National Association of Environmental Professionals

Be Connected

2019 ANNUAL NEPA REPORT

of the

National Environmental Policy Act (NEPA) Practice

Submitted to

NAEP Board of Directors

Edited and compiled by

Charles P. Nicholson, NEPA Practice Chair

With contributions by

Betty Dehoney, James Gregory, Piet and Carole deWitt, Charles P. Nicholson, and P. E. Hudson

May 2020

This report reviews NEPA document submittals and statistics, NEPA legislation, and NEPA litigation for calendar year 2019. The purpose of this report is to document the status of NEPA compliance and perspectives during the reporting year. We welcome reader comment and inquiry to naep@naep.org.

Table of Contents

Figures

Tables

Acronyms and Abbreviations

APHIS	Animal and Plant Health Inspection Service
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
BOR	Bureau of Reclamation
CatEx	Categorical Exclusion
CPB	Customs and Border Protection
CEQ	Council on Environmental Quality
DOC	Department of Commerce
DOE	Department of Energy
DOI	Department of Interior
DOS	Department of State
DOT	Department of Transportation
DVA	Department of Veterans Affairs
EA	Environmental assessment
EIS	Environmental impact statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FAST	Fixing America's Surface Transportation
FEMA	Federal Emergency Management Agency
FERC	Federal Energy Regulatory Commission
FHwA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
FWS	Fish and Wildlife Service
GSA	General Services Administration
HHS	Department of Health and Human Services
H.R.	House Resolution
HUD	Department of Housing and Urban Development
NAEP	National Association of Environmental Professionals
NASA	National Aeronautics and Space Administration
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
NOI	Notice of Intent
NPS	National Park Service
NRC	Nuclear Regulatory Commission
NSF	National Science Foundation
OSM	Office of Surface Mining and Reclamation and Enforcement
PEIS	Programmatic environmental impact statement
ROD	Record of Decision
RUS	Rural Utilities Service
S.	Senate
TVA	Tennessee Valley Authority
USACE	U.S. Army Corps of Engineers
USAF	United States Air Force
USCG	United States Coast Guard
USFS	U.S. Forest Service
USMC	United States Marine Corps
USN	United States Navy

1. Introduction

Betty Dehoney, CEP, PMP, ENV SP[1]
NAEP President

This 2019 Annual Report of the National Environmental Policy Act Practice (Annual NEPA Report) has been prepared for the benefit of the members of the National Association of Environmental Professionals (NAEP), and for submittal to the Council on Environmental Quality (CEQ) to be shared with federal agency liaisons with whom NAEP members work to ensure adherence to the stated legislative purpose of NEPA:

> "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."

The purpose of the *Annual NEPA Repor*t is to improve environmental impact assessment practice through a retrospective review of the 2019 environmental impact statements (EISs), evaluation of the average timeline for preparation of EISs, consideration of legislative activities undertaken by Congress in relation to NEPA, and summarization of "lessons learned" from the decisions issued by the U.S. Circuit Courts of Appeal.

This review is based on consideration of over 315 EISs issued by 43 Federal lead agencies. As in previous years four departments (Agriculture, Interior, Transportation, and Defense) are responsible for three-quarters of all EISs published in 2019. The Bureau of Land Management was the agency that published the most EISs in 2019 (they published 64), and the U.S. Forest Service published the second most, 52. The Army Corps of Engineers published 32, the Federal Energy Regulatory Commission published 20, and the Fish and Wildlife Service published 18. Eight state or local agencies were lead agencies for EISs published in 2019.

The annual average preparation time of final EISs made available in 2019 was the third consecutive year of decreased preparation times, and is one-half year less than the peak in 2016. The annual average preparation time for draft EISs made available in 2019 was the highest recorded for the period 1997-2019. Federal agencies adopted more EISs in 2019 than in any year since 1997.

Excluding the duplicate bills that were introduced in both the Senate and House and bills that were later incorporated into another bill, a total of 110 unique bills addressing NEPA were introduced in 2019. Of these 110 unique bills addressing NEPA, 41 did not make changes to

[1] Betty.Dehoney@hdrinc.com

existing NEPA compliance processes and typically addressed NEPA through clauses stating that the subject activity must comply with NEPA.

One bill with a substantive NEPA provision became law in 2019. The NEPA provision in the National Defense Authorization Act for Fiscal Year 2020 is a narrowly focused streamlining directive that authorizes the Secretary of Transportation to coordinate with other Federal agencies to expedite the NEPA process for specified port facility improvement projects and to seek to coordinate all reviews or requirements with appropriate Federal, State, and local agencies. Of the other introduced bills with substantive NEPA provisions, six were approved in committee and one was passed by the Senate during 2019. Few of these bills had received further action in either chamber by mid-May, 2020.

In 2019, the U.S. Courts of Appeal issued 21 substantive decisions involving implementation of the NEPA by five different departments within federal agencies. Overall, the federal agencies had a prevail rate of 80 percent of the substantive NEPA cases brought before the U.S. Courts of Appeal. Eighteen of the cases involved one or more challenges to assessment of impacts, including cumulative impacts, as well as four categorical exclusion cases. Two cases involved arguments whether an agency's action qualified as a federal action. Three cases involved the duty to or involved challenges to supplemental document. The courts tended to focus on the deference afforded to the agency when they upheld the impact assessment analysis.

The *Annual NEPA Report* is provided to serve regulators and practitioners in their environmental practice related to NEPA, and for the continued betterment of the practice. Many thanks to NAEP NEPA Practice chair, Chuck Nicholson, the over 100 environmental professionals that participate in the NEPA Practice group, and the contributions to this Annual NEPA Report provided by Chuck , James Gregory, Piet deWitt, Carole deWitt, and P. E. Hudson.

2. The NEPA Practice in 2019

Charles P. Nicholson, PhD[2]
Chair, NAEP NEPA Practice

The mission of the NEPA Practice is to improve environmental impact assessment as performed under the National Environmental Policy Act.

NAEP's NEPA Practice is pleased to present the thirteenth annual report. The 2019 Annual NEPA Report of the National Environmental Policy Act Practice (Annual NEPA Report) contains summaries of the latest developments in NEPA as well as the NEPA Practice's activities, in 2019.

The Annual NEPA Report is prepared and published through the initiative and volunteer efforts of members of the NAEP's NEPA Practice. The NAEP's NEPA Practice supports NEPA practitioners through monthly conference calls, networking opportunities, educational opportunities, outreach with the President's Council on Environmental Quality (CEQ), and projects such as this Annual NEPA Report. Highlights of 2019 activities included:

- Discussion of significant court rulings on NEPA cases, including Cowpasture River Preservation Association v. Forest Service on the Atlantic Coast Pipeline; National Parks Association v. Semonite on the Dominion Energy James River transmission line; Citizens for Clean Energy v. Zinke on the federal coal leasing moratorium; United Keetoowah Band of Cherokee Indians v. FCC on NEPA and National Historic Preservation Act compliance for Federal Communications Commission approval of wireless facilities; Western Watersheds Project v. Schneider on Bureau of Land Management sage-grouse plan amendments; and the continuing litigation over the Keystone XL Pipeline,
- Discussion of NEPA provisions in Executive Orders 13855, 13867, and 13868, as well as the continued discussion of E.O 13807, and the associated One Federal Decision process
- Discussion of revisions to agency NEPA procedures
- Presentation on Department of the Navy streamlining initiatives
- Discussion, compilation, and submission of comments on behalf of NAEP on the Council on Environmental Quality's Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions.

The NEPA Practice has approximately 115 active members. We hold monthly conference calls in which we discuss emerging developments in NEPA such as new draft regulations, guidance, legislation, court rulings, projects, or studies. Monthly conference calls are normally held at 2:30 p.m. (Eastern) on the second Wednesday of each month, and all NAEP members are welcome to participate. To be added to the NEPA Practice email list and call reminders, email your request to office@naep.org.

[2] Questions concerning this report should be directed to:
Charles P. Nicholson, PhD, PO Box 402, Norris, TN 37828-0402; cpnicholson53@gmail.com

3. Just the Stats

James Gregory[3]

In 2019, the Environmental Protection Agency (EPA) published Notices of Availability (NOAs) for 315 environmental impact statements (EISs) in the *Federal Register*. Of the published notices, 145 were draft EISs (including supplemental and revised draft EISs) and 170 were final EISs (including supplemental and revised final EISs). Information regarding these documents is available through the EPA's online EIS database, available at: https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search. This database contains both the EISs and EPA's comment letter for EISs on which that agency commented. Past versions of this "Just the Stats" report have included a summary of the ratings of draft EISs assigned by EPA as part of its Clean Air Act Section 309 EIS review process. As of October 22, 2018, EPA discontinued use of this EIS rating system and therefore it is not addressed in this report.

3.1 2019 Published EISs

There was small decrease in the number of EISs published in 2019 compared to the 323 published in 2018. Forty-three agencies published at least one EIS in 2019 and seven agencies published at least a dozen EISs (Table 3-1). The Bureau of Land Management (BLM) was the agency that published the most EISs in 2019 (they published 64), and the U.S. Forest Service (USFS) published the second most, 52. The U.S. Army Corps of Engineers (USACE) published 32, the Federal Energy Regulatory Commission (FERC) published 20, and the Fish and Wildlife Service (FWS) published 18. Eight state or local agencies were lead agencies for EISs published in 2019. Table 3 1 shows draft and final EISs filed in 2019 by agency.

Table 3-1. Draft and final EISs published in *Federal Register* in 2019 by agency.

Lead Agency	Number of EISs
Bureau of Land Management	64
Forest Service	52
U.S. Army Corps of Engineers	32
Federal Energy Regulatory Commission	20
Fish and Wildlife Service	18
Federal Highway Administration	16
Bureau of Reclamation	14
National Marine Fisheries Service	9
Department of Energy	8
Bureau of Indian Affairs	7
Tennessee Valley Authority	5

[3] James W. Gregory, SWCA Environmental Consultants, 1220 SW Morrison St., Ste 700, Portland, OR 97205; James.Gregory@swca.com

Lead Agency	Number of EISs
Nuclear Regulatory Commission	5
National Park Service	5
National Oceanic and Atmospheric Administration	4
United States Air Force	4
General Services Administration	4
National Science Foundation	3
Federal Railroad Administration	3
Department of Veteran Affairs	3
Natural Resource Conservation Service	3
United States Navy	3
National Aeronautics and Space Administration	3
Office of Surface Mining	3
Animal and Plant Health Inspection Service	3
City of New York, Office of Management and Budget	2
Department of State	2
Connecticut Department of Housing	2
California High-Speed Rail Authority	2
Federal Aviation Administration	2
Rural Utilities Service	2
U.S. Customs and Border Protection	1
Federal Transit Administration	1
United States Army	1
Arizona Department of Transportation	1
U.S. Coast Guard	1
Department of Defense	1
Department of Housing and Urban Development	1
Utah Department of Transportation	1
Los Angeles Housing Community Investment Department	1
Texas Department of Transportation	1
Department of Health and Human Services	1
Florida Department of Transportation	1
Total	**315**

As in previous years four departments (Agriculture, Interior, Transportation, and Defense) are responsible for three-quarters of all EISs published in 2019. Figure 3-1 shows the EISs by department, with the departments responsible for publishing large numbers of EISs broken out separately.

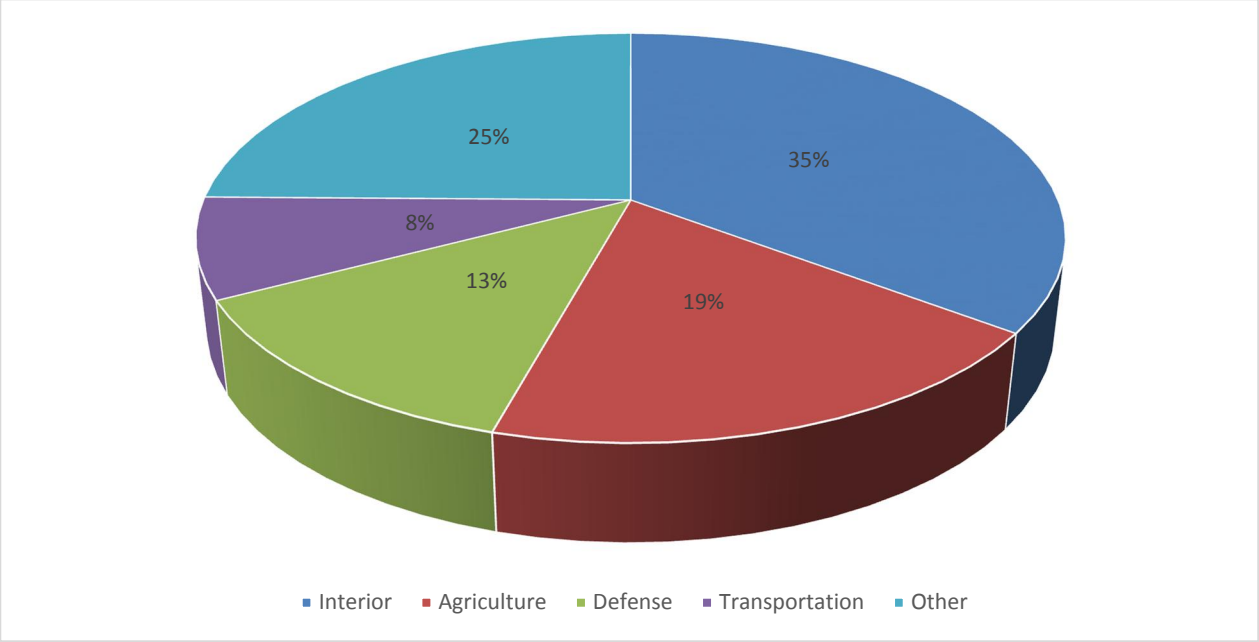

Figure 3-1. Draft and final EISs published in 2019 by department.

3.2 Geographic Distribution of EISs Published in 2019

The geographic breakdown of draft and final EISs by state and territory is shown in Table 3-2. As has been the case in prior years, many more EISs were prepared for actions in California (60) than in any other state[4]. Nevada, Alaska, Oregon, Arizona, and Texas followed California in terms of EISs for actions in those states, with 19 in Nevada, 15 each in Alaska and Oregon, and 13 each in Arizona and Texas. Five EISs addressed nationwide, regional, or programmatic actions and 39 EISs addressed actions in multiple states. As in past years, in 2019 there were a large number of EISs published for actions in western states, indicative of the extensive Federal lands and water projects managed or undertaken by the BLM, USFS, USACE, FWS, and Bureau of Reclamation in the West.

[4] Based on EISs for which one state was identified in the EPA EIS database.

Table 3-2. Draft and final EISs published in 2019 by state and territory.

State/Territory	Number of EISs			
California	60		Tennessee	2
Nevada	19		Nebraska	2
Alaska	15		Connecticut	2
Oregon	15		Maine	2
Arizona	13		North Dakota	2
Texas	13		Hawaii	2
Montana	11		Mississippi	2
Colorado	11		Rhode Island	1
Florida	11		Michigan	1
Idaho	11		Missouri	1
New Mexico	10		Pennsylvania	1
Louisiana	10		Iowa	1
Wyoming	10		New Jersey	1
New York	8		Illinois	1
Washington	7		Guam	1
Utah	6		Wisconsin	1
Virginia	4		Oklahoma	1
North Carolina	3		Maryland	1
South Carolina	3		Nationwide	1
Alabama	3		Program/Regulatory	4
West Virginia	3		Multi-state	39
			Total	**315**

4. Preparation Times for Environmental Impact Statements Made Available in Calendar Year 2019

Piet deWitt and Carole deWitt[5]

4.1 Summary

In calendar year 2019, federal agencies made available 144 draft and 152 final environmental impact statements (EISs). The annual average preparation time of 1,662 days (4.6 years) for final EISs made available in 2019 was the third consecutive year of decreased preparation times from the highest annual average of 1,864 days (5.1 years) observed in 2016. The annual average preparation time of 1,244 days (3.4 years) for draft EISs made available in 2019 was the highest recorded for the period 1997–2019. Federal agencies adopted more EISs in 2019 that in any year since 1997.

4.2 EIS Numbers

In calendar year 2019, federal agencies made available through Notices of Availability (NOAs) published by the Environmental Protection Agency (EPA) 144 draft and draft supplemental EISs (i.e., draft EISs) and 152 final and final supplemental EISs (i.e., final EISs)[6].

The numbers of draft and final EISs made available in 2019 are low relative to preceding years. The largest number of draft EISs made available in any year from 1997-2019 was 320 in 2003, and the smallest number was 126 in 2017. The largest number of final EISs in any year during our study period was 306 in 2004, and the smallest number was 115 in 2017. For the period 1997-2019, the average number of draft EISs made available in a year was 239 ± 57 (mean ± one standard deviation), and the average number of final EISs made available in a year was 216 ± 47.

In 2019 seven federal agencies adopted 16 final EISs. This is the highest number of adoptions recorded for the period 1997-2019. The previous high number was 15 adoptions in 2017. For the period 1997-2019, the average number of adoptions in any year was 5.3 ± 4.0. In 2019, the Department of Energy (DOE) adopted eight final EISs prepared by the Federal Energy Regulatory Commission (FERC). The Department of Veterans Affairs (DVA) and the Office of Surface Mining Regulation and Enforcement (OSM) each adopted two final EISs.

4.3 Final EISs

In calendar year 2019, 24 federal agencies made 152 final EISs available to the public. Of those 152 EISs six agencies in the Department of the Interior prepared a total of 55 (36.2%), and three agencies in the Department of Agriculture prepared a total of 31 (20.4%). Three final supplemental EISs had no Notice of Intent (NOI) for their supplementation. These EISs are not included in our preparation time calculation, but are discussed below. The following discussion of final EIS preparation times is based on the 149 final EISs that had NOIs.

---

[5] Piet and Carole deWitt, 12 Catamaran Lane, Okatie, SC 29909; pdewitt0815@gmail.com and cdewitt0613@gmail.com

[6] For various reasons described later, these numbers do not match the numbers in some of the subsequent analyses.

The 2019 final EISs prepared by all agencies combined had an average preparation time (from the *Federal Register* NOI to the EPA NOA for the final EIS) of 1,662 ± 1,173 days (4.6 ± 3.2 years) (see Table 5-1 "ALL" "NOI to Final EIS"). The 2019 average was 134 days less than the 2018 average of 1,796 ± 1,468 days (4.9 ± 4.0 years). For the period 1997-2019 the highest annual average preparation time for final EISs was 1,864 ± 1,259 days (5.1 ± 3.4 years) in 2016, and the lowest annual average was 1,166 ± 899 days (3.2 ± 2.5 years) in the year 2000. The 2019 average is 202 days less than the 2016 average and 496 days (1.4 years) more than the 2000 average.

The draft EISs for the 2019 final EISs required an average of 1,151 ± 956 days (3.2 ± 2.6 years) to prepare following publication of their NOIs in the *Federal Register* (see Table 4-1 "ALL" "NOI to Draft EIS"). The 2019 average is 227 days less than the highest annual average time for the preparation time of draft EISs, 1,378 ± 1,103 days (3.8±3.0 years) in 2016 and 441 days (1.2 years) longer than the shortest average preparation time of 710 ± 666 days (1.9 ± 1.8 years) in the year 2000.

Table 4-1. Preparation times in calendar days for final and final supplemental EISs made available in calendar year 2019. See the Acronyms and Abbreviations list on page iii for abbreviations of agencies not mentioned in the text.

			NOI to Draft			Draft to Final			NOI to FEIS				
Agency	**n**	**%**	**Mean**	**s.d.**	**Med**	**Mean**	**s.d.**	**Med**	**Mean**	**s.d.**	**Med**	**Min**	**Max**
ALL	149	100	**1151**	956	925	**511**	657	322	**1662**	1173	1330	294	5786
APHIS	2	1.3	**1750**	1276	1750	**590**	399	590	**2340**	1674	2340	1156	3524
BIA	3	2.0	**362**	236	270	**1874**	2912	252	**2236**	2846	882	319	5506
BLM	29	19.5	**1224**	894	1250	**412**	382	287	**1636**	1080	1666	310	3851
BOR	7	4.7	**1967**	1016	1761	**743**	1207	329	**2710**	1257	2537	721	4620
CBP	1	0.7	**35**			**259**			**294**				
DOS	1	0.7	**1080**			**2611**			**3691**				
DVA	1	0.7	**567**			**203**			**770**				
FERC	13	8.7	**979**	410	1136	**178**	54	154	**1158**	408	1304	394	1724
FHwA	12	8.1	**2176**	1738	1546	**746**	837	315	**2922**	1911	2878	697	5786
FRA	1	0.7	**1051**			**630**			**1681**				
FWS	10	6.7	**1036**	917	831	**562**	623	336	**1598**	1048	1408	393	3304
GSA	3	2.0	**1118**	1308	525	**382**	167	476	**1500**	1413	1005	401	3093
HUD	3	2.0	**619**	534	339	**170**	43	161	**790**	530	556	417	1396
NASA	1	0.7	**2489**			**371**			**2860**				
NOAA	10	6.7	**591**	334	501	**535**	314	424	**1126**	361	1228	590	1632
NPS	4	2.7	**1872**	616	2082	**371**	50	354	**2243**	650	2436	1309	2793
NRC	2	1.3	**349**	43	349	**275**	92	275	**624**	135	624	528	719
NSF	2	1.3	**674**	407	674	**302**	239	302	**975**	168	975	856	1094
OSM	1	0.7	**429**			**294**			**723**				
RUS	1	0.7	**780**			**322**			**1102**				
TVA	2	1.3	**472**	140	472	**256**	173	256	**728**	313	728	506	949
USACE	11	7.4	**1178**	926	947	**302**	168	301	**1480**	914	1215	637	3997
USCG	1	0.7	**106**			**189**			**295**				
USFS	28	18.8	**978**	666	778	**603**	496	401	**1581**	853	1404	451	3496

n = number of EISs in sample; s.d. = standard deviation; Med = median; Min = minimum; Max = maximum

The 2019 average time for preparing the final EIS from the draft EIS was 511 ± 657 days (1.4±1.8 years). The 2019 average was 97 days shorter that the highest annual average of 608 ± 623 days (1.7 ± 1.7 years) in 2018, and 122 days longer than the shortest annual average of 389 ± 379 days (1.1 ± 1.1 years) in the year 2000.

The five historically most prolific EIS-preparing agencies made available 84 final EISs in 2019, 55% percent of the total number made available. These EISs required an average of 1,810 ± 1,209 days (5.0 ± 3.3 years) to complete, 148 days longer than the 2019 average for all agencies combined. The U.S. Forest Service (USFS) and the National Park Service (NPS) tied previous low numbers of final EISs made available in a year, and the U.S. Army Corps of Engineers (USACE) established a new low number of final EISs made available in a year. These agencies did not establish any other highs or lows in EIS numbers or preparation times.

In 2019, all agencies combined established new high final EIS completion rates for the 3-to-4-year interval and the 12-to-13-year interval (see Table 4-2). Federal agencies did not establish any new low completion rates in 2019.

Table 4-2. A comparison of 2019 final EIS completion rates with the average EIS completion rates for the period from 1997 through 2018.

		1997 - 2018			
Completion Interval in Years from NOI*	**2019 Completion Percentage**	**Average Completion Percentage**	**Standard Deviation**	**Lowest Completion Percentage (Year)**	**Highest Completion Percentage (Year)**
0 to 1	4.0	6.7	3.5	0.7 (2018)	14.9 (2001)
1 to 2	18.1	23.1	5.0	13.7 (2015)	30.3 (2000)
2 to 3	16.1	18.9	2.4	15.2 (2008)	24.5 (2009)
3 to 4	19.5	13.1	2.6	9.3 (2004)	18.6 (2 years)
4 to 5	10.7	10.0	2.4	6.2 (2002)	16.4 (2012)
5 to 6	6.7	7.3	2.0	4.5 (2000)	10.6 (2011)
6 to 7	4.7	6.2	2.0	3.0 (2001)	10.7 (2006)
7 to 8	6.0	4.0	1.5	1.5 (2000)	7.0 (2013)
8 to 9	2.0	3.3	1.7	1.3 (2002)	6.7 (2012)
9 to 10	4.7	2.1	1.3	0.5 (2000)	6.0 (2015)
10 to 11	2.7	1.5	1.1	0.4 (4 years)	3.8 (2014)
11 to 12	0.0	0.75	0.60	0.0 (6 years)	1.6 (2 years)
12 to 13	3.4	0.81	0.81	0.0 (5 years)	3.0 (2016)
13 to14	0.0	0.50	0.55	0.0 (7 years)	2.3 (2013)
(14 to 15	0.0	0.49	0.53	0.0 (9 years)	1.6 (2 years)
15 to 16	1.3	0.46	0.46	0.0 (15 years)	1.8 (2016)

In 2019, eight agencies made only one final EIS available to the public. These agencies required an average of 1,427 ± 1245 days (3.9 ± 3.4 years) to prepare their EISs. In contrast, agencies that made more than one final EIS available required an average of 1,675 ± 1,172 days (4.6 ± 3.2 years) to complete their EISs.

Previously, we noted that three final supplemental EISs made available in calendar year 2019 were not included in our assessment of EIS-preparation times because a NOI to supplement the parent EIS was not published in the *Federal Register*. Council on Environmental Quality regulations provide that agencies supplementing an EIS are not required to "scope" the supplement if the agencies believe that scoping would provide no new information. Agencies have interpreted this to allow them to initiate the supplementation process without publishing a NOI in the *Federal Register*. Without such a notice or additional research, we have no ready means to estimate the time an agency required to prepare a supplemental EIS.

The first supplemental EIS we excluded from our analysis was prepared by the BLM for the Ray land exchange in Arizona. The first EIS was initiated in June, 1997 and completed in June, 1999. The draft supplemental EIS was made available in November, 2017 without a NOI. The supplemental EIS was completed in July, 2019. The second EIS was prepared by the Federal Railroad Administration (FRA) for the California High Speed Rail section between Fresno and Bakersfield. The EIS was initiated in October, 2009 and completed, after a draft and draft supplement, in April, 2014. A draft supplemental EIS was made available in November, 2017 without a NOI. The final supplemental EIS was completed in November, 2019.

The third supplemental EIS was prepared by the U.S. Navy for the Surveillance Towed Array Sonar System (SURTASS). This EIS was initiated in July, 1996. It was supplemented five times before its completion in July, 2019. The parent EIS and each of the first four supplements were preceded by a NOI; the fifth supplement was not. Preparation of the original EIS and the first four supplements required the Navy 5,246 days (14.4 years). The fifth supplement required 301 days to convert the draft EIS to a final EIS. The total number of days of EIS preparation was 5,547 (15.2 years). If we add 5,547 days to the total number of the days required to prepare all of the other final EISs made available in 2019 and divide by 150 EISs (n+1) our average preparation time for all agencies combined is 1,688 days, 26 days longer than the average shown in Table 4-1. This is a minimum value. If we add the days between the announcement of the availability of the fourth final supplement and the fifth draft supplement (417), our average preparation time for all 2019 final EISs is 1,690 days. This is a maximum value. The true value lies somewhere between these estimates.

The annual average final EIS-preparation time for all federal agencies combined (see "ALL" "NOI to final EIS" in Table 4-1)) increased from the year 2000 through 2016 at an average rate of +42 days per year, as determined through linear regression. The coefficient of determination (R^2) for that regression was 0.91. Annual average preparation times for 2017, 2018, and 2019 have been less than that of 2016. As a result, the average rate of increase for the period 2000 through 2019 was +36 days per year, and the value of R^2 decreased to 0.88. Similarly, for the time required to produce the draft EIS from the NOI, the average rate of increase has decreased from +34 days per year for the period 2000 through 2016, to +28 days per year for the period 2000 through 2019. The R^2 value has also decreased from 0.87 in 2016 to 0.80 in 2019. This

relationship has not occurred for the time required to produce the final EIS from the draft EIS. In 2016, the annual average rate of increase was +7.6 days per year with an R^2 value of 0.74. In 2019, the average rate of increase was +8.0 days per year with an R^2 value of 0.72. The 2018 annual average time to prepare the final EIS from the draft EIS, 608 days, was the highest recorded in our study; it exceeded the previous high annual average of 513 days set in 2012. This may be the reason this preparation interval does not match the other two intervals.

4.4 Draft EISs

In calendar year 2019, 25 federal agencies made 144 draft EISs available to the public. Of those 144 draft EISs, five agencies in the Department of the Interior produced a total of 50 (34.7%); four agencies in the Department of Agriculture produced a total of 29 (20.1%) and three agencies in the Department of Defense produced a total of 28 (17.4%). Four of the draft supplemental EISs that supplemented final EISs had no NOI published in the *Federal Register* and are not included in our preparation time calculations. Our 2019 sample includes 140 draft and draft supplemental EISs.

The 2019 annual average draft EIS preparation time for all agencies combined was 1,244 ± 1,240 days (3.4 ± 3.4 years) (see "ALL" in Table 4.3). The 2019 annual average was the highest for the period 2000 through 2019. It was seven days longer than the previous high average of 1,237 ± 1,061 days (3.4 ± 2.9 years) in 2013 and 534 days (1.5 years) longer than the lowest annual average 710 ± 666 days (1.9 ± 1.8 years) in the year 2000.

