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ANNUAL NEPA REPORT 2013

of the

National Environmental Policy Act (NEPA) Practice

Submitted to

NAEP Board of Directors

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Guest Editorial by
The Honorable John D. Dingell

April 2014

This report reviews NEPA document submittals and statistics, NEPA litigation and agency procedures for calendar year 2013. Additional sections provide commentary on the implementation of the NEPA process and expert expectations for the future. The purpose of this report is to document the status of NEPA compliance and perspectives during the reporting year. We welcome reader comment and inquiry to naep@naep.org.

Acronyms and Abbreviations

ACOE	United States Army Corps of Engineers
AQRV	Air Quality Related Values
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
BOR	Bureau of Reclamation
BPPs	Best Practice Principles
CE	Categorical Exclusion
CEQ	Council on Environmental Quality
CEQA	California Environmental Quality Act
CRS	Congressional Research Service
DOE	Department of Energy
DOT	Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FRA	Federal Railroad Administration
FS	Forest Service
FTA	Federal Transit Administration
FWS	Fish and Wildlife Service
GAO	Government Accounting Office
GIS	Geographic Information System
GPS	Global Positioning System
GSA	General Services Administration
HUD	Housing and Urban Development
IG	Inspector General
IT	Information Technology
LLQR	Lessons Learned Quarterly Report
MAP-21	Moving Ahead for Progress in the 21st Century
MOU	Memorandum of Understanding
NAEP	National Association of Environmental Professionals
NASA	National Aeronautics and Space Administration
NEC	Northeast Corridor
NEPA	National Environmental Policy Act
NIH	National Institutes of Health
NNSA	National Nuclear Security Administration
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
NOI	Notice of Intent
NPS	National Park Service
NRC	Nuclear Regulatory Commission
NRCS	Natural Resources Conservation Service
OMB	Office of Management and Budget
OPR	California, the Governor's Office of Planning and Research
RAPID Act	Responsibly and Professionally Invigorating Development Act of 2012
ROD	Record of Decision
TVA	Tennessee Valley Authority
USA	United States Army
USACE	United States Army Corps of Engineers
USAF	United States Air Force
USCG	United States Coast Guard
USDOT	United States Department of Transportation (in Commentary 4)
USFS	United States Forest Service
USMC	United States Marine Corps
USN	United States Navy
WAPA	Western Area Power Administration

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The NEPA Practice in 2013

Ron Lamb and Joe Trnka[1]

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

The National Association of Environmental Professionals' (NAEP's) National Environmental Policy Act (NEPA) Practice is pleased to present our seventh NEPA Annual Report. This report contains summaries of the latest developments in NEPA as well as the NEPA Practice's efforts for the past year.

Among the findings of this year's report: the time to prepare the 172 Final EISs made available in 2013 (measured from Notice of Intent to Final EIS) varied widely from a minimum of 7 months (206 days) to a maximum of 19 years (232 months or 6,958 days). The average preparation time for Final EISs was 4.7 years. Sixty-five percent of EISs were completed in five years or less. From 2000 2013, the annual average EIS-preparation time for all agencies increased at an average rate of 37 days per year. The increase in EIS preparation times is modest, considering EIS analysis has become more comprehensive and precise, with an increased emphasis on cumulative effects analysis, climate change, Cooperating Agencies, and increased opportunities for public involvement.

This year's Guest Editorial is from the Honorable John. D. Dingell. The current Dean of the House of Representatives, Congressman Dingell announced his retirement from Congress at the end of this term.

The *Annual NEPA Report* is prepared and published through the initiative and volunteer efforts of members of the NAEP's NEPA Practice. The NAEP's NEPA Practice supports NEPA practitioners through monthly conference calls, networking opportunities, an online NEPA Forum, educational opportunities, outreach with the President's Council on Environmental Quality (CEQ), and projects such as this *Annual NEPA Report*. Highlights of 2013 activities include:

- In response to a Congressional request, the U.S. Government Accountability Office (GAO) recognized the NAEP NEPA Practice and the *Annual NEPA Reports* as an authoritative source of data on NEPA compliance issues. GAO staff also interviewed NAEP President Harold Draper in July 2013 on NAEP and the *Annual NEPA Reports*.
- NAEP NEPA Practice members submitted the report on Best Practice Principles (BPPs) for Environmental Assessments (EAs), which was selected by the CEQ as one of five pilot

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projects to modernize and reinvigorate Federal agency implementation of NEPA (www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/nepa-pilot-project). Under this pilot project, experience-based BPPs focus on the preparation of effective EAs that are timely, cost-effective, and incorporate those environmental issues that are relevant to the decision-making process.

- NAEP is temporarily hosting the CEQ's NEPA Training Compendium (www.naep.org/compendium-of-nepa-training). NEPA Practice members are validating current NEPA Training Compendium information, updating it to include additional training resources that are available, and will provide an updated compendium for CEQ's review and use.

Presentations at the NEPA Practice's monthly conference calls in 2013 included EPA's NEPAssist GIS tool (www.epa.gov/oecaerth/nepa/nepassist-mapping.html), and "lessons learned" from expedited EISs on Federal Infrastructure Priority Projects (www.permits.performance.gov/). NEPA Practice member Ms. Kristen Maines (Gannett Fleming) presented information on the high-priority Baltimore Red Line project EIS.

NEPA Practice members also supported NAEP webinars on "Environmental Planning under MAP-21 Transportation Projects" (March 2013), "2012 NEPA Legal and Regulatory Update" (May 2013), the CEQ and Advisory Council on Historic Preservation (ACHP) Handbook for Integrating NEPA and Section 106 (August 2013), and "NEPA and Sustainability" (January 2014).

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

Perspectives on NEPA

The Honorable John D. Dingell[2]

Forty-five years ago, the United States had virtually no laws in place to protect the environment. Private individuals, industry, and governments could burn into the air, pump into the water, or dump onto the ground virtually anything – with impunity. It is because of these kinds of actions that I authored the National Environment Protection Act (NEPA) in 1969 and was proud to help usher in a new era of environmental and wildlife conservation.

During debate on NEPA, I noted the following, "mankind is playing an extremely dangerous game with his environment. We have not yet learned that we must consider the natural environment as a whole and assess its quality continuously if we really wish to make strides in improving and preserving it." NEPA declared that protecting the environment is of national policy interest to the United States. In turn, this ensured that the public health and well-being of our citizens would be protected and preserved for future generations to come.

As you know, NEPA assures that federal agencies weigh the environmental consequences of development projects before they are undertaken. This law requires that the Federal government issue an environmental impact statement (EIS) when proposing any major action affecting the environment. It also established a Council on Environmental Quality (CEQ) within the Executive Office of the President. Moreover, NEPA passed with overwhelming bipartisan support by a vote of 372-15. Simply put, NEPA can be surmised in one concept—look before you leap.

Unfortunately, there have been several recent attempts in the 113th Congress to circumvent or open loopholes in NEPA. I have been a vocal critic of these efforts both on the House floor and in the Energy and Commerce Committee. I worry that eliminating NEPA environmental reviews will lead us down a path of going back to those days of impunity and disregard for the well-being and concerns of the public.

It is up to environmental professionals like you to ensure the NEPA review process not only remains solvent and strong, but is also properly implemented and enforced. Your expertise in these matters have led to the preservation of vital natural resources, in addition to protecting the well-being of our general public. I thank you for your stewardship and for your continued fight to protect our environment.

[2] Congressman Dingell represents Michigan's Twelfth Congressional District and is the longest continuously serving member of the U.S. House of Representatives. An avid conservationist and outdoorsman, Congressman Dingell also wrote the Endangered Species Act, the 1990 Clean Air Act, the Safe Drinking Water Act, and numerous other environmental and conservation laws.

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1. Just the Stats

Grace Musumeci and Karen Vitulano[3]

In 2013, announcements of 377 environmental impact statements (EISs) were published in the Federal Register. This and additional information is available through the Environmental Protection Agency's (EPA) database of EISs, which is accessible on the internet at http://www.epa.gov/Compliance/nepa/eisdata.html. The database includes data back to 2004 and contains information on each document as well as EPA comment letters.

With respect to the 2013 documents, ten agencies each prepared ten or more EISs; five agencies prepared 20 or more. Similar to previous years, the U.S. Forest Service (USFS) provided the most with 80, and for the second year the Bureau of Land Management (BLM) came in with the next highest with 49; the Federal Highway Administration (FHWA) was third with 43. Once again, the Army Corps of Engineers (ACOE) was a close fourth with 41 documents. **Figure 1-1** shows the NEPA documents aggregated by Department and **Table 1-1** shows NEPA documents filed in 2013 by agency. Of the 377 total, 206 were draft EISs and 171 were finals.

This year, the count by State is slightly different from the reporting of previous years. In the past, we attributed regional or multi-state documents to multiple states. This year, we excluded such documents from the state counts and place them in a separate category in **Table 1-2**.

The agency and state distributions seem to indicate a predominance of Federal actions associated with the management of Federal lands. Under the Federal Land Policy and Management Act, the notion of "multiple use" involves the balancing of needs of current and future generations, just as NEPA does. The Act speaks to "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." This attempt at balancing can be seen through the NEPA alternatives analysis.

1.1 EPA's Review and Comments

Under Section 309 of the Clean Air Act, EPA is required to review and publicly comment on the environmental impacts of major Federal actions including actions that are the subject of draft and final Environmental Impact Statements. EPA categorizes or "rates" the EIS according to an alphanumeric system. See http://www.epa.gov/compliance/nepa/comments/ratings.html for an explanation of EPA's ratings.

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

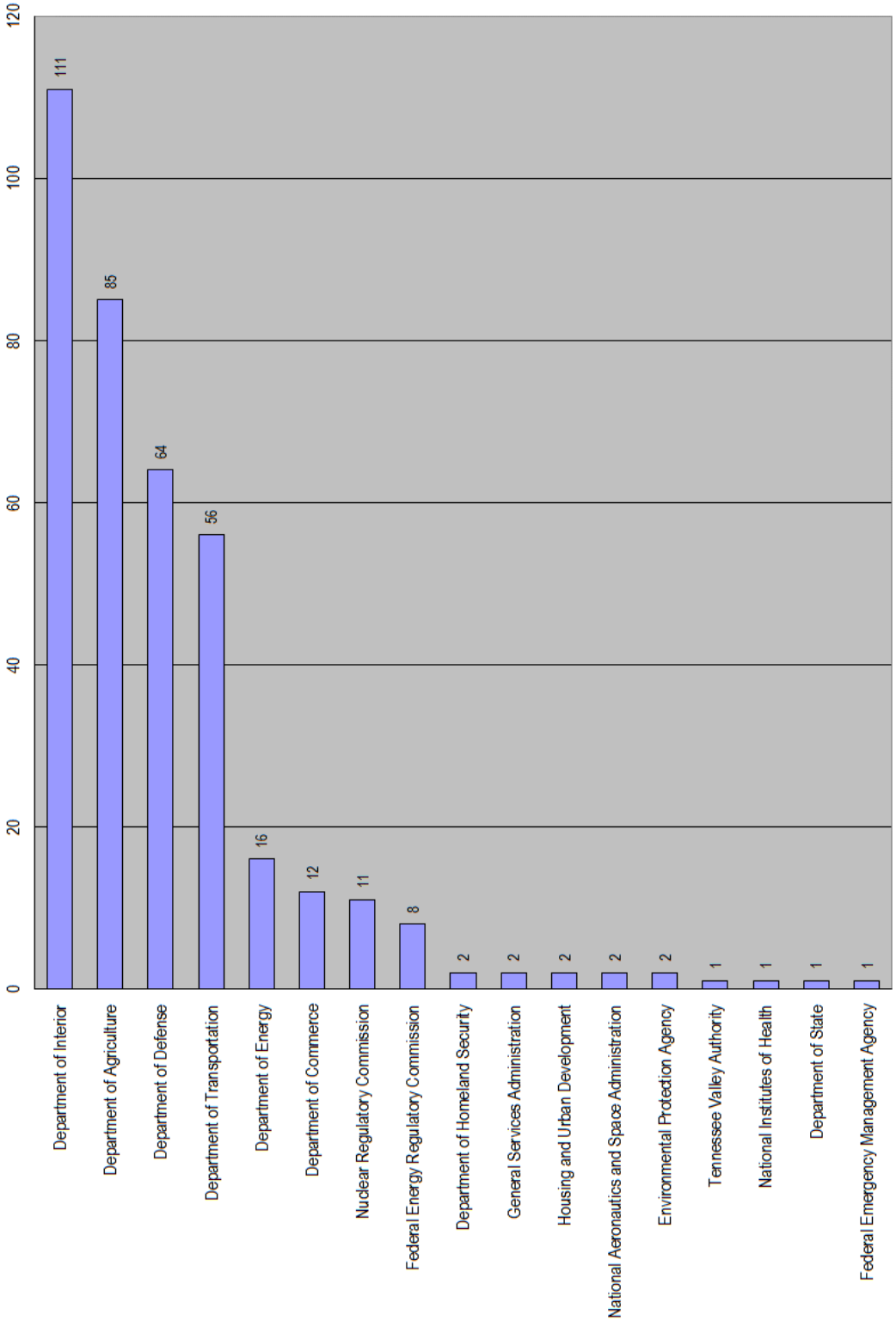

Figure 1-1. Draft and Final EISs Announced in Federal Register in 2013 (by Department)

Table 1-1. Draft and Final EISs Announced in Federal Register in 2013

Lead Agency	Number of documents
U.S. Forest Service	80
Bureau of Land Management	49
Federal Highway Administration	43
U.S. Army Corps of Engineers	41
National Park Service	27
Fish and Wildlife Service	16
National Oceanic and Atmospheric Administration (NMFS)	12
Nuclear Regulatory Commission	11
Department of Energy	10
U.S. Navy	10
Federal Transit Administration	9
Bureau of Reclamation	8
Federal Energy Regulatory Commission	8
U.S. Air Force	7
Bureau of Indian Affairs	6
U.S. Army	6
Bureau of Ocean Energy Management, Regulation and Enforcement	4
Western Area Power Administration	4
Federal Rail Administration	2
General Services Administration	2
Federal Aviation Administration	2
U.S. Coast Guard	2
Housing and Urban Development	2
National Aeronautics and Space Administration	2
Environmental Protection Agency	2
Natural Resource Conservation Service	2
Bonneville Power Administration	1
Rural Utilities Service	1
Animal & Plant Health Inspection Services	1
Tennessee Valley Authority	1
National Institutes of Health	1
Department of the Interior	1
Department of State	1
National Nuclear Security Administration	1
Federal Emergency Management Agency	1
U.S. Department of Agriculture (Valles Caldera Trust)	1
Total	**377**

Table 1-2. Draft and Final EISs in 2013 by State

States	# Draft and Final EISs	States	# Draft and Final EIS
California	77	Illinois	2
Nevada	20	Iowa	2
Florida	18	Maine	2
Wyoming	17	Michigan	2
Oregon	16	Oklahoma	2
Alaska	15	Pennsylvania	2
Arizona	15	South Carolina	2
Texas	15	Tennessee	2
Montana	14	West Virginia	2
Colorado	13	Wisconsin	2
Idaho	13	Alabama	1
Washington	11	Arkansas	1
Louisiana	10	District of Columbia	1
Utah	8	Guam and CNMI	1
New York	7	Kansas	1
New Mexico	6	Nebraska	1
North Carolina	5	New Hampshire	1
Hawaii	4	New Jersey	1
Maryland	4	South Dakota	1
Minnesota	4	Connecticut	0
Ohio	4	Kentucky	0
Virginia	4	Puerto Rico	0
Indiana	3	Rhode Island	0
Massachusetts	3	Vermont	0
Mississippi	3	American Samoa	0
Missouri	3	Virgin Islands	0
North Dakota	3	Multistate	29
Delaware	2	**TOTAL**	**377**
Georgia	2		

CNMI=Commonwealth of Northern Marianas Islands

As to project ratings for 2013, of the 206 draft EISs (DEIS) published, 12 ratings were unavailable for various reasons at the time these numbers were compiled. Of the 191 documents that received *impact ratings*[4] on the proposed action, 67 (35.1%) projects were rated Lack of Objections (LO) by the EPA, 110 (57.6%) were rated Environmental Concerns (EC), 12 (6.3%) received an Environmental Objections (EO) rating, 2 (1.0%) were rated Environmentally Unsatisfactory (EU) (**Figure 1-2**).

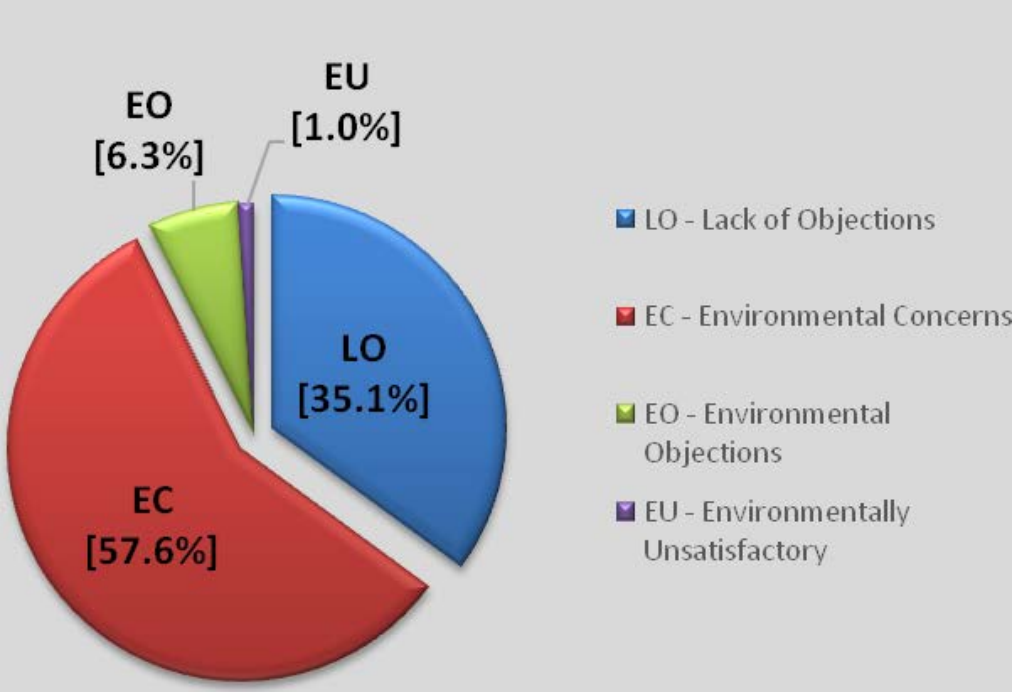

Figure 1-2. Environmental Impact of the Action

Of the 194 documents that received *adequacy ratings* on the document itself, 43.8 percent (85) of the documents were considered adequate[5], 53.6% (104) had insufficient information, and 2.6% (5) were rated inadequate (**Figure 1-3**).

Similar to 2012, three of the five inadequate ratings involved mining projects: Arturo Mine Project in Elko County, Nevada (rated 3), Roca Honda Mine Exploration and Development in New Mexico (rated EO-3), and the King Coal Highway Delbarton to Belo and Buffalo Mountain Surface Mine (rated EU-3). The documents were published by three different lead agencies, BLM, USFS, and FHWA respectively. The two additional inadequate ratings were for the South Mountain Freeway in Arizona (rated 3) and the Buffalo Field Office Planning Area Resource Management plan in Wyoming (rated 3). Those documents were released by FHWA and BLM, respectively.

[4] Three documents were found to be inadequate and therefore the impacts of the proposed project did not receive a rating.

[5] Documents that received an impact rating of LO, but did not receive a separate adequacy rating, were considered to be adequate.

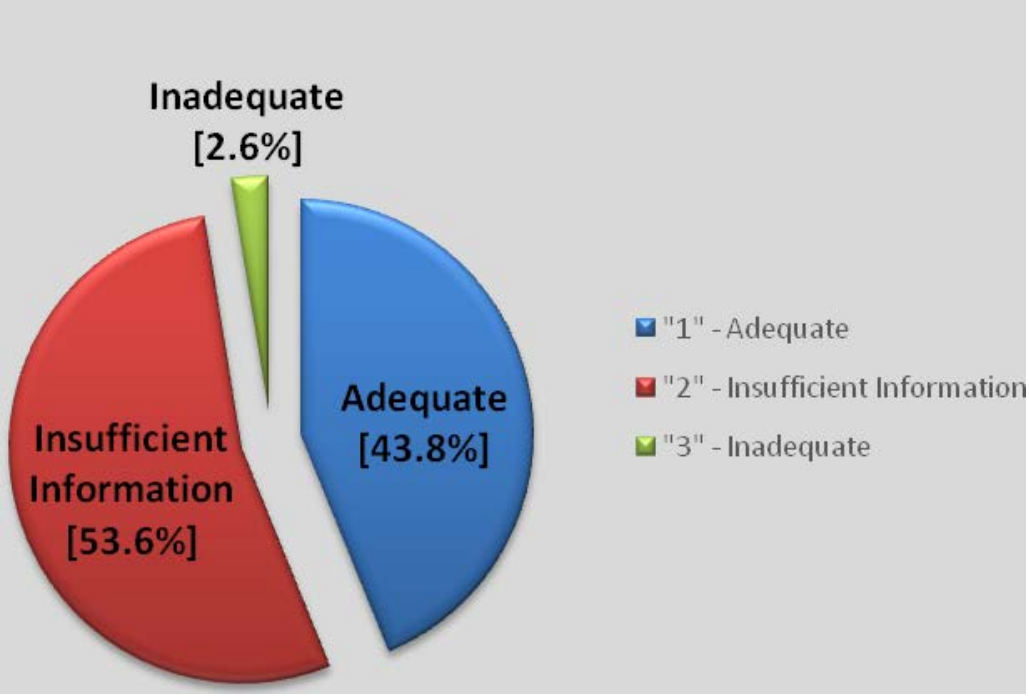

Figure 1-3. Adequacy of the Impact Statement

The Arturo Mine Project in Elko County, Nevada, is a proposed gold mining operation that would disturb approximately 2,703 acres of BLM lands and would include expansion of an existing mine pit, construction of two new waste rock disposal facilities, construction of a new heap leach pad, construction of additional support facilities, and transport of mill-grade ore material to a mine facility. The DEIS received the inadequate rating due to the lack of analysis regarding potential impacts to surface and groundwater from waste rock impoundments that have the potential to cause water quality violations. In addition, critical information was lacking regarding the nature, estimated cost, and funding mechanism (financial assurance) to implement essential mitigation in perpetuity after the mine would be closed to prevent surface and groundwater contamination.

The Roca Honda Project would develop and conduct underground uranium mining operations in the Cibola National Forest in New Mexico. The proposed mine and surface support facilities would disturb 1,920 acres of land, and operations would last 18 years with a possible extension. The DEIS received an inadequate rating because it lacked financial assurance for post-closure obligations and there was an inadequate analysis of the characterization and treatment of waste rock. The backfill would have the potential to increase concentrations of uranium and radium, as well as other pollutants in the groundwater. There was also a lack of analysis of possible seepage between aquifers; and water quality monitoring and mitigation measures were insufficient. Furthermore, information regarding likely impacts on tribal cultural resources and environmental justice communities was lacking. Mt. Taylor is sacred for the Acoma, Laguna, Zuni, Hopi, and Navajo tribes. The environmental objections were based on the significant adverse impacts to groundwater quantity. Groundwater wells and springs within a 17-mile radius would have a high probability of becoming dry following the mining operations.

The King Coal Highway and Mine Project involves one of the largest surface coal mines ever proposed in Appalachia. Construction of the mine and highway connections would create 12 valley fills, bury 7.4 miles of high quality streams, and temporarily impact an additional 3.3 miles of streams. The draft Supplemental EIS was found "inadequate" because it only considered the proposed action and the no action alternative, even though there are likely additional alternatives that would meet the stated purpose. In addition, the document failed to adequately analyze the impacts to aquatic resources, air quality, drinking water, hydrology, cultural resources, low income and minority populations, and health, and did not adequately address cumulative impacts.

The DEIS for the South Mountain Freeway (Loop 202) Project in Arizona, a new 22-mile multilane freeway south of Phoenix paralleling the Gila River Indian Community border, was deemed "inadequate" because it lacked information regarding transportation conformity, an adequate analysis of air quality impacts along the freeway corridor, and an air toxics risk assessment to address local community concerns regarding health impacts.

The Resource Management Plan prepared by the Buffalo Field Office of the BLM analyzed alternatives for the planning and management of public lands and resources that fall under its jurisdiction. This includes 782,000 surface acres, and federal mineral estate totals of 4.8 million acres. The DEIS estimated that approximately 7,700 new coal bed natural gas and 3,600 new conventional oil and gas wells would be installed and that there are approximately 26,000 and 4,100 wells, respectively, already. The document received an inadequate rating because it failed to provide the proper scope and detail of analysis to inform decision-making for the large planning area with regard to surface waters, groundwater, drinking water, and riparian/wetland resources.

Environmental Protection Agency Rating System for Environmental Impact Statements

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.

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

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

2. Preparation Times for Environmental Impact Statements Made Available in 2013

Piet and Carole deWitt [6]

In calendar year 2013, 32 federal agencies made publicly available 206 draft environmental impact statements (EISs), and 29 agencies made available 180 final EISs. Eight of the final EISs were adoptions and are not included in our calculation of EIS-preparation times.

The draft and final EISs made available by all federal agencies as a group in calendar year 2013 required the longest average preparation times we have recorded for the period 1997-2013. The number of final EISs made available was the lowest annual total, and the number of draft EISs made available was the second lowest annual total we have recorded for our study period.

2.1 Final EISs

The 172 final EISs in our sample had an average preparation time (from the Federal Register Notice of Intent (NOI) to the Notice of Availability for the final EIS) of 1705±1244 days (4.7±3.4 years) (mean ± one standard deviation) (see "ALL" in **Table 2-1**). The 2013 average EIS-preparation time was the longest we have recorded for all agencies, as a group, for the period 1997-2013. The 2013 average exceeded by 30 days the previous annual high average of 1675±1247 days (4.6±3.4 years) [n=197] recorded in 2012. The draft EISs associated with the 2013 final EISs required an average of 1212±1050 days (3.3±2.9 years) to prepare following the publication of their NOIs. This average was 49 days longer than the previous high average of 1163±1048 days (3.2±2.9 years) [n=197] recorded in 2012. The 2013 average time for preparing the final EIS from the draft EIS, 493±502 days (1.4±1.4 years), was the second highest average recorded for the period 1997-2013. The highest average, 512±548 days (1.4±1.5 years) was also recorded in 2012 and is 19 days longer than the 2013 average.

Report Statistics

In the following text and tables, we provide two measures of central tendency (the mean and the median) and two measures of dispersion (the standard deviation and the range). The mean is the average value for the data. The median is the number in the arrayed data that has an equal number of data points on either side of it. The standard deviation shows how much variation or dispersion from the mean exists. A low standard deviation indicates that the data points tend to be very close to the mean, and a high standard deviation indicates that the data points are spread out over a large range of values. The range provides the values of the maximum and minimum data points.

In the figures we provide the least squares line and formula for the data being analyzed. The line is the best fit for the data because it minimizes the distance between the calculated line and all the data points. The value R^2 is a measure of how well the data fit the calculated line. Values of R^2 range from 0 to 1 with the value increasing with the closeness of the data to the line.

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Table 2-1. Preparation Times in Calendar Days for Final EISs Made Available in 2013

Agency	n	% ALL	NOI to Draft			Draft to Final			NOI to Final				
			Mean	s.d.	M	Mean	s.d.	M	Mean	s.d.	M	Min	Max
ALL	172	100	1212	1050	820	493	502	343	1705	1244	1214	206	6958
BIA	2	1.2	750	249	750	970	896	970	1720	647	1720	1262	2177
BLM	18	10.5	901	702	788	451	305	368	1352	940	1162	206	4292
BOEM	2	1.2	235	158	235	186	45	186	420	202	420	277	563
BOR	5	2.9	1073	1354	473	489	253	350	1561	1276	1120	583	3801
DOE	4	2.3	788	445	727	179	13	175	967	443	916	480	1555
EPA	1	0.6	708			91			799				
FAA	1	0.6	2073			287			2360				
FERC	2	1.2	516	141	516	200	15	200	716	127	716	626	805
FHWA	19	11	2363	1653	2066	730	776	406	3093	1668	2738	597	6958
FRA	2	1.2	1030	1119	1030	557	490	557	1587	1609	1587	449	2724
FS	40	23.3	1069	949	722	410	330	301	1480	1111	1113	307	5411
FTA	5	2.9	2406	1052	2170	643	670	497	3048	944	2667	2118	4385
FWS	10	5.8	832	467	793	415	275	319	1248	724	1114	372	2822
GSA	1	0.6	855			350			1205				
HUD	1	0.6	196			105			301				
NASA	1	0.6	534			287			821				
NIH	1	0.6	368			315			683				
NNSA	1	0.6	735			574			1309				
NOAA	6	3.5	989	702	763	480	434	354	1468	1033	1190	484	3146
NPS	10	5.8	1701	1057	1277	525	488	438	2226	1387	1610	700	4853
NRC	5	2.9	1425	621	1373	697	510	478	2123	1057	2108	1033	3823
NRCS	1	0.6	525			98			623				
TVA	2	1.2	1139	933	1139	410	243	410	1549	1177	1549	717	2381
USA	2	1.2	566	383	566	651	129	651	1217	511	1217	855	1578
USACE	19	11	1109	845	756	641	886	343	1750	1257	1129	311	4704
USAF	3	1.7	676	504	478	292	165	294	968	391	933	595	1375
USCG	1	0.6	1306			462			1768				
USN	6	3.5	850	525	687	378	90	378	1228	529	1142	700	2244
WAPA	1	0.6	1694			462			2156				

n = number of EISs in the sample; s.d. = standard deviation; M = median

Of the major EIS-preparing agencies in 2013, the U.S. Forest Service (USFS) and the Federal Highway Administration (FHWA) recorded new high annual average final EIS-preparation times. These two agencies prepared approximately one-third of all the final EISs made available in 2013 (see "% ALL" in **Table 2-1**). The USFS's 2013 average EIS-preparation time was 82 days longer than its previous high average of 1398±925 days (3.8±2.5 years) [n=54] recorded in 2012. The FHWA's 2013 average exceeded by 476 days its previous high average of 2617±1580 days (7.2±4.3 years) [n=26] recorded in 2006.

Five or 2.9% of the final EISs made available in 2013 were completed in less than one year following publication of their NOIs (see "0 to 1" in **Table 2-2**). This is the lowest annual percentage of EISs completed in less than one year during our study period. From 1997-2012 an average of 8.1±3.0% of final EISs were completed in less than one year. The previous low completion rate (3.5%) was recorded in 2012. The highest completion rate (14.9%) was recorded in 2001. Since 2001, the percentage of EISs completed in less than one year has declined at an average rate of -0.62%/year.

In 2013 record high EIS-completion rates were established for the annual intervals 7-to-8 years, 10-to-11 years, 13-to-14 years, 14-to-15 years, and 19-to-20 years (**Table 2-2**). However, only a few EISs are normally completed in these intervals.

The average time required by all federal agencies combined to prepare final EISs has increased since the year 2000 when it averaged 1166±899 days (3.2±2.5 years) [n=198]. The annual average EIS-preparation time for all agencies peaked in 2013 as noted previously. From 2000-2013, the annual average EIS-preparation time for all agencies, as a group, increased at an average rate of 37.2 days/year (see "Total EIS Preparation Time" in **Figure 2-1**). About 79% of the increase occurred in the preparation of draft EISs. The remaining 21% was incurred in the preparation of the final EIS from the draft EIS.

In 2013, 16 agencies made available only one or two final EISs (see right four columns in **Table 2-3**). Eight (8) of these agencies appear in the ten lowest average EIS-preparation times for the year. However, producing one or two EISs annually does not guarantee that the preparation times will be short. Five (5) of the agencies that made available only one or two final EISs in 2013 appear in the ten longest average EIS-preparation times for the year.

For the period 1997-2012, federal agencies made available an average of 240±32 final EISs/year. The 180 final EISs made available in 2013 was the lowest number we recorded for the period 1997-2013. The previous low number, 206 final EISs, was recorded in both 2011 and 2012. The high number, 311 final EISs, was recorded in 2004.

Table 2-2. A Comparison of 2013 Final EIS Completion Rates with the Average Final EIS Completion Rates for the Period 1997 through 2013.

