



National Association of Environmental Professionals
Promoting Excellence in the Environmental Profession

Annual NEPA Report 2008 Of the National Environmental Policy Act (NEPA) Working Group

Submitted to
NAEP Board of Directors

By
Peter W. Havens, CEP
Grace Musumeci

May 1, 2009

This report reviews NEPA document submittals and statistics, NEPA litigation and agency procedures for calendar year 2008. Additional sections provide commentary on the conduct of the NEPA Process and expert expectations for the future. The purpose of this report is to document status of NEPA compliance and perspectives during the reporting year. We welcome reader comment and inquiry.

Table of Contents

| | |
|---|----|
| Table of Contents..... | 2 |
| Introduction | 3 |
| The NEPA Working Group 2008..... | 3 |
| Just the Stats..... | 3 |
| NEPA Documents Filed in 2008..... | 5 |
| Agency Procedures | 7 |
| Natural Resources Conservation Service, Department of Agriculture | 7 |
| U.S. Forest Service, Department of Agriculture..... | 7 |
| Department of the Interior | 7 |
| National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce..... | 8 |
| Litigation Updates for 2008 – Lucinda Low Swartz..... | 8 |
| Commentary | 9 |
| Facts about National Environmental Policy Act (NEPA) Third-Party Contracting..... | 9 |
| Definition of a Reasonably Foreseeable Future Action | 10 |
| Evaluating Greenhouse Gases and Climate Change Impacts under NEPA; Ten Steps to Taking a Hard Look..... | 11 |
| That Was the Year It Was..... | 13 |
| Appendix A – Recent Cases (2008) | A1 |

Introduction

[I]t is the continuing policy of the Federal Government...to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
—National Environmental Policy Act of 1969

This is the National Association of Environmental Professionals (NAEP) National Environmental Policy Act (NEPA) Working Group Annual Report. Our goal is to represent a summary of the work conducted by the NEPA WG and major NEPA related issues of the immediate past calendar year. In this, the second and improved NAEP NEPA Working Group Annual Report we have expanded the original outline with commentary from Working Group members on important topics of 2008. The report is prepared and published through the initiative and volunteer efforts of members of the NAEP NEPA Working Group.

The NEPA Working Group 2008

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

The NEPA Working Group maintained its standard goal of monthly conference calls throughout the year with the gracious donation of a conference line from Battelle. In our calls, we discussed several issues of interest, including:

- NEPA compliance guidance
- Climate change and how best to address greenhouse gasses
- Current NEPA litigation
- Changing agency rules

We established an Internet web site for Working Group members providing opportunity for discussions, wiki page development, blog postings, jobs, conference call agendas and notes.¹ The web site has become the primary vehicle for communications among the Working Group membership. About 19 members have been active on our Working Group web site.

Richard Burke
Nick Chevance
Harold Draper
Rich Gilmour
Peter Havens

Roger Hansen
Al Herson
Denise Keel
Tom King
Jean Krewson

Paul Looney
David Mattern
Lynn McLeod
Jim Melton
Grace Musumeci

Owen Schmidt
Karen Vitulano
Lasantha Wedande
Hova Woods

Just the Stats

¹ The NAEP NEPA Working Group web site is open to NAEP members who also wish to participate with the NEPA Working Group. To join the web site, please call or write the NAEP NEPA Working Group chairperson.

In 2008, a total of 548 environmental impact statements were published. Fourteen agencies each prepared ten or more documents, with the Forest Service providing the most at 123 and the next highest being the Federal Highway Administration with 65. The accompanying table at the end of this report provides the overall agency distribution. Two hundred seventy two (272) were draft documents and 276 were finals. During the year, some form of final document as well as draft document was published for 70 actions/projects; of which 27 of the draft documents were rated LO, 37 were rated EC, and two were rated EO. Twenty five (25) different agencies led the evaluations of these 70 federal actions.

As of January 1, 2009, 144 proposed projects had been rated LO by the Environmental Protection Agency (EPA), while 11 received an EO rating, none was rated EU. One document was found to be inadequate and one was withdrawn. See Note Box for an explanation of EPA's ratings.

Projects that received EO ratings were actions by the Forest Service, Bureau of Indian Affairs, Bureau of Land Management, Coast Guard, Corps of Engineers (2), Department of Homeland Security, Federal Highway Administration (2), Bureau of Reclamation, and Army; 4 of the projects were in California, 2 in North Carolina, and one each in Montana, Alabama, Colorado, Alaska, and Washington.

Though the most recognized by the public, EISs make up the smallest group of NEPA documents. Once again, an unknown number of environmental assessments and categorical exclusions were issued.

RATING DEFINITIONS

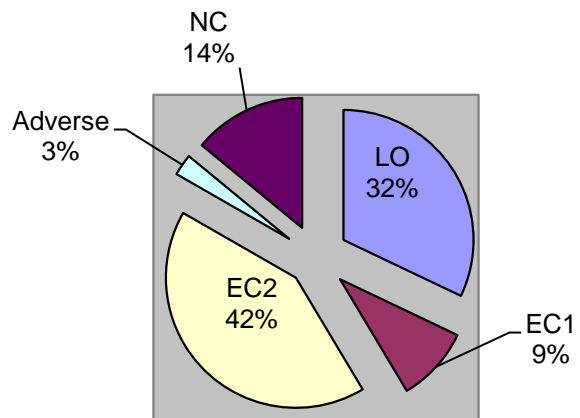
LO-Lack of Objections: The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

EC-Environmental Concerns: The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

EO-Environmental Objections: The EPA review has identified significant environmental impacts that must be avoided to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

EU-Environmentally Unsatisfactory: The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of environmental quality, public health or welfare. EPA intends to work with the lead agency to reduce these impacts. If the potential unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

*From: EPA Manual 1640, "Policy and Procedures for the Review of Federal Actions Impacting the Environment."



NEPA Documents Filed in 2008

By Grace Musumeci

Environmental Impact Statements Filed during Calendar Year 2008

Total – 547

| | |
|--|------------|
| Department of Agriculture | 1 |
| Agriculture Research Service | |
| Animal & Plant Health Inspection Service | 2 |
| Farm Service Agency | 1 |
| Forest Service | 123 |
| Natural Resource Conservation Service | 1 |
| Rural Utilities Service | |
| Subtotal | 128 |

| | |
|---------------------------------------|-----------|
| Department of Commerce | |
| National Oceanic & Atmospheric Admin. | 37 |
| Economic Development Administration | |
| Subtotal | 37 |

| | |
|---|-----------|
| Department of Defense | |
| Defense Base Closure & Realignment Commission | |
| Defense Logistics Agency | |
| National Guard Bureau | 1 |
| U.S. Air Force | 6 |
| U.S. Army | 6 |
| U.S. Army Corps of Engineers | 43 |
| U.S. Marine Corp | |
| U.S. Navy | 24 |
| Subtotal | 80 |

| | |
|--|-----------|
| Department of Energy | 8 |
| Bonneville Power Administration | 3 |
| Federal Energy Regulatory Commission | 20 |
| National Nuclear Security Administration | 4 |
| Western Area Power Administration | 2 |
| Subtotal | 37 |

| | |
|--|----------|
| Department of Health & Human Services | |
| Food & Drug Administration | |
| National Institute of Health | 1 |
| Subtotal | 1 |

| | |
|--|----------|
| Department of Homeland Security | 3 |
| Customs and Border Protection | |
| Federal Emergency Management Agency | |
| U.S. Coast Guard | 6 |
| Subtotal | 9 |

| | |
|--|--|
| Department of Housing & Urban Development | |
| HUD Assumable Programs | |
| Federal Housing Administration | |

| | |
|-----------------|----------|
| Subtotal | 0 |
|-----------------|----------|

| | |
|-----------------------------------|------------|
| Department of the Interior | 2 |
| Bureau of Indian Affairs | 11 |
| Bureau of Land Management | 49 |
| Bureau of Reclamation | 16 |
| Fish and Wildlife Service | 13 |
| Geological Survey | |
| Indian Health Service | |
| Minerals Management Service | 4 |
| National Park Service | 27 |
| Office of Surfacing Mining | 2 |
| Subtotal | 124 |

| | |
|---------------------------------|----------|
| Department of Justice | 1 |
| Bureau of Prisons | 1 |
| Drug Enforcement Administration | |
| Subtotal | 2 |

| | |
|-------------------------------------|----------|
| Department of Labor | |
| Mine Safety & Health Administration | |
| Subtotal | 0 |

| | |
|-------------------------------------|----------|
| Department of State | |
| International Boundary & Water Com. | 2 |
| Subtotal | 2 |

| | |
|--|------------|
| Department of Transportation | |
| Federal Aviation Administration | 10 |
| Federal Highway Administration | 65 |
| Federal Motor Carrier Safety Admin. | |
| Federal Railroad Administration | 3 |
| Federal Transit Administration | 21 |
| Maritime Administration | |
| National Highway Traffic Safety Admin. | 2 |
| Surface Transportation Board | 4 |
| Subtotal | 105 |

| | |
|--------------------------------------|----------|
| Department of Treasury | |
| Subtotal | 0 |
| Department of Veteran Affairs | |
| Subtotal | 0 |

| | |
|--|---|
| Independent Agency | |
| Advisory Council on Historic Preservation | |
| Agency for International Development | |
| Delaware River Basin Commission | |
| Environmental Protection Agency | 1 |
| Federal Communication Commission | |
| Federal Mine Safety & Health Review Commission | |
| General Services Administration | 2 |

| | |
|---|------------|
| National Aeronautics & Space Administration | 1 |
| National Capital Planning Commission | 1 |
| National Science Foundation | 1 |
| National Transportation Safety Board | |
| Nuclear Regulatory Commission | 12 |
| Susquehanna River Basin Commission | |
| Tennessee Valley Authority | 2 |
| The Presidio Trust | 1 |
| U.S. Postal Service | 1 |
| Subtotal | 22 |
| | |
| Total | 547 |

