



National  
Association of  
Environmental  
Professionals

Be Connected

# NEPA Case Law Update

**MODERATOR:**

Fred Wagner, Partner – *Venable LLP*

**PRESENTERS:**

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

Michael D. Smith, National Practice Leader, Environmental Process  
& Policy – *WSP*

# 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.

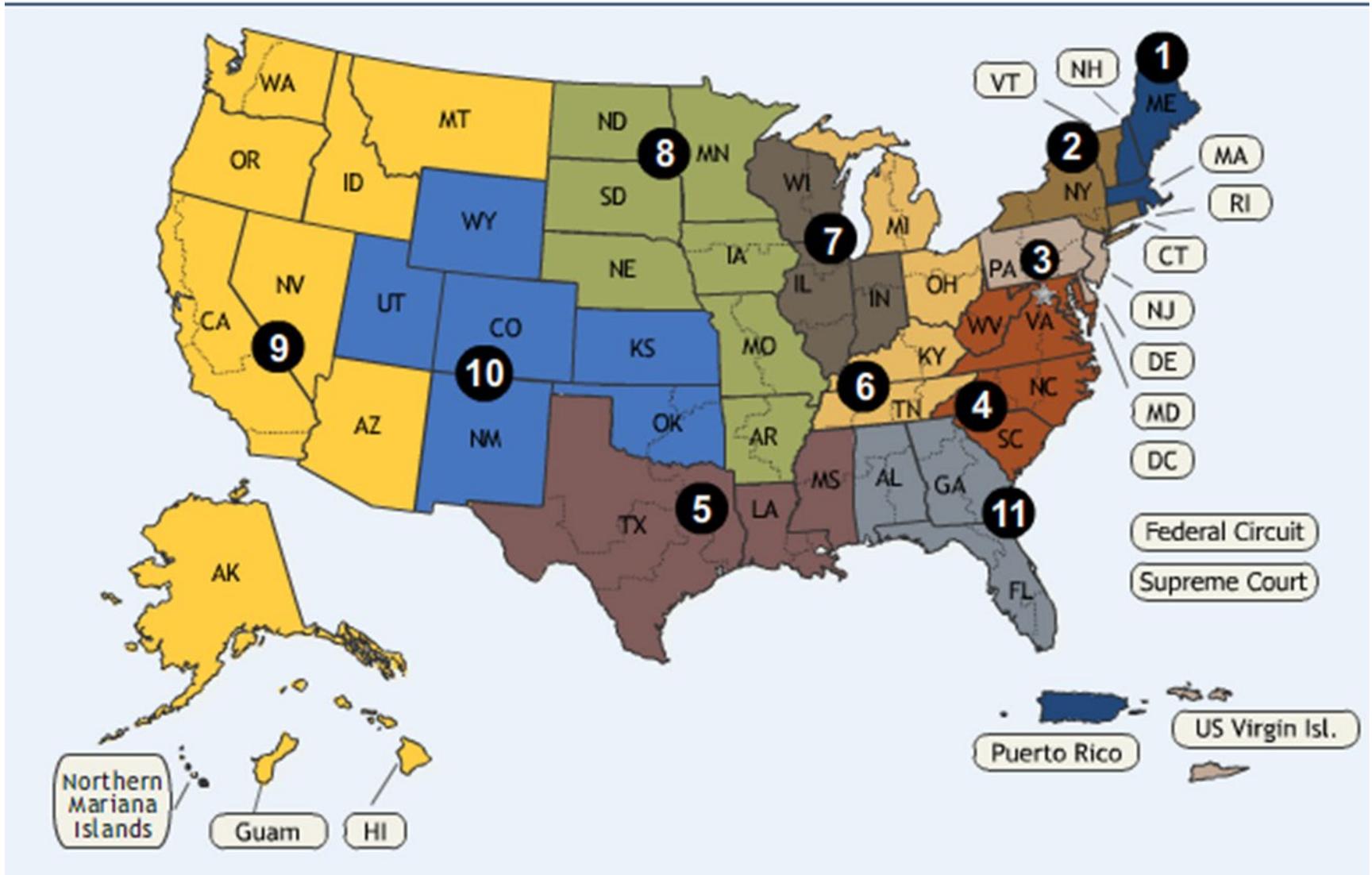
The court may also retain jurisdiction over the matter until resolved

# 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



# 2021 NEPA Litigation Statistics

- U.S. Courts of Appeals issued 18 NEPA decisions (where courts reviewed NEPA documents) in 2020, 6 in the 9th, 5 in the D.C. Circuit, and 2 each in the 4<sup>th</sup> and 10<sup>th</sup> Circuits, and 1 each in the 1<sup>st</sup>, 2<sup>d</sup>, and 7<sup>th</sup> Circuits
- 6 different agencies:
  - DOI (BLM, NPS, BIA) – 5 cases (prevailed in all cases but one) (\*\*was co-defendant with DOT in a case)
  - DOD (USACE) – 5 cases (prevailed in all cases but two)
  - DOT (FAA, FHWA) – 4 cases (prevailed in three cases out of four (in the case where it did not prevail, it partially prevailed on one NEPA claim but not the other))
  - USDA (USFS) – 3 cases (prevailed in all cases)
  - FERC – 1 case where it did not prevail
  - FCC – 1 case where it prevailed
- Government prevailed in **72% (75% if partial counted)** of the cases