Completion Interval in Years from NOI*	2013 Completion Percentage	1997 – 2013			
		Average Completion Percentage	Standard Deviation	Lowest Percentage (Year)	Highest Percentage (Year)
0 to 1	2.9	8.1	3.0	2.9 (2013)	14.9 (2001)
1 to 2	18.8	25.4	3.6	16.8 (2012)	30.3 (2000)
2 to 3	18.8	18.6	2.6	15.5 (2005)	24.9 (2009)
3 to 4	15.9	13.0	2.4	9.3 (2004)	18.9 (2005)
4 to 5	8.2	10.1	2.6	6.2 (2002)	13.1 (2006)
5 to 6	8.2	7.1	2.0	4.5 (2000)	11.6 (2011)
6 to 7	5.9	6.0	2.1	3.0 (2001)	10.6 (2006)
7 to 8	7.1	3.6	1.3	1.5 (2000)	7.1 (2013)
8 to 9	2.9	2.8	1.4	1.3 (2002)	6.6 (2012)
9 to 10	1.2	1.7	0.8	0.5 (2000)	2.8 (1999)
10 to 11	3.5	1.0	0.7	0.4 (4 years)	3.5 (2013)
11 to 12	0.6	0.6	0.6	0.0 (6 years)	1.5 (4 years)
12 to 13	1.8	0.6	0.6	0.0 (4 years)	2.3 (2008)
13 to 14	2.4	0.3	0.3	0.0 (7 years)	2.4 (2013)
14 to 15	1.2	0.3	0.3	0.0 (8 years)	1.2 (2013)
15 to 16	0.0	0.1	0.3	0.0 (13 years)	0.9 (2010)
16 to 17	0.0	0.3	0.4	0.0 (11 years)	1.3 (2006)
17 to 18	0.0	0.1	0.2	0.0 (13 years)	0.4 (4 years)
18 to 19	0.0	0.1	0.2	0.0 (15 years)	0.8 (2005)
19 to 20	0.6	0.08	0.2	0.0 (16 years)	0.6 (2013)
20 to 21	0.0	0.03	0.1	0.0 (16 years)	0.5 (2012)
21 to 22	0.0	0.03	0.1	0.0 (16 years)	0.4 (2010)
∑	100.0	99.8			

*NOI = Federal Register Notice of Intent to Prepare the Environmental Impact Statement

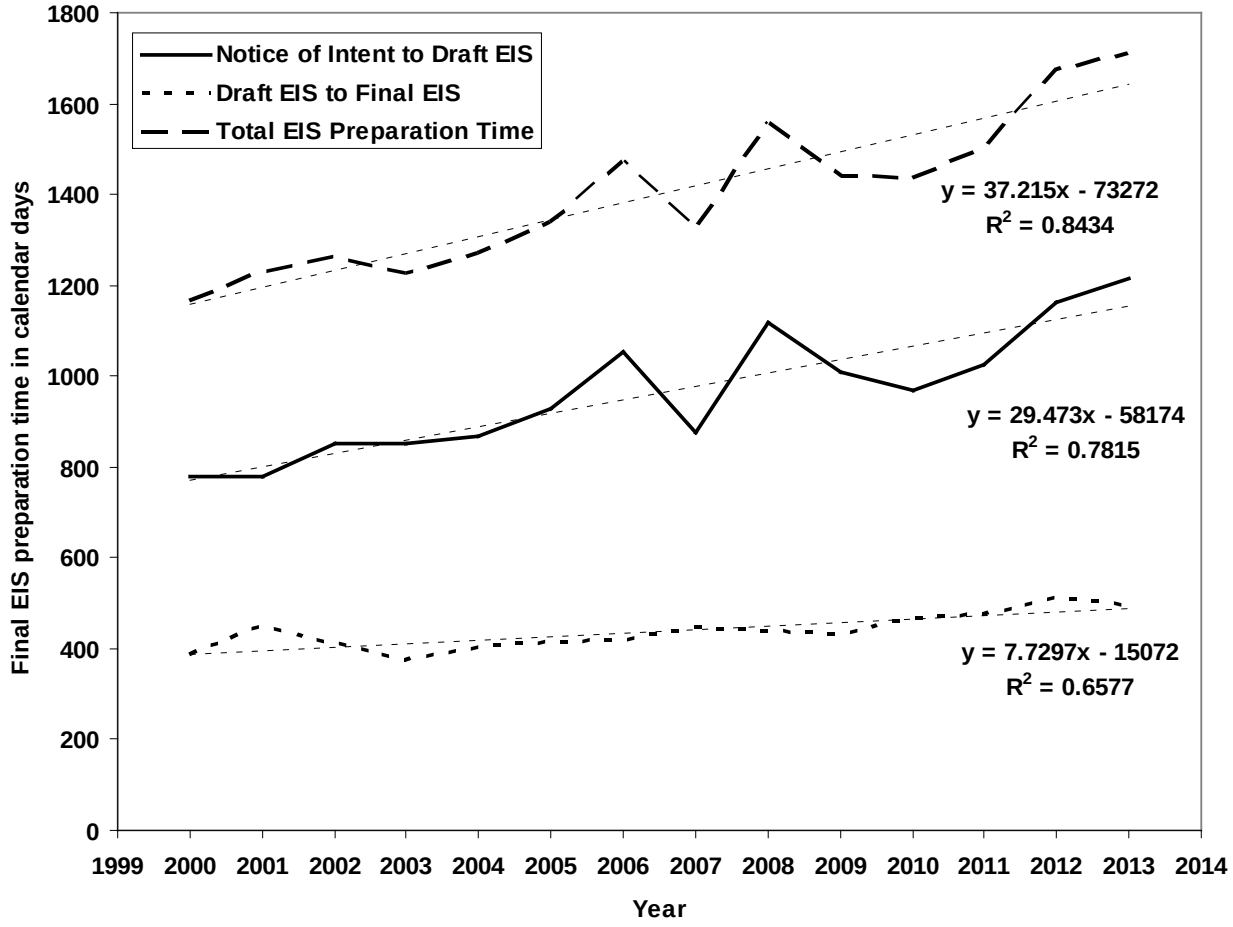

Figure 2-1. Trends in annual average preparation times for final EISs made available by all agencies from 2000 through 2013 with their linear regression lines and equations.

Table 2-3. Average Preparation Times for Draft and Final EISs Made Available in 2013 Arranged in Descending Order by Mean.

2013 Draft EISs			
Rank	Agency	n*	Mean
1	BOR	3	2428
2	NPS	17	2209
3	USACE	22	1963
4	FHWA	23	1832
5	FERC	6	1289
6	BLM	30	1207
7	VCT**	1	1120
8	WAPA	2	1101
9	USCG	1	1092
10	FEMA	1	1058
11	USAF	4	1027
12	BPA	1	974
13	NOAA	6	895
14	APHIS	1	857
15	FS	42	853
16	DOE	6	805
17	FWS	5	766
18	NASA	1	758
19	EPA	1	708
20	FTA	3	603
21	USN	4	557
22	NRCS	1	525
23	USA	2	523
24	NRC	5	522
25	BIA	4	479
26	FAA	1	374
27	BOEM	2	285
28	STATE	1	266
29	HUD	1	196
30	DOI	1	192
31	GSA	1	149
32	RUS	1	126

2013 Final EISs			
Rank	Agency	n*	Mean
1	FHWA	19	3093
2	FTA	5	3048
3	FAA	1	2360
4	NPS	10	2226
5	WAPA	1	2156
6	NRC	5	2123
7	USCG	1	1768
8	USACE	19	1750
9	BIA	2	1720
10	FRA	2	1587
11	BOR	5	1561
12	TVA	2	1549
13	FS	39	1492
14	NOAA	6	1468
15	BLM	18	1352
16	NNSA	1	1309
17	FWS	10	1248
18	USN	6	1228
19	USA	2	1217
20	GSA	1	1205
21	USAF	3	968
22	DOE	4	967
23	NASA	1	821
24	EPA	1	799
25	FERC	2	716
26	NIH	1	683
27	NRCS	1	623
28	BOEM	2	420
29	HUD	1	301

*n = number of EISs
**VCT = Valles Caldera Trust

2.2 Draft EISs

In 2013, federal agencies made available 206 draft and draft supplemental EISs. One draft EIS was retracted as an erroneous filing and was eliminated from our sample. Our remaining sample includes 205 draft and draft supplemental EISs (**Table 2-4**).

The 2013 annual average draft-EIS preparation time for all agencies combined, 1259±1088 days (3.4±3.0 years), was the longest we have recorded for the period 1997-2013 (see "ALL" in **Table 2-4**). The previous high average for all agencies 1087±991 days (3.0±2.7 years) [n=200], was recorded in 2012. The 2013 average exceeded the 2012 average by 172 days.

Three of the five most prolific EIS producers established their highest annual average draft-EIS preparation times in 2013. The USFS's 2013 average time was 98 days longer than its previous high average of 755±519 days (2.1±1.4 years) [n=43] set in 2012. The Army Corps of Engineers' (USACE's) 2013 average time was 598 days longer than its previous high average of 1365±1009 days (3.7±2.8 years) [n=28] set in 2005. Finally, the National Park Service's (NPS's) 2013 average time exceed by 324 days its previous high of 1885±1075 days (5.2±2.9 years) [n=15] set in 2011. These three agencies combined to produce approximately 40% of all the draft EISs made available in 2013 (see "% All" in **Table 2-4**).

From 1997-2012 an average of 28.6±5.4% of draft EISs was completed in less than one year following publication of their NOIs (see "0 to 1" in **Table 2-5**). In 2013, twenty-eight (28) or 13.9% of the draft EISs made available were completed in less than one year. This average is the lowest annual percentage of draft EISs completed in less than one year we have recorded for the period 1997-2013. The previous low completion rate, 16.0%, was set in 2012. The highest completion rate, 37.0%, was recorded in 2000. Since 2000, the percentage of draft EISs completed in less than one year has declined at an average rate of -0.98%/year.

In 2013 record high draft EIS completion rates were established for the annual intervals 6-to-7 years, 8-to-9 years, 11-to-12 years, and 12-to-13 years (**Table 2-5**). As with final EISs, only a few draft EISs are completed in these intervals.

The lowest annual average preparation time for draft EISs, 710±666 days (1.9±1.8 years) [n=243], was recorded in the year 2000. Since then annual average draft EIS-preparation times for all agencies combined have increased at an average rate of 24.5 days/year (**Figure 2-2**).

In 2013, 18 federal agencies made available only one or two draft EISs (see left four columns in **Table 2-3**). Eight (8) of these agencies appear in the ten lowest annual average preparation times, and five (5) of them appear in the ten longest annual average preparation times.

The 206 draft EISs made available in 2013 was the second lowest number we recorded for the period 1997-2013. The lowest number, 200 draft EISs, was recorded in 2012, and the highest number, 320 draft EISs was recorded in 2003. For the period 1997-2012, federal agencies made available an average of 266±33 draft EISs/year.

Table 2-4. Preparation Times in Calendar Days for Draft EISs Made Available in 2013.

Agency	n	% ALL	Mean	s.d.	M	Min	Max
ALL	**205**	**100**	**1259**	**1088**	**857**	**66**	**5468**
APHIS	1	0.5	857	---	---	---	---
BIA	4	2.0	479	108	467	381	602
BLM	30	14.6	1207	752	984		
BOEM	2	1.0	285	260	285	101	469
BOR	3	1.5	2428	362	2332	2123	2828
BPA	1	0.5	974	---	---	---	---
DOE	6	2.9	805	352	723	318	1232
DOI	1	0.5	192	---	---	---	---
EPA	1	0.5	708	---	---	---	---
FAA	1	0.5	374	---	---	---	---
FEMA	1	0.5	1058	---	---	---	---
FERC	6	2.9	1289	885	1192	451	2572
FHWA	24	11.7	1963	1243	1914	207	4985
FS	42	20.6	853	897	642	133	4805
FTA	4	2.0	1021	864	748	312	2277
FWS	6	2.9	793	205	874	429	974
GSA	1	0.5	149	---	---	---	---
HUD	1	0.5	196	---	---	---	---
NASA	1	0.5	758	---	---	---	---
NOAA	6	2.9	895	676	627	395	2150
NPS	17	8.3	2209	1215	1689	462	4657
NRC	5	2.4	522	186	616	323	722
NRCS	1	0.5	525	---	---	---	---
RUS	1	0.5	126	---	---	---	---
STATE	1	0.5	266	---	---	---	---
USA	4	2.0	523	243	524	231	814
USACE	22	10.7	1963	1487	1747	99	5468
USAF	4	2.0	1027	1113	731	133	2513
USCG	1	0.5	1092	---	---	---	---
USN	4	2.0	557	220	586	309	749
VCT	1	0.5	1120	---	---	---	---
WAPA	2	1.0	1101	781	1101	549	1653

Total draft EISs = 206; one retracted as "erroneous filing" (11/29/13)
n = number of EISs in sample; s.d. = standard deviation; M = median
VCT = Valles Caldera Trust

Table 2-5. A Comparison of 2013 Draft EIS Completion Rates with the Average Draft EIS Completion Rates for the Period 1997 through 2013.

Preparation Interval in Years from NOI*	2013 Preparation Percentage	1997 – 2013			
		Average Preparation Percentage	Standard Deviation	Lowest Percentage (Year)	Highest Percentage (Year)
0 to 1	13.9	28.6	5.4	13.9 (2013)	37 (2000)
1 to 2	28.2	27.6	3.2	24.4 (2002)	34.1 (2009)
2 to 3	16.8	16.7	3.1	14 (2 years)	22.5 (2012)
3 to 4	11.9	9.6	2.2	6.2 (2001)	13.1 (1999)
4 to 5	8.9	6.3	2.0	3.3 (2002)	9.4 (2010)
5 to 6	4.5	4.1	1.8	1.8 (1998)	7.9 (2005)
6 to 7	5.0	2.9	1.1	0.7 (1998)	5.0 (2013)
7 to 8	2.5	1.3	0.7	0.3 (2005)	2.8 (1997)
8 to 9	3.0	0.9	0.6	0.0 (3 years)	3.0 (2013)
9 to 10	0.5	0.8	0.7	0.0 (2 years)	1.9 (2003)
10 to 11	0.5	0.2	0.3	0.0 (9 years)	0.8 (2011)
11 to 12	1.0	0.3	0.3	0.0 (6 years)	1.0 (2013)
12 to 13	2.5	0.3	0.3	0.0 (7 years)	2.5 (2013)
13 to 14	0.5	0.1	0.3	0.0 (13 years)	0.7 (2 years)
14 to 15	0.5	0.2	0.3	0.0 (11 years)	0.9 (2003)
15 to 16	0.0	0.08	0.2	0.0 (13 years)	0.4 (2001)
16 to 17	0.0	0.04	0.1	0.0 (15 years)	0.4 (2002)
17 to 18	0.0	0.02	0.1	0.0 (16 years)	0.3 (2003)
18 to 19	0.0	0.06	0.2	0.0 (15 years)	0.5 (2012)

*NOI = Federal Register Notice of Intent to Prepare the Environmental Impact Statement

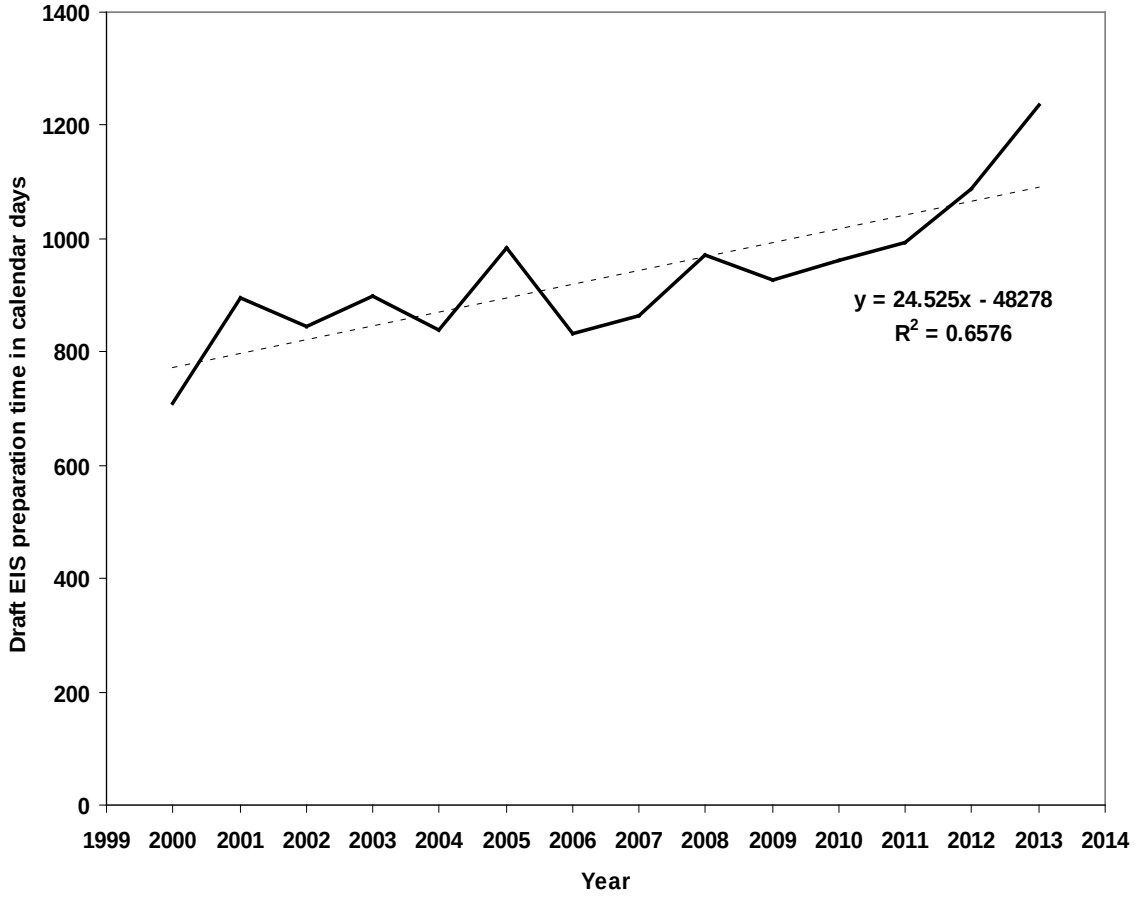

Figure 2-2. Trend in Annual Average Preparation Times for Draft EISs Made Available by All Agencies from 2000 through 2013 with their Linear Regression Line and Equation.

3. Excerpts from the CEQ's Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects, November 2, 2011

Full Report Available at:
http://energy.gov/nepa/downloads/11th-and-final-ceq-report-congress

In November 2011 the Council on Environmental Quality (CEQ) submitted its Final Report in accordance with section 1609(c) of the American Recovery and Reinvestment Act of 2009 (ARRA). The Final Report provided the status and progress of NEPA compliance for activities funded under Division A of ARRA as reported by 15 departments and 9 independent agencies through September 30, 2011.

The departments and agencies reported the timely completion of NEPA reviews that inform decisions on projects and activities receiving ARRA funds and position the agencies to implement those projects and activities in an environmentally sound manner. No department or agency reported instances of substantial delays related to NEPA reviews to CEQ. Agencies met the challenges of administering programs and projects that were dramatically expanded by ARRA funding by providing tools (e.g., checklists, templates) and additional guidance to help program and project managers deliver projects and activities while meeting their environmental review requirements. Examples of agencies implementing NEPA efficiencies include the development of programmatic analyses to meet NEPA compliance requirements for multiple projects and activities, resulting in the expeditious completion of these and subsequent projects and activities.

Table 3-1 and **Figure 3-1** summarize agency NEPA compliance for reported projects as presented in Attachment 1 of the Final Report.

Table 3-1. Overview of Department/Agency NEPA Status for Reported Projects

	Categorical Exclusions (CE)	Percent of Total	EAs	Percent of Total	EIS	Percent of Total	Total NEPA Analyses
OVERALL TOTAL	184,813	95.8%	7,240	3.8%	841	0.4%	192,895
USDA	96,751	98.3%	1492	1.5%	150	0.2%	98,394
HUD	27681	91.1%	2709	8.9%	0	0.0%	30,391
DOT	23668	95.3%	892	3.6%	273	1.1%	24,834
DOD	5960	87.9%	522	7.7%	298	4.4%	6,781
DOI	4824	86.4%	681	12.2%	78	1.4%	5,584
NSF	5133	99.8%	6	0.1%	1	0.02%	5,141
DOJ	4003	98.3%	70	1.7%	0	0.0%	4,074
HHS	2667	88.8%	336	11.2%	2	0.1%	3,006
VA	1491	99.2%	12	0.8%	0	0.0%	1,504
All Other Agencies	12,635	95.8%	520	3.9%	39	0.3%	13,186

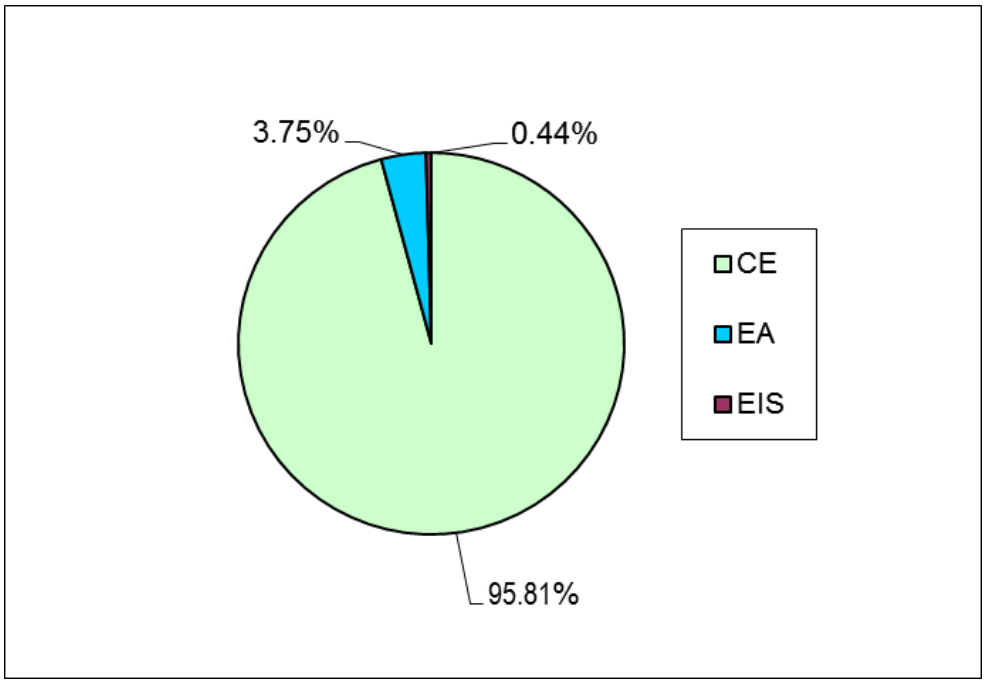

Figure 3-1. Type of NEPA Analyses (Categorical Exclusions (CE), Environmental Assessments (EA), and Environmental Impact Statements (EIS)) for ARRA Reported Projects

4. Recent NEPA Cases (2013)

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4.1 Introduction

In 2013, the U.S. Courts of Appeal issued 21 decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 21 cases involved 10 different departments and agencies, and in 19.5 of the 21 cases (93 percent) the federal department or agency prevailed. The U.S. Supreme Court issued no NEPA opinions in 2013; opinions from the U.S. District Courts were not reviewed. For comparison purposes, **Table 4-1** shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2013, by circuit. **Figure 4-1** is a map showing the states covered in each circuit court.

Table 4-1. Number of U.S. Courts of Appeal NEPA Cases, by Year and by Circuit.

	U.S. Courts of Appeal Circuits												TOTAL
	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	2	1	2	3	1		1		12	3	2	1	28
2013	**2**			**2**		**1**	**1**		**9**	**2**	**1**	**3**	**21**
TOTAL	**8**	**6**	**5**	**7**	**6**	**4**	**4**	**5**	**90**	**22**	**5**	**12**	**175**
	5%	3%	3%	4%	3%	2%	2%	3%	52%	13%	3%	7%	100%

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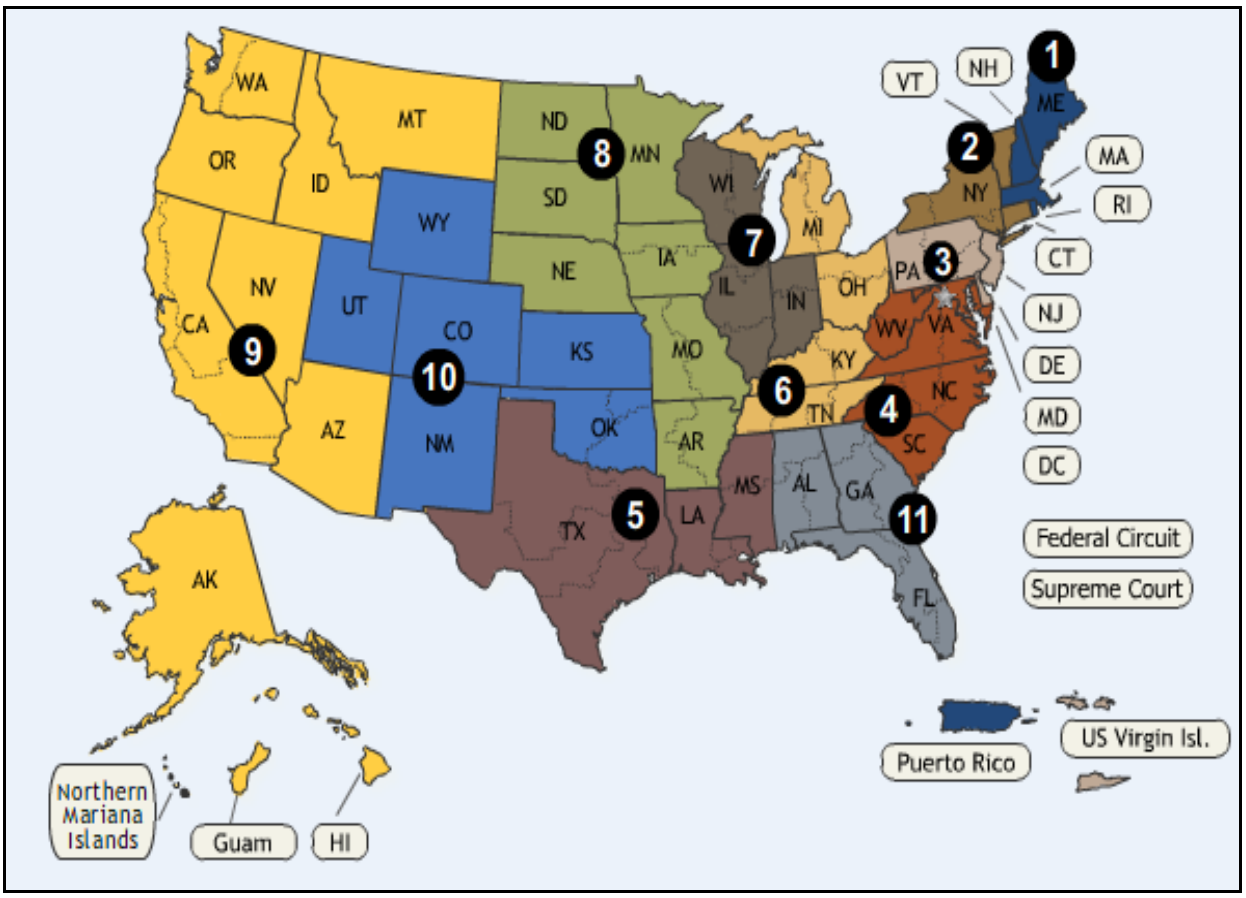

Figure 4-1. Map of U.S. Circuit Courts of Appeal.

4.2 Statistics

The U.S. Forest Service (USFS) did not achieve first place as the agency involved in the largest number of NEPA cases in 2013, a departure from most previous years. While USFS was involved with two cases (and prevailed in both), the U.S. Army Corps of Engineers (ACOE) and the U.S. Bureau of Land Management (BLM) each had five cases. ACOE prevailed in four and lost one; BLM prevailed in 4.5 and lost 0.5 cases (prevailed in one of two NEPA claims, lost the other).

The other NEPA cases involved:

- U.S. Department of Agriculture (USDA)/Animal Plant Health Inspection Service (APHIS) – one case (agency prevailed)
- U.S. Department of Defense (DOD)/U.S. Department of the Navy (Navy) – one case (agency prevailed)
- U.S. Department of the Interior (DOI) – one case (agency prevailed)
- DOI/National Park Service – one case (agency prevailed)

- U.S. Department of Transportation (DOT) – one case (agency prevailed)
- DOT/Surface Transportation Board (STB) – one case (agency prevailed)
- U.S. Nuclear Regulatory Commission (NRC) – three cases (agency prevailed in all)

Interesting conclusions from the 2013 cases:

- Continuing the trend from 2012, federal agencies prevailed in an even larger percentage of the NEPA challenges brought (86 percent in 2012; 93 percent in 2013).
- 12 of the cases involved environmental impact statements (EIS) and each resulted in a decision in favor of the federal agency.
- The one-and-one-half cases lost involved environmental assessments (EA):
    - *Kentucky Riverkeeper, Inc. v. Rowlette*, ___ F.3d ___ (6th Cir. 2013) – having taken the easier path of preparing an EA instead of an EIS, agency needed to follow applicable regulations by documenting its assessment of impacts.
        - But see, *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 716 F.3d 119 (4th Cir. 2013) – EA prepared by ACOE for a § 404 permit was adequate because the record amply shows the agency grappled with the issues raised; and
        - *Jones v. National Marine Fisheries Service, et al.*, ___ F.3d. ___ (9th Cir. 2013) – an EIS is not required anytime there is some uncertainty, but only where the effects of the project are highly uncertain.
    - *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013)) – failure to consider reduced- or no-grazing alternatives in an EA violated NEPA.
- Agency deference is alive and well:
    - *Jayne v. Sherman*, 706 F.3d 994 (9th Cir. 2013) – agency's analysis is entitled to deference given the expertise the agency has in matters of its own budget and how it affects priorities.
    - *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 716 F.3d 119 (4th Cir. 2013) – court may not use review of an agency's environmental analysis as a guide for second-guessing substantive decisions committed at the discretion of the agency.
    - *WildEarth Guardians et al. v. Jewell, et al.*, ___ F.3d ___ (D.C. Cir. 2013) – court's role is not to "flyspeck" an agency's environmental analysis, looking for any deficiency no matter how minor.
    - *Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) – a lead agency does not violate NEPA when it does not defer to the concerns of other agencies; all that NEPA requires is that the lead agency consider these concerns and explain why it finds them unpersuasive. Further, it is not the role of the court to decide whether an EIS is based on the best scientific method available as long as the agency engages in a reasonably thorough discussion of the impacts.

  - *Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (D.C. Cir. 2013) – the determination as to whether information is new and significant requires a high level of technical expertise requiring the court to defer to the informed discretion of the agency.
- Harmless technical errors do not result in NEPA violations:
  - *Drakes Bay Oyster Company v. Jewell*, ___ F.3d ___ (9th Cir. 2013) (revised opinion issued January 14, 2014) – technical violations did not result in any prejudice to plaintiffs.
  - *International Brotherhood of Teamsters v. U.S. Department of Transportation*, ___ F.3d. ___ (D.C. Cir. 2013) – plaintiffs did not identify any aspect of the program the agency could have designed differently to reduce environmental impacts. Therefore, any technical error was harmless and not grounds for vacating the decision or remanding to the agency.

NEPA issues the courts addressed include:

- Tiering
  - *Hoosier v. U.S. Army Corps of Engineers*, 722 F.3d 1053 (7th Cir. 2013) – there is a difference between segmentation in the pejorative sense and breaking a complex investigation into manageable bits.
  - *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013) – decision requires distinguishing between the level of detail required in a programmatic NEPA document as compared to a site-specific NEPA document.
- Purpose and Need/Applicants
  - *Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) – agency must consider statutory context of the proposed action in addition to a private applicant's objectives, but plaintiffs did not show that adoption of the applicant's goals led the agency to consider a too limited range of alternatives.
  - *Beyond Nuclear v. U.S. Nuclear Regulatory Commission*, __ F3. ___ (1st Cir. 2013) – where the agency is not itself the project's sponsor, consideration of alternatives may accord substantial weight to the preferences of the applicant. Further, in most cases, a reasonable energy alternative is one that is currently commercially viable or will become so in the relatively near term.
- Alternatives
  - *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013)) – failure to consider reduced- or no-grazing alternatives in an EA resulted in a NEPA violation.
  - *WildEarth Guardians v. National Park Service*, 703 F.3d 1178 (10th Cir. 2013) – failure to consider a "natural wolf" alternative in an elk and vegetation management plan did not violate NEPA where the record demonstrates that the alternative would be impractical.

- *Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) – an EIS need not consider an infinite range of alternatives, only reasonable or feasible ones.
- *WildEarth Guardians v. National Park Service*, 703 F.3d 1178 (10th Cir. 2013) – agency is not required to consider alternatives that are too remote, speculative, or impractical or ineffective.

- Cumulative Impacts
  - *Kentucky Riverkeeper, Inc. v. Rowlette*, ___ F.3d ___ (6th Cir. 2013) – failure to use past impacts to assess cumulative impacts violated NEPA.
  - *Jones v. National Marine Fisheries Service, et al.*, ___ F.3d. ___ (9th Cir. 2013) – the EA cited publicly available data that was available to plaintiffs and was not deficient. Further, because the majority of plans to widen scope of mining are speculative and have not been reduced to specific proposals, the agency's cumulative impact analysis did not need to include them.
  - *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 716 F.3d 119 (4th Cir. 2013) – agency's analysis was adequate and plaintiff's arguments are reduced to no more than a substantive disagreement with the ACOE.
  - *Montana Wilderness Association v. Connell*, 725 F.3d 988 (9th Cir. 2013) – failure to include a section devoted exclusively to cumulative impacts in the EIS did not violate NEPA where the agency discussed cumulative impacts throughout the document.

- Supplementation
  - *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836 (9th Cir. 2013) – the agency did not violate NEPA when the selected alternative is made of elements from alternatives that were analyzed in the draft EIS and the combination was within the spectrum of previously analyzed alternatives.
  - *Western Watershed Project v. U.S. Bureau of Land Management*, 721 F.3d 1264 (10th Cir. 2013) – combining two analyzed alternatives into a hybrid alternative, with additional environmentally protective features, in the Finding of No Significant Impacts (FONSI) did not require supplementation or violate NEPA.
  - *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (1st Cir. 2013) – supplementation not required based on conjecture that additional information might arise in the future.
  - *Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (D.C. Cir. 2013) – new and significant information is that which presents a seriously different picture of the environmental impact of the proposed action from what was previously envisioned.

- Mitigation Implementation
  - *Village of Bald Head Island v. U.S. Army Corps of Engineers*, ___ F.3d ___ (4th Cir. 2013) – ACOE's failure to implement its promised mitigation, described in an EIS, was not a final agency action that could be challenged.

  - *Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) – NEPA does not require the finalization or adoption of mitigation measures but mandates only that the agency engage in a reasonably thorough discussion of mitigation.

