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2022 ANNUAL NEPA REPORT

of the

National Environmental Policy Act Working Group

of the

National Association of Environmental Professionals

Submitted to

NAEP Board of Directors

Edited and compiled by

Charles P. Nicholson, NEPA Working Group Chair

With contributions by

James Gregory, Piet and Carole deWitt, Charles P. Nicholson, Rona Spellecacy, and P. E. Hudson

July 2022

This report reviews National Environmental Policy Act document submittals and statistics, legislation, and litigation for calendar year 2022. The purpose of this report is to document the status of National Environmental Policy Act compliance and perspectives during the reporting year. We welcome reader comment and inquiry to naep@naep.org.

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Acronyms and Abbreviations

APA	Administrative Procedures Act
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
CatEx	Categorical Exclusion
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of Interior
DOT	Department of Transportation
DVA	Department of Veterans Affairs
EA	Environmental assessment
EIS	Environmental impact statement
EO	Executive Order
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FAST	Fixing America's Surface Transportation (Act)
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
FWS	U.S. Fish and Wildlife Service
H.R.	House Resolution
MARAD	Maritime Administration
NAEP	National Association of Environmental Professionals
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
NOI	Notice of Intent
NPS	National Park Service
NRC	Nuclear Regulatory Commission
ROD	Record of Decision
RUS	Rural Utilities Service
S.	Senate
STB	Surface Transportation Board
TVA	Tennessee Valley Authority
USA	United States Army
USACE	U.S. Army Corps of Engineers
USAF	United States Air Force
USC	U.S. Code
USCG	United States Coast Guard
USFS	U.S. Forest Service
USN	United States Navy

1. Introduction

Rona Spellecacy, AICP, CEP, PMP[1]
NAEP President 2021–2023

This 2022 Annual Report of the National Environmental Policy Act (NEPA) Working Group (Annual NEPA Report) has been prepared for the benefit of the members of the National Association of Environmental Professionals (NAEP) and for submittal to the Council on Environmental Quality (CEQ) to be shared with federal agency liaisons with whom NAEP members work to ensure adherence to the stated legislative purpose of NEPA:

> "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."
>
> (Pub. L. 91–190, § 2, Jan. 1, 1970, 83 Stat. 852.)

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

This sixteenth Annual NEPA Report aligns with the mission of the NAEP, which is to be the interdisciplinary organization dedicated to developing the highest standards of ethics and proficiency in the environmental professions. Our members are public and private sector professionals who promote excellence in decision-making considering the environmental, social, and economic impacts of those decisions.

The Annual NEPA Report is intended to inform regulators and practitioners in their environmental practices related to NEPA and to foster continuous improvement of NEPA practice. This Report is made possible by NAEP's NEPA Working Group, whose members volunteer their time and energy to keep NAEP members up to date on the state of NEPA practice. Given the rapidly evolving changes related to NEPA and its implementation, joining the NEPA Working Group is a great way to stay up to date on emerging issues. There are several other NAEP Working Groups designed to facilitate networking and information sharing with focus on a technical discipline of interest to NAEP members. I encourage all NAEP members to get involved in these groups and Be Connected to your fellow environmental professionals.

Many thanks to NEPA Working Group Chair Chuck Nicholson, the more than 100 environmental professionals who participate in NAEP's NEPA Working Group, and the contributions to this Annual NEPA Report provided by Chuck, James Gregory, Piet deWitt, Carole deWitt, and P. E. Hudson.

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2. The NEPA Working Group in 2022

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

The mission of the NAEP NEPA Working Group is to improve environmental impact assessment as performed under NEPA.

The NEPA Working Group is pleased to present this sixteenth annual report. The 2022 Annual NEPA Report of the National Environmental Policy Act Working Group (Annual NEPA Report) contains summaries of many of the latest developments in NEPA as well as the NEPA Working Group's activities in 2022.

Although several bills proposing changes in NEPA compliance processes were introduced in Congress in 2022, none of those that were signed into law made major changes. Consequently, the Infrastructure Investment and Jobs Act, commonly referred to as the Bipartisan Infrastructure Law and enacted in November 2021, remains the most significant law affecting NEPA enacted during the 117th Congress. Both the IIJA and the Inflation Reduction Act of 2022, enacted in August 2022, spurred increased bipartisan interest in NEPA and related permitting reform legislation to speed approval of projects funded by the two acts as well as other infrastructure projects. Despite this interest and a flurry of activity in late 2022, no such broad-scope legislation was enacted in 2022. Interest in NEPA and permitting reform legislation remained high in the 118th Congress in early 2023 and passage of such legislation appeared likely as this report was nearing completion.

The Council on Environmental Quality (CEQ) continued its effort to revise its 2020 regulations for implementing NEPA with the publication of the final rule for its Phase I revisions in April 2022. The scope of these revisions was limited and included reverting the definition of effects to the pre-2020 version including direct, indirect, and cumulative effects and removing the requirement that the purpose and need statement for an environmental impact statement (EIS) be based on the goals of an applicant and the agency's statutory authority.

The number of EISs issued in 2022, 185, continued the recent decline and was the lowest in many years. As in 2021, this number was boosted by the high number of EISs issued by the Federal Energy Regulatory Commission (28 in 2022, more than any other agency). The high number of recent FERC EISs in 2022, as well as in 2021, is due in part to FERC's recent decision to produce EISs for many natural gas facility certification actions that previously would have been the subject of environmental assessments. And, as described below, many of these FERC EISs were completed very quickly.

The preparation time for final EISs issued in 2022 continued to decline, with an average time of 4.2 years and a median time of 3.0 years from publication of the notice of intent to publication of the notice of availability. This was the lowest average preparation time since 2011.

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

U.S. Courts of Appeal issued 27 decisions on NEPA cases during 2022, somewhat higher than the 2006-2021 annual average of 23 decisions. Agencies prevailed in 21 cases and did not prevail or prevailed on some but not all claims in six cases. Cases in which agencies did not prevail or only partially prevailed involved the adequacy of environmental assessments, the adequacy of an environmental impact statement, and the lack of a NEPA document.

The Annual NEPA Report is prepared and published through the initiative and volunteer efforts of members of the NAEP's NEPA Working Group. The NAEP's NEPA Working Group supports NEPA practitioners through monthly conference calls, networking opportunities, educational opportunities, outreach with CEQ, and projects such as this Annual NEPA Report. The developments described above were all discussion topics during the monthly meetings of NAEP's NEPA Working Group. Highlights of 2022 activities included:

- Discussion of the Phase 1 revisions to the 2020 CEQ NEPA regulations and expectations for the Phase 2 revisions
- Discussion of environmental justice analysis tools
- Discussion of the NEPAccess (www.NEPAccess.org) tool led by its developers
- Discussion of the Biden-Harris Permitting Action Plan
- Discussion of NEPA provisions in the Inflation Reduction Act of 2022
- Discussion of NEPA / permitting reform bills introduced in Congress
- Discussion of NEPA compliance for American Rescue Plan Act-funded projects
- Participation in NAEP webinars on NEPA topics
- Review of many of the court rulings on NEPA cases described elsewhere in this report as well as several U.S. District Court rulings on NEPA cases
- Review of interesting Notices of Intent (NOIs) to prepare EISs and recently released draft and final EISs

The NEPA Working Group has approximately 125 active members. We hold monthly conference calls in which we discuss emerging developments in NEPA such as new regulations, guidance, legislation, court rulings, projects, and 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 Working Group email list and call reminders, sign up on the NAEP website at Member Center / My Profile / My Features E-Lists:
https://naep.memberclicks.net/index.php?option=com_community&view=profile&task=app&app=elists&userid=2000830294 - e-lists

3. Just the Stats

James Gregory[3]

In 2022, Notices of Availability (NOAs) for 185 environmental impact statements (EISs) were published in the *Federal Register*. Of the published notices, 96 were draft EISs (including supplemental draft EISs) and 89 were final EISs (including supplemental and revised final EISs). Information regarding these documents is available through the EPA's online EIS database, available at: https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search. The database contains links to the EISs and EPA's comment letter for EISs on which they commented.[4]

3.1 EISs Published in 2022

The 185 EISs published in 2022 was just one fewer than the 186 EISs published in 2021. Both 2022 and 2021 had markedly fewer EISs published than in previous years. **Table 3-1** presents a summary of the total number of EISs published by year for the past 10 years.

Table 3-1. EISs published from 2013 through 2022.

Year	Number of EISs Published
2022	185
2021	186
2020	254
2019	219
2018	323
2017	257
2016	312
2015	381
2014	384
2013	377

Thirty-seven agencies published at least one EIS in 2022 and three agencies published at least 15 EISs (**Table 3-2**); for comparison two agencies published 15 or more EISs in 2021. Again, 2022 and 2021 are similar in that both had notable decreases from the five agencies published at least a 15 EISs in 2020. Federal Energy Regulatory Commission, the U.S. Army Corps of Engineers and the U.S. Forest Service were the agencies that published the most EISs (28, 23 and 18, respectively). Continuing a recent trend, the Bureau of Land Management, the agency that published the most EISs in 2020 (48) and 2019 (64) published 9 in 2022 and 11 in 2021.

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[4] Nine records in the 2022 notices were fore "adoption" and "withdrawn" and are not counted in the totals presented here.

Four state agencies with delegated NEPA authority (California Department of Transportation, California High-Speed Rail Authority, Texas Department of Transportation, and Utah Department of Transportation) were lead agencies for EISs published in 2022. **Table 3-2** shows draft and final EISs filed in 2022 by agency.

Table 3-2. Draft and final EISs published in the *Federal Register* in 2022 by lead agency.

Lead Agency	Number of EISs
Federal Energy Regulatory Commission	28
U.S. Army Corps of Engineers	23
US Forest Service	18
Federal Highway Administration	13
Bureau of Ocean Energy Management	10
National Marine Fisheries Service	9
Bureau of Land Management	9
US Navy	8
Tennessee Valley Authority	7
US Coast Guard	6
Department of Energy	5
Bureau of Indian Affairs	5
Nuclear Regulatory Commission	4
US Fish and Wildlife Service	4
Rural Utilities Service	3
US Air Force	3
Federal Transit Administration	3
California High Speed Rail Authority	3
Department of Agriculture	2
National Oceanic and Atmospheric Administration	2
National Nuclear Security Administration	2
US Environmental Protection Agency	2
Texas Department of Transportation	2
Animal and Plant Health Inspection Service	1
Department of Defense	1
US Army	1
Bureau of Reclamation	1
National Park Service	1

Lead Agency	Number of EISs
Maritime Administration	1
National Highway Transportation Safety Administration	1
Surface Transportation Board	1
Department of Veterans Affairs	1
Armed Forces Retirement Home	1
California Department of Transportation	1
National Aeronautics and Space Administration	1
US Postal Service	1
Utah Department of Transportation	1
Total	**185**

In 2022 five departments (Energy, Defense, Interior, Transportation[5] and Agriculture) were responsible for 88 percent all EISs published. These are the same 5 departments that published the majority of EISs in 2021, however in 2022 a greater proportion of all EISs were published by these agencies. Department of Energy agencies published the largest share of EISs (25% of all EISs published). **Figure 3-1** shows the EISs by department, with the departments responsible for publishing large numbers of EISs broken out separately.

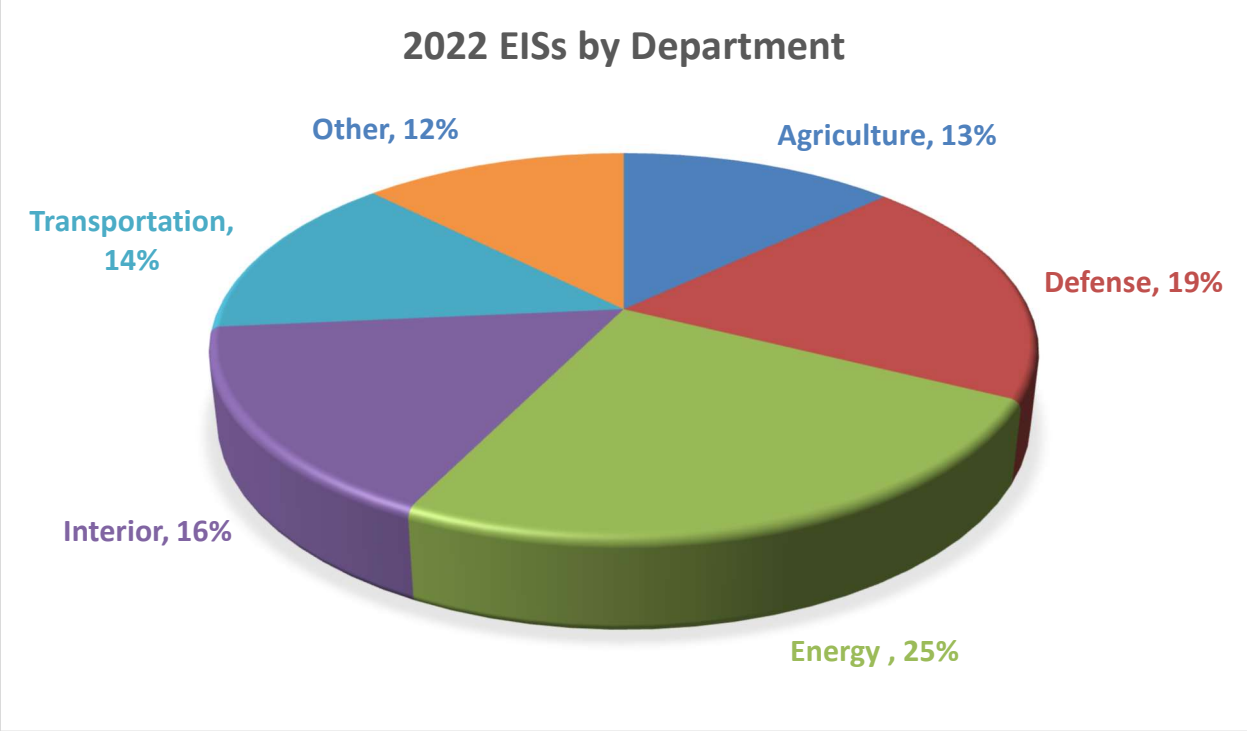

Figure 3-1. Draft and final EISs published in 2022 by department.

[5] EISs published by states with delegated authority were counted as "other departments".

3.2 Geographic Distribution of EISs Published in 2022

The geographic breakdown of draft and final EISs by state and territory is shown in **Table 3-3**. As has been the case in prior years, many more EISs were prepared for actions in California (22) than in any other state[6]. Compared to previous years, this was a lower total for California than in 2021 (32 EISs), 2020 (42), and 2019 (60). Louisiana and Oregon had the second- and third-most EISs published in 2022, their same rankings as in 2021. Fourteen EISs were identified in the database as regional, national, for programmatic actions, and "other" – up from 6 in 2021. Finally, 36 EISs were listed as involving multiple states, a slight reduction from the 38 in 2021.

Table 3-3. Draft and final EISs published in 2022 by state and territory.

State/Territory	Number of EISs	State/Territory	Number of EISs
California	22	Illinois	2
Louisiana	13	Montana	2
Alaska	7	North Dakota	2
Tennessee	7	New York	2
Texas	7	Utah	1
Washington	7	Wyoming	1
Florida	5	Alabama	1
South Carolina	5	Arkansas	1
Wisconsin	5	Indiana	1
Idaho	4	Kansas	1
New Mexico	4	Massachusetts	1
Nevada	4	Mississippi	1
District of Columbia	3	New Hampshire	1
Hawaii	3	New Jersey	1
Maryland	3	Oklahoma	1
Virginia	3	Programmatic/Regulatory/Other	14
Arizona	2	Multistate	36

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

4. Preparation Times for Environmental Impact Statements Made Available in Calendar Year 2022

Piet deWitt and Carole deWitt[7]

4.1 Highlights of 2022

- In 2022, federal agencies continued to reduce their annual average final environmental impact statement (EIS) preparation time.
- The Federal Energy Regulatory Commission (FERC) made available more draft and final EISs than any other agency.
- Federal agencies established a new high final EIS completion rate for those made available in one year or less from the publication of their Notice of Intent.
- Federal agencies published the fewest draft EISs for the period 1997-2022.

4.2 EIS Numbers

In calendar year 2022, federal agencies made available through Notices of Availability (NOAs) published in the Federal Register by the Environmental Protection Agency (EPA) 93 draft and draft supplemental EISs (i.e., draft EISs) and 87 final and final supplemental EISs (i.e., final EISs).

The number of draft EISs made available in 2022 was the lowest for the period 1997-2022. The largest number of draft EISs made available in any year from 1997-2022 was 320 in 2003. The 94 draft EISs made available in 2022 supplanted the previous low of 99 drafts in 2021. The average number of draft EISs made available in a year has decreased from 2003 at an average rate of 12.2 documents per year as determined by linear regression. The coefficient of determination (R^2) for this regression is 0.96. For the period 1997-2022, the average number of draft EISs made available in a year was 221 ± 69 (mean ± one standard deviation).

The largest number of final EISs in our study period was 306 in 2004. The 87 final EISs in 2022 was seven EISs more than the previous low of 80 final EISs in 2021. Since 2004, the number of final EISs made available in a year has decreased at an average rate of 10.5 EISs per year (R^2 = 0.90). For the period 1997-2022, the average number of final EIS made available in a year was 190 ± 62.

Two of the five most prolific EIS-preparing agencies, the U.S. Forest Service (USFS) and U.S. Army Corps of Engineers (USACE) each made ten final EISs available to the public in 2022, and each agency established a new low. Of the ten final EISs made available by the USFS, two were supplements with no supplementing Notice of Intent (NOI) and the USACE had one supplement with the same problem (see first paragraph under "Final EISs'). For the period 1997-2022 the USFS averaged 44 ± 18 final EISs per year. During the same period the USACE averaged 18 ± 6 final EISs per year.

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4.3 Final EISs

In calendar year 2022, 25 agencies made 87 final EISs available to the public. Agencies in the Departments of Defense, Transportation, Agriculture and the Interior prepared 56% of those final EISs. Four final supplemental EISs had no NOI for their supplementation and are not included in our preparation time calculations. Our 2022 sample includes 83 final EISs (95.4% of our final EIS population).

In 2022 final EISs prepared by all agencies combined had an average preparation time (from the Federal Register NOI to the EPA NOA for the final EIS) of 1,533 ± 1,230 days (4.2 ± 3.4 years) see **Table 4-1** "ALL" "NOI to final EIS). The 2022 average was 145 days shorter than the 2021 average of 1,678 ± 1,589 days (4.6 ± 4.4 years). For the period 1997-2021, the longest annual average preparation time for final EISs was 1,864 ± 1,259 days (5.1 ± 3.4 years) in 2016, and the shortest annual average was 1,166 ± 899 days (3.2 ± 2.5 years) in the year 2000. The 2022 average is 331 days (0.9 year) less than the 2016 average and 367 days (1.0 year) more than the year 2000 average. Since 2016, final EIS preparation times have decreased at an average rate of 44 days per year (R^2 = 0.76). The 2022 average preparation time for all agencies is the lowest average since 2011.

Table 4-1. Preparation times in calendar days for final and final supplemental EISs made available in calendar year 2022. See the Acronyms and Abbreviations list on page ii for abbreviations of agencies not mentioned in the text.

			NOI to Draft EIS			Draft EIS to Final EIS			NOI to Final EIS				
Agency	**n**	**%**	**Mean**	**s.d.**	**Med**	**Mean**	**s.d.**	**Med**	**Mean**	**s.d.**	**Med**	**Min**	**Max**
ALL	**83**	100	**995**	904	651	**538**	574	357	**1,533**	1,230	1,088	184	5,840
AFRH*	**1**	1.2	**1,242**			**2,485**			**3,727**				
BIA	**2**	2.4	**2,095**	1,577	2,095	**1,127**	1,158	1,127	**3,222**	419	3,222	2,926	3,518
BLM	**3**	3.6	**2,186**	1,543	2,359	**558**	232	427	**2,744**	1,579	3,185	991	4,056
BOEM	**1**	1.2	**414**			**364**			**778**				
DOD	**1**	1.2	**571**			**154**			**725**				
DOE	**2**	2.4	**348**	221	348	**300**	305	300	**647**	526	647	275	1,019
DVA	**1**	1.2	**1,096**			**364**			**1,460**				
EPA	**1**	1.2	**438**			**154**			**592**				
FERC	**13**	15.7	**326**	526	190	**133**	22	133	**459**	525	317	184	2,177
FHWA	**8**	9.6	**1,400**	858	1,268	**654**	565	427	**2,053**	1,014	1,650	831	3,295
FRA	**3**	3.6	**2,668**	1,522	1,901	**341**	45	322	**3,009**	1,491	2,223	2,075	4,729
FTA	**2**	2.4	**1,626**	1,378	1,626	**1,726**	569	1,726	**3,351**	1,947	3,351	1,974	4,728
FWS	**2**	2.4	**625**	398	625	**277**	64	277	**901**	462	901	574	1,228
MARAD	**1**	1.2	**387**			**637**			**1,024**				
NOAA	**8**	9.6	**1,063**	505	592	**385**	179	406	**1,449**	634	473	605	2,167
NPS	**1**	1.2	**2,425**			**651**			**3,076**				
NRC	**2**	2.4	**546**	247	546	**609**	346	609	**1,155**	593	1,155	735	1,575
RUS	**2**	2.4	**186**	50	186	**175**	10	175	**361**	40	361	332	389
TVA	**3**	3.6	**357**	7	354	**310**	138	238	**668**	144	592	577	834

			NOI to Draft EIS			Draft EIS to Final EIS			NOI to Final EIS				
Agency	**n**	**%**	**Mean**	**s.d.**	**Med**	**Mean**	**s.d.**	**Med**	**Mean**	**s.d.**	**Med**	**Min**	**Max**
USACE	**9**	10.8	**1,277**	913	1,226	**903**	922	567	**2,180**	1,655	2,235	465	5,840
USAF	**1**	1.2	**982**			**140**			**1,122**				
USCG	**3**	3.6	**327**	182	303	**315**	170	266	**642**	351	569	333	1,024
USFS	**8**	9.6	**1,048**	566	1,171	**678**	421	763	**1,727**	811	1,862	589	2,713
USN	**4**	4.8	**891**	440	767	**749**	713	476	**1,640**	1,143	1,243	759	3,314
USPS	**1**	1.2	**183**			**126**			**309**				

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

The draft EISs for the 2022 final EISs required an average of 995 ± 904 days (2.7 ± 2.5 years) to prepare following the publication of their NOIs in the Federal Register (see Table 5-1 "ALL" "NOI to Draft EIS"). The 2022 average is 105 days (0.3 years) shorter than the 2021 average of 1,100 ± 1381 days (3.0 ± 3.8 years). The 2022 average is also 383 days (~1 year) shorter than the longest annual average 1,378 ± 1,103 days (3.8 ± 3.0 years) in 2016 and 285 days (0.8 year) longer than the shortest annual average preparation time of 710 ± 666 days (1.9 ± 1.8 years) in the year 2000. Since 2016 preparation times for draft EISs have decreased at an average rate of 53 days per year (R^2 = 0.84).

The 2022 average time for preparing the final EIS from the draft EIS was 538 ± 574 days (1.5 ± 1.6 years) (see Table 5.1 "ALL" "Draft EIS to Final EIS"). The 2022 average was 40 days shorter than the 2021 average of 578 ± 565 days (1.5 ± 1.6 years). The 2022 average was also 70 days shorter than the longest average of 608 ± 623 days (1.7 ± 1.7 years) in 2018 and 149 days longer than the shortest average of 389 ± 379 days (1.1 ± 1.1 years) in the year 2000. Since 2016 the time required to prepare the final EIS from the draft EIS has increased at an average rate of 9 days per year (R^2 = 0.20).

In 2022, 14 EISs were completed in less than one year. Ten of those EISs were prepared by FERC. The other four agencies in this group were the Department of Energy (DOE), U.S. Coast Guard, Rural Utilities Service and U.S. Postal Service. The average preparation time for the 14 EISs was 290 ± 51 days.

The five historically most prolific EIS-preparing agencies made available 29 final EISs in 2022, 35% of our sample. The EISs from these agencies required an average of 2,109 ± 1,226 days (5.8 ± 3.4 years) to complete. The 2022 average was three days shorter than the average for 2021, 2,112 ± 1,760 days (5.8 ± 4.8 years). The 54 final EISs prepared by agencies other than the five most prolific required an average of 1,223 ± 1,127 days (3.4 ± 3.1 years) to complete. The average EIS-preparation times for each of the five most prolific EIS preparers are included in the ten longest averages for 2022 (see Table 5-5, Final EISs).

