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ANNUAL NEPA REPORT 2014

of the

National Environmental Policy Act (NEPA) Practice

Submitted to

NAEP Board of Directors

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The Honorable Gregorio Kilili Camacho Sablan

June 2015

This report reviews NEPA document submittals and statistics, NEPA litigation and agency procedures for calendar year 2013. Additional sections provide commentary on the implementation of the NEPA process and expert expectations for the future. 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.

Acronyms and Abbreviations

APHIS	Animal and Plant Health Inspection Service
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
BOR	Bureau of Reclamation
BPA	Bonneville Power Administration
BPP	Best Practice Principle
CDC	Centers for Disease Control and Prevention
CEQ	Council on Environmental Quality
CEQA	California Environmental Quality Act
CSO	Corporate Sustainability Officer
DCE	Documented Categorical Exclusion
DEIS	Draft Environmental Impact Statement
DOE	Department of Energy
DOI	Department of the Interior
DOT	Department of Transportation
EA	Environmental Assessment
EC	Environmental Concerns
EIS	Environmental Impact Statement
EO	Environmental Objections
EPA	Environmental Protection Agency
EU	Environmentally Unsatisfactory
FAA	Federal Aviation Administration
FEMA	Federal Emergency Management Agency
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FRA	Federal Railroad Administration
FS	Forest Service
FSA	Farm Service Agency
FTA	Federal Transit Administration
FWS	Fish and Wildlife Service
GHG	Greenhouse Gas
GIS	Geographic Information System
GS	General Schedule
GSA	General Services Administration
H.R.	House of Representatives
HUD	Housing and Urban Development
IT	Information Technology
LAU	Lynx Analysis Unit
LO	Lack of Objections
MAP-21	Moving Ahead for Progress in the 21st Century
MAST	Marine Access and State Transparency
MOU	Memorandum of Understanding
NAAQS	National Ambient Air Quality Standard
NAEP	National Association of Environmental Professionals
NASA	National Aeronautics and Space Administration
NEPA	National Environmental Policy Act
NGO	Non-governmental Organization
NIH	National Institutes of Health
NNSA	National Nuclear Security Administration
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
NOI	Notice of Intent
NPS	National Park Service
NRC	Nuclear Regulatory Commission
NRCS	Natural Resources Conservation Service
OGC	Office of General Counsel
OMB	Office of Management and Budget
OPM	Office of Personnel Management
PEA	Programmatic EA
PEIS	Programmatic EIS
P.L.	Public Law
$PM_{2.5}$	Particulate Matter
RAPID Act	Responsibly and Professionally Invigorating Development Act of 2012
S	Senate
ROD	Record of Decision
USA	United States Army
USACE	United States Army Corps of Engineers
USAF	United States Air Force
USCG	United States Coast Guard
USFS	United States Forest Service
USN	United States Navy
WAPA	Western Area Power Administration
VCT	Valles Caldera Trust

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1. Introduction

Harold Draper
NAEP President

This 2014 report is a continuation of ongoing efforts by environmental professionals to increase awareness of the state of NEPA practice and its potential. It is produced annually by the NEPA Practice group, an all-volunteer subcommittee within the National Association of Environmental Professionals (NAEP). NAEP tracks developments at the national and state levels in the practice of impact assessment. The NAEP annual conference has a session on NEPA, the association's webinar series addresses emerging issues, and the association's flagship journal, *Environmental Practice* (http://journals.cambridge.org/action/displayJournal?jid=ENP), also contains articles that address state-of-the-art NEPA practice.

Professionals often focus on the act of producing a document, because that is what the agency and federal permit applicants want. But NEPA as implemented by agencies has the potential to be, and should be, much more than a document. It should be about thinking before we leap, about having a conversation between the agency and its stakeholders, and about addressing the issues that are important to those who are affected. NEPA is both strategic (programmatic) and site-specific in its reach. When a document is produced, it can be a roadmap for policies and practices that the agency will undertake in the future. NEPA is a flexible statute because its definition of the human environment is broad, and a variety of social and environmental concerns fall within the national environmental policy established under Section 101 of NEPA. Environmental issues such as biodiversity, climate change, environmental justice, and sustainability can be addressed under NEPA without further legislation or regulation. As you read through this year's report, think about NEPA, its flexibility to address emerging environmental issues, and how implementation can be improved to produce better environmental decisions.

For further thought-provoking articles on NEPA, please refer to the December 2014 issue of *Environmental Practice*.

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2. Perspectives on NEPA

The Honorable Gregorio Kilili Camacho Sablan [1]

The Honorable John D. Dingell, who authored the National Environmental Policy Act, warned in this *Perspective* last year of the on-going efforts to circumvent NEPA. Mr. Dingell is now retired after the longest—and certainly one of the most distinguished—terms of service in the U.S. House of Representatives. So, it falls to a new generation to defend his signature legislation and carry on the work of protecting the environment on which all human life depends.

As a member of the House Natural Resources Committee I am on the frontline of defending of the Act. I do this confident that the people I represent in the Northern Mariana Islands understand well the value of NEPA. Because today we are in the middle of reviewing a proposed expansion of activity by the U.S. military on the islands of Tinian and Pagan, where up until now the military has had little or no presence. If it were not for NEPA, the military might never have had to explain their plans to the public or estimate what the costs would be to our environment and way of life. And were it not for NEPA, the public would have had little or no opportunity to comment, criticize, or question the impact of the military's plans.

Those who would roll back the Act or block new guidelines, such as the Obama Administration's on inclusion of climate change effects in environmental impact reviews, complain that NEPA is an impediment to commerce or stifles individual freedoms.

I would disagree. It is true that NEPA review can be complex and slow. But most of the people I represent in the Northern Mariana Islands would say they appreciate the complexity and the thoroughness of the environmental impact statement that NEPA required the military to prepare for its proposed actions on Tinian and Pagan. Many of the people I represent, including the Governor and other elected officials, even argue that the process should be slower, should allow more time for objective technical and scientific experts and for the public to review the military's actions, which could have long-lasting and profound impact on our community.

Public meetings on Tinian and on the island of Saipan have been well attended and the military will now have to take into consideration the comments of hundreds of residents, as well as the more formal responses from our government entities. But neither the lengthy exposition of the military's plans and consideration of impacts contained in the draft EIS nor the opportunity for public review and comment would have occurred or been possible without the National Environmental Policy Act of 1969. This Act declaring that it is our national policy to protect our environment has stood the test of time. NEPA has proven its worth by forcing the federal government to explain the consequences of its actions in a way that must be thorough and transparent. And NEPA has empowered ordinary Americans—like my constituents—to stand up to their government and say no, when government threatens to take actions that could damage our environment, or, as I call it: our home.

[1] Congressman Sablan represents the People of the Northern Mariana Islands. Congressman Sablan is the first and only person to have represented the people of the Northern Mariana Islands in the U.S. House of Representatives. He began service on January 6, 2009 and has been reelected to office three times. The Commonwealth of the Northern Mariana Islands is a commonwealth in political union with the United States in the western Pacific Ocean.

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3. The NEPA Practice 2014

Ron Lamb and Joe Trnka [2]

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

The National Association of Environmental Professionals' (NAEP's) National Environmental Policy Act (NEPA) Practice is pleased to present our eighth NEPA Annual Report. This report contains summaries of the latest developments in NEPA as well as the NEPA Practice's efforts for the past year.

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, an online NEPA Forum, educational opportunities, outreach with the President's Council on Environmental Quality (CEQ), and projects such as this *Annual NEPA Report*. Highlights of 2014 activities include:

- The CEQ accepted the final NAEP Pilot Project Report on Best Practice Principles for Environmental Assessments (EA BPPs), one of five pilot projects to modernize and reinvigorate Federal agency implementation of NEPA (www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/nepa-pilot-project). Under this pilot project, experience-based BPPs focus on the preparation of effective EAs that are timely, cost-effective, and incorporate those environmental issues that are relevant to the decision-making process. The EA BPPs, Final Report, and other background information can be found on the NAEP website at http://www.naep.org/bpps-for-eas-to-the-ceq.
- Presentations at the NEPA Practice's monthly conference calls in 2014 included EPA's NEPAssist Geographic Information System (GIS) tool and Department of Energy NEPA IT tools.
- NEPA Practice members also supported NAEP webinars on "NEPA and Sustainability" (January 2014), Environmental Planning under Moving Ahead for Progress in the 21st Century Act (MAP-21) Transportation Projects" (March 2013), "2013 NEPA Legal and Regulatory Update" (May 2014), and "Practical Improvements for Better Implementation of NEPA" (December 2014).

NEPA Practice monthly conference calls are typically held at 2:30 p.m. (Eastern) on the 2nd Wednesday of each month. NAEP members are welcome to participate. To be added to the NEPA Practice email list and call reminders, email your request to naep@naep.org.

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4. Just the Stats

Grace Musumeci and Karen Vitulano[3]

In 2014, Notices of Availability (NOAs) for 384 environmental impact statements (EISs) were published in the Federal Register. Of the 384 total, 200 were draft EISs and 184 were final EISs. This and additional information is available through the Environmental Protection Agency's (EPA) database of EISs which is accessible on the internet at http://www.epa.gov/Compliance/nepa/eisdata.html. The database contains information on each document as well as EPA's comment letters.

With respect to the 2014 documents, nine agencies each prepared ten or more; five agencies prepared 20 or more. Similar to previous years, the U.S. Forest Service (USFS) provided the most documents with 89. The Army Corps of Engineers had the second highest number with 44 documents; the Federal Highway Administration was a close third with 43. This year the Bureau of Land Management (BLM) was tied for fourth with the National Park Service at 25 documents. The other agencies publishing ten or more were the Federal Energy Regulatory Commission with 16, the Fish and Wildlife Service with 14, and the National Marine Fisheries Service and Nuclear Regulatory Commission, each with 10. **Table 4-1** shows Draft and Final EISs filed in 2014 by agency and **Figure 4-1** shows the EISs aggregated by Department.

Table 4-1. Draft and Final EISs Announced in Federal Register in 2014 (by Agency)

Lead Agency	Number of documents
U.S. Forest Service	89
U.S. Army Corps of Engineers	44
Federal Highway Administration	43
Bureau of Land Management	25
National Park Service	25
Federal Energy Regulatory Commission	16
Fish and Wildlife Service	14
National Marine Fisheries Service	10
Nuclear Regulatory Commission	10
U.S. Navy	9
Bureau of Reclamation	8
Federal Transit Administration	8
Bureau of Indian Affairs	7
Bureau of Ocean Energy Management, Regulation and Enforcement	6
National Oceanic and Atmospheric Administration	6
U.S. Air Force	6
Federal Rail Administration	5
Animal & Plant Health Inspection Service	4
Department of Energy	4

[3] Grace Musumeci, US Environmental Protection Agency, Region 2, and Karen Vitulano, USEPA, Region 9. Any views expressed in this article do not necessarily represent the views of the EPA or the United States government.

Lead Agency	Number of documents
U.S. Army	4
Federal Aviation Administration	3
National Aeronautics and Space Administration	3
National Resource Conservation Service	3
Bonneville Power Administration	2
Department of Interior	2
Department of State	2
Farm Service	2
Health and Human Services	2
Housing and Urban Development	2
National Institutes of Health	2
Rural Utilities Service	2
U.S. Coast Guard	2
U.S. Department of Agriculture	2
U.S. Marine Corps	2
Western Area Power Authority	2
Department of Commerce	1
Department of Transportation	1
Environmental Protection Agency	1
Federal Emergency Management Agency	1
General Services Administration	1
National Nuclear Security Administration	1
Office of Surface Mining	1
Surface Transportation Board	1
Total	**384**

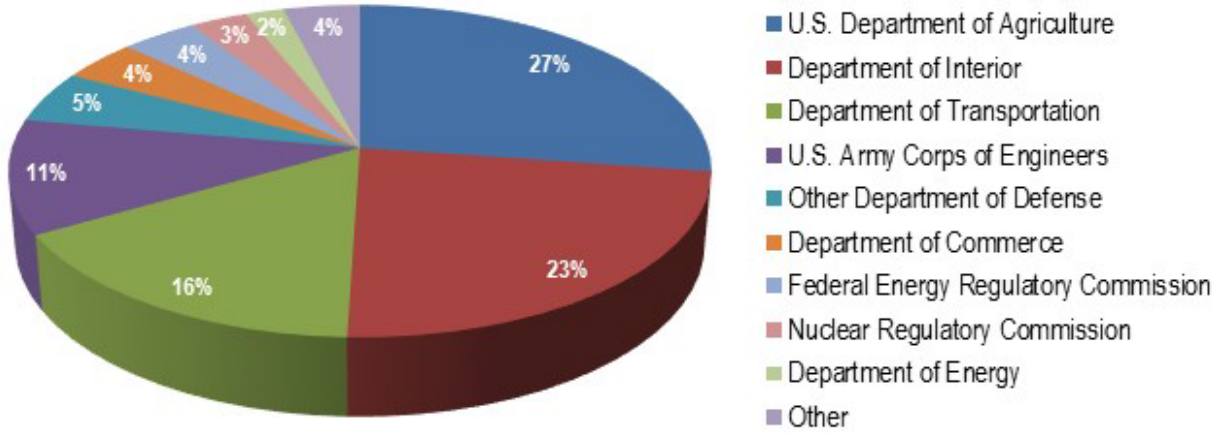

Figure 4-1. Draft and Final EISs in 2014 (by Department)

The geographic breakdown of Draft and Final EISs by State is in **Table 4-2**. As done in the 2013 Annual Report, regional or multi-state documents appear in a separate category.

Table 4-2. Draft and Final EISs in 2014 by State

States	# Draft and Final EISs
California	70
Colorado	19
Florida	19
Washington	19
Oregon	18
Texas	17
Montana	16
New York	14
Idaho	13
Alaska	11
Nevada	12
New Mexico	11
Utah	10
Arizona	8
Illinois	7
North Carolina	7
Wyoming	7
South Carolina	6
Virginia	6
Ohio	5
Wisconsin	5
District of Columbia	4
Hawaii	4
Missouri	4

States	# Draft and Final EISs
Mississippi	4
Louisiana	3
Maryland	3
Minnesota	3
North Dakota	3
Pennsylvania	3
Tennessee	3
Alabama	2
Georgia	2
Indiana	2
Kansas	2
Massachusetts	2
New Hampshire	2
New Jersey	2
South Dakota	2
Guam	1
Maine	1
Michigan	1
Nebraska	1
Puerto Rico	1
West Virginia	1
Multistate	28
Total	**384**

The agency and state distributions seem to indicate a predominance of Federal actions associated with the management of Federal lands. Under the Federal Land Policy and Management Act, the notion of "multiple use" involves the balancing of needs of current and future generations, just as NEPA does. The Act speaks to "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." This attempt at balancing can be seen through the NEPA alternatives analysis.

4.1 EPA's Review and Comments

Under Section 309 of the Clean Air Act, EPA is required to review and publicly comment on the environmental impacts of major Federal actions including actions that are the subject of draft and final EISs. EPA categorizes or "rates" the EIS according to an alphanumeric system. See http://www.epa.gov/compliance/nepa/comments/ratings.html for an explanation of EPA's ratings.

As to project ratings for 2014, of the 200 draft EISs (DEIS) published, 11 ratings were unavailable for various reasons at the time these numbers were compiled. Of the 188 documents that received *impact ratings*[4] on the proposed action, 62 (30%) projects were rated Lack of Objections (LO) by the EPA, 115 (61.2%) were rated Environmental Concerns (EC), 10 (5.3%) received an Environmental Objections (EO) rating, 1 (0.5%) was rated Environmentally Unsatisfactory (EU) (**Figure 4-2**).

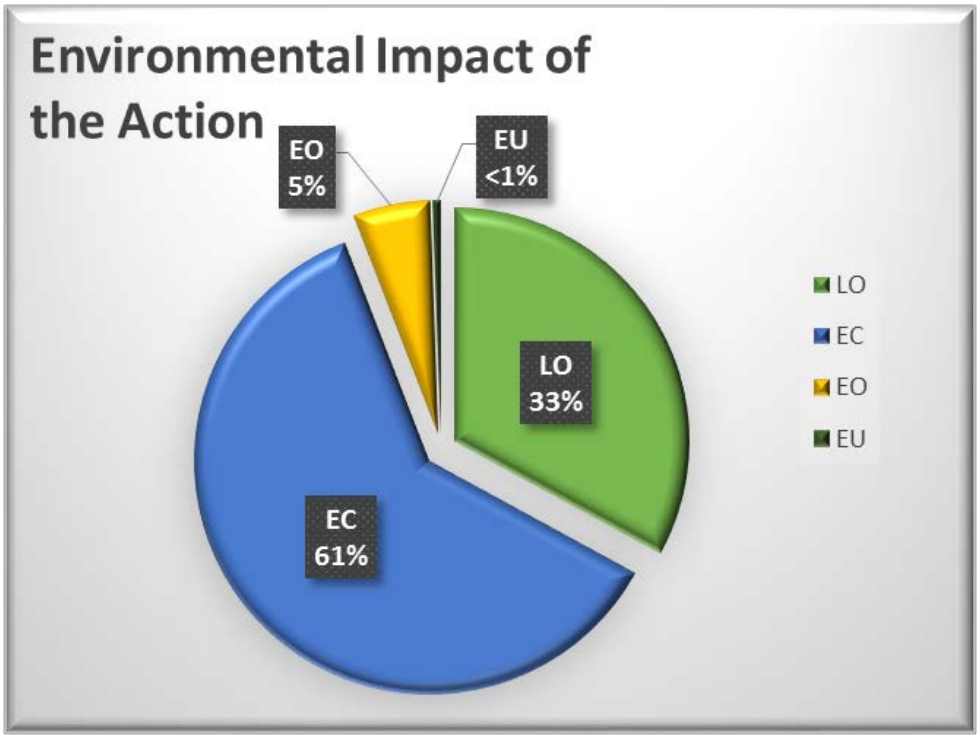

Figure 4-2. Environmental Impact of the Action

[4] One of the documents found to be inadequate did not receive a rating on the impacts of the proposed project.

Of the 189 documents that received *adequacy ratings* on the document itself, 39.7% (75) of the documents were considered adequate[5], 59.3% (112) had insufficient information, and 1.1% (2) were rated inadequate (**Figure 4-3**).

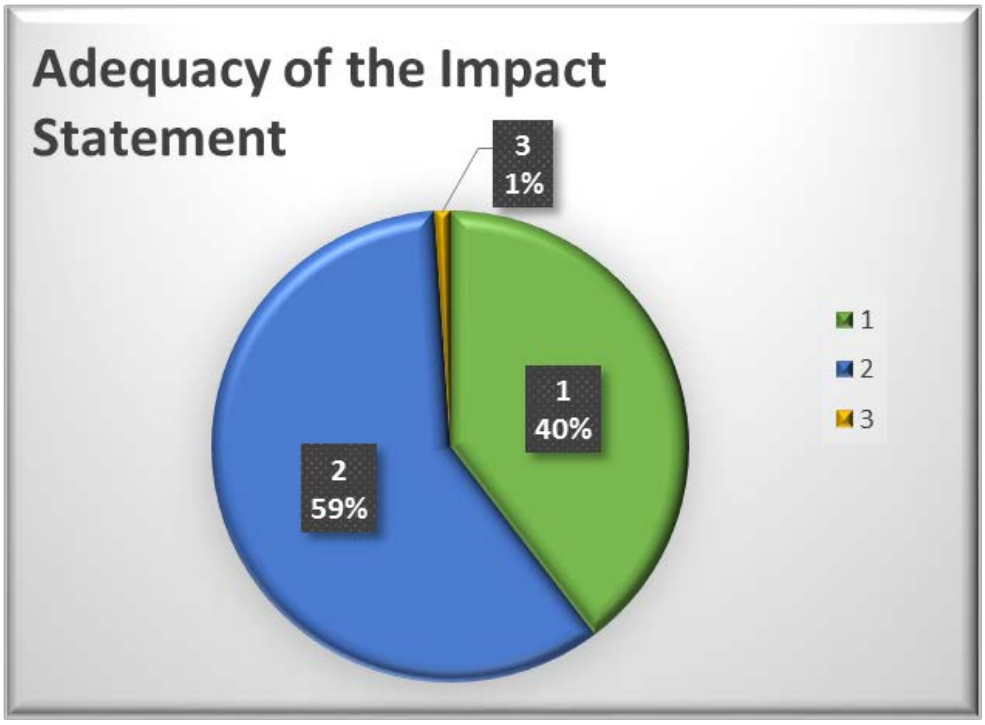

Figure 4-3. Adequacy of the Impact Statement

EPA considers ratings of "EU – Environmentally Unsatisfactory" and "3 - Inadequate" to be adverse ratings which, if not remedied, are potential candidates for referral to the CEQ. There were three adversely rated projects in 2014. One EIS received an "EU" rating – the Federal Highway Administration's (FHWA) US Route 460 project, and two EISs were deemed inadequate ("3" rating) - BLM's Proposed Modification to the Thompson Creek Mine Plan of Operations, Section 404 Clean Water Act Permit Application, Public Land Disposal, and Draft Resource Management Plan Amendment; and Caltrans' (for FHWA) Centennial Corridor Project.

EPA gave several alternatives in FHWA's US Route 460 project its harshest rating for environmental impacts, deeming them "environmentally unsatisfactory," due to potential extensive direct and indirect impacts to wetlands and stream channels. The total potential impacts of the alternatives studied include up to 664 acres of wetlands and 79,120 linear feet of stream channel, representing one of the largest amounts of aquatic resource impacts associated with a single project proposed in the mid-Atlantic region. The wetland resources in the area include high value and unique systems which are considered difficult to mitigate. EPA recommended consideration of an alternative with fewer wetlands impacts and reminded the

[5] Documents that received an impact rating of LO, but did not receive a separate adequacy rating, were considered to be adequate.

FHWA that only the Least Environmentally Damaging Practicable Alternative can be permitted under Section 404 of the Clean Water Act.

The BLM EIS mentioned above that was deemed inadequate involves the expansion of the Thompson Creek molybdenum mine in Idaho – the fourth largest molybdenum mine in the world. EPA deemed the EIS inadequate because it did not provide detailed information on funds that would be made available post closure to treat the resulting mine-influenced water in perpetuity. EPA's independent estimate of financial assurance needed for long-term water quality treatment and associated operations was up to $77.8 million. BLM's trust fund to cover earlier mine operations was $42.3 million and covers only reclamation, not post-closure operations and water quality treatment. EPA had estimated that there is significant potential for major releases from the site, with the potential for adverse downstream impacts based on the presence of elevated concentrations of metals in the surface water bodies located within 15 miles downstream of the site. EPA recommended that a supplemental EIS be prepared and that BLM disclose the amount of financial assurance that would be required.

The second "inadequate" EIS was for the Centennial Corridor Project, a proposed new expressway in Bakersfield, California. EPA rated the EIS an "EO-3" because the document did not include enough information to adequately analyze and mitigate the project's potentially significant impacts to localized and regional air quality. The project is located in California's San Joaquin Valley, which has among the worst air quality in the United States, especially for fine particulate matter ($PM_{2.5}$), and the project could contribute to a localized National Ambient Air Quality Standard (NAAQS) violation and delay timely attainment of the standard. EPA also deemed the environmental justice analysis inadequate. Segments of the Preferred Alternative could isolate communities with EJ characteristics, and project emissions could lead to an increase in $PM_{2.5}$ exposure in these populations. Caltrans District 6, as the NEPA-delegated Lead Agency, was advised to work closely with the local Air Quality Management District and pursue all practicable $PM_{2.5}$ mitigation within the project area.

Environmental Protection Agency Rating System for Environmental Impact Statements

RATING THE ENVIRONMENTAL IMPACT OF THE ACTION

LO (Lack of Objections) The review has not identified any potential environmental impacts requiring substantive changes to the preferred alternative. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposed action.

EC (Environmental Concerns) The review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact.

EO (Environmental Objections) The review has identified significant environmental impacts that should be avoided in order to adequately protect the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative).

EU (Environmentally Unsatisfactory) The review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed.

RATING THE ADEQUACY OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT (EIS)

1. (Adequate) The draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

2. (Insufficient Information) The draft EIS does not contain sufficient information to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the proposal. The identified additional information, data, analyses, or discussion should be included in the final EIS.

3. (Inadequate) The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS.

USEPA 2009. Environmental Impact Statement (EIS) Rating System Criteria.

http://www.epa.gov/oecaerth/nepa/comments/ratings.html#rating.

