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NEPA Case Law Update

MODERATOR:

Fred Wagner, *Partner – Venable LLC*

PRESENTERS:

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

Michael D. Smith, *Principal – Ecology & Environment (member of WSP)*

NAEP Webinar July 15, 2020

NEPA Litigation

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- 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

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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

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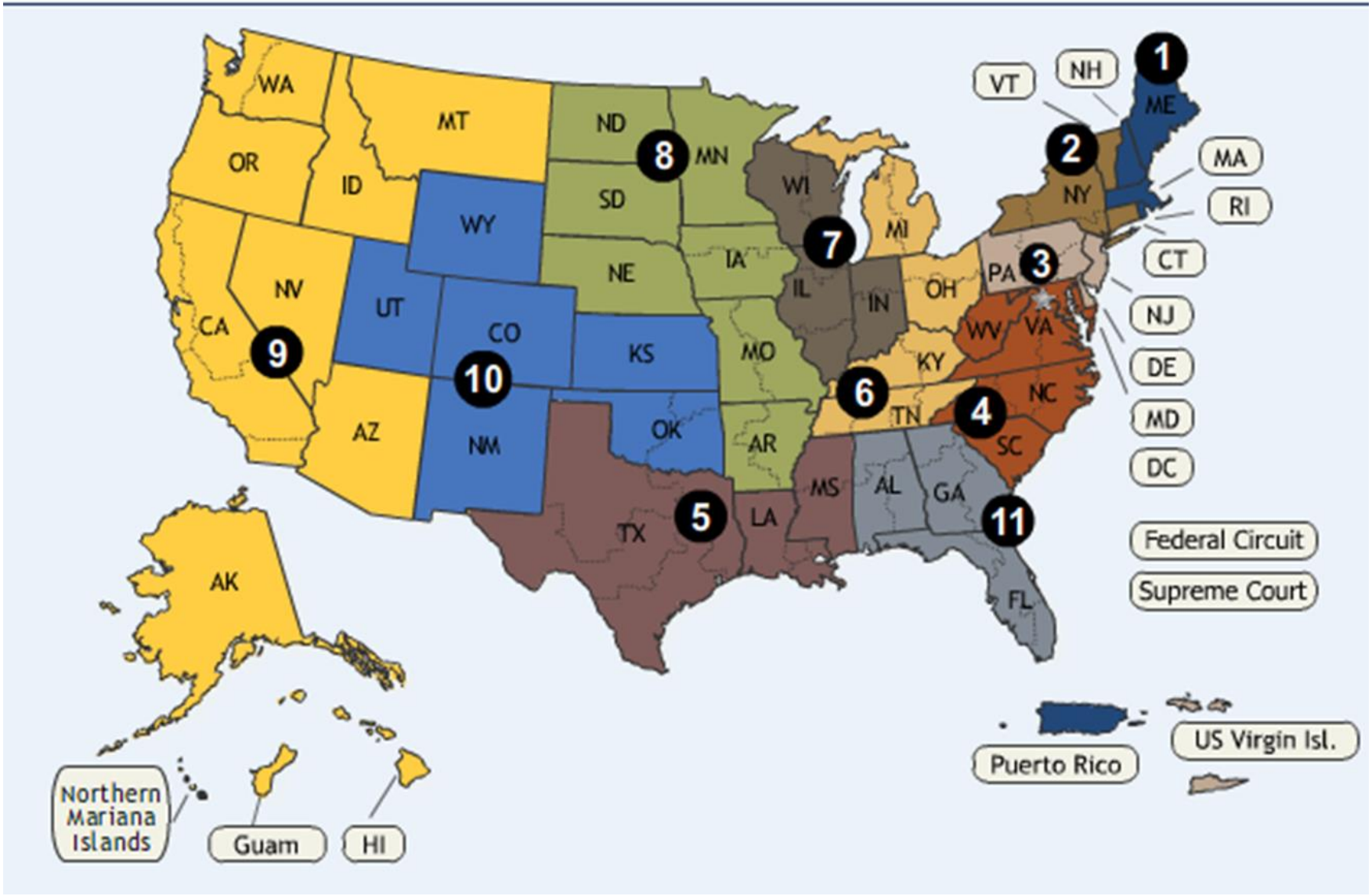
- Challenges to NEPA/APA involve federal actions and are brought in federal court
  - District courts (one or more in each state)
  - Courts of Appeal (several states within one circuit; 11 circuits of general jurisdiction and 1 of special jurisdiction [Federal Circuit])
  - U.S. Supreme Court (only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

Jurisdiction of Federal Courts of Appeal



2019 NEPA Litigation Statistics

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- U.S. Courts of Appeals issued 21 NEPA decisions (where courts reviewed NEPA documents) in 2019, 9 by the 9th Circuit, 6 by the D.C. Cir., 2 in the 10th, and 1each in the and 4th, 7th and 8th, and the 11th.
- 7 different agencies:
  - USDA (USFS) – 7 cases (prevailed)
  - DOT (FAA, FHWA) – 4 cases (did not prevail in one case)
  - DOI (BLM, BIA, NPS) – 4 cases (did not prevail in 1 case and prevailed on some class but not all in the other)
  - FERC – 3 cases (prevailed)
  - DOD (USACE)– 3 cases (did not prevail in 1 case)

- Government prevailed in **80% (83%** if partial counted) of the cases.

Comparison to Previous Years

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	U.S. Courts of Appeal Circuits												
	lst	**2nd**	**3rd**	**4th**	**5th**	**6th**	**7th**	**8th**	**9th**	**10th**	**11th**	**D.C.**	**TOTAL**
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	2	1	2	3	1		1		12	3	2	1	28
2013	2			2		1	1		9	2	1	3	21
2014				2		5			10	2		3	22
2015	1					1			6	2		4	14
2016				2		1	1		14	1	1	7	27
2017		1	1		1				13	1		8	25
2018			1	3	2	1			16		3	9	35
2019				1			1	1	9	2	1	6	21
TOTAL	9	7	7	15	9	12	6	6	158	30	10	50	319
	3%	2%	2%	5%	3%	4%	2%	2%	**49%**	9%	3%	**16%**	

Why did federal agencies prevail?

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- Courts relied heavily on deference provided to agency, especially regarding impact analysis.