Of the five historically most prolific EIS-preparing agencies, the USFS, USACE, and Bureau of Land Management (BLM) established new lows for the number of final EISs made available in a year. The BLM also established new high average preparation times for the intervals of NOI to draft EIS and total preparation time. The National Park Service established a new high total preparation time, and the USACE established a new high average for the interval from the draft EIS to the final EIS.

In 2022, all federal agencies combined established a new high completion rate for final EISs completed in less than one year (see **Table 4-2**). These agencies also established a new low completion rate for the 3-to-4-year completion interval.

Table 4-2. A comparison of 2022 final EIS completion rates with the average final EIS completion rates for the period 1997 through 2021.

Completion Interval in Years from NOI	2022 Completion Percentage	1997 - 2021			
		Average Completion Percentage	Standard Deviation	Lowest Completion Percentage (Year)	Highest Completion Percentage (Year)
0 to 1	16.8	6.8	3.4	0.7 (2018)	14.9 (2001)
1 to 2	16.8	22.6	4.9	13.7 (2015)	30.3 (2000)
2 to 3	16.8	18.5	2.3	15.2 (2008)	24.5 (2009)
3 to 4	7.2	13.3	3.0	9.0 (2021)	19.5 (2019)
4 to 5	9.6	10.1	2.3	6.2 (2002)	16.4 (2012)
5 to 6	6.0	7.4	1.9	4.3 (2017)	10.6 (2011)
6 to 7	7.2	5.8	2.3	0.0 (2021)	10.7 (2006)
7 to 8	2.4	4.1	1.5	1.5 (2000)	7.0 (2013)
8 to 9	7.2	3.4	1.8	1.3 (2002)	7.7 (2021)
9 to 10	3.6	2.2	1.4	0.0 (2021)	6.0 (2015)
10 to 11	1.2	1.6	1.1	0.4 (4 years)	3.8 (2014)
11 to 12	1.2	0.82	0.70	0.0 (7 years)	2.6 (2021)
12 to 13	2.4	0.91	0.94	0.0 (6 years)	3.4 (2019)
13 to 14	0.0	0.44	0.54	0.0 (10 years)	2.3 (2013)
14 to 15	0.0	0.59	0.69	0.0 (10 years)	2.6 (2021)
15 to 16	0.0	0.33	0.53	0.0 (16 years)	1.8 (2016)
16 to 17	1.2	0.22	0.43	0.0 (18 years)	1.5 (2018)

4.4 Draft EISs

In calendar year 2022, 26 agencies made 93 draft EISs available to the public. This was the lowest number of draft EISs made available in the period 1997-2022. Four agencies, FERC, USFS, USACE, and Federal Highway Administration (FHWA), produced nearly half of the 2022 draft EIS population. Four draft supplemental EISs had no NOI published in the *Federal Register* and are not included in our preparation time calculations. Our sample of 89 draft EISs is 96% of the total 2021 draft EIS population.

The 2022 annual average draft EIS preparation time for all agencies combined was 738 ± 707 days (2.0 ± 1.9 years) (see "ALL" in **Table 4-3**). The 2022 average is 506 days shorter than the highest average 1,244 ± 1,240 days (3.4 ± 3.4 years) observed in 2019 and 28 days longer than the lowest annual average of

710 ± 666 days (1.9 ± 1.8 years) observed in the year 2000. The 2022 average is also 141 days lower than the 2021 average of 879 ± 121 days (2.4 ± 3.1 years).

Table 4-3. Preparation times in calendar days for draft and draft supplemental EISs made available in calendar year 2022.

Agency	n	%	Mean	s.d.	Median	Minimum	Maximum
ALL	**89**	100	**738**	707	490	36	3,396
APHIS	**2**	2.2	**777**	446	777	461	1,092
BIA	**3**	3.4	**1,209**	1,441	441	315	2,871
BLM	**5**	5.6	**420**	224	332	158	738
BOEM	**7**	7.9	**664**	436	512	451	1,649
BSEE*	**1**	1.1	**462**				
DOE	**2**	2.2	**301**	155	301	1,91	410
EPA	**1**	1.1	**438**				
FERC	**16**	18.0	**282**	477	172	79	2,051
FHWA	**8**	9.0	**1,238**	975	880	519	3,396
FRA	**1**	1.1	**2,962**				
FTA	**1**	1.1	**1,081**				
FWS	**2**	2.2	**323**	178	323	197	449
MARAD	**1**	1.1	**1,185**				
NASA	**1**	1.1	**203**				
NNSA*	**2**	2.2	**776**	64	776	730	821
NOAA	**3**	3.4	**1,162**	1,304	444	375	2,667
NRC	**2**	2.2	**593**	511	593	231	954
RUS	**1**	1.1	**150**				
STB	**1**	1.1	**273**				
TVA	**3**	3.4	**318**	61	318	248	354
USA	**1**	1.1	**581**				
USACE	**10**	11.2	**1,192**	618	1,000	245	2,160
USAF	**2**	2.2	**438**	292	438	231	644
USCG	**1**	1.1	**518**				
USFS	**8**	9.0	**942**	673	872	36	1,971
USN	**4**	4.5	**672**	399	637	238	1,176

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

The five historically most prolific EIS-preparing agencies made available 31 draft EISs in 2022, 35% of our sample. Draft EISs produced by these five agencies required an average time of 1,015 ± 730 days (2.8 ±

2.0 years) to complete, 277 days longer than the average for all agencies combined. The 2022 average was 141 days less than the 2021 average of 879 days. All other agencies combined had an average draft EIS preparation time of 589 ± 653 days (1.6 ± 1.8 years).

All federal agencies combined did not establish any new high or low preparation percentages by year intervals in 2022 (see **Table 4-4**).

Table 4-4. A comparison of 2022 draft and draft supplemental EIS completion rates with averages for the period 1997 through 2021.

Preparation Interval in Years from NOI	2022 Preparation Percentage	1997 - 2021			
		Average Preparation Percentage	Standard Deviation	Lowest Percentage (Year)	Highest Percentage (Year)
0 to 1	36.0	26.1	6.6	13 .9 (2013)	38.8 (2021)
1 to 2	28.1	27.7	4.0	20.4 (2021)	37.5 (2017)
2 to 3	15.7	16.7	2.7	12.0 (1999)	22.5 (2012)
3 to 4	6.7	10.1	2.4	6.2 (2001)	15.3 (2018)
4 to 5	3.4	6.5	1.7	2.5 (2000)	9.4 (2010)
5 to 6	5.6	3.9	1.7	1.0 (2021)	7.9 (2005)
6 to 7	0.0	3.1	1.3	0.7 (1998)	5.1 (2015)
7 to 8	2.2	1.5	0.66	0.3 (2005)	2.8 (1997)
8 to 9	1.1	1.3	0.98	0.0 (3 years)	4.2 (2017)
9 to 10	1.1	1.1	0.76	0.0 (2 years)	2.9 (2019)

Of the five historically most prolific EIS-preparing agencies, the USFS and USACE made available the smallest number of their draft EISs. The BLM established a low average draft EIS preparation time.

4.5 Draft and Final EIS Preparation Time Ranks

Six agencies appeared in the ten longest averages for both draft and final EISs (**Table 4-5**): Federal Transit Administration (FTA) (ranked 2 and 7, respectively), FHWA (8 and 2), Federal Railroad Administration (FRA) (5 and 1), Bureau of Indian Affairs (BIA) (3 and 3), USACE (7 and 4), and USFS (9 and 8).

Five agencies appeared in the ten lowest averages for both draft and final EISs: FERC (23 and 23), Fish and Wildlife Service (FWS) (16 and 20), Tennessee Valley Authority (TVA) (19 and 21), EPA (22 and 17) and DOE (20 and 22).

The ten agencies in the highest final EIS-preparation times group made available 41 EIS available in 2022; the ten agencies with the lowest average final preparation times made available 30 EISs. The average final EIS-preparation time for agencies with the ten highest averages was 2,284 ± 1,271 days

(6.3 ± 3.5 years), and the average times for the agencies with the ten lowest averages was 575 ± 417 days (1.6 ± 1.1 years).

Table 4-5. Annual average EIS-preparation times in calendar days for final and draft EISs made available in 2022 arranged in descending order.

2022 Final EISs				2022 Draft EISs			
Rank	Agency	n	Mean	Rank	Agency	n	Mean
1	AFRH	1	3,727	1	FRA	1	2,962
2	FTA	2	3,351	2	FHWA	8	1,238
3	BIA	2	3,222	3	BIA	3	1,209
4	NPS	1	3,076	4	USACE	10	1,192
5	FRA	1	3,009	5	MARAD	1	1,185
6	BLM	3	2,744	6	NOAA	3	1,162
7	USACE	9	2,180	7	FTA	1	1,081
8	FHWA	8	2,053	8	USFS	8	942
9	USFS	8	1,727	9	APHIS	2	777
10	USN	4	1,640	10	NNSA	2	776
11	DVA	1	1,460	11	USN	4	672
12	NOAA	8	1,449	12	BOEM	7	664
13	NRC	2	1,155	13	NRC	2	593
14	USAF	1	1,122	14	USA	1	581
15	MARAD	1	1,024	15	USCG	1	518
16	FWS	2	901	16	BSEE	1	462
17	BOEM	1	778	17	EPA	1	438
18	DOD	1	725	18	USAF	2	438
19	TVA	3	668	19	BLM	5	420
20	DOE	2	647	20	FWS	2	323
21	USCG	3	642	21	TVA	3	318
22	EPA	1	592	22	DOE	2	301
23	FERC	13	459	23	FERC	16	282
24	RUS	2	361	24	STB	1	273
25	USPS	1	309	25	NASA	1	203
				26	RUS	1	150

Note: n = number of EISs

The ten agencies in the highest draft EIS-preparation group made available 39 EIS in 2022; the ten agencies with the lowest average draft preparation times made available 34 EISs. The average draft EIS-

preparation time for agencies with the ten highest averages was 1,149 ± 816 days (3.1 ± 2.2 years), and the average times for the agencies with the ten lowest averages was 316 ± 345 days (0.87 ± 0.95 years).

4.6 A Glance at FERC

FERC is not historically a major EIS producer. Our preparation-time database on FERC contains 217 draft EISs and 210 final EISs. From 1997 through 2022, FERC made available an average of 8.4 ± 4.7 draft EISs per year with a maximum of 17 (2006) and a minimum of 0 (2020). FERC's percentage in our annual samples averaged 4.4 ± 3.9% with a maximum of 18% (2022) and a minimum of 0% (2020). In comparison, for the period 1997 through 2020, FERC's percentage of our annual draft EIS samples was 3.5 ± 1.7% with a maximum of 8.2% (2018) and a minimum of 0.5% (2012). The differences reflect FERC's slightly increased EIS production during a period when EIS production by more prolific EIS producers was rapidly declining.

From 1997 through 2022, FERC made available an average of 8.1 ± 4.2 final EISs per year with a maximum of 17 (2007) and a minimum of 2 (2012 and 2013). FERC's percentage in our annual samples averaged 4.5 ± 3.2% with a maximum of 15.7 (2022) and a minimum of 1.0 (2012). Prior to 2021, FERC's percentage of our annual final EIS samples was 3.8 ± 1.9% with a maximum of 8.6 (2019) and a minimum of 1.0% (2012). The same factors that increased FERC's visibility for draft EISs are also operative with 2022 final EISs.

The 210 final EISs prepared by FERC since 1997 required an average of 783 ± 612 days (2.1 ± 1.7 years) to complete. The agency completed 20% of its EISs in less than one year and 61% in two years or less. FERC completed 217 draft EISs in our database. Those EISs required an average of 529 ± 508 days (1.5 ± 1.4 years) to complete. FERC completed 51% of its draft EISs in one year or less, and 78% in two years or less.

5. NEPA Legislation in 2022

Charles P. Nicholson, PhD[8]

5.1 Introduction

2022 was the second year of the 117th Congress which convened on January 3, 2021, and closed on January 3, 2023. During 2021, 203 bills (about 150 of them unique) containing the phrase "National Environmental Policy Act" and/or addressing the NEPA review process had been introduced. An additional 102 NEPA bills were introduced in 2022, bringing the total number of NEPA bills in the 117th Congress to 305. This was an increase over the previous three Congresses which had between 225 and 250 NEPA bills.

Major themes of NEPA bills in the 117th Congress included codifying provisions in the 2020 Council on Environmental Quality (CEQ) NEPA regulations; consideration of environmental justice; NEPA streamlining, including expediting NEPA compliance and related permitting actions, particularly for fossil fuel, infrastructure, and critical minerals mining project. As has been the case in previous Congresses, several of the bills introduced in the 117th Congress, particularly in early 2021, had been introduced but not passed in previous Congresses. Many of these reintroduced bills focused on streamlining NEPA compliance processes.

Bipartisan interest in "permitting reform," particularly for energy-related projects and including expediting NEPA compliance, increased in mid- and late-2022 during negotiations over the **Inflation Reduction Act** (H.R.5376; see below for a discussion of its NEPA provisions). The act was passed in August with an agreement to address permitting reform in the remainder of the 117th Congress. Senator Manchin (D-WV) led much of this effort with his proposed Energy Independence and Security Act of 2022. Although never formally introduced, Senator Manchin attempted to attach his bill to must-pass spending bills. This effort, as well as other efforts to pass permitting reform legislation late in the session, including H.R.8966 and S.4856, the **Simplify Timelines and Assure Regulatory Transparency (START) Act** championed by Senator Capito (R-WV), were ultimately unsuccessful. Attempts to pass permitting reform legislation accelerated in early 2023 in the 118th Congress.

As in recent previous Congresses, a very small proportion of the NEPA bills in the 117th Congress was enacted into law and a large majority of the introduced bills never progressed beyond being referred to committee. The most substantive NEPA bill to become law during 2021, as well as the whole of the 117th Congress, was the **Infrastructure Investment and Jobs Act**, H.R.3684 (Public Law (PL) 117-58, also known as the Bipartisan Infrastructure Law). This was also arguably the most substantive law addressing NEPA to be passed since the Fixing America's Surface Transportation Act of 2015. See the 2021 Annual NEPA Report (https://www.naep.org/nepa-annual-report) for a review of NEPA legislation introduced in 2021.

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Any opinions and conclusions in this article are those of the author and do not represent those of HDR, Inc.

The remainder of this article summarizes the substantive NEPA legislation introduced during the second (2022) year of the 117th Congress. It also updates the status of substantive NEPA legislation introduced in 2021 that Congress acted upon in 2022. "Substantive" NEPA legislation herein refers to bills that address NEPA compliance processes in some manner and excludes routine NEPA-related appropriations bills. About 60 percent of the NEPA legislation introduced in the 117th Congress was substantive.

Some of the NEPA legislation introduced but not passed in the 117th Congress is likely to be reintroduced in the 118th Congress. Any final rule on the CEQ Phase 2 revisions of the NEPA implementing regulations is also likely to be the subject of legislation in the 118th Congress, as were the 2020 and 2022 final rules on the NEPA implementing regulations in the 117th Congress.

5.2 Enacted Legislation

As noted above, the most substantive legislation enacted during the 117th Congress was the 2021 Infrastructure Investment and Jobs Act. The remainder of this section describes substantive NEPA legislation which became law in 2022.

H.R.7776, the **James M. Inhofe National Defense Authorization Act for Fiscal Year 2023**, was enacted as P.L. No. 117-923 on 12/27/2022. It had no NEPA implications when first introduced. The Water Resources Development Act of 2022 (S.4136, S.4137) was later incorporated into it and Division H – Water Resources, Title LXXXI contains NEPA provisions. Section 8134 requires the Secretary of Defense to annually report NEPA data for Corps of Engineers water resources project feasibility studies, including number of categorical exclusion (CatEx) determinations, environmental assessments (EAs), findings of no significant impact (FONSIs) and environmental impact statements (EISs) issued as well as the number of pending CatEx determinations, EAs, and EISs. The reports also include the time required to complete the EAs and EISs. Section 10303 directs the Ocean Policy Committee to establish a publicly accessible, centralized digital archive of ocean-related and ocean-mapping-related NEPA documents. Section 11710 declares that the conveyance of a 2.4-acre tract of land controlled by the National Oceanic and Atmospheric Administration to the City of Juneau, Alaska is not a major federal action under NEPA.

H.R.5376, the **Inflation Reduction Act**, evolved from numerous bills introduced in 2021 and early 2022 collectively known as "Build Back Better." It emerged in its near-final form in mid-2022 and was enacted as P.L. No: 117-169 through the reconciliation process with strictly partisan votes in August 2022. In a title on fossil fuel resources, it declares that the impacts of specific mandated oil and gas leases in the Gulf of Mexico have been adequately addressed in a 2016 programmatic final EIS and 2017 record of decision. Perhaps more significantly, it provides $100 million for the U.S. Forest Service, $115 million for the Department of Energy, $100 million for the Federal Energy Regulatory Commission, $150 million for the Department of Energy, $40 million for the Environmental Protection Agency, $30 million for CEQ, and $100 million for the Federal Highway Administration for NEPA compliance work. Although there is some variation among departments and agencies, most of these funds are available through September 2026 and are to be used for hiring and training of personnel, development of programmatic environmental documents, procurement of services for environmental reviews, development of environmental information systems, stakeholder and community engagement, and purchase of new equipment for environmental analysis with the overall goal of facilitating timely and efficient

environmental reviews and authorizations. It also provides $350 million for the Federal Permitting Improvement Steering Council Environmental Review Improvement Fund, available through September 2031.

The **Hualapai Tribe Water Rights Settlement Act of 2022**, S.4104 and H.R.7633, was signed into law as P.L.117-349 on January 5, 2023. It states that the execution of the water right settlement agreement is subject to NEPA (and other applicable environmental laws) but is not a major federal action under NEPA. The same provision was included in H.R.5118, the **Continental Divide Trail Completion Act**, which was passed by the House. The **Colorado River Indian Tribes Water Resiliency Act of 2022**, S.3308, introduced in 2021, was also enacted as P.L. 117-343 on January 5, 2023. It states that the execution of a water right agreement is not a major federal action.

5.3 Proposed Legislation

This section summarizes the substantive NEPA legislation introduced but not enacted into law during 2022. Unless described otherwise, these bills did not progress beyond being introduced and assigned to committee.

Council on Environmental Quality NEPA Regulations

The April, 2022 Phase 1 revisions to the CEQ NEPA regulations were challenged under the Congressional Review Act in resolutions introduced in July in the Senate (Senate Joint Resolution 55) and in the House (House Joint Resolution 91). The Senate resolution passed by a vote of 50-47, with 49 Republicans and one Democrat voting for it, 47 Democrats voting against it, and 1 Republican and 2 Democrats not voting. The House did not act on its version of the resolution.

Several bills introduced in 2021 would codify parts or all of the 2020 CEQ NEPA regulations and more such bills were introduced in 2022. These include H.R.7654, the **Stop NEPA Expansion Act**; S.3982, the **Furthering Resource Exploration and Empowering (FREE) American Energy Act**; H.R.8966 and S.4856, the **Simplify Timelines and Assure Regulatory Transparency (START) Act**. S.3762, the **Energy Freedom Act**, would reinstate the 2020 CEQ NEPA regulations (thus rejecting the 2022 Phase 1 revisions) and prohibit CEQ from modifying the regulations for 15 years. H.R.8069, the **Reducing Farm Input Costs and Barriers to Domestic Production Act**, would nullify the 2022 Phase 1 revisions and thus reinstate the parts of the 2020 regulations that were revised in 2020.

NEPA Assignment / Delegation

The above-mentioned **START Act**, H.R.8966 and S.4815, in Section 7 titled Federal Land Freedom authorizes qualifying states to assume responsibility for authorizing and regulating oil, gas and other energy development on federal lands in the state, except for tribal and national park system lands, national wildlife refuges, and designated wilderness. State actions under this program are exempt from the Administrative Procedures Act (APA), NEPA, National Historic Preservation Act (NHPA), and ESA.

Judicial Review

The **START Act** also exempts any federal permitting actions related to the approval of the Mountain Valley Pipeline from judicial review.

Categorical Exclusions

Numerous bills addressing categorical exclusions were introduced in 2021. A few additional bills addressing this topic were introduced in 2022. The **Transparency And Production of (TAP) American Energy Act**, H.R.9087, would categorically exclude the issuance of a federal drilling permit on non-federal surface estate where less than 50% of the subsurface mineral estate is federally owned. It would also exempt this drilling from NHPA consultation and ESA Section 7 requirements. The **Energy Freedom Act**, S. 3762 and H.R.7094, would categorically exclude approval of geothermal exploration test projects on federal lands, subject to consideration of extraordinary circumstances.

The House version of the **Save Our Sequoias Act**, H.R.8168, categorically excludes specified wildfire emergency response and rehabilitation activities.

S.3807 and H.R.7456, the **Stopping Hindrances to Invigorate Ports and Increase Trade (SHIP IT) Act**, categorically excludes the designation of plots of federal land for short-term use for storage of cargo containers.

NEPA Streamlining

The **Determination of NEPA Adequacy Streamlining Act**, H.R.9025, would direct the Secretaries of Interior and Agriculture to use previously completed EAs and EISs to meet NEPA requirements for transmission line, energy pipeline, and renewable energy facility projects where the action and effects are substantially similar to those described in the previous EA or EIS.

H.R.9372 and S.5165 , the **Pipeline Permitting for Energy Security Act**, addresses several items applicable to Clean Water Act Section 401 and 404 permitting, NEPA compliance, and Endangered Species Act compliance. Its NEPA provisions include declaring that conducting an EA on a nationwide basis is sufficient for the reissuance of a nationwide 404 permit. It also codifies several parts of the 2020 CEQ NEPA regulations including the definition of effects, the actions not considered to be major federal actions, EIS page and time limits, and consideration of submitted alternatives, information, and analyses. It also requires the Secretaries of the Army, Agriculture, and Interior to, within 21 days, issue all permits and approvals necessary to complete the Mountain Valley Pipeline and exempts these actions from judicial review.

The **Energy Freedom Act**, S. 3762 and H.R.7094, sets a 200-page limit for EISs for energy projects.

Time limits for completing EAs and EISs and making decisions on approvals were addressed in additional bills. The **Securing America's Mineral Supply Chains Act of 2022**, H.R.8981, would set time limits of 12 months for an EA and 24 months for an EIS on mineral exploration or mine permit actions on federal lands. The **Permitting for Mining Needs Act of 2022**, H.R.8928, would set time limits of 18 months for EAs and 24 months for EISs for mining projects on federal lands. H.R.9006 (no formal title) would set time limits of 1 year for EAs and 2 years for EISs completed by the Secretary of Interior and Secretary of Agriculture on applications for a right-of-way. The **Energy Freedom Act**, S. 3762 and H.R.7094, would require FERC to make a decision on gas pipeline applications within 1 year of receipt of the application. The same time limit would also apply to Corps of Engineers approval. The **Transparency And Production of (TAP) American Energy Act**, H.R.9087, directs the Secretaries of Interior and Agriculture to complete

EAs within one year and EISs within two years. It also directs the Secretary of Transportation to apply the 23 CFR 139 efficient environmental review procedures for DOT surface transportation projects to pipeline projects. The **One Federal Decision Act 1.3**, H.R.8418, expands this by applying 23 U.S.C. 139 process, including One Federal Decision, DOT port infrastructure, pipeline, and airport and aviation projects.

S.5023, the **Agriculture Disaster Assistance Improvement Act of 2022**, waives the 30-day comment period under NEPA for emergency agricultural conservation and forest restoration projects on BLM land and authorizes the Secretary of Interior to adopt NEPA reviews prepared by the Natural Resources Conservation Service.

The **Interactive Federal Review Act**, S.3 and H.R.9339, encourages and provides funding for pilot projects using interactive, digital, cloud-based platforms in carrying out the environmental impact analysis and community engagement processes for federal-aid highway projects under the DOT 23 U.S.C. 327 Surface Transportation Delivery Program.

S.5321, the **Deploying the Internet by Guaranteeing Indian Tribes Autonomy over Licensing (DIGITAL) on Reservations Act**, would require the Federal Communications Commission and participating agency heads, in consultation with Tribes, to issue guidelines on NEPA compliance for broadband deployment on Tribal and Native Hawaiian lands.

The **Mt. Hood and Columbia River Gorge Recreation Enhancement and Conservation (REC) Act of 2022**, H.R.7665, directs the Secretary of Agriculture, to the maximum extent practicable, to develop a programmatic NEPA analysis of the management of the subject area.