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5. Preparation Times for Environmental Impact Statements Made Available in 2014

Piet and Carole deWitt [6]

In calendar year 2014, 35 federal agencies made publicly available 198 draft and draft supplemental EISs, (i.e. draft EISs); and 33 agencies made available 186 final and final supplemental EISs (i.e. final EISs). Three of the final EISs were adoptions and are not included in our calculation of EIS-preparation times. In addition, one 2014 final EIS was supplemented or revised and reissued during the year; the first final EIS was deleted from the preparation-time calculations. Our 2014 sample of final EISs includes 182 entries.

The final EISs made available by all federal agencies as a group in calendar year 2014 required the longest annual average preparation time we have recorded for the period 1997-2014. The draft EISs made available in 2014 required the third longest annual average preparation time and marked the third consecutive year the annual average has exceeded 1000 days.

5.1 Final EISs

The 182 final EISs in our sample had an average preparation time (from the Federal Register Notice of Intent (NOI) to the Notice of Availability for the final EIS) of 1709±1225 days (4.7±3.4 years) [mean ± one standard deviation] (see "ALL" in **Table 5-1**). The 2014 average EIS-preparation time was the longest we have recorded for all agencies, as a group, for the period 1997-2014. The 2014 average exceeded by 4 days the previous high annual average of 1705±1244 days (4.7±3.4 years) [n=172] recorded in 2013. The draft EISs associated with the 2014 final EISs required an average of 1198±1074 days (3.3±2.9 years) to prepare following the publication of their NOIs. This average was the second longest we have recorded and is 14 days less than the high average of 1212±1050 days (3.2±2.9 years) [n=172] recorded in 2013. The 2014 average time for preparing the final EIS from the draft EIS, 511±484 days (1.4±1.3 years), was the second highest average recorded for the period 1997-2014. The highest average, 512±548 days (1.4±1.5 years) [n=197] was recorded in 2012 and is one day longer than the 2014 average

Of the five major EIS-preparing agencies, in 2014 the U.S. Army Corps of Engineers and the National Park Service recorded new high annual average final EIS-preparation times. These two agencies prepared approximately 22% of all the final EISs made available in 2014 (see "% ALL" in **Table 5-1**). The Corps of Engineers' 2014 average EIS-preparation time was 51 days longer than its previous high average of 2086±1483 days (5.7±4.1 years) [n=21] recorded in 2001. The National Park Service's 2014 average exceeded by 549 days its previous high average of

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Table 5-1. Preparation times in calendar days for final and final supplemental EISs made available in 2014.

			NOI to Draft			Draft to Final			NOI to Final				
Agency	**n**	**% ALL**	**Mean**	**s.d.**	**M**	**Mean**	**s.d.**	**M**	**Mean**	**s.d.**	**M**	**Min**	**Max**
ALL	**182**	100	**1198**	1074	776	**511**	484	336	**1709**	1225	1371	184	5706
APHIS	**2**	1	**346**	151	346	**167**	62	167	**512**	89	512	449	575
BIA	**6**	3.3	**737**	586	494	**1058**	1188	656	**1795**	1336	1469	561	3725
BLM	**9**	4.9	**762**	584	584	**661**	441	763	**1423**	839	1362	273	2590
BOEM	**3**	1.6	**494**	589	210	**343**	310	182	**837**	898	392	248	1871
BOR	**2**	1	**1881**	342	1881	**340**	282	340	**2221**	624	2221	1779	2662
CDC	**1**	0.5	**1639**			**140**			**1779**				
DOE	**2**	1	**933**	424	933	**329**	59	329	**1262**	364	1262	1004	1519
DOI	**1**	0.5	**192**			**196**			**388**				
EPA	**1**	0.5	**686**			**875**			**1561**				
FAA	**2**	1	**810**	617	810	**675**	371	675	**1485**	987	1485	787	2183
FEMA	**1**	0.5	**1058**			**581**			**1639**				
FERC	**8**	4.4	**968**	788	565	**233**	176	144	**1201**	938	740	605	2985
FHwA	**22**	12.1	**1746**	1284	1366	**617**	587	357	**2362**	1445	2312	333	5392
FRA	**1**	0.5	**1023**			**644**			**1667**				
FS	**39**	21.4	**795**	818	539	**479**	455	328	**1274**	968	1183	226	5379
FSA	**1**	0.5	**1786**			**157**			**1943**				
FTA	**3**	1.6	**800**	291	792	**863**	1019	455	**1664**	757	1247	1207	2537
FWS	**6**	3.3	**1361**	1704	754	**422**	453	238	**1783**	1755	1047	480	5238
GSA	**1**	0.5	**3740**			**245**			**3985**				
NASA	**2**	1	**513**	346	513	**193**	45	193	**706**	391	706	429	982
NIH	**1**	0.5	**772**			**252**			**1024**				
NOAA	**8**	4.4	**643**	645	449	**533**	462	371	**1175**	1053	853	184	3661
NPS	**19**	10.4	**2111**	802	2110	**711**	412	552	**2821**	966	2804	1109	4460
NRC	**6**	3.3	**677**	231	674	**378**	78	364	**1055**	255	1037	694	1479
NRCS	**1**	0.5	**284**			**105**			**389**				
RUS	**1**	0.5	**779**			**161**			**940**				
STATE	**1**	0.5	**1500**			**336**			**1836**				
USA	**2**	1	**524**	84	524	**266**	59	266	**790**	25	790	772	807
USACE	**21**	11.5	**1715**	1492	1281	**422**	367	286	**2137**	1538	1897	301	5706
USAF	**4**	2.2	**951**	1076	540	**525**	693	203	**1476**	1277	1387	360	2772
USCG	**1**	0.5	**1092**			**287**			**1379**				
USN	**3**	1.6	**1305**	1000	749	**394**	156	455	**1699**	846	1218	1204	2676
VCT	**1**	0.5	**1120**			**336**			**1456**				

n = number of EISs in the sample; s.d. = standard deviation; M = median, VCT = Valles Caldera Trust

2272±654 days (6.2±1.8 years) [n=9] recorded in 2011. The Forest Service, Federal Highway Administration and Bureau of Land Management did not establish new record annual average EIS-preparation times.

Ten or 5.5% of the final EISs made available in 2014 were completed in one year or less following publication of their NOIs (see "0 to 1" in **Table 5-2**). From 1997-2013 an average of 7.8±3.1% of final EISs were completed in one year or less. The lowest one-year completion rate, 2.9%, was recorded in 2013. The highest completion rate, 14.9%, was recorded in 2001. Since 2001, the percentage of EISs completed in less than one year has declined at an average rate of -0.53%/year.

Table 5-2. A comparison of 2014 final EIS completion rates with the average final EIS completion rates for the period 1997 through 2013.

Completion Interval in Years from NOI*	2014 Completion Percentage	1997 – 2013			
		Average Completion Percentage	Standard Deviation	Lowest Completion Percentage (Year)	Highest Completion Percentage (Year)
0 to 1	5.5	7.8	3.1	2.9 (2013)	14.9 (2001)
1 to 2	17.6	25.0	3.9	16.9 (2012)	30.3 (2000)
2 to 3	18.1	18.7	2.5	15.2 (2008)	24.5 (2009)
3 to 4	11.5	13.2	2.5	9.3 (2004)	18.6 (2005)
4 to 5	10.4	9.9	2.6	6.2 (2002)	12.8 (2006)
5 to 6	7.1	7.1	1.8	4.5 (2000)	11.6 (2011)
6 to 7	7.7	6.0	2.1	3.0 (2001)	10.7 (2006)
7 to 8	6.6	3.8	1.5	1.5 (2000)	7.0 (2013)
8 to 9	4.4	2.9	1.5	1.3 (2002)	6.7 (2012)
9 to 10	1.1	1.7	0.9	0.5 (2000)	3.2 (2011)
10 to 11	3.8	1.2	0.9	0.4 (4 years)	3.8 (2014)
11 to 12	1.1	0.6	0.6	0.0 (6 years)	1.6 (2011)
12 to 13	1.6	0.6	0.6	0.0 (5 years)	2.3 (2008)
13 to 14	1.1	0.4	0.6	0.0 (7 years)	2.3 (2013)
14 to 15	1.6	0.3	0.4	0.0 (8 years)	1.6 (2014)
15 to 16	0.5	0.1	0.3	0.0 (14 years)	0.9 (2010)
16 to 17	0.0	0.2	0.4	0.0 (11 years)	1.3 (2006)
17 to 18	0.0	0.1	0.2	0.0 (14 years)	0.5 (2010)
18 to 19	0.0	0.08	0.2	0.0 (16 years)	0.8 (2005)
19 to 20	00	0.04	0.1	0.0 (17 years)	0.6 (2013)
20 to 21	0.0	0.03	0.1	0.0 (17 years)	0.5 (2012)
21 to 22	0.0	0.03	0.1	0.0 (17 years)	0.5 (2010)
∑	**99.7**	**99.8**			

*NOI = Federal Register Notice of Intent to Prepare the Environmental Impact Statement

In 2014, record high final-EIS completion rates were established for the annual intervals 10-to-11 years and 14-to-15 years (**Table 5-2**). Only a few EISs are normally completed in these intervals. No new low final-EIS completion rates were established in 2014.

The average time required by all federal agencies combined to prepare final EISs has increased since the year 2000 when it averaged 1166±899 days (3.2±2.5 years) [n=198].

The annual average EIS-preparation time for all agencies peaked in 2014 as noted previously. From 2000-2014, the annual average EIS-preparation time for all agencies, as a group, increased at an average rate of +37.5 days/year (see "Total EIS Preparation Time" in **Figure 5-1**). About 78% of the total increase occurred in the preparation of draft EISs. The remaining 22% was incurred in the preparation of the final EIS from the draft EIS.

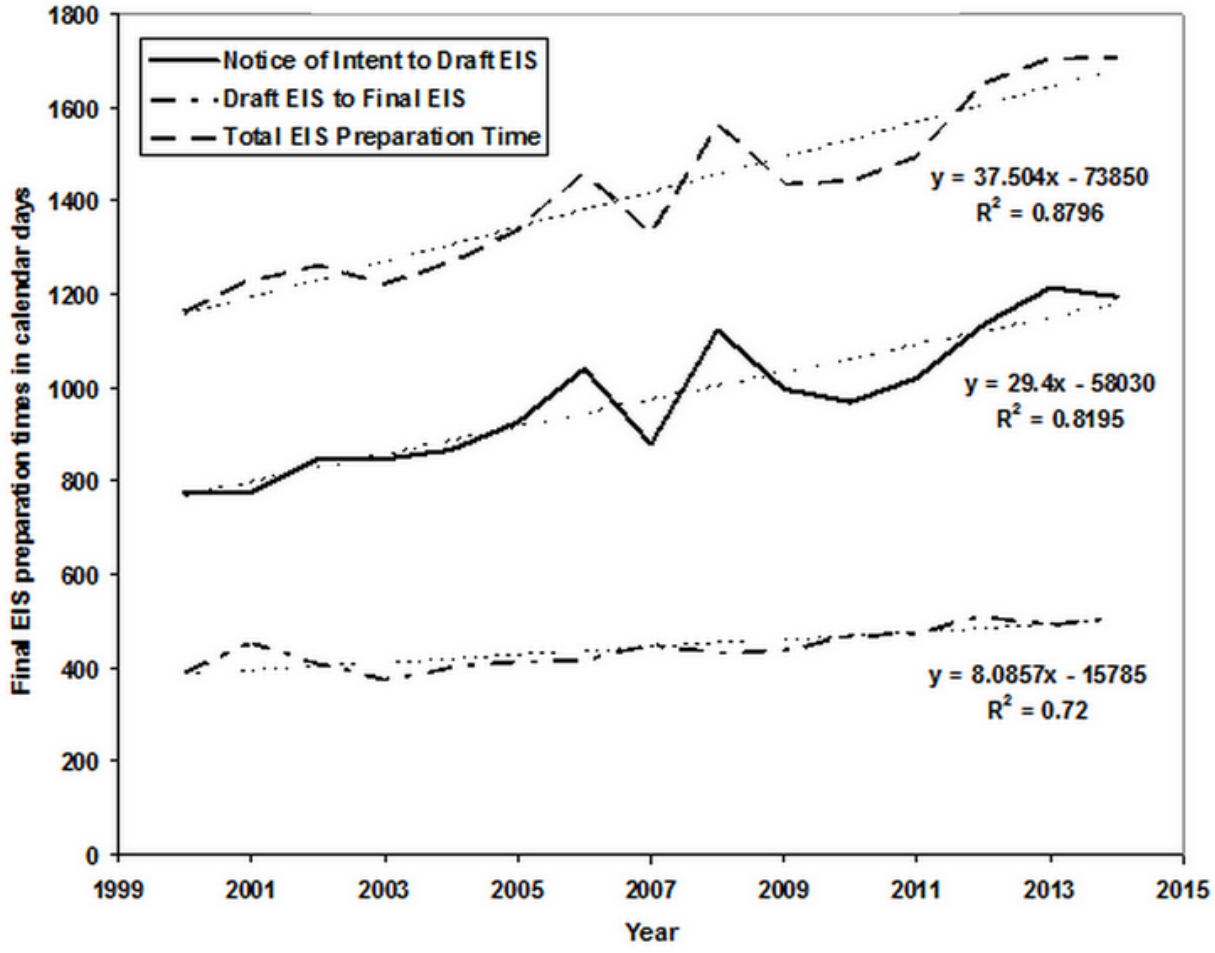

Figure 5-1. Trends in annual average preparation times for final EISs made available by all agencies from 2000 through 2014 with their linear regression lines and equations and coefficients of determination (R^2).

In 2014, 19 agencies made available only one or two final EISs (see left four columns in **Table 5-3**). Seven (7) of these agencies appear in the ten lowest average EIS-preparation times for the year. However, producing one or two EISs annually does not guarantee that the preparation times will be short. Five (5) of the agencies that made available only one or two final EISs in 2014 appear in the ten longest average EIS-preparation times for the year.

Table 5-3. Average preparation times for draft and final EISs made available in 2014 arranged in Descending Order by Mean.

2014 Final EISs			
Rank	**Agency**	**n***	**Mean**
1	GSA	1	3985
2	NPS	19	2821
3	FHwA	22	2362
4	BOR	2	2221
5	USACE	21	2137
6	FSA	1	1943
7	STATE	1	1836
8	BIA	6	1795
9	FWS	6	1783
10	CDC	1	1779
11	USN	3	1699
12	FRA	1	1667
13	FTA	3	1664
14	FEMA	1	1639
15	EPA	1	1561
16	FAA	2	1485
17	USAF	4	1476
18	VCT**	1	1456
19	BLM	9	1423
20	USCG	1	1379
21	FS	39	1274
22	DOE	2	1262
23	FERC	8	1201
24	NOAA	8	1175
25	NRC	6	1055
26	NIH	1	1024
27	RUS	1	940
28	BOEM	3	837
29	USA	2	790
30	NASA	2	706
31	APHIS	2	512
32	NRCS	1	389
33	DOI	1	388

*n = number of EISs
** VCT = Valles Caldera Trust

2014 Draft EISs			
Rank	**Agency**	**n***	**Mean**
1	STB	1	2450
2	BOR	6	1635
3	FAA	1	1569
4	NPS	7	1555
5	USA	2	1550
6	FHwA	22	1534
7	DOI	1	1445
8	NOAA	9	1365
9	FWS	9	1336
10	RUS	1	1330
11	USACE	23	1283
12	BIA	1	1107
13	BLM	15	1093
14	NNSA	1	1045
15	FTA	5	986
16	BPA	2	977
17	DOE	2	975
18	NRC	4	970
19	FRA	4	922
20	USN	8	882
21	HUD	2	841
22	WAPA	2	840
23	NIH	1	772
24	FS	46	688
25	OSM	1	618
26	FERC	8	612
27	STATE	1	599
28	USCG	1	536
29	APHIS	3	425
30	CDC	1	403
31	NRCS	1	284
32	NASA	1	268
33	USAF	2	268
34	FSA	1	238
35	BOEM	3	168

For the period 1997-2014, federal agencies made available an average of 233±34 final EISs/year. The 186 final EISs made available in 2014 was the second lowest number we recorded for that period. The lowest number, 180, was recorded in 2013, and the high number of final EISs, 311, was recorded in 2004.

5.2 Draft EISs

In 2014, federal agencies made available 198 draft and draft supplemental EISs (**Table 5-4**).

Table 5-4. Preparation times in calendar days for draft and draft supplemental EISs made available in 2014.

Agency	n	%	Mean	s.d.	M	Min	Max
ALL	198	100	**1041**	843	821	43	4028
APHIS	3	1.5	**425**	175	452	239	585
BIA	1	0.5	**1107**				
BLM	15	7.6	**1093**	653	1053	161	2289
BOEM	3	1.5	**168**	37	154	140	210
BOR	6	3.0	**1635**	1186	1388	331	3874
BPA	2	1.0	**977**	600	977	553	1401
CDC	1	0.5	**403**				
DOE	2	1.0	**975**	349	975	726	1221
DOI	1	0.5	**1445**				
FAA	1	0.5	**1569**				
FERC	8	4.0	**612**	192	565	330	893
FHwA	22	11.1	**1534**	1077	1447	144	4028
FRA	4	2.0	**922**	462	784	529	1590
FS	46	23.2	**688**	482	586	43	2065
FSA	1	0.5	**238**				
FTA	5	2.5	**986**	423	822	599	1095
FWS	9	4.5	**1336**	850	1270	354	3413
HUD	2	1.0	**841**	110	841	763	919
NASA	1	0.5	**268**				
NIH	1	0.5	**772**				
NNSA	1	0.5	**1045**				
NOAA	9	4.5	**1365**	1624	428	100	3881
NPS	7	3.5	**1555**	724	1158	702	2481
NRC	4	2.0	**970**	412	974	525	1407
NRCS	1	0.5	**284**				
OSM	1	0.5	**618**				
RUS	1	0.5	**1330**				
STATE	1	0.5	**599**				
STB	1	0.5	**2450**				
USA	2	1.0	**1550**	1157	1550	732	2368
USACE	23	11.6	**1283**	937	1043	147	3423
USAF	2	1.0	**268**	3.0	268	266	270
USCG	1	0.5	**536**				
USN	8	4.0	**882**	1085	640	56	3476
WAPA	2	1.0	**840**	64	840	795	885

n = number of EISs in sample; s.d. = standard deviation; M = median

The 2014 annual average draft-EIS preparation time for all agencies combined, 1041±843 days (2.9±2.3 years), was the third longest we have recorded for the period 1997-2014 (see "ALL" in **Table 5-4**). The 2014 annual average was exceeded only by the annual averages for 2013 and 2012.

None of the five most prolific EIS producers established new high or low annual average draft-EIS preparation times in 2014. These five agencies combined to produce 57% of all the draft EISs made available in 2014 (see "% All" in **Table 5-4**).

From 1997-2013 an average of 27.4±6.2% of draft EISs was completed in one year or less following publication of their NOIs (see "0 to 1" in **Table 5-5**). In 2014, thirty-seven (37) or 18.7% of the draft EISs made available were completed in one year or less. This average exceeds only the averages of 2013 and 2012. The highest completion rate, 37.0%, was recorded in 2000. Since 2000, the percentage of draft EISs completed in less than one year has declined at an average rate of -0.98%/year**.**

Table 5-5. A comparison of 2014 draft EIS completion rates for all agencies combined with the corresponding average draft EIS completion rates for the period 1997 through 2013.

Preparation Interval in Years from NOI*	2014 Preparation Percentage	1997 – 2013			
		Average Preparation Percentage	Standard Deviation	Lowest Percentage (Year)	Highest Percentage (Year)
0 to 1	18.7	27.4	6.2	13.9 (2013)	37 (2000)
1 to 2	25.3	27.7	3.0	21.9 (2005)	34.1 (2009)
2 to 3	20.7	16.7	3.0	12.0 (1999)	22.5 (2012)
3 to 4	15.2	9.8	2.2	6.2 (2001)	15.2 (2014)
4 to 5	7.1	6.4	2.0	2.5 (2000)	9.4 (2010)
5 to 6	2.0	4.2	1.7	1.8 (1998)	7.9 (2005)
6 to 7	4.5	3.0	1.2	0.7 (1998)	5.0 (2013)
7 to 8	2.0	1.4	0.7	0.3 (2005)	2.8 (1997)
8 to 9	0.5	1.0	0.8	0.0 (3 years)	3.0 (2013)
9 to 10	1.5	0.8	0.7	0.0 (2 years)	2.5 (2012)
10 to 11	2.0	0.2	0.3	0.0 (10 years)	2.0 (2014)
11 to 12	0.5	0.3	0.3	0.0 (6 years)	1.0 (2013)
12 to 13	0.0	0.4	0.6	0.0 (8 years)	2.5 (2013)
13 to 14	0.0	0.1	0.3	0.0 (14 years)	0.7 (2 years)
14 to 15	0.0	0.2	0.3	0.0 (12 years)	0.9 (2003)
15 to 16	0.0	0.1	0.1	0.0 (14 years)	0.4 (2001)
16 to 17	0.0	0.04	0.1	0.0 (16 years)	0.4 (2002)
17 to 18	0.0	0.02	0.1	0.0 (17 years)	0.3 (2003)
18 to 19	0.0	0.1	0.2	0.0 (16 years)	0.5 (2012)
∑	**100.0**	**99.9**			

*NOI = Federal Register Notice of Intent to Prepare the Environmental Impact Statement

In 2014, record high draft EIS completion rates were established by all agencies combined for the annual intervals 3-to-4 years and 11-to-12 years (**Table 5-5**). No new record low draft EIS completion rates were established in 2014.

The lowest annual average preparation time for draft EISs, 710±666 days (1.9±1.8 years) [n=243], was recorded in the year 2000. Since then annual average draft EIS-preparation times for all agencies combined have increased at an average rate of 22.7 days/year (**Figure 5-2**).

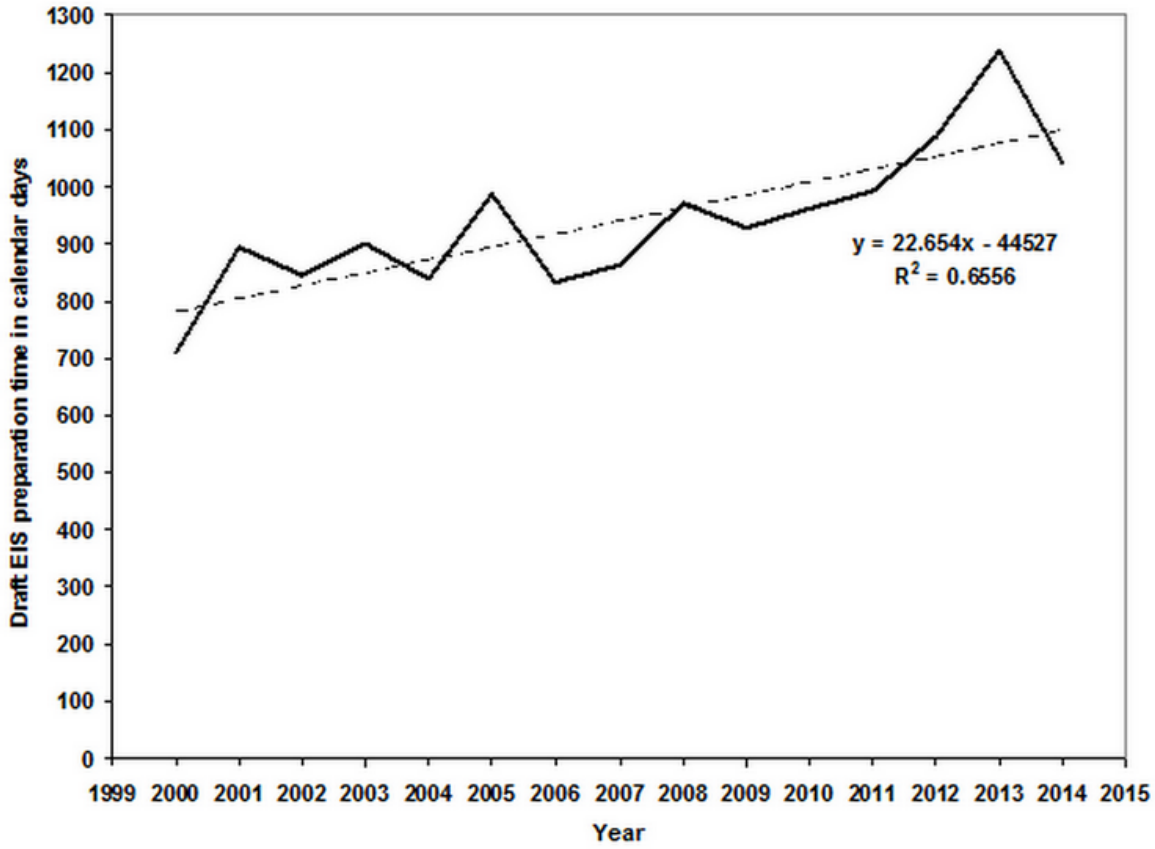

Figure 5-2. Trend in annual average preparation times for draft and supplemental draft EISs made available by all federal agencies from 2000 through 2014 with their linear regression line and equation and their coefficient of determination (R^2).

