

NEPA Litigation

- There is no NEPA cause of action – challenges to an agency decision not made in accordance with NEPA are brought under the Administrative Procedure Act (APA)
 - “Arbitrary and capricious” standard
- Plaintiffs must show they are within the “zone of interests” protected by NEPA and that they are or would be harmed if the agency’s decision were implemented
 - Plaintiffs must raise their concerns during the agency’s NEPA process

NEPA Remedies

Typical remedies for violations of NEPA under the Administrative Procedure Act (APA), 5 U.S.C. § 706, include:

- (1) reversing and remanding without instructions to vacate,
- (2) reversing and remanding with instructions to vacate,
- (3) equitable relief (injunction),
- (4) declaratory relief (declaratory judgment), and
- (5) mandamus.

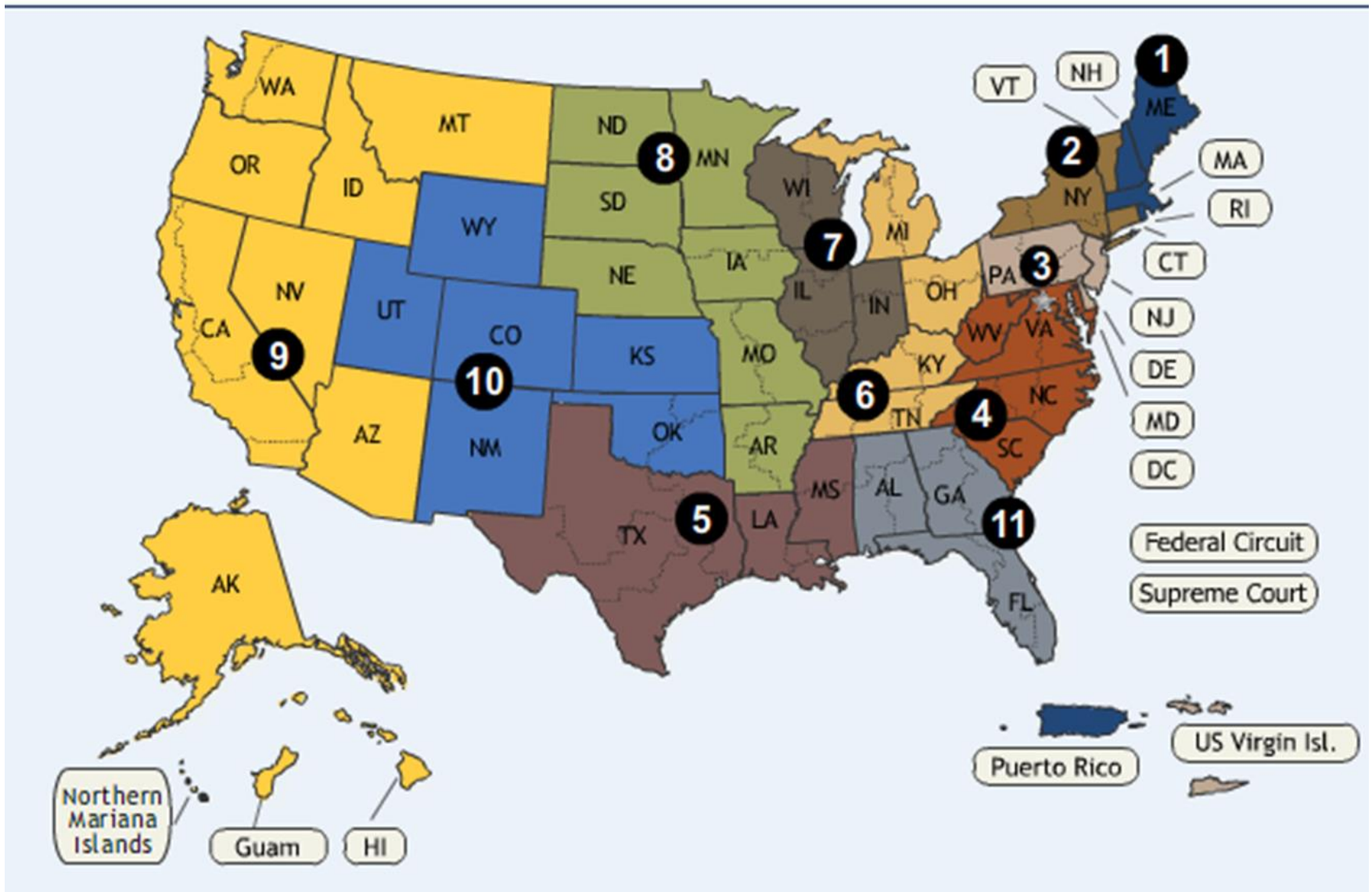
The court may also retain jurisdiction over the matter until resolved.

Federal Court System

- Challenges to NEPA/APA involve federal actions and are brought in federal court
 - District courts (one or more in each state)
 - Courts of Appeal (several states within one circuit; 11 circuits of general jurisdiction and 1 of special jurisdiction [Federal Circuit])
 - U.S. Supreme Court (only takes cases it agrees to hear – usually to address differences in the circuits or constitutional questions)



Jurisdiction of Federal Courts of Appeal



2018 NEPA Litigation Statistics

- U.S. Courts of Appeals issued 35 NEPA decisions (where courts reviewed NEPA documents) in 2018, 16 by the 9th Circuit, 9 by the D.C. Cir., 3 in the 11th and 4th, 2 in the 5th and 1 each in 2nd and 6th.
- 7 different agencies:
 - USDA (USFS, APHIS-WS) – 12 cases (did not prevail in 5 cases, prevailed in part, in 2 cases)
 - DOT (FAA, FHWA) – 6 cases (prevailed)
 - DOI (BLM, NPS) – 5 cases (did not prevail in 1 case)
 - FERC – 5 cases (did not prevail in 1 case)
 - DOD (USAF, USACE)– 4 cases (prevailed)
 - NRC – 2 cases ((did not prevail in 1 case)
 - DOE (BPA) – 1 case (prevailed)
- Government prevailed in **80%** of the cases.

Comparison to Previous Years

	U.S. Courts of Appeal Circuits												
	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	TOTAL
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	2	1	2	3	1		1		12	3	2	1	28
2013	2			2		1	1		9	2	1	3	21
2014				2		5			10	2		3	22
2015	1					1			6	2		4	14
2016				2		1	1		14	1	1	7	27
2017		1	1		1				13	1		8	25
2018			1	3	2	1			16		3	9	35
TOTAL	9	7	7	14	9	12	5	5	149	28	9	44	298
	3%	2%	2%	5%	3%	4%	2%	2%	50%	9%	3%	15%	

Why did federal agencies prevail?



