National Association of Environmental Professionals

Promoting Excellence in the Environmental Profession

Annual NEPA Report 2009

Of the

National Environmental Policy Act (NEPA) Working Group

Submitted to
NAEP Board of Directors

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This report reviews NEPA document submittals and statistics, NEPA litigation and agency procedures for calendar year 2009. Additional sections provide commentary on the conduct of the NEPA Process and expert expectations for the future. The purpose of this report is to document status of NEPA compliance and perspectives during the reporting year. We welcome reader comment and inquiry.

Contents

Introduction

> *[I]t is the continuing policy of the Federal Government…to use all practicable means and measures…to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.*
>
> National Environmental Policy Act of 1969

This is the third National Association of Environmental Professionals (NAEP) National Environmental Policy Act (NEPA) Working Group Annual Report. The report provides a summary of activities conducted by the NEPA Working Group and of major NEPA-related issues of the past calendar year. This annual report is prepared and published through the initiative and volunteer efforts of members of the NAEP NEPA Working Group.

The NEPA Working Group 2009 – Peter W. Havens[1]

> *"The mission of the NEPA Working Group is to improve environmental impact assessment as performed under the National Environmental Policy Act."*

During 2009, the NEPA Working Group has continued to be a valuable asset for the NAEP. Through monthly telephone calls and the Internet, the Working Group provides an open venue where senior NEPA experts and inexperienced NEPA practitioners alike come together for healthy dialogue about current events and the NEPA Process. This report is an outgrowth of the WG and our focus on NEPA events through the reporting year.

The Working Group has continued the tradition of Battelle-sponsored monthly telephone conference calls. Our discussions address timely topics including participation in the NAEP Annual Conference, preparing this report, updating our web site and providing NEPA training. Most of all, our telephone conference calls improve communication and camaraderie among our members. The Working Group "draft NEPA" web site has proved to be a great resource for member contributions and participation in internet discussions.

This year, with thanks to participating members, we've entertained discussions on the NEPA process, Civics and NEPA, NEPA litigation, Energy and Climate Change, NEPA training and NEPA practitioner job availability. The Working Group's focus was drawn to the new administration and economic recovery. Congress enacted the American Recovery and Reinvestment Act (ARRA), providing an influx of funds supporting agency project implementation. The NEPA process figured prominently in this law as some

[1] Peter W. Havens, CEP, Environmental Planner, Sound & Sea Technology, Lynnwood, Washington

feared the NEPA requirements would slow the movement of funds or even stall the program altogether.

Our report brings together the activities of the Working Group with a retrospective view of NEPA documentation, regulation and court case summaries from 2009. Commentary considers the relationship between ARRA and the NEPA process.

Just the Stats – Grace Musumeci[2]

In 2009, a total of 499 environmental impact statements (EISs) were published. Thirteen agencies each prepared 10 or more documents; seven agencies prepared 20 or more. Once again, the Forest Service provided the most with 134 and the next highest was the Federal Highway Administration with 58. The table and map on following pages show NEPA documents filed in 2009 by agency and by State.

Of the total, 277 were draft EISs and 222 were finals. During the year, some form of final document as well as draft document was published for 59 actions/projects; of which 19 of the draft documents were rated LO and 39 were rated EC; one received no comment. Seventeen different agencies oversaw the evaluations of these 59 federal actions.

As of January 1, 2010, 65 proposed projects had been rated LO by the Environmental Protection Agency (EPA), 140 were rated EC, eight received an EO rating, one was rated EU. Five documents were not rated for various reasons, and comments were pending or not yet reported for 59 projects. See the Note Box above for an explanation of EPA's ratings.

Projects that received EO ratings were actions by the Forest Service, Bureau of Land Management (2), U.S. Army Corps of Engineers, Federal Highway Administration (2), National Park Service, and U.S. Fish and Wildlife Service; one project each was in Oregon, Nevada, California, Wyoming, and Arizona and two were in North Carolina. The EU rating was for a Forest Service project in Montana.

The following table and graphics show the distribution of ratings within category and the distribution of EIS documents among the proponent agencies and state by state across the nation.

[2] Grace Musumeci, Chief, Environmental Review Section, Region 2 Environmental Protection Agency, New York, NY. Any views expressed in this article do not necessarily represent the views of the EPA or the United States.

Environmental Protection Agency rating system for Environmental Impact Statements[a]

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).

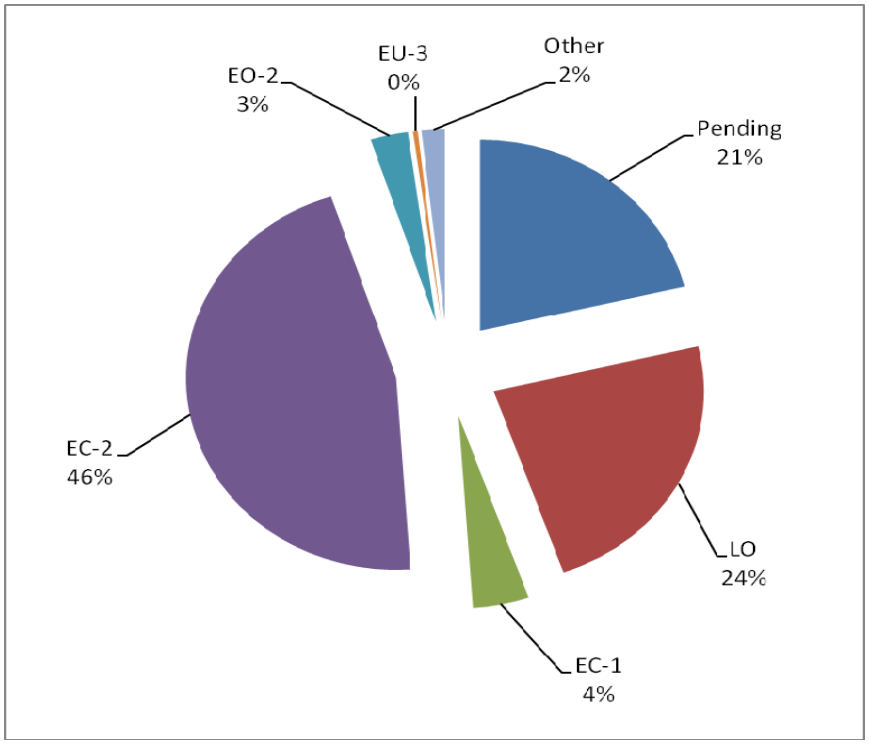
EU (Environmentally Unsatisfactory) The review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed.

RATING THE ADEQUACY OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT (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.

[a] USEPA 2009. Environmental Impact Statement (EIS) Rating System Criteria. http://www.epa.gov/oecaerth/nepa/comments/ratings.html#rating. Accessed April 25, 2010

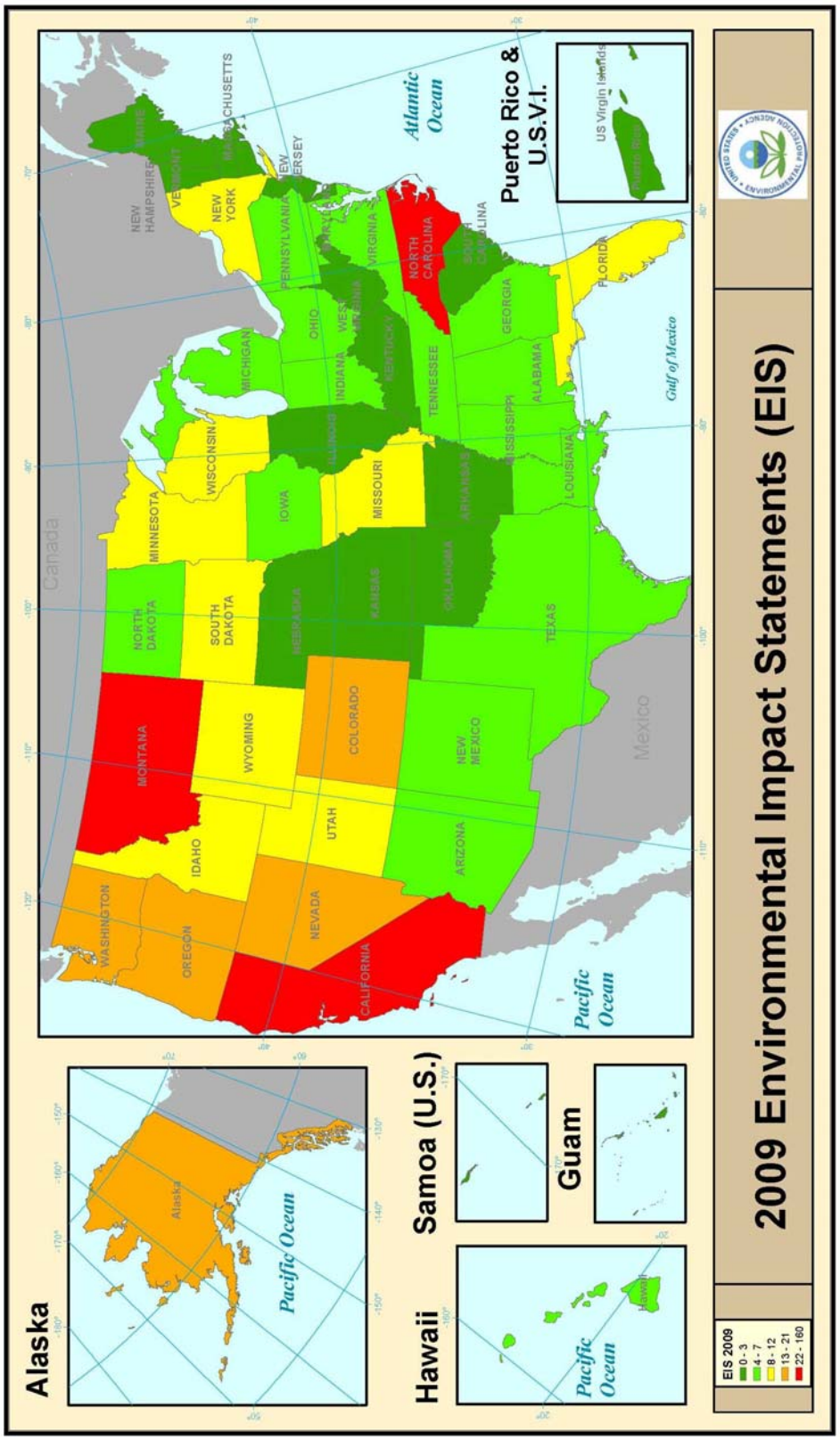
Environmental Impact Statements rated by the Environmental Protection Agency in 2009 by percentage within each rating category



NEPA Documents Filed in 2009[a]

Abbreviation	Lead Agency	Number of Documents
APH	Animal & Plant Health Inspection Service	1
ARD	Rural Development Program	1
BIA	Bureau of Indian Affairs	4
BLM	Bureau of Land Management	28
BOP	Bureau of Prisons	1
BPA	Bonneville Power Administration	2
BR (IBR)	Bureau of Reclamation	19
DHS	Department of Homeland Security	1
DOE	Department of Energy	5
DOS (STA)	Department of State	2
EPA	Environmental Protection Agency	4
FAA	Federal Aviation Administration	6
FER (FRC)	Federal Energy Regulatory Commission	14
FHW	Federal Highway Administration	58
FRA	Federal Rail Administration	2
FRB	Federal Reserve Bank	1
FSA	Farm Service Agency	1
FTA	Federal Transit Administration	10
GSA	General Services Administration	4
IBW	International Boundary & Water Commission	1
MMS	Minerals Management Service	2
NGB	National Guard Bureau	1
NHT	National Highway Traffic Safety Administration	1
NIG	National Indian Gaming Commission	1
NIH	National Institutes of Health	2
NOA	National Oceanic & Atmospheric Administration	26
NPS	National Park Service	34
NRC	Nuclear Regulatory Commission	13
NRS	National Resources Conservation Service	3
NSA	National Security Agency	2
NSF	National Science Foundation	2
STB	Surface Transportation Board	3
TPT	The Presidio Trust	1
TVA	Tennessee Valley Authority	4
USA	U.S. Army	13
USA-COE	U.S. Army Corps of Engineers	41
USAF (UAF)	U.S. Air Force	4
USC (CGD)	U.S. Coast Guard	8
USF (AFS)	U.S. Forest Service	134
USFW (SFW)	U.S. Fish & Wildlife Service	13
USM	U.S. Marines	2
USN	U.S. Navy	22
USP (UPS)	U.S. Postal Service	1
WAP	Western Area Power Authority	1
Total		499

[a] Source: United States Environmental Protection Agency


2009 Environmental Impact Statements (EIS)
EIS 2009
0 - 3
4 - 7
8 - 12
13 - 21
22 - 180
Alaska
Hawaii
Samoa (U.S.)
Guam
Puerto Rico & U.S.V.I.
US Virgin Islands
Puerto Rico
Canada
Mexico
Atlantic Ocean
Pacific Ocean
Gulf of Mexico
WASHINGTON
OREGON
CALIFORNIA
IDAHO
NEVADA
MONTANA
WYOMING
UTAH
ARIZONA
COLORADO
NEW MEXICO
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
KANSAS
OKLAHOMA
TEXAS
MINNESOTA
IOWA
MISSOURI
ARKANSAS
LOUISIANA
WISCONSIN
ILLINOIS
MICHIGAN
INDIANA
OHIO
KENTUCKY
TENNESSEE
MISSISSIPPI
ALABAMA
GEORGIA
FLORIDA
SOUTH CAROLINA
NORTH CAROLINA
VIRGINIA
WEST VIRGINIA
PENNSYLVANIA
NEW YORK
NEW JERSEY
MARYLAND
MASSACHUSETTS
VERMONT
NEW HAMPSHIRE
MAINE

Agency Procedures – Leo Tidd[3]

Final Rules and Actions

Agency for International Development

National Environmental Policy Act: Categorical Exclusions for Certain Internal, Domestic USAID Activities Funded From the USAID Operating Expense Account, Directive of Final Action and Request for Comments (74 FR 46413)

USAID has established categorical exclusions for certain domestic administrative, maintenance and procurement activities.

Armed Forces Retirement Home

Compliance with the National Environmental Policy Act, Final Rule (74 FR 57608)

The Armed Forces Retirement Home (an independent Federal agency with property in Washington, D.C. and Gulfport, MS) has established agency-specific NEPA regulations at 38 CFR 200. The regulations establish screening criteria to determine when a categorical exclusion may be applied and define the extraordinary circumstances that may preclude the use of a categorical exclusion. An appendix to the final rule provides lists of actions corresponding to the following four categories: categorical exclusions requiring no documentation, categorical exclusions requiring documentation, actions requiring an environmental assessment and actions requiring an environmental impact statement.

