RECENT NEPA CASES (2015)

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ABSTRACT

This paper reviews substantive NEPA cases issued by federal courts in 2015. The implications of the decisions and relevance to NEPA practitioners will be explained.

INTRODUCTION

In 2015, the U.S. Courts of Appeal issued 14 decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 14 cases involved 11 different departments and agencies. Overall, the federal agencies prevailed in 11 of the 14 cases (79 percent).

For four of the 14 cases, the courts did not rule on the adequacy of a NEPA document either because no NEPA document was prepared (lack of a major federal action) or because the case only involved an initial finding regarding the plaintiffs' standing to bring the litigation.

For the 10 cases in which courts made a determination regarding the adequacy of a NEPA document, the federal agencies prevailed in eighty (80) percent. However for two that were remanded for further action, the agency had prevailed on the majority of the NEPA claims raised although ultimately not prevailing on one claim in each case, and in the other case, petitioners were found to have standing to challenge the agency's actions.

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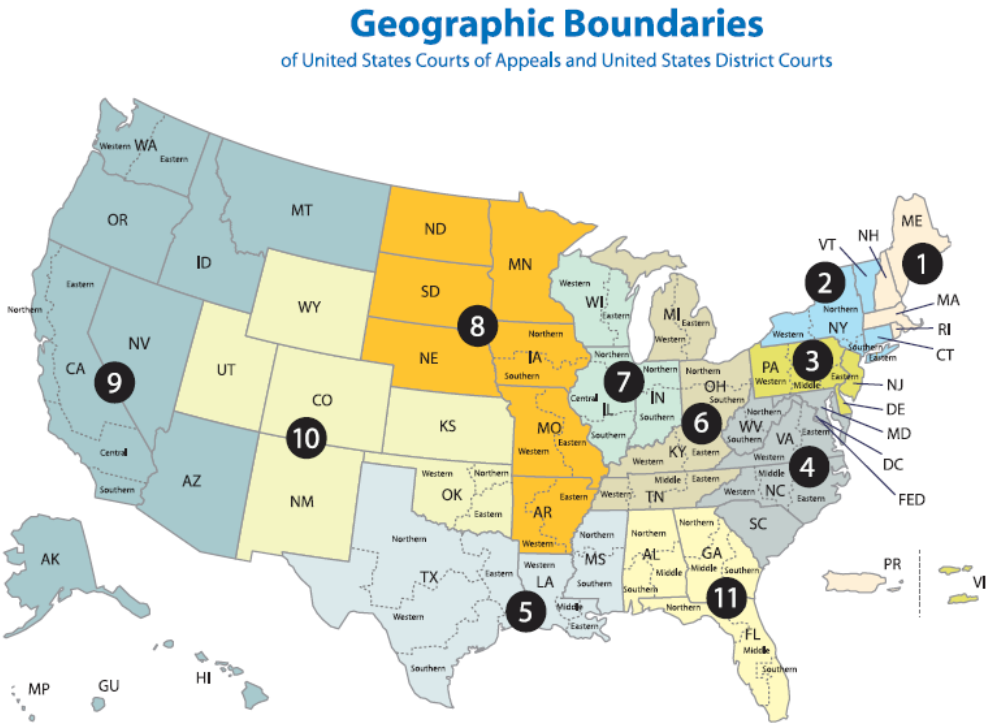
The U.S. Supreme Court issued no NEPA opinions in 2015; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, Table 1 shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2015, by circuit. Figure 1 is a map showing the states covered in each circuit court.

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

	U.S. Courts of Appeal Circuits												
	Ist	**2nd**	**3rd**	**4th**	**5th**	**6th**	**7th**	**8th**	**9th**	**10th**	**11th**	**D.C.**	**TOTAL**
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	2	1	2	3	1		1		12	3	2	1	28
2013	**2**			**2**		**1**	**1**		**9**	**2**	**1**	**3**	**21**
2014				**2**		**5**			**10**	**2**		**3**	**22**
2015	**1**					**1**			**6**	**2**		**4**	**14**
TOTAL	**9**	**6**	**5**	**9**	**6**	**10**	**4**	**5**	**106**	**26**	**5**	**20**	**211**
	4%	3%	2%	4%	3%	5%	2%	2%	51%	12%	2%	10%	100%

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



STATISTICS

The U.S. Department of Interior (DOI) agencies (Bureau of Indian Affairs) [BIA], Bureau of Land Management [BLM], Bureau of Ocean Energy Management [BOEM], Bureau of Safety and Environmental Enforcement [BSEE], National Park Service [NPS], and U.S. Fish and Wildlife Service [FWS]) came in first as the agency involved in the largest number of NEPA cases in 2015 with 7 cases (prevailed in 6.5 cases).

Of those, the BLM was involved in 2 cases, with BOEM, FWS, NPS, BIA and BSEE each involved in one case.

- BIA – 1 case (prevailed)
- BLM – 2 cases (prevailed in 1.5)
- BOEM – 1 case (prevailed)
- BSEE – 1 case (prevailed)
- NPS – 1 case (prevailed)
- FWS – 1 case (prevailed)

The U.S. Department of Agriculture (DOA) (both cases involved the United States Forest Service (USFS)) and U.S. Department of Defense (DOD) (both cases involved the Army Corps of Engineers [ACOE]) tied for second in 2015 with two NEPA cases each (USFS did not prevail in both cases; ACOE prevailed in both cases).

U.S. Department of the Transportation, Federal Energy Regulatory Commission (F.E.R.C.), and Tennessee Valley Authority (TVA) were each involved in one case and each prevailed.

Interesting conclusions from the 2015 cases:

- Continuing the trend from 2012, federal agencies continued to prevail in a large percentage of the NEPA challenges brought.

- Eight of the substantive cases where NEPA documents were reviewed involved environmental assessments (EA) and two involved environmental impact statements (EIS). One EA and one EIS were found to be partially inadequate, and the agencies prevailed in the other eight cases. In the cases where the agencies did not fully prevail, the decision was split with agencies prevailing in defending certain NEPA claims, but losing other NEPA claims:
    - *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920 (9th Cir. 2015) (holding that the EIS did not provide the public adequate access to information about the impact of snowmobiles on big game wildlife and habitat, and that the information included in and referenced by the EIS did not allow the public to "play a role in both the decisionmaking process and the implementation of that decision"). *But see Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105 (9th Cir. 2015) (noting that agencies have discretion in deciding how to organize and present information in environmental assessments and holding that 40 C.F.R. § 1508.7 does not explicitly require individual discussion of the impacts of reasonably foreseeable

projects, and stating it is not for the Court to tell the agency how to specifically present such evidence in an EA).

- *Soda Mountain Wilderness Council v. U.S. Bureau of Land Management*, 607 Fed. Appx. 670 (9th Cir. 2015) (not selected for publication, no precedential value) (finding that agency violated NEPA when it prepared its EA because the EA's cumulative effects assessment did not include any discussion of the Cottonwood Forest Management project that was reasonably foreseeable at the time the BLM issued the EA as supported by the Administrative Record (AR)). A fairly vigorous dissent followed the majority opinion, finding that by examining the AR in further detail the BLM appropriately excluded the Cottonwood project because it was not a reasonably foreseeable future action.

- *Environmental Assessments:* Ten cases of the cases involved substantive review of NEPA documents by the courts, and of these, 8 cases involved environmental assessments (EAs), with the challenges largely focused on the significance determination, connected actions, and cumulative effect assessment. Agencies prevailed in seven of the 8 cases involving EAs.

- *Connected Actions and Cumulative Effects Assessment:* Seven of the 10 cases involving substantive review of NEPA documents challenged whether the agency should have analyzed connected actions, including reasonably foreseeable future actions, continuing a trend from 2014 involving challenges to cumulative effects assessment and connected actions as discussed in *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014) and *Minisink Residents for Environmental Preservation and Safety v. F.E.R.C.*, 762 F.3d 97 (D.C. Cir. 2014).
  - *Grunewald v. Jarvis,* 776 F.3d 893 (D.C. Cir. 2015) (affirming the district court's decision granting summary judgment and upholding the agency's EIS. The Court held that the NPS was within its discretion when it declined to analyze the Exotic Plant and Deer Management Plans together as "connected" actions. It held that neither Plan automatically triggered other actions, and that the actions pursuant to the Deer Management Plan had already proceeded, and did not depend on the concurrent or previous undertaking of the Draft Exotic Plant Plan or some other action. The Plans were not interdependent parts of a larger action. The fact that the Plans have similar goals, protecting the native ecology, does not make the plans sufficiently intertwined.).
  - *Myersville Citizens for a Rural Community, Inc. v. Federal Energy Regulatory Commission,* 783 F.3d 1301 (D.C. Cir. 2015) (denying petition for review of EA and distinguishing *Delaware Riverkeeper*. The Court, in reviewing the Administrative Record (AR), found that the Allegheny Storage Project and the Cove Point LNG terminal were unrelated, and that neither depended on the other for its justification. The Court rejected a finding of connectedness between the Allegheny Storage Project and the Cove Point LNG export terminal.).
  - *Sierra Club v. Bureau of Land Management,* 786 F.3d 1219 (9th Cir. 2015) (affirming the district court's decision upholding BLM's grant of a right-of-way for a wind energy project developed on private land. The Court found that that the wind energy project and road providing the right-of-way have independent utility and are

not connected actions. BLM appropriately assessed the impacts of the wind energy project in its cumulative effects assessment portion of its EA.).

- *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105 (9th Cir. 2015) (holding that BIA's aggregation of past, present and reasonably foreseeable future actions to create a baseline for the No Action Alternative from which to consider incremental impact of timber sale project did not violate NEPA).
- *Sierra Club v. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015) (upholding the dismissal of Sierra Club's claims against the Corps in connection with an EA assessing the impacts of a 593-mile oil pipeline from Illinois to Oklahoma on both public and private lands. Sierra Club unsuccessfully argued that the Corps impermissible segmented the proposed action in an effort to trigger NEPA's connected- and cumulative-actions doctrines and the Corps' agency-specific NEPA regulations. The Court found that because the approvals required only consideration of discrete geographic sections of the pipeline (which comprised less than five percent of its overall length), the federal agencies involved were not required to conduct NEPA analysis of the entire pipeline, including those portions not subject to federal control or permitting. The limited geographic scope of each of the agencies' jurisdiction over the project was an important factor in the decision, and the Court emphasized that the ruling was limited to the particular facts of the case.). *Cf. Sierra Club v. Bostick*, 787 F. 3d 1043 (10th Cir. 2015) (finding that the Corps was not required to prepare an EA for the entirety of an applicant's Gulf Coast pipeline before issuing CWA Section 404 Nationwide Permit verification letters).
- *Kentucky Coal Ass'n v. Tennessee Valley Authority*, 804 F.3d 799 (6th Cir. 2015) (finding that the TVA did not violate NEPA when it decided to replace two coal-fired power generators with a natural gas-fueled power generating plant. Kentucky Coal contended that the TVA ignored the effects of a necessary part of its plan: building a natural-gas pipeline. The Court disagreed and found that the TVA considered the cumulative impact of all "closely related" actions, including building a natural-gas pipeline to reach the newly configured plant.).
- *Soda Mountain Wilderness Council v. U.S. Bureau of Land Management*, 607 Fed. Appx. 670 (9th Cir. 2015)(not selected for publication, no precedential value) (holding that the BLM violated NEPA when it prepared its EA because the EA's cumulative impact analysis did not include any discussion of the Cottonwood Forest Management project that was reasonably foreseeable at the time the BLM issued the EA as supported by the Administrative Record (AR)). Again, a fairly vigorous dissent followed the majority opinion, finding that by examining the AR in further detail the BLM appropriately excluded the Cottonwood project because it was not a reasonably foreseeable future action.