Table 4-3. Preparation times in calendar days for draft and draft supplemental EISs made available in calendar year 2019.

Agency	n	%	Mean	s.d.	Median	Min	Max
ALL	140	100	1,244	1,240	805	29	5,511
APHIS	1	0.7	869				
BIA	4	2.9	888	1,002	529	184	2,310
BLM	31	22.1	1,292	1,127	913	143	4,068
BOR	5	3.6	3,097	1,618	3,502	560	4,796
DOS	1	0.7	497				
FERC	7	5.0	593	525	492	58	1,575
FHwA	7	5.0	2,215	1,994	1,050	200	4,795
FRA	2	1.4	1,716	852	1,716	1,113	2,318
FTA	1	0.7	1,226				
FWS	8	5.7	1,956	2,145	805	329	5,511
GSA	1	0.7	487				
HHS	1	0.7	246				
HUD	3	2.1	649	508	372	339	1,235
NASA	2	1.4	116	123	116	29	203
NOAA	3	2.1	1,223	1,286	520	441	2,707
NPS	1	0.7	282				

Agency	n	%	Mean	s.d.	Median	Min	Max
NRC	3	2.1	329	12	318	309	333
NRCS	2	1.4	2,781	1,215	2,781	1,922	3,640
NSF	1	0.7	961				
RUS	1	0.7	3,262				
TVA	3	2.1	333	34	315	312	373
USACE	22	15.7	1,047	1,080	783	126	5,042
USAF	4	2.9	574	167	553	393	798
USFS	24	17.1	1,194	879	1,065	176	4,342
USN	2	1.4	567	25	567	549	584

n = number of EISs in sample; s.d. = standard deviation

The five historically most prolific EIS-preparing agencies made available 85 draft EISs or 59% of our sample. These EISs required an average of 1,265 ± 1,158 days (3.5 ± 3.2 years) to complete, 21 days longer than the average for all agencies combined. The National Park Service (NPS) established a new low annual average draft EIS preparation time. No other new high or low annual average preparation times were established. The Federal Highway Administration (FHwA) established its new low number of draft EISs made available in a year, and the NPS tied its previously established low. The remaining agencies, not among the five most prolific, combined to produce 59 draft EISs or 41% of our sample. These EISs required an average of 1,211 ± 1,368 days (3.3 ± 3.7 years) to complete, 33 days less than the average for all agencies combined.

All agencies combined established new high draft EIS-completion rates for the 9-to-10-year and the 13-to-14-year intervals. No new low draft EIS-completion rates were established in 2019 (see Table 4-4).

Table 4-4. A comparison of 2019 draft EIS completion rates with the average draft EIS completion rates for the period 1997 through 2018.

Completion Interval in Years from NOI*	2019 Completion Percentage	Average Completion Percentage	Standard Deviation	Lowest Completion Percentage (Year)	Highest Completion Percentage (Year)
0 to 1	23.6	25.7	6.4	13.9 (2013)	37.0 (2000)
1 to 2	23.6	28.3	3.8	21.9 (2005)	37.5 (2017)
2 to 3	14.3	16.8	2.8	12.0 (1999)	22.5 (2012)
3 to 4	10.0	10.2	2.6	6.2 (2001)	15.3 (2018)
4 to 5	7.1	6.5	1.8	2.5 (2000)	9.4 (2010)
5 to 6	5.0	4.0	1.7	1.7 (2017)	7.9 (2005)
6 to 7	3.6	3.1	1.3	0.7 (1998)	5.1 (2015)
7 to 8	1.4	1.5	0.7	0.3 (2005)	2.8 (1997)

8 to 9	1.4	1.3	1.0	0.0 (3 years)	4.2 (2017)
9 to 10	2.9	0.93	0.66	0.0 (2 years)	2.5 (2012)
10 to 11	1.4	0.40	0.56	0.0 (12 years)	2.0 (2014)
11 to 12	1.4	0.40	0.43	0.0 (7 years)	1.7 (2015)
12 to 13	0.7	0.34	0.56	0.0 (11 years)	2.5 (2013)
13 to 14	2.1	0.10	0.23	0.0 (18 years)	0.7 (2 years)
14 to 15	0.7	0.26	0.42	0.0 (13 years)	0.9 (2003)
15 to 16	0.7	0.16	0.38	0.0 (16 years)	1.7 (2017)

In 2019 eight agencies made only one draft EIS available to the public. These agencies required an average of 979 ± 984 days (2.7 ± 2.7years) to complete. In contrast, agencies that made more than one draft EIS available during the year required an average of 1,260 ± 1,256 days (3.5 ± 3.4 years) to complete their drafts.

The shortest annual average preparation time for draft EISs, 710 ± 666 days (1.9 ± 1.8 years) was recorded in the year 2000. From 2000 through 2018 the average draft EIS preparation time increased at an average rate of +17 days per year with an R^2 value of 0.58. The 2018 annual average draft EIS preparation time of 990 ± 804 days (2.7 ± 2.2 years) was relatively low compared to the 2019 annual average, which was 672 days (1.8 years) longer. For the period 2000 through 2019, the average rate of increase, as measured through linear regression, was +19 days per year with an R^2 value of 0.64.

4.5 Agency Ranks by Preparation Times

Table 4-5 ranks the agencies that made available draft and/or final EISs in 2019 from the longest average preparation time to the shortest average time. Five agencies appear in the ten longest averages for both draft and final EISs: Federal Highway Administration (FHwA), Bureau of Reclamation (BOR), FWS, BLM, and Federal Railroad Administration (FRA). Two agencies appear in the ten shortest averages for both draft and final EISs: Tennessee Valley Authority (TVA) and Nuclear Regulatory Commission (NRC).

For the three years this ranking has been conducted (see deWitt and Dewitt 2918, 2019) the FHwA and the FWS have appeared in the ten longest averages for final EISs all three times. The TVA is the only agency to appear in the ten shortest averages in all three years.

Four agencies that made available only one final EIS in 2019 were included in the ten longest average preparation times, while five such agencies were in the ten shortest average times. With the exception of the National Oceanic and Atmospheric Administration (NOAA), no agency in the ten shortest averages made available more than three final EISs in 2019. Two agencies that made only one draft EIS available in 2019 were in the ten longest average preparation times, and four such agencies were included in the ten shortest averages.

Table 4-5. Average preparation times in calendar days for Draft and Final EISs made available in 2019 arranged in descending order.

2019 Final EISs			
Rank	Agency	n	Mean
1	DOS	1	3,691
2	FHwA	1	2,922
3	NASA	1	2,860
4	BOR	7	2,710
5	APHIS	2	2,340
6	NPS	4	2,243
7	BIA	3	2,236
8	FRA	1	1,681
9	BLM	29	1,636
10	FWS	10	1,598
11	USFS	28	1,581
12	GSA	3	1,500
13	USACE	11	1,480
14	FERC	13	1,158
15	NOAA	10	1,126
16	RUS	1	1,102
17	NSF	2	975
18	HUD	3	790
19	DVA	1	770
20	TVA	2	728
21	OSM	1	723
22	NRC	2	624
23	USCG	1	295
24	CBP	1	294

2019 Draft EISs			
Rank	Agency	n	Mean
1	RUS	1	3,262
2	BOR	5	3,097
3	NRCS	2	2,781
4	FHwA	7	2,215
5	FWS	8	1,956
6	FRA	2	1,716
7	BLM	31	1,292
8	FTA	1	1,226
9	NOAA	3	1,223
10	USFS	24	1,194
11	USACE	22	1,047
12	NSF	1	961
13	BIA	4	888
14	APHIS	1	869
15	HUD	3	649
16	FERC	7	593
17	USAF	4	574
18	USN	2	567
19	DOS	1	497
20	GSA	1	487
21	TVA	3	333
22	NRC	3	329
23	NPS	1	282
24	HHS	1	246
25	NASA	2	116

4.6 Literature Cited

deWitt, P., and C. deWitt. 2018. Preparation Times for Environmental Impact Statements Made Available in 2017. Pages 10 – 18 in 2017 Annual NEPA Report, National Association of Environmental Professionals.

_____. 2019. Preparation Times for Environmental Impact Statements Made Available in Calendar Year 2018. Pages 9 – 17 *in* 2018 Annual NEPA Report, National Association of Environmental Professionals.

5. 2019 NEPA Legislation

Charles P. Nicholson, PhD[7]

5.1 Introduction

The 116th United States Congress convened on January 3, 2019 with a new Democratic Party majority in the House of Representatives and a slightly larger (53 seats, an increase of 3) Republican Party majority in the Senate. Strengthening environmental laws and regulations was a prominent issue in 2018 Congressional races, and many bills on environmental topics were introduced early in the session. Several of these bills addressed some aspect of the National Environmental Policy Act (NEPA). This report reviews NEPA legislation introduced during the first session of the 116th Congress in 2019.

During 2019, 139 bills containing the phrase "National Environmental Policy Act" and/or addressing the NEPA review process were introduced. Excluding the duplicate bills that were introduced in both the Senate and House and bills that were later incorporated into another bill, a total of 110 unique bills addressing NEPA were introduced in 2019. Of these 110 unique bills addressing NEPA, 41 did not make changes to existing NEPA compliance processes and typically addressed NEPA through clauses stating that the subject activity must comply with NEPA.

The remainder of this article describes the substantive NEPA provisions of the one bill addressing NEPA that became law by the end of 2019 and summarizes the substantive NEPA provisions of the bills introduced in 2019 that did not become law. The bills that did not become law are categorized by the major NEPA compliance topic(s) that they address. Unless stated otherwise, the bills did not receive a committee vote or consideration by the full House or Senate. The complete text of all the bills mentioned in this report is available at https://www.congress.gov/.

In comparison with the 115th Congress, the 116th Congress held few House or Senate committee hearings that addressed NEPA compliance and associated permitting processes that were not legislative hearings on specific bills. As described below, only one bill with a substantive NEPA provision became law in 2019. Of the other introduced bills with substantive NEPA provisions, six were approved in committee and one was passed by the Senate during 2019. Few of these bills had received further action in either chamber by mid-May, 2020. The prospects for enacting many of these bills, aside from the 5-year transportation funding bill, **America's Transportation Infrastructure Act of 2019 (**S.2302), are likely low given Congress's recent extended recess and focus on legislation addressing the COVID-19 pandemic, as well as the upcoming 2020 elections. The **America's Water Infrastructure Act of 2020 (**S.3591), introduced on May 4, 2020, contains a section requiring the Secretary of the Army to review and adopt categorical exclusions (CatExs) applicable to water resource projects and a section streamlining the review of non-federal hydropower applications at existing Corps of Engineers projects. This bill is likely to pass in some form during the current session of Congress and could incorporate some of the bills described below addressing the review of specific water resource projects. Additional bills

[7] PO Box 402, Norris, TN 37828; cpnicholson53@gmail.com
Any opinions and conclusions in this article are those of the author and do not represent those of HDR, Inc.

addressing recovery from the COVID-19 pandemic that include provisions on infrastructure development are another potential avenue for legislation addressing NEPA compliance processes.

5.2 Enacted Legislation

By the end of 2019, only one bill with a substantive NEPA provision became law, S.1790 (Public Law 116-92), the **National Defense Authorization Act for Fiscal Year 2020**. The NEPA provision in this law is a narrowly focused streamlining directive under Section 3514, the "Ports Improvement Act," that authorizes the Secretary of Transportation to coordinate with other Federal agencies to expedite the NEPA process for specified port facility improvement projects and to seek to coordinate all reviews or requirements with appropriate Federal, State, and local agencies. The other bills that became law and addressed NEPA in some form were the **John D. Dingell, Jr. Conservation, Management, and Recreation Act,** S.47, which stated that several of its included actions were subject to NEPA, and appropriation bills that included the CEQ budget or included standard language on the NEPA review of Department of Housing and Urban Development activities. S.47 included several sections that were previously introduced as stand-alone bills.

5.3 Proposed Legislation

Delegation of NEPA Responsibilities
The delegation (also known as NEPA assignment) of NEPA compliance responsibilities to non-federal entities has been a theme in enacted and proposed legislation for several years, at least since the enactment of the **Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users Act** (SAFETEA-LU) in 2005. During 2019, both novel bills and bills recycled from previous sessions addressing the topic were introduced.

The **Reducing Environmental Barriers to Unified Infrastructure and Land Development (REBUILD) Act of 2019, H.R.363,** introduced in every session since the 112th, has the broadest scope of the NEPA delegation bills. It would amend NEPA by adding Section 106 on Assignment to States of Environmental Review Responsibilities with Respect to Certain Projects in the State. Under this provision, the Secretaries of Interior, Transportation, and Army, as well as the Administrator of the EPA can enter into agreements with states to assume their agency's NEPA responsibilities and responsibilities under other federal environmental laws. The states must meet regulatory requirements established by the subject federal agencies in order to assume the responsibilities.

The **Resilience Revolving Loan Fund Act of 2019, H.R.3779**, would authorize the Administrator of the Federal Emergency Management Agency (FEMA) to delegate responsibilities under NEPA, the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA) to a participating state or tribal government applying for hazard mitigation revolving loan funds provided the participating entity carries out such responsibilities in the same manner and subject to the same requirements as the FEMA Administrator. This bill was passed by the House Transportation and Infrastructure Committee.

H.R.292, the **Rural Broadband Permitting Efficiency Act of 2019** would authorize the Secretaries of interior and Agriculture to establish program under which a state or tribe may

assume NEPA responsibilities for permitting of broadband projects within existing operational right-of-ways on public lands and Indian lands. It is similar to the Highway Rights-of-Way Permitting Efficiency Act of 2017, S.604, introduced in the 115th Congress.

A few bills propose delegating NEPA responsibilities for specified actions to Indian tribes. **S.1211, Addressing Underdeveloped and Tribally Operated Streets (AUTOS) Act**, passed in committee, **S.207**, "a bill to enhance tribal road safety, and for other purposes," and the previously mentioned **WORKS Act, H.R.4759**, authorize the Secretary of Transportation to enter into programmatic agreements with qualifying tribes to allow the tribes to make CatEx determinations for specified tribal transportation projects. **H.R.1312**, the **Yurok Lands Act**, would authorize the Yurok Tribe to develop a Tribal Land Use Management Plan under NEPA for land held in trust and to be the joint lead agency in the NEPA review of other actions on federal land within the boundary of the revised Yurok Reservation in California. **S.209 and H.R.2031, the Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGRESS) for Indian Tribes Act of 2019**, would authorize qualifying tribes to assume some federal responsibilities under NEPA and related provisions of other laws for specified construction projects. This bill was passed by the Senate and by the House Committee on Natural Resources, and is very similar to S.2515 that was passed by the Senate in the 115th Congress.

The **Resilience Revolving Loan Fund Act of 2019, H.R.3779**, would authorize the Administrator of FEMA to delegate responsibilities under NEPA, the ESA, and the NHPA to a participating state or tribal government applying for hazard mitigation revolving loan funds provided the participating entity carries out such responsibilities in the same manner and subject to the same requirements as the FEMA Administrator. This bill was passed by the House Transportation and Infrastructure Committee.

Although they do not directly address NEPA delegation, **S.1050**, **S.1051**, and **S.1054**, amend, respectively, the CWA, ESA, and NHPA to allow states that have assumed NEPA responsibilities under the surface transportation project delivery program to apply to assume specified CWA §404, ESA §7, and NHPA §106 federal responsibilities for highway projects.

Exemptions From NEPA

As has been the case in recent sessions of Congress, multiple bills exempt specified federal actions from complying with NEPA. The untitled **S.2430** has the broadest scope of such bills in the current and recent sessions of Congress. Its brief text states "Notwithstanding any other provision of law, the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and division A of subtitle III of title 54, United States Code (formerly known as the "National Historic Preservation Act"), shall not apply to any project or activity that (1) is not located in a metropolitan statistical area (as defined by the Office of Management and Budget); and (2) is carried out using Federal funds."

A few NEPA exemption bills focus on federal lands. **H.R.483** exempts the conveyance of 0.9 acres of Federal land in the Henry's Lake Wilderness Study Area in Idaho to non-federal entities to resolve long-standing encroachments. **H.R.253**, the **Nevada Lands Bill Technical Corrections Act of 2019**, directs the Secretary of Interior to convey 400 acres of public land in Nevada to a local county without a NEPA review. The **Combustion Avoidance along Rural**

Roads (CARR) Act, H.R.243, authorizes the Secretary of Interior and Secretary of Agriculture to carry out wildfire mitigation activities within 500 feet of any road on Federal land "without regard to" NEPA and the ESA. The **Localizing Authority of Management Plans (LAMP) Act of 2019, H.R.4483**, exempts cooperative management agreements with states and non-federal persons for conserving endangered or threatened species, species proposed for listing, and candidates for listing on non-federal and federal lands and waters. H.R.243 and H.R. 4483 were also introduced in the 115th Congress. **H.R.255**, the **Big Bear Land Exchange Act**, declares that the relocation of a segment of the Pacific Crest National Scenic Trail in the area of a proposed exchange of federal land for San Bernardino County land is not subject to NEPA. The bill does not mention of whether the land exchange is subject to NEPA.

Environmental compliance for border security continued to be a topic of interest, although it is only addressed in one bill. The **Furthering American Security by Tempering Environmental Regulation (FASTER) Act, H.R.1732**, amends the Illegal Immigration Reform and immigrant Responsibility Act of 1996 to specify that the waiver authority under the act includes NEPA and ESA for purposes of construction of physical barriers along border. The practical effects of this are unclear because the Secretary of Homeland Security already has "the authority to waive all legal requirements" (§ 102(c)).

H.R.4294, the **American Energy First Act**, states that oil and gas exploration and production activities in areas with a non-federal surface estate and federal ownership interest in the subsurface mineral estate of less than 50 percent are not federal actions and not subject to BLM permitting or NEPA (or the ESA or NHPA). It also authorizes the Secretary of Interior to delegate exclusive authority to qualifying states for issuing oil and gas drilling permits and approving drilling plans on federal lands. The bill does not mention whether the states would have to comply with NEPA and related federal laws and regulations. The **Opportunities for the Nation and States to Harness Onshore Resources for Energy (ONSHORE) Act, S.218**, contains the same exemption, along with an exemption for oil and gas operations in areas with federal mineral ownership interest and potential drainage impacts. The similar **Ending Duplicative Permitting Act, H.R.1650**, states that these activities are categorically excluded under NEPA and not subject to the ESA or NHPA when the operator has a state permit. **S. 218** and **H.R. 1650** were also introduced in the 115th Congress.

The **Safe Gun Storage Act of 2019, H.R.4691** and **S.3065**, requires the Consumer Product Safety Commission to issue a rule setting standards for firearm locks and safes, and states that this rulemaking is not subject to NEPA.

The **Water Optimization for the West (WOW) Act, H.R.5217**, declares that the filing of a Notice of Determination or Notice of Exemption under the California Environmental Quality Act for any project of the Central Valley Project shall meet the requirements of NEPA.

Not Major Federal Actions Under NEPA

Several bills state that specified actions shall not be a major federal action under NEPA. Under **H.R.3225**, the **Restoring Community Input and Public Protections in Oil and Gas Leasing Act of 2019**, this applies to the required rulemaking to establish a minimum acceptable bid higher than $5/acre for onshore oil and gas leasing. **S.3019**, the **Montana Water Rights Protection Act**, applies it to the execution of a water rights compact by the tribes, the U.S.

government, and the state of Montana. H.R.2607, the **Resilient Federal Forests Act of 2019**, declares that the development of forest plans are not considered major federal actions. The **Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community Water Rights Settlement Act of 2019**, S.3113, the **Navajo Utah Water Rights Settlement Act of 2019,** S.1207, the **Navajo Utah Water Rights Settlement Act of 2019,** H.R.644, and the **Hualapai Tribe Water Rights Settlement Act of 2019,** S.1277 and H.R.2459, declare that the execution of the subject water rights agreements are subject to NEPA but not major Federal actions for purposes of NEPA.

Level of Review

Three bills mandate the level of NEPA review for specific actions. H.R.1105, the **Prevention of Escapement of Genetically Altered Salmon in the United States Act**, **r**equires that an application for Federal authorization of otherwise prohibited actions involving genetically altered salmon be the subject of an EA or EIS. This bill was introduced in previous sessions of Congress. The **Fostering Opportunities for Resources and Education Spending through Timber Sales (FORESTS) Act of 2019,** H.R.4057, states that a covered active forest management project (e.g., a timber harvest) within a designated Forest Active Management Areas will be the subject of an EA unless a CatEx is applicable or a programmatic EIS is in effect. No alternatives to the agency proposed action are required and the cumulative impacts analysis is restricted to consideration of previously approved projects. The **Malheur Community Empowerment for the Owyhee Act,** S.2828, requires the Secretary of Interior to prepare a programmatic EIS within 1 year and every subsequent 10 years on the adaptive management of certain federal land in Malheur County, Oregon. The management plan and PEIS shall describe restoration areas, restoration objectives and desired ecological outcomes, the priority of restoration areas, prescribed treatment, and monitoring methods and techniques.

Categorical Exclusions

The **Critical Infrastructure Act of 2019,** H.R.5445, categorically excludes any project to install or maintain electrical transmission poles or powerlines. It would also categorically exclude a construction project that includes a buffer area if the project "would otherwise only require an assessment" under NEPA because of the presence of prairie dogs in the buffer area. The bill does not mention the consideration of extraordinary circumstances or specify the agencies whose actions would be categorically excluded.

The **Connecting Communities Post Disasters Act of 2019,** S.2645 and H.R.4741, declares that the construction, rebuilding, and hardening of communications facilities following a major disaster or emergency declared by the President shall treated as categorically excluded and not subject to Section 106 of the NHPA. The bill does not address the consideration of other extraordinary circumstances. This bill was also introduced in the 115th Congress.

One of the many provisions in S.1518, the **Rebuild America Now Act**, is a requirement that the Secretary of Transportation, within 180 days and in consultation with the Administrator of FEMA and Secretary of the Army, identify communities that are imminently threatened from flooding or erosion and designate specified mitigating actions to be categorically excluded. Regulations to carry out this requirement will be promulgated within 150 days.

H.R.4294, the **American Energy First Act**, would amend the Energy Policy Act of 2005 to categorically excludes the reinstatement of oil and gas leases, expansion of activities at existing well pad sites not exceeding 20 acres, and new well pad sites not exceeding 20 acres where the activity previously evaluated under NEPA, as well as specified activities conducted from non-Federal surface into federally owned minerals. The consideration of extraordinary circumstances is not required.

A few bills, similar to bills introduced in recent sessions of Congress, categorically exclude specified geothermal exploration projects, subject to consideration of extraordinary circumstances. These bills are the **Enhancing Geothermal Production on Federal Lands Act,** S.2270 and H.R.4026, the **Advanced Geothermal Innovation Leadership (AGILE) Act of 2019**, S.2657, and the **American Energy First Act**, H.R.4294. The AGILE Act, which was passed by the Energy and Natural Resources Committee, also requires the Secretary of Interior determine whether the proposed project qualifies for a CatEx within 30 days of receipt of the notice of intent for the project.

Several bills in recent sessions of Congress have addressed CatExs for forest management activities. H.R.2607, the **Resilient Federal Forests Act of 2019**, would categorically exclude specified critical response activities on areas not exceeding 10,000 acres or 30,000 acres if the activity was developed through specified collaborative processes. It also categorically excludes salvage operations on areas not exceeding 10,000 acres that include stream buffers and reforestation; activities to meet early successional forest goals on areas not exceeding 10,000 acres; roadside hazard tree removal and salvage activities; and hazardous fuel reduction activities on areas not exceeding 10,000 acres. The bill limits the scope of consideration of extraordinary circumstances by the USFS and requires the Secretary of Agriculture to issue a final rulemaking addressing the changes to consideration of extraordinary circumstances. The **Proven Forest Management Act of 2019,** H.R.5218, similarly to H.R.2607, would categorically exclude forest management activities on National Forest System land for the purpose of reducing forest fuels on areas not exceeding 10,000 acres, including not more than 3,000 acres of mechanical thinning; and that are developed in coordination with impacted and other interested parties and consistent with the forest plan. The **Fostering Opportunities for Resources and Education Spending through Timber Sales (FORESTS) Act of 2019,** H.R.4057, requires the Secretary of Agriculture to establish Forest Active Management Areas with annual harvest quotas. Active management projects in these areas prepared using a collaborative process and with a maximum area of 10,000 acres are categorically excluded. The consideration of extraordinary circumstances is not mentioned.

H.R.316, the **Guides and Outfitters (GO) Act** (also introduced in recent previous sessions) would categorically exclude the issuance of special recreation permits for specified activities are categorically excluded if carried out on federal lands and waters allocated to such use and if there are no extraordinary circumstances. The related, bipartisan **Recreation Not Red Tape Act**, S.1967 and H.R.3458, and the **Simplifying Outdoor Access for Recreation (SOAR) Act,** S.1665 and H.R.3879, require the Secretaries of Interior and Agriculture to evaluate whether additional CatExs would reduce processing times or costs for special recreation permits without affecting the quality of the human environment and establish any such new CatExs within 1 year. Existing extraordinary circumstances will be applied when evaluating the use of the new CatExs.

The **Water Optimization for the West (WOW) Act, H.R.5217**, states the Secretary of Interior to Secretary shall, within 180 days, survey use of CatExs by the Bureaus of Reclamation and Indian Affairs and identify potential new CatExs. The proposed rulemaking for new CatExs is to be published within 1 year. The bill also categorically excludes the repair, reconstruction, or rehabilitation of Reclamation or Indian Affairs projects damaged by an event that is declared a major disaster or emergency by the President if repair or reconstruction activity is in same location with same design and commenced within two years of the event.

The **America's Transportation Infrastructure Act of 2019, S.2302**, requires the Secretary of Transportation to identify CatExs that would accelerate project delivery if the CatExs were available to other specified agencies and provide documentation and substantiating information on the CatExs to the other agencies. The other agencies are required to publish proposed rulemakings on the CatExs within 1 year of receiving the information on them. **H.R.4759**, the **Withdrawing from Overburdensome Reviews and Keeping us Safe (WORKS) Act**, similarly requires the Secretary of Transportation, working with other agencies, to identify CatExs that could accelerate transportation project delivery within 60 days and publish the proposed rulemaking for any CatExs within 1 year of completion of the review. The **Addressing Underdeveloped and Tribally Operated Streets (AUTOS) Act**, **S.1211,** which passed in committee, and the similar **S.207**, "a bill to enhance tribal road safety, and for other purposes," require the Secretary of Interior to review available CatExs applicable to specified tribal transportation safety projects and establish new CatExs within 180 days.

General Streamlining

General streamlining is a broad category of various measures, including time limits, limits on alternatives, and "One Federal Decision" processes, designed to expedite the NEPA process and not included under other headings in this report.

S.1518, the **Rebuild America Now Act**, contains some of the most extensive streamlining provisions. Its declared purpose is "to improve the processes by which environmental documents are prepared and permits and applications are processed and regulated by Federal departments and agencies, and for other purposes." It amends NEPA by adding a new Title III on Interagency Coordination Relating to Permitting that contains many of the streamlining provisions. The provisions include:

- a project sponsor is authorized to prepare the EIS or EA subject to oversight, independent evaluation, and approval and adoption by the lead agency
- the environmental review of any action is limited to no more than 1 EIS and 1 EA unless a supplement is required or an EIS or EA is required by a court order
- a federal agency may adopt an environmental document prepared under state law if the environmental protection and opportunity for public involvement is substantially similar. The lead agency can supplement the state environmental document if necessary; the public comment period on such a supplement is limited to 45 days. The lead agency may also adopt a secondary or cumulative impact analysis included in any EIS or EA for a project in the same area.
- any Federal cooperating agency, subject to exceptions, that is required to adopt the EIS or EA issued by the lead agency shall be designated as a cooperating agency and collaborate in the EIS or EA preparation

- the lead agency shall invite the Governor of an affected state and a local or tribal government that may have an interest in the project to be cooperating agencies. If the invited government declines, they are precluded from submitting comments on the EIS or EA and from opposing the approval of the project
- a cooperating agency shall not provide comments on a subject matter that does not relate to its expertise and statutory authority, and a lead agency shall not respond to or include such comments from a cooperating agency.
- for projects constructed, managed, funded, or carried out by a non-federal project sponsor, the EIS or EA shall only evaluate an alternative that the project sponsor may feasibly carry out, and is determined by the lead agency to be technically and economically feasible
- the methodologies used in preparing the EIS or EA and the means by which the methodologies were selected must be described in the EIS or EA
- changes in potential short-term and long-term employment and shifts in employment must be evaluated
- sets deadlines of 2 years from the earlier of the date on which the lead agency receives an application from a project sponsor and the date of the NOI for issuance of the EIS, and 1 year for issuance of a FONSI
- limits the public comment period on an EIS or EA to 30 days, subject to exceptions
- requires final actions on permit, license, or other application within 90 days of the NOA for a FEIS and completion of all other relevant Federal agency reviews, subject to extension up to 1 year by mutual agreement
- declares that the failure for meeting the deadlines shall constitute project approval
- establishes a 300-page limit for environmental documents
- requires the development of a single document consisting of the FEIS, each ROD relating to the project, and the final decision by the Secretary of the Army on any CWA §404 permit application unless the FEIS makes a substantial change relating to an environmental or safety concern or for significant new circumstances or information on an environmental concern

The bill requires CEQ to amend its NEPA regulations to address these requirement within 180 days and other agencies to revise their NEPA regulations within 120 days of the CEQ final rulemaking.