- Categorical Exclusions
  - *Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013) – NEPA regulations relating to the scope of EISs do not apply to application of categorical exclusions, even though courts have applied certain EIS requirements to EAs.
- Other
  - *Defenders of Wildlife, et al. v. U.S. Department of the Navy, et al.*, ___ F.3d ___ (11th Cir. 2013) – if an agency analyzed all phases of a proposed action in an EIS, there is no requirement that the agency authorize all phases in the resulting ROD.
  - *Drakes Bay Oyster Company v. Jewell*, ___ F.3d ___ (9th Cir. 2013) (revised opinion issued January 14, 2014) – NEPA does not apply to an agency decision to let a permit expire as an environmental conservation effort.

Each of the 2013 NEPA cases, organized by federal agency, is summarized in **Appendix A**.

10 Years of Department of Energy (DOE) NEPA Metrics: 2003–2012

Reprinted (with permission) from DOE NEPA Lessons Learned Quarterly Report, September 2013

The Department of Energy's (DOE's) Office of NEPA Policy and Compliance has been tracking completion times and other metrics since 1994.[8] The NEPA Office's most recent analysis – for calendar years 2003 through 2012 – shows that completion time and cost vary considerably from document to document and often within a single year. However, overall performance, as measured through median values throughout the period, generally appears to have remained stable, notwithstanding a substantial workload.

DOE's NEPA Workload

The number of environmental impact statements (EISs), environmental assessments (EAs), and categorical exclusion (CX) determinations completed each year is one measure of the Department's overall NEPA workload. DOE began tracking CX determinations during the study period and has complete data on all 3 levels of NEPA review since 2010. CX determinations dominate in sheer numbers with, for example, about 8,500 completed from 2010 through 2012, compared to 174 EAs and 31 EISs (**Figure 1**).

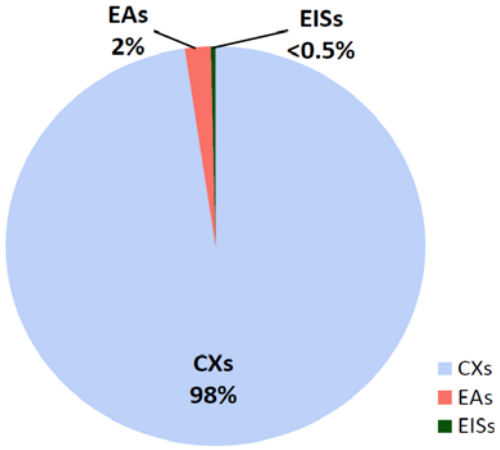

Figure 1. Distribution of Completed DOE NEPA Documents, 2010-2012

The number of NEPA documents completed during 2010 and 2011 was higher than normal because of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which authorized an increase in DOE activities of more than $30 billion and required most funding decisions to be made within 2 years. (See *Lessons Learned Quarterly Report* [*LLQR]*, December 2011, page 10.) However, the relative distribution of NEPA review types reflects DOE's typical workload. By 2012, when DOE had finished its NEPA reviews for nearly all Recovery Act projects, CX determinations still accounted for 98 percent of completed reviews. Although CX determinations represent the dominant form of NEPA review, the preparation of EISs and EAs clearly requires the greatest effort.

Another way to measure NEPA workload is cost. EISs account for the largest share by far of DOE's NEPA expenditures. From 2003 through 2012, DOE completed 38 EISs for which cost data were applicable at a total contractor cost of about $220 million (average $22 million per year). During this same period, DOE completed 250 EAs at a total contractor cost of about $28 million (average $2.8 million per year). DOE does not track the cost of CX determinations, which are small. Limited data show that EIS preparation costs are typically a small fraction – well under 1 percent – of total project costs.

[8] See related article, and *Notes on NEPA Metrics* in DOE NEPA Lessons Learned Quarterly Report, September 2013.)

Median EIS Completion Time: 29 Months

DOE issued 79 EISs from 2003 through 2012, including 13 EISs that DOE adopted after completion by another federal agency (**Figure 2**). The low for the period was 3 EISs completed in 2006, and the high was 11 EISs in both 2010 and 2011. **Figure 3** presents the distribution of completion times for 66 EISs completed during this period for which time data are applicable. Thirteen adopted EISs are not included in these calculations because DOE does not control the schedule when it is not the lead agency.

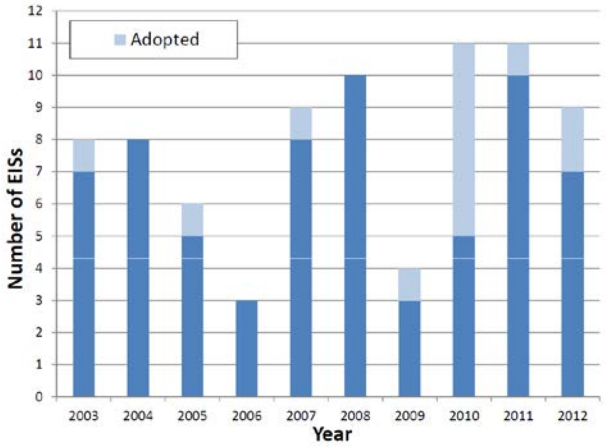

Figure 2. EISs Completed, 2003–2012

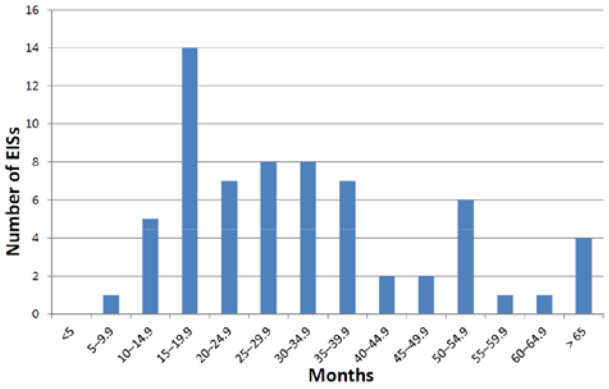

Figure 3. EIS Completion Times, 2003–2012

Completion time is calculated from publication of DOE's NOI to publication of the Environmental Protection Agency's (EPA's) notice of availability of the final EIS. The median completion time for these documents was 29 months; the average was 33 months. Median completion times were less for project-specific EISs (26 months) than for programmatic and site-wide EISs (41 months). Median EIS completion times have been stable during the past 10 years with no discernible trend over time.

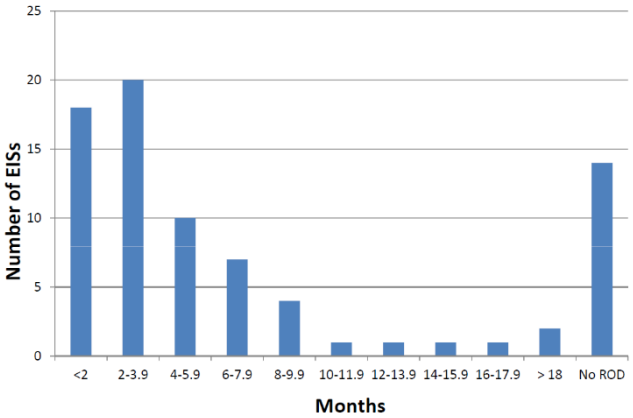

Figure 4. Time from Final EIS to ROD, 2003–2012

After completing an EIS, agencies must issue a record of decision (ROD) before taking action. A ROD generally may be issued no sooner than 30 days after EPA publishes a notice of availability of the final EIS (40 CFR 1506.10). **Figure 4** summarizes ROD issuance times for 79 EISs (including adopted EISs) completed from 2003 through 2012. ROD issuance times are measured from the publication of EPA's notice of availability, or notice of adoption, of the final EIS to publication of DOE's ROD. (If more than one ROD was issued, the issuance time is measured to the first ROD.)

During this period, DOE issued 28 percent of the RODs in less than 2 months, and issued 50 percent of the RODs within 3 months. Program office staff have noted that factors unrelated to the NEPA process, such as financing and other project uncertainties, influence the timing of the issuance of RODs. After completion of some EISs, DOE does not issue a ROD, for example because the proposed project is cancelled.

Median EIS Costs Stable

EIS costs have been stable during the past 10 years with no discernible trend over time. The median and average contractor cost per EIS was $1.4 million and $5.8 million, respectively. Most of the difference between the median and average cost is attributable to a very few documents with unusually high costs. As is the case with average completion time, data on average EIS costs should be interpreted cautiously in view of the relatively small number of EISs and the influence that a single extraordinary document can have on the average. Cost as well as completion time metrics are summarized in **Table 1**. **Figure 5** provides further information on the distribution of EIS costs.

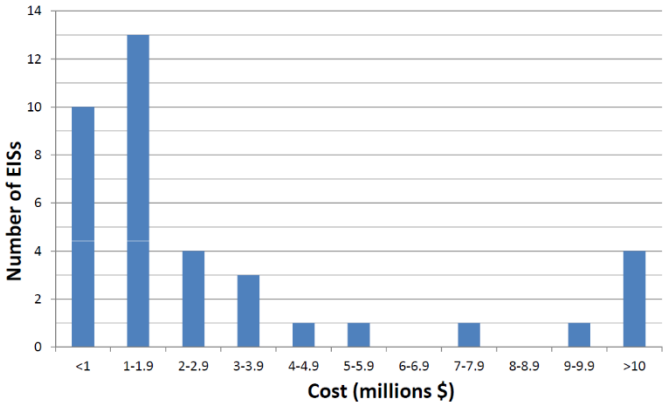

Figure 5. EIS Costs, 2003–2012

Table 1. EIS and EA Completion Time and Cost, 2003–2012

Document Type (#)	Completion Time (months)				Cost (thousands $)			
	Avg	Med	Min	Max	Avg	Med	Min	Max
Programmatic/ Site-wide EISs (11)	45	41	21	101	4,840	2,200	56	17,300
Project-specific EISs (68)	30	26	10	84	6,020	1,350	320	85,000
All EISs (79)[1]	33	29	10	101	5,800	1,390	56	85,000
All EAs (344)[2]	13	9	1.2	97	110	60	3	1,230

[1] The 79 EISs include adopted and applicant-paid documents. Completion time data reflect 66 EISs for which DOE was the lead agency. Cost data reflect contractor costs for 38 EISs for which DOE was the lead agency and that were not paid for by applicants.

[2] The 344 EAs include adopted and applicant-paid documents. Completion time data reflect 316 EAs for which DOE was the lead agency. Cost data reflect contractor costs for 250 EAs for which DOE was the lead agency and that were not paid for by applicants.

EA Completion Time and Cost

Completion time and cost metrics for EAs issued from 2003 through 2012 also are summarized in **Table 1**.

From 2003 through 2009, DOE completed about 25 EAs per year on average (**Figure 6**). The number of EA completions doubled in 2010, when about two-thirds of the EAs (52 of 78 documents) issued were for projects funded by the Recovery Act, and EA completions remained high in 2011, when about half (37 of 70 documents) were for Recovery Act projects. The completion rate then dropped to historical levels. In 2012, DOE completed 26 EAs, including 2 for Recovery Act projects.

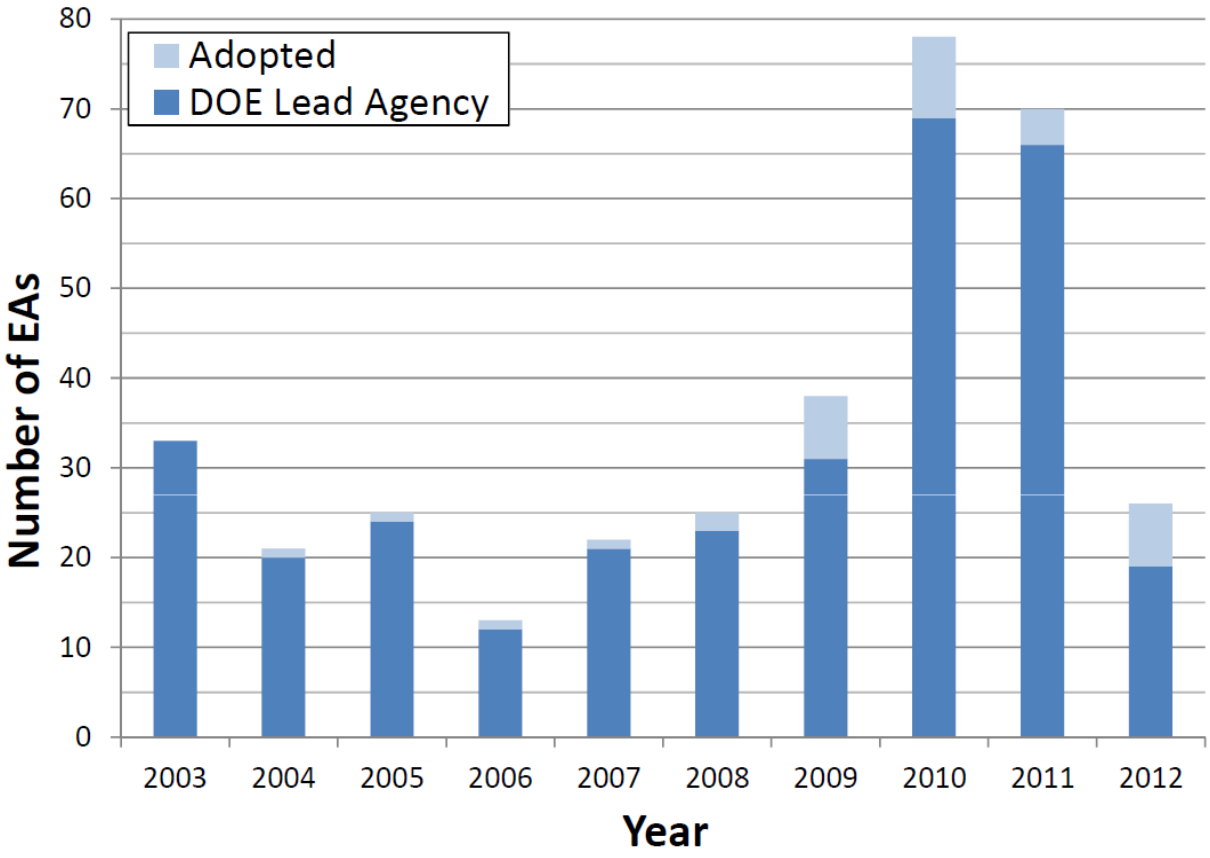

Figure 6. EAs Completed, 2003–2012

Figure 7 presents the distribution of completion times for 316 EAs, for which DOE was the lead agency, completed from 2003 through 2012. The median and average completion times were 9 months and 13 months, respectively; the range was 5 weeks to 97 months.

Figure 8 presents the distribution of contractor costs for 250 EAs completed from 2003 through 2012 for which cost data are applicable. The median and average costs were $60,000 and $110,000, respectively; the range was $3,000 to $1.23 million.

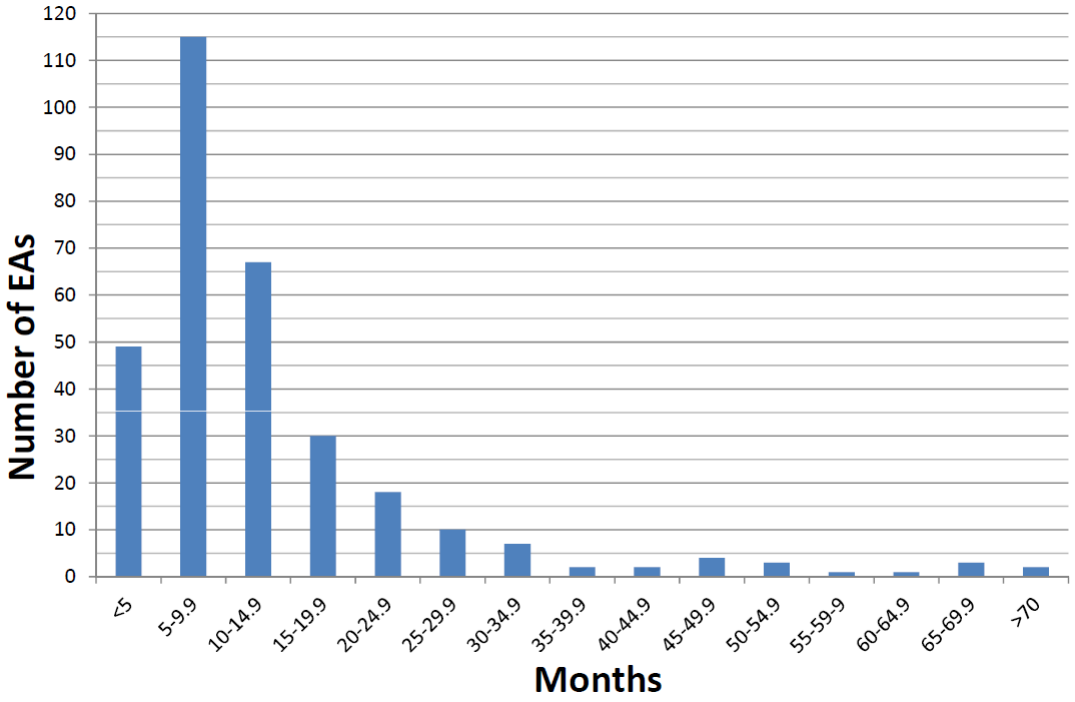

Figure 7. EA Completion Times, 2003–2012

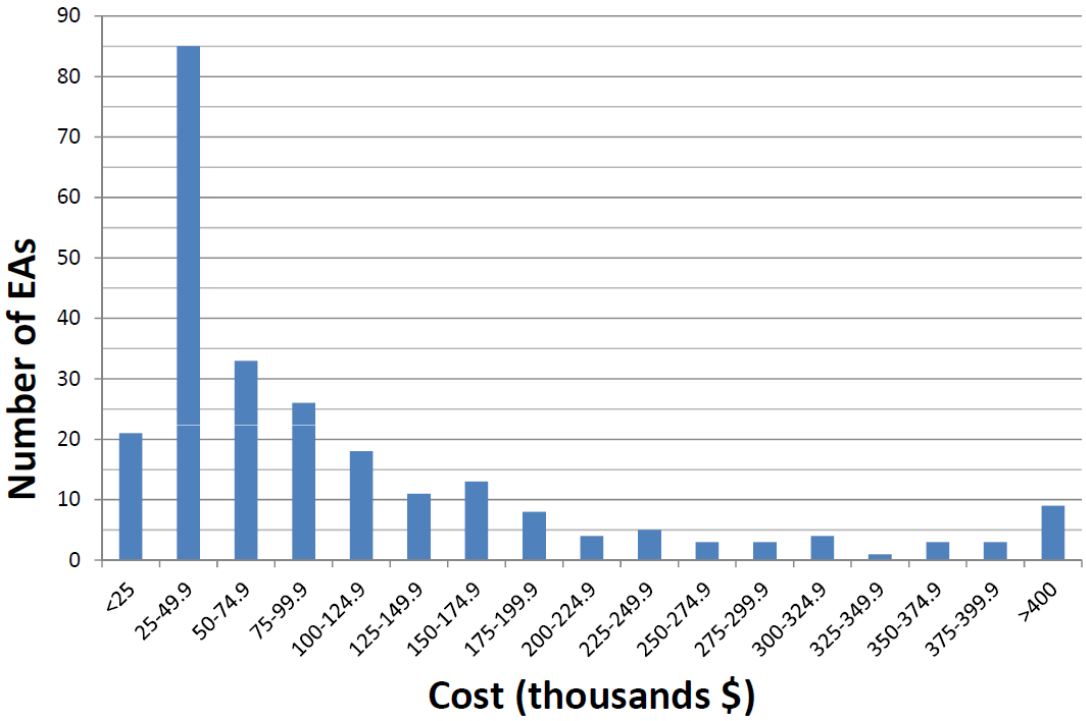

Figure 8. EA Costs, 2003–2012

While EA metrics have been generally stable over the past 10 years, the median cost and time to complete EAs decreased substantially in 2009 through 2011, even though the EA workload doubled. The improved performance is attributable to EAs for Recovery Act projects. The respective median time and cost to prepare Recovery Act EAs (6 months and $44,000) are about 40 percent lower than corresponding metrics for non-Recovery Act EAs. (See *LLQR*, September 2011, page 1.) Metrics for post-Recovery Act EAs, however, appear to be in line with historical norms for non-Recovery Act EAs. For example, in 2012, when only 2 of 26 EAs were for Recovery Act projects, the respective median time and cost for those documents for which these metrics are applicable were 11.5 months and $95,000.

NEPA Process Rated Effective

Measures of effectiveness remained positive for EAs and EISs completed from 2003 through 2012. During this period, about 75 percent of Lessons Learned Questionnaire respondents rated the NEPA process as "effective;" in the past 2 calendar years, 94 percent of respondents rated the NEPA process as "effective." Respondents continue to note many examples of how the NEPA process helped to enhance or protect the environment and enable informed decisions. (See What Worked and Didn't Work, page 20, and *LLQR*, March 2013, page 1.)

Notes on NEPA Metrics

Since 1994, the [DOE] NEPA Office has solicited comments from NEPA Compliance Officers, NEPA Document Managers, and other involved persons on lessons learned for each completed EIS and EA. The NEPA Office tracks and reports periodically on NEPA process performance metrics, including completion time, cost, and measures of effectiveness. The NEPA Office analyzes trends to assess the Department's progress and recommends ways to foster improvement. Past analyses of trends in metrics data are reported in *LLQR*, including for the periods: 1994–1997 (March 1998, page 17 and June 1999, page 19), 1994–2003 (September 2003, page 4), 1996–2005 (March 2006, page 32),1997–2007 (June 2007, page 28), 1998–2007 (December 2008, page 16) and 2001–2010 (September 2011, page 1).

Completion time for EISs is measured from DOE's publication of the notice of intent to prepare an EIS to EPA's publication of the notice of availability of the final EIS. EA completion time is measured from the EA determination date to EA approval. Completion time data are not reported for adopted documents.

Costs reflect contractor costs to prepare a document that would not be incurred but for the NEPA process; federal staff time associated with contractor-prepared and adopted documents is not tracked. Cost data are not reported for adopted or applicant-paid documents.

DOE began systematically tracking CX determinations in November 2009, when DOE's policy to post CX determinations online became effective (*LLQR*, December 2009, page 1). Cost and completion time data for CX determinations are not tracked.

For further information on DOE's NEPA metrics, contact Eric Cohen, Unit Leader, NEPA Office, at eric.cohen@hq.doe.gov.

Historical Perspective on DOE EIS Completion Times

Reprinted (with permission) from DOE NEPA Lessons Learned Quarterly Report, September 2013

The Department of Energy (DOE) has sought for many years to better understand and reduce the time it takes to complete the NEPA process. Much of this effort is rooted in the 1994 *Secretarial Policy Statement on the National Environmental Policy Act* (NEPA Policy Statement), which included a number of measures later incorporated in DOE Order 451.1B, *NEPA Compliance Program*.

> *A key responsibility for all participants is to control the cost and time for the NEPA process while maintaining its quality.*
> – DOE Order 451.1B, NEPA Compliance Program

A major focus of the NEPA Policy Statement was streamlining the NEPA process to reduce time and cost while ensuring quality. It set an EIS completion time goal of 15 months and directed measures (text box, page 7) intended to help meet that goal. The NEPA Policy Statement also established a lessons learned program. *Lessons Learned Quarterly Report* (*LLQR*) plays a key role in this program by publicly reporting completion time data, analyses of trends and factors that affect the length of the NEPA process, and best practices for NEPA practitioners.

The NEPA Office issued the first *LLQR* in December 1994, and began tracking NEPA completion time trends and other NEPA process metrics. To gain perspective on environmental impact statement (EIS) completion times, the NEPA Office examined the 15 EISs completed just before issuance of the NEPA Policy Statement. The median completion time for these mostly project-specific EISs was 33 months (*LLQR*, June 1997, page 16).

The NEPA Office then studied a cohort of EISs (1994 cohort) initiated after issuance of the NEPA Policy Statement. Documents started before but completed after issuance of the NEPA Policy Statement were not included. The median completion time for 20 EISs started between July 1994 and March 1997 was 21 months (19 months for 11 project-specific EISs and 22 months for 9 programmatic/site-wide EISs), a statistically significant improvement[9] (*LLQR*, June 1999, page 19). That improvement likely can be attributed to the policy measures.

The NEPA Office later examined a second cohort (1997 cohort) of 20 EISs started between April 1997 and March 1999. The median completion time for the 1997 cohort was 29 months, which represents a notable slippage from the 1994 cohort, though completion times remained less than those for documents prepared prior to the NEPA Policy Statement.

Since 1999, median completion times remained essentially unchanged, as indicated in the graph (**Figure 1**). Time series trends for DOE EIS completion times, such as in the graph, must be interpreted cautiously in view of the relatively few documents completed each year and the wide variation in completion times. Examining groups of EISs over long periods of time confirms the

[9] Statistical tests (modified t-test confirmed by nonparametric analysis) provide greater than 95 percent confidence that the 1994 cohort was a faster-completed population than the 15 EISs completed just before the NEPA Policy Statement was issued.

trend. *LLQR* has reported on EISs completed during long time periods, typically 10 years. For example, the median completion time for EISs completed in the most recent 10-year period, from 2003 through 2012, is 29 months.

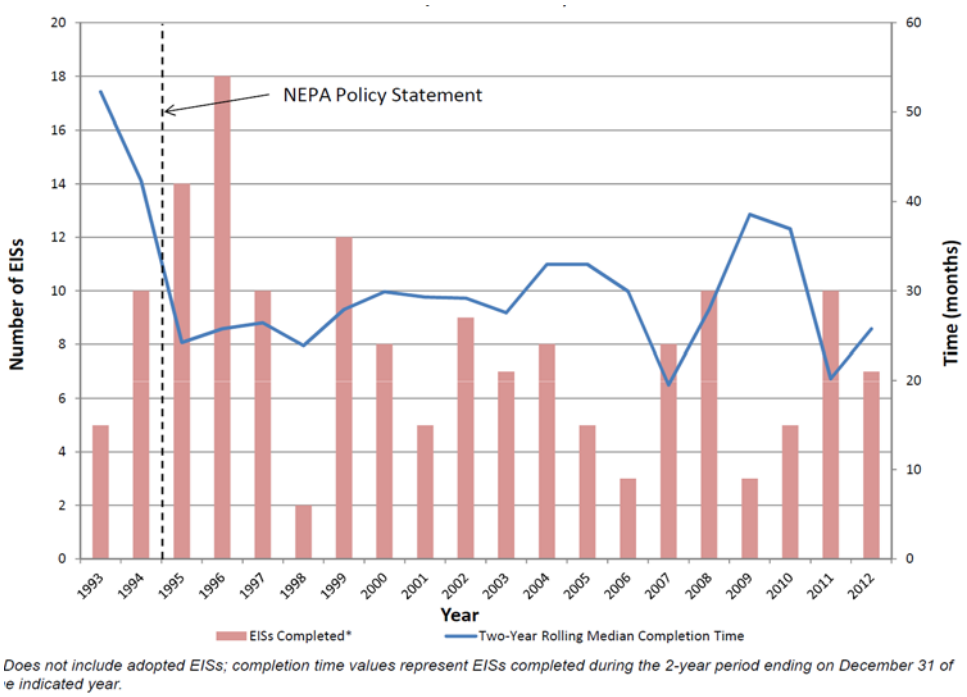

Figure 1. Median EIS Completion Times, 1993-2012

Reasons for the slippage in median completion time from 21 to 29 months between the 1994 and 1997 cohorts, and the subsequent maintenance of about a 29-month median, are not clear. Information in *LLQR* and feedback from NEPA Compliance Officers and NEPA Document Managers in the 1990s suggest greater senior management attention was paid to EIS schedules immediately after issuance of the NEPA Policy Statement than was paid to documents started later on. Similarly, management attention was identified as a key factor contributing to a notable decrease in time to complete Recovery Act environmental assessments (EAs) relative to non-Recovery Act EAs (related article, page 1; *LLQR*, September 2011, page 1).

These data show that it may be possible to reduce EIS completion times by focusing on the measures

1994 Secretarial Policy Statement on NEPA

Emphasized the importance of:

- Senior management attention
- Teamwork
- EIS schedules
- Integrating NEPA and project planning

Streamlining measures included, among other things:

- Designation of NEPA Document Managers
- Establishing inter-office document preparation teams
- Conducting early internal scoping
- Reducing document review cycles
- Developing guidance and training

that were implemented successfully for a period of time after issuance of the 1994 NEPA Policy Statement. For further information on NEPA process metrics, contact Eric Cohen, Unit Leader, NEPA Office, at eric.cohen@hq.doe.gov.

The most important step to reduce NEPA document preparation and review time is to actively involve senior management in the NEPA process; i.e., to obtain the decision maker's commitment and attention. Other useful measures include early planning, internal scoping, aggressive contract management, and use of a team approach.

– Questions and Answers
on the Secretarial Policy Statement on NEPA, 1994

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Commentary 1 — NEPA 2013 Regulatory Update

Ronald Bass, JD, AICP
Senior Consultant, ICF International[10]

The White House Council on Environmental Quality (CEQ) and the U.S. Environmental Protection Agency's (EPA) Office of Federal Activities are the two federal entities with oversight responsibility for the implementation of the National Environmental Policy Act (NEPA.) One of CEQ's main roles is to provide leadership to other federal agencies regarding how to best implement NEPA. In this capacity, CEQ periodically issues guidance on NEPA issues and also has an ongoing program to promote improvement in NEPA implementation within federal agencies.

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

This article summarizes the key NEPA developments at CEQ and EPA during 2013.

CEQ NEPA Developments

On March 5, 2013, CEQ released two new handbooks that encourage more efficient environmental reviews under NEPA by integrating the NEPA process with other review processes. One handbook deals with NEPA and Section 106 of the National Historic Preservation Act (NHPA) and the other addresses the integration of NEPA and the California Environmental Quality Act (CEQA). Both documents are available on the CEQ NEPA website:

http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/handbooks

NEPA and NHPA: A Handbook for Integrating NEPA and Section 106

CEQ and the Advisory Council on Historic Preservation (ACHP) jointly prepared a new handbook that provides advice to federal agencies, project sponsors, and consultants on how to take advantage of existing regulatory provisions to align the NEPA process and NHPA Section 106 consultation process. Although federal agencies have independent legal obligations under NEPA and NHPA, for many projects agencies can use the procedures and documentation required by NEPA to comply with NHPA Section 106, instead of undertaking a separate process. Like NEPA, the Section 106 consultation process requires a series of procedural steps:

Step 1: Initiate the consultation process

- Determine if there is an "undertaking" as defined in Section 106
- Develop a plan to coordinate with NEPA

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- Notify the State and/or Tribal Historic Preservation Office (SHPO/THPO)
- Identify other consulting parties
- Develop a plan to involve the public

Step 2: Identify historic properties

- Determine the "area of potential effect"
- Identify historic properties (relying on National Register of Historic Places criteria)
- Consult with SHP0, THPO and other parties about effects
- Involve the public

Step 3: Assess adverse effects

- Apply Section 106 criteria for "adverse effect"
- Consult with SHPO, THPO and other parties
- Involve the public

Step 4: Resolve adverse effects

- Avoid, minimize or mitigate adverse effects
- Notify the ACHP
- Consult with SHPO, THPO and other parties
- Involve the public

The handbook explains how to align each of these steps with the comparable requirements of NEPA and provides a series of "roadmaps" for coordination of the two statutes. The handbook also explains the distinction between the two forms of alignment, "integration" and "substitution" and discusses how each would work when a lead agency prepares a Categorical Exclusion, an Environmental Assessment, or Environmental Impact Statement (EIS) to satisfy NEPA.

The handbook is intended to encourage federal agencies to take advantage of the existing opportunities to integrate the two laws, to avoid duplication and delay.

NEPA and CEQA: Integrating State and Federal Environmental Reviews

CEQ and its counterpart in California, the Governor's Office of Planning and Research (OPR) jointly prepared a draft handbook on integrating NEPA and CEQA review processes. The handbook provides environmental professionals with an overview of NEPA and CEQA, a topic-by-topic comparison of key provisions, as well as suggestions for developing a single environmental review process that can meet the requirements of both statutes. The handbook employs a question and answer format to discuss and contrast key differences between the two

laws. It is organized by stages of the environmental review process and includes the following topics:

Stage 1: Preliminary Questions

- How does NEPA and CEQA terminology differ?
- What activities require environmental review?
- What level of environment review is needed?
- Can an analysis and documentation under one law satisfy the other?

Stage 2: Integrating and Managing NEPA and CEQA Processes

- When can incorporation by reference be used?
- When can tiering from an EIS/Environmental Impact Report (EIR) be used?
- When should the environmental review process begin?
- How can public involvement requirements be satisfied?
- What timelines apply to environmental review schedules?

Stage 3: Preparing the NEPA and CEQA Analyses and Documentation

- How can purpose and need and project objectives be aligned?
- Are EIS/EIR alternatives consistent?
- How should environmental impacts / effects / consequences be considered?
- How should cumulative impacts be considered?
- What are the differences in determining significance?
- When should an EIS/EIR be re-released or supplemented?
- How do mitigation requirements differ?

Stage 4: The Decision

- How do agencies document their final environmental decision making?
- Which statute of limitations will apply?

In addition to addressing these important topics, the new guidance includes a memorandum of understanding (MOU) framework to assist federal and state lead agencies coordinate preparation of joint NEPA/CEQA documents. The guidance should be particularly helpful because each year state and local agencies collaborate with federal agencies on dozens of combined documents.

CEQ and OPR solicited public comments and a final version of the guidance is expected to be completed in the spring of 2014. While the guidance is California-oriented, many of the concepts discussed would be applicable to other states with "little-NEPA" type laws.