In 2014, 20 federal agencies made available only one or two draft EISs (see right four columns in **Table 5-3**). Seven (7) of these agencies appear in the ten shortest annual average preparation times, and five (5) of them appear in the ten longest annual average preparation times.

The 198 draft EISs made available in 2014 was the lowest number we recorded for the period 1997-2014. The previous low number, 200 draft EISs, was recorded in 2012, and the highest number, 320 draft EISs was recorded in 2003. For the period 1997-2014, federal agencies made available an average of 263±36 draft EISs/year.

6. NEPA Regulatory Update

Ron Bass[7]

During the past year, the CEQ continued its role in providing guidance to assist federal agencies and environmental professionals in implementing NEPA. On December 18, 2014 CEQ issued two new guidance documents: (1) "Revised, *Draft Guidance on the Consideration of Greenhouse Gas and Climate Change in NEPA reviews*" and, (2) "*Final Guidance on the Effective Use of Programmatic NEPA Reviews"*. Additionally, on January 26, 2015 CEQ released its *NEPA Pilot Projects Report and Recommendations* to wrap-up the pilot projects program. This article summarizes these latest CEQ efforts. Full copies of all three documents can be found on CEQ's website.[8]

6.1 Revised Draft Guidance on the Consideration of Greenhouse Gas (GHG) and Climate Change in NEPA Reviews

The revised draft GHG/Climate Change guidance supersedes the previous draft guidance issued in 2010 that was never finalized. The revised guidance became publicly available on CEQ's website on December 18, 2014, and the Federal Register Notice of Availability was published on December 24, 2014. The initial public comment ran through February 23, 2015[9] and was extended to March 25, 2015[10]. After considering all comments received, hopefully CEQ will finalize this guidance so that federal agencies will have consistent guidance about how to handle GHG and climate change impacts under NEPA.

The following is a summary of the key sections of the revised guidance.

6.1.1 Introduction

Purpose of the Guidance. The introduction discusses the two main goals that CEQ is trying to accomplish by issuing revised guidance:

- To encourage consistency in approach to GHG and climate change in NEPA documents, but at the same time recognizing and accommodating the particular unique requirements and circumstances of each federal agency;
- To encourage agencies to tailor their analysis of GHG/climate change impacts so that they are appropriately proportionate to the effects of the proposed action.

Two aspects of the GHG/Climate change. The introduction also explains that the guidance addresses the two different aspects of climate change impacts: 1) The potential effects of a proposed action on climate change as indicated by its GHG emission, and; 2) the implications of climate change for the proposed action and its environmental effects.

[7] Ron Bass is a Senior Consultant with ICF International
[8] https://ceq.doe.gov/ (Note: since the CEQ guidance documents contain complete citations to NEPA, the CEQ NEPA regulations, and other relevant laws, only limited citations are included in this article)
[9] 79 F.R 77801 (Dec. 24, 2014)
[10] 80 F.R. 9443 (Feb. 23, 2015)

Agency discretion. Additionally, the introduction explains that, despite the CEQ's goal of fostering a consistent approach, federal agencies have substantial discretion regarding how to evaluate GHG/climate change impacts, as they do for other issues under NEPA.

NEPA Fundamentals. Finally, the Introduction discusses how some fundamental principles of environmental impact assessment should apply to the evaluation of GHG/climate change impacts. For example, federal agencies should:

- Discuss direct, indirect and cumulative impacts;
- Highlight consideration of alternatives and mitigation measures;
- Use a standard "reference point" to determine when GHG emissions analysis warrant a quantitative analysis (this concept is explained in a separate section of the guidance);
- Evaluate issues using either a programmatic or project-specific analysis;
- Use information in NEPA documents to consider alternatives that are more resilient to the effects of changing climate;
- When possible, utilize existing information and tools of analysis, to evaluate GHG/climate change impacts.

6.1.2 Background

The Background section of the revised guidance also lays out some of the fundamental principles of NEPA that are relevant to the evaluation of GHG/Climate Change impacts.

NEPA's "rule of reason" applies. First the guidance reiterates that one of NEPA's primary objectives is to lead to better government decision – not better paperwork. To help achieve this goal, analysis of GHG/Climate change impacts, like the evaluation of other impacts under NEPA, should be governed by the "rule of reason", which means that analysis and presentation should be reasonable and focused on GHG/climate change impacts that are important to the decision making process. The analysis should also emphasize alternatives and mitigation measures that would reduce carbon emissions.

Status of climate change science. The second part of the Background section includes a short review of the current status of climate change science at the national level, particularly citing studies from the U.S. Global Change Research Program, the National Research Council, and the U.S. Environmental Protection Agency. This discussion also mentions EPA' "endangerment finding" under the Clean Air Act and discusses some of the already well-known impacts of climate change such as:

- More frequent and intense heat waves;
- Increased droughts;
- More severe wildfires;
- Degraded air quality;

- More intense storms, heavy downpours, and flooding;
- Greater sea-level rise;
- Harm to water resources;
- Harm to agriculture;
- Harm to wildlife and ecosystems.

This section of the guidance leaves little doubt regarding the scientific support for the causes and effects of climate change.

6.1.3 Considering the Effects of GHG Emissions and Climate Change

This section of the guidance discusses what federal agencies should consider when they evaluate GHG/climate change impacts and how they should conduct their analysis. It covers several key topics, some of which have been controversial over the years and needed clarification.

Small contributions not an excuse for no analysis. Interestingly, CEQ's first recommendation is that federal agencies should not merely conclude that because a proposed action would have only a small contribution to the global problem that no analysis is necessary. In the past, some agencies would use the "small contribution" concept as an excuse for avoiding any discussion of GHG and climate change impacts. CEQ wants to make sure that this is not a basis for the failure to evaluate the impacts in the future.

Scope and content of analysis. CEQ recommends that the analysis of the GHG/climate change impacts should be commensurate with the quantity of GHG emissions impacts that would result from the proposed action. This concept of proportionality should help frame scope and content of the analysis.

Regardless of the level of analysis, the impact discussion should describe the direct, indirect and cumulative impacts and should discuss the "context" and "intensity" of those impacts. As with other impacts under NEPA, the scope of analysis of GHG/climate change impacts should be tailored to their importance to the decision making process, and should rely, to the extent possible, on existing information that can be incorporated by reference.

"Upstream" and "downstream" actions. Additionally, the proposed guidance reminds federal agencies that a NEPA document must include the evaluation of the impacts of "connected actions". In the context of GHG/climate change impacts, this includes actions that precede the agency's actions – referred to as "upstream" actions, as well as actions that are a consequence of the agency's actions – referred to as "downstream" actions. While the guidance does not provide a specific example, in the case of a proposed industrial facility, the "upstream" impacts would include emissions from bringing raw materials to the facility for processing and "downstream" impacts would include emissions that would result from shipping finished products to customers.

Applicability to federal land management activities. The revised guidance also specifically covers the impacts of federal land management activities, which was excluded from the earlier, proposed guidance.

Use of state or local regulatory requirements. Finally, the proposed guidance suggests that federal agencies consider state or local regulatory requirements as a frame of reference for the discussion of impacts. For example, federal agencies in California may want to utilize the GHG reduction goals under the state's Global Warming Solutions Act of 2006 to help frame the context for the evaluation of GHG impacts. [11]

Conducting the emissions analysis. In the discussion of how to conduct a GHG impact analysis, the proposed guidance discusses several important subtopics:

- **Rule of Reason and Proportionality.** The following general rules are put forth in the guidance:
    - The analysis of GHG emissions should be guided by the "rule of reason" and proportionality;
    - The analysis may be either quantitative or qualitative, but in either case, the lead agency must explain why it has elected to use the particular method of analysis it chooses;
    - The analysis should rely, to the extent possible, on existing analytical tools;
    - In determining the scope of analysis, the lead agency should consider both temporal and spatial parameters;
    - The scope of analysis should consider investment of time and resources and may want to rely on monetizing costs and benefits.

  While making these specific recommendations, the proposed guidance clearly indicates that a lead agency has broad discretion as to which analytical tools and methods to use in the GHG analysis, but must explain why such methods were selected.

- **Special Consideration for biogenic sources from land management actions.** Unlike the earlier draft guidance, the new proposed guidance specifically includes impacts from federal land management activities. In evaluating GHG impacts from land management activities, agencies should recognize that such actions may result in both carbon emissions and carbon sequestration. Additionally, agencies should develop approaches that address both short-term and long-term carbon impact. The proposed guidance also recommends the use of a balanced, comprehensive approach to sustainable management and climate change adaptation.
- **"Reference Point" for when to conduct a quantitative analysis.** A key feature of the proposed guidance is CEQ's establishment of a "reference point" that agencies should use as a guide in determining when to conduct a quantitative analysis of GHG impacts. According to the guidance, if a proposed action would produce greater than 25,000 metric tons/year of CO2 equivalent, then the lead agency should conduct a quantitative analysis. On the contrary, projects producing less than that amount would be candidates for a qualitative analysis. CEQ is careful to point out that exceeding the "reference point" does not require a quantitative analysis in every case, nor does the "reference point" constitute a "threshold of

[11] 2006 Stats. Ch. 488; CA Health & Safety Code 38500 et seq

significance" for purpose of determining if impacts are "significant" thereby requiring an EIS.

- **Emphasize on alternatives and mitigation.** The proposed guidance advises agencies that the emphasis of their GHG emissions analysis should be on the comparison of the impacts of alternatives and the potential for mitigation. Specifically the evaluation should focus on alternatives and mitigation measures that would result in greater energy efficiency, lower GHG emitting technology, carbon capture, carbon sequestration and other approaches to reducing GHG emissions. Additionally, mitigation should focus on measures that are permanent, verifiable, enforceable and additional to legally required reductions.

6.1.4 Considering the Effects of Climate Change on the Environmental Consequences of the Proposed Action

This section of the proposed guidance discusses how federal agencies should address the impacts of climate change on proposed actions and their future impacts. The guidance leaves no doubt that these types of impacts, sometimes referred to as "reverse environmental impacts", are clearly within the purview of NEPA. In evaluating these impacts, the guidance sets forth several general principles that lead agencies should consider.

- **Temporal considerations.** Agencies should rely on temporal considerations in determining the duration of the impacts to be evaluated. This means that the time horizon for discussing climate change impacts should generally correlate to the lifespan of the proposed project. For example if the life of a project would be long-term, such as highway project in the coastal zone, then considering the effects of long-term sea level rise on the project would be appropriate. On the other hand, for a project of limited duration a long term look at climate change impacts might be inappropriate.
- **Focus of impact analysis.** The analysis should focus on aspects of the environment that are impacted by both the proposed project and climate change. For example, if a project would require water from a stream that is already experiencing the effects of climate change such as low snow pack, such discussion would fall squarely within the bounds of NEPA
- **Importance of adaptation.** The discussion of climate change impacts should focus on the ability of a project to adapt changing future conditions and demonstrate resilience in the face of those conditions.
- **Emphasis on vulnerable geographic areas.** The analysis of climate change impacts should focus in vulnerable geographic areas, such as the coastal zone.
- **Reliance on existing information.** In evaluating climate change impacts, agencies should incorporate existing information by reference when possible. In this regard, the proposed guidance recognizes the ever-expanding body of knowledge about the influences of climate change and encourages agencies to take advantage of such information when it is available.

6.1.5 Traditional NEPA Tools and Their Relationship to GHG Analysis)

This section of the guidance reiterates the importance of relying on some of NEPA's traditional tools and approaches to evaluating GHG/Climate Change impacts, such as: scoping and framing

the NEPA review; using available information; incorporation by reference; as well as preparing programmatic documents, when appropriate.

6.1.6 Conclusion

Overall, the GHG/Climate Change guidance will inform federal agencies and environmental professionals how to address the fundamental principles of NEPA as they evaluate GHG emissions and the impacts of climate change**.** The draft guidance, once finalized and adopted by CEQ, will hopefully encourage agencies to address these issues in a consistent manner that is both reasonable and appropriate to the project being evaluated. In the meantime agencies may want to rely on the principles in the draft guidance, as many did with the prior draft guidance.

6.2 Final Guidance on Programmatic NEPA Reviews

Final Guidance on Programmatic NEPA Reviews is the culmination of CEQ's efforts to provide clarification when federal agencies should rely on programmatic NEPA reviews. The draft guidance was released for review on August 25, 2014, after which CEQ received almost 350 public and agency comments.[12] The final guidance reflects many of the ideas submitted during the public review period. The following is a summary of the key provisions.

6.2.1 Introduction

According to the CEQ NEPA Regulations, NEPA not only applies to individual federal actions but also to broad federal actions, such as federal agency policies, plans and programs. When evaluating polices, plans or programs, federal agencies may prepare "programmatic" NEPA documents. Although programmatic documents are governed by the same regulations and rules as NEPA documents for individual actions, in practice there has been considerable uncertainty about when and how to prepare them. This new CEQ guidance provides a summary of the advantages of preparing programmatic NEPA documents and discusses the rules and current practices for preparing them. It also explains how programmatic NEPA documents can be used to facilitate the tiering process and how they can best be integrated into government planning and decision making.

Nature of programmatic reviews. According to the new guidance, programmatic NEPA reviews typically address the environmental impacts of broad-scale proposed actions and, therefore, can help establish the framework for how subsequent, site-specific and project-specific actions are evaluated. Specifically, programmatic documents can facilitate NEPA compliance by:

- Providing the analysis necessary for approving high-level decisions;
- Identifying and evaluating impacts within a broad geographic area in which future, proposed activities may occur;
- Providing a comprehensive picture of the environmental impacts of multi proposed actions;
- Serving as the basis for evaluating future activities using a tiered approach to NEPA review;
- Focusing impact discussions on future-tier documents;

[12] 79 F.R. 164 (Aug. 25, 2014)

- Narrowing the range of alternatives that must be considered in future tier document.

In addition to aiding in NEPA compliance, programmatic reviews can help influence the nature of proposed future projects and assist agencies make better policy- and plan-level decisions.

Programmatic reviews in the CEQ regulations. This section of the guidance summarizes the key provisions of the CEQ regulations that address programmatic NEPA documents. The regulations allow an agency to prepare a programmatic EIS (PEIS) for "broad federal actions" such as rules, programs and plans. Agencies are encouraged to prepare programmatic documents that are relevant to the policies being considered and timed to coincide with meaningful points in the agency's planning and decision making. The regulations also provide several ways that the evaluation may be done in a programmatic document, including:

- Geographically, including actions occurring in the same general location;
- Generically, including actions that have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media or subject matter;
- By stage of technological development;[13]

Although the regulations specifically discuss programmatic documents in the context of the EIS, according to the guidance CEQ interprets its regulations to allow the use of a programmatic approach in developing an EA as well as an EIS. Thus, for a policy, plan or program that would not trigger an EIS, an agency still has the option of preparing a programmatic NEPA document.

The guidance also refers to, but does not summarize, the provisions dealing with "tiering". [14]

When to use programmatic and tiered NEPA reviews. This section of the guidance discusses the four main categories of activities that would typically be evaluated using a programmatic NEPA document.

1. **Adopting official policy.** The first category of programmatic decisions are those to formally adopt an official policy that would substantially change agency programs. According to the guidance, a programmatic analysis for such a decision should include a roadmap for future agency actions with defined objectives, priorities, rules, or mechanisms to implement specific objectives. Examples include:
    - Rulemaking at the national or regional level;
    - Adoption of an agency-wide policy;
    - Redesign of an existing program.
2. **Adopting formal plans.** The second category of programmatic actions are decisions to adopt formal plans such as those that guide or constrain the use of federal resources upon which future agency actions will be based. Examples include:

[13] 42 CFR 1502.4(b)-(c)
[14] 42 CFR 1502.20 and 1508.28

- Strategic planning linked to agency resource allocation (e.g. Forest Plans adopted by the U.S. Forest Service or Resource Management Plans adopted by the U.S. Bureau of Land Management);
- Adoption of an agency plan for a group of related projects.

3. **Adopting agency programs.** This category of programmatic actions include the decision to proceed with a group of related actions to implement a specific policy or plan. Examples include:
    - A new agency mission or initiative;
    - A Proposal to substantially redesign an existing program.
4. **Approving multiple actions.** The final category of programmatic actions covers decisions to approve multiple projects that are temporally or spatially connected and which will have a series of associated concurrent or subsequent decisions. Examples include:
    - Several similar actions or projects in the same region, or even nationwide;
    - A suite of ongoing, proposed, or reasonably foreseeable future actions that share common geography or timing.

This section of the guidance also clarifies that an agency may prepare a single NEPA document to support both programmatic and project-specific actions. Such an approach (which could be called "simultaneous tiering") is appropriate when an agency plans to make a decision on the broad federal action followed closely in time by decisions on one-or more specific projects to be carried out under the broad action. When this is done, the programmatic NEPA document should evaluate both the broad-scale impacts of the policy, plan or program as well as sufficiently detailed, project-specific impacts of those individual actions that may also be approved. When programmatic decisions and project-level decision are combined, the NEPA document should clearly explain the approach being taken and should clearly delineate the programmatic impacts from the project-specific impacts.

Further, the guidance advised agencies to carefully consider whether a programmatic NEPA review will be cost effective to prepare.[15] Two basic questions are recommended to help make this decision:

1. Could the programmatic document be sufficiently forward-looking to contribute to the agencies basic planning for the overall program?
2. Would the programmatic document provide the agency with the opportunity to avoid "segmenting" the overall program?

Practical considerations for programmatic reviews and documents. This section of the guidance provides practical advice to assist federal agencies in conducting a successful programmatic analysis and preparing the programmatic document. It covers the following important NEPA topics in considerable detail:

[15] Within some federal agencies, certain types of programmatic EISs are required by the agencies NEPA regulations, and therefore, must be prepared regardless of the cost of doing so.

- **Determining the utility and scope of the Programmatic NEPA review.** This section discussed some general considerations in determining the scope of a programmatic document. For example it discusses how to figure out the temporal and spatial scope of the document that is appropriate to the broad action being evaluated. It also addresses the data gathering and analysis process that is appropriate for evaluating broad actions that may cover large geographic areas.

  In addressing each of these topics, the guidance goes into considerable detail about how the federal agency should organize and scope the programmatic process, as well as how each requirement of NEPA should be addressed. It covers the following specific in detail:

  - **Determining the Scope of the programmatic document,** including how an agency should address the Purpose and Need; scope of analysis; proposed action: alternatives; and the environmental impacts;
  - **Public and Interagency outreach,** including collaboration with other agencies, public engagement, and coordination with other environmental reviews;
  - **Preparing the documents,** including how to determine whether to prepare a PEIS or a Programmatic EA (PEA); the level of detail and the depth of analysis to include in the programmatic document;
  - **Mitigation and Monitoring,** including how to incorporate comprehensive mitigation planning, best management practices, and standard operating procedures, as well as the relationship between monitoring and adaptive management;
  - **Handling new proposals while preparing a programmatic review,** including what type of document is appropriate for an individual undertaking and how it relates to the not-yet-completed programmatic document;
  - **The decision document,** including what must go into Record of Decision after a PEIS is prepared and how to handle the decision document after a PEA is prepared.

Subsequent, proposal-specific NEPA reviews and tiering. The guidance distinguishes between issues that are appropriate for discussion in a programmatic NEPA document versus those that may be deferred to future tiers of NEPA. According to the guidance, when preparing a programmatic NEPA document an agency may limit its analysis to environmental impacts that are foreseeable at the time the document is being prepared. Those that are not yet foreseeable, may be deferred to the future. In making these distinctions, the programmatic document should explain why some impacts are foreseeable and being evaluated at the current time and why others are being deferred. The document should also explain when and where those future impacts will be evaluated.

The guidance also discusses the advantages of and approaches to "tiering". According to the guidance, one of the main purposes of preparing a programmatic NEPA document is the ability to "tier" subsequent reviews of it. Tiering offers the advantage of not having to repeat broad-scale impacts that have already been evaluated so as to focus and expedite the evaluation of subsequent actions. When a PEIS or PEA has been prepared, issues already discussed in the broad document need only be summarized and incorporated by reference into the narrower, future document.

Although the CEQ regulations specifically authorizes tiering off of a PEIS, according to the guidance, CEQ recognizes that PEAs may also be used as the basis of tiering.

Further, the guidance discusses how to address new information and when a supplemental document is required Under the CEQ NEPA regulations, a federal agency may have to prepare a supplemental document when it determines that there is significant new information that is relevant to the proposed action or its impacts. The rules relating to supplementing apply to both project-specific documents and programmatic documents. In the case of programmatic documents, the guidance specifies how an agency should evaluate the new information to determine if the programmatic document itself should be supplemented or whether the new information can be incorporated into the later-tiered documents.

Lifespan of programmatic NEPA documents. This section of the guidance addresses the so called "lifespan" of a NEPA document. As with any NEPA document, the passage of time, together with significant new information about the proposed action or its impacts can render the document out-of-date and may give rise to the need to prepare a supplement. This issue is particularly relevant for programmatic NEPA document which is expected to be used to evaluate future projects, often for the life of the program. According to the guidance, there is no fixed time line or expiration date for a PEA or a PEIS. Rather, agencies should determine the factors that may trigger the need to supplement the document and should develop criteria for evaluating new information as it arises.

Appendices. The new guidance includes two very helpful appendices:

- **Appendix A – Programmatic and Tiered Analysis.** This appendix contains a detailed table identifying some of the key differences between how NEPA is handled at the programmatic versus action-specific levels.
- **Appendix B – Sample Programmatic Analysis.** This appendix contains examples of programmatic documents and how various NEPA topics were addressed in them

With the release of the Final guidance on Programmatic NEPA Reviews, federal agencies and environmental professionals now have a roadmap on how to prepare and utilize PEISs and PEAs. The guidance should take some of the mystery out of programmatic documents and encourage agencies to use them. Through the greater use of PEISs and PEAs agencies should achieve the dual benefits of integrating broad scale impact evaluation into agency planning and decision making as well as enhancing efficiency in the preparation of project-specific documents through tiering.

6.3 NEPA Pilot Projects Report and Recommendations

In 2011, CEQ initiated a Pilot Projects program to identify, evaluate and disseminate innovative ways to prepare NEPA documents. Under this program, CEQ selected five pilot projects that would further NEPA's goals of transparency and informed decision making. The five pilot projects are:

- Assessing NEPA information technology (IT) tools to improve the efficiency and management of the federal environmental review process;
- NAEP's project to improve efficiency of environmental reviews through the development of "*Best Practice Principles for EAs*";
- Improving the efficiency of environmental reviews through the use of the Environmental Protection Agency's *NEPAssist* geospatial tool;
- Identifying efficiencies to expedite the Department of Transportation's [Federal Railroad Administration (FRA)] environmental review process for rail service in the Northeast Corridor;
- Facilitating and assessing the Forest Service's collaborative approach to forest restoration and the development of a *NEPA Best Practices for Forest Restoration Projects.*

During the Pilot Projects Program, CEQ collaborated with many federal agencies to modernize and reinvigorate NEPA implementation. Based on the results of the program, CEQ is providing the following ten points of advice to federal agencies and environmental professionals:

1. Agencies should refine and develop their NEPA management and pubic engagement IT tools by leveraging existing tools and working collaboratively across the federal government to ensure the compatibility of IT tools;
2. Agencies should have a suite of NEPA IT tools at their disposal and be able to choose which ones they need to meet their needs, depending on the project and step in the NEPA review process;
3. Agencies should review the *Best Practices Principles* for developing Environmental Assessments and incorporate them into their NEPA practices;
4. Agencies should provide comments to CEQ on which best practices should be incorporated into CEQ guidance;
5. Agencies should encourage the use of EPA NEPAssist geospatial too by program and project managers as well as NEPA practitioners;
6. Agencies should ensure their IT tools are compatible to ensure ease of use with NEPAssist;
7. Agencies should consider developing and using a recommended "*Statement of Principles*" in lieu of the more complex and time-intensive process of a formal Memorandum of Understanding (MOU) when developing interagency agreements with other federal, tribal, state or local governmental entities;
8. Agencies should review the *Final Best Practices Report* for the FRA's Northeast Corridor Future project when developing a large-scale (temporal and spatial) NEPA review;
9. Agencies should review the final reports for the Forest Service's pilot restoration projects and use the best practices when developing a large-scale NEPA review;
10. Agencies should optimize the use of collaborative stakeholder groups for developing and implementing monitoring for the impacts of proposed projects and the effectiveness of proposed mitigation measures.