Sec. 106, Permittee Bill of Rights, of **S.1518** amends Section 101 of NEPA by stating that it is the policy of the United States "(A) to use natural resources in a responsible manner to maximize value and utility, while protecting public health and welfare; and "(B) that, therefore, in implementing a Federal permitting law, a Federal agency should, to the maximum extent practicable, seek to issue permit decisions favorably."

Title III of **S.1518** addresses Natural Gas Pipeline Permitting Efficiency. It requires FERC to approve or deny applications for prefiled projects within 1 year of receipt of a completed application. Decisions on associated approvals by other agencies must be made within 90 days of the issuance of the final environmental document by FERC. An agency's failure to meet these deadlines will constitute approval by the agency.

Two titles in **H.R.5217** , the **Water Optimization for the West (WOW) Act**, address NEPA streamlining. Title V is the Bureau of Reclamation and Bureau of Indian Affairs Water Project Streamlining Act. Sec. 5002 requires final feasibility reports, including associated NEPA reviews, for studies of BOR and BIA water projects to be completed within 3 years and have a maximum federal cost of $3 million. The Secretary of Interior may authorize longer and/or more costly reviews under specified conditions. Sec. 5004 directs the Secretary of Interior to develop and implement a coordinated environmental review process for the development of project studies. A state or local government entity project sponsor may serve as a joint lead agency and prepare the NEPA document under the guidance of the Secretary and in compliance with NEPA requirements. Federal agencies with associated actions are to adopt this NEPA document. The Secretary of Interior is directed to issue guidance regarding the use of programmatic approaches to the environmental review process. Public comment deadlines are limited to 60 days for a DEIS and 30 days for other comment periods unless longer deadlines are established by mutual agreement or for good cause. Sec. 5004 establishes issue identification and resolution requirements for lead, cooperating, and participating agencies. It also authorizes financial penalties for missed decision deadlines.

Title VI of the **WOW Act** is the Water Supply Permitting Coordination Act, which was also introduced as **H.R.1621**. This title establishes BOR as lead agency for environmental review of water storage projects on DOI and DOA lands. These projects must use a unified environmental review project with a single environmental record on which all cooperating agencies will base their project approval decisions. Decisions for projects that are subject of EAs and FONSIs must be made within 1 year of acceptance of the application. Decisions for projects that are subject of an EIS must be made within 1 year and 30 days of close of the DEIS comment period.

The **Sites Reservoir Project Act, H.R.1435**, directs the BOR to be the lead agency for the feasibility study, EIS, and environmental impact report for the subject water supply project. All federal reviews and decisions are to be completed on an expeditious basis, use the shortest applicable time, and to the maximum extent practicable, be completed by January 1, 2022. The Secretary will issue a plan for the completion of the required studies within 6 months.

The **Drought Resiliency and Water Supply Infrastructure Act, S.1932**, states that the Secretary of Interior, in reviewing participation in a non-federal water storage project, shall rely on reports prepared by the project sponsor, retain responsibility for making independent determinations, and prepare necessary supplementary studies. Similarly, for participating in desalination project, the Secretary may rely on reports prepared by the project sponsor and shall retain responsibility for making independent determinations. **H.R.3723**, the **Desalination Development Act**, contains a similar provision for the review of desalination projects.

H.R.292, the **Rural Broadband Permitting Efficiency Act of 2019**, establishes broadband permit streamlining team in each state or regional Department of Agriculture and Department of Interior office with responsibility for issuing permits for broadband projects. The team would include agency staff with expertise in public lands planning, NEPA, and ESA Section 7.

The **National Strategic and Critical Minerals Production Act, H.R.2531**, declares that NEPA requirements for issuance of mine exploration or mining permits by BLM and USFS shall be considered satisfied if the lead agency determines that any state or federal agency has or will

address the environmental impacts of the permitted action and possible alternatives in accordance with the requirements of NEPA §102(C) and public participation. The determination of whether NEPA requirements have been satisfied must be made within 90 days of receipt of application. For projects not covered by an existing NEPA review, the lead agency, cooperating agencies, and proponent will set time limits for the major NEPA process steps. Unless extended by mutual agreement, the total permitting review process is not to exceed 30 months. Lead agencies are not required to address agency or public comments that were not submitted during a public comment period or a consultation period, or otherwise as required by law.

The **Nuclear Waste Policy Amendments Act of 2019, S.2917** and **H.R.2699**, states that the Secretary of Energy is not required to consider alternative actions or a no-action alternative in any NEPA analysis related to infrastructure activities associated with use of the Yucca Mountain site as a spent nuclear fuel and high-level radioactive waste repository.

H.R.4294, the **American Energy First Act**, inhibits public involvement by amending Section 17 of the Mineral Leasing Act to require the payment of a filing fee with minimum or $150 for filing a protest. Title III on Alternative Energy, Section 301 requires the Secretary of Interior to designate priority areas on BLM lands for geothermal, solar, and wind energy projects, and, as necessary, supplement the existing final programmatic EISs on geothermal, solar, and wind energy development. The supplements are to be completed within 1 year and not exceed 150 pages in length. Section 301 is similar to measures in previous bills and the current bipartisan **Public Land Renewable Energy Development Act of 2019** (**S.2666**, **H.R.3794**), except the latter bill has longer time limits for the supplements. The related **Enhancing Geothermal Production on Federal Lands Act, S.2270** and **H.R.4026**, requires the Secretary of Interior to designate geothermal leasing priority areas on Federal land within 5 years and to prepare supplement to the geothermal leasing PEIS within 1 year of initial priority area designation. S.2666/H.R.3794 also directs the Secretary of Interior to establish multidisciplinary BLM Regional Energy Coordination Offices to expedite permit processing and allows the Secretary of Interior to accept donations from renewable energy companies to help cover the costs of environmental reviews. The **Advanced Geothermal Innovation Leadership (AGILE) Act of 2019**, **S.2657**, establishes a Geothermal Energy Permitting Program with interdisciplinary state or district offices.

The bipartisan **Utilizing Significant Emissions with Innovative Technologies (USE IT) Act**, **S.383** and **H.R.1166**, requires CEQ to develop guidance on the environmental review and permitting for carbon capture, utilization, and sequestration projects, including compliance with NEPA and the use of programmatic environmental reviews. It also establishes an interagency task force to address improving the permitting process. **S.383** was reported by the Senate Committee on Environment and Public Works. It is also incorporated into **America's Transportation Infrastructure Act of 2019, S.2302**, as Sec. 1406.

The **Resilient Federal Forests Act of 2019, H.R.2607**, states EAs and EISs for forest management activities that are developed through a collaborative process, proposed by a resource advisory committee, on lands identified as suitable for timber production, or covered by a community wildfire protection plan shall analyze only the proposed action and no action alternatives. The evaluation of the no action alternative must address effects of no action on forest health, habitat diversity, wildfire potential and other issues, and the implications on

domestic water supply, wildlife habitat loss, and other economic and social factors. EAs for salvage operations or reforestation proposed after large-scale catastrophic events shall be completed within 60 days of the conclusion of the event

H.R.244, the **Advancing Conservation and Education Act**, states that EISs or EAs on the exchanges of western public lands with state lands, under some conditions, are not required to evaluate more than one action alternative.

The **Land Grant and Acequia Traditional Use Recognition and Consultation Act, H.R.3682,** requires the Secretaries of Agriculture and Interior, when developing a management plan that is the subject of an EIS and contains land within or adjacent to a qualified land grant-merced, to, in consultation with the land grant-merced governing body, evaluate the potential impacts on the ability of the relevant community users to carry out historical-traditional uses of the land grant-merced. Adverse impacts to traditional uses must be mitigated to the maximum extent practical. It also requires the Secretary to notify the governing body within 30 days of the time necessary to complete any required EA or EIS for activities proposed by the governing body on a qualified acequia or land grant-merced on federal land. The Secretary must make the permit decision within 30 days of completing the NEPA review. It also authorizes the Secretary to waive any cost-share requirement for the NEPA review of the permitted activities. This bill is very similar to H.R.6487 in the 115th Congress.

The **Guides and Outfitters (GO) Act**, H.R.316, and the bipartisan **Recreation Not Red Tape Act**, S.1967 and H.R.3458, require the Secretaries of Agriculture and Interior to revise their regulations within 180 days to streamline permit processing for outfitter and guide special use permits. The Recreation Not Red Tape Act and the similar, bipartisan **Simplifying Outdoor Access for Recreation (SOAR) Act,** S.1665 and H.R.3879, also authorize the Secretaries to use a programmatic review and incorporate material from a previous environmental review when reviewing a special recreation permit, and requires the Secretaries to promulgate regulations as necessary for this process within 1 year.

America's Transportation Infrastructure Act of 2019, S.2302, the five-year transportation funding bill and successor to the FAST Act, contains a Subtitle C on Project Delivery and Process Improvement. Sec. 1301 of this title, on Efficient Environmental Reviews for Project Decisionmaking and One Federal Decision amends 23 USC 139 (originally part of MAP-21). This section codifies much of the One Federal Decision policy established in E.O. 13807. It defines a "major project" as requiring multiple permits or reviews, having reasonable availability of funds sufficient to complete the project, not a covered project (per Section 41001 of the FAST Act), and requiring an EA or EIS. Major projects are to be the subject of a single EA or EIS and the lead agency will develop a project schedule, with concurrence of the project sponsor, to complete the environmental review with an agency average of no more than 2 years from the publication of the notice of intent or the decision to produce an EA. Authorization decisions will be made within 90 days of the issuance of a record of decision. It requires the Secretary of Transportation to establish a performance accountability system to track each major project and to annually calculate and report the average time taken by the lead agency to complete all environmental documents for each project during the previous fiscal year. It also requires the Secretary to review, in consultation with other agencies, existing procedures, regulations, and laws to identify impediments to efficient reviews, as well as best practices, programmatic

agreements, and potential changes to department procedures that would facilitate an efficient review process. The NEPA streamlining provisions in S.2302 are also included in **H.R.4759**, the **Withdrawing from Overburdensome Reviews and Keeping us Safe (WORKS) Act** as Sec. 3001. **S.2302** was reported by the Senate Committee on Environment and Public Works.

Sec. 3002 of **S.2302** requires that the NEPA review of specified tribal transportation projects be completed using the shortest existing applicable process and that final action for approvals occur within 45 days of receipt of a complete application. Otherwise the tribe is to be provided a schedule for the completion of the review. This provision is also included in **H.R.4759**, the **WORKS Act.**

The **Maritime Administration Authorization and Enhancement Act of 2019, S.1417**, and **S.1439,** another Senate bill with the same name, direct the Secretary of Transportation to coordinate with other Federal agencies, as well as state and local agencies, to expedite efforts to comply with NEPA for specified port and intermodal connection projects and for strategic seaport projects. This provision was enacted as part of the **National Defense Authorization Act for Fiscal Year 2020, S.1790**.

The bipartisan **Reinventing Economic Partnerships And Infrastructure Redevelopment (REPAIR) Act, S.1535**, establishes a similar Infrastructure Financing Authority that includes a Project Delivery Task Force. The task force is charged with establishing a permitting timetable for an eligible proposed project, coordinating concurrent permitting reviews and coordinating with relevant state agencies and regional infrastructure development agencies. Each agency will formulate and implement "mechanisms to ensure completion of the environmental review process in a timely, coordinated, and environmentally responsible manner." The **Leading Infrastructure for Tomorrow's America Act, H.R.2741**, establishes a new Broadband Infrastructure Finance and Innovation program. Applications for funding under this may be approved before the required NEPA review is completed but the funding cannot be obligated until the NEPA review is completed. The same NEPA provision is contained in the **Broadband Infrastructure Finance and Innovation Act of 2019**, **S.2344** and **H.R.4127**.

Expanded NEPA Requirements

H.R.4657, a bill "To require the Federal Energy Regulatory Commission to consider greenhouse gas emissions related to natural gas pipelines, and for other purposes" requires FERC, in complying with NEPA requirements for approval of natural gas pipeline projects, to consider GHG emissions from the construction and operation of the pipeline and the production, transportation, and combustion of the natural gas to be transported through the pipeline.

The **California Central Coast Conservation Act, H.R.5303**, establishes a moratorium on oil and gas leasing on public land on the central coast of California by suspending the October 2019 ROD for the BLM's Central Coast Field Office Resource Management Plan Amendment for Oil and Gas Leasing and Development until BLM completes a new SEIS. The new SEIS must consider the effects of all oil and gas development authorized to occur under BLM's preferred Alternative F which appears in the May 2019 FEIS but was not included in the January 2017 DEIS. It must consider the effects on GHG emissions and climate, as well as other resources. If the SEIS finds significant detrimental effects, BLM must conduct a new NEPA review of Federal oil and gas leasing on the Central Coast of California. The bill requires EPA to review

and publish comments on the SEIS including identification of any significant impacts that should be avoided and whether the SEIS contains sufficient information to assess such impacts.

H.R.2579, the **Hardrock Leasing and Reclamation Act of 2019**, establishes permitting requirements, subject to NEPA review, for mineral activities on federal land that may cause a surface disturbance. It directs the Secretaries of Interior and Agriculture to jointly promulgate regulations to ensure transparency and public participation in permit decisions, consistent with the requirements of Section 102 of NEPA. This bill was reported by the Committee on Natural Resources.

The **Pipeline Fairness and Transparency Act,** H.R.173, amends Section 15 of the Natural Gas Act to expand the environmental review requirements for interstate natural gas pipeline projects by adding the following requirements:

- FERC must prepare a supplement to a DEIS or FEIS if FERC makes a substantial change in the proposed action that is relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns.
- If a DEIS for an application for Federal authorization does not include mitigation plans for adverse impacts that cannot be reasonably avoided, a supplemental EIS must be prepared that includes this information.
- Any NEPA public meetings shall be held in each county or equivalent subdivision in which the project will be located and during any public comment periods following publication of DEIS, FEIS and supplemental EIS.
- The evaluation of visual impacts of the project on a national scenic trail shall consider the cumulative visual impacts of any similar proposed project with an application in pre-filing or filing stage, and that impacts the same trail within 100 miles of the first project. It shall also include visual impact simulations depicting leaf-on and leaf-off views at each location where major visual impacts occur, as identified during scoping by the agency administering the land at the applicable locations.
- No amendment to a National Forest management plan shall be considered, pursuant to an application for Federal authorization, if the amendment would substantially interfere with the nature and purposes of the national scenic trail.

Numerous bills have been introduced in recent sessions of Congress requiring that the designation of national monuments be subject to NEPA. None of these bills has passed. Only one such bill, the **National Monument Creation and Protection (National Monument CAP) Act,** H.R.1664 , was introduced in 2019. It requires any monument designation to be the subject of an EA or EIS. It also requires that the decision to reduce the size of a national monument by more than 85,000 acres be subject to NEPA.

Judicial Review

The **Resilient Federal Forests Act of 2019,** H.R.2607, described previously for other NEPA provisions, establishes an arbitration pilot program in lieu of judicial review of forest management activities. It also prohibits courts from issuing a restraining order, preliminary injunction, or injunction pending appeal of a salvage operation or reforestation activity in response to a large-scale catastrophic event. The **Fostering Opportunities for Resources and Education Spending through Timber Sales (FORESTS) Act of 2019,** H.R.4057 , similarly

declares that any challenges to a covered active management project developed through a collaborative process must be addressed by arbitration instead of litigation.

The amendments to NEPA in S.1518, the **Rebuild America Now Act,** described above, include the establishment of a deadline of 180 days from the publication of the record of decision for judicial review. The **Water Optimization for the West (WOW) Act,** H.R.5217, also previously described, sets a 3-year limit on claims for judicial review of BOR and Bureau of Indian Affairs water resource projects. It also declares in Sec. 2009 on Regulatory Streamlining that the BOR does not have to cease or modify any federal action related to any project of the Central Valley Project pending completion of the judicial review of a NEPA determination. Title II of S.1518, the **Rebuild America Now Act**, requires that court challenges to a broad range of energy-related actions on public and Indian lands be filed within 60 days of final agency action and brought in the U.S. District Court for the District of Columbia. If the plaintiff does not prevail, the plaintiff will pay the defendant's expenses.

The **Nuclear Waste Administration Act of 2019,** S.1234, requires that NEPA challenges to actions implemented under the act be tried in the U.S. Court of Appeals for the petitioner's circuit or in the Court of Appeals for the District of Columbia Circuit.

Environmental Justice

The **Environmental Justice Act of 2019,** S.2236 and H.R.3923, codifies much of E.O. 12898 on environmental justice. All federal agencies would be required to develop and implement environmental justice strategies addressing communities of color, indigenous communities, and low income communities with respect to NEPA implementation and other areas. It also enacts Sections II and III of the CEQ 1997 "Environmental Justice Guidance under the National Environmental Policy Act" into law.

6. Recent NEPA Case Law—2019

P.E. Hudson, Esq.[8]

This paper reviews substantive NEPA cases issued by federal courts in 2019 and explains the implications of the decisions and relevance to NEPA practitioners.

6.1 Introduction

In 2019, the U.S. Courts of Appeal issued 21 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 21 cases involved five different departments. Overall, the federal agencies prevailed in 16 of the cases, did not prevail in three cases, and prevailed on some but not all NEPA claims in one case, with a total prevail rate of 80 percent[9] (83 percent if the partial cases are included). The U.S. Supreme Court issued no NEPA opinions in 2019; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, Table 6-1 shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2019, by circuit. Figure 6-1 is a map showing the states covered in each circuit court.

Table 6-1. Number of U.S. Courts of Appeal NEPA cases, by year and by circuit.

	U.S. Courts of Appeal Circuits												
	lst	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	TOTAL
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	2	1	2	3	1		1		12	3	2	1	28
2013	2			2		1	1		9	2	1	3	21
2014				2		5			10	2		3	22
2015	1					1			6	2		4	14
2016				2		1	1		14	1	1	7	27

[8] Questions concerning information in this paper should be directed to:
P.E. Hudson, Esq., Counsel, Department of the Navy, Office of General Counsel, Center for Seabees and Facilities Engineering/Civil Engineer Corps Officers School, Port Hueneme, CA, 93001; pam.hudson@navy.mil
Note: Any views in this article are the author's personal views and not necessarily the views of the federal government.

[9] One case involving an EA was amended on rehearing on another issue involving remedy, *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019), amended on rehearing in part, by *Nat'l Parks Conservation Ass'n v. Semonite*, 925 F.3d 500 (D. C. Cir. 2019), and was counted twice. The decision was amended on rehearing for a determination involving remedy, and was not used to calculate the prevailing rate.

	U.S. Courts of Appeal Circuits												
2017		1	1		1				13	1		8	25
2018			1	3	2	1			16		3	9	35
2019				**1**			**1**	**1**	**9**	**2**	**1**	**6**	**21**
TOTAL	9	7	7	15	9	12	6	6	158	30	10	50	319
	3%	2%	2%	5%	3%	4%	2%	2%	**49 %**	9%	3%	**16 %**	

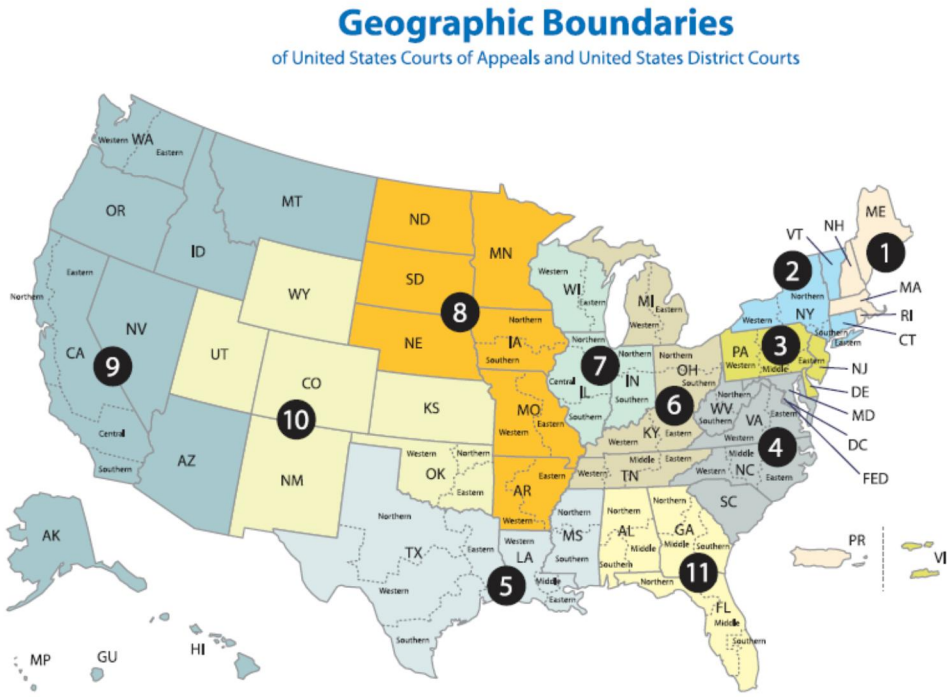

Figure 6-1. Map of U.S. Circuit Courts of Appeal.

6.2 Statistics and Overview of Cases

Federal agencies prevailed in 80 percent (83 percent if the partial cases are included) of the substantive NEPA cases brought before the U.S. Courts of Appeal.

The U.S. Department of the Agriculture (U.S. Forest Service [USFS]) was involved in seven cases. The U.S. Department of the Interior (Bureau of Land Management [BLM], Bureau of Indian Affairs [BIA] and National Park Service [NPS]) and U.S. Department of Transportation

[Federal Highway Administration [FHwA] and Federal Aviation Administration [FAA]) were each involved in four cases. The Department of Defense (U.S. Army Corps of Engineers [USACE]), and the Federal Energy Regulatory Commission (FERC) were each involved in three cases.

The Department of Interior did not prevail in one of its cases, and prevailed in some, but not all of the NEPA claims in another case. The Department of Defense and Department of Transportation did not prevail in one of their cases.

Of the 21 substantive cases, four cases involved a categorical exclusion (CatEx), 10 involved environmental assessments (EAs), and seven involved environmental impact statements (EISs).

One case in which the agencies did not prevail involved a CatEx (*City of Burien v. Elwell*, No. 18-71705, 790 Fed. Appx. 857, 2019 WL 6358039 (9th Cir. Nov. 27, 2019) (not for publication)). Three cases in which the agencies did not prevail or only partially prevailed involved EAs: *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019); *Oregon Natural Desert Ass'n v. Rose*, 921 F.3d 1185 (9th Cir. 2019), amended on rehearing in part, by 925 F.3d 500 (D. C. Cir. 2019); and *Diné Citizens Against Ruining our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019, agency partially prevailed). The agencies prevailed in all cases involving an EIS. The agencies prevailed in the other 16 cases.

6.3 Trends

The following relates some trends and interesting conclusions from the 2019 substantive cases. Note that there are several cases that were not reported, which means they have no precedential value, depending on the court. However, the rulings can still be of value to NEPA practitioners.

***Assessment of Impacts**:* Eighteen of the cases involved one or more challenges to assessment of impacts, including cumulative impacts, as well as four CatEx cases. The courts tended to focus on the deference afforded to the agency when they upheld the impact assessment analysis.

Categorical Exclusion: Four cases involved application of CatExs to projects.

- *Center for Biological Diversity v. Ilano*, 928 F.3d 774 (9th Cir. 2019) (concluding that the USFS, in applying a CatEx for designation of land areas and in its approval of a plan to combat the invasive pine bark beetle, considered relevant scientific data, engaged in a careful analysis, and reached its conclusion based on evidence supported by the record).

- *Wise v. Dep't of Transp.,* 943 F.3d 1161 (8th Cir. 2019) (upholding agency's decision to apply a CatEx involving an existing operational right of way for improvements proposed along I-630, in the City of Little Rock, Arkansas, increasing the travel lanes from six to eight and replacing all bridges within the project's limits).

- *Sauk Prairie Conserv. Alliance v. U.S. Dep't of the Interior*, 944 F.3d 644 (7th Cir. 2019) (opining the NPS's application of a CatEx for approval of dog training for hunting, and off-road motorcycle riding was adequate because there was enough

analysis in the state's Master Plan and EIS and in the NEPA screening form to support the NPS's conclusion that the amendments would have minimal impact).

- *City of Burien v. Elwell*, No. 18-71705, 790 Fed. Appx. 857, 2019 WL 6358039 (9th Cir. Nov. 27, 2019) (not for publication) (disapproving the application of a CatEx involving FAA's approval of a procedure for turning southbound turboprops to the west at Sea-Tac Airport with instructions to consider the potential cumulative impact of all relevant reasonably foreseeable future actions, such as the Sea-Tac Sustainable Airport Market Plan, as part of its extraordinary circumstances analysis).

***Direct Impacts**:* Ten cases involved challenges to assessment of direct impacts.

- *Save our Sound OBX, Inc. v. North Carolina Dep't of Transp.*, 914 F.3d 213 (4th Cir. 2019) (finding that the agencies' adequately considered the environmental effects of construction of a bridge replacing a segment of highway on the Outer Banks of North Carolina).

- *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019), *amended on rehearing in part, by* 925 F.3d 500 (D. C. Cir. 2019) (opining that the USACE's EA and grant of a permit to a utility company to construct a transmission across the historically significant St. James River triggered several significance factors, 40 C.F.R. §1508.27).

- *WildEarth Guardians v. Conner*, 920 F.3d 1245 (10th Cir. 2019) (holding that the USFS adequately assessed the impacts to Canada lynx in an EA involving a project in response to the mountain pine beetle epidemic).

- *Oregon Natural Desert Ass'n v. Rose*, 921 F.3d 1185 (9th Cir. 2019) (finding that BLM's issuance of travel management plan failed to establish adequate environmental baseline conditions necessary to assess impacts).

- *WildEarth Guardians v. Provencio,* 923 F.3d 655 (9th Cir. 2019) (upholding BLM's issuance of a travel management plan and EA in Kaibab National Forest (NF), Arizona, analyzing several significance factors and finding no significant impact).

- *City of Oberlin, Ohio v. Federal Energy Regulatory Comm'n*, 937 F.3d 599 (D.C. Cir. 2019) (discussing, in a brief decision, that FERC, in authorizing the construction and operation of a natural gas pipeline, fulfilled its duty to independently consider the pipeline's safety risks).

- *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029 (9th Cir. 2019) (discussing that the agency's record of decision stated that the EIS "included an analysis of all environmental issues associated with construction and operation" of turbines, and therefore did not require more analysis or a supplemental document, even if it never stated that the information was not "significant," *citing Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013)).

- *Indian River County, Florida v. U.S. Dep't of the Transp.*, 945 F.3d 515 (D.C. Cir. 2019) (holding Federal Railway Agency's EIS clearly complied with the impact assessment requirements of NEPA).

- *Friend of the Wild Swan v. Kehr,* No. 18-35612, 770 Fed. Appx. 351 (Mem) (9th Cir. May 10, 2019) (not for publication) (holding, in a brief decision, that although the USFS could have done a better job demonstrating its compliance with the elk habitat road density standards by more precise mapping and explanation that the project met the Forest Plan's standards, the USFS did just enough to comply with the Forest Plan and NEPA).

- *Conservation Congress v. United States Forest Serv*., No. 17-16153, 775 Fed. Appx. 298 (9th Cir. June 4, 2019) (not for publication) (concurring that the USFS did not violate NEPA when it assessed the impacts of a plan to administer fuel and vegetative treatments in Mendocino NF, California in a limited geographic scope).

Indirect Impacts: Three cases involved assessment of indirect impacts.

- *Birckhead v. Federal Energy Regulatory Comm'n*, 925 F.3d 510 (D.C. Cir. 2019) (considering whether FERC was required to consider upstream and downstream gas production (indirect effects) as reasonably foreseeable effects and after discussing in the opinion, ultimately declining to make a decision since the argument was not previously raised in the record).

- *Center for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019) (upholding USACE's issuance of a § 404 permit and EA involving phosphate mining and finding USACE did not have to consider indirect effects of creating and managing phosphogypsum resulting from downstream fertilizer production).

- *Appalachian Voices v. Federal Energy Regulatory Comm'n*, No. 17-1271, Consolidated with 18-1002, 18-1175, 18-1177, 18-1186, 18-1216, 18-1223, 2019 WL 847199 (D. C. Cir. Feb. 19, 2019) (not for publication) (concluding, in a brief opinion, that FERC's estimate of the upper bound of emissions resulting from end-use combustion was adequate, in light of FERC's explanation that the Social Cost of Carbon tool is not an appropriate measure of project level climate change impacts or their significance).

Cumulative Impacts*:* Four cases involved inadequacy or lack of cumulative impact assessment.

- *WildEarth Guardians v. Conner*, 920 F.3d 1245 (10th Cir. 2019) (opining, in a brief discussion, that the USFS's analysis finding the cumulative effects on Canada lynx were not significant).

- *Diné Citizens Against Ruining our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019) (agreeing that BLM never considered the cumulative impact of the water use associated with the 3,960 reasonably foreseeable horizontal wells in the Mancos Shale in New Mexico).