Corporation for National and Community Service

Protocol for Categorical Exclusions Under the National Environmental Policy Act for Programs Funded by the American Recovery and Reinvestment Act, Interim Final Action (74 FR 34309)

The Corporation for National and Community Service has established categorical exclusions for the administration of community service activities authorized under the American Recovery and Reinvestment Act of 2009. The community service activities being categorically excluded include tutoring, assistance to job-seekers, health care support services, renovating or constructing homes for low-income families, and assisting with wildlife and land conservation programs.

Department of Commerce

National Environmental Policy Act - Categorical Exclusions, Notice (74 FR 33204)

The Department of Commerce has established department-wide categorical exclusions and requires the use of a Departmental NEPA Checklist to assist in

[3] Leo Tidd, Senior Planner, Louis Berger Group, Rochester, New York

determining the class of action. The checklist is available at http://www.nepa.noaa.gov/procedures.html

Department of Energy

Online Posting of Certain DOE Categorical Exclusion Determinations, Policy Statement (74 FR 52129)

The Department of Energy has established a policy of posting certain categorical exclusion determinations online. The posting of classified or confidential information is excluded from the policy.

The policy specifically applies to categorical exclusion determinations involving classes of actions listed in Appendix B to Subpart D of DOE's NEPA regulations (10 CFR 1021). Appendix B to Subpart D covers certain facility operations, research and monitoring, and waste management and environmental restoration activities. In explaining the rationale for the policy, DOE states that posting categorical exclusions online is consistent with the spirit of President Obama's "Transparency and Open Government" memorandum issued on January 21, 2009.

Variance for Certain Requirements Under the Department of Energy's National Environmental Policy Act Implementing Procedures for the Deployment of Combined Heat and Power, District Energy Systems, Waste Energy Recovery Systems, and Efficient Industrial Equipment Initiative, Notice of Variance (74 FR 41693)

Variance for Certain Requirements for the Electric Drive Vehicle Battery and Component Manufacturing Initiative Under the Department of Energy's National Environmental Policy Act Implementing Procedures, Notice of Variance (74 FR 30558)

DOE has decided to grant variances from its NEPA regulations for project selection in order to expedite the award of competitive grants for certain projects funded by American Recovery and Reinvestment Act of 2009. Environmental factors will be considered in the grant award process through an environmental questionnaire completed by applicants and the involvement of DOE NEPA Compliance Officers in the review of the grant applications. Individual projects funded under these grants that require an EA or EIS will still need to comply with NEPA prior to DOE approval, the variance only applies to the grant award process.

Federal Highway Administration and Federal Transit Administration, Dept. of Transportation

Environmental Impact and Related Procedures; Final Rule (74 FR 12518)

FHWA and FTA have issued a final rule modifying their joint NEPA procedures. The primary impetus for the modifications was to incorporate the requirements established by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Sections 6002 and 6010. Definitions of the terms applicant, lead agencies, participating agency and project sponsor have been added to FHWA-FTA

regulations. In addition, the final rule creates categorical exclusions for the deployment of intelligent transportation system technologies and for the acquisition of land for hardship or protective purposes. Finally, the SAFETEA-LU 180-day limitation on claims following notice of final agency action in the Federal Register is incorporated into the regulations.

National Endowment for the Arts

Protocol for Categorical Exclusions Supplementing the Council on Environmental Quality Regulations Implementing the Procedural Provisions of the National Environmental Policy Act for Certain American Recovery and Reinvestment Act Projects, Notice of Final Action (74 FR 21011)

The National Endowment for the Arts has established a categorical exclusion for American Recovery and Reinvestment Act-funded projects focused on the preservation of jobs in the nonprofit arts sector.

National Telecommunications and Information Administration, Department of Commerce

National Environmental Policy Act - Categorical Exclusions covering the Broadband Technology Opportunities Program (BTOP), Notice (74 FR 52456)

NTIA has established categorical exclusions specific to the Broadband Technology Opportunities Program. The categorical exclusions were recommended by CEQ to promote consistency with the categorical exclusions of the U.S. Department of Agriculture, Rural Utilities Services' Telecommunication Program.

Natural Resources Conservation Service, Department of Agriculture

Compliance with NEPA, Interim Final Rule (74 FR 33319)

NRCS has established additional categorical exclusions for restoration and conservation activities that will assist the agency in expeditiously implementing projects funded under the American Recovery and Reinvestment Act of 2009. Specifically, 21 additional categorical exclusions are added to 7 CFR 650.6. NRCS notes that the process used to establish these additional categorical exclusions considered comparable categorical exclusions established by other Federal agencies, the findings of an interdisciplinary review team of experts, and previous environmental reviews for these restoration and conservation activities.

Proposed Rules

Nuclear Regulatory Commission

Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Proposed Rule (74 FR 38117)

The NRC has an issued a proposed rule to amend the NEPA procedures for renewing nuclear power plant operating licenses. As part of this proposed rulemaking, NRC has updated the 1996 Generic Environmental Impact Statement for License Renewal of Nuclear Plants (1996 GEIS). The 1996 GEIS identified two main categories of environmental issues associated with nuclear plant license renewal:

- Category 1 Issues - Issues involving the same or similar environmental impacts for all nuclear power plants. Category 1 issues are addressed generically and no additional plant-specific analysis of these issues is required.

- Category 2 Issues - Issues that require site-specific information to determine the level of impact.

Category 2 issues are addressed in a plant-specific, supplemental EIS to the 1996 GEIS during the license renewal process. Category 1 issues do not need to be addressed by the plant-specific supplemental EIS.

As part of the revised GEIS prepared in conjunction with this proposed rule, the environmental issues in the 1996 GEIS were reviewed to determine if the 1996 GEIS findings are still valid or need to be modified. Several environmental issues were combined or changed categories as a result of this review process. The proposed amendment to 10 CFR 51 includes an updated version of Table B-1 in Appendix B to Subpart A of "Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants."

Executive Orders

E.O. 13514: Federal Leadership in Environmental, Energy, and Economic Performance

On October 5, 2009, President Obama signed a sweeping new executive order with far-reaching ramifications for federal energy conservation and environmental policy. The E.O. It contains a virtual potpourri of initiatives for federal agencies to implement, including requirements related to energy efficiency, greenhouse gas reduction, water conservation, recycling, pollution prevent, sustainability, liable communities, transpartency in government and NEPA.

The NEPA provison of the E.O. states that "Federal agencies must advance regional and local integrated planning by identifying and analyzing impacts from energy usage and alternative energy sources in all EISs (environmental impact statements) and EAs (environmental assessments) for proposals for new or expanded Federal facilities under NEPA" This provision is effective immediately, thereby placing a new analysis requirement on federal agencies preparing NEPA documents.[4]

[4] Reprinted with permission: excerpt from an article by Jonathan Riker, Regulatory Specialist, and Ron Bass, Senior Regulatory specialist published in The Impact Report an on-line publication of ICF International: http://icif.com.

Administration of Barack H. Obama, 2010

Proclamation 8469—40th Anniversary of the National Environmental Policy Act, 2010

December 31, 2009
By the President of the United States of America
A Proclamation

Forty years ago, the National Environmental Policy Act (NEPA) was signed into law with overwhelming bipartisan support, ushering in a new era of environmental awareness and citizen participation in government. NEPA elevated the role of environmental considerations in proposed Federal agency actions, and it remains the cornerstone of our Nation's modern environmental protections. On this anniversary, we celebrate this milestone in our Nation's rich history of conservation, and we renew our commitment to preserve our environment for the next generation.

NEPA was enacted to "prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." It established concrete objectives for Federal agencies to enforce these principles, while emphasizing public involvement to give all Americans a role in protecting our environment. It also created the Council on Environmental Quality to lead our Government's conservation efforts and serve as the President's environmental advisor.

America's economic health and prosperity are inexorably linked to the productive and sustainable use of our environment. That is why NEPA remains a vital tool for my Administration as we work to protect our Nation's environment and revitalize our economy. The American Recovery and Reinvestment Act of 2009 reaffirmed NEPA's role in protecting public health, safety, and environmental quality, and in ensuring transparency, accountability, and public involvement in our Government.

Today, my Administration will recognize NEPA's enactment by recommitting to environmental quality through open, accountable, and responsible decision making that involves the American public. Our Nation's long-term prosperity depends upon our faithful stewardship of the air we breathe, the water we drink, and the land we sow. With smart, sustainable policies like those established under NEPA, we can meet our responsibility to future generations of Americans, so they may hope to enjoy the beauty and utility of a clean, healthy planet.

Now, Therefore, I, Barack Obama, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim January 1, 2010, as the 40th Anniversary of the National Environmental Policy Act. I call upon all executive branch agencies to promote public involvement and transparency in their implementation of the National Environmental Policy Act. I also encourage every American to learn more about the National Environmental Policy Act and how we can all contribute to protecting and enhancing our environment.[5]

[5] [Filed with the Office of the Federal Register, 8:45 a.m., January 6, 2010] This proclamation was released by the Office of the Press Secretary on January 4, 2010, and it was published in the Federal Register on January 7.

Litigation Updates for 2009 – Lucinda Low Swartz[6]

Introduction

In 2009, federal courts issued 48 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. These cases involved 13 different departments and agencies. The government prevailed in 33 of the 48 cases (69 percent).

Cases of particular interest are discussed below. Appendix A contains a synopsis of all of the 2009 NEPA cases.

Statistics

The U.S. Forest Service (USFS) again won first place as the agency involved in the largest number of NEPA cases, with 12 cases (one of which also involved the U.S. Bureau of Land Management [BLM]). The agency prevailed in 8 of the 12. BLM came in a close second with 10 cases (one of which also involved USFS), of which they prevailed in 6.

In addition to the 10 BLM cases, other U.S. Department of the Interior agencies had another 11 cases:

- National Park Service (NPS) – 2 cases, winning one and losing one
- Fish and Wildlife Service (FWS) – 7 cases, winning 5 and losing 2
- Bureau of Reclamation (BurRec) – 1 case, which the agency won
- Minerals Management Service (MMS) – 1 case, which the agency won

The Army Corps of Engineers (ACOE), the only U.S. Department of Defense agency involved in court decisions this year, had 4 cases. Of those 4, ACOE won 3 and lost 1.

The U.S. Department of Energy (DOE) was involved in 2 cases, winning one and losing one.

U.S. Department of Transportation agencies had 2 cases, both involving the Federal Aviation Administration (FAA). The agency won both.

The Federal Energy Regulatory Commission (FERC) and the U.S. Nuclear Regulatory Commission (NRC) each were involved in 3 cases. FERC won 2 and lost 1; NRC won all 3 of their cases.

The Animal and Plant Health Inspection Service (APHIS) and the Tennessee Valley Authority (TVA) were each involved in 1 case. APHIS lost and TVA won.

[6] Lucinda Low Swartz, Esq., Environmental Consultant, Kensington, Maryland

Themes

As always, courts upheld decisions where the agency could demonstrate it had given potential environmental impacts a "hard look":

- *Theodore Roosevelt Conservation Partnership v. Salazar,* 605 F. Supp. 2d 263 (D.D.C. 2009)
- *Gardner v. U.S. Bureau of Land Management,* 633 F. Supp. 2d 1212 (D. Or 2009)
- *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015 (D. Ariz. 2009)
- *Natural Resources Defense Council v. Federal Aviation Administration*, 564 F.3d 549 (2d Cir. 2009)
- *Heartwood, Inc. v. Agpaoa*, 611 F. Supp. 2d 675 (E.D. Ky 2009)
- *Habitat Education Center, Inc. v. U.S. Forest Service*, 593 F. Supp. 2d 1019 (E.D. Wisc. 2009)
- *Sierra Club v. Wagner*, 555 F.3d 21 (1st Cir. 2009)
- *New York v. U.S. Nuclear Regulatory Commission*, 589 F.3d 551 (2d Cir. 2009)
- *Sierra Club v. Kimbell*, 595 F. Supp. 2d 1021 (D. Minn. 2009)

And invalidated those where the agency failed to do so:

- *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2009)
- *Center for Biological Diversity v. U.S. Department of the Interior*, Civil Action No. 07-16423, September 14, 2009 (9th Cir.) (for publication)
- *New Mexico v. U.S. Bureau of Land Management*, 565 F.3d 683 (10th Cir. 2009)
- *South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of the Interior*, 588 F.3d 718 (9th Cir. 2009)

The following issues were also addressed.

Does NEPA Apply? Federal Control and Responsibility

In two cases involving ACOE, courts came to different conclusions regarding the scope of analysis required. The court in *Ohio Valley Environmental Coalition v. Aracoma Coal Co*, 556 F.3d 177 (4th Cir. 2009), found that "the fact that the Corps' § 404 permit is central to the success of the valley-filling process does not itself give the Corps 'control and responsibility' over the entire fill" and declined to require an analysis of the entire project. This finding was based in part on the fact that the West Virginia Department of Environmental Protection, not ACOE, had "control and responsibility" over all aspects of the projects.

But in *White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033 (9th Cir. 2009), the court noted that, under ACOE regulations, the ACOE scope of analysis must "address the impacts of the specific activity requiring a permit and those portions of the entire

project over which the district engineer has sufficient control and responsibility to warrant federal review. . . . Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project." The court then stated that where a development could not go forward without a permit, then the federal involvement was sufficient to grant "Federal control and responsibility" over the project within the meaning of the regulation.

In a case involving DOE, the court noted that "courts look to the degree of federal funding and to indicia of federal involvement and control" in determining whether NEPA applied in a particular situation. Here, DOE was to occupy the computer sciences building to be built and the court found that sufficient to make the project a federal action. *Save Strawberry Canyon v. U.S. Department of Energy*, 613 F. Supp. 2d 1177 (N.D. Cal. 2009).

In *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, 657 F. Supp. 2d 1233 (D. Colo. 2009), the court rejected the agency's argument that the activities to be undertaken by the mineral rights owner did not amount to a federal action and therefore did not trigger NEPA requirements. The court found that NEPA was triggered because sufficient federal control existed where the U.S. had surface rights and granted access to the surface estate to the mineral rights owner.

But in *Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115 (10th Cir. 2009), the court concluded that there was no federal action in the establishment of winter feeding of 13.000 Wyoming elk. USFS had issued a permit, but remained "largely uninvolved" in the operations of the feedground. That the Forest Service retains discretion to amend the permit does not alone lead to the conclusion there is ongoing major federal action or major federal action to occur.

"Controversial" and "Uncertainty"

Courts continued to find that in determining whether impacts were "controversial" (40 CFR § 1508.28(b)(4) – definition of "significantly"), agencies should consider whether there is a substantial dispute as to the size, nature or effect of the federal action rather than to the existence of opposition. *Northwest Environmental Defense Center v. National Marine Fisheries Service*, 647 F. Supp. 2d 1221 (D. Or. 2009); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015 (D. Ariz. 2009); *Sierra Club v. Wagner*, 555 F.3d 21 (1st Cir. 2009).

A court also noted that the Council on Environmental Quality (CEQ) regulations do not require an environmental impact statement (EIS) anytime there is uncertainty (40 CFR § 1508.28(b)(5)), but only if the effects of the project are "highly uncertain." Here, the agency made reasonable predictions on the basis of prior data. Although the spector of climate change made the agency's prediction less certain, such uncertainty was not "high" but rather was "that quotient of uncertainty which is always present when making predictions about the natural world." *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009).

