RECENT NEPA CASES (2016)

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ABSTRACT

This paper reviews substantive NEPA cases issued by federal courts in 2016. The implications of the decisions and relevance to NEPA practitioners is explained.

INTRODUCTION

In 2016, the U.S. Courts of Appeal issued 27 decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 27 cases involved seven different departments and agencies. Overall, the federal agencies prevailed in 21 of the cases, did not prevail in three cases, and did not prevail, in part, in three cases, with a total prevail rate of 83 percent. The U.S. Supreme Court issued no NEPA opinions in 2016; 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 – 2016, by circuit. Figure 1 is a map showing the states covered in each circuit court.

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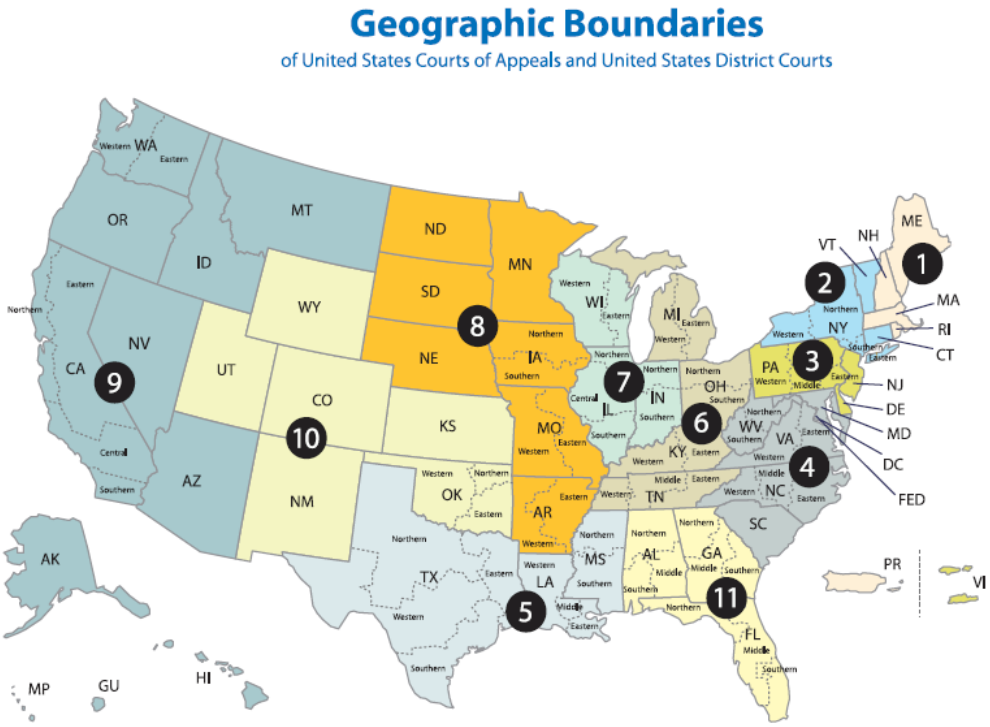
Table 1. Number of U.S. Courts of Appeal NEPA Cases, by year and by circuit

	U.S. Courts of Appeal Circuits												
	lst	**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**
2016				**2**		**1**	**1**		**14**	**1**	**1**	**7**	**27**
TOTAL	**9**	**6**	**5**	**11**	**6**	**11**	**5**	**5**	**120**	**27**	**6**	**27**	**238**
	3%	3%	2%	5%	3%	5%	2%	2%	50%	11%	3%	11%	100%

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



STATISTICS

Federal agencies prevailed in 83 percent of the NEPA cases brought before the U.S. Courts of Appeal. Since 2012, federal agencies have prevailed in NEPA challenges in increasingly large percentages.

The U.S. Department of Interior (Bureau of Indian Affairs [BIA], Bureau of Land Management [BLM], Bureau of Ocean Energy Management [BOEM], Bureau of Reclamation [BOR] and U.S. Fish and Wildlife Service [FWS]) came in first as the department involved in the largest number of NEPA cases in 2016 with eight cases.

Of those, BLM and FWS were involved in three cases each (including one case involving both agencies), with BIA, BOEM and BOR involved in one case each.

- BIA – 1 case (prevailed)
- BLM – 3 cases (co-defendant with the FWS in one case) (prevailed in 2 cases, did not prevail, in part, in 1 case)
- BOEM – 1 case (did not prevail)
- BOR – 1 case (did not prevail, in part)
- FWS – 3 cases (co-defendant with the BLM in one case) (prevailed in 1 case, did not prevail in 1 case, and did not prevail, in part, in 1 case)

The U.S. Department of Agriculture (USDA) came in second with six cases, and prevailed in all but one case. Five cases involved the United States Forest Service (USFS), including Klamath National Forest, and one case involved USFS and the Farm Service Agency (FSA).

The Department of Transportation (DOT) was involved in four cases, and prevailed in each. Two cases involved the Federal Highway Administration (FHWA) and one involved the Federal Transit Administration (FTA) and one involved the Federal Aviation Administration (FAA).

The U.S. Department of Defense (DoD) was involved in three cases: two Army Corps of Engineers (USACE) cases and one Department of the Navy (DON) case. The agencies prevailed in each case.

The U.S. Department of Energy (DOE), Bonneville Power Administration (BPA), was involved in two cases and prevailed in both.

Of the independent agencies, the Federal Energy Regulatory Commission (FERC) was involved in three cases and prevailed in each. The U.S. Nuclear Regulatory Commission (NRC) was involved in one case and prevailed.

Of the 27 substantive cases, one involved a categorical exclusion (CATEX), 10 involved environmental assessments (EA), and 16 involved environmental impact statements (EIS). One EA and two EISs were found to be inadequate; one other EA and two EISs were found to be inadequate on certain NEPA claims but adequate on other NEPA claims:

- *Public Employees for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016) (finding the EIS inadequate involving the agency's failure to conduct geological surveys on the seafloor, concurrent with a lack of geophysical data, to ensure support for wind turbines).
- *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016) (holding that in its EIS, the agency failed to consider a reasonable range of alternatives when it did not consider any other reasonable alternatives that would have taken fewer Indiana bats than the applicant's plan involving wind turbines).
- *Oregon Nat'l Desert Ass'n v. Jewell*, 840 F.3d 562 (9th Cir. 2016) (discussing that because the agency did not conduct winter surveys involving the sage grouse, in its EA, it failed to assess baseline conditions accurately at the project site. The Court rejected the argument that the agency did not address cross-population genetic connectivity because the issue was not raised in enough detail during the comment period).
- *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095 (9th Cir. 2016) (finding that the agency's analysis of air impacts in the FEIS was inadequate because the agency did not provide any support for its use of baseline values of zero for several air pollutants).
- *Klamath Siskiyou Wildlands Ctr. v. Grantham*, 642 Fed. Appx. 742 (9th Cir. 2016) (*not for publication*) (finding that the contents of the EA did not support a FONSI because it included no available quantifiable evidence—the purpose of the EA is to require the agency to seek or develop evidence to determine whether there is likely to be a significant environmental impact from the project).
- *Pacific Coast Fedn of Fishermen's Ass'ns v. U.S. Dep't of the Interior*, 655 Fed. Appx. 595 (9th Cir. 2016) (*not for publication*) (noting that agency's "no action" alternative in its EA, which assumed continued interim contract renewal, did not comply with NEPA; discussing that the agency did not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities and the agency did not adequately explain why it eliminated the alternative from detailed study).

Interesting conclusions from the 2016 cases:

- *Alternatives Considered:* Five of the cases involved challenges to the sufficiency of the alternatives considered:
    - *Protect our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (holding that the agency did not act unreasonably in dismissing the distributed-generation alternative when, in its EIS, it considered five action alternatives, and two no-action alternatives. The agency also briefly considered seven project design alternatives and three energy generation alternatives, including the distributed-generation alternative. The agency rejected the distributed-generation alternative because it would require 100,000 new rooftop solar units on private and commercial properties to match the energy generation from the original proposal.).
    - *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016) (discussing that in its EIS, the agency failed to consider a reasonable range of

alternatives when it did not consider any other alternatives that would have taken fewer Indiana bats than the applicant's plan involving wind turbines).

- *State of New York v. U.S. Nuclear Regulatory Cmm'n*, 824 F.3d 1012 (D.C. Cir. 2016) (noting that the Commission need not have considered the alternative of ceasing licensing in its General EIS, because the Commission will analyze that alternative later in time during site specific licensing proceedings).
- *Friends of Tahoe Access v. U.S. Dep't of Agriculture*, 641 Fed. Appx. 741 (9th Cir. 2016) *(not for publication)* (holding that agency considered a reasonable range of alternatives to implement the 2005 Travel Management Rule in the Tahoe National Forest; the agency engaged in a robust public process to develop six action alternatives that were consistent with the motorized travel).
- *Idaho Conservation League v. Bonneville Power Admin.*, No. 12-70338, 2016 WL 3409458, -- Fed. Appx. --- (9th Cir. June 21, 2016) *(not for publication)* (upholding, in a brief memorandum, an EA that considered a no-action alternative and preferred alternatives at length; the EA explained that two other alternatives did not merit extended consideration because they weren't feasible).

- *Assessment of Impacts:* Fourteen of the cases involved challenges to assessment of impacts, which involved challenges to baseline data, indirect effects and assessment methodologies or models. The courts tended to focus on the deference afforded to the agency when they upheld the impact assessment analysis.
  - *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095 (9th Cir. 2016) (upholding agency's use of two models involving big-horn sheep, the "risk of contact" model and the disease model, when the agency used top-rated model designers, peer-reviewed methodologies, reviewed the ground movements of the sheep, and clearly explained assumptions under which the model was based, including any limitations and certainties in the model. The Court also acknowledged the deference to the agency when undertaking technical analysis.).
  - *San Diego Broadway Complex Coal. v. U.S. Dep't of Def.*, 817 F.3d 653 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 597 (U.S. Dec. 12, 2016)(No. 16-503) (finding the risk of terrorist attack assessment adequate when the agency's EA clearly explained the Navy's Anti-Terrorism Force Protection requirements, and further identified and incorporated by reference the Unified Facilities Criteria specifications for the Broadway Complex facility. "[A]n agency . . . must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.").
  - *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 833 F.3d 1274 (11th Cir. 2016) (noting that in view of the deference afforded to agency action, "Riverkeeper faced an uphill swim." The Court upheld the agency's decision to issue a general nationwide permit, NWP 21, and to treat old and new activities differently under the two provisions of NWP 21. It found that the activities authorized under both provisions would result in minimal individual and cumulative impacts to the aquatic environment and that the Corps' decision-making was not arbitrary and capricious.)
  - *Protect our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (discussing that the agency adequately assessed impacts involving project specific

noise on birds at all life stages. The agency correctly relied on existing studies and scientific literature to assess nighttime flight routes. The Court deferred to the agency's expertise in analyzing effects of inaudible noise and found it took a "hard look" at the impacts on global warming).

- *Public Employees for Envt'l Resp. v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016) (requiring the agency to supplement its EIS with adequate geological studies to ensure the seafloor will be able to support wind turbines).
- *Center for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136 (9th Cir. 2016) (explaining that the agency's air quality analysis of the impacts of the Recreational Area Management Plan (RAMP) was adequate. The Court noted the analysis of the number of visitors recreating in the area and how they were recreating were both adequate, stating that "because the [agency's analysis] regarding visitation were supported by substantial evidence, they deserve deference.").
- *Oregon Nat'l Desert Ass'n v. Jewell*, 840 F.3d 562 (9th Cir. 2016) (holding that BLM erred in failing to assess baseline conditions involving the sage grouse at a wind energy development site).
- *Great Basin Res. Watch v. Bureau of Land Mgmt*., 844 F.3d 1095 (9th Cir. 2016) (discussing that the agency's analysis of air impacts in the FEIS was inadequate because the agency did not provide any support for its use of baseline values of zero for several air pollutants).
- *Japanese Village, LLC v. Federal Transit Admin.*, 843 F.3d 445 (9th Cir. 2016) (finding that agency provided adequate analysis with regard to construction related noise and vibration impacts, long term, operational and noise impacts, subsidence risk and parking impacts involving a light rail project in Los Angeles).
- *Sierra Club v. Federal Energy Regulatory Comm'n*, 827 F.3d 36 (D.C. Cir. 2016) (the "Freeport" LNG project in Texas) *& Sierra Club v. Federal Energy Regulatory Comm'n*, 827 F. 3d 59 (D.C. Cir. 2016) (the "Sabine Pass" LNG project in Louisiana) *(these are companion cases both published on June 28, 2016)* (rejecting, in both cases, the petitioners' claims that the Commission did not adequately analyze indirect effects, where petitioners argued that authorization of the LNG terminal improvement would lead to greater exports thereby increasing natural gas prices leading to greater domestic use of coal, noting that an agency need only study those indirect impacts that have a reasonably close causal relationship between the environmental effect and the alleged cause).
- *Earth Reports, Inc. v. Federal Energy Regulatory Cmm'n*, 828 F.3d 949 (D.C. Cir. 2016) (discussing that Commission did not have to address indirect effects of anticipated impacts of natural gas because the Department of Energy, not the Commission, has sole authority the license export of any natural gas; and rejecting argument that Commission should have used "social cost of carbon" tool when assessing greenhouse gas emissions. The D.C. Circuit also upheld the Commission's assessment of ballast water, impacts of maritime traffic on the North Atlantic Right Whale, and risk of impact of a catastrophic incident on public health as a result of the proposed LNG facility. In evaluation the agency's analysis, the Court stated "[a]s long as the agency's decision is fully informed and

well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment.").

- *State of New York v. U.S. Nuclear Regulatory Cmm'n,* 824 F.3d 1012 (D.C. Cir. 2016) (upholding Commission's analysis of impacts of continued storage of spent nuclear fuel, noting that "where the analysis is generic or site-by-site, it must be thorough and comprehensive" and that the court is "most deferential to the [agency's] technical judgments and predictions").
- *Klamath Siskiyou Wildlands Ctr. v. Grantham*, 642 Fed. Appx 742 (9th Cir. 2016) (*not for publication*) (finding that the contents of the EA did not support a FONSI because it included no available quantifiable evidence—the purpose of the EA is to require the agency to seek or develop evidence to determine whether there is likely to be a significant environmental impact from the project).
- *Idaho Conservation League v. Bonneville Power Admin.*, No. 12-70338, 2016 WL 3409458, -- Fed. Appx. --- (9th Cir. June 21, 2016) *(not for publication)* (upholding an EA, in a brief memorandum, finding baseline information was adequate to analyze the environmental impacts of flexible winter operations; discussing that the analysis of wildlife impacts is was not deficient agency took a "hard look" at extensive data regarding erosion and the flowering rush, and that agency adequately analyzed erosion impacts).

- *Cumulative Effects Assessment:* Seven of the cases involving substantive review of NEPA documents challenged whether the agency analyzed cumulative impacts sufficiently:
  - *Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402 (6th Cir. 2016) (explaining that, in the context of a categorical exclusion, the agency is not required to independently evaluate cumulative impacts because the categorical exclusion process already takes cumulative effects into account).
  - *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 833 F.3d 1274 (11th Cir. 2016) (noting that the agency has significant deference in its determination of whether the activities under its general nationwide permit, NWP 21(a), will result in "minimal and cumulative adverse effects." The agency emphasized that the district engineer, at the time of application, must determine that the activities will continue to result in minimal individual and adverse cumulative effects in the aquatic environment.).
  - *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095 (9th Cir. 2016) ("[The agency] did not provide sufficiently detailed information in its cumulative air impacts analysis. The [agency] made no attempt to quantify the cumulative air impacts of the [mining] Project together with the Ruby Hill Mine and vehicle emissions. Nor did the [agency] attempt to quantify or discuss in any detail the effects of other activities, such as oil and gas development, that are identified in the FEIS as potentially affecting air resources." The Court faulted the agency for using an erroneous baseline analysis, in providing no basis for a baseline value of zero for certain pollutants, thus making the cumulative impact assessment inadequate.).
  - *Sierra Club v. Federal Energy Regulatory Comm'n*, 827 F.3d 36 (D.C. Cir. 2016) (the "Freeport" LNG project in Texas) *& Sierra Club v. Federal Energy*

Regulatory Comm'n, 827 F. 3d 59 (D.C. Cir. 2016)(the "Sabine Pass" LNG project in Louisiana) *(these are companion cases both published on June 28, 2016)* (explaining that, in the Freeport LNG project, requiring the Commission to conduct a nationwide cumulative impacts assessment, "draws the NEPA circle too wide for the Commission. A NEPA cumulative-impact analysis need only consider the "effect of the current project along with any other past, present or likely future actions *in the same geographic area*" as the project under review." The Court did limit its language to the specific project at issue. In the Sabine Pass LNG project, the Court addressed petitioners' allegation that Commission should have considered the impacts of the 2014 Amendment alongside several other proposals to increase natural gas export capacity nationwide, some pending, some already approved but found the Commission was not on notice of Sierra Club's broader objections. The Court stated that the Commission did not fail to address the cumulative impacts of the 2014 Amendment and the Sabine Pass projects for largely the same reason stated in the Freeport LNG project.).

- *State of New York v. U.S. Nuclear Regulatory Cmm'n*, 824 F.3d 1012 (D.C. Cir. 2016) (analyzing the Commission's environmental review documentation, and noting that in light of no currently pending proposals for waste disposal before the Commission, that the Commission did not improperly segment its environmental impact analysis; finding that the Commission discussed the cumulative impacts adequately in its documentation).
- *Friends of Tahoe Access v. U.S. Dep't of Agric.*, 641 Fed. Appx. 741 (9th Cir. 2016) *(not for publication)* (finding that the agency did not act arbitrarily in limiting its analysis of the cumulative impacts of the Motorized Travel Management Project to the boundary of the Tahoe National Forest).

- *Mitigation.* Four of the cases involved allegations involving inadequate mitigation:
  - *Japanese Village, LLC v. Federal Transit Admin.*, 843 F.3d 445 (9th Cir. 2016) (finding that in response to Japanese Village's allegations, that the agencies analyzed and adopted additional mitigation measures for construction related noise and vibration after the FEIS was released for light rail project and that mitigation measures need not completely compensate for adverse impact, and noting that agencies' plan to mitigate subsidence was sufficient to allow a finding of effectiveness. The court considered Bonaventura's objections and found that the environmental impact analysis and mitigation proposed contained a reasonably through discussion of the impacts on access for emergency vehicles. The Court upheld the mitigation measures and an adaptive management plan, when the mitigation measures described how impacts will be monitored and planned responses. The Court discussed that the adaptive management plan would provide flexibility in responding to environmental impacts through a regime of continued monitoring and inspection.)
  - *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095 (9th Cir. 2016) (upholding agency's mitigation measures aimed at reducing the possible adverse environmental impacts of poor mine lake quality, because it was a reasonable approach given the relatively low probability and temporal remoteness of adverse impacts to ground water).

- *Oregon Nat'l Desert Ass'n v. Jewell*, 840 F.3d 562 (9th Cir. 2016) (finding that because the baseline analysis was inadequate, the impacts on the sage grouse for the project were not properly established, qualitatively or quantitatively, then the agency could not determine which impacts to effectively mitigate).
- *Protect our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (holding that the mitigation measures, including the 85-page protection plan, provided ample detail and adequate baseline data for the agency to accurate assess impacts; the court explained that the inclusion of an adaptive management plan, among other mitigation measures, provide flexibility in responding to environmental impacts through a regime of continued monitoring and inspection).

- *Duty to Supplement*: Four of the cases involved challenges to the agency's duty to supplement:
  - *Idaho Wool Growers Assoc. v. Vilsack*, 816 F.3d 1095 (9th Cir. 2016) (explaining that agency did not have a duty to supplement when its FEIS: (1) discussed the study at issue, the Lawrence study, in unpublished form multiple times in its FEIS, (2) the study bolstered the agency's decision by confirming that pneumonia linked bacteria were transmitted from domestic to bighorn sheep, and that the transmitted bacteria likely caused pneumonia that killed the bighorns in the study, and (3) the study confirmed the risk of bacteria transmission and reaffirmed the scientific consensus regarding the risks domestic sheep present to bighorn sheep).
  - *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068 (7th Cir. 2016) (finding that a 2013 article in a scholarly journal, which detailed the impact of White-Nose Syndrome on the Indiana bat, only discussed the risks of the disease in general, and did not constitute a substantial change requiring a supplemental EIS).
  - *City of Mukilteo v. U.S. Dept. of Transp*., 815 F.3d 632 (9th Cir. 2016) (stating that the FAA did not need to supplement its 2012 decision (an EA involving environmental review of commercial passenger service) because any additional airline that wished to fly out of Paine Field would need to request access from the FAA and an amendment to their Part 119 Specifications, triggering another round of environmental assessment).
  - *Oregon Wild v. Connaughton*, No. 14-35251, 2016 WL 6092397, -- Fed. Appx. -- (9th Cir. Oct. 19, 2016) *(not for publication)* (upholding an EIS for expansion of a ski area in Oregon, and finding the Agency took a "hard look" at the new information and reasonably determined that no supplemental EIS was required).

Each of the 2016 NEPA cases, organized by federal agency, is summarized below. Unpublished cases are noted. Although such cases may not have precedential value depending on the court, they are of value to NEPA practitioners.

