National Association of Environmental Professionals

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2024 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

P. E. Danko, Piet and Carole deWitt, James Gregory, Melanie Hernandez, Mike Mayer, Charles P. Nicholson, and Fred Wagner

September 2025

This report reviews National Environmental Policy Act document submittals and statistics, legislation, and litigation for calendar year 2024. The purpose of this report is to document the status of National Environmental Policy Act compliance and perspectives during the reporting year. We welcome reader comment and inquiry to naep@naep.org.

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Acronyms and Abbreviations

APA	Administrative Procedures Act
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
BOR	Bureau of Reclamation
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
MARAD	Maritime Administration
MDA	Missile Defense Agency
NAEP	National Association of Environmental Professionals
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NNSA	National Nuclear Security Agency
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
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
USGS	U.S. Geological Survey
USN	United States Navy

1. Introduction

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

This 2024 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 2024 and the groundwork for major changes in early 2025, 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, P. E. Danko, Piet and Carole deWitt, James Gregory, Melanie Hernandez, and Fred Wagner. Without their dedication to the practice, this report would not be possible.

[1] michael.mayer@hdrinc.com

2. The NEPA Working Group in 2024

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 seventeenth annual report. The 2024 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 2024.

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 in NEPA were discussed during the monthly meetings of the NEPA Working Group. Highlights of 2024 activities and monthly meetings included:

- Discussion of CEQ's Phase II revisions to the regulations for implementing NEPA
- Discussion of other NEPA-related rulemakings
- Review and discussion of the categorical exclusion adoption process and categorical exclusion rulemaking and adoptions by agencies
- An update by CEQ staff on the results of the E-NEPA study
- 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
- Discussion of the Supreme Court arguments in the Seven County Infrastructure Coalition v. Eagle County NEPA litigation
- Discussion of selected recently filed NEPA lawsuits
- Discussion of the Loper Bright Enterprises v. Raimondo Supreme Court ruling and its implications on NEPA reviews and litigation
- Review of interesting Notices of Intent (NOIs) to prepare EISs and recently released draft and final EISs
- Review of exemptions from NEPA
- Participation in NAEP webinars on NEPA topics

The NEPA Working Group has approximately 150 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

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

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 2024

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

The 2023 NEPA Annual Report described 2023 as an eventful year in the evolution of the National Environmental Policy Act and its associated compliance processes. 2024 was also an eventful year.

On May 1, CEQ issued its final Phase II rule revising its regulations for implementing NEPA. The rule incorporated the amendments to NEPA in the 2023 Fiscal Responsibility Act, restored several features of the 1978 version of the regulations that were eliminated in the 2020 version, and maintained other features of the 2020 version. It also emphasized the consideration of climate change-related effects and effects on communities with environmental justice concerns. As expected, the reception of the Phase II regulations was mixed and the regulations were challenged under the Congressional Review Act in both chambers of Congress and in a few other bills that would have rescinded them. None of these efforts were successful.

No major, broad-scope NEPA legislation comparable to the amendments to NEPA in the Fiscal Responsibility Act was enacted during 2024 although several such bills were introduced or discussed. Interest in "permitting reform," particularly for energy-related actions, was high at the end of the 118th Congress and will likely carry over to the 119th Congress in 2025.

With the issuance of the Phase II regulations, agencies had one year to issue a proposed rule revising their NEPA procedures to align with the Phase II regulations. By the end of the year, no agencies had published such a proposed rulemaking. Much of the agency NEPA-related rulemaking during 2024 focused on establishing and revising categorical exclusions. A few agencies also published notices of their adoption of categorical exclusions issued by other agencies.

On July 17, CEQ issues its "Report to Congress on the Potential for Online and Digital Technologies to Address Delays in Reviews and Improve Public Accessibility and Transparency" as directed by Congress in the Fiscal Responsibility Act amendments to NEPA. The report makes recommendations on common standards for NEPA-related data, a common model to facilitate sharing of information between agencies, and adoption of shared NEPA tools through the development of new and existing software applications.

The 223 EISs issued during 2024, including 100 draft EISs and 123 final EISs, continued the long-term decline in EIS numbers. The 223 EISs is, however, a notable increase over the number issued in 2021, 2022, and 2023. The average preparation time of EISs issued in 2024, from notice intent to notice of availability of the final EIS, is 1,601 days (4.4 years) and the median is 1,007 days (2.8 years). This is about two months longer than the average for final EISs issued in 2023, when the several EISs prepared by FERC lowered the overall average preparation time. Slightly over half of the EISs completed in 2024 were within the two-year time limit in the Fiscal Responsibility Act amendments to NEPA. Due to the

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

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 26 substantive rulings in NEPA litigations during 2024. Federal agencies prevailed in 19 (81 percent) 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. The District of Columbia Circuit Court of Appeals November ruling in *Marin Audubon Society v. Federal Aviation Administration* was particularly noteworthy. Although the FAA lost this case, the court went further to rule that CEQ did not have the authority to issue regulations on the implementation of NEPA. Also of note was the U.S. Supreme Court agreement to review *Seven County Infrastructure Coalition v. Eagle County, Colorado*, the first NEPA litigation to reach the Supreme Court since the court's *Department of Transportation v. Public Citizen* ruling. *Seven County Infrastructure* was argued on December 10, 2024.

4. Just the Stats

James Gregory[4]

In 2024, Notices of Availability (NOAs) for 238 environmental impact statements (EISs) were published in the *Federal Register*. Of the published notices, 98 were listed as draft EISs (including revised and supplemental draft EISs) and 140 were final EISs (including supplemental, second supplemental and revised final EISs); 16 final EISs were adoptions, and these are not included in this assessment. One draft EIS had two *Federal Register* notices, and was only counted as one EIS. With the removal of the adoptions and one duplication, the total number of EISs in 2024 was 221. Information regarding these documents is available through the EPA's online EIS database, available at: https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search. The database contains links to the EISs and EPA's comment letter for EISs on which they commented.

4.1 EISs Published in 2024

The 221 EISs published in 2024 were notably more than the number of EISs published in 2023 (162). 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 2015—2024.

Year	Number of EISs Published
2024	221
2023	162
2022	185
2021	186
2020	254
2019	219
2018	323
2017	257
2016	312
2015	381

4.2 EISs Published in 2024 by Agency and Department

Thirty-seven agencies published at least one EIS in 2024 and three agencies published at least 15 EISs (Table 4-2), the same as in 2022 and 2023. The Bureau of Land Management, the US Forest Service and the US Army Corps of Engineers were the agencies that published the most EISs (53, 17 and 15, respectively). One hundred and thirty-five EISs had federal cooperating agencies.

[4] James W. Gregory, Jacobs, 2020 SW 4th Avenue, Suite 300, Portland, OR 97201-4973; james.gregory@jacobs.com

Three non-federal agencies with delegated NEPA authority (California Department of Transportation, California High-Speed Rail Authority, and Utah Department of Transportation) published EISs in 2024. 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 2024 by lead agency.

Lead Agency	Number of EISs
Bureau of Land Management	53
Forest Service	19
U.S. Army Corps of Engineers	12
Nuclear Regulatory Commission	12
United States Air Force	12
General Services Administration	10
Bureau of Ocean Energy Management	8
Federal Highway Administration	8
Federal Transit Administration	7
National Oceanic and Atmospheric Administration	7
Animal and Plant Health Inspection Service	6
Bureau of Reclamation	5
Federal Energy Regulatory Commission	5
National Marine Fisheries Service	5
Natural Resource Conservation Service	5
Bureau of Indian Affairs	4
Fish and Wildlife Service	4
National Park Service	4
Tennessee Valley Authority	4
United States Army	4
Department of Energy	3
Bureau of Prisons	2
California Department of Transportation	2
California High-Speed Rail Authority	2
Geological Survey	2
Office of Surface Mining	2
U.S. Coast Guard	2
United States Navy	2
Federal Railroad Administration	1
Missile Defense Agency	1

Lead Agency	Number of EISs
National Highway Traffic Safety Administration	1
National Nuclear Security Administration	1
National Security Agency	1
Rural Utilities Service	1
Utah Department of Transportation	1
Total	**162**

In 2024 five departments[5] --Interior, Defense, Agriculture, Energy, and Transportation -- were responsible for 86 percent of all EISs published. These are the same five departments that together published the majority of EISs in 2022 and 2023. Department of Interior agencies published the largest share of EISs (82 total, or 37 percent 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.

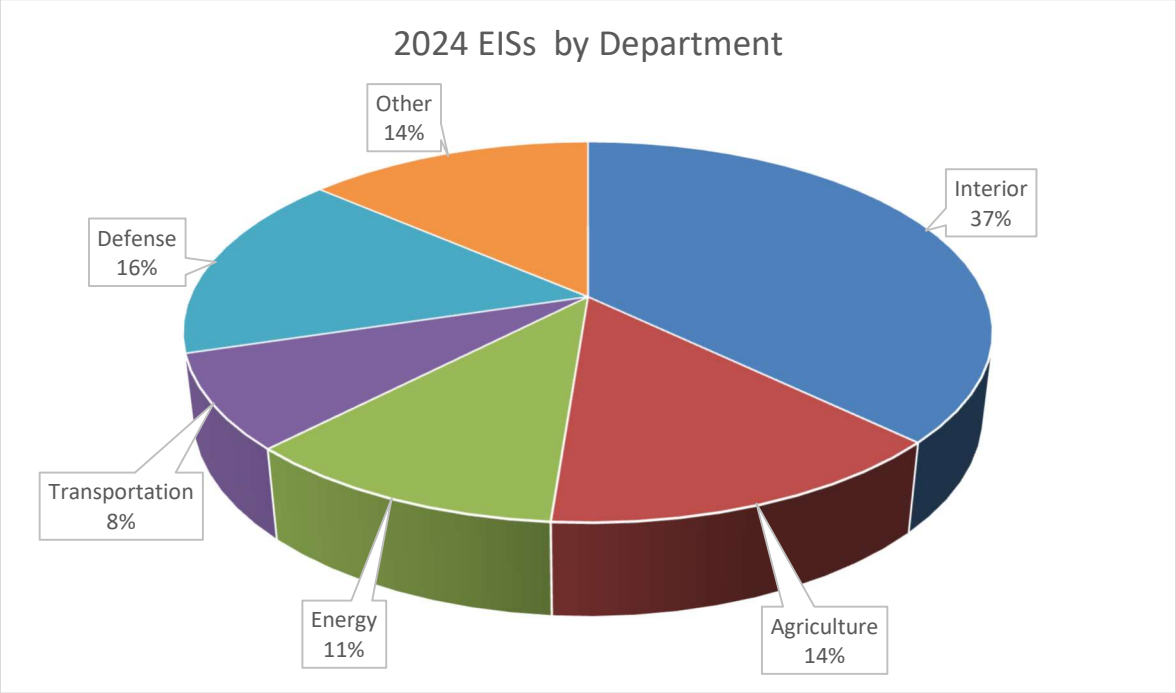

Figure 4-1. Draft and final EISs published in 2024 by department.

4.3 Geographic Distribution of EISs Published in 2024

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, more EISs were prepared for actions in California (22) in 2024 than in any other state[6]. Nevada had the next highest with 16 and no other single state had more than nine. Forty-

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

eight EISs were listed as involving multiple states. Eight EISs were identified in the database as for actions that were programmatic, regulatory, and/or national in scope.

Table 4-3. Draft and final EISs published in 2024 by state and territory.

State/Territory	Number of EISs	State/Territory	Number of EISs
CA	22	SC	
NV	16	TN	3
FL	9	WY	3
AK	8	GA	3
ID	8	GU	2
OR	7	KY	2
WA	7	ND	2
WI	7	NJ	2
AZ	6	AL	2
TX	6	CT	1
UT	6	DC	1
MN	5	ME	1
HI	4	MI	1
MD	4	NC	1
MS	4	NY	1
MT	4	OH	1
NM	4	RI	1
CO	3	VA	1
IL	3	Programmatic/Regulatory/National	8
NE	3	Multiple States	48
		Total	221

5. Preparation Times for Environmental Impact Statements Made Available in Calendar Year 2024

Piet deWitt and Carole deWitt[7]

5.1 Summary

The annual average preparation times for draft and final EISs made available in 2024 were slightly higher than the averages for 2023 but well below the highest 1997-2023 annual averages. Approximately two-thirds of the agencies making draft or final EISs available produced at least one EIS that met the two-year preparation time requirement of the amendments to NEPA in the Fiscal Responsibility Act of 2023. Approximately 39 percent of the 2024 draft EISs were completed in less than 1 year from the publication of their Notice of Intent (NOI), and 33 percent of the final EISs were completed in less than 2 years from the publication of their NOI.

5.2 EIS Numbers

Adoptions

In 2024, eight agencies adopted 16 final EISs. The National Oceanic and Atmospheric Administration (NOAA) made six adoptions and the Department of Energy (DOE) made four. The Bureau of Ocean Energy Management (BOEM) had seven of its EISs on offshore wind energy adopted; NOAA adopted six of these EISs and DOE adopted one. The 16 adoptions in 2024 were the second highest total since 1997, tying the total in 2019. The highest number of adoptions in a year was 20 in 2023.

Draft and Final EISs

In 2024, 26 agencies made available 100 draft and draft supplemental EISs. The Bureau of Land Management (BLM) made 22 of these EISs available. The next highest producers were the Corps of Engineers (USACE) and the Nuclear Regulatory Commission (NRC) with seven apiece. Nine agencies made one draft EIS available. For the period 1997–2024 the average number of draft EISs made available per year was 214 ± 75 (average ± one standard deviation). The last year in which the number of draft EISs equaled or exceeded 214 was 2011. The highest number of draft EISs made available was 320 in 2003, and the lowest number was 84 in 2023. For the period 1997–2024 the average number of draft EISs being made available in a year decreased at an average rate of -8.2 drafts per year with a coefficient of determination (R^2) of 0.81. From 2003, the peak year, the average rate of decrease was -11.8 drafts per year (R^2 =0.96).

26 agencies also made 123 final and final supplemental EISs available to the public in 2024. The BLM made available 31 of these EISs. The next highest producer was the US Forest Service (USFS) with 15 finals. For the period 1997–2024, the average number of final EISs made available in a year was 195 ± 62. The last year in which the number of final EISs made available equaled or exceeded 195 was 2012. The highest number of final EISs made available was 306 in 2004, and the lowest number was 78 in 2023. For the period 1997–2024 the average number of final EISs being made available in a year

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

decreased at an average rate of -6.4 finals per year (R^2 = 0.73). From 2004, the peak year, the average rate of decrease was -9.9 finals per year (R^2 =0.89).

5.3 Final EIS Preparation Times

In calendar year 2024, the 123 final EISs made available included one supplemental EIS which lacked a supplementing NOI. This EIS was therefore eliminated from our analysis which includes 122 final EISs.

In 2024 final EISs prepared by all agencies combined had an average total preparation time (from the date of the NOI publication in the *Federal Register* to the date of EPA's publication of the NOA for the final EIS) of 1,601 ± 1,447 days (4.4 ± 4.0 years) [See "ALL" in Table 5-1]. The 2024 average was 98 days longer than the 2023 average of 1,503 days (4.1 years). The 2024 average was also 361 days (1.0 years) shorter than the high average of 1,864 days (5.1 years) in 2016, and 435 days (1.2 years) longer than the lowest annual average of 1,166 days (3.2 years) achieved in 2000. Individual EIS preparation times ranged from 203 days (0.56 years) to 6,218 days (17.0 years). Each of these EISs was prepared by the U.S. Forest Service.

Table 5-1. Preparation times in calendar days for final and final supplemental EISs made available in calendar year 2024. 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	122	100	**1,029**	1,026	563	**571**	626	307	**1,601**	1,447	1,007	203	6,218
APHIS	2	1.6	**1,627**	576	1,627	**116**	64	116	**1,742**	512	1,742	1,380	2,104
BIA	3	2.5	**1,289**	1,420	871	**889**	848	728	**2,178**	1,725	2,677	259	3,599
BLM	31	25.4	**995**	1,074	505	**538**	783	293	**1,535**	1,499	784	413	6,006
BOEM	5	4.1	**528**	50	541	**407**	142	378	**936**	129	974	786	1,110
BOP	1	0.8	**520**			**133**			**653**				
BOR	3	2.5	**1,117**	524	879	**289**	154	371	**1,466**	620	1,240	991	2,167
DOE	2	1.6	**608**	468	608	**669**	629	669	**1,277**	1,097	1,277	501	2,052
FERC	2	1.6	**277**	35	277	**263**	74	263	**539**	109	539	462	616
FHWA	6	4.9	**1,727**	1,549	1,088	**1,028**	874	798	**2,755**	2,329	1,886	528	5,826
FRA	2	1.6	**2,858**	148	2,858	**469**	228	469	**3,327**	375	3,327	3,061	3,592
FTA	4	3.3	**904**	603	1,027	**611**	414	613	**1,514**	948	1,633	324	2,468
FWS	2	1.6	**401**	116	401	**203**	40	203	**604**	156	604	494	714
GSA	5	4.1	**380**	65	367	**325**	276	210	**704**	324	631	465	1,268
NNSA	1	0.8	**730**			**399**			**1,129**				
NOAA	7	5.7	**961**	885	814	**640**	630	371	**1,601**	1,455	1,120	366	4,621
NPS	3	2.5	**1,305**	1,540	560	**497**	291	371	**1,802**	1,815	861	651	3,895
NRC	5	4.1	**637**	391	406	**265**	142	210	**901**	472	623	507	1,459
NRCS	4	3.3	**1,500**	1,460	1003	**579**	809	189	**2,079**	2,251	1,150	583	5,432
NSA	1	0.8	**354**			**224**			**578**				
RUS	11	0.8	**3,262**			**1,883**			**5,145**				
TVA	1	0.8	**703**			**280**			**983**				
USACE	8	6.6	**1,327**	1,465	614	**628**	559	522	**1,955**	1,926	1,272	277	5,985
USAF	6	4.9	**589**	387	497	**193**	64	204	**782**	400	644	492	1,540
USFS	14	11.5	**1,174**	1,067	973	**914**	703	781	**2,088**	1,540	2,152	203	6,218
USCG	2	1.6	**516**	4	516	**1,043**	386	1,043	**1,559**	383	1,599	1,288	1,829
USGS	1	0.8	**283**			**161**			**444**				

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

The draft EISs for the 2024 final EISs required an average of 1,029 ± 1,026 days (2.8 ± 2.8 years) to complete following publication of their NOIs in the *Federal Register*. The 2024 average preparation time was 63 days longer than the 2023 average of 966 days (0.17 years). The 2024 average was also 349 days (0.96 years) shorter than the longest annual average of 1,378 days in 2016 and 319 days (0.87 years) longer than the shortest average of 710 days (1.9 years) for the year 2000.

The 2024 average time for preparing the final EIS from the draft EIS was 571 ± 626 days (1.6 ± 1.7 years). The 2024 average was 34 days longer than the 2023 average of 537 days (1.5 years). The 2024 average was also 37 days shorter than the longest average of 608 days (1.7 years) and 182 days (0.5 years).

The Fiscal Responsibility Act of 2023 amended NEPA by requiring, among other things, that agencies complete their final EISs in two years unless the EIS-preparing agency extends the deadline. In 2024, 18 agencies produced 64 final EISs (52.5 % of our sample) in two years or less from the dates of their NOIs. This is the highest percentage of final EISs completed within two years since 1997 and the only year in which with a two-year completion rate greater than 50 percent.

All federal agencies combined established a new low completion percentage for the 4-to-5-year interval, and new high percentages for the 14-to-15 and 16-to-17-year intervals (See Table 5-2).

Table 5-2. A comparison of 2024 final and final supplemental EIS completion rates with averages for the period 1997 through 2023.

Completion Interval in Years from NOI	2024 Completion Percentage	1997 - 2023			
		Average Completion Percentage	Standard Deviation	Lowest Percentage (Year)	Highest Percentage (Year)
0 to 1	4.1	7.4	3.9	0.7 (2018)	16.3 (2022)
1 to 2	28.7	22.2	5.0	13.7 (2015)	30.3 (2000)
2 to 3	19.7	18.7	2.8	15.2 (2008)	24.7 (2023)
3 to 4	12.3	13.2	3.1	8.1 (2022)	19.5 (2019)
4 to 5	5.7	10.1	2.2	6.2 (2002)	16.4 (2012)
5 to 6	6.6	7.1	2.1	2.6 (2023)	10.6 (2011)
6 to 7	4.1	5.8	2.3	0.0 (2021)	10.7 (2006)
7 to 8	3.3	4.0	1.5	1.5 (2000)	7.0 (2013)
8 to 9	3.3	3.6	1.9	1.3 (2002)	7.7 (2021)
9 to 10	2.5	2.1	1.4	0.0 (2 years)	6.0 (2015)
10 to 11	1.6	1.6	1.1	0.4 (3 years)	3.8 (2014)
11 to 12	0.8	0.86	0.69	0.0 (7 years)	1.6 (2 years)
12 to 13	0.8	0.93	0.96	0.0 (7 years)	3.4 (2019)
13 to 14	0.0	0.51	0.67	0.0 (11years)	2.6 (2023)
14 to 15	2.5	0.55	0.68	0.0 (12 years)	1.6 (2 years)
15 to 16	1.6	0.31	0.51	0.0 (18 years)	1.8 (2016)
16 to 17	1.6	0.20	0.42	0.0 (19 years)	1.5 (2018)
17 to 18	0.8	0.23	0.53	0.0 (19 years)	1.3 (y Years)

5.4 Draft EISs Preparation Times

In 2024, 26 agencies made 100 draft and draft supplemental EISs available to the public. One of the draft supplements had no NOI for its supplementation. That supplement was eliminated from our sample.

The 2024 annual average draft EIS preparation time for all agencies combined was 681 ± 714 days (1.9 ± 2.0 years) [See "ALL" in Table 5-3]. The 2024 average is 30 days longer than the 2023 average of 651 days (1.8 years). The 2023 average was the lowest annual average in our record. The 2024 average is also 563 days (1.5 years) shorter than the 2019 average of 1,244 days (3.4 years). Individual EIS preparation times ranged from 77 days to 5174 days (14.2 years).

Table 5-3. Preparation times in calendar days for draft and draft supplemental EISs made available in calendar year 2024.

Agency	n	%	Mean	s.d.	Med	Min	Max
ALL	99	100	**681**	714	448	77	5,174
APHIS	4	4.0	**1,222**	606	1,139	576	2,034
BIA	1	1.0	**126**				
BLM	22	22.2	**713**	1,061	454	176	5,174
BOEM	3	3.0	**438**	108	438	331	546
BOP	1	1.0	**469**				
BOR	2	2.0	**504**	531	504	128	879
DOE	1	1.0	**277**				
FERC	3	3.0	**421**	176	407	252	603
FHWA	5	5.1	**779**	528	534	346	1,677
FRA	1	1.0	**2,943**				
FTA	3	3.0	**1,123**	900	973	308	2,089
FWS	3	3.0	**482**	56	452	448	547
GSA	5	5.1	**374**	87	345	312	525
MDA	1	1.0	**539**				
NHTSA	1	1.0	**668**				
NOAA	6	6.1	**702**	462	869	114	1,278
NRC	7	7.1	**731**	513	406	282	1,618
NRCS	1	1.0	**415**				
OSM	1	1.0	**904**				
TVA	3	3.0	**365**	132	364	234	497
USA	4	4.0	**837**	421	795	435	1,323
USACE	7	7.1	**990**	1,067	406	183	2,550
USAF	6	6.1	**599**	375	507	169	1,151
USFS	5	5.1	**224**	156	184	77	436
USGS	1	1.0	**283**				
USN	2	2.0	**336**	40	336	308	364

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

In 2024, 17 agencies produced 35 draft EISs (35% of our sample) in one year or less from the dates of their NOIs. The highest percentage of draft EISs completed in one year was 38.8% recorded in 2021. Another 37% of draft EISs were completed in 1-to-2 years, and a total of 72% were completed in two years or less.

