle inspection every three months. The rider directed the DOT Inspector General to conduct a comprehensive review of border infrastructure and then certify that opening the border would not pose an unacceptable safety risk to the American public. The rider also imposed stricter requirements on the full compliance review of Mexican motor carriers, to be conducted within eighteen months after issuance of provisional operating authority.
105. FMCSA, Environmental Assessment, supra note 76, at 58.
106. Id. at 34.
107. See id.
108. Id. at 60.
that the law "requires FMCSA to issue a certificate of operating authority to any person... deemed willing and able to comply with designated economic, safety, and financial responsibility requirements."\textsuperscript{109} "Consequently," reasoned the agency in its EA, "the FMCSA is statutorily precluded from considering environmental issues in deciding whether to grant applications."\textsuperscript{110} The agency acknowledged that, after the lifting of the moratorium, "there could be an increase in the number of" trips made within the United States by Mexican motor carriers.\textsuperscript{111} However, "this ... would be the result of the modification of the moratorium and not the implementation of the Proposed Action."\textsuperscript{112} Based on this distinction, FMCSA concluded that a full EIS was not required and issued a Finding of No Significant Impact (FONSI) along with the EA on January 16, 2002.\textsuperscript{113}

Next, the FMCSA published the Application and Safety Monitoring Rules, updated to incorporate section 350's requirements, in the Federal Register on March 19, 2002.\textsuperscript{114} The programmatic EA and the FONSI were included in the docket to the Rules. The FMCSA delayed the effective date of these "interim final rules" until May 3, 2002 to allow public comment on the provisions that the agency had added to comply with section 350.

Also in the March 2002 version of the Rules, the FMCSA responded to earlier criticism of the agency's failure to comply with NEPA by pointing to the findings of its programmatic EA.\textsuperscript{115} In response to the California Attorney General's comment from 2001 that a CAA conformity determination was required, FMCSA argued that the project did not require a CAA conformity determination for two reasons.\textsuperscript{116} First, the agency alleged that all rulemakings that pertain to internal agency procedures receive a categorical exemption from the conformity requirement.\textsuperscript{117} Second, even if there is no categorical exemption, the air quality impacts from the new rules would not rise above the threshold that would trigger the conformity requirement.\textsuperscript{118} This conclusion that the air quality impacts were \textit{de minimis} seemed to be based on the same

\textsuperscript{109} Id. at 52.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 60.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 34-35.
\textsuperscript{115} Application, supra note 114, at 12,714, Safety Monitoring, supra note 114, at 12,770.
\textsuperscript{116} Application, supra note 114, at 12,704-05, Safety Monitoring, supra note 114, at 12,764.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
reasoning from the NEPA analysis that had allowed the agency to distinguish the effects of its rulemaking from the larger impacts of the lifting of the moratorium.

After the publication of these revised rules, the EA, and the FONSI, critics of the Mexican trucking plan had even more to complain about. The International Brotherhood of Teamsters, the California Federation of Labor, Public Citizen, and the Natural Resources Defense Council found the EA to be "woefully inadequate" and demanded the preparation of an EIS as well as a CAA conformity analysis. These groups argued that the regulations would increase overall trade between the United States and Mexico, causing increased environmental pressures. They also cited predictions that the proposed action would result in the use of Mexican-domiciled vehicles to carry freight currently carried by U.S.-domiciled trucks. Since the Mexican trucking fleet pollutes more than the U.S. fleet, any displacement of an American truck by a Mexican truck would tend to increase air pollution. The comments also stressed the extent to which several areas in California and Texas already struggled to comply with the NAAQS, and argued that FMCSA's regulations were not in conformity with those states' State Implementation Plans under the CAA. They concluded, based on a consultant's report, that the EA contained many technical and analytical inadequacies.

The California Attorney General submitted comments with similar criticisms: the EA was inadequate and further environmental review was needed before the FMCSA could say it had complied with NEPA and the CAA. The Attorney General said that the FMCSA had artificially limited the scope of its project's effects, and should have considered all of the environmental effects caused by the allowance of Mexican trucks into this county. Furthermore, the Attorney General alleged that the EA

120. Id. at 296-97.
122. Id. at 297.
123. Id. at 296-304. For instance, FMCSA did not consider the adverse air-quality impacts of the Mexican trucks to be an "indirect effect" of its regulations, it only examined the overall percentage increases in emissions nationwide rather than looking at the affected region, and it considered only short-term impacts. For more details on the alleged scientific deficiencies, see Sierra Research, supra note 121, at 307.
124. Lockyer Comments, supra note 93, at 372-73.
125. Id. at 378-79.
relied on outdated data, ignored significant emissions differences between Mexican and American trucks, failed to assess localized impacts, used an insufficient time frame, and ignored the toxic effects of diesel engine exhaust.126

III. DEPARTMENT OF TRANSPORTATION V. PUBLIC CITIZEN

A. The Parties

One day before the Application and Safety Monitoring Rules were to go into effect, a coalition of labor, environment, and consumer groups filed suit against the Department of Transportation under the judicial review provision of the APA.127 Public Citizen, the Brotherhood of Teamsters, Auto and Truck Drivers Local 70, the California Labor Federation, the California Trucking Association, the Environmental Law Foundation, and the International Brotherhood of Teamsters (collectively referred to in court documents as "Public Citizen") challenged the Application and Safety Rules on the grounds that FMCSA had failed to examine adequately the environmental consequences of these regulations, as required by NEPA and the CAA.128 On June 14, 2002, the court allowed the Natural Resources Defense Council and the Planning and Conservation League to intervene on behalf of these petitioners.129

B. The Ninth Circuit Demands Environmental Review

The Ninth Circuit Court of Appeals was the first court to review Public Citizen's allegations that FMCSA had violated NEPA and the CAA.130 The court initially addressed Public Citizen's standing to sue.131 The court found that it was reasonably probable that the President would rescind the moratorium once FMCSA promulgated the heightened safety regulations required by Congress (and in fact the President did so between oral argument and the written opinion in this case), thus there

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126. Id. at 378-385.
127. Dep't of Transp. v. Pub. Citizen, 316 F. 3d 1002, 1014 (9th Cir. 2003), overruled by 541 U.S. 752 (2004). Suit was filed on May 2, 2002.
128. Id. at 1009.
129. Id. at 1014.
130. Id. at 1014. The Court of Appeals had jurisdiction to review Public Citizen's petition under 28 U.S.C. § 2342(3)(A) (2000), which provides for direct review in the court of appeals of certain administrative actions.
131. Id. at 1014-20. Standing was a major issue in the Ninth Circuit case, but it is treated only briefly here to illuminate the contrasting understandings of causation developed in the appellate court and Supreme Court decisions.
was a sufficient causal link between FMCSA’s act and Public Citizen’s alleged injury to support standing.\textsuperscript{132}

The court asked for supplemental briefs from the parties once the President actually lifted the moratorium.\textsuperscript{133} FMCSA argued that granting relief to Public Citizen at this point would be “tantamount to enjoining Presidential action.”\textsuperscript{134} The court disagreed with this idea, reasoning that:

The President of the United States is not a party to this action, and the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c) . . . Our task here is relatively narrow: we are asked only to review the adequacy of the environmental analyses conducted by DOT before promulgating the three regulations.\textsuperscript{135}

Turning to the merits of the NEPA claim, the court found that FMCSA’s regulations were major federal actions significantly affecting the environment, so the decision not to perform a full environmental impact statement was arbitrary and capricious.\textsuperscript{136} Central to this finding was the court’s conclusion that the effects of the regulations included all of the effects resulting from the President lifting the moratorium. Because the agency’s rulemaking would trigger the President’s action, the agency’s action “caused” the increase in cross-border trucking.\textsuperscript{137}

The court dismissed FMCSA’s narrower understanding of the scope of the effects of its regulations as a novel and inadequate interpretation of NEPA.\textsuperscript{138} Echoing the causation analysis in the standing context, the court referred to CEQ regulations to find that the “reasonably foreseeable” effects of the regulations clearly included the full effects of increased cross-border trucking, and not just an increase in the number of roadside inspections.\textsuperscript{139} Furthermore, the court held that FMCSA’s restricted understanding of “effects” would contravene “the statutory command of NEPA, that environmental effects of government action be considered ‘to the fullest extent possible.’”\textsuperscript{140} Armed with this decision about the scope of the effects to be considered, the court explored several ways that the effects of a major federal action could be “significant” to conclude that, indeed, an EIS was required.\textsuperscript{141}

\textsuperscript{132} Id. at 1017-18. The President officially lifted the moratorium in November 2002. Id. at 1014.