While these recommendations themselves are quite general, the specifics found in individual pilot projects, including project-specific recommendations, best practice manuals, and case studies all contain more detailed and helpful advice. Copies of CEQ's report and links to the specific advice can be found on the CEQ NEPA website at www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/nepa-pilot-project.

7. Recent Congressional Legislation Regarding NEPA

Charles P. Nicholson, PhD[16]

7.1 Introduction

The 113th session of the U.S. Congress ended on January 3, 2015. During its term, at least 240 bills containing "National Environmental Policy Act" in their text were introduced. At least a quarter of these bills proposed some alteration of NEPA compliance requirements. Only a small portion of these bills were signed into law and these included few with major changes to established NEPA compliance processes.

The 114th session of Congress began on January 3, 2015 and by early March 2015 at least 50 bills addressing NEPA in some form had been introduced. These included several bills proposing major changes in NEPA compliance processes, some of which were reintroduced after failing in the 112th and/or 113th Congresses. As in the previous Congress, a large portion of those with substantive changes to NEPA requirements address energy development. The remainder of this article summarizes the NEPA-related legislation in the 113th session of Congress with emphasis on legislation that became law and on legislation introduced after early March 2014[17]. It then summarizes the NEPA-related legislation introduced in the first two months of the 114th session of Congress.

7.2 NEPA Legislation in the 113th Congress

A. Legislation Enacted-Categorical Exclusions

Few of the bills introduced in the 113th Congress that contained substantive NEPA provisions such as exempting actions from NEPA, categorically excluding specific proposed actions, or imposing restrictions on the development of EAs and EISs for specific actions became law. At least four that became law categorically exclude specific actions.

1. The "Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act" (H.R. 678, P.L. 113-24) directed the Bureau to "apply its categorical exclusion process" to certain small hydroelectric projects.
2. The "Agricultural Act of 2014" (H.R. 2642, P.L. 113-79) declares that certain collaborative forest restoration actions are categorically excluded from the requirements of NEPA and requires the Secretary of Agriculture to prepare an annual report on the use of categorical exclusions for these restoration actions.
3. The "Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act of 2014 (H.R. 3979, P.L. 113-291) categorically excludes the issuance of grazing permits and leases on public lands where the permits or leases continue the current grazing management and the department Secretary has determined the allotment meets applicable standards. It also categorically excludes the trailing and crossing of livestock on public lands. These exclusions

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[17] See the Annual NEPA Report 2013 for a summary of earlier NEPA legislation in the 113th session of Congress.

were included in the "Grazing Improvement Act (S. 258) which died in the Energy and Natural Resources Committee.

4. The "Water Resources Reform and Development Act of 2014" (H.R. 3080, P.L. 113-121; see below for additional NEPA provisions in this act) declares that the like-kind repair or reconstruction of water resources projects damaged by events that result in presidential disaster declarations are to be actions categorically excluded under 40 C.F.R. § 1508.4.

B. Legislation Enacted-Excluded Federal Actions

The "Bill Williams River Water Rights Settlement Act of 2014 (H.R. 4924, P.L. 113-233) declares that the implementation of specified water rights settlement agreements are subject to the requirements of NEPA but shall not constitute major federal actions. The "Howard Coble Coast Guard and Maritime Transportation Act of 2014" (S. 2444, P.L. 113-281) declares that the conveyance of a small tract of land to municipal ownership shall not be considered a major federal action for the purposes of NEPA. The "National Defense Authorization Act for Fiscal Year 2014" states that NEPA does not apply to the transfer of land in a Navy gunnery range to the Department of Interior and any associated decontamination actions.

C. Legislation Enacted-Review Timelines

The "Denali National Park Improvement Act" (S. 157, P.L. 113-33) sets a deadline of 180 days for completion of any required NEPA analyses after receipt of an application for specific small hydroelectric projects.

D. Legislation Enacted-Multiple Provisions

The "Water Resources Reform and Development Act of 2014" (H.R. 3080, P.L. 113-121) contains several provisions revising and establishing new requirements for the environmental review process for water resource projects. These include designating the U.S. Army Corps of Engineers as the federal lead agency, requiring the Secretary of the Army to issue guidance on programmatic approaches that eliminate duplicative efforts and promote collaboration with participating agencies, establish a plan for coordinating public and agency participation, establish default deadlines for comment including no more than 60 days for a DEIS and no more than 30 days for other comment periods, and identify and resolve any issues that could delay completion of the process. It expands financial penalties for failures of participating agency to complete their required approval or decision by established deadlines; this section is similar to Section 1306 – Accelerated Decisionmaking in MAP-21 (P.L. 112-141). The act also requires the Secretary of the Army to survey the use of categorical exclusions by the Corps since 2005, identify types of actions that are candidates for new categorical exclusions, and initiate the rulemaking process for establishing new categorical exclusions meeting the criteria of C.F.R. § 1508.4.

E. Proposed Legislation

Bills introduced during the second half of the 113th Congress with substantive NEPA provisions that failed to pass include the following:

H.R. 5358 would have amended NEPA to clarify that no federal agency is required to consider the social cost of carbon as a condition of NEPA compliance. This act is an apparent

reaction to High County Conservation Advocates vs. U.S. Forest Service district court ruling (13-cv-01723, (D. Colo., 06/17/2014).

S. 3017 would have established a categorical exclusion as defined in 40 C.F.R. § 1508.4 for specified sage grouse habitat management actions on federal lands.

H.R. 5167 and the similar S. 2684 would have made the conveyance of about 1,500 acres in the National Petroleum Reserve to an Alaskan Native Corporation exempt from NEPA. This bill passed the House.

H.R. 4272 and H.R. 5598 would require the Forest Service and Bureau of Land Management, respectively, to prepare an EA or EIS for any change in road or trail access.

H.R. 1363 would exempt certain geothermal energy exploration activities on federal lands from NEPA.

S. 2768 would categorically exclude certain hazardous fuel reduction actions of up to 10,000 acres on federal lands.

7.3 NEPA Legislation in the 114th Congress

The first bills affecting NEPA compliance to be considered in the 114th Congress were H.R. 3, the "Keystone XL Pipeline Act" and its companion S. 147, the "Keystone Pipeline Approval Act." These measures declared that the Final Supplemental EIS issued in January 2014 satisfied all NEPA requirements as well as all other federal consultation and review requirements. The measure was promptly vetoed and the attempt to override the veto failed in the Senate.

The swift passage of the Keystone Act may be indicative of action on NEPA-related legislation during the remainder of the 114th Congress. The introduction of H.R. 3 was quickly followed by the introduction of numerous bills, both new and reintroduced after failing in previous sessions, with substantive NEPA provisions.

The "RAPID" and "REBUILD" acts, both of which failed in the 112th and 113th Congresses, seek to shift NEPA responsibilities to non-federal actors. The RAPID Act (Responsibly and Professionally Invigorating Development" Act, H.R. 348) proposes to amend the Administrative Procedures Act to authorize federal agencies to allow states and other applicants to prepare their own EISs or EAs. It also requires all federal agencies responsible for approving a project to rely on the environmental document prepared by the lead agency and sets time limits for comment periods and for the completion of EISs and EAs. The 2015 version of the RAPID Act also contains a provision prohibiting agencies from using the social cost of carbon in any environmental decisionmaking process. The REBUILD ("Reducing Environmental Barriers to Unified Infrastructure and Land Development," H.R. 211) Act authorizes federal agencies to delegate their NEPA and other environmental responsibilities to states. The "Department of the Interior Tribal Self-Governance Act of 2015" (S. 286) also authorizes delegation of NEPA responsibilities. Subject to agreement by the Secretary of Interior, tribes could assume NEPA responsibilities and a tribal officer could assume the status of the responsible federal official for construction projects on tribal lands.

H.R. 161, the "Natural Gas Pipeline Permitting Reform Act," would set time limits on environmental reviews by requiring the Federal Energy Regulatory Commission to approve or deny proposed gas pipelines within one year of receiving a complete application (similar to provisions in the Deepwater Port Act of 1974 as amended by the Maritime Transportation Security Act of 2002; P.L. 107-295). A few bills would limit comment on EISs or EAs by placing time limits on comment periods, restrict who is eligible to comment, or prohibit the lead agency from addressing comments on alternatives other than the proposed action. H.R. 538, the "Native American Energy Act," for example, would limit the review of EISs for federal actions on tribal lands to members of the affected tribe and other residents of the affected area. The "Authorizing Alaska Production Act" (S. 494) and similar H.R. 339 limit the scope of alternatives in an EIS on Alaska oil leasing actions. H.R. 339 goes further to restrict consideration of public comments to the preferred action alternative and only if submitted within 20 days.

A few bills exempt actions from the requirements of NEPA. The reintroduced "Federal Land Freedom Act of 2015" (S. 490, H.R. 866) would allow states to control the development of all forms of energy on all available public lands. The state actions would not be considered federal actions under NEPA, the Endangered Species Act, the National Historic Preservation Act, or the Administrative Procedures Act. The "Secure Our Borders First Act of 2015" (H.R. 399, S. 208) would waive compliance with all environmental laws for the construction and operation of security measures on federal lands within 100 miles of international borders (similar to provisions in the REAL ID Act of 2005; P.L. 109–13). H.R. 564, the "Endangered Salmon and Fisheries Predation Act," reintroduced from the previous two sessions, would exempt the lethal take of California sea lions in the lower Columbia River. The "Water in the 21st Century Act" (H.R. 291, S. 176) would exempt loans and loan guarantees for water infrastructure projects made under a Bureau of Reclamation program established by the Act from NEPA.

H.R. 459, the "Planning for American Energy Act of 2015," proposes to greatly expand energy production on federal lands while greatly reducing NEPA compliance requirements. The Secretary of Interior, in consultation with the Secretary of Agriculture, would be required to develop a Quadrennial Federal Onshore Energy Production Strategy every four years and set production objectives for oil, natural gas, coal, strategic and critical energy minerals, helium, and renewable energy. The Secretary would then be required to take all necessary actions to achieve these targets. All NEPA requirements would be met by a single programmatic EIS completed within one year.

As in recent previous sessions, several bills seek to establish categorical exclusions. Some include the provision "as defined by C.F.R. 40 § 1508.4" indicating that extraordinary circumstances are applicable, while others omit this. S. 468, the "Sage-Grouse and Mule Deer Habitat Conservation and Restoration Act of 2015," is similar to S. 3017 in the 113th Congress except that it includes mule deer habitat management activities. S. 562, the "Geothermal Exploration Opportunities Act of 2015," would categorically exclude specified geothermal exploration actions, subject to C.F.R. 40 § 1508.4 and consideration of extraordinary circumstances. S. 411, the "Natural Gas Gathering Enhancement Act," would categorically exclude natural gas gathering lines and associated field compression units in disturbed areas or existing right-of-ways on federal lands with an approved land use plan or environmental

document that analyzed natural gas transportation. H.R. 695, the "Healthy Forest Management and Wildlife Prevention Act," would make certain emergency hazardous fuels reduction actions eligible for a categorical exclusion. EISs and EAs addressing emergency hazardous fuel reduction programs would not be required to have more than one action alternative.

A few bills expand NEPA requirements, sometimes in an apparent attempt to limit Presidential or agency actions or to require a more expansive impact analysis. The "Improved National Monument Designation Process Act" (S. 437), the "National Monument Designation Transparency and Accountability Act of 2015" (H.R. 900, S. 228), and the "Marine Access and State Transparency (MAST) ACT" (H.R. 330) complicate the designation of national monuments by making the designations subject to NEPA and requiring Congressional and state legislature approval. Similar bills had been introduced in the 112th and 113th Congresses. H.R. 394, the "Prevention of Escapement of Genetically Altered Salmon in the United States Act" and the similar S. 738 would prohibit the culture, release, shipment, or sale of genetically altered salmon except where the Secretary of Commerce considers it appropriate after completion of an EIS or EA. S. 585, the "American Natural Gas Security and Consumer Protection Act," would amend the Natural Gas Act (15 U.S.C. 717b) to require, among other things, that the Secretary of Energy issue an EIS on any authorization for the export of natural gas and that he EIS include an analysis of the impact of the extraction of the gas on the environment in communities where the natural gas is extracted.

7.4 Status of NEPA Legislation in the 114th Congress

As of mid-March 2015, the only bill with substantive NEPA provisions, except for the Keystone XL bills, to pass either the House or the Senate was H.R. 161, the "Natural Gas Pipeline Permitting Reform Act." This was also the only bill other than Keystone XL to receive a White House Office of Management and Budget Statement of Administration Policy with a veto recommendation. Given that veto recommendations were issued in recent years for a few bills with substantive NEPA provisions similar to others introduced in the 114th Congress, it is reasonable to expect more veto recommendations.

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8. Bill Cohen Summit Report

Ray Clark and David Mattern

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8.1 Background

The Bill Cohen NEPA Summit NEPA "Cohen Summit" convened some of the nation's top NEPA experts to identify both real and perceived problems with NEPA's implementation and to address solutions. The Summit was a tribute to the tireless work of Bill Cohen, a former Chief of Environmental Litigation at the Department of Justice, who taught in the Duke University NEPA Certificate Program for many years. The Summit is intended to be a three-part process: the first session on 2-4 December focused on identification of issues and began a series of roundtables to address systemic issues with implementation of NEPA and to highlight success stories.

This report is from the first phase of the Cohen Summit.

At the start of the Bill Cohen Summit, there were tributes to the life and work of Bill Cohen. Bill had worked at the Department of Justice as Chief of the Environmental Litigation Branch in the office of the Assistant Attorney General for Environment and Natural Resources. Later, he joined the Perkins-Coie law firm in Washington and taught classes at the Duke Environmental Leadership Program. Upon his death, Perkins-Coie and the entire Duke team raised money for the Bill Cohen Memorial Scholarship Program. This program aided students who wished to attend Duke NEPA classes, but were barred solely because of resources.

The Bill Cohen Summit was sponsored by Duke University Nicholas Institute for Environmental Policy Solutions, Perkins-Coie law firm, and The Environmental Law Institute. Bill was well known in all three of these communities and all wanted to honor his legacy in environmental law. But specific to the topic, all three institutions have an interest in seeing NEPA work better as a national policy.

8.2 Summit Workgroups

In order to focus efforts and encourage brainstorming, the Cohen Summit participants met in small workgroups to discuss five issues that they agreed were important areas of NEPA practice needing reform.[18] The workgroups then examined these agreed-upon problems in order to come up with consensual solutions and ideas.

[18] These issues are discussed in detail later in this report. They include Creative Concepts for Resourcing NEPA, Improving Document Preparation and Access, Improving Public and Agency Involvement, Ensuring Accountability for Mitigation and Monitoring, and Building a 21st Century Environmental Impact Evaluation Model.

The Summit participants agreed that the following five subjects were relevant, timely, and effective ways to improve NEPA practice:

- *Creative Concepts for Resourcing NEPA*: Because improving NEPA analyses requires more money, more people, or better use of existing resources, the participants discussed ways to increase the total amount of resources and/or to improve access to existing resources. The group is cognizant that the call for more money is unlikely to be heeded nor would it be a panacea. The conversation that began, however, was how to *invest* in NEPA implementation that could yield a more efficient implementation.
- *Improving Document Preparation and Access*: The participants agreed that improving document preparation and access would benefit the public (by making documents more readable/accessible) as well as agency staff and decision-makers (by making existing information easier to locate and use, and by making documents more readable). It included some bold ideas of restructuring how the documents are currently presented to the public.
- *Improving Public and Agency Involvement*: Because of a lack of timely public and agency involvement, the participants agreed that decisions are being made without all the relevant information and that the essence of the statute was to increase transparency in how decisions are made.
- *Ensuring Accountability for Mitigation and Monitoring*: This was a topic that was discussed throughout the Summit and the majority of participants agreed that unless mitigation efforts are required to be monitored, very little effective mitigation is actually taking place and a wealth of useful data is being lost, along with a trust in government decisions.
- *Building a 21st Century Environmental Impact Evaluation Model*: While this idea was put forth as a total reimagining of NEPA implementation as a fully iterative process for the 21st century, the workgroups focused on applying adaptive management as a technique to expedite the process, incorporating monitoring, and ensuring mitigation is executed. This one change would fundamentally alter the existing practices so that the practices improve and data are not lost.

8.2.1 Cross-Cutting Issues

Certain subjects that existed within all of the workgroup categories found almost universal agreement among the participants. These subjects generally addressed NEPA by looking at the people involved, resources available, and daily practices of NEPA practitioners, and were further analyzed by the Summit participants at the conclusion of the workgroup meetings.

8.2.2 People

Despite the fact that NEPA is analyzed in relation to documents, the Summit participants agreed NEPA is fundamentally about people involved in a process and a conversation, and that improving NEPA practice requires senior leadership and management support. Such support is critical to any success of a NEPA program and may be one of the top issues determining success. Examples were put forth by Summit participants to show that effective leadership could drastically impact the usefulness of NEPA and ensure that NEPA is being used to affect decision-making.

However, the participants realized that leadership alone is not enough to improve NEPA practices. A key issue the participants agreed upon was the fact that government staff need to develop the inherently governmental sections of NEPA documents such as the Purpose and Need. Ensuring this would lead to better staff understanding of the decision to be made and the reasonable alternatives, and would also ensure staff accountability.

Also, because so much NEPA work is contracted out to consultants, the Summit participants agreed that new forms of contractor accountability are needed in preparation of NEPA documents. Multiple options were discussed, and those that found consensus are discussed in the "Workgroups" section of this document.

Finally, the importance of communicating the benefits of the process to the next generation could not be stressed enough and a way must be found to make NEPA work for millennial so that the best students can be encouraged to become NEPA practitioners and further improve its workings.

8.2.3 Resources

Resources are very scarce in the federal agencies and resources for critical parts of the NEPA process are simply not being funded. Examples of underfunded areas include training, cooperating agency participation, effective public engagement, monitoring, and contractor oversight.

Throughout the Summit, participants expressed the need to have a central database of NEPA documents to eliminate duplication and enable data sharing. While databases are expensive to build, many agencies are building natural resource and environmental databases for reasons other than NEPA. In order to make the most of these efforts, they need a coordination policy to share data among agencies, particularly across agencies working in the same watershed, ecoregion, airshed, or with similar geographic-area-based functional characteristics. This would eliminate duplication, encourage use of the best science, and minimize per project costs.

8.2.4 Practice

While NEPA practices vary between (and even within) agencies and include a multitude of actions, decisions, and documents, certain practices are ripe for improvement and offer significant gains. For example, scoping is a tool to trim the bulk and unnecessary analysis, but is often not being used effectively. A change in the timing or method of scoping would eliminate impossible alternatives (and projects) early and offer access to alternatives that might not otherwise be considered.

Environmental Assessments represent around 4-5% of all NEPA analyses prepared (categorical exclusions are the most common form of NEPA analysis), and many of the EAs do not become Environmental Impact Statements because they conclude in a Mitigated Finding of No Significant Impact (FONSI). But, as of now, there is little to no oversight or monitoring of mitigation plans. Effective mitigation requires a commitment to monitoring whether a mitigation plan was implemented and whether that mitigation was effective.

New forms of scoping and a commitment to effective mitigation would make NEPA practice much more of an iterative process, which the majority of Summit participants agreed was lacking in current NEPA practice.

Key subjects developed in all workgroups were:

A. NEPA is fundamentally about people involved in a process.

B. Senior Leadership and Management Support is critical to any success of a NEPA program and may be one of the top issues determining success.

C. Resources are very scarce in the federal agencies and resources for critical parts of the NEPA process are not being funded: training, cooperating agency participation, effective public engagement, monitoring, and contractor oversight.

D. Effective mitigation requires a commitment to monitoring whether a mitigation was implemented and whether that mitigation was effective.

E. Scoping is a tool to trim the bulk and unnecessary analysis, but is often not being used effectively.

F. Databases are expensive to build, but many agencies are building natural resource and environmental databases for reasons other than NEPA. This effort needs a coordination policy to share data among agencies, particularly across agencies working in the same watershed, ecoregion, airshed, or similar type geographic-area-based functional characteristics.

G. EAs represent around 4-5% of all NEPA analyses prepared.

   i. Contractor accountability needed in preparation of EAs

   ii. Government staff need to develop the inherently governmental sections such as Purpose and Need

H. Need to have a central database of EAs to eliminate duplication and enable data sharing

I. Needs to be an iterative process for development

J. Importance of communicating the benefits of the process to the next generation—make NEPA work for millennials

8.3 Themes from the Summit

Immediately following the Summit, the authors of this report gathered to review notes and flip charts to try and synthesize the proceedings. This review found five themes that carried throughout the discussions at the Summit and that provide a useful means to both report on what transpired and to plan for next steps. The common themes developed from the Summit are:

A. Recommit Senior Leadership

B. Organize Government for Success

C. Invest in Streamlining

D. Maximize the Flexibility in the CEQ Regulations

E. Open government (transparency) as NEPA intended

Each theme is discussed below with reference to the Summit proceedings as well as additional supporting information.

8.3.1 Recommit Senior Leadership

In some quarters, NEPA has become a document to be prepared on the timeline of a project that is important to the agency leadership. However, NEPA is much more than a document, it is at the heart of what an agency stands for. It is intended to help decision-makers balance policy, programs, and projects with the needs of communities and the environment. To truly embrace the letter and spirit of the statute, the leadership of an agency must be engaged in its implementation. It is only the senior leadership that can commit an agency to the goals of Section 101. Without such commitment, it is difficult to imagine a path to fulfill the ideas contained in NEPA.

This essential issue crossed many work groups. It was cited by the work groups, surveys, and external reading material. All the attendees had read-ahead material that included a survey that was conducted by Ron Lamb. He led a survey conducted with NEPA practitioners and published these findings in the National Association of Environmental Professionals Journal in an article entitled "Essential Elements of Effective Implementation of NEPA-Agency Decision-making Process." The stark conclusion of this survey was that no other issue came close to the issue of senior leadership commitment. The highest ranked element (1. Critically important) was senior management support for the NEPA process. There was no substantive difference in responses from federal agency employees versus contractors. The top three responses were 1) senior management support for the NEPA process, to include the consideration of environmental impacts along with technical and economic considerations, 2) adequate funding for EAs/EISs or other program elements, and 3) an agency culture in which NEPA and related environmental staff can effectively participate in the decision-making process (Lamb, 2014).

At the plenary session, the idea of the creation of a Corporate Sustainability Officer (CSO) reporting to the Secretary or agency head who had purview over the entire law and the NEPA officer responsible for Section 102 analyses and documents would bring the attention the statute requires. Just how this might work, its precedents, and its parallels in industry, along with an analysis of its success can be the mission of one of the follow-on work resulting from the Summit.

There are things that can be done in the short term and should be done within this Administration. However, systemic fixes will take a longer time frame and to analyze in the next year, and can be brought to a new Administration during the transition phase.

8.3.2 Organize Government for Success

This also requires senior leadership and, as discussed above, there is a need to review the agencies' organizations for implementing NEPA and ensure that organizations at regional/field offices reflect alignment with the CSO chain of command and that NEPA staff in the field have access to senior level decision-makers. Common elements for agencies to consider are:

a. NEPA is interdisciplinary, but there should be certain requirements in education and training that is required (review of 0028 series, OPM hiring requirements).

b. The Office of General Counsel relationships to program management and interpretation of the requirements of NEPA should be reviewed.

The current organizational structure in most federal agencies does not lend itself to ensuring that key people are in the right position to influence decisions under NEPA. Many times, the environmental specialists managing and/or preparing the analysis to support the NEPA document are far removed from the decision-makers on the project, geographically or organizationally. Staff managing the NEPA process have been cut in many agencies and may have little or no experience or training in managing the NEPA process. Organizational placement can affect the integrity and value of the NEPA process for a given project or program.

8.3.2.1 Access to Decision-makers

Too often, decisions about the project or program under consideration are made outside of the NEPA process without any engagement or discussion of the decision with the resource experts or the NEPA project manager. This problem is the result, not only of program managers and decision-makers viewing NEPA as a check-the-box compliance requirement instead of a decision-making process, but also the result of the inherent organizational structure of the agencies.