NEPA Best Practices Memo – CEQ Pilot Project – U.S. Department of Transportation, Federal Railroad Administration: NEC Future Tier 1 Environmental Impact Statement - web site:

http://www.whitehouse.gov/sites/default/files/best_practices_memo.pdf

In March 2011, CEQ initiated a series of pilot projects to highlight some of the ways that NEPA practice can be improved. CEQ intends to share the results of these projects broadly among NEPA professionals. In January 2013, CEQ selected the *U.S. Department of Transportation, Federal Railroad Administration: Northeast Corridor (NEC) Future – Tier 1 Environmental Impact Statement* as one of the pilot projects. NEC FUTURE is a comprehensive planning effort to define, evaluate and prioritize future investments in the Northeast Corridor (NEC), launched by the Federal Railroad Administration (FRA). FRA's work will include new ideas and approaches to grow the region's intercity, commuter and freight rail services and an environmental evaluation of proposed transportation alternatives.

In March 2013, based on lessons learned during FRA's scoping phase of the Tier 1 EIS, CEQ prepared a *Best Practices Memo* to guide the preparation of the Draft EIS and to serve as guidance during future, second-tier EISs. Some of the practices that CEQ wants to promote include:

- Early and regulator outreach to all federal and state resource and regulatory agencies, both headquarters and regional offices, throughout the NEPA process;
- Development of a Statement of Principles by FRA to guide communication and consultation with environmental resource and regulatory agencies;
- Collection of resource data and agency input along a large, multi-state project via a unique and informed approach;
- Increasing agency participation by using on-line meetings and web-based techniques; and
- Building interagency trust through enhanced agency input, coordination, and communication

According to the Best Practices Memo *"this approach of engaging resource and regulatory agencies early in the planning process and involving them as collaborative partners not only in the implementation of several aspects of the NEPA process (e.g., development of purpose and need, formulation of alternatives, and development of impact assessment methodology), but also in the structuring of the agency-coordination effort (e.g., development of the Statement of Principles) is a new and innovative approach for FRA. The effort was well-received by all parties involved, and led to more effective coordination with the resource and regulatory agencies."*

In addition to serving the NEC project, hopefully the *Best Practices Memo* will provide useful ideas to other engaged in the NEPA process.

U.S. EPA NEPA Developments

The following summary is based EPA's own assessment of 2013 NEPA development as published on the Office of Compliance and Enforcement NEPA website:

http://www2.epa.gov/nepa/national-environmental-policy-act-nepa-2013-annual-results

Although EPA continued its review and coordination role during 2013, it did not publish any new handbooks or guidance documents, as it has done in past years.

Review of Environmental Impact Statements

In fulfillment of responsibilities under Section 309 of the Clean Air Act, EPA issued comment letters on 372 draft and final EISs during 2013. EPA's comments are designed to encourage lead agencies to make changes in their proposed actions to mitigate significant environmental impacts. EPA has internal numeric goals to measure the success of their comments. According to the NEPA website, EPA met its performance goals in 2013 for the NEPA program because 74% of the significant impacts identified in EPA's comment letters on draft EISs were avoided, minimized, or compensated for by the lead agencies by the time the final EISs were completed. (See also the EPA Inspector General's report on EIS effectiveness below)

High Priority Infrastructure Projects

EPA is collaborating with the Office of Management and Budget (OMB) and other federal agencies on the development of an implementation plan for the Presidential Memorandum entitled Modernizing Federal Infrastructure Permitting and Review of Infrastructure Projects (Executive Office of the President, May 17, 2013).

According to the Presidential Memo, the plan will identify proposed actions and associated timelines to:

- Institutionalize and expand best practices or process improvements that agencies are already implementing to improve the efficiency of reviews, while improving outcomes for communities and the environment;
- Revise key review and permitting regulations, policies, and procedures (both agency-specific and government-wide);
- Identify high-performance attributes of infrastructure projects that demonstrate how the projects seek to advance existing statutory and policy objectives and how they lead to improved outcomes for communities and the environment, thereby facilitating a faster and more efficient review and permitting process;
- Create process efficiencies, including additional use of concurrent and integrated reviews;

- Identify opportunities to use existing share-in-cost authorities and other non-appropriated funding sources to support early coordination and project review;
- Effectively engage the public and interested stakeholders;
- Expand coordination with State, local, and tribal governments;
- Strategically expand the use of information technology (IT) tools and identify priority areas for IT investment to replace paperwork processes, enhance effective project siting decisions enhance interagency collaboration, and improve the monitoring of project impacts and mitigation commitments; and
- Identify improvements to mitigation policies to:
    - ✓ Provide project developers with added predictability;
    - ✓ Facilitate landscape-scale mitigation based on conservation plans and regional environmental assessments;
    - ✓ Facilitate interagency mitigation plans where appropriate;
    - ✓ Ensure accountability and the long-term effectiveness of mitigation activities; and,
    - ✓ Utilize innovative mechanisms where appropriate

EPA also engaged with lead Federal Agencies during NEPA reviews to support work on a number of high priority infrastructure projects identified through this Presidential Memorandum and the Executive Order 13604 -Improving Performance of Federal Permitting and Review of Infrastructure Projects (March 22, 2012).

In a related effort, EPA also worked with federal agencies as a member of the Rapid Response Teams for Renewable Energy, Transmission Lines, and Transportation to improve federal agency coordination and timely completion of permits, reviews, and requirements for high priority infrastructure projects. The Rapid Response Teams were part of an Obama administration initiative, commenced in 2009, to revamp the country's infrastructure for renewable energy, transmission, and transportation projects, to encourage energy self-sufficiency.

Air Quality Memorandum of Understanding

EPA continued its efforts to implement the interagency Memorandum of Understanding (MOU) with the Bureau of Land Management, the Forest Service, the National Park Service, and the Fish and Wildlife Service that established a mutually acceptable approach, under NEPA, for addressing air quality analyses and mitigation for Federal oil and gas development actions.

The MOU commits the signatory agencies to the following:

- Commitments to collaborate throughout the NEPA process, including providing the Lead Agency with input and assistance early in the process on appropriate analyses and mitigation to address air quality and air quality related values (AQRVs);

- Common procedures for determining which type of air quality analyses are appropriate and when air modeling is necessary;
- Specific provisions for analyzing and discussing impacts to AQRVs and for mitigating such impacts;
- A dispute resolution process to facilitate the timely resolution of differences among the signatories or their respective agencies; and
- Assurances that, if the EPA determines the MOU procedures have been followed, it will rate the resulting NEPA analyses of air quality or AQRVs as "adequate" (and not inadequate "or "3") under the EPA criteria for rating draft EIS.

In May 2013, EPA hosted an interactive training session for over 90 participants from across the country representing all the signatory agencies of the MOU. During the training, participants shared "lessons learned" during the first 18 months of the MOU's implementation. The MOU can be found at:

http://www2.epa.gov/sites/production/files/2014-01/documents/air-quality-analyses

Environmental Justice and NEPA

EPA developed a new webpage entitled *Environmental Justice and NEPA Agency Resource Compendium: Key References*. The page provides key references from the Environmental Justice and NEPA Agency Resource Compendium created by EPA's Office of Environmental Justice and the NEPA Committee of the *Federal Interagency Working Group on Environmental Justice*. The compendium gathers into one place the Environmental Justice and NEPA documents from Federal Agencies. Website:

http://www.epa.gov/compliance/nepa/nepaej/nepa-ej-policies-guidance.html

EPA Inspector General Report: Comments Improve the Environmental Impact Statement Process but Verification of Agree-upon Actions Is Needed

In addition to the NEPA activities reported by EPA's Office of Compliance and Enforcement, on August 22, 2013, the EPA Office of the Inspector General (IG) released a report (No. 13-P-0352) entitled EPA's *Comments Improve the Environmental Impact Statement Process But Verification of Agreed-Upon Actions is Needed* that focused on the effectiveness of EPA's comments on EISs. To conduct the review, the Inspector General's office evaluated 10 Final EISs out of the 218 submitted for review during 2012. The EIS were prepared by a variety of different federal agencies, focusing on renewable energy, oil and gas, and transportation projects. Specifically, the IG reviewed the draft and final comment letters for their content and to document EPA's ratings, as well as the lead agency's response to these comments. The report then determined how potential environmental impacts were avoided between the draft and the final EIS and how those changes related to EPA's comments. In addition to the document reviews, the IG's staff interviewed several EPA regional staff members and representatives of the respective federal lead agencies.

The review revealed that federal agencies are making changes in response to EPA's comments to mitigate or eliminate potential environmental impacts. Specifically, EPA's comments frequently result in positive changes to final EISs. The eight federal agencies that were interviewed all stated that they changed their final EISs based on the EPA's comment on their draft EISs.

The EPA's goal was for federal lead agencies to mitigate at least 70 percent of the environmental impacts identified in its reviews of EISs. The EPA tracks progress on its goal by counting the number of substantive comments it makes on EISs and the responses (mitigation) from the lead federal agency. For 2012, the EPA reported it exceeded its goal and obtained a 75-percent result for substantive comments addressed by the federal agency. This measure captures the prospective impact of the EPA's proposed mitigation measures.

However, while EPA's comments are effective in convincing federal lead agencies to mitigate their proposed actions in their Final EISs and Records of Decision, the IG's report also revealed there is no uniform system in place for EPA to verify that the agree-upon mitigation measures are actually implemented. The report concluded that EPA could do more to monitor and report on the results that federal lead agencies are having in mitigating environmental impacts of federal actions.

Conclusion

As these handbooks and programs illustrate, during 2013 both CEQ and EPA continued their efforts to improve and modernize the implementation of NEPA and related environmental consultation and permitting processes. They also strive to make NEPA information and resources more accessible. Hopefully these and other on-going federal initiatives will encourage federal lead agencies, their consultants, and other environmental professionals to implement NEPA in a timely and efficient manner.

Commentary 2 — Implementation of the MAP-21 Environmental Review Provisions

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Introduction

In 2012, Congress passed the *Moving Ahead for Progress in the 21st Century Act (MAP-21)*, which reauthorized funding for the federal highway and transit programs for approximately two years and included numerous changes to improve the administration of those programs. Subtitle C of Title I included 23 separate provisions intended to expedite transportation project delivery, the majority of which focused on environmental reviews and permitting. These provisions are summarized in **Table C2-1**.

Table C2-1. Project Delivery Provisions in MAP-21

1301	Declaration of Policy and Project Delivery Initiative
1302	Advance Acquisition of Real Property Interests
1303	Letting of Contracts—Construction Manager/General Contractor
1304	Innovative Project Delivery Methods
1305	Efficient Environmental Reviews for Project Decisionmaking
1306	Accelerated Decisionmaking
1307	Assistance to Affected Federal and State Agencies
1308	Limitations on Claims
1309	Accelerating Completion of Complex Projects Within 4 Years
1310	Integration of Planning and Environmental Review
1311	Development of Programmatic Mitigation Plans
1312	State Assumption of Responsibility for Categorical Exclusions
1313	Surface Transportation Project Delivery Program
1314	Application of Categorical Exclusions for Multimodal Projects
1315	Categorical Exclusions in Emergencies
1316	Categorical Exclusions for Projects Within the Right-of-Way
1317	Categorical Exclusion for Projects of Limited Federal Assistance
1318	Programmatic Agreements and Additional Categorical Exclusions
1319	Accelerated Decisionmaking in Environmental Reviews
1320	Memoranda of Agency Agreements for Early Coordination
1321	Environmental Procedures Initiative
1323	Review of Federal Project and Program Delivery

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The Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) have begun to implement the project delivery provisions in MAP-21 through rulemakings and guidance. Rulemakings and guidance issued under MAP-21 are posted on FHWA's MAP-21 website, http://www.fhwa.dot.gov/map21/.[12]

The implementation of MAP-21's project delivery provisions has involved in several distinct stages. Initially, FHWA released interim guidance and question-and-answer (Q&A) guidance. FHWA then initiated a series of rulemakings for which specific deadlines had been established in the statute. As those rulemakings are completed, FHWA will turn to other rulemakings and guidance documents that are not specifically mandated by the statute but are necessary or useful to its implementation.

This paper summarizes the implementation status of some of the most important project delivery provisions in MAP-21:

- Combining the Final Environmental Impact Statement (EIS) and Record of Decision (ROD);
- New opportunities to apply Categorical Exclusions (CEs);
- Assignment of FHWA (and potentially other U.S. Department of Transportation [USDOT]) responsibilities in the environmental review process to States;
- Using decisions and analyses from the transportation planning process (prior to NEPA) as the starting point for the NEPA document; and
- Financial penalties for delayed permitting decisions.

Combining the FEIS and ROD

For more than 30 years, the Council on Environmental Quality (CEQ) regulations have required a 30-day waiting period between publication of the FEIS and issuance of the ROD.[13] But in Section 1319 of MAP-21, Congress provided - for the first time - statutory authority for the FEIS and ROD to be issued as a single document. Section 1319(b) of MAP-21 provides that:

> To the maximum extent practicable, the lead agency shall expeditiously develop a single document that consists of a final environmental impact statement and a record of decision, unless—
>
> (1) the final environmental impact statement makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or
>
> (2) there are significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or the impacts of the proposed action.

[12] In addition, the USDOT Office of the Inspector General (OIG) is tracking the implementation of the project delivery provisions in MAP-21. The OIG's reports are available here: http://www.oig.dot.gov/library-item/5998.

[13] 40 CFR 1506.10(b)(2). The 30-day period begins to run when the notice of availability of the FEIS is published in the Federal Register.

On January 14, 2013, FHWA and FTA jointly issued interim guidance regarding the implementation of this section.[14] The interim guidance provided criteria for determining whether it is "practicable" to combine the FEIS and ROD. The guidance suggested consideration of certain factors referenced below in determining whether it is practicable to combine the FEIS and ROD:

- Are there coordination activities that are more effectively completed after the FEIS is available?
- Are there unresolved interagency disagreements over issues that will be addressed in the FEIS?
- Is there a substantial degree of controversy?
- Does the DEIS identify a preferred alternative?
- Are there unresolved regulatory compliance issues that must be resolved before the ROD, or that the federal lead agency wants to resolve before signing the ROD, but that do not merit deferring issuance of the FEIS?

To date, FHWA has issued several combined FEIS/ROD documents. One of the earliest examples was the Tier 1 FEIS/ROD for the Illiana Corridor project, a proposed new toll road connecting Indiana and Illinois in the southern portion of the Chicago/Gary region.[15] Since then, this approach also has been used on other projects, including the Oregon Route (OR) 62: I-5 to Dutton Road project, which involved the proposed construction of a 7.5-mile, four-lane, access-controlled expressway to serve as a bypass of existing OR 62 in Jackson County, Oregon.[16]

New and Modified Categorical Exclusions

FHWA and FTA each maintain lists of categorical exclusions (CEs) in their joint NEPA regulations, at 23 Code of Federal Regulations (CFR) Part 771. In MAP-21, Congress sought to expand the agencies' use of CEs by directing the agencies to adopt new CEs for several specific types of activities, to modify some existing CEs to make them easier to use, and to adopt additional new CEs based on survey input. Congress also provided more specific authorization and encouragement for FHWA's use of programmatic agreements under which State DOTs can approve the use of CEs.

1. CE for Emergency Projects.

Section 1315 of MAP-21 directed the USDOT to issue a new CE covering a project that involved repair or replacement of a highway facility that was damaged in either (1) an emergency declared

[14] FHWA and FTA, "Information: Interim Guidance on MAP-21 Section 1319 Accelerated Decisionmaking in Environmental Reviews" (Jan. 14, 3013) available at: http://www.fhwa.dot.gov/map21/guidance/guideaccdecer.cfm.

[15] The Tier 1 FEIS and ROD for the Illiana Corridor is available at http://www.illianacorridor.org/tier_1/t1_feis.aspx.

[16] The FEIS and ROD for the OR 62 project is available at: http://www.oregon.gov/ODOT/HWY/REGION3/pages/archive_index.aspx.

by the President or (2) an emergency declared by the Governor and concurred with by the Secretary of the USDOT.

In final regulations issued on February 19, 2013, FHWA adopted a new CE for replacement or rehabilitation of highway facilities damaged in declared emergencies; as part of the same rulemaking, FTA adopted a nearly identical CE for transit facilities.[17] The final rule clarified that a replacement or rehabilitation project can qualify for the CE even if it includes "upgrades to meet existing codes and standards as well as upgrades warranted to address conditions that have changed since the original construction."

The final regulations also included several important caveats. They noted that (1) the project qualifies for the CE only if it is built entirely within the existing right-of-way; (2) the agency must still consider the potential for "unusual circumstances," as would be the case with any CE; and (3) the application of this CE does not exempt the project from the requirements of other laws, such as Section 106 of the National Historic Preservation Act (NHPA). This CE was utilized in responding to last year's Skagit River bridge collapse in Washington State.

2. CEs for Projects in the Existing Right-of-Way

Section 1316 of MAP-21 directed the USDOT to issue a new CE covering projects that are built within the "existing operational right-of-way." The statute defined that term to include "all real property interests acquired for the construction, operation, or mitigation of a project ..., including the locations of the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway."[18]

In a final rule issued on January 13, 2014, FHWA adopted a new CE for highway projects constructed within existing right-of-way; FTA adopted a similar CE for transit projects.[19] The final rule sought to give meaning to the terms "existing" and "operational" as used in the statute. It provides that the "existing operational right-of-way" means "right-of-way that has been disturbed for an existing transportation facility or is maintained for a transportation purpose." This definition excludes right-of-way that has been "acquired and held for a future transportation project," as well as "uneconomic remnants or excess right-of-way that is secured by a fence to prevent trespassing."

As with the final rule on CEs for emergency projects, this new CE also emphasizes that (1) the agency must still consider the potential for "unusual circumstances," as would be the case with any CE; and (2) the application of this CE does not exempt the project from the requirements of other laws, such as Section 106 of the NHPA.

3. CE for Projects with Limited Federal Financial Assistance

Section 1317 of MAP-21 directed the USDOT to establish a CE for projects that receive limited federal financial assistance. As defined in the statute, the CE would cover any project that:

- receives less than $5 million in federal funds, or

[17] 78 Fed. Reg. 11593 (Feb. 19, 2013).
[18] MAP-21, Sec. 1316.
[19] 79 Fed. Reg. 2107 (Jan. 13, 2014).

- has a total estimated cost of not more than $30 million *and* Federal funding in an amount that comprises less than 15% of the total cost.

In a final rule issued on January 13, 2014, FHWA and FTA adopted new CEs for highway and transit projects, respectively, that satisfied these funding thresholds. The preamble to the final rule emphasized that "The uniqueness of this CE (that is, a CE determination based on dollar thresholds instead of a particular scope or description of the action) makes the consideration of unusual circumstances particularly important to ensure that projects that receive Federal funds below the established thresholds are not processed as CEs when the unusual circumstances warrant another level of NEPA review." 79 Fed. Reg. 2115.

The preamble to the final rule also noted that a "Re-evaluation would be triggered if there is an increase in the amount of federal funds for the project beyond the established thresholds, and there is still an FHWA and/or FTA action that needs to be taken when these changes occur."

4. Other CEs

Section 1318 of MAP-21 directed USDOT to take several other actions to make CEs more widely available and easier to use. These included: (1) conducting a survey and then proposing new CEs in response to the results of that survey; (2) changing some existing CEs to require less documentation; and (3) more clearly authorizing FHWA's use of programmatic CE agreements.

On September 19, 2013, FHWA and FTA jointly issued proposed regulations implementing these requirements.[20] The proposed regulations would:

- Move three existing FHWA CE's to a list of CEs - known as the "(c) list" - that generally can be approved with minimal documentation. These CEs covered activities such as highway rehabilitation and reconstruction projects. These CEs would be available only if the activity satisfies certain "constraints" - e.g., it does not require an individual permit under Section 404 of the Clean Water Act.
- Create four new FHWA CEs, covering activities such as localized geotechnical and archeological investigations; environmental restoration and pollution abatement activities; ferry boat purchases; and ferry terminal rehabilitation and reconstruction.
- Create five new FTA CEs, covering issues such as bridge removal; preventive maintenance to culverts and channels within and adjacent to transportation right-of-way; and localized geotechnical and archeological investigations.
- Codifies in regulations FHWA's statutory authority (under MAP-21) to enter into programmatic agreements with States, under which States can make CE determinations on FHWA's behalf, and defining criteria that those programmatic agreements must meet.

The comment period on these proposed regulations has closed; the final rule has not yet been issued.

[20] 78 Fed. Reg. 57587 (Sept. 19, 2013).

Assignment of USDOT Environmental Responsibilities to States

In the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Congress established two programs under which FHWA was authorized to assign certain of its environmental responsibilities to State DOTs. These programs included: (1) a permanent program that was open to all States, under which FHWA could assign authority to make CE determinations; and (2) a pilot program that was open to only five States, under which FHWA could assign its authorities in the environmental review process to a State for any class of action, including an Environmental Assessment (EA) or EIS.[21] Both of these programs included certain conditions and limitations, including a requirement that the State accept the jurisdiction of the federal courts for purposes of any challenges to its compliance with federal environmental laws under the assignment program.

After SAFETEA-LU was enacted, the California Department of Transportation sought and received full assignment; two other States - Utah and Alaska - sought and received assignment just for CEs.[22] Under the terms of the statute as it existed then, the States only received assignment of FHWA's authorities. Authorities of other USDOT modal administrations were not allowed to be assigned.

In Sections 1312 and 1313 of MAP-21, Congress amended the assignment programs in ways that removed some impediments to State's pursuit of assignment. These changes included:

- Clarifying that a State cannot be required to give up any existing procedural flexibility as a condition of accepting assignment.
- Allowing a State to terminate delegation on 90 days' notice to USDOT.
- Clarifying that legal fees incurred by a State as a result of taking over USDOT's responsibility are eligible for federal reimbursement.
- Making the full-assignment program permanent, and opening it to all States.
- Allowing assignment of USDOT responsibilities for transit and rail projects to a State under the full-assignment program, if the State also accepted assignment of USDOT responsibilities for highway projects.
- Placing a four-year time limit on the requirement for USDOT "audits" under the full-assignment program; after that time, only "monitoring" is required.

Following the enactment of MAP 21, Texas has joined California, Utah and Alaska in assuming CE responsibility and is in the process of pursuing full NEPA assignment.

On August 30, 2013, the FHWA, FTA, and the Federal Railroad Administration (FRA) jointly issued a proposal to amend the regulations for the full-assignment program.[23] The proposed

[21] *See* 23 U.S.C. 326 (CE assignment) and 23 USC 327 (full assignment).
[22] For information on the California assignment program, refer to the "NEPA Assignment" page on the California Department of Transportation website: http://dot.ca.gov/hq/env/nepa_pilot/index.htm.
[23] 78 Fed. Reg. 57,587 (Sept. 19, 2013).

regulations focus primarily on the application requirements for States that seek assignment under the full-assignment program. The proposed regulations also would place some limits on the types of projects that can be assigned under this program - for example, they would preclude the assignment of projects that cross State boundaries and projects that are at or cross international boundaries. The comment period on these proposed regulations has closed; the final rule has not yet been issued.

In addition, on September 30, 2013, FHWA released an updated template Memorandum of Understanding (MOU) for the assignment of responsibility for CEs. This template reflects changes in MAP-21, and provides a starting point for developing MOUs with any additional States that seek to assume responsibility for CEs.[24]

Planning-NEPA Linkage

Under federal law, States and metropolitan areas are required to carry out a multimodal transportation planning process at the statewide and metropolitan levels, respectively. This process involves development of long-range (20-year) statewide and metropolitan transportation plans.[25] The planning process can include corridor studies or other analyses that seek to identify transportation needs and determine the range of alternatives to be considered for addressing those needs.[26]

Prior to MAP-21, the FHWA and FTA had issued joint regulations that provided a framework for linking the transportation planning process to the NEPA process. The regulations include a guidance document, in an appendix, which described in detail the types of planning-level decisions and analyses that could be adopted for use in the NEPA process.

In Section 1310 of MAP-21, Congress embraced the concept of planning-NEPA linkage by enacting a statutory provision that was closely modeled on the framework the FHWA/FTA regulations and guidance. This new statutory framework provides clear authority for FHWA and FTA to adopt certain planning-level decisions and analyses for use in the NEPA process. At the same time, it also places some limits on this approach. It requires FHWA or FTA to make a series of findings, and to obtain concurrence in those findings by other agencies that are designated as "participating agencies" in the NEPA process.

Beginning even before MAP-21 was enacted, FHWA has invested substantial effort in training State DOTs and FHWA Division staffs across the country in best practices for linking the planning and NEPA processes. These efforts are expected to lead to increased use of these practices over time.

Financial Penalties for Delayed Permitting Decisions

In SAFETEA-LU, Congress established a new environmental review process - often called the 'Section 6002 process' - that was mandated for all highway and transit projects that involved

[24] *See* http://www.fhwa.dot.gov/hep/map-21_research/resources/categorical_exclusions/.
[25] *See* 23 U.S.C. 134, 135; 23 C.F.R. Part 450.
[26] *See* 23 C.F.R. 450.318 and 23 C.F.R. Part 45, Appendix A.

preparation of an EIS by the USDOT.[27] This process included a 180-day deadline for federal agencies to issue permits; the period began to run when the USDOT agency had completed its NEPA process for the project ***and*** a complete permit application had been filed. If an agency missed the deadline, the lead agency (USDOT) was required to submit a report to the transportation authorizing committees in Congress.

In Section 1306 of MAP-21, Congress retained this provision, but added a new provision that imposes financial penalties on any agency that does not meet the statutorily defined permitting deadline. [28] The penalties are:

- $20,000 per week if the project requires a financial plan - i.e., for any "Major Project" as defined in 23 USC 106; and
- $10,000 per week for all other projects.

The financial penalties will be applied automatically, when a permit decision is not issued by the 180-day deadline, ***unless*** the lead agency concurs that the delay was not the fault of the permitting agency.[29]

The financial penalties will continue to accrue as long as the delay continues, but are subject to caps specified in the statute. The penalties will be applied by rescinding funds from the office of the head of agency, or office within the agency to which the permit decision was delegated. The statute requires agency audits to ensure that the funds are actually rescinded as required.

FHWA issued guidance regarding the implementation of this provision in February 2014 (www.fhwa.dot.gov/map21/qandas/qasect1306.cfm).

[27] *See* 23 U.S.C. 139.
[28] *See* 23 U.S.C. 139(h)(6).
[29] *Id.*

Commentary 3 — NEPA Legislation in the 113th Congress

Charles P. Nicholson, PhD[30]

Introduction

As in recent sessions of Congress, numerous bills (at least 72 by early March 2014) addressing the National Environmental Policy Act (NEPA) in some form have been introduced in the 113th Congress. Most of these bills reduce or "streamline" NEPA compliance requirements. This article summarizes the major themes in these bills with emphasis on those that would most affect long-standing NEPA compliance processes and procedures.

Several of the NEPA-related bills in the 113th Congress address local, small-scale actions conveying Federal land and/or facilities to non-Federal ownership. Some of these, such as House of Representatives Bill (HR) 251, the "South Utah Valley Electric Conveyance Act," make the action subject to applicable NEPA compliance requirements. A few others, such as HR 586 (Senate Bill [S] 157), the "Denali National Park Improvement Act" set deadlines, often 180 days, for completion of any required NEPA analyses after receipt of the application. HR 1168 and HR 1170 would direct the Secretary of Interior to convey 1,400 acres and 9,400 acres, respectively, in Nevada within 180 days of receipt of the application and states that the conveyances "shall not be considered a major federal action for purposes of Section 102(2)" of NEPA. HR 1633, the "Small Lands Tracts Conveyance Act," would categorically exclude the conveyance of certain Bureau of Land Management (BLM) and Forest Service (USFS) lands to adjacent non-federal landowners.

At least two bills add new NEPA requirements in an apparent attempt to limit the Administration's powers. HR 1459, the "Ensuring Public Involvement in the Creation of National Monuments Act," would amend the Antiquities Act of 1906 to declare the declaration of national monuments of more than 5,000 acres to be a major Federal action under NEPA. The declaration of national monuments of less than 5,000 acres would be categorically excluded. S 104, the reintroduced "National Monuments Act of 2011," would amend the Antiquities Act to make all designations of national monuments subject to NEPA.

Energy Bills

As in the 112th Congress, a major focus of bills in the 113th Congress with NEPA provisions is on energy. At least four, HR 3, HR 1881, HR 2674, and S 582 address the Keystone XL pipeline. They would deem the final EIS issued by the Secretary of State in August 2011, along with the State of Nebraska's Final Evaluation Report, to satisfy all requirements of NEPA and the National Historic Preservation Act.

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Another group of bills addresses oil and gas development on the Outer Continental Shelf and/or the Alaskan Coastal Plan. Some of them, such as the "Infrastructure Jobs and Energy Independence Act" (HR 787), require the Secretary of Interior to implement the Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program 2010-2015, issued in January 2009 and then withdrawn following the Deepwater Horizon accident, and declare the Secretary to "have issued a FEIS… in accordance with all requirements of Section 202(2)(C)" of NEPA. The preparation of the FEIS for the 2010-2015 leasing program was canceled in 2010 and a more restrictive 2012-2017 leasing program was subsequently developed. HR 787 and HR 1881/S 17, the "Energy Production and Project Delivery Act of 2013," would also accelerate oil and gas leasing on the Alaskan Coastal Plan, including the Alaskan National Wildlife Refuge, by, among other things, limiting the scope and public involvement in the development of an EIS for actions not covered in the 1987 Final Legislative EIS on Coastal Plain development. The new EIS must be completed within 18 months, be limited to two action alternatives, and have public comment limited to a 20-day period.

Several other bills would place time limits or other restrictions on the NEPA compliance process for energy-related actions. HR 1900, the "National Gas Pipeline Permitting Reform Act," would require the NEPA reviews of Federal pipeline approval applications to be completed within nine months. The "Native American Energy Act" (HR 1548) would restrict public involvement in EISs for major energy-related federal actions on Indian lands to members of the tribe and others living within the affected area. The "Planning for American Energy Act of 2013" (HR 1394) would place a much greater restriction on the NEPA process. It would require the Secretary of Interior to develop and execute an "all-of-the-above energy production plan strategy" on a four-year basis covering all onshore Federal lands managed by Interior and the USFS. The Secretary would be required to develop a programmatic EIS within 12 months of enactment of the bill. This EIS would "be deemed sufficient to comply with all requirements under that Act for all necessary resource management and land use plans associated with the implementation of the strategy." HR 3301, the "North American Energy Infrastructure Act," would eliminate the need for EISs on the approval of cross-border oil and gas pipelines [such as the Keystone XL pipeline] and electric transmission facilities by declaring their approval to not constitute a major Federal action for purposes of NEPA.

HR 2511, the "Federal Land Freedom Act of 2013," would allow states to control much of the development of energy resources on Federal lands with minimal NEPA and other Federal environmental compliance requirements. States could establish programs to develop energy resources on all Federal lands in the state other than lands that are part of the National Park and National Wildlife Refuge Systems and congressionally designated wilderness areas. Once a state establishes a program and submits its certification, the requirements of all Federal laws, including NEPA and other environmental laws, would be considered to be satisfied and activities carried out under the Act would not be subject to judicial review.

A few bills in the 113th Congress state that NEPA would not apply to particular energy-related actions. These actions include certain geothermal exploration activities on Federal lands (HR 1363), certain meteorological monitoring activities associated with potential wind energy

development on Federal lands (HR 1375, the "Reducing Regulatory Obstacles to Wind Energy Production Act") and on the Outer Continental Shelf (HR 1398, HR 1782).

S 279, the "Public Land Renewable Energy Development Act of 2013," requires the Secretary of Agriculture to prepare a programmatic EIS on solar and wind energy development on National Forest System lands. This effort would presumably be similar to the development of the programmatic EISs by the BLM on wind energy completed in 2005 and on solar energy completed in 2012.

The "Bureau of Reclamation Small Conduit Hydropower Development and Rural Jobs Act" (HR 678, enacted as Public Law 113-24 on August 9, 2013) directs the Bureau of Reclamation (BOR) to "apply its categorical exclusion process" to certain hydroelectric projects with a capacity of no more than 5 megawatts and utilizing existing canals, pipelines, and similar manmade water conveyances. The Senate version of this bill, S 306, stated that NEPA did not apply to the subject hydroelectric projects and the provision to apply the categorical exclusion process originated in the House version.

Natural Resource Management Bills

A second major focus area is on natural resource management, where several bills would change NEPA compliance requirements for a variety of actions. While ostensibly restricted to permitting for coal mining, the "Coal Jobs Protection Act of 2013" (HR 1829 and the similar S 861, S 1514) would establish deadlines of one year for the completion of EAs and two years for the completion of EISs for Clean Water Act Section 404 permits, regardless of the cause of the proposed discharge of fill material. HR 657 / S 258, the "Grazing Improvement Act," categorically excludes the extension of grazing permits and leases on Federal lands if monitoring shows management objectives are being met or if the decision is "consistent with the policy of the Department of the Interior or the Department of Agriculture, as appropriate, regarding extraordinary circumstances." Certain related actions, such as livestock crossing authorizations and range improvements would be exempt from NEPA and final grazing decisions could only be appealed by livestock grazing applicants, permittees, and lessees.

A few bills open extensive areas of Federal lands to resource production and extraction with severely restricted NEPA review processes. The "Restoring Healthy Forests for Healthy Communities Act" (HR 1526) would establish Forest Reserve Revenue Areas dedicated to the production of forest materials and the associated revenues from their sales, on every unit of the National Forest System. The establishment of each Area would be the subject of an EA limited in length to 100 pages, not required to assess alternatives to the proposed action, and restricted to only considering the cumulative impacts of previously approved projects. Once an EA is completed, no additional analysis under NEPA would be required for actions in the Area. The bill also categorically excludes the establishment of Areas of 10,000 acres or less and exempts their establishment from the appeals process for Forest Service actions.

