National Association of Environmental Professionals

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2018 ANNUAL NEPA REPORT

of the

National Environmental Policy Act (NEPA) Practice

Submitted to

NAEP Board of Directors

Compiled by

Charles P. Nicholson, NEPA Practice Chair

With contributions by

Marie Campbell, Ron Deverman, Liz Ellis, James Gregory, Piet and Carole deWitt, Charles P. Nicholson, P. E. Hudson, Lucinda Low Swartz and Roger Turner

November 2019

This report reviews NEPA document submittals and statistics, NEPA legislation, and NEPA litigation for calendar year 2018. The purpose of this report is to document the status of NEPA compliance and perspectives during the reporting year. We welcome reader comment and inquiry to naep@naep.org.

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Acronyms and Abbreviations

AFRH	Armed Forces Retirement Home
APHIS	Animal and Plant Health Inspection Service
ARS	Agricultural Research Service
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
BOP	Bureau of Prisons
BOR	Bureau of Reclamation
BPA	Bonneville Power Administration
CEQ	Council on Environmental Quality
DC	Denali Commission
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of Interior
DOS	Department of State
DOT	Department of Transportation
DVA	Department of Veterans Affairs
EA	Environmental assessment
EC	Environmental Concerns
EIS	Environmental impact statement
EO	Environmental Objections
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FAST	Fixing America's Surface Transportation
FEMA	Federal Emergency Management Agency
FERC	Federal Energy Regulatory Commission
FHwA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
FWS	Fish and Wildlife Service
H.R.	House Resolution
LO	Lack of Objection
NAEP	National Association of Environmental Professionals
NCPC	National Capital Planning Commission
NEPA	National Environmental Policy Act
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
NOI	Notice of Intent
NMFS	National Marine Fisheries Service
NPS	National Park Service
NRC	Nuclear Regulatory Commission
NSF	National Science Foundation
PEIS	Programmatic environmental impact statement
ROD	Record of Decision
RUS	Rural Utilities Service
S.	Senate
TVA	Tennessee Valley Authority
USACE	U.S. Army Corps of Engineers
USAF	United States Air Force
USFS	United States Forest Service
USMC	United States Marine Corps
USN	United States Navy

1. Introduction

Marie Campbell
NAEP President

This *2018 Annual Report of the National Environmental Policy Act Practice (Annual NEPA Report)* has been prepared for the benefit of the members of the National Association of Environmental Professionals (NAEP), and for submittal to the Council on Environmental Quality (CEQ) to be shared with federal liaison with whom NAEP members work to ensure adherence to the stated legislative purpose of NEPA:

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

The purpose of the *Annual NEPA Report* is to improve environmental impact assessment practice through a retrospective review of the 2018 environmental impact statements (EISs), evaluation of the average timeline for preparation of EISs, consideration of legislative activities undertaken by congress in relation to NEPA, and summarization of "lessons learned" from the decisions issued by the U.S. Circuit Court of Appeals. This review is based on consideration of over 300 EISs issued by nearly 50 Federal Lead Agencies, with three agencies accounting for over half of the EISs: US Department of Agriculture Forest Service (75), US Department of the Interior Bureau of Land Management (48), and U.S. Army Corps of Engineers (35). As in 2017, the time required for preparation of draft EISs continued to decline from the peak that occurred in 2016, possibly suggesting that the effects of Title 41 of the FAST Act and recent Executive Orders appear to be influencing NEPA timelines. A total of 13 bills that addressed NEPA were enacted into law during the 2017-2018 115th session of Congress. Four of these had substantive provisions; they all focused on specific actions and none made sweeping changes to NEPA compliance processes. The U.S. Circuit Courts of Appeals issued 35 substantive decisions in 2018, the highest number since 2006. The decisions focused on an array of topics, including purpose and need statement, proposed action, segmentation and connected actions, streamlining, tiering, impact analysis, use of existing data, and cumulative impacts. Federal agencies prevailed in 28 of the cases, did not prevail in 5, and prevailed on some but not all NEPA claims in 2 cases. The 80% "win" rate for federal agencies was relatively low. The attitude of the Court regarding the obligation of the Federal Agency to meet the purpose and intent of NEPA, while achieving federal mandates for use of existing data and regulatory timelines was evident in *American Rivers v. Federal Energy Regulatory Comm'n, 895 F.3d 32 (D.C Cir. 2018)* where the Court held that "…[t]he record simply [on myriad grounds] does not provide a rational connection between the licensing decision, the record evidence, and the finding of no significant environmental impact."

This *Annual NEPA Report* also includes a perspective on the timely topic of NEPA streamlining. Efforts to streamline the NEPA process (widely interpreted as completing it faster) have been

underway since shortly after NEPA was enacted. The article reviews the history of streamlining efforts, describes current initiatives, and discusses some of their successes and failures.

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

2. The NEPA Practice in 2018

Charles P. Nicholson, PhD[1]
Chair, NAEP NEPA Practice

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

NAEP's NEPA Practice is pleased to present the twelfth annual report. The 2018 Annual Report of the National Environmental Policy Act Practice (Annual NEPA Report) contains summaries of the latest developments in NEPA as well as the NEPA Practice's activities, in 2018.

The Annual NEPA Report is prepared and published through the initiative and volunteer efforts of members of the NAEP's NEPA Practice. The NAEP's NEPA Practice supports NEPA practitioners through monthly conference calls, networking opportunities, educational opportunities, outreach with the President's Council on Environmental Quality (CEQ), and projects such as this Annual NEPA Report. Highlights of 2018 activities include:

- Continued review of agency actions to comply with Title 41 of the FAST Act
- Discussion of Executive Orders addressing NEPA including EO 13807 – Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, and Department of Interior Secretarial Order 3355 – Streamlining NEPA Reviews and Implementing EO 13807
- Discussion of introduced legislation addressing NEPA
- Discussion of significant court rulings on NEPA cases
- Commenting on CEQ's June, 2018 Advanced Notice of Proposed Rulemaking on revisions to the CEQ regulations for implementing NEPA
- Commenting on the Bureau of Reclamation's October 2018 notice on categorically excluding title transfer actions

NEPA Practice has approximately 100 active members. We hold monthly conference calls in which we discuss emerging developments in NEPA such as new draft regulations, guidance, legislation, court rulings, projects, or studies. Monthly conference calls are normally held at 2:30 p.m. (Eastern) on the second Wednesday of each month, and all NAEP members are welcome to participate. To be added to the NEPA Practice email list and call reminders, email your request to office@naep.org.

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

3. Just the Stats

James Gregory[2]

In 2018, Notices of Availability (NOAs) for 323 environmental impact statements (EISs) were published in the *Federal Register*. Of the published notices, 176 were draft EISs (including supplemental and revised draft EISs) and 147 were final EISs (including supplemental and revised final EISs). Information regarding these documents is available through the EPA's online EIS database, available at: https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search. The database contains both the EISs and EPA's comment letter for EISs on which that agency commented.

3.1 2018 Published EISs

There was substantial 26% increase in the number of EISs published in 2018 compared to the 257 published in 2017. The number of EISs published in 2017 was also substantially lower than in preceding years, with 312 EISs were published in 2016, 381 published in 2015, 384 in 2014, and 377 in 2013. Forty-six agencies published at least one EIS in 2018 and seven agencies published at least a dozen EISs (Table 3-1). Like previous years, the U.S. Forest Service (USFS) published the most documents with 73 EISs in 2018 (they published 61 in 2017). The Bureau of Land Management (BLM) published the second most with 48; the Army Corps of Engineers (ACOE) published 35, the Federal Highway Administration[3] (FHWA) published 19, and the Federal Energy Regulatory Commission published 17. The most notable from 2017 by an agency was the nearly four-fold increase by BLM, from 9 EISs in 2017 to 48 in 2018. As in 2017 four departments (Agriculture, Interior, Transportation, and Defense) are responsible for three-quarters of all EISs published in 2018.

Table 3-1 shows draft and final EISs filed in 2018 by agency, and Figure 3-1 shows the EISs by department, with the departments responsible for publishing large numbers of EISs broken out separately.

Table 3-1. Draft and Final EISs Published in Federal Register in 2018 (by Agency)

Lead Agency	Number of EISs
Forest Service	73
Bureau of Land Management	48
US Army Corps of Engineers	35
Federal Highway Administration	19
Federal Energy Regulatory Commission	18

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

[3] This figure does not include EISs published by state departments of transportation that have been assigned NEPA authority under the Surface Transportation Project Delivery Program (California, Texas, and Utah in 2018).

Lead Agency	Number of EISs
US Fish and Wildlife Service	14
National Marine Fisheries Service	12
National Park Service	9
Federal Transit Administration	7
Federal Aviation Administration	6
Nuclear Regulatory Commission	6
US Navy	6
Bureau of Reclamation	5
General Services Administration	5
Department of Energy	4
Tennessee Valley Authority	4
Bureau of Indian Affairs	3
California Department of Transportation	3
Department of Agriculture	3
Office of Surface Mining	3
US Air Force	3
Animal and Plant Health Inspection Service	2
Bureau of Ocean Energy Management	2
Department of Health and Human Services	2
Department of Housing and Urban Development	2
Environmental Protection Agency	2
Federal Railroad Administration	2
National Oceanic and Atmospheric Administration	2
National Science Foundation	2
New Jersey Department of Environmental Protection	2
Utah Department of Transportation	2
Bonneville Power Administration	1
Denali Commission	1
Department of Commerce	1
Department of Homeland Security	1
Department of State	1
Department of Interior	1
Veterans Administration	1
National Aeronautics and Space Administration	1
National Capital Planning Commission	1
National Highway Transportation Safety Administration	1
National Indian Gaming Commission	1

Lead Agency	Number of EISs
Rural Utilities Service	1
Texas Department of Transportation	1
US Coast Guard	1
Customs and Border Protection	1
US Army	1
Western Area Power Administration	1
Total	**323**

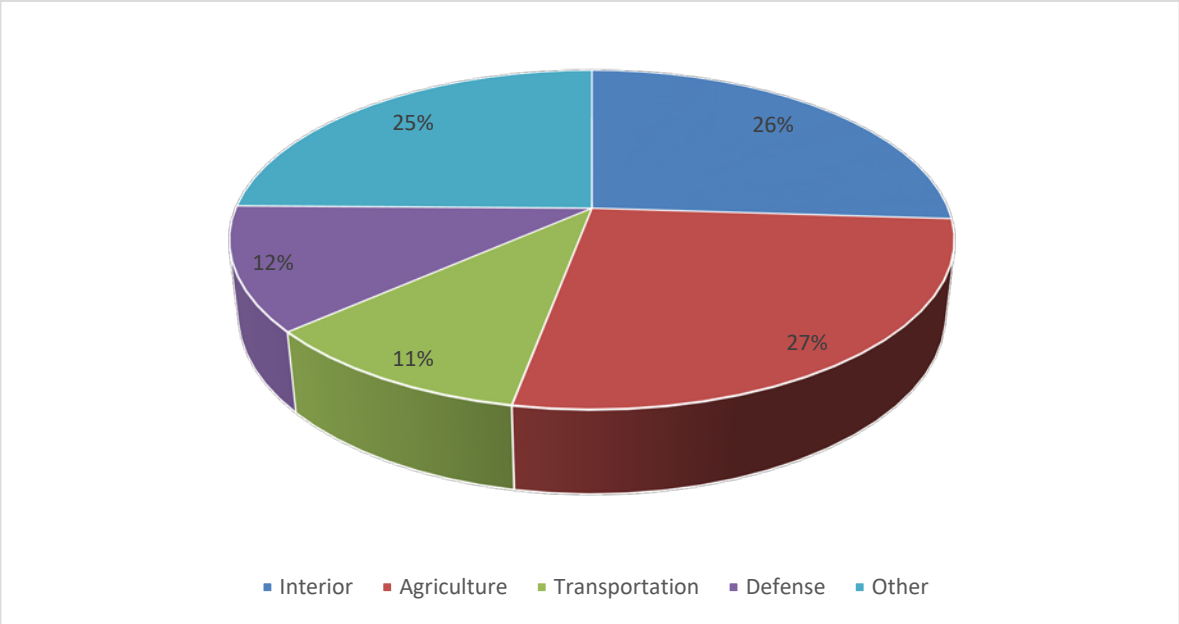

Figure 3-1. Draft and Final EISs in 2018 by Department

Geographic Distribution of EISs with Published Notices in 2018

The geographic breakdown of draft and final EISs by state and territory is shown in Table 3-2. As has been the case in prior years, many more EISs were prepared for actions in California (51) than in any other state[4]. Colorado, Alaska, Washington, Idaho, and Oregon followed California in terms of EISs for actions in those states, with 18 in Colorado, 16 each in Alaska and Washington, and 15 in Idaho and Oregon. Eight EISs addressed nationwide, regional, or programmatic actions and 49 EISs addressed actions in multiple states but were not nationwide. As in past years, in 2018 there were a large number of EISs published for actions in western states, indicative of the extensive Federal lands and water projects managed or undertaken by the USFS, BLM, ACOE, and Bureau of Reclamation in the West.

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

Table 3-2. Draft and Final EISs in 2018 by State and Territory.

State/Territory	Number of EISs	State/Territory	Number of EISs
California	51	Michigan	2
Colorado	18	Minnesota	2
Alaska	16	Mississippi	2
Washington	16	North Carolina	2
Idaho	15	New Jersey	2
Oregon	15	Ohio	2
Texas	13	Oklahoma	2
Montana	12	Alabama	1
Wyoming	12	Connecticut	1
Louisiana	10	District of Columbia	1
Utah	10	Iowa	1
Nevada	9	Indiana	1
New Mexico	8	Massachusetts	1
Arizona	7	Missouri	1
Florida	4	Nebraska	1
North Dakota	4	New Hampshire	1
New York	4	Puerto Rico	1
South Carolina	4	Tennessee	1
Virginia	4	Wisconsin	1
Georgia	2	Nationwide	5
Illinois	2	Program/Regulatory	3
Maryland	2	Multi-state	49
Maine	2		
		Total	**323**

3.2 EPA's Review and Comments

Under Section 309 of the federal Clean Air Act (CAA), EPA is required to review and publicly comment on the environmental impacts of major Federal actions including actions that are the subject of draft and final EISs. As of October 22, 2018, EPA discontinued use of its EIS rating system it applied as part of this review to characterize their evaluation of the environmental impacts of the proposal and the adequacy of the draft EIS. [5]

[5] See https://www.epa.gov/sites/production/files/2018-10/documents/memorandum_on_changes_to_epas_environmental_review_rating_process.pdf

Ninety-six DEISs[6] from EPA's database referenced above had comment letters available that included EPA's impact ratings on the proposed action. Two of these DEISs had ratings split among alternatives. Fifty (52%) were rated Lack of Objections (LO), 43(45%) were rated Environmental Concerns (EC), and 1 (1%) received an Environmental Objections (EO) rating (Figure 3-2). The percentage of DEISs rated LO was slightly lower than in 2017 (when it was 59% of DEISs), and EC ratings were correspondingly higher than 2017 (39%). No DEIS received an Environmentally Unsatisfactory rating. Two DEISs received different ratings for different alternatives, with some alternatives rated LO and some rated EC.

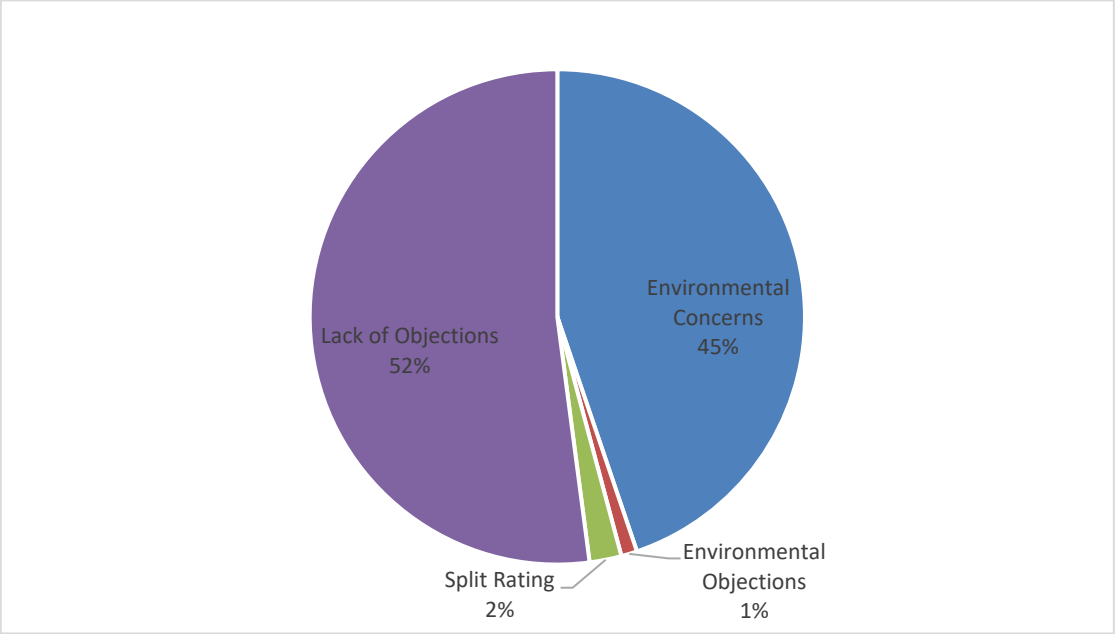

Figure 3-2. EPA Environmental Impact Ratings of 2018 DEISs

Of the 46 DEISs that received adequacy ratings, 13%were considered adequate,[7] 87% were rated insufficient information, and none were rated inadequate (Figure 3-3). These percentages were roughly the same as those in 2017.

[6] Includes Supplemental Draft EISs.

[7] Documents that received an impact rating of LO and not assigned an adequacy rating are considered to be adequate. DEISs with split ratings that included adequacy for at least one alternative were included in totals of DEISs that included adequacy ratings in EPA's comments.

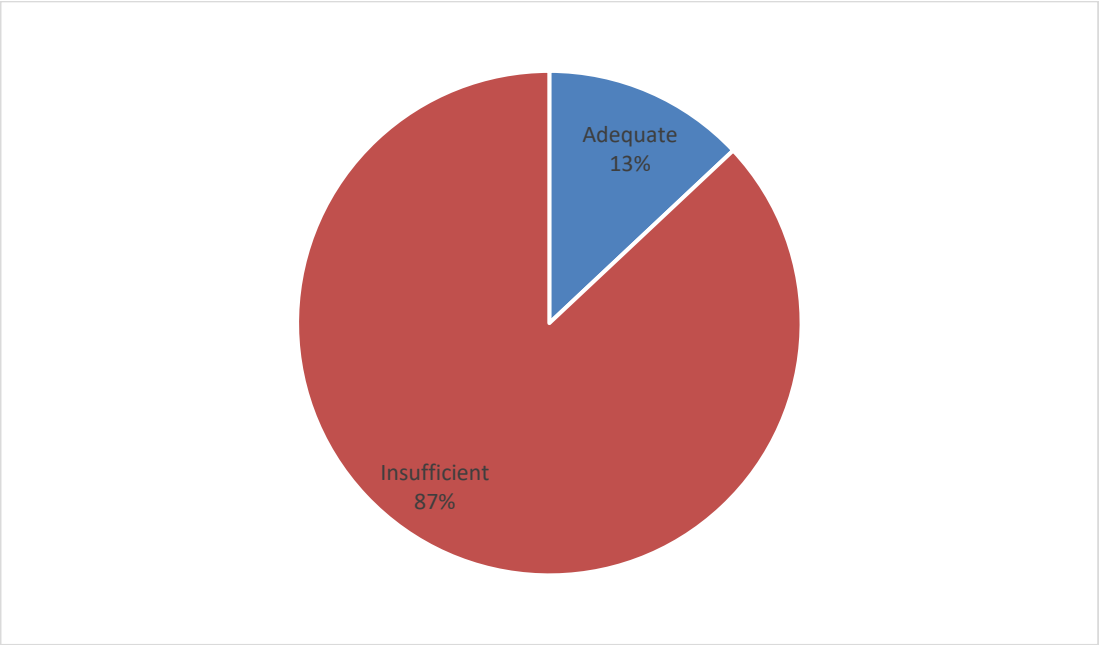

Figure 3-3. EPA Adequacy Ratings of 2018 DEISs

4. Preparation Times for Environmental Impact Statements Made Available in Calendar Year 2018

Piet and Carole deWitt [8]

4.1 Summary

In calendar year 2018, federal agencies made available 175 draft and 144 final environmental impact statements (EISs), an increase over the 20-year record low number in 2017 but lower than the long-term average. The annual average time for all agencies combined to prepare a draft EIS decreased from the 2017 average, but the time to prepare a final EIS increased slightly above the 2017 average. Only one final EIS made available in 2018 required less than one year to complete following the publication of its Notice of Intent in the *Federal Register*.

4.2 EIS Numbers

In calendar year 2018, federal agencies made available through the Environmental Protection Agency (EPA) 175 draft and draft supplemental EISs (i.e., draft EISs) and 144 final and final supplemental EISs (i.e., final EISs). These numbers do not match the numbers in our samples for various reasons as explained in subsequent discussions.

The largest number of draft EISs made available in any year from 1997–2018 was 320 recorded in 2003, and the smallest number was 126 recorded in 2017. The largest number of final EIS in any year in our study period was 306 recorded in 2004, and the smallest number was 115 recorded in 2017. For the period 1997–2017, the average number of draft EISs made available in a year was 247±53 [mean ± one standard deviation], and the average number of final EISs made available in a year was 222±43.

4.3 Final EISs

In calendar year 2018, 27 federal agencies made 144 final EISs available to the public. Six of these final EISs were "Adoptions" and are not included in our preparation-time calculations. One final EIS was voided by the preparing agency and is not included in our calculations as well. Our 2018 sample includes 137 final and final supplemental EISs.

The 2018 final EISs prepared by all agencies combined had an average preparation time (from the *Federal Register* Notice of Intent (NOI) to the Notice of Availability for the final EIS) of 1,796±1,468 days (4.9±4.0 years) (see Table 4-1 "ALL" "NOI to Final EIS"). The 2018 average was 10 days longer than the 2017 average. For the period 1997–2017, the highest annual average preparation time for final EISs was 1,864±1,259 days (5.1±3.4 years) observed in 2016, and the lowest annual average 1,166±899 days (3.2±2.5 years) was observed in the year 2000. The 2018 average is 168 days shorter than the highest annual average and 630 days (1.7 years) longer than the shortest annual average.

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

Table 4-1. Preparation times in calendar days for final and final supplemental EISs made available in calendar year 2018.

			NOI to Draft			Draft to Final			NOI to FEIS				
Agency	**N**	**%**	**Mean**	**s.d.**	**Med**	**Mean**	**s.d.**	**Med**	**Mean**	**s.d.**	**Med**	**Min**	**Max**
ALL	137	100	**1189**	1168	743	**608**	623	374	**1796**	1468	1256	293	7441
APHIS	2	1.5	**740**	165	740	**1005**	1133	1005	**1745**	129	1745	826	2663
BLM	17	12.4	**974**	943	668	**440**	380	217	**1414**	1115	1116	422	4252
BOEM	1	0.7	**693**			**378**			**1071**				
BOR	2	1.5	**1131**	926	1131	**266**	148	266	**1397**	1074	1397	637	2156
BPA	1	0.7	**554**			**1344**			**1898**				
DC	1	0.7	**301**			**70**			**371**				
DOE	2	1.5	**1867**	1835	1867	**1827**	1574	1827	**3694**	261	3694	3509	3878
FAA	1	0.7	**640**			**102**			**742**				
FERC	4	2.9	**884**	469	920	**156**	50	133	**1040**	450	1099	512	1451
FHWA	12	8.8	**1813**	1277	1609	**1154**	1272	571	**2967**	1910	2691	637	6671
FTA	5	3.6	**3399**	1999	2843	**633**	376	448	**4032**	2135	3490	1256	6470
FWS	7	5.1	**1551**	648	1382	**409**	192	364	**1960**	802	1959	638	5234
GSA	1	0.7	**1787**			**868**			**2655**				
HHS	1	0.7	**210**			**161**			**371**				
HUD	2	1.5	**708**	5	708	**298**	213	298	**1005**	208	1005	858	1152
NCPC	1	0.7	**666**			**154**			**820**				
NOAA	3	2.2	**314**	181	290	**252**	164	168	**566**	340	458	293	947
NPS	4	2.9	**1042**	418	1049	**343**	165	368	**1385**	297	1438	980	1684
NRC	3	2.2	**752**	389	808	**711**	1076	95	**1463**	1408	903	422	3065
NSF	1	0.7	**584**			**280**			**864**				
OSM	1	0.7	**1592**			**329**			**1921**				
TVA	2	1.5	**448**	143	448	**137**	25	137	**585**	118	585	501	668
USACE	18	13.1	**1799**	1674	1180	**781**	354	826	**2580**	1708	2058	931	6841
USAF	3	2.2	**489**	184	470	**252**	62	231	**741**	175	792	547	885
USFS	37	27.0	**835**	866	595	**586**	528	357	**1421**	1296	1050	445	7441
USN	4	2.9	**841**	248	803	**617**	269	564	**1458**	462	1464	1037	1866
WAPA	1	0.7	**885**			**1302**			**2187**				

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

The draft EISs for the 2018 final EISs required an average of 1,189±1,168 days (3.3±3.2 years) to prepare following publication of their NOIs (see Table 5-1 "ALL" "NOI to Draft EIS"). The 2018 average is 189 days less than the high annual average for the preparation of draft EISs, 1,378±1,103 days (3.8±3.0 years) observed in 2016 and 479 days (1.3 years) longer than the shortest average of 710±666 days (1.9±1.8 years) recorded in the year 2000.

The 2018 average time for preparing the final EIS from the draft EIS was 608±623 days (1.7±1.7 years). The 2018 average was the longest recorded for the period 1997–2018. The 2018 average was 95 days longer than the previous high average of 513±485 days (1.4±1.5 years) observed in 2012, and 219 days (0.6 year) longer than the shortest average of 389±379 days (1.1±1.0 years) observed in the year 2000.

The five historically most prolific EIS-preparing agencies made available 88 final EISs in 2018, 64% of the total. These EISs required an average of 1,866±1,538 days (5.1±4.2 years) to

complete, 70 days longer than the 2018 average for all agencies combined. Three of these agencies (U.S. Forest Service [USFS], Federal Highway Administration [FHWA], and U.S. Army Corps of Engineers [USACE]) established new high averages for the interval for preparing the final EIS from the draft EIS (as discussed previously). The National Park Service's four final EISs established a new low number for final EISs made available in a year by that agency. The previous low was six final EISs recorded in 2017.

Table 4-2 compares 2018 and earlier final EIS preparation times by year intervals. In 2018, all agencies combined established a new low final EIS completion rate for the 0-to-1 year interval. The agencies completed only one EIS within 365 days following the publication of its NOI. For the period 1997–2017 federal agencies completed an average of 7.0±3.3% of their final EISs within one year of the NOI publication. The highest annual completion rate for the 0-to-1 year interval, 14.9%, was observed in 2001. The 2018 0-to-1-year completion rate of 0.7% replaced the previous low completion rate of 2.7% measured in 2015 (see Table 5-2). Federal agencies did not establish any new high or low completion rates in 2018 for other time intervals.

In 2018 ten agencies made available only one final EIS. These agencies required an average of 1,290±808 days (3.5±2.2 years) to prepare these EISs. Agencies that made more than one final EIS available during the year required an average of 1,836±1,502 days (5.0±4.1 years) to complete their documents.

The average time required by all federal agencies combined to prepare a final EIS has increased since the year 2000. From 2000–2018, the annual average EIS-preparation time for all agencies has increased at an average rate of +39.5 days per year (see Figure 4-1 "Total EIS Preparation Time"). Approximately 79% of the increase reported for the period 2000–2018 is accounted for by the increase in the preparation times of drafts EISs. The remaining increase is the result of increases in the time to prepare the final EIS from the draft EIS. As noted previously, the 2018 average time to prepare the final EIS from the draft EIS was longest we have recorded.

Table 4-2. A comparison of 2018 final EIS completion times with the average EIS completion times for the period from 1997 through 2017.

		1997–2017			
Completion Interval in Years from NOI*	**2018 Completion Percentage**	**Average Completion Percentage**	**Standard Deviation**	**Lowest Completion Percentage (Year)**	**Highest Completion Percentage (Year)**
0 to 1	0.7	7.0	3.3	2.7 (2015)	14.9 (2001)
1 to 2	19.7	23.3	5.1	13.7 (2015)	30.3 (2000)
2 to 3	23.4	18.7	2.3	15.2 (2008)	24.5 (2009)
3 to 4	11.7	13.2	2.6	9.3 (2004)	18.6 (2005)
4 to 5	8.0	10.1	2.4	6.2 (2002)	12.8 (2006)
5 to 6	10.2	7.2	1.9	4.5 (2000)	10.6 (2011)
6 to 7	5.1	6.3	2.0	3.0 (2001)	10.7 (2006)
7 to 8	2.9	4.1	1.5	1.5 (2000)	7.0 (2013)

8 to 9	5.8	3.2	1.6	1.3 (2002)	6.7 (2012)
9 to 10	3.6	2.0	1.3	0.5 (2000)	6.0 (2015)
10 to 11	1.5	1.5	1.1	0.4 (4 years)	3.9 2014)
11 to 12	0.7	0.75	0.61	0.0 (6 years)	1.6 (2 years)
12 to 13	0.7	0.81	0.83	0.0 (5 years)	3.0 (2016)
13 to 14	0.7	0.50	0.56	0.0 (8 years)	2.3 (2013)
14 to 15	0.7	0.48	0.54	0.0 (9 years)	1.6 (2 years)
15 to 16	0.0	0.24	0.47	0.0 (15 years)	1.8 (2016)
16 to 17	1.5	0.19	0.36	0.0 (15 years)	1.3 (2006)
17 to 18	0.7	0.10	0.19	0.0 (15 years)	0.5 (2 years)
18 to 19	1.5	0.13	0.28	0.0 (17 years)	0.9 (2017)
19 to 20	0.0	0.03	0.13	0.0 (19 years)	0.6 (2013)
20 to 21	0.7	0.07	0.22	0.0 (21 years)	0.9 (2017)

*** NOI = *Federal Register* Notice of Intent to prepare the EIS.**

4.4 Draft EISs

In calendar year 2018, 31 federal agencies made 175 draft EISs available to the public. Four of the draft supplemental EISs that supplemented final EISs had no NOI published in the *Federal Register* and are not included in our preparation-time calculations. In addition, one draft EIS was included in two separate EPA Notices of Availability. The second notice was not included in our calculations. Our 2018 sample includes 170 draft and draft supplemental EISs.

The 2018 annual average draft EIS preparation time for all agencies combined was 990±804 days (2.7±2.2 years) (see "ALL" in Table 4-3). The 2018 average preparation time was 109 days shorter that the 2017 average of 1099±1143 days (3.0±3.1 years) and 247 days shorter than the longest annual average 1237±1061 days (3.4±2.9 years) recorded in 2013. The 2018 average was 280 days longer than the shortest average 710±666 days (1.9±1.8 years) recorded in 2000.

In 2018, all agencies combined established a new high draft EIS-completion rate of 15.3% for the 3-to-4 year interval (see Table 4-4). No new low draft EIS completion rates were established in 2018.

In 2018, 13 agencies made only one draft EIS available to the public. These agencies required an average of 644±621 days (1.8±1.7 years) to complete. In contrast, agencies that made more than one draft EIS available during the year required 1,018±812 days (2.8±2.2 years) to complete.

The shortest annual average preparation time for draft EISs, 710±666 days (1.9±1.8 years), was recorded in the year 2000. For the period 2000–2018, the average draft EIS preparation time has increased at an average rate of 17 days per year (see Figure 5-2). The 2018 average rate of increase is 2.5 days shorter than the 2017 average.

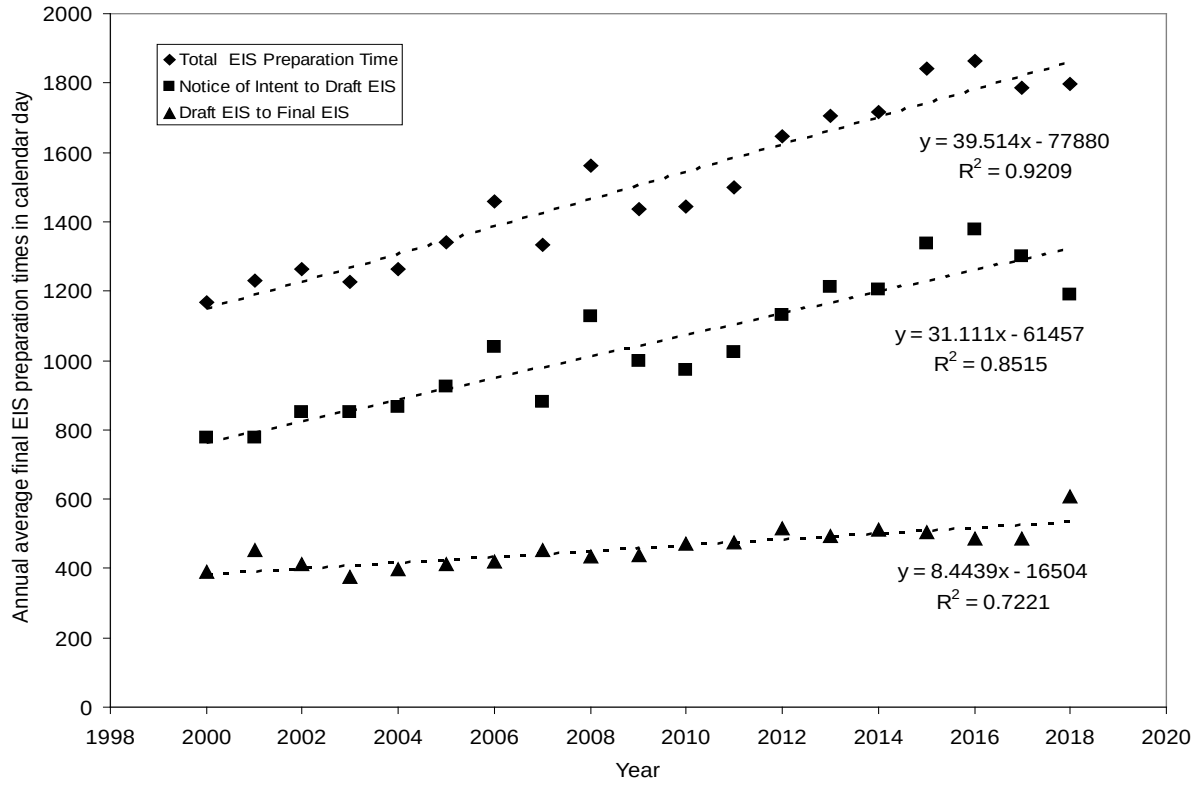

Figure 4-1. Average annual preparation times for final and final supplemental EISs made available by all federal agencies from 2000 through 2018 with their linear regression line and equation and coefficient of determination (R^2).

The shortest draft EIS preparation time during 2018, 4 days for the Department of State Draft Supplemental EIS for the Keystone XL Mainline Alternative Route was an anomaly. This controversial project, the subject of previous final and final supplemental EISs, was the subject of a May 25, 2018 NOI for the preparation of an environmental assessment (EA) that addressed an alternative pipeline route. After issuing the draft EA on July 30, 2018 for a 30-day public comment period, the Department of State decided to prepare a supplemental EIS based on the EA. The draft supplemental EIS was issued 4 days after its NOI.

Table 4-3. Preparation times in calendar days for draft and draft supplemental EISs made available in calendar year 2018.

Agency	n	%	Mean	s.d.	Median	Min.	Max.
ALL	170	100	990	804	772	4	4662
APHIS	3	1.8	622	226	623	396	848
BIA	3	1.8	1321	785	1159	630	2174
BLM	30	17.6	991	832	822	205	3103
BOEM	1	0.6	252				
BOR	2	1.2	1917	412	1917	1626	2208
CBP	1	0.6	765				

DOE	1	0.6	854				
DOS	1	0.6	4				
DVA	1	0.6	567				
FAA	2	1.2	751	156	751	640	861
FERC	14	8.2	979	424	1157	261	1565
FHwA	12	7.1	1291	1068	925	276	3549
FRA	2	1.2	1731	740	1731	1207	2254
FTA	2	1.2	1747	1550	1747	651	2843
FWS	7	4.1	1219	1040	855	211	3017
GSA	4	2.4	263	65	259	203	331
HHS	1	0.6	210				
HUD	2	1.2	498	302	498	284	711
NASA	1	0.6	2489				
NHTSA	1	0.6	380				
NOAA	11	6.5	677	438	589	147	1431
NPS	5	2.9	1807	553	2005	973	2352
NRC	3	1.8	326	60	338	2612	379
NSF	1	0.6	584				
OSM	2	1.2	1011	822	1011	429	1592
RUS	1	0.6	780				
TVA	1	0.6	571				
USACE	17	10.0	1247	1213	914	531	4662
USCG	1	0.6	106				
USFS	36	21.2	876	619	677	206	2843
USN	1	0.6	812				

n = number of EISs in sample; s.d. = standard deviation
CBP = Customs and Border Protection
DOS = Department of State
DVA = Department of Veterans Affairs

Table 4-4. A comparison of 2018 draft EIS completion rates with the average draft EIS completion rates for the period 1997 through 2017.

