RECENT NEPA CASES (2012)

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ABSTRACT

This paper will review substantive NEPA cases issued by federal courts in 2012. The implications of the decisions and relevance to NEPA practitioners will be explained.

INTRODUCTION

In 2012, the U.S. Courts of Appeal issued 28 decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 28 cases involved 13 different departments and agencies. The government prevailed in 24 of the 28 cases (86 percent). The U.S. Supreme Court issued no NEPA opinions in 2012; opinions from the U.S. District Courts were not reviewed. For comparison purposes, Table 1 shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2012, by circuit. Figure 1 is a map showing the states covered in each circuit court.

Table 1. Number of U.S. Courts of Appeal NEPA Cases, by year and by circuit

	U.S. Courts of Appeal Circuits												
	Ist	**2nd**	**3rd**	**4th**	**5th**	**6th**	**7th**	**8th**	**9th**	**10th**	**11th**	**D.C.**	**TOTAL**
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	*2*	*1*	*2*	*3*	*1*		*1*		*12*	*3*	*2*	*1*	*28*
TOTAL	**6**	**6**	**5**	**5**	**6**	**3**	**3**	**5**	**81**	**20**	**4**	**10**	**154**
	4%	4%	3%	3%	4%	2%	2%	3%	53%	13%	3%	6%	100%

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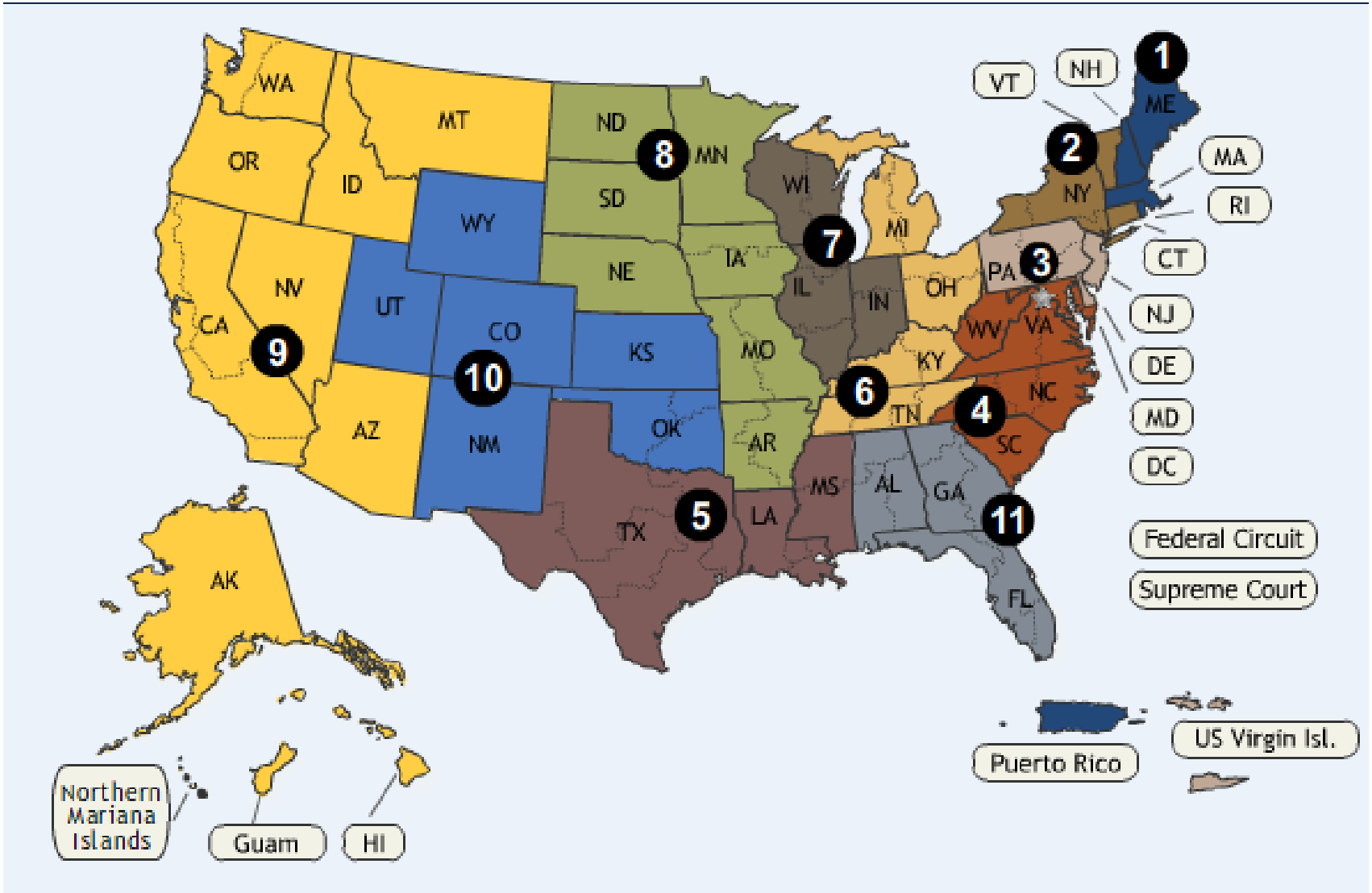
Figure 1. Map of U.S. Circuit Courts of Appeal



STATISTICS

The U.S. Forest Service (USFS) again won first place as the single agency involved in the largest number of NEPA cases, with six cases. In an extreme departure from past years, the agency prevailed in all of the cases brought against it.

The agencies of the U.S. Department of the Interior (DOI) also were involved in six NEPA cases. These agencies are: Bureau of Land Management (BLM), Bureau of Ocean Energy Management (BOEM), Bureau of Reclamation (BoR), and Fish and Wildlife Service (FWS); in a few cases, two DOI agencies were involved in the same case. FWS was involved in four of the six. Of the six cases, DOI agencies lost one.

The other NEPA cases involved:

- U.S. Department of Agriculture (USDA)/Natural Resources Conservation Service – one case (win)
- U.S. Department of Commerce (DOC)/National Oceanic and Atmospheric Administration (NOAA)/National Marine Fisheries Service (NMFS) – two cases (both wins)
- U.S. Department of Defense/Army Corps of Engineers – four cases (three wins, one loss)
- U.S. Department of Energy (DOE) – three cases (all wins)
- U.S. Department of Transportation (DOT)/ Federal Aviation Administration (FAA) – one case (win)
- DOT/Federal Highway Administration (FHWA) – three cases (two wins, one loss)
- Federal Energy Regulatory Commission (FERC) – one case (win)
- U.S. Nuclear Regulatory Commission (NRC) – one case (loss)

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

- Scope of analysis/level of detail required
    - *Webster v. U.S. Department of Agriculture*, 685 F.3d 411 (4th Cir. 2012)
    - *Save the Peaks Coalition v. U.S. Forest Service*, 669 F.3d 1025 (9th Cir. 2012)
    - *Habitat Education Center, Inc. v. U.S. Forest Service*, 673 F.3d. 518 (7th Cir. 2012)
    - *Pacific Coast Federation v. Blank*, 693 F.3d. 1084 (9th Cir. 2012)
    - *Tri-Valley CAREs v. Department of Energy*, 671 F.3d 1113 (9th Cir. 2012)
    - *Citizens for Smart Growth v. Secretary of Transportation*, 669 F.3d 1203 (11th Cir. 2012)
    - *Prairie Band Pottawatomie Nation v. Federal Highway Administration*, 684 F.3d 1002 (10th Cir. 2012)
- Scientific integrity/dissenting scientific views
    - *Save the Peaks Coalition v. U.S. Forest Service*, 669 F.3d 1025 (9th Cir. 2012)
    - *League of Wilderness Defenders v. U.S. Forest Service*, 689 F.3d. 1060 (9th Cir. 2012)
    - *Earth Island Institute v. U.S. Forest Service*, 697 F.3d. 1010 (9th Cir. 2012)

    - *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156 (10th Cir. 2012)
- Requirements for environmental assessments
    - *Earth Island Institute v. U.S. Forest Service*, 697 F.3d. 1010 (9th Cir. 2012)
    - *Native Ecosystems Council v. Weldon*, 697 F.3d. 1043 (9th Cir. 2012)
    - *Defenders of Wildlife v. Bureau of Ocean Energy Management*, 684 F.3d. 1242 (11th Cir. 2012)
    - *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012)
    - *State of New York v. Nuclear Regulatory Commission*, 681 F.3d 471 (D.C. Cir. 2012)

Each of the 2012 NEPA cases, organized by federal agency, is summarized below.

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

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

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		Appellants insist is missing—specifically, the impact that the dam would have on downstream fisheries. The NRCS, in its discussion of the Site 16 dam's effects on aquatic resources, candidly acknowledged that the dam "would result in a barrier to fish movement between the upper reaches of Lower Cove Run and the lower sections of this stream and the main stem [of the] Lost River." Other effects that Appellants maintain are missing are either speculative or relatively inconsequential flyspecks." Cost-benefit analysis: Plaintiffs argued that the NRCS cost-benefit analysis was deficient for several reasons: 1) the NRCS admitted that the usual design life for watershed-protection and flood-prevention structures is 50 to 100 years, but in its cost-benefit analysis, it used a design life of 100 years, the far end of the spectrum; 2) the NRCS's cost-benefit ratio compared the costs and benefits of the Project as a whole, not Site 16 specifically, which may mask a less desirable cost-benefit ratio for Site 16 alone; and 3) the NRCS included as benefits over $900,000 that would result from incidental recreation, even though it eliminated recreation as a purpose. Recognizing that an EIS may be deficient if its assessment of costs and benefits relies upon misleading economic assumptions (citing *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996)), the court found that a project life of 100 years was a reasonable exercise of the agency's discretion, "it is evident that the NRCS considered the costs and benefits of Site 16 specifically, and "it was not misleading for the NRCS to include incidental recreational benefits after removing recreation as a purpose. The 2009 SEIS explained that, although recreation was no longer a purpose for the dam at Site 16, incidental recreation, such as fishing, bird watching, boating, and hiking, would still occur. The estimated benefits reflected this incidental recreation, and nothing suggests that this amount is inflated or otherwise erroneous." Mitigation: Plaintiffs argued that the 2009 SEIS failed to provide sufficient detail about planned mitigation measures so that they could be fairly evaluated. In rejecting this argument the court found that "there is no requirement that the agency formulate and adopt a complete mitigation plan at this stage. *See Robertson*, 490 U.S. at 352-53. That the NRCS may have to develop further mitigation measures in the future to comply with permit requirements does not render its current mitigation discussion insufficient under the NEPA. In the 2009 SEIS, the NRCS provided a detailed discussion of various mitigation measures it would take to reduce wetlands effects. It is enough, for purposes of the NEPA, to demonstrate that the NRCS took a hard look at the effects its action would have on wetlands and that it developed plans to mitigate those effects."
Pacific Rivers Council v. U.S. Forest Service, 689 F.3d 1012 (9th Cir. 2012) [June 20 decision replaced February 3 decision (668 F.3d 609); dissent added]	USFS	**WIN/LOSS** – Plaintiffs challenged a Supplemental EIS issued for a 2004 Framework for the management of the 11 national forests in the Sierra Nevada Mountains. An EIS had been prepared for proposed changes to the Sierra Nevada Forest Plan. In the Record of Decision, the USFS selected an alternative referred to as the 2001 Framework (prepared under the Clinton Administration); after a review of the 2001 Framework (conducted under the subsequent Bush Administration), the USFS proposed to reevaluate the 2001 Framework to consider fire-related issues and to identify opportunities to reduce the impacts of the 2001 Framework on grazing permit holders, recreation users and permit holders, and local communities.