- *Alternatives Considered:* Three of the 10 cases involving substantive review of the NEPA documents challenged the sufficiency of the alternatives considered:
  - *Grunewald v. Jarvis,* 776 F.3d 893 (D.C. Cir. 2015) (upholding the agency's EIS involving deer management and finding it did not violate NEPA when it failed to consider the reduction of exotic plant species as an alternative way to protect the native vegetation in the Park. In reviewing an agency's selection of alternatives, the court owes "considerable deference to the agency's expertise and policy-making

role.""[A]s long as the agency 'look[s] hard at the factors relevant to the definition of purpose,' [the courts] generally defer to the agency's reasonable definition of objectives.").

- *Myersville Citizens for a Rural Community, Inc. v. Federal Energy Regulatory Commission*, 783 F.3d 1301 (D.C. Cir. 2015) (discussing that an agency's specification of the range of reasonable alternatives is entitled to deference. The Court explained that a consideration of alternatives is required regardless of whether the agency issues a FONSI, the relevant regulations provide that the consideration of alternatives in an Environmental Assessment need not be as rigorous as the consideration of alternatives in an EIS. *Compare* 40 C.F.R. § 1508.9(b) (requiring "brief discussion[ ]" of alternatives in an EA) *with id.* § 1502.14(a) (requiring agency to "[r]igorously explore and objectively evaluate all reasonable alternatives" when EIS required). The agency's EA considered and rejected both alternatives -- an "existing pipeline" alternative and a "looping" alternative -- adequately discharging its NEPA obligations.).
- *Kentucky Coal Ass'n v. Tennessee Valley Authority*, 804 F.3d 799 (6th Cir. 2015) (holding that the TVA did not violate NEPA because it did not limit its alternatives, and considered 10 other feasible and reasonable options. An agency may have a preferred alternative so long as it does not "[l]imit the choice of reasonable alternatives" to pick the one it likes.).

- *Major Federal Action*: Four cases concluded that the agency had not (or not yet) implemented an action that met the definition of a major federal action. For that reason, the failure of the agency to prepare an EA or EIS was not actionable:
    - *Sierra Club v. Bostick*, 787 F. 3d 1043 (10th Cir. 2015) (finding that the Corps was not required to prepare an EA for the entirety of TransCanada's Gulf Coast pipeline before issuing CWA Section 404 Nationwide Permit verification letters.).
    - *Center for Sustainable Economy v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015)(discussing a challenge to a multiple-stage program under the Outer Continental Shelf Lands Act, when no lease sale had occurred and no irreversible and irretrievable commitment of resources had been made. The court found that allowing NEPA challenges to be brought at a very early stage, "when no rights have yet been implicated, or actions taken, would essentially create an additional procedural requirement for all agencies adopting any segmented program," that "would impose too onerous an obligation, and would require an agency to divert too many of its resources at too early a stage in the decision-making process.").
    - *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015) (holding that BSEE was not required to prepare an EIS before approving Oil Spill Response Plans. The Court explained that the BSEE had no authority to require petroleum companies to make changes to the prepared Plans pursuant to Oil Pollution Act in order to minimize adverse environmental effects.).
    - *Padgett v. Surface Transp. Board*, 804 F.3d 103 (1st Cir. 2015) (finding that the STB is correct that NEPA does not apply to its declaratory order, because the order was not a "major Federal action" because it did not provide federal funds, approve or license the transload facility, or otherwise manifest "indicia of control"

over the proposed action that would be sufficient to establish a "major Federal action").

Each of the 2015 NEPA cases, organized by federal agency, is summarized below.

2015 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
U.S. Department of Agriculture (Listed in alphabetical order by Agency)		
***WildEarth Guardians v. Montana Snowmobile Ass'n,* 790 F.3d 920 (9th Cir. 2015).**	USFS	**Agency prevailed on one NEPA claim but did not prevail on a second NEPA claim** (affirmed in part, reversed on part, and remanded). **Issue(s):** impact analysis adequacy; unavailable information (40 C.F.R § 1502.22) This case involved an EIS, which was found to be inadequate in one aspect. Environmental groups (collectively, WildEarth) brought action challenging the United States Forest Service's (USFS) decision to designate over two million acres (or roughly 60%) of public land in the Beaverhead-Deerlodge National Forest for use by winter motorized vehicles, principally snowmobiles. WildEarth alleged that the USFS review of environmental impacts of snowmobiles under NEPA was inadequate: first, that the USFS did not adequately analyze the site-specific impact of snowmobile on big game wildlife; and second, that the USFS analysis of conflicts between snowmobiles and other recreational uses was insufficient. Specifically, on the first allegation, WildEarth argued that the EIS failed to comply with NEPA because it did not: (1) identify the location of the winter range for big game animals; (2) establish where snowmobiles impact that range; and (3) discuss what options are available to avoid the concomitant (naturally accompanying or associated) impacts. **Holding:** On the first allegation, the Ninth Circuit agreed that the EIS neither met the public disclosure purpose of NEPA nor the specific requirements in the CEQ regulations. The Ninth Circuit reviewed the EIS, which was structured around alternatives that provided varying degrees of protection for big game wildlife by managing vehicle access. The Ninth Circuit reviewed the CEQ regulations which state that, to comply with NEPA, an agency "must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). The agency may incorporate publicly available data underlying the EIS by reference. 40 C.F.R. § 1502.21. To incorporate underlying data by reference, the agency must cite the source in the EIS and briefly describe the content. *Id.* A source may be incorporated by reference only if "it is reasonably available for inspection by potentially interested persons within the time allowed for comment." *See also* 40 C.F.R. § 1502.24 (requiring the agency to "make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the [EIS]"). Upon review, the Ninth Circuit found that the Wildlife Habitat section of the EIS listed the percentage of the big game winter range protected in each landscape area -- but provided virtually no information about where

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		the big game winter range is actually located nor the concentration of game in each area. The USFS responded that several parts of the EIS referenced data for the public to assess snowmobile impacts on the big game winter range. First, the USFS pointed out that it referenced a "wolverine habitat prediction" map in the EIS. USFS stated that this map used the big game winter range as an indicator of wolverine habitat due to the fact that wolverines depend on big game for food. However, upon further review, the Ninth Circuit found that the map contained an appendix that discussed impacts on wolverine denning habitat and not big game. The Ninth Circuit noted that the EIS did not mention that the wolverine habitat map identified the big game range. The USFS did concede that the map did not accurately depict the big game winter range, but that it remedied the error by using updated maps provided by Montana Fish, Wildlife & Parks (MFWP) in the final analysis. However, the Ninth Circuit noted that the maps were not included or referenced in the EIS. The Ninth Circuit then concluded that in determining the proposed project's effects, the USFS relied upon incorrect assumptions or data in its EIS. If the wolverine habitat prediction map did not accurately depict the big game winter range, and the USFS ultimately worked from a different, accurate map, then it is the accurate map that must be disclosed to the public. Second, the USFS stated that the information WildEarth demanded in the form of a map was "otherwise provided" in the tables and accompanying qualitative discussion in the EIS. The Ninth Circuit pointed out that without data on the location of the big game winter range, the public was severely limited in its ability to participate in the decision-making process. In addition, MFWP commented extensively regarding impacts the snowmobile use would have on moose in several different site-specific management areas. MFWP also expressed concern that the project should address the importance of not approaching or stressing moose during winter and it expressed concern that snowmobile through willow communities would likely reduce moose forage. The Ninth Circuit noted that there was nothing in the EIS responsive to the MFWP's comments. The USFS maintained that it did adequately discuss impacts on moose, pointing to a table in the EIS showing the percentage of big game winter range closed to snowmobiles and a one sentence statement that winter non-motorized "allocation are designed to protect low elevation winter range for deer, elk, and moose." The Ninth Circuit found that the EIS did not provide the information necessary to determine how the specific land should be allocated to protect particular habitat important to the moose and other big game wildlife. Third, the USFS argued it adequately considered impacts on big game wildlife because it acknowledged "motorized winter recreation can adversely affect wildlife by causing them to move away when demands on their energy reserves are highest" and provided illustrative data. The data was displayed in tabular form and showed the comparative probability

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		that elk and mule deer would take flight from all-terrain vehicles, bicycle riders, horse riders, and hikers passing by at different distances. The Ninth Circuit stated that there was no basis for concluding that the table would provide probative evidence of how big game wildlife would respond to snowmobiles in winter. The study the data is drawn from is specific to mule, deer and elk and not to big game species generally. The study also showed the measure of response to all-terrain vehicles, rather than snowmobiles. And, notably the study did not address winter flight response (it spoke to summer, fall and spring). Nor did the EIS acknowledge or explain the absence of data on the snowmobile disturbance on specific species. *See* 40 C.F.R. § 1502.22 (establishing if data is incomplete or unavailable," then the "agency shall always make clear such information is lacking."). In sum, the Ninth Circuit held that the EIS did not provide the public adequate access to information about the impact of snowmobiles on big game wildlife and habitat, and that the information included in and referenced by the EIS did not allow the public to "play a role in both the decisionmaking process and the implementation of that decision." *See Robertson v. Methow Valley Citizens Council*, 490 U.S 332, 349, 109 S.Ct. 1835 (1989). The USFS defeated the claim that it violated NEPA because it did not adequately address how the snowmobile allocations in its recreation plan affect other winter recreational activities such as cross-county skiing and snowshoeing. The USFS created five categories of recreational opportunities: (1) areas emphasizing motorized recreation; (2) areas where motorized use was permitted in winter but not in summer; (3) areas where only non-motorized use is allowed, "provid[ing]for quiet recreation year round"; (4) semi-primitive backcountry area with a wide mix of motorized and non-motorized designations; and (5) designated wilderness areas where mountain biking and motorized use is prohibited. It also noted that while snowmobile use is permitted in roughly 60% of the forest, 100 percent of the forest is open to at least some non-motorized use for winter recreation activities. The EIS also included a section devoted to "recreation and travel management," which covered both summer and winter recreational activities. The ROD and EIS illustrate that the USFS collected information and based on that information, adopted guideline that it applied in its decisionmaking process, and provided that information to the public. WildEarth finally argued that the USFS should have analyzed the possibility of "illegal motorized entry" into non-motorized areas. The Ninth Circuit concluded that NEPA does not require the USFS affirmatively address every uncertainty. It found that the USFS provided sufficient information to establish that it took a "hard look" at the impacts of snowmobile use on non-motorized recreation.

