Department of Transportation v. Public Citizen: The Supreme Court Allows Mexican Trucks to Cross the Border Under NAFTA Without Environmental Scrutiny

I. INTRODUCTION 231
II. BACKGROUND 234
III. THE COURT'S DECISION 236
IV. ANALYSIS 239
V. CONCLUSION 242

I. INTRODUCTION

In late 1992, the leaders of the United States, Canada, and Mexico signed the North American Free Trade Agreement (NAFTA).[1] As a result of this treaty, the United States agreed to lift an existing moratorium on the operation of Mexican motor carriers within its borders by January 2000.[2] However, because of continuing concern for the adequacy of safety regulations governing Mexican trucks, the President did not abide by the timetable proposed by NAFTA. In 2001, Mexico elected to exercise its rights under NAFTA's dispute resolution provisions.[3]

Following a ruling by an international arbitration panel in favor of Mexico, President George W. Bush expressed his intention to lift the moratorium on Mexican motor carrier certification and travel within the United States.[4] The United States agreed to lift the moratorium following the preparation of new application and safety regulations for Mexican trucks. The Federal Motor Carrier Safety Administration (FMCSA), an agency within the Department of Transportation (DOT), was to draft the regulations.[5] Shortly thereafter, Congress enacted the Department of Transportation and Related Agencies Appropriations Act.[6] Section 350 of the Act stipulated that no funds allocated under the Act could be made available for the processing of Mexican truck applications until FMCSA implemented specific application and safety monitoring requirements.[7]

1. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 107 Stat. 2057, 32 I.L.M. 605.
2. Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2211 (2004).
3. *Id.*
4. *Id.*
5. *See id.*
6. Pub. L. No. 107-87, 115 Stat. 833 (2001).
7. *Dep't of Transp.*, 124 S. Ct. at 2211.

Pursuant to the requirements of the National Environmental Policy Act (NEPA)[8] and its associated regulations promulgated by the Council on Environmental Quality (CEQ),[9] FMCSA issued a programmatic Environmental Assessment (EA) for its proposed application and safety monitoring rules in January 2002.[10] In exploring the environmental impact of its actions in the categories of traffic and congestion, public safety and health, air quality, noise, socioeconomic factors, and environmental justice, FMCSA assumed that any change in trade volume or motor carrier traffic between the United States and Mexico would result not from its new regulations, but from the President's decision to lift the moratorium.[11] Therefore, FMCSA did not consider the environmental effects of a greater presence of Mexican trucks within the United States. Instead it focused on what it considered to be the effects of its regulatory efforts, namely an increase in the number of roadside Mexican truck and bus inspections.[12] FMCSA ultimately concluded that the effects from these inspections (slight emissions increases, noise, and possible danger to passing motorists) were minor and could be mitigated by the inspection process itself.[13] Based on these findings, FMCSA concluded that its proposed regulations would not significantly impact the environment. Consequently, FMSCA issued a finding of no significant impact (FONSI) at the same time it released its EA.[14]

On March 19, 2002, FMCSA released its interim final rules, which took effect on May 3, 2004.[15] In the regulatory preambles to these rules, FMCSA noted its decision to issue a FONSI and also stated that it need not conduct a conformity review under the Clean Air Act (CAA)[16] because the increase in emissions caused by the new regulations would

8. 42 U.S.C. §§ 4321-4370f (2000).

9. 40 C.F.R. §§ 1500-1508 (2004). These are "binding regulations implementing the procedural provisions of NEPA." Robertson v. Methow Valley Citizens, 490 U.S. 332, 354 (1989) (citing Exec. Order No. 11991, 3 C.F.R. 123 (1977)).

10. *Dep't of Transp.*, 124 S. Ct. at 2211.

11. *Id.* at 2211-12.

12. *Id.* at 2212.

13. *Id.*

14. *Id.*

15. *Id.* The two rules challenged in this case are: Application by Certain Mexico-Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border, 67 Fed. Reg. 12,701 (Mar. 19, 2002) (codified at 49 C.F.R. pt. 365 (2004)) [hereinafter Application Rule], and Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers, 67 Fed. Reg. 12,756 (Mar. 19, 2002) (codified at 49 C.F.R. pt. 385) [hereinafter Safety Rule].

