



National Association of Environmental Professionals
Promoting Excellence in the Environmental Profession

Annual NEPA Report 2010
Of the
National Environmental Policy Act (NEPA) Working Group

Submitted to
NAEP Board of Directors

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This report reviews NEPA document submittals and statistics, NEPA litigation and agency procedures for calendar year 2010. 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.

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Introduction

January 1, 2010 marked the 40th anniversary of NEPA's enactment and was the start of a remarkable year that saw the issuance of new guidance from the President's Council on Environmental Quality (CEQ), debate on the proper use and implementation of NEPA following the Deepwater Horizon incident off the Gulf of Mexico and sweeping changes in the political landscape of the United States.

Despite the many changes occurring in the forty years since its enactment, NEPA has maintained its place as the foundation of the nation's environmental laws and as an integral component of our collective efforts to care for and preserve our natural resources. As President Obama stated in his Proclamation on the 40th anniversary:

NEPA elevated the role of environmental considerations in proposed Federal agency actions, and it remains the cornerstone of our Nation's modern environmental protections. On this anniversary, we celebrate this milestone in our Nation's rich history of conservation, and we renew our commitment to preserve our environment for the next generation.

President Barack Obama,
Proclamation on the Fortieth Anniversary of the
National Environmental Policy Act, 2010

This is the fourth National Association of Environmental Professionals (NAEP) National Environmental Policy Act (NEPA) Working Group Annual Report. The report provides a summary of activities conducted by the NEPA Working Group and of major NEPA-related issues of the past calendar year. Of particular note for 2010 was the issuance of new guidance from CEQ on categorical exclusions, mitigation and monitoring and greenhouse gas emissions². The NEPA Working Group also responded to CEQ's solicitation of comments for their Review of Minerals Management Service³ NEPA Procedures for Outer Continental Shelf Oil and Gas Exploration and Development. This annual report is prepared and published through the initiative and volunteer efforts of members of the NAEP NEPA Working Group.

The NEPA Working Group 2010 – Lisa Mahoney

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

During 2010, the NEPA Working Group has continued to be a valuable asset for the National Association of Environmental Professionals (NAEP) and has made great strides in our efforts to increase the visibility and influence of the Working Group in the national conversations and debates on NEPA. Through monthly telephone calls and email exchanges, the Working Group provides an open venue where senior NEPA experts and inexperienced NEPA practitioners alike come together for healthy dialogue about current events and the NEPA process. This report is an outgrowth of the Working Group and our focus on NEPA events through the reporting year.

²Greenhouse Gas Guidance is still in draft form as of April 15, 2011. The draft guidance is available at: http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf

³ Please see the Commentary article in this report for additional information about MMS and the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE)

The Working Group has continued the tradition of Battelle-sponsored monthly telephone conference calls. Our discussions address timely topics including participation in the NAEP Annual Conference, current events and NEPA Working Group initiatives such as the creation of this report. Most of all, our telephone conference calls improve communication and camaraderie among our members.

This year, with thanks to participating members, we engaged in numerous discussions surrounding the possible causes and problems associated with NEPA implementation for oil and gas leases in light of the Deepwater Horizon Oil Spill. We contributed to the national dialogue on this issue both through Working Group discussions and the submission of comments on CEQ's review of MMS NEPA Procedures for OCS Oil and Gas Exploration and Development. These efforts helped us to achieve our goal for 2010 of improving NAEP's visibility and role in national discussions on NEPA.

We've also created a draft list of NEPA Training Essentials for environmental professionals that will be presented at the annual conference. The goal of the NEPA Training Essentials initiative is to develop a list of vital competencies and skills that should be possessed by environmental professionals engaging in the NEPA process and to determine how training can be used to help build these skills. The Working Group undertook this initiative after identifying the need for a NEPA skills and competency benchmark. Nothing of this sort now exists. We look forward to presenting our preliminary version of the training essentials at this year's 2011 Conference and to the feedback we receive from NAEP members. Following the conference, the Working Group plans to refine the list of Training Essentials and produce a final product by the end of 2011. Specific details on the schedule and process for achieving this goal will be discussed during the panel presentation at the 2011 Conference.



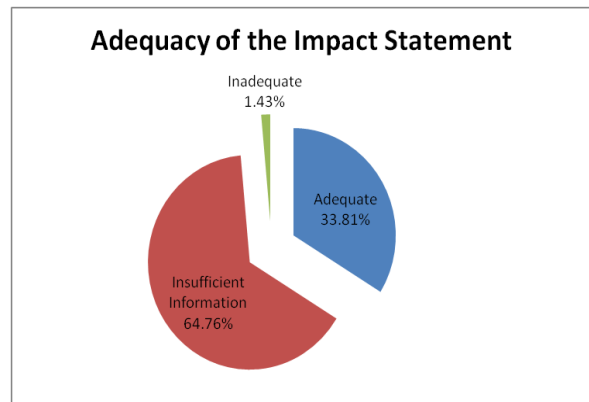
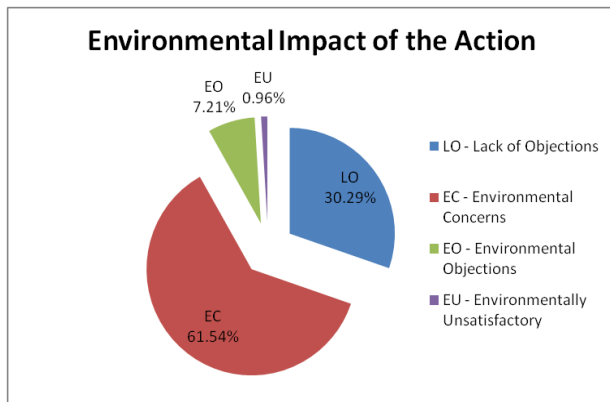
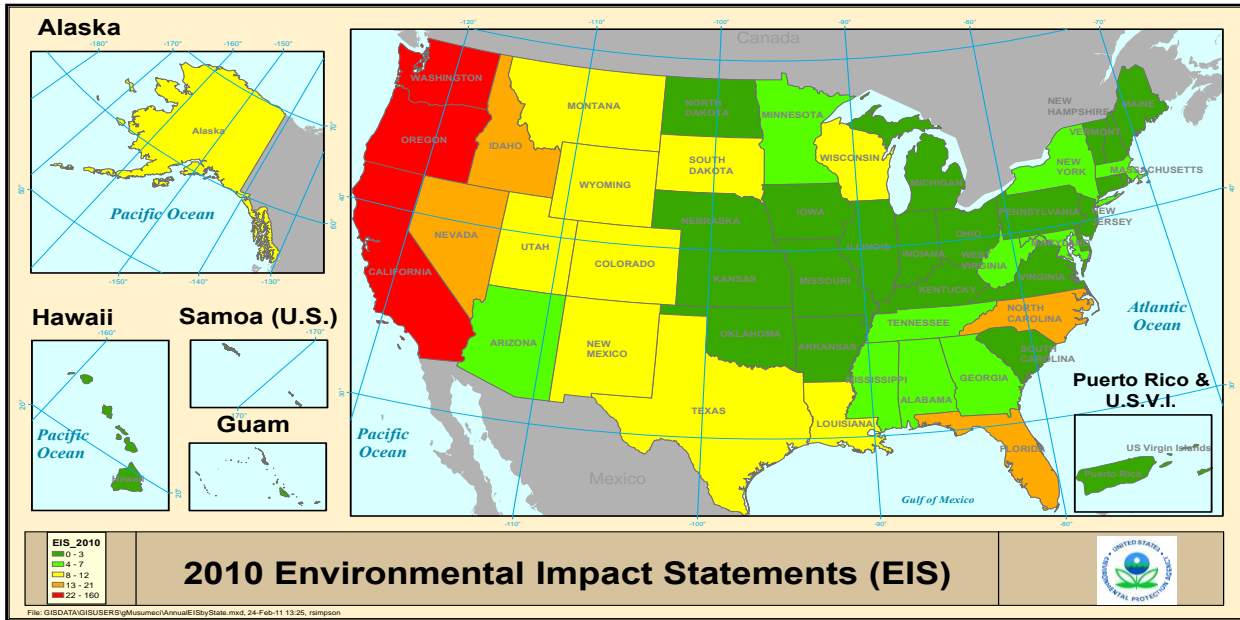
Just the Stats — Karen Vitulano and Grace Musumeci⁴

In 2010, announcements of 474 environmental impact statements (EISs) were published in the Federal Register. Thirteen agencies each prepared 10 or more documents; six agencies prepared 20 or more. Similar to previous years, the Forest Service provided the most with 104 and the next highest was the Federal Highway Administration with 56. Of the total, 243 were draft EISs and 231 were final EISs. The table and map on the following pages show NEPA documents filed in 2010 by agency and by State.

With regard to projects rated during 2010, 74 (30.3%) proposed projects had potential impacts rated LO (Lack of Objections) by the Environmental Protection Agency (EPA), 148 (60.7%) were rated EC (Environmental Concerns), 18 (7.4%) received an EO (Environmental Objections) rating, four (1.6%) were rated EU (Environmentally Unsatisfactory). Thirty five percent (86) of the documents were considered adequate, 63% (155) had insufficient information and 2% (5) were inadequate. See the Note Box on Page 6 for an explanation of EPA's ratings.

⁴ **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.

Lead Agency	Number of documents
U.S. Forest Service	104
Federal Highway Administration	56
Bureau of Land Management	55
U.S. Army Corps of Engineers	39
National Park Service	27
National Oceanic and Atmospheric Administration	21
Nuclear Regulatory Commission	19
Bureau of Reclamation	16
Federal Transit Administration	14
U.S. Fish and Wildlife Service (1 is co-lead with NOAA)	13
U.S. Navy	13
U.S. Army	10
U.S. Air Force	10
Bureau of Indian Affairs	9
Federal Energy Regulatory Commission	8
Department of Energy	6
Tennessee Valley Authority	6
Western Area Power Authority	6
Farm Service Agency	4
Bonneville Power Administration	3
Federal Rail Administration	3
General Services Administration	3
U.S. Coast Guard	3
Bureau of Prisons	2
Federal Aviation Administration	2
Housing and Urban Development	2
National Aeronautics and Space Administration	2
National Highway Traffic Safety Administration	2
National Security Agency	2
Rural Utilities Service	2
Surface Transportation Board	2
Animal & Plant Health Inspection Services	1
Bureau of Ocean Energy Management, Regulation and Enforcement	1
Department of State	1
Environmental Protection Agency	1
Federal Reserve Bank of San Francisco	1
International Boundary and Water Commission	1
National Capital Planning Commission	1
National Institutes of Health	1
National Science Foundation	1
The Presidio Trust	1
TOTAL	474



Projects that received a rating of either “EU” or “3” were actions by the Navy (1), Army Corps of Engineers (3), Nuclear Regulatory Commission (3), Bureau of Land Management (1) and the Department of State (1). Three of the projects were proposed in Wyoming; and one each in Minnesota, Texas, Nevada, Missouri and Guam; and one was multi-jurisdictional. The list of projects follows.

Guam and Commonwealth of the Northern Mariana Islands (CNMI) Military Relocation, Proposed Relocating Marines from Okinawa, Visiting Aircraft Carrier Berthing and Army Air and Missile Defense Task Force, Implementation, GU - **EU3**

NorthMet Project, Proposes to Construct and Operate an Open Pit Mine and Processing Facility, Located in Hoyt Lakes - Babbitt Area of St. Louis County, MN - **EU3**

Lost Creek In-Situ Uranium Recovery (ISR) Project, Proposal to Construct, Operate, Conduit Aquifer Restoration and Decommission an In-Situ Recovery (ISR) Uranium Milling Facility, Sweetwater County, WY - **"3"**

Moore Ranch In-Situ Uranium Recovery (ISR) Project, Proposal to Construct, Operate, Conduct Aquifer Restoration and Decommission an In-Situ Recovery (ISR) Facility, NUREG-1910, Campbell County, WY - **"3"**

Nichols Ranch In-Situ Uranium Recovery (ISR) Project, Proposal to Construct, Operate, Conduct Aquifer Restoration and Decommission and In-Situ Recovery Uranium Milling Facility, Campbell and Johnson Counties, WY - **"3"**

Lake Columbia Regional Water Supply Reservoir Project, Proposes to Construct, Operate and Maintain a Dam and Reservoir, Mud Creek, Angelina River, Cherokee and Smith Counties, TX - **EU3**

Keystone XL Oil Pipeline Project, Presidential Permit for the Proposed Construction, Connection, Operation and Maintenance of a Pipeline and Associated Facilities at the United States Border for Importation of Crude Oil from Canada - **"3"**

Genesis Project, Proposes Expansion of Existing Mine Pits and Development of the Bluestar Ridge Open Pit Mine, Newmont Mining Corporation, Eureka County, NV - **"3"**

Missouri River Commercial Dredging, Proposal to Extract Sand and Gravel from the Missouri River, US Corp of Engineer's Section 10 and 404 Permits, Kansas City, Central Missouri and Greater St. Louis, Missouri - **EU2**

The three in-situ uranium projects listed above received inadequate ratings due to the narrow range of wastewater disposal alternatives analysis along with limited discussions regarding waste management impacts. The documents also lacked information regarding air pollutants and their impacts. The two mining projects received adverse ratings due to the deficiency in analysis of water quality impacts from acid producing potential of the waste rock. The dam project received an EU3 rating for failing to adequately assess impacts to wetlands, specifically in light of secondary and cumulative effects. The commercial dredging project in the Missouri River received an EU2 rating because a preferred alternative was not identified so each alternative had to be rated. Two of the alternatives received the EU rating; however all others received EC2. The oil pipeline project received a 3 due to an inadequate discussion of purpose and need and lack of analysis regarding air pollutant emissions at the refineries, pipeline safety and spill response, environmental justice concerns, wetlands, migratory birds and greenhouse gas emissions. Finally, the military base relocation project received an EU3 due to impacts to water and wastewater infrastructure and impacts to coral reef ecosystems.