Alternatives

The 9th Circuit Court of Appeals invalidated a BLM EIS that considered a developer's request to exchange private lands for several parcels surrounding BLM-owned land to develop a former iron ore mine into a landfill. Among the reasons was that BLM unreasonably narrowed the purpose and need for the project to only those that would meet the private needs of the applicant. Although BLM had proposed several alternatives that would have been responsive to the need to meet long-term landfill demand, BLM did not consider these options in any detail because each of these alternatives failed to meet the narrowly drawn project objectives, which required that the applicant's private needs be met. "BLM cannot define its objectives in unreasonably narrow terms and may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives." *National Parks & Conservation Association v. U.S. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2009).

In *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015 (D. Ariz. 2009), the court reiterated that there is no minimum number of alternatives that must be addressed in an EIS.

In *Natural Resources Defense Council v. Federal Aviation Administration*, 564 F.3d 549 (2d Cir. 2009), the court held that NEPA does not require discussion of alternatives that could only be implemented after significant changes in government policy or legislation.

One court recognized that, for an environmental assessment (EA), a sliding scale approach to alternatives analysis is appropriate. "An EA must discuss alternatives to the planned action, but need not discuss all proposed alternatives. The range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial." *Dallas v. Hall*, 562 F.3d 712 (5th Cir. 2009).

Supplementation

In *New Mexico v. U.S. Bureau of Land Management*, 565 F.3d 683 (10th Cir. 2009), the court ruled that BLM should have issued a Supplemental EIS because the location and extent of impacts had changed, even though the type of impacts did not. "If a change to an agency's planned action affects environmental concerns in a different manner than previous analyses, the change is surely 'relevant' to those same concerns...."

Although "[t]he agency has an obligation to re-circulate if a proposed action ultimately differs so dramatically from the alternatives canvassed in the draft EIS as to preclude meaningful consideration by the public," in *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, 591 F. Supp. 2d 1206 (D. Wyo. 2009), the court ruled that the additional information plaintiffs relied on to bolster their position was made available to the public, was commented upon, and was the subject of public hearings. For this reason, a supplemental draft EIS was not required.

The court in *City of Las Vegas v. Federal Aviation Administration*, 570 F.3d 1109 (9th Cir. 2009), also found that supplementation was not required because subsequent modifications to the proposed action were not significant. "An SEA is only required, however, when the environmental impact is significant or uncertain and the EA/[Finding of No Significant Impact (FONSI)] is no longer valid."

Cumulative Impacts

In *Northwest Environmental Defense Center v. National Marine Fisheries Service*, 647 F. Supp. 2d 1221 (D. Or. 2009), the court indicated that agencies had flexibility in the analysis of cumulative impacts:

"While the agency is required to determine the cumulative effect of the proposed project combined with other actions, it is neither [plaintiff's] nor this court's role to dictate the best procedure for determining those effects. Categorically requiring the agency to discuss in detail every aspect of all previous actions, regardless of their current impact on the area, would impose a requirement not mandated by statute."

The 9th Circuit Court of Appeals reiterated "that an aggregated cumulative effects analysis that includes relevant past projects is sufficient." *Ecology Center v. Castaneda*, 562 F.3d 986 (9th Cir. 2009). A district court agreed, stating that agencies are not required to list or analyze the effects of past actions unless such information is necessary to describe the cumulative effect of all past actions combined. *Habitat Education Center, Inc. v. U.S. Forest Service*, 593 F. Supp. 2d 1019 (E.D. Wisc. 2009); *see also, Habitat Education Center, Inc. v. U.S. Forest Service*, 603 F. Supp. 2d 1176 (E.D. Wisc. 2009).

In *Natural Resources Defense Council v. Federal Aviation Administration*, 564 F.3d 549 (2d Cir. 2009), the court rejected the argument that the FAA had failed to address the cumulative impacts of state highway projects. The court found that the FAA had no actual knowledge of the planned projects and the plaintiffs did not bring it to their attention. The court also found that the FAA's cumulative impact study areas were based on a consideration of drainage basins, Sector Plan boundaries, census boundaries, noise contours, drive time contours, and consultation with other agencies. "This is sufficient for us to conclude that [FAA's] delineation of the cumulative impact study areas was not arbitrary and capricious."

In *Ohio Valley Environmental Coalition v. Aracoma Coal Co*, 556 F.3d 177 (4th Cir. 2009), the court also concluded that the agency's cumulative impact analysis was sufficient: "the Corps has analyzed cumulative impacts in each of the challenged permits and has articulated a satisfactory explanation for its conclusion that cumulative impacts would not be significantly adverse...."

Categorical Exclusions

Several categorical exclusions were the subject of litigation in 2009. In *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2009), the court issued a

preliminary injunction for the application of a categorical exclusion to a final NPS rule allowing persons to possess concealed weapons in national parks. The court agreed with plaintiffs that NPS's Decision Memorandum reflected

"a significant misunderstanding of the obligations imposed by NEPA. Under that statute, the DOI was required to take a 'hard look' at the environmental consequences of the Final Rule before its implementation. ...This burden is greater than simply examining whether environmental impacts are authorized by the Final Rule – the DOI was required to consider all direct, indirect, and cumulative impacts that were foreseeable as a result of the Final Rule....Rather than performing an evaluation to ascertain the extent of any foreseeable environmental impacts, the DOI simply assumed there were none because the Final Rule did not authorize any impacts."

The court did reject plaintiffs' argument that the agency was required to solicit public comment on its application of a categorical exclusion.

Similarly, in a case involving FWS (*Delaware Audubon Society v. Secretary of the Department of the Interior*, 612 F. Supp. 2d 442 (D. Del. 2009)), a court found that the agency violated NEPA by approving an action without preparation of an EA or EIS:

"The defendants do not contest that, starting in 2003, they allowed genetically modified crops to be planted on Prime Hook [National Wildlife Refuge]. They also do not contest that their own biologists determined that these activities posed significant environmental risks to Prime Hook, including biological contamination, increased weed resistance, and damage to soils. Nonetheless, the record reflects that the defendants did not conduct any NEPA environmental assessments, make any compatibility determinations, or prepare any environmental impact statements to assess the impact of these activities on Prime Hook."

The court in *People of California v. U.S. Department of Agriculture*, 575 F.3d 999 (9th Cir. 2009), invalidated USFS' application of a categorical exclusion for its 2005 State Petitions Rule for roadless areas, disagreeing that the rule fell within the categorical exclusion and finding the explanation regarding the absence of extraordinary circumstances to be insufficient.

But In *Wild Fish Conservancy v. Kempthorne*, 613 F. Supp. 2d 1209 (E.D. Wash. 2009), the court found that a categorical exclusion was appropriately applied for the operation of a fish hatchery. "Courts do not apply NEPA to federal actions that merely maintain the status quo...In addition, the routine maintenance of an ongoing, pre-NEPA project does not trigger NEPA's requirements."

Similarly, the court in *Alliance of the Wild Rockies v. Tidwell*, 623 F. Supp. 2d 1198 (D. Mont. 2009), found that USFS had properly applied a categorical exclusion for a sanitation harvest of primarily diseased, dead, or dying fir trees for the purpose of trying to save the rest of the forest from a beetle infestation.

Public Involvement for EAs

The court in *Theodore Roosevelt Conservation Partnership v. Salazar*, 605 F. Supp. 2d 263 (D.D.C. 2009), held that public participation requirements for the EAs were met even though the agency did not circulate the EAs for notice and comment. "[T]he agency has significant discretion in determining when public comment is required with respect to EAs."

Similarly, the court in *California Trout v. Federal Energy Regulatory Commission*, 572 F.3d 1003 (9th Cir. 2009), ruled that while NEPA does not require federal agencies to assess, consider, and respond to public comments on an EA to the same degree as it does for an EIS, "an agency must permit some public participation when it issues an EA." Courts have not stated what kind of public participation is required to meet NEPA standards, but they have held that a complete failure to involve or even inform the public about an agency's preparation of an EA would violate NEPA regulations.

In rejecting plaintiff's argument that FONSIs should have been circulated for 30 days, a court held that "[a]n agency that adopts a FONSI without seeking input can be expected at least to accept comments before acting on the merits of a decision; but here both EAs were circulated in draft form and comments solicited even before any FONSI was finally adopted." *Sierra Club v. Wagner*, 555 F.3d 21 (1st Cir. 2009).

Deference Given to Agencies

Courts reiterated that agencies are entitled to substantial deference, especially with respect to scientific and technical analyses:

- *Gardner v. U.S. Bureau of Land Management*, 633 F. Supp. 2d 1212 (D. Or 2009)
- *Natural Resources Defense Council v. Federal Aviation Administration*, 564 F.3d 549 (2d Cir. 2009)
- *Habitat Education Center, Inc. v. U.S. Forest Service*, 603 F. Supp. 2d 1176 (E.D. Wisc. 2009)
- *Sierra Club v. Wagner*, 555 F.3d 21 (1st Cir. 2009)
- *New York v. U.S. Nuclear Regulatory Commission*, 589 F.3d 551 (2d Cir. 2009)
- *Sierra Club v. Kimbell*, 595 F. Supp. 2d 1021 (D. Minn. 2009)

Plaintiff's Failure to Comment

Courts continued to hold that a plaintiff would be considered to have waived arguments that should have been raised in its comments on the Draft EA or EIS. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015 (D. Ariz. 2009); and *Natural Resources Defense Council v. Federal Aviation Administration*, 564 F.3d 549 (2d Cir. 2009). One court ruled that plaintiffs should have brought their concerns to the agency during the scoping period held for a categorical exclusion action. "It was Plaintiffs' responsibility to participate in the administrative process in a meaningful way and to alert the FS to their position and contentions." *Alliance of the Wild Rockies v. Tidwell*, 623 F. Supp. 2d 1198 (D. Mont. 2009).

Another court found that:

"failure to object or comment on a selection during administrative proceedings does not automatically preclude one from challenging the selection. Neither NEPA itself...nor the CEQ regulations ... expressly limit judicial review of final agency action to those who preserved their appellate rights through public comment. ... Additionally, as the Supreme Court found in [*Department of Transportation v. Public Citizen]*, 541 U.S. 752, 765 (2004), 'the agency bears the primary responsibility to ensure that it complies with NEPA . . . and . . . an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'"

Thus, in this case, the court rejected the agency's argument that plaintiff's failure to comment or object to the selection of an alternative after the issuance of the Final EIS precluded a challenge to it. *Friends of Tims Ford v. Tennessee Valley Authority*, 585 F.3d 955 (6th Cir. 2009).

Of Note

- **Readability**: A BLM EIS was invalidated because, among other things, it did not foster informed decisions and public participation. "In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form…." *National Parks & Conservation Association v. U.S. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2009).
- **Third-Party Contracting**: BLM selected the contractor following the provisions of the BLM Manual for third-party contracting and maintained control of the entire process. The oil and gas companies did not select the EIS contractor, although they did recommend the contractor and pay the bill. No conflict of interest has been shown that would support plaintiffs' contentions. *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, 591 F. Supp. 2d 1206 (D. Wyo. 2009).
- **Impacts of Terrorism**: In cases involving NRC, courts upheld NRC's determination that terrorist attacks are "too far removed from the natural or expected consequences of agency action" to require an environmental impact analysis (*New Jersey Department of Environmental Protection v. U.S. Nuclear Regulatory Commission*, 561 F.3d 132 (3rd Cir. 2009)) and concluded that NEPA did not require an evaluation of terrorist attacks because "the consequences of a terrorist attack cannot be said to be 'an effect' of [NRC's Design Basis Threat] rule, and analyzing the effects of a terrorist attack would be speculative at best" (*Public Citizen v. Nuclear Regulatory Commission*, 573 F.3d 916 (9th Cir. 2009)).
- **Final Action**: A challenge to an NOI as a final agency decision to proceed with the NEPA process before the project had been developed was dismissed because there was no final agency action. The court recognized that several steps remained in the NEPA process (draft EIS, public comment period, final EIS) during which the alleged defects could be cured. *Central Delta Water Agency v. U.S. Fish and Wildlife Service*, 653 F. Supp. 2d 1066 (E.D.Cal. 2009).
- **Consulting with CEQ**: An agency's amendment of its NEPA procedures was invalidated because the agency had failed to consult with CEQ before doing so.

Piedmont Environmental Council v. Federal Energy Regulatory Commission, 558 F.3d 304 (4th Cir. 2009).

- **Freedom of Information Act (FOIA)**: Communications between BLM, the cooperating agencies, and DOE regarding DOE's Draft Programmatic EA for the Uranium Leasing Program in western Colorado were pre-decisional and not subject to release under FOIA. The exception in the CEQ regulations regarding the release of EISs, comments received, and underlying documents (40 CFR 1506.6(f)) under FOIA does not apply to an EA...." *Information Network for Responsible Min v. U.S. Bureau of Land Management*, 611 F. Supp. 2d 1178 (D. Colo. 2009).
- **Statute of Limitations**: There is a 6-year statute of limitations in which to bring NEPA claims under the Administrative Procedure Act. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015 (D. Ariz. 2009); *Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115 (10th Cir. 2009); *Friends of Tims Ford v. Tennessee Valley Authority*, 585 F.3d 955 (6th Cir. 2009).

Commentary – Ron Bass[7]

Economic Stimulus and NEPA: Lessons Learned in the First Year [8]

Under Section 1609 of American Recovery and Reinvestment Act of 2009 (Recovery Act) Federal agencies are required to devote adequate resources to ensuring that applicable environmental reviews carried out under the National Environmental Policy Act (NEPA) are completed on an expeditious basis using the shortest existing, applicable process allowed by the law. With this requirement, Congress expressed the clear intent that agencies must still comply with NEPA, but that they should do so in a streamlined fashion within NEPA's existing legal framework. Section 1609 also requires the President to submit quarterly reports to Congress (specifically, the U.S. Senate Committee on Environment and Public Works and the U.S. House of Representative Committee on Natural Resources) on the NEPA compliance status of projects and activities funded by the Recovery Act. The President has delegated this responsibility to the Council on Environmental Quality (CEQ.) Remarkably, this is the first time in NEPA's 40-year history that Federal agencies are required to systematically account for their progress in complying with NEPA. As of this writing, the CEQ had transmitted four such reports to Congress: on May 18, August 3, and November 2, 2009, and on January 1, 2010.[9] These reports are based on detailed filings that each Federal agency made to CEQ. This article summarizes and assesses the first year of NEPA compliance for Recovery Act funding. It reveals the number of each type of NEPA document that Federal agencies have prepared, highlights examples of what Federal agencies are doing to streamline NEPA compliance, and discusses how the Recovery Act reporting may have wider influences on NEPA practices in general.

