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Supreme Court Allows Mexican Trucks To Enter the United States Without Environmental Impact Assessments

In *Department of Transportation v. Public Citizen*¹, the Supreme Court paved the way for Mexican trucks to enter the United States under the North American Free Trade Agreement (NAFTA). The Court overturned a Ninth Circuit decision that blocked the federal government from allowing the trucks into the U.S. until it had completed a full environmental impact statement (EIS).² The Ninth Circuit had determined that the Federal Motor Carrier Safety Administration (FMCSA) acted arbitrarily and capriciously in failing to issue an EIS for its regulations concerning Mexican trucks crossing the border.³ The Supreme Court disagreed, holding that since the FMCSA lacked the ability to prevent Mexican trucks from crossing the border, a study on environmental impact "would have no effect on FMCSA's decision-making—FMCSA simply lacks the power to act on whatever information might be contained in the EIS."⁴

The controversy over Mexican trucks began with the passage of the Bus Regulatory Reform Act of 1982. This act created a two-year moratorium on the entry of motor carriers from Canada and Mexico beyond restricted border zones, to be extended by the president if in the national interest.⁵ Congress made the moratorium permanent under the ICC Termination Act of 1995, allowing the president to rescind it for cause, including "the obligations of the United States under a trade agreement."⁶ One such obligation was NAFTA, signed in 1994, which expressly sought to eliminate barriers to trade such as the moratorium on foreign

¹. 124 S. Ct. 2204 (2004) [hereinafter *Public Citizen II*].
². *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002 (9th Cir. 2003) [hereinafter *Public Citizen III*].
³. *Id.* at 1022.
trucks entering the United States. Despite these NAFTA provisions, President Clinton refused to completely open the borders to Mexican trucks, responding to pressure from labor and environmental organizations. Clinton instead restricted the trucks to within 20 miles of the Mexican border. In February 2001, acting on a challenge from Mexico, a NAFTA arbitration panel determined that the moratorium on Mexican trucks in the United States violated the treaty. President George W. Bush announced his intention to comply with the arbitration panel and withdraw the moratorium once the Department of Transportation (DOT) issued new regulations allowing Mexican trucks to enter the United States.

In order to forestall President Bush's compliance, Congress, in the Department of Transportation Appropriations Act in December 2001, barred DOT from issuing permits to Mexican trucks to operate in the United States until it conducted a comprehensive review of its border operations and until the Secretary of Transportation certified in writing that opening the border to Mexican trucks did not "pose an unacceptable safety risk to the American public." In 2002, DOT complied with the Appropriations Act requirements and promulgated three regulations whose combined effect would have allowed the President to lift the moratorium on Mexican trucks. DOT then issued a preliminary Environmental Assessment (EA) for two of the three regulations as required by the National Environmental Protection Act (NEPA). In its assessment, DOT concluded that a full EIS was not required because the regulations did not significantly impact the environment. DOT did not prepare an EA for the third regulation, which dealt with the certification

of safety inspectors, since it determined this had no environmental impact.\textsuperscript{15}

Various consumer, labor, and environmental organizations (including Public Citizen, the Brotherhood of Teamsters, and the Environmental Law Foundation) challenged the regulations in May 2002, arguing that DOT failed to conduct an environmental impact statement as required by NEP\,A and also failed to conform with state law as required by the Clean Air Act.\textsuperscript{16}

\textit{Ninth Circuit Finds that DOT Violated NEPA and the Clean Air Act}

The Ninth Circuit examined whether the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."\textsuperscript{17} Under the APA, the court "must determine whether the agency articulated a rational connection between the facts found and the choice made." The petitioners asserted two violations of applicable law.\textsuperscript{18}

First, petitioners charged that the government lacked any basis for its decision not to prepare an EIS for its regulations. Environmental impact statements are required under NEP\,A for all "major Federal actions significantly affecting the...human environment."\textsuperscript{19} Agencies are permitted to first issue an environmental assessment to determine whether a full EIS will be necessary.\textsuperscript{20} If not, the agency can issue a Finding of No Significant Impact (FONSI), which DOT did with regard to these regulations. DOT argued before the court that the regulations would have little or no environmental impact, since the regulations themselves did not rescind the moratorium on Mexican trucks in the United States; instead, the President must end the moratorium in a separate action.\textsuperscript{21} The Ninth Circuit dismissed this argument, holding that it contravenes "the statutory command of NEPA, that environmental effects of government action be considered 'to the fullest extent possible.'"\textsuperscript{22} The government also unsuccessfully argued that its regulations would not significantly affect the environment, since any increase in local pollution would be "very small relative to the national

\textsuperscript{15} Id.
\textsuperscript{16} Id. at 1014.
\textsuperscript{18} Ariz. Cattle Growers' Ass'n v. United States Fish and Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001).
\textsuperscript{19} 42 U.S.C. § 4332(2)(C).
\textsuperscript{20} Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001). A full EIS is necessary if the Environmental Assessment finds the potential for a significant environmental impact. Id.
\textsuperscript{21} Public Citizen I, 316 F.3d at 1022.
\textsuperscript{22} Id. (quoting 42 U.S.C. § 4332).
levels of emissions." The court rejected the comparison with national emission levels, holding that DOT must analyze local or regional emission levels. The court also faulted DOT for failing to project the future impact of withdrawing the moratorium on Mexican trucks and for using arbitrary assumptions in determining that the number of trucks admitted into the United States would not be affected by ending the moratorium. The court ordered DOT to prepare environmental impact statements for all three regulations.

