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# 2023 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, Bilal Harris, Mike Mayer, Melanie Hernandez, Charles P. Nicholson, and P. E. Hudson

**October 2024**

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

| | |
|---|---|
| AFRH | Armed Forces Retirement Home |
| APA | Administrative Procedures Act |
| BIA | Bureau of Indian Affairs |
| BLM | Bureau of Land Management |
| BOEM | Bureau of Ocean Energy Management |
| BOR | Bureau of Reclamation |
| BSEE | Bureau of Safety and Environmental Enforcement |
| CE | Categorical Exclusion |
| CEQ | Council on Environmental Quality |
| CFR | Code of Federal Regulations |
| DOE | Department of Energy |
| DOI | Department of Interior |
| 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) |
| 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 |
| GSA | General Services Administration |
| H.R. | House Resolution |
| HUD | Housing and Urban Development |
| MARAD | Maritime Administration |
| NAEP | National Association of Environmental Professionals |
| NASA | National Aeronautics and Space Administration |
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act |
| NOA | Notice of Availability |
| NOAA | National Oceanic and Atmospheric Administration |
| NOI | Notice of Intent |
| NPS | National Park Service |
| NRC | Nuclear Regulatory Commission |
| NRCS | Natural Resources Conservation Service |
| NSA | Nuclear Security Agency |
| 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 |
| USCG | United States Coast Guard |
| USFS | U.S. Forest Service |
| USN | United States Navy |
| USPS | U.S. Postal Service |

# 1. Introduction

Michael Mayer, JD[1]
NAEP President 2023–2025

This 2023 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. Given the statutory and regulatory changes released in 2023, understanding how those changes affect the implementation of NEPA is critical to our membership.

This seventeenth Annual NEPA Report aligns with the mission of 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. I want to thank the 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, P. E. Hudson, Bilal Harris, and Melanie Hernandez. Without their dedication to the practice, this report would not be possible.

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# 2. The NEPA Working Group in 2023

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 2023 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 2023.

The Annual NEPA Report is prepared and published through the initiative and volunteer efforts of members of the NAEP's NEPA Working Group. The 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 discussed during the monthly meetings of the NEPA Working Group. Highlights of 2023 activities and monthly meetings included:

- Discussion of the amendments to NEPA in the Fiscal Reduction Act
- Discussion of CEQ's proposed Phase II revisions to the regulations for implementing NEPA
- Discussion of CEQ's interim guidance on considering greenhouse gas emissions and climate change in NEPA reviews
- Discussion of the Federal Emergency Management Agency EIS on the implementation of the plan for National Flood Insurance Program —Endangered Species Act Integration in Oregon
- Discussion of the Department of Energy proposed rulemaking on the Coordinated Interagency Transmission Authorization and Permits Program
- Review of categorical exclusion adoptions and rulemaking by agencies
- A presentation on NEPAccess by its University of Arizona developers
- An update by CEQ staff on the E-NEPA and CEQ/Office of Management and Budget/Federal Permitting Improvement Steering Committee initiatives on use of information technology in environmental reviews
- 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
- Participation in NAEP webinars on NEPA topics

[2] Questions concerning this report should be directed to:
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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, go to https://www.naep.org/working-groups and follow the instructions to join a listserve (i.e., working group). NAEP membership is required.

# 3. NEPA Highlights in 2023

Charles P. Nicholson, PhD[3]
Chair, NAEP NEPA Working Group

2023 was an important year in the evolution of the National Environmental Policy Act and its associated compliance processes. As in recent sessions of Congress, numerous bills addressing NEPA compliance processes were introduced in 2023, the first session of the 118th Congress. Only one substantive bill addressing NEPA, the Fiscal Responsibility Act, was signed into law. This bill, however, was the most substantive law affecting NEPA compliance processes in decades. It addressed several aspects of permitting reform, a hot topic in recent Congresses, through several amendments to NEPA. These amendments, based on the Previously introduced BUILDER Act, codified several of the provisions newly introduced in the 2020 CEQ NEPA regulations as well as the rescinded Executive Order 13807. The amendments to NEPA were negotiated with the White House and received bipartisan support. Very few of the other substantive bills addressing NEPA progressed beyond being introduced and assigned to committee. And several of the proponents permitting reform were dissatisfied with the scope of the amendments to NEPA and promised to continue their efforts in 2024.

The Council on Environmental Quality (CEQ) continued its effort to revise its 2020 regulations for implementing NEPA with the publication of the proposed Phase II rulemaking on July 31. This proposed rule was targeted to be issued earlier, but with the passage of the Fiscal Responsibility Act amendments to NEPA in June, CEQ quickly reworked the proposed rulemaking to address the NEPA amendments in the Fiscal Responsibility Act. By the time the comment period closed on September 31, CEQ received almost 150,000 comments on the proposed rule, including a comment letter from NAEP. At the end of the year, CEQ was still reviewing the comments and working on the final rule.

There were other notable CEQ actions on NEPA during 2023. In January, CEQ issued interim NEPA guidance on considering greenhouse gas emissions and climate change that largely reiterated the 2016 guidance that was rescinded by President Trump. In March, CDQ hosted an industry forum on potential Phase ii revisions to the NEPA regulations. A few NAEP members participated in this forum and the discussions during the forum probably influenced the proposed Phase ii regulations that CEQ issued a few months later. And in October, CEQ, along with the Office of Management and Budget and the Federal Permitting Improvement Steering Council hosted the first-ever Environmental Permitting and Data Summit to discuss tools for more effective and efficient environmental reviews. This was held, in part, to inform CEQ's E-NEPA study prescribed in the NEPA amendments in the Fiscal Responsibility Act.

The number of EISs issued in 2023, 162, continued the recent decline and was the lowest since at least 1997. The preparation time for final EISs issued in 2023 continued to decline from its 2016 peak, with an average time of 4.1 years and a median time of 2.7 years from publication of the notice of intent to publication of the notice of availability. The average preparation time was 30 days less than for final EISs

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

issued in 2022 and the lowest average preparation time since 2011. The average and median preparation times for draft EISs issued in 2023, 1.8 and 1.3 years, respectively, were also low. Of the 77 final EISs issued in 2023, 22 (28 percent) were completed within the 2-year time limit in the 2020 CEQ NEPA regulations and the NEPA amendments in the Fiscal Responsibility Act. Due to the lack of a centralized database or reporting system, similar statistics on preparation times for environmental assessments are not readily available.

U.S. Courts of Appeal issued 25 decisions on NEPA cases during 2023, somewhat higher than the 2006-2022 annual average of 23 decisions. Agencies prevailed in 19 cases, did not prevail in three cases, and prevailed in one NEPA claim but not the others in three cases. The cases where agencies did not prevail or only partially prevailed were over plaintiffs'' claims concerning the range of alternatives analyzed, the application of a categorical exclusion, the impacts of greenhouse gas emissions, noise impacts, scope of analysis of direct, indirect, and cumulative impacts, consideration of opposing viewpoints, reliance on inaccurate data, inadequate discussion of mitigation measures, and unsupported significance determinations.

# 4. Just the Stats

James Gregory[4]

In 2023, Notices of Availability (NOAs) for 182 environmental impact statements (EISs) were published in the Federal Register. Of the published notices, 84 were listed as draft EISs (including revised and supplemental draft EISs and one withdrawn) and 78 were final EISs (including supplemental and revised final EISs); 20 final EISs were adoptions and are not included in this assessment. With the removal of the adoptions, the total number of EISs in 2023 was 162. 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.[5]

## 4.1 EISs Published in 2023

The 162 EISs published in 2023 is notably fewer than the number EISs published in the two preceding years (185 in 2022 and 186 in 2021). Table 4-1 presents a summary of the total number of EISs published by year for the past 10 years.

**Table 4-1 EISs Published 2014—2023**

| Year | Number of EISs Published |
|---|---|
| 2023 | 162 |
| 2022 | 185 |
| 2021 | 186 |
| 2020 | 254 |
| 2019 | 219 |
| 2018 | 323 |
| 2017 | 257 |
| 2016 | 312 |
| 2015 | 381 |
| 2014 | 384 |

## 4.2 EISs Published in 2023 by Agency and Department

Thirty-seven agencies published at least one EIS in 2023 and three agencies published at least 15 EISs (Table 4-2), the same as in 2022. The Bureau of Land Management, the US Forest Service and the Federal Energy Regulatory Commission were the agencies that published the most EISs (25, 22 and 15, respectively). One hundred and three EISs had federal cooperating agencies.

Four non-federal agencies with delegated NEPA authority (California Department of Transportation, Los Angeles County Housing Community Investment Department, Texas Department of

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

Transportation, and Utah Department of Transportation) were lead agencies for EISs published in 2023. Table 4-2 shows draft and final EISs filed in 2023 by agency.

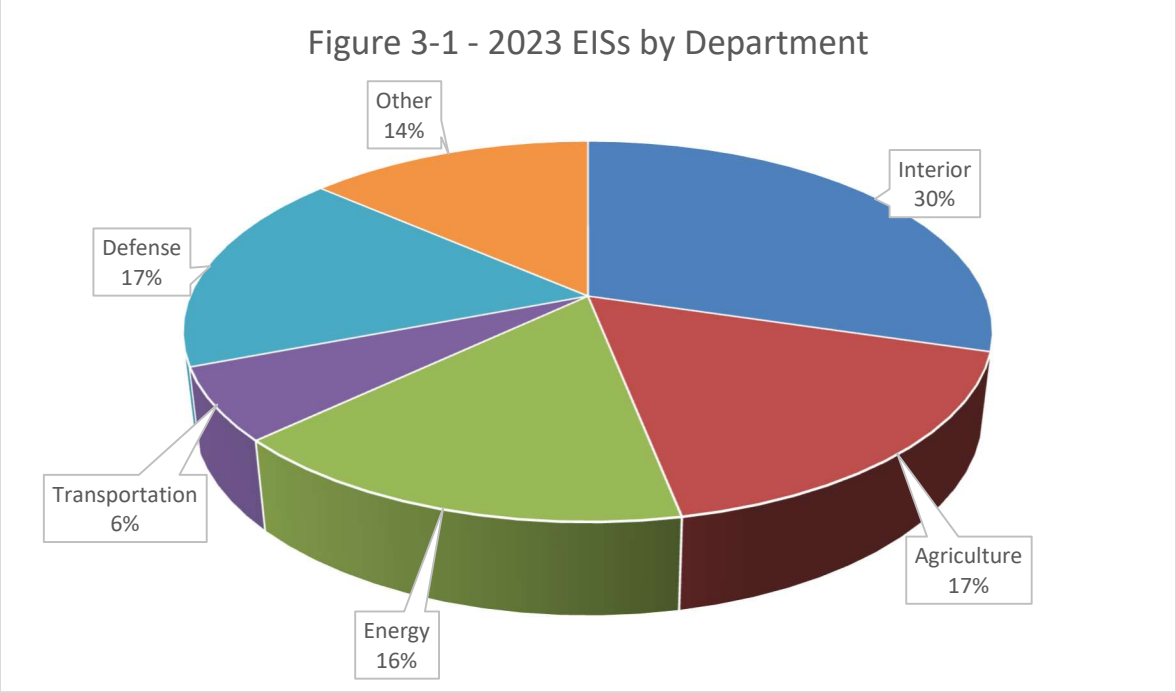
**Table 4-2. Draft and final EISs published in the *Federal Register* in 2023 by lead agency.**

| Lead Agency | Number of EISs |
|---|---|
| Bureau of Land Management | 25 |
| Forest Service | 22 |
| Federal Energy Regulatory Commission | 15 |
| US Army Corps of Engineers | 12 |
| Bureau of Ocean Energy Management | 11 |
| US Air Force | 10 |
| Nuclear Regulatory Commission | 6 |
| Texas Department of Transportation | 6 |
| Federal Highway Administration | 5 |
| General Services Administration | 5 |
| Natural Resources Conservation Service | 5 |
| Fish and Wildlife Service | 3 |
| Bureau of Reclamation | 3 |
| National Park Service | 3 |
| Tennessee Valley Authority | 3 |
| Bureau of Indian Affairs | 2 |
| Federal Railroad Administration | 2 |
| Los Angeles Housing Community Investment Department | 2 |
| National Oceanic and Atmospheric Administration | 2 |
| National Marine Fisheries Service | 2 |
| US Army | 2 |
| US Navy | 2 |
| US Postal Service | 2 |
| California Department of Transportation | 1 |
| Department of Agriculture | 1 |
| Department of Defense | 1 |
| Department of Energy | 1 |
| Department of Interior | 1 |
| Federal Transit Administration | 1 |
| National Aeronautics and Space Administration | 1 |
| National Highway Traffic Safety Administration | 1 |

| Lead Agency | Number of EISs |
|---|---|
| National Nuclear Security Administration | 1 |
| National Security Agency | 1 |
| Surface Transportation Board | 1 |
| Utah Department of Transportation | 1 |
| **Total** | 162 |

In 2023 five departments[6] --Interior, Agriculture, Defense, Energy, and Transportation -- were responsible for 86 percent all EISs published. These are the same five departments that together published the majority of EISs in 2022. Department of Interior agencies published the largest share of EISs (30% of all EISs published). Figure 4-1 shows the EISs by department, with the departments responsible for publishing large numbers of EISs broken out separately. Independent agencies are included in the "Other" category.

**Figure 4-1. Draft and final EISs published in 2023 by department.**




## 4.3 Geographic Distribution of EISs Published in 2023

The geographic breakdown of draft and final EISs by state and territory is shown in Table 4-3. As has been the case in prior years, many more EISs were prepared for actions in California (15) than in any other state[7]. 2023 continued a trend of lower totals for California than in previous years, with 22 EISs in 2022, 32 in 2021, 2020, and 60 in 2019. Alaska (10) and Texas (9) had the second- and third-most

[6] EISs published by non-federal agencies with delegated authority were counted as "other agencies".
[7] Based on EISs for which one state was identified in the EPA EIS database.

EISs published in 2023. Thirty-nine EISs were listed as involving multiple states. Six EISs were identified in the database as regional, national, for programmatic actions, a reduction from 14 in 2023.

**Table 4-3. 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 |

# 5. Preparation Times for Environmental Impact Statements Made Available in Calendar Year 2023

Piet deWitt and Carole deWitt[8]

## 5.1 Highlights of 2023

- In 2023, federal agencies continued to reduce their annual average final environmental impact statement (EIS) preparation time.
- Federal agencies made available the lowest number of both draft and final EISs since 1997.

## 5.2 EIS Numbers

In calendar year 2023, federal agencies made available through Notices of Availability (NOAs) published in the *Federal Register* by the Environmental Protection Agency (EPA) 84 draft and draft supplemental EISs (i.e., draft EISs) and 78 final and final supplemental EISs (i.e., final EISs).

The number of draft EISs made available in 2023 was the lowest for the period 1997–2023. The highest number of draft EISs made available in any year since 1997 was 320 in 2003. The 84 draft EISs made available in 2023 supplanted the previous low of 93 drafts in 2022. The average number of draft EISs made available in a year has decreased from 2003 at an average rate of 12.1 documents per year as determined by linear regression. The coefficient of determination ($R^2$) for this regression is 0.97, indicative of a highly significant decreasing trend. For the period 1997–2023, the average number of draft EISs made available in a year was 218 ± 73 (mean ± one standard deviation).

From 1997–2023 an average of 31.5 ± 3.6 (mean ± one standard deviation) agencies made draft EISs available each year. The highest number of agencies was 37 in 2007, and the lowest number was 23 in 2023. In 2017, only 27 agencies made draft EISs available. This was the first year in which fewer than 30 agencies made draft EISs available, and 30 agencies have not made draft EISs available since then. From 1997–2016, the average number of agencies making draft EISs available was 33.1 ± 2.3. For the period 2017–2023, the average was 27.0 ± 2.5.

The 78 final EISs in 2023 were two EISs fewer than the previous low of 80 final EISs in 2021. The highest number of final EISs in our study period was 306 in 2004. Since 2004, the number of final EISs made available in a year has decreased at an average rate of 10.6 EISs per year ($R^2$ = 0.92). For the period 1997-2023, the average number of final EIS made available in a year was 190 ± 61.

From 1997–2023 an average of 30.1 ± 3.6 agencies made final EISs available. The highest number of agencies was 38 in 2007, and the lowest number was 25 in 2019, 2021, and 2023. From 1997–2023, an average of 31.8 ± 3.0 agencies made final EISs available annually. For each year since 2016, the number of agencies making final EISs available has been less than 30 with an average for the period 2017–2023 of 26.1 ± 1.5 agencies.

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## 5.3 Final EISs Numbers and Preparation Times

In calendar year 2023, 25 agencies made 78 final EISs available to the public. One final supplemental EIS had no Notice of Intent (NOI) for its supplementation and is not included in our preparation time calculations. Our 2023 sample includes 77 final EISs (98.7% of our final EIS population).

In 2023 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 1,503 ± 1,508 days (4.1 ± 4.1 years); see Table 5-1 "ALL" and "NOI to Final EIS". The 2023 average was 30 days less than the 2022 average of 1,533 ± 1,230 days (4.2 ± 3.4 years). For the period 1997–2021, the highest annual average preparation time for final EISs was 1,864 ± 1,259 days (5.1 ± 3.4 years) in 2016, and the lowest annual average was 1,166 ± 899 days (3.2 ± 2.5 years) in the year 2000. The 2023 average is 361 days (1 year) less than the 2016 average and 337 days (0.9 year) more than the year 2000 average. Since 2016, final EIS preparation times have decreased at an average rate of 48 days per year ($R^2 = 0.84$).

**Table 5-1 Preparation times in calendar days for final and final supplemental EISs made available in calendar year 2023. 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** | 77 | 100 | **966** | 1.142 | 568 | **537** | 534 | 336 | **1,503** | 1,508 | 969 | 198 | 8,029 |
| **APHIS** | 1 | 1.3 | **1,092** | | | **295** | | | **1,387** | | | | |
| **BIA** | 1 | 1.3 | **2,622** | | | **295** | | | **1,387** | | | | |
| **BLM** | 7 | 9.1 | **1,050** | 1,088 | 738 | **678** | 551 | 420 | **1728** | 1,583 | 1,099 | 623 | 4,817 |
| **BOEM** | 6 | 7.8 | **689** | 471 | 506 | **343** | 58 | 329 | **1,032** | 522 | 816 | 787 | 2,097 |
| **BOR** | 1 | 1.3 | **5,768** | | | **2,261** | | | **8,029** | | | | |
| **BSEE** | 1 | 1.3 | **462** | | | **364** | | | **826** | | | | |
| **FERC** | 11 | 14.3 | **387** | 575 | 150 | **245** | 218 | 154 | **632** | 741 | 325 | 198 | 2,387 |
| **FHWA** | 8 | 10.4 | **1,657** | 1,568 | 946 | **460** | 426 | 326 | **2,116** | 1,926 | 1,324 | 823 | 6,279 |
| **FRA** | 1 | 1.3 | **1,590** | , | | **3,304** | | | **4894** | | | | |
| **FWS** | 2 | 2.6 | **330** | 168 | 330 | **217** | 10 | 217 | **547** | 178 | 547 | 421 | 673 |
| **GSA** | 1 | 1.3 | **164** | | | **679** | | | **843** | | | | |
| **HUD** | 1 | 1.3 | **809** | | | **126** | | | **935** | | | | |
| **NASA** | 1 | 1.3 | **203** | | | **210** | | | **413** | | | | |
| **NNSA** | 1 | 1.3 | **821** | | | **364** | | | **1,185** | | | | |
| **NOAA** | 2 | 2.6 | **2,297** | 1,975 | 2,297 | **532** | 40 | 532 | **2,829** | 1,935 | 2,829 | 1,460 | 4,197 |
| **NRC** | 3 | 3.9 | **840** | 727 | 644 | **497** | 256 | 378 | **1,337** | 739 | 1435 | 553 | 2022 |
| **NRCS** | 1 | 1.3 | **385** | | | **105** | | | **490** | | | | |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **STB** | 1 | 1.3 | **273** | | | **1,775** | | | **448** | | | | |
| **TVA** | 1 | 1.3 | **619** | | | **182** | | | **969** | | | | |
| **USA** | 2 | 2.6 | **364** | 115 | 364 | **770** | 119 | 770 | **1,134** | 233 | 1,134 | 969 | 1,299 |
| **USACE** | 3 | 3.9 | **2,258** | 2,415 | 1,001 | **800** | 549 | 535 | **3,058** | 2,963 | 1,536 | 1,165 | 6,473 |
| **USAF** | 5 | 6.5 | **422** | 199 | 302 | **456** | 330 | 287 | **878** | 389 | 917 | 385 | 1,267 |
| **USFS** | 13 | 16.9 | **865** | 608 | 751 | **761** | 456 | 714 | **1,626** | 977 | 1,390 | 282 | 3,264 |
| **USN** | 2 | 2.6 | **707** | 663 | 707 | **305** | 15 | 305 | **1,012** | 678 | 1,012 | 532 | 1,491 |
| **USPS** | 1 | 1.3 | **568** | | | **217** | | | **785** | | | | |

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

The draft EISs for the 2023 final EISs required an average of 966 ± 1,142 days (2.6 ± 3.1 years) to prepare following the publication of their NOIs in the *Federal Register* (see Table 5-1 "ALL" and "NOI to Draft EIS"). The 2023 average is 29 days (0.08 year) less than the 2022 average of 995 ± 904 days (2.7 ± 2.5 years). The 2023 average is also 412 days (1.1 year) less than the highest annual average 1,378 ± 1,103 days (3.8 ± 3.0 years) in 2016 and 256 days (0.7 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 55 days per year ($R^2 = 0.89$).

The 2023 average time for preparing the final EIS from the draft EIS was 537 ± 534 days (1.5 ± 1.5 years) (see Table 5-1 "ALL" and "Draft EIS to Final EIS"). The 2023 average was one day less than the 2022 average of 538 ± 574 days (1.5 ± 1.6 years). The 2023 average was also 71 days shorter than the longest average of 608 ± 623 days (1.7 ± 1.7 years) in 2018 and 148 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 7 days per year ($R^2 = 0.14$).

In 2023, 9 EISs (11.7 % of Final EISs) were completed in less than one year. As in 2022, most of those EISs, eight in 2023, were prepared by the Federal Energy Regulatory Commission (FERC). FERC completed those eight EISs in an average of 278 ± 58 days.

The five historically most prolific EIS-preparing agencies (Federal Highway Administration, U.S. Army Corps of Engineers, U.S. Forest Service, Bureau of Land Management, National Park Service) made available 31 final EISs in 2023, 40% of all 2023 Final EISs. The EISs from these agencies required an average of 1,914 ± 1,587 days (5.2 ± 4.3 years) to complete. The 46 final EISs prepared by agencies other than the five most prolific required an average of 1,226 ± 1,402 days (3.4 ± 3.8 years) to complete. The average EIS-preparation times for four of the five most prolific EIS preparers are included in the ten longest averages for 2023 (see Table 5-1, Final EISs). The National Park Service did not make a final EIS available in 2023.

For the period 1997–2023, the five historically most prolific EIS-preparing agencies made available 59.5 ± 7.1 % of all final EISs made available each year with a maximum of 70.6 % in 2003 and a minimum of 36.8 % in 2022. These agencies made an average of 60.9 ± 5.0 % for the period 1997–2020. After 2020, the agencies contributed an average of 41.5 ± 5.5 % of all final EISs.

In 2023, all federal agencies combined established new high completion percentages for final EISs completed in the intervals 2-to-3 years, 13-to-14 years, 17-to-18 years, and 21-to-22 years (see Table 5-2). These agencies also established a new low completion percentage for the 5-to-6-year interval.