\textsuperscript{133} Id. at 1020.

\textsuperscript{134} Id.

\textsuperscript{135} Id.

\textsuperscript{136} Id. at 1021-22.

\textsuperscript{137} Id at 1022.

\textsuperscript{138} Id.

\textsuperscript{139} Id.

\textsuperscript{140} Id. (quoting 42 U.S.C. § 4332 (2000)).

\textsuperscript{141} Id. at 1023-27. An example of the factors the court considered is the intensity of public health effects.
The court then confronted FMCSA's two claims about why its regulations did not require a full CAA conformity determination. FMCSA had continued to argue that (1) the total of direct and indirect emissions caused by the regulations fell below the amount that would trigger the requirement, and (2) that the regulations were categorically excluded as "rulemakings." Dismissing the first argument, the court stated that "[b]ecause of its illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry, DOT systematically underestimated the emissions that would result from its regulations." The court also found that FMCSA was clearly misinterpreting the narrow "rulemaking exception" in the EPA regulations, which applies only to "the process of developing and issuing federal regulations, as opposed to the substantive result produced by the actual implementation of the final rules." The court concluded that FMCSA had acted arbitrarily and capriciously in failing to prepare a conformity determination.

In its conclusion, the court emphasized that it drew "no conclusions about the actions of the President of the United States, nor the validity of NAFTA, neither of which is before us," and remanded the case to the DOT so that it could prepare a full EIS and CAA conformity determination for all three regulations.

C. The Petition For and Granting of Certiorari

Commentators perceived the U.S. Supreme Court's grant of certiorari as part of an ambitious judicial examination of the powers of the executive branch. These observers saw connections between the case and such issues as Vice President Cheney's refusal to comply with FOIA requests for Energy Task Force documents and the status of the Guantanamo Bay prisoners. The Cheney case and Department of Transportation v. Public Citizen were deemed "separation-of-powers cases" and "major tests ... of the limits of executive branch powers." To understand these perceived connections, it is necessary to look at the arguments advanced in the government's petition for a writ of certiorari.

142. Id. at 1029-30.
143. Id. at 1030.
144. Id. at 1031.
145. Id. at 1032.
146. Id. at 1032.
147. Tony Mauro, Battle Over Executive Branch Power Looms; Supreme Court Takes Up Two Cases That Test Presidential Authority on Privilege and Conduct of Foreign Policy, LEGAL TIMES 8 (December 22, 2003).
148. Id.
149. Id.
The Solicitor General, arguing on behalf of DOT and FMCSA, explicitly framed the issue as one of executive discretion.\textsuperscript{150} The government’s argument was twofold: (1) the court of appeals misapplied environmental laws; (2) the court’s decision would have disastrous policy consequences.\textsuperscript{151} The government relied heavily on its arguments that the lower court’s decision “constrained the President’s discretion to conduct foreign affairs” and “prolongs a significant trade dispute between the United States and Mexico.”\textsuperscript{152}

The factual framework set out in the petition emphasized the constitutional and global scale of the issues. The government cited the constitutional provisions defining the “President’s foreign-affairs power and Congress’s foreign-commerce power” and declared that NAFTA and ensuing trade reforms arise from a “joint exercise” of these powers.\textsuperscript{153} The government also minimized the role of the FMCSA, declaring it has “no authority to base [its] registration decisions on environmental considerations,” with rhetoric emphasizing the lack of discretion FMCSA enjoyed in composing its rules.\textsuperscript{154}

The government’s arguments for granting the petition are worth quoting here, since they show the emphasis on NAFTA and executive power that produced the buzz surrounding this case:

The President of the United States must be able to act quickly and with assurance to implement the decisions that are entrusted personally to him. That is particularly true when, as here, the President’s responsibilities involve relations with other nations. In this case, the Ninth Circuit has construed the environmental laws as contravening that constitutionally grounded necessity. The Ninth Circuit’s approach is unsupported by the relevant statues and inconsistent with agency regulations. If not overturned, the court of appeals’ decision will delay substantially the United States’ compliance with the North American Free Trade Agreement and the arbitration panel’s decision of February 2001. That delay is causing the Government of Mexico to continue its parallel restrictions on operations by United States motor carriers and to threaten new trade sanctions.\textsuperscript{155}

This argument for a broad foreign policy exception from environmental review is most likely what provoked speculation among commentators about this case. If the Court was to accept the government’s argument,
this could preclude environmental reviews wherever an agency action would limit the President's ability to "act quickly and decisively." This could constitute a significant change in the balance of environmental power. The Supreme Court granted certiorari on December 15, 2003.156

D. The Evidence Presented to the Supreme Court

Before exploring the Supreme Court's opinion on the merits, it is important to understand the highlights of the parties' briefs, because several of Public Citizen's arguments receive short shrift in the opinion itself. The government's brief continued to argue the same broad policy considerations about executive discretion that it had argued at the petition for certiorari stage. The government's brief also set forth an analysis of the substantive NEPA and CAA regulations that would be cited with approval in the eventual Court opinion, so that analysis is discussed below.

Meanwhile, Public Citizen framed the issue entirely differently, arguing strenuously against the "strained... suggestion that this case pose[d] a constitutional question about the President's foreign affairs power."157 Public Citizen focused on the expansion of FMCSA's discretion and authority caused by section 350 of the Appropriations Act, the provision that prevented FMCSA from registering Mexican motor carriers until certain heightened safety standards were in place.158 They argued that this provision clearly expressed Congress's intent that FMCSA authorization should serve as an independent prerequisite to the entry of Mexican trucks.159 Perhaps to check the force of DOT's rhetoric about the President, Public Citizen leaned heavily on rhetoric about Congress's powers, framing the challenge before the Court as one of respecting congressional authority.160 Public Citizen explained that Congress has "comprehensive power under the Commerce Clause to enact safety and environmental requirements."161 Thus, the issue was whether Congress intended, in enacting section 350, to require FMCSA to conduct environmental reviews.162 Public Citizen concluded that Congress ratified this interpretation when it twice reenacted section 350 after the Ninth Circuit decision.163

The parties also differed on the question of whether FMCSA could have chosen, based on environmental considerations, among various

158. Id. at 2-3.
159. Id. at 7, 16.
160. Id. at 18.
161. Id. at 16.
162. Id.
163. Id. at 26.
safety rule alternatives that were within its authority. Public Citizen contended that the agency had “meaningful discretion” over the content of the safety rules ordered by section 350, and therefore could exercise that discretion to mitigate the environmental effects of the entry of older, less safe Mexican-domiciled trucks. In other words, an EIS would allow the agency to identify safety standards that correlated with lower projected pollution increases. For example, they explained, the agency enjoys discretion over the frequency of inspections, and could choose a higher frequency with an eye to keeping out more aging, dirty trucks. This exercise of discretion would not involve blocking the entry of all trucks, and thus would not constitute the alleged interference with presidential authority and NAFTA. Public Citizen argued that FMCSA’s failure to consider such alternatives in its programmatic EA violated NEPA’s provision regarding alternatives. The government replied that since neither Public Citizen nor any of its allies raised this issue during FMCSA’s rulemaking proceedings, it could not be considered in court. This issue arose repeatedly in the oral arguments. As explained briefly below, earlier comments by Public Citizen on this issue could have made their position more tenable.