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		The USFS prepared a Supplemental EIS to consider two alternatives – the 2001 Framework and a "preferred alternative" that would allow more logging and reduce restrictions on grazing. The Draft Supplemental EIS was criticized by the USFS' Washington Office because there was no discussion of the effects of logging and related activities on riparian ecosystems, streams, and fish. The Final Supplemental EIS was issued without a discussion of the "riparian ecosystems, streams and fisheries" that the Washington Office said was needed, and the Regional Forester issued a Record of Decision selecting the preferred alternative. Plaintiffs alleged that the 2004 EIS did not sufficiently analyze the environmental consequences of the 2004 Framework for fish and amphibians. The district court granted summary judgment to the USFS. On appeal, the 9th Circuit concluded that the analysis of fish in the 2004 EIS did not comply with NEPA, but that the analysis of amphibians did comply. The court remanded the case to the district court. "Both the 2001 and 2004 Frameworks are written in general terms, rather than addressing specific sites at which the logging and logging-related activities will take place. But there are substantial differences between the 2001 and 2004 Frameworks. Relevant to this appeal are changes in authorized logging and logging-related activities, and changes in grazing standards for commercial and recreational livestock." After finding that the plaintiffs did have standing to sue even though the USFS decision did not result in any specific logging activities, the court considered whether the agency had given a "hard look" to the environmental consequences of the 2004 Framework on fish and amphibians. "The 2001 EIS contained a 64–page detailed analysis of environmental consequences of the 2001 Framework for individual species of fish. In stark contrast to the 2001 EIS, the 2004 EIS contains no analysis whatsoever of environmental consequences of the 2004 Framework for individual species of fish. The 2004 EIS incorporates by reference the analysis contained in the 2001 EIS, but contains no analysis of additional or different environmental consequences of the 2004 Framework even though the new framework authorizes substantially more environment-altering activities than the old framework. Of particular importance, the 2004 Framework allows an additional 4.9 billion board feet of green and salvage timber harvesting during the first two decades, much of it conducted nearer streams, compared to the 2001 Framework. The 2004 EIS also incorporates by reference two biological assessments ('BAs') of the consequences of the 2001 and 2004 Frameworks on listed fish under the Endangered Species Act. But it neither summarizes the findings of the BAs nor includes them in an appendix." "The Forest Service contends that the 2004 EIS takes a sufficiently hard look at environmental consequences of the 2004 Framework on fish. It makes two arguments. First, it points out that the 2004 Framework is an amendment to the Sierra Nevada Forest Plan. The Forest Service argues that because the Forest Plan is an LRMP, it is not reasonably possible for the 2004 EIS to provide an analysis of environmental consequences of the 2004 Framework on individual species. Second, it argues that the 2004 EIS's incorporation by reference of the BAs

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		concerning environmental consequences of the 2001 and 2004 Frameworks on listed fish satisfies the hard look requirement." While recognizing that the required level of analysis in an EIS is different for programmatic and site-specific plans, the court stated that "NEPA requires that an EIS analyze environmental consequences of a proposed plan as soon as it is 'reasonably possible' to do so. *Kern*, 284 F.3d at 1072." "We do not require the Forest Service to provide in the 2004 EIS precisely the same level of analysis as in its 2001 EIS. We recognize that it may be appropriate to have fewer than 64 pages of detailed analysis of environmental consequences for individual species of fish in the 2004 EIS. Indeed, if the Forest Service had explained its reasons for entirely omitting any analysis of the impact of the 2004 Framework on individual species of fish, it is conceivable that it could have convinced us that there is good reason entirely to postpone such analysis until it makes a site-specific proposal. But the Forest Service has provided no explanation. Compare 40 C.F.R. § 1502.22 (requiring that an agency 'always make clear' if it lacks information to conduct environmental analysis). The Forest Service has provided almost the opposite of an explanation, for it promised such an analysis and then failed to provide it. As we noted above, Section 4.2.3. of the 2004 EIS promises an analysis of the '[e]ffects of the alternatives on species dependent on aquatic, riparian, and meadow habitats' in Section 4.3.2. Section 4.3.2 contains a detailed analysis of the environmental effects on individual species of mammals, birds and amphibians. But Section 4.3.2. contains no analysis whatsoever of individual species of fish, even though fish are the quintessential 'species dependent on aquatic . .. habitat[ ].'" "In light of the extensive analysis of the environmental consequences on individual fish species in the 2001 EIS, and of the extensive analysis of the environmental consequences on individual species of mammals, birds, and amphibians in the 2004 EIS, we conclude, contrary to the Forest Service's contention, that it was 'reasonably possible' to provide some analysis of the environmental consequences on individual fish species in the 2004 EIS. The failure of the 2004 EIS to provide any such analysis is a failure to comply with the hard look requirement of NEPA." Turning to the USFS argument that the "hard look" requirement was met by two BAs incorporated by reference in the 2004 EIS, the court stated: "First, depending on its nature, material should be in the text of an EIS, should be in an appendix to the EIS, or should be incorporated by reference in the EIS. …If the BAs were intended to serve as the analysis of the environmental consequences of the 2004 Framework for fish, the 2004 EIS needed to do more than incorporate them by reference. They should have been described and analyzed in the text of the 2004 EIS, and the BAs themselves should have been included in an appendix. This is not a mere formality. The purpose of an EIS is to inform decisionmakers and the general public of the environmental consequences of a proposed federal action. That purpose would be defeated if a critical part of the analysis could be omitted from an EIS and its appendices. …The material that

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		is incorporated by reference is not circulated to the public; it need only be 'made available….Material that is incorporated by reference must be 'briefly described' in the body of the EIS, 40 C.F.R. § 1502.21, but a brief description cannot fulfill the purpose of the EIS if the substance of what is incorporated is an important part of the environmental analysis." "Second, even if they had been fully described and analyzed in the 2004 EIS, the BAs could not have satisfied the 'hard look' requirement. The BAs functioned as a trigger to the consultation process required under Section 7 of the Endangered Species Act. They merely enumerated the several species of 'listed' fish that may have been affected by the alternatives considered in the 2001 and 2004 EISs. There was no analysis in either of the BAs of the manner or degree to which the alternatives may have affected these fish. To the degree that any analysis was performed, it was performed by the Fish and Wildlife Service when it prepared Biological Opinions in response to the BAs. The 2004 EIS makes no reference, in any form, to either of the Biological Opinions." "Third, even if the BAs could have satisfied the hard look requirement, they applied to only one group of fish species. As described above, the 2001 EIS analyzed the environmental consequences for three groups: (1) 'federally threatened and endangered fish species' (9 species); (2) 'sensitive fish species' (11 species); and (3) 'moderate and high vulnerability fish species' (14 species). The BAs analyzed only the individual species in the first group. They said nothing whatsoever about the individual species in the second and third groups." With respect to amphibians, the court stated that the 2004 EIS "contains an extensive analysis of individual amphibians." "[W]e are satisfied that the Forest Service's analysis was sufficient, at this stage of the process, given that the EIS provides significant analysis of the environmental effects on amphibians, and that site-specific projects are not yet at issue."
Save the Peaks Coalition v. U.S. Forest Service, 669 F.3d 1025 (9th Cir. 2012)	USFS	**WIN** – This was a challenge to a USFS decision to allow snowmaking at a ski resort on federal land using reclaimed water. USFS prepared an EIS for the project. The EIS was challenged by four groups of plaintiffs including several Native American Tribes. The lower court found no NEPA violation, but on appeal, the 9th Circuit held that the EIS did not reasonably address the risks posed by the possibility of human ingestion of snow made from reclaimed water. However, the 9th Circuit en banc vacated the opinion of the 3-judge panel and the U.S. Supreme Court denied certiorari. After this litigation, another plaintiff – which had closely monitored the litigation but did not join it – filed suit alleging that the USFS violated NEPA because the FEIS did not contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of making snow from reclaimed water, the USFS failed to ensure the scientific integrity of its analysis, and the USFS did not disseminate quality information. The district court granted summary judgment for the USFS, finding that the plaintiffs were barred by the doctrine of laches (i.e., that the plaintiffs should have brought their suit at an earlier time) and, even if laches did not apply, the USFS had not violated NEPA. The 9th Circuit found that the litigation was not barred, but agreed with the district court that the USFS had not violated NEPA.

