NEPA CASE LAW—2021

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This paper reviews decisions on substantive NEPA cases issued by federal courts in 2021 and explains the implications of the decisions and their relevance to NEPA practitioners.

INTRODUCTION

In 2021, the U.S. Courts of Appeal issued 18 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 18 cases involved four different departments and two independent agencies. Overall, the federal agencies prevailed in 13 of the cases, did not prevail in four cases, and prevailed on one NEPA claim but not the other NEPA claim in one case, with a total prevail rate of 72 percent (75 percent if the partial cases are included). The U.S. Supreme Court issued no NEPA opinions in 2021; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, Table 1 shows the number of U.S. Court of Appeals NEPA case decisions issued in 2006 – 2021, by circuit. The number of decisions issued in 2021 is below the 2006 – 2021 annual average of 23 decisions. Figure 1 is a map showing the states covered in each circuit court.

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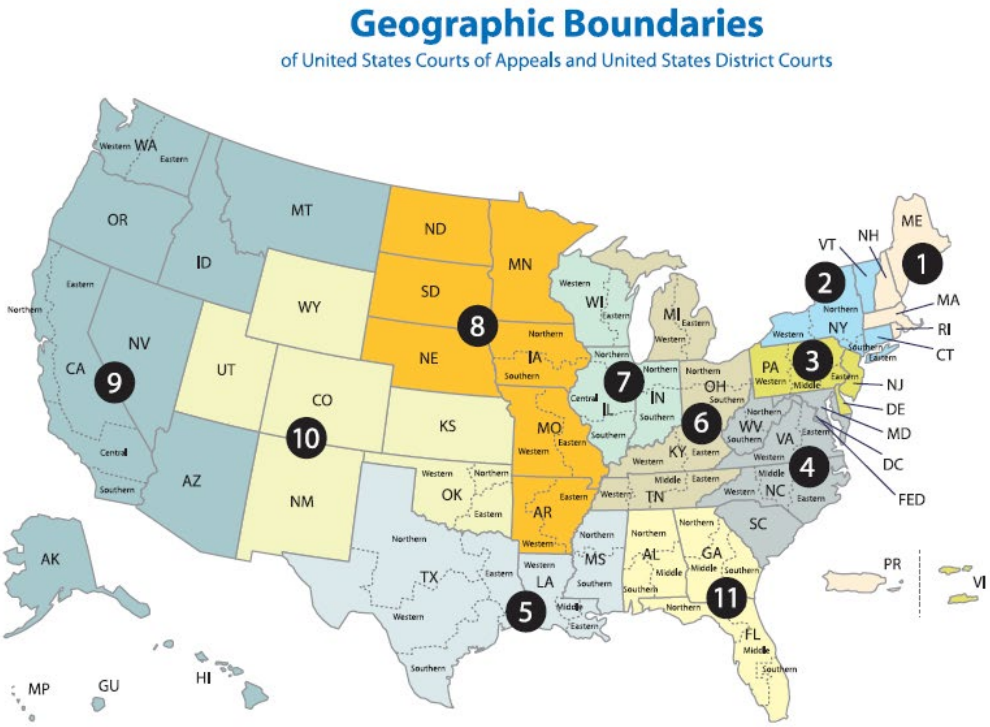
Table 1. Number of U.S. Courts of Appeal NEPA Opinions, by year and circuit

	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**

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



STATISTICS

Federal agencies prevailed in 72 percent (75 percent if the partial opinions are included) of the substantive NEPA cases brought before the U.S. Courts of Appeal.

Both the Department of Interior (Bureau of Land Management [BLM], National Park Service [NPS], and Bureau of Indian Affairs [BIA]) and the Department of Defense (United States Army Corps of Engineers [Corps]) were involved in five cases.[2] The Department of Transportation (Federal Aviation Administration [FAA] and Federal Highway Administration= was involved in four cases. *See Footnote 2*. The Department of Agriculture (United States Forest Service [USFS]) was a defendant in three cases. Both the Federal Energy Regulatory Commission (FERC) and Federal Communications Commission (FCC) were defendants in one case, each.

The Department of Interior prevailed in all but one of its five cases. The Department of Defense prevailed in all but two of its five cases. The Department of Transportation 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). The Department of Agriculture prevailed in all three cases. FERC did not prevail in its only case while FCC prevailed in its only case.

Of the 18 substantive cases, two cases involved a categorical exclusion (CatEx), six involved environmental assessments (EA), five involved environmental impact statements (EIS), and five cases involved federal actions for which there was no NEPA document.

Of the four cases in which agencies did not prevail, one involved an EA (*Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs,* 985 F.3d 1032 (D.C. Cir. 2021), one involved an EIS (*City of Los Angeles v. Dickson*, No. 19-71581, 2021 WL 2850586, -- Fed. Appx. --- (9th Cir. Jul. 8, 2021) (not for publication)) and two involved the lack of a NEPA document (*The Coalition to Protect Puget Sounds 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); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 21-35085, No. 21-35095, 2021 WL 4228689 (9th Cir. Feb. 13, 2021) (not for publication)). The one case in which the agency only partially prevailed involved a CatEx (*City of Los Angeles v. Dickson*, No. 19-71581, 2021 WL 2850586, -- Fed. Appx. --- (9th Cir. Jul. 8, 2021) (not for publication)). The agencies prevailed in the other 13 cases.

TRENDS

The following relates some trends and interesting conclusions from the substantive 2021 cases.

[2] The NPS, DOI was a co-defendant with FHWA, DOT in *Protect Our Parks, Inc. v. Buttigieg,* 10 F.4th 758 (7th Cir. 2021), in which the agencies prevailed.

***Assessment of Impacts**:* Twelve[3] of the cases examined one or more challenges to assessment of impacts (including greenhouse gas impacts and cumulative impacts). The courts tended to focus on the deference afforded to the agency when they upheld the impact assessment analysis.

Categorical Exclusion: Two cases scrutinized the application of CatExs to projects based on the potential for impacts, including the consideration of extraordinary circumstances.

- *City of Los Angeles v. Dickson*, No. 19-71581, 2021 WL 2850586, -- Fed. Appx. --- (9th Cir. Jul. 8, 2021) (not for publication) (finding that the FAA failed to address the record evidence indicating that there was a dispute over the potential effects of the amended flight arrival routes in the initial environmental review, in contravention of its own procedures, thus, the FAA's application of a CatEx was arbitrary and capricious).

- *R. L. Vallee, Inc. v. Vermont Agency of Transp.*, 20-2665-cv, 2021 WL 4238120, -- Fed. Appx. --- (2d Cir. Sep. 17, 2021) (not for publication) (upholding agency's application of a CatEx for a planned construction project centered on a highway interchange near Colchester, Vermont, and stating that that congestion relief alone did not amount to a significant impact on travel patterns).

***Direct impacts**:* Eight cases considered challenges to assessment of direct impacts.

- *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032 (D.C. Cir. 2021) (holding that several serious scientific disputes existed, thereby rendering the effects of the Corps' easement decision for the Dakota Access Pipeline "highly controversial").

- *National Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 991 F.3d 577 (4th Cir. 2021) (applying a deferential standard of review and holding that the Corps collected a broad range of data drawn from the facts and objectives of a the coastal North Carolina shoreline erosion project, historical statistics and records, computer analyses, and opinions of other specialized agencies, and it analyzed the data to make judgments ultimately based on its own special expertise under the numerous criteria imposed by NEPA).

- *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395 (1st Cir. 2021) (agreeing the Corps assessed the baseline environmental conditions adequately in its EA both in a standalone section, and in discussing the environmental impacts of the project, which discussed baseline environmental conditions along the entirety of the Central Maine Power Corridor, part of a high-voltage direct-current transmission line from Quebec to Massachusetts; the court upheld the 164-page EA, which adequately analyzed the impacts of the Corps permits on wetlands, as well as surrounding forest land and wildlife and declined to find the project "controversial.").

[3] Cases were only counted once even if multiple claims were adjudicated within that case involving impact assessment.

- *Vecinos Para El Bienestar De Law Comunidad Costera v. Federal Energy Reg. Comm'n*, 6 F.4th 1321 (D.C. Cir. 2021) (sustaining Petitioners' environmental justice claims because FERC's decision to restrict the analysis of the impacts on air quality to communities in census blocks within two miles of the liquified natural gas terminal project sites - without an explanation - was arbitrary).

- *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758 (7th Cir. 2021) (confirming the agencies complied with NEPA by studying the various impacts of tree removals for a Chicago highway project to air quality and migratory birds, including consideration of the unique characteristics of Jackson Park).

- *Center for Cmty. Action & Envtl. Justice v. Fed. Aviation Admin.*, 18 F.4th 592 (9th Cir. 2021) (rejecting the petitioners' contentions that the FAA's geographical boundaries for the study areas for an air cargo facility at the San Bernardino airport resulted in a failure to "appropriately capture the true environmental impacts of the project" such as air quality and socioeconomic impacts; the Ninth Circuit also rejected the petitioners' assertion that the FAA failed to consider the project's ability to meet state and federal air quality standards).

- *Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, No. 19-35528, 848 Fed. Appx. 298 (9th Cir. May 18, 2021) (not for publication*)* (stating that deference to the USFS scientific methodology in its analysis of the viability of bighorn sheep in the Beaverhead-Deerlodge National Forest was warranted).

- *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) (criticizing the Corps' citation to a limited scientific study of the effects of one type of shellfish on one natural resource, where the study did not consider a wide range of environmental stressors and did not justify — without further explanation — the Corps' much broader determination that issuing a permit for the aquaculture of at least five types of shellfish will have insignificant and minimal effects on the full aquatic environment).

- *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 Forest Service's proposed logging project in the White River National Forest is "controversial among area residents and visitors' because it "would gravely impact the recreational, aesthetic, and economic interests of residents").

Indirect Impacts: Two cases involved assessment of indirect impacts, and both weighed challenges to greenhouse gas impacts.

- *Vecinos Para El Bienestar De Law Comunidad Costera v. Federal Energy Reg. Comm'n*, 6 F.4th 1321 (D.C. Cir. 2021) (stating that FERC was required to address petitioners' argument concerning the significance of 40 C.F.R. § 1502.21(c), and that

its failure to do so rendered its analyses of the projects' greenhouse gas emissions deficient; FERC must explain whether 40 C.F.R. § 1502.21(c) calls for it to apply the social cost of carbon protocol or some other analytical framework, as "generally accepted in the scientific community" within the meaning of the regulation).

- *Swomley v. Schroyer*, D.C. No. 1:19-CV-01055-TMT, 2021 WL 4810161 (10th Cir. Oct. 15, 2021) (rejecting residents' claim that the analysis involving cumulative effects on GHG emissions and climate change was arbitrary and capricious; it also rejected the residents' argument that the inadequacy of climate change impacts was controversial).

Cumulative impacts: Five cases considered the adequacy of the agency's cumulative effects assessment.

- *Center for Cmty. Action & Envtl. Justice v. Fed. Aviation Admin.*, 18 F.4th 592 (9th Cir. 2021) (criticizing the unfounded conclusions by the Center for Community Action (CCA) that the FAA needed to conduct a better cumulative impacts analysis; the Ninth Circuit stated that the CCA could not identify any specific cumulative impacts that the FAA failed to consider and that suggested that there were none).

- *Friends of the Clearwater v. Higgins*, No. 20-35623, 847 Fed. Appx. 394 (9th Cir. Feb. 4, 2021) (not for publication) (holding that USFS was not required to engage in a fine-grained analysis of all historical details of past actions related to a proposed timber harvest and road project, especially for an EA where the NEPA regulations allow for an aggregate method of analyzing cumulative impacts).

- *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) (rejecting the Corps' analysis when it acknowledged the negative effects on the environment from aquaculture activities but did not explain adequately why those effects were insignificant or minimal; the Ninth Circuit found several of the Corps' reasons were illogical).

- *R. L. Vallee, Inc. v. Vermont Agency of Transp.*, 20-2665-cv, 2021 WL 4238120, -- Fed. Appx. --- (2d Cir. Sep. 17, 2021) (not for publication) (disagreeing with the contention that FHWA's decision improperly categorized a nearby development as a cumulative impact rather than an indirect effect of the interchange project).

- *Swomley v. Schroyer*, D.C. No. 1:19-CV-01055-TMT, 2021 WL 4810161 (10th Cir. Oct. 15, 2021) (not for publication) (rejecting claim that the analysis involving cumulative effects on GHG emissions and climate change was arbitrary and capricious).

Alternatives Considered: Two cases involved challenges to the sufficiency of the alternatives considered, and the courts upheld the agencies' selection of the preferred alternative in each case:

- *National Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 991 F.3d 577 (4th Cir. 2021) (discussing that because the agency was able to compare all alternatives in the same light, it appropriately selected the preferred alternative that was the least environmentally damaging practicable alternative).

- *Friends of the Capital Crescent Trail v. U.S. Army Corps of Eng'rs,* No. 20-1544, 855 Fed. Appx. 121 (4th Cir. May 13, 2021) (not for publication) (affirming that the agency evaluated a range of project alternatives for a D.C-area mass transit project that had been considered by expert agencies and the public over a period of years, including the three rapid bus options and the transportation management option, all of which contemplated upgraded bus service and rejected these alternatives both because they would not adequately advance the goals of the project and because the Purple Line, the preferred alternative, would have lesser impacts on wetlands).