E. The Supreme Court: A Holding Limited to Statutory Interpretation

Justice Thomas delivered the unanimous opinion for the Court, which reversed the Ninth Circuit decision. The opinion almost entirely ignored the international implications of the case, focusing instead on domestic statutory interpretation. The Court concluded that NEPA and CAA do not require FMCSA to evaluate the environmental effects of increased cross-border trucking, because FMCSA lacks the discretion to prevent the increase. “[T]he relevant question,” according to the Court, was whether the increase in cross-border operations of Mexican motor carriers, with the correlative release of emissions by Mexican trucks, is an “effect” of FMCSA’s issuance of the Application and Safety Monitoring Rules; if not, FMCSA’s failure to address these effects in its EA did not violate NEPA, and so FMCSA’s issuance of a FONSI cannot be arbitrary and capricious.

164. Id. at 39.
165. Id.
166. Reply Brief for Petitioners at 8, Pub. Citizen (No. 03-358).
168. Id. at 764.
169. Id. at 756.
170. Id. at 764.
The Court’s analysis went on to define legal cause and effect in terms of remedy and redressability: if an actor cannot prevent an effect, then he is not legally the cause of that effect.171

The Court decided that FMCSA could not prevent the increased cross-border trucking. The Court first rejected, as both forfeited and insufficiently proven, Public Citizen’s arguments about the connection between truck safety rules and environmental impacts.172 Public Citizen alleged that FMCSA could have mitigated the environmental impacts of the increased truck traffic by issuing stricter safety rules, and therefore should have studied these alternatives in an EIS.173 However, Public Citizen did not clearly identify these concerns in their comments to FMCSA during the rulemaking process.174 Therefore they forfeited these objections.175 Furthermore, the Court stated, the “connection between enforcement of motor carrier safety and the environmental harms alleged in this case is... tenuous at best.”176

The Court proceeded to dismiss Public Citizen’s arguments about the significance of section 350, the funding bill rider.177 The Court found that FMCSA’s narrow mandate to register any motor carrier “willing and able to comply” with the financial and safety regulations means that it “has no ability to countermand the President’s lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States.”178 Although section 350 did restrict FMCSA’s ability to authorize cross-border operations of Mexican motor carriers, it did not grant FMCSA sufficient new authority to allow the agency to completely block those operations.179

The Court then stated what the rule about causation in the NEPA context should be. Public Citizen relied on an overly “unyielding variation of ‘but for’ causation.”180 The Court preferred an analogy to the...
tort law paradigm of proximate cause, and concluded that "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." Justice Thomas also relied on what he called a "rule of reason" that courts have read into NEPA. It instructs that an agency need only prepare an EIS if it would be useful to the decision-making process. This "rule of reason" informs the analysis about the underlying policies that courts must look to in attributing responsibility for an effect to an agency: only if an EIS would be useful should a court declare an agency legally responsible for the environmental impacts the EIS would reveal.

Justice Thomas then applied this rule, looking to the underlying policies behind NEPA. He declared that the NEPA EIS requirement serves two purposes, neither of which would be served by requiring an EIS here. First, it "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Since FMCSA lacked the power to act on any information produced by an EIS, this decision-making purpose was not served. Second, an EIS "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." Justice Thomas had a bit more trouble disposing of this "informational purpose," but he carefully chose his citations and worded his analysis to preserve the ultimate focus on decision-making by the agency itself. "[H]ere, the 'larger audience' can have no impact on FMCSA's decision-making, since, as just noted, FMCSA simply could not act" on this input. Any broader informational goals are therefore outside "NEPA's core focus on improving agency decisionmaking." He concluded that NEPA's purposes make it clear that the causal connection was insufficient to make FMCSA responsible for considering the environmental effects of the increased trucking.

The Court's major holding was

181. Id. (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 n.7 (1983)).
182. Id.
183. Id. at 768.
184. Id. (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).
185. Id.
186. Id. at 768 (quoting Robertson, 490 U.S. at 349).
187. See id. at 768-69.
188. Id. at 769.
189. Id. at 769, n.2.
190. Id. at 769.
that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a major Federal action.\textsuperscript{191}

Since FMCSA was not the legal cause of the increased cross-border trucking and subsequent air pollution, it did not need to include these effects in its environmental impact analysis. Thus FMCSA did not violate NEPA when it ignored those effects. Finally, the Court rejected Public Citizen’s argument that Congress had ratified the Ninth Circuit decision by twice reenacting section 350, declaring that “on the legal issues involved in this case, Congress has been entirely silent.”\textsuperscript{192}

In its brief treatment of the CAA issues, the Court found that emissions from Mexican trucks were neither “‘direct’ nor ‘indirect’ emissions” resulting from FMCSA’s regulations.\textsuperscript{193} The emissions were not direct because they will not occur at the same time or at the same place as the promulgation of the regulations.\textsuperscript{194} And they were not indirect because FMCSA would not maintain control over the emissions since it had no influence on truck emissions after licensing the carrier.\textsuperscript{195} Thus, FMCSA did not violate the conformity provision of the CAA.\textsuperscript{196}

The Supreme Court, by deciding against Public Citizen, removed the last obstacle blocking the Mexican motor carriers’ journey into the United States.

IV. AN INTERNATIONAL DISPUTE REVEALS THE WEAKNESSES OF DOMESTIC LAW

\textit{Department of Transportation v. Public Citizen} brings into sharp relief several flaws inherent in NEPA. The following analytical portion of the Note relies on the extensive legal, factual, and procedural background covered thus far to explore some of these problems. Then, legislative proposals addressing the truck pollution are described, as well as some broader legislative and judicial responses to the larger problem of NEPA’s soft spots. Some consideration is given to reform of the CAA, which failed just as decisively as NEPA did here.

\begin{thebibliography}{99}
\bibitem{191} Id.
\bibitem{192} Id. at 770 n.4.
\bibitem{193} Id. at 772.
\bibitem{194} Id.
\bibitem{195} Id. at 772-73.
\bibitem{196} Id. at 773.
\end{thebibliography}
A. The Decision Reveals the Inadequacies of NEPA

1. NEPA is Particularly Vulnerable to Judicial Narrowing.

The Supreme Court’s interpretation of NEPA in *Department of Transportation v. Public Citizen* is in line with other judicial interpretations of the statute which have steadily undermined its intentions and narrowed its reach. Because the substantive language of NEPA has proved too vague for judicial enforcement, the ambitious goal of integrated environmental management has been eclipsed by the EIS requirement.197 This section will discuss the expansive spirit of NEPA, including its substantive side, as well as the potential that exists for a broad understanding of the purposes of NEPA and the environmental review process. This section will then show how the Supreme Court has narrowed the reach of the statute, and lastly describe how constricted judicial interpretation produced an environmentally negative result in the Mexican trucking case.

a. The Goals of NEPA

NEPA is a comprehensive and holistic statute that sets out a philosophy as well as specific requirements. The policies, regulations, and public laws of the United States are to be interpreted and administered in accordance with NEPA’s policies “to the fullest extent possible.”198 It has proved difficult to understand exactly what faithful accordance with NEPA’s policies should mean. What is clear, however, is that NEPA’s authors had a vision of a substantive policy that would steer the nation towards better environmental conditions.

Lynton Caldwell, a distinguished professor of public administration and the intellectual father of the EIS, concluded recently that “viewed broadly with regard to the intentions of its sponsors, the full potential of NEPA has not yet been realized.”199 The broad purposes declared in the preamble included the declaration of “a national policy which will encourage productive and enjoyable harmony between man and his environment” and the promotion of “efforts which will prevent or eliminate damage to the environment.” Although the legislative history illustrates that the statute’s authors’ main goal was to inject environmental considerations into the process of governing, their aims

went beyond improving process. The authors of NEPA also intended to produce results that would change the environment "for the better."\(^{200}\) The Congressmen who created NEPA sought to stop doing "irreparable damage to the air, land, and water which support life on earth."\(^{201}\) They meant for NEPA to provide a mechanism to improve the environment and prevent further irreparable damage.\(^{202}\)

Some legal scholars have concluded that it is "more fruitful" to look at what the legislators were trying to solve than to try to deduce from the rather scarce legislative history what they intended to happen.\(^{203}\) One problem the legislators were trying to solve was an ignorance of environmental impacts that results in arbitrary and destructive agency decisions.\(^{204}\) Another problem they hoped to address, also carefully tied to agency decisionmaking, was administrative fragmentation and narrowly defined agency mandates.\(^{205}\) But NEPA wasn’t only responding to problems of information and agency organization. The statute was passed in recognition of "the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances."\(^{206}\) NEPA was a response to an upwelling of public concern over the worsening state of the environment.\(^{207}\)

It is also important to understand the holistic nature of the NEPA statute before judicial narrowing set in. Unlike other environmental statutes, NEPA integrates a "broad range of public issues—economic, demographic, ecological, esthetic, and ethical."\(^{208}\) NEPA supplements the

\(^{200}\) 115 CONG. REC. 26,572 (1969) (goal of House bill is to change the environment for the better).

