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Annual NEPA Report 2011
Of the
National Environmental Policy Act (NEPA) Working Group

Submitted to
NAEP Board of Directors

Edited by Lisa Mahoney and Karen Johnson

With contributions by
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June 4, 2012

This report reviews NEPA document submittals and statistics, NEPA litigation and agency procedures for calendar year 2011. 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.

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Introduction

"In the current economic climate it is critical that agencies take steps to expedite permitting and review, through such strategies as integrating planning and environmental reviews; coordinating multi-agency or multi-governmental reviews and approvals to run concurrently; setting clear schedules for completing steps in the environmental review and permitting process; and utilizing information technologies to inform the public about the progress of environmental reviews as well as the progress of Federal permitting and review processes."

President Barack Obama,
Presidential Memorandum-Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review, August 2011

Over the past year, considerable effort has been made to increase efficiencies in the National Environmental Policy Act (NEPA) process while ensuring the integrity of decision-making and sound environmental analysis. President Obama issued a memorandum urging agencies to develop more efficient environmental reviews to speed infrastructure development. The Council on Environmental Quality (CEQ) moved forward with its pilot program for several projects geared toward improving the efficiency and effectiveness of NEPA reviews. Most recently, CEQ issued Final Guidance to Promote Efficient Environmental Reviews (March 2012). These efforts have led NEPA practitioners to look for ways to reinvigorate the NEPA process, including new ways to apply NEPA in the context of modern projects and technologies.

This is the fifth National Association of Environmental Professionals (NAEP) NEPA Working Group Annual Report. This report contains summaries of the latest developments in NEPA as well as the NEPA Working Group's efforts for the past year. This year's report focuses on applying NEPA efficiently, and the NEPA Working Group's efforts to create a reference list of NEPA fundamentals for practitioners. This annual report is prepared and published through the initiative and volunteer efforts of members of the NAEP NEPA Working Group.

The NEPA Working Group 2011 - Lisa Mahoney[1]

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

Over the past year, NEPA practitioners have continued to find solutions to environmental challenges as the Nation faced natural disasters that created devastation across the country. In addition to responding to the pressing needs of their local communities, NEPA practitioners have tracked the latest policies for supporting more efficient NEPA reviews.

Of particular note this year was CEQ's selection of a pilot project sponsored by NAEP and developed by members of the NEPA Working Group. The project was one of only five projects that will be piloted by CEQ with the aim of looking at improved implementation of NEPA through innovation, public engagement, and transparency. Under this pilot project, NAEP is engaging agencies and NEPA practitioners that have experience in preparing EAs, assembling lessons learned, and designing best practice principles to present in a report to CEQ. CEQ will seek public comment and input on the best practice principles and, once finalized, provide them to agency NEPA practitioners and use them as a training and educational tool. Experience-based best practice principles will focus on the preparation of effective EAs that are timelier, more cost-effective, and incorporate those environmental issues that are relevant to the decision making process. This project is expected to improve the quality and transparency of agency decision making by decreasing the length and complexity of EAs, encouraging the use of timelines and page limit ranges, providing for expedited review, and promoting public involvement.

The NEPA Working Group also completed a major undertaking this year to create the "NAEP NEPA Fundamentals." This initiative was undertaken after identifying the need for a standardized set of NEPA skills and competencies for varying types of NEPA practitioners, since no similar effort has been conducted to-date. NEPA practitioners can use this tool to benchmark their services against other NEPA practitioners and target areas for professional development. This year's efforts were to incorporate feedback from NAEP members gathered during the 2011 conference presentation last year and finalize the document for presentation to the NAEP Board of Directors in October of 2011.

