

# Congestion Pricing in the Courts: NEPA as a Vehicle for Addressing Interstate Disputes

By Christine Billy and Janet Bering



New York State's congestion pricing scheme, perennially in the news but yet to get off the ground, is currently facing six legal challenges.<sup>1</sup> Among the litigants is the state of New Jersey.<sup>2</sup> The various lawsuits challenge the adequacy of the Federal Highway Administration's (FHWA) environmental review of the program under the National Environmental Policy Act (NEPA), among other claims.<sup>3</sup> In this respect, the current litigation raises interesting questions about the role of NEPA in evaluating interstate disputes.

## I. How Did We Get Here? The History of New York's Congestion Pricing Program

Congestion pricing programs aim to reduce traffic in heavily congested urban areas through the use of tolling or other pricing signals to deter vehicles from driving in the area designated under the program. London<sup>4</sup> and Stockholm,<sup>5</sup> among others, tout the success of their programs. For example, in London, congestion pricing has reduced traffic by thirty percent and greenhouse gas (GHG) emissions by twelve percent, while increasing transit ridership significantly.<sup>6</sup>

## A. The Path to State Congestion Pricing Legislation

In New York City, the effects of traffic congestion have long contributed to public health and other quality of life problems.<sup>7</sup> Pre-pandemic, 7.7 million people entered Manhattan's Central Business District (CBD) each day.<sup>8</sup> Vehicular traffic results in GHG emissions as well as localized pollution.<sup>9</sup> In certain areas of Manhattan, concentrated levels of particulate matter (PM) and ozone are exceedingly high<sup>10</sup> and contribute to increased deaths and serious illnesses, such as heart and lung diseases.<sup>11</sup>

The idea of using a congestion pricing scheme to address the acute traffic in Manhattan's CBD has been percolating for over a century.<sup>12</sup> The Bloomberg administration made attempts in 2007 and 2008,<sup>13</sup> but despite a coordinated effort and strong public support, the state failed to provide approvals required to unlock federal funding.<sup>14</sup> After that defeat, policy makers and advocates released various proposals and continued advocating for congestion pricing as a method to reduce congestion in Manhattan.<sup>15</sup>

Congestion pricing advocates finally succeeded in 2019, when the state authorized the implementation of a congestion pricing program, officially known as the Central Business District Tolling Program (“the Program”).<sup>16</sup> The Program works by charging drivers a toll to enter the Manhattan CBD, which is comprised of Manhattan south of and including 60th Street, but excluding the FDR Drive, the West Side Highway, and the Hugh L. Carey Tunnel connection to West Street.<sup>17</sup>

The authorizing statute (the Act) sets twin purposes for the Program: to reduce traffic congestion and to fund capital improvements to the Metropolitan Transportation Authority (MTA).<sup>18</sup> In its legislative findings, the Act notes that in the most congested part of Midtown Manhattan, the average vehicular speed is a sluggish 4.7 miles per hour.<sup>19</sup> At a minimum, the tolling program must “provide for sufficient revenues . . . to fund fifteen billion dollars for capital projects” for the MTA.<sup>20</sup> The legislature found that increasing funding for the MTA and reducing congestion were critical to protect the public health and safety of New Yorkers.<sup>21</sup>

The Act directs the Triborough Bridge and Tunnel Authority (TBTA), an affiliate of the MTA, to design and establish the Program, with input from the New York City Department of Transportation (NYCDOT).<sup>22</sup> The Act also instructs the TBTA to create a Traffic Mobility Review Board (TMRB) for purposes of making recommendations for the Program.<sup>23</sup> In recommending toll amounts, the TMRB is instructed to consider factors including, among other things, “traffic patterns, traffic mitigation measures, operating costs, public impact, public safety, hardships . . . and environmental impacts, including but not limited to air quality and emissions trends.”<sup>24</sup>

The Act waives certain state and local environmental and land use review processes, including the State Environmental Quality Review Act and New York City’s Uniform Land Use Review Procedure.<sup>25</sup> However, the Program, as envisioned, would involve tolling on federally funded roadways,<sup>26</sup> which requires approval by the FHWA under the federal Value Pricing Pilot Program (VPPP).<sup>27</sup>

