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ANNUAL NEPA REPORT 2012

of the

National Environmental Policy Act (NEPA) Practice

Submitted to

NAEP Board of Directors

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April 2013

This report reviews NEPA document submittals and statistics, NEPA litigation and agency procedures for calendar year 2012. Additional sections provide commentary on the implementation of the NEPA process and expert expectations for the future. The purpose of this report is to document the status of NEPA compliance and perspectives during the reporting year. We welcome reader comment and inquiry to naep@naep.org.

Acronyms and Abbreviations

ADR	Alternative Dispute Resolution
APU	American Public University
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
CD	Compact Disc
CE	Categorical Exclusion
CEQ	Council on Environmental Quality
DOC	Department of Commerce
DOE	Department of Energy
DOI	Department of Interior
DOT	Department of Transportation
eMNEPA	Electronic Modernization of NEPA
EA	Environmental Assessment
ECCR	Environmental Consensus Conflict Resolution
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FWS	Fish and Wildlife Service
GSA	General Services Administration
IT	Information Technology
MAP-21	Moving Ahead for Progress in the 21st Century
NAEP	National Association of Environmental Professionals
NEPA	National Environmental Policy Act
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
NOI	Notice of Intent
NPS	National Park Service
NRC	Nuclear Regulatory Commission
NRCS	Natural Resources Conservation Service
OMB	Office of Management and Budget
PEPC	Planning, Environment, and Public Comment
$PM_{2.5}$	Particulate Matter less than 2.5 Microns in Diameter
RAPID Act	Responsibly and Professionally Invigorating Development Act of 2012
USAF	United States Air Force
USBR	United States Bureau of Reclamation
USCG	United States Coast Guard
USFS	United States Forest Service
USMC	United States Marine Corps
USN	United States Navy

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Introduction

Ronald E Lamb, CEP

The National Association of Environmental Professionals' (NAEP's) National Environmental Policy Act (NEPA) Practice (formerly known as the NEPA Working Group) is pleased to present our sixth NEPA Annual Report. This report contains summaries of the latest developments in NEPA as well as the NEPA Practice's efforts for the past year. This annual report is prepared and published through the initiative and volunteer efforts of members of the NAEP's NEPA Practice.

In the 2011 Annual Report we noted considerable effort was being expended to "streamline" the NEPA process. As discussed in this year's *NEPA Regulatory Update*, *Moving Ahead for Progress in the 21st Century* (*MAP-21)*, and *Legislative Update*—this theme continues. As NEPA practitioners we welcome efforts to improve the process while ensuring the integrity of decision-making and sound environmental analysis. We also urge caution to not lose sight of what we expect from the NEPA process—good decision-making and agency disclosure.

Consider what business gurus Chip and Dan Heath say about business decision-making[1]:

> *Q: "How do you institutionalize good decision-making in your organization?*
>
> *A: "You need a process whereby everyone can handle a decision the same way. There should be attention paid to disconfirming information. Attention to alternate ways to frame the problem. Attention to what will happen if things go unexpectedly well or poorly. The process doesn't guarantee a good outcome. But it sets guardrails to keep you from falling into the common decision-making traps."*
>
> *Q: "With so much information available, how come we're not making better decisions?"*
>
> *A: "There's so much information that it's easy to build a case for what we wanted to do all along. You have to wire opposition into your decision-making process..."*

If business savvy organizations do not have something like the NEPA process to follow, they need to create it. Perhaps this is a new, untapped market for environmental professionals!

In terms of agency disclosure, it is important to remember what the NEPA process means to state and local governments, Tribes, and other potential stakeholders. During a series of hearings before the U.S. House of Representatives Committee on Resources, numerous speakers stressed the importance of the NEPA process. The mayor of Albuquerque succinctly stated:

> *"I participated in scoping and comment periods and I have often relied upon NEPA to keep me abreast of Federal management activities and projects that impacted places where I worked or recreated. As a councilor, I see NEPA as an important avenue of communication between local government and the Federal Government. I consider NEPA to be primarily a*

[1] Inc. March 2013, page 24. www.inc.com/magazine/201303/leigh-buchanan/what-if-your-gut-is-gasp-wrong.html

> *planning tool. This law gives us a clear and predictable planning framework that citizens and communities can use in order to participate in decisions affecting local public lands and these decisions have a huge impact on local economies and cultural and recreational resources. Many citizens and local governments rely upon the structure that NEPA provides to understand the impacts and alternatives associated with a nearby federally funded project...NEPA is among our best tools for planning Federal projects. It gives voice to our citizenry and provides a predictable avenue for democratic involvement..."*
>
> – Martin Heinrich, City Councilor, Albuquerque, NM, Testimony Before the Committee on Resources Task Force on Improving the National Environmental Policy Act U.S. House of Representatives, August 1, 2005.[2]

Environmental professionals are innovative problem solvers. Working through organizations such as NAEP, we can identify practical ways to improve the NEPA process while ensuring the integrity of decision-making and meaningful public involvement.

[2] https://bulk.resource.org/gpo.gov/hearings/109h/22851.txt

The NEPA Practice[3] 2012

Ron Lamb and Joe Trnka[4]

The mission of the NEPA Practice is to improve environmental impact assessment as performed under the National Environmental Policy Act.

The NAEP's NEPA Practice[3] supports NEPA practitioners through monthly conference calls, networking opportunities, an online Forum, outreach with the President's Council on Environmental Quality (CEQ), educational opportunities, and projects such as this *Annual NEPA Report*. Of particular note was the CEQ pilot project sponsored by NAEP and developed by NEPA Practice members (www.whitehouse.gov/administration/eop/ceq/ Press_Releases/NEPA/ October_ 19_2011). Under this pilot project, Best Practice Principles for Environmental Assessments (EAs) was prepared. Experience-based Best Practice Principles will focus on the preparation of effective EAs that are timely, cost-effective, and incorporate those environmental issues that are relevant to the decision-making process. As discussed briefly in the *NEPA Regulatory Update*, the CEQ will seek public comments on the report findings and provide the final Best Practice Principles to agency NEPA practitioners and use them as a training and educational tool.

The NAEP's *NEPA Training Fundamentals* developed in 2011 was used as a benchmark for new training programs, including the American Public University (APU) development of an online graduate certificate in NEPA.

Presentations at the NEPA Practice's monthly conference calls in 2012 included:

- Ms. Dinah Bear on H.R. 4377, the "Responsibly and Professionally Invigorating Development Act of 2012" (RAPID Act) and provisions for NEPA "streamlining."
- Ms. Nathalie Tisseaux, National Oceanic and Atmospheric Administration (NOAA), and Mr. Michael Booth, Cardno TEC, on NOAA climate change screening.
- Mr. Lamar Smith, Federal Highway Administration (FHWA), on the Moving Ahead for Progress in the 21st Century (MAP-21) transportation legislation and provisions for "efficient environmental reviews."
- NEPA Practice members also supported NAEP webinars on Native American Consultation (January 2012), CEQ Guidance on NEPA Review (April 2012), Review of 2011 NEPA

[3] Traditionally known as the NEPA Working Group, NAEP's Committee and Working Group structure was updated and streamlined in 2012. The NEPA Practice is now under the Environmental Policy Committee.

[4] Questions concerning this report should be directed to:

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Cases (June 2012), and the CEQ and Office of Management and Budget (OMB) Memorandum on Environmental Collaboration and Conflict Resolution (November 2012).

NEPA Practice monthly conference calls are typically held at 2:30 p.m. (Eastern) on the 2nd Wednesday of each month. NAEP members are welcome. To be added to the NEPA Practice email list and call reminders, email your request to naep@naep.org or to ronaldlamb@comcast.net.

Just the Stats

Karen Vitulano/Grace Musumeci[5]

In 2012, announcements of 404 draft and final environmental impact statements (EISs) were published in the *Federal Register*. Nine agencies each prepared 10 or more documents; six agencies prepared 20 or more. Similar to previous years, the Forest Service (USFS) provided the most with 102; the next highest was the Bureau of Land Management (BLM) with 56, while the FHWA slipped to third with 44. Of the total, 194 were draft EISs and 210 were finals. **Table 1** and **Figure 1** on following pages show NEPA documents filed in 2012 by agency and by state. **Table 2** aggregates the EISs by department.

With regard to projects rated during 2012, 63 (33%) proposed projects were rated Lack of Objection (LO) by the U.S. Environmental Protection Agency (EPA), 120 (62%) were rated Environmental Concern (EC), 9 (5%) received an Environmental Objection (EO) rating, and 1 (0.5%) was rated Environmentally Unsatisfactory (EU) (**Figure 2**). Thirty eight percent (74) of the draft EIS documents were considered adequate, 60% (117) had insufficient information, and 2% (3) were inadequate (**Figure 3**). See the Note Box at the end of this paper for further explanation of EPA's ratings.

Two of the three inadequate ratings on draft EISs were for mining projects: the Hollister Underground Mine Project in Elko County, Nevada (rated EO-3) and the Greens Creek Mine Tailings Disposal Facility Expansion, Admiralty National Monument, Tongass National Forest, Alaska (rated 3). The basis for these inadequate ratings was the lack of critical information regarding the nature, estimated cost, and funding mechanism (financial assurance) to implement essential mitigation in perpetuity after the mine is closed to prevent surface and groundwater contamination. For Greens Creek, there were also concerns regarding long-term environmental impacts on wetlands and Monument values. The third inadequate rating on a draft EIS was for a transportation project – the I-710 Corridor Project, a significant freight corridor proposed for expansion serving the Ports of Los Angeles and Long Beach, CA (freeway widening-only alternatives rated EU-3, and alternatives including a zero-emission freight corridor rated 3). The 3 rating was based on an inadequate air quality analysis and lack of information on project phasing and technologies. The EU rating reflected likely significant cumulative air quality and public health impacts from particulate matter less than 2.5 microns ($PM_{2.5}$) emissions disproportionately affecting low-income, minority (environmental justice) populations.

[5] Karen Vitulano, US Environmental Protection Agency, Region 9 and Grace Musumeci USEPA, Region 2. Any views expressed in this article do not necessarily represent the views of the EPA or the United States.

Table 1. EISs Filed in 2012 by Agency

LEAD AGENCY	# of EISs
Forest Service (USFS)	102
Bureau of Land Management (BLM)	56
Federal Highway Administration (FHWA)	44
Army Corps of Engineers (USACE)	41
National Park Service (NPS)	21
Fish and Wildlife Service (FWS)	19
National Oceanic and Atmospheric Administration (NOAA)	17
Navy (USN)	14
Federal Transit Administration (FTA)	10
Nuclear Regulatory Commission (NRC)	8
Bureau of Reclamation (USBR)	8
Air Force (USAF)	7
Federal Rail Administration (FRA)	7
Department of Energy (DOE)	6
Bureau of Ocean Energy Management (BOEM)	5
Bureau of Indian Affairs (BIA)	4
Bonneville Power Administration (BPA)	4
Federal Energy Regulatory Commission (FERC)	3
Western Area Power Administration (WAPA)	3
General Services Administration (GSA)	3
Federal Aviation Administration (FAA)	3
Rural Utilities Service (RUS)	3
Animal & Plant Health Inspection Services (APHIS)	2
Veterans Administration (VA)	2
Coast Guard (USCG)	2
Tennessee Valley Authority (TVA)	1
Housing and Urban Development (HUD)	1
National Highway Traffic Safety Administration (NHTSA)	1
Department of Homeland Security (DHS)	1
Maritime Administration (MARAD)	1
National Aeronautics and Space Administration (NASA)	1
National Institutes of Health (NIH)	1
National Nuclear Security Administration (NNSA)	1
Army (US Army)	1
Marine Corps (USMC)	1
TOTAL	**404**

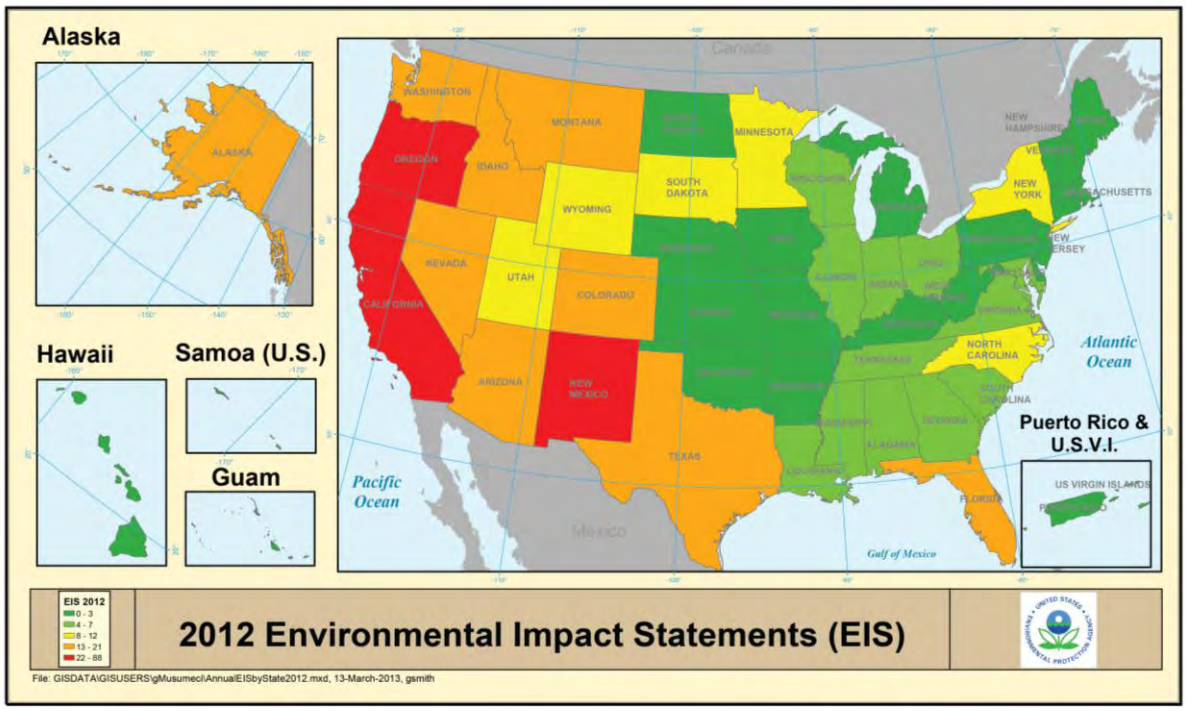

Figure 1. 2012 EISs by Region

Table 2. EISs Filed in 2012 by Department

LEAD AGENCY	# of EISs
Department of Interior (DOI)	**113**
Department of Agriculture (USDA)	**107**
Department of Transportation (DOT)	**65**
Department of Defense (DOD)	**64**
National Oceanic and Atmospheric Administration (NOAA)	**17**
Department of Energy (DOE)	**14**
Nuclear Regulatory Commission (NRC)	**8**
Federal Energy Regulatory Commission (FERC)	**3**
General Services Administration (GSA)	**3**
Veterans Administration (VA)	**2**
Department of Homeland Security (DHS)	**3**
Tennessee Valley Authority (TVA)	**1**
Department of Housing and Urban Development (HUD)	**1**
National Highway Traffic Safety Administration (NHTSA)	**1**
National Aeronautics and Space Administration (NASA)	**1**
National Institutes of Health (NIH)	**1**
TOTAL	**404**

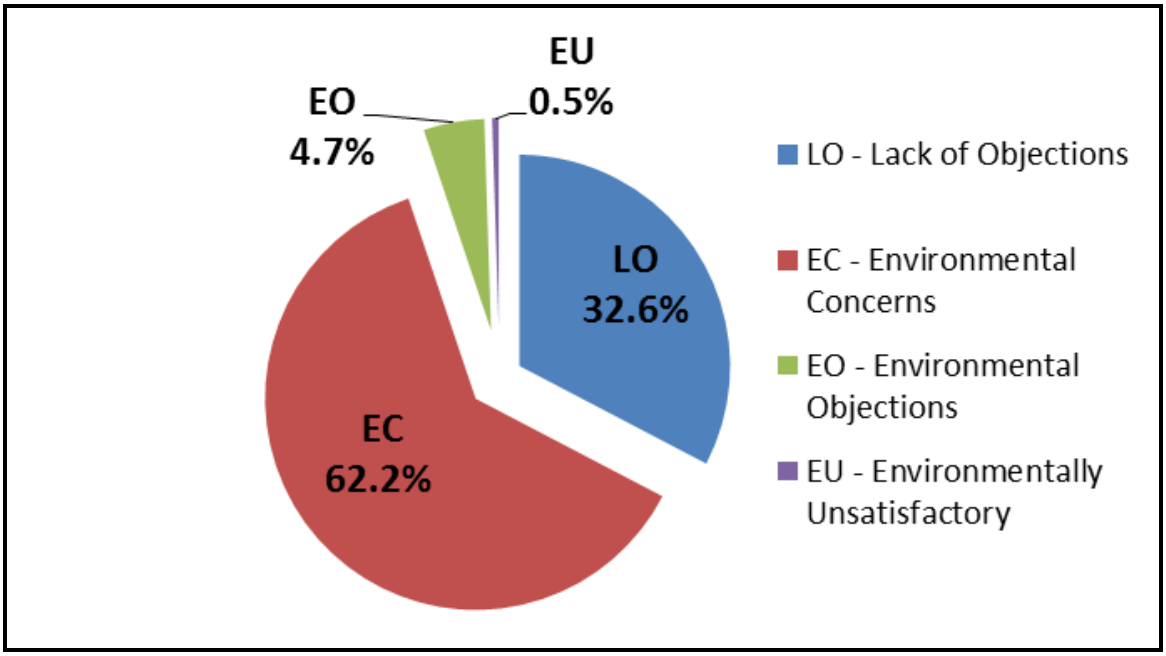

Figure 2. Environmental Impact of the Action

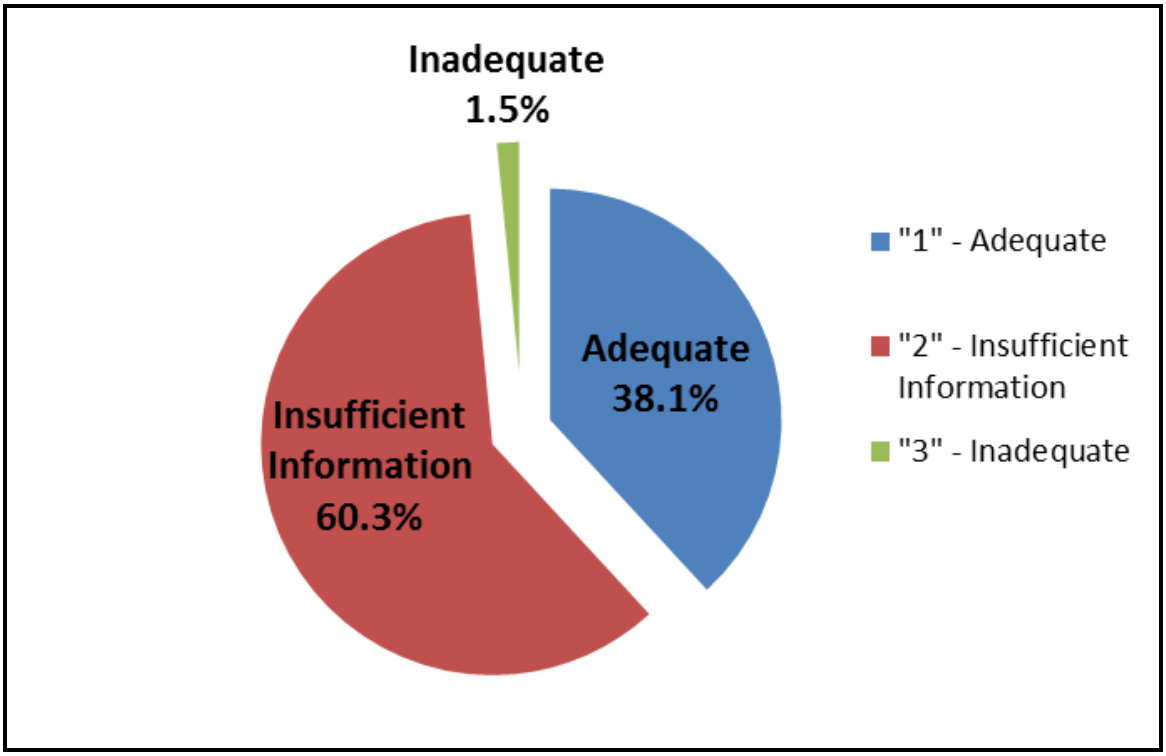

Figure 3. Adequacy of the Impact Statement

Environmental Protection Agency Rating System for EISs

RATING THE ENVIRONMENTAL IMPACT OF THE ACTION

LO (Lack of Objections) The review has not identified any potential environmental impacts requiring substantive changes to the preferred alternative. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposed action.

EC (Environmental Concerns) The review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact.

EO (Environmental Objections) The review has identified significant environmental impacts that should be avoided in order to adequately protect the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative).

EU (Environmentally Unsatisfactory) The review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed.

RATING THE ADEQUACY OF THE DRAFT EIS

1. (Adequate) The draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

2. (Insufficient Information) The draft EIS does not contain sufficient information to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the proposal. The identified additional information, data, analyses, or discussion should be included in the final EIS.

3. (Inadequate) The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS.

USEPA 2009. Environmental Impact Statement (EIS) Rating System Criteria.

http://www.epa.gov/oecaerth/nepa/comments/ratings.html#rating.

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Preparation Times for Final EISs 2012

Piet and Carole deWitt[6]

In calendar year 2012, 31 federal agencies made publicly available 200 draft EISs, and 29 agencies made available 205 final EISs. Seven of the final EISs were adoptions and are not included in our calculations. Two final EISs were withdrawn following their publication. One of those final EISs was replaced during 2012. The first version of that EIS was deleted from our calculation to avoid counting it twice.

Final EISs

The 197 final EISs in our sample had an average preparation time (from the *Federal Register* Notice of Intent [NOI] to the Notice of Availability [NOA] for the final EIS) of 1,675±1,247 days (4.6±3.4 years) (Mean ± one standard deviation) (**Table 3**). The 2012 average EIS-preparation time was the highest we have recorded for all agencies (as a group) for the period 1997-2012. The 2012 average exceeded by 125 days the previous annual high average of 1,550±1,124 days (4.2±3.1 years) [n=262] recorded in 2008, and by 240 days the 2011 average of 1,435±1,028 days (3.9±2.8 years) [n=198]. The difference between the average EIS-preparation times for 2011 and 2012 was the largest measured during our study period. The previous maximum difference, 225 days, occurred between 2007 and 2008. The 2012 average time for preparation of the draft EIS following the NOI, 1,163±1,048 days (3.2±2.9 years) exceeded by 50 days the previous high of 1,113±976 days (3.0±2.7 years) [n=262] recorded in 2008. The 2012 average for preparation of the final EIS from the draft EIS, 512±548 days (1.4±1.5 years) exceeded by 41 days the previous high of 471±484 days (1.3±1.3 years) [n=197] recorded in 2011.

Seven (3.5%) of the final EISs made available in 2012 were completed in less than one year following publication of their NOIs. This is the lowest annual percentage of EISs completed in less than one year during our study period. The annual average completion rate for EISs, completed in one year or less from 1997-2011, was 8.3±2.8%. The previous lowest completion rate (4.1%) was recorded in 2009. Likewise, 33 (16.7%) of the final EISs made available in 2012 were completed between one and two years following publication of their NOIs. This was the lowest annual completion rate recorded for this interval from 1997-2012. The average completion rate for this interval from 1997-2011 was 25.9±2.8%, and the previous low (19.6%) was recorded in 2011.