Federal Action: Four cases contemplated whether an agency should prepare an impact assessment (federal action).

- *Natural Res. Defense Council v. McCarthy*, 993 F.3d 1243 (10th Cir. 2021) (opining where the relevant BLM Resource Management Plan designates an area as open to Off-Highway Vehicle (OHV) use, lifting a temporary closure order of that area under 43 C.F.R. § 8341.2(a) is non-discretionary and does not require NEPA analysis).

- *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395 (1st Cir. 2021) (acknowledging that the Corps could reasonably rely on the negligible percentage of the entire project that is within Corps jurisdiction to conclude that the Corps did not have "sufficient control and responsibility to warrant Federal review" of the entire project and rejecting Sierra Club's argument that that the cumulative federal involvement tips the scale toward major federal action).

- *Environmental Trust Health v. Federal Communication Comm'n*, 9 F.4th 893 (D.C. Cir. 2021) (rejecting the argument that NEPA required the FCC to issue an EA or EIS regarding its decision to terminate a notice of inquiry regarding the adequacy of its 1996 Radio Frequency (RF) guidelines because there was no ongoing federal action regarding its RF limits).

- *Fisheries Survival Fund v. Haaland*, No. 20-5094, 2021 WL 2206426, 858 Fed. Appx. 371 (D.C. Cir. May 20, 2021) (not for publication) (finding that an offshore lease for a windfarm off the coast of New York did not trigger BOEM's NEPA obligations because it would not result in irreversible and irretrievable commitments of resources to an action that will affect the environment[4]).

Remedies: Three cases involved application of remedies:

[4] The issuance of the lease was the subject of an EA and FONSI and any future development of the site by the lessee would require approval by BOEM.

- *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032 (D.C. Cir. 2021) (agreeing 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 -- but reversing the district court's granting of an injunction requiring the Dakota Access Pipeline (DAPL) to be shut down.).

- *Vecinos Para El Bienestar De Law Comunidad Costera v. Federal Energy Reg. Comm'n*, 6 F.4th 1321 (D.C. Cir. 2021) (considering in the selection of a remedy, the D.C. Circuit found it reasonably likely that on remand the FERC could redress its failure of explanation regarding its analyses of the projects' impacts on climate change and EJ communities and remanding to FERC without vacatur),

- *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 21-35085, No. 21-35095, 2021 WL 4228689 (9th Cir. Feb. 13, 2021) (not for publication) (ordering the continuation of a temporary injunction on certain construction activities related to the Willow Master Development Plan, a major oil and gas development project in the National Petroleum Reserve-Alaska, concluding that the appellants raised a serious question in contending that the Naval Petroleum Reserves Production Act applies only to actions challenging the sale or issuance of the leases themselves, and that it does not extend to challenges to later production site specific actions taken on the leased lands).

Each of the substantive 2021 NEPA cases, organized by federal agency, is summarized below. Unpublished cases are noted (9 of the 18 substantive cases in 2021 were unpublished). Although such cases may not have precedential value depending on the court, they can be of value to NEPA practitioners.

U.S. DEPARTMENT OF AGRICULTURE

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

Issues: Cumulative impacts, public involvement.

Facts: Environmental organizations, (collectively, Friends) challenged the USFS' EA involving timber harvest and road construction in the Brebner Flat Project in Shoshone County, Idaho. The district court denied organizations' motion for a preliminary injunction to prevent timber harvest and road construction; the Ninth Circuit affirmed.

Decision: Friends argued the district court erred in its assessment of Friends' likelihood of success on the merits of their NEPA claims. Friends claimed that the USFS failed to analyze adequately (a) the cumulative effects of the Project on elk, and (b) the efficacy of the chosen mitigation measures for elk.

Friends contended that USFS was required to disclose in the EA historical declines in the elk population in the project area due to past activities such as logging and road building. The court disagreed, stating that USFS was not required to engage in such a fine-grained analysis of all historical details of past actions, especially for an EA where the NEPA regulations allow for an aggregate method of analyzing cumulative impacts. 36 C.F.R. § 220.4(f) (providing that cumulative effects analyses need not "catalogue or exhaustively list and analyze all individual past actions"); *see also Cascadia Wildlands v. BIA*, 801 F.3d 1105, 1111–13 (9th Cir. 2015).

Friends argued that the misstatement in the EA that the "project area . . does not include . . . the [St. Joe] [W]ild and [S]cenic [R]iver corridor" constituted a "failure to fully inform the public," that deprived the public of an opportunity to "offer meaningful comments" on the agency's analyses in violation of NEPA. The district court weighed the effect of the agency's misstatement on public participation and concluded that the EA's single sentence incorrectly stating the scope of the Project did not so drastically undermine public participation as to render the USFS's action unlawful. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090–91 (9th Cir. 2014). We agree.

The Ninth Circuit held that because the district court did not err in its assessment of Friends' likelihood of success on the merits of their NEPA claims they did not address the remaining *Winter* factors for each of Friends' claims. *Winter v. Natural Res. Def. Council*, Inc., 555 U.S. 7, 129 S.Ct. 365 (2008)).

Gallatin Wildlife Ass'n v. U.S. Forest Serv., No. 19-35528, 848 Fed. Appx. 298 (9th Cir. May 18, 2021) (not for publication).
Agency prevailed.

Issues: Impact Assessment.

Facts: Conservation organizations (collectively, Gallatin) challenged that the agency failed, in its EIS, to properly evaluate the viability of bighorn sheep in the Beaverhead-Deerlodge National Forest by utilizing a flawed coarse filter methodology in determining that domestic sheep grazing did not pose a significant threat to the viability of bighorn sheep. The lower court granted summary judgment for the agency and denied Gallatin's motion for injunction; the Ninth Circuit affirmed.

The Ninth Circuit stated that deference to the USFS scientific methodology in its analysis of the viability of bighorn sheep was warranted. *See Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1108 (9th Cir. 2016) (applying the arbitrary and capricious standard in holding that the USFS' methodology in assessing bighorn sheep viability was sound). In conducting a coarse filter analysis, the USFS considered threats from domestic sheep grazing to bighorn sheep, including disease transmission; it discussed impacts of domestic sheep grazing on bighorn sheep viability; and it adequately delineated the reasons why the coarse filter methodology was employed in lieu of a fine filter analysis. *See id* (explaining that "[t]he USFS is owed greater-than-average deference as it relates to its choice of technical methodologies").

Although the FEIS mentioned that a fine filter analysis "was conducted for . . . species identified by the public as having viability concerns," the FEIS elaborated that

only two species met the criteria for conducting a fine filter analysis as identified through public comments—the northern goshawk and the great gray owl. Contrary to Gallatin's assertions, the court found that USFS did not commit to conducting a fine filter analysis for every species identified in public comments as having viability concerns, nor was it otherwise compelled to utilize the fine filter analysis for those species.

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

Issues: Impact Assessment (Fungi, Climate Change, Cumulative), flyspecking.

Facts: Twenty-one residents living near the project filed a petition for review of USFS' approval of a timber project in the White River National Forest in Colorado. The Tenth Circuit affirmed the lower court's judgment for the agency.

In 2018, the USFS issued a Final Decision Notice approving a timber project (the Project) in the White River National Forest. The USFS prepared an EA, concluding the Project was unlikely to significantly affect the environment. Twenty-one residents living near the Project disagreed.

The Project authorized logging on 1,631 acres of forest within the White River National Forest, less than 10% of the total acreage the USFS considered for the Project. The Project Area is a lodgepole pine, aspen, and mixed conifer forest. The EA noted tree "species composition within the [Project Area] landscape is relatively diverse, [but] age-class diversity and structural diversity is more homogenous." When describing the environmental effects of foregoing the Project—the No-Action alternative—the USFS stated the lack of young forest within the area landscape could make the area more vulnerable to large-scale insect epidemics and drought induced mortality. As fuels continue to increase, there would be increased risk of a large, severe wildfire. The EA noted that severe wildfire can aggravate a problem posed by a potentially changing climate: If snowmelt ends earlier and the surrounding trees are also dead, it is possible that wetlands would have even faster drying time.

The Project called for using the "clear-cut with leave tree" treatment method on 1,061 acres of forest. This treatment would harvest all lodgepole pines over five inches in diameter but leave aspen and mixed conifer species on the landscape. Another 198 acres would be treated through a "coppice" method, in which all the merchantable trees would be harvested, and the non-merchantable trees would be either felled or burned. The remaining 369.6 acres would be treated through a "group selection" method that "create[s] small openings, a quarter acre to an acre in size, to create an environment suitable for conifer regeneration." These openings "would be dispersed throughout" the Project Area and would not collectively exceed 25–30% of the acreage treated with this method. Id. The Project would require "[a]pproximately 9 miles of temporary roads . . . to access cutting units," which involves "road maintenance (blading, drainage, surfacing, curve widening)" activities as necessary.

The Project had three purposes: (1) provide commercial forest products and/or biomass to local industries; (2) increase tree age/size class diversity at the stand and landscape scales, thereby increasing forest resistance and resilience to disturbances, such as future bark beetle outbreaks, fires, and other climate-related mortality event, and; (3) provide snowshoe hare habitat in both the stand initiation structural stage and in mature, multi-story conifer vegetation to benefit the Canada lynx, a federally threatened species.

The USFS engaged with stakeholders within one year of listing the Project in its Schedule of Proposed Actions; it included a 60-day scoping and comment period, receiving 39 comments including one from the Residents which, among other things, raised concerns about climate change, mycelium fungi, and the broader impact of the Project. The USFS addressed these concerns directly in its formal response to comments and agreed to analyze certain issues in subsequent specialist reports.

The USFS prepared an EA in August 2017, and considered two alternatives, the no action and proposed action alternative. The EA considered two alternatives: (1) the "No Action" alternative and (2) the "Proposed Action" of moving forward with the Project. Under their procedures, the USFS issued a draft notice in December 2017, where during the 45-day pre-decisional period, it received twelve objections. The Residents filed an objection that again raised their concerns about climate change,

mycelium, and the Project's environmental impact, and the USFS responded. On April 20, 2018, the USFS issued the Project's final Decision Notice, including a FONSI.

Decision: The Residents argued the USFS violated NEPA by failing to: (1) consider the Project's impact on climate change: (2) adequately consider scientific data on the Project's impact on mycelium, and; (3) prepare an EIS.

Climate Change Impacts. Residents claimed the USFS' failure to consider and discuss the Project's indirect and cumulative effects on GHG emissions and climate change was arbitrary and capricious. The Tenth Circuit dismissed this claim because the Residents failed to brief this issue on appeal, under F.R.C.P. 28. Residents attempted to submit extra-record evidence and did not cite or rely on the administrative record; the Tenth Circuit claimed that the Residents "presented arguments divorced from legal or factual predicates."

In their brief Residents cited to websites, 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. The court opined that these materials do not raise concerns neglected during the Forest Service's NEPA review. *See Nance v. Sun Life Assur. Co. of Can.,* 294 F.3d 1263, 1269 (10th Cir. 2002) (stating extra-record evidence need not be considered).

Mycelium Impacts. The USFS also found the Project's effect on mycelium was insignificant and did not warrant further review. Residents challenged this conclusion, arguing the agency failed to ensure their analysis had "scientific integrity" as required under NEPA. 40 C.F.R. § 1502.24. The Tenth Circuit also rejected this claim due to inadequate briefing finding that the Residents did not prepare a record enabling judicial review of this claim.

The Residents alleged three studies independently show that clearcutting causes significant negative impacts on mycelium and the environment and alleging the USFS actively choose to ignore the results of these studies in favor of other data, and thus violated NEPA. But Petitioners did not include the studies in their appendix, and the court could not determine whether the agency's decision runs counter to the evidence that was before it. Without the disputed studies, the Tenth Circuit could not determine whether USFS' interpretation of the studies was arbitrary or capricious.

Significance of Impacts. The court rejected the Residents' first claim that the climate change impacts because it was inadequately briefed; it also rejected the argument that the lack of climate change impacts was controversial, citing to 40 C.F.R. § 1508.27(b)(4). The court found the Residents were mistaken. "If alleged noncompliance with NEPA rendered a project controversial, this factor would be reduced to surplusage."

Residents argued the Project was controversial because it "leaves considerable uncertainty about the Project's effects that should be addressed in an EIS." The court found this uncertainty, however, was merely Petitioners' claims about climate change and mycelium repackaged in a different form. Based on the inadequate record and briefing, the Tenth Circuit found both claims meritless, meaning they do not create sufficient controversy to require an EIS.

Lastly, Residents contended the Project is "controversial among area residents and visitors" because it "would gravely impact the recreational, aesthetic, and economic interests of residents." The court stated controversy in this context does not mean opposition to a project, but rather a substantial dispute as to the size, nature, or effect of the action." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012). Again, the court reiterated that there was no substantial dispute about the effects of this action given Petitioners' inadequate briefing. The Tenth Circuit affirmed the district court's order.

U.S. DEPARTMENT OF DEFENSE

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032 (D.C. Cir. 2021).
Agency did not prevail

Issues: Impact Assessment (Controversy), Remedy.