**Table 5-2. A comparison of 2023 final EIS completion rates with the average final EIS completion rates for the period 1997 through 2022.**

| Completion Interval in Years from NOI | 2023 Completion Percentage | 1997 - 2022 | | | |
|---|---|---|---|---|---|
| | | Average Completion Percentage | Standard Deviation | Lowest Completion Percentage (Year) | Highest Completion Percentage (Year) |
| **0 to 1** | 11.7 | 7.2 | 3.8 | 0.7 (2018) | 16.8 (2022) |
| **1 to 2** | 16.9 | 22.4 | 4.9 | 13.7 (2015) | 30.3 (2000) |
| **2 to 3** | 24.7 | 18.4 | 2.5 | 15.2 (2008) | 24.5 (2009) |
| **3 to 4** | 15.6 | 13.1 | 3.1 | 8.1 (2022) | 19.5 (2019) |
| **4 to 5** | 10.4 | 10.1 | 2.2 | 6.2 (2002) | 16.4 (2012) |
| **5 to 6** | 2.6 | 7.3 | 1.9 | 4.3 (2017) | 10.6 (2011) |
| **6 to 7** | 2.6 | 5.9 | 2.3 | 0.0 (2021) | 10.7 (2006) |
| **7 to 8** | 2.6 | 4.0 | 1.5 | 1.5 (2000) | 7.0 (2013) |
| **8 to 9** | 3.9 | 3.5 | 1.9 | 1.3 (2002) | 7.7 (2021) |
| **9 to 10** | 0.0 | 2.2 | 1.4 | 0.0 (2021) | 6.0 (2015) |
| **10 to 11** | 1.3 | 1.6 | 1.1 | 0.4 (4 years) | 3.8 (2014) |
| **11 to 12** | 1.3 | 0.84 | 0.69 | 0.0 (7 years) | 2.6 (2021) |
| **12 to 13** | 0.0 | 0.96 | 0.96 | 0.0 (6 years) | 3.4 (2019) |
| **13 to 14** | 2.6 | 0.43 | 0.53 | 0.0 (11 years) | 2.3 (2013) |
| **14 to 15** | 0.0 | 0.57 | 0.68 | 0.0 (11 years) | 2.6 (2021) |
| **15 to 16** | 0.0 | 0.32 | 0.52 | 0.0 (17 years) | 1.8 (2016) |
| **16 to 17** | 0.0 | 0.21 | 0.42 | 0.0 (18 years) | 1.5 (2018) |
| **17 to 18** | 2.6 | 0.14 | 0.24 | 0.0 (19 years) | 0.7 (2 years) |
| **18 to 19** | 0.0 | 0.19 | 0.39 | 0.0 (19 years) | 1.5 (2018) |
| **19 to 20** | 0.0 | 0.02 | 0.18 | 0.0 (25 years) | 0.6 (2013) |
| **20 to 21** | 0.0 | 0.13 | 0.33 | 0.0 (20 years) | 1.3 (2022) |
| **21 to 22** | 1.3 | 0.07 | 0.27 | 0.0 (23 years) | 1.3 (2022) |

## 5.4 Draft EISs Numbers and Preparation Times

In calendar year 2023, 23 agencies made 84 draft EISs available to the public. This was the lowest number of draft EISs made available in the period 1997–2023. Two draft supplemental EISs had no NOI published in the *Federal Register* and are not included in our preparation time calculations. For one of those agencies, the draft supplemental EIS was its only contribution and it does not appear in this

analysis as a contributing agency. Our sample of 82 draft EISs is 98% of the total 2023 draft EIS population.

The 2023 annual average draft EIS preparation time for all agencies combined was 651 ± 603 days (1.8 ± 1.7 years) (see "ALL" in Table 5-3). The 2023 average is 593 days shorter than the highest average 1,244 ± 1,240 days (3.4 ± 3.4 years) observed in 2019 and 59 days shorter than the previous lowest annual average of 710 ± 666 days (1.9 ± 1.8 years) observed in the year 2000.

**Table 5-3. Preparation times in calendar days for draft and draft supplemental EISs made available in calendar year 2023.**

| Agency | n | % | Mean | s.d. | Med | Min | Max |
|---|---|---|---|---|---|---|---|
| **ALL** | 82 | 100 | **651** | 603 | 484 | 15 | 2782 |
| **BIA** | 1 | 1.2 | **2,622** | | | | |
| **BLM** | 18 | 22.0 | **535** | 269 | 488 | 214 | 1,372 |
| **BOEM** | 3 | 3.7 | **518** | 68 | 485 | 473 | 596 |
| **BOR** | 2 | 2.4 | **246** | 139 | 246 | 148 | 344 |
| **FERC** | 5 | 6.1 | **197** | 131 | 171 | 15 | 346 |
| **FHWA** | 5 | 6.1 | **693** | 151 | 739 | 525 | 877 |
| **FRA** | 1 | 1.2 | **2,753** | | | | |
| **FTA** | 1 | 1.2 | **58** | | | | |
| **FWS** | 3 | 3.7 | **338** | 137 | 319 | 211 | 483 |
| **GSA** | 4 | 4.9 | **314** | 93 | 320 | 194 | 421 |
| **HUD** | 1 | 1.2 | **809** | | | | |
| **NOAA** | 2 | 2.4 | **1,055** | 559 | 1,055 | 660 | 1,450 |
| **NPS** | 2 | 2.4 | **420** | 198 | 420 | 280 | 560 |
| **NRC** | 3 | 3.7 | **536** | 351 | 336 | 331 | 941 |
| **NRCS** | 4 | 4.9 | **686** | 367 | 694 | 352 | 1,003 |
| **NSA** | 1 | 1.2 | **354** | | | | |
| **TVA** | 2 | 2.4 | **661** | 59 | 661 | 619 | 703 |
| **USA** | 1 | 1.2 | **595** | | | | |
| **USACE** | 9 | 11.0 | **1,062** | 971 | 1,054 | 133 | 2,698 |
| **USAF** | 5 | 6.1 | **545** | 463 | 302 | 227 | 1,343 |
| **USFS** | 8 | 10.0 | **810** | 848 | 705 | 93 | 2,782 |
| **USPS** | 1 | 1.2 | **385** | | | | |

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

The 28 draft EISs made available within one year of the publication of their NOI were prepared by 13 of the 23 agencies that produced draft EISs in 2023. These agencies produced these draft EISs in an average 237 ± 96 days (0.65 ± 0.26 years). FERC produced five of these draft EISs, more than any other agency in the group. FERC produced these draft EISs at an average rate of 197 ± 131 days (0.54 ± 0.36 years).

For the period 1997–2023, the five most historically most prolific EIS-preparing agencies contributed an average of 57.7 ± 8.6 % of all draft EISs made available, with a maximum of 66.6 % in 2003 and a minimum of 36.4% in 2020. The group's contribution in 2019 was 60.0%. After 2019, the group's contribution averaged 41.1 ± 6.9 %.

For all agencies combined, the proportion of 2023 draft EISs with a preparation time of 1-to-2 years and 7-to-8 years was a record high (Table 5-4). The proportion of 2023 draft EISs with a preparation time of 3-to-4 years, 4-to-5 years, and 5-to-6 years was a record low.

**Table 5-4. 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) |

## 5.5 Draft and Final EIS Preparation Time Ranks

Table 5-5 ranks the agencies that made available draft and/or final EISs in 2023 from the longest average preparation time to the shortest average time. Six agencies appeared in the ten longest averages for both draft and final EISs: Federal Railroad Administration (2 & 1), U.S. Army Corps of Engineers (3 & 3), National Oceanic and Atmospheric Administration (4 & 4), Bureau of Indian Affairs (5 & 2), Federal Highway Administration (6 & 7), and U.S. Forest Service (8 & 5). Three of these agencies (USACE, FHWA, and USFS are members of the historically most prolific EIS preparers. Five of the six agencies (above) were in this same group in 2022.

**Table 5-5. Annual average EIS-preparation times in calendar days for final and draft EISs made available in 2023 arranged in descending order.**

| 2023 Final EISs | | | | 2023 Draft EISs | | | |
|---|---|---|---|---|---|---|---|
| Rank | Agency | n | Mean | Rank | Agency | n | Mean |
| 1 | AFRH | 1 | 3,727 | 1 | FRA | 1 | 2,962 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1 | FRA | 1 | 2,753 | 2 | FHWA | 8 | 1,238 |
| 2 | BIA | 1 | 2,622 | 3 | BIA | 3 | 1,209 |
| 3 | USACE | 9 | 1,062 | 4 | USACE | 10 | 1,192 |
| 4 | NOAA | 2 | 1,055 | 5 | MARAD | 1 | 1,185 |
| 5 | USFS | 8 | 810 | 6 | NOAA | 3 | 1,162 |
| 6 | HUD | 1 | 809 | 7 | FTA | 1 | 1,081 |
| 7 | FHWA | 5 | 693 | 8 | USFS | 8 | 942 |
| 8 | NRCS | 4 | 686 | 9 | APHIS | 2 | 777 |
| 9 | TVA | 2 | 661 | 10 | NNSA | 2 | 776 |
| 10 | USA | 1 | 595 | 11 | USN | 4 | 672 |
| 11 | USAF | 5 | 545 | 12 | BOEM | 7 | 664 |
| 12 | NRC | 3 | 536 | 13 | NRC | 2 | 593 |
| 13 | BLM | 18 | 535 | 14 | USA | 1 | 581 |
| 14 | BOEM | 3 | 518 | 15 | USCG | 1 | 518 |
| 15 | NPS | 2 | 420 | 16 | BSEE | 1 | 462 |
| 16 | USPS | 1 | 385 | 17 | EPA | 1 | 438 |
| 17 | NSA | 1 | 354 | 18 | USAF | 2 | 438 |
| 18 | FWS | 3 | 338 | 19 | BLM | 5 | 420 |
| 19 | GSA | 4 | 314 | 20 | FWS | 2 | 323 |
| 20 | BOR | 2 | 246 | 21 | TVA | 3 | 318 |
| 21 | FERC | 5 | 197 | 22 | DOE | 2 | 301 |
| 22 | FTA | 1 | 58 | | | | |
| 23 | NRCS | 1 | 490 | | | | |
| 24 | STB | 1 | 448 | | | | |
| 25 | NASA | 1 | 413 | | | | |

Note: n = number of EISs

Four agencies appeared in the ten lowest averages for both draft and final EISs: Fish and Wildlife Service (22 and 18), Federal Energy Regulatory Commission (21 and 21), US Postal Service (20 and 16), and General Services Administration (18 and 19). The FWS and FERC were in this group in 2022

The ten agencies in the highest final EIS-preparation times group made 41 final EISs available in 2023; the ten agencies with the lowest average final preparation times made 25 final EISs available. The average final EIS-preparation time for agencies with the ten highest averages was 2,047 ± 1,707 days (5.6 ± 4.7 years), and the average times for the agencies with the ten lowest averages was 687 ± 527 days (1.9 ± 1.4 years).

The ten agencies in the highest draft EIS-preparation group made available 34 EISs in 2023; the ten agencies with the lowest average draft preparation times made available 40 EISs. The average draft EIS-preparation time for agencies with the ten highest averages was 954 ± 791 days (2.6 ± 2.2 years), and the average times for the agencies with the ten lowest averages was 414 ± 238 days (1.1 ± 0.65 years). The group with the lowest average preparation times produced 27 drafts in less than one year, 15 of FERC's drafts were in this group. The group with the ten highest averages produced three drafts in less than one year.

# 6. NEPA Legislation in 2023

Charles P. Nicholson, PhD[9]

## 6.1 Introduction

The 118th Congress convened on January 3, 2023, with Republicans holding a nine-vote majority in the House of Representatives and Democrats holding a two-vote majority (including three independents who normally caucus with Democrats) in the Senate. With the narrowly divided chambers and internal disputes among House Republicans, expectations for legislation were low and the number of laws passed during 2023 was the lowest during the first year of a session of Congress in decades.

During 2023, 163 bills containing the phrase "National Environmental Policy Act" and/or addressing the NEPA review process were introduced. About three fourths of the NEPA bills introduced in the House were introduced by Republicans while the number introduced in the Senate by Republicans and Democrats was about equal. The 163 bills include several that were introduced in one or more previous Congresses but were not passed. The number of introduced bills is within the 139–203 range of the number of NEPA bills introduced during the first year of the three previous Congresses. After accounting for identical or very similar bills introduced in both chambers, the number of unique bills addressing NEPA introduced in 2023 is 130. As with previous Congresses, several of the bills are not considered substantive for purposes of this report because they did not propose any changes to NEPA compliance processes. A total of 116 bills, 96 of them unique, are considered substantive and described below. They are arranged by the general NEPA processes they address, with the majority addressing a wide range of NEPA streamlining topics. Consequently, several bills appear under more than one topic heading.

## 6.2 Enacted Legislation

Only one bill that substantively addressed NEPA compliance processes was enacted into law during the 2023, the first year of the 118th Congress. This bill, the **Fiscal Responsibility Act of 2023,** H.R. 3746, was signed into law on June 3, 2023, after fast-track consideration by Congress. It is easily the most significant law addressing NEPA in years. While its main purpose was to raise the federal debt ceiling and address other fiscal issues, it became a vehicle to enact a few unrelated or tangentially related measures. One of the unrelated measures contained in Division C–Grow the Economy is Title III–Permitting Reform, part of which, Section 321, the BUILDER Act, amends NEPA for the first time since minor amendments of the 1970 act were passed in 1975 and 1995.

H.R. 3726 was introduced on May 29 and referred to multiple committees. On May 30, the House Rules Committee reported a resolution to proceed with floor debate and close the bill to amendments. This also precluded consideration by any other House committees. The bill was debated and passed by a vote of 314 – 117 during the evening of May 31. Later that evening, it was received in the Senate and placed on the legislative calendar under general orders, bypassing consideration in committee. It was debated

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on the Senate floor on June 1 and passed without amendment by a vote of 63 – 36. The President received and signed it into law on June 3.

The amendments to NEPA in the Fiscal Responsibility Act are largely based on H.R. 1577, the **Building United States Infrastructure through Limited Delays and Efficient Reviews (BUILDER) Act of 2023**,[10][11] introduced by Representative Graves in March 2023. This earlier BUILDER Act would have codified several of the provisions in CEQ's 2020 NEPA regulations as well as the One Federal Decision framework in E.O. 13807, which was rescinded in 2021. As a result of negotiations between the White House and the bill sponsors, some of the provisions of H.R. 1577 remained largely intact, others were modified, and provision limiting the scope of the affects analysis and judicial review were dropped from the NEPA amendments. The final version of the amendments modified parts of Section 102(C) on the effects analysis and alternatives, added sections 102(D) on professional integrity, (E) on use of reliable data and resources, and (F) on technically and economically feasible alternatives. It also added the following new sections:

106 – Procedure for Determination of Level of Review
107 – Timely and Unified Federal Reviews, describing the role of lead and cooperating agencies, requiring a single environmental document where practicable, and establishing pate and time limits
108 – Programmatic Environmental Document
109 – Adoption of Categorical Exclusions
110 – E-NEPA, requiring CEQ to report to Congress on the results of the "potential for online and digital technologies to address delays in reviews and improve public accessibility and transparency"
111 - Definitions

See https://ceq.doe.gov/laws-regulations/fra.html for a lengthier summary of the amendments.

The text of the new Section 110 on E-NEPA is identical to H.R. 3767 (no formal name). This bill was introduced by Representative Graves on May 31, while deliberations on the NEPA amendments were underway.

## 6.3 Proposed Legislation

This section summarizes substantive bills introduced but not enacted during 2023. As noted above, two introduced bills were incorporated into the Fiscal Responsibility Act. Portions of several other bills addressing NEPA streamlining included some of the provisions of the BUILDER Act. Five of the bills described below were passed by one chamber of Congress and an additional 24 were reported by committee. The remainder remained in committee.

[10] While H.R. 1577 had this long formal name, "BUILDER" was not spelled out in the Fiscal Responsibility Act resulting the name of Section 321 giving little indication of its content.
[11] Similar versions of the BUILDER Act were introduced in the 116th Congress (H.R.8333) and 117th Congress (H.R.2515). Neither was passed by committee.

## Council on Environmental Quality NEPA Regulations

The **Transparency, Accountability, Permitting, and Production of (TAPP) American Resources Act**, H.R. 1335, the **Furthering Resource Exploration and Empowering (FREE) American Energy Act**, S. 782, and the **Lower Energy Costs Act,** H.R. 1 and S. 947, all codify the 2020 CEQ regulations in their entirety. The **Revitalizing the Economy by Simplifying Timelines and Assuring Regulatory Transparency (RESTART) Act**, S. 1449, similarly codifies much of the 2020 CEQ regulations as amendments to NEPA.

S. 879, the **Energy Freedom Act**, reinstates the 2020 CEQ NEPA regulations and prohibits modifications to them for 15 years.

The **Department of the Interior, Environment, and Related Agencies Appropriations Act, 2024**, H.R. 4821, prohibits funding for implementing the 2022 Phase I revisions to CEQ NEPA regulations or finalizing the Phase II revisions.

## NEPA Streamlining

Despite having the prominent H.R. 1 designation, the **Lower Energy Costs Act** was not introduced until March 14. Once introduced, the House quickly acted on it and it passed by a 225–204 vote on March 30, shortly after the White House announced that President Biden would veto the bill in its present form. The very similar Senate version, S. 947, was introduced March 22 and received no further action. H.R. 1 is a lengthy bill with numerous sections related to the environmental review of energy-related actions. It incorporates both the **BUILDER Act**, H.R. 1577, and the **TAPP American Resources Act**, H.R.1335, described elsewhere in this report. Other provisions include requiring the Comptroller General, within 60 days, to report on the sufficiency of the environmental review process for offshore wind projects. Like H.R. 1115 (see below), it establishes FERC as the only lead agency for the NEPA review of authorizations under sections 3 and 7 of the Natural Gas Act, establishes procedures for participating agencies, and eliminates the requirement for state Clean Water Act (CWA) Section 401 certification of FERC authorizations. Participating agencies may propose terms or conditions regarding water quality but FERC is not obligated to accept them. It also requires the Secretary of Energy and the Nuclear Regulatory Commission to report within 180 days on streamlining regulatory timelines for new power plants, requires CEQ to report on the potential for an online permitting portal, and requires the Secretary of Transportation to apply the 23 U.S.C. 139 procedures to pipeline projects. It also declares that projects related to critical minerals are covered projects under FAST-41.

Several other lengthy bills addressed a range of energy production and related activities. The **Transparency, Accountability, Permitting, and Production of (TAPP) American Resources Act**, H.R. 1335, incorporates the BUILDER Act, H.R. 1577, described above. It also sets a 30-day limit for the completion of NEPA reviews for the issuance of permits to drill in oil, gas, and geothermal leased areas and establishes a $100/day fine for failure of the lead agency to meet the established review deadline for an applicant's proposal. The **Limit, Save, Grow Act of 2023**, H.R. 2811, incorporates the **TAPP American Resources Act** (H.R.1335) and the **Lower Energy Costs Act** (H.R.1), including their NEPA provisions.

The **Spur Permitting of Underdeveloped Resources (SPUR) Act,** S. 1456, has much in common with the NEPA and permitting provisions in H.R.1 and similar bills promoting energy development on Federal

lands. It also declares that a 2019 programmatic BLM EA on lifting the pause on issuance of new federal coal leases satisfies the NEPA requirements for issuance of new coal leases on federal land. Its many provisions include allowing states to assume authority for oil and gas permitting on federal lands identified in planning documents as available for leasing or already leased, eliminating the requirement for a federal permit to drill where the federal government owns less than half the mineral rights and does not own the surface estate; requiring the Secretary of Interior to issue a categorical exclusion under 42 U.S.C. 14942 for an application for permit to drill and produce Federal minerals from a well pad constructed on non-federal lands; and prohibits FERC from considering effects of upstream and downstream emissions and using social cost metrics.

S. 782, the **Furthering Resource Exploration and Empowering (FREE) American Energy Act,** requires federal agencies and FERC to approve or deny all pending applications and authorizations for a federal energy authorization within 60 days of enactment of this act, and to approve or deny subsequent applications and authorizations within 60 days of receipt. The deadline may be extended by up to 30 days upon approval by the President or Congress. Authorizes delegation of federal agency permitting authority to states for oil and gas development, extraction, and transportation actions.

H.R. 1457, the **Combating Obstruction Against Leasing (COAL) Act**, requires the Secretary of Interior to publish a draft EA for public comment as soon as practicable for any pending coal lease.

The **Promoting Interagency Coordination for Review of Natural Gas Pipelines Act**, H.R. 1115, H.R. 829, and the similar S. 988, establishes FERC as the only lead agency for NEPA reviews of natural gas pipeline permit applications under the Natural Gas Act. It establishes deadlines for FERC to invite and designate participating agencies, prohibits FERC from considering comments from non-participating agencies, and requires concurrent reviews. It also voids the requirement for an applicant to provide a CWA Section 401 certification and instead requires FERC to incorporate the water quality certification into its NEPA review. H.R. 1115 was reported by committee.

The **Building American Energy Security Act of 2023**, S. 1399, defines detailed procedures for the environmental review and permitting of certain energy infrastructure and mining actions including time limits and requirements for reviews involving multiple agencies. It requires the President to maintain a list of energy infrastructure projects for which permitting is prioritized and expands the list of FAST-41 covered projects to include critical minerals and energy infrastructure projects over $50 million in cost. It also requires FERC approval for certain interstate electric transmission facilities and hydrogen pipelines and therefore makes them the subject of NEPA reviews.

The **California Central Coast Conservation Act**, H.R. 433, voids the 2019 BLM ROD on Central Coast of California oil and gas leasing and prohibits new leasing until BLM completes a supplemental EIS. Following publication of the SEIS, the Administrator of the EPA will review it. If significant impacts are identified, the BLM Director will consult with the EPA administrator before taking any leasing action.

The **More Energy More Jobs Act of 2023**, H.R. 1559, sets time limits of 1 year for an EA and 2 years for an EIS for oil and gas leases in the Gulf of Mexico.

**Pipeline Fairness, Transparency, and Responsible Development Act of 2023**, S. 2547, requires a supplemental EIS is required when comments on a draft EIS raise issues that exceed the initial scope of the draft EIS, or when the draft EIS does not include mitigation plans for adverse impacts that cannot be reasonably avoided. Public meetings must be held in each county in which the project is located and during public comment periods preceding publication of the DEIS, FEIS, and any SEIS. Notice of such meetings must be provided to the public at least 30 days before the date of the meeting.

H.R. 4394, the **Energy and Water Development and Related Agencies Appropriations Act, 2024**, establishes the Bureau of Reclamation as lead agency for new surface water storage projects on federal lands. It establishes cooperating agency processes and requires a unified environmental review document with deadlines of 1 year after acceptance of application for issuance of EA and FONSI and 1 year and 3 months for issuance of draft EIS. H.R. 186, the **Water Supply Permitting Coordination Act**, contains the same NEPA provisions.

The **Hydropower Clean Energy Future Act**, H.R. 4045, requires FERC to develop an expedited licensing process for next-generation hydropower projects with aa 2-year deadline for issuing the license. It also includes other streamlining measures including financial penalties for failure to meet an established schedule deadline.

S. 1521, the **Community and Hydropower Improvement Act**, amends the environmental review process in Section 2403 of the Energy Policy Act of 1992 by promoting the involvement of cooperating agencies and tribes, requiring consideration of ongoing and reasonably foreseeable effects including effects on fish, eliminating consideration of nonrecurring past effects of a dam, and including appropriate onsite and offsite mitigation measures, among other things. It establishes an expedited licensing process for qualifying closed-loop and off-stream pumped storage projects including whether NEPA obligations can be met by preparing an EA or supplementing a previously prepared EA or EIS.

S. 3433 and H.R. 6708, the **Dredging to Ensure the Empowerment of Ports (DEEP) Act,** directs the Secretary of the Army to issue a new CWA Section 404 nationwide permit for non-Federal dredging projects in navigable waters and complete the NEPA review of the permit within 2 years of the date the permit is proposed.

The **Public Land Renewable Energy Development Act of 2023**, H.R. 178, requires the Secretary of Interior, in consultation with the Secretary of Energy, to identify priority areas for renewable energy development on public lands and National Forest System lands and to evaluate their designation in updates to the final programmatic EISs issued in 2008 for geothermal leasing, 2012 for solar energy development, and 2005 for wind energy development. The related **Enhancing Geothermal Production on Federal Lands Act**, H.R. 6482, directs the Secretary of Interior to complete a supplement to any programmatic EIS for geothermal leasing within one year of the designation of a lease area when the PEIS does not sufficiently analyze the designation.

