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2024 NEPA Case Law Update

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Fred Wagner focuses on environmental and natural resources issues concerning major infrastructure, including surface transportation, energy, mining, and commercial project development. Fred advises clients on environmental reviews under the National Environmental Policy Act or equivalent state statutes. He also helps secure permits and approvals from regulators under a variety of federal programs, including Section 404 of the Clean Water Act, the Endangered Species Act, the Clean Air Act, and the National Historic Preservation Act. Fred provides strategic counseling regarding implementation of the full spectrum of federal environmental programs, as well as U.S. Department of Transportation (USDOT) surface transportation grant management and safety regulations.

Prior to joining Jacobs, Fred represented a wide variety of developers, public entities, and businesses in environmental, land use, and natural resources litigation in federal trial and appellate courts across the country, from citizen suits to government enforcement actions and Administration Procedure Act (APA) challenges. Most recently, Fred was counsel of record in the Seven County Infrastructure Coalition NEPA case before the U.S. Supreme Court.

Jacobs

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P.E. (Hudson) Danko

Attorney, Federal Aviation Administration

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- NAEP member since 2012.
- Over 25 years of experience reviewing EAs and EISs, including projects involving transportation, airport development and grants, commercial space transportation, military testing and training, including ranges, military construction and unmanned aerial systems deployment, including legislation and policy support
- Served on the 2013 NAEP Committee for Best Practice Principles for Environmental Assessments, a CEQ Pilot Project.
- Annually serves as an author of the yearly NEPA case law review for NAEP since 2014.

Any views expressed are Ms. Hudson's personal views and not necessarily those of the FAA or Federal Government.

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NAEP Board Member, Chair NEPA Working Group, Senior Environmental Planner/Scientist/HDR

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- NAEP member for 15+ years
- 45 years of professional experience in the environmental and natural resources fields
- 28 years as a NEPA compliance specialist
- Tennessee Valley Authority
- Extensive experience in the preparation of EIS, EA, and CE documentation for wide range of actions
- PhD, Ecology & Evolutionary Biology, University of Tennessee, Knoxville, 2004
- MS, Wildlife Management, University of Maine, 1978
- BS, Wildlife and Fisheries, University of Tennessee, Knoxville, 1975

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Melanie Hernandez

Scout Co-Founder, Vice President, NEPA Program Manager

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Melanie Hernandez is a licensed attorney and the Co-Founder and Vice President of Scout, a Service-Disabled Veteran-Owned Small Business (SDVOSB) based in San Diego, California. With over 20 years of experience in National Environmental Policy Act (NEPA) compliance and environmental law, Melanie serves as a senior NEPA program manager primarily for Department of Defense federal clients including the Navy, Marine Corps, Air Force, Army, Coast Guard, and Veterans Affairs. Her expertise includes managing multidisciplinary NEPA teams for projects involving new military systems, construction, and public land access, as well as developing environmental law training programs covering NEPA, the Clean Air Act, Clean Water Act, and National Historic Preservation Act.

Prior to founding Scout, Melanie led some of the Department of Defense's most complex and controversial Environmental Impact Statements in the Pacific region, including major basing and infrastructure initiatives, while living in Japan for five years.

Melanie holds a B.S. from Andrews University and a J.D. from The George Washington University Law School. She is a member of the Maryland and District of Columbia bars.

SCOUT

NEPA Litigation

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

NEPA Remedies

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

(1) reversing and remanding without instructions to vacate,

(2) reversing and remanding with instructions to vacate,

(3) equitable relief (injunction),

(4) declaratory relief (declaratory judgment), and

(5) mandamus.