2016 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
U.S. Department of Agriculture		
***Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095 (9th Cir. 2016)**	USFS	**Agency prevailed**. **Issues:** Consultation with agencies with special expertise, supplementation **Facts:** USFS prepared a Final Supplemental Environmental Impact Statement (FSEIS) related to the potential for disease transmission to immunologically vulnerable bighorn sheep as a result of domestic sheep grazing in the Payette National Forest. In its 2010 Record of Decision (ROD), USFS concluded that there was a significant risk of fatal disease to the small and insular populations of bighorn sheep in the Payette and decided to reduce domestic sheep grazing in the forest by approximately 70% in order to protect bighorn sheep against risk of disease transmission from domestic sheep. The Idaho Wool Growers Association, other national trade associations, and affected ranchers brought suit for declaratory and injunctive relief, challenging the adequacy of the FSEIS and ROD under NEPA. District court entered summary judgment in favor of the USFS; the court of appeals affirmed. **Decision:** The USFS error, if any, in failing to consult with the Agricultural Research Service (ARS) (an agency within USDA) when making decision to reduce domestic sheep grazing was harmless. "The pivotal question is whether ARS has 'special expertise' concerning one significant aspect of the proposed decision, the mechanics of pathogen transmission in domestic sheep. Wool Growers argues that it does . . . The Forest Service argues, in response, that it had no duty to consult with ARS because that agency has no expertise in wildlife management. Although ARS's expertise does center on domestic, not wild, animals, the development within and movement of pathogens in domestic sheep is of some relevance to concerns regarding disease transmission to bighorn sheep. The Forest Service's assessment of the pertinence of that expertise may be too narrow an interpretation of its consultation duty under NEPA. And the language establishing NEPA's consultation requirement is expansive. It mandates consultation with any federal agency that has "special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(c); s*ee also* 40 C.F.R. § 1503.1(a)(1). Further, *Warm Springs Dam Task Force v. Gribble* suggests that for the consultation requirement to apply, the particular expertise of an agency does not have to encompass the proposed project as a whole or the issue the proposed project was designed to address. Rather, the expertise need relate only to one of the project's anticipated environmental effects . . . In the end, we need not resolve in this case the precise parameters of the consultation requirement, or whether it extended to ARS on the record before us. Any violation of the consultation duty that occurred here, we are persuaded, was harmless." The court specifically noted the USFS' consideration of comments from an ARS scientist and comments by other scientists regarding the effect of stressors on bighorn sheep disease and uncertainties regarding disease transmission. As a result, the failure to

2016 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		consult with ARS was not material because USFS considered the information that ARS would have provided if such a consultation occurred. USFS did not act arbitrarily or capriciously or abuse its discretion by declining to supplement the FSEIS in light of the publication of a 2010 study. "Wool Growers contends that publication of the Lawrence study in 2010, after the FSEIS issued, triggered the Forest Service's duty to supplement. But: (1) the Forest Service cited and discussed the study, in unpublished form, numerous times in the FSEIS; (2) the study bolstered the Forest Service's decision by confirming that pneumonia-linked bacteria were transmitted from domestic to bighorn sheep, and that the transmitted bacteria likely caused the pneumonia that killed the bighorns in the study; and (3) the study, while confirming bacterial transmission between the species in a manner not yet definitively proven, reaffirmed the scientific consensus regarding the risk domestic sheep present to bighorn sheep, as discussed in the FSEIS and ROD." The USFS' use of core herd home range analysis in its risk of contact model to map home ranges was not arbitrary and capricious. "Wool Growers' final challenge is to the modeling the Forest Service used to analyze bighorn sheep home ranges and movement, and the potential impacts of various management alternatives . . . We reject Wool Growers' argument. The Forest Service is owed greater-than-average deference as it relates to its choice of technical methodologies. Also, as the methodologies used to construct the risk of contact model were peer-reviewed and used successfully elsewhere, it was not unreasonable for the Forest Service to rely on the model, adjusted to fit local circumstances in the Payette. The model was reliable as a predictor of actual movements because it was predicated on data depicting actual bighorn sheep movements. Given the model's Payette data-based origin, the Forest Service could reasonably assume that its predictions were sufficiently reliable to satisfy NEPA. Ultimately, the Forest Service used top-rate model designers; relied on peer-reviewed methodologies applied by other bighorn researchers addressing similar issues; and incorporated on-the-ground data of bighorn sheep movements within the Payette. Given the foregoing, and in light of the deference owed to the agency when undertaking technical analysis within its purview, the Forest Service's reliance on the risk of contact model was not arbitrary, capricious, or an abuse of discretion."
***Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402 (6th Cir. 2016)**	USFS	**Agency prevailed**. **Issues:** Use of categorical exclusion, extraordinary circumstances, cumulative impacts **Facts:** Environmental organization alleging that the USFS violated NEPA by relying on a categorical exclusion instead of preparing an EA or an EIS for the renewal of a special use permit (SUP), which allowed an energy company (Enbridge) to continue operating an oil pipeline which ran through a national forest. Plaintiffs argued that the reissuance of

2016 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Enbridge's permit fell outside of the plain language of the categorical exclusion (CE-15), and that extraordinary circumstances' applied such that an EA or EIS was required even if the action might normally be excluded from documentation. The district court granted summary judgment for defendants; the court of appeals affirmed. **Decision:** The USFS appropriately found that the reissuance of Enbridge's SUP fell within a categorical exclusion and thus the agency was not required to prepare an EIS or an EA. Although plaintiffs argued that Enbridge (formerly Lakehead Pipeline Company) had increased the scope and intensity of authorized activities, the court noted that the USFS does not and never has regulated the flow of oil inside the pipeline. Accordingly, Enbridge has not varied the scope or intensity of authorized activities. Further, the court found that CE-15 applies to "issuance of a new special use authorization . . . to replace an existing or expired special use authorization," and that Enbridge had applied for a renewal prior to the expiration of the original 1992 permit. Finally, plaintiffs were incorrect in asserting that the new permit was issued to a new company. Rather, the 1992 permit was issued to Lakehead, but the USFS amended the 1992 permit in 2002 when Lakehead changed its name to Enbridge. Thus, plaintiffs' arguments that the 2015 permit is a brand-new permit to a new permittee are without merit. With respect to whether extraordinary circumstances existed such that a categorical exclusion was inappropriate, plaintiffs argued that the project may impact an endangered species, Kirtland's warbler. Even if a proposed agency action would normally fall within a categorical exclusion, the USFS is required to consider whether "extraordinary circumstances related to the proposed action" preclude the use of the categorical exclusion (36 C.F.R. § 220.6(a)). To make this determination, USFS regulations require the agency to consider certain "[r]esource conditions," including whether there are "[f]ederally listed threatened or endangered species" in the area. 36 C.F.R. § 220.6(b)(1)(i). However, the "mere presence" of an endangered species does not preclude the use of a categorical exclusion (36 C.F.R. § 220.6(b)(2)). Rather, the USFS must consider whether there is "a cause-effect relationship between a proposed action" and the species, and if so, "the degree of the potential effect" of the agency action on the species. Although it is undisputed that Kirtland's warbler, an endangered songbird, is "known to occur" in the area of national forest where the pipeline is located, the USFS's decision memo on the 2015 permit includes a biologist's report that unambiguously concludes that "the Enbridge Special Use Authorization would have no effect on Kirtland's warbler." Accordingly, plaintiffs are not entitled to relief on the basis of this argument. In addition, the court found, contrary to plaintiffs' claims, that the USFS was not required to assess the cumulative impacts of its actions prior to applying the categorical exclusion because that requirement applies to the scope of EISs (40 C.F.R. § 1508.25(a)). "Because a categorical exclusion defines a type of agency action that has no cumulative significant effect

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CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		on the environment, courts have 'conclude [d] that section 1508.25's requirements do not apply to [an agency's] categorical exclusion analysis.' *See, e.g., Ctr. for Biological Diversity v. Salazar*, 706 F.3d1085, 1097 (9th Cir. 2014); *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006). Rather, in order to comply with NEPA, the agency must determine whether a CE applies and whether an extraordinary circumstance exists that precludes the use of a CE; the agency is not required to independently evaluate cumulative impacts because this process already takes cumulative impacts into account. *See Ctr. for Biological Diversity*, 706 F.3d at 1097; *Utah Envtl. Cong*., 443 F.3d at 741–42." Similarly, the USFS need not independently consider the significance factors set forth in 40 C.F.R. § 1508.27(b) in determining whether an EIS is required because a categorical exclusion is defined as a category of agency action that has no significant effect on the human environment. 40 C.F.R. § 1508.4.
***Cure Land, LLC v. Vilsack,* 833 F.3d 1223 (10th Cir. 2016)**	USDA/FSA	**Agency prevailed.** **Issue(s):** Ability to issue a partial decision in a FONSI **Facts:** This case concerns a rural water conservation program administered by USDA and USDA's Farm Service Agency (FSA) (collectively referred to as "the agency"). Plaintiff cropland owners contend that the agency's handling of a proposed amendment to the conservation program violated NEPA. Under the Colorado Republican River Conservation Reserve Enhancement Program, enrolled cropland owners receive payments in exchange for committing to cease irrigation of their land. By removing marginal cropland from agricultural production, the program aims to achieve various local environmental benefits, including conserving groundwater, improving surface water quality, controlling erosion, and protecting wildlife. The conservation program is implemented and funded by the FSA and USDA in partnership with local and state entities, including the Republican River Water Conservation District. The program originally authorized enrollment of up to 35,000 acres of cropland throughout the northeastern corner of Colorado. To participate, landowners such as Cure Land that seek compensation for ceasing groundwater irrigation are required to cancel their well permits, seal their wells, and implement practices intended to restore their land to its natural state. Landowners who retire wells adjacent to either of two river branches in the Republican River basin deemed critical for improving water quality and wildlife habitat receive extra incentive payments in addition to the base pay rate. In 2007, the District proposed an amendment to the conservation program to expand the conservation program by increasing the enrollment area to 55,000 acres, adding two participating counties, increasing program funding, and authorizing incentive payments for land adjacent to a third critical river branch. In addition, the amendment would create a so-called "target zone" within the original program boundaries. In that zone, different rules would apply: (1) although the zone is not adjacent to a critical river branch, landowners would be entitled to extra incentive payments for enrolled acres; and (2) rather

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		than retiring the wells on those acres, landowners could instead participate in the program by conveying their groundwater rights to the District, which would use the water to help satisfy Colorado's obligations under the Republican River Compact Compliance Agreement. Accordingly, in 2008, the District preemptively purchased groundwater rights from the predominant landowner in the target zone, which is Cure Land. The District also began construction (since completed) on the pipeline. Although the agency initially expressed concern over whether the target zone would serve the conservation program's environmental goals, in 2009 the agency notified the District that it generally supported the amendment as a whole and began preparing a supplemental EA for the program amendment as required by NEPA. While preparing the EA, the agency encountered public opposition to the target zone including formal comments on the circulated draft EA. Local citizens and nearby water districts objected to the target zone because they believed it would inure solely to the benefit of Cure Land, who appeared poised to obtain a windfall by receiving program payments for ceasing to use water that it had already sold to the District for a large sum. Moreover, because the "conserved" water would not contribute to replenishment of the overdrawn aquifer underlying the Republican River basin, but rather would be pumped to neighboring states, opposing parties doubted that any local environmental or economic benefits would be realized. In November 2010, the agency published its supplemental EA for the proposed amendment and concluded that the proposed amendment would have no significant negative environmental impacts; instead, the resulting surface and groundwater savings would have overall beneficial long term effects on water resources, wildlife, and wildlife habitat in the region. The EA acknowledged the public's input regarding the alleged inequity and inefficacy of the target zone, but concluded that it raised issues beyond the scope of the assessment's environmental inquiry. Following the issuance of the supplemental EA, the agency delayed issuing a formal FONSI while it considered how to handle the public opposition to the target zone. Finally, in April 2012, after considering various options, the agency issued a FONSI that applied only to the proposed amendment without the target zone. The parties agree that the target zone component of the proposed amendment cannot proceed unless it is authorized by a FONSI. Cure Land expresses the concern that, without target zone eligibility, the cropland on which Cure Land sold groundwater rights to the District cannot be enrolled in the conservation program. With the NEPA process resolved against its interests, Cure Land brought this suit, contending that the agency's decision not to include the target zone in the FONSI violated NEPA. The district court upheld agency's actions, and the court of appeals affirmed. **Decision:** "Cure Land's primary contention is that the FONSI contradicts

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		the EA's findings concerning the environmental impacts of the target zone, such that the agency acted arbitrarily and capriciously in failing to explain that inconsistency. It is axiomatic that, if the FONSI was materially different from or contradictory to the underlying EA's findings, the agency would need to provide a "reasoned explanation" for the difference . . . We disagree, however, with Cure Land's interpretation of the FONSI. Because we conclude that the FONSI is, in fact, consistent with the EA, the foregoing concerns are not implicated." "We defer to the agency's permissible interpretation of its own language. A presumption of validity attaches to the agency's action, *Richardson v. Bureau of Land Mgm't*, 565 F.3d 683, 705 (10th Cir. 2013), and we owe at least some deference to the agency's interpretation of its own document. *See Citizens' Committee to Save our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) ("Our review is highly deferential."). Even if we did not, it is pellucid that removal of the target zone was not, in fact, necessary to avoid significant negative environmental impacts from the amendment . . . Because we find that the FONSI's determination is not materially different from or contradictory to the EA's factual findings, the agency was not arbitrary and capricious for failing to explain its removal of the target zone component in greater detail. "Cure Land further contends that the agency's decision and analysis were based on improper considerations. Specifically, Cure Land argues that the agency removed the target zone out of bias, in subjective bad faith, and/or in response to political pressure. Those assertions find no support in the record . . . Agencies "are not required to elevate environmental concerns over other valid concerns." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162-63 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003); *see also Robertson v. Methow Valley Citizens Counsel*, 490 U.S. 332, 350, 109 S. Ct. 1835 (U.S. 1989) ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."). "So long as the record demonstrates that the agencies in question followed the NEPA procedures . . . the court will not second-guess the wisdom of the ultimate decision." *Utahns for Better Transp.*, 305 F.3d at 1163; *see Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1092 (10th Cir. 2004) (holding that an agency "was not required to select the preferred option indicated in the final [environmental impact statement]" when the record showed that public support for the non-preferred alternative was higher)." "Cure Land does not contend that the agency failed to take a "hard look," *Utahns*, 305 F.3d at 1163, at the amendment's impacts on the natural environment, and has failed to show that the agency's environmental analysis was otherwise flawed. Because NEPA's procedural requirements are met, our inquiry ends here. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228, 100 S. Ct. 497 (1980) ("[T]here is no doubt that [the agency] considered the environmental consequences of

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		its decision .... NEPA requires no more.")." "Finally, Cure Land contends the agency violated NEPA's notice and comment requirements because it did not present the amendment without the target zone as a separate alternative in the EA…. The record shows the public was given ample opportunity to comment on all components of the proposed amendment. The record contains a draft EA made available to the public discussing each component of the proposed amendment, explanations of the public meetings and the corresponding thirty-day comment period made available to the public and a copy of the EA responding to each public comment. "[N]otice was presumably sufficient since the comments themselves brought the issue [of removing the target zone] up." *WildEarth Guardians*, 784 F.3d 677, 699 (10th Cir. 2015). The agency "acted well within the confines of [its] substantial discretion" when it approved all but one component of the program expansion on which it had sought public comment. *Id.; see Flowers*, 359 F.3d at 1257, 1259 (10th Cir. 2004) (upholding a FONSI where the public had not had an opportunity to comment on the alternatives considered by the agency)."
***Friends of Tahoe Access v. U.S. Dep't of Agric.,* 641 Fed. Appx. 741 (9th Cir. 2016)** (not for publication)	USFS	**Agency prevailed.** **Issues:** Alternatives, geographical boundaries of cumulative effects analysis **Facts**: Plaintiffs were groups of motor sports enthusiasts who challenge the adequacy of a USFS EIS on the Tahoe Motorized Travel Management Project. Plaintiffs claimed that the USFS violated NEPA when it evaluated the environmental impacts of permitting or prohibiting motor vehicle use on 869 miles of "user-created" roads and trails in the Tahoe National Forest. The term "user-created" refers to those roads and trails that visitors to the Forest created over time by driving vehicles off of the agency-maintained system of roads and trails. **Decision**: The district court granted summary judgment in favor of the USFS and the court of appeals affirmed. • "The Tahoe Motorized Travel Management Project implemented the Department of Agriculture's 2005 Travel Management Rule, which provided for a nationwide overhaul of off-road vehicle management in America's National Forests….The Rule required the Forest Service to draft a new map of roads, trails, and other areas in each National Forest that the agency designated as open for motorized travel, and to prohibit the public from possessing or operating a motor vehicle "on National Forest System lands . . . other than in accordance with those designations," including on any existing user-created routes not selected for inclusion in the Forest Service's official transportation network . . . Because the Forest Service's decision to regulate motor vehicle use in the National Forests stands to have a significant impact on "the quality of the human environment," NEPA obligated the agency to prepare a detailed Environmental Impact Statement ("EIS") in order to assess the potential

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		environmental effects of various alternative proposals prior to settling on a course of action . . . Accordingly, the Forest Service prepared an EIS for the Tahoe Motorized Travel Management Project to assist the agency in determining which, if any, of the 869 miles of user-created routes in the Tahoe National Forest would be included in its final list of authorized trails and roads. In 2010, the Forest Service issued a final Rule [sic] of Decision designating approximately 62 miles of user-created roads and trails in the Tahoe National Forest into the agency's official transportation system, and closing the remainder of user-created roads and trails to future motor vehicle use . . . [Plaintiffs] subsequently brought suit alleging a variety of procedural defects arising out of the Forest Service's NEPA analysis that led to its decision not to designate more than 62 miles of user-created roads and trails." • "We hold that the Forest Service considered a reasonable range of alternatives to implement the 2005 Travel Management Rule in the Tahoe National Forest and fully considered the environmental impacts of those alternatives; this is all that NEPA requires . . . The record demonstrates that the Forest Service engaged in a robust public process to develop six action alternatives that were consistent with the Motorized Travel Management Project's stated purpose and need . . . The Forest Service also evaluated the environmental consequences of continuing to allow motor vehicle use on all 869 miles of user-created roads and trails through its consideration of a "no-action alternative." The Forest Service's assessment of the environmental impacts of each alternative was detailed and thorough. Plaintiffs have failed to show how considering additional alternatives would have fostered more informed decision making than the alternatives that the Forest Service analyzed and rejected based on the adverse environmental impacts it perceived. *See California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (explaining that an agency is not obligated to consider an alternative unless it would have aided the agency in making a 'reasoned choice')." • "We further find that the Forest Service did not act arbitrarily in limiting its analysis of the cumulative impacts of the Motorized Travel Management Project to the boundary of the Tahoe National Forest. The Tahoe National Forest was the designated project area, and we have affirmed that an agency's decision to use a project's boundaries as the geographic scope of its cumulative effects analysis is reasonable, even where a project may have cumulative impacts in a broader geographic area. *See Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996) (holding that the Forest Service did not have to consider cumulative impacts on animal populations adjacent to, but outside, of a project area); *see also Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 960 (9th Cir. 2003) ("It was not unreasonable for the Forest Service to limit its analysis to the [geographic unit] in which the . . . Project would take place.")."
Siskiyou Wildlands Ctr. v. Grantham*, 642 Fed. Appx 742 (9th Cir. 2016*) (not for publication)	USFS/ Klamath National Forest	**Agency did not prevail.** **Issues:** Inadequate analysis **Facts**: The Klamath National Forest (KNF) prepared an EA as part of a

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		project reauthorizing cattle grazing on certain federal lands. The Forest subsequently concluded that it was not required to prepare an EIS and issued a FONSI. Plaintiffs, KS Wild, brought suit alleging that the KNF's actions violated NEPA and the National Forest Management Act (NFMA). **Decision**: The district court granted summary judgment to the KNF. The 9th Circuit disagreed and overturned the district court's decision. • "[T]he KNF identified a single "significant issue" associated with the grazing project: cattle drifting outside of their designated allotment into the adjacent Rogue River Siskiyou National Forest ("RRSNF"). But while the EA explained that the KNF's proposed action was supposed to result in little to no cattle drift within a few years of implementation, it provided essentially no information about the environmental impact of the drifting cattle in the RRSNF in the past or during the period covered by the proposed action. Given this omission, we cannot say that the KNF took the "'hard look' at the potential environmental consequences of the proposed action" required by NEPA. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004)." • "The Forest argues that there is no available quantitative evidence of the impact of drifting cattle on the RRSNF. But that is exactly the point—the purpose of the EA is to require the agency to seek or develop evidence to determine whether there is likely to be a significant environmental impact from the project. Nor can the RRSNF's failure to provide the relevant evidence excuse the KNF's omission; under NEPA, the agency preparing the EA must demonstrate that its proposed action will not have a significant environmental impact. Moreover, while the KNF lacked quantitative evidence of the past or likely future impact of drifting cattle, the record was replete with anecdotal and photographic evidence suggesting impact from drifting cattle, which should have been discussed." • "We therefore reverse the judgment of the district court and require the KNF to prepare a new EA or to prepare an EIS, as it deems appropriate. On remand, the KNF must develop sufficient evidence to determine the likely environmental impact of its plan and discuss the available evidence of the impact of drifting cattle—considered alone and cumulatively with other actions, such as grazing by RRSNF cattle—on the RRSNF and its unique ecological characteristics." The court did not require the KNF to produce an EIS unless it determines that cattle drift could have a significant environmental impact.
***Oregon Wild v. Connaughton*, No. 14-35251, 2016 WL 6092397, -- Fed. Appx. --- (9th Cir. Oct. 19, 2016)** (not for publication)	USFS	**Agency prevailed.** **Issues:** Supplementation **Facts**: U.S. Court of Appeals for the 9th Circuit upheld a USFS decision not to prepare a supplemental EIS for the expansion of a ski area in Oregon. Environmental groups had identified five categories of new information since the 2004 preparation of an EIS that they contended warranted supplemental review under NEPA. The new information included ten documents with information on climate change (eight climate change studies and two internal climate change guidance documents).

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		Decision: The Ninth Circuit said it owed its "highest" deference to the USFS' explanations regarding why the climate change documents were either irrelevant or did not otherwise provide significant new information area that necessitated supplemental NEPA review. • "'Whether new information requires supplemental analysis is a classic example of a factual dispute the resolution of which implicates substantial agency expertise,'" *citing Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012). • "Deference towards the agency 'is highest when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise,'" *citing League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). • The USFS took a "hard look" at the new information and reasonably determined that no supplemental EIS was required. The USFS therefore was not arbitrary or capricious in failing to prepare a supplemental NEPA analysis.
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***San Diego Broadway Complex Coal. v. U.S. Dep't of Def.*, 817 F.3d 653 (9th Cir. 2016*, cert. denied*, 137 S. Ct. 597 (U.S. Dec. 12, 2016) (No. 16-503).**	DOD/DON	**Agency prevailed.** **Issues:** Impact analysis involving a risk of terrorist attack **Facts:** The San Diego Broadway Complex Coalition (the "Coalition"), a local community group, challenged the finding of no significant impact (FONSI) for an Environmental Assessment (EA) involving the redevelopment of a fifteen acre site for Navy administrative facilities on federally owned land in a public private venture partnership (PPV) in downtown San Diego adjacent to the waterfront. Congress enacted legislation in 1986 that authorized the Secretary of the Navy to pursue a public-private venture to implement the co-location concept at the Navy Broadway Complex site. 1987, the Navy and the City of San Diego executed a Memorandum of Understanding to establish the terms of potential future development on the Navy Broadway Complex site. The Navy issued an Environmental Impact Statement in 1990 and Record of Decision in 1991. The Record of Decision memorialized the Navy's decision to redevelop the Navy Broadway Complex site and identified essential uses for the site. The Navy Broadway Complex would expand from 861,000 square feet of Navy office, warehouse, and industrial space to 3.25 million square feet of mixed military and civilian facilities, including hotels, retail, and entertainment spaces. The Navy and the City of San Diego executed a development agreement implementing the preferred alternative from the 1990 EIS. In 1992, the Navy took steps to implement the Development Agreement, but due to the economy the development efforts stalled. To facilitate implementation of the Development Agreement, and in consideration of the amount of time that had passed since the 1990 EIS, the Navy completed an EA under NEPA in 2006 that analyzed the environmental impacts associated with

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		implementing the 1992 Development Agreement (the "2006 EA"). In January 2007, the Coalition, a citizens' group purporting to represent San Diego residents, filed a lawsuit against several federal Department of Defense defendants (referred to as the "Navy") alleging, among other claims, that the Navy failed to comply with NEPA's public notice and participation provisions prior to issuing the 2006 EA and 2006 Finding of No Significant Impact. The district court agreed that the administrative record was insufficient to demonstrate that the Navy gave proper public notice of its intent to prepare the 2006 EA and Finding of No Significant Impact. The district court granted partial summary judgment in favor of the Coalition on the public participation allegations only, and remanded the case to the agency, instructing the Navy to address the insufficiency. The Navy produced a new draft EA on September 17, 2008 and widely publicized the draft EA's public availability. Three public hearings were held in September and October 2008. In March 2009, the Navy issued a finalized EA ("2009 EA"). The 2009 EA incorporated updated conditions in San Diego and examined the Navy Broadway Complex's potential as a terrorism target. The Navy found that "[b]ased on current threat reporting, there is no known specific threat targeting" the Navy Broadway Complex. The 2009 EA concluded that the risk of terrorism was "too speculative, remote, and removed from the environmental effects of the proposed action to merit further analysis under NEPA." The Navy altered the final 2009 EA to include its response to public comments about terrorism in the draft EA. After finalizing the 2009 EA, the Navy issued a 2009 Finding of No Significant Impact, concluding that no changed or unexplored circumstances required a new or Supplemental EIS before the Navy proceeded with redevelopment of the Navy Broadway Complex On January 25, 2011, the Coalition again filed suit in federal district court challenging the redevelopment of the Navy Broadway Complex on several grounds. One such ground was the Navy's alleged failure to prepare a Supplemental EIS that adequately examined the potential environmental impact of a terrorist attack at the Navy Broadway Complex. The District Court granted final judgment on all claims on the Navy's behalf. With regard to the potential for a terrorist attack, the district court held that since "the same naval administrative services that are currently located on the site will remain after construction of the project . . . the potential terrorist threat remains essentially the same, except that the administrative services will be located in modern, improved, and higher security facilities." The Coalition appealed and argued that the district court erred in granting summary judgment in favor of the Federal Defendants, insisting that the Navy violated the National Environmental Policy Act ("NEPA") by failing to produce a Supplemental Environmental Impact Statement that addressed a potential terrorist attack at the redeveloped military and civilian facilities near the San Diego waterfront. The Ninth Circuit affirmed. **Decision:** First, the Ninth Circuit consideration whether potential terrorism must be considered under NEPA. *In San Luis Obispo Mothers for*