# Comparison to Previous Years



National  
Association of  
Environmental  
Professionals  
*Be Connected*

	U.S. Courts of Appeals Circuits												
	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	TOTAL
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	2	1	2	3	1		1		12	3	2	1	28
2013	2			2		1	1		9	2	1	3	21
2014				2		5			10	2		3	22
2015	1					1			6	2		4	14
2016				2		1	1		14	1	1	7	27
2017		1	1		1				13	1		8	25
2018			1	3	2	1			16		3	9	35
2019				1			1	1	9	2	1	6	21
2020		1			1	1			19		2		24
2021	1	1		2			1		6	2		5	18
TOTAL	10	9	7	17	10	13	7	6	183	32	12	55	361
Proportion	3%	2%	2%	5%	3%	4%	2%	2%	50%	9%	3%	15%	100%

# 2021 Case Trends

- 18 cases total
  - 2 cases – CATEX (prevailed in one case, partially prevailed in other case)
  - 6 cases – EAs (prevailed in all but one case)
  - 5 cases – EISs (prevailed in all but one case)
  - 5 cases – No document (prevailed in all but two cases)

# 2021 Case Trends

- 12 (of 18) cases involved challenges to impact analysis
  - 2 cases, CATEX
  - 9 cases - direct impacts
  - 2 cases - indirect impacts (GHG)
  - 5 cases - cumulative impacts

Note: Several cases involved challenges in multiple categories.

# 2021 Case Trends (con't)



- 4 cases involved whether an agency's action qualified as a federal action
- 3 cases involved remedies
- 2 cases involved challenges to sufficiency of alternatives

# Impact Assessment

## 40 C.F.R. §1502.23 Methodology and Scientific Accuracy.

Agencies shall ~~ie~~ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental ~~documents~~~~impact statements~~. Agencies shall make use of reliable existing data and resources. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. 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 agenciesy~~ may place discussion of methodology in an appendix. Agencies are not required to undertake new scientific and technical research to inform their analyses. Nothing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.

# Impact Assessment

## 40 C.F.R. §1508.1 Effects

- (g) *Effects or impacts* means changes to the human environment from the proposed action or alternatives that **are reasonably foreseeable** and include the following:
  - (1) Direct effects, which are caused by the action and occur at the same time and place.
  - (2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still **reasonably foreseeable**. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

# Impact Assessment

## 40 C.F.R. §1508.1 Effects

- (3) Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.
- (4) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.

# Federal Action:

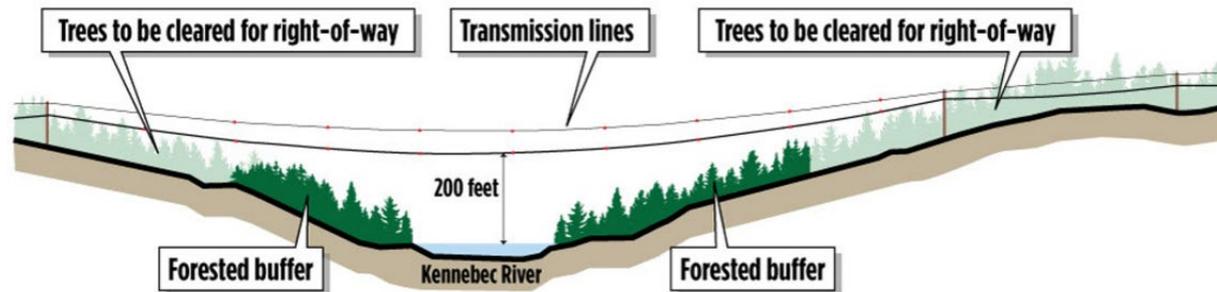
*Sierra Club v. U.S. Army Corps of Eng'rs*,  
997 F.3d 395 (1st Cir. 2021)



- Environmental organizations (Sierra Club) appeal from the district court's denial of preliminary injunctive relief barring construction of Segment 1 of a planned five-segment electric transmission power corridor in Maine. This was part of a larger project which would run from Quebec, Canada to Massachusetts

# Sierra Club (con't)

- The corridor would be built by Central Maine Power (CMP)
- Sierra Club challenged Corps' decision, after consideration of an EA, to issue a permit authorizing CMP to take three actions in Segment 1: (1) temporarily fill certain wetlands, (2) permanently fill other wetlands, and (3) construct a tunnel under the Kennebec River



SOURCE: Central Maine Power

STAFF GRAPHIC | MICHAEL FISHER

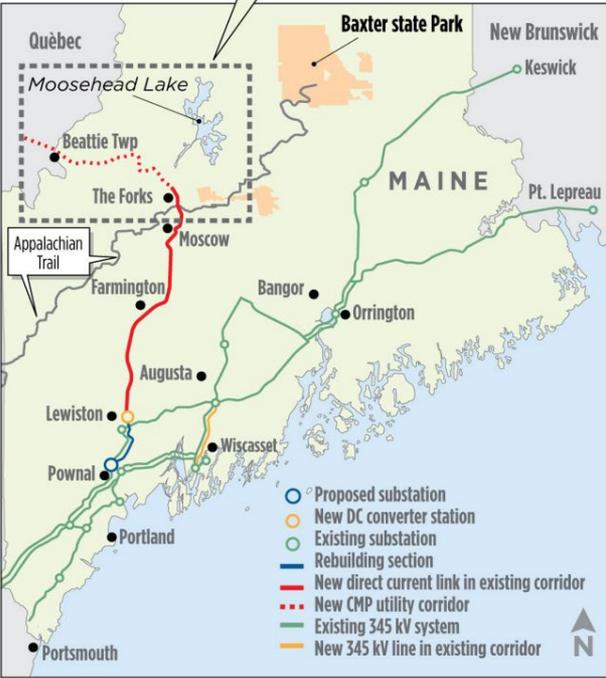
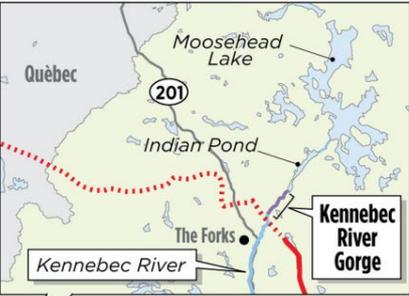
# Sierra Club (con't)

