RECENT NEPA CASES (2014)

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ABSTRACT

This paper will review substantive NEPA cases issued by federal courts in 2014. The implications of the decisions and relevance to NEPA practitioners will be explained.

INTRODUCTION

In 2014, the U.S. Courts of Appeal issued 22 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 22 cases involved 11 different departments and agencies. The federal agencies prevailed in 19.5 of the 22 cases (89 percent).

The U.S. Supreme Court issued no NEPA opinions in 2014; 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 – 2014, by circuit. Figure 1 is a map showing the states covered in each circuit court.

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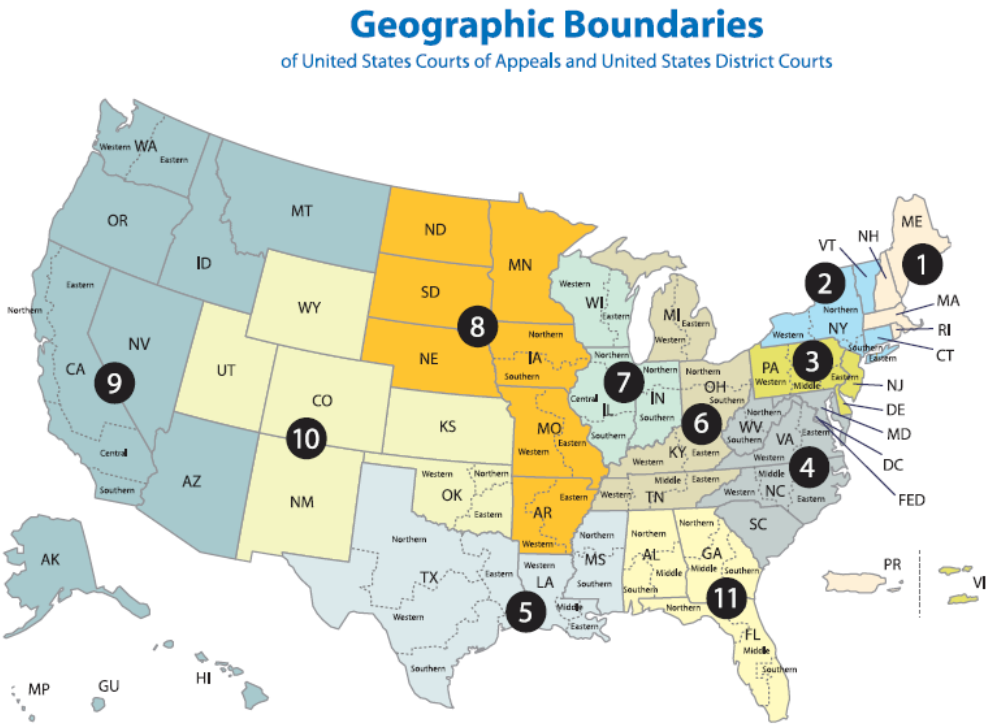
Table 1. Number of U.S. Courts of Appeal NEPA Cases, by year and by circuit

	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
2013	**2**			**2**		**1**	**1**		**9**	**2**	**1**	**3**	**21**
2014				**2**		**5**			**10**	**2**		**3**	**22**
TOTAL	**8**	**6**	**5**	**9**	**6**	**9**	**4**	**5**	**100**	**24**	**5**	**16**	**197**
	4%	3%	3%	4%	3%	4%	2%	3%	51%	12%	3%	8%	100%

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



STATISTICS

The U.S. Department of Transportation (DOT) agencies came in first as the agency involved in the largest number of substantive NEPA cases in 2014 with seven cases (prevailed in all). Of those, the Federal Highway Administration (FHWA) was involved in five cases, with the Federal Aviation Administration (FAA) and Federal Transit Administration (FTA) each involved in one case. The U.S. Forest Service (USFS) placed second in 2014 with six substantive NEPA cases (did not prevail in one case).

U.S. Department of the Interior agencies (Bureau of Ocean Energy Management [BOEM], Bureau of Land Management [BLM], Bureau of Reclamation [BoR], and U.S. Fish and Wildlife Service [FWS])were involved with five cases (prevailed in 4.5 cases), and the Federal Energy Regulatory Commission (FERC) was involved in two cases (prevailed in one case). The U.S. Army Corps of Engineers (ACOE) and the U.S. Department of Energy (DOE) were each involved in one case and each prevailed.

Each of the 2014 NEPA cases, organized by federal agency, is summarized below.

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
U.S. Department of Agriculture		
***League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton,* 752 F.3d 755 (9th Cir. 2014)**	USFS	**Agency did not prevail** (lower court decision affirmed in part and reversed in part). **Issues**: Supplementation, cumulative effects, "hard look" Plaintiff environmental groups challenged the adequacy of a final EIS prepared for the Snow Basin logging project in the Whitman Wallowa National Forest in northeast Oregon. After a ROD approving the project, plaintiffs sought to enjoin the timber sale on four NEPA grounds: 1) because the Forest's Travel Management Plan (TMP) had been withdrawn, the FEIS' reliance on the TMP in analyzing the impact of the project on certain species within the Forest was invalid, and a supplemental EIS must be completed; 2) the FEIS' failure to consider the cumulative effects of the 130-acre logging project in the correction notice was error; 3) the failure of the FEIS to analyze the cumulative effects of potentially increased stream temperatures and sedimentation was error; and 4) the FEIS did not properly explain why it found that bull trout were not present in the project area, and so did not analyze the project's impact on bull trout. Finding that the plaintiffs were likely to prevail on the first of their four claims (although none of the other three), the Court of Appeals reversed the district court's denial of a preliminary injunction and remanded the case to the district court with instructions to enter a preliminary injunction sufficient to protect the status quo while USFS completed a supplemental EIS. **Holding:** "A draft environmental impact statement ("EIS") was issued in March 2011, and the final EIS ("FEIS") was issued in March 2012. One way in which the FEIS differed from the draft EIS is that one segment of the project, about 170 acres of regenerative logging, had been removed from consideration in the FEIS. After the adoption of the FEIS, in April 2012, the Forest Supervisor withdrew the Forest's Travel Management Plan ("TMP"), which had proposed to regulate off-road motorized travel and reduce the amount of roads within the Forest, and which had been mentioned in addressing environmental harms from the logging project. In July 2012, the USFS issued a correction notice that said that "group selection" treatment was being considered for 130 of the 170 acres that had been removed from the draft EIS and not considered in the FEIS." *Supplemental EIS Claim*. "The Snow Basin FEIS opens its analysis of the project's impact on the area's elk population by stating that elk are the "most popular" big game in the area, and are "an indicator of the quality and diversity of the general forested habitat," but that "[d]isturbance due to roads is a major factor influencing elk distribution." After surveying the existing status of the habitat, it begins its analysis of road density. It notes that three parcels within the project area currently exceed the recommended road density, but that the TMP, "will result in a net reduction of open roads within the project area, which will provide additional habitat that is free from disturbance from motor vehicles." It

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		then goes on to say that, although the precise reduction in road density could not be quantified because the TMP was not final, the TMP would "result in a substantial improvement in elk security habitat in the Snow Basin project area." It also includes a table, which calculates the road density in all affected parcels under each alternative. At oral argument, USFS explained that this chart does not include the impact of the TMP within its calculations. Later, under separate header, the FEIS discusses the potential impacts of other foreseeable future projects, including fire thinning, cattle grazing, and the TMP." "…with the TMP now withdrawn, the USFS must prepare a supplemental EIS. Although parts of the USFS' analysis do not consider the TMP, as a whole, its review of the Snow Basin project's independent environmental impacts on elk and their habitat are interwoven with statements that explicitly rely upon the TMP to mitigate harms that the Snow Basin project will cause. When the public reviews an EIS to assess the environmental harms a project will cause and weighs them against the benefits of that project, the public should not be required to parse the agency's statements to determine how an area will be impacted, and particularly to determine which portions of the agency's analysis rely on accurate and up-to-date information, and which portions are no longer relevant." "This lack of clarity likely renders the EIS deficient. Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA. *See, e.g., Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (describing one of the purposes of NEPA as ensuring "that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1034 (9th Cir. 2006) (noting that one of the purposes of NEPA is "ensuring that the public can both contribute to that body of information, and can access the information that is made public"). Without supplemental analysis of impacts absent the TMP, previously stressed in parts of the agency's assessment, the public would be at risk of proceeding on mistaken assumptions." *First Cumulative Impact Analysis Claim*. "[P]laintiffs have not shown that they are likely to prevail on their claim that the 130 acres of group selection treatment listed in the USFS' Correction Notice meet the standard for an identified proposal for which cumulative impacts analysis must be done. The USFS may have a goal, but the likelihood of proceeding on that goal and a timetable on any such action are not yet defined. More importantly, there is no indication that the USFS "is actively preparing to make a decision," 36 C.F.R. § 220.4(a)(1), but rather, they have disclaimed any intention to move forward on that logging in any particular time frame. As the record now stands, the USFS may permit this logging, or it may not take any action at all. Environmental impacts of this possibility are at present inchoate and to a degree speculative."

