The Role of Social Cost of Carbon in Environmental Review

*By Aaron Gershonowitz**

In this article, the author addresses the use of social cost of carbon in the environmental review process.

Social cost of carbon (SCC) is a means of quantifying the costs related to emissions of greenhouse gasses.[1] The costs related to greenhouse gasses (i.e., climate change costs such as storm damage and droughts) are borne by society as a whole and not by the individual projects that contribute to those costs.[2] By quantifying those costs, decisionmakers can better compare projects and proposals and assess their potential impacts.[3] The environmental review process, required by the National Environmental Policy Act[4] at the federal level, and numerous state environmental review statutes at the state and local level,[5] is the process whereby government decisionmakers are required to consider environmental impacts of a project or proposal before approving the project or proposal.[6] This article addresses the use of social cost of carbon in the environmental review process or, more specifically, whether cost of carbon is an appropriate means of assessing potential impacts.

The recent decision by the U.S. Court of Appeals for the Ninth Circuit in *350 Montana v. Haaland* addressed a claim that an agency had violated the National Environmental Policy Act (NEPA) (i.e., had failed to take the required "hard look" at potential environmental impacts} because it refused to consider cost of carbon.[7] The case arose out of the decision by the Office of Surface Mining and Enforcement[8] (hereinafter referred to as Interior or the Agency) that a proposal to expand a coal mine did not need an environmental impact statement because it was not likely to have significant environmental impacts.[9] Environmental interest groups challenged that decision alleging that by not using social cost of carbon to quantify the environmental impacts, the agency's determination was arbitrary and capricious.[10]

The district court partially granted plaintiffs' motion for summary judgment and on remand, the agency revised its environmental assessment (EA) and its finding of no significant impacts (FONSI), but again declined to use the social cost of carbon.[11] Plaintiffs challenged that decision and the district court accepted the agency's explanation of why it did not use

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social cost of carbon and granted summary judgment to Interior on most of the claim.[12]

Plaintiffs appealed and the Ninth Circuit affirmed in part and reversed in part, holding that the agency was not required to use social cost of carbon in its EA, but that the agency violated NEPA because it failed to articulate "science-based criteria" to support the finding of no significant impacts.[13]

This article assesses the court's reasoning and what the decision means for future projects. At first glance, the decision appears to be internally inconsistent because the court concluded that failure to use the social cost of carbon as a criterion for measuring impacts did not render the approval arbitrary and capricious, but the approval was arbitrary and capricious because without use of social cost of carbon as its criterion, the agency had failed to articulate a science-based criterion for measuring impacts.

THE NINTH CIRCUIT'S DECISION IN *350 MONTANA*

The court began its discussion by noting that there were two issues before it: (1) whether the agency adequately reviewed environmental impacts, and (2) whether the conclusion that there are no significant impacts is reasonable.[14] The court noted that the requirement that agencies take a "hard look" at environmental impacts is procedural.[15] The standard of review in such a case is "arbitrary and capricious" and therefore a reviewing court will look to see whether the agency has provided "a convincing statement of the reasons" for concluding that environmental consequences are insignificant.[16] Some courts look at these two issues as one, reasoning that if an agency is not able to adequately explain the basis for its decision, the decision is arbitrary and capricious. The Ninth Circuit treated them as separate issues, so that an agency must take the required "hard look" at potential impacts and it must also provide a reasoned analysis in support of its conclusions.[17]

The EA noted a broad consensus relating greenhouse gasses to climate change and stated that climate change is having "alarming effects on our environment."[18] The EA stated that over the life of the mine, the emissions from the mine would equal about .44% of the total worldwide emissions in a single year.[19] The EA then concluded that these emissions would be minor on an annual basis and therefore, there would be no significant impacts.[20]

The court noted that Interior did not cite any scientific evidence to support Its conclusion that the impacts would not be significant.[21] It also did not articulate any criteria for determining significance with regard to climate change issues.[22] The court explained that the need for criteria for determining significance was critical, because Interior did not dispute the fact that this project may be the largest emitter of greenhouse gasses in the United States.[23] Interior's position must have been that the problem of climate change is so large, with so many sources, that no single source is significant. But if that was Interior's conclusion, it needed to be explained.

Interior argued that it identified the impacts by stating that the project would have emissions; emissions cause climate change; and climate change causes storms, droughts and other bad things.[24] It next discussed the significance by explaining the quantity of

emissions.[25] Quantity is often the starting point for determining significance. For example, New York's environmental quality review regulations list projects that are presumed to have significant impacts and size of the project is often the determining factor - a project that will affect greater than x acres of land is presumed to have significant impacts.[26] Then, Interior compared the emissions from this project with emissions of other projects and to worldwide emissions as part of their discussion of significance.[27]

What was missing, according to the court was a means to determine the significance of the emissions.[28] Interior stated that emissions cause climate change, which causes impacts. Interior also quantified the emissions.[29] What Interior did not do was find a meaningful way to connect a quantity of emissions to a quantity of climate change impacts.[30] Interior quantified the emissions, but not the impacts.[31] The only means of connecting emissions to impacts that was presented to the court was social cost of carbon, but Interior refused to consider that.[32]