In addition to their procedural argument under NEPA, the petitioners also asserted that DOT failed to ensure that its regulations conformed with substantive state regulations required under the Clean Air Act. That Act requires all states to adopt a State Implementation Plan (SIP) for each pollutant regulated by the Act. It then forbids the federal government from taking any action not in conformity with a SIP. The government argued that it was exempt from this requirement, since its actions would not result in an increase in emissions, again relying on its "illusory distinction" between its regulations and the President's potential withdrawal of the moratorium. The government also argued that all federal regulations were exempt from these provisions of the Clean Air Act, since the Environmental Protection Agency listed "rulemaking" as an activity that had no bearing on emissions. The court dismissed "DOT's erroneous, albeit novel, assertion" as a misinterpretation of EPA's intent. Therefore, the court ruled that DOT failed to meet the conformity requirement of the Clean Air Act.

Supreme Court Overturns the Ninth Circuit

On June 7, 2004, the Supreme Court unanimously overturned the Ninth Circuit decision. In an opinion written by Justice Clarence Thomas, the Court disputed the Ninth Circuit's conclusion that the issuance of the regulations would be the "but-for" cause of the return of Mexican trucks, since the President would be ultimately responsible for removing the moratorium. The Court also held that the FMCSA simply lacked the power to determine whether Mexican trucks could cross the

23. Id. at 1023.
24. Id.
25. Id. at 1025.
26. Id. at 1032.
31. Id. at 1030.
32. Id.
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border, so an environmental impact statement would serve no purpose: “Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry.”

Regulations promulgated under NEPA require federal agencies to prepare an EIS for any “major Federal action” as well as “actions with effects that may be major and which are potentially subject to Federal control and responsibility.” Those “effects” can be direct or indirect, but they must be reasonably foreseeable. The Court found the relevant question to be whether any increase in emissions from the entry of Mexican trucks into the U.S. could be considered an effect of FMCSA’s rule-making. “[I]f 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.”

The Court held that the additional release of Mexican truck emissions could not possibly be an “effect” of the FMCSA’s rulemaking, since the agency lacked the statutory discretion to prevent Mexican trucks from entering the country. The agency is responsible for ensuring safety, establishing minimum levels of financial responsibility for trucks, and creating standards for safety inspections for commercial vehicles. FMCSA has only limited flexibility in registering commercial vehicles, since its authorizing statutes require that it “shall register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with” the DOT’s safety and financial responsibility requirements. The Supreme Court emphasized the word “shall” in the statute, indicating that FMCSA lacked all discretion if those requirements were met. Since the FMCSA cannot exclude Mexican trucks for environmental reasons if they meet safety restrictions, requiring the agency to create an environmental impact statement would serve no legitimate purpose. The plaintiffs could not show that the regulations would actually cause the increase in pollution from Mexican trucks, since the President would be ultimately responsible for lifting the

34. Id. at 2217.
35. 40 C.F.R § 1508.18 (2003).
36. Id. at § 93.152.
37. Public Citizen II, 124 S. Ct. at 2213.
38. Id.
39. Id. at 2214.
41. Id. § 13902(a)(1).
42. Public Citizen II, 124 S. Ct. at 2214-15.
43. Id. at 2215-16. For the same reason, the FMCSA did not violate the Clean Air Act conformity review. Id. at 2218.
moratorium. Public Citizen "must rest, then, on a particularly unyielding variation of 'but for' causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect." \(^4^4\)

The Supreme Court ruling may not have a major impact. The Bush Administration had already begun the EIS that the Ninth Circuit ordered last year and was close to completing it by the time of the Supreme Court decision. \(^4^5\) The Administration indicated that it would then allow Mexican trucks across the border as soon as it was free to do so. \(^4^6\) As many as 300 Mexican trucking fleets have applied to operate in the United States, and Mexican trucks currently make 4.5 million border crossings per year. \(^4^7\) White House spokesperson Claire Buchan indicated that the Supreme Court decision "is good for American workers and we welcome it. The president has been committed to opening the border to Mexican trucking in a way that ensures safety, and we're pleased that can now proceed." \(^4^8\) The government did not indicate how quickly Mexican trucks would be allowed into the United States, but a DOT spokesperson indicated that "[w]e'll move as quickly as possible." \(^4^9\) The government estimated that as many as 34,000 trucks would operate inside the United States once the moratorium is lifted. \(^5^0\) However, since the Supreme Court overturned the Ninth Circuit decision and negated the need for an EIS, the actual impact of these trucks on the nation's air quality remains unknown.

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\(^4^4\) Id. at 2215.
\(^4^6\) Id.
\(^4^8\) Gearan, *supra* note 45, at 4.
\(^5^0\) Id.