[6] Piet & Carole deWitt
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Table 3. Preparation Times in Calendar Day for Final EISs Made Available in 2012

Agency	n	% ALL	NOI to Draft			Draft to Final			NOI to Final				
			Mean	s	M	Mean	s	M	Mean	s	M	Min	Max
ALL	**197**	100	**1163**	1048	875	**512**	548	343	**1675**	1247	1394	107	7386
APHIS	**2**	1	**1126**	879	1126	**361**	173	361	**1486**	1052	1486	742	2230
BIA	**2**	1	**376**	115	376	**1292**	1668	1292	**1667**	1783	1667	406	2928
BLM	**28**	14.2	**1098**	756	1031	**436**	319	322	**1534**	869	1447	414	3705
BOEM	**3**	1.5	**527**	432	324	**210**	28	203	**737**	456	513	436	1262
USBR	**5**	2.5	**1890**	1936	1366	**662**	398	672	**2552**	2211	1835	332	6126
BPA	**2**	1	**571**	174	571	**179**	114	179	**750**	288	750	546	953
USACE	**17**	8.6	**1465**	1221	1024	**447**	481	280	**1912**	1282	1451	389	4354
DHS	**1**	0.5	**311**			**315**			**626**				
DOE	**2**	1	**968**	564	968	**886**	361	886	**1853**	925	1853	1199	2507
FAA	**1**	0.5	**5300**			**2086**			**7386**				
FERC	**2**	1	**576**	226	576	**298**	154	298	**874**	380	874	605	1143
FHWA	**18**	9.1	**1347**	1010	1185	**1047**	1227	592	**2394**	1465	2208	380	5293
FRA	**3**	1.5	**1102**	884	680	**460**	468	259	**1562**	1351	939	634	3112
FS	**59**	29.9	**994**	818	801	**403**	305	329	**1398**	925	1260	107	4112
FTA	**6**	3	**942**	628	814	**872**	603	578	**1814**	1129	1247	889	3535
FWS	**9**	4.6	**1393**	1033	1198	**509**	300	441	**1901**	1043	1627	850	4488
GSA	**1**	0.5	**458**			**441**			**899**				
HUD	**1**	0.5	**690**			**266**			**956**				
NHTSA	**1**	0.5	**199**			**231**			**430**				
NOAA	**6**	3	**723**	478	812	**287**	335	182	**1010**	595	1177	228	1582
NPS	**10**	5.1	**1635**	1079	1256	**565**	300	462	**2200**	1138	1886	953	4966
NRC	**4**	2	**549**	93	544	**427**	230	427	**976**	255	922	764	1298
RUS	**1**	0.5	**932**			**217**			**1149**				
USA	**1**	0.5	**714**			**252**			**966**				
USAF	**2**	1	**546**	293	546	**154**	10	154	**700**	283	700	500	900
USCG	**1**	0.5	**2170**			**924**			**3094**				
USN	**6**	3	**2338**	2544	862	**315**	132	280	**2653**	2586	1208	672	6148
VCT	**1**	0.5	**1022**			**140**			**1162**				
WAPA	**2**	1	**515**	213	515	**547**	197	547	**1061**	16	1061	1050	1072

Key: n = number of EISs; s = standard deviation; M = Median; VCT = Valles Caldera Trust

From 1997-2011, federal agencies (as a group) completed the largest percentage (25.9±2.8%) of their final EISs in the one-to-two-year annual interval following publication of their NOIs. The second highest completion percentage (18.7±2.7%) occurred in the two-to-three-year interval. Prior to 2012, this distribution was reversed only in 2009 when the percentage of final EISs completed in the two-to-three-year interval exceeded those completed in the one-to-two-year interval. This reversal occurred again in 2012 (two-to-three-year interval = 18.7%; one-to-two-year interval = 16.7%) (**Figure 4**).

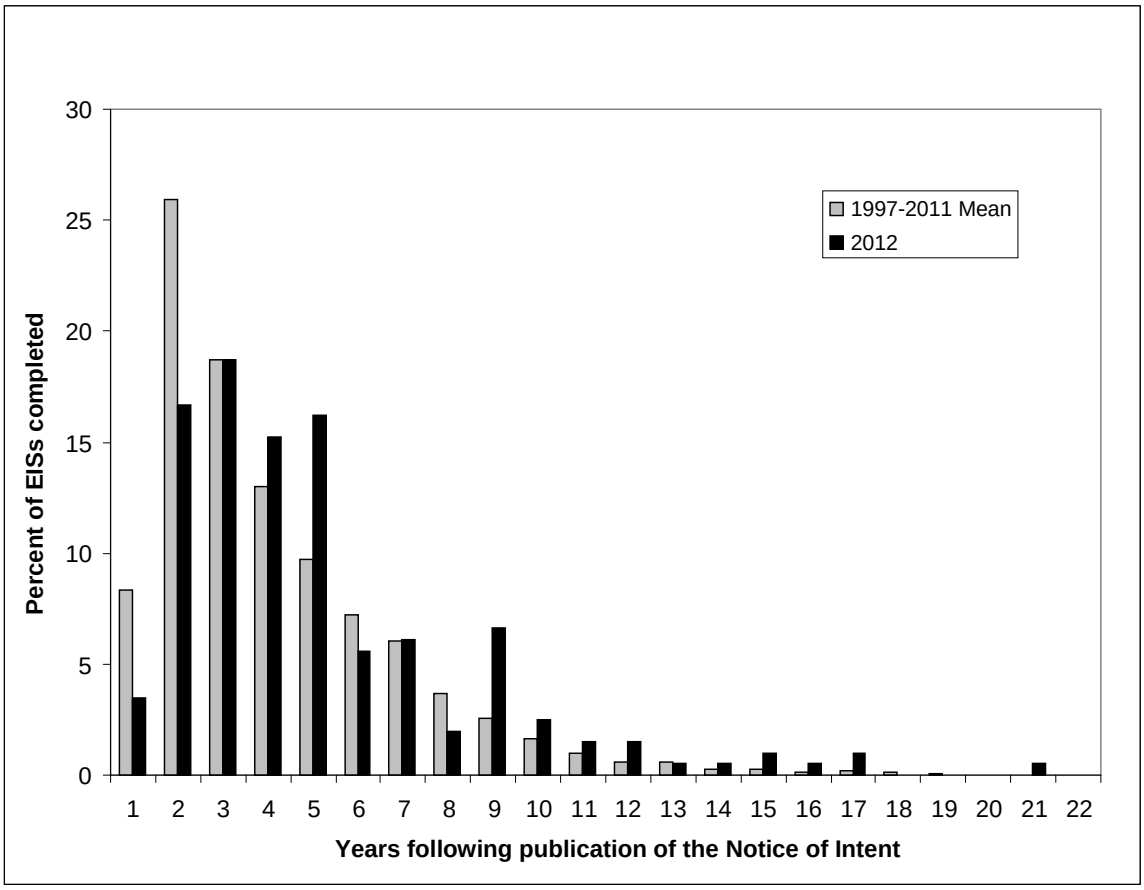

Figure 4. Comparison of Annual Final EIS Completion Rates by Year Following the Notice of Intent for 2012 and the Average for the Period 1997-2011

Thirty-two (16.7%) of the final EISs made available in 2012 were completed between four and five years following publication of their NOIs. This was the highest percentage of EISs completed in this annual interval recorded over our study period. The 1997-2011 average completion rate for this interval was 9.7±2.2%, and the previous high average (13.1%) was recorded in 2006. Similarly, in 2012 federal agencies established the highest average EIS-completion rate (6.6%) for the eight-to-nine-year interval. The previous high average completion rate for this annual interval was 4.5% recorded in 2011. The 1997-2011 annual average was 2.6±1.1%.

The average time required by all federal agencies combined to prepare final EISs has increased since the year 2000 when it averaged 1,166±899 days (3.2±2.5 years) [n=198]. The annual average EIS-preparation time for all agencies previously peaked in 2008 at 1,550±1,124 days (4.2±3.1 years) [n=262]. From 2000-2012, the total annual average EIS-preparation time for all agencies (as a group) increased at an average rate of 34.2 days/year (**Figure 5**). About 78% of the increase occurred in the preparation of draft EISs. The remaining 22% was incurred in the preparation of the final EIS from the draft EIS.

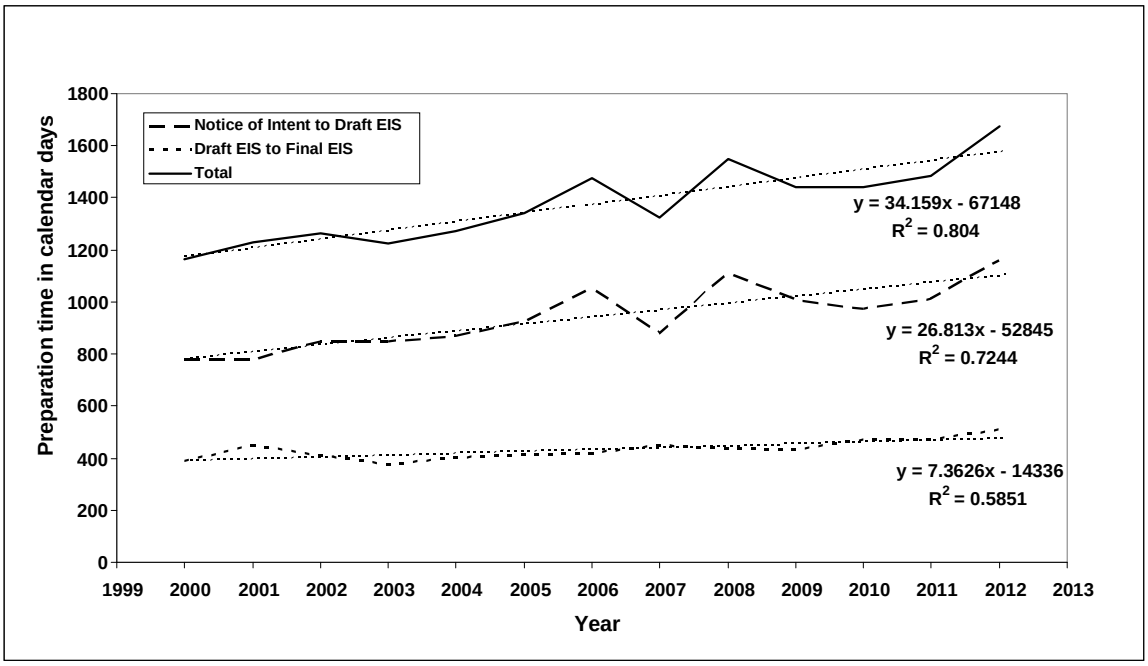

Figure 5. Annual Average Preparation Time for Final EISs Made Available by All Agencies from 2000-2012 with Their Linear Regression Lines and Equations

We sorted the data in **Table 1** to array the agencies by their average EIS-preparation times. We then grouped the ten highest averages, the ten lowest averages, and the remaining intermediate averages (**Table 4**). Sixteen (55%) of the agencies making final EISs available in 2012 produced only one or two EISs. Representatives of this group appear in each of the three categories in **Table 4**. Eight (50%) of those agencies appear in the group with the lowest average EIS preparation times. The highest number of final EISs prepared by an agency in the "lowest average" group was four.

Table 4. 2012 Annual Average Final EIS Preparation Times in Calendar Days Arranged in Descending Order by Preparing Agency

Highest Average EIS-Preparation Times			Intermediate Average EIS-Preparation Times			Lowest Average EIS-Preparation Times		
Agency	**n**	**Mean**	**Agency**	**n**	**Mean**	**Agency**	**n**	**Mean**
FAA	1	7386	***ALL***	***198***	***1673***	NRC	4	976
USCG	1	3094	BIA	2	1667	USA	1	966
USN	6	2653	FRA	3	1562	HUD	1	956
USBR	5	2552	BLM	28	1534	GSA	1	899
FHWA	18	2394	APHIS	2	1486	FERC	2	874
NPS	10	2200	USFS	59	1398	BPA	2	750
FWS	9	1901	VCT	1	1162	BOEM	3	737
USACE	18	1882	RUS	1	1149	USAF	2	700
DOE	2	1853	WAPA	2	1061	DHS	1	626
FTA	6	1814	NOAA	6	1010	NHTSA	1	430

Key: n = Number of Final EISs; VCT = Valles Caldera Trust

Draft EISs

The 200 draft EISs made available by all federal agencies in 2012 had an average preparation time (from the *Federal Register* NOI to the NOA for the draft EIS) of 1087±991 days (3.0±2.7 years) (**Table 5**). The 2012 average draft EIS preparation time was 95 days longer than the 2011 average of 992±888 days (2.7±2.4 years) [n=237].

Table 5. Preparation Times in Calendar Days for Draft EISs Made Available in 2012

Agency	n	% All	Mean	s	M	Minimum	Maximum
All	200	100	1087	991	776	30	6664
BIA	2	1.0	841	120	841	756	926
BLM	27	13.5	863	593	765	211	2464
BOEM	2	1.0	647	741	647	123	1171
USBR	3	1.5	1517	1708	770	310	3472
BPA	2	1.0	793	487	793	448	1137
USACE	23	11.5	1160	1016	777	56	4120
DOE	1	0.5	312				
EPA	1	0.5	686				
FAA	1	0.5	2073				
FERC	1	0.5	416				
FHWA	25	12.5	2120	1593	1985	207	6664
FRA	3	1.5	590	398	508	239	1023
USFS	43	21.5	755	519	668	30	3255
FTA	4	2.0	909	909	626	214	2170
FWS	12	6.0	1231	1154	841	218	3823
GSA	2	1.0	622	330	622	388	855
NASA	1	0.5	534				
NIH	1	0.5	368				
NNSA	1	0.5	1948				
NOAA	9	4.5	631	548	427	137	1897
NPS	10	5.0	1706	1103	1239	729	3739
NRC	4	2.0	932	578	694	547	1792
NRCS	1	0.5	2418				
RUS	1	0.5	401				
TVA	1	0.5	479				
USAF	5	2.5	524	261	478	255	1887
USCG	1	0.5	1306				
USN	9	4.5	770	439	703	392	1887
VA	1	0.5	520				
VCT	1	0.5	1203				
WAPA	2	1.0	1345	494	1345	995	1694

Key: n = number of EISs; s= standard deviation; M= median; VCT= Valles Caldera Trust

Our early study objective was to determine the preparation times for only final EISs. We measured the preparation times of draft EISs only as they related to their final EISs. Until this year, we did not measure draft EIS-preparation times independently. At this time, we have computed draft EIS preparation times for the years 2000, 2010, 2011 and 2012. We selected the year 2000 because it is the year with the lowest average final EIS preparation time for all agencies (as a group). Until we complete our computations for the years remaining in our sample, we do not know if the year 2000 also has the lowest average preparation time for draft EISs, but we believe that it is likely representative of EIS preparation times near the beginning of our study period. Our ability to make comparisons similar to those we can make for final EISs will have to await completion of our draft EIS-preparation time calculations. Our average draft EIS-preparation times for the four years mentioned above are provided in **Table 6**.

Table 6. Average Preparation Times in Calendar Days for Draft EISs

Year	n	Mean	s	Minimum	Maximum
2000	243	710	666	10	4523
2010	245	961	862	10	4441
2011	237	992	888	36	6931
2012	200	1087	991	30	6664

Key: n= number of draft EISs; s = standard deviation

We sorted the data in **Table 5** to array the agencies by their average draft EIS-preparation times and grouped the agencies as we did previously for final EISs (**Table 7**). Eighteen (58%) of the agencies making draft EISs available in 2012 produced only one or two EISs. Representatives of this group appear in each of the three categories in **Table 7**. As with the comparison of final EISs, eight (44%) of those agencies appear in the group with the lowest average EIS-preparation times. The largest number of final EISs prepared by an agency in the "lowest average" group is five.

Agencies appearing in the "highest average" group for both draft and final EISs include the FHWA, Federal Aviation Administration (FAA), National Park Service (NPS), Fish and Wildlife Service (FWS), Bureau of Reclamation (USBR), and the Coast Guard (USCG). Agencies appearing in the "lowest average" group for both draft and final EISs include the General Services Administration (GSA), Air Force (USAF), and the Federal Energy Regulatory Commission (FERC).

Table 7. 2012 Average Draft EIS Preparation Times in Calendar Days Arranged in Descending Order by Preparing Agency

Highest Average EIS-Preparation Times			Intermediate Average EIS-Preparation Times			Lowest Average EIS-Preparation Times		
Agency	**n**	**Mean**	**Agency**	**n**	**Mean**	**Agency**	**n**	**Mean**
NRCS	1	2418	USACE	23	1160	NOAA	9	631
FHWA	25	2120	***ALL***	***200***	***1087***	GSA	2	622
FAA	1	2073	NRC	4	932	FRA	3	590
NNSA	1	1948	FTA	4	909	NASA	1	534
NPS	10	1706	BLM	27	863	USAF	5	524
USBR	3	1517	BIA	2	841	VA	1	520
WAPA	2	1345	BPA	2	793	TVA	1	479
USCG	1	1306	USN	9	770	FERC	1	416
FWS	12	1231	USFS	43	755	RUS	1	401
VCT	1	1203	EPA	1	686	NIH	1	368
			BOEM	2	647	DOE	1	312

Key: n = number of draft EISs; VCT = Valles Caldera Trust

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Litigation Updates for 2012

Lucinda Low Swartz, Esq.[7]

Introduction

In 2012, the U.S. Courts of Appeal issued 28 decisions involving implementation of the NEPA by federal agencies. The 28 cases involved 13 different departments and agencies. The government prevailed in 24 of the 28 cases (86 percent). The U.S. Supreme Court issued no NEPA opinions in 2012; opinions from the U.S. District Courts were not reviewed. For comparison purposes, **Table 8** shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2012, by circuit. **Figure 6** is a map showing the states covered in each circuit court.

Table 8. Number of U.S. Courts of Appeal NEPA Cases, by year and by circuit

	U.S. Courts of Appeal Circuits												TOTAL
	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	
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***
TOTAL	**6**	**6**	**5**	**5**	**6**	**3**	**3**	**5**	**81**	**20**	**4**	**10**	**154**
	4%	4%	3%	3%	4%	2%	2%	3%	53%	13%	3%	6%	**100%**

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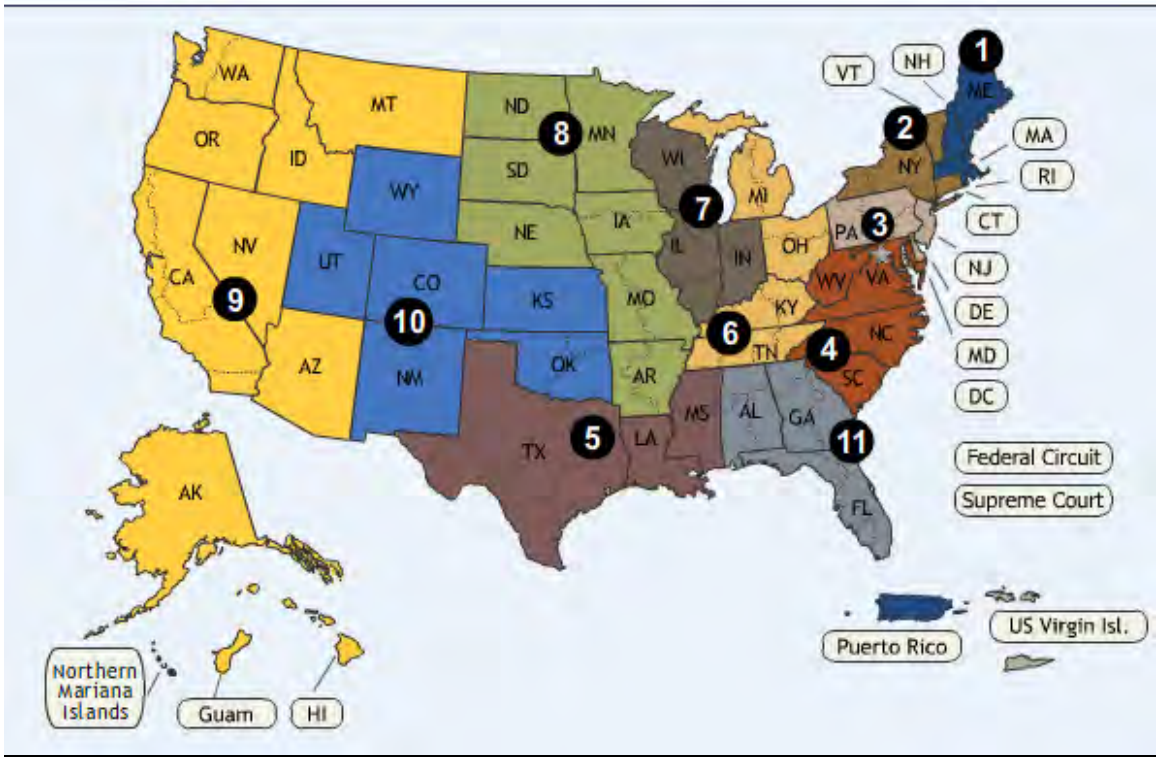

Figure 6. Map of U.S. Circuit Courts of Appeal

Statistics

The USFS again placed first as the agency involved in the largest number of NEPA cases, with six cases. In an extreme departure from past years, the agency prevailed in all of the cases brought against it.

The agencies of the Department of the Interior (DOI) also were involved in six NEPA cases. These agencies are: BLM, BOEM, USBR, and FWS; in a few cases, two DOI agencies were involved in the same case. FWS was involved in four of the six. Of the six cases, DOI agencies lost one.

The other NEPA cases involved:

- USDA/Natural Resources Conservation Service (NRCS) – one case (win)
- U.S. Department of Commerce (DOC)/NOAA/National Marine Fisheries Service (NMFS) – two cases (both wins)
- Department of Defense (DOD)/USACE – four cases (three wins, one loss)
- Department of Energy (DOE) – three cases (all wins)
- Department of Transportation (DOT)/FAA – one case (win)
- DOT/FHWA – three cases (two wins, one loss)

- FERC – one case (win)
- Nuclear Regulatory Commission (NRC) – one case (loss)

Overall, a few themes emerged from the 2012 NEPA cases:

- Scope of analysis/level of detail required
    - Webster v. U.S. Department of Agriculture, 685 F.3d 411 (4th Cir. 2012)
    - *Save the Peaks Coalition v. U.S. Forest Service*, 669 F.3d 1025 (9th Cir. 2012)
    - *Habitat Education Center, Inc. v. U.S. Forest Service*, 673 F.3d. 518 (7th Cir. 2012)
    - *Pacific Coast Federation v. Blank*, 693 F.3d. 1084 (9th Cir. 2012)
    - *Tri-Valley CAREs v. Department of Energy*, 671 F.3d 1113 (9th Cir. 2012)
    - *Citizens for Smart Growth v. Secretary of Transportation*, 669 F.3d 1203 (11th Cir. 2012)
    - Prairie Band Pottawatomie Nation v. Federal Highway Administration, 684 F.3d 1002 (10th Cir. 2012)
- Scientific integrity/dissenting scientific views
    - Save the Peaks Coalition v. U.S. Forest Service, 669 F.3d 1025 (9th Cir. 2012)
    - League of Wilderness Defenders v. U.S. Forest Service, 689 F.3d. 1060 (9th Cir. 2012)
    - Earth Island Institute v. U.S. Forest Service, 697 F.3d. 1010 (9th Cir. 2012)
    - Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers, 702 F.3d 1156 (10th Cir. 2012)
- Requirements for environmental assessments
    - Earth Island Institute v. U.S. Forest Service, 697 F.3d. 1010 (9th Cir. 2012)
    - Native Ecosystems Council v. Weldon, 697 F.3d. 1043 (9th Cir. 2012)
    - Defenders of Wildlife v. Bureau of Ocean Energy Management, 684 F.3d. 1242 (11th Cir. 2012)
    - Center for Biological Diversity v. Salazar, 695 F.3d 893 (9th Cir. 2012)
    - State of New York v. Nuclear Regulatory Commission, 681 F.3d 471 (D.C. Cir. 2012).

Each of these cases is summarized in **Appendix A**.

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NEPA Regulatory Update

Ronald Bass, JD, AICP[8]

The CEQ and EPA's Office of Federal Activities are the two federal entities with oversight responsibility for the implementation of the NEPA. One of CEQ's main roles is to provide leadership to other federal agencies regarding how to best implement NEPA. In this capacity, CEQ periodically issues informal guidance on NEPA issues and also has an ongoing program to promote NEPA improvement and streamlining within federal agencies.

EPA's main responsibility for NEPA oversight is to review all EISs prepared by federal agencies. To aid in reviewing EISs, EPA also periodically issues informal guidance advising federal agencies what they should include in NEPA documents and what EPA will look for in reviewing them, particularly relating to emerging environmental issues.

This article summarizes the key NEPA developments at CEQ and EPA during 2012.

CEQ Developments

1. CEQ & OMB *"Memorandum on Environmental Collaboration and Conflict Resolution"*

On September 7, 2012, the OMB and CEQ jointly issued a guidance document entitled "*Memorandum Environmental Collaboration and Conflict Resolution."* This new memorandum superseded an earlier OMB/CEQ joint memorandum issued in November 28, 2005, on *"Environmental Conflict Resolution*." It broadens the efforts called for under the 2005 memorandum by explicitly encouraging appropriate, effective, and upfront environmental collaboration to minimize or prevent conflict.

This new memorandum also directs departments and agencies to increase the use of third-party assisted environmental collaboration as well as environmental conflict resolution to resolve problems and conflicts that arise in the context of environmental, public lands, or natural resources issues, including matters related to energy, transportation, and water and land management.

The memorandum applies to all executive branch agencies as they carry out their responsibilities under NEPA as well as under other environmental and natural resource laws. The memorandum consists of five parts:

- **Preamble.** Part 1 of the memorandum is a preamble which states that " *To advance the successful integration of multiple-use conservation, and restoration of the environment and natural resources, Federal agencies need to foster collaboration to*

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build relationships, enhance public engagement, minimize or prevent conflicts, and manage and resolve conflicts when they arise."