\(^{201}\) 115 CONG. REC. 40,926 (1969).

\(^{202}\) Id. ("we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth); 115 CONG. REC. 40,926 (1969) ("the enthusiastic administration of these laws by the executive branch should bring a restoration of environmental quality in the United States of which we may all be proud").

\(^{203}\) Daniel A. Dreyfus and Helen M. Ingram, The National Environmental Policy Act: a View of Intent and Practice, 16 NAT. RESOURCES J. 243, 244 (1976). See also Paul J. Culhane, NEPA’s Effect on Agency Decision Making: NEPA’s Impacts on Federal Agencies, Anticipated and Unanticipated, 20 ENVTL. L. 681 (1990) (rather than trying to find clear legislative intent, it is better to understand NEPA as a product of various reformist pressures and ideas that found an outlet).

\(^{204}\) Staffs of Senate Committee on Interior & Insular Affairs & House Comm. on Science and Aeronautics, Congressional White Paper on a National Policy for the Environment, 90th Cong., 2d Sess. 18 (Comm. Print 1968) ("Alteration and use of the environment must be planned and controlled rather than left to arbitrary decision. Technological development, introduction of new factor affecting the environment, and modifications of the landscape should proceed only after an ecological analysis and projection of probable effects."). LINDSTROM & SMITH, supra note 197, at 33.

\(^{205}\) Dreyfus and Ingram, supra note 203, at 245-46.


\(^{207}\) Caldwell, supra note 199, at 208.

\(^{208}\) Id. at 204; See generally LINDSTROM & SMITH, supra note 197.
mandate of all agencies, even those whose primary missions seemingly have nothing to do with the environment. The policies, regulations, and public laws of the United States must be interpreted and administered in accordance with NEPA's policies "to the fullest extent possible." The CEQ regulations reflect this holistic and ambitious mandate. They require agencies to examine the cumulative impact of their actions, defined as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency... or person undertakes such other actions." Thus, the regulations provide that agencies must evaluate their actions in a realistic context.

b. The Purpose of Environmental Impact Statements

Although the primary purpose of an EIS is to inform agency decisionmaking, as Justice Thomas acknowledged in the Mexican trucking case, the CEQ regulations and the legislative history of NEPA indicate that there is a broader informational purpose as well. First, an EIS can serve as important information for decisionmakers other than the agency that prepares it. Significant evidence of this is found in the regulations about the "heart of the environmental impact statement," the discussion of alternatives. Agencies must include "reasonable alternatives not within the jurisdiction of the lead agency." Thus, the exploration of alternatives serves to inform other agencies and other decisionmakers. At least one court recognized this function of environmental review, though the holding was subsequently restricted by the Supreme Court. National Resources Defense Council v. Morton noted that NEPA was intended, within the rule of reason, to provide a basis of discussion for legislative as well as executive decision makers.

211. Regulations for Implementing NEPA, 40 C.F.R. § 1508.7 (2005) ("Cumulative impact"). This regulation, however, is also subject to judicial narrowing beyond all meaning when the overall spirit of NEPA is not respected. In Department of Transportation v. Public Citizen, the Supreme Court rejected the idea that the cumulative impact regulation changed the analysis. 541 U.S. 752 (2004). The Court stated that

FMCSA appropriately and reasonably examined the incremental impact of its safety rules assuming the President's modification of the moratorium. . . . The 'cumulative impact' regulation does not require FMCSA to treat the lifting of the moratorium itself, or consequences from the lifting of the moratorium, as an effect of its promulgation of it Application and Safety Monitoring Rules.

Id. at 770.
213. Id.
There is some evidence that the congressional drafters of NEPA wanted more information about the proposals they were receiving from executive agencies, especially on alternatives to the proposal. Thus it is possible to see Congress as the ultimate decisionmaker for whom the information from an EIS is intended. The potential for legislative change appears to be the only basis for justifying the CEQ's instruction that "potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered." The CEQ explained that “[a]lternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the congressional approval or funding in light of NEPA's goals or policies.” The CEQ regulations, bolstered by Congress's goals in enacting NEPA, thus suggest that that environmental review documents are valuable for everyone in the government, not just the agency that creates them.

NEPA also ensures that the public is aware of the environmental consequences of government actions. Agencies are to make "diligent efforts" to involve the public throughout the NEPA process. Furthermore, the controversial nature of a proposal should be factored into an agency's evaluation of the significance of a project's impacts. This rule underscores the idea that in addition to improving the internal agency decisionmaking process, NEPA also provides a structured forum for public debate. EIS's can serve as useful organizing tools for the communities where projects are planned. This educational and political value of environmental review should not be overlooked.

Many agencies and academics have criticized the EIS process as overly time-consuming and burdensome. But the information developed in the EIS process is extremely valuable. NEPA review has resulted in more protection of the environment in federal

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217. Id.
218. Other requirements of NEPA, 40 C.F.R. § 1506.6 (2005).
221. See Bradley C. Karkkainen, Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance, 102 COLUM. L. REV. 903, 918 (May 2002); Federal Highway Administration, Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance § 4.1.1 (May 8, 2001) at http://environment.fhwa.dot.gov/strmng/baseline/index.htm (on average an EIS took 3.6 years to complete, with some taking up to twelve years).
undertakings. One authority explains that “this has come about because of the NEPA review process and the resultant changes in projects, such as alterations in project design, location, or operation; agency consideration of a greater range of alternatives; implementation of mitigation measures; and enhanced opportunity for public involvement in the decision-making process.” Lynton Caldwell concurs: “[t]o the extent that the NEPA Process informs decisionmaking, the Act must generally be accounted a success. It has caused reconsideration, redesign, and even withdrawal of federal projects ... forced ... public disclosure ... and has facilitated inter-agency cooperation.” Thus NEPA has a great potential for many valuable results, especially if its multipurpose, visionary nature is given proper respect.

NEPA’s Lackluster Performance in the Higher Courts

Despite NEPA’s ambitious goals and wide-ranging potential for serving as our country’s environmental constitution, the brevity of its provisions and the vagueness of its substantive language have had an undermining effect. After a few years of generous interpretation by the lower courts, the Supreme Court began deciding against NEPA plaintiffs. Because courts are the major enforcers of NEPA’s environmental mandate, judicial hostility to expansive readings of NEPA has doomed a substantive role for the statute.

NEPA’s policy and procedural components both suffer from vagueness. The goals of “fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations” and “attain[ing] the widest range of beneficial uses of the environment without degradation” are admirable, but it is not clear what exactly they

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222. JACOB I. BREGMAN, ENVIRONMENTAL IMPACT STATEMENTS, 2 (2d ed. 1999).
223. Id.
224. Caldwell, supra note 199, at 207.
226. Aberdeen & Rockfish R. R. Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975) (finding sufficient consideration of environmental issues); Kleppe v. Sierra Club, 427 U.S. 390 (1976) (finding no need to prepare an EIS on an entire region when all the proposals were for actions of either local or national scope); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976) (holding that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way); Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978) (ruling formulation of procedures is basically to be left within the discretion of the agencies); Andrus v. Sierra Club, 442 U.S. 347 (1979) (holding agencies need not prepare environmental impact statements to accompany appropriations requests); Strycker's Bay Neighborhood Council, Inc. v. Karlen 444 U.S. 223 (1980) (holding that the only role for reviewing court is to ensure that procedural requirements have been met).
instruct an agency to do. Agencies and courts could interpret these substantive provisions to be decisive in close cases, but that has not been the path taken. In fact, consequences must be "considered," but courts do not require an agency to choose a course of action that furthers the substantive goals of NEPA. Only if an agency fails to comply with the procedural requirements of NEPA will the court issue an injunction commanding the agency to try again.