- Sierra Club alleged should have completed an EIS rather than its 164-page EA
- Corps' decision that its permitting jurisdiction over waters of the United States constituted only a small part of Segment 1 and an even smaller part of the overall project. The Corps found that less than 2% of the overall corridor required a Corps permit

# Sierra Club (con't)

## New England Clean Energy Connect

The 145-mile transmission corridor proposed by Central Maine Power crosses the Kennebec River Gorge, a 10-mile stretch of water prized by white-water rafters and others for its scenic beauty.



STAFF GRAPHIC | MICHAEL FISHER

# ***Sierra Club (con't)***

- Considered four other federal agency projects and impacts in area
- Sierra Club did not show a likelihood of success that the Corps' conclusion that the overall project (rather than the portion involving the Corps' permit) was not a major federal action
- Four factors federal control exists:
  - Regulated activity merely a link in corridor project (Sierra Club only addressed this factor)
  - Sierra Club argued cumulative federal involvement tips scale to federalization
  - Sierra Club also argued segmentation

# Sierra Club (con't)

- First Circuit concluded that the Corps did not have “sufficient control and responsibility to warrant Federal review” of the entire project
- First Circuit rejected Sierra Club’s arguments that the cumulative federal involvement tips the scale. The Corps rationally concluded that the involvement of other agencies here did not rise to the level of cumulative involvement sufficient to trigger Appendix B's federalization theory
- First Circuit declined to find the project “controversial “

# Impact Assessment: Vecinos Para El Bienestar De Law Comunidad Costera v. Federal Energy Reg. Comm'n, 6 F.4th 1321 (D.C. Cir. 2021)



- Residents, environmental groups, and nearby city (Petitioners) petitioned for review of decisions by FERC authorizing construction and operation of three liquefied natural gas (LNG) export terminals on shores of shipping channel in Texas and construction and operation of two 135-mile pipelines that would carry LNG to one of those terminals, allegedly in violation of, *inter alia*, NEPA. **The D.C. Circuit granted the Petition and remanded to agency without vacatur.**

# ***Vecinos (con't)***

- At issue are LNG projects by Texas LNG Brownsville LLC, Rio Grande LNG LLC and Rio Bravo Pipeline Co. that are slated to be built in the Port of Brownsville in an area surrounded by mostly low-income and minority communities
- A local group, Vecinos Para el Bienestar de la Comunidad Costera, and the city of Port Isabel had joined the Sierra Club in suing FERC for allegedly failing to consider the cumulative risks of ozone pollution from the facilities. The groups said FERC had arbitrarily limited the scope of its analysis to a 2-mile radius around the facilities.

# Vecinos (con't)

- FERC had argued that the facilities did not pose an outside risk to more vulnerable communities because all the surrounding residents were part of environmental justice communities.
- FERC also said that since there was not a universal standard for measuring climate risks, the agency could not measure the climate impacts of the LNG terminals.
- The D.C. Circuit agreed with the challengers that FERC had an obligation under NEPA compliance rules for federal agencies to either attempt to address their concerns about failing to use the social cost of carbon, which is used to put a price tag on carbon pollution, or offer an explanation for why it could not apply the metric. (Challengers relied on of 40 C.F.R. 1502.21 (c)).
- The Court stopped short of saying that FERC was obligated to use the social cost of carbon in its analysis.