In most agencies, NEPA staff are not organizationally co-located with the program staff that are the project proponents and/or decision-makers nor are they at a senior level to monitor the NEPA program. As a result, agency program staff and sometimes the NEPA staff tend to see their responsibilities as separate and distinct rather than as part of the integrated decision-making process that NEPA intended. Similarly, agencies are increasingly leaving the management of the NEPA process to junior-level field staff who have limited or no ability to communicate with the decision-makers both in the regions and at headquarters who will be actually making decisions based on the NEPA analyses that the NEPA staff are preparing. In turn, junior-level staff contract for the analyses to outside vendors.

8.3.2.2 Qualifications for Staff Managing the NEPA Process

Successfully managing a NEPA process requires a unique set of skills and abilities not currently reflected in the federal hiring process. Federal jobs are managed through the Office of Personnel Management (OPM) and are advertised and hired through a specific job category called a "series." Each "series" has its own requirements for individuals that want to apply for a position. Currently, most NEPA staff are hired as either an Environmental Protection Specialist (GS-0028 series) or for a specific technical discipline such as a Wildlife Biologist (GS-0486 series) or Environmental Engineer (GS-0819). While the specific technical disciplines and skill sets provide important skills for members of the interdisciplinary team that prepare NEPA analyses, the wildlife biologists and engineers do not necessarily have the management skills or experience necessary to oversee the NEPA process for the agency. The Environmental Protection Specialist series, therefore, seems to be a better fit for NEPA staff. However, not all NEPA processes are managed by Environmental Protection Specialists, and the GS-0028 series itself does not meet all of the key requirements necessary for effective NEPA managers. To remedy this problem, the

Cohen Summit seeks to explore the potential for either revising the GS-0028 series requirements or the creation of a new NEPA Specialist series.

8.3.2.3 Office of General Counsel (OGC) Involvement

General counsel offices within federal agencies understandably have the protection of the agency from litigation as one of their primary mission objectives. With 40 years of experience in case law interpreting NEPA to rely upon, the OGC staff are often reluctant to embrace new and creative ways of conducting the NEPA process. This is especially true in agencies where there is a long history of litigation such as the Forest Service and Department of Transportation. The result is that agencies are increasingly focused on trying to make their NEPA analyses litigation proof, which has resulted in incredibly lengthy documents and a misplaced focus on documentation instead of the decision-making process intended by NEPA. While the courts have given federal agencies incredible deference under NEPA and the CEQ regulations provide inherent flexibility in how to apply the statute, the fear of litigation has created an inherent tension between the creative and efficient application of the statute as a decision-making process and the OGC's desire to protect the agency from protracted litigation.

To combat this challenge, program staff and NEPA staff need to be able to work with OGC staff to weigh the pros and cons of decisions of how to implement NEPA for specific projects and programs. Differences of opinion as to the preferred approach should not be left to OGC staff alone unless the proposed approach is clearly in violation of the statute, regulations, or agency policy. NEPA is an incredibly flexible statute that leaves a lot of discretion to the agencies about how to implement it. A Chief Sustainability Officer could help to resolve any differences of opinion between OGC staff and NEPA or program staff.

8.3.3 Invest in "Streamlining"

While there is much talk and Congressional support for "streamlining" NEPA, there are few analyses with details regarding what investments may be required that would be more than a one-dimensional "do it faster." Few, if any, at the Summit thought that NEPA analyses should not be reviewed to make them more efficient. There are classical management techniques to make document production move faster. However, to gain these efficiencies and meet the spirit of the law, a more thorough analysis would include making the right investments to ensure performance for the dollars invested.

An investment in monitoring and adaptive management could actually reduce the amount of time required to complete an analysis. It could also bring a maturity to environmental impact analysis. As one of the attendees said in their pre-summit survey: "

> *"The NEPA process currently defines project development as a simple, linear process that does not match the gradual, iterative way decisions are actually made. In practice there is a lot of valuable evaluation and learning that takes place behind the scenes of the NEPA process as plans and designs move from initial concept towards practical proposals. Often this internal work will include some participation from environmental staff and possibly other agencies."*

There is pressure to get a document done at the cheapest price point. This really is often a stranded investment because all the predictions about long-range impacts are fraught with potential errors and all the mitigation that is promised is not delivered, and the mitigation that is delivered is not monitored to ensure its effectiveness. A better method may be to admit our prediction weaknesses, invest in a solid monitoring program, and set performance standards.

A new Administration can begin to put management metrics within the NEPA context, but it will take the Office of Management and Budget (OMB) to put emphasis on the budget and the management of NEPA implementation. OMB could require Purpose and Need statements for projects, which could accompany budget requests and should be the basis for the NEPA analysis. If these Purpose and Need statements cannot be delivered with a budget, there should be time limits for development of that Purpose and Need.

Discussion during the Summit continued these ideas citing the inefficiencies and delays that are basically caused by a lack of funding. Inadequate funding currently causes delays when there are too few staff and when the staff involved do not have sufficient training to manage the NEPA process efficiently. Because this condition is the baseline, simply having sufficient and consistent funding to fulfill existing requirements should improve performance and produce streamlining.

Developing a single, unified website and database for all NEPA evaluations and documents can facilitate inter-agency cooperation and public accessibility. Investing in a common database so agencies can share and draw on each other's NEPA records (similar to the suggestion from the workgroup on resourcing NEPA) was suggested, noting that currently agencies are not readily able to learn from others' experiences. Some specific investments to improve NEPA practice included:

- Research guide to NEPA (possibly underway at CEQ).
- Updated scoping guidelines that address modern technology and FACA.
- A single website for NEPA evaluations and documents that operates similar to "Regulations.gov" (similar to the suggestion from the workgroup on document preparation) that would include EISs, EAs, and Documented Categorical Exclusions (DCEs). This database could be first developed as a pilot project in specific regions.

8.3.4 Maximize the Flexibility of the CEQ Regulations

NEPA's brevity and focus on analysis and disclosure lend great flexibility to federal agencies—a characteristic that is preserved in CEQ's implementing regulations. While there are some prescriptive elements, primarily the requirement to conduct a thorough review of potential impacts to the environment, the program is easily adapted to accommodate projects of varying sizes, in different locations, involving both permitting and resource agencies, and for multiple audiences. NEPA's focus on analytical process rather than strict compliance with substantive standards makes it an ideal tool for iterative decision-making.

Certain aspects of implementation could be improved through use of web-based technologies for public engagement and mitigation that incorporates continued learning. For example, many agencies are building natural resource and environmental databases for reasons other than

NEPA. A central database would enable data sharing and help eliminate duplication, particularly across projects and programs in the same eco-region.

To be successful, this effort requires policy tools and guidance to direct agencies to coordinate and share data. Guidelines could be developed to encourage agencies to better utilize the expertise found in many colleges and universities or partner more effectively with non-governmental organizations (NGOs) that engage in "citizen science." Any materials developed should reflect NEPA's paramount objectives of inclusive, transparent, and informed decision-making, while demonstrating opportunities that maximize the program's inherent flexibility. For example, the necessity of CEQ guidance changes should be reviewed.

The CEQ regulations are now nearly 40 years old. When they were written, they were considered some of the best regulations in government. But as one of the authors of those regulations noted in a paper that was a read ahead for the Summit, the CEQ regulations were done only a couple of years after the invention of the first Apple computer. We have learned much about ecosystems in the last 40 years; we have learned much about how decisions are made; and we have learned much about how agencies will respond to the regulations.

The statute is constitutional in nature and can stand the test of time because it really is a reflection on American values and the "decency and dignity" of our federal government. However, the CEQ regulations, still very effective, have some systemic flaws. They do not recognize the equal status of American Indian tribes and that is significant enough reason for a change. However, other reasons are that the regulations never anticipated the wide use of Categorical Exclusions (and extensive documentation) and Environmental Assessments (and the offspring "mitigated FONSI"). Moreover, there has not been any attempts to incorporate lessons learned over the last 40 years. At the Summit, there was a recommendation to combine the Final EIS and Record of Decision. This suggestion alone could save time and money, while doing no harm to the NEPA process.

The regulations could actually slow the adoption of an adaptive management model. Legal counsels have argued that if an agency monitors under the adaptive management approach and finds inaccurate predictions, the agency would be penalized by having to conduct a supplemental analysis and give litigants a second shot at stopping a project.

In fact, one of the most important statements at the Summit about the regulations was "don't forget, there are 40 years of case law that go with those regulations." It is new regulations that could make monitoring and mitigation mandatory.

8.3.5 Open Government (transparency) as NEPA Intended

The Cohen Summit participants agreed that NEPA is supposed to promote transparency and that such transparency is one of the central tenets of NEPA. However, the participants also felt that current NEPA practice does not promote transparency to the degree that it could and should.

This is not a new problem, and the Administration and federal agencies have made efforts to improve and increase transparency in the past. Unfortunately, these efforts have yet to come to fruition and have yet to propagate through all agencies or into all decision-making. For example,

in March 2011, Katie Scharf, CEQ Deputy General Counsel, stated: "NEPA is, at its core, a transparency statute…" Prior to that, in February 2010, the CEQ proposed several steps to modernize and reinvigorate NEPA, in conjunction with its 40th Anniversary. These measures were designed to assist federal agencies to meet the goals of NEPA, enhance the quality of public involvement in governmental decisions relating to the environment, increase transparency, and ease implementation.

Despite these efforts, the participants at the Cohen Summit almost unanimously agreed that transparency is still lacking in NEPA, and this transparency impacts our understanding of exactly what NEPA analyses have been done, what has been learned from these analyses, and how these analyses have impacted decision-making. Reasons for this lack of transparency were offered, including that easy access to documents and information could induce more Freedom of Information Act requests, pose litigation risks, flood offices with inquiries seeking additional information, a lack of infrastructure to provide public access, and lack of leadership directing more transparency.

The Cohen Summit participants recognized that the lack of transparency in NEPA limits the ability of NEPA to influence decision-making, and makes analyses of NEPA itself problematic. While there are no easy solutions, the participants discussed possible improvements as a group and in smaller workgroups.

8.4 Future of Cohen Summit

The Bill Cohen Summit is the necessary start of a longer and more dynamic process. This report is the first tangible product but is not meant to be a definitive assessment or to offer recommendations.

The first step to moving into a dynamic second phase is the general acceptance of this report from the participants. This is not the report for finding better words to describe the Summit or provide better analysis of the issues. The reviewers of this report are in no way bound by the particulars because there is much more work to be done. However, any substantive error of omission or commission should be corrected. This report will be built upon by other groups.

Once this report has been accepted, we will develop a process to form small working groups to tackle specific issues. The reports from these groups will be incorporated into this initial report, as we build the case for change and what that change may entail.

Simultaneously, this report will be used to make the case to select foundations from which this work should continue. Sometime in the fall of 2015 a Bill Cohen Summit Phase II will be convened. From this Phase II, the vision to develop a professional report, which would include the 'thinking' of the professional NEPA community and recommendations for a new Administration in January 2017, would be finalized.

9. Recent NEPA Cases (2014)

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9.1 Introduction

In 2014, the U.S. Courts of Appeal issued 22 substantive decisions involving implementation of NEPA by federal agencies. The 22 cases involved 11 different departments and agencies. The federal agencies prevailed in 19.5 of the 22 cases (89 percent).

The U.S. Supreme Court issued no NEPA opinions in 2014; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, **Table 9-1** shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2014, by circuit. **Figure 9-1** is a map showing the states covered in each circuit court.

9.2 Statistics

The U.S. Department of Transportation (DOT) agencies came in first as the agency involved in the largest number of substantive NEPA cases in 2014 with seven cases (prevailed in all). Of those, FHWA was involved in five cases, with the Federal Aviation Administration (FAA) and Federal Transit Administration (FTA) each involved in one case. The U.S. Forest Service (USFS) placed second in 2014 with six substantive NEPA cases (did not prevail in one case).

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Table 9-1. Number of U.S. Courts of Appeal NEPA Cases, by year and by circuit

	U.S. Courts of Appeal Circuits												TOTAL
	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	
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**
TOTAL	**8**	**6**	**5**	**9**	**6**	**9**	**4**	**5**	**100**	**24**	**5**	**16**	**197**
	4%	3%	3%	4%	3%	4%	2%	3%	51%	12%	3%	8%	100%

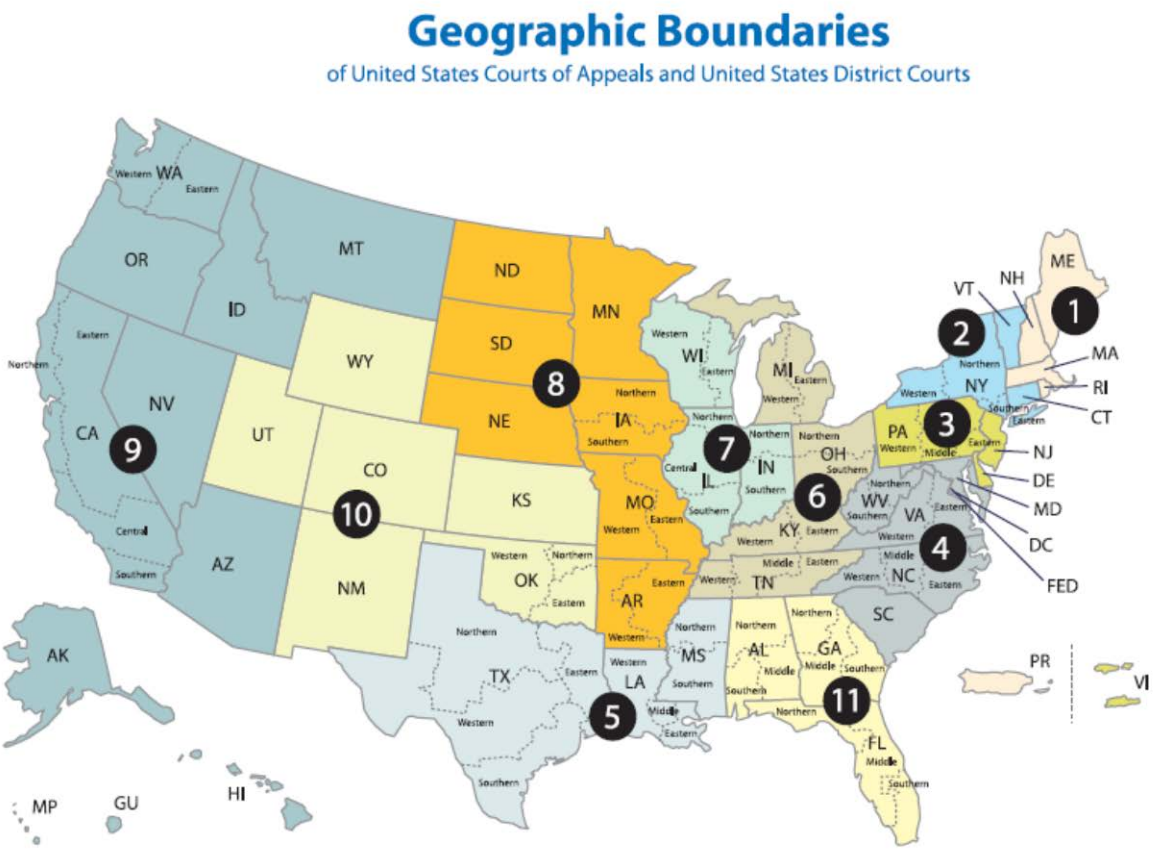

Figure 9-1. Map of U.S. Circuit Courts of Appeal

U.S. Department of the Interior agencies (Bureau of Ocean Energy Management [BOEM], BLM, Bureau of Reclamation [BOR], and U.S. Fish and Wildlife Service [FWS])were involved with five cases (prevailed in 4.5 cases), and the Federal Energy Regulatory Commission (FERC) was involved in two cases (prevailed in one case). The U.S. Army Corps of Engineers (USACE) and the U.S. Department of Energy (DOE) were each involved in one case and each prevailed.

Each of the 2014 NEPA cases, organized in alphabetical order by federal agency, is summarized below.

2014 NEPA Cases		
Case Name/Citation	**Agency**	**Decision / Holding**
U.S. Department of Agriculture		
***League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755 (9th Cir. 2014)**	USFS	**Agency did not prevail** (lower court decision affirmed in part and reversed in part). **Issues**: EIS, Supplementation, cumulative effects, "hard look" Plaintiff environmental groups challenged the adequacy of a final EIS prepared for the Snow Basin logging project in the Whitman Wallowa National Forest in northeast Oregon. After a Record of Decision (ROD) approving the project, plaintiffs sought to enjoin the timber sale on four NEPA grounds: 1) because the Forest's Travel Management Plan (TMP) had been withdrawn, the FEIS' reliance on the TMP in analyzing the impact of the project on certain species within the Forest was invalid, and a supplemental EIS must be completed; 2) the FEIS' failure to consider the cumulative effects of the 130-acre logging project in the correction notice was error; 3) the failure of the FEIS to analyze the cumulative effects of potentially increased stream temperatures and sedimentation was error; and 4) the FEIS did not properly explain why it found that bull trout were not present in the project area, and so did not analyze the project's impact on bull trout. Finding that the plaintiffs were likely to prevail on the first of their four claims (although none of the other three), the Court of Appeals reversed the district court's denial of a preliminary injunction and remanded the case to the district court with instructions to enter a preliminary injunction sufficient to protect the status quo while USFS completed a supplemental EIS. **Holding:** "A draft environmental impact statement ("EIS") was issued in March 2011, and the final EIS ("FEIS") was issued in March 2012. One way in which the FEIS differed from the draft EIS is that one segment of the project, about 170 acres of regenerative logging, had been removed from consideration in the FEIS. After the adoption of the FEIS, in April 2012, the Forest Supervisor withdrew the Forest's Travel Management Plan ("TMP"), which had proposed to regulate off-road motorized travel and reduce the amount of roads within the Forest, and which had been mentioned in addressing environmental harms from the logging project. In July 2012, the USFS issued a correction notice that said that "group selection" treatment was being considered for 130 of the 170 acres that had been removed from the draft EIS and not considered in the FEIS." *Supplemental EIS Claim.* "The Snow Basin FEIS opens its analysis of the project's impact on the area's elk population by stating that elk are the "most popular" big game in the area, and are "an indicator of the quality and diversity of the general forested habitat," but that "[d]isturbance due to roads is a major

2014 NEPA Cases		
Case Name/Citation	**Agency**	**Decision / Holding**
U.S. Department of Agriculture		
		factor influencing elk distribution." After surveying the existing status of the habitat, it begins its analysis of road density. It notes that three parcels within the project area currently exceed the recommended road density, but that the TMP, "will result in a net reduction of open roads within the project area, which will provide additional habitat that is free from disturbance from motor vehicles." It then goes on to say that, although the precise reduction in road density could not be quantified because the TMP was not final, the TMP would "result in a substantial improvement in elk security habitat in the Snow Basin project area." It also includes a table, which calculates the road density in all affected parcels under each alternative. At oral argument, USFS explained that this chart does not include the impact of the TMP within its calculations. Later, under separate header, the FEIS discusses the potential impacts of other foreseeable future projects, including fire thinning, cattle grazing, and the TMP." ". . . with the TMP now withdrawn, the USFS must prepare a supplemental EIS. Although parts of the USFS' analysis do not consider the TMP, as a whole, its review of the Snow Basin project's independent environmental impacts on elk and their habitat are interwoven with statements that explicitly rely upon the TMP to mitigate harms that the Snow Basin project will cause. When the public reviews an EIS to assess the environmental harms a project will cause and weighs them against the benefits of that project, the public should not be required to parse the agency's statements to determine how an area will be impacted, and particularly to determine which portions of the agency's analysis rely on accurate and up-to-date information, and which portions are no longer relevant." "This lack of clarity likely renders the EIS deficient. Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA. *See, e.g., Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (describing one of the purposes of NEPA as ensuring "that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.")(quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1034 (9th Cir. 2006) (noting that one of the purposes of NEPA is "ensuring that the public can both contribute to that body of information, and can access the information that is made public"). Without supplemental analysis of impacts absent the TMP, previously stressed in parts of the agency's assessment, the public would be at risk of proceeding on mistaken assumptions." *First Cumulative Impact Analysis Claim.* "[P]laintiffs have not shown that they are likely to prevail on their claim that the 130 acres of group selection treatment listed in the USFS' Correction Notice meet the standard for an identified proposal for which cumulative impacts analysis must be done. The USFS may have a goal, but the likelihood of proceeding on that goal and a timetable on any such action are not yet defined. More importantly, there is no indication that the USFS "is actively preparing to make a decision," 36 C.F.R. § 220.4(a)(1), but rather, they have disclaimed any intention to move forward on that logging in any particular time frame. As the record now stands, the USFS

2014 NEPA Cases		
Case Name/Citation	**Agency**	**Decision / Holding**
U.S. Department of Agriculture		
		may permit this logging, or it may not take any action at all. Environmental impacts of this possibility are at present inchoate and to a degree speculative." *Second Cumulative Impacts Claim*. Plaintiffs argue that the FEIS did not consider the symbiotic relationship between increased sediment in the streams that flow through the project area and the pre-existing thermal stress that the stream's high temperatures place on the fish that inhabit the streams. The EIS notes that both Little Eagle Creek and Eagle Creek exceed their target temperatures, which results in harms for both migration and spawning. It also notes that logging could add low to moderate amounts of sediment to those same streams. However, the plaintiffs' allegation misapplies the cumulative impact test. Because the project will not have any impact on stream temperatures, any thermal stress on the fish is a part of the project's environmental baseline. Therefore, no cumulative effects analysis is required, and the LOWD plaintiffs have not shown that they are likely to prevail on this claim. *Bull Trout Analysis Claim*. "In the FEIS, the USFS cited to a study of the project area by the Oregon Department of Fish and Wildlife. The Oregon study indicates that, although bull trout were "common" in Eagle Creek in the 1940s and '50s and continued to be documented there through the 1980s, snorkeling surveys conducted between 1991 and 1994 failed to find bull trout in Eagle Creek. The EIS concludes that "[b]ull trout have likely been extirpated from the Eagle Creek system since the 1990s," and as a result, the EIS does not analyze the impact of the Snow Basin project on bull trout. While the FEIS does not engage with existing contrary scientific opinions about the potential presence of bull trout in Eagle Creek, it included all of the relevant scientific data and contains sufficient information to let the public make an informed determination of the environmental impacts of the Snow Basin project." Plaintiffs argued that the data relied on by USFS regarding bull trout were too vague or stale to support the conclusions drawn from it and that the hard look standard required the agency to conduct new scientific studies in order to fully and fairly analyze the impacts of the project. While recognizing that the snorkel surveys were more than 15 years old, the court found that there was no reliable evidence that showed their results were likely incorrect or that the status of bull trout in the project area had changed over time, so we cannot say that the USFWS and USFS' reliance on the surveys was arbitrary and capricious."
***Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036 (10th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, Alternatives analysis, "hard look" Environmental groups interested in species and habitat protection in Black Hills National Forest brought actions against USFS and several of its officials challenging various decisions related to management. The environmental groups contended the USFS violated NEPA in three ways: by failing to (1) consider a reasonable range of alternatives in the Final EIS because it did not include a "no grazing" alternative; (2) take a "hard look" at how the Phase II Amendment would affect sedimentation in the BHNF's waterways, including how the sedimentation might affect sensitive plants and aquatic fauna; and (3) take a "hard look" at historical grazing practices before re-authorizing grazing use in the Phase II Amendment.