16. CAA §§ 101-618q, 42 U.S.C. §§ 7401-7671q (2000).

fall below the Environmental Protection Agency's (EPA) threshold levels for review.[17]

Before the President could lift the moratorium on qualified Mexican motor carriers, Public Citizen, in conjunction with numerous labor and environmental groups,[18] filed petitions for judicial review of FMCSA's application and safety monitoring rules, arguing that the rules violated NEPA and the CAA.[19] The United States Court of Appeals for the Ninth Circuit held that FMCSA "acted arbitrarily and capriciously in failing to prepare a full Environmental Impact Statement [EIS] under [NEPA], as well as a conformity determination under the [CAA]."[20] Central to the court's analysis of both the EIS and the conformity determination claims was its conclusion that FMCSA should have taken into account the environmental effects of the increase of cross-border traffic.[21]

In reversing the decision of the Ninth Circuit, the United States Supreme Court first found that because only the President, and not FMCSA, had the power to authorize cross-border operations of Mexican motor carriers by lifting the moratorium, FMCSA need not consider the environmental effects of their entry.[22] The Court then *held* that (1) FMCSA did not violate NEPA or its CEQ regulations when it did not consider the environmental effect of the increase of cross-border traffic, and (2) FMCSA did not act improperly by not performing a conformity review pursuant to the CAA. *Public Citizen v. Department of Transportation*, 124 S. Ct. 2204, 2218 (2004).

---

17. *Dep't of Transp.*, 124 S. Ct. at 2212; *see* Application Rule, *supra* note 15, at 12,704-05; Safety Rule, *supra* note 15, at 12,764.

18. Also taking part in the suit were the Brotherhood of Teamsters; Auto and Truck Drivers, Local 70; California Labor Federation; California Trucking Association; Environmental Law Foundation; International Brotherhood of Teamsters; Natural Resources Defense Council; and Planning and Conservation League. Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1009 n.1 (2003).

19. *Dep't of Transp.*, 124. S. Ct. at 2212.

20. *Pub. Citizen*, 316 F.3d at 1032.

21. *See id.* at 1023-25, 1030. With regard to the EA, the court stated: "There are a number of areas of uncertainty regarding DOT's EA that merit additional investigation. The most significant of these is whether, and to what extent, cross-border Mexican truck traffic will increase if DOT implements the regulations." *Id.* at 1024-25. In its discussion of CAA standards, 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." *Id.* at 1030.

22. *Dep't of Transp.*, 124 S. Ct. at 2217.

II. BACKGROUND

In 1982, Congress enacted the Bus Regulatory Reform Act, which imposed a two-year, renewable moratorium on the issuance of new U.S. highway authorizations to Mexican and Canadian trucks.[23] Although the ban was immediately lifted on Canadian motor carriers due to a determination that Canadian motor carrier safety standards were comparable to those in the United States, concerns about the safety of Mexican trucks led to an extension of the restrictions against Mexican motor carriers operating within the United States for the next decade.[24]

Upon the signing of NAFTA, the United States agreed to allow all Mexican trucks to operate throughout the country by the year 2000.[25] As a result of the events described in Part I, FMSCA drafted the regulations at issue in this case in order to fulfill President George W. Bush's goal of making the United States fully NAFTA-compliant by January 1, 2002.[26]

The first claim against the DOT in the court of appeals was that the new FMCSA regulations violated NEPA. Federal agencies contemplating "major federal actions significantly affecting the quality of the human environment" must prepare an EIS.[27] However, the CEQ's regulations governing the procedural implementation of NEPA allow an agency to prepare the more limited EA if the agency's action is not one that normally requires, nor categorically excludes, the production of an

---

23. Pub. L. No. 97-261, 96 Stat. 1102 (1982). The moratorium was renewable in two-year intervals by the President "in the national interest." *Pub. Citizen*, 316 F.3d at 1012 (citing Pub. L. No. 97-261, § 6(g), 96 Stat. 1102, 1107-08 (1982)).

24. *See* Hale E. Sheppard, *The NAFTA Trucking Dispute: Pretexts for Noncompliance and Policy Justifications for U.S. Facilitation of Cross-Border Services*, 11 MINN. J. GLOBAL TRADE 235, 237 (2002).