The court may also retain jurisdiction over the matter until resolved

Federal Court System

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Challenges to NEPA/APA involve federal actions and are brought in federal court

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

Jurisdiction of Federal Courts of Appeal

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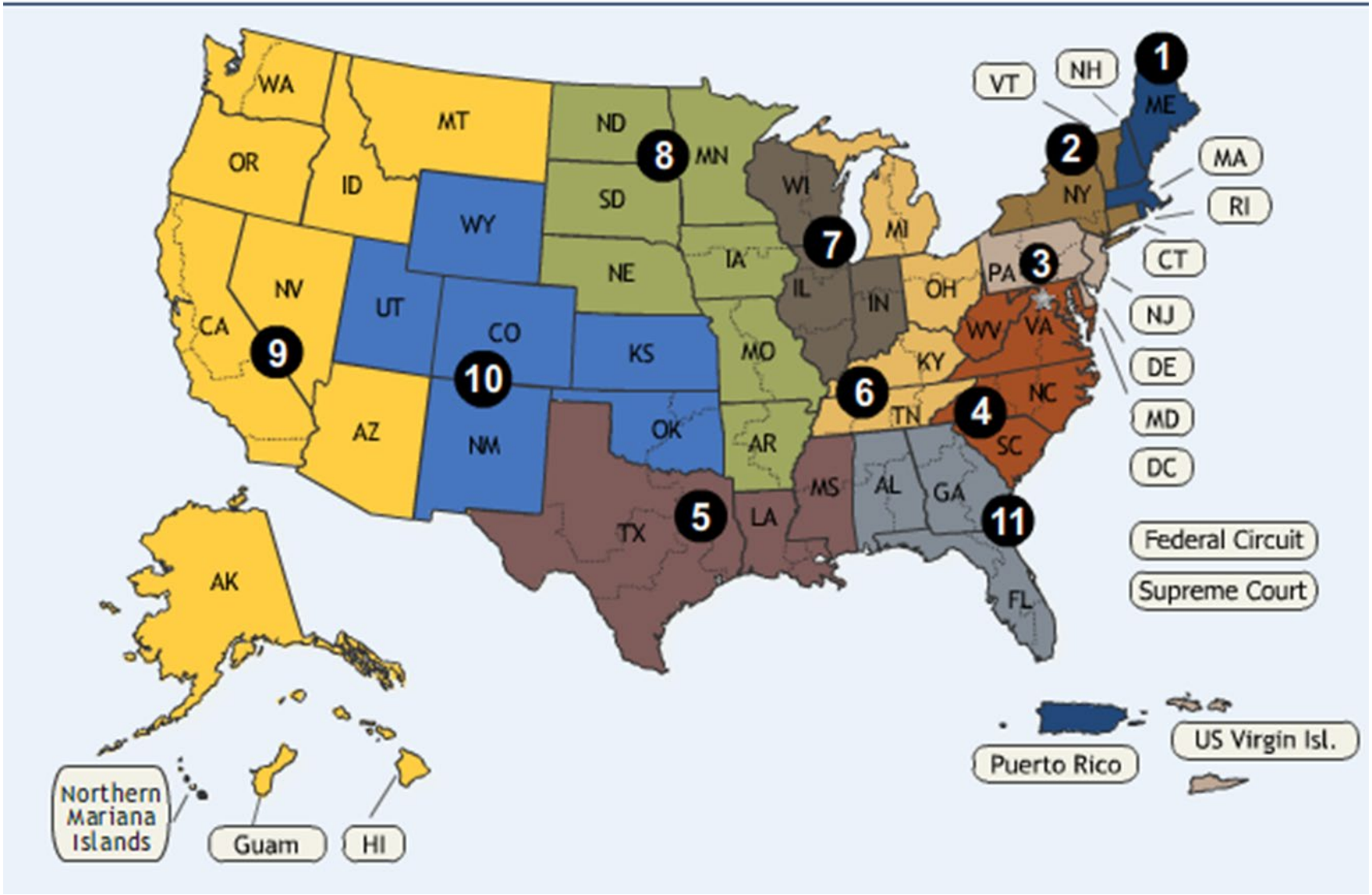