The "National Strategic and Critical Minerals Production Act of 2013" (HR 761) deems domestic mines that could provide strategic and critical minerals to be infrastructure projects under Executive Order 13616. The lead Federal, state, local or tribal agency for issuing a mining

exploration or mine permit would be the lead agency for the NEPA review. The lead agency must determine that its approval does not constitute a major federal action significantly affecting the environment if the procedural and substantive safeguards of the applicable Federal and state permitting processes "provide an adequate mechanism to ensure that environmental factors are taken into account." The lead agency shall coordinate with other agencies to avoid duplicative reviews and minimize paperwork, and shall consider the "best practices" of relying upon baseline data and analyses performed by state agencies. Deadlines for completing the total review process, normally not to exceed 30 months, must be established. The bill also places restrictions on public comments and judicial review of the final Federal agency action.

HR 1965, the "Federal Lands Jobs and Energy Security Act of 2013," incorporates some of the provisions of the energy-related acts mentioned above, including HR 1548 and HR 1394. It also deems the BLM 2008 final regulations on oil shale management to satisfy all legal and procedural requirements for oil shale leasing, including those under NEPA.

The REBUILD and RAPID Acts

Two bills reintroduced from the 112th Congress would shift NEPA compliance responsibilities to other parties. The Reducing Environmental Barriers to Unified Infrastructure and Land Development Act of 2013 (HR 2097 the "REBUILD Act") authorizes federal agencies to shift responsibilities to state governments. The Responsibly And Professionally Invigorating Development Act of 2013 (HR 2641 the "RAPID Act") authorizes federal agencies to allow applicants to prepare their own EISs and other NEPA documents for construction projects involving Federal funds or permit approvals. It includes several other changes to established NEPA procedures, including a one-year deadline for completing an EA and a two-year deadline for completing an EIS, limits on the range of alternatives, and limits on public and interagency commenting and judicial review. Except for supplements, only one EA or EIS could be prepared for a project and Federal agencies with associated actions are required to rely on the EA or EIS prepared by the lead agency.

Implementing the Changes

The NEPA bills in the 113rd Congress vary greatly in the direction given to the agencies responsible for implementing the changes to NEPA processes and procedures. Most of the bills do not direct agencies to revise their NEPA procedures. A few bills, such as HR 678, direct agencies to apply their existing NEPA processes. Other bills including HR 657 and HR 1526 state that actions shall be categorically excluded from the requirements of NEPA without stating how this is to be done. The "REBUILD" and "RAPID" Acts give detailed descriptions of the NEPA process changes. Several other bills simply state that NEPA does not apply to particular actions, many of which have the potential to cause environmental impacts.

Status of NEPA Legislation

Most of the NEPA legislation in the 113th Congress was first introduced in the House and referred to the Committees on Energy and Commerce, Transportation and Infrastructure, and/or Natural Resources. Bills passed by the House through early March 2014 with potentially broad

NEPA implications include the "RAPID Act" (HR 2641), the "Grazing Improvement Act" (HR 657), the National Strategic and Critical Minerals Production Act" (HR 761), and the "Federal Lands Jobs and Energy Security Act" (HR 1965). The White House Office of Management and Budget has issued Statements of Administration Policy with veto recommendations on a few NEPA-related bills, including HR 3, HR 761, HR 1526, HR 1900, and HR 1965. The few NEPA-related bills in the 113th Congress that have been enacted have relatively limited scopes and include the BOR Small Conduit Hydropower Development and Rural Jobs Act and several acts conveying small tracts of Federal lands and/or facilities.

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Commentary 4 — "Streamlining" the NEPA process

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For at least a decade, agencies and applicants have been asking how to expedite or otherwise "streamline" the environmental review, permitting, and compliance process for federally funded or approved projects. The National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. §§ 4321, et seq.), the implementation of which is overseen by the Council on Environmental Quality (CEQ), is one central target of streamlining efforts.

This article documents our examination of some recent efforts to streamline the NEPA process. During this examination, we attempted to compare proposed streamlining methods to examples where agencies successfully used NEPA as a planning tool. We sought to answer whether or not proposed Congressional legislation provide the changes necessary to improve NEPA in such a way that projects will be a success story or simply result in yet another cautionary tale of unintended consequences. We also sought to point out some of the more commonly encountered externalities that are outside of the NEPA planner's control; externalities that the various Federal streamlining initiatives simply cannot address. The article then concludes with a discussion of ways to address delay in the NEPA practice that are caused by inadequate resources, project complexity, or legal challenge due to controversy. Finally, we close with our thoughts regarding what we might give up as a society due to our quest to expedite NEPA.

The NEPA process has been the subject of streamlining initiatives for a number of reasons. NEPA is not a process that results in a permit; it is a procedural process, mandated by statute, that obligates federal agencies to consider the potential impacts of "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment" before proceeding with it (Congressional Research Service [CRS] 2006; CEQ; 2012).

NEPA is a declaration of policy with action-forcing provisions, not a regulatory statute comparable to the various environmental laws that were promulgated in order to protect clean air, clean water, or a variety of other resources. As explained by Luther (CRS, 2006), NEPA establishes an integrated framework under which decision making can proceed. NEPA does not explicitly explain how this process should occur, and the CEQ does not have the authority to enforce NEPA. Instead, the CEQ provides guidance, helping to ensure Federal agencies' policies, procedures, and regulations are in compliance with NEPA. Every Federal agency has a primary mission, or perhaps a primary set of missions. NEPA establishes that every Federal agency, in carrying out their mission; considers the likely effects their proposed actions would have on the human environment during the project planning process.

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As a process, NEPA has no set deadlines. Agencies can; however, establish project review deadlines within their own environmental review procedures. The CEQ addressed the flexibility Federal agencies have with respect to setting time limits for the NEPA process under 40 CFR Part 1501.8 *Time limits*. The CEQ does encourage Federal agencies to set time limits, as needed, that are appropriate to individual actions and consistent with their guidelines at 40 CFR §1506.10.

NEPA also strives to formalize citizen participation in the government decisionmaking process. NEPA does this by requiring agencies to inform the public on alternatives and tradeoffs that would be involved when making decisions about proposed Federal actions. In many cases, it is the public – not the agency proposing the action – that have identified serious errors in underlying data and analysis. For example, in 2009, a retired test pilot analyzed tables and models developed by the lead agency to analyze the risk profile of introducing non-native oysters into Chesapeake Bay. The pilot found mathematical errors which caused the risk profile for oyster introduction to be understated. This citizen involvement led to a revision in the final Environmental Impact Statement (EIS), and ultimately a decision that the risk was too great to approve the proposed action (Bay Journal, 2009)

When reviewing statistics on the preparation of EISs, upon first glance the reader would think environmental review under NEPA may exceed the number of calendar days in one year – or as with the case of the Federal Aviation Agency (FAA), nearly 19 years (7,386 days). **Tables C4-1** and **C4-2** show Preparation Times for Final EISs (deWitt and Piet, 2012). **Table C4-1** shows the Annual Average Final EIS Preparation Time in Calendar Days Arranged in Descending Order by Preparing Agency. It should be noted that a very small percentage (<1%) of proposed Federal actions become subjected to the EIS process. The overwhelming majority of proposed Federal projects are not subject to an EIS.

Even if preparing an EIS, the number of documents prepared in a year is no indicator of average preparation time. For example, the U.S. Forest Service prepared 59 EISs, and the National Park Service (NPS) prepared 10. The NPS had the higher average preparation time by 802 days.

Table C4-1 appears counter-intuitive, with agencies that prepare more EISs taking longer to prepare the document than agencies that prepare fewer EISs. The most final EISs produced in the "lowest average" EIS preparation time was the Nuclear Regulatory Commission (NRC) with four, and this agency also has the highest "low" score. Agencies may be taking longer to develop an EIS. According to deWitt (2012) the lowest annual percentage (3.5%) of EISs since 2009 were completed in less than one year during the 2012 calendar year, with only seven final EISs reported made available following publication of their NOIs. For comparison, the annual average completion rate for EISs completed in one year or less from 1997-2011 was 8.3±2.8%. Many of the various Federal streamlining initiatives have been intended to address the delays associated with developing an EIS.

Table C4-2 shows trends in the preparation of EISs since the year 2000; with the number of EISs decreasing and the length of time for preparation increasing (for all agencies):

Table C4-1. Annual Average Final EIS Preparation Time in Calendar Days Arranged in Descending Order by Preparing Agency (2012)

Highest Average EIS-Preparation Times			Intermediate Average EIS-Preparation Times			Lowest Average EIS-Preparation Times		
Agency	n	Mean	Agency	n	Mean	Agency	n	Mean
FAA	1	7,386	***ALL***	***198***	***1,673***	NRC	4	976
USCG	1	3,094	BIA	2	1,667	USA	1	966
USN	6	2,653	FRA	3	1,562	HUD	1	956
BOR	5	2,552	BLM	28	1,534	GSA	1	899
FHWA	18	2,394	APHIS	2	1,486	FERC	2	874
NPS	10	2,200	USFS	59	1,398	BPA	2	750
FWS	9	1,901	VCT	1	1,162	BOEM	3	737
USACE	18	1,882	RUS	1	1,149	USAF	2	700
DOE	2	1,853	WAPA	2	1,061	DHS	1	626
FTA	6	1,814	NOAA	6	1,010	NHTSA	1	430

Key: n = Number of Final EISs; VCT = Valles Caldera Trust. Source: deWitt 2012.

Table C4-2. Average Prep Times in calendar days 2000 through 2012

Year	n	Mean	s	Minimum	Maximum
2000	243	710	666	10	4,523
2010	245	961	862	10	4,441
2011	237	992	888	36	6,931
2012	200	1,087	991	30	6,664

Key: n= number of draft EISs; s = standard deviation. Source: deWitt 2012.

A number of initiatives have been proposed to streamline the NEPA process. However, none of them appear to answer the following questions: Why do agencies still take two to three years on average to develop a single EIS? Why does the NEPA process work relatively smoothly for some projects and take up to two decades for others? What are some of the external delays that NEPA planners face? Of these, which can they control and which are outside of their ability to control? Is the NEPA process, or the underlying regulations, the cause of delay? How would streamlining the NEPA process reduce or prevent delays?

According to the 2006 CRS report on NEPA Streamlining, the debate stems from disagreements among stakeholders regarding the degree of delay, which falls into two categories: 1) how much time it takes to move through NEPA documentation (generally referencing EISs), and 2) delays resulting from NEPA-related litigation.

One well-known Federal streamlining effort is the RAPID (Responsibly and Professionally Invigorating Development Act of 2013) Act. On July 10, 2013, Rep. Tom Marino (R-PA)

introduced a bill in the House that would amend the Administrative Procedure Act (APA) to streamline the environmental review process under NEPA (H.R. 2641). The House of Representatives passed the bill on March 6, 2014. The RAPID act sets timelines on the preparation of environmental review documents, limits the reviews that could be performed on a major federal action, and allows agencies to tier to the environmental review done by state agencies or by federal agencies on similar actions. While the Act represents a strong attempt at worthwhile NEPA reform, according to Peter C. Whitfield, Editor, in a review under BakerHostetler Environmental Law Strategy Blog, it may also present complicated judicial review questions should it become law (Whitfield 2013).

The RAPID Act would establish a level of certainty to the NEPA process by establishing deadlines for the completion of environmental reviews. If the agency fails to meet these deadlines, extensions are allowed. Without an extension, the project may move forward, deemed approved. The RAPID Act is consistent with NEPA's internal directive to reduce paperwork, and allows federal agencies to tier off of state review, or review by multiple federal agencies. Agencies are also free to prepare supplemental analyses that would save them from preparing an independent stand-alone NEPA document.

Whitfield points out that the RAPID Act may produce as many complications as it does benefits, even overlooking areas where reform may truly be needed. For example, the imposition of a timeline can be helpful, but blanket approval of the document if the deadline is missed is likely to be challenged in court. And without a complete environmental review and a well-articulated basis to justify the agency position, the project will most likely not survive a legal challenge, because the Act does not automatically shield approved decisions from environmental review (Whitfield, 2013).

Commenting on the RAPID Act of 2012, the CEQ referenced the Federal Highway Administration's (FHWA) detailed study of its NEPA review process. The FHWA found that 96.5% of federally funded projects are Categorically Excluded (CE), and only 0.3% required an EIS. Project delays were typically the result of incomplete funding, local opposition, low priority, or waiting on compliance with other laws and regulations – rarely due to NEPA.

In 2012, Ms. Nancy Sutley, the Chair of the CEQ wrote:

> "For example, the Federal Highway Administration (FHWA) has found that 96.5 percent of federally funded highway projects are approved under the least intensive, shortest and quickest layer of NEPA analysis, namely categorical exclusions (CEs). CEs can take as little as a few days to a few months to complete, not years, and are usually done concurrently with other aspects of the project review process so that the entire review process is completed quickly. Only 0.3 percent of FHWA projects require a full environmental impact statement (EIS), the most detailed study under NEPA. When there are project delays, they are typically caused by incomplete funding packages, local opposition, and low local priority, or compliance with other laws and requirements considered during the NEPA process, but rarely NEPA itself (CEQ Letter on the RAPID Act, dated April 24, 2012).

The EIS is all too often the primary target of streamlining legislation – seen as a long, burdensome process without clear sidebars, often wrought with obstacles or indecision. The truth is, many experienced planners have encountered similar experiences with CEs. Unfortunately there are times when CEs take far too much time and far too many pages of text. For example, a recently completed CE for a recreational trail project in one state took almost 3 years to complete and the final documentation exceeded 100 pages. This was for a 3,500 foot long recreational trail through a modern urban subdivision for a project that had no environmental concerns.

This particular CE is not an outlier. The template documents for preparing a FHWA CE in some states are 20 or more pages in length and routinely lead to documents of 60 or more pages for projects that were found to clearly have no significant environmental impacts. The amount of time and money expended for the NEPA review of miniscule federal projects such as these are completely out of proportion to the potential for impacts. Furthermore, these types of documents speak to a systematic failure to comply with both the spirit of and letter of the NEPA law. This does; however, speak to a prevailing problem – that of encyclopedic NEPA documents.

Section 1500.4 of the Regulations for Implementing the Procedural Provisions of NEPA (aka the CEQ NEPA regulations) clearly state that reducing paperwork is part of their purpose, policy, and mandate. The NEPA regulations direct agencies to reduce excessive paperwork in a number of ways that, including:

- Preparing analytic rather than encyclopedic environmental impact statements [1500.4(b) and 1502.2(a)],
- Discussing only briefly issues other than significant ones [1500.4(c) and 1502.2(b)],
- Using the scoping process to deemphasize insignificant issues [1500.4(g) and 1501.7], and
- Incorporating by reference [1500.4(j) and 1502.21].

This brings us to another source of delay – the regulations governing excessive paperwork are unfortunately routinely ignored by Federal agencies, their state partners, and project proponents. These parties unwisely seek to provide every possible answer to any conceivable question that might be asked by anyone during the review cycle. This is done in the erroneous quest for a comprehensive NEPA document that — purposely or not — quashes public and agency review. When taken to the extreme, these overblown NEPA documents simply prove the wisdom of the Solzhenitsyn (1968) assertion that "One fool can ask enough questions to keep a hundred wise men too busy to answer them all." The reality is that the NEPA regulations provide sufficient guidance for agencies to concisely answer relevant questions. Federal agencies and their partners deliberately violate these NEPA regulations on a distressingly regular basis. Ultimately, the sheer volume of a NEPA document can work against the Federal agency. In extreme cases, courts have found that a multi-hundred page Environmental Assessment (EA) indicated that an EIS was necessary and ordered the Federal agency to prepare one.

An entirely different aspect of the NEPA process that is resistant to streamlining is that very often the NEPA process requires data in order to comply with certain environmental regulations.

The NEPA process often relies upon other sources of information, such as permit decisions from other agencies, which often take time. Gathering information for a NEPA decision often takes more time than any other part of NEPA, but this is the point of the process – as NEPA is about making informed decisions. To "streamline" or "shorten" NEPA impacts the ability of the decision maker to make a fully informed decision. Examples abound of situations where the NEPA process is temporarily placed on hold until the necessary data are obtained and expert agencies are consulted. Perhaps the most easily presented example would be when a proposed project would take place within the habitat for a biological species that is listed as threatened or endangered. Depending on the species itself, it can easily be a year or more before data are available. The classic example, often encountered, is that a listed plant can only be definitively identified during its flowering phase, which might only be two weeks in the spring. Deciding we need this data for a NEPA document in September for a plant that only flowers in April logically leads to at least a nine month delay during which time the NEPA process cannot proceed. This does not result in a delay in the sense that it holds up the process. While the review time may be extended, this is due to a lack of necessary data, not due to NEPA, and is not truly a delay in the first place. No amount of streamlining the NEPA process can resolve a lack of needed data without unintentionally violating a different Federal law.

NEPA Contains Streamlining Provisions

In our opinion, streamlining initiatives that do not result in shorter, more focused NEPA documents are doomed to failure because they are procedurally flawed and subject to being questioned simply due to their length. Simple and effective streamlining could easily be achieved by mandating brevity in NEPA documents consistent with the regulations. We close this thought on encyclopedic NEPA documents by quoting § 1500.1(c) of the NEPA regulations:

> Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

On the 40th anniversary of NEPA, the CEQ issued a memo to modernize and reinvigorate NEPA to assist federal agencies in: meeting the goals of NEPA, enhancing the quality of public involvement in governmental decisions relating to the environment, increasing transparency, and easing implementation (CEQ Memo, February 18 2010, Accessed 1/28/2014, available at http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/February_18_2010).

The CEQ's efforts have resulted in the following:

(1) Draft guidance on the consideration of greenhouse gases and climate change impacts,

(2) Final CEQ guidance for mitigation and monitoring,

(3) Final CEQ guidance clarifying use of categorical exclusions ,

(4) Final CEQ guidance on NEPA efficiencies, and

(5) Enhanced public tools for reporting NEPA activities, pilot projects and handbooks

Limited Staffing Resources

Environmental review under NEPA is often being conducted by Federal agencies that operate under the burden of having insufficient and/or inadequately trained and experienced NEPA staff. Any seasoned NEPA professional can probably tell numerous stories of mistakes made by inexperienced NEPA professionals or by very qualified NEPA professionals who are working on too many projects at any one time. Loss of corporate knowledge due to turnover or retirement remains a significant challenge for many state agencies that prepare NEPA documents on behalf of their Federal counterparts.

Insufficient Training

Too often, these same personnel are not allowed to regularly attend professional development training. When they are allowed to attend training, there is always the possibility that the training itself is inadequate. The majority of NEPA training seminars spend most of their time teaching about the EIS process despite the fact that the vast majority of NEPA process documents are CEs. Reliance upon contractor-prepared NEPA documents has an inherent risk of NEPA bloat because contractors are often paid by the hour, not by the product. This incentivizes contractors to expand analysis whenever possible in order to improve their own revenue. Streamlining legislation does not address these issues, and by imposing deadlines, could even increase the challenge for some agencies with insufficient resources.

Importance of Public Involvement

Our final discussion of streamlining the NEPA process involves public participation. Based on a careful evaluation of the available literature, there seems to be a strong correlation between improving how public officials involve the public when making decisions that affect the public and their environment and public response to these projects. Thoughtful public participation does take time and effort at the beginning of the NEPA process; however, it provides the reward of lessened potential for lawsuits challenging the final decision at the end of the NEPA process.

The need for and value of public participation is recognized within the NEPA regulations, which require pubic scoping, which is a process for determining what issues should be address related to the proposed action, for EIS projects. Arguably there may be less need for public scoping of issues for an EA although agency scoping is very typically practiced. For CE-level NEPA documents, public and outside agency review is typically not carried out, which is acceptable provided that the project has accurately been defined as a CE in the first place. In some cases, public involvement has been carried out successfully even for CE-level projects to confirm the federal agency's understanding of the resources, and lack of sensitive resources, in a project area is accurate. The NEPA regulations encourage thoughtful public involvement when it makes sense regardless of the level of NEPA documentation being conducted.

When coupled with effective public involvement, the NEPA process can be a particularly successful planning tool. For example, involving the public in the development of the Purpose and Need section of an EIS or EA provides a very sound beginning to the environmental review

process. The Purpose and Need are then used as a filter during the development of alternatives because an alternative that does not meet the Purpose and Need can be eliminated from further evaluation. Thus, involving the public in the development helps demonstrate that the action-taking agency understands the need to be addressed in the first place. Communities can be invited to form multi-sector groups which then suggest improvements to the original proposal, thereby improving both the outcome and public satisfaction with the process. In some cases, Federal decisions and even court judgments have been improved by public involvement in the NEPA process. Public involvement allows local residents to share important information about the communities that may not be available to federal agencies located elsewhere. Public involvement can lead to modifications of a project that improve protection for endangered species as a result of community involvement. Finally, changing political environments can result in a positive impact from careful consideration of new alternatives in a public process, thereby reducing or even eliminating public concerns that the decisions are being made elsewhere without popular input.

Use Constraint-Based Analysis

Our first recommendation involves using constraint analysis even before beginning the formal NEPA process. Using modern technology, especially a combination of Geographic Information System (GIS), Global Positioning System (GPS), and tablet computer technology allows for rapid and effective data collection from a variety of sources for a myriad of resource topics. Desktop analysis using existing GIS-enabled knowledge centers such as the Environmental Protection Agency's NEPAssist can be incorporated very early in the overall project planning process. Taking advantage of readily available data, such as the National Wetland Inventory, can allow project planners to be knowledgeable regarding the constraints that may be present throughout a planning area. There seems to be little point to disregard readily available information about resources that could easily pose an insurmountable challenge during environmental review. It is important to identify early in the planning process the constraints to the environmental review process. This is especially applicable when advocating for a streamlined schedule for completion of the NEPA process. Streamlining projects that can be identified as bad ideas can only lead to schedule issues and/or judicial challenges during the process. After all, NEPA is a process, without deadlines, that has intentionally been designed to ensure appropriate consideration of environmental values takes place during the project planning process.

Study and Measure Sources of Delay

Our second recommendation involves the potential for additional data analysis. Some very interesting data have been developed recently to quantify delay in the EIS process and to quantify the relative proportions of NEPA projects completed as EIS vs. EA vs. CE documents. More information could prove to be very beneficial regarding delay in EA and CE projects. Key questions could be answered, such as "How much time does the typical documented CE decision process or EA/Finding of No Significant Impact decision process require? How many pages of text are found in a typical CE? EA? FONSI?" Given that over 95% of FHWA NEPA decisions are CE documents, this type of data analysis could derive considerably more value to the general

public and to the NEPA community than continuing to focus our attention on those EIS documents that constitute a very small minority of the NEPA documents completed annually.

We offer the observation that the discussions on NEPA delay often appear to ignore the true externalities that "delay" the NEPA process. We find it somewhat disingenuous to claim that the NEPA process can "delay" projects because the NEPA process has no timelines. We argue that the term delay should be used cautiously in the discussion of the NEPA process. Those who advocate revising the NEPA process should be obligated to define what types of delay they proposed to address. Are they revising NEPA to address a lack of necessary data or a shortage of qualified NEPA staff? If so, there are more traditionally acceptable solutions already available to address these issues. Are they proposing to evaluate projects that have not been sufficiently vetted by the public during the development of the project's Purpose and Need? Again, there are more traditionally acceptable solutions already available. Finally, we need to factor in the number of successful NEPA projects that are completed in a timely manner when complaining about NEPA projects that fail to proceed in a timely manner. For every EIS, the statistics indicate that approximately 96 CEs and 3 EAs are completed.

We close by asking the following: Should we risk running afoul of laws such as the APA or the Marine Mammal Protection Act because we speed up NEPA review to a point where the process no longer follows the rules of the various laws? How does that achieve streamlining? Can we honestly be good stewards of the environment and our taxpayer resources by eliminating public involvement in projects? Perhaps we should remind ourselves that NEPA resulted from public dissatisfaction regarding their lack of input into Federal projects that dramatically altered their neighborhoods or public lands. One true measure of NEPA effectiveness is that the public is no longer "up in arms" with respect to the speed at which Federal projects were transforming their lives in ways perceived to be largely negative. The fact that the vast majority of Federal projects avoid this one measure is the clearest indication that NEPA remains effective and should not be altered. Perhaps we should learn to conduct the NEPA process correctly, using sufficient numbers of adequately trained and experienced professionals.

Sources:

Andreas, E. and K. Kennedy, Wiley Rein, LLP. 2012. NEPA and renewable energy practices: streamlining sustainability. June 28 2012. ABA Environmental Litigation, Vol. 23: No 3. Spring 2012 Available at Lexology.com: http://www.lexology.com/library/detail.aspx?g=6c2f0e4a-48a9-4419-95f3-eb6890fb0b10

Bay Journal. 2009. EIS math error may underestimate risk of ariakensis introduction: oyster gardener finds mistake that others missed in 1500 page report. March 01, 2009. Article available at: http://www.bayjournal.com/article/eis_math_error_may_underestimate_risk_of_ariakensis_introduction

Clark, R. and L. Canter (eds.). 1997. *Environmental Policy and NEPA: Past, Present, and Future.* St. Lucie Press, Boca Raton, FL.

Congressional Research Service. 2006. The National Environmental Policy Act: Streamlining NEPA. Resources, Science, and Industry Division. February 8, 2006. Order Code RL33267. 39 pp.

Council on Environmental Quality and Advisory Council on Historic Preservation. 2013. *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106.* Washington, DC.

Council on Environmental Quality. 1978. 40 Code of Federal Regulations Part 1500-1508. Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act. Washington, DC.

Council on Environmental Quality. "Steps to Modernize and Reinvigorate NEPA." January 28, 2014; available at http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa)

Council on Environmental Quality. Letter to Honorable Chairman Coble and Ranking Member Cohen, House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law on H.R. 4377, the Responsibly and Professionally Invigorating Development Act of 2012. April 24, 2012.

Environmental Law Institute. 2010. NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government. Washington, DC.

Gaines, L. and S. Lurie. 2007. "NEPA for the 21st Century: A Comparative Analysis of Other Organization's Environmental Review Structures." Institute for Natural Resources, Oregon State University, Corvallis.

Lake, E. A. and T. N. William. 2013. Holland & Knight. Federal Efficiency/ Streamlining: CEQ Issues New NEPA Guidance Documents. March 19, 2013. http://www.hklaw.com/publications/federal-efficiencystreamlining-ceq-issues-new-nepa-guidance-documents-03-19-2013/

Lake, E. A. 2013. Holland & Knight. Integrating NEPA and NHPA Section 106 Reviews: New Guidance Document Provides Useful Advice, But Leaves Some Questions Unanswered. March 19, 2013. http://www.hklaw.com/publications/integrating-nepa-and-nhpa-section-106-reviews-new-guidance-document-provides-useful-advice-but-leaves-some-questions-unanswered-03-19-2013/

Solzhenitsyn, A. *Cancer Ward*. 1968. Farrar, Straus, and Giroux, New York.

Whitfield, P. 2013. NEPA Watch – House proposes legislation to streamline NEPA. Posted on August 15, 2013. BakerHostetler Environmental Law Strategy Blog. http://www.environmentallawstrategy.com/2013/08/nepa-watch-house-proposes-legislation-to-streamline-nepa-reviews/

Appendix A — Summary of 2013 NEPA Cases

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***Center for Food Safety v. Vilsack*, 718 F.3d 829 (9th Cir. 2013)**	USDA/APHIS	**AGENCY PREVAILED -** This appeal represents another chapter in USDA's regulation of Roundup Ready Alfalfa ("RRA"). RRA is a plant genetically "engineered" or "modified" by the Monsanto Company to be resistant to the herbicide, Roundup. An earlier phase of the litigation concerned the scope of an injunction prohibiting the planting of RRA pending completion of an EIS by APHIS. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761–62 (2010). In this case, the court considers the ROD issued by APHIS, which unconditionally deregulated RRA on the ground that RRA was not a "plant pest" within the meaning of the term in the Plant Protection Act ("PPA"), 7 U.S.C. §§ 7701–7772. Concerned about environmental harms, the plaintiffs in this appeal argue that APHIS's unconditional deregulation of RRA violated the NEPA by unconditionally deregulating RRA without considering the option of partially deregulating the crop, an action that the agency had included in the EIS. The court affirmed the lower court decision in favor of APHIS (all text from the decision): [T]he statute does not regulate the types of harms that the plaintiffs complain of, and therefore APHIS correctly concluded that RRA was not a "plant pest"…. Once the agency concluded that RRA was not a plant pest, it no longer had jurisdiction to continue regulating the plant. APHIS's lack of jurisdiction over RRA obviated the need for the agency to consult with the FWS under the ESA and to consider alternatives to unconditional deregulation under NEPA. See Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 665 (2007). … Nor did the district court err in entering summary judgment in favor of the defendants on the plaintiffs' NEPA claim. That claim rested on the contention that APHIS should have considered partial deregulation as an alternative to full deregulation. NEPA requires that an agency take a "hard look" at the environmental effects of a proposed action that could significantly affect the environment by evaluating all reasonable alternatives to the proposed action. See 40 C.F.R. § 1502.14(a); Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006) (internal quotation marks omitted), abrogated on other grounds by Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 21 (2008). Here, there were no reasonable alternatives to deregulation because the agency lacks jurisdiction to regulate RRA. APHIS was not required to look at alternatives to the unconditional deregulation of RRA absent any jurisdiction to adopt them. See S. Coast Air Quality Mgmt. Dist. v. FERC, 621 F.3d 1085, 1092 (9th Cir. 2010) ("[NEPA] does not expand the jurisdiction of an agency beyond that set forth in its organic statute . . . .") (internal quotation marks omitted) (alterations in original).
***Jayne v. Sherman*, 706 F.3d 994 (9th Cir. 2013)**	USFS	**AGENCY PREVAILED -** Plaintiffs challenged the United States Forest Service's October 16, 2008 Record of Decision adopting the modified Idaho Roadless Rule, which creates different categories of land within Idaho's 9.3 million acres of "inventoried roadless areas." In upholding the lower court decision in favor of the USFS, the court stated (all text from the decision): After scouring both the administrative and district court records in this case, we conclude that the district court's grant of summary judgment to the defendants was warranted. The inclusive, thorough, and transparent process resulting in the challenged rule conformed to the demands of the law and is free of legal error. Thus, we affirm the district court's

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		judgment in Appeal No. 11-35269, adopt the district court's comprehensive opinion as our own, Jayne v. Rey, 780 F. Supp. 2d 1099 (D. Idaho 2011), and attach it to this opinion as the Appendix. In its decision, the district court had held that (all text from the decision): NEPA required the Forest Service to take a "hard look" at the environmental impacts of the Idaho Roadless Rule. Native Ecosystems Council v. U.S. Forest Service, 418 F.3d 953 (9th Cir. 2005). That "hard look" standard is not satisfied when an agency relies "on incorrect assumptions or data in an EIS." Id. at 964. At the same time, the Court must defer to an agency's determination in an area involving a "high level of technical expertise." Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 954 (9th Cir.2003). In this case, the Forest Service estimated the Rule's impact by relying on data and projections it obtained from each National Forest. This information included (1) logging and road projects since the 2001 Roadless Rule, and (2) "any foreseeable future projects [over the next 15 years] and the likelihood of their implementation based on budget." … An interdisciplinary team of experts examined that data and developed projections for future logging and road building "based on trends from the Existing Plans [provided by the National Forests] and from the 2001 Roadless Rule, and considering the Agency's flat budget trend and high interest in responding to fire risk." Id. After reviewing the report of the interdisciplinary team, the Forest Service concluded that road building > would likely not see an increase in the foreseeable future (next 15 years) because the appropriated budget is flat or declining and there is no indication the trend will change. In addition, there is a backlog of road maintenance; therefore, there is no emphasis on constructing new roads that need to be maintained. If roads are constructed they are likely to be temporary. Consistent with that conclusion, the Forest Service projected over the next 15 years there would be no increase in permanent roads over the 2001 Roadless Rule but an increase in temporary roads from 3 miles to 21 miles. This record shows that the Forest Service's projection of road building was based not only on levels existing under the 2001 Roadless Rule but also on the realities of budgets and the balancing of priorities. While plaintiffs accurately point out that the Idaho Roadless Rule allows more roads, they offer nothing to challenge the Forest Service's assumption that its lean budget will be stretched thin just to cover maintenance of existing roads, and will not allow the construction of any more permanent roads. Moreover, plaintiffs offer no evidence that the projection of an increase in temporary roads from 3 miles under the 2001 Roadless Rule to 21 miles under the Idaho Roadless Rule was arbitrary or capricious. The Forest Service's analysis is entitled to deference given the expertise the agency has in matters of its own budget and how it affects project priorities. Selkirk, 336 F.3d at 954.
***Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836 (9th Cir. 2013)**	USFS	**AGENCY PREVAILED -** This case arises out of the long and contentious process to repair a flood-damaged road in a sensitive area of the Humboldt-Toiyabe National Forest in Elko County, Nevada. Great Old Broads appeals the district court's grant of summary judgment to the USFS on Great Old Broads's claims related to the Forest Service's ROD determining the method for restoring the South Canyon Road as a part of the Jarbidge Canyon Project (the "Project"). The Project was an effort to reestablish the South Canyon Road after flood waters damaged the road in 1995, eliminating vehicle access to the Snowslide Gulch Wilderness Portal in the Jarbidge Wilderness. In April 2003, the Forest Service published a draft EIS that analyzed an Elko County proposal for the South Canyon Road, and six other management alternatives for the Project. In April 2005, the Forest Service issued a draft

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		ROD. The draft ROD did not adopt any of the alternatives analyzed in the draft EIS to form the management alternative selected for the Project (the "Selected Alternative"). Instead, the Selected Alternative was a combination of elements from the several draft EIS alternatives. The Forest Service issued the final ROD and final EIS in April 2005, adopting the Selected Alternative in a form essentially unchanged from the draft ROD. The final EIS analyzed the same seven alternatives considered in the draft EIS and did not add additional analysis of the Selected Alternative. The final ROD included a more detailed explanation of the Selected Alternative. Great Old Broads contends that "combining Alternatives 1, 3, and 4 dramatically changed their environmental impacts, [so] the Forest Service violated NEPA by failing to prepare a supplemental EIS (SEIS)." Affirming the district court decision that no SEIS was required, the court found (all text from the decision): An agency "must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input." California v. Block, 690 F.2d 753, 771 (9th Cir. 1982). But if after this process, an "agency makes substantial changes in the proposed action that are relevant to environmental concerns," the agency must prepare an SEIS. 40 C.F.R. § 1502.9(c). Great Old Broads points to no specific changes that it deems not adequately analyzed in the final EIS. Instead, Great Old Broads relies on the First Circuit's decision in Dubois v. U.S. Department of Agriculture to argue that an SEIS is required whenever a proposed project constitutes "a different configuration" of previously analyzed elements. 102 F.3d 1273, 1291–93 (1st Cir. 1996). In Dubois, the Forest Service published an EIS analyzing the effects of a proposed ski resort. Id. at 1278. The preferred alternative adapted an analyzed alternative to a smaller parcel of land, eliminating woodland buffer zones between ski trails and proposing an unanalyzed "28,500-square-foot base lodge facility within the existing permit area." Id. at 1292. The First Circuit held that these were "substantial changes from the previously-discussed alternatives, not mere modifications 'within the spectrum' of those prior alternatives." Id. Here, by contrast, the Selected Alternative is primarily made of elements from Alternatives 1, 3, and 4 that were analyzed—as elements—in the final EIS. From that analysis, the Forest Service and the public could assess the cumulative effect of these elements, and the Forest Service could reasonably determine that the combination was "within the spectrum" of previously analyzed alternatives. Great Old Broads alternatively contends that even if the Forest Service correctly decided that an SEIS was not required, it violated NEPA because it did not adequately document that determination in the record. An agency must make a reasoned decision whether an SEIS is required, see Friends of the Clearwater, 222 F.3d at 557, and the Forest Service often presents this threshold determination in a supplemental information report ("SIR"). See Forest Service Handbook 1909.15, ch. 10 §§ 18.1-18.2. Here the Forest Service did not prepare a separate SIR, but it did make a reasoned decision, documented in the record, that an SEIS was not warranted.