Completion Interval in Years from NOI*	2018 Completion Percentage	1997–2017			
		Average Completion Percentage	Standard Deviation	Lowest Completion Percentage (Year)	Highest Completion Percentage (Year)
0 to 1	22.4	25.9	6.5	13.9 (2013)	37.0 (2000)
1 to 2	25.9	28.4	3.8	21.9 (2005)	37.5 (2017)

2 to 3	17.1	16.8	2.9	12.0 (1999)	22.5 (2012)
3 to 4	15.3	10.0	2.4	6.2 (2001)	15.2 (2014)
4 to 5	5.3	6.5	1.8	2.5 (2000)	9.4 (2010)
5 to 6	4.7	4.0	1.7	1.7 (2017)	7.9 (2005)
6 to 7	3.5	3.1	1.3	0.7 (1998)	5.1 (2015)
7 to 8	1.8	1.5	0.71	0.3 (2005)	2.8 (1997)
8 to 9	2.4	1.2	1.0	0.0 (3 years)	4.2 (2017)
9 to 10	1.2	0.92	0.68	0.0 (2 years)	2.5 (2012)
10 to 11	0.0	0.41	0.57	0.0 (10 years)	2.0 (2014)
11 to 12	0.0	0.42	0.43	0.0 (7 years)	1.7 (2015)
12 to 13	0.6	0.32	0.57	0.0 (11 years)	2.5 (2013)

* NOI = Federal Register Notice of Intent to Prepare the EIS

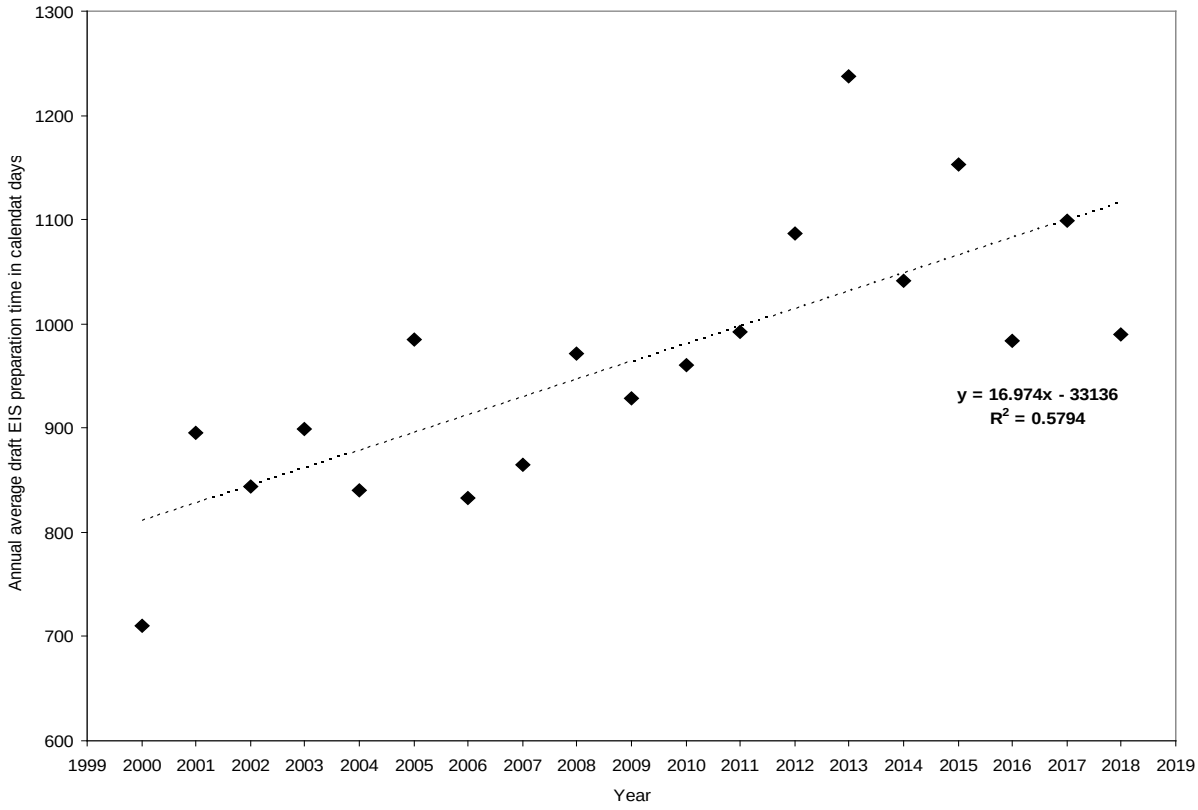

Figure 4-2. Average annual preparation times for draft and draft supplemental EISs made available by all federal agencies from 2000 through 2018 with their linear regression line and equation and their coefficient of determination (R^2).

4.5 Agency Ranks by Preparation Times

Table 4-5 ranks the agencies that prepared draft and/or final EISs in 2018 from the longest average to the shortest average. Five agencies appear in the ten longest averages for both draft and final EISs: Federal Transit Administration, Federal Highway Administration, U.S. Army

Corps of Engineers, Fish and Wildlife Service, and Office of Surface Mining. Three agencies appear in the ten shortest averages for both draft and final EISs: Housing and Urban Development, Tennessee Valley Authority, and Health and Human Services.

Table 4-5. Average preparation times in calendar days for Draft and Final EISs made available in 2018 arranged in descending order.

2018 Final EISs			
Rank	Agency	n	Mean
1	FTA	5	4,032
2	DOE	2	3,694
3	FHWA	12	2,967
4	GSA	1	2,655
5	USACE	18	2,580
6	WAPA	1	2,187
7	FWS	7	1,960
8	OSM	1	1,921
9	BPA	1	1,898
10	APHIS	2	1,745
11	NRC	3	1,463
12	USN	4	1,458
13	USFS	37	1,421
14	BLM	17	1,414
15	BOR	2	1,397
16	NPS	4	1,385
17	BOEM	1	1,071
18	FERC	4	1,040
19	HUD	2	1,005
20	NSF	1	864
21	NCPC	1	820
22	FAA	1	742
23	USAF	3	741
24	TVA	2	585
25	NOAA	3	566
26	DC	1	371
27	HHS	1	371

2018 Draft EISs			
Rank	Agency	n	Mean
1	NASA	1	2,489
2	BOR	2	1,917
3	NPS	5	1,807
4	FTA	2	1,747
5	FRA	2	1,731
6	BIA	3	1,321
7	FHWA	12	1,291
8	USACE	17	1,247
9	FWS	7	1,219
10	OSM	2	1,011
11	BLM	30	991
12	FERC	14	979
13	USFS	36	876
14	DOE	1	854
15	USN	1	812
16	RUS	1	780
17	CBP	1	765
18	FAA	2	751
19	NOAA	11	677
20	APHIS	3	622
21	NSF	1	584
22	TVA	1	571
23	DVA	1	567
24	HUD	2	498
25	NHTSA	1	380
26	NRC	3	326
27	GSA	4	263
28	BOEM	1	252
29	HHS	1	210
30	USCG	1	106
31	DOS	1	4

NCPC = National Capital Planning Commission; DC = Denali Commission; DVA = Department of Veterans Affairs; DOS = Department of State.

5. 2018 NEPA Legislation

Charles P. Nicholson, PhD[9]

5.1 Introduction

The 115th session of Congress began on January 3, 2017 with a sizeable Republican majority in the House of Representatives and a narrow Republican majority in the Senate. Newly inaugurated President Donald Trump made reducing regulation, including environmental regulation, and expanding and more rapidly approving infrastructure major focus areas for his administration. Therefore, the likelihood of legislation affecting NEPA, as well as related environmental laws and regulations, appeared high early in the session.

Approximately 250 bills containing the phrase "National Environmental Policy Act" and/or addressing the environmental review process under NEPA were introduced in the 115th Congress. 161 of these bills were introduced in 2017 and 89 were introduced in 2018. Excluding duplicate bills introduced in both the Senate and House and bills that were later incorporated into other bills, about 190 unique bills were introduced. A significant number of these bills were introduced during the first weeks of the session and they included several with major NEPA implications. Some of these, such as the REBUILD Act of 2017 (H.R. 481) and the Federal Land Freedom Act of 2017 (S. 335, H.R. 3565) had been introduced in previous sessions of Congress but failed to pass. Most of the NEPA-related bills introduced in the 115th session of Congress did not affect NEPA compliance processes and addressed NEPA through clauses stating that the subject activity must comply with NEPA and other laws.

House and Senate committees held multiple hearing that addressed NEPA compliance and associated permitting processes for energy, transportation, communications, and water infrastructure, electric utility right-of-way management, forest management, sage grouse management, livestock grazing, and other topics. Legislative hearings focused on proposed legislation. Other broader oversight hearings addressed compliance processes more generally and phrases such as barriers to deployment, modernizing environmental laws, bureaucratic roadblocks, deficiencies in permitting processes, and federal natural resource laws gone astray appeared in the title or memoranda for several of these hearings. Few of the broader NEPA oversight hearings appeared to result in bills introduced in the 115th Congress.

Two oversight hearings held by the House Committee on Natural Resources directly addressed NEPA: "Modernizing NEPA for the 21st Century" held November 30, 2017 (see https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=106653 and https://republicans-naturalresources.house.gov/calendar/eventsingle.aspx?EventID=403418) and "The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare" on April 25, 2018 (see https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=108215).

By the time the 115th Congress adjourned on January 3, 2019, 13 bills that addressed NEPA had become law. Nine of these bills did not affect NEPA compliance processes. Four of the bills that

[9] PO Box 402, Norris, TN 37828; cpnicholson53@gmail.com
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became law, all introduced in 2018, had more substantive NEPA provisions. At adjournment, about a quarter of the bills had been reported (i.e., recommended to the full chamber for consideration and passage) and a smaller number had been passed by either the House or Senate. The majority of the other bills with substantive NEPA provisions never received a vote in the House or Senate committees to which they were referred.

The remainder of this article describes the substantive NEPA provisions of the bills that became law and summarizes the substantive NEPA provisions of bills introduced in 2018 that did not become law. NEPA bills introduced in 2017 are summarized in the 2017 NEPA Annual Report; several of these that received a vote in 2018 are described below. The bills that did not become law are categorized by the major NEPA compliance topic(s) that they address. Unless stated otherwise, the bills did not receive a committee vote. The complete text of all the bills mentioned in this report is available at https://www.congress.gov/.

5.2 Enacted Legislation

S. 3021 (Public Law 115-270), **America's Water Infrastructure Act of 2018**, enacted in October 2018, authorizes and funds Corps of Engineers water resources projects and funds the Environmental Protection Agency's Drinking Water State Revolving Fund program. It also, among other things, addresses the Federal Energy Regulatory Commission licensing of certain hydroelectric projects. This bill combined **H.R. 8**, the **Water Resources Development Act of 2018**, and **S. 2800**, also titled America's Water Infrastructure Act of 2018. H.R. 8 had passed in the House and S. 2800 was reported by the Senate Committee on Environment and Public Works but subjected to a hold on the Senate floor over an unrelated issue. S. 3021 passed with strong bipartisan support. It also incorporates provisions of other bills, including **S. 2655**, **H.R. 2872,** and **H.R. 2696**, all titled **Promoting Hydropower Development at Existing Nonpowered Dams Act,** and **H.R. 2880,** the **Promoting Closed-Loop Pumped Storage Hydropower Act.**

Title I – Water Resources Development, Section 1126 addresses the purpose and need statements for water storage projects. It states that no later than 90 days after receipt of a complete application for a water storage project, the Corps District Engineer shall develop and provide to the applicant a purpose and need statement that describes whether the District Engineer concurs with the applicant's assessment of the purpose of and need for the project. If the District Engineer does not concur, the applicant is to be provided an assessment by the District Engineer of the purpose of and need for the project. The development of the EIS or EA for the project "shall not substantially commence" until the District Engineer provides a purpose and need statement to the applicant.

Title III – Energy contains three sections on the licensing of hydropower facilities. Section 3002 raises the maximum capacity of conduit hydropower facilities qualifying for exemption from FERC licensing – and the associated NEPA review – from 5 megawatts to 40 megawatts.

Section 3003 addresses the licensing process for hydropower development at existing nonpowered dams. It amends Part I of the Federal Power Act (16 U.S.C. 792 et seq.) by adding a new Section 34 on Promoting Hydropower Development at Existing Nonpowered Dams. It directs FERC to issue a rule within 180 days establishing an expedited process for issuing and amending licenses for qualifying facilities and to convene an interagency (federal, state, tribes)

task force to coordinate the regulatory processes. Qualifying facilities shall not result in any material change to the storage, release, or flow operation of the associated nonpowered dam. The expedited process must ensure a final decision on the application for the FERC license will be made within two years after receipt of the completed application. The amendment also specifies that interagency communications relating to licensing process coordination shall not be considered to be ex parte communications under FERC rules and that, to the extent practicable, agency staff cooperating with FERC under NEPA are separated from agency staff participating in the licensing proceeding.

Section 3004 addresses the licensing process for closed-loop pumped storage projects. It amends Part I of the Federal Power Act by adding a new Section 35 on Closed-Loop Pumped Storage Projects. Similar to Section 3003, it requires FERC to issue a rule establishing an expedited licensing process within 180 days and to establish an interagency task force. The final decision is to be made within two years after receipt of a completed application. Qualifying closed-loop pumped storage projects must cause little to no change to existing surface and ground water flows and uses and be unlikely to adversely affect species listed as threatened or endangered under the Endangered Species Act.

FERC published the proposed rule on the licensing process for qualifying existing nonpowered dams and for closed-loop pumped storage projects on February 7, 2019. The final rule was published on April 24, 2019 and is available at https://www.federalregister.gov/documents/2019/04/24/2019-08239/hydroelectric-licensing-regulations-under-the-americas-water-infrastructure-act-of-2018.

The **Agriculture Improvement Act of 2018 (H.R. 2, S. 3042)** the five-year, omnibus Farm Bill enacted in December 2018, contains provisions on the environmental review of watershed protection actions, sage-grouse and mule deer habitat management actions, and leasing of U.S. Forest Service administrative sites.

- Title VIII – Forestry, Section 8404 amends the Healthy Forests Act of 2003 by adding Section 303 on Water Source Protection Program. This section enables the Secretary of Agriculture to carry out watershed protection and restoration projects on National Forest System land. Proposed activities are to be described in water source management plans that are consistent with the area forest plan. The secretary may conduct a single EIS or similar analysis required under NEPA for the plan or for each included project.

- Title VIII – Forestry, Part I is titled Expedited Environmental Analysis and Availability of Categorical Exclusions to Expedite Forest Management Activities. Section 8611 directs the Secretary of Agriculture and Secretary of Interior to develop a categorical exclusion for specified vegetation management activities carried out to protect, restore, or improve habitat for greater sage-grouse and mule deer. The CatEx is to be developed within one year and its application must comply with National Forest System and public lands extraordinary circumstances procedures. Part II, Miscellaneous Forest Management Activities, Section 8623 addresses the leasing of Forest Service administrative sites. The environmental review of the lease of an administrative site of up to 40 acres is only required to analyze the most reasonably foreseeable use of the site, as determined through market analysis, and the no-lease alternative.

The **Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019 (H.R. 5895)**, enacted in September 2018, in Title II, Section 233, prohibits the use of funds to conduct an environmental assessment of Veterans Health Administration medical facilities as part of a planned realignment of Veterans Affairs services until the Secretary provides a report to Congress. This report must include, among other things, detailed realignment plans, a cost-benefit analysis of each planned realignment, an inventory of Veterans Affairs buildings with historic designation, a description of how the realignment will be consistent with the requirements of the National Historic Preservation Act, and consideration for the reuse of historic buildings.

The **VA MISSION Act of 2018 (S. 2372, H.R. 5674)**, was enacted in June 2018. Title II—VA Asset and Infrastructure Review requires the Veterans Administration to establish a nine-member Asset and Infrastructure Review Commission charged with preparing a report on Veterans Health Administration (VHA) facility modernization and realignment. Section 205 exempts actions by the President, the Department of Veterans Affairs, and the Commission to implement the Commission recommendations from NEPA. Exceptions are for Veterans Affairs actions "during the process of property disposal" and "during the process of relocating functions from a facility of the Veterans Health Administration being closed or realigned to another facility after the receiving facility has been selected but before the functions are relocated." During the review of these relocation actions, the Secretary does not have to consider the need for the action as recommended by the Commission or alternative facilities. The VA Mission Act of 2018 incorporates provisions of the **VA Asset and Infrastructure Review Act of 2017 (H.R. 4243)**.

5.3 Proposed Legislation

Delegation of NEPA Responsibilities
The **Practical Reforms and Other Goals To Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGRESS) for Indian Tribes Act of 2018 (S. 2515)** would authorize tribes that have entered into a self-governance compact to assume some NEPA responsibilities for construction projects. The Senate passed this bill; the House committee did not act on it.

Division A, Title I, Subtitle B of the **Jobs and Justice Act of 2018 (H.R. 5785)** would establish the Community Resilience Grant Program. The Secretary of Housing and Urban Development would be authorized to release program block grant funds to recipients who assume environmental review responsibilities under NEPA. The Secretary would also issue regulations on the delegation process after consultation with the Council on Environmental Quality.

The **Rural Broadband Permitting Efficiency Act of 2018 (H.R. 4824),** Section 3, would authorize the Secretary of Agriculture and Secretary of Interior to establish a voluntary program to allow a state or tribe to prepare the NEPA analysis for permitting of broadband projects within an operational right-of-way on public lands and Indian lands. The state or tribe must have staff qualified to conduct the review. Section 4 directs the Secretaries to establish a broadband permit streamlining team in each state or regional office with responsibility for issuing permits for broadband projects. The House passed H.R. 4824; the Senate did not act on it. H.R. 4824 is

similar to the **Highway Rights-of-Way Permitting Efficiency Act of 2017 (S. 604)** which was introduced in March 2017 and did not receive a committee vote.

Exemptions from NEPA

A few bills addressing exemptions from NEPA focused on publicly owned lands. The **Localizing Authority of Management Plans (LAMP) Act of 2018 (H.R. 6364)** would exempt cooperative management agreements for endangered or threatened species, species proposed for listing, and candidates for listing on non-Federal and Federal lands. The **Combustion Avoidance along Rural Roads (CARR) Act (H.R. 7042)** would authorize the Secretary of Interior and Secretary of Agriculture to carry out wildfire mitigation activities within 500 feet of any road on Federal land "without regard to" NEPA and the Endangered Species Act. The **Hardrock Leasing and Reclamation Act of 2018, H.R. 5753**, states that the Secretary of Interior and the Secretary of Agriculture are not required to conduct a NEPA analysis of a noncompetitive mining lease if the noncompetitive lease does not authorize any additional surface disturbance to the surface of an area already authorized under a mine plan of operations. **H.R. 6924**, **"To authorize the Secretary of the Interior to convey certain public land within the Henry's Lake Wilderness Study Area in the State of Idaho to resolve an unauthorized use and an occupancy encroachment dating back to 1983,"** would exempt the conveyance of 0.9 acres of land in the Wilderness Study Area from the requirements of NEPA. The **Streamlining Permitting to Enable Efficient Deployment of Broadband Infrastructure (SPEED) Act of 2018 (H.R. 4842)** would amend the Communications Act of 1934 to exempt Federal Communications Commission permitting of certain communications facilities within a public ROW from review under NEPA. It would also exempt the granting of easements for certain communication facilities on Federal property from review under NEPA. This CatEx provision was also included in the similar **SPEED Act of 2017, S. 1988**.

Other bills on exemptions from NEPA addressed a range of topics. The **Whaling Convention Amendments Act of 2018 (H.R. 5064)** would exempt the authorization of aboriginal subsistence whaling from review under NEPA if the Secretary of Commerce determines the action is sustainable based on the most recent review of the status of the whale stock by the Scientific Committee of the International Whaling Commission.

The **Ensuring Small Scale LNG Certainty and Access Act (H.R. 4606)** would exempt the approval by the Federal Energy Regulatory Commission of the import or export of a volume of natural gas that does not exceed 0.14 billion cubic feet/day from the preparation of an EA or EIS. This bill passed the House but was not reported by committee in the Senate.

With immigration and border security a major focus of the Trump administration, several bills addressing this topic were introduced. They contained similar sections aimed at clarifying the conditions under which U.S. Customs and Border Protection has authority to waive compliance with NEPA and numerous other environmental laws. These bills include the **Border Security for America Act of 2017 (H.R. 3548), American Border Act (H.R. 6415), Border Security and Immigration Reform Act of 2018 (H.R. 6136), Securing America's Future Act of 2018 (H.R. 4760), Building America's Trust Act (S. 1757), and SECURE Act of 2017 (S. 2192)**. H.R. 4760 and H.R. 6136 failed to pass in House floor votes. None of the others emerged from committee.

Not Major Federal Actions under NEPA

The **Federal Lands Fire-Related Incidents Recovery and Economic Stimulus (Federal Lands FIRES) Act of 2018 (H.R. 6799)** authorizes the President to declare a Federal lands wildfire disaster where at least 40 percent of the burned area consists of Federal lands. Actions to restore facilities to pre-disaster conditions would not be deemed a major Federal action significantly affecting the quality of the human environment under NEPA.

The **Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act (H.R. 7034)** declares that the execution of the subject proposed agreement by the Secretary of Interior is subject to NEPA but not a major Federal action under NEPA. The similarly named **S. 2154** was introduced in late 2017 and favorably reported by the Senate committee.

The **Black Mountain Range and Bullhead City Land Exchange Act of 2018 (S. 3634, H.R. 6738)** declares that the exchange of 345 acres of Federal land for 1,100 acres of non-Federal land in Arizona shall not constitute a major Federal action for purposes of NEPA.

S. 3727 and **H.R. 7226**, the **Good Samaritan Remediation of Orphan Hardrock Mines Act of 2018**, declares that the issuance and modification of Good Samaritan permits by the EPA Administrator for covered mine reclamation activities shall not be considered a major Federal action significantly affecting the quality of the human environment for purposes of NEPA. Related actions by the Secretary of Agriculture or Secretary of Interior are subject to NEPA.

The **Opportunities for the Nation and States to Harness Onshore Resources for Energy (ONSHORE) Act (S. 2319)** declares that oil and gas operations on a non-Federal surface estate where the U.S. mineral ownership interest is 50 percent or less shall not require a permit from the Bureau of Land Management and shall not be considered a major Federal action under NEPA. Title II of **H.R. 4239**, the **Strengthening the Economy with Critical Untapped Resources to Expand (SECURE) American Energy Act**, introduced in late 2017, incorporated the provisions of S. 2319. The House committee favorably reported H.R. 4239 in November 2018. The Senate committee did not take action on S. 2319.

The **Reducing Antiquated Permitting for Infrastructure Deployments (RAPID) Act[10] (S. 2576, H.R. 5378)** directs the Federal Communications Commission to determine the classes of activities of entities to which the Commission issues radio station licenses that do not constitute a major Federal action under NEPA and are not an undertaking under the National Historic Preservation Act.

Categorical Exclusions

The **Protecting American Communities from Wildfire Act (H.R. 7315)** categorically excludes specified wildfire risk reduction actions in wildland-urban interface areas and prohibits the judicial review of the actions. It makes no mention of extraordinary circumstances.

[10] This RAPID Act is different from the **Revitalizing American Priorities for Infrastructure Development (RAPID) Act (S. 3631)** that addresses the transportation infrastructure finance and innovation (TIFIA) program. S. 3631 requires, among other things, that projects eligible for a TIFIA loan have received a CatEx, a FONSI, or a ROD under NEPA.

H.R. 4845, the **Connecting Communities Post Disasters Act of 2018**, declares that the construction, rebuilding, and hardening of communications facilities following a major disaster or emergency declared by the President shall treated as categorically excluded and not subject to Section 106 of National Historic Preservation Act. The bill does not address the consideration of other extraordinary circumstances.

The **Reclamation Title Transfer and Non-Federal Infrastructure Incentivization Act (H.R. 3281)** states that the Secretary of Interior shall apply a categorical exclusion process under NEPA on the title transfer for eligible Bureau of Reclamation projects or facilities.[11] Eligibility criteria include that the transfer will not have an unmitigated significant effect on the environment and that the receiving entity intends to use the property for substantially the same purposes the property was used for at the time the transfer was evaluated. This bill passed the House in July 2018; the Senate committee did not consider it.

Two bills would categorically exclude certain oil and gas exploration and development activities. The **Common Sense Permitting Act (H.R. 6106)** would amend the Energy Policy Act of 2005 to categorically exclude certain oil and gas exploration and development actions on public lands. Qualifying actions would be limited to 20 acres of new surface disturbance, 2 miles of new road, and 3 miles of pipelines or utilities. It does not address extraordinary circumstances. The **Ending Duplicative Permitting Act (H.R. 6107)** would categorically exclude Federal drilling permits for certain oil and gas exploration and production activities conducted on non-Federal surface estate. It would also exempt these activities from Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act. Both of these bills were favorably reported by committee but neither received a vote in the full House.

The **Public Land Recreational Opportunities Improvement Act (S. 3550)** would require the Secretary of Interior and Secretary of Agriculture, within 1 year, to evaluate potential categorical exclusions that would reduce processing times and costs for issuance and renewal of special recreation permits without significantly affecting the human environment. If the review determines that a CatEx would reduce the times or costs of issuance and renewal of special recreation permits without significantly affecting the human environment, the Secretaries are directed to establish that CatEx. The Cat Ex shall apply agency extraordinary circumstances procedures. S. 3550 also authorizes the Secretaries to use a programmatic environmental review and adopt or incorporate material from a previous EIS or EA.

The **Guides and Outfitters (GO) Act (S. 2355)** would categorically exclude new special recreation permits issued by Secretary of Agriculture and Secretary of Interior if the proposed use is same as or similar to a previously authorized use, subject to application of extraordinary circumstances procedures. The Secretaries would also, within 180 days of enactment, revise their regulations to streamline the issuance and renewal of outfitter and guide special use permits by providing for the use of programmatic EAs and CatExs. The similar **H.R. 289**, with the same title, was introduced in January 2017 and passed in October 2017. Neither S. 2335 nor H.R. 289 was acted upon in Senate committee.

[11] The NAEP submitted comments to the Bureau of Reclamation on the Bureau's October 17, 2018 Notice of Proposed Revisions to establish such a categorical exclusion.

Limits on Public Involvement
The **Emery County Public Land Management Act of 2018 (H.R. 5727, S. 2809, S. 3803)** declares that an EA or EIS on the conveyance of certain public lands in Utah is not required to address actions other than the proposed agency action and the no action alternative. H.R. 5727 was favorably reported by Committee but did not receive a vote in the full House. S. 2809 was favorably reported by Senate committee but did not receive a vote in the full Senate. S. 3803 was introduced but not assigned to a committee.

H.R. 3053, the **Nuclear Waste Policy Amendments Act of 2018** declares that the NEPA review of infrastructure activity associated with the Yucca Mountain repository need not consider alternative actions or a no-action alternative. Other Federal agencies are directed to adopt the analysis prepared by the Secretary of Energy.

Limits on Judicial Review
The **North Texas Water Supply Security Act of 2018 (S. 3202, H.R. 4423)** would prohibit the judicial review of the authorization of Lower Bois d'Arc Creek Reservoir Project in Texas unless the claim is filed within 105 days after final approval and filed by a party that submitted comments during public comment period on the revised DEIS.

Scope of NEPA Review
The **I-5 Corridor Cooperation Act (H.R. 6673)** would require that any NEPA review of tolling along segments of I-5 and I-205 in the Portland, Oregon – Vancouver, Washington area include an economic impact study.

General Streamlining
This section includes bills that address the streamlining the NEPA review and decision making in ways that are not addressed in the other categories in this report, including time limits, reviews of NEPA compliance processes, designation of lead and cooperating agencies, and the use of programmatic reviews.

The **Streamlining Permitting Efficiencies in Energy Development (SPEED) Act (H.R. 6088)** directs the Secretary of Interior to, within 1 year, establish procedures by which an operator may conduct drilling and production activities on Federal and non-Federal land after sending the Secretary a notification of permit to drill in lieu of obtaining an application for permit to drill. The Secretary may not object to a notification of permit to drill where the drilling will be in a developed field reviewed within 10 years under NEPA, an area with less than 150 acres of total surface disturbance in area reviewed within 10 years under NEPA, or an area in which a CatEx applies for oil and gas drilling. In each case, the NEPA review must have analyzed drilling as reasonably foreseeable activity. The previous review must have concluded that the actions proposed in the notification of permit to drill "pose no significant threat on the human environment or threatened or endangered species" and "pose no significant effects on cultural or historic properties or resources." The decision by the Secretary to not object to the notification of permit to drill (i.e., approving it) would not constitute a major Federal action under NEPA. H.R. 6088 was favorably reported by the House committee but did not receive a House vote.

The **LNG Permitting Certainty and Transparency Act (S. 3495)** would require the Secretary of Energy to issue the final decision on an application for authorization to export natural gas no

later than 45 days after completion of the NEPA review. The judicial review the action must be in the circuit court where the facility located or in the U.S. Court of Appeals for District of Columbia Circuit, and the court will give the review expedited consideration.

S. 3475, "A bill to require a report on multiagency use of airspace and environmental review," would require the Federal Aviation Administration in consultation with the Secretary of Defense to submit to Congress a report on resolving challenges for special use airspace requests in support of short notice testing requirements at Major Range and Test Facility Bases. The report shall include an analysis of challenges and progress in complying with NEPA.

The **Public Land Recreational Opportunities Improvement Act (S. 3550)** authorizes the Secretary of Agriculture and Secretary of Interior to use a programmatic environmental review and adopt or incorporate material from a previous EIS or EA when issuing and renewing a special use permit.

The **Advancing the Quality and Understanding of American Aquaculture (AQUAA) Act (S. 3138)** would establish a regulatory system for marine aquaculture in the U.S. exclusive economic zone. It would require the Secretary of Commerce to issue aquaculture permits within 30 days after a public comment period on the completed application has concluded, if requirements under NEPA and other laws have been completed within that timeframe, or to notify applicant that the permit decision has been deferred. The National Oceanic and Atmospheric Administration would be the lead agency for a single consolidated environmental review under NEPA for all applicable Federal permits with input from other Federal agencies as cooperating agencies. Agencies would conduct a coordinated review with a single request for public comment. The Secretary would initiate and lead programmatic EISs for areas determined to be highly favorable for marine aquaculture and likely compatible with other uses. Individual projects may require additional review pursuant to NEPA.

S. 3056, the **North American Energy Infrastructure Act**, would require the Federal Energy Regulatory Commission, for pipelines, and the Department of Energy, for electric transmission facilities, to issue a certificate of crossing for a border-crossing facility within 120 days after the final action under NEPA, unless it is not in the public interest. The related **Promoting Cross-Border Energy Infrastructure Act (HR. 2883)**, introduced in June 2017, would set the same time limit for the issuance of a certificate of crossing.

Three related bills address the assumption of environmental review responsibilities by state Departments of Transportation under the surface transportation project delivery program. For states that have assumed NEPA responsibilities, **S. 2586** would amend the Federal Water Pollution Control Act to allow the states to administer individual and general Clean Water Act Section 404 permitting responsibility for highway projects. **S. 2587** would similarly amend the Endangered Species Act of 1973 to allow the states to assume Section 7 responsibilities for highway projects. **S. 2588** would amend Title 54, United States Code, to allow the states to assume National Historic Preservation Act Section 106 responsibilities for highway projects.

The **Land Grant and Acequia Traditional Use Recognition and Consultation Act (H.R. 6487)** would require the Secretary of Agriculture and Secretary of Interior, when developing a management plan, for which an EIS is being prepared, for an area that contains a qualified land

grant-merced to involve the governing body of the qualified land grant-merced. It would also establish schedule milestones for completing an EA or EIS on proposed actions on a qualified land grant-merced or qualified acequia on Federal land.

The **Water Supply Infrastructure and Drought Resilience Act of 2018 (S. 2563)** contains a Title I, Subtitle A on Water Supply Permitting Coordination. It states that new surface water storage projects on Department of Interior or Department of Agriculture land that are not otherwise covered under Title XLI of the FAST Act or Section 2045 of the Water Resources Development Act of 2007 would be subject to a unified environmental review process for all agency approvals. The Bureau of Reclamation would be the lead agency. Federal approvals must be made within 1 year of acceptance of a substantially complete proposal for projects with an EA and FONSI, and within 1 year and 30 days from the close of public comment period for a DEIS. S. 2563 is similar to other bills introduced in the 115th session of Congress including the **Bureau of Reclamation Transparency Act (H.R. 660, S. 216**; passed by the House) and the **Water Supply Permitting Coordination Act (H.R. 1654, S. 677**, passed by the House). The Water Supply Permitting Coordination Act is also incorporated as Title V of the **Gaining Responsibility on Water (GROW) Act of 2017 (H.R. 23)**, which was passed by the House and referred to committee in the Senate.

The **Nuclear Utilization of Keynote Energy (NUKE) Act (H.R. 1320)** was introduced in 2017 and passed in the House in September 2018. It directs the Nuclear Regulatory Commission to issue the DEIS for a production or utilization facility within 24 months, and the FEIS within 42 months, of the acceptance of the application. It also directs the NRC to prepare a supplemental EIS for a combined construction permit and operating license for a site for which an early site permit has been issued and an EIS prepared. H.R. 1320 was referred to committee in the Senate and received no further action.

S. 2602 and the similar **H.R. 7347**, the **Utilizing Significant Emissions with Innovative Technologies (USE IT) Act** encourage the development of programmatic environmental reviews under NEPA for carbon capture, utilization, and sequestration projects and carbon dioxide pipelines. It was favorably reported by the Senate committee but did not receive a floor vote.

The **Federal Lands Infrastructure Partnership (FLIP) Act (H.R. 5170**) would reauthorize and reform the Land and Water Conservation Fund. It would also establish a pilot program to streamline the Federal permitting, including compliance with NEPA, of Federal energy-related activities on the Outer Continental Shelf. Qualified staff from multiple agencies would be assigned to at least three regional pilot offices to implement the program.

6. Perspective: NEPA in Action – The Historical Validity of Streamlining

Ron Deverman, CEP[12], Liz Ellis[13], and Roger Turner[14]

6.1 Introduction

For National Environmental Policy Act (NEPA; 42 U.S.C. §4321 et seq.) practitioners and policy-makers, it is important to understand the history behind NEPA streamlining. "Streamlining," in this context, is generally considered to mean the timely delivery of a proposed development project while minimizing potential impacts to the built and natural environment. This is important because, due to the 2017 Executive Order (EO) 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, there is much agency discussion about what can be done to further streamline environmental reviews. Over the years since NEPA was enacted, there have been many different contexts, many different approaches, and different points of reference within what truly defines successful project delivery. An important consideration has always been understanding the regulatory premises that drive the desire to streamline. The seemingly constant interest to streamline environmental reviews is tied to the desire to accelerate decision-making, to reduce project delays, and ultimately to save money. This interest implies that timely project outcomes are not happening; at least not happening with enough regularity that agency staff, decision-makers, and elected officials are dissatisfied and continue to convey a need to streamline NEPA environmental processes. But the reality within NEPA practice is that there is little substantive data to support these claims.

Practitioners seasoned in managing transportation infrastructure projects, for example, know there are always a few projects that are subject to delays and cost overruns during the environmental process. But the authors ask the following questions: is it safe to assume these unwanted outcomes are directly tied to the environmental process itself? And where is the line drawn that begins to restrict the elemental nature of NEPA rooted in critical thinking? In January 1997, the Council on Environmental Quality (CEQ) conducted a robust study focusing on this issue and NEPA's effectiveness after 25 years (CEQ 1997). The study concluded that project delays and cost overruns on projects that are the subject of complex environmental impact statements (EISs) are actually more often the direct result of changing the project's definition mid-stream, slowing down project funding, or inhibiting agency decision-making during the NEPA process. Studies by several federal agencies, like the Federal Highway Administration (FHWA), have supported these findings and have cited additional reasons leading to substantive delays: duplicative regulatory processes, changes in agency priorities, scarcity of agency resources (staffing and funding), and dependence on case law to define a project or agency's procedural direction.

[12] Associate Vice-President, Environmental Services/Transportation Planning, HNTB Corporation, One South Wacker Drive, Suite 900, Chicago, IL 60606; rdeverman@hntb.com
[13] Senior Planner, Environmental Review and Cultural Resource Review and Coordination, Financial Management Section, Water Quality Program, Washington State Department of Ecology, P.O. Box 47600, Olympia, WA 98504-7600; liz.ellis@ecy.wa.gov
[14] Roger Turner and Associates, Riverside, CA; rwturner44@gmail.com

6.2 Historical Context of NEPA

To establish further context to streamlining, it is important to remember and understand a few basics about the National Environmental Policy Act (NEPA). NEPA is a declaration of policy with action-forcing provisions, not a regulatory statute comparable to the various environmental laws that were promulgated to protect clean air, clean water, and other natural resources. As explained by Luther (2006), NEPA establishes an integrated framework under which decision making can proceed. NEPA does not explicitly explain how this process should occur, and the CEQ does not have the authority to enforce NEPA (Trnka and Ellis 2014).

Prior to NEPA, federal agencies frequently made decisions without consulting each other, much less anyone else like the public who may be affected by project development decisions. Senator Henry "Scoop" Jackson grew concerned at both the impacts of these inefficient and ineffective decisions and the lack of communication. As chair of the Senate Committee on Interior and Insular Affairs, Senator Jackson witnessed parts of the federal government working against each other due to different federal mandates and missions. Jackson gathered the agency heads from the U.S. Army Corps of Engineers, the Department of Interior, and the Federal Highway Administration to discuss this dilemma. He discovered quickly that while one agency tried to protect land, another agency tried to bulldoze a road through it, and no one from either federal agency was communicating anything to anyone.

"This was the root of the problem that Jackson was trying to address: he wanted a mechanism to force federal decision makers at the lowest possible levels to identify objectives and conflicts before they committed funds and undertook irreversible actions," wrote Robert G. Kaufman in a 2000 Jackson biography (Kaufman 2000).

With this challenge foremost in his mind, Jackson and Daniel Dreyfus, a Jackson staffer, worked on legislation that met with some interference but also some avid support, such as the support from Representative John Dingell of Michigan. The bill was debated by the House and Senate, and after a number of amendments, the bill included three key elements: 1) a sweeping declaration of national environmental policy, 2) a statement asserting that "…each person has a fundamental and inalienable right to a healthful environment," and 3) several action-forcing mechanisms requiring federal officials to report their "findings" of the probable environmental impacts of their proposed projects. The original bill did not require the "detailed statement" (i.e., the EIS).

The insertion of a "detailed statement" on the environmental impacts of a project came later, during discussions with Senator Edmund Muskie, chairman of the Senate Public Works Committee, who was working on a strong and sweeping water pollution bill (later called the Clean Water Act). One area the two Senators did not agree upon was the level of trust to be granted to the federal agencies. Muskie did not trust federal agencies to enforce compliance on themselves and wanted an external policing mechanism to replace the "findings" statement. In testimony before Muskie's Senate Public Works Committee in the spring of 1969, Dr. Lynton K. Caldwell, an early advocate of interdisciplinary environmental studies and consultant to Jackson, expressed the compelling idea that for every proposed project there should be "an evaluation of the effects of these proposals upon the state of the environment" (Caldwell 1998; Caldwell and Van Ness 1968). In the end, the two powerful Senators, Jackson and Muskie, reached a compromise. They strengthened the "findings" provision by adding language requiring federal

officials to produce a detailed statement on the environmental impact of a project, including the impacts of alternatives to the proposed action. The EIS was now in the compromise bill (Kersher 2011).

The bill went to the Conference Committee where one final change was made, which dissatisfied Senator Jackson. The original language clearly stated, “each person has a fundamental and inalienable right to a healthful environment.” This was changed to the current language - "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment" (*NEPA* statute; Sec. 101 [42 USC § 4331]). Jackson opposed this change, stating in a December 20, 1969 speech on the Senate floor: "I opposed this change ... Every person does have a fundamental and inalienable right to a healthful environment. If this is not the law of the land ... then it is my view that some fundamental changes are in order" (*Kersher 2011*). President Richard Nixon signed NEPA on January 1, 1970. Caldwell was the principal author of the Act itself, and he is attributed with creating the concept of the environmental impact statement (*Kersher 2011*).