All federal agencies combined established a new low completion percentage for the 7-to-8-year interval (See table 5-4).

Table 5-4. A comparison of 2024 draft and draft supplemental EIS completion rates with averages for the period 1997 through 2023.

Preparation Interval in Years from NOI	2024 Preparation Percentage	1997 - 2023			
		Average Preparation Percentage	Standard Deviation	Lowest Percentage (Year)	Highest Percentage (Year)
0 to 1	35.4	26.8	6.7	13.9 (2013)	38.8 (2021)
1 to 2	37.4	28.2	4.4	20.4 (2021)	39.0 (2023)
2 to 3	13.1	16.6	2.6	12.0 (1999)	22.5 (2012)
3 to 4	5.1	9.8	2.6	4.9 (2023)	15.3 (2018)
4 to 5	2.0	6.1	2.1	0.0 (2023)	9.4 (2010)
5 to 6	3.0	3.8	1.8	0.0 (2023)	7.9 (2005)
6 to 7	2.0	2.9	1.4	0.0 (2022)	5.1 (2015)
7 to 8	0.0	1.6	0.92	0.3 (2005)	4.9 (2023)
8 to 9	1.0	1.2	0.97	0.0 (4 years)	4.2 (2017)
9 to 10	0.0	1.0	0.75	0.0 (2 years)	2.9 (2019)
10 to 11	0.0	0.39	0.56	0.0 (13 years)	2.0 (2014)
11to 12	0.0	0.44	0.46	0.0 (9 years)	1.7 (2015)
12 to 13	0.0	0.31	0.52	0.0 (13 years)	2.5 (2013)
13 to 14	0.0	0.21	0.47	0.0 (20 years)	2.1 (2019)
14 to 15	1.0	0.25	0.40	0.0 (16 years)	1.7 (2017)

6. NEPA Legislation in 2024

Charles P. Nicholson, PhD[8]

6.1 Introduction

At least 286 bills containing the phrase "National Environmental Policy Act" and/or addressing the NEPA review process in some manner were introduced in the 118th Congress, which ran from January 3, 2023 to January 3, 2025. 175 of these bills were introduced in 2023 and 2 of these became law in 2023. Only one of these contained substantive NEPA provisions. This bill, the Fiscal Responsibility Act, H.R.3746 / P.L. 118-5, amended NEPA for the first time in decades and was the most substantive NEPA legislation that became law in the 118th Congress as well as in several previous congresses. The Fiscal Responsibility Act and other legislation potentially affecting NEPA compliance and introduced in 2023 are described in NAEP's 2023 Annual NEPA Report.

During the 2024 session of the 118th Congress, 111 bills addressing NEPA in some manner were introduced. After accounting for identical or very similar bills introduced in both chambers, the number of unique bills addressing NEPA introduced in 2024 is 94. 26 of these bills are not considered substantive, i.e., they state that a particular action is subject to NEPA or address appropriations, leaving 68 unique bills addressing NEPA compliance processes that were introduced in 2024. These bills are described below. This report also identifies bills introduced in 2023 that were passed by a chamber of Congress in 2024 or enacted into law. Several NEPA bills introduced in 2023 received floor votes in late 2024 and several of these were enacted into law. Including 4 NEPA bills introduced in 2024 that were enacted into law, a total of 15 unique bills in the 118th Congress addressing NEPA became law and 9 of these included substantive NEPA provisions.

Substantive NEPA legislation introduced in 2023 is described in NAEP's 2023 Annual NEPA Report. This 2024 Annual NEPA Report briefly reviews substantive NEPA legislation introduced in 2023 and signed into law and describes substantive NEPA legislation introduced in 2024, including the one substantive bill introduced in 2024 that was signed into law. The descriptions of the substantive NEPA legislation introduced in 2024 are organized by topic.

Following the enactment of the Fiscal Responsibility Act, several proponents of NEPA and permitting reform were dissatisfied with the scope of the NEPA amendments. In July 2024, Senators Manchin and Barrasso, chair and ranking member of the Energy and Natural Resources Committee, introduced the **Energy Permitting Reform Act of 2024**, S.4753, to address some perceived deficiencies in the Fiscal Responsibility Act amendments to NEPA and streamline the review of energy-related actions. The bill was passed by committee but did not receive a floor vote. Further efforts involving House leadership to draft energy permitting legislation near the end of the session were unsuccessful. There was also a flurry of committee and floor action on other NEPA legislation in the last few weeks of the session. While few NEPA bills became law during this period, it does set the stage for continued interest in NEPA legislation in the 119th Congress which convened on January 3, 2025.

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

6.2 Legislation Enacted in 2024

Introduced in 2023

S.2228 and H.R.4549, the **Building Chips in America Act of 2023**, was introduced in April 2023 and signed into law in October 2024. It amends the 2021 CHIPS Act by declaring that Federal financial assistance other than loans or loan guarantees for semiconductor facilities, where the Federal assistance comprises less than 10 percent of the total project cost and the project is initiated before 12/31/2024, is not a major federal action under NEPA. For the NEPA review of Federal financial assistance for other semiconductor facilities, the Department of Commerce has the first right to serve as the lead federal agency. The act also makes multiple categorical exclusions issued by other agencies available for use by the National Institute of Standards and Technology and establishes three new DOC categorical exclusions for federal financial assistance for certain semiconductor facility-related actions.

The **Good Samaritan Remediation of Abandoned Hardrock Mines Act of 20**24, S.2781 and H.R.7779, was introduced September 2023 and became law in December 2024. It 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 has issued a FONSI.

H.R.1607 (with no formal name) was introduced in March 2023 and became law in December 2024. It states that the withdrawal of National Forest System land for a proposed Salt River pumped storage project is not a major federal action under NEPA. The development of the pumped storage facility is subject to NEPA.

S.870 (also with formal name) was originally introduced in March 2023 as the **Fire Grants and Safety Act of 2023** (H.R.4090) and did not address NEPA. The **Accelerating Deployment of Versatile, Advanced Nuclear for Clean Energy (ADVANCE) Act of 2024**, previously introduced as S.1111, was later added to it as Division B and S.870 became P.L. No. 118-67 in July 2024. It sets an 18-month deadline for the completion of NRC's NEPA review of the combined license application for proposed nuclear plants meeting certain criteria. It also requires NRC to report within 180 days on its efforts to expedite environmental reviews of license applications through the use of categorial exclusions, EAs, and generic EISs as well as efforts to implement the amendments to NEPA in the Fiscal Responsibility Act.

The **Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025**, H.R.5009, was introduced in July 2023 and became P.L. 118-159 in December 2024. It directs the Secretary of Transportation to issue a notice of proposed rulemaking within 6 months giving the Maritime Administrator the ability to use FHWA, FTA, and FRA categorical exclusions and initiate a rulemaking to propose new categorical exclusions for port authority actions. A related House version of the bill, H.R.8070, contained the same provisions.

The **Expanding Public Lands Outdoor Recreation Experiences (EXPLORE) Act**, H.R.6492, was introduced in November 2023 and became P.L. 118-234 in January 2025. It requires the Secretary of Interior to, within 2 years, 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.

The **Securing Growth and Robust Leadership in American Aviation Act** (also known as the FAA Reauthorization Act of 2024), H.R.3935, was introduced in June 2023 and signed into law in May 2024. It 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. It also requires the Secretary of Transportation to review and adopt categorical exclusions for various airport projects and categorically excludes airport projects with less than $6 million in federal funding or for which the federal funds comprise less than 15% of a total cost of less than $35 million and like-kind airport repair or replacement projects in a declared disaster or emergency area, subject to consideration of extraordinary circumstances.

Introduced in 2024

S.4367, the **Thomas R. Carper Water Resources Development Act of 2024**, became P.L. 118-272 in January 2025. It requires the Comptroller General of the US to, within 1 year, initiate a review of the efforts of the Secretary of the Army to implement the 2023 amendments to NEPA, review the current use of categorical exclusions by the Secretary, and recommend whether the adoption of categorical exclusions used by other agencies and new programmatic EISs would facility environmental reviews. A separate section requires the Comptroller General to conduct a similar review of Department of Commerce NEPA processes for economic development actions.

6.3 Legislation Introduced in 2023 and Passed by House or Senate in 2024

The **Electronic Permitting Modernization Act**, H.R.5509, was passed by the House in September 2024. It requires the Department of Interior to establish a modernized electronic permitting system and a centralized electronic permitting system online repository available to the public. The systems must be compatible with the priorities identified NEPA section 110 (E-NEPA) for any permit that requires a NEPA review.

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. It was passed by the House in April 2024 but not acted upon in the Senate.

The **Alaska's Right to Produce Act of 2023**, H.R.6285, was passed by the House in May 2024. It 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. It also bars judicial review of approvals associated with the Coastal Plain Oil and Gas Leasing Program. The Senate version, S.3289, was not acted upon. H.R.8214, the **Alaskan Energy Production and Fisheries Protection Act**, introduced in 2024, contained similar provisions.

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, includes at least one alternative that provides operational flexibility in livestock grazing use to account for changing conditions. The Senate passed it in December.

The **Atomic Energy Advancement Act**, H.R.6544, was passed by the House in February. It 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 **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. It was passed in December.

6.4 Legislation Introduced in 2024 but Not Passed by Either Chamber

CEQ Regulations for Implementing NEPA

Following CEQ's issuance of the Phase 2 revisions to its NEPA regulations in May 2024, identical resolutions to repeal the regulations under the authority of the Congressional Review Act were soon introduced in both the House (H.J.Res.168) by Graves (R-LA) and the Senate (S.J.R. 99) by Manchin (I-WV). The House version was the subject of a Natural Resources Committee hearing and the Senate version was never acted upon.

The **Countering Communist China Act**, H.R.7476, through its incorporation of the **BUILDER Act** (H.R. 1577), codifies the July 2020 CEQ NEPA regulations.

NEPA Streamlining

H.R.3316 (no formal name) would amend U.S.C. titles 46 on shipping and 49 on airports to streamline the environmental review process for major projects by applying the FAST-41 (23 U.S. Code § 139) process, including One Federal Decision, to Department of Transportation port, pipeline, and airport and aviation actions. It also requires DOT to maintain a publicly available database on categorically excluded port, pipeline, and airport and aviation projects. Reported by committee near end of session. This bill was reported by committee in December.

The **Coast Guard Authorization Act of 2024**, H.R.7659, amends the Deepwater Port Act of 1974 to state that the Department of Transportation, instead of the Coast Guard, will act as the lead agency for NEPA compliance for actions authorized by the act, and this compliance will fulfill the NEPA responsibilities of other involved federal agencies. The House passed this bill. The similar Senate version, S.5468, more specifically designates the Maritime Administration as the lead agency.

The broad-scope **Undoing NEPA's Substantial Harm by Advancing Concepts that Kickstart the Liberation of the Economy (UNSHACKLE) Act**, S.5323, amends Section 107 of NEPA to require that EISs be completed within 1 year of the publication of the notice of intent. If an agency fails to meet this deadline, the Director of the Office of Management and Budget is authorized to reduce the budget for the office of the head of the agency by 0.5 percent. Additional penalties can accrue for the continued failure to meet deadlines. It also includes provisions for use of state-, sponsor-, and third party-prepared environmental reviews. It requires CEQ and OMB to develop a methodology to assess the comprehensive costs of the NEPA process and for agencies to submit annual reports to Congress on the numbers, timelines, and costs of categorical exclusion determinations, EAs, and EISs. A new Section 108

of NEPA authorizes EPA to provide technical assistance and comment on draft and final EISs while a different section of the UNSCHACKLE act repeals Section 309 of the Clean Air Act which established EPA's EIS review and comment authority.

The **Energy Permitting Reform Act of 2024**, S.4753, contains several sections addressing the NEPA review and permitting of energy projects. The environmental review for a coal lease on federal land must begin within 90 days of a request by a qualified applicant and records of decision and findings of no significant impact must be issued within 90 days of the completion of the subject EIS or EA. The notice of intent for a right-of-way for a renewable energy project on public or National Forest System land that is the subject of an EIS must be issued within 90 days of receipt of a completed application. The Secretary of Interior and Secretary of Agriculture are required to, within 180 days, promulgate regulations for certain low disturbance activities necessary for renewable energy projects. The BLM National Renewable Energy Coordination Office is required to, within 2 years, promulgate renewable energy project review standards to be adopted by regional renewable energy coordination offices. It establishes FERC as the lead agency for federal authorizations for transmission lines and the Department of Interior as lead agency for transmission facilities on the outer continental shelf.

The **Department of Energy AI Act**, S.4664,. establishes a program within DOE to improve federal permitting processes for energy-related projects, including critical minerals projects, using artificial intelligence. Program components include collecting and analyzing data from past NEPA reviews, including to inform more flexible and effective categorical exclusions, building tools to improve future environmental reviews and, in consultation with other agencies and the Federal Permitting Improvement Steering Council, developing a strategic plan to implement and deploy online and digital tools to improve federal permitting. After being introduced in July, it was passed by committee in November.

H.R.10508, the **Offshore Energy Modernization Act of 2024**, provides $50 million for the Bureau of Ocean Energy Management and $45 million to the National Oceanic and Atmospheric Administration for the hiring of personnel, development of programmatic environmental documents, and other activities to facilitate permitting and review of offshore renewable energy projects. It also requires the Secretary of Interior conduct detailed planning area impact studies prior to any offshore renewable energy area lease sales, although it does not specify that these studies comply with NEPA. The **Create Offshore Leadership and Livelihood Alignment by Operating Responsibly And Together for the Environment (COLLABORATE) Act**, S.5441, requires similar planning area impact studies. It also provides for grants to enable states, Indian Tribes, other organizations, and potentially affected communities to participate in the planning activities.

The **Public Land Renewable Energy Development Act of 2024**, H.R.9012, requires the Secretary of Interior to, within 18 months, complete the final programmatic EIS on utility-scale solar energy development for which the draft PEIS was issued in January 2024, and to review and update the 2005 final PEIS on wind energy development on BLM-administered lands, the 2008 final PEIS on geothermal leasing in the western US, and the 2012 final PEIS on solar energy development in six southwestern states. It also requires the Secretary to issue the notice of intent for an EIS within 180 days of receipt of a completed application for a right-of-way for a wind or solar energy project.

H.R.7370, the **Geothermal Energy Opportunity (GEO) Act**, requires the Department of Interior to process applications for geothermal drilling and related actions under a valid existing geothermal lease

within 60 days of the completion of NEPA, ESA, NHPA, and related requirements. It was passed by the House.

The **Studying NEPA's Impact on Projects (SNIP) Act**, S.5263, would amend NEPA to require CEQ to publish an annual report on each cause of action based on alleged non-compliance with this Act filed during the previous 1-year period, as well as the length and timelines of EISs completed during the previous 5 and 10 years, respectively. It is similar to H.R.6129 introduced in 2023.

S.4424 and H.R.8557, the **National Prescribed Fire Act of 2024**, requires the Secretary of Agriculture and Secretary of Interior to develop landscape-scale prescribed fire plans for National Forest System units and BLM districts within 2 years. The plans, developed in accordance with NEPA, would eliminate the need for subsequent NEPA reviews of implementing actions.

The **Marine Energy Technologies Acceleration Act**, H.R.9238, establishes an interagency task force to, among other things, report on and develop recommendations for efficient permitting processes for marine energy projects, consistent with NEPA.

S.3891, the **Economic Development Reauthorization Act of 2024**, contains Section 122 on Modernization of Environmental Reviews, requiring the Secretary of Commerce to report to Congress within 180 days on efforts to facilitate efficient, timely, and predictable environmental reviews of projects funded by the Public Works and Economic Development Act of 1965, including through expanded use of categorical exclusions including categorical exclusion adoptions, EAs, and programmatic EISs. It also requires the Secretary to promulgate a final rule streamlining environmental reviews within 2 years. S.3891 was reported by committee.

The **Enhancing Mitigation and Building Effective Resilience (EMBER) Act**, S.4628, directs the Secretary of Interior and Secretary of Agriculture to increase the use of programmatic environmental analyses addressing similar or connected projects that are large scale or implemented over a long time period.

The **Reducing Regulatory Barriers to Housing Act**. S.4460 and H.R.8604, directs the Secretary of Housing and Urban Development to, working with other departments and CEQ, streamline procedures under NEPA to promote housing production and transit-oriented development.

H.R.8156 (no formal name) requires OMB to issue an updated version of the 1981 report "The Council on Environmental Quality: A Tool in Shaping National Policy" with emphasis on the role of CEQ in actions related to the Lower Snake River dams, including its responsibilities under NEPA.

S.4757 and H.R.9073, the **Environmental Health in Prisons Act**, requires the Attorney General, Secretary of Homeland Security, and Secretary of Interior, in consultation with the Administrator of the EPA, the CEQ, and the National Environmental Justice Advisory Council, to review and update procedures relating to the implementation of NEPA for major federal actions carried out at Federal carceral facilities. Other aspects of this bill are described below.

The previously mentioned **Countering Communist China Act**, H.R.7476, sets a 30-day time limit for completing the NEPA review of pending applications to drill for oil, gas, and geothermal energy on leased areas.

NEPA Exemptions / Not Major Federal Action

The **Energy Permitting Reform Act of 2024**, S.4753,.declares the approval of joint interregional transmission plans required by the act is not considered a major federal action under NEPA while projects selected pursuant to the plans are major federal actions. H.R.7786 and S.4027, the **Streamlining Powerlines Essential to Electric Demand (SPEED) and Reliability Act of 2024**, similarly declare that the designation of a proposed transmission facility as a national interest high-impact transmission facility is not a major federal action under NEPA.

H.R.10528 (no formal name) would exempt Federal actions related to energy and mineral activities under the Mineral Leasing Act and the Mining Law of 1872 from the requirements of NEPA.

The previously mentioned **Countering Communist China Act**, H.R.7476, declares that several actions on federal lands subject to approval by the Secretary of Interior or Secretary of Agriculture are declared to not be major federal actions. These include the reinstatement of a lease under the Mineral Leasing Act or the Geothermal Steam Act, geotechnical investigations, offroad travel in an existing right-of-way, construction of meteorological towers, drilling geothermal exploratory wells, repair and maintenance of existing transmission and distribution infrastructure. Oil, gas, and geothermal activities on land where the U.S. owns less than 50 percent of the subsurface mineral estate and the surface estate is non-federal does not nor require a federal permit are also major federal actions.

The **Harnessing Energy At Thermal Sources (HEATS) Act**, H.R.7409, also declares that geothermal exploration and production activities in areas where there is a non-Federal surface estate and Federal ownership interest of the subsurface geothermal estate of less than 50 percent is not a major Federal action and not subject to ESA Section 7 and NHPA Section 106. It was passed by the House.

The **Pipeline Safety, Modernization, and Expansion Act of 2024**, H.R.7655, declares that the establishment and implementation of a pipeline safety testing program by the Secretary of Transportation is not a major Federal action under NEPA. It was reported by committee.

Several bills declare that the execution of Indian water rights settlements are not major federal actions. These bills include S.4633 and H.R.8940, the **Northeastern Arizona Indian Water Rights Settlement Act of 2024**; S.4705 and H.R.8949, the **Yavapai-Apache Nation Water Rights Settlement Act of 2024**; S.4505 and H.R.8685, the **Ohkay Owingeh Rio Chama Water Rights Settlement Act of 2024**; S.4643 and H.R.8951, the **Zuni Indian Tribe Water Rights Settlement Act of 2024**; S.4998 and H.R.8945, the **Navajo Nation Rio San José Stream System Water Rights Settlement** Act of 2024; S.306 and H.R.8920, the **Tule River Tribe Reserved Water Rights Settlement Act of 2024**; and S.1987 and H.R.7240, the **Fort Belknap Indian Community Water Rights Settlement Act of 2024**. The Fort Belknap act was included in the S.2226, **National Defense Authorization Act for Fiscal Year 2024**, but was not in the version of the act (H.R.2670) signed into law. The Senate versions of most of these water rights settlement acts were reported by committee.

The **No Net Gain in Federal Lands Act of 2024**, H.R.10089, declares that the acreage of land acquired by the U.S. and under Interior and Agriculture department jurisdiction in a state during a fiscal year cannot exceed the acreage of land under Interior and Agriculture department jurisdiction that is disposed or in that state during that fiscal year. As part of implementing this, it declares that the disposal of land to achieve no net gain is not a major federal action under NEPA.

The **Fix Our Forests Act**, H.R.8790, requires the designation of fireshed management areas and declares that this action is not subject to NEPA. The development of fireshed assessments and associated potential fireshed management projects is also not subject to NEPA. It was passed by the House.

The **Wireless Broadband Competition and Efficient Deployment Act**, H.R.7376 and the identical H.R.3289, declares that the installation of a personal wireless service facility on an existing such facility, or the modification of such facility, is not a major federal action under NEPA. It also declares that it is not an undertaking under NHPA. The **Facilitating Optimal and Rapid Expansion and Siting of Telecommunications (FOREST) Act**, H.R.8230, similarly exempts the installation of communications equipment and facilities on National Forest System lands from compliance with NEPA if authorized utilities, communications facilities, or powerline facilities are already installed on the site.

H.R.8467, the **Farm, Food, and National Security Act of 2024** ("farm bill"), declares that certain agricultural land transactions undertaken by USDA and the Commodity Credit Corporation are not major federal actions under NEPA. It also incorporates the **Save Our Sequoias Act**, H.R. 2989, described in the 2023 NEPA Annual Report. H.R.8467 was reported by committee.

H.R.10493 and S.5611, the **Shipbuilding and Harbor Infrastructure for Prosperity and Security (SHIPS) for America Act of 2024**, declares that payments for privately owned vessels to enroll in a newly established Strategic Commercial Fleet are not considered major federal actions under NEPA. It also declares that financial assistance for vessels constructed under a Voluntary Intermodal Sealift or Voluntary Tanker Agreement is not a major federal action under NEPA. It amends FAST-41 to add construction of maritime industry infrastructure to the list of covered actions.

Judicial Review

The **Comprehensive Offshore Resource Enhancement (CORE) Act of 2024**, H.R.9472, prohibits a court from enjoining an offshore oil and gas survey project for claims under NEPA if the court determines the plaintiff is unable to demonstrate that the claim is likely to succeed on its merits. The survey approval can be remanded to the applicable agency for correction of deficiencies within 30 days. Preparation of a new EA or EIS is not required unless the applicable agency entirely failed to publish a required EA or EIS. The act establishes a 120-day statute of limitations for filing claims and plaintiffs must have participated in the environmental review process. District and appeals courts must issue decisions within 30 days of filing of the petition or appeal.

The **UNSHACKLE Act** (S.5323), mentioned above, establishes a 150-day statute of limitations for filings claims for judicial review and prescribes conditions under which a preliminary injunction, temporary restraining order, or permanent injunction may be issued.

The **Nuclear Waste Administration Act of 2024**, H.R.9786, requires that judicial review of NEPA claims over actions authorized by the act occur in the court of appeals for the circuit in which the petitioner resides or has the principal office or the U.S. Court of Appeals for the DC Circuit. Claims must be filed within 180 days of the decision.