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		Holding: In a lengthy decision, with a brief analysis of NEPA, the Tenth Circuit held : "The scope of the Phase II Amendment did not call for consideration of a no grazing alternative. After "an agency establishes the objective of the proposed action ... the agency need not provide a detailed study of alternatives that do not accomplish that purpose or objective." In the second challenge, the court found that the USFS mitigated the impacts of sedimentation in lakes and streams caused by livestock, timber harvesting, mining, road construction, and recreation. The record indicated otherwise. The court found that the USFS looked hard at how the its plans would mitigate sedimentation and concluded the USFS made a reasoned evaluation of how the Watershed Conservation Practices Handbook and the Best Management Practices (BMPs) would mitigate sedimentation under the Phase II Amendment. In its final challenge, the environmental groups argued that the USFS violated NEPA by failing to take a "hard look" at the effects of past grazing projects before approving four site-specific grazing projects. The court found that even if the Forest Service were required to consider past grazing practices for the four site-specific projects, the record indicates it did so, and met the hard look requirement.
***Biodiversity Conservation Alliance v. U.S. Forest Service*, 765 F.3d 1264 (10th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed). **Issues**: EA, "hard look," extent to which impacts are highly controversial Plaintiff environmental group, Biodiversity Conservation Alliance (BCA), challenged a USFS decision modifying trail use in Medicine Bow National Forest in southern Wyoming. The agency formally closed several hundred miles of unauthorized motorized trails, but allowed motorcycle use on the Albany Trail, an approximately five-mile trail in the Middle Fork Inventoried Roadless Area (Middle Fork IRA), and several connecting trails. Plaintiff argued that USFS did not properly consider the impacts on wetlands and non-motorized recreation in reaching its decision, and should have found that significant impacts required the preparation of an EIS. Specifically, plaintiff claimed that USFS failed to take a hard look at the impact on wetland areas known as fens and failed to acknowledge a substantial controversy regarding the effect on non-motorized recreation such as hiking and wildlife viewing. **Holding**: The court found that the EA adequately supported its finding that the proposed decision would have no significant impacts on wetlands or other users of the Middle Fork IRA. Impact on Fens. "As an initial matter, the Forest Service recognized that there are six potential fens within the project area and the Albany Trail crosses three of them. According to the Forest Service's Biological Assessment, "[m]otorized trail use can change soil properties and infiltration of precipitation thus changing the growing environment for plants. Recreational use within wetland/fen areas could remove and/or injure plants, alter soil properties, change the hydrologic regime and/or reduce the overall vigor of round leaf sundew." But the Forest Service concluded that the damage had already been done . . . [Plaintiff's] argument, in essence, asks the Forest Service to assume

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		the Albany Trail never existed as a baseline for the NEPA analysis." However, the court concluded that "the Forest Service properly employed existing usage as the basis for its no-action alternative and the point of reference for measuring significant impacts." The court also rejected plaintiff's argument that USFS was required to conduct additional on-site visits to the affected fens and perform full botanical surveys. "But NEPA does not require the agency to use particular methodologies, and BCA does not point to any case law suggesting that an agency cannot take a hard look at the impact on a particular site unless both botanists and wildlife specialists conduct on-site visits. NEPA grants substantial discretion to an agency to determine how best to gather and assess information…. And, because the question is whether the agency's decision was arbitrary and capricious, we look to whether the agency's chosen method is sound, not whether there are competing methods that might work as well. Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205, 1212-1213 (10th Cir. 2002) "[C]ourts are not in a position to decide the propriety of competing methodologies, but should simply determine whether the challenged method had a rational basis and took into consideration the relevant factors." . . . The Forest Service's chosen method here allowed it to soundly evaluate the impact on fens . . . Given the deference we owe the Forest Service, we cannot conclude that, absent reasons to question the Forest Service's factual findings, the failure to provide additional study renders the Albany Trail decision arbitrary and capricious." With respect to the obligation to look at the impact on adjacent fens, plaintiff argued that the agency "failed to consider the likelihood that opening the Albany Trail would draw additional motorcyclists, who would in turn create new unauthorized routes across fens in other parts of the Middle Fork IRA…. Absent countervailing evidence in the record, we can conclude from the EA that the Forest Service took a hard look at the relevant information and determined that opening motorized trails would slow the creation of unauthorized routes in the area and, accordingly, the impact on fens in other parts of the Middle Fork IRA." Plaintiff also argued that the decision had a significant impact because the degree to which the effects on the environment are "highly controversial." The court recognized that "[c]ontroversy in the NEPA context does not necessarily denote public opposition to a proposed action, but a substantial dispute as to the size, nature, or effect of the action." *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002). Further, "[a] substantial dispute can be found, for example, when other information in the record "cast[s] substantial doubt on the adequacy of the agency's methodology and data." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012). BCA can point to no evidence in the record contradicting the conclusion that the Proposed Alternative and Alternative 2 would have significantly similar impacts on recreation user conflicts. Instead, [plaintiff] argues that there is not enough evidence in the record to support that conclusion. But a dearth of factual information cannot serve as proof of a dispute . . . Although the Forest Service's analysis does not involve the kind of empirical inquiry for which [plaintiff] had hoped, we cannot overturn the agency's conclusion simply because it is based on forest managers'

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		observations of visitor behavior and common sense—especially since unauthorized usage is particularly difficult to measure."
***American Whitewater v. Tidwell*, 770 F.3d 1108 (4th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed). **Issue**: EA, speculation, "fly-specking" In 2012, USFS revised its management plan for the Headwaters of the Chattooga River to allow non-motorized rafting (floating) on most of the Headwaters during the winter months, when flows are highest and conditions are best. Plaintiff environmental groups challenged the plan as inconsistent with the Wild and Scenic Rivers Act; two intervening parties (Georgia ForestWatch and the Rust Family who are landowners along the river) argued that the USFS decision to allow any floating violates NEPA. **Holding:** With respect to the NEPA claim, the court stated: "The Rusts also argue that the Forest Service violated NEPA by failing to analyze the risk that opening portions of the Headwaters to floating could lead to trespass on Rust property. They insist that floaters are likely to attempt to reach the River by crossing their property illicitly, instead of using the trails and parking lots already available to the public. The district court correctly held that this prospect is so speculative that no NEPA analysis is required." "NEPA encourages conservation not by imposing substantive obligations on agencies, but by requiring that agencies consider the environmental consequences of their actions and present them to the public for debate. *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184-185 (4th Cir. 2005). Accordingly, our review under NEPA is limited to ensuring that an agency has taken a "hard look" at the environmental impacts of a proposed action. *Id.* at 185. Moreover — and dispositive here — an agency need consider only the "reasonably foreseeable" effects of its decisions. *See Webster*, 685 F.3d at 429 ("[A]lthough agencies must take into account effects that are reasonably foreseeable, they generally need not do so with effects that are merely speculative."); *see also* 40 C.F.R. § 1508.8. Any possible increase in the risk of trespass on the Rusts' land does not meet this standard." "Even assuming that a heightened risk of trespass was reasonably foreseeable, the Forest Service's discussion of that risk satisfies NEPA. The Forest Service presented the Rusts' concerns to the public and explained that they were addressed by the continued ban on floating above Green's Creek, and the Rusts' property. In this context, that discussion was sufficient; agencies have discretion to determine which issues merit detailed discussion, and here the risk of trespass or any associated environmental impact was not so significant that more was required. *See Nat'l Audubon Soc'y*, 422 F.3d at 186 ("A 'hard look' is necessarily contextual."); *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) ("Detailed analysis is required only where impacts are likely."). Review under NEPA is not a vehicle for "flyspeck[ing]" agency analysis and discussion, *Nat'l Audubon Soc'y*, 422 F.3d at 186, and we find that the Forest Service has met its NEPA obligations."

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***Alliance for the Wild Rockies v. U.S. Dep't of Agriculture,* 772 F.3d 592 (9th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed on NEPA claim). **Issue**: EIS, supplementation In 2011, plaintiffs challenged a USFS 2008 Management Plan and 2011 annual decision to permit recurring low-altitude helicopter flights that harass Yellowstone grizzly bears, during spring and summer bear season, over National Forest lands in the Yellowstone Grizzly Bear Recovery Zone. Plaintiffs claimed that USFS decision to permit the flights to haze bison in the Yellowstone Grizzly Bear Recovery Zone violated NEPA (and ESA) because the USFS failed to undertake the proper procedures for reevaluating the effect of helicopter hazing on Yellowstone grizzly bears. USFS and other agencies had completed an EIS and biological assessment prior to approval of an Interagency Bison Management Plan in 2000 to allow hazing in order to minimize disease transfer between bison and livestock. Although the court reversed the lower court's finding that plaintiff environmental groups lacked standing to bring its NEPA claim, the court affirmed the grant of summary judgment to USFS (and multiple other federal and state agencies) on the NEPA claim. **Holding:** The Management Plan's 2000 EIS adequately analyzed the impacts of helicopter hazing on grizzly bears and USFS was not required to prepare a supplemental EIS. "Once an original EIS has been completed, NEPA requires that agencies perform a supplemental EIS whenever "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns or [] [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1); *see also Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 560 (9th Cir. 2006). An impact on a threatened or endangered species is a factor that can give rise to the requirement to perform a supplemental EIS. 40 C.F.R. § 1508.27(b)(9). "In support of its claim that the federal defendants are required to prepare a supplemental EIS, [plaintiffs] alleges three significant new circumstances or information" pertaining to the Management Plan. First, while the final EIS for the Management Plan indicated that hazing impacts on Yellowstone grizzly bears would end in April or May, helicopter hazing now extends into June and July. Second, although the final EIS contemplated that Yellowstone grizzly bears would be denning, or at higher elevations, during hazing operations, "most hazing now occurs after denning and den emergence, and grizzly bears are consistently present in the lower elevation areas where hazing occurs during most hazing operations." Third, the final EIS indicated that hazing would be stopped if there was evidence of Yellowstone grizzly bear activity in the hazing operation area, but hazing operations remain ongoing despite such actions. Because the federal defendants' considered these issues during the initial final EIS process, we affirm the district court's grant of summary judgment to the federal defendants." "Accordingly, we hold that the federal defendants considered the possibility of extended helicopter hazing and encounters with Yellowstone grizzly bears in the initial EIS and, thus, the information presented by Alliance does not establish a substantial change in the proposed action nor significant new circumstances or information requiring the federal defendants to supplement the EIS."

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***Conservation Congress v. Finley*, 774 F.3d 611 (9th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed). **Issue**: EIS, "hard look" Plaintiff environmental group challenged a USFS lumber thinning and fuel reduction project in northern California, known as the Beaverslide Project. The project's two main purposes are to protect against the current risk of wildfires due to the dense forest, and to provide a sustainable, long-term timber supply to local communities. The project calls for commercial thinning of trees, reduction of fuels, and the creation of fuel corridors, among other treatments. The project has the potential to affect the Northern Spotted Owl. USFS had prepared an EIS in 2009, and a Supplemental EIS in 2010. **Holding**: "[Plaintiff] contends that the Forest Service violated NEPA because its two issued EISs failed to take the requisite "hard look" at information in the 2011 Recovery Plan describing potential short-term effects to the Northern Spotted Owl and the threat of barred owls. However, the two EISs prepared by the Forest Service contain full and fair discussions of possible short-term effects to the owl. Indeed, the Forest Service devotes entire sections of its reports to analyzing the project's possible consequences to the owl's habitat and to the owl's most common prey. This analysis includes discussion of numerous short-term effects. Likewise, the EISs directly respond to concerns about barred owls by discussing findings on whether barred owls are present in the project area, and how the project affects the barred owl threat. We therefore agree with the district court that the Forest Service took the requisite "hard look" at potential dangers to the Northern Spotted Owl and, using its expertise and discretion, reached its conclusion through a reasoned analysis."

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***Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, 746 F.3d 698 (6th Cir. 2014)**	USACE	**Agency prevailed** (lower court decision affirmed). **Issues**: EA, agency discretion, and small federal handle (applicant proposal) This appeal involved two environmental and citizen groups', Kentuckians for the Commonwealth and the Sierra Club, opposition to the issuance of a Clean Water Act (CWA) § 404 dredge and fill permit in Perry County, Kentucky. The Army Corps of Engineers granted a mining company, Leeco, Inc., a permit to discharge dredged or fill materials into navigable waters. In early 2007, the mining company submitted an application to the Corps for a secondary permit to discharge of fill material into streambeds, as required by § 404 of the CWA as part of its overall mining project. In 2009, the Corps, the EPA and the Department of the Interior instituted an agency plan that intended to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, with extensive comments by the EPA outlining concerns with water quality, mitigation attempts, and human health impacts on the low income surrounding communities. After the mining company addressed various concerns and implemented strategies outlined by the EPA, the Corps

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		issued an EA finding "no significant impact" and issued the §404 permit in 2012." **Holding**: The citizen groups lost their case in the lower courts when they challenged both the issuance of the permit as violating both NEPA and the CWA, and dismissed the lawsuit. On appeal, among other CWA objections, the citizen groups challenged the Corps decision to issue the § 404 permit, asserting that the Corps abused its discretion by failing to consider the public health effects of the overall mining activity in conducting its NEPA review of the environ-mental effects of granting the § 404 permit. The Corps did not violate NEPA by deciding not to consider the evidence linking surface coal mining in general to public health consequences of granting the § 404 permit, the Corps properly focused on the possible public health effects of discharges on the local water supply as well as those effects caused by air pollution created by the machines that would be conducting the permit-relevant site preparation and operations. The Corps reasonably limited its scope of review to the effects proximately caused by the specific activities that were authorized by the permit. More importantly, the Corps complied with the relevant regulations interpreting and implementing NEPA's requirements. The Corps did not entirely ignore the health effects of granting the permit, but rather reasonably limited its scope of analysis only to those human health effects closely related to the discharge of fill or dredged material into jurisdictional streambeds. The Sixth Circuit found that the Corps acted without abusing its discretion when it determined that the scope of its NEPA analysis should be limited to the local, proximate effects of the dredging and filling activities that were specifically authorized by the permit. The court determined the lower court correct determined that, given the Corps' relatively minor role in the congressional designed scheme for regulating surface mining, the Corps did not have sufficient control and responsibility over other aspects of surface mining operation to warrant expanding the scope of its NEPA review. The court held that the Corps was entitled to substantial deference with regard to its determination that the district engineer lacked "sufficient control and responsibility" to warrant review of the other portions of the mining project. The court discussed that the restriction for the Corps' scope of analysis is consistent with the congressional policy to give to state governments the primary responsibility to regulate overall surface mining operations. In reviewing the Corps decision to issue a FONSI, the court found that the content of the analysis was rational and appeared to be thorough. The Corps reasonably complied with its own regulations, adequately studied the issues and took a hard look at the environmental consequences of the action, and did not act arbitrarily and capriciously.

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***Klein v. U.S. Department of Energy*, 753 F.3d 576 (6th Cir. 2014)**	DOE	**Agency prevailed** (lower court decision on NEPA issue affirmed). **Issues**: EA, alternatives analysis, no significant impact finding In connection with an alternative energy program created by Congress, Frontier Renewable Resources sought funding from DOE to build a plant in the Upper Peninsula of Michigan that would convert lumber into ethanol. Plaintiffs (individual and Sierra Club) sued to stop the project, claiming that DOE failed to comply with NEPA when it prepared an EA for the project and found no significant environmental impact. **Holding**: "In carrying out [NEPA], the agency has considerable discretion. Courts review an agency's actions under the Act through the deferential lens of the "arbitrary" and "capricious" standard. 5 U.S.C. § 706(2)(A). Through "searching and careful" review, *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989), they ask whether the agency "adequately studied the issue and [took] a hard look at the environmental consequences of its decision," not whether the agency correctly assessed the proposal's environmental impacts. *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006) (quotation omitted). "The Department's environmental assessment—over 400 pages in length—meets this deferential standard. The assessment explained that the Department's funding of the plant will carry out the requirements of the Energy Policy Act, which aim to reduce dependence on fossil fuels by commercializing alternative renewable energy sources. It considered the plant's potential impacts on forest resources, threatened and endangered species, land use patterns, cultural resources, weather, air quality, soil quality, water quality, landfills, worker safety, noise, traffic, environmental justice and aesthetics. And it listed the public participants in the assessment, including the Fish and Wildlife Service, the Michigan Department of Transportation, the Inter-Tribal Council of Michigan and an assortment of individuals who submitted comments." "Through 400 pages of analysis, the Department took a "hard look" at the environmental impacts the Frontier plant will cause and decided that those impacts did not call for a full environmental impact study. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As a matter of process and substance, this decision was neither arbitrary nor capricious. *See Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 506 (6th Cir. 1995) (upholding an agency's decision "to dispense with a full-scale environmental impact statement" reached through an "extensive environmental assessment process")." "The plaintiffs offer several competing arguments. First, they note that the Department considered only one alternative to funding the Frontier plant: not funding it. An agency in general has wide discretion to choose the alternatives to evaluate in light of the project's purpose and environmental impacts. That is particularly true when an agency decides to prepare only an environmental assessment, which makes any "duty to consider environment-friendly alternatives" "less pressing." *Save Our Cumberland Mountains*, 453 F.3d at 342.

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		"In this instance, the Department's assessment considered, explicitly and implicitly, other possibilities. It explicitly made the mitigation measures discussed in the environmental assessment binding on Frontier through the funding agreement. That of course goes beyond just saying "yes" or "no" to a funding request. The Department also implicitly considered other alternatives. It described the three alternative sites that Frontier Renewable Resources considered for the plant. It studied the environmental impacts of a 40 million gallon per year plant, even though the federal funds supported only the 20 million gallon per year plant Frontier plans to build initially. In acknowledging that demand for some hardwoods (such as aspen) exceeds demand for others (such as basswood and oak), it explained that Frontier may vary the types of hardwood used as feedstock to avoid depleting in-demand trees. And it estimated the environmental impacts of trucking supplies to the plant to come up with a "worst case scenario," though Frontier plans to bring supplies in by train. That is not an analysis preoccupied with one option." "To the extent the plaintiffs mean to suggest that the assessment should have considered a different type of plant as an alternative, the Department had no obligation to do so. An agency must consider alternatives "within the ambit of an existing standard—say, a different scope of operation or additional mitigation measures." *Id.* at 347 (internal quotation marks omitted). An agency need not consider "a policy alternative generally—say, energy conservation in the context of a surface mining application." *Id.* (internal quotation marks omitted). An alternative such as a different type of plant, say one that uses "canary grass" as its feedstock, falls within this latter category. Frontier applied for funding to build a plant that used hardwood as its feedstock because it had developed the technology to produce cellulosic ethanol from that feedstock. A plant with a different feedstock, one Frontier could not convert to cellulosic ethanol, exceeds the "reasonable alternatives" the Department had to assess. *Save Our Cumberland Mountains*, 453 F.3d at 346." "Second, the plaintiffs argue that the assessment did not adequately discuss the project's environmental impacts or mitigation measures. As for environmental impacts, the plaintiffs argue that the Department failed to consider the plant's impacts on forest resources, on habitats for certain species and on greenhouse gas emissions. The assessment adequately discussed each impact." "As for mitigation measures, the plaintiffs claim that those discussed in the assessment are speculative or unenforceable. Speculative is an unfair description of some of the measures. Most stem from federal or state permitting requirements. Because construction of the plant requires developing 50 acres of undeveloped land, for example, the Michigan Department of Environmental Quality will require a soil erosion and sedimentation control plan before granting a construction permit. Those plans "incorporate best management practices . . . to prevent sedimentation impacts." The assessment in other words discusses future requirements the plant will have to meet to secure construction and operation permits. That those permitting requirements will take effect sometime in the future does not alter the reality that they must take effect before construction and operation (and the resulting environmental impacts) could begin. That makes the requirements certain, not speculative. *Cf. Robertson*, 490 U.S. at 352–53 (explaining that the mitigation discussion in an

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		environmental impact statement need not contain a "complete mitigation plan," especially where impacts "cannot be mitigated unless nonfederal government agencies [with jurisdiction over those effects] take appropriate action"). "Third, the plaintiffs claim that the Department should have supplemented the assessment in light of a press release announcing Frontier's partnership with Valero Energy Corporation in December 2011 issued five months after the no-significant-impact finding. Through this deal, Valero obtained an "option to expand the [plant] to up to 80 million gallons per year." An agency must supplement an environmental impact statement in light of "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) (quoting 40 C.F.R. § 1502.9(c)(1)). Assuming for the sake of argument that the same rule applies to environmental assessments, any complaint about a supplemental environmental assessment is moot. Valero, as the parties all acknowledge, recently abandoned its partnership with Frontier. The Department need not supplement its environmental assessment to account for an unplanned expansion." "Fourth, the plaintiffs argue that the assessment raised sufficient concerns to require the preparation of an environmental impact statement. The relevant regulations define "significantly" (as in "significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C)) by reference to ten "intensity" factors. 40 C.F.R. § 1508.27. The plaintiffs claim that the ten factors show that the plant will significantly affect the human environment. While the ten factors may show that the Department could have prepared an environmental impact statement, they do not show that the Department acted arbitrarily and capriciously in not completing one." "In the final analysis, the Department completed a thorough environmental assessment of the Frontier plant and reasonably described the environmental impacts the assessment identifies as not significant. The National Environmental Policy Act requires no more."

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***Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014)**	BOEM	**Agency prevailed on first NEPA claim**, but **did not prevail on second NEPA claim** (lower court decision reversed). **Issues**: EIS, 40 C.F.R. § 1502.22 Incomplete or unavailable information (phasing), impact analysis flawed Environmental advocacy groups brought action against the Secretary of the Interior, the Bureau of Energy Management (BOEM) and its Director. The case involved a prospective lease of oil and gas development in the Chukchi Sea off the northwest coast of Alaska. The parcels available for lease were known as Lease Sale 193. BOEM prepared an FEIS analyzing the environmental effects of the proposed leases, basing its environmental analysis on the assumption that

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		if oil development actually occurs, one billion barrels of oil will be economically recoverable. The advocacy groups challenged the EIS of the proposed lease of federal land for offshore oil and gas development under NEPA on six grounds. The lower court, after an initial remand, found that both the EIS and SEIS satisfied the requirements of NEPA. The advocacy groups appealed, and argued that the agency abused its discretion on two grounds: (1) that essential information is missing in the FEIS and SEIS, and (2) that the FEIS and SEIS underestimated the adverse environmental impact of the lease sale because BOEM applied an unrealistically low estimate of the economically recoverable oil. The advocacy groups argued that "essential" information was missing from the FEIS, as much of the missing information concerned animal populations affected by oil exploration and production under the leases. The missing information included population of animals in the Chukchi Seas, including endangered or threatened animals. BOEM, in the SEIS, concluded that sufficient protections would be provided by the requirements of the CAA, the MMPA, ESA and by the requirement by NEPA to provide site-specific analyses at later stage of development. **Holding**: "An agency's obligation involving incomplete or unavailable information is instructed by the regulatory requirements of 40 C.F. R. § 1502.22." The court discussed the regulatory requirements of 40 C.F.R. § 1502.22, and found that "[W]hile certain information may, in fact, be essential at a later stage of OCS lands Act [OSCLA review], such information may not be essential to a reasoned choice among alternatives at the lease sale stage." The court found that a "lease sale under the OCSLA is analogous to a "programmatic plan." The required level of analysis in an EIS is different for programmatic and site specific plans. The court further analyzed that: > Regardless of whether a programmatic or site-specific plan is at issue, NEPA requires an EIS analysis of environmental consequences of a proposed plan as soon as it is "reasonably possible" to do so . . . This is not to say an agency must provide the most extensive environmental analysis possible at the earliest possible moment, for an agency has some flexibility in deciding the level of analysis to be performed at a particular stage. We will defer to the agency's judgment about the appropriate level of analysis so along as the EIS provides as much environmental analysis as is reasonably possible under the circumstances, thereby "providing sufficient detail to foster informed decision-making" at the stage in questions." The court found that BOEM reasonably concluded that the missing information from the FEIS and SEIS was not "essential to the informed decision-making" at the lease sale stage. It agreed with BOEM that compliance with statutes, such as MMPA and ESA, provide protection for animals covered by those statutes. It agreed with BOEM that further environmental analysis would be appropriate at a later stage, "when a project proponent actually submits a plan."