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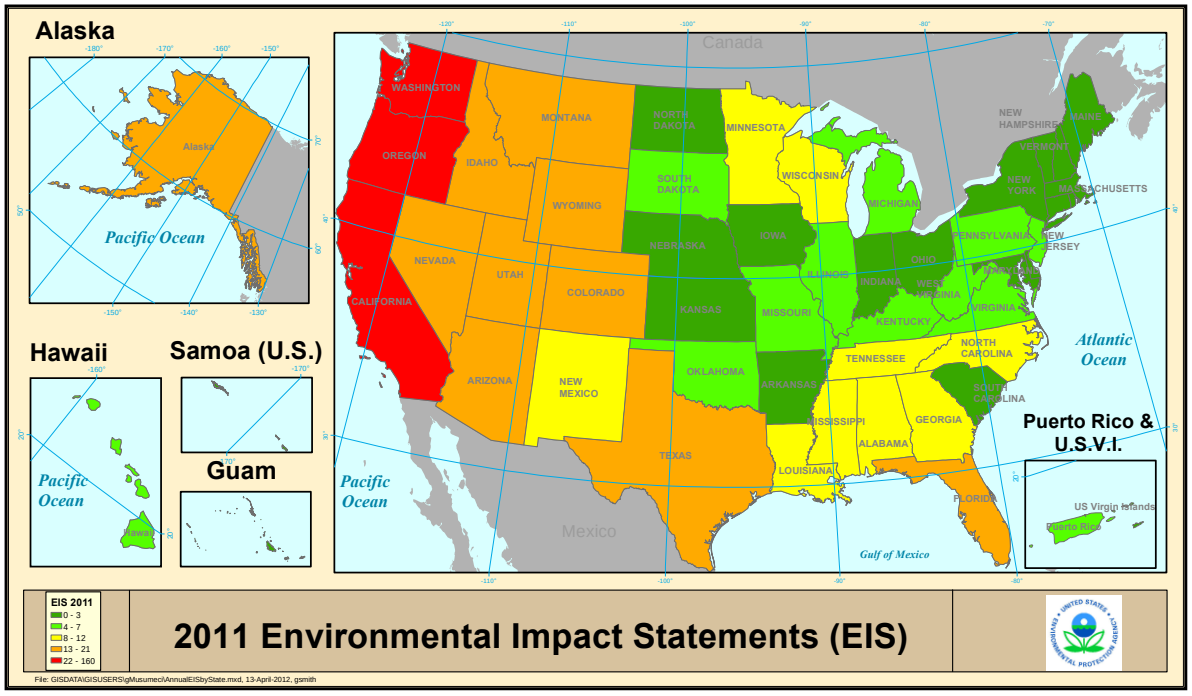
Just the Stats — Karen Vitulano and Grace Musumeci[2]

In 2011, announcements of 438 environmental impact statements (EISs) were published in the *Federal Register*. Ten agencies each prepared 10 or more documents; six agencies prepared 20 or more. Similar to previous years, the Forest Service provided the most with 109 and the next highest was the Federal Highway Administration with 49. Of the total, 234 were draft EISs and 204 were finals. The table and map on following pages show NEPA documents filed in 2011 by agency and by State.