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WildEarth Guardians v. U.S. Dep't of Agriculture, 795 F.3d 1148 (9th Cir. 2015)	USFS	**Agency did not prevail** (plaintiffs held to have standing to proceed with the litigation) **Issue(s):** standing This case involved a programmatic EIS, but no decision was made on its adequacy. **Holding:** "Environmental organization WildEarth Guardians sued to enjoin the federal government's participation in the killing of predatory animals in Nevada. WildEarth alleged that the program's continued reliance on a decades-old programmatic environmental impact statement ('PEIS') causes the government to use outdated and unnecessarily harmful predator control techniques that interfere with WildEarth's members' enjoyment of outdoor activities. The district court dismissed for lack of standing, holding that WildEarth had not shown that its alleged injuries were caused by the government's reliance on the PEIS, and that, in any event, Nevada could choose to implement an independent predator damage management program if the federal government ceased its activities, so WildEarth's injuries were not redressable. Both of these reasons for dismissal were erroneous, so we reverse." "WildEarth submitted a declaration from Don Molde, a WildEarth member, who engages in outdoor recreation in parts of Nevada affected by NWSP's predator control. Molde's declaration described his frequent recreational use of areas in Nevada impacted by NWSP's activities, his plans to continue visiting those areas, and the negative effect of NWSP's predator damage management on his recreational and aesthetic enjoyment of the impacted areas." "To establish standing, a plaintiff must show that '(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision.' *Salmon Spawning & Recovery Alliance v. Guiterrez*, 545 F.3d 1220, 1225 (9th Cir. 2008) (*citing Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130 (1992)). "To demonstrate standing to bring a procedural claim—such as one alleging a NEPA violation—a plaintiff 'must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.' *Western Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 485 (9th Cir. 2011). For an environmental interest to be 'concrete,' there must be a 'geographic nexus between the individual asserting the claim and the location suffering an environmental impact.' *Id.* '[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.' *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693 (2000). Once plaintiffs seeking to enforce

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		a procedural requirement establish a concrete injury, 'the causation and redressability requirements are relaxed.' *W. Watersheds Project*, 632 F.3d at 485. 'Plaintiffs alleging procedural injury must show only that they have a procedural right that, if exercised, could protect their concrete interests.' *Salmon Spawning*, 545 F.3d at 1226." "The district court dismissed Claims One and Two, holding that WildEarth had not shown that any of its members had a concrete injury caused by the PEIS. But the injuries Molde alleges are concrete enough, and are sufficiently causally related to APHIS's failure to update the PEIS, to support WildEarth's standing for Claims One and Two….Molde's injury is his reduced recreational and aesthetic enjoyment of areas in Nevada impacted by NWSP's predator damage management programs. His declaration names specific wilderness areas in Nevada that he has visited and has specific plans to visit again. The declaration states that NWSP's predator control negatively impacts Molde's enjoyment of those areas by causing him to curtail his recreational activities and reducing his likelihood of seeing predators, including coyotes and ravens. This satisfies the injury-in-fact requirement." "Because WildEarth seeks to enforce a procedural right under NEPA, the requirements for causation and redressability are relaxed. *W. Watersheds Project*, 632 F.3d at 485. Under that relaxed standard, WildEarth's allegations, based on Molde's experience, are sufficient to support standing. WildEarth alleges that APHIS implements its predator damage management programs pursuant to the 1994/1997 PEIS, and that APHIS has improperly failed to update that PEIS. The Record of Decision for the final PEIS specifically states that APHIS will rely on information from the final PEIS for NEPA compliance." "Molde's injury also satisfies the relaxed redressability requirement for procedural claims. This requirement is satisfied when "the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision." *Salmon Spawning*, 545 F.3d at 1226. This relaxed redressability standard governs procedural challenges to programmatic actions as well as to specific implementing actions."
U.S. Department of Defense		
***Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015)**	ACOE	**Agency prevailed**. **Issue(s):** failure to comment during public involvement period, major federal action**.** This case involved an EA, which was found to be adequate. An environmental group, an energy group and a planning commission (collectively, Sierra Club) challenged the validity of a nationwide permit under § 404 of the Clean Water Act and verification letters issued by the Army Corps of Engineers (the Corps)**.** TransCanada Corporation planned to rely on the nationwide permit to build an oil pipeline, the Gulf Coast

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		Pipeline, which would run approximately 485 miles and cross over 2,000 waterways. The Corps issued letters verifying that Nationwide Permit 12 would cover the proposed construction. Shortly thereafter, TransCanada began constructing the pipeline, which has since been completed and is currently transporting oil. As a matter of background, the nationwide permit authorizes activities involving the discharge of dredged or fill material in U.S. waters and wetlands. *See* 33 U.S.C. § 1344(e) (2012). Exercising this permitting authority, the Corps issued Nationwide Permit 12, which allows anyone to construct utility lines in U.S. waters "provided the activity does not result in the loss of greater than ½ acre of [U.S. waters] for each single and complete project." Sierra Club argued that the Corps' environmental analysis was deficient because the agency failed to consider the risk of oil spills and the cumulative impacts of pipelines and that the Corps failed to conduct an environmental analysis when verifying that the pipeline was permissible under the nationwide permit. **Holding:** The Tenth Circuit rejected Sierra Club's arguments. It held Sierra Club waived its claims involving failure to address oil spills and cumulative impacts and the Corps was not required to conduct an environmental analysis when verifying compliance with the nationwide permit. Parties challenging an agency's compliance with NEPA must ordinarily raise relevant objections during the public comment period. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65, 124 S.Ct. 2204 (2004). But two exceptions exist. First, commenters need not point out an environmental assessment's flaw if it is "obvious." *Id.* at 765, 124 S.Ct. 2204. Second, a commenter does not waive an issue if it is otherwise brought to the agency's attention. *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir.2007). Sierra Club conceded that no commenter raised the oil-spill issue. Sierra Club then contended that the issue is not waived because the risk of oil spills is obvious, and the Corps knew about the risk of oil spills when issuing the nationwide permit. The Tenth Circuit rejected both of Sierra Club's contentions. Sierra Club did not show an obvious deficiency in the Corps' EA, and the Corps' knowledge of oil-spill risks did not relate to a deficiency in the Corps' assessment for the construction, maintenance, and repair of utility lines. Sierra Club then asserted that the oil-spill issue is not waived because the risk of oil spills is obvious. The Tenth Circuit again rejected this contention, explaining that to qualify for this exception, then Sierra Club must show that the omission of any discussion of oil-spill risks entailed an

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		obvious flaw in the EA. It discussed that it is Sierra Club's burden to show that the EA for the construction, maintenance and repair of utility lines contained an obvious flaw, not that the agency failed to discuss impacts of an obvious risk associated with certain activity. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765, 124 S.Ct. 2204 (2004) (stating that "an [EA's] ... flaws might be so obvious that there is no need for a commenter to point them out"). The fact that pipelines create a risk of spillage does not mean that the alleged deficiency in the Corps' EA for the construction, maintenance, and repair of utility lines would have been obvious. Sierra Club argued that the risk of oil spills should have been obvious to the Corps because of comments submitted to agencies concerning the proposed Keystone XL project (another project). But these comments would have led the Corps to believe that the risk of oil spills fell within the domain of other agencies, for all of the comments about oil spills had been directed to the Pipeline and Hazardous Materials Safety Administration (rather than the Corps). In these comments, no one questioned the Corps' focus on environmental risks from the activities authorized under the nationwide permits (rather than the environmental risks from future operations). Because the Corps ordinarily confined its EA to impacts from the activities authorized under the nationwide permit (construction, maintenance, and repair of utility lines), rather than the eventual operation of these utility lines, the risk of oil spills would not have alerted the Corps to an obvious deficiency in its EA. Sierra Club also asserted the oil-spill issue is not waived because the Corps knew about spill risks when issuing the nationwide permit. The Tenth Circuit rejected this argument finding that even if the Corps knew about spill risks, this knowledge would not have prevented a waiver. The Tenth Circuit recognized an exception to waiver when an issue is brought to the agency's attention. It pointed out that another Circuit, the Ninth Circuit, has equated this exception and the obviousness exception. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir.2011) ("This court has interpreted the 'so obvious' standard as requiring that the agency have independent knowledge of the issues that concern petitioners."). The Tenth Circuit did need not decide whether to adopt the Ninth Circuit's view, as it elsewhere concluded that the risk of oil spills would not have created an obvious deficiency in the Corps' environmental analysis of the construction, maintenance, and repair of utility lines. The Tenth Circuit criticized the application of the independent knowledge approach -- stating that the application here would make little sense. Applying this principal, the Corps' "independent knowledge" would be based on its role as a cooperating agency in the State Department's environmental impact statement for the Keystone XL Pipeline. None of the commenters suggested that the Corps had any responsibility to address the risk of oil spills. In these circumstances, the Corps' alleged

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		knowledge about oil spills would not have avoided a waiver. The environmental groups also argue the Corps violated NEPA by failing to consider the cumulative impacts of oil pipelines. This argument is also waived, as no commenter objected to the Corps' assessment on this ground. As discussed, parties challenging an agency's compliance with NEPA must raise relevant objections during the comment period. These objections must specifically raise the issue presented on appeal; if the objections do not raise the issue, it is waived. Some commenters mentioned cumulative impacts in other contexts, such as aquatic areas. But no one discussed a need for the Corps to consider the cumulative impacts on dry-land areas. For example, some commenters objected to the use of multiple permits for multiple water crossings associated with one linear project. In the view of these commenters, the use of multiple permits might "prevent the Corps from assessing the [overall] cumulative effects" of one linear project. Another commenter requested that the Corps apply the half-acre limit to entire linear projects (rather than each water crossing) to ensure the Corps assessed "cumulative effects" of the entire project. The Court explained that although these comments used variations of the phrase "cumulative impact," the commenters were focusing on the cumulative impact on aquatic areas—not dry-land areas. As a result, Sierra Club's objection was waived. Sierra Club also argued the Corps should have prepared a NEPA analysis for the entire Gulf Coast Pipeline before issuing the verification letters. The Tenth Circuit disagreed. The verifications do not constitute "major Federal action" warranting NEPA review, and the agency was not required to assess impacts of the entire pipeline. The Tenth Circuit found that the Corps considered the impact of the construction of an oil pipeline when it issued Nationwide Permit 12, and that the letters only verified that TransCanada's actions were covered by the Permit. Thus, the Court held there was no need for the Corps to conduct a second environmental assessment.
Sierra Club v. Army Corps of Engineers, 803 F.3d 31 (D.C. Cir. 2015)	ACOE	**Agencies prevailed.** **Issue(s):** scope of environmental review, connected actions This case involved an EA, which was found to be adequate. **Holding:** "The Flanagan South oil pipeline pumps crude oil across 593 miles of American heartland from Illinois to Oklahoma. Almost all of the land over which it passes is privately owned. As soon as Enbridge Pipelines (FSP), LLC, (Enbridge) began building the pipeline in 2013, the Sierra Club, a national environmental nonprofit organization, sued the federal government seeking to set aside several federal agencies' regulatory approvals relating to the pipeline and to enjoin the pipeline's construction and operation in reliance on any such approvals. Sierra Club's chief claim was that various federal easements and approvals that Enbridge obtained