H.R.5118 was introduced in August 2021 as the Continental Divide Trail Completion Act and evolved into the **Wildfire Response and Drought Resiliency Act**. It passed in the House on July 29, 2022, but was not acted upon in the Senate. It would require the Secretary of Agriculture to establish NEPA strike teams in each Forest Service region with priority for regions with high wildfire risk. Where a single EIS or EA is produced for landscape-scale forest restoration projects, there may be multiple subsequent RODs or decision notices. A programmatic EIS or EA may tier to site-specific EAs or CatEx determinations.

H.R.9641, the **Offshore Energy Modernization Act of 2022**, would appropriate $50 million for the Bureau of Ocean Energy Management (BOEM) and $45 million for the National Oceanic and Atmospheric Administration (NOAA) to facilitate timely and efficient environmental reviews of offshore renewable energy projects.

The previously mentioned **START Act**, H.R.8966 and S.4856, requires that the FEIS for an energy project requiring federal approval contain sufficient detail to inform the decisions of all involved federal agencies.

H.R.7722, the **Unleashing American Resources Act**, would require the Secretary of Agriculture to issue the final EIS for the Resolution Copper Project and Land Exchange within 90 days. The final EIS for this project in Arizona was withdrawn in March 2021 for additional review and consultation with tribes.

Expanded Public Involvement

The **Pipeline Fairness and Transparency Act**, S.4864 and the similar H.R.8847, require that FERC hold public meetings on any DEIS, FEIS, and SEIS in each county in which the proposed project would be located.

Environmental Justice

One of the bills introduced in 2021 that addressed the consideration of environmental justice during the NEPA process, the **Environmental Justice for All Act**, H.R.2021 and S.872, was reported by the House Natural Resources Committee in July 2022. It then received increased attention following the death of cosponsor Rep. Donald McEachin (D-Va.). An amended version was reported by the committee in late December but was never brought to a floor vote.

The House-passed H.R.5118, the **Wildfire Response and Drought Resiliency Act** , originally introduced as the more narrowly focused Continental Divide Trail Completion Act first introduced in 2021, addresses environmental justice in Division D. It would require agencies to implement and regularly update an agencywide environmental justice strategy that includes consideration of environmental justice in implementing NEPA. It would codify the December 1997 CEQ guidance on environmental justice and establishes outreach and other requirements for the review of actions that may affect environmental justice communities.

While H.R.9218, the **Cumulative Impacts Act of 2022**, does not directly address analysis of cumulative impacts under NEPA, it does require consideration of cumulative impacts to overburdened communities in NPDES and Clean Air Act permitting decisions.

Expanded Review Requirements

The previously mentioned **Pipeline Fairness and Transparency Act**, H.R.8847 and S.4864, amends the Natural Gas Act to require the preparation of supplement to DEIS or FEIS if the Federal Energy Regulatory Commission makes substantial change in the proposed action that is relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns. If the DEIS on pipeline authorization does not include information about mitigation plans, a supplemental EIS must be prepared that includes such information. Any evaluation of visual impacts on a national scenic trail in an EIS must include consideration of cumulative visual impacts of other similar proposed projects in the FERC pre-filing or filing stage that may affect the trail within 100 miles of the first project and include both leaf-on and leaf-off visual impact simulations.

H.R. 8294, the **Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2023**, would require the Department of Interior to prepare an EIS prior to approving oil or gas operations in Big Cypress National Reserve. This bill passed in the House. H.R.8262, the **Department of the Interior, Environment, and Related Agencies Appropriations Act, 2023**, contains the same requirement.

The **Ensuring an Accurate Postal Fleet Electrification Act**, H.R.7682, voids the December 2021 U.S. Postal Service FEIS on Purchase of Next Generation Delivery Vehicles and prohibits vehicle procurement under the February 2021 contract with Oshkosh Defense until USPS issues a revised FEIS.

S.4752, the **Malheur Community Empowerment for the Owyhee Act**, would require the Secretary of Interior to prepare a programmatic EIS on the adaptive management of certain federal lands in Malheur County, Oregon, within 1 year and then at 10-year intervals.

Reduced Review Requirements

The **Energy Freedom Act**, S. 3762 and H.R.7094, as well as the **Ukraine Assistance and American Energy Acceleration Act**, H.R.7012, would amend Section 102(2) of NEPA to limit the analysis of impacts in any NEPA review to those occurring in the United States.

H.R.8499 and S.4596, the **Transparency and Honesty in Energy Regulations Act of 2022**, prohibits specified departments and agencies from considering the social cost of greenhouse gas (GHG) emissions in taking any action unless in compliance with Office of Management and Budget guidance. It also prohibits the Chair of CEQ, under NEPA, from considering the social cost of GHGs as part of a cost-benefit analysis in any rulemaking, issuance of guidance, or taking other agency action.

Alternatives

In addition to declaring that the required designation of Forest Active Management Areas in national forests is not subject to NEPA, H.R.8091, the **Fostering Opportunities for Resources and Education Spending through Timber Sales (FORESTS) Act of 2022**, the NEPA reviews of management projects in these areas would not be required to evaluate any alternative to the agency proposed action and the cumulative effects evaluation would be restricted to the impacts of previously approved actions.

The **Malheur Community Empowerment for the Owyhee Act**, S. 4860, requires the Secretary of Interior to develop and evaluate at least one alternative to provide operational flexibility in NEPA reviews of a grazing permit or lease on the subject federal land.

Not Major Federal Actions

Several bills declared that specified actions would not be major federal actions under NEPA. The scope of the actions addressed in these bills varied greatly.

H.R. 9012, the **Stay Off My Line Act**, would amend NEPA to limit its applicability by stating that "major federal action" does not include an action that does not involve federal land and is not subject to federal control and responsibility. In addition, actions could not be considered to be major federal actions on the basis of an interstate effect or provision of federal funds. The same provision was included in H.R.9087, the **Transparency and Production of (TAP) American Energy Act**.

Some of the bills in this category address energy-related actions. S.4229, the **Opportunities for the Nation and States to Harness Onshore Resources for Energy (ONSHORE) Act**, declares that permitting of oil and gas actions on non-federal surface estate where the U.S. mineral ownership is 50% or less is not a major federal action under NEPA. H.R.9641, the **Offshore Energy Modernization Act of 2022**, requires that regional impact studies be conducted prior to holding offshore renewable energy lease sales and declares that the studies are not major federal actions. The **TAP American Energy Act**, mentioned above, also declares that several exploratory, maintenance, and upgrade actions related to

renewable energy and transmission projects and rights-of-way are not major federal actions under NEPA.

The **Fueling American Prosperity Act**, H.R.8224, requires the Secretary of Interior to hold three offshore oil and gas lease sales, one in the Cook Inlet area and two in the Gulf of Mexico, and declares that the sales are not a major federal action under NEPA. It also declares that the finalization of the 2022-2027 offshore oil and gas lease sale program is not a major federal action under NEPA. Lastly, it establishes time limits of 1 year for EAs and 2 years for EISs when the national average price of gasoline exceeds $3.99 a gallon. If these deadlines are not met, the action is not a major federal action under NEPA.

The **Hydrogen Permitting Simplification Act**, H.R.8117, would amend the Energy Policy Act of 2005 by declaring that "no major Federal action, including any major Federal action with respect to the production of hydrogen from nuclear, solar, wind, or geothermal energy sources" is subject to the requirements of NEPA.

S.3571, the **Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022**, declares that the issuance of a "Good Samaritan" mine reclamation permit is a major federal action and the permit may only be issued when the lead agency makes a finding of no significant impact.

A handful of bills declare that the execution of the subject water rights settlement agreement is not a major federal action. These include S.4896, and H.R.8921, the **Pueblos of Jemez and Zia Water Rights Settlement Act of 2022**; H.R.8920 and S.4898, the **Pueblos of Acoma and Laguna Water Rights Settlement Act of 2022**; and S.4870, the **Tule River Tribe Reserved Water Rights Settlement Act of 2022**. H.R.9633, the **Arizona Tribes Water Marketing Act of 2022**, declares that the execution of a water lease, exchange, and storage agreements between Arizona tribes, the state, and the Secretary of Interior are not major federal action under NEPA. The approval of the agreements by the Secretary of Interior, however, is subject to NEPA.

Two other bills declare actions of limited scope are not major federal actions under NEPA: the **San Juan Southern Paiute Tribal Homelands Act of 2022**, H.R.9480, for the establishment of a reservation for the San Juan Southern Paiute Tribe on land that is part of the Navajo Indian Reservation, and the **Coast Guard Authorization Act of 2022**, S.4802, for the conveyance of specified federal property to the City of Juneau, Alaska. The latter conveyance is, however, subject to NEPA.

NEPA Exemptions

The **Wind Safety Standard Act of 2022**, H.R.8818, exempts the issuance of an interim final workplace safety standard. S.5299, the **Gun Violence Prevention and Community Safety Act of 2022**, includes an exemption from NEPA requirements for a section of the act addressing firearm locks and safes.

Two bills addressed the exemption of border protection actions from compliance with NEPA and other laws and regulations. The authority to waive such compliance to "ensure expeditious construction" of barriers and roads along the U.S.-Mexico border was first granted to the Secretary of Homeland Security by the Real ID Act of 2005. H.R.6637, the **Dignity for Immigrants while Guarding our Nation to Ignite and Deliver the American Dream (DIGNIDAD or Dignity) Act** and H.R. 7450, the **Build the Wall Now Act**, expand this waiver authority to additional border security actions.

H.R.9535, the House version of the July 2021 **Federal Land Freedom Act**, S.2394, was introduced in December 2022. It authorizes states to assume leasing and permitting of oil, natural gas, and other energy development on federal lands that are not tribal lands, designated wilderness areas, or units of the National Park System or National Wildlife Refuge System and exempts the assumed leasing actions from NEPA and other environmental laws.

6. NEPA Case Law—2022

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This paper reviews decisions on substantive National Environmental Policy Act (NEPA) cases[10] issued by federal appeals courts in 2022 and explains the implications of the decisions and their relevance to NEPA practitioners.

6.1 Introduction

In 2022, the U.S. Courts of Appeals issued 27 substantive decisions involving implementation of the NEPA by federal agencies. The 27 cases involved four different departments and three independent agencies. Overall, the federal agencies prevailed in 21 of the cases, did not prevail in two cases, and prevailed on one NEPA claim but not the other NEPA claim(s) in four cases, with a total prevail rate of 78 percent (85 percent if the partial cases are included). The U.S. Supreme Court issued no NEPA opinions in 2022; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, **Table 6-1** shows the number of U.S. Court of Appeals NEPA case decisions issued in 2006 – 2022, by circuit. The number of decisions issued in 2022 is above the 2006 – 2021 annual average of 23 decisions. **Figure 6-1** illustrates the states covered by each circuit court.

6.2 Statistics and Overview of Cases

Federal agencies prevailed in 78 percent (85 percent if the partial opinions are included) of the substantive NEPA cases brought before the U.S. Courts of Appeals.

The Department of Interior (Bureau of Energy Management [BOEM], Bureau of Land Management [BLM], Bureau of Safety and Environmental Enforcement [BSEE], U.S. Fish and Wildlife Service [FWS], National Park Service [NPS], and the Office of Surface Mining and Reclamation Enforcement [OSMRE])

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Note: Any views in this article are the author's personal views and not necessarily the views of the Navy, the Department of Defense, or the federal government.

[10] The author included *Wild Virginia v. Council on Envt'l Quality*, 56 F.4d 281 (4th Cir. 2022), where the Fourth Circuit affirmed the dismissal of a challenge to the CEQ's 2020 final NEPA regulations that affected how federal agencies conduct reviews under NEPA; although it was decided on procedural grounds, the decision may have substantive impacts (in the application of which NEPA regulations apply) on field practitioners. Alternately, some commenters have argued that even though the court left the 2020 NEPA regulations in place, CEQ has signaled that it is likely to replace these regulations in the near future.

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

	U.S. Courts of Appeals Circuits												
	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	TOTAL
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	2	1	2	3	1		1		12	3	2	1	28
2013	2			2		1	1		9	2	1	3	21
2014				2		5			10	2		3	22
2015	1					1			6	2		4	14
2016				2		1	1		14	1	1	7	27
2017		1	1		1				13	1		8	25
2018			1	3	2	1			16		3	9	35
2019				1			1	1	9	2	1	6	21
2020		1			1	1			19		2		24
2021	1	1		2			1		6	2		5	18
2022				**2**		**1**	**1**		**15**	**2**	**1**	**5**	**27**
TOTAL	10	9	7	19	10	14	8	6	198	34	13	60	388
Proportion	**3%**	**2%**	**2%**	**5%**	**2%**	**4%**	**2%**	**2%**	**51%**	**9%**	**3%**	**15%**	**100**

constituted almost half of this year's case law with twelve cases.[11] The Department of Agriculture (U.S. Forest Service [USFS]) was a defendant in five cases. The Department of Transportation (Federal Aviation Administration [FAA] and Federal Highway Administration [FHWA] were involved in four cases.[12] The Federal Energy Regulatory Commission (FERC) was involved in three cases and the Council on Environmental Quality (CEQ), Nuclear Regulatory Commission (NRC) and Tennessee Valley Authority (TVA) were each the defendant in one case.

[11] I have listed Interior as the primary defendant as the agency is the primary decision-maker in the case, although in two of the cases, the agency is a co-defendant with USDA/USFS or DOT/FHWA. See *Rocky Mountain Peace & Justice Center v. U.S. Fish and Wildlife Serv.*, 40 F.4th 1133, (10th Cir. 2022) (FWS/DOT/FHWA); C*ottonwood Env'tl Law Ctr. v. Gianforte*, No. 20-36125, 2022 WL 612673 (9th Cir. Mar. 2, 2022) (not for publication) (NPS/DOI /FWS/USFS/USDA).

[12] The DOT was the lead co-defendant with NPS in *Protect Our Parks, Inc. v. Buttigieg,* 39 F.4th 389 (7th Cir. 2022) (DOT (FHWA)/NPS).

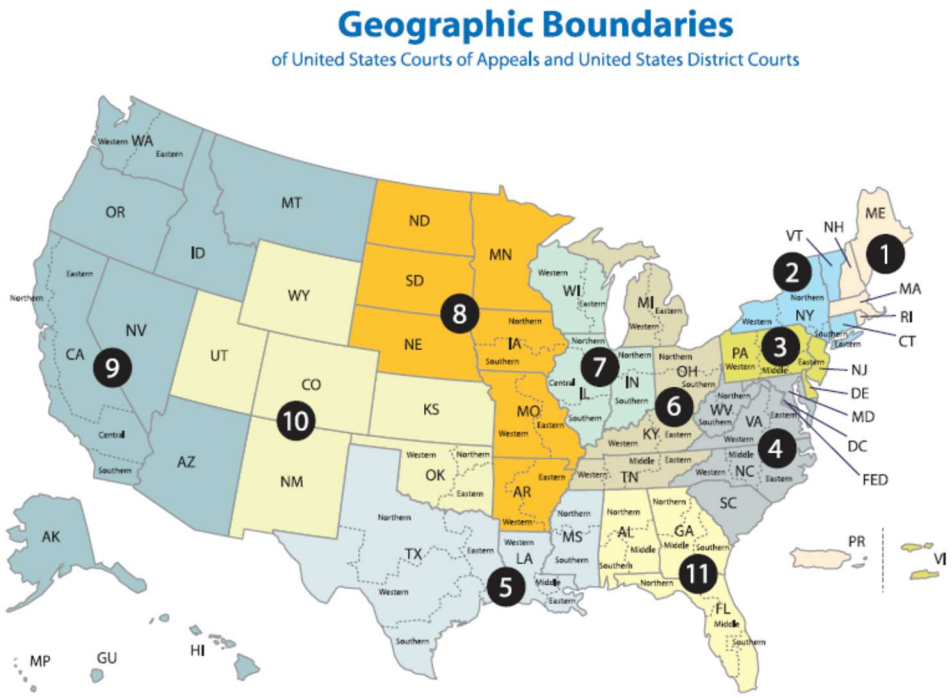

Figure 6-1. Map of U.S. Circuit Courts of Appeal.

The Department of Interior prevailed in all but three of its twelve cases (in one of the cases where it did not prevail, it partially prevailed on one NEPA claim but not the other). The Department of Agriculture prevailed in four cases out of five (in the case where it did not prevail, it partially prevailed on one NEPA claim but not the other). The DOT prevailed on all four cases. FERC prevailed in two cases out of three (in the case where it did not prevail, it partially prevailed on one NEPA claim but not the other). CEQ and NRC prevailed in their perspective NEPA cases; however, TVA did not prevail.

Of the 27 substantive cases, six cases involved a categorical exclusion (CE), ten involved environmental assessments (EA), six involved environmental impact statements (EIS), and two cases involved federal actions for which there was no NEPA document.

Of the six cases in which agencies did not prevail (or only partially prevailed), four involved EAs (*350 Montana v. Haaland*, 29 F.4th 1158 (9th Cir. 2022), *amended by* 50 F.4th 1254 (9th Cir. 2022) (9th Cir. 2022) (partially prevailed); *Environmental Def. Ctr. v. Bureau of Ocean Energy Mgm't,* 36 F. 4th 850 (9th Cir. 2022); *Gulf Restoration Network v. Haaland*, 47 F.4th 795 (D.C. Cir. 2022) (agency partially prevailed); *Food & Water Watch v. Fed. Energy Reg. Comm'n*, 28 F.4th 277 (D.C. Cir. 2022) (agency partially prevailed)), one involved an EIS (*Wild Virginia v. U.S. Forest Serv.*, 24 F.4th 915 (4th Cir. 2022) (agency partially prevailed)) and one involved the lack of a NEPA document (*Sherwood v. Tennessee Valley Authority,* 46 F.4th 439 (6th Cir. 2022)).

6.3 Trends

The following relates some trends and interesting conclusions from the substantive 2022 cases.

CEQ 2020 final NEPA regulations: These are the first cases at the federal appellate level in which the CEQ 2020 final NEPA regulations were applied or discussed.

- *Sherwood v. Tennessee Valley Authority*, 46 F.4th 439 (6th Cir. 2022) (comparing and applying new regulations involving programmatic EIS and site specific statements; stating that the new rules make clear that the site-specific statement or assessment does not necessarily need to be an EIS itself—instead, "the tiered document needs only to summarize and incorporate by reference the issues discussed in the broader document" and "shall concentrate on the issues specific to the subsequent action." 40 C.F.R. § 1501.11(b)).

- *Save our Skies v. Federal Aviation Admin.,* 50 F.4th 854 (9th Cir. 2022) (examining the CEQ 2020 final NEPA regulations when upholding FAA's application of its CE).

- *Wild Virginia v. Council on Envt'l Quality*, 56 F.4d 281 (4th Cir. 2022) (rejecting Plaintiffs' challenge to the CEQ 2020 final NEPA regulations; this action has resulted in the enduring portions of the regulations remaining in effect although CEQ indicated it plans to amend these regulations).

- *Neighbors Against Bison Slaughter v. Nat'l Park Serv.,* No. 21-35144, 2022 WL 1315302 (9th Cir. May 3, 2022) (not for publication) (referring to the 2-year timelines from CEQ 2020 final NEPA regulations).

Alternatives Considered: Seven cases involved challenges to the sufficiency of the alternatives considered, and the courts upheld the agencies' selection of the preferred alternative in each case except for one.

- *Wild Virginia v. U.S. Forest Serv.*, 24 F.4th 915 (4th Cir. 2022) (discussing that the agencies did, in fact, consider alternative routes for the Mountain Valley Pipeline but concluded that the environmental impacts would simply be shifted to other lands -- that the increased length of the Pipeline's route would affect more acreage, incorporate additional privately owned parcels, and increase the number of nearby residences).

- *Environmental Def. Ctr. v. Bureau of Ocean Energy Mgm't,* 36 F. 4th 850 (9th Cir. 2022) (remanding to the district court with instructions to amend its injunction to prohibit the agencies from approving permits for well stimulation treatments until the agencies issued an EIS and have fully and fairly evaluated all reasonable alternatives (the court found the agencies' summarily dismissed commenters' suggested alternatives)).

- *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389 (7th Cir. 2022) (noting that Protect Our Parks ignored the "reasonable" half of the reasonable alternatives requirement. *See* 40 C.F.R. §

1502.14; "it would be unreasonable to require agencies to spend time and taxpayer dollars exploring alternatives that would be impossible for the agency to implement.").

- *Audubon Society v. Haaland,* 40 F.4th 917, (9th Cir. 2022) (holding that FWS sufficiently explained why it did not list as a formal alternative the complete elimination of lease land agriculture in the refuges as a formal alternative in the EIS).

- *Audubon Society v. Haaland,* 40 F.4th 967, (9th Cir. 2022) (opining that NEPA did not obligate FWS to consider reduced-pesticide alternatives; and, in a second challenge, that FWS adequately explained why a process by which pesticides could be approved for use was essential to meeting the EIS' purposes, when the Audubon Society Portland claimed it should have evaluated organic farming alternatives in the refuges.)

- *Gulf Restoration Network v. Haaland*, 47 F.4th 795 (D.C. Cir. 2022) (disagreeing with the challengers' argument that a true "no action" alternative would involve the cancellation of all future planned leases when the agency met that goal when in the programmatic EIS BOEM considered the effect of allowing no new leasing in the Gulf and in the entire Shelf).

***Assessment of Impacts**:* Nineteen[13] of the cases examined one or more challenges to assessment of impacts (including greenhouse gas impacts and cumulative impacts). The courts tended to focus on the deference afforded to the agency when they upheld the impact assessment analyses.

Categorical Exclusion (CE): Five cases scrutinized the application of CEs to projects based on the potential for impacts, including the consideration of extraordinary circumstances.

- *Los Padres Forestwatch v. U.S. Forest Serv*., 25 F.4th 649 (9th Cir. 2022) (defending the agency's application of CE-6 and stating the USFS was not required to examine impacts to public safety or fuelbreak location efficacy in analyzing whether extraordinary circumstances prevented the use of CE-6).

- *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667 (9th Cir. 2022) (upholding the application of the USFS CE-6, where the agency analyzed each of the resource conditions for extraordinary circumstances as required in USFS regulations and found that the project would have "no significant impact" on each).

- *Safari Club Int'l v. Haaland,* 31 F.4th 1157 (9th Cir. 2022) (criticizing the State and Safari Club when they suggested their opposition to the Kenai Rule and the ensuing public controversy is an extraordinary circumstance that triggered FWS' obligation to prepare an EIS or EA;"[m]ere opposition to an action does not, by itself, create a controversy within the meaning of NEPA regulations.").

[13] Cases were only counted once even if multiple claims were adjudicated within that case involving impact assessment.

- *Rocky Mountain Peace & Justice Center v. U.S. Fish and Wildlife Serv.,* 40 F.4th 1133 (10th Cir. 2022) (concluding no extraordinary circumstances rendered the 2018 Environmental Action Statement ineligible for the application of the categorical exclusions).

- *Save our Skies v. Federal Aviation Admin.,* 50 F.4th 854 (9th Cir. 2022) (upholding FAA's application of its CE and stating that Save Our Skies did not meaningfully dispute that the orders fall within the scope of the categorical exclusion; the orders did not implicate extraordinary circumstances, so the FAA did not err in relying on the CE).

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

- *Wild Virginia v. U.S. Forest Serv.*, 24 F.4th 915 (4th Cir. 2022) (finding that the USFS and the BLM erroneously failed to account for real-world data suggesting increased sedimentation along the route of the Mountain Valley Pipeline).

- *Environmental Def. Ctr. v. Bureau of Ocean Energy Mgm't*, 36 F. 4th 850 (9th Cir. 2022) (criticizing and stating that the agencies should have prepared a full EIS in light of the unknown risks posed by the well stimulation treatments and the significant data gaps that the agencies acknowledged; NEPA review cannot be used "as a subterfuge designed to rationalize a decision already made.").

- *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389 (7th Cir. 2022) (agreeing with the FAA and finding that Protect Our Parks' argument that NPS and the DOT did not adequately consider three of the ten factors set forth in the NEPA regulations in effect while the review was underway was flawed; it found the administrative record showed that the agencies "consider[ed] the proper factors," ensuring that their decision is entitled to deference).

- *Audubon Society v. Haaland,* 40 F.4th 967 (9th Cir. 2022) (discussing that the record confirmed that FWS took a "hard look" at the direct, indirect, and cumulative effects of its decision to re-adopt and extend the Pesticide Use Proposal process for reviewing potential pesticide applications on the refuges; FWS also explained their reasoning in reaching each of these conclusions).