Facts: Indian tribes challenged the U.S. Army Corps of Engineers' (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. The lower court: (1) required that the Corps prepare an EIS; (2) vacated the easement pending the preparation of an EIS; and (3) ordered that the pipeline be shut down and emptied of oil. The D.C. Circuit affirmed in part (that an EIS was required, and the easement should be vacated) but reversed the order requiring the pipeline to be shut down and emptied of oil.

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. As the Standing Rock Sioux Tribe explained:

> Lake Oahe is the source of life for the Tribe. It provides drinking water for over 4,200 people on the Reservation. It is the source of water for irrigation and other economic pursuits central to the Tribal economy. And it provides the habitat for fish and wildlife on the Reservation upon which tribal members rely for subsistence, cultural, and recreational purposes. Moreover, the Tribe's traditions provide that water is more than just a resource, it is sacred—as water connects all of nature and sustains life.

In December 2015, the Corps published and sought public comment on a Draft EA finding that the construction would have no significant environmental impact. The Tribes submitted comments voicing a range of concerns, including that that the Corps had insufficiently analyzed the risks and consequences of an oil spill. The DOI raised concerns involving the pipeline's potential impact on trust resources. The EPA registered its concern that the Draft EA lacked sufficient analysis of direct and indirect impacts to water resources, though it requested additional information and mitigation in the EA rather than preparation of an EIS. The EPA supplemented its comments to note that, while it agreed with the Corps that there was "minimal risk of an oil spill," it worried, based on its "experience in spill response," that a break or leak could nonetheless significantly affect water resources.

On July 25, 2016, the Corps published its Final EA and a Mitigated FONSI. Shortly after the Final EA's release, Standing Rock sued the Corps for declaratory and injunctive relief. Dakota Access and the Cheyenne River Sioux Tribe intervened on opposing sides, and Cheyenne River filed a separate complaint adding additional claims. The tribes submitted letters raising concerns about the EA's spill risk analysis; the tribe also submitted an expert review of the EA from an experienced pipeline consultant who concluded that the assessment was "seriously deficient and [could not] support the finding of no significant impact, even with the proposed mitigations. Following the Corps' internal review, the Assistant Secretary stood by her prior decision, but concluded that the historical relationship between the affected tribes and the federal government merited additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments.

During the ensuing review, both Standing Rock and the Oglala Sioux Tribe submitted additional comments and analysis. The Corps solicited Interior's opinion on the pipeline, Interior's Solicitor responded with a recommendation that the Corps prepare an EIS, and the Secretary of the Army for Civil Works issued a memorandum directing the Army not to grant an easement prior to preparation of an EIS.

Two days later, a new administration took office, and the government's position changed significantly. In a January 24 memorandum, the President directed the Secretary of the Army to instruct the Corps and the Assistant Secretary for Civil Works to expedite DAPL approvals and consider whether to rescind or modify the Notice of Intent to Prepare an EIS. The Army in turn concluded that the record supported granting an easement and that no EIS or further supplementation was necessary.

The Corps granted the easement on February 8, 2017. The district court denied injunctive relief but concluded that the Corps' decision not to issue an EIS violated NEPA by failing to adequately consider three issues: whether the project's effects were likely to be "highly controversial," the impact of a hypothetical oil spill on the tribes' fishing and hunting rights, and the environmental justice effects of the project and

remanded the matter to the agency to address those three issues.

The Corps completed its remand analysis in February 2019, and the parties again moved for summary judgment, with the tribes arguing that the Corps failed to remedy its NEPA violations and pressing several other non-NEPA claims. The district court concluded that "many commenters in this case pointed to serious gaps in crucial parts of the Corps' analysis," demonstrating that the easement's effects were "likely to be highly controversial." It remanded to the agency for it to complete an EIS but reserved the question whether the easement should be vacated during the remand. Following additional briefing, the court concluded that vacatur was warranted and ordered that "Dakota Access shall shut down the pipeline and empty it of oil by August 5, 2020."

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 Mineral Leasing Act 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.

Decision: In considering the 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 D.C. Circuit rejected the Corps' first argument that because its efforts to respond to the tribes' criticisms were not superficial. 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.

The D.C. Circuit rejected the Corps second argument, distinguishing *National Parks*, that the "opposition here has come from the tribes and their consultants, not from disinterested public officials." But 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." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894 (1982). Rather, they are "domestic dependent nations that exercise inherent sovereign authority over their members and territories" and the resources therein. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). 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.

The court then examined the four disputed facets of the analysis that the lower court found involved unresolved scientific controversies for purposes of NEPA's "highly controversial" factor.

DAPL's Leak Detection System. The D.C. Circuit agreed with the lower court that the Corps failed to address adequately the controversy involving the 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, leaded to substantial harm. The D.C. Circuit concurred that the Corps did not sufficiently address this, and other concerns raised by the tribes that would show it had resolved the controversy.

DAPL's Operator Safety Record. The D.C. Circuit agreed that the Corps' decision to rely in its risk analysis on general pipeline safety data, rather than DAPL's operator's specific safety record, rendered the effects of the Corps' decision highly controversial.

The tribes' retained an expert explained that "[Pipeline and Hazardous Materials Safety Administration] data shows Sunoco," DAPL's operator, "has experienced 276 incidents in 2006–2016," which the expert described as "one of the lower performing safety records of any pipeline operator in the industry for spills and releases."

The D.C. Circuit criticized the Corps' focus on defending the DAPL's operator performance record (rather than general pipeline safety data). In reply, the Corps emphasized that "70% of [DAPL's] operator's reported accidents on other pipelines were minor and limited to the operator's property." The Court found that did nothing to address the "[t]wo central concerns" on which the district court based its decision: "(1) the 30% of spills—about 80 of them—that were not limited to operator property; and (2) the criticism that the spill analysis should have incorporated the operator's record." The Court rejected the Corps' second argument, that it had no need at all to address the operator safety controversy because it focused on the operators' safety practices.

Winter Conditions. The tribes' claimed that the Corps did not evaluate the effect winter conditions would have on a potential spill and provided experts, explaining that shut-off valves might be more prone to failure and response efforts hindered by freezing conditions. The experts explained that "winter conditions create significant difficulties" because, among other things, "workers require more breaks and move slower due to the bundling of clothing," "daylight hours are shorter," and "slip-trip-fall risk increases significantly."

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; but the Corps emphasized in its brief that "no one has identified any way to calculate exactly how much more difficult" a clean-up would be during winter. The D.C. Circuit found that the Corps never stated that it applied its technical expertise to consider whether it was possible to identify such a method, especially when the tribes' experts stated this would be an issue. The court reasoned that had the Corps considered the problem and concluded that no comprehensive analysis was possible, that might have amounted to "successfully" resolving the controversy.

Worst Case Discharge. The lower court considered the "largest area of scientific controversy" to be "the worst-case-discharge estimate for DAPL used in the spill-impact analysis." The regulations set forth a detailed formula for calculating the worst-case discharge, 49 C.F.R. § 194.105(b)(1); the idea is to calculate the maximum amount of oil that could possibly leak from the pipeline before a spill is detected and stopped. According to the Corps 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). The D.C. Circuit stated that although the Pipeline and Hazardous Materials Safety Administration formula did not require the Corps to model a complete doomsday scenario in which every possible human error and technical malfunction occurs, it agreed with the district court that the Corps' failure to explain why it declined to consider any such eventualities leaves unresolved a substantial dispute as to its worst-case discharge calculation.

In sum, the D.C. Circuit held that several serious scientific disputes existed, thereby rendering the effects of the Corps' easement decision "highly controversial."

Regarding the vacatur, 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. The D.C. Circuit did reverse the district court's granting of an injunction requiring the DAPL to be shutdown.

National Audubon Soc'y v. U.S. Army Corps of Eng'rs, 991 F.3d 577 (4th Cir. 2021).
Agency prevailed.

Issues: Impacts, alternatives.

Facts: National Audubon Society (Audubon Society) challenged the Corps' issuance of a permit to Town of Ocean Isle Beach, North Carolina (the Town) to construct a "terminal groin" jetty — a jetty extending seaward perpendicular to the shoreline — to arrest chronic erosion of its beaches.

The lower court granted summary judgment to the Corps and town and the Fourth Circuit affirmed.

Ocean Isle Beach is a barrier island located in Brunswick County, North Carolina, that is 5.6 miles long and 0.6 miles wide with a long history of

suffering chronic erosion, putting 238 parcels of land and 45 homes at risk of loss. To date, 5 homes have been lost, as have some 560 feet of streets and related utility lines. Currently, renourishment is conducted on behalf of the Town under a federal program that dumps an average of roughly 400,000 cubic yards of sand on its beaches every three years.

After retaining an engineering firm, the Town applied to the Corps in May 2012 for a permit under the CWA to construct a terminal groin at the east end of the island; the groin would be 1,050 feet long with 300 feet landside to anchor it and 750 feet extending seaward from the shoreline. The proposal submitted to the Corps also included a plan to dredge the Shallotte Inlet every five years and place the dredged sand on the west side of the groin to maintain a permanent sand fillet there.

After a comprehensive, years-long study, involving input from numerous agencies and comments from the public, the Corps issued a FEIS on April 15, 2016, in which it evaluated the environmental and economic costs of each alternative. It relied mainly on the output of the Delft3D model, a sophisticated model which considers water and sediment flows in the context of water level, tides, currents, waves, and wind. The Corps also considered the costs and environmental effects of dredging sand from Shallotte Inlet, nourishing the beach, and building permanent structures like the groin.

Decision: The Audubon Society argued first that the Corps did not accurately portray the economic costs and environmental effects of each alternative because it mixed its sources of data in considering each alternative.

While projections of environmental effects were based on the direct output of the Delft3D model, projections of economic costs were adjusted based on historical rates of erosion. Under Alternative 1, for example, the Delft3D model indicated that the erosion of sand was estimated to be 24,000 cubic yards per year, while the historically observed rate was 91,000 cubic yards per year. The Corps used the first number to calculate environmental effects, while it used the latter number to calculate economic costs.

As a result, the Audubon Society insists, the Corps effectively projected "two shorelines for each alternative," using the less-eroded shoreline to predict environmental effects and the more-eroded shoreline to estimate economic costs with the consequence that, as it contends, it was "impossible for the public or the agency to evaluate each alternative as a coherent package of economic and environmental impacts."

The Fourth Circuit found the Corps' use of differing data was justified and, in any event, immaterial. The Corps' approach reflected its judgment about the suitability of the data and the tools available for making the assessments. The Delft3D model provided an initial baseline for both types of effects. Yet the Corps was able to calculate more accurate economic costs based on historical rates of erosion because it had available the necessary data to calculate the volume of sand that would need to be renourished periodically, the primary cost of each alternative. By contrast, environmental effects were more dynamic in nature owing to the complexity of coastal waters.

This relative lack of certainty led the Corps to qualify those environmental effects "should be interpreted with caution," though the data were still adequate to reveal "trends" and "relative differences." And because no reliable historical data for habitat acreage was available, the Corps was unable to make the same adjustment for environmental effects that it had made for economic costs, which the Court found to be an appropriate judgment.

The Corps used the same data derived from the Delft3D model to measure the environmental effects of each alternative. Likewise, in determining economic costs, it used the same source of data for each alternative. The Fourth Circuit upheld this portion of the Corps' analysis.

The Audubon Society argued the Corps similarly erred by calculating 30 years of economic costs for each alternative but considering only up to 5 years of data in determining environmental effects. But, again, the Corps provided a reasonable explanation for doing so, and it consistently applied its approach to each alternative.

The Corps modeled each alternative's quantitative environmental effects for an initial period of 3 years, and 5 years for Alternative 5, because those periods fell immediately before each alternative's second scheduled beach-nourishment event. By measuring environmental effects at the time before a planned beach nourishment, the Corps was able to compare "apples to apples," whereas reporting results at a

different uniform period would have skewed results because one alternative, having just received nourishment, would have looked deceptively favorable in comparison to another alternative that had not yet received the scheduled nourishment.

The Corps explained that quantitative data of environmental effects after the initial 3-year period could only be speculative. *See Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (finding a shortened quantitative model "was perfectly reasonable" given "the difficulties and uncertainties involved in modeling" over a longer period).

The Fourth Circuit discussed that the Corps followed its initial quantitative results with a rigorous qualitative analysis of each alternative's likely long-term environmental effects. In that qualitative analysis, the Corps expressly acknowledged potential long-term effects of the terminal groin that the Audubon Society insists the Corps "ignored." It noted that the groin was proposed to be "semi-permeable" or "leaky" so that seawater, sand, and small marine animals might pass through it. The Delft3D model found that the sand would accrete on the groin's west side for the first year and deprive sand from the east side, but "following [that] initial year of adjustment, the shoreline response east of the [groin] [would] stabilize[ ]" and begin to accrete sand and regain volume for the betterment of wildlife habitats.

In addition, the Corps included in its analysis a series of minimization and mitigation efforts designed to reduce the adverse environmental effects with respect to Alternative 5, anticipating those effects over the full 30-year life of the project. For example, the Town and Corps would be required to monitor the beach habitat and erosion rates and to take corrective measures as necessary, including modifications to the groin.

Finally, the Corps justified using a different set of data — adjusted historical costs — to compute the economic costs over a 30-year period because those data enabled the Corps to calculate the economic costs in a relatively mechanical manner. But the important fact remains that the economic costs were computed uniformly for each alternative. The court upheld the Corps' analysis.