## **B. Environmental Review Under NEPA**

The need for FHWA approval triggered federal environmental review under NEPA. NEPA is a process statute that requires federal agencies to assess significant environmental impacts before taking major federal actions.<sup>28</sup> The NEPA review process can also lead to project mitigation measures to avoid adverse environmental impacts.<sup>29</sup> Depending on the likelihood of significant environmental impacts, NEPA requires varying levels of agency analysis

and public participation.<sup>30</sup> The most extensive environmental review process under NEPA is an Environmental Impact Statement (EIS), which involves multiple public hearings, opportunities for public comment, and detailed analysis.<sup>31</sup>

In the case of New York’s congestion pricing proposal, the FHWA chose the second-most in-depth level of review—an Environmental Assessment (EA).<sup>32</sup> The goal of an EA is to determine whether there are potentially significant adverse environmental impacts that would need to be studied and disclosed in an EIS.<sup>33</sup> An EA can also help the agency identify alternatives and measures to mitigate adverse environmental impacts.<sup>34</sup> In this case, the project sponsors<sup>35</sup> conducted an “EA plus,” and engaged in multiple rounds of public hearings and stakeholder engagement sessions that are not strictly required for an EA.<sup>36</sup>

The EA’s traffic analysis indicated that the Program would result in significant decreases in vehicles entering Manhattan, minor decreases in regional vehicles miles traveled, and a minor increase in traffic in certain neighborhoods in New York and New Jersey.<sup>37</sup> The traffic reductions would have significant benefits for local and regional air quality.<sup>38</sup> For example, the EA found that depending on the specific tolling scheme selected, the Program could reduce annual PM<sub>10</sub> emissions by twelve percent in the Manhattan CBD.<sup>39</sup>

One notable element of this process was consideration of environmental justice impacts of the Program. The concept of environmental justice was first incorporated into federal agency action by Presidential Executive Order in 1994.<sup>40</sup> The Biden Administration has strengthened this commitment with Executive Order 14096, which builds upon prior efforts to promote environmental justice and explicitly incorporates environmental justice analysis under federal agency NEPA review.<sup>41</sup> FHWA has developed its own guidance on how it will incorporate environmental justice into its work, including during NEPA review.<sup>42</sup>

For the congestion pricing NEPA review, FHWA and the project sponsors convened an Environmental Justice Stakeholder Working Group and an Environmental Justice Technical Advisory Group.<sup>43</sup> The EA considered environmental justice impacts by looking at how the Program might divert traffic to highways around the Manhattan CBD, and whether these additional vehicles might adversely affect the air quality of nearby neighborhoods.<sup>44</sup> The EA identified particular neighborhoods that could be adversely affected, including areas in Lower Manhattan, Brooklyn, and the Bronx in New York, and Orange, East Orange, Newark, and Fort Lee in New Jersey.<sup>45</sup> To address potential increased pollution in those neighborhoods, the EA proposed targeted mitigation measures, such as road-

side vegetation, parks and greenspace, and air filtration in schools.<sup>46</sup>

### C. The MTA Inches Toward Implementation

The NEPA process concluded in June 2023, approximately four years after the Act was enacted.<sup>47</sup> The FHWA determined that the Program would not have a significant adverse environmental impact and that a full EIS would not be needed.<sup>48</sup>

The MTA released a planned tolling program in December 2023,<sup>49</sup> following recommendations from the TMRB.<sup>50</sup> The MTA held a series of public hearings on the proposed plan,<sup>51</sup> and reviewed over 25,000 public comments.<sup>52</sup> On March 27, 2024, the MTA, acting in its capacity as the board of the TBTA, formally voted to approve the tolling plan.<sup>53</sup> However, the MTA has separately announced that it is suspending certain capital projects and all new advertisements of construction contracts linked to congestion pricing funds, while the lawsuits are pending.<sup>54</sup> Such delays will stall updates to the subway's signaling system, station accessibility upgrades, phase two of the Second Avenue Subway line, and electrification of fleets.<sup>55</sup> Pending the outcome of the litigation, MTA has indicated that it intends to implement the Program by this summer.<sup>56</sup>