- *Oglala Sioux Tribe v. U.S. Nuclear Reg. Comm'n*, 45 F.4th 291 (D.C. Cir. 2022) (upholding NRC's analysis because that the agency explained the unavailability of the cultural information and presented the substance of its findings in publicly accessible decisions after on-the-record hearings).

- *City of North Miami v. Federal Aviation Admin.,* 47 F.4th 1257 (11th Cir. 2022) (disagreeing that the FAA violated NEPA when it failed to evaluate the Project's true air quality impacts and finding that the FAA's Clean Air Act analysis showing that the Project would have only a *de minimis* impact on air quality satisfies NEPA).

- *Highlands Ranch Neighborhood Coalition v. Cater*, No. 19-1190, 2022 WL 815411 (10th Cir. Mar. 18, 2022) (not for publication) (finding, in an EA, that the use of short-term

measurements comports with the plain language of Colorado's guidelines and was also substantiated by declarations confirming that short-term noise measurements are appropriate).

- *Fallon Paiute-Shoshone Tribe v. U.S. Dep't of the Interior,* No. 22-15092, No. 22-15093 (9th Cir. Aug. 1, 2022) (not for publication) (stating that the district court reasonably found that there was more than sufficient baseline information (i.e., flow test, hydrogeological model, USGS data regarding Dixie Valley toad) available to BLM on the relevant environmental issues in connection with its development of both the EA and the Aquatic Resource Monitoring and Mitigation Plan, including water resources and species information; and, with regard to the visual impacts challenges, BLM took steps to minimize visual impacts of the Project, including the requirement that buildings be painted consistent with BLM's visual color guidelines and comply with dark-sky lighting practices, as reflected in the EA).

- *Cascade Forest Conservancy v. U.S. Forest Serv*., No. 22-35087, 2022 WL 10964667 (9th Cir. Oct. 19, 2022) (not for publication) (finding that the record reflected that the USFS' EA took the requisite "hard look" at the direct, indirect, and cumulative effects of the Project, including on scientific research and in conjunction with the effects of past, present, and reasonably foreseeable future actions).

- *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgm't*, No. 22-35035 (9th Cir. Nov. 25, 2022) (not for publication) (affirming that North Project (involving timber harvest) will not jeopardize the Northern Spotted Owl as a species, adversely modify its critical habitat, nor result in its incidental take).

Indirect Impacts: Three cases involved assessment of indirect impacts, and all weighed challenges to greenhouse gas impacts.

- *Food & Water Watch v. Fed. Energy Reg. Comm'n*, 28 F.4th 277 (D.C. Cir. 2022) (finding that FERC failed to account for reasonably foreseeable indirect impacts that a new natural gas pipeline and compressor station in Massachusetts would have on greenhouse gas emissions).

- *350 Montana v. Haaland*, 29 F.4th 1158 (9th Cir. 2022), *amended by* 50 F.4th 1254 (9th Cir. 2022) (9th Cir. 2022) (remanding to the agency for failing to provide a "convincing statement of reasons" why the expansion's impact on greenhouse gas emissions would be insignificant).

- *Delaware Riverkeeper Network v. Fed. Energy Reg. Comm'n*, 45 F.4th 104 (D.C. Cir. 2022) (rejecting challenges regarding FERC's analysis of the project's impacts on greenhouse gas emissions and climate change; the court upheld FERC's conclusion that upstream effects such as new natural gas wells to meet the pipeline's increased capacity were not reasonably foreseeable. The court stated that downstream greenhouse gas emissions were not reasonably foreseeable because FERC could not identify the end users).

Cumulative impacts: Four cases considered the adequacy of the agency's cumulative effects assessment.

- *Sierra Club. v. Fed. Energy Reg. Comm'n*, 38 F.4th 220 (D.C. Cir. 2022) (agreeing that FERC's analysis that the cumulative impacts of the two projects (the Southgate Project and Mainline System Project) on stream turbidity would be limited because of the geographic and spatial distance between the stream crossings).

- *Audubon Society v. Haaland,* 40 F.4th 967 (9th Cir. 2022) (rejecting challenger's argument that FWS failed to evaluate the cumulative effects to sage-grouse of grazing on the adjacent Modoc National Forest and found that the agency took a sufficiently hard look at the effects of grazing on sage-grouse, including the cumulative effects).

- *City of North Miami v. Federal Aviation Admin.,* 47 F.4th 1257 (11th Cir. 2022) (disagreeing with Petitioners that FAA's assessment that FAA use the 2017–2018 period as its baseline minimized the effects of the FAA's pre-2017 actions, and that the FAA should have instead used the 2006 noise levels as a baseline. The court upheld the FAA's cumulative impact analysis because none of the prior actions had a legal impact on noise levels in the area because they were either subject to categorical exclusions or did not change flight procedures).

- *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389 (7th Cir. 2022) (deferring to the agency when Protect Our Parks accused the agencies of failing to consider the "cumulatively significant impact" of the project; the court found the EA did so—it just reached a conclusion with which Protect our Parks disagreed).

Segmentation: Four cases involved claims of improper segmentation:

- *Friends of Animals v. U.S. Fish and Wildlife Serv.,* 28 F.4th 19 (9th Cir. 2022) (holding that the permits for barred owl removal were not "connected" to the broader barred owl removal experiment because the experiment could proceed without the permits; each permit has "independent utility" because the issuance of one permit did not depend on the issuance of any other permit -- therefore, the FWS did not need to analyze their impacts together in a single document).

- *Food & Water Watch v. Fed. Energy Reg. Comm'n*, 28 F.4th 277 (D.C. Cir. 2022) (analyzing the projects' degree of physical and functional interdependence, and holding that FERC reasonably determined that the Upgrade Project and the Longmeadow Project were amenable to separate NEPA analyses).

- *Rocky Mountain Peace & Justice Center v. U.S. Fish and Wildlife Serv.,* 40 F.4th 1133, (10th Cir. 2022) (finding the modifications to the planned public trail system had independent utility, and it was not arbitrary or capricious for the FWS to segment the potential changes in the Wind Blown Area from its analysis).

- *Delaware Riverkeeper Network v. Fed. Energy Reg. Comm'n*, 45 F.4th 104 (D.C. Cir. 2022) (reviewing the scope of the project and opining that "even assuming FERC was required to consider the Project and the PennEast Pipeline as connected actions, FERC's environmental

review did not prejudice petitioners because the abandonment of the PennEast project eliminated the possibility that the projects could have a cumulative environmental impact").

Supplemental Statements: Three cases alleged that a supplemental statement should have been completed.

- *Friends of Animals v. U.S. Fish and Wildlife Serv.,* 28 F.4th 19 (9th Cir. 2022) (discussing that the permits were an ancillary aspect of the experiment and constitute a "minor variation" which doesn't require a supplemental statement).

- *Gulf Restoration Network v. Haaland*, 47 F.4th 795 (D.C. Cir. 2022) (agreeing with petitioners that because BOEM promised to consider the GAO report at the leasing stage, it should have explained its later decision not to do so; the court found BOEM was arbitrary and capricious when it brushed aside the GAO report as beyond the scope of the supplemental EIS).

- *Cottonwood Envt'l Law Ctr. v. Marten,* No. 21-35070, 2022 WL 1439127 (9th Cir. May 6, 2022) (not for publication) (finding that because the 1987 Forest Plan was not ongoing action under the applicable case law for the purposes of NEPA, the USFS was not required to conduct a supplemental NEPA analysis for the 1987 Forest Plan after the USFS promulgated regulations in 2012 recognizing that climate change necessitated updates to forest plans).

6.4 Details of Cases

Each of the substantive 2022 NEPA cases, organized by federal agency, is described in more detail below. Unpublished cases are noted (7 of the 27 substantive cases in 2022 were unpublished). Although such cases may not have precedential value depending on the court, they can be of value to NEPA practitioners.

COUNCIL ON ENVIRONMENTAL QUALITY

***Wild Virginia v. Council on Envt'l Quality*,** 56 F.4d 281 (4th Cir. 2022)
Agency prevailed.

Issues: Status of CEQ 2020 NEPA Regulations.

Facts: Plaintiffs, a group of seventeen environmental organizations, sued the CEQ in July 2020 related to the Trump Administration's promulgation of a final rule that affected how federal agencies would conduct reviews under NEPA[14]. Plaintiffs brought ten claims against CEQ: nine claims of APA violations in the rulemaking process, and one allegation that some changes to the rule fell outside CEQ's rulemaking authority. They requested that the court vacate and set aside the 2020 Rule and reinstate the previous version of the rule; the lower court dismissed their claims due for lack of jurisdiction, and the Fourth Circuit affirmed.

Decision: Plaintiffs claimed that the 2020 Rule would (1) create problems with NEPA analyses, (2) pose obstacles for them to comment on NEPA analyses or otherwise participate in agency decision-making, (3) make it more difficult for them to obtain information about proposed federal actions, and (4) eliminate some categories of actions from NEPA review altogether. The Fourth Circuit considered each purported injury in turn and concluded it lacked jurisdiction as to all of them.

First, the Fourth Circuit found that Plaintiffs' claims related to potential flaws in future NEPA analyses were unripe. *Cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891, 110 S.Ct. 3177 (1990) ("[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.").

Second, the court found it lacked jurisdiction to consider the concerns about Plaintiffs' ability to comment on proposed federal actions or participate in the NEPA process. Concerns about agencies' choices related to bonds, hearings, and responses to comments are speculative until those third parties take such actions or at least demonstrate some imminent likelihood of doing so. *Doe v. Va. Dep't of State Police,* 713 F.3d 745, 758 (4th Cir. 2013). It found the second set of challenges unripe.

Similarly, the Fourth Circuit did not resolve the ripeness issue as to Plaintiffs' comment-based claims, however, because even assuming those claims were ripe, Plaintiffs lacked standing to assert them. To establish standing, Plaintiffs would have to point to a specific project as to which the new commenting rules impacted their interests. Plaintiffs did not point to a single agency action they desired to comment on but were unable to because of the 2020 Rule, or where they diverted resources to prepare comments in accordance with the 2020 Rule. They thus lacked standing to challenge the commenting requirements based on the present record.

As to the third set of concerns, the court found these claimed injuries were unripe for the same reasons noted above: they hinge on future decisions by third parties (other agencies) that may or may not come to pass. The court also rejected this argument based on standing - even assuming Plaintiffs' 2020 filing of FOIA requests was enough to ripen this injury, they lacked standing. The court assessed that the Plaintiffs cannot

[14] This was one of four such complaints over the 2020 regulations. The three other cases were all dismissed by district courts in different circuits.

create standing in advance by altering their behavior -- by filing FOIA requests for information they will still receive through the NEPA process.

Finally, Plaintiffs raise concerns about specific types of projects that may be or will certainly be categorically excluded from NEPA review. The court rejected their claims involving Concentrated Animal Feeding Operations ("CAFOs") and certain timber harvests based on insufficient evidence in both cases of potential harm.

The Fourth Circuit emphasized the limited nature of its holding in that it did not hold that Plaintiffs may never challenge the 2020 Rule—only that they may not do so based on the record and arguments they put before the court in this case. CEQ conceded that Plaintiffs will be able to challenge the 2020 Rule "in the context of specific projects if and when a final decision that threatens actual imminent harm to [P]laintiffs or their members occurs."

The author notes that at the time of this opinion, Phase I of the 2022 CEQ final NEPA regulations (Phase I) had been finalized and replaced a portion of the 2020 CEQ final NEPA regulations, which remain in effect.

U.S. DEPARTMENT OF AGRICULTURE

Wild Virginia v. U.S. Forest Serv., 24 F.4th 915 (4th Cir. 2022)
Agency Did Not Prevail on some NEPA Claims but Prevailed on other NEPA Claims.

Issues: Impact Assessment, Alternatives.

Facts: In two consolidated cases, several environmental advocacy organizations -- Wild Virginia, the Sierra Club, Appalachian Voices, the Wilderness Society, Preserve Craig, Save Monroe, and the Indian Creek Watershed Association -- sought review of the renewed decisions of the USFS and BLM to allow the Mountain Valley Pipeline, an interstate natural gas pipeline system, to cross three and a half miles of the Jefferson National Forest in Virginia and West Virginia.

This is the second time Petitioners challenged the agencies' approval of the Pipeline. In response to the first challenge, USFS and the BLM prepared a supplemental EIS which sought to address the Pipeline's sedimentation impacts utilizing two hydrological analyses provided by the applicant. But neither of these hydrological analyses, nor the supplemental EIS, considered water quality monitoring data from the USGS monitoring stations fifteen miles outside the Jefferson National Forest, where construction of the Pipeline had occurred near the Roanoke River. The USGS data showed water turbidity values that were 20% higher downstream from the Pipeline's construction than upstream -- a significant difference from the 2.1% increase in sedimentation the hydrologic analyses predicted for the Roanoke River.

The Fourth Circuit granted the petitions for review as to those impacts and effects; denied the petitions regarding remaining arguments about the alternative routes and vacated the decisions of the USFS and the BLM; and remanded to the agencies.

Decision: Petitioners contended that the USFS and the BLM violated NEPA, by inadequately considering the Pipeline's sediment and erosion impacts. Specifically, Petitioners asserted that 1) the sediment modeling the applicant used in its hydrological analyses relied on unsupported and implausible assumptions; 2) evidence of the Pipeline's actual impacts indicated the modeling was unreasonable, and the USFS and the BLM did not address such evidence; and 3) the agencies failed to address whether erosion and sedimentation caused by the Pipeline would violate water quality standards. The Fourth Circuit found for the Petitioners on the second of these assertions.

The court held USFS and the BLM erroneously failed to account for real-world data suggesting increased sedimentation along the Pipeline route. There was no evidence that the agencies reviewed the USGS water quality monitoring data from the Roanoke River, which could indicate a significant increase in sedimentation beyond that predicted in the modeling used for the supplemental EIS. At the very least, the supplemental EIS should have acknowledged this disparity and explained its impact on the agencies' reliance on the sedimentation data in the hydrological analyses. The court further rejected that the Petitioners had a duty to explain how the USGS data made a difference in the selection of alternatives. It rejected the agencies' argument that

the USGS data should be rejected because it was collected outside the Jefferson National Forest.

The Fourth Circuit stated, "[b]y creating a false dichotomy between the impacts of construction inside and outside the Jefferson National Forest, placing the burden on Petitioners to explain the similarities between these two areas, and failing to address the USGS modeling that occurred nearby in the Roanoke River, the USFS and the BLM "entirely failed to consider an important aspect of the problem."

The Fourth Circuit agreed with the Petitioners' claims that the USFS and the BLM violated NEPA by approving the use of the conventional bore method to cross the four streams within the Jefferson National Forest without first analyzing the method's environmental effects. "It would be one thing if the USFS had adopted a new alternative that was actually within the range of previously considered alternatives . . . It is quite another thing to adopt a proposal that is configured differently."

The court reasoned that the USFS and the BLM improperly approved the use of the conventional bore method for the four streams in the Jefferson National Forest without first considering FERC's analysis.

However, the court rejected the argument that the USFS and the BLM insufficiently evaluated alternative routes for the Pipeline that did not pass through national forests. It found the supplemental EIS amply demonstrated that the agencies did, in fact, consider alternative routes but concluded that the environmental impacts would simply be shifted to other lands and the increased length of the Pipeline's route would affect more acreage, incorporate additional privately owned parcels, and increase the number of residences near the Pipeline. Therefore, the record revealed that the BLM and the USFS complied with their obligations to assess alternative routes.

Los Padres Forestwatch v. U.S. Forest Serv., 25 F.4th 649 (9th Cir. 2022)
Agency prevailed on its NEPA claims.

Issues: Categorical Exclusion (CE), Extraordinary Circumstances.

Facts: Nonprofit environmental organizations brought action against USFS challenging USFS' approval of the fuelbreak project for wildfire management in inventoried roadless area (IRA) of Tecuya Ridge, Los Padres National Forest, Mt. Pinos, California.

Decision: The Ninth Circuit upheld the application of categorical exclusion 6 (CE-6), stating that the USFS was not required to examine impacts to public safety or fuelbreak location efficacy in analyzing whether extraordinary circumstances prevented the use of CE-6 for the Project. Consistent with 36 C.F.R. § 220.6, the USFS analyzed each resource condition and determined that the Project would have "no significant impact" on each. Although the list of resource conditions located at 36 C.F.R. § 220.6(b) is not exhaustive, NEPA merely permits, rather than requires, the USFS to consider additional factors during its extraordinary circumstances review. Courts have rejected the contention that the USFS is required to analyze additional factors on top of the specified resource conditions in determining whether extraordinary circumstances prevent the application of a CE. *See All. for the Wild Rockies v. Weber*, 979 F. Supp. 2d 1118, 1127 (D. Mont. 2013) (finding that the FWS did not need to analyze certain factors set out under a different regulation related to bull trout habitat in determining "no extraordinary circumstances" prohibited its application of CE-6 to a proposed project).

It found the USFS' decision to locate the Tecuya Ridge Project in the "Wildland Zone" instead of the "Threat Zone" was not arbitrary and capricious. The Los Padres National Forest Strategic Community Fuelbreak Improvement Project Fire/Fuels Report states that while most existing fuelbreaks are in "high hazard chaparral areas," a few fuelbreaks, like the one contemplated here, "are in coniferous forest and serve to limit fire spread from or towards communities or timber stands in poor condition." The Cuddy Valley/Tecuya Stand Improvement Projects Fire/Fuels Report also notes that "[t]o reduce the threat of spotting distance from firebrands (spotting potential), fuels would need to be reduced both near and at some distance from the WUI [Wildland Urban Interface]."

The Decision Memo for the Project further explained that the USFS chose the project location to strategically "connect to past and future treatment

areas on both public and adjacent private lands." It was therefore reasonable for the USFS to conclude that the Project location will "provide a buffer between developed areas and wildlands," one of the goals of the Mt. Pinos Community Wildfire Protection Plan.

The court did not find evidence that the proposed fuelbreak would be constructed in a "remote backcountry location" that would fail to facilitate firefighter access. The Tecuya Ridge fuelbreak will be located around communities within the wildland-urban intermix, including Pine Mountain Club, Pinon Pines Estates, Lake of the Woods, and Frazier Park. Sixty-six percent of the Project overlaps with the Antimony IRA, which is linearly shaped and adjacent to major roadways. The court discussed that firefighters may access the Antimony IRA via the many developed roads and trails. Thus, the fuelbreak location did not appear to be too remote for firefighters to approach in the case of wildfire.

Whether the location of the fuelbreak proposed for the Tecuya Ridge Project will serve to protect the Mt. Pinos Communities from wildfire is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Or. Nat. Res. Council,* 490 U.S. 360, 376, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). Because the USFS substantiated its decision to place the Tecuya Ridge Project within the Wildland Zone with evidence in the record, the court found its decision was not arbitrary and capricious.

Mountain Communities for Fire Safety v. Elliott, 25 F.4th 667 (9th Cir. 2022)
Agency prevailed.

Issue: Categorical Exclusion (CE).

Facts: Nonprofit environmental organizations brought action against USFS under NEPA challenging the application of a CE for approval of forest health and fire mitigation project involving commercial thinning of trees in overcrowded areas of Los Padres National Forest in the Cuddy Valley, Mt. Pinos, California. The Ninth Circuit affirmed lower court's summary judgment in favor of the agency.

Decision: An agency's decision to invoke a categorical exclusion to avoid an EIS or EA is not arbitrary and capricious if "the agency reasonably determined that a particular activity is encompassed within the scope of a categorical exclusion." *Earth Island Inst. v. Elliott*, 290 F. Supp. 3d 1102, 1114 (E.D. Cal. 2017).

CE-6 permits "[t]hinning or brush control to improve growth or to reduce fire hazard" as long as these activities "do not include the use of herbicides or do not require more than 1 mile of low standard road construction." 36 C.F.R. § 220.6(e)(6). Because the Cuddy Valley Project authorizes thinning to reduce "stand density, competing vegetation, and fuels" and will not require the use of herbicides or any road construction, the USFS reasonably determined that it falls within the scope of CE-6. The USFS' decision memorandum adequately explained that the project would combat fire, insect damage, and disease. Given the deferential standard of review, we cannot say that the USFS's decision to apply CE-6 was arbitrary and capricious.

Appellants contended that invoking CE-6 was arbitrary and capricious because the USFS ignored NEPA's intensity factors when deciding that no extraordinary circumstances existed that would bar relying on CE-6. The regulations provide many "resource conditions" that the USFS should analyze in determining whether there are "extraordinary circumstances." 36 C.F.R. § 220.6(b).

Here, the USFS analyzed each of these resource conditions and found that the project would have "no significant impact" on each. Appellants claimed that the USFS should have explicitly analyzed the second and fourth factors, which are about effects on "public health or safety" and those that are "highly controversial," respectively. 40 C.F.R. § 1508.27. The USFS conceded that it did not directly analyze the § 1508.27 intensity factors in approving the project.

The Ninth Circuit stated that the USFS did not have to examine the intensity factors when analyzing whether extraordinary circumstances prevented the use of CE-6. Because the scope of the resource conditions is expansive, the USFS must "necessarily take into account the NEPA-wide definition of '[s]ignificantly' provided in § 1508.27" when it analyzes those resource conditions. *Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 411 (6th Cir. 2016). To require an agency to analyze the extraordinary circumstances factors once (under resource conditions), and then again under merely renamed factors, would be "inconsistent with the efficiencies that the abbreviated categorical exclusion process

provides." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1097 (9th Cir. 2013).

Dissent: District Judge Stein writes a vigorous and lengthy dissent explaining the misapplication of CE-6. He disagreed strongly with the authorization of commercial thinning of 601 acres of the Los Padres NF. He explains the USFS relies on a novel interpretation of its long-standing CE-6 to facilitate its 1,200-acre Cuddy Valley Project and that such an interpretation would allow the USFS to approve commercial thinning of trees—to contract with private logging companies to cut and then sell large trees—over a potentially unlimited number of acres.

He disagreed with the textual analysis (as a matter of statutory interpretation) for CE-6, specifically: (1) Textual Analysis of CE-6 of "Thinning"; (2) the Textual Analysis of CE-6 with "Timber Stand Improvement"; (3) The History of 36 C.F.R. § 220.6 shows that "Thinning" Does Not Encompass "Commercial Thinning"; and, (4) The Overall Policy Concerns Animating CE-6 Do Not Support a Definition of "Timber Stand Improvement" That Includes Commercial Thinning.

District Judge Stein states, that "[b]y failing to consider the consequences of allowing the USFS to evade NEPA's environmental disclosure requirements for projects involving significant amounts of commercial thinning—projects that are outside the scope of activities CEs are meant to authorize—the majority misses the forest for the trees and does an impermissible disservice to NEPA's regulatory scheme and the law."

Cottonwood Envt'l Law Ctr. v. Marten, No. 21-35070, 2022 WL 1439127 (9th Cir. May 6, 2022) (not for publication)
Agency prevailed.

Issues: Federal Action, Supplemental Statements.

Facts: Cottonwood's claim for relief alleged that NEPA obligated the USFS to supplement its EIS for the 1987 Gallatin Forest Plan after the USFS promulgated regulations in 2012 recognizing that climate change necessitated updates to forest plans. The Ninth Circuit affirmed the district court's dismissal of Cottonwood's complaint without leave to amend.

Decision: In a brief opinion considering the agency's Motion to Dismiss, the Ninth Circuit considered Cottonwood's first claim for relief alleging NEPA obligated the USFS to supplement the EIS for the 1987 Gallatin Forest Plan after the USFS promulgated regulations in 2012 recognizing that climate change necessitated updates to forest plans, 36 C.F.R. § 219.5.2

NEPA requires the USFS to supplement an EIS where 1) there are "significant new circumstances or information" that will "show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered," and 2) "there remains major Federal action to occur," or "ongoing" action. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372-74 (1989); *Norton v. S. Utah Wilderness All*. ("SUWA"), 542 U.S. 55, 73 (2004).

The court stated the claim hinged on whether the 1987 Forest Plan constitutes ongoing federal action. The USFS argued that SUWA's holding that finalized BLM land plans do not constitute ongoing major Federal action under NEPA controls.

Cottonwood, however, argued that *Pacific Rivers Council v. Thomas'*s holding that USFS forest plans "represent ongoing agency action" under the ESA controls, because "ongoing agency action" for the purpose of the ESA is "ongoing major Federal action" for the purpose of NEPA. 30 F.3d 1050, 1053 (9th Cir. 1994). In other words, the parties differ over whether "ongoing major Federal action" is consistent by statute or by agency.