- Courts relied heavily on deference provided to agency, especially regarding impact analysis.
- Of the 35 substantive cases where NEPA documents were reviewed, 2 involved a CATEX, 14 involved EAs and 15 involved EISs (in one case the court ruled a NEPA document was not required). 2 EAs were found to be inadequate; in 5 EISs the agency did not prevail but 2 of those were inadequate on certain NEPA claims but adequate on other NEPA claims.

2018 Case Trends

- 18 (of 35) cases involved challenges to impact analysis
 - 2 cases, CATEX; 13 cases - direct impacts; 4 cases – involved use of old/stale data and methodology/software; 9 cases - cumulative impacts.
- 7 cases involved challenges to alternatives
- 4 cases involved whether an agency's action qualified as a federal action
- 4 cases dealt with connected actions/segmentation
- 3 cases involved predetermination
- 3 cases involved adoption/incorporation by reference of other NEPA documents
- 3 cases involved the duty to supplement

More 2018 Case Trends



- 3 cases addressed the waiver of claim defense
- 2 cases involved challenges to purpose and need statements
- 2 cases involved claims that the environmental consultant/agency had a conflict of interest with the underlying project
- 1 case addressed the unique situation of emergency action; this is an issue rarely litigated
 - *Forest Service Service Employees for Environmental Ethics v. U.S. Forest Service*, No. 17-35569, 726 Fed. Appx. 605 (9th Cir. Jun. 8, 2018) (not for publication) (addressing emergency provisions and upholding the USFS's decision to construct a community protection line during the Wolverine wildfire of 2015 in the Okanogan-Wenatchee National Forest in eastern Washington).
- 16 of the cases were unpublished (1 case each from 3d, 4th and 5th Cir., 2 from the D.C. Cir, and 11 from 9th Cir.)

Impact Assessment

40 C.F.R. §1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

Categorical Exclusions



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

Impact Assessment: American Rivers v. FERC (D.C. Cir. 2018)



- Challenge of FERC's grant of a 30 year license to continue power generation on a portion of the Coosa River in Alabama.



- From its headwaters in Georgia, the [Coosa River](#) flows through Alabama to form the Alabama River. These waters flow on through the Tensaw Delta into Mobile Bay and, ultimately, the Gulf of Mexico. Rich in aquatic biodiversity, it is the fourth largest basin in the country with regards to stream flow.

American Rivers v. FERC

- **Challenge:** Plaintiffs argued that FERC. violated NEPA with respect to FERC's actions in the relicensing, by failing to prepare an EIS (because of significant adverse impacts of the project with respect to fish passage and dissolved oxygen and further, that the cumulative impact analysis was flawed).



American Rivers v. FERC

- On June 20, 2013, FERC granted Alabama Power a new 30–year license to continue operating the now-combined Coosa Project. Both the FERC’s EA and the FWS’s Biological Opinion (BO) were incorporated, without change, into the license.
- The license imposed several terms and conditions:
 - (i) implement “aeration” measures to achieve a constant minimum dissolved oxygen level of 4.0 milligrams per liter (“mg/L”) at each development “at all times,”
 - (ii) enhance dissolved oxygen levels at Logan Martin during periods of non-generation to protect certain listed aquatic species,
 - (iii) incorporate water-quality monitoring measures prescribed by the Alabama Department of Environmental Management, and
 - (iv) conduct surveys of aquatic species to ensure no further decline of threatened and endangered mussels and snails.

American Rivers v. FERC

- Flawed analysis: (1) Fish Passage
 - Project would result in large mortality rates for a number of species entrained (that is, killed) by Project turbines—as many as 1.3 million fish per year; EA found it insignificant because the entrained fish likely would be non-protected species or juveniles with high natural mortality rates.
 - Relied on 1997 survey of fish entrainment and estimates provided by the license applicant itself.
 - No updated information was collected; no field studies were conducted. Nor was any independent verification of applicant's estimates undertaken and its estimates were entirely unmoored from any empirical, scientific, or otherwise verifiable study or source.
 - “[FERC’s] acceptance, hook, line, and sinker, of [the] outdated estimates, without any interrogation or verification of those numbers is, in a word, fishy.”

American Rivers v. FERC

- Flawed analysis: (1) Fish Passage, con't
 - “NEPA demands far more analytical rigor than the EA’s breezy dismissal of the high fish mortality rate documented in its dated and unverified studies.”
 - “[FERC’s] cheery assurance that “excellent” human-operated sport and commercial fisheries remain downstream is just whistling past the graveyard.
 - EA made no effort to explain how downstream, human-operated sport and commercial fisheries are relevant bellwethers for environmental impacts in the upstream Coosa River.
 - “The nearby presence of a nice zoo has never been a relevant answer under NEPA to high species mortality in nature.”

“The record simply does not provide a rational connection between the licensing decision, the record evidence, and the finding of no significant environmental impact.”

American Rivers v. FERC



- Flawed analysis: (1) Maintenance of Dissolved Oxygen Levels
 - Dissolved oxygen in the water is indispensable for aquatic animal life. Many of the aquatic species in the Coosa River Project area, including those listed as endangered or threatened under the ESA require well-oxygenated, flowing water to survive.
 - As a general rule, dissolved oxygen levels can threaten “acute mortality” for many aquatic species if they fall below 4.0mg/L for any sustained period of time; here required by Alabama State Law through water quality certification process

American Rivers v. FERC

- Flawed analysis: (1) Maintenance of Dissolved Oxygen Levels, con't
 - FERC accepted applicant's submissions that it would be infeasible to maintain 4.0 mg/L dissolved oxygen minimums at all times even if various mitigation measures identified were implemented
 - Court found authorization to operate for substantial periods of time without maintaining the lowest level of dissolved oxygen identified in the text of Alabama's statute and necessary to avoid "acute mortality," constituted a significant adverse environmental consequence without reasoned justification.
 - Record documented an extensive and troubling pattern during which dissolved oxygen levels in the Project area frequently plummeted below the lowest tolerable level, threatening "acute mortality" for many aquatic species – but was not accounted for in the EA

American Rivers v. FERC

- Flawed analysis: (1) Maintenance of Dissolved Oxygen Levels, con't
 - FERC “hangs its hat on the license’s requirement that Alabama Power install oxygen diffuser aeration systems. These aeration systems are generally designed to pump additional oxygen into the water during generation periods.”
 - No solid plan for system: licensing record is devoid of information about what aeration system will be implemented, or when, or how it will perform. Applicant never provided any details or specifications about its proposed aeration system, but FERC embraced it as a sufficient mitigation measure. The measures would be implemented 18 months after licensed.
 - If agency was aware of a successful aeration system available for applicant to use, then it should have required that it use that system or its equivalent rather than give the Company an 18–month blank check.