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		from the agencies gave necessary go-ahead to the Flanagan South project as a whole, and thus the entire pipeline was a foreseeable effect of federal action requiring public environmental scrutiny under NEPA." The district court entered summary judgment in favor of the federal agencies and Enbridge. The Court of Appeals upheld the lower court's decision. "We hold that the federal government was not required to conduct NEPA analysis of the entirety of the Flanagan South pipeline, including portions not subject to federal control or permitting. The agencies' respective regulatory actions—in the form of easements, Clean Water Act verifications, and authorization to harm or kill members of endangered species without incurring liability under the Endangered Species Act (ESA)—were limited to discrete geographic segments of the pipeline comprising less than five percent of its overall length. As explained below, the agencies were required to conduct NEPA analysis of the foreseeable direct and indirect effects of those regulatory actions. However, on the facts of this case, the agencies were not obligated also to analyze the impact of the construction and operation of the entire pipeline." "Sierra Club's objection in this suit concerns the scope, not the intensiveness, of the agencies' analyses. That is, Sierra Club does not complain that an agency improperly prepared an EA and issued a FONSI when it should have prepared an EIS. Rather, it complains that no agency ever conducted pipeline-wide NEPA analysis to any degree, whether an EA or an EIS. Sierra Club identifies three groups of federal agency approvals that, it contends, support its claim that federal law requires a pipeline-wide NEPA analysis of the Flanagan South project: (1) easements granted by the Corps and the Bureau for the pipeline to span two parcels of federally owned riverside land and 34 parcels of federally managed Indian lands; (2) Clean Water Act verifications issued by the Corps concluding that 1,950 water crossings complied with the Clean Water Act under Nationwide Permit 12; and (3) conditional permission for Enbridge to take endangered species in the course of constructing and maintaining the pipeline without incurring liability under the ESA— permission provided through an Incidental Take Statement [ITS], issued by the Service and implemented by the Corps in its verifications. Sierra Club contends that those actions triggered a requirement under NEPA that one of the agencies review the environmental impact of the entire pipeline, including portions outside the segments that the federal actions purported to address." "Sierra Club contends that the agencies should have conducted NEPA review of the pipeline as a whole. The only alleged federal action that, by its terms, addressed the entire pipeline was the Service's ITS in its Biological Opinion. Sierra Club argues that either the [Fish and Wildlife] Service's issuance of the ITS during Section 7 consultation with the Corps and Bureau [of Indian Affairs], or the Corps's implementation of the ITS as a condition of the Clean Water Act verifications it issued to Enbridge, constituted federal action encompassing all of Flanagan South, thereby mandating whole-pipeline NEPA review…. We conclude, on the facts of

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		this case, that the Service's issuance of the ITS was not, standing alone, federal action triggering NEPA review. By contrast, the Corps's implementation of the ITS as a condition of its Clean Water Act verifications was federal action, but with geographic scope far more limited than the NEPA review Sierra Club seeks. In advocating for review of the entire pipeline, Sierra Club unsuccessfully invokes the doctrine against impermissible segmentation of NEPA review in an effort to trigger NEPA's connected- and cumulative-actions doctrines and the Corps's agency-specific NEPA regulations." "The Service's development and issuance of the Section 7 ITS, standing alone, was not federal action. But, as explained below, the Corps' implementation of the ITS was federal action, albeit of confined scope. An agency's advice to another agency on how that agency should proceed with its permitting actions does not amount to federal action under NEPA…. But the record in this case makes clear that the Fish and Wildlife Service acted only in its consultative role, 'merely offering its opinions and suggestions to [the Corps], which, as the action agency, ultimately decides whether to adopt or approve the [ITS].'…. Here, similarly, it was the Corps' action, by way of adopting and incorporating the ITS in the verifications of Flanagan South's water crossings under the Clean Water Act, that qualified as federal action under NEPA…. The Service was not obligated … in this case to complete a NEPA analysis, because an agency need not complete such analysis 'where another agency will authorize or implement the action that triggers NEPA.' " "The Service's issuance of the ITS was not the functional equivalent of a permit, but the Corps' incorporation of the ITS was. When the Service issues an ITS in its consultative role, Enbridge correctly notes, it "do[es] not allow or authorize (formally permit) incidental take under section 7." When the Service issues a Section 10 permit directly to a private party, it functions as an action agency. Before it began construction, Enbridge considered applying to the Service for a private Section 10 permit. Once the Service estimated that the Section 10 process could "take years to complete," Enbridge decided against the Section 10 route. Enbridge instead opted only to participate in the speedier Section 7 process and settled for a much more limited authorization of anticipated take. It was only when the Corps formally incorporated the ITS into its Clean Water Act verifications that it gave Enbridge permission to take species free from the threat of ESA liability. The Corps-implemented ITS is the functional equivalent of a permit and thus constitutes federal action subject to NEPA. *See* 40 C.F.R. § 1508.18(b)(4). But because its permission is limited to the areas subject to the verifications, it is federal action of much more limited scope than Sierra Club contends; contrary to Sierra Club's claim, it does not require NEPA review of the whole pipeline." "Sierra Club has failed to preserve its claim that the several easement actions, verifications and ITS, taken together, amount to a single federal action that requires its own NEPA analysis. We assume arguendo that the Corps' and Bureau's discrete easement actions and verifications

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		incorporating the ITS were all component parts of the same federal action, but Sierra Club has failed to preserve an argument that the government was required to perform a unified NEPA analysis on anything less than the entire Flanagan South pipeline…. That claim is forfeited. Therefore, the only NEPA question preserved for our consideration is whether the federal actions of verifying the Pipeline's water crossings under Nationwide Permit 12, incorporating the ITS, and granting the easements to cross federal lands required NEPA analysis of the entire Flanagan South pipeline." "The connected actions regulation, on which Sierra Club relies most heavily, does not dictate that NEPA review encompass private activity outside the scope of the sum of the geographically limited federal actions…. The point of the connected actions doctrine is to prevent the government from 'segment[ing]' its own 'federal actions into separate projects and thereby fail[ing] to address the true scope and impact of the activities that should be under consideration.' *Delaware Riverkeeper Network v. F.E.R.C.,* 753 F.3d 1304, 1313 (D.C. Cir. 2014). *Delaware Riverkeeper* illustrates the connected actions regulation's anti-segmentation principle, and why it does not accomplish all that Sierra Club asks of it. Under *Delaware Riverkeeper*, an agency cannot segment NEPA review of projects that are "connected, contemporaneous, closely related, and interdependent," when the entire project at issue is subject to federal review. *Id*. at 1308. In this case, the oil pipeline is undoubtedly a single 'physically, functionally, and financially connected" project, but one in which less than five per cent is subject to federal review.' *See id*. The Natural Gas Act requirement that natural gas pipelines be pre-certified for public convenience and necessity made the whole pipeline in *Delaware Riverkeeper* the subject of major federal action triggering NEPA. … Here, the project is an oil pipeline, however, so not subject to any such overall pipeline precertification." "Sierra Club's more modest claim at oral argument was that *Delaware Riverkeeper* and the connected action regulation require that "the federal actions in this case—the easements, the other areas within federal jurisdiction—those are connected" and so should have been analyzed together… That is the accurate statement of connected actions doctrine, but, as noted above, the claim resting on it was not preserved." **NOTE:** The court was careful to state that its decision is "based on the facts of this case," leaving open the potential for a different decision based on different facts.

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***Grunewald v. Jarvis*, 776 F.3d 893 (D.C. Cir. 2015)**	NPS	**Agency prevailed.** **Issue(s):** alternatives considered, connected actions, environmental effects (foreseeability) This case involved an EIS, which was found to be adequate. An animal rights group alleged that the National Park Service (NPS) violated NEPA, among other claims, when it analyzed impacts for its deer management plan. **Holding:** The D.C. Circuit upheld the National Park Service's (NPS) deer management plan for Rock Creek National Park in Washington, DC. The animal right groups argued that the NPS violated NEPA because it failed to consider all reasonable alternatives to the proposed action by failing to consider the reduction of exotic plant species as an alternative way to protect the native vegetation in the Park. In reviewing an agency's selection of alternatives, we owe "considerable deference to the agency's expertise and policy-making role." *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C.Cir.1999). "[A]s long as the agency 'look[s] hard at the factors relevant to the definition of purpose,' we generally defer to the agency's reasonable definition of objectives." *Id.* (*quoting Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)). The NPS reasonably determined that the overpopulation of white-tailed deer in Rock Creek Park detrimentally affects the Park's ecology. Given this concern, it was not unreasonable for the NPS to define its objectives in terms of abating the effects of deer browsing and trampling. A stand-alone exotic plants management plan would not address the deer problem. The agency did not adopt "an 'unreasonably narrow' definition of objectives that compels the selection of a particular alternative." *Theodore Roosevelt Conservation Partnerships v. Salazar*, 661 F.3d 66, 73 (D.C. Cir 2011). Instead, the NPS reasonably defined its objectives and alternatives in light of its legitimate concern with deer populations. Accordingly, the NPS did not violate NEPA when it did not consider a "plants-only" option as an alternative. Similarly, the D.C. Circuit held that the NPS was not required to analyze its 2004 Draft Exotic Plant Management Plan in the same NEPA document as its Deer Management Plan, as the animal rights groups alleged. Connected actions are "closely related and therefore should be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(1). Similar actions are those "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together." *Id.* at § 1508.25(a)(3). The D.C. Circuit discussed that NPS did not act arbitrarily, but rather

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		exercised its lawful discretion, when it declined to analyze the Exotic Plant and Deer Management Plans together. While the NPS acknowledged that the subject of deer management and invasive species management are "in some ways related," the NPS maintained that they are distinct actions "addressed in two different planning efforts." The D.C. Circuit distinguished that even though the fact that each plan may be related to the Park's General Management Plan does not mean that the plans are so closely related to each other that NEPA requires concurrent analysis of deer management and exotic plant control. As the Supreme Court has held, "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities." *Mobil Oil Exploration & Producing Se. Inc. v. United Distribution Cos.,* 498 U.S. 211, 230, 111 S.Ct. 615 (1991). The D.C. Circuit further examined the animal rights groups' allegation that both actions were connected. Under the regulation, actions are "connected" if they "[a]utomatically trigger other actions which may require environmental impact statements"; "[c]annot or will not proceed unless other actions are taken previously or simultaneously"; or "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). Again, the D. C. Circuit upheld that the Park Service acted within its discretion when it declined to analyze the Exotic Plant and Deer Management Plans together as "connected" actions. Nothing in the record indicates that any of the regulatory definitions of "connected" apply. Neither Plan automatically triggers other reportable actions. Actions pursuant to the Deer Management Plan have already proceeded, and have not depended on the concurrent or previous undertaking of the Draft Exotic Plant Plan or some other action. The Plans are not interdependent parts of a larger action. The fact that the Plans have similar goals, protecting the native ecology, does not make the plans sufficiently intertwined to require concurrent NEPA analysis. The D.C. Circuit held that the NPS did not err in concluding that the Deer Management and Exotic Plant Plans are not "similar" or "connected" for the purposes of NEPA. Finally, the animal rights group argued that the NPS "violated NEPA by failing to consider the adverse impact its decision to kill wildlife will have on the public's ability to enjoy this extremely special national park which for over 120 years has been ... completely free of any violence against wildlife." The D.C. Circuit found that the NEPA adequately analyzed the impact on the human environmental and ultimate held that concerns that some members of the public might be psychologically harmed by simply knowing that deer are killed in Rock Creek Park is too remote an impact and falls outside the scope of NEPA.