The **Modernize Nuclear Reactor Environmental Reviews Act**, H.R. 6252, directs the NRC to report on implementing the amendments to NEPA in the Fiscal Responsibility Act within 90 days and to conduct a rulemaking on implementing the amendments within 2 years.

H.R. 6544, the **Atomic Energy Advancement Act**, directs the NRC to develop techniques and guidance for evaluating license applications and requires periodic reporting of licensing performance metrics. Within 90 days, NRC must report to Congress on efforts to streamline reviews of nuclear reactor applications including through use of categorical exclusions, EAs, and generic EISs. NRC must also issue a final rule implementing identified streamlining measures within 2 years. The related **Nuclear for Brownfield Site Preparation Act**, H.R. 6268, and the **Accelerating Deployment of Versatile, Advanced Nuclear for Clean Energy (ADVANCE) Act of 2023**, S. 1111, both require the NRC to review licensing procedures for nuclear plants on brownfield sites, including retired fossil fuel generating plant sites and, within 2 years, initiate any identified rulemaking to facilitate timely licensing reviews. The licensing reviews would include consideration of previously completed NEPA reviews.

S. 1804 and H.R. 4689, the **Facilitating America's Siting of Transmission and Electric Reliability (FASTER) Act of 2023**, directs the Secretary of Energy to study and designate interstate national interest electric transmission corridors. FERC is designated as the lead federal agency for environmental reviews of associated transmission facilities and all authorization decisions must be completed with 3 years of the applicant beginning the FERC-administered prefiling process or within 1 year of submittal of the application. Facilities are considered covered projects under FAST-41 and single environmental review document is required.

The **Federal Broadband Permit Coordination Act of 2023**, H.R. 3306, authorizes the establishment of state or regional office interagency broadband permit streamlining teams with state and tribal participation. Agency members must have NEPA and other environmental compliance expertise.

The **Permitting for Mining Needs Act of 2023**, H.R. 209, establishes measures to expedite the environmental review and permitting of mining actions on federal lands, including a 12-month time limit for an EA and a 24-month time limit for an EIS, allowing applicant-prepared EAs and EISs, adding mineral production as a FAST-41 covered action, and requiring approval within 15 days of notice for mineral exploration activities with less than 5 acres of surface disturbance on Federal land.

S. 2781, the **Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2023**, establishes streamlined NEPA review requirements for abandoned hardrock mine land reclamation projects carried out by a Good Samaritan, including a single environmental assessment and decision document, public comment, and the involvement of EPA as a cooperating agency. The permit cannot be issued unless the lead agency issues a FONSI.

H.R. 3195, the **Superior National Forest Restoration Act**, revokes Public Land Order 7917 to reinstate mineral leases and permits in Superior National Forest and orders the Secretaries of Interior and Agriculture to complete the NEPA reviews for associated mine plans of operations within 18 months. This bill passed by a 212–205 vote.

H.R. 3316 (no formal name) amends parts of 49 U.S.C. to direct the Secretary of Transportation to apply the 23 U.S.C. 139 Efficient Environmental Reviews and One Federal Decision procedures to port infrastructure, pipeline, and airport or aviation projects.

S. 1939, the **FAA Reauthorization Act of 2023**, contains several NEPA streamlining measures. FAA must develop the purpose and need statement for an EIS or EA when it is the lead federal agency within 45 days of receiving the airport sponsor's purpose and need description. FAA is directed to, within 90 days, to publish drone-specific environmental review guidance and implementation procedures. Within the same time period, FAA is to examine and integrate programmatic-level approaches for NEPA compliance for drone operations within a defined geographic area. It also authorizes the FAA to request that sponsors of unmanned aircraft test ranges provide a draft EA on the proposal, subject to supervision and adoption by FAA. The **Securing Growth and Robust Leadership in American Aviation Act**, H.R. 3935, a lengthy bill also intended to reauthorize the FAA, establishes a streamlined environmental review process with deadlines for certain airport development projects, including concurrent reviews, a single NEPA document requirement, and EIS page limits. It also requires tracking and annual reporting of NEPA metrics. Both H.R. 3935 and H.R. 3958 (no formal name) require the FAA Administrator to provide guidance on environmental review procedures for unmanned aircraft system operations.

H.R. 1430, the **Determination of NEPA Adequacy Streamlining Act**, requires the Department of the Interior and the National Forest Service to use previously completed environmental assessments and environmental impact statements to satisfy NEPA requirements if the agency determines that a new proposed action and its effects are substantially the same as a previously analyzed proposed action and its effects.

The **Building Chips in America Act of 2023**, H.R. 4549 and S. 2228, amends Section 9909 of the 2021 National Defense Authorization Act to define lead and cooperating agency roles, and to require a single NEPA document requirement and joint record of decision for specified semiconductor-related actions. Early versions of the **National Defense Authorization Act for Fiscal Year 2024**, S. 2226 and the similar H.R. 2670, contained the NEPA provisions and other topics in the **Building Chips in America Act of 2023**, H.R. 4549 and S. 2228, and the **Fort Belknap Indian Community Water Rights Settlement Act of 2023**, S. 1987 and H.R. 5088, described elsewhere in this report. The final version of H.R. 2670 did not contain any NEPA provisions and was signed into law in December 2023.

The **Livestock Disaster Assistance Improvement Act of 2023**, S. 555, waives the 30-day public comment requirement under NEPA for emergency livestock drought relief measures and emergency forest restoration actions on BLM-administered lands. It also authorizes BLM to accept NEPA reviews conducted by the Natural Resources Conservation Service.

S. 3310 and H.R. 6420, the **Wy'East Tribal Resources Restoration Act**, requires the Secretary of Agriculture to develop a programmatic NEPA analysis for the management strategy for designated Indian Treaty Resources Emphasis Zones in Mount Hood National Forest.

The **Salvaging American Lumber Via Action with Greater Efficiency (SALVAGE) Act,** H.R. 567, requires that EAs for timber salvage operations exceeding 10,000 acres on National Forest System and public lands following large-scale catastrophic events be completed within 60 days after the conclusion of the event. For such salvage proposals, public scoping and comment is limited to 30 days and limits for filing and objection and the agency response to the objection are each 15 days.

The **Fostering Opportunities for Resources and Education Spending through Timber Sales (FORESTS) Act of 2023**, H.R. 4228, establishes Forest Active Management Areas on National Forest System Lands through a collaborative process. Unless eligible for a categorical exclusion or covered by a programmatic EIS, active management projects in the designated areas will be reviewed by an EA and the analysis of alternatives to the proposed agency action is not required.

S. 199 and H.R. 674, the **Root and Stem Project Authorization Act of 2023**, authorizes the Forest Service and BLM to accept funding from a party that has collaboratively developed a project on National Forest System land or public land that meets local and rural community needs. The funding is to be used for any required environmental analysis, including for NEPA compliance.

The **Advancing the Quality and Understanding of American Aquaculture (AQUAA) Act**, S. 1861 and H.R. 4013, establishes a unified process for multi-agency permitting of offshore aquaculture operations. It requires, to the extent allowable under NEPA, that the NEPA review of an offshore aquaculture action be conducted through a single, consolidated review with NOAA as the lead federal agency.

The **504 Credit Risk Management Improvement Act of 2023**, S. 1345, requires the Administrator of the Small Business Administration to issue rules to clarify procedures for an eligible certified development company to comply with requirements of NEPA.

S. 877, the **Federal Permitting Modernization Act of 2023**, amends FAST-41 by setting a schedule for the issuance of a notice of intent for the NEPA document, limiting public scoping periods to 60 days, publishing the final EIS within 30 days of the close of the draft EIS public comment period, and authorizing a project sponsor to prepare the EIS with lead agency guidance, evaluation, and approval.

The **Interactive Federal Review Act**, S. 2319 and H.R. 4621, directs the Secretary of Transportation to publish guidance on the use of a digital, cloud-based platform for environmental impact analysis and community engagement processes, and demonstrate the use of such a platform for at least 10 surface transportation projects.

## NEPA Assignment / Delegation

The **Reducing Environmental Barriers to Unified Infrastructure and Land Development (REBUILD) Act of 2023 Act,** H.R. 495, amends NEPA by adding a new Section 106 allowing states to assume federal NEPA responsibilities for actions funded by, carried out by, or subject to approval by federal agencies except for Corps of Engineers projects or actions that are the subject of an EIS.

S. 782, the **Furthering Resource Exploration and Empowering (FREE) American Energy Act,** authorizes the delegation of federal agency permitting authority to states for oil and gas development and transportation, geothermal, solar, and wind energy production, and mineral production projects. The **Federal Land Freedom Act of 2023**, H.R. 98 and S. 20, goes further to authorize states to assume responsibility for leasing, permitting, and regulating energy development on all available federal lands in the state. State actions would not be subject to the Administrative Procedures Act, NEPA, the Endangered Species Act, or National Historic Preservation Act.

H.R. 4908, the **Expedited Federal Permitting for California Act**, amends 23 U.S.C. 330 to expand the Department of Transportation NEPA assignment program to include airport-related and port development projects.

The **Rural Broadband Permitting Efficiency Act of 2023**, H.R. 3307, authorizes the Secretaries of Agriculture and Interior to delegate NEPA responsibilities to qualifying states and tribes for broadband projects rights-of-way on National Forest System land, land managed by the Department of Interior, or Indian land.

The **Fort Belknap Indian Community Water Rights Settlement Act of 2023**, S. 1987 and H.R. 5088, authorizes the Fort Belknap Indian Community to prepare NEPA documents necessary for implementing the terms of the water rights settlement agreement. H.R. 1304 and S. 595, the **Rio San Jose and Rio Jemez Water Settlements Act of 2023**, similarly authorizes the Pueblos of Acoma and Laguna and the Pueblos of Jemez and Zia to prepare NEPA documentation for implementing the specified water rights agreements.

The **Building Chips in America Act of 2023**, H.R. 4549 and S. 2228, authorizes the assignment of NEPA responsibilities to states for specified semiconductor-related actions.

## Environmental Justice

The **A. Donald McEachin Environmental Justice For All Act**, S. 919 and H.R. 1705, a reintroduced version of the Environmental Justice for All Act, H.R. 2021 and S. 872, in the 117th Congress, is a lengthy bill with numerous environmental justice-related requirements. Section 15 is titled “Strengthening Community Protections under the National Environmental Policy Act of 1969.” It amends NEPA by adding several environmental justice-related definitions, replaces "man" with "human" and "mankind" with "humankind," and states that a reasonable range of alternatives includes those that are technically and economically feasible and do not cause or contribute to adverse cumulative effects, including exposure to environmental pollution, on an overburdened community that are greater than those borne by other communities unless the agency determines there is a compelling public interest in the affected overburdened community.

## Judicial Review

Of the several introduced bills that address the judicial review of NEPA decisions, the **Revitalizing the Economy by Simplifying Timelines and Assuring Regulatory Transparency (RESTART) Act**, S. 1449, would make the most changes. It does this by amending NEPA with a new Section 112 on judicial review. It would limit judicial review by establishing a 60-day post-decision filing deadline and barring judicial review of a ROD or FONSI if the ROD or FONSI was issued at the time at which the project or activity began and if the project or activity is fully constructed or operational. District courts and courts of appeals must render final judgements as expeditiously as practicable and within 180 days. Agencies are required to act on any remanded action within 180 days. It also declares that the application of a categorical exclusion to a final agency action is not subject to judicial review.

S. 3170, **Revising and Enhancing Project Authorizations Impacted by Review (REPAIR) Act of 2023**, makes several changes to the judicial review process for decisions under NEPA and multiple other laws.

These include establishing a 30-day deadline for filing for judicial review. It also establishes a mediation process overseen by the Federal Permitting Improvement Steering Council and requires mediation for an authorization enjoined, remanded, or vacated by a court.

Other bills also establish statutes of limitations for filing for judicial review. The **Building American Energy Security Act of 2023**, S. 1399, establishes a 150-day statute of limitations for filing claims arising under federal law. If an action is remanded, the court must set a schedule not to exceed 180 days for the agency to act on remand, unless a longer time period is necessary to comply with applicable law. The **Building Chips in America Act of 2023**, H.R. 4549 and S. 2228, establishes a 150-day statute of limitation on filing claims over the NEPA review of covered semiconductor-related actions. The **Transparency, Accountability, Permitting, and Production of (TAPP) American Resources Act**, H.R. 1335, establishes a 120-day limit on claims for judicial review of mineral projects, energy facilities, and energy storage devices and prohibits such claims by parties that did not submit comments during the public comment period. It also establishes a filing fee for protests under Section 17 of the Mineral Leasing Act. The **Permitting for Mining Needs Act of 2023**, H.R. 209, also sets a 120-day limit on filing of a claim for judicial review of a mining project approval.

H.R. 1067, the **American Energy Act**, prohibits courts from preventing the award of leases under the Mineral Leasing Act or Outer Continental Shelf Act in response to NEPA litigation if the Department of Interior has opened bids for such leases.

H.R. 3195, the **Superior National Forest Restoration Act**, prohibits judicial review of the issuance of certain mineral leases or permits.

S. 877, the **Federal Permitting Modernization Act of 2023**, amends FAST-41 by prohibiting preliminary injunctive relief in NEPA actions unless the "environmental review has failed substantially and materially to comply with the requirements of NEPA" and cannot be cured by supplementing the environmental document or other mitigation measures. The **Salvaging American Lumber Via Action with Greater Efficiency (SALVAGE) Act,** H.R. 567, also limits injunctions by prohibiting courts from issuing injunctions or restraining orders pending appeal of a decision on a salvage operation in response to a large-scale catastrophic event.

The **Bringing Reliable Investment into Domestic Gulf Energy (BRIDGE) Production Act of 2023**, H.R. 5616, declares that a civil action challenging a subject Gulf of Mexico and Cook Inlet lease sale shall not affect the validity of the lease or delay any approvals. If a court finds that the lease sale was not carried out in compliance with Federal law, the court may not vacate or enjoin the lease sale while the Secretary of Interior is correcting the noncompliance.

## Categorical Exclusions

H.R. 4549 and S. 2228, the **Building Chips in America Act of 2023**, authorizes the adoption by the National Institute of Standards and Technology of specified categorical exclusions issued by other agencies.[12]

Early Senate versions of the **National Defense Authorization Act for Fiscal Year 2024**, S. 2226, directed the Maritime Administration to review its categorical exclusions as well as the categorical exclusions of the other Transportation administrations and, within one year, publish a proposed rulemaking on new categorical exclusions and use of categorical exclusions of other administrations. This measure was dropped from the House version of the bill, H.R. 2670, that was signed into law.

S. 1804 and H.R. 4689, the **Facilitating America's Siting of Transmission and Electric Reliability (FASTER) Act of 2023**, directs FERC to evaluate and, if feasible, establish categorical exclusions for transmission-related actions or adopt applicable categorical exclusions issued by other agencies.

The **FAA Reauthorization Act of 2023**, S. 1939, directs the FAA to, after consulting with CEQ, establish categorical exclusions for vertiports at existing airports.

S. 873, the **America's Outdoor Recreation Act of 2023**, H.R. 6492, and the **Expanding Public Lands Outdoor Recreation Experiences (EXPLORE) Act**, both require the Secretary of Interior to, within 1 year (S. 873) or 2 years (H.R. 6492), evaluate existing categorical exclusions applicable to special recreation permits and, if indicated by the results of the evaluation, modify existing categorical exclusions or incorporate new categorical exclusions. H.R. 1527 and S. 1630, the **Simplifying Outdoor Access for Recreation Act**, expands this requirement by including the Secretary of Agriculture. It is the only one of these bills to mention consideration of extraordinary circumstances.

Several bills categorically exclude specified forest management actions. H.R. 3522 and S.1719. the **Forest Improvements through Research and Emergency Stewardship for Healthy Ecosystem Development and Sustainability (FIRESHEDS) Act,** categorically excludes fireshed management projects in designated areas on National Forest System and public lands. The **Proven Forest Management Act of 2022**, H.R. 188, categorically excludes forest management activities on National Forest System land that are developed collaboratively, consistent with the forest plan, and meet acreage limitations. It does not mention evaluation of extraordinary circumstances. H.R. 567, the **Salvaging American Lumber Via Action with Greater Efficiency (SALVAGE) Act,** categorically excludes timber salvage operations on areas of up to 10,000 acres of National Forest System lands and public lands. Stream buffers and a reforestation plan are required while consideration of extraordinary effects is not required. The **Save Our Sequoias Act**, H.R. 2989, declares that specified emergency response and reforestation and rehabilitations actions to protect giant sequoias are categorically excluded.

[12] In September, 2023, NIST adopted some of the specified Department of Energy categorical exclusions under the authority of the new Section 109 of NEPA.

The **Lower Energy Costs Act,** H.R. 1, establishes categorical exclusions for specified forest management activities related to electric line rights-of-way; consideration of extraordinary circumstances is not required.

The **Resiliency for Ranching and Natural Conservation Health Act**, S. 1553, categorically excludes the renewal of grazing permits on National Forest System lands if the permittee is in compliance with the terms of the permit and the renewal is consistent with the terms of the permit being renewed. It also categorically excludes the temporary use of a vacant grazing allotment following an unforeseen natural event or disaster.

The **Closing Long Overdue Streamlining Encumbrances To Help Expeditiously Generate Approved Permits (CLOSE THE GAP) Act,** S. 2855, requires the federal land management agencies to establish a categorical exclusion for modifications to existing communications facilities that would improve public safety on federal land.

S. 879, the **Energy Freedom Act**, categorially excludes geothermal exploration test projects on federal lands, with consideration of extraordinary circumstances.

## Scope of Review

H.R. 4982, the **Tolling Transparency Act of 2023**, requires that the NEPA review of a proposed toll facility include an economic impact study including the impact on businesses and communities, impacts due to diversion of traffic onto other roadways, and the impact on low-income residents and seniors.

The **Transparency, Accountability, Permitting, and Production of (TAPP) American Resources Act**, H.R. 1335, limits the scope of review for oil and gas leases and permits to areas within or immediately adjacent to the lease plots and other directly affected areas and declares that consideration of the downstream, indirect effects of oil and gas consumption is not required. The **Spur Permitting of Underdeveloped Resources (SPUR) Act,** S. 1456, similarly prohibits FERC from considering the effects of upstream and downstream greenhouse gas emissions and using social cost metrics. H.R. 4394, the **Energy and Water Development and Related Agencies Appropriations Act, 2024**, also, more broadly, prohibits the use of funds provided by this act to consider the social cost of carbon in NEPA reviews, budgeting, or procurement processes.

S. 1890, the **Malheur Community Empowerment for the Owyhee Act**, requires that the BLM NEPA review of the renewal of a grazing permit in Malheur County, Oregon, include at least 1 alternative that provides operational flexibility in livestock grazing use to account for changing conditions.

S. 879, the **Energy Freedom Act**, amends NEPA sections 102(2)(C) to limit the consideration of impacts to impacts occurring in the United States and 102(2)(F) by inserting "in any proposal or other major Federal action that involves the funding or development of projects outside the United States or the exclusive economic zone of the United States" at the start of the statement to precede "recognize the worldwide and long-range character of environmental problems and... lend appropriate support...".

The **Pipeline Fairness, Transparency, and Responsible Development Act of 2023**, S. 2547, requires that the cumulative impact analysis for an interstate natural gas pipeline consider other applications for

pipelines in the same state and within 100 miles of the first project. Any evaluation of the visual impacts to a designated national scenic trail must also consider the cumulative visual impacts of any similar project in the pre-filing or filing state and within 100 miles of the trail.

H.R. 189, the **Action Versus No Action Act**, requires that EAs and EISs for collaborative forest management actions on National Forest System lands and public lands only consider the proposed action and no action alternatives, and that the evaluation of the no action alternative include effects on forest health, potential losses of life and property, habitat diversity, wildfire potential, insect and disease potential, and timber production.

### Not Major Federal Action / NEPA Exemptions

S. 306, the **Tule River Tribe Reserved Water Rights Settlement Act of 2023**, declares that the execution of the 2007 settlement agreement is not a major Federal action under NEPA. The implementation of the agreement and the act, however, is subject to NEPA. Both the **Fort Belknap Indian Community Water Rights Settlement Act of 2023**, S. 1987 and H.R. 5088, and the **Rio San Jose and Rio Jemez Water Settlements Act of 2023**, S. 595 and H.R. 1304, declare that the implementation of the subject settlement agreements is not a major Federal actions under NEPA.

H.R. 4665, the **Department of State, Foreign Operations, and Related Programs Appropriations Act, 2024**, in Section 7071 on Presidential Permitting Reform, states that "[E.O.] 13867, or any successor Executive Order, should not be construed to require the application of the National Environmental Policy Act of 1969 prior to the Secretary providing advice to the President of the United States concerning any new or amended Presidential permit application."

H.R. 1205, the **Bureau of Land Management Mineral Spacing Act**, amends the Mineral Leasing Act to state that no Federal permit is required for oil and gas exploration and production activities on non-Federal surface estate where the US owns less than half of the subsurface mineral estate the operator submits the state permit. The activities are also exempt from NHPA Section 106 and ESA Section 7 requirements.

The **Transparency, Accountability, Permitting, and Production of (TAPP) American Resources Act**, H.R. 1335, declares that several energy-related actions including geotechnical investigations, reinstatement of a lease under the Mineral Leasing Act or the Geothermal Steam Act, and modifications of existing transmission infrastructure are not major Federal actions under NEPA.

The **Lower Energy Costs Act,** H.R. 1, exempts certain wildfire mitigation activities on federal lands from compliance with NEPA and the Endangered Species Act.

The **Hydrogen Permitting Simplification Act**, H.R. 2962, amends Title VII of the Energy Policy Act of 2005 to state 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, under this title shall be subject to the requirements of NEPA."

The **Enhancing Geothermal Production on Federal Lands Act**, H.R. 6482, declares that certain geothermal exploration projects on public lands for which a geothermal lease has been issued are not major Federal actions under NEPA.

H.R. 3522 and S.1719. the **Forest Improvements through Research and Emergency Stewardship for Healthy Ecosystem Development and Sustainability (FIRESHEDS) Act,** declares that the designation of fireshed management areas in collaboration with states is not subject to the requirements of NEPA.

The **Save Our Sequoias Act**, H.R. 2989, authorizes emergency response actions to protect giant sequoias prior to compliance with NEPA, ESA Section 7, and NHPA Section 106. It also categorically excludes specified emergency response and reforestation actions.

H.R. 4045, the **Hydropower Clean Energy Future Act**, eliminates FERC license requirements for closed-loop pumped storage projects that are not on federal lands and do not use a federally owned dam or reservoir. Unless requiring other federal authorizations, such facilities would not be subject to NEPA.

The bills listed below state that federal authorizations of specified actions related to broadband and other communications facilities are not major federal actions. Most of these also exempt the actions from Section 106 of the National Historic Preservation Act. Except for H.R. 4141, none of these bills were passed by the assigned House committees.
H.R. 3292, **Brownfields Broadband Deployment Act**, on broadband facilities on brownfield sites
H.R. 4141, no formal name, on easements for communications facilities on federal property where easements for such facilities have already been granted
H.R. 3291, **Proportional Reviews for Broadband Deployment Act**, on specified modifications of existing wireless towers or base stations
H.R. 3280, **Timely Replacement Under Secure and Trusted for Early and Dependable (TRUSTED) Broadband Networks Act,** on the removal and replacement of specified communication equipment
H.R. 3311, **Coastal Broadband Deployment Act**, on certain wireless facilities in floodplains
H.R. 3301, **Connecting Communities Post Disasters Act of 2023**, on or improving a communications facility following a major disaster
H.R. 3297, **Reducing Barriers for Broadband on Federal Lands Act of 2023**, on broadband infrastructure projects on a right-of-way on federal land
H.R. 3288, **Broadband Competition and Efficient Deployment Act**, on colocated telecommunications service equipment on existing support infrastructure
H.R. 3289, **Wireless Broadband Competition and Efficient Deployment Act**, on colocated personal wireline service facility on an existing wireless facility
H.R. 3296, **Wildfire Communications Resiliency Act**, on replacement of communication facilities damaged in a wildfire in a declared disaster area
H.R. 3323, **Reducing Antiquated Permitting for Infrastructure Deployment (RAPID) Act, on** small personal wireless service facilities
H.R. 3342, **Streamlining Permitting to Enable Efficient Deployment (SPEED) for Broadband Infrastructure Act of 2023,** on the issuance of easements for specified communications facilities on federal property if an easement has already been granted for another communication or utility facility on the property.