2024 NEPA Litigation Statistics

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U.S. Courts of Appeals issued 26 NEPA decisions (where courts reviewed NEPA documents) in 2024, 10 in both the 9th and D.C. Circuits, and 3 in the 10th Circuit and 1 each in the 1st, 5th, and 7th Circuits

6 different agencies:

- USDA (USFS and Natural Res. Conserv. Svc.) – 9 cases (prevailed in all cases but two)
- DOI (BLM, BOR, and BOEM) – 4 cases (prevailed in all cases)
- DOT (FAA, FHWA, MARAD) – 4 cases (prevailed in all cases but one))
- DOD (USACE) – 1 case (prevailed)
- FERC – 6 (prevailed in three cases (in one case FERC did not prevail but partially prevailed in the two remaining cases))
- NRC – 1 case (prevailed)
- FCC - 1 case (prevailed)

Government prevailed in **81% (85%** if partial counted) of the cases

Comparison to Previous Years

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	U.S. Courts of Appeals Circuits												
	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	TOTAL
2006 - 2016	9	6	5	11	6	11	5	5	120	27	6	27	238
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
2022				2		1	1		15	2	1	5	27
2023				**1**	**2**		**2**	**1**	**12**	**3**	**1**	**3**	**25**
2024	**1**				**1**		**1**		**10**	**3**		**10**	**26**
TOTAL	11	9	7	10	13	14	11	7	230	40	14	73	439
Proportion	2%	2%	2%	5%	3%	3%	2%	2%	50%	9%	3%	17%	100

Why Such a High Government Success Rate?

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- Courts continued to apply the "rule of reason" and refused to "flyspeck"
  - *El Puente v. USACE*
  - *Healthy Gulf v. FERC*
  - *City of Port Isabel v. FERC*
  - *Rocky Mountain Wild v. Dallas*
  - *Beyond Nuclear, Inc. v. U.S. NRC*

  But See:
  - *Western Watersheds Project v. Vilsack (agency loss)*
  - *City of Port Isabel v. FERC (agency loss)*

- Courts relied heavily on evidence in AR and agency discretion

- Agencies prevailed in all but one case involving EAs (loss involved baseline challenge and in 3 of 4 CATEXs
  - Only EIS cases lost involved lack of support/reasoning for agency decision-making

2024 Case Trends

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- 26 cases total
  - 4 cases – CATEX (prevailed in three of four cases) (75% prevail rate)
  - 11 cases – EAs (prevailed in all but one case) (95% prevail rate)
  - 11 cases – EISs (prevailed in 8 cases, did not prevail in 1 case, and in 3 other cases partially prevailed (73% prevail rate or 86% if partial cases counted)

2024 Case Trends

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22 (of 26) cases involved challenges to impact assessment:

- 4 cases - CATEX
- 9 cases - direct impacts
- 6 cases - indirect impacts (GHG)
- 7 cases - cumulative impacts

Note: Several cases involved challenges in multiple categories.

2024 Case Trends

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- 9 cases involved challenges to alternatives analysis (the courts upheld the agencies' alternatives analysis in each case except for one *(Western Watersheds Project v. Vilsack)*
- 5 cases involved claims of segmentation/connected actions
  (6 if we count one of CE cases where CEs combined)
- 5 cases involved Duty to Supplement

What's changed since April 2025

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- CEQ NEPA Regulations rescinded effective April 11, 2025
- Seven County Supreme Court Decision: *Seven County Infrastructure Coalition v. Eagle County, Colorado, 605 U.S. ---, 145 S.Ct. 1497 (2025)*
- Late June/Early July agency regulations & procedures published
- The following cases reflect decisions in 2024
- The panel will address what may have changed if these decisions were in 2025

The First CATEX Case:
Friends of the Inyo v. U.S. Forest Serv., 103 F.4th 543 (9th Cir. 2024)
(Agency Did Not Prevail)

Friends of the Inyo (cont.)

