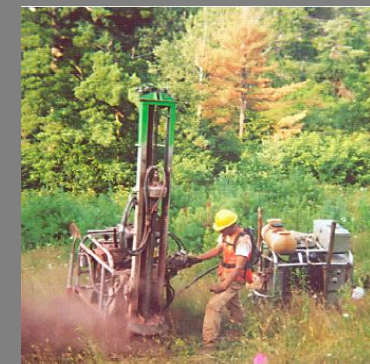




Legal Update

Recent Legal Challenges and New Policies involving Air Quality and GHGs

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Energy in the Law®



OVERVIEW

- Recent Cases Confronting Industry – Air Quality
- Trends and Issues Confronting Project Permitting
- Executive Branch Initiatives and Policies
- Greenhouse Gas Emissions – Litigation Overview

Legal Landscape

- National Environmental Policy Act
- Federal Land Policy and Management Act
- Clean Air Act
- Regulatory Roles and Jurisdiction

Legal Landscape

- **National Environmental Policy Act**
 - Procedural statute that does not impose substantive results
 - Requires “hard look” analysis of the potential impacts of the project on the environment
 - Analysis of “reasonably foreseeable” impacts, not speculative impacts

Legal Landscape

- **Federal Land Policy and Management Act**
 - Governs land use planning on public lands: Resource Management Plans (RMPs)
 - Requires management under “principles of multiple use and sustained yield”
 - Requires BLM to comply with laws regulating air and water quality when approving land use plans