- **Definition of "environmental collaboration and conflict resolution."** Part 2 of the memorandum defines "environmental collaboration and conflict resolution" (ECCR) as third-party assisted collaborative problem solving and conflict resolution in the context of environmental, public lands, or natural resources issues or conflict. According to the memorandum, ECCR also encompasses a range of assisted collaboration, negotiation, and facilitated processes that directly engage interested parties, federal agencies and decision makers.
- **Application to federal agencies.** Part 3 explains that the memorandum applies to all executive branch departments and agencies. Independent agencies are encouraged to use ECCR.
- **Key policies.** Part 4 sets forth several key policies to be followed by federal agencies. Specifically, agencies should:
    - Effectively explore opportunities for collaboration in their planning and decision-making processes to address different perspectives and avoid potential conflicts.
    - Identify and support upfront investments in collaborative processes and conflict resolution, and demonstrate those savings in performance and accountability measures.
    - Use existing mechanisms, strategies, and resources to aid departments and agencies in this effort and to build internal department and agency capacity.
    - Give careful consideration to the use of assisted negotiations including:
        - Using their own ECCR and Alternative Dispute Resolution (ADR) staffs
        - The U.S. Institute for Environmental Conflict Resolution
        - The U.S. Department of Justice (e.g., for litigation matters)
        - Other ECCR/ADR organizations, as appropriate.

To achieve these policies, the Director of OMB and Chair of CEQ will convene periodic leadership meetings of departments and agencies to advance progress. Additionally, the U.S. Institute for Environmental Conflict Resolution will convene quarterly interagency forums for senior department and agency staff to provide advice and guidance and to facilitate interagency exchange of ideas. Finally, agencies are required report at least every year to the Director of OMB and the Chair of CEQ on their use of ECCR for these purposes, and on the estimated cost savings and benefits.

- **Mechanisms and Strategies.** Part 5 sets forth mechanisms and strategies to increase the use of environmental collaboration and conflict resolution including:
    - Integrating ECCR objectives and focusing on up-front collaboration as a key principle in agency mission statements and strategic plans

- Developing internal ECCR guidance
- Coordinating with other departments and agencies to address emerging areas of conflict and cross-cutting challenges
- Strategizing with other departments and agencies on how to assess the costs and benefits of ECCR
- Documenting the savings and benefits of ECCR.

The memorandum is available on the NEPA.gov website at:

http://ceq.hss.doe.gov/ceq_regulations/OMB_CEQ_Env_Collab_Conflict_Resolution_20120907.pdf

2. Guidance on *"Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act"*

On March 7, 2012, CEQ issued final guidance that seeks to improve the efficiency and timeliness of environmental reviews conducted by federal agencies under NEPA. The guidance is primarily a refresher on some of the ways that NEPA regulations already encourage agencies to efficiently conduct their environmental reviews and provides clarity for agencies that were unsure of how those regulatory provisions applied to NEPA reviews. The guidance addresses nine topics:

- Making NEPA documents concise and straightforward
- Integrating NEPA into early project planning efforts
- Conducing early and well-defined scoping
- Improving inter-governmental coordination with state, local, and tribal environmental reviews
- Coordinating NEPA with reviews and documents prepared under other applicable laws
- Adopting other agencies' NEPA documents
- Use of "incorporation by reference"
- Expediting responses to comments
- Establishing clear time lines for NEPA reviews.

For each of these topics, the draft guidance makes specific recommendations for improving NEPA implementation. Perhaps the most important message in the new guidance is that all of these well-established tools for streamlining NEPA are not limited to preparing EISs (which is how most of them appear in the CEQ NEPA regulations), but rather are equally applicable to the preparation of EAs.

The guidance can be found on the CEQ website at:

http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/efficiencies-guidance

3. NEPA Pilot Projects

Note: NAEP reported about this program in last year's annual report. Because it is an ongoing program and some were selected in 2012, we are including it to update you on the status of the pilots.

As part of CEQ's efforts to modernize and reinvigorate federal agency implementation of NEPA through innovation, public engagement, and transparency, CEQ issued a solicitation to members of the public and federal agencies on March 17, 2011, inviting them to nominate projects employing innovative approaches to completing environmental reviews more efficiently and effectively. The nominations period for NEPA pilot projects ended on June 15, 2011, and CEQ has selected five pilots. CEQ is working with the submitters and the relevant federal agencies to implement the pilots, and to identify and replicate efficiencies and other time- and cost-saving approaches learned from them.

CEQ sought nominations of projects that propose improvements to any aspect of the NEPA process that can be replicated to increase efficiency of this process across government, including:

- Simplifying NEPA implementation practices
- Reducing the time and cost involved in preparing NEPA reviews
- Utilizing information technology to improve the efficiency of NEPA implementation
- Improving the effectiveness of public engagement.

The following five pilot projects have been selected to date:

- **National Park Service/U.S. Forest Service IT Tools.** On August 31, 2011, CEQ announced the selection of the first NEPA pilot project. CEQ identified two information technology (IT) tools developed by the USFS and the NPS that have significant potential to reduce costs and save time in federal NEPA implementation. CEQ convened a NEPA IT Working Group to ensure that broader adoption of IT tools such as NPS's Planning, Environment, and Public Comment (PEPC) and the USFS's Electronic Modernization of NEPA (eMNEPA) websites will ease the burden of communication and collaboration among government agencies. The IT Working Group promoted the availability and adoption of these NEPA IT tools, providing federal agencies with the template for an IT tool that effectively and efficiently tracks, manages, and reports on the NEPA process.
- **Multiple Agencies - EA Lessons Learned/Best Practices Principles.** On October 19, 2011, CEQ announced the selection of a pilot project to gather lessons-learned

from agencies that have significant experience preparing EAs and create best practice principles to facilitate more efficient and cost-effective NEPA environmental reviews. CEQ has now received the draft report on the survey results and is preparing the proposed best practice principles for review and comment.

- **EPA NEPA Assist.** For the third pilot, CEQ selected an EPA project – NEPAssist – designed to make an IT tool more user-friendly and available to the public. EPA announced the public NEPAssist site on April 26, 2012. This successful NEPA pilot project has expanded the number of data sets and geospatial layers available to NEPA practitioners and made the tool available to the public (www.epa.gov/oecaerth/nepa/nepassist-mapping.html).

- **U.S. Department of Transportation.** On January 13, 2012, CEQ and the U.S. Department of Transportation (DOT) announced the selection of a fourth NEPA pilot to implement an innovative, efficient NEPA review process for high-speed passenger rail service in the Northeast Corridor. Through this pilot project, CEQ and DOT have engaged federal, state and local governments and the public in the environmental review process earlier to set benchmarks that maintain rigorous environmental protections and save time and costs by avoiding conflicts and delays in the later steps of rail-project development. CEQ and the Federal Rail Administration (FRA) worked with the federal resource and regulatory agencies to develop a Statement of Principles that provide an alternative to developing a Memorandum of Understanding (MOU) to memorialize the roles and responsibilities of the agencies with equities in the selection of the rail corridor and subsequent route and station determinations. The Statement of Principles facilitates the early collaboration while being less resource (and time) intensive in its development than an MOU. A report on the lessons learned and best practices for inter- and intra-governmental coordination and collaboration is being prepared.

- **U.S. Forest Service – Range Management Approaches**. On February 9, 2012, CEQ and the USFS announced the selection of a fifth NEPA pilot project. The final pilot, "Approaches to Restoration Management," is evaluating and comparing the effectiveness of USFS environmental reviews for two forest restoration projects – a large, landscape scale project and a small watershed focused project – and compare and contrast them to identify best practices that can be applied to environmental reviews for future restoration projects. The collaborative efforts and best practices related to this pilot will be presented in webinars for federal planners and NEPA practitioners. The first webinar was completed in July 2012 and the next will follow the collaborative development of an adaptive management strategy in a draft EIS for the Four Forest Restoration Initiative.

CEQ intends to share the lessons learned from these pilot projects widely throughout the NEPA community. Information about the pilot projects program can be found on the CEQ website at:

http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/nepa-pilot-project

EPA Developments

1. "e-NEPA" Electronic Filing of EIS

Pursuant to Section 309 of the Clean Air Act, EPA is charged with the responsibility of reviewing all EISs prepared by federal agencies. For years, federal agencies were required to submit multiple hard copies of the documents to EPA. Eventually, EPA allowed the submittal of EISs on Compact Discs (CDs); however, on August 24, 2012, EPA amended its EIS Filing System Guidance to require federal agencies to file EISs electronically. Under this new system, after October 1, 2012, EPA no longer accepts paper copies or CDs of EISs for filing purposes. Rather, EPA has created an on-line, electronic filing system, known as "e-NEPA" which meets EPA's requirements for EIS filing. Now, all EIS submissions must be made through e-NEPA.

Use of e-NEPA for electronic filing of EISs does not change any of the requirements for distribution of EISs to other federal agencies for review, including EPA Regional Offices, or the general public. EPA Regional Offices generally prefer at least one paper copy of each EIS; however, federal agencies should contact the appropriate EPA Regional Office for more information about their specific filing requirements.

As in the past, an EIS may be filed no earlier than they are transmitted to commenting agencies and made available to the public. This will assure that the EIS is received by all interested parties by the time the EPA NOA appears in the *Federal Register*, and therefore, allows for the full minimum review periods prescribed in the CEQ NEPA Regulations (40 CFR 1506.10.)

Once received by EPA, each EIS is given an official filing date and checked for completeness and compliance with the content requirements of the CEQ NEPA Regulations (40 CFR 1502.10). If the EIS is not complete, EPA will contact the lead agency to obtain the missing information or to resolve any problems prior to publication of the NOA in the *Federal Register*.

Agencies often publish a date by which all comments on an EIS are to be received. Agencies should ensure that the date they use is based on the date of publication of the NOA in the *Federal Register*. If the published date gives reviewers less than the minimum review time computed by EPA, then EPA will send the agency contact a letter explaining how the review period is calculated and the correct date by which comments are due back to the lead agency. This letter also encourages agencies to notify all reviewers and interested parties of the corrected review periods.

Under the new guidance EPA will prepare a weekly report of all EISs filed during the preceding week for publication in the *Federal Register*. At the time EPA sends its weekly report to the *Federal Register*, it will also send the report to CEQ. For each document, the report will include the EIS "accession" number (created by EPA), EIS status (draft, final, supplemental), date filed with EPA, the agency or bureau that filed the EIS, the state and

county of the action that prompted the EIS, the title of the EIS, the date comments are due and the agency contact.

Further information about "e-NEPA", including how agencies can enroll and submit documents, can be found on EPA's website at:

http://www.epa.gov/compliance/nepa/submiteis/index.html

2. "Memorandum Addressing Children's Health through Reviews Conducted Pursuant to the National Environmental Policy Act and Section 309 of the Clean Air Act"

On August 14, 2012, the EPA Office of Federal Activities and the Office of Children's Health Protection jointly issued a memorandum dealing with how EPA's NEPA reviewers should evaluate EISs to ensure that they address children's health issues. The memorandum implements Executive Order 13045 "*Protection of Children from Environmental Health Risks and Safety Risks* (April 21, 1997) which directs federal agencies to assign high priority to identifying and assessing environmental health and safety risks that may disproportionately affect children.

The memorandum recognizes that children are more susceptible than adults to many environmental factors that are commonly encountered in EIS reviews, such as exposure to mobile source air pollution, particulate matter from construction or diesel emissions, and lead and other heavy metals present in construction and demolition debris and mining waste. (While not specifically mentioned in memorandum, children are often referred to as "sensitive receptors" by many NEPA practitioners.)

Therefore, the memorandum recommends that an analysis of potential impacts on children be included in a draft EISs if disproportionate impacts on children caused by the proposed action are reasonably foreseeable. Childhood exposures at each lifestage, including those experienced via pregnant and nursing women, are relevant and should be considered when addressing health and safety risks for children.

The memorandum includes a template for EPA scoping comments for children's health issues and a listing of sample federal projects that might warrant children's health review. This template recommends that, when relevant, that a draft EIS should assess children's potential exposures and susceptibilities to the pollutants of concern. According to the memo, the analysis in a NEPA document should include the following:

- **Identification of the pollutants and sources of concern** - Consider whether the pollutants and sources of concern pose a particular hazard to children's health (for example, lead or other heavy metals, or air pollution from near roadway exposures.)
- **Exposure Assessment** - Describe the relevant demographics of affected neighborhoods, populations, and/or communities and focus exposure assessments on children who are likely to be present in areas such as schools, recreation areas,

childcare centers, parks, and residential areas that are in close proximity to the proposed project.

- **Baseline health conditions** - Obtain and discuss relevant, publicly available health data/records for the populations, neighborhoods, and/or communities of concern.
- **Impact Evaluation** – Evaluate exposures and impacts to children, including:
  - Air quality impacts from mobile source air pollutants;
  - Air quality impacts from non-mobile source emissions;
  - Respiratory impacts/Asthma;
  - Noise impacts;
  - Impacts affecting obesity factors (e.g., walk ability, bikability, and opportunities for exercise, etc.);
  - Diet/ingestion factors (e.g., impacts to food and water supplies); and
  - Impacts from other chemical or physical exposures (e.g. toxics, pesticides, etc.).

The memorandum also includes a list of project types that are likely to affect children's health such as transportation projects, power plants, oil and gas development, airports and others activities typically resulting in air pollution, water pollution, excessive noise, or toxic contamination. Projects with particularly extended periods of construction or long life span are especially noted.

The full text of the memorandum can be found at:

http://www.epa.gov/compliance/resources/policies/nepa/NEPA-Children%27s-Health-Memo-August-2012.pdf

As the above summaries demonstrate, CEQ and EPA continue to play active roles in overseeing NEPA's implementation and ensuring that the law is carried out in an effective and efficient manner.

Commentary 1 — Moving Ahead for Progress in the 21st Century (MAP-21): Moving the Bar from Environmental Streamlining to Accelerating Project Delivery

Nancy T. Skinner, AICP, NAEP Transportation Working Group[9]

Introduction

2012 marked the year that Congress finally approved a reauthorization of the transportation act. On July 6, 2012, President Obama signed into law the new transportation act, **Moving Ahead for Progress in the 21st Century (MAP-21)**, replacing the 2005 Safe, Accountable, Flexible Efficient Transportation Equity Act – a Legacy for Users (SAFETEA-LU), which had been extended nine times since its expiration in 2009. The new two-year law represented a compromise among various transportation advocates to achieve the timely delivery of transportation projects; a major focus of the new act is the environmental review process, perceived by many as overly burdensome and often protracted.

The Act explicitly declares that it is in the national interest to expedite project delivery, and directs each federal agency to cooperate with the U.S. Department of Transportation (USDOT) to reduce the length of environmental reviews. Subtitle C of the Act, Accelerating Project Delivery, contains 23 provisions (Sections (1301 through 1323). These provisions call for earlier coordination, greater linkage between the planning and environmental review processes, programmatic approaches where possible, consolidating final EISs and Records of Decision (ROD), and completing EISs and related permits within four years of the EIS NOI. MAP-21 also establishes a framework for setting deadlines for decision-making in the environmental review process, with a process for issue resolution and referral, and penalties for federal agencies that fail to make a decision. The law also expands authority for use of categorical exclusions (CEs) to a variety of other types of projects, including multi-modal projects, projects to repair roads damaged in a declared disaster, projects within existing operational rights-of-way, and projects receiving limited federal assistance.

Many of the provisions were effective as of the new federal fiscal year (October 1, 2012) since they were established in the statute, while others require the FHWA to issue new guidance or in some cases new regulations.

Previous Focus on Environmental Streamlining

Environmental streamlining is not a new concept emerging from MAP-21; the concept goes back to Transportation Equity Act for the 21st Century (TEA-21) passed in 1998 and then renewed in 2005 in SAFETEA-LU. The basis of this emphasis in the recent transportation acts has been the criticism that the environmental review process required by NEPA has been a major cause of

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delays and increased costs for highway projects. Evidence has shown that on average completing an environmental review took considerably longer in the 1990s and 2000s than in the 1970s when NEPA was first implemented.

TEA-21 Environmental Streamlining Provisions. TEA-21's provisions were intended to address concerns relating to delays in implementing projects, unnecessary duplication of effort, and added costs that are often associated with the conventional process for reviewing and approving surface transportation projects. Section 1309 of TEA-21 required FHWA to pursue streamlining compliance procedures, to expedite the project development process, including environmental reviews, while not compromising environmental protection. Key provisions of Section 1309 included:

- Establishing a coordinated environmental review process by which USDOT would work with other federal agencies to assure that major highway and transit projects are advanced according to cooperatively determined time frames.
- Emphasizing the use of concurrent, rather than sequential reviews to save time.
- Establishing a dispute resolution process between USDOT and other federal agencies.
- Allowing states the option of including their environmental reviews in the coordinated environmental review process.
- Authorizing the USDOT to approve state DOT requests to reimburse federal agencies for expenses associated with meeting expedited time frames.

SAFETEA-LU Environmental Streamlining Requirements. SAFETEA-LU also contained requirements for environmental stewardship and environmental streamlining. These provisions included:

- **Section 6002 - Environmental review process.** This section created a new environmental review process for major highways, transit, and multimodal projects. It added a new category of "participating agencies" and required a plan for coordinating public and agency participation. It also required that state DOTs provide an opportunity for public and interagency involvement in defining the project's purpose and need and range of alternatives. This section established the option of setting a 180-day statute of limitations for lawsuits challenging federal agency approvals.
- **Sections 6004 and 6010 - State assumption of responsibilities**. This allowed each state the option of assuming responsibility for CEs, with FHWA in a programmatic monitoring role. The section also authorized the establishment of a new categorical exclusion for activities supporting the deployment of intelligent transportation infrastructure and systems.
- **Section 6005 – Project Delivery Pilot Program.** This allowed five states to apply to USDOT to assume all USDOT environmental responsibilities for highway projects under NEPA and other environmental laws (excluding the Clean Air Act and transportation planning requirements). To date, only California has assumed this delegation or assignment.

- **Section 6007 and 6010 – Section 4(f) De Minimis.** The act created a flexibility to allow an exemption from 4(f) requirements if a program or project will have a *de minimis* impact on the area. The act also exempted the Interstate System from being treated as an historic resource under Section 4(f), unless the USDOT determines that individual elements possess national or exceptional historic significance and should receive protection.

MAP-21 Environmental Streamlining Provisions

Despite the provisions of the predecessor laws, when Congress finally enacted MAP-21, the continued concern over the time it takes to complete environmental reviews was evident. The new legislation contains 23 provisions focused on environmental streamlining. **Section 1301, Declaration of Policy and Project Delivery Initiative**, declared "*…it is in the national interest to expedite delivery of surface transportation projects by substantially reducing the average length of the environmental review process,"* which is the first time this intent has been articulated in a transportation act.

Other key provisions to accelerate project delivery are summarized as follows. FHWA issued Frequent Asked Questions (FAQs) on all of these sections on September 25, 2012; the FAQs can be found at http://www.fhwa.dot.gov/map21/qandas/.

Section 1302 – Advanced Acquisition of Real Property Interests. This section substantially broadened the flexibility for states to acquire real property prior to completing the NEPA process for the planned project. States must certify that eight conditions are met in order to use federal funds to carry out early acquisition. The new provisions were effective on October 1, 2012. No rulemaking is required, although FHWA may issue a rulemaking or guidance to revise its right-of-way regulations (23 CFR 710)

Section 1303 – Letting of Contracts. This section, not directly applicable to environmental reviews, allows flexibility in the letting of contracts prior to completion of NEPA. Rulemaking will be necessary for this section to be implemented.

Section 1304 – Innovative Project Delivery Methods. Again, this section does not directly affect environmental reviews but may accelerate project delivery. It allows 100 percent federal share if innovative project delivery methods and technologies are used. To date, no guidance or rulemaking has been issued.

Sections 1305 through 1309 amend SAFETEA-LU Section 6002 environmental review process.

Section 1305 – Efficient Environmental Reviews for Project Decisionmaking. This meaty section contains a bevy of provisions, including: (a) allows US DOT to use programmatic approaches for environmental reviews; (b) allows US DOT to designate a single DOT modal agency as lead agency for environmental review of projects requiring approval of more than one modal administration; and (c) requires concurrence of participating agencies for the project schedule if a schedule is included in the coordination plan. The requirement for programmatic agreements will require rulemaking. The requirement for concurrence of participating agencies for schedules has a potential to slow down rather than accelerate environmental reviews.

Section 1306 – Accelerated Decisionmaking. Under this section, within 30 days after a draft EIS is issued, US DOT may convene a meeting with resource agencies and others to ensure all are on schedule to meet decision deadlines for the project. This section strengthens the previously established issue resolution and elevation process in the event of disputes. It also imposes financial penalties ($10K-20K per week) on agencies that fail to meet specified deadlines for decisions under NEPA and under other laws, but allows US DOT to waive the penalties under certain conditions. This provision applies to other environmental laws besides NEPA, such as wetland permits and ESA determinations. While no rulemaking is required, FHWA may issue a rulemaking to revise 23 CFR 771 to conform to the revised language. An update to the Section 6002 guidance is expected.

Section 1307 – Assistance to Affected Federal and State Agencies. This section amends prior law, which permits state DOTs to use federal funds to pay for federal and state resource agency staff and other costs to expedite environmental reviews and permits. This amendment requires a Memorandum of Understanding (MOU) be established between the state DOT and the resource agency to specify priorities and projects covered by the funding.

Section 1308 – Limitation on Claims. This shortens the time period in which lawsuits can be filed after a final EIS is issued, from 180 days to 150 days. The section became effective October 1, 2012, although FHWA is expected to amend its regulations to reflect this change.

Section 1309 – Accelerating Completion of Complex Projects within Four Years. This applies to complex projects (i.e., EISs that have been underway for two years from date of NOI without a ROD). For these EISs, USDOT must provide additional technical assistance if requested and establish a schedule for completing permits, approvals, etc., within four years of the NOI. The schedule must have concurrence of the Council on Environmental Quality (CEQ) and participating agencies. Updated guidance and rulemaking may be forthcoming.

Section 1310 – Integration of Planning and Environmental Review. This provision reinforces the ongoing emphasis on Planning and Environmental Linkages (PEL), to use planning products in NEPA, without having to revisit them in the NEPA stage. The provision lists five decisions and eight analyses that can be adopted from planning into an environmental document, so long as the 10 conditions spelled out in statute are met. The requirement is fairly rigid in that participating agencies, the lead agency, and project sponsors must all concur that these conditions have been met. FHWA may issue a notice of rulemaking to address this provision.

Section 1311 – Development of Programmatic Mitigation Plans. This is a new area to be formalized in statute. State DOTs or Metropolitan Planning Organizations (MPO) may develop programmatic mitigation plans. FHWA may issue a notice of rulemaking to address this provision.

Section 1312 – State Assumption of Responsibility for Categorical Exclusions. This provision amends the assignment program of Section 6004 of SAFETEA-LU, by allowing US

DOT or the state to terminate the state's assumption of responsibility for CEs. FHWA is developing a revised agreement template based on the changes in this section.

Section 1313 – Surface Transportation Project Delivery Program. This provision also amends the 5-state pilot assignment program of SAFETEA-LU, by making it permanent and extending to all states the opportunity to assume responsibility for the NEPA process. It also expands coverage from highways to include rail, transit, and/or multi-modal projects. This provision has the potential to be a time-saver by eliminating FHWA reviews, but it does not eliminate the need for coordination with federal environmental agencies during NEPA. It also increases the state's exposure to litigation. This will require rulemaking, which is under development as of March 2013.

Section 1314 – Application of Categorical Exclusions of Multimodal Projects. This amends Title 49 to allow a DOT modal agency acting as lead authority for a multimodal project to apply a CE using the authority of another DOT modal agency that is also participating in the project, subject to certain conditions specified in the statutory language.

Section 1315 – Categorical Exclusions in Emergencies. This provision requires US DOT to initiate a rulemaking to treat as CEs any repair or reconstruction activity for a road, bridge, or highway damaged by an emergency declared by the Governor or President, if the activity is "in the same location, with the same capacity, dimensions, and design as the original road, highway or bridge as before…" On February 19, 2013, FHWA issued the Final Rule on Emergency CEs, which expanded the emergency CE to include upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction (i.e., new flood risk information and fish passage concerns).

Section 1316 – Categorical Exclusions for Projects with the Right-of-Way. This provision requires the US DOT Secretary within 180 days after enactment of MAP-21 to designate as a CE any project in existing right of way. FHWA/FTA issued a notice of proposed rulemaking to address this provision on February 28, 2013, with comments due by April 29, 2013.

Section 1317 – Categorical Exclusions for Projects with Limited Federal Assistance. This provision expands CEs to include any project that receives less than $5 million in federal funding; and any project that is less than $30 million in total cost, with less than 15 percent federal share. FHWA/FTA issued a notice of proposed rulemaking to address this provision on February 28, 2013, with comments due by April 29, 2013.