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Proposed Action: Approval of Long Valley Exploration Drilling Projects in Inyo NF, east of Mammoth Lakes

- 12 drilling pads
- 1 year or less
- Monitoring and any needed habitat restoration for 3 years

The NEPA review: application of 2 USFS CatExs

Plaintiff's claim: Because the proposed action was not covered by 1 CE, the Forest Service improperly applied 2 CEs, contrary to USFS regulations

Friends of the Inyo (cont.)

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The two CEs at issue:

CE-6 allows "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction," 36 C.F.R. § 220.6(e)(6) ("CE-6 (habitat improvement)")

CE-8 allows "[s]hort-term (1 year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than 1 mile of low standard road, or use and minor repair of existing roads," *Id.* § 220.6(e)(8) ("CE-8 (mineral operations less than 1 year)")

Friends of the Inyo (cont.)

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USFS Regs state:

"A proposed action may be categorically excluded . . . .only if there are no extraordinary circumstances related to the proposed action and if: (1) The proposed action is within one of the categories established by the Secretary at 7 CFR part 1b.3; or (2) The proposed action is within a category listed in § 220.6(d) and (e).

Friends of the Inyo (cont.)

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- The agency evaluated the two-phase Project as a single proposed action. USFS regulations prohibit artificially bifurcating reclamation from a proposed plan of operations.
- But because the monitoring took it out of the 1 year limit a single CE could not be used.
- Ninth Circuit: In 1991, when USFS CEs established, drafters clearly intended for the Forest Service to consider each CE independently. *See id.*; 36 C.F.R. § 220.6(e). Allowing the Forest Service to combine CEs after the fact would undermine this effort.
- Ninth Circuit: the structure of § 220.6 shows that CEs cannot be combined, where one CE alone cannot cover a proposed action. Each CE is separately defined by the Section, and many include time and space limitations that would be futile if they could be duplicated or combined. *E.g.*, 36 C.F.R. § 220.6(e)(3)

Friends of the Inyo (cont.)

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- Somewhat Heated Dissent :
  - Harmless error given that this project would disturb less than an acre of land and no one has identified any significant impact on the environment, any error made by the Forest Service was harmless
  - But recommended USFS separate the proposed actions rather than combining CEs and would have survived review.
  - Is this the independent utility argument?
  - “We do not just freely vacate agency decisions at the slightest inkling of error.”
  - In analyzing the project for any “extraordinary circumstances” under § 220.6(a)(2), the USFS extensively evaluated the project's impact on the Inyo's wildlife, botany, water, noise, and cultural heritage. It concluded none existed – no potential for significant impact.

But compare another (similar) CATEX Case:

Oregon Wild et al. v. U.S. Forest Serv., No. 23-35579, 2024 WL 4286965 (9th Cir. Sep. 25, 2024) (not for publication)

(Agency Prevailed)

Oregon Wild (cont.)

Proposed Action: 3 commercial timber harvests—the South Warner, Bear Wallow, and Baby Bear projects totaling 29,000 acres

The NEPA review: application of CE-6, ""[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction," 36 C.F.R. § 220.6(e)(6)

Oregon Wild (cont.)

Plaintiffs (Oregon Wild and WildEarth Guardians) claim:

- Application of CE-6 to the three projects violated APA and NEPA because CE-6 does not cover “large scale” commercial logging operations and contains undefined, implicit size / acreage limitation
- Second claim of failure to make required determination of no significant impacts remanded to district court for reconsideration

Oregon Wild (cont.)

Decision (For the USFS):

- Court held CE-6 applied to the three projects at issue because they addressed the need to improve forest stand conditions and wildlife habitat, and *did not include the use of herbicides or require more than one mile of low standard road construction*.
- No extraordinary circumstances attendant to the three projects, which would warrant an EIS or EA
- CE-6 does not limit activities based on scale or acreage. *See* 36 C.F.R. § 220.6(e)(6).
- Acknowledging that CE-6 does not contain an explicit size or scale limitation, Oregon Wild instead contended that an undefined size or acreage limitation should be read into CE-6. The Ninth Circuit declined to adopt such a reading.