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***Center for Sustainable Economy v. Jewell,* 779 F.3d 588 (D.C. Cir. 2015)**	BOEM	**Agency prevailed.** **Issue(s):** associational standing, ripeness, major federal action Neither an EA nor an EIS was prepared. **Holding:** "The Outer Continental Shelf Lands Act (OCSLA) created a framework to facilitate the orderly and environmentally responsible exploration and extraction of oil and gas deposits on the OCS [outer continental shelf]. It charges the Secretary of the Interior with preparing a program every five years containing a schedule of proposed leases for OCS resource exploration and development. In light of the potential benefits and costs of OCS development, the Secretary's program must balance competing economic, social, and environmental values in determining when and where to make leases available. Those obligations are set forth in Section 18 of OCSLA, 43 U.S.C. § 1344. "The Center for Sustainable Economy (CSE), an Oregon-based nonprofit organization working to 'speed the transition to a sustainable economy,' challenges the Department of the Interior's latest leasing program on the ground that the 2012-2017 leasing schedule fails to comply with the provisions of Section 18(a)… (footnotes omitted)…. CSE also argues that, in preparing its Final Programmatic Environmental Impact Statement ('Final EIS'), Interior violated the National Environmental Policy Act's (NEPA) procedural requirements by using a biased analytic methodology and providing inadequate opportunities for public comment at the Draft EIS stage….We deny CSE's petition and conclude that: (1) CSE has associational standing to petition for review, (2) CSE's NEPA claims are unripe, (3) two of CSE's Program challenges are forfeited, and (4) CSE's remaining challenges to Interior's adoption of the 2012-2017 leasing schedule fail on their merits." "CSE has associational standing. An association has standing to bring suit on behalf of its members when: (1) 'its members would otherwise have standing to sue in their own right;' (2) 'the interests it seeks to protect are germane to the organization's purpose;' and (3) 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977)." "CSE's NEPA claims are unripe. Interior violated NEPA in the Program's Final EIS, CSE contends, by presenting a biased analysis of the so-called 'no-action alternative' that undervalued OCS non-mineral resources in their natural and unaltered state. CSE sees a further NEPA violation insofar as Interior denied a meaningful opportunity for comment at the Draft EIS stage on Interior's economic analyses, which CSE contends appeared for the first time when Interior simultaneously released the Final EIS and Final Economic Analysis Methodology, with 'a wealth of new assumptions and conclusions,' after the opportunity for comment on the draft documents had closed. As we recognized in CBD, '[i]n the context of

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		multiple stage leasing programs . . . [the] obligation to fully comply with NEPA do[es] not mature until leases are issued,' because only at that point has there been an 'irreversible and irretrievable commitment of resources.' *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 480 (10th Cir. 2009). Here, as in CBD, we confront a challenge to a multiple-stage program under which no lease sale has yet occurred and no irreversible and irretrievable commitment of resources has been made. As we reasoned in CBD, allowing NEPA challenges to be brought at this early stage, 'when no rights have yet been implicated, or actions taken, would essentially create an additional procedural requirement for all agencies adopting any segmented program,' that 'would impose too onerous an obligation, and would require an agency to divert too many of its resources at too early a stage in the decision-making process.' *Id*. at 480-81. A petitioner 'suffer[s] little by having to wait until the leasing stage has commenced in order to receive the information it requires. In the meantime . . . no drilling will have occurred, and consequently, no harm will yet have occurred to the animals or their environment.' *Id.* at 481. In light of our holding in CBD, CSE's NEPA claims must be dismissed as unripe."
***WildEarth Guardians v. United States Fish and Wildlife Serv*., 784 F.3d 677 (10th Cir. 2015)**	FWS	**Agency prevailed.** **Issue(s):** impact analysis adequacy; significance determination This case involved an EA, which was found to be adequate. Environmental groups (collectively, WildEarth) challenged the decision of the U.S. Fish and Wildlife Service (FWS) to convey a strip of land (the corridor) to a consortium of local governmental for the construction of a parkway. WildEarth Guardians, Rocky Mountain Wild, and the Town of Superior (collectively, WildEarth) challenged the authority of the U.S. Fish & Wildlife Service (FWS) to construct a parkway through the former Rocky Flats nuclear facility. Rocky Flats was formerly used to manufacture nuclear weapons, and since 1989, the Department of Energy (DOE) had been tasked with a cleanup effort to remediate the land. Under the Rocky Flats Act, Congress designated authority to the DOE to manage the central area of the Flats, which was contaminated by plutonium and other hazardous materials, and transferred the remainder of the land to the FWS to become a National Wildlife Refuge. The Rocky Flats Act further provided the DOE would transfer the remainder of the land to the FWS as soon as the cleanup was complete, and set aside a large parcel of land at the Flats' border to be used for transportation improvements (specifically, the parkway). The DOE transferred the remaining land to the FWS in 2007, and the FWS began considering applications for the transportation project jointly with the DOE. Among other claims, WildEarth claimed the FWS violated NEPA when it prepared an EA for the land exchange with respect to three main factual areas: (1) contaminated soils; (2) air pollution; and (3) the Prebel's

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		Meadow Jumping Mouse. WildEarth asserted that the impacts required an EIS rather than an EA. With regard to the contaminated soils, in WildEarth's view, the parkway potentially significantly affects the quality of the human environmental because its construction would release dangerous levels of plutonium. **Holding:** In its decision not to conduct an EIS, the FWS relied on assurances it received from an EPA, specifically, in 2006, where the EPA certified that conditions in the area where the corridor would be situated were "acceptable for unrestricted use and unlimited exposure." Five years later, the FWS requested and prior to its decision, the EPA clarified that the clearance applied to the construction of the proposed parkway as well. WildEarth argued the EPA's advice was inapplicable because it was supposedly premised on the assumption that no soil disturbance would take place, and thus did not account for the construction of a parkway. The Tenth Circuit found this was true of the 2006 EPA report, but not true of the 2011 EPA letter, which explicitly addressed the parkway construction and explicitly confirmed that such construction posed no risk of exposing anyone to an unacceptable level of radioactive material. Although WildEarth tacitly agreed that the EPA was undeniably an agency with respect to developing and enforcing environmental standards, with respect to plutonium, that the FWS could rely on -- but further objected that: (1) the letter "was not subject to any of the form and procedure that accompanies a CERCLA determination; and (2) it was based on flawed reasoning." The Tenth Circuit found the first argument unconvincing, and stated that the 2011 EPA letter was reasonably read as a clarification and elaboration of the 2006 Report, extrapolating from the 2006 findings to explain the risk to construction workers. And, the Tenth Circuit found it was reasonable of the FWS to regard the letter as a continuation of the CERCLA process that the EPA had begun several years earlier. The Tenth Circuit rejected WildEarth's second argument as flawed because WildEarth complained that the letter "equated a wildlife refuge workers with . . . construction workers." The Tenth Circuit explained that the letter did not do so, and in reaching its conclusion, looked to the EPA's explanation that it took account of the difference between the two types of employees – "including the potential for greater raters of inhalation and ingestion of the soil by the construction worker" – but then determined that the "differences are likely offset by the much great exposure duration" for refuge workers, relative to construction workers would who would just be exposed for "a few months." The Tenth Circuit stated that the EPA's logic was straightforward and comprehensive. WildEarth also articulated a highly detailed criticism of the EPA's conclusion based on the supposed areas that were cleaned and the supposed levels of acceptable hazardous materials. The Court found its criticism could not be squared with the contents of the 2011 letter. In its letter, the EPA indicated it addressed dangers to construction workers insofar as they would be working on a construction project related to "a

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		future land transfer at the eastern edge of the site, as per provision of the [Rocky Flats Act]." The Court declined to second-guess the judgment of the EPA, recognizing the EPA's authority in the pollutants arena, and stated that the FWS reasonably consulted the EPA and was given approval to proceed. WildEarth next discerned a NEPA violation in the FWS's failure to take "a hard look at ozone [smog] and nitrogen dioxide pollution" because its air quality impacts would be significant. Simply put, WildEarth alleged that the FWS failed to consider the impacts that the construction of the parkway would have on smog, despite having ample data, and by choosing to rely on state studies. Their objection to the state studies was that the studies relay on outdated EPA air quality standards, and in 2008 the EPA revisited those standards and thus, the FWS should have utilized the new standards. The FWS replied that the 2008 air quality standards had not yet been implemented when the EA was prepared. The Tenth Circuit rejected this argument that the FWS was arbitrary and capricious in relying on the studies predicated on the then-prevailing standards promulgated by the nations' leading environmental agency, simply because the new standards were forthcoming. WildEarth also claimed that the FWS did not sufficiently analyze or disclose the emissions that would result from the construction of the parkway. In its EA, the FWS noted that the parkway project would be required to comply with current and future air quality standards. The Court noted that the federal action was the land transfer rather than the parkway construction itself, which would have required a more detailed analysis of the environmental impact, including emissions. The Court discussed that the FWS relied on the supposition that the parkway would have to obtain environmental clearance that would ensure its compliance with the same laws and standards the FWS itself would have considered if it were directly approving construction of the parkway itself. The Court found the FWS was on solid ground in relying on the procedure for future environmental oversight as Congress specifically provided an important mechanism through the transportation improvement plan. WildEarth maintained the FWS treatment of nitrogen dioxide emissions from vehicles on the proposed parkway violated NEPA in that it: (1) failed to quantify emissions; (2) it omitted "an alternative qualitative description of the public health impacts associated with "emissions"; and (3) it failed to consider whether emissions would comply with a nitrogen dioxide standard adopted by the EPA in 2010. The Court found that the FWS left out these impacts out of its EA because of forthcoming legal standards that had not been promulgated by the EPA, and in consideration of the absence of clear nitrogen dioxide guidelines, and rejected WildEarth's claims. WildEarth also contended that the FWS violated NEPA in its EA with respect to its treatment of the Preble's Meadow Jumping Mouse. Finally, as to the protected mouse, the Court noted that the FWS considered the