Finally, the Audubon Society contended that the Corps failed, with respect to Alternative 4, to model beach nourishment events in tandem with targeted dredging. That failure, the Audubon Society argues, "made it impossible to meaningfully compare Alternative 4 to the other alternatives."

The Fourth Circuit stated that the Corps explained both the purpose and result of its analysis. It modeled Alternative 4 for a total of 6 years, the first 3 matching Alternative 1's rate of erosion to establish a baseline for Alternative 4 and the next 3 years modeling the effects of strategic dredging. That two-step process permitted the Corps to measure the effect of targeted dredging in isolation from the effects of other interventions. The component of Alternative 4 that increased beach nourishment was otherwise observable in the Corps' analysis of Alternative 3, which did not include targeted dredging. In this fashion, the Corps was able to compare Alternative 4 to Alternative 3 for purposes of assessing both alternatives. And in doing so, it found that Alternative 4's repeated dredging caused the intended "build-up of material on the west side of Shallotte Inlet," which the Corps expected to "continue to result in positive shoreline impacts along the east end of Ocean Isle Beach."

The Fourth Circuit held this was a reasonable explanation involving distinct components of a complex policy choice, and the Corps was able to compare all alternatives in the same light, ultimately finding Alternative 5 to be the least environmentally damaging practicable alternative.

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

Issues: Federal Action, Segmentation, Impacts, Public Comment.

Background: 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.

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.

Sierra Club alleged that the Corps was required to issue not merely an EA, but an EIS. Sierra Club argued that the Corps failed to properly apply its own Appendix B regulations. They argued (1) the scope of the Corps' EA was too narrow, (2) the Corps failed to account for baseline environmental conditions in its EA, (3) the Corps underestimated the intensity of environmental impacts from the project and should have conducted an EIS, and (4) the Corps failed to provide adequate opportunity for notice and comment.

The lower court granted summary judgment against the agency but allowed the activity to continue. The Ninth Circuit affirmed.

Discussion: The First Circuit found that Sierra Club did not meet its burden that the Corps' application of Appendix B factors was arbitrary and capricious because Corps applied each of the Appendix B factors with a reasoned discussion before reaching its conclusion.

The First Circuit considered that the 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.

The First Circuit found the Corps also properly considered the cumulative effect of the activities of other federal agencies: FERC had in 2018 allowed CMP to enter service contracts; USDOE issued a Presidential Permit for the Canadian border crossing; FWS's analysis was incorporated into the Corps' EA; and FERC's analysis related solely to consumer rates.

The First Circuit reiterated that 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 was arbitrary or capricious.

The Corps lists four factors, according to Appendix B, that should typically be considered in determining whether sufficient federal control exists. Sierra Club focused the first listed factor, "[w]hether or not the regulated activity comprises 'merely a link' in a corridor type project." Sierra Club argued that the examples in Appendix B did not address dispersed regulated activities or the import of multiple "links." The First Circuit found that the Corps could reasonably rely on the negligible percentage of the entire project that is within Corps jurisdiction to conclude that the Corps did not have "sufficient control and responsibility to warrant Federal review" of the entire project.

Sierra Club challenged the Corps' conclusion that only 1.9% of the project is within the Corps' jurisdiction, suggesting that the proper figure is 17%. The Court accepted the Corps argument, that both the 1.9% figure and the 17% figure were well under the 60% figure referenced in Appendix B's examples. *See* Appendix B § 7(b)(3) ("[I]f 30 miles of [a] 50-mile transmission line crossed wetlands or other 'waters of the United States,' the scope of analysis should reflect impacts of the whole 50-mile transmission line.").

The court 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.

The court rejected Sierra Club's remaining challenges that: (1) the Corps failed to adequately assess the baseline environmental conditions in Segment 1 in its EA, (2) apart from any argument about cumulative federal control, the Corps improperly "segmented" its own EA from the USDOE's analysis, (3) the Corps should have conducted an EIS, and (4) the Corps failed to provide adequate opportunity for notice and comment.

The Corps assessed the baseline environmental conditions in its EA both in a standalone section, and in discussing the environmental impacts of the project. The Corps correctly incorporated the whole of MDEP's environmental analysis, which discussed baseline environmental conditions along the entirety of the CMP Corridor.

Sierra Club's next claim that the Corps improperly "segmented" its environmental analysis from USDOE's separate assessment. The Court found this argument waived because it was not raised in the lower court. IF the court did consider this, the CEQ regulations direct agencies to coordinate in preparing an "impact statement." 40 C.F.R. § 1508.25(a)(1). CEQ

does not impose similar requirements on EAs and Sierra Club did not provide any other source of authority for such a requirement.

Sierra Club claimed that the Corps should have conducted an EIS because "[t]he [corridor] will have significant impacts not only to aquatic resources but also the surrounding forest and wildlife." The Corps issued a 164-page EA, which analyzed the impacts of the Corps permits on wetlands, as well as surrounding forest land and wildlife. The Corps' conclusions matched MDEP's own detailed environmental analysis. The Corps considered factors relating to the "intensity" of environmental impact pursuant to CEQ regulations. 40 C.F.R. § 1508.27(b).

Sierra Club stated that "Segment 1 . . . will run through more than 800 aquatic resources, and will establish new, fragmenting electrical infrastructure through the Western Maine Mountains." Plaintiffs argue the Corps "failed to consider the effects from forest fragmentation." The court rejected this and accepted the Corp's impact assessment.

Sierra Club claimed that the project is scientifically "controversial" and therefore required an EIS. *Cf. Hillsdale Env'tl Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012). Sierra Club argued that they have submitted a series of affidavits from experts who disagree with portions of the Corps' EA analysis. Many of these claims rely on plaintiffs' unsuccessful argument that the Corps was obligated to consider the environmental effects along the entirety of Segment 1. The Court rejected these claims. The Corps considered and responded to criticisms of its methodology and conclusions in its EA, and its analysis accords with the detailed position of MDEP.

Sierra Club finally claimed the Corps failed to provide adequate opportunities for notice and comment before issuing the final FONSI. But the "Corps did provide public notice and held a public hearing as part of its EA review process. The Corps' public hearing complemented other public hearings associated with the [CMP Corridor] but overseen by other agencies." As the district court noted, the Corps has discretion under CEQ rules as to whether it opens the final FONSI to 30 days of public comment. CEQ regulations require agencies to provide for public involvement "to the extent practicable," 40 C.F.R. § 1501.5(e), and hold or sponsor NEPA hearings "whenever appropriate or in accordance with the statutory requirements applicable to the agency," *id*. § 1506.6(c). A 30-day comment period is only required if an EIS would ordinarily be required, or if the agency's proposed action is "without precedent." 40 C.F.R. § 1501.6(a)(ii). The First Circuit concluded that neither condition was present.

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).
Agency did not prevail.

Issues: Impacts, Cumulative impacts, Remedy.

Facts: Environmental organizations (collectively, the Coalition) challenged Corps' issuance of nationwide permit authorizing discharges, structures, and work in waters of Puget Sound related to commercial shellfish aquaculture claiming violations*, inter alia,* of NEPA.

The district court granted summary judgment in favor of organizations but allowed many of the aquaculture activities to continue while applications for individualized permits were filed. Aquaculturists intervened and appealed.

Decision: The Ninth Circuit found that the district court correctly held that the agency abused its discretion, 5 U.S.C. § 706(2), by failing to explain adequately its conclusions that the 2017 version of NWP 48 will have "no significant impact" pursuant to NEPA, and "will have only minimal cumulative adverse effect on the environment," 33 U.S.C. § 1344(e)(1). *See Bair v. Cal. Dep't of Transp.*, 982 F.3d 569, 577 (9th Cir. 2020).

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 and that 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. *See* 40 C.F.R. § 1508.7 (2017).

Similarly, the Corps responded to a concern about pesticides with the irrelevant explanation that the Corps does not regulate pesticides. The Ninth Circuit criticized the Corps' citation to a limited scientific study of the effects of one type of shellfish on one natural resource. That study did not consider a wide

range of environmental stressors and did not justify — without further explanation — the Corps' much broader determination that at least five types of shellfish will have insignificant and minimal effects on the full aquatic environment.

The Ninth Circuit discussed that the district court crafted an equitable remedy. After briefings on the remedy, the court carefully crafted a hybrid remedy that reasonably balanced the competing risks of environmental and economic harms.

The court allowed many aquaculture activities to continue while applicants seek an individualized permit from the Corps, and the court permissibly accepted the good-faith compromise reached by some parties. The Intervenors requested full vacatur, allowing nearly 900 aquaculturists to continue their operations in full without any further review by the Corps. Particularly because vacatur is the presumptive remedy, and because aquaculturists may seek individualized permits, the Ninth Circuit upheld the lower court's remedy.

Friends of the Capital Crescent Trail v. U.S. Army Corps of Eng'rs, No. 20-1544, 855 Fed. Appx. 121 (4th Cir. May 13, 2021) (not for publication).
Agency prevailed.

Issue: Alternatives.

Facts: Friends of the Capital Crescent Trail and two residents of Montgomery County, Maryland, (collectively, Friends) challenged the Corps' issuance of a Section 404 permit, for a mass transportation project to connect the Maryland suburbs of Washington, D.C, specifically the light rail option known as the Purple Line, which is planned to extend 16 miles through the Maryland suburbs and to connect to existing mass transit options, including the Washington Metrorail.

Friends asserted the Corps unreasonably relied exclusively on alternatives for the project evaluated during a prior environmental review process and failed to consider certain unspecified bus alternatives that may have created a lesser environmental impact.

This case involves the lengthy planning process for a mass transportation project to connect the Maryland suburbs of Washington, D.C. After years of receiving public comments and evaluating various alternative proposals, the Maryland Transit Administration (Maryland) and the Federal Transit Administration (collectively, the transit agencies) selected a light rail option known as the Purple Line.

In a comprehensive opinion, the district court concluded that the Corps' decision to issue a permit was not arbitrary or capricious and rejected Friends' contention that the Corps should have considered additional hypothetical alternatives, given the relatively minor impact the project would have on nearby wetlands. The Fourth Circuit agreed with the district court's analysis and affirmed the court's judgment.

Discussion: Friends contended that the Corps acted arbitrarily and capriciously in granting the Section 404 permit without considering alternatives other than the eight options reviewed during the NEPA process. Although the specific nature of the Friends' preferred alternative was not entirely clear, the Friends generally asserted that the Corps should have considered other bus service configurations, or "some different mix of guideway and transit mode choices," including options that would not require the widening of bridges or roads.

The Fourth Circuit discussed that Friends did not challenge the Corps' conclusion that the Purple Line would cause the least environmental impact of all the rapid bus and light rail options that were considered in the NEPA process. The Fourth Circuit criticized that Friends' did not dispute that the transportation management and no-build options failed to advance the purposes of the project. The lower court concluded that "it was not at all unreasonable for the Corps to incorporate the NEPA alternatives analysis and focus on those alternatives the [transit agencies] had found potentially feasible, rather than trying to 'reinvent the wheel' by proposing or demanding novel alternatives that no party has yet clearly outlined." *Friends of the Cap. Crescent Trail v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 3d 804, 817-18 (D. Md. 2020).

The Fourth Circuit agreed that the "permanent aquatic impacts" of the Purple Line are "quite minor," totaling less than a half-acre of impacted wetlands and less than one linear mile of impacted streams. In addition to these relatively minor aquatic impacts, the Corps concluded that required mitigation measures would provide a net gain in protected wetlands in the area.

The Fourth Circuit reasoned that these circumstances did not require the Corps to "reinvent the wheel" by expanding its review beyond the NEPA alternatives. *See Hoosier Env't Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013) ("If another agency has conducted a responsible analysis the Corps can rely on it in making its own decision."). There is no evidence in this case that the Corps merely "rubber stamped" the NEPA analysis, or that the Corps otherwise abdicated its duty under the Clean Water Act. Rather, upon its review of the draft and final environmental impact statements, the Corps concluded that the transit agencies had conducted a "comprehensive" analysis of project alternatives and had provided the information necessary to assess the "tradeoffs of impacts versus benefits" of the proposals.

The Fourth Circuit agreed with the Corps' assessment that the analysis of alternatives conducted during the NEPA process was comprehensive. The transit agencies selected the eight project options for detailed study based on the agencies' expertise in transportation planning, after considering and receiving public comments on a "wide range of modes and alignments." The transit agencies thereafter engaged in a lengthy and thorough analysis of the eight alternatives, which process was upheld by the D.C. Circuit. *Friends of the Cap. Crescent Trail*, 877 F.3d 1051.

The Fourth Circuit concluded that the Corps did not act arbitrarily or capriciously in failing to consider proposals not in the record, namely, unspecified alternative bus options that the Friends appear to favor. In arguing that the Corps failed to consider their preferred alternatives, Friends pointed to general objections the Corps received regarding the Purple Line project, including comments advocating for "upgraded bus service," "increasing express bus service," and "adding additional and alternative bus routes."

The Corps was presented with a range of project alternatives that had been considered by expert agencies and the public over a period of years, including the three rapid bus options and the transportation management option, all of which contemplated "upgraded bus service." The Corps rejected these alternatives both because they would not adequately advance the goals of the project and because the Purple Line would have lesser impacts on wetlands.