H.R. 3557, **American Broadband Deployment Act of 2023**, on authorization of easements on federal property if an easement has already been granted for another communication facility on the same property or the easement is in a public right-of-way.

S. 2855, the **Closing Long Overdue Streamlining Encumbrances To Help Expeditiously Generate Approved Permits (CLOSE THE GAP) Act,** exempts the granting a communication use authorization on federal land where such use has previously been granted from compliance with NEPA.

H.R. 1607, with no formal name, states that the withdrawal of Forest Service land for a proposed Salt River pumped storage project is not a major federal action under NEPA.

The **Build the Wall Now Act**, H.R. 989 and S. 422, recodifies exemptions from environmental laws and regulations, including NEPA, for construction of barriers along the U.S. Mexican border.

Three bills exempt the issuance of standards and rules. These are H.R. 6596, the **Gun Violence Prevention and Community Safety Act of 2023**, for the issuance of a standard for firearm safes; the **Asuncion Valdivia Heat Illness, Injury, and Fatality Prevention Act of 2023**, S. 2501, and H.R. 4897, for the issuance of an interim final rule establishing a worker heat protection standard; and H.R. 6221, the **Smoke Mitigation and Occupational Key Enhancements (SMOKE) Act**, for the promulgation of an interim final standard on protecting workers from adverse air.

### Uncategorized

H.R. 6129, the **Studying NEPA's Impact on Projects Act**, amends Section 201 of NEPA to require CEQ to publish an annual report on NEPA litigation, length of EISs published during the previous 5 years, and preparation times of EISs issued during the previous 10 years.

H.R. 1058 and S. 23, the **Promoting Cross-border Energy Infrastructure Act**, voids the current Presidential permit requirement for border-crossing oil and gas pipelines and electric transmission lines and gives the approval authority to FERC for oil and gas pipelines and to DOE for electric transmission lines. The approvals would be subject to NEPA.

The **Alaska's Right to Produce Act of 2023**, S. 3289 and H.R.6285, declares that the 2020 Record of Decision on oil and gas leasing in the Coastal Plain of Alaska satisfies NEPA requirements for leasing in the area and withdraws and prohibits completion of the 2023 draft supplemental EIS on the topic.

The **Offshore Energy Security Act of 2023**, S. 2389, and the **Bringing Reliable Investment into Domestic Gulf Energy (BRIDGE) Production Act of 2023**, H.R. 5616, prescribe mandatory Gulf of Mexico oil and gas lease sales to be carried out in accordance with the 2017 ROD for the 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program Final Programmatic EIS. S. 2389 also declares that litigation under NEPA over a lease sale shall not affect the validity of any subsequently issued leases or delay consideration of an application for permit to drill.

The **Department of the Interior, Environment, and Related Agencies Appropriations Act, 2024**, H.R. 4821, prohibits funding for a USFWS EIS on the North Cascades Ecosystem Grizzly Bear Restoration Plan, as well as funding for completion of the BLM resource management plans and EISs for the Rock Springs,

Wyoming, Colorado River Valley, Grand Junction, Colorado, and Redding and Arcata Field Offices. It requires issuance of the ROD on the programmatic EIS on the 2023-2028 outer continental shelf oil and gas leasing program within 90 days. It also requires the Secretary of Interior to prepare an EIS prior to approving oil and gas operations within the Big Cypress National Preserve. funding to finalize and implement the January 2023 CEQ interim NEPA guidance on consideration of greenhouse gases and climate change, as well as funding related to the social cost of greenhouse gases is also prohibited. This bill was passed by the House with a 213–203 vote.

# 7. NEPA Case Law—2023

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This paper reviews decisions on substantive National Environmental Policy Act (NEPA) cases issued by federal appeals courts in 2023 and explains the implications of the decisions and their relevance to NEPA practitioners.

## 7.1 Introduction

In 2023, the U.S. Courts of Appeals issued 25 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 25 cases involved four different departments and two independent agencies. Overall, the federal agencies prevailed in 19 of the cases, did not prevail in three cases, and prevailed on one NEPA claim but not the other NEPA claim(s) in three cases, with a total prevail rate of 76 percent (82 percent if the partial cases are included). The U.S. Supreme Court issued no NEPA opinions in 2023; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, Table 7-1 shows the number of U.S. Court of Appeals NEPA case decisions issued in 2006 – 2023, by circuit. As in preceding years, the number of cases in the Ninth Circuit Court of Appeals greatly exceeded those in the other circuits, accounting for almost half of the 2023 cases. The 25 decisions issued in 2023 is above the 2006 – 2022 annual average of 23 decisions. Figure 7-1 illustrates the states covered by each circuit court.

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**Table 7-1. Number of U.S. Courts of Appeals NEPA opinions, by year and 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 |
| **2023** | | | | **1** | **2** | | **2** | **1** | **12** | **3** | **1** | **3** | **25** |
| **TOTAL** | 10 | 9 | 7 | 20 | 12 | 14 | 10 | 7 | 210 | 37 | 14 | 63 | 413 |
| **Proportion of total** | **2%** | **2%** | **2%** | **5%** | **3%** | **4%** | **2%** | **2%** | **51%** | **8%** | **4%** | **15%** | **100** |

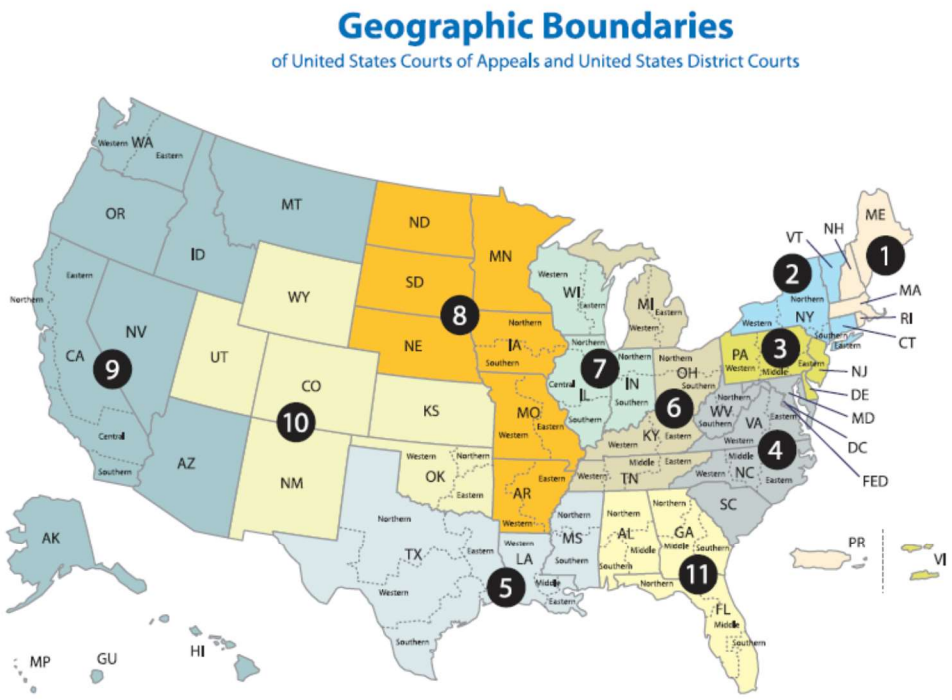


**Figure 7-1. Map of U.S. Circuit Courts of Appeal**

## 7.2 Statistics

Federal agencies prevailed in 76 percent (82 percent if the partial opinions are included) of the substantive NEPA cases brought before the U.S. Courts of Appeals.

The Department of Agriculture (U.S. Forest Service [USFS] and Rural Utilities Service) was the defendant in the largest number of cases with eight cases.[14] The Department of the Interior (Bureau of Land Management [BLM], Bureau of Reclamation [BOR], U.S. Fish and Wildlife Service [FWS], and the National Park Service [NPS]) was a defendant in six cases. The Department of Transportation (Federal Aviation Administration [FAA] and Federal Highway Administration [FHWA] and Surface Transportation Board [STB]) was involved in five cases. The Department of Defense (U.S. Army Corps of Engineers [USACE])

[14] The Department of Agriculture was a co-defendant with the Department of Interior in two cases: *North Cascades Conserv. Council v. U.S. Forest Serv.,* No. 22-35430, 2023 WL 2642930 (9th Cir. Mar. 27, 2023) (not for publication) (USFS/DOI FWS); *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.,* No. 22-15259, 2023 WL 3267846 (9th Cir. May 5, 2023) (not for publication) (USFS/DOI FWS).

was a defendant in three cases. The Federal Energy Regulatory Commission (FERC) was involved in two cases and the U.S. Nuclear Regulatory Commission (NRC) was a defendant in one case.

The Department of Agriculture prevailed in all but one of its eight cases. The Department of Interior prevailed in five cases out of six (in the case where it did not prevail, it partially prevailed on one NEPA claim but not the other). The Department of Transportation prevailed on all five cases. The Department of Defense prevailed in two of its three cases. FERC prevailed in one case out of two. NRC prevailed in its NEPA case.

Of the 25 substantive cases, three cases involved a categorical exclusion (CE), eleven involved environmental assessments (EA), eleven involved environmental impact statements (EIS).

Of the six cases in which agencies did not prevail (or only partially prevailed), three involved EAs: *Diné Citizens Against Ruining our Environment v. Haaland,* 59 F.4th 1016 (10th Cir. 2023) (agency partially prevailed), *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.,* No. 22-15259, 2023 WL 3267846 (9th Cir. May 5, 2023) (not for publication), and *O'Reilly v. All State Financial Co*., No. 22-30608, 2023 WL 6635070 (5th Cir. Oct. 12, 2023) (not for publication). Two involved EISs: *City of Los Angeles, California v. Federal Aviation Admin.,* 63 F.4th 835 (9th Cir. 2023) (agency partially prevailed) and *Eagle County, Colorado v. Surface Transp. Board*, 82 F.4th 1152, 2023 WL 5313815 (D.C. Cir. Aug. 18, 2023) (agency partially prevailed). One case involved a categorical exclusion: *Solar Energy Industries Ass'n. v. Fed. Energy Reg. Comm'n,* 80 F.4th 956 (9th Cir. 2023).

## 7.3 Trends

The following relates some trends and interesting conclusions from the substantive 2023 cases.

***Alternatives Considered:*** Nine 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.

- *No Mid-Currituck Bridge-Concerned Citizens v. North Carolina Dep't of Transp.*, 60 F.4th 794 (4th Cir. 2023) (upholding the selection of alternative when the agency evaluated the relative benefits of a bridge project, the no-build alternative, and the existing-roads alternative in relieving the traffic congestion; these analyses revealed that the bridge project still offered the most benefits overall, especially on summer weekends, and it would continue to fulfill its hurricane-evacuation purpose)

- *City of Los Angeles, California v. Federal Aviation Administration*, 63 F.4th 835 (9th Cir. 2023) (holding that the FAA considered a reasonable range of alternatives when the FAA drafted an adequate purpose and need statement and then narrowed the range of alternatives for detailed study based on rational considerations)

- *Center for Biological Diversity v. Federal Energy Regulatory Commission*, 67 F.4th 1176 (D.C. Cir. 2023) (disagreeing with Plaintiff's argument that FERC should have selected the no action alternative, and finding that in the EIS, FERC considered and reasonably rejected the no-

action alternative; the D.C. Circuit also stated the agency does not need to provide the same level of detailed analysis for each alternative that it provides for the action under review)

- *Center for Biological Diversity v. U.S. Dep't of Interior,* 72 F. 4th 1166 (10th Cir. 2023) (affirming that the "no action" alternative provided an appropriate baseline for comparing the impacts of the proposed action)

- *Missouri ex rel. Bailey v. U.S. Dep't of Interior, Bureau of Reclamation*, 73 F.4th 570 (8th Cir. 2023) (concluding, in a brief decision, that BOR sufficiently assessed the project's environmental impacts, and that limiting the analysis to a no action alternative was appropriate given the minimal environmental effects of the project)

- *National Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 75 F.4th 743 (7th Cir. 2023) (opining that it was not unreasonable for the Corps, in narrowing its alternatives, to eliminate from consideration certain alternatives that would require Congressional action, and that it was reasonable for the Corps to reject an alternative that would propose ecological restoration as an authorized project purpose)

- *Earth Island Institute v. U.S. Forest Serv*., 87 F.4th 1054 (9th Cir. 2023) (holding that Earth Island's suggested alternatives were not "significantly distinguishable" from the action alternative the USFS considered and that the suggested alternatives were therefore unreasonable)

- *North Cascades Conserv. Council v. U.S. Forest Serv.*, No. 22-35430, 2023 WL 2642930 (9th Cir. Mar. 27, 2023) (not for publication) (finding that the USFS considered a range of reasonable alternatives (ten), and that the alternatives that Appellants argued the USFS should have considered in greater depth would "extend beyond those reasonably related to the purposes of the project")

- *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.,* No. 22-15259, 2023 WL 3267846 (9th Cir. May 5, 2023) (not for publication) (opining that the agency did not consider a reasonable range of alternatives when the EA considered only a "no-grazing" alternative and the proposed action, and the agency rejected Neighbors' proposed alternative because it would not advance the purpose and need of the project)

***Assessment of Impacts**:* Twenty-one[15]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.

***Categorical Exclusion (CE):*** Three cases scrutinized the application of CEs to projects; in one case the court found the application of a CE to be insufficient.

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

- *Alliance for the Wild Rockies v. Petrick,* 68 F.4th 475 (9th Cir. 2023) (remanding the application of a CE back to the lower court to reconsider the application of a CE available under the Healthy Forest Restoration Act (HFRA) and vacating the previous injunction)

- *Solar Energy Industries Association v. Federal Energy Regulatory Commission*, 80 F.4th 956 (9th Cir. 2023) (rejecting the application of a CE by determining that when an agency is uncertain about the possible environmental effects of a proposed action, the proper course is to prepare an EA to the best of the agency's ability, not to avoid environmental analysis altogether by use of a CE. The court explained that while the lack of reasonably foreseeable environmental impacts may justify an agency's decision not to complete an EIS, it cannot relieve an agency of its obligation to produce an EA)

- *Earth Island Institute v. Muldoon,* 82 F.4th 624 (9th Cir. 2023) (finding that the NPS's use of the "minor-change" exclusion to be appropriate, indicating that the projects did indeed constitute minor amendments to the existing Fire Management Plan and that their impacts were sufficiently analyzed to be considered minimal)

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

- *Diné Citizens Against Ruining our Environment v. Haaland*, 59 F.4th 1016 (10th Cir. 2023) (discussing that although BLM took the requisite hard look at impact on air quality, the court criticized BLM for failing to take a hard look at the direct, indirect, and cumulative impacts of greenhouse gas emissions as required by NEPA)

- *No Mid-Currituck Bridge-Concerned Citizens v. North Carolina Dep't of Transp.*, 60 F.4th 794 (4th Cir. 2023) (disagreeing with Plaintiff's arguments that the previous predictions of heavy traffic were rendered obsolete by new forecasts, which "showed significantly lower expectations of future traffic" and finding that agencies prepared new traffic forecasts and network congestion measures, which resulted in a conclusion that travel-time benefits associated with the bridge might be lower than originally predicted, but the updated analysis found that the main roads were still congested and will become worse)

- *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 61 F.4th 633 (9th Cir. 2023) (explaining that FAA did not need to prepare an EIS (due to significant impacts) because a California Environmental Impact Report (EIR) prepared under California Environmental Quality Act (CEQA) found that the proposed Project could result in significant impacts on air quality, greenhouse gas, and noise. The Court disagreed and stated, "[d]efendants [a]re not required to rely on the conclusion in the CEQA EIR because CEQA and NEPA are different statutes with different requirements (the court upheld the FAA's impact analysis.))

- *City of Los Angeles, California v. Federal Aviation Administration*, 63 F.4th 835 (9th Cir. 2023) (agreeing that the FAA did not take a hard look at noise impacts from the Project construction equipment on nearby neighborhoods because FAA's analysis rested on an

unsupported and irrational assumption that construction equipment would not be operated simultaneously)

- *Center for Biological Diversity v. Federal Energy Regulatory Commission*, 67 F.4th 1176 (D.C. Cir. 2023) (upholding FERC's impact assessment of the Project on the endangered Cook Inlet beluga whales, and on wetlands; the court upheld FERC's methodology when it decided not to use the social cost of carbon tool, but rather it compared the Project's direct emissions with existing Alaskan and nationwide emissions)

- *Blue Mountains Diversity Project v. Jeffries*, 72 F.4th 991 (9th Cir. 2023) (disagreeing that the agency analyzed the impacts on too broad a level (context), and finding the agency took a hard look with the significance intensity factors (uniqueness, controversy, setting a precedent or a violation of federal, state or local laws))

- *Center for Biological Diversity v. U.S. Dep't of Interior*, 72 F. 4th 1166 (10th Cir. 2023) (upholding impact assessment analysis highlighting agency's use of historical hydrology data and agency's methodological choices in assessing the environmental impacts of the contract)

- *Missouri ex rel. Bailey v. U.S. Dep't of Interior, Bureau of Reclamation*, 73 F.4th 570 (8th Cir. 2023) (concluding, in a brief decision, that BOR sufficiently assessed a water supply project's environmental impacts, when the assessment involved various environmental considerations, including the impact on Missouri River depletions, and concluded that the project would not significantly impact the environment)
- *National Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 75 F.4th 743 (7th Cir. 2023) (upholding the Corps' programmatic approach, and finding based on this approach, the Corps did not act unreasonably in declining to provide more detailed economic analyses)

- *Western Watersheds Project v. U.S. Bureau of Land Mgm't*, 76 F.4th 1286 (10th Cir. 2023) (finding that BLM's consideration of impacts on sage-grouse and pronghorn were reasonable despite limited research on the impact of development within sage-grouse winter concentration areas, because BLM utilized available studies to inform its analysis and anticipated how development would affect sage-grouse populations; similarly, it found that for the pronghorn, BLM considered the potential adverse impacts of the project on migration patterns and population viability, analyzing broader migratory routes and using the Sublette Herd as a proxy for impacted pronghorn populations)

- *Eagle County, Colorado v. Surface Transportation Board*, 82 F.4th 1152 (D.C. Cir. 2023) (agreeing with Plaintiffs that the Board failed to take a hard look at the risk and impact of wildfires presented by the Railway given the expected increased traffic on the Union Pacific Line)

- *Lowman v. Federal Aviation Administration*, 83 F.4th 1345 (11th Cir. 2023) (criticizing Plaintiffs' argument that the "FAA violated NEPA by failing to analyze all air quality and

should have conducted additional air quality analyses" and finding that the Proposed Development Project would increase area emissions at [the Airport]; however, the increase in emissions would not constitute a significant impact)

- *Don't Waste Michigan v. U.S. Nuclear Regulatory Commission*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023) (not for publication) (discussing that in a challenge to the impact assessment analysis the D.C. Circuit stated "our role is not to "flyspeck" an environmental analysis for minor deficiencies)

- *North Cascades Conserv. Council v. U.S. Forest Serv.*, No. 22-35430, 2023 WL 2642930 (9th Cir. Mar. 27, 2023) (not for publication) (rejecting contention that the agency needed to establish a baseline of the wildlife population in the Project area for it to have taken a hard look, as required by NEPA, and discussing that the USFS took a sufficiently hard look at the Project's impact on the environment, reasonably explaining how the Project will affect and benefit species in the Project area)

- *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.,* No. 22-15259, 2023 WL 3267846 (9th Cir. May 5, 2023) (not for publication) (stating that the EA failed to consider adequately the potential effects of the agency's action on residents of the neighboring communities; contained significant misstatements and errors that frustrated NEPA's goals of fostering informed decisionmaking and public participation. The Ninth Circuit found that the historical grazing data was inaccurate and did not allow for proper comparison to the proposed action)

- *Swan View Coalition v. Steele,* No. 22-35137, 2023 WL 3918686 (9th Cir. Jun. 9, 2023) (not for publication) (rejecting Swan View's argument that the USFS violated NEPA by failing to consider or disclose the environmental impact of its revised road management framework on grizzly bears or bull trout)

- *O'Reilly v. All State Financial Co.*, No. 22-30608, 2023 WL 6635070 (5th Cir. Oct. 12, 2023) (not for publication) (finding that the EA inadequately addressed public and expert concerns about the project's effects on local flooding, habitat destruction, and other environmental consequences, and criticizing the Corps' reliance on minimal explanations and the lack of a robust discussion of mitigation measures or the project's broader ecological implications)

- *Western Watersheds Project v. McCullough,* No. 23-15259, No. 23-15261, No. 23-15262, 2023 WL 4557742 (9th Cir. Jul. 17, 2023) (not for publication) (determining that BLM's impact assessment of water quality was sufficient when BLM's conditions for groundwater monitoring and compliance with state standards were sufficient to prevent degradation)

***Indirect Impacts:*** Six cases involved assessment of indirect impacts, three of which involved greenhouse gas impacts.

- *Diné Citizens Against Ruining our Environment v. Haaland*, 59 F.4th 1016 (10th Cir. 2023) (criticizing BLM for failing to take a hard look at the direct, indirect, and cumulative impacts of greenhouse gas emissions as required by NEPA)

- *Center for Biological Diversity v. Federal Energy Regulatory Commission*, 67 F.4th 1176 (D.C. Cir. 2023) (finding that FERC did not violate NEPA by refusing to consider the Project's indirect greenhouse gas emissions when FERC explained the Project's natural gas would either be exported to foreign buyers or sold to domestic users in Alaska)

- *Center for Biological Diversity v. U.S. Dep't of Interior*, 72 F. 4th 1166 (10th Cir. 2023) (rejecting the environmental groups' argument that the Bureau failed to consider relevant scientific data on future water availability and climate change).

- *Missouri ex rel. Bailey v. U.S. Dep't of Interior, Bureau of Reclamation*, 73 F.4th 570 (8th Cir. 2023) (concluding, in a brief decision, that BOR sufficiently assessed the project's environmental impacts, including downstream impacts)

- *Eagle County, Colorado v. Surface Transportation Board*, 82 F.4th 1152 (D.C. Cir. 2023) (discussing that the court found that the Board failed to disclose reasonably foreseeable upstream and downstream effects of increased oil drilling and refining, including greenhouse gas emissions from combustion.)

- *O'Reilly v. All State Financial Co.*, No. 22-30608, 2023 WL 6635070 (5th Cir. Oct. 12, 2023) (not for publication) (discussing that the Corps articulated no basis for its findings of significance, and failed to explain why it determined that Timber Branch II project, a proposed multiuse commercial and residential development located in Covington, St. Tammany Parish, Louisiana, would have a short-term minor effect on aquatic organisms but a long-term minor effect on other wildlife)

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

- *Diné Citizens Against Ruining our Environment v. Haaland*, 59 F.4th 1016 (10th Cir. 2023) (finding that BLM's analysis of the cumulative impacts of these emissions were inadequate because it relied on simplistic comparisons to state and national emissions without adequately considering the specific environmental consequences of the emissions from the drilling activities and concluding that BLM's assessments did not fully account for the cumulative environmental effects of the proposed drilling operations)

- *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 61 F.4th 633 (9th Cir. 2023) (upholding FAA's cumulative effect analysis when the record showed that the FAA accounted for the traffic generated by these 80-plus projects for purposes of identifying cumulative traffic volumes, and that the FAA properly analyzed for cumulative air quality impacts)

- *City of Los Angeles, California v. Federal Aviation Administration*, 63 F.4th 835 (9th Cir. 2023) (agreeing that the FAA did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not be operated simultaneously, and that this deficiency carried through in its cumulative impacts analysis)

- *Center for Biological Diversity v. U.S. Dep't of Interior*, 72 F. 4th 1166 (10th Cir. 2023) (finding that agency adequately considered the environmental impacts of the contract, including the effects of climate change on water availability and the cumulative impacts of existing and future water depletions on the Colorado River system)

- *Missouri ex rel. Bailey v. U.S. Dep't of Interior, Bureau of Reclamation*, 73 F.4th 570 (8th Cir. 2023) (disagreeing with Missouri's argument that the cumulative effects analysis needed to consider another state-sponsored project, the Red River Valley Project, to avoid an improper segmentation. The Eight Circuit found that the BOR's decision to limit the scope of the EA to the federal Central North Dakota Project was not arbitrary and capricious).