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Second Cumulative Impacts Claim. Plaintiffs argue that the FEIS did not consider the symbiotic relationship between increased sediment in the streams that flow through the project area and the pre-existing thermal stress that the stream's high temperatures place on the fish that inhabit the streams. The EIS notes that both Little Eagle Creek and Eagle Creek exceed their target temperatures, which results in harms for both migration and spawning. It also notes that logging could add low to moderate amounts of sediment to those same streams. However, the plaintiffs' allegation misapplies the cumulative impact test. Because the project will not have any impact on stream temperatures, any thermal stress on the fish is a part of the project's environmental baseline. Therefore, no cumulative effects analysis is required, and the LOWD plaintiffs have not shown that they are likely to prevail on this claim. *Bull Trout Analysis Claim*. "In the FEIS, the USFS cited to a study of the project area by the Oregon Department of Fish and Wildlife. The Oregon study indicates that, although bull trout were "common" in Eagle Creek in the 1940s and '50s and continued to be documented there through the 1980s, snorkeling surveys conducted between 1991 and 1994 failed to find bull trout in Eagle Creek. The EIS concludes that "[b]ull trout have likely been extirpated from the Eagle Creek system since the 1990s," and as a result, the EIS does not analyze the impact of the Snow Basin project on bull trout. While the FEIS does not engage with existing contrary scientific opinions about the potential presence of bull trout in Eagle Creek, it included all of the relevant scientific data and contains sufficient information to let the public make an informed determination of the environmental impacts of the Snow Basin project." Plaintiffs argued that the data relied on by USFS regarding bull trout were too vague or stale to support the conclusions drawn from it and that the hard look standard required the agency to conduct new scientific studies in order to fully and fairly analyze the impacts of the project. While recognizing that the snorkel surveys were more than 15 years old, the court found that there was no reliable evidence that showed their results were likely incorrect or that the status of bull trout in the project area had changed over time, so we cannot say that the USFWS and USFS' reliance on the surveys was arbitrary and capricious."
***Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036 (10th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed). **Issues**: Alternatives analysis, "hard look" Environmental groups interested in species and habitat protection in Black Hills National Forest brought actions against USFS and several of its officials challenging various decisions related to management. The environmental groups contended the USFS violated NEPA in three ways: by failing to (1) consider a reasonable range of alternatives in the Final EIS because it did not include a "no grazing" alternative; (2) take a "hard look" at how the Phase II Amendment would affect sedimentation in the BHNF's waterways, including how the sedimentation might affect sensitive plants

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		and aquatic fauna; and (3) take a "hard look" at historical grazing practices before re-authorizing grazing use in the Phase II Amendment. **Holding**: In a lengthy decision, with a brief analysis of NEPA, the Tenth Circuit held : "The scope of the Phase II Amendment did not call for consideration of a no grazing alternative. After "an agency establishes the objective of the proposed action ... the agency need not provide a detailed study of alternatives that do not accomplish that purpose or objective." In the second challenge, the court found that the USFS mitigated the impacts of sedimentation in lakes and streams caused by livestock, timber harvesting, mining, road construction, and recreation. The record indicated otherwise. The court found that the USFS looked hard at how the its plans would mitigate sedimentation and concluded the USFS made a reasoned evaluation of how the Watershed Conservation Practices Handbook and the Best Management Practices (BMPs) would mitigate sedimentation under the Phase II Amendment. In its final challenge, the environmental groups argued that the USFS violated NEPA by failing to take a "hard look" at the effects of past grazing projects before approving four site-specific grazing projects. The court found that even if the Forest Service were required to consider past grazing practices for the four site-specific projects, the record indicates it did so, and met the hard look requirement.
***Biodiversity Conservation Alliance v. U.S. Forest Service*, 765 F.3d 1264 (10th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed). **Issues**: "hard look," extent to which impacts are highly controversial Plaintiff environmental group challenged a USFS decision modifying trail use in Medicine Bow National Forest in southern Wyoming. The agency formally closed several hundred miles of unauthorized motorized trails, but allowed motorcycle use on the Albany Trail, an approximately five-mile trail in the Middle Fork Inventoried Roadless Area (Middle Fork IRA), and several connecting trails. Plaintiff argued that USFS did not properly consider the impacts on wetlands and non-motorized recreation in reaching its decision, and should have found that significant impacts required the preparation of an EIS. Specifically, plaintiff claimed that USFS failed to take a hard look at the impact on wetland areas known as fens and failed to acknowledge a substantial controversy regarding the effect on non-motorized recreation such as hiking and wildlife viewing. **Holding**: The court found that the EA adequately supported its finding that the proposed decision would have no significant impacts on wetlands or other users of the Middle Fork IRA. Impact on Fens. "As an initial matter, the Forest Service recognized that there are six potential fens within the project area and the Albany Trail crosses three of them. According to the Forest Service's Biological

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Assessment, "[m]otorized trail use can change soil properties and infiltration of precipitation thus changing the growing environment for plants. Recreational use within wetland/fen areas could remove and/or injure plants, alter soil properties, change the hydrologic regime and/or reduce the overall vigor of round leaf sundew." But the Forest Service concluded that the damage had already been done…. [Plaintiff's] argument, in essence, asks the Forest Service to assume the Albany Trail never existed as a baseline for the NEPA analysis." However, the court concluded that "the Forest Service properly employed existing usage as the basis for its no-action alternative and the point of reference for measuring significant impacts." The court also rejected plaintiff's argument that USFS was required to conduct additional on-site visits to the affected fens and perform full botanical surveys. "But NEPA does not require the agency to use particular methodologies, and BCA does not point to any case law suggesting that an agency cannot take a hard look at the impact on a particular site unless both botanists and wildlife specialists conduct on-site visits. NEPA grants substantial discretion to an agency to determine how best to gather and assess information…. And, because the question is whether the agency's decision was arbitrary and capricious, we look to whether the agency's chosen method is sound, not whether there are competing methods that might work as well. *See id.* ("[C]ourts are not in a position to decide the propriety of competing methodologies, but should simply determine whether the challenged method had a rational basis and took into consideration the relevant factors."…. The Forest Service's chosen method here allowed it to soundly evaluate the impact on fens…. Given the deference we owe the Forest Service, we cannot conclude that, absent reasons to question the Forest Service's factual findings, the failure to provide additional study renders the Albany Trail decision arbitrary and capricious." With respect to the obligation to look at the impact on adjacent fens, plaintiff argued that the agency "failed to consider the likelihood that opening the Albany Trail would draw additional motorcyclists, who would in turn create new unauthorized routes across fens in other parts of the Middle Fork IRA…. Absent countervailing evidence in the record, we can conclude from the EA that the Forest Service took a hard look at the relevant information and determined that opening motorized trails would slow the creation of unauthorized routes in the area and, accordingly, the impact on fens in other parts of the Middle Fork IRA." Plaintiff also argued that the decision had a significant impact because the degree to which the effects on the environment are "highly controversial." The court recognized that "[c]ontroversy in the NEPA context does not necessarily denote public opposition to a proposed action, but a substantial dispute as to the size, nature, or effect of the action." *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002). Further, "[a] substantial dispute can be found, for example, when other information in the record "cast[s] substantial doubt

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		on the adequacy of the agency's methodology and data." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012). BCA can point to no evidence in the record contradicting the conclusion that the Proposed Alternative and Alternative 2 would have significantly similar impacts on recreation user conflicts. Instead, [plaintiff] argues that there is not enough evidence in the record to support that conclusion. But a dearth of factual information cannot serve as proof of a dispute . . . Although the Forest Service's analysis does not involve the kind of empirical inquiry for which [plaintiff] had hoped, we cannot overturn the agency's conclusion simply because it is based on forest managers' observations of visitor behavior and common sense—especially since unauthorized usage is particularly difficult to measure."
***American Whitewater v. Tidwell*, 770 F.3d 1108 (4th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed). **Issue**: Speculation, "fly-specking" In 2012, USFS revised its management plan for the Headwaters of the Chattooga River to allow non-motorized rafting (floating) on most of the Headwaters during the winter months, when flows are highest and conditions are best. Plaintiff environmental groups challenged the plan as inconsistent with the Wild and Scenic Rivers Act; two intervening parties (Georgia ForestWatch and the Rust Family who are landowners along the river) argued that the USFS decision to allow any floating violates NEPA. **Holding:** With respect to the NEPA claim, the court stated: "The Rusts also argue that the Forest Service violated NEPA by failing to analyze the risk that opening portions of the Headwaters to floating could lead to trespass on Rust property. They insist that floaters are likely to attempt to reach the River by crossing their property illicitly, instead of using the trails and parking lots already available to the public. The district court correctly held that this prospect is so speculative that no NEPA analysis is required." "NEPA encourages conservation not by imposing substantive obligations on agencies, but by requiring that agencies consider the environmental consequences of their actions and present them to the public for debate. *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184, 185 (4th Cir. 2005). Accordingly, our review under NEPA is limited to ensuring that an agency has taken a "hard look" at the environmental impacts of a proposed action. *Id.* at 185. Moreover — and dispositive here — an agency need consider only the "reasonably foreseeable" effects of its decisions. *See Webster*, 685 F.3d at 429 ("[A]lthough agencies must take into account effects that are reasonably foreseeable, they generally need not do so with effects that are merely speculative."); *see also* 40 C.F.R. § 1508.8). Any possible increase in the risk of trespass on the Rusts' land does not meet this standard." "Even assuming that a heightened risk of trespass was reasonably foreseeable, the Forest Service's discussion of that risk satisfies NEPA. The