Next, the court assessed the arguments regarding the social cost of carbon.[33] The court defined social cost of carbon as "a method of quantifying the impacts of [greenhouse gases (GHGs)] that estimates the harm, in dollars, caused by each incremental ton of carbon dioxide emitted into the atmosphere in a given year."[34] SCC was developed by an interagency working group that included representatives of Interior.[35] Interior argued that SCC was too uncertain because it resulted in too wide a range of values.[36] It also argued that SCC was created for analyzing proposed rules and was inappropriate for use in analyzing proposed projects.[37] The district court found that Interior had adequately explained its reasons for not using SCC and the Ninth Circuit affirmed that decision.[38]

Plaintiffs argued that SCC applies to projects in the same way that it applies to rulemaking.[39] The court responded by noting that the court's role is not to prescribe a method of analysis.[40] The court's role is to determine whether the agency adequately analyzed impacts and adequately explained its conclusion.[41] NEPA does not require a specific methodology or means of analyzing impacts, but it does require that the agency have some methodology and provide reasons for its conclusion.[42]

The court affirmed the district court's finding that use of SCC was not necessary.[43] It reversed, however, on the issue of whether the agency adequately explained its conclusion.[44] While ordinarily in such a case, the agency's decision would be vacated, pending further proceedings, the court declined to do so in this case.[45]

Judge Nelson, dissenting, argued that Interior's decision was not arbitrary and capricious because Interior's explanation was adequate.[46] The court understood the impacts of the project as follows: the release of large quantities of greenhouse gasses is the direct impact;[47] greenhouse gasses cause climate change and climate change causes disasters such as drought, floods, storm and fires. So, the court concluded that the indirect impacts of the project, the impacts whose significance needed to be assessed, include droughts, floods, storms and fires.[48] Judge Nelson did not believe these were the impacts that needed to be assessed because droughts, floods, storms and fires are going to occur even if this project is rejected.[49]

To understand the impacts of the project, one would need to explain how many additional droughts, floods, storms and fires would occur.[50] The court found Interior's identification of the impacts to be adequate and faulted Interior for not explaining how one should determine whether those impacts were significant.[51] To Judge Nelson, there is no way to predict how many droughts, floods, storms or fires would be caused by this project with any degree of accuracy and thus, what Interior did was adequate.[52]

Judge Nelson then argued that the court used the wrong rule when analyzing impacts.[53] The court required Interior to analyze and even quantify, what Judge Nelson viewed as remote and speculative impacts (e.g., might cause a storm or drought somewhere in the world).[54] The rule, however, requires a review of only those impacts that are "sufficiently likely to occur that a person of reasonable prudence would take into account in reaching a decision."[55] In other words, the analysis should be a negligence, proximate cause analysis, which clearly does not take into account remote and highly speculative results.[56]

Judge Nelson also disagreed with the court regarding whether some of the alleged impacts were, in fact, impacts.[57] For example, plaintiffs assumed that all the greenhouse gasses from the burning of this coal are impacts of this project.[58] However, Judge Nelson noted that the power plants in Japan at which the coal is intended to be burned, will be burning coal even if this project is rejected.[59] Indeed, coal from this mine makes up a very small percentage of the coal burned to produce electricity.[60] Judge Nelson argued that if a so-called impact would not be avoided upon defeat of the project, then it is not an impact of the project.[61]

DID THE COURT MAKE THE RIGHT DECISION?

What Are the Impacts of a Project?

To determine whether an agency has adequately assessed the environmental impacts of a project, we must understand the meaning of the word "impact" and then the meaning of "assess." Interior said that a key impact of the project would be the emission of greenhouse gasses.[62] The agency then quantified the emissions and compared that quantity to other projects and to worldwide emissions.[63] Plaintiffs argued, on the other hand, that impact means how a project will affect the human environment.[64] That means that emissions are not the impact, the impact is the floods, storms, droughts, etc., that are caused by emissions of greenhouse gasses.

Plaintiffs' argument was based on the Ninth Circuit's decision in *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*,[65] where the court explained that the total number of acres to be harvested was not an adequate measure of the impacts of a logging project. The logging would impact drinking water and wildlife habitat and the impacts that needed to be examined were the impacts on drinking water and habitat.[66] Similarly, the *Klamath* court explained that a for a road construction project, quantifying the miles of road to be constructed is not an assessment of the impacts of the project.[67] The agency would need to examine the impacts of that quantity of road.[68] If quantity of acres harvested and miles of road constructed are not a means of quantifying impacts, then quantity of emissions also should not be a means of quantifying impacts.[69]

Plaintiffs further reasoned, based on the

Klamath case, that if a project included the release of toxic substances into a river, simply quantifying the toxic substances would not be a review of the impacts of the project - the agency would need to go the next step and assess that how those toxic substances would affect the environment, e.g., fish will die and drinking water supplies will be threatened.[70] Similarly, explained the plaintiffs, quantifying the emissions of greenhouse gasses tells us nothing about the impacts of the project. To understand the impacts of the project, we need to examine how those greenhouse gasses will impact the environment.

