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ANNUAL NEPA REPORT 2015

of the

National Environmental Policy Act (NEPA) Practice

Submitted to

NAEP Board of Directors

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This report reviews NEPA document submittals and statistics, NEPA litigation and agency procedures for calendar year 2015. Additional sections provide commentary on the implementation of the NEPA process and expert expectations for the future. The purpose of this report is to document the status of NEPA compliance and perspectives during the reporting year. We welcome reader comment and inquiry to naep@naep.org.

Acronyms and Abbreviations

ACOE	Army Corps of Engineers
AR	Administrative Record
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BOEM	Bureau of Ocean Energy Management
BSEE	Bureau of Safety and Environmental Enforcement
CAA	Clean Air Act
CEQ	Council on Environmental Quality
CERPO	Chief environmental review and permitting officer
CSE	Center for Sustainable Economy
DOA	Department of Agriculture
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of Interior
DOT	Department of Transportation
EA	Environmental assessments
EC	Environmental Concerns
EIS	Environmental impact statements
EO	Environmental Objections
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FAST	Fixing America's Surface Transportation
FERC	Federal Energy Regulatory Commission
FHwA	Federal Highway Administration
FONSI	Findings of No Significant Impact
FWS	Fish and Wildlife Service
GHG	Greenhouse Gas
ITS	Incidental Take Statement
LEDPA	Least environmentally damaging practicable alternative
LO	Lack of Objections
MFWP	Montana Fish, Wildlife & Parks
NAEP	National Association of Environmental Professionals
NEPA	National Environmental Policy Act
NOA	Notices of Availability
NOI	Notice of Intent
NPS	National Park Service
OCS	Outer continental shelf
OCSLA	Outer Continental Shelf Lands Act
OMB	Office of Management and Budget
OSRP	Oil Spill Response Plans
PEIS	Programmatic environmental impact statement
RAPID	Responsibly and Professionally Invigorating Development
ROD	Record of Decision
TVA	Tennessee Valley Authority
USFS	United States Forest Service

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1. Introduction

Brock Hoegh, CEP
NAEP President

Shortly after signing the National Environmental Policy Act (NEPA) into law on New Year's Day in 1970, President Richard Nixon discussed in his State of the Union address:

> *"The great question…is shall we make peace with nature and begin to make reparations for the damage we have done to our air, our land and our water?….Clean air, clean water, open spaces – these should once again be the birthright of every American…..The price tag is high. Through our years of past carelessness, we have incurred debt to nature. Now that debt is being called."*
> *http://www.infoplease.com/t/hist/state-of-the-union/183.html*

Now, 46 years later, that price tag is even higher, and problems of the past continue. New challenges such as climate change have emerged within our industry. Still, NEPA's influence is unquestionable and it remains the nation's environmental governing star.

This 2015 report is a continuation of ongoing efforts by environmental professionals to increase awareness of the state of the NEPA practice and it's potential. It is produced annually by the NEPA Practice Group, an all-volunteer committee of the National Association of Environmental Professionals (NAEP). NAEP tracks developments at the national and state levels in the practice of impact assessment.

This past April, the NAEP annual conference held a unique and exciting session for NEPA practitioners featuring a special set of sessions providing a continuation of the 2014 Cohen NEPA Summit. These sessions focused on distributing recommendations generated by the 2014 Summit and brainstorming ideas on how to bring them to fruition. In addition to our conference, NAEP has continued our successful webinar series addressing emerging issues, including a series on NEPA that took place on June 1, June 8 and August 3, 2016. The June 1 and June 8 webinars were our annual NEPA Case Law Update and NEPA Legislative and Policy Update and the August 3 webinar focused on the Cohen NEPA Summit Summary Report. And lastly, the NAEP's flagship journal, *Environmental Practice* also contains articles that address state-of-the-art NEPA practice.

Too often the focus is on the act of producing a NEPA document, because that is what the agency and federal permit applicants want. But NEPA has the potential to be, and should be, much more than a document. It should be about thinking before we leap, about having a conversation between the agency and its stakeholders, and about addressing the issues that are important to those who are affected. NEPA is both strategic (programmatic) and site-specific in its reach. When a document is produced, it can be a roadmap for policies and practices that the agency will undertake in the future. NEPA is a flexible statute because its definition of the

human environment is broad, and a variety of social and environmental concerns fall within the national environmental policy established under Section 101 of NEPA. Environmental issues such as biodiversity, climate change, environmental justice, and sustainability can be addressed under NEPA without further legislation or regulation. As you read through this year's report, think about NEPA, its flexibility to address emerging environmental issues, and how implementation can be improved to produce better environmental decisions.

2. Perspectives on NEPA—Guest Editorial

Horst Greczmiel[1]

The past year marked NEPA's 46th year and 37 years of NEPA practice under the Council on Environmental Quality's Regulations. Those who understand NEPA view the NEPA review process as integral and valuable to planning and sound decisionmaking. NEPA brings to the fore analysis and information that a federal agency might otherwise overlook. Looking before leaping to decisions that could unintentionally undermine our environmental and community values has long been NEPA's goal. Regrettably, our efforts to demonstrate NEPA's value have been less than successful in overcoming the calls for "streamlining NEPA"

In the never-ending crusade to cut red tape, the value NEPA brings to agency decisionmaking is often overlooked, ignored, or mischaracterized. NEPA implementation must evolve to protect and strengthen its most valuable aspects. The time has come to forge a consensus on NEPA's most valuable aspects and ensure their implementation. Similarly important is demonstrating and documenting NEPA's value to meet the challenges brought on by those more interested in saving dollars and time.

What are NEPA's most valuable aspects? Experience teaches that public involvement and considering alternatives matter most in bringing about decisions with beneficial outcomes are key to fulfilling NEPA's promise of man and nature existing in productive harmony. Providing the public, which includes citizens as well as agencies and organizations, the opportunities to be heard and have concerns addressed promotes our democratic ideals and provides practical insight into the trade-offs involved when Federal agencies make tough decisions. One group's successful outcome is too often seen as another's loss. NEPA done well explains the tradeoffs brought about by the reality of limited environmental and community resources.

Equally valuable is the consideration of reasonable alternatives. Alternatives provide the opportunity to consider, weigh, and compare competing values. How many times have we heard that there are no, or no other, alternatives to achieve the proponent's carefully crafted purpose and need statement? All too often we've seen another alternative emerge later, either delaying the decision or too late to be fully considered. The careful crafting and consideration of alternatives is time well spent; rancorous debate over whether to even consider another reasonable alternative is not.

The challenge in defending NEPA has increased as fewer Environmental Impact Statements and more Environmental Assessments are prepared. The efficacy of using a less detailed, faster

[1] Mr. Greczmiel retired on December 31, 2015, as the longest serving Associate Director at the Council on Environmental Quality (CEQ). In addition to serving as Associate Director for National Environmental Policy Act (NEPA) Oversight at CEQ for 17 years, he spent more than 14 years active duty in the United States Army and more than 7 years in the Environmental Law Division at US Coast Guard headquarters. He wrote and reviewed NEPA environmental reviews before joining CEQ where he oversaw and advanced Federal agencies' NEPA compliance.

process is undeniable; however, all too often the Environmental Assessment process shortchanges public involvement and consideration of alternatives. The challenge ahead is in preparing meaningful Environmental Assessments without wasting time in disputes over access to information or attempts to justify excluding alternatives.

Capturing NEPA's value has been elusive, often hampered by limited resources as efforts focus on the next review before capturing the benefits of the one completed. Time and cost can be measured while outcomes that avoid detrimental or more adverse results are not explicitly captured. Further complications arise when a beneficial outcome is attributed to another worthy environmental statute or process such as the Endangered Species Act or National Historic Preservation Act. However, upon closer review, it is often the case that NEPA brought the issue and the availability of reasonable alternatives to light. In many cases, absent NEPA, the potentially adverse outcome would not have been recognized in time, if at all.

There will not, at least if the past is an indicator, be a surplus of time and budget to allow for the luxury of continuing apace. The work necessary to strengthen the pillars of public engagement and alternatives along with better capturing and articulating the results of NEPA falls upon NEPA practitioners that recognize the value of the NEPA process. With them, we can have a public that appreciates the value of NEPA, and a celebration of NEPA's 50th that resonates with more than a small group of specialists.

3. The NEPA Practice 2015

Ron Lamb[2]

The mission of the NEPA Practice is to improve environmental impact assessment as performed under the National Environmental Policy Act.

NAEP's National Environmental Policy Act (NEPA) Practice is pleased to present our ninth NEPA Annual Report. This report contains summaries of the latest developments in NEPA as well as the NEPA Practice's activities in 2015.

The *Annual NEPA Report* is prepared and published through the initiative and volunteer efforts of members of the NAEP's NEPA Practice. The NAEP's NEPA Practice supports NEPA practitioners through monthly conference calls, networking opportunities, educational opportunities, outreach with the President's Council on Environmental Quality (CEQ), and projects such as this *Annual NEPA Report*. Highlights of 2015 activities include:

- Developed and submitted comments on CEQ's revised draft greenhouse gas (GHG) guidance.
- Discussed the themes of the Cohen Summit to strengthen NEPA implementation: 1. Recommit Senior Leadership, 2. Organize NEPA Role in Government for Success, 3. Invest in Streamlining, 4. Maximize the Flexibility of the CEQ Regulations, and 5. Open Government (Transparency) as NEPA Intended.
- Read and discussed "The Rationality and Logic of NEPA Revisited" by Professor Robert V. Bartlett. Professor Bartlett joined the call in August to discuss the article and participated in a Q&A with the group.
- Read and discussed "Model Protocols for Assessing the Impacts of Climate Change on the Built Environment under NEPA and State EIA Laws" developed by the Columbia Law School, Sabin Center for Climate Change Law. Joining the call was Mr. Michael Gerrard—Andrew Sabin Professor of Professional Practice at Columbia Law School, director of the Sabin Center for Climate, and Chair of the Faculty of Columbia University's Earth Institute—and Ms. Jessia Wentz—Associate Director and Postdoctoral Fellow at the Sabin Center for Climate Change Law.

NEPA Practice has approximately 70 active members. We hold monthly conference calls in which we discuss emerging developments in NEPA such as new draft regulations, guidance, legislation, projects, or studies. Monthly conference calls are held at 2:30 p.m. (Eastern) on the

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2nd Wednesday of each month and all NAEP members are welcome to participate. To be added to the NEPA Practice email list and call reminders, email your request to naep@naep.org.

4. *Just the Stats*

Karen Vitulano[3]

In 2015, Notices of Availability (NOAs) for 381 environmental impact statements (EISs) were published in the Federal Register. Of the 381 total, 182 were draft EISs and 199 were final EISs. Information regarding these documents is available through the Environmental Protection Agency's (EPA) online EIS database, available at: https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search. The database contains both the EIS and EPA's comment letter for each project.

In 2015, fourteen agencies each prepared ten or more EISs; four agencies prepared 20 or more. Similar to previous years, the U.S. Forest Service (USFS) published the most documents with 71. The Bureau of Land Management and Army Corps of Engineers had the second highest number with 40 documents each; and the Federal Highway Administration was third with 23. **Table 4-1** shows Draft and Final EISs filed in 2015 by agency and **Figure 4-1** shows the EISs aggregated by Department.

Table 4-1. Draft and Final EISs Published in Federal Register in 2015 (by Agency)

Lead Agency	Number of documents
U.S. Forest Service	71
Bureau of Land Management	40
U.S. Army Corps of Engineers	40
Federal Highway Administration	23
National Park Service	17
Federal Energy Regulatory Commission	17
Fish and Wildlife Service	16
National Oceanic and Atmospheric Administration	15
Nuclear Regulatory Commission	15
Bureau of Reclamation	13
U.S. Navy	12
Federal Transit Administration	12
Department of Energy	12
USDA (including Animal & Plant Health Inspection Services)	10
U.S. Army	7
Federal Rail Administration	6
Bureau of Ocean Energy Management, Regulation and Enforcement	6
U.S. Air Force	4
General Services Administration	4
Bureau of Indian Affairs	3
Western Area Power Authority	3

[3] Karen Vitulano, US Environmental Protection Agency, Region 9. Any views expressed in this article do not necessarily represent the views of the EPA or the United States government.

Lead Agency	Number of documents
Federal Aviation Administration	3
Veterans Administration	3
Tennessee Valley Authority	3
Bureau of Prisons	3
Office of Surface Mining	3
U.S. Marine Corps	2
Housing and Urban Development	2
National Institutes of Health	2
Federal Emergency Management Agency	2
Food and Drug Administration	2
National Resource Conservation Service	2
Surface Transportation Board	2
Department of Interior	1
Bonneville Power Administration	1
Rural Utilities Service	1
U.S. Coast Guard	1
National Highway Traffic Safety Administration	1
National Geospatial-Intelligence Agency	1
TOTAL	**381**

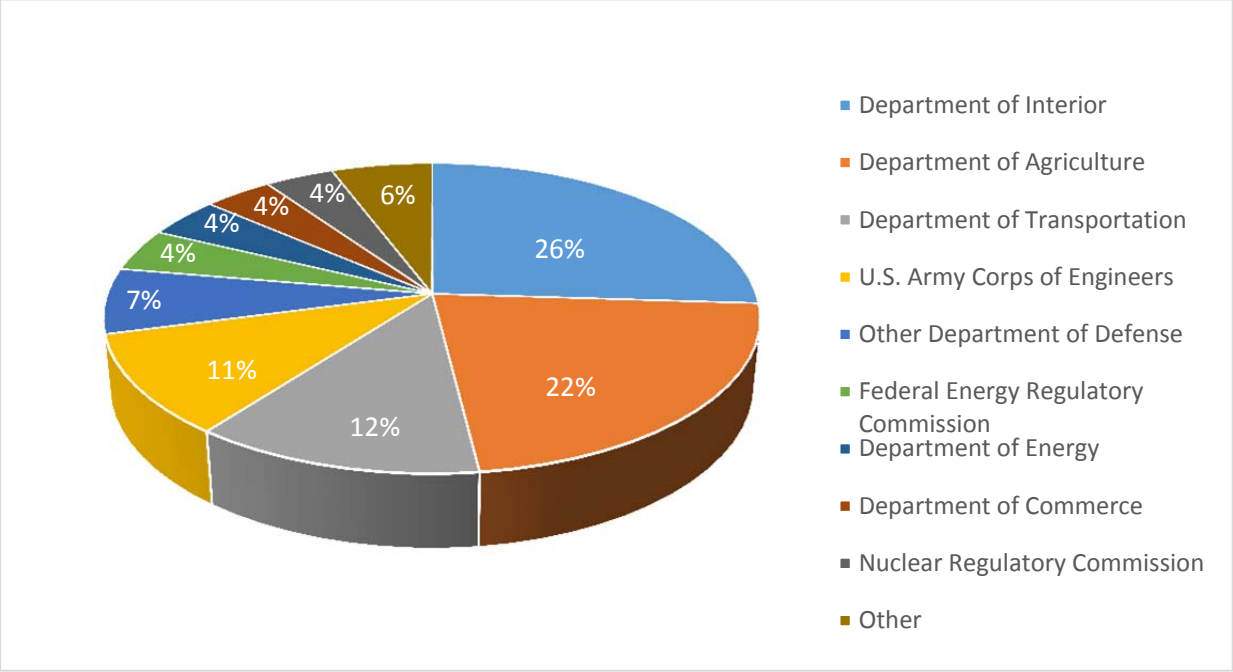

Figure 4-1. Draft and Final EISs in 2015 (by Department)

The geographic breakdown of Draft and Final EISs by State is in **Table 4-2**. Regional or multi-state documents appear in a separate category.

Table 4-2. Draft and Final EISs in 2015 by State

States	# Draft and Final EISs	States	# Draft and Final EISs
California	67	Kentucky	3
Colorado	20	Mississippi	3
Idaho	20	District of Columbia	2
Oregon	17	Massachusetts	2
Montana	16	Michigan	2
Washington	14	North Dakota	2
Alaska	12	Nebraska	2
Utah	11	New Hampshire	2
Florida	10	Ohio	2
Nevada	10	Pennsylvania	2
Texas	10	Vermont	2
Louisiana	9	Wisconsin	2
Arizona	8	Alabama	1
Hawaii	8	Connecticut	1
Wyoming	8	Georgia	1
North Carolina	7	Iowa	1
Virginia	6	Indiana	1
Minnesota	5	Kansas	1
Illinois	4	Maine	1
Maryland	4	New Jersey	1
New Mexico	4	Oklahoma	1
New York	4	South Dakota	1
Puerto Rico	4	South Carolina	2
Tennessee	4	West Virginia	1
Guam	3	Multi-state	51
		Total	**381**

The agency and state distributions continue to favor the west and indicate a predominance of Federal actions associated with the management of Federal lands. Like 2014, California had the most Draft and Final EISs published. More than half of these were by the Army Corps of Engineers, the Bureau of Reclamation and the Forest Service. A number of these projects reflected responses to California's four-year drought, including several fire recovery projects in the National Forests, and various water transfer and water recycling projects. Colorado and Idaho, who had the next highest number of EISs, had the majority of projects proposed by the Forest Service and BLM (75% and 65% for Colorado and Idaho respectively).

4.1 EPA's Review and Comments

Under Section 309 of the Clean Air Act (CAA), EPA is required to review and publicly comment on the environmental impacts of major Federal actions including actions that are the subject of draft and final EISs. EPA categorizes or "rates" the EIS using an alphanumeric system, which signifies EPA's evaluation of the environmental impacts of the proposal and the adequacy of the draft EIS, and includes the designated rating in EPA's comment letter. For an explanation of EPA's ratings, see www.epa.gov/nepa/environmental-impact-statement-rating-system-criteria.

In 2015, of the 182 draft EISs (DEIS) published, 12 ratings were unavailable for various reasons at the time these numbers were compiled. Of the 166 DEISs that received *impact ratings*[3] on the proposed action, 41 (24.7%) were rated Lack of Objections (LO) by the EPA, 113 (68.1%) were rated Environmental Concerns (EC), and 12 (7.2%) received an Environmental Objections (EO) rating. No DEISs received an "EU" rating in 2015. (**Figure 4-2**).