American Rivers v. FERC

- Flawed analysis: (1) Maintenance of Dissolved Oxygen Levels, con't
 - “Given the exceptional importance of maintaining minimum dissolved oxygen levels to the aquatic ecosystem, it was irrational for the Commission to cast those significant environmental impacts aside in reliance on some sort of mitigation measures, which the Commission was content to leave as “TBD.” ”

Impact Assessment:

Atchafalaya Basinkeeper v. USACE (5th Cir. 2018)

- Corps and applicant's appeal of a district court's grant of a preliminary injunction preventing construction of a pipeline in part through the **Atchafalaya Basin** of southern Louisiana. The injunction was based on the Corps' alleged failure to satisfy the demands of the National Environmental Policy Act in issuing a Section 404 CWA Permit.



Atchafalaya Basinkeeper v. USACE

- Bayou Bridge, the applicant, applied for a Section 404 permit allowing it to build a 162-mile crude oil pipeline from Lake Charles, Louisiana to terminals near St. James. Portions of the pipeline will cross the Atchafalaya Basin, affecting wetlands.
- USACE prepared two EAs and issued permits (one under Section 408 R&HA, and 404 (CWA)).



Atchafalaya Basinkeeper v. USACE



Environmental organizations filed for a preliminary injunction claiming:

- (1) the EAs violated NEPA and the CWA by failing to adequately analyze mitigation for the loss of cypress-tupelo swamp along the pipeline right of way through the Basin, and;
- (2) the EAs violated NEPA and the CWA by failing to adequately consider historical noncompliance by other pipelines and the cumulative effects of this project.

The resulting preliminary injunction stopped construction only “within the Atchafalaya Basin.”

Atchafalaya Basinkeeper v. USACE



- Court found that the FONSI was not a mitigated FONSI despite mitigation; thus no significant environmental impact.
- Court reviewed the question whether the Corps properly applied CWA regulations when it determined that Bayou Bridge could (1) utilize approved construction methods within the Basin, and (2) purchase (a) in-kind mitigation credits, i.e. cypress-tupelo acreage within the watershed and, when those were exhausted, (b) out-of-kind credits of bottomland hardwood acreage within the watershed to compensate for the project's impact.

Atchafalaya Basinkeeper v. USACE



- The LRAM was published and was subject to comment by the public and numerous federal and state agencies, and was revised following their input. The LRAM's purpose is "quantify adverse impacts associated with permit applications and environmental benefits associated with compensatory mitigation to determine the amount and type of credits necessary to offset a given impact. The LRAM scores wetland impacts based on factors including (1) number of acres affected by the prospective permit, (2) how difficult the wetlands are to replace, (3) habitat condition; (4) hydrologic condition, (5) negative human influences, and (6) permanent or temporary loss. The LRAM assigns values to the quality of the wetlands and of mitigation banks, converts the values into credits, and determines on a watershed basis how many acres in mitigation banks must be purchase by the applicant.
- The Supreme Court has held that the use of scientific methodology, like in the LRAM, is subject to judicial deference.. The Corps used the LRAM in its 404 EA and fully explained its background and use.

Atchafalaya Basinkeeper v. USACE



- LRAM analysis "rationally connected" the out-of-kind-mitigation bank purchases in the Basin to the "aquatic functions and services" lost by the project because:
 - (1) Applicant required to buy bottomland hardwood credits within the Basin watershed only because it had already purchased all available cypress/tupelo swamp credits;
 - (2) the Corps responsibility under the CWA was to ensure the protection of aquatic functions and services, which did not include the protection of tree species, as such;
 - (3) the 404 EA used the LRAM
 - (4) citing CWA the 404 EA discussion of required compensatory mitigation bank purchases notated that the conclusion was consistent with the preferred hierarchy as set forth by the Corps (i.e. in-basin, in-kind mitigation first, in-basin, out-of-kind mitigation second, etc.);
 - (5) the Corps 404 EA's analysis includes the Corps' BMPS during construction and requires conditions that must be met with specificity.
 - (6) *O'Reilly* predates CWA.

Atchafalaya Basinkeeper v. USACE



- Judge Reavley Dissent:
 - The Corps relied on the LRAM, but found that one of the chosen mitigation banks did not have the number of cypress-tupelo acres necessary to match a fully in-kind mitigation; the Corps then sanctioned instead the purchase of 69 cypress-tupelo acres and 243.8 bottomland hardwood acres. Thus, the Corps swapped each acre of unaccounted-for cypress tupelo of surplus bottomland hardwood, and treated the two resource types interchangeably
 - LRAM lacked a critical explanatory component. In short, 33 C.F.R § 332.3(e)(1) prefers in-kind over out-of-kind mitigation because similar resources are "most likely to compensate for the functions and services lost at the impact site." Therefore, the LRAM is not a tool for out-of-kind mitigation. The 404 EA did not explain the gaps of impacts of out-of-kind mitigation.