Interior argued in response, that this analogy to acres affected or to toxins released to a body of water is not apt because it "ignores the nature of climate change."[71] A timber project will have impacts on the forest in which it occurs, and the release of toxic substances into a body of water will have impacts on that body of water, but climate change impacts are not local impacts. Climate change impacts are worldwide and it is impossible to connect a single project to any specific climate change impacts. Thus, Interior concluded, the only way to quantify impacts (or maybe the best way) is to quantify emissions and make comparisons.[72]

The court seems to have accepted Interior's view that the impacts of the project are emissions, and to quantify the emissions is to quantify of impacts. It then proceeded to discuss whether the discussion of the quantity of emissions was adequate, i.e., did the agency make the right comparisons so that the impacts could be understood.[73] Based on that discussion, the court concluded that the agency had taken the required "hard look" at impacts.[74]

The court and the dissent then seem to agree that it is impossible to connect a specific project with any specific climate change consequences. The conclusions they draw from this, however, are vastly different. To the court, that means that specific climate change impacts cannot be viewed as impacts of the project and they need not be identified. General climate change impacts, however, are consequences of the project and the agency did an adequate job of identifying them. What the agency did not do, was adequately explain why those impacts were not significant.

To the dissent, the fact that one cannot connect any specific climate change impacts or even any quantity of climate change impacts to the project proves that Interior was right.[75] Interior looked at the quantity of emissions and compared it with worldwide emissions and nationwide emissions and that comparison was the best they could do to identify and assess impacts.[76] Because it is impossible to identify any specific climate changes impacts that are connected to this project, climate change impacts need not be identified. Science does not provide a means to determine what climate change impacts may result from this project or any project. Therefore, the failure to develop scientific criteria to determine significance was not a flaw in the agency's reasoning.

The key to understanding why the court and the dissent disagree is the social cost of carbon. To the court, social cost of carbon is a means to assess the significance of the impacts. NEPA does not require an agency to use any particular method to assess the significance of the impacts, but it does require some method. Interior did not use any method to assess the significance of the impacts and

therefore it failed in its obligation to adequately explain its FONSI. To the dissent, social cost of carbon is too indefinite to be a real means of assessing the significance of the impacts. And, if there is no reliable means of assessing the impacts, Interior cannot be faulted for not suggesting such a method.

In sum, two significant questions were raised regarding the court's conclusion that emissions are the impacts that need to be assessed. Plaintiffs argued that just as quantity of road and quantity of chemicals released are not impacts, quantity of greenhouse gas emissions are not impacts. The court responded by saying that greenhouse gas impacts are different from all other impacts. The dissent argued that what Interior did was adequate because climate change impacts are so different from all other impacts that they cannot be explained. The court's reasoning regarding impacts is thus walking a fine line. Thus, the court is correct only if climate impacts are fundamentally different from other impacts, but not as fundamentally different as the dissent thought.

Role of Social Cost of Carbon

The court began it discussion of the social cost of carbon by noting that social cost of carbon was developed by an interagency working group "which consisted of experts from various federal agencies."[77] The court then quoted courts and agencies that have praised it, including another agency within the Department of Interior, which stated that "SCC estimates provide valuable and critical insights."[78]

Interior declined to use social cost of carbon, stating several reasons. Interior first argued that social cost of carbon is a valuable tool, but it was developed for rulemaking and not for analysis of individual projects.[79] The difference, Interior argued, is that agencies are required to use a cost benefit analysis in rulemaking, but not in NEPA proceedings.[80] When required to perform a cost benefit analysis, the agency needs a means to analyze costs and social cost of carbon helps with that.[81] In NEPA there is no requirement to use a cost benefit analysis and therefore no reason to use social cost of carbon.[82] The court accepted that reasoning.

That reasoning is seriously flawed. The fact that social cost of carbon was developed for rulemaking and not for individual projects says nothing about whether it is a useful tool for assessing the impacts of individual projects. Indeed, the court did nothing to meaningfully distinguish rulemaking from individual projects. The court noted that agencies in rulemaking must do a cost benefit analysis and thus cost is important, while cost benefit analysis is not a necessary part of a NEPA proceeding. However, the court made no attempt to explain why social cost of carbon is an appropriate means of assessing cost in rulemaking, but would not be an appropriate means for assessing cost-related impacts to an individual project. For an individual project, NEPA requires agencies to examine impacts (not costs and benefits), but measuring the cost would certainly be one way to measure impacts.

Having determined that use of social cost of carbon was not required, the court needed to explain why it was reasonable for Interior to leave it out of the impact discussion. Interior had argued that social cost of carbon is too uncertain a tool to be useful in this case.[83] It cited two experts that used social cost of carbon to estimate the costs of this project

and "under that analysis the emission costs over the project's nine-year span varied by 40 fold." A second analysis estimated that the cost would be between $3.2 billion and $32.5 billion, a range of about 10-fold.[84]

Examining the degree of variability seems to miss the point. If we were making a budget for the project and the estimated costs ranged from $3 billion to $30 billion, we would probably conclude that the means used to estimate the costs was too variable to be useful. In a NEPA analysis, however, the question is not how much will it cost. The question is: Will there be significant impacts. In such a case, the variability may not matter. Even at the lowest end, it is not unreasonable to say that $3 billion in costs is not an insignificant impact. Thus, while social cost of carbon may be too uncertain and too variable for some uses, that says very little about whether it is too uncertain and too variable for this use. Indeed, one could have looked at the lowest of all the cost estimates and reasonably concluded that costs caused by the project may be significant and therefore the impacts of the project may be significant.