S.5290 and H.R.10008, the **Protect LNG Act of 2024**, declares that if a court finds the environmental review of a permit, license, or approval to export natural gas or for an LNG terminal violates the Natural Gas Act or NEPA, the court must remand the matter and cannot vacate the permit, license, or approval. The case must also be heard in the U.S. court of appeals for the circuit in which the subject facility is

located. The act also establishes a 90-day statute of limitations on filing claims for judicial review. S.3829, the **LNG Security Act**, similarly requires that judicial review of a decision by FERC on an application to export natural gas or approve an LNG facility occur in the U.S. Court of Appeals for the circuit in which the facility is located.

The **Undoing NEPA's Substantial Harm by Advancing Concepts that Kickstart the Liberation of the Economy (UNSHACKLE) Act**, S.5323, defines conditions under which a plaintiff has standing, establishes a 150-day statute of limitations for filings claims for judicial review, and prescribes conditions under which a preliminary injunction, temporary restraining order, or permanent injunction may be issued.

The previously mentioned **Energy Permitting Reform Act of 2024**, S.4753, establishes a 150-day statute of limitations for filing for judicial review of authorizations under federal mining laws, the Outer Continental Shelf Lands Act, and the Geothermal Steam Act of 1970. The reviewing court must expedite their consideration of the claim and remanded actions must be completed within 180 days.

The previously mentioned **Fix Our Forests Act**, H.R.8790, establishes a 120-day statute of limitations for claims for judicial review of fireshed management projects and sets conditions under which the court can vacate or enjoin the action or remand the matter. It was passed by the House.

The **Countering Communist China Act** (H.R.7476), also previously mentioned, places restrictions on the judicial review of permits, licenses, or approvals of mineral and energy facilities by a federal agency, including a 120-day statute of limitations and the requirement that the plaintiffs must have submitted detailed comments during public comment periods.

NEPA Delegation/Assignment

The **UNSHACKLE Act** (S.5323), mentioned above, adds a new Section 109 on Project Delivery Programs to NEPA, directing the head of each federal agency, upon request by a state, to enter into a written agreement with the state for the state to assume federal NEPA responsibilities for projects within the state. This would effectively result in an expansion of the DOT's Surface Transportation Project Delivery Program (23 U.S.C. 327) to other agencies and other types of actions.

Categorical Exclusions

The **Energy Permitting Reform Act of 2024**, S.4753, requires the Secretary of Interior and Secretary of Agriculture to, within 180 days, promulgate regulations for categorical exclusions for placement of electric transmission or distribution facilities in approved right-of-way corridors, maintenance and upgrades of such existing facilities, and construction and operation of energy storage facilities on previously disturbed sites. The secretaries must also, within 180 days, promulgate regulations for categorical exclusions for geothermal resource exploration and testing actions resulting in disturbances of less than 10 acres. The **Geothermal Energy Optimization Act**, S.3954, similarly requires the Secretary of Interior to, within one year, develop a categorical exclusion, subject to consideration of extraordinary circumstances, for geothermal resource exploratory and test projects. The **Streamlining Thermal Energy through Advanced Mechanisms (STEAM Act)**, S.4865, addresses categorically excluding geothermal exploration and development activities by adding them to a categorical exclusion for certain oil and gas exploration and development activities on public lands and National Forest System lands established in Section 390 of the Energy Policy Act of 2005. It is identical to H.R.6474 (no formal name), introduced in 2023 and passed by the House in 2024 after the introduction of S.4865.

H.R.7587, the **Port Optimization for Responsible Transportation Act**, directs the Secretary of Transportation to, within 6 months, issue a notice of proposed rulemaking to enable the Maritime Administration to use categorical exclusions issued by FHWA, FTA, and FRA. It also directs the Secretary to issue a notice, also within 6 months, of proposed rulemaking for new Maritime Administration categorical exclusions for port projects. Maritime Administration categorical exclusions must also be updated every 4 years.

The **Outdoor Americans with Disabilities Act**, S.4553, states that the closure of Department of Interior or National Forest System lands under certain conditions is categorically excluded, subject to consideration of extraordinary circumstances.

H.R.6994, the **Restoring Our Unopened Trails for Enjoyment and Safety (ROUTES) Act**, establishes a Department of Interior and Department of Agriculture categorical exclusion for specified activities on Interior recreational lands and National Forest System lands including repair and restoration following natural disasters, removal of hazard trees, and mitigation of soil erosion. The application of the CE is subject to consideration of extraordinary circumstances. It was reported by committee.

The previously mentioned **Fix Our Forests Act**, H.R.8790, categorically excludes vegetation management and operation and maintenance activities on electric utility line fights-of-way on specified public lands.

The **EMBER Act**, (S.4628), mentioned above, directs the Secretary of Homeland Security to amend its NEPA instruction manual to include post-fire revegetation, waterway protection, water resource protection, and other post-fire community environmental needs in its list of categorical exclusions.

H.R.10513, the **Co-Location Energy Act**, directs the Secretary of Interior to determine whether the issuance of permits for wind and solar energy development on areas under an existing federal energy lease qualifies for categorical exclusion.

The **Prioritizing American Farmers and Agricultural Industry Over Bureaucracy Act**, H.R.10529,directs the Secretary of Agriculture to, within one year, develop a categorical exclusion for high priority hazard tree activities on areas up to 3,000 acres where the activities are compatible with applicable rules and land and resource management plans. It also incorporates the Save Our Sequoias Act, H.R. 2989 (described in the 2023 NEPA Annual Report).

H.R.8997, the **Energy and Water Development and Related Agencies Appropriations Act, 2025**, prohibits the use of funds made available to DOE to provide a categorical exclusion for energy storage systems.

Scope of Analysis

The previously mentioned **UNSHACKLE Act**, S.5323, prohibits the consideration of the effects the proposed action and alternatives on climate change and the effects of GHG emissions on climate change.

The previously mentioned **Countering Communist China Act**, H.R.7476, limits the impact analyses of oil and gas leases or permits to applies to areas in the immediate vicinity of the lease area and states that the consideration of downstream indirect effects of oil and gas consumption is not required.

The **LNG Public Interest Determination Act of 2024**, H.R.10207, declares that an order authorizing the export of natural gas is a major federal action under NEPA and that the associated assessment must include a climate change assessment including quantified life cycle GHG emissions and address the social cost of those GHG emissions, as well as an environmental justice assessment. The use of a categorical exclusion for approval of the export of natural gas is prohibited. The final public interest finding must show that the proposed export does not significantly contribute to climate change or slow global GHG emission reduction and does not create disproportionate impacts on vulnerable communities.

S.4454 and H.R.9062, the **Operational Flexibility Grazing Management Program Act,** requires that BLM, in renewing an authorized grazing permit or lease, at the request of the permittee or lessee, analyze at least 1 alternative to provide operational flexibility in livestock grazing use to account for changing conditions. This alternative must include monitoring commitments to inform management adjustments.

The **Nautical Oversight, Safety, and Protection of Inflammable Liquids by Law in the Sea (NO SPILLS) Act of 2024**, H.R.10490 and S.5597, amends the Deepwater Port Act of 1974 to require consideration of health and climate impacts on impacted communities and environmental justice communities nationwide, effects on threatened and endangered species and their ability to adapt to a changing climate, effects of upstream and downstream activities, and cumulative effects in the review of a proposed deepwater port action. They also require preparation of a programmatic EIS for deepwater port actions in the Gulf of Mexico and prohibit the issuance of any deepwater port licenses or permits until the programmatic EIS is completed.

The previously mentioned **Environmental Health in Prisons Act**, S.4757 and H.R.9073, requires EISs for federal carceral facilities must analyze the effects of the proposed action on communities with environmental justice concerns and consider alternatives to incarceration.

The **Oregon Owyhee Wilderness and Community Protection Act**. H.R.10082, requires the Secretary of Interior to, within three years, initiate the process to amend the 2024 Southeastern Oregon Resource Management Plan, Vale District, FEIS and ROD to include a Wilderness Plan for wilderness designated by the act, as well as a travel management plan. It also incorporates the NEPA requirement in S.1890, the **Malheur Community Empowerment for the Owyhee Act**, introduced in 2023 and passed by the Senate in December 2024.

Public Involvement

The previously mentioned **Environmental Health in Prisons Act**, S.4757 and H.R.9073, requires that all NEPA documents on actions at federal carceral facilities must be freely accessible to the incarcerated people at or reasonably foreseeable to be transferred to the subject facility, as well as facility staff. These people must also be provided the opportunity to participate in the scoping and public review processes.

Miscellaneous

The **Department of the Interior, Environment, and Related Agencies Appropriations Act, 2025**, H.R.8998, requires the Secretary of Interior to prepare an EIS prior to approving non-federal oil or gas operations within the Big Cypress National Preserve and to issue a new Record of Decision for the Caldwell Canyon Mine that addresses the deficiencies in Center for Biological Diversity v. BLM (Case Number 4:21-CV-00182-BLW). It also prohibits the use of funds it makes available for finalizing or

enforcing the interim NEPA guidance on consideration of greenhouse gas emissions and climate change issued by CEQ on January 9, 2023, for implementing or enforcing the Phase 1 and Phase 2 revisions to NEPA implementing regulations published in 2022 and 2024, and for environmental justice activities. H.R.8998 was passed by the House. The Senate version, S.4802, approved by committee, did not include these NEPA provisions.

S.4406 and H.R.8554, the **End Polluter Welfare Act of 2024** repeals Sections 106, 107, 108, 109, 110, and 111 of NEPA as amended by the Fiscal Responsibility Act, as well as the changes to Section 102(2) in the Fiscal Responsibility Act.

The **National Defense Authorization Act for Fiscal Year 2025**, S.4638, in Section 1094 orders the Secretary of Interior to select either of two build alternatives for the Ambler Mining District industrial access road in Alaska as the preferred alternative and publish a ROD selecting the alternative. The bill was reported by committee.

7. NEPA Case Law—2024

P.E. Danko, Esq. [9]

Melanie Hernandez, Esq.

Fred Wagner, Esq.

This paper reviews decisions on substantive NEPA cases issued by federal courts in 2024 and explains the implications of the decisions and their relevance to NEPA practitioners.

7.1 Introduction

In 2024, the U.S. Courts of Appeals issued 26 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 26 cases involved four different departments and three independent agencies. Overall, the federal agencies prevailed in 81 percent pf the cases (85 percent if the partial cases are included). The U.S. Supreme Court issued no NEPA opinions in 2024[10]; 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 – 2024, by circuit. For the first time, the Ninth and D.C. Circuit Court of Appeals tied for the highest number of cases, with ten cases each, greatly exceeding those in the other circuits, accounting for 77% of the 2024 cases. The 26 decisions issued in 2024 is above the 2006 – 2023 annual average of 23 decisions. Figure 7-1 illustrates the states covered by each circuit court.

7.2 Statistics

Federal agencies prevailed in 81 percent (85 percent if the partial opinions are included) of the substantive NEPA cases brought before the U.S. Courts of Appeals.

The Department of Agriculture (U.S. Forest Service [USFS] and Natural Resources Conservation Service [NRCS]) was the defendant in the largest number of cases with nine cases The Department of the Interior (Bureau of Land Management [BLM], Bureau of Reclamation [BOR], and Bureau of Ocean Energy Management [BOEM]) was a defendant in four cases.[11] The Department of Transportation (FAA, Federal Highway Administration [FHWA] and Maritime Administration [MARAD]) was involved in four cases. The Department of Defense (U.S. Army Corps of Engineers [USACE]) was a defendant in one case. Of the independent agencies, Federal Energy Regulatory Commission (FERC) was involved in six cases, Federal

[9] Questions about this paper should be directed to: P.E. Danko, Esq., Federal Aviation Administration, pamellendanko@gmail.com and any views attributable to co-author P.E. Danko are her personal views and not necessarily the views of the FAA, Department of Transportation, or the federal government. Melanie Hernandez, Esq., Scout, 169 Saxony, Suite 214, Encinitas, CA 92024, melanie.hernandez@scoutenv.com; Fred Wagner, Jacobs, fred.wagner@jacobs.com.

[10] However, one 2023 case was granted certiorari review at the Supreme Court, and was argued on December 10, 2024, with a decision issued on May 29, 2025. *See Seven County Infrastructure Coalition v. Eagle County, Colorado,* 605 U.S. ---, 145 S.Ct. 1497 (2025).

[11] The U.S. Fish and Wildlife Service was a co-defendant in two of the USDA's cases.

Communications Commission (FCC) defended one case, and the U.S. Nuclear Regulatory Commission (NRC) defended one case.

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
2024	**1**				**1**		**1**		**10**	**3**		**10**	**26**
TOTAL	11	9	7	20	13	14	11	7	220	40	14	73	439
Proportion of total	**2%**	**2%**	**2%**	**5%**	**3%**	**3%**	**2%**	**2%**	**50%**	**9%**	**3%**	**17%**	**100**

The Department of Agriculture prevailed in all but two of its nine cases. The Department of Interior (DOI) prevailed in all four cases. The Department of Transportation prevailed in three of its four cases. The Department of Defense prevailed in its one case. FERC prevailed in three out of six cases (in one case FERC did not prevail but FERC partially prevailed in the two remaining cases). Both FCC and NRC prevailed in their respective cases.

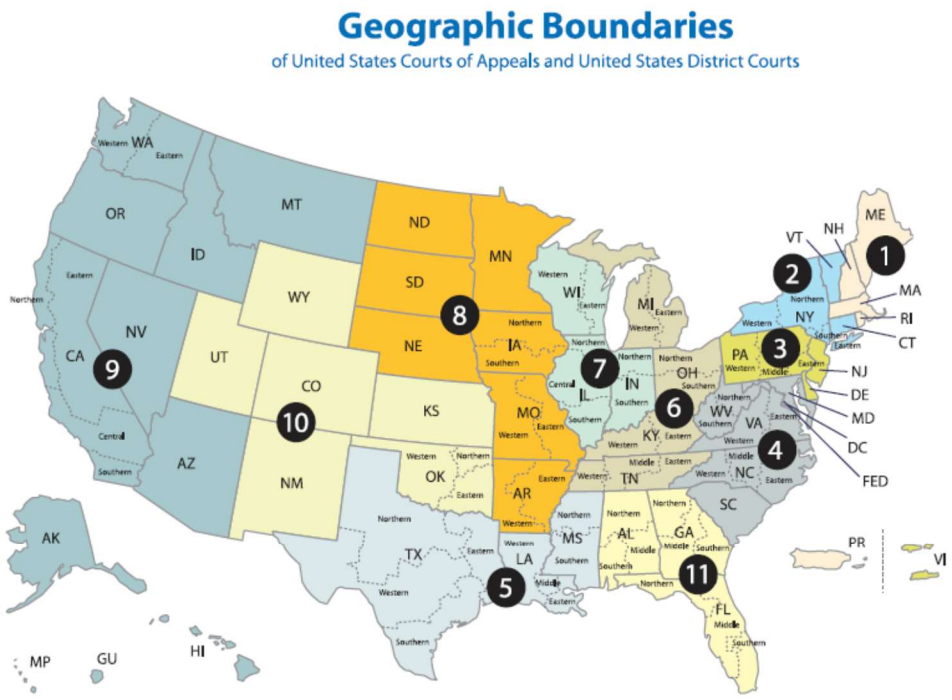

Figure 7-1. Map of U.S. Circuit Courts of Appeal

Of the 26 substantive cases, four cases involved categorical exclusions (CE), eleven involved environmental assessments (EA), and eleven involved environmental impact statements (EIS). For those cases involving: a CE, the agencies prevailed in four cases but did not prevail in two cases (agencies were successful 60% of the time); an EA, the agency prevailed in all ten cases (agencies were successful 100% of the time); an EIS, the agencies prevailed in eight cases, did not prevail in two cases, and in two other cases, the agency partially prevailed (82% agency prevailed if partial cases counted (otherwise agencies prevailed in 73% of the cases)).

Of the six cases in which agencies did not prevail (or only partially prevailed), two involved CEs, *Friends of the Inyo v. U.S. Forest Serv*., 103 F.4th 543 (9th Cir. 2024), and *Marin Audubon Soc'y v. Fed. Aviation Admin.,* 121 F.4th 902 (D.C. Cir. 2024). Four cases involved EISs: *New Jersey Conserv. Found. v. Fed. Energy Reg. Comm'n*, 111 F.4th 42 (D.C. Cir. 2024) (agency partially prevailed); *City of Port Isabel v. Fed. Energy Reg. Comm'n*, 111 F.4th 1198 (D.C. Cir. 2024); *Healthy Gulf v. Fed. Energy Reg. Comm'n*, 107 F.4th 1033 (D.C. Cir. 2024); *Project v. Vilsack,* No. 23-8081, 2024 WL 4589758 (10th Cir. Oct. 28, 2024) (not for publication).

7.3 Trends

The following relates some trends and interesting conclusions from the substantive 2024 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 two.

- *Protect Our Parks v. Buttigieg*, 97 F.4th 1077 (7th Cir. 2024) (rejecting Protect Our Park's contention that NEPA requires federal agencies to consider alternative sites for the Obama Presidential Center, and opining that agencies lacked the authority to dictate where the Center would be located, and so it would be unreasonable of them to waste time and resources exploring potential alternative sites)
- *Citizens for Clean Air & Water in Brazoria County v, U.S. Dep't of Transp*., 98 F.4th 178 (5th Cir. 2024) (concluding that NEPA did not require consideration of alternatives that did not achieve the goals of the applicant)
- *Earthworks v. Dep't of the Interior*, 105 F.4th 449 (D.C. Cir. 2024) (rejecting Earthworks' claims that BLM did not study all reasonable alternatives, and stating that "the alternative to withdrawing the proposed rule was to adopt it, which the BLM had already concluded would have no significant impact on the environment")
- *Healthy Gulf v. Fed. Energy Reg. Comm'n*, 107 F.4th 1033 (D.C. Cir. 2024) (upholding FERC's alternatives analysis because FERC made decisions based on the relevant considerations specific to each alternative, and it explained those decisions in sufficient detail)
- *City of Port Isabel v. Fed. Energy Reg. Comm'n*, 111 F.4th 1198 (D.C. Cir. 2024) (finding that supplemental analysis was required because the sequestration system itself could be viewed as a new "alternative," which should have been subject to public scrutiny).
- *Seafreeze Shoreside, Inc. v. U.S. Dep't of the Interior*, 123 F.4th 1 (1st Cir. 2024) (holding that BOEM reasonably limited the alternatives to those within the lease area because the agency was responding to the project proponent's proposal, not proposing the project itself)
- *Save the Colorado v. U.S. Dep't of Interior*, No. 23-15247, 2024 WL 1756103 (9th Cir. Apr. 24, 2024) (not for publication) (stating that the agency considered a reasonable range of alternatives, including seven distinct options that varied in their operational strategies and priorities (e.g., fish recovery vs. power generation))
- *Western Watersheds Project v. Vilsack*, No. 23-8081, 2024 WL 4589758 (10th Cir. Oct. 28, 2024) (not for publication) (finding that the record states there are viable alternatives to expanding the use of lethal controls for the prairie dog population, but none of the proposed actions consider this type of alternative)
- *Smith v. Tumalo Irrigation Dist.*, No, 24-70, 2024 WL 5153597 (9th Cir. Dec. 18, 2024) (not for publication) (discussing that the agency properly eliminated the on-farm efficiency upgrades alternative from detailed study because this alternative would have been difficult to implement and would not have met the "purpose and need to improve water delivery reliability and public safety")

***Assessment of Impacts**:* Twenty-one[12] 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): Five cases scrutinized the application of CEs to proposed actions; in two cases the court found the application of a CE to be insufficient.

- *San Luis Obispo Mothers for Peace v. Nuclear Reg. Comm'n*, 100 F.4th 1039 (9th Cir. 2024) (concluding that NRC's issuance of the CE (10 C.F.R. § 51.22(c)(25)) was supported by the record and rejecting Mothers for Peace's arguments that the language of the CE limits its use to certain types of exemptions)
- *Friends of the Inyo v. U.S. Forest Serv.*, 103 F.4th 543 (9th Cir. 2024) (holding that the plain text of the CE (36 C.F.R. § 220.6) prohibited USFS from combining CEs to approve a proposed action when no CE alone is sufficient)
- *International Dark Sky Assoc. v. Fed. Comm. Comm'n*, 106 F.4th 1206 (D.C. Cir. 2024) (upholding FCC's application of a CE, and stating an agency may consider mitigation when weighing the significance of potential environmental effects)
- *Marin Audubon Soc'y v. Fed. Aviation Admin.*, 121 F.4th 902 (D.C. Cir. 2024) (finding that the Agencies failed to fully consider the Air Tour Management Plan's environmental effects because they treated the effects of the existing flights as a starting point in the decision to apply a CE)
- *Oregon Wild v. U.S. Forest Serv.*, No. 23-35579, 2024 WL 4286965 (9th Cir. Sep. 25, 2024) (not for publication) (rejecting Oregon Wild's argument that CE-6 (36 C.F.R. § 220.6(e)(6)) does not cover "large-scale" commercial logging operations and stating that the text of CE-6 plainly covers the three projects at issue, finding CE-6 does not limit activities based on scale or acreage)

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

- *Trenton Threatened Skies, Inc. v. Federal Aviation Admin.*, 90 F.4th 122 (3d Cir. 2024) (applauding the FAA's use of the EPA's Environmental Justice and Screening and Mapping Tool, and upholding the FAA's environmental justice analysis, noting that most of the environmental justice communities were 1-2 miles outside of the project area)
- *Protect Our Parks v. Buttigieg*, 97 F.4th 1077 (7th Cir. 2024) (combing through the record and finding that the agencies were very thorough because the EA included, among other things, a Natural Resources Technical Memorandum that discusses the habits of migratory birds and how the project will affect their nests, as well as a Tree Technical Memorandum that considers each species of tree that will be cut down to build the Center)
- *Citizens for Clean Air & Water in Brazoria County v, U.S. Dep't of Transp.*, 98 F.4th 178 (5th Cir. 2024) (stating that "[c]onsidering the detail and extent of the analysis in the record, the agency adequately considered the direct and indirect effects of varying spills")
- *Rocky Mountain Wild v. Dallas*, 98 F.4th 1263 (10th Cir. 2024) (disagreeing with Rocky Mountain Wild's argument that the development that would result from construction of the right-of-way is a direct effect of the action (the USFS analyzed it as a direct effect), and

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

distinguishing that Rocky Mountain Wild failed to demonstrate that the development would occur at the "same time," especially when development plans have yet to be finalized)