Recovery Act Reporting Requirements

The Section 1609 reporting requirement was part of a Congressional compromise under which Congress agreed not to weaken NEPA in the name of economic recovery, but rather to encourage streamlining within the existing legal framework and to require greater Congressional oversight through period reporting. Section 1609 also requires that agencies provide adequate resources (e.g., funding and staffing) to ensure that environmental reviews applicable under NEPA are expedited using the shortest applicable process under NEPA. Although the law does not specify which type of NEPA document must be prepared for each economic stimulus project, it certainly encourages agencies, in light of the short spending timetables dictated by the Recovery Act, to use previously prepared NEPA documents, categorical exclusions (CEs), and other legitimate streamlining techniques to comply with NEPA. The Recovery

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[8] This article is based on an earlier version first published in The Impact Report an on-line publication of ICF International : http://icif.com

[9] The complete text of these reports is available on CEQ's NEPAnet web site at: http://ceq.hss.doe.gov/nepa/nepanet.htm.

Act does not, however, provide Federal agencies with a license to take inappropriate shortcuts not allowed by NEPA.

Analysis of the First Full Year of Quarterly Reports

As seen from the numbers in Table 1, the first year's reporting reveal that the large majority of federal projects were "shovel-ready," meaning that NEPA compliance and other Federal permitting had already been completed, or that the underlying projects were not subject to NEPA. Of those activities that were subject to NEPA, by far the largest category were projects being processed using CEs (approximately 94.9%). The large number of CE projects is not surprising. Even before the passage of the Recovery Act, Federal agencies prepared far more CEs than Environmental Assessments (EAs) or Environmental Impact Statements (EISs). While each agency's list of CEs is different, most agencies include maintenance and repairs of existing facilities, continued funding for ongoing activities, and a host of other minor projects that have little likelihood of resulting in significant impacts on the human environment.

Table 1 – Summary of NEPA Compliance for Recovery Act – Funded Projects (January 2009-through December 2009)

Type of NEPA Document and Status	Action Total	Action Status	Percentage of all NEPA Actions
NEPA Does Not Apply	**4141**		**n/a**
Categorical Exclusions	**158,316**		**94.9%**
Completed CEs		154,040	
Pending CEs		4,276	
Environmental Assessments		**7596**	
4.6%			
Completed EAs		6,316	
Pending EAs		1,280	
Environmental Impact Statements	**806**		**0.5%**
Completed EISs		719	
Pending EIS		83	
Total NEPA Actions	**166,718**		**100%**
Completed Actions		161,075	
Pending Actions		5,643	
Total Recovery Act-Funded Projects		161,553*	

*Total does not equal sum of NEPA documents – due to status of some pending, unfunded projects.

Thus, given a choice of how to spend Recovery Act dollars, most agencies are apparently marshalling those discretionary funds to projects that fit into CEs. One reason for the extensive use of CEs may be that the Recovery Act mandates very short deadlines for the allocation and spending of funds. In some situations, if an agency does not spend the money within specified deadlines, the funding for those programs is no longer available. Agencies should be mindful, however, that the desire to act quickly in the name of economic stimulus is not, itself, a reason to rely on a CE. Rather, for a CE to apply a project must fit squarely into an adopted CE category and not be subject to any exceptions for extraordinary circumstances.

As the reports show, relatively few Recovery Act projects are being evaluated using EAs (approximately 4.6 %) and even fewer using EISs (approximately 0.5%). This is not surprising given that the Recovery Act is intended to bring project funds to bear quickly. Federal agencies indicated that they are generally completing those projects expeditiously and often adding Recovery Act funding to projects that had already begun or completed an EA or EIS. This "need for speed" is evidenced in the difference in the percentages of projects that are relying on previously prepared EAs versus previously prepared EISs. Approximately 67% of the projects using EAs are relying on a previously prepared EA, while about 87% of the projects using EISs are relying on an already prepared EIS.

Several agencies reported using programmatic NEPA reviews to address similar projects and activities. Using a programmatic review can facilitate NEPA implementation of individual projects and activities either by providing full NEPA compliance or by programmatically addressing common environmental issues and thereby eliminating the need to replicate the analysis of those issues in subsequent, project-specific, NEPA reviews. In some cases, these programmatic documents are based on new, innovative approaches that are outside of the traditional NEPA model. For example, the Maritime Administration, within the Department of Transportation, reported preparing a programmatic CE for all 75 Recovery Act grants issued under the Small Shipyard Grant program.

In addition to the statistical summary, the CEQ quarterly reports to Congress include agency-by-agency descriptions of some of the main Recovery Act spending programs. These spreadsheets provide interesting information about where agencies are focusing their economic stimulus efforts.[10] Notably, despite what some critics had predicted, no departments or agencies have reported instances of substantial NEPA-related delays. However, in some cases, the need to expedite Recovery Act funding has caused the agency to take a fresh look at some of the institutional delays that have traditionally slowed down the NEPA process. For example, the Bureau of Indian Affairs, within the Department of the Interior, has noted that the requirement for tribal consultation has slowed down some of its Recovery Act spending and is looking into ways to improve this process for economic stimulus projects.

[10] The complete agency-by-agency spreadsheets are available on the CEQ NEPANet web site at http://ceq.hss.doe.gov/nepa/nepanet.htm

The reports also show that the Recovery Act's emphasis on streamlining NEPA compliance is having a ripple effect on the broader NEPA practice. Some agencies have already initiated changes to their NEPA regulations and manuals to incorporate techniques and approaches for making NEPA compliance more efficient and expedient. CEQ is encouraging these efforts and providing guidance to support them. For example, according to the August report, the Natural Resources Conservation Service, within the Department of Agriculture, has worked closely with CEQ to revise its NEPA regulations to encourage expeditious completion of all projects subject to NEPA, not just economic stimulus projects. These proposed regulations are currently pending.

In a separate report on its NEPAnet web site, CEQ keeps track of recently implemented and newly proposed NEPA procedures from other Federal agencies. Notably, several agencies have developed new categorical exclusions just for certain types of Recovery Act projects. Additionally some Federal agencies have relied on other unique approaches to "streamlining" NEPA compliance for Recovery Act funding.[11] An example of one such approach is the Department of Energy (DOE) which recently published several "variances" from the agency's normal NEPA procedures for Recovery Act funding. One variance applies specifically to competitive grant activities and the funding decisions for certain energy efficiency projects. Under this variance, funding decisions are made without the DOE-prepared environmental critiques, environmental synopses, and supplemental reviews called for in DOE's NEPA regulations. Instead, DOE NEPA Compliance Officers participate in a Merit Review Board that evaluates environmental questionnaires prepared by prospective grantees. The Merit Review Board considers environmental effects when selecting potential projects, and DOE continues to prepare EAs and EISs before commencement of activities that could affect the environment. In other words, the use of variance changes the timing of NEPA compliance. Instead of complying with NEPA before the funding decision is made, DOE will comply with NEPA after the funding is granted, but before any projects with potential environmental impacts are actually implemented.

While this "variance" approach to NEPA is not specifically supported by the CEQ NEPA regulations, DOE asserts that it has the authority to conduct alternative procedures for certain types of projects, in the interest of public welfare, by virtue of its own regulations.[12] According to DOE, the Recovery Act funding program meets that public welfare standard.

Conclusion

CEQ's quarterly reports generally paint a glowing picture about the relationship between NEPA and the Recovery Act. For example, the final report includes dozens of success stories from throughout the Federal government of how environmental analysis required by NEPA improved the projects, but still allowed timely Recovery Act funding. CEQ provides the following observation about these and other examples: "*Agency activities under ARRA are more than just the number of reviews that occur. Across the government, the quality of decision-making is improved by NEPA compliance. ....*"

[11] http://ceq.hss.doe.gov/nepa/Agency_NEPA_Procedures_December_16_2009.doc
[12] 10 CFR 1021.343(c)

Additionally, CEQ concludes that: "*agency environmental reviews have resulted in taxpayer dollars and energy saved, resources better protected, and the fostering of community agreements. These benefits were gained while expeditiously completing NEPA reviews for the ARRA funded projects.*"

Despite CEQ's remarks about the reported success stories, the overwhelming reliance on CEs and the reliance on other unusual NEPA short-cuts certainly raise a red flag. Unfortunately, prior to the Recovery Act, most Federal agencies kept no statistics on the number of CEs, or their relative frequency of use, compared to other NEPA documents. Thus there is no baseline by which to determine whether reliance on so many Categorical Exclusions is appropriate or not. Hopefully, most agencies are taking their NEPA responsibilities seriously and using CEs only as they were intended - for minor projects with little likelihood for any potential environmental impacts. However, with more than 161,000 projects receiving Recovery Act Funding, some misuse of NEPA has probably occurred. Nevertheless, to date there is no evidence of any widespread attempt to subvert the objectives of NEPA in the name of economic stimulus. Nor has there been any sudden increase in NEPA litigation over Recovery Act-funded projects which would also be an indicator of alleged NEPA violations.

Between the statistical details, the agency-by-agency analysis, and the project examples, the first year's quarterly reports reveal thought-provoking information about NEPA practices and will hopefully pave the way for additional improvements to NEPA in the future. Additionally, the Recovery Act's first-ever NEPA reporting requirements should continue to foster an "open book" approach to overall NEPA compliance.

Appendix A – Summary of 2009 NEPA Cases

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2009 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
U.S. Department of Agriculture		
***Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009)**	USDA - APHIS	**LOSS** Court of Appeals upheld issuance of preliminary injunction until APHIS issues an EIS on its decision for regulation of Roundup Ready Alfalfa. To obtain permanent injunctive relief, a plaintiff must show (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The U.S. Supreme Court has recognized that "the balance of harms will usually favor the issuance of an injunction to protect the environment" if injury is found to be sufficiently likely because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).
***Heartwood, Inc. v. Agpaoa*, 611 F. Supp. 2d 675 (E.D. Ky 2009)**	UDSA - USFS	**WIN** Court held that an EA/FONSI prepared for the Ice Storm Recovery Project on the Daniel Boone National Forest was adequate. USFS decision not to evaluate in detail plaintiffs suggested "no logging" alternative was supported by the administrative record and was not arbitrary and capricious. The administrative record also shows that USFS took the requisite hard look at the use of herbicides and that the use did not present a significant risk to human health or the ecology. FWS had concluded that the use of herbicides was not likely to jeopardize the continued existence of any threatened or endangered species. Risk assessments were properly incorporated by reference into the EA.
***Citizens for Better Forestry v. U.S. Department of Agriculture*, 632 F. Supp. 2d 968 (N. D. Cal. 2009)**	USDA - USFS	**LOSS** Court invalidated USFS EIS prepared for 2008 rule governing the development and revision of forest plans. "Although the USDA maintains that it prepared a thorough EIS prior to promulgating the 2008 Rule, the EIS does not actually analyze the environmental effects of implementing the Rule. Instead, the EIS repetitively insists – as the USDA insists in connection with the present motion ...that the Rule will have no effect on the environment because it merely sets out the process for developing and revising LRMPs and is removed from any foreseeable action that might affect the environment." The court rejected this reasoning in earlier litigation and adheres to its earlier reasoning in this case.
***Ecology Center v. Castaneda*, 562 F.3d 986 (9th Cir. 2009)**	USDA - USFS	**WIN** Plaintiffs challenged the USFS approval of 9 timber sale and restoration projects in Montana's Kootenai National Forest claiming violations of NFMA, NEPA, and USFS regulations. The Court of Appeals affirmed the lower court's decision granting summary judgment in favor of USFS. For each of the 9 projects, USFS had completed either an EA or an EIS, but plaintiffs argued that the cumulative impact analyses were inadequate and that the documents fail to present meaningful old growth data. With respect to cumulative impacts, the court discussed its holding in Lands

2009 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Council v. Powell (Lands Council I), 395 F.3d 1019 (9th Cir. 2005) and stated "in League of Wilderness Defenders—Blue Mountains Biodiversity Project v. United States Forest Service, 549 F.3d 1211 (9th Cir. 2008), we provided two important clarifications of this standard. First, we held that the Forest Service 'may aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7,' the regulation defining 'cumulative impact.' Id. at 1218; see, e.g., WildWest Inst. v. Bull, 547 F.3d 1162, 1173 (9th Cir. 2008) (holding Forest Service's analysis of cumulative impacts of past timber harvests and other historical events satisfied 'hard look' standard). Second, we noted that Lands Council I 'merely reaffirms the general rule that NEPA requires adequate cataloguing of relevant past projects in the area.' Id. (internal quotation marks omitted). The Forest Service need not catalogue events that are not 'truly significant to the action in question.' See id.; 40 C.F.R. § 1500.1(b); NW Envt'l Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125, 1140 (9th Cir. 2006) (noting Lands Council I required a detailed catalogue of projects in order to 'inform analysis,' and concluding that cataloguing is not required where other projects would have no related effects). We reiterate that an aggregated cumulative effects analysis that includes relevant past projects is sufficient. The Forest Service met this standard here." With respect to the USFS data, the court held that "NEPA requires that the Forest Service disclose the hard data supporting its expert opinions to facilitate the public's ability to challenge agency action. See Idaho Sporting Cong. v. Thomas, 137 F.3d at 1150, overruled on other grounds by Lands Council II, 537 F.3d at 997. We defer to an agency's choice of format for scientific data. See League of Wilderness Defenders—Blue Mountains, 549 F.3d at 1218 ('It is not for this court to tell the Forest Service what specific evidence to include, nor how specifically to present it.'). WildWest does not contend the data is actually unavailable, and the format of the data has not apparently impaired WildWest's ability to bring legal challenges. Therefore, the Forest Service has fulfilled its obligations under Idaho Sporting Congress."
***Habitat Education Center, Inc. v. U.S. Forest Service*, 593 F. Supp. 2d 1019 (E.D. Wisc. 2009)**	USDA - USFS	**WIN** EIS prepared for USFS approval of the "Twentymile" restoration project in the Chequamegon-Nicolet National Forest was adequate. Before addressing the merits of the case, the court stated that the only role for a court is to insure that the agency has taken a "hard look" at the environmental consequences. Rather than apply a rigid standard, a court must make a pragmatic judgment as to whether the agency has fostered the two principal purposes of NEPA: informed decisionmaking and informed public participation. In making its pragmatic judgment, a court must be careful not to "flyspeck" an agency's environmental analysis, looking for any deficiency, no matter how minor. Turning to the merits, the court held that USFS adequately explained its rationale for excluding plaintiff's suggested alternative from detailed study. Its rationale included that the alternative did not satisfy the project's purposes and because it suggested unnecessary measures and included components that were already incorporated into other alternatives that were studied in detail. In addition, USFS gave a reasoned explanation for limiting the scope of its cumulative impact analysis to selected regions within the forest. As CEQ has stated in guidance, agencies are not required to list or analyze the effects of past actions unless such information is necessary to describe the cumulative effect of all past actions combined. Plaintiffs did not explain why more details about individual past projects would be necessary or meaningful. Further, a project that had not yet been formulated and had no goals was not reasonably foreseeable and was not required to be analyzed in the cumulative effects analysis. "The Forest Service thus had no way of quantifying