### II. A Wave of Litigation Challenging New York's Congestion Pricing Program

The lawsuits challenging New York's congestion pricing scheme began as soon as the FHWA released the Final EA. In July 2023, New Jersey filed a suit alleging that the FHWA did not adequately consider New Jersey in its environmental analysis.<sup>57</sup> New Jersey also challenged the FHWA's analysis of air quality impacts in New Jersey under the federal Clean Air Act's "conformity" provisions, which require federal agencies to consider how a federal action impacts a state's ability to conform with federal air quality standards.<sup>58</sup>

In November, Mark Sokolich, mayor of Fort Lee, New Jersey, and a group of constituents filed a similar complaint, focusing on the specific impacts to Fort Lee, which sits at the base of the George Washington Bridge.<sup>59</sup> Fort Lee raised concerns about how traffic that would be diverted around the congestion pricing zone could potentially impact local air quality.<sup>60</sup>

A second wave of lawsuits began in December 2023 and January 2024, when three groups of New York plaintiffs filed three separate lawsuits. Two suits were filed by lower Manhattan community groups and residents.<sup>61</sup> A further suit was brought by a coalition of unions, including the United Federation of Teachers (UFT), and a

group of local, state, and federal elected officials from New York City and surrounding New York counties, including the Staten Island Borough president.<sup>62</sup> Each of these suits focuses on alleged NEPA violations, claiming that the FHWA should have conducted a full EIS and failed to adequately analyze and mitigate impacts to environmental justice communities in New York City and surrounding areas.<sup>63</sup> These lawsuits further allege that the FHWA must produce a supplemental EIS to evaluate these impacts, on the theory that the MTA is proceeding with a pricing plan that was not specifically studied by the EA.<sup>64</sup> The UFT plaintiffs also brought claims alleging that the congestion pricing scheme violates the Dormant Commerce Clause, impinges on the right to travel, and violates the New York State Constitution's Green Amendment because it will allegedly increase air pollution in parts of New York.<sup>65</sup>

In late March 2024, on the day before the MTA gave final approval to the congestion pricing tolling plan, Rockland County, New York, filed a claim alleging that the tolls would constitute an unauthorized tax in violation of state and federal constitutional provisions.<sup>66</sup> The county is also seeking to force the MTA to perform a study of the impacts of the congestion pricing tolls in the context of other fees and tolls paid by the region's commuters.<sup>67</sup>

### III. The Road Forward: NEPA as a Vehicle for Addressing Interstate Disputes

Although NEPA was designed as a process statute that imposes disclosure obligations on federal agencies, New Jersey is utilizing the federal law as a sword to challenge New York's policy decisions in enacting and designing the state's congestion pricing scheme. In this regard, this particular case raises interesting questions about the role of NEPA as a means of evaluating interstate disputes.

NEPA's implementing regulations address the role of states at various points in the review process. As an initial matter, when federal agencies are determining the appropriate level of NEPA review, the agencies must consider the "affected area," which can be "national, regional, or local."<sup>68</sup> Further, federal agencies are directed to involve state governments when preparing EAs "to the extent practicable."<sup>69</sup> There are additional requirements for state involvement when agencies prepare Environmental Impact Statements, which FHWA elected not to prepare here.<sup>70</sup>

FHWA's NEPA regulations also address state government involvement in environmental review. States seeking federal approvals from FHWA that trigger NEPA have an obligation to notify and solicit early input from "[o]ther States . . . that may be significantly affected by the action."<sup>71</sup> State applicants must also notify affected

state governmental agencies when the EA is available for comment.<sup>72</sup>

### **A. New Jersey Has Claimed Harm, But Who Speaks for New Jersey Residents?**

In the congestion pricing litigation, New Jersey has raised both procedural and substantive NEPA claims challenging the adequacy of the NEPA review with regard to out-of-state impacts. New Jersey has argued that FHWA should have conducted a full EIS, rather than an EA,<sup>73</sup> and that the EA process failed to “meaningfully engage” New Jersey and its state agencies, which allegedly led FHWA to overlook significant impacts on New Jersey.<sup>74</sup> In response, the FHWA argues that the process for obtaining input from New Jersey exceeded NEPA’s requirements, noting that the project sponsors conducted two “early outreach” sessions in New Jersey, and three additional environmental justice webinars specifically dedicated to New Jersey.<sup>75</sup>