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		Peace v. Nuclear Regulatory Commission, the Nuclear Regulatory Commission ("NRC") argued that the construction of an installation for the on-site storage of spent nuclear fuel rods did not require the NRC "to consider the possibility of terrorist attacks" for the purposes of NEPA. 449 F.3d 1016, 1035 (9th Cir. 2006) ("*Mothers for Peace I* "). This court held that while "security considerations may permit or require modification of some . . . NEPA procedures," such modifications do not absolve an agency for its legal duty to fulfill NEPA's requirements, such as public contribution to the NRC's decision-making process. *Id*. at 1034. In its briefs, the Navy argued that the holding in *Mothers for Peace I* that terrorism must be considered under NEPA is inapplicable to the redevelopment of the Navy Broadway Complex. The Ninth Circuit discussed that although the Navy facilities were not the same as a nuclear plant, the facilities still held major military commands coordinating "base operating support functions for operating forces throughout the region," as well as providing "logistics, business, and support services to . . . commands of the Navy[,] Coast Guard . . . and other joint and allied forces." The Court looked to the language in the 2009 EA, where the EA states "a general threat exists in the U.S. from al Qa'ida and affiliated groups and individuals." The Court, in consideration of the government's assessed general risk of terrorism, the location of the redevelopment project, and the military commands to be housed in the Navy Broadway Complex, found that the Navy must address the risk of a possible terrorist attack in the NEPA analysis. The Court then reviewed whether the level of analysis provided by the Navy in the 2009 EA was sufficient to satisfy NEPA's requirements under *Mothers for Peace I*. After issuing a draft EA in September of 2008, the Navy held three public meetings and received numerous public comments related to the threat of terrorism. The Navy responded to the comments and modified the 2009 EA to address the public's concerns regarding terrorism. Such constructive exchanges with the public demonstrate the "informed public participation" that NEPA requires. *See Ctr. for Biological Diversity v. Nat'l Traffic Safety Admin.*, 538 F.3d 1192, 1194 (9th Cir. 2008); *see also Save the Peaks Coal. v. Forest Serv.*, 669 F.3d 1025, 1037 n. 5 (9th Cir.2012) ("[C]ourts may consider responses to comments for confirmation that an agency has taken a "hard look" at an issue."). The Court then looked to an assessment by the Navy Criminal Investigative Service (NCIS), which determined that "no known specific threat of a terrorist attack" existed. The Court found that the Navy erred by including the NCIS assessment in its EA, stating that the risks associated with terrorism are constantly in flux; it discussed that whether or not the intelligence community is aware of a specific threat to a facility at the time a NEPA analysis is conducted should have no bearing on whether to consider the impacts of an attack. The Court found, however, that the 2009 EA clearly explained the Navy's Anti–Terrorism Force Protection requirements and clarified that those requirements "would apply to all onsite buildings occupied either wholly or partially by [Department of Defense] personnel," provided such personnel meet a minimum occupancy rate in the building. The 2009 EA also incorporates by

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		reference the Unified Facilities Criteria specifications for the Department of Defense's Minimum Antiterrorism Standards for Buildings, UFC 4–010–01 ("Unified Facilities Criteria"). The Unified Facilities Criteria specifications are based on specific threats based on an examination of plausible terrorist attack scenarios including attacks by explosives, vehicle bombs, waterborne vessel bombs, placed bombs, mail bombs, indirect fire, direct fire, as well as chemical, biological, and radiological weapons. The 2009 EA stated that antiterrorism building standards would "reduce the potential damage that could be inflicted by terrorist activity." And the complex would be limited to administrative functions and would not remain operational if subject to a terrorist attack. The Navy further concluded that the complex "would not jeopardize the national security of a military installation or the safety of our citizens" by virtue to its proximity to non-government buildings. The Court found that the Navy's 2009 EA identifies and incorporates by reference the Unified Facilities Criteria, which was made available to the public and explains the minimum antiterrorism force protection standards for public consideration. Further, "informed public participation" that included considerations of those antiterrorism force protection standards at the Navy Broadway Complex is evident in the record, in the public's participation in meetings, in the Navy's solicited public comments, and in the Navy's responses to those comments. The Ninth Circuit panel found the Navy considered the relevant factors in its "hard look" at potential terrorism at the Navy Broadway Complex. The Federal Defendants did not abuse their discretion in determining that there was no significant impact from the possible environmental effects of potential terrorism at the Navy Broadway Complex, and a Supplemental Environmental Impact Statement was not required. Senior District Judge Carr dissented based on the reasoning that the Navy did not sufficiently address the environmental consequences of a possible terrorist attack. He reiterated that the NCIS determined there was "no known specific threat" of a terrorist attack at the Complex and based on that assessment, the Navy deemed the risk of such attacks "too speculative, remote and removed from the environmental effects of the proposed action to merit further analysis[.]" He cited the duty recited in *Mothers of Peace I*, which requires agencies to address the environmental consequences of possible terrorist attacks and found that the Navy did not rule out the possibility of a terrorist attack at the Complex. *Cf. Ground Zero Ctr. for Non–Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082 (9th Cir.2004) (finding that the Navy was not required to consider environmental impact of accidental missile explosion, where Navy determined risk of such explosion "is between one in 100 million and one in 100 trillion"). Senior District Judge Carr discussed that the Navy could have, and should have, considered the environmental impact of at least a few attack scenarios at the Complex. He did note that the Navy revised the EA after receiving public comments about a potential terrorist attack.

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		He discussed that those revisions only strengthened the facilities' defenses against a potential terrorist attack; they did not assess the likely environmental impact of such an attack.
***Ohio Valley Envt'l Coal., Inc. v. U.S. Army Corps of Eng'rs.*, 828 F.3d 316 (4th Cir. 2016)**	USACE	**Agency prevailed.** **Issues:** Scope of review involving Clean Water Act (CWA) Section 404 permits **Facts:** Raven Crest Contracting, LLC operates a surface coal mine near Racine, West Virginia, known as the Boone North No. 5 Surface Mine ("the Boone North mine"). The appeal involves challenges to the adequacy of the environmental review, an EA conducted by the Army Corps of Engineers ("the Corps") before the Corps issued a permit pursuant to section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, authorizing Raven Crest to discharge fill material into waters of the United States in conjunction with that mine. At the Boone North mine, Raven Crest planned to "provide for the safe and efficient extraction of approximately 6.8 [million] tons of steam grade bituminous coal" from a 724-acre area. A consortium of environmental groups (collectively "OVEC") have engaged in advocacy efforts involving surface coal mining operations in West Virginia in the past. OVEC claims that the Corps violated NEPA by failing to consider evidence that surface coal mining is associated with adverse public-health effects in nearby communities. The district court disagreed, and found that the Corps properly determined that the connection between surface coal mining and public health was an issue not properly within the scope of its environmental review. OVEC appealed, and the Fourth Circuit affirmed the district court's ruling. **Decision:** OVEC argued that the Corps violated NEPA by failing to include in its EA any analysis of the studies OVEC cited as suggesting a connection between surface coal mining and adverse public health effects in nearby communities. The Corps responded that OVEC's argument is foreclosed by the precedent in *Ohio Valley Envtl. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009), and the Fourth Circuit agreed. The Fourth Circuit discussed that *Aracoma* involved a dispute about the proper scope of the Corps' NEPA inquiry for a section 404 permit associated with a proposed surface coal mine. The mines at issue in *Aracoma* involved "valley fills," a practice in which excess earth excavated from the mine is disposed of in a manner that buries an entire valley. To ensure the stability of the resulting mass, valley fills typically involve the creation of an "underdrain system" by placing large boulders in the streams located beneath the valley fill. *Aracoma*, 556 F.3d at 186. This constitutes the discharge of fill material into waters of the United States, necessitating a section 404 permit. OVEC argued that the Corps "should have considered all environmental impacts caused by the fills" during its permit review process, "including

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		the impacts to the upland valleys where the fills will be located." *Id*. at 193. The Corps countered that it had reasonably interpreted its own regulations to limit the scope of its review to only the effects of the discharge of fill material into "the affected waters and adjacent riparian areas." *Id.* The Corps' regulations provide that, in conducting its NEPA analysis, the Corps need address only "the impacts of the specific activity requiring a [section 404] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. pt. 325, app. B, § 7(b)(1). Further, the Corps has "sufficient control and responsibility" to warrant review of a project as a whole, rather than just the specific activity requiring a Corps permit, when "the environmental consequences of the larger project are essentially products of the Corps permit action." *Id.* pt. 326, app. B., § 7(b)(2). In the case of the valley fills at issue in *Aracoma*, the court held that the "specific activity" authorized by the section 404 permit was "nothing more than the filling of jurisdictional waters for the purpose of creating an underdrain system for the larger valley fill," and that the Corps did not have sufficient control and responsibility over the entire valley fill to warrant including the entire project in the scope of the Corps' environmental review. *Aracoma*, 556 F.3d at 194–95. "To say that the Corps has a level of control and responsibility over the entire valley fill project such that "the environmental consequences of the larger project are essentially products of the Corps permit action,' " would be "to effectively read out of the equation the elaborate, congressionally mandated schema for the permitting of surface mining operations prescribed by the [Surface Mining Control and Reclamation Act (SMCRA)]." *Id.* at 195 (*quoting* 33 C.F.R. pt. 325, app. B, § 7(b)(2)). In other words, because the great bulk of environmental effects associated with surface coal mining operations in West Virginia are authorized by the West Virginia Department of Environmental Protection's (WVDEP) granting of a SMCRA permit, not by the Corps' granting of a section 404 permit, it would be inappropriate to require the Corps to review aspects of those projects outside of the specific dredge-and-fill activities regulated by section 404. The Fourth Circuit found the Corps appropriately limited its NEPA review to the environmental impacts of the dredge-and-fill activities associated with "mining through" the streams located at the Boone North mine site. OVEC, however, argued that the Corps' review should have included consideration of the environmental impacts of surface coal mining more generally, and specifically of the studies OVEC cited showing adverse public health effects in communities near surface coal mines. As in *Aracoma*, however, the activity OVEC sought to force the Corps to study—surface coal mining—is neither the "specific activity" authorized by Raven Crest's § 404 permit nor an aspect of the Boone North mine over which the Corps has "sufficient control and responsibility to warrant

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		Federal review." *See* 33 C.F.R. pt. 325, app. B, § 7(b)(1). The Corps has no jurisdiction to authorize surface coal mining; SMCRA makes clear that only WVDEP can do that in West Virginia. The specific activity the Corps authorized was simply the dredging and filling of certain stream beds at the Boone North mine. Thus, the reasoning and holding in *Aracoma* was equally applicable to this case: the Corps properly limited its NEPA review to only those environmental impacts associated with the specific discharge of fill material authorized at the Boone North mine. The Court found that even if human-health impacts were not considered elsewhere in the permitting process, *Aracoma* would not require the Corps to consider them. The Fourth Circuit explained that *Aracoma* holds that the Corps need not consider the effects of surface coal mining because the Corps' issuance of a § 404 permit cannot authorize surface coal mining; only a SMCRA permit can do that.
***Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 833 F.3d 1274 (11th Cir. 2016)**	USACE	**Agency prevailed.** **Issues:** Impact analysis, cumulative Impacts **Facts:** Black Warrior Riverkeeper and Defenders of Wildlife (collectively "Riverkeeper") challenged the U.S. Army Corps of Engineers' (the "Corps") issuance of a nationwide permit (NWP 21) that allowed surface coal mining operations to discharge dredged or fill materials into navigable waters based in part, on violations of NEPA. This case involved a challenge to NWP 21, a type of permit issued by the Corps. On February 21, 2012, after affording the public the opportunity to participate in an administrative process that included notice and comment, the Corps issued fifty nationwide permits, including NWP 21. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184 (Feb. 21, 2012). NWP 21 authorizes "[d]ischarges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations." *Id.* at 10,274. The Nationwide Permit eliminates the requirement for individual permits under § 404 of the Clean Water Act. The 2012 version of the NWP 21 contains two new provisions, a grandfathering provision that allows for the reauthorization of operations that were previously authorized under the 2007 permit, and a provision for new operations that adds several specific limits on stream-filling activities. Riverkeeper began litigation involving the permit scheme and in 2014, the lower court upheld the permitting system. Upon appeal, in 2015, Riverkeeper challenged only a single error of the Corps' reasoning, which it called the "differential treatment error." Riverkeeper argued that "it was arbitrary and capricious for the Corps to conclude, on the one hand, that the new stream-fill limits contained in paragraph (b) of NWP 21 are necessary to avoid significant environmental effects, but on the other, to decline to apply them to projects reauthorized pursuant to paragraph (a)."

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		The Eleventh Circuit remanded the case to the Corps with a one year time limit to reconsider its decision, and concluded that it could not resolve the merits of the suit because "the Corps admitted on the eve of oral argument that it underestimated the number of acres of waters that may be impacted by NWP 21." Specifically, the Corps had failed to "take into account that activities re-verified under paragraph (a)"the grandfathered-in activities that were not subject to the new limitations imposed by paragraph 21(b) "could impact more than a half-acre of waters of the United States." *Id*. Based on this new information, the Court could not discern whether the Corps' error was "truly significant" and whether the Corps' "ultimate conclusion—that NWP 21 will have minimal effects—was unlawful. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs.*, 781 F.3d 1271, 1275-78 (11th Cir. 2015). The district court sent the case back upstream to the Corps "for a thorough reevaluation of the Corps' CWA and NEPA determinations in light of all of the relevant data, including the Corps' recalculated figure for the acreage of waters affected by NWP 21." It ordered that the reevaluation be accomplished within a year and stayed the case pending completion of the reevaluation. The Corps revised its Decision Document, which did not result in any changes to the NWP 21, but rather updated the analysis of the impacts of the permit, addressing Riverkeeper's concerns. The Corps was able to provide an estimate of environmental impacts that encompassed all of the NWP 21(a) verifications that could be issued. In all, 88 verifications were issued under 21(a), with impacts to approximately 503 acres and 280,700 linear feet of waters of the United States. To offset those impacts, the Corps required compensatory mitigation of approximately 653 acres and 377,300 linear feet. The Corps determined that 21(b) would be used approximately 7 times per year nationwide, resulting (over the life of the permit) in impacts to approximately 6.5 acres and 17,000 linear feet of waters of the United States, and requiring 11.5 acres and 21,000 linear feet of compensatory mitigation to offset the impacts. Thus, on average, each of the 21(a) authorizations impacts nearly 6 acres and 3,200 linear feet of waters of the United States (in comparison with the ½–acre and 300 linear feet limits imposed on all 21(b) authorizations). The Corps concluded, as required by the CWA, that "despite the higher impact and compensatory mitigation amounts expected to occur across the country during the five year period this NWP is in effect, . . . the individual and cumulative adverse effects on the aquatic environment resulting from the activities authorized by this NWP will be minimal." Riverkeeper moved for summary judgment on the same grounds. The district court rejected their argument because it determined that statements in the Revised Decision Document that the changes to NWP 21 were "necessary" to ensure minimal environmental impact logically referred to all changes and all new terms and conditions, not just the changes in 21(b). Moreover, the district court determined that the Corps took a hard look and that the decision to treat grandfathered-in permits under 21(a) differently than new permits under 21(b) was not arbitrary and capricious because the Corps considered the permit as a whole in

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		making its FONSI. This appeal followed, and the Eleventh Circuit affirmed the district court's ruling. **Decision:** In this appeal, Riverkeeper claimed that the Corps has not articulated a sufficient rationale for treating similar mining activities differently under NWP 21(a) and (b). Riverkeeper specifically argued it was contradictory for the Corps to impose stringent stream-fill limits on new operations but to decline to apply those very same limits to operations previously authorized by the 2007 permit. Riverkeeper alleged that the Corps could not rationally have found that the new limits were "necessary to avoid significant environmental impacts while also concluding the impacts of the grandfathered project would be minimal." The Eleventh Circuit noted that in view of the substantial deference afforded agency action, "Riverkeeper face[d] an upstream swim." Riverkeeper alleged that the activities authorized under 21(a) cannot possibly result to minimal impact to navigable waters because they are not subject to the very limitations that the Corps itself deemed necessary to ensure minimal impact. Riverkeeper pointed out that 41 of the 88 authorization under 21(a) are located in the Black Warrior River Watershed, and those 41 authorizations will allow an additional 25 miles of stream impact that would not occur if subject to the limitation in 21(b). The Eleventh Circuit rejected these arguments, "Riverkeeper's arguments can't swim against the tide." The Court noted that the text of NWP 21(a) supported the Corps' determination that authorized activities under 21(a) will have minimal individual and cumulative adverse effects. NWP 21(a) provides that a previously authorized mining activity under the 2007 NWP 21 can only be authorized under 21(a) if a district engineer determines that the activity does not create any greater "loss of waters" than it did under the 2007 permit – the activity "will result in minimal individual and cumulative adverse effects." It must also comply with additional "applicable regional conditions and any activity-specific conditions added to the NWP authorization by the district engineer, such as compensatory mitigation requirements. The Court emphasized that the explicit requirements apply to all 21(a) authorizations and substantially undercut Riverkeeper's arguments that the new 21(b) are the only way the Corps can ensure minimal individual and cumulative adverse environmental effects. The Eleventh Circuit restated the permit's requirements that if the district engineer determines that the cumulative adverse effects of a NWP 21 authorized activities are more than minimal in a "specific watershed," they are authorized to require individual permits or add conditions to the NWP on a case-by-case basis. Further the revised Decision Document reiterated the text of NWP 21(a): if a previously verified activity is expanded in such a way that it will "result in greater losses of waters off the United States," it cannot be authorized under NWP 21 *unless* it qualified under NWP 21(b). The Court also reiterated that the Revised Decision Document made it abundantly clear throughout that the minimal

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		impact analysis is based on both 21(a) and 21(b) activities. The Revised Decision Document stated, in part, "[t]he activities authorized by this NWP, *including the activities authorized under paragraphs (a) and (b) of this NWP*, will result in a minor incremental construction to the cumulative effects that have occurred to wetlands, streams, and other aquatic resources. . ." (emphasis added). The Court reasoned that because the 2015 Revised Decision Document reviewed and considered all the 21(a) verifications in effect after the 2012 Decision was issued, that the Corps considered the relevant factors in performing its environmental impact analysis. The Court noted that there were a few statements in the 2015 Decision Document that suggest that 21(b) limitations are necessary to ensure minimal environmental impacts. But the Court stated that they "must uphold a decision of less than ideal clarity if the agency's path must reasonably be discerned." The Court dsicussed that the Corps considered the limitations imposed under both sections of NWP 21, as well as general permit conditions applicable to all NWPs in reaching its environmental impact determinations. The Eleventh Circuit explained in estimating the environmental impact of the new NWP 21, that the Corps assessed "individual and cumulative effects" by considering "the terms and limits of the NWP, pre-construction notification requirements, and the standard NWP general conditions." The Revised Decision Document repeatedly states that the Corps' environmental impact determinations were based on both 21(a) and (b) activities and the wide array of means available to limit the impact of activities under both provisions. Specifically, it noted that "the imposition of the ½–acre limit, 300 linear foot limit, and prohibition against authorizing valley fills on activities that were not previously authorized under the 2007 NWP 21, as well as the pre-construction notification requirements and other procedural safeguards, will authorize only those activities with minimal individual and cumulative adverse effects on the aquatic environment." These "other procedural safeguards include the authority for division engineers to modify, suspend, or revoke NWP 21 authorizations on a regional basis, and the authority for district engineers to modify NWP 21 authorizations by adding conditions, such as compensatory mitigation requirements, to ensure minimal individual and cumulative adverse effects on the aquatic environment." The Court focused on the language in the Revised Decision Document elaborating that "[c]ompensatory mitigation required for activities verified under the 2007 NWP 21 [i.e., the 2012 grandfathered activities under 21(a)] will continue to be required, and may be augmented if the district engineer determines that they do not adequately compensate for losses of aquatic resource function and ensure minimal adverse effects." In fact, the Corps' ultimate "minimal impact" finding explicitly referenced all of the limits that NWP 21 imposes on permitted activities, not just those contained in 21(a): "Compliance with the terms and conditions of this NWP, including the mitigation general condition (general condition 23), as well as compliance with regional conditions imposed by division

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		engineers and activity-specific conditions added to NWP verifications by district engineers, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse effects on the aquatic environment." The Court held that the Corps took a hard look at the environmental impact of authorizations under both 21(a) and (b), and determined that the restrictions imposed on each set of authorizations were sufficient to ensure that they result in no more than minimal individual and adverse cumulative effects. The Court noted that throughout the Revised Decision Document, the Corps placed special reliance on compensatory mitigation as a means of ensuring minimal net environmental impacts. The Revised Decision Document states that "it is difficult to assess whether compensatory mitigation has fully or partially offset the lost functions provided by the aquatic resources that are impacted by permitted activities," but determined that so long as its general guidelines are followed, compensatory mitigation "will provide aquatic resource functions and services to offset some or all of the losses of aquatic resource functions caused by the activities by this NWP, and reduce the contribution of those activities to the cumulative effects on the Nation's wetlands, streams, and other aquatic resources." In reviewing the documents, the Eleventh Circuit afforded the Corps deference in this area because it "is making predictions, within its area of special expertise, at the frontiers of science . . . as opposed to simple findings of fact." The Court hesitated to second-guess the Corps and its reliance on scientific studies; it noted the document's minimum impact analysis involved difficult predictions about how coal mining activities will affect complex ecosystems, and how district engineers will be able to offset those effects through permit-specific requirements and compensatory mitigation. The Court explained that Riverkeeper did not challenge the "minimal impact" analysis under the CWA. Finally, Riverkeeper claimed that the Corps did not articulate a sufficient rationale for treating similar mining activities differently under NWP 21(a) and (b). With regard to the NEPA claims in this matter, the Court considered that the Revised Decision Document evinced an additional, reasonable basis for treating authorizations under 21(a) and (b) differently. Paragraph (a) only applies to a well-defined and limited subset of activities that can be reliably verified to have minimal environmental impact. At the time that it drafted the 2012 NWP 21, the Corps knew the entire universe of potential projects under 21(a) because they had all already been operating for five years by that time, and, notably, by the time that it drafted the Revised Decision Document, it had impact data for "all of the NWP 21(a) verifications that could be issued during the period [the 2012] NWP 21 is in effect." In contrast, for new projects under 21(b), the Corps had to rely on estimates of potential use over the five-year term. The Court explained that the Revised Decision Document cited "the

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		difficulty of documenting minimal adverse effect determinations for losses of aquatic resource area and functions that exceed those allowed in other NWPs" as a reason for moving away from preconstruction review and instead imposing strict caps on new projects. It opined that the difficulty is substantially less relevant for grandfathered-in permits that had already been operating for years at the time that NWP 21 was issued. The Corps reasonably concluded that this subset of projects presents less of a risk of harm to the aquatic environment, while deciding to hold new—and, therefore, more unpredictable—projects to a different, and higher, standard. The Court found that since the Corps provided a "satisfactory explanation for its action" based on its findings in the Revised Decision Document, the Court must defer to its decision.
U.S. Department of Energy		
***Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173 (9th Cir. 2016)** ***Cf. Idaho Conservation League v. Bonneville Power Admin.*, No. 12-70338, 2016 WL 3409458, -- Fed. Appx. --- (9th Cir. June 21, 2016)** (not for publication)	BPA	**Agency prevailed.** **Issues:** Major federal action, continued operations **Facts:** Operated by the Army Corps of Engineers (the "Corps"), the Albeni Falls Dam helps provide power to the Pacific Northwest. The dam straddles the Pend Oreille River, which connects Lake Pend Oreille and the Columbia River; Lake Pend Oreille serves as the dam's reservoir. The Power Administration ("BPA") is charged with marketing the power generated from the dam. In the initial winters of the dam's operation, starting in the late 1950s, the Corps fluctuated the level of the lake to generate power as needed. In some years, however, the Corps held the lake's level constant, often near 2051 feet. In 1995, the Corps determined that allowing the lake's elevation to drop during the winter months had adverse effects on the kokanee salmon population and so beginning in 1997 began holding the lake's elevation constant. But in 2009, BPA urged the Corps to return to a more flexible approach to winter dam management. After two years of discussions and a public comment period, the agencies confirmed in a 2011 EA that they planned to follow through with BPA's proposal. The plan for "flexible winter power operations" gave the Corps the option each winter to store water in the reservoir and then release it through the dam according to power needs. Thus, instead of keeping the lake's level constant, the Corps could allow it to rise and fall by as much as five feet during the winter. The EA concluded that the proposed winter fluctuations would have no significant environmental impact. Accordingly, the agencies decided to move forward with the proposal without preparing an EIS. Plaintiff environmental group challenged this action on the grounds that the agencies finalized the decision without preparing an EIS. The court of appeals held that there was no major federal action that would necessitate an EIS under NEPA.