Environmental interests and activists immediately understood the importance of the NEPA bill. They demanded transparency and “a detailed statement” for large federal projects such as oil pipelines and nuclear power projects. Federal agencies struggled after NEPA was enacted, and the Army Corps of Engineers eventually complained that “NEPA had been responsible for modifications, delays or halts in 350 of its projects.” (Kersher 2011).

With NEPA in place, some states began to pass similar laws, with the California Environmental Quality Act passing in 1970, and Washington State passing its State Environmental Policy Act in 1971. NEPA has evolved in practical application over the decades. The CEQ, which was created by NEPA, reported that litigation connected with NEPA has dropped significantly over the years “…from a high of 189 cases in 1974 to 81 in 1992” (Clark and Canter 1997). In addition, the number of environmental assessments (EAs) filed every year has vastly overtaken the number of more rigorous EISs. Overtaking both EAs and EISs is the number of categorical exclusion determinations, or CatExs, completed for every federal agency. More CatExs are filed than EAs and EISs combined for any of the federal agencies (Clark and Canter 1997).

Over the decades, we believe NEPA has accomplished all three of its goals: 1) it established a lasting national policy, 2) it spawned vast amounts of environmental research, and 3) it permanently established an environmental presence in the executive branch of US government. Russell Train, the first Chairman of CEQ, called it a “revolutionary change” (*NEPA Success Stories*, p. 3). Others have gone even further. It "is often referred to as the Magna Carta of the country’s national environmental laws” (Rychlak and Case 2010). So after all these years, why is NEPA still considered *inefficient*, and why are federal agencies seen as requiring *discipline and accountability* in order to implement this process?

6.3 History of Streamlining Efforts

Agency interest to streamline NEPA may be exaggerated with each incoming presidential administration; but, as with any process, a close continuous improvement look is always important to understanding possible future actions in environmental reviews. The authors’ brief historical snapshot below reveals that we as environmental professionals have been directed to

implement streamlining from the very beginning, as evidenced by the following references and timeline:

- In 1978, CEQ's *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act of 1969* set forth several policies on timely delivery and cost savings.
- In 1986, under the 1981 Vice President's Regulatory Relief Task Force, recommendations were that "CEQ's streamlining regulations for the implementation of NEPA requirements should receive full support from the Administration and the federal agencies."
- In 1991, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) was the first U.S. transportation bill to include "streamlining" provisions.
- In 1998, Transportation Equity Act for the 21st Century (TEA-21) mandated environmental streamlining to promote the timely delivery of transportation projects while protecting and enhancing the environment. TEA-21 also required transportation and resource/regulatory agencies to establish realistic timeframes to develop projects.[15]
- In 2002, President George W. Bush signed EO 13274, titled *Environmental Stewardship and Transportation Infrastructure Project Reviews*, which emphasized the importance of expedited transportation project delivery while being good stewards of the environment.
- In 2005, President George W. Bush signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). SAFETEA-LU made further changes to "improve and streamline" the environmental process for transportation projects.
- In 2012, the Moving Ahead for Progress in the 21st Century Act (MAP-21) created a streamlined and performance-based surface transportation program and promoted accelerated project delivery while encouraging innovation.
- In 2012, President Barack Obama also signed EO 13604, titled *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, which established the Federal Permitting Dashboard to track the performance of identified transportation and other infrastructure projects.
- In 2015, the Fixing America's Surface Transportation Act (FAST Act) contained provisions to overhaul the environmental review of infrastructure projects under NEPA.
- In 2017, President Trump signed EO 13807 on environmental accountability that directs federal agencies to undertake several actions to expedite environmental process delivery; most notably, an emphasis on delivering EISs in two years and any subsequent permitting within 90 days thereafter.

6.4 Policy and Procedures

As NEPA practitioners and environmental managers know, a mission statement guides federal agencies' purpose in implementing any federal mandate prescribed by Congress. Federal agencies have prepared individual policies and guidance procedures to implement their mission statements. These include supporting policy and guidance documents for implementing NEPA. At times individual agency policy statements conflict with other federal agency policy

[15] The authors note that the two landmark bills that brought surface transportation into the 21st century were ISTEA and TEA-21. ISTEA and TEA-21 also promoted best management practices.

documents implementing NEPA, creating procedural and environmental evaluation delays beyond established NEPA timelines.

Over the years, Congress has established legislation to provide environmental streamlining provisions in several federal agencies as noted in the Introduction. The U.S. Department of Transportation (DOT), for example, has established procedures for efficient environmental reviews and project decision-making through the transportation bills described in the previous section. The Department of Energy (DOE) is another example, creating a NEPA Lessons Learned Program in 1994 to foster continuous improvement by measuring NEPA performance. Their quarterly reports were beneficial for other agencies and NEPA planners, showing NEPA program metrics, trends and challenges, discussing NEPA best practices, and tips from NEPA experts. The Federal Energy Regulatory Commission (FERC), as another example, has issued streamlining procedures intended to expedite the completion of its authorizations of energy development projects. However, there are other considerations that can add complexity to a proposed project. Depending on the resources affected, other federal regulations and executive orders, including those addressing air quality, greenhouse gas emissions and climate change, water quality, wetlands, floodplains, endangered species, environmental justice, and historic properties, may need to be addressed along with NEPA. Also, respective state environmental laws and regulations, Native American tribal laws, and local ordinances and requirements need to be considered.

One agency that has attempted to incorporate federal laws with NEPA in a programmatic umbrella is the US Environmental Protection Agency (EPA). The EPA through the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA[16]) established the WIFIA program, a federal credit program administered by EPA for eligible water and wastewater infrastructure projects. The EPA developed a Programmatic Environmental Assessment for the program, reliant largely on checklists. As directed by WIFIA, the U.S. Environmental Protection Agency (USEPA) developed a programmatic environmental assessment (PEA) that reviewed multi-million-dollar loan projects "covering a group of projects that are similar in scope, scale, and magnitude, and that have similar types of impacts, rather than a singular project. The USEPA provides a streamlined NEPA compliance path for water and wastewater infrastructure projects and will make compliance with NEPA straightforward through the use of an environmental questionnaire." (USEPA 2019). The EPA encourages projects that receive money from WIFIA and the state-managed Clean Water State Revolving Fund (CWSRF) to use or adopt the same streamlined process. The CWSRF program is a federal-state partnership that provides communities a permanent, independent source of low-cost financing for a wide range of water quality infrastructure projects. With regard to CWSRF, the state-managed program projects are expected to comply, which can be challenging, with any Federal decision, because "Requiring additional environmental reviews is duplicative and time consuming" (Statement from the Council on Infrastructure of Financing Authorities, 2019).

Those environmental professionals who are NEPA practitioners have seen projects delayed by the following three factors: 1) limited agency staff for reviews, 2) limited project funding, and 3) limited staff or manager training. The current Administration does not appear to support these three factors for many federal agencies; e.g., hire more agency staff. Required staff expertise and training is typically underfunded as agencies are restructured and priorities changed. Prior to

[16] Part of the Water Resources Development Act of 2014, 33 U.S.C. § 2201; PL 113-121

this Administration, the Congressional Research Service (Luther 2006, 2007) and Department of Energy (DOE Lessons Learned, March 2016) found that reasons for long timelines included the increasing complexities required during a NEPA review, including but not limited to:

1. Estimating climate change impacts that necessitates further coordination with agencies that have the requisite expertise
2. Navigating the growing list of protected species under the ESA
3. Coordinating with State and/or Tribal Historic Preservation Officers

Furthermore, many agencies have not refilled positions when a staff member has left the agency for a professional or personal reason. Environmental reviews under NEPA, consequently, are often conducted by inexperienced or inadequately trained staff. Or the EIS or EA may be developed by a qualified contractor or consultant, but the agency does not have adequate staff expertise to critically review it. Too often, agency personnel are not allowed to attend professional development training. Sometimes available NEPA training does not meet the needs of the particular agency's staff person. For example, the NEPA training may spend the majority of time teaching about the EIS process, even though, as noted earlier in this article, the majority of NEPA documents are CEs.

We have observed, as practitioners, that some federal agencies at times lack consistency between an agency's regional office where many NEPA reviews and decisions subject to NEPA are made and the agency headquarters regarding the agency's policy implementing NEPA. In part, regional agency regulators often do not have the guidance or authority to move a project forward before agency headquarters weighs in and completes a final legal review, thereby resulting in delayed decisions and delayed project schedules. Moreover, we have seen too often new federal legislation or Executive Orders, like EO 13807, promulgated that at times hamper implementation of effective, efficient compliance decisions regarding projects and programs. Moreover, since each federal agency's NEPA procedures are based around the agency's mission, each agency has established project-review deadlines within the context of their own environmental review procedures.

As we know, NEPA also strives to formalize citizen participation in the government decision-making process. NEPA does this by requiring agencies to inform the public on alternatives and the merits and trade-offs that would be involved when making decisions about proposed federal actions. In some cases, it has been the public review—not agency review—that has identified omissions in an agency's underlying data and analysis. For example, in 2009, a retired test pilot analyzed tables and models developed by the lead agency to analyze the risk profile of introducing non-native oysters into Chesapeake Bay. The pilot found mathematical errors that caused the risk profile to be understated. This led to a revision in the Final EIS and ultimately a decision that the risk was too great to approve the proposed action (Blankenship 2009). The importance of public involvement, however, is sometimes overlooked as federal agencies work to become "disciplined" and streamline NEPA. Engaging the public takes time, patience, empathy and thoughtful consideration of viewpoints. Well planned and thoughtful community and stakeholder outreach during public scoping, as one example, can result in fewer stakeholder comments, a well-designed set of reasonable alternatives, and consequently, a streamlined environmental document. In other words, public engagement can streamline NEPA while strengthening relationships between local, state, federal and tribal governments if done right; as

experienced NEPA practitioners know not properly engaging the public can dramatically delay the proposed project.

6.5 Streamlining for Streamlining's Sake

NEPA is a regulatory process that takes time if done successfully. The process requires gathering information, defining the purpose and need, the proposed action, comparing alternatives, and sharing potential impact information with the public and decision-makers. It is an open and transparent process and a preferred alternative may be refined with stakeholder input. This type of process may appear too slow for many lead agency managers as our world continues to accelerate, particularly as information is conveyed within seconds electronically. Industry stakeholders, Congressional leaders, politicians at all levels of government, and business representatives continue to question the environmental review and decision-making process. EO 13807 sets a two-year timeframe for completing the NEPA EIS process from Notice of Intent (NOI) to Record of Decision (ROD). After the ROD, EO 13807 also establishes a 90-day timeframe to complete any required federal permits. Edward "Ted" Boling, Associate Director of NEPA Oversight at CEQ, recently noted in a NAEP NEPA Infrastructure webinar that the average EIS completion time for all federal agency EISs completed between 2010 and 2017 is 4 years and 6 months (Boling, NAEP webinar, July 2019)

Since NEPA was passed, we believe the CEQ has improved the application of NEPA for today's world, which continues to be increasingly complicated. Our increasing knowledge of the human footprint on our planet's limited natural, cultural, social and economic resources requires that we use the best available knowledge, experience and science to show a clear set of reasonable alternatives, determine the true impacts of those alternatives, and design measures to mitigate those impacts. Can we do that for large, complex projects crossing multi-state lines that involve local, state, tribal and federal governments, as well as non-profit organizations, various landowners and numerous other interests within two years?

In 2012 President Obama signed EO 13604 and, in 2015, the Fixing America's Surface Transporting (FAST) Act. Patterned after streamlining measures for large transportation projects, Title 41 of the FAST Act (FAST-41, 42 U.S.C. §§4370m *et seq.)* created a governance structure (Federal Permitting Improvement Steering Council and Chief Environmental Review and Permitting Officers) to improve the environmental review and authorization process for a broader number of covered infrastructure projects (including energy and water resources). Qualifying projects are those projects that have costs likely to exceed $500 million, require authorizations by multiple agencies, and are likely to require an EIS. The resulting Federal Permitting Dashboard, established under an August 2011 Presidential memorandum, was the first concerted effort to track the performance metrics of major infrastructure projects going through the NEPA and permitting processes. The goal was to rigorously track in a measurable way whether an agency's project development efforts are actually saving time and agency resources while preserving environmental and socioeconomic resources.

The 2017 EO 13807 was signed by President Trump to address "inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations." According to EO 13807, "More efficient and effective Federal infrastructure decisions can transform our economy, so the Federal Government, as a whole, must change the way it processes environmental reviews and authorization decisions." The

justification of the EO, as well as the Administration's changes to other environmental regulations, is promote the economy, particularly to hasten infrastructure and energy resource development. This is different from the reason NEPA was originally created. Moreover, the EO does not address any of the other federal environmental, social or cultural laws and regulations. Remember the original goal for NEPA was to ensure that federal agencies "identify objectives and conflicts before they committed funds and undertook irreversible actions" on the environment or public resources ((Kaufman 2000; now codified within Sec. 102 [42 USC § 4332]).

As we have seen over the years, many initiatives have been proposed to streamline the NEPA process. However, none of them appear to answer the following questions:

- Why do agencies still take more than 4 years on average to develop a single EIS?
- Why does the NEPA process work relatively smoothly for some projects and take up to two decades for others?
- What are some of the external delays that NEPA planners face?
    - Of these delays, what can they control and what are outside of their ability to control?
- Is the NEPA process, or the underlying regulations, the cause of delay?
    - How would further streamlining the NEPA process reduce or prevent delays?

Also, what if a new Congressional streamlining bill were successfully passed and it resulted in alternative outcomes that caused other delays not addressed during the development of the bill? As an example, in 2014, the House of Representatives passed H.R. 2641, the RAPID (Responsibly and Professionally Invigorating Development) Act of 2013 (US Congress, 2013), a bill designed to streamline NEPA. This bill was first introduced in 2012 in the 112th Congress, then reintroduced in the 113th Congress (where it passed in the House), and in the 114th Congress (where it passed in the House). The RAPID Act did not allow for a complete environmental review and a well-articulated basis to justify the agency position; there was concern it would open the doors to legal challenges. The Act did not automatically shield approved decisions from environmental review (Whitfield 2013).

Even CEQ commented on the RAPID Act in 2013, noting that – "by using the NEPA process in place by the Federal Highway Administration – over 95% of the reviews resulted in a Categorical Exclusion, not an EIS." When there are project delays, they are typically caused by incomplete funding packages, local opposition, low local priority, or compliance with other laws and requirements considered during the NEPA process, but rarely NEPA itself. The Office of Management and Budget (OMB) did issue a Statement of Administration Policy on 3/5/2014 that stated the Administration's opposition to the bill and recommended the President veto it. The RAPID Act for a variety of reasons did not pass. (Trnka and Ellis 2015)

So why is NEPA continually the target of streamlining? No less than four federal task forces have been established to examine NEPA for either "effectiveness" or address how it is implemented over the years (for example, see Luther 2006), including a CEQ NEPA Task Force, Energy Task Force, Transportation Task Force, and a House Resources Committee NEPA Task Force. The goals remain similar – monitor, review, expedite, improve, and the ever present "address delays." More often than not, it is the EIS that appears to be the primary target of

streamlining legislation. This document is viewed as a long, burdensome process without clear sidebars, often wrought with obstacles or indecision. The truth is that many experienced planners have encountered similar experiences with EAs and CatExs. Unfortunately, CatExs on infrastructure projects often take far too much time, comparatively, and require far too many pages of text.

As we have noted in the History of Streamlining Efforts section, NEPA already contains streamlining provisions. Simple, effective streamlining can easily be achieved by mandating brevity in NEPA documents that is consistent with the regulations. Streamlining initiatives that do not result in shorter, more focused NEPA documents will be subject to question simply based on their encyclopedic length. Section 1500.1(c) of the NEPA regulations states:

"Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."

On the 40th anniversary of NEPA, the CEQ issued a memorandum (CEQ 2010) to modernize and reinvigorate NEPA to assist federal agencies in meeting the NEPA goals of enhancing the quality of public involvement in government decisions relating to the environment, increasing transparency, and easing implementation. CEQ efforts since 2010 have resulted in the following guidance, most of which are available at https://ceq.doe.gov:

- Final guidance on the consideration of greenhouse gases and climate change impacts (subsequently withdrawn by the Trump administration; the development of replacement guidance is currently underway)
- Final guidance for mitigation and monitoring
- Final guidance clarifying use of categorical exclusions
- Final guidance on NEPA efficiencies
- Enhanced public tools for reporting NEPA activities, pilot projects, and handbooks.

So, what is not working? Are the Federal agencies better tracking the results and outcomes (performance metrics) and reporting back in order to justify further streamlining and "NEPA discipline"? NEPA is about making informed decisions. To arbitrarily streamline or shorten the NEPA process affects the ability of the decision maker to make a fully informed decision. An obvious example to practitioners would be when a proposed project would take place within the habitat of a plant or animal that is listed as threatened or endangered. In this example, the NEPA process could be delayed by a task dictated by the ESA. Thus, the NEPA review time may be extended by a lack of necessary data associated with an external law or regulation, not by NEPA, and thus is not truly a NEPA delay. No amount of streamlining of the NEPA process will resolve this. Given the current emphasis on areas such as endangered species, environmental justice, recreation, water management, forested areas, water quality, historic places, greenhouse gas emissions, and public involvement, we caution federal agencies to engage unknowingly in "fast tracking" efforts. However, NEPA practitioners know that there are pre-NOI activities, such as stakeholder outreach, initial agency coordination, data collection and environmental surveys, that can be accomplished before the NEPA process formally starts.

Here is a specific case example that demonstrates the challenge of integrating the ESA and NEPA where no amount of streamlining will change the process. Salmon and steelhead populations have been declining in the Columbia Basin since the second half of the 19th Century. Activities such as logging, farming, mining, irrigation, and commercial fishing all contributed to the decline, and fish populations further declined since the construction and operation of the Federal Columbia River Power System (FCRPS) dams in the mid-1900s. In 1991, the Snake River sockeye became the first Pacific salmon stock listed as endangered under the ESA. There are now 12 salmon and steelhead stocks that are listed as either threatened or endangered (NWPCC Report 2016).

Beginning in 1992, the National Marine Fisheries Service (NMFS) issued a series of Biological Opinions (BiOps), nearly every one of which the district court has found inconsistent with the ESA. While the district court has consistently demanded changes to the BiOps that were meant to protect the endangered salmon species recovery, they also allowed portions of each BiOp to stay in place so that the Federal Columbia River Power System (FCRPS) operations could continue while the federal agencies attempted to remedy the BiOps. The district court discussed what other operational actions, proposed and implemented, should take place to further reduce jeopardizing the listed species, especially salmon and steelhead that were being directly affected by the hydropower dams. The district court also held that the FCRPS action agencies (the Corps of Engineers, Bonneville Power Administration, and Bureau of Reclamation) violated NEPA by failing to prepare an EIS in connection with their proposals for operation of the FCRPS (CRS 2016).

6.6 Conclusions: NEPA Timing and Project Delivery

Most federal agencies have procedures in place that require a NEPA decision prior to the release of funding for design and construction. This is consistent with the intent of NEPA – no commitment of federal resources that may result in irretrievable commitments. However, this places agencies sometimes in a challenging position from a planning perspective. Consequently, most NEPA project development decisions need to be made when a project is at a 30% design or less. Without the input and results from all the permitting and consulting parties, a lead agency may not be aware of all the potential impacts. As noted earlier, EO 13807 requires completion of permits within 90 days of the ROD. In some cases, with regard to federal permits, consulting parties and permitting agencies will not have discussions until the proposed project is at least 70% designed. For example, Section 106 consultation under the National Historic Preservation Act must be very clear on the depth and width of disturbance, and the Area of Potential Effect, for any undertaking, prior to initiating formal consultation. The CEQ has recognized this and attempted to find a way to coordinate NEPA and Section 106 consultation (CEQ 2013). In general, the timing of NEPA compared to other permits remains an issue. This attempt to coordinate NEPA and all the permits under one umbrella should help address this, and NEPA practitioners today are focusing their attention on this approach. Clearly this is one of the objectives of the Permitting Dashboard and FAST-41.

NEPA, more so than any other environmental law, regulation or policy, seeks to find a balance within the context of project development and agency decision making; specifically, a balance near the middle of the project development/environmental protection continuum. We believe that EO 13807 represents a substantial shift in this decision-making process continuum, from a balanced mid-point to a sharply development-oriented viewpoint. This shift may in effect take

the concept of streamlining to another level – positively or not so positively, and that is yet to be determined. We believe that continued "streamlining" efforts without a clearly defined purpose, including baseline metrics, full knowledge of NEPA history, and without defined outcomes are meaningless. CEQ has recently begun to define the process of the two-year EIS timeframe goal that EO 13807 has established. (Boling, July 2019) Since 1970, NEPA has required us, as environmental professionals, to balance stewardship, environmental protection, resource use, economic activity, community interests, project delivery and fiscal responsibility all within the context of expedited environmental reviews. And in the 21st century, in 2019, the history of NEPA streamlining continues to be made.

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7. 2018 NEPA Court Rulings

P.E. Hudson, Esq.[17] and Lucinda Low Swartz, Esq.[18]

ABSTRACT

This paper reviews substantive NEPA cases issued by federal courts in 2018. The implications of the decisions and relevance to NEPA practitioners are explained.

7.1 Introduction

In 2018, the U.S. Courts of Appeal issued 35 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 35 cases involved seven different departments. Overall, the federal agencies prevailed in 28 of the cases, did not prevail in five cases, and prevailed on some but not all NEPA claims in two cases, with a total prevail rate of 80 percent (83 percent if the partial cases are included). The U.S. Supreme Court issued no NEPA opinions in 2018; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, Table 1 shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2018, by circuit. Figure 1 is a map showing the states covered in each circuit court.

7.2 Statistics and Overview of Cases

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

The U.S. Department of the Agriculture (United States Forest Service [USFS], Animal Plant Health Inspection Service – Wildlife Services [APHIS-WS]) was involved in 12 cases; the U.S. Department of Transportation (Federal Aviation Administration [FAA], and Federal Highway Administration [FHWA]) was involved in six cases. The U.S. Department of the Interior (Bureau of Land Management [BLM], and National Park Service [NPS]) was involved in five cases and the Federal Energy Regulatory Commission (FERC) was involved in five cases. With respect to the other agencies,

- U.S. Department of Defense (Army Corps of Engineers [USACE]) was involved in four cases.
- The U.S. Nuclear Regulatory Commission [NRC] was involved in two cases.
- U.S. Department of Energy (Bonneville Power Administration [BPA]) was involved in one case.

[17] Questions concerning information in this paper should be directed to:
P.E. Hudson, Esq., Counsel, Department of the Navy, Office of General Counsel, Center for Seabees and Facilities Engineering/Civil Engineer Corps Officers School, Port Hueneme, CA, 93001; pam.hudson@navy.mil
Note: Any views attributable to co-author P.E. Hudson are her personal views and not necessarily the views of the federal government.
[18] Environmental Consultant, 4112 Franklin Street, Kensington, MD, 20895; LLS@LucindaLowSwartz.com

Table 7-1. Number of U.S. Courts of Appeal NEPA Cases, by year and by circuit

	U.S. Courts of Appeal Circuits												
	Ist	**2nd**	**3rd**	**4th**	**5th**	**6th**	**7th**	**8th**	**9th**	**10th**	**11th**	**D.C.**	**TOTAL**
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
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**
TOTAL	9	7	7	14	9	12	5	5	149	28	9	44	298
	3%	2%	2%	5%	3%	4%	2%	2%	**50%**	**9%**	3%	**15%**	

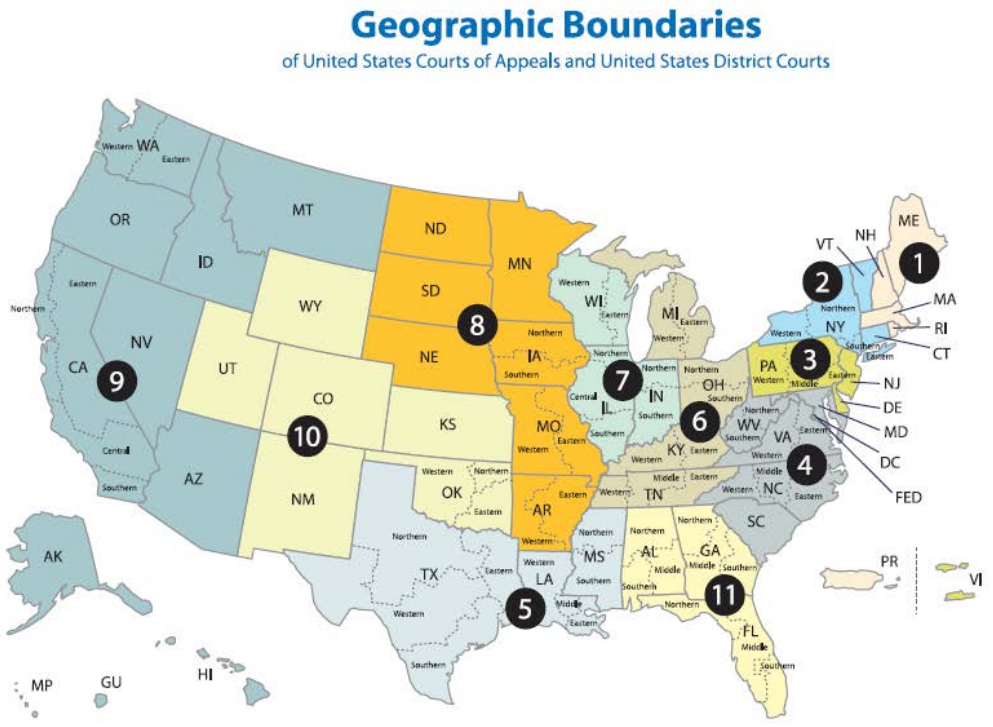

Figure 7-1. Map of U.S. Circuit Courts of Appeal.

The USFS did not prevail in three of its ten cases, FERC did not prevail in one of its five cases, and NRC did not prevail on one of its two cases. USFS was involved in two cases in which it prevailed on some but not all of the NEPA claims brought.

Of the 35 substantive cases, two cases involved a categorical exclusion (CatEc), 14 involved environmental assessments (EA), and 15 involved environmental impact statements (EIS). In four cases, the court ruled that a NEPA document was not required.

Two cases in which the agencies did not prevail involved EAs (*Greenpeace, Inc. v. Stewart*, No. 17-35945, 743 Fed. Appx. 878 (9th Cir. Nov. 28, 2018) (unpublished) and *American Rivers v. Fed. Energy Reg. Comm'n*, 895 F.3d 32 (D.C Cir. 2018)). Five cases in which the agencies did not prevail involved EISs, (*Sierra Club v. U.S. Forest Serv*., 897 F.3d 582 (4th Cir. 2018, *Cowpasture River Pres. Assoc. v. U.S. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018), and *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520 (D.C. Cir. 2018)) although in two of them, the agencies prevailed on some but not all of the NEPA claims brought (*Sierra Club v. U.S. Forest. Serv.*, 897 F.3d 582 (4th Cir. 2018) and *Alliance for Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105 (9th Cir. 2018)). One case in which the agency did not prevail involved whether plaintiffs had waived their right to bring a NEPA claim (*Alliance for Wild Rockies v. Savage*, 897 F.3d 1025 (9th Cir. 2018)). The agencies prevailed in the other 28 cases.

7.3 Trends

The following relates some trends and interesting conclusions from the 2018 substantive cases. Note that there are several cases that were not reported, which means they have no precedential value, depending on the court. However, the rulings can still be of value to NEPA practitioners.

Assessment of Impacts*:* Eighteen of the cases involved one or more challenges to assessment of impacts, including cumulative impacts, as well as two categorical exclusion cases. The cases also involved challenges to analysis of "stale," old, outdated data or methodologies (software, for example). The courts tended to focus on the deference afforded to the agency when they upheld the impact assessment analysis.

Categorical Exclusion:

- *Highway J. Citizens Group v. U.S. Dep't of Transp*., 891 F.3d 697 (7th Cir. 2018) (reasoning that renovating 7.5 miles of an existing two-lane road does not stand out as a major cause of a significant effect and upholding agency's categorical exclusion determination using agency's environmental report).
- *BRRAM, Inc. v. Federal Aviation Admin*., No. 16-4355, 721 Fed. Appx. 173 (3d Cir. Jan. 9, 2018) (determining that FAA properly considered applicant's request to amend its Operating Specifications [the terms an air carrier must comply with to ensure an air carrier is operating safely in air transportation] and determined that no extraordinary circumstances existed; the court also upheld FAA's decision applying a categorical exclusion).

***Direct impacts**:*

- *Native Ecosystems Council v. Marten*, 883 F.3d 783 (9th Cir. 2018) (finding that if an agency's mistake was not a significant factor in the approval of project then it was not inconsistent with the agency having taken a "hard look" at the project).
- *Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906 (9th Cir. 2018) (construing that the Corps, in issuing a Section 404 permit, reasonably determined that the project was not likely to affect steelhead populations in the Santa Clara River, when it used the California Toxics Rule, a method for calculating a site-specific dissolved-copper criterion and considered other sources of data, including project-specific modeling).
- *Cachil Dehe Band of Wintun Indians of the Colusa Indian American Community v. Zinke*, 889 F.3d 584 (9th Cir. 2018) (upholding EIS despite challenges to economic data, air quality analysis, and impacts to protected fish).
- *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692 (5th Cir. 2018) (rejecting that an EA was a "mitigated FONSI," and concluding that the Corps properly used the Louisiana Wetland Rapid Assessment Method (LRAM) to assess wetland impacts, including selection of compensatory mitigation).
- *Rivers v. Federal Energy Regulatory Comm'n*, 895 F.3d 32 (D.C Cir. 2018) (finding "[t]he record simply [on myriad grounds] does not provide a rational connection between the licensing decision, the record evidence, and the finding of no significant environmental impact").
- *Northern Plains Resource Council, Inc. v. U.S. Bureau of Land Mgm't*, No. 16-35447, 725 Fed. Appx. 527 (9th Cir. Feb. 27, 2018) (determining that the BLM adequately considered the effects upon the affected topography and water resources, and the agency was "fully informed and well-considered," and was entitled to judicial deference).
- *McGuinness v. U.S. Forest Serv.*, No. 16-2406, 741 Fed. Appx. 915 (4th Cir. Jul. 26, 2018) (deferring to agency expertise and its ability to address impacts to property values as an impact; even if an impact is "highly controversial," the court considered that was only one of ten factors in determining significance).
- *Informing Citizens Against Runway Airport Expansion v. Fed. Aviation Admin.*, No. 17-71536, 2018 WL 6649605, -- Fed. Appx. --- (9th Cir. Dec. 18, 2018) (not for publication) (finding that FAA addressed the project's effect on property values sufficiently to comply with NEPA when FAA examined several studies about the effect of aircraft noise on property values).
- *Wildlands Defense v. Seesholtz*, No. 18-35400, 2018 WL 6262505, -- Fed. Appx. --- (9th Cir. Nov. 29, 2018) (not for publication) (discussing that USFS considered both the context and intensity of the proposed actions and considered the projects' impacts on the total area affected by the fire and on the project areas, the identification of the geographic area within which a project's impacts on the environmental resources may occur is a task assigned to the special competency of the appropriate agencies).
- *Vaughn v. Fed. Aviation Admin.*, No. 16-1377, 2018 WL 6430368, -- Fed. Appx. --- (D.C. Cir. Nov. 30, 2018) (not for publication) (finding that FAA sufficiently considered impacts of noise levels and of reducing noise and emissions to the extent

practicable; it also held that FAA sufficiently considered air emissions and on the climate).

- *Paradise Ridge Defense Coalition v. Hartman*, No. 17-35848, 2018 WL 6434787, -- Fed. Appx. --- (9th Cir. Dec. 7, 2018) (not for publication) (reasoning that the agency's EA was not arbitrary and capricious: the FHWA's reliance on the Highway Safety Manual was the industry standard; it used accepted engineering judgment; and the agency provided a "reasonably thorough discussion" of the risk and severity of collisions between vehicles and wildlife, as well as mitigation measures to decrease the risk of those collisions).
- *Comanche Nation of Oklahoma v. Zinke*, No. 17-6247, 754 Fed. Appx. 768 (10th Cir. Dec. 14, 2018) (not for publication) (rejecting that the NEPA analysis was flawed because it failed to consider the economic effects the new casino would have on Comanche Nation's existing casino because socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA).
- *The Town of Weymouth, Massachusetts v. Fed. Energy Regulatory Comm'n*, No. 17-1135 (consolidated with 17-1139,17-1176, 17-1220, 18-1039, 18-1042), 2018 WL 6921213, -- Fed. Appx. --- (D.C. Cir. Dec. 27, 2018) (not for publication) (rejecting argument that FERC violated NEPA by inadequately considering coal ash, noise, traffic, greenhouse-gas emissions, and the project's effects on environmental justice communities).

Use of old or "stale" data/surveys/software:

- *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, 889 F.3d 584 (9th Cir. 2018) (concluding that the plaintiff was unable to support its generalized statement that the unspecified "biological data" contained in the FEIS is "stale" when oldest data was historical from 2000, but most other data was after 2006).
- *American Rivers v. Federal Energy Regulatory Comm'n*, 895 F.3d 32 (D.C Cir. 2018) (stating that reliance on a decade-old survey of fish entrainment and estimates was not sufficient: no updated information was collected; no field studies were conducted, nor was any independent verification of the applicant's estimates undertaken).
- *Vaughn v. Fed. Aviation Admin.*, No. 16-1377, 2018 WL 6430368, -- Fed. Appx. --- (D.C. Cir. Nov. 30, 2018) (not for publication) (deferring to FAA's reasonable explanation that a noise screening using earlier "outdated" software counts as "environmental analysis" for the purpose of complying with the agency's own guidance; because FAA started conducting its EA before March 2012 [the date the new software was available], it was not required to switch to the new software in March 2012).
- *Northern Plains Resource Council, Inc. v. U.S. Bureau of Land Mgm't*, No. 16-35447, 725 Fed. Appx. 527 (9th Cir. Feb. 27, 2018) (not for publication) (upholding tiering to a 1990 EIS, when plaintiff failed to point to any evidence, other than age, suggesting the unreliability of the 1990 data. The court reasoned that "[t]he age of data, without more, is not dispositive as to reliability").

***Cumulative impacts**:*

- *Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906 (9th Cir. 2018*)* (finding that because the Corps reasonably determined that the project was not likely to affect steelhead populations in the Santa Clara River, it was not arbitrary or capricious to conclude that the project would not result in significant cumulative water quality impacts to steelhead).
- *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692 (5th Cir. 2018) (finding the lower court's concern about cumulative effects based on the alleged past noncompliance with Corps permit conditions was misplaced because the Corps acknowledged extrinsic past impacts on the basin and explained how the permit will not only remediate the impacts of this project but would not interfere with further efforts to restore the watershed).
- *American Rivers v. Federal Energy Regulatory Comm'n*, 895 F.3d 32 (D.C Cir. 2018) (finding that FERC's cumulative impact analysis left out critical parts of the equation and, as a result, fell far short of the NEPA mark, when it gave scant attention to those past actions that had led to and were perpetuating the Coosa River's heavily damaged and fragile ecosystem; nor did it offer any substantive analysis of how the present impacts of those past actions would combine and interact with the added impacts of the 30-year licensing decision).
- *City of Boston Delegation v. Federal Energy Regulatory Comm'n*, 897 F.3d 241 (D.C. Cir. 2018) (concluding that FERC thoroughly considered the environmental effects of another pipeline upgrade project (the Atlantic Bridge Project) throughout the cumulative impacts section of the instant project's [the AIM Project] EIS, and it contained sufficient discussion of the cumulative impacts of the Atlantic Bridge project; the court then held that another project's (Given Access Northeast Project) cumulative impact analysis was limited, but sufficient, given the preliminary stage and the resulting lack of available information about its scope at the time).
- *Northern Plains Resource Council, Inc. v. U.S. Bureau of Land Mgm't*, No. 16-35447, 725 Fed. Appx. 527 (9th Cir. Feb. 27, 2018) (rejecting contention that the BLM's cumulative-impacts analysis violated NEPA by failing to address reasonably foreseeable mining in the "mirror-image" mine to the north of the existing mine area because the BLM reasonably determined that hypothetical future mining activity contemplated to the north is not currently a reasonably foreseeable future action).
- *Fath v. Texas Dep't of Transp.*, No. 17-50683, 2018 WL 3433800, -- F.3d --- (5th Cir. Jul. 17, 2018) (finding that, given the overpass project's limited scope and location over busy urban intersections, it was not arbitrary and capricious for the state transportation agency to limit its cumulative impact analysis where the record supports its finding that the project will have no significant direct or indirect impacts).
- *Clatsop Residents Against Walmart (CRAW) v. U.S. Army Corps of Eng'rs*, No. 16-35767, 735 Fed. Appx. 909 (9th Cir. May 25, 2018) (not for publication) (rejecting plaintiff's contention the Corps' cumulative impacts analysis under NEPA was arbitrary and capricious, because the Corps aggregated the cumulative effects of past projects into an environmental baseline, which included quantified and detailed information about past impacts, and that the choice of a five-year baseline range was sufficient because NEPA does not impose a requirement that the Corps analyze

impacts for any particular length of time and the five-year range included the most significant past impact, the 14.9 acres fill of the property).

- *Wildlands Defense v. Seesholtz*, No. 18-35400, 2018 WL 6262505, -- Fed. Appx. --- (9th Cir. Nov. 29, 2018) (not for publication) (finding that USFS appropriately considered cumulative impacts when it aggregated the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project was measured).
- *Vaughn v. Fed. Aviation Admin.*, No. 16-1377, 2018 WL 6430368, -- Fed. Appx. --- (D.C. Cir. Nov. 30, 2018) (not for publication) (finding that FAA did not need to conduct a cumulative analysis because it had already determined the project would have no significant effect).

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

- *Little Traverse Lake Property Owners Ass'n v. National Park Serv,*, 883 F.3d 644 (6th Cir. 2018) (finding plaintiff's proposal was not a reasonable alternative because the alternative route they proposed did not accomplish the stated purpose and need of the proposed action).
- *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, 889 F.3d 584 (9th Cir. 2018) (ruling that the range of alternatives was not "illusory" when the agency analyzed five alternative sites).
- *Audubon Society of Greater Denver v. U.S. Army Corps of Eng'rs*, 908 F.3d 593 (10th Cir. 2018) (upholding Corps' alternatives analysis in a water storage reallocation project because: (1) the Corps considered increased water conservation at length and concluded that water conservation is not an equivalent practicable alternative because it did not meet the needs of the project, (2) it adequately explained why upstream gravel pits did not merit further discussion, and (3) it sufficiently explained why storing water at another reservoir was not a viable alternative to the project).
- *Granat v. U.S. Dep't of Agriculture*, No. 17-15665, 720 Fed. Appx. 879 (9th Cir. Apr. 27, 2018) (not for publication) (holding that the USFS had considered a reasonable range of alternatives and that it engaged with the public to develop four action alternatives consistent with the project's purpose and need).
- *McGuinness v. U.S. Forest Serv.*, No. 16-2406, 741 Fed. Appx. 915 (4th Cir. Jul. 26, 2018) (not for publication) (finding that the USFS's consideration of the alternatives, including the No Action alternative, was more than sufficient to satisfy the NEPA requirement that it take a "hard look" at the effect of its actions on the existing noise level).
- *Vaughn v. Fed. Aviation Admin.*, No. 16-1377, 2018 WL 6430368, -- Fed. Appx. --- (D.C. Cir. Nov. 30, 2018) (not for publication) (rejecting allegations that FAA's EA was deficient because it considered only the proposed action and the no-action alternatives, when FAA evaluated various groups of procedures in different combinations, in order to determine what "alternative action" to present in the Final EA).
- *Informing Citizens Against Runway Airport Expansion v. Fed. Aviation Admin.*, No. 17-71536, 2018 WL 6649605, -- Fed. Appx. --- (9th Cir. Dec. 18, 2018) (not for publication) (concluding that FAA acted reasonably by seriously considering only alternatives that

involved a 5,200-foot runway, which was reasonably related to a project's purpose; because keeping the current runway length was not a viable alternative, FAA did not violate NEPA by failing to examine that alternative).