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		mouse habitat and found it would not be significantly affected by the transportation improvement. WildEarth also asserted that the FWS violated NEPA by not specifically addressed the acquired property as "mitigation measure of the exchange." The Court ultimately held that the FWS was only required to include mitigation measures if its EA forecasted a significant impact resulting from the land exchange, which it did not in this case. WildEarth challenged the FWS's public notice and comment procedures. Relying on the considerable discretion regarding EAs in 40 C.F.R. § 1501.4(b) and its own decision in *Greater Yellowstone Coal v. Flowers*, 359 F.3d 1257, 1279 (10th Cir. 2004), the Tenth Circuit explained that in this case the EA was circulated, and mentioned the possibility of impacts on the mouse, and comments themselves brought the issue up. Here, the Tenth Circuit upheld the amount of public involvement in this EA. The Tenth Circuit also upheld the FWS's decision to conduct an intra-agency consultation regarding the potential effect on the parkway on the mouse. The Court finally noted the FWS appropriately issued an incidental take statement regarding the mouse.
***Sierra Club v. Bureau of Land Management*, 786 F.3d 1219 (9th Cir. 2015)**	BLM	**Agency prevailed.** **Issue(s):** scope of environmental review, connected actions This case involved an EA, which was found to be adequate. **Holding:** The court of appeals affirmed the district court's decision upholding BLM's grant of a right-of-way for a wind energy project developed on private land. The Wind Project was developed near Tehachapi, California; and the Road Project was initiated when North Sky applied to the BLM for a right-of-way to connect the Wind Project to an existing state highway. Because the Wind Project could be built without the federal Road Project, and because the federal Road Project had independent utility, the BLM concluded that the Wind Project was not subject to formal consultation under the Endangered Species Act, and need not be analyzed as a connected action under NEPA. "The Wind Project is a wind energy project developed by North Sky on more than 12,000 acres of private land located in the Sierra Nevada mountain range, northeast of Tehachapi, California. The Road Project was initiated when North Sky applied to the BLM for a right-of-way over federal land to connect the Wind Project to an existing state highway. The right-of-way (Road Project) would contain underground power and fiber optic communication lines from the Wind Project to California's energy grid. … After review of the Revised Proposal and related documents, the BLM issued an environmental assessment, in which the BLM found that the Road Project would have no significant environmental impact. Therefore, the BLM was not required to (1) consult with the United States Fish and Wildlife Service (FWS) under the ESA, or (2) prepare an Environmental Impact Statement under NEPA. This determination

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		depended in large part upon the BLM's conclusion that the Private Road Option was a viable alternative to the Road Project…. Because the Wind Project could be built without the federal Road Project, and because the federal Road Project had independent utility, the BLM concluded that the Wind Project was not subject to formal consultation under the ESA, and need not be analyzed as a connected action under NEPA." "The Wind Project did not trigger consultation requirements under the NEPA. … As explained, the Wind Project is not a major federal action because the BLM has no control or responsibility over any aspect of the Wind Project. …In any event, the BLM would not have been required to consider the effects of the Wind Project under NEPA because the Road and Wind Projects are not connected, cumulative, or similar actions [footnote and citations omitted]." "The Road and Wind Projects have independent utility and are not connected. … The Road Project was independently useful for providing dust and stormwater control and limiting access to the Pacific Crest Trail. … And, North Sky would likely have developed the Wind Project even without the access provided by the Road Project because it could have accessed its land using the Private Road Option. Thus, these projects had independent utility." "Finally, the BLM sufficiently evaluated the Wind Project as a cumulative effect of the Road Project. The environmental assessment contained a detailed analysis of wind farms within 25 miles of the right-of-way, including the North Sky wind farm. In sum, the BLM was not required to prepare an Environmental Impact Statement under NEPA, because the Wind Project was not a federal action or connected to the Road Project."
***Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015)**	BSEE	**Agency prevailed.** **Issue(s):** major federal action Neither an EA nor an EIS was prepared. Environmental groups challenged the Bureau of Safety and Environmental Enforcement (BSEE) stating the agency violated NEPA by failing to prepare an EIS before approving Oil Spill Response Plans (OSRPs) involving development of offshore oil and gas resources in the remote Beaufort and Chuckchi seas on Alaska's Arctic coast. As a matter of background, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.,* establishes a four-stage process for the exploration and development of offshore oil and gas resources. Each stage triggers certain environmental analysis and the Bureau of Ocean Energy Management (BOEM) is responsible for managing the process, including the necessary environmental reviews. In addition, the Clean Water Act, 33 U.S.C. § 1321(b) mandates oil spill contingency planning at four levels: the national, regional, and area levels, and lastly, at the level of individual owners and operators of offshore oil facilities. This case is brought against the BSEE following a relatively complex procedural and statutory backdrop. In short, after the DOI issued new guidance regarding the

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		content and analysis that should be provided in OSRPs, Shell updated its OSRPs for the Chukchi and Beaufort Seas in May 2011, and again in early 2012, and BSEE approved the two OSRPs in February and March of 2012, respectively. In response to the NEPA challenges, the BSEE defended its action stating that it must approve any OSRP that meets the statutory requirements under the current guidance. **Holding:** The Ninth Circuit found that the statute involved restricted the BSEE's discretion because the BSEE was required to approve an OSRP that met the statute's requirements, which the agency reasonably interpreted to be the checklist of six requirements set forth in the Clean Water Act, 33 U.S.C. § 1321(j)(5)(d). *Cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 766, 124 S.Ct. 2204 (2004) (holding an agency had "no ability categorically to prevent the cross-border operations . . . motor carriers, [and thus] the environmental impact of the cross-border operations would have no effect on [that agency's] decisionmaking"). The Ninth Circuit held that an EA that was previously prepared and required to be conducted as to Shell's exploration plan during that stage in the process, expressly considered the environmental effects of Shell's OSRPs. An operator's OSRP, which is the fourth step of the Clean Water Act's oil spill response framework, must be submitted in conjunction with a lessee's exploration plan, which is OCSLA's third step. 30 C.F.R. § 550.219. The Court referenced a memorandum dated February 17, 2012, where BSEE clarified that the Chukchi OSRP was considered in the development of an EA in Shell's Revised Exploration Plan for the Chukchi Sea. Similarly, Shell's Beaufort Sea OSRP was considered in the exploration plan Shell submitted regarding its Flaxman Island Leases. Thus, both of the OSRPs at issue here underwent NEPA review at OCSLA's third step—which was consistent with the requirement that OSRPs be submitted at this stage. The Ninth Circuit ultimately concluded that the BSEE was not required to prepare an EIS prior to approving the OSRPs. This case also contained a vigorous dissent discussing that, first, the BSEE regulates the response activities and prevention effort of entities like Shell, and because it retains its authority to ensure that those entities' response efforts will protect the environmental effectively in the event of the oil spill, it is not exempt from its duty to conduct a NEPA review. Second, the dissent argued that the BSEE did not discharge its duty under the Oil Pollution Act to conduct NEPA review by relying on previous analysis that considered the environmental impact of oil and natural gas exploration in the Arctic.

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***Cascadia Wildlands v. Bureau of Indian Affairs, 801* F.3d 1105 (9th Cir. 2015)**	BIA	**Agency prevailed.** **Issue(s):** no action alternative, cumulative effects assessment This case involved an EA, which was found to be adequate. Environmental groups (collectively, Cascadia) challenged the Bureau of Indian Affairs' (BIA) approval of the Middle Forks Kokwel timber sale (the Kokwel Project), a plan by the Coquille Indian Tribe (the Tribe) to harvest 268 acres of timber in the Coquille Forest, comprised of 5,410 acres of land along the SW Oregon Coast that was restored to the Tribe. Among other challenges, on the NEPA claim, Cascadia argued that the BIA violated NEPA because it did not adequately consider the cumulative environ-mental impact of the Kokwel Project in light of a previously approved harvest the Alder/Rasler Project on adjacent and overlapping land. As a matter of background, in 2011 and 2013, BIA approved two different proposals by the Tribe to harvest timber in the Coquille Forest. In 2011, the BIA approved the Alder/Rasler Project, which called for 270 acres of regeneration harvest, 52 acres of density management and 56 acres of commercial thinning between 2011 and 2016. The BIA conducted an EA for this Project, which estimated it would create between 44 and 220 jobs and over $10.5 million in revenue though the sale of 22.44 million board feet of timber. In 2013, the BIA approved a second project – the Kokwel Project – to conduct an additional 268 acres of regeneration harvest, 221 acres of commercial thinning and 42 acres of density management in the Coquille Forest over a period of 10 years. The BIA and Tribe conducted an EA, which estimated the Kokwel Project would create 242 direct jobs, 532 indirect jobs and over $8 million in revenue through the sale of 13.9 million board feet of timber. Cascadia argued that the BIA and the Tribe violated NEPA because they did not adequately consider the cumulative impacts of the Kokwel Project in light of the Alder/Rasler Project. **Holding:** The Ninth Circuit looked to the CEQ Regulations in determining whether a proposed action will significantly impact the human environmental, noting that NEPA directs agencies to consider "[w]hether the action is related to other actions with individually insignificant but cumulative significant impacts." 40 C.F.R. § 1508.27(b)(7). "[C]umulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. "[T]he general rule under NEPA is that, in assessing cumulative effects, the [agency] must give a sufficiently detailed catalogue of past, present, and reasonably foreseeable future projects, and difference between the

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		projects, are thought to have impacted the environment." *Lands Council v. Powell,* 395 F.3d 1019, 1028 (9th Cir. 2005). An agency, however, may satisfy NEPA by aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured." *See Ecology Ctr v. Castaneda,* 574 F.3d 652, 666-667 (9th Cir. 2009). The BIA and the Tribe, in the EA analyzed the cumulative impacts of the Kokwel Project by comparing it against the environmental baseline, incorporated into the "No Action Alternative." The No Action Alternative described the "existing condition and the continuing trends, assuming "[o]ngoing activities would continue to occur on existing projects," including "other projects covered by earlier decision records." The EA explained that it would aggregate other projects into the No Action Alternative, rather than individually discuss them. The Tabular treatment of impacts, Table 8, listed only one project proposed for the foreseeable future: the Alder/Rasler Project. The EA's resource-specific cumulative impacts discussion did not individually analyze the impact of any specific past, present or reasonably foreseeable future action. The Ninth Circuit noted that agencies have discretion in deciding how to organize and present information in environmental assessments. It held that 40 C.F.R. § 1508.7 does not explicitly require individual discussion of the impacts of reasonably foreseeable projects, and stated it is not for the Ninth Circuit to tell the agency how to specifically present such evidence in an EA. The Ninth Circuit noted its role was to ensure that an agency takes a "hard look" at the cumulative environmental consequences of the proposed project, and ensure it provides a clear explanation of its analysis to enable informed public comment on the project and possible alternatives. An agency can take a "hard look" at the cumulative impact either by individually discussing a previously approved project, or incorporating the expected impact of such a project into the environmental baseline against which the incremental impact of a proposed project is measured. Under either approach, what is important is that the agency make clear it has considered the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. When an agency chooses to aggregate reasonably foreseeable projects, it must be clear from the record that the cumulative effects of the prior proposals were considered by both the drafting and approving agencies. *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 442 (5th Cir. 1981). Here, the Kokwel EA identified the Alder/Rasler Project as a reasonably foreseeable project that would be considered as part of the baseline, i.e., the "No Action Alternative." The expected impacts of the Alder/Rasler Project, in turn, were set forth in detail in the Alder/Rasler EA. The Ninth Circuit noted that this holding was in accord with two other United States Circuit Courts of Appeals, the District of Columbia Circuit and the Fifth Circuit. *See Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 70 (D.C. Cir. 1987). Cascadia alternatively argued that, even if it is permissible to aggregate a