25. *Id.* Certain exceptions had been made to the moratorium over the years such that Mexican motor carriers were permitted to operate within certain commercial zones in California, Arizona, New Mexico, and Texas. *Id.* (citing Off. of Inspector Gen., U.S. Dep't of Transp. Audit Report: Mexico-Domiciled Motor Carriers, Rep. No. TR-2000-013 (Nov. 4, 1999), *available at* http://www.oig.dot.gov/item_details .php?item=220). Cargo transported from Mexico into the United States is generally delivered to terminals within these border zones, where it is then transferred to U.S. carriers for transport to its final destination. Brief for the Petitioners at n.1, Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 957 (2004) (No. 03-358). Passengers on commercial bus services between the two countries must follow a similar procedure. *Id.*

26. Sheppard, *supra* note 24, at 240.

27. NEPA § 102(C), 42 U.S.C. § 4332(C) (2000). The EIS must consider:

> (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term used of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible commitments of resources which would be involved in the proposed action should it be implemented.

Id.

EIS.[28] Based on its EA, the agency must then decide whether to complete a full EIS or issue a FONSI.[29] An agency's decision not to prepare an EIS can be set aside only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[30] To make this determination, the 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" on the part of the agency.[31]

In assessing whether an agency's actions have affected the environment for the purposes of NEPA, the Supreme Court has emphasized the need for a close relationship between the action and the environmental effect at issue. In *Metropolitan Edison Co. v. People Against Nuclear Energy*, the Court held that the Nuclear Regulatory Commission was not required by NEPA to consider the psychological health damage from risk of nuclear accidents that could ensue from permitting renewed operation of a nuclear power plant.[32] Analogizing to the tort law doctrine of proximate cause, the Court stated that a reading of the EIS requirements in NEPA suggests that "a reasonably close causal relationship" between the change in the physical environment and the psychological effect at issue is required.[33] As such, *Metropolitan Edison* stands for the proposition that mere "but for" causation may be inadequate in identifying the effects of agency action under NEPA.[34]

The evaluation of alternatives to a proposed action is as fundamental to an EIS as the identification of the environmental impacts of that action.[35] In *Vermont Yankee v. National Resources Defense Council*, the Court discussed the limits of the responsibilities of federal agencies to identify alternatives to their proposed actions.[36] Holding that the Atomic Energy Commission need not consider energy conservation as an alternative to licensing a nuclear reactor, the Court, while

---

28. *See id.*; 40 C.F.R. § 1501.4(a)-(b) (2004).

29. *See* 40 C.F.R. §§ 1501.4(e), 1508.13.

30. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000); *see also* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375-76 (1989).

31. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), *rev'd on other grounds*, 494 F.2d 1212 (6th Cir. 1974).

32. 460 U.S. 766, 774, 778-79 (1983).

33. *Id.* at 774.

34. *Id.* ("Some effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [section] 102 because the causal chain is too attenuated.").

35. In fact, the CEQ regulations concerning the EIS process state that the section outlining the procedure for presenting alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14 (2004).

36. 435 U.S. 519 (1978).

conceding that "NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action," emphasized that the detailed list of alternatives required by NEPA cannot be considered deficient "simply because the agency failed to include every alternative device and thought conceivable by the mind of man."[37] The Court then went on to stress that it is crucial for concerned intervenors to alert the agency of their suggestions for alternatives, particularly when comments suggest that the agency explore "uncharted territory" in the form of new or unheard-of solutions.[38]

Also at issue in the noted case was the allegation that the conformity review provision of the CAA had been violated. The conformity review language, added to the CAA as part of the 1977 Amendments, prohibits the federal government and its agencies from "engag[ing] in, support[ing], in any way or provid[ing] financial assistance for, licens[ing] or permit[ting], or approv[ing], any activity which does not conform to [an approved state] implementation plan."[39] The CAA defines "conformity" to include restrictions on "increas[ing] the frequency and severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard . . . in any area."[40] Regulations have been promulgated to require that an agency undertake a conformity determination in order to ensure that any proposed action is consistent with this statutory mandate.[41]