- Of the 21 substantive cases where NEPA documents were reviewed, 4 involved a CATEX, 10 involved EAs and 7 involved EISs. 1 CATEX and 3 EAs were found to be inadequate; in 1 EA the agency did not prevail on certain NEPA claims but prevailed on other NEPA claims.

- Agencies prevailed in all cases involving an EIS.

2019 Case Trends

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- 18 (of 21) cases involved challenges to impact analysis
  - 4 cases, CATEX; 10 cases - direct impacts; 3 cases – indirect impacts; 4 cases - cumulative impacts
  - 3 of the cases discussed specific impact factors focusing on 40 C.F.R. 1508.27
- 4 cases involved challenges to alternatives
- 2 cases involved involved whether an agency's action qualified as a federal action
- 3 cases involved the duty to supplement

More 2019 Case Trends

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- One case addressed the situation when the agency does not make a statement regarding significance of impacts of new information:

Protect Our Communities Found. v. LaCounte, 939 F.3d 1029 (9th Cir. 2019)(discussing that the agency's ROD stated that the EIS "included an analysis of all environmental issues associated with construction and operation" of turbines, and therefore did not require more analysis or a supplemental document, even if it never stated that the information was not "significant," *citing Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013)).

More 2019 Case Trends

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- One case addressed the situation when agencies' preferred alternative involved a settlement agreement:

  Save our Sound OBX, Inc. v. North Carolina Dep't of Transp., 914 F.3d 213 (4th Cir. 2019) (disagreeing that the settlement agreement predetermined the agencies' selection of alternative, because the settlement only required that the preferred alternative, the Jug-Handle bridge, be identified and required the merger team to concur; the entire merger team was responsible for approving the final alternative, and the parties to the settlement constituted only 3 of the 10 parties on the merger team).

- 6 of the cases were unpublished (5 cases from the 9th Circuit and one case from the D.C. Circuit .)

Impact Assessment

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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.

** current regulation

Categorical Exclusions

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- *Center for Biological Diversity v. Ilano*, 928 F.3d 774 (9th Cir. 2019) (concluding that the Forest Service, in applying a categorical exclusion for its approval of a plan to combat the invasive mountain pine beetle, considered relevant scientific data, engaged in a careful analysis, and reached its conclusion based on evidence supported by the record).
- *Wise v. Dep't of Transp.,* 943 F.3d 1161 (8th Cir. 2019)(upholding agency's decision to apply a categorical exclusion involving an existing operational right of way for improvements proposed along I-630, in the City of Little Rock, Arkansas, including increasing the travel lanes from six to eight and replacing all bridges within the project's limits).

Categorical Exclusions (con’t)

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- *Sauk Prairie Conserv. Alliance v. U.S. Dep't of the Interior*, 944 F.3d 644 (7th Cir. 2019)(opining the National Park Service's application of a categorical exclusion for approval of dog training for hunting and off-road motorcycle riding was adequate because there was enough analysis in the state's Master Plan and EIS and in the NEPA screening form to support the Service's conclusion that the amendments would have minimal impact).

Categorical Exclusions (con't)

- *City of Burien v. Elwell*, No. 18-71705, 790 Fed. Appx. 857, 2019 WL 6358039 (9th Cir. Nov. 27, 2019) (not for publication)

- Challenge from City of Burien involving FAA's approval of a procedure for turning southbound turboprops to the West at Sea-TAC

Impact Assessment

Nat'l Parks (11th Cir. 2019)

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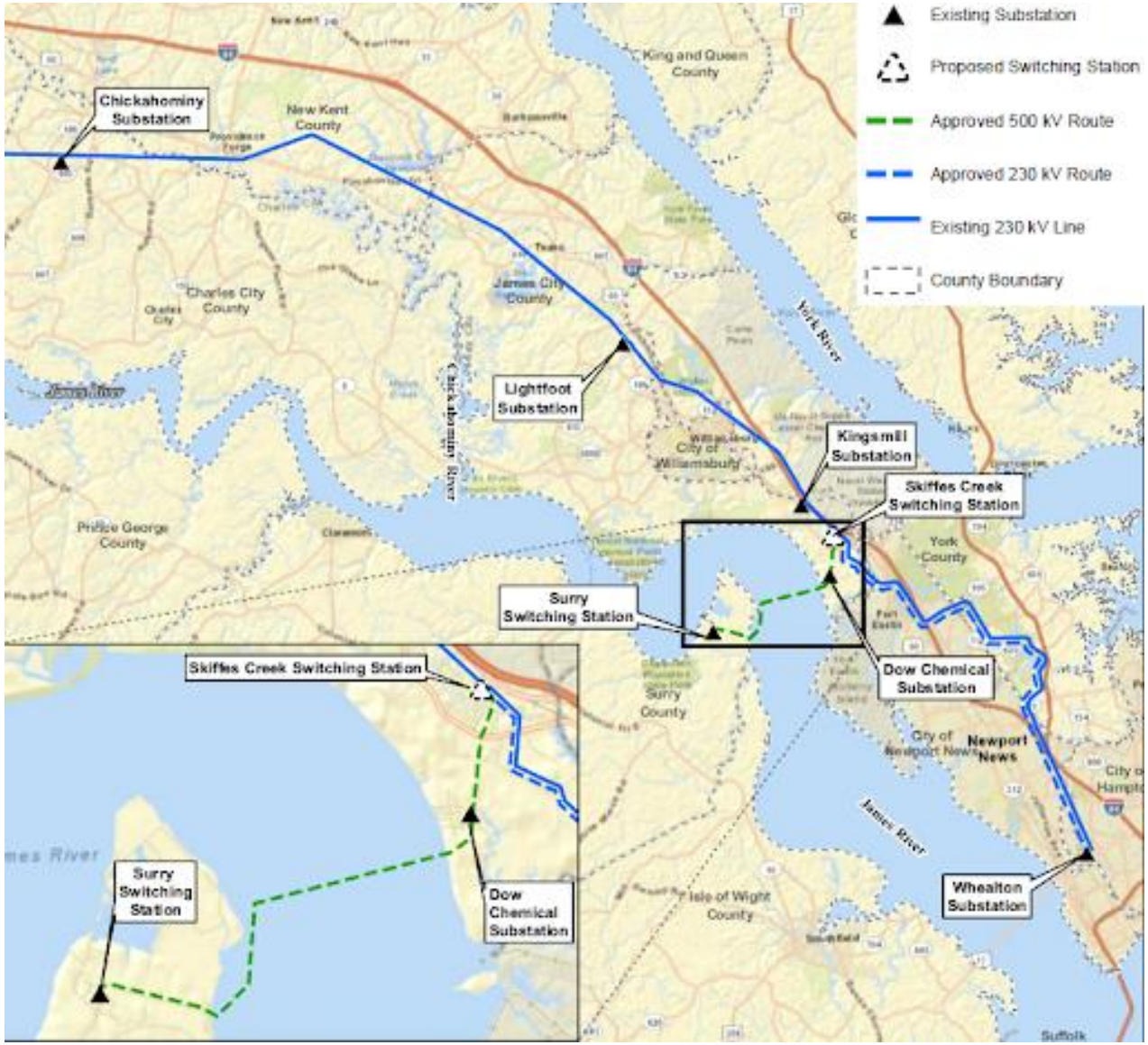