New Jersey has separately claimed that the EA failed to properly analyze how traffic diversions resulting from the toll structure could impact air quality in New Jersey generally, and in local New Jersey environmental justice communities specifically.<sup>76</sup> FHWA has responded to these allegations by pointing to the EA’s findings that the project would result in no more than a 0.2% change in vehicle miles traveled in New Jersey as a whole, with minimal impacts on air quality.<sup>77</sup> The agency defended its methodology for considering localized impacts on environmental justice communities within New Jersey, pointing to the EA’s description of place-specific mitigation measures that could be adopted in New Jersey.<sup>78</sup>

FHWA’s attention to potential mitigation measures to address impacts on environmental justice communities in New Jersey was driven, in part, by participation by the Environmental Protection Agency (EPA). The EPA submitted a letter asking for a more detailed environmental justice analysis of air quality impacts in the Bronx, Staten Island, and Bergen County, New Jersey, “where the analysis in the Draft EA projects that traffic congestion will likely worsen due to Project implementation.”<sup>79</sup> The EPA urged more community engagement on environmental justice impacts and more attention to potential mitigation measures.<sup>80</sup> In the final EA, FHWA conducted additional study of such potential impacts and included additional discussion of mitigation measures.<sup>81</sup>

In this regard, the NEPA process appears to have served as a procedural vehicle for federal consideration of how a program operating in one state can impact the environmental health of residents in a neighboring state. This is meaningful, as it is unclear whether the MTA would have

had any reason on its own to consider the health of New Jersey residents when setting up a tolling structure within the jurisdictional boundaries of New York City.<sup>82</sup>

New Jersey’s claims also raise important questions about who speaks for the state when engaging in inter-state disputes. It is notable that the New Jersey attorney general did not make an appearance in the congestion pricing litigation; the state hired outside counsel.<sup>83</sup> However, two local government units within New Jersey chose to participate in the litigation. Bergen County filed a separate amicus brief in support of New Jersey’s case, and the mayor of Fort Lee and a contingent of New Jersey residents filed a separate case bringing similar claims.<sup>84</sup> Each of these governmental entities purport to speak for the state or a subdivision within it.

The public engagement process built into NEPA also allowed other voices to come forward and speak on behalf of New Jersey’s interests. Several New Jersey-based entities filed comments on the draft EA, providing their own perspective on how the congestion pricing program would impact New Jersey residents.<sup>85</sup> Later, when New Jersey brought suit challenging the NEPA analysis, a coalition of thirty-four New Jersey local community-based organizations representing environmental, transportation, and equity-based interests filed an amicus brief defending the EA and directly challenging the positions taken by New Jersey.<sup>86</sup> The New Jersey community organizations heralded the benefits of congestion pricing for New Jersey and defended the NEPA public engagement process.<sup>87</sup> In a set of pointed arguments, the local groups identified a dissonance between New Jersey’s position in this case, and the state’s choice to pursue less rigorous NEPA review for the state’s New Jersey Turnpike expansion project, noting that: “Public input in connection with the Tolling Program was a model of transparency compared to what NJTA is doing in connection with the Turnpike Expansion.”<sup>88</sup>

One consequence of a participatory democracy is that when administrative or judicial proceedings afford multiple opportunities for public input, this can lead to complex, and at times fractured, definitions of local representation. In the case of congestion pricing, multiple parties were able to speak on behalf of the people of New Jersey, and each were offered an opportunity to be heard. How this will shape the ultimate outcome remains to be seen.