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		Adequate assessment of human ingestion of snow. "Under NEPA, federal agencies must take a 'hard look' at the potential environmental consequences of proposed actions…. The purpose of NEPA is to 'ensure that agencies carefully consider information about significant environmental impacts' and 'guarantee that relevant information is available to the public.' … We employ a rule of reason standard to evaluate whether an environmental impact statement 'contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.' '[A]s long as the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made," we must uphold the agency's decision [citations omitted]." "When evaluating a NEPA challenge, our review is limited to whether an environmental impact statement 'took a "hard look" at the environmental impacts of a proposed action.' *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt*., 606 F.3d 1058, 1072 (9th Cir.2010) (citation omitted). This requires 'a "pragmatic judgment whether the[environmental impact statement]'s form, content and preparation foster both informed decision-making and informed public participation." ' *Id*. (citation omitted). The environmental impact statement is reviewed as a whole. *See Nat'l Parks & Conservation Ass'n*, 222 F.3d at 682. Once we are satisfied that an agency has taken a 'hard look' at a decision's environmental consequences, our review ends. *See Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv*., 460 F.3d 1125, 1135 (9th Cir.2006) (citation omitted)." "[T]he Save the Peaks Plaintiffs' assertion that the USFS did not consider the risk of human ingestion of snow in the FEIS is incorrect. The FEIS is replete with examples of the USFS considering the risks posed by ingestion and the safety of using reclaimed water to make snow…. Underscoring the USFS's attention to the risks posed by human ingestion of snow, the response to comments specifically addressed the concerns raised by the Save the Peaks Plaintiffs…. Having discussed the issue at length in the FEIS and the response to comments, the USFS clearly took a 'hard look' at the environmental impacts of permitting the snowmaking project to proceed. The FEIS contains a thorough discussion of the significant aspects of the probable environmental consequences, including the risks posed by human ingestion of snow. Indeed, it is hard to imagine how the USFS's analysis could have been more exhaustive. The form, content, and preparation of the FEIS fostered both informed decision-making and informed public participation." Scientific integrity of NEPA analysis. "The Save the Peaks Plaintiffs also contend that the USFS failed to ensure the scientific integrity of its analysis because it allegedly based its decision entirely on an assumption that ADEQ's analysis of the reclaimed water's safety was sound. This argument is based on the following sentence in the USFS's response to comments: 'Because ADEQ approved the use of reclaimed water, it is assumed different types of incidental contact that could potentially occur from use of class A reclaimed water for snowmaking were fully considered.' According to the Save the Peaks Plaintiffs, the 'assumption' contained in the sentence does not ensure the scientific integrity of the USFS's analysis because the USFS did not oversee the ADEQ's decision-making process or review the ADEQ's conclusions. The Save the Peaks Plaintiffs are mistaken. The USFS had a duty to ensure the scientific integrity of the FEIS' discussion and analysis. …. This

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

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

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

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		accomplish [both] purposes of the project may properly be rejected as imprudent.'). The League has failed to identify a 'viable but unexamined alternative' that would satisfy both these goals. *Natural Res. Def. Council*, 421 F.3d at 813. Accordingly, we hold that the range of alternatives considered in the EIS is reasonable." Scientific Integrity: "NEPA regulations require that an agency ensure the 'scientific integrity' of the discussions and analyses in an EIS and explicitly refer to 'the scientific and other sources relied upon for conclusions in the [EIS].' 40 C.F.R. § 1502.24. As a reviewing court, we are 'most deferential when the agency is making predictions[ ] within its area of special expertise.' *Lands Council*, 537 F.3d at 993 (internal quotation marks omitted). 'At the same time, courts must independently review the record in order to satisfy themselves that the agency has made a reasoned decision based on its evaluation of the evidence.' *Earth Island Inst. v. U.S. Forest Serv*., 442 F.3d 1147, 1160 (9th Cir.2006) (internal quotation marks omitted), overruled on other grounds by *Winter*, 555 U.S. 7." The court concluded that USFS had met this test. Hard Look: Quoting earlier 9th Circuit decisions, the court stated that "'Our role in reviewing an EIS is to ensure that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action.' *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1135 (9th Cir.2010) (internal quotation marks omitted). Taking a "hard look" includes 'considering all foreseeable direct and indirect impacts. Furthermore, a 'hard look' should involve a discussion of adverse impacts that does not improperly minimize negative side effects.' *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir .2006) (internal quotation marks and citation omitted). '[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.' *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir.2007) (internal quotation marks omitted)." "'[W]e employ a rule of reason standard to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.' *League of Wilderness Defenders*, 615 F.3d at 1130 (internal quotation marks omitted). This standard 'requires a pragmatic judgment whether the EIS's form, content[,] and preparation foster both informed decision-making and informed public participation.' *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir.2005) (internal quotation marks omitted)." Here, the court concluded that USFS had taken a "hard look" at the Project's impacts on overall tree mortality and on wildlife species that depend on standing dead trees. "The Service's analysis of impacts on snag-dependent species constitutes a hard look under our precedent. As with tree mortality, its qualitative prediction about impacts on snag-dependent species suffices because it explains why precise quantification was unreliable. *See Brong*, 492 F.3d at 1134. In *WildWest Institute v. Bull*, 547 F.3d 1162, 1175 (9th Cir.2008), we held that a Service EIS took an adequate "hard look" at a logging project's impact on a snag-dependent woodpecker where it discussed the woodpecker's habitat needs and acknowledged that some snags would be removed or burned, but noted that the

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		Project would generally retain snags. The EIS in this case does that and more." Affirming the district court ruling for USFS, the 9th Circuit stated that the USFS "proposes a forest management research project in an experimental forest specifically set aside for such study. The EIS considers in detail a reasonable range of alternatives that would fulfill both of the Project's goals by reducing the risk of wildfire and beetle infestation, and by addressing six specified research objectives. The EIS is adequately supported by scientific data and takes a hard look at the significant impacts of the Project."
Earth Island Institute v. U.S. Forest Service, 697 F.3d. 1010 (9th Cir. 2012)	USFS	**WIN** – Plaintiff environmental group challenged the USFS Angora restoration project in the Lake Tahoe area after the Angora Fire. The court found that the USFS did not fail to (1) ensure the scientific integrity of the EA, (2) properly respond to dissenting scientific opinion, (3) properly consider proposed alternatives to the Angora Project EA, and (4) take the requisite "hard look" at the impacts of the Angora Project. For this reason, the court concluded that the USFS analysis of the Angora Project's environmental effect was not arbitrary and capricious under NEPA and affirmed the district court opinion. The Forest Service designed the Angora Project in response to damage caused by the Angora Fire, which consumed over 3,100 acres of land. The USFS' Lake Tahoe Basin Management Unit (LTBMU) manages the affected National Forest System land. The LTBMU developed the Angora Project pursuant to the LTBMU Forest Plan in an effort to balance the ecological needs of restoring the ecosystem and protecting area residents and visitors from falling trees and future fires. Project activities include the removal of certain live and dead trees from portions of the forest. The Forest Service determined that, if no action was taken, surface fuels would accumulate as dead and damaged trees fall, increasing the risk of another harmful fire that would threaten both local communities and the forest ecosystem. Before implementing the Angora Project, the USFS prepared an EA and solicited public comment on the EA. The EA discussed the impact of the Angora Project on various species, including black-backed woodpeckers. The EA also responded to some concerns raised in the comments and assessed a no-action alternative and the preferred alternative that the USFS determined would best reduce fuel loads and the severity of future fires. The USFS also briefly considered an option submitted by Earth Island Institute that would limit removal of standing dead trees (snags) to those greater than 16 inches in diameter. However, the USFS dismissed this alternative, because the agency concluded that this alternative would not effectively accomplish the USFS' goals. After the USFS issued its Decision Notice, plaintiffs challenged the action under the National Forest Management Act and NEPA. <u>Scientific Integrity</u>: "NEPA requires that '[a]gencies shall insure the professional integrity including scientific integrity, of the discussions and analyses in environmental impact statements.' 40 C.F.R. § 1502.24. By its terms, this regulation only applies to preparation of an EIS, but the Forest Service does not dispute that this scientific integrity requirement applied to their EA. Therefore, we assume without deciding that this requirement does in fact apply to the Angora

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		Project EA." "Plaintiffs argue that the Forest Service failed to ensure the scientific integrity of the final EA by misrepresenting the facts regarding trends in the black-backed woodpecker's population. However, this argument is based on an incorrect premise…. The data sufficiently supports the agency's claim about black-backed woodpecker population distribution. Thus, the Forest Service was not arbitrary and capricious in failing to fulfill the requirement of 'insur[ing] the professional integrity, including scientific integrity, of [its] discussions and analyses . . . .' 40 C.F.R. § 1502.24. Furthermore, '[b]ecause analysis of scientific data requires a high level of technical expertise, courts must defer to the informed discretion of the responsible federal agencies.' *Earth Island Inst. v. U.S. Forest Serv*., 351 F.3d 1291, 1301 (9th Cir. 2003). Finally, 'reviewing court[s] may not "fly speck" an [EA] and hold it insufficient on the basis of inconsequential, technical deficiencies.' *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). Thus, the Angora Project EA's analysis was not arbitrary and capricious with regard to NEPA's scientific integrity requirements." Dissenting Scientific Opinion: "In the context of environmental impact statements, NEPA requires agencies to respond explicitly and directly to 'responsible opposing view[s].' 40 C.F.R. § 1502.9(b)….Plaintiffs argue that the Forest Service violated that requirement here by not appropriately responding to four comments submitted by Dr. Chad Hanson in response to the initial EA. However, we conclude that the Forest Service was not required by § 1502.9(b) to respond to Dr. Hanson's comments, because the regulation by its own terms only applies this requirement to '[f]inal environmental impact statements,' 40 C.F.R. § 1502.9(b). As a general rule, courts should not impose new requirements on agencies not imposed by the APA or a substantive statute." The court drew a distinction between this case and a 1984 case: "Although the Plaintiffs cite to *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1245 n.6 (9th Cir. 1984), for the proposition that both EAs and EISs are required to respond to dissenting views, this case is not controlling here. *Save Our Ecosystems* was a case based on a finding that the agency's EA was the 'functional equivalent of an EIS.' 747 F.2d at 1247 ('When an EA is the functional equivalent of an EIS, it is subject to the same procedures.'). Plaintiffs have not argued in this case that the EA is the functional equivalent of an EIS." The court also found that, even if the USFS were required to comply with § 1502.9(b) and respond to dissenting views, the agency did not fail to meet that requirement in an arbitrary and capricious manner. "Though the Forest Service did not perform the point-by-point type of counter-argument to experts that Plaintiffs appear to desire, our precedent makes clear that an agency 'need not respond to every single scientific study or comment.' *See Castaneda*, 574 F.3d at 668 (addressing duty to respond to opposing views in an EIS). Furthermore, even if Plaintiffs disagree with the agency's responses, 'that disagreement does not render the Forest Service's review and comment process improper.' *Carlton*, 626 F.3d at 473."