Western Watersheds Project et al. v. Vilsack, No. 23-8081, 2024 WL 4589758 (10th Cir. Oct. 28, 2024) (not for publication) (Agency Did Not Prevail)

WWP (cont.)

Proposed Action: 2020 amendment to USFS Thunder Basin National Grassland management plan focused on management of the black-tailed prairie dog population

The NEPA review: EIS

Plaintiffs' (Western Watersheds Project, Rocky Mountain Wild, WildEarth Guardians) claim: EIS had unduly narrow purpose and need, failed to consider a reasonable range of alternatives, and failed to take required "hard look"

WWP (cont.) – What is at issue?

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The black-footed ferret, a highly endangered predator, relies almost entirely on black-tailed prairie dogs for both food and shelter, living in their burrows for shelter and consuming up to 90% of their diet as prairie dogs.

WWP (cont.) – What is at issue?

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The black-tailed prairie dog is a keystone species

But they compete with livestock

WWP (cont.) – Complex History

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- Thunder Basin is a sprawling grassland in NE Wyoming
  - 553,000 acres of USFS-managed land and
  - more than one million acres of land
- In 1981, the USFS adopted a grassland management plan which sought to establish Thunder Basin as a potential ferret habitat, based on its existing prairie dog population
- In 2002, the USFS revised its governing grassland plan with 50K acres as ferret reintroduction plan
- In 2009, the USFS amended, recognizing shooting and poisoning efforts could reduce prairie dog population.
- In 2017 – Prairie dog populations shot to high of colonies over 75K acres
- Shortly after – disaster - sylvatic plague reduced to 1,100 acres.
- Thus, USFS issued a 2020 Plan Amendment to manage population but considered lethal control methods.

WWP, (cont.)

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A look at Purpose and Need and Alternatives (USFS additionally lost on Impact Assessment, as well)

The purpose of this proposed plan amendment is to:

- provide a wider array of management options to respond to changing conditions;
- minimize prairie dog encroachment onto non-Federal lands;
- reduce resource conflicts related to prairie dog occupancy and livestock grazing;
- ensure continued conservation of at-risk species; and
- support ecological conditions that do not preclude reintroduction of the black-footed ferret.

WWP (cont.)

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Specifically, an amendment is needed to:

- revise management direction in Management Area 3.63 – Black-Footed Ferret Reintroduction Habitat
- adjust the boundaries of management area 3.63 to be more conducive to prairie dog management; and
- increase the availability of lethal prairie dog control tools to improve responsiveness to a variety of management situations, including those that arise due to encroachment of prairie dogs on neighboring lands, natural and human-caused disturbances, and disease.

WWP (cont.)

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Decision (against USFS):

- The Tenth Circuit found that by identifying a need of the 2020 Plan Amendment as to “increase the availability of lethal prairie dog control tools to improve responsiveness to a variety of management situations,” the USFS has defined the Purpose and Need statement so narrowly as to “preclude a reasonable consideration of alternatives."
- Each of the four proposed action alternative increased the availability of lethal control methods, including poisoning and shooting.
- There are viable alternatives to expanding the use of lethal controls, but none of the proposed actions consider these alternatives.
- The Purpose and Need statement thus precluded the USFS from considering a “reasonable consideration of alternatives,” in violation of NEPA.

WWP (cont.)

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Decision (against USFS):

- The Court criticized the USFS because it did not provide an adequate explanation in its discussion of why expanding lethal control options was the only viable choice.
- The USFS argued that it explained nonlethal control methods such as translocation and vegetation barriers were “inefficient and costly,” local communities were resistant to them, and were “impractical to prevent encroachment on sufficient scales.”
- The Court found that these statements were contradicted by evidence elsewhere in the FEIS .
- The USFS had not attempted translocation since 2011 and had relied on third-party studies to assess the effect of vegetation barriers.