### **B. Beyond Congestion Pricing: What Will Interstate Disputes Over Air Quality Look Like in the Future?**

While the congestion pricing litigation moves forward, another set of inter-state air quality disputes have been garnering national attention. In February 2024, the Supreme

Court heard oral argument on whether it should grant an emergency stay of EPA's Good Neighbor Plan and interstate ozone rule.<sup>89</sup> The rule was issued pursuant to the "Good Neighbor" provision of the Clean Air Act, which instructs upwind states to reduce emissions that impact the air quality in downwind states.<sup>90</sup> Three states—Ohio, Indiana, and Virginia—along with a group of companies and trade associations, have challenged EPA's rule.<sup>91</sup>

In the Good Neighbor litigation, New York and New Jersey have teamed up together as part of a coalition of downwind states and local governments that have joined the proceeding in defense of EPA's rule, noting that "[o]zone precursors transported from upwind States contribute substantially to the elevated ozone levels in [downwind States]," including over fifty percent of ozone-forming emissions in some downwind jurisdictions.<sup>92</sup> The stakes of this litigation may be higher than the congestion pricing litigation, insofar as the upwind states are challenging EPA's authority to directly regulate pollution within those upwind states. As discussed, NEPA plays an important role in governmental decision-making and can lead to mitigation measures, but it does not extend authority to federal agencies to directly regulate state conduct.

During oral argument, several Supreme Court justices exhibited a skepticism toward EPA's position in the Good Neighbor case.<sup>93</sup> This skepticism appears in the context of an overall willingness by the Court to constrain federal agency administrative actions, particularly with regard to environmental protection.<sup>94</sup> It is unclear what this precarity surrounding EPA's authority will mean for downwind states like New York and New Jersey, and what protections they will receive in the future.

This backdrop of uncertainty regarding the authority of federal agencies to directly regulate inter-state air pollution adds an additional gloss to the congestion pricing litigation. Politics, like pollution, are affected by changing winds. Depending on the goals of the next presidential administration, state efforts to address local air quality and GHG emissions may take on increasing significance. The congestion pricing litigation illustrates that NEPA can be one vehicle for examining how a state's policies may affect local air pollution outside the state. NEPA's built-in opportunities for broad public engagement may play an ongoing role in bringing forth multiple perspectives on how extraterritorial interests might be implicated in state policies.

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## Endnotes

1. Compl., *New Jersey v. Dep't of Transportation*, No. 2:23-cv-03885, (D.N.J. Jul. 21, 2023); Compl., *Sokolich v. Dep't of Transportation, MTA et al.*, No. 2:2023-cv-21728 (D.N.J. Nov. 1, 2023); Compl. *Chan v. Dep't of Transportation*, No. 23-cv-10365 (S.D.N.Y. Nov. 22, 2023); Compl., *Mulgrew v. Dep't of Transportation, MTA, etc.*, No. 24-cv-81 (E.D.N.Y. Jan. 4, 2024); Compl., *New Yorkers Against Congestion Pricing Tax v. Dep't of Transportation*, No. 1:24-cv-00367 (S.D.N.Y. Jan. 18, 2024); Compl., *County of Rockland et al. v. Triborough Bridge and Tunnel Authority and MTA*, No. 7:24-cv-02285 (S.D.N.Y. Mar. 27, 2024).
2. Compl., *New Jersey v. Dep't of Transportation*, No. 2:23-cv-03885, *supra*, n. 1 (supported by an amicus brief from Bergen County). *See also* Compl., *Sokolich v. Dep't of Transportation, MTA et al, supra*, n. 1 (brought by the Mayor of Fort Lee).
3. *See supra*, n. 1; National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321 *et seq.*
4. Congestion Charge, Transport For London, <https://tfl.gov.uk/modes/driving/congestion-charge>.
5. Patrick Ercolano, *Study: Stockholm Traffic Tax Helps Kids in Sweden Breathe Easier*, John Hopkins University (Mar. 2, 2017), <https://hub.jhu.edu/2017/03/02/health-effects-for-children-sweden-traffic-tax/>.
6. San Francisco County Transportation Authority, Downtown Congestion Pricing Study, (Feb. 2020), [https://www.sfcta.org/sites/default/files/2020-02/Congestion-Pricing-Case-Studies\\_2020-02-13.pdf](https://www.sfcta.org/sites/default/files/2020-02/Congestion-Pricing-Case-Studies_2020-02-13.pdf).
7. Chad Hughes, *Congestion Pricing and the Opportunity to Confront New York City's Air Quality Emergency*, 45 Wm. & Mary Envtl. L. & Pol'y Rev. 859 (2021) (arguing that congestion pricing should be set, in part, based on local air quality standards); Michael B. Gerrard & Edward McTiernan, *New*