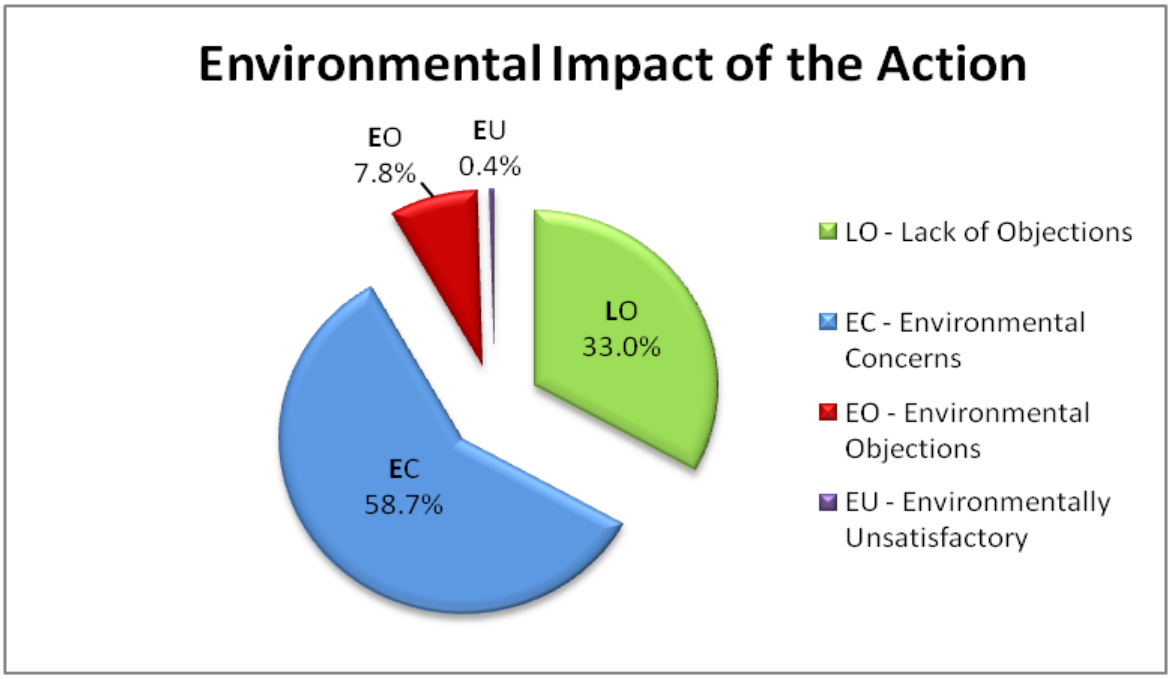
LEAD AGENCY	# of EISs
U.S. Forest Service	**109**
Federal Highway Administration	**49**
Bureau of Land Management	**42**
U.S. Army Corps of Engineers	**33**
National Park Service	**26**
National Oceanic and Atmospheric Administration	**24**
Nuclear Regulatory Commission	**17**
Fish and Wildlife Service	**14**
Bureau of Reclamation	**10**
Federal Transit Administration	**10**
U.S. Navy	**9**
Department of Energy	**9**
Federal Energy Regulatory Commission	**7**
U.S. Army	**6**
Tennessee Valley Authority	**6**
Bureau of Indian Affairs	**5**
Housing and Urban Development	**5**
U.S. Air Force	**4**
Bonneville Power Authority (DOE)	**4**
Federal Rail Administration	**4**
National Nuclear Security Administration	**4**
Western Area Power Authority (DOE)	**3**
General Services Administration	**3**
Bureau of Prisons	**3**
Federal Aviation Administration	**3**
Rural Utilities Service	**3**
Surface Transportation Board	**3**
Bureau of Ocean Energy Management, Regulation and	**3**

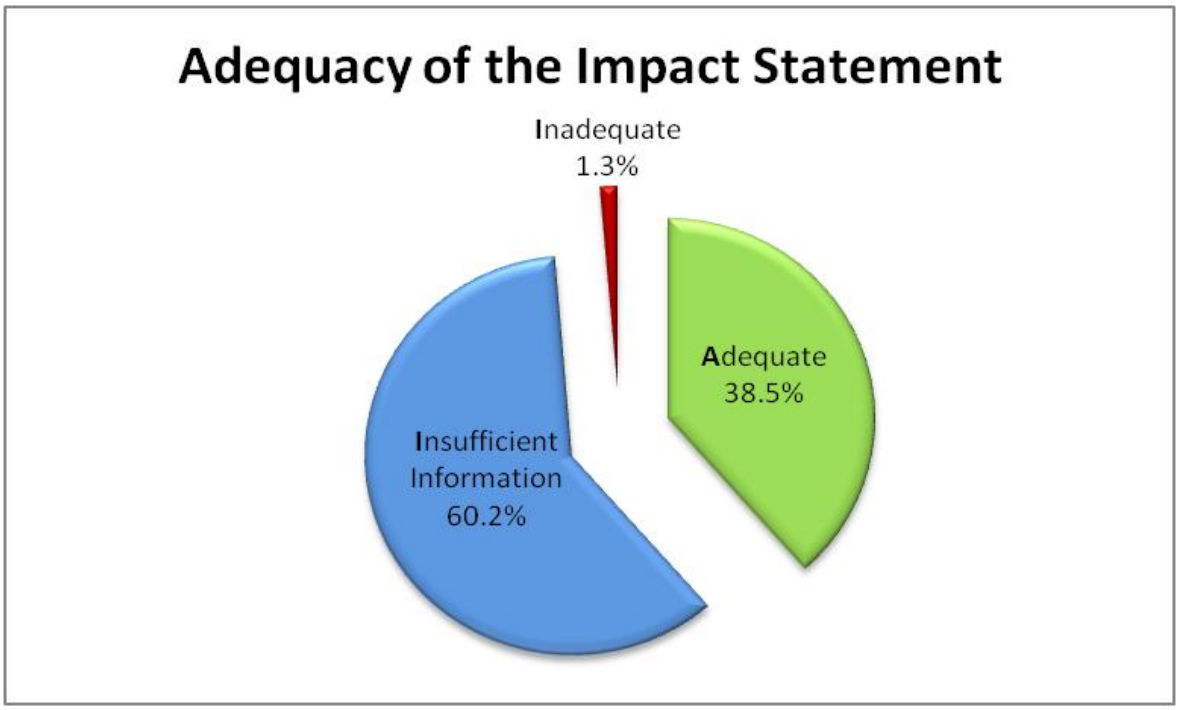
[2] **Karen Vitulano,** US Environmental Protection Agency (USEPA), Region 9, and **Grace Musumeci** USEPA, Region 2. Any views expressed in this article do not represent the views of the USEPA or the United States.