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. Internet URL <http://www.epa.gov/oecaerth/nepa/comments/ratings.html#rating>. Accessed April 17, 2011.



CEQ Issues NEPA Guidance in 2010 — Chuck Nicholson⁵

The Council on Environmental Quality (CEQ) issued three draft NEPA guidance documents in February 2010 and had finalized two of them by the end of January 2011. The guidance documents addressed:

- 1) The Establishment, application and revision of categorical exclusions;
- 2) The Use of mitigated Findings of No Significant Impact (FONSI) and the need for monitoring of mitigation commitments; and
- 3) When and how Federal agencies consider greenhouse gas emissions and climate change in EAs and EISs.

All of these guidance documents were developed as part of CEQ's continuing effort to modernize and reinvigorate NEPA and were issued for public comment on February 18th, 2010 in conjunction with CEQ's celebration of the 40th anniversary of NEPA. The draft and final guidance documents are available at http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html.

Establishing, Applying and Revising Categorical Exclusions Under the National Environmental Policy Act:

The first version of this guidance was developed by a CEQ interagency NEPA task team and issued in draft for public comment in September 2006. The task team reviewed the numerous public comments and prepared a preliminary final version in early 2007. Work on the guidance was suspended until mid-2009 when CEQ staff circulated a revised version for review by Federal agency NEPA liaisons. The revised draft guidance was then issued for public comment in February 2010. The final guidance was issued on November 23, 2010. The associated *Federal Register* notice, published on December 6, 2010⁶, summarized the 58 comments received on the draft guidance and CEQ's responses to these comments.

The categorical exclusion (CE) guidance provides detailed descriptions of how Federal agencies should establish new CEs and revise existing CEs. It describes the types and potential sources of information necessary to define and substantiate proposed CEs and how to use public involvement in this process. It also recommends that agencies consider increased public disclosure of their use of CEs, especially when a proposal, which is a candidate for a categorical exclusion, raises concerns regarding extraordinary circumstances or potentially significant cumulative impacts. The guidance reiterates the direction in CEQ regulations (40 CFR 1507.3) that agencies review their policies and procedures and revise them as necessary, but adds a specific recommendation that agencies review their CEs at least every seven years. The purpose of this review is to ensure that agency CEs are still current, useful and appropriate and to ensure that their extraordinary circumstances are sufficient to limit new or revised CEs to those actions that do not have the potential for significant effects.

Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact

This guidance was first developed by CEQ staff and circulated in preliminary draft form for review by Federal agency NEPA liaisons in 2009. Following issuance of the draft guidance in February 2010, CEQ

⁵ Charles P. Nicholson, PhD, Manager, NEPA Compliance Tennessee Valley Authority

⁶ Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 FR 75628-75638]

received over 60 comments during the 90-day public comment period. The final guidance was issued on January 14, 2011 and published in the *Federal Register* on January 21, 2011.

The guidance reaffirms the issuance of a FONSI based on the use of mitigation to reduce impacts to insignificant levels, but also emphasizes the importance of ensuring that these mitigation commitments are met after the NEPA process has ended. Agencies should commit to this mitigation in decision documents and include enforcement clauses in permits, contracts and other authorizations to ensure that the mitigation actually takes place. Mitigation commitments must specify expected results or performance standards so that progress toward these commitments can be easily understood and evaluated. The mitigation commitments should be within the agencies' legal authority and agencies should have the resources necessary to perform or ensure the performance of the mitigation. Agencies should establish a monitoring protocol to ensure the mitigation was implemented and was effective in reducing the level of impacts; lead agencies or others can do the actual monitoring. The results of this monitoring should be made available to the public. Agencies should remedy ineffective or non-implemented mitigation when the Federal action is not yet complete and, if necessary, consider supplemental NEPA analysis to address the resulting impacts when mitigation is not undertaken or does not result in the predicted effects. The final guidance concludes with a case study appendix describing the Department of the Army mitigation implementation and monitoring procedures.

Consideration of the Effects of Climate Change and Greenhouse Gas Emissions

CEQ developed this guidance in response to informal requests by Federal agencies and a formal petition submitted to CEQ under the Administrative Procedures Act in 2008. A preliminary draft was circulated for review by Federal agency NEPA liaisons in 2009. Following issuance of the draft guidance in February 2010, CEQ received about 115 comments during the 90-day public comment period, almost twice the number received on either of the other two draft guidance documents.

The draft guidance advises Federal agencies to estimate the annual direct GHG emissions from their proposed actions and, if over 25,000 metric tons of CO₂-equivalent GHGs are anticipated, consider a quantitative analysis of the GHG emission effects and the effects of climate change on the proposed action. The 25,000 metric ton reference point is suggested as a presumptive threshold because it is the threshold used in the 2009 EPA GHG reporting final rule (74 FR 56260). The guidance emphasizes a rule of reason and acknowledges that GHG emissions from individual agency actions frequently have small potential effects and would not typically otherwise require a detailed analysis in an EIS. Significant national policy decisions may, however, result in large GHG emissions and impacts. The analysis of GHG emissions should identify alternatives and other measures for reducing GHG emissions and can reference studies by the U.S. Global Change Research Program and others in assessing the impacts of climate change. Agencies are advised to consider GHG emissions in programmatic analyses

The draft guidance does not address GHG emissions from Federal land and resource management actions. These actions are excluded because of the lack of established Federal protocols for quantifying their GHG emissions and potential for GHG sequestration. In the draft guidance, CEQ requests comment on how GHG emissions and climate change impacts should be assessed.



Litigation Updates for 2010 — Lucinda Low Swartz, Esq⁷

ABSTRACT

This paper will review substantive NEPA cases issued by federal courts in 2010. The implications of the decisions and relevance to NEPA practitioners will be explained.

INTRODUCTION

In 2010, federal courts issued 43 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies: one decision from the U.S. Supreme Court, 23 decisions from the U.S. Courts of Appeal and 19 decisions from the U.S. District Courts. These cases involved 14 different departments and agencies. The government prevailed in 29 of the 43 cases (67 percent).

Table 1 (in Appendix A) contains a synopsis of the 2010 substantive NEPA cases and cases of particular interest are noted below.

STATISTICS

The U.S. Forest Service (USFS) again won first place as the agency involved in the largest number of NEPA cases, with 16 cases. The agency prevailed in 12 of the 16 cases (75 percent). BLM came in a distant second with 6 cases, of which they prevailed in 2 (33 percent).

In addition to the 6 BLM cases, other U.S. Department of the Interior agencies had another 6 cases:

- National Park Service (NPS) – 2 cases, winning 1 and losing 1
- Fish and Wildlife Service (FWS) – 2 cases, winning both
- Bureau of Reclamation (BurRec) – 2 cases, winning 1 and losing 1

The Federal Highway Administration (FHWA) also had 4 cases and prevailed in 3 of them. Another U.S. Department of Transportation agency – the Surface Transportation Board (STB) – was involved in 1 case which it won.

The National Marine Fisheries Service (NMFS), part of the U.S. Department of Commerce, had 3 cases and prevailed in 2 of them.

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The Animal Plant Health Inspection Service (APHIS) had 2 cases (including the one U.S. Supreme Court case) and prevailed in both.

The Army Corps of Engineers (ACOE), the only U.S. Department of Defense agency involved in court decisions this year, had 2 cases of which it won 1.

The Federal Energy Regulatory Commission (FERC), the U.S. Nuclear Regulatory Commission (NRC), and the U.S. State Department were each involved in 1 case and the agencies prevailed in all of them.

THEMES

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

- *Hapner v. Tidwell*, 621 F.3d 1239 (9th Cir. 2010)
- *Sierra Club v. Kimbell*, 632 F.3d 549 (8th Cir. 2010)
- *Rock Creek Alliance v. U.S. Forest Service*, 703 F. Supp.2d 1152 (D. Mont. 2010)
- *Sierra Club North Star Chapter v. LaHood*, 693 F. Supp.2d 958 (D. Minn. 2010)

The courts also invalidated those decisions where the agency failed to demonstrate a “hard look”:

- *Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th Cir. 2010)
- *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, 608 F.3d 592 (9th Cir. 2010)
- *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187 (9th Cir. 2010)
- *Government of the Province of Manitoba v. Salazar*, 691 F. Supp.2d 37 (D.C.C. 2010)

U.S. SUPREME COURT DECISION

A NEPA case came before the U.S. Supreme Court, but the issue raised and the decision reached related primarily to the type of relief available when an agency violates NEPA requirements, rather than to NEPA requirements themselves.

In *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), conventional alfalfa growers and environmental groups brought action against Monsanto, the company that developed a genetically-altered “Roundup Ready Alfalfa (RRA)” plant and APHIS, which had deregulated the altered alfalfa plant before issuing an EIS. The district court held that APHIS violated NEPA when it deregulated RRA without first completing a detailed EIS. To remedy that violation, the court vacated the agency's decision completely deregulating RRA; enjoined APHIS from deregulating RRA, in whole or in part, pending completion of the EIS; and entered a nationwide permanent injunction prohibiting almost all future planting of RRA during the pendency of the EIS process. Monsanto and APHIS appealed, challenging the scope of the relief granted but not disputing that APHIS's deregulation decision violated NEPA. The 9th Circuit affirmed the district court decision, holding that the lower court had not abused its discretion in rejecting APHIS's proposed mitigation measures in favor of a broader injunction.

After finding Monsanto had standing to seek review of the lower court rulings and finding plaintiffs had standing to seek injunctive relief, the Court found that the district court had abused its discretion in

enjoining APHIS from effecting partial deregulation and in prohibiting the planting of the altered alfalfa pending the agency's completion of its EIS. Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L. C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641. This test fully applies in NEPA cases. See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. ----, ----, 129 S.Ct. 365, 172 L.Ed.2d 249. Thus, the existence of a NEPA violation does not create a presumption that injunctive relief is available and should be granted absent unusual circumstances.

The Court found that none of the four factors supported the district court's order enjoining APHIS from partially deregulating RRA during the pendency of the EIS process. Most importantly, respondents could not show that they would suffer irreparable injury if APHIS were allowed to proceed with any partial deregulation, for at least two reasons. First, if and when APHIS pursued a partial deregulation that arguably ran afoul of NEPA, plaintiffs may file a new suit challenging such action and seeking appropriate preliminary relief. Accordingly, a permanent injunction was not needed to guard against any present or imminent risk of likely irreparable harm. Second, a partial deregulation need not cause plaintiffs any injury at all; if its scope is sufficiently limited, the risk of gene flow could be virtually nonexistent. Indeed, the broad injunction entered by the lower court essentially preempted the very procedure by which APHIS could determine, independently of the pending EIS process for assessing the effects of a complete deregulation, that a limited deregulation would not pose any appreciable risk of environmental harm.

The Court also held that the district court erred in entering the nationwide injunction against planting RRA, for two independent reasons. First, because it was inappropriate for the district court to foreclose even the possibility of a partial and temporary deregulation, it follows that it was inappropriate to enjoin planting in accordance with such a deregulation decision. Second, an injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91. If, as plaintiffs concede, a less drastic remedy (such as partially or completely vacating APHIS's deregulation decision) was sufficient to redress their injury, no recourse to the additional and extraordinary relief of an injunction was warranted.

Justice Stevens dissented. Justice Breyer did not participate in the decision.

OTHER NEPA CASES

Cumulative Impact Analysis

- *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897 (7th Cir. 2010): Projects that are "nebulous" or not capable of meaningful analysis when an EIS is being prepared do not need to be considered in a cumulative impact analysis.
- *League of Wilderness Defenders – Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122 (9th Cir. 2010): Cumulative effects analysis was adequate where the agency used an "aggregate effects approach" without details on time, type, place and scale for past actions. The court also found that the cumulative effects analysis was adequate because it was consistent with Council on Environmental Quality guidelines.