Atchafalaya Basinkeeper v. USACE

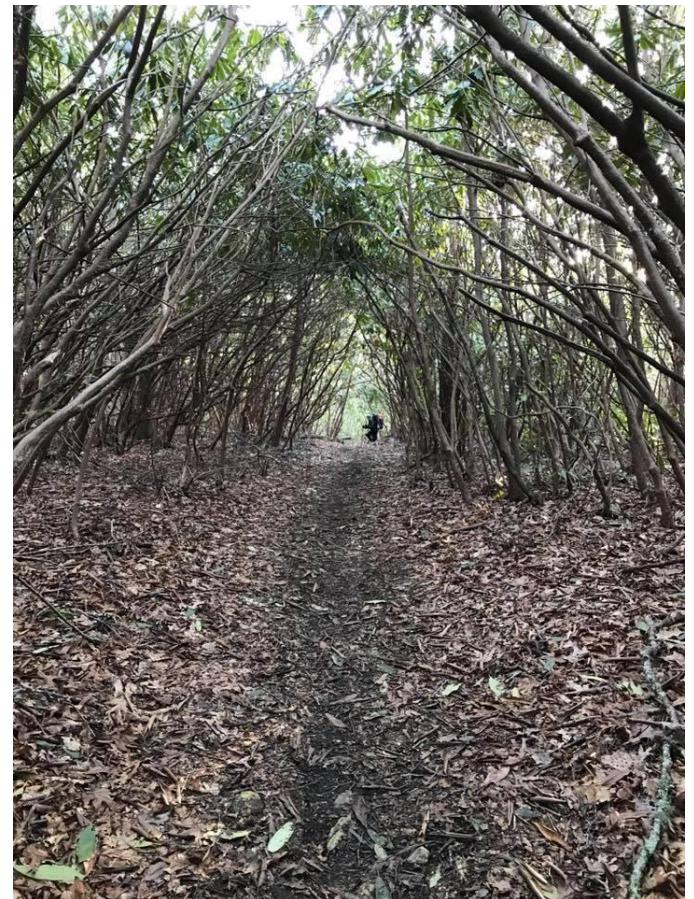


- Judge Reavley Dissent con't:
 - *O'Reilly* stands for a fundamental proposition: When mitigation is a necessary part of a FONSI, the agency bears a duty to explain why the mitigation will be effective.
 - Two types of FONSIs under *O'Reilly*: (1) those in which mitigation is an integral part of the insignificant outcome and (2) those in which the mitigation is ultimately gratuitous—that is, when the impacts would be insignificant even without mitigation. There is no third option.
 - Was mitigation necessary to this project's insignificant impact? The Corps was unwilling to concede that mitigation was necessary to reduce the project's impact to insignificance, despite numerous pages of EA detailing impacts to wetlands acreage and compensatory mitigation.

Impact Assessment: McGuinness v. USFS (4th Cir. 2018)



- Challenge to shooting range in Nantahala NF.
- 11 years, 2 EAs and 2 Noise Studies Conducted



McGuinness v. USFS (4th Cir. 2018)



- Argued proposed project likely to be highly controversial.
- Shooting range would create additional low-level noise for residents in vicinity and that hikers on the Chunky Gal Trail would hear gunfire and increased noise levels that would approximate loud conversational speech or even shouting during very heavy shooting range use.
- In this context, agency action is 'likely to be highly controversial' when 'a substantial dispute exists as to the size, nature or effect of the major federal action.'

McGuinness v. USFS (4th Cir. 2018)



- Appellants nitpick the results of the sound tests considered by USFS, but mere opposition—or the extent of that opposition—to a proposed agency action does not create a ‘substantial dispute’ or make the action ‘highly controversial.’
- Even if the proposed project is ‘likely to be highly controversial,’ 40 C.F.R. § 1508.27(b)(4), ‘the existence of a controversy is only one of the ten factors listed for determining if an EIS is necessary.’ *Soc’y Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000).

Note: This is unusual finding by the Court – recommend exercising caution in this instance.

McGuinness v. USFS (4th Cir. 2018)



- Alleged USFS violated NEPA by not considering the possible effects of the proposed shooting range project on the values of nearby property....
- “Though authority is scant, some courts have considered the potential effect of a proposed agency action on nearby property values. See *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1324 (D.C. Cir. 2015) (considering whether ‘Environmental Assessment [took] a “hard look” at “quantifying the impacts of the project on property values and lost development opportunities”’).
- USFS acknowledged that effect of noise on property values was of concern to some local residents, albeit not a major issue in the global sense and noted that it had ‘searched the literature and consulted with social scientists and legal experts.’
- USFS ‘considered the relevant factors,’ ‘examined the relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made. Even though the EA omits mention of the anecdotal evidence regarding property values, we are not able to say that the agency made an arbitrary and capricious decision.”

Use of “Stale” data or methodology:



- *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, 889 F.3d 584 (9th Cir. 2018) (concluding that the plaintiff was unable to support its generalized statement that the unspecified “biological data” contained in the FEIS is “stale” when oldest data was historical from 2000, but most other data was after 2006).
- *American Rivers v. Federal Energy Regulatory Comm'n*, 895 F.3d 32 (D.C Cir. 2018) (stating that reliance on a decade-old survey of fish entrainment and estimates was not sufficient: no updated information was collected; no field studies were conducted, nor was any independent verification of the applicant's estimates undertaken).

Use of “Stale” data or methodology:



National
Association of
Environmental
Professionals
Be Connected

- *Vaughn v. Fed. Aviation Admin.*, No. 16-1377, 2018 WL 6430368, -- Fed. Appx. --- (D.C. Cir. Nov. 30, 2018) (not for publication) (deferring to FAA’s reasonable explanation that a noise screening using earlier “outdated” software counts as “environmental analysis” for the purpose of complying with the agency’s own guidance; because FAA started conducting its EA before March 2012 [the date the new software was available], it was not required to switch to the new software in March 2012).
- *Northern Plains Resource Council, Inc. v. U.S. Bureau of Land Mgm’t*, No. 16-35447, 725 Fed. Appx. 527 (9th Cir. Feb. 27, 2018) (not for publication) (upholding tiering to a 1990 EIS, when plaintiff failed to point to any evidence, other than age, suggesting the unreliability of the 1990 data. The court reasoned that “[t]he age of data, without more, is not dispositive as to reliability”).

Adoption/Incorporation by reference:



National
Association of
Environmental
Professionals
Be Connected

- *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (discussing that the USFS, when adopting the FERC's FEIS, did not undertake an independent review of the sedimentation analysis, given that it adopted the EIS in spite of the USFS's prior disagreement over the level of efficacy of barriers intended to block sedimentation of waterways).

Adoption/Incorporation by reference:



- *Cowpasture River Preservation Assoc. v. U.S. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018) (stating as a cooperating agency, the USFS violated NEPA because it adopted FERC's inadequate EIS without undertaking the required "independent review," and because the FEIS did not satisfy the USFS' earlier comments and concerns on the DEIS). ****Lesson Learned: Ensure if adopted document explain how comments and concerns were addressed.**
- *Alliance for Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105 (9th Cir. 2018) (distinguishing between tiering and incorporation by reference).

40 C.F.R. 1508.25 Scope

Agencies shall consider. . . 3 types of actions . . . :

- (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
- (i) Automatically trigger other actions which may require environmental impact statements.
 - (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
 - (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. 1508.25 Scope



Agencies shall consider. . . 3 types of actions . . . :

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

Segmentation/Connected Actions:



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

Segmentation/Connected Actions:



- *Township of Bordentown, New Jersey v. Federal Energy Regulatory Comm'n*, 903 F.3d 234 (D.C. Cir. 2018) (finding that proposal to upgrade existing interstate natural gas pipeline system so that applicant could increase pipeline capacity for natural gas from its Mainline to its Trenton-Woodbury Lateral had independent utility and was not connected to other pipeline upgrade projects).
- “The prevailing view amongst the Courts of Appeals, an essential question is whether the segmented projects have **independent utility**. ... Projects have independent utility where ‘each project would have taken place in the other's absence.’ *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 426 (4th Cir. 2012).