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Forest Service presented the Rusts' concerns to the public and explained that they were addressed by the continued ban on floating above Green's Creek, and the Rusts' property. In this context, that discussion was sufficient; agencies have discretion to determine which issues merit detailed discussion, and here the risk of trespass or any associated environmental impact was not so significant that more was required. *See Nat'l Audubon Soc'y*, 422 F.3d at 186 ("A 'hard look' is necessarily contextual."); *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) ("Detailed analysis is required only where impacts are likely."). Review under NEPA is not a vehicle for "flyspeck[ing]" agency analysis and discussion, *Nat'l Audubon Soc'y*, 422 F.3d at 186, and we find that the Forest Service has met its NEPA obligations."
***Alliance for the Wild Rockies v. U.S. Dep't of Agriculture,* 772 F.3d 592 (9th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed on NEPA claim). **Issue**: Supplementation In 2011, plaintiffs challenged a USFS 2008 Management Plan and 2011 annual decision to permit recurring low-altitude helicopter flights that harass Yellowstone grizzly bears, during spring and summer bear season, over National Forest lands in the Yellowstone Grizzly Bear Recovery Zone. Plaintiffs claimed that USFS decision to permit the flights to haze bison in the Yellowstone Grizzly Bear Recovery Zone violated NEPA (and ESA) because the USFS failed to undertake the proper procedures for reevaluating the effect of helicopter hazing on Yellowstone grizzly bears. USFS and other agencies had completed an EIS and biological assessment prior to approval of an Interagency Bison Management Plan in 2000 to allow hazing in order to minimize disease transfer between bison and livestock. Although the court reversed the lower court's finding that plaintiff environmental groups lacked standing to bring its NEPA claim, the court affirmed the grant of summary judgment to USFS (and multiple other federal and state agencies) on the NEPA claim. **Holding:** The Management Plan's 2000 EIS adequately analyzed the impacts of helicopter hazing on grizzly bears and USFS was not required to prepare a supplemental EIS. "Once an original EIS has been completed, NEPA requires that agencies perform a supplemental EIS whenever "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns or [] [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1); *see also Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 560 (9th Cir. 2006). An impact on a threatened or endangered species is a factor that can give rise to the requirement to perform a supplemental EIS. 40 C.F.R. § 1508.27(b)(9). "In support of its claim that the federal defendants are required to prepare a supplemental EIS, [plaintiffs] alleges three significant new circumstances or information" pertaining to the Management Plan. First, while the final EIS for the Management Plan indicated that hazing impacts on Yellowstone grizzly bears would end in April or May, helicopter hazing

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		now extends into June and July. Second, although the final EIS contemplated that Yellowstone grizzly bears would be denning, or at higher elevations, during hazing operations, "most hazing now occurs after denning and den emergence, and grizzly bears are consistently present in the lower elevation areas where hazing occurs during most hazing operations." Third, the final EIS indicated that hazing would be stopped if there was evidence of Yellowstone grizzly bear activity in the hazing operation area, but hazing operations remain ongoing despite such actions. Because the federal defendants' considered these issues during the initial final EIS process, we affirm the district court's grant of summary judgment to the federal defendants." "Accordingly, we hold that the federal defendants considered the possibility of extended helicopter hazing and encounters with Yellowstone grizzly bears in the initial EIS and, thus, the information presented by Alliance does not establish a substantial change in the proposed action nor significant new circumstances or information requiring the federal defendants to supplement the EIS."
***Conservation Congress v. Finley*, 774 F.3d 611 (9th Cir. 2014)**	USFS	**Agency prevailed** (lower court decision affirmed). **Issue**: "hard look" Plaintiff environmental group challenged a USFS lumber thinning and fuel reduction project in northern California, known as the Beaverslide Project. The project's two main purposes are to protect against the current risk of wildfires due to the dense forest, and to provide a sustainable, long-term timber supply to local communities. The project calls for commercial thinning of trees, reduction of fuels, and the creation of fuel corridors, among other treatments. The project has the potential to affect the Northern Spotted Owl. USFS had prepared an EIS in 2009, and a Supplemental EIS in 2010. **Holding**: "[Plaintiff] contends that the Forest Service violated NEPA because its two issued EISs failed to take the requisite "hard look" at information in the 2011 Recovery Plan describing potential short-term effects to the Northern Spotted Owl and the threat of barred owls. However, the two EISs prepared by the Forest Service contain full and fair discussions of possible short-term effects to the owl. Indeed, the Forest Service devotes entire sections of its reports to analyzing the project's possible consequences to the owl's habitat and to the owl's most common prey. This analysis includes discussion of numerous short-term effects. Likewise, the EISs directly respond to concerns about barred owls by discussing findings on whether barred owls are present in the project area, and how the project affects the barred owl threat. We therefore agree with the district court that the Forest Service took the requisite "hard look" at potential dangers to the Northern Spotted Owl and, using its expertise and discretion, reached its conclusion through a reasoned analysis."

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
U.S. Department of Defense		
***Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers,* 746 F.3d 698 (6th Cir. 2014)**	ACOE	**Agency prevailed** (lower court decision affirmed). **Issues**: EA, agency discretion, and small federal handle (applicant proposal) This appeal involved two environmental and citizen groups', Kentuckians for the Commonwealth and the Sierra Club, opposition to the issuance of a Clean Water Act (CWA) § 404 dredge and fill permit in Perry County, Kentucky. The Army Corps of Engineers granted a mining company, Leeco, Inc., a permit to discharge dredged or fill materials into navigable waters. In early 2007, the mining company submitted an application to the Corps for a secondary permit to discharge of fill material into streambeds, as required by § 404 of the CWA as part of its overall mining project. In 2009, the Corps, the EPA and the Department of the Interior instituted an agency plan that intended to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, with extensive comments by the EPA outlining concerns with water quality, mitigation attempts, and human health impacts on the low income surrounding communities. After the mining company addressed various concerns and implemented strategies outlined by the EPA, the Corps issued an EA finding "no significant impact" and issued the §404 permit in 2012." **Holding**: The citizen groups lost their case in the lower courts when they challenged both the issuance of the permit as violating both NEPA and the CWA, and dismissed the lawsuit. On appeal, among other CWA objections, the citizen groups challenged the Corps decision to issue the § 404 permit, asserting that the Corps abused its discretion by failing to consider the public health effects of the overall mining activity in conducting its NEPA review of the environ-mental effects of granting the § 404 permit. The Sixth Circuit held : The Corps did not violate NEPA by deciding not to consider the evidence linking surface coal mining in general to public health consequences of granting the § 404 permit, the Corps properly focused on the possible public health effects of discharges on the local water supply as well as those effects caused by air pollution created by the machines that would be conducting the permit-relevant site preparation and operations. The Corps reasonably limited its scope of review to the effects proximately caused by the specific activities that were authorized by the permit. More importantly, the Corps complied with the relevant regulations interpreting and implementing NEPA's requirements. The Corps did not entirely ignore the health effects of granting the permit, but rather reasonably limited its scope of analysis only to those human health effects closely

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		related to the discharge of fill or dredged material into jurisdictional streambeds. The Sixth Circuit found that the Corps acted without abusing its discretion when it determined that the scope of its NEPA analysis should be limited to the local, proximate effects of the dredging and filling activities that were specifically authorized by the permit. The court determined the lower court correct determined that, given the Corps' relatively minor role in the congressional designed scheme for regulating surface mining, the Corps did not have sufficient control and responsibility over other aspects of surface mining operation to warrant expanding the scope of its NEPA review. The court held that the Corps was entitled to substantial deference with regard to its determination that the district engineer lacked "sufficient control and responsibility" to warrant review of the other portions of the mining project. The court discussed that the restriction for the Corps' scope of analysis is consistent with the congressional policy to give to state governments the primary responsibility to regulate overall surface mining operations. In reviewing the Corps decision to issue a FONSI, the court found that the content of the analysis was rational and appeared to be thorough. The Corps reasonably complied with its own regulations, adequately studied the issues and took a hard look at the environmental consequences of the action, and did not act arbitrarily and capriciously.
U.S. Department of Energy		
***Klein v. U.S. Department of Energy,* 753 F.3d 576 (6th Cir. 2014)**	DOE	**Agency prevailed** (lower court decision on NEPA issue affirmed). **Issues**: EA, no significant impact finding In connection with an alternative energy program created by Congress, Frontier Renewable Resources sought funding from DOE to build a plant in the Upper Peninsula of Michigan that would convert lumber into ethanol. Plaintiffs (individual and Sierra Club) sued to stop the project, claiming that DOE failed to comply with NEPA when it prepared an EA for the project and found no significant environmental impact. **Holding**: "In carrying out [NEPA], the agency has considerable discretion. Courts review an agency's actions under the Act through the deferential lens of the "arbitrary" and "capricious" standard. 5 U.S.C. § 706(2)(A). Through "searching and careful" review, *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989), they ask whether the agency "adequately studied the issue and [took] a hard look at the environmental consequences of its decision," not whether the agency correctly assessed the proposal's environmental impacts. *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006) (quotation omitted). "The Department's environmental assessment—over 400 pages in length—meets this deferential standard. The assessment explained that the Department's funding of the plant will carry out the requirements of

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		the Energy Policy Act, which aim to reduce dependence on fossil fuels by commercializing alternative renewable energy sources. It considered the plant's potential impacts on forest resources, threatened and endangered species, land use patterns, cultural resources, weather, air quality, soil quality, water quality, landfills, worker safety, noise, traffic, environmental justice and aesthetics. And it listed the public participants in the assessment, including the Fish and Wildlife Service, the Michigan Department of Transportation, the Inter-Tribal Council of Michigan and an assortment of individuals who submitted comments." "Through 400 pages of analysis, the Department took a "hard look" at the environmental impacts the Frontier plant will cause and decided that those impacts did not call for a full environmental impact study. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As a matter of process and substance, this decision was neither arbitrary nor capricious. *See Friends of Fiery Gizzard v. Farmers Home Admin*., 61 F.3d 501, 506 (6th Cir. 1995) (upholding an agency's decision "to dispense with a full-scale environmental impact statement" reached through an "extensive environmental assessment process")." "The plaintiffs offer several competing arguments. First, they note that the Department considered only one alternative to funding the Frontier plant: not funding it. An agency in general has wide discretion to choose the alternatives to evaluate in light of the project's purpose and environmental impacts. That is particularly true when an agency decides to prepare only an environmental assessment, which makes any "duty to consider environment-friendly alternatives" "less pressing." *Save Our Cumberland Mountains*, 453 F.3d at 342. "In this instance, the Department's assessment considered, explicitly and implicitly, other possibilities. It explicitly made the mitigation measures discussed in the environmental assessment binding on Frontier through the funding agreement. That of course goes beyond just saying "yes" or "no" to a funding request. The Department also implicitly considered other alternatives. It described the three alternative sites that Frontier Renewable Resources considered for the plant. It studied the environmental impacts of a 40 million gallon per year plant, even though the federal funds supported only the 20 million gallon per year plant Frontier plans to build initially. In acknowledging that demand for some hardwoods (such as aspen) exceeds demand for others (such as basswood and oak), it explained that Frontier may vary the types of hardwood used as feedstock to avoid depleting in-demand trees. And it estimated the environmental impacts of trucking supplies to the plant to come up with a "worst case scenario," though Frontier plans to bring supplies in by train. That is not an analysis preoccupied with one option." "To the extent the plaintiffs mean to suggest that the assessment should have considered a different type of plant as an alternative, the Department had no obligation to do so. An agency must consider alternatives "within the ambit of an existing standard—say, a different