2009 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		the possible environmental effects of the project. Again, the Forest Service probably knew that any project would involve some logging, but nothing convinces me that the inclusion of a generalized statement in the Twentymile EIS that 'some logging' might be conducted in the Twin Ghost area at some point in the future would have meaningfully improved decision-making or public participation with respect to the Twentymile project." The court also stated that the "succinct" discussion in the EIS regarding the cumulative effect of each alternative on sensitive species was enough to enable a ready to evaluate the impacts. With respect to the need to prepare a supplemental EIS, the court noted that the principal factor an agency should consider in exercising its discretion whether to supplement an existing EIS because of new information is the extent to which the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS. Here the court found that "plaintiffs' unsupported assertions cannot establish that new information presents a 'seriously different picture of the environmental landscape such that another hard look is necessary.' ...Therefore, I conclude that the discovery of occupied marten territory does not require supplementation of the EIS, and that the Forest Service has adequately explained why its mitigation measure was a sufficient response to the discovery."
***Habitat Education Center, Inc. v. U.S. Forest Service*, 603 F. Supp. 2d 1176 (E.D. Wisc. 2009)**	USDA - USFS	**WIN** EIS prepared for USFS approval of the "Fishbone" project in the Chequamegon-Nicolet National Forest was adequate. Using reasoning similar to that in the Twentymile EIS case, the court ruled that "rather than getting bogged down in possible technical flaws, a court must 'take a holistic view of what the agency has done to assess environmental impact.'... Further, courts must remember that it is the agency, and not the court, that has the technical expertise required to perform the environmental analysis in the first place. This means that judicial review of an EIS must be deferential, especially when it comes to the scientific and technical details that make up the heart of the analysis." In addition, the court found that USFS had explained the purpose of the project, the reasonable alternatives, and the extent to which each alternative should be analyzed. The court also upheld the cumulative impact analysis.
***Izaak Walton League of America, Inc. v. Kimbell*, 558 F.3d 751 (8th Cir. 2009)**	USDA - USFS	**LOSS** The Court of Appeals affirmed a lower court decision which held that the EA prepared for a USFS plan to construct a snowmobile trail connecting the North and South Fowl Lakes in northeastern Minnesota and located adjacent to the Boundary Waters Canoe Area Wilderness Area failed to properly analyze the noise impact resulting from snowmobile use on the trail as required by NEPA. USFS proposed the new trail as a part of an effort to close an unlawful snowmobile trail and provide safe access. The lower court remanded the case to USFS to prepare an EIS to assess the sound impact of the proposed trail routes on the adjoining wilderness area, and also enjoined the Forest Service from conducting any further activity on the proposed trail pending its completion of the EIS. The Court of Appeals concluded that it had no jurisdiction to review the remand to the agency because "a remand order is 'interlocutory' rather than 'final,' and thus may not be appealed immediately." USFS had not appealed the decision to require an EIS instead of permitting the agency to consider whether a modified EA and FONSI would be sufficient. The agency did not raise an issue that could not be appealed after the proceedings on remand.

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***People of California v. U.S. Department of Agriculture*, 575 F.3d 999 (9th Cir. 2009)**	USDA - USFS	**LOSS** The court invalidated USFS' application of a categorical exclusion for its 2005 State Petitions Rule for roadless areas, disagreeing that the rule fell within the categorical exclusion and finding the explanation regarding the absence of extraordinary circumstances to be insufficient. USFS characterized the rule as administrative only and without direct, indirect, or cumulative effects on the environment, and applied its categorical exclusion for "[r]ules, regulations, or policies to establish Servicewide administrative procedures, program processes, or instructions." The district court had rejected this "procedural only" argument because it failed to account for the fact that the State Petitions Rule, when it was promulgated, specifically removed the Roadless Rule from the Code of Federal Regulations. The district court reasoned that the replacement of the Roadless Rule's uniform substantive protections with a less protective and more varied land management regime would qualify as "substantive" action and would meet the relatively low threshold to trigger some level of environmental analysis under NEPA. In addition, "[w]here there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions. California v. Norton, 311 F.3d 1162, 1177 (9th Cir.2002)." In promulgating the State Petitions Rule, USFS stated that the rule would have no "discernable effects on the various classes of resources listed in the agency's NEPA Policy and Procedures that can constitute extraordinary circumstances." The court held that, "[e]ven if we were to believe that this rule might fall within the categorical exclusion – which we do not – this is an insufficient explanation of why the rule would not fall into one of the exceptions to the categorical exclusion." The lower court's decision was affirmed.
***Sierra Club v. Wagner*, 555 F.3d 21 (1st Cir. 2009)**	USDA - USFS	**WIN** Plaintiffs challenged USFS approval of two forest resource management projects in the White Mountain National Forest, arguing that the agency's conclusion that the impacts would not be significant was erroneous. The court recognized that agencies are given deference in technical and scientific matters and declined to hold that the impacts of a decision to commit roadless areas for nonwilderness uses for 10-15 years was, by law, "significant. Although the EAs conceded that there would or could be negative effects that could harm both water and wildlife, mitigation measures were promised and are relevant. Plaintiffs also argued that an EIS was required because the effects of the projects was "controversial," but did not indicate "amongst whom there is a meaningful dispute." That the plaintiffs disagree with the conclusion reached by the USFS is not "controversy" and is not sufficient by itself to require an EIS. The court found that the EAs did not "brush off environmental concerns," and "considered all of the arguable categories of harm...." Finally, in response to the argument that the FONSIs should have been circulated for 30 days, the court held that "[a]n agency that adopts a FONSI without seeking input can be expected at least to accept comments before acting on the merits of a decision; but here both EAs were circulated in draft form and comments solicited even before any FONSI was finally adopted."
***Sierra Forest Legacy v. Rey*, 577 F.3d 1015 (9th Cir. 2009)**	USDA - USFS	**LOSS** Withdrawing and superceding *Sierra Forest Legacy v. Rey*, 526 F.3d 1228 (9th Cir. 2009), although reaching the same conclusion. Court held that plaintiffs challenging USFS award of logging contracts to private parties for fire prevention purposes have demonstrated a likelihood of success on the merits. Plaintiffs claim that USFS failed to rigorously explore and objectively evaluate all reasonable alternatives. "It is undisputed that USFS relied on its discussion of alternatives in the 2001 Framework's Final Environmental Impact Statement ("FEIS") to satisfy this

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		requirement for the 2004 Framework's SEIS. The district court determined that USFS's reliance on the 2001 FEIS likely complied with NEPA because the 2004 Framework was merely a supplement to the 2001 Framework. This finding was based on an erroneous legal standard because, 'where changed circumstances affect the factors relevant to the development and evaluation of alternatives,' USFS 'must account for such change in the alternatives it considers.' *Natural Res. Def. Council v. U.S. Forest Serv*., 421 F.3d 797, 813-14 (9th Cir.2005) (citation omitted)."
***Alliance of the Wild Rockies v. Tidwell*, 623 F. Supp. 2d 1198 (D. Mont. 2009)**	USDA-USFS	**WIN** Court found that the USFS properly applied a categorical exclusion for a sanitation harvest primarily of diseased, dead, or dying Douglas fir trees for the purpose of trying to save the rest of the forest from a Douglas fir beetle infestation. In determining that goshawk fledglings would not be affected, USFS was entitled to make scientific judgments among varying opinions as long as the judgments are reasonably supported by evidence. Further, plaintiffs did not bring their concerns to the attention of the USFS during the scoping period held for the categorical exclusion action. "It was Plaintiffs' responsibility to participate in the administrative process in a meaningful way and to alert the FS to their position and contentions."
***Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115 (10th Cir. 2009)**	USDA-USFS DOI-BLM	**WIN** Plaintiffs alleged that USFS and BLM failed to comply with NEPA for the establishment of winter feeding of 13,000 Wyoming elk. The court concluded there was no federal action. "It is important to note the relevant NEPA provisions expressly apply only to federal action. 42 U.S.C. § 4332(C). Since issuance of the permit, the Forest Service has remained largely uninvolved in the operations of the feedground. That the Forest Service retains discretion to amend the permit does not alone lead to the conclusion there is ongoing major federal action or major federal action to occur. While the Forest Service could potentially amend the permit in such a manner as to constitute a major federal action, there is no allegation this has occurred. Because the State of Wyoming remains the only meaningful actor involved in the operation of the Forest Park feedground, there is no ongoing major federal action or major federal action to occur. Thus, the Forest Service's decision not to undertake an environmental analysis of the Forest Park feedground was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. We therefore affirm the district court's denial of GYC's request to compel an environmental analysis of the Forest Park feedground." The court also noted that there is a 6-year statute of limitations to actions brought under the Administrative Procedure Act and that the lawsuit was filed 10 years after the USFS permit was granted.
***Sierra Club v. Kimbell*, 595 F. Supp. 2d 1021 (D. Minn. 2009)**	USDA-USFS	**WIN** USFS EIS for a revision to forest plans for the Superior and Chippewa National Forests was adequate. In particular, the court found that the level of detail in the Programmatic EIS was adequate where the revised forest plan does not change the management direction for the area of concern, the Boundary Waters Canoe Area Wilderness. "If the Forest Service proposed a site-specific action such as the clearcutting of forest directly adjacent to the BWCAW, the action's impacts on the BWCAW could be – and would have to be – identified and assessed....But the direction in the forest plan is much more general. It makes sense, then, that the EIS for the forest plan should assess the plan's effects on the BWCAW at a similarly general level....Although the statements in the FEIS about effects on the BWCAW are somewhat conclusory, they demonstrate that the Forest Service did consider such effects. In a site-specific plan, such conclusory statements would not pass muster, as an EIS must provide reasons supporting its analysis, not just conclusions." With respect to whether plaintiffs raised issues at the appropriate time, the court noted that "[a]s a

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		general rule, parties challenging agency action under NEPA must 'structure their participation so that it is meaningful, so that it alerts the agency to the [parties'] position and contentions.' ... It follows that when a party challenges agency action in litigation based on an issue that the party never raised before the agency, courts will generally not consider such a challenge. ...But it is one thing for a court to refuse to consider an issue that was never presented to an agency. It is quite another for a court to refuse to consider an issue that was raised before the agency at some point (in this case, during the administrative appeal of the decision to adopt the forest plan) but may not have been raised at the earliest possible moment (in this case, during the earlier comment period)." Case law does not require that issues be raised at the earliest possible time, but it does require that issues be raised so as to give the agency the opportunity to consider the issue that the challenger later seeks to raise in litigation. The court also reiterated that on matters within an agency's expertise, reviewing courts must deter to the agency's choice of methodology as long as it is not arbitrary or without foundation. "The Forest Service did not act arbitrarily and capriciously in relying on 2002 INFRA and GIS data in developing the revised forest plan and the associated FEIS, even if data from 2004 is more accurate."
U.S. Department of Defense		
***Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, 606 F. Supp. 2d 121 (D.D.C. 2009)**	DOD - ACOE	**WIN** Plaintiffs challenged ACOE issuance of a permit to Newport News to build a reservoir on Cohoke Creek in Virginia. The court found that no supplemental EIS was required even those the final EIS was issued 8 years before the ROD. Plaintiffs failed to present information that was both new and provided a "seriously different picture of the environmental landscape."
***Ohio Valley Environmental Coalition v. Aracoma Coal Co*, 556 F.3d 177 (4th Cir. 2009)**	DOD - ACOE	**WIN** Plaintiffs challenged ACOE issuance for 4 permits allowing the filling of West Virginia stream waters in conjunction with area surface coal mining operations, alleging violations of NEPA, the Clean Water Act, and the APA. The lower court found for the plaintiffs, but the Court of Appeals reversed. ACOE had prepared EA/mitigated FONSIs for each of the permits, limiting its analysis to impacts on jurisdictional waters. Plaintiffs argued that ACOE was required to examine the environmental impacts of the project as a whole. However, the court found that "the fact that the Corps' § 404 permit is central to the success of the valley-filling process does not itself give the Corps 'control and responsibility' over the entire fill" and declined to require an analysis of the entire project. This finding was based in part on the fact that the West Virginia Department of Environmental Protection, not ACOE, had "control and responsibility" over all aspects of the projects. With respect to the mitigated FONSIs, the court found that the compensatory mitigation plans for each of the challenged permits explained how mitigation would compensate for fill impacts and were sufficient. The court also concluded that "the Corps has analyzed cumulative impacts in each of the challenged permits and has articulated a satisfactory explanation for its conclusion that cumulative impacts would not be significantly adverse...."

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***White Tanks Concerned Citizens v. Strock*, 563 F.3d 1033 (9th Cir. 2009)**	DOD - ACOE	**LOSS** This case involved an EA prepared by ACOE for a permit to fill several ephemeral washes that run through an area sought to be developed for a new housing development west of Phoenix, Arizona to be known as "Festival Ranch." ACOE limited the scope of the EA analysis to the washes themselves and certain upland areas directly affected by the dredge and fill activity. Plaintiffs who oppose the development challenged the issuance of the CWA permit, and the Court of Appeals invalidated the EA and held that the scope of analysis was too narrow. During the preparation of the EA, both EPA and FWS expressed concern that this permit would have unacceptable environmental impacts that would exceed NEPA's "significance" threshold and urged ACOE to prepare an EIS to address the large-scale direct, secondary, and cumulative impacts of the project. EPA was also concerned about the potential impacts on the aquatic resources of the area and indicated that ACOE should conduct a comprehensive EIS covering not only the impacts of the one housing development in question, but also the impacts of many of the other large-scale developments in the area, which would together "transform . . . Buckeye from a relatively undeveloped landscape into a large suburban community." Instead of preparing an EIS, the Corps issued a FONSI after concluding that the issuance of the dredge and fill permit would not cause significant environmental impacts with respect to the areas it considered, i.e., the 787 acres of washes and the 83.6 acres of uplands immediately adjacent to the washes. As a preliminary matter, the court held that the plaintiffs did have standing: "In environmental cases, the requisite injury for standing purposes is not necessarily injury to the environment, but injury to the plaintiff. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 182 (2000). That injury element is satisfied if the plaintiff has an aesthetic or recreational interest in the particular place and that interest will be impaired by the defendant's conduct." Turning to the scope of analysis argument, the court, citing ACOE NEPA regulations, noted that the ACOE scope of analysis must "address the impacts of the specific activity requiring a permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant federal review. . . . Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project." The court then stated that where a development could not go forward without a permit, then the Federal involvement was sufficient to grant "Federal control and responsibility" over the project within the meaning of the regulation. Although ACOE assumed that a viable large-scale development could proceed apart from the lands containing the washes, The court found that this was not an accurate description of the situation as reflected in the administrative record. Specifically, as the developers' application described it, without the fill permit, there would not be a single community, which is the intent of Festival Ranch, but instead, different "pods" with "restricted access and limited connectivity." The developers also conceded that a denial of a permit would "force abandonment of the Festival Ranch Master Plan." The court concluded that, although the acreage affected was only 5% of the entire site, the basis for determining federal control is "the relationship between the jurisdictional waters and the projects for which the dredge and fill permits were sought. It is not the quantity of the water that matters, but the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the project's goals." Because this project's viability is founded on the ACOE issuance of a Section 404 permit, the entire project is within the ACOE purview and should have been