- *Eagle County, Colorado v. Surface Transportation Board*, 82 F.4th 1152 (D.C. Cir. 2023) (explaining that the Board failed to explain adequately why it could not estimate the emissions or other environmental impacts it expected in its cumulative impact analysis since it identified where the oil and gas production induced by the railway was expected to occur).

- *Lowman v. Federal Aviation Administration*, 83 F.4th 1345 (11th Cir. 2023) (disagreeing with the argument that the FAA failed to "take into consideration the cumulative impact of its past actions to follow NEPA because the FAA's Phase II analysis did not adequately account for the cumulative impacts of (a) Phase I, (b) the other Airport development projects it approved via categorical exclusion, and (c) Phase II; the court lauded the FAA's analysis calling it rigorous and detailed)

- *Western Watersheds Project v. McCullough,* No. 23-15259, No. 23-15261, No. 23-15262, 2023 WL 4557742 (9th Cir. Jul. 17, 2023) (not for publication) (upholding the BLM's analysis of cumulative impacts, noting the comprehensive assessment of past and future development activities in the area)

- *O'Reilly v. All State Financial Co.*, No. 22-30608, 2023 WL 6635070 (5th Cir. Oct. 12, 2023) (not for publication) (highlighting the importance of considering the incremental impacts of the project in conjunction with other past, present, and reasonably foreseeable actions, and pointing out that the Corps' analysis fell short of capturing the potential compound effects of multiple projects on the environment, thereby underestimating the true impact of the proposed development)

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

- *Harrison County, Mississippi v. U.S. Army Corps of Eng'rs*, 63 F.4th 458 (5th Cir. 2023) (affirming that the Corps was not required to prepare a supplemental EIS due to the increased use of the Bonnet Carré Spillway, which diverts water from the Mississippi River into Lake Pontchartrain; the Fifth Circuit noted that the Spillway had been fully constructed and operational for over 90 years, with no substantial changes to its design or operation that would necessitate a reevaluation under NEPA.)

- *No Mid-Currituck Bridge-Concerned Citizens v. North Carolina Dep't of Transp.*, 60 F.4th 794 (4th Cir. 2023) (disagreeing with Plaintiff's arguments that significant changes to anticipated growth and development patterns and significant changes to projections of sea level rise required the preparation of a supplemental EIS)

- *Earth Island Institute v. U.S. Forest Serv*., 87 F.4th 1054 (9th Cir. 2023) (declining to agree with Earth Island's argument that, following the 2020 bark-beetle outbreak, the USFS was obligated to supplement its NEPA analysis because the lost marten habitat constituted a "significant new circumstance" requiring supplemental NEPA analysis, when the agency completed a supplemental information report to the 2018 EA)

## 7.4 Details of Cases

Each of the substantive 2023 NEPA cases, organized by federal agency, is described in more detail below. Unpublished cases are noted (7 of the 25 substantive cases in 202e were unpublished). Although such cases may not have precedential value depending on the court, they can be of value to NEPA practitioners.

### U.S. DEPARTMENT OF AGRICULTURE

***Alliance for the Wild Rockies v. Petrick***, 68 F.4th 475 (9th Cir. 2023)
*Agency prevailed on its appeal involving NEPA (but noting further analysis by lower court is needed).*

Issues: Application of a Categorical Exclusion (CE)

Facts: Environmental organization ("Alliance for the Wild Rockies" or "Alliance") sought review of a USFS decision approving the Hanna Flats logging project in the Idaho panhandle, alleging violations of NEPA arising from USFS' determination that project was categorically excluded from NEPA as a wildland-urban interface under the Healthy Forest Restoration Act (HFRA).

In August 2017, the USFS issued a Scoping Notice announcing an agency project in the Idaho Panhandle National Forests within Bonner County, Idaho. The Project involved several treatments, including commercial thinning, noncommercial thinning, and prescribed burning. The USFS, through the Project, sought to remove forest fuel hazards to minimize wildfire risk and remove diseased trees spanning 6,814 acres, nearly 97% of which is public land.

The USFS sought public comment. Members of the public, including Alliance, provided extensive comments, expressing concern because of the Project's proximity to the Selkirk Grizzly Bear Recovery Zone and the Priest Bears Outside Recovery Zone.

In August 2017, the USFS approved the Project under a statutory categorical exclusion (CE) authorized under the HFRA for projects within the wildland-urban interface.

The court reviewed two cases (*Hanna Flats I* and *Hanna Flats II*). In *Hanna Flats I*, the district court granted summary judgment for Alliance, reasoning that the record did not show that the Project fell within the statutory definition of wildland-urban interface and ordered further analysis supporting the CE on remand. The USFS complied and issued a Supplement to the Decision Memo further justifying the CE. The Supplemental Decision Memo further justified the use, explaining that the project fell within the Community Wildfire Protection Plan's definition of wildland-urban interface. The Supplement provided a map of the Project, the surrounding area, and the Community Plan's wildland-urban interface, highlighting nearby locations of at-risk communities But, in a new action by Alliance (*Hanna Flats II*), the district court issued a preliminary injunction, again reasoning that the USFS could not invoke the CE.

The Ninth Circuit remanded to the district court with instructions to reconsider and vacated the district court's injunction.

Decision: Alliance argued that the USFS violated NEPA when it issued its CE determination based on a HFRA categorial exclusion. HFRA requires the USFS to act to "reduce wildfire risk" and "enhance efforts to protect watersheds and address threats to forest and rangeland health." *WildWest Inst. v. Bull,* 547 F.3d 1162, 1165 (9th Cir. 2008) (*quoting* 16 U.S.C. § 6501(1), (3)). It requires the USFS, as soon as practicable to implement an "authorized hazardous fuel reduction project[ ]on federal land" where certain imminent risks exist*. Id.* (alterations in original) (*quoting* 16 U.S.C. § 6512(a)(4)).

HFRA provides a statutory categorical exclusion to NEPA when the project is located "in the wildland-urban interface." 16 U.S.C. § 6591b(c)(2)(A). A "wildland-urban interface" is an area where structures and other human development intermingle with undeveloped wild areas. Wildfires pose extraordinary risks to life and property in such areas. HFRA specifically defines a "wildland-urban interface" as "an area within or adjacent to an at-risk community that is identified in recommendations to the Secretary in a community wildfire protection plan." *Id.* § 6511(16)(A) (emphases added). An "at-risk community" must satisfy multiple requirements; as relevant here, it "is comprised of . . . a group of homes and other structures with basic infrastructure and services . . . within or adjacent to Federal land." *Id.* § 6511(1)(A)(ii).

First, the USFS argued that the doctrine of administrative waiver applied (that they did not receive notice of the Alliance's concerns). The lower court focused on the requirement of HFRA, whether Alliance's comments "sufficiently alerted" the USFS "of its concern about how the wildland-urban interface was delineated for the Project." The lower court found that one of more than a hundred pages of comments satisfied the notice requirement:

> The forest plan Glossary definition of [wildland-urban interface] under (A) has allowed entities other than the general public to set [wildland-urban interface] boundaries outside of NEPA. . . processes, and under (B) defines it so vaguely as to expand the delineation of the [wildland-urban interface] greatly – again outside . . . NEPA processes.

The Ninth Circuit criticized the district court's approach, finding that the notice requirement was not met, and vacated the grant of summary judgment and remanded for the district court to consider in the first instance whether any such comments were necessary to challenge a project exempted from NEPA analysis by a CE.

In the second case, *Hanna Flats II,* the parties disagreed at the outset about the standard of review that the court applies to the USFS' decision to rely on a CE - the traditional "arbitrary or capricious" standard or the less deferential standard of "reasonableness."

Following the text of the Administrative Procedures Act and Ninth Circuit precedent, the court found that the USFS' reliance on HFRA's CE should be under the familiar arbitrary or capricious standard. Applying that standard, the court will set aside an agency's action:

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence

> before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856 (1983).

Turning to the district court's preliminary injunction analysis, the Ninth Circuit agreed with the district court's conclusion that, the project's location within Bonner County's Community Wildfire Protection Plan was not enough to justify the use of the HFRA categorical exclusion. However, the Ninth Circuit found that the district court erred in its analysis of whether the project falls within "an area within or adjacent to an at-risk community." The Ninth Circuit found that the statutory scheme creates a baseline protection of at least 0.5 to 1.5 miles around at-risk communities and the at-risk community does not need to border the HFRA project. 16 U.S.C. § 6511(16)(B)(i), (ii). The court opined that HFRA prioritizes communities with plans and allows them a more flexible standard for defining the wildland-urban interface.

Finally, the Ninth Circuit held that there was no reason to conclude that it should exercise its equitable discretion to leave an injunction in place that was wrongly granted, and where there was no clear likelihood of success on another claim. Because the preliminary injunction was based on a legal error, the Ninth Circuited vacated it.

***Blue Mountains Diversity Project v. Jeffries***, 72 F.4th 991 (9th Cir. 2023)
*Agency prevailed.*

Issue: Administrative Record, Impact Assessment

Facts: In a case involving previous litigation, environmental organization (Blue Mountains Diversity Project (BMDP)) brought action against the USFS and forest supervisor, asserting that the USFS's approval of Walton Lake Restoration project violated NEPA. The Ninth Circuit affirmed the district court and dissolved the previous preliminary injunction.

Walton Lake is a 218-acre recreation site in the Ochoco National Forest in Oregon. The USFS developed the Walton Lake Restoration Project (Project) to replace trees infested with laminated root rot and bark beetles with disease-resistant trees. In 2015, relying on a regulation that excludes the sanitation harvest of trees to control disease and insects from some NEPA requirements, 36 C.F.R. § 220.6(e)(14) (2015), the USFS issued a decision memorandum approving the Project. In May 2016, the USFS contracted with T2, a private company, for logging to implement that decision. Although no logging has yet occurred, the T2 contract remains in place.

BMDP sued, challenging the 2015 decision, and the district court preliminarily enjoined the logging on October 18, 2016. The next day, the USFS withdrew its decision.

The USFS issued an EA and a decision notice approving the Project in 2017 but withdrew the decision notice later that year, citing a need for "additional dialogue and analysis." The USFS issued a revised EA in July 2020 and a revised decision notice in December 2020. The revised EA analyzed four alternatives, including a no-action alternative.

The selected alternative authorizes 35 acres of sanitation logging and 143 acres of commercial and noncommercial thinning to reduce the risk of wildfires and bark beetle infestation. The 2020 decision notice stated that the Project "provides the best opportunity for long-term public enjoyment of this area, with fewer risks of falling trees, and more longevity in the large ponderosa pines that provide much of the scenic quality"; found that there would be no significant environmental impact; and made four Project-specific amendments to the Ochoco National Forest Plan.

Decision: BMDP argued that the administrative record (AR) was incomplete. BMDP asserted that deliberative materials are part of the "whole record" and that a privilege log is required if they are not included in the AR. It also contended that all documents in the 2016 AR should be in the AR for this case.

No previous Ninth Circuit opinion addressed whether deliberative materials are part of the "whole record." District courts in the Ninth Circuit are split on the issue. *See Save the Colorado v. U.S. Dep't of the Interior*, 517 F. Supp. 3d 890, 896–97 (D. Ariz. 2021) (collecting cases). The District of Columbia Circuit, however, has held that deliberative materials are generally not part of the

AR absent impropriety or bad faith by the agency. *See Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019). The Ninth Circuit agreed.

Because deliberative materials are "not part of the administrative record to begin with," they are "not required to be placed on a privilege log." The Ninth Circuit agreed with the D.C. Circuit that "a showing of bad faith or improper behavior" might justify production of a privilege log to allow the district to determine whether excluded documents are actually deliberative. *Id.; see also In re United States*, 875 F.3d 1200, 1211–12 (9th Cir. 2017) (Watford, J., dissenting) (discussing potential circumstances justifying expansion of the AR), *vacated,* ––– U.S. ––––, 138 S. Ct. 443, 445, (2017).

BMDP did not assert any misconduct by the USFS, nor did it contend that specific documents were improperly classified as deliberative. The court upheld the judgment of the district court denying of BMDP's motion to compel completion of the AR and declined to order the USFS to produce a privilege log, concluding that certain documents sought by BMDP were deliberative materials and that BMDP did not establish that some documents in the AR filed in response to the 2016 suit were "before the agency" in its 2020 decision.

In doing so, the Ninth Circuit stated, "[w]e place a thumb on the scale against supplementation of the AR," and BMDP has not demonstrated how the inclusion of "over two thousand pages that the Service had included in the 2016 AR," would "identify and plug holes in the administrative record," *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

BMDP contended that the logging contract with T2 violated regulations prohibiting an agency from "commit[ting] resources prejudicing selection of alternatives" or taking actions that would "[l]imit the choice of reasonable alternatives." 40 C.F.R. §§ 1502.2(f), 1506.1(a)(2). The court found that BMDP has failed to establish that the contract improperly committed resources under any standard.

Under the contract, T2 would receive $78,262 to remove non-commercial timber and about $36,000 worth of harvested commercial timber. Critically, the USFS reserved the right to "terminate this contract, or any part hereof, for its sole convenience," at which point T2 "shall immediately stop all work." T2 has not conducted any logging under the contract because the USFS has not issued a notice to proceed. And, given the district court's preliminary injunction against logging, which has been stayed pending appeal, no logging can occur until this case is resolved. The EA contains no indication that the T2 contract prejudiced or limited the consideration of alternatives. Therefore, the court determined that the contract did not improperly commit resources.

BMDP contended that the EA diluted the significance of some impacts by analyzing them on too large a scale. BMDP conceded that the 2020 decision "acknowledges the highly-localized nature of the Project's effects" and that the EA contains a "disclosure of local impacts." The USFS extensively analyzed various local impacts—including those on scenic integrity, on late and old structure stands, and on threatened and endangered species. And, the EA explained why it chose certain broader contexts for analysis in other instances. The record fails to establish that the agency's decisions about context were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Although the EA described Walton Lake as "unique" because it boasts a high number of visitors and is "the only Developed Recreation Management Area that has a lake with the combination of moist mixed conifer and dry mixed conifer forest surrounding it," the USFS reasonably found that the Project would affect neither the lake itself, nor "the diversity of tree species in the project area around Walton Lake." The USFS also reasonably concluded that the Project "would not substantially affect the use of the area as a recreation site" because the infested area was already closed to recreational uses for safety reasons. And BMDP does not challenge the USFS' conclusion that the Project would not affect any of the "unique" characteristics listed in the regulation. See 40 C.F.R. § 1508.27(b)(3).

The record also does not suggest that the Project is highly controversial. See id. § 1508.27(b)(4). The USFS concluded that the Project was not highly controversial because its potential effects were well-established or supported by the best available science. Citing a range of research, the USFS found "no evidence that the proposed treatments would exacerbate" laminated root rot. It also decided against stump removal because of "soil

disturbance" and "the high cost of removing stumps."

It was also reasonable for the USFS to conclude that the Project is unlikely to establish a precedent for future actions. *See* 40 C.F.R. § 1508.27(b)(6). The USFS explained that "no other known Developed Recreation Management Areas ... have a laminated root rot problem on the Ochoco National Forest." The USFS found that the Project is "site-specific" and "any future decision would need to go through the NEPA process." Even if other sites might one day develop similar infestation issues, that does not necessarily make this Project precedential, "especially since any other [project] would be subject to its own NEPA analysis." *WildEarth Guardians*, 923 F.3d at 674.

The USFS' decision also reasonably accounted for federal, state, and local laws. See 40 C.F.R. § 1508.27(b)(10). The Ninth Circuit found that the impact assessment was not arbitrary and capricious.

***Driftless Area Land Conservancy v. Rural Utilities Serv***., 74 F.4th 489 (7th Cir. 2023)
*Agency prevailed.*

Issues: Federal Action.

Facts: Environmental advocacy organizations (Driftless) filed suit alleging, in part, Rural Utilities Service violated NEPA in its adoption of an EIS involving the Cardinal-Hickory Creek Project, a planned electric transmission line that would deliver wind energy from Iowa to Southern Wisconsin. through which would run from the Hickory Creek substation west of Dubuque, Iowa, through far Southwest Wisconsin near Cassville and the Mississippi River to Middleton in the center of Southern Wisconsin, all through what is known as "the Driftless Area." The Seventh Circuit affirmed lower court's summary judgment in favor of the agency.

The Cardinal-Hickory Creek Project is a planned electric transmission line that would deliver wind energy from Iowa to Southern Wisconsin. The utility companies responsible for the line asked the FWS to allow construction across the Upper Mississippi River National Wildlife and Fish Refuge alongside a road and railroad that already cross the Refuge.

In October 2019 the Rural Utilities Service completed an EIS assessing this transmission line under NEPA, 42 U.S.C. § 4332(2)(C). The FWS and the Army Corps of Engineers adopted the statement for their own use in considering the project. In December 2019 the FWS determined that permitting the line to pass through the Refuge would be "compatible" with its "major purposes" under the Refuge Act. 16 U.S.C. § 668dd(d)(1)(A). The agency issued a right-of-way permit in September 2020.

Several environmental advocacy groups sued, arguing that the permit violates the Refuge Act and that the environmental impact statement is deficient under the NEPA. While litigation was pending, the utility companies applied for an amended permit slightly altering the route, which still would largely parallel the road. They also asked the FWS to consider a land exchange under 16 U.S.C. § 668dd(b)(3) as an alternative to the permit. While reviewing these new requests, the agency discovered that it had relied on incorrect easement documents in issuing its original compatibility determination. By a letter dated August 27, 2021, it revoked the determination and permit. This letter also promised to consider the proposed land exchange. Almost two years have passed, but the agency has not issued a new decision.

Decision: The court found that Driftless' request for relief against the Rural Utilities Service (RUS) under the NEPA was premature. Dairyland Power Cooperative, a utility company with a nine percent ownership interest in the project, told the RUS hat, after the transmission line is complete, it may seek a federal loan that will replace some or all of the line's current private financing. Dairyland has yet to make any proposal to the RUS so financing is even farther from finality than is the land swap.

The court admitted that the EIS for the transmission line is "final" in the sense that multiple agencies have adopted it. But an EIS differs from a decision to approve any given action. NEPA requires an agency to include a statement as part of its "recommendation or report" for "major Federal actions significantly affecting the quality of the human environment". 42 U.S.C. § 4332(2)(C). It is the decision incorporating the statement into a recommendation or report that is a reviewable agency action. *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1079 (7th Cir. 2016).

The court held that the Rural Utilities Service has yet to issue a recommendation or report on any proposal, because Dairyland has not made one. When the agency adopted the EIS that did not "consummat[e]" its decisionmaking process, *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597, 136 S.Ct. 1807 (2016), but took just one preliminary step toward an eventual decision. And the agency's conclusion that the statement complies with the NEPA lacks legal consequences—any entitlements will flow from the ultimate funding decision. To which we add that it is not possible to evaluate the environmental consequences of any decision, such as the extension of federal credit, before knowing what that decision would entail.

EISs are required only for "major" federal actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). It is not obvious that funding part of a project that will be completed with or without federal assistance is a major federal action. The transmission line that Driftless objects to would be in operation before Dairyland even requested funding. If the agency decides that federal loans will replace some private financing, that decision may or may not "significantly" affect the environment.

***Earth Island Institute v. U.S. Forest Serv***., 87 F.4th 1054 (9th Cir. 2023)
*Agency prevailed.*

Issue: Alternatives, Public Involvement, Duty to Supplement.

Facts: Earth Island contended that the USFS violated NEPA when it failed to adequately consider alternatives for the Three Creeks Project, a proposed logging project in the Inyo National Forest, and when the USFS failed to solicit public comments following its 2018 EA and when the USFS failed to supplement its NEPA analysis following the 2020 bark-beetle outbreak and subsequent Inyo Craters Project. The Ninth Circuit affirmed the lower court's summary judgment in favor of the agency.

To understand this decision, this project takes place in the Inyo National Forest (the Forest). The forest looks much different now than it did in the nineteenth century. Large, mature trees once dotted the landscape. But decades of logging, fire suppression, and drought rendered the forest dense with thin, immature trees. Conditions became ripe for catastrophic forest fires, bark-beetle infestations, and fungal infections.

The USFS sought to address this problem by approving the Three Creeks Project. It intended for the Three Creeks Project to return the Forest to its resilient, pre-European settlement conditions by thinning excess trees, removing excess fire fuel, and using prescribed fire. In March 2016, the USFS published a draft EA. The EA described the Three Creeks Project area as greatly at risk of high-intensity fires. It explained that action was needed to open the forest to its pre-European settlement conditions, where the horizon was open and park-like, scattered with a random distribution of age-diverse trees, but dominated by older, larger trees. Under such conditions, fires burned frequently but not intensely, and rarely catastrophically. The USFS contemplated two alternatives to reach this goal: action or no action.

In July 2017, the USFS published a revised EA (2017 EA). The USFS removed eight units—around 600 total acres—from the Three Creeks Project after they were destroyed by fires. The project size decreased to 9,590 acres divided into 130 unequal units. Otherwise, the 2017 EA remained essentially the same as the 2016 EA.

Based on a letter from Earth Island requesting withdrawal of the project, and a resolution meeting In January 2018, the USFS published its final revised EA ("2018 EA").

During the summer of 2020, the Forest suffered a widespread bark-beetle outbreak. Bark-beetles wrought massive tree mortality across about 520 acres of the Forest. Of the infested acres, 220 were within the Three Creeks Project area. The USFS issued a supplemental information report (SIR) evaluating the impact of the bark-beetle outbreak on the Three Creeks Project. It found that "treatments authorized for the two affected units . . . [were] no longer appropriate[.]" So the USFS removed the entirety of the two affected units (559 acres total) from the project. It also noted that the two beetle-infested former units constituted only a small percent of the Forest's entire habitat for the Pacific marten, so the project's overall effect on martens would remain the same as discussed in the 2018 EA. The USFS concluded that the bark-beetle outbreak did not warrant further NEPA analysis

"because the effects [of decreasing the project footprint] are within the scope and range of effects as originally analyzed in the environmental assessment and do not result in any new or significant impacts."

Decision: Earth Island argued that it presented the USFS with three viable alternatives, but the USFS failed to either analyze these alternatives or explain why these alternatives did not warrant analysis. However, the Ninth Circuit found that because Earth Island's failed to suggest alternatives in its 2016 comments and failed to connect its 2017 objections to a specific comment referencing alternatives, Earth Island's argument that the USFS should have been "put on notice" to consider alternatives was unconvincing. Because Earth Island failed to raise its proposed alternatives during the comment period, the Ninth Circuit found it failed to exhaust its argument.

The court also examined whether if they could reach the three suggested Earth Island alternatives -- the alternatives would fail as unreasonable.

An alternative is reasonable if it 1) advances the project's purpose and need, and 2) is "significantly distinguishable from alternatives actually considered, or which have substantially similar consequences." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dept. of Interior*, 608 F.3d 592, 602 (9th Cir. 2010).