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		scope of operation or additional mitigation measures." *Id.* at 347 (internal quotation marks omitted). An agency need not consider "a policy alternative generally—say, energy conservation in the context of a surface mining application." *Id.* (internal quotation marks omitted). An alternative such as a different type of plant, say one that uses "canary grass" as its feedstock, falls within this latter category. Frontier applied for funding to build a plant that used hardwood as its feedstock because it had developed the technology to produce cellulosic ethanol from that feedstock. A plant with a different feedstock, one Frontier could not convert to cellulosic ethanol, exceeds the "reasonable alternatives" the Department had to assess. *Save Our Cumberland Mountains*, 453 F.3d at 346." "Second, the plaintiffs argue that the assessment did not adequately discuss the project's environmental impacts or mitigation measures. As for environmental impacts, the plaintiffs argue that the Department failed to consider the plant's impacts on forest resources, on habitats for certain species and on greenhouse gas emissions. The assessment adequately discussed each impact." "As for mitigation measures, the plaintiffs claim that those discussed in the assessment are speculative or unenforceable. Speculative is an unfair description of some of the measures. Most stem from federal or state permitting requirements. Because construction of the plant requires developing 50 acres of undeveloped land, for example, the Michigan Department of Environmental Quality will require a soil erosion and sedimentation control plan before granting a construction permit. Those plans "incorporate best management practices . . . to prevent sedimentation impacts." The assessment in other words discusses future requirements the plant will have to meet to secure construction and operation permits. That those permitting requirements will take effect sometime in the future does not alter the reality that they must take effect before construction and operation (and the resulting environmental impacts) could begin. That makes the requirements certain, not speculative. *Cf. Robertson*, 490 U.S. at 352–53 (explaining that the mitigation discussion in an environmental impact statement need not contain a "complete mitigation plan," especially where impacts "cannot be mitigated unless nonfederal government agencies [with jurisdiction over those effects] take appropriate action")." "Third, the plaintiffs claim that the Department should have supplemented the assessment in light of a press release announcing Frontier's partnership with Valero Energy Corporation in December 2011 issued five months after the no-significant-impact finding. Through this deal, Valero obtained an "option to expand the [plant] to up to 80 million gallons per year." An agency must supplement an environmental impact statement in light of "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) (quoting 40 C.F.R. § 1502.9(c)(1)). Assuming for the sake of

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		argument that the same rule applies to environmental assessments, any complaint about a supplemental environmental assessment is moot. Valero, as the parties all acknowledge, recently abandoned its partnership with Frontier. The Department need not supplement its environmental assessment to account for an unplanned expansion." "Fourth, the plaintiffs argue that the assessment raised sufficient concerns to require the preparation of an environmental impact statement. The relevant regulations define "significantly" (as in "significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C)) by reference to ten "intensity" factors. 40 C.F.R. § 1508.27. The plaintiffs claim that the ten factors show that the plant will significantly affect the human environment. While the ten factors may show that the Department could have prepared an environmental impact statement, they do not show that the Department acted arbitrarily and capriciously in not completing one." "In the final analysis, the Department completed a thorough environmental assessment of the Frontier plant and reasonably described the environmental impacts the assessment identifies as not significant. The National Environmental Policy Act requires no more."
U.S. Department of the Interior		
***Native Village of Point Hope v. Jewell,* 740 F.3d 489 (9th Cir. 2014)**	BOEM	**Agency prevailed on first NEPA claim**, but **did not prevail on second NEPA claim** (lower court decision reversed). **Issues**: EIS, 40 C.F.R. § 1502.22 Incomplete or unavailable information, impact analysis flawed Environmental advocacy groups brought action against the Secretary of the Interior, the Bureau of Energy Management (BOEM) and its Director. The case involved a prospective lease of oil and gas development in the Chukchi Sea off the northwest coast of Alaska. The parcels available for lease were known as Lease Sale 193. BOEM prepared an FEIS analyzing the environmental effects of the proposed leases, basing its environmental analysis on the assumption that if oil development actually occurs, one billion barrels of oil will be economically recoverable. The advocacy groups challenged the EIS of the proposed lease of federal land for offshore oil and gas development under NEPA, on six grounds. The lower court, after an initial remand, found that both the EIS and SEIS satisfied the requirements of NEPA. The advocacy groups appealed, and argued that the agency abused its discretion on two grounds: (1) that essential information is missing in the FEIS and SEIS, and (2) that the FEIS and SEIS underestimated the adverse environmental impact of the lease sale because BOEM applied an unrealistically low estimate of the economically recoverable oil. The advocacy groups argued that "essential" information was missing from the FEIS, as much of the missing information concerned animal

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		populations affected by oil exploration and production under the leases. The missing information included population of animals in the Chukchi Seas, including endangered or threatened animals. BOEM, in the SEIS, concluded that sufficient protections would be provided by the requirements of the CAA, the MMPA, ESA and by the requirement by NEPA to provide site-specific analyses at later stage of development. **Holding**: "An agency's obligation involving incomplete or unavailable information is instructed by the regulatory requirements of 40 C.F. R. § 1502.22." The court discussed the regulatory requirements of 40 C.F.R. § 1502.22, and found that "[W]hile certain information may, in fact, be essential at a later stage of OCS lands Act [OSCLA review], such information may not be essential to a reasoned choice among alternatives at the lease sale stage." The court found that a "lease sale under the OCSLA is analogous to a "programmatic plan." The required level of analysis in an EIS is different for programmatic and site specific plans. The court further analyzed that: > Regardless of whether a programmatic or site-specific plan is at issue, NEPA requires an EIS analysis of environmental consequences of a proposed plan as soon as it is "reasonably possible" to do so . . . This is not to say an agency must provide the most extensive environmental analysis possible at the earliest possible moment, for an agency has some flexibility in deciding the level of analysis to be performed at a particular stage. We will defer to the agency's judgment about the appropriate level of analysis so along as the EIS provides as much environmental analysis as is reasonably possible under the circumstances, thereby "providing sufficient detail to foster informed decision-making" at the stage in questions." The court found that BOEM reasonably concluded that the missing information from the FEIS and SEIS was not "essential to the informed decision-making" at the lease sale stage. It agreed with BOEM that compliance with statutes, such as MMPA and ESA, provide protection for animals covered by those statutes. It agreed with BOEM that further environmental analysis would be appropriate at a later stage, "when a project proponent actually submits a plan." But, the court found that BOEM chose an arbitrary number for the total barrels of economically recoverable oil from Lease Sale 193, of one billion barrels. It found that BOEM did not articulate a rational basis for its decision to use the one billion barrel estimate. The estimate was in dispute between environmental planning personnel, and that the agency personnel rejected a range of barrels, classifying the range as "too broad." Several BOEM employees expressed concern in the record. The court also

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		found that the agency did not use a reasoned methodology for its basis in choosing the estimate. In addition, numerous commenters to the DEIS expressed concern about the scenario BOEM had developed, including the EPA. FWS also challenged the one billion barrel estimate as inaccurate. FWS recommended that BOEM not proceed with the lease sale until problems with the EIS were corrected. Despite the criticisms, BOEM instructed FWS to rely on that estimate in the analysis of whether the lease sale would jeopardize listed threatened species. The court found that BOEM did not justify its choice of the lowest possible amount of oil that was economical to produce as the basis for its analysis, and that choice caused a flawed analysis. It also found FEIS did not take into account the variation in oil prices in arriving at the estimate that one billion barrel of oil are economically recoverable (an assumption that ignores the fact that the amount of economical recoverable oil varies with the oil prices). Finally that BOEM did not provide an adequate explanation for its decision to base its EIS only on the amount of oil expected to be produce from the first field in the leased area of the Chukchi Sea.
***San Luis and Delta-Mendota Water Authority v. Jewell,* 747 F.3d 581 (9th Cir. 2014)**	FWS	**Agency prevailed on one claim** and **did not prevail on another** (lower court decision on NEPA issue affirmed). **Issue**: Boundaries of NEPA (small federal handle/applicant proposal) This case arises from "a continuing war over the protection of the delta smelt." The lower district court invalidated a complex 400 page biological opinion by FWS that concluded that the Central Valley and State Water Projects proposed by the Bureau of Reclamation jeopardized the continued existence of a the delta smelt and its habitat, a three inch long fish protected by ESA. The challenging parties, consisting of various water districts, water contractors, and agricultural consumers brought suit against various federal defendants, including Fish and Wildlife, Bureau of Reclamation, FWS, and the Secretary of the Interior to prevent the federal defendants from implementing the biological opinion (BiOp) and its proposed alternatives in a project. On appeal, in part, the challenging parties argue that both FWS and Reclamation must comply with NEPA. The federal agencies argued that FWS need not comply with NEPA because Reclamation will complete an EIS. **Holding**: The court considered whether FWS's issuance of the BiOp was a "major federal action[ ] significantly affecting the quality of the human environment" such that FWS would be required to complete an EIS. A "[m]ajor federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. The regulations offers several categories of major federal actions, including "[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		actions will be base" and "[a]approval of specific projects such as construction or management activities located in a defined geographic area." *Id.* at § 1508.18(b)(2), (4). The federal agencies argued that FWS in its capacity as a consulting agency under Section 7 of the ESA, was merely offering its opinion and suggestions to Reclamation, which as the action agency, ultimately decides whether to adopt or approve the plan. The court confirmed that an action agency like Reclamation has some discretion to deviate from the BiOp. The court discussed it was mindful of the fact that the FWS BiOP "theoretically serves an 'advisory function' in reality it has a powerful coercive effect on the action agency." But the court stated, the "powerful coercive effect" of a BiOp on an action agency like Reclamation does not render it akin to the "[a]doption of formal plans" or "[a]pproval of specific projects" which tend to trigger NEPA's requirements. The court distinguished that because Reclamation, and not FWS, bears responsibility for implementing the BiOp – or an alternative that complies with Section 7's mandates – and distinguished this holding from *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996). *Ramsey* involved the states of Washington and Oregon, a position occupied typically by a federal agency such as Reclamation, because the BiOp and ITS were issued as part of a federal-state-tribal compact. In that case, there was no downstream federal agency to complete an EIS. IF the consulting agency in *Ramsey*, NMFS, did not complete NEPA, it would evade NEPA review entirely. The Ninth Circuit reiterated that there is no comparable need for the FWS to prepare an EIS because Reclamation stands ready to do so.
***In Defense of Animals v. U.S. Dep't of the Interior,* 751 F.3d 1054 (9th Cir. 2014)**	BLM	**Agency prevailed** (lower court decision affirmed). **Issues**: EA, Challenge to FONSI Environmental groups brought action against Bureau of Land Management (BLM) challenging its decision to conduct horse gather in the Twin Peaks Heard Management Area (HMA) to reduce the horse population to a predetermined appropriate management level (APL). The district court denied the groups' emergency motion for injunctive relieve and denied their claims at the summary judgment stage. The groups appealed on several grounds including that BLM violated NEPA by deciding not to issue EIS. The organization challenged BLM's reliance on certain studies in the EA and that BLM failed to take a "hard look." The Ninth Circuit found that: BLM prepared a 157 page Gather Plan EA in May 2010, in the Twin Peaks HMA, where it briefly discussed the ten intensity factors for significance under 40 C.F.R. § 1508.27. The groups challenged its EA and FONSI claiming that the effects of the gather were "controversial" under 1508.27(b)(4), due to its "unprecedented scope" and intensive manipulations of horses left on the range (such as injection of immunocontraceptives into the mares and skewing of the stallion to mare