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***Village of Bald Head Island v. U.S. Army Corps of Engineers*, ___ F.3d ___ (4th Cir. 2013)**	ACOE	**AGENCY PREVAILED -** The Village of Bald Head Island, a coastal town in North Carolina, commenced this action against the U.S. Army Corps of Engineers to require it, through an order of specific performance and injunction, to honor commitments made to the Village and other North Carolina towns when developing its plans to widen, deepen, and realign portions of the Cape Fear River navigation channel. The Village alleged that when implementing the project, the Corps failed to honor commitments to protect the adjacent beaches against the adverse effects of the project and to restore sand to the beaches, in violation of NEPA, the Coastal Zone Management Act, the Rivers and Harbors Act, Corps Regulation 33 C.F.R. § 337.10, and contract principles. The court upheld the district court's dismissal of the complaint for lack of subject-matter jurisdiction, concluding that the Corps' alleged failure to implement the project in accordance with its commitments was not "final agency action" that was subject to judicial review under the APA (all text from the decision): In June 1996, the Corps prepared an Environmental Impact Statement for the project and scheduled construction to begin in 2000. Before construction began, however, the Corps discovered an area of rock at the bottom of the channel that would require extensive blasting to remove and learned that the planned extension of the channel would cut through a substantial amount of live coral, causing ecological damage. As a result, it proposed several revisions to the project, including a realignment of the channel's entrance closer to Bald Head Island. It also proposed to dispose of beach-quality sand dredged during the project's construction and subsequent maintenance on the adjacent beaches of Bald Head Island and Oak Island, two barrier islands located on either side of the entrance to the Cape Fear River. In connection with these proposed revisions, the Corps issued an Environmental Assessment in February 2000, evaluating the revised project's environmental impacts, as well as its consistency with North Carolina's Coastal Management Plan. The Environmental Assessment included a Sand Management Plan, which described in detail the Corps' plan for depositing dredged beach-quality sand on nearby beaches during construction of the project and predicted the need, after work was complete, to perform "maintenance dredging" every two years. Because a study showed that approximately two-thirds of the sediment at the entrance of the channel came from Bald Head Island and one-third from Oak Island, the Sand Management Plan provided that the dredged beach quality sand would be placed on Bald Head Island in years two and four following the completion of the project and on Oak Island in year six and that this "disposal cycle" would be followed thereafter. The Corps also developed the Wilmington Harbor Monitoring Plan, which established a "routine monitoring program" to observe "the response of the adjacent beaches and the shoaling patterns in the entrance channel" and to use the data derived from those observations to make an "initial assessment of the impacts of the sand management plan on the system." … Both before and after the Corps conducted its Environmental Assessment, the Village of Bald Head Island provided numerous comments to the Corps. … The Village informed the Corps that it would oppose the project and consider legal action unless "it received written agreement from the Corps that the project would include sand management and [beach] protection measures or otherwise would be constructed and operated in a manner so as not to adversely impact Bald Head Island or, if the project caused adverse impacts, the project would be modified and the impacts would be corrected." … [Negotiations with the Corps and the North Carolina Department of Environment and Natural Resources] resulted in the

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		issuance of two letters, one from U.S. Army District Engineer Colonel James W. DeLony, dated June 9, 2000, and the other from Donna D. Moffitt, Director of North Carolina's Division of Coastal Management, dated June 15, 2000. … In August 2000, about six months after the issuance of the Environmental Assessment for the revisions to the project, the Corps issued a Finding of No Significant Impact ("FONSI") (which obviated the need for an Environmental Impact Statement), concluding that the modifications "will not significantly affect the quality of the human environment." The FONSI also stated that the Corps "will comply with the conditions indicated in [Moffitt's] letter." … Following completion of the project in 2002, the Corps also performed maintenance dredging during the winters of 2004-2005, 2006-2007, and 2008-2009. The sand dredged during the first two of those maintenance operations was placed on Bald Head Island, and the sand from the third was placed on Oak Island. But as the winter of 2010-2011 approached, the Corps informed the Village of Bald Island that the Corps' maintenance for that winter would have to be curtailed for budgetary reasons. It reported that it "ha[d] sufficient funding to dredge a portion of the Channel [that winter], but [did] not have the funding for dredging the portion of the Channel nearest Bald Head Island or for disposing of beach-quality sand onto Bald Head Island beaches." In response to the Corps' notice, the Village of Bald Island commenced this action against the Corps…. The Corps contends that the district court correctly concluded that project implementation is not final agency action within the meaning of the APA. It also contends that the Village has not identified a discrete agency action that the Corps was required to take but failed to perform, as required for judicial review of an agency's failure to act under the APA. See Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 64 (2004). It argues that allowing "judicial review of the Village's claims would place a burden on courts to manage ongoing agency actions and would eviscerate Congress' carefully crafted scheme for judicial review." … The Village protests that it is challenging agency action that is circumscribed and discrete. It asserts that it is not "challenging a regional or nationwide dredging program for shipping channels" but, instead, the implementation of "a specific dredging project at a specific coastal site." Yet, by challenging the Corps' ongoing real world physical actions, even at a localized level, the Village is essentially "demand[ing] a general judicial review of the [Corps'] day-to-day operations" in maintaining the channel, the type of review the Supreme Court has explicitly held the APA does not authorize. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 899 (1990); see also SUWA, 542 U.S. at 64, 66-67. We therefore conclude that the Corps' implementation of the Wilmington Harbor Project, including the ongoing periodic maintenance dredging and resulting nourishment of nearby beaches, does not constitute "agency action" within the meaning of the APA.
***Kentucky Riverkeeper, Inc. v. Rowlette*, ___ F.3d ___ (6th Cir. 2013)**	DOD/ACOE	**LOSS –** Plaintiffs sued ACOE alleging violations of, among other things, NEPA during the ACOE's issuance of two nationwide coal-mining waste-discharge permits in 2007. The district court granted summary judgment to the ACOE, and plaintiffs appealed. Reversing the district court in part, the court held (all text from the decision): In 2007, the Corps issued two nationwide general permits (hereinafter the "nationwide permits"): permit 21 and permit 50. Permit 21 authorized surface coal-mining operations to discharge dredged and fill material into waters of the United States (i.e., streams); permit 50

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		allowed underground coal-mining operations to do the same. Before issuing each permit, the Corps conducted a public notice-and-comment period and completed required environmental analyses, including a cumulative-impacts analysis. Each cumulative-impacts analysis projected the permits' respective environmental impacts before determining that compensatory mitigation would reduce adverse impacts to a minimal level. The Corps disclosed its analyses and findings in each nationwide permit's Environmental Assessment (hereinafter "the Assessment(s)"), prepared for NEPA purposes in lieu of an environmental impact statement. The nationwide permits became effective on March 19, 2007. … Riverkeeper sued the Corps, alleging that the cumulative-impacts analyses prepared for the Assessments authorizing the nationwide permits violated the CWA, NEPA, and the APA. Riverkeeper advanced two primary challenges to the permits' Assessments: (1) that the Corps bypassed a necessary NEPA consideration, the present effects of past permit authorizations, see 40 C.F.R. § 1508.7–.9; and (2) that the Corps failed—in violation of the CWA, NEPA, and the APA—to properly explain how compensatory mitigation would ensure cumulatively minimal impacts. See Ky. Riverkeeper, Inc. v. Midkiff, 800 F. Supp. 2d 846 (E.D. Ky. 2011). … To spare agencies the hardship of conducting exhaustive review of every NWP proposal's environmental impact, CEQ authorized agencies to first prepare a less burdensome environmental assessment as a method for determining whether a proposal needed an environmental impact statement. See 40 C.F.R. § 1508.9. The Corps did that here, deeming an EIS unnecessary. Though less demanding than an environmental impact statement, an environmental assessment still required the authorizing agency to consider the environmental impacts of its proposals. See id. § 1508.9(b); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F. 3d 1172, 1215 (9th Cir. 2008) (explaining that environmental assessments "need not conform to all the requirements" of an environmental impact statement) (internal quotation marks omitted). The NEPA regulations provide that environmental assessments "[s]hall include brief discussions of the . . . environmental impacts of the proposed action and alternatives," 40 C.F.R. § 1508.9(b), including "cumulative impact," see id. § 1508.7–.8.2 Cumulative impact refers to "the impact on the environment which results from the incremental impact of the [proposed] action when added to other past, present, and reasonably foreseeable future actions." Id. § 1508.7. The Corps concedes that these regulations required it to assess the impact of past actions, but cites a CEQ advisory memorandum for the proposition that it could satisfy this obligation by considering past actions' impact "in the aggregate." (Appellee Br. At 31–32 (citing Council on Environmental Quality, Guidance on the Consideration of Past Actions in Cumulative Effects Analysis (2005)…. The Ninth Circuit has already adopted this view from the Guidance, see League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1217 (9th Cir. 2008), and we have no qualms agreeing. The Corps' argument runs aground, however, because the Assessment failed to identify any impact—aggregate or otherwise—of past actions. … In our view, two aspects stand out. First, though reviewing agencies retain considerable discretion to determine the "scop[e]" and "relevan[ce]" of past actions, and may "focus[] on the current aggregate effects of past actions without delving into . . . individual past actions," this discretion coincides with their obligation to provide "a concise description of the identifiable present effects of past actions to the extent that they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency proposal for action

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		and its alternatives may have a continuing, additive and significant relationship to those effects." Id. at 1 (emphasis added). An environmental assessment that omits consideration of past impacts, followed by a conclusory suggestion that past impacts did not matter, cannot be in conformance. This is especially true where the reviewing agency reauthorizes a nationwide permit involving the same type of mining activities that cause the same type of environmental impacts. Second, the Guidance instructs the reviewing agency to "distinguish" the use of past impacts to forecast future impacts from the use of past impacts to assess cumulative impacts. The Corps did not do this. It used past impacts to forecast future impacts, but not to assess cumulative impacts. While taking advantage of the more lenient environmental-assessment method (instead of the intensive environmental-impact statement method), the Corps short-circuited the "cumulative impact" analysis by confining its review to an estimate of future impacts. The Corps reasonably relied on data regarding past impacts to project future impacts, but it failed to combine the two to gauge the cumulative impact of reauthorizing permit 21. Its Assessment offered no explanation for this shortcoming. Such limited review not only avoids the NEPA regulation's definition of "cumulative impact," but also the ordinary meaning of "cumulative." See Webster's II New College Dictionary 275 (2d ed. 2001) (defining "cumulative" as "[e]nlarging or increasing by successive addition"). … We find similarly troubling the Corps' defense to Riverkeeper's compensatory mitigation claims under the CWA and NEPA. Citing CWA regulations, Riverkeeper specifically faults the Corps' failure to provide "analysis or documentation" for the Assessment's determination that compensatory mitigation will ensure cumulatively minimal adverse effects. (Appellant Br. at 27–28 (citing 40 C.F.R. §§ 230.7(b), 230.11).) Though the Corps disputes its failure to provide an explanation for its decision, it offers no response to Riverkeeper's no-documentation charge. … Absent from this discussion is any mention of the Corps' factual underpinnings for this determination. Both in its briefing and at oral argument, the Corps relied on its procedures overseeing individual projects' success in mitigating environmental impacts. (Appellee Br. at 52–53; Oral Arg. at 30:40–32:36.) Yet these post-issuance mechanisms do not explain how the Corps arrived at its pre-issuance minimal cumulative-impact findings. … We acknowledge that the Corps may rely on post-issuance mitigation procedures to minimize environmental impacts, but in making a minimal-cumulative-impact finding, it must, at a minimum, provide some documented information supporting that finding. 40 C.F.R. §§ 230.7(a)–(b), 230.11(g). … After opting for streamlined nationwide permitting, the Corps took the easier path of preparing an environmental assessment instead of an environmental impact statement. Having done so, it needed to follow the applicable CWA and NEPA regulations by documenting its assessment of environmental impacts and examining past impacts, respectively. Failing these regulatory prerequisites, the Corps leaves us with nothing more than its say-so that it meets CWA and NEPA standards. We may not supply a reasoned basis for the agency's action that the agency itself has not given. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).
***Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 716**	DOD/ACOE	**AGENCY PREVAILED -** In connection with a proposed surface coal mine adjacent to Reylas Fork (a stream) in Logan County, West Virginia involving removing mountaintop rock, the ACOE issued a fill permit under Clean Water Act (CWA) § 404, authorizing Highland Mining to place rock overburden into the adjacent valley of Reylas Fork as part of the mining process. The Corps issued the permit without an EIS, finding that the fill would

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F.3d 119 (4th Cir. 2013)		not have a substantial cumulative impact on the water quality in the relevant watershed. Four environmental groups (collectively, the "Environmental Coalition") commenced this action to challenge the fill permit issued under CWA § 404. The Environmental Coalition contends that the Corps, in conducting its analysis for the § 404 permit, "materially misapprehended" the baseline conditions in the relevant watershed, thus corrupting its analysis of the cumulative impact that the mine would have on the streams in the watershed. It also contends that the Corps acted arbitrarily and capriciously in determining that the valley fill would not have a significant cumulative impact on the water quality in the relevant watershed. Upholding the lower court decision in favor of the ACOE, the court found (all text from the decision): … no merit to the Environmental Coalition's claim that the Corps 'misapprehended" the baseline conditions. The Corps considered the relevant factors, evaluating both the impact site and the entire watershed. Only after this evaluation did the Corps reach its informed judgment as to the baseline conditions. For its second argument, the Environmental Coalition contends that the Corps' finding of cumulative insignificance was "arbitrary and capricious" because the Corps irrationally dismissed the strong correlation between surface coal mining activities and downstream biological impairment. … In assessing whether a project's impacts will be significant, the Agency must take a "hard look" at potential environmental consequences. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). "The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms." Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 185 (4th Cir. 2005). In this case, the Corps collected the competing views of the Environmental Coalition, the EPA, the WVDEP, and Highland Mining and examined them in some detail, along with the supporting data. … At bottom, the Document reached the conclusion that "the valley fill, sediment pond, and mine through activities, if conducted in accordance with all applicable state and Federal regulations, should not contribute to or result in cumulative significant adverse impacts to the aquatic or human environment within the Dingess Run Watershed." J.A. 256. Thus, contrary to the Environmental Coalition's contention that the Corps failed to take a hard look at conductivity and stream impairment, the record amply shows that the Corps grappled with the issue extensively, rationally finding that (1) the connection between conductivity and stream impairment was not strong enough to preclude a permit and (2) the compromise measures agreed to by the EPA and Highland Mining would successfully mitigate the potential for adverse effects. With the inability to demonstrate that the Corps failed to take a "hard look," the Environmental Coalition's arguments are reduced to no more than a substantive disagreement with the Corps. But our review is limited, and we may not "use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency." Nat'l Audubon Soc'y, 422 F.3d at 185 (citing Robertson, 490 U.S. at 350). The Corps' predictive judgment in this case was based on facts and recommendations, adduced during a lengthy consultation between the Corps, Highland Mining, the EPA, and the WVDEP, and we conclude that this process satisfies NEPA's procedural requirement to take a "hard look." See Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999) ("[A]n agency takes a sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from experts

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		outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised" (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378-85 (1989))). Because the Corps' analysis satisfied NEPA's procedural requirements, the Corps' finding of cumulative insignificance is neither arbitrary nor capricious. See Aracoma Coal, 556 F.3d at 209.
***Hoosier v. U.S. Army Corps of Engineers*, 722 F.3d 1053 (7th Cir. 2013)**	ACOE	**AGENCY PREVAILED –** This case involves construction of a proposed highway in Indiana and the issuance of a CWA § 404 permit by the ACOE. As noted by the court (all text from the decision): I-69 is an interstate highway (part of the federal interstate highway system) that when completed will run from Canada to Mexico (and of course in the opposite direction as well) through a number of states including Indiana. At present, however, the highway consists of disjointed segments. One of the breaks is between Indianapolis in central Indiana and Evansville in the extreme southwestern corner of the state. A federal interstate highway (I-70) runs between Indianapolis and Terre Haute. A lesser federal highway, Route 41, runs between Terre Haute and Evansville. [T]hese two highways form the sides of an approximate right triangle. The direct route between Indianapolis and Evansville is the hypotenuse and thus the shorter of the two routes—142 miles rather than 155 miles long. The roads on the direct route (the hypotenuse) tend to be narrow and crowded with truck traffic and to experience an above-average incidence of traffic accidents. The Federal Highway Administration and the Indiana Department of Transportation (the latter a defendant in this suit by environmental groups; the other principal defendant is the Army Corps of Engineers) decided that a worthwhile contribution to the completion of I-69 would be to build an interstate highway on the hypotenuse. The highway would thus be a segment of I-69. … Environmentalists opposed building a highway on the direct route on the ground that it would destroy wetlands, disrupt forests, and also disrupt "karst" ecosystems, unusual landscapes permeated by caves and other formations that provide rich habitats for wildlife, including such endangered and threatened species as the Indiana bat (endangered) and the bald eagle (threatened). … The federal and state highway authorities filed, as they were required to do, Environmental Impact Statements, which concluded that building a new interstate highway on the direct route was preferable to upgrading the indirect route. After a suit contending that the highway would violate the National Environmental Protection Act [sic] failed, Hoosier Environmental Council v. U.S. Dept. of Transportation, No. 1:06-cv-1442-DFH-TAB, 2007 WL 4302642, at *1 (S.D. Ind. Dec. 10, 2007), the highway authorities began addressing the exact location of the highway within the direct route and the placement of structures ancillary to the new highway, such as bridges and culverts. The proposed highway was divided into six sections. Sections 1 through 3 have been built; sections 4 through 6 have not yet been built though section 4 is under construction. Section 3, a 26-mile stretch, is as we said the immediate subject of this case. … The plaintiffs don't disagree with the Corps' conclusion that the plan for section 3 of the highway minimizes the wetland effects of that section. Their objection is to the choice of the direct route (the hypotenuse), of which section 3 is just one slice, over the indirect one. They argue that the Corps failed to consider whether the direct route as a whole, rather than one section of it, would be in the public interest and whether the indirect route (upgraded as we explained earlier) would be a practicable alternative. But the district court found the Corps' analysis adequate to justify the grant of the permit and so awarded summary judgment to the defendants, precipitating this appeal. …

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		So on to the merits, where the first issue is the scope of the Corps of Engineers' duty to consider alternatives to proposed projects that threaten wetlands. Did it adequately consider whether the indirect route was a practicable alternative to the direct route? If it was practicable, and superior from an environmental standpoint, then the "practicable alternative" regulation required the Corps to deny a Clean Water Act permit for the direct route. … Because of the magnitude of the project to fill the I-69 gap between Indianapolis and Evansville, the planning for it has … proceeded in two separate stages, conventionally but unilluminatingly termed "Tier I" and "Tier II." … As the plaintiffs point out, the highway authorities may not shirk responsible analysis of environmental harms by "segmentation," Swain v. Brinegar, 542 F.2d 364, 368-71 (7th Cir. 1976) (en banc); Indian Lookout Alliance v. Volpe, 484 F.2d 11, 19-20 (8th Cir. 1973), that is, by evaluating those harms severally rather than jointly. The environmental harms caused by section 3 are modest when the possibility of re-creating the wetlands destroyed by the section is taken into account. But without an estimate of the environmental harms likely to be caused by all six sections, the Corps of Engineers would be unable to determine the aggregate environmental damage that a highway on the direct route would cause. Yet given the alignment (locational) options within each route (that is, where precisely to locate a highway in each 2000-foot corridor slice) and also the options concerning the number and siting of ancillary structures such as bridges, culverts, and rest areas, an attempt at an exact comparison of the effect on wetlands of all possible alternative routes would have made the Tier I analysis unmanageable. There is a difference between "segmentation" in its pejorative sense, and—what is within administrative discretion—breaking a complex investigation into manageable bits. Klemme v. Sierra Club, 427 U.S. 390, 412-15 (1976). The Federal Highway Administration's Environmental Impact Statement, issued as part of the Tier I analysis, had compared the effects on wetlands of the two corridors. It had found that the indirect route would harm only between 22 and 40 acres of wetlands and the direct route 75 acres. The alignment of the highway and the number and location of ancillary structures could affect these figures, but those determinations were properly deferred to Tier II. … The plaintiffs have not shown that the conclusion the Corps drew from its detailed and highly technical analysis -- that section 3 of the direct route is in the public interest -- was unreasonable. … Anyway the highway agencies' Environmental Impact Statements had covered most, maybe all, of the ground that a public interest analysis would have covered. The plaintiffs argue neither that the project as a whole is contrary to the public interest nor that it was sectioned in order to prevent consideration of its total environmental harms. . .They may be playing a delay game: make the Corps do a public interest analysis from the ground up (along with an all-at-once six-section permit analysis) in the hope that at least until the analysis is completed there will be no further construction, so that until then the highway will end at the northernmost tip of section 3 -- making it a road to nowhere.
***Jones v. National Marine Fisheries Service*, et al., ___ F.3d. ___ (9th Cir. 2013)**	ACOE	**AGENCY PREVAILED –** The court affirmed the lower court's summary judgment in favor of the ACOE (in this case that also involved the National Marine Fisheries Service [NMFS]) on NEPA grounds in a challenge to the issuance of a permit to Oregon Resources Corporation (ORC) as part of a project to mine valuable mineral sands near Coos Bay, OR. The court found that the ACOE properly considered the risks of hexavalent chromium (Cr+6) generation, properly considered that the risk of hexavalent chromium generation did not warrant an EIS, and properly declined to consider cumulative impacts of future chromium mining. In addition to an ACOE § 404 permit, ORC was required to obtain approvals from a

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		number of state agencies, including the Oregon Department of Geology and Minerals Industry (DOGAMI), the Oregon Department of State Lands, and the Oregon Department of Environmental Quality (DEQ). In its holding, the court stated (all text from the decision): In its NEPA analysis, the Corps considered the potential for increased Cr+6 generation from the proposed mining. Woodlands' public comments on the permit application noted that the chromite sands ORC planned to mine contained benign trivalent chromium (Cr+3), which can oxidize into toxic Cr+6 in the presence of manganese oxide, which is also present at the sites. [Plaintiffs] Woodlands was concerned that ORC's mining project could lead to increased Cr+6 generation, which could, in turn, contaminate ground and surface water. Woodlands submitted expert reports that recommended, among other things, ongoing monitoring during the mining process to ensure that the amount of Cr+6 did not increase. ORC responded to Woodlands' comments and expert reports in a Biological Assessment (BA). The BA suggested that the risk of Cr+6 generation was minimal…. In addition, the Corps and NMFS requested independent technical support from William Mason, a Registered Geologist with the DEQ. Mason examined the information provided by ORC and Woodlands, along with academic literature regarding Cr+6 generation, and summarized his findings in a memorandum (Mason Memorandum). The Mason Memorandum noted that the conditions at the mining sites favored Cr+6 attenuation rather than generation…. As a result of these recommendations [in the Mason Memorandum], DOGAMI notified the Corps that it would require ongoing Cr+6 monitoring as part of ORC's permit from that agency, and explained that it would require suspension of mining and/or other measures if the monitoring showed an increase in Cr+6 levels. The ORC Section 404 Permit issued by the Corps required ORC to comply with all conditions of the DEQ and DOGAMI permits. Based on this information from the DEQ and DOGAMI, the Corps concluded that the risks associated with the generation of Cr+6 would not "have a significant impact on the quality of the human environment." In addition to examining the potential for Cr+6 generation, the Corps considered the possibility that ORC would engage in future mining beyond the sites included in the Section 404 permit application, noting that ORC had suggested that it intended to mine for mineral sands along the Oregon coast "from Cape Arago to Port Orford." The EA also noted that ORC had removed from the Section 404 permit application two sites that had already been surveyed, one of which, Section 33, had already been granted a mining permit by DOGAMI. The record also reflects, however, significant challenges to developing any of the mining sites that had been identified by ORC. … Woodlands argues that the Corps failed to comply with NEPA because (1) contrary to NEPA regulations, the EA "contains only narratives of expert opinions," Klamath- Siskiyou Wildlands v. BLM, 387 F.3d 989, 996 (9th Cir. 2004) (citations omitted)); (2) the uncertainty surrounding Cr+6 generation rendered the FONSI arbitrary and capricious; and (3) the Corps' failure to consider the environmental impacts of widespread mineral sands mining was arbitrary and capricious. We reject Woodlands' arguments. "NEPA documents are inadequate if they contain only narratives of expert opinions." Klamath-Siskiyou, 387 F.3d at 996. "[A]llowing the [Agencies] to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which [an Agency] expert derived her opinion." Idaho Sporting

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		Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998). In both Klamath and Sporting Congress, the EAs "fail[ed] to provide the public with a basis for evaluating the impact of the [agency action]" because they did not include data that would permit the public to evaluate the agency decisions. Idaho Sporting Cong., 137 F.3d at 1150. Woodlands contends that the EA is deficient for the same reasons. Woodlands' argument, however, ignores that an agency may incorporate data underlying an EA by reference. See City of Sausalito v. O'Neill, 386 F.3d 1186, 1214 (9th Cir. 2004) (quoting 40 C.F.R. § 1502.21). Here, the Corps did just that. The EA cited to publically-available data provided by ORC and discussed in the Mason Memorandum. The Mason Memorandum, a thorough study of the issues surrounding Cr+6 generation, includes data from numerous test wells drilled at the mining sites, as well as a review of academic literature related to Cr+6 generation and attenuation. That is all NEPA requires, and the EA was thus not deficient as were those at issue in Klamath or Sporting Congress. See Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 956 (9th Cir. 2008)…. Woodlands next argues that significant uncertainty as to the likelihood and effect of Cr+6 generation renders the Corps' FONSI and subsequent failure to prepare an EIS arbitrary and capricious. Although uncertainty is inherent in any environmental decision, an EIS is not required "anytime there is some uncertainty, but only [where] the effects of the project are highly uncertain." Ctr. For Biological Diversity v. Kempthorne, 588 F.3d 701, 712 (9th Cir. 2009) (internal quotations omitted). Here, three separate agencies examined ORC's project and concluded that the risk of Cr+6 generation was minimal for two primary reasons: (1) There was no causal mechanism that would lead to increased Cr+6; and (2) the chemical makeup of the site favored Cr+6 attenuation rather than Cr+6 generation. Woodlands, however, argues that the Mason Memorandum established that a lack of site specific data rendered any conclusions regarding Cr+6 generation highly uncertain and that this uncertainty required the Corps to conduct a full EIS before granting the Section 404 Permit. See Nat'l Parks and Conservation Ass'n v. Babbitt, 241 F.3d 722, 732 (9th Cir. 2001). We disagree. … In context, it is clear that the Mason Memorandum established that Cr+6 generation is unlikely to occur at the site. Rather than recommending additional studies in order to address remaining uncertainty, the Mason Memorandum made clear that the site specific nature of Cr+6 attenuation means that the only way to ensure that Cr+6 does not reach harmful levels is to monitor how Cr+6 behaves once mining begins. … Woodlands also argues that it was inappropriate for the Corps to "rely on monitoring [in] dismiss[ing] potential impacts." The Corps cannot rely on monitoring and mitigation alone in reaching a FONSI. See N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1084–85 (9th Cir. 2011). This argument, however, misrepresents the role of monitoring in the Corps' decision here. In Northern Plains, the Bureau of Land Management (BLM) informed the Surface Transportation Board (Board) that there was insufficient data regarding the effects of the proposed project on sage grouse. Id. at 1084. In response, the Board proposed to conduct sage grouse surveys during the project's operation, as well as proposing "pre-construction surveys" to determine the extent of sage grouse habitat in the project area. Id. We concluded that the Board's actions were arbitrary and capricious because (1) without data on sage grouse populations the agency could not carefully consider whether the project would have a significant environmental impact and (2) the lack of data available to the public during the

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		EIS process deprived citizens of the opportunity to participate in the decision-making process. Id. at 1085. Here, by contrast, the Corps, relying in part on the Mason Memorandum, concluded that Cr+6 generation due to ORC's mining project was unlikely given the site conditions. … Woodlands argues that the Corps failed to analyze the cumulative impacts of ORC's mining project, pointing to ORC's plans to widen the scope of mining in the future. But, the majority of these plans are speculative and have not been reduced to specific proposals. Woodlands also claims that the three alternative sites considered in the EA as possible future projects require the Corps to perform a cumulative impact analysis. In Northern Plains, we determined that the Board's decision to consider only five years of cumulative impacts was arbitrary and capricious. N. Plains, 668 F.3d at 1079. Our decision was based on the fact that the BLM had previously prepared an EIS that projected the growth of mining activity over the next 20 years. Id. at 1078–79. In light of this study, we found that projects outside of the five year time frame were "reasonably foreseeable," and that the Board's failure to analyze the cumulative effects of these projects was arbitrary and capricious. Id. at 1079. Here, by contrast, there is no reliable study or projection of future mining in this case. ORC's general statements regarding a desire for increased mining give no information as to the scope or location of any future projects or even how many such projects ORC contemplates pursuing. The general plans for expanded mining recited by Woodlands thus do not require a cumulative impacts analysis. See id.; Envtl. Protect. Info. Ctr. v. Forest Serv. (EPIC), 452 F.3d 1005, 1014 (9th Cir. 2006). The three sites excluded from the application, Section 33, Shepard, and Westbrook, all face significant logistical hurdles to development. … Under these circumstances, the Corps was not required to consider the cumulative impact of speculative widespread mining for mineral sands on the Oregon coast.
***Defenders of Wildlife, et al. v. U.S. Department of the Navy, et al.*, ___ F.3d ___ (11th Cir. 2013)**	Navy	**AGENCY PREVAILED -** Plaintiffs filed suit against the Navy, challenging the Navy's decision to install and operate an instrumented Undersea Warfare Training Range (USWTR) in waters fifty nautical miles offshore of the Florida/Georgia border in waters adjacent to the only known calving grounds of the endangered North Atlantic right whale. The court concluded that plaintiffs had not identified any provision in NEPA requiring an agency to authorize all phases of a proposed action evaluated in an EIS at the time it issued a ROD. Therefore, the court found that it was not an independent violation of NEPA, warranting reversal of the district court's judgment, for the Navy to enter into a construction contract after it signed an ROD authorizing construction and after having its NEPA analysis upheld by the district court. Accordingly, the court affirmed the district court's judgment that the Navy complied with NEPA. In this decision, the court found (all text from the decision): Appellants confine their NEPA claim on appeal to the argument that the Navy violated 40 C.F.R. § 1506.1(a) by signing a contract for construction of the USWTR before it has issued an ROD for operations on the USWTR. Appellants make this argument even though the Navy had issued an ROD for its construction of the USWTR. … Under the plain language of Section 1506.1(a), Appellants' argument fails. The action taken by the Navy that Appellants challenge as violative of Section 1506.1(a)—signing a contract for construction of the USWTR—did not occur before the Navy signed an ROD concerning that construction, but after, and Section 1506.1(a) only precludes agency action taken before the agency signs an ROD. Yet, Appellants take issue with the fact that the ROD only authorized half of the entire

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		proposal for the range. Indeed, the ROD states that "[a]t this time the Navy is implementing only a portion of the proposed action, a decision to move forward with installation of the USWTR." The ROD further states that any "decision to implement training" at the USWTR "will be based on the updated analysis of environmental effects in a future [EIS] in conjunction with appropriate coordination and consultation with the [NMFS] and after compliance with applicable laws and executive orders including the [MMPA], the [ESA], the [NEPA] and the Coastal Zone Management Act (CZMA) as they relate to the operation of the proposed USWTR." Id. The Navy has stated that it will prepare a second ROD that specifically authorizes operations based on updated environmental data, prior to operations ever commencing on the USWTR. In Appellants' view, the Navy prejudiced its future decision to approve operations on the USWTR by proceeding with the $127 million construction of the USWTR prior to an ROD approving operations. Once construction starts, Appellants argue, the Navy's future NEPA process will become nothing more than an attempt to "rationalize or justify decisions already made." Andrus v. Sierra Club, 442 U.S. 347, 351 n.3, 99 S. Ct. 2335, 2338 n.3, 60 L.Ed.2d 943 (1979). But Appellants have presented no authority mandating that an agency must authorize all stages of a project in one ROD. Indeed, the EIS is "[a]t the heart of NEPA," Dept. of Transp. v. Pub. Cit., 541 U.S. 752, 757, 124 S. Ct. 2204, 2209, 159 L.Ed.2d 60 (2004), rather than the ROD, which is merely a means of documenting the agency's final decision on a proposed action that required an EIS. While a fundamental NEPA principle is that connected actions be analyzed together in one EIS, see 40 C.F.R. § 1508.25(a), Appellants have conceded that the Navy's EIS analyzed both phases of the USWTR, and nothing in NEPA reiterates this "anti-segmentation" principle with regard to an ROD. … In sum, Appellants have not pointed to any provision in NEPA requiring an agency to authorize all phases of a proposed action evaluated in an EIS at the time it issues an ROD. We thus find that it is not an independent violation of NEPA, warranting reversal of the district court's judgment, for the Navy to enter into a construction contract after it signs an ROD authorizing construction and after having its NEPA analysis upheld by the district court. The district court's judgment that the Navy complied with NEPA is due to be affirmed.