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		Decision: "NEPA only requires the preparation of an EIS when a proposed federal action is major. *See Upper Snake River Chapter of Trout Unlimited v. Hodel,* 921 F.2d 232, 234–35 (9th Cir. 1990). A federal action that may have significant environmental impacts need not "also be "major" in an economic or some other nonenvironmental sense to trigger the EIS requirement." *City of Davis v. Coleman*, 521 F.2d 661, 673 n.15 (9th Cir. 1975); *see* 40 C.F.R. § 1508.18 ("Major reinforces but does not have a meaning independent of significantly."). But when an agency, responding to changing conditions, makes a decision to operate a completed facility "within the range originally available" to it, the action is not major. Upper Snake River, 921 F.2d at 235 (*quoting Cty. of Trinity v. Andrus*, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977)). In other words, "where a proposed federal action would not change the status quo, an EIS is not necessary." *Id.*; *accord San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 646 (9th Cir. 2014)." "If the agencies in our case have consistently fluctuated winter lake levels, formalizing that approach would not be a major federal action because the agencies would be "doing nothing new, nor more extensive, nor other than that contemplated when the [Albeni Falls Dam] was first operational." *Id*. at 235. The Corps fluctuated the elevation of Lake Pend Oreille in many winters prior to 1997, and various dam management strategies considered in a 1995 EIS included elements of what is now the proposal for flexible winter operations. Accordingly, the question is whether holding lake levels constant from 1997 to 2011 changed the status quo. If not, then reverting to the previous regime doesn't change the status quo either . . . Because the period when the agencies held winter lake levels constant did not change the operational status quo, neither does the decision to revert to flexible winter operations." "[Plaintiff] finally argues that implementing flexible winter operations requires an EIS because the continued operation of the Albeni Falls Dam is itself a major federal action that significantly affects the human environment. *See* 40 C.F.R. § 1508.18(a) ("Actions include new and continuing activities . . . '). But decisions made as a part of the ongoing operation of a federal project must themselves "rise to the level of major federal actions to warrant preparation of an EIS." *Upper Snake River*, 921 F.2d at 235 n.3. Requiring an agency to prepare an EIS every time it takes an action consistent with past conduct would grind agency decisionmaking to a halt. *Cf. Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373, 109 S. Ct. 1851 (1989) (explaining that requiring a supplemental EIS every time new information is available "would render agency decisionmaking intractable"); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1022 (9th Cir. 2012) (noting it would be neither pragmatic nor realistic to require an agency to prepare an EIS when it engages in "routine and required annual reporting")." "[Plaintiff] claims the EA arbitrarily concludes that flexible winter operations will have only an incremental impact on the spread of the flowering rush, an invasive species that was discovered around Lake Pend Oreille in 2008. Because the decision adopting flexible winter operations

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		doesn't trigger NEPA's requirement to publish an EIS, this and Petitioner's other challenges to the EA's finding of no significant impact are moot. *See Upper Snake River*, 921 F.2d at 234." **NOTE:** In addition to challenging the failure to prepare an EIS, the plaintiff environmental group filed a challenge to the adequacy of the EA prepared for the Albeni Falls Dam operations revision. The 9th Circuit Court of Appeals issued a separate, unpublished, opinion, finding that the EA was not deficient: ***Idaho Conservation League v. Bonneville Power Admin.,*** No. 12-70338, 2016 WL 3409458, -- Fed. Appx. --- (9th Cir. June 21, 2016) (not for publication). **Agency prevailed.** **Issues:** Alternatives in EA, use of best available information (impact analysis) **Decision**: • "It's generally sufficient for an environmental assessment (EA) to consider only a no-action and preferred alternative. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1021–22 (9th Cir. 2012); *but see W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1051–53 (9th Cir. 2013) (finding deficient an EA that considered one no-action alternative and three action alternatives). The EA at issue considers no-action and preferred alternatives at length. It also explains that two other alternatives did not merit extended consideration because they weren't feasible. *See Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 916 (9th Cir. 2012). And the preferred alternative contains various measures aimed at "[m]inimizing impacts [of flexible winter power operations] by limiting the degree or magnitude of the action." 40 C.F.R. § 1508.20(b) (defining mitigation). Finally, the EA explains that the agencies rejected proposed monitoring and mitigation strategies because BPA already engages in monitoring and mitigation for existing operations at the Dam. Accordingly, BPA's failure to discuss a monitoring and mitigation alternative in the EA was not arbitrary and capricious. *See Earth Island Inst.*, 697 F.3d at 1023." • "We reject the contention that the EA violates NEPA's 'hard look' requirement by failing to incorporate up-to-date baseline information to analyze the environmental impacts of flexible winter operations. With respect to erosion, the EA supplements historical information with citations to and discussions of more recent studies." • "Nor are we persuaded that the EA's analysis of wildlife impacts is deficient because its conclusion might have changed, had it considered more extensive data regarding erosion and the flowering rush. Because BPA took the requisite hard look at those two environmental factors, Petitioner's challenge to the EA's analysis of wildlife impacts also fails." • Petitioner finally argued that the EA is deficient because it fails to

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		consider recent wildlife surveys. But Petitioner pointed the court to no case, and "we are not aware of any, in which an otherwise sufficient EA violated NEPA for failing to incorporate such surveys . . . In any event, 'the primary wildlife concern [associated with flexible winter operations] is related to loss of habitat around the lake from erosion,' and BPA adequately analyzed erosion impacts." Accordingly, BPA fulfilled its duty "to take a "hard look" at how the choices before [it] affect the environment, and then to place [its] data and conclusions before the public." *W. Watersheds*, 719 F. 3d at 1047.
U.S. Department of the Interior		
***Protect our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016)**	BLM	**Agency prevailed.** **Issues:** Purpose and need, alternatives, mitigation, impact analysis **Facts:** Protect our Communication Foundation, Backcountry against Dumps and Donna Tisdale (collectively, "Plaintiffs") appeal the decision of the Bureau of Land Management ("BLM") to grant a right of way on federal lands to construct and operate a wind energy facility on 12,360 acres of land in the McCain Valley, 70 miles east of San Diego based on alleged violations, in part, of NEPA. Tule Wind, LLC's ("Tule") original right of way proposal to the BLM envisioned the construction of 128 wind turbines and supporting infrastructure, which would generate up to 200 megawatts of electricity. The BLM released a lengthy DEIS for public comment. Ultimately, the BLM granted Tule a right-of-way for the development of a more modest wind-energy facility, which eliminated thirty-three turbines from the project, and repositioned several wind turbines, to eliminate avian collisions. The project was expected to generate 168 megawatts of electricity, meeting the needs of 65,000 homes and businesses. The BLM released its FEIS in October 2011 and published a ROD in December 2011, which specified a thirty-year term, with an option to renew. The grant further provided that it was expressly conditioned on the implementation of mitigation measures and monitoring programs as well as compliance with all other necessary federal and state approvals, authorizations and permits. On appeal, Plaintiffs allege that the BLM (and other federal defendants) failed to comply with NEPA because: (1) the purpose and need statement was too narrow, (2) failed to adequately examine viable alternatives, including a "distributed generation" alternative involving the use of rooftop solar panels, (3) proposed mitigation strategies are too vague and speculative, and (4) failed to take a "hard look" in several distinct ways. Specifically, Plaintiffs allege that the EIS omits a comprehensive discussion of the impacts of noise; fails to conduct a survey of nighttime migratory birds; does not fairly address the impacts of inaudible noise, electromagnetic fields, stray voltage on humans, or the consequences of the project on global warming. The Ninth Circuit affirmed the district court's grant of summary judgment.

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		Decision: The Ninth Circuit first examined the purpose and need statement on the EIS: [T]he purpose and need for the proposed action is to respond to a [Federal Land Policy and Management Act (FLPMA)] right-of-way application submitted by Tule Wind, LLC . . . In conjunction with FLPMA, the BLM's applicable authorities include the following: • Executive Order 13212 . . . which mandates that agencies act expediently and in a manner consistent with applicable laws to increase the production and transmission of energy in a safe and environmentally sound manner. • Section 211 of the Energy Policy Act of 2005 . . . which established a goal for the [DOI] to approve at least 10,000 megawatts of nonhydropower renewable energy power on public lands by 2015. • Secretarial Order 3285A1, [which] establishes the development of renewable energy as a priority for the DOI [and] announced a policy goal of identifying and prioritizing specific locations (study areas) best suited for large-scale production of solar energy. The Court found that the EIS purpose and need statement reflected both the agency's immediate objective, to "respond" to the right of way request, and broader policy goals the agency considered in deciding among alternatives. The Court noted that the statement was fully consistent with the agency's duty to consider federal policies in fashioning its response to a right of way application. Plaintiffs challenged the need for the action, but the Court found that the need was supported by the federal objective outlined in the EIS, in particular, Section 211 of the Energy Policy Act of 2005 setting forth an agency goal of approving up to 10,000 watts of renewable energy development on public lands by 2015 – a time frame which the agency determined would be most readily met through the development of a utility-scale energy project. The Ninth Circuit discussed that the range of alternatives considered in the EIS was not impermissibly narrow, as the agency evaluated all "reasonable [and] feasible" alternatives in light of the ultimate purposes of the project. *City of Carmel–by–the–Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). An agency need not review "remote and speculative" alternatives. *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004). Instead, its review is guided by a "rule of reason." *City of Carmel–by–the–Sea*, 123 F.3d at 1155. Accordingly, the EIS need only "briefly discuss" the reasons for eliminating an alternative not selected for detailed examination. 40 C.F.R. § 1502.14(a). The agency reviewed five action alternatives to the project originally proposed by Tule, as well as two no-action alternatives. The agency also

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		briefly considered seven project-design alternatives and three energy-generation alternatives, including distributed generation. The distributed-generation alternative involved the use of rooftop solar panel systems on buildings in San Diego County and the development of other renewable-energy systems. The Ninth Circuit held that the BLM reasonably concluded that the overall effectiveness of a distributed-generation alternative, which was reliant on private installation and technical upgrading, remained speculative in practice. According to the BLM, the installation of at least 100,000 new rooftop solar units, primarily on private residential or commercial properties, would be required in order to match the energy generation from the original wind-energy proposal. Similarly, Plaintiffs' final contention that the distributed-generation systems would present a cost-effective alternative must be weighed against the feasibility of the overall approach and its consistency with agency goals. Considered as a whole, therefore, the BLM did not act unreasonably in dismissing the distributed-generation alternative. Plaintiff's contended that the mitigation measures outlined in the EIS did not provide "sufficient detail," and that the EIS improperly deferred the formulation of certain mitigation measures until post-development monitoring and inspection, notably through the use of an adaptive-management plan. Pursuant to NEPA, an agency must also consider appropriate mitigation measures that would reduce the environmental impact of the proposed action. 42 U.S.C. § 4332(2)(C)(ii). The mitigation measures must be in "sufficient detail to ensure that environmental consequences have been fairly evaluated." *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009). "Perfunctory descriptions or mere lists of mitigation measures are insufficient." *Alaska Survival v. Surface Transp. Bd*, 705 F.3d 1073, 1088 (9th Cir. 2013). Rather, the agency must provide "an assessment of whether the proposed mitigation measures can be effective . . . [and] whether anticipated environmental impacts can be avoided." *S. Fork Band Council*, 588 F.3d at 727. Because mitigation measures are projections that allow an agency to alleviate "impact after construction," the EIS may not use them "as a proxy for [collecting] baseline data" before construction that would enable the agency to "first understand[ ] the extent of the problem." *N. Plains Res. Council, Inc. v. Surface Transp. Bd*., 668 F.3d 1067, 1084–86 (9th Cir. 2011). On the other hand, the EIS's proposed mitigation measures "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000). The Court found that the mitigation measures, including the 85-page Protection Plan, provided ample detail and adequate baseline data for the agency to evaluate the overall environmental impact of the Project. The Court chided the Plaintiffs for merely "fly speck[ing]" the EIS rather than identify consequential flaws that would prevent the agency from

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		sufficiently grasping the Project's potential environmental consequences. The Ninth Circuit held that the EIS's inclusion of an adaptive-management plan, among other mitigation measures, provided flexibility in responding to environmental impacts through a regime of continued monitoring and inspection. That an agency decides to incorporate an adaptive management plan as one component of a comprehensive set of mitigation measures did not mean that the agency lacked a sufficient foundation of current baseline data from which to evaluate the Project's environmental effects. Rather, the use of such a continuous monitoring system may complement other mitigation measures, and help to refine and improve the implementation of those measures as the Project progresses. Plaintiffs also raised a series of four substantive challenges to the BLM's investigation of the environmental impacts of the Project. The first challenge involved insufficiency of the avian impact analysis. Plaintiffs contended that the EIS fails to comprehensively review the effects of Project-related noise on birds at all life stages, not just the nesting stage; and, that the agency failed to conduct nighttime migratory-bird surveys in the Project area to better estimate the numbers of such birds that might be struck by wind turbines. The court found that the agency outlined over a dozen noise-mitigating measures that it determined would significantly reduce the environmental impacts of noise on birds to "low" or minimal levels. Thus, because the noise effects could be effectively reduced, the BLM provided less analysis of noise effects in the EIS as compared to other more significant or unmitigable environmental impacts. *See* 40 C.F.R. § 1502.2(b) ("Impacts shall be discussed in proportion to their significance. There shall only be brief discussion of other than significant issues."). "Even though the agency could have included more detailed discussion of noise impacts or collected further information, its existing analysis did not impermissibly misconstrue the existing data or force the public and policymakers to speculate concerning projected environmental effects." In addition, while the mitigation measures discussed in the EIS focus on the nesting and fledgling phases, the BLM reasonably deemed these life stages to be the most critical in bird development, and accordingly focused its analysis on those stages. With regard to the nighttime surveys, the Ninth Circuit discussed that the BLM relied upon existing surveys and scientific literature, which indicated that use of the Project area by nocturnal species would be low and that most nocturnal species would fly at altitudes higher than those of the proposed turbines. This determination, too, was a reasonable exercise of the agency's discretion. Moreover, the BLM chose to reposition turbines in valleys rather than on top of ridgelines, which would lessen any risk to low-flying nocturnal migrants. In the second challenge, Plaintiffs contended that the EIS failed to adequately address the environmental effects of inaudible noise, including infrasound and low-frequency noise, on humans. In support of their contentions, Plaintiffs relied on a 2011 scientific study, which

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		concludes that inaudible noise may have adverse effects on human health. The BLM considered this study in conjunction with an array of other scientific research literature, and ultimately concluded that inaudible noise generated by the Project would not cause discernable health impacts, based on a "consensus among acoustic experts." In particular, the BLM explicitly distinguished the results of the 2011 study in its responses to public comments on the EIS. The Ninth Circuit upheld the impact analysis, deferring to the agency's discretionary judgment with respect to the "evaluation of complex scientific data within the agency's technical expertise." Third, the Plaintiffs claimed that the EIS failed to adequately examine the adverse health effects of electromagnetic fields and stray voltage that may be generated by the Project, thus, disagreeing with the conclusions in the EIS. In reaching its conclusion, the BLM properly canvassed the available literature on electromagnetic fields and, in a reasonable exercise of its technical expertise, determined that any fields created by the Project did not present public health risks that would cause concern. In addition, the BLM analyzed the risk of stray voltage and discussed appropriate mitigation efforts. Although the EIS acknowledged the risk of stray voltage on human health and safety, it reasonably discounted this risk in light of mitigation plans that would ground the turbines and provide for regular inspections to ensure their continued safety. Therefore, the EIS conformed to NEPA's requirement that the agency engage in reasoned analysis of environmental hazards, in proportion to their significance, to ensure that the public is adequately informed of a project's potential impacts. In response to the Plaintiffs' claims that the agency failed to take a hard look at the impact on global warming. The Court discussed that the EIS analyzed projected emissions from the Project and concluded that the emissions, at 646 metric tons of carbon dioxide per year, fell below the level of significance required for further analysis under NEPA. In addition, the EIS stated "the project would create a renewable source of energy, thereby potentially decreasing overall emissions attributable to electrical generation in California," thus satisfying that the agency took a "hard look." Finally, Plaintiffs contended that the BLM failed to take into account the emissions generated by the manufacture and transportation of equipment to the Project area. The Court agreed with the BLM's reasoning that these emissions levels were largely outside the control of Tule and that attempts to estimate these amounts would be overly speculative.
***Public Employees for Envt'l Resp. v. Hopper,* 827 F.3d 1077 (D.C. Cir. 2016)**	BOEM	**Agency did not prevail.** **Issues:** Baseline surveys, impact analysis **Facts:** Environmental organizations brought action against federal agencies alleging that they violated NEPA, among other environmental laws, when they approved an off-shore wind energy project, the "Cape Wind Project." The Cape Wind Project is a proposal to generate

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		electricity from windmills off the coast of Massachusetts. It calls for the "construction, operation and maintenance . . . of 130 wind turbine generators" in the Horseshoe Shoal region of Nantucket Sound. The turbines have an estimated life-span of twenty years, and during that time they are expected to generate up to three-quarters of the electricity needs for Cape Cod and the surrounding islands. The project's "underlying purpose" is to help the region achieve Massachusetts's renewable energy requirements, which "mandate that a certain amount of electricity come from renewable energy sources, such as wind." As a matter of background, offshore energy providers like Cape Wind must comply with federal statutes designed to protect the environment, promote public safety, and preserve historic and archeological resources on the outer continental shelf. They must also go through "several regulatory and administrative procedures" to satisfy regulations promulgated under these statutes. In 2004, the Army Corps of Engineers (the "Corps") issued a DEIS for the Cape Wind project. After the Bureau of Ocean Energy Management (the "Bureau") assumed authority, it reviewed the Corps' draft statement, "identified information requirements and/or issue areas that [were] incomplete," and announced that it would issue its own impact statement. The Bureau published DEIS and FEIS in 2008 and 2009, respectively. In the appeal, environmental organizations challenged the Bureau's decision to issue the lease for Cape Wind's project without first obtaining "sufficient site-specific data on seafloor and subsurface hazards" in Nantucket Sound. They argued that the Bureau violated the NEPA by relying on inadequate "geophysical and geotechnical" surveys. The district granted summary judgment to the agencies and the plaintiffs appealed. The D.C. Circuit affirmed in part, reversed in part, and remanded the case Of note, the D.C. Circuit vacated the EIS and required the Bureau to supplement it with adequate geological surveys before Cape Wind may begin construction. The Court declined to vacate Cape Wind's lease or other regulatory approvals based on this NEPA violation. **Decision:** The environmental organizations (the "plaintiffs") claimed that the EIS relied on inadequate geological surveys, which according to the Bureau's internal guidance, help determine whether "the seafloor [is] able to support large structures," and whether "important archaeological and prehistoric features [can] be protected." In support, plaintiffs referred to a series of internal Bureau emails describing "the dearth of geophysical data over the entire area" of the proposed wind farm. The court reviewed the emails from the Bureau geologist overseeing the impact statement's geophysical data section, who emailed a list of concerns to the Bureau's Cape Wind Project Manager, which stated"[t]here is no indication that [Cape Wind] ha[s] adequate data to address" various geological hazards, and that Cape

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		Wind's surveys "don't seem to conform (even loosely) to the 'Guidance Notes on Site Investigations for Offshore Renewable Energy Projects' . . . " His emails referred to three surveys conducted for Cape Wind between 2001 and 2005 that the Bureau concedes were "insufficient" to "support approval to construct the project . . . " In June 2007, the Bureau's geologist repeated his "geophysical data concerns," and the Cape Wind Project Manager forwarded to the Bureau's NEPA Coordinator the geologist's conclusion that Cape Wind "has not acquired sufficient geophysical data and information to adequately delineate in detail geologic hazards and conditions in the vicinity (1000m radius) of even one proposed turbine location . . . " The Bureau attributed the emails to "a robust internal debate," and claimed that there was at least sufficient data "to support [the Bureau's] *initial* decision . . . to offer a lease," if not to justify final construction of the windmills. The Bureau also disputes whether the geologist actually harbored such serious concerns, noting that his email "acknowledge[s] that the data . . . constitute[s] "an informative reconnaissance-level survey of the project area . . . '. " The Court found there was no evidence the Bureau relied on any additional surveys in its EIS. The EIS must therefore look beyond the decision to offer a lease and consider the predictable consequences of that decision. By relying solely on data so roundly criticized by its "own experts," the Bureau failed to fulfill this duty. "An agency need not be clairvoyant." In some cases it may be appropriate for an impact statement to provide for ongoing monitoring in order to gather more data. But that does not excuse the Bureau from its NEPA obligation to gather data about the seafloor. Without adequate geological surveys, the Bureau cannot "ensure that the seafloor [will be] able to support" wind turbines. The Court vacated the EIS and required the Bureau to supplement it with adequate geological surveys before Cape Wind may begin construction. The Court declined to vacate Cape Wind's lease or other regulatory approvals based on this NEPA violation. Finally, the Court found the Bureau's grant of a regulatory departure permitting the developer to depart from a requirement to submit geological surveys with its construction plans did not violate other environmental laws, acts or NEPA.
***Confederated Tribes of the Grand Ronde Cmty of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016), *pet. cert docketed (on other grounds), No. 15-572 (*Oct. 27, 2016)**	BIA	**Agency prevailed.** **Issues:** Duty to verify information **Facts:** The Confederated Tribes of the Grand Ronde Community and Clark County residents sued under the APA, challenging the Department of Interior's ("DOI") acquisition of 152 acres of land in trust for the Cowlitz Tribe, which scattered after its lands were sold in the 19th century but which was again acknowledged by the United States as a Tribe in 1978. Among various allegations, the Tribes claim that the DOI's Bureau of Indian Affairs ("BIA") violated NEPA.