The court noted that the "significantly distinguishable" requirement is more complicated, as it is defined in the negative. NEPA does not require an agency to consider "every conceivable permutation" of its proposed alternatives. *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 872 (9th Cir. 2004); *see City of Los Angeles v. Fed. Aviation Admin.*, 63 F.4th 835, 847 (9th Cir. 2023) (finding that, where an agency considered a variation of a party's suggested alternative, "NEPA did not require [the agency] to consider further permutations of that alternative"); *see also Vt. Yankee*, 435 U.S. at 551, 98 S.Ct. 1197 ("Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man."). Nor does NEPA require agencies to evaluate "mid-range" alternatives between action and no action. *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1004-05 (9th Cir. 2013) (finding that such alternatives are not "necessary to foster informed decisionmaking and public participation").

The Ninth Circuit held that Earth Island's suggested alternatives were not "significantly distinguishable" from the action alternative the USFS considered and are therefore unreasonable. Earth Island argued that its proposed alternatives would not result in "substantially similar consequences," But, Earth Island only claimed that its alternatives "would preserve the remaining large trees" – but did not explain how its suggested alternatives could reach that goal but the USFS' action alternative could not. Earth Island failed to meaningfully distinguish between the consequences of its proposed alternatives and the USFSs.

Earth Island contended that the USFS was required to circulate its 2018 EA for public comment because the EA contained substantial changes to the Three Creeks Project's desired forest conditions, the methods proposed to achieve these conditions, and the project's expected effect on the Pacific marten and black-backed woodpecker.

The USFS regulations require it to offer the opportunity for public comment after it prepares an EA "based on consideration of new information or changed circumstances[.]" 36 C.F.R. §§ 218.22(a), (d).

Public comments are intended to help agencies assess an action's environmental impact, so the agency can then modify its next draft or final EA to reflect that public input. If an agency had to file a supplemental draft EA and repeat the public comment process every time it makes any such modifications, the NEPA review process would never end, and agencies would balk at modifying their EAs. *California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982). An agency is therefore not required to repeat the public comment process when the EA is only a slightly modified version of a draft EA. Id. at 771 (holding that repeating the public comment process is unnecessary "when only minor modifications are made" to a draft EA). Conversely, an agency is required to repeat the public comment process when the EA includes substantial changes relevant to environmental concerns. *See Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 548 (8th Cir. 2003).

Earth Island argued that the change to desired forest conditions and methods constitutes "new information or changed circumstances" requiring an opportunity for public comment. Per Earth Island's request, the USFS included the desired trees per acre and desired mean tree diameter as clarifications. As perhaps the greatest change between the 2017 and 2018 EA, the USFS reduced the desired number of large trees per acre by eight—but again, despite this change, the overarching desired conditions remained consistent. The court held these to be minor modifications in response to public input, and did not require further public comment.

Second, Earth Island claimed that the discussion of the project's impact on the black-backed woodpecker and Pacific marten constituted new information requiring public comment. The USFS' 2017 EA concluded that the project would have "little direct or indirect" impact on martens generally across the project area, no impact within the marten units, and could possibly even improve some habitat components. Its 2018 EA concluded the same, but also cited a study Earth Island discussed in its 2017 objections. Since the 2018 EA maintained the same conclusions as the 2017 EA regarding the black-backed woodpecker and Pacific marten and otherwise only contained minor modifications, the court held that the USFS was not required to offer another public comment period.

Earth Island argued that, following the 2020 bark-beetle outbreak, the USFS was obligated to supplement its NEPA analysis. Earth Island contended that the lost marten habitat constituted a "significant new circumstance" requiring supplemental NEPA analysis because ninety percent of the Three Creeks Project's marten habitat was removed from its footprint, martens "rarely use Project areas outside of the three identified units," and it is not "biologically realistic that the resident martens will now all occupy the [Project's] remaining [ten] percent of marten habitat."

The court examined this argument and found that the marten units as described in the 2018 EA were not intended to mitigate the Three Creeks Project's harm to martens, because the project did not harm martens. Therefore, the removal of two marten units was not a "substantial change[ ]" relevant to environmental concerns, but a "minor variation[ ]" that geographically shrunk the project's footprint and remained "qualitatively within the spectrum of alternatives that were discussed" in the 2018 EA.

***North Cascades Conserv. Council v. U.S. Forest Serv.,*** No. 22-35430, 2023 WL 2642930 (9th Cir. Mar. 27, 2023) (not for publication)
*Agency prevailed.*

Issue: Alternatives, Impact Assessment

Facts: North Cascades Conservation Council and Kathy Johnson (collectively, Appellants) challenged the agency's decision to approve the South Fork Stillaguamish Vegetation Project in the Mount-Baker-Snoqualmie National Forest (the Project). The Ninth Circuit affirmed the lower court's grant of summary judgment.

Decision: The Ninth Circuit found that the Project did not violate NEPA by failing to take a hard look or consider a range of reasonable alternatives. Appellants contended that the agency needed to establish a baseline of the wildlife population in the Project area for it to have taken a hard look, as required by NEPA.

The court discussed, that under NEPA, the USFS must "assess, in some reasonable way, the actual baseline conditions at the [project] site." *Or. Nat. Desert Ass'n v. Jewell,* 840 F.3d 562, 569 (9th Cir. 2016) (citations omitted). The court discussed the USFS did that, analyzing the various species of wildlife in the Project area along with their habitats. The agency took a sufficiently hard look at the Project's impact on the environment, reasonably explaining how the Project will affect and benefit species in the Project area. *See Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1023 (9th Cir. 2012).

The Ninth Circuit found that the USFS considered a range of reasonable alternatives—ten. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005). The alternatives that Appellants argued the USFS should have considered in greater depth would "extend beyond those reasonably related to the purposes of the project." *Westlands Water Dist.*, 376 F.3d at 868 (quotation omitted).

Moreover, the court criticized that the Appellants offered no explanation of how their alternatives would be funded. In sum, the court decided that Appellants failed to show a violation of NEPA.

***Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv***., No. 22-15259, 2023 WL 3267846 (9th Cir. May 5, 2023) (not for publication)
*Agency Did Not Prevail.*

Issue: Alternatives, Significance of Impacts

Facts: Neighbors of the Mogollon Rim, Inc. (Neighbors) challenged USFS' authorized cattle grazing on several grazing allotments in the Tonto National Forest, in central Arizona. The Ninth Circuit reversed and remanded, ordering the district court to partially vacate the EA and the accompanying decision notice to the extent that it allowed grazing on the Colcord/Turkey Pasture and authorized more than the equivalent of 374 adult cattle.

Decision: The Ninth Circuit found that the USFS violated NEPA by inadequately considering and inadequately explaining the possible effects of the proposed agency action. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007)

First, the agency did not consider a reasonable range of alternatives. The EA considered only a "no-grazing" alternative and the proposed action. Neighbors maintained that the USFS should have considered a third alternative that authorized some grazing on the Bar X ranch, but not on the Colcord/Turkey Pasture. The USFS failed to give full and meaningful consideration to Plaintiff's proposed alternative, which maintains the status quo as to the closure of the Colcord/Turkey Pasture to grazing. *See W. Watersheds Project v. Abbey,* 719 F.3d 1035, 1050–53 (9th Cir. 2013) ("The existence of a viable but unexamined alternative renders an [EA] inadequate.").

The EA's primary rationale for rejecting Neighbors' proposed alternative was that it would not advance the purpose and need of the project. The agency argues that, because the Colcord/Turkey Pasture is designated as "suitable" for livestock grazing by the Tonto Forest Plan, any alternative that excluded grazing on that pasture would be inconsistent with the EA's purpose and need. But that argument misconstrues the role of the Forest Plan. The designation of land as suitable for grazing does not eliminate the requirement for an appropriate NEPA analysis before grazing is authorized.

The USFS EA also rejected the potential third alternative because "[t]he scope of current management places it within the range of alternatives between the No Grazing and the Proposed action." To be sure, there is no minimum number of alternatives that must be considered: the focus is on the substance of the alternatives, not their number. *Native Ecosystems Council v. USFS*, 428 F.3d 1233, 1246 (9th Cir. 2005). The agency did not consider maintaining the status quo, or any other option between "no grazing" and the proposed alternative. The only alternative considered by the EA that met the purpose and need of the project was the proposed action. *See High Country Conservation Advocs. v. USFS*, 951 F.3d 1217, 1224 (10th Cir. 2020).

Studying an alternative that excludes the Colcord/Turkey Pasture from grazing would not require the USFS to adopt that plan. Instead, it would allow the agency and the public to consider fully the effects of the different alternatives and express informed opinions. *See W. Watersheds Project*, 719 F.3d at 1053–54.

Second, the Ninth Circuit opined that the EA failed to consider adequately the potential effects of the agency's action on residents of the neighboring communities. The EA asserted that any effect on the Colcord and Ponderosa Communities would not be significant because "these subdivisions have always been within an active grazing allotment." But that reasoning overstates the importance of the Forest Plan's designation of that area as "suitable" for grazing and ignores the fact that the Colcord/Turkey Pasture has not actually been grazed for more than forty years, except in 2015. The agency's conclusory statement is insufficient to satisfy NEPA's requirements. *See Bark v. USFS,* 958 F.3d 865, 872 (9th Cir. 2020) (concluding that the agency violated NEPA by relying on a vague and uncertain analysis instead of meaningfully considering the effects of the proposed project).

The EA does analyze the potential for same place-same time encounters with respect to recreational users and suggests possible adjustments to minimize those conflicts, such as fencing popular dispersed recreation corridors or adjusting grazing schedules.

Yet the EA does not discuss whether the permittee should maintain fencing or adjust grazing schedules to mitigate the prospect of encounters

with landowners, residents, and car traffic in that area. Additional analysis of same place-same time encounters with residents and landowners is necessary to support USFS' conclusion that the grazing plan will not have a significant effect.

Third, the EA contains significant misstatements and errors that frustrate NEPA's goals of fostering informed decisionmaking and public participation. "

The EA and the decision notice authorized 30% more grazing than is supported by the USFS grazing capacity analysis. The EA provided no explanation for this discrepancy, and the USFS contended that this flaw is a typographical error. Plaintiff, however, maintains that there is a substantive error that resulted in permitting livestock numbers that exceed the agency's own grazing capacity analysis. Regardless of which explanation is correct, the error "materially affected the substance of the agency's decision." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016).

Finally, the Ninth Circuit stated that the historical grazing data are inaccurate and do not allow for proper comparison to the proposed action. That error alone may not be enough to render the NEPA analysis inadequate, but it is compounded by other methodological choices that prevent the public from making an informed comparison between the proposed alternatives and the current conditions.

***Swan View Coalition v. Steele***, No. 22-35137, 2023 WL 3918686 (9th Cir. Jun. 9, 2023) (not for publication)
*Agency prevailed.*

Issue: Impact Assessment.

Facts: Swan View Coalition alleged that the USFS violated NEPA by failing to consider or disclose the environmental impact of its revised road management framework on grizzly bears or bull trout. In a brief opinion, the Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

Decision: The Ninth Circuit rejected Swan View's argument that the USFS violated NEPA by failing to consider or disclose the environmental impact of its revised road management framework on grizzly bears or bull trout. The court found that the EIS fully disclosed the USFS' departure from the requirements under Amendment 19 (including the potential negative impacts to listed species) and considered alternatives to the departure. The FEIS addressed and rejected plaintiffs' comments that the change would harm grizzly bear populations and habitat.

The FEIS also disclosed the impact on bull trout of implementing the discretionary standards in Guideline FW-GDL-CWN-01 which replaced the prior plan's mandatory culvert management and removal requirements. "Among other reasons, the FEIS offered an adequate explanation of its decision to implement the Guideline, and also included a plan to monitor culverts in order to address the impacts of sedimentation on bull trout and the bull trout habitat."

The court opined that the USFS did not ignore any adverse impact of the FEIS (on grizzly bears and bull trout) and took "the requisite 'hard look' " at the environmental consequences of its actions, *The Lands Council v. McNair*, 537 F.3d 981, 1001 (9th Cir. 2008) (en banc), regardless whether Swan View agreed with its scientific conclusion.

Because the USFS adequately fulfilled its obligations under NEPA of disclosure and reasoned explanation, *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–52 (1989), and NEPA involves different standards than the ESA, *see Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1012 (9th Cir. 2006), the Ninth Circuit held that the district court's conclusion that the 2017 Biological Opinion as deficient in certain respects in addressing the reclaimed road standard and mandatory culvert removal did not necessarily mean that the FEIS violated NEPA in addressing the issues.

***Western Watersheds Project v. McKay***, No. 22-35706, 2023 WL 7042541 (9th Cir. Oct. 26, 2023) (not for publication)
*Agency prevailed on its NEPA challenges*

Issue: Impact Assessment (direct effects)

Facts: Western Watersheds Project and other environmental organizations appealed the district court's grant of summary judgment in favor of the USFS under NEPA, challenging the impacts to the threatened Oregon spotted frog in Winema National Forest. In a brief decision, the Ninth

Circuit affirmed the lower court's grant of summary judgment.

Decision: Western Watersheds claimed that the USFS' FEIS failed to take a "hard look" at three key issues regarding threats to Oregon spotted frogs: (1) direct impacts such as trampling, (2) climate change and increasing drought, and (3) population-level effects.

The Ninth Circuit found that the FEIS satisfied the hard look standard because it "contain[ed] a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.' " *City of Los Angeles v. FAA*, 63 F.4th 835, 849 (9th Cir. 2003) (*quoting Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 984 (9th Cir. 2022)). The court discussed that the FEIS rationally explained its decision to focus on habitat characteristics rather than frog numbers. The FEIS acknowledged the threats posed by trampling (and other direct impacts) and climate change.

The court considered that although the FEIS did not specifically compare the magnitude of these threats across alternatives, the FEIS included sufficient information for a reader to understand how the different grazing strategies would affect these threats, thus allowing for an "informed comparison of alternatives." *Native Ecosystems Council v. Marten*, 883 F.3d 783, 795 (9th Cir. 2018).

## U.S. DEPARTMENT OF THE DEFENSE

***Harrison County, Mississippi v. U.S. Army Corps of Eng'rs*,** 63 F.4th 458 (5th Cir. 2023)
*Agency prevailed.*

Issues: Duty to Supplement

Facts: Several Mississippi counties, cities, and associations, collectively referred to as the plaintiffs, filed a lawsuit against the United States Army Corps of Engineers (Corps) concerning the management of the Bonnet Carré Spillway. The plaintiffs sought a judicial declaration that the Corps violated NEPA by not updating the EIS to reflect the increased frequency of opening the Spillway, which diverts water from the Mississippi River into Lake Pontchartrain. The operation of the Spillway, according to the plaintiffs, adversely impacted the environment and the local economy, causing issues such as toxic algae blooms, affecting marine life, and leading to beach closures.

The Corps argued that there was no legal requirement to prepare a supplemental EIS given that there were no significant new circumstances or information that would materially alter the environmental assessments previously conducted. Furthermore, the Corps maintained that the operation of the Spillway did not constitute a "major federal action" under NEPA that would necessitate a supplemental EIS. The District Court for the Southern District of Mississippi sided with the Corps, granting summary judgment in its favor. The plaintiffs appealed the decision, arguing that the Corps' refusal to prepare a supplemental EIS was in violation of NEPA.

Decision: The Court of Appeals, in reviewing the case, focused on whether the Corps was obligated under NEPA to prepare a supplemental EIS due to the increased use of the Bonnet Carré Spillway. The court examined the legal requirements under NEPA, noting that a supplemental EIS is only required if there is ongoing "major federal action" and if significant new circumstances or information arise that are relevant to environmental concerns and that bear on the proposed action or its impacts.

The court agreed with the District Court's conclusion, affirming that the Corps was not required to prepare a supplemental EIS. It highlighted that the Spillway had been fully constructed and operational for over 90 years, with no substantial changes to its design or operation that would necessitate a reevaluation under NEPA. The court noted that while the frequency of the Spillway's use had increased due to changing environmental conditions, this did not constitute a significant new circumstance warranting a supplemental EIS. The operation of the Spillway as it stood was within the Corps' discretion and was in accordance with its established criteria.

Furthermore, the court pointed out that there was no ongoing decision-making process regarding the Spillway that could benefit from a supplemental EIS. The decision to open the Spillway was based on specific operational criteria that had not changed. The court concluded that the plaintiffs failed to demonstrate that the Corps had a clear

duty under NEPA to prepare a supplemental EIS given the circumstances.

The Court of Appeals emphasized the limited role of federal courts in reviewing agency actions under NEPA, underscoring that the Corps' discretion and expertise in managing the Spillway should not be second-guessed without clear evidence of legal error or failure to consider important aspects of the problem. The court affirmed the District Court's summary judgment in favor of the Corps, effectively ending the plaintiffs' challenge on this issue.

***National Wildlife Fed'n v. U.S. Army Corps of Eng'rs***, 75 F.4th 743 (7th Cir. 2023)
*Agency prevailed.*

Issues: Purpose and Need, Alternatives, Impacts Assessment (Economic Analysis), Programmatic Statements

Facts: Environmental organizations challenged the Corps decision to continue a program of building river training structures on the Middle Mississippi River. This challenge was based on claims that the Corps' Final Supplemental Environmental Impact Statement (SEIS) did not comply with the Water Resources Development Act (WRDA) or NEPA. The Corps' project, dating back to 1910, aimed to maintain a navigable channel in the Middle Mississippi through river training structures, minimizing the need for dredging. The 2017 SEIS assessed the ongoing project's ecological impacts, considering new circumstances like newly listed species and updated information on the effects of training structures on wildlife. Plaintiffs alleged the SEIS failed to include a specific mitigation plan as mandated by the 2007 WRDA amendment, did not properly define the project's purpose and need, and did not explore reasonable alternatives. The District Court for the Southern District of Illinois sided with the government, granting summary judgment in its favor

Decision: The Court of Appeals upheld the District Court's decision, noting the Corps' SEIS performed a programmatic analysis to evaluate the ongoing project of maintaining a navigable channel in the Middle Mississippi River. This analysis was deemed necessary given the project's long-term scope and the unpredictable nature of the river's changing conditions, which made it impractical to determine the exact future needs for construction and dredging. The Court recognized that the Corps' approach, assessing environmental impacts at a programmatic level, was in line with NEPA regulations that encourage "tiering" of environmental studies. This method allows for an initial broad analysis of potential impacts, focusing on the actual issues ripe for decision at each level of environmental review and eliminating repetitive discussions. The SEIS detailed how the Corps planned to continue building river training structures to minimize dredging needs, with the acknowledgment that specific locations and types of future structures could not be predetermined. The Corps committed to conducting site-specific EAs for any additional structures prior to their construction. The Court found this programmatic approach reasonable, emphasizing that it provided sufficient information regarding overall impacts of the proposed action, allowing decision-makers to make a reasoned judgment on the merits of the action at the present planning stage.

***O'Reilly v. All State Financial Co.***, No. 22-30608, 2023 WL 6635070 (5th Cir. Oct. 12, 2023) (not for publication)
*Agency did not prevail.*

Issues: Significance of Impacts, Impact Assessment, Cumulative Impacts, Direct and Indirect Impacts.

Facts: All State Financial Company aimed to dredge and fill 24.58 acres of wetlands in St. Tammany Parish, Louisiana, for a mixed commercial and residential development. The Corps issued a permit under § 404 of the Clean Water Act (CWA), after concluding the project would not significantly impact the environment, evidenced by a Finding of No Significant Impact (FONSI). The EA concluded minimal effects, despite concerns over flooding, habitat destruction, and other environmental impacts.

The development's location, adjacent to the Tchefuncte River and Timber Branch River, would alter the natural wetland ecosystem, echoing concerns from a previously enjoined 2000 proposal. The Corps' EA offered minimal rationale for its conclusions, emphasizing mitigation measures without in-depth analysis or acknowledgment of public concerns regarding the project's broader ecological implications.

Decision: The appellate court identified substantial shortcomings in the Corps' EA and its subsequent issuance of a FONSI for All State Financial Company's development project. The court criticized the Corps for failing to provide a thorough analysis of the project's direct, indirect, and cumulative impacts, as mandated by NEPA and the CWA. The decision emphasized the court's expectation for a detailed examination of potential environmental impacts, which was notably absent in the Corps' cursory evaluation.

Further scrutiny revealed that the Corps' assessment inadequately addressed public and expert concerns about the project's effects on local flooding, habitat destruction, and other environmental consequences. The appellate court was particularly critical of the Corps' reliance on minimal explanations and the lack of a robust discussion on mitigation measures or the project's broader ecological implications. This oversight was deemed a failure to adhere to the stringent analytical standards required by NEPA.

Moreover, the court found that the Corps did not properly evaluate the cumulative impacts of the proposed development, a critical aspect of environmental analysis under NEPA and the CWA. The decision highlighted the importance of considering the incremental impacts of the project in conjunction with other past, present, and reasonably foreseeable actions. The appellate court pointed out that the Corps' analysis fell short of capturing the potential compound effects of multiple projects on the environment, thereby underestimating the true impact of the proposed development.

The appellate court also expressed concerns about the procedural aspects of the Corps' decision-making process. It noted the absence of a meaningful response to public comments and the lack of independent verification of data provided by the project proponent. This approach contradicted NEPA's requirements for public involvement and agency accountability in environmental decision-making. The court criticized the Corps for not sufficiently justifying its decision to issue a FONSI, thereby bypassing the need for a more comprehensive EIS.

Ultimately, the appellate court reversed the district court's decision, vacated the FONSI, and enjoined the Corps from issuing the § 404 permit until a new, comprehensive EA was conducted in compliance with NEPA and the CWA guidelines.

## U.S. DEPARTMENT OF THE INTERIOR

***Diné Citizens Against Ruining our Environment v. Haaland***, 59 F.4th 1016 (10th Cir. 2023)
*Agency did not prevail on one or more of its NEPA claims but prevailed on other NEPA claims.*

Issues: Impact Assessment, Indirect Effects (GHG), Cumulative Impacts.

Facts: Environmental organizations challenged the Bureau of Land Management's (BLM) processing of applications for permits to drill (APDs) for oil and gas in the San Juan Basin, alleging violations of NEPA. The plaintiffs argued that BLM's EAs and an EA addendum did not properly consider the environmental consequences of the drilling projects, especially concerning greenhouse gas emissions, water resources, and air quality impacts. This legal dispute emerged in the wake of previous litigation that had identified deficiencies in BLM's environmental review processes. Consequently, BLM prepared an EA addendum to address potential shortcomings in its original assessments, a move that the plaintiffs contended unlawfully predetermined the outcome of the environmental review. The case brought to the fore tensions between federal land management policies aimed at facilitating resource extraction and environmental regulations designed to safeguard public and ecological health.

The BLM had previously approved numerous APDs within the basin, relying on EAs that were later found wanting in terms of comprehensive environmental impact analysis. In response to judicial directives, BLM undertook additional environmental analysis via an EA addendum, hoping to rectify identified deficiencies, particularly around the cumulative impacts of approved drilling activities. Environmental organizations, however, remained unsatisfied with BLM's supplemental efforts, challenging the adequacy and legality of the revised environmental assessments in court.

Central to the dispute was whether BLM had adequately considered the direct, indirect, and cumulative impacts of greenhouse gas emissions

resulting from the approved drilling operations. Plaintiffs argued that BLM's methodology for projecting emissions over the lifespan of the wells was fundamentally flawed. They contended that BLM failed to account for the cumulative environmental impacts adequately, particularly in light of the significant increase in oil and gas extraction activities in the region. The case also raised critical questions about the legal standards governing federal environmental reviews and the extent to which federal agencies must go to assess and mitigate the environmental impacts of resource extraction projects on public lands.

Decision: The Court of Appeals held that the challenges to APDs that BLM had not yet approved were not ripe for judicial review, thus narrowing the scope of the court's review to those APDs where BLM had completed its approval process. On the merits, the court determined that BLM did not unlawfully predetermine the outcome of the EA addendum. However, the court found significant flaws in BLM's analysis of the environmental impacts associated with the drilling projects, particularly regarding the assessment of greenhouse gas emissions and their cumulative impacts.