- *City of Burien v. Elwell*, No. 18-71705, -- Fed. Appx. ---, 2019 WL 6358039 (9th Cir. Nov. 27, 2019) (not for publication) (disagreeing with the application of a CatEx involving FAA's approval of a procedure for turning southbound turboprops to the west at Sea-Tac Airport with instructions to consider the potential cumulative impact of all relevant reasonably foreseeable future actions, such as the Sea-Tac Sustainable Airport Market Plan, as part of its extraordinary circumstances analysis).

- *Alliance for the Wild Rockies v. Savage*, No. 19-35035, 783 Fed. Appx. 756 (Mem) (9th Cir. Nov. 4, 2019) (not for publication) (holding, in a brief opinion, that the aggregation of road closures breaches into the environmental baseline was adequate, and the USFS was not required to provide a separate analysis of cumulative impacts).

***Alternatives Considered**:* Four cases involved challenges to the sufficiency of the alternatives considered:

- *Save our Sound OBX, Inc. v. North Carolina Dep't of Transp.*, 914 F.3d 213 (4th Cir. 2019) (disagreeing that the settlement agreement predetermined the agencies' selection of alternative, because the settlement only required that the preferred alternative, the Jug-Handle bridge, be identified and that the merger team concur; the entire merger team was responsible for approving the final alternative, and the parties of the settlement constituted only 3 of 10 parties on the merger team).

- *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019), *amended on rehearing in part, by* 925 F.3d 500 (D. C. Cir. 2019) (taking no position on the alternatives challenge, after finding the impact assessment inadequate, but urging USACE to consider its sister agencies' concerns that prior iterations were "superficial," "inadequate," and "extremely problematic.").

- *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029 (9th Cir. 2019) (rejecting suggestion that BIA failed to consider any mid-range alternatives "that entailed building some but not all of the proposed ridgeline turbines.")

- *Conservation Congress v. United States Forest Serv*., No. 17-16153, 775 Fed. Appx. 298 (9th Cir. June 4, 2019) (not for publication) (upholding USFS adequately analyzed potential alternatives for its plan to administer fuel and vegetative treatments to further habitat and fire management goals in the Mendocino NF in Northern California).

Federal Action: Two cases involved arguments whether an agency's action qualified as a federal action.

- *Center for Biological Diversity v. Ilano*, 928 F.3d 774 (9th Cir. 2019) (holding that the USFS's designation of landscape-scale areas identifying swaths of land suffering from the harms of insect or disease infestation did not trigger a NEPA analysis).

- *Sauk Prairie Conserv. Alliance v. U.S. Dep't of the Interior*, 944 F.3d 644 (7th Cir. 2019) (agreeing that no impact statement was required because the Army conditioned its approval of the land transfer on continued helicopter use, and thus the USFS had no discretion over whether to take the proposed action).

Duty to Supplement: Three cases involved the duty to or involved challenges to supplemental documents.

- *Center for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288 (11th Cir. 2019) (opining that, under 40 C.F.R. § 1502.9, additional information need only be accounted for if the information would have been useful to the agency's decisionmaking process).

- *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029 (9th Cir. 2019) (rejecting allegations that BIA should have prepared a supplemental EIS to analyze new information that arose after the EIS was published).

- *Save our Sound OBX, Inc. v. North Carolina Dep't of Transp.*, 914 F.3d 213 (4th Cir. 2019) (discussing that a supplemental EIS is only required when changes to a project present a "seriously different picture of the environmental impact.").

6.4 Details of Cases

Each of the substantive 2019 NEPA cases in U.S. Courts of Appeals, organized by federal agency, is summarized below. Unpublished cases are noted (6 of the 21 substantive cases in 2019 were unpublished, with 5 cases from the Ninth Circuit, and 1 case from the D.C. Circuit). Although such cases may not have precedential value depending on the court, they can be of value to NEPA practitioners.

U.S. DEPARTMENT OF AGRICULTURE

WildEarth Guardians v. Conner, 920 F.3d 1245 (10th Cir. 2019)
Agency prevailed.

Issues: Proposed Action, Significance of impacts (specific factors discussed), Cumulative Impacts

Facts: WildEarth Guardians (WildEarth) challenged the USFS's preparation of an EA. WildEarth alleged that the USFS did not adequately assess the effects on Canada lynx resulting from its Tennessee Project (the Project), and should have prepared an EIS. The Project, in the San Isabel and White River National Forests, was proposed to protect the forests from insects, disease, and fire, improve wildlife habitat, and maintain watershed conditions.

The USFS planned the Project, proposed over a time period of 10 – 15 years, as a response to the mountain-pine-beetle epidemic that impacted forest stands on the White River and San Isabel National Forests and created an associated threat to headwaters that serve communities along Colorado's Front Range. The Project's goals were to "create forest conditions that are more resilient to outbreaks of insects, disease and wildfire; to improve habitat for threatened, endangered and sensitive species and other important wildlife species; and to provide for sustainable watershed conditions." The planned action involves a mix of clearcutting, thinning, and prescribed burns. The dominant forest type in the 16,450-acre Project area is lodgepole pine (11,096 acres), although there are also significant spruce-fir stands (2,177 acres) and aspen stands (564 acres). The lodgepole pines are currently vulnerable to beetle infestations and the spread of dwarf mistletoe. In 2014, 40% of the lodgepole-pine stands were already infected by dwarf mistletoe. The spruce-fir and aspen stands were invaded by only a low incidence of insects and disease, but prevention in the future of the aging trees was of concern to the USFS.

In 2013 the USFS issued a draft EA, as well as a draft biological assessment (BA) that primarily analyzed the Project's effects on lynx. As a matter of background, the Canada lynx is native to the snowy, high-altitude coniferous forests of Colorado's Southern Rockies. The mountains provide the conditions necessary for lynx habitat: elevated forests dominated by spruce-fir, lodgepole pine, and aspen-conifer mix, and populated by snowshoe hare for lynx to prey on. The FWS designated the lynx as a threatened species in 2000.

In early 2014 the USFS released the final EA and final BA together with a draft FONSI. The final EA examined three alternatives for treating the Project area, including a no-action alternative. The USFS's chosen alternative involved 2,370 acres of clearcutting, 6,765 acres of thinning, 345 acres of precommercial thinning (a process of thinning stands that were clear-cut 20-30 years earlier, so that growth can be concentrated on the more commercially valuable trees), and 6,040 acres of prescribed burns (some of which will overlap with the clearcutting and thinning), as well as the creation of about 21 miles of temporary roads. The EA also described how much those treatments, spaced out over 10 to 15 years, impact each forest type. The USFS uses clearcutting and prescribed burns to create openings in lodgepole-pine stands, but on no more than 25% of the 9,480 acres of treatable pine, and with clear-cuts limited to irregularly shaped 40-acre patches. The clear-cuts will "essentially eliminate" the risk of beetle infestation in treated stands and will allow new stands to regenerate "mistletoe free." Although the EA quantified the amount of each type of treatment, it did not specify the treatment locations. Rather, the USFS intended to identify 300 to 500 acres for thinning and clearcutting each year over the next 10 to 15 years. It asserted that this flexible approach is necessary for reacting to on-the-ground conditions, such as a beetle infestation or fire risk.

The EA included nine pages analyzing the proposed action's possible effects on lynx, as well as an appendix assessing its adherence to each 2008 Rockies Lynx Amendment (SRLA). The SLRA's purpose was to strike "a reasonable balance in providing for the conservation of lynx habitat while also allowing appropriate levels of human uses to occur." Because the USFS did not know precisely which of the 9,480 acres of mapped lynx habitat will be treated, it took the conservative approach of assuming that all lynx habitat in the Project area will be treated. After reviewing objections to the EA and the draft FONSI, Leadville District Ranger Tamara Conner issued a final (slightly revised) FONSI in November 2014. One of the EA's many conclusions was that the Project was unlikely to adversely affect Canada lynx, and the FONSI declared that the Project would not significantly impact the human environment.

Decision: WildEarth argued that the EA was inadequate because it did not sufficiently evaluate the Project's effects on lynx. The Tenth Circuit rejected all of WildEarth's arguments.

First, WildEarth argued that the USFS was obligated to specify the sizes, locations, and treatment planned for each of the treatment units and the locations of the 21 miles of temporary road. WildEarth claimed that the decision in *Richardson* held that an EA must include such "site-specific" detail about a project area so that a proper analysis can be performed. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 703 (10th Cir. 2009). The 10th Circuit distinguished *Richardson*, finding that it did not hold that an agency's EA or EIS always must specify the precise locations within a project area that will be affected.

The USFS, in its EA, analyzed what could happen whatever sites were eventually chosen for treatment by the Project, so long as the Project restrictions were satisfied. The USFS's analysis accounted for the uncertainty about treatment locations by evaluating the Project's effects on lynx in a worst-case scenario in which all the mapped lynx habitat in the Project area is treated, and by including conservation measures to protect high-quality lynx habitat, such as not treating healthy spruce-fir stands or any stands with greater than 35% dense horizontal cover. Moreover, the USFS had a valid reason for not identifying specific treatment sites in its EA: it intends to select treatment units based on changing on-the-ground conditions over the 10 to 15 years of the Project. *Cf. Biodiversity Conservation Alliance v. U.S. Forest Serv.*, 765 F.3d 1264, 1270 (10th Cir. 2014) (providing "substantial discretion to an agency to determine how best to gather and assess information" about a project's environmental impacts). The 10th Circuit noted that the USFS was not postponing the requisite environmental analysis until it picked the specific sites for treatment under the Project; rather, it was saying that such future analysis would be unnecessary because, in its expert opinion, whatever sites it ultimately chooses (within the constraints imposed by the Project), would not be a negative impact on the lynx.

Second, WildEarth argued that the USFS violated NEPA by not disclosing the locations of its preidentified precommercial thinning units. The Tenth Circuit determined that the disclosure was not material to determining whether the Project would adversely affect the lynx. More importantly it found WildEarth's argument waived because it was not raised in the opening brief. *See Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) ("The failure to raise an issue in an opening brief waives that issue.").

Third, WildEarth argued that the USFS could not truly understand the Project's impact on lynx without knowing how much affected habitat would be denning habitat. The court rejected this argument, stating the USFS relied on an expert opinion that denning habitat is not a constraint on the lynx in the Project area, relying on a study conducted noting how adept lynx are in creating dens: "lynx have used all kinds of deadfall for den sites, so it is likely almost any forest does supply denning habitat . . . the research does not indicate a certain minimum amount of denning habitat is required for lynx." The Court noted that the Project will avoid treating healthy spruce-fir stands or any tree stands with greater than 35% dense horizontal cover as a conservation measure. The Tenth Circuit found that the USFS did not need to quantify denning habitat to conclude that the Project will not adversely affect lynx. *See Utah Shared Access Alliance*, 288 F.3d 1205, 1212–13 (10th Cir. 2002) (stating the USFS must use a methodology with a "rational basis" but does not need to use the best possible methodology or create the most detailed EA possible).

Fourth, WildEarth contended that the USFS should have quantified the amount of winter lynx habitat that will be affected. But such habitat analysis in the EA was not necessary, because the USFS reasonably found that the Project would preserve existing high-quality winter habitat, target stands that provide poor or no winter habitat, and even generate new winter habitat in those treated areas. Based on the studies relied on and the impact assessment that was transparent on its use of snowshoe-hare winter habitat the court not unreasonable for the EA to treat snowshoe-hare availability as the key factor for lynx winter habitat.

Fifth, WildEarth claimed the EA was inadequate for failing to include "baseline data" regarding lynx denning and winter habitat in the Project area. But the Court found that the USFS determined, based on data and studies it deemed reliable, that the Project would not have an adverse impact on the lynx and reasonably determined that it had sufficient information to conclude that the lynx would not be adversely affected by the Project. WildEarth alleged that more baseline data about the Project area is necessary to monitor (what WildEarth called the "ground-truth") the USFS's commitment not to treat areas of mapped lynx habitat with greater than 35% dense horizontal cover. In essence, WildEarth was saying it did not trust the USFS to do what it promised and needed additional information so that it can later investigate whether the USFS has lived up to its commitments. "We generally presume that government agencies comply with the law and NEPA creates no exception to this presumption." *Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069, 1082 (9th Cir. 2010) ("[W]e presume that agencies will follow the law.").

In sum, the court found that the record showed that the USFS made a reasoned evaluation of how the Project will affect lynx. WildEarth contended that the USFS needed to state in the EA precisely where the Project would do what and then evaluate the specific effects of those actions on the lynx. But the nature of

the Project, which requires responding to conditions on the ground as they develop over the course of 10 to 15 years, makes such precision impracticable. And the USFS's long study of the lynx and the requirements for its habitat enabled it to reasonably conclude that even in the worst-case scenario, the Project would not adversely affect that animal.

WildEarth claimed that the USFS erred by issuing a FONSI instead of conducting an EIS. An agency may issue a FONSI only if, after reviewing the direct and indirect effects of a proposed action, it concludes that the action "will not have a significant effect on the human environment." 40 C.F.R. § 1508.13; *see also* 40 C.F.R. § 1508.8. To determine whether the effects of a proposed action on the human environment are significant enough to require an EIS instead of a FONSI, an agency must consider the "context and intensity" of the action. 40 C.F.R. § 1508.27. The obligation to conduct an EIS can be triggered by an effect on one of those significance factors, but the simple existence of an effect does not trigger that obligation—the "relevant analysis is the degree to which the proposed action affects" a listed factor. *Hillsdale Envt'l Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1180 (10th Cir. 2012).

First, WildEarth contended that the sheer size of the Project—over 2,000 acres of clearcutting and 7,000 acres of thinning — was significant. *See* 40 C.F.R. § 1508.27(b)(1) (agency should consider both "beneficial and adverse" impacts and a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial"). WildEarth argued that a project affecting this much acreage of National Forest requires an EIS. Nothing in the opinion suggested that a project of more than 2,000 acres necessarily requires an EIS, as WildEarth seems to argue here. Size in itself does not establish significance, as the D.C. Circuit stated in *TOMAC v. Norton*, 433 F.3d 852, 862 (D.C. Cir. 2006):

> TOMAC offers no support for the proposition that an EIS is required when a project reaches a certain size. The relevant benchmark is whether the federal action "significantly affect[s] the quality of the human environment."42 U.S.C. § 4332(2)(C). Large federal projects may, on the average, be more likely to meet this threshold. But there is no categorical rule that sizable federal undertakings always have a significant effect on the quality of the human environment.

Context is an important consideration. *See* 40 C.F.R. § 1508.27(a). The Tenth Circuit restated that treatment by the Project would encompass less than .1% of the Holy Cross Ranger District and only 5.4% of the Leadville Ranger District (slightly more than 1% of the San Isabel NF).

WildEarth next argued that the Project's direct and cumulative impacts on lynx and lynx habitat will be significant because the Project will destroy some denning habitat for 150 years, degrade other winter and denning habitat, degrade linkage area, and render some lynx habitat unsuitable for up to 25 years. *See* 40 C.F.R. § 1508.27(b)(1), (b)(7). The Tenth Circuit reiterated that the USFS reasonably determined that this worst-case scenario would not significantly hurt the lynx, and WildEarth ignored how the Project's priorities and restrictions will limit the impact on denning and winter habitat and eventually produce some new habitat.

WildEarth then argued that the Project "would be implemented in and near areas with 'unique characteristics,' including in and near areas with proximity to 'ecologically critical areas' and historic resources." 40 C.F.R. § 1508.27(b)(3)). The "ecologically critical areas," according to WildEarth, include lynx, wolverine, and elk habitat, as well as federally designated wilderness and various trails. And the "historic resources" that might be affected are six 10th Mountain Division huts. But the USFS concluded that the effects on the lynx, wolverine, and elk would not be significant. Regarding impact on wilderness areas, the Project is only adjacent to (not overlapping with) wilderness and roadless areas, so the USFS concluded that the sole anticipated impact would be that wilderness visitors would be subjected to a short-term increase in noise and visual disturbances. The USFS explained in its FONSI that it had designed the Project to ensure that there would be no direct effect—and only slight risk of indirect effect—on cultural resources, a determination after consultation with the Colorado Historic Preservation Office to confirm that any adverse effect on heritage resources was unlikely. WildEarth did not attempt to rebut any portion of the USFS's analysis on these matters.

WildEarth argued that the Project's effects on lynx are "highly controversial" and "highly uncertain"— two other significance factors under § 1508.27(b)(4)–(5). Even in the absence of substantial public opposition, an action may be "highly controversial" if there is "a substantial dispute as to the size, nature, or effect of the action." *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002). But given that the USFS reasonably concluded that the Project was unlikely to harm lynx regardless of treatment locations, it could properly conclude that there was no legitimate controversy.

WildEarth contended significance existed because of the "degree to which the action may adversely affect an endangered or threatened species or its habitat," 40 C.F.R. § 1508.27(b)(9). WildEarth pointed out that even under the USFS's conclusion that the Project is unlikely to adversely affect lynx, there is a possibility of some effect on lynx. The Tenth Circuit concluded that WildEarth "utterly failed to show what could be accomplished through an EIS that would be material to whether the Project should proceed as planned."

WildEarth Guardians v. Provencio, 923 F.3d 655 (9th Cir. 2019)
Agency prevailed.

Issue: Proposed Action, Significance of Impacts (intensity factors discussed).

Facts: Environmental advocacy groups (WildEarth) brought action against the USFS under NEPA (and other laws), challenging travel management plans implemented by USFS to permit limited motorized big game retrieval in three ranger districts in Kaibab NF in Arizona (two of which adjoin Grand Canyon National Park). In July 2010, the USFS released the EA for the Williams Ranger District's travel management plan, and subsequently issued a FONSI. The FONSI generally "prohibit[s] motorized travel off of designated routes on the Williams Ranger District," but permits "the limited use of motor vehicles within one mile of all designated system roads (except where prohibited) to retrieve a legally hunted and tagged elk during all elk hunting seasons." It allows motorized big game retrieval of elk (but not bison) up to one mile off all designated open roads, so long as hunters make only "[o]ne trip that uses [the] most direct route and least ground disturbing." The designated open road system consists of 1,114 miles of roadway, a reduction from previous motor vehicle activity, when 1,460 miles of roads and 95 percent of the District were open to motor vehicle use. Several miles of the open roads pass through the spotted owl critical habitat.

The USFS's FONSI for the Tusayan Ranger District designated 566 miles of road open to motor vehicles. The decision permits "[l]egally harvested elk [to] be retrieved during all legal elk hunting seasons" by motor vehicles within one mile of designated roads. Motorized retrieval of bison is not permitted, and the FONSI limits use of motor vehicles when "conditions are such that travel would cause damage to natural and/or cultural resources," and mandated that "[m]otorized vehicles would not be permitted to cross riparian areas, streams and rivers except at hardened crossings or crossings with existing culverts."

Prior to implementation of a new travel management plan, 1,852 miles of road in the North Kaibab Ranger District were open to motor vehicle use, with 83 percent of the District open to cross-county travel. In September 2012, the USFS released an EA analyzing the North Kaibab Ranger District's new plan. The USFS issued a FONSI that designated 1,476 miles of open roads for motorized travel, including an additional 16 miles of unauthorized, user-created roads. Motor vehicles can be used to retrieve elk or bison during hunting seasons, under certain limiting conditions. Notably, the plan prohibits motorized retrieval of mule deer; the data indicated that far more mule deer—1,020—were harvested in the District in 2009 than bison or elk. The FONSI also included guidance for monitoring and mitigation, as well as practices to limit the spread of invasive exotic weeds.

Decision: WildEarth contended that "the presence of several significance factors indicating possible significant environmental consequences of the proposed actions" required the USFS to prepare EISs for each of the Districts' travel management plans.

Beneficial and Adverse. WildEarth relies on the factor "[i]mpacts that may be both beneficial and adverse," and noted that "[a] significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1). WildEarth discussed that both motorized vehicle use on open, designated roads and cross-country, off-road motorized vehicle use can have "significant detrimental

effects . . . on a variety of resources." However, the Ninth Circuit found this assertion was addressed in the EAs prepared for the Williams and Tusayan Ranger Districts. Those EAs noted that "the scientific literature documents a variety of negative effects of roads and motorized travel on wildlife," with potential direct and indirect effects of roads and motorized travel on wildlife including habitat loss, fragmentation, and degradation caused by roads and cross country motorized travel; roads can create barriers to movements of certain species; animals can be killed or injured as a result of being hit or run over by motor vehicles; human disturbance or harassment of animals caused by or facilitated by motorized travel; and shooting or harvest of animals facilitated by motor vehicle access to wildlife habitats.

The Williams Ranger District EA further indicated that off-road vehicle use "in areas with sensitive or moist soils can create tracks, ruts and new user routes that may crush, displace, and/or destroy cultural materials (i.e. artifacts, features, traditionally used plants), and damage significant information that may contribute to our understanding of history." A particularly vexatious problem related to motorized vehicle use is the spread of invasive weeds. Each of the three EAs noted that vehicles are a common cause of weed introduction and spread, with the North Kaibab Ranger District EA reporting that "the authorization of motorized big game retrieval will have an increased threat of invasive species spread as every vehicle that travels cross-country has the ability to serve as a vector and create disturbance."

The Ninth Circuit agreed with WildEarth's assertion that motorized big game retrieval can have a negative effect on the environment; however, the court concluded that the environmental impacts discussed in the EAs did not raise substantial concerns that necessitated the preparation of EISs.

Unique characteristics. WildEarth assert that the invasive species and plants are too close to "unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." *Id*. § 1508.27(b)(3). They noted that "both the North Kaibab and Tusayan Ranger Districts immediately abut Grand Canyon National Park." The NPS, in a letter from the Acting Park Superintendent of Grand Canyon National Park, advised the USFS to "institute a buffer zone of 1-mile along the park boundary for any purpose including big-game retrieval, fuel-wood gathering, cross-county travel, etc.," due to "increased pressure from motorized vehicles at or near the southern park boundary over the past several years"—a recommendation that was not adopted in the Tusayan Ranger District FONSI. The court found that the EAs demonstrated that motorized big game retrieval risks the spread of invasive weeds, an undeniable environmental impact. In response, the USFS noted that the plan eventually selected for the Tusayan Ranger District opted to limit the number of roads open to the public, which, the EA noted, "reduces the number of opportunities for noxious and invasive exotic weeds to be introduced and spread." The Ninth Circuit concluded that the Tusayan EA confirmed that the agency considered the issue and reasonably concluded that the decision will reduce, not increase, the spread of exotic plants. The court discussed that just because USFS occasionally conflated reduction with insignificance did not necessarily mean that it violated NEPA.

The USFS acknowledged that the North Kaibab Ranger District contained "several species of invasive weeds," which "are spread [ ] via roads and forest visitors." The plan that was eventually selected "reduce[d] the number of roads that can be traveled on by 376 miles," which, the EA found, would "lower the amount of invasive species seed introduced or spread." But notably, the EA continued:

> The authorization of motorized big game retrieval will have an increased threat of invasive species spread as every vehicle that travels cross-country has the ability to serve as a vector and create disturbance. Alternative 2 [the selected plan] authorizes motorized big game retrieval for only elk and mule deer. This is expected to lead to only a small increase in the potential for invasive species spread and disturbance when compared to Alternative 3 and should not generate any realistic impacts.

This language in the EA indicates that the USFS acknowledged a potential environmental impact, and then determined that, due to features of the travel management plan and other remediation efforts, it was unlikely to be significant. Contrary to Plaintiffs' argument, the USFS did not merely determine that the problem would be reduced; it also concluded that the impact would not be significant.

Similarly, although the USFS did not follow all of the recommendations made by Grand Canyon National Park's Acting Park Superintendent, this fact did not mean that it ignored a significant environmental impact. "Agencies can thoughtfully consider suggestions but ultimately decide to reject them, and the presence of an articulated concern does not alone trigger the need to conduct an EIS." *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005). The Ninth Circuit stated that the evidence in the record indicated that, although the EAs acknowledged that motorized big game retrieval might have negative impacts on the environment, the USFS's determination that these impacts would not be significant evinced "a rational connection between the facts found and the conclusions made." *Or. Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997).

Controversy and Uncertainty. NEPA requires the preparation of an EIS when an action's "effects on the quality of the human environment are likely to be highly controversial," and/or "are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(4)–(5). "A project is 'highly controversial' if there is a ' "substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use." ' " *Native Ecosystems Council*, 428 F.3d 1233, 1240 (9th Cir. 2005). WildEarth contended "the travel management plans for the Tusayan, Williams, and North Kaibab Ranger Districts present highly controversial and highly uncertain effects that involve unique or unknown risks," because "significant controversy exists as to the amount and type of motorized recreation that would be allowed across the three Ranger Districts." WildEarth argued that there was "uncertainty regarding whether or not hunters will actually remove gut piles" when retrieving carcasses, which they must do "to protect California condors from lead poisoning." But although the USFS acknowledged that this issue might present a problem, the record also indicates that it considered the issue and reasonably concluded that it was unlikely to significantly impact the North Kaibab Ranger District's condors because the Arizona Game and Fish Department had provided to hunters, among other incentives, lead-free ammunition. The USFS also noted that "there would be decreased risk of human disturbance of scavenging condors as a result of a reduced open road system and substantially restricted motorized cross-country travel," and concluded that the North Kaibab Ranger District plan "is not likely to jeopardize the continued existence [of] California condors." The court found that WildEarth neither challenged nor addressed these conclusions.

Precedent for Future Actions. Another consideration for measuring an action's intensity for NEPA purposes is "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." 40 C.F.R. § 1508.27(b)(6). The USFS here explicitly found that each of the three travel management plans was "not likely to establish a precedent for future actions with significant effects." It is true that the record contains evidence to this effect—including that the Coconino NF "will defer to the neighboring Kaibab NF's policy for [motorized big game retrieval] in units shared with the Williams Ranger District, regardless of how the Coconino proposes to apply the Travel Management Rule," and that the Prescott NF will "match them as best as we can"—but that does not mean that the Districts' plans bind or necessarily shape other forests' plans in such a way that they should be considered precedential, especially since any other forest's plan would be subject to its own NEPA analysis. Thus, this consideration alone did not require preparation of an EIS.

Threatened Species. Finally, there is the issue of the Mexican spotted owl, a threatened species found in the Williams and North Kaibab Ranger Districts. The USFS must consider "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973." 40 C.F.R. § 1508.27(b)(9). The EA ultimately concluded that the selected plan would be "primarily beneficial," and would "not adversely affect Mexican spotted owl or Mexican spotted owl designated Critical Habitat." In a separate biological assessment (BA), the USFS concluded that the effects determination for Mexican spotted owl and Mexican spotted owl critical habitat is may affect, not likely to adversely affect," based on the determination that potential effects of the proposed action on the Mexican spotted owl would be primarily beneficial. Notably, the FWS concurred in this determination. In short, although the USFS did not definitively conclude that no Mexican spotted owls would be adversely affected by the Districts' travel management plans, the record indicates that they sufficiently considered the issue and arrived at a reasonable conclusion that the effects would not be significant, thus obviating the need for an EIS.

In the end, the court concluded that the USFS's determination that no EISs were needed as to the Districts' travel management plans was reasonable. The USFS gave the requisite hard look and made determinations that were neither arbitrary nor capricious, and were consistent with the evidence before it.

Center for Biological Diversity v. Ilano, 928 F.3d 774 (9th Cir. 2019)
Agency prevailed.

Issue: Federal Action, Categorical Exclusion, Extraordinary Circumstances

Facts: Two environmental groups, the Center for Biological Diversity and Earth Island Institute (collectively CBD), filed suit challenging both the USFS's designation of at-risk forest lands in and around the Tahoe NF and its approval of the Sunny South Project in Tahoe NF, on the grounds that the agency's actions violated NEPA. The district court granted summary judgment in favor of the USFS and the CBD appealed.

In 2014, Congress amended the Healthy Forests Restoration Act (HFRA) to allow the USFS greater flexibility in managing the health of forest lands threatened by the outbreak of the pine bark beetle, which was "creating potentially hazardous fuel loads in several western states." In furtherance of this objective, the amendments created a two-step process to combat insect infestations and diseased forests. Under the first step, large areas of forest land that face a heightened risk of harms from infestation and disease are designated as "landscape-scale areas."

The USFS identified large swaths of lands in California, including lands within the Tahoe NF, as insect-infested and diseased areas under the HFRA and determined NEPA did not apply in designating lands. Under the second step of the two-step process, treatment projects are created and implemented to combat issues faced in the landscape-scale areas. Projects under this second step may be categorically excluded from the requirements of NEPA. In 2016, the USFS approved the Sunny South Project, which aimed to address spreading pine-beetle infestation in previously designated at-risk areas within the Tahoe NF.

In the fall of 2015, the USFS initiated planning for the Sunny South Project, which authorizes tree thinning and prescribed burning across 2,700 acres of the Tahoe NF. The project addresses the "perfect storm for an outbreak of bark beetles" caused by "four years of drought causing moisture stress in the trees and dense stands of almost pure ponderosa pine in sizes attractive to the bark beetle." Its stated objective is to "give the remaining green trees access to more water and nutrients, leading to improved vigor to overcome the insect infestation." The project was designed to "have positive . . . effects on wildfire control operations."