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		The Cowlitz are an American Indian tribe from southwestern Washington state. After refusing to sign a land cession treaty with the United States in 1855, President Lincoln, by a 1863 proclamation, opened its land to non-Indian settlement. Without a land base, the Cowlitz scattered, and for decades federal Indian policy reflected a mistaken belief that they no longer existed as a distinct communal entity. After a formal process for federal acknowledgment came into being in 1978, the Cowlitz at last gained legal status as a tribe in the eyes of the government in 2002. Immediately thereafter, they successfully petitioned the DOI to take into trust and declare as their "initial reservation" a parcel of land. The Cowlitz wished to use this parcel for tribal government facilities, elder housing, a cultural center, as well as a casino. The Confederated Tribes of the Grand Ronde Community and Clark County residents challenged the DOI's decision to take the land into trust and to allow casino-style gaming. One group is comprised of Clark County, Washington, homeowners and community members in the area surrounding the parcel, as well as competing gambling clubs and card rooms. Another is the Confederated Tribes of the Grand Ronde Community of Oregon, which owns and operates a competing casino. The district court granted summary judgment for the defendants. In this appeal, the Clark County Appellants claim that the DOI violated NEPA based on an alleged failure independently to verify the Cowlitz's business plan and membership figures. The D.C. Circuit affirmed the lower court's ruling. **Decision:** In 2006, the DOI issued a DEIS for the casino. The agency subsequently received comments requesting that it provide the tribe's business plan, which is required as part of the tribe's fee-to-trust application package. The plan showed the Tribe had 3,544 members. It also stated the Tribe would require approximately $113 million annually for its "unmet needs," or, in other words, to fund government infrastructure, programs, and services. The DOI appended the plan to the FEIS, which included the $113 million figure from the plan in the FEIS Purpose and Need statement. Appellants protested that the Tribe's new membership level from the business plan represents a dramatic increase from 1,482 members in 2002, when the Cowlitz were first federally acknowledged. Under the Indian Reorganization Act of 1934's regulations, the Cowlitz submitted a list of members as part of the federal acknowledgment process, which became its official "base roll" for federal funding and other purposes. That regulation provides that additions to the roll must meet certain criteria, such as "maintaining significant social and political ties with the tribe." The Clark County Appellants argued the agency had a duty to verify the membership increase, and to verify the Tribe's self-reported unmet economic needs. The Appellants' concern in that regard relates back to the agency's consideration of the range of reasonable alternatives. The DOI originally identified nineteen possible project locations, but

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		eliminated five locations that were north of the parcel as too inconvenient to the Seattle and Portland markets to "adequately meet the economic objectives and needs of the Tribal government." The Court rejected these arguments because the Clark County Appellants never raised to the agency a duty to verify membership enrollment pursuant to the regulation. The best Appellants could point to were letters expressing the County's concern to the agency about the business plan and the Tribe's unmet needs in reference to the NEPA process. Appellants also failed to point to any comments in the FEIS raising concerns about Cowlitz membership levels. This directly undercuts their claim that the DOI failed to address questions about the Tribe's expanded enrollment. While some comments responding to the FEIS referenced the Tribe's unmet needs figure, as opposed to membership levels, the DOI fully addressed all questions about the business plan actually raised before the agency. The DOI determined that agency review of a "Tribe's internal economic planning strategy document" to "be inappropriate and contrary to federal Indian policies encouraging tribal sovereignty, self-determination and self-governance." The Court agreed that the agency did not have a duty to verify that the Cowlitz's unmet needs report was accurate. That CEQ regulations provide that "[i]f an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement . . . [t]he agency shall independently evaluate the information submitted and shall be responsible for its accuracy." 40 C.F.R. § 1506.5(a). Neither the annual unmet needs figure complained of here, nor the membership numbers that purportedly inflated the Tribe's unmet needs, are environmental in nature. Section 1506.5(a) might in other circumstances apply to some kind of information that is simultaneously socioeconomic and environmental, but the Court found that Clark County's quarrel is that the agency's failure to do its own investigation resulted in excluding from consideration reasonable alternatives located farther away from competing casino interests. As Clark County did not challenge on any other grounds the decision to exclude certain allegedly reasonable alternatives from the FEIS, the Court held that the agency did not have a duty to verify the applicable information.
***Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016)**	FWS	**Agency did not prevail.** **Issue:** Alternatives **Facts:** Buckeye sought to build and operate a commercial wind energy facility in Champaign County, Ohio. The proposed facility would include up to 100 wind turbines, each with a capacity of 1.6 to 2.5 Megawatts ("MW"), with a total generating capacity of approximately 250 MW for the facility. Necessary construction and access infrastructure would be built as well. The site for the facility is a predominantly agricultural and rural area where Indiana bats maintain a presence during the summer maternity season and presumably traverse during spring and fall migrations to and from their hibernacula. Buckeye applied for an

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		incidental take permit with the United States Fish and Wildlife Service ("the Service") and submitted a conservation plan. The conservation plan provided that Buckeye would site its turbines away from known Indiana bat habitats, adjust the turbines' operating times and speeds, and protect additional habitat. The Service issued the permit. Union Neighbors United, Inc. ("Union Neighbors") challenged the issuance of the permit, claiming that the Service failed to comply with its obligations under NEPA, and other environmental laws. As to the Service's NEPA violations, Union Neighbors claimed that it failed to consider a reasonable range of alternatives before issuing the permit. Specifically, Union Neighbors argued that the Service did not satisfy NEPA's requirement to consider a reasonable range of alternatives because it failed to include among the alternatives an economically viable plan that would have taken fewer Indiana bats than Buckeye's compliance with the Habitat Conservation Plan (HCP). The district court granted summary judgment for the agencies, and the D.C. Circuit reversed the district court's summary judgment claims involving NEPA, but affirmed the claims involving other environmental laws. **Decision:** The D.C. Circuit first discussed that the alternatives to the proposed action are "the heart of the [EIS]." 40 C.F.R. § 1502.14. "Reasonable alternatives.... include [ ] alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action." 43 C.F.R. § 46.420(b). The D.C. Circuit reviewed the Service's selection of alternatives under the "rule of reason." *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011). "[A]n agency need follow only a "rule of reason" in preparing an EIS, and ... this rule of reason governs 'both which alternatives the agency must discuss, and the extent to which it must discuss them.' " *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). Under the rule of reason, "as 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." *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72. Furthermore, "where a federal agency is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.' " *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994). Because "[t]he goals of an action delimit the universe of the action's reasonable alternatives," *Citizens Against Burlington*, 938 F.2d at 195, the Court evaluated the Service's alternatives with its stated goals in mind. The Service explained that the five purposes of its action were: (1) responding to Buckeye's application for an incidental take permit for the Indiana bat, (2) protecting, conserving and enhancing the Indiana bat and its habitat," (3) providing a means and taking steps to conserve the ecosystems" upon which the Indiana bat depends, (4) ensuring the long-term survival of the Indiana bat, and (5) complying with all federal laws and regulations. These five purposes reflected "a need to ensure that take

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		of Indiana bats is avoided and minimized to the maximum extent practicable and to ensure that the impact of any remaining take is fully mitigated" and "to protect the habitat of Indiana bats." The Service considered the following alternatives: Buckeye's plan incorporating variable cut-in speeds of up to 6.0 m/s at night from April to October; the No Action Alternative; the Minimal Alternative with a cut-in speed of 5.0 m/s for the first six hours after sunset from August to October; and the Max Alternative, which would have turned off the turbines at night from April to October. The Court found that upon viewing the range of alternatives through the lens of its stated goals, the Service failed to consider a reasonable range of alternatives because it did not consider any reasonable alternative that would be economically feasible while taking fewer bats than Buckeye's proposal. Buckeye's proposal would take 5.2 bats per year. The only alternative the Service considered that would take fewer bats was the Max Alternative. According to the Service, the value of the Max Alternative was in the fact that it "eliminat[ed] Indiana bat mortality." But the Service also conceded that the Max Alternative is not an economically feasible alternative, noting higher costs and lower energy production with the Max Alternative. The Service knew, at a minimum, that Buckeye claimed a full nighttime option was not economically viable, and it was aware of other, more viable measures that would still take fewer bats than Buckeye's proposal. The D.C. Circuit focused on comments by Union Neighbors, who repeatedly suggested using a cut-in speed higher than 6.0 m/s. Yet the Service failed to consider any higher cut-in speed in either the Draft or Final EIS. Because the Service in that context failed to consider any economically feasible alternative that would take fewer Indiana bats than Buckeye's proposal, it failed to consider a reasonable range of alternatives. The Court discussed at length that the Service knew of the economic infeasibility of the Max Alternative yet did not change its alternatives (despite comments from Union Neighbors) from the DEIS to FEIS. Although the Service recognized that "higher cut-in speeds may result in less bat mortality," it rejected analyzing a cut-in speed of 6.5 m/s because the difference between Buckeye's proposal and the Max Alternative was "not significant," making analysis of other variations with higher cut-in speeds "not necessary." The Service argued it already considered higher cut-in speeds separately by including the higher speeds in the literature supporting its analysis of the various alternatives. The Court rejected this argument focusing on the Service's response to Union Neighbors' comments. The Court examined that when the Service rejected Union Neighbors' comments, it did not say that higher cut-in speeds were "effectively incorporated" or had been "previously considered" in its analysis. The Service stated simply that considering a 6.5 m/s cut-in speed was "not necessary." The Court pointed out that because the adaptive

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		management plan incorporates a speed of 6.5 m/s in certain scenarios, the Service's analysis does not suggest that the impacts would be identical to a consistent permanent cut-in speed. If cut-in speeds could potentially reduce additional impacts on bats, and the adaptive plan operates under 6.5 m/s under certain scenarios, the Court determined that certainly the impacts would be different with constant cut-in speeds. Accordingly, because the Service in these circumstances did not consider any other reasonable alternative that would have taken fewer Indiana bats than Buckeye's plan, it failed to consider a reasonable range of alternatives and violated its obligations under NEPA.
***Center for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136 (9th Cir. 2016)**	BLM/FWS	**Agency prevailed.** **Issues:** Baseline, public Involvement **Facts:** The Center for Biological Diversity and other environmental organizations (the "Center") brought action against the Bureau of Land Management ("BLM") and the Fish and Wildlife Service ("FWS"), based on allegations that the BLM's proposal to expand access for off-road vehicle recreation) violated the NEPA among other environmental laws. The current litigation, which has been ongoing for over a decade, originates from the BLM's decision to reopen land within the Imperial Sand Dunes Special Recreation Management Area to off-road vehicle use. The Imperial Sand Dunes Planning Area, a 227,000–acre tract of desert, 214,930 acres of which is managed by the BLM, lies in Southeast Imperial County, California near the US-Mexico border. The expanse is home to the Algodones Dunes, the largest active sand dune system in the United States. A 138,111–acre portion of the Planning Area, designated as the Imperial Sand Dunes Special Recreation Management Area, is set aside for the protection of plants and wildlife, as well as for outdoor recreation. Protected species include Peirson's milk vetch, a perennial herb, and desert tortoise, both listed as threatened under the Endangered Species Act. The Dunes consistently attract well over one million visitors annually, particularly off-road vehicle enthusiasts who flock to the area to take advantage of the unique terrain and beautiful landscape. The BLM issued an EIS and consulted with the FWS, which issued a biological opinion (BiOp) finding that the plan was not likely to jeopardize the continued existence of the milkvetch or the desert tortoise. The district court entered summary judgment in favor of the agencies. In this appeal, the Center claimed that the BLM's decision to open additional land to off-road vehicle use violated NEPA, and the APA, among other environmental laws, in its air quality analysis assessing the impacts of 2013 Recreation Area Management Plan ("RAMP") demonstrating that emissions resulting from visitors to the Dunes would not be increased impermissibly by the land openings. The Center also claimed the BLM did not respond to other agencies' comments and concerns appropriately. The Ninth Circuit affirmed. **Decision:** The Center first argued that the assumptions supporting the

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		BLM's ultimate conclusion that implementation of the 2013 RAMP would not increase ozone emissions were arbitrary and capricious. Specifically, the Center takes issue with the BLM's assumptions regarding the number of individuals who will visit the Dunes and how an average visitor will spend his time recreating. In its FEIS, the BLM assumed, for purposes of its emissions analysis, that its plan to open additional areas of the Dunes to off-road vehicle use would not lead to an overall increase in the number of visitors: "[V]isitor use of the Planning Area will remain the same as current levels for all alternatives, and there would be no incremental change in GHG [greenhouse gas] emissions from the baseline." The Center argued that such an assumption cannot possibly be correct—that opening additional areas to off-road vehicle use will necessarily attract an increased number of off-road vehicle enthusiasts. The Court reviewed the previous assertions in the previous litigation surrounding the previous 2003 RAMP, when it challenged the BLM's contention that closing certain areas would result in a decline in visitors. The lower court agreed with the Center concluding there is no data linking closures to reduced off-highway vehicle ("OHV") visitation levels. The BLM stated no new data surfaced indicating that closing the areas would change the number of visitors to the Dunes. The Ninth Circuit concluded that the facts and data in the record tended to support the assertion that opening further acreage to off-road vehicle use would not lead to an increased number of visitors. The Ninth Circuit did note that an inconsistency exists between the BLM's emissions analysis and its economic analysis, the latter of which assumed that opening additional acreage would in fact result in an increased number of visitors. But the Ninth Circuit found that the BLM had the discretion to apply different models and assumptions in different circumstances. The Ninth Circuit discussed that the Center could demonstrate persuasively numerous ways in which the BLM's emissions analysis could be improved. "Mere differences in opinion, however, are not sufficient grounds for rejecting the analysis of agency experts." Because the BLM's assumptions regarding visitation were supported by substantial evidence, the Court found they deserve deference. Second, the Center attacked BLM's assumptions contained in its FEIS relating to how visitors spend their time at the Dunes. Specifically, the Center argues that the BLM underestimated the number of hours per day an average rider uses his ORV, the distance he rides, and the speed at which he travels (the numbers for these variables were significantly higher in the BLM's DEIS). As with the BLM's prediction of the number of visitors, such assumptions are entitled to deference so long as they are supported by "substantial evidence." The Court discussed that for purposes of analysis, the BLM's revised assumptions regarding vehicle use are irrelevant. A conformity analysis must be prepared only if the emissions caused by the federal action—

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		here, the BLM's "preferred alternative" in the 2013 RAMP—exceed listed *de minimis* levels. *See* 40 C.F.R. 93.153(b). The BLM applied the same assumptions relating to vehicle use to its preferred alternative as to the baseline conditions against which the BLM compared its plan. The Center limited its claims that BLM's assumptions regarding vehicle use, which apply equally to all proposed alternatives, are wrong. The Court applied the same logic undercutting the Center's argument that BLM failed to account for other sources of emissions, such as campfires and generators. Absent an increase in visitation, overall pollution would not change. The Center additionally challenges the "fugitive particulate emissions" (PM–10) portion of BLM's air-quality analysis—specifically the BLM's procedure for evaluating the characteristics of the soil found throughout the Dunes. Unlike the assumptions regarding vehicle usage, a change in soil evaluation methods is relevant even if the number of visitors remains constant because soil characteristics vary throughout the Dunes. PM–10 emissions thus depend on which portions of the Dunes are open for off-road vehicle use. The Court noted that the OHVs kick up dust. As a general rule, greater silt content in soil results in greater PM–10 emissions from vehicle traffic. Conversely, when soil contains a greater concentration of sand, PM–10 emissions are reduced. In its original analysis, contained in the DEIS, the BLM relied upon "standard assumptions" regarding silt content to determine the amount of airborne PM–10 off-road vehicles operating in the Dunes might produce. After publishing the draft statement, the BLM revisited its analysis and "determined the standard assumptions that were used greatly overestimated emissions." The agency was instead persuaded that actual soil samples would provide a better foundation for the analysis and so officials proceeded to test soil throughout the Dunes: "Sites were visited and approximately 800 gram samples were collected. These samples were returned to the office where they were sieved and weighed to determine the various fractions of silt and sand in the sample." The testing demonstrated that soils on the Dunes were predominantly sand, with over 75 percent of each sample not passing through a mesh screen. Silt content proved to be low, constituting less than 0.5 percent. Such findings, when incorporated into the analysis, yielded a PM–10 figure below the de minimis threshold. Indeed, because the BLM's proposed openings would shift off-road vehicle use to areas of the Dunes with lower silt content, and would incorporate proposed mitigation measures, the new analysis predicted a decrease in PM–10 emissions from the baseline. Next, the Center argued that the soil sample method employed by the BLM was impermissible because it failed to conform to Imperial County's Implementation Plan. Rule 800 of the Implementation Plan, entitled "General Requirements for Control of Fine Particulate Matter (PM–10)," prescribed a method for analyzing soil characteristics. Rule 800, section G.1.e specifically governed the determination of silt content for "Unpaved Roads and Unpaved Vehicle/Equipment Traffic Areas." The Center

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		averred that because the BLM ignored such rule, the results of its analysis are void. The agency countered that the Center's proposed method is used solely to determine whether a road is considered a "stabilized unpaved road" and was therefore inapplicable for BLM's purpose -- to estimate PM–10 emissions from OHV usage. The Court agreed with the BLM that the aim of testing is to determine whether a surface is in fact a "Stabilized Unpaved Road," which Rule 800 defines as "[a]ny Unpaved Road or unpaved vehicle/equipment traffic area surface which meets the definition of Stabilized Surface as determined by the test method." Rule 800 makes use of the "stabilized unpaved road" standard, where it requires those overseeing lands on which off-road vehicles are used to employ methods such as watering, paving, or speed restrictions to ensure that a surface does not cease being a "stabilized unpaved road"— that is, to ensure that excessive dust is not generated. Simply put, a "stabilized unpaved road" under Rule 800 is a standard—a surface over which vehicles travel without kicking up excessive amounts of dust; one determines whether the standard is met by using the test prescribed bythe regulations. Contrary to the Center's assertion, the test prescribed by appendix B is not a procedure for gauging PM–10 emissions generally. The BLM's use of an alternative method for estimating PM–10 emissions was therefore permissible. Finally, the Center argued that BLM impermissibly disregarded concerns raised by EPA and the Imperial County Air Pollution Control District regarding potential impacts on the environment. The Court rejected this argument for three reasons: (1) ultimate responsibility for ensuring compliance with applicable laws lies with the agency undertaking the proposed action - here, the BLM. *See* 42 U.S.C. § 7506(c), (2) that another agency might prefer a different approach is insufficient to demonstrate that the BLM acted unreasonably, and (3) the record indicates that BLM did indeed consider and respond to criticisms and concerns raised by other agencies, as well as those from the general public. The Court found that the BLM's analysis and response to comments was not arbitrary and capricious.
***Oregon Nat'l Desert Ass'n v. Jewell*, 840 F.3d 562 (9th Cir. 2016)**	FWS	**Agency prevailed on one NEPA issue and did not prevail on the other.** **Issues:** Baseline, mitigation, failure to comment **Facts:** The Oregon Natural Desert Association and the Audubon Society of Portland (collectively, "ONDA") challenged a wind-energy development on the grounds that the U.S. Bureau of Land Management's ("BLM") environmental review of the project did not adequately address impacts to the greater sage grouse, a relatively large ground-dwelling bird once abundant in the western United States. Greater sage grouse depend on sagebrush habitat for their survival. The challenged project entails the construction of wind turbines and a right-of-way across a sagebrush landscape in southeastern Oregon's Harney County.

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		The Echanis Wind Energy Project "is a 104–megawatt (MW) wind energy facility that would be constructed on a 10,500–acre privately-owned tract" on Steens Mountain in Harney County, Oregon. Between 40 and 69 wind turbines would be built on the Echanis site. The entire undertaking—that is, both the transmission line and the turbine complex—("the Project"), was approved in the BLM's FEIS and ROD. Columbia Energy Partners received a conditional use permit from Harney County to develop the Project, commissioned several studies of the Project, and secured a 20–year agreement to sell energy generated by the wind facility. Because the right-of-way for the transmission line crosses public lands administered by the BLM, the construction of the turbines is a "connected action." 40 C.F.R. § 1508.25(a)(1). The Echanis site was chosen because "[i]nitial site reconnaissance revealed wind-swept areas well exposed to prevailing west winds and—where present—significant 'flagging' of vegetation, indicating a robust westerly wind resource." This preliminary assessment was confirmed after a meteorological tower was erected at the site. After considering three alternatives, the BLM chose a route for the transmission line and associated infrastructure that would cut across, in part, the Steens Mountain Cooperative Management and Protection Area ("Steens Protection Area"). Steens Mountain, home to many sagebrush communities, lies near the center of one of the last remaining "strongholds of contiguous sagebrush habitat essential for the long-term persistence of [the protected] greater sage-grouse." The impacts of the Project on sage grouse were by far the most significant concern during the environmental review process at issue here. In the DEIS, FEIS, and ROD, the BLM adopted information, guidance, and mitigation measures concerning the sage grouse from the Oregon Department of Fish & Wildlife's Mitigation Framework and Sage Grouse Strategy documents. The FEIS acknowledged the "potential conflict between wind energy development and greater sage-grouse winter foraging habitats, because the windswept ridges that keep sagebrush exposed during winter months could also be ideal locations for wind energy development." Despite this concern, no surveys were conducted to determine if sage grouse are present at the Echanis site during the winter months of November through April. Instead, the BLM assumed, based on surveys done at the nearby East Ridge and West Ridge sites, that no grouse use the Echanis site during winter. The FEIS stated "no greater sage-grouse were found" at the East and West Ridge sites between late December and April, during the period of snow accumulation. The district court granted summary judgment on behalf of the agencies and denied ONDA's motion for summary judgment. On appeal, ONDA challenged the BLM FEIS on two grounds: (1) the BLM erred in failing directly to assess baseline conditions at the Echanis site, instead relying on an extrapolation from nearby sites to conclude that there is no greater

