



TXDOT CLIMATE CHANGE AND NEPA

Where are we? And how did we get here?

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NEPA and Climate Change

According to the Council on Environmental Quality...

Federal agencies should consider the extent to which a proposed action and its reasonable alternatives would contribute to climate change,...

- *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, August 2016 (rescinded April 5, 2017)

But Wait,...

Climate change is different, and fundamental principals provide some room for interpretation

According to CEQ:

Inherent in NEPA and the CEQ regulations is a “*rule of reason*” that allows agencies to determine, based on their expertise and experience, how to consider an environmental effect and prepare an analysis based on the available information.

Rule of reason states that agencies determine whether and to what extent to prepare their NEPA reviews based on the usefulness of potential information to the decision-making process, and to focus their analyses on issues that deserve study.

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Otherwise, what’s to keep us from studying all the world’s problems in a NEPA analysis (e.g., degradation of the oceans, depletion of natural resources) – its not a stretch to connect global issues to a single action.

What level of consideration of climate change associated with a proposed action is useful to the decision-maker?

More confusing than helpful.

What have the courts said?



City of Los Angeles v. National Highway Traffic Safety Administration
(D.C. Circuit, 1990)

One of the first climate change cases.

Concerned the setting of the Corporate Average Fuel Economy (CAFE) standard by NHTSA. The complaint alleged that lowering the standard by one mpg would worsen global warming and that an EIS should have been required.

- ❑ The *court did not doubt that global warming was a proper subject for analysis under NEPA* (Plaintiff had standing); however there was no indication that the particular action's impact exceeded the threshold of significance. Plaintiff failed to show *any* effect from the actions, much less a *significant* effect. No EIS required.

Massachusetts v. Environmental Protection Agency
(Supreme Court, 2007)

Concerned the denial by EPA to regulate greenhouse gases from motor vehicles as a harmful pollutant under the Clean Air Act.

Court opinion:

- Court found EPA's denial was improper – failed to justify denial of petition to regulate
- Determined that *GHGs constitute air pollutants under Clean Air Act*

Center for Biological Diversity v. National Highway Traffic Safety Administration (9th Circuit, 2007)

Court Opinion:

- ❑ We conclude that the *EA's cumulative impacts analysis is inadequate*. While the EA quantifies the expected amount of CO₂ emitted from light trucks MYs 2005-2011, it does not evaluate the “incremental impact” that these emissions will have on climate change,...
- ❑ Thus, the fact that “*climate change is largely a global phenomenon that includes actions that are outside of [the agency's] control . . . does not release the agency from the duty of assessing the effects of its actions on global warming within the context of other actions that also affect global warming.*”
- ❑ *The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.*

Thank you Judge Fletcher of the 9th Circuit. At least we have our marching orders.

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NEPA and Climate Change

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The 9th Circuit -



Other circuits? Anything highway related?

Sierra Club v. Federal Highway Administration
(S.D. Tex., 2010)

The Plaintiffs sued FHWA (and TxDOT) alleging inadequacies of the Final EIS, including inadequate consideration of impacts to air quality including failure to consider greenhouse gas emissions.

Court Opinion:

- ❑ The court has not found any evidence that the defendants considered the impact of Segment E on greenhouse gas emissions. *The plaintiffs have not, however, pointed to any law or regulation showing that defendants' failure to consider greenhouse gas emissions makes the FEIS inadequate*, or makes the decision of the FHWA arbitrary or capricious.

Dude,.... so where are we??????????