LEAD AGENCY	# of EISs
Enforcement	
Natural Resource Conservation Service	**3**
Minerals Management Service	**3**
National Highway Traffic Safety Administration	**2**
Animal & Plant Health Inspection Services	**2**
Department of State	**2**
Federal Reserve Bank of San Francisco	**2**
Department of the Interior	**2**
National Capital Planning Commission	**1**
National Science Foundation	**1**
Department of Homeland Security	**1**
Agricultural Research Service	**1**
TOTAL	**438**



With regard to projects rated during 2011, 76 (33%) proposed projects were rated LO by the Environmental Protection Agency (EPA), 135 (59%) were rated EC, 18 (8%) received an EO rating, 1 (0.4%) was rated EU. 89 (39%) of the documents were considered adequate, 139 (60%) had insufficient information, and 3 (1%) were inadequate. See the Note Box for an explanation of EPA's ratings.





The inadequate ratings were for Draft EISs for three mining projects. These included the Bureau of Land Management's Phoenix Copper Leach Project (rated 3) and Mount Hope Project (rated EO-3), both in Nevada. The basis for these inadequate ratings was the lack of critical information regarding the nature, estimated cost, and funding mechanism (financial assurance) to implement essential mitigation in perpetuity after the mine is closed to prevent surface and groundwater contamination. The other inadequate rated document was the Forest Service's Draft EIS for the Rosemont Copper Project (rated EU-3) in Arizona. Financial assurance information was also lacking for this project, as was essential information regarding air and water impacts and mitigation measures.

Environmental Protection Agency Rating System for Environmental Impact Statements

RATING THE ENVIRONMENTAL IMPACT OF THE ACTION
LO (Lack of Objections) The review has not identified any potential environmental impacts requiring substantive changes to the preferred alternative. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposed action.
EC (Environmental Concerns) The review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact.
EO (Environmental Objections) The review has identified significant environmental impacts that should be avoided in order to adequately protect the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative).
EU (Environmentally Unsatisfactory) The review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed.

RATING THE ADEQUACY OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT (EIS)
1. (Adequate) The draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.
2. (Insufficient Information) The draft EIS does not contain sufficient information to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the proposal. The identified additional information, data, analyses, or discussion should be included in the final EIS.
3. (Inadequate) The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS.

USEPA 2009. Environmental Impact Statement (EIS) Rating System Criteria. http://www.epa.gov/oecaerth/nepa/comments/ratings.html#rating.