# Impact Assessment: *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032 (D.C. Cir. 2021)

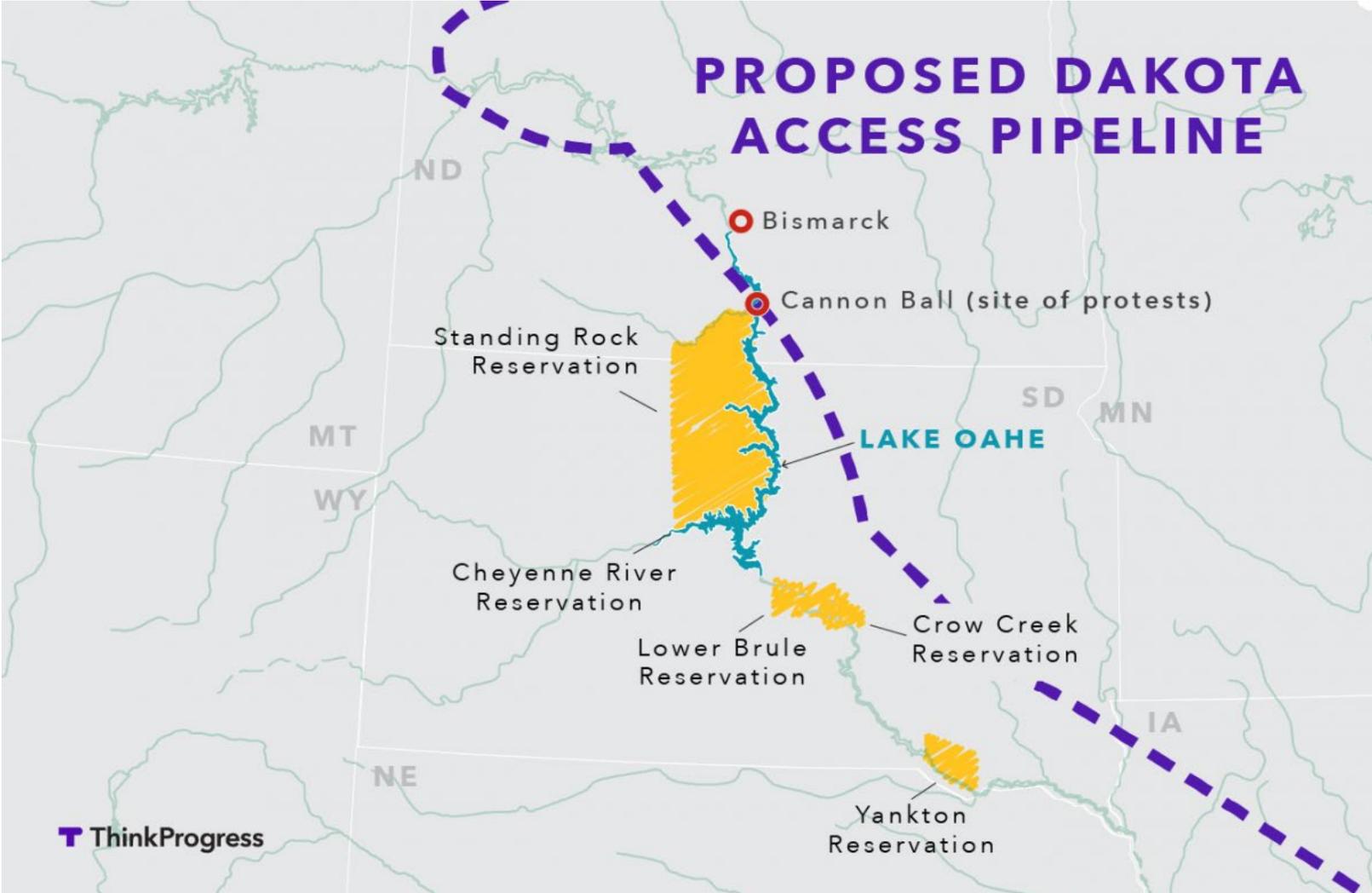


- Tribes challenged the Corps' issuance of an EA and easement for the Dakota Access oil pipeline to cross beneath federally regulated reservoir on the Sioux Tribe reservation on the Lake Oahe crossing site that provided tribes with water resources

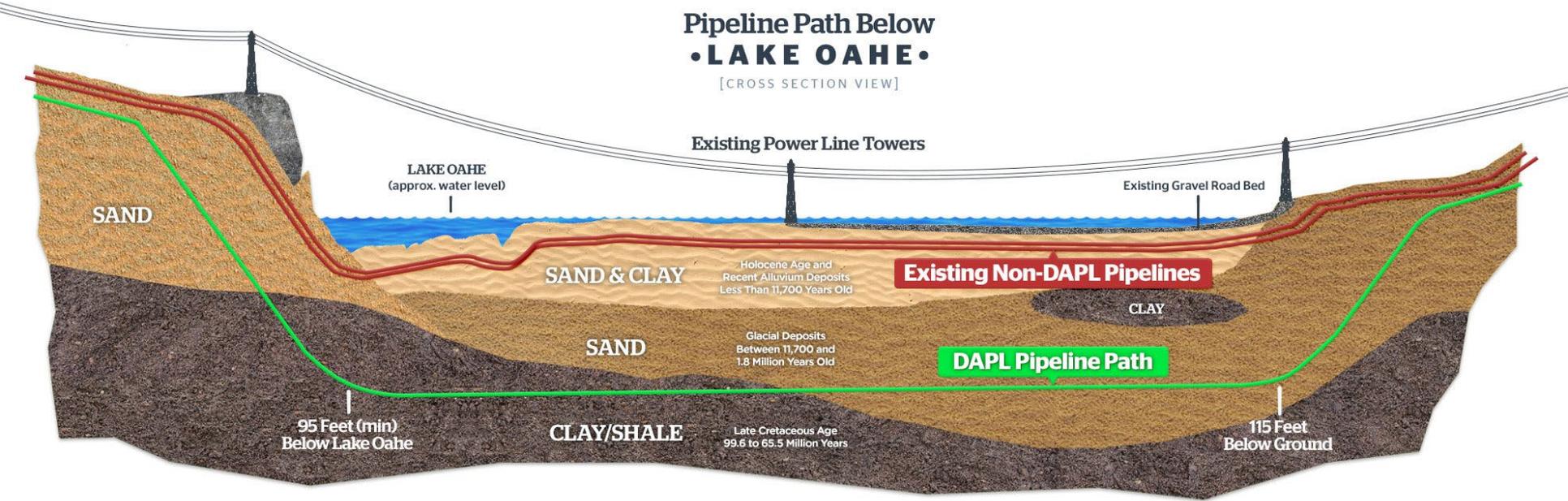
# ***Standing Rock (con't)***

- The Dakota Access Pipeline (DAPL), nearly 1,200 miles long, is designed to move more than half a million gallons of crude oil from North Dakota to Illinois each day
- DAPL crosses many waterways, including Lake Oahe, an artificial reservoir in the Missouri River created when the Corps constructed a dam in 1958
- The dam's construction and Lake Oahe's creation flooded 56,000 acres of the Standing Rock Reservation and 104,420 acres of the Cheyenne River Sioux Tribe's trust lands
- The Tribes rely on Lake Oahe's water for drinking, agriculture, industry, and sacred religious and medicinal practices

# Standing Rock (con't)



# Standing Rock (con't)



●● Illustrated Pipelines are Much Larger Than Scale for Visibility

**Not Shown:** There are 7 Other Pipelines that Cross Lake Oahe in Near Proximity

Eight pipelines currently cross under Lake Oahe, many near the surface. The Dakota Access Pipeline will be 95-115 feet underground, and use a path similar to, but much farther underground than a pipeline pair that has been operating for almost 35 years.