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		Alternatives: "We conclude that the Forest Service's consideration of a no action alternative and its preferred action was not arbitrary and capricious under the less rigorous requirements of an EA (rather than an EIS). In *Native Ecosystems Council*, 428 F.3d at 1246, we 'join[ed] our sister circuits in holding that an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS.' Since that decision, we are aware of no Ninth Circuit case where an EA was found arbitrary and capricious when it considered both a no-action and preferred action alternative." The Forest Service's argument is consistent with our previous reasoning in *Native Ecosystems Council*, that 'it makes no sense' for agencies 'to consider alternatives that do not promote the goal' or the 'purpose' the agency is trying to accomplish. 428 F.3d at 1248 (internal quotation marks omitted). Thus, we held that '[w]hen the purpose of the . . . Project is to reduce fire risk, the Forest Service need not consider alternatives that would increase fire risk.' Id." "The concerns that Plaintiffs raise all rely on authority dealing with the more stringent analysis requirements for an EIS. However, under the less stringent analysis requirements for an EA, the Forest Service's consideration of alternatives was not arbitrary and capricious." Hard Look: "Plaintiffs argue that the Forest Service failed to take a 'hard look' at the Angora Project's impact on black-backed woodpeckers and future fire behavior. Plaintiffs rely on the Forest Service's 'analytical failings as a whole' in the EA in support of this argument. However, because we do not agree that the alleged analytical failings of the Forest Service were arbitrary and capricious, Plaintiffs have not demonstrated that the Forest Service's analysis overall failed to take the required hard look under NEPA."
Native Ecosystems Council v. Weldon, 697 F.3d. 1043 (9th Cir. 2012)	USFS	**WIN** – Plaintiff environmental group challenged an action regarding the Ettien Ridge Fuels Reduction Project in the Lewis and Clark National Forest in Montana. The Project was designed to reduce the spread and intensity of potential future wildfires in the Judith Basin County Wildland-Urban Interface by removing naturally occurring wildfire fuels. Plaintiff alleged that USFS violated NEPA and the National Forest Management Act (NFMA) when it issued a FONSI and Decision Notice approving the Project. The 9th Circuit held that the USFS took the requisite "hard look" at the environmental impact of the Project on the elk hiding cover, and goshawk populations, in the manner required by NEPA. On its NEPA claims, plaintiff argued that the Forest Service's aerial photo interpretation (PI Type) methodology was invalid and unreliable. The court held that "[t]he mere fact that Native Ecosystems Council disagrees with the methodology does not constitute a NEPA violation. In reviewing Native Ecosystems Council's NEPA appeal, we may not insert our opinions in the place of those of forest biologists. *Lands Council*, 537 F.3d at 988. Rather, we are required to apply the highest level of deference in our review of the Forest Service's scientific judgments in selecting the elk hiding cover methodology. *Northern Plains*, 668 F.3d at 1075. Given the paucity of Native Ecosystems Council's factual distinctions, and the substantial deference owed to the Forest Service's determinations, we hold that the Forest Service's selection of the PI Type

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		methodology did not violate NEPA. *Lands Council*, 537 F.3d at 987–88." Next, plaintiff challenged the elk cover hiding analysis in the EA. The court noted that: "An agency decision is arbitrary and capricious if, among other things, it 'offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' *Lands Council*, 537 F.3d at 987 (internal citation and quotation marks omitted). Under NEPA, the purpose of an Environmental Assessment (EA) is simply to create a workable public document that briefly provides evidence and analysis for an agency's finding regarding an environmental impact.' *Tri–Valley CAREs*, 671 F.3d at 1129. We do not require the agency 'to compile an exhaustive examination of each and every tangential event that potentially could impact the local environment. Such a task is impossible, and never-ending. The EA must only 'provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.' *Bering Strait Citizens*, 524 F.3d at 953. We thus defer to agency decisions so long as those conclusions are supported by studies 'that the agency deems reliable.' *N. Plains Res. Council*, 66 F.3d at 1075 (emphasis added)." The court found that none of the findings challenged by the plaintiff was contradicted by the record and deferred to the USFS' conclusions.
U.S. Department of Commerce		
Pacific Coast Federation v. Blank, 693 F.3d. 1084 (9th Cir. 2012)	NMFS	**WIN** – In 2011, NMFS and the Pacific Fishery Management Council adopted changes to the fishery management plan for the trawl sector of the Pacific Coast groundfish fishery. The changes, adopted as Amendments 20 and 21 to the PacificCoast Groundfish Fishery Management Plan, were designed to increase economic efficiency through fleet consolidation, reduce environmental impacts, and simplify future decisionmaking. Plaintiff fishermen's associations, whose longtime participation in the fishery may shrink under Amendments 20 and 21, argued that the Amendments were unlawful under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and NEPA. The district court granted summary judgment to the defendants and the 9th Circuit affirmed, saying that "NMFS complied with the MSA's provisions, which required the agency to consider fishing communities but did not require it to develop criteria for allocating fishing privileges to such communities or to restrict privileges to those who 'substantially participate' in the fishery. NMFS also complied with NEPA by preparing a separate study for each amendment, analyzing a reasonable range of alternatives, adequately evaluating potential environmental effects, and adopting flexible mitigation measures designed, in part, to lessen the potential adverse effects of Amendments 20 and 21 on fishing communities. The plaintiffs reasonably disagree with the balance NMFS struck between competing objectives, but they do not show that NMFS exceeded its statutory authority under the MSA or ignored its obligations under NEPA." <u>Connected Actions</u>: Plaintiffs argued that a single EIS was required for Amendments 20 and 21 under two NEPA regulations: 40 C.F.R. §§ 1502.4(a) and 1508.25(a)(1). Section 1502.4(a) states that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of

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		action shall be evaluated in a single impact statement." Section 1508.25(a)(1) directs agencies to study "connected actions" in "the same impact statement," and sets forth criteria for determining whether actions are "connected." However, the court concluded that § 1502.4(a) does not impose an independent test for determining when to study related actions in a single EIS, and directs agencies to § 1508.25 to make that determination. "Thus, whether an agency must prepare a single EIS for more than one proposal turns on the criteria set forth in § 1508.25." Using those criteria, the court found that "Amendments 20 and 21 have independent utility, and thus are not connected actions under § 1508.25(a)(1). First, the two amendments have overlapping, but not co-extensive, goals. … While it is true the record is replete with statements about how Amendments 20 and 21 are linked, two actions are not connected simply because they benefit each other or the environment. *See Nw. Res. Info. Ctr. v. NMFS*, 56 F.3d 1060, 1068-69 (9th Cir. 1995) (two actions were not connected merely because they both would benefit salmon); *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989) ('[E]ach [action] could exist without the other, although each would benefit from the other's presence.')." "Perhaps more important than parsing NMFS's words or predicting whether it would adopt one Amendment without the other is answering the question whether, in preparing separate EISs, NMFS evaded its duty to fully study the combined effects of Amendments 20 and 21. This is the real concern behind § 1508.25. *See Great Basin Mine Watch*, 456 F.3d at 969 ("The purpose of this requirement is to prevent an agency from dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." (citation and internal quotation marks omitted)); *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1194 (9th Cir. 1997) (explaining that NEPA prevents an agency from "illegally segmenting projects in order to avoid consideration of an entire action's effects on the environment") (citing *Thomas v. Peterson*, 753 F.2d 754, 758-59 (9th Cir. 1985) (finding connected actions under § 1508.25)). This 'divide and conquer' concern is not present here. NMFS prepared lengthy EISs that thoroughly studied the direct, indirect, and cumulative effects of Amendments 20 and 21, individually and together." <u>Alternatives</u>: "We 'review an agency's range of alternatives under a 'rule of reason' standard that requires an agency to set forth only those alternatives necessary to permit a reasoned choice.' *Presidio Golf Club v. Nat'l Park Serv*., 155 F.3d 1153, 1160 (9th Cir. 1998) (quotation marks, alteration, and citation omitted); *see also N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) ('Under NEPA, "an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative."' (*quoting Headwaters, Inc. v. BLM*, 914 F.2d 1174 (9th Cir. 1990)))." Finding that, in this case, NMFS studied enough alternatives to permit a reasoned choice, the court rejected plaintiffs' argument that "NMFS was required to 'embrace the range of options an agency can lawfully pursue under its substantive mandates.' This argument fails as a matter of law and a matter of fact. 'An agency need not . . . discuss alternatives similar to alternatives actually considered, or alternatives which are "infeasible, ineffective, or inconsistent with

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		the basic policy objectives"' of the project. *N. Alaska Envtl. Ctr.*, 457 F.3d at 978 (quotation omitted); *Westlands Water Dist.*, 376 F.3d at 868, 871." Impact Evaluation: "Excluding appendices, the Amendment 20 and 21 EISs contain 384 and 102 pages of detailed effects analysis, respectively. The plaintiffs nonetheless complain that this analysis is inadequate because it focuses mostly on socioeconomic impacts; only a small portion is devoted to the Amendments' environmental effects, and an even smaller portion to the Amendments' effects on groundfish habitat specifically. In the plaintiffs' view, NEPA requires more, especially since the Amendments will, in their view, 'ensure the long-term domination of trawling' in the fishery and trawling is harder on fish habitat than fishing using fixed gear. The plaintiffs are incorrect." "Thus, even if trawl gear has more impacts than fixed gear on fish habitat, 'potential adverse impacts from trawl gear could be expected to be lower under the proposed action than under' current management or other alternatives. These discussions may be less robust than the discussions of socioeconomic effects, but NEPA only requires agencies to discuss impacts 'in proportion to their significance.' 40 C.F.R. § 1502.2(b)." Mitigation: Amendment 20 contains two primary mitigation features: an adaptive management program under which up to ten percent of the quota shares each year will be set aside to address unforeseen effects and a quadrennial review to make sure the program is meeting its goals. The review process includes a community advisory committee. Amendment 20 also contains other measures expected to meaningfully reduce the impacts of trawl rationalization on fishing communities, such as caps on the accumulation of quota shares and an initial two-year moratorium on transferring shares. Amendment 21 contains a five-year review provision. "The plaintiffs argue that these mitigation measures are vague, uncertain, and inadequate. However, we previously have found reasonably detailed mitigation evaluations like the ones at issue here to be sufficient."
Lovgren v. Locke, 701 F.3d. 5 (1st Cir. 2012)	NOAA/NMFS	**WIN** – Commercial fishermen and related businesses challenged federal management actions taken in New England's Multispecies Groundfish Fishery which established new restrictions on fishing activities to end and prevent overfishing (referred to as Amendment 16). Among other things, plaintiff argued that NOAA/NMFS violated NEPA in promulgating the restrictions by failing to consider reasonable alternatives and best available information. In its Amendment 16 EIS, the federal agency assessed the viability of several alternatives in relation to the stated purpose and need (to meet all requirements of the Magnuson-Stevens Act, including its mandate to end overfishing by 2010), including one put forward by plaintiffs. The agency concluded that some of the alternatives were "infeasible, ineffective, or inconsistent with the basic policy objectives" of Amendment 16. Because of this, the agency did not analyze these alternatives in detail, but did analyze other alternatives in the EIS. The court found the agency's alternatives analysis in compliance with NEPA. The court also concluded that the agency took a hard look at the potential impact of the proposed action on the affected industry. "The NEPA ensures that an