Agency Procedures

Natural Resources Conservation Service, Department of Agriculture

This interim final rule modifies the NRCS NEPA regulations at 7 CFR 650 to allow for decisions on proposed grants in conformity with 60 and 90 day timelines in Farm Bill by eliminating the requirement for 30 day public review periods for all environmental assessments and by explicitly providing for programmatic environmental assessments – published as final rule on September 23, 2008 ([73 FR 54667](#)).

U.S. Forest Service, Department of Agriculture

National Environmental Policy Act (NEPA) Compliance – published as final rule (36 CFR part 220) July 24, 2008 ([73 FR 43084](#)).

- Clarifies actions subject to NEPA by summarizing the relevant CEQ regulations in one place.
- Recognizes Forest Service obligations to take immediate emergency responses and emphasize the options available for subsequent proposals to address actions related to the emergency when normal NEPA processes are not possible.
- Incorporates CEQ guidance language regarding what past actions are “relevant and useful” to a cumulative effects analysis.
- Clarifies that an alternative(s), including the proposed action, may be modified through an incremental process.
- Clarifies that adaptive management strategies may be incorporated into an alternative(s), including the proposed action.
- Incorporates CEQ guidance that states environmental assessments (EAs) need to analyze alternatives to the proposed action if there are unresolved conflicts concerning alternative uses of available resources as specified by section 102(2)(E) of NEPA.

Department of the Interior

Implementation of the National Environmental Policy Act of 1969 – published as final rule (43 CFR part 46) October 15, 2008 ([73 FR 61291](#)).

- Clarifies which actions are subject to NEPA section 102(2) by locating all relevant CEQ guidance in one place, along with supplementary Department procedures.

- Establishes the Department's documentation requirements for urgently needed emergency responses.
- The Responsible Official (RO) must assess and minimize potential environmental damage to the extent consistent with protecting life, property, and important natural, cultural and historic resources and, after the emergency, document that an emergency existed and describe the responsive actions taken.
- Incorporates CEQ guidance that the effects of a past action relevant to cumulative impacts analysis of a proposed action may in some cases be documented by describing the current state of the resource the RO expects will be affected.
- Clarifies that the Department has discretion to determine, on a case-by-case basis, how to involve the public in the preparation of EAs.
- Highlights that adaptive management strategies may be incorporated into alternatives, including the proposed action.
- Incorporates language from the statute and CEQ guidance that EAs need only analyze the proposed action and may proceed without consideration of additional alternatives when there are no unresolved conflicts concerning alternative uses of available resources.

National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce

Published for comment May 14, 2008 ([73 FR 27997](#))

PowerPoint summary on NOAA's web site:

http://www.nmfs.noaa.gov/msa2007/docs/MSRA_proposed_rule_June_26_2008_revised.ppt

This proposed rule would revise and update the procedures for complying with the National Environmental Policy Act in the context of fishery management actions – the rule was developed pursuant to the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act. NOAA received 15,000 comments on the draft rule. A final rule has not been published as of this writing.

Litigation Updates for 2008 – Lucinda Low Swartz

In 2008, federal courts issued 46 substantive decisions involving NEPA implementation by federal agencies. These cases involved 18 different departments and agencies. The government prevailed in 29 of the 46 cases (63 percent). The U.S. Forest Service and the U.S. Army Corps of Engineers were involved in the largest number of cases (12 and 7, respectively). As has been the case in previous years, courts focused on whether agencies could demonstrate that they have given environmental impacts a “hard look.” In addition to decisions from the U.S. District Courts and U.S. Courts of Appeal, the U.S. Supreme Court issued a NEPA case in 2008, in which it held that the U.S. Navy should not be enjoined from conducting naval exercises that could adversely affect marine mammals although the Navy had not yet completed an EIS. Cases of particular interest, including the U.S. Supreme Court case, are discussed more fully in Appendix A.

Commentary

Facts about National Environmental Policy Act (NEPA) Third-Party Contracting

By Al Herson, JD, FAICP
Principal/Environmental Planning Practice Leader
SWCA Environmental Consulting

What is NEPA third-party contracting?

Under a NEPA third-party contract, the federal lead agency, project applicant, and environmental consultant enter into an agreement about how a NEPA document such as an EIS will be prepared. The applicant pays for the consultant's services, but the federal lead agency ("third party") is responsible for independently reviewing, analyzing and judging all information in the EIS. Under NEPA regulations, the lead agency is responsible for guiding and participating in EIS preparation, independently evaluating the EIS prior to its approval, and taking responsibility for the EIS scope and contents. 40 CFR 1506.4(c).

Why do contractors often prepare EISs instead of lead agencies?

Third-party EIS contracting is commonly used, across the nation, for applicant projects requiring lead agency approvals. Many lead agencies rely on the experience and expertise of environmental consultants to assist in EIS preparation. Contractors are often used because lead agencies do not have the staff expertise, staff resources or time to conduct the technical analysis necessary to comply with NEPA. Contractors can provide valuable assistance in NEPA process management, as well as technical study preparation.

How is a third-party contractor selected?

NEPA regulations provide that the lead agency, not the applicant, is ultimately responsible for selecting the environmental contractor to prepare an EIS (40 CFR 1506.5(c)). The lead agency may use applicant input to make this selection. Federal procurement requirements (such as competitive bidding) do not apply because the lead agency incurs no obligations or costs under the contract, nor does it procure anything under the contract. (Council of Environmental Quality (CEQ) "40 Questions" Guidance, Question 16)

How are conflicts of interest avoided?

In addition to the lead agency being responsible for contractor selection, the NEPA regulations provide another important safeguard. EIS contractors must execute a disclosure statement, prepared by the lead agency, specifying that the contractor has no "financial or other interest in the outcome of the project." (40 CFR 1506.5(c)) This term is interpreted broadly to cover any known benefits other than general enhancement of professional reputation. When a consulting firm has been involved in developing initial data and plans for a project but does not have a financial or other interest in project decision, the firm is not disqualified from preparing the EIS. The EIS should clearly state the extent of the firm's prior involvement to demonstrate conflicts of interest do not exist. CEQ "40 Questions" Guidance, Question 17.

What other safeguards prevent bias in an EIS prepared by a third-party contractor?

To expedite permit processing, it is in the applicant's interest that the EIS comply with all NEPA requirements. The EIS is required to be an objective, good faith attempt at full disclosure, and could be invalidated in court if it is found to be biased. Cases of third-party NEPA contractor bias are extremely rare; the only sustainable business practice for third-party NEPA contractors is to produce objective,

scientifically accurate NEPA documents. Furthermore, the scoping and Draft EIS comment period provide an opportunity for the public to present any concerns about perceived bias in the information presented. The lead agency is then required to address these concerns prior to completion of the EIS and approval of the permit.

Definition of a Reasonably Foreseeable Future Action

By

Owen L. Schmidt, JD

Two new cases reinforce the notion that a "future action" becomes "reasonably foreseeable" once it is "proposed." Until then it is "speculative" and need not be accounted for in the cumulative impacts analysis in an EA or EIS.