Section 1318 – Programmatic Agreements and Additional Categorical Exclusion. Under this provision, US DOT must publish rulemaking to propose new CEs, and the rulemaking must be based on US DOT review of CEs used since 2005 and a solicitation of new CEs from state DOTs, MPOs, transit agencies, and others. In addition, US DOT must propose rulemaking to move from subsection (d) to subsection (c) certain CE activities in 771.117 of the CFR (highway 4R projects, shoulders, auxiliary lanes, highway safety or traffic operational improvements, and bridge 3R projects, and railroad grade crossing replacements). Further, DOT must seek

opportunities for programmatic agreements with states that establish efficient administrative procedures for environmental reviews.

To address the requirement to propose new CEs, in September 2012, the US DOT Secretary sent a questionnaire to state DOTs, transit authorities, MPOs, local public agencies, and federally-recognized Tribes asking for actions they request for consideration as new CEs through rulemaking. The results of the survey and review were published in November 2012. FHWA is developing a proposed rule addressing new CEs and move first three (d) list CEs to (c) list in 23 CFR 771.117.

Section 1319 – Accelerated Decisionmaking in Environmental Reviews. By Section 1319(a), the use of an errata sheet is appropriate for the final EIS when comments received on a draft EIS are minor, and the lead agency's responses to those comments are limited to factual corrections or explanations of why the comments do not warrant further response. According to the Interim Joint Guidance issued by FHWA and FTA on January 14, 2013, when this provision is applied, the errata sheets and the information required in a final EIS are included in an attachment to the draft EIS; and the document must undergo legal sufficiency review. Section 1319(b) directs the lead agency, to the maximum extent practicable, to develop a single document that consists of a final EIS and ROD, unless there are substantial changes or there are significant new circumstances or information changes.

Sections 1320 – 1323. The following four sections address early coordination and require various studies:

Section 1320, Memoranda of Agency Agreements for Early Coordination. This section adds reinforcement to the value of early coordination as a key to environmental streamlining. This section (a) requires US DOT and federal resource agencies to provide technical assistance, "to the extent practicable and appropriate," if requested by a state or MPO; and (b) allows the lead agency to establish MOAs with other agencies, if requested by a state or MPO. No specific guidance or rulemaking is required.

Section 1321, Environmental Procedures Initiative. This section establishes an initiative to review and develop consistent procedures for environmental permitting and procurement requirements" under Title 23 (highways) and Title 49/Chapter 53 (transit).

Section 1322, Review of State Environmental Reviews and Approvals for the Purpose of Eliminating Duplication of Environmental Reviews. This requires a review and evaluation by the General Accounting Office to determine which states have state environmental laws and protections that are compatible with federal requirements, and determine the frequency and cost of duplicative environmental reviews at the state and federal levels.

Section 1323,Review of Federal Project and Program Delivery. This requires US DOT to compare time required for environmental reviews in three different periods of time (1, 2, and 5 years after July 6, 2012), for CEs, EAs, and EISs, and to report on it to Congress.

Summary

The reauthorization of the transportation act has a major focus of accelerating project delivery and much of that focus targets streamlining of the environmental review process. Cumulatively *Subtitle C: Accelerating Project Delivery* appears to be an impressive menu of solutions to correct the perceived problems of the current environmental review process. Several provisions have a substantial potential to streamline environmental reviews, such as Section 1319 that permits a project's final EIS and ROD to be combined, Section 1316 that creates a new CE for projects in operational right-of-way, and Section 1313 that broadens NEPA delegation to all states and transit, rail and/or multimodal projects. Also, MAP-21 allows states more leeway in early acquisition of real property prior to completion of NEPA, a welcomed flexibility by state DOTs. The effect of other provisions is more subtle, such as the reduction of the number of days in the statute of limitations on claims (from 180 to 150 days) as per Section 1308. And there are some provisions that have the potential to add more delay, such as Section 1305, which requires concurrence of participating agencies for the project schedule if a schedule is included in the coordination plan.

MAP-21 is a two-year act, extending through the end of Fiscal Year 2014, compared with the previous four year SAFETEA-LU legislation. Many of the provisions that required no rulemaking were effective October 1, 2012; this included Section 1302 regarding advanced acquisition and Section 1308, Limitations on Claims. Other provisions, however, will not be effective until FHWA or FTA develops rulemaking, such as Sections 1316 and 1317 regarding CEs for projects within the operational right-of-way or those with limited federal assistance. With the number of provisions that must be addressed by rulemaking and/or guidance, it may take the entire two-year period for FHWA to fully implement the accelerating project delivery provisions.

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Commentary 2 — Recent Congressional Legislation Regarding NEPA

Dinah Bear[10]

Introduction

The 112th Congressional session saw the introduction of at least 61pieces of legislation aimed at altering in some way the process of implementing the National Environmental Policy Act (NEPA) for a particular class of proposed actions or in some instances, amending NEPA itself. Of these bills, one set of provisions in the transportation bill entitled "Moving Ahead for Progress in the 21st Century" (MAP-21) passed and was signed into law. Some of the other provisions are likely to be reintroduced in the same or modified form in the current session. The analysis below identifies the major themes, subject matters and mechanisms of the bills, describes in some detail the NEPA provisions in the transportation bill that have become law, and identifies some of the upcoming activity in this Congressional session.

Bills in the 112th Congress

Out of the 61bills introduced in the 112th session of Congress, 24 of the bills focused exclusively on oil and gas leasing activities. Nine bills targeted NEPA for national forest projects. Six bills focused on alternative energy and four bills on transportation projects. The remainder were rather evenly divided between a variety of classes of actions: border security, water projects, infrastructure, hunting in wilderness and national wildlife refuges, proposed actions on tribal lands, sea lion take, grazing, farm bill, mining, general jobs issues, litigation and attorneys' fees, climate change, and in a couple of cases, all proposed projects.

A sense of the basic goals of the bills can quickly be gleaned from their titles. Speed, certainty, jobs and infrastructure are major themes. Thus, there was the "FASTER Act" (The Facilitating American Security Through Energy Resources Act), H.R. 2375 and the "RAPID Act" (The Responsibly and Professionally Invigorating Development Act of 2012), H.R. 4377, along with the "Providing Leasing Certainty for American Energy Act of 2012 (H.R. 4382). Streamlining Permitting of American Energy Act of 2012, H.R. 4383, and the "No More Excuses Energy Act of 2011," H.R. 1023. Other telling titles included, "The Roads to Jobs Act," H.R. 1049, the "Putting the Gulf of Mexico Back to Work Act," H.R. 1229, and the "Domestic Jobs, Domestic Energy and Deficit Reduction Act of 2011," S. 706 and H.R. 1287.

A few of the bills simply provided that NEPA did not apply to a particular type of action (for example, H.R. 946, the "Endangered Salmon Predation Act" stated that NEPA would not apply to permits to kill California sea lions for a period of three years after passage of the Act.) More typically, a bill provided that certain types of proposed actions would be "categorically excluded" under NEPA. For example, "A Roadmap for America's Energy Future," H.R. 909, would have included "all preliminary activities on outer Continental Shelf tracts" for oil and gas leasing as a "categorical exclusion." Importantly, however, in this bill and several others, while the term "categorical exclusion" is used, its meaning is significantly different than how that term

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is defined in the CEQ regulations implementing the procedural provisions of NEPA. In CEQ's regulations, CEs are an administrative mechanism designed to relieve an agency from the requirement to document the environmental effects of a proposed action, but they are not an exemption from the need for such an analysis in all circumstances. Specifically, the regulations require that agency NEPA procedures "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4. In H.R. 909 and several other bills, the provision would explicitly remove any requirement "to analyze whether any exceptions to a categorical exclusion apply for activities under the authority of this Act." H.R. 909, Section 107.

Another frequent focus of efforts to shorten the NEPA process was the proposed elimination of the statutory and regulatory requirement to analyze reasonable alternatives to a proposed action, characterized as the "heart of the environmental impact statement" in CEQ's NEPA regulations. 40 C.F.R. § 1502.14. Typically, these bills limit alternatives to either one action alternative and the "no action" alternative (for example, H.R. 2170, the "Cutting Federal Red Tape to Facilitate Renewable Energy Act") or limit the action alternatives to two alternatives and eliminate the "no action" alternative (for example, H.R. 3407, the Alaskan Energy for American Jobs Act, that would also have limited public comment to 20 days and allow consideration of comments only in regards to the preferred alternative).

A number of the bills focusing on oil and gas development introduced in the last session were responding to the Deepwater Horizon accident and its aftermath in the Gulf of Mexico. Generally, the direction of such legislation was to require the executive branch to rely on prior NEPA documentation for new energy development in the Gulf of Mexico or to expedite such energy development by eliminating key elements of the NEPA process. Some bills, such as H.R. 1230 ("Restarting American Offshore Leasing Now Act") would have deemed such prior analyses as adequate for purposes of future sales and other bills would require certain oil and gas sales to be offered under expedited timeframes (for example, H.R. 3410, the Energy Security and Transportation Jobs Act and H.R. 6082, the Congressional Replacement of President Obama's Energy-Restricting and Job-Limiting Offshore Drilling Plan).

Some bills sought to displace the responsibility of federal agencies for compliance with all or parts of the NEPA process by shifting responsibility to other actors. The Reducing Environmental Barriers to Unified Infrastructure and Land Development Act of 2011 (H.R. 2538 the "REBUILD Act") would authorize federal agencies to shift responsibilities to state governments. On the other hand, H.R. 4377, the "RAPID Act," that would have amended NEPA through the Administrative Procedures Act, would have authorized federal agencies to allow applicants, including private applicants, to prepare their own environmental impact statements. Finally, some bills explicitly linked NEPA to unemployment or jobs. For example, S. 1720, the Jobs Through Growth Act, not only required that the EIS process for all projects be completed within 270 days but, if the national unemployment rate is five percent or more, the lead agency would be instructed to use the most expeditious means authorized under NEPA to conduct the review, presumably a categorical exclusion.

NEPA Provisions in the Transportation Authorization Law

Provisions intended to streamline NEPA compliance in the transportation bill mirrored some of the types of provisions identified above and included some provisions (see also previous article on MAP-21). Signed into law on July 6, 2012, the transportation bill (Public Law 112-141) includes the following provisions related to NEPA:

Section 1303, Letting of Contracts. Prior to the completion of the NEPA process, a contracting agency may issue requests for proposals, proceed with the award of a contract for preconstruction services, and issue notices to proceed with preliminary design work at any level of detail to the extent that those actions do not limit the range of reasonable alternatives. All contracts must carry a termination provision in the event that the "no build" alternative is selected.

Section 1305, Efficient Environmental Reviews for Project Decisionmaking. Programmatic Compliance – Directs the initiation of a rulemaking, with 60 days for public review and comment, for the use of programmatic approaches to conduct environmental reviews.

Section 1306, Accelerated Decisionmaking. Establishes a dispute resolution process involving applicants, agencies, governors, cabinet secretaries, CEQ and ultimately the President.

Establishes a system of financial penalties to agencies with jurisdiction by law over a project that could result in fines of either $10,000 or $20,000 a week if agencies do not meet a schedule for the NEPA process. The fines could amount to up to 7% of that office's budget, and no reprogramming is allowed.

Section 1308, Limitation on Claims. This provision shortens the statute of limitations to file a lawsuit to 150 days. For context, the last transportation bill shortened the period from the six-year limit applicable to most NEPA claims in other agencies to 180 days.

Section 1309, Accelerating Completion of Complex Projects within Four Years. This section requires all reviews for "complex projects" to be completed within four years. "Complex projects" are those for which the NEPA process has been ongoing for two years without issuance of a record of decision.

Section 1313, State Assumption of NEPA Responsibilities. This section allows states to assume responsibility for all NEPA reviews and to use federal funds to pay for attorneys' fees. The prior transportation act authorized this for five states.

Sections 1315, 1316, 1317 and 1318, Legislative Categorical Exclusions. These are all new legislated categorical exclusions along with a provision that requires the Department of Transportation to solicit new ideas for additional categorical exclusions.

Section 1319, Accelerated Decisionmaking in Environmental Reviews. This provision provides for the preparation of a final EIS by attaching errata sheets to the draft EIS under certain conditions and requires, to the maximum extent possible and unless certain conditions exist, that the final EIS and the ROD be combined into one document.

The 113th Congress

There is every reason to think that the 113th Congress, at least in the House of Representatives, will focus even more on NEPA than its predecessor. The Chairman of the House Committee on Natural Resources, Doc Hastings (R-Wa.) announced on December 20, 2012, that the Committee was creating a new subcommittee, "Public Lands and Environmental Regulation" that would have jurisdiction over NEPA and all public lands. The press release announcing this development included the following statement, "The creation of this new Subcommittee builds on the reforms started at the beginning of this Congress when we established the Indian and Alaska Native Affairs Subcommittee – another issue that was previously handled at the Full Committee," said Chairman Hastings. "Moving jurisdiction of NEPA to a specific Subcommittee will allow us to better review and address how this law is being implemented and the impacts its bureaucratic red-tape has on jobs, our economy and access to public lands and resources." The Committee, joined by other House committee chairpersons, has since followed up with a letter to the U.S. Government Accountability Office (GAO) posing a number of questions regarding NEPA compliance over the past five years within the Departments of Defense, Interior, Transportation, Energy, and Agriculture (Forest Service). While no hearings have yet been announced, hearings in Washington, D.C. and possibly field hearings are anticipated.

No systematic review of NEPA has been announced in the Senate, but at least two proposals have been noted relating to NEPA. Senator Barrasso (R-Wy.) has recently reintroduced the "Grazing Improvement Act," S. 258, that would limit review required under NEPA by creating several new classes of categorical exclusions. And Senator Lisa Murkowski (R-Alaska) included in a list of principles for energy development an interest in providing mandatory timelines for completion of the NEPA process, reducing the statute of limitations for NEPA challenges to 60 days and centralizing all litigation in the U.S. Court of Appeals for the D.C. Circuit.

Conclusion

There is obviously a great deal of interest in Congress in making changes to NEPA that are intended to shorten the time that the process takes, including time available for litigation. With one exception, there has been little objective work into documenting and analyzing actual timelines and identifying the causes of what is perceived to be an overly lengthy administrative processes. The one exception to that is a series of reports prepared by both the Congressional Research Service and the GAO in the context of highway projects; those reports concluded that NEPA was not a major delay of building highways. Some awareness of shortfalls in agency capacity to carry out or oversee NEPA responsibilities have been met with proposals to shift NEPA responsibilities to either the states or applicants themselves. A number of the proposals are clearly weighed in favor of approving projects, rather than the more neutral act of agency decision-making. Further development of all of these themes, including the possibility of broader GAO reports on NEPA and hearings, are likely to be featured in the current Congress.

Commentary 3 — NEPA and Agency Decisionmaking

Bob Cunningham and Judith Lee[11]

The preparation of our annual NEPA report is an excellent time to stop and think about how NEPA is or is not fulfilling the expectations of its authors and how it is actually serving the American people. Certainly, no one in 1969 envisioned lengthy environmental documents, 1,000-page legal references, and prospering small and large legal and environmental firms preparing costly tomes of obscure environmental factoids. Notwithstanding what some would call the excess of NEPA document discourse, NEPA and the practice of environmental review is serving the public well and will continue to do so by improving citizen involvement and the quality of projects benefiting the public.

Several federal agencies are moving to improve their use of categorical exclusions. It seems reasonable that over 40 years of NEPA implementation experience would lead to a better understanding of actions not requiring an EIS or EA, in the absence of extraordinary circumstances.

After many years of cumbersome multi-disciplinary efforts to plan and then environmentally review projects, progressive companies and agency staff are integrating modern planning principles with NEPA procedures in effective interdisciplinary project planning teams, engaging the public with meaningful information, and providing access to real decision-making and project improvements affecting their lives and wellbeing.

More and more people are actually reading and understanding the purposes of NEPA so gracefully stated in section 101(b) of the Act. A casual review of the most promising and noteworthy NEPA-related projects over the last several years reveals a common thread of planning integration among company staff, government regulators, and environmental and public interests. Thriving projects that serve the public interest and achieve the goals of NEPA rely on the effective integration of diverse talents and interests. The integration of planning and review guides successful projects. As we move forward in our work, it is imperative we keep our focus on section 101(b):

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Judith Lee, *President of Environmental Planning Strategies, Inc.*, has over 30 years of experience in integrated natural resources management, planning, and NEPA. She has supported the U.S. Army Corps of Engineers, US Fish and Wildlife Service, US Department of Agriculture, US Environmental Protection Agency, National Marine Fisheries Services, Department of Defense, US Forest Service, and many other agencies on a wide variety of infrastructure and other projects. Jleeeps@mchsi.com, 563-332-6870.

"[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –

1. fulfill the responsibilities of each generation as trustee of the environmental for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environmental which supports diversity, and a variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

Our national environmental policy is very clear. Each of us in our own way is making NEPA a reality today and tomorrow.

Commentary 4 — The Preamble and 'Environmental' Focus of NEPA Belies Its Importance – It is a Decision-making Process

David A. Yentzer, LEED, CFM, PMP[12]

If you think NEPA is a key environmental law, you're only partially right. NEPA is also key to effective agency decision-making.

Most federal agencies do not have a decision-making procedure, which leads to confused decision-makers, inconsistent and sub-optimal decisions that fail to achieve the desired outcome, and frustrated impacted stakeholders. The lack of established procedures also leads to the inability to give rational explanations for decisions when they are highly scrutinized.

There is a classical decision-making process. However, decision-making is not taught in many schools and the staff assigned to develop decisions are left to their own techniques. Invariably, staff use a few steps in the classic decision-making process but leave out essential ingredients that sub-optimize recommendations and limit the decision-maker from having all reasonable alternatives. Two fatal flaws in decision-making occur when the staff leaps from problem definition to alternatives and/or fails to conduct due diligence on the "end state" criteria. Both situations lead to recommendations that will not satisfy the desired/required results.

NEPA provides the solution to formalized decision-making – and satisfies the statutory requirements.

The preamble and "environmental" focus of NEPA belie its importance -- it is a decision-making procedure.

Too often agencies made NEPA an after-the-fact check-off that had to be made to legalize the decision. Those agencies failed to appreciate NEPA and embrace it for its value. They treated NEPA as a problem and not a solution.

Professor Robert Bartlett best summed up the value of NEPA to the federal decision-making process: "NEPA is a great deal more than a mere legal requirement for preparation of environmental impact statements. NEPA has been inadequately recognized as an attempt to force bureaucracies to use science-like approaches as the basis of their policies and decisions—an attempt to force great rationality in government decision making…implicit in NEPA and underlying its logic as policy legislation in a distinct form of reasoning—an ecological rationality."

When integrated into the planning process, NEPA does provide science-like approaches and force reasoning into the decision-making. NEPA's mandate is to integrate the requirements of

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the law (NEPA) with other planning and provide a process to identify and assess all reasonable alternatives. When viewed from another angle, NEPA is fundamentally the classic five-step decision-making process: (1) Define the Problem, (2) Develop the Decision Criteria, (3) Define the Alternatives, (4) Analyze the Alternatives, and (5) Make the Decision…and that is fundamentally what we had been trying to achieve in developing a consistent, logical approach to decision-making.

Five Step Decision-making Process		**NEPA**
• **Define the Problem**		**Purpose and Need**
• **Develop the Criteria** • **Develop Alternatives** • **Conduct Analysis**	}	**Scoping, Alternatives, Analysis**
• **Make Decision**		**FONSI/ROD**

NEPA is formalized decision-making following classic decision-making procedures and provides a consistent, structured approach where none exist.

Defining the problem or the purpose and need

NEPA is a more robust and disciplined process in addressing the "problem" than most decision-making processes. It requires a Purpose and Need Statement that sets the stage for consideration of the alternatives. It has three parts: The Purpose, the Need, and Goals and Objectives. The Purpose defines the problem to be solved. The Need provides data to support the problem statement. The Goals and Objectives describe other issues that need to be resolved as part of a successful solution to the problem.

The Purpose and Need Statement is intended to clarify the expected outcome of public expenditure and to justify that expenditure -- what you are trying to accomplish and why you think it is necessary. As such, it should be the first step in the project development process. It will be used to guide the development of alternatives, and it will be a fundamental element when developing criteria for selection between alternatives.

Establishing criteria for decision-making

A clear definition of the goals and objectives is obviously essential to decision-making. NEPA clearly requires that the purpose and need with goals and objectives be established for every environmental assessment. This step is often skipped in a decision process. It can alternately be thought of as defining success. If we go to all of the work to make the decision and implement the solution, how do we know we were successful or when we achieved success? When determining the reasonable range of alternatives to consider, the alternatives under consideration should be assessed to determine whether or not they fully meet the goals and objectives defined in the Purpose and Need Statement. If an alternative does not fully meet Purpose and Need Statement, then it should be eliminated. The latter can greatly simplify the analysis of alternatives, since some will be eliminated because they do not meet the objectives. There are

usually some easy criteria to define. Those are obvious: the solution must be within certain budget parameters, it must be timely, and it must be executable or technologically feasible. Beyond that, the criteria may get a little difficult to define. The key is to define the solution in terms of end-state objectives. The easiest way to do this is to try to visualize what the ideal solution will look like. What features or attributes will it have to make it perform perfectly…or at least successfully.

Developing the alternatives

Alternative thinking is an extremely powerful tool. Not until all potential alternatives are identified and analyzed can a decision-maker be sure that they are left with the optimum solution. The Purpose and Need Statement defines and establishes the parameters for the range of alternatives. The gathering of alternatives is accomplished by review of all similar activities that might be used to satisfy the Purpose and Need Statement…every facility is a potential alternative, every type of energy sources is a potential alternative, and every transportation source is a potential alternative depending on the "Need." Decision-makers should rely on multiple sources for generating alternatives. NEPA adds a formal Public Scoping to determine what external skate-holders may think are alternatives.

Analyzing the alternatives

The list of potential alternatives can be extensive and bog down the analytical process. NEPA has a method of easing the analysis – only "reasonable" alternatives need to be considered. The Goals and Objectives defined in the Purpose and Need Statement are key to determining what is reasonable. That is why it is critical in any decision purpose to set clear, measurable, and quantifiable criteria. NEPA, and any good decision-making process, does not require consideration of any alternative that does not meet the criteria for satisfying the Purpose and Need Statement. In the broadest sense, "Reasonable Alternatives" must:

- Support the purpose and need
- Be within the scope of the proposed action
- Be relevant to the decision
- Be implementable
- Be technically feasible.

The quantified criteria help the analysis and then rationalize the decision.

Addressing cost

The cost to implement is probably one of the most important considerations in a decision. NEPA does not specifically address costs; however, there is often a Socio-Economic Analysis included in NEPA decision-making to determine the economic impacts on the affected area. Other decision-making needs to add a cost analysis, as appropriate, perhaps in the form of a life-cycle cost analysis.

Making the decision

A well-defined decision-making process should make the final decision relatively easy. The problem is thoroughly defined, the goals and objectives (criteria) established, and all alternatives analyzed. NEPA requires documentation of the entire process with the result being a formal Finding of No Significant Impact (FONSI) or a ROD.

Wrapped-up and Rational

The beauty of NEPA is that it is a consistent and repeatable process, requires rational explanations using defined, consistent decision criteria, and is just plain good thinking. The process works. One of the more interesting uses of NEPA for decision-making occurred when the Army wanted to establish the first Joint Tactical Training Center (JTFC). The purpose and need was clear; however, the selection of an installation to host the JTFC was totally undecided and the methodology to get to a decision did not exist. The issue was, what is the world of alternatives, how do we get to a final single decision, and provide a rational explanation for the decision. The analysis team began the search for potential alternatives with "it had to be an existing military installation because the minimum size of 42,500 acres with some infrastructure was not affordable to purchase." That initial view of potential sites generated 1,450 potential alternatives (Number of DOD installations in the United States). The development of the criteria and initial analysis quickly reduced the number of potential alternatives as we drove toward "reasonable alternatives." The first criterion was the requirement for 42,500 acres to conduct just the maneuver training. The application of that criterion brought the number of alternatives to 49. The screening of those alternatives with additional broad criteria such as a requirement for transportation hubs, location of a substantive body of water on site to conduct river crossing training, and available number of training days rapidly reduced the alternatives. The analysis team literally ended up with two reasonable alternatives – alternatives that "fully met the goals and objectives defined in the Purpose and Need Statement" and would assure success. We then applied the "environmental and cost analysis" to determine the decision. The process was actually quite expedient and resulted in an answer that withstood the questioning by Congress.