- York's New Congestion Pricing Law*, 261(89) N.Y. L. J. (May 9, 2019).
8. See U.S. Department of Transportation, Federal Highway Administration, Central Business District (CBD) Tolling Program Final Environmental Assessment Figure ES-2, ES-3 (April 2023) <https://new.mta.info/project/CBDTP/environmental-assessment> (hereinafter "EA").
  9. New York City Department of Environmental Protection, Transportation Emissions, <https://www.nyc.gov/site/dep/environment/transportation-emissions.page>; New York City Mayor's Office of Climate and Environmental Justices, NYC Greenhouse Gas Inventories, <https://climate.cityofnewyork.us/initiatives/nyc-greenhouse-gas-inventories/>.
  10. See EA, *supra* n. 8, Table 10-2 at 10-4.
  11. New York City Department of Health and Mental Hygiene, Air Pollution and the Health of New Yorkers: The Impact of Fine Particles and Ozone, <https://www.nyc.gov/assets/doh/downloads/pdf/eode/eode-air-quality-impact.pdf>.
  12. Michael B. Gerrard & Edward McTiernan, *New York's New Congestion Pricing Law*, *supra* n. 7.
  13. Michael B. Gerrard & Edward McTiernan, *New York's New Congestion Pricing Law*, *supra*, n. 7; Sam Schwartz, et al., *A Comprehensive Transportation Policy for the 21st Century: A Case Study of Congestion Pricing*, 17 N.Y.U. Env't'l L. J. 580, 590-91 (2008); see also Christian Iaione, *The Tragedy of Urban Roads: Saving Cities from Choking. Calling on Citizens to Combat Climate Change*, 37 Fordham Urb.. L.J. 889, 919-21 (2010).
  14. See Iaione, *supra* n. 13, at 921 (noting NYC City Council's approval of the Bloomberg congestion pricing plan).
  15. See Jason Czarnecki, *New York City Rules! Regulatory Models for Environmental and Public Health*, 66 Hastings L. J. 1621, 1643 (2015) (noting that congestion pricing components continued to be included in other Bloomberg administration plans); Marc Santora, *Cuomo Calls Manhattan Traffic Plan an Idea 'Whose Time Has Come'*, New York Times (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/nyregion/cuomo-rethinks-opposition-to-tolls-to-ease-manhattan-traffic.html>.
  16. MTA Reform and Traffic Mobility Act, N.Y. S. 1509--C /A. 2009--C, Part ZZZ (2019).
  17. N.Y. Veh. & Traf. Law § 1704(2).
  18. *Id.* § 1701.
  19. *Id.*
  20. N.Y. Veh. & Traf. Law § 1704-a(1).
  21. *Id.* § 1701.
  22. *Id.* § 1704.
  23. N.Y. Pub. Auth. § 553-k.
  24. *Id.* § 553-k(3).
  25. N.Y. Veh. & Traf. Law § 1704(6).
  26. EA, *supra* n. 8. at 0-1.
  27. Intermodal Surface Transportation Efficiency Act of 1991 (Public Law 102-240 § 1012-B, 105 Stat. 1914), as amended by the Transportation Equity Act for the 21st Century (TEA-21) (Public Law No. 105-178 § 1216(a), 112 Stat. 107 (1998)); [https://ops.fhwa.dot.gov/congestionpricing/value\\_pricing/](https://ops.fhwa.dot.gov/congestionpricing/value_pricing/).