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***Drakes Bay Oyster Company v. Jewell*, ___ F.3d ___ (9th Cir. 2013) (revised opinion issued January 14, 2014)**	DOI	**AGENCY PREVAILED -** Court of Appeals affirmed the district court's order denying a preliminary injunction challenging the Secretary of the Interior's discretionary decision to let Drakes Bay Oyster Company's permit for commercial oyster farming at Point Reyes National Seashore expire on its own terms. The court held that plaintiffs were not likely to succeed on the merits of their claims. One of the claims involved a challenge to an EIS prepared to examine the potential environmental impacts associated with the operation and the closure of the oyster farm. With respect to the NEPA claim, the court held (all text from the decision): Under NEPA, an agency is required to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The government urges that its decision to let Drakes Bay's permit expire is not a "major Federal action[]," but rather is inaction that does not implicate NEPA. Drakes Bay responds that the term "major Federal actions" includes failures to act, 40 C.F.R. § 1508.18, and that NEPA applies to decisions concerning whether to issue a permit. Here, the Secretary's decision to let Drakes Bay's permit expire according to its terms effectively "denied" Drakes Bay a permit. We have held that "if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action." Ramsey v. Kantor, 96 F.3d 434, 444 (9th Cir. 1996) (emphasis added). But we have never held failure to grant a permit to the same standard, and for good reason. If agencies were required to produce an EIS every time they denied someone a license, the system would grind to a halt. Our case law makes clear that not every denial of a request to act is a "major Federal action." We have held, for example, that no EIS was required when the federal government denied a request to exercise its regulatory authority to stop a state's program killing wildlife. State of Alaska v. Andrus, 591 F.2d 537, 541 (9th Cir. 1979). … We are skeptical that the decision to allow the permit to expire after forty years, and thus to move toward designating Drakes Estero as wilderness, is a major action "significantly affecting the quality of the human environment" to which NEPA applies. 42 U.S.C. § 4332(2)(C). "The purpose of NEPA is to 'provide a mechanism to enhance or improve the environment and prevent further irreparable damage.'" Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995) (quoting Pacific Legal Foundation v. Andrus, 657 F.2d 829, 837 (6th Cir. 1981)). The Secretary's decision is essentially an environmental conservation effort, which has not triggered NEPA in the past. For example, in Douglas County, we held NEPA did not apply to critical habitat designation under the Endangered Species Act ("ESA") because it was "an action that prevent[ed] human interference with the environment" and "because the ESA furthers the goals of NEPA without demanding an EIS." Id. at 1505, 1506 (emphasis added). Because removing the oyster farm is a step toward restoring the "natural, untouched physical environment" and would prevent subsequent human interference in Drakes Estero, id. at 1505, the reasoning of Douglas County is persuasive here. The Secretary's decision to allow the permit to expire, just like the designation under the ESA, "protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose." Id. at 1507. … Ultimately, we need not resolve whether NEPA compliance was required because, even if it was, the Secretary conducted an adequate NEPA review process and any claimed deficiencies are without consequence. The government produced a lengthy EIS, which the

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		Secretary considered and found "helpful." Although the Secretary acknowledges that compliance with NEPA was less than perfect, Drakes Bay is unlikely to succeed in showing that the errors were prejudicial. … Drakes Bay points to "technical" violations, specifically, the Secretary's failure to publish the EIS more than thirty days before he made his decision and the Secretary's framing the extension denial in the form of a Decision Memorandum rather than a Record of Decision. Drakes Bay has shown no prejudice from these claimed violations. See Nat'l Forest Pres. Grp. v. Butz, 485 F.2d 408, 412 (9th Cir. 1973) (declining to reverse where NEPA timing and EIS requirements were not strictly followed but the agency "did consider environmental factors" and the "sterile exercise" of forcing agency to reconsider "would serve no useful purpose"); see also City of Sausalito v. O'Neill, 386 F.3d 1186, 1220 (9th Cir. 2004) (declining to reverse based on violation of deadline for ESA biological assessment where no harm was shown). Drakes Bay puts considerable stock in its claims that the final EIS was based on flawed science and that the absence of the thirty-day comment period denied it an opportunity to fully air its critique, specifically with regard to conclusions regarding the "soundscape" of the estero. Nothing in the record suggests that Drakes Bay was prejudiced by any shortcomings in the final soundscape data. Drakes Bay sent the Secretary its scientific critique before he issued his decision. The Secretary specifically referenced that communication and stated that he did not rely on the "data that was asserted to be flawed." The Secretary was well aware of the controversies on the specific topics that Drakes Bay criticizes and his statement was unambiguous that they did not carry weight in his decision. Drakes Bay's suggestion that the Secretary could not have made the informed decision that NEPA requires without resolving all controversies about the data is unsound. NEPA requires only that an EIS "contain[] a reasonably thorough discussion of the significant aspects of the probable environmental consequences." Seattle Audubon Soc. v. Espy, 998 F.2d 699, 703 (9th Cir. 1993) (internal quotation marks and citation omitted). Drakes Bay is not likely to succeed in showing that the final EIS was inadequate, even assuming NEPA compliance was required.
***Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013)**	DOI/BLM	**AGENCY PREVAILED –** Plaintiffs contend that BLM violated NEPA by permitting Denison Mines Corp to restart mining operations at the Arizona 1 Mine in 2009 after a 17-year hiatus, under a plan of operations that BLM approved in 1988. The Arizona 1 Mine is a uranium mine located in Mohave County, Arizona. In 1984, Energy Fuels Nuclear, Inc. submitted to BLM a plan for uranium exploration activities on mining claims it owned in Mohave County, Arizona. On October 4, 1984, BLM approved the exploration plan. Four years later, in 1988, Energy Fuels submitted to BLM a plan of operations to develop and operate a portion of its mining claims as the Arizona 1 Mine. BLM reviewed the proposed plan of operations, took into account public sentiment, and prepared an environmental assessment of the mining activities' impact. After a detailed review, on May 9, 1988, BLM approved the plan, determining that the proposed mining operations at the Arizona 1 Mine would not "cause any undue or unnecessary degradation of public lands" or "significantly affect the quality of the human environment." The plan of operations contained a portion governing the interim management of the Arizona 1 Mine "in the event of an 'extended period of non-operation before mining is completed.'" Such a shutdown, the interim management portion of the plan stated, was, though unanticipated, a "possibility." Once the plan of operations was approved, Energy Fuels actively developed the Arizona 1 Mine until a severe drop in uranium prices made mining at the site economically

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		unjustifiable. As a result, Energy Fuels ceased mining activities at the Arizona 1 Mine in 1992 and placed the mine on "standby and interim management status." In May 1997, while mining operations remained on hold, International Uranium Corporation, USA, acquired the Arizona 1 Mine. In 2007, International Uranium merged with Denison. During the period following the cessation of mining activities at the Arizona 1 Mine, Energy Fuels, International Uranium, and later Denison, followed the interim management portion of the 1988 plan of operations. Among other things, the companies maintained buildings, mine shafts, gates, fences, and signage for the mine. The companies also maintained a surety bond for reclamation and paid utilities, property taxes, BLM maintenance fees, and insurance premiums. Additionally, the companies sent employees and contractors to the mine to ensure that the mine complied with the 1988 plan of operations. Likewise, throughout the interim period, BLM conducted field inspections at the Arizona 1 Mine. In 2007, Denison advised BLM of its intention to restart mining operations at the Arizona 1 Mine. At Denison's urging, Mohave County obtained a "Free Use Permit" from BLM to extract gravel to maintain an employee access road to the mine. BLM determined that issuance of the gravel permit to the county fell within a categorical exclusion. Before mining resumed in full, in November 2009, plaintiffs filed their initial complaint in district court against BLM, arguing that Denison could not begin operations under the 1988 plan of operations because the 17-year cessation of mining activities rendered that plan ineffective. The district court denied a motion for preliminary injunction, holding that the 1988 plan of operations had not become ineffective and that BLM did not have to prepare a supplemental NEPA analysis prior to Denison recommencing mining operations. Center for Biological Diversity v. Salazar, No. CV-09-8207-PCT-DGC, 2010 WL 2493988 (D. Ariz. June 17, 2010). After further proceedings, the district court held for BLM on all claims, except that BLM "provided no more than a 'cursory statement' of no cumulatively significant impacts in applying the categorical exclusion" when issuing Mohave County the "Free Use Permit" to remove gravel and remanded the issue to the BLM. A short time later, BLM provided further explanation as to its use of the categorical exclusion. The district court found that BLM had presented a rational explanation for its use of the categorical exclusion. Accordingly, the district court concluded that use of the categorical exclusion as to the gravel permit was not arbitrary and capricious. The district court thus granted summary judgment on the categorical exclusion issue in favor of BLM. Plaintiffs appealed the grants of summary judgment to BLM on all NEPA counts. The court of appeals upheld the lower court decision (all text from the decision): Appellants next contend that BLM violated NEPA by failing to supplement the 1988 environmental assessment BLM conducted in connection with the approval of the 1988 plan of operations. Essentially, Appellants contend that the 1988 NEPA analysis became stale and outdated, necessitating supplemental review of the Arizona 1 Mine's environmental impact. NEPA requires that federal agencies perform environmental analysis before taking any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Thus, whether NEPA is triggered depends on whether there is a new, proposed "major Federal action." … Supplementation of a prior NEPA environmental analysis is only required where "there remains major Federal action to occur." Norton v. S. Utah Wilderness Alliance (SUWA), 542 U.S. 55, 73 (2004) … Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989) (whether supplementation should occur "turns on the

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		value of the new information to the still pending decisionmaking process . . . and if the new information is sufficient to show that the remaining action will affec[t] the quality of the human environment in a significant manner or to a significant extent not already considered"). Undoubtedly, the approval of the 1988 plan of operation was a "major federal action" triggering NEPA's requirements. See SUWA, 542 U.S. at 73. Nevertheless, as in SUWA, "that action [wa]s completed when the plan [wa]s approved." Id.; see also Cold Mountain v. Garber, 375 F.3d 884, 894 (9th Cir. 2004). Before that action was complete, BLM performed the requisite environmental analysis. Accordingly, as far as the 1988 plan of operations is concerned, appropriate NEPA review took place and "[t]here is no ongoing 'major Federal action' that could require supplementation," SUWA, 542 U.S. at 75. Appellants argue, however, that BLM's issuance of a gravel permit to Mohave County, requirement that Denison obtain a new air quality control permit, and approval of an updated reclamation bond each constituted a prerequisite to mining and thus, "major Federal actions" triggering supplementation of the 1988 environmental analysis. While it is true that each of the above actions potentially constituted a "major Federal action" that would have required NEPA analysis—a question we address below as to the gravel permit and reclamation bond—none of those actions affected the validity or completeness of the 1988 approval of the Arizona 1 Mine's plan of operations nor did they prevent Denison from mining under that plan. These additional, independent actions thus did not trigger NEPA supplementation of the 1988 environmental analysis. In sum, "because the [1988 plan of operations] has been approved . . . [BLM's] obligation under NEPA has been fulfilled." Cold Mountain, 375 F.3d at 894. … While BLM required Denison to update its reclamation bond before recommencing mining operations, that action did not consist of an "[a]pproval of [a] specific project[]." Id. BLM approved the Arizona 1 Mine plan of operations in 1988. That plan, as explained above, has not been invalidated or modified since that time. It thus continues in effect and controls activities at the mine. The plan of operations contains a reclamation portion. … BLM's update of the Arizona 1 Mine reclamation bond consisted of the ministerial tasks of feeding reclamation data from the 1988 plan into BLM's "SHERPA" software program, comparing SHERPA's reclamation estimate with that of Denison, and then accepting Denison's proposed bond amount, which was greater than BLM's SHERPA calculation. Such post-project-approval functions are the type of monitoring and compliance activities that this court has determined do not trigger NEPA's requirements. See Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988); San Francisco Tomorrow v. Romney, 472 F.2d 1021, 1025 (9th Cir. 1973). … Appellants also challenge BLM's application of the categorical exclusion to its issuance of the Free Use Permit to Mohave County for extraction of gravel from the Robinson Wash. … Application of a categorical exclusion is not an exemption from NEPA; rather, it is a form of NEPA compliance, albeit one that requires less than where an environmental impact statement or an environmental assessment is necessary. Id. Appellants contend that BLM unlawfully limited the scope of NEPA analysis in invoking this categorical exclusion by failing to analyze adequately "indirect" and "cumulative" impacts of the gravel permit, as well as the impact of "connected actions" under 40 C.F.R. § 1508.25. Section 1508.25 provides that in "determin[ing] the scope of environmental impact statements," an agency must consider, among other things, "[c]onnected actions," and

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		"indirect" and "cumulative" environmental "impacts" to the proposed action. By its plain language, however, this regulation applies only to environmental impact statements. Id. Appellants, in a footnote, contend that although section 1508.25 explicitly applies to environmental impact statements, it should also apply to all actions under NEPA, including the application of a categorical exclusion. In support of this argument, Appellants point to a number of decisions of this court in which we have applied requirements for environmental impact statements to environmental assessments. See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1076 (9th Cir. 2002); Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp., 113 F.3d 1505, 1509 (9th Cir. 1997); S. Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983). Appellants contend that for the same reason that this court has applied certain environmental impact statement requirements to environmental assessments, the requirements of 1508.25 should also apply to application of categorical exclusions. We have explained, however, that where a proposed action fits within a categorical exclusion, full NEPA analysis is not required. Wong v. Bush, 542 F.3d 732, 737 (9th Cir. 2008). … Moreover, application of section 1508.25's requirements to categorical exclusions is inconsistent with the efficiencies that the abbreviated categorical exclusion process provides. See 40 C.F.R. §§ 1500.4(p), 1500.5(k); Utah Env't Congress v. Bosworth, 443 F.3d 732, 741 (10th Cir. 2006). Accordingly, we conclude that section 1508.25's requirements do not apply to BLM's categorical exclusion analysis in this case. … We conclude that BLM appropriately found that issuance of the gravel permit fell into a categorical exclusion and adequately explained why the permit had no "cumulatively significant" environmental effects preventing application of the categorical exclusion.
***Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013)** **See also, *Montana Wilderness Association v. Connell*, 725 F.3d 988 (9th Cir. 2013), below**	DOI/BLM	**AGENCY PREVAILED& LOST –** The court of appeals affirmed in part and reversed in part the district court's summary judgment in favor of the agencies in a challenge to BLM's management of grazing within the Upper Missouri River Breaks National Monument in Montana. In accordance with the Antiquities Act, President Clinton designated the 375,000-acre area as a national monument in 2001 (Proclamation No. 7398). The Monument was established for the purpose of protecting big horn sheep, essential winter range for sage grouse; habitat for prairie dogs; one of the few remaining fully functioning cottonwood gallery forest ecosystems on the Northern Plains; large concentrations of antelope and mule deer; spawning habitat for the endangered pallid sturgeon; perching and nesting habitats for hawks, falcons and eagles; habitat for great blue heron, pelican and a wide variety of waterfowl; habitat for 48 fish species; archeological and historical sites, from teepee rings and remnants of historic trails to abandoned homesteads and lookout sites used by Meriwether Lewis; and remnants of a rich Native American and pioneer history scattered throughout the Monument. Specifically, the court held that BLM's Breaks Monument EIS complied with NEPA by taking a hard and careful look at grazing impacts, but that the EA for the Woodhawk Allotment, located within the Monument, violated NEPA by not considering a reasonable range of alternatives that included a no- or reduced-grazing option. The court of appeals remanded the case to the district court to order BLM to remedy the deficiencies in the EA for the Woodhawk Allotment or to prepare a more detailed EIS. From the decision: Western Watersheds's underlying concern is that the Breaks Resource Plan, the Breaks EIS, and the EA for the Woodhawk Allotment ignore the detrimental impacts of livestock grazing on Monument objects, especially riparian areas, cottonwood gallery forest

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		ecosystems, and sage-grouse habitat. Livestock have grazed in the Breaks Monument area since the late 1800s. BLM acknowledges that livestock grazing can significantly affect the protected biological objects of the Monument. Overgrazing reduces habitat quality for the greater sage-grouse, which can cause increased predation on nests or nest desertion. In riparian areas, grazing degrades water quality, affecting fish and other aquatic species. BLM studies have found hot-season grazing to be a significant cause of the lack of cottonwood and willow regeneration along the Missouri River. … We next review whether the Breaks EIS complied with NEPA. Western Watersheds contends that the Breaks EIS violates NEPA in several ways: (1) it improperly determined that programmatic changes to BLM's grazing policies were outside the scope of the Breaks EIS; (2) it did not consider a no-grazing or reduced-grazing alternative; and (3) it did not take a "hard look" at grazing impacts. We conclude that the Breaks EIS did not violate NEPA. … BLM did not violate NEPA by excluding changes to its grazing practices from the scope and purpose of the Breaks Resource Plan. Because the Breaks Resource Plan was developed to implement the Proclamation's objectives, those objectives guide our analysis of the reasonableness of the purpose outlined in the EIS. See Westlands Water Dist., 376 F.3d at 866 ("Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS."). We have already determined that BLM's interpretation of the Proclamation to allow the continued use of its grazing management was reasonable under FLPMA and the Proclamation. Based on that analysis, BLM also reasonably defined the scope and purpose of the Breaks Resource Plan in the EIS. Western Watersheds does not show that NEPA mandates a different conclusion. It was also reasonable for the Breaks EIS to exclude detailed consideration of a no-grazing or reduced-grazing alternative. An EIS need not consider in detail an alternative that does not meet the purpose of the project. See City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986) ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."). But if an alternative is eliminated from detailed study, the agency must "briefly discuss [its] reasons" for doing so. 40 C.F.R. § 1502.14(a). Here, the EIS explained why it excluded from detailed review two alternatives that would reduce or eliminate grazing. The EIS considered but eliminated two reduced-grazing alternatives: (1) an alternative to identify lands as not available for livestock grazing and (2) an alternative to reduce or phase out livestock grazing. BLM rejected the first alternative because the Proclamation did "not require nor suggest" the need to restrict grazing and the existing Lewistown Standards could be used "to mitigate conflicts with Monument uses and values." Similarly, BLM excluded the second alternative because there was "no documented need to reduce or phase out livestock grazing based on the Proclamation and Standards for Rangeland Health." Given the scope and purpose of the Breaks Resource Plan, these explanations satisfy NEPA's brief discussion requirement. See League of Wilderness Defenders – Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1072–73 (9th Cir. 2012) (concluding that the Forest Service did not err by eliminating from detailed review two alternatives that would not meet the purpose of the proposed action). We conclude that at the programmatic level of NEPA review, it was reasonable for Western Watersheds also argues that the Breaks EIS should have disclosed as a cumulative impact that BLM destroyed over two-thousand acres of sage-grouse habitat in 1979 through sagebrush spraying. We disagree. NEPA requires an agency to consider the

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		cumulative impact of the current action "when added to other past, present, and reasonably foreseeable future actions." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214–15 (9th Cir. 1998). Although in some situations discussion of the environmental impact of a thirty-year-old project might be useful and relevant, we conclude that it is not here. The EIS took a "hard look" at environmental impacts on sage-grouse without discussing the 1979 spraying. BLM to decline to analyze in detail an alternative that would change grazing management levels throughout the entire Monument. Western Watersheds also contends that the Breaks EIS did not take a "hard look" at grazing impacts. They argue that the Breaks EIS did not adequately analyze these impacts and that it inappropriately tiered to other NEPA documents. The record leads us to opposite conclusions. NEPA requires agencies "to take a 'hard look' at how the choices before them affect the environment, and then to place their data and conclusions before the public." Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1099 (9th Cir. 2008). This "hard look" requires a "full and fair discussion of significant environmental impacts" in the EIS. 40 C.F.R. § 1502.1. "General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 491 (9th Cir. 2011) (citations and alterations omitted). … In concluding that BLM complied with NEPA in developing the Breaks EIS, we distinguish between the two different levels of agency planning and management: programmatic and site-specific. See id. When an agency develops an EIS for a programmatic plan like the Breaks Resource Plan, the EIS "must provide 'sufficient detail to foster informed decision-making,' but 'site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development.'" Id. (quoting N. Alaska Envtl. Ctr. v. Lujan, 961 F.2d 886, 890–91 (9th Cir. 1992)). Our conclusion that the Breaks EIS contains sufficient analysis for informed decision-making at the programmatic level does not reduce or minimize BLM's critical duty to "fully evaluate[]" site-specific impacts. See id. Stated another way, BLM's decision to exclude broad changes to its grazing management throughout the Monument in the Breaks Resource Plan does not avoid its critical obligation to consider changes to grazing preferences at the site-specific stage. We consider whether the EA for the Woodhawk Allotment complied with NEPA. Western Watersheds challenges BLM's finding of no significant impact and argues that BLM should have prepared a full EIS before issuing the renewed permit. It also contends that BLM did not consider a reasonable range of alternatives because the EA did not consider (1) a no-grazing alternative or (2) an alternative that incorporated the potential-natural-community standard. Western Watersheds further expresses concern that the EA tiers to outdated NEPA documents. --- We are troubled by BLM's decision not to consider a reduced- or no-grazing alternative at the site-specific level, having chosen not to perform that review at the programmatic level. Although we have held above that the decision not to consider these alternatives in the Breaks Resource Plan did not violate NEPA, this decision has deprived BLM of information on the environmental impacts of the unconsidered alternatives. At the site-specific level, then, BLM is operating with limited information on grazing impacts. It is at this stage, when the agency makes a critical decision to act, that the agency is obligated fully to evaluate the impacts of the proposed action. See 'Ilio'ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1097 (9th Cir. 2006) (explaining that if an agency does not consider reasonable alternatives at the

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		programmatic stage, then it has an "obligation" to consider such alternatives at the site-specific stage). The analysis in the Breaks EIS was sufficient for the proposed programmatic action, but the proposed permit renewal at the site-specific level demands more. Where modification of grazing practices is not considered at a programmatic level for the full Monument area, it is all the more important that agency actions on site-specific areas give a hard and careful look at grazing impacts on Monument objects. … [T]he EA process for the Woodhawk Allotment was deficient in its consideration of alternatives insofar as it did not consider in detail any alternative that would have reduced grazing levels on the Allotment in light of the Monument's protected objects. BLM cannot ignore the Proclamation's goal of protecting Monument objects when it determines the reasonable range of alternatives for NEPA review of site-specific actions. We make no decision of substance on how a balance should be struck by BLM, but we conclude that the agency's procedural efforts to explore alternatives in the EA did not satisfy NEPA. Because we reverse on this issue, we do not reach Western Watersheds's arguments that BLM should have considered a potential natural- community standard or that BLM should have prepared an EIS for the Woodhawk Allotment.
***Western Watershed Project v. U.S. Bureau of Land Management*, 721 F.3d 1264 (10th Cir. 2013)**	DOI/BLM	**AGENCY PREVAILED –** This case involved a challenge to a BLM decision to grant a 10-year grazing permit to LHS Spilt Rock Ranch for four federal public land allotments in central Wyoming. BLM issued a 102-page EA that acknowledged serious ecological problems on the rangeland. The EA considered five alternatives to address these problems, but only three were analyzed in detail. Two alternatives, referred to as "No Action" and "No Grazing," were briefly considered but rejected without detailed analysis. Several months after the EA was issued, BLM issued a FONSI, finding that renewal of the Split Rock grazing permit would not significantly affect the environment. BLM then issued a Notice of Proposed Decision, which did not match any of the alternatives described in the EA. Instead, it combined Alternatives One and Two by eliminating the most environmentally protective features of each, but did incorporate other protective features such as fencing, deferred rotation, and shorter grazing season. Upholding the lower court decision finding the EA met the hard look requirement, the court held (all text from the decision): We review de novo the district court's grant of summary judgment for BLM. State of New Mexico, 565 F.3d at 704-05 (10th Cir. 2009). Although the district court's decision is not afforded deference, BLM's decision must be: "Our inquiry under the APA must be thorough, but the standard of review is very deferential to the agency." Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers, 702 F.3d 1156, 1165 (10th Cir. 2012) (quotations omitted). "A presumption of validity attaches to the agency action and the burden of proof rests with" WWP. Morris v. U.S. Nuclear Regulatory Comm'n, 598 F.3d 677, 691 (10th Cir. 2010) (quotations omitted). Our deference is most pronounced in cases where, as here, the challenged decision involves "technical or scientific matters within the agency's area of expertise." Utah Envtl. Congress v. Bosworth, 443 F.3d 732, 739 (10th Cir. 2006). This deference means we may set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). … WWP illustrates its critique of BLM's Proposed Decision with this analogy: I want to increase my savings so I formulate two plans. In Plan A I will forgo a planned vacation, but continue eating lunch every day at Cafe Milano in downtown Tucson. In Plan

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		B I will forgo eating at Cafe Milano, but will go on vacation. I decide to adopt a Hybrid Plan that partakes of both: I will keep eating at Cafe Milano every day, and also go on vacation. Aplt. Br. at 53. Under this analogy, two alternative plans to save money are combined to create a hybrid plan that lacks the most effective features of either alternative and is therefore likely to be less successful in advancing the goal of saving money. But this analogy demonstrates a critical problem with WWP's argument: It calls into question the wisdom of BLM's Proposed Decision, but not whether BLM could predict its effects. As we explain above, the relevant question is whether the impact of the Proposed Decision can be reasonably predicted from the EA's analysis, not whether it is the best possible decision. See State of New Mexico, 565 F.3d at 707. NEPA "merely prohibits uninformed—rather than unwise—agency action." Id. at 704 (quotations omitted). Moreover, even though the Proposed Decision omits environmentally protective features from Alternatives One and Two, it nevertheless adds other features that are more environmentally protective than historical practice—features that were analyzed in the EA, such as fencing, herding, rest rotation, and fewer grazing days. Our review of the EA and the Proposed Decision indicates that BLM analyzed the various components of the plan sufficiently to meet NEPA's hard look requirement and did not act arbitrarily or capriciously.
***Montana Wilderness Association v. Connell*, 725 F.3d 988 (9th Cir. 2013)** **See also, *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013), above**	DOI/BLM	**AGENCY PREVAILED –** In this second challenge to BLM's Resource Management Plan for the Upper Missouri River Breaks National Monument (see Western Watersheds Project v. Abbey, 719 F.3d 1035 (9th Cir. 2013), above), the court of appeals held that BLM had complied with the Federal Land Policy and Management Act and NEPA, but had violated the National Historic Preservation Act by failing to conduct Class III surveys with respect to roads, ways, and airstrips that have not been the subject of such surveys. In accordance with the Antiquities Act, President Clinton designated the 375,000-acre area as a national monument in 2001 (Proclamation No. 7398). The Monument was established for the purpose of protecting big horn sheep, essential winter range for sage grouse; habitat for prairie dogs; one of the few remaining fully functioning cottonwood gallery forest ecosystems on the Northern Plains; large concentrations of antelope and mule deer; spawning habitat for the endangered pallid sturgeon; perching and nesting habitats for hawks, falcons and eagles; habitat for great blue heron, pelican and a wide variety of waterfowl; habitat for 48 fish species; archeological and historical sites, from teepee rings and remnants of historic trails to abandoned homesteads and lookout sites used by Meriwether Lewis; and remnants of a rich Native American and pioneer history scattered throughout the Monument. With respect to the NEPA claims, the court held (all text from the decision): Here, MWA argues that BLM failed to take a hard look at cumulative effects by neglecting to analyze how a host of activities authorized by the RMP (including six airstrips, over 400 miles of roads and jet boats), in conjunction with grandparented activities already occurring in the Monument (especially oil and gas development and livestock grazing), may cumulatively impact objects of the Monument, including (1) the "most viable" elk herd in Montana; (2) one of the "premier" big horn sheep herds in the continental United States; and (3) the Upper Missouri National Wild and Scenic River (UMNWSR). At the most basic level, MWA faults the FEIS because it does not include sections devoted exclusively to cumulative impacts on elk, bighorn sheep and opportunities for solitude in the UMNWSR. MWA properly points out that a NEPA analysis should be informed by the laws driving the federal action being reviewed. See Or. Natural Desert Ass'n v. BLM,625 F.3d

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		1092, 1109 (9th Cir. 2010) ("[B]ecause 'NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,' the considerations made relevant by the substantive statute driving the proposed action must be addressed in NEPA analysis." (citation omitted) (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978))). The Proclamation and the Antiquities Act focus on the protection of "objects," so MWA suggests that the FEIS should have included sections – including cumulative impact analyses – devoted to each of the Monument's objects. An agency, however, has discretion in deciding how to organize and present information in an EIS. See League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008) (holding that an agency "is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate. It is not for this court to tell the [agency] what specific evidence to include, nor how specifically to present it."). Here, BLM structured the FEIS around specific subjects – air quality; cultural resources; fish and wildlife; geology and paleontology; soils; vegetation; visual resources; water; forest resources; lands and realty; livestock grazing; oil and gas; recreation; transportation; fire management; wilderness study areas; social conditions; and economic conditions – rather than around the objects of the Monument. Although the FEIS does not include sections devoted exclusively to elk, bighorn sheep, the UMNWSR and other objects of the Monument, the FEIS discusses these objects throughout. Bighorn sheep, for example, are discussed not only in the section addressing impacts on fish and wildlife, but also in the sections on livestock grazing, oil and gas, transportation, social conditions and economic conditions. BLM's decision to structure the FEIS in this fashion was within the agency's discretion. Whether BLM complied with NEPA thus turns on the substance of the FEIS rather than its form: the question boils down to whether BLM took a hard look at impacts on the UMNWSR, elk and bighorn sheep. We conclude that BLM did so.
***WildEarth Guardians et al. v. Jewell, et al.*, ___ F.3d ___ (D.C. Cir. 2013)**	DOI/BLM	**AGENCY PREVAILED -** Antelope Coal LLC (Antelope Coal) filed an application with BLM requesting that a tract of federal land adjacent to Antelope Coal's existing mine in the Wyoming Powder River Basin be offered for competitive lease sale to interested parties. BLM prepared an EIS, which spans nearly five hundred pages and includes the BLM's responses to public comments on the draft EIS. The BLM solicited further public comment on the FEIS and issued written responses to the comments it received. On March 25, 2010, the BLM issued the ROD, approving Antelope Coal's application and dividing the land into two tracts (the West Antelope II tracts), each to be offered for lease by competitive bidding. Antelope Coal won the bidding for both leases and the leases became effective in 2011. Plaintiffs challenged BLM's decision to approve the West Antelope II tracts for lease, arguing that the FEIS and ROD were deficient in several respects. The district court granted summary judgment to the defendants, finding that the plaintiffs lacked standing to raise one of their arguments and that their remaining arguments failed on the merits. The court of appeals concluded that, while plaintiffs did have standing, their merits arguments fall short. Accordingly, the court affirmed the judgment of the district court. In its decision on the NEPA issues, the court stated (all text from the decision): We apply the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., to the merits of the Appellants' NEPA and FLPMA challenges and review de novo the district court's grant of summary judgment. Theodore Roosevelt I, 616 F.3d at 507; Nevada v. Dep't of Energy, 457 F.3d 78, 87 (D.C. Cir. 2006); see 5 U.S.C.§

