National Association of Environmental Professionals

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2017 Annual NEPA Report

of the National Environmental Policy Act (NEPA) Practice

Submitted to

NAEP Board of Directors

Compiled by

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November 2018

This report reviews NEPA document submittals and statistics, NEPA legislation, and NEPA litigation for calendar year 2017. 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.

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Acronyms and Abbreviations

AFRH	Armed Forces Retirement Home
APHIS	Animal and Plant Health Inspection Service
ARS	Agricultural Research Service
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
BOP	Bureau of Prisons
BOR	Bureau of Reclamation
BPA	Bonneville Power Administration
CEQ	Council on Environmental Quality
DC	Denali Commission
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of Interior
DOS	Department of State
DOT	Department of Transportation
DVA	Department of Veterans Affairs
EA	Environmental assessment
EC	Environmental Concerns
EIS	Environmental impact statement
EO	Environmental Objections
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
H.R.	House Resolution
LO	Lack of Objection
NAEP	National Association of Environmental Professionals
NCPC	National Capital Planning Commission
NEPA	National Environmental Policy Act
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
NOI	Notice of Intent
NMFS	National Marine Fisheries Service
NPS	National Park Service
NRC	Nuclear Regulatory Commission
NSF	National Science Foundation
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
USFS	United States Forest Service
USMC	United States Marine Corps
USN	United States Navy

1. Introduction

Marie Campbell
NAEP President

The 2017 NEPA Annual Report provides an update on actions related to the National Environmental Policy Act (NEPA). The Report was prepared by the National Association of Environmental Professionals NEPA Practice Group, under the guidance of the Chair, Charles Nicholson, with contributions from James Gregory on EIS statistics, Piet and Carole DeWitt on EIS preparation times, and Pamela Hudson and Lucinda Low Schwartz on NEPA court rulings. Dr. Nicholson also summarized NEPA legislation introduced in 2017. NAEP is indebted to these senior NAEP members. Without their expertise and tireless efforts, this important annual report would not be available to NAEP members or as a courtesy to the Council on Environmental Quality (CEQ) and the federal NEPA liaisons.

While this report describes many important activities related to NEPA during 2017, it does not describe executive branch actions, most noticeably executive orders and agency responses to the executive orders. The most significant executive order addressing NEPA was Executive Order (EO) 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*. Enacted in late August 2017, this EO, among other things, established a "One Federal Decision" process for federal actions on infrastructure projects involving multiple federal agencies, and an accelerated timeline for completing EISs. Much of the effect of the EO on the environmental practice will be more readily apparent in 2018.

In 2017, the struggle to balance the need for environmental conservation and economic development continued throughout the world. In the *UN Environment Annual Report: Towards a Pollution-Free Environment*, United Nations Secretary General Antonio Guterres states, "…When the environment is compromised, lives are often endangered and people's opportunities for better standard of living are profoundly curtailed." In 2017, while the United States experienced a period of deregulation and efforts to "streamline," the United Nations noted in their report, "…Over 4,000 heads of state, ministers, business leaders, UN officials, civil society representatives, activists and celebrities came together for the third UN Environment Assembly… By the time the Assembly closed, delegates had passed 13 resolutions, 3 decisions and, for the first time, a ministerial declaration. UN Environment's #BeatPollution campaign presented to the Assembly nearly 2.5 million individual commitments to clean up the planet."[1] But these efforts have not come without a cost. In July 2017, Global Witness, a UK-based watchdog group, reported that 207 environmental activists were killed in 2017, with the highest numbers of fatalities occurring in Brazil, the Philippines, and Colombia.[2]

[1] United Nations, 2017. *UN Environment Annual Report: Towards a Pollution-Free Environment.* Available at: https://www.unenvironment.org/annualreport/2017/index.php?page=5&lang=en , Downloaded November 19, 2018.
[2] Global Witness, July 24, 2018. *At What Cost? Irresponsible Business and the murder of land and environmental defenders in 2017.* Available at: https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/

While Global Witness reported no environmental activists killed in the United States in 2017, the over 155,000 environmental scientists, specialists, and engineers in this country witnessed a culture shift away from balancing environmental and economic considerations toward prioritizing economic considerations over the environment.[3] An analysis published by the Center for Progressive Reform showed a pattern of delaying Federal regulations in 2017. The Harvard Law School's Environmental Regulation Rollback Tracker identified eight rules that were rolled back through executive branch actions in 2017 (Table 1-1).[4] Congress, under the Congressional Review Act, reversed additional environmental regulations in 2017, including, perhaps most significantly, the surface mining Stream Buffer Rule. Columbia Law School's Climate Tracker provides additional comparable data related to climate change.

Table 1-1. Environmental Rules Rolled Back in 2017.

Rule	Agency	Date
BLM Land Use Planning 2.0	BLM	10/07/2017
Coal Leasing Moratorium	DOI	5/09/2017
Regulatory Reform Initiatives	DOI	9/21/2017
Power Plant Startup, Shutdown, and Malfunction Rule	EPA	9/27/2017
Uranium Extraction Water Quality Standards	EPA, NRC	10/16/2017
Executive Order 13783 – Energy Development	Multiple	10/25/2017
Pacific Bycatch Limits for Whales, Dolphins, and Sea Turtles	NOAA, NMFS	7/17/2017
Disposable Plastic Water Battle Ban	NPS	10/13/2017

Throughout the inevitable turmoil and chaos that accompanies change, environmental professionals throughout the United States persevered in doing the work that is required to ensure compliance with federal, state, and local statutes and regulations. Practitioners are empowered by a response to the will of the people to protect the precious environmental resources that define the quality of life that is a quintessential characteristic of the American

[3] Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2016-17 Edition, Environmental Scientists and Specialists. Available at https://www.bls.gov/ooh/life-physical-and-social-science/environmental-scientists-and-specialists. . Downloaded June 11, 2017.
[4] Harvard Environmental Law Program, 2018. Regulatory Rollback Tracker. Available at: http://environment.law.harvard.edu/POLICY-INITIATIVE/REGULATORY-ROLLBACK-TRACKER/

experience. On behalf of NAEP, many thanks to the preparers of this report and for the work of our Nation's environmental professionals.

2. The NEPA Practice in 2017

Charles P. Nicholson[5]

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 eleventh annual report. The *2017 Annual 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 2017.

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, and projects such as this *Annual NEPA Report*. Highlights of 2017 activities include:

- Continued review of agency actions to comply with Title 41 of the FAST Act
- Discussion of Executive Orders addressing NEPA including E.O. 13766 – Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects , E.O. 13783 - Promoting Energy Independence and Economic Growth, E.O. 13807 – Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, and Department of Interior Secretarial Order 3355 – Streamlining NEPA Reviews and Implementing EO 13807
- Discussion of introduced legislation addressing NEPA
- Discussion of significant court rulings on NEPA cases

NEPA Practice has approximately 100 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.

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3. Just the Stats

James Gregory[6]

In 2017, Notices of Availability (NOAs) for 257 environmental impact statements (EISs) were published in the *Federal Register*[7]. Of the 257 published notices, 125 were draft EISs (including supplemental and revised draft EISs) and 116 were final EISs (including supplemental and revised final EISs); 14 were listed as "adoption" and two as "withdrawal." 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. The database contains both the EISs and EPA's comment letters on the EISs.

3.1 2017 Published EISs

Forty-two agencies published at least one EIS in 2017 and five agencies published at least ten EISs (Table 3-1). Similar to previous years, the U.S. Forest Service published the most documents with 61. The Army Corps of Engineers had the second highest number with 27, followed by the Federal Highway Administration with 15 and United States Air Force with an un usually high number of 10. The Bureau of Land Management and Federal Energy Regulatory Commission, typically among the top EIS producers, each published nine EISs. Four departments (Agriculture, Interior, Transportation, and Defense) are responsible for more the three-quarters of all EISs published in 2017. Figure 3-1 shows the number of EISs by Department, with the Departments responsible for publishing large numbers of EISs broken out separately (for purposes of presentation state-issued transportation EISs are included with Department of Transportation EISs).

Table 3-1. Draft and final EISs published in Federal Register in 2017 by agency.

Lead Agency	Number of EISs
Forest Service (USFS)	61
U.S. Army Corps of Engineers (USACE)	27
Federal Highway Administration (FHwA)	15
United States Air Force (USAF)	10
Bureau of Land Management (BLM)	9
Federal Energy Regulatory Commission (FERC)	9
National Park Service (NPS)	7
Bureau of Ocean Energy Management (BOEM)	7
National Oceanic and Atmospheric Administration (NOAA)	7

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[7] Notices of adoption and withdrawal of EISs are excluded from these statistics.

Lead Agency	Number of EISs
United States Navy (USN)	7
Bureau of Reclamation (BOR)	6
Federal Transit Administration (FTA)	6
Federal Railroad Administration (FRA)	6
Fish and Wildlife Service (FWS)	6
California Department of Transportation	5
Department of Commerce (DOC)	5
National Marine Fisheries Service (NMFS)	5
Tennessee Valley Authority (TVA)	5
Department of State (DOS)	4
Animal and Plant Health Inspection Service (APHIS)	3
Bonneville Power Administration (BPA)	3
Department of Housing and Urban Development (HUD)	3
Department of Transportation (DOT)	3
Bureau of Prisons (BOP)	2
Department of Energy (DOE)	2
Federal Emergency Management Agency (FEMA)	2
National Science Foundation (NSF)	2
Denali Commission (DC)	1
Agriculture Research Service (ARS)	1
Armed Forces Retirement Home (AFRH)	1
Bureau of Indian Affairs (BIA)	1
Department of Agriculture	1
Department of Veteran Affairs (DVA)	1
Federal Aviation Administration (FAA)	1
National Capital Planning Commission (NCPC)	1
National Security Agency (NSA)	1
Nuclear Regulatory Commission (NRC)	1
Rural Utilities Service (RUS)	1
United States Marine Corps (USMC)	1
Utah Department of Transportation	1
Total	**241**

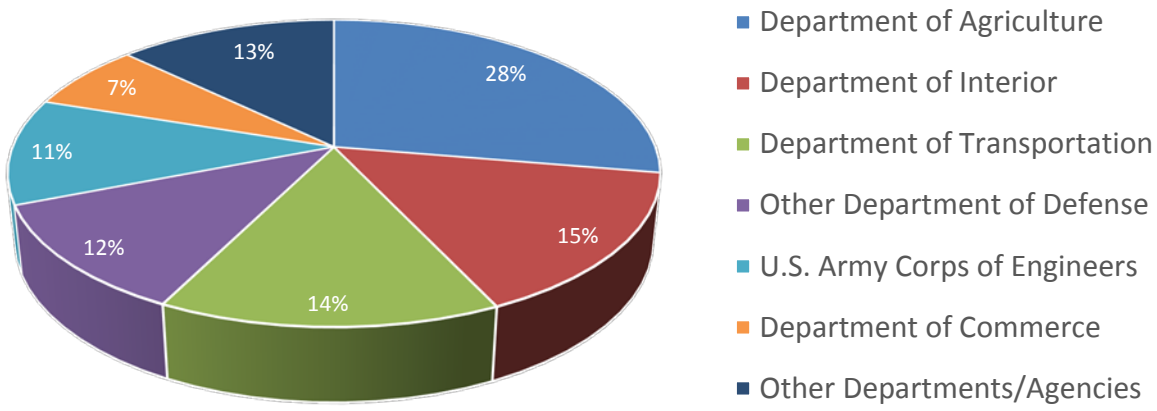

Figure 3-1. Draft and final EISs in 2017 by department.

Geographic Distribution of EISs with Published Notices in 2017

The geographic breakdown of draft and final EISs by state and territory is shown in Table 3-2. As has been the case for several years, many more EISs were prepared for actions in California (53) than in any other state. Oregon and Alaska followed California in terms of EISs for actions in those states, with 11 each. Four EISs addressed nationwide actions; another was listed as "regional" but had a nationwide scope. 43 EISs addressed actions in multiple states but were not nationwide. As in past years there were a large number of EISs published in 2017 for actions in western states, indicative of the extensive Federal lands and water projects by the USFS, BLM, USACE, and BOR in the West.

Table 3-2. Draft and final EISs in 2017 by state and territory.

State/Territory	Number of EISs	State/Territory	Number of EISs
California	53	Hawai'i	2
Oregon	11	Louisiana	2
Alaska	11	Massachusetts	2
Washington	9	Puerto Rico	2
Colorado	8	Tennessee	2
Idaho	7	West Virginia	2
		Wisconsin	2
Montana	7	Alabama	1
Texas	7	Indiana	1
Wyoming	6	Kansas	1
Utah	6	Minnesota	1
Arizona	5	Mississippi	1
District of Columbia	5	Missouri	1
Illinois	4	Nebraska	1
Kentucky	4	New Hampshire	1
Maryland	4	North Dakota	1
Nevada	4	Ohio	1
New York	4	Pennsylvania	1
New Jersey	3	Rhode Island	1
Virginia	3	South Carolina	1
Delaware	2	Multi-state	43
New Mexico	2	Nationwide	5
North Carolina	2	**Total**	**241**

3.2 EPA's Review and Comments

Under Section 309 of the federal Clean Air Act, EPA is required to review and publicly comment on the environmental impacts of major Federal actions including actions that are the subject of draft and final EISs. EPA categorizes or "rates" the EIS using a two-part alphanumeric system. The first part rates the environmental impacts of the proposal and the second part rates the adequacy of the draft EIS. For an explanation of EPA's ratings, see https://www.epa.gov/nepa/environmental-impact-statement-rating-system-criteria.

Ratings were available in EPA's database for all but one of the draft EISs[8]. For all but six of the draft EISs, EPA provided a single rating for either the preferred alternative (where there were multiple action alternatives and the preferred alternative was identified) or for the draft EIS as a whole. The majority (58 percent) of these ratings for the environmental impacts of the proposal were Lack of Objections (LO); only four draft EISs (3 percent) were rated Environmental Objections (EO) **(**Figure 3-2). Six draft EISs with no identified preferred alternative received different ratings for different alternatives. For five of these draft EISs, the ratings were a mix of LO and Environmental Concerns (EC). The remaining draft EIS received a mix of EC and EO ratings. No draft EIS received an Environmentally Unsatisfactory (EU) rating.

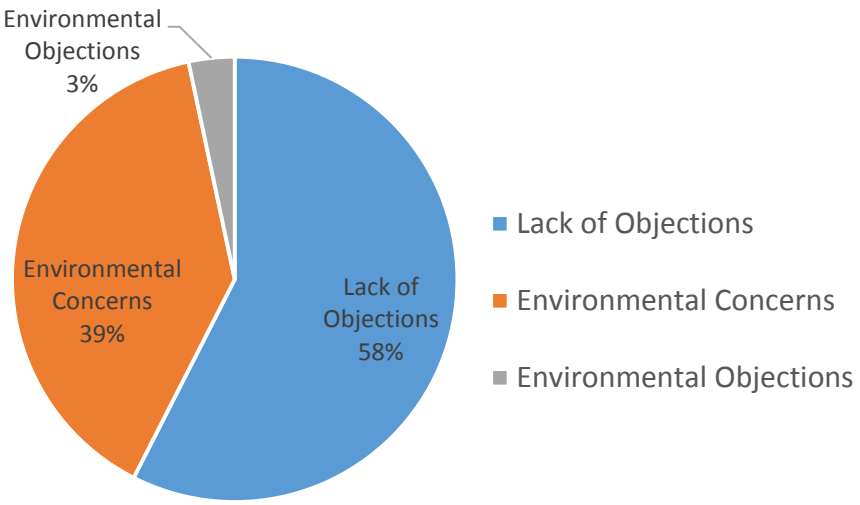

Figure 3-2. EPA ratings of 2017 draft EISs.

Draft EISs with a rating of LO for the environmental impacts of the proposal are not given an adequacy rating. Of the 52 draft EISs that received an overall adequacy rating, 6 (12 percent) of the documents were rated Adequate and 46 (88 percent) were rated Insufficient Information. The adequacy ratings for the six draft EISs that received different ratings for different alternatives were either Adequate or Insufficient Information. No draft EISs were rated Inadequate.

The percentage of DEISs rated LO was substantially greater in 2017 than in 2016, when 35 percent of draft EISs received that rating. The percentage of draft EISs with adequacy rating of Insufficient Information was also substantially higher in 2017 than in 2016, when 54.5 percent received that adequacy rating. Historically, the most frequent draft EIS ratings have been EC and Insufficient Information.

[8] Includes supplemental and revised draft EISs.

4. Preparation Times for Environmental Impact Statements Made Available in 2017

Piet and Carole deWitt [9]

4.1 Summary

In calendar year 2017, federal agencies made available fewer draft and final environmental impact statements (EISs) than in any year since 1997. The annual average preparation time for final and final supplemental EISs decreased for the first time since 2009. The annual average preparation time for draft and draft supplemental EISs made available in 2017 was the third longest of any year from 1997–2016.

4.2 EIS Numbers

In calendar year 2017, federal agencies[10] made available through the Environmental Protection Agency (EPA) 126 draft and draft supplemental EISs (i.e., draft EISs) and 131 final and final supplemental EISs (i.e., final EISs). These numbers are the lowest we have recorded for the period 1997–2017.

The largest number of draft and final EISs made available in a calendar year was 617 in 2004. Since 2004, the number of draft and final EISs being made available has decreased at an average rate of 24 EISs per year. The number of final EISs made available in a single year also peaked in 2004 at 306. Since 2004, the number of final EISs being made available during a calendar year has decreased at an average rate of 11 EISs per year. The number of draft EISs being made available in a single years peaked in 2003 at 320, and the number of draft EISs being made available in a calendar year has decreased at an average rate of 13 EISs per year.

In 2017, federal agencies adopted 15 final EISs. This number exceeded the previous high of nine adoptions in 2016. For the period 1997–2016, federal agencies adopted an average of 4.2 ± 2.5 [mean ± one standard deviation] EISs per year. On average adopted EISs constituted 1.9 ± 1.4% of all final EISs. The 15 adoptions in 2017 constituted 11.5% of all final EISs made available that year.

4.3 Final EISs

In calendar year 2017, 29 federal agencies made 131 final and final supplemental EISs available to the public. The 15 EIS adoptions described above are not included in our calculation of EIS-preparation times. One final EIS was withdrawn by the preparing agency and a revised final was made available later in the year. The revised final is the basis of our calculation of the preparation time for this EIS. Our 2017 sample includes 115 final and final supplemental EISs.

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[10] EISs prepared by state transportation departments under 23 USC 327 are included in the Federal Highway Administration (FWHA) totals.

The 2017 final EISs prepared by all agencies had an average preparation time (from the *Federal Register* Notice of Intent (NOI) to the Notice of Availability for the final EIS) of 1786 ± 1480 days (4.9 ± 4.1 years) (see Table 4-1 "ALL" "NOI to Final EIS"). The 2017 average was 78 days shorter than the 2016 average (1864 ± 1259 days [5.1 ± 3.4 years]) and 55 days shorter than the 2015 average (1841 ± 1347 days [5.0 ± 3.7 years]). However, the 2017 average was longer than any average for the years 1997 through 2014. The 2017 average was 620 days longer than the lowest annual average of 1166 ± 899 days (3.2 ± 2.5 years) recorded in the year 2000. The 2017 average was also the first annual average to be lower than that of its preceding year since 2009.

Table 4-1. Preparation times in calendar days for final and final supplemental EISs made available in 2017.

			NOI to Draft			Draft to Final			NOI to Final				
Agency	**n**	**%**	**Mean**	**s.d.**	**M**	**Mean**	**s.d.**	**M**	**Mean**	**s.d.**	**M**	**Min**	**Max**
ALL	115	100	**1301**	1346	865	**486**	511	315	**1786**	1480	1346	212	8379
ARS	1	0.9	**1880**			**611**			**2391**				
BLM	5	4.3	**804**	360	906	**623**	513	308	**1427**	732	1428	638	2201
BOEM	4	3.5	**1413**	1762	735	**254**	89	284	**1667**	1683	1050	483	4084
BOP	1	0.9	**1337**			**189**			**1526**				
BOR	1	0.9	**465**			**98**			**563**				
BPA	1	0.9	**122**			**252**			**374**				
DOC	5	4.3	**607**	94	639	**413**	96	385	**1020**	49	1024	961	1080
DOE	1	0.9	**1743**			**637**			**2380**				
DOS	2	1.7	**2493**	1054	2493	**207**	35	207	**2699**	1020	2699	1978	3420
DVA	1	0.9	**364**			**182**			**546**				
FEMA	1	0.9	**1787**			**210**			**1997**				
FERC	5	4.3	**542**	130	556	**225**	51	238	**767**	132	815	612	892
FHWA	12	10.4	**2903**	2132	2538	**758**	581	469	**3659**	2155	3296	1110	8379
FRA	3	2.6	**1997**	1163	1436	**439**	71	476	**2435**	1093	1919	1696	3691
FTA	1	0.9	**2989**			**182**			**3171**				
FWS	1	0.9	**1437**			**875**			**2312**				
HUD	1	0.9	**539**			**112**			**651**				
NOAA	6	5.2	**674**	487	622	**1058**	1522	216	**1732**	1832	957	282	4994
NPS	6	5.2	**1351**	822	1044	**648**	242	581	**1999**	996	1644	836	3451
NRC	1	0.9	**358**			**197**			**555**				
NSA	1	0.9	**564**			**252**			**816**				
NSF	1	0.9	**158**			**280**			**438**				
RUS	1	0.9	**854**			**539**			**1393**				
TVA	3	2.6	**291**	74	274	**216**	36	231	**507**	106	505	402	613
USACE	12	10.4	**1177**	813	965	**344**	182	284	**1521**	843	1252	728	3158
USAF	4	3.5	**539**	325	537	**293**	256	202	**832**	483	739	387	1463
USFS	29	25.2	**1097**	1027	786	**488**	474	371	**1585**	1189	1114	212	5210

USMC	1	0.9	**581**			**966**			**1547**				
USN	4	3.5	**3011**	3049	2063	**480**	404	389	**3491**	2849	2343	1618	7659

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

The draft EISs for the 2017 final EISs required an average of 1301 ± 1346 days (3.6 ± 3.7 years) to prepare following publication of their NOIs (see Table 4-1 "All" "NOI to Draft EIS"). The 2017 average was the third longest for the period 1997–2017 and was exceeded only by the annual averages for 2015 (1336 ± 1206 days [3.7 ± 3.3 years]) and 2016 (1378 ± 1103 days [3.8 ± 3.0 years]). The 2017 average was 563 days longer than the shortest annual average of 738 ± 673 days recorded in 1998.

The 2017 average time for preparing the final EIS from the draft EIS was 486 ± 511 days (1.3 ± 1.4 years). This average was the fourth longest for the period 1997–2017 and was exceeded by the averages for 2012 (516 ± 554 days [1.4 ± 1.5 years]), 2014 (513 ± 485 days [1.4 ± 1.5 years]) and 2013 (493 ± 505 days [1.4 ± 1.4 years]). The 2017 average was 30 days shorter than the 2012 longest average but 97 days longer than the shortest average (389 ± 379 days) recorded in 2000.

Of the five most prolific EIS-preparing agencies, only the U.S Forest Service (USFS) and the Federal Highway Administration (FHWA) established new record preparation times in 2017. Both agencies established new long averages for the preparation of the draft EIS from the NOI and the preparation of the final EIS from the NOI (NOI to Draft EIS and NOI to Final EIS in Table 4-1 for the respective agencies). The Corps of Engineers (USACE), Bureau of Land Management (BLM) and National Park Service (NPS) did not establish record long or short EIS-preparation times in 2017.

In 2017, all agencies combined established a new low final EIS completion rate for the 5-to-6 year interval, replacing the 4.5% completion rate recorded in 2000 (see Table 4-2). The agencies also established new high completion rates for the 18-to-19, 20-to-21 and 22-to-23 year intervals.

Table 4-2. Comparison of 2017 final EIS completion rates by time interval with the average final EIS completion rates for the period 1997 through 2016.

Completion Interval in Years from NOI*	2017 Completion Percentage	1997 - 2016			
		Average Completion Percentage	Standard Deviation	Lowest Completion Percentage (Year)	Highest Completion Percentage (Year)
0 to 1	3.4	7.2	3.2	2.7 (2015)	14.9 (2001)
1 to 2	19.8	23.5	5.1	13.7 (2015)	30.3 (2000)
2 to 3	20.6	18.6	2.3	15.2 (2008)	24.5 (2009)
3 to 4	11.2	13.3	2.7	9.3 (2004)	18.6 (2006)
4 to 5	12.1	10.0	2.4	6.2 (2002)	12.8 (2006)
5 to 6	4.3	7.3	1.8	4.5 (2000)	10.6 (2011)

6 to 7	6.0	6.3	2/1	3.0 (2001)	10.7 (2006)
7 to 8	5.2	4.0	1.6	1.5 (2000)	7.0 (2013)
8 to 9	4.3	3.1	1.6	1.3 (2002)	6.7 (2012)
9 to 10	3.4	2.0	1.3	0.5 (2000)	6.0 (2015)
10 to 11	1.7	1.5	1.2	0.4 (4 years)	3.9 (2014)
11 to 12	0.9	0.7	0.6	0.0 (6 years)	1.6 (2 years)
12 to 13	1.7	0.8	0.8	0.0 (5 years)	3.0 (2016)
13 to 14	0.9	0.5	0.6	0.0 (7 years)	2.3 (2013)
14 to 15	0.9	0.5	0.5	0.0 (10 years)	1.6 (2 years)
15 to 16	0.9	0.2	0.5	0.0 (16 years)	1.8 ((2016)
16 to 17	0	0.2	0.4	0.0 (15 years)	1.3 (2005)
17 to 18	0	0.1	0.2	0.0 (17 years)	0.5 (2 years)
18 to 19	0.9	0.1	0.2	0.0 (19 years)	0.8 (2005)
19 to 20	0	0.0	0.1	0.0 (19 years)	0.6 (2013)
20 to 21	0.9	0.0	0.1	0.0 (19 years)	0.5 (2013)
21 to 22	0	0.0	0.1	0.0 (19 years)	0.5 (2010)
22 to 23	0.9	0.0	0.0	0.0 (20 years)	0.0 (20 years)

In calendar year 2017, 15 of the 29 agencies made only one final EIS available during the year. Of these 15 agencies, four appeared in the ten longest annual averages and seven appeared in the ten shortest averages. (see left four columns in Table 4-5). EISs prepared by agencies making only one final EIS available had an average preparation time of 1377 ± 899 days (3.8±2.5 years). EISs prepared by agencies making available more than one final EIS had an average preparation time of 1848 ± 1542 days (5.1 ± 4.2 years).

The average time required by all federal agencies combined to prepare final EISs has increased since the year 2000. The annual average recorded for 2017 was comparable to those measured in 2016 and 2015 and was significantly longer than the 2000 average. From 2000 through 2017, the annual average EIS-preparation time for all agencies combined has increased at a rate of 40.8 days per year (see Figure 4-1, “Total EIS Preparation Time”). In response to the reduced annual average preparation time in 2017, the average rate of increase from the year 2000 is nearly one day shorter than that recorded in 2016. Approximately 83 percent of the increase recorded in 2017 for final EISs is accounted for by the increase in the preparation of times of their drafts. The remaining increase is the result of increases in the time to prepare the final EIS from its draft.