Appendix A — Summary of 2012 NEPA Cases

Lucinda Low Swartz, Esq

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U.S. Department of Agriculture		
Webster v. U.S. Department of Agriculture, 685 F.3d 411 (4th Cir. 2012)	NRCS	WIN – Plaintiff landowners challenged an NRCS EIS prepared for a proposed dam and water impoundment project in West Virginia (referred to as Site 16). NRCS had prepared an EIS in 1974 for the larger, 5-dam project as a whole, and subsequent EISs, EAs, and Supplemental EISs for each individual project. Upholding the District Court summary judgment decision for NRCS, the court of appeals examined each of the plaintiffs'' issues. Purpose and need statement: "On the whole, it is evident that although the NRCS considered the local project sponsors' goals and needs, as was appropriate, it nevertheless conducted its own searching inquiry into the purposes and needs for the Site 16 dam. It then framed the purposes and needs in a manner that was neither so narrow as to yield only one suitable alternative nor so broad as to produce an overwhelming and unmanageable number of alternatives. And, importantly, the NRCS's purposes and needs for the dam at Site 16 are consistent with Congress's authorization in the Flood Control Act. *See Citizens Against Burlington*, 938 F.2d at 196 (recognizing that when arriving at the purposes and needs for a proposed action agencies must consider their statutory authorization to act). In the end, therefore, the NRCS's decision to include watershed protection, flood prevention, and water supply as the purposes and needs underlying Site 16's dam was an appropriate exercise of its discretion." Scoping process: Although plaintiffs argued that the NRCS 2009 EIS replaced its 2007 EIS and thus was required to engage in a new scoping process, the court found that the NRCS 2009 Supplemental EIS supplemented its 2007 Supplemental EIS and no additional scoping process was required. "That the NRCS decided to withdraw its record of decision related to the 2007 SEIS and issue the 2009 SEIS does not operate to nullify the scoping process it had previously undertaken." Missing information: The court rejected plaintiffs' argument that the EIS failed to consider details regarding the construction and operation of the Site 16 dam. The court "reiterate[d] that we may not seize upon trivial inadequacies to reject the agency's decision, for that would impermissibly intrude into its decisionmaking prerogative. *Nat'l Audubon Soc'y*, 422 F.3d at 186. Put another way, '[d]eficiencies in an EIS that are mere 'flyspecks' and do not defeat [the] NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal.' *N.M. ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 704 (10th Cir. 2009)." In addition, the court noted that agencies are charged with concentrating on issues that are truly significant and not amassing needless detail, citing 40 CFR § 1500.1(b). To the extent the 2009 SEIS did not include the information sought by the plaintiffs (such as the number of workers needed for construction, the location and distance of access roads and utility rights-of-way, type of construction equipment that would be used and for how long and location and size of parking lots), the court found the omissions to be "inconsequential." This information was "needless detail that would clutter the 2009 SEIS or trivial deficiencies that invite flyspecking. In the end, the omission of this information does not disturb our belief that the NRCS took a hard look at the Site 16 dam's environmental effects and that the public had adequate information to participate in the decisionmaking process. As a result, we will not second-guess the agency's decision to omit it."

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		Connected actions: The court rejected plaintiffs' assertion that a water treatment facility and water distribution network that would be necessary to meet the water supply purpose of the agency action were connected actions. Although water supply was a stated purpose of the project, the court held that plaintiffs "failed to demonstrate that any other water treatment facility or water distribution system has been planned, much less in connection with the dam at Site 16. Appellants apparently argue that because the Site 16 dam will include a water supply source, it will necessarily require such a facility and system in the future to service the source, so the NRCS should have considered them as connected actions. [NRCS], however, insist that there are no plans for such a facility or system, and Appellants give us no reason to question this representation. In the absence of any impending plans to construct such a system or facility, segmentation is not a concern." Reasonable alternatives: Plaintiffs argued that NRCS should have considered alternatives involving multiple actions that separately could achieve the individual purposes of the Site 16 dam project. The court held that plaintiffs had failed to offer a specific alternative offering multiple actions that NRCS should have considered in detail. "So we are left only to speculate that one might exist, which is an insufficient ground for disturbing the agency's decision. We therefore are unconvinced that the NRCS improperly eliminated from detailed consideration alternatives involving multiple actions that could achieve Site 16's dam's purposes individually." The court also rejected plaintiffs' argument that NRCS should have considered other sites within the watershed, finding that NRCS had "asserted that as part of its supplemental evaluation it had reconsidered whether the Site 16 and Site 23 locations were still the most viable alternatives. It observed that its reevaluation prompted it to eliminate Site 23 as infeasible. With respect to the dam at Site 16, it determined that there were no new locations for impoundments that were viable and that would achieve the identified purposes and needs. Appellants do not offer a location that would call into question this determination, so we defer to it." Use of old information: "In addressing this issue, [plaintiffs] begin by insisting that the 2009 SEIS is deficient because it incorporated and relied on information set forth in the 1974 EIS without indicating that the NRCS updated it or otherwise ensured its continued accuracy. But given that the CEQ's regulations encourage agencies to tier their analyses and incorporate such prior statements in subsequent statements by reference, see 40 C.F.R. § 1502.20, it was appropriate for the NRCS to rely on the 1974 EIS in its 2009 SEIS. Moreover, [plaintiffs] fail to highlight any inaccurate or outdated information upon which the NRCS relied. In the absence of evidence that the NRCS relied on inaccurate or outdated information from the 1974 EIS, we will not assume that it did." Cumulative impacts: "Our opinion that the NRCS took a hard look at the environmental effects of constructing the dam at Site 16 is undisturbed by the specific effects that Appellants contend the NRCS failed to discuss. It is again clear that the NRCS considered at least one of the sources of information that Appellants insist is missing—specifically, the impact that the dam would have on downstream fisheries. The NRCS, in its discussion of the Site 16 dam's effects on aquatic resources, candidly acknowledged that the dam "would result in a barrier to fish movement between the upper reaches of Lower Cove Run and the lower sections of this stream and the main stem [of the] Lost River." Other effects that Appellants maintain are missing are either speculative or relatively inconsequential flyspecks."

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		Cost-benefit analysis: Plaintiffs argued that the NRCS cost-benefit analysis was deficient for several reasons: 1) the NRCS admitted that the usual design life for watershed-protection and flood-prevention structures is 50 to 100 years, but in its cost-benefit analysis, it used a design life of 100 years, the far end of the spectrum; 2) the NRCS's cost-benefit ratio compared the costs and benefits of the Project as a whole, not Site 16 specifically, which may mask a less desirable cost-benefit ratio for Site 16 alone; and 3) the NRCS included as benefits over $900,000 that would result from incidental recreation, even though it eliminated recreation as a purpose. Recognizing that an EIS may be deficient if its assessment of costs and benefits relies upon misleading economic assumptions (citing *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996)), the court found that a project life of 100 years was a reasonable exercise of the agency's discretion, "it is evident that the NRCS considered the costs and benefits of Site 16 specifically, and "it was not misleading for the NRCS to include incidental recreational benefits after removing recreation as a purpose. The 2009 SEIS explained that, although recreation was no longer a purpose for the dam at Site 16, incidental recreation, such as fishing, bird watching, boating, and hiking, would still occur. The estimated benefits reflected this incidental recreation, and nothing suggests that this amount is inflated or otherwise erroneous." Mitigation: Plaintiffs argued that the 2009 SEIS failed to provide sufficient detail about planned mitigation measures so that they could be fairly evaluated. In rejecting this argument the court found that "there is no requirement that the agency formulate and adopt a complete mitigation plan at this stage. *See Robertson*, 490 U.S. at 352-53. That the NRCS may have to develop further mitigation measures in the future to comply with permit requirements does not render its current mitigation discussion insufficient under the NEPA. In the 2009 SEIS, the NRCS provided a detailed discussion of various mitigation measures it would take to reduce wetlands effects. It is enough, for purposes of the NEPA, to demonstrate that the NRCS took a hard look at the effects its action would have on wetlands and that it developed plans to mitigate those effects."
Pacific Rivers Council v. U.S. Forest Service, 689 F.3d 1012 (9th Cir. 2012) [June 20 decision replaced February 3 decision (668 F.3d 609); dissent added]	USFS	WIN/LOSS – Plaintiffs challenged a Supplemental EIS issued for a 2004 Framework for the management of the 11 national forests in the Sierra Nevada Mountains. An EIS had been prepared for proposed changes to the Sierra Nevada Forest Plan. In the Record of Decision, the USFS selected an alternative referred to as the 2001 Framework (prepared under the Clinton Administration); after a review of the 2001 Framework (conducted under the subsequent Bush Administration), the USFS proposed to reevaluate the 2001 Framework to consider fire-related issues and to identify opportunities to reduce the impacts of the 2001 Framework on grazing permit holders, recreation users and permit holders, and local communities. The USFS prepared a Supplemental EIS to consider two alternatives – the 2001 Framework and a "preferred alternative" that would allow more logging and reduce restrictions on grazing. The draft Supplemental EIS was criticized by the USFS' Washington Office because there was no discussion of the effects of logging and related activities on riparian ecosystems, streams, and fish. The Final Supplemental EIS was issued without a discussion of the "riparian ecosystems, streams and fisheries" that the Washington Office said was needed, and the Regional Forester issued a Record of Decision selecting the preferred alternative. Plaintiffs alleged that the 2004 EIS did not sufficiently analyze the environmental consequences of the 2004 Framework for fish and amphibians. The district

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		court granted summary judgment to the USFS. On appeal, the 9th Circuit concluded that the analysis of fish in the 2004 EIS did not comply with NEPA, but that the analysis of amphibians did comply. The court remanded the case to the district court. "Both the 2001 and 2004 Frameworks are written in general terms, rather than addressing specific sites at which the logging and logging-related activities will take place. But there are substantial differences between the 2001 and 2004 Frameworks. Relevant to this appeal are changes in authorized logging and logging-related activities, and changes in grazing standards for commercial and recreational livestock." After finding that the plaintiffs did have standing to sue even though the USFS decision did not result in any specific logging activities, the court considered whether the agency had given a "hard look" to the environmental consequences of the 2004 Framework on fish and amphibians. "The 2001 EIS contained a 64–page detailed analysis of environmental consequences of the 2001 Framework for individual species of fish. In stark contrast to the 2001 EIS, the 2004 EIS contains no analysis whatsoever of environmental consequences of the 2004 Framework for individual species of fish. The 2004 EIS incorporates by reference the analysis contained in the 2001 EIS, but contains no analysis of additional or different environmental consequences of the 2004 Framework even though the new framework authorizes substantially more environment-altering activities than the old framework. Of particular importance, the 2004 Framework allows an additional 4.9 billion board feet of green and salvage timber harvesting during the first two decades, much of it conducted nearer streams, compared to the 2001 Framework. The 2004 EIS also incorporates by reference two biological assessments ('BAs') of the consequences of the 2001 and 2004 Frameworks on listed fish under the Endangered Species Act. But it neither summarizes the findings of the BAs nor includes them in an appendix." "The Forest Service contends that the 2004 EIS takes a sufficiently hard look at environmental consequences of the 2004 Framework on fish. It makes two arguments. First, it points out that the 2004 Framework is an amendment to the Sierra Nevada Forest Plan. The Forest Service argues that because the Forest Plan is an LRMP, it is not reasonably possible for the 2004 EIS to provide an analysis of environmental consequences of the 2004 Framework on individual species. Second, it argues that the 2004 EIS's incorporation by reference of the BAs concerning environmental consequences of the 2001 and 2004 Frameworks on listed fish satisfies the hard look requirement." While recognizing that the required level of analysis in an EIS is different for programmatic and site-specific plans, the court stated that "NEPA requires that an EIS analyze environmental consequences of a proposed plan as soon as it is 'reasonably possible' to do so. *Kern*, 284 F.3d at 1072." "We do not require the Forest Service to provide in the 2004 EIS precisely the same level of analysis as in its 2001 EIS. We recognize that it may be appropriate to have fewer than 64 pages of detailed analysis of environmental consequences for individual species of fish in the 2004 EIS. Indeed, if the Forest Service had explained its reasons for entirely omitting any analysis of the impact of the 2004 Framework on individual species of fish, it is conceivable that it could have convinced us that there is good reason entirely to postpone such analysis until it makes a site-specific proposal. But the Forest Service has provided no explanation. Compare 40 C.F.R. § 1502.22 (requiring that an agency 'always make clear' if it lacks information to conduct environmental analysis). The Forest Service has provided

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		almost the opposite of an explanation, for it promised such an analysis and then failed to provide it. As we noted above, Section 4.2.3 of the 2004 EIS promises an analysis of the '[e]ffects of the alternatives on species dependent on aquatic, riparian, and meadow habitats' in Section 4.3.2. Section 4.3.2 contains a detailed analysis of the environmental effects on individual species of mammals, birds and amphibians. But Section 4.3.2 contains no analysis whatsoever of individual species of fish, even though fish are the quintessential 'species dependent on aquatic . .. habitat[ ].'" "In light of the extensive analysis of the environmental consequences on individual fish species in the 2001 EIS, and of the extensive analysis of the environmental consequences on individual species of mammals, birds, and amphibians in the 2004 EIS, we conclude, contrary to the Forest Service's contention, that it was 'reasonably possible' to provide some analysis of the environmental consequences on individual fish species in the 2004 EIS. The failure of the 2004 EIS to provide any such analysis is a failure to comply with the hard look requirement of NEPA." Turning to the USFS argument that the "hard look" requirement was met by two BAs incorporated by reference in the 2004 EIS, the court stated: "First, depending on its nature, material should be in the text of an EIS, should be in an appendix to the EIS, or should be incorporated by reference in the EIS. …If the BAs were intended to serve as the analysis of the environmental consequences of the 2004 Framework for fish, the 2004 EIS needed to do more than incorporate them by reference. They should have been described and analyzed in the text of the 2004 EIS, and the BAs themselves should have been included in an appendix. This is not a mere formality. The purpose of an EIS is to inform decisionmakers and the general public of the environmental consequences of a proposed federal action. That purpose would be defeated if a critical part of the analysis could be omitted from an EIS and its appendices. …The material that is incorporated by reference is not circulated to the public; it need only be 'made available….Material that is incorporated by reference must be 'briefly described' in the body of the EIS, 40 C.F.R. § 1502.21, but a brief description cannot fulfill the purpose of the EIS if the substance of what is incorporated is an important part of the environmental analysis." "Second, even if they had been fully described and analyzed in the 2004 EIS, the BAs could not have satisfied the 'hard look' requirement. The BAs functioned as a trigger to the consultation process required under Section 7 of the Endangered Species Act. They merely enumerated the several species of 'listed' fish that may have been affected by the alternatives considered in the 2001 and 2004 EISs. There was no analysis in either of the BAs of the manner or degree to which the alternatives may have affected these fish. To the degree that any analysis was performed, it was performed by the Fish and Wildlife Service when it prepared Biological Opinions in response to the BAs. The 2004 EIS makes no reference, in any form, to either of the Biological Opinions." "Third, even if the BAs could have satisfied the hard look requirement, they applied to only one group of fish species. As described above, the 2001 EIS analyzed the environmental consequences for three groups: (1) 'federally threatened and endangered fish species' (9 species); (2) 'sensitive fish species' (11 species); and (3) 'moderate and high vulnerability fish species' (14 species). The BAs analyzed only the individual species in the first group. They said nothing whatsoever about the individual species in the second and third groups." With respect to amphibians, the court stated that the 2004 EIS "contains an extensive analysis of individual amphibians." "[W]e are satisfied that the Forest Service's analysis was

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		sufficient, at this stage of the process, given that the EIS provides significant analysis of the environmental effects on amphibians, and that site-specific projects are not yet at issue."
Save the Peaks Coalition v. U.S. Forest Service, 669 F.3d 1025 (9th Cir. 2012)	USFS	WIN – This was a challenge to a USFS decision to allow snowmaking at a ski resort on federal land using reclaimed water. USFS prepared an EIS for the project. The EIS was challenged by four groups of plaintiffs including several Native American Tribes. The lower court found no NEPA violation, but on appeal, the 9th Circuit held that the EIS did not reasonably address the risks posed by the possibility of human ingestion of snow made from reclaimed water. However, the 9th Circuit en banc vacated the opinion of the 3-judge panel and the U.S. Supreme Court denied certiorari. After this litigation, another plaintiff – which had closely monitored the litigation but did not join it – filed suit alleging that the USFS violated NEPA because the FEIS did not contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of making snow from reclaimed water, the USFS failed to ensure the scientific integrity of its analysis, and the USFS did not disseminate quality information. The district court granted summary judgment for the USFS, finding that the plaintiffs were barred by the doctrine of laches (i.e., that the plaintiffs should have brought their suit at an earlier time) and, even if laches did not apply, the USFS had not violated NEPA. The 9th Circuit found that the litigation was not barred, but agreed with the district court that the USFS had not violated NEPA. Adequate assessment of human ingestion of snow. "Under NEPA, federal agencies must take a 'hard look' at the potential environmental consequences of proposed actions…. The purpose of NEPA is to 'ensure that agencies carefully consider information about significant environmental impacts' and 'guarantee that relevant information is available to the public.' … We employ a rule of reason standard to evaluate whether an environmental impact statement 'contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.' '[A]s long as the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made," we must uphold the agency's decision [citations omitted]." "When evaluating a NEPA challenge, our review is limited to whether an environmental impact statement 'took a "hard look" at the environmental impacts of a proposed action.' *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt*., 606 F.3d 1058, 1072 (9th Cir.2010) (citation omitted). This requires 'a "pragmatic judgment whether the [environmental impact statement]'s form, content and preparation foster both informed decision-making and informed public participation." ' *Id*. (citation omitted). The environmental impact statement is reviewed as a whole. *See Nat'l Parks & Conservation Ass'n*, 222 F.3d at 682. Once we are satisfied that an agency has taken a 'hard look' at a decision's environmental consequences, our review ends. *See Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv*., 460 F.3d 1125, 1135 (9th Cir.2006) (citation omitted)." "[T]he Save the Peaks Plaintiffs' assertion that the USFS did not consider the risk of human ingestion of snow in the FEIS is incorrect. The FEIS is replete with examples of the USFS considering the risks posed by ingestion and the safety of using reclaimed water to make snow…. Underscoring the USFS's attention to the risks posed by human ingestion of snow, the response to comments specifically addressed the concerns raised by the Save the Peaks Plaintiffs…. Having discussed the issue at length in the FEIS and the response to comments, the USFS clearly took a 'hard look' at the environmental impacts of permitting the snowmaking project to proceed. The FEIS contains a thorough discussion of the significant aspects of the probable environmental consequences, including the risks posed by human ingestion of snow. Indeed, it is hard to imagine how the USFS's analysis could have been

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		more exhaustive. The form, content, and preparation of the FEIS fostered both informed decision-making and informed public participation." Scientific integrity of NEPA analysis. "The Save the Peaks Plaintiffs also contend that the USFS failed to ensure the scientific integrity of its analysis because it allegedly based its decision entirely on an assumption that ADEQ's analysis of the reclaimed water's safety was sound. This argument is based on the following sentence in the USFS's response to comments: 'Because ADEQ approved the use of reclaimed water, it is assumed different types of incidental contact that could potentially occur from use of class A reclaimed water for snowmaking were fully considered.' According to the Save the Peaks Plaintiffs, the 'assumption' contained in the sentence does not ensure the scientific integrity of the USFS's analysis because the USFS did not oversee the ADEQ's decision-making process or review the ADEQ's conclusions. The Save the Peaks Plaintiffs are mistaken. The USFS had a duty to ensure the scientific integrity of the FEIS' discussion and analysis. …. This duty required the USFS to disclose its methodologies and scientific sources. ….Contrary to the Save the Peaks Plaintiffs' assertion, however, the USFS did not base its decision on an assumption that the ADEQ's analysis was sound. As discussed above, it carefully considered the risks posed by human ingestion of snow throughout the FEIS, most of which made no reference to the ADEQ analysis. Nevertheless, in performing its analysis, the USFS also properly considered the conclusions of the ADEQ about the safety of reclaimed water from Rio de Flag and the safety of making snow from Class A reclaimed water like that produced at Rio de Flag. …Federal policy encouraged the USFS to do so. …Thus, we affirm the district court's conclusion that the USFS did not fail to ensure the scientific integrity of its analysis in considering the ADEQ's conclusions. [citations omitted]." Quality information. The court declined "to reach the issue of whether the USFS failed to provide 'high quality' information about the impacts of ingesting snow made from reclaimed water because the Save the Peaks Plaintiffs have waived it on appeal."
Habitat Education Center, Inc. v. U.S. Forest Service, 673 F.3d. 518 (7th Cir. 2012)	USFS	WIN – Plaintiffs had successfully sued USFS to enjoin logging projects (Northwest Howell and McCaslin projects) planned for the Chequamegon-Nicolet National Forest (*Habitat Educ. Ctr. v. Bosworth* (Howell I), 363 F. Supp. 2d 1090, 1098-99 (E.D. Wis. 2005); *Habitat Educ. Ctr. v. Bosworth* (McCaslin I), 363 F. Supp. 2d 1070, 1078 (E.D. Wis. 2005)). The district court later lifted the injunction, finding that USFS had taken appropriate corrective action to comply with NEPA by preparing supplemental EISs. Plaintiffs appealed the lifting of the injunction, arguing that it should not have been lifted because USFS had failed to consider how a future project (the Fishel project) within the forest might alter the cumulative impacts analysis in draft EISs prepared for the logging projects. The court of appeals held that the future project was proposed after USFS had issued the draft EISs and it was not arbitrary and capricious for the agency to exclude from the cumulative impact analysis in the Final EIS those projects that (1) only become capable of meaningful discussion after the agency has issued its draft statement, and (2) do not significantly alter the environmental landscape presented in the draft. The court also found that the agency did not act arbitrarily and capriciously when it failed to issue supplemental EISs. With respect to plaintiffs' argument that the agency did not follow "NEPA's procedures for indicating incompleteness," the court concluded that "NEPA does not require an agency to generate paperwork bearing no meaningful effect on the substance of pending proposals." Cumulative Impact Analysis. "Strictly construed, NEPA and the CEQ regulations permit an agency to issue a final EIS that does no more than incorporate a previously issued draft EIS and respond to comments received regarding that draft (assuming, of course, that the draft

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		complies with NEPA). That seems to be what occurred here. The Forest Service excluded the Fishel project from its final statements because the Fishel project was not capable of meaningful discussion at the time the McCaslin and Northwest Howell draft statements were issued, and the Fishel project did not alter the environmental landscape presented in the draft (an issue we discuss more fully below). We cannot say that the Forest Service's decision was arbitrary, capricious, or contrary to law. To hold otherwise would paralyze federal agencies by transforming the two-stage EIS preparation process into an endless loop of creating and recreating draft statements. NEPA does not require federal agencies to do the impractical. *Inland Empire Pub. Lands Council v. U.S. Forest Serv*., 88 F.3d 754, 764 (9th Cir. 1996). And logic dictates that at some point an agency must be allowed to move beyond the draft EIS. In our view, unless newly discovered information requires supplementation, that point is reached when the draft is issued. It was therefore not a 'clear error of judgment' for the Forest Service to reach the same conclusion." Supplemental EISs. "The particular facts of this case favor deference to the agency. Unlike *Hughes*, this case does not involve disclosure of new information about how a project might harm a previously overlooked species; rather, it involves a revelation of additional information about a future project for which the agency had already made assumptions and incorporated those assumptions into its analysis. On this record, we think the Forest Service's failure to supplement was neither arbitrary nor capricious. *See Marsh*, 490 U.S. at 385. ('Even if another decisionmaker might have reached a contrary result, it was surely not "a clear error of judgment" for the Corps to have found that the new and accurate information contained in the documents was not significant and that the significant information was not new and accurate.')." Incomplete and Unavailable Information. Plaintiffs contended that USFS violated NEPA by not strictly complying with 40 CFR § 1502.22, which mandates that an agency indicate that its analysis is incomplete if such is the case. However, the USFS' compliance with § 1502.22 is subject to the "rule of reason." "The Forest Service has never taken the position that its cumulative impacts analysis did not include the Fishel project because of exorbitant costs. Nor has it maintained that the means to obtain a cumulative analysis of all three projects were 'not known.' Instead, the Forest Service has consistently contended that the Fishel project was not reasonably foreseeable at the time it issued the draft supplemental statements for McCaslin and Northwest Howell, and the cumulative analysis for all three projects would be presented in the Fishel EIS. Under these circumstances, an agency need only have made clear that information was lacking to comply with the regulations. The Forest Service did just that." "Because the Forest Service could not meaningfully discuss the Fishel project when the draft statements for the McCaslin and Northwest Howell projects were issued, analysis of the cumulative impacts of all three projects likely would be, and indeed was, discussed in the Fishel project's EIS, and nothing in the record suggests that the Fishel project significantly altered the environmental landscape presented in those draft statements, the plaintiffs' plea amounts to a request that the agency generate more paperwork to further (and somewhat retroactively) justify actions that it proposed, analyzed, and adopted in substantial compliance with NEPA. The statute, however, is intended to foster excellent and environmentally conscious action, not prevent it. We believe that our holding aligns with the essential purpose of NEPA."