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		informed decision is made, not that the decision is satisfactory to all those affected by it. See Buzzards Bay, 644 F.3d at 31."
U.S. Department of Defense		
Friends of Back Bay v. U.S. Army Corps of Engineers, 681 F.3d. 581 (4th Cir. 2012)	ACOE	**LOSS** – Plaintiff environmental groups challenged a decision to issue a Clean Water Act Section 404 permit for a mooring facility and concrete boat ramp about 3,000 feet from the Back Bay National Wildlife Refuge in Virginia Beach, VA on the grounds that the agency should have prepared an EIS. Rather, the agency had prepared an EA, finding that the impacts of the project would not be significant because implementation of a "no-wake zone" (NWZ) would reduce potential environmental impacts. Both the FWS and EPA had recommended that an EIS be prepared because impacts could be significant and enforcement of a NWZ would be problematic (staffing constraints, funding). The district court ruled for the ACOE; the court of appeals reversed that decision. "Absent any reasonable basis to conclude that, as of October 2008, the NWZ was being adequately enforced or its efficacy was otherwise assured, the concept thereof as discussed within the EA was a logical nullity. Being unable to divorce the Corps's demonstrably incorrect assumption of an effective NWZ from its ultimate conclusion that no EIS need be prepared, we find ourselves constrained to invalidate the resultant FONSI as arbitrary and capricious. The judgment below to the contrary must therefore be vacated, and the matter remanded to the district court for further remand to the Corps." The court then took the unusual step of determining that the ACOE was required to prepare an EIS: "The FWS specifically recommended preparation of an EIS as an alternative to denying the permit, and we agree that is the preferred approach here. Even were the situation considerably less clear-cut, we remain mindful that 'when it is a close call whether there will be a significant environmental impact from a proposed action, an EIS should be prepared.' *Hoffman*, 132 F.3d at 18. We concur with the view of the Second Circuit in Hoffman that the policy goals underlying NEPA are best served if agencies 'err in favor of preparation of an EIS when there is a substantial possibility that the [proposed] action may have a significant impact on the environment.' *Id.*"
Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers, 683 F.3d 1155 (9th Cir. 2012)	ACOE	**WIN** – Puget Sound Energy (PSE) operates a hydroelectric dam at Snoqualmie Falls in WA. The Snoqualmie River drains a large watershed above the falls, and all of the water from this area must pass through a single narrow channel before it reaches the falls, creating a bottleneck during heavy rains. This subjects the City of Snoqualmie, located just upstream of the falls, to persistent and significant flooding. PSE planned to lower the dam to mitigate upstream flooding problems and obtained a FERC license to make upgrades and modifications to the dam. Because the upgrade involves discharging fill material into the waters of the U.S, which requires a Clean Water Act Section 404 permit, PSE sought verification from ACOE that it could proceed under a series of general nationwide permits (NWPs) authorizing certain discharges, rather than applying for an individual permit. ACOE verified that it could. Plaintiffs (downstream property owners) challenged the decision, stating that the NWPs did not apply to the proposed action and ACOE was required to comply with NEPA. Upholding the district court and denying the plaintiffs' claim, the court stated "The Alliance bases its NEPA claim on the argument that the Corps was required by the CWA to inform PSE that it could not

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

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

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		those comments 'cast substantial doubt on the adequacy of the [agency's] methodology and data.' 241 F.3d at 736–37." "The comments here do not cast doubt on the agency's methodology and data. Hillsdale is correct that many of the comments they cite are more than mere statements of opposition; they question various aspects of the Corps's analysis, mostly its failure to analyze the cancer risks of DPM [diesel particulate matter] emissions but also the intermodal facility's impacts on water quality, regional air quality, and so on. "But all comments Hillsdale identifies raise the same issues it raised in this appeal. As we have discussed, the Corps took the requisite 'hard look' at every one of these issues, which is all NEPA requires. *Forest Guardians*, 611 F.3d at 711. Hillsdale cannot overcome its failure on the merits simply by pointing to comments expressing the same concerns. If Hillsdale cannot show there is some merit to opposing opinions, they cannot demonstrate controversy. *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003); *see also Bering Strait Citizens v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 957 (9th Cir. 2008). "An additional point in the Corps's favor is that none of the federal or state agencies the Corps consulted opposed the project or the Corps's analysis. Although not dispositive, this is additional evidence of a lack of controversy. *See Nw. Envtl. Advocates*, 460 F.3d at 1139; *Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170, 185 (D.D.C. 2004); *cf. Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 43 (D.D.C. 2000) (finding controversy where 'three federal agencies and one state agency have all disputed the Corps evaluation . . . and pleaded with the Corps to prepare an EIS'). In short, neither the nature nor the number of the comments Hillsdale cites demonstrates the intermodal facility is controversial…."
U.S Department of Energy		
Tri-Valley CAREs v. Department of Energy, 671 F.3d 1113 (9th Cir. 2012)	DOE	**WIN** – The 9th Circuit upheld the district court's summary judgment in favor of DOE. DOE prepared an EA for a biosafety level 3 (BSL-3) facility at Lawrence Livermore National Laboratory (LLNL). In an earlier challenge to that EA, the 9th Circuit upheld all aspects of the EA except for its failure to consider the impact of a possible terrorist attack. DOE then prepared a Final Revised EA (FREA) to consider the environmental impacts of an intentional terrorist attack on the BSL-3 facility and the district court found that the FREA was adequate. Tri-Valley CAREs appealed the district court's decision, asking the 9th Circuit to require DOE to prepare an EIS or to revise the EA to determine whether an EIS is required. The 9th Circuit held that DOE "took the requisite 'hard look' at the environmental impact of an intentional terrorist attack in the manner required by [NEPA] and *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission,* 635 F.3d 1109 (9th Cir.2011)." "An agency has 'the discretion to determine the physical scope used for measuring environmental impacts' so long as the scope of analysis is 'reasonable.' *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir.2002). If the proposed action does not significantly alter the status quo, it does not have a significant impact under NEPA. *Burbank Anti–Noise Group v. Goldschmidt*, 623

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		F.2d 115, 116 (9th Cir.1980). At bottom, an agency need only provide a 'convincing statement' of why the threat did not require an EIS to satisfy NEPA. *See Ocean Advocates v. U.S. Army Corps. of Eng'rs*, 402 F.3d 846, 864 (9th Cir.2005) (internal citations and quotation marks omitted). An agency is not required to consider every scenario, and further, nothing in NEPA requires it to rely on purely empirical data. *Id*." "Under NEPA, we must restrain from acting as a type of omnipotent scientist, and instead must restrict ourselves to inquiring only whether an agency took a 'hard look' at the potential environmental impacts at issue. *Muckleshoot Indian Tribe v. U.S. Forest Serv*., 177 F.3d 800, 814 (9th Cir.1999) (*per curiam*) (*quoting Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). When reasonable scientists disagree on appropriate models for analysis, we must defer to agency experts. *Lands Council*, 537 F.3d at 988. Here, the DOE provided ample justification and evidence for why it used the centrifuge model to assess the impact of a terrorist attack: it analogized triggering events, compared critical distinctions, and considered uniquely different circumstances. Accordingly, because of the deference that must be afforded to the agency, we find that the DOE took the requisite 'hard look' at the threat of direct terrorist attack." "We find that the DOE's determination of the potential impact of a terrorist theft and release of a pathogen on a national level satisfies NEPA because the record does not show any meaningful difference between the materials present at the LLNL BSL–3 facility and those present at other BSL–3 facilities nationwide. Nowhere in the record is there any proof that the LLNL BSL–3 facility is more prone or attractive to terrorist theft and release of a pathogen by an outsider than any other BSL–3 facility…. Given that there are more than 1,300 other BSL–3 facilities nationwide, many of which lack the safeguards of LLNL's BSL–3 facility, and further, given that many of the BSL–3 pathogens also exist in the natural environment, DOE reasonably concluded that the construction of a BSL–3 facility at LLNL did not change the status quo, and therefore found no significant impact. *See Burbank Anti–Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir.1980) (holding that where a proposed project does not alter the status quo then it does not have a significant impact). Accordingly, we find that the DOE reasonably exercised its discretion in determining no significant impact from the threat of theft and release by a LLNL BSL–3 terrorist outsider." "DOE's discussion of the impact of the potential theft and release of a pathogen by an LLNL BSL–3 terrorist insider also satisfies NEPA. Although the DOE did not use an empirical model, it engaged in a thorough two-step probabilistic analysis that assessed: (1) the probability that an insider with access to BSL–3 pathogens would have the motive to commit such an attack; and (2) the public threat that would result, assuming that an insider did have the access and motive to release a pathogen. Tri–Valley CAREs' claim that the DOE violated NEPA because it did not employ empirical analysis fails. Empirical analysis is not required under NEPA; an agency must only provide a 'convincing statement' of why the threat did not require an EIS. *See Ocean Advocates v. U.S. Army Corps. of Eng'rs*, 402 F.3d 846, 864 (9th Cir.2005)…. Based upon the facts that (1) a very small number of people have access to the select agents at LLNL BSL–3, all of whom are subject to

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		extensive screening procedures from multiple agencies; and (2) the form and quantities of the pathogens at LLNL BSL–3 would require significant additional efforts to bring about a terrorist attack, the DOE concluded that the threat of a theft and release by an insider was not significant. The DOE's methodical inquiry satisfies NEPA's requirement that it provide a ''convincing statement" as to why the threat did not require an EIS. Accordingly, we find that the DOE reasonably concluded, based upon its discretion and a thorough examination of the evidence in the record, that threat of terrorist attack by a theft and release from an LLNL BSL–3 terrorist insider was not significant." Tri-Valley CAREs also claimed that DOE violated NEPA by failing to fully disclose a 2005 anthrax shipping incident, thereby depriving the public of the ability to comment. However, the court found that DOE considered the risks of shipping infectious materials to and from the BSL–3 lab in the original EA, the DREA, and the FREA, and disclosed these risks to the public. "The purpose of an EA is not to compile an exhaustive examination of each and every tangential event that potentially could impact the local environment. Such a task is impossible, and never-ending. The purpose of the EA is simply to create a workable public document that briefly provides evidence and analysis for an agency's finding regarding an environmental impact." Finally, Tri-Valley CAREs contends that DOE violated NEPA when it failed to supplement the FREA to address the results of its Security Assessment (SA) conducted at LLNL. The court recognized that DOE had prepared "a supplemental report to determine whether the SA constituted significant new information requiring supplementation of the FREA. There, the DOE examined whether the low rating, and the deficiencies identified therein, significantly altered the outcomes of any of the three terrorist attack scenarios …. Because the DOE determined in its supplemental report that the SA did not show a 'seriously different picture of the likely environmental harms stemming from the proposed project,' we must defer to the DOE's finding that a supplemental REA was not required. *Wisconsin v. Weinberger*, 745 F.2d 412, 416–17 (7th Cir.1984)."
Alcoa, Inc. v. Bonneville Power Administration, 698 F.3d 774 (9th Cir. 2012)	DOE/BPA	**WIN** – This case involves a dispute over a contract between Alcoa and BPA, with Alcoa claiming that the contract is unlawful because it is inconsistent with the agency's statutory mandate to act in accordance with sound business principles. Plaintiff also claimed that BPA relied on a CX for an action for which an EIS was required. When it issued the final contract, BPA stated that it did not have to prepare an EIS because it fell within a CX where no physical changes to the system would occur (10 CFR Part 1021, Subpart D, Appendix D, CX B4.1). Plaintiff argued that the contract did not fall within the CX because the status quo is Alcoa's inevitable closure of its smelter, and the contract changes the status quo by allowing the smelter to keep operating. The court found that "[a]ll these arguments are wrong." "We will uphold an agency's reliance on a categorical exclusion if 'the application of the exclusions to the facts of the particular action is not arbitrary and capricious.' *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 & n.5 (9th Cir. 1996). In analyzing this issue, we ask 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of