- *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, 608 F.3d 592 (9th Cir. 2010): A cumulative impact analysis that assumed all direct impacts will be avoided and mitigated and that all existing, proposed and reasonably foreseeable future activities would avoid or mitigate all known and discovered resources is insufficient. Also, in order to prevail, plaintiffs need not show what cumulative impacts would occur. But see, *Center for Environmental Law and Policy v. U.S. Bureau of Reclamation*, 715 F. Supp.2d 1185 (E.D. Wash. 2010) (plaintiffs failed to mention any specific projects that were not considered in the cumulative impacts analysis.)
- *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010): A project need not be final to be “reasonably foreseeable.” Interestingly, the court concluded that projects for which notices of intent to prepare an EIS were “too preliminary to meaningfully estimate their cumulative impacts.”
- *Sierra Club North Star Chapter v. LaHood*, 693 F. Supp.2d 958 (D. Minn. 2010): Meaningful cumulative impact analysis was conducted where the agency set forth the geographic and time boundaries, summarized the existing condition of each potentially affected resource, summarized the impacts of the proposed project on each resource, identified other current and reasonably foreseeable future actions and their possible impacts on those resources and discussed the potential for cumulative impacts on the resources and mitigation measures.

Purpose and Need and Alternatives

- *National Parks and Conservation Association v. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2010): EIS was inadequate because the purpose and need focused on the applicant’s needs and unreasonably narrowed the alternatives to be considered. Although agencies are precluded from completely ignoring a private applicant’s objectives, “[r]equiring agencies to consider private objectives... is a far cry from mandating that those private interests define the scope of the proposed project.”
- *Biodiversity Conservation Alliance v. Bureau of Land Management*, 608 F.3d 709 (10th Cir. 2010): Agency had reasonably refused to give detailed study to a plan that would not meet the project's purposes. “Agencies may not define a project's objectives so narrowly as to exclude all alternatives....[b]ut where a private party's proposal triggers a project, the agency may ‘give substantial weight to the goals and objectives of that private actor.’”
- *Weiss v. Kempthorne*, 683 F. Supp.2d 549 (W.D. Mich. 2010): It was appropriate for the agency to consider the applicant’s economic goals and to eliminate from serious consideration an alternative that did not meet those goals.
- *Sierra Club North Star Chapter v. LaHood*, 693 F. Supp.2d 958 (D. Minn. 2010): Agency had no duty to analyze the alternatives put forward by plaintiffs because either they did not meet the purpose and need for the project or because they were adequately addressed in the supplemental final EIS. The “detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable.”

Climate Change/Greenhouse Gas Emissions

- *Hapner v. Tidwell*, 621 F.3d 1239 (9th Cir. 2010): Although plaintiffs argued that the EA should have addressed global warming, the court concluded that because the project involved a relatively small amount of land and it would thin rather than clear cut trees, “the EA adequately considered the Project’s impact on global warming in proportion to its significance.”
- *North Carolina Alliance for Transportation Reform v. U.S. Department of Transportation*, 713 F. Supp.2d 491 (M.D. N.C. 2010): EIS need not consider climate change where EPA comments did not “suggest the need to study greenhouse gases” and greenhouse gas emission analysis would not be informative or useful for this highway project.

Public Comments

- *Earth Island Institute v. Carlton*, 626 F.3d 462 (9th Cir. 2010): “The Forest Service responded in a sufficiently detailed manner to the range of comments submitted. NEPA requires no more.”

Beneficial Impacts

- *Humane Society of the U.S. v. Locke*, 626 F.3d 1040 (9th Cir. 2010): Plaintiffs argued that NMFS' determination under the Marine Mammal Protection Act that sea lions were having a “significant negative impact on the decline or recovery” of listed salmonid populations necessarily implied that the environmental benefits of authorizing the lethal removal of sea lions would have a significant positive impact on the salmonid populations. They contended that this significant beneficial environmental impact triggered the duty to prepare an EIS under NEPA. The court stated that this was a question it did not need to resolve “because even if solely beneficial impacts trigger an EIS, the record does not demonstrate a significant beneficial impact on the human environment in this instance.”

Readability

- *National Parks and Conservation Association v. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2010): Relevant discussion of a particular environmental impact was scattered throughout the EIS. “In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form. . . . Here, the discussion of eutrophication is neither full nor fair with respect to atmospheric eutrophication. A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together. . . . This patchwork cannot serve as a “reasonably thorough” discussion of the eutrophication issue.”



Commentary – Holly Reuter and David Contrada⁸

Deepwater Horizon: Lessons for NEPA Practitioners

The recent oil spill in the Gulf of Mexico provides an opportunity for National Environmental Policy Act (“NEPA”) practitioners to reflect on the challenges of implementing NEPA in an environment of rapid technological advancement. While technology often leads to a more efficient use of resources, it also presents new challenges from unknown or uncertain environmental risks. This article will discuss the White House Council on Environmental Quality’s (CEQ) review of the Minerals Management Service’s (MMS) NEPA policies, practices and procedures to interpret what other agencies can expect in the face of evolving technology, activities and programs.

Background

The Deepwater Horizon drilling rig, operated by British Petroleum, exploded in the Gulf of Mexico (BP Spill) in April 2010. The explosion fractured the Macondo oil well, resulting in the largest oil spill in U.S. waters to date.⁹ MMS oversaw the oil and gas development and leasing activities on the Outer Continental Shelf, including the NEPA analyses applicable to Deepwater Horizon and the Macondo oil well.¹⁰ Following the BP spill, the Department of Interior reorganized MMS into three separate entities: the Bureau of Ocean Energy Management, Regulation (BOEMRE), the Office of Natural Resources Revenue and the Bureau of Safety and Environmental Enforcement.¹¹ BOEMRE assumed responsibility for the development and leasing of oil and gas activities on the Outer Continental Shelf.¹²

CEQ released a report analyzing the environmental policies, practices and procedures MMS used to issue leases for Deepwater Horizon and the Macondo well (MMS Report) in August 2010. The MMS Report summarizes the leasing process used for Deepwater Horizon and explained MMS’ analyses that ultimately led to a categorical exclusion of the British Petroleum exploration plan from further NEPA review.¹³ CEQ’s report does not comment on the adequacy of MMS’ NEPA analyses. Instead, CEQ identifies seven recommendations in the MMS Report for BOEMRE to strengthen its NEPA analyses:

1. Perform careful and comprehensive NEPA review of individual deepwater exploration, operation, development, production and decommissioning activities, including site-specific information where appropriate.

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⁹ Curry L. Hagerty & Jonathan L. Ramseur, U.S. Cong. Research Serv., *Deepwater Horizon Oil Spill: Selected Issues for Congress* (R41262; June 18, 2010).

¹⁰ Council on Envtl. Quality, *Report Regarding the Minerals Management Service’s National Environmental Policy Act Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development*, 1 (August 16, 2010) (hereinafter “MMS Report”).

¹¹ U.S. Dep’t of Interior, *Implementation Report: Reorganization of the Minerals Management Service*, 2 (July 14, 2010).

¹² *Id.*

¹³ MMS Report at 11-12.

2. Track and take into account all mitigation commitments made in NEPA and decision documents that are relied upon in determining the significance of environmental impacts, from the initial Programmatic EIS through site-specific NEPA analyses and decisions.
3. Ensure that NEPA analyses fully inform and align with substantive decisions at all relevant decision points; that subsequent analyses accurately reflect and carry forward relevant underlying data; and that those analyses will be fully available to the public.
4. Ensure that NEPA documents provide decision-makers with a robust analysis of reasonably foreseeable impacts, including an analysis of reasonably foreseeable impacts associated with low probability catastrophic spills for oil and gas activities on the Outer Continental Shelf.
5. Review the use of categorical exclusions for Outer Continental Shelf oil and gas exploration and development in light of the increasing levels of complexity and risk—and the consequent potential environmental impacts—associated with deepwater drilling. Determine whether to revise these categorical exclusions.
6. Continue to seek amendments to the Outer Continental Shelf Lands Act to eliminate the 30-day decisional timeframe for approval of submitted Exploration Plans.
7. Consider supplementing existing NEPA practices, procedures and analyses to reflect changed assumptions and environmental conditions, due to circumstances surrounding the BP Oil Spill.¹⁴

Discussion

The following discussion focuses on three of CEQ's recommendations to explain how NEPA practitioners can adapt to changing technology, activities and programs. Applicants for federal licenses, for example, may seek approval to use new technology in their activities. Alternatively, license holders may use new technology to carry out activities under existing licenses. Agencies frequently change the scope of their programs and actions. The NEPA practitioner must decide which changes require a reevaluation of potential impacts from existing activities and weigh the unknown risks of new technology.

I. Ensure that NEPA documents provide decision-makers with a robust analysis of reasonably foreseeable impacts, including an analysis of reasonably foreseeable impacts associated with low probability catastrophic spills for oil and gas activities on the Outer Continental Shelf.

MMS prepared the environmental analyses applicable to Deepwater Horizon and the Macondo well between 2000 and 2008.¹⁵ At that time, MMS determined an oil spill of the magnitude of the BP spill was not reasonably foreseeable based in part on historic spill rates.¹⁶ This was one of the factors that led MMS to categorically exclude the British Petroleum exploration plan from further NEPA review. Subsequently, the public outcry surrounding the BP spill changed the conversation on how to view the scope of reasonably foreseeable impacts in 2010.¹⁷ BOEMRE will need to analyze potential impacts of low probability, catastrophic spills moving forward.¹⁸ Two questions arise from this recommendation: 1)

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 13-14.

¹⁶ *Id.* at 27.

¹⁷ The public outcry created Congressional interest and led to the CEQ review of MMS' NEPA procedures.

¹⁸ MMS Report at 4.

Do other agencies have to analyze the potential impacts of high risk, low probability events; and 2) Is there a difference between high risk, low probability events and worst-case scenarios?

CEQ did not object to MMS' use of historic information as an indicator of what is reasonably foreseeable in the MMS Report. Therefore, agencies may continue to rely on historic information with the understanding that a catastrophic event could change the balance of what is reasonably foreseeable for their activities. Changes in technology, activities and programs may also increase the likelihood of a catastrophic event.

The distinction between a high risk, low probability event and a worst-case scenario is ambiguous. Although a catastrophe like the BP spill sounds like a worst-case scenario, as MMS discovered, catastrophes can have far less of an impact than a worst-case scenario. A high risk, low probability event is one in which the potentially adverse impacts of an action are large, but impacts are unlikely to occur. A worst-case scenario assumes the largest amount of adverse impacts possible occurs, regardless of probability. A high risk, low probability event may not approach the level of a worst-case scenario. For example, the BP spill was a high risk, low probability event. British Petroleum predicted operations at the *Deepwater Horizon* site could result in a worst-case spill of 162,000 barrels per day.¹⁹ While experts debate the quantity of barrels spilled, all estimates indicate the BP spill was well below the worst-case scenario.²⁰ The BP spill demonstrates the need to fully understand the potential for any type of catastrophic event to occur.

NEPA practitioners should focus on gathering accurate information and data trends from their activities and not worry about the distinction between high risk, low probability events and worst-case scenarios. CEQ removed the requirement to analyze worst-case scenarios in 1986.²¹ Now, agencies just need to rely on current information to determine if a high probability, low impact event is reasonably foreseeable. Until there is reason to suspect an impact is reasonably foreseeable, agencies do not have to analyze it.²²

Agencies should view CEQ's recommendation to BOEMRE as specific advice reflecting the current technology and risks associated with deepwater drilling as is now evident by the BP spill. If an agency has a new program or activity, or uses a new technology, it should track the impacts so it can have a basis for saying whether a high risk, low probability event is or is not reasonably foreseeable. This data will be useful to explain the agency's actions in subsequent environmental analyses as well as enable the agency to save resources by limiting its analyses to potential impacts.

II. Review the use of categorical exclusions for Outer Continental Shelf oil and gas exploration and development in light of the increasing levels of complexity and risk—and the consequent potential environmental impacts—associated with deepwater drilling. Determine whether to revise these categorical exclusions.

As wells move further offshore with new and innovative technology, the complexity and risk of potential impacts from deepwater drilling similarly increases.²³ As a result, BOEMRE should review and possibly

¹⁹ *Id.* at 19.

²⁰ The official estimate is 5,000 barrels a day, and higher estimates range from 35,000 to 60,000 barrels per day.

²¹ MMS Report at 27.

²² CEQ consistently asks agencies to utilize the information available to them in order to minimize the burden on agencies. For example, *see generally*, Council on Env'tl. Quality, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions* (February 18, 2010).

²³ MMS Report at 30.

modify its environmental analyses for offshore drilling.²⁴ The pivotal factors for BOEMRE's assessment of complexity and risk appear to be technological advancement and changes in the scope and type of its activities. Other agencies will have to develop methods to address changes in complexity and risk from their own activities.