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		previously approved project into an environmental baseline, the Kokwel EA did not actually aggregate the impacts of the Alder/Rasler Project. The Ninth Circuit disagreed with this assertion, stating that the Kokwell EA explained it measured the impacts of the Kokwel Project against a baseline that summed "[o]ngoing activities would continue to occur on existing projects," including "other projects covered by earlier decision records." The Ninth Circuit reviewed the Kokwel EA and noted that the EA stated that the "[r]easonably foreseeable future actions are assumed to be the same for the No Action as well as the Proposed Action," and that "Table 8 lists treatments proposed for the foreseeable future on land in the analysis area that will be considered in the following resource-specific cumulative impact discussion." The Ninth Circuit again noted that the Kokwel EA explained Table 8 listed only one project – the Alder/Rasler Project, and that the EA stated that the Alder/Rasler Proejct was a "treatment[ ] proposed for the foreseeable future," which as assumed to be the same for both the No Action and the Proposed Action, and assumed as part of the baseline against which the incremental impact of the Kokwel Project was measured. The Ninth Circuit stated that the EA did not specifically explain how it calculated the pre-harvest mileage of certain roads in the Project or expressly say how its calculation included the Alder/Rasler Project. The Ninth Circuit found that the EA's explanation of its methodology could have been clearer, but to restate each time the EA presented baseline date for an individual resource that the Adler/Rasler Project was considered and would have been redundant and therefore unnecessary, particularly in a document meant to be "concise and "[b]rief [ ]." *See* 40 C.F.R. § 1508.9(a). The Ninth Circuit finally held that by specifically identifying the Alder/Rasler Project at the outset and explaining it would be assumed as part of the baseline in the resource-specific cumulative impacts analyses, the Kokwel EA sufficiently catalogued relevant past projects in the area. Because the EA explained that it aggregated the Alder/Rasler Project in the No Action Finally, the Ninth Circuit rejected Cascadia's argument this was a "post hoc rationalization" by the BIA.
***Soda Mountain Wilderness Council v. U.S. Bureau of Land Management,* 607 Fed. Appx. 670 (9th Cir. 2015)** (not available for publication, no precedential value)	BLM	**Agency prevailed on 7 of 8 NEPA claims and did not prevail on the 8th claim.** This case involved an EA, which was found to be adequate in most respects. On one issue, the case was remanded to the district court for further consideration. **Issue(s):** significance determination; cumulative effects assessment (reasonably foreseeable future actions (RFFAs)) Environmental organizations (collectively, Soda Mountain) brought action against the Bureau of Land Management (BLM), *inter alia,* alleging that BLM committed several violations of NEPA for the proposed Sampson Cove Forest Management Project (the Project).

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		Holding: The Ninth Circuit found that the BLM adequately assessed the Project area's wilderness characteristics. The EA relied on a 2006 wilderness survey prepared by the BLM which addressed the definition elements of wilderness in the Wilderness Act, 16 U.S.C. § 1131(c). The decision to rely on the report that was four years old when the EA was issued was reasonable. The Ninth Circuit exercised deference to the BLM's assessment of wilderness characteristics. The Ninth Circuit concurred with the BLM's decision not to analyze the effects of the Project involving a potential expansion of the Cascade Siskiyou National Monument. The court found the monument expansion was a "remote and highly speculative consequence" that did not warrant analysis in the EA. Soda Mountain also argued that the BLM violated NEPA because the EA's cumulative impact analysis did not include any discussion of the Cottonwood Forest Management project that was reasonably foreseeable at the time the BLM issued the EA. The Ninth Circuit noted that many of the elements of the Cottonwood project were already firmly established: team meetings discussing the scope of the project and pointed to documentation that the determination regarding the Northern Spotted Owl habitat would be complete within the following month. In addition, two months after the BLM issued the Project's EA, it notified the public of the Cottonwood project. This timing was consistent with the interdisciplinary team notes and left little doubt in the Ninth Circuit's review that the Cottonwood project was reasonably foreseeable. The Ninth Circuit remanded this issue to the BLM for further consideration of its cumulative impact analysis regarding the Cottonwood project, and whether that analysis effects its decision not to issue an EIS. Soda Mountain argued that the EA's cumulative impact analysis so far as the Shale City project was inadequate. The Court held that the impact analysis was sufficient because the EA contained some "quantified or detailed information." *Kern v. U.S. Bureau of Land Mgmt.,* 284 F.3d 1062, 1075 (9th Cir. 2002). In particular, the EA noted the Shale City project was of limited size, no new roads would be built in the project area, the project was not expected to affect special status wildlife species, and no direct or indirect effects to the aquatic habitat were anticipated as a result of the project. Soda Mountain also argued that BLM should have completed a cumulative impact analysis of the Swinning Project. The Ninth Circuit found that BLM correctly did not analyze the Shale City Project since it was outside of the cumulative impact analysis area. The Ninth Circuit did not analyze the challenge to the BLMs' cumulative impact analysis because the EA had not addressed the impact of grazing allotment renewals in the Project area. The Ninth Circuit instructed the District Court to address the issue on remand.

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		The Ninth Circuit also found that the BLM sufficiently analyzed the Project's potential impact on bat habitats. Under NEPA, the EA was required to "briefly provide[ ] evidence and analysis for an agency's finding regarding an environmental impact," not "compile an exhaustive examination of each and every tangential event that potentially could impact the local environment." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1129 (9th Cir. 2012). Thus, the EA met the standard in assessing the Project potential impact on bat habitat. Finally, Soda Mountain argued the BLM should have prepared an EIS. The Ninth Circuit found that the BLM did not fail to take a hard look at the Project area's "unique characteristics" or "highly controversial" effects. 40 C.F.R. § 1508.27(b)(3)-(4). A fairly vigorous dissent followed the majority opinion, finding that by examining the AR in further detail the BLM appropriately excluded the Cottonwood project because it was not a reasonably foreseeable future action. The dissent would not have remanded the EA, rather it would have affirmed the District Court opinion.
U.S. Department of Transportation		
***Padgett v. Surface Trans. Board*, 804 F.3d 103 (1st Cir. 2015)**	STB	**Agency prevailed.** **Issue(s):** major federal action, reliance on categorical exclusion Neither an EA nor an EIS was prepared. Among other claims, The Town of Grafton (the "Town") petitioned the Court for judicial review stating that the Surface Transportation Board ("Board"), a federal agency of the Department of Transportation, violated the NEPA by failing to conduct any analysis of the environmental aspect of its decision with respect to Grafton & Upton Railroad Company's (G & U) liquid petroleum gas transloading facility (the "facility"). The Town argued that NEPA applies here because the Board's preemption decision constitutes a "major Federal action," as G & U could not construct the facility absent the Board's preemption determination. According to the Town, the Board's statement that "[t]his action will not significantly affect either the quality of the human environment or the conservation of energy resources" constitutes a FONSI, which was produced without the preparation of an Environmental Assessment, in violation of NEPA. The Board responded that NEPA is inapplicable because the declaratory order here is not a "major Federal action," as neither federal funding nor Board licensing was involved, relying on this court's holding that the test for major federal action under NEPA is "whether federal approval is the prerequisite to the action taken by the private actors and whether the federal agency possesses some form of authority over the outcome." *Mayaguezanos por la Salud y el Ambiente v. United State*s, 198 F.3d 297, 302 (1st Cir.1999).

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		The First Circuit found the Board is correct that NEPA does not apply to its declaratory order, because the order was not a "major Federal action" under 42 U.S.C. § 4332(C). The Board made a legal determination concerning preemption of the Town's zoning and permitting ordinances. The Board did not provide federal funds, approve or license the transload facility, or otherwise manifest "indicia of control" over G & U that would be sufficient to establish a "major Federal action." *Mayaguezanos*, 198 F.3d at 302. Moreover, declaratory orders are categorically exempted from environmental documentation requirements under the Board's NEPA regulations absent "extraordinary circumstances." 49 C.F.R. § 1105.6(c) ("No environmental documentation will normally be prepared ... for the following actions ... (iii) [d]eclaratory orders...."). The Town failed to demonstrate any "extraordinary circumstances" that could overcome the categorical exemption. 40 C.F.R. § 1508.4. Therefore, the Town did not establish that the Board violated NEPA.
Independent Agencies		
***Myersville Citizens for a Rural Community, Inc. v. Federal Energy Regulatory Commission,* 783 F.3d 1301 (D.C. Cir. 2015)**	F.E.R.C.	**Agency prevailed.** **Issue(s):** alternatives considered, consideration of impacts to property values, scope of environmental review, and connected actions This case involved an EA, which was found to be adequate. **Holding:** Petition for review of agency action was denied. "Citizens of the small town of Myersville, in Frederick County, Maryland, oppose the construction of a natural gas facility called a compressor station in their town. The compressor station is a small part of a larger expansion of natural gas facilities in the northeastern United States proposed by Dominion Transmission, Inc., a regional natural gas company and Intervenor in this case. Dominion, which is in the business of storing and transporting natural gas, requested approval from the Federal Energy Regulatory Commission to move ahead with the project [referred to as the Allegheny Storage Project]. The Commission, over the objections of the Myersville citizens, conditionally approved it in December 2012. Dominion then fulfilled the Commission's conditions, including obtaining a Clean Air Act permit from the Maryland Department of the Environment. Dominion built the station, and it has been operating for approximately six months." Among other things, the plaintiffs challenged FERC's environmental review of the project, including its consideration of potential alternatives. "Before any applicant may construct or extend natural gas transportation facilities, it must obtain a 'certificate of public convenience and necessity' from the Commission pursuant to Section 7(c) of the [Natural Gas] Act. Id. § 717f(c)(1)(A)…. After preparing an Environmental Assessment of the Allegheny Storage Project, the Commission rejected the objections made by Petitioners and others and granted Dominion a conditional Section 7 certificate. …Petitioners timely petitioned for review of the Commission's orders."