Nat'l Parks (2019)

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- The action involves seventeen 250 foot (or so) steel lattice transmission towers covering eight miles, four of which cross the James River and cut through the middle of the historic district encompassing Jamestown and other historic resources.
- The undertaking was known as the Surry-Skiffes Creek-Whealton project (the Project).
- The Corps prepared an EA, considered nearly thirty alternatives, reached out to consulting parties and invited agencies, and the public to comment on the Project.
- Over 50,000 comments.
- The Advisory Council on Historic Preservation (ACHP) warned the Project threatened to irreparably alter a relatively unspoiled and evocative landscape that provides context and substance for historic properties.
- The Department of Energy's Argonne National Laboratory (Argonne) found the Corps' analyses "scientifically unsound" and "completely contrary to accepted professional practice."
- The ACHP also warned the alternative analysis was extremely problematic. While the deluge of comments poured in, the Corps considered and amended its statement.

Nat'l Parks (2019)

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- Two challenges: (1) significant of impacts under 40 C.F.R. 1508.27 required an EIS rather than an EA; and (2) Corps' alternative analysis inadequate.
  - Effects are likely to be controversial (40 C.F.R. 1508.27(b)(3)).
  - Unique characteristics of geographic area such as proximity to historic or cultural resources (40 C.F.R. 1508.27(b)(4)).
  - Degree to which the action may adversely affect historic districts or sites (40 C.F.R. 1508.27(b)(8)).

Nat'l Parks

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- Flawed analysis: (1) Effects are likely to be controversial (40 C.F.R. 1508.27(b)(3)).
- The word "controversial," refers to situations where " 'substantial dispute exists as to the size, nature, or effect of the major federal action.' " *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003).
- "These are hardly the hyperbolic cries of "highly agitated," not-in-my-backyard neighbors "willing to go to court over the matter." Instead, they represent the considered responses—many solicited by the Corps itself—of highly specialized governmental agencies and organizations.
- "A substantial dispute can be found, for example, when other information in the record casts substantial doubt on the adequacy of the agency's methodology and data."

Nat'l Parks

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- Flawed Analysis: Controversy (con't)
- ANL: Corps' analyses is "scientifically unsound, inappropriate, and completely contrary to accepted professional practice," and accused the agency of conflating a cultural resource analysis with the very different visual resource analysis.
- Advisory Council on Historic Preservation : "[T]here are flaws in the visual effects assessment. . . . the treatment of effects on historic properties are of transcendent national significance."
- NPS believed that the visual analyses "do not meet its standards,"
- Industrial Economics (NPS expert): the Project could "have implications for successful future designation [of Jamestown] as a UNESCO World Heritage Site."
- The Virginia Department of Historic Resources warned of "irreparable alteration of the character of the area."
- Members of Congress, delegates to the Virginia Assembly, the Keeper of the National Historic Register, and the CEQ all voiced similar reservations.

Nat'l Parks

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- Flawed analysis: Uniqueness.
  - The court held that even without blocking the view or dominating the landscape from all angles, the Project undercuts the very purpose for which Congress designated these resources: to preserve their "unspoiled and evocative landscapes."
  - The D.C. Circuit found the mitigation measures in the agreement did not significantly reduce the impacts.

- Flawed analysis: Historic Resources.
  - The Corps conceded that the Project's "close proximity" to Carter's Grove, an eighteenth-century Georgian-style plantation, "would detract from the resource's characteristics of setting and feeling which are integral to the resource's qualifications for listing on the [National Register of Historic Places]."
  - By the Corps' own count, the region boasted fifty-seven sites on the National Register or eligible for inclusion on it—a concentration of historic resources found "in no other place in [the] United States."

Nat'l Parks (2019)

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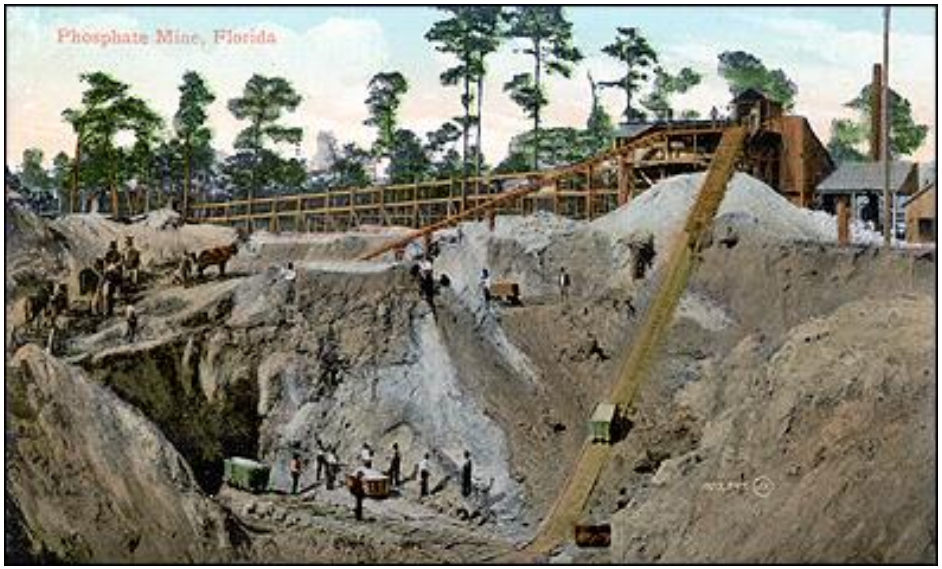
- The three intensity factors demonstrated not only that the Project will significantly impact historic resources, but also that it would benefit from an EIS.
- "Indeed, Congress created the EIS process to provide robust information in situations precisely like this one, where, following an environmental assessment, the scope of a project's remains both uncertain and controversial."
- Court remanded and urged the Corps to take careful consideration to its sister agencies' concerns that the prior iterations were "superficial," "inadequate," and "extremely problematic."