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League of Wilderness Defenders v. U.S. Forest Service, 689 F.3d. 1060 (9th Cir. 2012)	USFS	WIN – Plaintiff environmental groups alleged that an EIS prepared for an Experimental Forest Thinning, Fuels Reduction, and Research Project in the Deschutes National Forest (Oregon) failed to comply with NEPA. The Project allowed logging and controlled burning on 2,500 acres of the Pringle Falls Experimental Forest to reduce the risk of wildfire and beetle infestation and to conduct research on ponderosa pine forest management. First, the EIS improperly cabins its analysis by specifying a limited purpose and need for the Project, and by considering only Project alternatives that fit predetermined specifications contained in the Study Plan. Second, it lacks scientific integrity because it overstates the risk of wildfire and beetle infestation. Third, it fails to take a hard look at the Project's impacts on tree mortality and on wildlife species that depend on standing dead trees for nesting habitat." Purpose and Need: "In assessing the reasonableness of a purpose and need specified in an EIS, we must consider the statutory context of the federal action. *See Westlands*, 376 F.3d at 866 ('Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS.'). Here, two statutes inform the Project's purpose and need. The Organic Act gives the Service authority to 'make provisions for the protection against destruction by fire.' 16 U.S.C. § 551. The Research Act gives the Service authority to carry out in experimental forests any research experiments that it 'deems necessary.' Id. § 1642(a). One of the five major areas of research identified in the Research Act is 'protecting vegetation and other forest and rangeland resources from fires, insects, [and] diseases.' Id. § 1642(a)(3). The EIS's dual purpose and need of risk reduction and research opportunities comes directly from these statutory authorities." "In reviewing an EIS's statement of purpose and need, the 'touchstone for our inquiry' is whether the resulting alternatives analysis 'fosters informed decision-making and informed public participation.' *Westlands*, 376 F.3d at 868 (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir.1982))." The court found that, given the purpose of the Research Act, the Project's location in an experimental forest, and the discretion afforded agencies in this area, the EIS' statement of purpose and need was reasonable. Range of Alternatives: The EIS considered in detail a no-action alternative and two action alternatives. Recognizing that "[i]n another context, an EIS analyzing in detail two action alternatives that differed only in proposed acreage would likely be inadequate," here the court agreed "with the district court that the special circumstances of a research project in an experimental forest 'necessarily narrowed consideration of alternatives.'" The court examined the alternative proffered by the plaintiff and the USFS' explanation for its decision not to consider that alternative in detail, and concluded that the alternative would not been the agency's purpose and need. "In sum, the EIS only needs to consider in detail alternatives that would address both of the Project's stated purposes and needs by meaningfully reducing the risk of beetle infestation and wildfire while attempting to answer the six research questions. *See Ariz. Past & Future Found., Inc. v. Lewis*, 722 F.2d 1423, 1428 (9th Cir.1983) ('Alternatives that do not accomplish [both] purposes of the project may properly be rejected as imprudent.'). The League has failed to identify a 'viable but unexamined alternative' that would satisfy both these goals. *Natural Res. Def. Council*, 421 F.3d at 813. Accordingly, we hold that the range of alternatives considered in the EIS is reasonable." Scientific Integrity: "NEPA regulations require that an agency ensure the 'scientific integrity' of the discussions and analyses in an EIS and explicitly refer to 'the scientific and

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		other sources relied upon for conclusions in the [EIS].' 40 C.F.R. § 1502.24. As a reviewing court, we are 'most deferential when the agency is making predictions[ ] within its area of special expertise.' *Lands Council*, 537 F.3d at 993 (internal quotation marks omitted). 'At the same time, courts must independently review the record in order to satisfy themselves that the agency has made a reasoned decision based on its evaluation of the evidence.' *Earth Island Inst. v. U.S. Forest Serv*., 442 F.3d 1147, 1160 (9th Cir.2006) (internal quotation marks omitted), overruled on other grounds by *Winter*, 555 U.S. 7." The court concluded that USFS had met this test. Hard Look: Quoting earlier 9th Circuit decisions, the court stated that "'Our role in reviewing an EIS is to ensure that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action.' *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1135 (9th Cir.2010) (internal quotation marks omitted). Taking a "hard look" includes 'considering all foreseeable direct and indirect impacts. Furthermore, a 'hard look' should involve a discussion of adverse impacts that does not improperly minimize negative side effects.' *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir .2006) (internal quotation marks and citation omitted). '[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.' *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir.2007) (internal quotation marks omitted)." "'[W]e employ a rule of reason standard to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.' *League of Wilderness Defenders*, 615 F.3d at 1130 (internal quotation marks omitted). This standard 'requires a pragmatic judgment whether the EIS's form, content[,] and preparation foster both informed decision-making and informed public participation.' *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir.2005) (internal quotation marks omitted)." Here, the court concluded that USFS had taken a "hard look" at the Project's impacts on overall tree mortality and on wildlife species that depend on standing dead trees. "The Service's analysis of impacts on snag-dependent species constitutes a hard look under our precedent. As with tree mortality, its qualitative prediction about impacts on snag-dependent species suffices because it explains why precise quantification was unreliable. *See Brong*, 492 F.3d at 1134. In *WildWest Institute v. Bull*, 547 F.3d 1162, 1175 (9th Cir.2008), we held that a Service EIS took an adequate "hard look" at a logging project's impact on a snag-dependent woodpecker where it discussed the woodpecker's habitat needs and acknowledged that some snags would be removed or burned, but noted that the Project would generally retain snags. The EIS in this case does that and more." Affirming the district court ruling for USFS, the 9th Circuit stated that the USFS "proposes a forest management research project in an experimental forest specifically set aside for such study. The EIS considers in detail a reasonable range of alternatives that would fulfill both of the Project's goals by reducing the risk of wildfire and beetle infestation, and by addressing six specified research objectives. The EIS is adequately supported by scientific data and takes a hard look at the significant impacts of the Project."
Earth Island Institute v. U.S. Forest Service, 697 F.3d. 1010 (9th Cir. 2012)	USFS	WIN – Plaintiff environmental group challenged the USFS Angora restoration project in the Lake Tahoe area after the Angora Fire. The court found that the USFS did not fail to (1) ensure the scientific integrity of the EA, (2) properly respond to dissenting scientific opinion, (3) properly consider proposed alternatives to the Angora Project EA, and (4) take the requisite "hard look" at the impacts of the Angora Project. For this reason, the court

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		concluded that the USFS analysis of the Angora Project's environmental effect was not arbitrary and capricious under NEPA and affirmed the district court opinion. The Forest Service designed the Angora Project in response to damage caused by the Angora Fire, which consumed over 3,100 acres of land. The USFS' Lake Tahoe Basin Management Unit (LTBMU) manages the affected National Forest System land. The LTBMU developed the Angora Project pursuant to the LTBMU Forest Plan in an effort to balance the ecological needs of restoring the ecosystem and protecting area residents and visitors from falling trees and future fires. Project activities include the removal of certain live and dead trees from portions of the forest. The Forest Service determined that, if no action was taken, surface fuels would accumulate as dead and damaged trees fall, increasing the risk of another harmful fire that would threaten both local communities and the forest ecosystem. Before implementing the Angora Project, the USFS prepared an EA and solicited public comment on the EA. The EA discussed the impact of the Angora Project on various species, including black-backed woodpeckers. The EA also responded to some concerns raised in the comments and assessed a no-action alternative and the preferred alternative that the USFS determined would best reduce fuel loads and the severity of future fires. The USFS also briefly considered an option submitted by Earth Island Institute that would limit removal of standing dead trees (snags) to those greater than 16 inches in diameter. However, the USFS dismissed this alternative, because the agency concluded that this alternative would not effectively accomplish the USFS' goals. After the USFS issued its Decision Notice, plaintiffs challenged the action under the National Forest Management Act and NEPA. Scientific Integrity: "NEPA requires that '[a]gencies shall insure the professional integrity including scientific integrity, of the discussions and analyses in environmental impact statements.' 40 C.F.R. § 1502.24. By its terms, this regulation only applies to preparation of an EIS, but the Forest Service does not dispute that this scientific integrity requirement applied to their EA. Therefore, we assume without deciding that this requirement does in fact apply to the Angora Project EA." "Plaintiffs argue that the Forest Service failed to ensure the scientific integrity of the final EA by misrepresenting the facts regarding trends in the black-backed woodpecker's population. However, this argument is based on an incorrect premise…. The data sufficiently supports the agency's claim about black-backed woodpecker population distribution. Thus, the Forest Service was not arbitrary and capricious in failing to fulfill the requirement of 'insur[ing] the professional integrity, including scientific integrity, of [its] discussions and analyses . . . .' 40 C.F.R. § 1502.24. Furthermore, '[b]ecause analysis of scientific data requires a high level of technical expertise, courts must defer to the informed discretion of the responsible federal agencies.' *Earth Island Inst. v. U.S. Forest Serv*., 351 F.3d 1291, 1301 (9th Cir. 2003). Finally, 'reviewing court[s] may not "fly speck" an [EA] and hold it insufficient on the basis of inconsequential, technical deficiencies.' *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). Thus, the Angora Project EA's analysis was not arbitrary and capricious with regard to NEPA's scientific integrity requirements." Dissenting Scientific Opinion: "In the context of environmental impact statements, NEPA requires agencies to respond explicitly and directly to 'responsible opposing view[s].' 40 C.F.R. § 1502.9(b)….Plaintiffs argue that the Forest Service violated that requirement here by not appropriately responding to four comments submitted by Dr. Chad Hanson in

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		response to the initial EA. However, we conclude that the Forest Service was not required by § 1502.9(b) to respond to Dr. Hanson's comments, because the regulation by its own terms only applies this requirement to '[f]inal environmental impact statements,' 40 C.F.R. § 1502.9(b). As a general rule, courts should not impose new requirements on agencies not imposed by the APA or a substantive statute." The court drew a distinction between this case and a 1984 case: "Although the Plaintiffs cite to *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1245 n.6 (9th Cir. 1984), for the proposition that both EAs and EISs are required to respond to dissenting views, this case is not controlling here. *Save Our Ecosystems* was a case based on a finding that the agency's EA was the 'functional equivalent of an EIS.' 747 F.2d at 1247 ('When an EA is the functional equivalent of an EIS, it is subject to the same procedures.'). Plaintiffs have not argued in this case that the EA is the functional equivalent of an EIS." The court also found that, even if the USFS were required to comply with § 1502.9(b) and respond to dissenting views, the agency did not fail to meet that requirement in an arbitrary and capricious manner. "Though the Forest Service did not perform the point-by-point type of counter-argument to experts that Plaintiffs appear to desire, our precedent makes clear that an agency 'need not respond to every single scientific study or comment.' *See Castaneda*, 574 F.3d at 668 (addressing duty to respond to opposing views in an EIS). Furthermore, even if Plaintiffs disagree with the agency's responses, 'that disagreement does not render the Forest Service's review and comment process improper.' *Carlton*, 626 F.3d at 473." Alternatives: "We conclude that the Forest Service's consideration of a no action alternative and its preferred action was not arbitrary and capricious under the less rigorous requirements of an EA (rather than an EIS). In *Native Ecosystems Council*, 428 F.3d at 1246, we 'join[ed] our sister circuits in holding that an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS.' Since that decision, we are aware of no Ninth Circuit case where an EA was found arbitrary and capricious when it considered both a no-action and preferred action alternative." The Forest Service's argument is consistent with our previous reasoning in *Native Ecosystems Council*, that 'it makes no sense' for agencies 'to consider alternatives that do not promote the goal' or the 'purpose' the agency is trying to accomplish. 428 F.3d at 1248 (internal quotation marks omitted). Thus, we held that '[w]hen the purpose of the . . . Project is to reduce fire risk, the Forest Service need not consider alternatives that would increase fire risk.' Id." "The concerns that Plaintiffs raise all rely on authority dealing with the more stringent analysis requirements for an EIS. However, under the less stringent analysis requirements for an EA, the Forest Service's consideration of alternatives was not arbitrary and capricious." Hard Look: "Plaintiffs argue that the Forest Service failed to take a 'hard look' at the Angora Project's impact on black-backed woodpeckers and future fire behavior. Plaintiffs rely on the Forest Service's 'analytical failings as a whole' in the EA in support of this argument. However, because we do not agree that the alleged analytical failings of the Forest Service were arbitrary and capricious, Plaintiffs have not demonstrated that the Forest Service's analysis overall failed to take the required hard look under NEPA."

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Native Ecosystems Council v. Weldon, 697 F.3d. 1043 (9th Cir. 2012)	USFS	WIN – Plaintiff environmental group challenged an action regarding the Ettien Ridge Fuels Reduction Project in the Lewis and Clark National Forest in Montana. The Project was designed to reduce the spread and intensity of potential future wildfires in the Judith Basin County Wildland-Urban Interface by removing naturally occurring wildfire fuels. Plaintiff alleged that USFS violated NEPA and the National Forest Management Act (NFMA) when it issued a FONSI and Decision Notice approving the Project. The 9th Circuit held that the USFS took the requisite "hard look" at the environmental impact of the Project on the elk hiding cover, and goshawk populations, in the manner required by NEPA. On its NEPA claims, plaintiff argued that the Forest Service's aerial photo interpretation (PI Type) methodology was invalid and unreliable. The court held that "[t]he mere fact that Native Ecosystems Council disagrees with the methodology does not constitute a NEPA violation. In reviewing Native Ecosystems Council's NEPA appeal, we may not insert our opinions in the place of those of forest biologists. *Lands Council*, 537 F.3d at 988. Rather, we are required to apply the highest level of deference in our review of the Forest Service's scientific judgments in selecting the elk hiding cover methodology. *Northern Plains*, 668 F.3d at 1075. Given the paucity of Native Ecosystems Council's factual distinctions, and the substantial deference owed to the Forest Service's determinations, we hold that the Forest Service's selection of the PI Type methodology did not violate NEPA. *Lands Council*, 537 F.3d at 987–88." Next, plaintiff challenged the elk cover hiding analysis in the EA. The court noted that: "An agency decision is arbitrary and capricious if, among other things, it 'offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' *Lands Council*, 537 F.3d at 987 (internal citation and quotation marks omitted). Under NEPA, the purpose of an Environmental Assessment (EA) is simply to create a workable public document that briefly provides evidence and analysis for an agency's finding regarding an environmental impact.' *Tri–Valley CAREs*, 671 F.3d at 1129. We do not require the agency 'to compile an exhaustive examination of each and every tangential event that potentially could impact the local environment. Such a task is impossible, and never-ending. The EA must only 'provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.' *Bering Strait Citizens*, 524 F.3d at 953. We thus defer to agency decisions so long as those conclusions are supported by studies 'that the agency deems reliable.' *N. Plains Res. Council*, 66 F.3d at 1075 (emphasis added)." The court found that none of the findings challenged by the plaintiff was contradicted by the record and deferred to the USFS' conclusions.

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Pacific Coast Federation v. Blank, 693 F.3d. 1084 (9th Cir. 2012)	NMFS	WIN – In 2011, NMFS and the Pacific Fishery Management Council adopted changes to the fishery management plan for the trawl sector of the Pacific Coast groundfish fishery. The changes, adopted as Amendments 20 and 21 to the PacificCoast Groundfish Fishery Management Plan, were designed to increase economic efficiency through fleet consolidation, reduce environmental impacts, and simplify future decisionmaking. Plaintiff

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		fishermen's associations, whose longtime participation in the fishery may shrink under Amendments 20 and 21, argued that the Amendments were unlawful under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and NEPA. The district court granted summary judgment to the defendants and the 9th Circuit affirmed, saying that "NMFS complied with the MSA's provisions, which required the agency to consider fishing communities but did not require it to develop criteria for allocating fishing privileges to such communities or to restrict privileges to those who 'substantially participate' in the fishery. NMFS also complied with NEPA by preparing a separate study for each amendment, analyzing a reasonable range of alternatives, adequately evaluating potential environmental effects, and adopting flexible mitigation measures designed, in part, to lessen the potential adverse effects of Amendments 20 and 21 on fishing communities. The plaintiffs reasonably disagree with the balance NMFS struck between competing objectives, but they do not show that NMFS exceeded its statutory authority under the MSA or ignored its obligations under NEPA." Connected Actions: Plaintiffs argued that a single EIS was required for Amendments 20 and 21 under two NEPA regulations: 40 C.F.R. §§ 1502.4(a) and 1508.25(a)(1). Section 1502.4(a) states that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." Section 1508.25(a)(1) directs agencies to study "connected actions" in "the same impact statement," and sets forth criteria for determining whether actions are "connected." However, the court concluded that § 1502.4(a) does not impose an independent test for determining when to study related actions in a single EIS, and directs agencies to § 1508.25 to make that determination. "Thus, whether an agency must prepare a single EIS for more than one proposal turns on the criteria set forth in § 1508.25." Using those criteria, the court found that "Amendments 20 and 21 have independent utility, and thus are not connected actions under § 1508.25(a)(1). First, the two amendments have overlapping, but not co-extensive, goals. … While it is true the record is replete with statements about how Amendments 20 and 21 are linked, two actions are not connected simply because they benefit each other or the environment. *See Nw. Res. Info. Ctr. v. NMFS*, 56 F.3d 1060, 1068-69 (9th Cir. 1995) (two actions were not connected merely because they both would benefit salmon); *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989) ('[E]ach [action] could exist without the other, although each would benefit from the other's presence.')." "Perhaps more important than parsing NMFS's words or predicting whether it would adopt one Amendment without the other is answering the question whether, in preparing separate EISs, NMFS evaded its duty to fully study the combined effects of Amendments 20 and 21. This is the real concern behind § 1508.25. *See Great Basin Mine Watch*, 456 F.3d at 969 ("The purpose of this requirement is to prevent an agency from dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." (citation and internal quotation marks omitted)); *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1194 (9th Cir. 1997) (explaining that NEPA prevents an agency from "illegally segmenting projects in order to avoid consideration of an entire action's effects on the environment") (citing *Thomas v. Peterson*, 753 F.2d 754, 758-59 (9th Cir. 1985) (finding connected actions under § 1508.25)). This 'divide and conquer' concern is not present here. NMFS prepared lengthy EISs that thoroughly studied the direct, indirect, and cumulative effects of Amendments 20 and 21, individually and together."

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		Alternatives: "We 'review an agency's range of alternatives under a 'rule of reason' standard that requires an agency to set forth only those alternatives necessary to permit a reasoned choice.' *Presidio Golf Club v. Nat'l Park Serv*., 155 F.3d 1153, 1160 (9th Cir. 1998) (quotation marks, alteration, and citation omitted); *see also N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) ('Under NEPA, "an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative."' (*quoting Headwaters, Inc. v. BLM*, 914 F.2d 1174 (9th Cir. 1990))." Finding that, in this case, NMFS studied enough alternatives to permit a reasoned choice, the court rejected plaintiffs' argument that "NMFS was required to 'embrace the range of options an agency can lawfully pursue under its substantive mandates.' This argument fails as a matter of law and a matter of fact. 'An agency need not . . . discuss alternatives similar to alternatives actually considered, or alternatives which are "infeasible, ineffective, or inconsistent with the basic policy objectives"' of the project. *N. Alaska Envtl. Ctr*., 457 F.3d at 978 (quotation omitted); *Westlands Water Dist*., 376 F.3d at 868, 871." Impact Evaluation: "Excluding appendices, the Amendment 20 and 21 EISs contain 384 and 102 pages of detailed effects analysis, respectively. The plaintiffs nonetheless complain that this analysis is inadequate because it focuses mostly on socioeconomic impacts; only a small portion is devoted to the Amendments' environmental effects, and an even smaller portion to the Amendments' effects on groundfish habitat specifically. In the plaintiffs' view, NEPA requires more, especially since the Amendments will, in their view, 'ensure the long-term domination of trawling' in the fishery and trawling is harder on fish habitat than fishing using fixed gear. The plaintiffs are incorrect." "Thus, even if trawl gear has more impacts than fixed gear on fish habitat, 'potential adverse impacts from trawl gear could be expected to be lower under the proposed action than under' current management or other alternatives. These discussions may be less robust than the discussions of socioeconomic effects, but NEPA only requires agencies to discuss impacts 'in proportion to their significance.' 40 C.F.R. § 1502.2(b)." Mitigation: Amendment 20 contains two primary mitigation features: an adaptive management program under which up to ten percent of the quota shares each year will be set aside to address unforeseen effects and a quadrennial review to make sure the program is meeting its goals. The review process includes a community advisory committee. Amendment 20 also contains other measures expected to meaningfully reduce the impacts of trawl rationalization on fishing communities, such as caps on the accumulation of quota shares and an initial two-year moratorium on transferring shares. Amendment 21 contains a five-year review provision. "The plaintiffs argue that these mitigation measures are vague, uncertain, and inadequate. However, we previously have found reasonably detailed mitigation evaluations like the ones at issue here to be sufficient."
Lovgren v. Locke, 701 F.3d. 5 (1st Cir. 2012)	NOAA/NMFS	WIN – Commercial fishermen and related businesses challenged federal management actions taken in New England's Multispecies Groundfish Fishery which established new restrictions on fishing activities to end and prevent overfishing (referred to as Amendment 16). Among other things, plaintiff argued that NOAA/NMFS violated NEPA in promulgating the restrictions by failing to consider reasonable alternatives and best available information. In its Amendment 16 EIS, the federal agency assessed the viability of several alternatives in relation to the stated purpose and need (to meet all requirements of the Magnuson-Stevens

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		Act, including its mandate to end overfishing by 2010), including one put forward by plaintiffs. The agency concluded that some of the alternatives were "infeasible, ineffective, or inconsistent with the basic policy objectives" of Amendment 16. Because of this, the agency did not analyze these alternatives in detail, but did analyze other alternatives in the EIS. The court found the agency's alternatives analysis in compliance with NEPA. The court also concluded that the agency took a hard look at the potential impact of the proposed action on the affected industry. "The NEPA ensures that an informed decision is made, not that the decision is satisfactory to all those affected by it. See Buzzards Bay, 644 F.3d at 31."