Does SCC Attempt to Measure Significance or Reasonability?

The court began its discussion by noting that it had two issues before it: (1) Was Interior's finding of no significant impacts arbitrary and capricious, and (2) Did Interior provide a reasoned explanation of its conclusion.[85] The court answered no to both. If we are going to understand the proper role of social cost of carbon in the environmental review process, we need to understand which issue social cost of carbon helps address?

Plaintiffs argued that Interior had failed to assess the impacts of the emissions despite having the tools to do so."[86] The "tools" are a clear reference to social cost of carbon and failure to assess the impacts places social cost of carbon in the first bucket. Plaintiffs brief then moves into the argument that quantifying the emissions, but not quantifying impacts, was misleading.[87] This argument suggests that we are talking about how the information was presented, not what are the impacts. In other words, social cost of carbon is useful because it helps explain the agency's decision.

Plaintiffs then made a number of arguments that suggest that social cost of carbon is a means, and perhaps the only means, of identifying impacts.[88] They made a pretty convincing case that the emissions are a cause of impacts (and the emissions are not, themselves impacts) and unless we look at the impacts that result from the emissions, we have not taken the required "hard look" at impacts of the project. Thus, plaintiffs view social cost of carbon as relevant to both issues.

Interior responded by arguing that NEPA does not require an agency to quantify impacts.[89] In their view, they took a hard look at the impacts and the question on appeal was whether they had properly explained their decision. In other words, Interior viewed social cost of carbon as being mostly about how we present the information, meaning the second bucket. They spent a lot of time arguing that because NEPA does not require a cost benefit analysis, there is no need to quantify impacts.[90] As discussed above, however, lack of a requirement to quantify using social cost of carbon does not necessarily lead to the conclusion that social cost of carbon is not a very useful tool.

From Interior's perspective, the emissions are the impacts and the social cost of carbon is the means of explaining the significance of the impacts. That explains why the fact that NEPA does not require a cost benefit analysis is so important to Interior. Rulemaking must be assessed on a cost benefit analysis. A cost benefit analysis does not identify the impacts, it assesses them. NEPA does not require a cost benefit analysis. All NEPA requires is an identification of the impacts and some discussion of significance. If cost of carbon is merely a means to discuss significance; but not the only means, then there is no need to discuss social cost of carbon.

On the other hand, if social cost of carbon is a means of identifying impacts, it has greater implications for the environmental review process. If in order to adequately examine the impacts, to take the required "hard look" at impacts, it is essential to know not only that there will probably be more storms and floods, but that the best estimate of the costs associated with those storms and floods is X billion dollars, the cost of carbon becomes as essential element of the process. Without it, it is difficult to say that the agency has adequately identified the impacts.

Interior also stressed that NEPA is merely procedural.[91] Interior correctly pointed out that because NEPA is merely procedural, NEPA analysis is significantly different from challenges to rulemaking. A court looks at a rulemaking and asks substantively - was the agency's decision to implement this rule arbitrary and capricious.[92] In a NEPA case, however, the issue is simply whether the agency followed the procedures required by NEPA - did they take a hard look at impacts. The conclusion that Interior draws from this difference, however, that the decision not to quantify impacts was not arbitrary and capricious, does not necessarily follow. Interior seems to mix examination of impacts (which is required by NEPA) with evaluation of the substance of the project (which is not required by NEPA). It could very well be that to properly identify the impacts of the project, an agency needs to look beyond the emissions and find a way to identify or discuss the impacts of those emissions. Interior does not seem to have contemplated the possibility that social cost of carbon is a means to identify impacts.

The court seems to have accepted Interior's argument that the emissions were the impacts and social cost of carbon is merely a means of determining significance. The court stated Interior appropriately identified impacts when it described the relationship between the emission of greenhouse gasses and climate change.[93] Having identified climate change as a possible impact, the court did not suggest that anything further was needed. Questions like what type of climate change (e.g., storm or flood) or where the climate change impacts may occur, did not need to be asked in order for Interior to have met its burden of taking the required hard look.

Having concluded that the court took the required hard look, the court turned to social cost of carbon, only to examine significance.[94] SCC was thus, to the court, a means of determining significance, not a means of identifying impacts.

Impacts of the Decision

An agency examining the impacts of a proposed project can use this decision to support a decision not to use social cost of

carbon. The likely result would likely be less well-informed decisions. Additionally, because social cost of carbon analysis tends to make significant impacts appear more likely, the result of such a policy will likely be quicker approval of projects.

An agency applying the decision that way faces several potential risks.

First, it must find some other means to assess the significance of the potential impacts. As seen in the decision and the briefs, without use of social cost of carbon, the parties struggled to explain the significance of the impacts in other than the most general terms and the court found that the agency violated NEPA by not sufficiently explaining its decision. The conclusion that a project will increase climate change risks, but we cannot say how much or which specific risks or when or where or how those risks will manifest themselves, will be difficult to defend.

Second, while the court concluded that Interior had properly assessed the impacts by quantifying the emissions, not all projects will have measurable emissions. An energy project such as a coal mine will be a very different analysis from any other type of development. That significantly limits the significance of the decision regarding emissions.