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		judgment.' *Alaska Ctr*., 189 F.3d at 859 (*quoting Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).” “BPA's decision to do so was not arbitrary and capricious. As required by the regulation, BPA considered the relevant factors and determined that the present sale of power to Alcoa under the Alcoa Contract fell squarely within the terms of the categorical exclusion because it did not involve any new power-generation sources, any physical changes in transmission, or any alteration in the operating limits of existing generation resources. In support of this conclusion, BPA explained that if its existing power supply proved insufficient to provide Alcoa with the power mandated by the contract, the shortfall would be met through purchases on the open market (i.e., not through expansion of that capacity). Moreover, BPA noted that it would supply power to Alcoa 'over existing transmission lines that connect Intalco to BPA's electrical transmission system and no physical changes to this system would occur.' BPA's judgment regarding the applicability of the exclusion 'implicates substantial agency expertise' and is entitled to deference. Alaska Ctr., 189 F.3d at 859. Because BPA considered the relevant factors and did not make a 'clear error of judgment' in determining that the categorical exclusion was applicable to its execution of the Alcoa Contract, no EIS was required, and we are obliged to reject the petitioners' contrary contentions. *See Bicycle Trails*, 82 F.3d at 1456 & n.5.”
Los Alamos Study Group v. U.S. Department of Energy, 692 F.3d 1057 (10th Cir. 2012)	DOE/NNSA	**WIN** – Plaintiff group alleged that the design proposed for construction of a Chemistry and Metallurgy Research Replacement Nuclear Facility at the Los Alamos National Laboratory had changed so much since the original environmental analysis in 2003 that a new analysis was required and that all work on the facility should be halted until the conclusion of such analysis. The district court dismissed the claims on two grounds: (1) that they were prudentially moot because Defendants began an environmental analysis after the complaint was filed and committed to refraining from all construction until the analysis was complete; and (2) that the case was not yet ripe because there had been no final agency action. The 10th Circuit agreed with the district court on the ripeness issue and did not address the mootness issue.
U.S. Department of the Interior		
***Gulf Restoration Network, Inc. v. Salazar*,** 683 F.3d 158 (5th Cir. 2012)	DOI	**WIN** – Plaintiff environmental groups filed petitions for review in the court of appeals challenging 16 DOI exploratory plan approvals under the Outer Continental Shelf Lands Act (OCSLA). Plaintiffs argued that the plans violated both OCSLA and NEPA because the agency failed to consider the BP Deepwater Horizon disaster in approving further deep water drilling and incorrectly applied a categorical exclusion in light of extraordinary circumstances (relatively untested deep water, areas of high biological sensitivity, areas of high seismic risk, areas of hazardous natural bottom conditions). However, the court dismissed four of the petitions as moot and found that plaintiffs' failure to participate in the administrative proceedings barred them from challenging the resulting orders. “The DOI's performance in the proceedings prior to its approval of the plans was by no means flawless. Of the twelve plans dealt with in this section, the DOI approved two on the same day that their public versions were posted on the internet; and in one instance the agency approved the plan before it had been posted. The petitioners' showing in this case, however, does not persuade us that they would have participated in those proceedings had there been more time

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		between the postings and the approval of the plans. In respect to the clear majority of the plans at issue, there was ample time between the posting and the DOI's approval of the plan for a diligent interested party to participate in the administrative proceedings. Moreover, the petitioners have failed to offer any evidence or persuasive argument that the DOI's actions or omissions, rather than their own inattention or unpreparedness, caused their failure to participate in any of the administrative proceedings. Consequently, even if we were convinced that we have equitable powers to create an exception to [OCSLA] § 1349(c)(3)'s mandatory statutory requirement that judicial review shall be available only to a person who participated in the administrative proceedings, we conclude that the petitioners have not shown that they would be entitled to such an excuse from the rule in this case."
Center for Biological Diversity v. U.S. Bureau of Land Management, 698 F.3d. 1101 (9th Cir. 2012)	BLM/FWS	**LOSS** – This is an ESA case in which a NEPA Record of Decision was invalidated because of its reliance on a biological opinion that the court found was invalid. The case concerns a BLM decision to authorize the Ruby Pipeline Project, which involved the construction, operation, and maintenance of a 42-inch-diameter natural gas pipeline extending from Wyoming to Oregon, over 678 miles. The court noted that the "right-of-way for the pipeline encompasses approximately 2,291 acres of federal lands and crosses 209 rivers and streams that support federally endangered and threatened fish species. According to a Biological Opinion formulated by FWS, the project 'would adversely affect' nine of those species and five designated critical habitats. The FWS nonetheless concluded that the project 'would not jeopardize these species or adversely modify their critical habitat.' The propriety of the FWS's 'no jeopardy' conclusion, and the BLM's reliance on that conclusion in issuing its Record of Decision, are at the heart of this case." The court vacated the FWS Biological Opinion and remanded it to the agency to "formulate a revised biological opinion that: (1) addresses the impacts, if any, of Ruby's groundwater withdrawals on listed fish species and critical habitat; and (2) categorizes and treats the Conservation Action Plan measures as 'interrelated actions' or excludes any reliance on their beneficial effects in making a revised jeopardy and adverse modification."
Defenders of Wildlife v. Bureau of Ocean Energy Management, 684 F.3d. 1242 (11th Cir. 2012)	BOEM	**WIN** – Plaintiff environmental groups filed petitions for review in the court of appeals challenging BOEM's approval of an exploration plan (Shell EP) to drill 10 exploratory wells on offshore Alabama leases in the Central Gulf of Mexico between 7,100 and 7,300 feet deep. Finding for the federal defendant, the court stated: "Petitioners insist BOEM's decision not to prepare an EIS and its subsequent FONSI is a violation of NEPA. Yet, Petitioners simply cannot overcome our extremely deferential 'arbitrary or capricious' standard of review." Contrary to petitioners' argument that the EA failed to include a site-specific analysis of potential catastrophic oil spills, the court noted that "the EA extensively analyzes the risks and consequences of such an event. Appendix B of the EA, 'Catastrophic Spill Event Analysis,' evaluates the impact of a low-probability catastrophic spill. After taking into account regulations put into effect after the Deepwater Horizon disaster, BOEM determined that the risk of another spill was low. While this analysis is derived from a generalized scenario, it is based on the only two large spill disasters in the Gulf of Mexico -- the 1979 Ixtoc blowout in the Bay of Campeche Mexico and the 2010 Deepwater Horizon disaster. An oil spill is an

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		unexpected event, and its parameters cannot be precisely known in advance. Thus, it is appropriate for BOEM to summarize potential impacts resulting from a hypothetical oil spill." In addressing petitioners' argument that that BOEM failed to evaluate the worst case discharge spill of 405,000 barrels of oil per day, the court stated that "BOEM is not required to base its NEPA analysis on a worst case scenario. . . NEPA does not require a 'worst case discharge' analysis. Thus, we conclude that BOEM's reliance on analysis based on a lower spill rate, which it determined to be more likely than the worst case discharge, was not arbitrary or capricious or in violation of NEPA." With respect to petitioners' argument that the EA fails to discuss some endangered species present in the Gulf, including the piping plover, Gulf sturgeon, and various species of beach mice, the court concluded: "Petitioners suggest that every EA requires a detailed analysis of each species that could possibly be affected by a potential oil spill. NEPA clearly does not require such analysis. An EA is intended to be a document that '[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].' 40 C.F.R. § 1508.9(a)(1). Although the EA does not describe every possible environmental effect of an oil spill, BOEM took a hard look at environmental impacts, and its site-specific analysis of expected drilling operations is consistent with NEPA."
Grand Canyon Trust v. U.S. Bureau of Reclamation, 691 F.3d. 1008 (9th Cir. 2012)	BoR/FWS	**WIN** - Grand Canyon Trust is an organization devoted to the protection and restoration of the canyon country of the Colorado Plateau. BoR is responsible for the operation of the Glen Canyon Dam on the Colorado River and FWS is responsible for the protection of the humpback chub, a fish that exists primarily in the relatively inaccessible canyons of the Colorado River and that is listed as endangered under the ESA. The Trust appealed a lower court decision that rejected the Trust's claims alleging violations of ESA, NEPA, and the Administrative Procedure Act in the operation of the dam. In this appeal, the Trust raised several issues relating to a 2009 biological opinion (BiOp) and an incidental take permit and whether BoR must comply with ESA and NEPA before issuing an annual operating plan (AOP) for the dam. An AOP is required by the Colorado River Basin Project Act and must describe the actual operation under the adopted criteria for the preceding water year and the projected operation for the current year. Although BoR completed an EIS on specific operating criteria for the dam and issued an EA on a 2008 Experimental Plan for a one-time high water release, the Trust argued that BoR was also required to prepare an EA or EIS for each AOP. The district court granted summary judgment to BoR, concluding that AOPs are not "major federal action[s]" triggering compliance with NEPA procedural requirements. The 9th Circuit affirmed, noting that "the adopted operating criteria for the Dam is MLFF [modified low fluctuating flow] which was selected by the Secretary in 1996 in the NEPA-required Record of Decision, and Reclamation does not have the discretion, through its promulgation of an AOP, to deviate from the implementation of MLFF." BoR was not making material changes to the operating criteria when it issued an AOP, and did not change the status quo through the AOP