Given the minimal aquatic damage caused by the Purple Line, and the Corps' thorough review of the eight options presented, the Fourth Circuit would not require the Corps to opine on new, hypothetical mass transit configurations not presented to the Corps.

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Natural Res. Defense Council v. McCarthy, 993 F.3d 1243 (10th Cir. 2021).
Agency prevailed.

Issue: Federal action.

Facts: NRDC challenged BLM's decision to reopen area designed for Off-Highway Vehicles (OHV) that previously was temporarily closed in Factory Butte Area in Utah due to impacts to endangered species. The lower court granted the motion for the agency, dismissing the action for failing to state a claim; the Tenth Circuit affirmed.

In 2006, the BLM closed a portion of the Factory Butte area in Utah to OHVs due to their adverse effects on the endangered Wright fishhook cactus. The BLM lifted that closure order in 2019 and re-opened the area to OHV use but did not perform any kind of environmental analysis under NEPA before doing so.

As a matter of background, the Factory Butte area, located on federal public lands in Wayne County, Utah, is home to the Wright fishhook cactus. The Wright fishhook cactus has been listed as an endangered plant species under the Endangered Species Act since 1979. The Factory Butte area is not only where the Wright fishhook cactus is located, but the area is also host to many visitors using cross-country OHVs like motorcycles, all-terrain vehicles, and four-wheel drive trucks.

In 1982, the BLM approved the Henry Mountains Management Framework Plan for roughly 1.9 million acres of land, including the Factory Butte area. Despite OHV use in the area causing "unsightly scars" such that "undue and unnecessary degradation" may have been occurring, the 1982 Management Framework Plan designated the Factory Butte area as open for cross-country OHV use.

In 2006, a BLM survey of cacti species in the area indicated that OHV use was negatively impacting threatened and endangered species of cacti, specifically the Wright fishhook cactus. Based on this information, the BLM's authorized officer "determined that OHV use in the area is causing or will cause adverse effects to threatened and endangered plant species." The BLM accordingly invoked its authority under 43 C.F.R. § 8341.2(a) and closed 142,023 acres of the Factory Butte area to cross-country OHV use. The closure order was to remain in effect until the conditions threatening the cacti species were sufficiently addressed or until the BLM's Richfield Field Office completed its new comprehensive resource management plan.

In 2008, the BLM's Richfield Field Office released a Proposed Resource Management Plan (RMP) and a FEIS. The Proposed RMP designated three cross-country OHV "play areas," where cross-country OHV travel would be allowed: 5,800 acres around Factory Butte, 2,600 acres in Swing Arm City, and 100 acres in Caineville Cove Inn. The Proposed RMP explained that the 2006 temporary closure order of the Factory Butte and Caineville Cove Inn areas would remain in effect.

In April 2019, the BLM submitted a memorandum to the FWS requesting concurrence and stating that the BLM had complied with the requirements of the 2010 biological opinion and additional conservation measures. BLM further expressed its intent to move forward with rescinding the 2006 temporary closure order and opening the Factory Butte area to cross-country OHV use.

On May 20, 2019, FWS accepted the proposed changes and concluded that opening the Factory Butte area to cross-country OHV use was not likely to jeopardize the Wright fishhook cactus. BLM did not conduct an environmental analysis under NEPA or provide the opportunity for public comment before lifting its closure order.

Decision: The issue in this case boiled down to whether BLM's decision to lift a temporary closure order under 43 C.F.R. § 8341.2(a) was a non-discretionary action, such that environmental analysis under NEPA is not required.

NRDC argued that: (1) BLM retains discretion to lift the temporary closure order even after it determines the "adverse effects are eliminated and measures implemented to prevent recurrence," and (2) the BLM's determination that "the adverse effects are eliminated and measures implemented to prevent recurrence" is also itself discretionary, thus triggering the threshold for NEPA.

In contrast, BLM argued NEPA analysis is not required at any point because the agency has no discretion to temporarily close an area, and no discretion to keep the closure order in place once the requisite determination has been made. Additionally, the determination that "the adverse effects are eliminated, and measures implemented to prevent recurrence" is not an open-ended act of discretion; rather, just like the initial determination that OHVs are "causing or will cause adverse effects" in the first place, it is a judgment triggering mandatory action under the regulation (43 C.F.R. § 8341.2(a)).

For the first argument, the Tenth Circuit examined the language of the regulation. The relevant part of the temporary closure regulation reads:

> [W]here the authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects . . . the authorized officer shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence.

43 C.F.R. § 8341.2(a).

NRDC alternatively argued that the BLM's determination that "the adverse effects are eliminated, and measures implemented to prevent recurrence," 43 C.F.R. § 8341.2(a), is itself a discretionary act requiring NEPA analysis.

The Tenth Circuit discussed a case that recently expanded on this seemingly metaphysical distinction between judgment and discretion in *National Wildlife Fed'n v. Sec'y of the U.S. Dep't of Transp.*, 960 F.3d 872 (6th Cir. 2020). In that case, the Sixth Circuit explained that the clearest case of discretion is where an agency doesn't have to act—for instance, if a statute says 'may' rather than 'must' or 'shall.' " *Id.* at 876. Thus, under the Sixth Circuit's view of the Supreme Court's decision in *Home Builders,* if an "agency is required by [law]" to take a certain action once specified "triggering events have occurred," the action is not discretionary, even though the agency

may exercise some judgment in determining whether the "triggering events have occurred." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650–51, 127 S.Ct. 2518 (2007).

The court looked to another analogous case, where the court held that the reasoning of *Home Builders* controlled. *National Wildlife Fed'n v. Sec'y of the U.S. Dep't of Transp.*, 960 F.3d 872 (6th Cir. 2020)*; Home Builders*, 551 U.S. at 650–51. In that case, once the relevant agency determined, in its judgment, that an operator of an oil pipeline demonstrated that it met six enumerated statutory criteria to address the risk of a potential oil spill, the agency was required to approve the oil pipeline's response plan under the Clean Water Act. *Id*. at 877.6

Relying upon the above analysis from *Home Builders* and *National Wildlife Federation*, the court concluded the BLM's determination of whether "the adverse effects are eliminated, and measures implemented to prevent recurrence" more closely resembles judgment than it does discretion. Accordingly, when that determination is made, the BLM need not conduct environmental analysis before lifting a temporary closure order.

NRDC contended that *Home Builders* and *National Wildlife Federation* are distinguishable because, in their view, those cases merely involved an evaluative judgment of whether another party had satisfied enumerated statutory criteria. This case is different, the Plaintiffs urge, because the "BLM's role is not simply evaluative: the agency must itself formulate and implement protective measures before lifting a closure," which are discretionary acts that "form an inseparable part of the agency's ultimate decision." But even accepting that the BLM must itself formulate and implement protective measures, the court found that it does not make the subsequent decision to lift a temporary closure order discretionary.

The BLM does not have "discretion to impose terms and conditions" on its decision to lift a temporary closure order. *RESTORE: The North Woods v. U.S. Dep't of Agric.*, 968 F. Supp. 168, 175 (D. Vt. 1997) (holding that NEPA applied to a land exchange because the Forest Service possessed "discretion to impose terms and conditions on the transaction and to approve or disapprove the transaction based on the acceptability of the lands to be acquired"). And as discussed above, this is plainly not a case where the agency was "authorized, but not required, to make" a certain decision, and therefore possessed total discretion to act. *Friends of Columbia Gorge, Inc. v. U.S. Forest Serv.*, 546 F. Supp. 2d 1088, 1102 (D. Or. 2008) (holding that NEPA analysis was required).

Unlike the situations described, an environmental analysis here would not influence whether the BLM lifts a temporary closure order. Section 8341.2(a) mandates lifting a temporary closure order when the BLM, in its judgment, makes the requisite finding that "the adverse effects are eliminated, and measures implemented to prevent recurrence." The BLM's mandatory decision to lift the temporary closure order does not trigger the need for a new EIS.

The court also opined that the determination triggering the closure order is not discretionary, then neither is the determination triggering the re-opening; it disagreed with the Plaintiffs' asymmetrical reading that § 8341.2(a) operates as a one-way ratchet where the BLM exercises judgment when implementing a closure order, but exercises discretion when lifting one.

The court stated its reading of the regulation makes sense within the larger statutory and regulatory scheme. Section 8341.2(a) serves as a mechanism to temporarily close public lands. The closure is exempt from NEPA analysis to allow the agency to act quickly and "timely comply with its statutory mandate [under FLPMA] to 'take any action necessary to prevent unnecessary or undue degradation of the lands.' " *Carpenter*, 463 F.3d, 1136 (quoting 43 U.S.C. § 1732(b)). Likewise exempting the re-opening from NEPA analysis enables the BLM to timely comply with its countervailing statutory mandate under FLPMA to "manage the public lands . . . in accordance with the [RMP]," 43 U.S.C. § 1732(a), which, in this case, designated the Factory Butte area as open to cross-country OHV use.

The court held the regulation's text and place in the overall land management scheme, the decision in *Utah Shared Access All. v. Carpenter*, 463 F.3d 1125 (10th Cir. 2006), as well as instructive Supreme Court precedent and out of circuit guidance dictate the result here: where the relevant RMP designates an area as open to OHV use, lifting a temporary closure order of that area under 43 C.F.R. § 8341.2(a) is non-discretionary and does not require NEPA analysis.

Stand Up for California! v. U.S. Dep't of the Interior, 994 F.3d 616 (D.C. Cir. 2021).

Agency prevailed.

Issues: Duty to Supplement, Public Comment.

Facts: Nonprofit organizations and individuals (Standup!) challenged agencies' (DOI and BIA) decision to acquire land in trust on the Wilton Rancheria's (Wilton's) behalf so that it could build a casino on a 30-acre plot in Elk Grove, California.

The case follows a seven-year effort by the DOI to acquire land in trust on behalf of the Wilton Rancheria Tribe to build a casino. After the DOI finalized the acquisition of a parcel of land in Elk Grove, California, Stand Up! asserted DOI failed to adhere to its NEPA obligations when it selected the Elk Grove location. The D.C. Circuit affirmed the grant of summary judgment for agencies

After over forty years of lengthy proceedings, lawsuits, requests, and a settlement agreement involving Wilton, in November 2016, DOI requested comment from interested parties about a potential casino in the Elk Grove location. The list of notified parties included the State of California, the City of Elk Grove, and Stand Up. Stand Up responded that transferring title to the Elk Grove location would moot multiple pending state-court challenges seeking to prevent the acquisition and urged the DOI to delay title transfer. The DOI denied Stand Up's request and then published its final EIS, which identified the Elk Grove location as the preferred alternative. On January 19, 2017, the DOI issued a ROD that constituted the final agency action to acquire the Elk Grove location in trust on Wilton's behalf.

Discussion: Stand Up argued the DOI should have prepared either a supplemental EIS or a new EIS after it selected the Elk Grove location as the site for the casino.

An agency must prepare a supplemental EIS if (1) "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns," or (2) "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i)–(ii). An agency may also prepare a supplemental EIS if it determines that doing so would further NEPA's purpose. 40 C.F.R. § 1502.9(c)(2).

In *Marsh v. Oregon Natural Resources Council*, the Supreme Court evaluated whether NEPA required an agency to prepare a supplemental EIS after finalizing the EIS. 490 U.S. 360, 109 S.Ct. 1851 (1989). The D.C. Circuit has held that "[t]he overarching question is whether an EIS's deficiencies are significant enough to undermine informed public comment and informed decisionmaking." *Mayo v. Reynolds*, 875 F.3d 11, 20 (D.C. Cir. 2017).

The D.C. Circuit concluded that the DOI was not required to prepare a supplemental or a new EIS when it selected the Elk Grove location. The DOI's identification in the final EIS of a preferred action among the alternatives it had assessed did not result in a serious change in the environmental landscape. Nor did the fact that the DOI buttressed its analysis in the final EIS further Stand Up's argument. To support its argument that new information affecting the environmental analysis came to light, Stand Up pointed to the hundreds of pages of analysis that the DOI included in the appendix of the final EIS, but Stand Up failed to point to anything in these pages that suggests a significant development, thereby requiring supplementation.

Moreover, nothing prohibited DOI from buttressing its analysis between the draft EIS and the final EIS. In the final EIS, the agency must "respond to comments" and "discuss . . . any responsible view which was not adequately addressed in the draft" EIS. 40 C.F.R. § 1502.9(b); *see also id*. § 1503.4(a) (permitting the agency to respond to comments by modifying alternatives including the proposed action and supplementing, improving, or modifying its analyses in the final EIS). The agency must only be sure that the new analysis is not based on new information that paints "a seriously different picture" of the impact of the project.

The D.C. Circuit found that DOI's decision to select the Elk Grove location did not fail to properly notify the public of its plans. "Publication of an EIS, both in draft and final form, also serves a larger informational role" and "provides a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989). But the designation of the Elk Grove site as the preferred alternative did not deprive the public and interested parties of the opportunity to meaningfully comment on or evaluate the proposal because: (1) DOI listed the Elk Grove site as an alternative proposal; (2) DOI extensively analyzed the Elk Grove site in its draft EIS. The DOI

also published the draft EIS online and made it available in the Galt public library, which is only a few miles away from Elk Grove; (3) the DOI's inclusion of the Elk Grove site triggered public comment, including by Stand Up.The D.C. Circuit found the DOI satisfied its public notice requirements and was not required to prepare a supplemental or a new EIS.