III. THE COURT'S DECISION

The Court began its analysis of the NEPA claim by narrowly framing the issue at hand. Based on a review of the Ninth Circuit's reasoning, the Court stated that the relevant question on appeal was whether the increase of Mexican motor carriers was an effect of the new FMCSA regulations.[42] Only if that question was answered in the affirmative could FMCSA's decision not to prepare an EIS be considered arbitrary and capricious.[43]

The Court summarily dismissed respondents' argument that the EA FMCSA prepared failed to consider possible alternatives that could mitigate the environmental impact of the increase in traffic flow across

37. *Id.* at 551, 553.
38. *Id.* at 553. The court considered energy conservation to be such an idea. *Id.* at 551.
39. Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1011 (2003) (quoting CAA § 176(c)(1), 42 U.S.C. § 7506(c)(1) (2000)).
40. *Id.* (quoting CAA § 176(c)(1)(B), 42 U.S.C. § 7506(c)(1)(B)).
41. *E.g.*, 40 C.F.R. § 93.150 (2004).
42. Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2213 (2004).
43. *Id.*

the border.[44] Citing *Vermont Yankee*, the Court stated that such an argument was moot because respondents had not identified and presented any rulemaking alternatives apart from those that FMCSA considered in the EA.[45] Furthermore, although the Court conceded that the federal agency itself, and not the commentator, bore the primary burden of identifying possible alternatives for proposed actions in the drafting process, it determined that FMCSA did not overlook any obvious alternatives in their initial assessment process.[46] Therefore, because respondents did not submit their own comments, giving FMCSA the opportunity to examine other proposed alternatives, they forfeited their right to argue that the EA did not fully discuss possible alternatives.[47]

The Court then focused on whether FMCSA should have considered the environmental effects of an increase of Mexican trucks in cross-border operations in drafting its EA.[48] The Court pointed out what it considered to be a "critical feature" of the case that was overlooked by respondents' argument: 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 United States."[49] To the contrary, the Court noted that the law obligated FMCSA to register any motor vehicle that passed DOT safety requirements.[50] Citing *Metropolitan Edison*, the Court also found that NEPA requires a "reasonably close causal relationship" between the environmental effect and its alleged cause.[51] Applied to the facts of the case, the Court rejected the claim that a "but for" causal relationship was sufficient to make FMCSA responsible for a particular effect for which it was not the ultimate cause.[52]

The Court noted two additional reasons why FMCSA was not required to prepare a full EIS. First, the Court stated that requiring

44. *Id.* at 2213-14.

45. *See id.*

46. *Id.* at 2214.

47. *Id.* at 2213-14.

48. *Id.* at 2214. The Court stated that because it disregarded the supplementary argument regarding alternatives to the proposed regulations, "respondents have only one complaint with respect to the EA." *Id.*

49. *Id.*

50. *Id.* The Court stated that FMCSA was bound by law to adhere to 49 U.S.C. § 13902(a)(1) (2000), mandating that FMCSA "shall register a person to provide transportation . . . as a motor carrier." *Id.* (quoting 49 U.S.C. § 13902(a)(1)).

51. *Id.* at 2215 (citing Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)).

52. *Id.*

FMCSA to assess the environmental impact of cross-border Mexican motor carriers would be contrary to the "rule of reason" inherent in the implementation of NEPA. According to the Court, because FMCSA could not prevent the entry of Mexican trucks, it could not use any information about the direct effects of their entry for any useful purpose.[53] Second, the Court rejected the argument that FMCSA did not evaluate the cumulative impacts of its action.[54] The Court found that FMCSA properly assessed the cumulative effects of its action when it studied the incremental impact of its safety rules (as opposed to the impacts of lifting the moratorium, for which FMCSA was not responsible).[55]

Collectively, the Court directed its causal relationship, rule of reason, and cumulative impact arguments toward one driving conclusion: FMCSA and the regulations it promulgated could not be considered a cause of the influx of Mexican motor carriers because the agency did not have any statutory authority over the activity—that authority was bestowed only upon the President.[56] Therefore, the Court found that FMCSA need not consider the environmental effects arising from the entry of Mexican motor carriers in its EA.[57]