Segmentation/Connected Actions:



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

40 C.F.R. 1502.9(c)(1) Draft, Final and Supplemental Statement (Duty to Supplement)

Agencies:

- (1) Shall prepare supplements to either draft or final environmental impact statements if
 - (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
 - (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts
- (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so . . .

Duty to Supplement:

- *Western Organization of Resource Councils v. Zinke*, 892 F.3d 1234 (D.C. Cir. 2018) (recognizing that neither NEPA nor the agency's own documents create a legal duty for the agency to update the Federal Coal Management Program's programmatic EIS analyzing the climate impacts of federal coal leasing).
- *Greenpeace, Inc. v. Stewart*, No. 17-35945, 743 Fed. Appx. 878 (9th Cir. Nov. 28, 2018) (not for publication) ("USFS violated NEPA by declining to supplement its NEPA documents despite significant new circumstances that arose when USFS's reanalysis of the project revealed below guideline deer habitat capabilities").

Duty to Supplement:

- *Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906 (9th Cir. 2018) (discussing May 2011 Supplemental Analysis [incorporated into the 2009 ROD] merely confirmed the Corps' conclusion but was not its basis; accordingly, it did not contain "significant new information" that would require the Corps to recirculate the EIS/EIR for further comment).



National
Association of
Environmental
Professionals

Be Connected

Cumulative Impacts Cases

Cumulative Impacts

- CEQ Regulations § 1508.7:
 - *“Cumulative impact” is the impact on the environment which results from the incremental impact of the action being analyzed when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.*

2018 Cumulative Impacts Decisions

- *Friends of the Santa Clara River v. USACE* 887 F.3d 906 (9th Circuit) – USACE; no overlap in impacts
- *Fath v. TXDOT* (5th Circuit) No.17-50683 – TXDOT; no overlap in impacts
- **Vaughn v. FAA* No. 16-1377, (DC Circuit) 2018 WL 6430368 – FAA; no overlap in impacts
- *Atchafalaya Basinkeeper v. USACE* 894 F.3d 692 (5th Circuit) – USACE; past actions
- ***American Rivers v. FERC* 985 F.3d 32 (DC Circuit) – FERC; past actions, no analysis of impacts**
- **Clatsop Residents Against Walmart v. USACE* (9th Circuit) No.16-35767, 735 Fed. Appx.909 – USACE; past actions, baseline
- **Wildlands Defense v. Seesholtz* (9th Circuit) No.18-35400, 2018 WL 6262505 - USFS; past actions, baseline
- *City of Boston Delegation v. FERC* (DC Circuit) 897 F.3d 241 – FERC; present and reasonably foreseeable future actions
- **Northern Plains Resource Council v. BLM* (9th Circuit) No.16-35447, 725 Fed. Appx. 527 – BLM; reasonably foreseeable future actions

Results for 2018 cases

- Appellate Court decisions on agency cumulative impact analyses challenges
- Agencies prevailed in 89% (8 of 9) of the published and unpublished opinions
 - 4 in the 9th Circuit
 - 3 in the DC Circuit
 - 2 in the 5th Circuit
- Agencies prevailed in 80% (4 of 5) of the published opinions
- Agencies involved:
 - USACE (3 opinions)
 - FERC (2 opinions)
 - BLM, USFS, FAA, TXDOT (1 opinion each)

Results for 2017 cases



- Appellate Court decisions on agency cumulative impact analyses challenges
- Agencies prevailed in 100% (4 of 4) of the opinions (1 published; 3 unpublished)
 - 2 in the 9th Circuit
 - 1 in the DC Circuit
 - 1 in the 5th Circuit
- Agencies involved:
 - DOE (1 opinion)
 - USACE (1 opinion)
 - BLM (1 opinion)
 - USFS (1 opinion)

Results for 2016 cases

- Appellate Court decisions on agency cumulative impact analyses challenges
- Agencies prevailed in 83% (5 of 6) of the published opinions
 - 3 in the DC Circuit
 - 2 in the 6th Circuit
 - 1 in the 9th Circuit
- Agencies involved:
 - FERC (2 opinions)
 - NRC (1 opinion)
 - USACE (1 opinion)
 - BLM (1 opinion)
 - USFS (1 opinion)

Results for 2015 cases

- Agencies prevailed in 75% (3 of 4) of the opinions*
 - 3 in the 9th Circuit Court
 - 1 in the 6th Circuit
- Agencies involved:
 - BLM (2 opinions)
 - BIA (1 opinion)
 - TVA (1 opinion)

Results for 2014 cases

- Agencies prevailed in 75% (3 of 4) of the opinions
 - 2 in the 9th Circuit Court
 - 2 in the DC Circuit Court
 - 2008-2012 cases: Agencies prevailed in 76% (28 of 37) of the opinions
- Agencies involved:
 - FERC (2 opinions)
 - USFS (2 opinions)

Results for 2013 cases



- Agencies prevailed in 88% (7 of 8) of the opinions
 - 4 in the 9th Circuit Court
 - 1 each in the 4th, 6th, 10th and DC Circuit Courts
 - 2008-2012 cases: Agencies prevailed in 76% (28 of 37) of the opinions
- Agencies involved:
 - US Army Corps of Engineers – 4 opinions
 - BLM – 3 opinions
 - USFS – 1 opinion



National
Association of
Environmental
Professionals

Be Connected

**Cases involving no overlap of
impacts**

Friends of the Santa Clara River v. USACE (9th Circuit 2018)



- Section 404 CWA Permit for the proposed Newhall Ranch development in southern California
- 12,000-acre development:
 - 21,000 residential units
 - 5.5 million sq. ft. of commercial, office, and retail uses
 - Development along 5.5 linear river miles
- Plaintiffs alleged the EIS/EIR for the project had an inadequate cumulative impacts analysis of dissolved copper discharges on downstream steelhead





Quickview



Friends of the Santa Clara River v. USACE (9th Circuit 2018)



National
Association of
Environmental
Professionals
Be Connected

- Court rules that the agency properly concluded the project would not adversely affect steelhead
- Court: *“Furthermore, because the Corps reasonably determined that the Project was not likely to affect steelhead populations in the Santa Clara River, it was also not arbitrary or capricious to conclude that the Project would not result in significant cumulative water quality impacts to steelhead.”*
- Court: *“The data and analysis set forth in the Draft EIS/EIR and Final EIS/EIR consistently establish that concentrations of dissolved copper in discharges from the Project would be within the background range already observed in the Santa Clara River and well below the CTR’s dissolved-copper criterion for the Santa Clara River... Given this information, the Corps reasonably concluded that the Project’s discharges of dissolved copper would not affect steelhead downstream of Dry Gap.”*