Proper documentation of the impacts of agency actions will address changes in the complexity and risk of an agency's activities. Agencies must document their experience in performing an activity to justify a categorical exclusion.²⁵ If an agency uses a new technology or begins a new type of activity, the agency has to build an administrative record to show there are no impacts before it can categorically exclude the activity from further NEPA review. Despite the need for it, however, few agencies have established a system to effectively manage administrative records. Agencies typically have a system to collect the necessary information to produce the administrative record, but the information is not stored in an accessible and user-friendly format. An agency could design a document system to reduce inappropriate uses of categorical exclusions by storing the underlying rationale for each categorical exclusion in the system. A system designed for administrative records also could expedite the inclusion of new technology and activities onto a categorical exclusion list when sufficient data is collected to demonstrate there are no potential impacts.

Agencies should make the basis of environmental analyses transparent. For example, suppose an agency adopts a new technology to make one research activity more efficient. Using the old technology, the agency conducted its research activity for twenty years with no environmental impacts. About ten years ago, the agency developed a categorical exclusion for the research activity based on its experience and documentation that the research activity had no potential to impact the human environment. One of the reasons there were no impacts was the use of the old technology, but that information is not easily located or known by the current agency staff conducting the research activity. Now the agency engages in the same research activity with the new technology in place. The new technology uses a volatile compound that is significantly more risky than the old technology. Since the agency staff has no way to know of or look for the basis of the categorical exclusion, they continue to apply the categorical exclusion based on the old technology to the research activity. A shift in the agencies' activities occurred that changed the underlying assumptions on which the agency based its environmental analysis. Transparent decision-making and documentation would have alerted agency staff to the need to reexamine the environmental analyses. The public also could have alerted the agency to potential issues if the agency had shared its decision-making processes and had provided information about its environmental analyses to the public.

Agencies should also develop guidance for their programs about what constitutes a change in complexity or risk. Changes in technology are an obvious way in which the risk and complexity of an action may change. However, changes in the size and scope of an activity are likely to be more common and difficult to track. For MMS, one alteration that was a factor in the BP spill was moving further offshore to deepwater drilling. Other agencies will have to understand the parameters of their own activities to recognize when an alteration occurs. Program guidance will be helpful because these activities are likely program and project-specific.

III. Consider supplementing existing NEPA practices, procedures and analyses to reflect changed assumptions and environmental conditions, due to circumstances surrounding the BP Oil Spill.

²⁴ *Id.* at 31.

²⁵ Council on Env'tl. Quality, *Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act*, 6 (November 23, 2010).

The BP spill created a “changed circumstance” for MMS by making catastrophic spills reasonably foreseeable on the Outer Continental Shelf.²⁶ In light of the significance of the BP spill, BOEMRE will need to review its prior analyses of deepwater drilling activities on the Outer Continental Shelf and consider supplementing its analyses.²⁷

Although underutilized, supplemental impact analyses can be a very useful method for accounting for changes in technology, scope, or types of activities. A supplemental analysis allows an agency to adjust existing analyses in light of new information or a changed circumstance, such as the BP spill.²⁸ Agencies can use a supplemental analysis to adapt an existing NEPA analysis to current technology, programs and activities. For this reason, supplemental analyses save agencies resources that otherwise would be spent on conducting entirely new analyses.

Conclusion

The MMS Report provides insights for agencies struggling to implement NEPA for new or altered activities, programs and technology. Agencies should consider if their own policies, practices and procedures are structured to withstand these changes. If not, agencies can strengthen their own environmental analyses by adapting CEQ’s recommendations. If an agency tracks and documents the use and impacts of its activities and makes documentation transparent to both the public and throughout the agency, it will be prepared to adapt to changes as they arise. Agencies do not have to consider improbable disasters in their environmental analyses, but must use the available data to determine reasonably foreseeable impacts. When a change occurs, or when new information becomes available, the agency can use a supplemental analysis to remain compliant with NEPA.



Commentary – Chris Conrad²⁹

Performance Management for Environmental Managers

Environmental managers, especially those charged with environmental planning and analysis under NEPA are often asked to find a way to perform their missions “faster, better and cheaper.” It is a rare federal agency whose leadership hasn’t at some time blamed the environmental planning process for slowing down a project. Environmental planners, on the other hand, know that when projects are delayed, it is just as often the agency actions, or lack thereof, that are the cause for delays rather than the environmental analysis process itself. The following commentary describes one of the latest approaches to performance management that could be useful to environmental managers and planners in their continuing struggle to improve effectiveness and efficiency in meeting their mission.

Environmental Planning and Efficiency

Environmental planning is a part of the agency decision-making processes in which, the primary element is the relationship between natural systems and human systems. Driven by the National Environmental

²⁶ MMS Report at 32.

²⁷ *Id.* at 33-34.

²⁸ *Id.* at 34.

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Policy Act (NEPA), the purpose of environmental planning is to provide the decision-making process with an orderly, rational and transparent method for reaching decisions that benefit all constituents of both systems, today and in the future. The primary elements of current environmental planning practices include: natural resources and management, land use, social and economic development, infrastructure systems, regional and urban development, protection of human health and property and governance frameworks. Planning assessments often include such areas as air, noise and water pollution, natural habitat and endangered species, flood zones, land use, socio-economics, transportation, coastal zone erosion and visual studies, among many others. For any project, environmental planners deal with the full range of environmental regulations from federal to state to local.

To integrate the compliance with all environmental laws and regulations, NEPA regulations specify that, to the fullest extent possible, agencies must prepare NEPA analyses concurrently with any other environmental requirements. For the purposes of simplifying this discussion then, NEPA, as the driving and umbrella statute, is a useful proxy for environmental planning in general.

Courts have consistently held that NEPA requires all federal agencies to take a “hard look” at the environmental impacts of all major federal actions and include a detailed statement on the environmental impacts by the responsible official. Regulations by the Council on Environmental Quality, multiple other environmental and historic property protection regulations and forty years of case law have transformed this seemingly simple hard look requirement into a complex endeavor, generally requiring specialized expertise and extensive implementing guidance. To add further complexity, NEPA requires meaningful public participation before any major project can move forward. Certain federal actions such as highway construction, permitting for mining operations or energy projects may require compliance with dozens of laws and regulations which may then require input from an even greater number of local, State, tribal or other federal agencies.

The complexity and length of the process has often generated calls for a “streamlining” of NEPA. A call that proponents claim is necessary to cut through bureaucratic red tape, but that others see as an attempt to weaken environmental protection and lessen public participation in federal decision-making. Environmental planners and managers are almost continuously under pressure to improve the efficiency of their process. The 108th and 109th Congress, for example, introduced numerous bills with provisions to streamline NEPA, some of which were enacted for specific projects and agencies. As recently as March 2011, CEQ has called for pilot projects to improve the efficiency of environmental reviews.

Multiple studies, assessments, reviews and task forces have addressed the issues associated with the calls for “streamlining”³⁰. Their recommendations have ranged from changing the law in order to codify CEQ regulations, to detailed procedural changes in the production of the analyses themselves. Typically, these reviews found that NEPA processes took too long and cost too much; resources and agency senior leadership training were inadequate, the agency decision-making process was flawed; management

³⁰ Typical examples of NEPA process reviews:

Council for Environmental Quality (CEQ), 1997, *The National Environmental Policy Act: A Study of Its Effectiveness after Twenty-Five Years*.

Smythe, Robert and Caroline ISber. 2003 NEPA in the agencies: A critique of current practices. *Environmental Practices: Journal of the National Association of Environmental Professionals* 5(4): 290-297.

Gaines, Lisa and Sue Lurie. 2007. *NEPA for the 21st Century: A Comparative Analysis of Other Organizations' Environmental Review Structure*.

Congressional Research Service, 2007, *The National Environmental Policy Act: Streamlining NEPA*.

systems for performance measures, tracking and analysis were inadequate; and there was no way to formally identify or share “best practices.” There were no surprises here for the experienced environmental manager.

The issue for the environmental manager in the era of the 112th Congress is how to continue to improve the effectiveness and efficiency of environmental planning within his or her agency with the expectation of reduced resources. The good news is that many answers are already known within the agency and that powerful analytic tools are available to help reveal them.

Performance Improvement and Management

Measurement, reporting and improvement of performance have been of particular and increasing interest to the federal government for decades. In 1993, for example, Congress passed the Government Performance and Results Act (GPRA) that directed the federal government to undertake results-oriented performance planning, measurement and reporting. Since then the Office of Management and Budget has steadily made performance management an integral part of federal budget planning process. The current administration has taken this approach one step further by appointing a Chief Performance Officer and requiring all agencies to do the same.

Performance improvement in business processes has been an active area of interest, study and implementation for over a century. It involves measuring the output of a process, then identifying a procedure to increase output, efficiency, or effectiveness. Early in the last century, businesses often looked at the front end of the process, measuring input or the efficiency of a particular process to improve performance. More recently, approaches such as TQM and Six Sigma have undertaken to measure the output itself, to glean ways to improve performances that would impact the bottom line. The primary elements in Six Sigma that advanced the state of the art was the integration of the use of verifiable data in decision-making, the direct link to dollar returns and the requirement for strong, high-level leadership and support. More recently, a methodology called Comparative Effectiveness Research, or comparative analysis in short, has been used in large organizations to affect performance. Comparative analysis uses many of the same statistical tools used by Six Sigma, but undertakes to measure outcomes, rather than output. In short, rather than measuring the cost, quality or function of the output, the question for outcomes is, “Did the process make a difference?” The linkage then is made to managerial performance rather than to procedures or processes. The result of this performance management approach has been extraordinary, for example, in the development of supply chain management, research and development and quality control in very large companies.

As an example of relevance to the environmental professional: an environmental planning organization for a large agency has produced a very complex and detailed environmental impact statement – its output. The question would be, “Did it make a difference?” Did it, as part of the decision-making process actually affect the decision and if so, how? If not, why not? The results and implications of this type of analysis are broader than previous performance improvement methodologies. For example, the question of outcome could lead to the managerial and organizational procedures of the agency itself. Perhaps the environmental analysis was never integrated into the actual decision-making process of the agency, but was viewed as a procedural requirement to be finished before the project could be started.

Another aspect of the performance management approach using comparative analysis is that it focuses on what is already known within the organization and compares outcomes of the top-performing groups with the average performing groups. Often, performance metrics focus on the “average.” When average performance lags, we may assume all performance lags. As a consequence, we risk ignoring the lessons learned that are unique to top performers and how they could be applied to improve performance overall.

Comparative analysis finds the top performers and discovers the actual best practices, which may differ from the best practices of conventional wisdom.

In short, the performance management approach establishes benchmarks and compares outcomes; learns from the high performers; copies the knowledge learned to the core of the organization; and shifts the performance curve toward better outcomes.

Appendix A – Summary of 2010 NEPA Cases

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Table 1

2010 NEPA Cases		
CASE NAME / CITATION	AGENCY	DECISION / HOLDING
U.S. Department of Agriculture		
<i>Monsanto v. Geertson Seed Farms</i>, 130 S. Ct. 2743 (2010)	USDA - APHIS	<p>WIN - Conventional alfalfa growers and environmental groups brought action against Monsanto, the company that developed a genetically-altered "Roundup Ready Alfalfa (RRA)" plant and APHIS, which had deregulated the altered alfalfa plant before issuing an EIS. The district court held that APHIS violated NEPA when it deregulated RRA without first completing a detailed EIS. To remedy that violation, the court vacated the agency's decision completely deregulating RRA; enjoined APHIS from deregulating RRA, in whole or in part, pending completion of the EIS; and entered a nationwide permanent injunction prohibiting almost all future planting of RRA during the pendency of the EIS process. Monsanto and APHIS appealed, challenging the scope of the relief granted but not disputing that APHIS's deregulation decision violated NEPA. The 9th Circuit affirmed the district court decision, holding that the lower court had not abused its discretion in rejecting APHIS's proposed mitigation measures in favor of a broader injunction.</p> <p>After finding Monsanto had standing to seek review of the lower court rulings and finding plaintiffs had standing to seek injunctive relief, the Court found that the district court had abused its discretion in enjoining APHIS from effecting partial deregulation and in prohibiting the planting of the altered alfalfa pending the agency's completion of its EIS. Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." <i>eBay Inc. v. MercExchange, L.L. C.</i>, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641. This test fully applies in NEPA cases. See <i>Winter v. Natural Resources Defense Council, Inc.</i>, 555 U.S. ----, ----, 129 S.Ct. 365, 172 L.Ed.2d 249. Thus, the existence of a NEPA violation does not create a presumption that injunctive relief is available and should be granted absent unusual circumstances.</p> <p>The Court found that none of the four factors supported the district court's order enjoining APHIS from partially deregulating RRA during the pendency of the EIS process. Most importantly, respondents could not show that they would suffer irreparable injury if APHIS were allowed to proceed with any partial deregulation, for at least two reasons. First, if and when APHIS pursued a partial deregulation that arguably ran afoul of NEPA, plaintiffs may file a new suit challenging such action and seeking appropriate preliminary relief. Accordingly, a permanent injunction was not needed to guard against any present or imminent risk of likely irreparable harm. Second, a partial deregulation need not cause plaintiffs any injury at all; if its scope is sufficiently limited, the risk of gene flow could be</p>