The Ninth Circuit agreed with the USFS. SUWA reasoned from the language of NEPA, not from agency-specific language. 542 U.S. at 72-73. It found that because the 1987 Forest Plan is not ongoing action under SUWA for the purposes of NEPA, the USFS was not required to conduct a supplemental NEPA analysis for the 1987 Forest Plan.

Cascade Forest Conservancy v. U.S. Forest Serv., No 22-35087, 2022 WL 10964667 (9th Cir. Oct. 19, 2022) (not for publication)
Agency prevailed.

Issue: Significance of Impacts.

Facts: Cascade Forest Conservancy and others challenged USFS' planned action— the "Spirit Lake Tunnel Intake Gate Replacement and Geotechnical Drilling Project" -- intended to address the threat posed by a potential catastrophic breach of Spirit Lake, which is part of the Mount St. Helens National Volcanic Monument. The Ninth Circuit affirmed summary judgment in favor of the agency.

Decision: In this concise memorandum opinion, the Ninth Circuit found that the record reflected that the USFS' EA took the requisite "hard look" at the direct, indirect, and cumulative effects of the Project, including on scientific research and in conjunction with the effects of past, present, and reasonably foreseeable future actions. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 868 (9th Cir. 2020); *see also* 40 C.F.R. § 1508.25.

It held that the USFS did not act arbitrarily, capriciously, or contrary to law in issuing a FONSI and determining that an EIS was unnecessary based on its conclusion that the Project would not have a significant effect on the quality of the human environment. "Whether an action 'significantly' affects the environment requires analyzing both 'context' and 'intensity.'" *Wild Wilderness v. Allen*, 871 F.3d 719, 727 (9th Cir. 2017) (*citing* 40 C.F.R. § 1508.27). The Ninth Circuit concluded the USFS reasonably considered the factors for evaluating "intensity." 40 C.F.R. § 1508.27(b).

U.S. DEPARTMENT OF THE INTERIOR

Friends of Animals v. U.S. Fish and Wildlife Serv., 28 F.4th 19 (9th Cir. 2022)
Agency prevailed.

Issue: Supplemental Statements, Segmentation (Connected Actions).

Facts: Environmental advocacy organization sued FWS claiming violation of NEPA involving FWS's proposed experiment for which permits were issued and safe harbor agreements were entered with four non-federal landowners to conduct lethal removal of barred owls that were encroaching on habitat of northern spotted owl, which was listed as threatened species under ESA. The Ninth Circuit affirmed the district court's grant of summary judgment in FWS's favor.

Decision: In 2013, FWS issued an EIS analyzing the experiment's environmental impacts. Later, when FWS issued the permits and Safe Harbor Agreements, it conducted a less-intensive Environmental Assessment (EA) for each permit. All EAs concluded that the spotted owl would not be significantly affected. Friends contended FWS's environmental analyses did not meet NEPA requirements in two ways. First, although FWS issued an initial EIS, Friends claims FWS had to issue a Supplemental EIS, instead of the lesser EAs, when it later issued the permits. Second, Friends argued FWS should have considered environmental effects of each permit with those from other permits and the broader experiment.

The CEQ has issued regulations that "impose a duty on all federal agencies to prepare" a Supplemental EIS if "(i) the agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(d)(1). In addition, CEQ has published more guidance, which the Ninth Circuit has adopted as the proper framework for applying § 1502.9(d)(1). *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (*citing* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981)). Under this framework, a Supplemental EIS is not required if: "(1) the new alternative is a 'minor variation of one of the alternatives discussed in the [original] EIS,' and (2) the new alternative is 'qualitatively within the spectrum of alternatives that were discussed in the [original EIS].'" *Id.*

Friends argued that FWS had to issue a Supplemental EIS under either prong of § 1502.9(d)(1). It maintained that FWS made "substantial changes" to the "heart" of the barred owl removal experiment because the goal of the experiment was to conserve the northern spotted owl, but the permits authorized the take of spotted owls. Second, Friends contended that the specifics of each permit and Safe Harbor Agreement constitute "significant new information" that was not considered in the initial EIS. The Ninth Circuit held that the permits were an ancillary aspect

of the experiment and constitute a "minor variation" which doesn't require a supplemental statement. It also found the permits and Safe Harbor Agreements were clearly "within the spectrum of alternatives" discussed in the 2013 EIS (and would be "fleshed-out" later in time when executed, requiring further NEPA analysis).

The Ninth Circuit was satisfied that FWS conducted the required "hard look" review in determining that the permits were not environmentally significant. *See Cal. ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 792 (9th Cir. 2014). FWS conducted an EA for each permit and each EA determined that spotted owls would be taken only if the experiment managed to increase the spotted owl's population and range. And FWS concluded that such gains would be temporary, as barred owls would resume displacing the spotted owls after the experiment. In FWS' opinion, the environmental effects of the experiment were the same with or without the permits.

The Ninth Circuit rejected Friends claims that the broader experiment and the permits were "connected actions." Friends asserted that each permit and SHA depends on the experiment's informational benefit to satisfy the "net conservation benefit" requirement. Friends thus claimed that FWS erred in analyzing the experiment separately from the permits and addressing each permit in isolation from the other permits.

Actions are connected if they "[c]annot or will not proceed unless other actions are taken previously or simultaneously" or are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1501.9In applying § 1501.9(e)(1), the courts employ an "independent utility" test. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). "When one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not 'connected' for NEPA's purposes." *Id*.

The court held, here, the permits were not "connected" to the broader experiment because the experiment would proceed without the permits. Each permit has "independent utility" because the issuance of one permit did not depend on the issuance of any other permit. The EIS stated that each permit depended on "cooperation from nonfederal landowners" and "nonfederal lands would be included in the active experiment only if the landowners are willing." FWS issued the permits individually to each landowner, and irrespective of whether the other permits would issue, so the permits are not "connected." The court opined that b ecause the permits and the experiment were not "connected actions," FWS did not have to assess their environmental impacts together in a single document.

350 Montana v. Haaland, 29 F.4th 1158 (9th Cir. 2022), *amended by* 50 F.4th 1254 (9th Cir. 2022)
Agency prevailed on one of multiple claims.

Issues: Significance of Impacts, (Indirect Impacts (climate change), Use of Social Cost of Carbon), Remedy.

Facts: Environmental organizations brought action against Office of Surface Mining Reclamation and Enforcement (OSMRE), alleging violations of NEPA in connection with approval of proposed expansion of a coal mine in South Central Montana.

The Ninth Circuit discussed that the record was unclear about the extent to which the agency can resolve uncertainty regarding the magnitude of the project's contribution to the environmental harms identified in the EA; it stated that factfinding was necessary to determine whether the preparation of an EIS and vacatur of the plan approval is warranted and remanded back to the district court for future proceedings.[15]

Decision: The Ninth Circuit noted that the agency's 2018 EA thoroughly supported the relationship between GHG emissions and climate change and included an unvarnished summary of the broad consensus that has emerged from the scientific community—that climate change is having, and is expected to continue to have, alarming effects on our environment. The 2018 EA also calculated that the

[15] On Feb 10, 2023, the District Court of Montana vacated the approval of the expansion and remanded for the preparation of an EIS.

GHG emissions generated over the life of the Mine Expansion would total "approximately 0.44 percent of annual (single year) global GHG emissions." But in the single sentence that followed, the EA merely asserted that "while the [Mine Expansion] would contribute to the effects of climate change," its "contribution relative to other global sources [of GHGs] would be minor in the short-and long-term on an annual basis." With that, the EA summarily concluded that the Mine Expansion will not have a significant impact on the environment. (Note: Appendix D of the 2018 EA - comprising the agency's climate change analysis is published in the opinion).

The court discussed that the agency did not cite any scientific evidence supporting the characterization of the project's emissions as "minor" compared to global emissions, nor did it identify any science-based criteria the agency used in its determination. "Without some articulated criteria for significance in terms of contribution to global warming that is grounded in the record and available scientific evidence," The court stated the agency's conclusion that the Mine Expansion's GHG emissions will be "minor" is deeply troubling and insufficient to meet agency's burden.

The court lamented that the lack of a science-based standard for significance is critical because the record reflected no dispute that GHGs cause global warming and have had dramatic effects on the environment. The only question was the extent to which this project's GHGs will add to the severe impacts of climate change.

The 2018 EA's domestic comparisons failed to provide a convincing rationale in support of the FONSI and fell short of NEPA's requirement that environmental information be made available to citizens before decisions are made, because the U.S.-and Montana-based comparisons did not account for emissions generated by combustion of the project's coal. The district court cited the EA's domestic comparisons but did not specifically discuss that those calculations only include the emissions generated by mining the coal and transporting it to Vancouver, where it is shipped overseas. As the EA explained, 97 percent of GHGs from the project will result from coal combustion, primarily in Japan and the Republic of Korea.

The failure to account for combustion-related emissions in the domestic comparisons cannot be explained as an attempt to measure the Mine Expansion's local impact because there is no question that the coal from the Mine Expansion is intended to be sold for combustion. The court held that the omission of combustion-related emissions also contradicts a key premise of the 2018 EA—that climate change is a global problem. The court found there is no cogent rationale that justifies excluding combustion-related emissions from the 2018 EA's domestic comparisons -- it also noted that the agency's domestic comparisons in the 2015 EA did include combustion-related emissions.

The court criticized the agency by failing to provide a convincing statement of reasons why the project's impacts -- involving 190 million tons of GHGs, 0.44% of total GHGs emitted globally -- were insignificant. It found that the 2018 EA failed to articulate any science-based criteria of significance in support of its finding of no significant impact (FONSI), but instead relied on the arbitrary and conclusory determination that the Mine Expansion project's emissions would be relatively minor.

However, the court was not so persuaded that the agency was required to use the Social Cost of Carbon metric (a method of quantifying the impacts of GHGs that estimates the harm, in dollars, caused by each incremental ton of carbon dioxide emitted into the atmosphere each year) to quantify the environmental harms stemming from the project's GHG emissions. The panel further held that it was less clear whether the agency had any other metric available to assess the impact of this project.

Dissent: Circuit Judge Nelson, in a lengthy dissent, stated that the agency had adequately explained its findings and that courts "are ill-equipped to step into highly politicized scientific debates like this." He discussed that the agency's finding that the incremental effects of 0.04% of annual global greenhouse gas ("GHG") emissions were "minor" was not arbitrary or capricious under APA. This argument was barely raised, and he stated that the majority's contrary holding is wrong given the deferential APA review.

He stated that the effects were not reasonably foreseeable, 40 C.F.R. § 1508.8(b), and did not have "a reasonably close causal relationship" to the

project, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767, 124 S.Ct. 2204 (2004). He noted that the asserted flaws with Interior's EA were not grounded in any NEPA requirement, and the Plaintiffs provided no scientific evidence that an incremental increase of 0.04% of global GHG emissions (if that were the worst-case result) would cause a significant impact. He stated that the agency went to great lengths to fulfill its NEPA obligations: it identified how the project would affect the environment (including air quality, water quality, and other metrics) and described the effects of GHG emissions and climate change on a global, national, and state level. He concurred with the majority on the Social Cost of Carbon tool, and the decision not to vacate the approval of the project. or direct the agency to complete an EIS.

Safari Club Int'l v. Haaland, 31 F.4th 1157 (9th Cir. 2022)
Agency prevailed.

Issues: Categorical Exclusion, Extraordinary Circumstances.

Facts: The State of Alaska and international hunting organization filed suits against the Secretary of the Interior, seeking declaratory relief, injunctive relief, and vacatur of portions of FWS' "Kenai Rule," which limited certain hunting practices in the Kenai National Wildlife Refuge (NWR), even though Alaska had approved them. The Ninth Circuit affirmed the district court's grant of summary judgment in FWS' favor.

Decision: The State and Safari Club set out a two-part NEPA argument, first asserting that the Kenai Rule changed the environmental status quo in the Kenai Refuge such that NEPA review is required, and second, that FWS improperly fulfilled its NEPA obligations for the Kenai Rule through categorical exclusions (CEs).

The court considered that even assuming NEPA's procedures applied to the Kenai Rule, the NEPA requirement is satisfied by the application of a CE. *Bicycle Trails Councils of Marin v. Babbitt*, 82 F.3d 1445, 1456 n.5 (9th Cir. 1996). It discussed that the disputed parts of the Kenai Rule codified longstanding constraints on hunting in the Kenai Refuge, and the fact that these limitations changed from state to federal restrictions did not alter the permitted levels of use in the Kenai Refuge. The court found that FWS sensibly decided that the Kenai Rule fits a CE for "issuance of special regulations for public use of [FWS]-managed land, which maintain essentially the permitted level of use and do not continue a level of use that has resulted in adverse environmental impacts."

The State and Safari Club claimed "extraordinary circumstances" triggered the requirement for an EIS or EA for the Kenai Rule. The court criticized the State and Safari Club when they suggested their opposition to the Kenai Rule and the ensuing public controversy is an extraordinary circumstance that triggered FWS' obligation to prepare an EIS or EA. "Mere opposition to an action does not, by itself, create a controversy within the meaning of NEPA regulations." *Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1011 (9th Cir. 2020). "A project is highly controversial if there is a substantial dispute about the size, nature, or effect of the major Federal action rather than the existence of opposition to a use." *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 870 (9th Cir. 2020). The court emphasized that no documents cited by the State and Safari Club indicate that the disputed parts of the Kenai Rule have highly controversial, uncertain, or unique environmental effects, so reversal is unjustified for lack of any substantial evidence in the record that exceptions to the CE may apply.

Environmental Defense Center v. Bureau of Ocean Energy Mgm't, 36 F. 4th 850 (9th Cir. 2022)[16]
Agency did not prevail.

Issues: Significance of Impacts, Scope of Federal Action, Alternatives, Purpose and Need.

Facts: Environmental groups, the State of California, and the California Coastal Commission brought action alleging that BOEM and Bureau of Safety and Environmental Enforcement (BSEE) violated NEPA, *inter alia*, with respect to a federal proposal to allow oil well stimulation treatments, including fracking, off the coast of Santa Barbara, California.

This case involved a lengthy history of litigation that resulted in settlement agreement. As agreed in the

[16] Petition for certiorari reviewed docketed at the time of this writing.

agreement, the agencies issued a draft EA in February 2016 that examined the programmatic effects of allowing well stimulation treatments in the Pacific Outer Continental Shelf. There was a thirty-day public comment period, during which the agencies received thousands of comments from individuals, scientists, federal and state agencies, and elected officials. The agencies published a final programmatic EA and FONSI in May 2016.

The "Proposed Action" that the programmatic EA examined was "allow[ing] the use of selected well stimulation treatments on the 43 current active leases and 23 operating platforms" in the Pacific Outer Continental Shelf without restrictions. Under NEPA, agencies must evaluate the environmental impacts of alternatives to the proposed action, and it specifically mandates consideration of a "no action" alternative. 42 U.S.C. § 4332; 40 C.F.R. § 1502.14.

Based on the analysis in the programmatic EA, the agencies determined that the proposed action of allowing well stimulation treatments without restriction "would not cause any significant impacts" and accordingly, the federal agencies issued a FONSI, which concluded the NEPA environmental review process. In doing so, the agencies did not consult with the FWS or the National Marine Fisheries Service pursuant to the ESA before issuing their final EA and FONSI, nor did they review the proposed action in the EA for consistency with California's coastal management program pursuant to the CZMA.

The Ninth Circuit reversed the district court's grant of summary judgment upholding the EA and held that the agencies violated NEPA both because their EA was inadequate and because they should have prepared an EIS. The Ninth Circuit vacated the inadequate EA, which is the presumptive remedy for agency action that violates the NEPA as reviewed through the APA. The Ninth Circuit remanded to the district court with instructions to amend its injunction to prohibit the agencies from approving permits for well stimulation treatments until the agencies issued an EIS and have fully and fairly evaluated all reasonable alternatives.

Decision: First, Plaintiffs alleged that the agencies violated NEPA because the agencies' EA is inadequate and does not constitute a "hard look" of the environmental impacts of allowing well stimulation treatments offshore California. Specifically, Plaintiffs contend that in issuing the EA, the agencies relied on erroneous assumptions, used too narrow of a statement of need and purpose, and did not consider a reasonable range of alternatives. Second, the Plaintiffs additionally contended that the agencies violated NEPA by failing to prepare an EIS.

The Ninth Circuit discussed that the central assumption underlying the agencies' entire EA, and driving their conclusion of no significant impact, is that the use of well stimulation treatments in the Pacific Outer Continental Shelf would happen so infrequently that any adverse environmental effects would be insignificant."

The court agreed that the Plaintiffs raised legitimate doubts about the agencies' recordkeeping of well stimulation treatments and the reasonableness of relying on flawed recordkeeping to formulate an estimate for evaluating environmental impacts under NEPA. The agencies do not know the actual number of well stimulation treatments that have occurred on the Pacific Outer Continental Shelf because data collection has been incomplete. The court reasoned that because the EA's finding relied on the incorrect assumption that well stimulation treatments would be infrequent, we conclude that the agencies acted arbitrarily and capriciously by offering an analysis that ran "counter to the evidence before the agency," and that they failed to take the requisite hard look by "rely[ing] on incorrect assumptions or data" in arriving at their conclusion. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005).

The Ninth Circuit held the agencies also acted arbitrarily and capriciously by assuming in the EA that compliance with a permit issued by the EPA under the Clean Water Act, the National Pollution Discharge Elimination System General Permit ("NPDES permit"), would render the impacts of well stimulation treatments insignificant. Like the assumption concerning the infrequent use of well stimulation treatments, the agencies repeatedly relied on the NPDES permit to conclude that the proposed action would not significantly affect the environment. The agencies relied on the NPDES permit and its testing to find that impacts of the proposed action would be minimal on marine and coastal fish, marine birds, sea turtles, and fisheries. The agencies acted arbitrarily and capriciously by relying, in significant part, on these two flawed assumptions throughout the EA, *see Native Ecosystems Council*, 418 F.3d at 964. As a

result, the EA is inadequate, and the agencies violated NEPA by failing to take the requisite hard look.

Plaintiffs also contended that the EA violates NEPA because the agencies failed to consider a reasonable range of alternatives and relied upon too narrow a statement of "purpose and need" in the EA. NEPA requires agencies to consider alternatives to their proposed action. 42 U.S.C. § 4332(C)(iii).

The court reviewed the EA, which explained the "purpose of the proposed action (use of certain WSTs, such as hydraulic fracturing) is to enhance the recovery of petroleum and gas from new and existing wells on the [Pacific Outer Continental Shelf], beyond that which could be recovered with conventional methods." And the need is "the efficient recovery of oil and gas reserves" from the Pacific Outer Continental Shelf. The court found that although the "purpose and need" statement is narrow, it did not necessarily fail under our deferential standard of review.

Plaintiffs argued that the lack of any meaningful difference among the alternatives did not allow the informed decision making that NEPA requires. The agencies considered four courses of action as options: (1) allowing the use of well stimulation treatments without restriction; (2) allowing well stimulation treatments with a minimum depth restriction; (3) allowing well stimulation treatments with a prohibition on the open water discharge of fluids; and (4) the required "no action" alternative of prohibiting well stimulation treatments. The environmental impacts of the first three alternatives were all based on a forecast of authorizing up to five well stimulation treatments per year.

In the EA, the agencies acknowledged that the three "action alternatives" they considered were similar because they all "include the use of the same four types of WST" so the "nature and magnitude" of any impacts will be similar.

California and other commenters had suggested specific alternatives for the agencies to consider in the final EA, such as prohibiting well stimulation treatments in specific locations or at particular times of year, requiring the disclosure of well stimulation treatment constituents and additives, requiring notice to be given to state agencies and the public before well stimulation treatments are conducted, requiring testing of well stimulation fluids, or limiting the number of well stimulation treatments in a given year. Responding to these proposed alternatives in the Final EA, as they were required to do, the agencies summarily dismissed them. The Ninth Circuit concluded that the agencies did not meet their obligation under NEPA to "give full and meaningful consideration to all reasonable alternatives."

Plaintiffs argued that the agencies should have completed an EIS, rather than an EA, due to the significance of the effects (offshore well stimulation treatments may adversely affect endangered or threatened species; well stimulation treatments in the Pacific Outer Continental Shelf would affect unique geographic areas; the effects of offshore well stimulation treatments are highly uncertain and involve unknown risks;). 40 C.F.R. § 1508.27. The Ninth Circuit agreed with the Plaintiffs' claims. First, is finding of adverse effects, after consultation with FWS and NMFS, especially after the EA was published, is *prima facie* evidence that an EIS should have been prepared.

The Ninth Circuit discussed that the Santa Barbara Channel, where most of the offshore drilling on the Pacific Outer Continental Shelf takes place, is a unique area with proximity to "park lands ... or ecologically critical areas." Many of its waters and islands have special designations, including the Channel Islands National Park and Marine Sanctuary. The amicus brief filed by Members of Congress refers to the area as the "Galapagos of North America" and notes that 25 endangered species are present in the channel on a seasonal or permanent basis. the Final EA, the agencies responded to concerns about the unique characteristics of the area by asserting that the platforms' distance from the Channel Islands Marine Sanctuary would mitigate any effects to the area. But the Ninth Circuit agreed with the Plaintiffs that the affected area also has "proximity to historic or cultural resources" including the submerged remains of the Chumash people. Congress expressly designated the Channel Islands National Park to protect important cultural resources, including "archaeological evidence of substantial populations of Native Americans." 16 U.S.C. § 410ff(6). The Ninth Circuit opined the significance standard is satisfied and an EIS should have been prepared.

The Ninth Circuit discussed that an EIS is also warranted when the possible effects of the proposed

action are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). The lack of data regarding the toxicity of well stimulation fluids, and the uncertainty this poses for evaluating the potential environmental effects of the proposed action, counsels the agencies that an EIS should have been prepared. The regulatory body in California that supervises oil and gas development, the Division of Oil, Gas, and Geothermal Resources, also commented on the draft EA that "effects of discharging WST fluids on marine life are not fully understood due to the lack of toxicity data" and urged the agencies to conduct toxicity testing to address this gap. The court found this fact to be satisfied as well.

The court summarized its discussion of the alleged NEPA violations, concluding that the agencies did not take the "hard look" mandated by NEPA. They relied on flawed assumptions in the EA that distorted and rendered irrational their finding of no significant impact. They did not give full and meaningful consideration to a reasonable range of alternatives. This failure to take the requisite "hard look" renders the EA inadequate under NEPA. The agencies also should have prepared a full EIS considering the unknown risks posed by the well stimulation treatments and the significant data gaps that the agencies acknowledged. NEPA review cannot be used "as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). The court believed that is what happened in this case. The agencies, which had already ventured down the path of allowing well stimulation treatments without environmental review until they were sued by the environmental groups, did not give a meaningful assessment of reasonable alternatives, offered post-hoc rationalizations for their decision, and disregarded necessary caution when dealing with the unknown effects of well stimulation treatments and the data gaps associated with a program of regular fracking offshore California in order to increase production and extend well life.

Audubon Society of Portland v. Haaland, 40 F.4th 917 (9th Cir. 2022)
Agency prevailed.

Issue: Alternatives.

Facts: Environmental organization (Audubon Society Portland) dedicated to conservation of birds and their habitats brought action against FWS alleging that its ROD adopting a combined EIS and comprehensive conservation plan for the Tule Lake and Lower Klamath Refuges in the Klamath Basin National Wildlife Refuge Complex violated NEPA.

In 2017, after more than six years of research, planning, and consultation, FWS adopted a Comprehensive Conservation Plan for five National Wildlife Refuges in the Klamath Basin National Wildlife Refuge Complex. The Conservation Plan and its appendices span over 3,500 pages and address hundreds of public comments. The Ninth Circuit affirmed the district court's summary judgment for the agency.

Decision: Audubon Society argued that the EIS/CCP violates NEPA by failing to consider and analyze a listed alternative that would decrease the acreage of lease land available for agriculture.

The Ninth Circuit held that the agency sufficiently considered whether to reduce the acreage devoted to lease-land farming, and sufficiently explained why it did not list such reduction as an alternative in the EIS/CCP. For the Tule Lake and Lower Klamath Refuges, the FWS briefly considered the alternatives of eliminating lease land farming entirely and of "[c]urtail[ing] agriculture in years when only partial water deliveries are made." It rejected both alternatives and declined to list them as formal alternatives in the EIS/CCP.