✓ *Wilderness Workshop v. U.S. Bureau of Land Management*, 531 F.3d 1220, 1229 (10th Cir. 2008) (preliminary injunction denied for decision by the Bureau of Land Management (BLM) and the Forest Service (USFS) authorizing a company to construct, operate, and maintain the Bull Mountain Pipeline through roadless National Forest land) (EIS on natural gas pipeline is adequate even though it "did not consider development of new gas wells that would be facilitated by the pipeline as connected actions," where pipeline has independent utility and additional gas wells are not imminent):

"It is important to note that 'projects', for the purposes of NEPA, are described as 'proposed actions', or proposals in which action is imminent." *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 236 (5th Cir.2007) (citing 40 C.F.R. § 1508.23). "[T]he mere contemplation of certain action is not sufficient to require an impact statement." *Id.* (internal quotation marks omitted). "While a cumulative impact analysis requires the [reviewing agency] to include 'reasonably foreseeable' future actions in its review, improper segmentation is usually concerned with projects that have reached the proposal stage." *Id.*

In this case, the defendants concluded in their FEIS, in response to public comments, that it was unnecessary to analyze potential natural gas well development as a "connected action." 531 F.3d at 1231. However, as defendants noted in the FEIS, the development of additional natural gas wells is entirely speculative at this point, and will ultimately depend on "gas price and demand, among many other variables." In other words, although SG is undoubtedly contemplating the development of additional gas wells in the area, nothing in the record on appeal suggests that such development is imminent. See *O'Reilly*, 477 F.3d at 236.

✓ *Northwest Bypass Group v. U.S. Army Corps of Engineers*, 552 F.Supp.2d 97, 126 (D. N.H. 2008) (EA/FONSI is adequate for Corps §404 permit to fill three and one half acres of wetlands to build a 4,300-foot connector road in Concord, New Hampshire) (Phase II is not illegally segmented from Phase III, where Phase III is not a proposed action):

Finally, Phases II and III are not "cumulative action[s]" because there is no evidence that Phase III is a "proposed action" under the regulations. 40 C.F.R. § 1508.25(a)(2). A "proposed action" "exists at that stage in the development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23. The Corps states that "[t]here has not been a proposal to pursue Phase III since the City submitted its Section 404 application for Phase II to the

Corps in 2000,” (Fed Def.'s Opp'n at 12) and Plaintiffs provide no evidence to the contrary. Therefore, the Corps was not arbitrary and capricious in determining that Phase III is not a cumulative action, a connective action, or a similar action to the Phase II proposal.

552 F.Supp.2d at 127-28: At the same time, the City has stated that it does not have plans to go forward on Phase III, and if Phase III were initiated, it appears likely to take years before the project can be evaluated by the appropriate authorities. AR 1:32; *see Airport Impact Relief* 192 F.3d at 206. Furthermore, even if Phase III is describable with some amount of specificity, because Phase II stands on its own merit in supporting its purposes, the relevant agencies will not be “so firmly committed” to Phase III that they will not be able to consider the environmental consequences of that project if it is proposed. *Sierra Club*, 976 F.2d at 768. The Court concludes that on this record, the Corps was not arbitrary and capricious in not including Phase III as a cumulative impact, because it is too speculative to be “reasonably foreseeable.” 40 C.F.R. § 1508.7.

These cases are new additions to the related 18-page case list in the 964-page "NEPA Models and Case Lists, Second Edition." For more information please see <http://web.mac.com/olschmidt/NEPA/Index.html>

Evaluating Greenhouse Gases and Climate Change Impacts under NEPA; Ten Steps to Taking a Hard Look

BY
Ron Bass
ICF Jones & Stokes

Although NEPA requires federal agencies to take a “hard look” at the environmental consequences their proposed actions, many agencies are preparing NEPA documents with little or no analysis of greenhouse gas emissions (GHG) or the impacts of global climate change. As policy-makers continue to debate how agencies should address GHG emissions and climate change impacts under NEPA, lead agencies cannot afford to wait for answers. Unfortunately, all-too-many agencies are coming up with excuses for not addressing the issue at all, or including only vague references to it. Here are some of the more common excuses:

“...NEPA doesn’t cover climate change impacts....”

“... Climate change impacts are speculative and not foreseeable....”

“...We scoped it out of our document....”

“...We can’t solve the global problem so why discuss it...”

“... Why should we worry about polar bears when our project is in the desert...?”

Agencies relying on these excuses are in denial that NEPA already requires GHG/climate change impacts to be evaluated and are ignoring the emerging trends in the courts and in state legislatures. This paper briefly explains why GHG/climate change impacts must be evaluated under NEPA and includes a recommended ten-step approach for minimizing the risk of legal jeopardy.

Under the existing framework of NEPA and the Council on Environmental Quality’s NEPA regulations, there is little doubt that GHG emissions and climate change impacts must be evaluated. For example,

- Effects on *air quality* fall under NEPA’s definition of “*Effects on the Human Environment*” [40 CFR 1508.8 and 1508.14].
- NEPA requires consideration of “*direct*” and “*indirect*” and “*cumulative*” effects – [40 CFR 1502.16]. The GHG emissions resulting from a proposed action are either *direct* or *indirect* effects. The resulting global climate change impacts are classic examples of “*cumulative effects*.”
- Since climate change impacts are inherently cumulative they fall within the “*cumulative effects*” component of NEPA’s definition of “*significantly*” [40 CFR 1508.27(9c)(7)].
- NEPA requires discussions of “possible conflicts between the proposed action and the objectives of Federal, State, and local land use plans, policies and controls for the area concerned” [40 CFR 1502.16(c)]. Thus, a NEPA document must evaluate the relationship between the GHG emissions from a proposed act and any relevant state GHG emission reduction laws or policies.

As these examples illustrate, there is no reasonable interpretation of the CEQ NEPA regulations that would suggest GHG/climate change impacts should be left out of NEPA documents. On the contrary, the trend in the federal courts and at the state level suggests GHG/climate change impacts should definitely be considered under NEPA.

Last year, the U.S. Supreme Court held that climate change impacts are reasonably foreseeable, are caused in part by human activities, and should be regulated as pollutants under the Clean Air Act *Massachusetts et al. v. Environmental Protection Agency*, 549 U.S. 497 (2007). Additionally, the 9th Circuit Court of Appeals has already issued a ruling that a federal agency violated NEPA because it failed to adequately evaluate GHG/emissions and climate change impacts. *Center for Biological Diversity v. NHTSA*, 508 F.3d 508, (9th Cir. 2007).

Aside from this federal judicial activity, more than a dozen states have already enacted legislation regulating establishing reduction targets for GHG emissions. Although these state laws do not apply to federal agencies, NEPA does require that environmental documents consider the relationship between proposed federal actions and state environmental protection legislation. [See – Pew Center for Global Climate Change, <http://www.pewclimate.org>] Thus, NEPA documents should discuss the relationship of proposed projects to applicable GHG reduction targets and should recommend mitigation measures and alternatives that would help to achieve those reductions.

Unfortunately, neither CEQ nor the Environmental Protection Agency has yet to issue guidance on how to address GHG/climate change impacts under NEPA. EPA has, however, written formal comment letters on various NEPA documents questioning why the lead agencies have not taken such impacts seriously. Although there is little doubt that leads agencies must evaluate GHG/climate change impacts under NEPA, in the absence of specific, mandatory, requirements, the key question is: *what should an agency do – right now – to avoid putting itself in jeopardy?*

The following is a recommended ten-step approach that agencies may want to follow in their consideration of GHG/climate change impacts under NEPA. These recommendations take into consideration the existing provisions of the NEPA regulations, the recent court decisions, as well as various state programs. They are broken down to conform to the main elements of a NEPA document.

Affected Environment

- Step 1 Describe the existing global context in which climate change impacts are occurring and are expected to continue to occur in the future.

- Step 2 Summarize any relevant state laws that address climate change.
- Step 3 Describe any relevant national, statewide and/or regional GHG inventories to which the project will contribute.

Environmental Consequences

- Step 4 Quantify the project's direct and indirect GHG emissions.
- Step 5 Convert the GHG emissions into carbon equivalents using an established "carbon calculator."
- Step 6 Discuss whether the project would enhance or impede the attainment of applicable state GHG reduction.
- Step 7 Describe the cumulative, global climate change impacts to which the proposed action would contribute; in other words, the impacts of the project on climate change (This may be the same information as in step 1.
- Step 8 Describe how the impacts of global climate change could manifest themselves in the geographic area in which the project is proposed, and therefore, potentially affect the project; in other words the impacts of climate change on the project (e.g. sea level rise could affect a coastal project.)

Alternatives

- Step 9 Include, alternatives that would meet the project objectives but would also reduce GHG emissions.

Mitigation measures

- Step 10 Identify mitigation measures that would reduce GHG emissions; including project design or operational changes and/or potential compensatory mitigation (e.g. carbon offsets).

Keeping in mind that the standard of adequacy for a NEPA document is whether an agency has taken a "hard look" at the environmental effects of a proposed action, the closer an agency comes to including all of the above steps in its analysis, the better the chance of deflecting criticism and prevailing in court should the NEPA document be challenged.