No Clear Direction

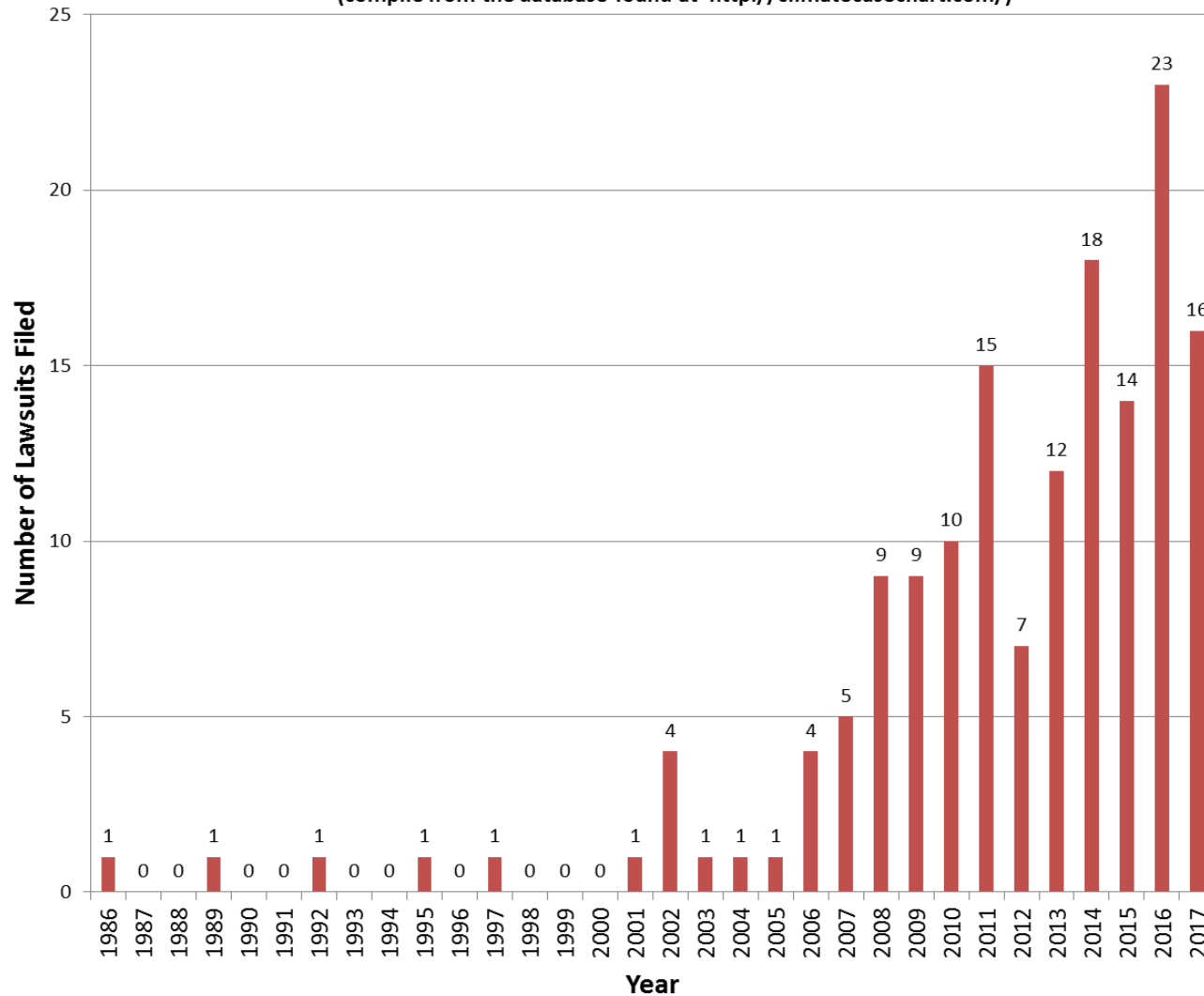


*OK, Let's Look at Risk
Where is it? What is it?*

Trend in Climate Change Lawsuits

Climate Change Litigation under NEPA

(compile from the database found at <http://climatecasechart.com/>)



TxDOT “must ground its reasons for action or inaction” on the subject of climate change.*