The Ninth Circuit's decision in *Center for Biological Diversity v. National Highway Transportation Administration*[95] illustrates the complexity of the analysis. The highway safety rules at issue were challenged from a number of perspectives, but in discussing the potential climate change impacts, it was unclear whether the rules would increase emissions or decrease the rate of increase of emissions and whether the analysis should look at individual aspects of the rule and how those individual aspect would impact emissions. For example, while it was unclear what the overall impact of the rule on emissions might be, there was a challenge to the portion of the rule regarding light trucks would increase emissions.

Uncertainty regarding several issues on which the court was silent may further increase the risks an agency faces in relying on this decision. The court did not address the line of cases that holds that release of a hazardous substance is not an "impact" and quantity of release is not an impact; to properly identify impacts, an agency needs to examine the effects the release may have on the human environment. It is likely that the court did not address those cases because, regarding climate change, the impacts are not local and not predictable. If so, then agencies may have some support for not examining the potential impacts on the human environment. On the other hand, if the court ignored those cases because they were not on point for some other reason, the uncertainty will make that decision difficult to rely on.

The relationship between NEPA and rulemaking cases also needs to be further analyzed. The court rejected reliance on the rulemaking cases because the standard of review is different when a rulemaking is challenged. In a challenge to a rulemaking, the court examines the substance of the rule and NEPA is merely procedural, so a challenge to a NEPA decision looks only to whether the agency followed the correct procedures. That is why a cost benefit analysis is important to a rulemaking and not relevant to a NEPA case.

That distinction, however, is only partially

accurate. It works when comparing a substantive challenge to a rulemaking and a NEPA case. However, a NEPA challenge to a rulemaking and a NEPA challenge regarding an individual project would entail the same impact review. Each of the rulemaking decisions "distinguished" by the court was a NEPA case and the court did nothing to explain why the impact analysis would be different. Without that, an agency looking at a proposed project might be advised to heed the advice of those cases.

From the applicant's perspective, it is easy to understand the desire to avoid the use of social cost of carbon. Compare an impact analysis that states that the project will have approximately X quantity of carbon emissions and carbon emissions can cause climate change impacts, so something bad may happen somewhere, sometime, with one that adds to that - and based on the best science the societal costs likely to be caused by the carbon emissions from this project are estimated to be in the range of X million dollars. The latter is much more likely to suggest changes to or limits on the size of the project to mitigate the impacts.

The applicant also has an interest in constructing the project as quickly as possible. From that perspective, the case may be ambiguous because use of social cost of carbon is likely to increase the time required for the environmental review process, but it is likely to decrease the chances of a lengthy court battle, such as one that may result from attempts to resolve some of the uncertainty of the *350 Montana* decision.

CONCLUSION

Social cost of carbon is a valuable metric used by government agencies in rulemaking, cost benefit analysis, site assessments and attempts to demonstrate the value of policies and practices intended to reduce the emission of greenhouse gasses. The 350 Montana decision raises significant doubts about the usefulness of this metric. The court accepted the Department of Interior's argument that because of the uncertainties associated with this metric (i.e., the range of estimates was vast) there was no need to use it in this case. While the court explained that the uncertainties were so great as to make it unhelpful in this case; there were cases, such a rulemaking, for which the use of cost of carbon would be appropriate. The court did not make an effort to explain this difference in a manner that will be helpful to future decision makers, but the difference does not seem to be a difference in the scope of the uncertainty; it is a difference between rulemaking and NEPA environmental review.

The court's explanation of the distinction is that different statutes have different statutory requirements. However, because the uncertainty associated with social cost of carbon in a rulemaking can be as great as the uncertainty associated with social cost of carbon in an impact assessment, the court gave little guidance regarding when cost of carbon would or would not be appropriate.

If the state of the law regarding use of social cost of carbon in impact analysis was unclear before this decision, this decision did little to make it more clear. The decision provides some support for those against the use of social cost of carbon in impact analysis. At the same time, it could increase the use of social cost of carbon in impact analysis because despite all the uncertainty in this area, one thing

is clear: use of social cost of carbon is a safe bet for the agency because it enhances both the conclusion that the agency took a hard look at impacts and the conclusion that the agency used up-to-date metrics to explain its conclusion.

NOTES:

[1]For background information about social cost of carbon see, https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf and The Social Cost of Carbon: Advances in Long-term Probabilistic Projections of Population, GDP, Emissions, and Discount Rates, Rennert, Prest et. al available at Brookings.edu; see also, *350 Montana v. Haaland*, 29 F.4th 1158, 1165 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022) ("Relevant here, plaintiffs argued Interior arbitrarily and capriciously quantified the socioeconomic benefits of the Mine Expansion while failing to use an available metric called the Social Cost of Carbon (SCC) to quantify the costs of GHG emissions.").

[2]*350 Montana v. Haaland*, 29 F.4th 1158, 1166 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022) ("There was no dispute between the parties regarding whether climate change was the result of the release of greenhouse gasses. There was also no dispute regarding what those impacts were. The dispute centered on how one determines whether impacts of a particular project are significant. Here, the parties do not dispute that GHGs cause global warming, that global warming causes climate change, or that human activity is likely the primary cause of these phenomena."). On October 14, 2022, the Ninth Circuit amended and superseded that decision and replaced it with a decision published at *350 Montana v. Haaland*, 50 F.4th 1254 (9th Cir. 2022). All further reference to the 350 Montana case will be to the amended opinion on October 14, 2022.