That Was the Year It Was

Closing thoughts from NAEP WG members

Compiled and paraphrased by Peter W. Havens, CEP

This year was marked by the election of a new President. Barak Obama (D) won the election on a platform of change. This focus on change has spread into the NEPA professional community with projected changes that might occur within the NEPA practice. Several of the NEPA Working Group members have voiced their opinions about upcoming change. In the paragraphs below I summarize the suggestions for change and improvement found on the NEPA Working Group web site discussion threads. These are the views of the individuals participating on the Working Group web site, not necessarily the NEPA Working Group or NAEP. However, each of these ideas is valuable and has the potential for involving regulatory change and improvement from the President's Council on Environmental Quality or the several Executive Agencies.

The President's Council on Environmental Quality continues to provide leadership and guidance for federal agencies in NEPA compliance. During 2008, in collaboration with the Office of Management and

Budget and Office of Science and Technology Policy, the CEQ issued a memorandum initiating pilot project to demonstrate application of a new national system of environmental trends and status (NEST) indicators. These indicators would help agencies select consistent data acquisition methodologies and statistical design. The goal for this system is to facilitate dialogue and decision making at the national level. According to the memorandum the NEST indicators would be used “to assess the outcomes of Federal policies and programs, and the effects of changes in environmental processes and economic activities.” With administration changes, perhaps there will be opportunity for CEQ to guide change through an update of the 40 Most Asked Questions.

Improving the NEPA document itself is a continuing focus area within the NEPA community. Several leaders are now providing training, publishing papers and texts about the NEPA Process and its improvement. Recommendations comprise a wide range of improvements from step-wise recommendations for putting together NEPA documents to reconstructions of how we view environmental impacts.

Some Working Group members see a need to revise the “third party” approach to NEPA document production, in which private applicants select NEPA consultants, with lead agency third party contracting and oversight. They suggest that lead agencies should improve objectivity in NEPA documentation through the use of independent writers. In those situations in which a licensee or applicant is asked to provide NEPA documentation, the lead agency should directly contract with and control consultants preparing NEPA documents for applicant projects, limiting applicant involvement to paying for the consultants’ services. Such an approach might improve the perceived or actual objectivity of alternative comparison and impact assessment, and reduce the distance between decision making and the impact analysis. On the other hand, this approach could reduce the time and cost efficiencies of the current approach to third-party NEPA contracting.

In 2009, more individual lead agencies will issue guidance on how to address greenhouse gas and climate change issues in their NEPA documents; the Department of Interior and the US Forest Service have already issued informal guidance. The Council on Environmental Quality has been asked by many parties to issue general guidance for all lead agencies, and may do so. Key guidance issues include how to determine the significance of a proposed action's greenhouse gas contributions to global climate change while preserving the ability to prepare FONISs and categorical exclusions for routine projects, and how to promote greenhouse gas analysis in first-tier programmatic documents to achieve efficiencies for project-level NEPA documents.

Recommendations for addressing greenhouse gasses within the NEPA document are also being considered by NEPA Working Group members. One such recommendation has been provided in this report with a ten-step method to address greenhouse gases. Another writer suggests that NEPA document preparers in 2009 will become more accustomed to preparing affected environment sections that describe not just existing conditions, but also future conditions with a changing climate. Environmental consequences sections will begin to use these changed future conditions as a baseline for measuring impacts. Alternatives could be developed that specifically respond to climate change threats, such as changes in increased coastal flooding, increased wildfires, and threats to endangered species. Refined adaptive management programs will increasingly be used as mitigation, given scientific uncertainty about the long-term effects of climate change.

Appendix A – Recent Cases (2008)

Lucinda Low Swartz, Esq.²
Environmental Consultant
Kensington, Maryland

ABSTRACT

This paper will review substantive NEPA cases issued by federal courts in 2008. The implications of the decisions and relevance to NEPA practitioners will be explained.

INTRODUCTION

In 2008, federal courts issued 46 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. These cases involved 18 different departments and agencies. The government prevailed in 29 of the 46 cases (63 percent). Cases of particular interest are summarized below.

STATISTICS

The U.S. Forest Service (USFS) again won first place as the agency involved in the largest number of NEPA cases, with 12 cases. The agency prevailed in 5 of the 12. The U.S. Army Corps of Engineers (Army Corps) was a distant second with 7 cases, all of which were decided in the agency's favor.

U.S. Department of the Interior agencies had a total of 12 cases:

- Bureau of Land Management (BLM) – 4 cases, winning 2
- Minerals Management Service (MMS) – 3 cases, winning 2
- National Park Service (NPS) – 2 cases, losing both
- Bureau of Indian Affairs (BIA) – 1 case, in which the agency won
- Fish and Wildlife Service (FWS) – 1 case, in which the agency won
- Bureau of Reclamation (BOR) – 1 case, in which the agency won

U.S. Department of Transportation agencies had a total of 8 cases:

² Questions concerning information in this paper should be directed to:

Lucinda Low Swartz, Esq.
Environmental Consultant
4112 Franklin Street
Kensington, MD 20895
Telephone: 301/933-4668
Fax: 301/933-6796
Email: LLS@LucindaLowSwartz.com
Webpage: www.LucindaLowSwartz.com

- Federal Highway Administration (FHWA) – 5 cases, winning 3
- Federal Aviation Administration (FAA) – 1 case, in which the agency won
- U.S. Coast Guard (USCG) – 1 case, in which the agency won
- National Highway Traffic Safety Administration (NHTSA) – 1 case, in which the agency lost

The Federal Energy Regulatory Commission (FERC) was involved in 2 cases and won both.

The following agencies were each involved in 1 case:

- U.S. Navy - win (in the U.S. Supreme Court)
- Nuclear Regulatory Commission (NRC) - win
- Federal Communications Commission (FCC) - loss
- U.S. Department of Agriculture (Rural Development) – loss
- U.S. Department of Housing and Urban Development (HUD) – win

THEMES

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

- *North Slope Borough v. Minerals Management Service*, 38 ELR 20014 (D. Alaska 2008)
- *Citizens Committee to Save Our Canyons v. Krueger*, 513 F.3d 1169 (10th Cir. 2008)
- *Utah Environmental Congress v. Russell*, 518 F.3d 817 (10th Cir. 2008)
- *Lands Council v. McNair*, 529 F.3d 1219 (9th Cir. 2008)
- *Wildwest Institute v. Bull*, 547 F.3d 1162 (9th Cir. 2008)

And invalidated those where the agency failed to do so:

- *Lands Council v. Martin*, 529 F.3d 1219 (9th Cir. 2008)
- *Oregon Natural Desert Association v. Bureau of Land Management*, 531 F.3d 1114 (9th Cir. 2008)
- *Anglers of the Au Sable v. United States Forest Service*, 565 F.Supp.2d 812 (E.D. Mich. 2008)
- *Wyoming v. United States Department of Agriculture*, 570 F.Supp.2d 1309 (D. Wyo. 2008)
- *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008)
- *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008)

The following issues were also addressed.

Application of NEPA

- *American Bird Conservancy, Inc. v. Federal Communications Commission*, 516 F.3d 1027 (D.C. Cir. 2008)

Plaintiff filed an action against the FCC, challenging the agency’s application of a categorical exclusion for communications towers. The FCC’s NEPA-implementing regulations categorically exclude communications towers from environmental review; however, interested parties may request a NEPA analysis of such actions. In this case, the FCC determined an EIS was

unnecessary due to the "lack of specific evidence . . . concerning the impact of towers on the human environment" and the "the lack of consensus among scientists regarding the impact of communications towers on migratory birds." The court concluded that these reasons cannot sustain the FCC's refusal to prepare an EIS without at least first requiring the preparation of an EA. The FCC's demand for definitive evidence of significant effects plainly contravenes the "may" standard. Similarly, the FCC's suggestion that scientific consensus is a precondition to NEPA action is inconsistent with the statute.

- *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008)

Plaintiffs challenged BIA's approval of a proposed casino on Native American lands on the basis of an EA/FONSI. An internal DOI document states that proposals for "large" and/or "potentially controversial" gaming establishments should require the preparation of an EIS. The internal document, however, is not binding on the agency. BIA's CEQ-approved NEPA procedures, codified in the agency's departmental manual, do not encompass the internal document. The manual includes lists of activities that normally require or do not require an EIS or EA, and BIA followed those procedures.

- *New Jersey v. United States Nuclear Regulatory Commission*, 526 F.3d 98 (3rd Cir. 2008)

The Third Circuit dismissed New Jersey's petition for review of an NRC guidance document. The court found that the guidance document was not a final order because it was non-binding, lacked legal consequences, and did not determine any rights or obligations. Further, the court rules that NRC was not required to prepare an EIS due to the document's non-binding and legally inoperative nature.