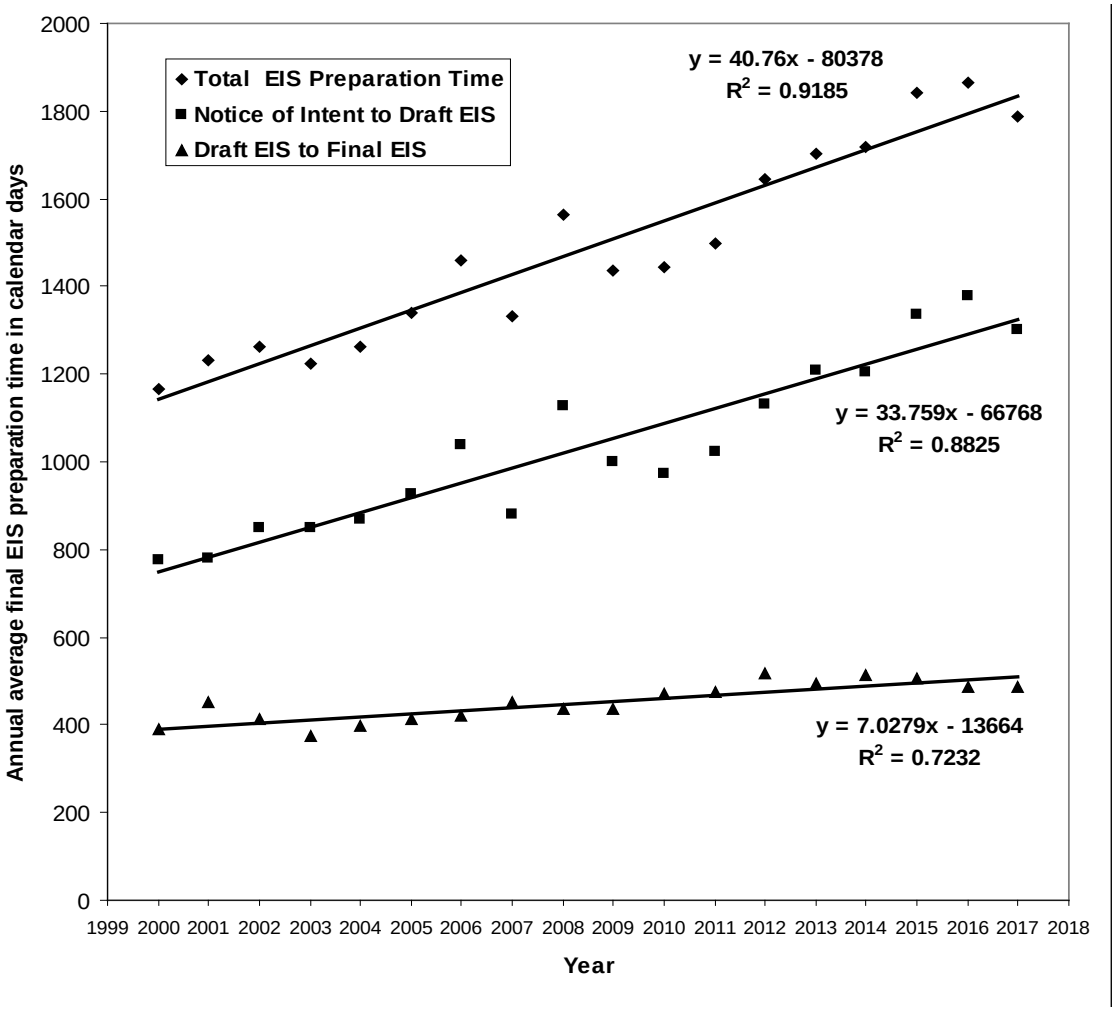

Figure 4-1. Annual average preparation times for final and final supplemental EISs made available by all agencies from 2000 through 2017 with their linear regression lines, equations, and coefficients of determination (R^2).

4.4 Draft EISs

In calendar year 2017, 27 agencies made 126 draft and draft supplemental EISs available to the public (Table 5-4). Six of the draft EISs that supplemented final EISs had no NOI in the *Federal Register* and are not included in our preparation-time calculations. Our 2017 sample includes 120 draft and draft supplemental EISs.

The 2017 annual average draft EIS preparation time for all agencies combined was 1099 ± 1143 days (3.0 ± 3.1 years) (See "ALL' in Table 4-3). The 2017 average was the third longest average recorded for the period 1997–2017. The 2017 annual average was 138 days shorter than the longest annual average, 1237 ± 1061 days [3.4 ± 2.9 years] recorded in 2013 and 389 days longer that the shortest annual average, 710 ± 666 days [1.9 ± 1.8 years] recoded in 2000.

Table 4-3. Preparation times in calendar days for draft and draft supplemental EISs made available in calendar year 2017.

Agency	n	%	Mean	s.d	M	Min	Max
ALL	120	100	**1099**	1143	677	25	5768
AFRH	1	0.8	**967**				
APHIS	3	2.5	**740**	670	353	353	1514
BIA	1	0.8	**980**				
BLM	4	3.3	**1193**	785	977	539	2278
BOEM	3	2.5	**314**	343	224	25	693
BOP	1	0.8	**126**				
BOR	5	4.2	**2612**	2023	1785	476	5768
BPA	2	1.7	**784**	420	784	487	1081
DC	1	0.8	**301**				
DOE	1	0.8	**3164**				
DOS	2	1.7	**1588**	226	1588	1428	1747
FEMA	1	0.8	**1787**				
FERC	4	3.3	**762**	381	632	465	1318
FHWA	10	8.3	**1676**	1041	1571	430	3264
FRA	3	2.5	**952**	382	1051	531	1276
FTA	3	2.5	**2227**	1070	1646	1573	3461
FWS	6	5.0	**888**	377	916	269	1306
HUD	2	1.7	**622**	117	622	539	704
NCPC	1	0.8	**666**				
NOAA	6	5.0	**478**	70	483	357	548
NPS	1	0.8	**1103**				
NSF	1	0.8	**386**				
TVA	2	1.7	**287**	84	287	227	346
USACE	16	13.3	**1926**	1888	1033	127	5565
USAF	6	5.0	**351**	201	296	96	682
USFS	31	25.8	**740**	724	605	42	4251
USN	3	2.5	**484**	294	596	150	705

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

In 2017, all agencies combined established new high draft EIS completion rates for the 1-to-2, 8-to-9, 14-to-15 and 15-to-16 year intervals (see Table 4-4). No new record low draft completion rates were established in 2017.

Table 4-4. Comparison of 2017 draft EIS completion rates by time interval with the average draft EIS completion rates for the period 1997 through 2016.

Completion Interval in Years from NOI*	2017 Completion Percentage	1997 - 2016			
		Average Completion Percentage	Standard Deviation	Lowest Completion Percentage (Year)	Highest Completion Percentage (Year)
0 to 1	18.3	26.2	6,5	13.9 (2013)	37.0 (2000)
1 to 2	37.5	27.9	3.3	21.9 (2006)	35.0 (2016)
2 to 3	15.0	16.9	2.9	12.0 (1999)	22.5 (2012)
3 to 4	8.3	10.1	2.4	6.2 (2001)	15.2 (2014)
4 to 5	7.5	6.5	1.9	2.5 (2000)	9.4 (2010)
5 to 6	1.7	4.1	1.7	1.8 (1998)	7.9 (2005)
6 to 7	0.8	3.2	1.3	0.7 (1998)	5.1 (2015)
7 to 8	1.7	1.5	0.7	0.3 (2006)	2.8 (1997)
8 to 9	4.2	1.1	0.8	0.0 (3 years)	3.0 (2013)
9 to 10	0.8	0.9	0.7	0.0 (2 years)	2.5 (2012)
10 to 11	0.0	0.4	0.6	0.0 (10years)	2.0 (2014)
11 to 12	0.8	0.4	0.4	0.0 (7 years)	1.7 (2015)
12 to 13	0.0	0.3	0.6	0.0 (10 years)	2.5 (2013)
13 to 14	0.0	0.1	0.2	0.0 (16 years)	0.7 (2005)
14 to 15	1.7	0.2	0.3	0.0 (12 years)	0.9 (2002)
15 to 16	1.7	0.1	0.2	0.0 (15 years)	0.6 (2015)

In 2017, nine of the 27 agencies making draft EISs available, made only one draft EIS available during the year. The draft EISs prepared by these agencies required an average of 1053±957 days (2.9±2.6 years) to complete. Agencies making more than one draft EIS available during the year required an average of 1103±1162 days (3.0±3.2 years) to complete.

In 2017 agencies that prepared only one draft EIS appeared four times in the ten longest average preparation times and three times in the shortest average preparation times (see Table 5-5, right four columns).

The shortest annual average preparation time for draft EISs 710 ± 666 days (1.9 ± 1.8 years) [n=243] was recorded in 2000. Since that time, the average draft EIS preparation time has increased at an average of 19.5 days per year (see Figure 5-2). The 2017 rate of increase is 0.6 days shorter than that recorded in 2016.

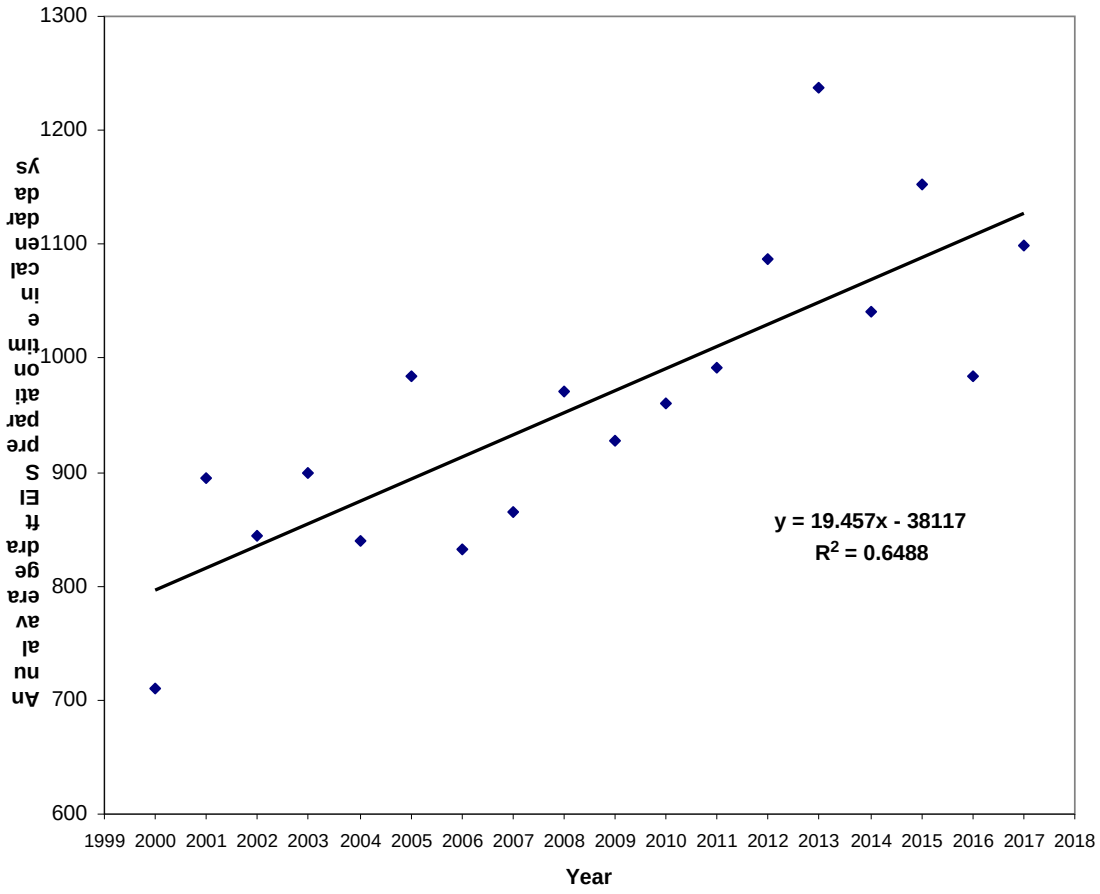

Figure 4-2. Average annual preparation times for draft and draft supplemental EISs made available by all federal agencies from 2000 through 2017 with their linear regression line, equation, and coefficient of determination (R^2).

4.5 Draft and Final EIS Preparation Ranks

Table 4-5 incorporates information from Tables 4-1 and 4-3. We use this array to determine if agencies with the ten longest average final EIS preparation times are also represented among those with the ten longest draft EIS preparation times. In 2017, five agencies met these criteria:

Federal Highway Administration
Federal Transit Administration
Department of Energy
State Department
National Park Service

In contrast, four agencies were among those with the ten shortest preparation times for both draft and final EISs in 2017:

U.S. Air Force

Housing and Urban Development
Tennessee Valley Authority
National Science Foundation

Table 4-5. Average preparation times in calendar days for Draft and Final EISs made available in 2017 arranged in descending order by 2017 agency mean.

2017 Final EISs					2017 Draft EISs			
Rank	Agency	n	Mean		Rank	Agency	n	Mean
1	FHWA	12	3657		1	DOE	1	3164
2	USN	4	3491		2	BOR	5	2612
3	FTA	1	3171		3	FTA	3	2227
4	DOS	2	2699		4	USACE	16	1903
5	FRA	3	2435		5	FEMA	1	1787
6	ARS	1	2391		6	FHWA	10	1676
7	DOE	1	2380		7	DOS	2	1588
8	FWS	1	2312		8	BLM	4	1193
9	BOEM	4	2065		9	NPS	1	1103
10	NPS	6	1999		10	BIA	1	980
11	FEMA	1	1997		11	AFRH	1	967
12	NOAA	6	1732		12	FRA	3	919
13	USFS	29	1586		13	FWS	6	888
14	USMC	1	1547		14	BPA	2	784
15	BOP	1	1526		15	FERC	4	762
16	USACE	12	1521		16	APHIS	3	740
17	RUS	1	1393		17	NCPC	1	666
18	BLM	6	1276		18	HUD	2	622
19	DOC	5	100		19	USFS	31	620
20	USAF	4	832		20	USN	3	484
21	NSA	1	816		21	NOAA	6	478
22	FERC	5	767		22	NSF	1	386
23	HUD	1	651		23	USAF	6	351
24	BOR	1	563		24	BOEM	3	314
25	NRC	1	555		25	DC	1	301
26	DVA	1	546		26	TVA	2	287
27	TVA	3	507		27	BOP	1	126
28	NSF	1	438					
29	BPA	1	374					

DOS = Department of State; ARS = Agricultural Research Service; DVA = Department of Veterans Affairs; AFRH = Armed Forces Retirement Home; NCPC = National Capital Planning Commission; DC = Denali Commission.

5. 2017 NEPA Legislation

Charles P. Nicholson, PhD[11]

5.1 Introduction

The 115th session of Congress began on January 3, 2017 with a sizeable Republican majority in the House of Representatives and a narrow Republican majority in the Senate. Newly inaugurated President Donald Trump made reducing regulation, including environmental regulation, and expanding infrastructure improvements focus areas for his administration. Therefore the likelihood of legislation affecting the National Environmental Policy Act (NEPA), as well as related environmental laws and regulations, being enacted by the 115th Congress appeared high early in the session.

The first legislative actions by Congress included the elimination of several environmental regulations under the Congressional Review Act (Section 251 of Public Law 104-121). Only one of these actions, described below, affected NEPA compliance processes.

House and Senate committees held multiple hearings that, among other things, addressed NEPA compliance and associated permitting processes for energy, transportation, communications, and water infrastructure, electric utility right-of-way management, forest management, sage grouse management, livestock grazing, and other topics. Some of these hearings focused on proposed legislation described below. Others addressed compliance processes more generally and phrases such as barriers to deployment, modernizing environmental laws, bureaucratic roadblocks, deficiencies in permitting processes, and federal natural resource laws gone astray appeared in the title or memoranda for many of these hearings. Few, if any, of these hearings appeared to result in bills introduced in 2017.

One oversight hearing titled "Modernizing NEPA for the 21st Century" directly addressed NEPA. The House Committee on Natural Resources held this hearing on November 30, 2017. See https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=403418 for the written testimony submitted by the witnesses and a video recording of the hearing.

By the time both chambers recessed in late December, at least 156 bills that included language about NEPA had been introduced. The NEPA-related bills introduced early in the session included several that were introduced but not passed in one or more previous sessions of Congress. At the end of 2017, few of the proposed bills addressing NEPA had been passed by at least one chamber and only one had been enacted into law. This bill did not make a substantive change to established NEPA compliance processes. The remainder of this article summarizes both the legislation addressing NEPA that was enacted into law and NEPA-related legislation introduced but awaiting final Congressional action. As in recent previous sessions, most (about 72 percent) of the NEPA-related bills would not affect NEPA compliance processes. The majority of these bills, which are not addressed below, address NEPA through clauses that state that the subject activity must comply with NEPA and other laws.

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5.2 Enacted Legislation

In a Division B on supplemental appropriations for disaster relief, **H.R. 601** (Public Law 115-56), the **Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017**, authorizes recipients of grants from a Housing and Urban Development fund for disaster relief and recovery to adopt any previous environmental review, approval, or permit issued by a Federal agency.

5.3 Proposed Legislation

Delegation of NEPA Responsibilities

The **Reducing Environmental Barriers to Unified Infrastructure and Land Development (REBUILD) Act of 2017 (H.R. 481)**, previously introduced in the 112th, 113th, and 114th Congresses, would amend NEPA to authorize the assignment to states of federal environmental review responsibilities under NEPA and other federal environmental laws for covered federal projects and for states to assume those responsibilities. States must meet requirements established by the responsible federal officials in order to assume the responsibilities. The bill has not received a committee vote.

The **John P. Smith Act (S. 302)** would authorize the Secretary of Interior to enter into programmatic agreements with tribes to allow qualified tribes to make categorical exclusion determinations for proposed tribal transportation projects. It passed in the Senate by unanimous consent in November. The provisions of this act are similar to those of the **TIRES Act (S. 1776)** introduced in the 114th Congress.

The **Highway Rights-of-Way Permitting Efficiency Act of 2017 (S. 604)** would authorize the Secretaries of Agriculture and Interior to assign environmental review responsibilities to states for rural broadband projects within existing highway or communications right-of-ways on public (Bureau of Land Management) and National Forest System lands. The states would have to consent to federal court jurisdiction and all applicable federal procedures and maintain the necessary financial resources to conduct the reviews. The bill has not been voted on in committee.

The **Bureau of Reclamation Water Project Streamlining Act (H.R. 875)** would authorize the sponsor agency of a non-Bureau initiated project requiring Bureau approval to be a joint lead agency in the NEPA review and prepare the review subject to Bureau approval and adoption. This bill has not received a committee vote.

Exemptions from NEPA

Two bills would exempt federal actions which, based on past similar actions, have the potential for significant adverse environmental impacts, from NEPA. The **Virginia Jobs and Energy Act (H.R. 1756)** declares that NEPA shall not apply to specified oil and gas lease sales on the Outer Continental Shelf of Virginia. The Bureau of Ocean Energy Management (BOEM) would ordinarily have addressed these lease sales in its programmatic EIS on the proposed 5-year

nationwide leasing program and subsequent tiered EISs. The act would also exempt offshore meteorological site testing and monitoring projects on the outer Continental Shelf from NEPA. H.R. 1756 was introduced before Executive Order 13795 and Department of Interior Secretarial Order 3350 were issued in April and May, 2017; these orders promote offshore oil and gas leasing in areas that include the Outer Continental Shelf of Virginia. H.R. 1756 has not received a committee vote.

The **Federal Land Freedom Act of 2017 (S. 335, H.R. 3565)**, previously introduced in both chambers of the 113th and 114th Congresses but never reported out of committee, would authorize states with established leasing, permitting, and regulatory programs to control energy development on all federal lands except for units of the National Park and National Wildlife Refuge systems and designated wilderness areas. All state leasing, permitting, and development actions on the federal lands would be exempt from the requirements of NEPA, the Endangered Species Act, and the National Historic Preservation Act. A subcommittee hearing was held on the House version in September.

Expanded NEPA Requirements

Four similar bills would expand NEPA requirements by requiring the President to comply with NEPA when designating a national monument. These bills are the **National Monument Designation Transparency and Accountability Act of 2017 (S. 132)**, the **Improved National Monument Designation Process Act (S. 33)**, the **Public Input for National Monuments Act (H.R. 2074)**, and the **Marine Access and State Transparency (MAST) Act (H.R. 1489)**. Some of these bills specifically state that the designation of a monument is a major Federal action significantly affecting the quality of the environment. In addition to the NEPA compliance requirements, these bills also require Congressional and state approval of national monument designations. S. 33 and H.R. 1489 (also introduced in the 114th Congress) add the requirement of state approval of marine national monument designations. None of these bills have received a committee vote.

The **Prevention of Escapement of Genetically Altered Salmon in the United States Act (H.R. 206)**, also introduced in the 112th, 113th, and 114th Congresses, directs the Under Secretary of Commerce for Oceans and Atmosphere, in consultation with the U.S. Fish and Wildlife Service, to include analyses of specific topics in EISs that evaluate actions relating to genetically engineered salmon for purposes other than their confined use for scientific research. These topics are the environmental risks of escaped fish, confinement failure modes and effects, costs of control or eradication of escaped fish, and the potential economic damage of escaped fish. This bill has not received a committee vote.

Not Major Federal Actions Under NEPA

The **Unleashing American Energy Act of 2017 (S. 665)** declares that the inclusion of an additional oil and gas lease sale to an approved 5-year leasing program covering the Gulf of Mexico Region of the outer Continental Shelf shall not be considered a major Federal action under NEPA. Under BOEM's current procedures, such additions would normally be the subject of one or more tiered environmental impact statements. The bill has not received a committee vote.

The **Alaska Oil and Gas Production Act (S. 49)** would open formerly closed parts of the coastal plain of Alaska, in particular the Arctic National Wildlife Refuge, to oil and gas leasing. The first lease sale, encompassing at least 300,000 acres, and associated development and production activities would not constitute a major Federal action under NEPA. The Secretary of Interior would prepare an EIS on subsequent lease sales; this EIS would not evaluate nonleasing action alternatives. The similar **American Energy Independence and Job Creation Act (H.R. 49)** would have required the completion of an EIS before the first lease sale. While neither of these acts received a committee vote, the **Tax Cuts and Jobs Act, H.R. 1**, enacted in December 2017 as Public Law 115-97, authorized oil and gas lease sales in the same area. H.R. 1 did not, however, address NEPA compliance for the lease sales. S. 49 and H.R. 49 will likely receive no further action.

The **King Cove Road Land Exchange Act (H.R. 218, S. 101)** declares that an exchange of Federal land in Izembek National Wildlife Refuge, including land designated as wilderness, for nearby non-federal land in Alaska and associated road construction is not a major federal action for the purposes of NEPA. Similar bills were introduced in the 113rd and 114th Congresses, and the content of the bill was included in three appropriations bills introduced in the 114th Congress. At least part of the covered actions were addressed in a 2013 FEIS. The land exchange was approved by Secretary of Interior Zinke in January 2018 and H.R. 218 and S. 101 will likely receive no further action.

The **Navajo Utah Water Rights Settlement Act of 2017 (S. 664)** declares that the execution of the subject water rights agreement by the Secretary of Interior shall not constitute a major Federal action under NEPA. A committee hearing on the bill was held in December.

The **New Water Available to Every Reclamation State Act (New WATER Act, H.R. 434)** declares that federal actions regarding loans or loan guarantees for non-federal water infrastructure projects in states in which the Bureau of Reclamation operates shall not be considered major federal actions under NEPA. This bill has not received a committee vote.

The **Greater Sage-Grouse Protection and Recovery Act of 2017 (H.R. 527, S. 273)** states that the results of a NEPA review "shall not have a preclusive effect on the approval or implementation" of a major Federal action consistent with a State grouse management plan .It has not been acted upon by either House or Senate committees.

Categorical Exclusions

Three bills direct Department Secretaries to survey the use of categorical exclusions for specified actions, identify actions that are candidates for new categorical exclusions, and initiate the rulemaking process for the new categorical exclusions. Both the **Bureau of Reclamation Water Project Streamlining Act (H.R. 875)** and the **Gaining Responsibility on Water (GROW) Act of 2017 (H.R. 23)** direct the Secretary of Interior to do this for Bureau of Reclamation actions and to publish the proposed rulemaking within 1 year of the identification of new categorical exclusions. The **John P. Smith Act (S. 302)** contains a similar provision for tribal transportation safety projects. The GROW Act of 2017 was passed by the House in July.

The following bills direct agencies to categorically exclude specified actions, most of which likely have a low potential for causing adverse impacts.

The **GROW Act of 2017 (H.R. 23)** categorically excludes repair and reconstruction actions for surface water storage projects damaged by an event declared by the President as a major disaster or emergency under the Stafford Act. The actions must be commenced within 2 years of the presidential declaration, take place in the same location as the original project, and result in the same capacity, dimensions, and design as the original project.

The **Highway Rights-of-Way Permitting Efficiency Act of 2017 (S. 604)**, mentioned above for its delegation of NEPA responsibilities, directs the Secretaries of Agriculture and Interior to categorically exclude rural broadband projects within existing highway or communications right-of-ways on public lands and National Forest System lands. The Secretaries will promulgate regulations establishing this categorical exclusion, in accordance with 40 CFR 1508.4, within 150 days of enactment of the act. This bill has not received a committee vote.

The **Federal Land Invasive Species Control, Prevention, and Management Act (S. 509, H.R. 1330)**, also introduced in the 113th and 114th Congresses, would categorically exclude invasive species control or management projects conducted in accordance with applicable agency procedures, including applicable land and resource management and land use plans, and other criteria including in prioritized, high risk areas within 1,000 feet of a port-of-entry, transportation facility, utility and other infrastructure, and park. Although not explicitly mentioned, this act appears to require consideration of extraordinary circumstances. It has not received a vote in either House or Senate committees.

The **Emergency Forest Restoration Act (H.R. 865)**, also introduced in the 114th Congress, would "make a categorical exclusion available" to the Secretaries of Agriculture and Interior for forest management activities on National Forest System lands and public lands that address insect or disease infestations declared as an emergency by a state governor. Areas where timber harvesting is prohibited by statute are excluded, and the bill does not address consideration of extraordinary circumstances. It has not received a committee vote.

The **Electricity Reliability and Forest Protection Act (H.R. 1873)** allows the owner or operator of an electric transmission and/or distribution right-of-way on public land and National Forest System lands to submit vegetation management, facility inspection, and operation and maintenance plans to the Secretary of Interior or Agriculture for approval. The Secretaries will jointly develop a coordinated process for the review and approval of the plans, with a 90-day limit for plan approval. The Secretaries are directed to apply their categorical exclusion process to the plans. Any new or revised regulations necessary to implement the act are to be finalized within 2 years. The House passed H.R. 1873 in June and the Senate committee held a hearing on it in September.

The **Small Tracts Conveyance Act (H.R. 1106)** would categorically exclude the conveyance of tracts of National Forest System lands and public lands no larger than 160 acres to adjacent non-federal landowners. Tracts that provide habitat for endangered or threatened species or that contain other "exceptional resources" are excluded. It did not receive a committee vote.

The **Guide and Outfitters (GO) Act (H.R. 289)** states that the issuance of new special recreational permits on Federal lands and waters administered by the Secretaries of Agriculture and Interior shall qualify for a categorical exclusion if the activities are similar to existing uses, consistent with approved uses, or considered under previous analyses. It also directs the Secretaries to provide for the use of programmatic environmental assessments and categorical exclusions for the issuance or renewal of permits to the maximum extent allowable under applicable law. H.R. 289 was passed by the House in October and was not considered by the Senate committee.

Limits on Public Involvement

The **Native American Energy Act (H.R. 210)**, also introduced in the 113th Congress and the 114th Congress, where it was passed by the House, would restrict the review and comment on EISs for actions other than gaming actions on Indian lands to the affected tribe, other residents of the affected area, and area governments. It would also set a 60-day limit for judicial review of Native American energy-related actions and specifies that their appellate review must be in the District of Columbia circuit court. The House Committee on Natural Resources approved H.R. 210 in October.

The **National Strategic and Critical Minerals Production Act (H.R. 520, S. 145)**, which was introduced and passed in the House in the 112th, 113th, and 114th Congresses, sets a 60-day limit for judicial review of covered mineral exploration and mine permits issued by the Bureau of Land Management (BLM) and Forest Service. The **Military Infrastructure Consolidation and Efficiency Act of 2017 (H.R. 753)** would also set a 60-day limit for judicial review of Department of Defense actions related to military installation closure or realignment. H.R. 753 has not received a committee vote.

NEPA Streamlining

Three bills address streamlining the environmental review of water supply projects. The **Bureau of Reclamation Water Project Streamlining Act (H.R. 875)** contains streamlining measures for the review of water storage, rural water supply, and water recycling projects similar to those in recent highway bills. It also sets a 3-year target for completion of project feasibility reports (including the associated NEPA reviews) and limits comment periods on draft documents to 60 days for a draft EIS and 30 days for other documents unless extended for good cause. For non-Bureau initiated projects requiring Bureau approval, the project sponsor agency can be a joint lead agency and prepare the environmental review subject to Bureau approval and adoption. The **Water Supply Permitting Coordination Act (S. 677, H.R. 1654)** contains similar streamlining measures but requires Reclamation to be the lead agency for reviews of surface water storage projects on public lands in Reclamation states. H.R. 875 has not received a committee vote. H.R. 1654 was passed in the House in June and was the subject of a June Senate subcommittee hearing.

The **GROW Act of 2017 (H.R. 23)**, mentioned above for other provisions, contains several streamlining measures. Title I, Sec. 110 declares that the a Notice of Determination or Notice of Exemption under the California Environmental Quality Act will satisfy the requirements of NEPA for specified actions related to the Central Valley Project. Title V, the Water Supply

Permitting Coordination Act, is the same as **S. 677** and **H.R. 1654**. Title VI, the Bureau of Reclamation Water Project Streamlining Act, is the same as **H.R. 875**.

The **National Strategic and Critical Minerals Production Act (H.R. 520, S. 145**), mentioned above, declares domestic mines for strategic and critical minerals to be "infrastructure projects" per E.O. 13604. The review of mineral exploration and mine permits would then be subject to the streamlining measures addressed in the E.O. It states that the NEPA requirements of all federal agencies are satisfied if the lead agency determines that any state or federal agency, acting pursuant to their authorities, has or will address standard NEPA factors including the impacts of the action, alternatives, and public participation. Environmental reviews are to be completed within 30 months. The Act makes no reference to the overlapping provisions of Title XLI of the 2015 FAST Act. The bill has not received a committee vote.

The **Nuclear Utilization of Keynote Energy (NUKE) Act (H.R. 1320)** states that the Nuclear Regulatory Commission, in a proceeding on the issuance of a combined construction permit and operating license for a site for which NRC has issued an early site permit, shall evaluate the construction permit/operating license in an EIS prepared as a supplement to the early site permit EIS. It also requires the NRC to issue the draft EIS on a nuclear energy facility construction permit, operating license, or combined construction permit and operating license within 24 months of accepting the application. H.R. 1320 has not received a committee vote.