Atchafalaya Basinkeeper v. USACE (5th Cir. 2018)



- Corps and applicant's appeal of a district court's grant of a preliminary injunction preventing construction of a pipeline in part through the **Atchafalaya Basin** of southern Louisiana. The injunction was based on the Corps' alleged failure to satisfy the demands of the National Environmental Policy Act in issuing a Section 404 CWA Permit.
- Court ruled in favor of the agency that the cumulative impacts analysis was adequate



Atchafalaya Basinkeeper v. USACE

- Applicant Bayou Bridge Pipeline, LLC, applied for a Section 404 permit allowing it to build a 162-mile crude oil pipeline from Lake Charles, LA to terminals near St. James, LA. Portions of the pipeline would cross the Atchafalaya Basin, affecting wetlands
- USACE prepared two EAs and issued permits (one under Section 408, and one for 404)



Atchafalaya Basinkeeper v. USACE (5th Cir. 2018)



- Plaintiffs alleged the EAs failed to consider past actions in their cumulative impact analyses, including projects not in compliance with CWA requirements
- COURT: *“Here, the EAs concluded that because of appropriate mitigation measures, in terms of construction conditions and limitations in the permit, and Bayou Bridge’s purchase of compensatory mitigation bank acreage, there would be no incremental impact; hence, there could be no cumulative effects with regard to pre-existing spoil banks.”*
- COURT: *“The 408 EA specifically acknowledged past, present and reasonably foreseeable future actions, including previous pipelines, and maintained its conclusion that there would be no adverse results from temporary discharges during this construction... It concluded that “through the efforts taken to avoid and minimize effects . . . and the mandatory implementation of a mitigation plan . . . permit issuance will not result in substantial direct, secondary or cumulative adverse impact on the aquatic environment.”*

Fath v. TXDOT (5th Circuit 2018)

- Three proposed highway projects in Austin, TX
 - Build two overpasses on TX State Highway Loop 1 - the “MoPac”
 - Add 8 miles of express lanes on the MoPac
 - Extend State Highway 45 West by 4 miles
- EA for the overpasses project
 - No NEPA for Highway 45 project as no federal aid money involved
 - Express lane project still under “initial review”



Fath v. TXDOT (5th Circuit 2018)



- Plaintiffs alleged that all three actions were “cumulative actions” under NEPA and/or they were “connected actions”
- Court rules that TXDOT permissibly followed only the FHWA NEPA regulations (Sec. 771.11(f)) that have a narrower definition of connected actions (and do not discuss cumulative actions)
- COURT: *“These cases are in line with the principle that courts apply a “specifically tailored” and “better fitted” statute over a “more general” one... we read § 771.111(f) as having tailored the general policy of § 1508.25(a) to the specific question of whether multiple highway projects are “in effect, a single course of action...As a result, TxDot did not act arbitrarily and capriciously by not complying with § 1508.25(a)(2).”*

Fath v. TXDOT (5th Circuit 2018)



- COURT: *“TxDot contends that a full analysis is unnecessary where, as here, it does not expect a project to have any significant environmental impact that can “accumulate” with the impacts of other actions. We agree... A full cumulative impact analysis here would not serve these purposes. The proposed overpasses are a two-mile project in an area that is already heavily developed and trafficked. After conducting a number of detailed technical studies, TxDot concluded that the project would not significantly impact the environment. We cannot say TxDot’s finding was arbitrary and capricious on these facts. If the project would have no significant impact by itself, it is unlikely to change the environmental status quo when “added” to other actions.”*

Fath v. TXDOT (5th Circuit 2018)



- COURT: “See *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng’rs*, No. 18-30257, 2018 WL 3339539, at *8–9 (5th Cir. July 6, 2018) (holding that a full cumulative impact analysis was unnecessary where Environmental Assessments concluded that a project would have no incremental impact and “hence, there could be no cumulative effects”); see also *Minisink Residents for Env’tl. Pres. & Safety v. FERC*, 762 F.3d 97, 113 (D.C. Cir. 2014) (concluding that no cumulative impact analysis was needed where “the [Environmental Assessment] concluded that because the . . . Project itself was expected to have minimal impacts, no significant cumulative impacts were expected to flow”)”

Fath v. TXDOT (5th Circuit 2018)



- COURT: *“Here, given the overpass project’s limited scope and location over busy urban intersections, it was not arbitrary and capricious for TxDot to limit its cumulative impact analysis where the record supports its finding that the project will have no significant direct or indirect impact.”*



National
Association of
Environmental
Professionals

Be Connected

Cases involving consideration of past actions

American Rivers v. FERC (D.C. Cir. 2018)

- Challenge of FERC's grant of a 30-year license to continue power generation on a portion of the Coosa River in Alabama
- Coosa River Basin covers 10,161 sq. miles in Alabama, Georgia and Tennessee
- 9 hydropower and storage projects along the river, nearly all in Alabama
- Plaintiffs argued that FERC violated NEPA by failing to prepare an EIS and that the cumulative impact analysis was flawed



American Rivers v. FERC (DC Circuit 2018)



National
Association of
Environmental
Professionals
Be Connected

- Challenge to the cumulative impact analysis under NEPA largely mirrored the objections to the FWS BiOp. EA relied heavily on the in establishing the current operation of the Coosa Project as the baseline for measuring environmental impacts
- As a result, the FWS's failure to factor the damage already wrought by the construction of dams into the cumulative impacts analysis "fatally infected" this aspect of the Commission's NEPA decision as well
- Scant attention to past actions that had led to and were perpetuating the Coosa River's heavily damaged and fragile ecosystem
- EA did not offer any substantive analysis of how the present impacts of those past actions would combine and interact with the added impacts of the 30-year licensing decision
- "[F.E.R.C's] cumulative impact analysis left out critical parts of the equation and, as a result, fell far short of the NEPA mark."