Impact Assessment (Indirect Effects)

Center for Biological Diversity v. U.S. Army Corps of Eng'rs, 941 F.3d 1288 (11th Cir. 2019)



- Challenge to the Corps approval of CWA § 404 permit (and EA) for discharge of dredge and fill materials to extend phosphate mining in Bone Valley, in Central Florida.

CBD

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- CBD stated Corp's permit violated NEPA by not considering "downstream" effects of radioactive phosphogypsum, a byproduct of fertilizer production.
- In 2010 and 2011, Mosaic sought CWA 404 permits for four mining related projects. The Corps considered all of Mosaic's mining projects in one area-wide EIS.
- In 2016, the Corps published a draft of its § 404 analysis for one of the projects, the South Pasture Mine Extension.
- The Corps prepared a supplemental EA (SEA) to be read with the area-wide EIS.
- In November 2016, the Corps issued Mosaic a § 404 permit for the South Pasture Mine Extension, giving Mosaic permission to discharge dredge and fill materials into the waters of the US in connection with mining phosphate at the South Pasture Mine Extension for subsequent use in fertilizer production.

CBD

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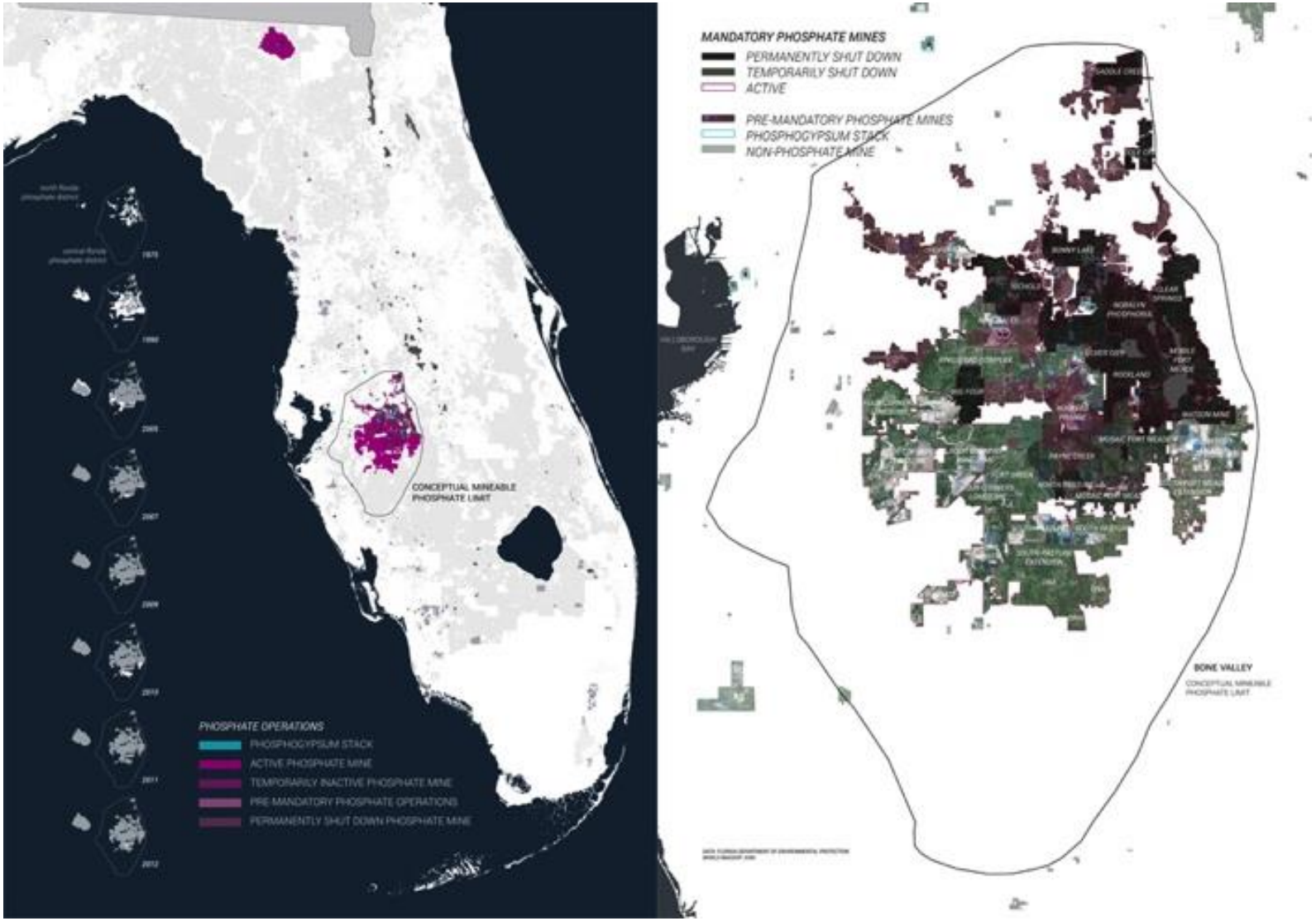