- *National Wildlife Federation v. Schafer*, 38 ELR 20186 (W.D. Wash. 2008)

USDA began a critical feed use haying and grazing program on conservation reserve lands. The agency did not prepare an EA or EIS because it concluded, on the basis of an "Environmental Evaluation," that the initiative would have no significant adverse environmental consequences. The district court issued a preliminary injunction, concluding that USDA had violated NEPA, acting arbitrarily, capriciously, and unreasonably.

- *Friends of the Columbia River Gorge v. U.S. Forest Service*, 546 F. Supp.2d 1088 (D. Ore. 2008)

Finding that the issuance of a quitclaim deed that would provide a permanent easement for use of road on federal land within the Columbia River Gorge National Scenic Area for access to private land for logging was not mandatory, the district court found that NEPA applies to the action. Recognizing that NEPA is not triggered by discretionary acts that do not alter the status quo (citing *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 784 (9th Cir.2006)), the court found that the language of the applicable statute "is permissive and does not mandate the Secretary to take such action," and thus that NEPA was potentially implicated.

- *Center for Biological Diversity v. U.S. Department of Housing and Urban Development*, 541 F.Supp.2d 1091 (D. Ariz. 2008)

The district court held that NEPA did not apply to the issuance of loan guarantees for residential and commercial developments. Although the developments would pump groundwater from an aquifer that supplied water to a river which was home to two endangered species, the court concluded that financial assistance programs are too attenuated to have the necessary reasonably close causal relationship to the alleged environmental harm. The court applied this analysis to the NEPA claim and Endangered Species Act claim. The court cited the U.S. Supreme Court decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) for the proposition that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect. Defendants argued that because their governing statutes and regulations did not give them the discretion to consider environmental factors, they were powerless to prevent harm to the listed species. In addition, to fall under the definition of indirect effects, the degradation of the watershed must not only be “caused” by the proposed action but must also be reasonably certain to occur. The court stated that it could not find “with any certainty that Defendants’ financial assistance programs will cause harm to the listed species or harm that is reasonably likely to occur” and that the “financial assistance programs at issue here are too attenuated to affect the listed species.” The court distinguished other cases cited by plaintiffs where the federal agency was intimately involved in floodplain management and had discretionary control over where development occurred (*National Wildlife Federation v. FEMA*, 345 F.Supp.2d 1151 (9th Cir.2004)) and where the federal agency financed 90% of an interstate highway project that ran through endangered sandhill crane habitat (*National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir.1976)).

Public Involvement Requirements for Environmental Assessments

- *Bering Strait Citizens for Responsible Resource Development v. United States Army Corps of Engineers*, 545 F.3d 1147 (9th Cir. 2008)

Affirming the opinion of the district court dismissing the case, the Court of Appeals held that the Army Corps complied with NEPA in issuing a mining company a dredge and fill permit for a major gold mining project in Nome, Alaska. In addition to other issues relating to the adequacy of the EA, plaintiffs argued that the Army Corps had failed to provide adequate public notice and comment under NEPA because it did not circulate a draft EA before the final EA was completed. The court stated that:

“Our law currently does not make clear whether NEPA requires the circulation of a draft EA. The regulations do not answer the question. 40 C.F.R. § 1503.1 requires the circulation of a draft EIS, but does not speak to the necessity of a draft EA. 40 C.F.R. § 1506.6 requires that agencies ‘[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures[,]’ but does not expressly require the circulation of a draft EA.”

The court went on to state that its decision in an earlier case (*Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004) regarding the public’s opportunity to comment on draft EAs was dictum, and stated that the 9th Circuit has not established a minimum level of public comment and participation required by the regulations governing the EA and FONSI process, citing *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961 (9th Cir. 2003). Thus,

“We hold today that the circulation of a draft EA is not required in every case. We do not say that it is always required or that it is never required. Instead, we stress that the regulations governing public involvement in the preparation of EAs are general in approach, see 40 C.F.R. § 1506.6, requiring the circulation of a draft EA in every case would apply a level of particularity to the EA process that is foreign to the regulations. Also, requiring the circulation of a draft EA in every case could require the reversal of permitting decisions where a draft EA was not circulated even though the permitting agency actively sought and achieved public participation through other means. The regulations do not compel such formality. See 40 C.F.R. § 1508.9.”

- *Sierra Nevada Forest Protection Campaign v. Rey*, 573 F.Supp.2d 1316 (E.D. Cal. 2008)

The public involvement process for an EA/FONSI prepared for a site-specific forest management project was sufficient even though a draft EA was not circulated. The plaintiffs’ argument that the USFS violated NEPA by not publicly circulating the EA is based upon a statement contained within the Ninth Circuit’s decision in *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961 (9th Cir.2003) to the effect that “the public must be given an opportunity to comment on draft EAs and EISs.” *Id.* at 970, quoting *Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir.2002). The Ninth Circuit recently revisited this area in *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 511 F.3d 1011 (9th Cir.2008). As noted above, the Ninth Circuit in *Bering Strait* rejected the notion that its previous holdings had decided the question, describing its previous statement in *Anderson*, about the circulation of a draft EA, to be simply dicta (*id.* at 1025). The *Bering Strait* court held unequivocally that the circulation of a draft EA is not required in every case. The court concluded that even though a draft EA was not circulated, the USFS nonetheless took other steps sufficient to meet the public participation requirement of NEPA.

- *Food & Water Watch, Inc. v. U.S. Army Corps of Engineers*, 570 F.Supp.2d 177 (D. Mass. 2008)

The district court held that an EA/FONSI was adequate for permit to install a fish containment structure known as an Aquadome holding approximately 5,000 black sea bass on the seafloor of Buzzards Bay near the Weepeket Islands, Massachusetts. Plaintiffs argued that the Army Corps violated NEPA by failing to circulate a draft FONSI for public comment. The CEQ regulations require that, “in certain limited circumstances,” an agency must make a FONSI available for public review before it makes the final decision as to whether to prepare an EIS; one of these “limited circumstances” is when “[t]he nature of the proposed action is one without precedent” (40 CFR §1501.4(e)(2)). The court found that because the CEQ regulations are concerned with environmental impacts, the question of whether something is “without precedent” is limited to whether there is something unprecedented about the way a particular project will impact the environment. See *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep’t of Army*, 398 F.3d 105, 115 (1st Cir.2005). Having considered and rejected this theory of harm to wild fish, the Corps’ decision that the Project would not lead to unprecedented impacts on the natural environment was neither arbitrary nor capricious, nor an abuse of discretion.

Alternatives

- *North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147 (9th Cir. 2008)

The Ninth Circuit affirmed in part and reversed in part a lower court decision holding that the DOT and the Idaho Transportation Department complied with NEPA in approving the construction of a highway improvement project in Idaho. In 1999, the agencies approved a final EIS for the road project and, in 2005, issued an EA that included various changes to the project design described in the 1999 EIS. In 2006, the agencies prepared an “environmental reevaluation” which described additional changes to the project and assessed the possible environmental effects. The agencies concluded at that time that there would be no additional significant impact and that neither a supplemental EIS nor a supplemental EA was required. Plaintiffs challenged the agencies’ approval of the project, claiming several violations of NEPA. However, the court concluded that the agencies fulfilled their obligations under NEPA’s alternatives provision when they considered and discussed only two alternatives in the 2005 EA. Plaintiffs agreed that the agencies had considered all reasonable alternatives in the 1999 EIS, and the 2005 EA looked at the project with and without the proposed changes. The court also found for the defendant agencies on the other NEPA claims regarding the adequacy of the EA. Finally, the court ruled that the agencies did not arbitrarily and capriciously fail to prepare a supplemental EIS regarding changes to the project discussed in the 2005 EA and the 2006 reevaluation. Stating that “[a]n agency is not required to prepare a [supplemental EIS (SEIS)] every time new information comes to light” and that “a SEIS is required only if changes, new information, or circumstances may result in significant environmental impacts ‘in a manner not previously evaluated and considered,’” the court held that an agency may prepare an environmental report (such as a reevaluation) or an EA to assist the agency in determining whether a SEIS is required.

- *Sierra Club v. U.S. Forest Service*, 535 F.Supp.2d 1268 (N.D. Ga. 2008)

The district court found that the alternatives analysis in a supplemental vegetation management EIS which supported 2002 forest plan amendments were not inadequate. The decision to consider only two alternatives– the one actually adopted and a no-action alternative–was not arbitrary and capricious under the circumstances. There is no requirement that more than two alternatives be considered in all cases.