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		Petitioners claimed error in FERC's performance of its NEPA obligations. The Commission had prepared an EA for the project and, concluding that the project would not constitute a major federal action significantly affecting the quality of the human environment, issued a FONSI. "Petitioners claim that the Environmental Assessment lacks adequate consideration of two alternatives—an 'existing pipeline' alternative and a 'looping' alternative. On both counts, Petitioners mischaracterize the Environmental Assessment, which considered and rejected both alternatives, adequately discharging the Commission's NEPA obligations." "Petitioners also argue that the Environmental Assessment failed to take a 'hard look' at 'quantifying the impacts of the project on property values and lost development opportunities' in Myersville. T he definition of 'hard look' may be 'imprecise,' but we have explained that an agency has taken a 'hard look' at the environmental impacts of a proposed action if 'the statement contains sufficient discussion of the relevant issues and opposing viewpoints,' and the agency's decision is 'fully informed' and 'well-considered.' *Nevada v. Dep't of Energy,* 457 F.3d 78, 93 (D.C. Cir. 20016) (*quoting NRDC v. Hodel*, 865 F.2d 288, 294 (D.C.Cir.1988)). "In response to community concern about the Myersville station's potential impact on property values, the Environmental Assessment noted that each purchaser of property has different criteria and values, but that, generally speaking, a compressor station could depress property values, particularly those of adjacent and nearby land. Nevertheless, the Commission concluded that the Myersville compressor station 'would not significantly reduce property or resale values' in Myersville because of the Commission's recommendations for noise and visual screening." "The Commission also acknowledged the 'lack of studies evaluating property values and aboveground natural gas facilities,' and that 'the effects on property values are difficult to quantify.' Seizing on that statement, Petitioners argue that the Commission should be required to do more to take into account the effects that safety concerns and pollution have on property values. But the Commission acknowledged three times, in the Environmental Assessment, in its certificate order, and in its order denying rehearing, that property values could be negatively affected by the compressor station. It chose nevertheless to approve the project because the negative impact was not 'sufficient to alter our determination that the Myersville Compressor Station is required by the public convenience and necessity.'" "Finally, Petitioners reiterate their assertion that the "overbuilt" Allegheny Storage Project will produce excess natural gas capacity destined for export through Dominion's Cove Point LNG terminal. By virtue of that alleged connection between the Project and Cove Point, Petitioners argue that the Commission should be required to review their environmental effects together. "Under applicable NEPA regulations, the Commission is required to

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		include 'connected actions,' 'cumulative actions,' and 'similar actions' in an Environmental Assessment. 40 C.F.R. § 1508.25(a)(1)-(3). 'An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.' *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C.Cir.2014) (internal quotation marks omitted). 'The purpose of this requirement is to prevent agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.' *Natural Resources Defense Council, Inc. v. Hodel,* 865 F.2d 288, 297 (D.C. Cir. 1988) (internal quotation marks omitted). 'Connected actions' include actions that are 'interdependent parts of a larger action and depend on the larger action for their justification.'' 40 C.F.R. § 1508.25(a)(1)(iii). "Petitioners claim that the Cove Point LNG export project is a 'connected action' that NEPA requires be considered together with the Allegheny Storage Project. In *Delaware Riverkeeper*, we held that the Commission unlawfully segmented its environmental review where four other pipeline projects were 'certainly 'connected actions' ' that, taken together, would result in 'a single pipeline,' that was 'linear and physically inter-dependent,' and contained 'no physical offshoots.' 753 F.3d at 1308, 1316. In addition, the other pipelines were under construction or pending review when the contested application was filed, the Commission's review of the projects was overlapping, and their cumulative effects were visited on the same environmental resources. We premised our decision requiring joint NEPA consideration on the unquestionable connectedness of the projects, the fact that the projects all were under consideration by the Commission at the same time, and the fact that the projects were financially interdependent. *Id*. at 1318. "The absence of all of those factors led us to reject an analogy to *Delaware Riverkeeper* in *Minisink*. There, as here, the petitioners argued that a project that the Commission found unrelated was nevertheless a 'connected action.' We rejected that argument and distinguished the connectedness and timing of the projects at issue in *Delaware Riverkeeper. Minisink Residents for Environmental Preservation and Safety v. F.E.R.C.,* 762 F.3d 97, 113 n. 11. (D.C. Cir. 2014). The same distinctions apply here. Unlike in *Delaware Riverkeeper*, the Commission in this case made clear that the Allegheny Storage Project and the Cove Point LNG terminal are unrelated, and that neither depends on the other for its justification. *See* 40 C.F.R. § 1508.25(a)(1)(iii). This is therefore not a case in which 'financially and functionally interdependent pipeline improvements were considered separately even though there was no apparent logic to where one project began and the other ended.' *Del. Riverkeeper*, 753 F.3d at 1318. The absence of evidence that would compel a finding of connectedness between the Allegheny Storage Project and the Cove Point LNG export terminal defeats Petitioners' challenge."

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***Kentucky Coal Ass'n v. Tennessee Valley Authority*, 804 F.3d 799 (6h Cir. 2015)**	TVA	**Agency prevailed.** **Issue(s):** significance determination, alternatives considered, connected actions This case involved an EA, which was found to be adequate. Coal industry association and members (collectively, Kentucky Coal) brought action against the Tennessee Valley Authority (TVA) alleging that the TVA failed to consider the environmental effects of a project to switch a power plant (the Paradise Plant) from coal to natural-gas generation, in violation of the National Environmental Policy Act (NEPA). Kentucky Coal maintained that the TVA acted arbitrarily by failing to "carefully consider" the effect on the environment of the Paradise decision through an environmental impact statement under the National Environmental Policy Act. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989); *see* 42 U.S.C. § 4332(2)(C). The agency has "considerable discretion" in determining whether an environmental assessment should lead to an impact statement. *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 580 (6th Cir.2014). And we review the decision not to prepare one under the "arbitrary and capricious" standard. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763, 124 S.Ct. 2204 (2004). **Holding:** The TVA acted within its discretion in preparing only an environmental assessment. Its 165–page assessment explored a wide range of environmental issues before concluding that switching to natural gas would not have a significant (negative) impact on the environment. The TVA adhered to the process laid out in the regulations and came to a reasoned conclusion, precluding us from setting it aside. The TVA took the requisite "hard look" at the effects of its proposed action. *Robertson*, 490 U.S. at 350, 109 S.Ct. 1835. Over the course of fifteen months, the TVA considered the natural-gas plant's potential impact on several areas, including air quality, climate change, surface water, floodplains, recreational areas, cultural and historic resources, socioeconomic and environmental justice, solid waste, groundwater, geology, biological resources, land use, farmland, transportation, hazardous waste, and noise pollution. For each of these topics, the TVA's assessment described the status quo and analyzed the consequences of retrofitting the units in comparison to switching to natural gas. The assessment also described the mitigation measures the TVA would take to address any possible environmental consequences. When considering the impact on air quality, to take one example, the assessment determined that switching to natural gas would have minor, temporary negative effects (due to construction of the new units), but that "the cumulative impact of the [switch to gas] would be positive." It did the same thing for eighteen other environmental issues. And it listed its interaction with

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		public participants, including state and federal officials and a variety of individuals who submitted comments. In the aftermath of this study, the TVA reasonably concluded that switching to gas would not have a significant impact on the environment. It found that the conversion would have a net positive impact in a number of areas, especially when compared to retrofitting the coal-fired units. Switching to gas for example would significantly reduce emissions, wastewater discharges, hazardous waste, transportation costs, and overall costs for energy production. Although there would be some negative impacts in areas like vegetation, these would be minor and could be mitigated by the measures identified in the assessment. The TVA permissibly concluded that any negative impacts did not rise to the level—"significant"—that would require an impact statement. *See Klein*, 753 F.3d at 584; 40 C.F.R. § 1508.27(a)-(b). All perspectives considered, the TVA "adequately studied the issue and [took] a hard look at the environmental consequences of its decision." *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006). As a matter of process and substance, the TVA did not act arbitrarily or capriciously in declining to undertake a full environmental impact statement. *See Klein*, 753 F.3d at 582 Kentucky coal also made four other NEPA counterarguments that the Ninth Circuit rejected. First, they contended that, because the TVA's regulations "normally ... require" an impact statement before building a major power-generating facility like this one, the TVA committed procedural error by not issuing one here. The TVA retains discretion to prepare only an assessment even when it normally would do otherwise as long as it takes the required close look at its actions. The Ninth Circuit held that because the fifteen-month, 165–page environmental assessment did just that, this regulation does not change the outcome. Second, the Kentucky Coal contended that the TVA ignored the effects of a necessary part of its plan: building a natural-gas pipeline. The Ninth Circuit disagreed and found that the TVA considered the cumulative impact of all "closely related" actions, including building a natural-gas pipeline to reach the newly configured plant. 40 C.F.R. § 1508.25(a)(1); *see Kleppe v. Sierra Club*, 427 U.S. 390, 410, 96 S.Ct. 2718 (1976). The assessment's scope "include[d] [the] potential natural gas pipeline corridors within which a gas pipeline(s) may be located by the gas supplier." Consistent with that scope, the assessment considered the pipeline's impacts in the nineteen environmental areas it studied. Even though the pipeline would disturb some vegetation, to use one example, the TVA concluded that it and the power plant together would have "no significant cumulative impacts" on vegetation. The eighteen other areas were no different, as they produced no significant cumulative impact on the environment. The Ninth Circuit also found that at the time of its assessment —"the earliest possible time" it could study the environmental effects of its actions, 40 C.F.R. § 1501.2 — the pipeline

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		route had not yet been approved. A different federal agency, the Federal Energy Regulatory Commission, approves pipeline routes. But Kentucky Coal cannot blame the TVA, which has "limited statutory authority" over the pipeline route. *See Pub. Citizen*, 541 U.S. at 770, 124 S.Ct. 2204. The TVA used the information it had at the time to fully consider the environmental impacts of the plant and the pipeline. Kentucky Coal accused the TVA of prejudging the switch to natural gas before completing its environmental study. An agency may have a preferred alternative so long as it does not "[l]imit the choice of reasonable alternatives" to pick the one it likes. 40 C.F.R. § 1506.1(a)(2); *see Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 206 (4th Cir. 2005). The TVA preferred switching to natural gas but did not limit its alternatives. It considered ten other feasible and reasonable options. The Court found that TVA could have picked the option that Kentucky Coal preferred (maintaining coal), but that does not mean that it could not pick the option that it preferred: switching to natural gas. *Cf. Klein*, 753 F.3d at 584. Fourth, Kentucky Coal argued that that the switch to natural gas will have devastating socioeconomic effects on the surrounding community—from "job loss and increased unemployment" to "potential outmigration of industry" and "higher poverty rates"—and contend that these potential effects required an environmental impact statement. The Ninth Circuit restated the rule that the regulations, for better or for worse, say that "economic or social effects are not intended by themselves to require preparation of an environmental impact statement." 40 C.F.R. § 1508.14. The National Environmental Policy Act is "not a national employment act," and its "[e]nvironmental goals and policies were never intended to reach social problems such as those presented here." *Breckinridge v. Rumsfeld*, 537 F.2d 864, 867 (6th Cir. 1976). The TVA at any rate did consider these and other socioeconomic effects and concluded that, while some negative effects may result (such as a 2% reduction in the county's workforce), they would not significantly affect the human environment. That decision was reasonable in light of the regulations and court precedent. Finally, the Ninth Circuit reject Kentucky Coal's argument that the retrofitting option would have been a much better policy choice, as it would save money, help the environment, and support the local economy. Once the agency has satisfied this obligation, "it need not [also] demonstrate to [our] satisfaction that the reasons for the new policy are better than the reasons for the old one." The TVA did not act arbitrarily in switching the Paradise plant to natural gas.