# ***Standing Rock (con't)***

## Background:

- The Corps published Draft EA in Dec. 2015; received comments from the Tribes voicing range of concerns, one notably that the Corps' insufficiently analyzed risks of an oil spill
- EPA and DOI raised concerns as well
  - Impacts on Trust resources by DOI
  - Direct and Indirect Impacts on Water Resources and Risk of Spill Impacts
- July 2016 Final EA and Mitigated FONSI
- Tribes challenged EA; Memo stating Corps not to grant an easement
- Jan. 2017 Change of Administration - Easement granted

# ***Standing Rock (con't)***

## More Background:

- District court denied injunctive relief but remanded for more analysis risk of spill to tribal treaty rights, environmental justice concerns and whether effects “highly controversial”
- Corps completed remand but Court ordered EIS and vacated easement
- The Corps and Dakota Access appealed the district court's order remanding for preparation of an EIS, as well as its separate order granting vacatur of the pipeline's MLA easement and ordering that the pipeline be shut down
- While this appeal was pending, a motions panel denied the Corps' request to stay the vacatur of the easement but granted its request to stay the district court's order to the extent it enjoined the pipeline's use

# Standing Rock (con't)

- Corps' and Dakota Access' claims that the impacts were not highly controversial, the court stated the standard:
  - A decision is “highly controversial,” under *National Parks Conservation Association v. Semonite*, if a “substantial dispute exists as to the size, nature, or effect of the major federal action.” 916 F.3d 1075, 1083 (D.C. Cir. 2019).  
“Something more is required for a highly controversial finding besides the fact that some people may be highly agitated and be willing to go to court over the matter.” *Id*
- The decisive factor **is not the volume of ink spilled in response to criticism**, but whether the agency has, through the strength of its response, convinced the court that it has materially addressed and resolved serious objections to its analysis.

# ***Standing Rock (con't)***

- Corps argued only controversy from the Tribes and consultants
- Court: The tribes are not, as Dakota Access suggested at oral argument, “quintessential . . . not-in-my-backyard neighbors.” “Indian tribes within Indian country are,” the Supreme Court has declared, “a good deal more than private, voluntary organizations”
- Rather, they are “domestic dependent nations that exercise inherent sovereign authority over their members and territories” and the resources therein
- The D.C. Circuit emphasized that the tribes’ unique role and their government-to-government relationship with the United States demand that their criticisms be treated with appropriate solicitude

# ***Standing Rock (con't)***

- *DAPL's Leak Detection System.* The D.C. Circuit found that the tribes' criticism regarding the potential for undetected slow pinhole leaks was not evaluated, and the Corps did not explain why it was not – stating that the leaks would be found. The tribes pointed to several examples where slow leaks were not found quickly, leading to substantial harm. Corps did not address
- *DAPL's Operator Safety Record.* Corps' decision to rely in its risk analysis on general pipeline safety data, rather than DAPL's operator's specific safety record (one of lowest performing safety records), rendered the effects of the Corps' decision highly controversial

# ***Standing Rock* (con't)**

- *Winter conditions.* Tribes were troubled that shutoff valves are more prone to failure in Winter and expressed other specific concerns
- The Corps argued that it had no need to engage in a quantitative evaluation of a winter spill scenario because its non-quantitative response was adequate
- Court stated Corps should have considered the problem

# Standing Rock (con't)

- *Worst Case Discharge*. “Largest area of scientific controversy.”
  - The regulations set forth a detailed formula for calculating the worst-case discharge, 49 C.F.R. § 194.105(b)(1)
  - Corps stated they did not have to complete that analysis because “an accident leading to a full-bore rupture of the pipeline is extremely unlikely” and, in any event, no statute or regulation required the Corps to calculate the worst-case discharge at all.
- The Corps estimated that, for purposes of a worst-case discharge, it would take 9 minutes to detect a leak and 3.9 minutes to close the shut-down valves (although the tribes’ argued due to technical malfunctions and human factors, it could be hours).
- No complete doomsday scenario needed, but Corps' failure to explain why it declined to consider any such eventualities leaves unresolved a substantial dispute as to its worst-case discharge calculation.

# ***Standing Rock (con't)***

- *Remedy*

- The Court of Appeals agreed with the reasoning of the district court, namely that the appropriate remedy for the Corps' unlawful action is vacatur, the standard remedy for NEPA violations
- However, The D.C. Circuit did reverse the district court's granting of an injunction requiring the DAPL to be shutdown
- 2 other cases involved remedies (see paper): *Vecinos* (remand without vacatur) and *Sovereign Inupiat for a Living Arctic* (temporary injunction upheld)

# Challenges involving “highly controversial effects” during 2021



- *Sierra Club, and Standing Rock*
- *Swomley v. Schroyer*, D.C. No. 1:19-CV-01055-TMT, 2021 WL 4810161 (10th Cir. Oct. 15, 2021) (disagreeing with residents’ contention that the project is “controversial among area residents and visitors’ because it “would gravely impact the recreational, aesthetic, and economic interests of residents”).