In 2016, biologists completed an evaluation to assess the Sunny South Project's "potential effects and determine whether [it] would result in a trend toward listing or loss of viability for sensitive species." In preparing the evaluation, the biologists made "a conscientious attempt . . . to review and draw from the best available science, their associated habitat needs, and the potential for adverse project-related effects." As part of that evaluation, the biologists examined the project's potential effect on the California spotted owl, which the USFS designated as a sensitive species in the Tahoe NF. Ultimately, the biologists concluded that the Sunny South Project "may affect individuals, but is not likely to result in a trend toward federal listing or loss of viability for the California spotted owl."

The USFS approved the Sunny South Project in a decision memo dated August 3, 2016. In the memo, the USFS concluded that the project was categorically excluded from NEPA analysis under the HFRA, as there were no extraordinary circumstances preventing the application of the CatEx from NEPA.

Decision: CBD first argued that the USFS's designation of 5.3 million acres as a landscape-scale area violated NEPA because no EA or EIS was prepared. The Ninth Circuit reasoned that the designation of landscape-scale areas does not "change the status quo." Designating landscape-scale areas does not mark the commencement of any particular projects; it only identifies swaths of land suffering from the harms of insect or disease infestation where certain priority projects may be implemented. *See* 16 U.S.C. § 6591a(d)(1). The Ninth Circuit upheld the USFS's determination, stating, unless there is a particular project that define[s] fairly precisely the scope and limits of the proposed development of the region, there can be no factual predicate for the production of an EIS of the type envisioned by NEPA. *Kleppe v. Sierra Club*,

427 U.S. 390, 402, 96 S.Ct. 2718, (1976). The court held that the designation of landscape-scale areas under HFRA does not trigger a NEPA analysis.

CBD argued that *California Wilderness Coalition v. United States Department of Energy*, 631 F.3d 1072 (9th Cir. 2011), compelled a contrary result. But the Ninth Circuit distinguished this case, where a NEPA analysis was required for designation of certain areas as national interest electric transmission corridors (NIETCs), permitting a fast track approval process, including a requirement for NEPA compliance in the law itself (as opposed to the HFRA), and reasoned that designation of NIETCs "create[s] new federal rights, including the power of eminent domain. *Id.* at 1101.

When determining whether a CatEx was available, the USFS concluded that no extraordinary circumstances existed and that the Sunny South Project was categorically excluded from NEPA compliance. CBD challenged the USFS's finding on the ground that the project's potential impact on the California spotted owl constitutes extraordinary circumstances and that, at a minimum, the USFS should have at least conducted an EA before moving forward with the project. CBD argued that because the project proposes "a medium-intensity logging method . . . that greatly reduces the canopy cover of the logged forest, from as high as 86% canopy cover down to just 50%," it will likely negatively affect the California spotted owl species. CBD cited a study that concluded "that reducing canopy cover below 70% has been found to be a serious issue for owls . . . because it can 'reduce reproductive potential, and reduce survival and territory occupancy as well.' " These potential effects, according to CBD, are of great significance because the population at large is already declining, and the particular populations in impacted areas "have recently shown the highest productivity possible with regard to owl reproduction."

The USFS identified the California spotted owl as a sensitive species within the project area and examined whether the project had any significant environmental effects on the species. Ultimately, it acknowledged that the project "may affect individual owls, but is not likely to result in a trend toward federal listing or a loss of viability" for the species as a whole. The USFS ensured the project did not affect the most important areas of the owls' habitat. The project avoided the Protected Activity Centers (PACs)—the most valuable owl habitat, which contains the owls' nesting trees. And while areas surrounding PACs, known as Home Range Core Areas (HRCAs), would be treated, the project left about 79 percent of these HRCAs untouched. The USFS acknowledged that treatment would "reduce habitat suitability by reducing canopy cover to a minimum of 50 percent, but [it] would retain other important components, notably the largest trees, snags, and logs, and untreated stream corridors." Ultimately, the USFS concluded that the spotted owl would in fact benefit in the long run because "[b]y protecting active territories and treating the surrounding forest, the project is expected to limit adverse short-term effects while improving long-term habitat" and "reducing the risk of losing suitable habitat."

In finding that individual owls may be negatively impacted in the short-term but the species would benefit in the long-run, the USFS relied upon scientific studies and its own expert judgment, to which the Ninth Circuit deferred. *See Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012) ("We . . . defer to agency decisions so long as those conclusions are supported by studies 'that the agency deems reliable."). CBD cited a different study, but "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851 (1989). The Ninth Circuit concluded that the USFS considered relevant scientific data, engaged in a careful analysis, and reached its conclusion based on evidence supported by the record.

Friends of the Wild Swan v. Kehr, No. 18-35612, 770 Fed. Appx. 351 (Mem) (9th Cir. May 10, 2019) (not for publication)
Agency prevailed.

Issue: Impacts (consistency with forest plan)

Facts: Four environmental nonprofits (Friends) sued to enjoin the USFS Beaver Creek Project, arguing that it is inconsistent with the Flathead NF Land and Resource Management Plan ("the Forest Plan"). The district court granted summary judgment in favor of the USFS and Friends' appealed.

Decision: The National Forest Management Act ("NFMA") requires that the USFS develop a forest plan for each National Forest, and that all projects be consistent with the governing forest plan. 16 U.S.C. § 1604(a), (i); *Native Ecosystems Council v. USFS*, 418 F.3d 953, 961 (9th Cir. 2005). Similarly, failure to comply with provisions of the governing forest plan violates NEPA. *Id*. at 965.

Friends argued that the USFS violated NEPA by failing to ensure that the Beaver Creek Project would comply with the Forest Plan's road density objectives for grizzly bear habitat in the Buck Holland subunit. Amendment 19 of the Forest Plan provides road density objectives for grizzly bear habitat in Flathead NF and standards for evaluating USFS action impacting the forest. Friends argued that the Buck Holland subunit was out of compliance with Amendment 19's objectives. However, the Ninth Circuit reasoned that the Beaver Creek Project complied with Amendment 19 if it satisfied Amendment 19's standard for actions affecting grizzlies. Because the Beaver Creek Project will "result in a net gain towards" the objectives in Amendment 19, the Project was not inconsistent with the forest plan's requirements in the Buck Holland subunit.

Friends' also argued that the USFS violated NEPA by failing to demonstrate that the Beaver Creek Project would comply the Forest Plan's road density standards for grizzly bear and for elk habitat in the Beaver Creek subunit. With respect to the Beaver Creek Grizzly Bear subunit, Friends argued that the Project does not comply with Amendment 19 because the Project will impermissibly increase road density in the Beaver Creek subunit because the USFS improperly excluded certain "reclaimed" roads from its calculation of road density following the Project. The Ninth Circuit reviewed Amendment 19, which states that open and restricted roads both count toward total motorized access calculations. But "reclaimed" roads may be subtracted from road density calculations. The Project activities the USFS plans to undertake will render the roads at issue "reclaimed." The USFS has thus demonstrated compliance with Amendment 19's road density objectives in the Beaver Creek subunit. Therefore, the Project is consistent with the Forest Plan and does not violate NEPA.

Alternately, Friends argued that the USFS violated NFMA and NEPA by failing to demonstrate compliance with the Forest Plan's road density standards for elk habitat in the Beaver Creek Project area. The Forest Plan contained a standard that requires "[a]reas with 'moist sites' " to be managed "with open road densities that average 1 mile or less per square mile" during the elk use period." The USFS admitted that the Project's EA did not expressly provide a specific determination about road density in areas near elk moist sites. Indeed, the USFS did not identify specific locations of elk moist sites, rather defined the moist site criteria. Ultimately, the Ninth Circuit conclude that the Project satisfied the Forest Plan based on the fact that a large portion of the Beaver Creek subunit had an open road density of less than one mile per square mile and the USFS's explanation in the EA that "moist sites occur primarily . . . in roadless and wilderness areas." While the USFS could have done a better job demonstrating its compliance with the elk habitat road density standards by mapping moist sites and showing that open road densities near those moist sites will meet the Forest Plan's standard, the Ninth Circuit concluded that the USFS did just enough to comply with the Forest Plan and with NEPA.

Conservation Congress v. United States Forest Serv., No. 18-17165, 774 Fed. Appx. 364 (9th Cir. May 20, 2019) (not for publication)
Agency prevailed on the NEPA claims.

Issue(s): Conservation Congress appealed the district court's denial of its motion for a preliminary injunction to stay the USFS's project to harvest timber burned in a forest fire (the Project) in Modoc NF.

Decision: To obtain a preliminary injunction, the moving party must show all four of the following: (1) that it "is likely to succeed on the merits;" (2) that it is "likely to suffer irreparable harm in the absence of preliminary relief;" (3) "that the balance of equities tips in [its] favor; " and (4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008).

The Ninth Circuit found that the district court did not abuse its discretion in determining that Conservation Congress failed to demonstrate that it was likely to succeed on the merits of its claims. Conservation

Congress asserted that the USFS violated NEPA by failing to adequately consider every relevant impact to the Northern Goshawk, the Modoc sucker, and their respective habitats. "Through the NEPA process, federal agencies must carefully consider detailed information concerning significant environmental impacts, but they are not required to do the impractical. Alternatively phrased, the task is to ensure that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992–93 (9th Cir. 2004). "Although an agency's actions under NEPA are subject to careful judicial scrutiny, courts must also be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency." *Id.* at 993.

The USFS concluded that "the Modoc sucker would not be [a]ffected by the proposed project," because the Modoc sucker riparian area is outside the Project area, is in a different subwatershed than most of the Project, and is "essentially disconnected" from any possible tributaries within the Project area. The USFS had a project map and a hydrology report that included a map of the subwatersheds before it when it made this scientific determination, and the agency's conclusion is entitled to deference. *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989). Conservation Congress did not show how additional mapping, surveying, grazing analysis, or sediment transportation analysis would have any effect on the USFS's conclusion. The court found that Conservation Congress did not demonstrate a likelihood of success on its Modoc sucker NEPA claims.

The USFS likewise determined that the Project would not have a significant impact on the Northern Goshawk. The record shows that USFS conducted three surveys of the Northern Goshawks Protected Activity Centers (PACs) within the Project area. It also evaluated the habitat of the Northern Goshawk's prey—concluding that although altering the post-fire habitat "may reduce the quality of salvage units for northern goshawk foraging in the short-term," these "minor short-term reductions . . . would be minimized to some extent" by other aspects of the Project. Although Conservation Congress asserts that the USFS should have conducted more surveys and re-mapped the Northern Goshawk PACs in the Project area, it has not identified any requirements for USFS to do so.

The Ninth Circuit upheld the lower court's finding court that the balance of the equities and the public interest favored denying the requested injunction. "[C]ourts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. They must also "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* The Ninth Circuit agreed with the district court, which found that the public's interest "in taking proactive steps to prevent treacherous road conditions caused by fire-killed trees falling on and obstructing public roads," and "in mitigating the intensity and severity of future fires" outweighed the public interests that supported an injunction.

The Ninth Circuit discussed that there was ample support in the record that public safety interests disfavor granting a preliminary injunction, including agency findings: (1) that "[t]here is an urgency to implement [the Project] as soon as feasible to improve public and Forest Service personnel safety;" (2) that "[r]oad maintenance activities will improve both administrative and public access, and fire responder safety;" (3) that "[g]usty winds are common in the area of the Cove Fire and could suddenly blow down many hazardous trees at one time, posing an unacceptable risk to area residents, forest workers, and visitors;" and (4) that the purposes of the Project include reducing "safety hazards . . . along high use roads," and reducing "small fire-killed trees to reduce future fuel loads." "These public safety interests are not clearly outweighed by the permanence of Conservation Congress's claimed injuries or the USFS's alleged failures to obey the law and to properly designate and mark trees for removal." *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (noting the strong public interest in mitigating hazardous road conditions and forest fires, which is given "great weight when the risk is imminent or the danger has begun"). The Ninth Circuit upheld the district court's denial of Conservation Congress' motion for preliminary injunction.

Conservation Congress v. United States Forest Serv., No. 17-16153, 775 Fed. Appx. 298 (9th Cir. June 4, 2019) (not for publication)
Agency prevailed.

Issue: Alternatives, Significance of Impacts

Facts: Conservation Congress brought action against the USFS and FWS alleging that the Smokey Project—a plan to administer fuel and vegetative treatments to further habitat and fire management goals in the Mendocino NF in Northern California -- violated NEPA, among other claims. As a matter of background, the district court initially issued a "Final Judgment" that ordered a limited remand for USFS to prepare a supplemental NEPA analysis and enjoined the removal of trees in the project area having a diameter of 20 inches or greater. On cross-motions for summary judgment, the district court subsequently issued an order granting the agency's motion to amend the judgment and dissolve the injunction, a final order, which Conservation Congress appealed.

Decision: The Ninth Circuit reasoned there was no error in finding that USFS's clarification on remand that "Limited Operating Periods" ("LOPs") applied only to "units" near known spotted owl activity centers, rather than to "all units," and thus, did not constitute a "post-decisional elimination" of a "core mitigation measure" that would give rise to a NEPA violation. The record fully supported the district court's conclusion that the USFS "provided a reasoned, clear, and thorough analysis for its conclusions," and that the Project had not changed. The application of the LOPs was disclosed throughout the decision-making process, and whatever ambiguity may have been introduced by the erroneous inclusion of the phrase "all units" in one appendix did not cause prejudice or skew the results such that the clarification on remand could not cure the issue.

The Ninth Circuit also found that the district court also correctly determined USFS did not violate NEPA by analyzing the impacts of the Smokey Project in too limited of a geographical area. USFS's EA (which incorporated the analysis of the FWS biological assessment) considered impacts in 35,023 acres comprising the treatment units and land within a 1.3-mile radius of those units. That scope was based on FWS's recommendation to analyze impacts within the spotted owl's "home range," and appeared to account for the location and movement patterns of the spotted owls, thereby warranting deference to the agencies' judgment. The court found that Conservation Congress's suggestion that a meaningful analysis required consideration of the entire Buttermilk late successional reserve reflected a different judgment as to the best way to evaluate the project, but it did not establish a NEPA violation.

The Ninth Circuit upheld the district court's finding that USFS adequately analyzed potential alternatives to the project. On remand, USFS specifically considered alternatives with several different diameter cap limits on trees to be felled and concluded none were viable. Although Conservation Congress suggested the alternatives considered were arbitrary, it made no attempt to show USFS's conclusions were unsound. Conservation Congress instead argued that USFS should have considered undertaking forest thinning at federal expense. Whatever arguments might support such a policy, however, Conservation Congress did not show it was improper for USFS to carry out its forest management mandates by contracting with private parties for timber removal.

Finally, the Ninth Circuit agreed with the lower court that an EIS was not required for the Smokey Project. The district court appropriately held the agency to its "hard look" obligations, when it issued the limited remand. Conservation Congress did not show how the district court's subsequent determination -- that the injunction should be lifted without requiring a full EIS -- was erroneous.

Alliance for the Wild Rockies v. Savage, No. 19-35035, 783 Fed. Appx. 756 (Mem) (9th Cir. Nov. 4, 2019) (not for publication)
Agency prevailed on its NEPA claims.

Issues: Cumulative Impacts (aggregation)

Facts: Alliance for the Wild Rockies (Alliance) appealed the district court's 2018 order dissolving the permanent injunction against the Miller West Fisher Project (Miller Project), in Kootenai NF, Montana, and certain NEPA holdings (among other claims) of the district court's rulings in its 2010 summary judgment order.

Decision: The Ninth Circuit rejected Alliance's argument that the USFS's analysis of the Miller Project did not comply with the NEPA. In preparing the EIS and supplemental EIS for the Miller Project, the USFS aggregated the impacts of road closure breaches into its analysis of the environmental baseline, and concluded that road closure breaches were not a fundamental factor. The court noted that Alliance did not point to any evidence in the record that the Miller Project would increase the frequency of road closure breaches. Therefore, the USFS could reasonably conclude it was not required to provide a separate analysis of the cumulative impacts of road closure breaches.

U.S. DEPARTMENT OF DEFENSE

Nat'l Parks Conservation Ass'n v. Semonite, 916 F.3d 1075 (D.C. Cir. 2019), *amended on rehearing in part, by* 925 F.3d 500 (D. C. Cir. 2019)
Agency did not prevail in the first case; the court remanded second case for a determination on remedy.

Issue(s): Significance of Impacts, (and upon rehearing, Remedy)

Facts: Nonprofit historic and national parks conservation organizations (collectively Nat'l Parks) brought action alleging violations of NEPA against the U.S. Army Corps' (the Corps) grant of a permit allowing a utility company to build a series of electrical transmission towers across the historic James River. The district court upheld the Corps' EA and Nat'l Parks appealed.

The D.C. Circuit reviewed the historical facts about the project area, revisiting that over 400 years ago, Captain John Smith arrived on the shores, now known as the Chesapeake Bay. "The economic, political, religious, and social institutions that developed during the first [nine] decades" of the corridor's settlement "have profound effects on the [U.S.]. Honoring the ties to the nation's past, Congress and several federal agencies have established a series of historic resources in and around the Chesapeake Bay, including Jamestown, Carter's Grove National Historic Landmark, and the Captain John Smith National Historic Trail (the Historic Trail), the national's only congressionally protected water trail. Due to the James River's extraordinary historic, economic, recreation, and environmental importance, Congress recognized it as "America's Founding River."

Virginia Electric and Power Company (part of Dominion Energy) determined, that in order to comply with the 2012 EPA rule requiring power facilities to reduce certain air pollutant emission, it would have to retire two coal-fired power generators. To compensate, Dominion applied in 2013 to the Corps for a permit to construct a new electrical switching station and two transmission lines. The action involves seventeen 250 foot (or so) steel lattice transmission towers, the line at issue in the case, would stretch for eight miles, four of which cross the James River and cut through the middle of the historic district encompassing Jamestown and other historic resources. The undertaking was known as the Surry-Skiffes Creek-Whealton project (the Project). The Corps prepared an EA, considered nearly thirty alternatives, reached out to consulting parties and invited agencies, and the public to comment on the Project. Over 50,000 comments were received, with many commenters urging the Corps to prepare an EIS. The Advisory Council on Historic Preservation (the Advisory Council) warned the Project threatened to irreparably alter a relatively unspoiled and evocative landscape that provides context and substance for historic properties. The Department of Energy's Argonne National Laboratory (Argonne) found the Corps' analyses "scientifically unsound" and "completely contrary to accepted professional practice." The ACHP also warned the alternative analysis was extremely problematic. While the deluge of comments poured in, the Corps considered and amended its statement.

In 2017, the newly appointed Secretary of the Interior signed an agreement with the Corps as a concurring party. In a memorandum for the record, the Corps acknowledged the Project would intrude upon the viewshed of historic properties and on a unique and highly scenic section of the St. James River. The Corps concluded the effects on these "national treasures" were "moderate at most" and "inherently subjective."

Where visible at all it explained the transmission towers would not block or dominate the view and would join modern visual intrusions such as Busch Gardens amusement park and recreational boat traffic.

Decision: Nat'l Parks alleged two violations of NEPA: (1) that due to the significance of impacts the Corps should have prepared an EIS; and (2) that the Corps' alternatives analysis fell short of the requirement imposed by NEPA and CWA. The D.C. Circuit looked to 40 C.F.R. § 1508.27 the "context" (region, locality) and "intensity" (severity of impact" factors. All parties agree that the historically-saturated "context" is this 50-mile stretch of the James River – qualified as significant, so the court focused on the intensity element, which enumerated ten factors that "should be considered." 40 C.F.R. § 1508.27(b).

Nat'l Parks argued the Project implicates three factors: (1) the degree to which the effects on the quality of the human environment are likely to be controversial (40 C.F.R. § 1508.27(b)(3)); (2) unique characteristics of the geographic area such as proximity to historic or cultural resources (40 C.F.R. § 1508.27(b)(4); and, (3) the degree to which the action may adversely affect districts or sites listed or eligible for listing in the National Register of Historic Places (40 C.F.R. § 1508.27(b)(8)).

Highly Controversial. The word "controversial," refers to situations where " 'substantial dispute exists as to the size, nature, or effect of the major federal action.' " *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003)). The D.C. Circuit explained in *Fund for Animals v. Frizzell*, "certainly something more is required" for a highly controversial finding "besides the fact that some people may be highly agitated and be willing to go to court over the matter." 530 F.2d 982, 988 n.15 (D.C. Cir. 1975). Ultimately, the D.C. Circuit held "[t]hese are hardly the hyperbolic cries of "highly agitated," not-in-my-backyard neighbors "willing to go to court over the matter." Instead, they represent the considered responses—many solicited by the Corps itself—of highly specialized governmental agencies and organizations. "A substantial dispute can be found, for example, when other information in the record casts substantial doubt on the adequacy of the agency's methodology and data."

An expert at Argonne labeled the Corps's analyses "scientifically unsound, inappropriate, and completely contrary to accepted professional practice," accusing the agency of conflating a cultural resource analysis with the very different visual resource analysis. The Advisory Council voiced serious concerns about the photo simulations: "there are flaws in the visual effects assessment . . . consulting parties have repeatedly suggested that the Corps should require photographs and simulations from an adequate range of viewpoints ... to illustrate the extent and magnitude of the effects." The Advisory Council, tasked as it is with preserving America's historic resources, merits special attention when it opined, on "the treatment of effects on historic properties of transcendent national significance." And the NPS believed that the visual analyses "d[id] not meet its standards," questioning whether the Corps and Dominion completed "an adequate visual analysis," "evaluated . . . socioeconomic impacts," and undertook a "sufficient effects analysis." The NPS repeatedly communicated its concerns to the Corps, and its own management plan requires that the "visual and historical integrity of the visitor experience" be "maximized" and that all new utility lines be installed underground. Industrial Economics, Inc., a consultant retained by the NPS, feared that the Project could "have implications for successful future designation [of Jamestown] as a UNESCO World Heritage Site." The Virginia Department of Historic Resources warned of irreparable alteration of the character of the area." Members of Congress, delegates to the Virginia Assembly, the Keeper of the National Historic Register, and the CEQ all voiced similar reservations. The non-profit Coalition to Protect America's National Parks, comprising current and former NPS employees, pleaded, as did a bevy of other organizations, that "the Corps owes . . . to this and future generations of Americans to protect the place where 'America Began.' "

The Corps contended that it did acknowledge and try to address concerns raised during the NEPA process by, for example, instructing Dominion to revise its analyses to address the shortcomings identified by commenters. Given that many critical comments, including those from the Advisory Council and the Argonne specialist, the NPS and others, the Corps obviously failed to address those concerns.

Unique Characteristics. Nat'l Parks asserted "the Corps-approved project entails putting giant modern transmission towers not only in close 'proximity to' numerous highly unique historic and cultural sites that are 'one-of-a-kind resources of national importance,' but putting them directly in and across the nation's only Congressionally-designated historic water trail." The Corps responded that the Project " 'is not a

blockage to viewing the river or the surroundings' and 'will not dominate the view.' " The court held that even without blocking the view or dominating the landscape from all angles, the Project undercuts the very purpose for which Congress designated these resources: to preserve their "unspoiled and evocative landscapes. The Corps maintains that the mitigation steps contained in its Memorandum of Agreement with Dominion would reduce the Project's impacts to a minimum. However, the court found the mitigation measure in the agreement did not significantly reduce the impacts.

The Corps emphasized that the Project's effects are visual, and relied on *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1038–39 (D.C. Cir. 1973), which stated that aesthetic "judgments are inherently subjective and normally can be made . . . reliably on the basis of an environmental assessment." But "normally" is not the same as "always." And in *Maryland-National Capital Park*, we distinguished aesthetic judgment calls that entail "defining what is beautiful" from situations like this one where Congress's purpose in designating the resources was to preserve "an unencumbered view of an attractive scenic expanse."

Historic Resources. The D.C. Circuit found the Project implicated the "degree to which the action may adversely affect districts [or] sites ... listed in or eligible for listing in the National Register of Historic Places." 40 C.F.R. § 1508.27(b)(8). The Corps conceded that the Project's "close proximity" to Carter's Grove, an eighteenth-century Georgian-style plantation, "would detract from the resource's characteristics of setting and feeling which are integral to the resource's qualifications for listing on the [National Register of Historic Places]." By the Corps's own count, the region boasts fifty-seven sites on the National Register or eligible for inclusion on it—a concentration of historic resources found "in no other place in [the] United States." The Corps' findings, paired with the record's "robust, well-supported analyses, from agencies with Congressionally-delegated authority and recognized expertise,"

The Corps has thus failed to make a "convincing case" that an EIS is unnecessary. Three intensity factors demonstrate not only that the Project will significantly impact historic resources, but also that it would benefit from an EIS. Indeed, Congress created the EIS process to provide robust information in situations precisely like this one, where, following an environmental assessment, the scope of a project's remains both uncertain and controversial.

Since the court found the Corps needed to prepare an EIS, the court did not address most of the remaining questions raised by the Nat'l Parks, such as the inadequacy of the alternatives analysis. Though taking no position on the adequacy of the Corps' alternatives analyses, the D.C. Circuit urged the Corps to take careful consideration to its sister agencies' concerns that the prior iterations were "superficial," "inadequate," and "extremely problematic."

Nat'l Parks Conservation Ass'n v. Semonite, 925 F.3d 500 (D. C. Cir. 2019) (amending the original decision on rehearing).
Remanded for a determination on remedy.

Issue: Remedy

Background: After the DC Circuit held that the Corps violated NEPA when it issued a permit to the Dominion to construct the Surry-Skiffes Creek-Whealton project and vacated the permit, the Corps and Dominion sought panel rehearing solely on the issue of remedy. Construction on the project had been completed ($400 million for the Project, originally estimated at $178.7 million in the EA) and the transmission lines electrified the week before the D.C. Circuit issued its above opinion. Neither petitioner advised the court that construction on the project had been completed and the transmission lines electrified.

Decision. On rehearing about remedy, the D.C. Circuit remanded the case to the district court to consider whether vacatur remains the appropriate remedy, including whether petitioners have forfeited or are judicially estopped from now opposing vacatur.

Note: The district court remanded without vacatur. *Nat'l Parks Conservation Ass'n v. Semonite*, Civil Action Nos. 1:17-cv-01361-RCL and 1:17-cv-01574-RCL, --- F.Supp.3d ----, 2019 WL 5864737 (D.D.C. Nov. 8,

2019) (upholding the Corps' approval of a permit for an already-constructed 17-mile transmission line after the D.C. Circuit found that the Corps had failed to prepare an EIS for the line in violation of NEPA). Although it acknowledged the seriousness of the Corps' determination that an EIS was not warranted (the Corps may make a different substantive decision if the towers were removed), but held that vacatur was not appropriate because revoking the permit (requiring the towers to be removed) would lead to seriously disruptive consequences, such as rolling blackouts, other negative impacts, and "massive waste." *Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (explaining that although vacatur is the standard remedy for improper agency action, courts have discretion to choose a different remedy). It remanded without vacatur to the Corps to complete the EIS in accordance with the D.C. Circuit's prior ruling.

Center for Biological Diversity v. U.S. Army Corps of Eng'rs, 941 F.3d 1288 (11th Cir. 2019)
Agency prevailed.

Issue(s)*:* Indirect Impacts, Supplementation

Facts: Center for Biological Diversity, Manasota-88, People for Protecting Peace River, and Suncoast Waterkeeper, (collectively, CBD) challenged the U.S. Army Corps of Engineers' (the Corps) approval of a Clean Water Act (CWA) § 404 permit for discharge of dredge and fill materials into the waters of the United States in connection with phosphate mining in Bone Valley, in Central Florida. The district court granted summary judgment to the Corps and CBD appealed.

Mosaic, a fertilizer manufacturer engaged in phosphate mining, applied for a CWA § 404 permit with the Corps to extend its phosphate mining operations within the Central Florida phosphate-mining district. Mosaic must also obtain mining permits from Florida's Department of Environmental Protection (FDEP), under authority delegated from the EPA, to approve phosphate mining in Florida, with conditions and regulations regarding pollutant discharges. In 2010 and 2011, Mosaic sought CWA 404 permits for four mining related projects. The Corps considered all of Mosaic's mining projects in one area-wide EIS. In 2016, the Corps published a draft of its § 404 analysis for one of the projects, the South Pasture Mine Extension. The Corps prepared a supplemental EA (SEA) to be read with the area-wide EIS. In November 2016, the Corps issued Mosaic a § 404 permit for the South Pasture Mine Extension, giving Mosaic permission to discharge dredge and fill materials into the waters of the US in connection with mining phosphate at the South Pasture Mine Extension for subsequent use in fertilizer production.

As a matter of background, phosphate mining is a form of strip mining. After excavating sand, clay and phosphate from the site, Mosaic engages in a beneficial process to separate sand and clay from valuable phosphate ore. The phosphate ore is then transferred to Mosaic's fertilizer plant for processing into phosphoric acid. Phosphoric acid is used to produce fertilizer. But the process of producing phosphoric acid generates waste in the form of phosphogypsum, a radioactive product.

Decision: The Eleventh Circuit examined the *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204 (2004), where the Supreme Court stated that indirect environment effects must be proximate, and do not include effects that are insufficiently related to an agency's action. "In assessing the proximate cause limitation, the Corps may reasonably take into account the fact that distantly caused effects in question are subject to independent regulatory schemes." In granting the CWA § 404 discharge permit without addressing the environmental effects of phosphogypsum, the Corps relied on part of on the fact that the other agencies directly regulate these effects.