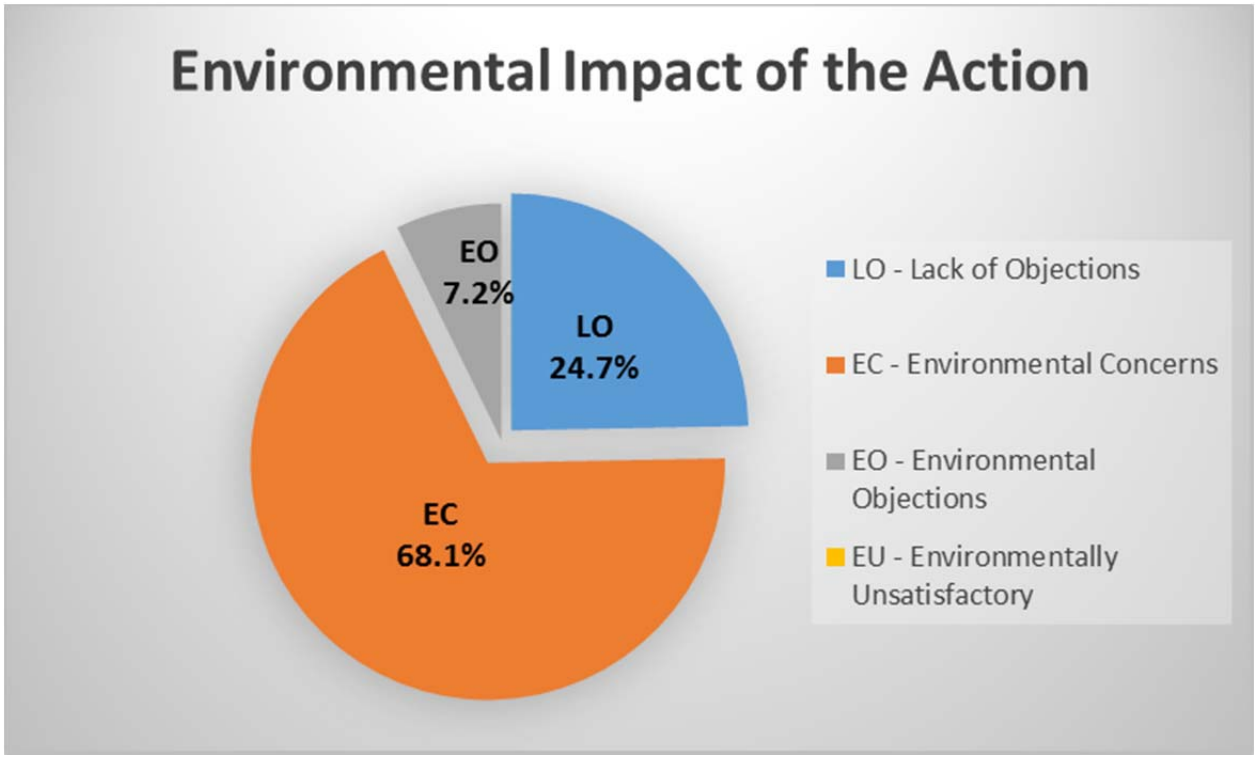

Figure 4-2. Environmental Impact of the Action

Of the 170 DEISs that received *adequacy ratings*, 59 (34.7%) of the documents were considered adequate[4], 107 (62.9%) were rated insufficient information, and 4 (2.4%) were rated inadequate (**Figure 4-3**).

[4] Documents that received an impact rating of LO are considered to be adequate

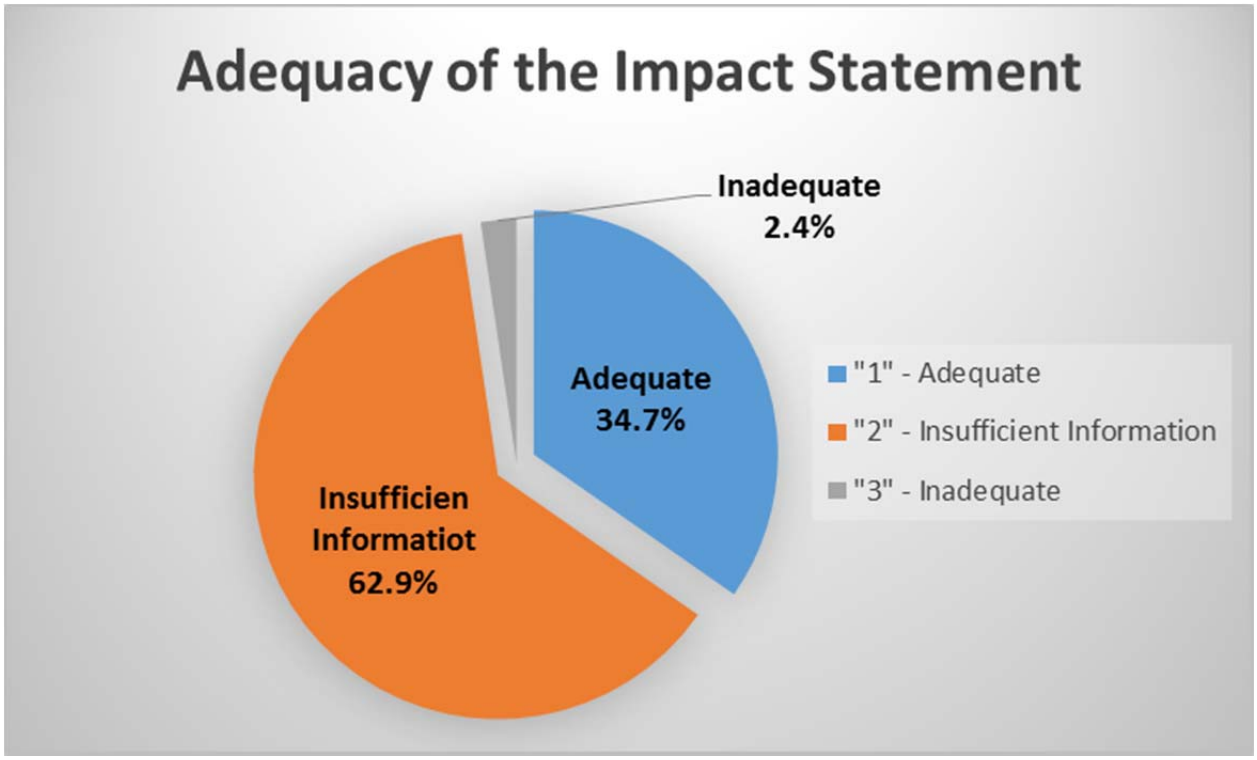

Figure 4-3. Adequacy of the Impact Statement

EPA considers ratings of "EU – Environmentally Unsatisfactory" and "3 - Inadequate" to be adverse ratings which, if not remedied, are potential candidates for referral to the Council on Environmental Quality (CEQ). There were four adversely rated projects in 2015.

As mentioned, no DEISs received an "EU" rating in 2015. Four DEISs were deemed inadequate ("3" rating):

- Corps of Engineers' *Lower Bois D'Arc Creek Reservoir Project* in Texas,
- FHWA's *State Route (SR) 710 North Improvements* in California,
- Bureau of Reclamation's *Bay Delta Conservation Plan/California Water Fix*, and
- BLM's *Coeur Rochester Mine Plan of Operations Amendment 10 Project*.

The Corps' *Lower Bois D'Arc Creek Reservoir Project* proposed construction of a water supply reservoir involving discharge of dredge and fill material into the watershed that would eliminate over 5,800 acres of wetlands and 120 miles of streams. The DEIS did not fully assess the nature and extent of these effects, the effectiveness and feasibility of proposed mitigation measures, or alternatives to this action. EPA deemed the DEIS inadequate and recommended a revised DEIS be prepared that considers a range of alternatives, and to ensure the proposal represents the least environmentally damaging practicable alternative or LEDPA, as required by Clean Water Act Section 404 permit guidelines.

The DEIS prepared by FHWA for State Route 710 did not fully evaluate whether the project alternatives could cause or contribute to localized CAA National Ambient Air Quality Standards exceedances in the project area, which has some of the worst air quality in the nation. EPA rated the Freeway Tunnel Alternative a "3" and recommended a Supplemental DEIS be prepared to further evaluate air quality impacts.

The Bureau of Reclamation's Bay Delta Conservation Plan/California Water Fix project involved the construction and operation of proposed new water export intakes on the Sacramento River to divert water into a proposed 40-mile twin tunnel conveyance facility in the California Bay Delta Estuary. The Supplemental DEIS did not provide detailed information on the impacts from operating the tunnels. Without this information, the environmental impacts to threatened and endangered fish, water quality, and other beneficial uses in the Bay Delta estuary could not be fully determined, therefore, the SDEIS received a "3" rating (inadequate) from EPA. Several pending regulatory actions, including updates to water quality standards, Endangered Species Act consultations, and Clean Water Act Section 404 permitting will generate more data, analysis and public input and will provide the needed supplemental information to allow a full review of the environmental impacts. EPA committed to working with Federal and State agencies as the project moves forward.

BLM's *Coeur Rochester Mine Plan of Operations Amendment 10 Project* was rated inadequate because the DEIS for the mine expansion project, which operates cyanide heap leach facilities, did not discuss the need for post-closure financial assurance to protect water quality and wildlife in the area, nor did it demonstrate that the costs of post-closure monitoring and mitigation for the expanded mine will be covered for as long as needed to avoid significant environmental impacts. The residual heap leach solution that would drain down in the closure and post-closure period is anticipated to exceed water quality thresholds for aluminum, antimony, arsenic, lead, copper, iron, mercury and silver. A supplemental DEIS was recommended to disclose adequate detail on what activities would be required in the post-closure period and how funds would be secured to ensure that they are available as long as they are needed to implement critical post-closure obligations.

5. Preparation Times for Environmental Impact Statements Made Available in 2015

Piet and Carole deWitt [5]

In calendar year 2015, 34 federal agencies made publicly available 179 draft and draft supplemental environmental impact statements (EISs), [i.e. draft EISs]; and 34 agencies made available 194 final and final supplemental EISs [i.e. final EISs]. Eight of the final EISs were adoptions and are not included in our calculation of EIS-preparation times.

The final EISs made available by all federal agencies as a group required the longest annual average preparation time we have recorded for the period 1997-2015. The draft EISs made available in 2015 required the second longest annual average preparation time and marked the fourth consecutive year the annual average has exceeded 1000 days. Analysis of supplemented EISs from 2005 through 2015 found the proportion of EISs that are supplemented increased while the trend in their average preparation time was similar to that of unsupplemented EISs.

5.1 Final EISs

Of the 186 final EISs that were not adoptions, two were supplemented or revised and reissued during the year; the total preparation time for these EISs was from their notices of intent to their final notices of availability. In addition, one final EIS had no Notice of Intent (NOI) published in the Federal Register and could not be included in our calculation. Our 2015 sample of final EISs includes 183 entries.

The 183 final EISs in our sample had an average preparation time (from the Federal Register NOI to the Notice of Availability for the final EIS) of 1841±1347 days (5.0±3.7 years) [mean ± one standard deviation] (see "ALL" in **Table 5-1**). The 2015 average EIS-preparation time was the longest we have recorded for all agencies, as a group, for the period 1997-2015. The 2015 average exceeded by 132 days the previous high annual average of 1709±1225 days (4.7±3.4 years) [n=182] recorded in 2014. The 2015 average EIS-preparation time was 675 days longer than the annual average recorded in 2000, 1166±899 days (3.2±2.5 years [n=198], the year with the lowest annual average for all agencies combined.

The draft EISs associated with the 2015 final EISs required an average of 1336±1206 days (3.7±3.3 years) to prepare following the publication of their NOIs. This average is the longest we have recorded and is 124 days longer than the previous high average of 1212±1050 days (3.2±2.9 years) [n=172] recorded in 2013. The 2015 average time for preparing the final EIS from the draft EIS, 505±365 days (1.4±1.0 years), was the third highest average recorded for the

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Table 5-1. Preparation Times in Calendar Days for Final and Final Supplemental EISs Made Available in 2015

			NOI to Draft EIS			Draft EIS to Final EIS			NOI to Final EIS				
Agency	**n**	**% ALL**	**Mean**	**s.d.**	**M**	**Mean**	**s.d.**	**M**	**Mean**	**s.d.**	**M**	**Min**	**Max**
ALL	**183**	100	**1336**	1206	919	**505**	365	406	**1841**	1347	1428	247	8464
APHIS	**3**	1.6	**609**	51	585	**158**	36	175	**767**	15	760	756	784
BLM	**22**	12	**1252**	744	828	**625**	152	592	**1876**	851	1445	641	3766
BOEM	**3**	1.6	**850**	1145	224	**558**	621	217	**1408**	1766	441	336	3446
BOP	**2**	1.1	**446**	172	446	**704**	757	704	**1149**	585	1149	735	1563
BOR	**8**	4.4	**1572**	1058	1294	**392**	321	270	**1964**	1271	1508	521	3598
BPA	**1**	0.5	**1401**			**259**			**1660**				
DOE	**5**	2.7	**635**	370	574	**266**	161	203	**901**	529	777	437	1739
DOI	**1**	0.5	**1445**			**413**			**1858**				
FAA	**1**	0.5	**1569**			**147**			**1716**				
FDA	**1**	0.5	**515**			**315**			**830**				
FEMA	**1**	0.5	**388**			**154**			**542**				
FERC	**9**	4.9	**773**	468	759	**242**	174	196	**1015**	622	878	371	2433
FHwA	**14**	7.7	**2767**	1590	2478	**805**	505	700	**3572**	1701	3359	1507	8464
FRA	**3**	1.6	**977**	544	819	**878**	913	371	**1855**	1446	1190	861	3514
FS	**40**	21.9	**958**	774	846	**547**	412	396	**1505**	949	1276	247	4027
FTA	**4**	2.2	**982**	878	672	**381**	215	357	**1363**	740	1029	928	2466
FWS	**7**	3.8	**1355**	967	1270	**549**	365	483	**1904**	985	1696	758	3980
GSA	**1**	0.5	**388**			**910**			**1298**				
HUD	**2**	1.1	**841**	110	841	**277**	104	277	**1118**	214	1118	966	1269
MARAD	**1**	0.5	**536**			**308**			**844**				
NIH	**1**	0.5	**218**			**119**			**337**				
NNSA	**1**	0.5	**5545**			**1015**			**6560**				
NOAA	**5**	2.7	**1073**	1378	428	**203**	167	147	**1276**	1538	512	311	3955

NPS	**7**	3.8	**2477**	1726	1689	**584**	210	560	**3061**	1806	2410	1108	5217
NRC	**7**	3.8	**854**	360	690	**367**	236	245	**1221**	539	851	724	1862
OSM	**1**	0.5	**718**			**399**			**1017**				
STB	**1**	0.5	**3874**			**385**			**4259**				
TVA	**1**	0.5	**2097**			**126**			**2223**				
USA	**5**	2.7	**921**	841	732	**358**	199	385	**1280**	754	1117	651	2501
USACE	**12**	6.6	**1992**	1324	1269	**535**	264	568	**2527**	1432	2038	939	5110
USAF	**1**	0.5	**270**			**392**			**662**				
USN	**9**	4.9	**1551**	2032	736	**532**	384	448	**2083**	1881	1352	883	6770
VA	**1**	0.5	**1451**			**112**			**1563**				
WAPA	**2**	1.1	**1224**	607	1224	**490**	396	490	**1714**	1003	1714	1005	2423

period 1997-2015. The highest average, 512±548 days (1.4±1.5 years) [n=197] was recorded in 2012.

Each of the five most prolific EIS-preparing agencies established new high annual average preparation times in 2015 (see "NOI to Final EIS" in **Table 5-1**). In addition, the Forest Service also established a new high average for the preparation of the final EIS from its draft version. The Federal Highway Administration, Corps of Engineers, and National Park Service established new high averages for the preparation of the draft EIS following publication of the NOI. The Bureau of Land Management did not establish any record for the component times, but its annual average for 2015 exceeded that of its previous high. These five agencies combined to produce 52% of the final EISs in our sample. The Federal Highway Administration and the National Park Service established new lows in the number of final EISs each made available in 2015. The Corps of Engineers tied its previous low number of final EISs made available in a year.

Five or 2.7% of the final EISs made available in 2015 were completed within one year following publication of their NOIs (see "0 to 1" in **Table 5-2**). This is the lowest completion rate for this time interval in our record. From 1997 through 2014 an average of 7.7±3.1% of final EISs were completed in one year or less. The highest one-year completion rate, 14.9%, was recorded in 2001. Since that year, the percentage of EISs completed in one year or less has declined at an average rate of -0.54% per year.

Federal agencies also established a new low completion rate for the interval "1 to 2 years" following publication of the NOI. The 25 final EISs made available during this interval in 2015 constituted 13.7% of our sample. The previous low completion rate for this interval, 16.9%, was

established in 2012. The highest completion rate for this interval, 30.3%, was recorded in 2000. Since 2000, the percentage of final EISs completed in this interval has decreased at an average rate of -0.92% per year.

Federal agencies established a new high percentage completion rate for the "9 to 10 year" interval in 2015. The 2015 completion rate of six percent exceeded the previous high of 3.2 percent recorded in 2009 and 2011.

The average time required by all federal agencies combined to prepare final EISs has increased since the year 2000 when it averaged 1166±899 days (3.2±2.5 years [n=198]. The annual average EIS-preparation time peaked in 2015 as noted previously. From 2000 through 2015 the annual average EIS-preparation time for all agencies combined has increased at an average rate of +40.2 days/year (see "Total EIS Preparation Time" in **Figure 5-1**). About 80% of the total increase occurred in the preparation of draft EISs. The remaining 20% was incurred in the preparation of the final EIS from the draft EIS.

Table 5-2. A Comparison of 2015 Final EIS Completion Rates with the Average Final EIS Completion Rates for the Period 1997 Through 2014

Completion Interval in Years from NOI*	2015 Completion Percentage	1997 – 2014			
		Average Completion Percentage	Standard Deviation	Lowest Completion Percentage (Year)	Highest Completion Percentage (Year)
0 to 1	2.7	7.7	3.1	2.9 (2013)	14.9 (2001)
1 to 2	13.7	24.6	4.1	16.9 (2012)	30.3 (2000)
2 to 3	16.9	18.7	2.4	15.2 (2008)	24.5 (2009)
3 to 4	18.6	13.0	2.4	9.3 (2004)	18.6 (2005)
4 to 5	10.9	10.0	2.6	6.2 (2002)	12.8 (2006)
5 to 6	8.2	7.1	1.8	4.5 (2000)	11.6 (2011)
6 to 7	6.6	6.1	2.1	3.0 (2001)	10.7 (2006)
7 to 8	4.4	4.0	1.6	1.5 (2000)	7.0 (2013)
8 to 9	2.2	3.0	1.5	1.3 (2002)	6.7 (2012)
9 to 10	6.0	1.7	0.8	0.5 (2000)	3.2 (2 years)
10 to 11	3.3	1.4	1.1	0.4 (4 years)	3.8 (2014)
11 to 12	1.6	0.7	0.6	0.0 (6 years)	1.6 (2011)
12 to 13	0.5	0.7	0.7	0.0 (5 years)	2.3 (2008)
13 to 14	1.1	0.4	0.6	0.0 (7 years)	2.3 (2013)
14 to 15	1.6	0.4	0.5	0.0 (8 years)	1.6 (2014)
15 to 16	0.0	0.1	0.3	0.0 (14 years)	0.9 (2010)
16 to 17	0.0	0.2	0.4	0.0 (12 years)	1.3 (2006)
17 to 18	0.5	0.09	0.2	0.0 (14 years)	0.5 (2010)
18 to 19	0.5	0.07	0.2	0.0 (16 years)	0.8 (2005)
19 to 20	0.0	0.03	0.1	0.0 (17 years)	0.6 (2013)
20 to 21	0.0	0.03	0.1	0.0 (17 years)	0.5 (2012)
21 to 22	0.0	0.03	0.1	0.0 (17 years)	0.5 (2010)
22 to 23	0.0	0.0	0.0	0.0 (18 years)	0.0 (18 years)
23 to 24	0.5	0.03	0.1	0.0 (18 years)	0.0 (18 years)
∑	99.8	100			

*NOI = Federal Register Notice of Intent to Prepare the Environmental Impact Statement