Legal Landscape

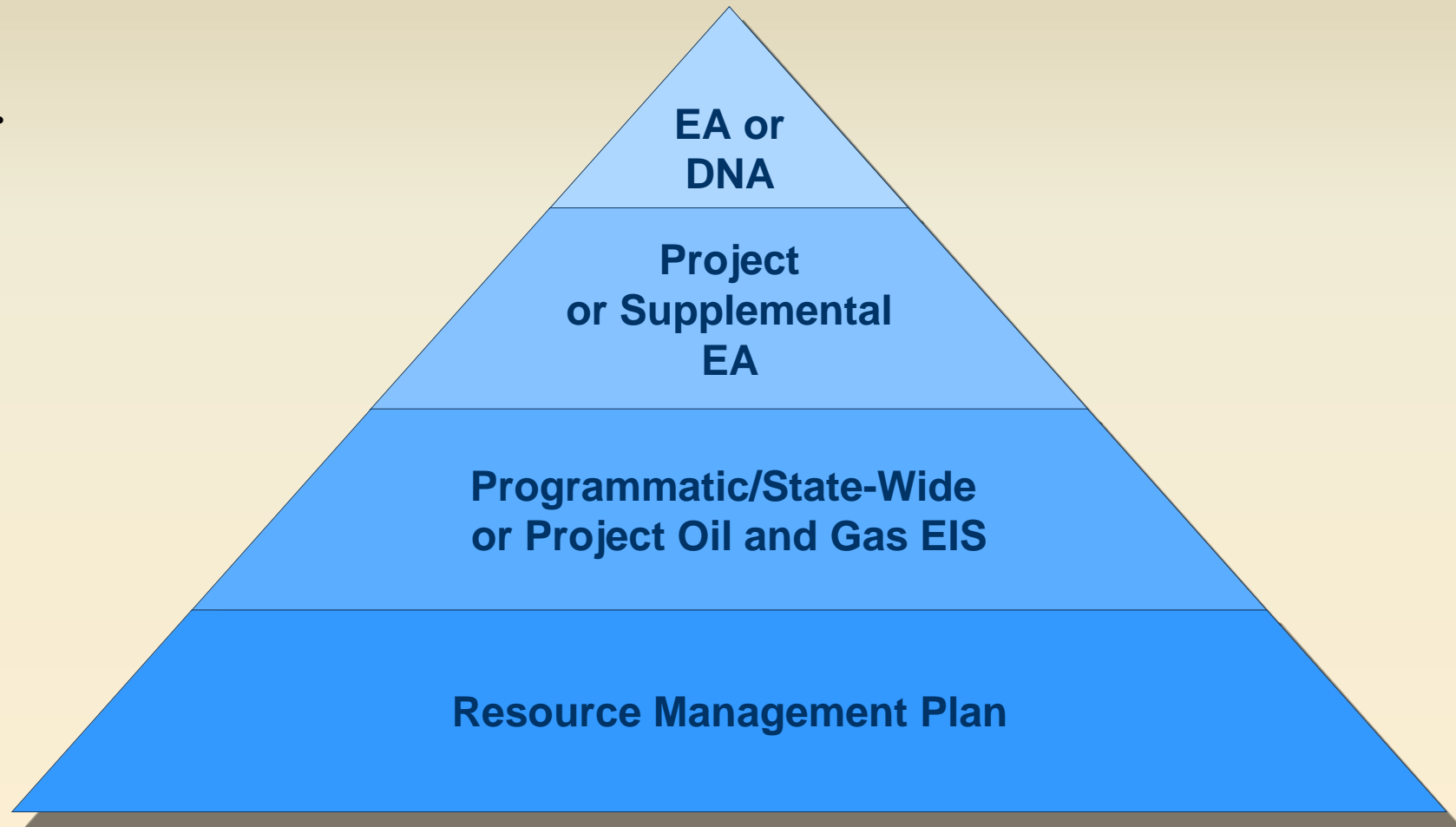
- **Clean Air Act**

- Establishes National Ambient Air Quality Standards (NAAQS)
- States delegated primary authority to ensure compliance
- Section 176 Conformity Provision: Federal agencies prohibited from approving a project which does not conform to a state implementation plan (nonattainment and maintenance areas)

Recent Cases Confronting Industry



Legal Challenges at Every Level





Legal Challenges to Federal Land Use Plans - Utah

- *Southern Utah Wilderness Alliance v. Allred*, U.S. District Court, District of Columbia
- New Utah BLM RMPs; Dec. 2008 Lease Sale
- Plaintiffs allege failure to analyze ozone in RMPs
- Argue NEPA and FLPMA required BLM to model potential impacts to air quality and climate change



Legal Challenges to BLM Lease Sales- New Mexico

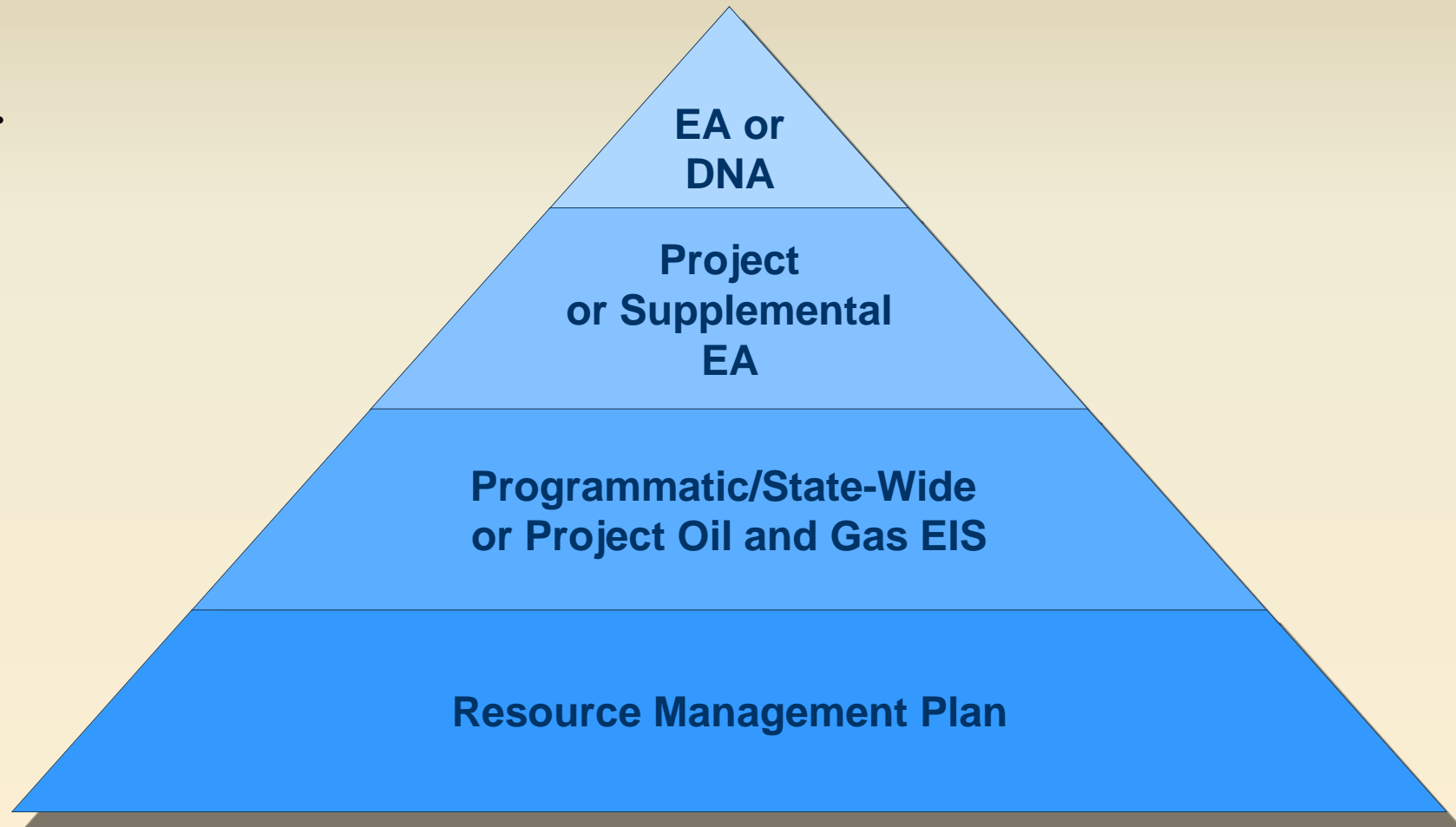
- *WildEarth Guardians v. BLM and Forest Service*
U.S. District Court, New Mexico
- Challenges 2008 BLM quarterly oil and gas lease sales for failure to ensure compliance with Ozone NAAQS
- Plaintiffs argue that BLM failed to (1) analyze ground-level ozone and (2) impose lease stipulations that will limit emissions.