- *Blue Mountains Biodiversity Project v. Jeffries,* 99 F.4th 438 (9th Cir. 2024), *cert. denied,* 145 S.Ct. 1048 (U.S. Jan 13, 2025) (finding the 2020 EA decision "acknowledges the highly-localized nature of the Project's effects" and disagreeing that the Projects impacts were highly controversial, unique, or precedential or violated federal, state, and local laws)
- *El Puente v. U.S. Army Corps of Eng'rs,* 100 F.4th 236 (D.C. Cir. 2024) (upholding the Corps' environmental justice analysis and rejecting El Puente's claim that the Corps failed to establish an adequate baseline for evaluating coral impacts when it had conducted coral surveys and included enforceable mitigation measures such as pre-construction diver surveys, avoidance buffers around corals, and real-time turbidity monitoring)
- *City of Port Isabel v. Fed. Energy Reg. Comm'n*, 111 F.4th 1198 (D.C. Cir. 2024) (faulting FERC for failing to consider data from only one air quality monitor in proximity to EJ communities and not a second monitor)
- *Marin Audubon Soc'y v. Fed. Aviation Admin*., 121 F.4th 902 (D.C. Cir. 2024) (finding that the Agencies failed to fully consider the Air Tour Management Plan's environmental effects because they treated the effects of the existing flights as a starting point (baseline) in the decision to apply a CE)
- *Save the Colorado v. U.S. Dep't of Interior*, No. 23-15247, 2024 WL 1756103 (9th Cir. Apr. 24, 2024) (not for publication) (finding the climate change analysis adequate, the court stated that the agency reasonably relied on historical hydrologic data, which it weighted to reflect increased likelihood of dry years, and modeled the performance of each alternative)
- *Patagonia Area Resource Alliance v. U.S. Forest Serv.*, No, 23-16167, 2024 WL 2180192 (9th Cir. May 15, 2024) (not for publication) (dismissing Patagonia's assertion that the USFS failed to reasonably evaluate the baseline conditions of the groundwater in the Sunnyside Project area and found USFS's reliance on studies conducted within the Cienega Creek Basin was reasonable, especially when the method suggested by Patagonia would require performance of the very drilling activities to which Patagonia objects)
- *Western Watersheds Project v. Vilsack*, No. 23-8081, 2024 WL 4589758 (10th Cir. Oct. 28, 2024) (not for publication) (criticizing USFS and finding the FEIS and record lacking because "there is no analysis or discussion of why or how the combined effects of reduced prairie dog acreage objectives, density control, plague, poison, and shooting will not result in a loss of viability to prairie dog populations. As such, it is entirely unclear from the FEIS and ROD whether the combined effects of reduced acreage objectives, density control, poison, plague, and shooting were analyzed or even considered by the USFS")

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

- *Alabama Municipal Distr. Group. v. Fed. Energy Reg. Comm'n*, 100 F.4th 207 (D.C. Cir. 2024) (upholding FERC's analysis because although FERC did not rely on the Social Cost of Carbon tool, FERC staff still estimated the social cost of carbon, publicly disclosed those estimates, and shared them in the EIS, opining that Congress gave export authorization to the Department of Energy — not FERC, and finding FERC did not err when it declined to consider the environmental effects of exported gas that flows through Evangeline Pass)

- *Food & Water Watch v. Fed. Energy Reg. Comm'n*, 104 F.4th 336 (D.C. Cir. 2024) (upholding FERC's analysis of potential downstream GHG emissions, when the agency quantified emissions and compared those to national and New York state totals, and agreeing with FERC when it concluded that the sources of this gas were unknown and its decision declining to address upstream environmental effects from the prospective drilling for natural gas)
- *Healthy Gulf v. Fed. Energy Reg. Comm'n*, 107 F.4th 1033 (D.C. Cir. 2024) (agreeing with Healthy Gulf's concern regarding the adequacy of the FERC's explanation of why it did not determine whether the Project's GHG emissions were significant and finding that FERC failed to explain its apparent departure from the approach it took in *Northern Natural Gas Co*., 174 FERC ¶ 61,189 (2021))
- *New Jersey Conserv. Found. v. Fed. Energy Reg. Comm'n*, 111 F.4th 42 (D.C. Cir. 2025) (finding that FERC did not adequately explain its decision to not make a GHG emissions significance determination and failed to discuss possible mitigation measures)

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

- *Trenton Threatened Skies, Inc. v. Federal Aviation Admin*., 90 F.4th 122 (3d Cir. 2024) (holding that, as required under FAA rules for an EA's cumulative analysis, the Final EA's Affected Environment section "include[d] critical background information of past, present, and reasonably foreseeable future actions")
- *Citizens for Clean Air & Water in Brazoria County v, U.S. Dep't of Transp*., 98 F.4th 178 (5th Cir. 2024) (disagreeing with the argument that the FEIS did not adequately analyze the cumulative air impacts because FEIS considered impacts from a 31.1-mile radius—a scope of review suggested by EPA regulations and finding that to be a reasonable approach)
- *El Puente v. U.S. Army Corps of Eng'rs,* 100 F.4th 236 (D.C. Cir. 2024) (upholding the Corps' cumulative impacts analysis, finding that the agency "reasonably identified the cumulative impacts of the proposed dredging project in light of past, present, and reasonably foreseeable future actions" and that NEPA does not require an agency to combine "every conceivable project into one analysis")
- *Healthy Gulf v. Fed. Energy Reg. Comm'n*, 107 F.4th 1033 (D.C. Cir. 2024) (remanding the FEIS to FERC to explain how its use of the 1-hour NO_2 significant impact level (SIL) is consistent with a proper cumulative effects analysis or to adequately assess the cumulative effects of the Project's NO_2 emissions using a different methodology)
- *Patagonia Area Resource Alliance v. U.S. Forest Serv.,* No, 23-16167, 2024 WL 2180192 (9th Cir. May 15, 2024) (not for publication) (finding that USFS took a hard look at the cumulative impact in the table contained in its EA, and was not required to separately discuss the Flux Canyon Project in its narrative analyses)
- *Blue Mountains Diversity Project, Inc. v. U.S. Forest Serv*., No. 23-3049, 2024 WL 4814553 (9th Cir. Nov. 18, 2024) (not for publication) (giving significant deference to USFS' decision to use different geographic scopes when assessing the cumulative impact on different resources and wildlife was based upon a reasoned "application of scientific methodology")
- *Smith v. Tumalo Irrigation Dist.*, No, 24-70, 2024 WL 5153597 (9th Cir. Dec. 18, 2024) (not for publication) (holding the agency adequately analyzed the project's cumulative effects on riparian areas and wetlands when the EA acknowledged that the project would affect riparian vegetation in and around the open canals but determined that the affected areas

did not meet the "functional criteria" for wetlands and that the project would benefit downstream riparian areas)

Connected Actions (Segmentation): Four cases involved allegations that the agency segmented the action, by not including connected actions.

- *Trenton Threatened Skies, Inc. v. Federal Aviation Admin*., 90 F.4th 122 (3d Cir. 2024) (rejecting the argument that FAA violated NEPA by segmenting the Airport Project and unmooring it from past Airport construction projects because the new terminal for the Trenton Airport had independent utility for multiple reasons and the EA also noted the independent utility of the various projects occurring at the Airport)
- *Protect Our Parks v. Buttigieg*, 97 F.4th 1077 (7th Cir. 2024) (denying Protect our Park's segmentation claims, and stating that because the federal agencies have no control over where the Center is being built, NEPA imposes no requirement that they oversee the other non-federal entities' (such as the Foundation's or the City's) actions)
- *Alabama Municipal Distr. Group. v. Fed. Energy Reg. Comm'n*, 100 F.4th 207 (D.C. Cir. 2024) (disagreeing with Alabama's arguments that four natural gas projects were connected actions, and finding substantial evidence that each project was physically and functionally independent of the Evangeline Pass Project)
- *City of Port Isabel v. Fed. Energy Reg. Comm'n*, 111 F.4th 1198 (D.C. Cir. 2024) (agreeing with City of Port Isabel's claims that the proposed carbon sequestration system was a connected action to the LNG project itself, when the record showed that the sequestration system was only useful if the LNG terminals were built)

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

- *Sierra Club v. Fed. Energy Reg. Comm'n*, 97 F.4th 16 (D.C. Cir. 2024) (noting that the agency made no changes to the proposed project that would trigger a supplemental NEPA analysis and stating courts must "defer to the informed discretion of the responsible federal agencies" in whether to prepare a supplemental EIS.")
- *Citizens for Clean Air & Water in Brazoria County v, U.S. Dep't of Transp*., 98 F.4th 178 (5th Cir. 2024) (agreeing with MARAD's conclusion that the new data on Rice's whales did not require a supplemental EIS)
- *Earthworks v. Dep't of the Interior*, 105 F.4th 449 (D.C. Cir. 2024) (rejecting Earthworks' claim that BLM was required to supplement its analysis due to changed circumstances, and noting that NEPA regulations only require supplementation when there is new information that "shows the action will affect the quality of the human environment in a significant manner or to a significant extent not already considered")
- *City of Port Isabel v. Fed. Energy Reg. Comm'n*, 111 F.4th 1198 (D.C. Cir. 2024) (finding the new analysis expanding the scope of environmental justice geographic boundaries presented a "seriously different picture of the environmental landscape," and in those circumstances, agencies are required to publish findings in a supplemental NEPA document, which would be subject to public review and comment)
- *Save the Colorado v. U.S. Dep't of Interior*, No. 23-15247, 2024 WL 1756103 (9th Cir. Apr. 24, 2024) (not for publication) (discussing that the agency's failure to respond to a post-FEIS demand letter requesting a supplemental EIS violated NEPA, but deeming it to be harmless error

because the studies relied on data available at the time of the original FEIS and reflected only different methodological choices—not significant new information)

- *Blue Mountains Diversity Project, Inc. v. U.S. Forest Serv*., No. 23-3049, 2024 WL 4814553 (9th Cir. Nov. 18, 2024) (not for publication) (affirming that USFS's analysis in its Supplement Information Report of the new projects in the Forest that were approved subsequent to the EA was proper because the USFS "determine[d] that the impact will not be significantly different from those it already considered.")

Each of the substantive 2024 NEPA cases, organized by federal agency, is summarized below. Unpublished cases are noted (7 of the 26 substantive cases in 2024 were unpublished). Although such cases may not have precedential value depending on the court, they can be of value to NEPA practitioners.

7.4 Details of Cases

Each of the substantive 2024 NEPA cases, organized by federal agency, is described in more detail below. Unpublished cases are noted (7 of the 26 substantive cases in 2024 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

Rocky Mountain Wild v. Dallas, 98 F.4th 1263 (10th Cir. 2024)

Agency prevailed.

Issues: Impact Assessment, Cooperating Agencies, Major Federal Action.

Facts: Environmental organization (Rocky Mountain Wild) petitioned for review of ROD alleging USFS violated NEPA. The case involves a dispute over a 300-acre parcel of land adjacent to the Wolf Creek Ski Area within the Rio Grande National Forest in Colorado, owned by Leavell-McCombs Joint Venture (LMJV), the intervenor. The land, obtained through a land exchange with the USFS in 1987, included a scenic easement that restricted development. LMJV sought to develop the parcel into a ski resort village but faced challenges due to limited access via a gravel road managed by the USFS, which was unusable in winter.

In 2007, LMJV invoked the Alaska National Interest Lands Conservation Act (ANILCA), claiming it required the USFS to grant access to inholdings within USFS land. The USFS initially proposed a second land exchange with LMJV to secure access to Highway 160. However, this proposal was challenged by Rocky Mountain Wild under the Administrative Procedure Act (APA), alleging violations of the NEPA, among other laws. In 2017, the district court vacated the USFS decision and remanded to the agency.

The USFS then considered a new alternative in the form of a right-of-way easement to LMJV across USFS land between the parcel and Highway 160. The USFS consulted with the FWS to secure a new biological opinion (BiOp) and incidental take statement (ITS) for the proposed action in 2018. The USFS then issued a final ROD in 2019, approving the easement.

The district court vacated and remanded under the law of the case doctrine, concluding that it was bound by the reasoning of the district court's 2017 order. The Agencies appealed the district court's decision vacating the 2018 BiOp and 2019 ROD.

The Tenth Circuit reversed and vacated the district court's decision.

Decision: Rocky Mountain Wild challenged how the USFS categorized the effects of the right-of-way in the EIS and 2019 ROD. They alleged that the USFS acted arbitrarily and capriciously in categorizing the LMJV's proposed development as an indirect effect of the right-of-way, rather than a direct effect.

Under the regulatory definitions, the Tenth Circuit stated that "LMJV's proposed development is an indirect effect of the right-of-way. The development plans have yet to be set and are thus removed in time, excluding them from the definition of "direct effects."' The Court found that they were nevertheless foreseeable, thereby bringing them within the ambit of "indirect effects." *See* 40 C.F.R. § 1508.8. The Court surmised that "the plans would cause "induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems," which the regulations describe as characteristic of indirect effects." *Id.* § 1508.8(b).

Rocky Mountain Wild argued that the development will result from construction of the right-of-way, and therefore it will be a direct effect of the action. The Court did not agree – distinguishing that Rocky Mountain Wild failed to demonstrate that the development would occur at the "same time," especially when development plans have yet to be finalized. *See id.* § 1508.8(a) (emphasis added). Accordingly, "the Agencies properly treated the LMJV development as an indirect effect of the right-of-way."

The Tenth Circuit further clarified that even if the effects were direct, Rocky Mountain Wild failed to identify any harmful impact from that presumed mis-characterization. USFS analyzed the impacts of high, medium and low development of the proposed resort village. USFS explicitly considered the impacts of each type of development on landscape disturbances, air quality, vegetation, and water flow, among other factors, and evaluated how the ultimate size of the development would interact with each of the federal actions proposed.

Rocky Mountain Wild also challenged the USFS's decision not to proceed with any cooperating agencies in developing the EIS. Under Tenth Circuit precedent, the court found that this challenge is unreviewable.

NEPA's implementing regulations provide that, "[u]pon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency." 40 C.F.R. § 1501.6. " In addition, any other federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency." Id. The Tenth Circuit has previously held that, when the USFS denies a request by a state to participate as a cooperating agency in the NEPA process under 40 C.F.R. § 1501.6, "the applicable regulations provide no standard for a court to apply in reviewing the [USFS's] denial of such a request, and are likewise devoid of any standards or directives that would guide the [USFS] in granting or denying such a request[, meaning] there is simply no law to apply." *Wyoming v. U.S. Dep't of Agric*., 661 F.3d 1209, 1242 (10th Cir. 2011).

The Tenth Circuit explained that, here, the Rocky Mountain Wild neglected to explain how the failure to categorize LMJV's development as part of a major federal action caused them harm. The Court found the EIS extensively reviewed—for three levels of potential density—the development proposal's impacts on the environment. *See, e.g., Eagle Cnty., Colo. v. Surface Transp. Bd.*, 82 F.4th 1152, 1176 (D.C. Cir. 2023); New *Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 704 (10th Cir. 2009);*WildEarth Guardians v. Nat'l Park Serv.,* 703 F.3d 1178, 1183 (10th Cir. 2013). Thus, although the agencies did not consider the LMJV's future development of the ski village as a major federal action, it considered the impact of that development as part of its assessment of the environmental effects of the right-of-way. Rocky Mountain Wild offered no explanation as to how the analysis would have been different if the Agencies had instead characterized the LMJV development itself as a major federal action.

In sum, the Tenth Circuit held that the USFS did not violate NEPA in preparing the EIS or the 2019 ROD and affirmed the 2019 ROD.

Blue Mountains Biodiversity Project v. Jeffries, 99 F.4th 438 (9th Cir. 2024), *cert. denied*, 145 S.Ct. 1048 (U.S. Jan 13, 2025)

Agency prevailed.

Issue: Impact Assessment

Facts: In a case involving previous litigation, an 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 had yet occurred, the T2 contract remained 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 D.C. 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 had not conducted any logging under the contract because the USFS had not issued a notice to proceed. And, given the district court's preliminary injunction against logging, which had 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. The EA explained why it chose certain broader contexts for analysis in other instances. The record failed 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 did 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." The court discussed that 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.

Friends of the Inyo v. U.S. Forest Serv., 103 F.4th 543 (9th Cir. 2024)

Agency Did Not Prevail.

Issues: Categorical Exclusion.

Facts: Environmental advocacy organization (Friends) filed suit, under NEPA, challenging USFS's approval of proposed Long Valley Exploration Drilling Project (the Project) on land in Inyo National Forest based on the application of a combination of two CEs.

The USFS promulgated 25 categories of CEs (references as CEs in the opinion) in 36 C.F.R. § 220.6(e). Two CEs are at issue here: (1) CE-6 allows "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction," 36 C.F.R. § 220.6(e)(6) ("CE-6 (habitat improvement)"); and (2) CE-8 allows "[s]hort-term (1

year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than 1 mile of low standard road, or use and minor repair of existing roads," *Id.* § 220.6(e)(8) ("CE-8 (mineral operations less than 1 year)").

The Long Valley Exploration Drilling Project is a proposed mineral exploration project on the USFS-managed land, east of Mammoth Lakes, California and within the Inyo National Forest. The Project was planned to proceed in two phases. The approved Plan of Operations would first allow KORE to build 12 temporary drilling pads in the Project area, which would be used for one year or less. Then, for the second phase, for up to three years after drilling, experts would monitor and tend to the Project area to ensure environmental rehabilitation is successful.

Each drilling pad would include up to 3 core, angle borings, which will reach depths from about 580 to 1,424 feet. KORE would use existing public roads and build up to 0.32 miles of temporary access roads for the Project. Between the temporary roads and drilling pads, KORE estimates the Project would directly disturb about 0.82 acres within the Project area.

On January 2, 2021, the USFS listed the Project "as a proposal on the Inyo National Forest Schedule of Proposed Actions (SOPA)." The USFS solicited public comment on the proposed Project and received over 1,500 comments. Among other concerns about impacts to the Bi-State sage grouse, a USFS species of conservation concern, and an endangered fish, the Owens tui chub, commentors also objected to the Forest Service's reliance on CE-8 (mineral operations less than 1 year) because the Project's reclamation period would take up to three years, and thus the Project could not be completed within one year.

In July 2021, the USFS altered its analysis of the Project. In the agency's draft Public Involvement Scoping Summary Report, the USFS acknowledged that commentors were concerned that the Project could not be approved using CE-8 (mineral operations less than 1 year) because "some activities would continue beyond one year, particularly monitoring and re-seeding as necessary, and other habitat restoration activities." The USFS stated that "[t]hese concerns were considered" and, ultimately, the agency "add[ed] another CE category to cover the minor activities that may occur to support rehabilitation, which may include additional seeding or planting vegetation, and leaving fences in place around revegetated areas."

The USFS formally approved the Project in a final decision memo. The decision memo continued to rely on the combination of two CEs, but it reversed its description of the Project's reclamation plan, finding that post-one-year reclamation efforts "are not support activities necessary for mineral exploration." As approved, the Project was divided into two phases. In phase one, covered by CE-8 (mineral operations less than 1 year), KORE will complete its mineral exploration and initial site reclamation.

Phase one will last one year, and at the end of the one-year period, all equipment will be removed, and exploration activities will be complete. In phase two, covered by CE-6 (habitat improvement), for up to three years after phase one, experts will monitor and tend to the Project area to ensure revegetation is successful.

The USFS found that the Project's plan of operations would avoid any significant effects on the environment. The final decision memo concluded that "impacts to the [sage grouse], should they be present, would be minor and temporary," and "will not result in any impacts to the species that would affect their viability within the Project area or the Inyo National Forest." It found that drilling may cause "physiological stress, reduced foraging success, and exposure to higher predation rates," but that, with the implementation of avoidance and minimization measures, any impact would be "short-term and spatially limited." The decision memo also evaluated risks to groundwater and concluded based on a historical groundwater analysis that "there is a very low potential for any effect to surface or groundwater quality or quantity from this exploration project.

Decision: Friends challenged the application of two CEs to avoid an EA or EIS. Under USFS regulation, § 220.6, "[a] proposed action may be categorically excluded from further analysis and documentation in an EIS or EA only if there are no extraordinary circumstances related to the proposed action and if . . . [t]he proposed action is within a category listed in § 220.6(d) and (e)." Section 220.6 thus requires NEPA compliance for each "proposed action" considered by the agency. Here, the agency evaluated the two-

phase Project as a single proposed action. The USFS properly analyzed the Project as one proposed action because USFS regulations prohibit artificially bifurcating reclamation from a proposed plan of operations. Thus, the Project was analyzed as a single action.

The parties agreed that neither CE applied by the Forest Service covers the Project alone. CE-8 applies to "[s]hort-term (1 year or less) mineral, energy, or geophysical investigations and their incidental support activities." 36 C.F.R. § 220.6(e)(8). But the proposed action, which includes two phases, exceeds one year. The decision memo found that after reclamation activities occur for "up to one year," the "minimum monitoring time" for the rehabilitation phase is three years. For its part, CE-6 applies to "[t]imber stand and/or wildlife habitat improvement activities." 36 C.F.R. § 220.6(e)(6). It cannot cover the full Project because phase one includes drilling and exploratory activities that are not remedial in nature. Both the Forest Service and KORE thus argue only that each phase of the Project could be covered by a different CE, not that one of the CEs applied by the Forest Service was sufficient alone.

The Court held that the plain text of § 220.6 prohibited the USFS from combining CEs to approve a proposed action when no CE alone is sufficient. That regulation provides, that "a proposed action may be categorically excluded from further analysis and documentation in an EIS or EA only if there are no extraordinary circumstances related to the proposed action and if: (1) The proposed action is within one of the categories established by the Secretary at 7 CFR part 1b.3; or (2) The proposed action is within a category listed in § 220.6(d) and (e)."

The Ninth Circuit examined and found that the plain language of § 220.6 alone prohibited the USFS from combining CEs, and that the structure, history, and purpose of the Section further reinforced that view.
First, the court discussed that the history of § 220.6 shows that its CE categories were intentionally enumerated independently, rather than as a grab bag of combinable exclusions.

Second, the Ninth Circuit found that the structure of § 220.6 shows that CEs cannot be combined, where one CE alone cannot cover a proposed action. Each CE is separately defined by the Section, and many include time and space limitations that would be futile if they could be duplicated or combined.

Finally, the purpose of NEPA and § 220.6 also support that CEs may not be combined, where no one CE could cover a proposed action alone. "We decline to do such violence to NEPA's procedural safeguards."

The Ninth Circuit vacated and remanded.

Dissent: Circuit Judge Butumay pointed out that this project would disturb less than an acre of land (out of two million acres of forest) and no one identified any significant impact on the environment (the Bi-State sage grouse is not classified as a protected species under federal law), thus, any error made by the USFS was harmless.

The dissent continued, stating that Friends identified no prejudice from the USFS invoking the two CEs here. The groups do not show that the Forest Service overlooked a significant effect on the environment based on the use of the two CEs. At most, they complain that the USFS did not prepare an environmental assessment. But it is uncontested that the project's two phases fit neatly into CE-8 (short-term mineral investigation) and CE-6 (wildlife improvements). Given that each phase would have no significant environmental impact individually or cumulatively, *see* 40 C.F.R. § 1508.4 (2017), analyzing the project as one would not yield any greater environmental impact. As the district court put it, "zero plus zero is zero."

USFS did not fail to take a hard look, in analyzing the project for any "extraordinary circumstances" under § 220.6(a)(2), the USFS extensively evaluated the project's impact on the Inyo's wildlife, botany, water, noise, and cultural heritage. It concluded none existed. it is hard to see what further environmental analysis would uncover.

"It was the USFS hypervigilance as the Inyo's environmental steward that caused this issue. After all, it was the USFS's insistence that the mineral-exploration phase be followed with re-habitation and revegetation efforts that took the project out of CE-8's one-year time limit.

"Think of it this way: The USFS could have complied with § 220.6(a)(2) by simply breaking the mineral exploration project into two separate "proposed

actions." Indeed, USFS's decision memo all but says that the two phases are two distinct "action[s]." According to the decision memo, despite the majority's assumption, the "[restoration] activities are not required to support the mineral exploration activities." As a result, the USFS determined it would "us[e] an additional CE category to cover these [restoration] activities." It makes sense to consider the two phases as different "proposed action[s]" because the habitat restoration would come only after the mining operation had been completed and all equipment removed. While this approach might not work for all projects, it does here and so any error in reading § 220.6(a)(2) was harmless.