2010 NEPA Cases		
CASE NAME / CITATION	AGENCY	DECISION / HOLDING
		<p>virtually nonexistent. Indeed, the broad injunction entered by the lower court essentially preempted the very procedure by which APHIS could determine, independently of the pending EIS process for assessing the effects of a complete deregulation, that a limited deregulation would not pose any appreciable risk of environmental harm.</p> <p>The Court also held that the district court erred in entering the nationwide injunction against planting RRA, for two independent reasons. First, because it was inappropriate for the district court to foreclose even the possibility of a partial and temporary deregulation, it follows that it was inappropriate to enjoin planting in accordance with such a deregulation decision. Second, an injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. See, e.g., <i>Weinberger v. Romero-Barcelo</i>, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91. If, as plaintiffs concede, a less drastic remedy (such as partially or completely vacating APHIS's deregulation decision) was sufficient to redress their injury, no recourse to the additional and extraordinary relief of an injunction was warranted.</p> <p>Justice Stevens dissented. Justice Breyer did not participate in the decision.</p>
<p><i>Natural Resources Defense Council v. U.S. Department of Agriculture</i>, 613 F.3d 76 (2d Cir. 2010)</p>	USDA - APHIS	<p>WIN – Affirming a lower court decision, court of appeals held that APHIS complied with NEPA in adopting new regulations for the importation of unmanufactured wood packaging material into the US because the agency considered all reasonable alternatives. Plaintiffs argued that APHIS should have fully considered a phased-in substitute materials requirement. The court found that APHIS had considered a phase-in requirement. Further, the court held that the agency adequately evaluated a substitute-materials-only alternative and had reasonably explained its decision not to adopt it as the final rule. “Under the facts of this case, APHIS reasonably concluded that while a phased-in substitute-materials-only requirement would provide maximum plant protection with minimal adverse environmental consequences, it is not currently a workable alternative to an urgent problem in need of an immediate response.”</p>
<p><i>Native Ecosystems Council v. Tidwell</i>, 599 F.3d 926 (9th Cir. 2010)</p>	USDA - USFS	<p>LOSS – USFS prepared an EA to examine livestock grazing and associated resource protection measures. “Because the Forest Service's environmental assessment was based on a nonexistent management indicator species (MIS), its habitat proxy analysis was not reliable. The Forest Service also failed to take the requisite “hard look” at the project as required by NEPA.” ““If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project's impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a project,” citing <i>Center for Biological Diversity</i>, 538 F.3d at 1220 (citations and internal quotation marks omitted). In addition, the USFS justifications for its decision not to supplement the EA in light of new information were unpersuasive. “Given the presence of potential nesting habitat and the corollary effect on that habitat of cattle grazing, the 2004 information impacted the project sufficiently that the [EA] should have been further revised. See <i>Klamath Siskiyou</i>, 468 F.3d at 560. We note that a revised [EA] considering the issues addressed above might come to a different conclusion than the original [EA] and necessitate the preparation of an [EIS].</p>

2010 NEPA Cases		
CASE NAME / CITATION	AGENCY	DECISION / HOLDING
<p>Habitat Education Center v. U.S. Forest Service, 609 F.3d 897 (7th Cir. 2010)</p>	<p>USDA - USFS</p>	<p>WIN – Plaintiffs challenged an EIS prepared for a forest management project (Twentymile Project) in the Chequamegon-Nicolet National Forest in northern Wisconsin, arguing that the EIS failed to describe the reasonably foreseeable cumulative effects of another proposed timber sale (Twin Ghost Project). Affirming a lower court decision, the court of appeals found that at the time the EIS was prepared the Twin Ghost project was too nebulous to be discussed in any meaningful way and thus that the cumulative impact analysis was sufficient. “We agree with our sister circuits that an agency decision may not be reversed for failure to mention a project not capable of meaningful discussion.” <i>Environmental Protection Information Center v. United States Forest Service</i>, 451 F.3d 1005, 1014 (9th Cir.2006) (“although it is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now, if not enough information is available to give meaningful consideration now, an agency decision may not be invalidated based on the failure to discuss an inchoate, yet contemplated, project.”); <i>Town of Marshfield v. FAA</i>, 552 F.3d 1, 4-5 (1st Cir.2008) (discussion of cumulative impacts of future action not required where “some...action was foreseeable but one could only speculate as to which... measures would be implemented); <i>City of Oxford v. FAA</i>, 428 F.3d 1346, 1353 (11th Cir.2005) (“An agency must consider the cumulative impacts of future actions only if doing so would further the informational purposes of NEPA”); <i>Society Hill Towers Owners' Ass'n v. Rendell</i>, 210 F.3d 168, 182 (3d Cir.2000) (“[P]rojects that the city has merely proposed in planning documents are not sufficiently concrete to warrant inclusion in the [environmental analysis] for the... project at issue here.”).</p> <p>Before reaching the merits, the court addressed the USFS claim that plaintiffs had forfeited their argument by not raising it in the administrative proceeding or in the district court. In support of its argument, USFS relied on two cases: <i>Public Citizen v. United States Dept. of Transp.</i>, 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004), and <i>Kleissler v. U.S. Forest Service</i>, 183 F.3d 196 (3d Cir.1999). In <i>Public Citizen</i>, the Supreme Court held that plaintiffs had forfeited their argument that the agency failed to consider alternatives because the plaintiffs had not raised new alternatives or urged the agency to consider new alternatives during the administrative process. 541 U.S. at 764. In <i>Kleissler</i>, the Third Circuit held that the plaintiff had failed to exhaust his administrative remedies by not presenting certain arguments in writing, instead raising them only informally at certain public meetings. 183 F.3d at 200-02. However, the court found that USFS had waived the forfeiture argument because it did not raise it in the district court.</p>
<p>Pit River Tribe v. U.S. Forest Service, 615 F.3d 1069 (9th Cir. 2010) (also involves BLM)</p>	<p>USDA - USFS</p>	<p>WIN – The underlying case concerns an effort by Calpine Corporation to develop a geothermal power plant (Fourmile Hill Plant) near Medicine Lake, an area of spiritual significance to the Pit River Tribe and other tribes in the region. In 1988, BLM issued 2 10-year leases to allow drilling, extracting, producing geothermal resources. In May 1998, BLM extended the leases for 5 years. In September 1998, USFS and BLM issued a final EIS for the Fourmile Hill Plant and in May 2000 issued an ROD approving the plant. In 2002, BLM extended the leases for another 40 years. Pit River Tribe sued, alleging the agencies had violated various federal laws during the leasing and development process. Reversing a lower court decision, the court of appeals held in the earlier litigation that the agencies should have prepared an EIS prior to granting the May 1998 lease extensions and that the</p>

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		error was not cured by the later September 1988 EIS. The court held that the NEPA violations constituted a violation of the agencies' minimum fiduciary duty to the Pit River Tribe and that the 5-year lease extensions and subsequent 40-year extensions must be undone. On remand to the district court, the parties disagreed as to whether the agencies had to reconsider only the 1998 lease extensions and any subsequent decisions on the approval of the plant and 40-year extensions or whether there were any lease rights remaining. The instant case addressed the appropriate remedy for the agencies' NEPA violations. "The district court's remand order sought to approximate what would have happened had the agencies used the proper procedures in 1998.... The district court's remand order requires that the agencies' decisions to extend Calpine's leases be 'undone,' void, as if they never happened. On remand, the agencies will now reconsider the relevant decisions, with a proper record and with proper environmental assessments."
<i>League of Wilderness Defenders – Blue Mountains Biodiversity Project v. Allen</i>, 615 F.3d 1122 (9th Cir. 2010)	USDA - USFS	WIN – Plaintiffs challenged the adequacy of an EIS on the Five Buttes Project involving 160,000 acres and 5,522 acres of commercial logging on the Deschutes National Forest. Court held that USFS "sufficiently considered and responded to opposing scientific views" and that the cumulative effects analysis was adequate without details on time, type, place and scale for past actions, instead using an "aggregate effects approach." The court also found that the cumulative effects analysis was adequate because it was consistent with the CEQ guidelines.
<i>Hapner v. Tidwell</i>, 621 F.3d 1239 (9th Cir. 2010)	USDA - USFS	WIN – USFS prepared an EA proposing 3 alternatives for the Smith Creek Project which would authorize logging and prescribed burning to reduce the chance of wildfires and to slow the spread of wildfires. The EA was issued for public comment; a final EA and FONSI were issued. Plaintiffs filed suit, claiming the project violated NEPA. The Service's EA cited the reduction of the risk of wildfires to local residents as a primary purpose of the Project. Plaintiffs argue that the Service violated NEPA by failing to address scientific debate concerning whether forest thinning actually reduces wildfire intensity. While a failure in an EA to discuss and consider evidence contrary to the agency's position would suggest that the agency did not take the requisite "hard look" at the environmental consequences" of its proposed action, in this case the court said that USFS had acknowledged the limits of the benefits that would be provided and did not claim that the project would eliminate wildfires in the area, but only that it would reduce the potential for wildfires. Plaintiffs also argued that the EA should have addressed global warming, but the court concluded that because the project involved a relatively small amount of land and it will thin rather than clear cut trees, "the EA adequately considered the Project's impact on global warming in proportion to its significance." The court also concluded that the EA sufficiently explained that its mitigation measures would minimize and compensate for, any soil disturbance from the Project.
<i>Meister v. U.S. Department of Agriculture and U.S. Forest Service</i>, 623 F.3d 363 (6th Cir. 2010)	USDA - USFS	LOSS - This case concerns USFS' management of recreational activities in the Huron-Manistee National Forests in MI, for which a management plan was issued in 1986. In 2003, USFS announced its intent to revise the plan, held public meetings, solicited public comments and in 2005 issued a draft EIS that described 3 alternative plans and designated a preferred plan. A final plan, EIS and ROD were issued in 2006. Plaintiff, after participating in the public comment process and an administrative appeal, filed suit to challenge the plan, arguing that USFS had unreasonably favored gun hunters and snowmobile users. He argued that

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		USFS should have, but did not, consider the alternative of closing certain areas to gun hunting and snowmobiling as a means of resolving a conflict between high-intensity noise and quiet recreational activities. The court concluded that USFS had mischaracterized plaintiff's alternative as a proposal to ban hunting on the forest. "The Service was incorrect to conclude that Meister's proposed alternative fell outside the ambit of the relevant standards here. It seems more likely to us that the Service's decision not to balance these competing uses and to disregard its own ROS descriptions, is what fell outside the relevant standards. Meister's proposed alternative deserves serious consideration under the National Environmental Policy Act."
<i>Sierra Club v. Kimbell</i>, 632 F.3d 549 (8th Cir. 2010)	USDA - USFS	WIN – USFS issued a Land and Resource Management Plan for the Superior National Forest. Sierra Club filed suit, arguing that the USFS assessment of the plan's environmental impacts violated NEPA because it failed to consider the plan's impact on the Boundary Waters Canoe Area Wilderness. Lower court's summary judgment for defendant USFS upheld in the court of appeals. "Our examination of the FEIS convinces us that the Forest Service took an appropriately "hard look" at the environmental consequences of the revised forest plan on the BWCAW." "Considered together, the agency's clear intention to act with neutrality towards the BWCAW, the evaluation of specific impacts to the wilderness area (including certain "edge effects") and the inclusion of the BWCAW within broader environmental analyses persuade us that the Forest Service took the "hard look" required of it under NEPA. We thus conclude that the Forest Service did not act arbitrarily or capriciously in its development of the FEIS."
<i>Earth Island Institute v. Carlton</i>, 626 F.3d 462 (9th Cir. 2010)	USDA - USFS	WIN – This case concerns post-wildfire logging in the Plumas National Forest. USFS initiated the Moonlight-Wheeler Project to remove burned trees posing a safety hazard to traffic in the project area, to recover the value of fire-killed trees and to reestablish the forest through planting of seedlings. However, snag forest habitat created after a high-intensity fire is important to the black-backed woodpecker, a management indicator species. After plaintiffs challenged the Moonlight-Wheeler project, USFS agreed to re-evaluate the project as part of an EIS underway for non-hazard tree logging. USFS issued a Draft Revised EIS, Revised Final EIS and ROD. The ROD authorized harvest of fire-killed trees. Plaintiffs filed motion for preliminary injunction to enjoin USFS from implementing the project, which was denied by the lower court. The court of appeals affirmed, finding that plaintiffs were not likely to succeed on the merits of its arguments. In particular, the court held that USFS responded in detail to specific comments raised by plaintiffs and to opposing scientific viewpoints. "The Forest Service responded in a sufficiently detailed manner to the range of comments submitted. NEPA requires no more. <i>McNair</i> , 537 F.3d at 1000, 1003. Accordingly, the district court did not abuse its discretion in finding that the Forest Service met its comment period obligations."
<i>Heartwood v. Agpaoa</i>, 628 F.3d 261 (6th Cir. 2010)	USDA - USFS	WIN – Plaintiffs challenged a 2004 Forest Plan for the Daniel Boone National Forest because the USFS failed to consider a "no commercial logging" alternative and account for use of herbicides in an EIS and challenged an EA undertaken pursuant to the plan that inadequately addressed the effects of herbicide application. The court of appeals reversed a lower court's decision for the USFS and found that plaintiffs did not have standing to maintain the action. Specifically, "a plaintiff must show: '(1) it has suffered an 'injury in fact' that is (a) concrete and particularized[,] and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is