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

- *Township of Bordentown, New Jersey v. Federal Energy Regulatory Comm'n*, 903 F.3d 234 (D.C. Cir. 2018) (finding that FERC was not required to exert jurisdiction over the entire pipeline project because of a small federal component and that FERC properly addressed the potential impacts of the project).
- *Havasupai Tribe v. Provencio*, 906 F.3d 1155 (9th Cir. 2018) (holding the original approval of the plan of operations [documented by an EIS in1998] was a major federal action and the resumed operation of Canyon Mine did not require any additional government action because it did not change the status quo).
- *Friends of the Columbia Gorge v. Bonneville Power Admin.*, No. 15-72788, 716 Fed. Appx. 681 (9th Cir. Mar. 27, 2018) (not for publication) (finding that agency's determination that the Wind Project was not a federal action because: (1), the project will receive no federal money; (2) the agency exercised no control over the planning and development of the Wind Project; (3) the agency engaged in a joint NEPA analysis with the state's regulatory agency; and (4) even if interconnection with the agency's facilities is the only feasible means of transmitting power generated from the Wind Project, the interconnection and the Wind Project serve complementary, but distinct functions).
- *Cascadia Wildlands v. U.S. Dep't of Agriculture*, No. 17-35508, 752 Fed. Appx. 457 (9th Cir. Nov. 14, 2018) (not for publication) (discussing small federal handle, and finding that decision to assist the State of Oregon in its removal of gray wolves was not a "major federal action" because neither the agency's financial contribution (10%) to the Oregon Wolf Conservation and Management Plan nor its control over the Plan's operation, alone or in combination, were sufficient to render its involvement a "major federal action").

Connected Actions/Segmentation: Four cases dealt with connected actions/segmentation:

- *Big Bend Conservation Alliance v. Federal Energy Regulatory Comm'n*, 896 F.3d 418 (D.C. Cir 2018) (finding that the connected actions doctrine does not require the aggregation of federal and non-federal actions, and does not dictate that NEPA review encompass private activity outside the scope of the sum of the geographically limited federal actions; reasoning that because no federal action was required to authorize the pipeline's construction, there were no connected federal actions and so the connected-actions regulation did not apply).
- *City of Boston Delegation v. Federal Energy Regulatory Comm'n*, 897 F.3d 241 (D.C. Cir. 2018) (holding that the functional and temporal distinctness of the three pipeline upgrade projects, as underscored by factual developments concerning two other upgrades to its northeast pipeline system, substantiate that it was permissible for FERC to prepare a separate EIS for construction of 5 miles of new pipeline (West Roxbury Lateral), which would run adjacent to an active quarry outside of Boston).
- *Township of Bordentown, New Jersey v. Federal Energy Regulatory Comm'n*, 903 F.3d 234 (D.C. Cir. 2018) (finding that proposal to upgrade existing interstate natural gas pipeline system so that applicant could increase pipeline capacity for natural gas from its

Mainline to its Trenton-Woodbury Lateral had independent utility and was not connected to other pipeline upgrade projects).

- *Fath v. Texas Dep't of Transp.*, No. 17-50683, 2018 WL 3433800, -- F.3d --- (5th Cir. Jul. 17, 2018) (finding that separate highway projects are not cumulative actions as defined by 40 C.F.R. § 1508.25(a)(2), and that the agency did not improperly segment the highway projects under 23 C.F.R. § 771.111(f)).

Adoption/Incorporation by Reference: Three of the cases involved adoption of other agency's impact statements or tiered to larger impact statements.

- *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (discussing that the USFS, when adopting the FERC's FEIS, did not undertake an independent review of the sedimentation analysis, given that it adopted the EIS in spite of the USFS's prior disagreement over the level of efficacy of barriers intended to block sedimentation of waterways).
- *Cowpasture River Preservation Assoc. v. U.S. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018) (stating as a cooperating agency, the USFS violated NEPA because it adopted FERC's inadequate EIS without undertaking the required "independent review," and because the FEIS did not satisfy the USFS' earlier comments and concerns on the DEIS).
- *Alliance for Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105 (9th Cir. 2018) (distinguishing between tiering and incorporation by reference).

Predetermination: Three cases involved allegations that impact analysis did not occur prior to agency decision-making (predetermination).

- *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520 (D.C. Cir. 2018) (finding that the tribe does not need to show irreparable harm for the agency to consider NEPA claims before approving license to construct a uranium mining project in the Black Hills of South Dakota).
- *Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, 879 F.3d 1202 (D.C. Cir. 2018) (upholding NRC's approval of a license for uranium mining at the Ross Project in Wyoming although there was not enough information before the agency concerning post-mining aquifer restoration; the court opined that NRC's NEPA process needs improvement but that a remand would be pointless considering that supplemental information was considered by the agency after the license was issued).
- *Paradise Ridge Defense Coalition v. Hartman*, No. 17-35848, 2018 WL 6434787, -- Fed. Appx. --- (9th Cir. Dec. 7, 2018) (not for publication) (holding that agency did not make "an irreversible and irretrievable commitment of resources" before completing its analysis, and so did not impermissibly predetermine the outcome of the NEPA analysis).

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

- *Western Organization of Resource Councils v. Zinke*, 892 F.3d 1234 (D.C. Cir. 2018) (recognizing that neither NEPA nor the agency's own documents create a legal duty for

the agency to update the Federal Coal Management Program's programmatic EIS analyzing the climate impacts of federal coal leasing).

- *Greenpeace, Inc. v. Stewart*, No. 17-35945, 743 Fed. Appx. 878 (9th Cir. Nov. 28, 2018) (not for publication) ("USFS violated NEPA by declining to supplement its NEPA documents despite significant new circumstances that arose when USFS's reanalysis of the project revealed below guideline deer habitat capabilities").
- *Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906 (9th Cir. 2018) (discussing May 2011 Supplemental Analysis [incorporated into the 2009 ROD] merely confirmed the Corps' conclusion but was not its basis; accordingly, it did not contain "significant new information" that would require the Corps to recirculate the EIS/EIR for further comment).

Waiver of claims: Three cases addressed the waiver of claims defense.

- *Little Traverse Lake Property Owners Ass'n v. National Park Serv,* 883 F.3d 644 (6th Cir. 2018) (explaining plaintiffs waived their claims for inadequate impact analysis when they did not renew their objections in the republished 2009 Trail Plan, but the court then provided that the claim involving alternatives was not waived because the agency did not respond to the plaintiffs' suggestions for an alternative route they submitted during the 2009 Trail Plain public involvement period).
- *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke,* 889 F.3d 584 (9th Cir. 2018) (explaining that because the plaintiffs did not tell the agency to consider the alternatives it proposed during the comment period, it waived any argument that the failure to consider those alternatives represented a violation of NEPA).
- *Alliance for Wild Rockies v. Savage*, 897 F.3d 1025 (9th Cir. 2018) (construing that the plaintiffs did not waive their claims regarding impacts to the Cabinet-Yaak grizzly bear because they raised the concerns at the first available opportunity, which in this case, was the FEIS).

Purpose and Need: Two of the cases involved challenges to purpose and need statements. Purpose and need statements in impact assessments were discussed during challenges involving sufficiency of alternatives.

- *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke,* 889 F.3d 584 (9th Cir. 2018) (disagreeing with the argument that the FEIS's purpose and need statement was "artificially limited" and opining that the purpose and need statement was quite broad).
- *Little Traverse Lake Property Owners Ass'n v. National Park Serv,*, 883 F.3d 644 (6th Cir. 2018) (upholding the purpose and need statement, because while the Trail Plan does prescribe a definite terminus, that requirement was not unreasonably narrow because it allowed for sufficient flexibility in planning the trailway's path, and the Trail Plan demonstrated considerable flexibility in achieving its purpose).

Contractor Conflict of Interest: Two cases involved claims that the environmental consultant/agency had a conflict of interest with the underlying project.

- *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke,* 889 F.3d 584 (9th Cir. 2018) (finding that the plaintiff did not provide any evidence that agency

did not make an independent choice to contract with contractor and plaintiff did not show an impermissible conflict of interest when it failed to allege that any financial stake contractor had in aiding with permit approvals was significant).

- *City of Boston Delegation v. Federal Energy Regulatory Comm'n*, 897 F.3d 241 (D.C. Cir. 2018) (providing that the supposed conflict was not a "disqualifying conflict" under the FERC's rules and that "even if petitioners had identified an actual conflict of interest, it would afford a ground for invalidating the EIS only if it rose to the level of compromising the objectivity and integrity of the NEPA process").

Emergency Action: One case addressed the unique situation of emergency action; this is an issue rarely litigated.[19]

- *Forest Service Service Employees for Environmental Ethics v. U.S. Forest Service*, No. 17-35569, 726 Fed. Appx. 605 (9th Cir. Jun. 8, 2018) (not for publication*)* (addressing emergency provisions and upholding the USFS's decision to construct a community protection line during the Wolverine wildfire of 2015 in the Okanogan-Wenatchee National Forest in eastern Washington).

7.4 Details of Cases

Each of the substantive 2018 NEPA cases, organized by federal agency, is summarized below. Unpublished cases are noted (16 of the 35 substantive cases in 2018 were unpublished, a significant number, with 11 cases from the Ninth Circuit, 2 cases from the D.C. Circuit, 1 from the Third, 1 from the Fourth Circuit, and 1 from the Fifth Circuit). Although such cases may not have precedential value depending on the court, they can be of value to NEPA practitioners.

U.S. DEPARTMENT OF AGRICULTURE

Native Ecosystems Council v. Marten, 883 F.3d 783 (9th Cir. 2018)
Agency prevailed.

Issues: "Hard look," reliance on scientific studies

Facts: After issuing an EIS, USFS approved a project to thin over 2,500 acres of forest land, including 495 acres of old growth forest, in the Gallatin National Forest (Montana) for the purpose of reducing the threat of wildfire in a populated area of the forest. Plaintiffs brought suit to enjoin the project contending it violated NEPA and other statutes. The district court enjoined the project but, after requiring USFS to remedy defects in Biological Opinions concerning two listed species, dissolved the injunction. The court of appeals affirmed.

[19] For an in-depth treatment of emergencies, *see* Daniel R. Mandelker, et al., NEPA LAW AND LITIGATION § 5:17 (2018); *see also* CEQ Guidance, *Memorandum to Federal Agency Contacts on Emergency Actions and NEPA* (Sep. 8, 2005) and attachments, *available at* https://ceq.doe.gov/docs/nepa-practice/Emergencies_and_NEPA.pdf and CEQ Guidance, *Memorandum to Heads of Federal Departments and Agencies, Emergences and NEPA* (May 12, 2010), *available at* https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-Emergencies.pdf.

Decision: Reiterating that an EIS complies with NEPA if it shows that the agency took a "hard look" at the environmental consequences of its proposed action, the court stated that an agency fails to meet its "hard look" obligation when it "rel[ies] on incorrect assumptions or data" in drafting an EIS or presents information that is "so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of alternatives," *quoting Native Ecosystems Council*, 418 F.3d at 960 and *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt*., 387 F.3d at 993.

Addressing the plaintiffs' claims that the EIS was misleading or inaccurate in three respects and was therefore deficient, the court agreed with USFS in two instances (USFS had no obligation to provide a detailed description of an article it cited in the EIS and that the USFS did not misrepresent the contents of an unpublished report used in the EIS analysis).The court did agree with the plaintiffs' third instance and concluded that USFS was "flatly wrong" in its interpretation of a Management Indicator Species Assessment relating to populations of goshawk and pine marten. However,

> "[i]t does not appear, however, that the mistake was a significant factor in USFS's approval of [the project]. We do not underestimate the importance of accurate descriptions of the results of MIS surveys. In the context of this particular project, however, we conclude that USFS's mistake was not inconsistent with its having taken a 'hard look' at the project."

Sierra Club v. U.S. Forest Serv., 897 F.3d 582 (4th Cir. 2018)
Agency prevailed on some, but not all, of the NEPA claims.

Issue: EIS adoption

Facts: Mountain Valley Pipeline (MVP) plans to construct, operate, and maintain about 300 miles of new underground natural gas pipeline from Wetzel County, WVA to Pittsylvania County, VA. The pipeline would require right-of-way from both BLM and USFS (Jefferson National Forest) and a Certificate of Public Convenience and Necessity from FERC.
FERC, as lead agency for natural gas pipeline projects, issued an EIS for the project. USFS and BLM served as cooperating agencies. As allowed under the CEQ NEPA-implementing regulations, USFS and BLM may adopt FERC's EIS, but only if the EIS "meets the standards for an adequate statement" under pertinent regulations, 40 C.F.R. § 1506.3(a), and only if the agencies undertake "an independent review of the statement" and determine that their "comments and suggestions have been satisfied," id. § 1506.3(c); see also *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 445 & n.6 (4th Cir. 1996). Both BLM and USFS did ultimately adopt the EIS and issued RODs on the basis of that EIS.

With respect to the USFS decision, it was undisputed that the MVP pipeline project was not consistent with the Jefferson Nation Forest Land Resource Management Plan. Based on the EIS, USFS decided to amend the Forest Plan such that the MVP project would be consistent with the plan, with the amendments limited to apply only to the MVP project.

Plaintiffs did not challenge FERC's issuance of the certificate. Plaintiffs did challenge BLM's decision as a violation of the Mineral Leasing Act and USFS' decision as a violation of both NEPA and the National Forest Management Act. Initially, the court of appeals vacated both agency decisions and remanded the cases to the agencies for further proceedings. Only the NEPA challenge is discussed below.

Decision: Plaintiffs challenged USFS' NEPA compliance in several respects: adequate analysis of erosion and sedimentation, forest impacts, ability to conduct a meaningful analysis, and analysis of alternatives.

Erosion and Sedimentation. MVP prepared three drafts of a "Hydrologic Analysis of Sedimentation," which was attached to the EIS.USFS filed comments on the first draft and MVP submitted a second draft to address those concerns and providing additional information regarding best management practices and sediment containment measures.

USFS also filed comments on the second draft and conveyed apprehension with conclusions regarding sedimentation and impact thresholds. After USFS filed the second set of comments, MVP expressed concern that lowering the containment efficiency value (to 48% from MVP's 79%) as suggested by USFS "would have ramifications for the entire project analysis and would not accurately reflect the work that MVP has already done." USFS urged MVP to provide additional supporting documentation for how MVP came up with their model assumptions, in particular the containment efficiency.

MVP issued a third and final version of the report responding to USFS comments. However, the next day FERC issued its EIS, which incorporated and relied upon the second draft of the report. Six months later, USFS adopted the FERC EIS and issued its ROD, presumably relying on the third and final hydrologic report. USFS

> "did not provide any discussion as to how its concerns with regard to the second draft had been alleviated, and did not explain how the EIS was an adequate statement even though it relied on the second draft, not the third. The ROD states merely, 'USFS hydrology and aquatic biology specialists reviewed the [Hydrologic Report] and . . . enlisted expertise from local, certified consultants to validate results.'"

In finding for the plaintiffs on this claim, the court stated:

> "we discern no evidence that the USFS undertook the required independent review of the EIS's sedimentation analysis. Nor can we ascertain how the USFS concluded that its comments had been satisfied, especially after having expressed such grave concerns about the sedimentation impact and containment figures presented in the second draft of the Hydrologic Report. USFS suggests the written comments from MVP after the second draft, and USFS's ROD months later, demonstrate that the concerns had been alleviated . . . But we certainly cannot discern USFS's rationale because, as MVP counsel admitted at argument, "[The USFS] doesn't say in the record specifically that [its proposed 48% figure] is incorrect." Indeed, the USFS expressed nothing but skepticism of the 79% figure for more than three months. In fact, the USFS proposed the 48% figure as a ceiling, rather than a floor or even a desired target, for sediment containment. Given the circumstances, we simply cannot conclude that the USFS undertook an independent review and determined that its comments and concerns were satisfied when it shifted from a 48% ceiling to 79% with absolutely no explanation. *See* 40 C.F.R. § 1506.3(c). This shift is particularly concerning in light of MVP's commentary at the May 9 meeting that using the 48% figure would have ramifications for the entire project analysis. *Id*. at 136 . . .
>
> "Pursuant to NEPA, we conclude the USFS acted arbitrarily and capriciously in adopting the sedimentation analysis in the EIS. It did not "articulate[] a rational connection between the facts found and the choice made." *Balt. Gas & Elec*., 462 U.S. at 105, 103 S.Ct. 2246. By MVP counsel's own admission, there is no statement in the ROD explaining the USFS's abandonment of its earlier concerns. "[The USFS] doesn't say in the record specifically that [its proposed 48% figure] is incorrect." Its decision also 'runs counter to the evidence before the agency.' *Defs. of Wildlife*, 762 F.3d at 396 (internal quotation marks omitted). Leading up to the filing of the EIS, the USFS expressed steadfast concerns about the figures proposed by the Hydrologic Report. But it is not clear whether and how MVP's comments and the studies and reports it provided to USFS alleviated those concerns. Finally, FERC incorporated the second draft of the Hydrologic

> Report in the EIS, even though the third and final draft was issued the previous day. There is also no indication FERC considered the third draft at all, yet USFS adopted the EIS anyway."

Forest Impacts. The plaintiffs argued that the BLM and USFS violated NEPA because, in adopting the EIS, they did not consider the impact on the forests in considering alternative routes and plans. For example, the agencies did not consider whether the core forests through which the right-of-way would pass would still be part of a contiguous forest patch, or whether alternative routes would reduce visual or scenic impacts. BLM and USFS did not recognize that the EIS fails to justify its conclusion that none of the alternative routes offers a significant environmental advantage.

Finding for the agencies, the court concluded that the plaintiffs

> "had not met their 'demanding burden' on this issue. *Almy v. Sebelius*, 679 F.3d 297, 307 (4th Cir. 2012). NEPA requires that agencies reasonably evaluate a right of way's impacts on forests and 'candidly acknowledge [] its risks.' *Webster v. U.S. Dep't of Agric*., 685 F.3d 411, 429 (4th Cir. 2012). 'It is of course always possible to explore a subject more deeply and to discuss it more thoroughly.' *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987). The BLM and the USFS, through their respective RODs, sufficiently explained their methodology and identified the competing factors they weighed in reaching their conclusion. They also considered viable alternatives and explained why they are not appropriate . . . In sum, perhaps the agencies' analysis could have been more 'nuanced, but the agencies did not 'entirely fail[] to consider an important aspect of the problem,' and their decision was not 'implausible.' *Defs. of Wildlife*., 762 F.3d at 396. We thus defer to the agencies' conclusions on the issue of forest effects."

Ability to conduct a meaningful analysis. The plaintiffs argued that the DEIS precluded meaningful comment because (1) it failed to address the efficacy of MVP's Erosion and Sediment Control Plan, (2) its description of the project's purpose and need precluded meaningful analysis, and (3) it did not adequately analyze or weigh impacts on forests. Therefore, the plaintiffs claim, the agencies should not have adopted the EIS. The court rejected each of these arguments.

> "Petitioners have not demonstrated that 'omissions in the DEIS left the public unable to make known its environmental concerns about the project's impact.' *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004)."
>
> "Although Petitioners would like more detail, specifically about the precise final destination of the gas transported through the pipeline, they have not sufficiently explained how the absence of that detail precluded meaningful analysis of the DEIS."
>
> Although claiming that "they lacked a meaningful opportunity to respond to an impacts analysis…Petitioners and others submitted detailed comments on these [impacts]. Clearly, then, there was an opportunity for meaningful comment and review, and Petitioners took advantage of it.'

Analysis of alternatives. The plaintiffs also argue that the USFS ROD is deficient because it does not discuss all alternatives examined in FERC's EIS. Rather, it "unlawfully limited its analysis to only two alternatives: MVP's proposal and the `no action' alternative." Although the NEPA regulations require that a ROD "[i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable" (40 C.F.R. § 1505.2(b)), it is the EIS that must "[r]igorously explore and objectively evaluate all reasonable alternatives," and "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits." Id. § 1502.14(a), (b).

"Therefore, the USFS did not act arbitrarily in failing to tick through each alternative and the reasons for rejecting them. By adopting the EIS and rendering its decision, it sufficiently 'identified' all alternatives considered and

'specified' that the preferred route was environmentally preferable. *Id.* § 1505.2(b). In the end, the USFS was tasked with determining whether to amend its Forest Plan, and whether to join in the BLM's decision to grant a right of way. It was not tasked with approving the project as a whole — nor could it be under the Natural Gas Act. Therefore, this argument fails."

Note: In October 2018, the Fourth Circuit Court of Appeals clarified this decision in *Sierra Club, Inc. v. U.S. Forest Serv.*, No. 17-2399 (L), No. 18-1012, No. 18-1019, No. 18-1036, 739 Fed. Appx. 185 (4th Cir. Oct. 10, 2018) (not for publication) ("[O]ur prior opinion in *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018), does not vacate the portion of the BLM's ROD authorizing a right of way and temporary use permits for MVP to cross the Weston and Gauley Bridge Turnpike Trail").

***Alliance for Wild Rockies v. Savage*, 897 F.3d 1025 (9th Cir. 2018)**

Agency did not prevail on the preliminary NEPA question.

Issue: Waiver of NEPA claims

Facts: This case involved the question of whether plaintiffs had waived their claim regarding impacts to the Cabinet-Yaak grizzly bear because they had not raised this argument in a timely manner during agency proceedings.

Decision: The court of appeals concluded that the plaintiffs did not waive their claim and could proceed with the litigation:

> "'Absent exceptional circumstances . . . belatedly raised issues may not form a basis for reversal of an agency decision.' *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (*per curiam*). Here, Alliance did not file an objection to the alleged increase in total linear road miles until after issuance of the Final Environmental Impact Statement, which, in the typical case, would be untimely. *See* 36 C.F.R. § 218.8(c); *Havasupai Tribe*, 943 F.2d at 34 (noting that issues raised after publication of the final environmental impact statement were 'belatedly raised' and concluding that the appellant 'had some obligation to raise these issues during the comment process')."
>
> "This, however, is not a typical case; Alliance's failure to object at an earlier time resulted from USFS's failure to disclose this aspect of the Project in the Draft Environmental Impact Statement. It was first revealed in the Final Environmental Impact Statement, to which Alliance promptly objected. In other words, Alliance raised its objection at the first available opportunity, and it is therefore not waived."

Havasupai Tribe v. Provencio, 906 F.3d 1155 (9th Cir. 2018)

Agency prevailed.

Issue: Definition of final agency action

Facts: Grand Canyon National Park is bordered to the north and south by the Kaibab National Forest. The southern portion of the forest contains Red Butte, a site of religious and cultural significance to the Havasupai Tribe. In 1988, after preparing an EIS, USFS approved a plan to build and operate what became known as Canyon Mine, a 17.4-acre uranium mine in the area around Red Butte. The Canyon Mine is now owned by two energy companies, collectively known as Energy Fuels.

In January 2012, the Secretary of the Interior withdrew, for 20 years, more than one million acres of public lands around Grand Canyon National Park from new mining claims. That withdrawal did not extinguish "valid existing rights." In April 2012, USFS issued a Mineral Report finding that the former owners of the Canyon Mine had "located" mining claims at the site in 1978 and "discovered" uranium ore there between 1978 and 1982. It further found that there were 84,207 tons of uranium ore on the site, and that "under present economic conditions, the uranium deposit on the claims could be mined, removed, transported, milled and marketed at a profit. USFS also reviewed its 1988 decision, including its EIS and the mine's approved plan of operations. In a "Mine Review" dated June 25, 2012, USFS concluded that the existing plan of operations was "still in effect and no amendment or modification to the [plan] is required before Canyon Mine resumes operations under the approved [plan]." USFS further concluded that "[n]o new federal action subject to further NEPA analysis is required for resumption of operations of the Canyon Mine."

In this appeal, the court of appeals considered, among other claims, whether USFS' 2012 decision that Energy Fuels had a valid existing right to operate the Canyon Mine on land within the withdrawal area was subject to NEPA.

Decision: As a preliminary matter, the court concluded that the USFS determination that Energy Fuels had valid existing rights was a final agency action subject to judicial review. Although USFS claimed that it had no authority to recognize mining rights, and that the Mineral Report represented only the agency's "opinion" as to their validity, the court concluded that the Mineral Report was final because the action marked the consummation of the agency's decisionmaking process and the action was one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154 (1997). The Mineral Report determined that such rights existed with respect to Canyon Mine. In addition, the court stated:

> "We have observed that "courts consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled." *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014)."

Turning to the question of whether the Mineral Report was a "major federal action" under NEPA, the court noted that:

> "We have held that 'where a proposed federal action would not change the status quo, an EIS is not necessary.' *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990). Nor is an EIS necessary to 'discuss the environmental effects of mere continued operation of a facility.' *Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980).

In this case, the original approval of the plan of operations was a major federal action. "[R]esumed operation of Canyon Mine did not require any additional government action. Therefore, the EIS prepared in 1988 satisfied the NEPA."

Alliance for Wild Rockies v. U.S. Forest Serv., 907 F.3d 1105 (9th Cir. 2018)
Agency prevailed on the NEPA claims.

Issue: Tiering

Facts: The Payette National Forest is managed in accordance with the 2003 Payette Forest Plan, which emphasizes restoration and maintenance of vegetation and watershed conditions. In 2011, USFS proposed

amendments to the Payette Forest Plan, which were called the Wildlife Conservation Strategy (WCS) amendments and would prioritize activities that would help maintain or restore habitat for certain species of wildlife that USFS determined were in greatest need of conservation.

USFS prepared and published an EIS for the restoration project. The FEIS, published in March 2014, stated that the purpose of the project is to move vegetation toward the Forest Plan's "desired conditions," which are those conditions deemed desirable to achieve the specific purpose for each Management Prescription Category (MPC). The FEIS further states that the Project is "consistent with the science in the Forest's [WCS DEIS]," which includes improving habitat for species of concern, maintaining and promoting large tree forest structure and forest resiliency, and reducing the risk of undesirable wildland fire. The Project also aims to restore certain streams, with an emphasis on restoring habitat occupied by ESA-listed species, such as the bull trout.

In September 2014, USFS issued a ROD for the Lost Creek Project, selecting, from the five alternatives discussed in the FEIS, a modified version of Alternative B, which implemented recreation improvement, road management, watershed restoration, and vegetation management, including 22,100 acres of commercial logging and approximately 17,700 acres of non-commercial logging. In the ROD, USFS also approved a "minimum road system" for the Project, decommissioning approximately 68 miles of roads and designating 401 miles of roads for maintenance or improvement in the Project area.

Following approval of the Project, Plaintiffs filed suit in federal court alleging that USFS violated NEPA by improperly incorporating the analysis of — or tiering to — prior agency documents that did not undergo a full NEPA review. Plaintiffs also alleged violations of the National Forest Management Act and the Endangered Species Act, which are not addressed here. The district court had granted summary judgment in favor of USFS; the court of appeals affirmed the lower court's decision with respect to NEPA.

Decision: The court first discussed requirements of tiering:

> "Ordinarily, an agency can avoid some of the burdens of the NEPA process by 'tiering' to a prior document that has itself been the subject of NEPA review. 'Tiering' is defined as 'avoiding detailed discussion by referring to another document containing the required discussion,' *Kern*, 284 F.3d at 1073… CEQ regulations further state that '[t]iering is appropriate when the sequence of statements or analyses is . . . [f]rom a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.' 40 C.F.R. § 1508.28(a). The Ninth Circuit has further interpreted these regulations to only permit tiering to another environmental impact statement. *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1219 (9th Cir. 2008) (collecting cases); *see also Kern*, 284 F.3d at 1073 ('However, tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA.'). This is because in order to comply with NEPA, the agency must 'articulate, publicly and in detail, the reasons for and likely effects of those management decisions, and . . . allow public comment on that articulation.' *Kern*, 284 F.3d at 1073."

The court then differentiated between tiering and incorporation by reference:

> "Alternatively, where an agency merely incorporates material 'by reference, without impeding agency and public review of the action, the agency is not improperly tiering. *See* 40 C.F.R. § 1502.21 ('Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut

down on bulk without impeding agency and public review of the action.'); *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 792-93 (9th Cir. 2014). Ultimately, when reviewing for NEPA compliance, we look to whether the agency performed the NEPA analysis on the subject action. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999)."

"The Alliance argues that the WCS amendments are policy decisions that have not undergone the full NEPA review, and are improperly relied upon in the Project FEIS to justify deviations from the policies set forth in the Payette Forest Plan. We note at the outset that because the WCS amendments themselves are an agency policy statement, not a NEPA document, tiering to this document would be categorically improper under the CEQ regulations. *League of Wilderness Defs. Blue Mountains Biodiversity Project*, 549 F.3d at 1219. Similarly, although the WCS DEIS is a NEPA document, adopting the scientific analysis in the WCS DEIS would be improper because that document did not undergo public comment and was therefore not subject to the full NEPA review. *See Kern*, 284 F.3d at 1073."

The court did not find that the USFS' reliance on the WCS DEIS was improper:

"[T]his case does not involve an EIS that lacks the required NEPA analysis. Rather, the portions of the Project FEIS identified by the Alliance show that Forest Service relied on data and science prepared for the WCS DEIS. This might be considered improper tiering, but for the fact that the Project FEIS goes on to analyze the desired conditions for MPC 5.1 and the wildlife habitat categories from the WCS amendments in the context of the present project, including analyzing the cumulative, direct and indirect effects on vegetative resources and wildlife. The Alliance has not identified any required analysis that was not performed in the Project FEIS. To the extent the Alliance challenges the adoption of WCS standards in lieu of the Payette Forest Plan's standards, this might give rise to a separate NFMA claim, but it does not, in and of itself, constitute improper tiering under NEPA, as we have previously understood and applied that term. *See* 40 C.F.R. § 1502.20. We accordingly reject the Alliance's contention that USFS violated NEPA by incorporating the standards and science underlying the WCS amendments."

Cowpasture River Preservation Assoc. v. U.S. Forest Serv., 911 F.3d 150 (4th Cir. 2018).
Agency did not prevail.

Issue: EIS adoption

Facts: Atlantic Coast Pipeline, LLC sought a Certificate of Convenience and Public Necessity from FERC to construct and operate the 600-mile Atlantic Coast Pipeline (ACP) from West Virginia to North Carolina, and a special use permit from USFS to construct and operate the pipeline through parts of the George Washington (16 miles) and Monongahela (5 miles) National Forests. FERC began the preparation of an EIS for the project and USFS became a cooperating agency.

During the EIS process, USFS submitted comments stating, among other concerns, that the FERC EIS must analyze alternative routes that did not cross national forest land and must address USFS policy that restricts special uses on national forest lands to those that "cannot reasonably be accommodated on non-National Forest System lands." USFS also expressed concerns regarding landslides, slope failures, sedimentation, and impacts to groundwater, soils, and protected species that it believed would result from the ACP project.

FERC did not address non-forest alternatives, stating in the DEIS that the ACP was routed on national forest lands to avoid the need for congressional approval of the pipeline to cross the Appalachian National Scenic Trail (ANST). Regarding impacts to the forests, FERC stated that: "a shorter pipeline could conceptually have significantly greater qualitative impacts to sensitive resources than a longer route, which could make the longer route preferable. In this instance, we have not identified or received any information that suggests the shorter pipeline route through the National Forests has significantly greater impacts to sensitive resources than the alternative, but acknowledge that ground resource surveys have not been conducted."

Despite USFS' clearly stated concerns regarding adverse impacts of the ACP project including comments on the DEIS, as the applicant's proposed deadline for a FEIS approached, the court noted that the agency's "tenor began to change." Specifically, USFS stated in a letter to FERC and the applicant dated May 2017, that it would not require site-specific stabilization designs before authorizing the project. FERC issued the FEIS in July 2017. On the same day, and in line with the applicant's timeline, USFS released its draft ROD proposing to adopt the FERC EIS, grant the special use permit. And exempt the applicant from several forest plan standards. The alternatives analysis in the FEIS is identical to the DEIS, on which USFS had submitted comments regarding alternatives and impacts. USFS issued its final ROD in November 2017, issued the special use permit and granted a right-of-way across the ANST. Plaintiffs challenged this decision arguing violations of NEPA, the National Forest Management Act, and the Mineral Leasing Act.

Decision: The Court of Appeals for the 4th Circuit concluded that the USFS' decisions violated the NFMA and NEPA, and that the agency lacked statutory authority pursuant to the MLA to grant a pipeline right of way across the ANST.

After reiterating that NEPA requires agencies to consider alternatives to the proposed action and to take a hard look at environmental consequences, the court turned to the terms under which a cooperating agency may adopt another agency's EIS:

> "As a cooperating agency, USFS may adopt FERC's EIS only if it undertakes 'an independent review of the [EIS]' and 'concludes that its comments and suggestions have been satisfied. 40 C.F.R. § 1506.3(c); see also Sierra Club, 897 F.3d at 590. It must also ensure that the EIS is 'adequate' under NEPA regulations. 40 C.F.R. § 1506.3(a). In reviewing an EIS, the court's responsibility is to 'determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made.' *Sierra Club*, 897 F.3d at 594 (*quoting Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 105 (1983))."

Plaintiffs asserted that FERC's FEIS was inadequate because it failed to sufficiently study alternative pipeline routes for the ACP that avoided national forest lands. According to Petitioners, USFS violated NEPA because it adopted FERC's inadequate EIS without undertaking the required "independent review," and because the FEIS did not satisfy USFS' earlier comments and suggestions on the DEIS. USFS argued that after FERC had approved the certificate, USFS could only approve the pipeline as authorized by FERC or deny the permits and right-of-way. Since FERC was responsible for analyzing alternative pipeline routes, USFS reasonably relied on that analysis in adopting the EIS.

The court disagreed:

> "The chain of events surrounding USFS's sudden acquiescence to the alternatives analysis in the FEIS is similar to that in Sierra Club v. Forest Service, where we determined that USFS had acted arbitrarily and capriciously in adopting the sedimentation analysis in the FEIS for a different pipeline project. *See Sierra Club*, 897 F.3d at 594–96. Here, like in *Sierra Club*, '[g]iven the circumstances, we simply cannot conclude that USFS undertook an independent review and determined that its comments and concerns were satisfied' when it seemingly dropped its demand that off-forest alternative routes be studied before the ACP was authorized without any further analysis. Id. at 595. In light of this, and particularly considering USFS's earlier skepticism that location decisions for the ACP were made solely to avoid congressional approval, we hold that adopting the unchanged alternatives analysis in the FEIS was arbitrary and capricious."

Further, with respect to the impacts analysis, the court stated that:

> "the FEIS could not have satisfied USFS's concerns that the DEIS lacked necessary information to evaluate the environmental consequences of the pipeline. Indeed, the FEIS conceded that USFS's concerns remained unresolved. Nevertheless, as Atlantic's deadlines drew near, USFS disregarded these concerns and adopted the FEIS -- including its conclusions that landslide risks, erosion impacts, and degradation of water quality remained unknown -- the very same day FERC issued it. To support its decision to approve the project and grant the SUP, USFS relied on the very mitigation measures it previously found unreliable. This was insufficient to satisfy NEPA, and did not constitute the necessary hard look at the environmental consequences of the ACP project."

Granat v. U.S. Dep't of Agriculture, No. 17-15665, 720 Fed. Appx. 879 (9th Cir. Apr. 27, 2018) (*not for publication*)
Agency prevailed.

Issues: Alternatives, local agency cooperation

Facts: To implement USDA's 2005 Travel Management Rule, USFS developed a proposal for limited, additional designations of motorized trails in the Plumas National Forest. It identified 1,107 miles of "user-created" routes where motor vehicle use had occurred over time without agency authorization, published an EIS and issued a ROD designating 234 of these miles as open for motorized travel. Plaintiffs challenged the decision in district court, arguing that USFS violated NEPA by failing to consider a reasonable range of alternatives and failing to coordinate and cooperate with local counties during the route designation process. The district court granted summary judgment to the agency.

Decision: The court of appeals affirmed, holding that USFS had considered a reasonable range of alternatives. It engaged with the public to develop four action alternatives consistent with the project's purpose and need. These four alternatives examined a reasonable range of user-created routes for designation, including a no action alternative that would have permitted motor vehicle use on all 1,107 miles of user-created routes. The plaintiffs did not show that "considering additional alternatives was 'necessary to permit [USFS to make] a reasoned choice.' *See State of California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (internal quotation marks omitted)." In addition, the court found that USFS had discharged its duty to coordinate and cooperate with the local counties because the agency had held public meetings, met with the county representatives, solicited the counties' input, and considered the counties' comments and objections.

Forest Service Employees for Environmental Ethics v. U.S. Forest Service, No. 17-35569, 726 Fed. Appx. 605 (9th Cir. Jun. 8, 2018) (*not for publication*)
Agency prevailed.

Issue: Emergency

Facts: Plaintiff-Appellant Forest Service Employees for Environmental Ethics (FSEEE) challenged a USFS decision to construct a community protection line (CPL) during the Wolverine wildfire of 2015 in the Okanogan-Wenatchee National Forest in eastern Washington. The CPL was a 300-foot wide swath of land thinned of vegetation that stretched for many miles. USFS constructed the CPL to act as a barrier between the Wolverine fire and populated communities. Plaintiffs challenged that decision, claiming a violation of NEPA. In response, USFS argued that it relied on an emergency regulation, which authorized it to forego an EIS or EA prior to constructing the CPL. The district court issued a summary judgment for USFS.

Decision: The court of appeals affirmed the lower court decision:

"FSEEE's only argument is that 'forest fires are not emergencies exempt from NEPA.' In support, FSEEE cites a dictionary definition of 'emergency': 'an unforeseen combination of circumstances or the resulting state that requires immediate action.' Because forest fires are a common occurrence in the western United States, FSEEE reasons that they are not 'unforeseen' and, thus, that USFS acted arbitrarily by resorting to the USFS Emergency Rule during its response to the Wolverine fire. While it is true that fires happen every year, it defies plain language and common sense to conclude that no individual fire - or its course, intensity, or duration - could be unforeseeable. It is unreasonable to argue that forest fires can never present emergency situations when viewed at the time the fire is raging. Further, FSEEE provides no evidence - outside of the immaterial NC Plan, which was crafted by a different agency in charge of a different area - that the Wolverine fire was not an emergency."