The court criticized BLM for failing to take a "hard look" at the direct, indirect, and cumulative impacts of greenhouse gas emissions as required by NEPA. It noted that BLM's use of an annual emission estimate to represent emissions over a twenty-year lifespan of the wells was unreasonable and failed to capture the true environmental impact of the proposed drilling activities. Moreover, the court found that BLM's analysis of the cumulative impacts of these emissions was inadequate because it relied on simplistic comparisons to state and national emissions without adequately considering the specific environmental consequences of the emissions from the drilling activities.

Regarding the impacts on water resources and air quality, the court concluded that BLM's assessments did not fully account for the cumulative environmental effects of the proposed drilling operations. The court specifically pointed out BLM's failure to analyze the long-term exposure risks associated with hazardous air pollutants emitted by the drilling operations, which could have significant health and environmental consequences.

As a result of these findings, the court reversed the district court's ruling that had upheld BLM's EAs and remanded the case for further proceedings. The appellate court directed the district court to determine the appropriate remedy for BLM's NEPA violations, considering the seriousness of the agency's analytical deficiencies and the potential environmental and economic consequences of vacating the APD approvals or enjoining further drilling activities.

***Center for Biological Diversity v. U.S. Dep't of Interior***, 72 F. 4th 1166 (10th Cir. 2023)
*Agency prevailed.*

Issues: Alternatives, Impact Assessment (warming effects on future water availability), Cumulative Impacts, Significance of Impacts.

Facts: The case involves a legal dispute over the Bureau of Reclamation's (BOR) decision related to a proposed water exchange contract, which was challenged by several environmental groups. They petitioned for judicial review, alleging violations of NEPA and the Administrative Procedure Act (APA). The proposed contract was to allow Utah to exchange water it was allocated under the Colorado River Compact, changing the point of diversion but not the amount of water Utah could use.

The environmental groups argued that the Bureau's EA was inadequate, particularly failing to consider the impacts of climate change on future water availability and the cumulative impacts of water depletions on the Colorado River system. They highlighted the importance of considering warming temperatures and the resulting reduction in river flow in their analysis. The groups also contended that the Bureau's technical assumptions in the EA were not well-reasoned, specifically critiquing the Bureau's reliance on historical hydrology data without adequately considering future projections that suggest a drier future.

In their analysis, BOR prepared an EA, which concluded with a FONSI, deciding against preparing a more detailed EIS. The Bureau argued that its analysis took a "hard look" at the environmental impacts, including the effects of warming on water availability and the impacts on fish resources in the Green River. The Bureau utilized historical data and specific methodologies

to assess the contract's potential environmental impacts, maintaining that these approaches were reasonable and sufficient under NEPA.

The district court for the District of Utah sided with BOR, denying the environmental groups' petition. The court found that the Bureau's NEPA analysis was not arbitrary or capricious and that the agency took the requisite "hard look" at the environmental impacts, including cumulative impacts and the necessity of an EIS.

The environmental groups then appealed the decision, arguing before the United States Court of Appeals, Tenth Circuit, that the district court erred in its judgment. They reiterated their concerns about the adequacy of the environmental analysis, emphasizing the need for a more thorough examination of climate change impacts and the cumulative effects of water depletions on the Colorado River system.

The case raised important questions about the scope of NEPA's requirements, particularly how federal agencies should address climate change and cumulative environmental impacts in their EAs. It also touched on the legal standards under the APA for reviewing agency decisions and the deference courts should give to agencies' technical and scientific judgments.

Decision: The Tenth Circuit Court of Appeals affirmed the district court's decision, upholding the BOR's EA and its FONSI regarding the proposed water exchange contract with Utah. The court found that the Bureau had adequately considered the environmental impacts of the contract, including the effects of climate change on water availability and the cumulative impacts of existing and future water depletions on the Colorado River system.

The court's analysis highlighted the Bureau's use of historical hydrology data and its methodological choices in assessing the environmental impacts of the contract. It concluded that the Bureau's approach was reasonable and within the agency's discretion under NEPA. The court emphasized the deference that should be given to the agency's expertise in technical and scientific matters, particularly in complex areas involving environmental predictions and assessments.

The court rejected the environmental groups' argument that the Bureau failed to consider relevant scientific data on future water availability and climate change. It reasoned that the Bureau had considered a range of data and methodologies, including drought scenarios, and provided a reasoned explanation for its approach. The court found that the Bureau's decision not to prepare an EIS was not arbitrary or capricious and that the environmental assessment met NEPA's requirements for a hard look at the environmental impacts.

Additionally, the court addressed the choice of the no-action alternative in the Bureau's analysis, affirming that it provided an appropriate baseline for comparing the impacts of the proposed action. The court also found the Bureau's analysis of cumulative impacts to be reasonable and supported by the record, concluding that the agency had not overlooked significant future water depletions.

In a separate opinion, one judge concurred in part, dissenting on the grounds that the Bureau had not adequately considered the effects of warming on future water availability. This judge would have remanded the case to the agency for further consideration of this issue, indicating a nuanced perspective on how federal agencies should address climate change impacts under NEPA.

***Missouri ex rel. Bailey v. U.S. Dep't of Interior, Bureau of Reclamation***, 73 F.4th 570 (8th Cir. 2023)
*Agency prevailed.*

Issues: Alternatives, Impact Assessment (Significance of Impacts), Cumulative Impacts.

Facts: In September 2018, BOR decided to proceed with a water supply project in North Dakota, which was challenged by Missouri under the APA, NEPA, and the Water Supply Act. This project involved a contract with the Garrison Diversion Conservancy District for water from the McClusky Canal, fed by Lake Sakakawea and regulated by the Army Corps of Engineers. Garrison Diversion's role is to develop water supply projects like the Central North Dakota Water Supply Project and the state-sponsored Red River Valley Water Supply Project to mitigate water scarcity.

The Bureau issued an EA and a FONSI, asserting that the project's impact was negligible and an EIS was unnecessary. This assessment involved various environmental considerations, including the impact on Missouri River depletions, and concluded that the project would not significantly impact the environment.

Decision: The Eighth Circuit Court affirmed the district court's summary judgment for the defendants. It held that with congressional approval for the project's water service contract, further approval under the Water Supply Act was not required. The Garrison Diversion Unit Act provided the necessary congressional approval. The court found that the Bureau's cumulative-effects analysis for NEPA did not need to include the state-sponsored project, and the Bureau's determination that an EIS was not required was not arbitrary or capricious.

Moreover, the court indicated that the Bureau's scope of analysis under NEPA was adequate. It concluded that the Bureau sufficiently assessed the project's environmental impacts, including downstream impacts and cumulative effects, and that limiting the analysis to a "no action" alternative was appropriate given the minimal environmental effects of the project. The district court's judgment was affirmed, validating the Bureau's procedures and findings under APA, NEPA, and the Water Supply Act.

***Western Watersheds Project v. U.S. Bureau of Land Mgm't***, 76 F.4th 1286 (10th Cir. 2023)
*Agency prevailed.*

Issues: Impact Assessment, Exhaustion (public comment).

Facts: In 2010, Jonah Energy proposed the Normally Pressured Lance (NPL) Project to expand natural gas development in the Wyoming Upper Green River Valley, aiming to drill 3,500 new wells over 10 years. BLM evaluated this project, considering its impact on two species of interest: the greater sage-grouse and the pronghorn, specifically the Sublette Herd and a subgroup, the Grand Teton Herd. The sage-grouse, which congregates in "winter concentration areas" (WCAs) for shelter and food during winter, and the pronghorn, which migrates through the Valley, including on the "Path of the Pronghorn" from Grand Teton National Park, were at the center of environmental concerns related to the project.

After a lengthy evaluation process, including public comment solicitation and draft EIS publication, the BLM released its final EIS in June 2018 and a Record of Decision about a month later, selecting "Alternative B" for the project. This alternative focused on conserving a broad range of resources and balanced various interests, including wildlife preservation. Despite acknowledging limited research on sage-grouse use of WCAs within the project area, the BLM based its analysis on several studies, including two years of winter studies and information from the Wyoming Game and Fish Department.

Decision: The Tenth Circuit Court of Appeals affirmed the district court's decision, upholding BLM's approval of Jonah Energy's NPL Project. The court rejected the challenges under NEPA and the Federal Land Policy and Management Act (FLPMA), brought forth by conservation groups concerned about the project's impact on sage-grouse populations and pronghorn antelope migration patterns. Key findings included:

1. BLM's Compliance with FLPMA and NEPA: The court determined that BLM did not violate FLPMA by failing to mandate phased development as required by the land use plan. It found that BLM had adequately considered the project's impact on sage-grouse WCAs and pronghorn migration patterns under NEPA, making a reasoned decision to select "Alternative B" for the project.

2. Consideration of Impacts on Sage-grouse and Pronghorn: Despite limited research on the impact of development within WCAs on sage-grouse, BLM utilized available studies to inform its analysis and anticipated how development would affect sage-grouse populations. For pronghorn, BLM considered the potential adverse impacts of the project on migration patterns and population viability, analyzing broader migratory routes and using the Sublette Herd as a proxy for impacted pronghorn populations.

3. Failure to Exhaust Administrative Remedies: The court noted that the

conservation groups failed to exhaust administrative remedies concerning their challenge to the project's indirect effects on Grand Teton National Park, as they did not raise this issue with specificity during the public comment period following the draft EIS's publication.

In conclusion, the Tenth Circuit affirmed the district court's ruling, holding that BLM's approval of the NPL Project was neither arbitrary nor capricious under NEPA and FLPMA, emphasizing the agency's procedural compliance and reasoned decision-making in evaluating the environmental impacts of the proposed natural gas development project.

***Earth Island Institute v. Muldoon***, 82 F.4th 624 (9th Cir. 2023)
*Agency prevailed.*

Issues: Impact Assessment, Alternatives Considered, Categorical Exclusions, Direct Impacts, Indirect Impacts, Cumulative Impacts, Segmentation, Supplemental Statements

Facts: In an effort to manage wildfire risk and restore natural ecosystems, the NPS initiated vegetation thinning projects in Yosemite National Park, aiming to reduce fuel for wildfires through controlled burns. These projects were slight deviations from a comprehensive 2004 Fire Management Plan/Environmental Impact Statement, which had been subjected to extensive public comment and aimed at balancing wildfire risk reduction with ecological preservation. The NPS argued these projects fell within the "minor-change" exclusion under NEPA, suggesting they would have minimal environmental impact and did not require a full EIS.

The Earth Island Institute challenged this classification, arguing that the projects required a detailed environmental review to assess potential significant effects on the park's ecology. The controversy centered on the NPS's application of categorical exclusions under NEPA, questioning whether the projects' environmental impacts were adequately considered and if the projects were indeed minor changes to the previously approved Fire Management Plan.

Decision: The Ninth Circuit Court upheld the District Court's ruling, affirming that the NPS had acted within its discretion under NEPA. The court found the NPS's use of the "minor-change" exclusion to be appropriate, indicating that the projects did indeed constitute minor amendments to the existing Fire Management Plan and that their impacts were sufficiently analyzed to be considered minimal. It also held that the NPS had adequately addressed potential direct, indirect, and cumulative impacts, finding no evidence of segmentation or the need for supplemental statements.

The court emphasized NEPA's procedural role, focusing on ensuring that federal agencies consider environmental impacts and inform the public rather than mandating specific outcomes. The decision reinforced the principle that agency determinations under NEPA are entitled to deference, provided they are not arbitrary, capricious, and are based on a reasoned analysis. The Earth Island Institute's appeal for a more detailed environmental review was thus rejected, allowing the NPS to proceed with its vegetation thinning projects under the designated categorical exclusions.

***Western Watersheds Project v. McCullough***, No. 23-15259, No. 23-15261, No. 23-15262, 2023 WL 4557742 (9th Cir. Jul. 17, 2023) (not for publication)
*Agency Prevailed.*

Issues: Impact Assessment, Direct Impacts, Cumulative Impacts

Facts: The case involves multiple appeals challenging BLM's approval of the Thacker Pass Lithium Mine Project. The plaintiffs, including environmental organizations and tribes, contested the BLM's decision, alleging violations of NEPA, the National Historic Preservation Act (NHPA), and the FLPMA. The challenges centered on concerns related to water quality, wildlife habitat, cultural resources, and the adequacy of environmental impact assessments.

The plaintiffs argued that the BLM failed to adequately assess the project's impacts on groundwater quality, wildlife populations, and cultural resources. They contended that the BLM's approval did not consider feasible alternatives to mitigate environmental harm and did not sufficiently address cumulative impacts from past and future development in the area. Additionally,

concerns were raised regarding the consultation process with Native American tribes and the adequacy of public disclosure of project records.

In response, the BLM and Lithium Nevada Corporation, the project developer, defended the approval process, asserting that comprehensive environmental impact assessments were conducted in compliance with NEPA and other applicable laws. They argued that the BLM's decision was supported by scientific evidence and properly addressed potential environmental impacts. Additionally, they contended that consultation with tribes was conducted in good faith and that the project's benefits, including economic development and lithium production for renewable energy technologies, outweighed any potential adverse effects.

Decision: The Ninth Circuit Court of Appeals affirmed the district court's grant of partial summary judgment in favor of the Federal Defendants and Lithium Nevada Corporation. The court found that the BLM's approval of the Thacker Pass Lithium Mine Project complied with NEPA, NHPA, and FLPMA requirements. Specifically, the court concluded that the BLM did not abuse its discretion in assessing water quality impacts, addressing cumulative effects, and consulting with Native American tribes.

Regarding water quality, the court determined that the BLM's conditions for groundwater monitoring and compliance with state standards were sufficient to prevent degradation. The court also upheld the BLM's analysis of cumulative impacts, noting the comprehensive assessment of past and future development activities in the area. Additionally, the court found that the BLM's consultation with tribes was reasonable and in accordance with NHPA regulations.

Overall, the court concluded that the BLM's decision-making process was not arbitrary or capricious and was supported by substantial evidence. The court's decision affirms the legality of the Thacker Pass Lithium Mine Project's approval, allowing the project to proceed as planned.

## U.S. DEPARTMENT OF TRANSPORTATION

***No Mid-Currituck Bridge-Concerned Citizens v. North Carolina Dep't of Transp.***, 60 F.4th 794 (4th Cir. 2023)
Agency Prevailed.

Issues: Alternatives, Impact Assessment (no-build baseline, updated traffic forecasts, sea-level rise data), Duty to Supplement

Facts: This challenge involved a proposed toll bridge across North Carolina's Currituck Sound that would connect the northern Outer Banks with the state mainland. Plaintiffs opposed the bridge—claiming the defendants didn't follow the procedures laid out in NEPA, 42 U.S.C. § 4321 et seq., when they approved the bridge project. The Statement of Purpose and Need identified three project purposes: (1) improving traffic flow on U.S. 158 and N.C. 12; (2) reducing travel time between the mainland and the Outer Banks; and (3) reducing evacuation times for Outer Banks visitors and residents. The Agencies published a final EIS in 2012. The final EIS analyzed the environmental impacts of various options, including doing nothing (the "no-build alternative") or widening the existing highways but not building a bridge (the "existing roads alternative"). The agencies ultimately recommended building a bridge.

Before the Agencies could issue a Record of Decision, North Carolina pulled the bridge funding and put the project on hold. More than three years had passed since the publication of the final EIS. Thus, regulations required the agencies to reevaluate the EIS given the passage of time.

The Agencies completed their reevaluation in 2019 and catalogued several changes affecting the project since publication of the EIS, including reductions in forecasted traffic, development, and growth; updated sea-level rise projections; and increased project cost. The Agencies concluded that because there were "no new issues of significance associated with this project," a supplemental EIS was not required.

Decision: Federal Highway Administration's regulations require a supplemental EIS where "[n]ew information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts would result in significant environmental impacts not evaluated in the EIS." 23 C.F.R. § 771.130(a)(2). Also, the Federal Highway Administration's regulations do not

require a supplemental EIS where new information solely results in a "lessening of adverse environmental impacts."

The Fourth Circuit determined whether an agency should have prepared a supplemental EIS in two steps. First, "whether the agency took a hard look at the proffered new information." *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 443 (4th Cir. 1996). "If the agency concludes after a preliminary inquiry that the environmental effect of the change is clearly insignificant, its decision not to prepare [a supplemental EIS] satisfies the hard look requirement." *Save Our Sound OBX, Inc. v. N.C. Dep't of Transp.*, 914 F.3d 213, 222.

Second, if the agency did take a hard look, the Court determines whether its "decision not to prepare a supplemental EIS was arbitrary or capricious." Hughes River, 81 F.3d at 443. The Court defers to the agency if its decision turned on a "factual dispute ... which implicate[d] substantial agency expertise." *Marsh v. Or. Nat. Res. Council,* 490 U.S. 360, 376 (1989).

Plaintiffs argued that the Agencies' previous predictions of heavy traffic were rendered obsolete by new forecasts, which "showed significantly lower expectations of future traffic." The Fourth Circuit disagreed. The Agencies prepared new traffic forecasts and network congestion measures and conceded that travel-time benefits associated with the bridge might be lower than originally predicted, but the updated analysis found that the main roads are still congested and will become worse.

The Agencies also reevaluated the relative benefits of the bridge project, the no-build alternative, and the existing-roads alternative in relieving this congestion. These analyses revealed that the bridge project still offered the most benefits overall, especially on summer weekends, and it would continue to fulfill its hurricane-evacuation purpose.

Next, Plaintiffs argued that significant changes to anticipated growth and development patterns required a supplemental EIS. Plaintiffs claimed that the Agencies originally assumed "full build-out" of the Outer Banks areas accessible by N.C. 12 and used that development to justify the bridge project. Since the EIS was issued, population growth, tourism, and home construction slowed in the area. However, the Court stated that standing alone, slowed development on the Outer Banks is not a reason to require a supplemental EIS.

Then, Plaintiffs argued that significant changes to projections of sea level rise also required the preparation of a supplemental EIS. Plaintiffs claimed the Agencies ignored the most up-to-date data on sea-level rise, which showed that the bridge could become inaccessible under new projections. The Agencies found that the bridge would be "a useful asset" if existing roads flooded, and that their reevaluation reaffirmed that conclusion. The Court pointed out that sea-level rise issue is a "factual dispute the resolution of which implicates substantial agency expertise." Marsh, 490 U.S. at 376. Further, the Agencies always acknowledged the bridge would be at risk during a storm surge, but that rising sea levels would inundate the roads even sooner, making the bridge the only way off the Outer Banks.

Next, Plaintiffs argue that the EIS was flawed because the agencies assumed full development of the Outer Banks—which would only happen if the bridge were constructed—and used that assumption to justify the bridge. The Court disagreed because in preparing the EIS, the Agencies looked to the local land-use plans as a starting point to calculate a baseline level of expected development. However, the Agencies removed the effects of the bridge in constructing the no-build baseline.

In sum, the Fourth Circuit agreed that the Agencies took a hard look at the new information proffered, and their decision to not prepare a supplemental EIS was not arbitrary or capricious.

***Center for Community Action and Environmental Justice v. Federal Aviation Administration***, 61 F.4th 633 (9th Cir. 2023)
*Agency Prevailed.*

Issues: Cumulative Impacts, Impact Assessment, NEPA/CEQA Interaction.

Facts: The FAA issued an EA that evaluated the environmental effects of the Project. The Project is to develop the Eastgate Air Cargo Facility of the San Bernardino International Airport. After reviewing the Project's potential environmental impacts, the FAA issued a Record of Decision, which included its

Final EA and Finding of No Significant Impact (FONSI).

In evaluating the environmental consequences of the project, the FAA utilized two areas—the General Study Area and the Detailed Study Area. The General Study Area is defined as the area where both direct and indirect impacts may result from the development of the Proposed Project. The Detailed Study Area is defined as the areas where direct physical impacts may result from the Proposed Project.

Decision: One of the plaintiffs, Center for Community Action (CCA), asserted that the FAA failed to sufficiently consider the cumulative impacts of the Project. A cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions. An EA may be deficient if it fails to include a cumulative impact analysis or to tier to an EIS that reflects such an analysis. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895–96 (9th Cir. 2002).

For cumulative impact analysis to be adequate, "an agency must provide some quantified or detailed information." *Bark v. United States Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020). While the agency is required to take a "hard look" at the cumulative impacts of a project, that requirement is about whether the agency adequately explained the potential effects and risks, not whether a plaintiff disagrees with those explanations.

CCA first argued that the FAA only considered past, present, and reasonably foreseeable projects within the General Study Area and should have expanded its assessment to include an additional 80-plus projects. The Ninth Circuit disagreed. The record showed that the FAA accounted for the traffic generated by these 80-plus projects for purposes of identifying cumulative traffic volumes.

The Court stated that the only specific deficiency the plaintiff alleged is the EA's cumulative air quality impact discussion. The plaintiff insisted that the FAA did not sufficiently support its conclusion that "cumulative emissions are not expected to contribute to any potential significant air quality impacts" because the EA makes no "references to combined PM or NOx emissions from the 26 projects" falling within the General Study Area. The Court was not convinced by this argument. Again though, the plaintiff pointed to nothing to support its assertion that the FAA needed to evaluate cumulative air quality impact in this way. More importantly, the plaintiff offered no evidence to substantiate its suggestion that the FAA's rationale is deficient.

Another plaintiff (California) asserted that the FAA needed to create an EIS because a California Environmental Impact Report (EIR) prepared under CEQA found that the proposed Project could result in significant impacts on Air Quality, Greenhouse Gas, and Noise. The Court disagreed and stated, "[d]efendants [a]re not required to rely on the conclusion in the CEQA EIR because CEQA and NEPA are different statutes with different requirements." *Save Strawberry Canyon v. United States Dept. of Energy*, 830 F. Supp. 2d 737, 749 (N.D. Cal. 2011). In sum, California failed to raise a substantial question as to whether the Project may have a significant effect on the environment so as to require the creation of an EIS. *Cf. Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1008 (9th Cir. 2020) ("NEPA regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are highly uncertain." (simplified)).

Next, California alleged certain errors related to the FAA's calculations regarding truck trips emissions generated by the Project. First, Plaintiffs argued that the EA failed to explain why its calculation for total truck trips is lower than the amount stated in the CEQA analysis. But the Ninth Circuit found that California did not raise a substantial question about whether the Project will have a significant environmental effect by simply pointing out the difference in the number of truck trips between the EA and CEQA analysis.

Finally, California argued that the record contained an inconsistency concerning the number of daily truck trips calculated by the FAA. However, it failed to articulate why this is relevant for any environmental impact other than traffic volume.

Plaintiffs finally asserted that the FAA failed to consider the Project's ability to meet California state air quality and federal ozone standards. First, the CCA argued that the EA failed to assess whether the Project met the air quality standards set by the California Clean Air Act (CCAA). The Court found this argument unpersuasive. CCA failed to identify

even one potential CCAA violation stemming from the Project. Moreover, the EA discussed California air quality law and the FAA perceived no violation of the CCAA because the Project will be able to meet the incremental progress it needs for attainment. The CCA did not refute this contention.

Second, the CCA argued that the EA failed to assess whether the Project meets federal ozone standards. The Court disagreed. Because the CCA did not demonstrate a risk of a violation of federal ozone standards and rather argued only that the EA needed to determine whether a risk existed, the CCA did not refute the fact that the Project could be allocated a greater portion of the emissions budget, as the CCA admitted happened before. In sum, the CCA provided no reason to believe that the Project threatened a violation of the federal ozone standards.

Finally, Plaintiffs argued that the EA failed to assess whether the Project meets California's greenhouse gas emission standards. Plaintiffs, however, only cited to California statutory pronouncements that statewide greenhouse gas emissions must be reduced to certain levels by certain time periods. Plaintiffs' argument was unsuccessful because they failed to proffer any specific articulation of how the Project will violate California and federal law. There is no reason to believe that the EA is deficient for purportedly failing to explicitly discuss the Project's adherence to California and federal environmental law.