The Ninth Circuit discussed that the EIS/CCP explained that the lease land agriculture in the two refuges provides two benefits. First, it provides a supplemental food source for waterfowl. Second, reducing the amount of lease land acreage would reduce the amount of water available to the refuges. Because the Service's 1905 water rights are available only for irrigation of crops and for the FWs' walking wetlands program on lease land, reducing the amount of lease land acreage "would simply make more water available to higher priority Project water users [outside the refuges] rather than to refuge wetlands."

These two reasons support the FWS' decision not to list as a formal alternative the complete elimination of lease land agriculture in the refuges. They equally support its decision not to list as an alternative the reduction of such agriculture. The Ninth Circuit held

that FWS sufficiently explained why it did not present such reduction as a formal alternative in the EIS/CCP.

Audubon Society v. Haaland, 40 F.4th 967 (9th Cir. 2022)
Agency prevailed.

Issues: Alternatives, impact assessment.

Facts: Center for Biological Diversity (CBD) and Western Watersheds Project (WWP) challenged the EIS/comprehensive conservation plan (CCP) adopted by FWS, that applied to five National Wildlife Refuges in Klamath Basin National Wildlife Refuge Complex and allegedly violated NEPA.

In 2017, after more than six years of research, planning, and consultation, FWS adopted a Comprehensive Conservation Plan for five National Wildlife Refuges in the Klamath Basin National Wildlife Refuge Complex. The Conservation Plan and its appendices span over 3,500 pages and address hundreds of public comments. In this case, the Ninth Circuit considered challenges by two conservation groups, the Center for Biological Diversity (CBD) and the Western Watersheds Project (WWP), to two discrete aspects of the Conservation Plan, as it relates to three of the five National Wildlife Refuges that the Conservation Plan covers.

The Ninth Circuit affirmed the district court's grant of summary judgment in FWS' favor.

Decision: CBD first argued that FWS failed to consider reduced-pesticide alternatives for Lower Klamath and Tule Lake Refuges. Second, CBD argued that FWS failed to take a sufficiently hard look at the effects of pesticides on these Refuges. The Ninth Circuit held that FWS did not act arbitrarily, capriciously, or contrary to law by continuing to use the Pesticide Use Proposal (PUP) process to evaluate potential pesticide applications on the Refuges, and by allowing for pesticide use as a last resort.

In this case, the Conservation Plan considered four formal alternatives for Lower Klamath Refuge and three alternatives for Tule Lake. Each alternative, while differing in various other respects, incorporated and expanded the integrated pest management (IPM) plan that FWS had been using on the Refuges since 1998. The PUP process, by which specific pesticide applications may be studied and approved—"as a last line of defense against pests, not as the first option of control"—is just one of the IPM plan's many pest-control components.

CBD claimed that FWS failed to consider a reasonable range of alternatives under NEPA because FWS did not consider mandating a reduction in existing pesticide use. The Ninth Circuit found FWS adequately explained that some amount of pesticide use was necessary on the Refuges to ensure sufficient crop production, on which Refuge waterfowl now depend. And FWS could conclude that reduced-pesticide alternatives would not have been reasonable given the uses and purposes of the Refuges. Thus, NEPA did not obligate FWS to consider reduced-pesticide alternatives.

The court then contemplated whether FWS considered reasonable alternatives given the Conservation Plan's purposes and needs. "The touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." The court found that FWS considered multiple pest-control methods and reasonably included a long-standing PUP process by which a committee of experts could review and, if necessary, approve, pesticide applications.

FWS fostered informed public participation in the Conservation Plan, which included consideration of reducing pesticide use. During the Conservation Plan's scoping process, which took place years before the Plan was eventually adopted, FWS solicited and received numerous public comments and held four public meetings. FWS summarized the scoping discussion in a report issued in January 2011.

CBD also argued that FWS should have considered allowing only organic farming on Lower Klamath Refuge. But FWS explained in response to public comments that it would "not make organic agriculture a strict requirement" because it "is dependent on a consistent water supply and external economic forces that are beyond [FWS's] control."

The court emphasized FWS' explanations for not mandating organic-only agriculture in Lower Klamath Refuge were based on its scientific judgment and are entitled to deference. *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013) (explaining that "[w]ithout evidence to the contrary,

we defer to the [agency's] technical expertise regarding" the feasibility of a proposed alternative); *see Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) ("A court generally must be 'at its most deferential' when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA." FWS therefore sufficiently explained its reasons for not considering an organic-only alternative. *See* 40 C.F.R. § 1502.14(a) (requiring agency to "briefly discuss the reasons" for eliminating alternatives from detailed study). The Ninth Circuit opined that FWS adequately explained why a process by which pesticides could be approved for use on the Refuges was essential to meeting the Conservation Plan's purposes.

The court next considered whether, under NEPA, FWS took a sufficiently thorough "hard look" at the environmental effects of pesticides on the Refuges in concluding that pesticides could continue to be used with minimal environmental consequences. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020). In performing this review, we do not "fly-speck" FWS' analysis and "hold it insufficient on the basis of inconsequential, technical deficiencies." *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). The court discussed that the record confirmed that FWS took a "hard look" at the direct, indirect, and cumulative effects of its decision to re-adopt and extend the PUP process for reviewing potential pesticide applications on the Refuges. FWS also explained their reasoning in reaching each of these conclusions.

FWS emphasized that the PUP process is a "screening risk assessment . . . intended to be complemented by the National Pesticide Consultations done by the National Marine Fisheries Service, [FWS], and EPA." FWS's judgment that the PUP process is sufficiently rigorous for evaluation of pesticide applications is entitled to deference. In addition to the stiff controls that the PUP process imposes, and further supporting its "hard look," FWS based its conclusion that pesticide effects are minor on (1) an earlier analysis from the 1998 IPM plan's EA, (2) a 2007 Formal Section 7 Consultation for the Implementation of the Pesticide Use Program on Federal Leased Lands, Tule Lake and Lower Klamath National Wildlife Refuges and (3) recent monitoring data, that shows that the PUP process has not led to adverse environmental consequences. Collectively, the court held that these various findings support FWS' determination that existing pesticide use under the PUP process did not produce adverse environmental effects on the Refuges.

WWP argued that FWS violated NEPA by failing to consider a formal reduced-grazing alternative and by failing to take a hard look at the effects of continued grazing on the greater sage-grouse and two species of suckerfish.

The Conservation Plan considered two alternatives for grazing on Clear Lake Refuge. Under Alternative A, the no-action alternative, FWS would continue authorizing "intensively managed cattle grazing" on the Refuge between mid-August to mid-November. Under Alternative B, FWS would add an experimental grazing period in the spring, creating new pastures to be "grazed with 300 to 500 cattle from March 1 to mid-April." The agency ultimately adopted Alternative B. WWP argued that FWS violated NEPA by not considering a reduced-grazing or no-grazing alternative.

The court held that FWS adequately explained in the Conservation Plan why these alternatives were not reasonable. Looking at the Purpose and Need explained that the agency's objective was to "develop and implement a comprehensive 15-year management plan for the Refuge Complex consistent with refuge purposes; refuge goals and objectives; and applicable laws, regulations, and policies." The very first goal that FWS included for Clear Lake Refuge was to "[p]rotect, maintain, and restore sagebrush-steppe and associated upland and wetland communities characteristic of the Great Basin ecosystem." FWS was required only to "'briefly discuss' the reasons" for eliminating from detailed consideration a reduced-grazing alternative. *See Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 581 (9th Cir. 2016) (*quoting* 40 C.F.R. § 1502.14(a)). The court found that FWS provided sufficient reasons for not including a reduced-grazing alternative for Clear Lake Refuge. Most centrally, the Conservation Plan explained grazing was necessary to promote sage-steppe habitat, on which the greater sage-grouse depends. In particular, grazing was needed to "control priority weed species with an emphasis on protecting high-priority wildlife habitats," "control invasive annual grasses and juniper seedlings," "reduce wildfire fuels," "assist with restoration of habitat on the east side of the 'U' Unit that was damaged by the Clear Fire," and "allow for

accelerated sagebrush restoration and prevent further destruction of this desired habitat."

In response to WWPs' comments about the potential harm that grazing could cause wildlife, FWS "disagree[d] that habitat management using prescriptive grazing, herbicide treatments, and juniper removal would harm resources on the refuge." FWS described "invasive annual grasses and the western juniper" as a "management challenge," with western juniper constituting "one of the greatest risks to the continued existence of sage grouse in this area." Juniper "out-competes desirable vegetation (e.g., sagebrush, other shrubs, forbs, and grasses)" that sage-grouse rely on, with the Conservation Plan noting that "[j]uniper expansion has been documented as one cause for greater sage-grouse to abandon leks." Other invasive grasses, like cheatgrass and medusahead, also "out-compete perennial bunchgrasses and some other native plants (e.g., forbs and sagebrush) that provide valuable wildlife habitat." These invasive grasses at the same time "provide an abundance of fine fuels for wildfires and can increase the intensity and severity of wildfires." FWS thus explained that grazing "is used to create short grass areas for spring foraging by geese; reduce the extent of exotic annual grasses; help rehabilitate previously burned sagebrush habitats by providing native shrubs, bunchgrasses, and forbs with a competitive edge; and reduce the quantity of fine fuels and the potential for future wildfires" (which, FWS noted, "can set back sagebrush restoration for decades"). In short, FWS concluded that managed grazing was necessary for ensuring sage-grouse habitat, and it sufficiently explained that position.

WWP also focused its public comments on the fact that no "reductions or removal of livestock" were analyzed in the Conservation Plan. But FWS in response reiterated that "grazing is a management method that is highly controlled at Clear Lake," and that the "the timing, intensity[,] and duration of grazing are all managed to produce a specific result based on the habitat objectives." In the spring, for instance, "non-native cheatgrass and medusahead are preferentially grazed by cattle," so FWS therefore proposed "short-term, intense grazing at this time of year specifically to help slower growing native bunchgrasses flourish." FWS cited supporting research "indicat[ing] that this kind of grazing . . . reduces annual grasses and increases native perennials and forbs," and concluded that grazing opens "areas that would otherwise be choked with vegetation and sub-optimal for use by waterfowl."

FWS also rejected using only alternative methods of controlling invasive plants, without using grazing. FWS explained that other alternatives, such as herbicides or machine mowing, would not be fully effective in controlling invasive species, and that mowing in some areas posed fire risks. The Ninth Circuit explained that FWS reasonably explained that managed grazing on Clear Lake Refuge was essential to protecting and restoring sage-grouse habitat. FWS thus did not violate NEPA by failing to consider a formal reduced-grazing alternative.

The Ninth Circuit held that FWS also took a sufficiently hard look at the effects of grazing on Clear Lake Refuge. The Conservation Plan discussed at length the potential effects of grazing on sage-grouse and why grazing would be beneficial to sage-grouse habitat. Grazing "would give native perennial grasses and forbs a competitive advantage, help restore native habitats, and reduce the abundance of fine fuels," thus lessening "the frequency, intensity, and spread of wildfires" and "enhanc[ing] the growth and survival of shrubs, such as sagebrush, that are very slow-growing." "This would all benefit sage brush-obligate species, such as sage grouse, that prefer habitats composed of forbs, moderate-height grasses, and larger-diameter sagebrush." With respect to the new spring grazing period, FWS explained that "light to moderate spring grazing could also make forbs more accessible to pre-laying sage grouse hens by removing standing herbage."

The court discussed WWP principally took issue with the agency's determination that the planned spring grazing would not significantly disturb sage-grouse nests. But FWS explained that the spring grazing—the only grazing that would overlap with the sage-grouse nesting season—would occur on the fire-damaged east side of the U, and "no hens are known to nest in that area due to the lack of sage brush cover." The court found the agency's factual determination, which is based on nearly a decade of monitoring data, merits deference. *See Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012).

The Ninth Circuit found that a driving purpose of the grazing program was to restore sagebrush habitat in that area, and hopefully increase successful sage-grouse nesting. FWS thus emphasized that the spring

grazing program was experimental and subject to monitoring. Moreover, FWS reasonably determined that even to the extent grazing would disturb sage-grouse nests, "the larger and longer-term habitat benefits of a properly conducted program would far outweigh such negative effects."

WWP maintained that FWS failed to evaluate the combined effects on sagebrush habitat of adding a spring grazing period to the existing fall grazing period. The court examined the Conservation Plan, which included as support for its cumulative impact analysis the joint "Conservation and Recovery Strategy for Sage-Grouse (*Centrocercus urophasianus*) and Sagebrush Ecosystems Within the Devil's Garden / Clear Lake Population Management Unit"—or "Sage-Grouse Recovery Plan" for short. That separate multi-agency plan to grow Clear Lake Refuge's sage-grouse population was developed just two years before the Conservation Plan's scoping process began. And it specifically included spring and fall grazing periods as part of the sage-grouse recovery strategy. The Ninth Circuit also rejected WWP's argument that FWS failed to evaluate the cumulative effects to sage-grouse of grazing on the adjacent Modoc National Forest and found that the agency took a sufficiently hard look at the effects of grazing on sage-grouse, including the cumulative effects.

The Ninth Circuit concluded that the Conservation Plan took a sufficiently hard look at the effects of managed livestock grazing on suckerfish in Clear Lake Refuge. FWS acknowledged that grazing "can adversely affect aquatic environments," but concluded that it had "no empirical data that shows that current grazing practices adversely affect the primary constituent elements (PCEs) of critical habitat for suckers in Clear Lake." FWS emphasized that "grazing has occurred on the Refuge for decades without major problems associated with [negative] effects, and stipulations associated with this use would greatly reduce the likelihood and significance of any potential impacts of this nature. FWS stated that "consultation for the [Conservation Plan] will be conducted pursuant to section 7 of the federal ESA, for federally listed species and their critical habitat," which includes suckerfish, and "conservation measures . . . will be implemented to protect listed species and their habitat that occur on the refuge, as applicable."

The Ninth Circuit found that the agency reasonably determined—based on the long history of grazing on the Refuge and the limits FWS imposed on it—that grazing would not have materially adverse effects on suckerfish. WWP has not demonstrated that other information was "essential to a reasoned choice among alternatives." *See* 40 C.F.R. § 1502.22(a). The Ninth Circuit, based on the cumulative effect analysis in the Conservation Plan, rejected WWP's claim that FWS failed to consider the cumulative effects of grazing on suckerfish, and found that the agency took a sufficiently hard look at the effects of grazing on suckerfish.

Rocky Mountain Peace & Justice Center v. U.S. Fish and Wildlife Serv., 40 F.4th 1133 (10th Cir. 2022)
Agency prevailed.

Issues: Segmentation, Categorical Exclusion, Extraordinary Circumstances, Supplemental Statement

Facts: Environmental advocacy organizations brought action against FWS, FHWA, and the DOT appealing FWS' approval of modifications to planned public trail system in national wildlife refuge surrounding decommissioned Rocky Flats nuclear facility, for which FWS did not issue a supplemental EIS or conduct an EA, when it relied on a CE.

In 2018, FWS issued an Environmental Action Statement ("2018 EAS"), which is the agency action challenged here. The FWS prepares an EAS instead of an EA when it concludes the action falls within a categorical exclusion but may be controversial. 550 FW § 3.3(C)(2)(b).

Two aspects of the 2018 EAS are relevant to that challenge: (1) the actual changes the FWS made to the 2004 CCP/EIS, and (2) certain proposed changes the FWS might consider in the future. The Tenth Circuit affirmed the denial of review of the claims by the district court.

Decision: The Center argues FWS violated NEPA by (1) segmenting the proposed trail modification into the Wind Blown Area from the 2018 Environmental Action Statement's (EAS) analysis, (2) relying on the CEs to avoid conducting an EA, and (3) failing to prepare a supplemental EIS based on significant new circumstances.

The Center argued FWS was not permitted to exclude the proposed trail extension and access point in the Wind Blown Area from the 2018 EAS. It contended this action was so intrinsically linked to the modifications made in the 2018 EAS that FWS had to evaluate the Wind Blown Area proposals in the same assessment.

The Tenth Circuit disagreed, and reviewed the standard to determine whether two actions are connected -- the independent-utility test. Under that test, "two proposed actions [are] connected where one action could not occur but for the occurrence of the other." *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012, 1029 (10th Cir. 2002). On the other hand, "projects that have independent utility are not connected actions." *Id*.

The Tenth Circuit found that the trail modifications in the 2018 EAS have independent utility and do not depend on the potential modifications in the Wind Blown Area. The modifications made to the Rocky Mountain Greenway trail remain viable even if the Service never proceeds with expansion of the trail into the Wind Blown Area or creates an access point there. The court discussed that FWS' stated goal of trail interconnectedness did not undermine the independent utility of the modifications to the Rocky Mountain Greenway trail. The Tenth Circuit held the modifications had independent utility, and it was not arbitrary or capricious for the FWS to segment the potential changes in the Wind Blown Area from its analysis.

FWS relied on three CEs for the trail modifications to avoid having to perform an EA. It determined the action consisted of:

> 1) "minor changes in the amounts or types of public use on Service or State-managed lands, in accordance with existing regulations, management plans, and procedures;"
>
> 2) "minor changes in existing master plans, comprehensive conservation plans, or operations, when no or minor effects are anticipated;" and
>
> 3) "the issuance of new or revised site, unit, or activity-specific management plans for public use, land use, or other management activities when only minor changes are planned."

FWS concluded no extraordinary circumstances rendered the 2018 EAS ineligible for the categorical exclusions.

The Center argued that two extraordinary circumstances foreclosed the use of the CEs: (a) the impact on public health, and (b) the highly controversial nature of the project.

The court upheld the FWS' CEs, stating that even if elevated plutonium levels exist in the Wind Blown Area, that is not relevant because the potential trail modification into the Wind Blown Area is not part of the challenged agency action because the FWS excluded it from the 2018 EAS. The court also disagreed that FWS previously acknowledged that different parts of the Refuge have varying levels of plutonium radiation, which could harm public health. In its rejection the court stated, "the 2004 CCP/EIS considered the varying plutonium levels across the Refuge and determined that the Refuge was generally safe for public use." The court held that Center has failed to show that the FWS' reliance on the CEs to make the trail modifications was arbitrary or capricious.

The Center argued that FWS needed to prepare a supplemental EIS because its acquisition of the Section 16 Parcel and ensuing decision to build a trail on the parcel presented a significant new circumstance. However, the Tenth Circuit considered this claim, and found that neither the acquisition of the Section 16 Parcel nor the decision to extend a trail onto it amounted to a significant new circumstance requiring a supplemental EIS.

Gulf Restoration Network v. Haaland, 47 F.4th 795 (D.C. Cir. 2022)
Agency did not prevail on one of its NEPA claims but prevailed on other NEPA claims.

Issues: No Action Alternative, Tiering. Reliance on Programmatic EIS (failure to consider GAO report), Supplemental statement.

Facts: Three environmental organizations (the Groups) brought action against agencies challenging offshore lease for oil drilling based on allegedly arbitrary EISs. The D.C. Circuit reversed the summary judgment in part and remanded the case to the

district court with instructions to remand it to the agency for further consideration of the GAO report.

This appeal concerns Lease Sales 250 and 251, which were among the 11 that Interior proposed in its five-year plan covering mid-2017 to mid-2022. Interior held the sales in 2018. They involve more than 150 million acres in the Gulf of Mexico. The Groups challenged the adequacy of an EIS prepared in connection with two lease sales held in 2018.

Before the sales, the agency prepared three EISs. First, it issued a programmatic EIS addressing the environmental impacts of the five-year plan. Second, it issued a narrower "multisale" EIS addressing the impacts of leasing in the Gulf. Third, it issued a supplemental EIS specific to the two lease sales at issue.

Decision: The Groups asserted that the supplemental EIS did not comply with NEPA; they argued that BOEM failed to assess a true "no action" alternative because it had assumed that energy development would occur sooner or later, even if Lease Sales 250 or 251 did not. They also argued that BOEM had unreasonably assumed two rules for protecting the environment would remain in effect, despite the possibility of future modifications. Finally, they argued that BOEM had unreasonably assumed all such rules would be effectively enforced, despite a report suggesting otherwise.

In the supplemental EIS, BOEM assessed environmental impacts on the assumption that future lease sales would occur in the Gulf even if one such sale were cancelled. The D.C. Circuit agreed with the agency when it concluded the cancellation of one proposed lease sale "would not significantly change the environmental impacts" of development in the Shelf. It found that this this analysis was not arbitrary. Interior has a statutory obligation to make the Shelf available for development to meet national energy needs. 43 U.S.C. §§ 1332(3), 1334(a). Thus, the agency's five-year plan proposed that all but one of its lease sales would take place in the Gulf. The court found BOEM reasonably concluded that the cancellation of a single lease sale would only postpone development in the region. It agreed that BOEM reasonably concluded that such a cancellation would not materially change overall environmental impacts. At this scale (each lease is for 50 years with project impacts over 70 years), any single sale would make "only a small . . . contribution" to overall activity on the Shelf.

The Groups argued that a true "no action" alternative would involve the cancellation of all future planned leases. The court believed the agency met that goal where in the programmatic EIS, BOEM considered the effect of allowing no new leasing in the Gulf and even in the entire Shelf. And in the supplemental EIS, it incorporated that analysis by reference. The court found the agency permissibly divided its analysis across the EISs.

The Groups next argued BOEM acted arbitrarily by failing to consider potential changes to two environmental rules designed to reduce the risk of oil and gas spills. The Bureau of Safety and Environmental Enforcement (BSEE), makes and enforces rules to reduce risks from drilling. In 2016, it adopted two rules at issue here. The Production Safety Rule addressed certain systems and devices required to ensure safe production of oil and gas. The Well Control Rule added new requirements for equipment used to safeguard against oil and gas blowouts. After BOEM completed its supplemental EIS, BSEE revised these rules to eliminate "unnecessary regulatory burdens." The Groups claimed BOEM should have discussed in its supplemental EIS the possibility that the 2016 rules would be changed. The court concluded that BOEM permissibly declined to consider the potential rule changes, which were too inchoate to require discussion in the supplemental EIS.

The Groups claimed that BOEM acted arbitrarily by failing to address a report about deficiencies in BSEE's enforcement of existing safety and environmental regulations.

BOEM repeatedly factored BSEE's work into its analysis, but BOEM did not consider whether BSEE's work was in fact rigorous, despite some evidence that it was not. After each EIS, commenters asked BOEM to address a Government Accountability Office report that criticized BSEE. The report faulted BSEE for maintaining "outdated policies and procedures" and failing to develop "criteria to guide how it uses enforcement tools." It further found that this lack of criteria "causes BSEE to act inconsistently," creates uncertainty about BSEE's "oversight approach and expectations," and risks "undermining [agency] effectiveness." After a commenter raised the report

in response to the programmatic EIS, BOEM promised to address the asserted deficiencies at the leasing stage. But it later reneged, telling commenters that the issues were outside the scope of the EISs at that stage. The D.C. Circuit agreed with the environmental groups that BOEM's failure to address the report was arbitrary. To engage in reasoned decision-making, an agency must respond to "objections that on their face seem legitimate." Here, BOEM itself had repeatedly acknowledged the importance of BSEE enforcement to its analysis of environmental risks. And the GAO report, while hardly conclusive on this point, raised seemingly legitimate concerns about enforcement effectiveness.

Likewise, because BOEM promised to consider the GAO report at the leasing stage, it should have explained its later decision not to do so. BOEM was of course free to change its views, but it should have acknowledged and explained the change. Instead, BOEM merely brushed aside the report as beyond the scope of the supplemental EIS. This unexplained about-face was also arbitrary.

The court remanded the case to the district court with instructions to remand it to the agency for further consideration of the GAO report but declined to vacate any of the administrative orders under review.

Cottonwood Env'tl Law Ctr. v. Gianforte, No. 20-36125, 2022 WL 612673 (9th Cir. Mar. 2, 2022) (not for publication)
Agency prevailed.

Issue*:* Remedies.

Facts*:* Cottonwood Environmental Law Center appealed the district court's decision remanding consideration of the Interagency Bison Management Plan (IBMP) to the NPS without vacating the decision; the district court further denied injunctive relief. The Ninth Circuit affirmed the district court's opinion.

Decision: Cottonwood contended that the district court should have granted its motion for a preliminary injunction and vacated a portion of the IBMP, thereby "enjoin[ing] the state and federal defendants from hazing Yellowstone bison while on federal lands." The Ninth Circuit discussed that Cottonwood only asserted NEPA claims pursuant to section 706(1) and (2) of the APA. The district court granted the only relief Cottonwood sought—a remand to the agency to consider new information. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (explaining that NEPA "does not mandate particular results"); *Mount St. Helens Mining & Recovery Ltd. P'ship v. United States*, 384 F.3d 721, 728 (9th Cir. 2004) (holding that "§ 706(1) of the APA does not empower the district court to . . . order the agency to reach a particular result," even if the agency "unlawfully withheld or unreasonably delayed its decision"). The district court did not abuse its discretion by denying additional relief not requested in Cottonwood's complaint.