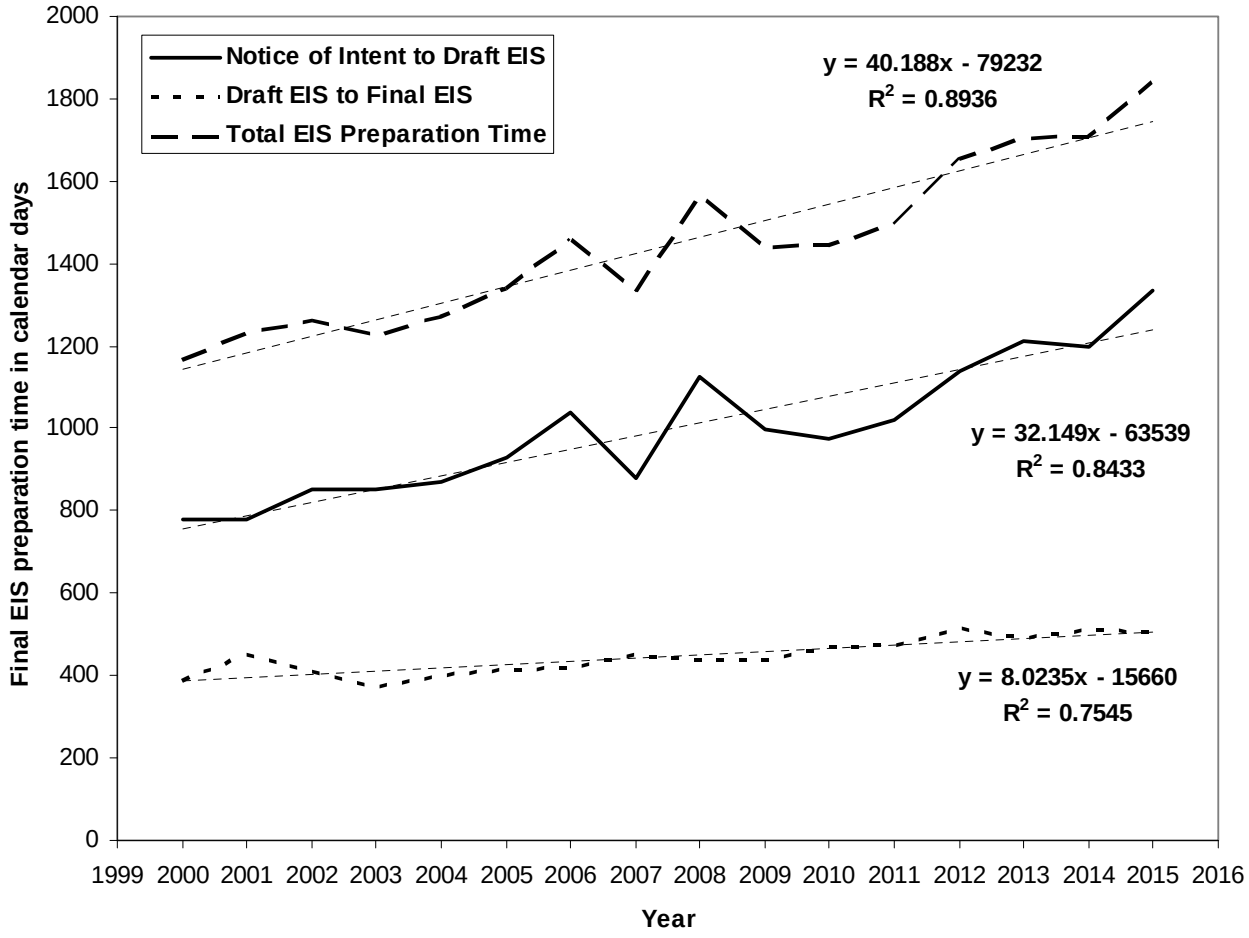

Figure 5-1. Annual Average Preparation Times for Final EISs Made Available by All Agencies from 2000 Through 2015 with Their Linear Regression Lines and Equations and Coefficients of Determination (R^2)

In 2015, 14 agencies made only one final EIS available and three agencies made two final EISs available (see left four columns in **Table 5-3**). Of these agencies, three appeared in the ten longest annual average EIS preparation times and seven appeared in the ten shortest annual average EIS-preparation times. EISs prepared by these 14 agencies required an average of 1667±1443 days (4.6±4.0 years) to complete. In contrast, EISs prepared by all other agencies required 1862±1337 days (5.1±3.7 years) to complete.

For the period 1997-2015, federal agencies made available an average of 235±34 final EISs per year. The 194 final EISs (including adoptions) was the third lowest number we have recorded for that period. The two lower totals were recorded in 2013 (180) and 2014 (186) final EISs. The highest number of final EISs made available, 311, was recorded in 2004.

Table 5-3. Average Preparation Times in Calendar Days for Draft and Final EISs Made Available in 2015 Arranged in Descending Order by Mean

2015 Final EISs			
Rank	**Agency**	**n***	**Mean**
1	NNSA	1	6560
2	STB	1	4259
3	FHwA	14	3572
4	NPS	7	3061
5	USACE	12	2527
6	TVA	1	2223
7	USN	9	2083
8	BOR	8	1964
9	FWS	7	1904
10	BLM	22	1876
11	DOI	1	1858
12	FRA	3	1855
13	FAA	1	1716
14	WAPA	2	1714
15	BPA	1	1660
16	VA	1	1563
17	FS	40	1505
18	BOEM	3	1408
19	FTA	4	1363
20	GSA	1	1298
21	USA	5	1280
22	NOAA	5	1276
23	NRC	7	1221
24	BOP	2	1149
25	HUD	2	1118
26	OSM	1	1017
27	FERC	9	1015
28	DOE	5	901
29	MARAD	1	844
30	FDA	1	830
31	APHIS	3	767
32	USAF	1	662
33	FEMA	1	542
34	NIH	1	337

* n = number of EISs

2015 Draft EISs			
Rank	**Agency**	**n***	**Mean**
1	FHwA	8	3174
2	FAA	1	2298
3	USACE	27	1902
4	OSM	2	1839
5	NPS	9	1757
6	FTA	7	1351
7	BLM	16	1183
8	FRA	3	1077
9	BOR	4	1027
10	VA	2	995
11	FWS	8	970
12	STB	1	914
13	NRC	8	873
14	RUS	1	854
15	NOAA	9	830
16	USAF	3	820
17	DOE	6	785
18	FS	30	674
19	USN	2	674
20	USMC	2	666
21	BIA	3	649
22	FERC	7	633
23	APHIS	2	621
24	WAPA	1	602
25	USA	2	595
26	BOP	1	567
27	FDA	1	515
28	TVA	2	457
29	FEMA	1	388
30	NHTSA	1	352
31	NGA**	1	333
32	GSA	3	247
33	NIH	1	218
34	BOEM	2	191

** NGA = National Geospatial- Intelligence Agency

5.2 Draft EISs

In 2015, federal agencies made available 179 draft and draft supplemental EISs (**Table 5-4**). Two draft supplemental EISs did not have NOIs published in the Federal Register and are excluded from our preparation time calculations. Our sample includes 177 draft EISs.

The 2015 annual average draft-EIS preparation time for all agencies combined, 1153±1023 days (3.2±2.8 years), was the second longest we have recorded for the period 1997-2015 (see "ALL" in **Table 5-4**). The 2015 annual average was exceeded only by the annual average of 1259±1088 days (3.2±3.0 years) [n=205] recorded in 2013.

Of the five most prolific EIS producers, only the Federal Highway Administration established a new high annual average draft-EIS preparation time in 2015. Of the Administration's eight draft EISs, four required more than 4000 days (almost 11 years) to prepare. The Administration's eight draft EISs also constituted the lowest number of draft EISs it made available in any year during the period 1997-2015. None of the other major EIS producers established new high or low annual average preparation times or numbers for draft EISs made available in 2015.

From 1997-2014 an average of 27.0±6.4% of draft EISs was completed in one year or less following publication of their NOI (see "0 to 1" in **Table 5-5**). In 2015, thirty-four (34) or 19.2% of the draft EISs made available were completed in one year or less. This average is the fourth lowest for the period 1997-2015. Previous lows for this completion interval were recorded in 2013 (13.9%), 2012 (16.0%) and 2014 (18.7%). Prior to 2012, the average completion rate for this interval was 27.4±8.2%. The highest completion rate, 37.0%, was recorded in 2000. Since 2000, the percentage of draft EISs completed in less than one year has declined at an average rate of -1.1%/year**.**

In 2015 record high draft EIS completion rates were established by all agencies combined for the annual intervals 6-to-7 years, 11-to-12 years, and 15-to-16 years (see **Table 5-5**). No new record low draft EIS completion rates were established in 2015.

The lowest annual average preparation time for draft EISs, 710±666 days (1.9±1.8 years) [n=243], was recorded in the year 2000. Since then annual average draft EIS-preparation times for all agencies combined have increased at an average rate of +22.7 days/year (see **Figure 5-2**).

In 2015, 18 federal agencies made available only one or two draft EISs (see right four columns in **Table 5-3**). Nine (9) of these agencies appear in the ten lowest annual average preparation times, and three (3) of them appear in the ten longest annual average preparation times. EISs prepared by these 18 agencies required an average of 735±536 days (2.0±1.5 years) to complete. In contrast, EISs prepared by all other agencies required 1225±1070 days (3.4±2.9 years) to complete.

Table 5-4. Preparation Times in Calendar Days for Draft and Draft Supplemental EISs Made Available in 2015

Agency	n	%	Mean	s.d.	M	Min	Max
ALL	177	100	**1153**	1023	833	32	5763
APHIS	2	1.1	**621**	66	621	574	668
BIA	3	1.7	**649**	414	833	175	938
BLM	16	9.0	**1183**	687	1178	402	3118
BOEM	2	1.1	**191**	47	191	158	224
BOP	1	0.6	**567**				
BOR	4	2.3	**1027**	867	835	269	2167
DOE	6	3.4	**785**	742	469	51	1802
FAA	1	0.6	**2298**				
FDA	1	0.6	**515**				
FEMA	1	0.6	**388**				
FERC	7	4.0	**633**	352	562	242	1120
FHwA	8	4.5	**3174**	1112	3508	1465	4330
FRA	3	1.7	**1077**	461	1239	557	1436
FS	30	16.9	**674**	538	502	85	2066
FTA	7	4.0	**1351**	790	1242	583	2503
FWS	8	4.5	**970**	938	651	324	3234
GSA	3	1.7	**247**	156	188	128	424
NGA*	1	0.6	**333**				
NHTSA	1	0.6	**352**				
NIH	1	0.6	**218**				
NOAA	9	5.1	**830**	539	949	32	1710
NPS	9	5.1	**1757**	821	1765	693	3293
NRC	8	4.5	**873**	735	559	165	2299
OSM	2	1.1	**1839**	102	1839	1767	1911
RUS	1	0.6	**854**				
STB	1	0.6	**914**				
TVA	2	1.1	**457**	59	457	415	498
USA	2	1.1	**595**	188	595	462	728
USACE	27	15.3	**1902**	1429	1351	94	5763
USAF	3	1.7	**820**	649	798	183	1480
USMC	2	1.1	**666**	120	666	581	750
USN	2	1.1	**674**	97	674	605	742
VA	2	1.1	**995**	645	995	539	1451
WAPA	1	0.6	**602**				

n = number of EISs in sample; s.d. = standard deviation; M = median

* NGA = National Geospatial-Intelligence Agency

Table 5-5. A Comparison of 2015 Draft EIS Completion Rates with the Average Draft EIS Completion Rates for the Period 1997 Through 2014

Preparation Interval in Years from NOI*	2015 Preparation Percentage	1997 – 2014			
		Average Preparation Percentage	Standard Deviation	Lowest Percentage (Year)	Highest Percentage (Year)
0 to 1	19.2	27.0	6.4	13.9 (2013)	37.0 (2000)
1 to 2	27.1	27.6	3.0	24.4 (2002)	34.1 (2009)
2 to 3	16.4	17.0	3.1	14.0 (2 years)	22.5 (2012)
3 to 4	10.7	10.1	2.5	6.2 (2001)	15.2 (2014)
4 to 5	6.8	6.4	2.0	3.3 (2002)	9.4 (2010)
5 to 6	5.6	4.1	1.7	1.8 (1998)	7.9 (2005)
6 to 7	5.1	3.1	1.2	0.7 (1998)	5.0 (2013)
7 to 8	2.3	1.4	0.7	0.3 (2005)	2.8 (1997)
8 to 9	2.3	1.0	0.8	0.0 (3 years)	3.0 (2013)
9 to 10	0.6	0.9	0.7	0.0 (2 years)	1.9 (2003)
10 to 11	1.1	0.3	0.5	0.0 (10years)	2.0 (2014)
11 to 12	1.7	0.4	0.3	0.0 (6 years)	1.0 (2013)
12 to 13	0.0	0.4	0.6	0.0 (8 years)	2.5 (2013)
13 to 14	0.0	0.1	0.3	0.0 (14 years)	0.7 (2 years)
14 to 15	0.6	0.2	0.3	0.0 (12 years)	0.9 (2003)
15 to 16	0.6	0.07	0.1	0.0 (14 years)	0.4 (2001)
16 to 17	0.0	0.04	0.1	0.0 (16 years)	0.4 (2002)
17 to 18	0.0	0.02	0.1	0.0 (17 years)	0.3 (2003)
18 to 19	0.0	0.05	0.1	0.0 (16 years)	0.5 (2012)
∑	100.1	100.2			

*NOI = Federal Register Notice of Intent to Prepare the Environmental Impact Statement

The 177 draft EISs made available in 2015 was the lowest number we recorded for the period 1997-2015. The previous low number, 198 draft EISs, was recorded in 2014, and the highest number, 320 draft EISs was recorded in 2003. For the period 1997-2015, federal agencies made available an average of 256±39 draft EISs/year.

5.3 Supplemental EISs (2005-2015)

Although our data stretches back to 1997, we selected the period 2005-2015 because we had coded the data for those years to allow the computer to sort the data to support this exercise. We had not coded the data for the preceding years in this manner.

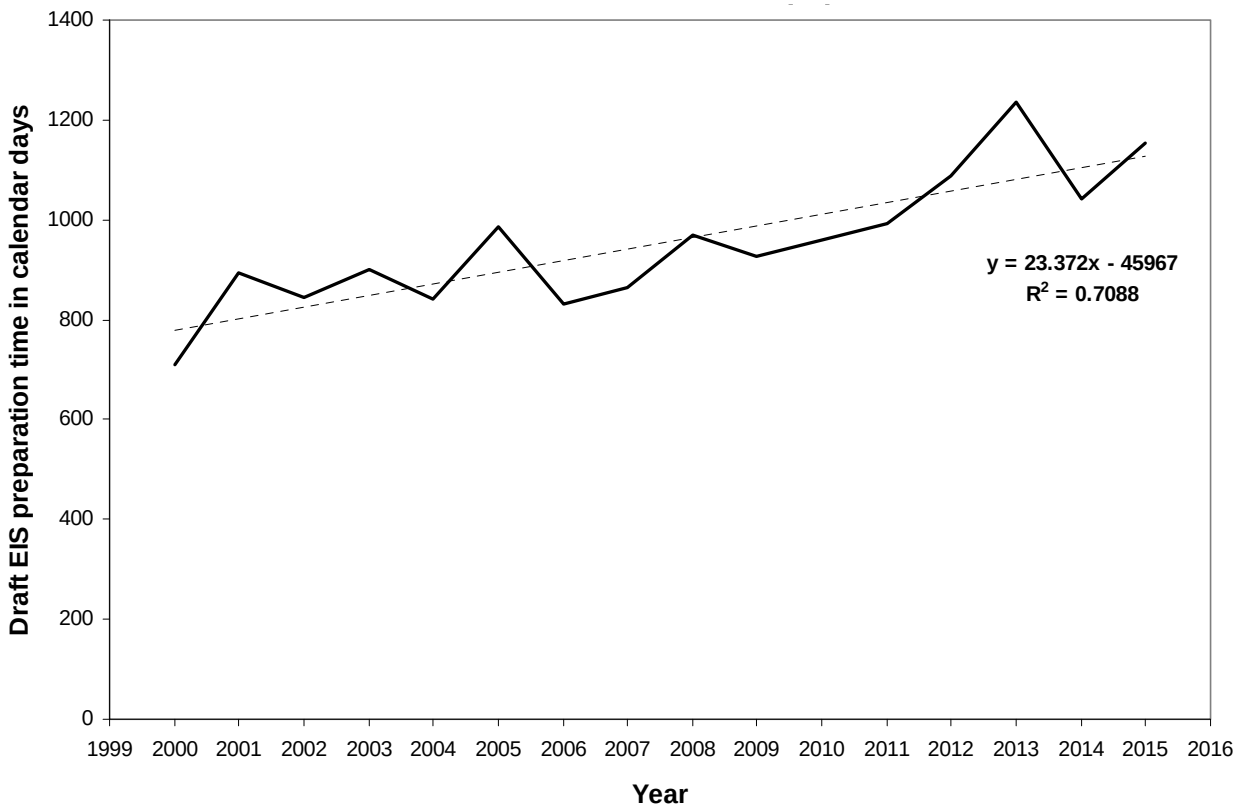

Figure 5-2. Annual Average Preparation Times for Draft and Draft Supplemental EIS's Made Available by All Federal Agencies from 2000 Through 2015 with Their Linear Regression Line and Equation and Their Coefficient of Determination (R^2)

For the period from 2005-2015 we counted the number and preparation times for both unsupplemented and supplemented EISs. We divided the supplemented EISs into two groups. The first group "Type 1" included EISs with only one supplement (e.g., draft-draft supplement-final or draft-final-final supplement). The second group "Type 2" included the following type of EISs draft-final-draft supplement-final supplement and included EISs with a repetition of this sequence. We also included EISs listed as "revisions" as supplements.

For these three types of EISs (unsupplemented, one supplement, multiple supplements) we calculated their annual average preparation times for each year and calculated the least square regression coefficient and the coefficient of determination (R^2). We also reviewed our data to determine which agencies prepared the largest number of supplemented EISs.

Figure 5-3 displays the trajectory of the annual percentage of supplemented EISs produced from 2005 through 2015. While the data indicate that the percentage of supplemented EISs is increasing, a test of the significance of this regression coefficient indicated that it is not different from zero. The calculated value of "t" was 0.167; the "t" value at .05 is 3.25.

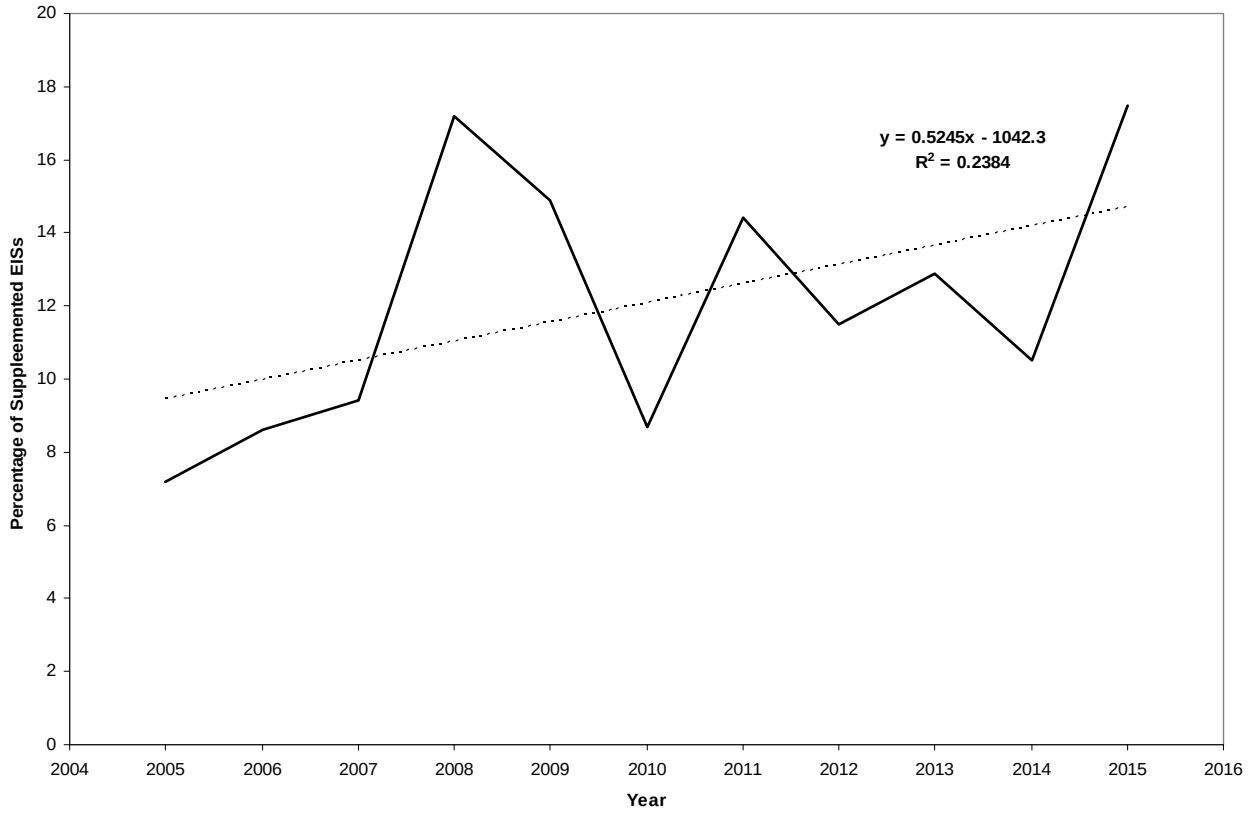

Figure 5-3. Percentage of Final EISs that were Supplemented from 2005 through 2015

Figure 5-4 displays the annual average preparation times for unsupplemented EISs, Type 1 and Type 2 supplemented EISs and their linear regression information. All three types of EISs have preparation times that are increasing, and the rates of increase are very similar. If the regression coefficient for Type 1 and Type 2 EISs were combined, the resulting coefficient would be closer to the coefficient for the unsupplemented EISs.