Therefore, USFS did not act arbitrarily or capriciously in invoking the USFS Emergency Rule during the Wolverine fire.

McGuinness v. U.S. Forest Serv., No. 16-2406, 741 Fed. Appx. 915 (4th Cir. Jul. 26, 2018) (*not for publication*)
Agency prevailed.

Issues: Alternatives, impact significance

Facts: After 11 years of environmental study and public comment, including two EAs and two noise studies, USFS authorized the development of a shooting range in the Nantahala National Forest in North Carolina. Residents of the county who opposed the project challenged the USFS decision arguing that the second EA did not consider an adequate range of alternatives, the study of noise impacts was flawed, the effects of the project on a particular trail had not been adequately considered, the study of traffic impacts was insufficient, and the description of the implementation of the project was insufficient. The district court granted summary judgment for USFS, concluding that the agency had given a hard look to potential environmental impacts and USFS' decision not to prepare an EIS was not arbitrary and capricious because the agency provided an explanation of its decision that included a rational connection between the facts found through those studies and the choice it ultimately made.

Decision: The court of appeals affirmed the lower court decision.

No Action Alternative: "The September 2013 EA discusses at every step of its analysis, in a fairly detailed manner, the need for the proposed shooting range and the environmental impacts of the alternatives to the proposed shooting range, including the no build alternative. Most significantly, the September 2013 EA describes *existing* noise levels in the vicinity of the proposed shooting range sites, and provides a detailed description of the additional noise that would result from either of the proposed alternatives."

"USFS's consideration of the alternatives, including the No Action alternative, was more than sufficient to satisfy the NEPA requirement that it 'take a `hard look"' at the effect of its actions on the existing noise level. *Aracoma Coal Co*., 556 F.3d at 191. In considering the impact of the proposed alternatives on soils, water quality, air quality, cultural and historical resources, roadless areas, biological resources, and the human environment, the September 2013 EA addressed, in varying degrees of detail, the No Action alternative. We conclude that USFS took the requisite 'hard look at the potential environmental consequences of' its decision authorizing the proposed shooting range."

Preparation of an EIS: "It is apparent from both the September 2013 EA and the Decision Notice that USFS did not act arbitrarily or capriciously in selecting the Perry Creek alternative without first issuing an EIS. The agency carefully considered the noise effects of its decision, noting that the shooting range would create additional low-level noise for residents in the vicinity and that hikers on the Chunky Gal Trail would hear gunfire and increased noise levels that would approximate loud conversational speech or even shouting during very heavy shooting range use." In the Decision Notice, USFS found that the effects on the quality of the human environment are not likely to be highly controversial and that the effects are not uncertain, and do not involve unique or unknown risk, noting that "'[t]he Forest Service has considerable experience with the types of activities to be implemented.'"

"These are reasonable conclusions based on agency expertise to which we defer. In this context, agency action is 'likely to be highly controversial' when 'a substantial dispute exists as to the size, nature or effect of the major federal action.' *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (internal quotation marks omitted). The general effects of gunfire on the environment are clearly not uncertain or unknown. The sound of a rifle being discharged is well-known to anyone in USFS. And, assuming the proposed project qualifies as a 'major federal action,' there is no 'substantial dispute' regarding 'the size, nature or effect' of the proposed project. Appellants nitpick the results of the sound tests considered by USFS, but mere opposition—or the extent of that opposition—to a proposed agency action does not create a 'substantial dispute' or make the action 'highly controversial.'"

"Finally, even if we concluded, based on the issues identified by the Appellants, that the proposed project is 'likely to be highly controversial,' 40 C.F.R. § 1508.27(b)(4), 'the existence of a controversy is only one of the ten factors listed for determining if an EIS is necessary.' *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000)."

Property Values: "Appellants contend USFS violated NEPA by not considering the possible effects of the proposed shooting range project on the values of nearby property…. Though authority is scant, some courts have considered the potential effect of a proposed agency action on nearby property values. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1324 (D.C. Cir. 2015) (considering whether 'Environmental Assessment [took] a "hard look" at "quantifying the impacts of the project on property values and lost development opportunities"')…. As is apparent from its statement in the September 2013 EA, USFS did not simply refuse to consider the effect of a shooting range on property values. It acknowledged that it was of concern to some local residents, albeit not a major issue in the global sense. Moreover, the agency gave at least some consideration to this issue, noting that it

had 'searched the literature and consulted with social scientists and legal experts.'… We conclude, based on the record before us, that USFS 'considered the relevant factors,' 'examined the relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made.' *Aracoma Coal Co*., 556 F.3d at 192 (internal quotation marks omitted). Even though the EA omits mention of the anecdotal evidence regarding property values, we are not able to say that the agency made an arbitrary and capricious decision."

Cost of Increased Road Maintenance. "Appellants argue that USFS failed to estimate the cost of increased road maintenance and failed to consider potential issues created by increased traffic related to the shooting range. USFS, however, took the required hard look at this issue, and its decision to authorize the project notwithstanding the maintenance costs and increased traffic was well within its discretion."

Cascadia Wildlands v. U.S. Dep't of Agriculture, No. 17-35508, 752 Fed. Appx. 457 (9th Cir. Nov. 14, 2018) (*not for publication*)
Agency prevailed.

Issue: Federal action

Facts: Plaintiff environmental groups challenged a USDA Animal and Plant Health Inspection Services-Wildlife Services' decision to participate in the Oregon Wolf Conservation and Management Plan without first complying with NEPA. They argued that federal funding for the project required the preparation of a NEPA document. The district court found for the agency and the Court of Appeals affirmed.

Decision: "The district court correctly concluded that Wildlife Services' decision to assist the State of Oregon in its removal of gray wolves was not a 'major federal action' under [NEPA]. 'Under NEPA, federal agencies are required to prepare either an [EA] or [EIS] for major Federal actions significantly affecting the quality of the human environment.' *Alaska Ctr. for the Env't v. U.S. Forest Serv*., 189 F.3d 851, 853 (9th Cir. 1999) (*citing* 42 U.S.C. § 4332(C)). 'There are no clear standards for defining the point at which federal participation transforms a state or local project into [a] major federal action. The matter is simply one of degree.' *Almond Hill Sch. v. U.S. Dep't of Agric*., 768 F.2d 1030, 1039 (9th Cir. 1985) (citation omitted); *see generally* 40 C.F.R. § 1508.18."

"In general, we make this determination by considering: (1) the degree to which the given action is funded by the federal agency, and (2) the extent of the federal agency's involvement and control in the action. *See, e.g., Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002) . . . Neither Wildlife Services' financial contribution to the Oregon Wolf Conservation and Management Plan (Oregon Wolf Plan or the Plan) nor its control over the Plan's operation, alone or in combination, are sufficient to render its involvement a 'major federal action.'"

The court held that the Wildlife Services' contributed only "a marginal level of federal funding," which amounted to eight percent of the plan's total cost. "We generally have been unwilling to impose the NEPA requirements when federal funding falls below ten percent of a state project's total costs. *See, e.g., Rattlesnake Coal. v. U.S. EPA*, 509 F.3d 1095, 1101–02 (9th Cir. 2007) (concluding that federal funding accounting for six percent of the estimated budget 'does not federalize' the state project); *Ka Makani*, 295 F.3d at 960 (concluding that federal funding constituting 'less than two percent of the estimated total project cost . . . . alone could not transform the entire [state project] into a 'major federal action"')."

In addition, the court held that Wildlife Services lacked actual power to control the Oregon Wolf Plan, which is a state-run program covered by state administrative rules and led by the Oregon Department of Fish and Wildlife (ODFW). ODFW had sole discretion to determine when a wolf should be killed under its rules, and where and when to remove problem wolves. Oregon would continue to kill gray wolves if Wildlife Services were not involved. "Under this state regulatory framework, Wildlife Services exercises only marginal discretion as to whether to accept or reject ODFW's request to remove a specific problem wolf. But this choice is limited, as Wildlife Services must remove the wolf only under conditions set by ODFW and the Plan. Wildlife Services determines the method it will use for the removal, but must consult with ODFW to make this determination, and must select one of the methods permitted by ODFW and the Plan. Wildlife Services also lacks 'regulatory authority or latitude to implement other approaches, nor can it require alternative actions of ODFW.'"

Greenpeace, Inc. v. Stewart, No. 17-35945, 743 Fed. Appx. 878 (9th Cir. Nov. 28, 2018) (*not for publication*)
Agency did not prevail.

Issue: Supplementation

Facts: Greenpeace challenged USFS's authorization of four timber sale projects in the Tongass National Forest alleging violations of both the National Forest Management Act and NEPA. The lower court held for USFS, but the court of appeals reversed that decision and ordered the lower court to vacate USFS' approval of the timber sales.

Decision: With respect to NEPA, the court of appeals found that "USFS violated NEPA by declining to supplement its NEPA documents despite significant new circumstances. 40 C.F.R. § 1502.9(c)(1)(ii) (requiring supplementation where there are 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts'). Significant new circumstances arose when USFS's reanalysis of the projects revealed below-guideline deer habitat capabilities. *See, e.g., Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) ('[A]n agency that has prepared an [environmental impact statement or environmental assessment] cannot simply rest on the original document. The agency must be alert to new information that may alter the results of its original environmental analysis . . . .')."

Wildlands Defense v. Seesholtz, No. 18-35400, 2018 WL 6262505, -- Fed. Appx. --- (9th Cir. Nov. 29, 2018) (*not for publication*).
Agency prevailed.

Issues: Impacts, cumulative impacts

Facts: Plaintiffs sought to enjoin the operation of two post-fire projects in the Boise National Forest, claiming violations of NEPA and the Endangered Species Act. The court of appeals affirmed the lower court opinion denying the preliminary injunction. The court's NEPA reasoning is addressed below.

Decision: A plaintiff seeking a preliminary injunction must establish that he or she is likely to succeed on the merits that he or she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his or her favor, and that an injunction is in the public interest. The court concluded that the USFS decision not to prepare an EIS was not arbitrary and capricious because the agency had taken a hard look at the

consequences of its actions, based its decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why the project's impacts were insignificant.

USFS considered both the context and intensity of the proposed actions and considered the projects' impacts on the total area affected by the fire and on the project areas, but "[i]n any event, '[t]he 'identification of the geographic area' within which a project's impacts on the environmental resources may occur "is a task assigned to the special competency of the appropriate agencies."' *Tri-Valley CAREs*, 671 F.3d at 1127 (*quoting Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976))."

USFS also appropriately considered cumulative impacts. "An agency may discharge its obligation to consider cumulative impacts 'by aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured.' Cascadia Wildlands v. Bureau of Indian Affairs, 801 F.3d 1105, 1111 (9th Cir. 2015). USFS acted within its discretion in doing so in this case."

U.S. DEPARTMENT OF DEFENSE

Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs, 887 F.3d 906 (9th Cir. 2018)
Agency prevailed.

Issue(s)*:* Impacts, Cumulative Impacts, Supplementation

Facts: Environmental advocacy organizations ("Friends") challenged Corps' CWA Section 404 permit and EIS, involving the Newhall Land Project. In December 2003, Newhall Land applied to the Corps for a CWA Section 404 permit that would allow construction and infrastructure of the Newhall Ranch Project, a large-scale residential, commercial and industrial development in NW Los Angeles, near the city of Santa Clara. The Corps coordinated with the California Department of Fish and Wildlife to prepare a combine EIS/EIR, published the Notice of Intent in both 2004 and 2005, and held two public scoping meetings. In May 2009, the Corps circulated the DEIR/DEIS for public comment. After taking into account public comments, the Corps published the FEIR/FEIS, which included a Section 404(b)(1) Guidelines Evaluation.

This EIS/EIR analyzed water quality, biological resources and cumulative impacts, and discussed the Project's water discharges into the Santa Clara River and potential impacts to the Southern California Steelhead, an endangered species. The Corps determined the Project was not part of the steelhead's critical habitat, but analyzed the potential for impact in its habitat and downstream through the Project area due to stormwater discharges, which would have potential for impact during the wet months but not during the months the river was partially dry (the "Dry Gap"). The Corps found that these changes would not have a substantial adverse effect on the southern steelhead. In making the determination the Corps analyzed the wastewater and stormwater discharges for dissolved copper concentration in the Santa Clara River that occurred during storm events large enough to flow through the Dry Gap (9.0 micrograms per liter). This concentration was less than the limit of the 32 micrograms per liter of dissolved copper required by the California Toxics Rule (CTR), an EPA-promulgated regulation establishing water quality standards (WQS) in California, for the Santa Clara River. The Corps concluded that the Project would not affect the steelhead and therefore it was not required to consult with NMFS to discharge its responsibilities under the ESA. The Ventura Coastkeeper sent a letter to the Corps stating the discharges would harm the Southern

California Steelhead; the EPA commented as well, focusing on the Corp's practicability analysis for different alternatives should have considered the expected revenues. However, after collaboration between EPA, the Corps and Newhall, the EPA subsequently sent a letter stating it would not seek review of the permit decision, citing project improvements and additional mitigation measures. In August 2011, the Corps issued a ROD, addressed Coastkeeper's comment letter, and summarized the results of a Supplemental Water Quality Analysis conducted by a third-party consultant in May 2011, which showed that the additional stormwater retention measures incorporated into the Project would further reduce the dissolved-copper concentration in the Project's stormwater discharges. The Friends sued the Corps and EPA alleging violations of NEPA. The district court granted summary judgment for the Corps and Friends appealed.

Decision: Friends contended that the Corps final EIR/EIS provided an inadequate analysis of the cumulative impacts of the Project's dissolved-copper discharges on steelhead in the reach of the Santa Clara River downstream of the Dry Gap.

First, Friends argued that a 2007 NMFS Technical Memorandum (An Overview of Sensory Effects on Juvenile Salmonids Exposed to Dissolved Copper), that Ventura Coastkeeper submitted with its comments on the Final EIR/EIS, demonstrated that the Project's dissolved-copper discharges may cause sublethal impacts to steelhead, and the Final EIS/EIR failed to consider those impacts (it relied on the CTR data).

In discussing the claim, which referenced the NMFS Memorandum, the court noted it may not substitute its scientific judgment for that of the agency. "The determination of what constitutes the 'best scientific data available' belongs to the agency's 'special expertise[']" and warrants substantial deference. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014). Accordingly, "[t]he best available data requirement 'merely prohibits [the Corps] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.' " *Kern Cty. Farm Bureau v. Allen,* 450 F.3d 1072, 1080 (9th Cir. 2006). In this case, the Corps reasonably concluded that the NMFS Memorandum did not contain the best scientific data available for the Project. The NMFS Memorandum summarized and analyzed laboratory studies regarding the effects of concentrations of copper on coho salmon in municipal water. It did not consider steelhead populations or the effect of copper concentrations in natural conditions. Moreover, it did not consider any data specific to the Project or the Santa Clara River. The court also discussed it was not arbitrary or capricious for the Corps to consider the CTR as "a useful benchmark" to assess the possible water-quality impacts of the Project's discharges. The Corps could reasonably consider the CTR criteria as one source of information, given that the EPA promulgated the CTR to establish water-quality criteria "legally applicable in the State of California for inland surface waters, enclosed bays and estuaries for all purposes and programs under the Clean Water Act." 65 Fed. Reg. at 31,682; *see also* 40 C.F.R. § 131.38. The CTR provided "an estimate of the highest concentration of a substance in water which does not present a significant risk to the aquatic organisms in the water and their uses," 65 Fed. Reg. at 31,689, and which California and the EPA must consider in implementing various water quality programs under the CWA. Because the effects of dissolved copper and other dissolved metals depend on water "hardness" and other factors that vary among bodies of water, the CTR provides a method for calculating a site-specific dissolved-copper criterion. The Corps could thus reasonably consider the CTR as part of its analysis. Moreover, because the Corps considered other sources of data, including project-specific modeling, in determining that issuance of the Section 404 Permit would have no effect on downstream steelhead, Friends' arguments regarding limitations in the applicability of the CTR were not material.

The Ninth Circuit ruled that because the Corps reasonably determined that the Project was not likely to affect steelhead populations in the Santa Clara River, it was not arbitrary or capricious to conclude that the Project would

not result in significant cumulative water quality impacts to steelhead. *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1448 (9th Cir. 1996) (explaining that an agency's "no effect" determination under the ESA supported its conclusion that the action would "not individually or cumulatively have a significant effect on the human environment" under NEPA) (*quoting* 40 C.F.R. § 1508.4). The Final EIS/EIR provided a sufficient discussion "to show why more study is not warranted," 40 C.F.R. § 1502.2(b), and satisfied NEPA's requirements.

Second, Friends' challenged the Corps' reference to the May 2011 Supplemental Analysis (incorporated into the ROD) in its response to comments on the Final EIS/EIR. Friends' argues that the Corps was required to recirculate a revised EIS/EIR containing the Supplemental Analysis or alternatively, include the full document as an Appendix. The court found that the Supplemental Analysis merely confirmed the Corps' conclusion (that there would be no effect because it established that the Projects' stormwater retention measures would further lower the dissolved-copper concentration in the Project's runoff), but was not its basis; accordingly, it did not contain "significant new information" that would require the Corps to recirculate the EIS/EIR for further comment. *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 794 (9th Cir. 2014); see also 40 C.F.R. § 1502.9(c)(1)(ii). The court found that the Corps did not violate NEPA by incorporating the Supplemental Analysis by reference and informing the public that it was available upon request, rather than providing the document in an appendix. Because the Final EIS/EIR provided an adequate analysis of the cumulative impacts of the Project's dissolved copper discharges, the Friends' NEPA claim failed.

Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs, 894 F.3d 692 (5th Cir. 2018)
Agency prevailed.

Issue(s): Impacts (Mitigated FONSI), Mitigation, Cumulative Impacts

Facts: Environmental groups challenged the issuance of a permit and EA involving a 162-mile crude oil pipeline in southern Louisiana. The district court granted a preliminary injunction based on the Corps' failure to satisfy NEPA in issuing its construction permit. The Corps appealed the injunction in this case.

In December 2017, after a year-long review the Corps issued Bayou Bridge Pipeline, LLC ("Bayou Bridge) a CWA Section 404 permit, 33 U.S.C. § 1344 and under §§ 10 and 14 under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 403,408, allowing it to build a 162-mile pipeline from Lake Charles, Louisiana to terminals near St. James. Portions of the Pipeline cross the Atchafalaya Basin, affecting wetlands. The Corps authored two EAs, one under the Rivers and Harbors Act (the "408 EA") and one under the CWA (the "404" EA), which consisted of 200 pages for both documents and another 200 pages together of appendices and concluded with a FONSI.

Atchafalaya Basinkeeper and other organizations ("Atchafalaya") brought suit against the Corps in January 2017 seeking an injunction alleging violations of NEPA. Applicants Bayou Bridge and Stupp Brothers, LLC intervened. The district court held an expedited hearing (before the complete AR was filed) and concluded that Atchafalaya had shown irreparable harm and demonstrated a likelihood of success on the merits as well as the other prerequisites of preliminary relief for two of their claims that: (1) the EAs violated NEPA and the CWA by failing to adequately analyze mitigation for the loss of cypress-tupelo swamp along the pipeline right of way through the Basin; and that (2) the EAs violated NEPA and the CWA by failing to adequately consider historical noncompliance by other pipelines and the cumulative effects of this project. The resulting preliminary injunction stopped construction only within the Atchafalaya Basin (the "Basin"). The Corps sought a stay of the injunction pending appeal, which the Fifth Circuit granted in a split decision.

Decision: The district court reviewed each of Atchafalaya's challenges, both procedurally and substantively. The lower court rejected both the assertion that the impact analysis on the Basin of the oil spills was arbitrary and capricious, and that the Corps provided defective public notice of the type and location of proposed mitigation measures (because the Corps addressed comments in the EA for over 26 pages, the court noted). The lower court then focused on specific impacts of the project in the Basin, i.e., that 455.5 acres of "jurisdictional wetlands" would be temporarily affected and approximately 142 acres of those wetlands "would be permanently converted from forested to herbaceous wetlands within the permanent right-of-way." The Section 404 EA stated that "[t]he proposed project will change and/or reduce wetland functional quality along the proposed ROW by conversion of forested habitat types." The EA identified "[a] key issue(s) of concern in this watershed is the loss of wetland function and value."

The lower court found three failures in the EAs: (1) that the 404 EA used perfunctory or conclusory language involving mitigation measures to avoid significance, (2) that the relevant section of the CWA regulation (33 C.F.R. § 332.3) did not require a mitigation hierarchy, that the Corps failed to explain how the mitigation choices, served the goals of replacing lost functions and services, and whether a preference for mitigation was appropriate, that the 404 EA was devoid of information analyzing the consequences of the "irretrievable loss" of 142 acres of cypress/tupelo swamp wetlands, and how the mitigation would affect loss of the cypress/tupelo swamp, and no discussion of best practices for the construction, and how they would offset the temporary impacts, and (3) EAs did not address cumulative impacts of the project with earlier projects that created spoil banks and other detrimental impacts.

The Fifth Circuit addressed each of these three "failures." First, the Fifth Circuit noted that mitigated FONSIs are those projects that without mitigation would have significant environmental impact. It discussed that the lower court's reliance on *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225 (5th Cir. 2007) (finding that the Corps failed to discuss mitigation measures involving the impact of a housing development on adjacent wetlands, which was undisputable and irrevocable) was misapplied. Here, it found that 200+ pages in both EAs acknowledged potential environmental impacts from the project, discussed third parties' concerns about those impacts, referenced in detail the hydrological, horticultural and wildlife environment in the affected acreage of the Basin, and explained how and where mitigation bank credits and construction protocols would be adopted to render the watershed impact not "significant." The Fifth Circuit rejected that the document was a "mitigated FONSI." It contemplated that perhaps the Corps' discussion might be improved with a few details, but that the path could be "reasonably be discerned" from the EAs and other publicly available documents and should have been upheld. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658, 127 S.Ct. 2518, 2530 (2007).

The court next reviewed the question whether the Corps properly applied CWA regulations when it determined that Bayou Bridge could (1) utilize approved construction methods within the Basin, and (2) purchase (a) in-kind mitigation credits, i.e. cypress-tupelo acreage within the watershed and, when those were exhausted, (b) out-of-kind credits of bottomland hardwood acreage within the watershed to compensate for the project's impact.

The Fifth Circuit noted that the lower court misapplied the CWA regulations involving the mitigation hierarchy (33 U.S.C. § 332.3) and failed to acknowledge its application by means of the Louisiana Wetland Rapid Assessment Method (LRAM). The Fifth Circuit reasoned that the language of the regulations set up a plain hierarchy that supported mitigation banks, as opposed to Atchafalaya proffered clean-up by Bayou Bridge of the spoil banks created by other pipeline builders long ago. The court stated that the Corps was authorized to employ out-of-kind credits within the same watershed if they serve the aquatic resource needs of the watershed and the Corps

reasoning is demonstrated in the AR. The court then looked to whether the Corps sufficiently documented how those credits serve the Basin's aquatic resource needs.

In reviewing the AR, the court found the LRAM is the type of functional assessment tool that CWA regulation advises should be used to determine how much compensatory mitigation is required. The LRAM was published and was subject to comment by the public and numerous federal and state agencies, and was revised following their input. The LRAM's purpose is "quantify adverse impacts associated with permit applications and environmental benefits associated with compensatory mitigation to determine the amount and type of credits necessary to offset a given impact. The LRAM scores wetland impacts based on factors including (1) number of acres affected by the prospective permit, (2) how difficult the wetlands are to replace, (3) habitat condition; (4) hydrologic condition, (5) negative human influences, and (6) permanent or temporary loss. The LRAM assigns values to the quality of the wetlands and of mitigation banks, converts the values into credits, and determines on a watershed basis how many acres in mitigation banks must be purchase by the applicant. The Supreme Court has held that the use of scientific methodology, like in the LRAM, is subject to judicial deference. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 109 S. Ct. 1851, 1861 (1989). The Corps used the LRAM in its 404 EA and fully explained its background and use.

The court found the LRAM analysis "rationally connected" the out-of-kind-mitigation bank purchases in the Basin to the "aquatic functions and services" lost by the project, as required by CWA regulations, and NEPA because: (1) the Applicant was required to buy bottomland hardwood credits within the Basin watershed only because it had already purchased all available cypress/tupelo swamp credits (rather than the less preferred alternatives); (2) the Corps responsibility under the CWA was to ensure the protection of aquatic functions and services, which did not include the protection of tree species, as such; (3) the 404 EA stated that "the [LRAM] was utilized to determine the acquisition of a total of 714.5 acres of suitable habitat credits, from approved mitigation banks within the watershed of impact;" (4) citing CWA regulations, the 404 EA discussion of required compensatory mitigation bank purchases notated that the conclusion was consistent with the preferred hierarchy as set forth by the Corps (i.e. in-basin, in-kind mitigation first, in-basin, out-of-kind mitigation second, etc.); (5) the Corps 404 EA's analysis includes the Corps' Best Management Practices during construction and requires conditions that must be met with specificity; (6) *O'Reilly*, which would have required the Corps to discuss mitigation alternatives (irrespective of the distinction between a FONSI and "mitigated FONSI"), is distinguishable *(O'Reilly* predated and did not rely on CWA regulations for mitigation hierarchy or rely on the LRAM tool). The court also noted that the expedited judicial process did not allow for the review of the AR.

The lower court found the EAs deficient for failing to evaluate the pipeline's project impact cumulatively with the effect of spoil banks left from past project and an alleged history of noncompliance with prior Corps-approved permits. The Fifth Circuit noted the lower court misread the applicable statute and the EAs. Under NEPA, agencies must consider each “cumulative impact” of permitted actions, and that term is defined as “the impact on the environment which results from the *incremental impact* of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7 (emphasis added). Here, the EAs concluded that because of appropriate mitigation measures, in terms of construction conditions and limitations in the permit, and Bayou Bridge’s purchase of compensatory mitigation bank acreage, there would be no incremental impact; hence, there could be no cumulative effects with regard to pre-existing spoil banks.

The 408 EA specifically acknowledged past, present and reasonably foreseeable future actions, including previous pipelines, and maintained its conclusion that there would be no adverse results from temporary discharges during this construction. The 404 EA stated that the district commander reviewed the 408 EA before publishing the FONSI and that the 404 EA did discuss cumulative effects on the environment. It concluded “through the efforts taken to avoid and minimize effects . . . and the mandatory implementation of

a mitigation plan . . . permit issuance will not result in substantial direct, secondary or cumulative adverse impact on the aquatic environment." The EA stated: "[r]esulting natural resource challenges and stresses include permanent loss of wetlands (of which this project constitutes temporary or conversion impacts, not permanent wetland loss), loss of wildlife habitat, and impacts to water quality. A key issue(s) of concern in this watershed is loss of wetland function and value." Not only does this clearly signify no permanent wetland loss, but also, after explaining mitigation for temporary impacts, monitoring and mitigation bank purchases in accord with the LRAM, the EA stated: "Appropriate compensatory mitigation was purchased at these banks to offset unavoidable impacts to wetlands that would result from permit issuance." Finally, to recapitulate the permit conditions mentioned previously, Bayou Bridge's construction, according to the permit, will leave the smallest possible footprint and will in several ways be accomplished without hindering possible future efforts to remove old spoil banks left by prior construction. In addition, the Corps is authorized under the permit to require replanting of desirable native tree species and undertake additional compensatory mitigation, further remediation actions, and/or further monitoring if the initial mitigation proves inadequate.

The Corps acknowledged extrinsic past impacts on the Basin and explained how the permit will not only remediate the impacts of this project but will not interfere with further efforts to restore the watershed. The Fifth Circuit found the lower court's concern about cumulative effects based on the alleged past noncompliance with Corps permit conditions was misplaced. Not only did some of those projects predate the CWA, but Appellants' factual information undermine specific charges made by Appellees about certain permit holders.

Dissent: Judge Reavley, in a healthy dissent, disagreed with two of the Fifth Circuit's findings. The Judge discussed that the pipeline project would clear 262 acres of wetlands in the Atchafalaya Basin, impacting two resource types, cypress-tupelo swamp and bottomland-hardwood forest. The Corps relied on the LRAM, but found that one of the chosen mitigation banks did not have the number of cypress-tupelo acres necessary to match a fully in-kind mitigation; the Corps then sanctioned instead the purchase of 69 cypress-tupelo acres and 243.8 bottomland hardwood acres. Thus, the Corps swapped each acre of unaccounted-for cypress tupelo or surplus bottomland hardwood, and treated the two resource types interchangeably. The Judge explained that the LRAM lacked a critical explanatory component. In short, 33 C.F.R § 332.3(e)(1) prefers in-kind over out-of-kind mitigation because similar resources are "most likely to compensate for the functions and services lost at the impact site." The LRAM lists habitats and groups into six resource categories; however, the LRAM does not explain how to quantify impacts to one resource in terms of another much less how cypress tupelo and bottomland hardwood habitats, i.e. out of kind habitats, of a "different structural and functional type" can swap seamless for each other in terms of the Basin's resource needs. Therefore, the LRAM is not a tool for out-of-kind mitigation. Nor does the 404 EA explain this gap, and the Corps did not meet its regulatory burden to explain out-of-kind mitigation.

The Judge also disagreed with the standard applied for mitigation within the context of a FONSI. The Corps argued however, that *O'Reilly* 's scrutiny applies only to mitigated FONSIs, those in which an agency engages in a two-part finding: (1) project impacts alone would be significant but (2) with mitigation, the impacts are reduced to insignificance. This case, the Corps says, does not involve a mitigated FONSI because the agency considered the project impacts and mitigation all at once before issuing a single FONSI, relying on the CEQ's Guidance*, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, Jan*. 21, 2011. The Judge noted that the distinction is all form with no substance. *O'Reilly* stands for a fundamental proposition: When mitigation is a necessary part of a FONSI, the agency bears a duty to explain why the mitigation will be effective. 477 F.3d at 231–32. Thus framed, there are but two types of FONSIs under *O'Reilly*: (1) those in which mitigation is an integral part of the insignificant outcome and (2) those in which the mitigation is ultimately gratuitous—that is, when the impacts would be insignificant even without mitigation. There is no third option.

Of course, the manner in which an agency arrives at its FONSI can make the role of mitigation apparent on the face of the administrative record (AR). When the agency issues a formal mitigated FONSI, we know for sure that mitigation is an integral piece. But, as here, when the EA lumps project impacts and mitigation into a single consideration with no further explication, the record obscures whether the impacts would have been significant absent the mitigation. All the same, these facially ambiguous assessments can involve necessary mitigation.

The Judge questioned: was mitigation necessary to this project's insignificant impact? On the one hand, the Corps was unwilling to concede that mitigation was necessary to reduce the project's impact to insignificance. This despite the pages and pages of the EA detailing the hundreds of acres of shredded wetlands and corresponding compensatory mitigation. *See* 33 C.F.R. § 320.4(r)(1) (explaining that compensatory mitigation is meant to rectify "significant resource losses"). Nonetheless, that must necessarily mean the project's impacts would be insignificant even without mitigation; but the Corps was unwilling to say that either. And therein lies the paradox—the ambiguous record enabled the Corps to tiptoe on a nonexistent fence between the only two realities: mitigation that matters and mitigation that does not. When an agency cloaks the importance of mitigation behind an ambiguous administrative record, the court should hold the agency to the standard articulated in *O'Reilly.*

Audubon Society of Greater Denver v. U.S. Army Corps of Eng'rs, 908 F.3d 593 (10th Cir. 2018)
Agency Prevailed.

Issue(s): Alternatives, Supplementation (of Administrative Record (AR)).

Facts: The Audubon Society of Greater Denver ("Audubon") challenged the Corps' compliance with NEPA, *inter alia*, involving Chatfield Storage Reallocation Project, which would allow certain water providers in the Denver metropolitan area to store 20,600 acre-feet of water in the Chatfield Reservoir, in Denver, Colorado. The lower court upheld the Corps' EIS and Audubon appealed.

In 1973, the Corps constructed the Chatfield Reservoir by erecting a dam across the South Platte River SW of Denver. The Reservoir was primarily built for flood control, but Congress authorized the Corps to develop recreational facilities at the Reservoir. In 1974, the Corps leased the land surrounding the Reservoir to the State of Colorado, which opens the area to the public as Chatfield State Park, one of the most popular state parks in Colorado. In 1986, Congress authorized the Corps to study whether it would be feasible and economically justifiable to reallocate part of Chatfield Reservoir's storage capacity from flood control to municipal, industrial, and agricultural water storage. The resulting study predicted that, even taking into account water conservation programs, water providers will need approximately 50% more water in 2050 because of population growth in the Denver metropolitan area. Under current conditions, absent the development of additional water supply, the Denver metropolitan area will have "approximately 90,000 acre-feet of unmet [water] needs" in 2050.

In 2009, Congress authorized modifications of the Chatfield Reservoir, and any required mitigation to accommodate water storage. The Reallocation Project allowed the water providers to store 20,600 acre-feet of water in Chatfield Reservoir. The immediate practical effect of the Reallocation Project was that the maximum water level in the Reservoir would rise by 12 feet, flooding 587 acres of Chatfield State Park, including various recreation facilities and sensitive environments. Because of these effects, the water providers also proposed two plans—one to relocate the recreation facilities and the other to mitigate environmental damage. Both plans involved the discharge of dredged and fill material into wetlands near Chatfield Reservoir.

As part of its review of the Reallocation Project, the Corps prepared an EIS. The EIS stated that the main problem addressed by the Reallocation Project was the increasing water demand in the Denver Metro area that exceeded available water supplies. The purpose and need was to increase availability of water, provide an additional average year yield of up to approximately 8,539 acre-feet of municipal and industrial water, which was sustainable over the 50-year period of analysis, in the greater Denver Metro area so that a larger proportion of existing and future water needs can be met.

The Corps initially examined thirty-eight alternatives for securing additional water supply for the Denver metropolitan area. These strategies fell into seven categories: increased water conservation, agricultural transfers, importation of water, development of new water storage facilities, storage of additional water at existing reservoirs, increased use of surface water and groundwater, and increased water recycling. The Corps used four criteria to compare these potential alternatives: ability to meet purpose and need, cost, logistics and technology, and environmental impacts. After briefly explaining its decision not to further analyze thirty-four alternatives, the Corps considered the remaining four alternatives in detail.

First, the Corps considered Alternative 1, the "No Action Alternative," which meant the Reallocation Project would not proceed and water providers would have to look to other options to secure additional water. Specifically, the No Action Alternative assumed that the water providers would store surface water in a newly-constructed Penley Reservoir and downstream gravel pits.

The Corps next considered Alternative 2, in which the water providers would meet future demand using groundwater and surface water stored in downstream gravel pits. The gravel pits in Alternative 2 would be developed in the same way as in Alternative 1. PAA0715. But in Alternative 2, instead of building Penley Reservoir, the water providers would also rely on groundwater to serve their customers.

The Corps then evaluated Alternative 3, which is the Reallocation Project that was ultimately selected. Under Alternative 3, the water providers could store 20,600 acre-feet of water in Chatfield Reservoir. Increasing the amount of water in Chatfield Reservoir would raise the water level by 12 feet. It stated that no new infrastructure would be needed at Chatfield by any water provider.

Finally, the Corps examined Alternative 4, which would allow water providers to store 7,700 acre-feet of water in Chatfield Reservoir. Alternative 4 would increase the water level in the reservoir by five feet. To meet additional demand, the water providers would also rely on groundwater and surface water stored in downstream gravel pits (again developed in the same way as in Alternative 1).

After comparing these four alternatives, the Corps chose Alternative 3. The Corps concluded that Alternative 3 maximizes [National Economic Development] benefits" by minimizing the cost of supplying water and best meets the water supply needs of the water providers. The Corps also concluded that Alternative 3 is the Least Environmentally Damaging alternative because: 1) the environmental impacts of Alternative 3 at Chatfield can all be fully mitigated; 2) Alternative 3 does not result in the drying up of any farmland or include the use of non-renewable groundwater; and 3) Alternative 3 is the plan most consistent with the Corps' seven Environmental Operating Principles. While conducting the NEPA analysis, the Corps remained mindful that the alternative chosen would need to comply with the CWA.

In May 2014, the Corps issued its ROD; in October 2014, Audubon sought review of the decision. The lower court upheld the decision and denied Audubon's request for injunctive relief.

Decision: Audubon argued that the Corps dismissed three alternatives without sufficient explanation. Specifically, Audubon faulted the Corps for failing to examine enhanced water conservation measures, which go beyond the standard methods already being used by water providers. Audubon also maintained that the Corps erred when it excluded upstream gravel pits from further consideration because they offered sufficient capacity for the Reallocation Project. Audubon asserted that the water providers could have purchased storage capacity at the Rueter-Hess Reservoir instead of expanding the Chatfield Reservoir. The Tenth Circuit upheld the Corps' analysis of alternatives.

First, the Corps considered increased water conservation at length and concluded that water conservation is not an equivalent practicable alternative to the proposed project because the "shortages of sustainable water supplies faced by the water providers will not be resolved by water conservation measures alone." Instead, the Corps' subsequent analyses assumed that "[c]urrent water conservation practices constitute an independent parallel action" to the Reallocation Project. As the Corps explained in response to a public comment, water conservation goals and amounts were considered when determining the amount of water needed for future use. Therefore, the Corps viewed each alternative as also including the various conservation programs as components. The Corps concluded that, while conservation can delay the timing of the need for additional supplies, it does not in itself eliminate the need for additional supplies." The court rejected Audubon's suggestion because, *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002), *abrogated on other grounds by Dine Citizens Against Ruining Our Env't v. Jewel*l, 839 F.3d 1276 (10th Cir. 2016), did not indicate that the Corp's analysis was inadequate. In *Davis,* the agency's NEPA analysis was deficient because it "summarily rejected" alternatives that could not, "standing alone," achieve the project's goals. 302 F.3d at 1120. The DOT made "no effort" to consider whether these alternatives, when analyzed "in conjunction" with each other, could achieve the project goals. I*d.* at 1121. The Corps' analysis here was far more extensive. The Corps thoroughly described the current status of the water providers' conservation plans and explained that, because the future unmet water need is so great, the water providers will develop even more stringent water conservation measures, even after the Reallocation Project is completed. This discussion sufficiently explained why the Corps did not consider enhanced water conservation to be a reasonable alternative worthy of further analysis, which is all that NEPA requires.