Even NEPA's procedural instructions leave many holes: NEPA does not indicate when an agency must prepare an impact statement; it does not say what alternatives must be considered, it does not indicate if an agency must hold hearings; it does not indicate whether agencies may delegate the responsibility to prepare an impact statement; and it does not provide for judicial review. The binding CEQ regulations fill some of these gaps, but others remain open for courts to fill. Courts have taken this opportunity to create an extensive "common law" of NEPA. The lower federal courts were the first to interpret NEPA, and they were receptive to a broad interpretation of NEPA's possibilities. These courts made NEPA judicially enforceable, often took a "hard look" at agency decision-making, and read the statute expansively. For example, in 1971 the D.C. Circuit called NEPA the broadest and perhaps most important of the recent environmental statutes, demanded good faith consideration of environmental values "at every distinct and comprehensive stage of the process," and required an "exercise of substantive discretion which will protect the environment 'to the fullest extent possible.'" But the winds changed in the mid-1970s when the Supreme Court intervened. In the first influential Supreme Court NEPA case, Kleppe v. Sierra Club, the Court rejected a lower court's balancing test for evaluating the timing of an EIS. The Court refused to require an EIS before there was a clear "recommendation or report on a proposal for federal action," on the grounds that a vaguer rule would result in the preparation of too many unnecessary impact statements.

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231. MANDELKER, supra note 227, § 3:1.
232. Id. § 3:2.
233. Id. § 3:7.
234. Id.
237. Id. at 406 (quoting Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 320 (1975)).
Kleppe also instructed that a court should never substitute its own judgment about environmental consequences for that of an agency.238

To this day, the Supreme Court has never decided in favor of a NEPA plaintiff.239 The Court has both drained NEPA of all substantive meaning and carved out exceptions to the procedural requirements.240 Meanwhile, the lower courts' response to NEPA has continued to be slightly more varied,241 but overall judicial interpretations of the statute have prevented it from having the wide-ranging influence its authors expected.

NEPA's pliability makes it particularly susceptible to reflecting a judge's ideology.242 Like constitutional law, it is easily manipulated to produce any desired result. A study produced by the Environmental Law Institute found a dramatic correlation between the outcome of NEPA cases and the party affiliation of the presiding judge, using the party of the President who nominated that judge as a proxy.243 Federal district court judges appointed by a Democratic president ruled in favor of

238. Id. at 410.
239. See Aberdeen, 422 U.S. 289 (finding sufficient consideration of environmental issues); Kleppe, 427 U.S. 390 (finding no need to prepare an EIS on an entire region when all the proposals were for actions of either local or national scope); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976) (ruling that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way); Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978) (holding formulation of procedures is to be left within the discretion of the agencies); Andrus v. Sierra Club, 442 U.S. 347 (1979) (finding agencies need not prepare environmental impact statements to accompany appropriations requests); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (finding only role for reviewing court is to ensure that procedural requirements have been met); Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139 (1981) (holding that disclosure of an EIS that contains classified national security information is not compulsory); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) (ruling that environmental effects do not include the risk of psychological harm); Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87 (1983) (holding generic rules on evaluating the environmental effects of a nuclear power plant's fuel cycle did not violate NEPA); Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989) (holding that agency decision not to supplement an existing EIS after new information was discovered was not arbitrary and capricious); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (finding that NEPA did not require a fully developed plan detailing what steps would be taken to mitigate adverse environmental impacts and did not require a "worst case analysis"); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) (holding that failure to show the injury in fact necessary to give rise to standing).

240. On the lack of substance in NEPA, see Strycker's Bay Neighborhood Council, 444 U.S. at 227 (NEPA's "mandate to the agencies is essentially procedural"). On procedural exceptions, see, e.g., Andrus, 442 U.S. at 347 (holding that agencies need not prepare an EIS for appropriation requests); Weinberger, 454 U.S. at 139 (holding that disclosure of an EIS that contains classified national security information is not compulsory); Vermont Yankee, 435 U.S. at 519 (finding that agencies' procedural duties are bounded by what is feasible).

241. See, e.g., Ashcroft v. Dep't of Army Corps of Engineers, 526 F. Supp. 660 (W.D. Mo. 1980), aff'd 672 F.2d 1297 (8th Cir. 1982) (examining the reasonableness of the agency's action); MANDELKER, supra note 227, § 3:7.
242. AUSTIN, supra note 12.
243. Id.
environmental plaintiffs just under 60 percent of the time, while judges appointed by a Republican president ruled in their favor only 28 percent of the time.\(^{244}\) The Institute found “[a]n even more striking pattern” in the three-judge panels of federal circuit courts, where Democrat-dominated panels ruled in favor of environmentalist NEPA plaintiffs six times as often as Republican-dominated panels.\(^{245}\) This pattern indicates that NEPA cases are not being decided objectively on the merits according to traditional statutory interpretation. NEPA is, unfortunately, a vehicle for turning a judge’s ideology into precedent, and is therefore highly vulnerable to narrow judicial construction.

d. Narrow Judicial Construction in Action

i) An avoidable but predictable result

We must not lose sight, in the midst of the complex statutory schemes and political disputes in this case, of the result produced by the Supreme Court’s decision: no one will be studying the impacts of opening the U.S.-Mexico border to Mexican trucks and buses. Although it is believed that the pollution generated by the aging Mexican trucking fleet will have negative health impacts on the border region’s population,\(^ {246}\) it is not clear just how bad those impacts will be, because no comprehensive study has been done under NEPA or the CAA. Both Texas and California have severe air quality problems. The liberalized trade in cross-border trucking services will certainly worsen these problems, making it more difficult for these states to comply with National Ambient Air Quality Standards. California representatives are particularly concerned about diesel exhaust, which is known to cause cancer.\(^ {247}\) "A study conducted by the South Coast Air Quality Management District in 2000... determined that 70 percent of the cancer risk from air pollution in the South Coast Air Basin is attributable to diesel engine exhaust.”\(^ {248}\) This exhaust causes other health risks as well, such as asthma and other respiratory diseases.\(^ {249}\) When the Mexico-domiciled motor carriers enter this highly polluted region, these health problems will only increase.

*Department of Transportation v. Public Citizen* could have come out the other way, as it did in the Ninth Circuit, but the anti-NEPA result was predictable given the Court’s history of narrowing the reach of NEPA at

\(^{244}\) Id.

\(^{245}\) Id.

\(^{246}\) *See Sierra Research, supra* note 121, at 307.

\(^{247}\) *See An Act to Amend Section 43701 of the Health and Safety Code, California A.B. 1009 § 1(a), Sept. 29, 2004.*

\(^{248}\) Id.

\(^{249}\) Id.
every turn. A brief explanation of why the case could have come out differently under a more favorable understanding of NEPA is in order. The reader should recall that the Ninth Circuit concluded that FMCSA had to conduct an EIS incorporating the effects of the increased cross-border trucking. The circuit court reached this result by approaching the case with an attitude that was much more sympathetic to NEPA. Also crucial to the tenor of the Ninth Circuit's decision was the emphasis on NAFTA's provisions that reserve for the parties the right to enact environmental protections and to have federal law prevail over treaty law. This helped the court avoid characterizing the entrance of the Mexican trucks as the President's decision.

The court's decision diverged from the Supreme Court's on the issue of causation. The court concluded that the full effects of increased cross-border trucking must be considered indirect effects of the FMCSA's regulations since they were "reasonably foreseeable." This was a legally justified interpretation, but it was overturned by the Supreme Court's narrow understanding of the policies behind NEPA and the implications of those policies for the boundaries of legal cause. In other words, the strongest critique the Supreme Court could muster of the Ninth Circuit's reasoning was that it misinterpreted the meaning of the word "cause" in the CEQ regulations that define indirect effects ("effects include ... indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.").