The court discussed that phosphogypsum-related effects are, at most, tenuously caused by the discharge of dredge and fill materials allowed by the Corps' permit because phosphogypsum is a byproduct -- not of phosphate mining -- but of fertilizer production, which takes place long after the discharges related to the mining. Mosaic's fertilizer production would add to existing gypstacks, as they are called, but would not result in any new stacks. Even the nearest fertilizer plants and gypstacks to the South Pasture Mine Extension receive phosphate rock from many different sources outside of the Corps' jurisdiction. CBD contended that "but for" caused the CWA § 404 permit phosphogypsum's environmental effects would be diminished because Mosaic would not be able to obtain as much phosphate, thereby reducing its fertilizer

(and phosphogypsum byproduct) production, if it could not discharge dredged and fill material into U.S. waters, which necessarily accompanies Mosaic's phosphate mining.

The Eleventh Circuit found that the events (phosphate mining and fertilizer production) are insufficiently related to one another for the purposes of NEPA. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773, 103 S.Ct. 1556 (1983) (stating NEPA does not cover all "effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation"). The court discussed that no reasonably close causal relationship exists between the approved discharge and the effects of phosphogypsum. Phosphogypsum is created and stored miles from the authorized discharges; it will only be created as long as Mosiac continues to operate in the fertilizer industry, the market continues to demand fertilizer with phosphoric acid, and phosphogypsum regulators continue to its creation and storage throughout Florida.

The court discussed that the Corps' decision not to consider phosphogypsum effects is fully justified by the "rule of reason." *Public Citizen*, 541 U.S. at 767. The rule of reason "ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Id*. Thus, "where an agency has no ability to present a certain effect due to its limited authority over relevant actions, the agency cannot be considered a legally relevant "cause" of the effect." *Id*. at 770. On the flip side, FDEP and EPA could regulate the gypstacks out of existence even if the Corps were to grant Mosaic its § 404 permit.

The Eleventh Circuit stated that if the Corps were required to consider all effects that it might indirectly police – even far from its proper sphere of regulatory authority – its NEPA review would have to account for every conceivable environment effect of fertilizer's use. The Court applied the Supreme Court holding that NEPA did not require the agency to consider effects that it "ha[d] no ability to categorically prevent." *Id* at 768. The court applied the rule from *Public Citizen* that the Corps has no ability to categorically prevent fertilizer production or the creation and storage of phosphogypsum. "It is irrelevant that the Corps' action is, in an attenuated way, a but-for cause of phosphogypsum production, because FDEP and the EPA have primary authority to regulate or prevent phosphogypsum's creation and storage . . . it would be pointless to require the Corps to gather and examine information regarding effects that it has no authority to prevent." The agency in *Public Citizen* had no discretion to refuse registration for a motor carrier that complied with its regulations. The Supreme Court rejected the idea that the agency could indirectly mitigate the environmental effects of lifting the moratorium by (i) not promulgating any new rules or (ii) setting burdensome standards so that fewer motor carriers could meet them and operate in the U.S. *See id*. at 765–68. The Court held that it was not enough that the agency could, in fact, mitigate those effects, when the agency was not statutorily authorized to base its decision on those ancillary effects. *See id*. Here, the Corps could, in fact, mitigate the effects of phosphogypsum by rejecting the Section 404 permit and choking off Mosaic's supply of phosphate ore. But the Corps is not statutorily authorized to base its permitting decision on environmental effects that are so indirectly caused by its action

The Eleventh Circuit discussed that the CWA did not give the Corps the discretion to deny a 404 permit for any reason – only if the allowed discharge will directly or indirectly or cumulatively have an unacceptable environmental effect. Thus, as in Public Citizen, the Corps' 404 permit for the discharge of dredged material is not a proximate cause of effects of Mosaic's fertilizer production and need not be considered under NEPA.

The court rejected that S*ierra Club v. F.E.R*.C. *(Sabal Trail)*, 867 F.3d 1357 (D.C. Cir. 2017) (requiring consideration of downstream environmental effects for an authorization of the construction and operation of a pipeline network that would feed gas directly to power plants that burn the gas) applied. It distinguished *Sabal Trail* for 4 reasons: (1) the causal relationship is much closer; (2) the scope of agency statutory authority was much broader than the Corps'; (3) the *Sabal Trail* case is at odds with of the D.C. Circuit opinion in *Sierra Club v. F.E.R.C. (Freeport)*, 827 F.3d 36, 42 (D.C. Cir. 2016) (finding downstream environmental effects do not have to be considered, if contingent upon the issuance of a license for another agency with sole authority to authorize downstream effects because the action is not a relevant cause of the effect for NEPA purposes), and; (4) the *Sabal Trail court* narrowly focused on the reasonable

foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents.

The Corps was required to study more only if it has "sufficient control and authority" over the effect (Mosaic's downstream fertilizer production). The court considered that sister circuits have ruled similarly, analogizing Corps § 404 permit in connection with the mining operations.

Finally, CBD challenged the Corps' area-wide EIS, and argued that the supplemental environmental assessment (SEA) was substantively insufficient because it (1) did not analyze substantial changes or significant new circumstances that arose after the Corps finalized the area-wide impact statement, (2) identified impacts in the area-wide impact statement which were left for but never analyzed in the supplemental assessment, and (3) never analyzed the impacts of digging out 409 acres of the Payne Creek watershed. CBD also claimed the SEA was insufficient because new circumstances were not analyzed: (i) changes in ownership of the mine, (ii) revisions to the project design and permit application, (iii) changes to the timing and duration of the mining plan, and (iv) changes to the compensatory mitigation plan. NEPA requires that an impact statement be supplemented if "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R § 1502.9. Read in light of the "rule of reason," additional information need only be accounted for if the information would have been useful to the agency's decisionmaking process. *See Pub. Citizen*, 541 U.S. at 767. None of the purportedly changed circumstances is significant or would otherwise affect the Corps' decision-making process.

Dissent. Circuit Judge Martin issued a robust dissent (concurring in part), attacking the majority's opinion, focusing on the controversy of whether the Corps should have considered the environmental effects of phosphogypsum in issuing the CWA § 404 permit. Reviewing the factual background, the dissent summarized that piles of phosphogypsum lie across 3,200 acres in Bone Valley, Florida, and over 1 billion tons of phosphogypsum loom over the flat Floridian landscape. Mosaic, a fertilizer manufacturer, mines 17.1 million tons of phosphate there each year. Mosaic turns this phosphate into fertilizer at four Mosaic fertilizer plants, also located in Bone Valley. The making of one ton of fertilizer-ready phosphate leaves five tons of phosphogypsum byproduct behind. Phosphogypsum has no beneficial use, so Mosaic heaps it in massive outdoor "stacks." These stacks are often built on top of old phosphate mines and wherever else Mosaic owns "unused" land in Bone Valley. To dispose of phosphogypsum, Mosaic pumps gallons of phosphogypsum-water "slurry" into huge reservoirs on top of the stacks. Over time, this slurry hardens into a crust, raising the stack and its basin for wastewater. A fully grown stack is as big as a square mile and as tall as 300 feet high. In the past 30 years, there have been five major spills of phosphogypsum, spilling over 10 million tons in Florida waters and aquifers. In 1997, a phosphogypsum spill into Florida's Alafia River poisoned 42 miles of its water, killing one million baitfish and shellfish, 72,900 gamefish, and 377 acres of trees and vegetation.

The dissent believed the record made it clear that it was more than reasonably foreseeable that granting a permit under § 404 of the CWA to Mosaic would result in the creation of more phosphogypsum. Mosaic told the Corps it needed the § 404 permit to mine phosphate for its fertilizer plant. And again, every single ton of fertilizer-ready phosphate sourced from Mosaic's mines produces five tons of radioactive phosphogypsum. Thus, it is undeniable that issuing a permit to Mosaic's phosphate mine would add to the stacks of phosphogypsum already piled high across central Florida. Yet, the Corps did not consider phosphogypsum as an indirect effect in the environmental impact statement at issue. The dissent, organized its opinion into four points: (1) phosphogypsum production was a reasonably foreseeable effect of the § 404 permit that enabled Mosaic to mine phosphate for fertilizer; (2) the Corps violated its own NEPA procedures when it considered the benefits of fertilizer manufacturing without considering its environmental impacts, including the production of radioactive phosphogypsum; (3) other agencies' oversight of phosphogypsum did not relieve the Corps of its obligation to consider the environmental effects; and, (4) the Corps has underlying statutory authority to consider phosphogypsum as an indirect effect under NEPA.

First, the dissent focused on 40 C.F.R. § 1508.8(b) ("Indirect effects are caused by the action and are later in time or further removed in distance."). The fact that phosphogypsum production occurs after the

phosphate has been mined and in a different place does not mean it is not a reasonably foreseeable indirect effect. The record showed that Mosaic's entire operation—from phosphate mining, to beneficiation, to production of phosphoric acid and phosphogypsum—takes place right in Bone Valley. The extraordinary scale on which Mosaic produces fertilizer makes its production of phosphogypsum more foreseeable, not less. "The majority opinion is forced to reason based on hypothetical facts because the actual facts cannot support its conclusion. There is overwhelming evidence, acknowledged by the Corps—but not referenced in the majority opinion—that Mosaic would produce millions of tons of phosphogypsum byproduct as a result of the dredging and filling permit for its phosphate mine. The operation of this phosphate mine clearly results in the production of phosphogypsum. Indeed, this fact is more than reasonably foreseeable. It is obvious and certain."

In Mosaic's initial application for a permit, it stated it would have to "cease operations" at its fertilizer plant "unless it is able to acquire economically viable phosphate rock from some unknown future source in order to continue operating" and that "[m]ining existing reserves [in Florida] is the only viable long-term solution to meeting this need" for phosphate ore. Mosaic explained that importing phosphate "does not provide for a predictable business model or allow for evaluation of risk, as [Mosaic] would have no control of the essential raw material needed for phosphate fertilizer production." And, Mosaic stated that its fertilizer plants "would not be able to compete in the phosphate crop nutrient market if they were required to pay for imported phosphate rock." Mosaic explicitly tied its ability to mine to the permit it was seeking: "the viability of the remaining four [fertilizer plants] is dependent upon the ability to continue phosphate ore mining and phosphate rock production . . . which in turn depends on issuance of the pending 404 Permit applications." The Corps' decision to ignore the environmental effects of phosphogypsum based on the idea that it did not foreseeably result from granting Mosaic a § 404 permit was simply not supported.

Second, the Corps violated its own regulations. These procedures require the Corps "[i]n all cases" to use the same "scope of analysis" for "analyzing both impacts and alternatives" as for "analyzing the benefits of a proposal." 33 C.F.R. § 325, app. B(7)(b)(3) (using same scope of analysis for impacts and benefits). The Corps' NEPA implementing procedures require it to conduct environmental analysis for projects in which Corps has sufficient control. 33 C.F.R. § 325 app. B(7)b(1). The Corps was required to consider phosphogypsum. It framed the public benefits of phosphate mining. The Corps pointed to benefits related to the export of finished phosphate products and fertilizer through the Port of Tampa each year, which contribute significantly to making the port the state's largest in tonnage shipped and about the 10th largest in the nation. But it must hone its analysis in on the "specific activity requiring a" permit. 33 C.F.R. § 325, app. B(7)(b)(1). And it is not free to disregard the impacts of activities over which it has no control when it chooses to count the benefits of those same activities.

Third, the Corps was incorrect when it did not account for environmental effects of phosphogypsum because other agencies more directly regulate the environmental effects. The fact that other agencies have regulatory responsibilities in this area does not mean that the Corps is relieved of its own duties. *Sabal Trail*, 867 F.3d at 1375. Another agency's jurisdiction over an effect does not make the effect unforeseeable*. Id.* NEPA does not ask agencies to consider only novel environmental effects that are not addressed by other agencies – NEPA requires agencies to consider direct, indirect, and cumulative effects, full stop. 40 C.F.R. §§ 1508.7; 1508.8

The dissent distinguishes *Public Citizen*, because the EPA and the state of Florida primary oversight of creation and storage of phosphogypsum is a far cry from the unilateral authority a president has to honor treaty obligations. In contrast, the Corps is charged with taking a public interest review of its § 404 permits and enjoy discretion to grant or deny those permits based on environmental concerns. The power of the Federal Motor Carrier Safety Administration (FMCSA), in *Public Citizen*, to deny entry to Mexican motor carriers had been bargained away to a treaty. *Public Citizen*, 541 U.S. at 770. In contrast, the Corps has the power to, and must, consider environmental effects when issuing § 404 permits. The dissent distinguishes as well its sister circuit cases the majority relies on as the EPA or the state of Florida does not have "exclusive jurisdiction" to regulate creation and storage of phosphogypsum. "The Corps' refusal to analyze phosphogypsum as an indirect effect cannot be excused by other agencies' ability to oversee it."

Finally, the dissent rejected the majority's view that the Corps lacked statutory authority to consider phosphogypsum as an indirect effect. The majority stated that the CWA allowed the Corps to deny a §404 permit for one reason only: environmental effects from dredge and fill material. Thus, phosphogypsum is not an effect from the dredge and fill material discharged into waters of the US. The dissent stated that the implementing regulations of the CWA give the Corps the power to grant or deny § 4040 permit when the potential impacts cause general environmental concerns on the water supply and conservation and water quality outweigh the benefit which reasonably may be expected to accrue for the proposed activity. 33 C.F.R. § 320.2(a)(1). Courts have consistently held the Corps NEPA obligations when issuing a § 404 permit extend beyond consideration of the effects of dredge or fill material in jurisdictional waters. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1063 (10th Cir. 2015); *see also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 232–34 (5th Cir. 2007). Requiring the Corps to consider the environmental implications of the underlying project benefited by dredging and filling is true to NEPA and the realities of our human environment. 42 U.S.C. § 4332(c). Mosaic intended to use its § 404 permit to mine phosphate for fertilizer. The Corps had authority to consider the environmental effects that emanate from the project.

U.S. DEPARTMENT OF INTERIOR

Oregon Natural Desert Ass'n v. Rose, 921 F.3d 1185 (9th Cir. 2019)
Agency did not prevail on its NEPA claims.

Issue(s): Impacts (baseline)

Facts: BLM issued a tiered EA for a route network for motorized vehicles in the Steens Mountain Cooperative Management and Protection Area (Steens Mountain Area). BLM issued two plans: the Steens Mountain Travel Management Plan (Travel Plan) and the Steens Mountain Comprehensive Recreation Plan ("Recreation Plan"). Oregon Natural Desert Association (ONDA) challenged BLM's action, alleging the agency acted arbitrarily and capriciously under NEPA, among other violations of law.

Decision: The Ninth Circuit found that BLM's issuance of the Travel Plan failed to establish the baseline environmental conditions necessary for a procedurally adequate assessment of the Travel Plan's environmental impacts, even if BLM properly inventoried all "roads and trails" in the Steens Mountain Area (under the Steens Act). "Without establishing the baseline conditions" before a project begins, "there is simply no way to determine what effect the project will have on the environment and, consequently, no way to comply with NEPA." *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016). The Ninth Circuit found nothing in the Travel Plan EA established the physical condition of the routes, such as whether they are overgrown with vegetation or have become impassable in certain spots. BLM acknowledged that it included some routes in the inventory even though its staff could not find those routes on the ground. Despite that lack of information, the Travel Plan EA authorized most routes for "Level 2" maintenance, which involves mechanically grading a route and "brushing" (removing) roadside vegetation. Such "routine" maintenance can dramatically change a lightly used route and its surroundings. Thus, without understanding the actual condition of the routes on the ground, BLM could not properly assess the environmental impact of allowing motorized travel on more than 500 miles of routes, or of carrying out mechanical maintenance on those routes. BLM "had a duty to assess, in some reasonable way, the actual baseline conditions" in the Steens Mountain Area, under *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 569 (9th Cir. 2016), but it failed to perform that duty.

The Ninth Circuit distinguished that NEPA did not require BLM to accept ONDA's assessment of the environmental consequences of the Travel Plan. It did, however, require the Bureau to "articulate[ ] a rational connection between the facts found and the choice made," instead of relying on an ipse dixit assessment of environmental impacts over a contrary expert opinion and data. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012). Ordinarily, the Ninth Circuit noted it must defer to an agency's technical expertise and reasonable choice of methodology, because NEPA "does not require adherence to a particular analytic protocol." *Or. Nat. Desert Ass'n v. BLM (ONDA v. BLM)*, 625 F.3d

1092, 1121 (9th Cir. 2010)). And an agency need not measure "actual baseline conditions in every situation—it may estimate baseline conditions using data from a similar area, computer modeling, or some other reasonable method." *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016). BLM did not use any method or estimate—aside from making generic statements about roads in the Steens Mountain Area—to establish baseline conditions. The court "cannot defer to a void." The Ninth Circuit found the EA itself "contains virtually no references to any material in support of or in opposition to its conclusions," even though the EA "is where BLM's defense of its position must be found." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (*citing* 40 C.F.R. § 1508.9(a)). The EA, and the previous EIS to which it is tiered, contain only a cursory analysis of the project's impact on noteworthy aspects of the Steens Mountain Area, such as the sage grouse population and the spread of noxious weed infestations. The Ninth Circuit warned "general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification" for why an agency could not supply more "definitive information." The Ninth Circuit found that the EA and the EIS lacked any such justification.

The Ninth Circuit stated that once BLM addressed the problems in the baseline, BLM may have decided to make different choices. "NEPA is not a paper exercise, and new analyses may point in new directions." As a result, although ONDA raised concerns regarding alleged substantive and procedural flaws within the Plan, the Ninth Circuit did not reach those issues but urged BLM to look at its new analysis with "fresh eyes."

The Ninth Circuit also found BLM acted arbitrarily and capriciously in issuing the Recreation Plan because BLM failed to establish the baseline conditions necessary for it to "carefully consider information about significant environmental impacts" to the Steens Mountain Area. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011). BLM made Route Analysis Forms and aerial photographs available during the comment period, but no details about the condition of the Obscure Routes were available. The completed forms failed to provide any details responsive to the questions asked. Without establishing baseline conditions for the Obscure Routes, BLM could not have analyzed the environmental impacts of the Recreation Plan properly. At some point after the public comment period closed, BLM attached ground photographs for a few Obscure Routes to the forms; the photographs show details about vegetation and the condition of the routes themselves. Such late analysis, "conducted without any input from the public," impedes NEPA's goal of giving the public a role to play in the decisionmaking process and so "cannot cure deficiencies" in an EA. *Id*. at 1104. And, because the Bureau added the Obscure Routes back to the Steens Mountain transportation network only over the 2014–15 winter, while Steens Mountain was largely inaccessible, ONDA did not have a chance to survey the Obscure Routes and respond to the photographs. Thus, BLM's failure to make the photographs available during the public comment period " 'caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation."

Diné Citizens Against Ruining our Env't v. Bernhardt, 923 F.3d 831 (10th Cir. 2019)
Agency prevailed on some its NEPA challenges but did not prevail on other NEPA challenges.

Issue(s): Tiering, Impact Assessment (Air and Water Impacts, Indirect effects, Cumulative Impacts)

Facts: Environmental organizations (Diné Citizens) alleged DOI, BLM, and the Secretary of BLM (collectively Federal Appellees) violated NEPA in granting more than 300 applications for permits to drill horizontal, multi-stage hydraulically fracked wells in the Mancos Shale area of the San Juan Basin in northeastern New Mexico, specifically that BLM authorized the drilling without fully considering its indirect and cumulative impacts on the environment or on historic properties.

The San Juan Basin is a large geographic region in the southwestern United States, including part of New Mexico, including both private and public lands. Drilling for oil and gas has occurred in the Basin for more than sixty years, and the Basin is currently one of the most prolific sources of natural gas in the country.

In 2000, BLM initiated the process of revising its existing RMP, which had been published in 1988. As part of this process, BLM contracted with the New Mexico Institute of Mining and Geology to develop a "reasonably foreseeable development scenario," or RFDS, to predict the foreseeable oil and gas

development likely to occur over the next twenty years. Based on historic production data and available geologic and engineering evidence, the RFDS estimated that 9,970 new oil and gas wells would be drilled on federally managed lands in the New Mexico portion of the San Juan Basin during this time period. Of these wells, the RFDS estimated that more than forty percent would be "Dakota, Mancos" gas wells—wells that could produce gas from both the Mancos geologic horizon and the Dakota geologic horizon that lies below it. The RFDS estimated that only 180 new oil wells would be drilled in the Mancos Shale, due to the fact that most reservoirs in the Mancos Shale were approaching depletion under then-current technologies, but it noted that there is excellent potential for the Mancos to be further evaluated.

In 2003, BLM issued its Proposed Resource Management Plan and FEIS (2003 EIS). In the document, BLM referred to the predictions and analysis contained in the RFDS in order to assess four proposed alternatives for managing federal lands in the San Juan Basin, including the "balanced approach" the agency ultimately decided to adopt. Under this balanced approach, BLM analyzed the cumulative impacts of an estimated 9,942 new wells in the San Juan Basin—approximately the same number predicted in the 2001 RFDS—by looking at, for instance, the likely air quality impacts from the drilling and operation of this many new wells in the region. The [2003 EIS] did not discuss specific sites or approve any individual wells, although it assumed the majority of new wells would be drilled in the high development area in the northern part of the managed area. BLM issued its final RMP, adopting the Alternative D balanced approach, in December 2003. *Diné Citizens Against Ruining Our Env't v. Jewell (Diné II),* 839 F.3d 1276, 1279–80 (10th Cir. 2016) (affirming denial of motion for a preliminary injunction).

Although the 2003 EIS analyzed oil and gas drilling in the San Juan Basin generally, operators wanting to drill new wells in the area must seek and receive approval for specific drilling via an application for a permit to drill (APD) submitted to BLM. When BLM receives an APD, it prepares an EA examining the environmental impacts of the proposed drilling. Beginning in 2010, BLM began receiving APDs for drilling in the Mancos Shale. Development interest in the area increased quickly, and between early 2012 and April 2014, seventy new wells were completed in the Mancos Shale area. In 2014, recognizing the potential for additional Mancos Shale development, BLM had a new RFDS prepared to evaluate the Mancos Shale's potential for oil and gas development. The 2014 RFDS estimated that full development of the Mancos Shale would result in 3,960 new wells.

The 2014 RFDS predicted that new drilling in the Mancos Shale would be done largely, if not entirely, by horizontal drilling and multi-stage hydraulic fracturing. "A horizontally drilled well starts as a vertical or directional well, but then curves and becomes horizontal, or nearly so, allowing the wellbore [i.e., drilled hole] to follow within a rock stratum for significant distances and thus greatly increase the volume of a reservoir opened by the wellbore." Hydraulic fracturing is a process designed to "maximize the extraction" of oil and gas resources. Fluids, usually water with chemical additives, "are pumped into a geologic formation at high pressure." When the pressure "exceeds the rock strength," it creates or enlarges fractures from which oil and gas can flow more freely. After the fractures are created, a "propping agent (usually sand) is pumped into the fractures to keep them from closing."

These new drilling techniques have greatly increased access to oil and gas reserves that were not previously targeted for development and have given rise to much higher levels of development in the Mancos Shale than BLM previously estimated and accounted for. Moreover, horizontal drilling and multi-stage fracturing may have greater environmental impacts than vertical drilling and older fracturing techniques. *Diné II*, 839 F.3d at 1283.

Hydraulic fracturing is common in the San Juan Basin and has been used there in some form since the 1950s. Horizontal drilling, however, is relatively new. At the time the 2003 EIS issued, "[h]orizontal drilling [wa]s possible but not [then] applied in the San Juan Basin due to poor cost[-]to[-]benefit ratio." The environmental impacts considered in the 2003 EIS were therefore based on the impacts associated with vertical drilling, not horizontal drilling. But the 2003 EIS noted that "[i]f horizontal drilling should prove economically and technically feasible in the future, the next advancement in horizontal well technology could be drilling multi-laterals or hydraulic fracturing horizontal wells." Since the 2003 EIS issued, 3,945 of the 9,942 contemplated vertical wells have been drilled in the San Juan Basin. BLM continued to receive and approve APDs for horizontal Mancos Shale wells.

In 2015, Diné Citizens filed their first Petition in district court, challenging BLM's issuance of APDs as violative of NEPA (and NHPA). In district court, Diné Citizens allege in their appeal: (1) a NEPA violation for improperly tiering the EAs to the 2003 EIS; and, (2) a NEPA violation for failing to prepare an EIS or supplement an existing EIS.

Decision: The Tenth circuit noted that although Diné Citizens challenged more than 300 individual agency actions, they only provided a complete record of BLM's decisionmaking process for only a few of the challenged actions, and the court only addressed those actions in its opinion, based on the lack of record on appeal.

Diné Citizens first argued that the challenged APDs cause environmental impacts qualitatively different from those considered in the 2003 EIS because the APDs authorize drilling in the southern portion of the Mancos Shale, while the 2003 EIS "only evaluated development in the northern portion." The court disagreed with Diné Citizens' argument because the 2003 EIS evaluated the effects of drilling throughout the entire San Juan Basin—an area that includes the location of the challenged APDs. The 2003 EIS's chapter on the affected environment contains a lengthy discussion of the cultural resources present in the Chaco Canyon. The record, therefore, did not support Diné Citizens' assertion that the challenged APDs are in a geographic area not considered by the 2003 EIS.

Diné Citizens also argued that BLM never fully analyzed the cumulative environmental impacts of drilling 3,960 horizontal wells in the Mancos Shale because those impacts exceed the environmental impacts evaluated in the 2003 EIS in two specific ways: air pollution and water use.

As to air pollution, the court concluded that Diné Citizens did not provide a complete record from which the court could assess BLM's NEPA analysis.

However, the Tenth Circuit agreed with the Diné Citizens that BLM never considered the cumulative impact of the water use associated with the 3,960 reasonably foreseeable horizontal Mancos Shale wells for five specific EAs.

Diné Citizens' cumulative impacts argument relied on one assumption: that BLM's NEPA analysis must consider the impacts associated with all 3,960 wells the 2014 RFDS identified as possible if full-field Mancos Shale development occurs. The court concluded that the 2014 RFDS made it reasonably foreseeable that 3,960 horizontal Mancos Shale wells would be drilled, and NEPA required BLM to consider the cumulative impacts of those wells in the EAs it conducted for subsequent horizontal Mancos Shale well APDs. The 2014 RFDS collected and analyzed geological and engineering evidence to determine the potential subsurface development of the Gallup/Mancos play. Based on this analysis, it estimated that full development of the Mancos Shale would result in 3,960 new wells. And, although it predicted a five-year delay in significant activity in the Mancos Shale area due to unfavorable economics, it also predicted that well activity would rapidly increase once the economics became more favorable.

BLM itself relied on RFDSs to define the scope of "reasonably foreseeable" actions for the purposes of its cumulative-impacts analyses. For example, two of the EAs cited to the 2014 RFDS in their discussions of cumulative impacts. In describing the methodology used to analyze cumulative impacts, EA 2016-0029 and EA 2016-0200/2016-0076 discussed oil and gas development predicted in the 2014 RFDS, and noted that the 2014 RFDS identified high, moderate, and low potential regions for oil development of the Mancos-Gallup Formation.

BLM relied on the 2001 RFDS for projected drilling amounts in the 2003 EIS. The 2003 EIS stated that the 2001 RFDS formed the basis for projected oil and gas development in the planning area over the next 20 years. The court concluded (based on BLM's past reliance on the drilling projected in RFDSs) that once the 2014 RFDS issued, the 3,960 horizontal Mancos Shale wells predicted in that document were reasonably foreseeable future actions (RFFAs). 40 C.F.R. § 1508.7. BLM therefore needed to consider the cumulative environmental impacts associated with the reasonably foreseeable 3,960 horizontal Mancos Shale wells when it conducted EAs for the challenged APDs.

Diné Citizens also argued that the total water used for drilling 3,960 horizontal Mancos Shale wells would exceed the water use contemplated in the 2003 EIS, and BLM therefore abused its discretion in tiering the EAs to the 2003 EIS, issuing FONSIs, and approving APDs. The Tenth Circuit agreed with the Diné Citizens that, as to five challenged EAs, BLM did not consider the cumulative water use associated with the 3,960 reasonably foreseeable horizontal Mancos Shale wells. Therefore, as to these five EAs, BLM's issuance of FONSIs and approval of APDs was arbitrary and capricious.

In their argument, the Diné Citizens focused on calculations in a comparison table, which showed that drilling a single horizontal well would use 1,020,000 gallons of water. In contrast, Diné Citizens assert the 2003 EIS predicted that drilling a single vertical well would use 283,500 gallons of water. Diné Citizens then multiply each of these numbers by the total number of wells (3,960 reasonably foreseeable horizontal wells; 3,945 already drilled vertical wells) and arrive at a total water consumption amount of over 5 billion gallons of water. According to Diné Citizens, the 2003 EIS contemplated total water use of just over 2.8 billion gallons. Therefore, when the 3,960 reasonably foreseeable horizontal Mancos Shale wells are taken into account, the projected water use increases by 82% over what the 2003 EIS considered.