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		ratio), and in consideration that all previous gather rounded up a smaller percentage of the overall populations (of wild horses and burros). The court noted that in EAs, if opposition to an agency's proposed action created a “substantial dispute,” an EIS would seemingly always be required. The court found that the EA's clear and lengthy analysis regarding the effects of the proposed gathers, did not “cast[ ] serious doubt upon the reasonableness of the agency's conclusions” and thus the effects were not highly controversial. The groups asserted that the gather's possible effects on the wild horses and burros in the HMA were highly uncertain and/or involve unique or unknown risks. 40 C.F.R. § 1508.27(b)(5). The organization submitted two studies that claim to demonstrate the use of immunocontraceptives, such as PZP, may have "potentially significant effects" on wild horses. The groups also claimed that the combination of the large herd size and skewing of the sex ration combined with PZP result in a high degree of uncertainly. The argument failed because "regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are "highly uncertain." The court noted PZP was used to manage wild horse populations since 1992 and that BLM has made adjustments to herd sex ratios in numerous gathers. The groups submitted no evidence that the combination of these practices pose serious unknown risks. The court reviewed two studies submitted, and upheld the district court opinion that studies cited found only possible effects of PZP, and do not represent true dissenting views. The court noted some horse protection groups, in the public comment period, called for even greater use of contraceptive treatments. The groups also claim that the gathers will “establish a precedent for future actions with significant effects.” The court dismissed this argument citing that "EAs are usually highly specific to the project and the locale, thus creating not binding precedent." *Barnes v. Dep't of Transportation*, 655 F.3d 1124, 1140 (9th Cir. 2011). The court found that BLM considered the relevant intensity factors in making its finding of no significant impact and "provided a convincing statement of reasons to explain why the projects impacts were expected to be insignificant," and that BLM did not violate NEPA when it decided not to issue an EIS. The groups argued that BLM failed to respond adequately to opposing scientific views regarding potential negative effects of the PZP citing the Cooper and Larsen (2006) and Nunez studies (2009), both of which were commented on in the EA. Under NEPA, the panel must assess whether the BLM "failed to address certain crucial factors, consideration of which [is] essential to a truly informed decision whether or not to prepare an EIS." The court examined the crucial factor of PZP on wild horses, and noted that the BLM did consider that "factor" by director the reader to

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		sections of the EA which address these fertility controls and provided citations to various studies demonstrating the lack of negative effects resulting from administration of the PZP. BLM also addressed fertility controls in the comment-at-issue by referencing sections of the fertility controls. After a careful review, the court found that agencies "need to respond to every single scientific study or comment. It discussed that NEPA does not required federal agencies to "assess . . . consider . . . [and] respond" to public comments on an EA to the same degree as it does to an EIS. The court finally held that despite the fact BLM did not recite to its reason for relying on the studies cited in the EA as opposed to the studies cited by the comment, the BLM still performed the "hard look" required by NEPA.
***California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior,* 767 F.3d 781 (9th Cir. 2014)**	BoR	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, fly-specking, incorporation by reference/tiering, supplementation. Imperial County and Imperial County Air Pollution Control District (the "districts") brought action claiming that the EIS filed by the Secretary did not comply with the NEPA or the CAA. Several California water districts, parties to the proposed transfer agreement, intervened as defendants. The district court granted summary judgment on behalf of the defendants, finding that the districts did not have standing to sue, and in the alternative, that the Secretary did not violate NEPA. On appeal the districts assert they have standing to bring their claims and challenge that Interior, in its Final Implementation EIS violated NEPA on several grounds. This case arises out of years of agreements and negotiations involving Colorado River water delivery to the Salton Sea. As a matter of background, the Secretary of Interior and Imperial Irrigation originally agreed to conduct a joint NEPA and state-CEQA study for the 1998 Imperial Irrigation/San Diego Water transfer agreement. Concurrently, in 2001 prompted by the Quantification Settlement Agreement, which several water districts negotiated to reduce Colorado River usage, among other objectives, the Secretary of Interior prepared an Implementation Agreement EIS to consider the consequences of delivering a portion of the Imperial Irrigation water at different diversion points on the Colorado River for use outside the Imperial Valley. Imperial Irrigation then prepared a separate study in June of 2002, (the "Transfer EIR") because CEQA has slightly different reporting requirements than NEPA. The Bureau of Reclamation prepared its own Transfer EIS to study on-river consequences of the proposed agreements. The Secretary then approved the Final Transfer EIS and Final Implementation Agreement EIS in November 2002. First, the districts allege that the Secretary either (a) did not clarify whether it incorporated the state Transfer Environmental Impact Report (EIR) or the federal Transfer EIS, or (b) improperly cited to a non-NEPA document – the Transfer EIS.

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Holding: The Ninth Circuit held that (all text from the decision): The Final Implementation Agreement EIS clearly distinguished between the Transfer EIR and the Transfer EIS, for the purpose of NEPA and CEQA regulatory compliance. The districts argument centered that in one instance the Secretary cited the Transfer EIR and Transfer EIS as a single document in her district court briefing. The court criticized this argument citing that "[t]hat the reviewing court may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." The districts also argued that the Secretary improperly tiered to "19 non-NEPA documents." The court rejected this argument stating the documents were regulations, state impact reviews and other EISs. It found that at the most, these documents were incorporated by reference. The districts also argued that many of these documents were not publicly available in the Final Implementation Agreement EIS. The court rejected this argument, stating that a final EIS may include information not cited in a draft; recirculation is required only if there is significant new information or circumstances relating to the proposed action. The districts also argued the Secretary, in the Implementation Agreement EIS improperly stated it tiered and incorporated by reference the Quantification Settlement Agreement Program EIR and the Coachella Valley Water District Management Plan (CVWDMP) EIR. The court again found that at most it incorporated by reference these documents (although the EIS did state it "tiered" these documents), and that the accidental misuse of the word tiering was harmless. The districts argued that all discussions of environmental impacts must be in the text of the EIS, rather than incorporated by reference. The court rejected their argument, stating that the Implementation Agreement EIS extensively considered the environmental effects on the Salton Sea. The districts argued that the Secretary improperly "segmented" the Quantification Settlement Agreements by preparing two EISs. The court applied the test of independent utility to determine whether reach of the two project would have taken place with our without the other and thus had independent utility. The court again rejected this argument, finding that the Implementation Agreement EIS considered both the on-river impact of changing the Colorado River diversion points and the second, off-river consequences of reducing Imperial Irrigation's water. The districts also argued that a SEIS was necessary because the water districts had altered their proposed conservation strategies, but the Final Implementation Agreement EIS failed to discuss them. The court held that the Secretary did not abuse her discretion because the Final Implementation Agreement EIS reasonably considered the consequences of providing the Salton Sea with no mitigation water at all, thereby qualitatively considering the water district's changed conservation strategies.