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		likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’ <i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.</i> , 528 U.S. 167, 180-81 (2000). A plaintiff that sues a federal agency must also demonstrate that: (1) its complaint “relate[s] to ‘agency action,’ which is defined to include ‘failure to act’”; and (2) it “suffered either ‘legal wrong’ or an injury falling within the ‘zone of interests’ sought to be protected by the statute on which [its] complaint is based.” <i>Ctr. For Biological Diversity v. Lueckel</i> , 417 F.3d 532, 536 (6th Cir. 2005) (citations omitted). Moreover, associations like Heartwood have yet another set of required showings: ‘(1) the organization’s members would otherwise have standing in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the law suit.” <i>Friends of Tims Ford v. Tenn. Valley Auth.</i> , 585 F.3d 955, 966 (6th Cir. 2009). This mishmash of interrelated but slightly separate requirements—for associations suing because of federal agency action, eight in total—no doubt creates a web of confusion difficult to untangle. Unfortunately, Heartwood seems to have lost sight of the forest of constitutional standing for the trees of associational and agency standing and it fails to allege with adequate specificity the central element of injury in fact.” “We have explained that injury to aesthetic, recreational, or scientific interests may constitute ‘concrete injury,’ but we have stressed that ‘plaintiffs can only suffer a concrete injury if the Forest Service . . . [is] undertaking or threatening to undertake activities that cause or threaten harm to the plaintiffs’ protected interests.’ <i>Lueckel</i> , 417 F.3d at 537. Both Mr. Chaplin and Ms. Schimmoeller’s affidavits indicate that the Forest provides them with aesthetic, recreational and scientific pleasure.” The specificity requirement of standing “is assuredly not satisfied by averments which state that . . . [an individual] uses unspecified portions of an immense tract of territory.” <i>Lujan v. Nat’l Wildlife Fed’n</i> , 497 U.S. 871, 889 (1990). “[E]nvironmental plaintiffs seeking to establish standing must identify particular segments of a river, sections and sub-sections of a forest, or passes in a mountain range that they use and will continue to use and that agency action will detrimentally affect.”
<i>Lands Council v. McNair</i>, --- F.3d ----, 2010 WL 5300804 (9th Cir. 2010)	USDA - USFS	WIN – This case challenged a USFS decision to thin 277 acres of old growth forest in the Mission Brush Project in the Idaho Panhandle National Forest on the basis that the project violated NEPA. USFS issued the Mission Brush FEIS and ROD in May 2004. This FEIS was later updated (as a result of litigation) in a Supplemental EIS; a supplemental FEIS and ROD was issued in 2006. The supplemental EIS contained additional information on cumulative effects and the methodologies for analyzing forest conditions, including wildlife analysis and stands of old-growth trees. The SFEIS also evaluated three alternative actions and one no-action alternative. The court affirmed a lower court ruling granting the USFS motion for summary judgment. In ruling for the USFS on the NEPA claims, the court said that plaintiffs had exhausted their administrative remedies before filing suit: “The purpose of the exhaustion doctrine is to permit administrative agencies to utilize their expertise, correct any mistakes and avoid unnecessary judicial intervention in the process. <i>Buckingham v. U.S. Dep’t of Agric.</i> , 603 F.3d 1073, 1080 (9th Cir.2010). A party forfeits arguments that are not raised during the administrative process. <i>See Dep’t of Transp. v. Pub. Citizen</i> , 541 U.S. 752, 763-65 (2004). However, a claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue

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		raised. <i>Native Ecosystems Council v. Dombeck</i> , 304 F.3d 886, 899 (9th Cir.2002). Accordingly, alerting the agency in general terms will be enough if the agency has been given ‘a chance to bring its expertise to bear to resolve [the] claim.’ <i>Id.</i> at 900. In finding for the USFS on plaintiffs’ NEPA claims, the court ruled that it was “within the Forest Service’s discretion to rely on its own data and to discount the alternative evidence proffered by Lands Council.” In addition, “the Forest Service considered the wildlife that could be affected by the proposed activities. The Forest Service assessed both capable and suitable habitat, as well as the quality and quantity of habitat necessary to support each species. In reaching its conclusions, the Forest Service relied on ‘scientific literature, wildlife databases, professional judgment, recent field surveys and habitat evaluations.’ The Forest Service’s methodology was validated as reliable and accurate through site visits of representative capable habitat, with an emphasis on stands considered ‘currently suitable.’ Indirect and cumulative impacts on the species were investigated and assessed.”
<i>Habitat Education Center v. U.S. Forest Service</i>, 680 F. Supp.2d 996 (E.D. Wisc. 2010)	USDA - USFS	WIN – Court found USFS supplemental EIS (prepared after court invalidated an earlier EIS) was adequate. In its ruling the court stated that an agency need not consider new alternatives in a supplemental EIS where the new analysis does not undermine alternatives already analyzed. Cumulative impact analysis was sufficient and the court concluded that USFS drew reasonable geographic boundaries.
<i>Habitat Education Center v. U.S. Forest Service</i>, 680 F. Supp.2d 1007 (E.D. Wisc. 2010)	USDA - USFS	WIN - Court found USFS supplemental EIS for Northwest Howell timber project in the Chequamegon-Nicolet National Forest (prepared after court invalidated an earlier EIS) was adequate. A new cumulative impacts analysis in supplemental EIS does not require consideration of new alternatives and the supplemental EIS on Howell project need not include cumulative effects of Fishel project where EIS on Fishel project includes such information. The court also concluded that USFS drew reasonable geographic boundaries for purposes of cumulative impacts analysis.
<i>Wolf Recovery Foundation v. U.S. Forest Service</i>, 692 F. Supp.2d 1264 (D. Idaho 2010)	USDA - USFS	WIN – The court denied plaintiffs’ motion for preliminary injunction for USFS categorical exclusions on special use permit issued to use helicopters to dart and collar gray wolves in the Frank Church Wilderness. The Forest Service did not conduct an EA or EIS but instead found that the activity fell within the terms of two categorical exclusions. Court found that plaintiffs were unlikely to prevail on their claims.
<i>Forest Service Employees for Environmental Ethics v. U.S. Forest Service</i>, 689 F. Supp.2d 891 (W.D. KY 2010)	USDA-USFS	WIN – The court found that an EA/FONSI was adequate for USFS decision to authorize the Continued Maintenance of Open Lands on the Land Between the Lakes National Recreational Area. The court also concluded that plaintiffs had exhausted their administrative remedies, or exhaustion would have been futile and that plaintiffs had standing.
<i>Rock Creek Alliance v. U.S. Forest Service</i>, 703 F. Supp.2d 1152 (D. Mont. 2010)	USDA-USFS	LOSS – Court held that the USFS decision approving the Revett Silver Company’s Rock Creek Mine Project, a proposed underground copper and silver mine located near Rock Creek and the Clark Fork River in the Cabinet Mountain Wilderness on the Kootenai National Forest, was arbitrary and capricious. The mine was approved to take place in two phases: Phase I would involve construction of a preliminary evaluation adit (horizontal entrance to the underground mine) and Phase II would involve the construction of the underground mine, mill and utility lines. Phase II could not begin until after the evaluation adit was complete, the mine owner submitted relevant information to USFS and the agency updated its

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		<p>plan of operations accordingly. Plaintiffs claimed the final EIS lacked critical information resulting in an unreliable environmental baseline, that the agency should have considered an alternative that would have approved only the evaluation audit and not the entire project, that USFS unlawfully deferred its mitigation analysis and its environmental baseline and environmental impacts analysis and that the final EIS failed to review the impacts of discharging mine water to ground water.</p> <p>The court ruled that:</p> <ul style="list-style-type: none"> • The decision not to consider Phase I as a separate alternative did not constitute a failure to take a “hard look” at the alternatives. The Forest Service reasonably argued that it was required to analyze Phases I and II together because of their contingent nature. • The EIS adequately discussed mitigation measures, noting that NEPA does not impose a substantive requirement that the Forest Service adopt mitigation plans; it imposes a procedural duty upon the agency to discuss mitigation in sufficient detail. <i>Robertson</i>, 490 U.S. at 352, 109 S.Ct. 1835. • The Forest Service may not address a deficiency in an EIS through the issuance of a supplemental information report. <i>Idaho Sporting Congress v. Alexander</i>, 222 F.3d 562 (9th Cir. 2000). The statements by the Forest Service and the Fish and Wildlife Service in 2003 show the agencies knew at the time that information on bull trout habitat and population was inadequate. The information should have been included in the Final EIS. The agency cannot “update its NEPA study” with a non-NEPA Supplemental Information Report issued four years after the Record of Decision. Court issued summary judgment in plaintiffs’ favor on this issue. • Plaintiffs’ claim regarding water discharge was premature.
<i>Alliance for the Wild Rockies v. Bradford</i>, 720 F. Supp.2d 1193 (D. Mont. 2010)	USDA-USFS	<p>LOSS – Court ruled that the USFS EIS for Grizzly Project, Miller Project and Little Beaver Project on the Kootenai National Forest, Montana was not adequate. Although agency gave a “hard look” to issue of habitat standards, it did not disclose weaknesses or flaws in study even though the study was the best available scientific information. Further, the analysis of consequences at the Bear Management Unit (BMU) level, rather than a larger scale, was not adequate where agency did not give reasons for choosing BMU scale.</p>
U.S. Department of Commerce		
<i>Humane Society of the U.S. v. Locke</i>, 626 F.3d 1040 (9th Cir. 2010)	DOC - NMFS	<p>WIN - In March 2008, the National Marine Fisheries Service (NMFS) authorized the states of Oregon, Washington and Idaho to kill up to 85 California sea lions annually at Bonneville Dam. To comply with NEPA, NMFS prepared an EA, which resulted in FONSI concluding that approval of the states’ application would not significantly affect the quality of the human environment. Plaintiffs sued, arguing that the agency’s action violated NEPA because it did not prepare an EIS. Plaintiffs first argued that NMFS’s determination under the MMPA that sea lions are having a “significant negative impact on the decline or recovery” of listed salmonid populations necessarily implies that the environmental benefits of authorizing the lethal removal of sea lions will have a significant positive impact on these salmonid populations. They contend that this significant beneficial environmental impact triggers the duty to prepare an EIS under NEPA. “This is a question we</p>

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		need not resolve, however, because even if solely beneficial impacts trigger an EIS, the record does not demonstrate a significant beneficial impact on the human environment in this instance. First, just because NMFS has concluded that sea lions are having a significant negative impact on listed salmonid populations does not mean that the agency has also determined that the removal action authorized here will have a significant positive impact on these same populations. Second, even if NMFS concluded that its action would have a ‘significant’ positive impact on the fish populations involved, that would not necessarily translate into a finding of a significant effect on the quality of the human environment, as required by NEPA: although both statutes speak of significance, the legal standards under the MMPA and NEPA are distinct.” In the alternative, plaintiffs contended that NMFS should have prepared an EIS based on significant adverse impacts – the controversial and uncertain nature of the action, the action’s potentially deadly consequences for Stellar sea lions that frequent the Bonneville Dam area and the impacts to local wildlife viewing opportunities if sea lions were removed. The court found none of these persuasive.
<i>Friends of the East Fork, Inc. v. Thom</i> , 688 F. Supp.2d 1245 (W.D. Wash. 2010)	DOC - NMFS	WIN – Although the court did not decide NEPA claims against incidental take permits for expansion of gravel mining activities in the East Fork Lewis River because it granted summary judgment against agencies on ESA claims, it did find that the alternatives in the EIS were reasonable, including two no-action alternatives.
<i>Consolidated Salmonid Cases</i> , 688 F. Supp.2d 1013 (E.D. Cal. 2010)	DOC – NMFS	LOSS – The court ruled that the issuance and/or implementation of a Biological Opinion (BiOp) with Reasonable and Prudent Alternative (RPA) for the coordinated operations of the federal Central Valley Project (CVP) and State Water Project (SWP) was “major federal action” that would inflict harm on the human environment. Thus, NMFS and/or Bureau of Reclamation should have, but did not prepare an EA or an EIS. “The stakes are high, the harms to the affected human communities great and the injuries unacceptable if they can be mitigated. NMFS and Reclamation have not complied with NEPA. This prevented in-depth analysis of the potential RPA Actions through a properly focused study to identify and select alternative remedial measures that minimize jeopardy to affected humans and their communities, as well as protecting the threatened species. No party has suggested that humans and their environment are less deserving of protection than the species. Until Defendant Agencies have complied with the law, some injunctive relief pending NEPA compliance is appropriate, so long as it will not further jeopardize the species or their habitat.”
U.S. Department of Defense		
<i>Micosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers</i> , 619 F.3d 1289 (11 th Cir. 2010)	DOD - ACOE	WIN – Plaintiff challenged the ACOE’s replacement of 1 mile of the ground-level Tamiami Trail with a bridge that would allow increased water flow into the Everglades National Park without preparation of an EA or EIS. The court found that the Omnibus Appropriations Act of 2009, which authorized the bridge, implicitly exempted the action from NEPA compliance. “In this case, we hold that the notwithstanding clause of the Omnibus Act, analyzed within its surrounding statutory language, repeals the relevant environmental laws so as to deprive the federal courts of subject matter jurisdiction over the Tribe’s suits. The district court’s finding that there was an “explicit exemption” from the environmental laws, while yielding the correct result, blurred the lines between the categories of repeal established in the cases. We believe it is correct and clearer to identify as such the general repealing clause that is at work here.”