# Highly Controversial Effects

*City of Los Angeles v. Dickson*, No. 19-71581, 2021 WL 2850586, -- Fed. Appx. --- (9th Cir. Jul. 8, 2021) (not for publication)



- The City of Los Angeles and Culver City (Cities) petitioned for review of FAA's issuance of three amended flight procedures for aircraft arriving at Los Angeles International Airport (LAX)

# *City of Los Angeles (con't)*



- The FAA pointed to two documents as the basis for its CATEX decision — a memo “confirming” the agency had completed the necessary environmental review, and an “Initial Environmental Review” document
- Court found both documents postdated the publication of the amended Arrival Routes by several months and thus, they cannot constitute the FAA's NEPA review

# City of Los Angeles (con't)

- FAA's procedures stated that “extraordinary circumstances” exist, and a CATEX may not be applied, when a proposed action is “likely to be highly controversial on environmental grounds,” meaning that “there is a substantial dispute over the degree, extent, or nature of a proposed action's environmental impacts”
- The Cities stated “extraordinary circumstances” existed because there was significant controversy about the extent to which aircraft were flying below the minimum altitudes on the original Arrival Routes
- Thus, substantial dispute over noise other environmental impacts that the amended Arrival Routes would cause, and the *public controversy* surrounding the Arrival Routes was evidence of this dispute
- Held: FAA failed to address the record evidence indicating that there was a dispute over the potential effects of the amended Arrival Routes in the Initial Environmental Review, in contravention of its own procedures. FAA's application of a categorical exclusion was arbitrary and capricious



National  
Association of  
Environmental  
Professionals

Be Connected

# Cumulative Impacts Cases

# 2021 Cumulative Impacts Decisions

- *Center for Community Action & Environmental Justice v. FAA*, 18 F.4th 592 (9th Cir. 2021)
- *Friends of the Clearwater v. Higgins*, No. 20-35623, 847 Fed. Appx. 394 (9th Cir. Feb. 4, 2021) (not for publication)
- *The Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, No. 20-35546, No. 20-35547, 843 Fed. Appx. 77 (9th Cir. Feb. 11, 2021) (not for publication)
- *R. L. Vallee, Inc. v. Vermont Agency of Transp.*, 20-2665-cv, 2021 WL 4238120, -- Fed. Appx. --- (2nd Cir. Sep. 17, 2021) (not for publication)
- *Swomley v. Schroyer*, D.C. No. 1:19-CV-01055-TMT, 2021 WL 4810161 (10th Cir. Oct. 15, 2021) (not for publication)

# Results for 2021 cases

- Appellate Court decisions on agency cumulative effects analyses challenges
- Agencies prevailed in 80% (4 of 5) of the opinions
  - 3 in the 9<sup>th</sup> Circuit
  - 1 in the 2<sup>nd</sup> Circuit
  - 1 in the 10<sup>th</sup> Circuit
- Agencies involved:
  - USFS (2 opinions)
  - USACE (1 opinion)
  - FHWA (1 opinion)
  - FAA (1 opinion)

# Results for 2020 cases

- Appellate Court decisions on agency cumulative effects analyses challenges
- Agencies prevailed in 80% (4 of 5) of the opinions
  - 4 in the 9<sup>th</sup> Circuit
  - 1 in the 10<sup>th</sup> Circuit
- Agencies involved:
  - BLM (2 opinions)
  - USFS (2 opinions)
  - US Navy (1 opinion)

# Results for 2019 cases

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

# Results for **2018** cases

- 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 9<sup>th</sup> Circuit
  - 3 in the DC Circuit
  - 2 in the 5<sup>th</sup> Circuit
- Agencies involved:
  - USACE (3 opinions)
  - FERC (2 opinions)
  - BLM, USFS, FAA, TXDOT (1 opinion each)

# Center for Community Action & Env'tl. Justice v. FAA, 18 F.4th 592 (9th Cir. 2021)

- FAA EA/FONSI for construction and operation of 658,000 sq. ft. air cargo facility at the San Bernardino Int'l Airport
- Plaintiffs alleged:
  - CIA boundaries too small; FAA failed to identify 80+ other actions
  - CIA had no specific, quantified analysis



# ***Center for Community Action & Env'tl. Justice v. Fed. Aviation Admin., 18 F.4th 592 (9th Cir. 2021)***

- Court rules plaintiffs:
  - Failed to identify any specific impacts that the unexamined present/future impacts could cause
  - Failed to explain why the baselines chosen were incorrect
  - Failed to explain why the air quality analysis was deficient when the standard for analysis is whether any individual project exceeds established thresholds
  - Failed to explain why the NEPA EA needed to be consistent with the findings of the CEQA EIR
  - Court rules presence of one factor of significance alone does not necessarily trigger need for an EIS



# ***Center for Community Action & Env'tl. Justice v. Fed. Aviation Admin., 18 F.4th 592 (9th Cir. 2021)***

- **DISSENTING Judge Rawlinson:**
  - "I do not say this lightly, but it must be said. This case reeks of environmental racism."
  - County is 73% Latinx; 13% African-American; 95% live below the poverty level; asthma rates in the 2% highest in CA
  - FAA's conclusion of no significant air quality impacts "would be laughable if the consequences were not so deadly to the population of San Bernardino County."
  - FAA does not explain why it only analyzed many other projects for traffic impacts
  - Other projects explained cursorily in a table
  - EA states: "cumulative projects have a moderate to low potential to result in permanent, significant cumulative air quality impacts," without any quantification of the emissions from these projects, individually or collectively."