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		analyzed in the NEPA document.
***Northwest Environmental Defense Center v. National Marine Fisheries Service*, 647 F. Supp. 2d 1221 (D. Or. 2009)**	DOD - ACOE [NFMS named as plaintiff on ESA grounds]	**WIN** Plaintiffs challenged an EA/FONSI prepared by ACOE for actions authorizing construction of a dock facility in the Willamette River, arguing that project would have a cumulatively significant impact on the environment. Court found the EA adequate and FONSI justified. In making public interest determinations the Corps may rely on the expertise of other government agencies and need not perform an independent evaluation of the need for a project. Further, "[w]hile the agency is required to determine the cumulative effect of the proposed project combined with other actions, it is neither [plaintiff's] nor this court's role to dictate the best procedure for determining those effects. Categorically requiring the agency to discuss in detail every aspect of all previous actions, regardless of their current impact on the area, would impose a requirement not mandated by statute." The court also rejected the argument that the agencies could not rely on a Biological Opinion prepared by NMFS because it was not a NEPA document. The court held that although NEPA and the ESA involve different standards, this does not require the Corps to disregard the findings made by NMFS in connection with formal consultation mandated by the ESA. The court also noted that the Corps properly incorporated the Biological Opinion by reference. In addressing whether an EIS was required because the potential impacts were controversial, the court stated that term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.
U.S. Department of Energy		
***Coalition on West Valley Nuclear Wastes v. Chu*, Civil Action No. 07-5243, August 31, 2009 (2d Cir.) (unpublished)**	DOE	**WIN** The Court of Appeals affirmed the district court dismissal of all of plaintiffs' claims challenging a DOE EIS on the management of nuclear wastes at the West Valley Demonstration Project near Buffalo, New York. Plaintiffs claimed that DOE's decision to prepare a closure EIS and a waste management EIS violated a Stipulation of Compromise agreed to in response to earlier litigation. The court disagreed and concluded "that separating the consideration of the waste management and the closure issues was not impermissible segmentation. ...But the CEQ's regulations implementing NEPA make clear that not all agency decisions to break a project into stages are impermissible segmentation. To the contrary, agencies must often undertake multi-faceted actions that have complex, interdependent environmental impacts; the agency must make reasonable judgments about what actions should be analyzed together and what should be analyzed separately....Appellants have not identified any way in which the waste management activities that the DOE contemplates will automatically trigger closure of the Nuclear Service Center, nor have they persuasively argued that the waste management activities cannot proceed without closure. We thus agree with the district court that neither of these grounds presents a basis for concluding that the waste management actions are 'connected' to the closure actions."

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***Save Strawberry Canyon v. U.S. Department of Energy*, 613 F. Supp. 2d. 1177 (N.D. Cal. 2009)**	DOE	**LOSS** Court issued a preliminary injunction to halt the construction of the Computational Research and Theory Facility by Lawrence Berkeley National Laboratory in Strawberry Canyon located in the hills above the city of Berkeley. No NEPA analysis was conducted. The court held that environmental injury and injury to the plaintiff by being deprived of the opportunity to participate in the NEPA process were imminent. With respect to the issue of whether NEPA applied, the court noted that "courts look to the degree of federal funding and to indicia of federal involvement and control." In addressing whether there was a "proposal" which was subject to NEPA review, the court held that "The "proposal" stage is defined not with respect to any specific, formal document or procedure but rather in a functional manner. The project's planning and development are at an advanced stage. Both sides indicated at the hearing that the builders will likely break ground well before the September 2009 trial in this case, although the project is not expected to be completed, and thus the computer centers are not expected to relocate, until 2011. If in fact construction of the project is a 'federal action,' then the LBNL and DOE are certainly 'at that stage in the development of [the] action when [the] agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal.' The time when 'effects can be meaningfully evaluated' is now, not when the project is completed and DOE decides to relocate its supercomputers. Therefore, insofar as plaintiff has established substantial questions on the merits of the 'federal action' issue, plaintiff has established a likelihood that there has been a 'proposal' for that action."
U.S. Department of the Interior		
***Theodore Roosevelt Conservation Partnership v. Salazar*, 605 F. Supp. 2d 263 (D.D.C. 2009)**	DOI-BLM	**WIN** Court held that a BLM EIS for a decision to grant drilling permits in the Atlantic Rim area of Wyoming was adequate. BLM did not violate NEPA's standards for scientific integrity and used a method that was considered by an interagency team to be a reasonable tool. Although a better tool became available before issuance of the Final EIS, BLM's decision not to use it was carefully considered and based on reason and therefore neither arbitrary nor capricious. BLM's method of analysis was supported in the record and reflected reasoned decisionmaking; courts will defer to agencies where the dispute involved technical issues that implicate substantial agency expertise. The record reflects that BLM took FWS' concerns seriously and responded in a manner designed to minimize the project's effects on sage grouse. Although an agency should consider the comments of other agencies, it does not necessarily have to defer to them when it disagrees. BLM's elimination of an alternative in the Final EIS due to the prolonging effect it would have on leaseholders and mineral rights development and would, as a result, contravene BLM's policy to allow reasonable access across federal lands for mineral development on both private and state lands was based on sound reasoning. Addressing the adequacy of EAs that tiered from the EIS, the court stated that "because BLM tiered the environmental assessments to the environmental impact statements, the environmental assessments do not need to include as thorough of an analysis." In addition, public participation requirements for the EAs were met even though the agency did not circulate the EAs for notice and comment. "[T]he agency has significant discretion in determining when public comment is required with respect to EAs."

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***Wilderness Society v. Salazar*, 603 F. Supp. 2d 52 (D.D.C 2009)**	DOI-BLM	**WIN** BLM EIS was adequate for decision to conduct oil and gas leasing in the National Petroleum Reserve in Alaska. Courts have acknowledged that the limited information available at the leasing stage necessarily limits the scope of the environmental analysis. The omission of speculative information from an EIS prepared at the lease sale stage is permissible; however, an EIS which is incomplete due to the omission of ascertainable facts, or the inclusion of erroneous information, violates the NEPA disclosure requirement. "This circuit has approved of an agency's use of the tiered approach in situations where completing a program 'involves many separate sub-projects and will take many years.' Nevada v. Department of Energy, 457 F.3d 78, 91 (D.C.Cir.2006). In addition, the Tenth Circuit has approved of tiering where the specificity that NEPA requires is not possible until concrete specific proposals are submitted. See Park County Resource Council, Inc. v. Dep't of Agriculture, 817 F.2d 609, 624 (10th Cir.1987). Defendants state that they intend to conduct further site-specific environmental analyses as to precise locations within the area as specific leases are issued and the lessees seek approval to conduct oil exploration and development." The court concluded that "the EIS provides the necessary information for the agency to consider the cumulative impacts of the proposed actions on the environment so as to provide a reasoned basis for deciding whether and how to proceed with the proposed course of action."
***Center for Biological Diversity v. U.S. Department of the Interior*, Civil Action No. 07-16423, September 14, 2009 (9th Cir.) (for publication)**	DOI - BLM	**LOSS** Plaintiff environmental groups filed suit contending that BLM's approval of a land exchange violated NEPA. Under the proposed exchange, the new landowner, a mining company, would not be subject to the requirements of the Mining Law of 1872; if the exchange did not occur, the land would continue to be managed by BLM and any mining operations would need to be conducted under the terms of the Mining Law of 1872, including the submission of a Mining Plan of Operations (MPO). BLM would have to approve the MPO before new mining could proceed. BLM prepared an EIS on the land exchange, but assumed that the mining company would carry out mining operations on the land in the same manner whether or not the land exchange occurred. Because the EIS contains no comparative analysis of the environmental consequences of the different alternatives proposed, the court concluded that BLM had not taken a "hard look" at the consequences of its proposed action in violation of NEPA.
***Gardner v. U.S. Bureau of Land Management*, 633 F. Supp. 2d 1212 (D. Or 2009)**	DOI - BLM	**WIN** Court found a BLM Fuel Reduction EA adequately analyzed the impacts of off-road vehicle (ORV) use. "The court generally must be 'at its most deferential' when reviewing scientific judgments and technical analyses within the agency's expertise" and it was within BLM's discretion to determine the optimal method for analyzing ORV impacts in the EA. Further, BLM was not required to conduct any particular test or to use any particular method, so long as the evidence provided to support its conclusions, along with other materials in the record, ensure that the agency made no clear error of judgment that would render its action arbitrary and capricious.

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***Information Network for Responsible Min v. U.S. Bureau of Land Management*, 611 F. Supp. 2d 1178 (D. Colo. 2009)**	DOI - BLM	**WIN** Court found that communications between BLM, the cooperating agencies, and DOE regarding DOE's Draft Programmatic EA for the Uranium Leasing Program in western Colorado are pre-decisional and not subject to release under FOIA. The exception in the CEQ regulations regarding the release of EISs, comments received, and underlying documents (40 CFR 1506.6(f)) under FOIA does not apply to an EA, which is "a distinct, relatively concise NEPA review document whose purpose is to provide sufficient evidence and analysis for the federal agency having jurisdiction over a proposed action to determine whether the action will have a significant effect on the human environment...INFORM assumes the regulatory exception to application of Exemption 5 in the EIS context also applies when a federal agency prepares an EA and receives comments on it. It provides no authority or argument in support of this assumption, however. As a result, I have no basis for looking past the plain language of the regulation to hold that it requires disclosure of the draft PEA and comments on it that the BLM has withheld pursuant to [FOIA] Exemption 5."
***National Parks & Conservation Association v. U.S. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2009)**	DOI - BLM	**LOSS** - Plaintiffs challenged the adequacy of an EIS on a developer's request to exchange private lands for several parcels surrounding BLM-owned land in Riverside County, CA to develop a former iron ore mine into a landfill. Court invalidated the EIS on several grounds. (1) The EIS did not foster informed decisions and public participation: "In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form...[citation omitted]. Here, the discussion of eutrophication is neither full nor fair... A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together...Rather than address eutrophication up front, the BLM instead attempts to cobble together a 'hard look' from various other analyses as varied as air quality and disease vector control. This patchwork cannot serve as a 'reasonably thorough' discussion of the eutrophication issue." (2) BLM unreasonably narrowed the purpose and need for the project to only those that would meet the private needs of the applicant. Although BLM proposed several alternatives that would have been responsive to the need to meet long-term landfill demand, BLM did not consider these options in any detail because each of these alternatives failed to meet the narrowly drawn project objectives, which required that the applicant's private needs be met. BLM cannot define its objectives in unreasonably narrow terms and may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives. "The BLM adopted Kaiser's interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange. As a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives."The court did conclude that the agency's consideration of mitigation measures to protect Bighorn sheep was "reasonably complete." [Note that plaintiffs' case against the National Park Service was dismissed because even if NPS were to withdraw its approval of the project, BLM, as the lead agency, could still move forward.]

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***New Mexico v. U.S. Bureau of Land Management*, 565 F.3d 683 (10th Cir. 2009)**	DOI - BLM	**LOSS** The court held that BLM's plan-level EIS did not comply with NEPA and affirmed that BLM was required to conduct a site-specific analysis of the impacts of fluid minerals development in New Mexico's Otero Mesa before the leasing stage. The Otero Mesa, which BLM seeks to open to oil and gas development at the conclusion of its planning process is home to threatened and endangered species and lies above the Salt Basin Aquifer. BLM determined in 1997 (after an exploratory well struck natural gas) that increased development interest required the agency to issue a management plan amendment for fluid mineral resources. The goal of the amendment process was to determine which public lands should be available for leasing and how leased lands would be managed. BLM prepared a Draft EIS and analyzed 3 alternative management schemes (Alternatives A [fewer development restrictions - preferred alternative], B, and No Action); it eliminated from further analysis alternatives that would have increased the level of protection for the plan area above the current level. In response to public comments on the Draft EIS, BLM announced it would reevaluate its preferred alternative in the Final EIS. Three years after issuing the Draft EIS, BLM issued a Proposed Resource Management Plan Amendment and Final EIS. In the Final EIS, BLM selected a modified version of Alternative A as a result of public comment. In response to public concern regarding the adoption of Alternative A-modified in the Final EIS, BLM prepared a supplement to the Final EIS in which it (1) made protection of some areas permanent rather than temporary, (2) provided a summary of changes between the Draft and Final EISs, and (3) provided some explanation of the reasons for the switch to Alternative A-modified. The State of New Mexico and others sued, claiming violations of NEPA, ESA, FLPMA, NHPA, and APA. The district court found for BLM on all counts, except that it held that BLM violated NEPA when it failed to conduct a site-specific analysis of the likely impacts of leasing a particular parcel and ordered BLM to prepare such an analysis. The plaintiffs appealed. The Court of Appeals agreed that BLM was required to prepare a site-specific analysis but also found that the plan-level EIS was inadequate. In particular, the Appeals Court found that Alternative A-modified was different in crucial respects from Alternative A but that the Final EIS describing the modified plan's impacts on vegetation and wildlife were not substantially modified. BLM should have issued a Supplemental EIS because the location and extent of impacts had changed, even though the type of impacts did not. "If a change to an agency's planned action affects environmental concerns in a different manner than previous analyses, the change is surely 'relevant' to those same concerns...BLM's unanalyzed, conclusory assertion that its modified plan would have the same type of effects as previously analyzed alternatives does not allow us to endorse Alternative A-modified as 'qualitatively within the spectrum of alternatives' discussed in the Draft EIS. Because location, not merely total surface disturbance, affects habitat fragmentation, Alternative A-modified was qualitatively different and well outside the spectrum of anything BLM considered in the Draft EIS, and BLM was required to issue a supplement analyzing the impacts of that alternative...." The court also concluded that BLM was required to analyze an alternative that would close the area to development and excluding such an option prevented BLM from taking a hard look at all reasonable options. The court rejected BLM's argument that FLPMA and the concept of multiple use prevented BLM from considering closing the Otero Mesa to development, saying that the principle of multiple use does not require BLM to prioritize development over other uses. Finally, the court found that BLM failed to examine relevant data regarding potential impacts to the Salt Basin Aquifer and thus had no basis for its

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		conclusion that such impacts would be minimal. "BLM disregarded NEPA when it failed to conduct a thoroughgoing environmental analysis of its chosen land management alternative, failed to consider the reasonable alternative of closing the entire Otero Mesa to fluid mineral development, and failed to demonstrate that it examined the relevant data regarding the likely impact of development on the Aquifer. Each of these failures was more than a mere flyspeck and thwarted NEPA's purposes by preventing both BLM and the public from accessing the full scope of required environmental information. Despite granting the Agency the full measure of respect and deference warranted by the arbitrary and capricious standard of review, we must reverse."
***South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of the Interior*, 588 F.3d 718 (9th Cir. 2009)**	DOI - BLM	**LOSS** - Challenge to the adequacy of an EIS prepared for a gold mining project on Mt. Tenabo in Nevada. Plaintiffs argued that BLM failed to conduct an appropriate mitigation analysis with respect to the environmental consequences of mine dewatering (that springs would dry up). Although it recognized that 50 perennial springs and 1 perennial creek were likely to dry up, BLM argued that a mitigation analysis was not required because it was impossible to predict the precise location and extent of ground water reduction. Court ruled that BLM's limited understanding of hydrologic features does not relieve the agency of the obligation to "give some sense" of whether consequences could be avoided before actions are put into effect. Court also rejected BLM's argument that an EIS for a different project would satisfy the agency's NEPA responsibilities for this project. "We have never held that the analysis of similar effects for a separate project excuses the failure to consider significant environmental impacts in an EIS."
***Western Organization of Resource Councils v. BLM*, 591 F. Supp. 2d 1206 (D. Wyo. 2009)**	DOI - BLM	**WIN** BLM EIS was adequate for approval of a project to develop coalbed methane wells in the Powder River Basin of Wyoming and Montana. As a preliminary matter, the court declined to include supplemental submissions in the administrative record. "[T]he Court does not find it appropriate to include those supplemental submissions as part of the administrative record on appeal, as doing so is contrary to the applicable law in this circuit. The Court's function in a review of agency action is to determine whether the agency's decision was arbitrary and capricious, based on the evidence presented at the hearing and the administrative record that is before the Court in this case." The court also ruled that a supplement to a Draft EIS was not necessary. Although "[t]he agency has an obligation to re-circulate if a proposed action ultimately differs so dramatically from the alternatives canvassed in the draft EIS as to preclude meaningful consideration by the public," the additional information plaintiffs rely on to bolster their position was made available to the public, was commented upon and was the subject of public hearings." In addition, a preliminary final EIS was circulated to sister agencies. The court also held that the selection of a contractor to prepare the EIS was conducted properly. BLM selected the contractor following the provisions of the BLM Manual for third party contracting and maintained control of the entire process. The oil and gas companies did not select Greystone, although they did recommend the contractor and pay the bill. No conflict of interest has been shown that would support plaintiffs' contentions.