Segmentation/Connected Actions

- *Wilderness Workshop v. United States Bureau of Land Management*, 531 F.3d 1220 (10th Cir. 2008)

The Tenth Circuit affirmed a lower court decision denying environmental groups’ motion to preliminarily enjoin the construction of a natural gas pipeline through roadless national forest land. The court found that the plaintiffs were unlikely to succeed on their claim that BLM violated NEPA by failing to consider the impacts of future natural gas development as a connected action. It appears that the pipeline will have independent utility, and, thus, BLM reasonably concluded it was proper to consider its environmental impact without further

consideration of potential future gas well development. The development of additional natural gas wells is entirely speculative at this point.

- *Missouri Coalition for the Environment v. Federal Energy Regulatory Commission*, 544 F.3d 955 (8th Cir. 2008)

The Eighth Circuit denied a petition for review of a FERC order authorizing the reconstruction of a hydroelectric generating plant in Missouri. In 2005, the upper reservoir of the project collapsed, and the operator sought authorization to reconstruct it. FERC issued an EA and FONSI, and approved the operator's request to reconstruct the upper reservoir. Because the license authorizing the project will be up for renewal in 2010, environmental groups filed suit challenging FERC's decision to only consider impacts of reconstruction in its EA. The petitioners argued that FERC's decision not to include the impacts of a relicensed operation in its EA was arbitrary and capricious under NEPA. The court found that relicensing of the plant is not a reasonably foreseeable future action such that it needed to be addressed in the EA. Moreover, the compliance regulations governing reconstruction are separate and distinct from the more stringent regulations governing relicensing.

- *Northwest Bypass Group v. U.S. Army Corps of Engineers*, 552 F.Supp.2d 97 (D. N.H. 2008)

The district court found that an EA/FONSI for an Army Corps §404 permit to fill three and one half acres of wetlands to build a 4,300-foot connector road in Concord, New Hampshire was adequate and did not segment actions in violation of NEPA. Although the project was planned in three phases, the court concluded that Phase II is not illegally segmented from Phase III, where Phase II has independent utility – to relieve traffic congestion. Plaintiffs provided no evidence that Phase II would “automatically trigger” Phase III or that Phase III “cannot or will not proceed” unless Phase II is undertaken “previously or simultaneously.” 40 CFR § 1508.25(a)(1), (2). Further, contrary to the Plaintiffs' assertions, Phase II is not “an interdependent part[] of a larger action,” and does not depend on the “larger action” of the whole proposed bypass for its justification. Plaintiffs contended that the purpose of Phase II was largely the same as “those advanced for the Northwest Bypass as a whole,” but the court stated that the issue is whether justification for Phase II depends on Phase III, not whether their purposes are similar or even identical.

Supplementation Requirements

- *Missouri v. United States Army Corps of Engineers*, 516 F.3d 688 (8th Cir. 2008)

The court of appeals held that the Army Corps did not violate NEPA when it implemented certain revisions to the operational document for the Missouri River Mainstem Reservoir System without preparing a SEIS. The revision concerned the controlled release of additional water into the system in the spring to benefit certain threatened and endangered species. Missouri, which has consistently opposed a spring rise because of its potential adverse effect on downstream flood control, filed suit to enjoin implementation of the plan. Neither the Army Corps' nor the CEQ's regulations prescribe a specific process to determine whether to prepare an SEIS. Here, the Corps prepared an EA, not to help it decide whether to prepare an EIS, but rather to determine whether the change in agency action required a SEIS. Although a FONSI is not appropriate because the action will have a significant impact on the environment, a SEIS is not

required because the impact was sufficiently analyzed in an earlier final EIS. This approach is neither a misuse of the EA procedure nor a violation of NEPA.

- *Friends of Yosemite v. Kempthorne*, 520 F.3d 1024 (9th Cir. 2008)

Affirming a lower court opinion, the Ninth Circuit held that the supplemental EIS prepared for the comprehensive management plan for the Merced Wild and Scenic River violated NEPA. The court concluded that the SEIS was deficient because it did not set forth a true “no-action” alternative. Rather, the SEIS assumed, as a baseline, the existence of the very plan being proposed. Further, the SEIS lacked a reasonable range of action alternatives and thus was unreasonably narrow.

- *Center for Biological Diversity v. Rey*, 526 F. 3d 1228 (9th Cir. 2008)

The Ninth Circuit preliminarily enjoined three logging projects permitted by the USFS in the Sierra Nevada National Forest. The Forest Service allowed the timber sales so that it could raise funds to carry on its fire prevention duties. While the Forest Service is clearly authorized to take action to prevent the occurrence of forest fires, the Forest Service's 2004 supplemental EIS for the timber sales violated NEPA. A number of circumstances concerning the funding of fire reduction objectives have changed since the final EIS was issued in 2001. The Forest Service, therefore, cannot rely on its discussion of alternatives in its 2001 final EIS to satisfy the alternatives requirement in its 2004 supplemental EIS.

- *Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1 (1st Cir. 2008)

Plaintiffs filed a petition for review of an FAA order permitting the construction of a new taxiway at Boston's Logan International Airport, arguing that the FAA acted arbitrarily and capriciously in deciding that it did not need to prepare a supplemental EIS before issuing its final order. In denying the petition, the court ruled that the FAA had adequately considered the continuing validity of the data underlying the final EIS. Data remain "current" if there has been no major change that would cause one to expect contemporaneous conditions to vary significantly from conditions at the time the data were gathered. By validating through a consultant's report that more recent conditions generate similar data as the data used in the original EIS, the FAA could reasonably conclude that all the data still reflected current conditions. In addition, the FAA's determination that there was no significant new information about the presence of ultrafine particular matter was not a clear error in judgment.

- *North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147 (9th Cir. 2008)

The Ninth Circuit affirmed in part and reversed in part a lower court decision holding that the DOT and the Idaho Transportation Department complied with NEPA in approving the construction of a highway improvement project in Idaho. In 1999, the agencies approved a final EIS for the road project and, in 2005, issued an EA that included various changes to the project design described in the 1999 EIS. In 2006, the agencies prepared an “environmental reevaluation” which described additional changes to the project and assessed the possible environmental effects. The agencies concluded at that time that there would be no additional significant impact and that neither a supplemental EIS nor a supplemental EA was required.

Plaintiffs challenged the agencies' approval of the project, claiming several violations of NEPA. However, the court concluded that the agencies fulfilled their obligations under NEPA's alternatives provision when they considered and discussed only two alternatives in the 2005 EA. Plaintiffs agreed that the agencies had considered all reasonable alternatives in the 1999 EIS, and the 2005 EA looked at the project with and without the proposed changes. The court also found for the defendant agencies on the other NEPA claims regarding the adequacy of the EA. Finally, the court ruled that the agencies did not arbitrarily and capriciously fail to prepare a supplemental EIS regarding changes to the project discussed in the 2005 EA and the 2006 reevaluation. Stating that "[a]n agency is not required to prepare a SEIS every time new information comes to light" and that "a SEIS is required only if changes, new information, or circumstances may result in significant environmental impacts 'in a manner not previously evaluated and considered,'" the court held that an agency may prepare an environmental report (such as a reevaluation) or an EA to assist the agency in determining whether a SEIS is required.

- *National Wildlife Federation v. Harvey*, 574 F.Supp.2d 934 (E.D. Ark. 2008)

After the discovery of an endangered species, a supplemental EA or EIS was not required for the Grand Prairie Project, which is designed to prevent the depletion of the Alluvial and Sparta Aquifers by pumping water from the White River and delivering it to the Grand Prairie farmland for irrigation. Whether a change or new information is significant enough to require a supplemental EIS requires consideration of both context and intensity. Citing an earlier Court of Appeals decision in this case (*Arkansas Wildlife Federation, et al v. U.S. Corps of Engineers*, 431 F.3d 1096 (8th Cir.2005)), the court concluded that a determination as to whether the changes were significant was one that was best left for the expertise of the Army Corps. The EIS reasonably determined it is unlikely that the water withdrawal would adversely affect bottomland hardwoods, and a monitoring plan was developed to ensure that the bottomland hardwood forests were protected and any unforeseen harm could be corrected through the adaptive management plan. In fact, the adaptive management plan was designed to address Plaintiffs' concerns about the bottomland hardwood forests. In view of the deferential standard set out in the Administrative Procedure Act, the court found that the defendants had complied with NEPA directives.

- *Highland Village Parents Group v. U.S. Federal Highway Administration*, 562 F.Supp.2d 857 (E.D. Tex 2008)

A supplement was not required for an EA/FONSI prepared for the construction of a federally funded 4.7 mile stretch of road in Denton County, Texas. The EA had addressed the extent to which additional project details would emerge and indicated they would be reevaluated as needed. "[W]here, as here, the reevaluation makes minor changes pursuant to design elements specifically called for in the FONSI, a plaintiff's reliance on such a document as the basis for filing suit is inappropriate." Although new information justifies the reassessment of previous conclusions, not every datum can possibly justify the reopening of prior valid agency judgments. On one end of the spectrum is the type of new information that requires fundamental changes to existing plans, and on the other end are minor discoveries not worthy of consideration. The former requires supplementation, while the latter does not.