Other Requirements

The bipartisan **Public Land Renewable Energy Development Act (S. 282, H.R. 825)** directs the Secretary of Interior to designate priority areas for the development of geothermal, solar, and wind energy on public lands. The 2008 programmatic FEIS on geothermal leasing, the 2012 programmatic FEIS on solar energy projects, and the 2005 programmatic FEIS on wind energy projects would be supplemented as necessary to address the priority area designations. The Secretary would establish a program to improve federal permit coordination for renewable energy projects on the covered land and the USFS and USCOE would designate staff with regulatory expertise to assist the BLM in the project reviews. H.R. 825 was approved by the Natural Resources committee in July and by the Agriculture committee in September. S. 282 has not received a committee vote.

The **Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act (H.R. 200)**, also introduced in the 113th and 114th Congresses, would replace the environmental review under NEPA of a fishery management plan or fishery management plan amendment with a fishery impact statement that, in addition to meeting most of the requirements of Section 102(C) of NEPA, shall describe the economic and social impacts of the proposed action on fishery participants and affected fishing communities, participants in fisheries in adjacent areas, and the safety of human life at sea. A draft of the fishery impact statement must be circulated at least 14 days before the Regional Fishery Management Council makes its final decision on the proposal. The regional councils would also be authorized to establish criteria to categorically exclude actions from the preparation of the fishery impact statement. The bill was reported by the Committee on Natural Resources in December.

The **Sacramento Valley Water Storage and Restoration Act (H.R. 1269)** states that the FEIS for the Sites water storage project will be completed within 16 months. It has not received a committee vote.

The **Coal Oversight and Leasing (COAL) Reform Act of 2017 (S. 737)** amends the Mineral Leasing Act to revise the U.S. coal leasing program. It requires the Secretary of Interior to develop coal leasing program with, among other things, a proper balance between potential for environmental damage, potential for discovery of coal, and potential for adverse impact on areas containing the coal, and in a manner that considers the impact of coal leasing and development on climate change. It would place a moratorium on leasing until the Act is implemented. Coal leases would be the subject of EISs. This bill, in effect, reinstates the review of the federal coal leasing program that was begun by former Secretary of Interior Jewell that was canceled by incoming Secretary of Interior Zinke in March, 2017. The review begun by Secretary Jewell was the subject of a notice of intent to prepare an EIS published in March 2016 and a scoping report published in January 2017. S. 737 has not received a committee vote.

The **Stopping EPA Overreach Act of 2017 (H.R. 637)** would amend the Clean Air Act to state that greenhouse gases are not air pollutants. It also states that nothing in the Clean Air Act, Clean Water Act, NEPA, Endangered Species Act, or Solid Waste Disposal Act "authorizes or requires the regulation of climate change or global warming."

6. 2017 NEPA Court Rulings

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ABSTRACT

This paper reviews substantive NEPA cases issued by federal courts in 2017. The implications of the decisions and relevance to NEPA practitioners are explained.

6.1 Introduction

In 2017, the U.S. Courts of Appeal issued 25 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 25 cases involved seven different departments and agencies. Overall, the federal agencies prevailed in 21 of the cases, did not prevail in only two cases, and prevailed on some but not all NEPA claims in two cases, with a total prevail rate of 84 percent (92 percent if the partial cases are included). The U.S. Supreme Court issued no NEPA opinions in 2017; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, Table 1 shows the number of U.S. Court of Appeals NEPA cases issued from 2006 through 2017, 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												
	Ist	**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

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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
2017		**1**	**1**		**1**				**13**	**1**		**8**	**25**
TOTAL	9	7	6	11	7	11	5	5	133	28	6	35	263
	3%	3%	2%	4%	3%	4%	2%	2%	51%	11%	2%	13%	

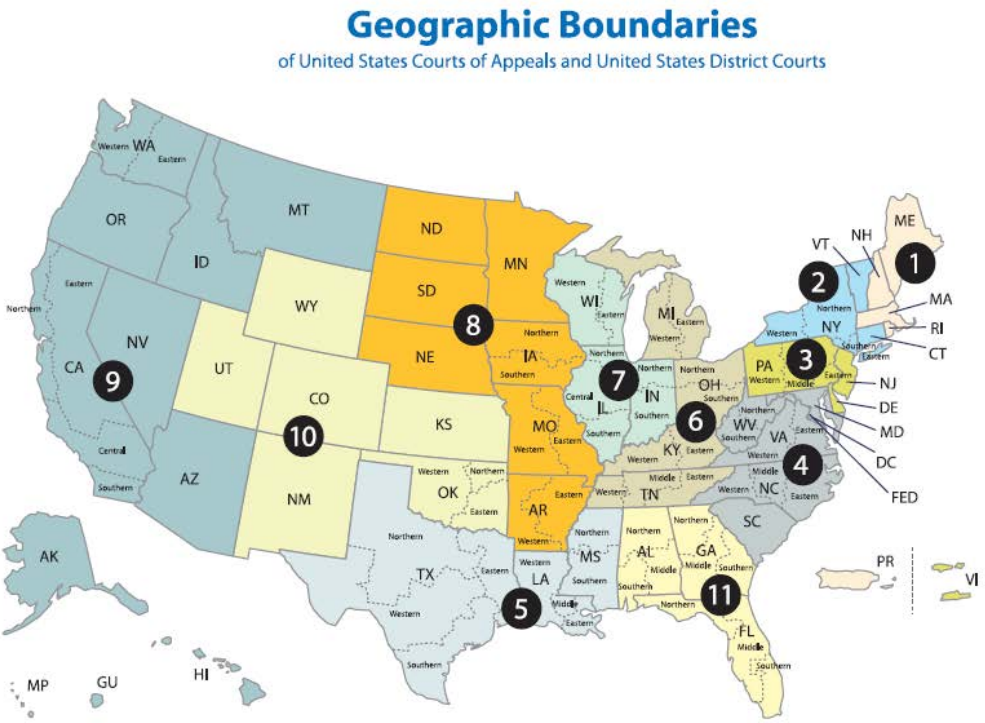

Figure 6-1. Map of U.S. Circuit Courts of Appeal.

6.2 Statistics and Overview of Cases

Federal agencies prevailed in 84 percent (92 percent if the partial cases are included) of the substantive NEPA cases brought before the U.S. Courts of Appeal. Since 2012, federal agencies have prevailed in NEPA challenges in increasingly large percentages.

The U.S. Department of the Interior (Bureau of Reclamation [BOR], Bureau of Land Management [BLM], and National Park Service [NPS]) and the U.S. Department of Transportation (Federal Aviation Administration [FAA], Federal Transit Administration [FTA],

and Federal Highway Administration [FHWA]) were each involved in six of the cases. The U.S. Department of Agriculture (U.S. Forest Service [USFS]) was involved in five of the cases. With respect to the other agencies,

- U.S. Department of Commerce (National Marine Fisheries Service [NMFS]) was involved in one case.
- U.S. Department of Defense (Air Force, Army Corps of Engineers, and Navy) was involved in four cases.
- U.S. Department of Energy was involved in one case.
- Federal Energy Regulatory Agency (FERC), an independent agency, was involved in two cases.

The USFS did not prevail in one of its five cases and the FAA did not prevail in one of its two cases. BLM and FERC were each involved in cases in which the agencies prevailed on some but not all of the NEPA claims brought.

Of the 25 substantive cases, one involved a categorical exclusion (CATEX), 11 involved environmental assessments (EAs), and 12 involved environmental impact statements (EISs). In one case, the court ruled that a NEPA document was not required.

The two cases in which the agencies did not prevail involved a CATEX (*City of Phoenix v. Huerta*, 869 F.3d 963 (D.C. Cir. 2017)) and an EA (*American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914 (D.C. Cir. 2017)). Of the 12 cases involving an EIS, in two of them, the agencies prevailed on some but not all of the NEPA claims brought (*WildEarth Guardians v. U.S. Bureau of Land Mgm't*, 870 F.3d 1222 (10th Cir. 2017) and *Sierra Club v. Federal Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017)). The agencies prevailed in the other 10 cases in which these agencies were involved.

6.3 Trends

The following relates some trends and interesting conclusions from the 2017 substantive cases:

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

- *Ground Zero Ctr. for Non Violent Action v. U.S. Dep't of the Navy*, 860 F.3d 1244 (9th Cir. 2017) (rejecting a NEPA challenge involving the construction of an explosive handling wharf, where the contention was that the alternatives were quite similar to each other; the Ninth Circuit focused on the need for the project and found that the Navy's operational goal of 400 days per year for an explosive handling wharf was not arbitrary, capricious, unreasonably narrow, or otherwise flawed, and that the Navy's considered alternatives were "reasonably in light of the cited project goals").
- *Delaware Riverkeeper Network v. U.S. Army Corps of Eng'rs*, 869 F.3d 148 (3d Cir. 2017) (upholding the Army Corps of Engineers' consideration of alternatives, when the contention was that the agency ignored the compression alternative; the court

looked to the purpose and need statement and the agency's reliance on Tennessee Gas' application and related documents, including FERC's EA).

- *WildEarth Guardians v. U.S. Bureau of Land Mgm't*, 870 F.3d 1222 (10th Cir. 2017) (finding that the agency's failure to disclose the data critical to the key distinction between two alternatives led to an uninformed agency decision and that the agency did not adequately disclose the rationale to the public; the court further opined that it was an abuse of discretion to rely on an economic assumption, which contradicted basic economic principles, as the basis for distinguishing between the no action alternative and the preferred alternative).
- *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051 (D.C. Cir. 2017) (approving the "funneling approach" used to narrow alternatives, which was adopted by Maryland Transit Administration and Federal Transit Administration, and finding the process was in accord with NEPA's "rule of reason").
- *Backcountry against Dumps v. Jewell*, No. 13-57129, 674 Fed. Appx. 657 (9th Cir. Jan. 5, 2017) (not for publication) (holding that the EIS did adequately discuss the alternatives to a right-of-way involving a wind energy project and finding that the agency did not draft the purpose and need statement too narrowly; the court explained that the focus of the purpose and need statement was to respond to the applicant, and was reasonable in light of the relevant statutes, directives and the wind resources available).
- *Gulf Coast Rod, Reel and Gun Club, Inc. v. U.S. Army Corps of Eng'r*s, No. 16-40181, 676 Fed. Appx. 245 (5th Cir. Jan. 19, 2017) (not for publication) (discussing that the Army Corps of Engineers adequately considered alternatives to closing Rollover Pass; the court looked to the purpose and need statement, and considered the agency's reliance on the application, where the proposed alternative suggested was eliminated).
- *Conservation Congress v. U.S. Forest Serv.*, No. 15-15737, 686 Fed. Appx. 392 (9th Cir. Mar. 31, 2017) (not for publication) ("NEPA only requires USFS to consider alternatives reasonably related to the purposes of the Project . . . and we hold that USFS has satisfied that standard here").
- *Our Money Our Transit v. Fed. Transit Admin.*, No. 14-35766, 689 Fed. Appx. 504 (9th Cir. Apr. 21, 2017) (not for publication) (holding, in a brief memorandum opinion, that it was not unreasonable to exclude a proposed alternative, the West 13th route, from the Federal Transit Administration's West Eugene EmX Extension EA, because the agency undertook a comprehensive analysis when it engaged in a previous Alternative Analysis (AA) prior to the EA).
- *Beverly Hills Unified School District v. Fed. Transit Admin.*, No. 17-55080, 694 Fed. Appx. 622 (9th Cir. Aug. 8, 2017) (not for publication) (finding, in an action involving a remedy order, that an award of a Grant Agreement/Design-Build contract was not an irreversible, irretrievable commitment of resources before addressing deficiencies in a prior EIS; the court reasoned that because the design may later affect alternative development, and the agency action is not yet final, the School District can challenge the analysis at a later time).
- *Central Oregon Landwatch v. Connaughton*, No. 15-35089, 696 Fed. Appx. 816 (9th Cir. Aug. 23, 2017) (not for publication) (holding that the agency did not act

arbitrarily and capriciously by defining its "no action" alternative as a continuation of the existing special use permit and that the discussion of the two alternatives studied in detail and dismissed from the study was sufficient).

- *Protecting Arizona's Res. and Children v. Fed. Highway Admin.*, No. 16-16586 & No. 16-16605, 2017 WL 6146939 (9th Cir. Dec. 8, 2017) (not for publication) (concluding that Federal Highway Administration's EIS, involving a highway expansion, complied with NEPA in its analysis of alternatives because it identified three alignment alternatives and a no-action alternative, and provided reasons for eliminating alternatives from detailed study).

Assessment of Impacts

Eighteen of the cases involved one or more challenges to assessment of impacts involving direct, indirect or cumulative impacts, and analyses where incomplete or unavailable information or uncertainty was present. The courts tended to focus on the deference afforded to the agency when they upheld the impact assessment analysis.

Direct impacts*:*

- *Delaware Riverkeeper v. Federal Energy Regulatory Comm'n*, 857 F. 3d 388 (D.C. Cir. 2017) (rejecting assertions that FERC failed to establish an accurate baseline from which to conduct its environmental review, that it misidentified numerous specially protected wetlands, and that it miscalculated both the cover type categorization of those wetlands and the total acreage of those wetlands).
- *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211 (9th Cir. 2017) (discussing, for the purposes of issuing a preliminary injunction, that there were neither serious questions or a likelihood of success on the merits of a NEPA claim based on the agency's use of the "habitat as a proxy" approach for assessing the viability of the pine marten; the "proxy-as-proxy" approach for assessing the viability of fisher; the agency's snow-intercept cover analysis; the open road density analysis; and the sediment analysis.).
- *Barnes v. Federal Aviation Admin.*, 865 F.3d 1266 (9th Cir. 2017) (approving agency's impact assessment involving: the forecasting methodology used to predict growth, the lead baseline measurements, impacts on children, water quality, the duration of emissions forecasting period, impacts involving lead emissions, and impacts to the alleged unique geography).
- *City of Phoenix v. Huerta*, 869 F.3d 963 (D.C. Cir. 2017) (holding the FAA acted arbitrarily in finding that impacts from a new flight route, comprising an increase in air traffic by 300%, with 85% of the increase coming from jets, were unlikely to be highly controversial, that extraordinary circumstances were not present and could thus be categorically excluded from further environmental review).
- *Gulf Coast Rod, Reel and Gun Club, Inc. v. U.S. Army Corps of Eng'rs*, No. 16-40181, 676 Fed. Appx. 245 (5th Cir. Jan. 19, 2017) (not for publication) (recognizing deference to the agency and agreeing with the agency that the closing of a manmade channel, Rollover Pass, did not create a significant impact; the court found that the salinity model was sufficient, as it was reasoned and deliberate, and took into account a significant amount of raw data that spanned over 70 years).

- *Backcountry against Dumps v. Jewell*, No. 13-57129, 674 Fed. Appx. 657 (9th Cir. Jan. 5, 2017) (not for publication) (upholding agency's analyses involving impacts on peninsula bighorn sheep, visual impacts, and health impacts resulting from low frequency noise and infrasound).
- *Our Money Our Transit v. Fed. Transit Admin.*, No. 14-35766, 689 Fed. Appx. 504 (9th Cir. Apr. 21, 2017) (not for publication) (disagreeing that the agency ignored the project's impacts on traffic, local trees, utilities and a street in the project area).
- *Central Oregon Landwatch v. Connaughton*, No. 15-35089, 696 Fed. Appx. 816 (9th Cir. Aug. 23, 2017) (not for publication) ("The [agency] was not required to conduct a quantitative analysis. NEPA provides for analysis of impacts 'in proportion to their significance' and requires 'only brief discussion of other than significant issues.' 40 C.F.R. § 1502.2(b)").
- *Zbitnoff v. James*, No. 16-3309-cv, 2017 WL 4176222 (2d Cir. Sept. 21, 2017) (not for publication) (rejecting assertion that the EIS must discuss non-environmental impacts (the cost-savings of placing the F-35 jets in South Burlington); "NEPA does not require the agency to assess every import or effect of its proposed action, but only the impact or effect on the environment . . . [i]f the harm does not have a sufficiently close connection to the physical environment, NEPA does not apply").
- *Protecting Arizona's Res. and Children v. Fed. Highway Admin.*, No. 16-16586 & No. 16-16605, 2017 WL 6146939 (9th Cir. Dec. 8, 2017) (not for publication) (discussing that although the agency declined to analyze the potential impact of a hazardous materials spill, its discussion of hazardous spills was sufficient; finding that the agency adequately considered the proposed freeway's potential impacts from emissions on children's health).

Indirect impacts:

- *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189 (D.C. Cir. 2017) (holding that the agency's evaluation of the upstream and downstream greenhouse-gas emissions from producing, transporting, and exporting LNG in its Life Cycle Report was sufficient, and that agency did not have to analyze other fuel sources that LNG might compete with, because the analysis would be "too speculative to inform the public interest determination" and that "practical considerations of feasibility might well necessitate restricting the scope of an agency's analysis").
- *Sierra Club v. Federal Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017) (ruling that, in approving the Southeast Market Pipelines, FERC did not -- but should have -- considered potential "downstream" greenhouse gas emissions from power plants burning natural gas supplied by the pipeline when preparing the FEIS; stating that "at a minimum, FERC should have estimated the amount of power plant carbon emissions that the pipelines will make possible" or if FERC was unable to quantify this amount, FERC should have "explained more specifically why it could not have done so").
- *WildEarth Guardians v. U.S. Bureau of Land Mgm't*, 870 F.3d 1222 (10th Cir. 2017) (criticizing agency's decision approving four coal leases that would expand coal mines in Powder River Basin in grasslands near Wright, Wyoming because the agency failed to comply with NEPA when it concluded issuing the leases would not

result in higher national carbon dioxide emissions than would declining to issue them based on a substitution assumption).

- *Friends of the Capital Crescent Trail v. Fed. Transit Admin.,* 877 F.3d 1051 (D.C. Cir. 2017) (agreeing that the agency adequately analyzed the indirect impacts of the project, specifically: the induced economic development on local water quality and wildlife, the impacts on the socioeconomic makeup of local communities, and impacts on environmental justice).

Cumulative impacts*:*

- *Western Watersheds Project v. Ruhs,* No. 15-17031, 701 Fed. Appx. 651 (9th Cir. Jul. 18, 2017) (not for publication)(disagreeing that agency did not address site specific impacts involving cumulative impacts, and rejecting the contention that the agency failed to analyze the cumulative effects of two past projects and reasonably foreseeable future projects in its Restoration Plan EA).
- *Gulf Coast Rod, Reel and Gun Club, Inc. v. U.S. Army Corps of Eng'rs*, No. 16-40181, 676 Fed. Appx. 245 (5th Cir. Jan. 19, 2017) (not for publication) (holding that the agency's extensive consideration of the cumulative impacts of closing a manmade channel, the Rollover Pass, on the East Bay's salinity was not arbitrary or capricious).
- *Conservation Congress v. U.S. Forest Serv.,* No. 15-15737, 686 Fed. Appx. 392 (9th Cir. Mar. 31, 2017) (not for publication) ("USFS properly analyzed the cumulative impacts of the Porcupine Project together with other actions, and the agency used a reasonable scope in that analysis. . .")

Incomplete or Unavailable Information/Uncertainty:

- *National Mining Assoc. v. Zinke,* 877 F.3d 845 (9th Cir. 2017) (discussing that the agency fully abided by 40 C.F.R. §1502.22, because the FEIS consistently acknowledged that information was incomplete with respect to a critical aspect of the withdrawal — namely, the connection between uranium mining and increased uranium concentrations in groundwater in the withdrawn area; the court pointed out that the document included several subsections titled "Incomplete or Unavailable Information," which discussed the relevance of that missing information to its analysis).
- *Conservation Congress v. U.S. Forest Serv*., No. 15-15737, 686 Fed. Appx. 392 (9th Cir. Mar. 31, 2017) (not for publication) ("An EIS is not required if there is simply some uncertainty over the Project's anticipated effects; rather, the Project's effects must be "highly" uncertain . . . and while the uncertain effect of fires in foraging areas may cast doubt on some aspects of the Project, the Project's anticipated effects as a whole are not highly uncertain and do not trigger the need for an EIS.").
- *Wild Fish Conservation v. National Park Serv.*, No. 14-35791, 687 Fed. Appx. 554 (9th Cir. Apr. 18, 2017) (not for publication) (concluding, after a review of the thorough analysis, that the risks posed by the hatchery programs proposed were minimal, and agency's approval of the hatchery programs would have no significant impact on the environment because the programs were not highly controversial, and the existence of "some" uncertainty did not require an EIS).

***Remedies**:* Four of the cases involved remedies, such as remedy scope, selection or modification. Typical remedies[14] for violations of NEPA under the Administrative Procedure Act (APA), 5 U.S.C. § 706, include: (1) reversing and remanding without instructions to vacate, (2) reversing and remanding with instructions to vacate,[15] (3) equitable relief (injunction), (4) declaratory relief (declaratory judgment), and (5) mandamus (an order to carry out a specific statutory duty). The court may also retain jurisdiction over the matter until resolved.

- *Government of the Province of Manitoba v. Zinke*, 849 F.3d 1111 (D.C. Cir. 2017) (concluding that a significant change in circumstances warranted modification of injunction, reasoning in part, that the design work proposed does not involve physical "construction"— the term used in the original injunction).
- *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211 (9th Cir. 2017) (discussing, for the purposes of issuing a preliminary injunction, that there were neither serious questions or a likelihood of success on the merits of a NEPA claim based on inadequate impact analysis).
- *WildEarth Guardians v. U.S. Bureau of Land Mgm't*, 870 F.3d 1222 (10th Cir. 2017) (declining, on a fairly narrow issue, to vacate existing leases when remanding the EIS (similar to last year's remedy in *Public Employees for Envt'l Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016)).
- *Beverly Hills Unified School District v. Fed. Transit Admin.*, No. 17-55080, 694 Fed. Appx. 622 (9th Cir. Aug. 8, 2017) (not for publication) (finding, in an action involving a remedy order, that an award of Grant Agreement/Design-Build contract was not an irreversible, irretrievable commitment of resources before addressing deficiencies in prior EIS; the court reasoned that because the design may later affect alternative development, and the agency action is not yet final, the District can challenge the analysis at a later time).

6.4 Details of Cases

Each of the substantive 2017 NEPA cases, organized by federal agency, is summarized below. Unpublished cases are noted (10 of the 25 substantive cases in 2017 were unpublished, a significant number, with eight cases from the Ninth Circuit, one from the Second Circuit, and one from the Fifth 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

Alliance for the Wild Rockies v. Pena, 865 F.3d 1211 (9th Cir. 2017) *Agency prevailed.*

[14] For an in-depth treatment of remedies, *see* Daniel R. Mandelker, et al., NEPA LAW AND LITIGATION §§ 4:52-4:65.30 (2017).

[15] For a comprehensive discussion of agency discretion upon remand, *see* Robert L. Glicksman & Emily Hammond, *Agency Behavior and Discretion Upon Remand*, 32 J. Land Use & Envtl. L. 483 (Spring 2017).

Issue(s): impact assessment (proxy approach)

Facts: The A to Z Project is a forest restoration project that encompasses 12,802 acres within the Colville National Forest in Washington. The project is generally comprised of commercial timber harvest treatments, road maintenance, stream restoration, and culvert replacements. After issuance of an EA, USFS issued a FONSI and Decision Notice approving the project. The Alliance filed a lawsuit challenging the USFS decision and sought a preliminary injection. The district court concluded that Alliance did not satisfy any of the four required factors for the issuance of a preliminary injunction (demonstrate likelihood of success on the merits, likelihood of suffering irreparable harm, balance of equities, and public interest), and the Ninth Circuit affirmed that decision.

Decision: "Alliance first contends that the EA violated the Colville Forest Plan by using 'failed' proxy analyses to conclude that A to Z Project would not significantly impact the viability of the pine marten and the fisher. Alliance argues that the use of these 'failed' proxy analyses does not constitute the requisite 'hard look' required by NEPA, and that the Forest Service additionally violated NEPA by failing to prepare an EIS to evaluate the impact of the A to Z Project on the viability of the pine marten and the fisher."

"First, although there have been no pine marten sightings in the project area since 1995, the pine marten has been seen in other parts of the Colville National Forest. Second, the EA implicitly determined that there were difficulties monitoring the pine marten. The EA explained that 'some . . . species may be comparatively easy to locate, [and] others may be difficult to detect due to their scarcity, mobility, behavior, or habitat use,' and therefore, the EA would use either 'surveys or habitat-based methods' to analyze the impact of the A to Z Project on these species. Because the EA then used a habitat-based method for the pine marten by identifying pine martin core areas through the Colville National Forest database, we can infer that the EA found pine marten to be a species that is 'difficult to detect.' Third, as described above, Alliance does not challenge the Forest Service's knowledge of the pine marten's required habitat or the EA's identification of this habitat within the project site. As such, the Forest Service's 'habitat as a proxy' analysis was neither arbitrary nor capricious. Accordingly, Alliance has not shown either serious questions or a likelihood of success on the merits of a . . . NEPA claim based on the Forest Service's use of the 'habitat as a proxy' approach for assessing the viability of the pine marten."

"Because the fisher is a furbearer that inhabits the Colville National Forest, the EA used the habitat of the pine marten, the management indicator species for furbearers, to similarly conclude that the A to Z Project would not impact the viability of the fisher. Alliance objects to this 'proxy-on-proxy' approach. . . . The absence of fisher sightings on the project site has no bearing on the reliability of the 'proxy-on-proxy' approach to determining the fisher's viability. . . . Because the 'proxy-on-proxy' approach uses a management indicator species 'as an indicator of the population of another species,' . . . sightings of the management indicator species (the pine marten), not the absent species (the fisher), play a role in determining the reliability of the 'proxy-on-proxy' approach. . . . And for the reasons stated above, the absence of pine marten sightings on the project site does not invalidate the EA's 'habitat as a proxy' analysis of the pine marten's viability; because the 'proxy-as-proxy' approach is based upon the 'habitat as a proxy' approach for the management indicator species, the absence of pine marten sightings does not invalidate the EA's 'proxy-as-proxy' analysis for the fisher for the same reasons."

"Alliance next contends that the A to Z Project violates the Colville Forest Plan's snow-intercept cover standard and open road density objective for big game habitat. Alliance argues that the Forest Service violated NEPA by failing to recognize the decrease in snow-intercept cover and the increase in open road density as significant environmental impacts and failing to prepare an EIS on these two issues."

"Alliance lastly contends that the Forest Service violated NEPA by making an arbitrary and capricious determination that sediment accumulation in streams within the project site resulting from the A to Z Project's activities was not a significant environmental impact.

The Ninth Circuit affirmed the district court's denial of a preliminary injunction in an action regarding the North Fork Mill Creek A to Z Project in the Colville National Forest. The panel held that Alliance has not demonstrated serious questions, much less a likelihood of success, with respect to the merits of any of its National Forest Management Act (NFMA) and [NEPA] claims. Therefore, the district court did not abuse its discretion in denying the motion for a preliminary injunction. In this case, Alliance has not shown either serious questions or a likelihood of success on the merits of a NFMA or NEPA claim based on the Forest Service's use of the "habitat as a proxy" approach for assessing the viability of the pine marten; the "proxy-as-proxy" approach for assessing the viability of fisher; the Forest Service's snow-intercept cover analysis; the open road density analysis; and the sediment analysis.

American Wild Horse Preservation Campaign v. Perdue, 873 F.3d 914 (D.C. Cir. 2017) (reissued decision) *Agency did not prevail.*

Issue(s): insufficient basis for finding of no significant impact

Facts: Since 1975, USFS protected and managed wild horses in the Devil's Garden section of the Modoc National Forest in California. That wild horse territory originally consisted of two separate tracts of land of roughly 236,000 acres, but in the 1980s, a USFS map added in an approximately 23,000 acre tract of land known as the Middle Section and, in so doing, linked the two territories into a larger and unified wild horse territory of approximately 258,000 acres. For more than two decades, USFS continued to describe the territory as a single contiguous area and to manage wild horses in the Middle Section. In 2013, however, USFS publicly acknowledged the cartographic confusion, declared the expansion reflected in the 1980s map to be an administrative error, and without further analysis redrew the wild horse territory's lines to exclude the Middle Section and to revert to two disjoined tracts of land. The American Wild Horse Preservation Campaign and other plaintiffs filed suit alleging that the Service's revamping of the territorial lines violated numerous federal laws, including NEPA. The district court found for the agency, reasoning that because the USFS "boundary adjustment simply corrected an administrative error and resulted in the continued management of the [Middle Section] as distinct from the [Wild Horse Territory]," the Service reasonably determined that its boundary correction would not significantly affect the quality of the human environment, within the meaning of NEPA."

Decision: The Court of Appeals reversed, holding that the USFS decision to eliminate the Middle Section of the Devil's Garden Wild Horse Territory Plan was arbitrary and capricious in two respects: USFS failed to acknowledge and adequately explain its change in policy regarding the management of wild horses in the Middle Section as part of a single, contiguous protected Wild Horse Territory, and USFS failed to consider adequately whether an EIS was required.