Preparation Times for Final EISs 2011 — Piet and Carole deWitt[3]

On March 6, 2012, the Council on Environmental Quality released its final guidance on "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act." The guidance reflects continued concern that environmental reviews require too much time and effort to complete. Environmental reviews include categorical exclusions, environmental assessments and environmental impact statements (EISs). Determining the preparation time of these reviews is generally easiest for EISs. Under normal circumstances the date of an EIS's initiation and conclusion are published in the *Federal Register*.

We measured EIS-preparation times using the *Federal Register* publication dates for the Notice of Intent to prepare the EIS and the Environmental Protection Agency's (EPA) Notices of Availability for the draft and final versions of the EIS. We used the website www.timeanddate.com to calculate separately for each EIS in our sample the time to prepare the draft EIS, the final EIS from the draft EIS, and the total EIS-preparation time. The variations about the mean presented in this discussion equal one standard deviation. For more detailed discussion of our methods see deWitt and deWitt (2008) [*Environmental Practice* 10(4): 164-174].

The average time required by all federal agencies combined to prepare EISs has increased since the year 2000 when it averaged 1,166±899 days (3.2±2.5 years) [n=198]. The annual average EIS-preparation time peaked in 2008 at 1,550±1,124 days (4.2±3.1 years) [n=262]. From 2000 to 2011, total annual average EIS-preparation times increased at an average rate of 30 days/year (Figure 1). About 80% of the increase occurred in the preparation of draft EISs. The remaining 20% was incurred in the preparation of the final EIS from the draft EIS.

In calendar year 2011, the USEPA made available 203 final, revised final or final supplemental EISs prepared by 34 separate agencies. Of these final EISs, three were adoptions, one was a duplicate entry and one was supplemented prior to the end of the year. We eliminated these five EISs from our 2011 duration sample. Preparation times for the remaining 198 final EISs are provided in Figure 1.

The annual average total EIS-preparation time for all agencies in 2011, 1,485±1028 days (4.1±2.8 years), was the second largest recorded from 1997 to 2011. The 2011 annual average was 43 days longer than the 2010 annual average, with 42 of those days for the preparation of the draft EIS. The 2011 annual average time to prepare the final EIS from the draft, 471±484 days (1.3±1.3 years) was the largest average recorded from 1997 to

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2011. The second largest average for preparation of the final EIS was recorded in 2010. The 2011 annual average time to prepare a draft EIS, 1,014±869 days (2.8±2.4 years) was the third highest average recorded from 1997 to 2011. Higher annual average draft EIS-preparation times were recorded in 2008, 1,113±976 days (3.0±2.7 years) and 2006, 1,053±946 days (2.9±2.6 years) [n=236].

Annual average EIS-completion rates (i.e. the percentage of final EISs made available in the year following publication of the Notice of Intent) for 2011 and the average for the period 1997 to 2010 are compared in Figure 2. The annual completion rates for 2011 are comparable to those for the 1997 to 2010 average in the first and third years following the Notice of Intent. The 2011 completion rates are, however, substantially less than those of the longer term average in the second and fourth years and greater than the long-term average in the fifth, sixth, and eighth through the twelfth years following the Notice of Intent. The average EIS-preparation time for the period 1997 to 2010 was 1318±1002 days (3.6±2.7 years) [n=3,219].

Figure 1. Annual Average Preparation Times for Draft and Final EISs from 1997 - 2011 with their linear regression lines and equations.