* Supreme Court to EPA in *Mass. v EPA*

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TxDOT

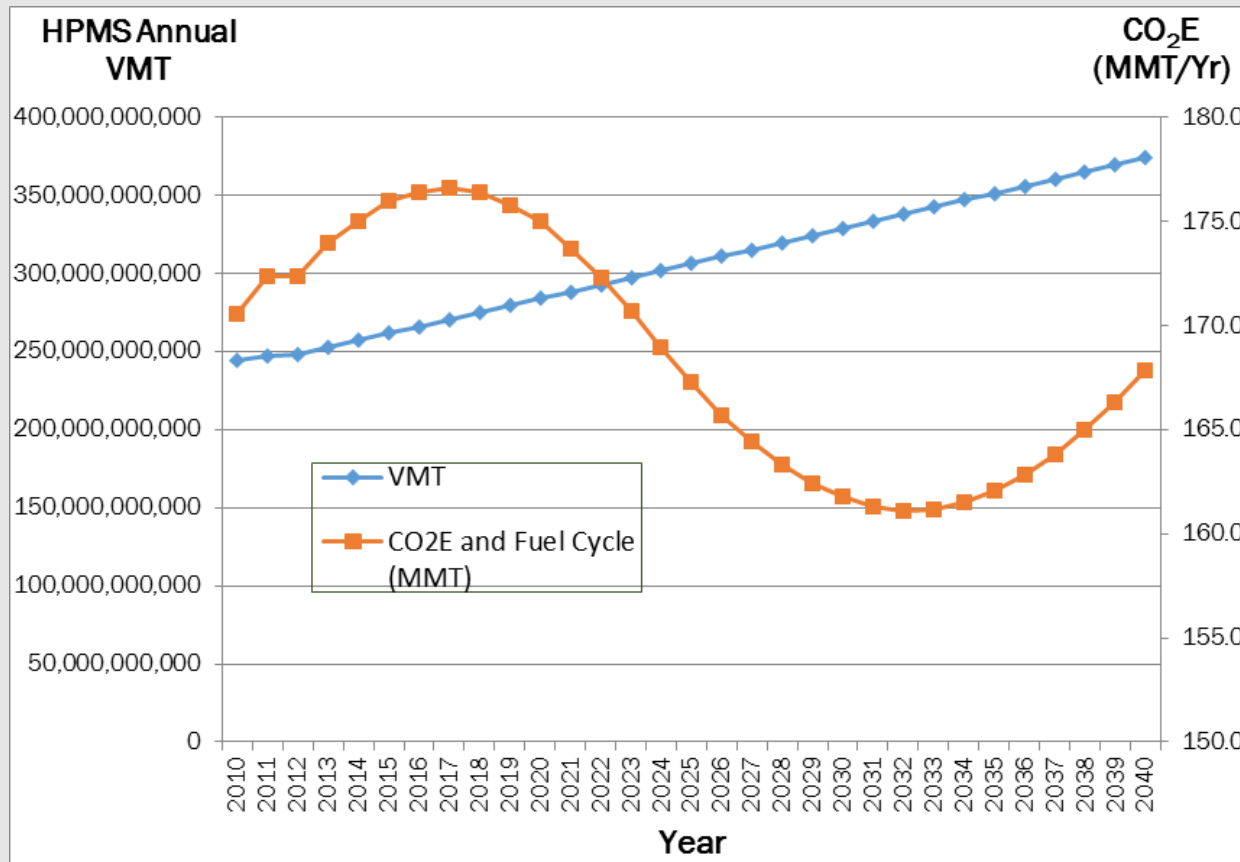
*Greenhouse Gas and Climate Change Technical Report
(in development)*

Programmatic / Statewide approach

- A statewide quantitative GHG analysis for the Texas on-road transportation system and using emissions modeling (MOVES2014) and statewide Vehicle Miles Traveled (VMT)

TxDOT Approach

Texas VMT and Annual CO₂E On-road and Fuel-Cycle Emissions Trends (*Preliminary*)



Goals of TxDOT Approach to NEPA and Climate Change

- ✓ **Recognize climate change in NEPA analysis**
- ✓ **Include a quantitative (on-road, statewide) GHG analysis**
- ✓ **Minimize project-level analysis**
- ✓ **Include a statewide assessment of impacts resulting from climate change**
- ✓ **Disclose to public and agencies**
- ✓ **Assist the NEPA decision-maker (w/o lengthy project-level analysis)**
- ✓ **Defensible**