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		sage grouse winter habitat at Echanis, and; (2) the FEIS erroneously failed to address genetic connectivity between sage grouse populations. The Ninth Circuit affirmed in part, reversed in part, and remanded. **Decision:** The Court first reviewed the standard for a baseline condition, finding that establishment of a "baseline is not an independent legal requirement, but rather, a practical requirement in environmental analysis often employed to identify the environmental consequences of a proposed agency action." *Am. Rivers v. FERC*, 201 F.3d 1186, 1195 n.15 (9th Cir. 1999). An EIS must "succinctly describe the environment of the area(s) to be affected . . . by the alternatives under consideration," 40 C.F.R. § 1502.15, and "insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken," *Id.*;§ 1500.1(b) (emphasis added). "Accurate scientific analysis . . . [is] essential to implementing NEPA." *Id.* The Ninth Circuit found the BLM had a duty to assess, in some reasonable way, the actual baseline conditions at the Echanis site. The baseline conditions were particularly important here because impacts to sage grouse were by far the most significant concern during environmental review, and as stated in the Sage Grouse Strategy Study, the unique features of winter habitat are essential to sage-grouse survival. Baseline conditions at the Echanis site thus warranted comprehensive study in the FEIS. The Court reviewed the FEIS further, noting that the FEIS did not report on any observations of the Echanis site surveying winter sage grouse use of the area. Instead, the FEIS assumed that sage grouse were absent from the site during winter. To justify this assumption, the FEIS relied on data from the East and West Ridge sites, located near the Echanis site but at generally lower elevations. In doing so, the FEIS asserted that, although 36 sage grouse were found at the East Ridge site on December 17, 2008 and nine birds were found on the West Ridge site on December 11, "no greater sage-grouse were found later in December, or in January, February, March, or April, during the time that snow had accumulated." The FEIS explained that its extrapolation from surveys at these sites was reasonable because the "potentially" lower elevation of the sites, as compared to the Echanis site, indicated that it is more likely that snow would accumulate at Echanis earlier and dissipate later in winter. It is less likely, the FEIS asserted, that sage grouse use the Echanis site than the East and West Ridge sites in winter. The Court found this reasoning faulty. Contrary to what the FEIS stated, four sage grouse were found at the East Ridge site—the surveyed site closer to Echanis—during February, indicating that some sage grouse do spend the winter there. The FEIS thus did not comply with the requirement to provide "[a]ccurate scientific analysis," which is "essential to implementing NEPA," 40 C.F.R. § 1500.1(b), or with the agency's obligation to "insure the professional integrity, including scientific integrity, of the discussions and analyses in [EISs*]," Id.;* § 1502.24. Further, that some sage grouse were found at the

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		East Ridge site in mid-winter greatly undermines the validity of the BLM's assumed absence of sage grouse at the Echanis site. Given that grouse do use the East Ridge site during the winter, the BLM's own extrapolation method should have resulted in assuming the birds' presence, not their absence. The Ninth Circuit found that the record confirmed the validity that the sage grouse were present in the winter. One FWS scientist, who prepared the Mitigation Framework, suggested that, if sage grouse were still present at the East and West Ridge sites in December, the conditions were probably right to spend the entire winter there; in fact, as noted, grouse were present in February. Further, several sources on which the FEIS relied, and the FEIS itself, acknowledge that the wind-swept character of the Echanis site—the aspect of the site that makes it ideal for wind-energy generation—suggests it could be good winter habitat for sage grouse, despite its "potentially" higher elevation, as snow there may be blown off sagebrush and exposed for grouse to eat. And scientists and cooperating agencies recommended to the BLM either that actual winter surveys of sage grouse be conducted or, if not, that the BLM assume sage grouse were present at the Echanis site during the entire winter. Without appropriate data regarding sage grouse use of the Echanis site during the winter, whether direct or via a supportable extrapolation, the Ninth Circuit discussed it was not possible to begin to assess whether sage grouse would be impacted with regard to access to viable sagebrush habitat in the winter months. The Court held that because assuming sage grouse were present during the winter months, the project would not go forward, as it would be classified as Category-1 habitat. In that respect, the BLM's analysis materially affected the outcome of environmental review. The Court rejected BLM's arguements that that the mitigation measures adopted in the FEIS cured any potential prejudice resulting from a faulty baseline analysis. The Court rejected this reasoning, stating with baseline conditions inadequately established, the public was not able to tailor its comments to address concerns regarding the potential winter presence of sage grouse at the Echanis site, nor was the BLM's explanation of the impacts to winter grouse habitat adequately informed. Having no reasonable assessment as to whether sage grouse are present at the Echanis site in winter, the BLM could not assess the Project's impacts to them, qualitatively or quantitatively. And with the impacts on sage grouse not properly established, the BLM did not know what impacts to mitigate, or whether the mitigation proposed would be adequate to offset damage to wintering sage grouse. Most importantly, had the BLM assumed the presence of sage grouse, rather than their absence, the Echanis site would be deemed Category–1 Habitat, and the mitigation measures adopted in the FEIS and ROD would not allow development to go forward there. ONDA next asserted that the FEIS erroneously failed to address genetic

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		connectivity between sage grouse populations. "Genetic connectivity" means the extent to which separate populations of a species are able to share genes and thereby to maintain a healthy genetic diversity within each population. The BLM argued ONDA did not raise this argument during the process, and that the FEIS and ROD adequately addressed the more general issue of habitat connectivity and fragmentation. In reviewing this issue, the Ninth Circuit found that ONDA did not use the term "genetic connectivity" in its comments on the DEIS, nor did it make specific arguments about that issue, separately from the more general issues of habitat connectivity and fragmentation. The closest ONDA came to raising the genetic connectivity argument as a distinct issue was the following comment to the BLM in its formal comment letter: > According to [the U.S. Fish & Wildlife Service's] candidate species listing decision, leks within 18 km (11.2 miles) of each other have common features, such as genetic characteristic[s] (genetic evidence proves that exchange between different leks by individual birds has not been restricted), compared to leks farther away. [The FWS] used this distance to determine connectivity between lek sites. Because Echanis and the transmission line alternatives fall within the parameters of connectivity, there will likely be impacts on the ability for sage-grouse to move across the landscape to lek sites for breeding and courtship. The Court found this statement, although related to genetic connectivity concerns, is not sufficient to alert the BLM that ONDA was asking for a genetic connectivity analysis regarding separate sage grouse populations. Reviewing the rest of the record in detail, the Court found that ONDA's comments address connectivity and fragmentation at length, but only in a general sense, not specifically with regard to cross-population genetic connectivity. ONDA did not use the phrase "genetic connectivity" anywhere in its comments, nor did it raise any distinct concern regarding genetic interchange between otherwise separate sage grouse populations. ONDA did not put the BLM sufficiently on notice that it should address genetic connectivity in the FEIS. The Court rejected ONDA's assertion that the issue was obvious. It found that genetic connectivity and the distinction between genetic connectivity and habitat connectivity are not such obvious issues that ONDA had no obligation to raise them to the agency. The Ninth Circuit found that ONDA never raised the issue of cross-population genetic connectivity, specifically, to the BLM, either by using the term "genetic connectivity" or by making the inter- versus intra-population connectivity distinction, or by referring to the Steens Corridor.

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		The BLM responded to comments regarding habitat connectivity and fragmentation issues at the level of detail at which those comments were presented.
***Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095 (9th Cir. 2016)**	BLM	**Agency did not prevail, in part, on its NEPA claims.** **Issues:** Baseline, cumulative impacts, mitigation **Facts:** Plaintiffs Great Basin Resource Watch and the Western Shoshone Defense Project (collectively, "Plaintiffs") challenged the Bureau of Land Management's ("BLM") approval of the Mt. Hope Project ("Project"), a proposed molybdenum mining operation near Eureka, Nevada. Plaintiffs argued that the BLM's review of the Project under NEPA was inadequate. Eureka Moly, an applicant, filed its first plan of operations for the Project with the BLM in June 2006. The BLM released a DEIS in December 2011. After receiving nearly 2,000 comments on the DEIS, the BLM prepared a FEIS, which was released in October 2012. Throughout the NEPA review process, Plaintiffs raised concerns about several aspects of the Project. Many of those concerns related to the adequacy of the BLM's analysis of environmental impacts in the DEIS and FEIS. In comments on the DEIS, Plaintiffs criticized the BLM's analysis of the Project's cumulative impacts, impacts to water quantity and quality, and impacts to cultural, religious, and historical resources. Plaintiffs renewed those criticisms in their comments on the FEIS, and they offered new criticisms concerning, among other things, the FEIS' discussion of funding for long-term mitigation and reclamation. The Environmental Protection Agency ("EPA") reviewed the FEIS and found that the BLM's analyses of air impacts, water quantity impacts, and the funding aspects of long-term mitigation were lacking. Eureka County criticized several aspects of the BLM's NEPA review, including the agency's analysis of air impacts. However, the lower court found for agency finding that the environmental review documents were adequate. In Plaintiffs' appeal, they challenged several aspects of NEPA analysis. They asserted that the BLM's selection of baseline levels of certain air pollutants was unreasonable and that the BLM's analysis of cumulative impacts was deficient. Plaintiffs also challenged the adequacy of the BLM's consideration of various mitigation measures. The Ninth Circuit affirmed in part, reversed in part, and remanded. **Decision:** Plaintiffs first argued that the BLM did not assess adequately the baseline levels of certain air pollutants when conducting the air impacts analysis. Establishing appropriate baseline conditions is critical to any NEPA analysis. "Without establishing the baseline conditions which exist . . . before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). An agency need not conduct measurements of actual baseline conditions in every situation—it may estimate baseline conditions using data from a similar area, computer

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		modeling, or some other reasonable method. *See Or. Nat. Desert Ass'n v. Jewell,* 840 F.3d 562, 570 (9th Cir. 2016) (holding that it would not necessarily be impermissible for the BLM to estimate baseline conditions in one area by extrapolating from another area). The Court discussed that whatever method the agency uses, its assessment of baseline conditions "must be based on accurate information and defensible reasoning." *Id.* When determining baseline air pollution levels for the Project, the BLM did not use actual measurements from the Project site because none were available. In the DEIS, the BLM used baseline values taken from measurements in Clark County, Nevada—the county in which Las Vegas is located—for some pollutants, and used the "default values" for unmonitored rural areas suggested by the Nevada Department of Environmental Protection's ("NDEP") Bureau of Air Pollution Control for some other pollutants. The DEIS discussed that the baseline numbers drawn from the Clark County measurements were "conservatively high" given the relatively urban character of the monitoring locations. In preparing the FEIS, the BLM instructed Eureka Moly "to follow NDEP's guidance in selecting the background concentrations for the air quality analysis." A permitting supervisor from the NDEP's Bureau of Air Pollution Control had previously advised (by means of a brief email) that the agency "assumed" a baseline of zero for all pollutants other than 10-micron particulate matter, and the FEIS adopts most of those baseline values in place of the "conservatively high" baseline values used in the DEIS. Specifically, the FEIS uses baseline values of zero for carbon monoxide, nitrogen dioxide, one- and three-hour time-averaged sulfur dioxide, and lead, while the DEIS had used measured values from Clark County for those pollutants. The FEIS continues to use the same Clark County data for the two longest time-averaged sulfur dioxide baselines, and it uses measurements taken at Great Basin National Park for 2.5-micron particulate matter baselines. Plaintiffs first argued that it was unreasonable for the BLM to use data from Great Basin National Park, a pristine area more than 100 miles away from the Project, to establish baselines for 2.5-micron particulate matter. Although it is true that this choice may have caused the agency to underestimate the baselines for 2.5-micron particulate matter, the BLM explained its choice adequately, and its explanation is reasonable. The Project is located in a rural area, and the BLM used data from a different rural area to estimate baseline conditions. Plaintiffs have not shown that this choice rested on inaccurate information or indefensible reasoning. Plaintiffs' arguments concerning the baseline choices for 10-micron particulate matter and the two longest time-averaged sulfur dioxide concentrations are similarly unconvincing. Like the baselines for 2.5-micron particulate matter, the baselines for 10-micron particulate matter relied on measurements taken at Great Basin National Park. The baselines for the two sulfur dioxide concentrations were "conservatively high," as the BLM noted in the DEIS. By acknowledging the shortcomings in its data

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		while using those data to make an estimate of baseline conditions, the BLM complied with NEPA. *See Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005) (noting that "NEPA . . . requires up-front disclosures of relevant shortcomings in the data or models"). Finally, Plaintiffs argued that the BLM's use of a zero baseline value for the remaining pollutants was unreasonable. The BLM and Eureka Moly responded that the choice of a zero baseline for those pollutants was reasonable because it was "based on recommendations from the [NDEP's Bureau of Air Pollution Control], the agency with Nevada-specific expertise." The FEIS similarly invoked the expertise of the NDEP's Bureau of Air Pollution Control ("BAPC"), prefacing the table of baseline values with the note that "[t]he BAPC was contacted to obtain representative background concentrations for the modeling analysis." And the air impacts analysis prepared for Eureka Moly and submitted to the BLM—the study that underlies the FEIS' air impacts analysis—also notes that the "NDEP-BAPC recommends assuming zero background for" the remaining pollutants. The Court found the only "expert recommendation" in the record is a brief email from an NDEP official—the email is, in fact, cited in the FEIS as the sole source of the zero baseline value. That email reads, in relevant part, as follows: > In an un-monitored area, BAPC uses 10.2 µg/m^3 for a 24-hour average background and 9.0 µg/m^3 for an annual average background for PM10. All other pollutants are assumed to be 0. If there is on-going quality assured monitoring representative of an area, we can rely on that data to set a different background. I'm not aware of any monitoring being performed by BAPC in the area you propose. This email did not explain how or why the NDEP arrived at zero. Such a bare assertion of opinion coming from an expert within the BLM, without any supporting reasoning, does not pass muster in an EIS. The fact that it comes from an expert at a state agency is of no significance to the analysis. *Cf. Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1412–14 (D.C. Cir. 1985) ("[I]n a rulemaking which must be supported by substantial evidence, [an agency] may not rely without further explanation on an unelaborated order from another agency. Neither we as a reviewing court nor participants in the rulemaking can possibly discover the substantive basis of [the second agency's] edict."). The Court explained it might reach a different conclusion had the NDEP official explained why an estimate of zero was appropriate, or had the BLM independently scrutinized that estimate and decided that it was reasonable, and then explained why. A baseline estimate must be based on accurate information and defensible reasoning. The BLM provided neither when it came to its baseline estimates of zero.

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		Eureka Moly argued that the FEIS' air impacts analysis is adequate because it relies on the NDEP's Bureau of Air Pollution Control's issuance of a Clean Air Act permit for the Project. This argument evinced a misunderstanding of the nature of NEPA and its relationship to "substantive" environmental laws such as the Clean Air Act. The failure to explain the zero baseline assumption frustrated the BLM's ability to take a "hard look" at air impacts, and the reference to the Project's Clean Air Act permit did nothing to fix that error. The Court held that the BLM's analysis of air impacts in the FEIS was inadequate because the agency did not provide any support for its use of baseline values of zero for several air pollutants. Plaintiffs next argued that the BLM's analysis of cumulative impacts was deficient. Plaintiffs pointed out that, although the FEIS mentions that there will be cumulative impacts stemming from the Project and nearby mining, agricultural, and other activities, there is no detailed discussion about the impacts, nor is there a quantified assessment of those impacts. "[T]he cumulative impact from an action means "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. Accordingly, "[i]n a cumulative impact analysis, an agency must take a 'hard look' at all actions" that may combine with the action under consideration to affect the environment. *Te–Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (emphasis added). Furthermore, simply listing all relevant actions is not sufficient. Rather, "some quantified or detailed information is required. Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998). The BLM completed the first step of the cumulative impacts analysis by identifying the relevant "past, present, and reasonably foreseeable future actions," 40 C.F.R. § 1508.7, that might affect the environment in the area of the Project. And the BLM provided a "useful analysis of the cumulative impacts" of those actions on some environmental resources." In this regard, the FEIS included a relatively thorough discussion of cumulative impacts to water quantity, complete with a quantitative analysis. The Court found that the discussion of cumulative impacts to other resources in the FEIS fell short. That insufficient discussion, in relevant part, follows: > Each of the identified individual projects within the [study area], including existing and proposed mining operations, emit air pollutants. With the possible exception of motor vehicle emissions, the existing and proposed mining

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		operations are the major sources of criteria pollutants within the [study area]. The modeling for the Proposed Action, as well as the Ruby Hill Mine . . . shows that the levels of these pollutants are below the applicable standards. The Proposed Action would not result in a significant cumulative impact to air resources. The [reasonably foreseeable future actions] would result in additional emissions similar to those currently emitted by the existing operations within the [study area]. In addition, the major sources of pollutants (except for motor vehicle emissions) within the [study area] would operate under permit conditions established by the [NDEP BAPC] and therefore would not be significant. The BLM did not provide sufficiently detailed information in its cumulative air impacts analysis. The BLM made no attempt to quantify the cumulative air impacts of the Project together with the Ruby Hill Mine and vehicle emissions. The BLM did not attempt to quantify or discuss in any detail the effects of other activities, such as oil and gas development, that are identified elsewhere in the FEIS as potentially affecting air resources. The Court noted that because the baseline was inadequate, it was impossible for the BLM to take a "hard look" at cumulative air impacts given its unjustified use of a zero baseline for those pollutants. Thus, the cumulative air impacts portion of the FEIS failed to "enumerate the environmental effects of [other] projects" or "consider the interaction of multiple activities." Plaintiffs argued that the BLM violated NEPA by failing to consider mitigation measures aimed at reducing the possible adverse environmental effects of poor mine pit-lake water quality. The FEIS stated that "[i]nitial pit lake water quality is predicted to be good" but that, "[a]s evaporation from the lake surface concentrates the dissolved minerals, some water quality constituent concentrations would be predicted to increase over time relative to baseline concentrations and to exceed the present Nevada water quality standards." The FEIS further predicted that "[t]here would be a low potential for impacts to ground water quality due to the formation of a ground water sink in the open pit," but that the impact is "not considered significant." The FEIS stated that access to the lake from humans and animals would be restricted, with no recreational access and the lake is not a drinking water source. The Plaintiffs argued that there are "low potential" for impact rather than "no potential" for impacts, and that the lake may, at some point, be used for a water source. The Court found that the agency's approach was reasonable in the circumstances given the relatively low probability and temporal remoteness of adverse impacts to ground water. And though the BLM did not consider any mitigation measures for the potential impact of poor pit-lake water quality on "future water users," it was not required to do so, because the existence of any such users is speculative.

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***Pacific Coast Fedn of Fishermen's Ass'ns v. U.S. Dep't of the Interior,* 655 Fed. Appx. 595 (9th Cir. 2016)** (not for publication)	BOR	**Agency did not prevail.** **Issues:** Alternatives, purpose and need, scope of review **Facts**: Pacific Coast Federation of Fishermen's Associations, Inc., and San Francisco Crab Boat Owners Association, Inc. ("plaintiffs") appeal the district court's partial dismissal and partial summary judgment of their action under NEPA against the Department of the Interior and the United States Bureau of Reclamation. The appeal involved challenges to approval of interim renewal contract authorizing water delivery from federal reclamation facility in California's Central Valley to certain water districts. Prior to approving eight interim two-year contracts for the delivery of water from the Central Valley Project to California water districts, Reclamation issued an EA and a FONSI. **Decision**: The district court dismissed plaintiffs' claims that an EIS was required and that the EA's "no action" alternative was deficient, and it granted summary judgment in favor of defendants on the remaining challenges to the EA. On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded, with the following specific findings: • The EA's "no action" alternative, which assumed continued interim contract renewal, did not comply with NEPA. A "no action" alternative may be defined as no change from a current management direction or historical practice. 43 C.F.R. § 46.30. The Court discussed that a "no action" alternative is "meaningless" if it assumes the existence of the very plan being proposed. When an agency action is mandatory, the "no action" alternative is properly defined as the carrying out of that action. *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 769, 124 S. Ct. 2204 (2004). The Ninth Circuit did not agree with the district court that the Central Valley Project Improvement Act ("CVPIA"), a part of the Reclamation Projects Authorization and Adjustment Act of 1992, required Reclamation to enter into the interim contracts. The CVPIA requires "appropriate environmental review," including the preparation of a programmatic EIS, before Reclamation is authorized to renew an existing long-term water service contract. CVPIA § 3404(c)(1). After the completion of the PEIS, Reclamation "shall, upon request, renew any existing long-term repayment or water service contract for the delivery of water from the Central Valley Project for a period of twenty-five years." Prior to the completion of the PEIS, Reclamation "may" renew water service contracts for interim three-year or two-year periods. The Ninth Circuit rejected Reclamation's argument that the contracts themselves mandated renewal. NEPA imposes obligations on agencies considering major federal actions that may affect the environment. An agency may not evade these obligations by contracting around them. • The EA's statement of purpose and need did not unreasonably narrow Reclamation's consideration of alternatives. The

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		statement did not assume that contract quantities would remain the same, and it was not an abuse of discretion.
		• Reclamation's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion, and the agency did not adequately explain why it eliminated this alternative from detailed study.
		  • First, the court rejected the assertion that the Reclamation Project Act mandated renewal of existing contract quantities when beneficially used. Reclamation did not know whether existing water quantities were "beneficially used" because Reclamation did not conduct a proper water needs assessment, as contractually required, and Reclamation's 2006 assessment was inadequate because it was prepared with data from 1999 that predated a land retirement project.
		  • Second, the Court rejected Reclamation's reasoning that the additional alternative (a reduction in maximum interim contract water quantities) was not warranted based on the Central Valley programmatic EIS, which had a preferred alternative of full contract quantities. The Court pointed out that the PEIS did not address site-specific impacts of individual contracts.
		  • Third, the Ninth Circuit rejected Reclamation's argument that a shortage provision in the interim contracts provided it with a mechanism for annual adjustments in water supplies. The Ninth Circuit agreed with the plaintiffs stating that "the existence of a mechanism for adjusting water quantities after contract approval did not relieve Reclamation of its obligation to consider a reduction in quantities prior to contract approval."
		  • Finally, the court criticized the reasoning that "retaining the full historic water quantities under contract provides the contractors with assurance the water would be made available in wetter years and is necessary to support investments for local storage, water conservation improvements and capital repairs." The court opined that "this reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts. Moreover, given the shortage provisions in the interim contracts and recent drought conditions, the water districts have not been able to rely on delivery of consistent quantities."
		• The court rejected plaintiff's assertion that the EA's geographic scope was improperly limited to the delivery areas and should also have considered the effects, including cumulative effects, of interim contract renewal on the California River Delta, the source of the water, and on the Delta's fish and other wildlife. *See Save*

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		Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1122 (9th Cir. 2005) (holding that agency must analyze all environmental consequences of action). The Ninth Circuit discussed that this contention lacks merit because the EA was tiered off of the PEIS, which addressed Central Valley Project-wide effects of long-term contract renewal. *See* 40 C.F.R. § 1508.28 (describing tiering). "In light of Reclamation's obligation to conduct a more comprehensive analysis in the PEIS, it would be impractical to require the agency to trace the incremental effects of each two-year water service contract on the Delta and all Central Valley Project waters. *See Friends of the Wild Swan v. Weber*, 767 F.3d 936, 943 (9th Cir. 2014) (stating that agency must balance need for comprehensive analysis against considerations of practicality)." • Plaintiffs waived their argument that the EA's analysis of the giant garter snake and the California least tern impermissibly equated a finding of no jeopardy under the Endangered Species Act with a finding of no significant impact under NEPA. Impacts on salmonids and green sturgeon, as well as cumulative impacts related to drainage and selenium, were more appropriately addressed in the PEIS and the San Luis Drainage Feature Re–Evaluation Final EIS, rather than the EA for interim contract renewal. The Ninth Circuit reversed in part and remanded with instructions for the district court to vacate its grant of summary judgment in favor of defendants on plaintiffs' claim that the EA was inadequate because it did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities. On remand, the Ninth Circuit instructed the district court to direct Reclamation consider such an alternative in any future EA for an interim contract renewal.
U.S. Department of Transportation		
***City of Mukilteo v. U.S. Dep't of Transp.*, 815 F.3d 632 (9th Cir. 2016)**	FAA	**Agency prevailed.** **Issues:** Connected actions, pre-made decision by agency, supplementation **Facts:** Two cities, an environmental conservation group, and two individuals petitioned for review of an order of the Federal Aviation Administration ("FAA"), which issued a FONSI, determining that no EIS was necessary to commence operating commercial passenger airline service at airport. Paine Field, located in Snohomish County, Washington, near the city of Everett, was originally constructed in 1936 when it was envisioned to become a major airport serving the communities located north of Seattle. Over the years, it has been used for military purposes (both during and after World War II), and for commercial and general aviation aircraft. Today, the Boeing Company operates its 747 aircraft production factory at