  28. 42 U.S.C. §4331(c); 40 C.F.R. §1508.18.
  29. 40 C.F.R. §1508.20.
  30. Council on Environmental Quality, A Citizen's Guide to NEPA 8 (Dec. 2007), [https://ceq.doe.gov/docs/get-involved/Citizens\\_Guide\\_Dec07.pdf](https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf).
  31. 40 C.F.R. Part 1502.
  32. EA, *supra* n. 8.
  33. 40 C.F.R. § 1508.9.
  34. 23 C.F.R. § 771.119(b).
  35. The project sponsors include the TBTA, NYSDOT, and NYCDOT.
  36. EA, *supra* n. 8 at chapter 18. In its Cross-Motion for Summary Judgment in *New Jersey v. Dep't of Transportation*, the FHWA notes that where practicable and where all of the "hallmarks of an EIS are present," an EA conducted by a federal agency can be treated as a functional EIS, citing *Spiller v. White*, 352 F.3d 235, 245 n.6 (5th Cir. 2003). Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment 4 *New Jersey v. Dep't of Transportation*, No. 2:23-cv-03885, (D.N.J.) (hereinafter "FHWA Cross-Motion for Summary Judgment").
  37. EA, *supra* n. 8 at ES-13.
  38. EA, *supra* n. 8 at ES-15; chapter 10.
  39. EA *supra* n. 8 at 10-33, Figure 10-12.
  40. Exec. Order No. 12898, 59 FR 7629 (1994) ("To the greatest extent practicable and permitted by law...each Federal Agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."). The Council on Environmental Quality has since issued guidance on how agencies can incorporate environmental justice analysis into their NEPA review. See Council on Env't Quality, Environmental Justice: Guidance Under the National Environmental Policy Act (1997), [https://www.epa.gov/sites/default/files/2015-02/documents/ej\\_guidance\\_nepa\\_ceq1297.pdf](https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf).
  41. Exec. Order No. 14096 88 FR 25251 (2023).
  42. FHWA, Guidance on Environmental Justice and NEPA (2011), [https://www.environment.fhwa.dot.gov/env\\_topics/ej/guidance\\_ejustice-nepa.aspx](https://www.environment.fhwa.dot.gov/env_topics/ej/guidance_ejustice-nepa.aspx).
  43. EA *supra* n. 8 at 0-1.
  44. EA *supra* n. 8 at chapter 17.
  45. *Id.*
  46. EA *supra* n. 8 at ES-22, ES-50, n. 32.
  47. U.S. Department of Transportation, Federal Highway Administration, Central Business District (CBD) Tolling Program, Finding of No Significant Impact, 88 FR 41998, (Jun 28, 2023), <https://new.mta.info/project/CBDTP/environmental-assessment>.
  48. *Id.*
  49. MTA, *MTA Announces Details of Congestion Pricing Public Comment Period* (Dec. 26, 2023), <https://new.mta.info/press-release/mta-announces-details-of-congestion-pricing-public-comment-period>.
  50. MTA, Traffic Mobility Review Board, <https://new.mta.info/project/CBDTP/traffic-mobility-review-board>.