Neighbors Against Bison Slaughter v. Nat'l Park Serv., No. 21-35144, 2022 WL 1315302 (9th Cir. May 3, 2022) (not for publication)
Agency prevailed.

Issue: Timelines.

Facts*:* The district court issued a remand order granting Defendants' motion for voluntary remand, without vacatur, of the Interagency Bison Management Plan, which provided for the management of American Bison that leave Yellowstone National Park. By granting Defendants' motion, the Remand EIS, Defendants argued, on appeal, that the district court erred by denying their Administrative Procedures Act § 706(1) claim seeking a judicially imposed deadline for completion of the new EIS, based on Defendants' alleged history of delay. The Ninth Circuit affirmed, citing that the rule of reason weighs against setting a deadline because not enough time has passed for us to find that agency action has been "unreasonably delayed." For instance, the district court granted Defendants' motion for voluntary remand to prepare a new EIS before this case was heard. Defendants then issued a notice of intent, which sets in motion a two-year regulatory deadline by which the new EIS normally must be completed. *See* Notice of Intent, 87 Fed. Reg. 4,653 (Jan. 28, 2022); *see also* 40 C.F.R.§ 1501.10(b)(2).

Decision: The Ninth Circuit held there is insufficient evidence to support a finding that Defendants are likely to miss the applicable regulatory deadline. It stated that the Defendants have committed to providing the district court "with regular status reports during the NEPA process." Because the Remand Order did not close the case with respect to any of Plaintiffs' other claims, the district court

retains jurisdiction to adjudicate these claims if they are not mooted by Defendants' actions on remand. *See Pit River Tribe v. U.S. Forest Serv*., 615 F.3d 1069, 1075, 1076 (9th Cir. 2010). The court stated that the district court's retention of jurisdiction provides an avenue for Plaintiffs to renew their claim challenging the timeliness of agency action, later, should they believe that Defendants have excessively delayed completion of the new EIS.

***Fallon Paiute-Shoshone Tribe v. U.S. Dep't of the Interior*,** No. 22-15092, No. 22-15093, 2022 WL 3031583 (9th Cir. Aug. 1, 2022) (not for publication)
Agency prevailed.

Issues: Significance of Impacts, Impact Assessment (Visual Impacts).

Facts: Fallon Paiute-Shoshone Tribe and Center for Biological Diversity jointly filed suit against BLM alleging violations of NEPA involving a grant of an application to construct and operate a geothermal project on federal public land located adjacent to the Dixie Meadows hot springs, an area visible from the Tribe's sacred site. This case is part of an ongoing challenge to the development of a geothermal project on federal public land located over forty miles outside of Fallon.

The appellants were seeking injunctive relief. The Supreme Court has explained that plaintiffs seeking a preliminary injunction must establish that (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm absent preliminary relief," (3) "the balance of equities tips in their favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The district court first concluded that it could not find, at this early stage of the litigation and given the record before it, that Plaintiffs were likely to succeed on the merits of their claims. The Ninth Circuit affirmed the district court's opinion.

Decision: Plaintiffs' NEPA claims challenge BLM's decision not to prepare an EIS. The Ninth Circuit agreed the district court reasonably determined that, under this deferential standard and at this stage of the proceedings, Plaintiffs did not demonstrate a likelihood of success on their NEPA claims. It stated the district court reasonably found that there was more than sufficient baseline information (i.e., flow test, hydrogeological model, USGS data regarding Dixie Valley toad) available to BLM on the relevant environmental issues in connection with its development of both the EA and the Aquatic Resource Monitoring and Mitigation Plan ("ARMMP"), including water resources and species information.

The Ninth Circuit held that the Plaintiffs failed to show that this conclusion amounts to an abuse of discretion, given the level of deference afforded to the agency under the APA.

Next, the Ninth Circuit found that BLM's reliance on the ARMMP as part of its finding of no significant impact ("FONSI") was not arbitrary and capricious. BLM was not required to mitigate impacts to zero to justify a FONSI. *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000), *overruled on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (en banc). Additionally, under NEPA, proposed mitigation need only be "developed to a reasonable degree." *Id.* Although BLM independently concluded that geothermal development was unlikely to affect the springs (based on the hydrogeological model and flow test), it nevertheless developed the ARMMP to address unanticipated impacts and impose meaningful mitigation measures as needed.

The district court also appropriately rejected Plaintiffs' argument that BLM violated NEPA by failing to meaningfully consider the visual impacts of constructing the Project in an area visible from the Tribe's sacred site. The district court permissibly focused on facts in the record demonstrating that BLM took steps to minimize visual impacts of the Project, including the requirement that buildings be painted consistent with BLM's visual color guidelines and comply with dark-sky lighting practices, as reflected in the EA.

Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgm't, No. 22-35035. 2022 WL 17222416 (9th Cir. Nov. 25, 2022) (not for publication)
Agency Prevailed.

Issues: Tiering, Impact Assessment.

Facts: Plaintiffs' claimed violations of NEPA when BLM developed the North Landscape Project, a site-specific management approach for conducting annual timber sales in the Klamath Falls Resource Area in

accordance with the 2016 Southwestern Oregon Resource Management Plan (RMP) and Oregon & California Revested Lands Act. BLM prepared an EA and incorporated the FWS' Biological Opinion concluding that the North Project will not jeopardize the Northern Spotted Owl ("NSO") as a species, adversely modify its critical habitat, nor result in its incidental take. The Ninth Circuit affirmed the summary judgment in favor of the agencies.

Decision: BLM conducted an EA for the North Project, which concluded that the action would have no direct effect on the NSO population and is consistent with the owl's recovery as a species. The EA was revised in 2020 with additional information and retained that conclusion. The Plaintiffs challenged this finding. The Circuit agreed that the district court correctly determined that BLM took a "hard look" at the environmental consequences of the North Project using the process provided by NEPA. First, the EA was not legally deficient when it tiered to the final FEIS of the 2016 RMP. The FEIS contains project-level analysis—such as potential loss of NSO habitat within the action area and reduced future NSO occupancy. In the revised EA, BLM relied on this analysis and separately evaluated new owl demographic data for the action area that post-date the 2016 RMP and contemplate additional owl habitat.

The court also discussed the EA assessed the North Project's indirect, direct, and cumulative effects on the NSO—including NSO habitat refugia and barred owl competition—by tiering to the 2016 FEIS and conducting independent site-specific analysis. The EA was not required to assess the experimental barred owl control program because the program's success was hypothetical and reliant upon data collection efforts that had not yet materialized. *See Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 1000 (9th Cir. 2013).

The Ninth Circuit also found that BLM's decision to prepare an EA instead of an EIS for the North Project was not arbitrary or capricious. It stated that the Plaintiffs did not show the North Project is highly controversial or uncertain, establishes binding precedent, or adversely affects the NSO. *See WildEarth Guardians v. Provencio,* 923 F.3d 655, 673–74 (9th Cir. 2019). The Ninth Circuit also rejected arguments that this project was precedential because it was not binding on future actions.

U.S. DEPARTMENT OF TRANSPORTATION

***Protect Our Parks, Inc. v. Buttigieg*,** 39 F.4th 389 (7th Cir. 2022
Agency prevailed.

Issue: Impact Assessment, Alternatives.

Facts: The case involved a second challenge to an EA prepared by NPS and FHWA in connection with construction of the Obama Presidential Center on land in Jackson Park in Chicago, Illinois. The plans for the Center require the closure of portions of three roads within Jackson Park. The Seventh Circuit affirmed lower court's denial of the preliminary injunction.

Decision: The NPS and the DOT conducted a joint EA and determined that no EIS was needed for the Obama Presidential Center project and issued a finding of no significant impact. The EA explained that the City had decided to place the Center in Jackson Park, that the City would close portions of three local roads to accommodate the Center. the agencies assessed the environmental impact of three options: Option A, in which neither the Park Service nor the federal DOT approved the City's plan; Option B, in which only the Park Service approved it; and Option C, in which both did. They found that Alternative C best met both agencies' goals. They also concluded that Alternative C would not have a significant impact on the environment.

To secure a preliminary injunction, Protect Our Parks must show that it is "likely to succeed on the merits, ... likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Defense Council*, 555 U.S. 7, 20, 129 S.Ct. 365 (2008). The Court held that the Protect Our Parks' primary problem stemmed from the first part of this test.

Protect Our Parks argued that the agencies' decision not to prepare an EIS was arbitrary and capricious, in part because the project requires the City to cut down about 800 trees and felling those trees may adversely affect certain migratory birds, and in part for historic preservation and other reasons noted earlier. The court found the agencies were very thorough. For

example, the EA included an exhaustive Tree Technical Memorandum, which catalogs the species of the trees that will be cut down and confirms that each tree lost will be replaced by a newly planted tree. The Memorandum concluded that the tree replacement plan will have an "overall neutral" impact and may even improve the park, because dying trees will be replaced with healthy ones. Similarly, the EA includes a detailed discussion of the project's effect on migratory birds. It considers the City's tree replacement plan, the hundreds of acres of Jackson Park that will remain untouched by the project, and the birds' nesting habits. The court deduced the agencies took a hard look at the impacts.

Protect Our Parks argued that NPS and the DOT did not adequately consider three of the ten factors set forth in the NEPA regulations in effect while the review was underway. *See* 40 C.F.R. § 1508.27(b) (2019) (listing factors). Whether or not a project "significantly" affects the environment turns on the project's context and the intensity of its effects. Id. § 1508.27(a)–(b). The court disagreed.

It found the AR showed that the agencies "consider[ed] the proper factors," ensuring that their decision is entitled to deference. *See Ind. Forest All.*, 325 F.3d at 859.

Protect Our Parks claimed the agencies ignored the unique characteristics of Jackson Park, *see* 40 C.F.R. § 1508.27(b)(3) (2019), but the EA did consider the historical and cultural resources in the park before concluding that the Center's effects will be minimal. Protect Our Parks also contends that the agencies did not consider "[t]he degree to which" environmental harm from the project is "likely to be highly controversial." *See id*. § 1508.27(b)(4). Its evidence of controversy comes from extra-record declarations from neighbors who oppose the project. But the controversy factor is not about whether some neighbors do not support a project. *See Ind. Forest All.*, 325 F.3d at 857 (NEPA does not contain a "heckler's veto"). Rather, an agency must consider whether there are substantial methodological reasons to disagree about the "size, nature, or effect" of a project. *Id.*; *see also Hillsdale Env't Loss Prevention v. U.S. Army Corps. of Eng'rs*, 702 F.3d 1156, 1181–82 (10th Cir. 2012).

Protect Our Parks accused the agencies of failing to consider the "cumulatively significant impact" of the project. *See* 40 C.F.R. § 1508.27(b)(7) (2019). But the EA did so—it just reached a conclusion with which the plaintiffs disagree. The court rejected all these arguments recognizing the agency's deference.

Protect Our Parks claimed the NPS and DOT sidestepped NEPA's reasonable-alternatives requirement by treating the City's decision to locate the Center in Jackson Park as a given. Protect Our Parks argued that NEPA required the agencies to evaluate alternative locations for the Center throughout Chicago. Protect our Parks claimed the agencies "piecemealed or segmented," the decision not to question the location of Jackson Park. The court outright rejected these arguments as two different activities: the federal decisions to approve the Urban Park and Recreation Recovery Act (UPARR) conversion and to expand roads, bike lanes, and pedestrian paths; and the City's earlier decision to build the Center in Jackson Park.

The court stated the City's decision to build the Center in Jackson Park is not a major federal action 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. § 1508.8 (2019) (defining "major Federal actions" as those "potentially subject to Federal control and responsibility."). Citing to *Public Citizen*, the court stated it was the City's decision that was the legal cause of the action. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770, 124 S.Ct. 2204, (2004). Agencies have no obligation to examine the effects of state and local government action that lies beyond the federal government's control. It follows that it was proper for the Park Service and the Department to confine their analysis to the portions of the project that are subject to federal review.

The court then further examined causation, discussion that although federal agencies' limited role in the project would be enough to defeat causation on its own, our conclusion is further bolstered by the mandatory language of the UPARR Act. 54 U.S.C. § 200507 says that NPS "shall" approve conversions of parkland so long as a local government's proposal meets statutory criteria. Because the agency found that Chicago's plan did so, it was obligated to approve the conversion.

Finally, the court noted that Protect Our Parks ignores the "reasonable" half of the reasonable-alternatives requirement. See 40 C.F.R. § 1502.14 (2019). It would be unreasonable to require agencies to spend time

and taxpayer dollars exploring alternatives that would be impossible for the agency to implement. *See Public Citizen*, 541 U.S. at 765, 124 S.Ct. 2204.

The Seventh Circuit rejected the remainder of Protect Our Parks' remaining arguments as it found they were a variation on the plaintiffs' theme that the agencies should have considered locations for the Center outside Jackson Park.

City of North Miami v. Federal Aviation Admin., 47 F.4th 1257 (11th Cir. 2022).
Agency prevailed.

Issue: Purpose and Need, Impact Assessment (Air Impacts), Cumulative Impacts

Facts: Petitioners, a group comprised of municipalities, individuals, and a nonprofit organization all based in South Florida petitioned for review of FAA's decision implementing new navigation procedures. These procedures were part of project to improve safety and efficiency of airspace in the metropolitan area of the South-Central Florida Metroplex, whose major airports include Miami International, Ft. Lauderdale-Hollywood International, Palm Beach International, Tampa International, and Orlando International. The Petitioners alleged violations of NEPA. The Seventh Circuit affirmed the lower court's denial of preliminary injunction.

Decision. As the FAA already employed in many other metro areas around the country, the agency recently designed and implemented new navigation procedures for flights taking off from and landing in the South-Central Florida Metroplex, whose major airports include Miami International, Ft. Lauderdale-Hollywood International, Palm Beach International, Tampa International, and Orlando International. These new procedures (the Project) made it possible for more planes to safely use the limited airspace and simplified air traffic control procedures.

The FAA conducted an extensive public outreach program for the Project -- in April and May 2019, the FAA held public workshops to solicit input on potential designs for the Project, including four in-person workshops and one virtual workshop in the Miami area. In July 2019, the FAA sent a letter announcing its plans for the Project to 590 federal, state, regional, and local agencies, elected officials, and tribes, and the FAA published a legal notice in English and Spanish in six newspapers.

The FAA also prepared a draft EA evaluating the Project's potential impact under NEPA, distributed the draft widely, and solicited public comments on the draft from May 2020 to July 2020. In June 2020, the FAA hosted twelve virtual workshops to give the public opportunities to learn about the Project and to ask the FAA questions about the Project and the draft EA. Finally, in October 2020, the FAA issued its Final EA, FONSI, and final decision adopting new flight procedures.

In its Final EA, the FAA described the Purpose and Need of the Project this way: "to provide for the efficient use of airspace, to develop plans and policy for the use of the navigable airspace, and to assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." The FAA also underscored the importance of safety and integrating the latest technologies, such as RNAV-based design.

Petitioners claimed the FAA violated NEPA for failing to include the reduction of noise and emissions, to the greatest extent practicable, in its Purpose and Need Statement, even though these considerations are listed among the seven goals of the NextGen program. Vision 100 Act, § 709(c)(7).

"Agencies must look hard at the factors relevant to the definition of purpose." *Citizens for Smart Growth*, 669 F.3d at 1212. "[A]n agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). But other than appealing to the general rule that agencies must consider the views of Congress, as expressed in the agency's statutory authorization, Petitioners identify no law or precedent that would compel the FAA, in its statement of Purpose and Need, to account for each one of Congress's goals for the NextGen project.

The court held that Congress outlined broadly seven goals in the Vision 100 Act, and at least the following five were mentioned in the FAA's Purpose and Need Statement: improving efficiency, harnessing new technologies, supporting the growth of

transportation, reducing operational errors, and leveraging additional data to ease air traffic controllers' workload.

Petitioners claimed because the Purpose and Need Statement omits mentioning noise and emission reduction - it relies on forgone conclusions (in essence, it is pre-decisional). FAA considered two options here -- the Project and no action at all. Petitioners' claim that the FAA failed to consider alternatives that accomplished noise and emission reduction presupposes that we hold that the FAA must have mentioned those objectives in its Purpose and Need Statement. *See Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73 (citation omitted) ("[W]e will reject an 'unreasonably narrow' definition of objectives that compels the selection of a particular alternative."). But we conclude that the FAA need not have mentioned noise and emission reduction in its Purpose and Need Statement.

The court upheld the no action and one other action alternative. "NEPA does not impose any minimum number of alternatives that must be evaluated." *Citizens for Smart Growth v. Peters*, 716 F. Supp. 2d 1203, 1212 (S.D. Fla. 2010), *aff'd*, 669 F.3d 1203 (11th Cir. 2012). And in *North Buckhead Civic Association*, we found that an EIS with only two alternatives studied in detail was sufficient. *See N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1541–43 (11th Cir. 1990). Of course, the FAA could have studied more alternatives, but they quickly rejected those that didn't meet paramount criteria, such as safety.

Second, Petitioners argued that the FAA also violated NEPA by incorrectly calculating the cumulative impact of its actions on the environment. In assessing the marginal change in noise from implementing the NextGen system in the South-Central Florida Metroplex, the FAA used the 2017–2018 period as its baseline. Petitioners stated this undercounted the effects of the FAA's pre-2017 actions, and that the FAA should have instead used the 2006 noise levels as a baseline. The court upheld the FAA's cumulative impact analysis.

Here, the FAA established a noise baseline using 1,741,841 flights in the South-Central Florida Metroplex region from June 1, 2017 to May 30, 2018 (which were all the flights that the FAA's radar detected in that timeframe). The FAA then modeled noise for both alternative plans (action and no-action) in 2021 and 2026. Based on this modeling, the FAA concluded that the Project will not have a significant noise impact. FAA Order 1050.1F defines a significant impact from the Proposed Action as an increase of Day-Night Level ("DNL") noise by 1.5 decibels at noise-sensitive land use locations (e.g., residences, schools, etc.) that are exposed to aircraft noise of DNL 65 decibels or higher. Further, the Final EA concluded that no population would experience an increase in "reportable noise," even when looking at areas with noise exposure levels between DNL 60 to 65 and DNL 45 to 60.

Because the 2006, 2015, and 2018 actions had no legally significant impact on noise levels, the FAA argues it did not need to incorporate them in its baseline measurement. The court agreed. It found that none of the prior actions had a legal impact on noise levels in the area because they were either subject to categorical exclusions or did not change flight procedures.

Finally, Petitioners argued the FAA violated NEPA when it failed to evaluate the Project's true air quality impact. The FAA relied on a complex regulatory framework in the process of determining that the effects of the project were entitled to a "presumption of conformity." The court reviewed the record and found that the FAA need not perform a conformity analysis on certain exempt actions that result in no emissions increases or increases that are clearly *de minimis.*

Here, the FAA made use of two presumptions: (1) for modifications to flight routes and procedures at or above 3,000 feet above ground level, and (2) for changes to flight paths below 3,000 feet when those changes are designed to improve operational efficiency. The court discussed that where the emissions will occur is relevant because the FAA's presumption is based on the determination that "aircraft emissions released into the atmosphere above" 3,000 feet "do not have an effect on pollution concentrations at ground level." Federal Presumed to Conform Actions Under General Conformity, 72 Fed. Reg. at 41,578.

Finally, Petitioners claim if the Project complies with State Implementation Plans (SIPs) and does not violate the CAA, NEPA requires the FAA to determine whether the action "[i]s not likely to have significant effects or the significance of the effects is unknown

and is therefore appropriate for an environmental assessment." 40 C.F.R. § 1501.3(a)(2). But the FAA defines a "significant" air quality impact under NEPA as one that "would cause pollutant concentrations to exceed one or more of the National Ambient Air Quality Standards (NAAQS), as established by the EPA the CAA." Order 1050.1F at 4-4. Here, the Project would not likely do so. Therefore, the FAA's Clean Air Act analysis showing that the Project would have only a *de minimis* impact on air quality satisfies NEPA.

Save our Skies v. Federal Aviation Admin., 50 F.4th 854 (9th Cir. 2022)
Agency prevailed.

Issue: Categorical Exclusion (CE), Extraordinary Circumstances.

Facts: Residents association filed petition for review of two FAA orders, which made editorial changes to FAA's prior orders that governed departure procedures at two airports, alleging that FAA violated NEPA by failing to complete an EA or EIS.

To comply with its procedural obligations under the NEPA, the FAA prepared an EA for the Southern California Metroplex. Multiple petitioners challenged that determination. The District of Columbia Circuit denied the petitions for review, concluding that the FAA's "environmental analysis was substantively reasonable and procedurally sound."

The two procedures at issue in this case are the HARYS departure procedure at Van Nuys Airport and the SLAPP departure procedure at the Burbank Airport. In early 2017, the FAA adopted the first versions of those procedures—HARYS ONE on April 27 and SLAPP ONE on March 2. HARY'S ONE was discarded due to noise issues involving Van Nuy's Airport Noise Abatement regulations.

To address that problem, the FAA promulgated HARYS TWO in May 2018. The new order replaced the HARYS ONE waypoint with one at essentially the same location as the waypoint that was originally proposed by and analyzed in the Metroplex.

Following HARYS TWO, the FAA promulgated two orders implementing minor editorial changes to the procedure.

Only the second of those orders, HARYS FOUR, is at issue in this case. HARYS FOUR made two changes to make the language of the procedure more consistent with the language in procedures used in other regions of the country. Specifically, it replaced the phrase "LANDING LAS COMPLEX" with "LANDING LAS TERMINAL AREA," and it added the phrase "VNY TOWER TO COMMUNICATIONS." Neither change affected the flight path of any aircraft departing from Van Nuys Airport.

As part of its preparation for promulgating HARYS FOUR, the FAA issued a declaration that the proposed order did not require additional review under NEPA because it was a minor change that was categorically excluded from review, and it did not present any "extraordinary circumstances."

While continuing to work on the SLAPP EA, the FAA determined that it was necessary to make a minor wording change to SLAPP ONE, like the one it made in HARYS FOUR, replacing "LANDING LAS COMPLEX" with "LANDING LAS TERMINAL AREA." That change did not affect the flight path of any aircraft departing from Burbank Airport. In the same declaration covering HARYS FOUR—and for the same reasons—the FAA stated that SLAPP TWO did not require additional review under NEPA.

Decision: Save Our Skies claimed the CEs were not sufficient and the FAA should have completed an EA. The FAA has established 16 categorical exclusions, one of which covers the "[p]ublication of existing air traffic control procedures that do not essentially change existing tracks, create new tracks, change altitude, or change concentration of aircraft on these tracks." FAA Order 1050.1F 5-6.5.k.

The court found the CEs encompass HARYS FOUR's and SLAPP TWO's contents exactly: The only actions taken in those orders are changing "LANDING LAS COMPLEX" to "LANDING LAS TERMINAL AREA" in HARYS FOUR and SLAPP TWO and adding "VNY TOWER TO COMMUNICATIONS" in HARYS FOUR. Those purely editorial changes had no effect on the flight path of any aircraft.

Save Our Skies did not meaningfully dispute that the orders fall within the scope of the categorical exclusion. Instead, it argued that the FAA could not invoke the exclusion because of what it calls the "obvious extraordinary circumstances" implicated by

HARYS FOUR and SLAPP TWO. But Save Our Skies did not explain how the minor wording changes "[m]ay have a significant impact." FAA Order 1050.1F 5-2.a. It asserted that the HARYS FOUR and SLAPP TWO edits "could exacerbate noise impacts," but the orders could not possibly have any effect on noise because, as we have explained, they do nothing to change the flight path of any aircraft. The orders did not implicate extraordinary circumstances, so the FAA did not err in relying on the categorical exclusion for its edits.

The court finally rejected the argument by Save our Skies that the FAA should have completed a supplemental statement. The Ninth Circuit held that even if the original EA were no longer valid here, the minor wording changes do not have an environmental impact, let alone a "significant or uncertain" one. The FAA therefore had no obligation to produce a supplemental assessment.

Highlands Ranch Neighborhood Coalition v. Cater, No. 19-1190, 2022 WL 815411 (10th Cir. Mar. 18, 2022) (not for publication).
Agencies prevailed.

Issues: Impact Assessment (noise).