CBD

Phosphate Mining to Fertilizer Production in Bone Valley, Florida

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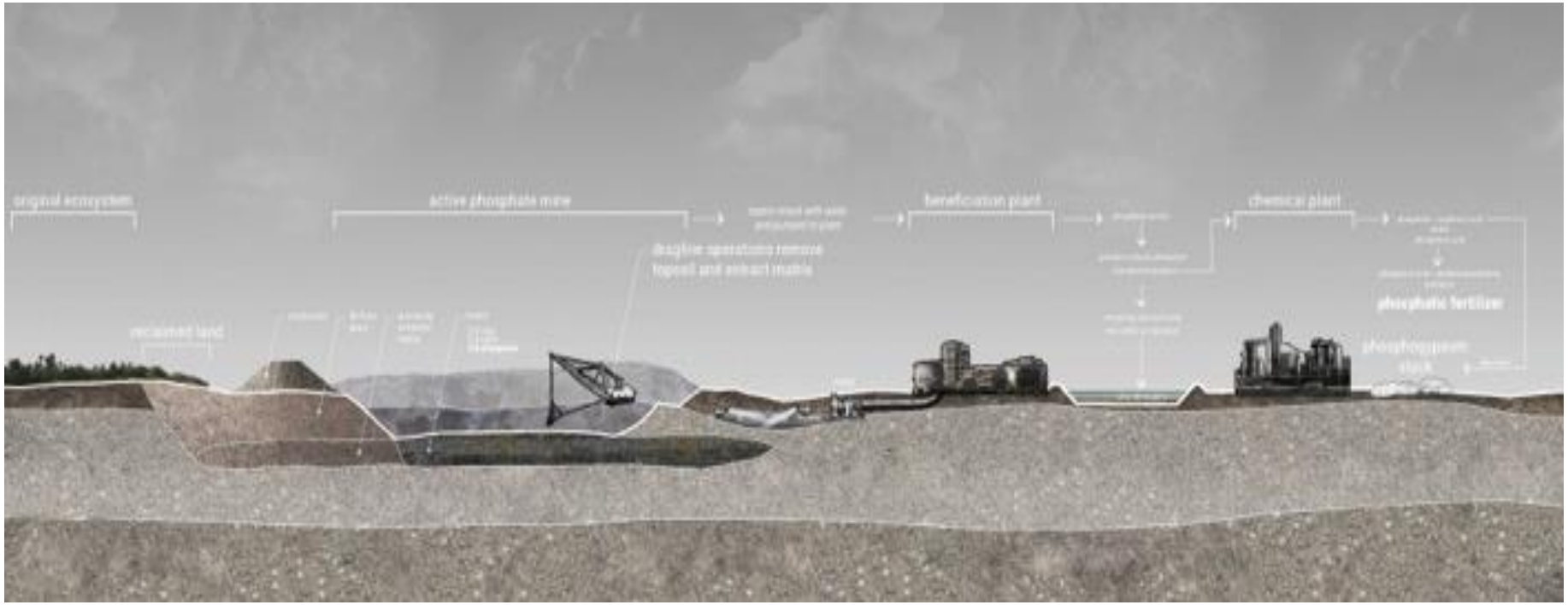

Phosphate mining is a form of strip mining. After excavating sand, clay and phosphate from the site, Mosaic engage in a beneficial process to separate sand and clay from valuable phosphate ore. The phosphate ore is then transferred to a fertilizer plant for processing into phosphoric acid. Phosphoric acid is used to produce fertilizer. But the process of producing phosphoric acid generates waste in the form of phosphosypsum, a radioactive product.

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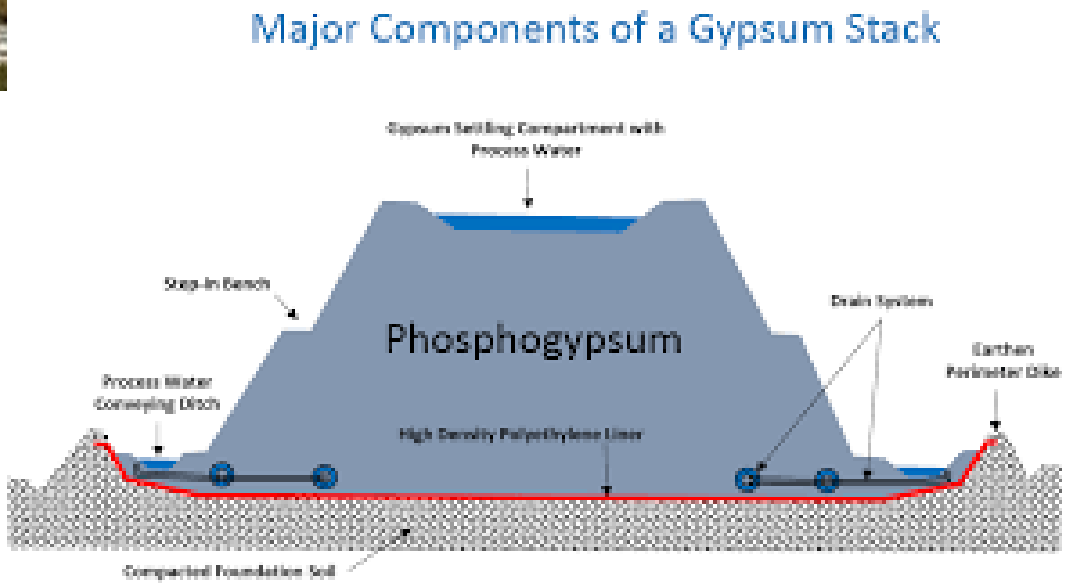
Examples of gypstacks, a byproduct of fertilizer production



CBD

- 11th Circuit discussed *Department of Transportation v. Public Citizen*, a 2004 SCOTUS case, and noted that the 404 permit only authorized the discharge of dredged or fill material into waters of the United States, the Corps had no discretion to deny the permit. It could deny only if the allowed discharge will directly or indirectly or cumulatively have an unacceptable environmental effect.
- Citing *Public Citizen*, the court recognized that a NEPA review is limited in scope to those effects proximately caused by the agency action.
- Because the Corps has control and responsibility only over the discharge of dredged and fill material, not over fertilizer plants regulated by the State of Florida and EPA, the Corps properly concluded that the effects of separate fertilizer plants that process mined phosphate ore are not effects of the Corps permit

CBD – the Robust Dissent

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1. Phosphogypsum production was a reasonably foreseeable effect of the § 404 permit that enabled Mosaic to mine phosphate for fertilizer;
2. The Corps violated its own NEPA procedures when it considered the benefits of fertilizer manufacturing without considering its environmental impacts, including the production of radioactive phosphogypsum;
3. Other agencies' oversight of phosphogypsum did not relieve the Corps of its obligation to consider the environmental effects; and,
4. The Corps has underlying statutory authority to consider phosphogypsum as an indirect effect under NEPA.