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		Paine Field. There are a host of related commercial businesses which repair and service large airplanes, providing jobs to more than 30,000 people. For that reason, the three existing runways are as long as 9,010 feet. Paine Field did not, however, become the hub of commercial passenger traffic originally envisioned when it was first built. In 2012, authorization was given to commence service by commercial passenger carriers, starting with permission to build a small two-gate terminal. This conflict involves a longstanding public debate over the future of the airfield. Petitioners challenged the FAA's decision that no EIS is necessary to commence operating commercial passenger service at Paine Field. The FAA made that decision after preparing a draft EA. Two and a half years and over 4,000 public comments later, the FAA published a final EA in September 2012. It found no significant environmental impacts as a result of the FAA's approval. Petitioners claim that the FAA unreasonably restricted the scope of the EA, failed to include connected actions as required, and predetermined an outcome before conducting its review. Petitioners made several arguments about the scope of the FAA's review, essentially claiming that the FAA wrongly failed to analyze what would happen if more airlines followed the first two proposed airlines into Paine Field. The Ninth Circuit denied the petition. **Decision:** The FAA based its flight operation projections on demand and determined that the only additional, and reasonably foreseeable, flights were those initially proposed by two airlines, amounting to approximately twenty-two operations per day. Those airlines proposed to employ smaller aircraft with a capacity of up to 150 passengers. In contrast, the projections touted by petitioners were based solely on the airport's maximum capacity and did not take into account actual historical demand. The Court noted that although the most current projections are not in the record, that data is not necessary to determine whether the FAA based its 2012 decision on reasonable grounds. Further, the ongoing validity of that 2012 decision is unchallenged. The FAA claimed that the 2012 FONSI is still valid because Propeller Air, Inc., the new outside investor, now plans to build "a terminal facility consistent with that evaluated in the Final EA," and that the number of operations will be similar. The Ninth Circuit also rejected Petitioners' argument that amending Paine Field's Part 139 Certificate to allow commercial passenger operations means that Paine Field "must allow access by all aircraft so requesting" in the future. Petitioners have provided no support for this come one, come all theory and instead rely on statutory provisions that limit the ability to take away airport access once access has been granted to a particular airline. *See* 49 U.S.C. § 47524(c)(1) (providing limits on new airport access restrictions); 49 U.S.C. § 41713(b)(1) (preempting state restrictions on access). The Ninth Circuit discussed that the statutes cited by the Petitioners only go into effect after access has been authorized—meaning that the airport is open to commercial operations generally (via the

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		airport's Part 139 Certificate) and the airline specifically has authority to conduct operations at that airport (via the airline's Part 119 Specifications). Thus, the Court's decision did not open the floodgates because any future airline must still get an amendment to its Part 119 Specifications in order to operate out of Paine Field. The FAA, therefore, reasonably based the EA on the number of operations Horizon and Allegiant intended to carry out, not on the speculative number of operations that could someday be carried out at Paine Field if other airlines also seek an amendment to their Part 119 Specifications. Petitioners next argued that the FAA violated 40 C.F.R. § 1508.25, which requires agencies to consider "connected actions" in NEPA documents. Connected actions are those that are interdependent or automatically triggered by the proposed action. *See* 40 C.F.R. § 1508.25. The FAA determined that there were no connected actions for this project, and The Court rejected Petitioners argument as mere speculation that the FAA's actions now will lead to more aircraft activity at Paine Field in the future than covered in the EA. Petitioners finally argued that the FAA decided what the result would be before performing the EA for two reasons: (1) the FAA made statements favoring passenger service at Paine Field, and (2) the FAA gave a schedule to the consulting firm that prepared the EA which included the date on which a FONSI could issue. Petitioners argued this schedule and the FAA's statements show that the FAA decided to issue a FONSI before even starting the environmental review process. Petitioners' first argument, that the FAA favored commercial service, is easily rejected because NEPA does not prohibit agencies from having or expressing a favored outcome. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir.2000). Agencies are required only to conduct the required environmental review "objectively and in good faith," rather than as "subterfuge to rationalize a decision already made." *Id.* at 1142. Indeed, the enabling legislation that created the FAA includes an express congressional directive that the agency shall promote and encourage the development of commercial aviation throughout the United States. *See Federal Aviation Act of 1958*, Pub. L. No. 85–726, §§ 102–103, 72 Stat. 731, 740 (later recodified and repealed) (explaining that the FAA is charged with "[t]he promotion, encouragement, and development of civil aeronautics"). The FAA acted well within the bounds of NEPA by advocating for commercial service at Paine Field. Petitioners' second argument, based on the FAA giving the EA contractor a schedule which included the date a FONSI could issue, is also without merit. As the FAA points out, approving a schedule which included the date a FONSI could issue did not obligate the FAA to reach a FONSI. The FAA simply identified its preferred outcome and laid out an optimistic timetable for achieving that outcome. This is consistent with regulations that actually encourage the FAA to identify a preferred alternative and encourage the FAA to set time limits during the environmental review

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		process. *See* 40 C.F.R. § 1501.8 (encouraging time limits); 40 C.F.R. § 1502.14(e) (encouraging listing a preferred alternative). As the FONSI at issue in this case states, the FAA did a "careful and thorough" review of the final EA before issuing its finding. Because the FAA reserved the "absolute right" to determine whether a FONSI would issue or not, creating this tentative schedule did not violate NEPA. In short, the Court held that the FAA's FONSI was not predetermined by the creation of an optimistic schedule for completing the environmental review or statements favoring commercial service at Paine Field. The FAA performed its NEPA obligations in good faith and did not prematurely commit resources to opening the terminal. The Court independently discussed whether a supplemental EA is needed, and reviewed the record. It found that the only changes since the FAA issued its 2012 decision is that a private entity, Propeller Air, Inc., stepped forward to pay for building the small passenger terminal which the FAA has previously approved, and that the airlines likely to use the terminal may change. *See Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 854 (9th Cir.2013) (holding that supplementation is not required when the final project is a "minor variation" of one of the alternatives discussed in the NEPA document); *see also* FAA Order 1050.1E (Change One) ¶ 402b(1) (requiring the FAA to supplement an EA only if "significant changes" have been made to the project). It ultimately found that practical concerns also weigh against requiring the FAA to reevaluate or supplement the EA at this time. Any airline wishing to fly out of Paine Field, besides Horizon or Allegiant, needs to request access from the FAA and an amendment to their Part 119 Specifications, potentially triggering another round of environmental assessment subject to scrutiny under NEPA.
***Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068 (7th Cir. 2016)**	FHWA	**Agency prevailed.** **Issues:** Supplementation **Facts:** Environmental plaintiffs brought action against DOT, FHWA, the Indiana Department of Transportation (INDOT), and related parties, (collectively Defendants) raising various challenges to interstate highway extension project, including alleged violations of NEPA. This case involves the extension of Interstate 69 (I–69) in Southern Indiana. The extension, which will connect Evansville and Indianapolis, has evolved over several decades and is scheduled to be completed in the coming years. The portion of the I–69 project that is primarily at issue in this case is Tier 2, Section 4. Pursuant to NEPA and other statutory prerequisites, FHWA and INDOT issued a DEIS for Section 4 in July 2010. A FEIS was issued in July 2011, and a ROD was issued in September 2011. The agencies selected the final route and construction plan for Section 4 after reviewing some 48 options available (within the constraints established by the Tier 1 ROD). In doing so, the agencies produced a

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		record reflecting their consideration of the plan's impact on historic sites, geological formations, and air quality, among other factors. Pursuant to its obligations under Section 7 of the ESA, the FWS engaged in consultation and issued a Biological Opinion (BiOp) regarding the possible impact of the project's tree-clearing on the endangered Indiana bat. Consultation was then reinitiated, and a revised BiOp, which addressed the issue of "White-Nose Syndrome"— an affliction affecting a large number of bats in the target area — issued for both Tier 1 and Tier 2. In this appeal, the environmental plaintiffs alleged that Defendants violated NEPA by failing to prepare a SEIS for Tier 2, Section 4 to address: (1) the 2009 vehicle fleet data, (2) the impact of the project on the endangered Indiana bat, and (3) the impact of the project on certain historic sites. The Seventh Circuit affirmed the district court's ruling. **Decision:** Environmental plaintiffs first claimed that the issuance of the 2009 vehicle fleet data required a SEIS and Defendants' decision to use the 2004 data was arbitrary and capricious. Pursuant to the CAA, Indiana agencies performed a "fleet mix" study in 2004 and a new study in 2009 to determine air quality standards for Greene County, Indiana because it was considered a "maintenance area." The 2009 study showed an older mix of cars than had been expected. This meant that pollution levels per vehicle were projected to be higher than that determined in the 2004 study. Defendants, acting in consultation, determined that the 2009 data should not be used until it had been quality assured. Therefore, Defendants used the 2004 data when formulating the Tier 2, Section 4 EIS and ROD since the quality assurance analysis was not completed on the 2009 data until October 2011. The environmental plaintiffs argued that the record shows Defendants were concerned with the 2009 data. Emails in the record did demonstrate that Defendants were aware the 2009 data might jeopardize Greene County's compliance with the CAA. One email even urged local authorities to complete their new transportation plans before the 2009 data was finalized in order to avoid the problematic nature of the new study. However, even though the evidence shows that Defendants were concerned with the 2009 data, Plaintiffs presented no evidence to establish that the 2009 data would have resulted in non-compliance. Further, evidence presented by Defendants shows that Greene County has since been updated by the EPA to an "attainment area." This evidence demonstrates that the air quality in Greene County improved and would rebut any evidence by Plaintiffs that there was a significant negative change in air quality that would require a SEIS. The environmental plaintiffs stated that the Defendants failed to take a hard look by relying on the 2004 data. But the Court agreed with the Defendants' conclusion that the 2009 data may contain "systemic deficiencies" and should not be used until it was quality assured. This was not an unreasonable decision, and it was one that was supported by the law since the 2009 data was not official at the time the analysis began.

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		See 40 C.F.R. § 93.110(a) (the conformity determination "must be based upon the most recent planning assumptions in force at the time the conformity analysis begins"). Second, the environmental plaintiffs alleged that a Supplemental EIS (SEIS) was required to deal with the impact of the project on the endangered Indiana bat. The environmental plaintiffs claimed that a 2013 article in a scholarly journal, which detailed the impact of White–Nose Syndrome on the Indiana bat, is proof that a substantial change had occurred and a SEIS was necessary. However, the article does not bear directly on the question at hand and only discusses the risks of the disease in general. The Court explained that the article itself did not constitute a substantial change requiring a SEIS. The environmental plaintiffs claimed that the Defendants and their contractors engaged in tree-clearing that violated the proposed action and substantially affected the Indiana bat. However, Plaintiffs have only provided evidence that one protected tree was felled by Defendants. Importantly, the record showed that a specialist investigated the fallen tree and determined that it had not been used as a "maternity tree" for the Indiana bat. Therefore, the impact of the one fallen tree was minimal or non-existent. The Court concluded that a SEIS was not necessary. Environmental plaintiffs argued that a SEIS was required to protect certain historic sites, but did not include this argument on appeal. The Court found they failed to provide sufficient evidence in the district court to support their allegations with respect to significant changes made to historical sites located in Tier 2, Section 4. Without any such evidence, the Ninth Circuit rejected their argument. The environmental plaintiffs then contended that the Defendants concealed certain information in violation of the NEPA. While the environmental plaintiffs made numerous allegations against Defendants, they failed to provide sufficient evidence to back up their claims. The record clearly shows that Defendants considered all relevant factors when deciding upon a route and made a rational decision. Finally, the environmental plaintiffs claimed that Defendants were guilty of fraud on the court and a violation of the duty of candor by hiding evidence related to Defendants' decision to use the 2004 vehicle fleet data. However, Plaintiffs failed to support these allegations with any admissible evidence. The only evidence Plaintiffs have produced is an affidavit from their own attorney which states that an anonymous employee of Defendants informed Plaintiffs' attorney that a supervisor employed by Defendants told the first employee that the supervisor had not used the 2009 vehicle fleet data in a direct attempt to get around environmental regulations. However, the court found that the attorney's affidavit is hearsay within hearsay and is not admissible. Further, the Court discussed that evidence related to Defendants' desire not to use the 2009 data was contained within the administrative record, including

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		an email which urged local authorities to complete their transportation plans before the 2009 data was finalized. Therefore, any argument that Defendants were attempting to conceal evidence related to their decision not to use 2009 data was unconvincing. The Court found that the environmental plaintiffs produced no evidence that would warrant a belief by a reasonable person that Defendants engaged in fraud or inappropriate behavior.
***Japanese Village, LLC v. Federal Transit Admin.*, 843 F.3d 445 (9th Cir. 2016)**	FTA	**Agency prevailed.** **Issues:** Impact analysis, mitigation, challenge to ROD **Facts:** Japanese Village, LLC ("Japanese Village") and Today's IV, Inc. dba Westin Bonaventure Hotel ("Bonaventure") brought action against federal and local transit agencies and their officials, alleging defendants violated, in part, the Administrative Procedure Act (APA) and NEPA involving an EIS for a new underground light rail line project in downtown Los Angeles. Los Angeles County Metropolitan Transportation Authority ("Metro") planned to construct the Regional Connector Transit Corridor Project ("the Project"), a 1.9-mile light rail extension line in downtown Los Angeles, with federal funding from the Federal Transit Administration ("FTA"). The Project is intended to meet increased demand for public transit and improve transit service in the region by connecting the light rail Gold Line to the Blue and Expo Lines. Appellants Japanese Village and Bonaventure own real property near the Project. The Japanese Village Plaza is a shopping center and office complex in the Little Tokyo area at the eastern end of the proposed line, and the Westin Bonaventure Hotel occupies the block in the Financial District. The FTA published a DEIS for public comment in September 2010. Metro initially identified two build alternatives for the Project: a light rail primarily operating above ground (the "At-Grade Emphasis Alternative") and a light rail that was primarily underground (the "Underground Emphasis Alternative"). During the DEIS drafting process, Appellees established a Little Tokyo Working Group, made up of leaders of the Little Tokyo Community Council and Metro staff, to discuss the impact of the Project on the community. The Little Tokyo community had concerns about the negative construction and operation impacts of both the At-Grade Emphasis Alternative and the Underground Emphasis Alternative. To address these concerns, the Little Tokyo Working Group collaborated on the development of the "Fully Underground Alternative," which Metro staff recommended in the DEIS. After the period for public comment on the DEIS, Metro's Board of Directors voted to designate the Fully Underground Alternative as the Locally Preferred Alternative. Appellees continued to refine the Locally Preferred Alternative and addressed the impact of the refinements in a Supplemental EA /Recirculated Sections of the DEIS ("SEA") released in July 2011. The

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		refinements included reductions in the use of "cut and cover construction" for tunnel excavation, replaced by the use of "Tunnel Boring Machine" or "TBM" excavation. As a matter of background – some terms are important for purposes of this decision. Cut and cover construction entails excavating down from the ground surface using temporary excavation support to stabilize the ground before excavation begins. Temporary concrete decking is placed over the "cut" to allow traffic to pass above during construction; once the tunnel is complete, the excavated trench area is backfilled and the temporary decking is replaced by permanent surface. A tunnel-boring machine ("TBM") is a large-diameter horizontal drill that is used to excavate circular tunnel sections. Compared to the cut and cover method, tunnel boring is far less disruptive to surface traffic and adjacent land uses. The Project refinements addressed in the SEA extended the use of TBM south along the route. The Project route was also realigned to eliminate the use of cut and cover construction in Little Tokyo in favor of Closed Face TBM construction. The new route required Metro to purchase an easement for tunneling below the Japanese Village shopping center and office complex. In January 2012, the Appellees issued an FEIS, which included a response to comments received. Appellees then accepted additional public comments on the FEIS and conducted a series of meetings with community stakeholders between February and April 2012. These efforts resulted in Metro staff recommending that the use of Closed-Face TBM be extended even farther south along the route, budget permitting. Metro also conducted additional analysis of the extent to which mitigation measures could reduce noise and vibration in Japanese Village. In advance of the meeting to approve the Project, Metro staff recommended that the Board adopt additional mitigation measures for Japanese Village. The Metro Board then adopted the staff's recommendations and voted to approve the project. The FTA issued its ROD approving federal funding for the Project in June 2012, which includes a mitigation monitoring and report plan ("MMRP"). The Ninth Circuit affirmed the district court's ruling in favor of the Appellees. **Decision:** Japanese Village argued that the FTA failed to comply with NEPA's procedural requirements for creating a ROD, because the ROD incorporates mitigation measures by reference. More significantly, Japanese Village argued that the FEIS does not include adequate analysis and mitigation discussion of: (1) construction-related noise and vibration impacts, (2) long-term, operational noise and vibration impacts, (3) subsidence risk, and (4) parking impacts. The Ninth Circuit addressed Japanese Village's argument: • Japanese Village challenged the adequacy of the mitigation plan

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		included with the FEIS that issued in January 2012. Specifically, focused on the below: • Construction-related noise. Japanese Village asserted that Appellees did not adequately addressed noise and vibration from construction of tunnels under the Japanese Village property. The FEIS noted that during operation of the tunnel-boring machine ("TBM"), certain portions of Japanese Village could sometimes experience ground-borne vibration (GBV) of 86 dB and ground-borne noise (GBN) of approximately 51 dBA and that Japanese Village businesses fall into a category of land use for which the federal annoyance criteria for infrequent vibration and noise are 83 VdB and 48 dbA, respectively. Thus, the FEIS recognized that without some mitigation, construction could cause significant impact to Japanese Village. The FEIS described several mitigation measures that could reduce noise and vibration at various construction locations. The measures include proper "maintenance and operation" of equipment and use of a "resilient mat" for delivery trains, among others. The FEIS also provided that "Metro shall monitor GBN and GBV levels in the in the [sic] building adjacent to TBM activity during its operation in that area" and that "[d]uring the few days the TBM will be operating in this area, should GBN or GBV measurements exceed FTA annoyance criteria for short-term impacts during construction, Metro shall offer to temporarily relocate affected residents." The Ninth Circuit found that Appellees analyzed and adopted additional mitigation measures for construction-related noise and vibration in Japanese Village after the release of the FEIS, and Appellees documented these measures in the June 2012 ROD. • Adoption of Mitigation Measures. The Court held that the Appellees analyzed and adopted additional mitigation measures for construction-related noise and vibration in Japanese Village after the release of the FIS and documented the measure in the 2012 ROD. • Relocation as a possible Mitigation Measure. The Ninth Circuit examined Japanese Village's argument that relocation does not constitute mitigation as a matter of law, since "relocation" is not specifically cited in 40 C.F.R. § 1508.20. The Court found that it need not decide where relocation can be a valid mitigation measure under NEPA because "NEPA does not require that mitigation measures completely compensate for the adverse environmental effects, " *citing* to *Conner v. Burford*, 848 F.2d. 1441, 1450 (9th Cir. 1988). • Operational Noise and Vibration. Japanese Village argued Appellee violated NEPA by not specifically required "isolated slab track" ("IST") technology to mitigate operational noise and vibration from trains passing below Japanese Village. At the time of the EIS in 2012, Appellee's mitigation plan

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		included other measures but not IST, since they did not expect that IST would be necessary. However, an engineering report issued after the FEIS suggested that without IST, the noise levels at the Japanese Village Plaza would exceed federal limits. However, Appellees specifically adopted IST for Japanese Village when the Metro Board approved the Project later in 2012. And, since the 2015 Final SEIS states that IST applies to Japanese Village, the argument is moot. • Subsidence. Japanese Village contended that the Appellees' plan to mitigate potential building subsidence is not sufficiently detailed, since the FEIS should have required that a .25 inch settlement in any building would trigger compensation grouting. The Court found that the MMRP included multiple measures to combat building subsidence, but were not site specific. After the FEIS was signed but before the ROD, an expect concluded three buildings in Japanese Village were anticipated to have "moderate" to "very severe" damage due to subsidence, and recommended that as soon as a building is approaching a settlement value of .25 inches, compensation grouting would be activated under the building. Since this was part of the administrative record when the ROD was issued, the Ninth Circuit determined that the plan to mitigate subsidence was not arbitrary or capricious. • Parking. Japanese Village then argued Appellees failed to adequately consider the increased demand that the new Little Tokyo transit station will place on Japanese Village's existing parking structure, and that analysis of the impact to that structure – as opposed to other off-street and on-street parking – was insufficient. The Court noted that "[t]here are no NEPA thresholds for determining the significance of parking impacts." The Ninth Circuit concluded that the analysis of off-street parking was sufficient because the Appellee estimated the number of parking spaces that could be lost in Little Tokyo due to the Project but they also estimated the number of spaces they expect the area to gain from other development. Appellees discussed how possible use of public transit would at least partially offset the need for additional parking, and discussed possible mitigation measures, thus, taking the requisite "hard look" at the parking impacts of the proposed Project before Approval. Bonaventure argued that Appellees (1) failed to analyze Closed-Face TBM construction as a reasonable alternative tunneling method for the Lower Flower portion of the Project in the FEIS, (2) failed to adequately analyze certain impacts and impermissibly deferred certain mitigation analyses in the FEIS, and (3) failed to prepare a Supplemental EIS to analyze nighttime construction. The Court discussed these arguments in turn:

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		• Analysis of Closed Face TBM on Lower Flower Street – Feasibility Determination in the FEIS. The Ninth Circuit agreed with the Appellees' finding that Closed-Faced TBM was not feasible on Lower Flower Street was not arbitrary and capricious when Appellees adopted the construction technique for other parts of the Project but found it infeasible on Lower Flower due to three reasonable impediments: (1) the Pocket Track Impediment -- a third track with connecting switches for train storage and passing located between two main track and used to enable quick recovery of the transit system when a train has to be taken out service, (2) Flower/5th/4th Street Station, and (3) Tiebacks – temporary stabilization systems made out of steel that are typically left in place after basement construction in the area. • Metro accepted public comments after the FEIS was published, and continued examining options for extending the use of Closed-Face TBM. At the board meeting later in 2012 Metro adopted its staff's recommendation to extend the use of Closed-Face TBM, if it could be done within the Project's budget. The Ninth Circuit agreed with the lower court that this post-FEIS admission of feasibility did not establish that the FEIS was procedurally deficient. The Court explained, that Bonaventure may have preferred the Appellees reach a different conclusion in the FEIS but that preference does not establish that Appellees were arbitrary and capricious in determining that the alternative was not feasible at the time. • Adequacy of Analysis of Project Impacts and Mitigation. Bonaventure expressed concern that the impact of "grade separation between the concrete decking and the existing sidewalk and driveway elevations. They argued that Appellees acknowledged the possibility of grade separation but then failed to quantify the possible extent or analysis the impact it may have on freeway and garage access. The Ninth Circuit found that the FEIS stated the requirements for decking appropriately, and responded to public comment about the impacts of grade separation. The Ninth Circuit held that since the Appellees determined there would be no significant environmental impacts from grade separation, they appropriately deferred the configuration decision and selection of decision criteria. The Court noted by the time the project was approved, it included a design refinement. • Emergency Vehicle Impact Analysis. Bonaventure expressed concerned about impact of construction on emergency vehicle access to adjacent properties, including the Westin Bonaventure Hotel. The Court acknowledged some of the discussion was conclusory by not explaining, for instance, how Metro would not allow construction to impede safe evacuation of the buildings or access for emergency personnel. But the Appellees acknowledged that construction activities could result in increased response times for emergency vehicles, and as a result, ensured the FEIS discussed very detailed mitigation measures to