The D.C. Circuit rejected Stand Up's argument that DOI made City of Elk Grove a cooperating agency too late in the process; however, once the City of Elk Grove requested to become a cooperating agency, the DOI granted that request. It also rejected the argument that the turnaround time between the close of the final EIS's comment period and the issuance of the ROD is impermissibly short (2 days). The D.C. Circuit stated that while it may have been unusual for the DOI to have moved so quickly to issue the ROD, that short turnaround in and of itself is insufficient to invalidate the decision.

Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt., No. 21-35085, No. 21-35095, 2021 WL 4228689 (9th Cir. Feb. 13, 2021) (not for publication) *Agency did not prevail.*

Issue: Remedy.

Facts: Sovereign Inupiat for a Living Arctic and environmental organizations (appellants) filed emergency motions for an injunction pending appeal, seeking to enjoin construction activities related to a proposed oil and gas production operation (known as the Willow Project) located in the National Petroleum Reserve-Alaska.

Decision: The district court initially denied appellants preliminary injunctive relief, concluding that appellants' NEPA claims were likely time-barred by 42 U.S.C. § 6506a(n)(1). This statute barred "judicial review of the adequacy of any program or site-specific [EIS under NEPA] concerning oil and gas leasing in the National Petroleum Reserve-Alaska" unless a claim is filed within 60 days after notice of the EIS is published.

The district court interpreted § 6506a(n)(1) to broadly apply to all activities associated with the commercial development of oil and gas resources in the National Petroleum Reserve-Alaska. The court concluded that § 6506a(n)(1) is ambiguous as to whether it applies only to leasing decisions themselves or also to later development decisions. But the district court then reasoned, in part, that the statute's use of the term "site-specific [EIS]" indicated that Congress likely intended § 6506a(n)(1) to apply more broadly, because at the time the statute was adopted in 1980, site-specific EISs were used to evaluate the environmental impacts of later stages of development, such as exploration and production.

Later, the district court granted a temporary injunction pending appeal, concluding that appellants had shown a likelihood that they will suffer irreparable harm absent injunctive relief. The district court also concluded that at least one of the claims challenging BLM's compliance with NEPA in reviewing and approving an EIS for the Willow Project may have a likelihood of success on the merits if it is determined that the claim is timely.

The Ninth Circuit concluded that appellants raised a serious question in contending that § 6506a(n)(1) applies only to actions challenging the sale or issuance of the leases themselves, and that it does not extend to challenges to later production actions taken on the leased lands.

The plain words lend support to that contention. The statute's reference to "site-specific" EISs does not mean that it necessarily extends beyond challenges to leasing decisions, because site-specific EISs can be required for some leasing decisions. It was known by 1980, when § 6506a(n)(1) was enacted, that an agency contemplating a multi-stage project was required to perform both a programmatic EIS in connection with an overall development plan, as well as an EIS for any anticipated site-specific environmental impacts associated with individual development projects, and that such a site-specific analysis had to be done at the time the agency made a commitment of resources. *See Env't Def. Fund v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979). Congress accordingly could well have been referring only to leasing decisions when it referred to programmatic and site-specific EISs in § 6506a(n)(1). At the very least, appellants' contention that the statute does not apply to their challenges raises a serious question.

The Ninth Circuit similarly concluded that the appellants would suffer irreparable harm in the absence of an injunction, and that at least one of its NEPA claims is likely to succeed if timely.

Fisheries Survival Fund v. Haaland, No. 20-5094, 2021 WL 2206426, 858 Fed. Appx. 371 (D.C. Cir. May 20, 2021) (not for publication).
Agency prevailed.

Issues: Ripeness (some argument of NEPA trigger (federal action)).

Facts: Appellants, organizations of fishermen and seaside municipalities, challenged the Bureau of Ocean Energy Management's (BOEM) decision to issue an offshore lease for a windfarm off the coast of New York.

The D.C. Circuit initially reviewed the agency's decision involving "ripeness" – when agency's NEPA obligations mature only once it reaches a critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment." *Center for Biological Diversity v. Department of the Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009). The Ninth Circuit explained that the issuance of an energy lease triggers NEPA unless the lease "reserves both the authority to preclude all activities pending submission of site-specific proposals and the authority to prevent proposed activities if the environmental consequences are unacceptable. The Ninth Circuit found the lease in this case satisfied both requirements. First, the lease declared that it "does not, by itself, authorize *any activity* within the leased area."

The lease thus "reserved both the authority to preclude all activities pending submission of site-specific proposals"—a site assessment plan (SAP) or construction and operation plan (COP)—and "the authority to prevent proposed activities"—by rejecting the SAP or COP— "if the environmental consequences are unacceptable." Accordingly, the D.C. Circuit found the lease did not trigger the Bureau's NEPA obligations.

Appellants relied on *Public Employees for Environmental Responsibility v. Hopper (PEER)*, which reached the merits of a NEPA challenge to an offshore windfarm lease. 827 F.3d 1077, 1083 (D.C. Cir. 2016). *PEER,* however, never mentioned, let alone evaluated, the ripeness of the NEPA claims. The closest it came was its observation that "[t]he Bureau does not contest that issuing a renewable energy lease constitutes a major federal action." *Id.*

Appellants contended that post-lease developments demonstrate that the lease issuance was a significant enough event to trigger NEPA. They observe that some states and private entities had entered into agreements in anticipation of the wind farm's construction. Appellants also cited to a 2019 statement made by the BOEM in connection with another project that they interpret as indicating the Bureau's belief that eventual approval of the wind farm "is reasonably foreseeable." The Court emphasized the apparent expectations of third parties, and even the BOEM itself, hardly constitute an "irreversible and irretrievable commitment of resources," the critical issue for NEPA ripeness

U.S. DEPARTMENT OF TRANSPORTATION

Protect Our Parks, Inc. v. Buttigieg, 10 F.4th 758 (7th Cir. 2021).
Agency prevailed.

Issue: Segmentation, Impacts.

Facts: Citizens group and city residents (Protect our Parks) challenged an EA prepared by the National Park Service (DOI) and Federal Highway Administration (DOT) in connection with construction of Obama Presidential Center on land in Jackson Park in Chicago, Illinois. The Seventh Circuit affirmed lower court's denial of preliminary injunction.

In 2016, the City of Chicago and the Barack Obama Foundation selected Jackson Park in Chicago as the location for the Obama Presidential Center. The Center, consisting of a museum, public library, and other spaces for cultural enrichment and education related to the life and presidency of Barack Obama, will take up about 20 acres of the park and require that the City close several nearby roadways. NPS approved the City's plan to build in the park on the condition that the City expand nearby spaces for public recreation. The FHWA approved construction of new roadways to make up for the roadways the City was to close. Both agencies together performed an EA and concluded that their decisions would have an insignificant effect on the environment.

Decision: Protect Our Parks's theory was that the agencies unlawfully "segmented" their review under the NEPA. Protect Our Parks insisted that the agencies found no significant environmental impact only by

separating the federal decisions—whether to approve the conversion of recreation property and whether to expand the roadways—from the state decision to build the Center in Jackson Park. If the agencies had considered alternative locations, Protect Our Parks argued, then they would have found building elsewhere to be the least environmentally harmful option.

The Seventh Circuit gave significant deference to the agencies and noted that segmentation refers only to the situation that arises when an agency arbitrarily separates related federal actions from one another. The Center is a local project, and the federal government has no authority to fix its location. Without federal involvement we do not even reach the issue whether the federal government segmented its actions. *See Old Town Neighborhood Ass'n Inc. v. Kauffman*, 333 F.3d 732, 735 (7th Cir. 2003). That is because the NEPA requires an impact statement only for "major Federal actions," which the relevant regulations define to mean actions that are "potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (2019). Environmental harm that federal agencies do not cause is irrelevant. *See Highway J Citizens Grp. v. Mineta, 349 F.3d 938, 954 & n.3 (7th Cir. 2003).*

Moreover, the agency's actions must be both a factual and a proximate cause of the asserted harm. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767, 124 S.Ct. 2204, (2004). The NPS' approval was a factual cause of the Center's placement in Jackson Park because construction could not start without its approval, but the agency's limited authority prevented it from being a proximate cause of any damage resulting from the Center. NPS "shall" approve conversion that meets the criteria of 54 U.S.C. § 200507; it need not assess "the environmental impact of an action it could not refuse to perform." *Pub. Citizen*, 541 U.S. at 769, 124 S.Ct. 2204; *see also Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, 944 F.3d 664, 680 (7th Cir. 2019)

The court found the causal link between the Center and FHWA's actions was even more tenuous. Constructing the Center is not an effect of the FHWA's approval, but the predicate condition for it. The City has the authority to close the roadways to build the Center without federal approval. If the Center were not built and the roadways were not closed, then the FHWA would have no new road construction to approve or disapprove.

The Seventh Circuit opined that despite the former arguments, the agencies did consider the full environmental impact of the Center's construction (as an "indirect" effect of the Park Service's decision to approve conversion) and concluded that it was not "significant." "If an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Mineta*, 349 F.3d at 953.

Protect Our Parks contended that the agencies ignored the environmental impact of cutting down around 800 trees to build the Center. But the agencies reviewed a meticulous tree survey and determined that the City's plan to provide 1:1 replacement with new trees would result in long-term environmental benefits, or at least end up neutral. Protect Our Parks argued that current trees and future saplings are not equivalent, but the court opined that it not its role to decide the relative value of the long- and short-term.

Protect Our Parks argued that the City's decision to restrict tree removal during migratory birds' breeding season is an admission that removing the trees will significantly harm the birds. The City's efforts to mitigate harm, though, do not imply that the harm, once mitigated, remains significant; they do not even necessarily imply it was significant to begin with. The agencies reasonably determined that the unaffected 500-plus acres of Jackson Park will provide the birds a comfortable environment during construction.

Finally, the agencies took the necessary "hard look" at Jackson Park's historical features. *See Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 526 (7th Cir. 2012). The agencies recognized that Jackson Park will change with the addition of the Center, but they also recognized that it has changed before. The City's plans included conscious efforts to integrate the Center with the existing landscape and to fulfill the vision of the Park's designer, Frederick Law Olmsted. The Seventh Circuit held that Protect Our Parks was unlikely to show that the agencies made a clear error in judgment when weighing the benefits of change against history.

Center for Cmty. Action & Envtl. Justice v. Fed. Aviation Admin., 18 F.4th 592 (9th Cir. 2021).
Agency prevailed on its NEPA claims (but with a heated dissent).

Issue: Impacts (geographic area of impacts, socioeconomic, cumulative, greenhouse gas, CEQA interaction, air, and noise).

Facts: Center for Community Action (collectively, CCA) and Environmental Justice, Sierra Club, Teamsters Local 1932, Shana Saters, Martha Romero, and the State of California (collectively, Petitioners) petitioned for review of FAA's record of decision, alleging NEPA violations, involving the construction and operation of an Amazon 658,500 square foot air cargo facility at the San Bernardino International Airport. The Ninth Circuit denied the Petition.

The Airport is a public airport located in San Bernardino County, California. The Airport is currently under the control of Respondent/Intervenor San Bernardino International Airport Authority (SBIAA), a joint powers authority consisting of San Bernardino County and some surrounding cities, including San Bernardino.

Because the SBIAA has received federal funding for previous Airport projects, the Project's proponents sought FAA approval of it to comply with 49 U.S.C. § 47107(a)(16) of the Airport and Airway Improvement Act. Among other requirements, the Act requires the SBIAA to "maintain a current layout plan of the airport" with any revisions subject to FAA review. 49 U.S.C. § 47107(a)(16)(B)–(D). The FAA's review of the Project under its own statutory scheme triggers its duties under NEPA, 42 U.S.C. §§ 4321–4370m. The FAA completed an EA, which CCA challenged.

In the EA, the FAA evaluated two study areas – the General Study Area and the Detailed Study Area. The General Study Area is defined as the area where both direct and indirect impacts may result from the development of the Proposed Project. The Detailed Study Area, on the other hand, is generally defined as the areas where direct physical impacts may result from the Proposed Project.

The General Study Area's "purpose . . . is to establish the study area for the quantification of impacts to resource categories that involve issues that are regional in scope and scale, including noise, land use, socioeconomic impacts, and Section 4(f) and 6(f) resources." The Detailed Study Area's purpose, meanwhile, "is to establish the study area for environmental considerations that deal with specific and direct physical construction or operational issues that directly affect natural resources such as water resources, air quality, and hazardous materials."

Decision. CCA argued the study areas did not appropriately capture the true environmental impacts of the project. CCA asserted FAA did not conform its study areas to the FAA's Order 1050.1F Desk Reference. The Ninth Circuit rejected these arguments because the Desk Reference does not serve as binding guidance upon the FAA (as it states in the Desk Reference). CCA claimed that the FAA itself pointed to the Desk Reference as a reference in analyzing the environmental consequences of the Project. The Ninth Circuit held that the FAA's nonadherence to the Desk Reference cannot alone serve as the basis for holding that the FAA did not take a "hard look" at the environmental consequences of the Project.