Another reason why the outcome in the Supreme Court was not the inevitable legal result is that a court-ordered EIS produced by FMCSA would not necessarily have been a futile action. An EIS would have served at least some of NEPA's purposes, even if the action-forcing mechanism could not work directly on FMCSA. More information on the specific environmental impacts of increased cross-border trucking would have been particularly useful to border state governments and public interest groups seeking to further engage the public on the debate about trade and the environment. This increased debate could certainly have

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251. Id. at 1011-12.
252. Id. at 1020. "The President of the United States is not a party to this action, and the issues before us do not touch on his clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c). We similarly reject DOT's assertion that the relief Public Citizen seeks will somehow affect NAFTA's viability. Again, neither the validity of nor the United States' compliance with NAFTA is before us. Our task here is relatively narrow: we are asked only to review the adequacy of the environmental analyses conducted by DOT before promulgating the three regulations." Id.
253. Id. at 1022.
changed the ultimate decision by Congress and the President about allowing the entry of the trucks, and therefore a full EIS and CAA conformity determination would not be the useless documents that the Supreme Court concluded they were.

ii) A recipe for pollution

As will be demonstrated below, another scholar has already denounced as inappropriate the Supreme Court's importation of the "legal cause" concept from tort law into NEPA jurisprudence. Arguably, the Court's method is overly subjective, which only heightens the problems of NEPA's pliability that have already been discussed here. The two critiques are explained here, with the terms "legal cause" and "proximate cause" used interchangeably.

One commentator has pointed out that the policy concerns that underlie NEPA are different from those motivating the tort law concept of proximate cause. Both tort law and NEPA use the term "foreseeability," but in different ways. In tort law, proximate cause is a tool used by courts to limit a defendant's liability to those effects that, after the fact, a court deems "reasonably foreseeable." This delineation is a policy-driven process that asks what substantive liability it is fair to impose on the defendant. In contrast, in the NEPA context there is no substantive liability, and the policy reasons behind the statute favor a broader conception of "foreseeable" effects, so a less restrictive version of causation is appropriate.

Even if one does accept Justice Thomas's analogy to proximate cause as an appropriate tool for NEPA cases, there remains the problem of the subjectivity of the test he poses. He suggests that courts "look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." This brings us back to the same problems we have seen with NEPA all along: what exactly was the legislative intent, and how much is a judge willing to do to enforce NEPA

256. Id. at 49.
257. Id.
258. Id.
259. Id.
260. Id. at 50.
261. The Supreme Court has not always had such a great admiration for the trustworthiness of the concept of proximate cause. The Court has called it an "elusive" concept and stated that "the principle of proximate cause is hardly a rigorous academic tool." Blue Shield of Va. v. McCready, 457 U.S. 465, 478 (1982).
underlying policies? If the judge does not strongly value the environment or public participation in government decisions, he can define NEPA's legislative intent narrowly, to conclude that there is no legally sufficient causal connection.

That is exactly what happened in Department of Transportation v. Public Citizen. Justice Thomas set forth limited understandings of NEPA and the EIS requirement, and then used that as his basis for concluding that it would not be in line with legislative intent to force the FMCSA to evaluate environmental impacts they could not avoid. He defined NEPA as a merely procedural statute, and then he explained that the only purpose of an EIS is to inform agency decision-making. With these postulates in one hand and the "legal cause" framework in the other, it was simple to conclude that FMCSA's decision not to perform a full EIS was reasonable. Thus, the combination of a weak law with an inappropriate and subjective analytical tool, in the hands of a conservative judge who wants to interpret the purposes of NEPA narrowly, quite predictably produced an anti-environmental result.

The problem with NEPA is that cases can come out one way or the other, depending on how the judge wants to rule, whether for valid legal reasons or suspect ideological ones. Since the statutory language and informational purpose lack clarity, a judge can easily overlook the holistic nature of NEPA and come up with a narrow interpretation of the issue at hand. NEPA's legislative authors and judicial interpreters must share the blame for outcomes that fail to protect the environment.

2. NEPA Does Not Apply to the President

Another weakness of NEPA revealed by the Mexican trucking case is that it doesn't apply to all actors making decisions about "major federal actions significantly affecting the quality of the human environment," because it does not apply to the President or the Executive Office of the President. This section will discuss this Presidential loophole, and show that the exemption of presidential actions from environmental review means much more now than it did at NEPA's creation. That is because we are now in an era of international trade agreements executed by the Congress and the President without much role for the administrative agencies or the courts. Thus, trade agreements go unscrutinized, though this is one of areas of federal action where we most would benefit from environmental impact analysis.
a. Origins of the Problem

Some provisions of NEPA refer to the policies and responsibilities of "the Federal Government," but the decisionmaking process outlined in section 102 is directed only towards "all agencies of the Federal government." Thus, the statutory language makes clear that only federal agencies must comply with the EIS requirement. Although the CEQ regulations provide that "the President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101," the regulations generally only impose duties upon federal agencies. The CEQ made it clear that "federal agency" "does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office." Lynton Caldwell, who is as good an authority as any on the legislative history of NEPA, hints at the origin of the presidential loophole when he says "[t]he possible question of the constitutionality of federal legislation on environmental policy was avoided by basing NEPA on the power of Congress to provide for the administration of the federal government." This statement indicates that Congress believed, probably rightly, that it did not have constitutional authority to dictate decisionmaking procedures and policy priorities to the President. There seems to have been only one legislator who contemplated that NEPA might be interpreted to apply beyond federal agencies. Representative William Harsha, a Republican from Ohio, expressed fears that NEPA would be "so wide sweeping as to involve every branch of the Government, every committee of Congress, every agency, and every program of the Nation." These fears were apparently not shared by any other legislator, as NEPA was enacted less than two weeks later, unchanged.

b. The Presidential Loophole Encompasses Trade Agreements

In this era of free trade, key decisions about domestic environmental quality are being made by the President in his foreign affairs capacity. This happens because international trade agreements are negotiated and overseen by the United States Trade Representative, which is part of the Executive Office of the President. Because the Representative is not affiliated with a federal agency, its actions are not subject to NEPA review. Trade agreements can make sweeping changes to the structure of the American economy. Since the economy and the environment are

265. Caldwell, supra note 199, at 213.
266. 115 CONG. REC. 40,928 (1969).
intimately interrelated, economic changes inevitably impact issues of energy policy, natural resource use, and pollution. The Mexican trucking controversy illustrates well this phenomenon, whereby trade agreements essentially decide issues of environmental policy. The opening of the border to Mexican motor carriers was negotiated in NAFTA Annex I. This effectively committed the United States to bearing the burden of extra pollution. However, there was no public outcry over the air quality impacts of this provision of NAFTA, probably because watchdog groups did not have enough information to predict accurately these impacts. These groups did not have information because no federal agency was sufficiently involved in the negotiations of this provision to trigger NEPA. In this case, the presidential loophole turned out to be big enough to drive a truck through.

c. The Balance of Environmental Power

The new international trade regimes effect an unanticipated change in the balance of power over domestic environmental regulation. There is no consideration in NEPA's legislative history of the role of trade agreements in setting environmental policy, probably because NEPA was enacted before there was extensive public debate about the interaction between foreign trade and the environment. The authors of the statute assumed NEPA would apply only to federal agencies, not the President or Congress. They did not seem to think this limitation would prevent NEPA from accomplishing the goal of environmental protection. Legislative intent aside, the twenty-first century is witnessing a significant shift in the power relationship between the President and other decision

267. Public Citizen, in fact, sought to compel the Office of the U.S. Trade Representative to prepare an environmental impact statement for NAFTA. Public Citizen first sought to compel an EIS in 1991. The D.C. Circuit ruled that because NAFTA was still in the negotiating stages, there was no final agency action upon which to base jurisdiction under the APA. Pub. Citizen v. U.S. Trade Representative, 970 F.2d 916 (D.C. Cir. 1992). In 1993, when the President had signed and released a draft of the agreement, the group tried again. Pub. Citizen v. US Trade Representative, 5 F.3d 549 (D.C. Cir. 1993). The D.C. Circuit rejected Public Citizen's claim on the grounds that NAFTA was not a final agency action under the APA and therefore not reviewable by the court. Id. at 550. Because of the authority retained by the President to renegotiate the agreement and to refuse to submit it to Congress, the final submission of NAFTA to Congress was the result of his actions. Thus it was the President's actions and not that of the Office of the Trade Representative that affected the environmental groups. Since the President is not an agency for APA purposes, the submission of NAFTA to Congress was not reviewable under the APA. The court concluded "NAFTA's fate rests in the hands of the political branches. The judiciary has no role to play." Id. at 553.