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<p><i>Sierra Club v. Van Antwerp</i>, 719 F. Supp.2d 58 (D.D.C. 2010)</p>	<p>DOD - ACOE</p>	<p>LOSS – Court rejected a FONSI on a permit for a 500-acre multi-use development in Tampa, FL located on wetlands which would need to be filled in order for the project to be completed as planned. An EIS should have been prepared where the project “is related to other actions with individually insignificant but cumulatively significant impacts” and there are “unique characteristics” (wetlands and ecologically critical areas). “[i]f any ‘significant’ environmental impacts might result from the proposed agency action then an EIS must be prepared <i>before</i> agency action is taken.’ <i>Grand Canyon Trust</i>, 290 F.3d at 339 (emphasis in original). Significance is determined by evaluating both the context of the action and the intensity of the impact. 40 C.F.R. § 1508.27. Intensity refers to the severity of the impact. ...Under NEPA, if ‘any significant environmental impact <i>might</i> result’ from an agency’s actions, an EIS is required. <i>Grand Canyon Trust</i>, 290 F.3d at 339 (second emphasis added). Significance is determined by evaluating both the context of the action and the intensity of the impact and intensity refers to the severity of the impact. The criteria in NEPA’s regulations for evaluating significance of environmental impacts highlight the need for an EIS because the [proposed development] site satisfies at least several of the criteria. <i>See Fund for Animals v. Norton</i>, 281 F.Supp.2d 209, 235 (D.D.C.2003) (“[O]ne or more significance factors can justify setting aside a [Finding of No Significant Impact].”). “The Corps presents the Court with no “rational connection” between the record and its decision to not prepare an EIS. <i>See Motor Vehicle Mfrs. Ass’n</i>, 463 U.S. at 43, 103 S.Ct. 2856. Therefore, Plaintiff’s motion for summary judgment regarding its NEPA claim is granted.”</p>
<p>U.S. Department of the Interior</p>		
<p><i>National Parks and Conservation Association v. Bureau of Land Management</i>, 586 F.3d 735 (9th Cir. 2010)</p>	<p>DOI – BLM</p>	<p>LOSS – BLM prepared an EIS for a land exchange that would allow for the development of a 4,600-acre landfill on a former mining site near the Joshua Tree National Park in CA. The court held that the EIS was inadequate because the purpose and need focused on the applicant’s needs and unreasonably narrowed the alternatives to be considered. “Other circuits have held that agencies must acknowledge private goals. <i>Colorado Env’tl. Coalition v. Dombeck</i>, 185 F.3d 1162, 1175 (10th Cir. 1999) (“Agencies . . . are precluded from completely ignoring a private applicant’s objectives.”); <i>Burlington</i>, 938 F.2d at 196 (“[T]he agency should take into account the needs and goals of the parties involved in the application.”). Requiring agencies to consider private objectives, however, is a far cry from mandating that those private interests define the scope of the proposed project.” Although finding that the discussion of impacts to bighorn sheep was sufficient, the court held that the EIS contained no specific discussion of eutrophication and that the relevant sections were scattered throughout the EIS. “In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form. <i>Block</i>, 690 F.2d at 761. Here, the discussion of eutrophication is neither full nor fair with respect to atmospheric eutrophication. A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together.... This patchwork cannot serve as a “reasonably thorough” discussion of the eutrophication issue.”</p>

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<p><i>Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior</i>, 608 F.3d 592 (9th Cir. 2010)</p>	<p>DOI-BLM</p>	<p>LOSS – Plaintiffs argued that BLM’s approval of an amendment to a plan of operations for an existing mineral exploration project in Nevada violated NEPA and other statutes. The project is located on the ancestral lands of the Te-Moak Tribe, which was well documented. The court concurred with the lower court’s dismissal of the other claims, but reversed the decision denying plaintiff’s motion for summary judgment on the NEPA claims. BLM prepared an EA and issued a FONSI conditionally approving the amendment and requiring the applicant to provide detailed maps prior to surface disturbing activities and to follow specific avoidance measures to protect cultural resources. Plaintiffs challenged BLM’s FONSI on the grounds that (1) BLM failed to take a “hard look” at the amendment’s cultural and environmental impacts because it approved all three phases of the amendment without obtaining sufficient information about each particular phase of exploration activities; (2) BLM did not conduct sufficient analysis of reasonable alternatives; and (3) BLM did not conduct sufficient analysis of cumulative impacts. After finding for defendants on the first two issues, the court held that BLM failed to include a proposed mining operation located within the “cumulative effects area” identified by BLM. “An EA’s analysis of cumulative impacts ‘must give a sufficiently detailed catalogue of past, present and future projects and provide adequate analysis about how these projects and differences between the projects, are thought to have impacted the environment.’ <i>Lands Council</i>, 395 F.3d at 1028. ‘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.’ <i>Neighbors of Cuddy Mountain</i>, 137 F.3d at 1380. ‘[S]ome quantified or detailed information is required. Without such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide.’ <i>Id.</i> at 1379.” The EA failed to include the required “quantified or detailed information.” The EA’s discussion of the amendment’s direct effects in lieu of a discussion of cumulative impacts is inadequate. The EA concludes that “[n]o incremental cumulative effects would occur to cultural resources as a result of the proposed project.” To reach this conclusion, the EA reasons that all of the impacts from the expanded exploration activities will be avoided or mitigated and that all “[e]xisting, proposed and reasonably foreseeable activities would avoid or mitigate all known and discovered resources.” The court found this discussion and the entire cumulative impacts section, to be “conclusory” and “vague.” “We conclude that in order for Plaintiffs to demonstrate that the BLM failed to conduct a sufficient cumulative impact analysis, they need not show what cumulative impacts would occur. To hold otherwise would require the public, rather than the agency, to ascertain the cumulative effects of a proposed action. See <i>id.</i> Such a requirement would thwart one of the ‘twin aims’ of NEPA—to ‘ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.’ <i>Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.</i>, 462 U.S. 87, 97 (1983)”</p>

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<p><i>Biodiversity Conservation Alliance v. Bureau of Land Management</i>, 608 F.3d 709 (10th Cir. 2010)</p>	<p>DOI-BLM</p>	<p>WIN - In this appeal, environmental and citizens' groups challenged a 2003 BLM resource management plan amendment allowing natural gas development in Wyoming's Powder River Basin. Plaintiffs argued that BLM violated NEPA when it refused to study in detail their proposal to phase development in the Basin over decades. Affirming the lower court, the court of appeals found that the agency had reasonably refused to give detailed study to a plan that would not meet the project's purposes. "Our review of a decision not to consider a particular alternative is informed by a rule of reason and practicality. <i>Airport Neighbors Alliance, Inc. v. United States</i>, 90 F.3d 426, 432 (10th Cir.1996). The Bureau may eliminate alternatives that are 'too remote, speculative, impractical, or ineffective,' or that do not meet the purposes and needs of the project. <i>New Mexico ex rel. Richardson</i>, 565 F.3d at 708-09 & n. 30 (citation omitted). Agencies may not define a project's objectives so narrowly as to exclude all alternatives. <i>Davis v. Mineta</i>, 302 F.3d 1104, 1119 (10th Cir.2002). But where a private party's proposal triggers a project, the agency may 'give substantial weight to the goals and objectives of that private actor.' <i>Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.</i>, 297 F.3d 1012, 1030 (10th Cir.2002)." The court found that the plaintiffs' phased development alternative would not help meet national energy needs, would not meet other project purposes and would not help identify environmental impacts. "In sum, the Bureau reasonably concluded that phased development was impractical and would not meet the project's purposes. This ground is an adequate basis for the Bureau's decision."</p>
<p><i>Theodore Roosevelt Conservation Partnership v. Salazar</i>, 616 F.3d 497 (D.C. Cir. 2010)</p>	<p>DOI - BLM</p>	<p>WIN – BLM prepared an EIS for the Atlantic Rim Natural Gas Field Development Project, which was designed to manage the resources on 270,000 acres of public and private land in south-central WY. After issuing the ROD, BLM began authorizing specific applications for permission to drill wells that were consistent with the project. Each approval was accompanied by an EA/FONSI. Plaintiffs challenged the EIS, ROD and subsequent drilling permits arguing they were issued in violation of NEPA and other statutes. Affirming a lower court decision, the court of appeals held, among other things, that BLM was not required to address the cumulative impacts of two other potential development projects near the Atlantic Rim Project. "We agree with the district court that the incipient notion of the two projects expressed in notices of intent to prepare an EIS for each did not establish reasonable foreseeability of the incremental impact of those projects in connection with the Atlantic Rim Project for purposes of § 1508.7. The history of the Atlantic Rim Project itself demonstrates that projects in their infancy have uncertain futures....Granted, a project need not be finalized to be 'reasonably foreseeable' under 40 C.F.R. § 1508.7. But neither was it arbitrary and capricious for the Bureau to omit from its cumulative impact analysis other projects for which nothing had been completed except notices of intent, each published after the Atlantic Rim Project's draft EIS had been released. The Bureau did not violate NEPA by concluding that these projects were too preliminary to meaningfully estimate their cumulative impacts in the Atlantic Rim Project EIS." The court also upheld the project's adaptive management plan did not violate NEPA's mandate to discuss possible mitigation measures in the EIS and ROD. "We agree with the district court that 'although the plaintiffs are dissatisfied with the level of protection provided under the current mitigation plan, the record clearly reflects that BLM analyzed and considered various alternatives and put in place measures far more stringent than those included in the original proposal.' <i>TRCP</i>, 605</p>

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		F.Supp.2d at 275 (quoting <i>NRDC</i> , 525 F.Supp.2d at 122). By setting forth both fixed mitigation measures and an adaptive management plan, the Record of Decision amply fulfills NEPA's mandate to discuss mitigation measures. We can require no more."
<i>Western Watersheds Project v. Kraayenbrink</i>, 620 F.3d 1187 (9th Cir. 2010)	DOI - BLM	LOSS – Plaintiffs challenged BLM’s 2006 amendments to its grazing regulations on which, among other things, decreased public involvement in public lands management, put new limitations on BLM’s enforcement powers and increased ranchers’ ownership rights to improvements and water on public lands. Plaintiffs argued that BLM violated NEPA by failing to take a “hard look” at the environmental effects of the regulations. Court of appeals upheld a lower court finding that BLM had violated NEPA by (1) failing to take a “hard look” at the environmental consequences of the proposed changes and to respond adequately to concerns and criticisms raised by the agency's own experts, FWS and other agencies; (2) failing to consider adequately the combined effects of the regulatory changes; and (3) failing to offer a reasoned explanation for why BLM was changing its grazing management policies, particularly given that BLM sought to reduce public participation and roll back environmental protections. <u>NOTE</u> that in 2008, BLM dismissed its appeal and no longer sought to challenge the district court’s judgment or defend the regulations. However, the intervenor organizations representing ranchers maintained their appeal.
<i>Center for Biological Diversity v. U.S. Department of the Interior</i>, 623 F.3d 633 (9th Cir. 2010)	DOI - BLM	LOSS – The court invalidated an EIS for a land exchange that would transfer open pit copper mining land out of federal ownership such that it would not be subject to the Mining Act of 1872. BLM prepared the EIS but concluded that the impacts of the mining would be the same under the proposed action and no action alternatives. Plaintiffs argued that mining impacts would be much worse under private ownership than on land managed by the federal government because BLM would have to approve a mining plan of operations that included mitigation and monitoring and challenged the adequacy of the EIS. The court held the EIS was inadequate because it failed to include a meaningful comparison of alternatives.
<i>Government of the Province of Manitoba v. Salazar</i>, 691 F. Supp.2d 37 (D.C.C. 2010)	DOI - BurRec	LOSS – Court held that an EIS prepared by the BurRec was not adequate for the Northwest Area Water Supply Project, a joint venture between the U.S. and North Dakota that would draw water from Lake Sakakawea and transfer it across the continental divide in a 45-mile pipeline for use in Minot, ND and surrounding areas. BurRec was ordered to take a “hard look” at (1) the cumulative impacts of water withdrawal on the water levels of Lake Sakakawea and the Missouri River and (2) the consequences of biota transfer into the Hudson Bay Basin, including Canada.