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		The districts also contended that the Implementation Agreement EIS and ROD failed to discuss potential mitigation measure, which the court briefly considered and rejected finding the EIS and ROD sufficiently considered potential mitigation measures. The districts also argued that the Secretary abused her discretion by using an "environmental evaluation" – a memorandum made available to the public – rather than an environmental assessment to explain her decision to prepare a SEIS. The court explained that the CEQ regulations do not dictate the form that an agency must use when deciding whether to prepare a SEIS, and that court approved the use of various documents, such as supplemental information reports, reevaluations, memorandums of record, and secretary issue documents. Lastly the districts challenge the Secretary's decision to discuss only one – alternative – the no action. The Implementation EIS only compared the Colorado River Water Delivery Agreement (CRWDA) to a no action alternative because the CRWDA is a negotiated agreement. The court reasoned that there was no benefit for the Final Implementation Agreement EIS to discuss other hypothetical alternatives because the transfer plans were carefully negotiated agreements between the parties.
Te-Moak Tribe of Western Shoshone Indians of Nevada v. U.S. Dep't of the Interior*, 565 Fed. Appx. 665 (9th Cir. 2014) (not for publication - no precedential value*)	BLM	**Agency prevailed** (lower court decision upheld). **Issue**: Failure to participate during NEPA comment period **Holding**: Appellate court affirmed the lower court's denial of NEPA challenge due to fact that plaintiffs did not raise the issues during the EIS public comment period, they waived their right to challenge the decision.
U.S. Department of Transportation		
***Town of Barnstable, Massachusetts v. Federal Aviation Administration,* 740 F.3d 681 (D.C. Cir. 2014)**	FAA	**Agency prevailed** (petitions for review denied). Issue: Boundaries of NEPA (small federal handle) Town and non-profit groups of pilots and others petitioned for review of FAA's no hazard determination for each of the 130 wind turbines a company proposed to build in the Nantucket Sound. The petitioners also asserted in the appeal that the hazard determination was similarly deficient for failing to analyze the safety risks posed by the project and to perform an environmental review required by NEPA. The case arises in the context of the approval of a lease by the Department of the Interior for construction of an off-shore wind farm in Nantucket Sound. Under the lease, the wind turbine company must obtain an FAA determination whether the turbines pose a hazard to air navigation and comply with any mitigation measures before beginning construction. **Holding**: The court found that the assertion that the FAA must participate in an analysis of environmental impacts of its no hazard determination

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		was flawed. It reiterated that "no hazard determinations generally do not require preparation of an environmental impact statement because they are not legally binding." The FAA has no authority to counterman Interior's approval of the project or to require changes to the project in response to environmental concerns. Citing and relying heavily on the *Public Citizen* analysis "[W]here an agency has not ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004). The D.C. Circuit further stated that the Interior Department prepared an EIS on the wind farm project and stated it would assess whether additional mitigation measures included in the FAA determination merited a supplemental EIS. There was no need for the FAA to duplicate Interior's NEPA analysis, which has been challenged in another proceeding.
***HonoluluTraffic.com v. Federal Transit Administration,* 742 F.3d 1222 (9th Cir. 2014)**	FTA	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, purpose and need, alternatives Consortium of interest groups and individuals opposed high speed rail project and filed action against the Federal Transit Administration (FTA), DOT, municipality and various federal and local administrators asserting challenges under NEPA, NHPA and DOTA. The lower court dismissed its NEPA claims and this appeal followed. The litigation represented a challenge to the construction of a 20-mile, high-speed rail system project from the western portion of Oahu through the downtown area of Honolulu, Hawaii. Honolulu has been unsuccessfully struggling to cope with traffic congestion since the mid-1960s. The consortium's challenges under NEPA were directed to principally the choice of wheel-on-steel Fixed Guideway system, in the city and the FTA's FEIS. Specifically, they asserted that the City and FTA (1) unreasonably restricted the Project's purpose and need, and (2) did not consider all reasonable alternatives as required under NEPA. **Holding**: The Ninth Circuit held (text from decision): An EIS must state the underlying purpose and need for the proposed action. *See* 40 C.F.R. § 1502.13. Courts evaluate an agency's statement of purpose under a reasonableness standard, and in assessing reasonableness, must consider the statutory context of the federal action at issue. *See League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1070 (9th Cir.2012). Agencies enjoy "considerable discretion" in defining the purpose and need of a project, but they may not define the project's objectives in terms so "unreasonably narrow," that only one alternative would accomplish the goals of the project.

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		The FEIS describes the project's purpose as follows: (1) "to provide high-capacity rapid transit in the highly congested east-west transportation corridor between Kapolei and University of Hawaii Manoa;" (2) "to provide faster, more reliable public transportation service in the study corridor than can be achieved with buses operating in congested mixed-flow traffic;" (3) "to provide reliable mobility in areas of the study corridor where people of limited income and an aging population live;" (4) "to serve rapidly developing areas of the study corridor;" and (5) to "provide additional transit capacity [and] an alternative to private automobile travel, and [to] improve transit links within the study corridor." It describes the need for transit improvements as follows: (1) "Improve corridor mobility;" (2) "Improve corridor travel reliability;" (3) "Improve access to planned development to support City policy to develop a second urban center;" and (4) "Improve transportation equity." The purpose was defined in accordance with the statutorily mandated formulation of the transportation plan that preceded the FEIS. The Project's stated objectives were consistent with all these purposes. Viewed in its statutory context, the project's objectives are not so narrowly defined that only one alternative would accomplish them. The statement of purpose and need is broad enough to allow the agency to assess various routing options and technologies for a high-capacity, high-speed transit project. The district court therefore properly concluded that it is reasonable, stating: "Because the statement of purpose and need did not foreclose all alternatives, and because it was shaped by federal legislative purposes, it was reasonable." The Consortium contended that the EIS did not properly consider all reasonable alternatives and should have considered alternatives the state had earlier rejected. In this case, the EIS did not expressly consider alternatives that had earlier been ruled out in the screening process conducted by the state. Plaintiffs therefore argue that the City and the FTA improperly relied on a proscribed Alternatives Analysis (AA) process to exclude certain alternatives such as the three lane MLA alternative and light rail from detailed consideration. The City prepared the AA with the benefit of public comment and federal guidance. The district court cited evidence in the record that the FTA furnished guidance during the AA's preparation and independently evaluated it, including letters between the City and the FTA about funding for alternatives considered in the AA, the ROD's approval of the AA, internal FTA discussions about AA logistics, and the FTA's indication that it would review the AA prior to publication. The district court also pointed to the many opportunities for public comment that generated over 3,000 comments from the public on the AA before the City selected the locally preferred alternative. The district court properly concluded that defendants did not err in relying on the AA prepared by the state to help identify reasonable alternatives as part of the NEPA process.

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Plaintiffs' real quarrel with the process is that it failed to consider Plaintiffs' proposed three-lane MLA alternative. The MLA alternative proposed construction of lanes dedicated for use by buses, high-occupancy vehicles, and toll-paying single-occupant vehicles, managed to maintain free-flowing speeds between Waiawa Interchange and Iwilei. Variations of the alternative included a two-lane plan versus a three-lane plan, and reversible lanes to allow higher capacity during peak hours. The defendants did consider a two-lane alternative that the FEIS specifically addressed and rejected for cost reasons. The three-lane MLA plan would have been even more costly. The district court determined that the estimates in the AA analysis were reasonable, and the Director of the City and County of Honolulu's Department of Transportation Services specifically stated that the three-lane alternative would increase costs. The Consortium finally maintained that the federal defendants arbitrarily and capriciously excluded the light-rail alternative from the EIS. Here too, defendants properly relied on the three phase AA process to eliminate alternatives, including corridor-wide light rail and light rail in the downtown portions of the corridor. The FEIS explained that those alternatives lacked feasibility and desired capacity. The EIS's identification of the project objectives and analysis of alternatives satisfied NEPA's requirements.
***Latin Americans for Social and Economic Development, et al. v. Federal Highway Administration, et al.,* 756 F.3d 447 (6th Cir. 2014)**	FHWA	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, Standing, Alternatives, Supplementation of Record, Environmental Justice. Community groups and bridge company of international bridge crossing brought action challenging FHWA's ROD selecting the Delray neighborhood of Detroit, Michigan as preferred location alternative for new international bridge crossing between Detroit Michigan and Windsor, Ontario, known as the Detroit River International Crossing (DRIC) project. Community groups and the bridge company claimed that the ROD violated NEPA, principals of environmental justice and other federal laws. The district court found that the bridge company had standing to challenge the ROD and granted the federal defendant's motion to affirm the ROD. Among other issues on appeal, the federal defendants continued to challenge the bridge company's prudential standing and the bridge company contended that the FHWA violated NEPA on several grounds. **Holding**: The Sixth Circuit held (all text from decision): A plaintiff seeking judicial review under the APA must not only meet constitutional requirements for standing, but must also demonstrate prudential standing. Prudential standing exists if the interest the plaintiff seeks to protect is within the "zone of interests" to be protected or regulated by the statute at issue. *Friends of Tims Ford v. Tennessee Valley*

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Authority, 585 F.3d 955, 967 (6th Cir. 2009). In this case, the statute at issue is NEPA and the zone of interest is environmental interests. Specifically, the federal defendants claimed that the bridge company lacked prudential standing because its allegations that the violations of law were based on economic injuries and not environmental injuries. The bridge company asserted that the construction of a second bridge crossing may adversely affect the bridge company's economic interests. Economic injury alone is insufficient to establish prudential standing under NEPA. However, the bridge company alleged in the complaint that it owns property in Delray where the new bridge is proposed and that the DRIC bridge in Delray will have an adverse impact on air quality and noise in those neighborhoods. Here, Sixth Circuit concluded that motives that rest on both economic and environmental concerns do not deprive the bridge company of standing under NEPA. The community groups and the bridge company claimed that the FHWA violated NEPA because it "pre-committed" to a government-owned bridge without reason or the benefit of public scrutiny, and without analyzing private-sector alternatives having less environmental impact. To the contrary, the record amply reflected that the FHWA's decision regarding DRIC governance was a lengthy, reasoned process based on an objective analysis subject to public scrutiny throughout. The FHWA took a hard look at the pros and cons of the various ownership/governance scenarios and concluded at the end of the process that government ownership, in partnership with private-sector entities, struck the best balance among the governance options, environmental considerations, purpose and needs of the DRIC project. The community groups and bridge company contend on appeal that the FHWA acted arbitrarily and capriciously by simply "acceding to Transport Canada's demands to eliminate an alternative, the X–12 from consideration" rather than giving X–12 a "hard look" as required by NEPA. However, the administrative record reflects that the FHWA did not simply defer to Canada and that there were a variety of reasons that Illustrative Alternative X–12 was not advanced as a Practical Alternative. NEPA does not require the FHWA to pursue alternatives that present unique problems, or are impractical or infeasible. Here, the FHWA evaluated the X–12 and all of the illustrative alternatives against the established criteria, assessed environmental impacts and project objectives, disclosed those impacts and objectives to the public, determined not to advance X–12 as a practical alternative in the DRIC project, and explained its reasons for doing so. Based on the record, it cannot be held that the FHWA's decision not to advance X–12 as a practical alternative was unreasonable, arbitrary and capricious, or an abuse of discretion. The community groups and bridge company also alleged that the FHWA incorrectly identified the "no build" alternative variation and, as a