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Cumulative Impacts Cases

Cumulative Impacts

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- 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.*

2019 Cumulative Impacts Decisions

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- *Wild Earth Guardians v. Conner* (10th Circuit) 920 F.3d 1245
- *DINE Citizens Against Ruining Our Environment v. Bernhardt* (10th Circuit) 923 F.3d 831
- *City of Burien v. Elwell* (9th Circuit) 790 Fed.Appx.857
- *Alliance for the Wild Rockies v. Savage* (9th Circuit) 783 Fed.Appx.756 (Mem)

Results for 2019 cases

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- Appellate Court decisions on agency cumulative impact analyses challenges
- Agencies prevailed in 50% (2 of 4) of the opinions
  - 2 in the 9th Circuit
  - 2 in the 10th Circuit
- Agencies involved:
  - BLM (1 opinion)
  - FAA (1 opinion)
  - USFS (2 opinions)

Results for 2018 cases

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

Results for 2017 cases

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- 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

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- 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

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- 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

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- 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

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- 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

WildEarth Guardians v. Conner (10th Circuit 2019)

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- EA for preparing forest restoration project on the San Isabel National Forest in southern Colorado
- Tennessee Creek Project:
  - Protect forest from insects, disease, and fire
  - Improve wildlife habitat
  - Maintain watershed conditions
  - 2,370 acres of clearcutting, 6,765 acres of thinning, 6,040 acres of prescribed burns, construction of 21 miles of temporary roads
- Plaintiffs argued that the EA inadequately analyzed project effects on Canadian lynx and that an EIS should have been prepared for the project

WildEarth Guardians v. Conner (10th Circuit 2019)

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- EA quantified treatment amounts, but did not specify specific locations
- 9,480 acres of lynx habitat – EA analysis assumed all would be treated
- USFWS agreed with USFS conclusion that impacts to lnyx even under this “worse-case” scenario would not be significant
- Plaintiffs alleged the “intensity” factor for significance was triggered by the project
  - 40 CFR 1508.27(b)(7): whether “the action is related to other actions with individually significant but cumulative significant impacts”
- Court: “Given that WildEarth has not challenged any of the reasoning of the Service supporting its rejection of any of the non-lynx factors as significant, we conclude that the Service’s conclusion must stand.”
- Court: “WildEarth has utterly failed to show what could be accomplished through an EIS…”

WildEarth Guardians v. Conner (10th Circuit 2019)

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The court rejected WildEarth's arguments, that the Forest Service:

(1) was obligated to specify the sizes location, and treatment plans, including temporary roads to be built (court found that ultimately no negative impact on lynx).

(2) needed to disclose the locations of its preidentified precommercial thinning units (court held argument waived).

(3) needed to specify the amount of winter lynx habitat was denning habitat (court disagreed)

(4) needed to quantify the amount of winter lynx habitat that will be affected (court opined in light of conservation measures and did not need to quantify when no adverse impact to lynx).

(5) failed to include "baseline data" regarding lynx denning and winter habitat in the Project area (court found agency relied on data and studies it deemed reliable, and determined that the Project would not have an adverse impact on the lynx).

WildEarth Guardians v. Conner (10th Circuit 2019)

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- WildEarth contended that the sheer size of the Project—over 2,000 acres of clearcutting and 7,000 acres of thinning—bears on two significance factors.
- 40 C.F.R. § 1508.27(b)(1) (agency should consider both "beneficial and adverse" impacts and a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial").
- Size in itself does not establish significance, as the D.C. Circuit stated in *TOMAC v. Norton*, 433 F.3d 852, 862 (D.C. Cir. 2006).
- The court considered context (40 C.F.R. § 1508.27(a)).
- Project constituted only slightly more than 1% of the San Isabel National Forest.

WildEarth Guardians v. Conner (10th Circuit 2019)

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- WildEarth argued that the Project's effects on lynx are “highly controversial” and “highly uncertain”—two other significance factors under § 1508.27(b)(4)–(5).
- Even in the absence of substantial public opposition, an action may be “highly controversial” if there is “a substantial dispute as to the size, nature, or effect of the action.”
- Forest Service reasonably concluded that the Project was unlikely to harm lynx regardless of treatment locations, thus it could properly conclude that there was no legitimate controversy.

WildEarth Guardians v. Conner (10th Circuit 2019)

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- WildEarth contended significance existed because of the “degree to which the action may adversely affect an endangered or threatened species or its habitat,” 40 C.F.R. § 1508.27(b)(9).

- The Tenth Circuit concluded that WildEarth "utterly failed to show what could be accomplished through an EIS that would be material to whether the Project should proceed as planned."

WildEarth Guardians v. Conner (10th Circuit 2019)

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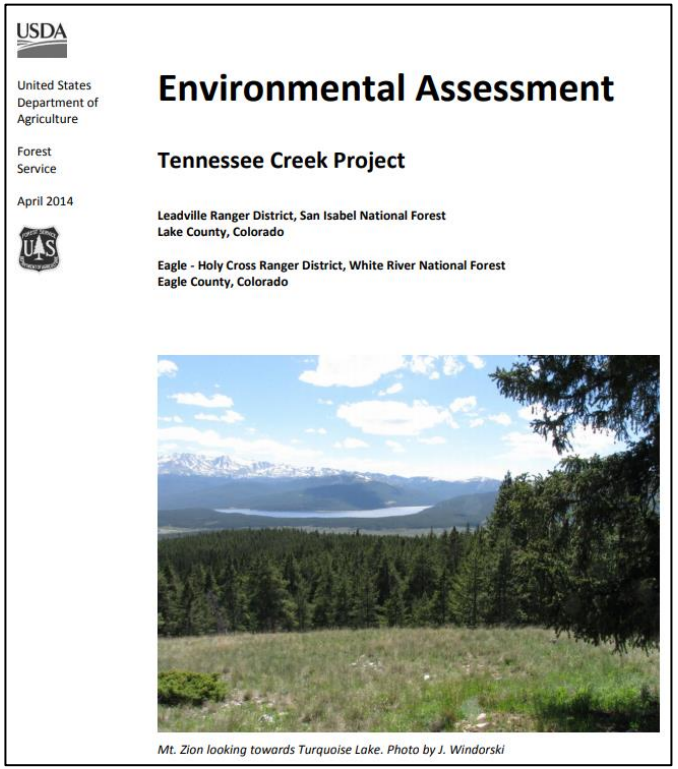
- EA Cumulative Impacts section on lynx:
  - “This action would add slightly and incrementally to the cumulative effects to this species. These cumulative effects include recreation (e.g., hiking, biking, camping, hunting, boating, and horse riding), road maintenance, vehicle traffic, and the ongoing Northwest Leadville Hazardous Fuels Project which is inside the project area. Previous activities include: access and roads, timber management, recreation, water development, and mining related actions. The proposed action would add to these effects.”