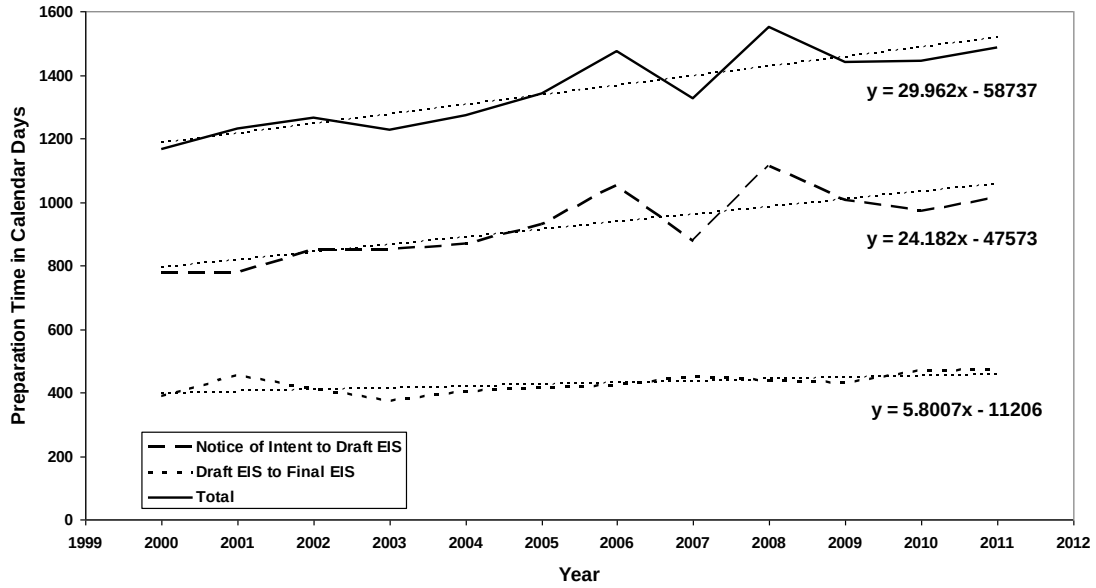

Figure 2. Comparison of Annual EIS-Completion Rates by Year Following the Notice of Intent for 2011 and the Average for the Period 1997-2010.