# ***Center for Community Action & Env'tl. Justice v. Fed. Aviation Admin., 18 F.4th 592 (9th Cir. 2021)***

- **DISSENTING Judge Rawlinson:**
  - "Does anyone doubt that this Environmental Analysis would not see the light of day if this project were sited anywhere near the wealthy enclave where the multibillionaire owner of Amazon resides? Certainly not...Residents of the San Bernardino Valley are not disposable. Their lives matter...This emissions-spewing facility that disproportionately impacts communities of color and was not properly vetted is a good place to start. We must do better, and I must dissent."



# ***Center for Community Action & Env'tl. Justice v. Fed. Aviation Admin., 18 F.4th 592 (9th Cir. 2021)***

- CONCURRING Judge Bumatay:
  - "I take no pleasure in writing this concurrence because I have great respect for our dissenting colleague. Such accusations are a serious matter. If the government acted with any racial motivation, this court has an obligation under the Constitution and the laws to stop it. The majority did not address such accusations—not because they are unimportant—but because no party raised them...The words 'discrimination,' 'disparate impact,' and 'racism' appear nowhere in the parties' briefing. Instead, our dissenting colleague alone raises the claim of "environmental racism." Of course, every judge is entitled to his or her views, but the dissent's assertions are unfair to the employees of the FAA and the Department of Justice who stand accused of condoning racist actions without a chance to defend themselves."



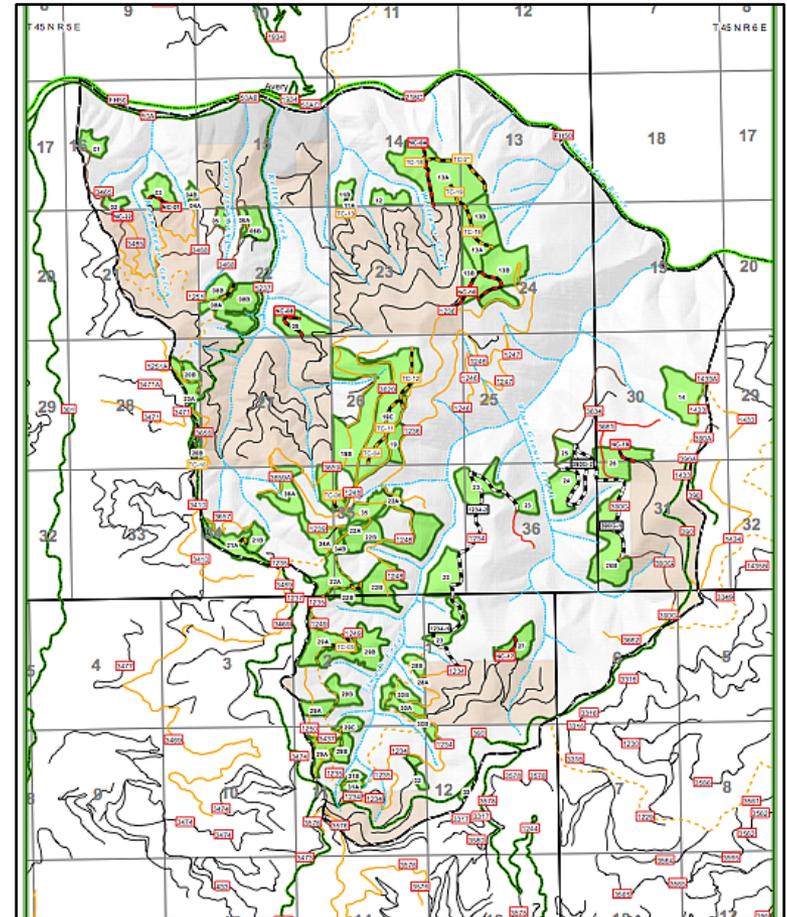
# ***Center for Community Action & Env'tl. Justice v. Fed. Aviation Admin., 18 F.4th 592 (9th Cir. 2021)***

- DISSENTING Judge Rawlinson:
  - "My concurring colleague chastises me for 'mark[ing] . . . government employees' with advancing environmental racism. For the record, I grew up in the segregated South and looked racism in the face, up close and personal, long before my concurring colleague was born. So pardon me if I take a hard pass on the lecture on when, where, and how to identify racial injustice. Indeed, if any compassion is owed in this case, it should be directed toward the people in San Bernardino County who are literally dying from being subjected to pollution on top of pollution. As for those involved in the preparation of this report who co-sign my colleague's accusation, I leave you with the wise words of my dearly departed Mama Louise: 'Only hit dogs holler.'"



# ***Friends of the Clearwater v. Higgins,*** **No. 20-35623, 847 Fed. Appx. 394 (9th** **Cir. Feb. 4, 2021) (not for publication)**

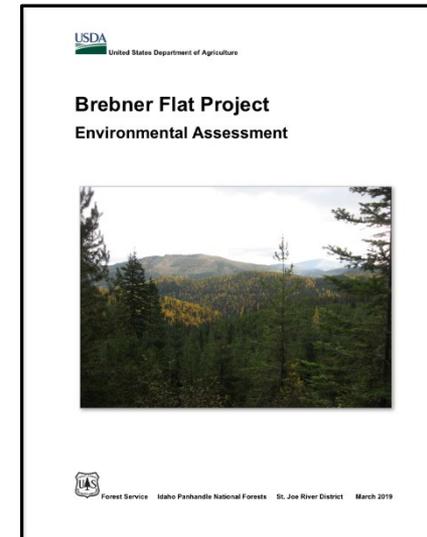
- FAA EA/FONSI for the Brebner Flat 12,000 acre Project on the Idaho Panhandle NF
- In their preliminary injunction request, plaintiffs allege the CIA failed to adequately analyze impacts to elk
  - USFS was required to disclose historical declines in the elk population due to past activities
  - COURT: "USFS was not required to engage in such a fine-grained analysis of all historical details of past actions."