Defined Study Areas. CCA first argued General Study Area is deficient because the FAA failed to create individualized study areas for individual impact categories (i.e., individualized study areas for the Project's effects on air quality, noise, water, etc.), but conceded that one large study area may encompass all impacts. The court found that the FAA justified the parameters of its General Study Area, based on the region around the Airport affected by noise, the region considered to be Airport property, and the region north of the Airport through which vehicle traffic was expected to flow to and from the project site. The Ninth Circuit discussed that CCA did not raise substantial questions as to whether the Project may cause significant degradation of some environmental factors. The court upheld the FAA's use of the General Study Area as a general baseline to evaluate multiple environmental impacts was not an abrogation of its responsibility of taking a hard look at the environmental consequences of the Project.

Air Quality. CCA argued that that the General Study Area does not appropriately encompass the effect of vehicle traffic on air quality because "the FAA's air quality analysis only captures air quality impacts to an area that is less than five miles wide and four miles long, even though many air quality impacts occur outside the General Study Area." However, the Ninth Circuit rejected this claim, finding that the FAA did evaluate air quality impacts outside of the General Study Area and provided a detailed explanation of its methodology in that regard. It stated there was no indication from the EA that the FAA limited its consideration of air quality impacts within the

geographical parameters of the General Study Area only. For example, throughout the EA, the FAA continuously evaluates the impact of vehicular emissions and the Project in general on the air quality within the South Coast Air Basin.

Specifically, throughout the EA, the FAA continuously evaluated the impact of vehicular emissions and the Project in general on the air quality within the South Coast Air Basin. The Basin encompasses a geographical area greater than the General Study Area and is overseen by the South Coast Air Quality Management District (SCAQMD) under the direction of the California Air Resources Board (CARB) to ensure air pollutant levels adhere to state and federal standards. In ascertaining the impact of vehicular emissions on air quality, the FAA considered the "[a]verage truck trip length for delivery trucks," and the average 64.25-mile length truck trip, goes far beyond the "five-by-four mile General Study Area[.]" The EA stated:

> The air quality analysis for this EA includes direct and indirect emissions inventories, as well as air dispersion modeling for landside sources (area, energy, and mobile) and airside sources (aircraft operations and GSE). Mass emissions inventories were prepared for both construction and operations of the Proposed Project and No Action Alternative. The criteria pollutant emission inventories developed as part of this EA used standard industry software/models and federal, state, and locally approved methodologies. Emissions of regulated pollutants were calculated to determine if the impacts to air quality from the Proposed Project would potentially be significant under the federal Clean Air Act of 1970, as amended. For those Proposed Project pollutant emissions that exceeded mass emissions thresholds, dispersion-modeling analyses were performed to determine if the Proposed Project would contribute to an exceedance of a [National Ambient Air Quality Standard].

The Ninth Circuit held the FAA went beyond the General Study Area in assessing impacts.

Socioeconomic Impacts. CCA next claimed that General Study Area did not appropriately encompass the socioeconomic impacts of the Project. Specifically, CCA argued the General Study Area is significantly smaller than the local population centers for the Cities of San Bernardino, Highland, Redlands, and unincorporated San Bernardino County. The court rejected this claim because CCA did not, other than citing to the FAA Desk Reference, detail why it was important to expand the General Study area.

CCA next claim was that the EA deficiently examines whether "the proposed action or alternative(s) creates impacts that are incompatible with existing and/or future planned uses in the study area." The Ninth Circuit found CCA lacked evidence suggesting that traffic stemming from the Project is expected to flow to residential neighborhoods.

CCA, again, citing again to the FAA Desk Reference, alleged that the Detailed Study Area examined by the FAA failed to consider "existing contaminated sites at the proposed project site or in the immediate vicinity of a project site" and include "local disposal capacity for solid and hazardous wastes generated from the proposed action or alternative(s)." The Ninth Circuit rejected this argument, stating that the sites fell outside of the Project area; the court also pointed to the FAA's consideration of the remediation and monitoring efforts at other remediation sites in determining that they do not present any notable risks. This remediation and monitoring effort also applied to the two hazardous materials sites, that the CCA highlighted.

Cumulative effects. CCA claimed FAA failed to adequately consider the cumulative effects of the site; they argued that the FAA only considered past, present, and reasonably foreseeable projects within the General Study Area and should have expanded its assessment to include an additional 80-plus projects. But the only actual, specific cumulative environmental impact resulting from these projects that CCA asserted the FAA failed to consider is the fact that "these 80[-plus] projects taken together will result in a massive 168,493 average daily trips in the first year of project operations." However, the record revealed that the FAA did consider that fact.

The court criticized CCA's unfounded conclusions that the FAA needed to conduct a better cumulative impacts analysis; it stated that fact that the CCA cannot identify any specific cumulative impacts that the FAA failed to consider suggests that there are none.

The Court noted that the Project's Final Environmental Impact Report (FEIR) analysis

performed under the California Environmental Quality Act (CEQA) recognizes that only if a project alone exceeds certain emission thresholds does a cumulatively significant impact occur:

> [P]rojects that do not exceed the project-specific thresholds are generally not considered to be cumulatively significant. Therefore . . . individual projects that do not generate operational or construction emissions that exceed the SCAQMD's recommended daily thresholds for project-specific impacts would also not cause a cumulatively considerable increase in emissions for those pollutants for which the Basin is in nonattainment, and, therefore, would not be considered to have a significant, adverse air quality impact.

The Ninth Circuit held there was no evidence that the FAA did not adequately consider the cumulative impacts.

CCA then argued that "the EA does not disclose specific, quantifiable data about the cumulative effects of related projects, and it does not explain why objective data about the projects could not be provided." The Ninth Circuit rejected that assertion, stating. That quantified data in a cumulative effects analysis is not a per se requirement.

The FAA did provide "detailed information" about cumulative impacts. The only specific deficiency with this information that the CCA alleges is the EA's cumulative air quality impact discussion. The CCA insists that the FAA did not sufficiently support its conclusion that "cumulative emissions are not expected to contribute to any potential significant air quality impacts" because the EA makes no "references to combined PM or NOx emissions from the 26 projects" falling within the General Study Area.

CCA pointed to nothing to support its assertion that the FAA needed to evaluate cumulative air quality impact in a different manner; CCA offered no evidence to substantiate their suggestion that the FAA's rationale for its cumulative effects conclusions, which does include a discussion of PM and NOx emissions, is deficient. The Ninth Circuit held there was no reason to find that the FAA conducted a deficient cumulative impact analysis.

California's claims. California, one of the Petitioners, claimed that FAA should have prepared an EIS. California asserted that the FAA needed to create an EIS because a California Environmental Impact Report (EIR) prepared under CEQA found that the proposed Project could result in significant impacts Air Impacts, Greenhouse Gas Impacts and Noise. The Ninth Circuit emphasized that California did not go so far as to argue that an EA under NEPA must reach the same conclusion as the CEQA analysis.

Regarding Air Impacts, within the EA is the fact that the SBIAA "initiated a formal request to the SCAQMD to determine if the mass emissions generated from the operation of the Proposed Project are within the General Conformity Budgets identified in the 2012 AQMP." Importantly, the SCAQMD's response to the request states, "[i]n summary, based on our evaluation the proposed project will conform to the AQMP (i.e. project emissions are within AQMP budgets) and is not expected to result in any new or additional violations of the NAAQS or impede the projected attainment of the standards." So by the SCAQMD's own assessment, the Project would comply with federal and state air quality standards.

Regarding Greenhouse Gas Impacts, California claimed that "the Final EIR determined that emissions from Project operations would exceed local air district thresholds, and that no feasible mitigation measures could reduce greenhouse gas emissions to levels that are less than significant." According to the State, the Final EIR concluded that the "Project operations would create a significant cumulative impact to global climate change." The CEQA analysis's conclusion here appears to be based solely on the fact that greenhouse gas emissions are projected to exceed SCAQMD regional thresholds. California did not refute the EA's following rationale for why it found no significant impact of the Project's greenhouse-gas emissions on the environment. The EA stated the project and construction would constitute less than 1 percent of less than 1 percent of both the U.S.-based GHG emissions and global GHG emissions and the emissions generated from construction of the Proposed Project in 2019 would be 0.0009 percent of the 2017 California GHG inventory and even less for the duration of the 2020 construction. Thus, the court rejected this argument.

Regarding noise impacts, the only concern stemming from the CEQA analysis is that connected with off-site transportation at adjacent noise-sensitive residential homes. But the EA notes that the SBIAA plans on expanding its territory and acquiring

adjacent properties to the airport as a noise mitigation measure.

Petitioners allege certain errors related to the FAA's calculations regarding truck trips emissions generated by the Project, specifically it claims the EA fails to explain why its calculation for total truck trips is lower than the amount stated in the CEQA analysis. They also challenged the EA's truck trip calculation method. The court pointed out that Petitioners did not argue that the EA's methodology was improper or that the data the FAA relied on was erroneous. The argued only that the EA should have explained the differences in numbers reached by the CEQA analysis and the EA. The court upheld the FAA's reasoning for the difference in truck trips amounts. It rejected that it was an impermissible post-hoc rationalization. In pointing out the differences in data used between the CEQA analysis and the EA, the FAA was not trying to justify anything it did; rather, the FAA was simply pointing out that the differences in data points could explain the different truck trip totals the agencies calculated. The Ninth Circuit held that the Petitioners did not raise a substantial question about whether the Project will have a significant environmental effect simply by pointing out the difference in the number of truck trips calculated as between the EA and CEQA analysis.

Second, Petitioners argue that the EA considered only one-way trips, not roundtrips, in calculating truck trip emissions. Although the FAA does not appear to specifically articulate what further analysis was conducted. The FAA consulted a large number of agencies and experts and the Petitioners did not provide any reason to believe that the EA did not correctly analyze total truck trips emissions.

Finally, Petitioners argued that the record contains an inconsistency concerning the number of daily truck trips calculated by the FAA. Specifically, Petitioners point out that the FAA itself sometimes refers to the Project as generating "3,823 daily truck trips" but uses a 192 daily truck trips figure to calculate air quality impact. Although Petitioners seem to suggest that the FAA impermissibly reduced the 3,823 figure to the 192 figure in calculating environmental impacts generally, the only portion of the EA that the FAA points to for the use of the 192 figure is the air quality impact calculation. The Ninth Circuit found that the FAA does not need to explain away the significance of a figure that Petitioners erroneously assume without explanation possesses certain significance or applies to environmental impacts apart from traffic volume. The court held that the Petitioners failed to raise any legitimate concerns about the EA's truck trips emissions calculations.

California and Federal Environmental Standards. Petitioners finally asserted that the FAA failed to consider the Project's ability to meet California state air quality and federal ozone standards. Petitioners' arguments invoked 40 C.F.R. § 1508.27(b)(10)'s instruction that evaluating whether a project will have a "significant" environmental impact "requires consideration[ ] of . . . w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment."

The Ninth Circuit rejected Petitioners' arguments because they failed to proffer any specific articulation of how the Project will violate California and federal law, there is no reason to believe that the EA is deficient for purportedly failing to explicitly discuss the Project's adherence to California and federal environmental law.

In sum, the Ninth Circuit opined that California failed to raise a substantial question as to whether the Project may have a significant effect on the environment to require the creation of an EIS.

Dissent: In dissent, Judge Johnnie B. Rawlinson wrote a scathing dissent, citing environmental racism concerns, namely, "'the creation, construction, and enforcement of environmental laws that have a disproportionate and disparate impact upon a particular race.'"

She stated it failed to include other projects located outside the study area in its cumulative impacts analysis, undercounted daily truck trips, and ignored California's finding that the project would impact an already over-polluted area.

"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?" Rawlinson wrote. "Certainly not."

The dissenting judge sided with the petitioners in viewing the EA as flawed and determining that the FAA's finding of no significant impact could be

explained by its failure to take the requisite "hard look" at the facts.

Concurring Opinion. Judge Patrick J. Bumatay wrote a concurrence stating it was "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."

No party raised the issue of environmental racism here, Bumatay wrote, and bringing accusations with no chance of rebuttal is "fundamentally unfair and not how the judicial process should work."

City of Los Angeles v. Dickson, No. 19-71581, 2021 WL 2850586, -- Fed. Appx. --- (9th Cir. Jul. 8, 2021) (not for publication).
Agency did not prevail on one of the NEPA claims, but did prevail on the other.

Issue: Categorical Exclusion.

Facts: 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.

Decision: The Ninth Circuit found the FAA violated NEPA in issuing its amended Arrival Routes. In compiling the administrative record (AR) for the amended Arrival Routes, the FAA pointed to two documents as the basis for its decision — a memo "confirming" the agency had completed the necessary environmental review, and an "Initial Environmental Review" document. But both documents postdated the publication of the amended Arrival Routes by several months. Accordingly, they cannot constitute the FAA's NEPA review. The court also rejected that the undated spreadsheet that the FAA points to for the first time during this litigation informs the requisite review.

The FAA argued that its post hoc Initial Environmental Review document brought the agency into compliance with NEPA by documenting the FAA's application of a CatEx to NEPA review. A CatEx excuses an agency from preparing an environmental impact statement or environmental assessment for a particular action. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1018–19 (9th Cir. 2007). But a CatEx may not be applied when there are "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *Id*. at 1019.