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***Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015 (D. Ariz. 2009)**	DOI - BurRec	**WIN** Plaintiffs argued that BurRec should have prepared an EIS for a 2008 Experimental Plan for Glen Canyon Dam. The court found that the EA was adequate and that an EIS was not required: (1) the explanation for use of a particular analysis period was sufficient, particularly given that an EA is to be a concise public document; (2) elimination of certain alternatives from detailed analysis was "not unreasonable" given the narrowly circumscribed purposes of the 2008 Experimental Plan; (3) there is no minimum number of alternatives that must be addressed; (4) there is a 6-year statute of limitations in which to bring NEPA claims under the APA so plaintiffs could not challenge the adequacy of a 1995 EIS from which the EA was tiered; (5) plaintiff waived arguments that is should have raised in its comments on the Draft EA; (6) disagreements by other federal agencies do not render an EA invalid; and (7) mere disagreement with a project or the existence of information supporting an opponent's view do not render a project "highly controversial" for purposes of NEPA.
***Delaware Audubon Society v. Secretary of the Department of the Interior*, 612 F. Supp. 2d 442 (D. Del. 2009)**	DOI - FWS	**LOSS** Plaintiffs challenged DOI approval of cooperative farming and farming with genetically modified crops on the Prime Hook National Wildlife Refuge in Delaware. The court granted summary judgment in favor of plaintiffs, finding that the agency violated NEPA by approving the action without preparation of an EA or EIS. "The defendants do not contest that, starting in 2003, they allowed genetically modified crops to be planted on Prime Hook. They also do not contest that their own biologists determined that these activities posed significant environmental risks to Prime Hook, including biological contamination, increased weed resistance, and damage to soils. Nonetheless, the record reflects that the defendants did not conduct any NEPA environmental assessments, make any compatibility determinations, or prepare any environmental impact statements to assess the impact of these activities on Prime Hook. Because there is no genuine issue of material fact that the defendants allowed farmers to grow genetically modified crops on Prime Hook without first preparing either an environmental assessment or an environmental impact statement, the court concludes that the defendants violated the NEPA as a matter of law.
***Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009)**	DOI - FWS	**WIN** Court held that plaintiffs had no standing for their NEPA claims because they had no particularized injury. Plaintiffs bear the burden of establishing the three elements of standing: (1) injury in fact, (2) a causal connection between the injury and the challenged conduct, and (3) it must be "likely" that the injury will be redressed by a favorable decision. A plaintiff alleging a procedural injury must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest. Plaintiffs failed to meet this requirement.
***Wild Fish Conservancy v. Kempthorne*, 613 F. Supp. 2d 1209 (E.D. Wash. 2009)**	DOI - FWS	**WIN** Court held that a categorical exclusion was appropriate for the operation of the Leavenworth National Fish Hatchery, finding that the action was categorically excluded and exempt from NEPA. "Courts do not apply NEPA to federal actions that merely maintain the status quo...In addition, the routine maintenance of an ongoing, pre-NEPA project does not trigger NEPA's requirements."

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***Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009)**	DOI - FWS	**WIN** Court held that the challenged EA/FONSI was adequate for FWS 5-year regulations under MMPA authorizing non-lethal "take" of polar bears and Pacific walrus. Plaintiffs argued that an EIS should have been prepared to address "highly uncertain or involve unique or unknown risks." Court reiterated that CEQ regulations do not require an EIS anytime there is uncertainty, but only if the effects of the project are "highly uncertain." Here, the agency made reasonable predictions on the basis of prior data. Although the spector of climate change made the agency's prediction less certain, such uncertainty is not "high" but rather is "that quotient of uncertainty which is always present when making predictions about the natural world."
***Central Delta Water Agency v. U.S. Fish and Wildlife Service*, 653 F. Supp. 2d 1066 (E.D.Cal. 2009)**	DOI - FWS	**WIN** Challenge to an NOI as a final agency decision to proceed with the NEPA process before the project had been developed. Court dismissed the claim because there was no final agency action. The court recognized that several steps remained in the NEPA process (draft EIS, public comment period, final EIS) during which the alleged defects could be cured.
***Dallas v. Hall*, 562 F.3d 712 (5th Cir. 2009)**	DOI - FWS	**WIN** FWS prepared an EA/FONSI for the creation the Neches Wildlife Refuge in East Texas and proceeded to set an acquisition boundary for the refuge and accept a conservation easement within that boundary. These actions precluded a reservoir the City of Dallas and the Texas Water Development Board (TWDB) had proposed for the same site. The City and TWDB sued in federal district court claiming that the EA was flawed and that an EIS should have been prepared. The Court of Appeals affirmed the lower court ruling dismissing plaintiffs' claims and issuing a summary judgment in favor of FWS. With respect to plaintiffs' claims regarding the alternatives analysis, the court stated that "An EA must discuss alternatives to the planned action, but need not discuss all proposed alternatives. The range of alternatives that the [agency] must consider decreases as the environmental impact of the proposed action becomes less and less substantial. Sierra Club, 38 F.3d at 803; see also Highway J Citizens Group v. Mineta, 349 F.3d 938, 960 (7th Cir. 2003) ("When . . . an agency makes an informed decision that the environmental impact will be small . . . a less extensive search [for alternatives] is required."). The rejection of even viable and reasonable alternatives, after an appropriate evaluation, is not arbitrary and capricious. See Miss. River Basin Alliance v. Westphal, 230 F.3d 170, 177 (5th Cir. 2000). Although plaintiffs argued that FWS was required to consider an alternative that would allow the refuge and the reservoir to coexist, in the EA, FWS had noted that it was unable to evaluate fully any such dual proposal, since plans for the reservoir were "speculative in the short-term, . . . not definitive in scope or purpose, and . . . far beyond the planning horizon for the refuge proposal (i.e., 20 years)." The court concluded that the record revealed no alternative that allowed construction of the reservoir and served FWS' goal of preserving the bottomlands and wetlands of the Upper Neches and FWS had concluded that the project would have no significant environmental impact. Under these circumstances, the range of alternatives was reasonable. The court also rejected plaintiffs' claim that the EA should have analyzed the effect of establishing the refuge on the City's water supply and urban planning process, given projected population growth. "Plaintiffs do not cite to any authority

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		for the proposition that an agency must account for the effects on a municipal water supply of precluding a proposed but as-yet-nonexistent water source. Further, the effects of establishing the refuge, and thus precluding the reservoir, are highly speculative and cannot be shown to be the proximate cause of future water shortages in Dallas." The court also rejected the argument that FWS had relied on old data (from an EA first prepared in 1988). "In this case much of the data in the EA was lifted from the earlier EA prepared in 1988. The City and TWDB note that there has been degradation of the site and that a significant portion of the Upper Neches bottomland hardwoods have been cleared. However, the City and TWDB have not shown that this information was so flawed that it precluded assessment of reasonably foreseeable impacts. ...Undoubtedly, were a plaintiff to show that a site had become so degraded–for example, by substantial clearcutting of the bottomland hardwoods such that it would not support migrating waterfowl even if protected–such a showing may well render the decision to rely on older data arbitrary within the meaning of NEPA. No such showing has been made in this instance." The court also noted that the establishment of a boundary involved no change to the physical environment and that if FWS proposed to take action such as removing non-native tree species, another EA or an EIS may be required.
***San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, 657 F. Supp. 2d 1233 (D. Colo. 2009)**	DOI - FWS	**LOSS** Plaintiffs alleged that the EA/FONSI prepared by FWS for mineral exploration in the Baca National Wildlife Refuge in Colorado was inadequate and sought a preliminary injunction. In granting the injunction the court held that plaintiffs were likely to prevail on the merits. FWS had argued that the activities to be undertaken by the mineral rights owner (Lexam) did not amount to a "federal action" and therefore did not trigger NEPA requirements. The court found the plaintiffs were likely to prevail in their argument that NEPA was triggered, saying that sufficient federal control exists where the U.S. has surface rights and granted access to the surface estate to the mineral rights owner. The court cited Colorado law, under which a surface owner has the legal right to determine how, where, and when mining can occur and ensure that the surface use is reasonable. With respect to the EA that was prepared, the court also held that plaintiffs were likely to prevail in their argument that mitigation measures (on which the FONSI was based) were not developed or evaluated for efficacy. Moreover, the objectives of the project which are key guidelines for deciding whether an agency has considered all reasonable alternatives were framed narrowly, which meant that the result was practically pre-determined.

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***Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009)**	DOI - MMS	**WIN** (on NEPA claims) Plaintiffs challenged DOI's proposed expansion of leasing areas within the Outer Continental Shelf (OCS) for offshore oil and gas development in the Beaufort, Bering, and Chukchi Seas off the coast of Alaska, arguing that the leasing program violates NEPA because it does not take into account the effects of climate change on OCS areas and the Leasing Program's effects on climate change and because Interior approved the leasing program without conducting sufficient biological baseline research for the three Alaskan seas and further failed to provide a research plan detailing how it would obtain this baseline data before the next stage of the program. However, the court found that, because of the multiple stage nature of the leasing program, plaintiffs' claims were not yet ripe for review. "This court's decision in Wyoming Outdoor Council v. United States Forest Service, 165 F.3d 43 (D.C. Cir. 1999), is instructive here. In Wyoming Outdoor Council, the court was faced with a NEPA challenge to a multi-stage on-shore leasing program similar to the Leasing Program at hand. The Wyoming Outdoor Council petitioners argued that the Forest Service violated NEPA because it approved an oil-and-gas leasing program without first determining whether an adequate site-specific environmental review had been performed. As here, the petitioners' challenge in Wyoming Outdoor Council was brought at the early stage of the program that involved only 'the identification and mapping of areas that might be suitable for leasing.' Id. at 45. The court dismissed the petitioners' NEPA challenge as unripe, finding that an agency's NEPA obligations mature only once it reaches a 'critical stage of a decision which will result in 'irreversible and irretrievable commitments of resources' to an action that will affect the environment.' Id. at 49 (quoting Mobil Oil Corp. v. FTC, 562 F.2d 170, 173 (2d Cir. 1977)). In the context of multiple-stage leasing programs, we ultimately held that 'the point of irreversible and irretrievable commitment of resources and the concomitant obligation to fully comply with NEPA do not mature until leases are issued." Wyoming Outdoor Council, 165 F.3d at 49. Applying this reasoning here, Petitioners' NEPA challenges are not ripe for review. At the point that Petitioners filed their petitions, Interior had only approved the Leasing Program at issue. No lease-sales had yet occurred. The Leasing Program here had therefore not yet reached that "critical stage" where an 'irreversible and irretrievable commitment of resources' has occurred that will adversely affect the environment."

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***Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1 (D.D.C. 2009)**	DOI - NPS	**LOSS** Court issued a preliminary injunction for the application of a categorical exclusion to a final rule promulgated by DOI, allowing persons to possess concealed, loaded, and operable firearms in national parks and wildlife refuges in accordance with state laws. In applying the "four-factored standard [for granting preliminary injunctive relief], district courts may employ a sliding scale under which a particularly strong showing in one area can compensate for weakness in another.... Accordingly, '[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak.'" Turning to the strength of the merits of the plaintiff's case, the court recognized that "[a]gencies must comply with the procedural requirements of NEPA, and the decision to forego production of an EIS or EA in favor of a categorical exclusion is subject to judicial review under the arbitrary and capricious standard of review." The court agreed with plaintiffs that the DOI's Decision Memorandum reflected "a significant misunderstanding of the obligations imposed by NEPA. Under that statute, the DOI was required to take a "hard look" at the environmental consequences of the Final Rule before its implementation. ...This burden is greater than simply examining whether environmental impacts are authorized by the Final Rule – the DOI was required to consider all direct, indirect, and cumulative impacts that were foreseeable as a result of the Final Rule....Rather than performing an evaluation to ascertain the extent of any foreseeable environmental impacts, the DOI simply assumed there were none because the Final Rule did not authorize any impacts." The court did reject plaintiffs' argument that the agency was required to solicit public comment on its application of a categorical exclusion.
***River Runners for Wilderness v. Martin*, 574 F.3d 723 (9th Cir. 2009)**	DOI-NPS	**WIN** Court held that the NPS Colorado River Management Plan EIS was adequate to support a decision regarding continued use of motorized rafts in Grand Canyon National Park. The court reiterated that judicial review of an environmental impact statement is "extremely limited" and that a court should evaluate such a statement only to determine whether it "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the challenged action. A court "need not fly-speck the document and hold it insufficient on the basis of inconsequential, technical difficulties, but will instead employ a rule of reason." The court declined to invalidate the challenged EIS because it found the plaintiffs provided no factual basis for their argument that information was not accurate or scientific and no record citations or analysis for impacts they say should have been considered cumulatively.
U.S. Department of Transportation		
***City of Las Vegas v. Federal Aviation Administration*, 570 F.3d 1109 (9th Cir. 2009)**	DOT - FAA	**WIN** Court found FAA EA/FONSI adequate for approving the modification of the departure route at McCarran International Airport, holding that the FAA was not required to issue a supplemental draft EA because subsequent modifications were not significant. "An SEA is only required, however, when the environmental impact is significant or uncertain and the EA/FONSI is no longer valid."