USDA

United States Department of Agriculture

Forest Service

April 2014

Environmental Assessment

Tennessee Creek Project

Leadville Ranger District, San Isabel National Forest
Lake County, Colorado

Eagle - Holy Cross Ranger District, White River National Forest
Eagle County, Colorado

Mt. Zion looking towards Turquoise Lake. Photo by J. Windorski

DINE Citizens Against Ruining Our Environment v. Bernhardt (10th Circuit 2019)

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- BLM approved 300 oil and gas well applications in northwestern New Mexico
- Several EAs used for approval that tiered to a 2003 RMP EIS
- Plaintiffs alleged that BLM violated NEPA due to:
  - Improperly tiering the EAs to the 2003 EIS
  - Not preparing a new EIS or Supplemental EIS
  - Failing to analyze cumulative impacts to resources in the Greater Chaco Landscape

DINE Citizens Against Ruining Our Environment v. Bernhardt (10th Circuit 2019)

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- Court notes that of the 300 challenged actions, BLM only had a complete Administrative Record for "a few of them" and thus the Court was unable to evaluate the sufficiency of the NEPA analyses for the "vast majority of the challenged actions"
- Plaintiffs alleged the cumulative impacts analysis was inadequate for not analyzing air pollution and water use impacts from 3,960 wells in the project area
- BLM argued that they did not need to consider the 3,960 wells as "reasonably foreseeable future actions" because "no operator has proposed to drill all of those wells."
- COURT: "BLM needed to consider the cumulative impact of all those wells, even if the wells were not going to be drilled imminently."

DINE Citizens Against Ruining Our Environment v. Bernhardt (10th Circuit 2019)

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- 2003 EIS stated a single vertical well would use 283,500 gallons of water; appellants argue a new horizontal well would use 1,020,000 gallons of water
- For all 3,960 wells, current estimate would over 5 billion gallons of water used vs. 2003 EIS estimate of 2.8 billion gallons (82% increase)
- Defendants argued that appellants advocated for “too narrow a definition of cumulative impact – one that would require specific, quantitative measurements of all potential effects.”
- Court rules this argument fails:
  - BLM did quantify cumulative water resources impacts of proposed drilling in the 2003 EIS
  - BLM could have quantified the cumulative water resources impacts of the 3,960 wells
  - Water use is an important aspect of the environmental impacts associated with well drilling

DINE Citizens Against Ruining Our Environment v. Bernhardt (10th Circuit 2019)

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- COURT:
  - “Appellants have established that the water use associated with drilling the 3,960 reasonably foreseeable horizontal Mancos Shale wells exceeded the water use contemplated in the 2003 EIS in a way that made the BLM’s failure to consider the cumulative water impacts “significant enough to defeat the goals of informed decision-making and informed public comment.””

City of Burien v. Elwell (9th Circuit 2019)

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- FAA used a Categorical Exclusion for changing takeoff patterns from Sea-Tac Airport
- City alleged improper use of the CATEX and that the extraordinary circumstance that actions that are likely to “cumulatively create a significant impact on the human environment” was present

City of Burien v. Elwell (9th Circuit 2019)

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- FAA used a CATEX for “modifications to currently approved procedures conducted below 3,000 feet above ground level that do not significantly increase noise over noise sensitive areas”
- Court concludes that:
  - “Specifically, even though FAA considered a number of of past, present, and reasonably foreseeable future actions within the study area in its cumulative impacts analysis, it failed to even mention future actions taking place at Sea-Tac itself, even to dismiss them as not reasonably foreseeable. Most notably, the FAA failed to address any cumulative impacts that might stem from projects described in Sea-Tac’s Sustainable Airport Master Plan (“SAMP”). Given that the FAA was involved in the funding and development of the SAMP, and that a final SAMP document listing specific expansion projects was published only weeks after the Procedure was approved in April 2018, the FAA had to be well aware of these planning documents and the substantial airport expansion described in them. The FAA should have addressed them in its cumulative impacts analysis.”

City of Burien v. Elwell (9th Circuit 2019)

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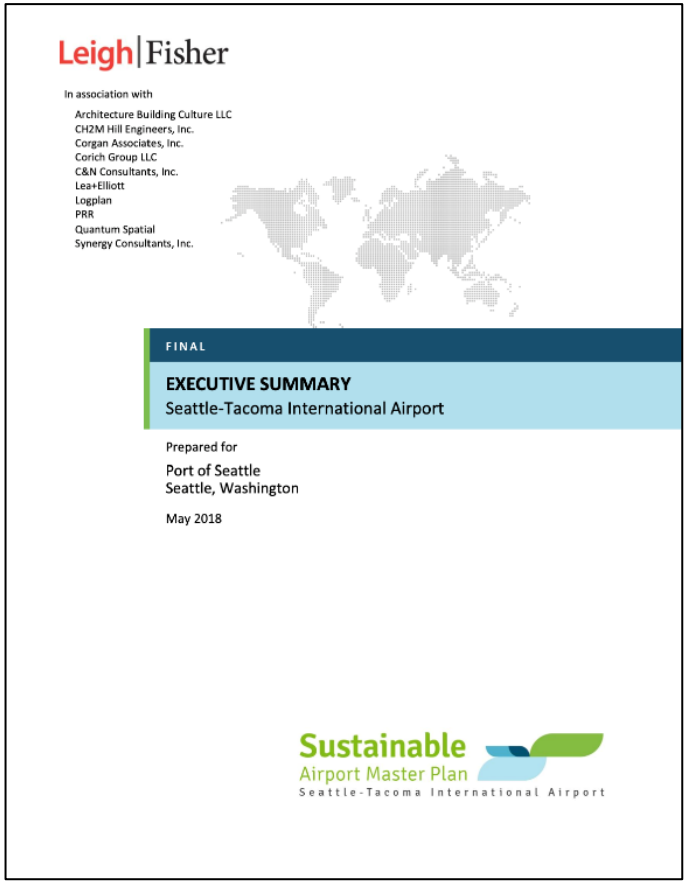
- SAMP Plan:
  - “SEA's SAMP plan recommends more than 30 Near-Term Projects that will improve efficiency, safety, access to the airport, and support facilities for airlines and the airport. Highlights include a new terminal with 19 gates, and an automated people mover with three stations to connect the rental car facility, new terminal, and main terminal. Near-Term Projects will accommodate 56 million passengers and meet the forecasted demand to 2027. Near-Term Projects will be complete or under construction by 2027.”