Dissent: The dissenting Judge stated that the EA did not come close to taking the requisite "hard look" and the environmental impacts of the project and that the case reeked of environmental racism. San Bernardino County, California, is one of the most polluted corridors in the entire United States and the site of the approved project in the case is populated overwhelmingly by people of color. The Judge disagreed with the FAA's assertion that the General Study Area was large enough to evaluate the effects on all environmental impact categories. The Judge used the example of how the project could lead to air pollutant emissions that may occur at some distance from a project site, and the study area for a project's air quality analysis could encompass many square miles.

Next, the Judge states that the EA is deficient in its analysis of socioeconomic impacts because the study area may be larger than the study area for other impact categories and should consider the impacts of the alternatives on broad indicators, such as, economic activity, employment, income, population, housing, public services, and social conditions.

The Judge further explained that cumulative effects analysis was flawed due to the General Study Area not being large enough to adequately analyze the cumulative impacts of the project. Further, the FAA's cumulative effects analysis was also inadequate for three additional reasons. First, the FAA did not explain why it analyzed the delineated 80 projects for traffic effects only. Second, the EA included a table of only 26 past, present, and future projects with minimal information which was insufficient to analyze their collective effect on the environment. Third, explanation of the cumulative effects in the EA is inadequate because it stated that cumulative projects have a moderate to low potential to result in permanent, significant cumulative air quality and roadway noise impacts, even though there was not any quantification of the emissions from these projects.

Lastly, the FAA did not give the requisite "hard look" to potential truck emissions because it arbitrarily used two different truck-trip figures and did not provide further analysis of roundtrip emissions.

***City of Los Angeles, California v. Federal Aviation Administration***, 63 F.4th 835 (9th Cir. 2023)
*Agency Did Not Prevail on one of its NEPA claims but prevailed on other NEPA claims.*

Issues: Cumulative Impacts, Impact Assessment, Purpose and Need Statement, Alternatives

Facts: The Burbank-Glendale-Pasadena Airport Authority (Authority), which owns and operates the Airport, reached an agreement with the City of Burbank to build a new terminal. In 2016, Burbank voters approved that agreement as required by local law. But before FAA could sign off on the project, NEPA required the agency to prepare an EIS. In May 2021, the FAA issued a Final EIS and ROD that let the Authority start constructing the replacement terminal, and shortly after, the City of Los Angeles petitioned for review.

Decision: Plaintiff (Los Angeles) first challenged FAA's compliance with NEPA's requirement that an EIS include a "detailed statement" of "alternatives

to the proposed action." Under the rule of reason, an agency acts arbitrarily and capriciously "only when the record plainly demonstrates that the agency made a clear error in judgment in concluding that a project meets the requirements of NEPA." *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 980 (9th Cir. 2022).

Since FAA considered a reasonable range of alternatives in the FEIS, the petition was denied on this ground. Here, FAA drafted an adequate purpose and need statement and then narrowed the range of alternatives for detailed study based on rational considerations. Los Angeles failed to identify any reasonable alternative that FAA should have studied given FAA's analysis of the relevant technical and economic constraints.

In the FEIS, FAA stated that its purpose and need were "to provide a passenger terminal building that meets current FAA Airport Design Standards, passenger demand, and building requirements as well as improve utilization and operational efficiency of the passenger terminal building," and "to ensure that the Airport operates in a safe manner" as required by the Airport and Airway Improvement Act of 1982 (AAIA), 49 U.S.C. § 47101(a)(1). FAA defined its purpose and need in the context of the applicable statutory framework and incorporated private goals without unreasonably eliminating alternatives from consideration. Therefore, its purpose and need statement was not too narrow to survive NEPA review.

Next, the Court considered whether FAA considered a reasonable range of alternatives given the purpose and need statement. *Audubon Soc'y of Portland*, 40 F.4th at 982. FAA made a list of ten potential alternatives. Then, FAA used a two-step screening process to decide which of those alternatives to study in detail.

FAA concluded that the new airport alternative was not feasible because the Joint Powers Agreement that formed the Authority did not provide the authority to construct a replacement airport and close the existing airport. Second, FAA listed three reasons to eliminate a remote landside facility alternative aside from Measure B: (i) no space existed near the Airport for such a facility; (ii) "[s]ite selection would be limited by . . . the Authority's inability to condemn or purchase property if the owners were unwilling to sell"; and (iii) travel time for passengers would increase.

Further, Los Angeles objected that FAA considered only the Project and the no action alternative. But "there is no minimum number of alternatives that must be discussed" in an EIS. *Cal. Ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 797 (9th Cir. 2014).

In its second issue, Los Angeles challenged FAA's analysis of construction-related impacts. The Court agreed. FAA did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not be operated simultaneously, resulting in greater construction noise impacts on nearby neighborhoods. Nor does FAA support its implied assumption that construction equipment would run in sequence.

Further, FAA based its cumulative impacts analysis on inadequate conclusions about construction noise. FAA mistakenly listed construction noise as a category that would not have potential adverse effects due to a flawed construction noise study. The Court determined FAA erred by improperly analyzing the possible effects of the proposed action.

On remand, FAA is directed to address (i) the deficiency in its construction noise analysis described in this opinion; (ii) the resulting deficiency in its cumulative impacts analysis; and (iii) the resulting deficiency in its environmental impacts analysis.

Dissent**:** The Court should have deferred to FAA's reasonable analysis. FAA's construction noise analysis was not arbitrary and capricious because records showed FAA considered the environmental consequences of the Project's construction noise. FAA factored the noise levels of various equipment at different distances, construction equipment running simultaneously, and assessed construction noise levels for communities next to the Project.

***Eagle County, Colorado v. Surface Transportation Board***, 82 F.4th 1152 (D.C. Cir. 2023)[16] *Agency Did Not Prevail.*

Issues: Impact Assessment, Indirect Effects (downstream impacts), Cumulative Impacts

Facts: Consolidated petitions concern an order of the Surface Transportation Board (Board) authorizing the construction and operation of a new rail line in the Uinta Basin in Utah.

Decision: Plaintiffs argued that the Board failed to take a hard look at the Railway's environmental impacts in violation of NEPA. They claimed the Board violated the NHPA by failing to consult Plaintiffs on the Railway and to evaluate the impact of the project on historic properties downline. Plaintiffs alleged that the Board should have considered environmental risks under NEPA, and it should have been consulted on potential impacts to downline historic properties. Lastly, Plaintiffs alleged that the Board arbitrarily limited its cumulative impact analysis.

Here, the Board assessed the environmental impacts of the Railway under pre-2020 regulations promulgated by the Council on Environmental Quality. The CEQ "regulations require an agency to evaluate cumulative impacts along with the direct and indirect impacts of a proposed action." TOMAC, Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 864 (D.C. Cir. 2006).

The Court ultimately found that the EIS failed to demonstrate that the Board took the requisite "hard look" at all the environmental impacts of the Railway because: (1) failure to quantify reasonably foreseeable upstream and downstream impacts on vegetation and special-status species from increased oil drilling and oil-train traffic in the Unita Basin and along the Union Pacific Line; (2) failure to take a hard look at risk to wildlife and water source impacts downstream; and (3) failure to explain the lack of available information on local accident risk in accordance with 40 C.F.R. § 1502.22(b).

Plaintiffs contended that the Final EIS ignored certain upstream and downstream impacts of the Railway. The Court agreed. The Board provided no reason why it could not quantify the environmental impacts of the oil wells it reasonably expects in this already identified region. At a minimum, the Board "must either quantify and consider the project's upstream impacts or explain in more detail why it cannot do so." Sabal Trail, 867 F.3d at 1375. The Board failed to explain why it cannot take the next step and estimate the emissions or other environmental impacts it expected in its impacts analysis since it has identified where the oil production is expected to occur. The Board failed to adequately explain why it could not employ "some degree of forecasting" to identify the upstream and downstream impacts considering the Board's extensive analysis and estimations related to increased oil production. The Board also cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the ground that it lacks authority to prevent, control, or mitigate those developments.

Plaintiffs' next set of NEPA challenges concerned the Board's assessment of "indirect or down-line impacts" of the Railway. 49 C.F.R. § 1105.7. The Final EIS discussed what impact the Railway could have downline on, among other things, rail accident risk, wildfire risk, water and biological resources, and land use and recreation. Because the Board failed to respond to significant opposing viewpoints concerning the adequacy of its analyses of rail accidents, the Court must find its analyses deficient under NEPA and the APA.

Plaintiffs also contended the Board violated NEPA by "failing to take a hard look at the risk and impact of wildfires presented by the Railway" given the expected increased traffic on the Union Pacific Line. The Court agrees. Plaintiffs pointed to record evidence submitted to the Board regarding the elevated risk of wildfire posed by the increase in rail traffic and accidents carrying highly flammable crude oil. The Board's assertion that an increase in rail traffic of up to 9.5 new trains a day would not result in a significant wildfire risk because it would not be a qualitatively "new ignition source" is utterly unreasoned.

[16] At the time of publication, the Board has filed and has been granted a Writ of Certiorari Review with the Supreme Court of the United States.

Next, Plaintiffs urged that the EIS failed to evaluate certain adverse impacts on downline resources. The Court Agreed. The Board responded in the Final Exemption Order and EIS to comments challenging the EIS's impact on biological resources on the Union Pacific Line. But the Board offers no citations that explicitly reference possible impacts to the relevant downline water resources or explains why the impacts are the same and apply to both. The Board also failed altogether to mention the Colorado River in the Final EIS's discussion of impacts on water resources. This was not a "hard look" under NEPA. But Plaintiffs' comments in no way alerted the Board to Plaintffs' specific challenges relating to downline impacts. The Board did not act arbitrarily in declining to address these "cryptic and obscure reference[s]" in the Final EIS.

Plaintiffs further argued that the Board's direct effects analysis failed to take a hard look at the geological risk of landslides attributable to the Railway. Ultimately, this argument is unpersuasive. Since the Board "explain[ed] in the EIS why the information was unavailable and what actions the agency took to address that unavailability," it was not a violation of NEPA for the Board to reach its determination that landslide risk would not be significant absent suggestions from parties as to better available data.

The Board's reasoning for narrowly defining the action area to not include waterways downline near the Union Pacific Line is unreasoned and fails to demonstrate a rational connection between the facts and the choice made. It is entirely unclear from the record why the Board determined that the additional train traffic with the associated increase in "leaks or drips of fuel or lubricants"—"would not substantially change the severity of impacts" on the protected species near the Union Pacific Line.

In the EIS, the Board, in its cumulative impact analysis, estimated the number of new oil wells that would be needed in the Basin to satisfy the expected increase in oil production. However, the Board did not provide a reason why it could not quantify the environmental impacts of the oil wells it reasonably expected in the region. The Court emphasized that the Board, at a minimum, must consider and quantify the project's impacts or thoroughly explain why it cannot.

Plaintiffs then argued the Board mischaracterized oil production in the Basin that could have environmental consequences upstream and downstream as cumulative effects instead of direct effects. The Court disagreed, stating that even if the Board mischaracterized the impacts related to increased oil production as cumulative impacts, Plaintiffs identify no way in which this decision materially affected the Board's NEPA analysis.

Further, the Court explained that the Board failed to explain adequately why it could not estimate the emissions or other environmental impacts it expected in its cumulative impact analysis since it identified where the oil and gas production induced by the railway was expected to occur.

***Lowman v. Federal Aviation Administration***, 83 F.4th 1345 (11th Cir. 2023)
*Agency Prevailed.*

Issue(s): Cumulative Impacts, Segmentation, Impact Assessment (air & noise impacts)

Facts: In 2015, the City of Lakeland (City) commissioned an Intermodal Feasibility Study to assess development opportunities for the Lakeland Linder International Airport in Lakeland, Florida. The study indicated that the Airport could be a secondary air cargo hub for air cargo carriers serving Miami International Airport if air cargo facilities were constructed and other improvements made. Subsequently, the City proposed a new Airport Layout Plan (ALP) to the FAA. Developments from the ALP were projected to result in approximately 820 additional air cargo aircraft operations annually by 2023. The FAA created a final EA and issued the Phase I FONSI/ROD approving the proposed Airport developments. The Phase I EA described the construction of four new buildings projected to total 223,000 square feet. After Phase I was approved but before construction commenced, however, Amazon notified the City that it would require a different orientation of the air cargo facility and it anticipated a greater number of incoming and outgoing flights. The City notified the FAA of these two changes in 2018. The FAA agreed with the City that the Phase I EA remained accurate, and no formal reevaluation was necessary, despite the increased flight estimate and revised site orientation. The FAA issued a FONSI/ROD approving Phase II. The Phase II EA described expanding the air cargo facility and determined that it would not have significant environmental effects.

Decision: Plaintiffs argued that the Airport renovations were improperly considered as separate projects rather than one larger Airport build-out. However, the Court stated the simple fact that two projects are related does not mean that those projects must necessarily be considered as part of one larger project. Similarly, proving that a project was segmented requires more than merely showing that a series of related projects were approved sequentially. Plaintiffs' claim failed because they offered no evidence that the FAA broke Phase I, Phase II, and the other Airport-related projects apart to avoid a more onerous environmental review. The only reference to future Airport projects at the time was the observation in the Phase I EA that future projects could be undertaken "as demand dictate[d]." The Eleventh Circuit Court disagreed. For obvious reasons, this one-off observation about an entirely speculative, not-yet-proposed future development is insufficient to prove that the FAA arbitrarily and capriciously violated NEPA's mandate against segmentation.

Plaintiffs argued that the FAA failed to "take into consideration the cumulative impact of its past actions to follow NEPA because the FAA's Phase II analysis did not adequately account for the cumulative impacts of (a) Phase I, (b) the other Airport development projects it approved via categorical exclusion, and (c) Phase II. The FAA's analysis was rigorous and detailed. In its final Phase II EA, the FAA assessed the cumulative impacts of 40 different actions—past, present, and future—across 14 different fields. The Court concluded that Plaintiffs' contentions that the cumulative impacts analysis was inadequate is without merit. Plaintiffs' last argument is that the "FAA violated NEPA by failing to analyze all air quality and should have conducted additional air quality analyses. The Proposed Development Project would increase area emissions at [the Airport]; however, the increase in emissions would not constitute a significant impact. The FAA, after studying the issue determined that a FONSI/ROD was proper because Phase II would not have a significant impact. Thus, the FAA did what it was required to do under NEPA and its regulations interpreting NEPA.

## INDEPENDENT AGENCIES

***Center for Biological Diversity v. Federal Energy Regulatory Commission***, 67 F.4th 1176 (D.C. Cir. 2023)
*Agency Prevailed.*

Issues: Alternatives, Social Cost of Carbon, Cumulative Impacts, Impact Assessment, Indirect Effects

Facts: The Alaska Gasline Development Corporation sought authorization to build and operate a system of natural gas facilities. After the Federal Energy Regulatory Commission (FERC) granted that authorization, the Center for Biological Diversity and the Sierra Club (collectively, "Plaintiffs") petitioned this court for review.

Decision:
Plaintiffs first argued FERC inadequately considered alternatives to the Project in contravention of NEPA's implementing regulations. Plaintiffs fault FERC for discussing in tandem the true no action alternative (where nothing like the Project is ever built) and the likely no-action alternative (where something like the Project is built). The Court disagreed. In the EIS, Authorization Order, and Rehearing Order, FERC considered and reasonably rejected the no-action alternatives consistent with NEPA and the APA.

Plaintiffs also argued FERC's consideration of alternatives falls short because FERC had to evaluate each alternative along every dimension of environmental impact used to analyze the Project. According to Plaintiffs, this evaluation is required because FERC must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." The D.C. Circuit disagreed. The agency does not need to provide the same level of detailed analysis for each alternative that it provides for the action under review.

Plaintiffs then argued FERC acted arbitrarily and contrary to law by refusing to employ the "social cost of carbon" metric to estimate the significance of the Project's direct emissions of greenhouse gases. However, the Court stated that FERC estimated the Project's annual volume of direct emissions and compared these projections with

existing Alaskan and nationwide emissions. Rather than use the social cost of carbon, FERC compared the Project's direct emissions with existing Alaskan and nationwide emissions. FERC recognized the lack of consensus about how to apply the social cost of carbon on a long-time horizon, it noted the social cost of carbon places a dollar value on carbon emissions but does not measure environmental impacts as such, and FERC has no established criteria for translating these dollar values into an assessment of environmental impacts.

Plaintiffs also argued FERC violated NEPA and its implementing regulations by refusing to consider the Project's indirect greenhouse gas emissions. FERC explained the Project's natural gas would either be exported to foreign buyers or sold to domestic users in Alaska. With respect to export-bound gas, the Department of Energy has exclusive jurisdiction and therefore FERC "does not have authority over, and need not address the effects of, the anticipated export of the gas." The Court declined to adopt Plaintiffs' aggressive reading of 40 C.F.R. § 1508.25, because FERC could not reasonably identify the end users of the gas, its decision not to consider the indirect effects of Alaska-bound gas was lawful. *See* 40 C.F.R. § 1508.8(b); *Del. Riverkeeper Network v. FERC ("Delaware Riverkeeper II")*, 45 F.4th 104, 110 (D.C. Cir. 2022).

Plaintiffs next argued FERC did not adequately consider the impact of the Project on the endangered Cook Inlet beluga whales. It maintains that FERC failed to consider cumulative impacts and did not take a hard look at the impacts of vessel noise on the belugas. The D.C. Circuit held otherwise. FERC discussed underwater sources of noise and to protect belugas from Project noise and imposed a series of mitigation measures that went beyond those measures proposed by the Corporation. The Court found the approach was reasonable under NEPA.

Plaintiffs further argued that FERC's evaluation of the Project's impacts on wetlands was arbitrary and capricious. Plaintiffs relied on a difference between FERC's estimate of the number of affected wetlands acres and the estimate the Corporation gave to the Army Corps of Engineers in a parallel permit application. FERC's calculation considered only wetlands proper, whereas the Corporation's estimate included rivers, lakes, and bodies of saltwater. The Court disagreed with Plaintiffs because FERC explained the estimates were based on different methods.

Finally, Plaintiffs suggested FERC's substantive decision to authorize the Project was arbitrary and failed to satisfy the Natural Gas Act (NGA). Under its delegated authority, FERC "shall issue" authorization for liquified natural gas facilities "unless" it determines doing so "will not be consistent with the public interest." 15 U.S.C. § 717b(a). The Court found this unpersuasive. FERC's approval of the Project easily comports with the NGA. FERC expressly concluded the Project was in the public interest because it would have substantial economic and commercial benefits, and these benefits were not outweighed by the projected environmental impacts.

***Solar Energy Industries Association v. Federal Energy Regulatory Commission,*** 80 F.4th 956 (9th Cir. 2023). *Agency Did Not Prevail.*

Issues: Categorical Exclusion, Standard of Review, Application of CE involving PURPA

Facts: The Federal Energy Regulatory Commission (FERC) determined that it was not required to conduct an environmental analysis of Order 872 under NEPA. First, FERC determined that Order 872 fell within a "categorical exclusion" to NEPA for rules that are "clarifying, corrective, or procedural" in nature. Second, FERC stated that any downstream environmental effects of Order 872, a final rule revising FERC regulations on implementing the Public Utilities Regulatory Policies Act, were too uncertain and speculative to trigger NEPA review. For those reasons, FERC determined that neither an environmental assessment nor an environmental impact statement was required.

Decision: FERC interpreted the "corrective" portion of its categorical exclusion as "including changes needed in order to ensure that a regulation conforms to the requirements of the statutory provisions being implemented by the regulation." Order 872, 85 Fed. Reg. at 54,728. Although the Court owes some deference to FERC's interpretation of its own regulation, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L.Ed.2d 841 (2019), the "corrective" component of the categorical exclusion cannot reasonably be read so broadly. When an agency adopts broad, transformative, and substantive changes to its regulations, it cannot

sidestep NEPA's requirements by claiming that it was motivated by its desire to better conform to the statute and then applying a "corrective" label. A regulatory change as significant as Order 872 is not corrective merely because the agency expresses some interest in better statutory compliance. If it were, nearly any regulatory change could evade NEPA review.

In support of its application of the categorical exclusion, FERC relies on *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). In that case, the Supreme Court rejected an argument that the Federal Motor Carrier Safety Administration had violated NEPA because the EA accompanying certain regulations failed to consider the potential environmental effects of increased cross-border travel by Mexican motor carriers. *Id*. at 755, 124 S.Ct. 2204. Drawing on *Public Citizen*, FERC argued that it had "no discretion" to keep the prior rules in effect once it determined that "certain of the 1980 PURPA Regulations conflicted with PURPA's statutory mandates." And, FERC said, because it had no option but to issue the "corrective" rules of Order 872, it "did not need to consider the environmental effects arising from" its revisions and could therefore apply the categorical exclusion. *Public Citizen*, 541 U.S. at 770, 124 S.Ct. 2204. Even if FERC issued Order 872, in part, to better conform to its interpretation of PURPA's statutory language, FERC nevertheless retained discretion in carrying out its statutory mandate. That discretion distinguishes this case from Public Citizen and makes FERC's reliance on the categorical exclusion unreasonable.

FERC also concluded that it was not required to prepare an EA or EIS because "any potential environmental impacts from the final rule are not reasonably foreseeable." Order 872-A, 85 Fed. Reg. at 86,716. Order 872 "does not involve a particular project that defines fairly precisely the scope and limits of the proposed development." Thus, it was "impossible to know what the states may choose to do in response to the final rule, whether they will make changes in their current practices or not, and how those state choices would impact QF [qualifying facility] development and the environment." FERC misunderstood NEPA's requirements. The Court stated that both the applicable regulations and case law make clear that an agency "shall ... prepare an environmental assessment" for a major agency action unless the proposed action is one that "normally ... do[es] not have a significant effect on the human environment" and therefore falls within a categorical exclusion. 40 C.F.R. § 1501.4. FERC's own regulations state that "[a]n environmental assessment will normally be prepared" for regulations not covered by a categorical exclusion. 18 C.F.R. §§ 380.5(a), (b) (12).

Even if Order 872 did not authorize any particular project, it was foreseeable that a regulatory change of this magnitude could produce significant environmental effects. The most significant environmental impact of Order 872 is the possible effect on greenhouse-gas emissions, which does not require any location-or project-specific analysis. FERC contended that it had no meaningful way to model or predict the effects of Order 872.

The Court acknowledges that NEPA does not require an agency to "peer into a crystal ball," "engage in speculative analysis," or "'do the impractical, if not enough information is available to permit meaningful consideration." *Northern Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1078–79 (9th Cir. 2011) (quoting *Environmental Prot. Info. Ctr. v. United States Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)). but this is precisely the type of determination that only can be intelligently made after the preparation of at least an EA." *California Wilderness Coal. v. United States Dep't of Energy*, 631 F.3d 1072, 1103 (9th Cir. 2011). When an agency is uncertain about the possible environmental effects of a proposed action, the proper course is to prepare an EA to the best of the agency's ability, not to avoid environmental analysis altogether. While the lack of reasonably foreseeable environmental impacts may justify an agency's decision not to complete an EIS, it cannot relieve an agency of its obligation to produce an EA.

***Don't Waste Michigan v. U.S. Nuclear Regulatory Commission***, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023) (not for publication)
*Agency Prevailed.*

Issues: Impact Assessment, Flyspecking

Facts: In June and July 2018, the Interim Storage Partners, LLC (ISP) applied for a license to store spent nuclear fuel at a private facility it would build in Texas. The facility would store spent nuclear fuel in dry cask storage systems on concrete pads. The

U.S. Nuclear Regulatory Commission (NRC) published notice of this application in the Federal Register and provided an opportunity for interested parties to intervene.

Decision: Plaintiffs contended that materials supporting the license failed to meet NEPA requirements. The Environmental Plaintiffs challenged the Board and the NRC's denials of their petitions to intervene. The Environmental Plaintiffs' contentions in support of intervention all sought to challenge the adequacy of the analysis in ISP's environmental report. In applying the Administrative Procedure Act's arbitrary-and capricious standard of review, our role is not to "flyspeck" an environmental analysis for minor deficiencies. *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006). The environmental report contained adequate consideration and discussion of the storage facility's environmental impacts; and the Board and Commission took the requisite "hard look" at the environmental impacts.

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