- *Olympic Forest Coalition v. U.S. Forest Service*, 556 F.Supp.2d 1198 (W.D. Wash. 2008)

The district court found that the EA/FONSI prepared for a timber sale was not adequate. The EA had been prepared following a 2004 forest plan amendment EIS and Record of Decision, which was later invalidated by *Pacific Coast Federation of Fishermen's Associations v. National Marine Fisheries Service.*, 482 F.Supp.2d 1248, 1255 (W.D.Wash.2007) ("*PCFFA*"). The Forest Service prepared an EA under what was at the time an applicable legal framework (that is, the 2004 ROD); the 2004 ROD was subsequently held invalid by an intervening legal decision (*PCFFA*). The Forest Service attempted to cure the then deficient EA by preparing an Interested Party Letter (a non-NEPA document); and the Interested Party Letter concluded that the analysis prepared under the 2004 ROD was in fact consistent with the more strict requirements set out in the 1994 ROD and that therefore the project would proceed without provision of any supplemental NEPA document. However, after *PCFFA* set aside the 2004 ROD, the Forest Service was obligated to go back and analyze the project under the 1994 ROD. The EA became deficient because of its reliance on the 2004 decision – only a supplement could cure this deficiency, not a letter to interested persons. The decision to forgo a supplemental NEPA document in light of *PCFFA* was arbitrary and capricious.

- *Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Department of the Interior*, 547 F.Supp.2d 1033 (D. Ariz. 2008)

The district court found that an EIS prepared for a BOR transfer of federal land to the Wellton-Mohawk Irrigation and Drainage District was adequate, and that the agency was not required to supplement the EIS to analyze refinery development because the agency had no control or authority over the refinery project or other future uses of the transferred lands. In the draft EIS, BOR identified 9,800 acres of transfer lands for commercial and industrial development in accordance with Yuma County's existing development plan. The draft EIS contains multiple references to possible "industrial" development. Thus, the transfer lands were identified as lands available for development in accordance with the 2010 Yuma County Comprehensive Plan, which specifically references commercial and industrial development. BOR also held meetings attended by plaintiff's representatives in 2004 during which the refinery project was discussed.

Programmatic EISs

- *Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008)

Affirming a lower court opinion, the Second Circuit dismissed plaintiffs' claim that an FWS depredation order authorizing certain state and federal agencies to kill double-crested cormorants violated NEPA and other statutes and treaties relating to the protection of migratory birds. In response to complaints of cormorant-related depredations, the FWS in 1999 issued a Notice of Intent to develop a "national cormorant management plan" with an accompanying EIS. FWS published its final EIS and issued a final depredation order as a final rule in 2003. In challenging the order, plaintiffs point to the lack of site-specific or localized analysis in the EIS as evidence that the FWS violated NEPA's requirement to examine and permit the public to comment on the environmental impact of the proposed Depredation Order. The court concluded, however, that the FWS did not commit itself to any site-specific actions, and it would have been largely speculative for the agency to identify the specific, localized areas where control efforts under the order would take place. "We therefore do not think that the FWS was

obligated under NEPA to include site-specific analyses in the EIS.” Under the Depredation Order, local agencies were given discretion to select the particular sites at which to pursue depredation control efforts, subject to the constraints set forth in the Depredation Order. In the absence of any certain site-specific action, it was sufficient for the FWS to prepare only a programmatic EIS, citing *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 801 (9th Cir. 2003) (“NEPA requires a full evaluation of site-specific impacts only when a ‘critical decision’ has been made to act on site development -- i.e., when the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to [a] project at a particular site.”).

- *Native Village of Point Hope v. Minerals Management Service*, 564 F.Supp.2d 1077 (D. Alaska 2008)

This case involved the issuance of permits to conduct seismic surveys prior to the completion of a programmatic EIS on a hypothetical future level of seismic activity in the Arctic Ocean. MMS and NMFS prepared EAs/FONSIs on the permits, but plaintiffs argued that MMS and NMFS violated NEPA by authorizing seismic surveys before completing the EIS, asserting that the agencies' decision to prepare an EIS covering future projects shows, by implication, that the 2008 seismic survey program will cause a significant impact on the human environment.

Defendants MMS and NMFS argued that because they prepared EAs and determined that the seismic surveying in the 2008 open-water season will not significantly affect the human environment, they are not bound by the requirements of 40 CFR §1506.1(c). They argue that the seismic surveys are neither a “major federal action” nor will they cause a “significant impact” on the environment, and therefore do not trigger the restrictions of section 1506.1(c). They maintain that the issuance of the permits following a FONSI, even when an EIS is pending, is entirely appropriate, citing *Intertribal Bison Co-op v. Babbitt*, 25 F.Supp.2d 1135, 1139 (D.Mont.1998). The district court agreed that the decision to prepare a Programmatic EIS on a hypothetical future level of seismic activity in the Arctic Ocean did not undermine the agencies' issuance of the EAs/FONSIs for the specific activities in this case.

Tiering

- *League of Wilderness Defenders v. United States Forest Service*, 38 ELR 20296 (9th Cir. 2008)

The Ninth Circuit held that the USFS approved a selective logging project in the Ochoco National Forest in violation of NEPA. Plaintiffs argued that the agency's cumulative effects analysis in the EIS regarding past timber sales was insufficient. In defending its analysis, the USFS argued that no deficiency existed because the omitted information appeared in a separate watershed analysis. The court found that the agency may not tier the EIS to a non-NEPA document.

- *Western Watersheds Project v. Bureau of Land Management*, 552 F.Supp.2d 1113 (D. Nev. 2008)

Plaintiffs argued that BLM's EA/FONSI for BLM's fire management amendment to resource management plans located in Elko County, Nevada violated NEPA because it tiered to a non-NEPA document. Recognizing that an agency is not permitted to tier to a document that has not been subject to NEPA review (citing *Oregon Natural Resources Council v. U.S. Bureau of Land Management*, 470 F.3d 818, 823 (9th Cir.2006)), the district court found that the EA contained the necessary analysis and did not tier to any non-NEPA publications. The EA analyzes

alternatives based on four components: general fire management, fire prevention, fire suppression, and fire rehabilitation. The fire prevention component is guided by the 1998 Elko District Field Office Fire Management Plan and the Elko/Wells District Vegetation Treatment by Fire Environmental Assessment. The fire rehabilitation component is guided by the 2001 Interagency Burned Area Emergency Stabilization and Rehabilitation Handbook and a 2000 Normal Fire Rehabilitation Plan Environmental Assessment. The EA indicates that only general information addressing the whole District is provided since most elements outlined in the EA are addressed in other documents. "Tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA." *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir.2002). Thus, to the extent Defendants "tiered" to non-NEPA documents, they cannot be considered to determine whether the analysis is sufficient. Rather, the adequacy of the EA depends on the analysis contained in the document itself. Thus, although plaintiffs were correct that NEPA does not permit tiering to non-NEPA documents, they did not point out any specific portion of the EA that was insufficient on its own.

Judicial Review Standard: Substituting the Courts' Judgment for that of the Agency

- *Sierra Club v. Van Antwerp*, 526 F.3d 1353 (11th Cir. 2008)

Finding that the lower court had failed to apply the appropriate standard of review, the Eleventh Circuit vacated and remanded a lower court's grant of summary judgment in favor of an environmental group who challenged the Army Corps' grant of CWA permits to mining companies allowing them to extract limestone from the "Lake Belt" area—a stretch of wetlands between the Florida Everglades and the northwest edge of metropolitan Miami. The court found that the district court had predetermined the answer to the ultimate issue—concluding that the Army Corps should not permit mining in the Lake Belt—and analyzed the permitting process with that answer in mind. In other words, no matter what the Army Corps concluded, and no matter what evidence supported that conclusion, the lower court would have banned mining because of its own determination that mining in the Lake Belt is a "bad thing." On remand, the lower court must determine whether the Army Corps complied with NEPA or the Clean Water Act permit process using the proper deferential standard of review.