The Federal Appellees disputed this fact, stating that generally that water use could be decreased through "new strategies and technologies." The Tenth Circuit concluded Diné Citizens established that the difference between the water use contemplated in the 2003 EIS and the water use associated with drilling the reasonably foreseeable horizontal Mancos Shale wells is more than a "mere flyspeck."

None of the five EAs before the Tenth Circuit considered the cumulative impacts of the water use associated with all 3,960 reasonably foreseeable horizontal Mancos Shale wells. EA 2014-0272 was the only EA that contained any discussion of the cumulative impacts on water resources. Its cumulative-impact analysis stated:

> Reasonably foreseeable development within the Largo sub-watershed may include an estimated additional 1,811 oil and gas wells and related facilities. Surface-disturbing activities that would be associated with these actions may affect an estimated 6,756 acres (2003 EIS, page 4-7). The [2003 EIS] determined that the primary cumulative impacts on water quality would result from surface disturbance, which would generate increased sediment yields (2003 EIS pages 4-123 and 4-124). Cumulative effects to water resources from the proposed action would be maximized shortly after construction begins and would decrease over time as reclamation efforts progress.
>
> The proposed action would cumulatively contribute approximately 20.0 acres of long-term disturbance in the watershed. Cumulative impacts to surface waters would be related to short-term sedimentation or flow changes. Surface-disturbing activities other than the proposed action that may cause accelerated erosion include—but are not limited to—construction of roads, other facilities, and installation of trenches for utilities; road maintenance such as grading or ditch cleaning; public recreational activities; vegetation manipulation and management activities; prescribed and natural fires; and livestock grazing.

This analysis of the cumulative impacts on water resources does not address the water consumption associated with the 3,960 reasonably foreseeable Mancos Shale wells. As to these five EAs, the court held that BLM was required to, but did not, consider the cumulative impacts on water resources associated with drilling the 3,960 reasonably foreseeable horizontal Mancos Shale wells.

The Tenth Circuit rejected Federal Appellees remaining arguments in support of BLM's NEPA analysis. The court discussed that the water use associated with drilling the 3,960 reasonably foreseeable horizontal Mancos Shale wells exceeded the water use contemplated in the 2003 EIS in a way that made BLM's failure to consider the cumulative water impacts "significant enough to defeat the goals of informed decisionmaking and informed public comment." The Tenth Circuit remanded with instruction to vacate and further noted there was no need to also "enjoin any further ground-disturbing activities on the APDs."

***Protect Our Communities Found. v. LaCounte*,** 939 F.3d 1029 (9th Cir. 2019)
Agency prevailed.

Issue: Mitigation Measures, Alternatives, Supplementation.

Facts: Environmental organizations brought action alleging that the Bureau of Indian Affairs' (BIA) approval of industrial-scale wind facility (85 wind turbines) on an Indian reservation, east of San Diego, California, violated NEPA, among other laws. Phase I concerned 65 turbines constructed on federal land in a valley and required approval from the Bureau of Land Management (BLM), which is responsible for granting rights-of-way for use of federal lands. Phase II concerned 20 turbines on the Tribe's reservation on ridgelines above the valley. Phase II required approval from BIA, which serves as a trustee for federally recognized Indian tribes.

Before BLM and BIA approved the respective phases, BLM prepared an EIS that covered both phases. Among other environmental impacts, the EIS expressly identified an "unavoidable adverse impact" to golden eagles from collisions with the turbines and loss of breeding territory, impacts that were especially acute for the Phase II turbines. The EIS considered five project alternatives for the Tule project, including one that would eliminate 63 turbines, including all of the Phase II turbines, from the 128 that were originally proposed.

For Phase I, Tule drafted a Project-Specific Avian and Bat Protection Plan (Protection Plan) that described possible means of mitigating bird and bat impacts in detail. Relying on that plan and the EIS, BLM approved Phase I. The Ninth Circuit upheld BLM's approval for Phase I. *See Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 577 (9th Cir. 2016) [hereinafter *Protect Our Communities I*].

For Phase II, Tule drafted a Supplemental Project-Specific Avian and Bat Protection Plan (Supplemental Protection Plan) that included updated eagle surveys and described measures to document and avoid bird impacts. The Supplemental Protection Plan concluded that, with mitigation measures, Phase II could "meet the current no-net loss standard for local breeding eagle populations." BIA made the Supplemental Protection Plan available for public comment. The FWS, among other entities, criticized the Supplemental Protection Plan's methodologies and conclusion.

BIA approved Phase II in a ROD that relied on BLM's EIS and Tule's Supplemental Protection Plan. The ROD adopted several mitigation measures designed to avoid impacts to golden eagles. These mitigation measures included a requirement that before operating, Tule had to apply for an eagle take permit under the Bald and Golden Eagle Protection Act ("BGEPA"), 16 U.S.C. § 668.

Decision: Plaintiffs contended that that reliance was improper because BIA did not explain its decision to not implement one of the EIS's listed mitigation measures. The measure provided:

> Authorize construction of portions of the project based on the results of behavioral and population studies of local golden eagles: Construction of [Phase II] would occur at those turbine locations that show reduced risk to the eagle population following analysis of detailed behavior studies of known eagles in the vicinity of the Tule Wind project. Pending the outcome of eagle behavior studies, all, none, or part of the second portion of the project would be authorized. . . . The final criteria determining the risk each location presents to eagles will be determined [by BIA] in consultation with the required resource agencies, tribes, and other relevant permitting agencies. . . . Turbine locations exceeding the acceptable risk levels to golden eagles based on these final criteria will not be authorized for construction.

BIA considered whether to "authorize construction of portions of the project," by considering each turbine and finding that all twenty satisfied the criteria for authorization. BIA considered "the risk each location presents to eagles" in the Supplemental Protection Plan; in particular, the Supplemental Protection Plan discussed whether to cease daytime operation for certain turbines close to specific nests. BIA satisfied the requirement to establish "final criteria determining the risk each location presents to eagles" and evaluate "acceptable risk levels to golden eagles based on these final criteria." The Supplemental Protection Plan

outlined how Phase II was expected to meet FWS's "no-net loss standard" for local breeding eagles. BIA determined that all ridgeline turbines could, with certain mitigation measures, be constructed in a way that met that criteria. And it further determined that the "primary period of risk" occurs at certain turbines and decided to limit daytime operations of those turbines. Finally, BIA meaningfully consulted with FWS by hearing comments from FWS throughout the process and relying on FWS protocols for BIA's study of the risk to eagles. BIA was not required to explain why it did not adopt a mitigation measure that it did in fact follow.

The Ninth Circuit rejected Plaintiffs' related argument that BIA should have explained why its ROD found no significant impacts to eagles, even though the EIS had concluded that the entire project would impact the eagles. There is no discrepancy: the EIS considered whether the entire project would have any impact on eagles, whereas the Supplemental Protection Plan considered whether Phase II would have significant impacts, taking into account the Supplemental Protection Plan's mitigation measures and analysis.

The EIS considered five action alternatives in light of the purpose to "facilitate the timely development of [the Tribe's] wind and solar energy resources through tribal renewable energy projects." Four alternatives contemplated construction of all turbines, with other changes to the transmission facilities. The fifth alternative eliminated about half of the turbines, including all of the Phase II turbines. Plaintiffs contended that this analysis was deficient because it did not consider an alternative where only some of the Phase II turbines were authorized.

The Ninth Circuit rejected Defendants' argument that *Protect Our Communities I* controlled. There, the Ninth Circuit held that "the range of alternatives considered in the EIS was not impermissibly narrow, as the agency evaluated all 'reasonable and feasible' alternatives in light of the ultimate purpose of the project." 825 F.3d at 580. But that holding did not control the case: that lawsuit was filed before BIA issued its ROD, and the Ninth Circuit did not address whether BIA's approval violated NEPA. The Ninth Circuit held that the alternatives analysis was also sufficient as to BIA's approval. If we were viewing Phase II as an isolated project, and not as part of a larger wind energy development, we might agree with Plaintiffs that the alternatives analysis was insufficient. Here, as to the Phase II turbines alone, the EIS effectively considered one no action alternative (alternative five) and four identical alternatives. No mid-range alternative, such as an alternative contemplating only ten of the turbines, was considered. If Phase II constituted the entire project, then, *Muckleshoot* would require us to conclude that the alternatives analysis was deficient. The Ninth Circuit did not read the project as isolated, like in Muckleshoot; instead, the twenty Phase II turbines were part of a wind turbine development that originally included over one hundred turbines, to be built by the same developer in the same general area but split along a jurisdictional line. Although the project was split along a jurisdictional line, Phase I and Phase II make up one and the same project.

Viewing the project as a whole, the alternatives analysis was sufficient. Although no mid-range alternative was considered as to the twenty Phase II turbines, the EIS's fifth alternative did consider a mid-range alternative for the project as a whole: construction of 63 out of 128 turbines. Indeed, BLM ultimately approved a configuration with fewer turbines than had been initially proposed. And, in this case, the Ninth Circuit discussed that the EIS did address the site-specific action. The details of the project were known, and the EIS specifically addressed its environmental impacts and considered a mid-range alternative. Unlike the USFS in *Muckleshoot* and BLM in *Klamath-Siskiyou*, the BIA is not "attempt[ing] to save" a deficient analysis by reference to a more general document. *Klamath-Siskiyou*, 387 F.3d at 998.

The Ninth Circuit rejected the Plaintiffs' suggestion that BIA failed to consider any alternatives "that entailed building some but not all of the proposed ridgeline turbines," either in the EIS or in "any subsequent document" is inaccurate. The EIS specifically contemplated that "all, none or part of the second portion of the project would be authorized." Subsequent to the promulgation of the EIS, the Supplemental Protection Plan considered seven plans in which the turbines most threatening to the eagle population would be curtailed during times of high eagle activity. These plans were similar to consideration of a less-than-full build.

In addition, in response to a comment to the Supplemental Protection Plan raised by FWS asking BIA to consider a build of only the six southernmost turbines, BIA explained why this mid-range alternative would

not have been practical, noting that "development of only 6 turbines would not be sufficient to justify the investment in infrastructure to access the 6 turbines which would result in no revenue source for the [Tribe]." Although we do not suggest that post-EIS analysis can serve as a substitute for EIS reasonable alternative analysis, these documents make it plain that BIA did not simply ignore the issue.

Next, Plaintiffs argued that BIA should have prepared a supplemental EIS ("SEIS") to analyze information that arose after the EIS was published. In general, NEPA requires agencies to prepare an SEIS when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(ii). We have held that NEPA does not require agencies to prepare an SEIS "every time new information comes to light" but instead requires agencies to "maintain a 'hard look' at the impact of agency action when the 'new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered.' " *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014).

Plaintiffs asserted five grounds in support of their argument, all of which the Ninth Circuit rejected. First, Plaintiffs contended that information in the Supplemental Protection Plan, along with third-party comments on that plan, met the "new and significant" threshold requiring an SEIS. New surveys described in the Supplemental Protection Plan revealed at least eight occupied golden eagle territories within ten miles of Phase II, two at which young had been successfully produced, and two at which eaglets failed to fledge. The Plan also indicated that the nests nearest Phase II continued to be active, and that the flight path of its fledglings overlapped with all of the turbine sites. It further revealed that no eagle territory produced young in every year. In addition, new flight surveys showed that 73 of 123 documented eagle flight paths traversed Phase II. Finally, comments from FWS raised concerns about BIA's lack of expertise on potential impacts to eagles, as well as the importance of the nearby nest to eagle populations in the areas and to FWS's plans. The Ninth Circuit held these facts were not new, and that the EIS recognized the presence of eagle territories in the area, the movement of those eagles from different territories in different years with varying levels of reproductive success, and the existence of the territory nearest Phase II. The EIS also disclosed that eagles traverse the Phase II ridgeline. Throughout, the EIS acknowledges that the project poses a threat to eagles.

Second, Plaintiffs argued that BIA improperly relied on the EIS (without supplemental review) because the EIS "rejected" the Phase II turbines. The Ninth Circuit disagreed: the EIS did not "reject" the Phase II turbines, instead, it determined that the ridgeline turbines posed particular risks to the eagles and that further study was required to understand and potentially mitigate those risks. The EIS fully contemplated and considered potential environmental impacts of the Phase II turbines, and the BIA took steps to mitigate risks.

Third, Plaintiffs argued that the new information required an SEIS because it met the criteria for "significance" under NEPA regulations. *See* 40 C.F.R. § 1508.27(b). Specifically, Plaintiffs contend that new information showed that Phase II is (1) close to cultural resources and ecologically critical areas; (2) highly controversial; (3) related to other actions with individually insignificant but cumulatively significant impacts, i.e., other energy projects in the area that threaten eagles; and (4) in violation of federal law. But the EIS had already addressed (1) the impact to eagles, and the cultural importance of the eagles; (2) FWS's comments critical of BIA's conclusions and analysis; (3) additional impacts to eagles from other developments; and (4) FWS's concern that Phase II will not qualify for a take permit under the BGEPA. In short, any additional information did not raise new issues that were "not already considered" in the EIS.

Fourth, Plaintiffs argued that BIA did not adequately respond to the comments of FWS and CDFW. The Ninth Circuit concluded that the BIA did, in fact, continue to maintain a hard look at the environmental impacts, as is shown by the extensive discussion on the impacts to golden eagles in the ROD and Supplemental Protection Plan.

Fifth and finally, Plaintiffs contended that Defendants were required to, but did not, assess the significance of the new information. The court looked to *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013), where the Ninth Circuit held that, at least where a change in project design is at issue, a

ROD that states that the EIS "fully analyzed" the relevant questions satisfied the requirement to assess the need for supplemental analysis.

The ROD stated that the EIS "included an analysis of all environmental issues associated with construction and operation" of Phase II turbines. Moreover, BIA addressed almost all of the purportedly new information in the ROD, the Supplemental Protection Plan, and its response to comments, even if it never stated that the information was not "significant" and therefore did not require more analysis.

Sauk Prairie Conserv. Alliance v. U.S. Dep't of the Interior, 944 F.3d 644 (7th Cir. 2019)
Agency prevailed.

Issue(s): Categorical Exclusion, Extraordinary Circumstances (significance, controversial), Federal Action.

Facts: Sauk Prairie Conservation Alliance (Alliance) challenged Department of Interiors National Park Service's (NPS) approval of dog training for hunting, off-road motorcycle riding, and helicopter drills by the Wisconsin National Guard in Sauk Prairie Recreation Area, on land converted from a former Cold War Munitions Plant.

The NPS donated more than 3,000 acres in central Wisconsin to the state's Department of Natural Resources (DNR). The goal was to turn the site of a Cold War munitions plant into a state park designed for a variety of recreational uses. That land now makes up the Sauk Prairie Recreation Area (Sauk Prairie Park).

Decision: The NPS stated it was not required to prepare an impact statement for hunting or off-road motorcycle riding because the NPS's approval of these uses was categorically excluded from NEPA's requirements. As for helicopter training, the Service argued that it had no discretion to discontinue the flights in light of the Army's demands.

The NPS stated that the hunting and off-road motorcycle riding fell within a CatEx for "[c]hanges or amendments to an approved plan, when such changes would cause no or only minimal environmental impact." No environmental-impact statement was required if the NPS found that the amendments to the Program of Utilization "would cause no or only minimal environmental impact."

The NPS relied on DNR's EIS. The NPS itself prepared only a short 13-page screening form in which it checked a few boxes and included a few lines of brisk explanation. Its final conclusions rested almost entirely on conclusions already made by the state environmental agency. An agency can approve a category of use as a CatEx only if the category first passes through procedures established "by a Federal agency." *See* 40 C.F.R. § 1508.4 (emphasis added). The court reviewed a similar question in a different context in *Highway J Citizens Group*. The question there was whether a federal agency could rely on a state-level environmental analysis—not at the first step of the CatEx analysis (whether a CatEx applies at all) but at the second step (whether extraordinary circumstances require an impact statement despite the category's application). We said that the federal agency could rely on the state's analysis because "neither a statute nor a rule requires the agency to write its own analysis." *Highway J Citizens Grp. v. U.S. Dep't of Transp.*, 891 F.3d 697, 699 (7th Cir. 2018). Accordingly, a federal agency may rely on a state's environmental-impact analysis to determine whether a CatEx applies.

The court opined there was enough analysis in the Master Plan and in the NEPA screening form to support the NPS's conclusion that the amendments would have minimal impact. In other words, some of the analysis does evaluate the effect of the amendments as amendments (which was what Alliance argued must be done).

The NPS's NEPA screening form relied heavily on the environmental analysis that the DNR provided in the Master Plan. The court noted that when the state agency prepared its own EIS, it was evaluating the plan in its entirety. As a result, it included analysis of both the total result—that is, the cumulative effect of the beneficial and harmful impacts—as well as of individual uses on their own. For example, the Master Plan described nine ways in which it proposed to limit the harmful effects of off-road motorcycling. Among others,

riding would be limited to six days per year and to half the park's trails, and each bike would have to be tested to ensure its noise did not exceed 96 decibels. The Master Plan then explained that at Wisconsin's Bong State Recreation Area, data showed that "[t]here doesn't appear to be a sizeable reduction in the number of species or number of birds in the area where motorized recreation is allowed compared to other areas on the property." Finally, the Master Plan concluded, "[w]hile individual animals may experience stress and stress responses[,] . . . any impacts to populations are expected to be minor." Largely relying on these findings, the NPS noted in its NEPA screening form that because the "plan has limited the frequency of motorized use and provides management guidelines to limit impacts on wildlife," the use would not "[h]ave significant negative impacts on species." In other words, it compares the effect of a plan with amendments to the effect of a plan with none (similar to a baseline).

The analysis of dog training was less extensive, but the Master Plan assessed its impact under a baseline, at least to some extent. For instance, the plan says that "[a]ny impacts to biological resources from dog trials are likely to be minimal, localized, and of short duration." It also stated that because there is no "pattern of problems or complaints related to the use of dog training grounds" at other recreation areas in the state, "[a]ny impacts associated with the dog training at [Sauk Prairie Park] are expected to be minor and temporary." The court found the analysis sufficient, and its application of expertise is entitled to deference.

Alliance argued four of the NPS's extraordinary circumstances prevented the application of a CatEx. *See* 43 C.F.R. § 46.215. Alliance argued that the action will have "significant impacts on such natural resources and unique geographic characteristics as ... park, recreation, or refuge lands[,] ... and other ecologically significant or critical areas." *Id*. § 46.215(b). It then argues that the action will have "highly uncertain and potentially significant environmental effects." *Id*. § 46.215(d). And finally, it argues that the action will "[e]stablish a precedent for future action . . . with potentially significant environmental effects." *Id*. § 46.215(e). The Seventh Circuit held that the NPS adequately explained why dog training and motorcycle riding will not have significant environmental effects.

As to the fourth extraordinary circumstance, Alliance claimed that the action will have "highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources." *Id.* § 46.215(c). The NPS acknowledged in its NEPA screening form that there was public controversy over whether to permit active or passive recreation. However, Alliance never argued before the district court that public controversy warranted a full impact statement under this regulation, and thus the court held the argument was therefore waived. *See Puffer*, 675 F.3d at 718.

However, the court noted the NPS offered essentially no independent analysis of the environmental impact of helicopter training at Sauk Prairie Park. And unlike with the other two contested uses, the agency didn't even purport to rely on the state-level environmental-impact statement. That was likely because the DNR couldn't say with certainty that continued helicopter training would not harm the environment. It noted that helicopters "will generate considerable wind and dust" and "substantial noise," and that "[t]here is a lack of information about other potential impacts [on wildlife,] including reproduction, physiological stresses, and behavior patterns." The federal defendants argued that no impact statement was required because NEPA applies only when an agency has discretion over whether to take the proposed action. The NPS had no discretion here because the Army conditioned its approval of this land transfer on continued helicopter use. It was the Army's land to begin with, and the Army would not release it without this provision. In other words, helicopter training was going to continue at Parcel V1 one way or another. Given that the NPS had no independent authority to end helicopter training at Parcel V1, no EIS was required.

The Supreme Court addressed this question in *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 766, 124 S. Ct. 2204 (2004). NEPA requires an environmental-impact statement only when a federal action will "significantly affect" the environment, § 4332(C), and federal regulations define "effects" as something "caused by the action" the federal agency is contemplating. 40 C.F.R. § 1508.8; *see Public Citizen*, 541 U.S. at 763–64. In *Public Citizen* there was an insufficient causal connection between the agency's proposed regulations and the environ-mental effect of new applications because the agency had no authority to prohibit those applications. *See id*. at 768–70. Applying *Public Citizen*, the NPS could either approve the provision that permitted helicopter training in the recreation area or it could permit the Army to retain the land and continue the helicopter training all the same. Because the NPS had no authority to end

the helicopter training, there was no causal connection between its decision to approve the provision and any environmental effects continued training might have, the NPS was not required to prepare an EIS.

U.S. DEPARTMENT OF TRANSPORTATION

Save our Sound OBX, Inc. v. North Carolina Dep't of Transp., 914 F.3d 213 (4th Cir. 2019).
Agency prevailed.

Issue(s): Supplementation (Alternatives, Impact Assessment), Role of Settlement Agreement in Alternative Selection

Facts: Save our Sound OBX and its members, residents and vacationers from North Carolina's Outer Banks (collectively SOS) brought action against Federal Highway Administration (FHwA) North Carolina Department of Transportation (NCDOT) and its secretary. SOS challenged the agencies' ROD approving a replacement of a segment of North Carolina Highway 12 (NC-12) with a bridge across the Pamlico Sound (the Jug-Handle Bridge) on grounds that such plans violated the NEPA among other laws.

State and federal agencies worked for several years to update and improve NC-12, the main roadway passing through the Outer Banks of North Carolina, because of its susceptibility to weather damage and erosion. In 2008, a team involving FHwA and NCDOT (the Merger Team) issued an EIS (the 2008 EIS) and § 4(f) evaluation, under the Department of Transportation Act of 1966, for improving NC-12. For the segment at issue, the 2008 EIS included discussion of several alternatives, including a proposed bridge in the Pamlico Sound near Rodanthe (the "Bridge South alternative") and proposals involving beach nourishment. An EA in 2010 further developed these alternatives.

The Merger Team released an updated EA in 2013 (the 2013 EA) to account for environmental changes after the 2010 EA, including the effects of Hurricane Irene in 2011. The 2013 EA identified four alternatives for the segment at issue: (1) the so-called Jug-Handle Bridge, a bridge extending out into the Pamlico Sound; (2) an easement bridge on the existing NC-12 location; (3) beach nourishment; and (4) an easement bridge combined with beach nourishment. The Merger Team did not study the beach nourishment alternatives in depth in the 2013 EA because, at a 2011 meeting, it had already determined not to pursue them after experts reported on a "high erosion rate and a lack of sand supply."

Concurrently, environmental groups Defenders of Wildlife and the National Wildlife Refuge Association (collectively the Environmental Groups) brought suit in federal court to challenge the agencies' NEPA determinations with respect to a different segment of NC-12 in the Outer Banks -- the Bonner Bridge, which connects Bodie Island and Hatteras Island to the north of Rodanthe. *See Defs. of Wildlife v. N.C. Dep't of Transp*., 762 F.3d 374 (4th Cir. 2014). The Environmental Groups and the agencies eventually reached an agreement in 2015 (the Settlement). The Settlement required NCDOT to identify the Jug-Handle Bridge as its preferred alternative for the segment of NC-12 at issue in this case. It also required NCDOT to seek Merger Team concurrence that the Jug-Handle Bridge was the Least Environmental Damaging Practicable Alternative (LEDPA) (the "LEDPA") pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344, among other requirements. *See* 40 C.F.R. § 230.10 (setting out the LEDPA requirement). In doing so, it stated that nothing in the Settlement "requires or should be interpreted to predetermine the choice" of the Jug-Handle Bridge as the final selected alternative. In exchange, the Environmental Groups dismissed the Bonner Bridge suit and agreed not to challenge the agencies in court if the Jug-Handle Bridge was determined to be the LEDPA and was ultimately selected in the ROD for this project. In its complaint, SOS alleged that the agencies' approval of the Jug-Handle Bridge violated NEPA because that decision was predetermined by the Settlement. The District Court granted summary judgment for the Agencies (and denied SOS' motion) and this appeal followed.

Decision: The Fourth Circuit disagreed with SOS's arguments that the agencies' environmental analyses violated NEPA because: (1) the agencies failed to prepare an SEIS with regards to the Jug-Handle Bridge

and beach nourishment alternatives before issuing the 2016 ROD; (2) the agencies failed to adequately consider the impacts of construction; and (3) the Settlement impermissibly predetermined the agencies' choice of the Jug-Handle Bridge.

SOS contended that a SEIS was necessary: (1) to evaluate the environmental effects of the Jug-Handle Bridge alternative because it was different from options that had previously been evaluated; and (2) to reconsider alternatives that involved beach nourishment pursuant to new information about sand availability and beach erosion rates. SOS argued that the final alignment of the Jug-Handle Bridge alternative (that is, its path across the Pamlico Sound and its connection points with the shore) was significantly different from previously evaluated alternatives. Specifically, SOS contended that the bridge's alignment changed significantly because the alternative evaluated in the 2008 EIS was "amorphously defined" and because the alternative evaluated in the 2010 EA (to which the 2013 EA, 2016 EA, and 2016 ROD refer) was "not comparable" to the Jug-Handle Bridge.

First, the Fourth Circuit opined that the agencies took a hard look at changes in the bridge's alignment in the 2016 EA. The 2016 EA describes the similarities and differences between the Jug-Handle Bridge as proposed in 2016 and the versions evaluated in the 2013 EA, the 2010 EA, and the 2008 EIS. For instance, it explained that the agencies decided to shift the alignment of the bridge to avoid areas of "dense submerged aquatic vegetation" that fell in the path of previous versions of the bridge. The 2016 EA also explained that the Jug-Handle Bridge's alignment reduces effects on the community as compared with previous versions because it requires a narrower right-of-way. Because the agencies went into detail in their comparison between the Jug-Handle Bridge and previous versions of the bridge, their coverage satisfies the hard look requirement.

Second, because the agencies took the requisite hard look and neither their environmental analyses nor SOS identified any particular differences that would merit a SEIS, their decision not to prepare an SEIS was not arbitrary or capricious. *See Hughes River Watershed Conserv. v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). An SEIS is only required when changes to a project present a "seriously different picture of the environmental impact." *Id*. The agencies explained how the Jug-Handle Bridge was different from previous versions of the bridge, and their explanations do not implicate any significant environmental concerns.

SOS then contended that the agencies failed to adequately reconsider beach nourishment after new erosion projections were released and after a 2014 emergency beach nourishment project in the area successfully repaired damage from Hurricane Sandy. According to SOS, this new information showed that coastal conditions had changed such that erosion would no longer threaten beach nourishment and that adequate sand was in fact available to complete the project.

The court found the agencies took the requisite hard look at these new circumstances in the 2016 EA. The 2016 EA discusses the 2014 emergency beach nourishment project in detail and considers updated information about coastal conditions in the area. Specifically, it noted that the 2014 emergency beach nourishment project was "essentially one round of nourishment in one part of [NC-12]." SOS cited improved erosion rates and an increased supply of sand as new factors that the agencies should have considered when deciding whether to prepare an SEIS. The court discussed that erosion and sand supply were not the agencies' only reasons for initially rejecting beach nourishment in the 2008 EIS. The agencies cited independent concerns such as inadequate protection against future breaches, risks of overwash, and incompatibility with the mission of a neighboring wildlife refuge. The Fourth Circuit held it was not arbitrary or capricious for the agencies to decline to reconsider beach nourishment alternatives in an SEIS when the new information proffered by SOS did not implicate all of the agencies' independently adequate reasons for initially rejecting beach nourishment.

SOS contended that the agencies' environmental analyses violate NEPA because they did not adequately consider the environmental effects of construction in the Rodanthe area. Specifically, SOS argued that the effects of construction traffic and haul roads were not adequately addressed in the 2016 EA and that any discussion of these issues in the 2008 EIS was irrelevant because that document focused on a larger area. The Fourth Circuit discussed that the agencies adequately considered the effects of construction traffic as a result of the Jug-Handle Bridge in the 2016 ROD.

Finally, SOS contended that the agencies violated NEPA because their choice of the Jug-Handle Bridge did not follow from their NEPA analysis but, rather, was a predetermined result of the Settlement. Under NEPA, agencies that have yet to issue a final decision may not "commit resources prejudicing selection of alternatives," 40 C.F.R. § 1502.2(f), nor may they take any action that would "[l]imit the choice of reasonable alternatives," 40 C.F.R. § 1506.1(a). An EIS based upon a predetermined choice that a certain alternative will be selected would violate these principles because it would not allow the agency to fully consider all alternatives.

The Fourth Circuit held that the agencies' choice of the Jug-Handle Bridge was not impermissibly predetermined. It considered the agencies' objective environmental analyses, the language of the Settlement, and the role of documents generated during negotiation of the Settlement. "[T]he evidence we look to in determining whether [predetermination] has taken place consists of the environmental analysis itself." *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 199 (4th Cir. 2005). Following *Nat'l Audobon Soc'y*, the Fourth Circuit focused on whether the agencies' objective environmental analyses demonstrated evidence of predetermination. The court noted the agencies changed their preferred alternative from the easement bridge to the Jug-Handle Bridge following the Settlement. "But that change alone [did] not mean that the agencies' choice was predetermined, particularly where members of the Merger Team had expressed concerns about the easement bridge as far back as 2013. And when we look to the agencies' environmental analyses here, those analyses satisfied NEPA's requirements."