American Rivers v. FERC (DC Circuit 2018)



National
Association of
Environmental
Professionals
Be Connected

- COURT: *“Third, the Commission’s cheery assurance that “excellent” human-operated sport and commercial fisheries remain downstream is just whistling past the graveyard. The Commission, for its part, made no effort to explain how downstream, human- operated sport and commercial fisheries are relevant bellwethers for environmental impacts in the upstream Coosa River. After all, the nearby presence of a nice zoo has never been a relevant answer under NEPA to high species mortality in nature. In short, with respect to the admitted killing of large numbers of fish in the Coosa River, the Commission’s NEPA analysis was woefully light on reliable data and reasoned analysis and heavy on unsubstantiated inferences and non sequiturs.”*
- USFWS cumulative impacts/baseline analysis did not include other projects; the NEPA analysis followed the same approach
- COURT: *“the Commission declined to factor in the decades of environmental damage already wrought by exploitation of the waterway for power generation and that damage’s continuing ecological effects.”*

American Rivers v. FERC (DC Circuit 2018)



National
Association of
Environmental
Professionals
Be Connected

- USFWS BiOp: *“The modifications to the Coosa River and the construction of [Alabama Power Company’s] hydro developments began nearly a century ago and their cumulative effects (e.g., fragmented habitats, impeded fish passage, altered hydrology and water quality) have undoubtedly changed the landscape in the Coosa Basin forever, impacting many aquatic species and likely contributing to the extirpation and extinction of several. However, **the relicensing of the Coosa Project at this time cannot take into account the historic impacts of these actions, but rather only the current and proposed future operations and their impacts.**”*
- COURT: *“In defining the environmental baseline, the Opinion reasoned that certain activities that “began as early as the 1920’s are beyond the scope of the consultation.” This exclusion of the historic impacts on the Coosa River Project appears to be inconsistent with the guidance in the ESA handbook.”*

American Rivers v. FERC (DC Circuit 2018)



National
Association of
Environmental
Professionals
Be Connected

- COURT: *“As a result, the Service’s failure to factor the damage already wrought by the construction of dams into the cumulative impacts analysis fatally infected this aspect of the Commission’s NEPA decision as well. The Commission gave scant attention to those past actions that had led to and were perpetuating the Coosa River’s heavily damaged and fragile ecosystem. Nor did it offer any substantive analysis of how the present impacts of those past actions would combine and interact with the added impacts of the 30-year licensing decision. The Commission’s cumulative impact analysis left out critical parts of the equation and, as a result, fell far short of the NEPA mark.”*

Clatsop Residents Against Walmart v. USACE (9th Cir. 2018; not for publication)



- USACE EA for Section 404 wetland fill permit for .37 acres in Warrenton, OR
- COURT: *"CRAW also contends that the Corps' cumulative impacts analysis under NEPA was arbitrary and capricious. We disagree. The Corps 'aggregat[ed] the cumulative effects of past projects into an environmental baseline,' Cascadia Wildlands v. Bureau of Indian Affairs, 801 F.3d 1105, 1111 (9th Cir. 2015), which included 'quantified [and] detailed information' about past impacts, Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 868 (9th Cir. 2005) (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1379-80 (9th Cir. 1998))."*



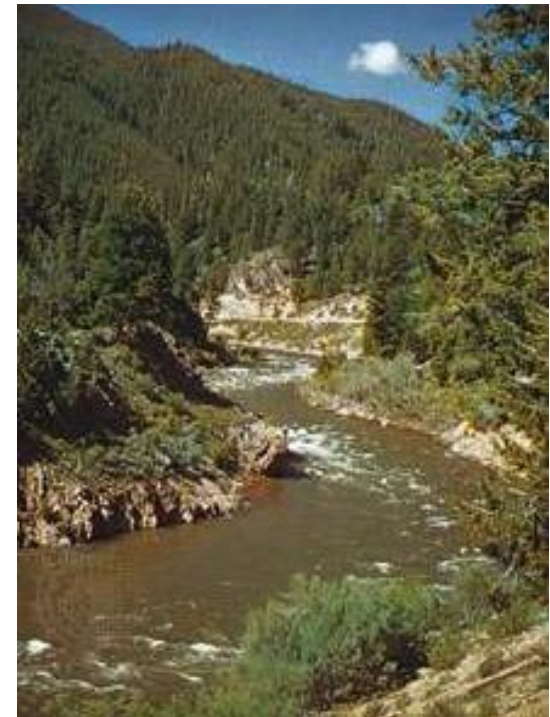
Clatsop Residents Against Walmart v. USACE (9th Cir. 2018; not for publication)



- COURT: *“The Corps' choice of a five-year baseline range was not arbitrary and capricious because “NEPA does not impose a requirement that the [Corps] analyze impacts for any particular length of time” and the five-year range included the most significant past impact, the 14.9 acres fill of the Nygaard property. Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 962 (9th Cir. 2003). The Corps also did not err in disregarding the wetlands acreage identified in Clatsop County's master plan as not “reasonably foreseeable,” 40 C.F.R. § 1508.7, because the master plan does not include a timeline or identify any specific proposed projects. Env't'l Prot. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1014 (9th Cir. 2006). At any rate, the Corps projected that fill permit authorizations would continue at the pace of four acres of affected wetlands per year. The Corps' cumulative impacts analysis was therefore not arbitrary and capricious under NEPA.”*

Wildlands Defense v. Seesholtz (9th Cir. 2018; not for publication)

- USFS EA for two post-fire recovery projects in the Boise National Forest
- COURT: *“The Forest Service also appropriately considered cumulative impacts. An agency may discharge its obligation to consider cumulative impacts “by aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured.” Cascadia Wildlands v. Bureau of Indian Affairs, 801 F.3d 1105, 1111 (9th Cir. 2015). The Forest Service acted within its discretion in doing so in this case. It was not error to include within the relevant environmental baseline the continued existence of roads within the Forest. Additionally, the Forest Service considered the potential for added sediment contribution to streams from the use of roads during salvage operations.”*





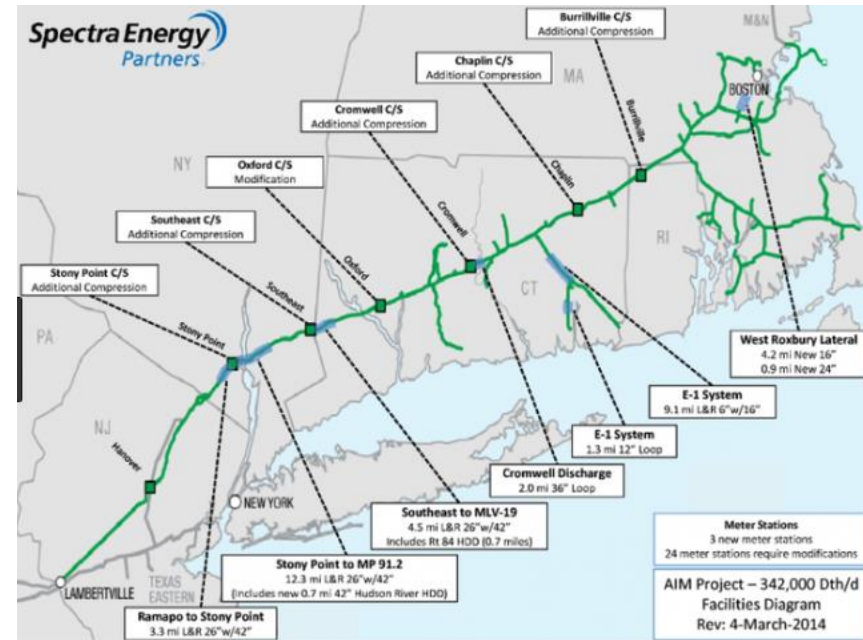
National
Association of
Environmental
Professionals