- *Greater Yellowstone Coalition v. Kempthorne*, 38 ELR 20244 (D.D.C. 2008)

Plaintiffs filed suit arguing that the NPS Winter Use Plan, which would allow 540 recreational snowmobiles and 83 snowcoaches to enter Yellowstone National Park every day, was issued in violation of NEPA. The district court found that NPS' plan was arbitrary and capricious, unsupported by the record, and contrary to law. It clearly elevates use over conservation of park resources and values and fails to articulate why the plan's "major adverse impacts" are "necessary and appropriate to fulfill the purposes of the park." Furthermore, the final EIS in support of the plan does not provide the decisionmaker with a clear analysis of the alternatives that NEPA requires. According to NPS' own data, the plan will increase air pollution, exceed the use levels recommended by NPS biologists to protect wildlife, and cause major adverse impacts to the natural soundscape in Yellowstone. Despite this, the NPS finds that the plan's impacts are wholly "acceptable" and utterly fails to explain this incongruous conclusion. Put simply, the plan provides "no rational connection between the facts found and the choice made."

Other Cases of Interest

- *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008) (climate change)

The Ninth Circuit reversed and remanded to NHTSA its rule that set corporate average fuel economy standards for light-duty trucks, including many sport utility vehicles. The court found that the rule is arbitrary and capricious and contrary to the Energy Policy and Conservation Act because it fails to monetize the value of carbon emissions, to close an SUV loophole, and to set fuel economy standards for all vehicles in a particular weight class. Additionally the agency's EA is inadequate because it failed to consider all environmental impacts including cumulative impacts on climate change, and a substantial question is raised regarding the potentially significant environmental impacts of the rule, which would trigger an EIS. On remand, NHTSA must prepare a revised EA or, as necessary, a complete EIS.

- *Wong v. Bush*, 542 F.3d 732 (9th Cir. 2008) (categorical exclusion)

The Ninth Circuit affirmed a lower court decision that the U.S. Coast Guard did not violate appellants' First Amendment rights or NEPA when it established safety zones insulating a private "super ferry" in Hawaii from blockade by local protesters. To the extent the blockade in protest of the super ferry constitutes symbolic speech, the Coast Guard's rule establishing the security zone is a reasonable time, place, and manner restriction. The rule is content-neutral, narrowly tailored to achieve a significant government interest, and leaves open ample alternative channels of communication. With respect to the NEPA claim, the court held that the security zone was established pursuant to a categorical exclusion and thus the Coast Guard was not required to consider a "no action" alternative.

- *Western Watersheds Project v. Kraayenbrink*, 538 F.Supp.2d 1302 (D. Id. 2008) (cost-benefit analysis)

The district court found that BLM revisions to nationwide grazing regulations for federal lands were not adequate because the final EIS "does not contain enough information to allow decision-makers and the public to make an informed evaluation of the BLM's claim that efficiency compels these changes."

BLM noted that "a formal and mathematically expressed cost-benefit analysis is not always a required part of an EIS..." *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 594 (9th Cir.1981). The district court stated that it was not requiring a mathematical cost-benefit analysis, but was requiring some analysis to demonstrate that the agency had taken a hard look at environmental consequences. The *Columbia Basin* case notes that the absence of a cost-benefit analysis "may be fatal" if the "EIS evaluation is insufficiently detailed to aid the decision-makers in deciding whether to proceed, or to provide the information the public needs to evaluate the project effectively..." *Id.* That is the case here.

U.S. Supreme Court Decision: Natural Resources Defense Council v. Winter

This case involves a challenge to the U.S. Navy's use of mid-frequency sonar in training exercises off the coast of southern California without first preparing an EIS. In February 2007, the Navy issued an EA and concluded that the 14 exercises planned through January 2009 would not have a significant impact on the environment. In its EA, the Navy stated that use of the sonar would result in harassment of marine mammals, but concluded that no harassment would – according to computer models – result in permanent injury to the mammals.

Plaintiffs sued the Navy and sought declaratory and injunctive relief on the grounds that the Navy's planned exercises violated NEPA, the Endangered Species Act, and the Coastal Zone Management Act. The district court granted the plaintiffs' motion for a preliminary injunction and prohibited the Navy from using mid-frequency sonar during its remaining training exercises. On appeal, the U.S. Court of Appeals for the 9th Circuit agreed that injunctive relief was appropriate but that a blanket prohibition on the use of mid-frequency sonar in southern California was too broad, and remanded the case to the district court "to narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises." 508 F.3d 885 (9th Cir. 2007).

In 2008, the U.S. District Court for the Central District of California, the U.S. Court of Appeals for the 9th Circuit, and the U.S. Supreme Court all issued rulings related to this case:

- January 3, 2008: On remand from the U.S. Court of Appeals for the 9th Circuit, the district court issues a revised preliminary injunction ordering the U.S. Navy to implement various mitigation measures to protect marine mammals from mid-frequency sonar used during training exercises off the coast of southern California (530 F.Supp.2d 1110 (C.D. Cal. 2008)).
- President Bush exempts the Navy from compliance with the Coastal Zone Management Act and CEQ approves "alternative arrangements" for the Navy to comply with NEPA because "emergency circumstances" prevented normal compliance.
- February 4, 2008: The district court overrules CEQ emergency exemption (527 F. Supp.2d 1216 (C.D. Cal. 2008)).
- February 29, 2008: The court of appeals upholds the preliminary injunction prohibiting the Navy from conducting mid-frequency sonar use, saying that the plaintiffs have shown a high likelihood of success on the merits (518 F.3d 658 (9th Cir. 2008)).
- November 12, 2008: In a 5-4 decision, the U.S. Supreme Court overrules the 9th Circuit and invalidates the preliminary injunction to the extent challenged by the Navy. 555 U.S. _____, No. 07-1239 (November 12. 2008).

U.S. Supreme Court Decision

Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. The Court's holding focused on the standard to be applied in determining whether plaintiffs' motion for a preliminary injunction should be granted (the U.S. District Court had issued a preliminary injunction and it had been upheld, with modifications, by the U.S. Court of Appeals for the 9th Circuit). A plaintiff seeking a preliminary injunction must establish that: (1) it is likely to have success on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in plaintiff's favor, and (4) an injunction is in the public interest. The Court found that the balance of

equities tipped strongly in favor of the Navy and vacated the preliminary injunction to the extent sought by the Navy.

First, the Court found that the lower courts had allowed the plaintiffs to show only the “possibility” of irreparable harm, which is too lenient. Even if plaintiffs had been able to demonstrate irreparable injury, such injury is outweighed by the public interest and the Navy’s interest in effective and realistic training. *[Note that the Court examined whether there would be irreparable injury to marine mammals, not whether plaintiffs’ would suffer irreparable injury to their informational interests, which are the interests protected by NEPA. Also, while the district court had said the plaintiffs only needed to show the possibility of irreparable harm, it also concluded that the plaintiffs had presented evidence that established “to a near certainty” that the Navy’s exercises would cause irreparable harm to the environment.]*

Second, although military interests do not trump other consideration, the courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. The court did not question the importance of the plaintiffs’ ecological, scientific, and recreational interests, but concluded that the balance of the equities and consideration of overall public interest tip strongly in favor of the Navy. *[Note that, by not questioning the importance of plaintiffs’ interests, the Court did allow military interests to trump other considerations.]*

Third, the Court held that the lower courts’ justifications for entering the preliminary injunction are not persuasive. The district court did not give serious considerations to the balance of the equities and the public interest and the court of appeals concluded that the Navy’s concerns were speculative, failing to properly defer to senior Navy officers’ specific predictive judgments of how the preliminary injunction would reduce the effectiveness of the training exercises. In addition, the district court abused its discretion in imposing two mitigation measures challenged by the Navy.

The Court did not address the underlying merits of the plaintiffs’ claims, but stated that its analysis makes it clear that issuing a permanent injunction along the same lines as the preliminary injunction would be an abuse of discretion. Plaintiffs’ ultimate legal challenge is that the Navy must prepare an EIS, not that the Navy must cease sonar training. Thus, there is no basis for enjoining such training pending the preparation of an EIS (if one is determined to be required) when doing so is credibly alleged to pose a serious threat to national security.

Concurring and Dissenting Opinions

Justice Breyer filed an opinion concurring in part and dissenting in part. In his view, the modified conditions imposed by the court of appeals in its February 2008 order reflect the best equitable conditions that can be created in the short time available between when the exercises are complete and the EIS is ready. The Navy has been training under these conditions since February 2008, so allowing them to remain in place would maintain what has become the status quo. He would modify the court of appeals order so that the provisional conditions it contains remain in place until the Navy’s completion of an acceptable EIS.

Justice Ginsburg filed a dissenting opinion in which Justice Souter joined. Justice Ginsburg stated that the central question in this action is whether the Navy must prepare an EIS. The Navy does not challenge its obligation to do so. If the Navy had completed the EIS before taking action, the training could have proceeded without interruption. Instead, the Navy acted first, thwarting the purpose an EIS is intended

to serve. To justify its course, the Navy sought dispensation from an executive council that lacks authority to countermand or revise NEPA's requirements. She would hold that the district court balanced the equities and did not abuse its discretion.