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		consequence, violated NEPA by failing to compare the "correct" "no build" alternative to the practical alternatives. The "no build" alternatives were extensively evaluated by the FHWA against the "build" alternatives. Based on this extensive review, the court concluded that the FHWA took the requisite "hard look" at the "no build" alternative as required by NEPA, and was not arbitrary and capricious in its decision to eliminate the "no build" alternative in favor of the Preferred Alternative to accomplish the DRIC project's purpose and needs. The community groups and bridge company claimed that the FHWA violated NEPA by failing to take a "hard look" at current traffic data, Contrary to the Bridge Company's contention, the FHWA did not ignore current actual data, but extensively evaluated that information in the context of the DRIC project's purpose and needs, earlier projections, and factors affecting traffic volume. Secondarily, the community groups and the bridge company argued that the district court improperly denied its motion to supplement the administrative record with a traffic study commissioned by Transport Canada and certain Canadian documents. The court found that the studies specified were not commissioned for the DRIC project, but propriety document created for other purposes. Further, these studies were not the only source of updated traffic data; updated traffic data was available from other studies and that data was thoroughly considered by the FHWA. Finally, the community groups and bridge company claimed that the FHWA violated environmental justice principles by failing to give a "hard look" at alternative bridge crossings that would not have a negative impact on the minority and low-income neighborhood of Delray. After exhaustive study and consideration of environmental justice issues, the FHWA selected a Preferred Alternative that the FHWA determined best fulfilled the DRIC project's purpose and needs. Environmental impacts and environmental justice issues are a consideration in agency decisionmaking, but are not controlling. The record amply reflects that the FHWA took a "hard look" at both these issues, considered the "no build" alternatives throughout the entire process, reasonably determined its priorities based on all the comparative information available, and made a choice that resulted from a reasoned process.
***Defenders of Wildlife v. North Carolina Department of Transportation,* 762 F.3d 374 (4th Cir. 2014)**	FHWA	**Agency prevailed** (on the NEPA claim) (lower court decision reversed). **Issues**: EIS, segmentation, tiered and phased documents. Defenders of Wildlife and National Wildlife Refuge Association (environmental groups) brought suit against the North Caroline Department of Transportation and Federal Highway Administration (federal defendants) claiming violations of NEPA and other laws. This case involved a long term transportation solution to programs involving a plan that essentially mirrors what currently exists in North

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Carolina: replacing the Bonner Bridge and maintaining NC 12 on Hatteras Island. The environmental groups alleged illegal segmentation of the analysis of environmental impacts as well as those pertaining to the permissible "tiering" of the analysis of impacts. **Holding**: The Fourth Circuit discussed the segmentation issue and held that it was permissible for FHWA to issue a ROD that approved only the first phase of a longer alternative that was considered in the EIS. The court distinguished between the scope of the agency's analysis and the scope of the agency's decision: Illegal segmentation is distinct from approving only a portion of a project that has been fully and adequately studied. Nothing in NEPA prohibits the agencies from authorizing only one part of the Project so long as doing so does not commit them to a course of action that has not been fully analyzed. The agencies' ROD does commit resources to the Project, and we perceive no reason why Defendants cannot analyze the entire Project "in a single impact statement." 40 C.F.R. § 1502.4(a). But they are not required to approve the entire Project in a single Record of Decision so long as their NEPA documents adequately analyze and disclose the impacts of the entire Project—including those portions that have yet to be approved. In reaching this decision, the court acknowledged that the selection of the phased alternative effectively committed FHWA and NCDOT to improving existing NC 12 in some manner, rather than building the 18-mile-long bridge over Pamlico Sound. The court held that it was permissible to make this commitment, without determining the specific nature of the improvements, "because Defendants have fully analyzed and disclosed the environmental impacts associated with these five legitimate alternatives" for improving existing NC 12. Thus, the agencies' decision to implement the project one phase at a time does not violate NEPA. The Fourth Circuit did note that changing conditions on the Outer Banks may necessitate another SEIS before a final decision could be made on the NC 12 improvements.
***Coalition for Advancement of Regional Transportation v. Federal Highway Administration*, 576 Fed. Appx. 477 (6th Cir. 2014) (unpublished)**	FHWA	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, purpose and need, GHG analysis, alternatives, "hard look" A mass transit advocacy group, Coalition for Advancement of Regional Transportation, brought action against FHA and various state transportation departments alleging a multitude of violations of NEPA and other federal laws involving a $2.6 billion construction and transportation management project designed to improve mobility across the Ohio River in Louisville, Kentucky. The district court granted the agencies' motion to dismiss all twenty claims. This appeal followed alleging violations of NEPA and other federal laws.

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		The proposed construction consisted of two tolled new bridges across the Ohio River connecting Indiana and Kentucky in the Louisville metropolitan area, and other improvements to the roadways connecting these interchanges. **Holding**: The court found that the EIS Purpose and Need Statement was not arbitrary and capricious. Rather, it was supported by a detailed study of existing traffic, safety, and other cross-river mobility problems, and it described the use of extensive socioeconomic data and state-of-the-art modeling of future travel conditions to project future transportation needs of the region. In addition, the court found that FHWA's failure to evaluate greenhouse gas emissions on a project-specific basis was not arbitrary and capricious because of the non-localized, global nature of potential climate impacts. The court also discussed that FHWA reasonably decided not to analyze the environmental impacts of "ultra-fine" particulates, and it took the requisite hard look at the environmental impacts of road runoff, tunnel spoil concerns, and bridge piers. The Sixth Circuit held that FHWA's review of reasonable alternatives was not arbitrary and capricious. Here, through two lengthy NEPA reviews, consisting of over 140 pages of analysis FHWA evaluated a wide range of alternatives to satisfy project's purpose and need statement. FHWA both one and two bridge alternatives, and reasonably concluded only a two bridge alternative would adequately address the Region's cross-river mobility needs. The record showed that FHWA rationally eliminated the alternatives preferred by the advocacy groups, because those alternatives would not satisfy the regionally focused Purpose and Need Statement. Thus, the evaluation of alternatives was not arbitrary and capricious.
***Natural Resources Defense Council v. U.S. Dep't of Transportation,* 770 F.3d 1260 (9th Cir. 2014)**	FHWA	**Agency prevailed** (lower court decision affirmed). **Issues**: EIS, "hard look" Environmental groups brought action alleging that the DOT and other federal and state agencies and officials violated the CAA and NEPA by failing to properly evaluate and disclose potential environmental impacts of a proposed expressway for trucks leaving the ports of Long Beach and Los Angeles. The construction of the expressway would be a dedicated connection between the ports and the mainland for use by cargo-carrying trucks only. As background, the expressway is part of the Schuyler Heim Bridge Replacement Project being enacted by federal and local agencies as part of a plan to decrease the traffic congestion heading into and out of Terminal Island, one of the primary hubs for cargo heading to and from the ports of Long Beach and Los Angeles — the two busiest container ports in the country.

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Holding: The Ninth Circuit held that agencies' environmental impact study adequately disclosed the project's likely health impacts, and contained detailed studies estimating cancer and other health risks in the immediate vicinity of the project. The EIS included a health risk assessment that was subject to the public comment and review process. The federal and local agencies also determined that a heating, ventilation and air conditioning retrofit program for residences near the expressway would be a feasible measure, satisfying the requirements laid out by the National Environmental Policy Act. "Because we are satisfied that defendants took a 'hard look' at the project's likely consequences and probable alternatives ... we agree with the district court that the [environmental impact study] comported with NEPA requirements."
Karst Environmental Education and Protection, Inc. v. Federal Highway Administration, 559 Fed. Appx. 421 (6th Cir. 2014) (not for publication - no precedential value)	FHWA	**Agency prevailed** (lower court decision upheld). **Issue**: Failure to participate during NEPA comment period **Holding**: Appellate court affirmed the lower court's denial of NEPA challenge due to fact that plaintiffs did not raise the issues during the EIS public comment period, they waived their right to challenge the decision. "[W]e conclude . . . that Karst Environmental did not meet its "obligation of meaningful participation" in the administrative process by stating its position with clarity at a time when FHWA could have taken necessary corrective actions without undue delay."
Independent Agencies		
***Delaware Riverkeeper Network, et al. v. Federal Energy Regulatory Commission,* 753 F.3d 1304 (D.C. Cir. 2014)**	FERC	**Agency did not prevail** (petition for review granted). **Issues**: Segmentation, cumulative impacts FERC issued a certificate of public convenience and necessity to, authorizing it to build and operate the Northeast Upgrade Project ("Northeast Project"). The project included five new segments of 30-inch diameter pipeline, totaling about 40 miles, and modified existing compression and metering infrastructure. The Northeast Project upgraded a portion of a much longer natural gas pipeline known as the 300 Line. Taken together, the Northeast Project and the three other connected, closely related, and interdependent Tennessee Gas upgrade projects on the 300 Line constituted a complete upgrade of almost 200 miles of continuous pipeline. Petitioner environmental group contended that in approving the Northeast Project, FERC violated NEPA by preparing an EA which: (1) segmented its environmental review of the Northeast Project – i.e., failed to consider the Northeast Project in conjunction with three other connected, contemporaneous, closely related, and interdependent Tennessee Gas pipeline projects – and (2) failed to provide a meaningful analysis of the cumulative impacts of these projects to show that the impacts would be insignificant. The court agreed and granted the petition.