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Friends of Back Bay v. U.S. Army Corps of Engineers, 681 F.3d. 581 (4th Cir. 2012)	USACE	LOSS – Plaintiff environmental groups challenged a decision to issue a Clean Water Act Section 404 permit for a mooring facility and concrete boat ramp about 3,000 feet from the Back Bay National Wildlife Refuge in Virginia Beach, VA on the grounds that the agency should have prepared an EIS. Rather, the agency had prepared an EA, finding that the impacts of the project would not be significant because implementation of a "no-wake zone" (NWZ) would reduce potential environmental impacts. Both the FWS and EPA had recommended that an EIS be prepared because impacts could be significant and enforcement of a NWZ would be problematic (staffing constraints, funding). The district court ruled for the ACOE; the court of appeals reversed that decision. "Absent any reasonable basis to conclude that, as of October 2008, the NWZ was being adequately enforced or its efficacy was otherwise assured, the concept thereof as discussed within the EA was a logical nullity. Being unable to divorce the Corps's demonstrably incorrect assumption of an effective NWZ from its ultimate conclusion that no EIS need be prepared, we find ourselves constrained to invalidate the resultant FONSI as arbitrary and capricious. The judgment below to the contrary must therefore be vacated, and the matter remanded to the district court for further remand to the Corps." The court then took the unusual step of determining that the USACE was required to prepare an EIS: "The FWS specifically recommended preparation of an EIS as an alternative to denying the permit, and we agree that is the preferred approach here. Even were the situation considerably less clear-cut, we remain mindful that 'when it is a close call whether there will be a significant environmental impact from a proposed action, an EIS should be prepared.' *Hoffman*, 132 F.3d at 18. We concur with the view of the Second Circuit in Hoffman that the policy goals underlying NEPA are best served if agencies 'err in favor of preparation of an EIS when there is a substantial possibility that the [proposed] action may have a significant impact on the environment.' *Id.*"
Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers, 683 F.3d 1155 (9th Cir. 2012)	USACE	WIN – Puget Sound Energy (PSE) operates a hydroelectric dam at Snoqualmie Falls in WA. The Snoqualmie River drains a large watershed above the falls, and all of the water from this area must pass through a single narrow channel before it reaches the falls, creating a bottleneck during heavy rains. This subjects the City of Snoqualmie, located just upstream of the falls, to persistent and significant flooding. PSE planned to lower the dam to mitigate upstream flooding problems and obtained a FERC license to make upgrades and

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		modifications to the dam. Because the upgrade involves discharging fill material into the waters of the U.S, which requires a Clean Water Act Section 404 permit, PSE sought verification from USACE that it could proceed under a series of general nationwide permits (NWPs) authorizing certain discharges, rather than applying for an individual permit. ACOE verified that it could. Plaintiffs (downstream property owners) challenged the decision, stating that the NWPs did not apply to the proposed action and USACE was required to comply with NEPA. Upholding the district court and denying the plaintiffs' claim, the court stated "The Alliance bases its NEPA claim on the argument that the Corps was required by the CWA to inform PSE that it could not proceed under general nationwide permits, but instead must apply for an individual permit. However, because the Corps did not violate the CWA, it also did not violate NEPA. Verifying that permittees may properly proceed under a nationwide permit does not require a full NEPA analysis at the time of the verification."
State of Delaware Department of Natural Resources v. U.S. Army Corps of Engineers, 685 F.3d 259 (3rd Cir. 2012)	USACE	WIN – This case involved an USACE decision to deepen the main channel of the Delaware River. The project was authorized and funded in 1992, although commencement of the project was delayed for several reasons until 2009. At that time, New Jersey and Delaware filed suit in district court to enjoin the USACE from dredging the deeper channel, alleging violations of NEPA and other federal statutes. The district court granted summary judgment to the USACE and the court of appeals affirmed. Since 1992, USACE prepared an EIS, a supplemental EIS, and an updated EA and concluded that the project should proceed because its economic benefits outweighed possible adverse environmental effects. "In our review of the Corps' conduct, we conclude that its publication of the 2009 EA was neither arbitrary nor capricious." "Despite the Corps' comprehensive public engagement, appellants contend it acted arbitrarily and capriciously under NEPA. They argue the Corps provided inadequate public notice; erred in declining to publish a FONSI alongside the EA; erred in not circulating a draft of the EA for public review before publication; and did not meaningfully review the comments submitted. None of these claims has merit." "For over twenty years, the Corps has devoted substantial efforts to evaluating the proposed five foot deepening project for the Delaware River. It has published three comprehensive NEPA reports, received multiple rounds of public comments, and had immeasurable communications with the relevant state and federal agencies. Its decision in 2009 to proceed with the project was consistent with NEPA, the CWA, and the CZMA. Accordingly, we will affirm the judgments of the District Courts of New Jersey and Delaware."
Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers, 702 F.3d 1156 (10th Cir. 2012)	USACE	WIN - This case concerned the construction of a new Burlington Northern Santa Fe (BNSF) rail/truck terminal outside Kansas City, Kansas. Because the preferred site contained streams and wetlands protected under federal law, several groups brought challenges to a dredge and fill permit issued by the USACE under the Clean Water Act. The district court denied Hillsdale's motion for an injunction and granted summary judgment for the USACE and BNSF. On appeal, Hillsdale argued that the permit should be set aside because the USACE inadequately considered alternatives to the selected site under the Clean Water Act and violated NEPA by preparing an inadequate EA and failing to prepare an EIS. Upon review, the 10th Circuit concluded the USACE's decision was supported by the record, and was not an arbitrary and capricious exercise of its approval powers under federal law. In addressing plaintiffs' claims, the court stated: "Because suits alleging NEPA and CWA violations are brought under the Administrative Procedure Act (APA), we review the underlying agency decision to determine whether it

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		was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). An action is arbitrary and capricious if 'the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.' *New Mexico*, 565 F.3d at 704 (internal quotation omitted). "Our inquiry under the APA must be thorough, but the standard of review is very deferential to the agency. *Forest Guardians v. U.S. Fish and Wildlife Serv*., 611 F.3d 692, 704 (10th Cir. 2010). "A presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge such action." *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691 (10th Cir.), *cert. denied* 131 S. Ct. 602 (2010) (internal quotation and alteration omitted). We may set aside the agency's decision "only for substantial procedural or substantive reasons." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 780 (10th Cir. 2006). "'Deficiencies in an [environmental assessment] that are mere 'flyspecks' and do not defeat NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal.' *New Mexico*, 565 F.3d at 704. 'Furthermore, even if an agency violates the APA, its error does not require reversal unless a plaintiff demonstrates prejudice resulting from the error.' *Prairie Band Pottawatomie Nation v. Federal Highway Admin*., 684 F.3d 1002, 1008 (10th Cir. 2012) (Prairie Band); 5 U.S.C. § 706(2)(F) ("[D]ue account shall be taken of the rule of prejudicial error.")." In addressing plaintiffs' argument that the ACOE should have prepared an EIS because the proposed action was "highly controversial," the court noted that controversy was only one of ten factors that the USACE must consider when deciding whether to prepare an EIS, citing 40 CFR § 1508.27(b)(4). Further, the court stated that "[c]ontroversy in this context does not been opposition to a project, but rather 'a substantial dispute as to the size, nature, or effect of the action.' *Middle Rio Grande*, 294 F.3d at 1229. In addition, 'controversy is not decisive but is merely to be weighed in deciding what documents to prepare.' *Town of Marshfield v. FAA*, 552 F.3d 1, 5 (1st Cir. 2008). So even if a project is controversial, this does not mean the Corps must prepare an EIS, although it would weigh in favor of an EIS." As support for their argument that the proposed action is controversial, plaintiffs claimed that 90 percent of the comments on the EA either disapproved of the project or asked the USACE to prepare an EIS. However, the court found this argument to be "without merit," finding "[w]hen analyzing whether a proposal is controversial, we consider the substance of the comments, not the number for or against the project. Even if 90% of the comments to the environmental assessment were negative, this merely demonstrates public opposition, not a substantial dispute about the "size, nature, or effect" of the intermodal facility. *Middle Rio Grande*, 294 F.3d at 1229. *National Parks*, which Hillsdale cites, found controversy not because of the high number of negative comments but because those comments 'cast substantial doubt on the adequacy of the [agency's] methodology and data.' 241 F.3d at 736–37." "The comments here do not cast doubt on the agency's methodology and data. Hillsdale is correct that many of the comments they cite are more than mere statements of opposition; they question various aspects of the Corps's analysis, mostly its failure to analyze the cancer

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		risks of DPM [diesel particulate matter] emissions but also the intermodal facility's impacts on water quality, regional air quality, and so on. "But all comments Hillsdale identifies raise the same issues it raised in this appeal. As we have discussed, the Corps took the requisite 'hard look' at every one of these issues, which is all NEPA requires. *Forest Guardians*, 611 F.3d at 711. Hillsdale cannot overcome its failure on the merits simply by pointing to comments expressing the same concerns. If Hillsdale cannot show there is some merit to opposing opinions, they cannot demonstrate controversy. *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003); *see also Bering Strait Citizens v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 957 (9th Cir. 2008). "An additional point in the Corps's favor is that none of the federal or state agencies the Corps consulted opposed the project or the Corps's analysis. Although not dispositive, this is additional evidence of a lack of controversy. *See Nw. Envtl. Advocates*, 460 F.3d at 1139; *Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170, 185 (D.D.C. 2004); *cf. Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 43 (D.D.C. 2000) (finding controversy where 'three federal agencies and one state agency have all disputed the Corps evaluation . . . and pleaded with the Corps to prepare an EIS'). In short, neither the nature nor the number of the comments Hillsdale cites demonstrates the intermodal facility is controversial…."

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Tri-Valley CAREs v. Department of Energy, 671 F.3d 1113 (9th Cir. 2012)	DOE	WIN – The 9th Circuit upheld the district court's summary judgment in favor of DOE. DOE prepared an EA for a biosafety level 3 (BSL-3) facility at Lawrence Livermore National Laboratory (LLNL). In an earlier challenge to that EA, the 9th Circuit upheld all aspects of the EA except for its failure to consider the impact of a possible terrorist attack. DOE then prepared a Final Revised EA (FREA) to consider the environmental impacts of an intentional terrorist attack on the BSL-3 facility and the district court found that the FREA was adequate. Tri-Valley CAREs appealed the district court's decision, asking the 9th Circuit to require DOE to prepare an EIS or to revise the EA to determine whether an EIS is required. The 9th Circuit held that DOE "took the requisite 'hard look' at the environmental impact of an intentional terrorist attack in the manner required by [NEPA] and *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission,* 635 F.3d 1109 (9th Cir.2011)." "An agency has 'the discretion to determine the physical scope used for measuring environmental impacts' so long as the scope of analysis is 'reasonable.' *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir.2002). If the proposed action does not significantly alter the status quo, it does not have a significant impact under NEPA. *Burbank Anti–Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir.1980). At bottom, an agency need only provide a 'convincing statement' of why the threat did not require an EIS to satisfy NEPA. *See Ocean Advocates v. U.S. Army Corps. of Eng'rs*, 402 F.3d 846, 864 (9th Cir.2005) (internal citations and quotation marks omitted). An agency is not required to consider every scenario, and further, nothing in NEPA requires it to rely on purely empirical data. *Id*."

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		"Under NEPA, we must restrain from acting as a type of omnipotent scientist, and instead must restrict ourselves to inquiring only whether an agency took a 'hard look' at the potential environmental impacts at issue. *Muckleshoot Indian Tribe v. U.S. Forest Serv*., 177 F.3d 800, 814 (9th Cir.1999) (*per curiam*) (*quoting Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). When reasonable scientists disagree on appropriate models for analysis, we must defer to agency experts. *Lands Council*, 537 F.3d at 988. Here, the DOE provided ample justification and evidence for why it used the centrifuge model to assess the impact of a terrorist attack: it analogized triggering events, compared critical distinctions, and considered uniquely different circumstances. Accordingly, because of the deference that must be afforded to the agency, we find that the DOE took the requisite 'hard look' at the threat of direct terrorist attack." "We find that the DOE's determination of the potential impact of a terrorist theft and release of a pathogen on a national level satisfies NEPA because the record does not show any meaningful difference between the materials present at the LLNL BSL–3 facility and those present at other BSL–3 facilities nationwide. Nowhere in the record is there any proof that the LLNL BSL–3 facility is more prone or attractive to terrorist theft and release of a pathogen by an outsider than any other BSL–3 facility…. Given that there are more than 1,300 other BSL–3 facilities nationwide, many of which lack the safeguards of LLNL's BSL–3 facility, and further, given that many of the BSL–3 pathogens also exist in the natural environment, DOE reasonably concluded that the construction of a BSL–3 facility at LLNL did not change the status quo, and therefore found no significant impact. *See Burbank Anti–Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir.1980) (holding that where a proposed project does not alter the status quo then it does not have a significant impact). Accordingly, we find that the DOE reasonably exercised its discretion in determining no significant impact from the threat of theft and release by a LLNL BSL–3 terrorist outsider." "DOE's discussion of the impact of the potential theft and release of a pathogen by an LLNL BSL–3 terrorist insider also satisfies NEPA. Although the DOE did not use an empirical model, it engaged in a thorough two-step probabilistic analysis that assessed: (1) the probability that an insider with access to BSL–3 pathogens would have the motive to commit such an attack; and (2) the public threat that would result, assuming that an insider did have the access and motive to release a pathogen. Tri–Valley CAREs' claim that the DOE violated NEPA because it did not employ empirical analysis fails. Empirical analysis is not required under NEPA; an agency must only provide a 'convincing statement' of why the threat did not require an EIS. *See Ocean Advocates v. U.S. Army Corps. of Eng'rs*, 402 F.3d 846, 864 (9th Cir.2005)…. Based upon the facts that (1) a very small number of people have access to the select agents at LLNL BSL–3, all of whom are subject to extensive screening procedures from multiple agencies; and (2) the form and quantities of the pathogens at LLNL BSL–3 would require significant additional efforts to bring about a terrorist attack, the DOE concluded that the threat of a theft and release by an insider was not significant. The DOE's methodical inquiry satisfies NEPA's requirement that it provide a ''convincing statement" as to why the threat did not require an EIS. Accordingly, we find that the DOE reasonably concluded, based upon its discretion and a thorough examination of the evidence in the record, that threat of terrorist attack by a theft and release from an LLNL BSL–3 terrorist insider was not significant." Tri-Valley CAREs also claimed that DOE violated NEPA by failing to fully disclose a 2005 anthrax shipping incident, thereby depriving the public of the ability to comment. However, the court found that DOE considered the risks of shipping infectious materials to and from

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		the BSL–3 lab in the original EA, the DREA, and the FREA, and disclosed these risks to the public. "The purpose of an EA is not to compile an exhaustive examination of each and every tangential event that potentially could impact the local environment. Such a task is impossible, and never-ending. The purpose of the EA is simply to create a workable public document that briefly provides evidence and analysis for an agency's finding regarding an environmental impact." Finally, Tri-Valley CAREs contends that DOE violated NEPA when it failed to supplement the FREA to address the results of its Security Assessment (SA) conducted at LLNL. The court recognized that DOE had prepared "a supplemental report to determine whether the SA constituted significant new information requiring supplementation of the FREA. There, the DOE examined whether the low rating, and the deficiencies identified therein, significantly altered the outcomes of any of the three terrorist attack scenarios …. Because the DOE determined in its supplemental report that the SA did not show a 'seriously different picture of the likely environmental harms stemming from the proposed project,' we must defer to the DOE's finding that a supplemental REA was not required. *Wisconsin v. Weinberger*, 745 F.2d 412, 416–17 (7th Cir.1984)."
Alcoa, Inc. v. Bonneville Power Administration, 698 F.3d 774 (9th Cir. 2012)	DOE/BPA	WIN – This case involves a dispute over a contract between Alcoa and BPA, with Alcoa claiming that the contract is unlawful because it is inconsistent with the agency's statutory mandate to act in accordance with sound business principles. Plaintiff also claimed that BPA relied on a CX for an action for which an EIS was required. When it issued the final contract, BPA stated that it did not have to prepare an EIS because it fell within a CX where no physical changes to the system would occur (10 CFR Part 1021, Subpart D, Appendix D, CX B4.1). Plaintiff argued that the contract did not fall within the CX because the status quo is Alcoa's inevitable closure of its smelter, and the contract changes the status quo by allowing the smelter to keep operating. The court found that "[a]ll these arguments are wrong." "We will uphold an agency's reliance on a categorical exclusion if 'the application of the exclusions to the facts of the particular action is not arbitrary and capricious.' *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 & n.5 (9th Cir. 1996). In analyzing this issue, we ask 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' *Alaska Ctr.*, 189 F.3d at 859 (*quoting Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989))." "BPA's decision to do so was not arbitrary and capricious. As required by the regulation, BPA considered the relevant factors and determined that the present sale of power to Alcoa under the Alcoa Contract fell squarely within the terms of the categorical exclusion because it did not involve any new power-generation sources, any physical changes in transmission, or any alteration in the operating limits of existing generation resources. In support of this conclusion, BPA explained that if its existing power supply proved insufficient to provide Alcoa with the power mandated by the contract, the shortfall would be met through purchases on the open market (i.e., not through expansion of that capacity). Moreover, BPA noted that it would supply power to Alcoa 'over existing transmission lines that connect Intalco to BPA's electrical transmission system and no physical changes to this system would occur.' BPA's judgment regarding the applicability of the exclusion 'implicates substantial agency expertise' and is entitled to deference. Alaska Ctr., 189 F.3d at 859. Because BPA considered the relevant factors and did not make a 'clear error of judgment' in

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		determining that the categorical exclusion was applicable to its execution of the Alcoa Contract, no EIS was required, and we are obliged to reject the petitioners' contrary contentions. *See Bicycle Trails*, 82 F.3d at 1456 & n.5."
Los Alamos Study Group v. U.S. Department of Energy, 692 F.3d 1057 (10th Cir. 2012)	DOE/NNSA	WIN – Plaintiff group alleged that the design proposed for construction of a Chemistry and Metallurgy Research Replacement Nuclear Facility at the Los Alamos National Laboratory had changed so much since the original environmental analysis in 2003 that a new analysis was required and that all work on the facility should be halted until the conclusion of such analysis. The district court dismissed the claims on two grounds: (1) that they were prudentially moot because Defendants began an environmental analysis after the complaint was filed and committed to refraining from all construction until the analysis was complete; and (2) that the case was not yet ripe because there had been no final agency action. The 10th Circuit agreed with the district court on the ripeness issue and did not address the mootness issue.

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Gulf Restoration Network, Inc. v. Salazar, 683 F.3d 158 (5th Cir. 2012)	DOI	WIN – Plaintiff environmental groups filed petitions for review in the court of appeals challenging 16 DOI exploratory plan approvals under the Outer Continental Shelf Lands Act (OCSLA). Plaintiffs argued that the plans violated both OCSLA and NEPA because the agency failed to consider the BP Deepwater Horizon disaster in approving further deep water drilling and incorrectly applied a categorical exclusion in light of extraordinary circumstances (relatively untested deep water, areas of high biological sensitivity, areas of high seismic risk, areas of hazardous natural bottom conditions). However, the court dismissed four of the petitions as moot and found that plaintiffs' failure to participate in the administrative proceedings barred them from challenging the resulting orders. "The DOI's performance in the proceedings prior to its approval of the plans was by no means flawless. Of the twelve plans dealt with in this section, the DOI approved two on the same day that their public versions were posted on the internet; and in one instance the agency approved the plan before it had been posted. The petitioners' showing in this case, however, does not persuade us that they would have participated in those proceedings had there been more time between the postings and the approval of the plans. In respect to the clear majority of the plans at issue, there was ample time between the posting and the DOI's approval of the plan for a diligent interested party to participate in the administrative proceedings. Moreover, the petitioners have failed to offer any evidence or persuasive argument that the DOI's actions or omissions, rather than their own inattention or unpreparedness, caused their failure to participate in any of the administrative proceedings. Consequently, even if we were convinced that we have equitable powers to create an exception to [OCSLA] § 1349(c)(3)'s mandatory statutory requirement that judicial review shall be available only to a person who participated in the administrative proceedings, we conclude that the petitioners have not shown that they would be entitled to such an excuse from the rule in this case."

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Center for Biological Diversity v. U.S. Bureau of Land Management, 698 F.3d. 1101 (9th Cir. 2012)	BLM/FWS	LOSS – This is an ESA case in which a NEPA Record of Decision was invalidated because of its reliance on a biological opinion that the court found was invalid. The case concerns a BLM decision to authorize the Ruby Pipeline Project, which involved the construction, operation, and maintenance of a 42-inch-diameter natural gas pipeline extending from Wyoming to Oregon, over 678 miles. The court noted that the "right-of-way for the pipeline encompasses approximately 2,291 acres of federal lands and crosses 209 rivers and streams that support federally endangered and threatened fish species. According to a Biological Opinion formulated by FWS, the project 'would adversely affect' nine of those species and five designated critical habitats. The FWS nonetheless concluded that the project 'would not jeopardize these species or adversely modify their critical habitat.' The propriety of the FWS's 'no jeopardy' conclusion, and the BLM's reliance on that conclusion in issuing its Record of Decision, are at the heart of this case." The court vacated the FWS Biological Opinion and remanded it to the agency to "formulate a revised biological opinion that: (1) addresses the impacts, if any, of Ruby's groundwater withdrawals on listed fish species and critical habitat; and (2) categorizes and treats the Conservation Action Plan measures as 'interrelated actions' or excludes any reliance on their beneficial effects in making a revised jeopardy and adverse modification."
Defenders of Wildlife v. Bureau of Ocean Energy Management, 684 F.3d. 1242 (11th Cir. 2012)	BOEM	WIN – Plaintiff environmental groups filed petitions for review in the court of appeals challenging BOEM's approval of an exploration plan (Shell EP) to drill 10 exploratory wells on offshore Alabama leases in the Central Gulf of Mexico between 7,100 and 7,300 feet deep. Finding for the federal defendant, the court stated: "Petitioners insist BOEM's decision not to prepare an EIS and its subsequent FONSI is a violation of NEPA. Yet, Petitioners simply cannot overcome our extremely deferential 'arbitrary or capricious' standard of review." Contrary to petitioners' argument that the EA failed to include a site-specific analysis of potential catastrophic oil spills, the court noted that "the EA extensively analyzes the risks and consequences of such an event. Appendix B of the EA, 'Catastrophic Spill Event Analysis,' evaluates the impact of a low-probability catastrophic spill. After taking into account regulations put into effect after the Deepwater Horizon disaster, BOEM determined that the risk of another spill was low. While this analysis is derived from a generalized scenario, it is based on the only two large spill disasters in the Gulf of Mexico -- the 1979 Ixtoc blowout in the Bay of Campeche Mexico and the 2010 Deepwater Horizon disaster. An oil spill is an unexpected event, and its parameters cannot be precisely known in advance. Thus, it is appropriate for BOEM to summarize potential impacts resulting from a hypothetical oil spill." In addressing petitioners' argument that that BOEM failed to evaluate the worst case discharge spill of 405,000 barrels of oil per day, the court stated that "BOEM is not required to base its NEPA analysis on a worst case scenario. . . NEPA does not require a 'worst case discharge' analysis. Thus, we conclude that BOEM's reliance on analysis based on a lower spill rate, which it determined to be more likely than the worst case discharge, was not arbitrary or capricious or in violation of NEPA." With respect to petitioners' argument that the EA fails to discuss some endangered species present in the Gulf, including the piping plover, Gulf sturgeon, and various species of beach mice, the court concluded: "Petitioners suggest that every EA requires a detailed analysis of each species that could possibly be affected by a potential oil spill. NEPA clearly does not require such analysis. An EA is intended to be a document that '[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].' 40 C.F.R. § 1508.9(a)(1). Although the EA does not describe every possible environmental effect of an

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		oil spill, BOEM took a hard look at environmental impacts, and its site-specific analysis of expected drilling operations is consistent with NEPA."
Grand Canyon Trust v. U.S. Bureau of Reclamation, 691 F.3d. 1008 (9th Cir. 2012)	USBR/FWS	WIN - Grand Canyon Trust is an organization devoted to the protection and restoration of the canyon country of the Colorado Plateau. USBR is responsible for the operation of the Glen Canyon Dam on the Colorado River and FWS is responsible for the protection of the humpback chub, a fish that exists primarily in the relatively inaccessible canyons of the Colorado River and that is listed as endangered under the ESA. The Trust appealed a lower court decision that rejected the Trust's claims alleging violations of ESA, NEPA, and the Administrative Procedure Act in the operation of the dam. In this appeal, the Trust raised several issues relating to a 2009 biological opinion (BiOp) and an incidental take permit and whether USBR must comply with ESA and NEPA before issuing an annual operating plan (AOP) for the dam. An AOP is required by the Colorado River Basin Project Act and must describe the actual operation under the adopted criteria for the preceding water year and the projected operation for the current year. Although USBR completed an EIS on specific operating criteria for the dam and issued an EA on a 2008 Experimental Plan for a one-time high water release, the Trust argued that USBR was also required to prepare an EA or EIS for each AOP. The district court granted summary judgment to USBR, concluding that AOPs are not "major federal action[s]" triggering compliance with NEPA procedural requirements. The 9th Circuit affirmed, noting that "the adopted operating criteria for the Dam is MLFF [modified low fluctuating flow] which was selected by the Secretary in 1996 in the NEPA-required Record of Decision, and Reclamation does not have the discretion, through its promulgation of an AOP, to deviate from the implementation of MLFF." USBR was not making material changes to the operating criteria when it issued an AOP, and did not change the status quo through the AOP process. "Our conclusion above that producing an AOP is not a major federal action requiring compliance with NEPA procedures is also reinforced by the same pragmatic and realistic concerns that supported our decision that AOPs do not routinely require ESA consultation. Similarly, we hold that Reclamation is not required to comply with NEPA procedural requirements before preparing each AOP for the Dam. The time for an agency to give a hard look at environmental consequences, and the opportunity for serious NEPA litigation on whether alternatives were adequately considered, should come in this context at the points where an agency establishes operating criteria for a dam, or embarks on some significant shift of direction in operating policy, not merely when there is routine and required annual reporting." The ESA claims were dismissed as moot.
Scarborough Citizens Protecting Resources v. U.S. Fish and Wildlife Service, 674 F.3d. 97 (1st Cir. 2012)	FWS	WIN – Plaintiffs sued the State of Maine and FWS alleging that easements conveyed by the state to a private developer violated NEPA. They argued that FWS violated NEPA by approving an easement to use a trail to a private developer without giving a "hard look" to the potential environmental consequences. First recognizing that NEPA does not have a private right of action but that violations of NEPA are allowed under the Administrative Procedure Act, the court noted that federal officials did not convey the easement and that "while a grant of federal approval might perhaps have required an environmental assessment under NEPA under certain circumstances, no such approval was sought by state officials or granted by the federal ones." Addressing plaintiffs' argument that the state should have requested approval and FWS' failure to approve the easement violated NEPA, the court recognized that while "deliberate inaction might in some cases be subject to NEPA, 40

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		C.F.R. § 1508.18 (2011); *Mayaquezanos por la Salud y el Ambiente v. U.S.*, 198 F.3d 297, 301 (1st Cir. 1999),” in this case “it is unclear that the grant of the easement required federal ‘approval’ at all.” “In any event, as federal officials were apparently not advised of the grant, failing to object can hardly be treated as a surrogate for approval given without complying with NEPA.” “Alternatively, if the grant of the easement independently violated [applicable regulations] and permitted remedial action by FWS, the failure to seek remedies would be reviewable under NEPA only where there is an enforceable duty to act…” The court stated that no such duty existed. “NEPA cannot be used to make indirectly reviewable a discretionary decisions not to take an enforcement action where the decision itself is not reviewable under the APA or the substantive statute. ‘No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had the power to act but did not do so.’ *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980)….”
Center for Biological Diversity v. Salazar, 695 F.3d 893 (9th Cir. 2012)	FWS	WIN – Plaintiff environmental groups challenged regulations and accompanying EA authorizing incidental non-lethal take of polar bears and Pacific walruses resulting from oil and gas exploration activities in the Chukchi Sea and on the adjacent coast of Alaska. The EA concluded that the incidental take regulations, along with accompanying mitigation measures, “would result in no measurable impacts o[n] the physical environment,” and “the overall impact would be negligible on polar bear and Pacific walrus populations.” In May 2008, FWS listed the polar bear as a threatened species under the ESA because of projected reductions in sea ice caused by climate change. The Pacific walrus is not listed as threatened or endangered under the ESA. Plaintiffs alleged that the five-year incidental take regulations, the accompanying BiOp (Biological Opinion), and the EA failed to comply with the MMPA, ESA, and NEPA. In holding for the defendants, the 9th Circuit stated that: "Section 101(a)(5)(A) of the MMPA requires the Service to determine separately that a specified activity will take only 'small numbers' of marine mammals, and that the take will have only a 'negligible impact' on the species or stock. We hold that the Service permissibly determined that only 'relatively small numbers' of polar bears and Pacific walruses would be taken in relation to the size of their larger populations, because the agency separately determined that the anticipated take would have only a 'negligible impact' on the mammals' annual rates of recruitment or survival. The 'small numbers' determination was consistent with the statute and was not arbitrary and capricious. We also hold that the Service's accompanying BiOp and EA comply with the ESA and NEPA." Plaintiffs did not challenge the FWS decision not to prepare an EIS, but rather argued that the EA failed to consider a reasonable range of alternatives to address the potential impacts of a large oil spill. The EA analyzed the no-action alternative and the proposed incidental take regulations. The no-action alternative assumed that oil and gas exploration activities would continue to occur but without the benefit of mitigation measures imposed by FWS and without the ability to monitor specific activities; the no-action alternative did recognize that any takes resulting from exploration activities would violate the MMPA. Plaintiffs faulted the EA for assuming that oil and gas exploration would continue under the no-action alternative. The court stated that “the EA usefully could have acknowledged that MMPA take liability would deter industry from pursuing at least some of the exploration activities under the no-action alternative, but its failure to do so does not make its alternatives analysis arbitrary and capricious.”