SOS cited to cases from the Ninth and Tenth Circuits to contend that courts have found predetermination based on contractual commitments made by an agency before the NEPA process was complete. *See Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (holding that a contract requiring a consultant to recommend that a project had no significant environmental impact before actually preparing an EA violated NEPA); *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000) (regarding a contract requiring an agency to make a proposal for a specific alternative before preparing an EA). The Fourth Circuit distinguished the cases because they involved contracts that agencies entered into before conducting any environmental analysis at all; in contrast, the Settlement here, which the agencies and the Environmental Groups entered into in 2015, was preceded by a number of environmental analyses, including the 2008 EIS, the 2010 EA, and the 2013 EA. And when the court examined each of these environmental analyses, it found no evidence of predetermination warranting reversal.

The Settlement only required NCDOT to identify the Jug-Handle Bridge as its preferred alternative and to seek Merger Team concurrence that the Jug-Handle Bridge was the LEDPA. These conditions did not require the agencies to select the Jug-Handle Bridge as the final approved alternative for this project. The court stated it was possible that the agencies' environmental analyses would demonstrate that the Jug-Handle Bridge was not the LEDPA. Additionally, the agencies' preferences alone could not bind the entire Merger Team, which was ultimately responsible for approving the final alternative, because the parties to the Settlement comprise only three of the ten state and federal agencies represented on the Merger Team. "This does not constitute predetermination."

SOS claimed external documents generated during the negotiation of the Settlement as evidence of predetermination, and were not included in the record. The court found the record as presented by the agencies reveals their reasoning, and concurred the district court found no evidence that the agencies acted in bad faith. The district court also determined that there was no evidence that the agencies actually reviewed the documents put forth by SOS as part of their decision to approve the Jug-Handle Bridge. In sum, the Fourth Circuit opined that the agencies did not violate NEPA when they approved the Jug-Handle Bridge because they were not required to prepare a SEIS, they adequately evaluated the effects of construction traffic, and they did not rely on a predetermined choice among alternatives

Indian River County, Florida v. U.S. Dep't of Transp., 945 F.3d 515 (D.C. Cir. 2019)
Agency prevailed.

Issue(s): Impact assessment (public safety and noise)

Facts: County challenged Department of Transportation's Federal Railway Agency's (FRA) approval of passenger railway service connecting Orlando and Miami, Florida, known as the All Aboard Florida (AAF) Intercity Passenger Rail Project (the Project).

Decision: The County contended that the EIS prepared for the Project does not comply with the requirements of NEPA. Appellant argued that the EIS did not take a "hard look" at the effects of the Project on public safety; that it did not adequately disclose and mitigate safety risks to trespassers cutting across the tracks at locations other than at legal grade crossings; and that it did not sufficiently analyze the noise impacts caused by both the higher speeds of the freight trains on the improved tracks and the train horns at grade crossings.

The court found the record did not support the claims. The district court's decision showed, the environmental review process conducted by FRA was thorough and it complied fully with the commands of NEPA. The district court aptly noted that "[a]gency action is rarely perfect. But NEPA does not demand perfection. Instead, it requires that an agency take a 'hard look' at the reasonably foreseeable impacts of a proposed major federal action. The extensive Final EIS, appendices, common responses, and Record of Decision together demonstrate that FRA met that requirement here." *Indian River Cty. v. Dep't of Transp.,* 348 F. Supp. 3d 17, 61-62 (D.D.C. 2018).

FRA prepared an EIS of more than 600 pages, examining the environmental impacts of the Project. This process also included multiple public meetings and opportunities for public comment. *Id*. at 2559-74. In September 2014, FRA released a draft EIS and received more than 15,400 comments from a wide range of stakeholders. The public commentary was then considered by FRA when it prepared the Final EIS. In early August 2015, the Final EIS was released.

The EIS examined the Project's impacts on land use, transportation, navigation, air quality, noise and vibration, farmland soils, hazardous material disposal, coastal zone management, climate change, water resources, wild and scenic rivers, wetlands, floodplains, wildlife habitat, threatened and endangered species, social and economic effects (including impacts on low-income communities), public health and safety, parks, historic properties, as well as the Project's cumulative impacts when combined with other past, present, or reasonably foreseeable future actions. The EIS set forth a host of mitigation measures to ameliorate those negative impacts.

The EIS included a thorough discussion of pedestrian safety, at both formal and informal crossings, examining mitigation of risks to pedestrians, including those using informal crossings. With respect to formal crossings, the EIS relied on a survey of every grade crossing on the rail corridor. This survey was conducted by FRA's Office of Safety, Highway Rail Crossing and Trespasser Program Division, and it included an accompanying analysis summarized in engineering reports. The EIS acknowledged that informal crossings do occur and that this form of trespassing was "an epidemic along this corridor." The EIS recognized that these informal crossings are illegal and unsafe, and that the arrival of AAF's passenger rail service could increase the frequency of accidents involving trains and pedestrians.

To mitigate these risks, the EIS described a two-pronged approach: (1) AAF must discourage the use of informal crossings by installing fencing, and (2) AAF must encourage the use of formal crossings by adding sidewalks. This mitigation approach included a public information campaign, which will be conducted in coordination with the rail-safety organization, Operation Lifesaver. The EIS noted that the rail corridor is already fenced in at certain locations, and that AAF will conduct field surveys along the right-of-way to determine where additional fencing and other preventative measures are needed to prevent trespassing. The EIS provided that the "corridor will be fenced where an FRA hazard analysis review determines that fencing is required for safety; this will be in populated areas where restricting access to the rail corridor is necessary for safety." "Fencing on the N-S Corridor would be upgraded based on existing public access locations and the potential for conflicts with the increased train frequency."

The D.C. Circuit found that FRA took a "hard look" at noise impacts from the Project. FRA noted that, if left unmitigated, these noises (principally from the warning horns that the trains at public highway-rail grade crossings) could cause adverse impacts. To mitigate these impacts, AAF committed to installing pole-

mounted horns at 117 intersections in the Phase II corridor, including 23 in Indian River County. To further reduce horn noise, AAF is cooperating with local governments that wish to establish "quiet zones" that allow both passenger and freight trains to pass through grade crossings without sounding horns.

The Eleventh Circuit endorsed the district court's opinion, which it stated contained an impressively thorough and thoughtful examination of the record. "The bottom line is that the Final EIS for the AAF Project clearly complies with the requirements of NEPA."

Wise v. Dep't of Transp., 943 F.3d 1161 (8th Cir. 2019)
Agency prevailed.

Issue(s): Categorical Exclusion, Extraordinary Circumstances

Facts: George Wise and others (Wise) filed suit against the U.S. Department of Transportation, the Federal Highway Administration (FHwA), and the Arkansas Department of Transportation (Arkansas DOT) (collectively, the defendants), alleging violations of the NEPA involving a project that proposed widening Interstate Highway 630 from six to eight lanes from Baptist Hospital to University Avenue (approximately 2.5 miles) within the City of Little Rock, Arkansas. The district court denied Wise's request for injunctive relief.

Decision: In October 2016, the defendants reported that the I-630 project qualified for a CatEx. The CatEx report outlined the improvements proposed along I-630, including increasing the travel lanes from six to eight and replacing all bridges within the project's limits. The report noted that the "[e]xisting right of way width varies, ranging from 220 to 400 feet" and explained that the project did not require any "additional permanent right of way." Arkansas DOT already owned the land that would be used for the I-630 project. Wise contended that the I-630 project required FHwA to complete an EA or EIS, because the project did not take place within the "existing operational right-of-way" and thus did not satisfy the CatEx set forth in 23 C.F.R. § 771.177(c)(22). According to Wise, the I-630 project's additional travel lanes would require expanded clear zones, which would necessarily be built in areas outside the existing operational right-of-way.

Wise argued that the district court rested its decision on the erroneous legal conclusion that "existing operational right-of-way" meant the entire right-of-way owned by Arkansas DOT. Wise contended that the term is limited to lanes of travel, shoulders, and clear zones. This limitation conflicts with the definition provided in the regulation, which states that an "[e]xisting operational right-of-way refers to right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose." *See* 23 C.F.R. § 771.117(c)(22). The regulation explained that an existing operational right-of-way includes features like mitigation areas and landscaping. *Id*. (providing a non-exhaustive list of "features associated with the physical footprint of the transportation facility" and "areas maintained for transportation purposes"). Wise claimed that its reading of the regulation is supported by the explanatory text accompanying the notice of the final rule, which states, "a project within the operational right-of-way that requires the creation of new clear zones or extension of clear zone areas beyond what already exists would not qualify" for a CatEx. *Environmental Impact & Related Procedures*, 79 Fed. Reg. 2107-01, 2113 (Jan. 13, 2014). To interpret this text consistently with the regulation, the court concluded that the explanatory text does not apply when the new or extended clear zones are built within the "existing operational right-of-way," as defined by the regulation. The Eight Circuit held that the district court properly rejected Wise's proposed limitation on the term's definition.

Applying the plain language of the regulation, the district court concluded that Wise did not present evidence to establish that the area required for the I-630 project required expansion beyond the existing operational right-of-way. Finally, Wise argued that the I-630 project does not qualify for a CatEx because it will have significant noise and air-quality impact and it involves unusual circumstances. *See* 23 C.F.R. § 771.117(a)-(b). Having failed to show that his claim was likely to succeed on the merits, the Eight Circuit held that Wise did not establish that the district court abused its discretion in denying his request for injunctive relief.

City of Burien v. Elwell, No. 18-71705, 790 Fed. Appx. 857, 2019 WL 6358039 (9th Cir. Nov. 27, 2019) (not for publication)
Agency did not prevail.

Issue(s): Categorical Exclusion, Extraordinary Circumstances.

Facts: City of Burien, a town west of Seattle-Tacoma (Sea-Tac) Airport, filed a petition challenging the FAA's decision to approve a procedure for turning southbound turboprops to the west in certain wind conditions (the "Procedure"). The procedure automates a formerly manual procedure of assigning heading to turboprops and has the effect of concentrating low-flying planes over Burien after takeoff.

The FAA applied a CatEx for "modification to currently approved procedure below 3,000 feet [AGL] that does not significantly increase noise over sensitive areas," listed in FAA Order 1050.1F. The Order explains that extraordinary circumstances exist such that the application of a CatEx is inappropriate if (1) one of the enumerated extraordinary circumstances exist and (2) the action may have a significant impact. The extraordinary circumstance at issue is an action likely to "cumulatively create a significant impact on the environment."

Decision: The Ninth Circuit found that the FAA acted arbitrarily and capriciously by failing to consider all reasonably foreseeable future actions at Sea-Tac in its analysis of whether a cumulative impact extraordinary circumstance existed. The FAA prepared a 128 page document applying the CatEx and considered a number of past, present, and reasonably foreseeable future actions but did not address any cumulative impacts stemming from the expansion projects proposed in the Sea-Tac Sustainable Airport Market Plan (SAMP), published only weeks after the Procedure was approved in April 2018.

The Ninth Circuit focused on the FAA's 1050.1F Desk Reference that guides its interpretation of relevant CatExs and it expressly states "[a]n action may be reasonably foreseeable even in the absence of a specific proposal." The Desk Reference further discussed that the existence of planning documents (like the SAMP), even if short of an official proposal, provide important evidence for determining whether a future project is reasonably foreseeable. In such circumstances, even if the FAA concludes that the planned projects are "improbable or remote," the Desk Reference specifically recommends that such actions "be mentioned in the NEPA document with an indication that they are not reasonably foreseeable."

"The bottom line is that, even though the FAA's analysis rambles on for 128 pages, that cannot excuse its failure to even address whether a "Master Plan" for a major expansion of the airport -- a plan that the FAA staff had commissioned and that was only weeks away from being published -- encompassed a "reasonably foreseeable future action" that should be considered within the FAA's cumulative impact analysis.'" The Ninth Circuit remanded this case to the FAA with instructions to consider the potential cumulative impact of all relevant reasonably foreseeable future actions -- including those which may exist in the SAMP documents -- as part of its extraordinary circumstances analysis pursuant to 40 C.F.R. § 1508.7.

Dissent. The case involved a healthy dissent by Judge Ikuta, who began with "[i]t's never enough, no it's never enough, No matter what I say" are the lyrics to a song by an American heavy metal band [Five Finger Death Punch, Never Enough], but it could be the anthem of a federal agency attempting to comply with the [NEPA]."

The dissent focused on Paragraph 5-2 of the FAA's Order 1050.1F, which stated that an extraordinary circumstance exists if a proposed action involves both circumstances: (1) the proposed action must involve any of a list of 12 circumstances, and (2) the proposed action "has the potential for significant impacts." The dissent supported the discretion of the FAA and its conclusion. The dissent continued its criticism, discussing "the City's challenge to the FAA's compliance is typical of this sort of environmental litigation." The City argued the FAA failed to do enough in analyzing the effects of the flight modification. The FAA thoroughly examined the potential impacts of the flight plan modification including providing extensive studies of noise impacts. The City did not provide any evidence to the contrary, and it argued that the FAA made a procedural error by failing to consider the cumulative impact of the flight modification together with the SAMP.

The dissent analyzed that the SAMP was a plan to make a plan. It did not identify any project at all and it merely "described the goals and objectives established by the Port of Seattle Commission to guide the SAMP, the SAMP process, and how the SAMP's goals and objectives will guide preparation of a recommended development plan. At most, these projects were "merely contemplated." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 762 (9th Cir. 2014). The Port did not issue any NOI for any projects described in the SAMP, nor did the SAMP suggest the Port was close to doing so. An agency need not provide documentation of every piece of available information. "It would be speculative and premature for the FAA to consider the cumulative impacts of a flight modification along with these consultant planning ideas*." See Kleppe v. Sierra Club*, 427 U.S. 390, 406, 96 S.Ct. 2718 (1976).

The dissent criticized the reliance on FAA's 1050.1F Desk Reference (July 2015), which itself stated it "may not be cited as the source of requirements under laws, regulations, Executive Orders, DOT or FAA directives, or other authorities." Such an internal guidance document does not impose judicially enforceable duties on the FAA. Alternatively, the dissent weighed, even if it did, it was administrative error. *Ground Zero Ctr for Non-Violent Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1252 (9th Cir. 2017).

Judge Ikuta then discussed that the City did not establish the second prong because it did not establish the flight modification "may have a significant impact" on the human environment. The City suggested that the flight plan modification in conjunction with the speculative SAMP, would increase demand at the airport and have a growth-inducing effect. The dissent disagreed that changes in flight patterns do not have a significant growth-inducing impact. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124 (9th Cir. 2011). Disagreeing with the dissent, the majority distinguished *Barnes* based on the fact that the focus was on indirect effects under 40 C.F.R. 1508.8(b) rather than cumulative impacts at 40 C.F.R. 1508.7. Accordingly, the dissent found the FAA's flight plan modification is deemed to increase demand only marginally, and therefore was not a "significant impact" for purposes of the second prong of the definition for "extraordinary circumstances."

The FAA followed its Order and appropriately determined that the flight plan modification was covered by a CatEx, stating "[t]he City has failed to provide any evidence indicating that the FAA erred in not expressly analyzing the SAMP, or that the flight plan modification has any significant impact on the human environment. In fact, neither the City nor the majority can identify any reason that the proposed flight plan modification does not fit within the FAA's categorical exclusion. In holding otherwise, the majority not only fails to give proper deference to the FAA, but also provides encouragement to the City's litigation strategy of "never enough.""

INDEPENDENT AGENCIES

Birckhead v. Federal Energy Regulatory Comm'n, 925 F.3d 510 (D.C. Cir. 2019)
Agency prevailed.

Issue: Alternatives, Indirect Impacts

Facts: Residents and business owners (Concerned Citizens) petitioned for review of FERC's decision to authorize the construction and operation of a new natural gas compression facility in Davidson County, Tennessee; petitioners argued that FERC violated NEPA by failing to adequately assess alternatives and by failing to consider the environmental effects of increased gas production and consumption related to the project.

In early 2015, Tennessee Gas Pipeline Co. applied for a certificate of public convenience and necessity for the Broad Run Expansion Project; designed to enhance the company's capacity to transport pressurized natural gas through the interstate pipeline network to markets in the SE United States, the Project called for construction of several gas compression facilities in Kentucky, Tennessee, and West Virginia. The most

controversial of these facilities was Compressor Station 563, which Tennessee Gas proposed to build near petitioners' Nashville homes and businesses. FERC completed an EA of the Project in March 2016 and issued a certificate order later that year.

Decision: The D.C. Circuit noted its role is not to " 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor," but instead "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97–98, 103 S.Ct. 2246, (1983).

Concerned Citizens first contended that the Commission violated NEPA by selecting the proposed site for Compressor Station 563 over an allegedly environmentally superior alternative location. The D.C. Circuit disagreed, holding that the EA reflected that, in addition to Tennessee Gas's proposed site, FERC considered twelve alternatives—including Concerned Citizens' favored site—and evaluated each with respect to eighteen different environmental factors. Acknowledging that several factors weighed in favor of Concerned Citizens' site, the FERC pointed out in the certificate order that other legitimate environmental factors weighed in favor of the proposed site. FERC explained that "[b]ased on [an] overall assessment of the various factors, which do not necessarily carry equal weight, ... [Concerned Citizens'] alternative site ... does not have a significant advantage over the proposed site."

The D.C. Circuit rejected Concerned Citizens' related claim that FERC violated NEPA by failing to consider the possibility that locating Compressor Station 563 at an alternative site more centrally located between two existing stations would enable Tennessee Gas to reduce emissions from the facility by forty percent. FERC explained in its rehearing order that any resulting "improvement in air quality impacts" would "not be significant," because the Project as a whole would "not have a significant impact on regional air quality." The D.C. Circuit found this analysis in the record adequate; the D.C. Circuit also rejected the petitioners' argument that FERC was avoiding the use of eminent domain in selecting alternatives and found the selection of the proposed site reasonable.
Concerned Citizens contended that FERC failed to adequately consider the option of building a smaller compressor station at the proposed site. FERC addressed that possibility both in the certificate order and the rehearing order, explaining that its engineering staff had reviewed the flow diagrams and hydraulic models submitted by Tennessee Gas and concluded that "Compressor Station 563[ ] [was] properly designed to provide the additional 200,000 Dth/d of incremental capacity proposed for the project." The court deferred to the informed discretion of FERC's conclusions. *See, e.g., Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) ("Where an issue requires a high level of technical expertise, we defer to the informed discretion of the [FERC].").

Concerned Citizens claimed that FERC failed to consider the impacts of upstream and downstream gas production (indirect effects). FERC declined to consider the impacts, stating they did not qualify as indirect effects. The D.C. Circuit, heeding a famous and sensible instruction, we "[b]egin at the beginning" of the pipeline, with the challenge to FERC's failure to consider the impacts of upstream gas production. Lewis Carroll, *Alice's Adventures in Wonderland* 142 (Edmund R. Brown ed., International Pocket Library 1936) (1865).

FERC stated that unless the record demonstrated that the proposed project represents the only way to get additional gas "from a specified production area" into the interstate pipeline system, no such "reasonably close causal relationship" existed. And even assuming causation, FERC stated the environmental effects of any upstream gas production induced by this project would not be reasonably foreseeable because the source area for the gas to be transported is ill-defined and "the number or location of any additional wells are matters of speculation." FERC claimed that asking for such information. "would be an exercise in futility," because the applicants themselves are unlikely to have it.

However, the court found Concerned Citizens did not provide any record evidence to help FERC predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project. Concerned Citizens identified no record evidence that would help FERC predict the number and location of any additional wells that would be drilled as a result of production demand created

by the Project. The D.C. Circuit held in the past (repeatedly) that a project applicant may demonstrate market need "by presenting evidence of preconstruction contracts for gas transportation service." *Sierra Club*, 867 F.3d 1357, 1379 (D.C. Cir. 2017). But just because FERC is satisfied there is a market need for a given project does not necessarily mean that a shipper/producer "would not have the ability to bring the gas to market" via another channel were the Commission to deny a certificate for the project. The D.C. Circuit concluded that FERC did not act arbitrarily or capriciously in declining to consider the environmental impacts of upstream gas production.

In considering whether FERC reasonably declined to consider greenhouse-gas emissions and other environmental impacts related to downstream gas consumption, the court reviewed *Sierra* Club, where the D.C. Circuit held that downstream greenhouse-gas emissions resulting from the combustion of natural gas were a reasonably foreseeable indirect effect of a pipeline project designed to transport gas to certain power plants in Florida. *See Sierra Club*, 867 F.3d at 1371–72. Based on this case, Concerned Citizens asserted that combustion-related emissions are necessarily a reasonably foreseeable indirect effect of a pipeline project that "must be considered and quantified by the Commission under NEPA."

"Establishing a bright-line rule that [it] must evaluate downstream . . . greenhouse gas emissions in all circumstances," FERC claimed it was impossible to assess whether the Project will result in increased emissions overall or offset emissions by reducing demand for other (perhaps dirtier) fuel sources. The D.C. Circuit disagreed with FERC's assertion that that downstream emissions are not reasonably foreseeable simply because the gas transported by the Project may displace existing natural gas supplies or higher-emitting fuels. The D.C. Circuit reiterated *Sierra Club*, if downstream greenhouse-gas emissions otherwise qualify as an indirect effect, the mere possibility that a project's overall emissions calculation will be favorable because of an "offset elsewhere" does not "excuse" the FERC "from making emissions estimates" in the first place. 867 F.3d at 1374–75. The D.C. Circuit stated that Concerned Citizens went too far in asserting that emissions from downstream gas combustion are, as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project. *See Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1122 (D.C. Cir. 1971) ("NEPA compels a case-by-case examination ... of discrete factors."). Here, the D.C. Circuit noted that *Sierra Club* fell short of resolving this case in favor of either party.

The D.C. Circuit noted "NEPA analysis necessarily involves some 'reasonable forecasting,' and . . . agencies may sometimes need to make educated assumptions about an uncertain future." *Sierra Club*, 867 F.3d at 1374. "It should go without saying that NEPA also requires the FERC to at least attempt to obtain the information necessary to fulfill its statutory responsibilities." *Cf. Delaware Riverkeeper Network*, 753 F.3d at 1310. In this case, the FERC made no effort to obtain the missing information from Tennessee Gas. Although FERC asserted that the project applicant itself is unlikely to possess the needed information, the court was skeptical of any suggestion that a project applicant would be unwilling or unable to obtain it if the Commission were to ask for such data as part of the certificate application process.

However, despite the D.C. Circuit's misgiving of the FERC's "less-than-dogged efforts" to obtain the information it says it would need to determine whether downstream greenhouse-gas emissions qualify as a reasonably foreseeable indirect effect of the Project, Concerned Citizens failed to raise this record-development issue in the proceedings before the FERC. Thus, the D.C. Circuit had no jurisdiction to hear it. *See* 15 U.S.C. § 717r(b) ("No objection . . . shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.").

City of Oberlin, Ohio v. Federal Energy Regulatory Comm'n, 937 F.3d 599 (D.C. Cir. 2019)
Agency prevailed on the NEPA claims.

Issues: Impacts (Safety)

Facts: City of Oberlin, Ohio, and the Coalition to Reroute Nexus, an organization of landowners, (the Petitioners), petitioned for the review of FERC's authorizing the Nexus Gas Transmission, LLC (Nexus) to construct and operate interstate natural gas pipeline.

On November 20, 2015, Nexus sought from the FERC authorization to build and operate approximately 257 miles of a new natural gas pipeline to transport 1.5 million dekatherms per day of Appalachian Basin shale gas to consuming markets in northern Ohio, southeastern Michigan, and Ontario, Canada. The pipeline extends from Hanover Township in Columbiana County, Ohio, to Ypsilanti Township in Washtenaw County, Michigan. On August 25, 2017, the Commission issued an order granting Nexus a Section 7 certificate of public convenience and necessity, authorizing the pipelines.

Decision: First, Petitioners argued that FERC impermissibly delegated its obligations under NEPA to independently review the pipeline's potential adverse impacts on public safety. Specifically, Petitioners contend, within its EIS, FERC over relied on the applicant's commitment to comply with safety standards promulgated by the Pipeline and Hazardous Materials Safety Administration, a division of the DOT.

The court disagreed and reasoned that the DOT has exclusive authority to establish safety standards for natural gas pipelines, *see* Memorandum of Understanding Between DOT and FERC Regarding Natural Gas Transportation Facilities. The court has have held that it is reasonable for FERC to reference such standards as a component of its review of a pipeline's safety risks, *see EarthReports, Inc. v. FERC*, 828 F.3d 949, 958 (D.C. Cir. 2016), which is exactly what FERC did. In a thorough analysis, FERC explained in detail how the applicant's compliance with DOT standards would address the specific safety concerns that commenters raised. FERC enumerated specific actions the applicant committed to take to account for safety risks that DOT regulations might not fully address. Accordingly, the D.C. Circuit held that FERC fulfilled its duty to independently consider the pipeline's safety risks and, in so doing, FERC considered the DOT regulations in an appropriate fashion.

Second, Petitioners contended that FERC arbitrarily failed to consider moving the pipeline away from residences and buildings. The D.C. Circuit dismissed that argument, stating that although FERC may not have considered the pipeline's proximity to buildings and residences in precisely the way Petitioners would prefer, Petitioners' argument that the FERC arbitrarily failed to consider this issue was unfounded.

Appalachian Voices v. Federal Energy Regulatory Comm'n, No. 17-1271, Consolidated with 18-1002, 18-1175, 18-1177, 18-1186, 18-1216, 18-1223, 2019 WL 847199 (D. C. Cir. Feb. 19, 2019) (not for publication)
Agency prevailed.

Issues: Impact Assessment (Indirect Effects)

Facts: Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, and others (the Petitioners) challenged FERC's issuance of a certificate and EA authorizing Mountain Valley Pipeline, LLC (Mountain Valley) to construct and operate a new gas pipeline. The proposed pipeline extended 300 miles from Wetzel County, West Virginia, into Pittsylvania County, Virginia, and required the construction of three new compressor stations; the pipeline could transport up to two million dekatherms (approximately two billion cubic feet) of natural gas per day.

Decision: Petitioners contended that FERC failed to adequately consider the climate change impacts of downstream greenhouse gas emissions resulting from combustion of gas transported by the new pipeline. Petitioners claim that FERC erred in concluding that such emissions are not reasonably foreseeable indirect effects of the Project. The D.C. Circuit focused on FERC's estimate of the upper bound of emissions resulting from end-use combustion; FERC gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. The D.C. Circuit found that is required for NEPA purposes. *See Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) ("FERC must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so."). In the absence of any explanation as to how FERC should have considered adverse impacts from downstream greenhouse gas emissions in its public interest determination under the Natural Gas Act using something other than the Social Cost of Carbon, the D.C. Circuit found no basis for deciding that FERC's

treatment of the issue in the Certificate Order was inadequate, unreasonable, or otherwise contrary to NEPA.

The D.C. Circuit rejected the Petitioners' remaining NEPA challenges; the court concluded that FERC adequately considered and disclosed erosion and sedimentation impacts on aquatic resources, impacts on groundwater in karst terrain, and impacts on Peters Mountain residents' cultural attachment to the land, and appropriately evaluated reasonable alternatives to the Project.

National Association of Environmental Professionals

Be Connected

NAEP Membership Benefits

Who We Are:

- We are a multidisciplinary, professional environmental association.
- We are dedicated to the promotion of ethical practices, technical competency and professional standards in the environmental fields.

What We Stand For:

- We stand for Integrity in the environmental professions.
- Our foundation is our Code of Ethics and Standards of Practice.
- As environmental professionals, we serve the public, our employers, and our clients with integrity, fairness and technical objectivity.

What We Do:

- We work for a diversity of employers, including government, industry, consulting, academia, and the private sector.
- We work in varied disciplines: air, water, noise, waste remediation, ecological resources, transportation, NEPA, sustainability, and education.

How You Benefit:

- Annual Conference brings together nation's top environmental professionals
- Access to Best Practices through our national committees
- Professional networking opportunities and activities through state and regional chapters
- On-line career center tailored to the environmental professions
- Bi-monthly *Environmental Practice Bulletin* featuring peer-reviewed articles, research findings, perspectives and chapter activities
- Bi-weekly National Desk newsletter featuring reporting from the publisher of GreenWire and ClimateWire
- Educational webinars on diverse topics such as new regulations and guidance, review of recent case law, and other emerging issues
- Member enjoy discounts on conference, regional and local programs, and members-only pages on our website www.naep.org

How We Are Unique:

- Interdisciplinary environmental practitioners
- Strong professional conduct through our Code of Ethics
- Achievement recognition through our Environmental Excellence Awards

Affiliated Chapters:

- Alaska
- Arizona
- California
- Florida
- Georgia
- Hawaii
- Idaho
- Illinois
- Mid-Atlantic
- Minnesota
- North Carolina
- North Texas
- Northwest
- Pennsylvania
- South Texas
- Tennessee
- Texas

JOIN NAEP NOW!! To join NAEP and one of our affiliated chapter, go to www.naep.org