The Court's discussion of respondents' CAA conformity determination claim was solely one of regulatory interpretation. The EPA's regulations provide that a conformity determination is required for each pollutant where the total of direct and indirect emissions caused by a federal action would equal or exceed certain threshold levels.[58] Based on the definition of "caused by" in the regulations, the Court determined that "but for" causal analysis could not be prohibited as it was in the NEPA claim.[59]

Nevertheless, the Court found that no conformity review was needed because the emission from Mexican cross-border motor carriers did not qualify under the definition of either "direct" or "indirect" emissions.[60] The Court stated that these were not direct emissions because they did not occur at the same time or place as the promulgation

53. *Id.* at 2215-16.
54. *Id.* at 2216-17.
55. *Id.*
56. *Id.* at 2217.
57. *Id.*
58. *See* Clean Air Act Regulations, 40 C.F.R. § 93.153(b) (2004).
59. "Emissions are '[c]aused by' a [f]ederal action if the 'emissions . . . would not . . . occur in the absence of the [f]ederal action.'" *Dep't of Transp.*, 124 S. Ct. at 2218 (quoting 40 C.F.R. § 93.152).
60. *See id.*

of FMCSA regulations.[61] Additionally, the Court reasoned the emissions were not indirect because "indirect emissions" are those that "[t]he [f]ederal agency can practicably control and will maintain control over due to a continuing program responsibility of the [f]ederal agency."[62]

Because FMCSA did not have the authority to promulgate regulations controlling vehicle emissions (i.e., emissions controls are not a continuing program responsibility of FMCSA), the Court held that the agency did not have the ability to control or maintain control over any "indirect emissions" under CAA conformity standards.[63] Having found that no future federal action by FMCSA would cause any direct or indirect emissions, the Court concluded that the minimum threshold emission rates necessary for a conformity determination under the CAA had not been met, and FMCSA was therefore not required to conduct the review.[64]

IV. ANALYSIS

The most critical portion of the Court's opinion in the noted case is unquestionably the first two paragraphs of the substantive holding, where the Court succinctly dismissed respondents' argument that FMCSA did not properly consider possible alternatives to its proposed regulations.[65] Having characterized what may have been respondents' strongest argument as outside the scope of its review, the Court then easily dismissed a fairly nebulous argument from respondents that FMCSA's decision not to account for the effects of increased cross-border operations of Mexican motor carriers was arbitrary and capricious. Consequently, the unanimous reversal is of no surprise.

The Court made strong use of the *Metropolitan Edison* holding at the outset of its NEPA analysis by initially establishing the requirement of a close causal relationship between FMCSA's regulations and the possible adverse environmental effects raised by respondents. The Court saw a glaring disconnect in respondents' argument—because FMCSA is not ultimately responsible for the influx of cross-border Mexican motor carriers, but is only able to react to this activity through its regulations, it cannot be required to consider those environmental effects.[66] The Court's

---

61. *Id.* "Direct emissions" are those "that are caused or initiated by the [f]ederal action and occur at the same time and place as the action." Clean Air Act Regulations, 40 C.F.R. § 93.152(b).

62. Clean Air Act Regulations, 40 C.F.R. § 93.152(b).

63. *Dep't of Transp.*, 124 S. Ct. at 2218.

64. *Id.*

65. *Id.* at 2213-14.

66. *See id.* at 2214.

subsequent rule of reason and cumulative effect analysis was effectively framed around the same general thesis, that FMCSA should not be held responsible for the effects of actions beyond its purview.

The Court's CAA conformity determination analysis is also persuasive given the framing of the issue. As mentioned above, in order for a federal action to be linked as a cause of indirect emissions under the CAA, there must be emissions that the "[f]ederal agency can practicably control and will maintain control over due to a continuing program responsibility of the [f]ederal agency."[67] The Court approached this analysis on the most direct level of regulatory interpretation by pointing out that FMCSA did not possess the program responsibility to regulate emissions standards.[68]

Respondents argued that FMCSA's continuing program responsibility to conduct inspections gave it the requisite control because FMCSA could control emissions standards by excluding the use of older trucks with poor emission controls through the imposition of stringent safety standards that older trucks would be unlikely to meet.[69] Though this argument for the use of stringent safety standards has merit in the context of the NEPA analysis (as discussed below), it has much less weight in the context of a CAA conformity determination—changes in the safety level of Mexican trucks over time could very well prevent FMCSA from "maintaining control" of emissions standards indirectly through safety regulations.