[3]Brookings Article, pg. 223. ("The social cost of carbon (SCC) is a crucial metric for informing climate policy, most notably for guiding climate regulations issued by the US government.").

[4]*350 Montana v. Haaland*, 50 F.4th 1254, 1259 (9th Cir. 2022) ("The district court agreed, reasoning that because the SCC was available and capable of quantifying the costs of GHG emissions, Interior improperly "place[d] [its] thumb on the scale by inflating the benefits of the [Mine Expansion] while minimizing its impacts.").

[5]State and Local Jurisdictions with NEPA-like Environmental Planning Requirement, https://ceq.doe.gov/laws-regulations/states.html.

[6]Brookings Article, pg. 225 ("The SCC has also been the basis for the value of federal tax credits for carbon capture technologies, beginning in 2018 (Rodgers and Dubov 2021), and zero-emissions credits for nuclear power in New York State. The power grid operator for New York is working to include the SCC as a cost adder on top of energy supply bids submitted by power plants, thereby reflecting social costs into market prices and plant dispatch. Many other states have used the SCC as the basis for climate policies and as a benchmark against which proposed carbon prices are compared. Proposed applications include federal procurement decisions and royalties on oil and gas leases on federal land (Prest 2021; Prest and Stock 2021; White House 2021b,sec. 5[b][ii]).").

[7]*350 Montana v. Haaland*, 50 F.4th 1254 (9th Cir. 2022).

[8]The Office of Surface Mining and Enforcement, within the Department of Interior, carries out the requirements of the Surface Mining Control and Reclamation Act to assure that mines are operated in a safe, environmentally sound manner. See Mission Statement, Office of Surface Mining Reclamation and Enforcement, https://www.osmre.gov/about/general-information ("Our mission is to carry out the requirements of the Surface Mining Control and Reclamation Act (SMCRA) in cooperation with States and Tribes. Our primary objectives are to ensure that coal mines are operated in a manner that protects citizens and the environment during mining and assures that the land is restored to beneficial use following mining, and to mitigate the effects of past mining by aggressively pursuing reclamation of abandoned coal mines.").

[9]*350 Montana v. Haaland*, 29 F.4th 1158, 1259 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[10]*350 Montana v. Haaland*, 29 F.4th 1158, 1260 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[11]*350 Montana v. Haaland*, 29 F.4th 1158, 1261 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022) (Based on a 2018 EA, Interior found that the project's GHG emissions would have no significant impact on the environment. The district court granted summary judgment in favor of Interior on all but plaintiffs' claim that Interior failed to consider the risk of coal train derailments. The district court vacated the 2018 EA, but not Interior's approval of the Mine Expansion, and remanded the matter to Interior to consider the risk of train derailment. Interior subsequently published a fourth EA that incorporated the 2018 EA and considered train derailment risks for the first time.).

[12]*350 Montana v. Haaland*, 29 F.4th 1158, 1261 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[13]*350 Montana v. Haaland*, 29 F.4th 1158, 1261 (9th Cir. 2022), amended and superseded on denial of reh'g

en banc, 50 F.4th 1254 (9th Cir. 2022). The court concluded that Interior violated the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321 et seq, by failing to provide a "convincing statement of reasons to explain why [the] project's impacts are insignificant." *Bark v. United States Forest Service*, 958 F.3d 865, 869 (9th Cir. 2020). The 2018 EA fails to articulate any science-based criteria for significance in support of its finding of no significant impact (FONSI), relying instead on the arbitrary and conclusory determination that the Mine Expansion project's emissions will be relatively "minor."

[14]*350 Montana v. Haaland*, 29 F.4th 1158, 1265 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). The court examined the EA with two purposes in mind: to determine whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion.

[15]*350 Montana v. Haaland*, 29 F.4th 1158, 1265 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022), reasoning that all that is required is a reasonably thorough discussion of probable environmental consequences.

[16]*350 Montana*. "In reviewing an agency's decision not to prepare an EIS, the arbitrary and capricious standard under the APA requires this court 'to determine whether the agency has taken a 'hard look' at the consequences of its actions, 'based [its decision] on a consideration of the relevant factors,' and provided a 'convincing statement of reasons to explain why a project's impacts are insignificant.' " *Barnes v. U.S. Dept. of Transp.*, 655 F.3d 1124, 1132, 73 Env't. Rep. Cas. (BNA) 1033 (9th Cir. 2011) (quoting *Environmental Protection Information Center v. U.S. Forest Service*, 451 F.3d 1005, 1009, 36 Envtl. L. Rep. 20120 (9th Cir. 2006)).