"A central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it. . . .The Service's main defense in this case, however, has been to insist that nothing changed in 2013. In the Service's view, the Middle Section was never part of the Devil's Garden Wild Horse Territory, and so there was nothing to change. That argument flatly defies the plain text of the official 1991 Forest Plan, repeated official agency statements, and two decades of agency practice. Blinders may work for horses, but they are no good for administrative agencies. The Service argues secondly that the inclusion of the Middle Section must be ignored because it lacked the legal authority to add it in the mid-1980s. That argument never even leaves the starting gate."

With respect to the NEPA argument, "the Campaign argues that the Service's failure to prepare an Environmental Impact Statement addressing the boundary changes violated NEPA and was the product of arbitrary and capricious

decisionmaking. . . . In finding no significant environmental impact that would warrant an Environmental Impact Statement, the Service's NEPA analysis never came to grips with its departure from past practice, and thus never analyzed the potential environmental significance of its 2013 decision to contract the boundaries of the Wild Horse Territory by approximately ten percent."

"Our task in particular is to ensure that the Service, in finding no significant impact, (i) "accurately identified the relevant environmental concern," (ii) took a "hard look at the problem" in making its decision, (iii) has made "a convincing case for its finding of no significant impact," and (iv) "has shown that even if there is an impact of true significance, an [Environmental Impact Statement] is unnecessary because changes and safeguards in the project sufficiently reduce the impact to a minimum." *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011); *see also Sierra Club v. Department of Transp.*, 753 F.2d 120, 127 (D.C. Cir. 1985)."

"The Service failed that task because its environmental analysis did not 'accurately identif[y] the relevant environmental concern.' *Van Antwerp*, 661 F.3d at 1154 (emphases added; internal quotation marks and citation omitted). Here, the relevant environmental concern was the effect of the boundary modification on the wild horse population in the Devil's Garden area. The Service not only failed to address that concern, it denied its very existence. . . .' The Service insisted that the redrawn boundary lines would have "no effect" on the ground because it was only "correct[ing] a boundary established for administrative convenience." That is, the only sense in which the Service 'identified' the effect of the boundary modification on wild horses was by insisting that there was 'no effect' and that nothing had ever really changed. That head-in-the-sand approach to past agency practice is the antithesis of NEPA's requirement that an agency's environmental analysis candidly confront the relevant environmental concerns."

"In this case, the Service brushed aside critical facts about its past treatment of and official statements about the boundaries of the Devil's Garden Wild Horse Territory. As a result, the Service failed: (i) to acknowledge and adequately explain its change in course regarding the size of the Devil's Garden Wild Horse Territory and its management of wild horses within the Middle Section, and (ii) to consider or to adequately analyze the environmental consequences of those changes."

Havasupai Tribe v. Provencio, 876 F.3d 1242 (9th Cir. 2017) *Agency prevailed.*

Issue(s): definition of "major federal action"

Facts: In 2012, the Department of the Interior withdrew more than one million acres of public lands around Grand Canyon National Park from new mining claims. That withdrawal did not extinguish "valid existing rights." The DOI withdrawal was upheld by the Ninth Circuit in *National Mining Association v. Zinke*, 877 F.3d 845 (9th Cir. 2017) [summarized in this paper]. The present case considers challenges by the Havasupai Tribe ("the Tribe") and three environmental groups (Grand Canyon Trust, Center for Biological Diversity and Sierra Club [collectively, "the Trust"])—to the USFS that Energy Fuels Resources had a valid existing right to operate a uranium mine on land within the withdrawal area.

Grand Canyon National Park is bordered to the north and south by the Kaibab National Forest. The southern portion of the forest contains Red Butte, a site of religious and cultural significance to the Tribe. In 1988, the Forest Service approved a plan to build and operate Canyon Mine, a 17.4–acre uranium mine in the area around Red Butte. During the approval process, the Forest Service prepared an EIS and also addressed the mine's impact under the National Historic Preservation Act. Based on its review, the Forest Service required mitigation measures to minimize the impact on possible relics buried on the site of the mine. The review did not include nearby Red Butte because that site was not eligible for inclusion on the National Register until 1992. The mine operator built surface facilities and sank the first 50 feet of a 1,400–foot shaft, but placed the mine on "standby" status in 1992 due to the unfavorable conditions in the uranium market.

In 2012, the Forest Service reviewed its 1988 decision, including its EIS and the mine's approved plan of operations ("PoO"), "for any changes in laws, policies or regulations that might require additional federal actions to be taken before operations resume." In a "Mine Review" dated June 25, 2012, it concluded that the existing PoO was "still in effect and no amendment or modification to the PoO is required before Canyon Mine resumes operations under the approved PoO." It further concluded that "[n]o new federal action subject to further NEPA analysis is required for resumption of operations of the Canyon Mine."

In addition to advancing three NHPA claims not addressed here, the plaintiffs alleged that the Forest Service's determination that Energy Fuels had valid existing rights to operate the Canyon Mine notwithstanding the January 2012 withdrawal was a "major federal action significantly affecting the environment," and, therefore, the service violated the NEPA by not preparing an EIS in connection with its determination.

Decision: "We have held that 'where a proposed federal action would not change the status quo, an EIS is not necessary.' *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990). Nor is an EIS necessary to 'discuss the environmental effects of mere continued operation of a facility.' *Burbank Anti–Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980). We applied those general principles in *Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013) ("*CBD*")."

"At issue in *CBD* was the resumption of mining at a uranium mine, 'after a seventeen-year hiatus, under a plan of operations that BLM approved in 1988.' 706 F.3d at 1088. We held that 'no regulation requires approval of a new plan of operations before regular mining activities may recommence following a temporary closure.' *Id*. at 1093. We further held that the original approval of the plan was a major federal action, but that "that action [wa]s completed when the plan [wa]s approved.' *Id*. at 1095 (*quoting, with alterations*, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73, 124 S.Ct. 2373 (2004)). By contrast, in *Pit River Tribe v. United States Forest Service*, 469 F.3d 768 (9th Cir. 2006), we held that a lease extension was a major federal action that altered the status quo because without it, the lessee would not have been able to continue operating a power plant on the leased property. *See id*. at 784."

"The district court correctly held that *CBD*, not *Pit River*, governs this case. As in *CBD*, the original approval of the plan of operations was a major federal action. And as in *CBD*, that action was complete when the plan was approved. Unlike *Pit River*, resumed operation of Canyon Mine did not require any additional government action. Therefore, the EIS prepared in 1988 satisfied the NEPA."

Conservation Congress v. U.S. Forest Serv., No. 15-15737, 686 Fed. Appx. 392 (9th Cir. Mar. 31, 2017) (not for publication) *Agency prevailed.*

Issue(s): "hard look," agency deference, uncertainty, alternatives, cumulative impacts

Facts: Conservation Congress challenges USFS's authorization of the Porcupine Vegetation and Road Management Project in the Shasta-Trinity National Forest, alleging that USFS did not take the requisite "hard look" at environmental consequences and should have prepared an EIS. At issue was "snag standards" – the requirement that all treated areas of the forest had to retain an average of 1.5 snags per acre greater than 15 inches in diameter at breast height and 20 feet tall.

Decision: USFS took the required "hard look" at the Project's anticipated effect on snag numbers. "The 2011 field studies established a snag baseline in proposed treatment units . . . and USFS compared that baseline to the effect treatment methods will have on snag levels. Because the Project only removes snags in two limited circumstances, it was reasonable for USFS to conclude that treatment methods will not reduce snag numbers below Forest Plan standards. USFS has therefore complied with NEPA with respect to the Project's effect on snag numbers."

"USFS appropriately considered all reasonable Project alternatives. . . . The Project's Environmental Analysis ("EA") considered a total of fourteen alternatives, five of which were discussed in detail. . . . USFS also considered an alternative involving no treatment within [northern spotted] owl habitat—Alternative 6—but ultimately decided to reject that alternative. . . . In making this decision, USFS did not act arbitrarily. USFS reasonably concluded that not treating 17% of the Project area would thwart the major purposes of the Project—to improve overall forest health by reducing fuel loads and preventing catastrophic wildfires, reduce damage from insect infestation, and remove impediments to efficient tree growth—which would benefit the owl and its habitat over the long term. USFS further concluded that its decision to reject Alternative 6 was not inconsistent with its earlier management decision to avoid logging in the Late-Successional Reserve, as that area contains some of the highest quality owl habitat in the region. NEPA only requires USFS to consider alternatives reasonably related to the purposes of the Project . . . and we hold that USFS has satisfied that standard here."

"USFS properly analyzed the cumulative impacts of the Porcupine Project together with other actions, and the agency used a reasonable scope in that analysis. . . . In contrast to Conservation Congress's claim, the Council on Environmental Quality ("CEQ") Handbook does not require USFS to use the owl's "natal dispersal" distance in its analysis. The Handbook is not afforded the same level of deference as formal CEQ regulations, *see Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), and it specifically notes that it is 'not [to] be viewed as formal CEQ guidance [or] intended to be legally binding.' Absent a specific regulation curtailing agency deference in this case, we will not disturb the application of both USFS and Fish & Wildlife Service expertise to assess the impact here . . . "

"Finally, USFS was not required to prepare an EIS for the Porcupine Project, and its ultimate finding of no significant impact ("FONSI") is supported by the record. . . . An EIS is not required if there is simply some uncertainty over the Project's anticipated effects; rather, the Project's effects must be "highly" uncertain. *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006). Conservation Congress misses this distinction. While there is some uncertainty regarding the effect fires have on foraging habitat, USFS has explained that owls are known to avoid high and moderate burn areas for use as roosting and nesting habitat, a habitat considered to be of higher quality than foraging habitat. In other words, while the uncertain effect of fires in foraging areas may cast doubt on some aspects of the Project, the Project's anticipated effects as a whole are not highly uncertain and do not trigger the need for an EIS."

"The same conclusion applies to Conservation Congress's claim that, because a limited amount of logging will occur in areas designated as critical habitat, an EIS is required to fully explore the effect logging will have in those areas. . . . But Conservation Congress has not shown that these logging practices will significantly affect the environment. . . . Rather, as USFS has explained, logging in designated critical habitat will be limited to areas that support lower-quality owl habitat—and no forest treatment will occur in nesting and roosting habitat. We think USFS has provided a "'convincing statement of reasons' to explain why [the Project's] impacts are insignificant.". . . USFS's FONSI is well supported, and USFS was therefore not required to prepare an EIS."

Central Oregon Landwatch v. Connaughton, No. 15-35089, 696 Fed. Appx. 816 (9th Cir. Aug. 23, 2017) (not for publication) *Agency prevailed.*

Issues(s): reasonable alternatives, no action alternative, qualitative analysis, monitoring

Facts: The City of Bend, Oregon has long sourced drinking and municipal water from Tumalo Creek and Bridge Creek, tributaries of the Deschutes River, and has been authorized by USFS to operate an intake facility and

pipeline for withdrawing that water on the Deschutes National Forest. Plaintiffs challenged the issuance of a USFS Special Use Permit ("SUP") authorizing the City to upgrade its intake facility, construct a new pipeline, and operate the Bridge Creek Water Supply System Project for 20 years subject to certain requirements. Plaintiffs contend that the Forest Service's decision to authorize the Project, as detailed in its EA and FONSI was arbitrary and capricious and in violation of NEPA and other federal statutes.

Decision: With respect to the NEPA issue, plaintiffs "argue that the Forest Service violated NEPA because the Service only discussed two alternatives in detail: (1) implementation of the Project, and (2) a 'no action' alternative based on the existing SUP. Plaintiffs contend that (1) the 'no action' alternative was not a true 'no action' alternative, (2) analyzing two near-identical alternatives is inadequate, and (3) the Service was required to analyze a no- or reduced-diversion alternative."

"[W]ith an EA, an agency only is required to include a brief discussion of reasonable alternatives," *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008), and there is no "minimum number of alternatives that an agency must consider," as it is the "the substance of the alternatives" that matters. *Native Ecosys. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005). Here, the purpose of the SUP was to "authorize use of National Forest System lands for planned upgrades to the City's existing Bridge Creek intake facility and replacement of the City's aging Bridge Creek water supply pipelines." The Forest Service determined that the surface water formed a "critical component of the City's dual-source [water] supply."

"Plaintiffs . . . contend that the Service was required to analyze 'a true no action alternative involving no withdrawal' or a 'reduced diversion alternative' and that the two alternatives studied in detail were insufficient. The EA did, however, describe the additional alternatives considered and dismissed from detailed study….The EA explained that groundwater-only options would 'compromise the City's ability to provide a safe and reliable water supply,' reduce water flows in other parts of the Deschutes River, be costly, and be less reliable than a dual-source system. The EA also flagged possible environmental concerns posed by the groundwater-only option, including reduced surface stream flows (which are fed by groundwater) and increased energy consumption caused by pumping groundwater. This discussion was sufficient."

"The Forest Service also did not act arbitrarily and capriciously by defining its 'no action' alternative as a continuation of the existing SUP, as doing so is permitted by its own regulations, Council of Environmental Quality regulations, and circuit precedent. *See* 36 C.F.R. § 220.7(b)(2)(ii); 46 Fed. Reg. 18,027 (Mar. 23, 1981); *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010); *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000). . . . [T]o mount a successful challenge under NEPA, plaintiffs must establish the existence of 'a viable but unexamined alternative'. . . Plaintiffs fail to make this showing. '[T]he alternatives considered were reasonable in light of the cited project goals,' and the Forest Service's alternatives analysis was not arbitrary and capricious."

"Finally, plaintiffs contend that the Forest Service's analysis of the impact of climate change on the Project and level of stream flows in Tumalo Creek was inadequate . . . because the Service (1) used a qualitative, not quantitative, analysis and (2) called for additional monitoring and future adjustments, rather than taking a 'hard look' at the impacts of climate change before authorizing the SUP."

"The Service was not required to conduct a quantitative analysis. NEPA provides for analysis of impacts 'in proportion to their significance' and requires 'only brief discussion of other than significant issues.' 40 C.F.R. § 1502.2(b). Here, the Forest Service determined that climate change would have the same potential impact on

stream flows under either alternative, and therefore only a brief discussion of climate change's impact on the Project area was required. Furthermore, we allow agencies to describe environmental impacts in qualitative terms when they explain their reasons for doing so and 'why objective data cannot be provided.' *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1076 (9th Cir. 2012) (citation omitted). The Service did just that, explaining 'why precise quantification was unreliable' and therefore discussion in qualitative terms was required. *Id*. at 1077."

The court also noted that the USFS provision for future monitoring did not conflict with the "hard look" requirement because the qualitative analysis was sufficient and USFS explained why monitoring would allow for better evaluation of the impact of climate change on the area.

U.S. DEPARTMENT OF COMMERCE

Wild Fish Conservation v. National Park Serv., No. 14-35791, 687 Fed. Appx. 554 (9th Cir. Apr. 18, 2017) (not for publication) *Agencies prevailed.*

Issues(s): significance, uncertainty

Facts: This case involved a challenge by Conservation Groups ("Wild Fish") to the Department of the Interior's (the "Department") and the Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service's (the "Service") approval of hatcheries operated by the State of Washington and Lower Elwha Klallam Tribe to restore Elwha River fish populations after a dam removal project.

Decision: The Ninth Circuit affirmed the district court's entry of a judgment against Wild Fish. The Ninth Circuit held that NMFS's decision to prepare an EA instead of an EIS before approving the hatchery programs under Limit 6 was neither arbitrary nor capricious. The Department had previously endorsed the use of hatcheries in the Elwha River in a 1996 EIS and decision. *See Or. Nat. Res. Council v. Lyng*, 882 F.2d 1417, 1424 (9th Cir. 1989) (finding supplemental EIS not required where previous EIS and comprehensive management plan "had already contemplated" agency actions "of the type and magnitude proposed").

The subsequent EA reasonably concluded, after thorough analysis, that the risks posed by the hatchery programs were minimal and that approving the programs would have no significant impact on the environment. The EA reasonably concluded that the programs were not highly controversial, and the existence of "some" uncertainty did not require an EIS. NMFS reasonably concluded that there would be no cumulatively significant impact on the environment. NMFS was not required simultaneously to consider the effects of its possible future approval of other hatchery programs, as those programs had been submitted for NMFS review "on separate time schedules" and "nothing in the record suggests that the agency intended to segment review."

Because the EA satisfied NMFS's NEPA obligations, the Ninth Circuit found it also satisfied the Department's NEPA obligations. The Department participated in preparing the EA, and the EA expressly considered the effects of the Department's funding actions.

U.S. DEPARTMENT OF DEFENSE

Ground Zero Ctr. for Non Violent Action v. U.S. Dep't of the Navy, 860 F.3d 1244 (9th Cir. 2017)
Agency prevailed.

Issue(s)*:* public disclosure, alternatives

Facts: This case, in part, involved a challenge to Explosive Handling Wharf 2, on the Bangor waterfront, an expansion of a TRIDENT nuclear submarine operating center at Naval Base Kitsap, Washington. The U.S. Department of the Navy ("Navy") needed to increase its operational capacity for missile submarine maintenance at Naval Base Kitsap, and considered the possibility of building a second Explosive Handling Wharf (EHW-2). The Navy prepared and published an EIS with its projected impacts, and issued a ROD. The Ground Zero Center for Nonviolent Action, Washington Physicians for Social Responsibility and peace activist Glen Milner (collectively "Ground Zero") challenged the Navy on violations of NEPA, specifically alleging that the Navy had not fully complied with NEPA's disclosure requirements and sought an injunction. The district court denied the motion for injunction and rejected Ground Zero's motion for summary judgment. Ground Zero appealed.

Decision: Ground Zero challenged the EIS on several grounds, alleging violations of NEPA by not disclosing in the EIS the portions of Appendices A, B, and C that are now public, and omitting from the EIS the Safety Board's disapproval of EHW-2 plans, including the Navy's own analysis of potential risks from explosion. Ground Zero also challenged Navy's analysis of alternatives to building EHW-2.

Ground Zero maintained that nothing in the appendices at issue was publicly disclosed when the EIS was issued for public comment. The Navy responded that different officials were responsible at different points for redaction decisions and exercised judgment in the context of a particular risk situation at that time. The Court agreed with Ground Zero's assertion that the Navy's failure to disclose the later produced appendix violated NEPA. The Ninth Circuit did note, citing to *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 145, 102 S. Ct. 197 (1981), that some sensitive nuclear information is protected from the Freedom of Information Act's ("FOIA") disclosure requirements. 10 U.S. C. § 128; 32 C.F.R. § 223.6. The court discussed that the Navy's inconsistency in its position, that the partially redacted versions of the EIS appendices released in the litigation would meet the FOIA objective standard ("reasonably be expected to have an adverse effect"), and found the Navy failed to comply with NEPA's mandate requiring disclosure "to the fullest extent possible." 42 U.S.C. § 4332. However, the Ninth Circuit found the Navy's failure to disclose portions of the appendices to be harmless error because Ground Zero had not specified any information in the portions of App. A or App. B that could make a difference in agency decision-making or public participation. The Ninth Circuit found that the EIS did not convey that App. C contained some significant amount of analysis regarding explosives safety. App. C was labeled appropriately ("Explosive Safety Arcs for Existing EHW and Proposed Second EHW"), and the EIS stated "designated restricted areas" at Bangor are "further discussed in Section 1.1 and Appendix C." Although the court scrutinized that perhaps this statement could mislead readers, it ultimately found that it was unlikely any reader would have thought that App. C. contained a thorough analysis of safety impacts. Thus, the Navy's failure to release additional information was harmless.

Ground Zero then contended that the EIS did not acknowledge the Safety Board's rejection of the planned construction of EHW-2. The Navy responded that the Safety Board's analysis regarding "maximum possible protection" is so low that it will reject proposals even if they don't rise to NEPA's standard of "reasonably foreseeable" risks that must be disclosed, relying on Dep't of Defense directive 6050.8E and *Ground Zero Ctr. for Nonviolent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1090-91 (9th Cir. 2004) (*Ground Zero I*). In *Ground Zero*

I, the Ninth Circuit found that the Navy relied on its own estimate of the remote possibility of risk involving accidental explosion for a different project (modification of the TRIDENT missile program at Bangor), and found "such remote possibilities do not in the law require environmental evaluation." The Navy argued that similarly, the risks that concerned the Safety Board were similarly remote, and so did not need to be discussed in the EIS. The court opined that, like *Ground Zero I*, the Navy calculated the risk to be extremely small, and that the record did not indicate that there was contrary evidence the Navy ignored. The Navy did take an adequately "hard look" at the issue of safety for NEPA purposes. The Navy: conducted an analysis of the collective and individual fatality risks faced by personnel at the wharf based on previously conducted propellant hazard studies; evaluated separation distances based on other facilities conducting similar operations; convened a meeting to discuss explosives risk, attended by the Safety Board, weapons manufacturers, the Office of the Chief of Navy Operations, and Bangor base representatives; provided extensive written documentation at various levels within the Navy Command concerning the degree of risk, particularly during secretarial certification; and, accommodated Safety Board requirements related to explosives handling by adopting plans to modify or demolish buildings. The Ninth Circuit held that the Navy's safety analysis was not arbitrary and capricious and was supported by substantial evidence.

Ground Zero argued that the EIS should have revealed the Safety Board's refusal to approve the second wharf at the Bangor site, stating that NEPA imposes on federal agencies conducting environmental review a duty to consult with certain other agencies. *See* 42 U.S.C. § 4332(2)(C)(mandating consultation with any federal agency that has "special expertise with respect to any environmental impact involved"). The Ninth Circuit discussed that the Navy's own determination that the risk of explosion was low does not excuse its failure to disclose in the EIS the results of its consultation with the Safety Board. 42 U.S.C. § 4332(2)(C) (finding that the Safety Board was both "jurisdiction by law" and "special expertise"). The Navy relied on the compliance with the Safety Board's explosive standards to justify a variety of decisions, and even responded to a public comment, that "[a]ll facilities constructed at the Bangor waterfront must comply with [Safety Board] and NOSSA requirements regarding explosive safety restrictions"). The court considered that the EIS created the appearance that the Navy was intent on complying with the Safety Board's standards; it did not reveal that Navy was seeking a secretarial certification to allow it to deviate from the Safety Board requirements. The Ninth Circuit found this omission to be harmless because the opposing viewpoint was fully considered in the internal decision-making process, even though its result was not fully disclosed to the public. By not disclosing the Safety Board's assessment the Navy violated the obligation, after "consult[ing] with" expert agencies, to "ma[k]e available . . . to the public" the comments and view of the consulting agency "to the fullest extent possible." 42 U.S.C. § 4332(2)(C). But, the court continued, given the gap between its risk assessment responsibility in the EIS and approach the Safety Board preferred, the failure to disclose was harmless.

Ground Zero challenged the Navy's selection of alternatives, stating that the alternatives were quite similar to each other, and aside from the "no action" alternatives, all involved building a second explosives handling wharf at an identical location, adjacent to EHW-1, differing only in some of their construction and support details. The Court focused on the Navy's need and operational goals for the project, with the overriding goal of reaching an operational capacity of 400 days per year at Kitsap. The Navy analyzed expediting the repair of EHW-1, however, that would provide only 300 operational days per year. Another location was rejected because EHW-2 had to be located where the water was deep enough for submarine operability but shallow enough to permit the wharf's construction. The Court found the Navy's operational goal of 400 days per year was not arbitrary, capricious, unreasonably narrow, or otherwise flawed, and that the Navy's considered alternatives were "reasonably in light of the cited project goals."

Delaware Riverkeeper Network v. U.S. Army Corps of Eng'rs, 869 F.3d 148 (3d Cir. 2017) *Agency prevailed on NEPA claim.*

Issue(s): prudential waiver, alternatives

Facts: This case involved a petition to review the U.S. Army Corps of Engineers' (the "Corps") approval of an energy company's application to build an interstate pipeline project, the Orion Project (12.9 miles of pipeline), alleging that the alternatives violated the Clean Water Act ("CWA"). Although the opinion focuses on CWA compliance, the Third Circuit discussed whether the petitioners provided adequate notice of their concerns during the comment period, and in the NEPA process. Tennessee Gas Pipeline Co. ("Tennessee Gas") submitted applications to several federal and state agencies seeking approval to build an interstate pipeline project, including the Corps. The Corps issued a permit approving the project. A citizen and Delaware Riverkeeper Network (collectively, "Riverkeeper") challenged the decision on the ground that the Corps acted arbitrarily and capriciously by rejecting the "compression" alternative.

At issue was the Orion Project, 12.9 miles of pipeline looping that would transport an additional 135,000 dekatherms per day of natural gas through Pennsylvania. Approximately 99.5% of the new pipeline would run alongside an existing pipeline. Riverkeeper asserted the construction would result in deforestation, destruction of wetland habitats, and other forms of environmental damage. Riverkeeper claimed that this damage may be avoided by building or upgrading a compressor station (which uses gas- and electric-powered turbines to increase the pressure and rate and flow at given points along the pipeline's route). Building or upgrading a compressor station would increase the amount of natural gas transported through existing pipelines and thus avoid any need to build pipeline looping. Contrary to Riverkeeper's assertions, the agencies concluded that the Orion project would result in only temporary or minimal environmental impact. Of the 12.9 miles of pipeline looping, fewer than 2 miles would cross wetlands or waterbodies. The pipeline would be buried 2-3 feet beneath the ground, and all disturbed areas would be returned to their original elevations and contours with no net loss of wetlands. However, nearly 5 acres of forested wetlands would be de-forested and turned into emergent wetlands. The compression alternative would, by contrast, require constructing one or more permanent fixtures – causing permanent deforestation as well as light, air, sound, and greenhouse gas pollution.

Under the Natural Gas Act of 1938, the Federal Energy Regulatory Commission ("FERC") is the lead agency for evaluating interstate pipeline projects. 15 U.S.C. § 717n(b). As part of that role, FERC performs a technical environmental analysis pursuant to NEPA. As a condition of FERC's approval, the applicant is required to obtain any additional state or federal licenses. Here, because the Orion Project would discharge "dredged or fill materials" into the "waters of the United States," Tennessee Gas was required to obtain a permit under Section 404 of the CWA. 33 U.S.C. § 1344(a); 1362(7). The Corps reviews applications for Section 404 permits. Among other things, the Corps may not issue a permit, under the CWA, where there is a "practicable alternative" with less adverse impact on the aquatic ecosystem, "so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). In performing its alternatives analysis, the Corps may rely on, in this case, an EA, prepared by FERC pursuant to NEPA. The agencies memorialized their cooperative relationship in a 2005 Memorandum of Understanding, which states that the Corps will "use the FERC record to the maximum extent practicable and as allowed by law . . . the Corps will give deference, to the maximum extent allowed by law, to the project purpose, project need, and project alternatives that FERC determines to be appropriate for the project."

Here, FERC circulated a non-public draft EA to the Corps for comment. The draft specifically considered and rejected a possible compression alternative in a detailed chart; it stated that while compression would be "technically feasible," "economic efficiency" would be "lower" and it would "require permanent land use conversion" and present a source of light, air emissions and noise. In August 2016, when FERC published its EA for public comment, the public draft omitted the agency draft's analysis of the compression alternative. The final EA recommended a FONSI because the Orion Project's "impacts on waterbodies and wetlands would be minor and temporary." Before publication of the EA, none of the environmental comments received on the Orion Project addressed specific alternatives. After publication, groups, including Riverkeeper, commented on alternatives, but never addressed compression. The Corps received no comments and received no requests for a public hearing.

The Corps reviewed Tennessee Gas's application for a Section 404 permit and issued it the same day as FERC's. The Corps incorporated the EA into its findings – concluding the water impacts would be "temporary in nature" and the project would have a negligible effect.

Decision: Before reaching the substantive portion of Riverkeeper's claims involving the Clean Water Act, the Third Circuit first addressed whether Riverkeeper waived (or forfeited) its claims, and the court found that it did not. The court discussed that it would not need to address whether the prudential waiver rule applied in this case where Riverkeeper brought challenges under the Clean Water Act, but the court proceeded to address that Riverkeeper did not waive its claims for two reasons.

First, the Court reviewed the prudential waiver rule, which requires that before bringing their NEPA challenges in court, parties must "structure their participation" in the administrative process "so that it . . . alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65, 124 S. Ct. 2204 (2004). Under that standard, a challenger who claims that an agency failed to consider an environmentally preferable alternative must generally raise that alternative in its comments. It further noted that courts have recognized two exceptions to the prudential waiver rule. First, commenters need not point out an EA's flaw if it is "obvious." Second, a commenter does not waive an issue if it is otherwise brought to the agency's attention. *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1048 (10th Cir. 2015). In this case, Riverkeeper actively participated in the administrative process but never raised its central argument, that compression is a reasonable alternative; but, the court found that the compression alternative was brought to the agency's attention. Tennessee Gas addressed the compression alternative in its initial and follow-on applications to FERC. The Corps dismissed the compression alternative for the same reasons stated in Tennessee Gas' applications. It was also further discussed in FERC's agency draft EA. Because the Corps had independent knowledge of Riverkeeper's concerns, there was no need to specifically point out the objection to the Corps to preserve its ability to challenge a proposed action. The court found that even if the prudential waiver rule applied in the case, Riverkeeper did not waive its argument because the compression alternative was brought to the Corps' attention, and Riverkeeper was not required to present its Corps-specific objections to FERC because the Corps process made it impracticable for Riverkeeper to lodge its objections with the Corps.