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		process. "Our conclusion above that producing an AOP is not a major federal action requiring compliance with NEPA procedures is also reinforced by the same pragmatic and realistic concerns that supported our decision that AOPs do not routinely require ESA consultation. Similarly, we hold that Reclamation is not required to comply with NEPA procedural requirements before preparing each AOP for the Dam. The time for an agency to give a hard look at environmental consequences, and the opportunity for serious NEPA litigation on whether alternatives were adequately considered, should come in this context at the points where an agency establishes operating criteria for a dam, or embarks on some significant shift of direction in operating policy, not merely when there is routine and required annual reporting." The ESA claims were dismissed as moot.
Scarborough Citizens Protecting Resources v. U.S. Fish and Wildlife Service, 674 F.3d. 97 (1st Cir. 2012)	FWS	**WIN** – Plaintiffs sued the State of Maine and FWS alleging that easements conveyed by the state to a private developer violated NEPA. They argued that FWS violated NEPA by approving an easement to use a trail to a private developer without giving a "hard look" to the potential environmental consequences. First recognizing that NEPA does not have a private right of action but that violations of NEPA are allowed under the Administrative Procedure Act, the court noted that federal officials did not convey the easement and that "while a grant of federal approval might perhaps have required an environmental assessment under NEPA under certain circumstances, no such approval was sought by state officials or granted by the federal ones." Addressing plaintiffs' argument that the state should have requested approval and FWS' failure to approve the easement violated NEPA, the court recognized that while "deliberate inaction might in some cases be subject to NEPA, 40 C.F.R. § 1508.18 (2011); *Mayaquezanos por la Salud y el Ambiente v. U.S*., 198 F.3d 297, 301 (1st Cir. 1999)," in this case "it is unclear that the grant of the easement required federal 'approval' at all." "In any event, as federal officials were apparently not advised of the grant, failing to object can hardly be treated as a surrogate for approval given without complying with NEPA." "Alternatively, if the grant of the easement independently violated [applicable regulations] and permitted remedial action by USFWS, the failure to seek remedies would be reviewable under NEPA only where there is an enforceable duty to act…" The court stated that no such duty existed. "NEPA cannot be used to make indirectly reviewable a discretionary decisions not to take an enforcement action where the decision itself is not reviewable under the APA or the substantive statute. 'No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had the power to act but did not do so.' *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980)…."

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Center for Biological Diversity v. Salazar, 695 F.3d 893 (9th Cir. 2012)	FWS	**WIN** – Plaintiff environmental groups challenged regulations and accompanying EA authorizing incidental non-lethal take of polar bears and Pacific walruses resulting from oil and gas exploration activities in the Chukchi Sea and on the adjacent coast of Alaska. The EA concluded that the incidental take regulations, along with accompanying mitigation measures, "would result in no measurable impacts o[n] the physical environment," and "the overall impact would be negligible on polar bear and Pacific walrus populations." In May 2008, FWS listed the polar bear as a threatened species under the ESA because of projected reductions in sea ice caused by climate change. The Pacific walrus is not listed as threatened or endangered under the ESA. Plaintiffs alleged that the five-year incidental take regulations, the accompanying BiOp (Biological Opinion), and the EA failed to comply with the MMPA, ESA, and NEPA. In holding for the defendants, the 9th Circuit stated that: "Section 101(a)(5)(A) of the MMPA requires the Service to determine separately that a specified activity will take only 'small numbers' of marine mammals, and that the take will have only a 'negligible impact' on the species or stock. We hold that the Service permissibly determined that only 'relatively small numbers' of polar bears and Pacific walruses would be taken in relation to the size of their larger populations, because the agency separately determined that the anticipated take would have only a 'negligible impact' on the mammals' annual rates of recruitment or survival. The 'small numbers' determination was consistent with the statute and was not arbitrary and capricious. We also hold that the Service's accompanying BiOp and EA comply with the ESA and NEPA." Plaintiffs did not challenge the FWS decision not to prepare an EIS, but rather argued that the EA failed to consider a reasonable range of alternatives to address the potential impacts of a large oil spill. The EA analyzed the no-action alternative and the proposed incidental take regulations. The no-action alternative assumed that oil and gas exploration activities would continue to occur but without the benefit of mitigation measures imposed by FWS and without the ability to monitor specific activities; the no-action alternative did recognize that any takes resulting from exploration activities would violate the MMPA. Plaintiffs faulted the EA for assuming that oil and gas exploration would continue under the no-action alternative. The court stated that "the EA usefully could have acknowledged that MMPA take liability would deter industry from pursuing at least some of the exploration activities under the no-action alternative, but its failure to do so does not make its alternatives analysis arbitrary and capricious." Plaintiffs also argued that even if the no-action alternative was appropriately described, the EA failed to analyze other reasonable alternatives, such as imposing additional mitigation measures recommended by FWS scientists, or excluding key habitat areas from the geographic scope of the regulations. FWS initially considered other action alternatives, but explained in the EA why they were not feasible. In finding for the defendants, the court stated that "[w]e have previously upheld EAs that gave detailed consideration to only two alternatives. *N. Idaho Cmty.*, 545 F.3d at 1154 ('[W]e hold that the Agencies fulfilled their obligations under NEPA's alternatives provision when they considered and discussed only two alternatives in the 2005 EA.'); *Native Ecosystems*, 428 F.3d at 1246 ('To the extent

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		that Native Ecosystems is complaining that having only two final alternatives—no action and a preferred alternative—violates the regulatory scheme, a plain reading of the regulations dooms that argument.'). Because an EA need only include a 'brief discussion[ ]' of reasonable alternatives, 40 C.F.R. § 1508.9(b), and an agency's 'obligation to consider alternatives under an EA is a lesser one than under an EIS,' *Native Ecosystems*, 428 F.3d at 1246, the Service's alternatives analysis here is not arbitrary and capricious." Plaintiffs also argued that the EA was deficient because it failed to analyze the potential impacts of an oil spill. The court found that "[t]he EA discusses the possible severe, even lethal, impacts of oil spills on polar bears, Pacific walruses, and their prey. However, the EA focuses primarily on the risk of 'small operational spills' because it considers the likelihood of a large spill to be very low. Plaintiffs point to a comment from the Marine Mammal Commission, citing a Minerals Management Service (MMS) estimate that the likelihood of a large oil spill in the Chukchi Sea was somewhere between 33 to 51 percent 'over the life of the development and production activity.' The Service discussed this estimate in its rule listing the polar bear, but explains in the EA that the scope of its analysis was more narrow because the Chukchi Sea incidental take regulations cover only exploration activities and only for a period of five years…. The EA's failure to mention the other MMS estimate, regarding the likelihood of a large spill over the life of development and production activities, is not arbitrary and capricious given the relatively narrow scope of the activity contemplated in the incidental take regulations."
U.S. Department of Transportation		
Tinicum Township v. U.S. Department of Transportation, 685 F.3d 288 (3rd Cir. 2012)	FAA	**WIN** – This case involved an appeal of the FAA's approval of a significant expansion of the Philadelphia International Airport. Petitioners alleged that the FAA EIS prepared for the project violated NEPA because the air quality analysis was inadequate. As evidence, petitioners cite comments on the EIS submitted by EPA. "Because the EPA is charged with administering and implementing the Clean Air Act and has significant responsibilities under the National Environmental Policy Act, Tinicum urges us to defer to its comments on the FAA's air quality analysis under *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc*., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We extend Chevron deference to an agency action if Congress intended the action to 'carry the force of law.' *Swallows Holding, Ltd. v. Comm'r of Internal Revenue*, 515 F.3d 162, 169 (3d Cir.2008). In urging deference here, Tinicum misapprehends the EPA's role in commenting on the FAA's Environmental Impact Statement. CEQ regulations require the lead agency, the FAA in this case, to '[o]btain the comments of any Federal agency' that has 'jurisdiction' or 'special expertise' or 'is authorized to develop and enforce environmental standards,' including the EPA here. 40 C.F.R. § 1503.1(a)(1). The EPA and other relevant agencies then review and comment on the EIS. 40 C.F.R. § 1503.2. Responding, the lead agency may: modify the alternative action it has reviewed; develop and evaluate new alternative actions; 'supplement, improve, or modify its analyses[;]' 'make factual corrections[;]' or '[e]xplain why the comments do not warrant further agency response . ' 40 C.F.R. § 1503.4(a). And if, in its review of an agency action, the EPA determines that it 'is unsatisfactory from

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

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

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		Capital Improvements Plan as pending in the project area, no cumulative impacts could be expected. Citizens argues that referencing to the Five-Year Plan was an error and that [defendants] should have consulted the Martin County Long-Range Plan instead. However, [defendants] determined that because the projects on the Long-Range Plan were listed far before their actual development, any analysis of the cumulative impacts of the Long-Range Plan projects would be mostly speculative. We have held that agencies cannot be 'forced to analyze the environmental impact of a project, the parameters and specifics of which would be a mere guess.' *City of Oxford v. FAA*, 428 F.3d 1346, 1356 (11th Cir. 2005)." • "Ultimately, Citizens argues that [FHWA] should have used different and better methodologies for reviewing environmental impacts of the project. However, we do not review an agency's compliance with NEPA by asking whether it made the optimal choices; NEPA does not require perfection. *See Druid Hills*, 772 F.2d at 708–09. [Defendants'] compliance with NEPA may not have been perfect, but it was sufficient." The court declined to consider plaintiffs' claim regarding the need for a supplemental EIS because plaintiffs had not alleged this in its original complaint and only raised it on appeal.
***North Carolina Wildlife Federation v. North Carolina Department of Transportation*,** 677 F.3d 596 (4th Cir. 2012)	FHWA	**LOSS** – Plaintiff environmental groups challenged an EIS prepared for a 20-mile toll road in North Carolina (North Monroe Connector Bypass). Overruling the lower court, the court of appeals found that FHWA had violated NEPA by failing "to disclose critical assumptions underlying their decision to build the road and instead provided the public with incorrect information…." Specifically, public commentators repeatedly asked FWHA whether the "no build" baseline in fact assumed construction of the Monroe Connector. In responding to these comments, the FHWA either failed to address the underlying issue or incorrectly stated that the Monroe Connector was not factored into the "no build" baseline. "Nonetheless, the Agencies maintain that because they "conducted a thorough analysis of the environmental impacts" of the Monroe Connector and 'accepted comments from the public,' we should defer to their expertise." The court of appeals declined to do so: "In sum, although we need not and do not decide whether NEPA permits the Agencies to use MUMPO's [Mecklenburg-Union Metropolitan Planning Organization's] data in this case, we do hold that by doing so without disclosing the data's underlying assumptions and by falsely responding to public concerns, the Agencies failed to take the required 'hard look' at environmental consequences. *Shenandoah Valley*, 669 F.3d at 196. We therefore vacate the judgment of the district court and remand so that the Agencies and the public can fully (and publicly) evaluate the 'no build' data."
***Prairie Band Pottawatomie Nation v. Federal Highway Administration*,** 684 F.3d 1002 (10th Cir. 2012)	FHWA	**WIN** - Plaintiff environmental groups challenge FHWA selection of a route for the South Lawrence Trafficway, a proposed highway project in Lawrence, KS. Their NEPA claim alleged that the EIS supporting the decision, arguing that (1) the noise analysis failed to adhere to DOT regulations; (2) the government should not have rejected Alternative 42C; (3) the cost analysis underestimated the costs for Alternative 32B; and (4) the safety analysis used incorrect safety criteria. In ruling on the claims, the court stated that "[i]n the context of a NEPA challenge, an agency's decision is arbitrary and capricious if the agency (1) entirely failed to