Second, the Corps adequately explained why upstream gravel pits did not merit further discussion. Upstream gravel pits were "eliminated from further consideration due to limited storage capacity and the logistical difficulties of combining reservoirs to meet the storage requirements of the project." The upstream gravel pits had 5,490 acre-feet of capacity spread across three reservoirs, which was less than the 8,539 acre-feet sought by the Reallocation Project. On the other hand, downstream gravel pits, which the Corps did analyze at length, would have provided 7,835 acre-feet of storage and presented fewer logistical complications. Compared to the upstream gravel pits, the downstream gravel pits were closer to existing water supply systems, which minimized connection costs for the water suppliers. Given that the upstream and downstream gravel pits were similar alternatives, but the downstream option offered more storage at a lower cost, the Corps' decision to exclude upstream gravel pits as an alternative was neither arbitrary nor capricious. *Prairie Band Pottawatomie Nation v. Fed. Highway Admin*., 684 F.3d 1002, 1011 (10th Cir. 2012) ("[A]n agency need not consider an alternative unless it is significantly distinguishable from the alternatives already considered."). Notwithstanding the Corps' reasoning, Audubon asserted that the Corps analysis was arbitrary and capricious because after the Corps finalized the EIS, an upstream gravel pit owner informed the Corps that a "preliminary" report showed that the pit could have the capacity for 11,000 acre-feet of storage when expanded." This new information does not render the Corps' decision arbitrary or capricious because the information was not provided to the Corps until after the final EIS was issued. *Prairie Band*, 684 F.3d at 1012–13.

Third, the Corps sufficiently explained why storing water at the Rueter-Hess Reservoir was not a viable alternative to the Reallocation Project. The Corps further noted that several water providers already owned the storage capacity at the Rueter-Hess Reservoir. Though the Rueter-Hess Reservoir had recently been expanded, the capacity was anticipated to primarily meet the needs of the current storage owners, who had not made any additional storage capacity available for sale since 2012. The Corps explained that storing additional water at Rueter-Hess was not a practicable alternative because there was no available storage in that reservoir. This analysis was not arbitrary or capricious.

Audubon argued that the district court abused its discretion by denying the motion to supplement the AR because the AR lacks documentation required to determine if the Corps' dismissal of Rueter-Hess Reservoir and enhanced water conservation measures was justified. Audubon claimed that consideration of a water conservation survey was necessary for the Corps to determine whether enhanced water conservation was a viable alternative to the Reallocation Project. Audubon also claimed that a report on a water recycling program (Project WISE) was necessary for the Corps to properly evaluate the viability of storing additional water in the Rueter-Hess Reservoir. The district court denied Audubon's motion because neither the survey of water conservation efforts nor the Project WISE information indicated that the Corps' NEPA analysis was deficient, and that the water conservation efforts, including potential efforts to enhance water conservation in the future, including the summary of Project WISE were extensively discussed in the EIS. Therefore, the extra record evidence would not have filled gaps or addressed inadequacies in the Corps' analysis.

Clatsop Residents Against Walmart (CRAW) v. U.S. Army Corps of Eng'rs, No. 16-35767, 735 Fed. Appx. 909 (9th Cir. May 25, 2018)(not for publication)
Agency prevailed.

Issue(s): Cumulative Impacts (including baseline).

Facts: Interest group, Clatsop Resident Against Walmart (CRAW), challenged approval of application for a CWA § 404 permit to fill 0.37 acres of wetlands in Warrenton, Oregon. The original permit applicant transferred the permit to Walmart.

Decision: CRAW challenged the range of alternatives under the CWA, which the Ninth Circuit rejected. CRAW also contended that the Corps' cumulative impacts analysis under NEPA was arbitrary and capricious. The Ninth Circuit disagreed because the Corps "aggregat[ed] the cumulative effects of past projects into an environmental baseline," *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111 (9th Cir. 2015), which included "quantified [and] detailed information" about past impacts, *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005).

The Corps' choice of a five-year baseline range was not arbitrary and capricious because "NEPA does not impose a requirement that the [Corps] analyze impacts for any particular length of time" and the five-year range included the most significant past impact, the 14.9 acres fill of the Nygaard property. *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003). The Corps also did not err in disregarding the wetlands acreage identified in Clatsop County's master plan as not "reasonably foreseeable," 40 C.F.R. § 1508.7, because the master plan does not include a timeline or identify any specific proposed projects. The Ninth Circuit pointed out that the Corps projected that fill permit authorizations would continue at the pace of four acres of affected wetlands per

year. The Ninth Circuit found that the Corps' cumulative impacts analysis was therefore not arbitrary and capricious under NEPA.

U.S. DEPARTMENT OF ENERGY

Friends of the Columbia Gorge v. Bonneville Power Admin., No. 15-72788, 716 Fed. Appx. 681 (9th Cir. Mar. 27, 2018) (not for publication).
Agency prevailed.

Issue(s): Federal action.

Facts: Friends of the Columbia Gorge and Save Our Scenic Area petitioned for review of a Bonneville Power Administration (BPA) record of decision granting the Whistling Ridge Energy Project, an interconnection to BPA's transmission system. BPA determined the Wind Project—as opposed to the interconnection itself—was not a major federal action under NEPA.

Decision: Finding for the agency, the court stated that determining whether an action is federal for purposes of NEPA requires an analysis of all facts and circumstances surrounding the relationship between the federal agency and the allegedly nonfederal action. The court evaluated (1) whether the project received federal funding, (2) whether the federal government exercised control over the planning and development of the project, (3) whether the environmental effects of the state action were ignored or whether the state project was taken into account as one of the secondary effects of the federal action, and (4) whether the two projects were so functionally interdependent that the projects constitute a single federal action or whether they served complementary, but distinct functions.

> "These factors support BPA's determination that the Wind Project was not a federal action. First, the Project will receive no federal money. Second, the federal government exercised no control over the planning and development of the Wind Project. Third, BPA engaged in a joint NEPA analysis with Washington's regulatory agency. Lastly, even if interconnection with BPA is the only feasible means of transmitting power generated from the Wind Project, the interconnection and the Wind Project 'serve complementary, but distinct functions.' [citation omitted] In contrast to the situation in *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979), BPA would merely transmit power generated by the private Wind Project to other private consumers along its existing transmission system. *Cf. id*. at 471 (identifying federal action in a contract to supply federally generated power to an aluminum plant). Accordingly, we cannot conclude that BPA's no-federal-action determination was arbitrary, capricious, or contrary to law."

Little Traverse Lake Property Owners Association v. National Park Service, 883 F.3d 644 (6th Cir. 2018)
Agency prevailed.

Issue(s): Waiver of Claims, Purpose and Need, Alternatives, Supplementation (of the Administrative Record (AR)).

Facts: In 2008, NPS proposed a plan to build a scenic trailway, the Sleeping Bear Heritage Trail, through the Sleeping Bear Dunes National Lakeshore in Leelanau County, Michigan. The Sleeping Bear Heritage Trail is a hard-surfaced, non-motorized, multi-use trail that will span twenty-seven miles from the northern end of the National Lakeshore at County Road 651 to the Leelanau–Benzie county line south of Empire, Michigan. The Trail currently runs almost twenty-two miles from Empire north to Bohemian Road (County Road 669), just west of Traverse Lake Road. The Trail is part of the Lakeshore General Management Plan, and was developed by the Leelanau Scenic Heritage Route Committee (the "Committee"), which was comprised of representatives from NPS, local municipalities, the Michigan DOT, the Leelanau Conservancy, the Leelanau County Road Commission, and other interested organizations and citizens.

In January 2007, the Committee solicited proposals for a pre-engineering study and draft EA. On October 1, 2008, NPS released a proposed plan and EA (the "2008 Trail Plan"), which stated that the plan's "purpose and need" was to "assist in the creation of a non-motorized trailway that will provide a continuous scenic pathway" within Leelanau County, beginning at the intersection of M–22 and Manning Road and ending at Good Harbor Bay, County Road 651. The 2008 Trail Plan divided the twenty-seven mile path into nine distinct segments in order to analyze alternatives and environmental impacts with more specificity, and in each segment the plan considered three alternatives—Alternative A, Alternative B, and No Action.

The easternmost segment, Segment 9, encompassed the Little Traverse Lake area at issue. Segment 9 ran from the intersection of Bohemian Road and Traverse Lake Road, east to the swimming beach and facilities located at the northern end of County Road 651, near the northern boundary of the Lakeshore, and provides access to historic Bufka Farm. The 2008 Trail Plan routed Alternative A for Segment 9 south of Little Traverse Lake along Highway M–22, but for Alternative B, the "preferred alternative," the 2008 Trail Plan proposed a ten-foot off-road asphalt section on the north side of M–22 up to Traverse Lake Road that would then turn north, using Traverse Lake Road for approximately three miles before emerging back on the M–22 right-of-way. Both the east and west ends of Traverse Lake Road intersect with M–22, and the road extends approximately 2.7 miles between those intersections. Traverse Lake Road is approximately twenty-two feet wide, with unpaved shoulders, and mature trees are present on both sides of the road. The south side of Traverse Lake Road is bounded by more than seventy private parcels. Wetland areas are located near the east and west ends of Little Traverse Lake, and sand dunes, some steep and more than fifty feet in height, are present along the eastern end of the road.

When NPS released the 2008 Trail Plan for public review and comment, it received 50 comments.
Among the comments, residents living along Traverse Lake Road objected to the expansion of the roadway to accommodate the Trail, asserting that it would "turn a quiet residential street into a highway with paved shoulders." Opponents of Alternative B also expressed concerns that the Alternative would present hazards for walkers, joggers, and bikers due to increased traffic. Opponents also voiced concerns about Alternative B's potential impact on wetlands located near both ends of Little Traverse Lake and dunes at the east end of Traverse Lake Road.

The president of the Little Traverse Lake Property Owners Association "strongly oppose[d] any modification of Traverse Lake Road to provide for bicycle lanes," asserting that "[c]onstruction of a bicycle lane on the north side of Traverse Lake Road" would interfere with "critical dunes and require the removal of many, many mature trees" and it would be "both costly and environmentally dreadful!" The Property Owners Association also stated that a trail on the south side of the road would cross more than seventy driveways and interfere with utilities, mailboxes, and landscaping, contrary to NPS's assessment that the Trail would minimally impact adjacent landowners. Finally, the Property Owners Association suggested that the Trail be rerouted to terminate at the north end of Bohemian Road at Lake Michigan.

After considering the public comments to the 2008 Trail Plan, NPS issued a revised plan and an EA in March 2009 (the "2009 Trail Plan"). The revised plan maintained the initial proposal for Alternative A, but modified Alternative B for segments 1, 2, and 9. The revised Alternative B for Segment 9 was approximately 4.8 miles long, 2.3 miles of which runs along Traverse Lake Road. It was described as:

> [A] 10' off-road asphalt section on the north side of M–22 up to Traverse Lake Road. The Trailway turns north on the west side of Traverse Lake Road onto an off-road boardwalk within the county road right of way. It continues as a separate 10' off road asphalt path on the north side of Traverse Lake Road either within the county road right-of-way or on Lakeshore property south of proposed wilderness. The Trailway would then follow an old two track road that runs from the northeast end of Little Traverse Lake becoming a crushed limestone path behind the Bufka Farmstead.

Thus, while the 2009 Trail Plan retained a route along Traverse Lake Road, it proposed three significant changes to address the concerns identified in the earlier comments. First, NPS sought to minimize the impacts to wetlands by using an off-road boardwalk to cross the wetlands and Shalda Creek at the west end of Little Traverse Lake, rather than widening Traverse Lake Road to accommodate the Trail. Second, after crossing the wetlands, the 2009 Trail Plan proposed a separate asphalt path on the north side of Traverse Lake Road, either within the county road right-of-way or on Lakeshore property rather than using the roadway surface. This separate path was suggested to address safety concerns about bike and pedestrian traffic, and to minimize the impact on Traverse Lake Road residents, almost all of whom live on the south side of the road. The separate path also allowed for greater flexibility in the Trail's path, so that the Trail can avoid mature trees. Finally, rather than crossing most of the wetlands at the east end of the lake, NPS proposed that the Trail follow "an old two track road that runs from the northeast end of Little Traverse Lake becoming a crushed limestone path behind the Bufka Farmstead."

The 2009 Trail Plan analyzed the impact of the trailway alternatives on topography, wetlands and water quality, vegetation and wildlife, Michigan state-listed species, soils, socioeconomics, cultural resources, visitor opportunities and use, and operations and maintenance. The 2009 Trail Plan determined that "four wetland areas . . . could be impacted," and that "[t]hree surface waters could be affected," including "Shalda Creek on Traverse Lake Road." However, the EA explained that "boardwalks or hardened trail surfaces[ ] would be located to the extent feasible to avoid directly dredging or filling wetlands," and the 2009 Trail Plan described best management and monitoring practices for reducing construction impacts. Based on its analysis, NPS concluded that Alternative B "would likely have short-term and long-term minor adverse impacts on the wetlands and water quality of the Lakeshore."

The 2009 Trail Plan also determined that Alternative B for Segment 9 could impact vegetation and forest resources, including "direct removal or loss of vegetation that serves as wildlife habitat." Indeed, the Trail Plan explained that because Segment 9 would be constructed in forested areas, "[trail] [p]lacement outside rights-of-

way would be required in Segment . . . 9," and that "development of a new trail through an area of relatively native forest where a swath of vegetation is removed to construct the trail would represent habitat loss." However, the Trail Plan concluded that "[m]inimal tree removal is expected due to the wide spacing of existing mature trees in this area," and that "virtually all trail locations out of the highway rights-of-way are on previously disturbed areas, or areas with widely spaced trees." Thus, NPS concluded that Alternative B's "impacts to vegetation are likely, in the short-term to be moderate adverse and in the long-term, to be minor and adverse."

The 2009 Trail Plan addressed dune ecosystems in its assessment of impacts on topography and soils. The EA acknowledged that slopes in portions of Segment 9 range from 18% to 45%, and that "retaining walls may have to be used when the slopeside exceeds 25%." The Trail Plan also considered the physical characteristics of the dunes, discussing the erodibility of the soil type in relation to Trailway development. While the environmental assessment recognized that some adverse impacts to topography might occur in several segments, it explained that "[d]isturbance of areas with steep side slopes and gradients would be avoided where possible." The EA described best management practices that would be employed to reduce impacts, including "silt fencing . . . in areas of steep topography" and "restoration to disturbed areas in order to reduce destructive erosion." NPS concluded that revised Alternative B "would have short- and long-term minor adverse impacts on topography," and short-term "moderate" and long-term "minor" adverse impacts on soils.

NPS made the 2009 Trail Plan available for public review and comment from March 5 to April 4, 2009, publicizing the revised Trail Plan in the same manner as the 2008 Trail Plan. This time, NPS received only five comments on the revised Trail Plan, none of which objected to the revised Segment 9 or raised concerns regarding Traverse Lake Road. None of the comments submitted during the 2009 comment period were submitted by Traverse Lake Road residents.

In August 2009, NPS issued a finding of no significant impact ("FONSI") and selected preferred Alternative B for Segment 9. Almost six years later, the Little Traverse Lake Property Owners Association, along with individual residents on Traverse Lake Road (collectively "Residents") brought action, contending that the 2009 plan violated NEPA. In support of their claims, the Residents sought to supplement the AR with additional pictures, maps, and other documents. The lower district court dismissed the claims. On appeal, the Residents challenged the district court's conclusion that they failed to preserve most of their challenges to the 2009 Trail Plan. They also argued that NPS violated NEPA when it failed to consider an alternative route proposed by Plaintiffs during the 2008 public comment period. Finally, Residents' contended that the district court abused its discretion when it denied their motion to supplement the administrative record with additional photos, maps, and lay testimony.

Decision. The Sixth Circuit found that the Residents' challenges to the adequacy and accuracy of the 2009 Trail Plan's environmental analysis were forfeited. The court discussed that the Residents did not preserve their challenges for two related reasons. First, Residents failed to raise any objections to the 2009 Trail Plan during the 2009 public comment period, even though they were required to make sure that NPS was aware of their continued objections and concerns, so that the agency could give the issues meaningful consideration before issuing its final decision. Second, while Residents articulated objections and concerns regarding the 2008 Trail Plan, the NPS meaningfully addressed Residents' specific complaints with significant changes in the revised 2009 Trail Plan, requiring Residents either to renew their objections or otherwise to make clear to NPS that the revised proposal did not sufficiently resolve their objections to the 2008 Trail Plan. The Sixth Circuit found that the earlier comments on the 2008 Trail Plan did not preserve Residents' ability to challenge the later 2009 Trail Plan.

NPS specifically addressed the Residents' material objections to the 2008 Trail Plan with significant changes in the revised proposal, such that it was reasonable for NPS to believe that it had sufficiently addressed Residents' concerns when they did not renew their objections in 2009. The court held that when an agency significantly responds to comments and objections to an EA, parties must renew their objections if they believe the agency failed to sufficiently address their concerns, so that the agency is put on notice of the parties' position and contentions with regard to the new proposal, in order to allow the agency to give the issues further meaningful consideration; otherwise the parties' claims under NEPA are forfeited. The court discussed that had the NPS ignored Residents' objections when it issued the revised 2009 Trail Plan, their claims likely would have been preserved because they would have timely "alert[ed] the agency to [their] position and contentions," and NPS would have failed to "give the issue meaningful consideration."

The Sixth Circuit did find that the Residents' claim that the 2009 Trail Plan failed to consider reasonable alternatives was not forfeited, because the 2009 Trail Plan failed to consider or respond to an alternative route Residents proposed during the 2008 comment period. However, the court found the claim was without merit because the alternative route they proposed did not accomplish the stated purpose and need of the proposed action, and therefore Residents' proposal was not a reasonable alternative that would require a detailed study and response by the NPS.

During the 2008 comment period, Residents urged the NPS to consider stopping the Trail at the end of Bohemian Road. But "[a]lternative actions . . . are measured against the Purpose and Need Statement, which explains why the agency is proposing to spend federal money on an action that potentially results in significant environmental impact," *Coal. for the Advancement of Reg'l Transp. v. Fed. Highway Admin.*, 576 Fed.Appx. 477, 481 (6th Cir. 2014), and Residents' proposed alternative route does not fulfill the Trail Plan's purpose to create "a continuous scenic pathway from . . . the south boundary of Leelanau County to the north boundary of the Lakeshore at Good Harbor Bay, County Road 651, all within Leelanau County." The suggested proposal would shorten the Trail by nearly ten percent, and would frustrate the Trail's purpose of reaching the northeastern-most portions of the Lakeshore. Thus, while NEPA requires agencies to evaluate reasonable alternatives to the proposed action, see 42 U.S.C. § 4332(2)(C)(iii) and 40 C.F.R. § 1502.14(a), NPS was not required to assess Residents' proposal because it would not have achieved the Trail's stated purpose and need, and "[o]nly alternatives that accomplish the purposes of the proposed action are considered reasonable." *Webster,* 685 F.3d at 422.

Residents also argued that, while an agency is not required to consider and eliminate every conceivable alternative, the Trail Plan's stated purpose and need was unreasonably narrow. In particular, Residents contended that NPS imposed a rigid and inflexible condition on the Trail Plan by requiring that it reach the northern boundary of the Lakeshore at Good Harbor Bay, County Road 651. The Sixth Circuit noted that " [a]gencies enjoy considerable discretion in defining the purposes and needs for their proposed actions, provided that they are reasonable," *Webster*, 685 F.3d at 422. While courts may reject an agency's statement of purpose and need as "unreasonably narrow" if the statement "compels the selection of a particular alternative," *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011), the Trail Plan's stated purpose of reaching the northeastern-most portion of the Lakeshore did not compel the selection of a particular alternative, and it was reasonably calculated to achieve the Committee's stated goal of reaching the entire Lakeshore within Leelanau County.

While the Trail Plan did prescribe a definite terminus, that requirement was not unreasonably narrow because it allowed for sufficient flexibility in planning the trailway's path. In fact, the Trail Plan demonstrates considerable flexibility in achieving its purpose. In contested Segment 9 alone there were two options, Alternative A and

Alternative B, that would have reached the Committee's desired terminus. Each of the other eight segments of the Trail Plan also had two action alternatives, which were planned to begin and end at the same points in each segment. That meant, for example, that selecting preferred Alternative B in Segment 1 did not necessarily preclude the agency from selecting Alternative A in Segment 2. Thus, from the trailway's starting point at the Leelanau–Benzie County line to its desired terminus at County Road 651, there were more than 500 possible combinations of routes that the Trail could have taken to achieve NPS's goal of reaching the northeastern-most portion of the Lakeshore.

Moreover, NPS' desire to reach County Road 651 was calculated to ensure that the trailway achieved the Committee's stated goals to reach the entire Lakeshore within Leelanau County, and to provide non-motorized access to "the beaches, trailheads, and other points of interest" in the northeastern-most portion of the Lakeshore, including the popular swimming beach at Good Harbor Bay and historic Bufka Farm. Thus, the Trail Plan's purpose and need were reasonable and well-considered. Because Residents' proposed alternative would not have achieved the Trail Plan's reasonable purpose, Residents' claim that NPS failed to consider reasonable alternatives because it ignored their proposal for a truncated Trail was without merit.

Residents also contended that NPS' failure to include an environmental screening form in the 2009 Trail Plan was a per se violation of NEPA because the agency's DO–12 Handbook requires a screening form for any project that may have an impact on the human environment. The DO–12 Handbook includes an "Environmental Screening Form," which contains a checklist for determining whether a project may impact physical, natural, or cultural resources or have other effects that could require an environmental impact statement. According to the DO–12 Handbook, NPS must complete a screening form for "any project that may have an impact on the human environment," and NPS conceded that it did not include a screening form in the 2009 Trail Plan. But "[i]nternal operating manuals . . . do not carry the force of law, bind the agency, or confer rights upon the regulated entity[,]" *Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995), and the DO–12 Handbook was intended as a guide to assist Park Service employees, not as a binding legal mandate. The DO–12 Handbook was never published in the Federal Register, and "[f]ailure to publish in the Federal Register is an indication that the statement in question was not meant to be a regulation." Instead, the Department of the Interior has promulgated separate rules that "codify its procedures for implementing [NEPA]," 73 Fed. Reg. 61292 (Oct. 15, 2008), which did not require preparation of the screening form described in the DO–12 Handbook, see 43 C.F.R. pt. 46. The Sixth Circuit rejected NPS' assertion that the DO–12 Handbook, "according to its own terms, has the force of law" because no NEPA provision, see 42 U.S.C. §§ 4331–70, CEQ regulation, *see* 40 C.F.R. §§ 1500–08, or DOI supplemental NEPA regulation, see 43 C.F.R. pt. 46, mandated the completion of the screening form, and the Handbook did not independently create legally enforceable obligations. Therefore, the screening form described in the DO–12 Handbook represented a non-binding internal procedural requirement that did not carry the force of law, bind the agency, or confer rights, and NPS' failure to include an environmental screening form in the 2009 Trail Plan was not a *per se* violation of NEPA.

Finally, the Sixth Circuit upheld the district court's order denying Resident's request to supplement the AR because Residents failed to show "exceptional circumstances" requiring supplementation. The court discussed that "[s]upplementation of the AR may be appropriate 'when an agency has deliberately or negligently excluded certain documents from the record, or when a court needs "background" information to determine whether the agency has considered all relevant factors.' " *S. Forest Watch, Inc. v. Jewell,* 817 F.3d 965, 977 (6th Cir. 2016). A "strong showing of bad faith" may also justify supplementation of the record. But Residents did not show that NPS deliberately or negligently excluded certain documents, and Residents did not allege that NPS acted in bad faith. As the district court observed, Residents did not allege that any of the materials that they propose be added to the

record were presented to NPS prior to the time it issued the 2009 FONSI. The court remarked that it would be strange to say that NPS deliberately excluded certain documents that were never presented to it for consideration.

Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke, 889 F.3d 584 (9th Cir. 2018)
Agency Prevailed.

Issue(s): Purpose and Need, Alternatives, Waiver of Claims, Mitigation, Impacts (old data).

Facts: Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, citizens' groups, and individuals (collectively "Cachil") brought action to enjoin the Bureau of Indian Affairs ("BIA") from taking parcel of land into trust for other Indian tribe, Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Enterprise") by challenging application from Enterprise Ranchero Maidu Indians to the BIA for 40 acres of land in trust to build a casino and hotel complex.

First, on August 13, 2002, Enterprise submitted its "fee-to-trust" application to the Secretary of the Interior. The application requested that Interior take title to the Yuba Site in trust so that the Tribe could build a 207,760 square foot casino and accompanying hotel. The application included a December 2001 document entitled ''Gaming and Hotel Market Assessment: Marysville, California," which evaluated ten market areas in Northern California and analyzed the characteristics of other existing tribal casinos, and estimated revenues and expenses for a casino/hotel for 2004–2008.

Enterprise's consultant, Analytical Environmental Services ("AES") prepared a draft EA and submitted it to the BIA on August 15, 2003, who suggested numerous revisions. In May 2004, BIA made the EA available for public review, and comment. On July 7, 2004, BIA sent a copy of the EA to Colusa, who did not comment on it.

Third, after receipt of comments by others than Colusa on the EA, BIA decided to prepare an EIS. The BIA, in preparing for the DEIS, engaged in its vigorous scoping process and published its NOI in the federal register on May 20, 2005, and again, the Colusa did not comment on it. AES completed the DEIS, under BIA's supervision, in February 2008. The DEIS analyzed five potential alternatives to the regulatory action: A) Enterprise Rancheria's proposed facility on the Yuba Site; B) a smaller casino without a hotel on the Yuba Site; C) a water park on the Yuba Site; D) a small casino on another site in Butte County; and E) no action. The DEIS recognized that while the proposed facility on the Yuba Site would benefit Enterprise, "the surrounding tribes that operate casinos could experience decreases in winnings, and potentially be adversely impacted by the decreases," with the proposed casino/hotel project expected to capture "approximately $77 million [per year] in total gaming win[ings] from the local market." The analysis was based on a study by the company Gaming Market Advisors from June 2006 contained in Appendix M of the DEIS, entitled "Socio-Economic, Growth Inducing and Environmental Justice Impact Study."

The DEIS was made available for review and comment was invited through publication in the Federal Register, and in Chico, Marysville, Oroville, and Sacramento newspapers. A public hearing was held on April 9, 2008. While multiple comments on the project were submitted, including by Indian Tribes who were opposed to the project, again, Colusa did not submit any comments on the project.

In May 2010, BIA completed the FEIS. The FEIS retained the same five alternatives which were contained in the DEIS, and incorporated the same analysis as included in the DEIS with respect to the casino alternatives' effects on

other tribal casinos. BIA made the FEIS available for public review and comment by publishing a Notice of Availability in the Federal Register and Chico, Marysville, and Oroville newspapers. Colusa then submitted a comment letter dated September 7, 2010. The comment letter complained that the FEIS's Purpose and Need Statement was unduly restrictive; the FEIS failed to consider reasonable alternatives; and Appendix M, which analyzed the effect of the proposed casino on other tribal casinos, relies on "conjecture rather than data." The BIA responded to each of the comments.

The BIA published its ROD under IGRA (the "IGRA ROD") in September 2011. The IGRA ROD concluded that the project would "1) be in the best interest of the Tribe and its members; and 2) that it would not be detrimental to the surrounding community." Pursuant to 25 U.S.C. § 2719(b)(1)(A), the BIA sought the concurrence of California Governor Jerry Brown in its decision. Governor Brown concurred by letter dated August 30, 2012.

The United Auburn Indian Community of the Auburn Rancheria (the "UAIC") filed a complaint in the District of Columbia on December 12, 2012 and the Colusa filed a complaint in the Eastern District of California a few days later. On December 20, 2012, Citizens filed a complaint in the District of Columbia as well. The Citizens and UAIC cases were consolidated and transferred to the Eastern District of California. On January 23, 2013, the Citizens/UAIC case was further consolidated with Colusa's into a single case. Enterprise intervened as a defendant. Citizens, Colusa, and UAIC immediately moved for injunctive relief to prevent the BIA from taking the land into trust for Enterprise. The motion for injunctive relief was denied. The Yuba Site was taken into trust on May 15, 2013. The district court denied the plaintiffs' relief when it granted the Defendants' motion for summary judgment. Citizens and Colusa (now collectively "Colusa") appealed.

Decision: Colusa argued that the FEIS was procedurally deficient in a number of ways. First, Colusa argued the FEIS's "purpose and need" statement was "artificially limited." The Ninth Circuit disagreed.

First, the court reviewed the objectives of the trust acquisition:

- Restore trust land to the Tribe in an amount equal to the amount of land previously lost as a result of federal action . . .
- Provide employment opportunities for tribal members and [the] non-tribal community.
- Improve the socioeconomic status of the Tribe by providing a new revenue source that could be utilized to build a strong tribal government, improve existing tribal housing, provide new tribal housing, fund a variety of social, governmental, administrative, educational, health, and welfare services to improve the quality of life of tribal members, and to provide capital for other economic development and investment opportunities.
- Allow Tribal members to become economically self-sufficient, thereby eventually removing Tribal members from public-assistance programs.
- Fund local governmental agencies, programs, and services.
- Make donations to charitable organizations and governmental operations.
- Effectuate the Congressional purposes set out in [IGRA].

The Purpose and Need Statement further stated that the Tribe "has no sustained revenue stream" which can be used to fund programs for Tribal members. The court opined the purpose and need statement was quite broad. It described the BIA's intent to provide Enterprise with a vehicle for substantial economic development, and the various benefits that may accrue from economic self-sufficiency. Colusa argued that the "narrow" Purpose and Need Statement led to a deficient analysis of possible alternatives.

But the BIA considered five possible alternatives: Alternative A, the hotel casino project that was ultimately accepted on the Yuba Site; Alternative B, a smaller casino on the Yuba Site; Alternative C, a water park on the Yuba Site; Alternative D, a casino on an alternate site in Butte County; and Alternative E, no action. The FEIS considered in detail the environmental and economic consequences of each alternative. Based on the analysis of the possible alternatives in the FEIS, the Interior concluded that the best alternative was the one selected—Alternative A, the casino/hotel project on the Yuba Site. Thus, the range of alternatives was not "illusory."

In addition, Colusa argued that the FEIS should have analyzed two additional sites—1) a site in Oroville purchased by Enterprise in 2006, and 2) an unspecified site on federal land near Enterprise. The court discussed that Colusa failed to propose these additional sites during the comment period. With respect to non-obvious defaults in an EA or EIS, "persons challenging an agency's compliance with NEPA must structure their participation so that it alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (original alterations, citations, and internal quotation marks omitted). A failure to identify "in their comments any rulemaking alternatives beyond those evaluated in the EA" causes those now objecting to an agency rulemaking to "forfeit[ ] any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action." *Id*. at 764–65, 124 S.Ct. 2204; *see also N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1156 & n.2 (9th Cir. 2008) (finding that the DOT's highway construction project did not violate NEPA when the agency failed to consider a tunnel alternative that was not brought to its attention until well after the notice and comment period for the EIS closed, and ruling that "any objection to the failure to consider that alternative has been waived"). The court held that because Colusa did not tell BIA to consider the alternatives it now proposed, it waived any argument that the failure to consider those alternative represented a violation of NEPA.

Then, Colusa argued that the FEIS failed adequately to analyze the effect of the proposed project on the local environment, because some of the data on which the FEIS relied was inadequate. First, Colusa argued that the "biological data" on which the FEIS relied was "stale." Second, Colusa argued that Appendix M—which analyzed the socio-economic impacts of the Yuba Site casino project—was based on insufficient data. Colusa argued that unspecified "biological data" in the FEIS is outdated, citing to *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005), a Ninth Circuit decision in which the court ruled that certain six-year old data on which an FEIS relied was "suspect." Colusa then stated broadly that "much of the biological information" is "several years old," and "in some cases nearly ten years old." The Ninth Circuit found those claims unsupported.

The court reviewed the FEIS Appendices -- which contained a variety of different studies, letters, and declarations from potentially impacted parties. For example, Appendix D contained a "Water and Wastewater Feasibility Study" prepared in July 2008, approximately two years before the publication of the FEIS, and Appendix H contained a "Biological Resources Assessment" of the site of the trust acquisition prepared in 2007, three years before the completion of the FEIS. Colusa did not explain why the data in the Appendices was unreliable. The data in the various Appendices was generally compiled after 2006, two years prior to the publication of the DEIS, and four years prior to the publication of the FEIS. Colusa pointed to no authority, and provided no argument, indicating that data which is four years old is inherently suspect. Colusa assigned a 2003 date to Appendix L, which contained correspondence with the State of California's Office of Historic Preservation indicating that no historic properties would be impacted. However, that Appendix contained two letters—one from 2003, and another from 2007, the latter of which similarly concurred that no historic properties would be affected.

Apart from Appendix L, only one Appendix contains data older than 2006: Appendix E, a 2000 declaration that a proposed wastewater treatment plant on the Yuba Site would not have a significant environmental impact. This document is historic and not subject to updating, and Colusa has not alleged that this historic document was the basis of any specific conclusions drawn in the FEIS. Colusa was therefore unable to support its generalized statement that the unspecified "biological data" contained in the FEIS was "stale."

Colusa next argued that the economic data on which Enterprise relied was flawed. As noted above, Appendix M of the FEIS contained a study authored by Gaming Market Advisors entitled "Socio-Economic, Growth Inducing and Environmental Justice Impact Study." That study described the likely economic impact of the proposed casino on other competing casinos, including that of plaintiff Colusa. Colusa argued that Appendix M relied on stale data and made improper economic assumptions. By contrast, Colusa insisted that the Meister Declaration contained a more accurate accounting of the effect Enterprise's casino would have on Colusa. But, the Meister Declaration was properly struck as it post-dated the FEIS and RODs. It also was based on proprietary data which Colusa did not provide to the BIA during the regulatory process and which Colusa still has not disclosed.

Further, Colusa's argument regarding the allegedly missing economic data was connected to its claim that Colusa will experience economic harm as a result of the casino project. The Ninth Circuit stated that they have "consistently held that purely economic interests do not fall within NEPA's zone of interests."

Colusa next argued that the FEIS failed to take a "hard look" at the environmental impacts of the proposed action. Colusa argued that the air quality was deficient under NEPA, because "[t]he FEIS merely asserted that the emissions from Enterprise's proposed casino would conform to California's state plan, but did not give any figures that would support that assertion." Colusa also argued that "it appears that NOx emissions may exceed EPA's de minimis threshold for both ozone and PM2.5 emissions and require offsets or other actions by DOI to conform to the California State Implementation Plan." Colusa did not elaborate on the effect of the alleged "NOx" emissions, or otherwise explain how the existence of such emissions violate the Clean Air Act, NEPA, or any other statute. The court held Colusa waived the argument for failing to develop it.

Further, Colusa's general contention that the FEIS provided insufficient figures is incorrect, as the FEIS supported its conclusion that the emissions from Enterprise's proposed casino would not violate the Clean Air Act or any California regulation. According to 40 C.F.R. § 93.153(b)(1), the *de minimis* threshold for emissions of NOx is 100 tons per year. The FEIS describes mitigation measures that will reduce emissions of NOx to below 25 pounds per day, or 4.56 tons per year, well below the regulatory threshold.

Colusa next argued that the FEIS ignores potential harm to six fish species of concern, five of which are listed under the ESA. Colusa argued that the FEIS should have discussed whether or not the canals near the Yuba parcel are "screened" in order to protect the migratory fish. Colusa did not proffer any evidence that there was an actual danger to these species of fish, or otherwise describe a likely effect of the casino project on the fish. The FEIS stated that the fish species will not live in or near the project site.

Colusa argued that BIA failed to exercise "sufficient independent oversight over [the] preparation of the FEIS," and insisted that Enterprise, rather than the BIA, "chose" AES as its contractor for the creation of the EIS. Colusa also argued that AES had an impermissible "financial interest" in the outcome of the project. The court disagreed with Colusa. Colusa did not provide any evidence that BIA did not make an independent choice to contract with AES. First, Enterprise contracted with AES under BIA's supervision, then BIA contracted with AES on a professional services third party agreement. Colusa did not show an impermissible conflict of interest, as it failed to allege that

any financial stake AES has in aiding with permit approvals is significant. BIA made a factual determination that there was no conflict of interest, and absent proof that this finding lacks substantial evidence to support it, the court should defer to the agency's factual determination. Colusa argued that the failure to require AES to make a certification "under penalty of perjury" demonstrates a failure of oversight. The court stated no such requirement for a statement under penalty of perjury exists in the regulations. The Ninth Circuit upheld the lower court's decision.

***Western Organization of Resource Councils v. Zinke*,** 892 F.3d 1234 (D.C. Cir. 2018)
Agency prevailed.

Issue: Duty to Supplement (outdated analysis)

Facts: West Organization of Resource Councils and Friends of the Earth, nonprofit organizations whose members are concerned about the environmental and climate-related impacts of coal production and combustion, petitioned to compel the DOI to update the federal coal management program's PEIS. As a matter of background, the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* (2012), and the Federal Land Policy and Management Act (FLPMA) of 1976, 43 U.S.C. § 1701 et seq., authorizes the DOI to lease rights to mine coal on public lands. In 1979, acting through the BLM, the DOI published a programmatic EIS ("PEIS") for a Federal Coal Management Program ("Program").

The PEIS analyzed the DOI's preferred program, as well as several alternatives for a federal coal management plan. These included no new federal leasing; only state determination of leasing levels; and emergency leasing only, among others. The PEIS considered the physical, ecological, socioeconomic, transportation, and energy impacts of the various alternatives. As part of this analysis, the agency acknowledged that emissions resulting from coal mining and combustion could lead to increased atmospheric carbon dioxide, and explained "there are indications that the rising CO2 levels in the atmosphere could pose a serious problem, commonly referred to as the greenhouse effect." It addressed carbon dioxide as a "potential pollutant," and predicted increased levels of emissions from coal production under the proposed alternatives. The agency ultimately stated "there are uncertainties about the carbon cycle, the net sources of carbon dioxide in the atmosphere, and the net effects of carbon dioxide on temperature and climate," and called for further study of the "impacts of increased coal utilization."

In July of that year, the Department issued a ROD adopting the Program. BLM then promulgated regulations establishing the Program's procedures. It amended those regulations in 1982, and last issued a supplement to the Program's PEIS in 1985. In 2014, Appellants sued the Secretary and other DOI officials, claiming that the DOI's failure to update the Federal Coal Management Program's PEIS violates NEPA and the APA. The States of Wyoming and North Dakota and the Wyoming Mining Association intervened as defendants. The district court held that, because the Program was established and the DOI had not proposed to take any new action respecting the Program, the Department had no obligation to prepare a new or supplemental PEIS. While the appeal was pending Secretary of the DOI, Sally Jewell, issued an order pausing all activity on new leases to permit the agency to revisit the PEIS. The order explained that "[n]umerous scientific studies indicate that reducing [greenhouse gas] emissions from coal use worldwide is critical to addressing climate change." Secretary Jewell therefore concluded that, in light of the "lack of any recent analysis of the Federal coal program as a whole, a more comprehensive, programmatic review [wa]s in order." On the parties' joint motion, the court held the case in abeyance.