While the data indicate that all three EIS types have increasing preparation times, the regression coefficients for the Type 1 and Type 2 supplemented EIS are not different from zero. The calculated value of "t" for Type 1 supplemented EISs is 0.78 and for Type 2 supplemented EISs is 0.95. Neither calculated value of "t" approaches the required value of 3.25 to be considered statistically significant.

In contrast, the calculated value of "t" for the unsupplemented EISs is 4.22 and confirms that the regression coefficient for these EISs is different from zero.

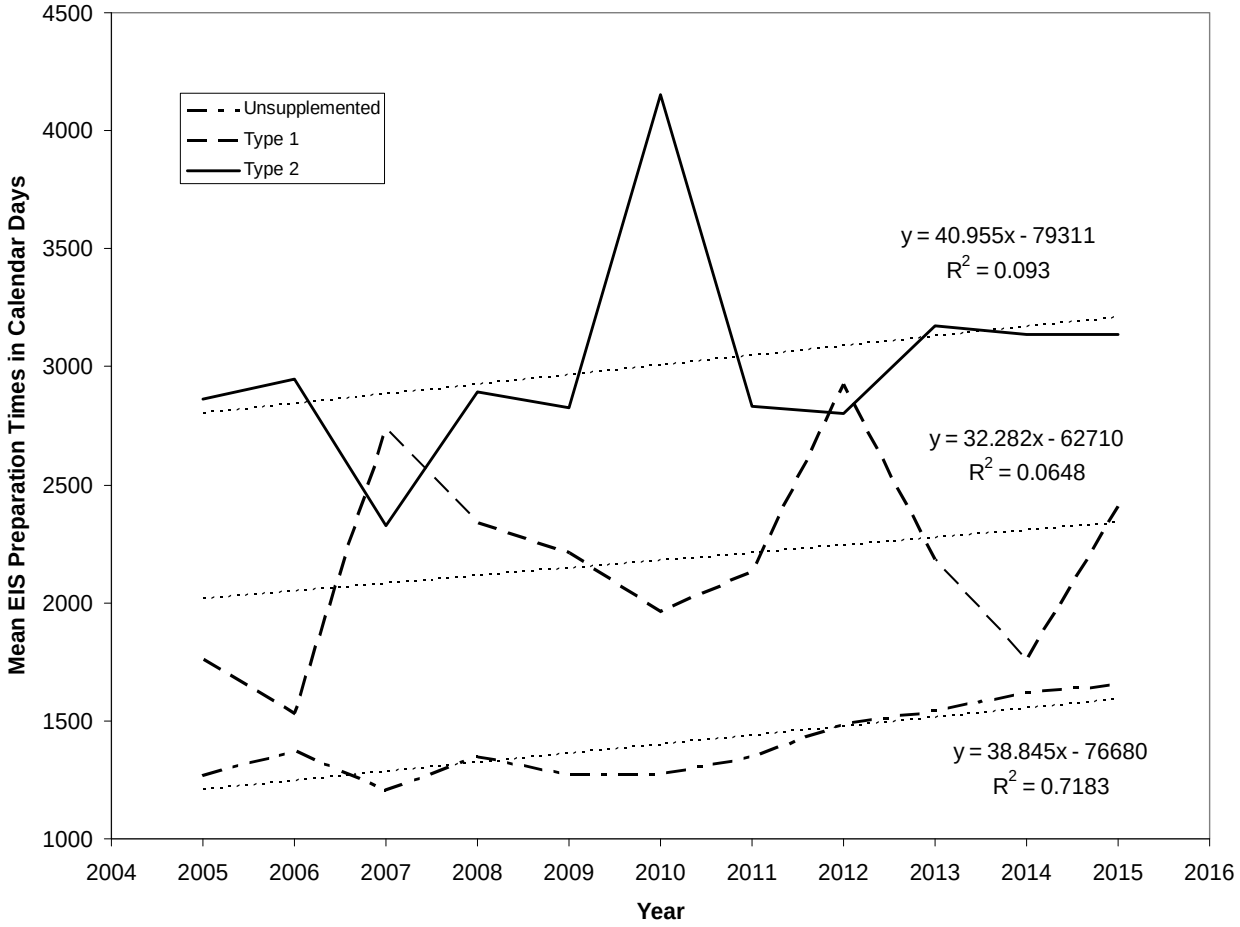

Figure 5-4. Annual Mean EIS Preparation Times for Unsupplemented and Supplemented EISs from 2005 through 2015

Figure 5-5 displays the results of reviewing the status of the 20 EISs with the longest preparation times for every year from 2005 through 2015. The term "% Supplemented" includes both Type 1 and Type 2 supplemented EISs.

Unsupplemented EISs averaged 61.4±9.5% of the EISs in the sample, and ranged from 50% to 80%. Type 1 EISs averaged 16.4±11.6% of the EISs in the sample, and ranged from 0% to 30%. Type 2 EISs averaged 22.3±6.8% of the sample, and ranged from 10% to 35%.

At no time did the percentage of supplemented EISs exceed the percentage for unsupplemented EISs.

The data suggest that the percentage of unsupplemented EISs increased and the percentage of supplemented EISs decreased over the period from 2005 through 2015. However, the regression coefficients for the two lines are not different from zero. The calculated value of "t" for both lines is 1.00 and did not approach the required value of 3.25 to be considered statistically significant.

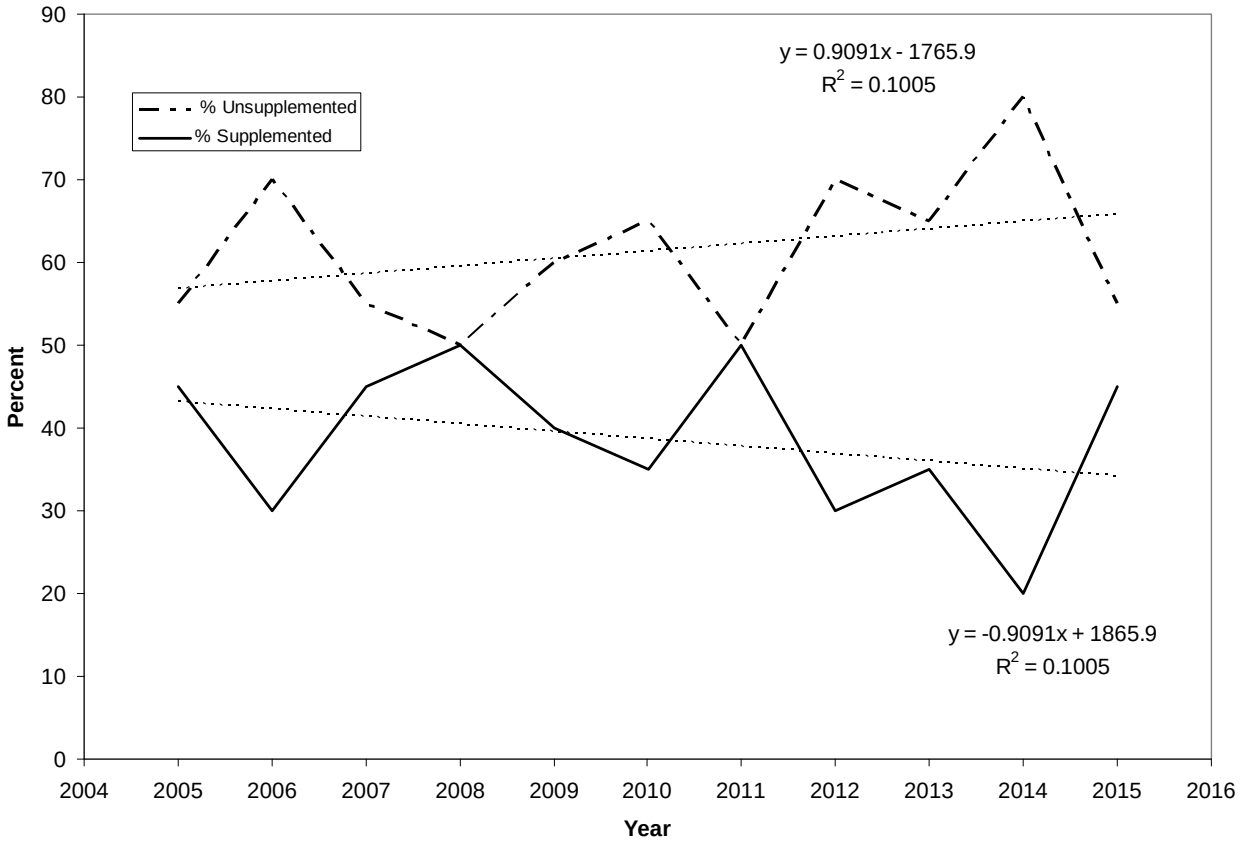

Figure 5-5. Percentage of Supplemented and Unsupplemented EISs in the Twenty Longest EIS Preparation Times from 2005 through

Table 5-6 lists all the agencies that prepared supplemented EISs from 2005 through 2015. The final EISs are listed by type (1 or 2) and the agencies are listed in decreasing order by the number of supplemented EISs produced. Twenty-eight (28) agencies prepared 137 type 1 EISs, and 26 agencies combined to produce 131 Type 2 supplemented EISs.

The Forest Service prepares more EISs than any other agency is also the most litigated agency under NEPA. From 2005 through 2015 the Forest Service prepared 551 final EISs; the 86 supplemented EIS are 15.6% of that total. Fifty-eight of the supplemented EISs (67%) were Type 2 supplemented EISs.

The Federal Highway Administration (FHwA) ranks second for both types of SEIS. The FHwA is the second most prolific EIS producer. From 2005 through 2015 the FHwA produced 285 final EISs; the 42 supplemented EISs are 14.7% of that total. Twenty-seven of the supplemented EISs (64%) were Type 1 supplemented EISs.

Table 5-6. Agencies that Prepared Supplemented EISs from 2005 - 2015

Type 1 Supplemented EISs			Type 2 Supplemented EISs		
Agency	**Number**	**Percent**	**Agency**	**Number**	**Percent**
FS	28	20.4	FS	58	44.3
FHW	27	19.7	FHW	15	11.5
COE	16	11.7	BLM	9	6.9
FTA	11	8.0	NOAA	6	4.6
BLM	9	6.6	USN	5	3.8
NOAA	6	4.4	FTA	5	3.8
NPS	5	3.6	DOE	4	3.1
USN	4	2.9	COE	4	3.1
BOR	3	2.2	USAF	3	2.3
STB	3	2.2	TVA	2	1.5
USA	3	2.2	NPS	2	1.5
BOEM	2	1.5	GSA	2	1.5
FAA	2	1.5	FWS	2	1.5
FRA	2	1.5	BOR	2	1.5
FWS	2	1.5	WAPA	1	0.8
NRC	2	1.5	USCG	1	0.8
BPA	1	0.7	USA	1	0.8
DOE	1	0.7	TPT	1	0.8
FERC	1	0.7	STB	1	0.8
HUD	1	0.7	STATE	1	0.8
NCPC	1	0.7	NRCS	1	0.8
NIH	1	0.7	NNSA	1	0.8
NNSA	1	0.7	FSA	1	0.8
RUS	1	0.7	BOEM	1	0.8
TVA	1	0.7	BIA	1	0.8
USAF	1	0.7	APHIS	1	0.8
VA	1	0.7			
WAPA	1	0.7			

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6. Recent Congressional Legislation Regarding NEPA

Charles P. Nicholson, PhD[6]

6.1 Introduction

As of early March 2016, at least 178 bills had been introduced in the 114th Congress that contained "National Environmental Policy Act" in their text[7]. Almost all of these bills were introduced in 2015. A few of the bills, including some with the most substantive effects on NEPA compliance, were previously introduced but did not pass in the 112th and 113rd Congresses. About 40 of the bills would have no effect on NEPA compliance requirements and are not discussed further in this review. Some of the remaining bills are House of Representatives and Senate versions of the same bill or closely related bills addressing the same topics in either the Senate or, more commonly, the House. The number of substantive NEPA bills in the first 14 months of the 114th Congress is over twice the number in the 112th Congress and somewhat less than in the 113rd Congress.

The "Recent Congressional Legislation Regarding NEPA" review in the Annual NEPA Report 2014 summarized the approximately 55 NEPA-related bills introduced through mid-March 2015 in the 114th Congress. This review describes the NEPA-related legislation in the 114th Congress that has been enacted into law and legislation that has passed either the House or the Senate. It then summarizes the major themes in NEPA-related bills pending floor action in the House or Senate.

6.2 Enacted Legislation

As of early March, Congress had taken final actions on only two bills that affect NEPA compliance. The first of these, **H.R.3** (and its companion **S. 147**), declared that the Final Supplemental EIS issued in January 2014 for the Keystone XL Pipeline satisfied all NEPA requirements as well as other Federal consultation and review requirements for the construction and operation of the pipeline. The measure was promptly vetoed and the attempt to override the veto failed in the Senate.

The second bill, which was signed into law on December 4, 2015, is The **FAST ("Fixing America's Surface Transportation") Act[8] (H.R. 22)**, the new long-term surface transportation

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[7] While many of these laws address compliance with other environmental laws, the focus of this article is on compliance with NEPA.

[8] The FAST Act is one of several NEPA-related bills in the 114th Congress with creative acronyms. Others include the STREAM Act (Supporting Transparent Regulatory and Environmental Actions in Mining, H.R. 1644, S. 1458), RAPID (Responsibly And Professionally Invigorating Development, H.R. 348), REBUILD (Reducing Employer Burdens, Unleashing Innovation, and Labor Development, H.R. 3682), SHARE (Sportsmen's Heritage and Recreational Enhancement, H.R. 2406), OPENS (Offshore Production and Energizing National Security, S. 2011), TIRES (Tribal Infrastructure and Roads

funding and authorization bill. Like its predecessors, the 1998 TEA-21, the 2005 SAFETEA-LU, and the 2012 MAP-21, FAST includes several sections addressing the environmental reviews of transportation projects in a Subtitle C on Acceleration of Project Delivery. Several of the provisions in FAST are reiterated from MAP-21, including preparation of the final EIS by attaching errata sheets to the draft EIS, combining the final EIS and the ROD, and delegating NEPA responsibilities to qualified states. The NEPA-related provisions in this subtitle include the following:

- Reliance on a single NEPA document prepared under the leadership of the lead agency for all Federal reviews and permits.
- Limit the comments of participating agencies to subject matter areas within their special expertise or jurisdiction.
- Elimination from detailed consideration in an EIS of alternatives previously considered and rejected in planning or review process by a metropolitan planning organization or state or local transportation agency with opportunity for public review and comment.
- Maintain a publicly accessible searchable database on the status of projects requiring an EA or EIS.
- Review categorical exclusions applicable to rail projects and initiate rulemaking process for reviewed and new categorical exclusions.

Many of the transportation project-related NEPA provisions in the FAST Act listed above were provisions of other bills introduced earlier in the 114th Congress. These bills include **H.R. 3763**, **H.R. 2410**, **H.R. 3064**, and **S. 1732**.

While these changes addressing transportation projects are substantial, the FAST Act also addresses NEPA compliance for a much broader range of actions. Late in its Congressional deliberations, Title XLI – Federal Permitting Improvement was added to the bill. This title includes and/or expands provisions that were the subject of separate bills in the 114th Congress including **S. 280 (Federal Permitting Improvement Act)** which was approved in Senate committee, **H.R. 2410**, and **H.R. 3064**. It also legislates and expands the scope of Executive Order 13604 – Improving Performance of Federal Permitting and Review of Infrastructure Projects and related Office of Management and Budget/Council of Environmental Quality memoranda. The focus of Title XLI is on major infrastructure construction projects defined in

Enhancement and Safety, S. 1776), DRIVE (Developing a Reliable and Innovative Vision for the Economy, S. 1647), BRIDGE (Building and Renewing Infrastructure for Development and Growth in Employment, S. 1589), FORESTS (Fostering Opportunities for Resources and Education Spending through Timber Sales, H.R. 2178), MAST (Marine Access and State Transparency, H.R. 330), ACCTION (Advanced Clean Coal Technology Investment in Our Nation, S. 601), and the prize winner, GROW AMERICA (Generating Renewal, Opportunity, and Work with Accelerated Mobility, Efficiency, and Rebuilding of Infrastructure and Communities throughout America, H.R. 2410 and H.R. 3064).

Section 41001 as those that: 1) require approval or environmental review by a Federal agency; 2) involve construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, and manufacturing; 3) are subject to NEPA; 4) are likely to require a total investment of more than $200,000,000; and 5) are not eligible for an abbreviated authorization or environmental review process.

Other provisions in Title XLI include the following:

Section 41002, Federal Permitting Improvement Council – establishes the Federal Infrastructure Permitting Improvement Steering Council chaired by the presidentially appointed Executive Director. Council members are appointed by each of the 13 named agencies and must hold a position of deputy secretary (or equivalent) or higher. The Council develops best practices recommendations for covered projects, including recommended ”Performance Schedules” based on a review of completed similar projects. Each agency also appoints a chief environmental review and permitting officer (CERPO).

Section 41003, Permitting Process Improvement – requires a sponsor of a covered project to submit a notice of its initiation to the Executive Director and the facilitating agency. The facilitating or lead agency develops a concise project plan addressing public and agency participation and permitting timetables based on the Performance Schedules. These plans, as well as status updates, are posted on an online Permitting Dashboard maintained by the Executive Director.

Section 41007, Litigation, Judicial Review, and Savings Provision – reduces the statute of limitations for judicial review from six to two years, requires plaintiffs to have submitted a comment during the environmental review, and requires courts to evaluate public health, safety, and employment impacts when considering claims.

6.3 Legislation That Has Passed House or Senate

Twelve bills affecting NEPA compliance for a range of activities passed either the House or the Senate by early March. Given the interest already shown in Congress on these bills, some of them are likely to be passed by both chambers. The Office of Management and Budget (OMB), however, has issued Statement of Administration Policy veto notices on eight of these bills. Changes to NEPA compliance processes are described as a factor in most of these veto notices. Whether the veto notices will affect their passage by the other chamber, as well as whether Congress overrides a veto of any bill that passes both chambers, remains to be seen.