51. MTA, Central Business Tolling Program, <https://new.mta.info/project/CBDTP>.
52. MTA, *MTA Adopts Central Business District Toll Rates* (Mar. 27, 2024), <https://new.mta.info/press-release/mta-board-adopts-central-business-district-toll-rates>.
53. *Id.*
54. MTA, *MTA Details Accessibility, Expansion, and Reliability Projects at Risk Due to Congestion Pricing Lawsuits* (Feb. 26, 2024), <https://new.mta.info/press-release/mta-details-accessibility-expansion-and-reliability-projects-risk-due-congestion>.
55. *Id.*
56. MTA, Central Business Tolling Program, *supra* n. 52.
57. *New Jersey v. Dep't of Transportation*, *supra*, n. 1.
58. *Id.* Section 7506(c) of the Clean Air Act (CAA) prevents Federal agencies from, among other things, approving any activity that “does not conform to an implementation plan after it has been approved or promulgated under [CAA] section 7410.” 42 U.S.C. § 7506(c)(1). An agency must accordingly conduct a “conformity analysis” to assess whether a federal action will interfere with a state’s plan for “eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards.” 42 U.S.C. § 7506(c)(1)(A).
59. *Sokolich v. Dep't of Transportation*, *supra* n. 1.
60. *Id.*
61. *New Yorkers Against Congestion Pricing Tax v. Dep't of Transportation*, *supra*, n. 1; *Chan v. Dep't of Transportation*, *supra* n. 1.
62. *Mulgrew v. Dep't of Transportation, MTA, etc.*, *supra*, n. 1.
63. *See supra* n. 62 and 63.
64. *Id.*
65. *Mulgrew v. DOT, MTA, etc.*, *supra*, n. 1.
66. *County of Rockland et al. v. Triborough Bridge and Tunnel Authority*, *supra* n. 1.
67. *Id.*
68. 40 CFR § 1501.3(b)(1).
69. 40 CFR 1501.5E.
70. 40 CFR § § 1501.9(b); 1502.20.
71. 23 CFR § 771.111(e); see also 23 CFR § 771.119(b) (describing agency involving in EA scoping process).
72. 23 CFR § 771.119(d).
73. Plaintiff’s Motion for Summary Judgment 3 *New Jersey v. Dep't of Transportation*, No. 2:23-cv-03885, (D.N.J.) (hereinafter “NJ Motion for Summary Judgment”).
74. *Id.* at 39.
75. FHWA Cross-Motion for Summary Judgment, *supra* n. 37 at 39.
76. NJ Motion for Summary Judgment, *supra* n. 76 at 3.
77. FHWA Cross-Motion for Summary Judgment, *supra* n. 37 at 30.
78. *Id.* at 31.
79. Letter from Lisa F. Garcia, Environmental Protection Agency Region 2 (Sept. 23, 2022), EA, *supra* n. 8 at Appendix 18C-467.
80. *Id.*
81. EA, *supra* n. 8 at 0-3; Dave Colon, *EPA Endorsed Congestion Pricing After MTA Resolved Initial Concerns*, StreetsBlogNYC, Feb. 13, 2024, <https://nyc.streetsblog.org/2024/02/13/exclusive-epa-endorsed-congestion-pricing-after-mta-resolved-initial-concerns>.
82. *But c.f. National Pork Producers Council v. Ross*, 598 U.S. 356, 381 (2023) (Gorsuch, J.) (giving credence to the idea that states may consider the social policy implications of conduct outside their territorial boundaries in some contexts).
83. *New Jersey v. Dep't of Transportation*, *supra*, n. 1
84. *See supra* n. 2.
85. EA, *supra* n. 8 at Appendix 18C.
86. Brief of Amici Curiae EmpowerNJ, et al., *New Jersey v. Dep't of Transportation*, No. 2:23-cv-03885, (D.N.J.).
87. *Id.* at 1-3.
88. *Id.* at 23.
89. *Ohio v. EPA*, Sup. Ct. Case No. 23-1183 (D.C. Cir.) (2024).
90. After EPA promulgated new federal ozone standards in 2015, EPA determined that 23 upwind states failed to submit adequate plans to limit their emission of ozone-forming pollutants that travel into downwind States. For each of those upwind States, EPA issued the “Good Neighbor Rule” to protect downwind States and their residents—including children and the elderly in particular—from high levels of cross-state ozone pollution. EPA, Federal “Good Neighbor Plan” for the 2015 National Ambient Air Quality Standards, 88 Fed. Reg. 36654 (June 5, 2023).
91. *Ohio v. EPA*, *supra* n. 89.
92. Brief for States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and the District of Columbia, the City of New York, and Harris County, Texas, Respondents in Opposition to Applications for Stays 4 *Ohio v. EPA*, Sup. Ct. Case No. 23-1183.
93. Amy Howe, *Supreme Court Likely To Block EPA Ozone Regulation*, SCOTUS Blog, Feb. 21, 2024, <https://www.scotusblog.com/2024/02/supreme-court-likely-to-block-epa-ozone-regulation/>.
94. *See, e.g., West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *Sackett v. Environmental Protection Agency*, 598 U.S. \_\_\_\_ (2023); Jody Freeman & Matthew Stephenson, *The Anti-Democratic Major Questions Doctrine*, Sup. Ct. Rev. 1 (2023) (describing the Supreme Court’s narrowing of federal agency authority to address pressing environmental issues through the Major Questions Doctrine).