Facts: Plaintiff, the Highlands Ranch Neighborhood Coalition (the Coalition) is a group of residents who live in the areas along the expanding state highway in the southwestern part of the Denver metropolitan area that will not receive noise-mitigation measures. The Coalition contends that the Agencies' decision to use only short-term noise measurements violated NEPA. The Tenth Circuit affirmed the district court order approving the agencies' decision.

Decision: Specifically, NEPA regulations require the Agencies to perform an EA to determine whether noise from the proposed expanded highway would significantly impact the surrounding areas.

FHWA regulations direct the Agencies to follow Colorado's state-specific guidelines for evaluating noise levels. *See* 23 C.F.R. § 772.7(b) (requiring state-highway agencies to develop and implement noise-evaluation policies consistent with federal regulations). These state-specific guidelines, found in Colorado's 2015 Noise Analysis and Abatement Guidelines ("the Guidelines"), require the Agencies to (1) identify the areas that will be affected by traffic noise, (2) evaluate the noise using Traffic Noise Model (TNM) software, and (3) validate the TNM with noise measurements.

At the heart of this dispute is step three: noise validation. The Agencies determined that sections 3.2.2 and 3.3 of the Guidelines permitted validation of the TNM using short-term noise measurements. Section 3.2.2 addresses modifications to existing roadways, and it requires the Agencies to perform at least two noise measurements. This section does not require a particular measurement method; instead, it requires only that the measurements "best illustrat[e] the existing traffic noise environment." Id. at 1288. Section 3.3 explains that to optimize the TNM's ability to "determine the worst-hour existing noise levels and predict ... future noise levels," field measurements are compared to the TNM's results. Id. Taking these sections together, the Agencies determined that short-term noise measurements would best represent traffic noise. After performing only short-term measurements, the Agencies drafted an EA concluding that noise-mitigation measures would be needed only in select areas along the highway. The Agencies then submitted the EA for public comment. During this comment period, the public raised concerns about noise mitigation. In response, the Agencies conducted long-term noise measurements. The Agencies did not incorporate the long-term measurements in the final assessment, but they noted that the results from the long-term measurements did not necessitate any changes.

The Coalition contended that the Agencies' decision to use only short-term noise measurements violated NEPA. The Coalition repeatedly notes that the Agencies had to follow state-specific guidelines for noise evaluations - the court found that the Agencies did, indeed, follow Colorado's guidelines.

The Coalition argued that the Agencies acted arbitrarily and capriciously by ignoring the Users Guide. The Agencies argued that the short-term measurements from sections 3.2.2 and 3.3 of the Guidelines follow more recent methodology and guidance from the FHWA. For support, the Agencies pointed to the declarations of a Region 1 Environmental Program Manager at the Colorado Department of Transportation, and a Senior Project Manager at Jacobs Engineering.

According to both experts, short-term noise measurements accurately provide data for highways with consistent traffic flow. Additionally, an Environmental Program Manager at the FHWA's Colorado Vision Office, stated in her declaration that the Users Guide served a limited purpose: to provide " 'standard validation practices' ... only if the model fails to validate in any given noise analysis."

The court found the use of short-term measurements comports with the plain language of the Guidelines and the Users Guide. It is also substantiated by declarations confirming that short-term noise measurements are appropriate. Accordingly, the Agencies' explanation for the use of short-term measurements was neither arbitrary nor capricious.

INDEPENDENT AGENCIES

Food & Water Watch v. Fed. Energy Reg. Comm'n, 28 F.4th 277 (D.C. Cir. 2022)
Agency did not prevail on one of the NEPA claims but prevailed on other NEPA claims.

Issues: Upstream Effects, Indirect Effects (GHG), Significance of Impacts, Federal Action (Climate Impacts), Segmentation.

Facts: Two environmental groups, Food & Water Watch and Berkshire Environmental Action Team, petitioned for review of FERC's decision to authorize a new natural gas pipeline and compressor station in Agawam, Massachusetts. The D.C. Circuit rejected Food & Water Watch's claims but noted that the EA failed to account for the reasonably foreseeable indirect effects of the project — specifically, the greenhouse-gas emissions attributable to burning the gas to be carried in the pipeline. The D.C. Circuit granted Food & Water Watch's petition for review and remanded to agency for preparation of a conforming EA.

Decision: The D.C. Circuit agreed with Food & Water Watch's indirect-effects argument as it relates to the pipeline's other terminus—the end user. As in the upstream-production context, FERC determined that the relevant effects—here, downstream gas consumption and the resulting greenhouse-gas emissions—were not reasonably foreseeable. After FERC attempted to procure the information about downstream gas consumption from the Applicant, and after receiving the Applicant's responses (that the additional capacity would be used in the local areas for residential and commercial uses), FERC deemed the information too "generalized" to "render the emissions associated with any consumption of the gas to be transported a reasonably foreseeable indirect effect of the project."

D.C. Circuit precedents established that downstream emissions are not, "as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project." *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (per curiam). Rather, foreseeability depends on information about the "destination and end use of the gas in question." The court found FERC had evidence that the Upgrade Project would add incremental capacity of 72,400 dekatherms per day to Tennessee Gas's system, 40,400 dekatherms per day of which was under contract with Columbia Gas. And, for that portion of the capacity under contract, FERC knew, with a good deal of specificity, where the gas in question would be going (to Columbia Gas's existing customers in the Greater Springfield area) and how it would be used (to fuel residential and commercial gas connections). Relying on *Sabal Trail*, the D.C. Circuit concluded that the available information was sufficiently specific to render downstream emissions reasonably foreseeable. *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) ("Sabal Trail"). The D.C. Circuit remanded to the agency to perform a supplemental EA in which it must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so.

Food & Water Watch's then challenged FERC's finding in its EA on the "significance" of the emissions directly connected to the project. The D.C. Circuit discussed that, in the EA's impacts section, FERC concluded that it was "unable to determine the significance of the Project's contribution to climate change." FERC quantified the greenhouse-gas emissions stemming from the construction and operation of the Upgrade Project but then found "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment." In reaching that conclusion, the FERC reviewed various models, none of which met its requirements. "Absent such a method," the FERC reasoned, no assessment of significance was possible." The court rejected (on jurisdictional grounds that the argument was not

previously raised in rehearing) that the Social Cost of Carbon was a potential tool for attributing impacts to quantities of greenhouse-gas emissions. The D.C. Circuit held that the Petitioner provided no reason to doubt the reasonableness of FERC's conclusion.

Food & Water Watch lastly contended that FERC improperly segmented its NEPA analysis of the Upgrade Project from its analysis of a nearby project, the Longmeadow Meter Station (Longmeadow Project). The D.C. Circuit relies on a "a set of factors that help clarify" when natural gas infrastructure projects—which frequently involve some degree of interconnection with other projects in the area—may be considered separately under NEPA. The courts focus projects' degree of physical and functional interdependence, *Del. Riverkeeper*. 753 F.3d at 1316, and their temporal overlap. *Id.* at 1318. Applying the same two criteria here, the D.C. Circuit held that FERC reasonably determined that the Upgrade Project and the Longmeadow Project were amenable to separate NEPA analyses.

Sierra Club. v. Fed. Energy Reg. Comm'n, 38 F.4th 220 (D.C. Cir. 2022)
Agency prevailed.

Issues: Mitigation, Cumulative Impacts.

Facts: Environmental organizations petitioned for review of an application by Mountain Valley, LLC resulting in a Certificate Order involving the construction of a new pipeline. That pipeline, the "Southgate Project," would extend Mountain Valley's Mainline System Project, connecting its terminus in Virginia to facilities in North Carolina. The D.C. Circuit denied the petition.

Decision: Petitioners attacked the FERC's EIS as inadequate on two fronts: its discussion of potential mitigation measures and the project's cumulative impacts.

Under NEPA's implementing regulations, an EIS must include potential mitigation measures that will "avoid, minimize, or compensate for effects" of the proposed activity. *See* 40 C.F.R. § 1508.1(s); *see also* id. §§ 1502.14(e); 1502.16(a); 1505.3. The Petitioners contended that FERC failed to take a "hard look" at the environmental consequences particularly with regard to sedimentation and erosion. Its reliance on measures that proved ineffective for the Mainline System and its failure to discuss the effectiveness of these measures was arbitrary and capricious, in Petitioners' view. Petitioners relied in part on a report from their own expert hydrogeologist, who criticized the measures discussed in the EIS—including silt fences, compost socks, water bars, traverse trench drains, and trench breakers to prevent stormwater runoff—as ineffective.

The court found that the EIS distinguished these measures from those that failed for Mountain Valley in the past. Pointing to empirical data, it cited 2018 as a record-breaking year for precipitation in the region. FERC did not expect that precipitation level to repeat and therefore, to cause the same erosion and sediment control issues. In response, Mountain Valley proposed monitoring weather conditions during construction and adjusting control measures. It will also document the effectiveness of its erosion control measures through weekly reports and allow FERC representatives on-site to enforce compliance. Third-party inspectors would have the authority to stop work on the pipeline immediately, if needed. The D.C. Circuit found Petitioners' criticisms missed the point of the mitigation measure discussion as an "information-forcing" exercise. It stated NEPA does not mandate that FERC formulate a specific mitigation plan, only that it discussed mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated."

Petitioners argued that FERC failed to consider the cumulative impact of the Southgate and Mainline System on aquatic resources in the affected area -- thus, purposefully restricted the temporal and geographic area of the project in its cumulative impact consideration to avoid overlap with the Mainline System Project. Chief among their concerns was turbidity plumes settling in the Kerr Reservoir, which sits downstream of both projects.

The D.C. Circuit reiterated that the purpose of the cumulative impact consideration in an EIS is to present a realistic picture of a proposed activity's impacts. The court recognized the deference accorded to FERC and found that it fulfilled that standard. First, FERC designated "hydrologic unit code-10" ("HUC-10") as the geographic scope for its cumulative analysis on surface water resources, which averages about 130,000 acres. Second, the FERC identified in-stream activities, including dredging and open pipeline crossing techniques, as

likely to result in increased turbidity in this area. EIS 4-242. It noted that turbidity plumes could travel downstream for a few miles, but that the impacts would be felt only temporarily, given the limited duration of these in-water activities and the plumes' tendency to disperse within several days. Third, FERC named other actions that would likely have an impact in the same area, with a particular focus on the Mainline System Project. The Southgate Project and Mainline System Project would overlap at two perennial streams and one intermittent stream within the Cherrystone Creek-Banister River HUC-10 watershed. But FERC stipulated that the Projects' stream crossings are three and a half miles apart, the Projects would not share overlapping workspace, and their construction would not take place at the same time. Lastly, FERC maintained that the cumulative impacts of the two projects on turbidity would be limited because of the geographic and spatial distance between the crossings. Therefore, in its cumulative analysis, FERC recognized the pertinent issues and reasonably concluded that the two projects are geographically and temporally separated enough to mitigate any compounded effect.

Delaware Riverkeeper Network v. Fed. Energy Reg. Comm'n, 45 F.4th 104 (D.C. Cir. Aug. 2, 2022)
Agency prevailed.

Issues: Upstream Effects, Indirect Effects (GHG, the Social Cost of Carbon Tool), Segmentation, Alternatives.

Facts: Petitioners challenged FERC's EA and approval of a Certificate for Adelphia Gateway, LLC's application involving the acquisition of an existing pipeline system in Pennsylvania and Delaware, an authorization to construct two short lateral pipeline segments extending from the existing pipeline infrastructure it would acquire, and to build additional facilities. The D.C. Circuit denied the petitions.

FERC conducted EA to assess the Southgate Project's safety and its effects on air quality, noise, and residential lands near the pipeline. FERC acknowledged that the Project "would contribute to global increases in [greenhouse-gas] levels," but did not calculate "the downstream GHG emissions of the southern portion of the Project," because "the downstream emissions from the remainder of the southern portion of the Project are not designated to a specific user, and the end use of the natural gas is not identified by Adelphia." FERC also declined to consider the upstream impacts of the Project on demand for natural gas, which it found to be "outside the scope of this EA." FERC considered and rejected several alternatives to the Project, and specifically to the location of the Quakertown Compressor Station. The EA concluded that "if Adelphia constructs and operates the proposed facilities in accordance with its application and supplements and FERC's recommended mitigation measures," the project would have "no significant impact" on the environment.

Decision: Petitioners contended that both the EA's environmental impact analysis and its analysis of alternatives to the Project were deficient, resulting in an erroneous FONSI. Petitioners maintained that the FERC failed to consider (1) upstream effects of increased demand for natural gas; (2) downstream effects of increased natural gas consumption, specifically the resulting greenhouse gas emissions from such consumption; (3) the effects on climate change resulting from downstream greenhouse-gas emissions; (4) the cumulative impact of the Project together with another pipeline project; and (5) the environmental effects of the Quakertown Compressor Station as compared to alternatives.

The court rejected Petitioners' arguments that FERC failed to consider the upstream effects because the petitioners "have identified no record evidence that would help the FERC predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project." The court considered that the petitioners did not point to any evidence that shippers "would not extract and produce [the] gas" even if the Southgate Project did not go forward.

The D.C. Circuit considered that FERC analyzed the downstream emissions impacts of much of the natural gas subscribed in Adelphia's four existing precedent agreements. FERC determined that any other downstream greenhouse gas emissions resulting from the Project — including emissions associated with a precedent agreement to deliver gas on the Zone South system for further transportation on the interstate grid — were not reasonably foreseeable because FERC was unable to identify the end users of that natural gas. The court rejected Petitioners' claim that because the vast majority of

natural gas is ultimately combusted for use as a fuel source, FERC should have used the entire volume of gas to be transported on the Project as a basis for estimating emissions — a so-called full-burn analysis.

FERC concluded that there was "no scientifically accepted methodology available to correlate specific amounts of GHG emissions to discrete changes in" the human environment and rejected the Social Cost of Carbon methodology for assessing climate change impacts. The Social Cost of Carbon is a tool that quantifies in monetary terms the climate change impact resulting from greenhouse-gas emissions. The D.C. Circuit upheld similar explanations as sufficient to justify FERC's refusal to use the Social Cost of Carbon tool. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016).

"An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Del. Riverkeeper*, 753 F.3d at 1313. Whether actions should be considered as connected turns on "whether one project will serve a significant purpose even if a second related project is not built." *City of Bos. Delegation v. FERC*, 897 F.3d 241, 252 (D.C. Cir. 2018). The court opined that "even assuming FERC was required to consider the Project and the PennEast Pipeline as connected actions, FERC's environmental review did not prejudice petitioners because the abandonment of the PennEast project eliminated the possibility that the projects could have a cumulative environmental impact."

Petitioners contended that FERC did not adequately consider the environmental effects of construction of the Quakertown Compressor Station as compared to alternative options. The court criticized Petitioners' "laundry list of purported deficiencies in FERC's analysis," and found that FERC took a "hard look" at each point raised by petitioners, discharging its obligations under NEPA.

Oglala Sioux Tribe v. U.S. Nuclear Reg. Comm'n, 45 F.4th 291 (D.C. Cir. 2022)
Agency prevailed.

Issues: Public Participation (Tribe requested a Scoping Hearing), Impact Assessment (Cultural Resources/Unavailable Information and other impacts).

Facts: The Oglala Sioux Tribe and its non-profit association Aligning for Responsible Mining sought review of the NRC's decision to grant Powertech (USA), Inc., a source material license to extract uranium from ore beds in the Dewey-Burdock area, which spans over 10,000 acres in South Dakota and sits atop aquifers laced with uranium-rich ore. The D.C. Circuit denied Tribe's petition for review.

Decision: The Tribe claimed that NRC failed to conduct a formal scoping of the project's impact and challenged the adequacy of the EIS with respect to the Tribe's cultural resources, the hydrogeologic effects of the project, the disposal of byproduct material, and mitigation strategies.

The court found that NRC's failure to conduct a hearing on scoping, as requested by the Tribes, to be harmless error. The D.C. Circuit noted that the agency placed notices in local papers, received comments from those notices, and met with various interested parties—including tribal authorities—to gather information on the Dewey-Burdock Project before drafting an EIS. As the EIS explains, "[t]he purpose of these meetings was to gather additional site-specific information to support NRC's environmental review." Even if these efforts did not precisely satisfy formal scoping requirements, the agency's efforts accomplished the same objectives, and the Tribe makes no argument that the failure impacted the project's actual scope. *See 1*0 C.F.R. § 51.29(a). In the context of this site-specific EIS, the court held that there was no evidence that the absence of formal scoping affected the agency's NEPA process or resulted in any prejudice.

The Tribe next argued NRC failed to satisfy NEPA because it did not adequately address the Tribe's cultural resources in the EIS. The parties do not question the Tribe's outsized historical connection to the Dewey-Burdock area, and the importance of considering those resources in reviewing Powertech's application. The NRC affirmed the Board's finding that this information was effectively unavailable because of the Tribe's intransigence.

The Tribe contended that the Agency should have relied on 40 C.F.R. 1502.22 - requiring an unavailability statement in the EIS. The Board further

explained the information was unavailable because of "the Tribe's demonstrated unwillingness or unjustifiable failure to work" with NRC, with no "reasonable assurance" of a future accord. Without the Tribe's participation, its cultural resource information "would not otherwise be obtainable" and thus was unavailable. In short, the D.C. Circuit held that the agency explained the unavailability of this information and presented the substance of its findings in publicly accessible decisions after on-the-record hearings.

The Tribe maintained that some information about its cultural resources was available since NRC could have conducted oral interviews with tribal members. But it is clear from the parties' course of dealing that oral interviews alone were never considered to be an adequate means of gathering the required information. The EIS also suggested that oral interviews alone would not be sufficient based on an earlier study of the area that found that "most of the tribal members interviewed knew their people had regular ceremonial, cultural, and religious activity in the Black Hill . . . however, no one could pinpoint present cultural, ceremonial, or religious use in the proposed area." Similarly, in affidavits tribal members averred general knowledge about cultural resources in the area but did not identify specific resources. Based on this course of dealing, the Sixth Circuit stated NRC did not commit a clear error of judgment.

The Sixth Circuit rejected the Tribe's claims that fault NRC for not spending enough time or money on a survey and effectively forcing the Tribe to subsidize it. NRC exercised its discretion to use compensated surveys as a method of gathering cultural resources. does not entitle the Tribe to demand more compensation or a different survey method. Nor does It planned to expend substantial resources on the survey and coordinated with Powertech to provide additional compensation for tribal members that participated in the survey.

The Sixth Circuit disagreed with the Tribe's remaining claims that the NRC did not take a "hard look" at the hydrogeologic effects of the project, the disposal of byproduct material, and mitigation strategies.

The D.C. Circuit held, as to the hydrogeologic concerns raised by the Tribe, NRC "adequately considered and disclosed the environmental impact of its actions." The EIS included meticulous analysis of contaminant levels present in the area's groundwater and set forth plans for restoring water quality using pre-licensing data. The record demonstrated NRC gave these impacts a hard look in the EIS: the agency identified 4,000 previously drilled exploration boreholes in addition to the 115 drilled by Powertech, analyzed the impact of those boreholes on vertical leakage, and outlined steps to mitigate those effects.

In the EIS, the agency thoroughly analyzed solid byproduct material by calculating the total byproduct accumulation of both Powertech's preferred and alternative disposal methods; explaining the process for temporary storage and transfer to a licensed disposal facility; identifying White Mesa as the presumed disposal facility and ensuring that facility has the capacity to accept Dewey-Burdock byproduct material; acknowledging that White Mesa still needed state authorization to accept this material; determining that transportation impacts will be small regardless of which disposal site Powertech uses; explaining the low risks and logistics of transporting byproduct material to White Mesa in accordance with DOT regulations; and mitigating any potential risk of improper storage by requiring Powertech to acquire and maintain a disposal contract before beginning operations. The D.C. Circuit held this analysis more than adequately satisfies NEPA's "hard look" requirement and undercuts the Tribe's claims that the agency failed to address byproduct material in the EIS.

The D.C. Circuit disagreed with the Tribe's claim involving mitigation. It held that the mitigation analysis in the EIS, however, was not limited to the list referenced by the Tribe. D.C. Circuit reiterated that the Tribe had "completely overlooked" other portions of the EIS, "which contained extensive analysis of mitigation measures" relating to issues such as "wildlife protection, wellfield testing, air impacts, and historical well hole plugging and abandonment." The court believed the Tribe focused only on the EIS's summary list of mitigation measures. The court opined that the agency more than satisfied NEPA's "hard look" requirement.

Sherwood v. Tennessee Valley Authority, 46 F.4th 439 (6th Cir. 2022)
Agency did not prevail.

Issues: Programmatic EIS, Remedies.

Facts: Property owners brought action alleging that TVA adopted tree-clearance practice without conducting required environmental review under NEPA. The Sixth Circuit agreed with property owners and reversed and remanded.

This appeal involves a decade-long dispute over the way in which the TVA clears trees in the transmission line rights-of-way it holds on the plaintiffs' private property. Finally, after years of litigation, in 2017, the district court enjoined TVA from practicing a particular tree-clearance practice, referred to as the "15-foot rule," until TVA prepared an EIS as required by NEPA.

In 2019, TVA moved to dissolve the injunction. TVA noted that it had held a statutory public comment period and then issued a final programmatic EIS in August 2019. TVA claimed that it rejected the 15-foot rule and instead adopted a plan called Alternative C, which it named "Alternative C: Condition-Based Control Strategy—End-State Meadow-Like, Except for Areas Actively Maintained by Others (Compatible Trees Allowed)." The current plaintiffs argued in response that the injunction should not be dissolved because the EIS "does not take a 'hard look' at the environmental consequences of TVA's proposed action and thus does not qualify as an 'environmental impact statement.'" The plaintiffs further argued that Alternative C was not a new policy, but instead was the "functional equivalent of the 15-foot rule," and the plaintiffs moved to require TVA to compile the administrative record supporting its choice of Alternative C.

In the instant case, the district court granted TVA's motion to dissolve the injunction. First, the district court concluded that a programmatic EIS was acceptable in this situation due to the "large region" at issue, so TVA could prepare a general, programmatic EIS and then later conduct more local analyses for specific sites. Second, the district court rejected the plaintiffs' argument that it was required to conduct a hard look analysis of whether TVA did in fact comply with NEPA. The district court held that that Alternative C was a different policy from the original 15-foot rule. The court thus concluded that if the plaintiffs wanted to challenge Alternative C, they could do so through new litigation. The plaintiffs appealed.

Decision: The court held that TVA did go through a public comment period and published a 328-page EIS that weighs the merits (and environmental impact of) several vegetation-management plans and explains why TVA chose Alternative C. The Sixth Circuit discussed that given Alternative C's similarities to the 15-foot rule, the district court should have interpreted the terms of the injunction to require a hard-look review at Alternative C before dissolving the injunction based on TVA's compliance with NEPA. The plaintiffs requested and received the injunction to prevent TVA from implementing the 15-foot rule until it complied with NEPA. Since Alternative C arguably has the same impact on the plaintiffs as the 15-foot rule, the court should make an actual finding on whether TVA has complied with NEPA before dissolving the injunction.

The court examined Plaintiffs' argument that the district court abused its discretion by requiring TVA to conduct only site-specific reviews (instead of site-specific EISs). The Sixth Circuit disagreed with the Plaintiffs and stated that the NEPA regulations allow agencies to "tier" their EISs and EAs "when it would eliminate repetitive discussions of the same issues." 40 C.F.R. § 1501.11(a). Tiering refers to the fact that when there is a programmatic EIS that covers a federal action as a whole, agencies are permitted to create a "program, plan, or policy statement or assessment of lesser or narrower scope or ... a site-specific statement or assessment" for smaller, localized projects that fall under the umbrella of the programmatic EIS. 40 C.F.R. § 1501.11(c)(1). The regulation makes clear that the site-specific statement or assessment does not necessarily need to be an EIS itself—instead, "the tiered document needs only to summarize and incorporate by reference the issues discussed in the broader document" and "shall concentrate on the issues specific to the subsequent action." 40 C.F.R. § 1501.11(b).

Recent updates to the regulations confirm that site-specific assessments are not required to take the form of an EIS. The final rule explaining the text of 40 C.F.R. § 1501.11 in its current state refers to "the typical use of EAs as a second-tier document tiered from an EIS." Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 2020 WL 4001797, 85 Fed. Reg. 43304, 43324 (July 16, 2020).

Furthermore, the Sixth Circuit pointed out that the district court did not rule out the possibility that TVA could be required to prepare a site-specific EIS if that was warranted by the circumstances. It was not an abuse of discretion for the district court to refer to site-specific reviews when a site-specific EIS may not be required in every localized situation. The Sixth Circuit remanded to the district court for further proceedings.

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