Here, the 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 maintained that, based on the FAA's own definition, there were such "extraordinary circumstances" here because there was significant controversy about the extent to which aircraft were flying below the minimum altitudes on the original Arrival Routes. In other words, the Cities asserted that there was a substantial dispute over the noise and other environmental impacts that the amended Arrival Routes would cause, and the public controversy surrounding the Arrival Routes was evidence of this dispute.

But the 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. Therefore, the FAA's application of a CatEx was arbitrary and capricious, in violation of NEPA. *See Sierra Club*, 510 F.3d at 1023; *see also City of Phoenix* v. Huerta, 869 F.3d 963, 972–73 (D.C. Cir. 2017). The Ninth Circuit granted the Cities' petition for review of the amended Arrival Routes with respect to the NEPA claims.

The Cities also argued that the FAA violated the Administrative Procedure Act, NEPA, and due process by posting a disclaimer (the Notice) on the FAA's "Instrument Flight Procedure Information Gateway" website. The Notice states that the FAA will not consider environmental comments submitted through this website, which is meant for technical feedback from "civil aviation organizations, affected military and civil air traffic control facilities, and aircraft owners and sponsors." Because the Notice does not have a direct and immediate effect nor require immediate compliance, it is not a final order within the meaning of 49 U.S.C. § 46110, and the Ninth Circuit lacked jurisdiction to review it, and dismissed the claim.

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

Issues: Categorical Exclusion.

Facts: Appellants appeal the decision from the district court denying its motion for summary judgment and granting judgment in favor of the State of Vermont, the Vermont Agency of Transportation (VTrans), and the FHWA, which centers on a challenge to the agencies' planned construction project centered on a highway interchange near Colchester, Vermont, that was categorically excluded.

Decision: Appellants contended that when the District Court entered judgment, the FHWA's 2013 decision did not constitute final agency action—and was therefore unreviewable—because the FHWA reevaluated its earlier decision and concluded that the previous CatEx "remain[ed] valid." 23 C.F.R. § 771.129.

The Second Circuit found the reevaluation focused only on what if any legal requirements had changed since 2013. The Second Circuit affirmed that the FHWA determined that the VTrans project was categorically excluded from NEPA review because it will not involve significant environmental impacts and falls into two categories of projects that often do not.

Appellants argues that *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 928–29 (9th Cir. 2000), and *RB Jai Alai, LLC v. Sec'y of Florida Dep't of Transp.*, 112 F. Supp. 3d 1301, 1317–22 (M.D. Fla. 2015) apply. In each of those cases, the courts concluded that the projects at issue should not have been categorically excluded from NEPA review. But the projects at issue in those cases were also very large, involved the construction of an entirely new interchange or overpass, and restricted or expanded the directions or locations that drivers could travel.

By contrast, there was no evidence that the project will have a significant impact on travel patterns or any other significant environmental impact. *See* 23 C.F.R. § 771.129(a). Although the FHWA acknowledged that the project will relieve congestion around the interchange, the Second Circuit deferred to its conclusion that congestion relief alone did not amount to a significant impact on travel patterns. *See City of New York v. Interstate Com. Comm'n*, 4 F.3d 181, 186 (2d Cir. 1993).

Appellants contended that the FHWA's decision improperly categorized a nearby development as a cumulative impact rather than an indirect effect of the interchange project, and because VTrans did not specifically represent those significant impacts would not result, as appellants claimed was required by the applicable FHWA regulation. *See* 23 C.F.R. § 771.117(d). The Second Circuit rejected these arguments, affirming the district court's opinion.

INDEPENDENT AGENCIES

Vecinos Para El Bienestar De Law Comunidad Costera v. Federal Energy Reg. Comm'n, 6 F.4th 1321 (D.C. Cir. 2021).
Agency did not prevail on its NEPA claims.

Issues: Impact Assessment (Greenhouse Gas Impacts, Environmental Justice), Remedy.

Facts: 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.

In March 2016, Texas LNG Brownsville LLC applied to the FERC for authorization to construct and operate an LNG export terminal (the Texas terminal) on a 635-acre site on the northern shore of the Brownsville Shipping Channel in Cameron Country, Texas. In May 2016, Rio Grande LNG, LLC applied to FERC for authorization to construct and operate an LNG export terminal (the Rio Grande terminal) on a 750-acre site on the same shore. Also in May 2016, Rio Bravo Pipeline Company (Rio Bravo Co.) applied to FERC for authorization to construct and operate a new interstate natural gas pipeline system to supply gas to the Rio Grande export terminal. In July 2016, Annova LNG Common Infrastructure, LLC and three affiliate entities applied to FERC for authorization to construct and operate an LNG export terminal on a 731-acre site on the southern shore of the Brownsville Shipping Channel. Each company had previously received authorization from the Department of Energy to export LNG. Since the appeal was filed Annova informed FERC that it was abandoning its project;

because the Annova project will not go forward, the court dismissed the petition as moot.

FERC completed an EIS for each project in the spring of 2019 and issued final orders approving the projects later that year. Petitioners argued that FERC's analyses of the projects' ozone emissions and impacts on climate change and environmental justice communities were deficient under NEPA.

Decision. Petitioners claimed that FERC's analyses of the projects' impacts on climate change and environmental justice communities were deficient under NEPA.

In its EIS for each project, FERC quantified the greenhouse gas emissions associated with the construction and operation of the project, described "existing and potential cumulative climate change impacts in the Project area," and explained that construction and operation of the Project would increase the atmospheric concentration of [greenhouse gases] in combination with past, current, and future emissions from all other sources globally and contribute incrementally to future climate change impacts.

In each EIS, however, FERC concluded that it was unable to determine the significance of the Project's contribution to climate change, explaining that "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to [the] Project's incremental contribution to [greenhouse gas emissions]," and that therefore "it is not currently possible to determine localized or regional impacts from [greenhouse gas] emissions from the Project." Petitioners contended that FERC was required to do more.

To the extent that FERC failed to respond to Petitioners' argument that 40 C.F.R. § 1502.21(c) required it to use the social cost of carbon protocol or some other generally accepted methodology to assess of the impact of the projects' greenhouse gas emissions, the court agreed with Petitioners that the FERC failed to adequately analyze the impact of the projects' greenhouse gas emissions. Because the FERC failed to respond to significant opposing viewpoints concerning the adequacy of its analyses of the projects' greenhouse gas emissions, we find its analyses deficient under NEPA and the APA. *See, e.g., TransCanada Power Mktg. Ltd. v. FERC,* 811 F.3d 1, 12–13 (D.C. Cir. 2015).

The court held that FERC was required to address Petitioners' argument concerning the significance of 40 C.F.R. § 1502.21(c), and that its failure to do so rendered its analyses of the projects' greenhouse gas emissions deficient. On remand, FERC must explain whether 40 C.F.R. § 1502.21(c) calls for it to apply the social cost of carbon protocol or some other analytical framework, as "generally accepted in the scientific community" within the meaning of the regulation.

In assessing environmental justice (EJ) claims, FERC examined the projects' impacts on communities in census block groups within a two-mile radius of each project site, but not on communities farther afield. FERC found that all communities within those census blocks were minority or low-income. FERC proceeded to examine "whether any of the Project impacts would disproportionately affect those communities due to factors unique to those populations like inter-related ecological, aesthetic, historical, cultural, economic, social, or health factors." FERC then concluded that the Rio Grande terminal and Rio Bravo pipeline system "would not have disproportionate adverse effects on minority and low-income residents in the area," and that the Texas terminal would have "negligible impacts on environmental justice communities."

Petitioners argued that the FERCs decision to analyze the projects' impacts on environmental justice communities only in census blocks within two miles of the project sites was arbitrary, given its determination that environmental effects from the projects would extend well beyond two miles from the project sites.

The D.C. Circuit agreed and stated that when conducting an EJ analysis, an agency's delineation of the area potentially affected by the project must be "reasonable and adequately explained," *Cmtys Against Runway Expansion*, 355 F.3d 678, 689 (D.C. Cir. 2004), and include "a rational connection between the facts found and the decision made," i*d*. at 685. The D.C. Circuit found that elsewhere in its EIS for each project, FERC determined that the environmental effects of the project would extend beyond the census blocks located within a two-mile radius of the project site (air quality). FERC offered no explanation as to why it chose to delineate the area potentially affected by the projects to include only those census blocks within two miles of the project

sites for the purposes of its EJ analyses. The D.C. Circuit found FERC's decision to analyze the projects' impacts only on communities in census blocks within two miles of the project sites to be arbitrary.

In the selection of a remedy, the D.C. Circuit found it reasonably likely that on remand the FERC can redress its failure of explanation regarding its analyses of the projects' impacts on climate change and EJ communities, while reaching the same result. The D.C. Circuit remanded to FERC without vacatur for further proceedings consistent with this opinion.

Environmental Trust Health v. Federal Communication Comm'n, 9 F.4th 893 (D.C. Cir. 2021*). Agency prevailed on its NEPA claim (but not on other non-NEPA claims).*

Issue: Federal action.

Facts: Environmental advocacy organization, consumer protection organizations, and individuals (Petitioners) petitioned for review of order of FCC, terminating notice of inquiry requesting comment on whether rulemaking should be initiated to modify FCC's guidelines for exposure to radiofrequency (RF) radiation.

The notice of inquiry requested comment on whether the FCC should initiate a rulemaking to modify its guidelines. The Commission concluded that no rulemaking was necessary. Petitioners argued that the FCC violated the requirements of the APA by failing to respond to significant comments. Petitioners also argue that NEPA required the FCC to issue an EA or an EIS regarding its decision to terminate its notice of inquiry.

To fulfill its obligations under NEPA, the FCC has promulgated guidelines for human exposure to RF radiation. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 87 (2d Cir. 2000). The guidelines set limits for RF exposure. Before the FCC authorizes the construction or use of any wireless facility or device, the applicant for authorization must determine whether the facility or device is likely to expose people to RF radiation more than the limits set by the guidelines. 47 C.F.R. § 1.1307(b). If the answer is yes, the applicant must prepare an EA regarding the likely effects of the FCC's authorization of the facility or device. *Id*. Depending on the contents of the EA, the FCC may require the preparation of an EIS, and may subject approval of the application to a full vote by the FCC. *Office of Eng'g & Tech., Fed. Commc'ns Comm'n*, OET Bulletin No. 65, Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields 6 (ed. 97-01, Aug. 1997). If the answer is no, the applicant is generally not required to prepare an EA. 47 C.F.R. § 1.1306(a).

The FCC last updated its limits for RF exposure in 1996. Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 34 FCC Rcd. 11,687, 11,689–90 (2019) ("2019 Order"); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b), 110 Stat. 56, 152. The limits are based on standards for RF exposure issued by the American National Standards Institute Committee (ANSI), the Institute of Electrical and Electronic Engineers, Inc. (IEEE), and the National Council on Radiation Protection and Measurements (NCRP). The limits are designed to protect against "thermal effects" of exposure to RF radiation, but not "non-thermal" effects.

In March 2013, the FCC issued a notice of inquiry regarding the adequacy of its 1996 guidelines. The FCC divided its notice of inquiry into five sections. In the first section, it sought comment on the propriety of its exposure limits for RF radiation, particularly as they relate to device use by children. In the second section, the FCC sought comment on how to better provide information to consumers and the public about exposure to RF radiation and methods for reducing exposure. In the third section, the FCC sought comment on whether it should impose additional precautionary restrictions on devices and facilities that are unlikely to expose people to RF radiation more than the limits set by the FCC's guidelines. In the fourth and fifth sections, the FCC sought comment on whether it should change its methods for determining whether devices and facilities comply with its guidelines. The FCC invited public comment on all these developments but underscored that it would "work closely with and rely heavily—but not exclusively—on the guidance of other federal agencies with expertise in the health field."

In December 2019, the FCC issued a final order resolving its 2013 notice of inquiry by declining to undertake any of the changes contemplated in the notice of inquiry.

Decision: Petitioners argued that NEPA required the Commission to issue an EA or EIS regarding its decision to terminate its notice of inquiry. The D.C. Circuit disagreed finding that the FCC was not required to issue an EA or EIS because there was no ongoing federal action regarding its RF limits.

The FCC already published an assessment of its existing RF limits that "'functionally' satisfied NEPA's requirements 'in form and substance.'" *EMR Network v. FCC*, 391 F.3d 269, 272 (D.C. Cir. 2004). NEPA obligations attach only to "proposals" for major federal action. *See* 42 U.S.C. § 4332(c); *see also* 40 C.F.R. § 1502.5.

An agency's promulgation of regulations constitutes a final agency action that is not ongoing. Once an agency promulgates a regulation and complies with NEPA's requirements regarding that regulation, it is not required to conduct any supplemental environmental assessment, even if its original assessment is outdated. Id. at 1242. The D.C. Circuit explained in *EMR Network* in response to the argument that new data required the FCC to issue a supplemental environmental assessment of its RF guidelines under NEPA, "the regulations having been adopted, there is at the moment no ongoing federal action, and no duty to supplement the agency's prior environmental inquiries." 391 F.3d at 272.

The court rejected the argument that because the FCC voluntarily initiated an inquiry to "determine whether there is a need for reassessment of the FCC radiofrequency (RF) exposure limits and policies" that it changed the analysis, requiring a supplement EA. The court explained that the as the FCC has not proposed to alter its guidelines, it need not yet conduct any new environmental review.