Marin Audubon Soc'y v. FAA, 121 F.4th 902 (D.C. Cir. 2024)

(Agency Did Not Prevail)

Marin Audubon (cont.)

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Challenge:

Environmental organizations (Marin Audubon) challenged the Bay Area Parks Plan*, the Air Management Tour Plan (or, the Plan) issued by the FAA and NPS.

The Plan governed flight tours over four national parks near San Francisco: Golden Gate National Recreation Area, Muir Woods National Monument, San Francisco Maritime National Historical Park, and Point Reyes National Seashore.

Marin Audubon (cont.)

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Substantive Issue:

- Marin Audubon argued that the agencies failed to properly comply with CEQ's NEPA regulations because they did not conduct an EA or EIS before issuing the Plan; the agencies completed a CATEX
- The Agencies decided that an EA or EIS was unnecessary because they believed the Plan would ultimately benefit the environment compared to current conditions under an interim operating authority (and, considering required mitigation in the Plan).
- In preparing the Bay Area Parks Plan, the Agencies treated the existing air tours in the Parks as the status quo for purposes of conducting their NEPA analysis. Those tours were conducted under interim operating authority.

Marin Audubon (cont.)

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Substantive Issue:

- Held: The National Parks Air Tour Management Act of 2000 makes clear that the provisional grant of interim operating authority should not function as the baseline for environmental analysis.
- The Court unanimously held that it was arbitrary and capricious to use existing conditions under the interim operating authority as the baseline for assessing the environmental impacts of the Plan
- Court initially vacates the Amended Plan (to the dismay of all parties)

Marin Audubon (cont.)

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But wait! There's more!

- Two judges ruled that CEQ's NEPA regulations are without legal basis
- CEQ never had authority to do more than advise its sister agencies on NEPA compliance
- CEQ's promulgation of rules binding on every agency violates separation of powers and statutory interpretation principles
- CEQ's rulemaking authority, which derives not from the statute but from EO 11990, issued during the Carter administration, lacks any Congressional basis
- Brushed off the Supreme Court's implicit past endorsements of the CEQ regulations in dicta in several NEPA cases
- Deemed the CEQ Regulations "Ultra Vires"

For an excellent discussion of the implication of the case, please see Bosshart and Boling article at https://perkinscoie.com/insights/update/dc-circuit-rejects-ceqs-rulemaking-authority

Marin Audubon, *Con't*

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Fiery Dissent by Chief Judge Srinivasan!

- Unnecessary and improper to reach the issue of CEQ's regulatory authority (Party Presentation Principle!)
- No party had challenged the validity of the CEQ regulations or the NEPA categorical exclusion, and the issue was not briefed
- Objected to vacatur of the challenged action that was not requested by Marin Audubon

El Puente v. USACE, 100 F.4th 236 (D.C. Cir. 2024)
(Agency Prevailed)

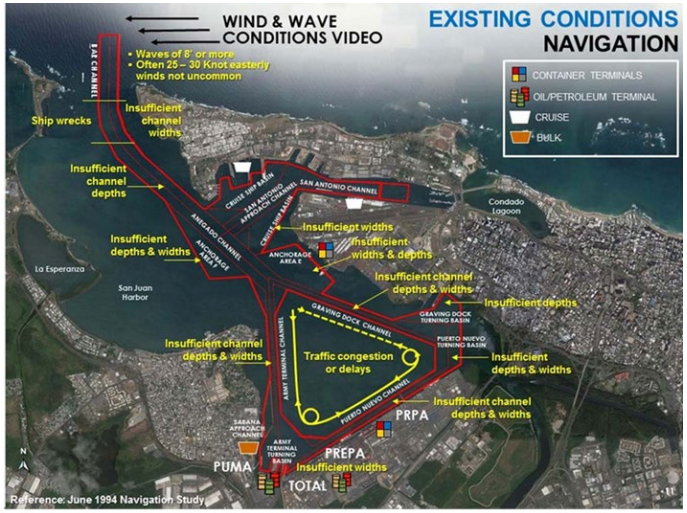

Figure 1: Existing navigation conditions

El Puente (cont.)