Legal Challenges to BLM RMP and Lease Sale - Colorado

- *Colorado Environmental Coalition v. Salazar*
Colorado Federal Court
- Challenge to land use plan and leases issued on Colorado's Roan Plateau (former Naval Oil Shale Reserve)
- Leases authorized by new RMP for the Roan Plateau Planning Area; Leasing required under Transfer Act
- Plaintiffs allege BLM failed to model potential ozone impacts

Legal Challenges at Every Level





Legal Challenges to Large Scale Projects – EIS Level

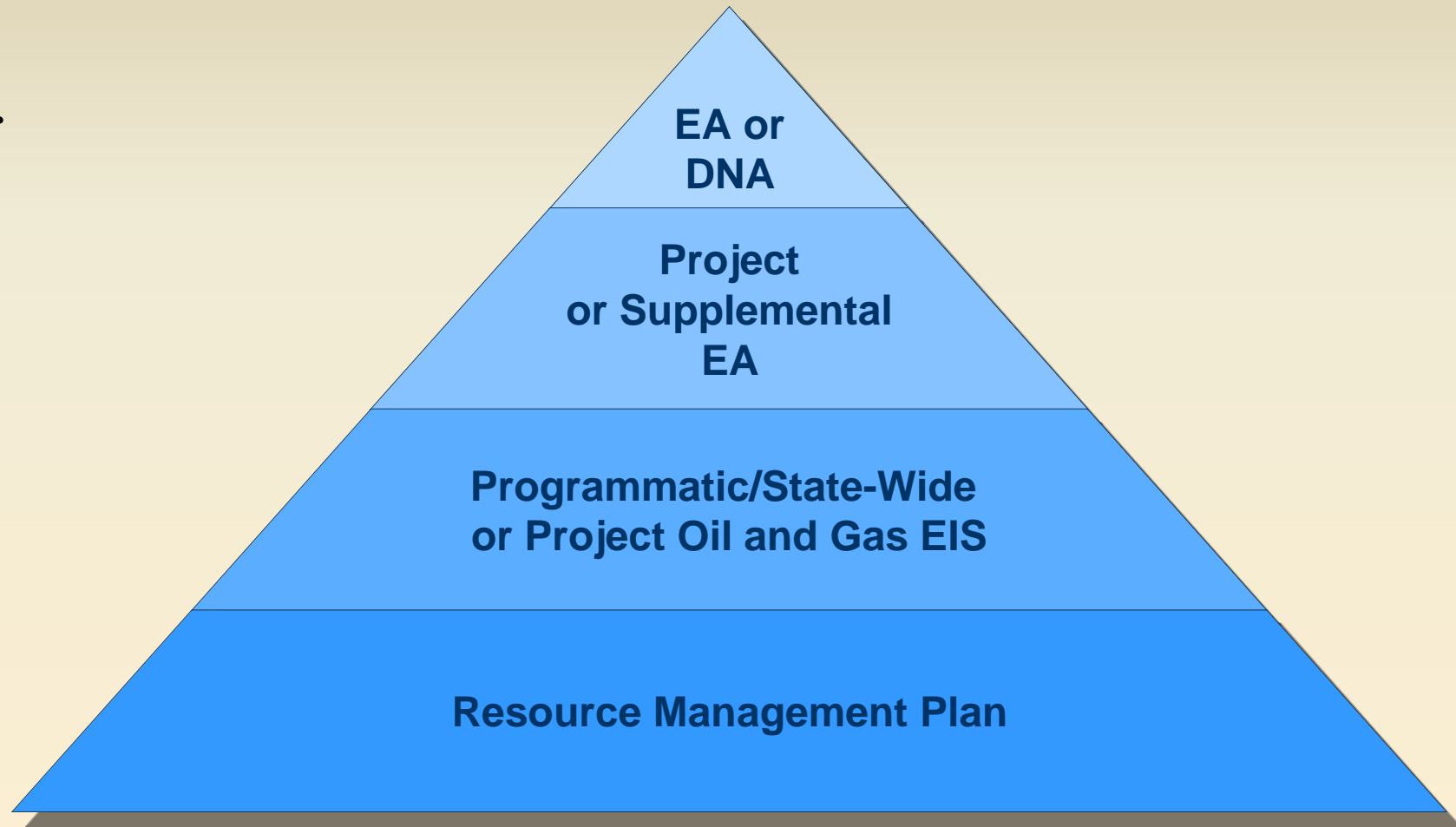
- *NRDC v. Kempthorne*, D.C. Circuit
 - Atlantic Rim, Carbon County, Wyoming
 - Natural Gas Field Development
 - “Discredited” method to analyze ozone
 - Lower Court upheld BLM’s Decision;
Plaintiffs appealed