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		consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment." However, "'Deficiencies in an EIS that are mere 'flyspecks' and do not defeat NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal.' *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir.2009). Furthermore, even if an agency violates the APA, its error does not require reversal unless a plaintiff demonstrates prejudice resulting from the error. APA § 706 ('[D]ue account shall be taken of the rule of prejudicial error.'); *see New Mexico ex rel. Richardson*, 565 F.3d at 708. Importantly, '[a] presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.' *New Mexico ex rel. Richardson*, 565 F.3d at 704." Noise analysis: "the noise analysis focused on the sensitive areas in and around the Haskell Farm. As the government points out, most of the remaining land along routes 32B and 42A is undeveloped. Appellants allege for the first time in their reply brief that the government 'failed to consider 32B's noise impacts on the nearby noise-sensitive Prairie Park and Nature Center and city homes east of the Haskell Farm.' Aplt. Reply Br. at 8. Appellants, however, have not laid a sufficient factual basis on the record for us to conclude that the government's decision to restrict the noise analysis to the Haskell Farm was arbitrary and capricious. To the contrary, as far as the record shows, that decision, made pursuant to public comment on the project, was entirely reasonable. To find otherwise would be to engage in 'flyspeck[ing]' the noise analysis based on factual allegations outside the record. *New Mexico ex rel. Richardson*, 565 F.3d at 704. This we may not do." Alternative 42C: "To the extent Appellants argue the government erred in not giving sufficient consideration to their 42C proposal, we note that Appellants did not propose alternative 42C until after the government issued its final EIS. Appellants do not explain why they did not propose this route during the scoping process or during the public comment period for the draft EIS. Despite Appellants' late proposal, the government considered their proposal and offered a reasoned explanation of why it was inferior to the chosen alternative. Appellants argue that the government's safety analysis for alternative 42C was inadequate, but given the timing of their proposal, the government arguably went above and beyond what was required." Alternative 32B Cost Analysis: "This argument, based on a single footnote in the EIS, warrants only a brief discussion… Although Appellants' interpretation is perhaps plausible when the footnote is read in isolation, it is obviously incorrect when read in conjunction with other sections of the EIS. Specifically, the portion of the EIS entitled Environmental Consequences has a subsection specifically addressing wetland mitigation for the 32nd Street corridor. There, a table totaling the costs for 32B includes wetland mitigation measures as well as other measures and lists the total cost as $18.6 million. See App. at 665. Thus, we are unconvinced that the government erroneously omitted wetlands mitigation costs from its consideration of alternative 32B."

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		Safety Criteria: "Finally, Appellants complain briefly that the EIS used the wrong vehicle accident rate metric to calculate the relative safety of each alternative. The EIS's purpose and need statement used accidents per million vehicle miles driven, but the EIS's safety analysis used accidents per year. The substantive difference between the two metrics is that accidents per million vehicle miles driven cancels out accident increases created solely by increased highway length, while accidents per year does not. Appellants claim the use of the latter metric in the safety analysis was erroneous given that the former metric was used to define the project's purpose and need. "We find the EIS's use of accidents per year instead of accidents per million vehicle miles was not arbitrary and capricious. We 'are not in a position to decide the propriety of competing methodologies in the transportation analysis context, but instead, should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors.' *Comm. to Pres. Boomer Lake Park v. Dep't of Transp*., 4 F.3d 1543, 1553 (10th Cir.1993). Appellants do not explain why accidents per year lacks a rational basis for NEPA purposes. To us, the total number of accidents that will be caused (or avoided) each year appears a reasonable safety metric, and Appellants do not attempt to convince us otherwise."
Independent Agencies		
Coalition for Responsible Growth and Resource Conservation v. Federal Energy Regulatory Commission, 2012 WL 2097249 (2nd Cir. 2012) (not selected for publication in Federal Reporter)	FERC	**WIN** – Plaintiff environmental groups challenged FERC's failure to prepare an EIS for the issuance of a certificate of public convenience and necessity for a proposed 39-mile natural gas pipeline through three counties in Pennsylvania and related facilities. FERC had prepared an EA/FONSI, concluding that an EIS was not required. The court held that the 296-page EA had "thoroughly considered the issues" and that FERC had reviewed the concerns raised by the comments on the EA. The court also held that the cumulative impact analysis was adequate. "FERC included a short discussion of Marcellus Shale development in the EA, and FERC reasonably concluded that the impacts of that development are not sufficiently causally-related to the project to warrant a more in-depth analysis. In addition, FERC's discussion of the incremental effects of the project on forests and migratory birds was sufficient. FERC addressed both issues in the EA and has required [the project proponent] to take concrete steps to address environmental concerns raised by petitioners and others."
State of New York v. Nuclear Regulatory Commission, 681 F.3d 471 (D.C. Cir. 2012)	NRC	**LOSS** – The State of New York and a number of environmental groups petitioned the court for review of the Commission's Waste Confidence Decision (WCD) rulemaking regarding temporary storage of permanent disposal of nuclear waste. Recognizing that this case "is another in the growing line of cases involving the federal government's failure to establish a permanent repository for civilian nuclear waste," the court, ruling for the petitioners, held that "the rulemaking at issue here constitutes a major federal action necessitating either an environmental impact statement or a finding of no significant environmental impact. We further hold that the Commission's evaluation of the risks of spent nuclear fuel is deficient in two ways: First, in concluding that permanent storage will be available 'when necessary,' the Commission did not calculate the environmental effects of failing to secure permanent storage—a possibility that cannot be ignored. Second, in determining that spent fuel can safely be stored on

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		site at nuclear plants for sixty years after the expiration of a plant's license, the Commission failed to properly examine future dangers and key consequences. For these reasons, we grant the petitions for review, vacate the Commission's orders, and remand for further proceedings." NRC first issued a WCD in 1984. It included 5 findings, including that a mined geologic repository for nuclear waste would be available by 2009 and that spend nuclear fuel (SNF) could be stored safely on nuclear power plant sites for at least 30 years beyond the licensed life of each plant. The rule was updated in 1990 to predict the availability of a repository by 2025; it was updated again in 1999 without changes. In 2010, NRC updated the WCD by stating that a suitable repository would be available "when necessary" rather than by a date certain. After examining the potential environmental effects from temporary storage, NRC also stated that SNF could be stored safely at nuclear power plant sites for at least 60 years beyond the licensed life of the plant. The petitioners argued that the WCD is a major federal action because it is a predicate to every decision to license or relicense a nuclear plant, and the findings made in the WCD are not challengeable at the time a plant seeks a license. NRC argued that because the WCD does not authorize the licensing of any nuclear reactor or storage facility, and because a site-specific EIS will be conducted for each facility at the time it seeks a license, the WCD is not a major federal action. NRC also argued that the WCD itself constituted an EA supporting the revision of the NRC rule (10 C.F.R. § 51.23(a)), and because the EA found no significant environmental impact, an EIS is not required. The court agreed with petitioners "that the WCD rulemaking is a major federal action requiring either a FONSI or an EIS. The Commission's contrary argument treating the WCD as separate from the individual licensing decisions it enables fails under controlling precedent. We have long held that NEPA requires that "environmental issues be considered at every important stage in the decision making process concerning a particular action." *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). The WCD makes generic findings that have a preclusive effect in all future licensing decisions—it is a pre-determined 'stage' of each licensing decision. … It is not only reasonably foreseeable but eminently clear that the WCD will be used to enable licensing decisions based on its findings. The Commission and the intervenors contend that the site-specific factors that differ from plant to plant can be challenged at the time of a specific plant's licensing, but the WCD nonetheless renders uncontestable general conclusions about the environmental effects of plant licensure that will apply in every licensing decision." Even accepting NRC's argument that the WCD constituted an EA for the permanent storage conclusion, the court found it to be insufficient because a finding that reasonable assurance that permanent SNF storage will be available when necessary "does not describe a probability of failure so low as to dismiss the potential consequences of such a failure. Under NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass…. An agency may find no significant impact if the probability

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		is so low as to be "remote and speculative," or if the combination of probability and harm is sufficiently minimal…. Here, a 'reasonable assurance' that permanent storage will be available is a far cry from finding the likelihood of nonavailability to be 'remote and speculative.' The Commission failed to examine the environmental consequences of failing to establish a repository when one is needed." The court also concluded that the "EA and resulting FONSI are not supported by substantial evidence on the record because the Commission failed to properly examine the risk of leaks in a forward-looking fashion and failed to examine the potential consequences of pool fires." Both the US Supreme Court and the D.C. Circuit Court have endorsed the NRC's practice of considering environmental issues through general rulemaking in appropriate circumstances. In this case, the court saw no reason that a comprehensive analysis would be insufficient to examine onsite risks that are common to all plants, particularly given NRC's use of conservative bounding assumptions and the opportunity to raise site-specific differences at the time of a specific plant's licensing. However, "whether the analysis is generic or site-by-site, it must be thorough and comprehensive. Even though the Commission's application of its technical expertise demands the "most deferential" treatment by the courts, *Baltimore Gas*, 462 U.S. at 103, we conclude that the Commission has failed to conduct a thorough enough analysis here to merit our deference." The court found that "an agency conducting an EA generally must examine both the probability of a given harm occurring and the consequences of that harm if it does occur. Only if the harm in question is so 'remote and speculative' as to reduce the effective probability of its occurrence to zero may the agency dispense with the consequences portion of the analysis." Contrary to petitioners' argument however, "the finding that the probability of a given harm is nonzero does not, by itself, mandate an EIS: after the agency examines the consequences of the harm in proportion to the likelihood of its occurrence, the overall expected harm could still be insignificant and thus could support a FONSI." In this case, NRC "did not undertake to examine the consequences of pool fires at all. Depending on the weighing of the probability and the consequences, an EIS may or may not be required, and such a determination would merit considerable deference….But unless the risk is 'remote and speculative,' the Commission must put the weights on both sides of the scale before it can make a determination." The court did agree with NRC that petitioners could not raise issues that it had not raised in the rulemaking. "We note, as did the Supreme Court in *Public Citizen*, that primary responsibility for compliance with NEPA lies with the Commission, not petitioners; nonetheless, the non-health effects alluded to here are not 'so obvious that there is no need for a commentator to point them out.' Id. Given, however, that we are invalidating the Commission's conclusions as a whole, petitioners will have the opportunity to properly raise and clarify these concerns on remand."