The Third Circuit then examined whether the Corps was arbitrary and capricious when it failed to consider the compression alternative when it issued its CWA § 404 permit. Although most of the decision centers on the CWA § 404 analysis, the court did note that one of the challenges submitted by Riverkeeper was that the Corps failed to consider the compression alternative because it was omitted from FERC's EA. However, the court looked to Tennessee Gas' applications, which were referenced in the Corps findings when it issued the § 404 permit. The court found that the Corps, when it issued the § 404 permit, reviewed all available information, including the FERC

EA and supporting documents, and noted extensive coordination with Tennessee Gas' including documents in its applications. Thus, the court found that the Corps was not arbitrary or capricious for these reasons.

Gulf Coast Rod, Reel and Gun Club, Inc. v. U.S. Army Corps of Eng'rs, No. 16-40181, 676 Fed. Appx. 245 (5th Cir. Jan. 19, 2017) (not for publication) *Agency prevailed.*

Issue(s): scientific models, cumulative impacts, alternatives.

Facts: This case involved a challenge to the U.S. Army Corps of Engineers' (the "Corps") issuance of a permit closing a manmade channel, Rollover Pass, connecting the East Bay to the Gulf of Mexico. A recreational organization that owns the land through which Rollover Pass was built, Gulf Coast Rod, Reel and Gun Club, Inc. and Gilchrist Community Association, a local civic group that helps maintain the fishing facilities at Rollover Pass (collectively "Gulf Coast Rod & Reel") challenged whether the Corps' permitting process fulfilled the requirements of NEPA.

Rollover Bay was dug by the State of Texas in 1955 to allow fish and salt water from the Gulf of Mexico to more easily enter the East Bay, an extension of Galveston Bay through the Bolivar Peninsula. The Pass is a popular destination for fishing. For decades, studies have shown the Pass has caused erosion along the Peninsula. When Hurricane Ike devastated the area in 2008, the Texas Legislature appropriated money to close the pass to better protect the coast from erosion and environmental damage. The Texas General Land Office ("GLO") commissioned a study and the Corps adopted that study into their EA and Statement of Findings. The Corps issued a CWA § 404 permit to close Rollover Pass in 2012. Gulf Coast Rod & Reel alleged that the Corps' EA was deficient under NEPA because: (1) the EA failed to fully assess the cumulative impact that closing Rollover Pass would have on the salinity of the East Bay, and (2) the EA did not adequately consider alternatives to closing the Pass. The lower court granted summary judgment for the Corps and Gulf Coast Rod & Reel appealed.

Decision: Gulf Coast Rod and Reel first alleged that the Corps failed to properly consider the cumulative impact that closing Rollover Pass would have on the salinity levels. They alleged that the Corps should have used better scientific models that were available, and that instead of looking at multi-seasonal averages of salinity, the Corps should have considered daily changes, as the existing TxBLEND model does. It asserted the Corps failed to take into account the new Needmore Diverson's impact, which will channel freshwater from Beaumont into East Bay. This would result in the Corps overestimating the salinity of the East Bay after the pass is closed, which could have negative impacts on aquatic species living in the bay. The Fifth Circuit discussed that the Corps ordinarily prepares an EIS before issuing a § 404 permit; however, an EA may be prepared to determine whether the proposed action is significant enough to warrant an EIS. The Fifth Circuit agreed with the Corps that the closing of Rollover Pass did not create a significant impact as defined by NEPA and the salinity model was sufficient.

The Fifth Circuit fond that because the Corps choice of salinity model was reasoned and deliberate, it did not act arbitrarily or capriciously. With regard to the Corps decision to use seasonal – instead of daily – averages of freshwater entering the bay, the Corps considered and rejected the daily model. It explained the seasonal model "provided results not subject to local anomalies and episodic events which would obscure the more relevant trends with transient excursions." Further, the seasonal models were less expensive and time consuming than a daily model. The Corp's model also took into account a significant amount of raw data that spanned more than seventy years. The Corps addressed the concerns that the model failed to account for certain freshwater inflows into the bay. The Corps acknowledged this limitation, but it concluded that other freshwater sources would not have a significant impact on the study because freshwater sources already included made up the vast majority of

all freshwater flowing into the bay. The Trinity River made up for sixty to seventy percent of all freshwater entering the system. The Corps, in response to public comments, expanded the study area that was modeled to more accurately assess the salinity level. Even after taking into account this larger area, the Corps still concluded that salinity would remain within an acceptable range.

The Corps addressed the concern regarding the new Needmore Diversion, and chose not to account for it because "it is not expected to have any appreciable impact on [ ] salinity." The Corps explained the because the diversion would operate only intermittently and during time of regionally heavy rainfall, all other freshwater inflows would increase too, so the model already account for these short periods of reduced salinity. The Fifth Circuit agreed, reasoning that even though the model proposed by Gulf Coast Rod & Reel may be better, the Corps provided reasoned justifications for why it chose its model and considered freshwater inflows. The Corps extensive consideration of the cumulative impacts that closing the pass could have on the East Bay's salinity convinced the Fifth Circuit that the agency's action was not arbitrary or capricious.

Gulf Coast Rod & Reel claimed the Corps did not adequately consider alternatives to closing Rollover Pass. NEPA requires that proposals "affecting the quality of human environment" contain a detailed statement of "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1508.9. "[A]n alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose." *Id*. The purposes must not be so narrow that they foreclose the consideration of reasonable alternatives. Here, the Corps condensed the project purposes into four objectives any alternative must meet: (1) present a long-term solution for beach erosion in the area of Rollover Pass; (2) eliminate sediment transport into East Bay and Rollover Pass; (3) return the area to its more natural salinity regime; and, (4) effectively stabilize the fill material, minimize water quality impacts, minimize impacts to existing bridges and utilities, and use compatible fill materials.

Gulf Coast Rod & Reel focused on two alternatives they alleged were not considered in the Corps' analysis: (1) the construction of jetties, and; (2) the construction of a gate at the mouth of Rollover Pass. The Corps considered six alternatives to closing Rollover Pass, including one no-action alternative. In each case, the Corps found that at least one of the stated purposes of the project would not be met. The Corps explained it did not consider the use of jetties as an alternative because the GLO had considered and rejected the use of jetties prior to the application for the § 404 permit. The Corps agreed with the GLO's conclusion that "jetties would have built up sand on one side and starved the other side of sand; shunting the excess into offshore waters and away from the beach." The Fifth Circuit has upheld as adequate, consideration of alternatives that were proposed but rejected at a preliminary stage, even when reviewing a more rigorous EIS. *See Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 177 (5th Cir. 2000).

The other alternative suggested, construction of a gate at Rollover Pass, was not ever proposed to the Corps. The Fifth Circuit discussed that parties challenging compliance to NEPA must structure their participation to alert the agency to their position in order "to allow the agency to give the issue meaningful consideration," unless a flaw is so obvious that there is no need to point out the shortcoming. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65, 124 S. Ct. 2204 (2004). Gulf Coast Rod & Reel did not raise this possibility before the lower court; thus, the Fifth Circuit declined to consider it. The Fifth Circuit explained that the construction of the gate alternative was very similar to an alternative the Corps did consider, the modification of an existing weir (a low dam built to regulate the level and flow of water), which the Corps rejected because it would not prevent sedimentation from entering the pass, and it would not result in the desired lowering of salinity or improvement of water quality. Because the

Corps considered and rejected a number of alternatives to closing Rollover pass, the decision to issue a permit for closing the pass was not arbitrary or capricious.

Zbitnoff v. James, No. 16-3309-cv, 2017 WL 4176222 (2d Cir. Sept. 21, 2017) (not for publication)
Agency prevailed.

Issue(s): public disclosure: failure to apprise public of non-environmental impacts (cost-savings) and state and local permitting requirements (pre-emption).

Facts: This case involved a challenge involving the U.S. Air Force's ("USAF") decision to relocate the Joint Strike Fighter (F-35) jet aircraft to the South Burlington National Guard station in Vermont. Plaintiffs (comprised of citizens and the Stop the F35 Coalition) claimed that the USAF violated NEPA by failing to apprise the public of the information considered because the EIS failed to address the anticipated cost-savings resulting from placement of the F-35 jets at Burlington Air National Guard (ANG) over other alternative locations, and the EIS failed to consider or address Vermont's land-use law's permitting requirements and the City of South Burlington's Comprehensive Plan.

Decision: Plaintiffs asserted that the EIS must discuss non-environmental impacts (the cost-savings of placing the F-35s in South Burlington) and they rely on several cases (*Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Chelsea Neighborhood Assoc. v. U.S. Postal Serv.*, 516 F.3d 378 (2d Cir. 1975)). The Second Circuit rejected this argument and distinguished those cases. It first found that the first case, *NRDC*, focused on the importance of environmental considerations, and the second case, *Chelsea*, stated that federal agencies must give serious weight to environmental factors in making discretionary choices. The Second Circuit relied upon *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 103 S. Ct. 1556 (1983), quoting "NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment . . . [i]f the harm does not have a sufficiently close connection to the physical environment, NEPA does not apply." The Second Circuit rejected the Plaintiffs argument on this basis.

Second, Plaintiffs argued that the EIS must consider the conflict between the USAF's basing decision and the requirements of Vermont's Act 250. The Second Circuit rejected this argument, relying on the Vermont Supreme Court's ruling in *In re: Request for Jurisdictional Opinion re: Changes in Physical Structures and Use at Burlington Int'l Airport for F-35A*, 198 Vt. 510, 113 A.3d 457 (2015), that development associated with housing F-35s fell outside Act 250's permitting requirements because Act 250 was preempted by federal law and the Act 250's "state purpose" requirement prevented its application to the USAF's federal project. The Second Circuit found that because Act 250's requirements are preempted by federal law and do not apply to development undertaken for a federal purpose, the EIS was not required to address Act 250's noise standards, since they fall within "the pervasive control vested in the EPA and in FAA . . . [and] . . . seems to use to leave no room for . . . local controls" on aircraft noise."

The Second Circuit rejected Plaintiffs' final argument that the EIS failed to address South Burlington's Comprehensive Plan, as it was preempted by federal law, as would be any attempts by municipalities to control aircraft noise. The Second Circuit noted that even though it was not required to do so, USAF did consider the effects of increased noise and effects on the housing developments in South Burlington and Winooski that may have been contemplated by South Burlington's Comprehensive Plan.

U.S. DEPARTMENT OF ENERGY

S***ierra Club v. U.S. Dep't of Energy***, 867 F.3D 189 (D.C. Cir 2017) *Agency prevailed.*

Issue(s): indirect impacts, flyspecking

Facts: Freeport LNG Expansion sought to construct the Freeport Liquefied Natural Gas (LNG) Terminal in Texas. Jurisdiction to approve construction falls to FERC; jurisdiction to approve exports from the terminal falls to DOE. In *Sierra Club v. FERC* (*Sierra Club (Freeport)*), 827 F.3d 36, 40 (D.C. Cir. 2016), the court upheld FERC's decision to approve construction, saying that the environmental impacts of which Sierra Club complained would occur, if at all, as a result of action by DOE.

The Freeport LNG Expansion applied to DOE for permission to export LNG. After receipt of the application, DOE prepared two studies to evaluate the impact of LNG exports on domestic energy markets and related macroeconomic effects in 2012. In 2013, DOE conditionally approved the applications pending completion of the FERC-led environmental review of the project. In 2014, FERC released its EIS, disclosing and analyzing direct, indirect, and cumulative impacts from the construction and operation of the proposed liquefaction and export facilities. However, it did not evaluate the indirect effects pertaining to the authorization of exports. The Department adopted the EIS in full and supplemented it with two reports: the Addendum and the Life Cycle Report. The Addendum examined certain indirect effects of LNG exports, focusing primarily on the impacts of export-induced natural gas production in the U.S. The Life Cycle Report assessed the "life cycle" – from the wellhead to power plant – of greenhouse-gas emissions associated with electricity generated using U.S. LNG in Europe or Asia, and compares these with emissions from electricity generated from coal or other sources of gas.

In 2014, DOE authorized one of the four requested LNG export applications (the FLEX application). The Sierra Club challenged DOE's decision, asserting that DOE had not sufficiently examined the indirect effects of LNG exports.

Decision: "In reviewing Sierra Club's challenges, 'our task is not to "flyspeck" [the Department]'s environmental analysis for "any deficiency no matter how minor."' *Sierra Club (Freeport*), 827 F.3d at 46 (*quoting Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011)). Our job is 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.' *Del. Riverkeeper*, 753 F.3d at 1312-13 (*quoting Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983)) . . . Sierra Club asserts the Department failed to comply with NEPA because it did not tailor its review of indirect environmental effects to any particular volume of exports. The Department responds that the type of analysis Sierra Club urges would be too speculative and, in any event, unhelpful to its decisionmaking."

"The Department offered a reasoned explanation as to why it believed the indirect effects pertaining to increased gas production were not reasonably foreseeable. At the outset, it explained the difficulty with attempting to predict the incremental quantity of natural gas that might be produced in response to an incremental increase in LNG exports out of the Freeport Terminal. The link between the two depends on the price of gas, and the Department explained that the price competitiveness of U.S. LNG in foreign energy markets depends upon numerous factors that are inherently difficult to predict, including the pace of technological change, U.S. and international economic conditions, potential market disruptions, and U.S. and foreign energy and environmental regulations . . . More importantly, even if the Department could make reasonable projections about the quantity of export-induced gas production, the Department was stumped by where, at the local level, such production might occur. . . . [E]very natural-gas-producing region in the country is a potential source for new gas wells in order to meet export-induced natural gas demand . . ."

"Given that 'nearly all of the environmental issues presented by unconventional gas production are local in nature,' the Department concluded that without knowing where the production would occur, the corresponding

environmental impacts are 'not "reasonably foreseeable"' under NEPA." The court agreed: "Because the Department could not estimate the locale of production, it was in no position to conduct an environmental analysis of corresponding local-level impacts, which would be 'more misleading than informative.'"

"Rather than ignore the potential impacts of increased gas production altogether, the Department assumed that production could occur anywhere across the country and examined the effects with that in mind. Thus, the Addendum considered impacts that may be felt regardless of where they occur. . . . Generalizing the impacts does not necessarily mean minimizing them; and here, the Addendum candidly discussed significant risks associated with increased gas production. . . . Under our limited and deferential review, we cannot say that the Department failed to fulfill its obligations under NEPA by declining to make specific projections about environmental impacts stemming from specific levels of export-induced gas production."

"Sierra Club similarly contends that the Department failed to fulfill its obligations with respect to the potential for the U.S. electric power sector to switch from gas to coal in response to higher gas prices, which in turn would be a response to increased exports. . . . As the Department noted, the economic causal chain between its export authorization and the potential use of coal as a substitute fuel for gas 'is even more attenuated' than its relationship to export-induced gas production. . . . Sierra Club has the same complaint about the Department's failure to make specific projections about the indirect effects of coal, but offers no reason to believe the impacts are any more foreseeable or more prone to usefulness than those associated with increased gas production. Thus, Sierra Club's petition with respect to coal usage is denied."

"Sierra Club challenges the Department's examination of the potential greenhouse-gas emissions resulting from the indirect effects of exports. To address these issues, the Department evaluated the upstream and downstream greenhouse-gas emissions (CO2 and methane) from producing, transporting, and exporting LNG in its Life Cycle Report. . . . As the Department explained, there are a number of other fuel sources that U.S. LNG might compete with, and '[t]o model the effect that U.S. LNG exports would have on net global [greenhouse-gas] emissions would require projections of how each' fuel source (nuclear, renewable, etc.) would be affected in each potential LNG-importing nation . . . Such an analysis, the Department noted, would require consideration of the dynamics of all energy markets in LNG-importing nations, and given the many uncertainties in modeling such market dynamics, the analysis would be 'too speculative to inform the public interest determination.' . . . In addition to foreseeability limitations, '"practical considerations of feasibility might well necessitate restricting the scope" of an agency's analysis.' . . . We see nothing arbitrary about the Department's decision."

U.S. DEPARTMENT OF THE INTERIOR

Government of the Province of Manitoba v. Zinke, 849 F.3d 1111 (D.C. Cir. 2017) *Agency prevailed.*

Issue(s): remedy (modification of injunction)

Facts: This case involved a modification of a previous injunction issued involving a project approved by the Bureau of Reclamation (the "Bureau") to improve drinking water quality by withdrawing water from the Missouri River and transporting it via a 45-mile long pipeline to the Hudson Bay Basin in North Dakota. On March 1, 2016, North Dakota filed a motion to modify an injunction governing the Northwest Area Water Supply Project ("NAWS" or "the Project"). The district court stated North Dakota did not present either changes in law or facts sufficient to warrant modifying the injunction" and summarily denied the motion.

The Project has a complex history -- for at least twenty years, North Dakota and the Bureau have attempted to design and construct NAWS, a project designed to ameliorate North Dakota's longstanding difficulties in obtaining sufficient quantities of high-quality drinking water. If approved, the Project would withdraw water from the Missouri River Basin and transport it via a 45-mile long pipeline to the Hudson Bay Basin located in Northwest North Dakota, providing a new water source to approximately 81,000 citizens of North Dakota living within the Project communities.

In 2001, the Bureau issued an EA and FONSI for NAWS. Construction began in 2002, but, six months later, the Province of Manitoba challenged the sufficiency of the EA and FONSI on the grounds that they did not adequately grapple with potential ecological problems caused by transferring treatment-resistant biota into the Hudson Bay Basin. According to the 2001 EA, water would be withdrawn from the Missouri River, "partially disinfected and pre-treated," travel via buried pipeline across the continental divide into the Hudson Bay Basin, and then receive final treatment. Project water "would drain into the Souris River, which flows into Manitoba." Manitoba claimed the Project would not adequately treat the water, resulting in the transfer of non-native biota into the Hudson Bay Basin. This could "eliminate indigenous species, cause reduced growth and survival rates in indigenous species, and change the trophic structure of fish communities." North Dakota intervened as a Defendant. In February 2005, the district court agreed with Manitoba, remanding the case to the Bureau for further NEPA work. After the remand, Manitoba asked the district court to grant a permanent injunction governing all NAWS-related activities. Otherwise, it argued North Dakota would "plunge ahead" with construction so as to "create a fait accompli, limit the 'freedom of choice' essential to sound decision-making under NEPA [,] and risk irreversible environmental consequences." Though the court noted the importance of "preserv[ing] for the agency the widest freedom of choice when it reconsiders its action after coming into compliance with NEPA," it weighed that interest against "the avoidance of unnecessary delay in the delivery of a reliable source of high quality water to approximately 81,000 people." The court also noted "the public interest is best preserved by ensuring attention to environmentally sensitive decision-making through the least-intrusive means necessary." Thus, rather than granting a full injunction, it permitted North Dakota to move forward with construction that would not impact the "opportunity for sound decision-making under NEPA . . . [and] [b]efore any other NAWS construction may proceed, the government must return to the Court to demonstrate why the proposed additional construction would not influence or alter the agency's ability to choose between water treatment options."

The Bureau completed its next NEPA analysis in January 2009. This time, the Bureau prepared an EIS rather than a FONSI, but it still identified the Missouri River as the Project source. Manitoba claimed the EIS still did not adequately address the transfer of treatment-resistant bacteria. Missouri filed a separate challenge, alleging the EIS did not properly account for cumulative effects of water withdrawal from the Missouri River. The cases were consolidated in 2009 and, together, Manitoba and Missouri moved for summary judgment. They argued the Bureau had not taken a hard look at (1) reasonable alternatives to the Project, (2) "the cumulative impacts of the Project on Missouri River water levels," and (3) the consequences of bacteria transfer. On March 5, 2010, the court again remanded to the Bureau for further consideration of the second and third issues. The court chastised the Bureau for "wast[ing] years by cutting corners and looking for short cuts," as well as its "breathtaking" misreading of the court's 2005 opinion.

After the second remand, the Bureau engaged in a third, full-blown NEPA analysis that not only considered the two remanded issues, but also "reexamin[ed] and updat[ed] all prior NEPA analyses" associated with the Project. The Bureau issued the final supplemental EIS ("FSEIS") in April 2015, and the ROD followed in August. The documents again identified the Missouri River as the selected Project alternative, with supplemental water taken from the Minot and Sundre aquifers, both of which are located in North Dakota. The FSEIS also included provisions for a

water-treatment plant in North Dakota that, among other things, would inactivate treatment-resistant bacteria before the water transferred to the Hudson Bay Basin. In January 2016, Missouri and Manitoba challenged the FSEIS once again. On March 1, 2016, North Dakota filed a motion to modify the 2005 injunction, seeking permission to begin "paper design" of the proposed water-treatment plant. On June 14, 2016, the district court denied North Dakota's request. On appeal, North Dakota asked for a remand with instructions to grant its requested modification.

Decision: The court rejected North Dakota's reliance on the four factors set out in *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20, 129 S.Ct. 365 (2008), but it noted that North Dakota's opening and reply briefs before the district court identified three changed circumstances that justified a modification of the injunction.

First, water quality and quantity concerns had become more acute and "continued to deteriorate." Second, the Bureau's completed FSEIS and ROD eliminated any concern that the modification would compromise the NEPA decisionmaking process. Third, "[d]ue to the state's biennial budget cycle, if funding requests for this design work [were] not submitted by [Summer of 2016], funding may not become available until mid-2019."

In support of its motion, North Dakota attached a declaration submitted by NAWS's Project Manager stating the paper design work would take approximately twenty months to complete, and physical construction would require an additional two years. Thus, at a minimum, the plant would take four years to construct. The Project Manager indicated the plant's paper design was the most time-consuming Project component. North Dakota attached a copy of a Memorandum of Understanding entered into with the Bureau, wherein North Dakota agreed to fund the paper design work at its own expense "until the NAWS injunction is lifted or the litigation is otherwise resolved." It did not, however, attach any concrete data demonstrating decreased water quantity or quality.

To counter North Dakota's water quantity argument, Manitoba presented daily water level data from the years 2000 to 2016 for the Sundre, Little Muddy, and New Rockford aquifers. Each graph depicted significant variety in water levels, but all three showed a general trend downward until about 2009, followed by a general upward trajectory that peaks between 2012 and 2014. Water levels in the Sundre and Little Muddy aquifers sit above where they rested in 2005. North Dakota rebutted the relevance of this data by noting the Little Muddy aquifer was outside the Project area. It provided a second declaration from the Project Manager, which stated the New Rockford aquifer "is already heavily appropriated . . . and is therefore incapable of serving as a useful municipal water supply." North Dakota described the upward trend in water levels as temporary, noting the state experienced significant flooding during 2011. It presented hydrographic data demonstrating water levels had subsequently dropped and argued 2011's anomaly could not be used to predict water levels going forward.

Regarding water quality, North Dakota identified (without supporting data) increased levels of arsenic, total dissolved solids ("TDS"), sodium, iron, and manganese. In response, Manitoba presented water-quality tables from Minot, one of the areas served by the Project, spanning the years 2011 to 2014. These tables reflect that sodium and TDS levels remained constant throughout this timeframe, and a 2002 Minot water-quality report attached to North Dakota's reply brief also recorded the same levels for these minerals. The court noted that upon comparing the 2002 and 2013 water-quality reports indicates arsenic levels have risen from 1.23 parts per billion in 2002 to 3.41 parts per billion in 2013.9. Though still falling within the Safe Drinking Water Act's safe drinking water standards, *see* 42 U.S.C. § 300f, et seq., the reports nevertheless demonstrate an almost threefold increase in arsenic during the course of the injunction's lifespan.

The court concluded North Dakota presented two changed circumstances sufficient to justify granting its narrow modification. First, issuance of the FSEIS and ROD constitutes a "significant change . . . in factual conditions" that "renders continued enforcement of the judgment detrimental to the public interest." In its initial injunction decision, the court justified the tailored injunction by emphasizing the need to protect the integrity of the NEPA decision-making process. The completion of the FSEIS and ROD marked the "consummation" of the Bureau's decision-making process regarding the Project's primary water source. The court found that the Bureau has "come to the end of the NEPA road."

Once North Dakota met the changed circumstances requirement, the court next reviewed whether North Dakota's requested modification was suitably tailored. The issuance of the FSEIS and ROD significantly eliminated — at least temporarily — the court's concerns about North Dakota's ability to exert influence over the Bureau's NEPA decisions. The court found this risk was further mitigated by North Dakota's agreement to incur all costs associated with the proposed paper design work until the injunction is lifted "or the litigation is otherwise resolved."

On the other side of the scale, beneficiaries of NAWS necessarily face, at minimum, a four-year-long delay before North Dakota can finish construction of the plant. With these two considerations in mind, the court found North Dakota's requested modification posed no current harm to the NEPA process and advanced the goal of protecting the Project's population from unnecessary delay. *See Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 606 F.2d 1261, 1272–73 (D.C. Cir. 1979) (declining injunction over project construction despite NEPA violations after considering "the social and economic costs of delay" and "[t]he public interest to be served in the continued construction"). Since North Dakota will fund the design work, and because the design work does not even involve physical "construction"— the term used in the original injunction — the court concluded the modification was "suitably tailored to the changed circumstance." The court held the modification met both the public interest and tailoring prongs, and should be granted.

Second, the increase in arsenic levels over the course of the injunction's lifespan constituted a significant changed circumstance warranting revision of the injunction. Exposure to arsenic in drinking water had been linked with cancer of the skin, liver, kidney, bladder, and lung. Though Minot's water levels still fell within safe drinking water standards, this toxin has nearly tripled during the course of the injunction. Further, the community must wait at least four years before any treatment plant can be built, during which time arsenic levels may continue to rise. Given the narrow scope of North Dakota's proposed design work, the court acknowledged the modification served the public interest because it allowed the State to attempt to reduce the duration of these exposure risks while causing no current harm to the NEPA process.

The court remanded to the district court with instructions to grant the motion. The court summarized that the relief North Dakota sought was exceedingly narrow, and — at its own expense — it would use the modification to address an imminent public health crisis faced by its citizens.

WildEarth Guardians v. U.S. Bureau of Land Mgm't, 870 F.3d 1222 (10th Cir. 2017) *Agency did not prevail on one of its substantive NEPA claims; prevailed on other substantive NEPA claim.*

Issue(s): flyspeck, impact assessment (impacts to carbon emissions, substitution assumption), remedy

Facts: This case involved a challenge by Wild Earth Guardians and Sierra Club ("WildEarth") to the U.S. Bureau of Land Management's ("BLM") decision approving four coal leases that would expand coal mines in Powder River Basin in grasslands near Wright, Wyoming. Plaintiffs argued that BLM failed to comply with NEPA when it

concluded issuing the leases would not result in higher national carbon dioxide emissions than would declining to issue them. The State of Wyoming ("Wyoming") intervened, as did a group of mining interests (BTU Western Resources, Inc., the National Mining Association, and the Wyoming Mining Association).

The Powder River Basin ("PRB") is the largest single contributor to US domestic coal production. In 2008, PRB represented 55.5% of the US surface-mined coal, and 38.5% of the country's total coal production. BLM controls much of this region and is often in the business of approving mining infrastructure and issuing mining leases under the Federal Land Policy and Management Act, the Mineral Leasing Act, and BLM's own regulations and plans. At issue are four coal tracts that extend the life of two existing surface mines near Wright, WY, the Black Thunder mine and the North Antelope Rochelle mine. The four "Wright Area Leases" at issue are North Hilight, South Hilight, North Porcupine and South Porcupine. The tracks are near, and partially within, the Thunder Basin National Grassland, a national forest. Alone, the two existing mines account for approximately 19.7% of the US annual coal production. The North and South Hilight leases will extend the life of the Black Thunder mine by approximately four years; the North and South Porcupine leases will extend the life of the Antelope Rochelle mine by approximately nine years. Without the leases, the existing mines would cease operations after the currently leased reserves are depleted. The North Hilight lease was never sold, although BLM prepared a ROD for it. Mining has commenced under three of the four leases. The tracts at issue contain roughly two billion tons of recoverable coal.

BLM prepared a DEIS in July of 2009 for the leases. In the DEIS, BLM compared its preferred action alternative to the no action alternation (none of the coal leases would be issued) as required by CEQ Regulations, 40 C.F.R. § 1502.14. Regarding carbon emissions and impacts on climate change, BLM concluded that there was no appreciable difference between the US's total carbon dioxide emissions under its preferred alternative and the no action alternative because even if BLM did not approve the leases, the same amount of coal would be sourced from elsewhere. Thus, there was no appreciable difference between the no action and preferred alternatives.