Proposed Action:

- Dredging of the San Juan Harbor to widen and deepen navigation channels.
- Project supports larger commercial vessels: cruise ships, cargo ships, and oil tankers.
- Dredged material transported by barge to an offshore ocean disposal site.

El Puente (cont.)
Background:

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2018 – Original EA Completed

- Corps finalizes **EA** for San Juan Harbor dredging.
- Issues **Finding of No Significant Impact (FONSI)**.
- No full EIS prepared; **ESA Section 7 consultation** completed with NMFS.

2018–2020 – Limited Public Access & Concerns Raised

- EA released shortly after **Hurricane Maria**; widespread power outages limit public participation.
- Initial **Environmental Justice (EJ) analysis** uses narrow 1-mile radius.
- Spanish translation of full EA not provided; public outreach limited to summaries and notices.

2023 – Supplemental EA Issued

- Corps considers **project expansion** into Sabana Approach Channel.
- Issues **Supplemental EA** in January 2023.
- Expands **EJ analysis radius to 5 miles** in response to public comments.
- Reaffirms FONSI; does **not prepare an EIS**.

2022–2024 – Litigation & Decision

- El Puente, CORALations, and Center for Biological Diversity file suit
- Court upholds the Corps' EA and SEA as **NEPA- and ESA-compliant** in May 2024.

El Puente (cont.)

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Decision:

- **Cumulative Impacts:** Sufficient. The Corps reasonably identified the affected area and foreseeable actions (e.g., anchorage expansion). LNG conversion not raised during the NEPA process, so challenge was forfeited.
- **Environmental Justice:** Initial one-mile analysis was narrow, but later expanded to five miles in supplemental review. Court accepted this as curing any earlier defects.
- **Translation & Public Involvement:** Corps' decision not to translate the full EA into Spanish or extend the comment period was upheld as reasonable under EO 12898.
- **Coral Impacts:** Agency relied on prior dredging data, video surveys, and turbidity monitoring with adaptive management. Court deferred to agency discretion.
- **ESA Consultation:** NMFS did not shift policy; revised conclusions were based on updated data, not inconsistent positions.

At its core, this case is about how much scientific uncertainty agencies can tolerate and how cumulative impacts must be framed.

El Puente (cont.)

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Key Takeaways:

- **Forfeiture is fatal:**
  - Courts will not consider issues (e.g., LNG as a connected action) if not raised during the NEPA comment period—even if they seem foreseeable.
- **EJ requires scope and method clarity:**
  - One-mile vs. five-mile buffer mattered. Supplemental analysis can save a narrow EJ zone—but build rationale up front.
- **Language access = flexibility, not a mandate:**
  - Agencies retain discretion in how they engage communities; full translations are not required.
- **Mitigation must be specific enough to reassure:**
  - Turbidity thresholds, station locations, and adaptive responses helped the Corps withstand ESA claims
- **Hard look ≠ perfection:**
  - Agencies must show they used best available science and explained their reasoning. This was enough here.

El Puente, Con't

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What's Next?

- On January 20, 2025, President Trump issued EO. 14154, Unleashing American Energy. The EO revoked EO 11991, which directed CEQ to propose rescinding CEQ's NEPA regulations and to provide guidance on implementing NEPA.
- On February 25, 2025, the CEQ published an interim final rule to remove its regulations implementing NEPA, effective April 11, 2025
- Decision by SCOTUS in *Seven County Infrastructure Coalition v. Eagle County, Colorado*, 605 U.S. ---, 145 S.Ct. 1497 (2025)
- Agencies published interim regulations/procedures in late June/Early July

FERC cases & Seven County case

- Series of 4-5 FERC cases almost moot?
- Changes in leadership
- Changes in policy

Questions/Comments?

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