Legal Challenges to Large Scale Projects – EIS Level

- *San Juan Citizens Alliance v. Stiles*
Colorado Federal Court
 - Northern San Juan Basin, Colorado
 - CBM Development – 150 wells
 - Plaintiffs argue failure to analyze ozone
 - Reliance on Four Corners Task Force Report

Legal Challenges at Every Level





Legal Challenges to Small Scale Projects – EA Level

- *SUWA v. Kempthorne*, D.C. Federal Court
 - Uinta Basin: Rock House project - 60 gas wells
 - Plaintiffs challenged lack of ozone analysis
 - Court remanded BLM Decision and EA
 - BLM to explain why it did not analyze ozone or to update EA to analyze cumulative impacts to ozone



Legal Challenges to Small Scale Projects – EA Level

- *NRDC v. Forest Service*, Colorado Federal Court
 - Colorado’s White River National Forest
 - Hells Gulch Project – 45 wells
 - Claims brought under NEPA, FLPMA, Clean Air Act for failure to protect air quality in Class I wilderness areas
 - Merits Briefing completed in November 2009

Project Permitting - Trends and Issues

- BLM Paralysis by Air Analysis
 - EPA Region 8 Comments
 - Escalating trend for air analysis
 - Greenhouse Gas Emissions Inventories
- Phantom EPA Significance Criteria – EA Projects
- Quantification of Project's Incremental Emissions
- Issue of Modeled Future Exceedance of NAAQS

Air Quality Strategies for Project Permitting

- Engage BLM proactively
- Cooperation on regional air studies
 - Uinta Basin Air Quality Study (UBAQS)
 - WRAP III Emission Inventory
- Develop Emission Control Strategy Prior to Submitting Project Proposal
- Tiering and Cumulative Impacts Analysis; Documenting rationales for analysis parameters



Department of the Interior New Policies and Initiatives

- October 8, 2009 “Stiles Report”
 - BLM Leadership Role in Air Quality
 - Regional Airshed Analyses
 - Programmatic Air Quality EIS
 - Monitoring Program
- EPA Region 8 → BLM
 - EPA Goal of Zero Net Emissions
 - Emission Controls and Offsets