WildEarth commented that BLM's conclusion on carbon dioxide emissions, was "at best a gross oversimplification" and at worst, "entire impossible." They argued that if the tracts were not leased it would be very difficult for domestic or international coal mines to replace that quantity of coal for the same price, making "other sources of electricity" with lower carbon dioxide emission rates, more competitive than coal. WildEarth concluded that the authorization of the leases would have a significant effect on national carbon dioxide emissions, and that BLM failed to adequately compare alternatives. In its responses to the comments, BLM stood by its conclusions regarding the comparative demand for coal and resulting carbon dioxide emissions. It acknowledged that cost is one factor which "determine[s] the potential for switching to non-carbon based electric generation" than coal production and coal mining would decrease. But it did not acknowledge that denying the Wright Area Leases would have any effect on the price for coal or demand for it. Instead, the BLM concluded that because Energy Information Administration ("EIA") projections indicated that population and energy demand would rise, and that coal would remain the largest fuel in the energy mix, demand for coal would remain static with the potential reduction in supply. BLM stated that limiting one or even several points of fuel supply would not affect coal use because of the diverse group of national and international suppliers.

The BLM published its FEIS in July 2010. However, the BLM's contested conclusion regarding comparative carbon dioxide emissions for the no action alternative remained in the FEIS:

> It is not likely that selection of the No Action alternative [ ] would result in a decrease of US CO2 emission attributable to coal mining and coal – burning power plants in the longer term because there are multiple other sources of coal, that, while not having the cost, environmental, or safety advantage,

> could supply the demand for coal beyond the time that the Black Thunder . . . and North Antelope Rochelle mines complete recovery of the coal in their existing leases.

For purposes of the conclusion, BLM assumed that all forms of electric generation would grow at a proportional rate in 2010, 2015 and 2020. The FEIS relied on several reports, including the EIA's Annual Energy Outlook reports from 2008, 2009 and 2010. Under these projections, coal's share of the energy mix represents the largest share in the United States. BLM predicted the overall demand for coal to grow in the Wright area. BLM then concluded that, because overall demand for coal was predicted to increase, the effect on the supply of coal of the no action alternative would have no consequential impact on demand.

The Tenth Circuit discussed that this long logical leap presumed either the reduced supply will have no impact on price, or that any increase in price will not make other forms of energy more attractive and decrease coal's share in the energy mix. BLM acknowledged that many forces might impact future demand for coal, but it continued to disagree that a lack of supply leading to an increase in price could be one of those forces. The court observed that BLM also repeatedly noted that PRB coal enjoys several cost advantages over coal from other regions, but again, disavows the possibility that the no action alternative, in which half of the current PRB production would stop, would impact the price of coal or demand for it.

Following the FEIS, BLM issued a ROD for each of the four tracts, deciding to offer them for lease, and each are practically identical in the discussion of climate change implications of the no action alternative. BLM addressed the issue, stating, "denying this proposed coal leasing is not likely to affect current or future domestic coal consumption used for electric generation." BLM disagreed with the comment that denying the proposed federal coal leasing application would consequentially reduce the overall rate of national coal consumption by electric generators. The ROD further stated that numerous mines located outside of the PRB extract and produce coal in the U.S. and many mines outside of the PRB have the capacity to replace the coal production generated by the Black Thunder Mine and the North Antelope Rochelle mine. The ROD explained that the inability of the Black Thunder Mine or any other existing PRB producer to offer reserves in the coal market would not cause electric generators to stop burning coal because utility companies would likely operate existing coal-burning facilities until either cost or regulatory requirements render them ineffective or they are replaced by other reliable large scale capacity electric generation technologies capable of consistently supporting the bulk electrical demands.

The court pointed out the contradictory language in the ROD with regard to its assertions regarding replacement coal not having an effect on the market:

> PRB coal has competed for an increasing share of coal sales in the market primarily because it [ha]s lower cost, [is] environmentally compliant, and [its] successful post-mining reclamation has been thoroughly demonstrated. For these reasons, over the past several decades, PRB coal has been replacing other domestic coals in the open market, and would be expected to compete similarly in the future. . . . When current reserves are depleted at these mines, their production would likely be replaced by other domestic and, potentially, international coal producers with coal that is more costly, less environmentally compliant, and has greater residual environmental impact.

Since BLM's decision, North and South Porcupine and South Hilight were leased; North Highlight's lease had not yet been sold.

In 2012, WildEarth challenged the four RODs and the FEISs in federal district court in three consolidated cases. The WildEarth objected to BLM's no action alternative analysis before the district court, among various other issues, but the district court did not specifically address it. In the end, the district court upheld the BLM's actions as reasonable.

Decision: The central issue on appeal was whether the BLM's assumption that there was no real world difference between issuing the Wright area leases -- and declining to issue them -- because third party sources of coal would perfectly substitute for any volume lost on the open market, should the BLM decline to issue the leases. WildEarth argued that BLM's substitution assumption rendered its comparison of the preferred alternative (issuing the leases) and the no action alternative (not issuing the leases) arbitrary and capricious for two reasons: the assumption itself lacked support in the administrative record and ignored basic supply and demand principles; and it ignored readily available tools to measure the market impact of such a large contraction in the nation's coal supply, which amounts to a failure to acquire the information "essential to a reasoned choice among alternatives." 40 C.F.R. § 1502.22(a) ("If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.").

WildEarth asserted that BLM's assumption of "replacement" lacks any support in the administrative record and the court agreed. BLM did not point to any information (other than its own unsupported statements) indicating that the national coal deficit of 230 million tons per year incurred under the no action alternative could be easily filled from elsewhere, or at a comparable price. It did not refer to the nation's stores of coal or the rates at which those stores may be extracted. Nor did BLM analyze the specific difference in price between PRB coal and other sources; such a price difference would affect substitutability. Wyoming argued that the record supported a conclusion that failing to issue the leases would not impact the nation's coal supply and thus would not impact the national price of coal because the replacement coal would come from within the PRB, and enjoy the same cost advantages over other regions. But BLM never indicated on the record that coal from within the PRB would replace that extracted under these leases (possibly to avoid any perception of agency capture); to the contrary, its statements indicated only that replacement coal would come from outside the region.

The Tenth Circuit found that the resource that BLM relied on opposed BLM's conclusions. BLM did not acknowledge portion of the 2008 Energy Outlook report, which contradicted its conclusion; BLM merely relied on other portions of that same source. The inconsistent portion explains that an increase in coal prices would affect national demand for coal because it would compete less effectively against other sources of energy – thus, the report supports what is intuitive: when coal carries a higher price, the nation burns less coal in favor of other sources, and that forces that drives up the cost of coal could drive down coal consumption. BLM counter-argued that overall increase for demand for electricity will override the effect of increase coal prices, but the court found no evidence in the record that BLM considered the potential impact of increased price on demand, BLM merely concluded it would have no impact. The Tenth Circuit found that BLM's assumption fell below the required level of data necessary to reasonably bolster BLM's choice of alternatives. "The evidence must be sufficient in volume and quality to 'sharply defin[e]' the issues and provide a clear basis for choice among alternatives."

The Tenth Circuit applied the rule of reason standard in deciding whether claimed deficiencies in an FEIS are merely flyspecks, or are significant enough to defeat the goals of informed decisionmaking and informed public comment. The court then looked to non-NEPA APA cases. In *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 S. Ct. 2246 (1983), the Supreme Court upheld the NRC's conclusion that permanent nuclear waste storage would not have a significant environmental impact based on the assumption that the waste repositories would perform

perfectly. The Supreme Court considered three factors regarding the assumption: (1) it had a limited purpose in the overall environmental analysis, i.e., it was not the key to deciding between two alternatives; (2) overall, the agency's estimation of the environmental effects was overstated, so this single assumption did not determine the overall direction the NEPA analysis took; and (3) courts are most deferential to agency decisions based not just on "simple findings of fact," but in the agency's "special expertise, at the frontiers of science." *Id*. at 102–04, 103 S.Ct. 2246.

The Tenth Circuit differentiated BLM's substitution assumption. First, the assumption was critical to deciding between two alternatives: whether or not to issue the leases, and thus was more than a mere "flyspeck." Second, the BLM's carbon emission analysis underestimated the effect on climate change. The RODs assume that coal will continue to be a much-used source of fuel for electricity and that coal use will increase with population size. Third, the court also found climate science was a scientifically verified reality, and that climate modeling technology exists. The court also distinguished *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), because in *Mid States*, the agency "completely ignored the effects of increased coal consumption and made no attempt to meet the CEQ regulation." Here, the BLM did not completely ignore the effects of increased coal consumption, but rather it analyzed them irrationally.

The Tenth Circuit found that failing to adequately distinguish between the alternatives defeated NEPA's purpose: (1) prevent uninformed agency decisions; (2) provide adequate disclosure to allow public participation in those decisions. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–39, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989); *see also Marsh v. Or. Nat. Res. Council,* 490 U.S. 360, 371, 109 S. Ct. 1851, 104 L.Ed.2d 377 (1989) (referring to "the Act's manifest concern with preventing uninformed action"). Failing to disclose the data critical to the key distinction between two alternatives led to what appears, on the record, to be an uninformed agency decision and did not adequately disclose the BLM's rationale to the public. The court held that it was an abuse of discretion to rely on an economic assumption, which contradicted basic economic principles, as the basis for distinguishing between the no action alternative and the preferred alternative.

The Tenth Circuit rejected, however, WildEarth's contention that BLM's failure to use "readily available" modeling tools to determine climate impact was arbitrary and capricious. The Plaintiffs pointed to an available computer modeling system, the National Energy Modeling System, that BLM might have used. The court found this modeling argument to be unpersuasive because NEPA does not require agencies to adopt any particular internal decision-making structure. Choosing not to adopt a modeling technique does not render the BLM's EIS arbitrary and capricious; its irrational and unsupported substitution assumption did.

The Tenth Circuit declined to extend any additional layer of deference to BLM. The BLM did not provide any reasoning or analysis for its conclusion that the no action alternative would bear no consequential difference to the proposed leases, other than noting that overall coal demand was projected to increase under the EIS's baseline assumptions. The Court also rejected BLM's harmless error argument, since it was not raised before the district court.

In a concurring opinion, Judge Baldock agreed with the court's analysis of the BLM's economic assumption on that basis, without joining in its analysis on climate science.

NOTE: In an interesting remedy, the court declined to vacate existing leases when remanding the EIS (similar to last year's remedy in *Public Employees for Envt'l Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016)). The Tenth Circuit considered the following remedies: (1) reversing and remanding without instructions, (2) reversing and

remanding with instructions to vacate, and (3) vacating agency decisions. The Tenth Circuit ultimately declined to vacate the leases. The court found the challenge was involving a fairly narrow issue, and considered that the district court may vacate the entire FEIS and RODs, or it might fashion some narrower form of injunctive relief based on equitable arguments the parties have failed to make. Second, the question remained what will happen to the leases, which were already issued, and whether mining the lease tracts should be enjoined—both of which were not addressed before the court. Third, the court considered the fact that the three leases that were issued are currently being mined.

Mayo v. Reynolds, 875 F.3d 11 (D.C. Cir. 2017) *Agency prevailed.*

Issue(s): supplementation

Facts: This case involves a challenge by two wildlife photographers, Kent Nelson and Timothy Mayo ("Plaintiffs") to decisions made by the National Park Service ("Park Service") authorizing recreational hunting of elk in Wyoming's Grand Teton National Park ("Grand Teton") without first conducting a NEPA review to assess whether and to what extent hunting was necessary for the proper management and protection of the elk.

Grand Teton and the National Elk Refuge ("Refuge") are home to the "Jackson herd," one of the largest concentrations of elk in North America. Two federal agencies share primary responsibility for managing the Jackson herd: the Park Service, which has jurisdiction over Grand Teton, and the U.S. Fish and Wildlife Service ("FWS"), which manages the Refuge. In 2007, the two agencies, acting together, adopted a fifteen-year plan ("2007 Plan") to manage the Jackson herd. The 2007 Plan set objectives to reduce the population size of the herd, limit their risk of disease, and conserve their habitat. In conjunction with the 2007 Plan, the agencies also issued a final environmental impact statement ("EIS"), as required by NEPA.

The 2007 Plan analyzed six alternative long-term strategies for managing the Jackson herd. The 2007 EIS, in turn, carefully assessed the environmental risks posed by the alternative strategies. In the end, the agencies adopted an elk-reduction program pursuant to which the Park Service would authorize elk hunting as needed to attain the Plan's population objectives. The program also contemplated that the FWS would reduce supplemental feed given to the elk during winter months on the Refuge. Between 2007 and 2015, the Park Service adhered to the elk-reduction program in determining the number of elk authorized to be harvested and the number of hunters deputized to participate in a hunt. As a result, from 2007 to 2015, the size of the herd decreased, as did the number of deputized hunters and the number of elk authorized to be harvested. During this same period, however, the FWS failed to meet the 2007 Plan's objective to wean the herd from supplemental feed.

In the district court, the Plaintiffs argued that the Park Service was required to prepare a new NEPA analysis every year that it implemented the fifteen-year elk-reduction program, disclosing and analyzing the unique environmental effects of each year's hunt. Because no such analysis was done for the 2015 hunt authorization, they claimed that the Park Service's action violated NEPA. Plaintiffs contended that the FWS's failure to reduce supplemental feeding in line with the Plan's goals necessitated the preparation of a supplemental EIS. However, supplemental feeding is managed by the FWS and Plaintiffs did not seek to pursue any action against the FWS with respect to that program, and the district court denied summary judgment. Nelson alone appealed.

Decision: Nelson's primary argument on appeal is that each annual hunting authorization constitutes a "major Federal action" that triggers NEPA's mandate that the agency prepare an EA or EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18 (defining "Federal action" to include "continuing activities" and approvals by federal agencies of

"specific projects, such as . . . management activities located in a defined geographic area" and "actions approved by permit"); *id*. § 1508.27 (defining "significantly"). Nelson offered three arguments in support of his claim that the 2007 EIS cannot satisfy this statutory requirement: (1) the 2007 Plan did not disclose the particulars of each future annual hunt; (2) the agencies have stopped implementing the Plan; and (3) significant new information bearing on the environmental effects of hunting had never been analyzed.

Intervenor, the State of Wyoming, argued that the Park Service's authorization of the 2015 elk-reduction program is not a "major Federal action" since it is "simply one step in the agency's ongoing management of the elk and bison herds under the fifteen-year term of the 2007 Plan." The Park Service, in turn, contended that even if each hunting authorization is a "major Federal action" which may "significantly affect" the environment, the 2007 EIS relieved the Park Service of the obligation to prepare fresh NEPA documentation each year it implements the elk-reduction program in conformity with the 2007 Plan.

The court agreed that once an agency has taken a "hard look" at "every significant aspect of the environmental impact" of a proposed major federal action, it is not required to repeat its analysis simply because the agency makes subsequent discretionary choices in implementing the program. In this case, the Park Service published a thorough and detailed EIS in 2007. Nelson did not identify any significant way in which the subsequent hunting authorizations deviated from the assessment made in 2007. NEPA does not impose a duty on agencies "to include in every EIS a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action." And an agency is not required to make a new assessment under NEPA every time it takes a step that implements a previously studied action. So long as the impacts of the steps that the agency takes were contemplated and analyzed by the earlier NEPA analysis, the agency need not supplement the original EIS or make a new assessment. The 2007 EIS was clearly sufficient to cover elk hunting during the ensuing fifteen years under the 2007 Plan absent a material change causing unforeseen environmental consequences.

1. Adequacy of the 2007 EIS

In preparing the 2007 EIS, the agencies took a hard look at the potential environmental effects of the program to reduce the Jackson elk herd through annual hunting determinations. Spanning more than 600 pages, the EIS analyzed the effects of elk hunting on a variety of relevant environmental factors. For example, the EIS described how the elk-reduction program would likely affect the elks' mortality potential, the overall size of the Jackson herd, and the ability of the Park Service to accomplish the Plan's population goals for the elk. The EIS considered the effect of hunting on the density of the herd and distribution of the elk throughout the Park and Refuge, as well as on calving, age, and sex ratios of the elk, how hunting might affect social practices, potentially increasing the elks' "nervousness, energetic expenditures, and possibly decreasing nutrition because of reductions in foraging." The EIS took into account the elk-reduction program's likely consequences on other wildlife, including various amphibians, as well as mule deer, moose, pronghorn and bighorn sheep, and the effect of hunting on listed species. In addition, the EIS considered the elk-reduction program's relation to the region's human environment. It evaluated the likelihood that hunting would cause injury, increase the risk of traffic accidents, and reduce visitors' opportunities to observe the elk, including for purposes of wildlife photography. The EIS further explained that by bringing people into proximity with the elk, hunting might increase the risk that humans catch diseases from the animals.

The EIS analyzed more than just the environmental effects of the elk-reduction program. It also evaluated alternative uses of hunting as an elk-management tool. For instance, it considered changing hunting practices by closing traditional hunting areas and opening non-traditional areas. It thoroughly discussed the possibility of

eliminating hunting completely from the Park and Refuge and contained a detailed discussion of possible mitigation measures. The court found there was no question that the 2007 EIS "adequately considered and disclosed the environmental impact of" the 2007 Plan's preferred elk-reduction program, its necessity, and its alternatives.

Nelson faulted the Park Service for not preparing a NEPA analysis each year during the fifteen-year term of the 2007 Plan to document each "hunt's timing, location, restrictions, and . . . potential alternatives for avoiding or minimizing impacts." The court found that Nelson claims seek more than is required by NEPA. Therefore, the Park Service had no duty to prepare a supplemental or new EIS.

2. Agency Discretion to Determine When and How to Engage in NEPA Analysis

NEPA does not prevent an agency from satisfying future NEPA obligations by performing a NEPA analysis at the outset of a long-term project. In *New York v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 1012, 1019 (D.C. Cir. 2016) (upholding a "Generic Environmental Impact Statement" concerning the effects of on-site storage of spent nuclear fuel), the court found it was clear that the agencies' decision to adopt a fifteen-year plan supported by one EIS was permissible under NEPA. It explained that agencies are not always free to comply with NEPA by issuing a single EIS at the outset of a long-term project. An environmental analysis that occurs too early in the planning process may lack "meaningful information" necessary for informed consideration. Thus, if a program "involves . . . separate sub-projects and will take many years," NEPA's implementing regulations allow the agency to "evaluate[ ] each sub-project as it becomes ready" and tailor its subsequent analyses to particularized considerations not already addressed in a prior "programmatic EIS." Tiering — as this process is known — is "appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." 40 C.F.R. § 1508.28(b).

In *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010), the plaintiffs argued that the specific approvals were arbitrary and capricious because the underlying EIS used an outdated scientific method for measuring the project's effects on ozone concentrations. *Id*. at 510–11 (approving drilling permits based on EAs that tiered to a programmatic EIS). The court rejected plaintiffs' contention, "[w]hile courts have required [EAs] to analyze certain impacts for the first time when the broader analysis did not address the impact in question at all, this is not such a case." *Id*. at 512. The earlier EIS already "address[ed] the impact drilling would have on ozone concentrations" and "[n]othing in the law requires agencies to reevaluate their existing environmental analyses each time the original methodologies are surpassed by new developments." *Id*.

The D.C. Circuit distinguished *Theodore Roosevelt* because the court expressly excused the agency from conducting subsequent environmental analyses of issues already thoroughly evaluated in the earlier impact statement, stating "site-specific" NEPA analyses are required only for "those localized environmental impacts that were not fully evaluated in the program statement." The D.C. Circuit noted it was the Park Service's duty to decide whether to perform the environmental analysis in a comprehensive EIS or in narrower annual documentation. *See also Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 374 n. 73 (D.C. Cir. 1981) ("[T]he decision whether to prepare a programmatic impact statement is committed to the agency's discretion."). Thus, the court rejected Nelson's argument.

3. Consistency of the Annual Hunts with the 2007 Plan and 2007 EIS's Projections

The record indicated that the Park Service implemented the elk-reduction program in the manner envisioned by the 2007 Plan and analyzed in the 2007 EIS. The Plan and EIS predicted that the number of deputized hunters in the Park would decline from an average of 1,600 hunters per year to 773–957 and, over "the long term," the number of elk harvested would decline from an average of 480 elk per year to 232 to 287 elk per year. Over the last ten years, the number of elk authorized to be hunted in the Park declined from 600 to 300, with fewer hunters deputized to hunt elk in both the Park and Refuge combined than the Plan allowed for the Park alone. In sum, the record confirmed that the Park Service's elk hunting authorizations have been within the range of the Plan's expectations, on which the 2007 EIS based its analysis.

The court found Nelson's argument that the agencies abandoned the 2007 Plan had no merit and further held that Nelson's policy preference for reduced supplemental feeding is beyond the scope of our review of his NEPA challenge. The 2007 EIS satisfied the requirements of the law for the annual elk hunts. The subsequent failure of the FWS to cut back on supplemental feeding does not undermine this conclusion, especially when the record indicates that all of the potential environmental effects of the Plan were fully addressed in the 2007 EIS and the principal policy objectives of the 2007 Plan are being met.

4. Challenge to the FWS's Supplemental Feeding

The question remains whether the FWS's failure to cut back on supplemental feeding is otherwise unlawful. The court really focused on the fact that the FWS, not the Park Service, is responsible for the supplemental feeding program, which takes place on the Refuge, not in the Park. Nelson's only argument was that the FWS's failure to decrease supplemental feeding represents a substantial change in the environmental consequences of the elk-reduction program requiring supplemental NEPA analysis. Nelson's claim hinges on the argument that if supplemental feeding is not reduced then hunting necessarily must continue in order to ensure that the size of the elk herd does not exceed the projections of the 2007 Plan. On this theory, Nelson argued that the Park Service must publish new NEPA analyses evaluating whether hunting continues to be necessary in light of the fact that supplemental feeding has not declined. The court rejected this argument. The EIS clearly and exhaustively contemplated the continuation of the elk-reduction program over the life of the fifteen-year Plan.

As explained above, the Park Service's implementation of the annual elk-reduction program has met the population goals of the 2007 Plan and EIS. From 2007 to 2015, the size of the herd decreased, as did the number of deputized hunters and the number of elk authorized to be harvested. In other words, the number of elk authorized to be harvested and the number of hunters deputized to participate in hunts did not increase as a result of the FWS's continued use of supplemental feeding.

The D.C. Circuit found that Nelson failed to demonstrate any "substantial change[ ] in the proposed action" — elk hunting in Grand Teton —"relevant to environmental concerns" or any "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). The D.C. Circuit reiterated, in reaching this conclusion, a crucial consideration here is that the "proposed action" challenged in this case is the Park Service's authorization of elk hunting in Grand Teton, not the FWS's supplemental feeding practices on the Refuge. The D.C. Circuit instructed Nelson if he wishes to challenge the merits of the FWS's supplemental feeding program, he would have to pursue an appropriate action against the FWS directly.

National Mining Assoc. v. Zinke, 877 F.3d 845 (9th Cir. 2017) *Agency prevailed on NEPA claims.*

Issue(s): incomplete and unavailable information, consultation

Facts: This case involved multiple challenges, in a small part involving NEPA, to the decision of the Secretary of the Interior to withdraw from new uranium mining claims, for up to twenty years, of over one million acres of land near Grand Canyon National Park. Determining the appropriate balance between safeguarding an iconic American natural wonder and permitting extraction of a critically important mineral was at the heart of the dispute.

The fission of uranium atoms into smaller component parts releases a huge amount of energy — enough to sustain a nuclear chain reaction, as scientists discovered in the first half of the last century. The design and construction of nuclear reactors and weaponry followed. In the ensuing years, uranium became, at times, highly valuable, though prices rose and fell dramatically in response to swings in demand. Uranium also entered the cultural lexicon.

In 1947, large quantities of uranium were discovered in Arizona near Grand Canyon National Park, a treasured natural wonder and World Heritage Site, called by John Wesley Powell, "the most sublime spectacle in nature." John Wesley Powell*, Canyons of the Colorado* 394 (1895). Northern Arizona saw limited uranium mining until a spike in uranium prices in the late 1970s led to a uranium mining surge in the 1980s and 1990s, when six new mines opened. But the mining boom did not last. With the collapse of the Soviet Union and consequent decommissioning of large numbers of nuclear warheads, demand for uranium dropped dramatically in the 1990s. Uranium production in much of northern Arizona stopped.

Prices spiked again in 2007, and renewed interest in mining operations in the region followed. With that resurgence came concerns about the environmental impact of the extraction of radioactive materials such as uranium. Reflecting those concerns, then the Department of the Interior published a Notice of Intent in the Federal Register to withdraw from new uranium mining claims, for a period of up to twenty years, of a tract of nearly one million acres of federally owned public land. See Federal Land Policy and Management Act of 1976 ("FLPMA") § 204(c), 43 U.S.C. § 1714 (authorizing the Secretary to make, revoke, or modify such withdrawals subject to certain conditions). After an extended study period, the Secretary issued a ROD in January 2012 announcing the withdrawal of 1,006,545 acres.

Several entities and one private individual ("Appellants") opposed to the withdrawal challenged the Secretary's decision in four separate actions filed in the lower district court. Parties interested in supporting the withdrawal moved to intervene, including four environmental groups and the Havasupai Tribe. The district court, in two well-crafted opinions, rejected the various challenges to the withdrawal.

Decision: The only NEPA challenge is that the final EIS regarding the withdrawal violated NEPA, that by ignoring missing data essential to its analysis, BLM failed to consider an important aspect of the problem facing the agency. The Ninth Circuit disagreed.

NEPA's implementing regulations require that "[w]hen an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an [EIS] and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." 40 C.F.R. § 1502.22. When that information is deemed "essential to a reasoned choice among alternatives," the agency must either obtain it or, if the information is not obtainable, include in the EIS: (1) a statement identifying relevant unavailable or incomplete information; (2) a discussion of the relevance of that information to potential environmental impacts; (3) a summary of the available credible scientific evidence which is relevant to evaluating foreseeable environmental

impacts; and (4) the agency's evaluation of those impacts based upon generally accepted scientific approaches. 40 C.F.R. § 1502.22(a) & (b).

The Ninth Circuit found that the final EIS fully abided by these regulatory requirements. The final EIS consistently acknowledged that information was incomplete with respect to a critical aspect of the withdrawal — namely, the connection between uranium mining and increased uranium concentrations in groundwater in the withdrawn area. The document included several subsections titled "Incomplete or Unavailable Information," which discussed the relevance of that missing information to its analysis.

For example, BLM acknowledged in the final EIS that "more precise information on the locations of exploration sites, mine sites, and roads would be useful to better understand the . . . impacts to wildlife and fish species," and that "[a] more thorough quantitative data investigation of water chemistry in the Grand Canyon region would be helpful to better understand groundwater flow paths, travel times, and contributions from mining activities." As required, the EIS then summarized the scientific evidence that was available and discussed foreseeable environmental impacts.

Furthermore, the ROD concluded that the missing information was not "essential to making a reasoned choice among alternatives." 40 C.F.R. § 1502.22. The ROD observed that there was data regarding dissolved uranium concentrations near six previously mined sites, and that a reasoned choice could be made using that data. The ROD stated that collecting additional data would be helpful for future decision-making in the area. But as the withdrawal was not permanent and would apply only to new mining claims, the ROD noted additional data could be collected during the withdrawal period and used to determine whether additional mines should be allowed in the future.

BLM expressly stated that the missing information was non-essential only in the ROD, not in the final EIS. The Ninth Circuit agreed with the Seventh and Tenth Circuits that an agency is not required to state specifically in the final EIS that relevant missing information was non-essential. "[NEPA's implementing] regulations do not prescribe the precise manner through which an agency must make clear that information is lacking." *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv*., 673 F.3d 518, 532 (7th Cir. 2012); *see also Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172–73 (10th Cir. 1999). As the final EIS complied with the requirements for essential information, thereby ensuring that interested parties had notice that the agency's information was incomplete, the delay in determining that the missing data was not essential. In short, the ROD concluded that any missing information was non-essential, and the final EIS identified that missing information, discussed its relevance, weighed the available scientific evidence, and presented its conclusions regarding potential environmental impact based on the available data — exactly what 40 C.F.R. § 1502.22(b) would have required if the missing information had been essential information

The second front of the NEPA challenge concerns requirements in FLPMA and NEPA regarding consultation with local government. As relevant here, FLPMA requires that the Secretary shall, "to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs" of the "local governments within which the lands are located" and shall "provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands." 43 U.S.C. § 1712(c)(9). NEPA's implementing regulations also require that federal agencies "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements." 40 C.F.R. § 1506.2(b). Appellants contend that the Secretary did not fulfill these overlapping obligations and the Ninth Circuit disagreed.

Interior held public meetings, designated the Counties as cooperating agencies, and met separately with representatives from the Counties. It also considered public comments submitted by the Counties regarding the withdrawal. Based in part on the comments it received from the Counties, the BLM ordered an expanded economic impact analysis for the region and consulted county representatives to determine what, if any, additional data to include in its modeling. The final EIS contained extensive analysis (spanning more than fifty pages) of the potential impact of withdrawal on the Counties and other affected communities, including economic impact, and observed that Mohave County passed a resolution opposing the withdrawal. The record thus demonstrates that Interior fully acknowledged and considered the Counties' concerns regarding the withdrawal, even though it chose in the end to proceed. FLPMA and NEPA require no more. In particular, the consent of state and local governments to a withdrawal is in no way required — and with good reason, as regional environmental threats must always be balanced against the economic gains the local governments could reap if no federal action were taken. NEPA does not confer veto power on potentially affected state or local governments, each with its own economic interests.