Friends of Crazy Mountains v. Erickson, No. 22-35555, 2024 WL 1502507 (9th Cir. Apr. 8, 2024) (not for publication)

Agency prevailed.

Issue: Proposed Action

Facts: Public land organization (Friends) alleged that in rerouting certain trails in the Custer Gallatin National Forest, USFS violated NEPA.

The Ninth Circuit agreed with the district court when it found the 2018 trail rerouting project ("the Ibex project") was included in earlier NEPA analyses.

Here, the agencies completed an EIS in 2006 and a related EA in 2009. Both the 2006 EIS and the 2009 EA gave reasonable notice that the 2018 trail reroute fell within their respective scopes. The 2006 EIS stated it would adopt a management plan for public access and travel within the Forest and made mention of numerous trails that would eventually be relocated, including those at issue here. *See Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of the Interior*, 608 F.3d 592, 600 (9th Cir. 2010) (stating an agency "may adapt its assessment of environmental impacts when the specific locations of [a project] cannot reasonably be ascertained until sometime after the project is approved"). The 2009 EA more specifically identified the trail relocation at issue and provided an estimated area where the reroute would take place, pending certain easement negotiations.

Friends contended that the earlier NEPA analyses did not describe the Ibex project with sufficient specificity but did not point to any sources of relevance requiring a greater level of granularity. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1117 (9th Cir. 2002) (rejecting the argument that an agency's maps were insufficiently detailed because "plaintiffs cannot seriously dispute that they had actual notice as to the [ ] areas that would be affected"), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Without more, Friends failed to show Defendants acted arbitrarily and capriciously in relying on the 2006 EIS and the 2009 EA.

To the extent Friends challenged the adequacy of the 2006 EIS and the 2009 EA, they failed to exhaust their administrative remedies in 2006 and 2009, when Friends did not seek remedies. *See Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 846–47 (9th Cir. 2013) (observing APA and agency statutory and regulatory provisions require administrative exhaustion prior to bringing a NEPA claim).

The Ninth Circuit affirmed lower court's summary judgment in favor of the agency.

Patagonia Area Resource Alliance v. U.S. Forest Serv., No, 23-16167, 2024 WL 2180192 (9th Cir. May 15, 2024) (not for publication).

Agency prevailed.

Issue: Impact Assessment, Cumulative Impacts

Facts: Environmental organization (Patagonia) appealed the district court's denial of their motion for a preliminary injunction against drilling activities on two mining projects located within the Coronado National Forest, Arizona Standard LLC's Sunnyside Project and South32 Hermosa Inc.'s Flux Canyon Project.

The Ninth Circuit affirmed the lower court's denial of a preliminary injunction in favor of the agency.

Decision: The Ninth Circuit found district court did not abuse its discretion in concluding that Patagonia was unlikely to succeed on the merits of their claims under NEPA.

Addressing the Sunnyside Project, Patagonia argued that the USFS inadequately considered the cumulative effects of the now completed Flux Canyon Project, in addition to two other upcoming projects.

The Ninth Circuit found that the USFS took a hard look at the cumulative impact in the table contained in its EA, and was not required to separately discuss the Flux Canyon Project in its narrative analyses. *See Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1112 (9th Cir. 2015). The USFS did not arbitrarily omit the Hermosa Critical Minerals Project (CMP) from its EA because the available information — which came largely from press releases that included neither a project timeline nor a plan of operations — was too speculative to trigger a duty to supplement the EA. *See North Idaho Cmty. Action Network v. Dep't of Transp.*, 545 F.3d 1147, 1154–55 (9th Cir. 2008) (requiring a supplemental analysis if "there are significant new circumstances or information," unless the information is not sufficient to "meaningfully evaluate the environmental impacts of any potential [project]") (citation omitted). And the EA's analysis of the Hermosa Project was consistent with all available information that warranted "meaningful consideration" from the agency. *Environmental Prot. Info. Ctr. v. USFS*, 451 F.3d 1005, 1014 (9th Cir. 2006).

Patagonia also contended that USFS failed to take a "hard look" at the impact the Sunnyside Project would have on the Mexican spotted owl. However, the USFS analyzed the project's temporary impact on the owl, observing that the affected portion of the owl's habitat was "relatively small," and would be "reclaimed and restored." The USFS also estimated the project's ground-level noise impact and prohibited any drilling activities during the owl's nesting season. Although Patagonia points to shortcomings contained in studies relied on by the USFS, the court found the shortcomings did not impact the USFS's ultimate analysis. *See Earth Island Inst. v. USFS*, 351 F.3d 1291, 1301 (9th Cir. 2003) ("[A]n agency is entitled to wide discretion in assessing the scientific evidence, ... [and] courts must defer to the informed discretion of the responsible federal agencies ....") (citation omitted).

Finally, the Ninth Circuit disagreed with Patagonia's assertion that the USFS failed to reasonably evaluate the baseline conditions of the groundwater in the Sunnyside Project area. But baseline conditions need not be directly measured if they were evaluated under another reasonable method. *See Or. Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1191 (9th Cir. 2019). The USFS's reliance on studies conducted within the Cienega Creek Basin was reasonable, especially when the method suggested by Patagonia would require performance of the very drilling activities to which they object. And because NEPA "does not require adherence to a particular analytic protocol," the Ninth Circuit deferred to USFS's chosen methodology. *Id.*

Oregon Wild v. U.S. Forest Serv., No. 23-35579, 2024 WL 4286965 (9th Cir. Sep. 25, 2024) (not for publication)

Agency Prevailed.

Issue: Categorical Exclusion.

Facts: Environmental organization (Oregon Wild) contended that the USFS violated NEPA in approving three commercial logging projects in the Fremont-Winema National Forest under CE-6.

Decision: Wild's first APA claim was that CE-6 does not encompass the three projects at issue. The Ninth Circuit agreed that the district court correctly determined that the Forest Service's use of CE-6 to approve the projects at issue — the South Warner Project, Bear Wallow Project, and Baby Bear Project — was not arbitrary or capricious so as to violate the APA. CE-6 applies to "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction." 36 C.F.R. § 220.6 The USFS determined that CE-6 applied to the three projects at issue because they addressed the need to improve forest stand conditions and wildlife habitat, and did not include the use of herbicides or require more than one mile of low standard road construction. Furthermore, the USFS determined that there were no extraordinary circumstances attendant to the three projects, which would warrant an EIS or EA. Wild argues that the USFS's approval of the Projects under CE-6 was arbitrary and capricious because CE-6 does not cover "large-scale" commercial logging operations like the projects at issue.

The Court stated that the text of CE-6 plainly covers the three projects at issue. CE-6 does not limit activities based on scale or acreage. *See* 36 C.F.R. § 220.6(e)(6). "Rather, it allows for timber stand improvement so long as such activities 'do not include herbicides or do not require more than 1 mile of low standard road construction' (neither of which applies

here)." *Mountain Cmtys for Fire Safety v. Elliot*, 25 F.4th 667, 676 (9th Cir. 2022).

Acknowledging that CE-6 does not contain an explicit size or scale limitation, Wild instead contended that an undefined size or acreage limitation should be read into CE-6. The Ninth Circuit declined to adopt such a reading.

The Ninth Circuit reviewed the text of CE-6 and noted that the examples it contains do not support a finding of an implied size or acreage limitation. Furthermore, the existence of specific size and acreage limitations in other CEs—including CE-4 which was promulgated in the same rulemaking as CE-6—demonstrate that the Forest Service was aware of size limitations and chose not to employ them in CE-6. *See Tang v. Reno*, 77 F.3d 1194, 1197 (9th Cir. 1996). Nor does Wild's appeal to the broader purpose of NEPA and the general definition of CEs authorize the court to rewrite CE-6 to add an undefined size or acreage limitation. *See Churchill Cnty v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001).

The Ninth Circuit dismissed Wild's second APA claim—that the application of CE-6 to the projects at issue violates NEPA itself because it found it to be time-barred. Wild asserted that if CE-6 covers the projects at issue, such an application would violate NEPA, since the USFS allegedly never made the required determination that the application of CE-6 to large-scale commercial logging operations would have no significant impact. The Ninth Circuit agreed with the district court, that a "procedural" challenge that accrued in 1992, when CE-6 was promulgated.

The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency (and vacated and remanded the rest of the ruling for the district court to determine if the claims are time-barred).

Western Watersheds Project v. Vilsack, No. 23-8081, 2024 WL 4589758 (10th Cir. Oct. 28, 2024) (not for publication)

Agency Did Not Prevail.

Issue: Purpose and Need, Alternatives, Impact Assessment.

Facts: Environmental organizations (WWP) challenged the Thunder Basin National Grassland 2020 Plan Amendment from the USFS. This dispute concerns the USFS's efforts to manage the black-tailed prairie dog population on the Thunder Basin National Grasslands, adopted by the USFS.

Thunder Basin is a sprawling grassland in northeastern Wyoming comprised of 553,000 acres of USFS-managed land and more than one million acres of land that is either state or privately managed. Because the federal land is non-contiguous, the USFS works closely with Intervenor-Appellee the State of Wyoming and other local stakeholders to manage Thunder Basin.

Thunder Basin is a habitat for the black-tailed prairie dog, a "keystone species" critical to supporting the habitats of several other animal species, including the black-footed ferret. The black-footed ferret feeds on black-tailed prairie dogs and relies on their burrows as habitat. As such, a healthy black-tailed prairie dog population is critical to the successful reintroduction of the black-footed ferret in each area.

For several decades, the USFS has eyed Thunder Basin as a potential habitat for reintroducing the black-footed ferret. In 1981, the USFS adopted a grassland management plan which sought to establish Thunder Basin as a potential black-footed ferret habitat, based on its existing prairie dog population. In 2002, the USFS revised its governing grassland plan. In promulgating the 2002 amendment, approximately 50,000-acres of National Forest System land was set aside as "Management Area 3.63 – Black-Footed Ferret Reintroduction Habitat." In 2009, the USFS promulgated a grassland plan amendment designed to enhance prairie dog management to support the reintroduction of the black-footed ferret on Thunder Basin. The 2009 amendment, the USFS specifically recognized that the combined effects of poisoning and recreational shooting could prevent prairie dog population recovery, and rejected alternatives that considered these actions. The USFS designated a category 1 prairie dog habitat which included a "large portion" of the black-footed ferret reintroduction habitat (Management Area 3.63), set an acreage objective of "at least 18,000 acres," prohibited recreational shooting, and limited poison use on federal lands to within a half mile of the Thunder Basin boundary and "only in cases where appropriate

and available non-lethal options have been tried and found ineffective."

In 2013, USFS commissioned a study on the black-footed ferret in response a request from the State of Wyoming to increase the poisoning prairie dogs and recreational shooting. In 2015, the USFS amended the Prairie Dog Management Strategy, where it extended the recreational shooting ban beyond category 1 to the category 2 habitat, expanded prairie dog acreage objectives, maintained limitations on the use of poison, and retained the use of plague mitigation tools.

In 2017, the black-tailed prairie dog population on Thunder Basin surged to a record high, with colonies spanning 75,000 acres, well beyond the USFS's then-existing goal of supporting 33,000 acres of prairie dog colonies across Thunder Basin. Shortly after, a major epizootic of the sylvatic plague spread across the black-tailed prairie dog population of Thunder Basin. This plague outbreak reduced the total black-tailed prairie dog population to approximately 1,100 acres of colonies by mid-2018.

Devastation caused by this plague outbreak, and ongoing disagreements with state and local stakeholders surrounding prairie dog populations on Thunder Basin led to the USFS issuing a 2020 amendment to the grassland plan (the "2020 Plan Amendment"). Among the stated goals of the 2020 Plan Amendment, as outlined in the USFS's FEIS were to increase the availability of lethal prairie dog controls and to amend how relevant portions of Thunder Basin were managed. The USFS adopted the following Purpose and Need statement for the 2020 Plan Amendment:

The purpose of this proposed plan amendment is to:

- provide a wider array of management options to respond to changing conditions;
- minimize prairie dog encroachment onto non-Federal lands;
- reduce resource conflicts related to prairie dog occupancy and livestock grazing;
- ensure continued conservation of at-risk species; and
- support ecological conditions that do not preclude reintroduction of the black-footed ferret.

Specifically, an amendment is needed to:

- revise management direction in Management Area 3.63 – Black-Footed Ferret Reintroduction Habitat,
- adjust the boundaries of management area 3.63 to be more conducive to prairie dog management; and
- increase the availability of lethal prairie dog control tools to improve responsiveness to a variety of management situations, including those that arise due to encroachment of prairie dogs on neighboring lands, natural and human-caused disturbances, and disease.

The USFS also set forth five alternatives for implementing the 2020 Plan Amendment, which included the no-action alternative.

The four action alternatives, in contrast, mostly shrunk prairie dog acreage objectives. Alternative two, the "Proposed Action," would set an objective of 10,000 acres of prairie dog colonies. Alternative three, the "Grassland-Wide Alternative," would set an objective of 10,000–15,000 acres of prairie dog colonies. Alternative four, the "Prairie Dog Emphasis Alternative," would set an objective of 27,000 acres of prairie dog colonies, and it would maintain many of the 2015 management strategies. And alternative five, the "Preferred Alternative," would set an objective of 10,000 acres of prairie dog colonies.

Each action alternative also proposed changing the designation of Management Area 3.63 and expanding the use of recreational shooting and poisoning.

In its final ROD, the USFS adopted the "Preferred Alternative," which reduced the target expanse of prairie dog colonies across Thunder Basin from 33,000 acres to 10,000 acres (with the ability to reduce the target to 7,500 acres in certain circumstances), increased the availability of poisons and recreational shooting of prairie dogs, and directed the USFS to design a new plague management strategy. The plan allowed the use of fumigant poisons in the boundary management zones, allowed recreational shooting throughout Thunder Basin (with a seasonal restriction in Management Area 3.67), and authorized experimental density control.

The FEIS separately documented the potential impacts to the black-tailed prairie dog population that could be caused by poisons, recreational shooting,

and plague. The USFS concluded that "[w]ith all activities combined," the plan was "not likely to result in a loss of viability in the planning area, nor cause a trend toward Federal listing, since the effects are expected to be localized," and that despite the impacts, "it is expected that sufficient distribution of the species will be maintained on the [Thunder Basin]."

WWP alleged on appeal that the 2020 Plan Amendment's Purpose and Need statement was impermissibly narrow in violation of NEPA; the range of alternatives analyzed by the 2020 Plan Amendment was unreasonable in violation of NEPA; and the USFS failed to take a hard look, as required by NEPA, at the combined effects of decreased acreage objectives, untreated sylvatic plague, increased poisoning, and recreational shooting on black-tailed prairie dogs and their dependent species, including the black-footed ferret.

Decision: WWP argued that the Purpose and Need statement was unreasonably narrow and violates NEPA because the "need" section narrowly focuses on increasing lethal prairie dog control tools without considering whether doing so is a sound idea. WWP further criticized the Purpose and Need statement for failing to acknowledge the USFS's duty to protect the black-footed ferret under the ESA.

The Tenth Circuit agreed with WPP that by identifying a need of the 2020 Plan Amendment as to "increase the availability of lethal prairie dog control tools to improve responsiveness to a variety of management situations," the USFS has defined the Purpose and Need statement so narrowly as to "preclude a reasonable consideration of alternatives," *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002) ("courts will not allow an agency to define the objectives so narrowly as to preclude a reasonable consideration of alternatives").

The Court found that each proposed action alternative accordingly increases the availability of lethal control methods, including poisoning and shooting. The record made it clear that these lethal methods will impact prairie dog populations. The Court found that the record stated there are viable alternatives to expanding the use of lethal controls, but none of the proposed actions consider these alternatives. The Purpose and Need statement thus precluded the USFS from considering a "reasonable consideration of alternatives," in violation of NEPA.

The Court criticized the USFS because it did not provide an adequate explanation in its discussion of why expanding lethal control options was the only viable choice. The USFS argued that it explained nonlethal control methods such as translocation and vegetation barriers were "inefficient and costly," local communities were resistant to them, and they were "impractical to prevent encroachment on sufficient scales." The Court found that these statements were contradicted by evidence elsewhere in the FEIS that the USFS had not attempted translocation since 2011 and had relied on third-party studies to assess the effect of vegetation barriers.

Finally, the USFS's failure to take a hard look at the combined impacts of decreased acreage objectives, density control, plague, poisoning, and shooting, further undermined the conclusion that expansion of lethal controls was the only option. Given the USFS's "general overarching objective[s]" of both honoring its multiple-use mandate and its responsibility to contribute to the recovery of endangered species under the ESA, its Purpose and Need statement—which narrowly directed the USFS to consider only action alternatives that expanded the use of lethal controls—precluded a reasonable consideration of alternatives and thus violated NEPA.

The Court found also that the USFS's Purpose and Need statement was impermissibly narrow in limiting the range of alternatives considered by the USFS to only those that expanded the use of lethal controls. But beyond that, the USFS considered only alternatives that maintained or shrunk prairie dog acreage objectives, reclassified Management Area 3.63 to a grasslands emphasis, and expanded the use of both poison and recreational shooting. This range of alternatives was not "reasonable" considering the Purpose and Need statement which emphasized, inter alia, the need to "provide a wider array of management options to respond to changing conditions," "ensure continued conservation of at-risk species," and "support ecological conditions that do not preclude reintroduction of the black-footed ferret." Despite these overarching purposes, which included conservation, none of the action alternatives focused on strategies that would expand acreage objectives or limit livestock grazing allotments.

The Court discussed that the USFS briefly acknowledged in the FEIS that it considered but declined to work up an alternative which would expand prairie dog acreage objectives. However, it states only that "[t]his suggestion was not analyzed in detail because an increase in the acreage objective for prairie dog colonies would not meet the purpose and need for the plan amendment." While agencies are not obligated to consider alternatives that do not meet the purpose and need statement, the USFS offered no explanation as to why increasing the acreage objective for prairie dog colonies would not meet the stated purpose of "continued conservation of at-risk species," This explanation is not "logically coherent," and therefore insufficient. *High Country Conservation Advocs. v. U.S. Forest Serv.*, 951 F.3d 1217, 1227 (10th Cir. 2020) (holding that the USFS violated NEPA by eliminating from detailed consideration an alternative that would have preserved land for conservation on National Forest lands in Colorado (the "conservation alternative")).

WWP argued that the USFS, in promulgating the 2020 Plan Amendment, failed to take a hard look at the combined impacts of decreased acreage objectives, density control, increased poisoning, increased recreational shooting, and unmitigated plague events on prairie dog populations, contradicting prior determinations the USFS made in 2009, 2013, and 2015.

Specifically, the Court found that the FEIS and record contained separate analyses of the effects of decreasing prairie dog acreage objectives, density control, recreational shooting, poison, and plague. These analyses are followed by the conclusory assertion that "all activities combined" are "not likely to result in a loss of viability in the planning area." The Court criticized the USFS stating "there is no analysis or discussion of why or how the combined effects of reduced prairie dog acreage objectives, density control, plague, poison, and shooting will not result in a loss of viability to prairie dog populations. As such, it is entirely unclear from the FEIS and ROD whether the combined effects of reduced acreage objectives, density control, poison, plague, and shooting were analyzed or even considered by the USFS. This absence is stark given the USFS's prior conclusions that the combined threats of habitat loss, poison, plague, and shooting could lead to the "eradication" of prairie dog populations on Thunder Basin."

The court analyzed the USFS's assertion in the 2020 Plan Amendment that "all activities combined" are "not likely to result in a loss of viability in the planning area" and found that it was nothing more than a "[c]onclusory statement[ ]" that fails to satisfy NEPA's hard look requirement."

The USFS in its briefing argued that its contrary conclusion is the result of updated scientific information, including "the rapid colony expansion and subsequent contraction in 2017 and 2018," but the USFS never actually provides an explanation along those lines in its FEIS or ROD. The Court found the data the USFS relied on still contradicts the USFS's conclusion first stated in 2013 that "when these threats are combined, eradication of entire populations of prairie dogs is possible." The court explained that there is no information that can be gleaned from the administrative record as to why the combined effects of decreased acreage objectives, density control, recreational shooting, poison, and plague are no longer considered to create the risk of eradication.

The Tenth Circuit held the USFS did not take a hard look in its 2020 Plan Amendment at the issue of the combined impact of decreased acreage objectives, density control, recreational shooting, poison, and plague on prairie dog populations.

The Tenth Circuit reversed the district court's grant of summary judgment in favor of the agency and remanded for the court to determine the appropriate remedy.

Dissent: Circuit Judge Tymkovich provided a hearty dissent. The Judge stated, "b]oom and bust population cycles in black-tailed prairie dogs have proven the Forest Service's existing Thunder Basin management plans to be ineffective. Accordingly, the Forest Service proposed amending these previous management decisions to expand its available management tools. The majority rejects this latest amendment. But it misses the forest for the trees. Sticking to a plan that has proven to be ineffective makes little sense and amending such plans—even considerably—can hardly be arbitrary or capricious. The Forest Service, based on its experience with the failed plan, properly identified and explained how it believed the plan must change. It then analyzed a reasonable range of alternatives that accomplished its purposes and needs. [T]he Forest Service took a

statutorily adequate "hard look" at this shift in management direction." (emphasis added).

Blue Mountains Diversity Project, Inc. v. U.S. Forest Serv., No. 23-3049, 2024 WL 4814553 (9th Cir. Nov. 18, 2024) (not for publication)

Agency Did Not Prevail.

Issue: Cumulative Impacts, Determination of Significance, Duty to Supplement.

Facts: Environmental organization (Blue Mountains) challenged USFS' decision to approve a logging and forest restoration project in the Malheur National Forest called the Camp Lick Project. USFS designed the Project to improve forest health and resiliency by returning Camp Lick to a more historical state. Historically, the Project area had consistent wildfires, leading to more low-density tree stands dominated by dryer tree species (ponderosa pine and western larch) growing to similar heights (old forest single strata).

To help shift the 170 million-acre Forest to a more historical state, USFS approved the 40,000-acre Camp Lick Project, which has 31,000 acres of prescribed burning and 12,220 acres of forest thinning, including 8,190 acres of commercial logging. Part of this thinning involves commercial logging of large fir trees younger than 150 years old and double the dripline or closer to ponderosa pine or western larch trees that are within warm, dry stands. Logging large trees requires a forest plan amendment.

The Final EA analyzed thirteen alternatives but eliminated them from detailed study because they would not fulfill the Project's goals of returning the landscape to a historical, heterogeneous state, resilient to wildfire and disease. USFS published a FONSI in 2017. After receiving objections, the USFS modified the treatments. USFS also published a Supplemental Information Report ("SIR") to address new information after its EA. The SIR analyzed new forestry projects in the watershed and new stream temperature data. At the end of the NEPA process, the USFS published its Final Decision Notice and FONSI, concluding the Project would not significantly affect the quality of the human environment.

Decision: First, Blue Mountains argued the USFS did not adequately assess the Project's cumulative impacts, "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7; *see Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002). Here, the Ninth Circuit gave considerable deference to the USFS's determination of the geographical scope of its cumulative impacts analysis. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1030 (9th Cir. 2007) (recognizing that the geographic scope determination "is a task assigned to the special competency of the appropriate agencies"). It was the USFS' decision to use different geographic scopes when assessing the cumulative impact on different resources and wildlife was based upon a reasoned "application of scientific methodology." *Dombeck*, 304 F.3d at 902.