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		Plaintiffs also argued that even if the no-action alternative was appropriately described, the EA failed to analyze other reasonable alternatives, such as imposing additional mitigation measures recommended by FWS scientists, or excluding key habitat areas from the geographic scope of the regulations. FWS initially considered other action alternatives, but explained in the EA why they were not feasible. In finding for the defendants, the court stated that "[w]e have previously upheld EAs that gave detailed consideration to only two alternatives. *N. Idaho Cmty*., 545 F.3d at 1154 ('[W]e hold that the Agencies fulfilled their obligations under NEPA's alternatives provision when they considered and discussed only two alternatives in the 2005 EA.'); *Native Ecosystems*, 428 F.3d at 1246 ('To the extent that Native Ecosystems is complaining that having only two final alternatives—no action and a preferred alternative—violates the regulatory scheme, a plain reading of the regulations dooms that argument.'). Because an EA need only include a 'brief discussion[ ]' of reasonable alternatives, 40 C.F.R. § 1508.9(b), and an agency's 'obligation to consider alternatives under an EA is a lesser one than under an EIS,' *Native Ecosystems*, 428 F.3d at 1246, the Service's alternatives analysis here is not arbitrary and capricious." Plaintiffs also argued that the EA was deficient because it failed to analyze the potential impacts of an oil spill. The court found that "[t]he EA discusses the possible severe, even lethal, impacts of oil spills on polar bears, Pacific walruses, and their prey. However, the EA focuses primarily on the risk of 'small operational spills' because it considers the likelihood of a large spill to be very low. Plaintiffs point to a comment from the Marine Mammal Commission, citing a Minerals Management Service (MMS) estimate that the likelihood of a large oil spill in the Chukchi Sea was somewhere between 33 to 51 percent 'over the life of the development and production activity.' The Service discussed this estimate in its rule listing the polar bear, but explains in the EA that the scope of its analysis was more narrow because the Chukchi Sea incidental take regulations cover only exploration activities and only for a period of five years…. The EA's failure to mention the other MMS estimate, regarding the likelihood of a large spill over the life of development and production activities, is not arbitrary and capricious given the relatively narrow scope of the activity contemplated in the incidental take regulations."

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Tinicum Township v. U.S. Department of Transportation, 685 F.3d 288 (3rd Cir. 2012)	FAA	WIN – This case involved an appeal of the FAA's approval of a significant expansion of the Philadelphia International Airport. Petitioners alleged that the FAA EIS prepared for the project violated NEPA because the air quality analysis was inadequate. As evidence, petitioners cite comments on the EIS submitted by EPA. "Because the EPA is charged with administering and implementing the Clean Air Act and has significant responsibilities under the National Environmental Policy Act, Tinicum urges us to defer to its comments on the FAA's air quality analysis under *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc*., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We extend Chevron deference to an agency action if Congress intended the action to 'carry the force of law.' *Swallows Holding, Ltd. v. Comm'r of Internal Revenue*, 515 F.3d 162, 169 (3d Cir.2008). In urging deference here, Tinicum misapprehends the EPA's role in commenting on the FAA's Environmental Impact Statement. CEQ regulations require the lead agency,

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		the FAA in this case, to '[o]btain the comments of any Federal agency' that has 'jurisdiction' or 'special expertise' or 'is authorized to develop and enforce environmental standards,' including the EPA here. 40 C.F.R. § 1503.1(a)(1). The EPA and other relevant agencies then review and comment on the EIS. 40 C.F.R. § 1503.2. Responding, the lead agency may: modify the alternative action it has reviewed; develop and evaluate new alternative actions; 'supplement, improve, or modify its analyses[;]' 'make factual corrections[;]' or '[e]xplain why the comments do not warrant further agency response.' 40 C.F.R. § 1503.4(a). And if, in its review of an agency action, the EPA determines that it 'is unsatisfactory from the standpoint of public health or welfare or environmental quality[,]' the Clean Air Act directs the EPA to refer the matter to the Council on Environmental Quality. 42 U.S.C. § 7609(b). Significantly, the EPA did not do so here." "Under this statutory and regulatory framework, the EPA's comments do not carry the force of law and do not warrant Chevron-style deference. *See Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 154–55 (3d Cir.2004) (noting that Chevron deference is inapplicable to agency interpretations rendered in 'opinion letters, policy statements, agency manuals, and enforcement guidelines'). As the D.C. Circuit noted in similar circumstances, '[the FAA] does not have to follow the EPA's comments slavishly—it just has to take them seriously.' *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C.Cir.1991)." "Citing the EPA's comments, Tinicum alleges five technical errors in the FAA's air quality analysis that purportedly render its environmental review inadequate under NEPA. Each allegation pertains to a category of data excluded from the FAA analysis. While additional data might enable a more detailed environmental analysis, NEPA does not require maximum detail. Rather, it requires agencies to make a series of line-drawing decisions based on the significance and usefulness of additional information. *Coalition on Sensible Transp. Inc. v. Dole*, 826 F.2d 60, 66 (D.C.Cir.1987)." After reviewing the FAA's response to EPA's comments, the court concluded that "the FAA gave serious consideration and reasonable responses to each of the EPA's concerns.[footnote omitted] As the lead agency, the FAA has some latitude to determine the level of analytical detail necessary to support an informed decision and to adequately disclose air quality impacts to the public. The technical errors alleged by Tinicum do not render the FAA's air quality analysis arbitrary or capricious." The court also rejected petitioners' argument that a supplemental EIS was required to address two studies referenced in an EPA letter summited to the FAA four months after the record of decision. "The two post-decision studies do not require a supplemental EIS. As the EPA noted in its April 26 letter, these two studies confirmed the conclusions the FAA reached in its Record of Decision and did not indicate any significant environmental impacts not contemplated in the EIS. Where new information merely confirms the agency's original analysis, no supplemental EIS is indicated. *See Town of Winthrop v. FAA*, 535 F.3d 1, 10 (1st Cir.2008) (citing *Vill. of Bensenville v. FAA*, 457 F.3d 52, 71 (D.C.Cir.2006))."
Citizens for Smart Growth v. Secretary of Transportation, 669 F.3d 1203 (11th Cir. 2012)	FHWA	WIN – Plaintiffs (Citizens) challenged a decision regarding the Indian Street Bridge Project in Marin County, FL, alleging that defendants (FHWA and FL DOT) violated NEPA by relying upon a Florida DOT Feasibility Study and Corridor Report; using an impermissibly narrow purpose and need statement that foreclosed consideration of a sufficiently wide array of alternatives; preparing a deficient EIS (inadequate review of alternatives, failure to take a hard look at direct effects, and insufficient consideration of cumulative and direct effects); and failing to prepare a supplemental EIS. Finding for the defendants on all counts, the court stated:

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		Circuit court precedent holds that incorporation of planning documents is permissible and that references to such documents can satisfy the requirements of NEPA and CEQ guidelines instruct agencies to incorporate material into an EIS by reference and encourage joint federal and local action. Although FHWA did not participate in the preparation of the document, it was permissible for FHWA to use publicly available documents in its EIS. FHWA's limitation of the purpose and need to cover only a southern crossing of the river was reasonable given the rationale that an existing bridge serves the central and northern parts of the county. FHWA's consideration of the relevant factors was sufficient and the purpose and need statement was not unduly narrow. NEPA does not impose any minimum number of alternatives that must be evaluated. FHWA considered 3 alternatives in-depth, including the alternative put forward by plaintiffs. Defendants' consideration of alternatives was sufficient to permit a reasoned choice. Defendants had no duty to conduct an in-depth analysis of impacts eliminated from detailed consideration, apart for a "brief" discussion of why they were eliminated. "[A] commitment to ongoing studies alone is not necessarily indicative of an insufficient EIS. *See City of Carmel-by-the-Sea v. U.S. Dep't of Transp*., 123 F.3d 1142, 1167 (9th Cir. 1997) (finding that an agency with only a 'conceptual' mitigation plan that intended to continue compliance efforts had satisfied Executive Order 11990 because it had complied 'to date')." Although plaintiffs argued that FHWA should have used a larger study area in which to review cumulative effects, defendants stated that that the basin area selected for review of cumulative impacts was the only basin into which another bridge also drained, and thus the only area where cumulative impacts could potentially occur. "This rationale is hardly indicative of arbitrary and capricious decision-making." Defendants discuss both indirect and cumulative impacts in the FEIS. "That subsection discusses the cumulative impacts on current and existing growth, emergency response and evacuation, wildlife, essential fish habitats, and water quality, as well as proposed transportation projects. The FEIS also noted that no other major construction projects pending in the area had obtained permit applications. The FEIS discussion of these matters, therefore, was sufficient." Plaintiff "also objects to the area selected for the study of induced growth but fails to explain why [defendants'] choice was erroneous. Determining the geographic extent of an analysis area is the kind of task 'assigned to the special competency of the appropriate agencies,' and such a determination can only be overturned by a showing of arbitrariness or capriciousness in the decision-making. *See Kleppe v. Sierra Club*, 427 U.S. 390, 414, 96 S. Ct. 2718, 2732 (1976). Furthermore, the FEIS recognized that commercial uses were in development or in the planning stages for development along the project's corridor. [Plaintiffs] cannot demand a more detailed response to their challenge without identifying precise geographic areas or instances of induced growth, considering that the project is already underway." "In their study of cumulative effects, [defendants] found that because no other construction projects were listed on the Martin County Five-Year Capital Improvements Plan as pending in the project area, no cumulative impacts could be expected. Citizens argues that referencing to the Five-Year Plan was an error and that [defendants] should have consulted the Martin County Long-Range Plan instead. However, [defendants] determined that because the projects on the Long-Range Plan were listed far before their actual development, any analysis of the cumulative impacts of the Long-Range Plan projects

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		would be mostly speculative. We have held that agencies cannot be 'forced to analyze the environmental impact of a project, the parameters and specifics of which would be a mere guess.' *City of Oxford v. FAA*, 428 F.3d 1346, 1356 (11th Cir. 2005)." "Ultimately, Citizens argues that [FHWA] should have used different and better methodologies for reviewing environmental impacts of the project. However, we do not review an agency's compliance with NEPA by asking whether it made the optimal choices; NEPA does not require perfection. *See Druid Hills*, 772 F.2d at 708–09. [Defendants'] compliance with NEPA may not have been perfect, but it was sufficient." The court declined to consider plaintiffs' claim regarding the need for a supplemental EIS because plaintiffs had not alleged this in its original complaint and only raised it on appeal.
North Carolina Wildlife Federation v. North Carolina Department of Transportation, 677 F.3d 596 (4th Cir. 2012)	FHWA	LOSS – Plaintiff environmental groups challenged an EIS prepared for a 20-mile toll road in North Carolina (North Monroe Connector Bypass). Overruling the lower court, the court of appeals found that FHWA had violated NEPA by failing "to disclose critical assumptions underlying their decision to build the road and instead provided the public with incorrect information…." Specifically, public commentators repeatedly asked FWHA whether the "no build" baseline in fact assumed construction of the Monroe Connector. In responding to these comments, the FHWA either failed to address the underlying issue or incorrectly stated that the Monroe Connector was not factored into the "no build" baseline. "Nonetheless, the Agencies maintain that because they "conducted a thorough analysis of the environmental impacts" of the Monroe Connector and 'accepted comments from the public,' we should defer to their expertise." The court of appeals declined to do so: "In sum, although we need not and do not decide whether NEPA permits the Agencies to use MUMPO's [Mecklenburg-Union Metropolitan Planning Organization's] data in this case, we do hold that by doing so without disclosing the data's underlying assumptions and by falsely responding to public concerns, the Agencies failed to take the required 'hard look' at environmental consequences. *Shenandoah Valley*, 669 F.3d at 196. We therefore vacate the judgment of the district court and remand so that the Agencies and the public can fully (and publicly) evaluate the 'no build' data."
Prairie Band Pottawatomie Nation v. Federal Highway Administration, 684 F.3d 1002 (10th Cir. 2012)	FHWA	WIN - Plaintiff environmental groups challenge FHWA selection of a route for the South Lawrence Trafficway, a proposed highway project in Lawrence, KS. Their NEPA claim alleged that the EIS supporting the decision, arguing that (1) the noise analysis failed to adhere to DOT regulations; (2) the government should not have rejected Alternative 42C; (3) the cost analysis underestimated the costs for Alternative 32B; and (4) the safety analysis used incorrect safety criteria. In ruling on the claims, the court stated that "[i]n the context of a NEPA challenge, an agency's decision is arbitrary and capricious if the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment." However, "'Deficiencies in an EIS that are mere 'flyspecks' and do not defeat NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal.' *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir.2009). Furthermore, even if an agency violates the APA, its error does not require reversal unless a plaintiff demonstrates prejudice resulting from the error. APA § 706 ('[D]ue account shall be taken of the rule of prejudicial error.'); *see New Mexico ex rel. Richardson*, 565 F.3d at 708.

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		Importantly, '[a] presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.' *New Mexico ex rel. Richardson*, 565 F.3d at 704." Noise analysis: "the noise analysis focused on the sensitive areas in and around the Haskell Farm. As the government points out, most of the remaining land along routes 32B and 42A is undeveloped. Appellants allege for the first time in their reply brief that the government 'failed to consider 32B's noise impacts on the nearby noise-sensitive Prairie Park and Nature Center and city homes east of the Haskell Farm.' Aplt. Reply Br. at 8. Appellants, however, have not laid a sufficient factual basis on the record for us to conclude that the government's decision to restrict the noise analysis to the Haskell Farm was arbitrary and capricious. To the contrary, as far as the record shows, that decision, made pursuant to public comment on the project, was entirely reasonable. To find otherwise would be to engage in 'flyspeck[ing]' the noise analysis based on factual allegations outside the record. *New Mexico ex rel. Richardson*, 565 F.3d at 704. This we may not do." Alternative 42C: "To the extent Appellants argue the government erred in not giving sufficient consideration to their 42C proposal, we note that Appellants did not propose alternative 42C until after the government issued its final EIS. Appellants do not explain why they did not propose this route during the scoping process or during the public comment period for the draft EIS. Despite Appellants' late proposal, the government considered their proposal and offered a reasoned explanation of why it was inferior to the chosen alternative. Appellants argue that the government's safety analysis for alternative 42C was inadequate, but given the timing of their proposal, the government arguably went above and beyond what was required." Alternative 32B Cost Analysis: "This argument, based on a single footnote in the EIS, warrants only a brief discussion… Although Appellants' interpretation is perhaps plausible when the footnote is read in isolation, it is obviously incorrect when read in conjunction with other sections of the EIS. Specifically, the portion of the EIS entitled Environmental Consequences has a subsection specifically addressing wetland mitigation for the 32nd Street corridor. There, a table totaling the costs for 32B includes wetland mitigation measures as well as other measures and lists the total cost as $18.6 million. See App. at 665. Thus, we are unconvinced that the government erroneously omitted wetlands mitigation costs from its consideration of alternative 32B." Safety Criteria: "Finally, Appellants complain briefly that the EIS used the wrong vehicle accident rate metric to calculate the relative safety of each alternative. The EIS's purpose and need statement used accidents per million vehicle miles driven, but the EIS's safety analysis used accidents per year. The substantive difference between the two metrics is that accidents per million vehicle miles driven cancels out accident increases created solely by increased highway length, while accidents per year does not. Appellants claim the use of the latter metric in the safety analysis was erroneous given that the former metric was used to define the project's purpose and need. "We find the EIS's use of accidents per year instead of accidents per million vehicle miles was not arbitrary and capricious. We 'are not in a position to decide the propriety of competing methodologies in the transportation analysis context, but instead, should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors.' *Comm. to Pres. Boomer Lake Park v. Dep't of Transp*., 4 F.3d 1543, 1553 (10th Cir.1993). Appellants do not explain why accidents per year lacks a

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		rational basis for NEPA purposes. To us, the total number of accidents that will be caused (or avoided) each year appears a reasonable safety metric, and Appellants do not attempt to convince us otherwise."

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Coalition for Responsible Growth and Resource Conservation v. Federal Energy Regulatory Commission, 2012 WL 2097249 (2nd Cir. 2012) (not selected for publication in Federal Reporter)	FERC	WIN – Plaintiff environmental groups challenged FERC's failure to prepare an EIS for the issuance of a certificate of public convenience and necessity for a proposed 39-mile natural gas pipeline through three counties in Pennsylvania and related facilities. FERC had prepared an EA/FONSI, concluding that an EIS was not required. The court held that the 296-page EA had "thoroughly considered the issues" and that FERC had reviewed the concerns raised by the comments on the EA. The court also held that the cumulative impact analysis was adequate. "FERC included a short discussion of Marcellus Shale development in the EA, and FERC reasonably concluded that the impacts of that development are not sufficiently causally-related to the project to warrant a more in-depth analysis. In addition, FERC's discussion of the incremental effects of the project on forests and migratory birds was sufficient. FERC addressed both issues in the EA and has required [the project proponent] to take concrete steps to address environmental concerns raised by petitioners and others."
State of New York v. Nuclear Regulatory Commission, 681 F.3d 471 (D.C. Cir. 2012)	NRC	LOSS – The State of New York and a number of environmental groups petitioned the court for review of the Commission's Waste Confidence Decision (WCD) rulemaking regarding temporary storage of permanent disposal of nuclear waste. Recognizing that this case "is another in the growing line of cases involving the federal government's failure to establish a permanent repository for civilian nuclear waste," the court, ruling for the petitioners, held that "the rulemaking at issue here constitutes a major federal action necessitating either an environmental impact statement or a finding of no significant environmental impact. We further hold that the Commission's evaluation of the risks of spent nuclear fuel is deficient in two ways: First, in concluding that permanent storage will be available 'when necessary,' the Commission did not calculate the environmental effects of failing to secure permanent storage—a possibility that cannot be ignored. Second, in determining that spent fuel can safely be stored on site at nuclear plants for sixty years after the expiration of a plant's license, the Commission failed to properly examine future dangers and key consequences. For these reasons, we grant the petitions for review, vacate the Commission's orders, and remand for further proceedings." NRC first issued a WCD in 1984. It included 5 findings, including that a mined geologic repository for nuclear waste would be available by 2009 and that spend nuclear fuel (SNF) could be stored safely on nuclear power plant sites for at least 30 years beyond the licensed life of each plant. The rule was updated in 1990 to predict the availability of a repository by 2025; it was updated again in 1999 without changes. In 2010, NRC updated the WCD by stating that a suitable repository would be available "when necessary" rather than by a date certain. After examining the potential environmental effects from temporary storage, NRC also stated that SNF could be stored safely at nuclear power plant sites for at least 60 years beyond the licensed life of the plant.

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		The petitioners argued that the WCD is a major federal action because it is a predicate to every decision to license or relicense a nuclear plant, and the findings made in the WCD are not challengeable at the time a plant seeks a license. NRC argued that because the WCD does not authorize the licensing of any nuclear reactor or storage facility, and because a site-specific EIS will be conducted for each facility at the time it seeks a license, the WCD is not a major federal action. NRC also argued that the WCD itself constituted an EA supporting the revision of the NRC rule (10 C.F.R. § 51.23(a)), and because the EA found no significant environmental impact, an EIS is not required. The court agreed with petitioners "that the WCD rulemaking is a major federal action requiring either a FONSI or an EIS. The Commission's contrary argument treating the WCD as separate from the individual licensing decisions it enables fails under controlling precedent. We have long held that NEPA requires that "environmental issues be considered at every important stage in the decision-making process concerning a particular action." *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). The WCD makes generic findings that have a preclusive effect in all future licensing decisions—it is a pre-determined 'stage' of each licensing decision. … It is not only reasonably foreseeable but eminently clear that the WCD will be used to enable licensing decisions based on its findings. The Commission and the intervenors contend that the site-specific factors that differ from plant to plant can be challenged at the time of a specific plant's licensing, but the WCD nonetheless renders uncontestable general conclusions about the environmental effects of plant licensure that will apply in every licensing decision." Even accepting NRC's argument that the WCD constituted an EA for the permanent storage conclusion, the court found it to be insufficient because a finding that reasonable assurance that permanent SNF storage will be available when necessary "does not describe a probability of failure so low as to dismiss the potential consequences of such a failure. Under NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass…. An agency may find no significant impact if the probability is so low as to be "remote and speculative," or if the combination of probability and harm is sufficiently minimal…. Here, a 'reasonable assurance' that permanent storage will be available is a far cry from finding the likelihood of nonavailability to be 'remote and speculative.' The Commission failed to examine the environmental consequences of failing to establish a repository when one is needed." The court also concluded that the "EA and resulting FONSI are not supported by substantial evidence on the record because the Commission failed to properly examine the risk of leaks in a forward-looking fashion and failed to examine the potential consequences of pool fires." Both the US Supreme Court and the D.C. Circuit Court have endorsed the NRC's practice of considering environmental issues through general rulemaking in appropriate circumstances. In this case, the court saw no reason that a comprehensive analysis would be insufficient to examine onsite risks that are common to all plants, particularly given NRC's use of conservative bounding assumptions and the opportunity to raise site-specific differences at the time of a specific plant's licensing. However, "whether the analysis is generic or site-by-site, it must be thorough and comprehensive. Even though the Commission's application of its technical expertise demands the "most deferential" treatment by the courts, *Baltimore Gas*, 462 U.S. at 103, we conclude that the Commission has failed to conduct a thorough enough analysis here to merit our deference." The court found that "an agency conducting an EA generally must examine both the

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		probability of a given harm occurring and the consequences of that harm if it does occur. Only if the harm in question is so 'remote and speculative' as to reduce the effective probability of its occurrence to zero may the agency dispense with the consequences portion of the analysis." Contrary to petitioners' argument however, "the finding that the probability of a given harm is nonzero does not, by itself, mandate an EIS: after the agency examines the consequences of the harm in proportion to the likelihood of its occurrence, the overall expected harm could still be insignificant and thus could support a FONSI." In this case, NRC "did not undertake to examine the consequences of pool fires at all. Depending on the weighing of the probability and the consequences, an EIS may or may not be required, and such a determination would merit considerable deference….But unless the risk is 'remote and speculative,' the Commission must put the weights on both sides of the scale before it can make a determination." The court did agree with NRC that petitioners could not raise issues that it had not raised in the rulemaking. "We note, as did the Supreme Court in *Public Citizen*, that primary responsibility for compliance with NEPA lies with the Commission, not petitioners; nonetheless, the non-health effects alluded to here are not 'so obvious that there is no need for a commentator to point them out.' Id. Given, however, that we are invalidating the Commission's conclusions as a whole, petitioners will have the opportunity to properly raise and clarify these concerns on remand."

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