Finally, Appellants propose that Interior did not comply with 40 C.F.R. § 1506.2(d), which requires agencies to "discuss any inconsistency of a proposed action with any approved State or local plan and laws" and, "[w]here an inconsistency exists ... describe the extent to which the agency would reconcile its proposed action with the plan or law." Appellants maintain that the withdrawal is inconsistent with county resolutions opposing the withdrawal. Those resolutions, however, are not "approved State or local plans or laws." The final EIS and ROD did consider approved county plans and the Ninth Circuit found no inconsistencies or conflicts.

Backcountry against Dumps v. Jewell, No. 13-57129, 674 Fed. Appx. 657 (9th Cir. Jan. 5, 2017) (not for publication) *Agency prevailed.*

Issue(s): impact assessment, purpose and need/alternatives

Facts: This case involved a challenge by Backcountry Dumps and Donna Tisdale ("Appellants") to the Bureau of Land Management's ("BLM") grant of a right-of-way to construct a wind energy facility near Ocotillo, California.

Decision: Appellants first contend that BLM violated the California Desert Conservation Act ("CDCA") Plan by failing to determine whether the Ocotillo Wind Energy Facility ("OWEF Project" or "Project") met the substantive requirements the Plan imposes on proposed uses of Class L land – the class of land upon which the OWEF Project is located. The CDCA Plan governs all land use activities within the CDCA. Because the OWEF Project is located on CDCA land, BLM was required to ensure the Project complied with the Plan before granting the right-of-way. The CDCA Plan includes a Plan amendment process that allows BLM to make changes to the CDCA Plan for a multitude of reasons, including a specific project that might not otherwise comply with the CDCA Plan. In the May 2012 ROD granting the right-of-way for the OWEF Project, BLM adopted a Category 3 Plan amendment to accommodate the project. BLM amended the CDCA Plan to designate the approximately 10,151 acres of public land where the Project was to be located as suitable for land development. The Category 3 amendment required an additional analysis of its own. A Category 3 amendment allows BLM to carve out an exception to the CDCA Plan for a specific use or activity. Then, that project is no longer required to comply with the substantive requirement of the class of land on which the project is sited, and is then governed by the plan amendment. When considering a Category 3 amendment, the District Manager begins by evaluating the "additional analysis" specific to the use or activity for which the amendment is requested, normally an EIS. BLM substantially complied with this process, and the court

found that BLM did not violate the CDCA plan. BLM prepared and issued an EIS for the OWEF Project, and Appellants contend this EIS violated NEPA in four respects.

First, the Appellants argued BLM failed to take a "hard look" at the Project's impacts on peninsula bighorn sheep, because there were no available studies demonstrating how the sheep would respond to wind turbines, and BLM failed to conduct its own independent study. The Ninth Circuit found these assertions were true, however, BLM did consider a formal ESA Section 7 consultation of the Project's impacts on peninsula bighorn sheep, including studies of bighorn sheep responses to other human activities, and a study of Rocky Mountain elk responses to wind turbine facilities. The EIS for the OWEF Project acknowledged that although the Project would temporarily impact 124.1 acres of essential habitat of peninsula bighorn sheep, and identified possible indirect impacts of the Project's construction and operation on the species. BLM sought to mitigate and minimize impacts by adopting several different "mitigation measures." The Ninth Circuit found that even though the actual effects the OWEF Project would have on the sheep were uncertain, they concluded BLM took a hard look because it considered extensively the potential impacts of the Project and the available mitigation measures.

Second, Appellants argued that BLM violated NEPA by failing to consider the full visual impacts of the OWEF Project, specifically the electrical substation, utility switchyard, operations and maintenance facility, observation tower, and parking lot. The Ninth Circuit found that although the EIS focused on the visual impacts of the wind turbines rather than the ancillary facilities, that analysis was permissible considering the visual impacts of the wind turbines would far exceed the ancillary facilities. The EIS did discuss the visual impact of all the Project's facilities, from construction to operation to decommissioning and discussed measures to mitigate these visual impacts and thus, was sufficient.

Third, Appellants argued that BLM violated NEPA because it failed to consider the health effects of low-frequency noise (LFN) and infrasound that would be produced by the wind turbines. In the EIS, BLM acknowledged that the experts were divided on the issue of whether exposure to LFN produced by wind turbines caused health problems. BLM discussed validity of several studies on both sides of the debate, and rejected several studies on basis of lack of supporting documentation or experimental flaws. BLM found persuasive several studies that concluded the LFN and infrasound would not cause health problems for nearby residents, for example, that measured LFN inside out outside of home using the same turbines, especially at distances greater than 300 meters. BLM concluded that the project would be unlikely to cause health effects because the distance from the turbines to the closest home is 805.67 meters, and any health impacts would be minimal. The Ninth Circuit deferred to the agency position on this technical issue.

Fourth, Appellants argued that the EIS did not adequately discuss the alternatives to the Project because BLM drafted the purpose and need statement too narrowly. In drafting a purpose and need statement, the Ninth Circuit reiterated that "an agency must consider the statutory context of the proposed action, any applicable congressional directive and the private applicant's objectives." The Ninth Circuit found BLM's framing of the purpose and need statement was reasonable. In the EIS, BLM separately laid out its objectives and the distinct objectives of the Corps of Engineers, Ocotillo, and the State of California. Within this discussion, BLM noted relevant statutes, and congressional and executive directives. BLM explained that the Project would assist it in addressing Executive Order 13212, the Energy Policy Act of 2005, Secretarial Order 3285A1, and the California Global Warming Solutions Act, all of which encourage, or mandate, the increased production of renewable energy. Although the focus of the purpose and need statement was responding to Ocotillo's application, the Ninth Circuit found this was reasonable in light of the relevant statutes and directives and the wind resources available at the Proposed Project site.

BLM initially considered 18 alternatives to the Project including other types of energy projects. The EIS briefly explained why these alternatives were eliminated from consideration. For example, a solar power project was eliminated both because it did not meet the purpose of harnessing wind energy, but also because the installation of solar panels would cause more land disturbance, which could have had a greater effect on cultural and biological resources outside of the project area. BLM also considered other locations for the Project; these alternative sites were eliminated from consideration for a variety of reasons. Some of the sites had special designations that precluded them from use, such as wilderness areas, some of the sites were already in use or had already been proposed for other wind energy projects, and some of the sites had substantially lower wind resources. Ultimately, BLM analyzed six alternatives in detail, including the required "no project" alternative. The Ninth Circuit held that BLM explored and evaluated all reasonable alternatives to the Project based on a reasonably drafted purpose and need statement.

Western Watersheds Project v. Ruhs, No. 15-17031, 701 Fed. Appx. 651 (9th Cir. Jul. 18, 2017) (not for publication) *Agency prevailed.*

Issue(s): cumulative impact, impact assessment

Facts: This case involved Western Watersheds Project's ("WW") challenge to the Bureau of Land Management's ("BLM") issuance of a final Cave Valley and Lake Valley Watersheds Restoration Plan EA, which sought to reduce fire risks and improve habitats for greater sage-grouse by removing trees and vegetation in eastern Nevada. WW argued the EA violates NEPA by failing to take a hard look at the Restoration Plan's potential effects on the greater sage-grouse and its habitat, by inadequately considering the cumulative impacts of the Restoration plan with past, present and future projects in around the project area, and by failing to analyze the potential impacts of the project's rangeland improvements.

Decision: The Ninth Circuit affirmed the lower court judgment, and found unpersuasive WW's claim that BLM violated NEPA by failing to take a hard look at cumulative impacts. The EA tiered to prior NEPA analyses in the Ely Proposed Resource Management Plan ("RMP")/FEIS and the Final Programmatic EIS on Vegetation Treatments Using Herbicides on Bureau of Land Management Lands in 17 Western States ("Vegetation PEIS"). These documents discuss the potential cumulative impacts of activities occurring within the Ely District, including "[c]onservation plans for greater sage-grouse," as well as "large, regional-scale trends and issues" related to chemical treatments, prescribed fire, and mechanical treatments and their effects on vegetation. Because these prior analyses cover larger regions, they note that site-specific analyses will be necessary in future projects covering more narrowly defined areas. WW argued that BLM failed to provide such site-specific analysis in the Restoration Plan's EA and the Ninth Circuit disagreed.

The EA discussed projects occurring within and around the Restoration Plan's project area. Within the EA's "Cumulative Impacts" section, the EA explicitly stated that BLM reviewed a prescribed "Cumulative Effects Study Area," which includes "the entire Cave Valley and Lake Valley Watersheds and nearby areas within the surrounding watersheds." The EA discussed several current and future plans, many of which could affect sage-grouse and its habitat and addressed potential effects of the Restoration Plan on sage-grouse and its habitat. The EA made clear that a goal of the Restoration Plan is the "[i]mprove[ment of] sage grouse habitat," and concluded that sage-grouse would benefit from the project. The EA recognized possible harms to sage-grouse and implemented its own mitigation measures to address these harms and to support its conclusions concerning potential impacts.

The EA included a chart that analyzed the desired future condition ("DFC") of sagebrush — the primary habitat and source of food for sage-grouse—compared to current condition percentages and the current condition percentages' differences from the DFC within the Cave and Lake Valley Watersheds. The EA demonstrated how the proposed action's resulting percentages concerning sagebrush conditions would be an improvement from current condition percentages within the project area, moving the condition of sagebrush closer to the DFC. The EA stated that the analysis of the impacts of the proposed action is based on the assumption that the objectives for the treatment units would be met through the implementation of the Restoration Plan's primary or adaptive management actions, and explained that it is reasonable to expect that the objectives would be met based on the results from past treatments.

WW argued that the EA did not address the cumulative impacts of two past projects that occurred within small areas of the Restoration Plan's project area, the Lincoln County Sage Grouse Habitat Restoration Project and the South Spring Valley Sagebrush Habitat Restoration Project. The Ninth Circuit rejected WW's arguments because the EA considered those projects' impacts in its aggregated review of past actions. Further, in those projects' NEPA analyses, BLM recognized that the projects' impacts could initially be harmful to sage-grouse habitat but concluded that the projects' activities would benefit sagebrush communities in the long-term. The court continued, reasoning that although the prior projects adopted annual monitoring regimes to study the effects of their actions on sagebrush — actions which are identical to those proposed in the Restoration Plan — any data collected between the time those projects were implemented and the Restoration Plan's EA was issued could not have accurately evaluated BLM's projected results of those prior actions. The Restoration Plan's EA was issued four years after the initiation of the Lincoln County and Spring Valley Projects. Studies agreed that it can take fifteen years using reseeding to restore such ranges with the appropriate subspecies of sagebrush and herbaceous species. The projections in the Spring Valley Project's NEPA analysis similarly anticipated that any increase to perennial grasses and forbs would occur within "5 to 10 years following completion of the proposed treatment." In the absence of evidence by WW demonstrating that early monitoring would nonetheless have been useful, the court held that BLM's failure to monitor the earlier projects did not render the Restoration Plan's NEPA analysis inadequate.

The Ninth Circuit found that BLM did not violate NEPA by failing to analyze the cumulative effects of the future Hamblin Valley Watershed Restoration Plan. Although agencies generally must address the cumulative impacts of reasonably foreseeable future projects in a current project's cumulative impacts analysis, a court can defer to the agency's on-the-record commitment to address the combined cumulative impacts of both projects in the future project's cumulative impacts analysis. The BLM represented to the court that it will analyze the cumulative impacts of the Restoration Plan combined with those of the Hamblin Valley project in the latter's own cumulative impacts analysis, and the court will ensure it is held to that commitment.

WW's second challenge to the EA on appeal is that BLM violated NEPA by approving a series of rangeland improvement projects as part of the Restoration Plan without first taking a "hard look" at the direct ecological consequences on sage-grouse of building the projects. Pursuant to NEPA's "hard look" requirement, an agency must prepare an up-front, coherent, and comprehensive environmental review, and "vague and conclusory statements, without any supporting data" will not be sufficient. The Ninth Circuit affirmed that the EA met this standard. The EA provided an adequate baseline analysis of the current conditions of sage-grouse and sagebrush within the project area; the EA provided a comprehensive environmental review of the impacts of the Restoration Plan's intended rangeland developments. The EA discussed potential negative impacts to sage-grouse and provided mitigation measures specific to the rangeland projects. The EA demonstrated that the long-term effect of the rangeland improvements would be beneficial to wildlife, with only minor short-term harms, which are limited by mitigation measures.

U.S. DEPARTMENT OF TRANSPORTATION

Barnes v. Federal Aviation Admin., 865 F.3d 1266 (9th Cir. 2017) *Agency prevailed.*

Issue(s): impact assessment (methodology, lead pollution, children, lead emissions, unique geography)

Facts: This case involved a challenge to new runway at the Hillsboro Airport, a general aviation airport, near Portland Oregon. The Ninth Circuit previously considered a challenge to the original EA done for the new runway and remanded for further consideration based on the concern for the possibility that the new runway would result in a larger number of takeoffs and landings at the airport, which was not adequately addressed. Following remand, a supplemental EA ("SEA") was prepared and concluded that the new runway would cause, at most, a small increase in air traffic and also determined that, even if the runway did induce a growth in traffic, any impact on air quality would be immaterial. The FAA issued a FONSI. Petitioners, five individuals and a non-profit challenged the SEA.

Hillsboro Airport (HIO) is located in the city of Hillsboro in Washington County, Oregon, twelve (12) miles west of Portland, Oregon. In terms of airport operations, it is the busiest airport in Oregon, surpassing Portland International Airport. In 2005, the airport owner, the Port of Portland, undertook to develop a Master Plan for HIO, among which the Plan proposed construction of a new third runway, to be used by small general aviation aircraft. The new runway would allow for separating small, single engine propeller planes from larger propeller planes and jet aircraft. The modifications were to be funded by FAA grants, triggering the need for an analysis of the effects of the project. In 2008, the FAA issued a FONSI. The Ninth Circuit, upon petition and review of the EA, found that the EA was inadequate because the FAA could not point to any documents in the record that actually discussed the impact of a third runway on aviation demand. On remand, the Port produced a SEA, which included three different forecasts for demand at HIO. The forecasts predicted at most a small increase in air traffic operations due to the new runway and concluded that pollution generated by any increased traffic would be negligible, and in 2014, the FAA issued a FONSI. Petitioners contend that the FAA should have prepared an EIS and that the SEA was deficient in a number of respects and did not constitute the hard look NEPA requires.

The SEA contemplated three forecasts for air traffic growth at HIO: the Unconstrained Forecast, the Constrained Forecast, and the Remand Forecast. The Unconstrained Forecast modeled air traffic based on socio-economic data without limitations related to the HIO's infrastructure – it predicted how much air traffic HIO would see if it had limitless runways and other facilities. The Unconstrained Forecast predicted that HIO would have 224,260 total aircraft operations in 2016 and 242,680 total aircraft operations in 2021.

The Constrained Forecast modeled air traffic while taking account of HIO's limited runways and assumed that the new runway would not be built. It assumed that if HIO became so crowded that the wait time to use its two existing runway became intolerable, then pilots would use other airports and HIO growth would taper off. The Constrained Forecast noted that the delays at HIO would not have reached an intolerable level by 2021 the end of the forecast period. The total aircraft operations were the same.

The Remand Forecast incorporated data from a survey. In the survey pilots, with planes based at HIO and other airports nearby, estimated whether and by how much they would increase their operations due to the new runway, the reduced delays at peak times, and the increased safety arising from separating single-engine propeller

planes from larger planes. The Remand Forecast predicted that HIO would see 235,610 operations in 2016 and 254,030 operations in 2021. Specifically, the Remand Forecast predicted it would have 11,350 more takeoffs and landings each year with the new runway than it would without the new runway.

The SEA contended (because of reliance on socio-economic conditions) that the Unconstrained Forecast adequately predicted future demand at HIO.

Decision: The Ninth Circuit addressed Petitioners contentions in the following areas:

1. Forecasting Methodologies. Petitioners contended that the Remand Forecast underestimated growth. Specifically, the Petitioners claimed that the survey used to generate the Remand Forecast did not include a response from Hillsboro Aviation, a pilot training school that Petitioners state is the largest aviation operator at HIO. The FAA responded that Hillsboro Aviation did respond to the survey, and the record reflected that. Thus, this challenge was without merit.

2. Lead Baseline Measurements. Petitioners argued that because the SEA did not assess the existing amount of lead in the soil and water surrounding HIO, it did not consider how any lead emissions from increased air traffic might impact the accumulation of lead in the soil and water, especially because unlike commercial aviation, fuels used in general aviation may contain lead. The SEA demonstrated that the new runway would have little effect on lead, an increase in lead emissions of less than four (4) percent, around HIO. The data was discussed in detail in the air quality technical memorandum attached to the SEA, and referred to the EPA's regulations on lead, which requires a conformity determination for any federal action which causes over 25 tons of lead, to evaluate the action's impact on the relevant region's compliance with the national ambient air quality standards ("NAAQS"). 40 C.F.R. § 93.153. The forecasted increase in lead emissions would not trigger a conformity determination. The Ninth Circuit stated that because the lead increase was so low, it would be pointless to measure or model the presence of that pollutant prior to commencing the project.

3. Impacts on Children. Petitions argued that the SEA failed to consider the impact that increased lead emissions may have on children. The SEA explained that with the increased air traffic projected by the Remand Forecast the air around HIO would remain well below the EPA's NAAQS lead limit of 0.15 $\mu g/m^3$. Using the FAA's Emission and Dispersion Modeling System, the SEA concluded that the maximum lead concentration in the air around HIO was .000405 $\mu g/m^3$. The SEA concluded that the EPA's NAAQS for lead was set at an acceptable level to protect sensitive populations, including children, and relied on the EPA's standards. To both points, the court found that the FAA was not arbitrary and capricious, and that it was appropriate for the FAA to defer to the EPA on the factual question of what level of airborne lead is safe for children.

4. Flight State Components Included in Lead Emission Calculation. Petitioners argued that the SEA did not adequately account for the various components of a typical flight path in its lead calculations. Petitioners claimed the FAA's estimate of taxi times was not accurate; however the court upheld the FAA's methodology, stating that FAA is entitled to deference. Petitioners argued that when considering lead emission in the air surrounding HIO, the SEA did not properly consider the altitude at which emissions were released during the "cruise" phase of flights, and that the SEA should have applied a mixing height of 3,000 ft. The court found that what essentially what the SEA did – that the FAA's Emissions and Dispersion Model (the emissions model) used a height of 2,031 feet. Petitioners argued that the emissions model did not include emissions that occur during the runup during pre-flight checks. The emissions model did not contemplate this phase, but the Ninth Circuit recognized agency deference in making the determination.

5. Impact on Water Quality. Petitioners argued that the SEA did not account for pollution in water and wetlands arising from potential increased air operations. The court found the SEA discussed impacts on water quality and wetlands in detail. It also noted that the SEA reliance on NAAQS included lead accounts for exposure through water.

6. Duration of Emissions Forecasting Period. Petitioners argued that the SEA should have published twenty years of emissions projections instead of the ten years it provided, since the FAA normally plans for long-range purposes twenty years in advance. The SEA pointed out that the shorter period to 2021 accounted for impacts that were reasonably foreseeable and likely to occur rather than merely possible. The Ninth Circuit found it was within FAA's discretion to select a five to ten year forecasting time, and noted that the FAA and EPA, for the purposes of lead emissions, were working to create an unleaded aviation fuel for existing piston engine aircraft by 2018.

Petitioners contended that the new runway would result in increased lead emissions significantly effecting public heath, especially children's health; the court found the SEA concluded that the increase in lead emission would be *de minimus*. Petitioners contended that the new runway is significant because it involves "unique . . . risks" to children. The court found this to be a reformulation of the previous argument and rejected it.

Petitioners contended that the new runway was significant because it is near residences and therefore has "unique geographical characteristics." 40 C.F.R. § 1508.27(b)(3). The court found Petitioners did not provide any reasons to conclude that there is anything unique about an airport near a residential area.

Petitioners finally contended that the project's effects were likely to be "highly controversial." 40 C.F.R. § 1508.27(b)(4). The Ninth Circuit pointed out that under that regulation, "controversial" is "a substantial dispute [about] the size, nature, or effect of a major Federal action rather than the existence of opposition to a use." Petitioners relied on another airport that was responsible for lead emissions lower than HIO (in San Carlos, California). The court rejected this argument because the non-airport lead sources near HIO were not the same as the non-airport lead sources near the other airport. The Ninth Circuit rejected a similar argument from the Petitioners that controversy exists because different analyses identified different levels near HIO, stating there was no controversy necessitating an EIS.

City of Phoenix v. Huerta, 869 F.3d 963 (D.C. Cir. 2017) *Agency did not prevail.*

Issue(s): categorical exclusion, extraordinary circumstances (potential for controversy)

Facts: This case involved a petition by the City and historic neighborhood association for review of a FAA order involving change to longstanding flight routes in and out of Phoenix Sky International Airport. The City and Neighborhood Association challenged the FAA's use of a categorical exclusion because the routes were highly controversial.

In response to a mandate from Congress to modernize the nation's air-traffic control system, *see* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, §§ 101(a), 213(a)(1)(A), 126 Stat. 11, 47, the FAA sought to alter the flight routes in and out of Sky Harbor and to employ satellite technology to guide planes. For consultation on its developing plans, the FAA formed the Phoenix Airspace Users Work Group with the City and others. One of the new flight paths the FAA devised would route planes over a major avenue and various public parks and historic neighborhoods. The new route would increase air traffic over these areas by 300%, with 85% of

the increase coming from jets. The FAA consulted on the environmental impact of this and other proposed changes primarily with a low-level employee in Phoenix's Aviation Department, who warned the FAA that he lacked the expertise and authority to discuss environmental matters on the City's behalf. The FAA never conveyed the proposed route changes to senior officials in the City's Aviation Department, local officials responsible for affected parks or historic districts, or elected city officials.

As plans progressed, the FAA used computer software to model the noise impact of the proposed route changes. This modeling predicted that two areas in Phoenix, which included twenty-five historic properties and nineteen public parks, would experience an increase in noise large enough to be "potentially controversial." But the agency concluded that these projected noise levels would not have a "[s]ignificant [environmental] impact" under FAA criteria. Based on this conclusion, the FAA issued a declaration categorically excluding the new flight routes from further environmental review.

The FAA shared these conclusions with the State Historic Preservation Officer ("SHPO"), predicting that the new noise levels would not disrupt conversation at a distance of three feet and would be no louder than the background noise of a commercial area. The SHPO initially concurred in this prediction.

The FAA presented the finalized flight routes in an April 2013 meeting attended by a low-level project manager of the City's Aviation Department. The agency also sent the proposed routes and maps showing affected areas to another low-level Aviation Department employee, with the caveat that plans were "subject to change." In May 2014, the FAA notified the Phoenix Airspace Users Work Group that the new routes would take effect in September. The FAA did not share its environmental conclusions with Airport management until the day before the routes were to go into effect. Management asked the FAA to delay implementation so the public could be informed; the FAA refused.

On September 18, 2014, the FAA published the new routes, and related procedures, and made them effective immediately. The public's reaction was swift and severe, and the D.C. Circuit summarized "the planes supplied the sound, the public provided the fury." In the next two weeks, the Airport received more noise complaints than it had received in all of the previous years. Residents complained that the flights overhead were too loud and frequent and rattled windows and doors in their homes. Some claimed that they had trouble sleeping uninterrupted, carrying on conversations outdoors, or feeling comfortable indoors without earmuffs to mute the noise. In response to the uproar, the FAA held a public meeting the next month that drew 400 attendees and hundreds of comments. There the agency promised to review the noise issue and update the City's Aviation Department. The FAA later claimed to have identified and corrected the problem: aircraft had been straying from the new routes. The agency said it was "teaming with the airport staff and industry experts" to see what more could be done about the noise levels. But despite the FAA's assurances, the City continued to receive record numbers of noise complaints. In early December, the City told the FAA that public concern remained high. That month the SHPO also asked the FAA to reconsider the new routes in light of their impact on historic properties, which he said was far worse than he had been led to believe. He said he had originally concurred with the agency's optimistic projections only out of deference to the FAA's technical expertise. On June 1, 2017, the City sought review in our court, characterizing the FAA's last letter as a final order.

Decision: The D.C. Circuit discussed that the FAA may not categorically exclude an action from environmental review if the Administrator determines that extraordinary circumstances are present. Under the FAA's regulations, extraordinary circumstances exist when an action's effects "are likely to be highly controversial on environmental grounds." The FAA found that the new routes were "not likely to be highly controversial on environmental

grounds" and thus, no extraordinary circumstances existed. The court reasoned that because the FAA failed to notify local citizens and community leaders of the proposed new routes before they went into effect, it was impossible for the FAA to take into account opposition on environmental grounds by a state or local government action or by a substantial number of the persons affected by the FAA's action.

The FAA argued that it was reasonable to assume that the proposal would not be controversial, given that the agency had confirmed no significant noise impacts were anticipated at all, received the concurrence of the SHPO and discussed the proposal with the Airport Authority, all of who did not express concern. The Ninth Circuit reasoned that the FAA's proposal would increase by 300% the number of aircraft flying over twenty-five historic neighborhoods and buildings and nineteen public parks, with 85% of flight traffic coming from jets; it stated the idea that a change from these effects would not be controversial was "so implausible" that it could not reflect reasoned decision-making.

The court noted the FAA erred by deviating from its usual practice in assessing when new flight routes are likely to be highly controversial, without giving a "reasoned explanation for . . . treating similar situations differently" when it assessed other proposed route changes at other airports. Thus, the agency acted arbitrarily in departing from its usual determinations regarding when a projected noise increase is likely to be highly controversial.

In short, the FAA had several reasons to anticipate that the new flight routes would be highly controversial: the agency was changing routes that had been in place for a long time, on which the City had relied in setting its zoning policy and buying affected homes. The air traffic over some areas would increase by 300% — with 85% of that increase attributed to jets — when before only propeller (rather than jet) aircraft flew overhead. The FAA found a "potential [for] controversy" but did not notify local citizens and community leaders of the proposed changes as the agency was obligated to, much less allow citizens and leaders to weigh in. And the agency departed from its determinations in materially identical cases. Thus, the FAA acted arbitrarily in finding that the new routes were unlikely to be highly controversial and could thus be categorically excluded from further environmental review.

Friends of the Capital Crescent Trail v. Fed. Transit Admin., 877 F.3d 1051 (D.C. Cir. 2017) *Agency prevailed.*

Issue(s): supplementation, alternatives, indirect impacts, mitigation measures

Facts: This case involved multiple challenges under NEPA by environmental activists ("the Friends") to the Federal Transit Administration's ("FTA") decision to approve Maryland's proposed "Purple Line" light rail project. The Purple Line is a 16-mile public transit project that would connect communities in Maryland's Montgomery and Prince George counties with each other and with other regional transit systems including the Washington Metropolitan Area Transit Authority's Metrorail system.

Between 2003 and 2008, after receiving funding, implementing plans that began as early as 1990, and in the first phase of the program, FTA and Maryland jointed prepared a DEIS. The DEIS was released for public comment in October 2008, and discussed eight project design alternatives for the Purple Line. Six were "build" alternatives, contemplating new construction of a light rail or bus rapid transit system at varying investment levels. The seventh was a "transportation systems management" alternative with no new construction, but various improvements to existing systems. The eighth was the no-action alternative. The DEIS compared the impacts between various alternatives. After the close of the comment period, Maryland publicly identified in August 2009 a modified version

of the medium-investment light rail options as its locally preferred alternative for the Purple Line. FTA issued the Purple Line's EIS in August 2013 with the following three purposes:

(1) Provide faster, more direct, and more reliable east–west transit service connecting the major activity centers in [Montgomery and Prince George's counties, including] Bethesda, Silver Spring, Takoma/Langley Park, College Park, and New Carrollton;

(2) Provide better connections to Metrorail services located in the corridor, and;

(3) Improve connectivity to the communities in the corridor located between the Metrorail lines.

Based on the FEIS, FTA issued the Purple Line's ROD in March 2004, thus advancing it to the "New Starts" phase, where engineering and design elements are finalized.

In 2014, the Friends filed suit alleging in developing the FEIS, FTA violated NEPA. In October 2015, the Friends wrote to FTA alleging various safety and ridership problems; FTA dismissed the concerns differentiating the Purple Line project from the Metrorail, noting these concerns as late comments on the FEIS. The Friends amended their complaint, alleging that the refusal to prepare a SEIS was arbitrary. The district court granted partial summary judgment to the Friends, and concluded that Metrorail's ridership decline and safety problems directly undermined the ridership rationale upon which the Purple Line was justified, and ordered FTA to prepare a SEIS. FTA filed a motion for reconsideration, and the district court permitted FTA to examine on remand the significance of Metrorail's ridership and safety issues on the Purple Line and determine what level of additional environmental analysis is required.

In December 2016, FTA filed a memorandum based on Maryland's evaluation of five hypothetical scenarios in which Metrorail ridership declines in varying degrees to the year 2040 ("FTA Scenarios Report"). The report emphasized that no matter the level of Metrorail's ridership, the Purple Line's environmental impact during construction and operation would not worsen and the preparation of a SEIS was not required. The district court disagreed, ordering the preparation of a SEIS.