# ***Friends of the Clearwater v. Higgins,*** **No. 20-35623, 847 Fed. Appx. 394 (9th** **Cir. Feb. 4, 2021) (not for publication)**

**Table 12. Effects of project alternatives on elk security in elk management unit 7-6 shown as acres changed**

<b>Indicator</b>	<b>Existing (no action)</b>	<b>Proposed Action</b>
Current security in EMU 7-6 (acres)	2,313	2,313
Security lost due to project work (acres)	0	-210
Security gained by proposed road closures (acres)	Not applicable	314
Gain/loss of elk security	0	104
Net elk security (acres)	2,313	2,417

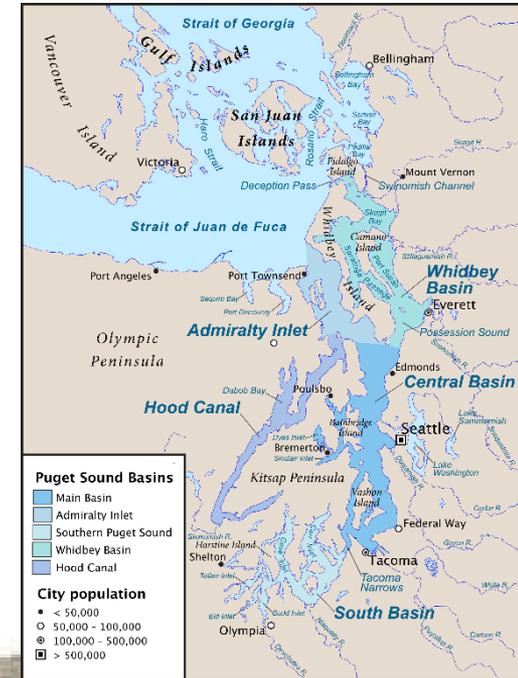


## ***Cumulative Effects of the Proposed Action***

There are no current timber sales within the Brebner Flat project area but there are foreseeable private land timber harvest activities in the project area that would occur. In our elk security calculations, all private lands are considered “not secure;” therefore, any additional harvest in those areas would not change (decrease) the amount of elk security since we already accounted for the lack of security habitat. There are no other activities ongoing or planned in the project area that would add cumulatively and substantially to the proposed action.

# ***The Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs, No. 20-35546, No. 20-35547, 843 Fed. Appx. 77 (9th Cir. Feb. 11, 2021) (not for publication)***

- USACE EA/FONSI for issuance of CWA NWP 48 for aquaculture activities
- 9th Circuit affirmed district court ruling that the CIA was inadequate



# ***The Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs, No. 20-35546, No. 20-35547, 843 Fed. Appx. 77 (9th Cir. Feb. 11, 2021) (not for publication)***

- USACE failed "to explain adequately its conclusions" that issuance of the permit will cause "no significant impact" pursuant to NEPA, and "will have only minimal cumulative adverse effects on the environment."
- "The Corps expressly acknowledged the negative effects on the environment from aquaculture activities but did not explain adequately why those effects were insignificant or minimal."
- "Several of the Corps' reasons were illogical. For example, the Corps explained that many other sources caused even greater harm to the aquatic environment than aquaculture, which is a reason that suggests there is a cumulative impact."
- "Similarly, the Corps responded to a concern about pesticides with the irrelevant explanation that the Corps does not regulate pesticides."

***R. L. Vallee, Inc. v. Vermont Agency of Transp., 20-2665-cv, 2021 WL 4238120, - Fed. Appx. --- (2nd Cir. Sep. 17, 2021) (not for publication)***

- Vtrans/FHWA use of a Categorical Exclusion for a highway interchange near Colchester, VT
- Plaintiffs allege that the CIA was inadequate because it improperly categorized a nearby development as a cumulative impact rather than an indirect effect of the interchange project.
- 2<sup>nd</sup> Circuit affirms district court ruling that this was not a substantial defect in the analysis



# ***Swomley v. Schroyer*, D.C. No. 1:19-CV-01055-TMT, 2021 WL 4810161 (10th Cir. Oct. 15, 2021) (not for publication)**

- White River NF EA/FONSI for 1,613-acre timber sale
- Plaintiffs allege the EA was inadequate for failing to consider and discuss indirect and cumulative effects of GHG emissions and climate change
- COURT: " The extra-record evidence includes photographs of unrelated projects, links to data from advocacy group websites, links to Wikipedia articles discussing wildfires, and links to media articles describing the biomass plant receiving the Project's timber. These materials do not raise concerns neglected during the Forest Service's NEPA review"



# Questions/Comments?

Fred Wagner, Partner – *Venable LLC*

[FRWagner@venable.com](mailto:FRWagner@venable.com)

(202) 344-4032

P.E. Hudson, Dep't of the Navy *Office of Counsel*

[pam.e.hudson.civ@us.navy.mil](mailto:pam.e.hudson.civ@us.navy.mil)

(805) 856-8370

Michael D. Smith, National Practice Director,  
Environmental Process and Policy – *WSP*

[michael.d.smith@wsp.com](mailto:michael.d.smith@wsp.com)

(571) 830-0854