The **RAPID Act (H.R. 348)**, first introduced in the 112th Congress, is among the more substantive of these bills and the subject of an OMB veto notice. It authorizes federal agencies to allow states and other applicants to prepare their own EISs or EAs. It also requires all federal agencies responsible for approving a project to rely on the environmental document prepared by

the lead agency and sets time limits for comment periods and for completion of EISs and EAs. In addition, it prohibits federal agencies from following the December 2014 CEQ draft guidance on considering greenhouse gas emissions and climate change in NEPA reviews and from using the social cost of carbon in environmental reviews.

The **Stream Act (H.R. 1644)**, also the subject of an OMB veto notice, amends the Surface Mining Control and Reclamation Act to require the Department of Interior to make publicly available any "scientific product" used in developing a rule, EIS, EA, policy or guidance 90 days before the publication of the rule, EIS, EA, policy or guidance. It also delays the implementation of the final Stream Protection Rule (80 Fed. Reg. 44436) by at least three years.

The **North American Energy Security and Infrastructure Act (H.R. 8)**, subject of another OMB veto notice, promotes concurrent, coordinated NEPA reviews of Federal Energy Regulatory Commission (FERC) authorization of natural gas pipelines. It states that the designation of National Energy Security Corridors for gas pipelines on federal lands is not a major federal action under NEPA. Actions associated with the construction of gas facilities within the corridors, however, are subject to NEPA. The Act requires the Secretary to "apply his or her categorical exclusion process" under NEPA to vegetation management plans for transmission lines on federal lands. FERC is designated as the lead agency for NEPA compliance for hydropower licensing and FERC's NEPA reviews of hydropower facilities at existing dams are to be EAs unless they qualify for a categorical exclusion. **H.R. 2295**, reported by committee, contains similar provisions for natural gas pipelines on federal lands, and would require approval within one year of applications for pipelines within the corridors.

The **National Strategic and Critical Minerals Production Act (H.R. 1937)** declares domestic mines for strategic and critical to be "infrastructure projects" per E.O. 13604. It states that the NEPA requirements of all federal agencies are satisfied if the lead agency determines that any state or federal agency, acting pursuant to their authorities, has or will address standard NEPA factors including the impacts of the action, alternatives, and public participation. Environmental reviews are to be completed within 30 months and a 60-day limit is established for filing of claims for judicial review.

Three bills passed by the House or Senate address NEPA compliance for activities on Indian lands. The **Native American Energy Act (H.R. 538)**, subject of an OMB veto notice, amends NEPA by restricting the public review and comment on EISs for federal actions on Indian lands to tribal members, other individuals living within the affected areas, and governments within the affected areas. Claims for judicial review of final energy-related actions must be filed within 60 days of the final agency action. The **Department of the Interior Tribal Self-Governance Act (S. 286)** authorizes tribes, upon approval by the Secretary of Interior, to assume NEPA responsibilities for certain construction projects. The **Native American Housing Assistance and Self-Determination Reauthorization Act (H.R. 360)** promotes the consolidated environmental reviews of tribal housing projects receiving funds from multiple agencies.

The **Western Water and American Food Security Act (H.R. 2898)** contains several NEPA provisions. It encourages the use of emergency alternative procedures for certain drought emergency and invasive species action. It requires the completion of NEPA reviews of certain Sacramento Valley water transfers within 30 days and sets time limits for the completion of EAs and EISs on Bureau of Reclamation water storage projects on federal lands. The in-kind repair or replacement of water storage projects damaged by events that result in an emergency declaration under the Stafford Act are categorically excluded and the Bureau of Reclamation is directed to initiate the process of establishing new categorical exclusions.

The **Resilient Federal Forests Act (H.R. 2647)** promotes expedited environmental analysis for forest management activities by limiting the range of alternatives in EAs and EISs for activities developed through collaborative processes and categorically excludes certain forest management activities within defined acreage thresholds. EAs for salvage and restoration activities following catastrophic events are to be completed within 3 months of the event and are not subject to court-issued injunctions or restraining orders. This bill is the subject of an OMB veto notice.

The **Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act (H.R. 1335)** amends the Magnuson-Stevens Act by replacing the environmental analysis under NEPA for fishery management plans with a more narrowly focused fishery impact statement. OMB issued a veto notice on H.R. 1335 shortly before it passed the House.

The **SHARE Act (H.R. 2406),** exempts actions to promote hunting, fishing and recreational shooting on National Wildlife Refuge system lands from review under NEPA. This bill is the subject of an OMB veto notice and is opposed by several conservation organizations.

The **Strengthening Fishing, Communities and Increasing Flexibility in Fisheries Management Act (H.R. 1335)**, subject of an OMB veto notice, would replace the environmental review under NEPA of fishery management plans with a more narrowly focused fishery impact statement.

6.4 Legislation Pending Floor Action

The remaining 100+ bills introduced through early March with NEPA implications cover a wide range of actions with varying effects on NEPA compliance processes. None of these bills mentioned in this section has received a floor vote and few have emerged from House or Senate committees. They are briefly described below according to major themes in how they affect NEPA compliance. Many of these themes are addressed in the FAST Act and legislation that has passed the House or Senate. Other major themes in the bills described above include, for specified departments, issuing a final EIS as errata sheets attached to the draft EIS, combining the final EIS and ROD, and coordinating NEPA reviews involving multiple agencies. The pending H.R. 2834 amends NEPA to extend the final EIS errata sheets and combined final EIS and ROD provisions to all agency actions.

Delegation of NEPA Responsibilities

The **REBUILD Act (H.R. 211)**, first introduced in the 112th Congress and reintroduced early in the 114th Congress, authorizes, among other things, the delegation of NEPA responsibilities to states. Additional bills introduced later in the session also authorize delegation of NEPA responsibilities. **H.R. 2497** authorizes the Secretary of Transportation to delegate NEPA responsibilities for highway and rail projects to qualified states. Given that the FAST Act includes a provision for delegating transportation NEPA responsibilities to states, it appears unlikely that other legislation focusing on this delegation will become law. The **TIRES Act (S. 1776)**, reported by Senate committee, authorizes tribes to assume Federal NEPA responsibilities and extends certain categorical exclusions under MAP-21 to transportation projects on Indian reservations. **S. 1894** authorizes the state of California to be the lead agency for drought resiliency projects receiving Federal funding. **H.R. 1792** and **S. 937** authorize the assignment of NEPA responsibilities to states that have entered into cooperative agreements for managing grazing allotments on federal lands.

Exemptions from NEPA

Actions proposed to be exempted from NEPA range from relatively small actions with low potential for adverse environmental impacts to larger actions with a high potential for significant impacts. Examples of bill exempting actions with low potential for environmental impacts include **H.R. 4298** for a memorial to be placed in Arlington National Cemetery and **H.R. 3843** for the issuance of permits by the Department of Interior for certain mine reclamation activities by "Good Samaritans." **H.R. 1840** exempts meteorological site testing and monitoring on the outer continental shelf and **H.R. 564** exempts permits for taking sea lions to protect salmon and other fish.

Examples of bills exempting actions with a greater potential for impacts include **H.R. 3911,** which exempts renewable energy, housing, community facility, and infrastructure development projects within the 150,000-acre Navajo Sovereignty Empowerment Zone, and **H.R. 2898,** which exempts certain drought emergency actions if the Secretary of Interior determines immediate implementation is necessary for public health or safety or there would be a loss of agricultural production for which the identifiable region depends for at least 25 percent of its tax revenues used to support public services. **S. 490** and **H.R. 866** authorize states with established leasing, permitting, and regulatory programs to take over oil, gas, and other energy development on federal lands. State actions would not be considered federal actions under NEPA and other laws. **H.R. 1997** and **S. 1036** exempt the implementation of state plans for sage-grouse conservation actions on federal lands.

A few bills would exempt actions with a high potential for significant adverse environmental impact. For example, Customs and Border Protection activities within 100 miles of Mexican and Canadian borders, including the construction of fences and other infrastructure, are exempt from NEPA and other environmental laws under **H.R. 399**, **H.R. 4034**, and **S. 208**.

Legislative Categorical Exclusions

As in recent previous sessions of Congress, several bills categorically exclude specified actions from the preparation of EISs or EAs. And, as in the past, some of these bills state that agencies will apply their normal procedures, i.e., consider extraordinary circumstances, in making their categorical exclusion determinations while other bills make no mention of the adherence to agency procedures and therefore may, in effect, exempt the specified actions from NEPA.

Actions categorically excluded in accordance with agency procedures include the following:

- Geothermal exploration activities (**S. 562**, **S. 2012**)
- Utility right-of-way vegetation management on federal lands (**H.R. 2358**)
- Hazardous fuel reduction activities in vicinity of infrastructure on federal lands (**H.R. 695**)
- Invasive species control or management actions of federal lands (**H.R. 1485**, **S. 2240**)

Examples of actions categorically excluded with no mention of adherence to agency procedures include the following:

- A California fiber optic project (**H.R. 3668**)
- In-kind repair or replacement of Bureau of Reclamation water storage projects damaged by an event that results in an emergency declaration under the Stafford Act (**H.R. 2898, H.R. 2097**)
- Stream improvement actions on certain Oregon federal lands (**S. 132**)
- Grazing allotment management plan renewals if the plans continue current grazing management allotments that were previously reviewed (**H.R. 1897**)
- Vegetation management projects on federal lands for sage-grouse and mule deer conservation (**H.R. 1793**, **S. 468**)
- Authorization of natural gas gathering lines in disturbed areas or existing right-of-ways in designated gas production fields that were the subject of a NEPA review that considered gas transportation **(H.R. 1616, S. 411**)

H.R. 2647, passed by the House, goes a step further in defining a categorical exclusion as "an exception to the requirements of [NEPA] for a project or activity relating to the management of National Forest System lands or public lands" (Sec. 2(2)). It then categorically excludes certain forest management activities if the treated areas do not exceed 5,000 acres.

Rulemaking for Categorical Exclusions

H.R.2898 and **H.R. 2097** direct the Bureau of Reclamation to survey their use of categorical exclusions and initiate the rulemaking process for new and revised categorical exclusions.

Adoption of NEPA Determinations

S. 1647 and **S. 1626** authorize divisions of the Department of Transportation to apply categorical exclusions, RODs, FONSIs, and associated evaluations of other DOT divisions.

Actions Developed through Collaborative Process

The **Agricultural Act of 2014** (**H.R. 2642**, **P.L. 113-79**) categorically excluded certain collaborative forest restoration actions. Several pending bills in the 114th Congress expand this theme for forest management activities on federal lands developed through collaborative processes. Bills categorically excluding such actions include **H.R. 3382** for fuel reduction actions in Lake Tahoe Basin, **H.R. 2178** for actions on 10,000 acres or less within designated Forest Active Management Areas (whose designation is subject to NEPA), and the previously mentioned **H.R. 2647**. **H.R. 2644** states that EAs and EISs for forest management activities on federal lands developed through a collaborative effort shall only analyze the preferred action and no-action alternatives.

Consideration of Alternatives

The alternatives considered in EAs and EISs is addressed in several bills. Many of these bills state that the consideration of alternatives to the agency preferred action is not required; others restrict the considerations of alternatives to the preferred action and no more than one other action alternative. Examples include **S. 2011**, **S. 1276**, and H**. R. 1840** for offshore oil and gas lease sales, **S. 494** for Alaska Coastal Plain oil and gas development, and **S. 2286**, **S. 508**, and **H.R. 2178** forest management projects.

Not Major Federal Action

Several bills declare actions would not be major federal actions significantly affecting the quality of the human environment. These include **S. 1983, S. 1125**, and **H.R. 1296** for execution of tribal water rights settlement agreements, **S. 133** for execution of Klamath Basin settlement agreements, and **S. 176** and **H.R. 291** for federal funding for specified water infrastructure projects,

Climate Change

H.R. 3880 declares that NEPA (and other environmental laws) does not authorize or require the regulation of climate change or global warming.[9] As described above, **H.R. 348** restricts consideration of greenhouse gas emissions and climate change in NEPA reviews. Early versions of the appropriations bill for the Department of Interior, Environmental Protection Agency, and related agencies (**S. 1645**, **H.R. 2822**) would have prohibited agencies from using appropriated funds to consider greenhouse gas emissions and climate change in NEPA reviews. This measure was dropped from the appropriations bill enacted in December 2015.

[9] Neither NEPA nor CEQ regulations for implementing NEPA (40 CFR 1500-1508) authorize or require regulation of climate change or global warming.

Limitations on Public Involvement

H.R. 339, H.R. 1487, and **S. 791** limit the consideration of public comments on an EIS on Alaska coastal plain oil and gas development to those addressing the preferred alternative and submitted within 20 days. They also amend NEPA to specify that only tribal members and others living on tribal land can comment on EISs for actions on tribal lands. **H.R. 2644** requires the plaintiff to post a bond when challenging a forest management activity developed through a collaborative process. **S. 854** places a 180-day limit on judicial review of nuclear waste management actions.

Expanded NEPA Requirements

A few pending bills expand NEPA requirements to either reduce Executive authority or require a more rigorous environmental analysis of actions with the potential for significant impacts. **H.R. 330**, **H.R. 900**, **S. 228**, and **S. 437** require the President to certify compliance with NEPA before designating national monuments. Actions taken directly by the President, such as designation of national monuments under the Antiquities Act (16 U.S.C. 431-433), are not subject to NEPA. **H.R. 1951** requires the completion of an EIS before authorization of hydraulic fracturing and acid well stimulation in the Pacific Outer Continental Shelf Region. **S. 738** requires an EIS for approval of the culture of genetically engineered salmon intended for human consumption. **S. 585** requires an EIS for natural gas export orders, including an analysis of the impacts of the gas extraction on the environment in the communities where it is extracted.

6.5 Conclusion

As in recent previous Congresses, numerous bills in the 114th Congress address NEPA. Only one bill with substantive changes to NEPA compliance processes, the FAST Act, was enacted by early March. The FAST Act builds on previous transportation bills and a Presidential-CEQ-OMB initiative, including an Executive Order, and in many aspects is more evolutionary than revolutionary. With its expanded list of covered actions and backing of law, it will likely accelerate the changes introduced by Executive Order 13604. Few, if any, of the major themes in the NEPA-related bills in the 114th Congress are new and most of them are designed to hasten federal decision-making. While some bills could result in more-informed decisions, more of them favor approving the action proposed by the agency and/or applicant. Some of the bills passed by either the House or the Senate would make substantive changes to NEPA compliance processes. Most of these bills proposing substantive changes are the subject of veto notices and some of them are unlikely to receive enough votes to override a veto. Some of the bills pending floor action address measures incorporated into the FAST Act and these bills are unlikely to receive any more congressional action. Based on the record of congressional action on NEPA-related bills late in recent sessions of Congress, few of the pending NEPA-related bills are likely to be enacted. The heated 2016 election campaign will probably also contribute to a lack of action on these bills.

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7. Recent NEPA Cases (2015)

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7.1 Introduction

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

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

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

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

For comparison purposes, **Table 7-1** shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2015, by circuit. **Figure 7-1** is a map showing the states covered in each circuit court.

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Table 7-1. Number of U.S. Courts of Appeal NEPA Cases, by year and by circuit

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

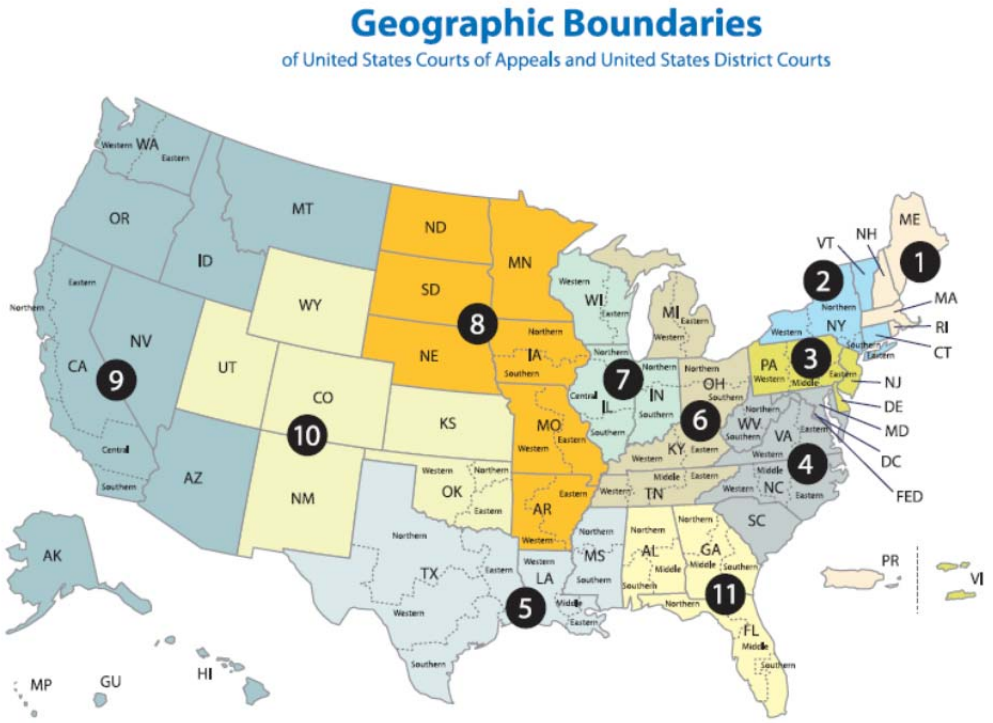

Figure 7-1. Map of U.S. Circuit Courts of Appeal

7.2 Statistics

The U.S. Department of Interior (DOI) agencies (Bureau of Indian Affairs) [BIA], Bureau of Land Management [BLM], Bureau of Ocean Energy Management [BOEM], Bureau of Safety

and Environmental Enforcement [BSEE], National Park Service [NPS], and U.S. Fish and Wildlife Service [FWS]) came in first as the agency involved in the largest number of NEPA cases in 2015 with 7 cases (prevailed in 6.5 cases).

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

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

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

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

Interesting conclusions from the 2015 cases:

- Continuing the trend from 2012, federal agencies continued to prevail in a large percentage of the NEPA challenges brought.
- Eight of the substantive cases where NEPA documents were reviewed involved environmental assessments (EA) and two involved environmental impact statements (EIS). One EA and one EIS were found to be partially inadequate, and the agencies prevailed in the other eight cases. In the cases where the agencies did not fully prevail, the decision was split with agencies prevailing in defending certain NEPA claims, but losing other NEPA claims:
    - *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920 (9th Cir. 2015) (holding that the EIS did not provide the public adequate access to information about the impact of snowmobiles on big game wildlife and habitat, and that the information included in and referenced by the EIS did not allow the public to "play a role in both the decisionmaking process and the implementation of that decision"). But see *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105 (9th Cir. 2015) (noting that agencies have discretion in deciding how to organize and present information in environmental assessments and holding that 40 CFR § 1508.7 does not explicitly require individual discussion of the impacts

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

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

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

- *Connected Actions and Cumulative Effects Assessment:* Seven of the 10 cases involving substantive review of NEPA documents challenged whether the agency should have analyzed connected actions, including reasonably foreseeable future actions, continuing a trend from 2014 involving challenges to cumulative effects assessment and connected actions as discussed in *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) and *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014).