269. Lynton Caldwell, in his 1969 report to the Senate, stated that after NEPA, "fewer environmentally controversial decisions would be made because ecologically injurious projects would be denied serious consideration in their early stages." LINDBRANT & SMITH, supra note 197, at 39.
makers. Thus the practical effect of excluding presidential decisions from environmental review grows larger, but our policy framework remains the same. *Department of Transportation v. Public Citizen* highlights the relative weakness of NEPA in an era where decisions are being made differently than NEPA’s writers anticipated. The permitting of thousands of heavy duty trucks would seem to be the kind of federal action with significant environmental impacts that should be scrutinized, but the presidential loophole has exempted this environmental policy from the NEPA process.

d. NEPA Substitutes

As discussed in Part I(C), during the ratification of NAFTA there was a lively debate in the United States about NAFTA’s effects on the environment. But the issue of the air pollution that would result from increased cross-border trucking never seemed to register on the public radar screen, perhaps because there were more significant environmental impacts to worry about. A truly rigorous environmental review would have had to analyze the specific provisions in NEPA that pertain to cross-border trucking, and thus would have predicted the impacts that the trucking would have on the environment and public health.

Although the United States Trade Representative did do a brief environmental analysis of NAFTA during negotiations, as well as a follow-up report after the completion of negotiations, these documents largely sought to extol the environmental virtues of free trade, and fell far short of the detail and depth of a proper EIS. The analysis often rested on abstract economic models and unproven assumptions about how the economy would develop and interact with the natural environment. For example, if “NAFTA results in greater prosperity for Mexico, then this should result in more money being available for well controlled and maintained vehicles and better fuels. This will, in turn, benefit both countries.” These reports claimed that the liberalized trade in cross-border trucking would benefit the environment by reducing border congestion, thus reducing air pollution in border cities. The United States Trade Representative’s follow-up report concedes that the border opening will increase the truck traffic and allow in more Mexican trucks, with their lower emissions standards and extra pollution. However, the report dismisses these problems by concluding that “[c]ooperation among the NAFTA countries should eventually harmonize commercial vehicle

271. NAFTA AND THE ENVIRONMENT at 540.
272. Id. at 248, 506.
emissions, engine manufacturing, and fuel standards, significantly reducing associated environmental problems." The Report further notes that, if Mexico adopts U.S. standards, the "only negative impact on air quality would result from any net increase in overall truck traffic resulting from increased economic activity." However, no further evaluation of that effect is given. Such perfunctory analysis suggests that the documents served largely to distract and placate environmentalists rather than to rigorously examine impacts.

It should be noted that in 1999 President Clinton put in place an Executive Order that requires the United States Trade Representative and CEQ to oversee environmental reviews of trade agreements. The order is not judicially enforceable, but President Bush has said that his administration will conduct written environmental reviews of major trade agreements. Guidelines implementing the Order were issued on December 19, 2000. The Order was not retroactive, so no review of the Mexican trucking issue was done under these guidelines. It remains to be seen whether these environmental reviews will prove accurate and transparent enough to fully mitigate the criticisms detailed in this Note. While certainly a step in the right direction, the guidelines implementing the Order do not mirror the procedural guarantees of NEPA, only cover

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273. Id. at 506.
274. Id. at 541.
275. In the discussion of transportation-related impacts of NAFTA on the U.S. interior, the authors of the 1993 report make many bold assumptions:

- This analysis assumes that Mexico will adopt: (1) more stringent standards comparable to U.S. standards, which are due to take full effect in the United States in 1996; (2) better fuel quality regulations; and better [inspection and maintenance] programs. Furthermore, it is assumed that more new catalyst-equipped vehicles will be purchased by Mexican citizens, and that these vehicles will be maintained better . . . .

- Therefore, while increased prosperity is likely to result in more trips by Mexican citizens to U.S. cities away from the border, this increase in vehicle miles traveled . . . is not likely to result in a major increase in overall emissions.

Id. at 540. On the effects of lifting the trucking moratorium:

- it is assumed that the NAFTA will result in an equalization of heavy duty ("HD") engine emission standards between Mexico and the United States. It is also assumed that Mexico will implement a low-sulfur diesel fuel requirement, due to the negative impact of fuel sulfur on expected future HD diesel aftertreatment devices. (This is a reasonable assumption, since NAFTA establishes a North American Automotive Standards Council, which will develop a work program to make fuel standards compatible.)

Id. at 541.

certain kinds of trade agreements, and do not provide mechanisms for legal enforcement.

B. Proposed Solutions

1. Addressing the Outcome of the Mexican Trucking Dispute

a. Proposed Trucking Legislation

Some legislators at the state and federal level responded quickly to the outcome of Department of Transportation v. Public Citizen. In the 2004 legislative session, identical bills were proposed in the U.S. House of Representatives and the Senate that would directly address the Supreme Court's finding that FMCSA lacks the authority to refuse to register trucks based on their emissions.279 However, both these bills died in committee when the legislative session ended, and will need to be reintroduced.

If enacted, the act proposed by the bills would be known as “The Clean Trucks Act of 2004.”280 If made law, these bills would modify the statute instructing the FMCSA to register any motor carrier that is “willing and able” to comply with safety and financial requirements.281 The bills would add a third requirement: compliance with “the heavy duty vehicle and engine emission performance standards and related regulations established” by EPA.282 Thus, any Mexico-domiciled truck that sought registration to operate in the United States would be obligated to meet domestic emissions standards. Such a provision would surely serve to lessen the pollution burden that will be borne by the heavily polluted border states worried about their Clean Air Act obligations.283

Additionally, the bills would require FMCSA to submit information about all truck operations to EPA, allowing EPA to publish estimates about the location and public health and regulatory impact of these truck emissions.284 EPA would publish these estimates “in a form and manner

280. Id.
281. Id. § 2.
282. Id.
283. It is unclear from the text of the bill, however, if it applies only prospectively to future truck models, or retrospectively as well. That is, would a Mexican vehicle made in 1990 need to meet the EPA's standards from 1990? If so, this bill would largely solve the pollution problem generated by opening the border to Mexican motor carriers. But if the bill only would obligate trucks built after the law's passage to meet American standards, the benefit to border states would be significantly less.
284. Id. § 3.
most useful to state air quality directors and transportation planners” for use in meeting Clean Air Act obligations. Thus, states would benefit both from stricter standards and better access to information.

The proposed Clean Trucks Act of 2004 would be an effective solution to the pollution problem underlying the Mexican trucking case. Unfortunately, the death of the bills in committee, plus the fact that the bills had no Republican co-sponsors, indicates that the political feasibility of the new legislation is not good. Nevertheless, it is an important legislative option that remains open. If the Mexican trucks and buses coming into this country in the coming years really do add a noticeable amount of pollution to the border states’ air, perhaps public outcry will resurrect the Clean Trucks Act.