Be Connected

Cases involving consideration of reasonably foreseeable future actions

City of Boston Delegation v. FERC (DC Cir. 2018)

- EIS for the \$972 million Algonquin Incremental Market (AIM) Project
- Included replacing 29.2 miles of existing pipeline w/ larger diameter pipe, constructing 8.2 miles of new pipeline, three new meter stations, and various modifications to other compressor and meter stations
- Plaintiffs alleged two other projects (Access Northeast and Atlantic Bridge) should have been analyzed in a single EIS



City of Boston Delegation v. FERC (DC Cir. 2018)



- COURT: *“Because the case before us is more in line with Minisink and Myersville than with Delaware Riverkeeper, we conclude that the Commission did not act arbitrarily and capriciously in declining to consider Algonquin’s three projects in a single environmental impact statement. With regard to temporal overlap, the Commission issued the AIM Project certificate in March 2015, Algonquin submitted the application for Atlantic Bridge in October 2015, and Algonquin has yet to file the Access Northeast application. The projects thus were not under simultaneous consideration by the agency.”*

City of Boston Delegation v. FERC (DC Cir. 2018)



- COURT: “Nor are the projects “financially and functionally interdependent.” On that score, we consider “whether one project will serve a significant purpose even if a second related project is not built,” *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987), and we look to the “commercial and financial viability of a project when considered in isolation from other actions.” In denying rehearing, the Commission observed that Algonquin’s three projects “held separate open seasons,” “executed individual precedent agreements” with largely distinct shippers, and “have different negotiated and recourse rates and separate in-service dates.” In those circumstances, the Commission reasonably concluded that “the projects do not depend on the other[s] for access to the natural gas market.”

City of Boston Delegation v. FERC (DC Cir. 2018)



- COURT: *“Factual developments after the Commission’s completion of environmental review for the AIM Project highlight the permissibility of conducting separate environmental assessments for Algonquin’s three projects. Following issuance of the environmental impact statement for the AIM Project, the Atlantic Bridge Project was significantly curtailed: the project’s planned capacity decreased by nearly 40 percent, and the length of pipeline to be replaced decreased by 88 percent. If the Commission’s environmental impact statement for the AIM Project had taken into account the Atlantic Bridge Project as then conceived, the review would have substantially overstated the environmental impact of the Atlantic Bridge Project. With regard to the Access Northeast Project, meanwhile, Algonquin withdrew the project from the Commission’s pre-filing process in June 2017, and it is uncertain when (or whether) the project will go forward.”*

City of Boston Delegation v. FERC (DC Cir. 2018)



- Court rules that the AIM Project EIS was “well-considered” with “sufficient discussion” of the reasonably foreseeable Atlantic Bridge Project in the cumulative impacts analysis
- COURT: *“The cumulative impacts discussion of the Access Northeast Project is much more limited, and understandably so. At the time of the AIM Project’s environmental impact statement, Access Northeast was months away from entering the pre-filing process and over a year away from issuance of a notice of intent to prepare an environmental impact statement. Given Access Northeast’s preliminary stage and the resulting lack of available information about its scope at the time, the project was “too preliminary to meaningfully estimate [its] cumulative impacts.” Theodore Roosevelt Conservation P’ship v. Salazar, 616 F.3d 497, 513 (D.C. Cir. 2010). Additionally, the AIM Project and Access Northeast would “not overlap in time,” meaning the short-term impacts from constructing the former would abate before construction commenced on the latter, and no long-term cumulative impacts were reasonably anticipated. In light of “the uncertainty surrounding [Access Northeast], and the difference in timing between the two projects, this discussion suffices under NEPA.”*

City of Boston Delegation v. FERC (DC Cir. 2018)



- COURT: *“None of this means that Algonquin will circumvent full consideration of the environmental impact of projects that continue to take shape. To the contrary, later projects can fully account for the cumulative impacts when those effects become better known. And in fact, the environmental assessment for the Atlantic Bridge Project considered the cumulative impacts of the Access Northeast Project once the latter project’s details were better defined and its anticipated impacts better understood. For purposes of the AIM Project, however, the Commission adequately considered the cumulative impacts of the other two projects based on the information then available to the agency.”*

Northern Plains Resource Council v. BLM (9th Cir. 2018; not for publication)



- EA for the Signal Peak coal mine in Montana's Bull Mountains
- Plaintiffs allege that EA's cumulative impact analysis failed to account for the reasonably foreseeable future action of the "mirror-image" mine located just north of the proposed mine



Northern Plains Resource Council v. BLM (9th Cir. 2018; not for publication)



National
Association of
Environmental
Professionals
Be Connected

- COURT: *“Here, future mining activity to the north was a “remote and highly speculative consequence” that did not warrant analysis in the EA. See Ground Zero Ctr. for Non-Violent Action v. U.S. Dep’t of Navy, [383 F.3d 1082](#), 1090 (9th Cir. 2004). The scope, magnitude, and time frame for future mining in the north have not been proposed or outlined. Because additional mining has not been proposed, “a cumulative effects analysis would be both speculative and premature.””*

CEQ and EPA Guidance on Cumulative Impacts



Issued by CEQ:

- [“Considering Cumulative Effects Under the National Environmental Policy Act”](#) (1997)
- [“Consideration of Past Actions in Cumulative Impact Analysis”](#) (2005)
 - Requires analysis of the “identifiable present effects of past actions” to the extent relevant and useful in analyzing whether the proposed action “may have a continuing, additive and significant relationship to those effects.”
 - “Agencies are not required to list or analyze the effects of individual past actions unless such information is necessary to describe the cumulative effect of all past actions combined.”
 - Agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions.

Issued by EPA:

- [Consideration of Cumulative Impacts in EPA Review of NEPA Document](#) (1999)

Questions/Comments?

Fred Wagner, *Partner - Venable LLP*

FRWagner@Venable.com

(202) 344-4032

P. E. Hudson, *Counsel - Department of the Navy
Office of General Counsel*

pam.hudson@navy.mil

(805) 982-1691

Michael D. Smith, *Senior Environmental Practice
Leader – GEI Consultants*

michael.smith84@gmail.com

(571) 830-0854