[17]*350 Montana v. Haaland*, 29 F.4th 1158, 1265 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[18]*350 Montana v. Haaland*, 29 F.4th 1158, 1265 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[19]*350 Montana v. Haaland*, 29 F.4th 1158, 1266 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022)

[20]*350 Montana v. Haaland*, 29 F.4th 1158, 1266 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[21]*350 Montana v. Haaland*, 29 F.4th 1158, 1266 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[22]*350 Montana v. Haaland*, 29 F.4th 1158, 1266 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[23]*350 Montana v. Haaland*, 29 F.4th 1158, 1266 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[24]*350 Montana v. Haaland*, 29 F.4th 1158, 1263 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). Significant for purposes of this appeal, the 2020 EA incorporated in full the 2018 EA's analysis of the Mine Expansion's GHG emissions and the impact of those emissions on global warming, climate change, and the environment. See Appendix D - Climate Change - *350 Montana v. Haaland*, 29 F.4th 1158, 1273 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[25]*350 Montana v. Haaland*, 29 F.4th 1158, 1170 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022) The 2018 EA calculated that the GHG emissions in the Mine Expansion would total approximately 0.44 percent of annual global GHG emissions.

[26]6 NYCRR Part 617 State Environmental Quality Review - Appendix A Full Environmental Assessment Form.

[27]*350 Montana v. Haaland*, 29 F.4th 1158, 1267 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022), "As far as we can tell, Interior resorted to a global comparison of the Mine Expansion's GHG emissions because it could not define, with precision, the incremental impacts of this project's emissions."

[28]*350 Montana v. Haaland*, 29 F.4th 1158, 1266 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). Interior did not cite any scientific evidence supporting the characterization of the project's emissions as "minor" compared to global emissions, nor did it identify any science-based criteria the agency used in its determination. "Without some articulated criteria for significance in terms of contribution to global warming that is grounded in the record and available scientific evidence," 5 (internal quotation marks and citation omitted).

[29]*350 Montana v. Haaland*, 29 F.4th 1158, 1267 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[30]*350 Montana v. Haaland*, 29 F.4th 1158, 1267–68 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[31]*350 Montana v. Haaland*, 29 F.4th 1158, 1267–68 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). It is worth repeating that the parties do not dispute the fact that the Mine is anticipated to generate more GHGs annually than the "largest single point source of GHG emissions in the United States." When asked at oral argument, Interior did not dispute that if a project of this scale can be found to have no significant impact, virtually every domestic source of GHGs may be deemed to have no significant impact as long as it is measured against total

global emissions.

[32]*350 Montana v. Haaland*, 29 F.4th 1158, 1268 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). Plaintiffs also argue that Interior arbitrarily and capriciously failed to use the Social Cost of Carbon metric to quantify the environmental harms that may result from the project's GHG emissions.

[33]*350 Montana v. Haaland*, 29 F.4th 1158, 1270 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[34]*350 Montana v. Haaland*, 29 F.4th 1158, 1270 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[35]*350 Montana v. Haaland*, 29 F.4th 1158, 1270 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[36]See Answering Brief for Defendants/Appellees at 21.

[37]Answering Brief for Defendants/Appellees at 21.

[38]*350 Montana v. Haaland*, 29 F.4th 1158, 1271 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[39]*350 Montana v. Haaland*, 29 F.4th 1158, 1271 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). Plaintiffs also strenuously argue that the SCC analysis applies with equal force - and produces equally valid results - to project-level agency decisions as it does to rulemaking proceedings.

[40]*350 Montana v. Haaland*, 29 F.4th 1158, 1271 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). But plaintiffs' arguments overlook that prescribing a specific metric for the agency to use on remand is not our role.

[41]*350 Montana v. Haaland*, 29 F.4th 1158, 1272 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[42]*350 Montana v. Haaland*, 29 F.4th 1158, 1272 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[43]*350 Montana v. Haaland*, 29 F.4th 1158, 1273 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). The court was not persuaded by plaintiff's argument that Interior was required to use the SCC, but it concluded that Interior must use some methodology that satisfies NEPA and the APA.

[44]*350 Montana v. Haaland*, 29 F.4th 1158, 1272 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[45]*350 Montana v. Haaland*, 29 F.4th 1158, 1273 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022), noting that Plaintiffs are correct that vacatur is the presumptive remedy under the APA On remand, the district court vacated Interior's decision, pending completion of an environmental impact statement. On remand, after a hearing, the district court vacated the Department of Interior approval pending completion of an environmental impact statement.

[46]*350 Montana v. Haaland*, 29 F.4th 1158, 1281 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[47]*350 Montana v. Haaland*, 29 F.4th 1158, 1281 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[48]*350 Montana v. Haaland*, 29 F.4th 1158, 1281 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[49]*350 Montana v. Haaland*, 29 F.4th 1158, 1281 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[50]*350 Montana v. Haaland*, 29 F.4th 1158, 1282 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[51]*350 Montana v. Haaland*, 29 F.4th 1158, 1282 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[52]*350 Montana v. Haaland*, 29 F.4th 1158, 1288 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[53]*350 Montana v. Haaland*, 29 F.4th 1158, 1282 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[54]*350 Montana v. Haaland*, 29 F.4th 1158, 1281 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[55]*350 Montana v. Haaland*, 29 F.4th 1158, 1284 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[56]*350 Montana v. Haaland*, 29 F.4th 1158, 1284 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). The court also noted that "a but for causal relationship is insufficient to make an agency responsible for a particular effect under NEPA."