  - *Grunewald v. Jarvis,* 776 F.3d 893 (D.C. Cir. 2015) (affirming the district court's decision granting summary judgment and upholding the agency's EIS. The Court held that the NPS was within its discretion when it declined to analyze the Exotic Plant and Deer Management Plans together as "connected" actions. It held that neither Plan automatically triggered other actions, and that the actions pursuant to the Deer Management Plan had already proceeded, and did not depend on the concurrent or previous undertaking of the Draft Exotic Plant Plan or some other action. The Plans were not interdependent parts of a larger action. The fact that the Plans have similar goals, protecting the native ecology, does not make the plans sufficiently intertwined.).
  - *Myersville Citizens for a Rural Community, Inc. v. Federal Energy Regulatory Commission*, 783 F.3d 1301 (D.C. Cir. 2015) (denying petition for review of EA and distinguishing *Delaware Riverkeeper*. The Court, in reviewing the Administrative Record (AR), found that the Allegheny Storage Project and the Cove Point LNG terminal were unrelated, and that neither depended on the other

for its justification. The Court rejected a finding of connectedness between the Allegheny Storage Project and the Cove Point LNG export terminal.).

- *Sierra Club v. Bureau of Land Management,* 786 F.3d 1219 (9th Cir. 2015) (affirming the district court's decision upholding BLM's grant of a right-of-way for a wind energy project developed on private land. The Court found that that the wind energy project and road providing the right-of-way have independent utility and are not connected actions. BLM appropriately assessed the impacts of the wind energy project in its cumulative effects assessment portion of its EA.).
- *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105 (9th Cir. 2015) (holding that BIA's aggregation of past, present and reasonably foreseeable future actions to create a baseline for the No Action Alternative from which to consider incremental impact of timber sale project did not violate NEPA.).
- *Sierra Club v. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015) (upholding the dismissal of Sierra Club's claims against the Corps in connection with an EA assessing the impacts of a 593-mile oil pipeline from Illinois to Oklahoma on both public and private lands. Sierra Club unsuccessfully argued that the Corps impermissibly segmented the proposed action in an effort to avoid triggering NEPA's connected- and cumulative-actions doctrines and the Corps' agency-specific NEPA regulations. The Court found that because the approvals required only consideration of discrete geographic sections of the pipeline (which comprised less than five percent of its overall length), the federal agencies involved were not required to conduct NEPA analysis of the entire pipeline, including those portions not subject to federal control or permitting. The limited geographic scope of each of the agencies' jurisdiction over the project was an important factor in the decision, and the Court emphasized that the ruling was limited to the particular facts of the case.). *Cf. Sierra Club v. Bostick,* 787 F. 3d 1043 (10th Cir. 2015) (finding that the Corps was not required to prepare an EA for the entirety of an applicant's Gulf Coast pipeline before issuing CWA Section 404 Nationwide Permit verification letters).
- *Kentucky Coal Ass'n v. Tennessee Valley Authority*, 804 F.3d 799 (6th Cir. 2015) (finding that the TVA did not violate NEPA when it decided to replace two coal-fired power generators with a natural gas-fueled power generating plant. Kentucky Coal contended that the TVA ignored the effects of a necessary part of its plan: building a natural-gas pipeline. The Court disagreed and found that the TVA considered the cumulative impact of all "closely related" actions, including building a natural-gas pipeline to reach the newly configured plant.).
- *Soda Mountain Wilderness Council v. U.S. Bureau of Land Management*, 607 Fed. Appx. 670 (9th Cir. 2015)(not selected for publication, no precedential value) (holding that the BLM violated NEPA when it prepared its EA because the

EA's cumulative impact analysis did not include any discussion of the Cottonwood Forest Management project that was reasonably foreseeable at the time the BLM issued the EA as supported by the Administrative Record [AR]). Again, a fairly vigorous dissent followed the majority opinion, finding that by examining the AR in further detail the BLM appropriately excluded the Cottonwood project because it was not a reasonably foreseeable future action.

- *Alternatives Considered:* Three of the 10 cases involving substantive review of the NEPA documents challenged the sufficiency of the alternatives considered:
    - *Grunewald v. Jarvis*, 776 F.3d 893 (D.C. Cir. 2015) (upholding the agency's EIS involving deer management and finding it did not violate NEPA when it failed to consider the reduction of exotic plant species as an alternative way to protect the native vegetation in the Park. In reviewing an agency's selection of alternatives, the court owes "considerable deference to the agency's expertise and policy-making role." "[A]s long as the agency 'look[s] hard at the factors relevant to the definition of purpose,' [the courts] generally defer to the agency's reasonable definition of objectives.").
    - *Myersville Citizens for a Rural Community, Inc. v. Federal Energy Regulatory Commission*, 783 F.3d 1301 (D.C. Cir. 2015) (discussing that an agency's specification of the range of reasonable alternatives is entitled to deference. The Court explained that a consideration of alternatives is required regardless of whether the agency issues a FONSI, the relevant regulations provide that the consideration of alternatives in an EA need not be as rigorous as the consideration of alternatives in an EIS. *Compare* 40 CFR § 1508.9(b) (requiring "brief discussion[ ]" of alternatives in an EA) *with id.* § 1502.14(a) (requiring agency to "[r]igorously explore and objectively evaluate all reasonable alternatives" when EIS required). The agency's EA considered and rejected both alternatives -- an "existing pipeline" alternative and a "looping" alternative -- adequately discharging its NEPA obligations.).
    - *Kentucky Coal Ass'n v. Tennessee Valley Authority*, 804 F.3d 799 (6th Cir. 2015) (holding that the TVA did not violate NEPA because it did not limit its alternatives, and considered 10 other feasible and reasonable options. An agency may have a preferred alternative so long as it does not "[l]imit the choice of reasonable alternatives" to pick the one it likes.).
- *Major Federal Action*: Four cases concluded that the agency had not (or not yet) implemented an action that met the definition of a major federal action. For that reason, the failure of the agency to prepare an EA or EIS was not actionable:

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

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

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

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

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

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

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		redressability requirements are relaxed.' *W. Watersheds Project*, 632 F.3d at 485. 'Plaintiffs alleging procedural injury must show only that they have a procedural right that, if exercised, could protect their concrete interests.' *Salmon Spawning*, 545 F.3d at 1226." "The district court dismissed Claims One and Two, holding that WildEarth had not shown that any of its members had a concrete injury caused by the PEIS. But the injuries Molde alleges are concrete enough, and are sufficiently causally related to APHIS's failure to update the PEIS, to support WildEarth's standing for Claims One and Two….Molde's injury is his reduced recreational and aesthetic enjoyment of areas in Nevada impacted by NWSP's predator damage management programs. His declaration names specific wilderness areas in Nevada that he has visited and has specific plans to visit again. The declaration states that NWSP's predator control negatively impacts Molde's enjoyment of those areas by causing him to curtail his recreational activities and reducing his likelihood of seeing predators, including coyotes and ravens. This satisfies the injury-in-fact requirement." "Because WildEarth seeks to enforce a procedural right under NEPA, the requirements for causation and redressability are relaxed. *W. Watersheds Project*, 632 F.3d at 485. Under that relaxed standard, WildEarth's allegations, based on Molde's experience, are sufficient to support standing. WildEarth alleges that APHIS implements its predator damage management programs pursuant to the 1994/1997 PEIS, and that APHIS has improperly failed to update that PEIS. The Record of Decision for the final PEIS specifically states that APHIS will rely on information from the final PEIS for NEPA compliance." "Molde's injury also satisfies the relaxed redressability requirement for procedural claims. This requirement is satisfied when "the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision." *Salmon Spawning*, 545 F.3d at 1226. This relaxed redressability standard governs procedural challenges to programmatic actions as well as to specific implementing actions."

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***Sierra Club v. Bostick*, 787 F.3d 1043 (10th Cir. 2015)**	ACOE	**Agency prevailed**. **Issue(s):** failure to comment during public involvement period, major federal action**.** This case involved an EA, which was found to be adequate. An environmental group, an energy group and a planning commission (collectively, Sierra Club) challenged the validity of a nationwide permit under § 404 of the Clean Water Act and verification letters

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

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

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

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

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

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

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

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		acknowledged that the subject of deer management and invasive species management are "in some ways related," the NPS maintained that they are distinct actions "addressed in two different planning efforts." The D.C. Circuit distinguished that even though the fact that each plan may be related to the Park's General Management Plan does not mean that the plans are so closely related to each other that NEPA requires concurrent analysis of deer management and exotic plant control. As the Supreme Court has held, "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities." *Mobil Oil Exploration & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 230, 111 S.Ct. 615 (1991). The D.C. Circuit further examined the animal rights groups' allegation that both actions were connected. Under the regulation, actions are "connected" if they "[a]utomatically trigger other actions which may require environmental impact statements"; "[c]annot or will not proceed unless other actions are taken previously or simultaneously"; or "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 CFR § 1508.25(a)(1). Again, the D. C. Circuit upheld that the Park Service acted within its discretion when it declined to analyze the Exotic Plant and Deer Management Plans together as "connected" actions. Nothing in the record indicates that any of the regulatory definitions of "connected" apply. Neither Plan automatically triggers other reportable actions. Actions pursuant to the Deer Management Plan have already proceeded, and have not depended on the concurrent or previous undertaking of the Draft Exotic Plant Plan or some other action. The Plans are not interdependent parts of a larger action. The fact that the Plans have similar goals, protecting the native ecology, does not make the plans sufficiently intertwined to require concurrent NEPA analysis. The D.C. Circuit held that the NPS did not err in concluding that the Deer Management and Exotic Plant Plans are not "similar" or "connected" for the purposes of NEPA. Finally, the animal rights group argued that the NPS "violated NEPA by failing to consider the adverse impact its decision to kill wildlife will have on the public's ability to enjoy this extremely special national park which for over 120 years has been ... completely free of any violence against wildlife." The D.C. Circuit found that the NEPA adequately analyzed the impact on the human environmental and ultimate held that concerns that some members of the public might be psychologically harmed by simply knowing that deer are killed in Rock Creek Park is too remote an impact and falls outside the scope of NEPA.
***Center for Sustainable Economy v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015)**	BOEM	**Agency prevailed.** **Issue(s):** associational standing, ripeness, major federal action Neither an EA nor an EIS was prepared. **Holding:** "The Outer Continental Shelf Lands Act (OCSLA) created a framework to facilitate the orderly and environmentally responsible

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		exploration and extraction of oil and gas deposits on the OCS [outer continental shelf]. It charges the Secretary of the Interior with preparing a program every five years containing a schedule of proposed leases for OCS resource exploration and development. In light of the potential benefits and costs of OCS development, the Secretary's program must balance competing economic, social, and environmental values in determining when and where to make leases available. Those obligations are set forth in Section 18 of OCSLA, 43 U.S.C. § 1344. "The Center for Sustainable Economy (CSE), an Oregon-based nonprofit organization working to 'speed the transition to a sustainable economy,' challenges the Department of the Interior's latest leasing program on the ground that the 2012-2017 leasing schedule fails to comply with the provisions of Section 18(a)… (footnotes omitted)…. CSE also argues that, in preparing its Final Programmatic Environmental Impact Statement ('Final EIS'), Interior violated the National Environmental Policy Act's (NEPA) procedural requirements by using a biased analytic methodology and providing inadequate opportunities for public comment at the Draft EIS stage….We deny CSE's petition and conclude that: (1) CSE has associational standing to petition for review, (2) CSE's NEPA claims are unripe, (3) two of CSE's Program challenges are forfeited, and (4) CSE's remaining challenges to Interior's adoption of the 2012-2017 leasing schedule fail on their merits." "CSE has associational standing. An association has standing to bring suit on behalf of its members when: (1) 'its members would otherwise have standing to sue in their own right;' (2) 'the interests it seeks to protect are germane to the organization's purpose;' and (3) 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977)." "CSE's NEPA claims are unripe. Interior violated NEPA in the Program's Final EIS, CSE contends, by presenting a biased analysis of the so-called 'no-action alternative' that undervalued OCS non-mineral resources in their natural and unaltered state. CSE sees a further NEPA violation insofar as Interior denied a meaningful opportunity for comment at the Draft EIS stage on Interior's economic analyses, which CSE contends appeared for the first time when Interior simultaneously released the Final EIS and Final Economic Analysis Methodology, with 'a wealth of new assumptions and conclusions,' after the opportunity for comment on the draft documents had closed. As we recognized in CBD, '[i]n the context of multiple stage leasing programs . . . [the] obligation to fully comply with NEPA do[es] not mature until leases are issued,' because only at that point has there been an 'irreversible and irretrievable commitment of resources.' *Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 480 (10th Cir. 2009). Here, as in CBD, we confront a challenge to a multiple-stage program under which no lease sale has yet occurred and no irreversible and irretrievable commitment of resources

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		has been made. As we reasoned in CBD, allowing NEPA challenges to be brought at this early stage, 'when no rights have yet been implicated, or actions taken, would essentially create an additional procedural requirement for all agencies adopting any segmented program,' that 'would impose too onerous an obligation, and would require an agency to divert too many of its resources at too early a stage in the decision-making process.' *Id*. at 480-81. A petitioner 'suffer[s] little by having to wait until the leasing stage has commenced in order to receive the information it requires. In the meantime . . . no drilling will have occurred, and consequently, no harm will yet have occurred to the animals or their environment.' *Id.* at 481. In light of our holding in CBD, CSE's NEPA claims must be dismissed as unripe."
***WildEarth Guardians v. United States Fish and Wildlife Serv.*, 784 F.3d 677 (10th Cir. 2015)**	FWS	**Agency prevailed.** **Issue(s):** impact analysis adequacy; significance determination This case involved an EA, which was found to be adequate. Environmental groups (collectively, WildEarth) challenged the decision of the U.S. Fish and Wildlife Service (FWS) to convey a strip of land (the corridor) to a consortium of local governmental for the construction of a parkway. WildEarth Guardians, Rocky Mountain Wild, and the Town of Superior (collectively, WildEarth) challenged the authority of the U.S. Fish & Wildlife Service (FWS) to construct a parkway through the former Rocky Flats nuclear facility. Rocky Flats was formerly used to manufacture nuclear weapons, and since 1989, the Department of Energy (DOE) had been tasked with a cleanup effort to remediate the land. Under the Rocky Flats Act, Congress designated authority to the DOE to manage the central area of the Flats, which was contaminated by plutonium and other hazardous materials, and transferred the remainder of the land to the FWS to become a National Wildlife Refuge. The Rocky Flats Act further provided the DOE would transfer the remainder of the land to the FWS as soon as the cleanup was complete, and set aside a large parcel of land at the Flats' border to be used for transportation improvements (specifically, the parkway). The DOE transferred the remaining land to the FWS in 2007, and the FWS began considering applications for the transportation project jointly with the DOE. Among other claims, WildEarth claimed the FWS violated NEPA when it prepared an EA for the land exchange with respect to three main factual areas: (1) contaminated soils; (2) air pollution; and (3) the Prebel's Meadow Jumping Mouse. WildEarth asserted that the impacts required an EIS rather than an EA. With regard to the contaminated soils, in WildEarth's view, the parkway potentially significantly affects the quality of the human environmental because its construction would release dangerous levels of plutonium. **Holding:** In its decision not to conduct an EIS, the FWS relied on assurances it received from an EPA, specifically, in 2006, where the

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		EPA certified that conditions in the area where the corridor would be situated were "acceptable for unrestricted use and unlimited exposure." Five years later, the FWS requested and prior to its decision, the EPA clarified that the clearance applied to the construction of the proposed parkway as well. WildEarth argued the EPA's advice was inapplicable because it was supposedly premised on the assumption that no soil disturbance would take place, and thus did not account for the construction of a parkway. The Tenth Circuit found this was true of the 2006 EPA report, but not true of the 2011 EPA letter, which explicitly addressed the parkway construction and explicitly confirmed that such construction posed no risk of exposing anyone to an unacceptable level of radioactive material. Although WildEarth tacitly agreed that the EPA was undeniably an agency with respect to developing and enforcing environmental standards, with respect to plutonium, that the FWS could rely on -- but further objected that: (1) the letter "was not subject to any of the form and procedure that accompanies a CERCLA determination; and (2) it was based on flawed reasoning." The Tenth Circuit found the first argument unconvincing, and stated that the 2011 EPA letter was reasonably read as a clarification and elaboration of the 2006 Report, extrapolating from the 2006 findings to explain the risk to construction workers. And, the Tenth Circuit found it was reasonable of the FWS to regard the letter as a continuation of the CERCLA process that the EPA had begun several years earlier. The Tenth Circuit rejected WildEarth's second argument as flawed because WildEarth complained that the letter "equated a wildlife refuge workers with . . . construction workers." The Tenth Circuit explained that the letter did not do so, and in reaching its conclusion, looked to the EPA's explanation that it took account of the difference between the two types of employees – "including the potential for greater raters of inhalation and ingestion of the soil by the construction worker" – but then determined that the "differences are likely offset by the much great exposure duration" for refuge workers, relative to construction workers would who would just be exposed for "a few months." The Tenth Circuit stated that the EPA's logic was straightforward and comprehensive. WildEarth also articulated a highly detailed criticism of the EPA's conclusion based on the supposed areas that were cleaned and the supposed levels of acceptable hazardous materials. The Court found its criticism could not be squared with the contents of the 2011 letter. In its letter, the EPA indicated it addressed dangers to construction workers insofar as they would be working on a construction project related to "a future land transfer at the eastern edge of the site, as per provision of the [Rocky Flats Act]." The Court declined to second-guess the judgment of the EPA, recognizing the EPA's authority in the pollutants arena, and stated that the FWS reasonably consulted the EPA and was given approval to proceed. WildEarth next discerned a NEPA violation in the FWS's failure to take "a hard look at ozone [smog] and nitrogen dioxide pollution" because its air quality impacts would be significant. Simply put, WildEarth

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		alleged that the FWS failed to consider the impacts that the construction of the parkway would have on smog, despite having ample data, and by choosing to rely on state studies. Their objection to the state studies was that the studies relay on outdated EPA air quality standards, and in 2008 the EPA revisited those standards and thus, the FWS should have utilized the new standards. The FWS replied that the 2008 air quality standards had not yet been implemented when the EA was prepared. The Tenth Circuit rejected this argument that the FWS was arbitrary and capricious in relying on the studies predicated on the then-prevailing standards promulgated by the nations' leading environmental agency, simply because the new standards were forthcoming. WildEarth also claimed that the FWS did not sufficiently analyze or disclose the emissions that would result from the construction of the parkway. In its EA, the FWS noted that the parkway project would be required to comply with current and future air quality standards. The Court noted that the federal action was the land transfer rather than the parkway construction itself, which would have required a more detailed analysis of the environmental impact, including emissions. The Court discussed that the FWS relied on the supposition that the parkway would have to obtain environmental clearance that would ensure its compliance with the same laws and standards the FWS itself would have considered if it were directly approving construction of the parkway itself. The Court found the FWS was on solid ground in relying on the procedure for future environmental oversight as Congress specifically provided an important mechanism through the transportation improvement plan. WildEarth maintained the FWS treatment of nitrogen dioxide emissions from vehicles on the proposed parkway violated NEPA in that it: (1) failed to quantify emissions; (2) it omitted "an alternative qualitative description of the public health impacts associated with "emissions"; and (3) it failed to consider whether emissions would comply with a nitrogen dioxide standard adopted by the EPA in 2010. The Court found that the FWS left out these impacts out of its EA because of forthcoming legal standards that had not been promulgated by the EPA, and in consideration of the absence of clear nitrogen dioxide guidelines, and rejected WildEarth's claims. WildEarth also contended that the FWS violated NEPA in its EA with respect to its treatment of the Preble's Meadow Jumping Mouse. Finally, as to the protected mouse, the Court noted that the FWS considered the mouse habitat and found it would not be significantly affected by the transportation improvement. WildEarth also asserted that the FWS violated NEPA by not specifically addressed the acquired property as "mitigation measure of the exchange." The Court ultimately held that the FWS was only required to include mitigation measures if its EA forecasted a significant impact resulting from the land exchange, which it did not in this case. WildEarth challenged the FWS's public notice and comment procedures. Relying on the considerable discretion regarding EAs in 40