Challenge to Ozone NAAQS Rule

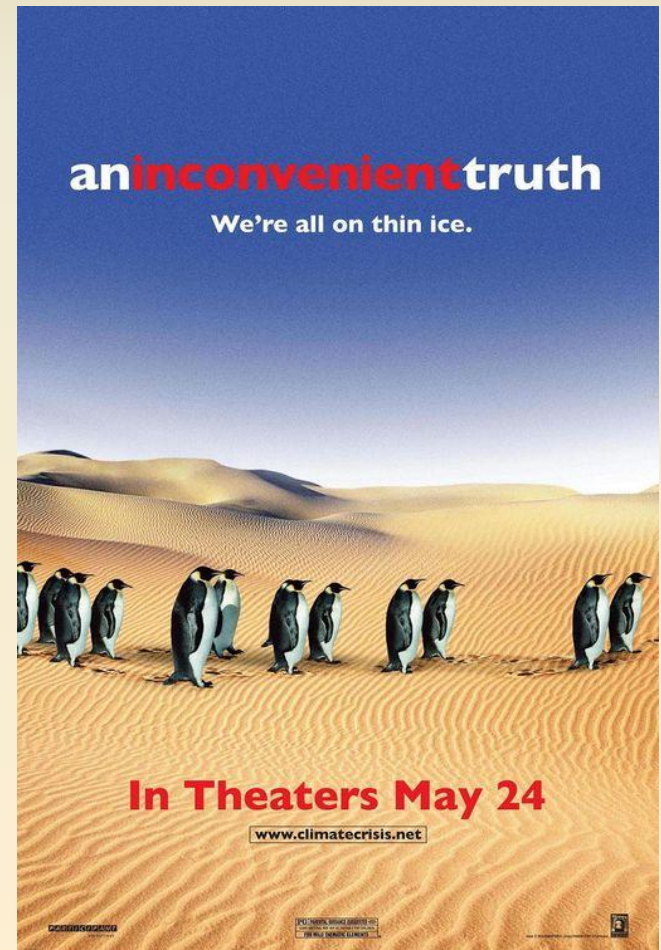
- *Mississippi v. EPA*, No. 08-1200, D.C. Circuit, 2009
- Mississippi and industry groups challenged new ozone NAAQS standard as too strict; enviros challenged as too lax
- EPA asked for delay in litigation to review
- On September 16, 2009, EPA informed the court that it will reconsider the rule through notice and comment rulemaking
- Notice of Proposed Rulemaking scheduled for release on December 21, 2009; Final Rule anticipated June 2010


EPA's New Source Aggregation Policy

- September 22, 2009 EPA Memo on when two or more emission activities should be considered a single source under New Source Review or Title V permitting programs
- Withdrew 2007 Aggregation Policy; Proximity Factor
- Three Regulatory Criteria for when projects must be grouped together for permitting:
 - Whether activities are controlled by one person
 - Whether activities are on contiguous/adjacent properties
 - Whether activities belong to the same industrial grouping

Climate Change and Global Warming


A political reality, whether or not a scientific reality.





Legal Challenges involving Climate Change/Global Warming

- *Montana Env't'l Information Center v. BLM*,
Montana Federal Court
 - Challenge to four 2008 BLM oil and gas lease sales in Montana
 - Claims alleged failure to consider and analyze global warming impacts



Legal Challenges involving Climate Change/Global Warming

- *Amigo Bravos v. BLM*, NM Federal Court
 - Challenge to four 2008 BLM oil and gas lease sales in New Mexico
 - Claims BLM failure to address GHG emissions

Limit on Private Parties Ability to Sue Over Climate Change?

- *Center for Biological Diversity v. Interior*
U.S. Court of Appeals, D.C. Circuit, 2009
 - Lawsuit under NEPA against Interior's 5 year offshore oil and gas leasing program (off Gulf Coast and Alaska)
 - Alleged failure to analyze climate change in approving the leasing program
 - Plaintiffs argued approval of leasing program, results in burning of fossil fuels, which brings about climate change, which adversely affects species and ecosystems, which threatens their enjoyment of them



Limit on Private Parties Ability to Sue Over Climate Change?

- D.C. Court of Appeals requires causal link between government action and injury
- Court rejected Plaintiffs' appeal, finding
 - Injury too generalized
 - Injury too uncertain
 - Causation too tenuous
 - Climate Change NEPA claims not ripe for review
b/c no lease sale had occurred under program

Greenhouse Gas Emissions and Climate Change



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