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- FAA's 1050.1F NEPA Desk Reference states that:
  - "An action may be reasonably foreseeable even in the absence of a specific proposal."
  - The existence of planning documents, even if short of an official proposal, provides important evidence for determining whether a future project is reasonably foreseeable
  - In such circumstances, even if FAA concludes that the planned projects are "improbable or remote," such actions should "be mentioned in the NEPA document with an indication that they are not reasonably foreseeable."

City of Burien v. Elwell (9th Circuit 2019)

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- MAJORITY OPINION:
  - "The bottom line is that, even though the FAA's analysis rambles on for 128 pages, that cannot excuse its failure to even address whether a "Master Plan" for a major expansion of the airport -- a plan that the FAA staff had commissioned and that was only weeks away from being published -- encompassed a "reasonably foreseeable future action" that should be considered within the FAA's cumulative impact analysis."

City of Burien v. Elwell (9th Circuit 2019)

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- *"It's never enough, no it's never enough. No matter what I say."*

  - Five Finger Death Punch

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- DISSENTING JUDGE:
  - ""It's never enough, no it's never enough, No matter what I say" are the lyrics to a song by an American heavy metal band, but it could be the anthem of a federal agency attempting to comply with the National Environmental Policy Act (NEPA)."

City of Burien v. Elwell (9th Circuit 2019)

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- DISSENTING JUDGE:
  - "The 2018 SAMP (which was not completed when the FAA decided to rely on the categorical exclusion) described "an optimal layout of facilities required to satisfy the unconstrained 20-year forecast demand," including a set of "enabling and capacity improvement projects required to accommodate forecast demand in 2027," which it labeled "near-term projects." This planning document, prepared by consultants for the Port's consideration, is far removed from a proposed agency action; the Port did not issue any Notice of Intent for any of the projects described in the SAMP, nor does the SAMP suggest that the Port was close to doing so. At most, these projects were "merely contemplated." It would be speculative and premature for the FAA to consider the cumulative impacts of a flight modification along with these consultant planning ideas."

City of Burien v. Elwell (9th Circuit 2019)

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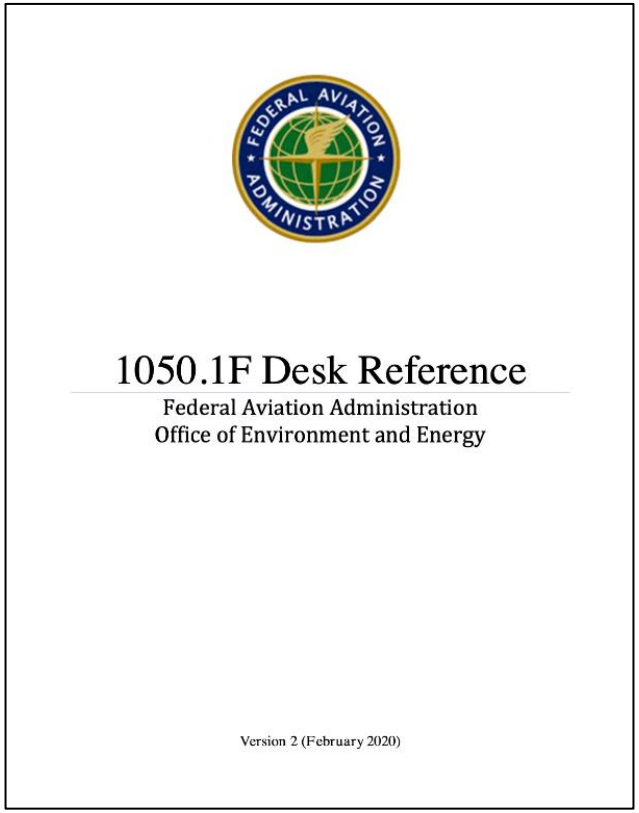
- Is the FAA 1050.1F Desk Reference is an "internal guidance document" only?
- This Desk Reference provides explanatory guidance for environmental impact analysis performed to comply with Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (CEQ Regulations) (40 Code of Federal Regulations CFR) parts 1500-1508), U.S. Department of Transportation (DOT) Order 5610.1C, Procedures for Considering Environmental Impacts, and Federal Aviation Administration (FAA) Order 1050.1F Environmental Impacts: Policies and Procedures. This Desk Reference is designed to complement FAA Order 1050.1F and should therefore be used in conjunction with the Order.



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- MAJORITY:
  - "The dissent errs in suggesting that this internal guidance document is not a proper source of interpretive guidance. Although the dissent is correct that the Desk Reference states that it "may not be cited as the source of requirements under laws, regulations, Executive Orders, DOT or FAA directives, or other authorities," it omits the first clause of the sentence which explicitly states that the "Desk Reference may be cited only as a reference for the guidance it contains." In fact, the FAA quoted the Desk Reference in its answering brief when attempting to define future actions as improbable or remote even though they have been mentioned in planning documents. Thus, while the Desk Reference is not an independent source of law regulating the FAA, it can properly serve as guidance for interpreting FAA Order 1050.1F, which is an independent source of law regulating the FAA."

Alliance for the Wild Rockies v. Savage (9th Circuit 2019)

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- EIS and SEIS for the Miller West Fisher Project on the Kootenai National Forest, MT

Alliance for the Wild Rockies v. Savage (9th Circuit 2019)

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- EIS and SEIS aggregated the impacts of road closure breaches into the environmental analysis baseline
- USFS concluded that road closure breaches were not a "fundamental factor" in contributing to adverse effects to grizzly bears
- COURT:
  - "Alliance has pointed to no evidence in the record that the Miller Project will increase the frequency of road closure breaches. Therefore, the Forest Service could reasonably conclude it was not required to provide a separate analysis of the cumulative impacts of road closure breaches."

Questions/Comments?

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Fred Wagner, *Partner – Venable LLC*
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, *Principal – Ecology & Environment (member of WSP)*
msmith@ene.com
(571) 830-0854