On March 29, 2017, newly appointed Secretary Zinke ordered an immediate halt to "[a]ll activities associated with the preparation of the [new] PEIS" and lifted the moratorium on new leasing. *See* Sec'y of the Interior, Order No. 3348 (Mar. 29, 2017).

Decision: Appellants claimed that NEPA required the DOI to issue a supplemental PEIS analyzing the climate impacts of federal coal leasing. The D.C. Circuit reviewed the Secretary's compliance with its statutory mandate under the APA, § 706(1) which states that a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Appellants contended that NEPA requires the DOI to supplement the 1979 PEIS for the Federal Coal Management Program, and that the DOI's failure to do so constitutes "agency action unlawfully withheld." Appellants requested relief to compel the DOI to comply with the statute as relief for the DOI's "failure to act."

Appellants asserted the DOI must update the PEIS based on two sources—(1) the supplementation requirement in the CEQ regulations; and (2) statements included by the DOI in the initial PEIS and ROD promising to update the environmental analysis as circumstances changed.

Appellants also relied heavily on the Supreme Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989):

> [T]he Supreme Court explained in *Marsh* [that] NEPA's duty to supplement an EIS applies when "remaining governmental action would be environmentally 'significant,' " the agency retains an "opportunity to weigh the benefits of the project versus the detrimental effects on the environment," and "new information is sufficient to show that the remaining action will 'affect the quality of the human environment' . . . to a significant extent not already considered." Interior's continuing management of the coal-leasing program easily brings this case within that test because—among other things—we now know that continued authorization of leases to extract (and then burn) federal coal is "affect[ing] the quality of the human environment . . . to a significant extent not already considered." The climate-change implications of that ongoing action are substantial and should now be informed by 38 years of research that Interior expressly called for in its 1979 PEIS, but has never considered in a supplemental programmatic analysis. Marsh forbids this result, as does the plain text of the governing regulation . . . .

Marsh, 490 U.S. at 371–74, 109 S.Ct. 1851).

The DOI did not contest Appellants' assertion that the analyses of climate impacts of coal leasing in the PEIS and supplemental PEIS are outdated. Nor did the DOI dispute Appellants' claims that the availability of meaningful scientific research measuring greenhouse gas emissions and their climate impacts qualify as "significant new information bearing on" federal coal leasing and its impacts. Instead, the Secretary asserted that DOI no longer had any NEPA obligations related to the Federal Coal Management Program. On this point, the Secretary contended that, because "BLM is not proposing to take any new action in reliance on the 1979 [P]EIS, . . . [the supplementation] regulation simply does not apply." And the Secretary contended that *Marsh* is inapposite because "[t]he Court in *Marsh* never considered any programmatic EIS, let alone the question whether a programmatic EIS must be supplemented."

Although the Federal Coal Management Program had been modified in various ways over the years, the 1979 regulations and ROD largely remain in effect. Through the BLM, the Secretary continues to run the Program and

make leasing and general programmatic management decisions—including how many, where, and to whom leases should be granted. In administering the Program, the DOI continues to engage in NEPA-required environmental analysis. Each lease issued under the Program represents a new "federal action." The Department prepares a specific EIS or EA for each lease before it is approved. *See* 43 C.F.R. § 3425.3 (2017). These project-specific EISs assess greenhouse gas emissions related to specific leases; however, they do not purport to consider the general climate effects of the national leasing Program as a whole. *See CEQ, Final Guidance for Fed. Dep'ts & Agencies on Consideration of Greenhouse Gas Emissions & the Effects of Climate Change in NEPA Reviews*, 81 Fed. Reg. 51,866, 51,866–67 (Aug. 1, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-08-05/pdf/201618620.pdf.

The D.C. Circuit held that neither NEPA nor the Department's own documents create a legal duty for the DOI to update the Federal Coal Management Program's PEIS, and that the court had no authority to compel the DOI to supplement its analysis.

Northern Plains Resource Council, Inc. v. U.S. Bureau of Land Mgm't, No. 16-35447, 725 Fed. Appx. 527 (9th Cir. Feb. 27, 2018) (not for publication)
Agency prevailed.

Issue(s): Cumulative Impacts, Tiering (stale EIS), Impacts.

Facts: Northern Plains Resource Council, Inc. ("Northern Plains") challenged BLM's decision to lease coal located in Montana's Bull Mountains, alleging that BLM failed to comply with NEPA when it analyzed potential environmental impacts of coal lease in its EA. The district court granted summary judgment for BLM and Northern Plains appealed.

Decision: Northern Plains contended that the BLM's cumulative-impacts analysis violated NEPA by failing to address reasonably foreseeable mining in the "mirror-image" mine to the north of the existing mine area. The Ninth Circuit rejected this contention because the BLM reasonably determined that hypothetical future mining activity contemplated to the north is not currently a reasonably foreseeable future action. Here, future mining activity to the north was a "remote and highly speculative consequence[ ]" that did not warrant analysis in the EA. The scope, magnitude, and time frame for future mining in the north have not been proposed or outlined. Because additional mining had not been proposed, "a cumulative effects analysis would be both speculative and premature."

Northern Plains argued that BLM improperly "tiered" its analysis to a EIS. Federal regulations allow "tiering," or incorporation by reference, the general discussions in a previous EIS that pertain to issues specific to a subsequent analysis. *See* 40 C.F.R. § 1508.28. Agencies may also tier "[f]rom an [EIS] on a specific action at an early stage" to a subsequent analysis at a later stage. 40 C.F.R. § 1508.28(b). Here, the BLM reasonably referenced analysis from its 1990 EIS to supplement and facilitate its analysis of the environmental effects of continued mining associated with its leasing decision. *See Kern v. U.S. Bureau of Land Mgmt.,* 284 F.3d 1062, 1073 (9th Cir. 2002) (stating tiering is encouraged to avoid repetitive discussions of issues previously included in another EIS). Northern Plains also contends that tiering was improper because the 1990 EIS data is too "stale" to be reliable. But Northern Plains failed to point to any evidence, other than age, suggesting the unreliability of the 1990 data. The age of data, without more, is not dispositive as to reliability. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 512 (D.C. Cir. 2010) ("NEPA does not limit tiering to analyses still on the scientific cutting edge."). Accordingly, the court held that the district court properly granted summary judgment on this issue.

Northern Plains contended that BLM failed to take the requisite "hard look" at the mining impacts upon the relevant topography and water resources. The Ninth Circuit discussed that because the EA contained an extensive discussion of the anticipated effects that further mining would have on the area's topography and water resources, including the ground and surface water quality, the hydrologic impacts of groundwater, and the effects of mining operations on area springs. Because the BLM adequately considered the effects upon the affected topography and water resources, its decision was "fully informed and well-considered," and is entitled to judicial deference.

Finally, Northern Plains contended that BLM's significant impacts analysis was improper because it relied on mitigation measures that minimized the impacts on surface and water resources. Although BLM acknowledged the existence of some surface effects from subsistence, BLM reasonably concluded that the overall surface effects from subsidence would be minor in the short term and negligible in the long term. BLM noted that Signal Peak's current mining permit required Signal Peak to mitigate short and long-term hydrologic and wetland impacts. BLM did not rely on any mitigation measures in its analysis to the extent that an EIS would be required, and its reasoned decision was consistent with its NEPA obligations.

Comanche Nation of Oklahoma v. Zinke, No. 17-6247, 754 Fed. Appx. 768 (10th Cir. Dec. 14, 2018) (not for publication)
Agency prevailed.

Issue(s): Impacts, Socioeconomic Impacts.

Facts: Comanche Nation brought action against Secretary of Interior (the "Secretary") challenging approval of application to take land into trust for the Chickasaw tribe to open casino property in Western Oklahoma, alleging violations of NEPA.

In June 2014, Chickasaw Nation submitted an application requesting that the DOI take approximately thirty acres of land near Terral, Oklahoma (the "Terral site") into trust for the tribe. Chickasaw Nation intended to use the Terral site, located 45 miles from a gaming facility operated by Comanche Nation, for a casino. After reviewing the application, the Secretary determined that: (1) Chickasaw Nation does not have a reservation; and (2) the proposed site is within the boundaries of its former reservation in Oklahoma.

Formal transfer of the Terral site occurred in January 2017, and in the same month a FONSI was issued based on an EA conducted pursuant to the NEPA. The notice of the trust acquisition was published later that year.

Comanche Nation challenged the action in the district court. Shortly after filing its complaint, Comanche Nation moved for a preliminary injunction to prevent Chickasaw Nation from opening its casino on the Terral site. The district court denied that motion for lack of likely success on the merits, and Comanche Nation appealed.

Decision: The Tenth Circuit reviewed of the denial of a preliminary injunction for abuse of discretion. To obtain a preliminary injunction, a moving party must show:

(1) that it has a substantial likelihood of prevailing on the merits;
(2) that it will suffer irreparable harm unless the preliminary injunction is issued;
(3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and,
(4) that the preliminary injunction if issued will not adversely affect the public interest.

The Ninth Circuit focused on the first prong and found that the Comanche Nation was unlikely to succeed on the merits of its NEPA claim involving the EA. Comanche Nation argued that the Secretary did not take a "hard look" at the environmental impact of the casino project, *citing to Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 100, 103 S.Ct. 2246 (1983). However, the court found that the record indicated that BIA completed a detailed EA and issued a FONSI for the trust acquisition of the Terral site for gaming. It also strongly stated that the Comanche Nation's conclusory allegations that the EA did not comply with *Baltimore Gas*, that BIA has a history of failing to comply with NEPA requirements, and that Chickasaw Nation intends to build larger-than-necessary sewer lagoons are not enough to carry the day for obtaining a preliminary injunction.

The Comanche Nation contended that the Secretary's NEPA analysis was flawed because it failed to consider the economic effects the new casino would have on Comanche Nation's existing casino. However, "[i]t is well-settled that socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA." *Cure Land, LLC v. U.S. Dep't of Agric.,* 833 F.3d 1223, 1235 (10th Cir. 2016).

The Ninth Circuit rejected the argument that the acquisition was arbitrary and capricious because the Secretary failed to consult Comanche Nation. Agencies should consult with "appropriate State and local agencies and Indian tribes." 40 C.F.R. § 1501.2(d). The regulation's use of the term "appropriate" suggests an agency possesses discretion in determining which bodies to consult. *See generally Martel-Martinez v. Reno*, 61 F.3d 916 (10th Cir. 1995) (table). Comanche Nation again relied solely on socioeconomic effects of the new casino and that was not enough to show it was necessarily an appropriate consulting tribe.

U.S. DEPARTMENT OF TRANSPORTATION

Highway J. Citizens Group v. U.S. Dep't of Transp., 891 F.3d 697 (7th Cir. 2018)
Agency prevailed.

Issue(s): Categorical Exclusion (CatEx) (impacts).

Facts: Local resident and environmental groups brought action under the NEPA against the DOT, challenging FHA's approval of an environmental report and federal funding for Wisconsin's proposed 7.5 miles of renovation of highway.

Wisconsin proposed to renovate a 7.5-mile stretch of Highway 164 (formerly known as Highway J), a two-lane road in southern Washington County. It was built in the 1960s with 5 to 6.5 inches of asphalt, a pavement expected to last 22 years, and resurfaced in 2000 with another 2.5 to 3.5 inches, expected to extend the road's life by 12 years. The new project entails repaving, reconstruction near hill crests where drivers cannot see approaching traffic, widening the lanes, making the shoulders flatter and two feet wider, improving sight lines, updating guardrails, adding rumble strips, and introducing turn or bypass lanes at some intersections. A 141-page environmental report prepared between 2013 and 2015 concluded that the renovation would not cause any significant environmental effects but would reduce the accident and injury rate. (Accidents are 63% more likely, per vehicle mile traveled, on this stretch than on Wisconsin's other rural highways, and crashes that occur are 45% more likely to produce an injury.)

FHA approved the environmental report and federal funding in 2015, finding that it is unnecessary to prepare an EIS. One local resident and two groups filed this suit, contending that more study is essential. The district court

denied the injunction, and found that the environmental report shows that the project fits the criteria for categorical exclusion (CatEx), eliminating the need for a more detail study. The Plaintiffs appealed, arguing that: that the agency's failure to write a decision separate from the report shows that it has yet to give the project independent consideration, and that the report does not analyze cumulative effects of multiple highway-renovation projects.

Decision: The Seventh Circuit discussed that renovating 7.5 miles of an existing two-lane road does not stand out as a major cause of a significant effect. Regulation 1508.4 establishes a "categorical exclusion" of projects that are not major:

> Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

FHA implemented this regulation through 23 C.F.R. § 771.117. Under FHA regulations, renovating existing roads generally does "not individually or cumulatively have a significant effect on the human environment". The point of the years-long, 141-page study was not to question the validity of the regulations but to find out whether this renovation, in particular, needed a thorough evaluation because it would cause "[s]ignificant environmental impacts."

The report concluded that the renovation of Highway 164 would not have a significant environmental effect. After the work is done it will be the same road, in the same place, with the same two lanes, and a little wider so that larger vehicles can safely use the shoulders (and are less likely to hit each other if they veer from the middle of a lane). Widening the road and improving sight lines by clearing some obstructions at roadside will use 38 acres of land in total (or 5 acres per mile of road). Of those 38 acres, 1.655 are wetlands, which would be filled; that's bad for some animals and plants, but that the state will create 2.825 acres of new wetlands at another site. No threatened or endangered species would be adversely affected. The area through which the highway runs would remain hilly and forested. All in all, the report concluded, not much bad could happen, while drivers and their passengers would become safer. The report added that reducing the speed limit on this stretch of road might endanger drivers, because although some would obey the lower limit many would not, and data show that a variance in different vehicles' speeds is a major cause of accidents.

The principal questions FHA had to decide were whether the project will have "[s]ignificant environmental impacts" (§ 771.117(b)(1)) or flunk the analysis under § 771.117(d)(13). The Seventh Circuit then compared the argument that because there was not a separate writing then the document was deficient, to the current practice of signing of search warrants (without written opinions), and the signature of the judge for a panel of a Circuit Court of Appeals, where the other judges join silently. The court granted deference to FHA, finding FHA's staff was active in preparing the report, commenting on drafts and making suggestions. Only when the whole process was complete, to its satisfaction, did FHA sign off, and that no statute or regulation required more.

The court then considered the argument that the 141-page report didn't analyze the cumulative effects of many different highway-repair projects, and found it true, but irrelevant. FHA must analyze cumulative effects when deciding whether the category (renovating highways) comes within the exclusion. But once a categorical decision has been made—and Plaintiffs did not contest FHA's finding in § 771.117 that road renovations cumulatively do not amount to major federal actions with significant environmental effects—the remaining question is whether a particular project flunks the constraints of § 771.117(e) or otherwise has "[s]ignificant environmental impacts" (§ 771.117(b)(1)) because that was what the report investigated. The Court restated that judicial review is

deferential, and it deferred to FHA applying the categorical exclusion of § 1508.4 and § 771.117 to the project. The court stated that trying to include all cumulative effects of every project when analyzing any project is not feasible.

The extraordinary circumstances portion of Section 771.117(b)(2) requires analysis when a project occasions "[s]ubstantial controversy on environmental grounds." Plaintiffs stated that their own opposition to the project, coupled with letters from several other organizations, add up to "[s]ubstantial controversy on environmental grounds." The Seventh Circuit discussed that FHA did not act arbitrarily, however, in deciding that the environmental report was itself an adequate response to that controversy because Section 771.117(b) does not require an EIS whenever someone opposes a project; it requires only "appropriate environmental studies." The court held that the lengthy report was such a study.

Fath v. Texas Dep't of Transp., No. 17-50683, 2018 WL 3433800, -- F.3d --- (5th Cir. Jul. 17, 2018)
Agency prevailed.

Issue(s): Cumulative Impacts, Segmentation.

Facts: Environmental groups and local residents (Plaintiffs) brought action against the Texas Department of Transportation (DOT) and regional transportation authority for violating NEPA involving an overpass project for the Texas State Highway Loop 1 in Austin, Texas. As a matter of background, Texas had proposed several new highways to alleviate horrific traffic in Austin. It wanted to build overpasses where Texas State Highway Loops 1 (colloquially known as "MoPac") intersection with two existing streets so that MoPac would pass under those streets. It is also in the midst of extending State Highway 45 West by about four miles with a tolled freeway that will run from MoPac's southern tip and down into bordering Hays County. Finally, it had plans to add express lanes in 8 miles of MoPac. For the overpass projects, the DOT conducted an EA, based on studies conducted between 2014 and 2015 and concluded that the overpass project would not cause any significant environmental effects. Plaintiffs challenged the highway studies, raising concerns about potential combined impacts from the highway projects on the Edwards Aquifer and endangered or protected species, including the golden-cheeked warbler and the Barton Spring and Austin blind salamanders. The lower court concluded that the DOT complied with NEPA.

Decision: Plaintiffs first contended that the DOT violated NEPA by studying the three highway projects as separate projects, instead of a single project, to determine their environmental impacts. The alleged violations consisted of (1) studying the projects separately without first considering whether the projects are "cumulative actions" under 40 C.F.R. § 1508.25(a)(2), and (2) improperly segmenting the highway projects under 23 C.F.R. § 771.111(f).

The court cited the legal maxim that agencies generally should not "segment," or "divide artificially a major Federal action into smaller components to escape the application of NEPA to some of its segments." *Save Barton Creek Ass'n v. Fed. Highway Admin.,* 950 F.2d 1129, 1140 (5th Cir. 1992) (per curiam). Both the CEQ and FHWA have regulations that govern whether agencies may treat multiple projects as separate projects in studying their environmental impacts. Under CEQ regulations, agencies must treat multiple projects as "in effect, a single course of action" if they are "connected actions," "cumulative actions," or "similar actions." See 40 C.F.R. §§ 1502.4(a), 1508.25(a). TxDot admits that it did not comply with this rule and the Fifth Circuit noted that, in highway cases, the FHWA's regulation controls. *See e.g., Save Barton Creek*, 950 F.2d at 1141–42 (concluding that challenged highway segments "fully comport[ed] with both case law and FHWA's regulations" and "satisfie[d] the FHWA's standards" without discussing the CEQ regulations); *see also id*. at 1140 & n.15 (explaining that our test for this issue consists of factors embodied in § 771.111(f)).

In its discussion the Seventh Circuit noted that given the case law precedent and the lack of highway cases suggesting otherwise, § 771.111(f) tailored the general policy of § 1508.25(a) to the specific question of whether multiple highway projects are "in effect, a single course of action." *See* 40 C.F.R. § 1502.4(a); *see also* DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIGATION § 9.12 (2d ed. 2017) ("CEQ regulations provide only general guidance on when related actions or proposals should be considered together in a single impact statement. More detailed regulations are provided by individual agency regulations, such as the regulations applicable to highway projects, and by case law."). As a result, the Fifth Circuit determined that the TxDot did not act arbitrarily and capriciously by not complying with § 1508.25(a)(2).

The Fifth Circuit then examined whether the TxDot treated the proposed overpasses on MoPac as a standalone project in its EA. Under § 771.111(f), to treat a highway project as a standalone project for NEPA purposes, the project must:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Plaintiffs argued that TxDot wrongly found that the overpass project meets § 771.111(f)(1)'s criteria by looking only at whether the project has "logical termini" and without asking whether it is "of sufficient length." We disagree, as this court and other circuits have similarly condensed § 771.111(f)(1) into a test about logical termini. *See Save Barton Creek*, 950 F.2d at 1141 ("[B]oth the segment of the Austin Outer Loop as well as MoPac South fully comport with both case law and FHWA's regulations requiring that segments have independent utility, connect with logical termini, and do not foreclose the opportunity to consider alternatives.").

The court stated that it made sense to conclude that a project is "of sufficient length" when it connected logical termini. It found that in this case, the TxDot identified the overpass project's logical termini at the points where MoPac intersects with the two streets it would pass under. The court couldn't find any other logical termini and the Plaintiffs offered no alternative termini. The Fifth Circuit found that "crossroads" are precisely the sort of logical termini the FHWA contemplated in issuing § 771.111(f)(1). See Conservation Law Found., 24 F.3d at 1472 (citing 37 Fed. Reg. 21,809, 21,810 (Oct. 14, 1972), which defines "highway section" as "a substantial length of highway section between logical termini," including "major crossroads, population centers, major traffic generators, or similar major highway control elements"). The Fifth Circuit held that the TxDOT complied with § 771.111.

The Plaintiffs next argued that TxDot violated NEPA because the overpass project's EA contains no analysis of the project's "cumulative impact" as required by 40 C.F.R. § 1508.25(c). The TxDot contended that a full analysis was unnecessary where, it does not expect a project to have any significant environmental impact that can "accumulate" with the impacts of other actions. The Fifth Circuit agreed with the TxDOT, applying the "rule of Reason" and discussing that information that serves not purpose, and the aim of NEPA was to make agencies carefully consider detailed information concerning significant environmental impacts while providing information useful to the public decision making process. *See* 40 C.F.R. § 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.").

The court held that a full cumulative impact analysis would not serve these purposes. The proposed overpasses were a two-mile project in an area that was already heavily developed and trafficked. After conducting a number of detailed technical studies, TxDot concluded that the project would not significantly impact the environment. If the project would have no significant impact by itself, it is unlikely to change the environmental status quo when "added" to other actions. *See e.g., Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692 (5th Cir. 2018) (holding that a full cumulative impact analysis was unnecessary where Environmental Assessments concluded that a project would have no incremental impact and "hence, there could be no cumulative effects"); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 113 (D.C. Cir. 2014) (concluding that no cumulative impact analysis was needed where "the EA concluded that because the . . . Project itself was expected to have minimal impacts, no significant cumulative impacts were expected to flow").

The Plaintiffs argued that *Fritiofson* applied and that a full cumulative effects assessment must be completed. *Fritiofson v. Alexander*, 772 F.2d 1225, 1240 (5th Cir. 1985), *abrogated on other grounds by Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992). In *Fritiofson*, the Fifth Circuit concluded that an agency failed to adequately analyze cumulative impacts in its EA for a project that would consume acres of wetlands because the record did not show consideration of "other past, present, and reasonably foreseeable future actions" on the island. *See* 772 F.2d at 1234, 1247. But the court found that *Fritiofson* was "undoubtedly an unusual case," owing to "the unique and fragile nature of wetland areas" and the rapid increase in Galveston Island commercial development. *See id.* at 1246–47. As the Fifth Circuit explained in *Fritiofson*, "[t]he extent of [a cumulative impact] analysis will necessarily depend on the scope of the area in which the impacts from the proposed action will be felt and the extent of other activity in that area." *Id*. at 1246. The Fifth Circuit rejected the *Fritiofson* analysis, and found that given the overpass project's limited scope and location over busy urban intersections, it was not arbitrary and capricious for TxDot to limit its cumulative impact analysis where the record supports its finding that the project will have no significant direct or indirect impact.

BRRAM, Inc. v. Federal Aviation Admin., No. 16-4355, 721 Fed. Appx. 173 (3d Cir. Jan. 9, 2018) (not for publication)
Agency prevailed.

Issue(s): Categorical Exclusion (CatEx) (impacts).

Facts: In 2016, Allegiant requested that FAA amended its Operating Specifications to allow it to operate at Trenton, NJ, a commercial airport. In its request, Allegiant explained that it would conduct 14 operations (7 takeoffs and 7 landings) per week. Allegiant submitted a noise assessment that stated that Allegiant's operating at Trenton would not have a significant impact on noise levels in the area. On November 2, 2016, FAA issued a Record of Decision applying a categorical exclusion (CatEx) (the "Decision") for approving the requested amendment. The discussed Allegiant's noise assessment along with a noise assessment prepared by Trenton, which was based on a forecast of air traffic twenty years into the future, and concluded, "no significant noise impacts will occur as a result of Allegiant's operation." The lower court upheld the Decision, and petitioners, most of whom reside or operate in Pennsylvania across the Delaware River from Trenton, appealed.

Decision: FAA published a list of CatExs and created a list of twelve extraordinary circumstances that require more thorough environmental review. In this case, FAA considered Allegiant's request to amend its Operating Specifications (the terms an air carrier must comply with to ensure an air carrier operates safely in air transportation) and determined that no extraordinary circumstances existed. FAA then concluded that its CatEx for

"[o]perating specifications and amendments that do not significantly change the operating environment of the airport" applied and that preparing an EIS was unnecessary.

The Petitioners challenged FAA's determination that Allegiant's request did not present any extraordinary circumstances. Specifically, they questioned FAA's conclusion that its extraordinary circumstance regarding noise, which precludes a determination that a CatEx is applicable when an action "has the potential for a significant impact" on "noise level of noise sensitive areas" did not apply to Allegiant's request. Petitioners claimed that FAA should not only have evaluated Allegiant's proposed 14 flights, but rather, considered impact of the expansion proposed because FAA has explained that once an airline is permitted to operate at an airport, FAA cannot control the number of flights the airline will operate.

The Third Circuit disagreed with the Petitioner's assertions, stating that as FAA explained in its Decision, FAA considered both Allegiant's noise analysis, which only accounted for the fourteen flights, and a noise analysis prepared by Trenton that was based on a forecast 20 years into the future of all foreseeable air traffic by Allegiant and other airlines operating at Trenton. Neither noise analysis showed that they would have a significant impact on noise in the area under FAA's prevailing standards for significance.

The court discussed that the Petitioners did not challenge the validity of Trenton's noise analysis (for example, they don't argue that the analysis is based on improper assumptions about future air traffic or its conclusions are erroneous). The Third Circuit affirmed FAA's Decision to approve Allegiant's requested amendment to its Operating Specifications.

Vaughn v. Fed. Aviation Admin., No. 16-1377, 2018 WL 6430368, -- Fed. Appx. --- (D.C. Cir. Nov. 30, 2018) (not for publication)
Agency prevailed.

Issue(s): Impacts (Air, Noise, Climate Change, Outdated Software), Cumulative Impacts, Alternatives.

Facts: Culver City, the Santa Monica Canyon Civic Association (a nonprofit organization that protects the environment quality of its neighborhood), and two individuals (who live in areas affected by the purportedly increased noise and other emissions from the SoCal Metroplex project) petitioned for review of order approving redesign of air-traffic control procedures and flight paths at several airports in Southern California, claiming violations of NEPA.

In 2016, as part of a broader project to modernize the federal airspace, FAA decided to redesign air-traffic control procedures and flight paths at several airports in Southern California. The SoCal Metroplex project was intended to improve the operational efficiency of air traffic, but the redesigned flight routes have allegedly led to increased noise in certain neighborhoods. FAA issued an EA and then a FONSI for the SoCal Metroplex project in 2016.

The four consolidated petitioners objected to FAA's conclusion that there would be no significant environmental effects resulting from the project. They raised several lines of attack against FAA's analysis, arguing the agency failed to account adequately for noise, air emissions, and cumulative environmental effects, in violation of NEPA.

Decision: The petitioners first challenged FAA's conclusion that the SoCal Metroplex project would not lead to noise increases above the agency's "significance threshold."

The petitioners claimed that FAA has a statutory duty not only to consider noise, but to consider ways of reducing it. Specifically, the SoCal Metroplex project is part of a broader FAA program called the Next-Generation Air Transportation System (NextGen), which aims to transition the national airspace from using outdated procedures to ones that take advantage of new technologies such as GPS. One of the seven goals for NextGen is that FAA must "take into consideration, to the greatest extent practicable, design of airport approach and departure flight paths to reduce exposure of noise and emissions pollution on affected residents." Vision 100 Act, § 709(c)(7). Based upon this goal, the petitioners argued FAA must strive to reduce noise below the pre-existing level, rather than simply avoid any significant increase in noise.

The Ninth Circuit held that FAA sufficiently considered reducing noise levels. The White Paper that FAA developed in response to public comments described several ways in which the agency modified the project in order to address community concerns about noise. For example, due to "local concern about the proposed design eliminating [a particular] waypoint," which would lead to greater noise over certain areas, FAA redesigned the procedures "with an intervening, redundant waypoint" in order to "address community concerns . . . while providing the airspace safety and efficiency enhancements sought by the proposed action." These modifications demonstrated FAA considered reducing noise and emissions to the extent practicable. Vision 100 Act, § 709(c).

The petitioners next objected to FAA's use of an outdated computer program called NIRS to analyze noise levels. According to the petitioners, FAA's use of NIRS violates the agency's own guidance memorandum, which calls for using AEDT, a newer software program, for "projects whose environmental analysis" started after March 1, 2012. FAA Order 1050.1E. FAA responded that although the dataset used for its environmental analysis covers the period from December 2012 to November 2013, noise analysis using NIRS actually began before the March 2012 cut-off date. The court deferred to FAA's reasonable explanation that this early noise screening counts as "environmental analysis" for the purpose of complying with the agency's own guidance. *See Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905 (1997) (finding agency's interpretation of its own regulation is "controlling" unless "plainly erroneous or inconsistent with the regulation"). Because FAA started conducting its environmental analysis before March 2012, it was not required to switch to the new software in March 2012.

Finally, the petitioners challenged FAA's choice of a metric to measure noise. Instead of using the Cumulative Noise Equivalency Level (CNEL), which weights more heavily noise occurring in the evening hours, FAA used the Day-Night Sound Level (DNL), which does not. According to the petitioners, FAA Order 5050.4B, NEPA Implementing Instructions for Airport Actions, § 9(n) (Apr. 28, 2006) required FAA to use CNEL for projects in California. As FAA explained, however, when viewed in light of another FAA order, it was permitted but not required to use the CNEL metric for this project. *See* Airports Desk Reference for FAA Order 5050.4B, Ch. 17 para. 1(c) at 2 (Oct. 2007) ("While DNL is the primary metric FAA uses to determine noise impacts, FAA accepts the CNEL when a state requires that metric to assess noise effects"). FAA's final EA explained that the SoCal Metroplex project does not involve any state environmental review; hence, it was not required to use CNEL.

FAA also determined the project would have a minimal effect on air emissions and on the climate. The petitioners argued FAA improperly presumed the SoCal Metroplex project would conform to California's SIP. Specifically, the petitioners challenged FAA's reliance upon its presumed-to-conform list, which specifies that modifications to flight routes and procedures at or above the mixing height (generally 3,000 feet above ground level) have only a *de minimis* effect on the environment and that, below that altitude, modifications are presumed to conform if they are "designed to enhance operational efficiency (i.e., to reduce delay)." 72 Fed. Reg. 41578/2 (2007). *See also* 40 C.F.R. § 93.153(c)(2)(xxii). Rather than challenging the validity of the presumptions, however, the petitioners' main contention was that the presumptions do not apply to the project.

First, the petitioners claim "most, if not all" the procedures will occur below 3,000 feet and therefore FAA cannot presume that effects on air emissions are *de minimis.* The final EA stated the opposite to be true: "changes to flight paths . . . would primarily occur at or above 3,000 feet [above ground level]." Second, the petitioners argued that any modifications to procedures below 3,000 feet do not qualify for the presumption of conformity because they are expected to increase fuel burn, albeit very slightly, and therefore are not "designed to enhance operational efficiency." 72 Fed. Reg. 41578/2 (2007). As FAA pointed out, the purpose of the SoCal Metroplex project is to address congestion in the airspace and improve safety – benefits FAA could reasonably conclude overpower the negligible increase in fuel burn. *See* Vision 100 Act, § 709(c) (describing the multi-factor nature of FAA's mandate to implement NextGen).

In its final EA, FAA concluded the project would not have a significant effect on the climate because the project would increase greenhouse gases by only 35 metric tons (MT) (0.41%) in 2016 and 42 MT (0.44%) in 2021. First, the Petitioner complained that use of a de minimis standard contradicts guidance issued by the CEQ. According to this guidance, a statement that additional emissions would "represent only a small fraction of global emissions . . . is not an appropriate basis for deciding whether to consider climate impacts under NEPA." 79 Fed. Reg. 77825/2-3 (Dec. 24, 2014). As FAA pointed out, however, the same guidance also provides a disclosure threshold of 25,000 MT, below which "a quantitative analysis . . . is not recommended unless quantification is easily accomplished." *Id.* at 77,807/2. In this case, the 42 MT increase in emissions in 2021 was far less than the 25,000 MT threshold at which disclosure was suggested by the CEQ. As it was not clear FAA had a duty even to quantify the increase in emissions, and the Ninth Circuit agreed with FAA's reasonable conclusion that the project would not have a significant effect on the climate.

The petitioners also argued California law requires the state to reduce greenhouse gas emissions to certain levels by 2020. The court rejected this argument, stating California law does not impose a duty on the federal government.

With respect to noise, FAA did not conduct a cumulative analysis because it had already determined the project would have no significant noise effect. Despite the petitioners' non-specific objection that the EA "barely mentions cumulative noise impacts, let alone takes a 'hard look' at such impacts," the petitioners did not advance any argument against FAA's reasoning. The court did not find FAA arbitrary and capricious for not conducting a cumulative impact analysis for a particular environmental resource after the agency reasonably has concluded its proposed action will not have a significant effect on that resource. *See Minisink Residents for Envt'l Pres. & Safety v. FERC*, 762 F.3d 97, 113 (D.C. Cir. 2014).

With respect to air quality, FAA reasonably concluded the SoCal Metroplex project would not result in any significant cumulative effects. In response, the petitioners claim FAA failed to account for a contemporary project of much broader scope in its analysis, namely, a project at the Los Angeles International Airport that involves moving and extending runways. As FAA explained, however, the proposal for the LAX runway project was made for 2025 – four years past the 2021 planning horizon for the SoCal Metroplex project. The Ninth Circuit held FAA did not act arbitrarily and capriciously by excluding the runway project from its cumulative air quality analysis because the project was not reasonably foreseeable.

Finally, the petitioners complained that the information provided in FAA's draft EA was not sufficiently accurate, making it difficult for a member of the public to determine where flight paths would cross his or her neighborhood. In order to make this argument, the petitioners point only to FAA's half-mile adjustment of a single waypoint

during the comment period. According to the petitioners, FAA did not perform a noise analysis of the change, making it "impossible" for the public to anticipate the degree of environmental effect from the project. FAA pointed to evidence in the record showing it did perform a new noise analysis after moving the waypoint and again found there was no significant noise effect.

The Ninth Circuit also rejected the petitioners' argument that the agency failed to take a hard look at a range of appropriate alternatives to the project, as required by the NEPA. In order to make this argument, the petitioners renewed their claim that FAA was required under Vision 100 to analyze alternatives that reduce noise. But the court believed FAA met its duty under Vision 100. The petitioners' contention – that FAA's EA was deficient because it considered only the proposed action and the no-action alternative – was similarly unpersuasive. As FAA pointed out, it evaluated various groups of procedures in different combinations, in order to determine what "alternative action" to present in the Final EA. The Ninth Circuit held FAA satisfied its duty to consider appropriate alternatives.

Paradise Ridge Defense Coalition v. Hartman, No. 17-35848, 2018 WL 6434787, -- Fed. Appx. --- (9th Cir. Dec. 7, 2018) (not for publication)
Agency prevailed.

Issue(s): Impacts, predetermination.

Facts: The Paradise Ridge Defense Coalition (Coalition) challenged that the Federal Highway Administration (FHWA) and the Idaho Transportation Department violated NEPA in selecting an alternative for construction of a new segment of Highway US-95 south of Moscow, Idaho.

Decision: The Ninth Circuit found FHWA took the "hard look" that NEPA requires and the agency's decision was not arbitrary or capricious. The court found that, first, the FHWA's reliance on the Highway Safety Manual for predicting the relative safety of each alternative route was reasonable given that it is the industry standard for highway safety, and the Coalition did not argue that the FHWA should have used an alternative methodology. The FHWA disclosed that the methodology did not yield confidence intervals for each of the proposed alternatives, and the FHWA also exercised engineering judgment in its evaluation of the proposed alternatives. Further, the FHWA provided a "reasonably thorough discussion" of the risk and severity of collisions between vehicles and wildlife, as well as mitigation measures to decrease the risk of those collisions.

Second, the FHWA did not make "an irreversible and irretrievable commitment of resources" before completing its analysis, and so did not impermissibly predetermine the outcome of the NEPA analysis. Nor did the FHWA err in considering one route from each geographic corridor, because the routes within each geographic corridor had substantially similar consequences, and NEPA "does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences." The FHWA also discussed the mitigation measures for invasive weeds "in sufficient detail to ensure that environmental consequences [had] been fairly evaluated."

Informing Citizens Against Runway Airport Expansion v. Fed. Aviation Admin., No. 17-71536, 2018 WL 6649605, -- Fed. Appx. --- (9th Cir. Dec. 18, 2018) (not for publication)
Agency Prevailed.

Issue(s): Impacts and impact methodology, alternatives, public comment/involvement.

Facts: Informing Citizens Against Runway Airport Expansion, the Petitioner, sought review of FAA's decision to approve a project to construct a 5,200-foot runway at the Ravalli County Airport in Hamilton, Montana.

Decision: The Ninth Circuit found FAA acted within its discretion, and exercised its technical expertise, in using fuel sales to estimate annual operations at the airport. It made the underlying data about the fuel sales available with the 2014 EA, which explained that the forecasting report relied in part on handwritten records of fuel sales to estimate operations. NEPA requires an agency to "disclose the hard data supporting its expert opinions," but NEPA does not dictate how the agency must disclose that data. Here, FAA provided "sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in" and "inform the agency decision-making process."

Especially in the realm of aviation forecasting, FAA has substantial discretion to choose among available forecasting methods, as long as it explains its choice. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) ("The agency must explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable.")). Here, FAA explained that FlightAware cannot capture every operation at the airport, so FAA relied on records of the airport's fuel sales to get a more complete picture of annual operations. FAA also explained that the records contained identifying numbers linked to specific aircraft, enabling the agency to determine which planes bought fuel and eliminate duplicates that also showed up in FlightAware's data. In sum, FAA gave the necessary explanation here, so the court deferred to its chosen methodology for aviation forecasting.

FAA reasonably articulated the project's purpose and need and considered an appropriate range of alternatives. Substantial evidence—in the form of FlightAware data and records of fuel sales—supports FAA's conclusion that B-II operations at the airport either exceeded, or came so close to, the 500-operations threshold that the airport needed a 5,200-foot runway to accommodate B-II aircraft safely. Although a 4,800-foot runway would accommodate most planes using the airport, FAA decided that the airport required a 5,200-foot runway because: (1) the airport sees some use by larger planes that would benefit from a 5,200-foot runway; (2) the 5,200-foot runway would allow planes to carry more fuel, passengers, and cargo (in particular, firefighting Forest Service planes could carry their full capacity of fire retardant); and (3) FAA has limited funds to disburse, and it would be financially responsible to build a 5,200-foot runway initially instead of building a 4,800-foot runway and later extending it by 400 feet to accommodate larger planes.

Moreover, FAA initiated its EA in response to the County's project proposal, but FAA did not simply adopt the County's goal of having a 5,200-foot runway as its own. An agency may allow a private interest to give context to its statement of purpose and need. And FAA has a statutory mandate to promote "the safe operation of the airport and airway system" and efficient air transportation. 49 U.S.C. § 47101(a)(1)(b). Providing adequate runway length furthers both of those goals by giving pilots higher safety margins and allowing aircraft to fly at full capacity. Against that background, FAA did not define the purpose and need "in unreasonably narrow terms."