[57]*350 Montana v. Haaland*, 29 F.4th 1158, 1287–88 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[58]*350 Montana v. Haaland*, 29 F.4th 1158, 1287 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[59]*350 Montana v. Haaland*, 29 F.4th 1158, 1288 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[60]*350 Montana v. Haaland*, 29 F.4th 1158, 1288 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[61]*350 Montana v. Haaland*, 29 F.4th 1158, 1288 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[62]*350 Montana v. Haaland*, 29 F.4th 1158, 1262 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[63]*350 Montana v. Haaland*, 29 F.4th 1158, 1264 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[64]*350 Montana v. Haaland*, 29 F.4th 1158, 1265 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[65]*Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 995, 59 Env't. Rep. Cas. (BNA) 1389, 34 Envtl. L. Rep. 20127 (9th Cir. 2004).

[66]*Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 997, 59 Env't. Rep. Cas. (BNA) 1389, 34 Envtl. L. Rep. 20127 (9th Cir. 2004).

[67]*Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 995, 59 Env't. Rep. Cas. (BNA) 1389, 34 Envtl. L. Rep. 20127 (9th Cir. 2004).

[68]*Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 1001, 59 Env't. Rep. Cas. (BNA) 1389, 34 Envtl. L. Rep. 20127 (9th Cir. 2004). The EAs do not reflect a hard look at the effects from proceeding with all of the anticipated projects and do not provide sufficient information to permit meaningful public scrutiny. The BLM cannot simply offer conclusions. Rather, it must identify and discuss the impacts that will be caused by each successive timber sale, including how the combination of those various impacts is expected to affect the environment, so as to provide a reasonably thorough assessment of the projects' cumulative impacts.

[69]*Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 1001, 59 Env't. Rep. Cas. (BNA) 1389, 34 Envtl. L. Rep. 20127 (9th Cir. 2004).

[70]Appellants Opening Brief at 30.

[71]Answering Brief for Defendants/Appellees at 12.

[72]*350 Montana v. Haaland*, 29 F.4th 1158, 1263 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). (9th Cir. 2022) Against this uncontroverted backdrop, Interior found that the Mine Expansion will have no significant impacts on the climate or the environment relative to cumulative statewide, national, and global GHG emissions. Interior based its FONSI on three simple comparisons: (1) a comparison of the total projected GHG emissions generated by the 11.5 year Mine Expansion project against total annual global GHG emissions; (2) a comparison of the projected GHG emissions from the Mine Expansion's activities in the United States against the United States' annual GHG emissions; and (3) a comparison of the projected GHG emissions from the Mine Expansion's activities in the United States against Montana's annual GHG emissions.

[73]*350 Montana v. Haaland*, 29 F.4th 1158, 1265 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[74]*350 Montana v. Haaland*, 29 F.4th 1158, 1266 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[75]*350 Montana v. Haaland*, 29 F.4th 1158, 1281–82 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[76]*350 Montana v. Haaland*, 29 F.4th 1158, 1287 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[77]*350 Montana v. Haaland*, 29 F.4th 1158, 1270–71 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[78]*350 Montana v. Haaland*, 29 F.4th 1158, 1270–71 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022), quoting the Department of the Interior Bureau of Reclamation.

[79]*350 Montana v. Haaland*, 29 F.4th 1158, 1271 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022) Interior completed a third EA and FONSI and again approved Signal Peak's Mine Expansion in 2018. Interior's 2018 EA declined to employ the SCC to quantify the costs of the project's anticipated GHG emissions for four reasons: (1) the SCC was originally developed for use in rulemakings, not individual adjudications.

[80]*350 Montana v. Haaland*, 29 F.4th 1158, 1271 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022), stating that NEPA does not require agencies to perform cost-benefit analyses.

[81]*350 Montana v. Haaland*, 29 F.4th 1158, 1271 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022). Although NEPA does require consideration of "effects" that include "economic" and "social" effects (40 C.F.R. 1508.8(b)), without a complete monetary cost-benefit analysis, which would include the social benefits of the proposed action to society as a whole and other potential costs and positive benefits, inclusion solely of an SCC cost analysis would be unbalanced, potentially inaccurate, and not useful in facilitating an authorized officer's decision.

[82]*350 Montana v. Haaland*, 29 F.4th 1158, 1271 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[83]*350 Montana v. Haaland*, 29 F.4th 1158, 1271 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[84]Appellant's Opening Brief at 12 and Answering Brief for Defendants/Appellants at 21.

[85]*350 Montana v. Haaland*, 29 F.4th 1158, 1265 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022), stating "We examine the EA with two purposes in mind: to determine

whether it has adequately considered and elaborated the possible consequences of the proposed agency action when concluding that it will have no significant impact on the environment, and whether its determination that no EIS is required is a reasonable conclusion."

[86]Appellants' Opening Brief at 29.

[87]Appellants' Opening Brief at 29–30.

[88]Appellants' Opening Brief at 40.

[89]Answering Brief for Defendants/Appellees at 15.

[90]Answering Brief for Defendants/Appellees at 15–18.

[91]Answering Brief for Defendants/Appellees at 18.

[92]Answering Brief for Defendants/Appellees at 18.

[93]*350 Montana v. Haaland*, 29 F.4th 1158, 1265 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[94]*350 Montana v. Haaland*, 29 F.4th 1158, 1270–1272 (9th Cir. 2022), amended and superseded on denial of reh'g en banc, 50 F.4th 1254 (9th Cir. 2022).

[95]*Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 67 Env't. Rep. Cas. (BNA) 1393 (9th Cir. 2008).