Meanwhile, the California legislature has enacted a statute that will “to the extent permissible under federal law” require the owner or operator of any commercial motor truck that enters the state to demonstrate that its engine met the U.S. federal emissions standards for the year it was manufactured. This statute applies consistent emissions standards to foreign and domestic vehicles, and goes a long way toward solving the problem of the relative old age of the Mexican fleet. It seems likely, however, that this bill will be challenged in court on the grounds that it is preempted by federal law. A more extended inquiry into the likely success of these preemption challenges is beyond the scope of this Note.

b. Proposal for a Change to the Clean Air Act or its Regulations

The CAA or EPA’s conformity regulations could also be changed to address the situation where an agency’s rules lead quite predictably, though indirectly, to air pollution violations. The Court did not accept Public Citizen’s arguments that FMCSA would “practically control” and maintain control over the emissions, so these emissions did not qualify as the kind of “indirect emissions” for which FMCSA bore responsibility. This regulatory definition of “indirect emissions” is a good target for change, since the conformity requirement has substantive teeth: federal agencies may not proceed with an action that would interfere with a

285. Id.
287. For further analysis of the California statute, including discussion of potential preemption challenges, see Steve Schnaidt, “Analysis: Heavy-duty vehicle emissions” available at http://info.sen.ca.gov/cgi-bin/postquery?bill_number=ab_1009&sess=PREV&house=B&site=sen.
The EPA CAA regulations establish that “but for” causation is sufficient for purposes of evaluating causation in the conformity review process, so there is not the same kind of causation problem as in the NEPA regulations. Thus, if the pollution caused by the increased cross-border trucking were the kind of indirect emissions that FMCSA were responsible for, the agency would have had to perform a conformity determination for several different pollutants. It would most likely have discovered that the entry of Mexican trucks would put several border states out of compliance with the CAA, and thus FMCSA would be out of conformity with those states CAA implementation plans. Then, FMCSA would have had to commit to enforceable mitigation measures to prevent all increases in overall air pollution.

The EPA could initiate a rulemaking to change its regulatory definition of “indirect emissions.” The current definition is overly preoccupied with what emissions a federal agency can “control,” while the real focus should be on what a federal agency can realistically do to mitigate emissions. The new definition ought to make some accommodation of a federal agency’s limited ability to predict and mitigate all of the emissions that its actions will indirectly cause. The EPA could redefine “indirect emissions” to mean those covered emissions that (1) are caused by the federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and (2) the federal agency can practicably mitigate. This will likely make some federal projects prohibitively difficult. However, any blocked project would only meet that fate if it caused increased air pollution in regions that are not currently attaining national air quality standards. In a sense, this regulation would merely require federal agencies to internalize the costs of pollution increases that they currently externalize to states and localities.

293. In the present matter, the FMCSA arguably could have mitigated the air pollution effects of opening the border to Mexican trucks. The agency could have exercised its discretion to impose more rigorous safety standards at a higher level of monitoring, which would cut down on the number of vehicles on the road (or encourage the use of newer, safer, less polluting vehicles), thus improving air quality.
294. 40 C.F.R. 93.153(b).
There could be a problem if a legal challenge were brought to this new regulation, alleging that it violated congressional intent by overly expanding the responsibility of federal agencies. Thus, it might be necessary to pass an amendment to the CAA underscoring Congress’s commitment to easing the heavy burden that states face in attempting to uphold their end of the cooperative federalism bargain. A legislative amendment could contain wording similarly to the regulation proposed above, emphasizing a requirement that federal agencies must internalize the costs of pollution they cause by mitigating any increases that push states out of compliance with air quality laws.

2. Judicial and Legislative Collaboration: Overarching Remedies for NEPA’s Failure

a. Judicial Interpretation

The larger problems posed by the Supreme Court’s ruling in Department of Transportation v. Public Citizen are more difficult to solve than the specific air pollution issue. Without legislative change to NEPA, the statute’s loose and ambiguous language will continue to allow narrow judicial interpretation. And international trade agreements will continue to be subject to environmental review only through a judicially unenforceable executive order. However, a court confronted with a situation similar to the one in this case has two ways of calling for more environmental impact analysis: interpret legal cause differently than the Supreme Court did, or distinguish the case on the facts.

As explained in Part A(1)(d), there are ways of understanding NEPA’s underlying policies that would justify granting legal cause status to an agency in FMCSA’s position. A judge could comply with the Supreme Court’s advice to courts to “look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not,” but reach a conclusion different from the Court’s. This possibility stems from the ambiguity of NEPA’s legislative intent. A court could support a finding of causation based on the kinds of arguments that the Ninth Circuit made in the Mexican trucking case: NEPA adds to the mandates of all agencies, NEPA is a visionary policy declaration, all agencies must comply with NEPA to the fullest extent possible. Concerns about the futility of an EIS produced by an agency with limited discretion could be addressed by pointing to the possibility that decision makers with more discretion may be affected, especially if the information provided by environmental review is shared with the public, leading to
political pressures. Concerns about the cost of producing an EIS would nonetheless continue to stand as obstacles.

Another possibility for a judicial fix would involve narrowly interpreting the decision in *Department of Transportation v. Public Citizen* to apply only when the agency involved has absolutely no discretion. Courts can continue to require full Environmental Impact Statements as long as the agency has some discretion. As long as an agency can act based on the information contained in an EIS, the decisionmaking function of environmental review would be fulfilled. The Court’s refusal to explicitly create a broad foreign affairs exception to NEPA is helpful here, because the opinion does not go the extra step urged by the Solicitor General to hold that courts must preserve the President’s ability to act quickly and decisively. The “legal cause” analysis only requires courts to carefully examine agency discretion to see if the agency can act based on an EIS. Thus, in a future case where the facts are slightly different, such that the agency involved has more discretion, a court need not fear encroaching on the President’s ability to negotiate trade agreements. Under the Supreme Court’s analysis, for better or worse, balance of powers issues and international relations do not enter the NEPA inquiry.

**b. Legislative Action**

Since the judiciary is unlikely to undo its own narrowing of NEPA, perhaps legislative action is needed. An amendment to NEPA could make it clear that any involvement on the part of a federal agency would suffice to trigger the environmental review process and the obligation to uphold NEPA’s substantive policy. I am unwilling, just as Public Citizen was, to argue that the President and Congress should be explicitly subject to NEPA, since Congress likely does not have the power to impose decisionmaking procedures on these political actors. In some cases the

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296. Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 766-70 (2004) (FMCSA has no ability to countermand the President’s lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the U.S. . . . FMCSA simply lacks the power to act on whatever information might be contained in the EIS . . . We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect) (emphasis added).
297. Id. at 768.
298. See supra Part III.E.
President surely will need to be able to act independently and decisively in order to protect the national interest, such as in the event of a military crisis. Nevertheless, it seems appropriate to require compliance with NEPA as soon as an agency gets involved, whether or not this agency holds the ultimate decision-making responsibility. The entrance of the administrative agency would serve as a proxy for sorting out those presidential decisions that truly require unfettered discretion from those that encroach on the traditional administrative role of agencies. Also, classified information need not be shared with the public.\footnote{Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981) (holding that disclosure of an EIS that contains classified national security information is not compulsory).}

Furthermore, the environmentally negative result in this case illustrates why most trade agreements should not be exempted from NEPA and CAA conformity review. Trade agreements simply contain too many complexities and controversial issues to slide through the presidential loophole Congress created when it applied these procedural requirements only to federal agencies. The details of trade agreements are more properly left to administrative agencies, which are subject to several forms of oversight, than to a presidential office unaccountable to the legislature or the people. Trade agreements are now fundamental aspects of domestic economic life, no longer simply a subset of foreign relations. Legislatures must address this problem, particularly if the executive order mandating environmental review proves too weak at upholding legitimate procedures and public participation.\footnote{For an illustration of the benefit of environmental review and public participation, see SIERRA CLUB, supra note 295.} Again, a solution would be to legislate that NEPA requires review once a federal agency is involved in the process of administering a trade agreement. At the very least, society ought to be aware of the way that trade agreements bring large swaths of domestic economic, social, and environmental policy within the discretion of the President.

Lastly, substantive laws may have to do the work that NEPA is proving unable to do. It may be that NEPA's goal of improving environmental quality indirectly through better environmental information is unrealistic. A child breathing in the particulate matter and ozone that passes for air in some parts of Southern California would probably appreciate it if her leaders and legal advocates started creating, enforcing, and litigating environmental statutes with real substantive power.

CONCLUSION

The decision of the Supreme Court in \textit{Department of Transportation v. Public Citizen} highlights the inadequacies of our procedural
environmental laws. The legislative proposals described in Part IV(B)(1) of this Note could provide an effective response to the specific failures of the Mexican trucking decision. But to address the larger problems of NEPA in an era when trade agreements are more likely to set substantive environmental policy than are judges, we will need to amend or reinterpret the statute. When decisions about the environment are made by the President in trade agreements decades before the public knows their impacts, the weaknesses in our environmental laws become clearer at the same time that the need for powerful laws is ever more apparent.