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		CFR § 1501.4(b) and its own decision in *Greater Yellowstone Coal v. Flowers*, 359 F.3d 1257, 1279 (10th Cir. 2004), the Tenth Circuit explained that in this case the EA was circulated, and mentioned the possibility of impacts on the mouse, and comments themselves brought the issue up. Here, the Tenth Circuit upheld the amount of public involvement in this EA. The Tenth Circuit also upheld the FWS's decision to conduct an intra-agency consultation regarding the potential effect on the parkway on the mouse. The Court finally noted the FWS appropriately issued an incidental take statement regarding the mouse.
***Sierra Club v. Bureau of Land Management*, 786 F.3d 1219 (9th Cir. 2015)**	BLM	**Agency prevailed.** **Issue(s):** scope of environmental review, connected actions This case involved an EA, which was found to be adequate. **Holding:** The court of appeals affirmed the district court's decision upholding BLM's grant of a right-of-way for a wind energy project developed on private land. The Wind Project was developed near Tehachapi, California; and the Road Project was initiated when North Sky applied to the BLM for a right-of-way to connect the Wind Project to an existing state highway. Because the Wind Project could be built without the federal Road Project, and because the federal Road Project had independent utility, the BLM concluded that the Wind Project was not subject to formal consultation under the Endangered Species Act, and need not be analyzed as a connected action under NEPA. "The Wind Project is a wind energy project developed by North Sky on more than 12,000 acres of private land located in the Sierra Nevada mountain range, northeast of Tehachapi, California. The Road Project was initiated when North Sky applied to the BLM for a right-of-way over federal land to connect the Wind Project to an existing state highway. The right-of-way (Road Project) would contain underground power and fiber optic communication lines from the Wind Project to California's energy grid. … After review of the Revised Proposal and related documents, the BLM issued an environmental assessment, in which the BLM found that the Road Project would have no significant environmental impact. Therefore, the BLM was not required to (1) consult with the United States Fish and Wildlife Service (FWS) under the ESA, or (2) prepare an Environmental Impact Statement under NEPA. This determination depended in large part upon the BLM's conclusion that the Private Road Option was a viable alternative to the Road Project…. Because the Wind Project could be built without the federal Road Project, and because the federal Road Project had independent utility, the BLM concluded that the Wind Project was not subject to formal consultation under the ESA, and need not be analyzed as a connected action under NEPA." "The Wind Project did not trigger consultation requirements under the NEPA. … As explained, the Wind Project is not a major federal action because the BLM has no control or responsibility over any aspect of the

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		Wind Project. …In any event, the BLM would not have been required to consider the effects of the Wind Project under NEPA because the Road and Wind Projects are not connected, cumulative, or similar actions [footnote and citations omitted]." "The Road and Wind Projects have independent utility and are not connected. … The Road Project was independently useful for providing dust and stormwater control and limiting access to the Pacific Crest Trail. … And, North Sky would likely have developed the Wind Project even without the access provided by the Road Project because it could have accessed its land using the Private Road Option. Thus, these projects had independent utility." "Finally, the BLM sufficiently evaluated the Wind Project as a cumulative effect of the Road Project. The environmental assessment contained a detailed analysis of wind farms within 25 miles of the right-of-way, including the North Sky wind farm. In sum, the BLM was not required to prepare an Environmental Impact Statement under NEPA, because the Wind Project was not a federal action or connected to the Road Project."
***Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015)**	BSEE	**Agency prevailed.** **Issue(s):** major federal action Neither an EA nor an EIS was prepared. Environmental groups challenged the Bureau of Safety and Environmental Enforcement (BSEE) stating the agency violated NEPA by failing to prepare an EIS before approving Oil Spill Response Plans (OSRPs) involving development of offshore oil and gas resources in the remote Beaufort and Chuckchi seas on Alaska's Arctic coast. As a matter of background, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, establishes a four-stage process for the exploration and development of offshore oil and gas resources. Each stage triggers certain environmental analysis and the Bureau of Ocean Energy Management (BOEM) is responsible for managing the process, including the necessary environmental reviews. In addition, the Clean Water Act, 33 U.S.C. § 1321(b) mandates oil spill contingency planning at four levels: the national, regional, and area levels, and lastly, at the level of individual owners and operators of offshore oil facilities. This case is brought against the BSEE following a relatively complex procedural and statutory backdrop. In short, after the DOI issued new guidance regarding the content and analysis that should be provided in OSRPs, Shell updated its OSRPs for the Chukchi and Beaufort Seas in May 2011, and again in early 2012, and BSEE approved the two OSRPs in February and March of 2012, respectively. In response to the NEPA challenges, the BSEE defended its action stating that it must approve any OSRP that meets the statutory requirements under the current guidance. **Holding:** The Ninth Circuit found that the statute involved restricted the BSEE's discretion because the BSEE was required to approve an

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		OSRP that met the statute's requirements, which the agency reasonably interpreted to be the checklist of six requirements set forth in the Clean Water Act, 33 U.S.C. § 1321(j)(5)(d). *Cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 766, 124 S.Ct. 2204 (2004) (holding an agency had "no ability categorically to prevent the cross-border operations . . . motor carriers, [and thus] the environmental impact of the cross-border operations would have no effect on [that agency's] decisionmaking"). The Ninth Circuit held that an EA that was previously prepared and required to be conducted as to Shell's exploration plan during that stage in the process, expressly considered the environmental effects of Shell's OSRPs. An operator's OSRP, which is the fourth step of the Clean Water Act's oil spill response framework, must be submitted in conjunction with a lessee's exploration plan, which is OCSLA's third step. 30 CFR § 550.219. The Court referenced a memorandum dated February 17, 2012, where BSEE clarified that the Chukchi OSRP was considered in the development of an EA in Shell's Revised Exploration Plan for the Chukchi Sea. Similarly, Shell's Beaufort Sea OSRP was considered in the exploration plan Shell submitted regarding its Flaxman Island Leases. Thus, both of the OSRPs at issue here underwent NEPA review at OCSLA's third step—which was consistent with the requirement that OSRPs be submitted at this stage. The Ninth Circuit ultimately concluded that the BSEE was not required to prepare an EIS prior to approving the OSRPs. This case also contained a vigorous dissent discussing that, first, the BSEE regulates the response activities and prevention effort of entities like Shell, and because it retains its authority to ensure that those entities' response efforts will protect the environmental effectively in the event of the oil spill, it is not exempt from its duty to conduct a NEPA review. Second, the dissent argued that the BSEE did not discharge its duty under the Oil Pollution Act to conduct NEPA review by relying on previous analysis that considered the environmental impact of oil and natural gas exploration in the Arctic.
***Cascadia Wildlands v. Bureau of Indian Affairs, 801* F.3d 1105 (9th Cir. 2015)**	BIA	**Agency prevailed.** **Issue(s):** no action alternative, cumulative effects assessment This case involved an EA, which was found to be adequate. Environmental groups (collectively, Cascadia) challenged the Bureau of Indian Affairs' (BIA) approval of the Middle Forks Kokwel timber sale (the Kokwel Project), a plan by the Coquille Indian Tribe (the Tribe) to harvest 268 acres of timber in the Coquille Forest, comprised of 5,410 acres of land along the SW Oregon Coast that was restored to the Tribe. Among other challenges, on the NEPA claim, Cascadia argued that the BIA violated NEPA because it did not adequately consider the cumulative environ-mental impact of the Kokwel Project in light of a previously approved harvest the Alder/Rasler Project on adjacent and overlapping land. As a matter of background, in 2011 and 2013, BIA approved two

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		different proposals by the Tribe to harvest timber in the Coquille Forest. In 2011, the BIA approved the Alder/Rasler Project, which called for 270 acres of regeneration harvest, 52 acres of density management and 56 acres of commercial thinning between 2011 and 2016. The BIA conducted an EA for this Project, which estimated it would create between 44 and 220 jobs and over $10.5 million in revenue though the sale of 22.44 million board feet of timber. In 2013, the BIA approved a second project – the Kokwel Project – to conduct an additional 268 acres of regeneration harvest, 221 acres of commercial thinning and 42 acres of density management in the Coquille Forest over a period of 10 years. The BIA and Tribe conducted an EA, which estimated the Kokwel Project would create 242 direct jobs, 532 indirect jobs and over $8 million in revenue through the sale of 13.9 million board feet of timber. Cascadia argued that the BIA and the Tribe violated NEPA because they did not adequately consider the cumulative impacts of the Kokwel Project in light of the Alder/Rasler Project. **Holding:** The Ninth Circuit looked to the CEQ Regulations in determining whether a proposed action will significantly impact the human environmental, noting that NEPA directs agencies to consider "[w]hether the action is related to other actions with individually insignificant but cumulative significant impacts." 40 CFR § 1508.27(b)(7). "[C]umulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR § 1508.7. "[T]he general rule under NEPA is that, in assessing cumulative effects, the [agency] must give a sufficiently detailed catalogue of past, present, and reasonably foreseeable future projects, and difference between the projects, are thought to have impacted the environment." *Lands Council v. Powell,* 395 F.3d 1019, 1028 (9th Cir. 2005). An agency, however, may satisfy NEPA by aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured." *See Ecology Ctr v. Castaneda,* 574 F.3d 652, 666-667 (9th Cir. 2009). The BIA and the Tribe, in the EA analyzed the cumulative impacts of the Kokwel Project by comparing it against the environmental baseline, incorporated into the "No Action Alternative." The No Action Alternative described the "existing condition and the continuing trends, assuming "[o]ngoing activities would continue to occur on existing projects," including "other projects covered by earlier decision records." The EA explained that it would aggregate other projects into the No Action Alternative, rather than individually discuss them. The Tabular treatment of impacts, Table 8, listed only one project proposed for the foreseeable future: the Alder/Rasler Project. The EA's resource-specific cumulative impacts discussion did not individually analyze the

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		impact of any specific past, present or reasonably foreseeable future action. The Ninth Circuit noted that agencies have discretion in deciding how to organize and present information in environmental assessments. It held that 40 CFR § 1508.7 does not explicitly require individual discussion of the impacts of reasonably foreseeable projects, and stated it is not for the Ninth Circuit to tell the agency how to specifically present such evidence in an EA. The Ninth Circuit noted its role was to ensure that an agency takes a "hard look" at the cumulative environmental consequences of the proposed project, and ensure it provides a clear explanation of its analysis to enable informed public comment on the project and possible alternatives. An agency can take a "hard look" at the cumulative impact either by individually discussing a previously approved project, or incorporating the expected impact of such a project into the environmental baseline against which the incremental impact of a proposed project is measured. Under either approach, what is important is that the agency make clear it has considered the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 CFR § 1508.7. When an agency chooses to aggregate reasonably foreseeable projects, it must be clear from the record that the cumulative effects of the prior proposals were considered by both the drafting and approving agencies. *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 442 (5th Cir. 1981). Here, the Kokwel EA identified the Alder/Rasler Project as a reasonably foreseeable project that would be considered as part of the baseline, i.e., the "No Action Alternative." The expected impacts of the Alder/Rasler Project, in turn, were set forth in detail in the Alder/Rasler EA. The Ninth Circuit noted that this holding was in accord with two other United States Circuit Courts of Appeals, the District of Columbia Circuit and the Fifth Circuit. *See Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 70 (D.C. Cir. 1987). Cascadia alternatively argued that, even if it is permissible to aggregate a previously approved project into an environmental baseline, the Kokwel EA did not actually aggregate the impacts of the Alder/Rasler Project. The Ninth Circuit disagreed with this assertion, stating that the Kokwell EA explained it measured the impacts of the Kokwel Project against a baseline that summed "[o]ngoing activities would continue to occur on existing projects," including "other projects covered by earlier decision records." The Ninth Circuit reviewed the Kokwel EA and noted that the EA stated that the "[r]easonably foreseeable future actions are assumed to be the same for the No Action as well as the Proposed Action," and that "Table 8 lists treatments proposed for the foreseeable future on land in the analysis area that will be considered in the following resource-specific cumulative impact discussion." The Ninth Circuit again noted that the Kokwel EA explained Table 8 listed only one project – the Alder/Rasler Project, and that the EA stated that the Alder/Rasler Project was a "treatment[ ] proposed for the foreseeable future," which

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		as assumed to be the same for both the No Action and the Proposed Action, and assumed as part of the baseline against which the incremental impact of the Kokwel Project was measured. The Ninth Circuit stated that the EA did not specifically explain how it calculated the pre-harvest mileage of certain roads in the Project or expressly say how its calculation included the Alder/Rasler Project. The Ninth Circuit found that the EA's explanation of its methodology could have been clearer, but to restate each time the EA presented baseline date for an individual resource that the Adler/Rasler Project was considered and would have been redundant and therefore unnecessary, particularly in a document meant to be "concise and "[b]rief [ ]." *See* 40 CFR § 1508.9(a). The Ninth Circuit finally held that by specifically identifying the Alder/Rasler Project at the outset and explaining it would be assumed as part of the baseline in the resource-specific cumulative impacts analyses, the Kokwel EA sufficiently catalogued relevant past projects in the area. Because the EA explained that it aggregated the Alder/Rasler Project in the No Action Finally, the Ninth Circuit rejected Cascadia's argument this was a "post hoc rationalization" by the BIA.
***Soda Mountain Wilderness Council v. U.S. Bureau of Land Management,* 607 Fed. Appx. 670 (9th Cir. 2015)** (not available for publication, no precedential value)	BLM	**Agency prevailed on 7 of 8 NEPA claims and did not prevail on the 8th claim.** This case involved an EA, which was found to be adequate in most respects. On one issue, the case was remanded to the district court for further consideration. **Issue(s):** significance determination; cumulative effects assessment (reasonably foreseeable future actions (RFFAs)) Environmental organizations (collectively, Soda Mountain) brought action against the Bureau of Land Management (BLM), *inter alia,* alleging that BLM committed several violations of NEPA for the proposed Sampson Cove Forest Management Project (the Project). **Holding:** The Ninth Circuit found that the BLM adequately assessed the Project area's wilderness characteristics. The EA relied on a 2006 wilderness survey prepared by the BLM which addressed the definition elements of wilderness in the Wilderness Act, 16 U.S.C. § 1131(c). The decision to rely on the report that was four years old when the EA was issued was reasonable. The Ninth Circuit exercised deference to the BLM's assessment of wilderness characteristics. The Ninth Circuit concurred with the BLM's decision not to analyze the effects of the Project involving a potential expansion of the Cascade Siskiyou National Monument. The court found the monument expansion was a "remote and highly speculative consequence" that did not warrant analysis in the EA. Soda Mountain also argued that the BLM violated NEPA because the EA's cumulative impact analysis did not include any discussion of the Cottonwood Forest Management project that was reasonably foreseeable at the time the BLM issued the EA. The Ninth Circuit noted that many of the elements of the Cottonwood project were

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		already firmly established: team meetings discussing the scope of the project and pointed to documentation that the determination regarding the Northern Spotted Owl habitat would be complete within the following month. In addition, two months after the BLM issued the Project's EA, it notified the public of the Cottonwood project. This timing was consistent with the interdisciplinary team notes and left little doubt in the Ninth Circuit's review that the Cottonwood project was reasonably foreseeable. The Ninth Circuit remanded this issue to the BLM for further consideration of its cumulative impact analysis regarding the Cottonwood project, and whether that analysis effects its decision not to issue an EIS. Soda Mountain argued that the EA's cumulative impact analysis so far as the Shale City project was inadequate. The Court held that the impact analysis was sufficient because the EA contained some "quantified or detailed information." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002). In particular, the EA noted the Shale City project was of limited size, no new roads would be built in the project area, the project was not expected to affect special status wildlife species, and no direct or indirect effects to the aquatic habitat were anticipated as a result of the project. Soda Mountain also argued that BLM should have completed a cumulative impact analysis of the Swinning Project. The Ninth Circuit found that BLM correctly did not analyze the Shale City Project since it was outside of the cumulative impact analysis area. The Ninth Circuit did not analyze the challenge to the BLMs' cumulative impact analysis because the EA had not addressed the impact of grazing allotment renewals in the Project area. The Ninth Circuit instructed the District Court to address the issue on remand. The Ninth Circuit also found that the BLM sufficiently analyzed the Project's potential impact on bat habitats. Under NEPA, the EA was required to "briefly provide[ ] evidence and analysis for an agency's finding regarding an environmental impact," not "compile an exhaustive examination of each and every tangential event that potentially could impact the local environment." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1129 (9th Cir. 2012). Thus, the EA met the standard in assessing the Project potential impact on bat habitat. Finally, Soda Mountain argued the BLM should have prepared an EIS. The Ninth Circuit found that the BLM did not fail to take a hard look at the Project area's "unique characteristics" or "highly controversial" effects. 40 CFR § 1508.27(b)(3)-(4). A fairly vigorous dissent followed the majority opinion, finding that by examining the AR in further detail the BLM appropriately excluded the Cottonwood project because it was not a reasonably foreseeable future action. The dissent would not have remanded the EA, rather it would have affirmed the District Court opinion.

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***Padgett v. Surface Trans. Board*, 804 F.3d 103 (1st Cir. 2015)**	STB	**Agency prevailed.** **Issue(s):** major federal action, reliance on categorical exclusion Neither an EA nor an EIS was prepared. Among other claims, The Town of Grafton (the "Town") petitioned the Court for judicial review stating that the Surface Transportation Board ("Board"), a federal agency of the Department of Transportation, violated the NEPA by failing to conduct any analysis of the environmental aspect of its decision with respect to Grafton & Upton Railroad Company's (G & U) liquid petroleum gas transloading facility (the "facility"). The Town argued that NEPA applies here because the Board's preemption decision constitutes a "major Federal action," as G & U could not construct the facility absent the Board's preemption determination. According to the Town, the Board's statement that "[t]his action will not significantly affect either the quality of the human environment or the conservation of energy resources" constitutes a FONSI, which was produced without the preparation of an Environmental Assessment, in violation of NEPA. The Board responded that NEPA is inapplicable because the declaratory order here is not a "major Federal action," as neither federal funding nor Board licensing was involved, relying on this court's holding that the test for major federal action under NEPA is "whether federal approval is the prerequisite to the action taken by the private actors and whether the federal agency possesses some form of authority over the outcome." *Mayaguezanos por la Salud y el Ambiente v. United State*s, 198 F.3d 297, 302 (1st Cir.1999). The First Circuit found the Board is correct that NEPA does not apply to its declaratory order, because the order was not a "major Federal action" under 42 U.S.C. § 4332(C). The Board made a legal determination concerning preemption of the Town's zoning and permitting ordinances. The Board did not provide federal funds, approve or license the transload facility, or otherwise manifest "indicia of control" over G & U that would be sufficient to establish a "major Federal action." *Mayaguezanos*, 198 F.3d at 302. Moreover, declaratory orders are categorically exempted from environmental documentation requirements under the Board's NEPA regulations absent "extraordinary circumstances." 49 CFR § 1105.6(c) ("No environmental documentation will normally be prepared ... for the following actions ... (iii) [d]eclaratory orders...."). The Town failed to demonstrate any "extraordinary circumstances" that could overcome the categorical exemption. 40 CFR § 1508.4. Therefore, the Town did not establish that the Board violated NEPA.