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		706(2)(A). In doing so, we are mindful that our role is not to" 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." Nevada, 457 F.3d at93. Rather, it is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." City of Olmsted Falls, Ohio v. FAA, 292 F.3d 261, 269 (D.C. Cir. 2002) (quoting Balt. Gas & Elec., 462 U.S. at 97–98). In short, "an agency must take a 'hard look' at the environmental effects of its proposed action." Theodore Roosevelt Conservation P'ship v. Salazar (Theodore Roosevelt II), 661 F.3d 66, 75 (D.C. Cir. 2011); accord Balt. Gas & Elec., 462 U.S. at 97. While the Appellants raise numerous challenges to the sufficiency of the FEIS, we find none has merit and consider only two worthy of discussion. We turn first to the Appellants' argument that the BLM did not take a hard look at the effect of its leasing decision on global climate change. In the FEIS, the BLM discussed at length the prevailing scientific consensus on global climate change and coal mining's contribution to it. The BLM estimated the greenhouse gas (GHG) emissions that occurred at the Antelope Mine in 2007 and projected emissions for a typical year of operations if the West Antelope II tracts are also leased. It projected that, with the addition of the West Antelope II tracts, Antelope Mine would account for only .63 per cent of state-wide emissions of carbon dioxide equivalent (CO2e). At the same time, the BLM noted that several factors made any projection about future emissions speculative. First, the BLM does not authorize mining through the issuance of a coal lease; rather, a mining permit must be obtained from the Wyoming Department of Environmental Quality with oversight from an independent federal agency, the Office of Surface Mining, and therefore mitigation measures can be imposed at a later stage. … The BLM further assumed that mining would continue at existing production rates and the coal would continue to be used to generate electricity by coal-fired power plants. Finally, the BLM identified considerable uncertainty about regulatory and technological developments that could affect future emissions. The Appellants allege several inadequacies in the BLM analysis but they are of the flyspecking variety. … Next we consider the Appellants' argument that the BLM failed to take a hard look at the effect the lease developments would have on local ozone levels. … In the FEIS, the BLM noted that the area around the West Antelope II tracts is in attainment—i.e., in compliance with NAAQS—for all pollutants. … The BLM projected that by 2010 emissions of NO2 would remain well below NAAQS; further, the FEIS included an extensive discussion of the current and projected emissions of NOx and NO2. … The projection of NO2 emissions was based on modeling done for the Powder River Basin Coal Review, "a regional technical study . . . to help evaluate the cumulative impacts of coal and other mineral development in the PRB." … No separate projection, however, was made for ozone. As the BLM explained, it addressed ozone in its discussion of NOx emissions because NOx is one of the main ingredients in the formation of ground level ozone and NO2, in turn, is a type of NOx. The BLM also noted that further modeling would be done at the permitting stage to ensure compliance with state and federal air quality standards. … We conclude that the BLM satisfied its obligations under NEPA. " 'The NEPA process involves an almost endless series of judgment calls,' and 'the line-drawing decisions necessitated by the NEPA process are vested in the agencies, not the courts.' " Duncan's Point Lot Owners Ass'n, Inc. v. FERC, 522 F.3d 371, 376 (D.C. Cir. 2008) (quoting Coal. On Sensible Transp., Inc. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987)) (alterations omitted). It may have been possible or even prudent for the BLM to separately model future ozone levels but we think that, given the limitations on such modeling and the critical role NOx plays in ozone formation, the BLM's projections and extensive discussion of NOx and NO2

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		emissions suffice.
***WildEarth Guardians v. National Park Service*, 703 F.3d 1178 (10th Cir. 2013)**	DOI/NPS	**AGENCY PREVAILED -** This appeal concerns WildEarth Guardians' challenge to NPS' elk and vegetation management plan for Rocky Mountain National Park (RMNP), established in 1915. The Rocky Mountain National Park Enabling Act (RMNP Act) bans hunting or killing wildlife within the park, with very limited exceptions. The park has always had a substantial elk population. But most elk predators, especially wolves and grizzly bears, were exterminated in the park area prior to its establishment, and Congress's decision to ban hunting in RMNP allowed the park's elk population to grow without constraint. In April 2006, NPS released a draft EIS that considered five alternative elk and vegetation management plans: (1) the current plan (the no-action alternative); (2) rapid reduction of the elk population, which the agency identified as its preferred alternative; (3) gradual reduction of the elk population; (4) a combination of managed killing and elk contraception; and (5) a combination of managed killing and the reintroduction of a small number of intensively managed gray wolves. A final EIS was prepared in 2007. WildEarth challenged the final EIS, contending the NPS violated NEPA by failing to include the reintroduction of a naturally reproducing wolf population as one of the alternatives considered in the EIS. The court found that the record supports the agency's decision to exclude consideration of a natural wolf alternative from its EIS (all text from the decision): WildEarth's sole NEPA claim is that the NPS deviated from NEPA's required procedure by declining to consider the natural wolf alternative in its environmental impact statement. WildEarth argues the wolf alternative fit the purpose and need of the proposed action, and thus required the NPS to consider it in an EIS. Agencies must consider alternatives to any project that might have a significant effect on the quality of the human environment. 42 U.S.C. § 4332(2)(C)(iii). But agencies need not consider every possible alternative to a proposed action, only "reasonable" alternatives. 40 C.F.R. § 1502.14(a); New Mexico, 565 F.3d at 703. A "rule of reason" applies to an agency's decision to prepare an EIS, as well as the agency's choice of alternatives to include in its analysis. DOT v. Public Citizen, 541 U.S. 752, 767 (2004). In other words, agencies are not required to consider alternatives they have "in good faith rejected as too remote, speculative, or . . . impractical or ineffective." Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1039 (10th Cir. 2001). "Alternatives that do not accomplish the purpose of an action are not reasonable, and need not be studied in detail by the agency." Citizens' Comm. To Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1031 (10th Cir. 2002) (internal quotation and citation omitted). Agencies must "briefly discuss the reasons" for eliminating unreasonable alternatives from an EIS. 40 C.F.R. § 1502.14(a). WildEarth acknowledges that NEPA does not require an agency to consider impractical alternatives, but it argues the natural wolf alternative was practical. In particular, WildEarth points to studies, emails, and other documents in the record discussing the benefits of this alternative. …While the record supports some benefits to a natural wolf option, that is not what guides us. What guides us is a rule of reason, where the agency explains its decision to take certain proposed options off the table because of a lack of practicality. The NPS did that here. The agency found the natural wolf alternative would be impractical despite some marginal upside, and the record supports that decision.

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***International Brotherhood of Teamsters v. U.S. Department of Transportation*, ___ F.3d. ___ (D.C. Cir. 2013)**	DOT	**AGENCY PREVAILED -** Pursuant to statute, the Federal Motor Carrier Safety Administration authorized a pilot program that allows Mexico-domiciled trucking companies to operate trucks throughout the United States, so long as the trucking companies comply with certain federal safety standards. Two groups representing American truck drivers, the Owner–Operator Independent Drivers Association and the International Brotherhood of Teamsters, contend that the pilot program is unlawful. In denying the plaintiffs' petition for review and holding for the federal agency, the court held (all text from the decision): [T]he Teamsters contend that the agency violated the National Environmental Policy Act, which requires agencies to analyze the environmental impact of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). In this case, the Act required the agency to prepare a document called an Environmental Assessment. See 40 C.F.R. § 1501.4(b). The agency did so. In Department of Transportation v. Public Citizen, the Supreme Court held that the agency was not responsible under NEPA for evaluating the environmental effects of the President's decision to allow Mexican trucks on U.S. roads. See 541 U.S. 752, 765–70 (2004). The Teamsters accept that holding. But they try to argue that the agency still had discretion to restrict the pilot program so as to mitigate the environmental impacts. The Teamsters identified several alternatives the agency should have pursued. But, as the agency has explained, the short and dispositive answer to the Teamsters' argument is that the agency lacks authority to impose the alternatives proposed by the Teamsters and those alternatives would go beyond the scope of the pilot program. See Final Environmental Assessment of the Pilot Program on NAFTA Long–Haul Trucking Provisions, Docket No. FMCSA–2011–0097, at 6, 7–10 (Sept.2011) (describing agency's discretion and rejecting alternatives the agency lacks discretion to implement). In addition, the Teamsters contend that the agency released its environmental analysis too late. An agency's analysis must be released "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). The Teamsters argue that the agency violated this requirement because it published its Environmental Assessment after it had already issued a final notice of intent to proceed with the pilot program. However, the Teamsters have not identified any aspect of the pilot program that the agency could have designed differently to reduce the environmental impacts, and the agency completed its Environmental Assessment before authorizing any Mexico-domiciled trucking companies to operate under the program. Any technical error was therefore harmless and not grounds for vacating or remanding. See Nevada v. Department of Energy, 457 F .3d 78, 90 (D.C.Cir.2006).
***Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013)**	STB	**AGENCY PREVAILED –** The case involved STB's decision authorizing Alaska Railroad Corporation (ARRC) to construct about thirty-five miles of new rail line between Port MacKenzie, located in Alaska's Cook Inlet, and the railroad's main line, located near Wasilla, Alaska. Plaintiffs challenged, among other things, STB's compliance with NEPA. With respect to the NEPA claim, the court held (all text from the decision): Petitioners raise a second issue of whether the STB's EIS complied with NEPA. They contend that the STB violated NEPA by adopting an unreasonable purpose and need statement, refusing to consider an alternative route without an access road, and inadequately assessing the project's adverse effect on wetlands. We disagree. 1. Purpose and Need Statement

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		Petitioners argue that the STB erred by adopting a purpose and need statement focused exclusively on the goals stated by ARRC. They contend that the STB did not take into consideration public goals when defining the purpose and need. Respondents assert that the purpose and need statement properly focused on both the STB's enabling statute and ARRC's goals. We agree with Respondents, and we hold that the STB did not act arbitrarily or capriciously by generating the purpose and need statement based on the statutory context and ARRC's objectives. A statement of purpose and need must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13 (2012). Courts review purpose and need statements for reasonableness giving the agency considerable discretion to define a project's purpose and need. Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 866 (9th Cir.2004). A purpose and need statement will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained. See NPCA, 606 F.3d at 1070. "Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS." Westlands Water Dist., 376 F.3d at 866. An agency must look hard at the factors relevant to definition of purpose, which can include private goals, especially when the agency is determining whether to issue a permit or license. NPCA, 606 F.3d at 1070–71. Petitioners contend that the STB failed to articulate a purpose and need that reflected the agency's perspective. They argue that STB erred when it adopted ARRC's asserted goals without considering the "public convenience and necessity" under § 10901. Petitioners are correct that an agency must consider the statutory context of the proposed action and any other congressional directives in addition to a private applicant's objectives. NPCA, 606 F.3d at 1070; see also League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1070 (9th Cir.2012) (considering statutory context to determine reasonableness of purpose and need statement). But when granting a license or permit, the agency has discretion to determine the best way to implement its statutory objectives, see Westlands Water Dist., 376 F.3d at 867, in light of the goals stated by the applicant, see Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C.Cir.1991) ("Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be."). We must consider whether the purpose and need statement is reasonable in light of the ARRC's stated goals and the statutory context of the ICCTA. See NPCA, 606 F.3d at 107 … Next, Petitioners argue that by "thoughtlessly adopt[ing]" ARRC's narrow goals, the STB considered an impermissibly narrow range of alternatives. But Petitioners do not show that the STB's adoption of ARRC's goals led the agency to consider a too limited range of alternatives. They do not demonstrate that the purpose and need statement resulted in the agency's failure to consider a non-access-road alternative nor do they point to any other deficiency in the alternatives considered in the FEIS. See Westlands Water Dist., 376 F.3d at 867–68 (reversing the district court's finding that the purpose and need statement was unreasonable when the statement did not improperly foreclose consideration of alternatives). The FEIS considered twelve build alternatives and one no-action alternative. The range of alternatives considered was sufficient to satisfy both the private and public objectives underlying the purpose of the project and to enable the STB to make an informed decision to grant the exemption. See City of Angoon v. Hodel, 803 F.2d 1016, 1022 (9th Cir.1986) (concluding that the EIS was adequate when the alternatives discussed enabled the agency to

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		make an informed decision). 2. No–Access–Road Alternative Petitioners contend that the STB impermissibly refused to consider an alternative rail design without a full-length access road adjacent to the rail line. They assert that a no-access-road alternative was a viable and reasonable option that should have been examined in the EIS. Respondents assert that the STB properly determined that a no-access-road alternative was not reasonable because an access road is necessary for modern rail line construction and maintenance. We conclude that the STB complied with NEPA when it determined that a no-access-road alternative was not feasible. NEPA requires an EIS to describe and analyze "every reasonable alternative within the range dictated by the nature and scope of the proposal." Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir.1998). Consideration of alternatives "is the heart of the [EIS]," and agencies should "[r]igorously explore and objectively evaluate all reasonable alternatives" that relate to the purposes of the project and briefly discuss the reasons for eliminating any alternatives from detailed study. 40 C.F.R. § 1502.14 (2012); see also Se. Alaska Conservation Council v. Fed. Highway Admin., 649 F.3d 1050, 1056 (9th Cir.2011). "The [EIS] need not consider an infinite range of alternatives, only reasonable or feasible ones." Carmel–By–The–Sea, 123 F.3d at 1155. But failure to examine a reasonable alternative renders an EIS inadequate. Friends of Southeast's Future, 153 F.3d at 1065. Those challenging the failure to consider an alternative have a duty to show that the alternative is viable. City of Angoon, 803 F.3d at 1021–22. We perceive several flaws in Petitioners' contention that the agency acted arbitrarily and capriciously by refusing to consider a no-access-road alternative. First, Petitioners merely contend but do not show that a no-access-road alternative is a feasible option that should have been considered by the STB. Id. Such an allegation begs the question of whether a no-access-road alternative is a feasible option. How could a railroad line effectively be built through rugged and undeveloped terrain without an access road for equipment and moving of supplies and personnel? Would a temporary access road cause more environmental harm in the Susitna wetlands than a permanent one? Without evidence to the contrary, we defer to the STB's technical expertise regarding modern railroad construction. See NPRC, 668 F.3d at 1075. Second, Petitioners rely heavily on EPA's comments expressing concern about the need for an access road. They seem to argue that because the EPA called the necessity of an access road into question, the STB is obligated to consider a no-access-road alternative based on NEPA's mandate that STB consult with other agencies. They further contend that the concerns raised by the EPA and other agencies should reduce the deference we afford to the STB. But a lead agency does not violate NEPA when it does not defer to the concerns of other agencies. Akiak Native Cmty. v. U.S. Postal Serv., 213 F.3d 1140, 1146 (9th Cir.2000). All that NEPA requires is that the lead agency consider these concerns and explain why it finds them unpersuasive. Id. The STB satisfied that burden here. Not only did the STB respond to EPA's concerns in the FEIS, it also addressed these concerns in its EM. We conclude that there is no error in STB's reliance on ARRC's explanation of modern railroad construction and maintenance practices to answer the EPA's concerns. It was reasonable for the STB to gather information about rail construction from the entity that will build the rail line. Moreover, Petitioners cite no case law for their assertion that we should not give deference to the STB's decision. We conclude that STB did not act arbitrarily or capriciously in declining to consider the no-access-road alternative.

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		3. Wetlands Delineation and Mitigation Lastly, Petitioners contend that the STB relied on improper methodology for its wetlands delineation. Petitioners further argue that the EIS did not provide sufficient detail about the wetlands impacts of the rail line, leading to insufficient discussion of mitigation measures. Respondents counter that they employed accepted wetland-delineation methodology that yielded detailed information and that the discussion of wetlands mitigation in the FEIS was sufficient under NEPA. We agree with Respondents. An EIS must contain a "reasonably complete discussion of possible mitigation measures." Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th Cir.2000) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)). "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.' " Carmel–By–The–Sea, 123 F.3d at 1154 (quoting Robertson, 490 U.S. at 352). Perfunctory descriptions or mere lists of mitigation measures are insufficient. Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir.1998). Petitioners take issue with the STB's use of "rapid assessment" survey methods, aerial photography, and computer generated information system data. They point to comments from both the National Marine Fisheries Service (NMFS) and the EPA that called for site-specific examinations. Although we have held that the use of stale data based on aerial surveys does not constitute a "hard look" under NEPA, NPRC, 668 F.3d at 1086–87, we are not convinced that the STB's chosen methodology was deficient. Petitioners point to no evidence that the data was stale. Nor do they demonstrate how the methodology employed led to insufficient data on which to base mitigation measures. The record shows that the methodology used for wetlands delineation was performed in accordance with the Army Corps of Engineers' delineation manual. Although NMFS and EPA expressed concern with the wetlands delineation and the information on the functions of wetlands, the record does not show that the STB's reliance on this methodology was arbitrary and capricious. It is not the role of this court "to decide whether an [EIS] is based on the best scientific methodology available." McNair, 537 F.3d at 1003 (internal quotations omitted) (alterations in original). As long as the agency engages in a "reasonably thorough discussion," we do not require unanimity of opinion among agencies. Carmel–By–The–Sea, 123 F.3d at 1151 (internal quotations omitted). Petitioners contend that the STB's analysis of wetland-damage mitigation is too cursory to meet NEPA's "hard look" requirement. They argue that the STB did not consider bridging streams and elevating track to minimize the need for filling of streams and wetlands as urged by the EPA. The STB responded to the EPA's concerns by explaining that the prohibitively high cost of constructing an elevated track makes it infeasible and discussing in the FEIS the positive and negative environmental impacts of bridges and culverts. The EM further addressed the EPA's concerns by reiterating the high costs of elevated track and noting that the EPA did not present any evidence that an elevated track was feasible. Petitioners likewise present no evidence of the feasibility of the elevated track. We cannot say that failure to consider this alternative is improper without evidence showing the feasibility of the alternative. City of Angoon, 803 F.3d at 1021–22. Further, although we give special weight to criticism from other federal agencies, see Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1122 (9th Cir.2004), the EPA's criticisms alone are not sufficient to invalidate the discussion of environmental impacts and mitigation measures that is found in the record. See Carmel–By–The–Sea, 123 F.3d at 1154–55.

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		Petitioners further argue that the STB impermissibly referred to mitigation measures as a "future prospect" to be handled by ARRC. NEPA does not require the finalization or adoption of mitigation measures but mandates only that the agency engage in a "reasonably thorough" discussion of mitigation. Carmel–By–The–Sea, 123 F.3d at 1151, 1154. The FEIS contains a lengthy discussion of measures to mitigate impacts on water resources, which includes removing debris from wetlands as soon as practicable and constructing the railroad to maintain natural water flows by installing bridges or using equalization culverts. Further, the STB's authorization of the exemption was conditional to ARRC's adoption of one hundred mitigation measures, including ensuring that bridges and culverts are designed and maintained in accordance with NMFS guidance and implementing best management practices to be imposed by the Army Corps of Engineers under the Clean Water Act § 404 permit, which ARRC must obtain before construction. Nothing about the discussion of mitigation measures is perfunctory. And we see no error in the STB's reliance on § 404's substantive requirements as mitigation measures when the agency otherwise complied with NEPA's requirement of a reasonably thorough analysis. See Carmel–By–The–Sea, 123 F.3d at 1152.

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***Beyond Nuclear v. U.S. Nuclear Regulatory Commission*, __ F3. ___ (1st Cir. 2013)**	USNRC	**AGENCY PREVAILED –** NextEra, operator of the Seabrook Nuclear Power Plant in New Hampshire, applied on May 25, 2010, to renew the Seabrook operating license, which will otherwise expire on March 15, 2030. With its application, NextEra submitted an environmental report. That report discussed the feasibility of alternative sources of electric energy. As part of the licensing process, NRC issued a decision denying the admission of a contention by Beyond Nuclear, the New Hampshire Sierra Club, and the Seacoast Anti–Pollution League (collectively "BN"), which questioned and sought a hearing on the conclusion in the environmental report by NextEra that offshore wind electric generation was not a reasonable alternative to the extended licensing of Seabrook. NRC's denial of admission of a contention meant that BN was not entitled to have a hearing on the merits about their contention that generation of electricity from offshore wind was a reasonable alternative source of baseload energy to the relicensing of Seabrook. NextEra's environmental report, among other things, addressed four alternative sources of energy to renewing Seabrook's license that it deemed viable, reasonable alternatives: natural gas-fired generation; coal-fired generation; a new nuclear plant; and power purchases. The report also discussed wind power, of which NextEra is the leading generator in North America, but concluded it was not a reasonable alternative as a source of baseload electricity during the relevant period of time. It is on that point that petitioners sought a full hearing before the Commission. The environmental report stated that "[f]or the purposes of this environmental report, alternative generating technologies were evaluated to identify candidate technologies that would be capable of replacing Seabrook Station's nominal net base-load capacity of 1,245 MWe," and that it "accounted for the fact that Seabrook Station is a base-load generator and that any feasible alternative to Seabrook Station would also need to be able to generate base-load power." Thus, any reasonable alternative would need to generate baseload power. NextEra's report relied on the NRC's Generic Environmental Impact Statement for the proposition that wind power is not suitable for baseload generation because of its intermittent nature. That intermittent nature meant that there had to be energy storage mechanisms. Energy storage mechanisms are too expensive to resolve the problem of intermittency and the technology for the generation of offshore wind energy is "not sufficiently demonstrated at this time." NRC correctly stated the standard for admission of a contention under NRC's rules of practice—that a petitioner must present "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." That meant NextEra's environmental report only needed to consider (1) baseload-power alternatives, not non-baseload alternatives, and (2) only such alternatives "likely to exist" during the renewal period. The Commission explained that, because of the difficulty inherent in predicting the viability of technologies decades in advance, in most cases reasonable alternatives are those that are "currently commercially viable, or will become so in the relatively near term." In finding for the agency, the court held (all text from the decision; footnotes omitted): BN suggests that by requiring an alternative energy source to provide baseload power, the NRC defined the objectives of the proposed actions so narrowly that it engaged in "outcome-controlled rigging." See Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C.Cir.1991) (stating agency cannot make objectives so narrow that outcome is a "foreordained formality"). That is not the case, for reasons both of law and common sense. NEPA requires only

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		consideration of reasonable alternatives. See, e.g., Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 837 (D.C.Cir.1972). That means "the concept of alternatives must be bounded by some notion of feasibility," Vt. Yankee, 435 U.S. at 551, which includes alternatives that are "technically and economically practical or feasible," Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 69 (D.C.Cir.2011) (quoting 43 C.F.R. § 46.420(b)) (internal quotation marks omitted). Moreover, an agency need only consider alternatives that will "bring about the ends" of the proposed action, Busey, 938 F.2d at 195, and where the agency is not itself the project's sponsor, "consideration of alternatives may accord substantial weight to the preferences of the applicant," City of Grapevine v. Dep't of Transp., 17 F.3d 1502, 1506 (D.C.Cir.1994) (quoting Busey, 938 F.2d at 197–98) (internal quotation mark omitted). NextEra operates a baseload power generator at Seabrook, and despite BN's "outcome-controlled rigging" argument, BN's own brief concedes it was "permissible" for the NRC to consider the goal of providing baseload electrical power. Thus, BN does not challenge the NRC's decision, in considering the feasibility of an alternative energy source, to focus on whether such an alternative source could supply baseload power. Cf. Envtl. Law & Policy Ctr. v. NRC, 470 F.3d 676, 684 (7th Cir.2006) (upholding baseload generation as appropriate goal). BN then attempts an argument that the NRC was required to consider what alternatives might look like in forty years time. Not so. Here again the NRC has taken a sensible course. The NRC stated that "[a]ssessments of future energy alternatives necessarily are of a predictive nature," and that "the applicant—and the agency—are limited by the information that is reasonably available in preparing the environmental review documents ." Because of the inherent difficulty in predicting decades in advance the viability of technologies not currently operational and years away from large-scale development, "in most cases a 'reasonable' energy alternative is one that is currently commercially viable, or will become so in the relatively near term." The NRC acknowledged the need for prediction, and made a rational decision that in most instances the best predictor of viability of an alternative in the distant future is the near term viability of the alternative. It did so in compliance with the law. The duty under NEPA is to "study all alternatives that 'appear reasonable and appropriate for study at the time' of drafting the EIS." Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1047 (1st Cir.1982) (quoting Seacoast Anti–Pollution League v. NRC, 598 F.2d 1221, 1228 (1st Cir.1979)).10 Forecasting should be based on "existing technology and those developments which can be extrapolated from it." Natural Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 639–40 (D.C.Cir.1976), rev'd on other grounds, Vt. Yankee, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460.11 This aspect of the NRC's framework does provide a "hard look" at alternatives. Substantial deference is required when an agency adopts reasonable interpretations of its own regulations, and we must accept the agency's position unless it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)) (internal quotation marks omitted). Because the NRC's elaboration of its admissibility standard was generally reasonable and consistent with both 10 C.F.R. § 2.309(f)(1)(vi) and NEPA, BN's challenge to the standard fails.

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***Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (1st Cir. 2013)** **See also, *Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (D.C. Cir. 2013), below**	USNRC	**AGENCY PREVAILED -** NRC rejected the Commonwealth's claims that the environmental findings in the EIS prepared under NEPA were inadequate in light of the damage to the Fukushima Daiichi ("Fukushima") nuclear power plant in Japan in March of 2011. The Commonwealth argues that the Commission's failure to file a supplemental analysis on the environmental impacts of relicensing in light of purported new and significant information learned from Fukushima violated its obligations under NEPA and NRC regulations. The NEPA claims made by Massachusetts to the NRC go to whether, in light of Fukushima, the EIS was adequate in its environmental assessments of: (1) spent fuel pool fires; and (2) core damage events. The court of appeals denied the Commonwealth's petition for review of the NRC decision (all text from the decision): NEPA's EIS requirement serves two purposes. First, "it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)) (internal quotation marks omitted). Second, it provides assurance that the agency will inform the public that it has considered environmental concerns in its decisionmaking process. Id. (citing Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 143, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981)). Put differently, NEPA seeks to guarantee process, not specific outcomes. Town of Winthrop v. FAA, 535 F.3d 1, 4 (1st Cir.2008). In short, NEPA requires the agency to take a "hard look" at the environmental consequences of a major federal action. Balt. Gas & Elec. Co., 462 U.S. at 97, 103 S.Ct. 2246. It is significant to this petition that the NRC assesses environmental impacts through two different procedures. One, for site-specific impacts, is done in the course of the individual plant relicensing. The other, for impacts that are generic to all plants of a particular type, is done through rulemaking rather than individual licensing proceedings. The Commonwealth confuses the two, and attempts to raise in the petition seeking review of the relicensing issues which both belong in generic rulemaking, see Massachusetts v. United States, 522 F.3d 115, 127 (1st Cir.2008) (environmental impacts of spent fuel pools dealt with through rulemaking), and are in fact being addressed in that rulemaking. As to relicensing, the NRC requires an applicant to submit an environmental report with its relicensing application. 10 C.F.R. § 51.53(c)(1). That was done here in 2006. The report for a license renewal must analyze the environmental impacts of the proposed action and include a severe accident mitigation alternatives ("SAMA") analysis. Id. § 51.53(c)(3)(ii)(L). The SAMA analysis, in the most basic sense, is a cost-benefit analysis that addresses whether the expense of implementing a mitigation measure not mandated by the NRC is outweighed by the expected reduction in environmental cost it would provide in a core damage event.5 See Duke Energy Corp., 56 N.R.C. 1, 7–8 (2002) ("Whether a SAMA may be worthwhile to implement is based upon a cost-benefit analysis—a weighing of the cost to implement the SAMA with the reduction in risks to public health, occupational health, offsite and onsite property."). … Going back to these relicensing proceedings, in certain instances where an EIS has been prepared, and the relicensing has not yet occurred, the emergence of new information will require federal agencies to supplement an EIS. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 372–73, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). Even so, to ensure that the agency decisionmaking process is not delayed unnecessarily, supplementation of the EIS is not

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		required every time new information arises. Id. at 373, 109 S.Ct. 1851. Rather, a supplemental EIS only need be prepared if there are "significant new circumstances or information." Town of Winthrop, 535 F.3d at 7 (quoting 40 C.F.R. § 1502.9(c)(1)) (emphasis omitted); see also 10 C.F.R. § 51.92(a)(2) (requiring final EIS be supplemented with "new and significant" information). That means new information must "paint[ ] a dramatically different picture of impacts compared to the description of impacts in the EIS." Town of Winthrop, 535 F.3d at 12; see also Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir.1984) (supplementation required where new information "provides a seriously different picture of the environmental landscape"). Entergy's relicensing application included an environmental report containing a SAMA analysis. The analysis included scenarios dealing with complete loss of offsite power, various sorts of operator failures during core damage events, the possibility of hydrogen build up in a core damage event leading to an explosion, and the use of filtered vents. The environmental report did not address the environmental impacts of spent fuel pool accidents because the NRC had adopted a generic EIS on that issue. Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Comm'n, NUREG–1437, 1 Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Main Report (May 1996). … On June 2, 2011, slightly less than three months after Fukushima, Massachusetts moved to admit a contention and to reopen the Pilgrim record, arguing that Fukushima revealed new and significant information that the environmental impact analysis and SAMA analysis needed to address. The Commonwealth contended that Fukushima showed: (1) the likelihood of spent fuel pool accidents was higher than estimated in the existing EIS; and (2) the frequency of core-melt accidents was also higher than estimated in the existing EIS, and relatedly, in light of new information on a variety of matters concerning core damage events, certain mitigation measures that the SAMA analysis ignored or rejected might be cost-effective. … The record shows that the NRC gave a hard look to the information Massachusetts presented to it, and it engaged in reasoned decisionmaking in explaining why it refused to reopen the record and why it denied the contention. The NRC did not need to wait to grant the relicensing based on conjecture that additional information might arise in the future. Indeed, the NRC gave assurances that if such information did arise, and resulted in new requirements, those requirements would, under its normal procedures, be applied to Pilgrim. … In denying Massachusetts's waiver petition, the NRC permissibly reasoned that Massachusetts did not show that the spent fuel pool issues in its contention were unique to Pilgrim. Rather, they applied to all nuclear power plants and would be more appropriately handled through rulemaking. We add that onsite storage of spent fuel is one of the issues being considered in the Commission's post-Fukushima review of lessons learned, as the Commission itself has noted.

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Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission, **___ F.3d ___ (D.C. Cir. 2013)** **See also,** ***Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission,*** **___ F.3d ___ (1st Cir. 2013), above**	USNRC	**AGENCY PREVAILED -** This case arises from actions taken by NRC approving (1) an application by Southern Nuclear Operating Company ("Southern") for combined licenses to construct and operate new Units 3 and 4 of the Vogtle Nuclear Power Plant and (2) an application by Westinghouse Electric Company ("Westinghouse") for an amendment to its already-approved AP1000 reactor design on which the Vogtle application relied. In 2009, after a contested evidentiary hearing in which plaintiffs participated, NRC granted Southern an early site permit for Vogtle Units 3 and 4. In 2008, Southern applied for combined licenses. A second contested proceeding was held in which plaintiffs participated. The application for the early site permit was supported by an EIS; the application for combined licenses was supported by the initial EIS and an updated EIS. After the close of the combined-license hearing record, Petitioners sought to reopen the hearing to litigate contentions relating to the nuclear accident at the Fukushima Dai-ichi complex in Japan on March 11, 2011. In the wake of the Fukushima accident, NRC commissioned a Task Force to reevaluate nuclear safety regulations in the United States. After the Task Force recommendations were issued and approved by NRC, Petitioners pursued various actions to compel the agency to supplement its EIS and to delay any action on the combined license and AP1000 design rulemaking proceedings until after the agency had implemented the Task Force recommendations. Plaintiffs contended that Vogtle's EIS violated NEPA because it did not address allegedly new and significant environmental implications of the Task Force's recommendations after Fukushima. NRC ruled that plaintiffs' challenges were premature, that the agency's existing procedural mechanisms were sufficient to ensure licensees' compliance with not-yet-enacted regulatory safeguards, and that the licensing and rulemaking proceedings could continue without delay. In late 2011, NRC issued its rule approving the AP1000 amended design, and in 2012 it authorized issuance of the combined licenses. Plaintiffs then filed the petitions for review giving rise to this action. Petitioners raise three principal contentions for consideration by the court. First, Petitioners claim that NRC abused its discretion in refusing to reopen the hearing record in the Vogtle licensing proceeding. Second, plaintiffs assert that NRC unreasonably denied them a right to participate in a mandatory hearing at which NRC technical staff confirmed that the Fukushima accident had not presented new and significant information that would require a supplemental EIS for Vogtle. Finally, plaintiffs argue that NRC abused its discretion in approving the AP1000 reactor design without first supplementing the AP1000 EA that contained important information regarding "Severe Accident Mitigation Design Alternatives" applicable to Vogtle. The court found no merit in these contentions and denied the petitions for review. In its ruling, the court held (all text from the decision): Petitioners failed to indicate any environmental data that were not considered in the EIS. Because Petitioners failed to point to any specific shortcoming in the EIS, NRC reasonably found Petitioners' contentions insufficient to support a contested hearing. … Under NEPA, NRC is obligated to undertake a supplemental EIS only when presented with "substantial changes in the proposed action that are relevant to environmental concerns" or "new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" after the EIS is assembled. 10 C.F.R. § 51.92(a)(1)-(2); see also id. § 51.72(a)(1)-(2). "New and significant" information presents "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned." Hydro Res., Inc., 50 N.R.C. 3, 14 (1999); see also Marsh, 490 U.S.

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		at 374 (looking to "the value of the new information to the still pending decisionmaking process" and requiring a supplemental EIS only if the new information is sufficient to show environmental effects "in a significant manner or to a significant extent not already considered"). The determination as to whether information is either new or significant "requires a high level of technical expertise"; thus, we "defer to the informed discretion of the [Commission]." Marsh, 490 U.S. at 377. Petitioners contend that the Task Force recommendations give rise to an obligation to supplement the Vogtle EIS because the recommendations may alter NRC regulations in the years ahead. Thus, in Petitioners' view, the Vogtle licenses necessarily must be delayed until the recommendations are finalized. We rejected a similar line of reasoning in Union of Concerned Scientists: Information raised in the environmental reports does not amount to a new material "issue" simply because it adds marginal weight to the case of an opponent or a proponent of a license; the reports instead raise a new "issue" only when the argument itself (as distinct from its chances of success) was not apparent at the time of the application. Although the concepts of new issues and new evidence are analytically distinct, we recognize that in practice they can converge – the demarcation line may depend on how the "issue" is stated. Still, whether an actual new "issue" is raised is a matter for the NRC to determine in the first instance and is reviewed deferentially. 920 F.2d at 55. … In this case, NRC's original EIS for Vogtle considered precisely the types of harm that occurred as a result of the Fukushima accident. The EIS considered consequences and mitigation of severe accidents involving reactor core damage and the release of fission products. Without an explanation from Petitioners as to what specific "new and significant" environmental information NRC failed to consider, or what deficiency in the existing EIS it failed to rectify, NRC reasonably found that Petitioners' contentions did not warrant a contested hearing. Petitioners' attempts to rely on future safety concerns in lieu of present environmental risks do not create an obligation for further NEPA review.

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