The Court erred, however, in dismissing this stringent standard argument in the context of the NEPA claim. The Court held that respondents forfeited their right to argue that FMCSA did not consider all proper alternatives because they did not bring these non-obvious options to FMCSA's attention during the comment period for the EA.[70] FMCSA was not responsible for identifying mitigating alternatives on its own, wrote Justice Thomas, because the connection between motor carrier safety and environmental effect is "tenuous as best."[71] Though respondents conceded that they did not argue this point until their reply brief on appeal, they contended that FMCSA had an affirmative obligation to take this alternative into account because the agency "had

---

67. Clean Air Act Regulations, 40 C.F.R. § 93.152(b).
68. *See Dep't of Transp.*, 124 S. Ct. at 2218.
69. Brief for the Respondents at 47-48, Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204 (2004) (No. 03-358).
70. *See Dep't of Transp.*, 124 S. Ct. at 2214.
71. *Id.*

the predicate facts in front of it."[72] Therefore, respondents argued that the facts in the noted case differed from *Vermont Yankee* in that the alternatives in this matter were known to the agency and were not "uncharted territory."[73]

It would seem that if FMCSA had any indication that the incoming Mexican motor carrier fleet consisted of trucks likely both to emit higher levels of pollutants than trucks in the United States and to have equipment safety problems, then it would be arbitrary and capricious on the agency's part not to explore the alternative of raising regulatory standards as a means of both ensuring high safety and environmental standards. FMCSA argued that no such correlative data existed, but a cursory glance at the documents in the history of the noted case indicate otherwise.[74]

In its reply brief, FMCSA speaks of the "commonsense notion that older trucks may be more likely than newer trucks to have equipment-safety problems."[75] In its EA, FMCSA classified one-third of Mexican trucks as identical to U.S. trucks manufactured after 1994, while the remaining two thirds were classified as identical to U.S. trucks manufactured in 1986, the year before emissions standards for trucks were enforced in either country.[76] Mexican emissions standards did not become equivalent to U.S. standards until 1994.[77] Based on these figures alone, there appears to be at least a preliminary indication that the Mexican fleet may be composed of older trucks that produce higher emission rates. Yet FMCSA failed to consider any correlation between the stringency of its safety regulations and the impact that Mexican motor carriers could have on the environment in assuming their new cross-border routes.[78]

Applying the definition of arbitrary and capricious to these facts, it is apparent that FMCSA did not take into account all relevant factors when identifying alternatives to its proposed federal action. There seems

---

72. Oral Argument at 40, Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204 (2004) (No. 03-358).

73. *Id.* (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 553 (1978)).

74. Reply Brief for the Petitioners at 12, Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204 (2004) (No. 03-358).

75. *Id.*

76. Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1025 (2003).

77. *Id.*

78. FMCSA looked at three different scenarios in its EA: (1) where the President did not lift the moratorium; (2) where the moratorium was lifted, but no new regulations were promulgated; (3) where the moratorium was lifted and the regulations were promulgated. Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2211 (2004).

to be a basis in fact for the assertion that some correlation between motor carrier safety and vehicle emissions exists and it is worthy of exploration in the context of FMCSA's role in such a far-reaching international initiative.

V. CONCLUSION

The Supreme Court's decision in the noted case raises concerns about how the environmental implications of executive action will be assessed. The Court narrowed the relevant issue as much as possible in order to arrive at its holding, which renders a government agency accountable only for assessing the environmental impacts for which its actions are an underlying cause, regardless of whether the agency may have the opportunity to take positive environmental action through the execution of its mandated duties. As a matter of policy, this may be favorable in that it encourages each agency to focus strictly on its own designated role, purpose, and directives. However, because environmental legislation such as NEPA is geared toward policing the activities of executive agencies, but not the President, the noted case also raises questions as to who, if anyone, is to assess the environmental impacts of presidential actions.

Joseph Kraft*

* J.D. candidate 2006, Tulane Law School; B.A. 1999, Middlebury College.