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		reduce the impact of street closures. In the FEIS, Appellees explained how they will maintain access for emergency vehicles, although potentially more limited access than usual. Early notification to emergency services providers would help to prepare the emergency service provides to navigate the more limited access and thereby mitigate the impact of the Project. • Deferred Monitoring and Mitigation Measures. Bonaventure claimed that Appellees impermissibly deferred "myriad studies, surveys, and mitigation plans" in violation of NEPA. The Ninth Circuit affirmed the lower court's ruling that the mitigation measures were not inadequate. The Court focused on that Appellees studied baseline conditions and conducted in depth analysis of the subsidence, vibration, traffic management, and noise impacts of the Project. The Ninth Circuit found that the challenged mitigation measure describe how the impact will be monitored and the planned responses. The Court also noted that adaptive management plans were proposed, that "provided flexibility in responding to environmental impacts through a regime of continued monitoring and inspection." • Supplemental EIS for Nighttime Construction. Bonaventura contended that Appellees were required to prepare a supplemental EIS because Metro applied for various noise ordinance variances to accommodate nighttime construction after the issuance of the FEIS. The Ninth Circuit noted that all four variance applications in the administrative record all list the same construction activities for the same time period. Bonaventura claimed that the FEIS only contemplated nighttime construction over a short, limited period, while the requested permits would allow for 24/7 construction over 1.5 years -- the Court rejected this contention, because the variances suggested that Metro was seeking blanket authorization for utility relocation activities, not that it would to on continuously in one area for 1.5 years. Finally, since the FEIS accounted for the noise and light impacts of possible nighttime construction, even if the variance application would to constitute a substantial change, no supplementation would be required, because the change would not affect the environment to a significant extent not already considered.
***North Carolina Wildlife Fed'n v. North Carolina Dep't of Transp.,* 651 Fed. Appx. 225 (4th Cir. 2016)** (not for publication)	FHWA	**Agency prevailed.** **Issues:** Alternatives, impact analysis **Facts**: The North Carolina Department of Transportation and FHWA) (collectively the Agencies) approved construction of a twenty-mile toll road in western North Carolina linking Mecklenburg and Union Counties—the Monroe Connector Bypass. Seeking to enjoin construction of the toll road, Clean Air Carolina, the North Carolina Wildlife Federation, and Yadkin Riverkeeper (collectively, the "Conservation Groups") filed suit in 2010. The Conservation Groups contended that the process by which the Agencies approved the road violated NEPA and the Administrative

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		Procedure Act (APA). The Conservation Groups alleged that the Agencies violated NEPA and the APA, involving an EIS, in four ways: (1) the alternatives analysis was arbitrary and capricious, (2) the environmental impact analysis was arbitrary and capricious, (3) the Agencies undermined NEPA by fostering a climate of misinformation, and (4) the Agencies should not have issued the FEIS and the ROD at the same time. **Decision**: In a lengthy opinion, the district court rejected those challenges, and the Conservation Groups appealed. The Fourth Circuit affirmed the district court's lengthy opinion finding: • the Conservation Groups did not establish that the Agencies "failed to take a sufficient 'hard look' at the reasonable alternatives." The district court explained that the Agencies "adequately created and compared No Build and Build scenarios" and corrected their previous flaws in evaluating alternatives. • the Agencies had adequately analyzed the environmental impacts of the project—including any growth induced by the project itself and the cumulative impacts of the project. • that "in light of the administrative record as a whole" the Agencies had complied with NEPA's requirements for public comment and transparency. • that the Agencies did not abuse their discretion in issuing the FEIS and the Record of Decision together, and concluding that the Agencies had met all of the requirements of NEPA and the APA, the district court granted summary judgment to the Agencies. The Fourth Circuit affirmed on the reasoning of the thorough district court opinion, available at *Clean Air Carolina v. North Carolina Dep't of Transp*., No. 5:14-CV-863-D, 2015 WL 5307464, -- F. Supp.3d --- (E.D.N.C. Sept. 10, 2015).
Independent Agencies		
***State of New York v. U.S. Nuclear Regulatory Cmm'n,* 824 F.3d 1012 (D.C. Cir. 2016)**	NRC	**Agency prevailed.** **Issues:** Alternatives, mitigation, consideration of environmental impacts through general rulemaking, cumulative impacts **Facts**: Several states, a Native American community, and numerous environmental organizations filed petitions for review of a rule and generic EIS (GEIS) issued by NRC, concerning the continued, and possibly indefinite, storage of spent fuel from U.S. nuclear power plants. NRC prepared a GEIS and proposed a Continued Storage Rule to codify its analysis of the effects of continued on-site storage of spent nuclear fuel. The stated purpose of the Rule "is to preserve the efficiency of the NRC's licensing process by adopting into the NRC's regulations the Commission's generic determinations of the environmental impacts of the continued

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		storage of spent nuclear fuel . . . beyond the licensed life for operations of a reactor . . . " *See* 79 Fed. Reg. 56,238, 56,239 (2014) (Continued Storage Rule); 79 Fed. Reg. 56,263 (2014) (notice of GEIS). The Rule incorporates the findings of the GEIS into all future reactor licensing proceedings. Plaintiffs (a group of states, a Native American community, and a group of environmental organizations [referred to as NRDC]) submitted comments on both the GEIS and the Rule. They then challenged the Rule and the GEIS on the basis that NRC failed to comply with NEPA. "First, the petitioners contend that the Rule is a major federal action that requires consideration of alternatives and mitigation measures to reactor licensing. Second, they dispute the NRC's assessment of the environmental impacts of the continued storage of spent nuclear fuel, asserting: (a) failure to employ conservative bounding estimates, (b) inadequate determination of the probability of failure to site a permanent geologic repository, (c) insufficient assessment of the cumulative impacts of the continued storage of spent nuclear fuel, and (d) unjustified dismissal of the risks of short-term, high-volume pool leaks. Relatedly, the petitioners challenge as "illusory" the NRC's process for granting a petition for waiver of the Rule in site-specific licensing proceedings. Finally, the petitioners characterize several of the NRC's underlying assumptions in the GEIS as unreasonable. We hold that none of these arguments is persuasive and deny the petitions." **Decision**: "We agree with the NRC and hold that, while the Rule is a 'major Federal action' under NEPA, the NRC complied with its NEPA obligations by preparing the GEIS. Because the Rule is not a licensing action, the NRC need not have considered the alternatives to licensing in the GEIS. We therefore deny the petitions for review on this issue." "Under NEPA, an agency must consider both the environmental impacts of a proposed action and alternatives to that action. *See* 42 U.S.C. § 4332(C). Part of the alternatives analysis includes review of measures available to mitigate adverse effects. *See* 40 C.F.R. §§ 1508.25(b), 1502.14(f). "[W]e review both an agency's definition of its objectives and its selection of alternatives under the "rule of reason" . . . That is, as 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." *Theodore Roosevelt Conservation P'ship v. Salazar (Theodore Roosevelt II*), 661 F.3d 66, 73 (D.C. Cir. 2011) (*quoting Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)) (alteration in original). Furthermore, "NEPA does not require agencies to discuss any particular mitigation plans that they might put in place, nor does it require agencies—or third parties—to effect any." *Theodore Roosevelt Conservation P'ship v. Salazar (Theodore Roosevelt I*), 616 F.3d 497, 503 (D.C. Cir. 2010) (citation and internal quotation marks omitted)." "We find nothing in the GEIS to indicate that the NRC went astray of NEPA's rule of reason. Regardless, because mitigation is equally relevant during the life of a licensed reactor as it is during decommissioning, the

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		NRC can defer consideration of such measures to site-specific review. *See Public Utils. Comm'n of Cal. v. F.E.R.C.*, 900 F.2d 269, 282–83 (D.C. Cir. 1990) ("[T]he Commission's deferral of decision on specific mitigation steps until the start of construction, when a more detailed right-of-way would be known, was both eminently reasonable and embraced in the procedures promulgated under NEPA."). Regardless, "NEPA does not require agencies to discuss any particular mitigation plans that they might put in place." *Theodore Roosevelt I*, 616 F.3d at 503 (citation and internal quotation marks omitted)." "We noted in *New York v. Nuclear Regulatory Com'n (New York I)* that "[b]oth the Supreme Court and this court have endorsed the [NRC's] longstanding practice of considering environmental issues through general rulemaking in appropriate circumstances'." 681 F.3d 471, 480 (D.C. Cir. 2012). We also stated that "we see no reason that a comprehensive general analysis would be insufficient to examine on-site risks that are essentially common to all plants." *Id*. Furthermore, "whether the analysis is generic or site-by-site, it must be thorough and comprehensive," *id.* at 481, and we are "most deferential" to the "NRC's technical judgments and predictions ...[,]" *Blue Ridge Env'tl Def. League v. Nuclear Regulatory Com'n*, 716 F.3d 183, 195 (D.C. Cir. 2013) (citation and internal quotation marks omitted). While we acknowledged in *New York I* that a generic analysis of impacts is "particularly" appropriate when the NRC utilizes "conservative bounding assumptions and the opportunity for concerned parties to raise site-specific differences at the time of a specific site's licensing," we did not make those factors essential. 681 F.3d at 480. Instead, the cornerstone of our holding was that the NRC may generically analyze risks that are "essentially common" to all plants so long as that analysis is 'thorough and comprehensive.'" "In this case, we are convinced that the NRC has met that standard. True, the NRC's analysis is not "bounding" in a strict sense . . . Nonetheless, according deference to the NRC's technical decision-making, *see Blue Ridge*, 716 F.3d at 195, we find nothing in the GEIS to undermine the NRC's conclusion that the identified risks are "essentially common" to all reactor sites . . . Furthermore, the GEIS "explain [s] qualitatively the factors that may cause the risk to be lower or higher than" at the Surry and Lake Michigan plants. Regardless, the NRC need not provide a perfect analysis, only one that is "thorough and comprehensive . . . " *New York I*, 681 F.3d at 481. We hold that the GEIS meets this requirement." "The NRDC argue[d] that the GEIS fails to discuss the cumulative impacts of continued storage of spent nuclear fuel "when added to other past, present, and reasonably foreseeable future actions . . ." 40 C.F.R. § 1508.7. We disagree. While it is true that NEPA requires an agency to consider 'cumulative or synergistic environmental impact[s]' of related, concurrently pending proposals, *Kleppe v. Sierra Club*, 427 U.S. 390, 410, 96 S. Ct. 2718 (1976), "the purpose of the cumulative impact requirement is to prevent agencies from dividing one project into multiple individual actions each of which has an insignificant environmental impact, but which collectively have a substantial impact," *Theodore Roosevelt I*, 616

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		F.3d at 514 (citation and internal quotation marks omitted) . . . Because there is no indication that the NRC has improperly segmented its environmental impact analysis, we deny the petitions on this issue." "Finally, we note that the NRC's regulations already provide a means by which the petitioners can raise site-specific challenges during licensing proceedings. Specifically, under 10 C.F.R. § 2.335(b), "[a] participant to an adjudicatory proceeding [before the NRC] . . . may petition that the application of a specified Commission rule or regulation or any provision thereof . . . be waived or an exception be made for the particular proceeding." The standard by which the NRC will grant such a petition "is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted." *Id.* We hold that the NRC's waiver provision provides an adequate mechanism by which the petitioners can challenge the GEIS in site-specific proceedings." "The States and the NRDC contend that the NRC utilized several unreasonable assumptions, including: (1) that spent nuclear fuel will be removed from spent-fuel pools within sixty years of reactor decommissioning; (2) that after the sixty-year period, spent fuel will be stored in dry casks that are replaced every one hundred years; and (3) that institutional controls over spent nuclear fuel will exist into perpetuity. We hold that none of these assumptions is so unreasonable as to render the NRC's decision-making arbitrary or capricious . . . An agency does not engage in arbitrary or capricious decision-making by making "predictive judgment[s]" or even by relying on "[i]ncomplete data." *New York v. EPA*, 413 F.3d 3, 31 (D.C. Cir. 2005). To the contrary, such judgments are 'entitled to deference," *id.* and a challenge to the agency's assumptions must be more than "an effort by [a petitioner] to substitute its own analysis' for the agency's, *Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 667, 737 (D.C. Cir. 2000). In this case, the NRC's assumptions in the GEIS are ably supported by the record."
***Sierra Club v. Federal Energy Regulatory Cmm'n,* 827 F.3d 36 (D.C. Cir. 2016) & *Sierra Club v. Federal Energy Regulatory Cmm'n,* 827 F. 3d 59 (D.C. Cir. 2016) (companion cases)**	FERC	**Agency prevailed.** **Issues:** Proximate cause analysis for indirect and cumulative effects **Facts:** In *Sierra Club (Freeport)*, Sierra Club and Galveston Baykeeper challenged a FERC Order and accompanying EIS allowing Freeport LNG Development to redesign its liquefied natural gas (LNG) terminal in Texas to support natural gas export operations. In *Sierra Club (Sabine Pass)*, Sierra Club challenged a FERC Order and accompanying EA allowing for the increase in production capacity at an existing LNG terminal in Louisiana operated by Sabine Pass Liquefaction and Sabine Pass LNG. In both cases, Sierra Club alleged that NEPA required FERC to address the environmental effects related to the increase in domestic natural gas production that Sierra Club believed these FERC approvals would induce. Sierra Club also argued that the indirect effect of increasing natural gas export capacity would be to increase domestic price of natural gas, which

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		would cause greater reliance on coal as a cheaper fuel. **Decisions:** On June 28, 2016, the U.S. Court of Appeals for the D.C. Circuit issued separate but related decisions upholding FERC's treatment of indirect and cumulative impacts under NEPA when the agency approved both the Freeport and the Sabine Pass projects. In both cases, the D.C. Circuit found that the Sierra Club had established associational standing to bring the suits on its members' behalf: (1) at least one of its members would have standing to sue in his or her own right, (2) the interests Sierra Club sought to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested required the participation of individual members in the lawsuit. However, the court in both decisions rejected the Sierra Club's claims on the merits, noting that an agency need only study those indirect impacts that have a reasonably close causal relationship between the environmental effect and the alleged cause. Specifically, the court rejected Sierra Club's assertion that FERC's authorization of either project would lead to greater natural gas exports and thereby increase natural gas prices, leading to greater domestic use of coal. In addition, even assuming the projects would result in greater natural gas imports, the court found that because DOE, not FERC, is the agency responsible for authorizing exports of LNG, FERC's authorization of the siting, construction, and operation of the LNG terminals was not the legally relevant cause of the alleged indirect effects. In the court's view, DOE's independent decision to allow exports breaks the NEPA causal chain and absolves FERC of responsibility to assess the alleged indirect effects. **Commentary**: This pair of decisions is significant for several reasons: 1. These decisions apply the U.S. Supreme Court's decision in *Department of Transp. v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204 (2004), to NEPA assessments for energy projects. The D.C. Circuit rejected the notion that FERC's NEPA analyses for its authorization of the terminals should include every possible impact that might occur for which the project could be a "but for" cause. Instead, the court invoked the "familiar doctrine of proximate cause" as articulated in *Public Citizen*, holding that NEPA requires a "reasonably close causal relationship" between the environmental effect and the alleged cause. The court excused FERC from considering those effects that could only occur as a result of subsequent action by DOE to approve LNG exports. In *Sierra Club (Sabine Pass)*, the court went further, holding that FERC acted reasonably when it found that additional natural gas production was not a reasonably foreseeable consequence of approving greater natural gas production capacity at the terminal. 2. The court rejected the Sierra Club's effort to adopt the Eighth Circuit's

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		ruling in *Mid States Coalition for Progress v. Surface Transp. Board*, 345 F. 3d 520 (8th Cir. 2003). In *Mid States*, the Eighth Circuit found inadequate the Surface Transportation Board's EIS which analyzed the construction and rehabilitation of hundreds of miles of railroad for the transportation of coal. The project would have made available an additional 100 million tons of coal for annual usage, but the Board failed to assess the environmental effects of this additional coal usage in its analysis. The D.C. Circuit declined to apply *Mid States*, noting that the Surface Transportation Board had itself identified air emissions from the burning of this coal as an indirect effect but then failed to assess this effect in the EIS. Thus, in the D.C. Circuit's view, the only reason the air emissions in *Mid States* were an appropriate indirect effect was because the Board had earlier identified these emissions as an indirect effect. Moreover, the D.C. Circuit saw no need to address the correctness of a decision that was not binding upon it, deciding that the bounds of indirect effects should be governed by *Public Citizen*, not by *Mid States*. The *Mid States* case has been cited by environmental groups in support of their position that NEPA reviews should consider the upstream and downstream impacts of energy projects. Therefore, the D.C. Circuit's rejection of *Mid States* is particularly noteworthy. 3. The D.C. Circuit decision in *Sierra Club (Freeport)* relating to the Texas LNG terminal also addressed cumulative impacts. In its EIS, FERC had identified the relevant geographic area for its cumulative impact analysis as the county in which the LNG terminal was located and within which the predominance of environmental impacts associated with the project would occur. Plaintiffs challenged this analysis as being too narrow, arguing that FERC should have undertaken a nationwide analysis that included applications for several other LNG terminal projects that were pending or had already been granted. The court rejected plaintiffs' arguments, holding that a cumulative impact analysis should identify the area in which the effects of the proposed project will be felt. The court held that where there is little or no evidence that a project itself has significant impacts, an agency's duty to address cumulative impacts is appropriately narrow. Accordingly, it was proper for FERC to identify the county as the relevant geographic areas for the assessment of cumulative impacts. In particular, the court explained: That is not to say that the nature of a particular agency action would never warrant a nationwide cumulative-impact analysis. *See Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002) (cumulative impact analyses must identify "the area in which the effects of the proposed project will be felt"). But given the scant record evidence identifying any reasonably foreseeable and proximate effects of the Freeport Projects themselves (separate from their exports) on national energy markets or emission levels, we hold that the Associations have not shown that the Commission acted arbitrarily or capriciously in analyzing the cumulative effects of the Freeport Projects. *See Minisink Residents for Environmental Preservation and Safety v. F.E.R.C.*,

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		762 F.3d 97, 113 (D.C. Cir. 2014) (upholding cumulative-impact analysis finding "no significant cumulative impacts were expected" where the "[p]roject itself was expected to have minimal impacts").
***Earth Reports, Inc. v. Federal Energy Regulatory Cmm'n,* 828 F.3d 949 (D.C. Cir. 2016)**	FERC	**Agency prevailed.** **Issues:** Proximate cause analysis for indirect and cumulative effects, social cost of carbon, reliance on findings of other agencies, public safety concerns **Facts:** Several environmental organizations petitioned for review of FERC's conditional authorization of the conversion of the Cove Point liquefied natural gas (LNG) facility from an import maritime terminal to a mixed-use, import and export terminal within the existing footprint of the marine terminal. FERC prepared a 200-page EA for the LNG conversion project that considered the direct, indirect, and cumulative impacts of new liquefaction facilities at Cove Point and the modification of pipeline and related facilities in Virginia. Petitioners contend that the Commission failed to consider several possible environmental impacts that the Cove Point conversion project may have, and thus did not satisfy its obligations under NEPA. The court denied the petition. "For the reasons set forth in *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016), the Commission was not required under NEPA to consider indirect effects of increased natural gas exports through the Cove Point facility, including climate impacts. Petitioners' remaining challenges—to the Commission's NEPA analysis of the impacts of ballast water on water quality, maritime traffic on the North Atlantic right whale, and the Cove Point facility's operations on public safety—fail to show that the Commission did not adequately address these concerns." **Decision:** "Petitioners' contentions regarding the indirect effect of increased exports on upstream natural gas production resemble those rejected in *Sierra Club (Freeport)* and *Sierra Club (Sabine Pass*). And while those cases did not address whether NEPA reaches the effects of emissions arising from the transport and consumption of exported natural gas, this indirect effect similarly "cannot occur unless a greater volume of [LNG] is shipped from [Cove Point] and enters the international marketplace." *Sierra Club (Sabine Pass*), 827 F.3d at 68. Because "[DOE] alone has the legal authority to authorize [Dominion] to increase commodity exports of liquefied natural gas[,]" the challenged orders here too "are not the legally relevant cause of the[se] indirect effects" and "the Commission did not need to consider [them] in its NEPA review." *Id*. As in *Sierra Club (Freeport)* and *Sierra Club (Sabine Pass)*, petitioners "remain[ ] free to raise these issues in a challenge to the [DOE's] NEPA review of its export decision." *Id.* FERC reasonably declined to consider upstream domestic natural gas production in NEPA review of facility's indirect effects. "One aspect of

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		petitioners' challenge, however, does not stem from increased natural gas exports, namely the Commission's failure to use 'social cost of carbon' analysis or a similar analytical tool to analyze the environmental impacts of greenhouse gas emissions from the construction and operation of the converted Cove Point facilities. The Commission acknowledged the availability of the 'social cost of carbon' tool, but, in its opinion concluded that, 'it would not be appropriate or informative to use for this project'… Although petitioners take a different position, they identify no method other than the 'social cost of carbon' tool that the Commission could have used. Hence, petitioners provide no reason to doubt the reasonableness of the Commission's conclusion. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 309-12 (D.C. Cir. 2013)." FERC did not arbitrarily minimize potential impact of unloading ballast water by maritime vessels taking on LNG at facility on local water quality. "To the extent petitioners view the Commission's statement that "[i]t is outside of [its] jurisdiction and expertise to promulgate regulations or invent best management practices regarding ballast water exchange and invasive species control[,]" to be an abdication of responsibility, we disagree. Rather, it represents the Commission's reasonable assessment that having "fairly evaluated" possible environmental impacts of ballast water, it had 'no grounds' for requiring more stringent conditions than those required by the Coast Guard and the state of Maryland . . . The cases cited by petitioners are distinguishable because the agencies deferred to another agency's assessment without independently evaluating the relevant impacts. *See Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015); *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 481 (D.C. Cir. 2012)." FERC adequately analyzed possible impact of maritime traffic associated with facility on North Atlantic right whale. "Petitioners criticize the Commission—as well as the National Oceanic and Atmospheric Administration . . . with which it consulted—for relying on a 2007 study prepared in connection with prior Cove Point authorizations . . . Petitioners point to nothing to question the reasonableness of the Commission's conclusion that its earlier analyses sufficiently anticipated the changes they identified and remain adequate to address the risks to the North Atlantic right whale. The Commission, thus, did not act arbitrarily and capriciously in relying on them. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 510–12 (D.C. Cir. 2010)." FERC adequately considered public safety issues cited by organizations. "Petitioners' primary public safety-related concern is that the Commission failed to adequately account for the fact that the Cove Point facility will handle dangerous chemicals on what petitioners view as a small footprint proximate to residential areas, which they maintain amplifies the possible effects of any safety incident. The Commission acknowledged public safety concerns" and the EA "included a detailed overview of the facility and its environs, noting the Cove Point facilities would be 'situated within a 131-acre area . . . located within an approximately 1,017-acre parcel

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		owned by [Dominion] . . . Petitioners object that the Commission's repeated assurances that the Cove Point LNG facility would comply with federal and local standards and coordinate with appropriate authorities constitutes an abdication of its responsibility to conduct an independent public safety evaluation . . . Petitioners fail to provide support for their assertion that the disparity between Cove Point's footprint-to-facility ratio and that of other, less densely occupied facilities impacts public safety as would show that the Commission failed adequately to identify and consider public safety issues . . . Commission conducted an extensive independent review of safety considerations; the opinions and standards of—and Dominion's future coordination with—federal and local authorities were one reasonable component."