The USFS provided "some quantified or detailed information" and a "useful analysis of the cumulative impacts of past, present, and future projects." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005). USFS concluded, after considering numerous studies and data, that the Project would result in increased acreage of relatively large old-growth trees over time.

Second, Blue Mountains contended the USFS violated NEPA by failing to consider the cumulative impacts on aquatic habitat. USFS's chosen geographic scope was supported by "a reasoned decision and support for its chosen" geographic scope. *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 943 (9th Cir. 2014). USFS experts considered multiple factors, such as the Forest's topography and drainage patterns, to determine the geographic scope for analyzing the cumulative impact on aquatic species. The USFS concluded that "[m]easurable effects from proposed activities are unlikely to extend downstream of" the chosen analysis area. Similarly, the USFS's decision not to consider every other project with restoration efforts in the Forest was proper, since the USFS concluded any impacts on aquatic habitat from the Camp Lick Project would not extend to these other locations.

Third, Blue Mountains argued the USFS impacts were "significant" and violated NEPA. 42 U.S.C. § 4332(C). USFS considered each of CEQ's ten "intensity" factors for assessing significance as part of its Finding of No Significant Impact ("FONSI"). *See* 40 C.F.R. § 1508.27(b).

The Ninth Circuit found that the project is not "highly controversial" because Blue Mountains does not show a "scientific controvers[y]" over the use of site-specific amendments in the Forest, *Wild Wilderness v. Allen*, 871 F.3d 719, 728 (9th Cir. 2017), or the length of time that trees will take to regrow, all of which the USFS considered in its EA and FONSI. Instead, Blue Mountains simply showed "the existence of opposition to a use" in the Forest.

For the remaining three factors Blue Mountains raised—that there are "cumulatively significant impacts," adverse effects to "an endangered or threatened species or its habitat," and violations of other environmental laws, the Court found that these claims independently failed by rehashing its separate NEPA claims.

Blue Mountains finally argued that the USFS violated NEPA by preparing a SIR rather than a supplemental EA or EIS. Supplementation of an EA or EIS is only required when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). An SIR is appropriate, as here, for considering information made available to USFS after issuing its EA. The USFS's analysis in its SIR of the new projects in the Forest that were approved subsequent to the EA was proper because the USFS "determine[d] that the impact will not be significantly different from those it already considered."

The Ninth Circuit affirmed the grant of summary judgment in favor of the agency.

Smith v. Tumalo Irrigation Dist., No, 24-70, 2024 WL 5153597 (9th Cir. Dec. 18, 2024) (not for publication)

Agency prevailed.

Issue: Alternatives, Cumulative Impacts

Facts: Property owners in central Oregon challenged the Natural Resources Conservation Service's approved project by the Tumalo Irrigation District to modernize an irrigation system by replacing over 60 miles of open irrigation canals and laterals with underground piping.

Decision: In a brief decision, the Ninth Circuit held that the agency's authorization of the project under NEPA was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). First, the agency properly eliminated the on-farm efficiency upgrades alternative from detailed study because this alternative would have been difficult to implement and would not have met the "purpose and need to improve water delivery reliability and public safety." The agency's "public safety" purpose is supported by the administrative record, and Property Owners provided no evidence that the agency's stated reasons for rejecting the alternative were pretextual.

Second, the Ninth Circuit held the agency adequately analyzed the project's cumulative effects on riparian areas and wetlands. The environmental assessment acknowledged that the project would affect riparian vegetation in and around the open canals but determined that the affected areas did not meet the "functional criteria" for wetlands and that the project would benefit downstream riparian areas.

The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

U.S. DEPARTMENT OF THE DEFENSE

El Puente v. U.S. Army Corps of Eng'rs, 100 F.4th 236 (D.C. Cir. 2024)

Agency prevailed.

Issues: Cumulative Impact Analysis, Environmental Justice, Impact Assessment (Baseline Data)

Facts: Petitioners—El Puente de Williamsburg, Inc., GreenLatinos, and Earthjustice—brought suit against the U.S. Army Corps of Engineers and the National Marine Fisheries Service (NMFS), challenging the Corps' approval of a dredging project in San Juan Bay, Puerto Rico. The project aimed to deepen existing navigation channels to accommodate larger commercial vessels and dispose of dredged material at an offshore disposal site regulated under the Marine Protection, Research, and Sanctuaries Act.

In 2018, the Corps issued an EA and FONSI. Following criticism of the EA's environmental justice and cumulative impact analysis, the Corps issued a Supplemental EA (SEA) in 2020, which reaffirmed the

FONSI. NMFS issued a Biological Opinion (BiOp) concluding that the project was not likely to jeopardize the continued existence of threatened coral species protected under the ESA.

Petitioners alleged violations of NEPA, and the APA, asserting deficiencies in the Corps' analysis of cumulative impacts, environmental justice effects, coral impacts, and alternatives. The district court granted summary judgment to the agencies.

Decision: The D.C. Circuit affirmed. The court held that the Corps took the required "hard look" at environmental impacts under NEPA and that its analysis was neither arbitrary nor capricious.

First, the court upheld the Corps' cumulative impacts analysis. The court found that the agency "reasonably identified the cumulative impacts of the proposed dredging project in light of past, present, and reasonably foreseeable future actions" and that NEPA does not require an agency to combine "every conceivable project into one analysis." *El Puente v. U.S. Army Corps of Eng'rs*, 100 F.4th 236, 250 (D.C. Cir. 2024) (citing *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004)). The court rejected petitioners' claim that the Corps improperly excluded the San Juan LNG facility from the cumulative analysis, noting that the record demonstrated the Corps had in fact considered the LNG facility's impacts.

Second, the court found that the Corps' environmental justice analysis complied with NEPA. Although the 2018 EA had employed a limited one-mile radius for the environmental justice review, the 2020 SEA expanded the analysis to include "the entirety of San Juan Bay and a five-mile buffer zone" surrounding the project area. *Id.* at 243. The court concluded that this expanded review was not a post hoc rationalization, stating that "a supplement that addresses concerns previously raised in the record does not constitute an impermissible post hoc justification." *Id.* at 245 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Third, the court rejected petitioners' claim that the Corps failed to establish an adequate baseline for evaluating coral impacts. The Corps had conducted coral surveys and included enforceable mitigation measures such as pre-construction diver surveys, avoidance buffers around corals, and real-time turbidity monitoring. The court held that these were not vague or speculative: "Mitigation measures can support a FONSI when they are 'integral components of the project' and not speculative." *Id.* at 252 (*quoting Env't Def. v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 69, 78 (D.D.C. 2007)).

Finally, the court held that petitioners forfeited arguments regarding the LNG facility by failing to raise them during the NEPA comment process. Citing *Department of Transp. v. Public Citizen*, the court reiterated that "parties must raise objections during the administrative process to preserve them for judicial review." *Id.* at 254 (citing *Pub. Citizen*, 541 U.S. at 764–65).

In affirming the agency actions, the court stressed that NEPA is a procedural statute, not a substantive constraint: "NEPA ensures that agencies take a hard look at environmental effects, not that they achieve particular environmental outcomes." *Id.* at 249 (*citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). Because the Corps followed NEPA procedures, and their decisions were supported by the record, the court affirmed the judgment of the district court.

U.S. DEPARTMENT OF THE INTERIOR

Nantucket Residents Against Turbines. Citizens Against Ruining our Environment v. U.S. Bureau of Ocean Energy Mgm't, 100 F.4th 1 (1st Cir. 2024)

Agency prevailed.

Issue: Incorporation of BiOp into NEPA

Facts: After consulting with the NMFS, BOEM approved the construction of Vineyard Wind, a wind power project off the coast of Massachusetts. A group of Nantucket residents -- organized as Nantucket Residents Against Turbines (Residents) challenged the approval. After a series of allegations that the Biological Opinion concluding that the project's construction likely would not jeopardize the critically endangered North Atlantic right whale violated ESA, the Residents further alleged that BOEM violated the NEPA by relying on NMFS's flawed analysis

Decision: After the court denied Nantucket Residents' challenges under the ESA, the Residents then argued that BOEM violated NEPA by relying on NMFS's allegedly defective biological opinion. The court stated that while an agency may rely on the findings in a biological opinion, such reliance is arbitrary and capricious if (1) the biological opinion is defective, or (2) the agency blindly relies on the biological opinion without conducting its own independent analysis. *City of Tacoma v. FERC,* 460 F.3d 53, 75–76 (D.C. Cir. 2006).

The First Circuit found neither criterion is satisfied here. NMFS's biological opinion was not defective. Therefore, BOEM properly relied on it. *Id*. Moreover, BOEM did not blindly rely on the biological opinion. Instead, BOEM's environmental impact statement includes a lengthy analysis of the Vineyard Wind project's likely effects on right whales. As a result, the First Circuit held that BOEM did not violate NEPA by relying on NMFS's biological opinion. Id.

Earthworks v. Department of the Interior, 105 F.4th 449 (D.C. Cir. 2024)

Agency prevailed.

Issue: Federal Action, Alternatives, Public Involvement, Duty to Supplement

Facts: This case arose from the BLM's 2003 adoption of a final rule interpreting Section 42 of the Mining Law of 1872 to allow claimants to locate multiple five-acre mill sites per mining claim. The lower court granted summary judgment in favor of the DOI, and the D.C. Circuit affirmed.

Decision: Earthworks contended the agency violated NEPA by failing to prepare an EIS for the Final Rule.

The EA the BLM prepared for the Final Rule concludes:

> Because this rule will maintain BLM's longstanding practice regarding mill sites, the rule does not create any new environmental impacts. Publishing this rule leads to the same environmental impacts as the no-action alternative because BLM is not changing the existing rules in any substantive way.

The court found BLM's reasoning was sound. It identified nine different agency documents dating from 1954 to 1991 in support of its conclusion that "[f]or nearly half a century, the BLM's written guidance has reflected the view that the mill site provision does not categorically limit the number of mill sites that may be located and patented for each mining claim." In other words, the Final Rule did nothing more than withdraw the proposed rule and codify the status quo ante.

The appellants argued the BLM ignored "the real on-the-ground impacts" of the Final Rule, which they characterize as embodying a "differing regulatory approach[ ]." The court discussed that the Final Rule did not change the status quo ante – it has no "real on-the-ground impacts" at all. "As we have held before, an agency's adoption of a policy that merely maintains the status quo is not a "major Federal action" for which the NEPA requires the agency to prepare an EIS. *See e.g., Fund for Animals, Inc. v. Thomas*, 127 F.3d 80, 82–84 (D.C. Cir. 1997). The Final Rule, therefore, was not a "major Federal action" within the meaning of the NEPA, and it was not arbitrary or capricious for the BLM not to prepare an EIS for the Final Rule.

The D.C. Circuit rejected appellants' argument that "lamely contend[ed]" that a change in the status quo in fact had taken place by seizing upon the word "return" in one sentence in the 2003 Opinion of the Solicitor: "Accordingly, the Department should return to its prevalent, pre-1997 administrative practice and interpretation, under which the mill site provision was interpreted as not imposing such numerical restrictions.'" The court discussed that the 2003 Opinion used "return" in the limited sense that it meant to repudiate the 1997 Opinion, which had never been implemented, and return to the Department's pre-existing stance; it did not suggest the Department was making a change that had practical environmental consequences requiring consideration and analysis in an EIS.

Earthworks also maintains that, because the BLM did not solicit public comment on the environmental assessment in the Final Rule, the BLM violated the DOI regulation that requires it to provide public notice and the opportunity for involvement "to the extent practicable" during its preparation of an EA. 43 C.F.R. § 46.305(a)–(b). In response to the 1999 proposed rule, the BLM had received public

comments on the proposed rule addressing mill sites and their environmental effects." 68 Fed. Reg. at 61,054. The Final Rule did nothing more than decline to adopt the proposed rule and instead codify the status quo ante, which had no effect on the human environment. Another round of notice and comment prior to issuing the Final Rule withdrawing the proposed rule and codifying the status quo would have accomplished nothing but expense and delay.

Dissent: Circuit Judge Pan dissented, arguing that the text and structure of Section 42 of the Mining Law of 1872 imposed a clear five-acre total cap on mill sites per mining claim. She criticized the majority for failing to adhere to "the statute's text, structure, and historical context" and would have vacated the rule as contrary to law. Judge Pan did not oppose the majority's ruling as to the NEPA findings.

Seafreeze Shoreside, Inc. v. United States Department of the Interior, 123 F.4th 1 (1st Cir. 2024), *cert denied* 2025 WL 1287066 (U.S. May 5, 2025) (No. 24-966)

Agency prevailed.

Issue: Alternatives

Facts: Seafreeze Shoreside, Inc. and several commercial fishing organizations challenged the approval of the South Fork Wind Farm Project, an offshore wind energy facility located more than 30 miles east of Montauk, New York, on the Outer Continental Shelf. BOEM approved the project after preparing an EIS. Plaintiffs alleged that BOEM violated NEPA.

The appeals challenged the federal government's process for approving a plan to construct and operate a large-scale commercial offshore wind energy facility located on the Outer Continental Shelf, some fourteen miles south of Martha's Vineyard and Nantucket, and which began delivering power to the New England grid in early 2024.

The district court granted summary judgment to the federal agencies, and the First Circuit affirmed.

Decision: On appeal, Seafreeze explicitly premised all three arguments on an underlying assertion that BOEM was improperly motivated to reach decisions so that Vineyard Wind could timely horror its prior contractual commitments surrounding the project. Seafreeze argued that BOEM violated the NEPA's procedural requirements by limiting its consideration of reasonable alternatives to the project and by failing to appropriately consider the incremental impact of the project in combination with the likely impact of other future, reasonably foreseeable offshore wind development projects.

As for the alternatives analysis, plaintiffs argued that BOEM should have considered alternatives outside the project lease area. The court rejected this claim, holding that BOEM reasonably limited the alternatives to those within the lease area because the agency was responding to the project proponent's proposal, not proposing the project itself. Citing regulatory authority, the court stated: "Where an agency is not itself the project's sponsor, the agency may give substantial weight to the applicant's preferences, at least insofar as it considers alternatives in the final environmental impact statement." 40 C.F.R. § 1502.14(a); 43 C.F.R. § 46.420(a)(2)).

The court then considered Seafreeze's argument that BOEM failed to appropriately consider the incremental impact of the project in combination with the likely impact of other future, reasonably foreseeable offshore wind development projects. They support this argument only with two conclusory allegations: (1) "the Federal Defendants gutted the core of the cumulative impacts analysis set forth in the Supplemental Draft EIS by removing much of it from the [FEIS], thereby violating NEPA's regulations"; and (2) "the Federal Defendants improperly segmented their NEPA analysis" by "undercounting reasonably foreseeable offshore wind development outside the lease area." However, the court rejected these arguments because Seafreeze did not elaborate on the claims, and thus, the court found that the claims were asserted in a perfunctory manner, unaccompanied by effort at a development argument and were thus waived.

The First Circuit held that the district court did not err in awarding summary judgment to the defendants on the plaintiffs' APA/NEPA claims.

Save the Colorado v. U.S. Dep't of the Interior, No. 23-15247, 2024 WL 1756103 (9th Cir. Apr. 24, 2024) (not for publication)

Agency prevailed.

Issue: Purpose and Need Statement, Alternatives, Impact Assessment, Duty to Supplement

Facts: Environmental groups including Save the Colorado, Living Rivers, and the Center for Biological Diversity challenged DOI's approval of the Long-Term Experimental and Management Plan (LTEMP) for the Glen Canyon Dam. The LTEMP governs monthly, daily, and hourly water releases from the dam over a 20-year period and was adopted through a FEIS and ROD. Plaintiffs alleged violations of NEPA and the APA, focusing on the adequacy of the purpose and need statement, the range of alternatives considered, the climate change analysis, and the agency's failure to prepare a supplemental EIS in light of new information.

Decision: The Ninth Circuit affirmed the district court's grant of summary judgment for the DOI, holding that the agency's NEPA process was not arbitrary or capricious under the APA, 5 U.S.C. § 706(2)(A), and that DOI had satisfied its obligations under NEPA in all but one respect. While the court agreed that the agency had erred by failing to document a reasoned decision regarding its refusal to prepare a supplemental EIS, it held that the error was ultimately harmless.

The court first upheld the LTEMP FEIS's purpose and need statement as consistent with NEPA and the agency's statutory mandates, including the Grand Canyon Protection Act and the Colorado River Storage Project Act. The statement reasonably identified multiple goals, including hydroelectric power generation, consistent with these statutes. "Interior developed the LTEMP FEIS pursuant to the Grand Canyon Protection Act of 1992," and the statement appropriately listed hydropower as "but one objective following a list of non-power needs the LTEMP was to serve."

The court also held that the agency considered a reasonable range of alternatives, including seven distinct options that varied in their operational strategies and priorities (e.g., fish recovery vs. power generation). Plaintiffs' proposed alternatives, which largely involved eliminating or severely curtailing hydropower, were reasonably excluded as inconsistent with the LTEMP's objectives and statutory authority. "[Appellants] failed to establish that their proposed alternatives were reasonably viable," and DOI "adequately articulated these concerns."

In terms of climate change analysis, the court found that DOI reasonably relied on historical hydrologic data, which it weighted to reflect increased likelihood of dry years, and modeled the performance of each alternative under 21 climate scenarios. Although the agency did not model worst-case projections from the Bureau of Reclamation's Basin Study, it explained that such scenarios were not representative of observed historical conditions and would not materially affect the comparative performance of alternatives. "NEPA does not require that we decide whether an [FEIS] is based on the best scientific methodology available." *350 Mont. v. Haaland*, 50 F.4th 1254, 1271–72 (9th Cir. 2022)).

However, the Ninth Circuit found that DOI's failure to respond to a post-FEIS demand letter requesting a supplemental EIS violated NEPA. The letter cited new studies that allegedly undermined DOI's climate analysis. The court held that DOI's silence amounted to a decision not to supplement the EIS, and such a decision must be documented in the record. "There is no 'reasoned decision, documented in the record' explaining why an SEIS was not required for us to review" (*id*. at *4, *quoting Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013)).

Nonetheless, the court deemed the error harmless. The studies relied on data available at the time of the original FEIS and reflected only different methodological choices—not significant new information. "Because there is no indication that the studies contain information 'not already considered' or that would 'materially affect […] the substance of [DOI's] decision,' no prejudice resulted from DOI's failure to respond." *Id., quoting Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104–06 (9th Cir. 2016).

U.S. DEPARTMENT OF TRANSPORTATION

Trenton Threatened Skies, Inc. v. Federal Aviation Admin., 90 F.4th 122 (3d Cir. 2024)

Agency Prevailed.

Issues: Cumulative Impacts, Connected Actions/ Segmentation, Impact Assessment (Environmental Justice)

Facts: Municipal, individual, and organizational petitioners filed a petition to review the FAA's FONSI involving improvements to the Trenton-Mercer Airport Terminal, alleging violations of NEPA.

The FAA conducted an environmental review, in the form of an EA and FONSI for improvements to the Trenton-Mercer Airport Terminal located in Ewing Township, New Jersey, four miles northwest of the state capital. The airport was constructed in 1975, and initially had fewer than 55,000 passengers yearly. That number swelled in recent years to 350,000 annual passengers.

The Airport's aging terminal building no longer complies with ADA standards or TSA requirements, and many of the Airport's inadequacies stem from spatial limitations; the Airport fails to meet fire egress requirements. Based on Airport Cooperative Research Program criteria, the Airport has 'earned' an F grade for its level of service, which relates to passenger congestion and the length of queues that passengers encounter within an airport terminal.

Mercer County completed an Airport Master Plan Update (AMPU) in 2018, recommending a new terminal. The AMPU proposed building a 125,000 square foot replacement structure (the "Project"). This came to be known as Terminal Building Replacement Alternative 4C ("Alternative 4C"). The FAA issued an EA and FONSI as required by NEPA. The FAA approved the Project in March 2022, authorizing the County to build the new Alternative 4C terminal.

Decision: Trenton contended that the FAA's FONSI violated NEPA by relying on false premises or inaccurate or false information. Specifically, they argued that the FAA erroneously determined that the Project does not expand the terminal and that it will not induce air traffic growth. However, the record indicated that (1) the FAA reasonably concluded that the new terminal would not induce growth because the forecasts of future air traffic predict a substantial increase regardless of whether a new terminal is built, and (2) the new terminal will have the same number of gates and aircraft parking spaces as the existing terminal.

The court found that the FAA reasonably determined that air traffic would likely grow at the Airport regardless of whether Mercer County builds a new terminal. In doing so, it noted that "[t]he existing terminal is currently operating above maximum capacity and cannot accommodate either the existing level of enplanements or the forecasted growth with a reasonable level of passenger comfort and convenience." Thus, it determined that a no-action alternative would fail to meet the purpose and need requirements. The FAA additionally weighed different alternatives and used the no-action alternative as a baseline to weigh environmental consequences in accordance with NEPA and FAA Order 1050.1F, ¶ 6-2.1(d).

Second, Trenton contended that the FAA violated NEPA by failing to consider the cumulative impact of its past actions, in part by segmenting the Airport Project and unmooring it from past Airport construction projects. Specifically, petitioners contended that the Final EA ignored that (1) the FAA "allow[ed] Frontier Airlines to begin scheduled service at the Airport by amending "Operations Specifications" in 2012," and (2) the FAA failed to "provide information about the impact of noise or air emissions that would be useful to the public." Also, they argue that the FAA segmented review of the new terminal from other various projects that FAA requires for an airport with a high volume of A320 traffic. They contend that these similar actions collectively expanding the Airport should be considered as a single project due to economic interdependence, common timing, and geographic proximity.

The Third Circuit rejected these arguments regarding economic interdependence, common timing, and geographic proximity – adhering to the independent utility test when determining whether an agency has violated NEPA by allegedly segmenting its analysis. *Twp. of Bordentown*, 903 F.3d 234, 249 (3d Cir. 2018); *see also Morongo Band of Mission Indians*, 161 F.3d 569, 579-80 (9th Cir. 1998) (rejecting the petitioners' argument that "the FAA improperly segmented the [East Arrival Enhancement Project] from a larger project, the [Los Angeles International Airport] Expansion Project," because "the primary purpose of the [East Arrival Enhancement Project] was to deal

with existing problems of delay and inefficiency"); *Lowman v. FAA*, 83 F.4th 1345, 1359 (11th Cir. 2023).

The Third Circuit reiterated that the FAA considered actions that "have been implemented, are under current planning, or are anticipated in the near future." The past actions the FAA considered when assessing cumulative impacts included the following: rehabilitating runways; reconstructing taxiways; constructing a remote parking lot; redeveloping the Former Naval Air Warfare Center (therein demolishing existing buildings and building a hangar); removing trees that protruded into protected airspace; and demolishing a civil air patrol building. The FAA also considered foreseeable future projects, including the following: rehabilitating and extending taxiways; building a combined snow removal equipment storage and maintenance facility; constructing a replacement air traffic control tower; constructing a deicing containment facility; and demolishing the existing electrical facility and building a replacement. Thus, as required under FAA rules for an EA's cumulative analysis, the Final EA's Affected Environment section "include[d] critical background information of past, present, and reasonably foreseeable future actions." FAA Order 5050.4B, ¶ 706(e)(1).