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<i>Center for Environmental Law and Policy v. U.S. Bureau of Reclamation</i>, 715 F. Supp.2d 1185 (E.D. Wash. 2010)	DOI - BurRec	WIN – The court rules that an EA/FONSI for Lake Roosevelt Incremental Storage Releases Project, also known as the Lake Roosevelt Drawdown Project, which would divert water from Lake Roosevelt, the reservoir formed behind Grand Coulee Dam, for irrigation use in the Odessa Subarea was adequate. The court found that analyzing only the proposed action and no action alternative was reasonable where the EA was tiered to programmatic EISs that had analyzed “at least two of the alternatives suggested” by plaintiffs and other alternatives would not meet the need for “a variety of water supply options and distribute the water to a variety of end uses” as stipulated in state law. Further, the EA adequately addressed the issue of induced growth which was subject to multiple factors and “is speculative at this stage.” Incorporation by reference is appropriate in an EA, “so long as it sufficiently summarizes the relevant portions of those documents, as this final EA does.” Plaintiffs failed to mention any specific projects that were not considered in the cumulative impacts analysis. Finally, it was not a NEPA violation for the agency to negotiate a water rights permit prior to completing EA/FONSI, because the permit did not commit agency to a specific choice of action.
<i>Forest Guardians v. U.S. Fish and Wildlife Service</i>, 611 F.3d 692 (10th Cir. 2010)	DOI - FWS	WIN – Court found that an EA/FONSI was adequate to support a FWS decision regarding the reintroduction of a nonessential experimental population of endangered Northern Aplomada Falcons into southern New Mexico. In reaching this decision, the court looked beyond the administrative record to examine whether the agency had impermissibly committed itself to a course of action before beginning the NEPA process and concluded it had not. “Predetermination occurs only when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis – which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action.” Here, the court found that “[a]t most, the evidence demonstrates that the FWS had a preferred alternative and that The Peregrine Fund shared that preference.” “NEPA does not require agency officials to be ‘subjectively impartial.’ <i>Envtl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army</i> , 470 F.2d 289, 295 (8th Cir.1972). An agency can have a preferred alternative in mind when it conducts a NEPA analysis. 40 C.F.R. §1502.14(e); see also <i>Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.</i> , 126 F.3d 1158, 1185 (9th Cir.1997) (noting that ‘an agency can formulate a proposal or even identify a preferred course of action before completing an EIS’). ‘The test of compliance ... then, is one of good faith objectivity rather than subjective impartiality.’ <i>Envtl. Def. Fund, Inc.</i> , 470 F.2d at 296. However, ‘the comprehensive ‘hard look’ mandated by Congress and required by [NEPA] must be timely and it must be taken objectively and in good faith, not as an exercise in form over substance and not as a subterfuge designed to rationalize a decision already made.’ <i>Metcalf</i> , 214 F.3d at 1142; accord <i>Int'l Snowmobile Mfrs. Ass'n v. Norton</i> , 340 F.Supp.2d 1249, 1257-58 (D.Wyo.2004).”
<i>Defenders of Wildlife v. Salazar</i>, 698 F. Supp.2d 141 (D.D.C. 2010)	DOI - FWS	WIN – Court found EIS for management of National Elk Refuge in Jackson Hole, WY adequate. The adaptive management strategy “adequately addressed the possible environmental impacts and mitigation measures.”

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<i>Weiss v. Kempthorne</i>, 683 F. Supp.2d 549 (W.D. Mich. 2010)	DOI - NPS	WIN – The court ruled that the EA/FONSI for development of a golf course in Benton Harbor, Michigan as part of the Harbor Shores project was adequate. In addressing plaintiff’s claims regarding alternatives, the court found that it was appropriate for the agency to consider the applicant’s economic goals and to eliminate from serious consideration an alternative that did not meet those goals. The court also held that EAs prepared by NPS and ACOE did not improperly segment the proposed action because there was “no indication” that the separate EAs “allowed the agencies to avoid” an EIS. Although it did not include the entire Harbor Shores project in its EA, the scope of the NPS EA was adequate because “NPS and the Corps have already conducted a review of the entire project in accordance with their respective jurisdictional authorities.”
<i>Recent Past Preservation Network v. Latschar</i>, 701 F. Supp.2d 49 (D.D.C. 2010)	DOI - NPS	LOSS – Programmatic EIS not sufficient for NPS decision to remove the historic Gettysburg Cyclorama Center on Ziegler’s Grove in Gettysburg National Park. The agency could not rely on a general management plan EIS for a site-specific decision. Although there is a 6-year statute of limitations to bring NEPA claims and the ROD was signed in 1999, the court held that the ROD issuance had not started the clock because the agency had not yet solicited bids for the project by November 2008.
U.S. Department of State		
<i>Sierra Club v. Clinton</i>, 689 F. Supp.2d 1147 (D. Minn. 2010)		WIN – This case involved the State Department issuance of permits to build and operate the Alberta Clipper Pipeline from Canada to Wisconsin. The court did not reach the merits of the case but noted that the “but for” test is not enough to establish that other projects are connected or cumulative and that plaintiffs were not likely to be able to show a reasonably close causal relationship between development of the Canadian tar sands and the AC Pipeline. The court also ruled that the ACOE and USFS had properly engaged the State Department in the preparation of an EIS for the project and that the EIS was not required to analyze “alternatives such as energy efficiency, renewable energy, clean technologies and demand-side management.”
U.S. Department of Transportation		
<i>Slockish v. U.S. Federal Highway Administration</i>, 682 F. Supp.2d 1178 (D. Or. 2010)	DOT - FHWA	LOSS – This case involved a highway-widening project on Highway 26 in Oregon. The court allowed the case to proceed, finding that it was sufficient if one plaintiff had established standing and that the case was not moot if there was ongoing harm to plaintiffs’ interests and where controversy remained live.
<i>Sierra Club North Star Chapter v. LaHood</i>, 693 F. Supp.2d 958 (D. Minn. 2010)	DOT - FHWA	WIN – This case involved a proposed bridge that would cross the Lower St. Croix River near Oak Park Heights, Minnesota. Although finding that a related NPS Section 7 evaluation was arbitrary and capricious, the court rejected all of plaintiff’s NEPA claims and found that the FHWA EIS prepared for the project demonstrated the agency had given a “hard look” to environmental impacts. Specifically, the court ruled that the agency had no duty to analyze the alternatives put forward by plaintiffs because either they did not meet the purpose and need for the project or that adequately addressed them in the supplemental final EIS. “Overall, while Sierra Club ‘points to some alternatives that might have been considered or discussed more fully, the ‘detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable.” <i>Laguna Greenbelt, Inc. v. U.S.</i>

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		<i>Dept. of Transp.</i> , 42 F.3d 517, 528 (9th Cir.1994) (quoting <i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.</i> , 435 U.S. 519, 551, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)). The SFEIS discusses an appropriate range of reasonable alternatives sufficient to satisfy NEPA." The court also found that the FHWA adequately addressed the indirect impacts of the proposed bridge ("The Court holds that FHWA's indirect effect analysis was sufficient. ... It identified indirect effects and mitigation measures to minimize those effects.") and that the FHWA adequately addressed cumulative impacts ("When read as a whole, FHWA's cumulative impacts analysis is a reasonable assessment, considering the relevant factors, which satisfies the 'hard look' requirement under NEPA."). With respect to the cumulative impact analysis, the court stated that "The analysis sets the geographic and time boundaries of the cumulative impacts assessment. It then summarizes the existing condition of each potentially affected resource. The analysis summarizes the impacts from the Proposed Bridge on each potentially affected resource and identifies other current and reasonably foreseeable future actions and their possible impacts on those resources. Finally, the analysis discusses the potential for cumulative impacts on the resources and mitigation or minimization measures. This approach constitutes a 'meaningful cumulative impact analysis.' <i>Grand Canyon Trust v. FAA</i> , 290 F.3d 339, 345 (D.C.Cir.2002)."
<i>Sierra Club v. Federal Highway Administration</i>, 715 F. Supp.2d 721 (S.D. Tex. 2010)	DOT - FHWA	WIN – Court found FHWA EIS for construction of Segment E, a 15-mile stretch of new highway in northwest Houston projected to be part of a 180-mile loop around Houston known as the Grand Parkway, was adequate. The court reiterated that there is no "minimum number of alternatives that an agency must consider" and that, in this case, the agency had "provided a reasonably complete discussion of possible mitigation measures."
<i>North Carolina Alliance for Transportation Reform v. U.S. Department of Transportation</i>, 713 F. Supp.2d 491 (M.D. N.C. 2010)	DOT - FHWA	WIN – Court found an FHWA EIS for construction of Winston-Salem Northern Beltway around the city of Winston-Salem, North Carolina was adequate, ruling that it need not consider climate change where EPA comments did not "suggest the need to study greenhouse gases" and greenhouse gas emission analysis would not be informative or useful for this highway project.
<i>Commuter Rail Division v. Surface Transportation Board</i>, 608 F.3d 24 (D.C. Cir. 2010)	DOT - STB	WIN – Canadian Pacific RR and Dakota, Minnesota & Eastern RR applied to the STB for approval of a merger in which a CPRR subsidiary would acquire DME and its subsidiary. STB approved the acquisition. Sierra Club challenged STB decision to defer preparation of an EIS until CPR decided whether to proceed with construction of a line connecting DME's track in SD to coal mines in WY. Court found Sierra Club had no standing to bring the claim. Sierra Club claimed Article III standing as the representative of two of its members. "An organization has representational standing to litigate on behalf of its members 'if (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" <i>Int'l Bhd. of Teamsters v. Transp. Sec. Admin.</i> , 429 F.3d 1130, 1134-35 (D.C.Cir.2005) (quoting <i>United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.</i> , 517 U.S. 544, 553 (1996)) (internal quotation omitted). Sierra Club fails the first prong of this test because it has not shown that either of the two members has standing in his own right. The 'irreducible constitutional

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		<p>minimum of standing contains three elements': (1) injury-in-fact, (2) causation and (3) redressability.' <i>Jackson County, N.C. v. FERC</i>, 589 F.3d 1284, 1288 (D.C.Cir.2009) (quoting <i>Lujan v. Defenders of Wildlife</i>, 504 U.S. 555, 560-61 (1992)) (internal quotation omitted). Thus, to demonstrate standing, 'a petitioner must allege (1) a personal injury-in-fact that is (2) fairly traceable to the defendant's conduct and (3) redressable by the relief requested.' <i>Int'l Bhd. of Teamsters</i>, 429 F.3d at 1134 (internal quotations omitted). Sierra Club has not made the required showing because neither Snyder's declaration nor Clauson's declaration alleges an injury that was caused by the Board's decision in this case."</p>
Independent Agencies		
<p><i>South Coast Air Quality Management District v. Federal Energy Regulatory Commission</i>, 621 F.3d 1085 (9th Cir. 2010)</p>	<p>FERC</p>	<p>WIN – North Baja Pipeline applied for a certificate of public convenience and necessity with FERC for the expansion and modification of its existing pipeline system to allow for transport of foreign-sourced natural gas from Mexico into the Basin Region of southern CA, in the jurisdictional area of the South Coast Air Quality Management District. In 2007, FERC issued an EIS. Plaintiff argued the EIS only examined the environmental impact relating to the construction and operation of the new pipeline itself and failed to consider the impact of the emissions resulting from the eventual use of the pipeline's gas by consumers in the Basin and to adopt measures to mitigate that impact. Finding that FERC adequately considered this impact in its EIS, the court did not resolve the issue of whether the agency was required to do so. "[I]n its EIS, FERC explicitly considered the environmental impact of downstream emissions and imposed what it reasonably believed to be effective measures to mitigate the impact."</p>
<p><i>Morris v. U.S. Nuclear Regulatory Commission</i>, 598 F.3d 67 (10th Cir. 2010)</p>	<p>NRC</p>	<p>WIN – In 1997, NRC (with BLM and BIA) issued a final EIS for in situ leach uranium mining on 4 sites in New Mexico proposed by Hydro Resources, Inc.(HRI). NRC issued a license to HRI in 1998. Plaintiffs argued that NRC failed to comply with NEPA because of the manner in which the agency considered airborne radiation at one of the sites. "Under NEPA, [o]ur job is not to question the wisdom of the agency's ultimate decision or its conclusion concerning the magnitude of indirect impacts. Rather, our job is to examine the administrative record, as a whole, to determine whether the agency made a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision-making." Based on excerpts from the FEIS, the court concluded that the NRC did consider the cumulative effects of airborne radiation from past mining as well as that expected from HRI's proposed operations. Plaintiffs also argued that the FEIS, in addressing the effects of the past mining operations, erroneously treated the airborne radiation already being emitted from the debris as naturally occurring rather than as man-made background radiation. "Even if it did so, the FEIS still adequately considered the cumulative impact from all of these sources of airborne radiation, regardless of how the NRC characterized that airborne radiation."</p>