Consequently, FAA acted reasonably by seriously considering only alternatives that involved a 5,200-foot runway. An agency need only evaluate alternatives that are reasonably related to a project's purpose. Considering an alternative that maintained the current runway length would have contravened FAA's mandate to promote safe and efficient air transportation, § 47101(a)(1), (b), given that past assessments of the airport recognized that the current runway can accommodate only 75% of B-II aircraft. Because keeping the current runway length was not a viable alternative, FAA did not violate NEPA by failing to examine that alternative.

FAA addressed the project's effect on property values sufficiently to comply with NEPA. FAA examined several studies about the effect of aircraft noise on property values. FAA also explained that no specific studies existed for the airport, although "noise modeling" for the preferred alternative showed that no residential properties would come within "the 65 DNL contour"— the area where planes are loudest. Petitioner complained that FAA did not address the studies that its members provided, but "an agency need not respond to every single scientific study or comment." Petitioner did not show how FAA's failure to respond to any specific comment or study rendered its final decision arbitrary.

Petitioner also argued that it should have had another chance to comment on the project's effect on property values after FAA released the FEA in 2017. The court opined that the Petitioner's argument is untenable as a practical matter because it would create an endless loop in the administrative process; an agency could never proceed with an action as long as the public continued to comment on new information that the agency released. The Ninth Circuit found FAA gave the public a meaningful opportunity to participate in the decision-making process. The comment period for the 2014 EA lasted 73 days, including an extension at Petitioner's request. The 2014 assessment contained information on each subject about which Petitioner's briefs expressed concern. Although NEPA's standards for the necessary level of public participation remain "amorphous," the court has recognized that NEPA does not require "substantial" public participation. *See Cal. Trout v. FERC*, 572 F.3d 1003, 1017 (9th Cir. 2009) ("We have held that a complete failure to involve or even inform the public about an agency's preparation of an [EA] would violate NEPA's regulations, but have also concluded that the circulation of a draft [EA] is not required in every case").

The court finally held that FAA was not required to prepare an EIS. "The mere fact that an agency prepared a lengthy EA does not, without more, demonstrate that the agency must prepare an EIS."

INDEPENDENT AGENCIES

American Rivers v. Federal Energy Regulatory Comm'n, 895 F.3d 32 (D.C Cir. 2018)
Agency did not prevail.

Issues: Impact analysis, cumulative Impacts

Facts: In 2013, FERC granted the Alabama Power Company a 30-year license to continue power generation by 7 hydropower developments on a portion of the Coosa River (collectively referred to as the "Coosa Project") and to consolidate all of the projects into a single license. In 2009, FERC issued a final EA and FONSI on the license application, concluding that the relicensing decision was not a major federal action significantly affecting the quality of the human environment.

In June 2012, USFWS issued a Biological Opinion concluding that the relicensing the project was not likely to jeopardize any threatened or listed species, nor destroy or deleteriously affect any critical habitats. In June 2013, FERC granted Alabama Power a new 30-year lease to continue operating the now-combined Coosa Project. Both the Commission's final EA and the USFWS Biological Opinion were incorporated, without change, into the license.

The license imposed several terms and conditions on Alabama Power's operations, including the duty to (i) implement "aeration" measures to achieve a constant minimum dissolved oxygen level of 4.0 mg/L at each development "at all times," (ii) enhance dissolved oxygen levels at Logan Martin during periods of non-generation to protect certain listed aquatic species, (iii) incorporate water-quality monitoring measures prescribed by the Alabama Department of Environmental Management, and (iv) conduct surveys of aquatic species to ensure no further decline of threatened and endangered mussels and snails.

Several parties, including the eventual plaintiffs and Alabama Power, sought rehearing of the licensing order. FERC denied the environmental groups' hearing request in full but granted Alabama Power's request, materially slackening Alabama Power's duty to maintain the required levels of dissolved oxygen. In particular, the Commission provided that the prescribed water quality standards, including the maintenance of dissolved oxygen levels, would apply only when the hydroelectric developments were actually generating power.

Plaintiff environmental groups challenged the FERC relicensing decision on the ground that it violated the Federal Power Act, NEPA, and the Endangered Species Act.

Decision: The court of appeals held for the plaintiffs:

> "A review of the license renewal's impact on the environment and endangered species documented that the project would cause a 100% take of multiple endangered mussels, a large loss of indigenous fish, and perilously low dissolved oxygen levels for substantial periods of time.
>
> "Nevertheless, FERC concluded that licensing the generation project would have no substantial impact on either the River's ecological condition or endangered species. In doing so, FERC declined to factor in the decades of environmental damage already wrought by exploitation of the waterway for power generation and that damage's continuing ecological effects. Because the Commission's environmental review and a biological opinion it relied on were unreasoned and unsupported by substantial evidence, the Commission's issuance of the license was arbitrary and capricious."

Accordingly, the court vacated the licensing decision and remanded the case back to FERC.

After agreeing with plaintiffs that the Biological Opinion did not comply with the Endangered Species Act, the court turned to the sufficiency of FERC's decision that relicensing the Coosa River Project for 30 years would not have any significant environmental effects on the Coosa River ecological system. "Because the record of the licensing proceedings points strongly in the opposite direction, the Commission's decision to forgo an Environmental Impact Statement does not hold water."

Enumerating the deficiencies in the EA the court held that "[t]he record simply does not provide a rational connection between the licensing decision, the record evidence, and the finding of no significant environmental impact." In particular:

- FERC's "only cited evidence for the amount of fish deaths [as many as 1.3M fish per year] was a more-than-decade-old-survey of fish entrainment studies and estimates provided by the license applicant itself,

> Alabama Power. No updated information was collected; no field studies were conducted. Nor was any independent verification of Alabama Power's estimates undertaken. . . The Commission's acceptance, hook, line, and sinker, of Alabama Power's outdated estimates, without any interrogation or verification of those numbers is, in a word, fishy. And it is certainly unreasoned."

- "NEPA demands far more analytical rigor than the Assessment's breezy dismissal of the high fish mortality rate documented in its dated and unverified studies. See *Myersville*, 783 F.3d at 1322 (agencies cannot overlook a single environmental consequence if it is even 'arguably significant')"
- FERC's "cheery assurance that 'excellent' human-operated sport and commercial fisheries remain downstream is just whistling past the graveyard…. The Commission, for its part, made no effort to explain how downstream, human-operated sport and commercial fisheries are relevant bellwethers for environmental impacts in the upstream Coosa River. After all, the nearby presence of a nice zoo has never been a relevant answer under NEPA to high species mortality in nature."

The court then turned to the consideration of cumulative impacts:

> "Put simply, an agency's Environmental Assessment 'must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum.' *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002). In so doing, the 'incremental impact of the action [at issue] must be considered when added to other past, present, and reasonably foreseeable future actions.' *Id*. (alteration in original; internal quotation marks omitted). In other words, '[i]t makes sense to consider the "incremental impact" of a project for possible cumulative effects by incorporating the effects of other projects into the background data base of the project at issue.' *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 70-71 (D.C. Cir. 1987) (internal quotation marks omitted). Indeed, the Commission agreed that the NEPA cumulative-effects analysis had to account for all past impacts of the dams' construction and operation, including the enduring or ongoing effects of past actions."

Plaintiffs challenge to FERC's cumulative impact analysis under NEPA mirrors their objections to the USFWS Biological Opinion because the EA relies heavily on that opinion in establishing the current operation of the Coosa Project as the baseline for measuring environmental impacts. "As a result, the Service's failure to factor the damage already wrought by the construction of dams into the cumulative impacts analysis fatally infected this aspect of the Commission's NEPA decision as well."

> "The Commission gave scant attention to those past actions that had led to and were perpetuating the Coosa River's heavily damaged and fragile ecosystem. Nor did it offer any substantive analysis of how the present impacts of those past actions would combine and interact with the added impacts of the 30-year licensing decision. The Commission's cumulative impact analysis left out critical parts of the equation and, as a result, fell far short of the NEPA mark."

Big Bend Conservation Alliance v. Federal Energy Regulatory Comm'n, 896 F.3d 418 (D.C. Cir 2018)
Agency prevailed.

Issue: Segmentation/connected actions

Facts: Plaintiff Big Bend Conservation Alliance sought review of two FERC orders authorizing Trans-Pecos Pipeline, LLC to construct and operate an export facility (a 1,100-foot natural gas pipeline from a meter station in Texas to the Mexican border) to allow the export of natural gas from the United States to Mexico. Seeking an expanded environmental review, Big Bend argues that FERC, in addition to exercising jurisdiction over the Export Facility at the border, FERC also should have exercised jurisdiction over the 148-mile intrastate pipeline (Trans-Pecos Pipeline), authorized by the State of Texas that would transport natural gas produced in Texas to the Export Facility. Alternatively, Big Bend contends that regardless of the scope of FERC's jurisdiction under the Natural Gas Act, an expanded review was required by the NEPA.

FERC's jurisdictional determinations affected the scope of its environmental review. In particular, FERC issued an EA addressing impacts of the Export Facility and recommending a finding of no significant impact. Because FERC concluded that the Trans-Pecos Pipeline was intrastate and not under federal control, the EA did not analyze its environmental impacts. FERC concluded that an EIS was not required because approval of the Export Facility "would not constitute a major federal action significantly affecting the quality of the human environment." Plaintiff argued that the projects at issue were impermissibly segmented, and the pipeline should be "federalized" for NEPA purposes.

Decision: The court found for FERC on the NEPA issues. With respect to whether the Export Facility and Trans-Pecos Pipeline were "connected actions" the court found:

> "'The point of the connected actions doctrine is to prevent the government from "segmenting" its own "federal actions into separate projects and thereby failing to address the true scope and impact of the activities that should be under consideration."' *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) (brackets omitted) *(quoting Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).
>
> "The connected-actions doctrine does not require the aggregation of federal and non-federal actions. In *Sierra Club*, we held that the need for federal approvals to construct discrete segments of an oil pipeline did not subject the entire pipeline to NEPA review. *See* 803 F.3d at 49-50. Although the pipeline was 'undoubtedly a single "physically, functionally, and financially connected" project,' the key point was that the bulk of it was not subject to federal jurisdiction. *See id*. at 50 (*quoting Del. Riverkeeper*, 753 F.3d at 1308). 'The connected actions regulation,' we explained, 'does not dictate that NEPA review encompass private activity outside the scope of the sum of the geographically limited federal actions.' *Id*. at 49.
>
> "This reasoning controls here. The Export Facility was subject to FERC's jurisdiction, but the Trans-Pecos Pipeline was not. Because no federal action was required to authorize the pipeline's construction, there were no connected federal actions, and so the connected-actions regulation does not apply."

Then addressing whether FERC's involvement in authorizing the Export Facility was enough to "federalize" the Trans-Pecos Pipeline. The court "declined to adopt that theory…:"

> "[J]udicial review of NEPA claims must address actions by the federal government, because review under the APA requires 'final agency action,' 5 U.S.C. § 704, which means final action by an agency of 'the Government of the United States,' *id*. § 701(b)(1). See *Karst*, 475 F.3d at 1297-98; *see also Sierra Club*, 803 F.3d at 50-51 (federal regulatory control over segments of oil pipeline did not federalize entire pipeline project); *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 197-98 (D.C. Cir. 2003) (federal funding for portions of rail transit system and prospect of future federal funding did not federalize rail-line extension project)."

City of Boston Delegation v. Federal Energy Regulatory Comm'n, 897 F.3d 241 (D.C. Cir. 2018)
Agency prevailed.

Issues: Connected actions, cumulative impacts, contractor conflict of interest.

Facts: In March 2015, the Federal Energy Regulatory Commission approved an application from Algonquin Gas Transmission, LLC, to undertake an upgrade to its natural gas pipeline system (the Algonquin Incremental Market [AIM] Project). The $972 million project would replace 29 miles of existing pipeline with larger diameter pipe, construct 8 miles of new pipe line, build three new meter stations, and modify various other compressor and meter stations. The AIM project also included a proposal to construct about 5 miles of new pipeline (West Roxbury Lateral), which would run adjacent to an active quarry outside of Boston. This project would enable Algonquin to

meet some of the increasing demand for natural gas in New England and reduce pricing volatility in the region. In January 2015, FERC issued its final EIS for the AIM Project and issued a certificate for the project in March 2015.

In addition to the AIM Project, Algonquin was pursuing two other upgrades to its northeast pipeline system: the Atlantic Bridge Project (increase capacity of its system by replacing several miles of pipeline with larger capacity pipe and constructing or modifying a number of compressor and meter stations) and the Access Northeast Project (install pipeline and modify facilities in order to provide natural gas to electric power plants in New England). FERC issued a certificate for the Atlantic Bridge Project in October 2015; Algonquin withdrew its certificate application for the Access Northeast Project in June 2017.

Plaintiffs allege, among other things, that FERC impermissibly segmented its NEPA review by failing to consider Algonquin's three planned projects together in a single EIS. Additionally, a coalition of environmental groups, community organizations, and individuals alleged, among other claims, that the Commission insufficiently examined the cumulative impact of the Atlantic Bridge and Access Northeast projects, failed to recognize the bias of a third-party contractor, and failed adequately to consider safety issues raised by the pipeline's proximity to the Indian Point nuclear facility. Only the NEPA issues are summarized below.

Decision: The court held for the plaintiffs on all claims:

> "Petitioners present two related arguments under NEPA. First, petitioners contend that the Commission improperly segmented its environmental review by failing to examine the AIM Project and Algonquin's two other pipeline upgrade projects together in a single environmental statement. Second, petitioners submit that the Commission failed to give adequate consideration to the cumulative environmental impacts of the three upgrade projects. We find no basis to set aside the Commission's order on those grounds…..
>
> "This court has developed a set of factors that help clarify when 'physically connected projects can be analyzed separately under NEPA.' *Id*. at 1315. As relevant here, when an agency considers projects non-contemporaneously, see *id*. at 1318, and when projects have 'substantial independent utility,' *id*. at 1316, separate environmental statements can be appropriate [referencing *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)].
>
> "Applying those considerations in *Delaware Riverkeeper*, we concluded that the Commission had impermissibly segmented its review of four pipeline upgrades. The projects, we explained, were 'connected and interrelated' and 'functionally and financially interdependent,' and they also had significant 'temporal overlap,' *id*. at 1319, because they were 'either under construction' or 'pending before the Commission for environmental review and approval' at the same time, *id*. at 1308.
>
> "[W]e conclude that the Commission did not act arbitrarily and capriciously in declining to consider Algonquin's three projects in a single environmental impact statement. With regard to temporal overlap, the Commission issued the AIM Project certificate in March 2015, Algonquin submitted the application for Atlantic Bridge in October 2015, and Algonquin has yet to file the Access Northeast application. The projects thus were not under simultaneous consideration by the agency."

The court also concluded that the projects were not

> "'financially and functionally interdependent.' *Del. Riverkeeper*, 753 F.3d at 1319. On that score, we consider 'whether one project will serve a significant purpose even if a second related project is not built,' *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987), and we look to the 'commercial and financial viability of a project when considered in isolation from other actions,' *Del. Riverkeeper*, 753 F.3d at 1316."

In this case, the court found that FERC had reasonably concluded that the projects do not depend on the others fpr access to the natural gas market. "In short, the functional and temporal distinctness of the three projects, as underscored by factual developments concerning the Atlantic Bridge and Access Northeast Projects, substantiate that it was permissible for the Commission to prepare a separate environmental impact statement for the AIM Project."

Relatedly, the plaintiffs contended that the Commission failed to give sufficient consideration to the cumulative environmental impacts of the AIM, Atlantic Bridge, and Access Northeast Projects, but the court disagreed:

> "To satisfy 'hard look' review, an agency's cumulative impacts analysis must contain 'sufficient discussion of the relevant issues' and be 'well-considered.' *Myersville*, 783 F.3d at 1324-25 (citation omitted). But importantly, the adequacy of an environmental impact statement is judged by reference to the information available to the agency at the time of review, such that the agency is expected to consider only those future impacts that are reasonably foreseeable.
>
> "At the time of the Commission's consideration of the AIM Project, the impacts of the Atlantic Bridge Project were reasonably foreseeable. And the Commission thoroughly considered the environmental effects of Atlantic Bridge throughout the cumulative impacts section of the AIM Project's environmental impact statement. The statement 'contains sufficient discussion of' the cumulative impacts of Atlantic Bridge and is 'well-considered.' *Myersville*, 783 F.3d at 1325.
>
> "The cumulative impacts discussion of the Access Northeast Project is much more limited, and understandably so. At the time of the AIM Project's environmental impact statement, Access Northeast was months away from entering the pre-filing process and over a year away from issuance of a notice of intent to prepare an environmental impact statement. Given Access Northeast's preliminary stage and the resulting lack of available information about its scope at the time, the project was 'too preliminary to meaningfully estimate [its] cumulative impacts.' *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 513 (D.C. Cir. 2010)….
>
> "Additionally, the AIM Project and Access Northeast would 'not overlap in time,' meaning the short-term impacts from constructing the former would abate before construction commenced on the latter, and no long-term cumulative impacts were reasonably anticipated. …. In light of 'the uncertainty surrounding [Access Northeast], and the difference in timing between the two projects, this discussion suffices under NEPA.' *Minisink*, 762 F.3d at 113."

The court did note that "later projects can fully account for the cumulative impacts when those effects become better known. And in fact, the environmental assessment for the Atlantic Bridge Project considered the cumulative impacts of the Access Northeast Project once the latter project's details were better defined and its anticipated impacts better understood."

With respect to whether the EIS contractor had an impermissible conflict of interest, the court agreed with FERC that "the supposed conflict identified by petitioners here was not a 'disqualifying conflict' under the Commission's rules." Further, "even if petitioners had identified an actual conflict of interest, it would afford a ground for invalidating the environmental impact statement only if it rose to the level of "compromis[ing] the objectivity and integrity of the NEPA process." *CARE*, 355 F.3d at 686-87 (formatting modified)."

Township of Bordentown, New Jersey v. Federal Energy Regulatory Comm'n, 903 F.3d 234 (D.C. Cir. 2018)
Agency prevailed.

Issues: Segmentation, cumulative impacts, impacts, federal action (Jurisdiction)

Facts: Transco proposed to upgrade its existing interstate natural gas pipeline system so that it could increase pipeline capacity for natural gas from its Mainline to its Trenton-Woodbury Lateral. The Project proposed to construct a new meter and regulating station, compressor station, and electric substation along the Trenton-Woodbury Lateral in Chesterfield, New Jersey and to upgrade and modify the existing motor drives and compressor station located on the Mainline in Mercer County, New Jersey.

The New Jersey Natural Gas company ("NJNG") contracted with Transco to utilize all the capacity added by the Project, for distribution via NJNG's intrastate pipeline system. In anticipation of obtaining the excess capacity, NJNG proposed to construct the Southern Reliability Link Project (SRL), a 28-mile-long intrastate pipeline that would connect to Transco's Trenton-Woodbury Lateral pipeline and deliver gas south-eastward for connection into NJNG's existing system. Separately, PennEast proposed to construct the interstate PennEast Pipeline Project, which would deliver natural gas from Pennsylvania's Marcellus Shale region and terminate at an interconnect with Transco's Mainline. NJNG has independently contracted with PennEast to purchase 180,000 dekatherms per day of the PennEast project's expected supply, for delivery to the SRL via Transco's pipeline network.

As required by the Natural Gas Act, Transco sought and obtained from FERC a certificate of public convenience and necessity authorizing the construction of the Project, subject to Transco receiving all applicable authorizations required under federal law. Prior to issuing the certificate, FERC conducted an environmental analysis and issued an EA concluding that, with the appropriate mitigation measures, the Project would have no significant impact on the environment. FERC issued the EA in November 2015 and, after receiving comments, issued Transco the certificate in April 2016.

Plaintiffs raised a number of NEPA claims, specifically challenging FERC's conclusion that the Project's impacts should be considered separately from the impacts of the PennEast and SRL projects, as well as FERC's determination that the Project would not significantly impact the potable wells in the project's vicinity.

Decision: The court of appeals concluded that FERC correctly rejected considering the Project's impacts in conjunction with the anticipated impacts of the proposed PennEast pipeline that, when completed, will be the source of the gas that NJNG will transport using the capacity added by the Project.

> "In line with the prevailing view amongst the Courts of Appeals, both FERC and the petitioners agree that the essential question is whether the segmented projects have independent utility. … Projects have independent utility where 'each project would have taken place in the other's absence.' *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 426 (4th Cir. 2012).
>
> The petitioners' theory of interdependence — or, stated in the inverse, the lack of independent utility — relies entirely on their unfounded contention that 'Transco's sole stated purpose for the Project is to supply capacity to NJNG from the PennEast Line.' … But this is simply not so. The statements that the petitioners point to in support merely articulate the undisputed fact that the Project would supply capacity to NJNG; they are agnostic as to the source of the gas that would utilize the capacity…. The Project exists to fulfill NJNG's need for gas in southern New Jersey, a need that will exist and require satisfaction whether or not PennEast is constructed."

Plaintiffs also argued that FERC should have considered the SRL as an essential part of the Project such that the impacts of the SRL in its NEPA documentation. The court disagreed:

> "FERC has developed a four-factor balancing test 'to determine whether there is sufficient federal control over a project to warrant environmental analysis.' *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1333 (D.C. Cir. 2004). Under the test, FERC considers
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> > (1) whether the regulated activity comprises merely a link in a corridor type project; (2) whether there are aspects of the nonjurisdictional facility in the immediate vicinity of the regulated activity that uniquely determine the location and configuration of the regulated activity; (3) the

> extent to which the entire project will be within the Commission's jurisdiction; and (4) the extent of cumulative federal control and responsibility.
>
> *Id.* at 1333-34 (citing 18 C.F.R. § 380.12(c)(2)(ii)). As the Court of Appeals for the District of Columbia Circuit has explained, the purpose of this test is to limit consideration of the environmental impacts of non-jurisdictional facilities to cases in which those facilities 'are built in conjunction with jurisdictional facilities and are an essential part of a major federal action having a significant effect on the environment.' *Id*. at 1334 . . .
>
> ". . . [a]lthough we recognize that one could quibble with its analysis of the second factor, we discern no abuse of discretion in FERC's final analysis or its weighing of the factors."

Plaintiffs alternatively argued that, even if FERC were not required to assert jurisdiction over the SRL, it was nevertheless required under NEPA to assess whether — in conjunction with the Project — the SRL would foreseeably have cumulative impacts on the environment. The court again held for the agency.

> "When conducting a cumulative-impacts analysis, FERC:
>
> > [M]ust identify (i) the `area in which the effects of the proposed project will be felt'; (ii) the impact expected `in that area'; (iii) those `other actions — past, present, and proposed, and reasonably foreseeable' that have had or will have impact `in the same area'; (iv) the effects of those other impacts; and ([v]) the `overall impact that can be expected if the individual impacts are allowed to accumulate.'
>
> *Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016) (quotation marks omitted) (quoting *TOMAC v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006)).
>
> In line with this test, FERC determined that the Project's 'main region of influence' in which cumulative impacts might be felt was .25 miles from each of the Project's components, but nevertheless considered the cumulative impacts of the SRL, PennEast line, and other projects even though they largely fell outside of the Project's area of influence…. Based on its finding that 'each project would be designed to avoid or minimize impacts on water quality, forest, and wildlife resources,' and given the Project's expected 'temporary and minor effects,' FERC concluded that the Project 'would not result in cumulative impacts.'"

Continuing, the court noted that the

> "petitioners complaint is not that the .25 mile area was incorrect, but that FERC failed to take full account of all the environmental impacts across the entire span of pipelines other than the project under review — impacts far afield from the geographic area impacted by the Project — merely because those pipelines will ultimately be part of the same network as that served by the Project. To echo the Court of Appeals for the District of Columbia Circuit, such an expansive reading of the cumulative impacts requirement 'draws the NEPA circle too wide for the Commission,' which need only review impacts likely to occur in the area affected by the project under FERC review. *Sierra Club*, 827 F.3d at 50."
>
> "The core of the petitioners' argument, that the SRL 'as a major linear project' that will span 'approximately 30 miles in length' will result in 'considerable' environmental impacts along its path, [citation omitted] itself defeats their claim that FERC had to consider all those various and oblique impacts when determining whether the SRL would cumulatively impact 'the same area' as the project before it — involving no new pipeline construction and disturbing only the immediately surrounding area. Accordingly, FERC did not act arbitrarily or capriciously when it 'acknowledge[d] that these resources may be affected' by the SRL but properly determined that 'a detailed analysis' of the impacts along the entirety of the SRL was 'not within the scope of our environmental analysis' for the jurisdictional Project under review. [citation omitted] By detailing and recognizing even environmental impacts outside of the zone impacted by the jurisdictional Project, FERC gave the petitioners' concerns the 'serious consideration and

reasonable responses' that NEPA requires. *Tinicum Twp. v. U.S. Dep't of Transp*., 685 F.3d 288, 298 (3d Cir. 2012). NEPA does not mandate exhaustive treatment of effects not plausibly felt in the Project's impact area."

"Contrary to the petitioners' claim, FERC did consider the SRL's impact on vegetation and wildlife, and given the Project's 'minor . . . impacts' determined that the cumulative impacts would be insignificant. [citation omitted] FERC explicitly acknowledged that the SRL may affect the Pinelands National Reserve and concluded reasonably that any impacts would be mitigated by the responsible state agency overseeing the permitting process for that project. [citation omitted] FERC was correct to rely upon New Jersey authorities to do so, as opposed — as the petitioners would have it — to assuming the worst and piggybacking that hypothetical impact onto the otherwise compliant jurisdictional Project. [footnote omitted] *See, e.g., EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016) (concluding that FERC reasonably relied upon the regulated parties' 'future coordination with' other regulators in its NEPA assessment); *Ohio Valley*, 556 F.3d at 207–08 (upholding finding of no cumulative impact that was based partly on projected mitigation efforts because the mitigation was a condition of other permitting regimes to which the project was subject and thus was not speculative or conclusory); *Friends of Ompompanoosuc v. FERC*, 968 F.2d 1549, 1555 (2d Cir. 1992) (concluding that regulated parties' responsibility to work with local authorities on mitigation proposal constituted a 'rational basis' for FERC finding of no significant impact)."

"Furthermore, had FERC failed to give the specific attention that it did to the various types of impacts that the SRL might potentially cause, we would still approve their cumulative impact conclusions….FERC thus reasonably concluded in the EA that the Project's 'minimal impacts' in its service area — relegated largely to 'geological and soil resources' impacts and other temporary impacts — meant that the Project necessarily 'would not result in cumulative impacts.' [citation omitted] We conclude that FERC did not abuse its discretion in reaching this decision. This is especially true considering that the impacts from the SRL that the petitioners allege FERC ignored are different than the limited kind of impacts that FERC concluded were likely to result from the Project and so are less likely to result in cumulatively significant impacts when considered together. [footnote omitted]…. Given that the petitioners failed to show anything more than minimal impacts from the Project itself, they have failed to show that FERC acted arbitrarily or capriciously in determining that the Project would likewise not contribute to significant cumulative impacts, even taking into account the potential different impacts of the SRL on other areas within the Project's region."

"The petitioners nevertheless argue that this low-impact project should be halted as a result of the possibly significant — but mostly different-in-kind — impacts of the nearby but later-in-time SRL. But this cannot be how the cumulative analysis inquiry operates. To hold otherwise would permit a jurisdictional project with little environmental impact to be torpedoed based only on a nearby non-jurisdictional project's significant impact, which FERC has no authority to control or mitigate….Rather, the cumulative impacts analysis was meant to address instances where the jurisdictional project itself has minor environmental impacts that nevertheless fall short of stopping the project, but where — if added to the minor impacts from nearby non-jurisdictional projects — the cumulative impact of all the projects would be significant. See 40 C.F.R. § 1508.7 ('Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.'); cf. id. § 1508.27 (setting out considerations for whether a project is 'significant,' including whether it 'is related to other actions with individually insignificant but cumulatively significant impacts' (emphasis added)). The analysis was not intended to combine the effects of a nearly no-impact project with those of a project with potentially serious impacts and then to bar them both."

The final NEPA claim went to FERC's conclusion that the Project's construction would not significantly impact the water quality of wells or cisterns in the service area. The court explained that:

"In its EA, FERC determined that '[m]inor, temporary impacts on groundwater infiltration could occur as a result of tree, herbaceous vegetation, or scrub-shrub vegetation clearing' around Station 203 during its construction, but that Transco would thereafter 'restore and revegetate cleared areas to pre-construction conditions to the maximum extent practicable.' [citation omitted] The EA continued that, in the event that groundwater is 'encountered during construction,' Transco would adhere to a series of mitigation measures, which would ensure that 'impacts on groundwater would be adequately minimized.'…[T]he particular finding that FERC did not 'anticipate any significant impacts on cisterns, wells, or septic systems in the Project areas" was based most directly on FERC's understanding that those resources simply did not exist."

"Transco and several commenters subsequently notified FERC that there were numerous private wells in the project area. Nevertheless, based on additional assurances from Transco that it would remedy any damage or disruption to the water supply — and without revising the EA or identifying the specific number of potentially impacted wells — FERC issued Transco the certificate, subject to additional monitoring and mitigation conditions. These included the requirement that Transco identify and file the locations of all private wells in the Station 203 project area prior to beginning construction; conduct 'pre- and post-construction monitoring of well yield and water quality'; and report to FERC any complaints it receives from well owners and how the complaints were resolved."

"The petitioners contend that FERC's 'no significant impacts' conclusion was therefore arbitrary and capricious because it was not based on sufficient evidence. Because we conclude that FERC sufficiently established the efficacy of the proposed mitigation plan, we will not disturb its conclusion that the Project's groundwater impacts — if any — will not be significant."

"When an agency's 'proposed mitigation measures [are] supported by substantial evidence, the agency may use those measures as a mechanism to reduce environmental impacts below the level of significance.' *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997). Mitigation measures will be deemed 'sufficiently supported' where 'they are likely to be adequately policed,' such as where the mitigation measures are included as mandatory conditions in a permit. *Id.; Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 955–56 (9th Cir. 2008) (explaining that an '"agency is not required to develop a complete mitigation plan detailing the precise nature . . . of the mitigation measures[,]" so long as the measures are "developed to a reasonable degree."' (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001)))."

"Nor must the proposed mitigation be included in the original EA in order to pass muster under NEPA. If FERC in its certificate order addresses the commenters' concerns about the adequacy of the EA's analysis and clearly articulates its mitigation plan therein, it takes "the requisite 'hard look' at the impact of the . . . Project on the environment."' *DRN II*, 857 F.3d at 401 (quoting *NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988)). This is because NEPA's 'purpose is not to generate paperwork — even excellent paperwork — but to foster excellent action' and to '[e]nsure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.' 40 C.F.R. § 1500.1; *Kleppe*, 427 U.S. at 409 ('By requiring an impact statement Congress intended to assure [consideration of the environmental impact] during the development of a proposal .. . .')."

The Town of Weymouth, Massachusetts v. Fed. Energy Regulatory Comm'n, No. 17-1135 (consolidated with 17-1139,17-1176, 17-1220, 18-1039, 18-1042), 2018 WL 6921213, -- Fed. Appx. --- (D.C. Cir. Dec. 27, 2018) (*not for publication*)
Agency prevailed.

Issues: Impacts (coal, ash, noise, traffic, greenhouse gas, environmental justice)

Facts: Algonquin Gas Transmission and Maritimes & Northeast Pipeline proposed upgrades to their New England systems, including replacing existing pipeline, modifying certain facilities, and building a new compressor station in Weymouth, Massachusetts. The pipeline companies applied to FERC for a certificate of public convenience and necessity under the Natural Gas Act. FERC issued the certificate and the Town of Weymouth, several environmental groups, and affected property owners challenged the certification arguing that FERC violated NEPA by inadequately considering coal ash, noise, traffic, greenhouse-gas emissions, and the project's effects on environmental justice communities.

Decision: In a summary decision for the agency, the court found that FERC had reviewed Algonquin's procedures for dealing with unexpected coal ash contamination and that construction would comply with relevant state environmental policies. The court also found that FERC had adequately considered noise from the compressor station and construction traffic. With respect to greenhouse gases and environmental justice, the court stated that:

> "Contrary to the petitioners' assertions, FERC both quantified the project's expected greenhouse gas emissions and discussed how the project would interact with Massachusetts's climate change goals. FERC also reasonably concluded that the project would not disproportionately affect environmental justice communities around Weymouth because the compressor station's effects would be similar to those experienced by non-environmental justice communities surrounding the three existing stations being expanded by the project."

Finally, the court found that "[a]lthough the petitioners argue that FERC's own best practices document requires an EIS for the project, in fact the project is not the type that FERC regulations suggest warrants an EIS: 'the construction, replacement, or abandonment of compression, processing, or interconnecting facilities' calls for an EA rather than an EIS."

Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n, 879 F.3d 1202 (D.C. Cir. 2018)
Agency prevailed.

Issue: Impact analysis prior to decisionmaking

Facts: Strata sought a license from NRC to mine uranium at the Ross Project in Wyoming. Plaintiffs intervened in the licensing proceeding and NRC admitted 5 contentions relating to restoration of groundwater upon the completion of mining, the absence of hydrological information on groundwater fluid migration, and failure to address cumulative impacts. After receipt of the license application, NRC prepared a DEIS to analyze the impacts of the proposal and alternatives. After completing the DEIS and seeking public comment on the DEIS, NRC published the FEIS in March 2014. Shortly thereafter, the agency issued an ROD and granted Strata a license.

Only then did NRC consider whether plaintiffs' contentions should be migrated to the DEIS. After an evidentiary hearing, NRC rejected all of the plaintiffs' contentions and found no fault with the decision to issue the license. It did find one fault with the FEIS (not enough information concerning post-mining aquifer restoration), but rejected plaintiffs' argument that NRC should invalidate the license on the ground that the FEIS was inadequate at the time the license was issued. Instead, NRC decided staff testimony in the record before it dealing with aquifer restoration at other sites served to "supplement[ ]" the FEIS, thus making it adequate to support issuance of the license.

Plaintiffs challenged this decision, arguing that the purpose of NEPA is to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken," 40 C.F.R. § 1500.1(b), and NRC as much as admitted the FEIS failed in that regard. Relatedly, plaintiffs cite *Robertson* for the proposition that NEPA is an information-forcing statute, intended to require agencies to have all the relevant information before "resources have been committed or the die otherwise cast." 490 U.S. at 349.

Decision: The court of appeals held for the agency:

> "These are not idle concerns. We must consider, however, the exact nature of the initial decision to issue the license. The Commission seeks to portray the initial licensing decision as entirely provisional; that is not quite correct for, as the Councils charge (and the Commission does not deny), Strata was authorized to begin digging immediately upon receipt of the license. At the same time, the license was provisional in the most meaningful sense; no portion of it was irrevocable, and the Commission's own regulations make clear that the Board can amend or rescind a license after it has been issued. 10 C.F.R. § 2.340(e)(2). Indeed, the Board did amend the license to increase the area in which Strata was required to attempt to locate and to fill previously dug boreholes. [citation omitted]
>
> "Moreover, the [plaintiffs] have not pointed to any harmful consequence of the supplementation; the Board came to the same decision after it had considered the supplemental information, and there is nothing to be gained by remanding the matter to the Commission for the staff or the Board to consider the same information again…..
>
> "We do not mean to imply the procedure the Board followed was ideal or even desirable. Certainly it would be preferable for the FEIS to contain all relevant information and the record of decision to be complete and adequate before the license is issued. [*Friends of the River (FOTR) v. FERC*, 720 F.2d 93 (D.C. Cir. 1983)], however, makes clear that even if this procedure was not ideal it was permissible, and common sense counsels against prolonging this dispute by requiring an utterly pointless proceeding on remand."

Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n, 896 F.3d 520 (D.C. Cir. 2018)
Agency did not prevail.

Issues: Impact analysis prior to decisionmaking

Facts: Powertech (USA), Inc. applied to NRC for a license to construct a uranium mining project in the Black Hills of South Dakota. The Oglala Sioux Tribe, which has historical ties to the proposed project area, intervened in opposition because it feared the destruction of its cultural, historical, and religious sites. NRC staff granted the license. On administrative appeal, the Commission decided to leave the license in effect—notwithstanding its own determination that there was a significant deficiency in its compliance with NEPA—pending further agency proceedings to remedy the deficiency. The Commission grounded this decision on the Tribe's inability to show that noncompliance with the Act would cause irreparable harm. In so doing, the Commission was following what appears to be the agency's settled practice to require such a showing.

Decision: Finding for the plaintiffs, the court stated:

> "The National Environmental Policy Act, however, obligates every federal agency to prepare an adequate environmental impact statement before taking any major action, which includes issuing a uranium mining license. The statute does not permit an agency to act first and comply later. Nor does it permit an agency to condition performance of its obligation on a showing of irreparable harm. There is no such exception in the statute.
>
> "In fact, such a policy puts the Tribe in a classic Catch-22. In order to require the agency to complete an adequate survey of the project site before granting a license, the Tribe must show that construction at the site would cause irreparable harm to cultural or historical resources. But without an adequate survey of the cultural and historical resources at the site, such a showing may well be impossible. Of course, if the project does go forward and such resources are damaged, the Tribe will then be able to show irreparable harm. By then, however, it will be too late.

"The Commission's decision to let the mining project proceed violates the National Environmental Policy Act. Indeed, it vitiates the requirements of the Act. We therefore find the decision contrary to law and grant the petition for review in part . . .

"Moreover, this was not a one-off decision by the NRC. Rather, it appears to reflect the agency's settled practice. See *Strata Energy, Inc*., 83 N.R.C. 566, 595 n.188 (2016) ('It is well settled that parties challenging an agency's NEPA process are not entitled to relief unless they demonstrate harm or prejudice.'); see also *Crow Butte Resources, Inc*., 83 N.R.C. 340, 413-14 (2016) (relying on the Powertech precedent to keep a license in effect, notwithstanding finding that the NRC staff had not complied with NEPA, and repeating the 'irreparable injury' requirement).

"The agency's decision in this case and its apparent practice are contrary to NEPA. The statute's requirement that a detailed environmental impact statement be made for a 'proposed' action makes clear that agencies must take the required hard look before taking that action. See, e.g., *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1081 (D.C. Cir. 2016) (holding that an agency's decision to issue a lease for a windpower project 'without first obtaining sufficient site-specific data. . . violated' NEPA (internal quotation marks omitted)); *New York*, 681 F.3d at 476 ('Under NEPA, each federal agency must prepare an [EIS] before taking a "major Federal action[] significantly affecting the quality of the human environment.'"' (quoting 42 U.S.C. § 4332(2)(C))). [footnote omitted] Nothing in NEPA's text suggests that the required environmental analysis of a 'proposed' action is optional if a party does not prove that 'irreparable harm' would result from going forward before the agency completes a valid EIS.

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