The Third Circuit explained that the proposed new terminal has independent utility for multiple reasons and stated that the EA also noted the independent utility of the various projects occurring at the Airport. For example, taxiway improvements will address existing safety and maintenance concerns. The court upheld FAA's analysis.

The court upheld FAA's environmental justice analysis, focusing on the FAA's EJ analysis on the communities surrounding the Airport, since the proposed project "would take place on existing Airport property," and "impacts to environmental resources ... are primarily concentrated on Airport property and would be mitigated as discussed, and therefore, are not anticipated to impact [EJ] populations. The court applauded FAA's use of the EPA's Environmental Justice and Screening and Mapping Tool, and noted that most of the environmental justice communities were 1-2 miles outside of the project area.

The Third Circuit found the FAA did not need to conduct a health assessment in its EA/FONSI. In reviewing the documents, the FAA reasonably found no such relationship between any likely change in environment and the health of children in the surrounding communities "because the impacts to environmental resources are primarily concentrated on Airport property and will be mitigated."

The Third Circuit denied the Petition.

Protect Our Parks v. Buttigieg, 97 F.4th 1077 (7th Cir. 2024), *cert. denied* (U.S. June 6, 2025) (24-311)

Agency Prevailed.

Issues: Connected Actions (segmentation) Major Federal Action, Alternatives, Impact Assessment

Facts: In a long-running set of challenges to the proposed Obama Presidential Center in Chicago, citizens group and city residents, (Protect our Parks) (POP) brought another action against city, state, and federal entities and officials and nonprofit foundation to block construction of the center in a Chicago's historic Jackson Park.

POP strenuously objected to the location of the planned Obama Presidential Center in Chicago. *See Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722 (7th Cir. 2020) ("POP I"), *cert. denied sub nom. Protect Our Parks, Inc. v. City of Chicago*, —— U.S. —— –, 141 S. Ct. 2583, —— L.Ed.2d —— (2021); *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758 (7th Cir. 2021) (per curiam) ("POP II"); *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389 (7th Cir. 2022) ("POP III"). Throughout the present phase of the case, the Center has been under construction. But the rub is this: it is rising in a corner of Chicago's historic Jackson Park on a site selected by the Barack Obama Foundation. POP contends that Jackson Park should have been off-limits, and it insists that the Center easily could have been placed elsewhere and alleges, in part, various violations of NEPA.

Decision: The Seventh Circuit affirmed the district court's summary judgment in favor of the agencies. As in POP III, POP argued that the defendants violated NEPA in three distinct ways. It first says that the federal agencies were required to prepare an EIS, rather than an EA. Their decision that the EA was arbitrary and capricious in POP's estimation, because the project requires the City to remove approximately 800 trees that provide nesting spaces for local and

migratory birds, and it will affect an historically and culturally significant area. The Seventh Circuit found that the argument failed for several reasons.

The court found the administrative record showed that "the agencies were very thorough." The EA included, among other things, a Natural Resources Technical Memorandum that discusses the habits of migratory birds and how the project will affect their nests, as well as a Tree Technical Memorandum that considers each species of tree that will be cut down to build the Center. After reviewing each of these effects, the agencies concluded that none would have a significant impact. The EA thus confirmed that the agencies took the necessary hard look at the likely environmental impact before reaching a decision. Having found and explained that "the proposed action will not significantly affect the environment," the agencies were not also required to prepare the more elaborate EIS.

Second, POP argued that the agencies unlawfully segmented their NEPA review. Segmentation " 'allows an agency to avoid the NEPA requirement that an [EIS] be prepared for all major federal action with significant environmental impacts by segmenting an overall plan into smaller parts involving actions with less significant environmental effects.' " *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 962 (7th Cir. 2003). However, POP pointed only to the fact that the Foundation's selection of the Jackson Park site requires the City to close some roadways and construct new ones using federal highway funds.

The court explained, NEPA covers only "major Federal actions." 42 U.S.C. § 4332(2)(C); *see also Mineta*, 349 F.3d at 962. The project is a local, not a federal, initiative. The federal agencies had (and have) no control over where the Center is being built, and NEPA imposes no requirement that they oversee the Foundation's or the City's actions. For that reason too, the court found that this argument failed.

POP's third contention was that NEPA required the federal agencies to consider alternative sites for the Center. The Seventh Circuit found that this argument suffered from the same flaws as the last two. The federal agencies lacked the authority to dictate where the Center would be located, and so it would be unreasonable of them to waste time and resources exploring potential alternative sites. The court held that the federal agencies did all that NEPA required of them.

Citizens for Clean Air & Water in Brazoria County v, U.S. Dep't of Transp., 98 F.4th 178 (5th Cir. 2024)

Agency Prevailed.

Issues*:* Alternatives, Impact Assessment, Duty to Supplement, Cumulative Effects.

Facts*:* Environmental organizations petitioned for review of MARAD''s approval of a license to construct and operate a large deepwater oil facility a few miles from the Texas coast, raising NEPA challenges.

The proposed Sea Port Oil Terminal (SPOT or Port) would enable very large crude oil tankers to moor at an offshore, deep-water terminal and be loaded with oil through subsea pipelines connected to shore facilities. It would be the largest facility of its kind and capable of exporting 18 percent of annual U.S. oil production. The Port would reduce the need for reverse lightering trips (smaller ships ferrying oil from coastal ports to larger ships moored offshore), consequently reducing oil transportation costs and boat traffic.

Decision*:* Petitioners claimed that MARAD failed to take that "hard look" as it crafted the FEIS for SPOT. They contend that the FEIS applied a "flawed" alternatives analysis and grossly underestimated SPOT's environmental impacts concerning a host of foreseeable consequences, including oil spills, harmful impacts on animals, catastrophic ruptures, and diminished air quality.

Petitioners first contended that "[t]he FEIS ignores the full scope of probable oil spill locations and sizes expected to occur throughout SPOT's network." Among the omissions, Petitioners argue that the agency never addressed probable spill analyses for several miles of pipelines, loading and processing facilities, and Port components near communities. As Petitioners claimed the agency instead only addressed "likely" oil spill models with limited releases.

The Fifth Circuit rejected this claim and found that the FEIS includes two thorough analyses of SPOT's oil spill risks: one performed by the applicant and the other by the Coast Guard. The court discussed that the FEIS

also considered oil spill risks to marine species in similar depth. To bolster its analysis, the agency consulted with the NMFS, who produced a report that the EIS incorporates by reference. Considering the detail and extent of the analysis in the record, the agency adequately considered the direct and indirect effects of varying spills. In so doing, the court held that the agency's review did not violate NEPA.

Petitioners next argued that the agency's analysis of SPOT's worst-case disasters is deficient. They explain that the FEIS failed to examine impacts caused by a catastrophic rupture or the broad effects of worst-case scenarios from different points in SPOT's infrastructure. Referring to *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354, 109 S.Ct. 1835, (1989), the court reframed that NEPA does not require a "worst-case" analysis but rather whether the potential effects are reasonably foreseeable. Here, the record provided that the FEIS indeed analyzed potential effects and risks of worst-case oil spills in several situations that the agency considered "reasonably foreseeable."

Petitioners alleged the agency failed to supplement the FEIS with new data concerning the habitat of Rice's whales. The Rice's whale is highly imperiled with one of the world's smallest whale populations. As the agency crafted the FEIS, it was understood that the Rice's whale was generally confined near Florida's coast. But that understanding was called into question by the recent detection of Rice's whale vocalizations near the coast of Texas. Scientists outlined these findings in a research article published after SPOT's FEIS review.

The court found that MARAD concluded that the new data on Rice's whales did not require a supplemental EIS. The vocalization study, the agency reasoned, did not alter the FEIS analysis because it already considered possible effects the Port may have on Rice's whales in the region. When addressing SPOT's potential harm to the species, the FEIS concluded that the whale's occurrence near SPOT would be "extremely unlikely" because its core distribution area is in much deeper waters than the SPOT facilities. The FEIS observed that the whale "could be affected by temporary changes in water quality and noise" and that the greatest threats to the whale would be vessel strikes and oil spills. The agency also conducted a post-EIS ESA consultation with NMFS. The Biological Opinion affirmed MARAD's conclusions, restating that Rice's whales are "most commonly observed along the northeastern [Gulf] . . . off the west coast of Florida, far from the project site."

Petitioners alleged the FEIS was insufficient because the agency failed to take a "hard look" at SPOT's direct, indirect, and cumulative air quality impacts. Petitioners first alleged that the FEIS did not analyze the full extent of the Port's ozone effects, especially in light of the region's non-attainment classification from "serious" to "severe" just before the agency approved SPOT's application. The Fifth Circuit did not agree. It concluded that the agency's air quality review was sufficient and aligned with government regulations. It acknowledged the EPA downgraded the region's non-attainment rating after the FEIS was issued. But that downgrade did not alter the agency's review because the FEIS determined that SPOT would not increase the severity of any existing ozone standard violation in any area.

Likewise, the court disagreed that the FEIS did not adequately analyze the cumulative air impacts. The FEIS considered impacts from a 31.1-mile radius—a scope of review suggested by EPA regulations and found that to be a reasonable approach.

Regarding alternatives, the environmental groups argued that the FEIS should have considered a reduced-capacity option that would reduce ozone air pollution, spill risk, and climate pollution. The Fifth Circuit concluded that NEPA did not require consideration of alternatives that did not achieve the goals of the applicant. The court held that the FEIS' consideration of a no-action alternative—which assumed other ports would export the same volumes of oil in the project's absence—did not violate NEPA.

Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902 (D.C. Cir. 2024)[13]

[13] In response to a Joint Unopposed Motion to Stay Issuance of the Mandate, the court in *Marin Audubon Soc'y v. Federal Aviation Admin.,* 129 F. 4th 869 (D.C. Feb. 28, Cir 2025), stayed the vacatur of the air tour management program, and withheld the issuance of mandate until 12 months from date of stay order. The court previously denied joint petitions for rehearing

Agency Did Not Prevail.

Issues: CEQ Authority to Issue Implementing Regulations, Impact Assessment (Baseline), Remedy.

Facts: Environmental organizations and one area resident (Marin Audubon) petitioned for review of FAA's and NPS's approval of air travel management plan governing commercial tourist flights over four national parks without adequate environmental analysis under NEPA.

The National Parks Air Tour Management Act of 2000 requires FAA and NPS to work together in developing plans regulating tour flights over national parks throughout the United States. *See* 49 U.S.C. § 40128. Congress directed these Agencies to "make every effort" to complete a Plan within twenty-four months of an air tour operator's application.

However, as of 2020, applications had been pending at twenty-five parks for nearly two decades," but the Agencies had "fulfilled their statutory mandate at only two," albeit even in those instances by reaching voluntary agreements with air tour operators rather than by establishing Plans.

Because of the Agencies' inaction, the D.C. Circuit granted a petition a writ of mandamus to compel the Agencies to bring all twenty-three parks with pending applications into compliance with the Act. *In re Pub. Emps. for Env't Resp. (In re PEER)*, 957 F.3d 267, 275 (D.C. Cir. 2020). In January 2023, the FAA and NPS issued an Air Tour Management Plan governing tourist flights over four national parks near San Francisco, California: the Golden Gate National Recreation Area, Muir Woods National Monument, San Francisco Maritime National Historical Park, and Point Reyes National Seashore.

For purposes of their NEPA analysis, the Agencies completed a CE and ROD. The Agencies used existing air tours to determine the environmental baseline against which they would assess the Plan's environmental impact.

At the time, two companies possessed interim operating authority to conduct flights over the Bay Area Parks. On paper, those operators together had authority to conduct 5,090 tours per year over the four Parks. Fewer flights were actually flown, however, and the Agencies decided to use the average annual number of actual flights to identify the baseline existing condition. The Agencies calculated that the operators conducted an annual average of 2,548 tours over Golden Gate and San Francisco Maritime from 2017 to 2019, and that 143 of those tours also flew over or close to Point Reyes. The Agencies treated that average volume as the existing environmental condition of the Bay Area Parks.

The Agencies determined that the impacts of the Plan will be beneficial compared to current conditions. That was because the Plan would maintain the existing number of flights, currently flying under interim operating authority, but would reduce their environmental impacts through the prescribed mitigation measures.

Decision: Petitioners claimed that the Agencies violated CEQ regulations; the Agencies denied the charge and defended by invoking CEQ regulations.

Petitioners, without invoking CEQ regulations, argued that the Agencies relied on an improper baseline for their environmental analysis by using the existing level of flights under interim operating authority as the baseline for assessing the environmental effects of the Plan. By contrast, the Parks Act makes clear that the provisional grant of interim operating authority should not function as the baseline for environmental analysis. Here, however, the Agencies failed to fully consider the Plan's environmental effects because they treated the effects of the existing flights as a starting point.

The D.C. Circuit held that the Agencies acted arbitrarily by using the air tours conducted under interim operating authority as the baseline for evaluating the Bay Area Parks Plan's environmental effects.

The D.C. Circuit granted the petitions, vacated the approval and remanded (a remedy neither party asked for). The D.C. Circuit also, in a 2-1 panel majority, examined CEQ's regulatory authority involving promulgation of the NEPA regulations. They

and rehearing en banc. *See Orders, Marin Audubon*, 121 F.4th 902, ECF Nos. 2097983, 2097987 (Jan. 31, 2025).

found it "quite remarkable that this issue has remained largely undetected and undecided for so many years in so many cases." However, the majority opined, "[t]he provisions of NEPA provide no support for CEQ's authority to issue binding regulations."

The court discussed how CEQ's regulatory authority began, resulting in NEPA regulations issued during the Carter administration that were binding, under authority of Executive Order 11991. The panel pointed out that "an executive order is not 'law' within the meaning of the Constitution." *California v. EPA*, 72 F.4th 308, 318 (2023). The Supreme Court, in one of its most significant separation of powers decisions, ruled that the Constitution does not permit the President to seize for himself the "law-making power of Congress" by issuing an order that, "like a statute, authorizes a government official to promulgate . . . rules and regulations." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588, 72 S.Ct. 863 (1952).

The panel continued, "CEQ's authority to issue regulations on the basis of an Executive Order raises what is essentially a "separation of powers" issue. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 453 (D.C. Cir. 2017) (Kavanaugh, J.). "To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850, 106 S.Ct. 3245 (1986); *see also Freytag v. Commissioner*, 501 U.S. 868, 878–89, 111 S.Ct. 2631 (1991); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232, 115 S.Ct. 1447 (1995); *Bahlul v. United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

The panel discussed early decisions that considered CEQ role to be merely advisory. But CEQ has held a quite different view. It considered its guidelines to be mandatory, "non-discretionary standards for agency decision-making."

The panel discussed that federal agencies, whether executive agencies like the FAA and NPS or independent agencies like NRC and FERC "literally ha[ve] no power to act" except to the extent Congress authorized them. *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 301, 142 S.Ct. 1638 (2022). It held that for CEQ's regulations to be legally binding on agencies, courts, and the public, "it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress." The panel expressed surprise that the regulations have not been challenged. It opined that one apparent reason for "the oversight is that CEQ publishes its "regulations" in the Code of Federal Regulations, as if that were a credential."

The panel examined previous Supreme Court decisions relying on the regulations, *Andrus v. Sierra* Club, 442 U.S. 347, 358, 99 S.Ct. 2335, (1979) (discussing that CEQ's regulations under NEPA are "entitled to substantial deference."), and *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757, 124 S.Ct. 2204 (2004) (stating that CEQ was "established by NEPA with authority to issue regulations interpreting it."). The panel CEQ's authority to issue regulations, and cited to *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244 (2024) for the proposition that the Supreme Court did not review the CEQ's authority to issue regulations. The panel found these decisions did not provide any binding authority, stating "we are not bound by every stray remark on an issue the parties neither raised nor discussed in any meaningful way."

However, the D.C. Circuit pointed out that for years, it expressed serious concerns about whether CEQ's regulations had any "binding effect" because it was "far from clear" that CEQ had any "regulatory authority under [NEPA]." *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 n.5 (D.C. Cir. 2006) (*quoting TOMAC v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006); *City of Alexandria v. Slater*, 198 F.3d 862, 866 n.3 (D.C. Cir. 1999)); *see also Grand Canyon Tr. v. FAA*, 290 F.3d 339, 341 n.* (D.C. Cir. 2002); *Food & Water Watch v. U.S. Dep't of Agric.,* 1 F.4th 1112, 1118 (D.C. Cir. 2021) (Randolph, J., concurring).

The D.C. Circuit rejected the authority derived from the Take Care Clause, stating "[t]he CEQ regulations are by no means a mere delegation of the President's authority under the Take Care Clause. U.S. Const. art. II, § 3; 3 U.S.C. § 301; *see also* Scott C. Whitney, The Role of the President's Council on Environmental Quality in the 1990's and Beyond, 6 J. Env't L. & Litig. 81, 91 (1991).

The panel examined agency regulations, stating that Many agencies, including the parent departments of

the agencies here (DOI, for NPS, and the Department of Transportation, for the FAA), have issued their own NEPA regulations.

And although the DOI once stated that it was "incorporat[ing]" certain CEQ guidance documents, it never said the same of the regulations. 73 Fed. Reg. 61,292, 61,292, 61,298 (Oct. 15, 2008). The Department of Transportation's rules are similar: they are "not a substitute for" the CEQ regulations; do not "repeat or paraphrase the language of those regulations"; and merely "supplement[ ] the CEQ regulations by applying them to DOT programs." Dep't of Transp., Order 5610.1C, at 2 (July 30, 1985). After an examination of the agency regulations, the panel found nothing in the agencies' rules evinced an intent to automatically incorporate every new iteration of the CEQ regulations.

Dissent: Senior Circuit Judge Sri Srinivasan filed a contentious dissent that it was unnecessary and improper to reach the issue of CEQ's regulatory authority. First and foremost he stated that no party challenged the CEQ's regulations. In nonetheless reaching out to address the issue, the court contravenes "our established 'principle of party presentation.'" *Keepseagle v. Perdue*, 856 F.3d 1039, 1055 (D.C. Cir. 2017). The D.C. Circuit did not have the benefits of any briefs by any party to the case.

Senior Circuit Judge Srinivasa would adhere to the D.C. Circuit's well-established, consistent practice of declining to address the validity of the CEQ regulations when no party asks us to do so.

He criticized the panel and further objected to the vacatur of the challenged action which was not requested by the petitioners or either party because they not only addressed an issue that no party raised, but they also ordered a remedy that no party desires. He stated that action, too, is out of step with the D.C. Circuit's decisions in like circumstances.

INDEPENDENT AGENCIES

Sierra Club v. Fed. Energy Reg. Comm'n, 97 F.4th 16 (D.C. Cir. 2024).

Agency Prevailed.

Issue: Duty to Supplement

Facts: Environmental organizations (collectively, Sierra Club) filed petitions for review challenging decisions of FERC to extend the deadlines for separate developers to build a series of improvements to an existing liquefied natural gas (LNG) terminal in Texas and a related pipeline, and to complete a 99-mile natural gas pipeline connecting gas producers to markets in Canada and throughout the northeastern U.S.

The D.C. Circuit denied the petitions.

Decision: Sierra Club argued that FERC failed to appropriately consider whether the original Certificate Orders' findings remained valid and failed to supplement its NEPA analysis based on new circumstances. As part of its NEPA argument, Sierra Club asserted that FERC had failed to address the impact of a new statute, the 2019 New York Climate Leadership and Community Protection Act ("Climate Act"), on project need.

The court discussed that NEPA, and FERC's prior precedents all provide bases for FERC to revisit its prior findings due to a significant change in circumstances. FERC revisits its prior findings if it believes doing so is mandated by NEPA; and it has substantial discretion to amend an approval certificate on those grounds. 15 U.S.C. § 717o; 40 C.F.R. § 1502.9(d)(1).

A determination by FERC about whether changed circumstances have undermined the validity of its previous findings of public convenience and necessity is entitled to substantial deference because such a decision necessarily relies on the FERC's technical expertise. Such deference also is due to a FERC determination about whether a supplemental environmental analysis is necessary under NEPA because such a judgment relies on the FERC's evaluation of "substantial changes" to the proposed project or "significant new circumstances or information" related to the project. *See 40 C.F.R. § 1502.9(d)(1); Marsh v. Or. Nat. Res. Council,* 490 U.S. 360, 377, 109 S.Ct. 1851, 104 (1989)*; Nat'l Comm. for the New River v. FERC,* 373 F.3d 1323, 1330 (D.C. Cir. 2004) ("[FERC's] determination that the new information was not significant enough to warrant preparation of a supplement to the [environmental analysis] is entitled to deference.").

Sierra Club also argued that the effects of the Climate Act necessitated a supplemental NEPA analysis. *See* 40 C.F.R. § 1502.9(d)(1). The D.C. Circuit opined that FERC's determination that the Climate Act will not significantly affect market need also indicates that the Act is not a "significant new circumstance[ ]" under NEPA.

The D.C. Circuit noted that FERC and National Fuel have made no changes to the proposed project that would trigger a supplemental NEPA analysis. See 40 C.F.R. § 1502.9(d)(1)(ii). FERC permissibly found that the only issue properly before it was the time needed to complete the project. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377, 109 S.Ct. 1851, 104 (1989) (requiring courts to "defer to the informed discretion of the responsible federal agencies" in whether to prepare a supplemental EIS."

The court held that FERC's decision to grant National Fuel's request for an extension of time without first conducting a supplemental NEPA analysis was not arbitrary or capricious.

Alabama Municipal Distr. Group. v. Fed. Energy Reg. Comm'n, 100 F.4th 207 (D.C. Cir. 2024)**.**

Agency Prevailed.

Issues: Connected Actions, Indirect Effects (GHG and Social Cost of Carbon Tool).

Facts: Environmental groups (collectively, Sierra Club) petitioned for review of decisions of FERC, authorizing natural gas companies to construct and replace pipelines, compression facilities, and meter stations along the same pipeline, the Evangeline Pass Expansion Project in the Southeastern U.S., alleging FERC improperly applied NEPA.

Decision: The Sierra Club first argued that FERC failed to consider the full scope of environmental effects of the Evangeline Pass Project because FERC's EIS did not include four other natural-gas projects that the Sierra Club says are "connected actions." As described by FERC, those projects are (1) a new terminal that exports natural gas; (2) an amendment to increase the amount of gas that terminal can export; (3) a new pipeline that serves as a hub for that terminal, connecting to several spokes; and (4) two new pipelines that are spokes on that hub. However, gas from the Evangeline Pass Project will reach the hub through a different spoke and then flow through the hub to the terminal, where it will be exported.

The court found there was substantial evidence that each project is physically and functionally independent of the Evangeline Pass Project. The terminal (first project), through its hub (third project), can receive "upstream sources of supply gas in many different ways" — not just from the Evangeline Pass Project. It also found that the two spokes on the terminal's hub (fourth project) are "different gas supply options on different pipeline systems" that do not receive gas from the Evangeline Pass Project. None of the projects share ownership with the Evangeline Pass Project.

The court reviewed the timing of the projects, and although it found that the Evangeline Pass Project's timeline overlaps more with the timelines for the fourth project's two pipelines. But projects "near in time to one another" may not be "connected actions." The court rejected Sierra Club's claims.

The Sierra Club next argued that FERC erred by failing to account for the environmental impact of two ongoing authorizations (by the Department of Energy) to export gas that may include some of the gas flowing through the Evangeline Pass pipeline system. FERC determined it was not required to evaluate indirect effects of the exported gas when it authorized the Evangeline Pass Project.