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		But, the court found that BOEM chose an arbitrary number for the total barrels of economically recoverable oil from Lease Sale 193, of one billion barrels. It found that BOEM did not articulate a rational basis for its decision to use the one billion barrel estimate. The estimate was in dispute between environmental planning personnel, and that the agency personnel rejected a range of barrels, classifying the range as "too broad." Several BOEM employees expressed concern in the record. The court also found that the agency did not use a reasoned methodology for its basis in choosing the estimate. In addition, numerous commenters to the DEIS expressed concern about the scenario BOEM had developed, including the EPA. FWS also challenged the one billion barrel estimate as inaccurate. FWS recommended that BOEM not proceed with the lease sale until problems with the EIS were corrected. Despite the criticisms, BOEM instructed FWS to rely on that estimate in the analysis of whether the lease sale would jeopardize listed threatened species. The court found that BOEM did not justify its choice of the lowest possible amount of oil that was economical to produce as the basis for its analysis, and that choice caused a flawed analysis. It also found FEIS did not take into account the variation in oil prices in arriving at the estimate that one billion barrel of oil are economically recoverable (an assumption that ignores the fact that the amount of economical recoverable oil varies with the oil prices). Finally that BOEM did not provide an adequate explanation for its decision to base its EIS only on the amount of oil expected to be produce from the first field in the leased area of the Chukchi Sea.
***San Luis and Delta-Mendota Water Authority v. Jewell,* 747 F.3d 581 (9th Cir. 2014)**	FWS	**Agency prevailed on one claim** and **did not prevail on another** (lower court decision on NEPA issue affirmed). **Issue**: EIS, boundaries of NEPA (small federal handle/applicant proposal) This case arises from "a continuing war over the protection of the delta smelt." The lower district court invalidated a complex 400 page biological opinion by FWS that concluded that the Central Valley and State Water Projects proposed by the Bureau of Reclamation jeopardized the continued existence of a the delta smelt and its habitat, a three inch long fish protected by ESA. The challenging parties, consisting of various water districts, water contractors, and agricultural consumers brought suit against various federal defendants, including Fish and Wildlife, Bureau of Reclamation, FWS, and the Secretary of the Interior to prevent the federal defendants from implementing the biological opinion (BiOp) and its proposed alternatives in a project. On appeal, in part, the challenging parties argue that both FWS and Reclamation must comply with NEPA. The federal agencies argued that FWS need not comply with NEPA because Reclamation will complete an EIS. **Holding**: The court considered whether FWS's issuance of the BiOp was a "major federal action[ ] significantly affecting the quality of the human environment" such that FWS would be required to complete an EIS. A "[m]ajor federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. The regulations offers several categories of major federal actions, including "[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal

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		resources, upon which future agency actions will be based" and "[a]pproval of specific projects such as construction or management activities located in a defined geographic area." *Id.* at § 1508.18(b)(2), (4). The federal agencies argued that FWS, in its capacity as a consulting agency under Section 7 of the ESA, was merely offering its opinion and suggestions to Reclamation, which as the action agency, ultimately decides whether to adopt or approve the plan. The court confirmed that an action agency like Reclamation has some discretion to deviate from the BiOp. The court discussed it was mindful of the fact that the FWS BiOP "theoretically serves an 'advisory function' in reality it has a powerful coercive effect on the action agency." But the court stated, the "powerful coercive effect" of a BiOp on an action agency like Reclamation does not render it akin to the "[a]doption of formal plans" or "[a]pproval of specific projects" which tend to trigger NEPA's requirements. The court stated that because Reclamation, and not FWS, was responsible for implementing the BiOp or an alternative that complies with Section 7's mandates, it distinguished this holding from *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996). *Ramsey* involved the states of Washington and Oregon, which were in a unique position occupied typically by a federal agency such as Reclamation. There because the BiOp and ITS were issued as part of a federal-state-tribal compact, NEPA review was required. In that case, there was no downstream federal agency to complete an EIS. IF the consulting agency in *Ramsey*, NMFS, did not complete NEPA, it would evade NEPA review entirely. The Ninth Circuit reiterated that there is no comparable need for the FWS to prepare an EIS because Reclamation stands ready to do so.
***In Defense of Animals v. U.S. Dep't of the Interior,* 751 F.3d 1054 (9th Cir. 2014)**	BLM	**Agency prevailed** (lower court decision affirmed). **Issues**: EA, Challenge to FONSI Environmental groups brought action against Bureau of Land Management (BLM) challenging its decision to conduct a horse gather in the Twin Peaks Heard Management Area (HMA) to reduce the horse population to a predetermined appropriate management level (APL). The district court denied the groups' emergency motion for injunctive relief and denied their claims at the summary judgment stage. The groups appealed on several grounds including that BLM violated NEPA by deciding not to issue EIS. The organization challenged BLM's reliance on certain studies in the EA and that BLM failed to take a "hard look." BLM prepared a 157 page Gather Plan EA in May 2010, in the Twin Peaks HMA, where it briefly discussed the ten intensity factors for significance under 40 C.F.R. § 1508.27. The groups challenged its EA and FONSI claiming that the effects of the gather were "controversial" under 1508.27(b)(4), due to its "unprecedented scope" and intensive manipulations of horses left on the range (such as injection of immunocontraceptives into the mares and skewing of the stallion to mare ratio), and in consideration that all previous gather rounded up a smaller percentage of the overall populations (of wild horses and burros). **Holding:** The court noted that in EAs, if opposition to an agency's proposed action created a "substantial dispute," an EIS would seemingly always be required. The court found that the EA's clear and lengthy analysis regarding the effects of the proposed gathers, did not "cast[ ] serious doubt upon the

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		reasonableness of the agency's conclusions" and thus the effects were not highly controversial. The groups also asserted that the gather's possible effects on the wild horses and burros in the HMA were highly uncertain and/or involve unique or unknown risks. 40 C.F.R. § 1508.27(b)(5). The groups submitted two studies that claim to demonstrate the use of immunocontraceptives, such as PZP, may have "potentially significant effects" on wild horses. The groups also claimed that the combination of the large herd size and skewing of the sex ration combined with PZP result in a high degree of uncertainly. The argument failed because "regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are "highly uncertain." The court noted PZP was used to manage wild horse populations since 1992 and that BLM has made adjustments to herd sex ratios in numerous gathers. The groups submitted no evidence that the combination of these practices pose serious unknown risks. The court reviewed two studies submitted, and upheld the district court opinion that studies cited found only possible effects of PZP, and do not represent true dissenting views. The court noted some horse protection groups, in the public comment period, called for even greater use of contraceptive treatments. The groups also claim that the gathers will "establish a precedent for future actions with significant effects." The court dismissed this argument citing that "EAs are usually highly specific to the project and the locale, thus creating not binding precedent." *Barnes v. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011). The court found that BLM considered the relevant intensity factors in making its finding of no significant impact and "provided a convincing statement of reasons to explain why the projects impacts were expected to be insignificant," and that BLM did not violate NEPA when it decided not to issue an EIS. The groups argued that BLM failed to respond adequately to opposing scientific views regarding potential negative effects of the PZP citing the Cooper and Larsen (2006) and Nunez studies (2009), both of which were commented on in the EA. Under NEPA, the court must assess whether BLM "failed to address certain crucial factors, consideration of which [is] essential to a truly informed decision whether or not to prepare an EIS." The court examined the crucial factor of PZP on wild horses, and noted that the BLM did consider that "factor" by directing the reader to sections of the EA which addressed these fertility controls and provided citations to various studies demonstrating the lack of negative effects resulting from administration of the PZP. BLM also addressed fertility controls in the comment portion of the EA by referencing the relevant sections of the EA. After a careful review, the court found that agencies "need not to respond to every single scientific study or comment. It discussed that NEPA does not required federal agencies to "assess . . . consider . . . [and] respond" to public comments on an EA to the same degree as it does to an EIS. The court finally held that despite the fact BLM did not recite to its reason for relying on the studies cited in the EA as opposed to the studies cited by the comment, the BLM still performed the "hard look" required by NEPA.
California ex rel.	BOR	**Agency prevailed** (lower court decision affirmed).

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***Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781 (9th Cir. 2014)**		**Issues**: EIS, fly-specking, incorporation by reference/tiering, supplementation. Imperial County and Imperial County Air Pollution Control District (the "districts") brought action claiming that the EIS filed by the Secretary did not comply with the NEPA or the CAA. Several California water districts, parties to the proposed transfer agreement, intervened as defendants. The district court granted summary judgment on behalf of the defendants, finding that the districts did not have standing to sue, and in the alternative, that the Secretary did not violate NEPA. On appeal the districts asserted they have standing to bring their claims and challenge that Interior, in its Final Implementation EIS violated NEPA on several grounds. This case arises out of years of agreements and negotiations involving Colorado River water delivery to the Salton Sea. As a matter of background, the Secretary of Interior and Imperial Irrigation originally agreed to conduct a joint NEPA and state-California Environmental Quality Act (CEQA) study for the 1998 Imperial Irrigation/San Diego Water transfer agreement. Concurrently, in 2001 prompted by the Quantification Settlement Agreement, which several water districts negotiated to reduce Colorado River usage, among other objectives, the Secretary of Interior prepared an Implementation Agreement EIS to consider the consequences of delivering a portion of the Imperial Irrigation water at different diversion points on the Colorado River for use outside the Imperial Valley. Imperial Irrigation then prepared a separate study in June of 2002, (the "Transfer EIR") because CEQA has slightly different reporting requirements than NEPA. The Bureau of Reclamation prepared its own Transfer EIS to study on-river consequences of the proposed agreements. The Secretary then approved the Final Transfer EIS and Final Implementation Agreement EIS in November 2002. First, the districts allege that the Secretary either (a) did not clarify whether it incorporated the state Transfer Environmental Impact Report (EIR) or the federal Transfer EIS, or (b) improperly cited to a non-NEPA document – the Transfer EIS. **Holding**: The Final Implementation Agreement EIS clearly distinguished between the Transfer EIR and the Transfer EIS, for the purpose of NEPA and CEQA regulatory compliance. The districts' argument centered that in one instance the Secretary cited the Transfer EIR and Transfer EIS as a single document in her district court briefing. The court criticized this argument citing that "[t]hat the reviewing court may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." The districts also argued that the Secretary improperly tiered to "19 non-NEPA documents." The court rejected this argument stating the documents were regulations, state impact reviews and other EISs. It found that at the most, these documents were incorporated by reference. The districts also argued that many of these documents were not publicly available in the Final Implementation Agreement EIS. The court rejected this argument, stating that a final EIS may include information not cited in a draft; recirculation is required only if there is significant new information or circumstances relating to the proposed action. The districts also argued the Secretary, in the Implementation Agreement EIS, improperly stated it tiered and incorporated by reference the Quantification

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		Settlement Agreement Program EIR and the Coachella Valley Water District Management Plan (CVWDMP) EIR. The court again found that at most it incorporated by reference these documents (although the EIS did state it "tiered" these documents), and that the accidental misuse of the word tiering was harmless. The districts argued that all discussions of environmental impacts must be in the text of the EIS, rather than incorporated by reference. The court rejected their argument, stating that the Implementation Agreement EIS extensively considered the environmental effects on the Salton Sea. The districts argued that the Secretary improperly "segmented" the Quantification Settlement Agreements by preparing two EISs. The court applied the test of independent utility to determine whether reach of the two projects would have taken place without the other and thus had independent utility. The court again rejected this argument, finding that the Implementation Agreement EIS considered both the on-river impact of changing the Colorado River diversion points and the second, off-river consequences of reducing Imperial Irrigation's water. The districts also argued that a SEIS was necessary because the water districts had altered their proposed conservation strategies, but the Final Implementation Agreement EIS failed to discuss them. The court held that the Secretary did not abuse her discretion because the Final Implementation Agreement EIS reasonably considered the consequences of providing the Salton Sea with no mitigation water at all, thereby qualitatively considering the water district's changed conservation strategies. The districts also contended that the Implementation Agreement EIS and ROD failed to discuss potential mitigation measures, which the court briefly considered and rejected finding the EIS and ROD sufficiently considered potential mitigation measures. The districts also argued that the Secretary abused her discretion by using an "environmental evaluation" – a memorandum made available to the public – rather than an environmental assessment to explain her decision to prepare a SEIS. The court explained that the CEQ regulations do not dictate the form that an agency must use when deciding whether to prepare a SEIS, and that court approved the use of various documents, such as supplemental information reports, reevaluations, memorandums of record, and secretary issue documents. Lastly the districts challenge the Secretary's decision to discuss only one – alternative – the no action. The Implementation EIS only compared the Colorado River Water Delivery Agreement (CRWDA) to a no action alternative because the CRWDA is a negotiated agreement. The court reasoned that there was no benefit for the Final Implementation Agreement EIS to discuss other hypothetical alternatives because the transfer plans were carefully negotiated agreements between the parties.
***Te-Moak Tribe of Western Shoshone Indians of Nevada v. U.S. Dep't of the Interior*, 565 Fed.** **Appx. 665 (9th Cir. 2014) (not for**	BLM	**Agency prevailed** (lower court decision upheld). **Issue**: Failure to participate during NEPA comment period **Holding**: Appellate court affirmed the lower court's denial of NEPA challenge because the plaintiffs did not raise the issues during the EIS public comment period, and thus, they waived their right to challenge the decision.

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***Town of Barnstable, Massachusetts v. Federal Aviation Administration,* 740 F.3d 681 (D.C. Cir. 2014)**	FAA	**Agency prevailed** (petitions for review denied). Issue: Boundaries of NEPA (small federal handle) Town and non-profit groups of pilots and others petitioned for review of FAA's no hazard determination for each of the 130 wind turbines a company proposed to build in the Nantucket Sound. The petitioners also asserted in the appeal that the hazard determination was similarly deficient for failing to analyze the safety risks posed by the project and to perform an environmental review required by NEPA. The case arises in the context of the approval of a lease by the Department of the Interior for construction of an off-shore wind farm in the Nantucket Sound. Under the lease, the wind turbine company must obtain an FAA determination whether the turbines pose a hazard to air navigation and comply with any mitigation measures before beginning construction. **Holding**: The court found that the groups' assertion that the FAA must participate in an analysis of environmental impacts of its no hazard determination was flawed. The court reiterated that "no hazard determinations generally do not require preparation of an environmental impact statement because they are not legally binding." It found that the FAA has no authority to countermand Interior's approval of the project or to require changes to the project in response to environmental concerns. Citing and relying heavily on the *Public Citizen* analysis "[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004). The D.C. Circuit further held that the Interior Department prepared an EIS on the wind farm project and planned to assess whether additional mitigation measures included in the FAA determination merited a supplemental EIS. There was no need for the FAA to duplicate Interior's NEPA analysis, which has been challenged in another proceeding.
***HonoluluTraffic.com v. Federal Transit Administration,* 742 F.3d 1222 (9th Cir. 2014)**	FTA	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, purpose and need, alternatives Consortium of interest groups and individuals opposed high speed rail project and filed action against the Federal Transit Administration (FTA), DOT, municipality and various federal and local administrators asserting challenges under NEPA, NHPA and DOTA. The lower court dismissed its NEPA claims and this appeal followed. The litigation represented a challenge to the construction of a 20-mile, high-

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		speed rail system project from the western portion of Oahu through the downtown area of Honolulu, Hawaii. Honolulu has been unsuccessfully struggling to cope with traffic congestion since the mid-1960s. The consortium's challenges under NEPA were directed to principally the choice of wheel-on-steel Fixed Guideway system, in the city and the FTA's FEIS. Specifically, they asserted that the City and FTA (1) unreasonably restricted the Project's purpose and need, and (2) did not consider all reasonable alternatives as required under NEPA. **Holding** An EIS must state the underlying purpose and need for the proposed action. *See* 40 C.F.R. § 1502.13. Courts evaluate an agency's statement of purpose under a reasonableness standard, and in assessing reasonableness, must consider the statutory context of the federal action at issue. *See League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1070 (9th Cir. 2012). Agencies enjoy "considerable discretion" in defining the purpose and need of a project, but they may not define the project's objectives in terms so "unreasonably narrow," that only one alternative would accomplish the goals of the project. The FEIS describes the project's purpose as follows: (1) "to provide high-capacity rapid transit in the highly congested east-west transportation corridor between Kapolei and University of Hawaii Manoa;" (2) "to provide faster, more reliable public transportation service in the study corridor than can be achieved with buses operating in congested mixed-flow traffic;" (3) "to provide reliable mobility in areas of the study corridor where people of limited income and an aging population live;" (4) "to serve rapidly developing areas of the study corridor;" and (5) to "provide additional transit capacity [and] an alternative to private automobile travel, and [to] improve transit links within the study corridor." It describes the need for transit improvements as follows: (1) "Improve corridor mobility;" (2) "Improve corridor travel reliability;" (3) "Improve access to planned development to support City policy to develop a second urban center;" and (4) "Improve transportation equity." The purpose was defined in accordance with the statutorily mandated formulation of the transportation plan that preceded the FEIS. The project's stated objectives were consistent with all these purposes. Viewed in its statutory context, the project's objectives are not so narrowly defined that only one alternative would accomplish them. The statement of purpose and need is broad enough to allow the agency to assess various routing options and technologies for a high-capacity, high-speed transit project. The district court therefore properly concluded that it is reasonable, stating: "Because the statement of purpose and need did not foreclose all alternatives, and because it was shaped by federal legislative purposes, it was reasonable." The Consortium contended that the EIS did not properly consider all reasonable alternatives and should have considered alternatives the State had earlier rejected. In this case, the EIS did not expressly consider alternatives that had earlier been ruled out in the screening process conducted by the State. The Consortium therefore argue that the City and the FTA improperly relied on a prescribed Alternatives Analysis (AA) process to exclude certain alternatives such as the three lane MLA alternative and light rail from detailed

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		consideration. The City prepared the AA with the benefit of public comment and federal guidance. The district court cited evidence in the record that the FTA furnished guidance during the AA's preparation and independently evaluated it, including letters between the City and the FTA about funding for alternatives considered in the AA, the ROD's approval of the AA, internal FTA discussions about AA logistics, and the FTA's indication that it would review the AA prior to publication. The district court also pointed to the many opportunities for public comment that generated over 3,000 comments from the public on the AA before the City selected the locally preferred alternative. The district court properly concluded that defendants did not err in relying on the AA prepared by the State to help identify reasonable alternatives as part of the NEPA process. The Consortium's' real quarrel with the process is that it failed to consider the proposed three-lane MLA alternative. The MLA alternative proposed construction of lanes dedicated for use by buses, high-occupancy vehicles, and toll-paying single-occupant vehicles, managed to maintain free-flowing speeds between Waiawa Interchange and Iwilei. Variations of the alternative included a two-lane plan versus a three-lane plan, and reversible lanes to allow higher capacity during peak hours. The defendants did consider a two-lane alternative that the FEIS specifically addressed and rejected for cost reasons. The three-lane MLA plan would have been even more costly. The district court determined that the estimates in the AA analysis were reasonable, and the Director of the City and County of Honolulu's Department of Transportation Services specifically stated that the three-lane alternative would increase costs. The Consortium finally maintained that the federal defendants arbitrarily and capriciously excluded the light-rail alternative from the EIS. Here too, defendants properly relied on the three phase AA process to eliminate alternatives, including corridor-wide light rail and light rail in the downtown portions of the corridor. The FEIS explained that those alternatives lacked feasibility and desired capacity. The court found that the FEIS's identification of the project objectives and analysis of alternatives satisfied NEPA's requirements.
***Latin Americans for Social and Economic Development, et al. v. Federal Highway Administration, et al.*, 756 F.3d 447 (6th Cir. 2014)**	FHWA	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, Standing, Alternatives, Supplementation of Record, Environmental Justice. Community groups and bridge company of international bridge crossing brought action challenging FHWA's ROD selecting the Delray neighborhood of Detroit, Michigan as preferred location alternative for new international bridge crossing between Detroit Michigan and Windsor, Ontario, known as the Detroit River International Crossing (DRIC) project. Community groups and the bridge company claimed that the ROD violated NEPA, principals of environmental justice and other federal laws. The district court found that the bridge company had standing to challenge the ROD and granted the federal defendant's motion to affirm the ROD. Among other issues on appeal, the federal defendants continued to challenge the bridge company's prudential standing and the bridge company contended that the FHWA violated NEPA on several grounds.

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		Holding: A plaintiff seeking judicial review under the APA must not only meet constitutional requirements for standing, but must also demonstrate prudential standing. Prudential standing exists if the interest the plaintiff seeks to protect is within the "zone of interests" to be protected or regulated by the statute at issue. *Friends of Tims Ford v. Tennessee Valley Authority*, 585 F.3d 955, 967 (6th Cir. 2009). In this case, the statute at issue is NEPA and the zone of interest is environmental interests. Specifically, the federal defendants claimed that the bridge company lacked prudential standing because its allegations that the violations of law were based on economic injuries and not environmental injuries. The bridge company asserted that the construction of a second bridge crossing may adversely affect the bridge company's economic interests. Economic injury alone is insufficient to establish prudential standing under NEPA. However, the bridge company alleged in the complaint that it owns property in Delray where the new bridge is proposed and that the DRIC bridge in Delray will have an adverse impact on air quality and noise in those neighborhoods. Here, the Sixth Circuit concluded that motives that rest on both economic and environmental concerns do not deprive the bridge company of standing under NEPA. The community groups and the bridge company claimed that the FHWA violated NEPA because it "pre-committed" to a government-owned bridge without reason or the benefit of public scrutiny, and without analyzing private-sector alternatives having less environmental impact. To the contrary, the record amply reflected that the FHWA's decision regarding DRIC governance was a lengthy, reasoned process based on an objective analysis subject to public scrutiny throughout. The FHWA took a hard look at the pros and cons of the various ownership/governance scenarios and concluded at the end of the process that government ownership, in partnership with private-sector entities, struck the best balance among the governance options, environmental considerations, purpose and needs of the DRIC project. The community groups and bridge company contend on appeal that the FHWA acted arbitrarily and capriciously by simply "acceding to Transport Canada's demands to eliminate an alternative, the X–12 from consideration" rather than giving X–12 a "hard look" as required by NEPA. However, the administrative record reflects that the FHWA did not simply defer to Canada and that there were a variety of reasons that Illustrative Alternative X–12 was not advanced as a Practical Alternative. NEPA does not require the FHWA to pursue alternatives that present unique problems, or are impractical or infeasible. Here, the FHWA evaluated the X–12 and all of the illustrative alternatives against the established criteria, assessed environmental impacts and project objectives, disclosed those impacts and objectives to the public, determined not to advance X–12 as a practical alternative in the DRIC project, and explained its reasons for doing so. Based on the record, it cannot be held that the FHWA's decision not to advance X–12 as a practical alternative was unreasonable, arbitrary and capricious, or an abuse of discretion. The community groups and bridge company also alleged that the FHWA incorrectly identified the "no build" alternative variation and, as a consequence, violated NEPA by failing to compare the "correct" "no build" alternative to the practical alternatives. The "no build" alternatives were extensively evaluated by

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		the FHWA against the "build" alternatives. Based on this extensive review, the court concluded that the FHWA took the requisite "hard look" at the "no build" alternative as required by NEPA, and was not arbitrary and capricious in its decision to eliminate the "no build" alternative in favor of the Preferred Alternative to accomplish the DRIC project's purpose and needs. The community groups and bridge company claimed that the FHWA violated NEPA by failing to take a "hard look" at current traffic data, Contrary to the Bridge Company's contention, the FHWA did not ignore current actual data, but extensively evaluated that information in the context of the DRIC project's purpose and needs, earlier projections, and factors affecting traffic volume. Secondarily, the community groups and the bridge company argued that the district court improperly denied its motion to supplement the administrative record with a traffic study commissioned by Transport Canada and certain Canadian documents. The court found that the studies specified were not commissioned for the DRIC project, but propriety document created for other purposes. Further, these studies were not the only source of updated traffic data; updated traffic data was available from other studies and that data was thoroughly considered by the FHWA. Finally, the community groups and bridge company claimed that the FHWA violated environmental justice principles by failing to give a "hard look" at alternative bridge crossings that would not have a negative impact on the minority and low-income neighborhood of Delray. After exhaustive study and consideration of environmental justice issues, the FHWA selected a Preferred Alternative that the FHWA determined best fulfilled the DRIC project's purpose and needs. Environmental impacts and environmental justice issues are a consideration in agency decisionmaking, but are not controlling. The record amply reflects that the FHWA took a "hard look" at both these issues, considered the "no build" alternatives throughout the entire process, reasonably determined its priorities based on all the comparative information available, and made a choice that resulted from a reasoned process.
***Defenders of Wildlife v. North Carolina Department of Transportation,* 762 F.3d 374 (4th Cir. 2014)**	FHWA	**Agency prevailed** (on the NEPA claim) (lower court decision reversed). **Issues**: EIS, segmentation, tiered and phased documents. Defenders of Wildlife and National Wildlife Refuge Association (environmental groups) brought suit against the North Caroline Department of Transportation and Federal Highway Administration (federal defendants) claiming violations of NEPA and other laws. This case involved a long term transportation solution to programs involving a plan that essentially mirrors what currently exists in North Carolina: replacing the Bonner Bridge and maintaining NC 12 on Hatteras Island. The environmental groups alleged illegal segmentation of the analysis of environmental impacts as well as those pertaining to the permissible "tiering" of the analysis of impacts. **Holding**: The Fourth Circuit discussed the segmentation issue and held that it was permissible for FHWA to issue a ROD that approved only the first phase of a longer alternative that was considered in the EIS. The court distinguished between the scope of the agency's analysis and the scope of the agency's

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		decision: Illegal segmentation is distinct from approving only a portion of a project that has been fully and adequately studied. Nothing in NEPA prohibits the agencies from authorizing only one part of the Project so long as doing so does not commit them to a course of action that has not been fully analyzed. The agencies' ROD does commit resources to the Project, and we perceive no reason why Defendants cannot analyze the entire Project "in a single impact statement." 40 C.F.R. § 1502.4(a). But they are not required to approve the entire Project in a single Record of Decision so long as their NEPA documents adequately analyze and disclose the impacts of the entire Project—including those portions that have yet to be approved. In reaching this decision, the court acknowledged that the selection of the phased alternative effectively committed FHWA and NCDOT to improving existing NC 12 in some manner, rather than building the 18-mile-long bridge over Pamlico Sound. The court held that it was permissible to make this commitment, without determining the specific nature of the improvements, "because Defendants have fully analyzed and disclosed the environmental impacts associated with these five legitimate alternatives" for improving existing NC 12. Thus, the agencies' decision to implement the project one phase at a time does not violate NEPA. The Fourth Circuit did note that changing conditions on the Outer Banks may necessitate another SEIS before a final decision could be made on the NC 12 improvements.
***Coalition for Advancement of Regional Transportation v. Federal Highway Administration*, 576 Fed. Appx. 477 (6th Cir. 2014) (not for publication – no precedential value)**	FHWA	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, purpose and need, GHG analysis, alternatives, "hard look" A mass transit advocacy group, Coalition for Advancement of Regional Transportation, brought action against FHA and various state transportation departments alleging a multitude of violations of NEPA and other federal laws involving a $2.6 billion construction and transportation management project designed to improve mobility across the Ohio River in Louisville, Kentucky. The district court granted the agencies' motion to dismiss all twenty claims. This appeal followed alleging violations of NEPA and other federal laws. The proposed construction consisted of two tolled new bridges across the Ohio River connecting Indiana and Kentucky in the Louisville metropolitan area, and other improvements to the roadways connecting these interchanges. **Holding**: The court found that the EIS Purpose and Need Statement was not arbitrary and capricious. Rather, it was supported by a detailed study of existing traffic, safety, and other cross-river mobility problems, and it described the use of extensive socioeconomic data and state-of-the-art modeling of future travel conditions to project future transportation needs of the region. In addition, the court found that FHWA's failure to evaluate greenhouse gas emissions on a project-specific basis was not arbitrary and capricious because of the non-localized, global nature of potential climate impacts. The court also discussed that FHWA reasonably decided not to analyze the environmental impacts of "ultra-fine" particulates, and it took the requisite hard look at the environmental impacts of road runoff, tunnel spoil concerns, and bridge piers.