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***Myersville Citizens for a Rural Community, Inc. v. Federal Energy Regulatory Commission,* 783 F.3d 1301 (D.C. Cir. 2015)**	FERC	**Agency prevailed.** **Issue(s):** alternatives considered, consideration of impacts to property values, scope of environmental review, and connected actions. This case involved an EA, which was found to be adequate. **Holding:** Petition for review of agency action was denied. "Citizens of the small town of Myersville, in Frederick County, Maryland, oppose the construction of a natural gas facility called a compressor station in their town. The compressor station is a small part of a larger expansion of natural gas facilities in the northeastern United States proposed by Dominion Transmission, Inc., a regional natural gas company and Intervenor in this case. Dominion, which is in the business of storing and transporting natural gas, requested approval from the Federal Energy Regulatory Commission to move ahead with the project [referred to as the Allegheny Storage Project]. The Commission, over the objections of the Myersville citizens, conditionally approved it in December 2012. Dominion then fulfilled the Commission's conditions, including obtaining a Clean Air Act permit from the Maryland Department of the Environment. Dominion built the station, and it has been operating for approximately six months." Among other things, the plaintiffs challenged FERC's environmental review of the project, including its consideration of potential alternatives. "Before any applicant may construct or extend natural gas transportation facilities, it must obtain a 'certificate of public convenience and necessity' from the Commission pursuant to Section 7(c) of the [Natural Gas] Act. Id. § 717f(c)(1)(A)…. After preparing an Environmental Assessment of the Allegheny Storage Project, the Commission rejected the objections made by Petitioners and others and granted Dominion a conditional Section 7 certificate. …Petitioners timely petitioned for review of the Commission's orders." Petitioners claimed error in FERC's performance of its NEPA obligations. The Commission had prepared an EA for the project and, concluding that the project would not constitute a major federal action significantly affecting the quality of the human environment, issued a FONSI. "Petitioners claim that the Environmental Assessment lacks adequate consideration of two alternatives—an 'existing pipeline' alternative and a 'looping' alternative. On both counts, Petitioners mischaracterize the Environmental Assessment, which considered and rejected both alternatives, adequately discharging the Commission's NEPA obligations." "Petitioners also argue that the Environmental Assessment failed to take a 'hard look' at 'quantifying the impacts of the project on property values and lost development opportunities' in Myersville. The definition of 'hard look' may be 'imprecise,' but we have explained that an agency has taken a 'hard look' at the environmental impacts of a proposed action if 'the statement contains sufficient discussion of the

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		relevant issues and opposing viewpoints,' and the agency's decision is 'fully informed' and 'well-considered.' *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 20016) (*quoting NRDC v. Hodel*, 865 F.2d 288, 294 (D.C.Cir.1988)). "In response to community concern about the Myersville station's potential impact on property values, the Environmental Assessment noted that each purchaser of property has different criteria and values, but that, generally speaking, a compressor station could depress property values, particularly those of adjacent and nearby land. Nevertheless, the Commission concluded that the Myersville compressor station 'would not significantly reduce property or resale values' in Myersville because of the Commission's recommendations for noise and visual screening." "The Commission also acknowledged the 'lack of studies evaluating property values and aboveground natural gas facilities,' and that 'the effects on property values are difficult to quantify.' Seizing on that statement, Petitioners argue that the Commission should be required to do more to take into account the effects that safety concerns and pollution have on property values. But the Commission acknowledged three times, in the Environmental Assessment, in its certificate order, and in its order denying rehearing, that property values could be negatively affected by the compressor station. It chose nevertheless to approve the project because the negative impact was not 'sufficient to alter our determination that the Myersville Compressor Station is required by the public convenience and necessity.'" "Finally, Petitioners reiterate their assertion that the "overbuilt" Allegheny Storage Project will produce excess natural gas capacity destined for export through Dominion's Cove Point LNG terminal. By virtue of that alleged connection between the Project and Cove Point, Petitioners argue that the Commission should be required to review their environmental effects together. "Under applicable NEPA regulations, the Commission is required to include 'connected actions,' 'cumulative actions,' and 'similar actions' in an Environmental Assessment. 40 CFR § 1508.25(a)(1)-(3). 'An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.' *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C.Cir.2014) (internal quotation marks omitted). 'The purpose of this requirement is to prevent agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.' *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988) (internal quotation marks omitted). 'Connected actions' include actions that are 'interdependent parts of a larger action and depend on the larger action for their justification.'' 40 CFR §

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		1508.25(a)(1)(iii). "Petitioners claim that the Cove Point LNG export project is a 'connected action' that NEPA requires be considered together with the Allegheny Storage Project. In *Delaware Riverkeeper*, we held that the Commission unlawfully segmented its environmental review where four other pipeline projects were 'certainly 'connected actions' ' that, taken together, would result in 'a single pipeline,' that was 'linear and physically inter-dependent,' and contained 'no physical offshoots.' 753 F.3d at 1308, 1316. In addition, the other pipelines were under construction or pending review when the contested application was filed, the Commission's review of the projects was overlapping, and their cumulative effects were visited on the same environmental resources. We premised our decision requiring joint NEPA consideration on the unquestionable connectedness of the projects, the fact that the projects all were under consideration by the Commission at the same time, and the fact that the projects were financially interdependent. *Id*. at 1318. "The absence of all of those factors led us to reject an analogy to *Delaware Riverkeeper* in *Minisink*. There, as here, the petitioners argued that a project that the Commission found unrelated was nevertheless a 'connected action.' We rejected that argument and distinguished the connectedness and timing of the projects at issue in *Delaware Riverkeeper. Minisink Residents for Environmental Preservation and Safety v. FERC,* 762 F.3d 97, 113 n. 11. (D.C. Cir. 2014). The same distinctions apply here. Unlike in *Delaware Riverkeeper*, the Commission in this case made clear that the Allegheny Storage Project and the Cove Point LNG terminal are unrelated, and that neither depends on the other for its justification. *See* 40 CFR § 1508.25(a)(1)(iii). This is therefore not a case in which 'financially and functionally interdependent pipeline improvements were considered separately even though there was no apparent logic to where one project began and the other ended.' *Del. Riverkeeper*, 753 F.3d at 1318. The absence of evidence that would compel a finding of connectedness between the Allegheny Storage Project and the Cove Point LNG export terminal defeats Petitioners' challenge."
***Kentucky Coal Ass'n v. Tennessee Valley Authority*, 804 F.3d 799 (6h Cir. 2015)**	TVA	**Agency prevailed.** **Issue(s):** significance determination, alternatives considered, connected actions This case involved an EA, which was found to be adequate. Coal industry association and members (collectively, Kentucky Coal) brought action against the Tennessee Valley Authority (TVA) alleging that the TVA failed to consider the environmental effects of a project to switch a power plant (the Paradise Plant) from coal to natural-gas generation, in violation of the National Environmental Policy Act (NEPA). Kentucky Coal maintained that the TVA acted arbitrarily by failing to

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		"carefully consider" the effect on the environment of the Paradise decision through an environmental impact statement under the National Environmental Policy Act. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989); *see* 42 U.S.C. § 4332(2)(C). The agency has "considerable discretion" in determining whether an environmental assessment should lead to an impact statement. *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 580 (6th Cir.2014). And we review the decision not to prepare one under the "arbitrary and capricious" standard. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763, 124 S.Ct. 2204 (2004). **Holding:** The TVA acted within its discretion in preparing only an environmental assessment. Its 165–page assessment explored a wide range of environmental issues before concluding that switching to natural gas would not have a significant (negative) impact on the environment. The TVA adhered to the process laid out in the regulations and came to a reasoned conclusion, precluding us from setting it aside. The TVA took the requisite "hard look" at the effects of its proposed action. *Robertson*, 490 U.S. at 350, 109 S.Ct. 1835. Over the course of fifteen months, the TVA considered the natural-gas plant's potential impact on several areas, including air quality, climate change, surface water, floodplains, recreational areas, cultural and historic resources, socioeconomic and environmental justice, solid waste, groundwater, geology, biological resources, land use, farmland, transportation, hazardous waste, and noise pollution. For each of these topics, the TVA's assessment described the status quo and analyzed the consequences of retrofitting the units in comparison to switching to natural gas. The assessment also described the mitigation measures the TVA would take to address any possible environmental consequences. When considering the impact on air quality, to take one example, the assessment determined that switching to natural gas would have minor, temporary negative effects (due to construction of the new units), but that "the cumulative impact of the [switch to gas] would be positive." It did the same thing for eighteen other environmental issues. And it listed its interaction with public participants, including state and federal officials and a variety of individuals who submitted comments. In the aftermath of this study, the TVA reasonably concluded that switching to gas would not have a significant impact on the environment. It found that the conversion would have a net positive impact in a number of areas, especially when compared to retrofitting the coal-fired units. Switching to gas for example would significantly reduce emissions, wastewater discharges, hazardous waste, transportation costs, and overall costs for energy production. Although there would be some negative impacts in areas like vegetation, these would be minor and could be mitigated by the measures identified in the assessment. The TVA permissibly concluded that any negative impacts did not rise to the level—"significant"—that would require an

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		impact statement. *See Klein*, 753 F.3d at 584; 40 CFR § 1508.27(a)-(b). All perspectives considered, the TVA "adequately studied the issue and [took] a hard look at the environmental consequences of its decision." *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006). As a matter of process and substance, the TVA did not act arbitrarily or capriciously in declining to undertake a full environmental impact statement. *See Klein*, 753 F.3d at 582 Kentucky coal also made four other NEPA counterarguments that the Ninth Circuit rejected. First, they contended that, because the TVA's regulations "normally ... require" an impact statement before building a major power-generating facility like this one, the TVA committed procedural error by not issuing one here. The TVA retains discretion to prepare only an assessment even when it normally would do otherwise as long as it takes the required close look at its actions. The Ninth Circuit held that because the fifteen-month, 165–page environmental assessment did just that, this regulation does not change the outcome. Second, the Kentucky Coal contended that the TVA ignored the effects of a necessary part of its plan: building a natural-gas pipeline. The Ninth Circuit disagreed and found that the TVA considered the cumulative impact of all "closely related" actions, including building a natural-gas pipeline to reach the newly configured plant. 40 CFR § 1508.25(a)(1); *see Kleppe v. Sierra Club*, 427 U.S. 390, 410, 96 S.Ct. 2718 (1976). The assessment's scope "include[d] [the] potential natural gas pipeline corridors within which a gas pipeline(s) may be located by the gas supplier." Consistent with that scope, the assessment considered the pipeline's impacts in the nineteen environmental areas it studied. Even though the pipeline would disturb some vegetation, to use one example, the TVA concluded that it and the power plant together would have "no significant cumulative impacts" on vegetation. The eighteen other areas were no different, as they produced no significant cumulative impact on the environment. The Ninth Circuit also found that at the time of its assessment —"the earliest possible time" it could study the environmental effects of its actions, 40 CFR § 1501.2 — the pipeline route had not yet been approved. A different federal agency, the Federal Energy Regulatory Commission, approves pipeline routes. But Kentucky Coal cannot blame the TVA, which has "limited statutory authority" over the pipeline route. *See Pub. Citizen*, 541 U.S. at 770, 124 S.Ct. 2204. The TVA used the information it had at the time to fully consider the environmental impacts of the plant and the pipeline. Kentucky Coal accused the TVA of prejudging the switch to natural gas before completing its environmental study. An agency may have a preferred alternative so long as it does not "[l]imit the choice of reasonable alternatives" to pick the one it likes. 40 CFR § 1506.1(a)(2); *see Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 206 (4th Cir. 2005). The TVA preferred switching to natural gas but did not limit its alternatives. It considered ten other feasible and reasonable options. The Court found that TVA could have picked the option that Kentucky Coal preferred (maintaining coal), but that does not mean that it could

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		not pick the option that it preferred: switching to natural gas. *Cf. Klein*, 753 F.3d at 584. Fourth, Kentucky Coal argued that that the switch to natural gas will have devastating socioeconomic effects on the surrounding community—from "job loss and increased unemployment" to "potential outmigration of industry" and "higher poverty rates"—and contend that these potential effects required an environmental impact statement. The Ninth Circuit restated the rule that the regulations, for better or for worse, say that "economic or social effects are not intended by themselves to require preparation of an environmental impact statement." 40 CFR § 1508.14. The National Environmental Policy Act is "not a national employment act," and its "[e]nvironmental goals and policies were never intended to reach social problems such as those presented here." *Breckinridge v. Rumsfeld*, 537 F.2d 864, 867 (6th Cir. 1976). The TVA at any rate did consider these and other socioeconomic effects and concluded that, while some negative effects may result (such as a 2% reduction in the county's workforce), they would not significantly affect the human environment. That decision was reasonable in light of the regulations and court precedent. Finally, the Ninth Circuit reject Kentucky Coal's argument that the retrofitting option would have been a much better policy choice, as it would save money, help the environment, and support the local economy. Once the agency has satisfied this obligation, "it need not [also] demonstrate to [our] satisfaction that the reasons for the new policy are better than the reasons for the old one." The TVA did not act arbitrarily in switching the Paradise plant to natural gas.

8. 2015 Cumulative Impacts Cases

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8.1 Introduction

2015 was a very light year for NEPA cases involving challenges to cumulative impacts analyses in the U.S. Courts of Appeals, with only three decisions published. One unpublished decision from the 9th Circuit Court of Appeals is also discussed in this review.

Three agencies were involved in the four total appellate decisions – two involving the Bureau of Land Management (BLM), one involving the Bureau of Indian Affairs (BIA), and one involving the Tennessee Valley Authority (TVA). Three of the decisions were issued by the 9th Circuit Court of Appeals and one by the 6th Circuit Court of Appeals. The federal agencies prevailed in three of the four decisions (75 percent). The three key issues involved in the four decisions were: (1) what qualifies as a reasonably foreseeable future action; (2) aggregation of past actions and inclusion of cumulative impacts information in the affected environment/baseline and future no action alternative; and (3) treatment of another action as either a connected action vs. a reasonably foreseeable future action.

The four decisions issued in 2015 involving NEPA cumulative impact analysis challenges were:

- *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105 (9th. Cir. 2015)
- *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219 (9th Cir. 2015)
- *Soda Mountain Wilderness Council v. U.S. Bureau of Land Management*, 670 (9th Cir. 2015) (not available for publication)
- *Kentucky Coal Association v. Tennessee Valley Authority*, 804 F.3d 799 (6th Cir. 2015)

The remainder of this article will discuss the key issues and the court's decision in each of the four cases, and then provide a conclusion on key takeaway lessons from the decisions for NEPA practitioners.

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8.2 Decisions Issued in 2015

In *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105 (9th. Cir. 2015), plaintiffs challenged the approval of a 268-acre timber harvest in the Coquille Forest in southwest Oregon. The primary point of challenge was that the Bureau of Indian Affairs (BIA) did not adequately consider another overlapping timber sale in the same vicinity in the cumulative impact analysis, and that BIA improperly aggregated the analysis of past actions. In addition, the plaintiffs challenged the agency's decision to consider reasonably foreseeable future actions as part of the baseline used for the No Action alternative, rather than in a separate, specific cumulative impact analysis. As stated in the methodology section of the EA:

> "The following descriptions of the No Action Alternative and the Proposed Action assume the combined relevant effects of all past actions. It is not necessary to individually identify or catalog these past actions as the description of the affected environment incorporates all those actions. For the cumulative effects analysis the description of the potential resulting impacts is the cumulative effect of all past, present and reasonably foreseeable actions. Reasonably foreseeable future actions are assumed to be the same for the No Action as well as the Proposed Action. Stands . . . are expected to be selectively harvested approximately every 60 to 80 years . . . . Current timber management on the surrounding private land is more intensive and occurs on a larger scale at rotations as short as 30 to 40 years."

The court noted that agencies have discretion in deciding how to organize and present information in environmental assessments and holding that 40 C.F.R. § 1508.7 does not explicitly require individual discussion of the impacts of reasonably foreseeable projects, and stating it is not for the court to tell the agency how to specifically present such evidence in an EA. The Court also held that BIA's aggregation of past, present and reasonably foreseeable future actions to create a baseline for the No Action Alternative from which to consider incremental impact of timber sale project did not violate NEPA.

In *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219 (9th Cir. 2015), environmental organizations brought action against Bureau of Land Management (BLM) alleging the agency's decision to grant a right-of-way for an access road over federal land for a wind energy project developed on private land in southern California violated NEPA because the wind project itself was not considered a connected action by BLM (the wind project itself, as opposed to the access road, was located on private land).

The Court ruled that BLM had properly dismissed the wind energy project as a connected action when preparing an EA on the road access project because the applicant had another alternative route for the access road that would not cross federal land and would not need a permit from

BLM. The Court further stated that BLM had sufficiently evaluated the impacts from the wind energy project as an interrelated cumulative effect along with the access road project.

In *Soda Mountain Wilderness Council v. U.S. Bureau of Land Management*, 670 (9th Cir. 2015) (not available for publication), plaintiffs brought action against BLM alleging that the agency committed several violations of NEPA for the proposed Sampson Cove Forest Management Project in southern Oregon. The court held that the BLM violated NEPA (on 1 out of 8 claims) when it prepared its EA because the EA's cumulative impact analysis did not include any discussion of the Cottonwood Forest Management project that was reasonably foreseeable at the time the BLM issued the EA, as supported by the evidence in the Administrative Record. Team meetings discussing the scope of the project and documentation in the record included the determination that the Northern Spotted Owl habitat assessment for the project would be complete within the following month. In addition, 2 months after the BLM issued the project's EA, it notified the public of the Cottonwood Project, and the timing was consistent with the interdisciplinary team notes.

However, one of the judges on the three judge panel issued a fairly vigorous dissent to the majority opinion, finding that by examining the record in further detail, the BLM appropriately excluded the Cottonwood Project because it was not a reasonably foreseeable future action. According to the dissenting judge, if an agency lacks enough information about the parameters of a possible future project to "permit meaningful consideration," it need not address the project in the EA. The judge noted that the BLM had not yet determined where the Cottonwood Project would be located in a 45,370-acre area, and that the meeting agendas were also lacking in specific information and that they were not titled correctly with the project name. According to the judge: "There's not a single piece of information about the Cottonwood project in the record—not a single clue as to its location or scope. The majority's only other support is an internal agenda for a "Cottonwood IDT Meeting" dated June 30, 2010, with more shorthand entries that include no information about the location or scope of the project. Based on this document, the majority claims that "less than one month before the BLM issued the Project's EA, many elements of the Cottonwood project were "already firmly established." But only a mind reader could figure that out."

In *Kentucky Coal Association v. Tennessee Valley Authority*, 804 F.3d 799 (6th Cir. 2015), a coal industry association and members (collectively, Kentucky Coal) brought action against the Tennessee Valley Authority (TVA) alleging that the agency failed to consider the environmental effects of a project to switch a power plant (the Paradise Plant) from coal to natural-gas generation in its EA in violation of NEPA. The 165–page EA explored a wide range of environmental issues before concluding that switching to natural gas would not have a significant (negative) impact on the environment. Kentucky Coal contended that the TVA ignored the effects of a necessary part of its plan: building a natural-gas pipeline.

However, the court concluded that the EA's scope "include[d] [the] potential natural gas pipeline corridors within which a gas pipeline(s) may be located by the gas supplier," and that the EA considered the pipeline's impact in addition to the power plant fuel source switch, in the 19 impact areas analyzed. Thus, the court concluded that the cumulative impact analysis contained in the EA was adequate.

8.3 Conclusion and Implications

Of the four U.S. Court of Appeals decisions issued in 2015 involving NEPA cumulative impact analyses, federal agencies prevailed in three of the four decisions (75 percent). The court decisions illustrate that federal agencies are generally successful in challenges to their cumulative impact analyses when they:

- Provide a clear and rational explanation for the exclusion of one more reasonably foreseeable actions from their cumulative impact analysis
- Make clear how they are treating past actions in their cumulative impact analyses
- Adequately analyze cumulative impacts in their NEPA analyses, no matter what section they place the analysis in.

In the one case the federal government lost in 2015, the court's decision illustrates the need to carefully consider whether an action is truly not reasonably foreseeable, and perhaps take a more conservative approach in eliminating projects from analysis if there is a question whether they are truly "remote" and "speculative."

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