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Holding: "FERC argues that because each project resulted in a measurable increase in the pipeline's overall capacity, the agency was justified in completing the NEPA analysis of the Northeast Project separately from the other projects. But FERC's position cannot be squared with the record, which shows that by May 2012, when FERC issued the certificate for the Northeast Project, it was clear that the entire Eastern Leg was included in a complete overhaul and upgrade that was physically, functionally, and financially connected and interdependent…. There is a clear physical, functional, and temporal nexus between the projects. There are no offshoots to the Eastern Leg. The new pipeline is linear and physically interdependent; gas enters the system at one end, and passes through each of the new pipe sections and improved compressor stations on its way to extraction points beyond the Eastern Leg. The upgrade projects were completed in the same general time frame, and FERC was aware of the interconnectedness of the projects as it conducted its environmental review of the Northeast Project. The end result is a new pipeline that functions as a unified whole thanks to the four interdependent upgrades. "FERC has not shown that there are logical termini between the new segments of the Eastern Leg or that each project resulted in a segment that has substantial independent utility apart from the other parts of the Eastern Leg. Rather, FERC merely argues that one terminus was "no more logical than another," and that the capacity added by each project was contracted separately. These explanations are insufficient to address Riverkeeper's segmentation claim. "On the record before us, we hold that in conducting its environmental review of the Northeast Project without considering the other connected, closely related, and interdependent projects on the Eastern Leg, FERC impermissibly segmented the environmental review in violation of NEPA. We also find that FERC's EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of the upgrade projects."
***Minisink Residents for Environmental Preservation and Safety, et al. v. Federal Energy Regulatory Commission,* 762 F.3d 97 (D.C. Cir. 2014)**	FERC	**Agency prevailed** (petition for review not granted). **Issues**: EA, alternatives, mitigation, public involvement, fly-specking In July 2012, FERC approved the Millennium Pipeline Company's proposal for the construction of a natural gas compressor station in the Town of Minisink, New York. A local group called "Minisink Residents for Environmental Preservation and Safety" ("MREPS") opposed the project and petitioned for judicial review of the decision. The petitioner argued that FERC's approval of the project was arbitrary and capricious, particularly given the existence of a nearby alternative site they insist is better than the Minisink locale approved by FERC. The court found that the agency's decision was reasonable and reasonably explained and denied the petition. **Holdin**g: Under the Natural Gas Act, FERC has authority to regulate the transportation and sale of natural gas in interstate commerce. Before an

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		applicant can construct or extend an interstate natural gas facility, it must obtain a Certificate of Public Convenience and Necessity from FERC. A certificate shall be issued to any qualified applicant upon a finding that "the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service" and "construction . . . is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). FERC may, in issuing such a certificate, attach "such reasonable terms and conditions as the public convenience and necessity may require." *Id.*; *Murray Energy Corp. v. FERC*, 629 F.3d 231, 234 (D.C. Cir. 2011). In conjunction with the certificating process, FERC must also complete a NEPA review of the proposed project. FERC's NEPA obligation requires that it "'identify the reasonable alternatives to the contemplated action' and 'look hard at the environmental effects of [its] decision[].'" *Id*. (quoting *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 374 (D.C. Cir. 1999)) (alterations in original). "FERC released its Environmental Assessment ("EA") for the Minisink Project several months later. See J.A. 428-97. Along with its detailed evaluation of the project's likely environmental impacts—on water resources, vegetation and wildlife, air quality and noise, and more—the EA also analyzed several alternatives to Millennium's proposal, including an in-depth comparison between the Minisink Project and the Wagoner Alternative [proposed by project opponents]….The EA did identify some positive environmental upshots associated with the Wagoner Alternative, …, but, on balance, the assessment found that the Minisink Project was environmentally preferable, due principally to the negative environmental consequences that would flow from an upgrade of the Neversink Segment, … ("[T]he greater environmental issues and landowner impacts of replacing the Neversink Segment cause us to conclude that the Wagoner Alternative does not provide a significant environmental advantage over the proposed project."). Overall, the EA concluded that, so long as Millennium implemented certain mitigation measures, the Minisink Project was expected to have no significant environmental impact." FERC subsequently issued a certificate, "leaning heavily on the results of the EA…. More broadly, the Commission also addressed a variety of other comments touching on environmental and landowner-related issues. At the end of the day, FERC adopted the EA's findings and concluded that, so long as Millennium adhered to the parameters outlined in its application and complied with certain environmental mitigation measures, the Minisink Project was expected to have no significant environmental impact." "Based on our assessment of the record, we are convinced that the Commission amply considered alternatives to the Minisink Project, devoting especially thorough attention to the Wagoner Alternative favored by Petitioners. For one, FERC's Certificate Order unmistakably outlines the Commission's exploration of the Wagoner Alternative as an

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		alternate possibility for Millennium's compressor station….In keeping with the recommendations set out in the EA, however, the Commission concluded that the more significant environmental impacts associated with the Wagoner Alternative—mostly due to improvement of the Neversink Segment—rendered that option less preferable than the proposed Minisink Project." "Furthermore, Petitioners seem to overlook the fact that, once the Wagoner Alternative surfaced, the Commission took the additional (and, from what we understand, relatively unusual) step of issuing a supplemental notice before completing its Environmental Assessment. Therein, the Commission specifically flagged its consideration of the Wagoner Alternative, inviting feedback and input from nearby residents and other potentially impacted parties." "In arguing to the contrary, Petitioners marshal only one meaningful theory in their favor. They claim that the Commission's analysis was flawed because Millennium either planned or needed to upgrade the Neversink Segment all along. In other words, according to Petitioners, even if Millennium moved forward with the Minisink Project (and not the Wagoner Alternative), it still had plans to replace the Neversink Segment in the very near future….[W]e have no basis to second-guess the Commission's determination that Millennium had no firm plans to upgrade the Neversink Segment in the wake of the Minisink Project." "Petitioners claim that the Commission failed to give the environmental impacts of the Minisink Project the "hard look" NEPA requires. We conclude otherwise…. In reviewing an agency's compliance with NEPA, the "rule of reason applies," and we "consistently decline[] to 'flyspeck' an agency's environmental analysis." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (quoting *Nevada v. U.S. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)). "Petitioners claim to eschew a flyspecking approach here, arguing instead that the Commission's analysis is laden with "gaping holes." Pet'rs' Br. at 41. They point to three. In our view, though, all fall decidedly more into the "flyspecking" camp than anything more. *First*, Petitioners contend that the Commission erred in failing to undertake a more fulsome cost-benefit analysis of the Minisink Project as compared with the Wagoner Alternative. This argument essentially piggybacks off their overall Wagoner Alternative theory, and, in that sense, we reject it for the reasons already stated. Otherwise, to the extent Petitioners contend that the Commission should have focused more generally on the monetary costs and benefits of the respective proposals, we disagree that NEPA requires such an approach, particularly where only an environmental assessment, rather than an environment impact statement, is involved. *See Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 430 (4th Cir. 2012) ("The agency does not," under NEPA, "need to display the weighing of the merits and drawbacks of the alternatives in a

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		monetary cost-benefit analysis."); *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 687 (D.C. Cir. 2004) ("[I]t is undisputed that the FAA was not required to undertake a formal cost-benefit analysis as part of the [environmental impact statement]."). "*Second*, Petitioners argue that the Commission failed to examine the Minisink Project's impact on property values. But as the Commission rightly rejoins, the EA clearly addressed this issue….It recognized there may be some adverse impacts on surrounding property values due to the compressor station. On balance, though, the EA concluded that "the recommended building design and landscaping plans would eventually minimize the visual impact from the station on the surrounding residential properties and would not significantly reduce property values or resale values."" "*Third*, Petitioners claim that the Commission failed to assess cumulative and future impacts. They accuse FERC of ignoring two issues in particular: (1) Millennium's planned development of a second compressor station on the pipeline upstream from Minisink (what came to be the "Hancock Project"), and (2) the potential construction of a lateral pipeline from the Minisink compressor to a proposed power plant operated by CPV Valley LLC. The record belies this argument on both scores. As for the Hancock Project, the EA's "Cumulative Impacts" discussion flags Millennium's "intent to construct a second compressor station" and explains that, because no certificate application had been filed with FERC, little was known about the details of the project. Nevertheless, given the "typical distances between compressor stations (70 miles) and the difference in construction timing," the EA stated that no significant cumulative impacts were expected, other than possibly with respect to air quality. ... In view of the uncertainty surrounding the second compressor station, and the difference in timing between the two projects, this discussion suffices under NEPA. The same holds true with respect to the potential development of the CPV Valley power plant. The EA's "Cumulative Impacts" section identifies this possible project, too, though it again signals the absence of any firm details surrounding project specifics. Even still, the EA concluded that because the Minisink Project itself was expected to have minimal impacts, no significant cumulative impacts were expected to flow from the possible development of the CPV Valley power plant, particularly since the construction timelines for the two potential projects would be quite distinct. ... In sum, based on our review of the EA, we are satisfied that FERC properly considered the cumulative impacts of the Minisink Project." "In approving the Minisink Project, the Commission accorded the Wagoner Alternative the serious consideration it was due, in keeping with its statutory obligations under the NGA and NEPA. In its judgment, the Commission did not think the Wagoner Alternative preferable and concluded that the Minisink Project, as put forward by Millennium, would serve the public interest and necessity. We are simply not empowered to second-guess the Commission's determination on this point or to

2014 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		substitute our judgment for the Commission's. Our much more limited role is, instead, to confirm that FERC thoroughly and reasonably examined the issue, and on the record before us, we are assured that it did."