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		The Sixth Circuit held that FHWA's review of reasonable alternatives was not arbitrary and capricious. Here, through two lengthy NEPA reviews, consisting of over 140 pages of analysis FHWA evaluated a wide range of alternatives to satisfy project's purpose and need statement. FHWA considered both one and two bridge alternatives, and reasonably concluded only a two bridge alternative would adequately address the Region's cross-river mobility needs. The record showed that FHWA rationally eliminated the alternatives preferred by the advocacy groups, because those alternatives would not satisfy the regionally focused Purpose and Need Statement. Thus, the evaluation of alternatives was not arbitrary and capricious.
***Natural Resources Defense Council v. U.S. Dep't of Transportation*, 770 F.3d 1260 (9th Cir. 2014)**	FHWA	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, "hard look" Environmental groups brought action alleging that the DOT and other federal and state agencies and officials violated the CAA and NEPA by failing to properly evaluate and disclose potential environmental impacts of a proposed expressway for trucks leaving the ports of Long Beach and Los Angeles. The construction of the expressway would be a dedicated connection between the ports and the mainland for use by cargo-carrying trucks only. As a matter of background, the expressway is part of the Schuyler Heim Bridge Replacement Project being enacted by federal and local agencies as part of a plan to decrease the traffic congestion heading into and out of Terminal Island, one of the primary hubs for cargo heading to and from the ports of Long Beach and Los Angeles — the two busiest container ports in the country. **Holding**: The Ninth Circuit held that agencies' environmental impact study adequately disclosed the project's likely health impacts, and contained detailed studies estimating cancer and other health risks in the immediate vicinity of the project. The EIS included a health risk assessment that was subject to the public comment and review process. The federal and local agencies also determined that a heating, ventilation and air conditioning retrofit program for residences near the expressway would be a feasible measure, satisfying the requirements laid out by the National Environmental Policy Act. "Because we are satisfied that defendants took a 'hard look' at the project's likely consequences and probable alternatives ... we agree with the district court that the [environmental impact study] comported with NEPA requirements."
Karst Environmental Education and Protection, Inc. v. Federal Highway Administration, 559 Fed. Appx. 421 (6th Cir. 2014) (not for publication - no precedential value)	FHWA	**Agency prevailed** (lower court decision upheld). **Issue**: EIS, failure to participate during NEPA comment period **Holding**: Appellate court affirmed the lower court's denial of NEPA challenge due to fact that plaintiffs did not raise the issues during the EIS public comment period, they waived their right to challenge the decision. "[W]e conclude . . . that Karst Environmental did not meet its "obligation of meaningful participation" in the administrative process by stating its position with clarity at a time when FHWA could have taken necessary corrective actions without undue delay."

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***Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission,* 753 F.3d 1304 (D.C. Cir. 2014)**	FERC	**Agency did not prevail** (petition for review granted). **Issues**: EA, segmentation, cumulative impacts FERC issued a certificate of public convenience and necessity to, authorizing it to build and operate the Northeast Upgrade Project ("Northeast Project"). The project included five new segments of 30-inch diameter pipeline, totaling about 40 miles, and modified existing compression and metering infrastructure. The Northeast Project upgraded a portion of a much longer natural gas pipeline known as the 300 Line. Taken together, the Northeast Project and the three other connected, closely related, and interdependent Tennessee Gas upgrade projects on the 300 Line constituted a complete upgrade of almost 200 miles of continuous pipeline. Petitioner environmental group contended that in approving the Northeast Project, FERC violated NEPA by preparing an EA which: (1) segmented its environmental review of the Northeast Project – i.e., failed to consider the Northeast Project in conjunction with three other connected, contemporaneous, closely related, and interdependent Tennessee Gas pipeline projects – and (2) failed to provide a meaningful analysis of the cumulative impacts of these projects to show that the impacts would be insignificant. The court agreed and granted the petition. **Holding**: "FERC argues that because each project resulted in a measurable increase in the pipeline's overall capacity, the agency was justified in completing the NEPA analysis of the Northeast Project separately from the other projects. But FERC's position cannot be squared with the record, which shows that by May 2012, when FERC issued the certificate for the Northeast Project, it was clear that the entire Eastern Leg was included in a complete overhaul and upgrade that was physically, functionally, and financially connected and interdependent . .. There is a clear physical, functional, and temporal nexus between the projects. There are no offshoots to the Eastern Leg. The new pipeline is linear and physically interdependent; gas enters the system at one end, and passes through each of the new pipe sections and improved compressor stations on its way to extraction points beyond the Eastern Leg. The upgrade projects were completed in the same general time frame, and FERC was aware of the interconnectedness of the projects as it conducted its environmental review of the Northeast Project. The end result is a new pipeline that functions as a unified whole thanks to the four interdependent upgrades. "FERC has not shown that there are logical termini between the new segments of the Eastern Leg or that each project resulted in a segment that has substantial independent utility apart from the other parts of the Eastern Leg. Rather, FERC merely argues that one terminus was "no more logical than another," and that the capacity added by each project was contracted separately. These explanations are insufficient to address Riverkeeper's segmentation claim. "On the record before us, we hold that in conducting its environmental review of the Northeast Project without considering the other connected, closely related, and interdependent projects on the Eastern Leg, FERC impermissibly segmented the environmental review in violation of NEPA. We also find that FERC's EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of the upgrade projects."

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***Minisink Residents for Environmental Preservation and Safety, et al. v. Federal Energy Regulatory Commission,* 762 F.3d 97 (D.C. Cir. 2014)**	FERC	**Agency prevailed** (petition for review not granted). **Issues**: EA, alternatives, mitigation, public involvement, fly-specking In July 2012, FERC approved the Millennium Pipeline Company's proposal for the construction of a natural gas compressor station in the Town of Minisink, New York. A local group called "Minisink Residents for Environmental Preservation and Safety" ("MREPS") opposed the project and petitioned for judicial review of the decision. The petitioner argued that FERC's approval of the project was arbitrary and capricious, particularly given the existence of a nearby alternative site they insist is better than the Minisink locale approved by FERC. The court found that the agency's decision was reasonable and reasonably explained and denied the petition. **Holding**: Under the Natural Gas Act, FERC has authority to regulate the transportation and sale of natural gas in interstate commerce. Before an applicant can construct or extend an interstate natural gas facility, it must obtain a Certificate of Public Convenience and Necessity from FERC. A certificate shall be issued to any qualified applicant upon a finding that "the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service" and "construction . . . is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). FERC may, in issuing such a certificate, attach "such reasonable terms and conditions as the public convenience and necessity may require." *Dominion Transmission, Inc. v. Summers, 7223 F.3d 238, 240 (D.C. Cir. 2013).*; *Murray Energy Corp. v. FERC*, 629 F.3d 231, 234 (D.C. Cir. 2011). In conjunction with the certificating process, FERC must also complete a NEPA review of the proposed project. FERC's NEPA obligation requires that it "'identify the reasonable alternatives to the contemplated action' and 'look hard at the environmental effects of [its] decision[].'" *Id*. (quoting *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 374 (D.C. Cir. 1999)) (alterations in original). "FERC released its Environmental Assessment ("EA") for the Minisink Project several months later. Along with its detailed evaluation of the project's likely environmental impacts—on water resources, vegetation and wildlife, air quality and noise, and more—the EA also analyzed several alternatives to Millennium's proposal, including an in-depth comparison between the Minisink Project and the Wagoner Alternative [proposed by project opponents] . . . The EA did identify some positive environmental upshots associated with the Wagoner Alternative, . . . but, on balance, the assessment found that the Minisink Project was environmentally preferable, due principally to the negative environmental consequences that would flow from an upgrade of the Neversink Segment" . . . "[T]he greater environmental issues and landowner impacts of replacing the Neversink Segment cause us to conclude that the Wagoner Alternative does not provide a significant environmental advantage over the proposed project." Overall, the EA concluded that, so long as Millennium implemented certain mitigation measures, the Minisink Project was expected to have no significant environmental impact." FERC subsequently issued a certificate, "leaning heavily on the results of the EA…. More broadly, the Commission also addressed a variety of other comments touching on environmental and landowner-related issues. At the end

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		of the day, FERC adopted the EA's findings and concluded that, so long as Millennium adhered to the parameters outlined in its application and complied with certain environmental mitigation measures, the Minisink Project was expected to have no significant environmental impact." "Based on our assessment of the record, we are convinced that the Commission amply considered alternatives to the Minisink Project, devoting especially thorough attention to the Wagoner Alternative favored by Petitioners. For one, FERC's Certificate Order unmistakably outlines the Commission's exploration of the Wagoner Alternative as an alternate possibility for Millennium's compressor station….In keeping with the recommendations set out in the EA, however, the Commission concluded that the more significant environmental impacts associated with the Wagoner Alternative—mostly due to improvement of the Neversink Segment—rendered that option less preferable than the proposed Minisink Project." "Furthermore, Petitioners seem to overlook the fact that, once the Wagoner Alternative surfaced, the Commission took the additional (and, from what we understand, relatively unusual) step of issuing a supplemental notice before completing its Environmental Assessment. Therein, the Commission specifically flagged its consideration of the Wagoner Alternative, inviting feedback and input from nearby residents and other potentially impacted parties." "In arguing to the contrary, Petitioners marshal only one meaningful theory in their favor. They claim that the Commission's analysis was flawed because Millennium either planned or needed to upgrade the Neversink Segment all along. In other words, according to Petitioners, even if Millennium moved forward with the Minisink Project (and not the Wagoner Alternative), it still had plans to replace the Neversink Segment in the very near future….[W]e have no basis to second-guess the Commission's determination that Millennium had no firm plans to upgrade the Neversink Segment in the wake of the Minisink Project." "Petitioners claim that the Commission failed to give the environmental impacts of the Minisink Project the "hard look" NEPA requires. We conclude otherwise…. In reviewing an agency's compliance with NEPA, the "rule of reason applies," and we "consistently decline[] to 'flyspeck' an agency's environmental analysis." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (quoting *Nevada v. U.S. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)). "Petitioners claim to eschew a flyspecking approach here, arguing instead that the Commission's analysis is laden with "gaping holes." They point to three. In our view, though, all fall decidedly more into the "flyspecking" camp than anything more. *First*, Petitioners contend that the Commission erred in failing to undertake a more fulsome cost-benefit analysis of the Minisink Project as compared with the Wagoner Alternative. This argument essentially piggybacks off their overall Wagoner Alternative theory, and, in that sense, we reject it for the reasons already stated. Otherwise, to the extent Petitioners contend that the Commission should have focused more generally on the monetary costs and benefits of the

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		respective proposals, we disagree that NEPA requires such an approach, particularly where only an environmental assessment, rather than an environment impact statement, is involved. *See Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 430 (4th Cir. 2012) ("The agency does not," under NEPA, "need to display the weighing of the merits and drawbacks of the alternatives in a monetary cost-benefit analysis."); *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 687 (D.C. Cir. 2004) ("[I]t is undisputed that the FAA was not required to undertake a formal cost-benefit analysis as part of the [environmental impact statement]."). "*Second*, Petitioners argue that the Commission failed to examine the Minisink Project's impact on property values. But as the Commission rightly rejoins, the EA clearly addressed this issue….It recognized there may be some adverse impacts on surrounding property values due to the compressor station. On balance, though, the EA concluded that "the recommended building design and landscaping plans would eventually minimize the visual impact from the station on the surrounding residential properties and would not significantly reduce property values or resale values."" "*Third*, Petitioners claim that the Commission failed to assess cumulative and future impacts. They accuse FERC of ignoring two issues in particular: (1) Millennium's planned development of a second compressor station on the pipeline upstream from Minisink (what came to be the "Hancock Project"), and (2) the potential construction of a lateral pipeline from the Minisink compressor to a proposed power plant operated by CPV Valley LLC. The record belies this argument on both scores. As for the Hancock Project, the EA's "Cumulative Impacts" discussion flags Millennium's "intent to construct a second compressor station" and explains that, because no certificate application had been filed with FERC, little was known about the details of the project. Nevertheless, given the "typical distances between compressor stations (70 miles) and the difference in construction timing," the EA stated that no significant cumulative impacts were expected, other than possibly with respect to air quality. ... In view of the uncertainty surrounding the second compressor station, and the difference in timing between the two projects, this discussion suffices under NEPA. The same holds true with respect to the potential development of the CPV Valley power plant. The EA's "Cumulative Impacts" section identifies this possible project, too, though it again signals the absence of any firm details surrounding project specifics. Even still, the EA concluded that because the Minisink Project itself was expected to have minimal impacts, no significant cumulative impacts were expected to flow from the possible development of the CPV Valley power plant, particularly since the construction timelines for the two potential projects would be quite distinct. ... In sum, based on our review of the EA, we are satisfied that FERC properly considered the cumulative impacts of the Minisink Project." "In approving the Minisink Project, the Commission accorded the Wagoner Alternative the serious consideration it was due, in keeping with its statutory obligations under the NGA and NEPA. In its judgment, the Commission did not think the Wagoner Alternative preferable and concluded that the Minisink Project, as put forward by Millennium, would serve the public interest and necessity. We are simply not empowered to second-guess the Commission's

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		determination on this point or to substitute our judgment for the Commission's. Our much more limited role is, instead, to confirm that FERC thoroughly and reasonably examined the issue, and on the record before us, we are assured that it did."

10. Cumulative Impacts Cases (2014)

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10.1 Introduction

2014 was a very light year for NEPA cases involving challenges to cumulative impacts analyses in the U.S. Courts of Appeals, with only four decisions published. Only two agencies were involved in the decisions – two involving the Federal Energy Regulatory Commission (FERC) and two involving the USFS. Two of the decisions were issued by the 9th Circuit Court of Appeals and two by the D.C. Court of Appeals. The federal agencies prevailed in three of the four decisions (75 percent). The three key issues involved in the four decisions were: (1) what qualifies as a reasonably foreseeable future action; (2) how should past actions be treated in an analysis; and (3) how to properly set boundaries for the analysis.

By contrast, in 2013 there were twice as many federal appellate decisions involving NEPA cumulative impacts issues involving more agencies and issued by a broader geographic distribution of the federal appellate courts, with federal agencies prevailing in a similar percentage of the decisions (7 of 8; 87.5 percent). The USACE was involved in four of the decisions, BLM was involved in three of the decisions, and the USFS in one of the decisions. Four of the decisions were from the 9th Circuit Court of Appeals, and one each from the 4th, 6th, 10th and D.C. Court of Appeals.

The four decisions issued in 2014 involving NEPA cumulative impact analysis challenges were:

- Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission, 753 F.3d 1304 (D.C. Cir. 2014)
- *Friends of the Wild Swan v. Weber*, 767 F.3d 936 (9th Cir. 2014)
- *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755 (9th Cir. 2014)
- *Minisink Residents for Environmental Preservation and Safety, et al. v. Federal Energy Regulatory Commission*, 762 F.3d 97 (D.C. Cir. 2014).

The remainder of this article will discuss the key issues and the court's decision in each of the four cases, and then provide a conclusion on key takeaway lessons from the decisions for NEPA practitioners.

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10.2 Decisions Issued in 2014

In *Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission*, 753 F.3d 1304 (D.C. Cir. 2014), FERC prepared an EA for the Northeast Upgrade Project, which involved construction of a proposed natural gas pipeline and associated infrastructure. Plaintiffs argued that three other proposed upgrade projects along the same 200-mile long pipeline corridor should have been analyzed together in a single NEPA analysis. This case involved four NEPA concepts that are often interrelated and sometimes confused: cumulative impacts, cumulative actions, connected actions, and similar actions. FERC argued that each of the four projects was a "stand-alone project designed to serve specific customers, with different capacity amounts, in different time frames." The court disagreed with FERC and ruled in favor of the plaintiffs, and concluded:

> FERC argues that because each project resulted in a measurable increase in the pipeline's overall capacity, the agency was justified in completing the NEPA analysis of the Northeast Project separately from the other projects. But FERC's position cannot be squared with the record, which shows that by May 2012, when FERC issued the certificate for the Northeast Project, it was clear that the entire Eastern Leg was included in a complete overhaul and upgrade that was physically, functionally, and financially connected and interdependent. There is a clear physical, functional, and temporal nexus between the projects. There are no offshoots to the Eastern Leg. The new pipeline is linear and physically interdependent; gas enters the system at one end, and passes through each of the new pipe sections and improved compressor stations on its way to extraction points beyond the Eastern Leg. The upgrade projects were completed in the same general time frame, and FERC was aware of the interconnectedness of the projects as it conducted its environmental review of the Northeast Project. The end result is a new pipeline that functions as a unified whole thanks to the four interdependent upgrades. FERC has not shown that there are logical termini between the new segments of the Eastern Leg or that each project resulted in a segment that has substantial independent utility apart from the other parts of the Eastern Leg. Rather, FERC merely argues that one terminus was "no more logical than another," and that the capacity added by each project was contracted separately…On the record before us, we hold that in conducting its environmental review of the Northeast Project without considering the other connected, closely related, and interdependent projects on the Eastern Leg, FERC impermissibly segmented the environmental review in violation of NEPA. We also find that FERC's EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of the upgrade projects.

In *Friends of the Wild Swan v. Weber*, 767 F.3d 936 (9th Cir. 2014), the USFS prepared two EAs for two separate proposed forest habitat improvement projects on the Flathead National Forest in Montana. Plaintiffs argued that neither EA discussed the other project in their respective cumulative impact analyses because the agency drew the analysis boundary too narrowly, even though the projects were located in the same watershed, had similar timing, and both impacted similar resources, including sediment loading, lynx, and grizzly bears. The court disagreed with the plaintiffs' argument, and concluded:

> The agency did not act arbitrarily and capriciously by defining the geographic scope for studying cumulative effects in this fashion. The groups of Lynx Analysis Units (LAUs) for each project cover several thousand acres, the boundaries were developed independent of these projects, and there is no overlap between the three LAUs touched by the Soldier Addition Project and the four LAUs affected by the Spotted Bear Project. Although Wild Swan argues the agency should have also considered effects from the neighboring project because the lands are adjacent, the agency has to draw a line somewhere and has offered a reasonable justification for why it drew the line where it did.

In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755 (9th Cir. 2014), the USFS prepared an EIS for a proposed logging project on the Wallowa-Whitman National Forest in Oregon. The plaintiffs argued that the cumulative impact analysis in the EIS was inadequate for: (1) leaving out a reasonably foreseeable future action that should have been considered in the analysis; and (2) for not including a discussion of the interactive impacts of stream temperature in the analysis; the symbiotic relationship between increased sediment in the streams that flow through the project area and the pre-existing thermal stress that the stream's high temperatures place on the fish that inhabit the streams. Regarding the issue of whether a reasonably foreseeable future action was incorrectly omitted from the analysis, the court disagreed with the plaintiffs and concluded:

> The USFS may have a goal, but the likelihood of proceeding on that goal and a timetable on any such action are not yet defined. More importantly, there is no indication that the USFS "is actively preparing to make a decision," 36 C.F.R. § 220.4(a)(1), but rather, they have disclaimed any intention to move forward on that logging in any particular time frame. As the record now stands, the USFS may permit this logging, or it may not take any action at all. Environmental impacts of this possibility are at present inchoate and to a degree speculative.

Regarding the stream temperature issue, the court also disagreed with the plaintiffs' argument and concluded:

> However, the plaintiffs' allegation misapplies the cumulative impact test. Because the project will not have any impact on stream temperatures, any thermal stress on the fish is a part of the project's environmental baseline. Therefore, no cumulative effects analysis is required, and the LOWD plaintiffs have not shown that they are likely to prevail on this claim.

In *Minisink Residents for Environmental Preservation and Safety, et al. v. Federal Energy Regulatory Commission*, 762 F.3d 97 (D.C. Cir. 2014) FERC prepared an EA for proposed construction of a natural gas pipeline compressor station in Minisink, NY. Plaintiffs argued that FERC failed to include two reasonably foreseeable future actions in their cumulative impact analysis – a second proposed compressor station on the pipeline route upstream from Minisink and construction of a proposed lateral pipeline from the proposed compressor station to a proposed new power plant. The court disagreed with the plaintiffs that the second compressor station needed to be included in the analysis, and concluded:

> Because no certificate application had been filed with FERC, little was known about the details of the project. Nevertheless, given the "typical distances between compressor stations (70 miles) and the difference in construction timing," the EA stated that no significant cumulative impacts were expected, other than possibly with respect to air quality. ... In view of the uncertainty surrounding the second compressor station, and the difference in timing between the two projects, this discussion suffices under NEPA.

The court also disagreed with the plaintiffs that the proposed lateral pipeline connecting to a proposed power plant was a reasonably foreseeable action that needed to be included in the cumulative impact analysis, and concluded:

> The same holds true with respect to the potential development of the CPV Valley power plant. The EA's "Cumulative Impacts" section identifies this possible project, too, though it again signals the absence of any firm details surrounding project specifics. Even still, the EA concluded that because the Minisink Project itself was expected to have minimal impacts, no significant cumulative impacts were expected to flow from the possible development of the CPV Valley power plant, particularly since the construction timelines for the two potential projects would be quite distinct. ... In sum, based on our review of the EA, we are satisfied that FERC properly considered the cumulative impacts of the Minisink Project.

10.3 Conclusion and Implications

Of the four U.S. Court of Appeals decisions issued in 2014 involving NEPA cumulative impact analyses, federal agencies prevailed in three of the four decisions (75 percent). The court decisions illustrate that federal agencies are generally successful in challenges to their cumulative impact analyses when they:

- provide a clear and rational explanation for the exclusion of one more reasonably foreseeable actions from their cumulative impact analysis
- make clear how they are treating past actions in their cumulative impact analyses
- provide a clear and rational explanation for how their choice of spatial and temporal boundaries for their cumulative impact analysis.

In the one case the federal government lost in 2014, the court's decision illustrates the need to carefully consider whether all elements of a proposed action are included in terms of connected actions and similar actions - and if a determination is made to evaluate a series of connected actions individually a solid argument must be provided that each part has independent utility.

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