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***Natural Resources Defense Council v. Federal Aviation Administration*, 564 F.3d 549 (2d Cir. 2009)**	DOT - FAA	**WIN** Plaintiff environmental groups sought review of an FAA order approving the relocation of the Panama City-Bay County International Airport to a new site in Bay County, Florida. Plaintiffs argued that the FAA's EIS failed to adequately evaluate alternatives, to consider the indirect and cumulative effects of the proposed project in its comparison of alternatives, and to disclose scientific evidence indicating that mitigation efforts will likely not succeed in offsetting the loss of wetlands. Plaintiffs also argued that the FAA should have prepared a supplemental EIS evaluating the impact of the proposed airport on the endangered ivory-billed woodpecker which was sited in the area after issuance of the ROD. The court rejected each of these arguments. First, it concluded that the FAA had not abused its discretion in declining to consider alternatives that would affect Florida Class II waters which Florida Department of Environmental Protection considered unacceptable. The court noted that NEPA does not require discussion of alternatives that could only be implemented after significant changes in government policy or legislation. In addition, the court rejected plaintiffs' contention that the FAA arbitrarily limited the geographic scope of its alternatives analysis to Bay County and noted that plaintiffs had not identified any alternative sites outside Bay County in their comments on the Draft EIS. Similarly, the court rejected the argument that the FAA had failed to address the cumulative impacts of state highway projects because the FAA had no actual knowledge of the planned projects and the plaintiffs did not bring it to their attention. While the agency has the primary responsibility to ensure it complies with NEPA, persons challenging an agency's compliance must structure their participation so it alerts the agency to the parties' position and contentions in order to allow the agency to give the issues meaningful consideration. The court also found that the FAA's cumulative impact study areas were based on a consideration of drainage basins, Sector Plan boundaries, census boundaries, noise contours, drive time contours, and consultation with other agencies. "This is sufficient for us to conclude that [FAA's] delineation of the cumulative impact study areas was not arbitrary and capricious." With respect to mitigation, the court declined to engage in a "battle of experts regarding the likelihood of success of the Sponsor's mitigation program" because "our role is not to resolve scientific disputes." Because the FEIS included a "thorough discussion of mitigation measures," the court concluded that it complied with NEPA. Finally, with respect to whether the FAA was required to issue a Supplemental EIS, the court noted that it prepared a Biological Assessment to consider the proposed airport project on the endangered woodpecker and submitted it to FWS. FWS concurred in the conclusion that the airport may affect but was not likely to adversely affect the woodpecker. On that basis, the FAA decided not to prepare a Supplemental EIS. The court concluded that the record demonstrated that the FAA had taken a hard look at the new information related to the woodpecker.
Independent Agencies		
***California Trout v. Federal Energy Regulatory Commission*, 572 F.3d 1003 (9th Cir.**	FERC	**WIN** Court found that FERC could deny plaintiffs late-intervention status because the issuance of an EA instead of an EIS did not give plaintiffs good cause for intervention. Although NEPA does not require federal agencies to assess, consider, and respond to public comments on an EA to the same degree as it does for an EIS, "an agency must permit some public participation when it issues an EA." Although the court has not stated what kind of public participation is required to meet NEPA standards, it has held that a complete failure to involve or even inform the public about an

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2009)		agency's preparation of an EA would violate NEPA regulations. "But neither enabling the public to comment nor providing the public with sufficient information to elicit informed responses requires intervention. Nonparties to the Commission's proceedings are not prevented from commenting on proposed actions or receiving information about the Commission's decisions. Instead, non-parties are simply unable to challenge the Commission's final decision in court. In this case, the Commission fully satisfied the participation standards we have sublimated from NEPA's implementing regulations" by circulating a draft EA and soliciting public comments.
***Jackson County, North Carolina v. Federal Energy Regulatory Commission*, 589 F.3d 1284 (D.C. Cir. 2009)**	FERC	**WIN** Local county challenged the adequacy of an EA/FONSI for utility's application to surrender its license for a hydroelectric project and to remove the project's dam and powerhouse. As a preliminary matter, the court held that the plaintiff county had standing because it had alleged a sufficient injury in fact (threatened physical destruction of property within its borders that will substantially alter the county's geography by converting a dammed lake into a free-flowing river. Addressing the merits of the case, the court found that FERC had not improperly segmented its review of projects. The projects were geographically distinct and a decision on one would not trigger a decision on the others. Moreover, the EAs adequately assessed the cumulative impacts of all of the projects. The court also rejected plaintiff's argument that FERC should have considered alternatives other than license surrender and dam/powerhouse removal. However, "given [the utilities'] express desire to surrender its license, any alternative predicated on the company's receiving a new license is not feasible and merits no further consideration."

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***Piedmont Environmental Council v. Federal Energy Regulatory Commission*, 558 F.3d 304 (4th Cir. 2009)**	FERC	**LOSS** Two state utilities commissions and two community interest organizations petition for review of several rulemaking decisions made by the FERC in connection with FERC's implementation of the new § 216 of the Federal Power Act (FPA). The regulations specified the content of permit applications under § 216(b).The court agreed with "FERC's determination that it was not required to prepare an environmental assessment or an environmental impact statement in connection with its issuance of procedural regulations dealing with the content of permit applications under § 216 of the FPA." Specifically, the court found that a programmatic EIS was not required because "FERC does not have information about the ultimate geographic footprint of the permitting program. Without such information a programmatic EIS would not present a credible forward look and would therefore not be a useful tool for basic program planning." In addition, "we conclude that FERC's rules, which require individual project applications, are not designed to segment the overall program in order to constrict environmental evaluation." The court noted that "[o]nce FERC receives a permit application, it will be required under NEPA to assess the environmental effects of the project. The assessment will likely prompt the preparation of an EIS or an EA." However, the court concluded that FERC did violate CEQ regulations when it failed to consult with CEQ before amending its NEPA-implementing regulations to cover § 216 permit applications. "We therefore vacate the amendments to the NEPA regulations and remand for FERC to engage in the required consultation with the CEQ." In doing so, the court rejected FERC's argument that the regulations were issued to implement § 216 of the FPA, not NEPA (although the regulations were amendments to FERC's NEPA regulations) and the argument that agencies were only required to consult with CEQ when the agency develops its initial NEPA-implementing regulations. The court dismissed, without prejudice, because it is not ripe, the challenge to the content of the amendments (which were vacated) to FERC's NEPA-implementing regulations.
***Friends of Tims Ford v. Tennessee Valley Authority*, 585 F.3d 955 (6th Cir. 2009)**	TVA	**WIN** The Court of Appeals affirmed the district court's decision to dismiss the action without prejudice because plaintiff failed to demonstrate standing to bring the case. Plaintiff was challenging a TVA decision regarding the development of a reservoir as violating NEPA by issuing a procedurally deficient EIS and failing to prepare a supplemental EIS. Before reaching the standing issue, the court addressed TVA's claim that the plaintiff's failure to comment or object to the selection of the alternative after the issuance of the Final EIS precluded a challenge to it. The court disagreed: "Contrary to TVA's contention, failure to object or comment on a selection during administrative proceedings does not automatically preclude one from challenging the selection. Neither NEPA itself...nor the CEQ regulations ... expressly limit judicial review of final agency action to those who preserved their appellate rights through public comment. ... Additionally, as the Supreme Court found in Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 765 (2004), 'the agency bears the primary responsibility to ensure that it complies with NEPA . . . and . . . an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.' TVA has not shown why, nor are we persuaded that, the development of the Reservoir in the face of a deficient FEIS/LMDP was not so obvious that FTF needed to comment to preserve its right to appeal." The court also concluded that plaintiff's action was not barred by the statute of limitations. Judicial review of NEPA actions is granted through the APA; an APA complaint for review of an agency action is a "civil action" within the

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		meaning of 28 U.S.C. 2401(a), and is governed by a 6-year statute of limitations. Here, the ROD was issued on October 28, 2000, and plaintiff filed its action on October 27, 2006, just before the expiration of the applicable statute of limitations. With respect to standing, the court stated that "whether FTF has adequately alleged a procedural injury in fact turns on whether the FEIS/LMDP fell below the standard required to comply with NEPA's procedural requirements and is linked to a concrete harm asserted by one of FTF's members that is connected to a proposed action. ...FTF has failed to adequately plead a procedural injury, because it has failed to connect the procedural harm alleged in its complaint – the creation of a new land use classification in the FEIS without an environmental assessment, resulting in uninformed–rather than unwise–agency action" in violation of NEPA – to specific harm threatening particular FTF members."
***New Jersey Department of Environmental Protection v. U.S. Nuclear Regulatory Commission*, 561 F.3d 132 (3rd Cir. 2009)**	USNRC	**WIN** The issue presented by this appeal is whether NRC, when it is reviewing an application to relicense a nuclear power facility, must examine the environmental impact of a hypothetical terrorist attack on that nuclear power facility. The New Jersey Department of Environmental Protection (NJDEP) contends that NEPA requires the analysis of the impact of such an attack for the relicensing of the Oyster Creek Nuclear Power Station. NRC concluded that terrorist attacks are "too far removed from the natural or expected consequences of agency action" to require an environmental impact analysis and that, in any event, it had already addressed the environmental impact of a potential terrorist act at Oyster Creek through its Generic Environmental Impact Statement and site-specific Supplemental Environmental Impact Statement. The court agreed with NRC and dismissed the litigation. NRC's "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (GEIS) addresses issues that are common to all nuclear plants. These have been designated "Category 1" issues. Of particular note here, the GEIS reviews the risk of sabotage to nuclear power plants. NRC has determined from this review that the risk is small and is provided for in the consideration of internal severe accidents. The court rejected NJDEP's claim on two grounds. "First, NJDEP has not shown that there is a 'reasonably close causal relationship' between the Oyster Creek relicensing proceeding and the environmental effects of a hypothetical aircraft attack. Accordingly, such an attack does not warrant NEPA evaluation. See DOT v. Pub. Citizen, 541 U.S. 752, 767 (2004); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983). Second, the NRC has already considered the environmental effects of a hypothetical terrorist attack on a nuclear plant and found that these effects would be no worse than those caused by a severe accident. NJDEP has not provided any evidence to challenge this conclusion and has not demonstrated that the NRC could undertake a more meaningful analysis of the specific risks associated with an aircraft attack on Oyster Creek.

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***New York v. U.S. Nuclear Regulatory Commission*, 589 F.3d 551 (2d Cir. 2009)**	USNRC	**WIN** Petition for review of a decision of the NRC denying rulemaking petitions filed by Massachusetts and California. Court held that the NRC gave due consideration to the relevant studies concerning the rulemaking petitions, and the court must defer to NRC's expertise in determining the proper risk level associated with the storage of nuclear material in spent fuel pools. States petition to review the NRC's decision was denied. The states had filed rulemaking petitions asking NRC to reverse its 1996 Generic Environmental Impact Statement, which found (among other things) that spent fuel pools at nuclear power plants do not create a significant environmental impact within the meaning of NEPA. The renewal of a license for a nuclear power plant is a major action requiring an EIS under NRC regulations. An EIS for license issuance and renewal at nuclear power plants covers both generic and plant-specific environmental impacts. The NRC has decided that these two kinds of impacts are to be treated separately. Category I impacts are those that: 1) are common to all nuclear power plants; 2) can be assigned a uniform significance level of small, moderate, or large (even if the impact is not precisely the same at each plant); and 3) do not require plant-specific kinds of mitigation. Category II impacts require site-by-site evaluation. Since Category I impacts are common to each license renewal, NRC produced a Generic Environmental Impact Statement ("GEIS") that applies to these common issues. The GEIS, combined with a site-specific EIS, constitutes the complete EIS required by NEPA for the major federal action of a plant's license renewal. NRC classifies on-site storage of spent fuel in pools as a Category I issue that causes a small environmental impact. Massachusetts and California contended that the information in their rulemaking petitions showed a greater risk of fire from this source than previously appreciated, and that therefore the environmental impact should no longer be discounted as small; they further contended that the risk should be evaluated plant-by-plant (rather than be considered within Category I). New York and Connecticut supported these original petitions. NRC considered both petitions together, and concluded that its initial determination was correct. The states challenged NRC's decision in federal court. Although an agency decision to deny a rulemaking petition is subject to judicial review, that review is "extremely limited and highly deferential." To deny review of a rulemaking petition, a court typically need do no more than assure itself that an agency's decision was "reasoned," meaning that it considered the relevant factors. "NRC had already analyzed most of the studies submitted in connection with Massachusetts and California's petitions; the petitioners simply disagree with the NRC's interpretation of those studies. Massachusetts and California did submit one study that the NRC had not previously considered; but the NRC--having examined this study in considering whether to grant the petitions--concluded that it was not as accurate as the studies on which the NRC had previously relied. These are technical and scientific studies. 'Courts should be particularly reluctant to second-guess agency choices involving scientific disputes that are in the agency's province of expertise. Deference is desirable.'" The States also contend that the risk of a spent fuel pool fire must be a Category II rather than a Category I risk, because the risk is affected by mitigation that varies from plant to plant. "It is true that the NRC relies in part upon mitigation at nuclear power plants...to conclude that the risk of an accidental or terrorist-caused fire in the pools is uniformly low. However, the NRC has mandated that these mitigation tactics be implemented at all nuclear power plants.... An agency may take into account attempts to mitigate an environmental impact when determining that an environmental impact is small enough to not require an EIS, so long as the

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		effectiveness of the mitigation is demonstrated by substantial evidence." Thus, the court concluded that "NRC's decision denying the rulemaking petitions was reasoned; it considered the relevant studies, and it took account of the relevant factors. We therefore must conclude that the agency acted within its broad discretion."
***Public Citizen v. Nuclear Regulatory Commission*, 573 F.3d 916 (9th Cir. 2009)**	USNRC	**WIN** The court found that an NRC EA/FONSI for a rule pertaining to industrial sabotage against nuclear power reactors was adequate. With respect to alternatives, the court stated that NRC acted within its discretion to conclude that air-based threats were beyond the scope of the Design Basis Threat (DBT) rule and that it was unnecessary for NRC to consider that decision as an alternative course within the scope of the rule. "We decline to ... create a rule that ignores reasonable boundaries in the scope of an EA alternative action analysis. The Commission did not merely select among a range of options, but instead determined air-based threats were not properly addressed by the DBT rule." The court also concluded that NEPA did not require an evaluation of terrorist attacks because "the consequences of a terrorist attack cannot be said to be 'an effect' of this rule, and analyzing the effects of a terrorist attack would be speculative at best." Further, the court stated because plaintiffs had not identified an effect of the revised DBT rule that "may cause significant degradation of some human environmental factor," no EIS was necessary. In fact, "an EA or an EIS is not necessary for federal actions that conserve the environment," citing Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir.1995).