Before the D.C. Circuit were two orders of the district court at issue. In the first order, the district court order directed FTA to prepare a supplemental EIS to analyze the effects of the Metrorail's recent safety and ridership problems on the Purple Line's environmental impact and purpose, and it vacated the original ROD. In the second order, the district court rejected challenges to FTA's FEIS.

Decision: The D.C. Circuit reversed the district court's first order, and affirmed the second, both in favor of the FTA.

First, the D.C. Circuit reviewed the standard for supplementation: "[t]he CEQ regulations . . . impose a duty on all federal agencies to prepare supplements to either draft or final EIS's if there 'are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.' "*Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 372, 109 S.Ct. 1851 (1989) (*quoting* 40 C.F.R. § 1502.9(c)). FTA's own regulations require supplementation where new information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the FEIS.

The Friends maintained the submitted Metrorail information on safety and ridership undermined conclusions in the FEIS, while FTA and Maryland viewed the information as not significant with respect to either environmental effects or the choice of alternative. Critical to the question whether a SEIS was required, was the preparation of the FTA's Scenarios Report, which assessed the impact of five hypothetical scenarios, from best case, where a slight decline in ridership returns to growth after 2017, and the worst case, where Metrorail ceases to exist, resulting in no transfers to or from the Purple Line. In the worst-case scenario, the light rail option would no longer satisfy any of the Purple Line's three purposes. The FTA determined, however, that this would not affect the choice between alternatives, because without a Metrorail system, no alternative would meet all three purposes, and roadway congestion at that point would amplify the extent to which the project meets the other purpose and need objectives. FTA determined that none of the scenarios would affect the construction-related environmental footprint of the Purple Line. Ultimately, FTA concluded that the additional information on ridership did not present significant new information with respect to the project's purposes or environmental impact that would have required a SEIS. The D.C. Circuit recognized that deference was due the agency in this determination.

The Friends objected that FTA applied their own regulation on supplementation rather than CEQ's. The D.C. Circuit disagreed, stating that the Friends misinterpreted the effect of the textual difference between the two regulations. The D.C. Circuit relied on *Marsh*, stating NEPA requires the preparation the preparation of a SEIS where new information "will affect the quality of the human environment in a significant manner or to a significant extent not already considered." 490 U.S. at 373–74. The D.C. Circuit reiterated that NEPA does not require agencies to needlessly repeat their environmental impact analyses every time such information comes to light. Rather, a SEIS must be prepared only where new information "provides a seriously different picture of the environmental landscape." *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004). The D.C. Circuit held that regardless of whether the CEQ or FTA regulation applies, FTA and Maryland reasonably explained why the Friends' Metrorail information did not require preparation of a SEIS, further explaining that the Metrorail information did not adversely affect the Purple Line's environmental impacts neither did it have effects that would alter Maryland's selection of light rail over bus rapid transit or other alternatives. At most, it partially called into question one of the Purple Line's purposes, and that this circumstance warranted deference by the court to FTA's reasonable, fact-intensive technical determination that preparation of a SEIS was not required.

The Friends also contended that: the alternatives analysis violated NEPA; the indirect effects analysis in the FEIS violated NEPA; and that the elimination of the "green track" mitigation technique necessitated preparation of a SEIS.

Although the DEIS compared eight project alternatives, the FEIS for the Purple Line compared only two: Maryland's "locally preferred" light rail alternative and the "no-build" option (i.e., taking no action and assuming all planned and in-progress local projects are completed). In the Friends' view, the comparison in the FEIS of only two starkly different alternatives precluded a meaningful analysis and was therefore insufficient. The court reviewed the standard: the reasonableness of the analysis of project alternatives in a FEIS is resolved not by any particular number of alternatives considered, but by the nature of the underlying agency action. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The D.C. Circuit found that the NEPA process adopted by FTA and Maryland for the Purple Line — an enormously complex project involving coordination between multiple government and private actors — fulfilled NEPA's purposes. As the FEIS explained, Maryland initially considered numerous alternatives, evaluating them for their effectiveness in meeting project goals, engineering feasibility, cost, public support, and environmental impact. Alternatives "not considered reasonable" were "eliminated from further consideration." The eight alternatives that met the reasonableness standard were evaluated in the DEIS at a range of investment levels. Following further study, Maryland chose the light rail option

as its locally preferred alternative. That choice narrowed FTA's role: Its ultimate decision was to decide whether or not to fund the preferred alternative. The FEIS therefore focused on comparing light rail and the “no-build” option.

The court held this “funneling approach” adopted by Maryland and FTA, of narrowing alternatives over a period of years, was in accord with NEPA's “rule of reason,” *Marsh*, 490 U.S. at 373–74, and common sense. Agencies are not required reanalyze alternatives previously rejected, particularly when an earlier analysis of numerous reasonable alternatives was incorporated into the final analysis and the agency has considered and responded to public comment favoring other alternatives. The alternatives analysis contained in the FEIS was sufficient under NEPA. The FEIS permissibly summarized and expressly incorporated the analysis of eight alternatives contained in the DEIS, identified the alternatives considered throughout the “New Starts” process, detailed the methodology used to compare alternatives, and explained the reasons light rail was chosen by Maryland. The FEIS included FTA's earlier responses to comments on the DEIS's alternatives analysis. The process undertaken fulfilled NEPA's purpose to identify and analyze project alternatives, to make that analysis available for public comment, and to respond to those comments in a manner that explained the preferred alternative, thereby promoting reasoned, well-considered decision-making.

Next, in the Friends' view, FTA failed to analyze adequately the impact of the Purple Line-induced economic development on local water quality, wildlife, abd the socioeconomic makeup of local communities. Under the regulations, “indirect effects” are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable”; they include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8(b). The required indirect effects analysis is thus limited to what is reasonably foreseeable, “with reasonable being the operative word.” *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017)[discussed in this paper].

The D.C. Circuit agreed with the FTA, finding that the analysis of indirect effects meets the standard. The FTA defined the area of analysis as "a reasonable walking distance around station areas of approximately one-half mile." The FEIS identified twelve urban light rail stations where the purple line would likely induce economic development to the cutoff year of 2040; it included a discussion of water quality and stormwater draining issues; it discussed the potential for increased property values and the potential socioeconomic effects at each station, such as residential and commercial displacement, housing stock changes, business migration, and changes to neighborhood character; it considered environmental justice issues and impacts on poor and minority communities, and; because politico-economic factors affect these kind of issues, the FTA explained that property value would be subjective and difficult to quantify. The court acknowledged that even assuming the indirect effects could be more thorough, the Friends did not identify a critical flaw or glaring hole that would inhibit NEPA's information promoting and accountability goals.

Finally, Friends challenged the FTA's decision to abandon its commitment to use a "green track" mitigation measures. The ROD stated that the Purple Line “will use” green track in certain locations, in which vegetation would be planted along the light rail route to reduce impervious surfaces, limit stormwater runoff, and provide aesthetic benefits. However, political changes at the state level conditioned the approval of the Purple Line on cost-cutting measures using other trackside mitigation measures, such as crushed stone instead of green track. The Friends contended that this was a significant change that required a SEIS. The D.C. Circuit disagreed, stating that the Friends failed to show that the change was legally significant enough to require preparation of an EIS, because the mitigation measures were hardly a central piece of the Purple line, and that state environmental and

stormwater standards will apply regardless of whether green track or other stormwater mitigation measures are used, and to that extent the environmental impact is the same.

Our Money Our Transit v. Fed. Transit Admin., No. 14-35766, 689 Fed. Appx. 504 (9th Cir. Apr. 21, 2017) (not for publication) *Agency prevailed.*

Issue(s): alternatives, impact assessment

Facts: This case involved a challenge by Our Money Our Transit and Robert Macherione ("Appellants") to Federal Transit Administration and Lane Transit District's (collectively the "FTA") approval of the West Eugene EmX Extension ("WEEE") near Eugene Oregon. Appellants argued that the EA failed to consider a reasonable alternative and ignored the WEEE's environmental impacts on traffic, local trees, utilities and Charnelton Street.

Decision: The Ninth Circuit considered that "an agency does not violate NEPA by refusing to discuss alternatives already rejected in prior state studies." *Honolulutraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1231 (9th Cir. 2014). The FTA engaged in an Alternative Analysis (AA) that assessed over fifty alternatives prior to the EA. "[A] state-prepared ["AA"] may be used as part of the NEPA process as long as it meets certain requirements . . ." *Id*. The AA met those requirements and resulted in several proposals being advanced to local stakeholders. As a result of consultation with those local stakeholders, the EA examined only the West 6th route as the Locally Preferred Alternative, as well as a No-Build alternative. The Ninth Circuit held that it was not unreasonable to exclude the West 13th route from the EA.

The Ninth Circuit also affirmed the district court's rejection of Appellants' argument that the EA and FONSI did not fulfill the "hard look" requirement. According to Appellants, both the EA and FONSI violated NEPA by failing to explain why traffic congestion, cutting down 200 mature trees, relocating utilities, and converting Charnelton Street from a local street will not so significantly affect the environment as to warrant a full EIS. The argument concerning the relocation of utilities was raised for the first time on appeal and the court found it waived. Even if this objection were not waived, however, the court stated it would hold that both the EA and FONSI meet the standard of providing a convincing statement of reasons why the actions will not have a significant impact on the environment. This is especially true when these documents are combined with the AA, as allowed by the Ninth Circuit's precedent. *Honolulutraffic.com*, 742 F.3d at 1231.

Beverly Hills Unified School District v. Fed. Transit Admin., No. 17-55080, 694 Fed. Appx. 622 (9th Cir. Aug. 8, 2017) (not for publication) *Agency prevailed.*

Issue(s): remedy, final agency action, alternatives, irreversible and irretrievable commitment of resources

Facts: In a case involving an existing Remedy Order, the Beverly Hills Unified School District challenged the Federal Transit Agency's (FTA) award of grant agreement/design-build contract before issuing a Supplemental Environmental Impact Statement (SEIS). The FTA is currently addressing deficiencies found in the EIS, under the court's remand.

Decision: The Ninth Circuit found that an award of Grant Agreement/Design-Build contract was not an irreversible, irretrievable commitment of resources before addressing deficiencies in prior EIS; the court opined that the design may later affect alternative development, and because the agency action is not yet final, the District can challenge the analysis at a later time.

The School District argued that the FTA predetermined the outcome of the environmental analysis. The Ninth Circuit noted that only reaches the question of predetermination if the School District has properly challenged final agency action. For an agency action to be final, it "must mark the consummation of the agency's decisionmaking process," and must be "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178, 117 S.Ct. 1154 (1997)

Under NEPA, the final agency action requirement merges with the requirement that an agency prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c). The School District argued that the FTA's commitment of funds through the Grant Agreement and the Design/Build Contract constitutes a major federal action, 42 U.S.C. § 4332(c), and that the FTA therefore could not permissibly enter into those agreements before completing the supplemental EIS. The Ninth Circuit opined that a financial commitment is only a major federal action under NEPA where it constitutes an "irreversible and irretrievable commitment of resources." *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988). An agency makes an irreversible and irretrievable commitment where, for instance, it "spend[s] most or all of its limited budget on preparations useful for only one alternative." *WildWest Inst. v. Bull*, 547 F.3d 1162, 1169 (9th Cir. 2008).

The Ninth Circuit found that the Grant Agreement and Design/Build Contract do not represent an irreversible and irretrievable commitment to the Constellation Station alignment. The FTA represented to the district court that the Grant Agreement and the Design/Build Contract would not prevent it from making changes to the planned alignment. Accordingly, the agreements were not final agency action.

The Ninth Circuit discussed that because the district court retains jurisdiction over the School District's NEPA action, the parties are free to return to it if subsequent events warrant, and the court may continue in its supervisory role. When the court reviews the FTA's supplemental EIS, it may evaluate whether the FTA's commitments — including those made via the Grant Agreement and Design/Build Contract—affected the FTA's analysis of alternatives. At this point, however, the Ninth Circuit held that the School District's challenge was premature.

Protecting Arizona's Res. and Children v. Fed. Highway Admin., No. 16-16586 & No. 16-16605, 2017 WL 6146939 (9th Cir. Dec. 8, 2017) (not for publication) *Agency prevailed*.

Issue(s): purpose and need, alternatives, impact assessment, mitigation measures

Facts: This case involved a NEPA challenge by Protecting Arizona's Resources and Children, additional advocacy groups, and the Gila River Indian Community ("GRIC") (collectively, "Appellants") to the Federal Highway Administration's and Arizona Department of Transportation's (collectively, "FHWA") approval of the Loop 202 South Mountain Freeway in Arizona.

Decision: The Ninth Circuit reviewed the FHWA's purpose and need statement, which examined projected population growth, housing demand, employment growth, transportation mileage, and transportation capacity deficiencies. The court found that these metrics were then used to establish the "underlying purpose and need" and to determine whether a previously proposed freeway was still necessary. *See Honolulu Traffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230–31 (9th Cir. 2014) (upholding a purpose and need statement based on objectives previously identified in a Transportation Plan). Because the Ninth Circuit provides agencies

"considerable discretion" when defining the purpose and need of a project, the court found the FHWA's purpose and need statement complied with NEPA.

An EIS must analyze reasonable or feasible alternatives to the proposed freeway project and is not required to consider an infinite range of alternatives. The court found that the FHWA used a multivariable screening process to evaluate reasonable alternatives over the course of thirteen years. The FHWA identified three alignment alternatives for the Western Section of the freeway, one alignment alternative for the Eastern Section of the freeway, and a no-action alternative for detailed study. The FHWA utilized the "Modal Method" to evaluate each non-freeway alternative, ultimately concluding that the non-freeway alternatives would not address an adequate percentage of the transportation capacity need. When FHWA eliminated an alternative from detailed study they provided reasons for the elimination. The Ninth Circuit therefore concluded that the FHWA's EIS complied with NEPA in its analysis of alternatives.

The court also reviewed the no-action alternative in the EIS. The FHWA's no-action alternative analysis assumed that "[e]xisting residential land use patterns and trends would be maintained," and then modeled the effects if the freeway were not built. The FHWA used a transportation planning report previously issued by the Maricopa County Association of Governments ("MAG"). The MAG report assumes some future expansion of highways, but does not explicitly rely on the "preferred alternative." Because the FHWA explained the basis for their decision to rely upon the socioeconomic projections of the MAG report and disclosed their reliance on the projections, the Ninth Circuit concluded that their examination of the no-action alternative was not arbitrary or capricious.

The court discussed that although FHWA declined to analyze the potential impact of a hazardous materials spill, their discussion of hazardous spills was sufficient. An EIS must "discuss the extent to which adverse effects can be avoided," and must include "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–52, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). However, an EIS need not discuss the potential environmental consequences of adverse effects that are remote or highly speculative. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1030 (9th Cir. 2006). The FHWA determined that "the probability of a spill of hazardous cargo is low," and discussed the extent to which a hazardous spill could be avoided or mitigated. The FHWA noted that the potential for such an accident already existed for portions of the Phoenix metropolitan areas and was governed by existing regulations. FHWA outlined Arizona's Department of Transportation's ("ADOT") coordination with emergency services providers responsible for responding to such spills, and FHWA discussed ADOT's ongoing assessment and evaluation of hazardous material restrictions.

The court also found FHWA adequately considered the proposed freeway's potential impact on children's health; the court gave deference to the agency's judgment as is the case when the agency undertakes "technical scientific analysis." The EIS included a conformity analyses mandated by the Clean Air Act, 42 U.S.C. § 7506(c), and the agency concluded that the proposed freeway project would not exceed National Ambient Air Quality Standards ("NAAQS") standards throughout the Study Area. Because NAAQS are set at levels designed to protect sensitive populations, including children, the FHWA concluded the South Mountain Freeway would cause no negative health impact on the general population in the Study Area. In coming to this conclusion, the FHWA produced a full Air Quality Technical Report, and performed a quantitative "hot spot" analysis for particulate matter ("PM10") and carbon monoxide ("CO"). "The hot-spot analysis show[ed] that the Preferred Alternative would not cause new violations of the PM10 and CO NAAQS, exacerbate any existing violations of the standard, or delay attainment of the standards or any required interim milestones." The FHWA adequately analyzed Mobile Source Air Toxic ("MSAT") emissions, in compliance with NEPA. The FHWA's MSAT analysis conformed to its own guidance for

roadway projects. The FHWA modeled MSAT emissions using the EPA's latest model, documented the Freeway Project's MSAT impacts in the Study Area and two subareas, and provided reasoning for their determination that an analysis of near-roadway emissions was not necessary.

The FHWA adequately considered mitigation measures. The FHWA's FEIS proposed several project-specific mitigation measures to address any direct impacts, cumulative impacts, and secondary impacts from the freeway project. Chapter 4 of the FEIS discussed the South Mountain Freeway's potential impact on biological resources and the contiguous nature of the community. The FHWA's FEIS proposed mitigation measures planned to reduce the amount of dust and noise pollution generated from the construction of the freeway project, including the use of watering trucks, windbreaks, dust suppressants and rubberized asphalt. The FEIS examined the wildlife located in the Study Area and disclosed that the South Mountain Freeway will fragment the habitats of many species. The FEIS explained that the freeway project will enhance bridges and drainage structures to maintain wildlife connectivity in the affected area. The FEIS also examined the potential displacement of households and businesses, proposing advisory services for displaced residents, rental assistance for eligible individuals, and land acquisition and relocation assistance pursuant to the Uniform Relocation Act, 42 U.S.C. §§ 4601, et seq., among other measures. The court noted that the fifteen percent design level did not hinder the FHWA from sufficiently detailing and discussing mitigating measures.

Finally, the FEIS contained a thorough discussion of the South Mountain Freeway's potential impacts to GRIC groundwater wells. The FHWA included in the design and construction contract a binding agreement that requires the contractor to "avoid and preserve the GRIC well properties, GRIC's legal access to GRIC well properties, and the water, wells, pipes, and ditches located therein." Further, the FHWA may re-evaluate and, if necessary, prepare a supplemental EIS if any alterations to the freeway alignment due to avoidance of the wells would result in significant environmental impacts that were not previously evaluated.

INDEPENDENT AGENCIES

Delaware Riverkeeper v. Federal Energy Regulatory Comm'n, 857 F. 3d 388 (D.C. Cir. 2017) *Agency prevailed.*

Issue(s): use of accurate baseline on which to base analysis, harmless error, agency deference

Facts: Transcontinental Gas Pipe Line Company, LLC ("Transco") filed an application with FERC to construct and operate its proposed Leidy Southeast Project, which was designed to expand the capacity of Transco's existing natural gas pipeline and add new facilities in Pennsylvania and New Jersey. Pursuant to the requirements of NEPA, FERC prepared an EA, which found that, with appropriate mitigation, there would be "no significant impacts" associated with the Leidy Project. Plaintiff challenged the EA, claiming that FERC failed to establish an accurate baseline from which to conduct its environmental review. Specifically, plaintiffs argued that FERC misidentified numerous specially protected wetlands, and miscalculated both the cover type categorization of those wetlands and the total acreage of those wetlands. Plaintiffs also challenged FERC's gas flow velocity analysis.

Decision: The court found no merit in the claims. "Riverkeeper contends that FERC violated NEPA by misclassifying wetlands in two ways: (1) under Pennsylvania's own state classification system; and (2) under the "Cowardin" classification system. We reject both challenges. FERC did not purport to rely on Pennsylvania's classification system and Riverkeeper does not show how any misclassification under the Cowardin system was prejudicial error.

Nowhere in the EA does FERC even discuss, much less rely on, the application of Pennsylvania's system….[T]he wetlands discussion does not refer to the Pennsylvania system at all."

"Riverkeeper's second wetlands argument attacks the Cowardin classification system that the Commission actually used. Riverkeeper contends that FERC 'failed to accurately account for the expected ground disturbance impacts that will result from the [Leidy] Project's construction and operational activity,' . . . because it misidentified the cover types of fourteen wetlands – totaling approximately 3.8 acres that would be impacted by operation or construction – pursuant to the Cowardin system . . . "

"However, Riverkeeper does not explain how this inexorably leads to the conclusion that FERC failed to accurately account for the Leidy Project's impact on the environment. Indeed, the ultimate implication Riverkeeper raises for this alleged erroneous classification is an 'alteration of wetland value due to vegetation clearing.'. . . But the EA identifies only one difference in vegetation clearing: the time it takes for the three different types of wetlands to re-vegetate . . . Riverkeeper does not raise any unaccounted-for consequences of this. In other words, even assuming FERC misclassified a small area of Pennsylvania wetlands, this merely means the Leidy Project will result in a longer re-vegetation process for some wetlands, and a shorter re-vegetation process for others. Riverkeeper fails to explain how this caused FERC's mitigation plan to be significantly deficient."

"What we see from the record in this case is that FERC responsibly addressed Riverkeeper's misclassification argument in its Certificate Order. The Commission stated that it relied on its classification only to 'disclose and evaluate potential impacts on wetlands and to serve as a starting point for the development of protective mitigation.'. . . FERC thus disclosed its methodology and purpose as a starting point for mitigation, which would subsequently involve the Corps and state agencies to further oversee mitigation. . . . It seems clear here that FERC took the requisite 'hard look' at the impact of the Leidy Project on the environment. . . . Even if FERC technically erred in some of its classifications, Riverkeeper has not shown any prejudice by virtue of the agency 'fail[ing] to comply precisely with NEPA procedures.' *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) . . . "

With respect to FERC's gas flow velocity analysis, the court stated: "In sum, on the record before us, we have no basis upon which to credit Riverkeeper's vague and unsubstantiated assertions that FERC withheld key data from the public. Indeed, the record reflects that FERC made every effort to comply with requests for information and no information was withheld from Riverkeeper." Further, "[w]e reject Riverkeeper's claims, which are based on sheer speculation, that FERC erred in its determinations regarding the safety of the Leidy Project's gas flow velocities." In conclusion, the court stated: "The Commission's NEPA review of the Leidy Project's proposed gas flow velocities appears to be fully informed and well-considered. Riverkeeper presents no countervailing evidence. As such, the Commission's judgment is 'entitled to judicial deference," *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988)."

Sierra Club v. Federal Energy Regulatory Comm'n, 867 F.3d 1357 (D.C. Cir. 2017) *Agency prevailed on some but not all NEPA claims.*

Issue(s): indirect effects, quantification of greenhouse gas emissions, "hard look"

Facts: Environmental groups and landowners challenged a FERC decision to approve the construction and operation of three new interstate natural-gas pipelines in the southeastern United States. Their primary argument is that the agency's assessment of the environmental impact of the pipelines was inadequate. Specifically, plaintiffs alleged that the EIS did not adequately address environmental justice or greenhouse gas emissions, erroneously limited the scope of alternatives, and giving too little consideration to the safety risks of construction.

Decision: The court found that the FERC EIS "did not contain enough information on the greenhouse-gas emissions that will result from burning the gas that the pipelines will carry" but that "[i]n all other respects . . . FERC acted properly." The court granted Sierra Club's petition for remand for preparation of a conforming EIS. The court concluded that FERC's analysis of greenhouse gas emissions was inadequate for the following reasons.

"An agency conducting a NEPA review must consider not only the direct effects, but also the indirect environmental effects, of the project under consideration. *See* 40 C.F.R. § 1502.16(b). 'Indirect effects' are those that 'are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable.' *Id*. § 1508.8(b). The phrase 'reasonably foreseeable' is the key here. Effects are reasonably foreseeable if they are 'sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.' " *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016).

"What are the 'reasonably foreseeable' effects of authorizing a pipeline that will transport natural gas to Florida power plants? First, that gas will be burned in those power plants. This is not just 'reasonably foreseeable,' it is the project's entire purpose, as the pipeline developers themselves explain. . . . It is just as foreseeable, and FERC does not dispute, that burning natural gas will release into the atmosphere the sorts of carbon compounds that contribute to climate change."

In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the court noted that it had "recently applied the *Public Citizen* rule in three challenges to FERC decisions licensing liquefied natural gas (LNG) terminals. *See Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016). Companies can export natural gas from the United States through an LNG terminal, but such natural gas exports require a license from the Department of Energy. *See Freeport*, 827 F.3d at 40. They also require physical upgrades to a terminal's facilities. The Department of Energy has delegated to FERC the authority to license those upgrades. See id. A question presented to us in all of these cases was whether FERC, in licensing physical upgrades for an LNG terminal, needed to evaluate the climate-change effects of exporting natural gas. Relying on *Public Citizen*, we answered no in each case. FERC had no legal authority to consider the environmental effects of those exports, and thus no NEPA obligation stemming from those effects. *See Freeport*, 827 F.3d at 47; *accord Sabine Pass*, 827 F.3d at 68-69; *EarthReports,* 828 F.3d at 956. An agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information."

"Rather, *Freeport* and its companion cases rested on the premise that FERC had no legal authority to prevent the adverse environmental effects of natural gas exports. *See Freeport*, 827 F.3d at 47. This raises the question: what did the Freeport court mean by its statement that FERC could not prevent the effects of exports? After all, FERC did have legal authority to deny an upgrade license for a natural gas export terminal. *See Freeport*, 827 F.3d at 40-41. And without such an upgrade license, neither gas exports nor their environmental effects could have occurred. The answer must be that FERC was forbidden to rely on the effects of gas exports as a justification for denying an upgrade license."

"Here, FERC is not so limited. Congress broadly instructed the agency to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines. . . . FERC will balance 'the public benefits against the adverse effects of the project,' . . . including adverse environmental effects . . . Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves . . . *Public Citizen* thus did not excuse FERC from considering these indirect effects [footnote omitted]."

In addressing FERC's argument that it is impossible to know exactly what quantity of greenhouse gases will be emitted as a result of this project being approved, the court recognized that the quantity will depend "on several uncertain variables, including the operating decisions of individual plants and the demand for electricity in the region. But we have previously held that NEPA analysis necessarily involves some 'reasonable forecasting,' and that agencies may sometimes need to make educated assumptions about an uncertain future."

"We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so. As we have noted, greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate."

"We do not hold that quantification of greenhouse-gas emissions is required every time those emissions are an indirect effect of an agency action. We understand that in some cases quantification may not be feasible. *See, e.g., Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189 (D.C. Cir. 2017)[discussed in this paper]. But FERC has not provided a satisfactory explanation for why this is such a case."

"Nor is FERC excused from making emissions estimates just because the emissions in question might be partially offset by reductions elsewhere. We thus do not agree that the EIS was absolved from estimating carbon emissions by the fact that some of the new pipelines' transport capacity will make it possible for utilities to retire dirtier, coal-fired plants. The effects an EIS is required to cover 'include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.' 40 C.F.R. § 1508.8. In other words, when an agency thinks the good consequences of a project will outweigh the bad, the agency still needs to discuss both the good and the bad."

"Our discussion so far has explained that FERC must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so. Sierra Club proposes a further analytical step. The EIS might have tried to link those downstream carbon emissions to particular climate impacts, like a rise in the sea level or an increased risk of severe storms. The EIS explained that there is no standard methodology for making this sort of prediction. . . . In its rehearing request, Sierra Club asked FERC to convert emissions estimates to concrete harms by way of the Social Cost of Carbon. This tool, developed by an interagency working group, attempts to value in dollars the long-term harm done by each ton of carbon emitted. But FERC has argued in a previous EIS that the Social Cost of Carbon is not useful for NEPA purposes, because several of its components are contested and because not every harm it accounts for is necessarily 'significant' within the meaning of NEPA. *See EarthReports,* 828 F.3d at 956. We do not decide whether those arguments are applicable in this case as well, because FERC did not include them in the EIS that is now before us. On remand, FERC should explain in the EIS, as an aid to the relevant decisionmakers, whether the position on the Social Cost of Carbon that the agency took in *EarthReports* still holds, and why."

With respect to environmental justice, the court held: "To sum up, the EIS acknowledged and considered the substance of all the concerns Sierra Club now raises: the fact that the Southeast Market Pipelines Project will travel primarily through low-income and minority communities, and the impact of the pipeline on the city of Albany and Dougherty County in particular. The EIS also laid out a variety of alternative approaches with potential to address those concerns, including those proposed by petitioners, and explained why, in FERC's view, they would do more harm than good. The EIS also gave the public and agency decisionmakers the qualitative and quantitative tools they needed to make an informed choice for themselves. NEPA requires nothing more."

With respect to claims regarding the scope of alternatives, the court noted that plaintiffs did not cite any reasonable alternatives that the agency failed to consider. Further, the agency did consider 12 major route alternatives and the no action alternative. "We defer to the agency's discussion of alternatives, and uphold it 'so long as the alternatives are reasonable and the agency discusses them in reasonable detail.' *Citizens Against Burlington*, *Inc. v. Busey,* 938 F.2d 190, 196 (D.C. Cir. 1991)."

With respect to construction safety, the court held that: "the EIS recognized and discussed the risk of pipeline crossings, ultimately concluding that some crossings were necessary to minimize impacts on natural resources and homes. [Plaintiff's] only response is that commenters, including the owner of one of the existing pipelines, submitted letters to FERC expressing safety concerns. But the EIS responded to those comments, and [plaintiff]

does not explain why the responses were insufficient. Again, NEPA does not require a particular substantive result, like the elimination of all pipeline crossings; it only requires the agency to take a 'hard look' at the problem. This FERC has done."

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