However, the D.C. Circuit discussed that FERC's decision relied on the limits of its authority under the Natural Gas Act and on the court's precedents. The Natural Gas Act excludes authority over foreign transport from FERC's authority over interstate transport. 15 U.S.C. § 717f(c); *see also City of Oberlin v. FERC*, 39 F.4th 719, 725-26 (D.C. Cir. 2022). The D.C. Circuit cited to Freeport, "the Department of Energy, not [FERC], has sole authority to license the export of any natural gas." *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) ("Freeport"). FERC did "not have to address the indirect effects of the anticipated export of natural gas." *Id.; see also Center for Biological Diversity v. FERC*, 67 F.4th 1176, 1185 (D.C. Cir. 2023) (FERC need not "consider the indirect effects of actions beyond its delegated authority").

The D.C. Circuit even found that *Sabal Trail,* which Sierra Club relied upon, supported FERC's position.

Sierra Club v. FERC, 867 F.3d 1357, 1372 (D.C. Cir. 2017) ("Sabal Trail"); *see also id*. ("when the agency has no legal power to prevent a certain environmental effect, there is no decision to inform, and the agency need not analyze the effect in its review").

The court opined that Congress gave export authorization to the Department of Energy — not FERC; it found FERC did not err when it declined to consider the environmental effects of exported gas that flows through Evangeline Pass.

The Sierra Club's final challenge to FERC's EIS faults FERC for not using an environmental metric known as the "social cost of carbon" — a tool that puts a dollar figure on every ton of emitted greenhouse gases. Instead, FERC analyzed the Pass Project's greenhouse gas emissions by conducting a comparative analysis. That analysis estimated the volume of direct emissions, compared those projections against state and national emissions, and then calculated the percentage amount that the Evangeline Pass Project would add to state and national emissions.

FERC did not ignore the social cost of carbon tool. Rather, FERC explained that it was not relying on the tool because of pending litigation challenging it, and because FERC had "not determined which, if any, modifications are needed to render that tool useful for project-level analyses." But even though FERC did not rely on the tool, FERC staff still estimated the social cost of carbon, publicly disclosed those estimates, and shared them in the EIS. The court upheld FERC's analysis.

The D.C. Circuit denied the Petition.

San Luis Obispo Mothers for Peace v. Nuclear Reg. Comm'n, 100 F.4th 1039 (9th Cir. 2024).

Agency Prevailed.

Issue: Categorical Exclusion.

Facts: Non-profit organizations (collectively, Mothers for Peace) concerned with dangers posed by nuclear power petitioned for review of NRC's decision, granting licensee's request for exemption to deadline for federal license renewal application for continued operation of nuclear power plant in Diablo Canyon, San Luis Obispo County, California and issuing a CE under NEPA.

Diablo Canyon is located in coastal San Luis Obispo County and contains two units licensed by NRC. Unit 1 has been in operation since 1985 and Unit 2 has been in operation since 1986. The current licenses (granted for the statutorily allowed maximum of forty years) will expire on November 2, 2024, and August 26, 2025, respectively.

PG&E submitted a license renewal application for Units 1 and 2 in November 2009. NRC docketed the applications thereby commencing its review of the renewal application and conferring timely renewal status on PG&E. However, PG&E changed course in 2018. PG&E submitted an initial request to NRC to delay the decision on PG&E's pending renewal application, made a follow up request to suspend review of the application, and submitted a third request on March 7, 2018, to withdraw the application. NRC granted PG&E's request to withdraw, terminated review, and closed the docket.

At that point, PG&E began decommissioning efforts with the intent to suspend operation of Units 1 and 2 at the end of their current operating licenses.

In September 2022, California enacted Senate Bill No. 846 ("SB 846"). The bill invalidated the prior approval by the state utilities commission of PG&E's plans to retire Diablo Canyon and directed PG&E (in coordination with the relevant state agencies) to take actions necessary to extend operation of Diablo Canyon until the new target retirement dates specified in the legislation.

In response, PG&E submitted a letter to NRC on October 31, 2022 requesting an exemption that would allow it to operate Diablo Canyon's nuclear power units beyond November 2024 and August 2025 until NRC issues a final order on its license renewal application (it did alternatively request that NRC reinstate its application).

NRC then evaluated whether the Exemption Decision qualified for a CE under NRC regulation, which outlines six factors to consider. See 10 C.F.R. § 51.22(c)(25). Specifically, NRC found (1) the Exemption Decision did not involve a significant hazard (i.e., a significant increase in the probability or consequences of an accident, a possibility of a new or

different kind of accident, or a significant reduction in margin of safety); (2) there were no significant changes in the types or amount of any effluents released offsite; (3) there was no significant increase in public or occupational radiation exposure; (4) the exempted regulation did not deal with construction so there was no significant construction impact; (5) the exemption was administrative in nature and did not impact the probability or consequences of accidents; and (6) the exemption involved scheduling requirements because it modified a filing deadline. 88 Fed. Reg. at 14398. NRC "conclude[d] that the proposed exemption meets the eligibility criteria for a CE set forth in 10 C.F.R. [§] 55.22(c)(25)" and no additional environmental review under NEPA was required.

Decision: The Ninth Circuit concluded that NRC's issuance of the CE was supported by the record. It rejected Mothers for Peace's arguments that in the language of the CE limits its use to certain types of exemptions. See 10 C.F.R. § 51.22(c)(25).

The court found that NRC historically has approved timely renewal exemption requests using the very same CE. The court explained that the Exemption Decision was not a license proceeding, and therefore a full EIS was not required.

The court noted that Mothers for Peace did not present any arguments of specific safety concerns with Diablo Canyon but only reference NRC's general prior acknowledgement that operation after 40 years may present unique age-degradation concerns.

The Ninth Circuit held that the NRC did not act arbitrarily or capriciously in invoking the CE when issuing the Exemption Decision.

The Ninth Circuit denied the Petition.

Food & Water Watch v. Fed. Energy Reg. Comm'n, 104 F.4th 336 (D.C. Cir. 2024)

Agency Prevailed

Issues: Impact Assessment (Indirect Effects (GHG, Upstream/Downstream)

Facts: Petitioners argued that FERC arbitrarily overlooked environmental issues in approving a certificate for a pipeline through Pennsylvania and New York. They asserted that the agency's EIS impermissibly failed to quantify greenhouse-gas emissions from upstream drilling for the extra gas, to quantify ozone emissions from its downstream burning, and to categorize emissions impacts as either significant or insignificant.

Decision: The court upheld FERC's analysis and decision not to conduct the requested upstream/downstream GHG review, and decision not to make a significance determination. In this regard, the court distinguished other, recent rulings, including *Seven County Infrastructure Coalition v. Eagle County*.

The project EIS included a 16-page summary of GHG effects. The EIS estimated the downstream carbon-dioxide emissions that would occur when Westchester County ConEd customers burn the gas transported in the pipeline. However, FERC concluded that the sources of this gas were unknown and declined to address upstream environmental effect from the prospective drilling for natural gas.

The court upheld this decision. First, it held that an agency need not analyze effects of drilling new wells if those effects were not "reasonably foreseeable." In so ruling, the court approved FERC's rationale, that there was too much uncertainty regarding the number and location of upstream wells. The existing pipeline received gas from many other pipelines across the country, covering a broad geographic area. In prior cases, the court had reasoned (in the context of downstream emissions), that pinpointing emissions to "somewhere in the Southeast" was not enough to trigger to explain under NEPA.

The D.C. Circuit distinguished its ruling in Seven County Infrastructure where it ordered the Surface Transportation Board to estimate upstream GHG emission from oil development. In that case, the court held that the location and potential number of upstream oil wells was more certain, and the agency had to either perform the analysis or explain why it could not. By contrast to the Surface Transportation Board litigation, the court took the view that the location of potential gas wells was far too speculative and spread over a much larger area.

With respect to potential ozone impacts, the court found that FERC's qualitative estimate of potential increased pollution was adequate. The agency had

justified its decision not to perform a more detailed quantitative review because potential ozone pollution could vary substantially based on a long list of industrial, commercial, and residential uses of natural gas. In upholding the agency's decision, the D.C. Circuit cited its own prior decision stating that NEPA is a "almost endless" series of line-drawing decisions, and even if FERC could technically hazard a guess as potential ozone pollution, its qualitative approach was reasonable.

Finally, the court upheld FERC's analysis of potential downstream GHG emissions. In its EIS, the agency quantified emissions and compared those to national and New York state totals. It estimated a specific number of metric tons of carbon to the atmosphere each year and the percentage increase in emissions nationally and locally. Petitioners contended that FERC should have gone further, to label that estimated quantity of downstream emissions as "significant' or "not significant." The court disagreed. It held that attaching a label to the level of emissions was not required, and in any event, FERC had altered its internal processes to exclude such a determination. A significance finding could be relevant to determine whether to prepare an EIS or an EA, but because the agency made the decision to prepare an EIS, that information was not a procedural requirement.

International Dark Sky Assoc. v. Fed. Comm. Comm'n, 106 F.4th 1206 (D.C. Cir. 2024)

Agency Prevailed.

Issue: Categorical Exclusion.

Facts: Satellite owner and environmental group (International Dark-Sky) of amateur astronomers and dark-sky enthusiasts petitioned for review of FCC's conditional approval of SpaceX's license for 7,500 low-altitude non-geostationary orbit satellites to deliver internet service.

International Dark-Sky maintained that FCC's decision to grant SpaceX a license without performing an environmental review was arbitrary and capricious and not in accordance with law. 5 U.S.C. § 706(2)(A). FCC applied a CE to the action.

Decision: International Dark-Sky alleged the FCC's decision to grant SpaceX a license without performing an environmental review was arbitrary and capricious and not in accordance with law. 5 U.S.C. § 706(2)(A).

First, International Dark-Sky argued the FCC acted arbitrarily and capriciously because its determination that Gen2 Starlink would have no significant environmental impact was conclusory and lacked record support. International Dark-Sky maintained the FCC failed to respond adequately to a report showing that SpaceX's satellite system would cause significant atmospheric effects from rocket launches and reentry as well as light pollution from orbiting satellites.

Relying on two European Space Agency studies, the FCC reasonably concluded that the volume of atmospheric material emanating from satellite launch and reentry would not comprise a significant environmental impact. The FCC concluded the studies were "the most relevant evidence in the record" and "sufficiently persuasive . . . to conclude that there would not be a significant environmental impact associated with a constellation of 7,500 Gen2 Starlink satellites." The FCC, in part, discounted the alternative report because it considered the effects of all 29,988 satellites, but the FCC licensed only a fraction of that number.

The D.C. Circuit found that the FCC adequately responded to International Dark-Sky's comments and reasonably explained its reliance on the European Space Agency studies.

Second, International Dark-Sky argued the FCC cannot rely on SpaceX's mitigation efforts when assessing the significance of the satellites' environmental impact. The D.C. Circuit rejected this argument. But an agency may consider mitigation when weighing the significance of potential environmental effects. 40 C.F.R. § 1501.4(b)(1); *see also Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1156 (D.C. Cir. 2011) ("[A] project with a potentially significant impact will not require [environmental review] if changes or safeguards sufficiently reduce the impact." (cleaned up)). The D.C. Circuit held the FCC reasonably concluded SpaceX's mitigation efforts would help minimize any environmental impact.

Finally, International Dark-Sky maintained the FCC's reliance on the FAA's programmatic EA cannot be reconciled with 47 C.F.R. § 1.1311(e). The court disagreed, stating, an applicant "need not . . . submit[

]" an environmental assessment to the FCC "if another agency . . . has assumed responsibility for determining whether [the action] . . . will have a significant effect on the" environment. 47 C.F.R. § 1.1311(e). Following this regulatory directive, the FCC concluded that it "need not conduct an environmental review of the Gen2 Starlink satellite launch activity" because the FAA had already completed a review and concluded the launches "would not significantly affect the quality of the human environment." Moreover, SpaceX was involved in the FAA's programmatic EA. The FCC expressed its "confidence the FAA ha[d] conducted, and will continue to conduct as necessary, thorough environmental reviews of SpaceX's launch activities."

The D.C. Circuit held that the FCC's reliance on the FAA's environmental review was therefore reasonable and consistent with its regulatory requirements. The D.C. Circuit rejected International Dark-Sky's claims because the FCC's determination that Gen2 Starlink would not have a significant environmental impact was reasonable, reasonably explained, and consistent with the FCC's legal obligations.

The D.C. Circuit affirmed the FCC's order licensing SpaceX's Gen2 Starlink satellites.

Healthy Gulf v. Fed. Energy Reg. Comm'n, 107 F.4th 1033 (D.C. Cir. 2024)

Agency Prevailed on One NEPA Claim but Did Not Prevail on Other NEPA Claims.

Issues: Alternatives, Impact Assessment (Greenhouse Gas Impacts), Cumulative Impacts.

Facts: Healthy Gulf and four other environmental groups petitioned for review of FERC's decision to authorize the construction and operation of liquefied natural gas facilities in southwestern Louisiana. They argued that FERC did not properly address certain NEPA requirements.

On August 20, 2019, Commonwealth LNG, LLC (Applicant) applied to FERC for authorization to build and operate a natural gas liquefaction and export facility in Cameron Parish, Louisiana (the Project). The Project would be located on approximately 153 acres of land on the west side of the Calcasieu Ship Channel, near the entrance to the Gulf of Mexico (now America). The Applicant's proposal included six LNG storage tanks, a marine facility consisting of an LNG carrier berth and barge dock, and utilities for electricity generation.

On September 9, 2022, after taking public comments on the Project's potential environmental impacts, FERC issued a final EIS. On November 17, 2022, FERC authorized the Project as modified by the FEIS's recommendations.

Decision: The court reviewed petitioners' NEPA claims under the "arbitrary and capricious" standard of the APA, stating that "[the court's] is not to flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor, but instead simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Birckhead v. FERC*, 925 F.3d 510, 515 (D.C. Cir. 2019) (per curiam) (citations and quotation marks omitted).

Petitioners assert that FERC failed to comply with NEPA because it arbitrarily declined to determine whether the Project's GHG emissions would be significant; inadequately assessed the cumulative effects of the Project's NO_2 emissions; and failed to properly consider alternatives to Applicant's proposal. The court agreed with the first and second arguments but rejected the third.

In the FEIS, FERC estimated that the direct GHG emissions from the Project's operation would result in an annual increase of about 3.2 million metric tons of carbon dioxide equivalent ("CO2e"). The FEIS also compared those estimated emissions to current state and national emissions levels and estimated the Project's impact using the "social cost of carbon," a method of quantifying in dollars the climate change impact of greenhouse gas emissions. *See Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 111 (D.C. Cir. 2022). FERC then explained why it could not reasonably determine whether those emissions are significant:

> To date, FERC staff have not identified a methodology to attribute discrete, quantifiable, physical effects on the environment resulting from the Project's incremental contribution to GHGs. Without the ability to determine discrete resource impacts, FERC staff are unable to

> assess the Project's contribution to climate change through any objective analysis of physical impact attributable to the Project.

FERC rejected these arguments, finding that FERC explained that it has not yet identified criteria that would allow it to non-arbitrarily determine when identified social costs become significant under NEPA. The Court explained that petitioners in this case do not offer any such criteria themselves, nor did they provide with any other basis to question the FERC's expert judgment.

However, the court agreed with petitioners' concern regarding the adequacy of the FERC's explanation of why it did not determine whether the Project's GHG emissions were significant: they contended that the FERC failed to explain its apparent departure from the approach it took in *Northern Natural Gas Co.,* 174 FERC ¶ 61,189 (2021).

Petitioners argued that the Project would emit an estimated 3.2 million metric tons of CO2e a year. That number represents a 0.06% increase in national emissions levels and a 1.7% increase in Louisiana's emissions levels and is roughly thirty-two times the FERC's draft significance threshold of 100,000 metric tons. The court agreed that the Petitioners raised a meaningful argument that it is unclear why the FERC could not have concluded, using the logic of *Northern Natural,* that the Project's GHG emissions were significant because they would register above any threshold FERC could reasonably adopt. Because the FERC neglected to address whether and why its order in *Northern Natural* is distinguishable, the D.C. Circuit remanded for it to do so.

The D.C. Circuit also agreed with petitioners' argument that FERC's analysis of the cumulative effects of the Project's NO_2 emissions was arbitrary. FERC found Project's NO_2 emissions' cumulative effects insignificant because the Project's incremental NO_2 emissions fell below the 1-hour NO_2 SIL at each NAAQS exceedance location. The D.C. Circuit remanded the FEIS to FERC to explain how its use of the 1-hour NO_2 SIL is consistent with a proper cumulative effects analysis or to adequately assess the cumulative effects of the Project's NO_2 emissions using a different methodology.

The D.C. Circuit disagreed with petitioners' assertion that the 1-hour NO_2SIL should not be used at all in NEPA effects analyses, even for assessing a project's incremental effects. The D.C. Circuit upheld FERC's methodology because the NAAQS are a "generally accepted standard" for evaluating air-pollution effects in the NEPA context, *see Sierra Club v. FERC* ("*Sabal Trail*"), 867 F.3d 1357, 1370-71 n.7 (D.C. Cir. 2017).

The court rejected petitioners' contention that FERC failed to adequately consider three alternatives to the Project: replacing the terminal's simple-cycle power plant with a 120-megawatt combined-cycle power plant, eliminating one of the six LNG storage tanks, and mandating the use of carbon capture and sequestration.

As to the consideration of the three alternatives, the D.C. Circuit found that FERC made decisions based on the relevant considerations specific to each alternative, and it explained those decisions in sufficient detail.

Petitioners object that, before dismissing the alternative, FERC should have sought more information on the feasibility of using CP2's proposed facilities. The D.C. Circuit found that this criticism is, at best, impermissible flyspecking. "NEPA . . .requires FERC to at least attempt to obtain the information necessary to fulfill its statutory responsibilities." *Birckhead*, 925 F.3d at 520. The D.C. Circuit held FERC satisfied its NEPA obligation, and under the circumstances, it reasonably rejected carbon capture and sequestration as infeasible.

The D.C. Circuit granted the petitions for review in part, denied them in part, and remanded without vacatur. The court refused to vacate FERC's orders based on the likelihood that FERC could successfully address the court's concerns on remand.

New Jersey Conserv. Found. v. Fed. Energy Reg. Comm'n, 111 F.4th 42 (D.C. Cir. 2024)

Agency Did Not Prevail in Part

Issues: Purpose and Need Statement, Impact Assessment (upstream and downstream effects, greenhouse gas significance determination), Mitigation Measures

Facts: A coalition of environmental and community. NGOs challenged FERC's decision to issue a certificate to build a pipeline through New Jersey and other states. Petitioners argued that FERC's NEPA analysis was flawed in several respects and that the agency failed to make an adequate showing of a market need for the project.

Decision: The D.C. Circuit found that FERC did not adequately explain its decision to not make a GHG emissions significance determination and failed to discuss possible mitigation measures. The court upheld the agency's definition of the project Purpose and Need as well as its decision not to calculate both upstream emissions (from natural gas extraction) and downstream emissions (from ozone).

FERC's policy concerning GHG emissions has ping-ponged back and forth in recent years. As a result, the D.C. Circuit has reviewed agency processes that did and did not perform a significance determination. In this case, the agency declined to apply the social cost of carbon tool, taking the position that it was not able to perform the analysis. The court remanded for further analysis because just three years earlier, the agency applied the social cost of carbon to perform its analysis. The court held that FERC had neither acknowledged the change in position nor justified that change. Indeed, the court pointed out that prior analyses had led to a significance finding for projects that would have resulted in exponentially less GHG emissions. (In reaching its ruling, the court distinguished a decision issued just months earlier, in *Food & Water Watch v. FERC*, 104 F.4th 336 (D.C. Cir. 2024), summarized above.)

The court's rationale concerning mitigation measures was brief in large part because FERC allowed the project developer not to implement any mitigation for GHG emission impacts and did not discuss any options. That, the court found, was inconsistent with NEPA's regulations in effect at the time.

By contrast, the court rejected petitioners' claims regarding FERC's decision not to study potential upstream and downstream GHG emissions effects. The court seemed sympathetic to the argument but held that the record evidence was insufficient to support the connection from the project to either upstream (additional natural gas extraction) or downstream (the generation of ozone pollution as a result of additional emissions) effects.

Finally, the court ruled that the project Purpose and Need was not defined unreasonably narrowly. The agency had clearly defined the purpose in narrow and express terms. However, the D.C. Circuit held that the Purpose & Need definition did not prevent the agency from a fair consideration of the No-Action alternative (petitioners' preferred alternative). And it held that the agency was not required to analyze non-natural gas alternatives.

City of Port Isabel v. Fed. Energy Reg. Comm'n, 111 F.4th 1198 (D.C. Cir. 2024)

Agency Did Not Prevail

Issues: Duty to supplement, Connected actions/alternatives, Impact Assessment (direct air quality impacts) and Environmental Justice.

Facts: Residents, environmental groups, and nearby city petitioned for review of decisions by FERC, authorizing construction and operation of two liquefied natural gas (LNG) export terminals and pipeline that would carry natural gas to one of those terminals, allegedly in violation of NEPA.

Decision: The D.C. Circuit had previously remanded FERC's prior approvals of these projects for further review in 2021. When the agency subsequently reauthorized the projects, the D.C. Circuit once again vacated FERC's approvals. The court found that the analysis and process by which the agency conducted review of environmental justice, of a proposed carbon sequestration system, and of air quality data was so flawed, FERC once again had to reassess the project.

With respect to the environmental justice analysis, FERC' previous NEPA review had limited the scope of analysis to communities within two miles of the project sites. The D.C. Circuit held that FERC had not adequately explained this assumption. On remand, FERC expanded its demographic search to 50 kilometers from the project sites. However, the agency's analysis was conducted internally by staff and was not included in a Supplemental EIS.

Simply put, the court found that the new analysis presented a "seriously different picture of the environmental landscape." In those circumstances, agencies are required to publish findings in a

supplemental NEPA document, which would be subject to public review and comment. Most importantly, the court pointed out that the prior review concluded that there would be no disproportionate or adverse effects to EJ communities. The new analysis reached the opposite conclusion and recommended additional mitigation measures.

FERC defended its internal process, which included limited opportunity for public comment. It also claimed that because its analysis did not show significant air quality impacts, a remand would serve no purpose and any error should be viewed as harmless. The court disagreed. In the D.C. Circuit's view, this was a classic case where new conclusions and analysis should have been published in a supplemental EIS.

The court's analysis of the proposed carbon sequestration system turned on whether that aspect of the project should have been deemed a "connected action" to the LNG project itself. The agency and the project proponent asserted that the new system, designed to reduce greenhouse gas emissions, and the LNG projects had independent utility and would proceed even if the other did not. The court disagreed. It held that "projects have substantial independent utility for purposes of the connected action inquiry only when both projects are independently useful." Here, the record showed that the sequestration system was only useful if the LNG terminals were built. Moreover, the court held that supplemental analysis was required because the sequestration system itself could be viewed as a new "alternative," which should have been subject to public scrutiny.

Finally, the D.C. Circuit faulted FERC for failing to consider data from only one air quality monitor in proximity to EJ communities and not a second monitor. The agency asserted that the second monitor was further away from the EJ populations, and in any event, did not show at least three years of validated data. Again, the court disagreed. It turns out that the monitor used by FERC in its review of air quality showed that the area was in attainment for fine particulate matter. The one it rejected, by contrast, showed exceedances for that same pollutant. Despite some of the data limitations explained by the agency, the court remanded for further explanation about why that second monitor's data was excluded from analysis.

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