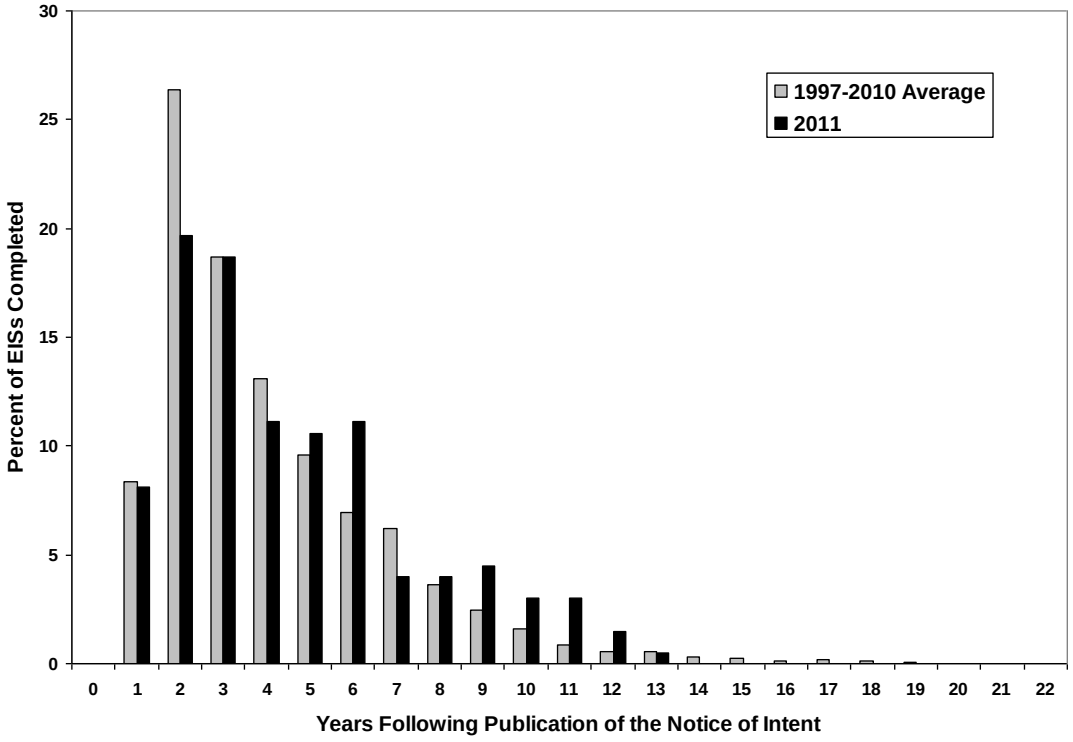

Table 1. Preparation Times in Calendar days for 2011 Final EISs												
		NOI to Draft EIS			Draft EIS to Final EIS			Total				
Agency	n	MEAN	s	M	MEAN	s	M	MEAN	s	M	MIN	MAX
ALL	198	1014	869	679	471	484	336	1485	1028	1151	147	4490
BIA	1	953			357			1310				
BLM	16	825	564	657	541	402	434	1366	800	1220	457	3439
BOEM	2	1157	1307	1157	67	35	67	1224	1341	1224	275	2172
BOP	1	154			77			231				
BOR	6	1227	868	1069	573	329	420	1799	1002	1612	737	3014
BPA	3	445	96	402	303	138	231	748	129	772	609	864
USACE	15	1320	942	821	402	412	280	1722	1201	1472	648	4490
DOE	3	218	68	211	215	129	140	433	141	429	294	575
FAA	2	1307	986	1307	609	356	609	1916	630	1916	1470	2361
FERC	4	461	632	164	247	118	207	708	614	451	312	1617
FHwA	29	1512	1101	1025	847	772	609	2359	1112	2486	567	4063
FRA	1	1512			210			1722				
FRBSF	1	2189			147			2336				
USFS	43	799	759	564	439	463	287	1238	930	995	295	4245
FTA	5	1550	1264	1242	288	128	245	1839	1350	1599	336	4032
FWS	5	1488	1209	1017	246	210	203	1735	1160	1220	470	3258
GSA	2	860	1007	860	487	193	487	1347	814	1347	771	1922
HUD	3	151	61	150	128	40	105	279	98	255	196	387
NCPC	1	396			1337			1733				
NHTSA	1	137			238			375				
NNSA	2	2317	1252	2317	308	257	308	2625	994	2625	1922	3328
NOAA	12	822	516	755	234	128	179	1056	563	978	281	2020
NPS	10	1424	461	1470	686	550	588	2109	803	2058	644	3650
NRC	11	461	232	451	329	141	343	790	255	662	532	1191
NRCS	1	239			168			407				
NSF	1	1842			266			2108				
RUS	1	658			238			896				
STATE	1	830			133			963				
STB	2	783	13	783	315	79	315	1098	66	1098	1051	1144
TVA	4	476	195	521	205	88	203	681	187	697	445	883
USA	2	736	961	736	812	1020	812	1548	1981	1548	147	2948
USAF	3	1368	1132	1320	775	517	1008	2143	767	2454	1269	2706
USN	2	1863	1737	1863	406	69	406	2269	1668	2269	1089	3448
WAPA	2	268	86	268	261	42	261	529	129	529	438	620
NOI = Notice of Intent to prepare an EIS												
n = number of EISs in the sample												
s = standard deviation												
M = median												

Litigation Updates for 2011 — Lucinda Low Swartz, Esq[4]

ABSTRACT

This paper will review substantive NEPA cases issued by federal courts in 2011. The implications of the decisions and relevance to NEPA practitioners will be explained.

Introduction

In 2011, the U.S. Courts of Appeals issued 14 decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies; of these, 12 were issued by the U.S. Court of Appeals for the 9th Circuit. The 14 cases involved 10 different departments and agencies. The government prevailed in 5 of the 14 cases (36 percent). The U.S. Supreme Court issued no NEPA opinions in 2012; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, Table 1 and Figure 1 show the number of U.S. Court of Appeals NEPA cases issued from 2006 to 2011, by circuit. Figure 2 is a map showing the states covered in each circuit court.

Table 1. Number of U.S. Courts of Appeals NEPA Cases, by Year and by Circuit

	U.S. Court of Appeals Circuit												
	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
TOTAL	**4**	**5**	**3**	**2**	**5**	**3**	**2**	**5**	**69**	**17**	**2**	**9**	**126**
	3%	4%	2%	2%	4%	2%	2%	4%	55%	13%	2%	7%	100%

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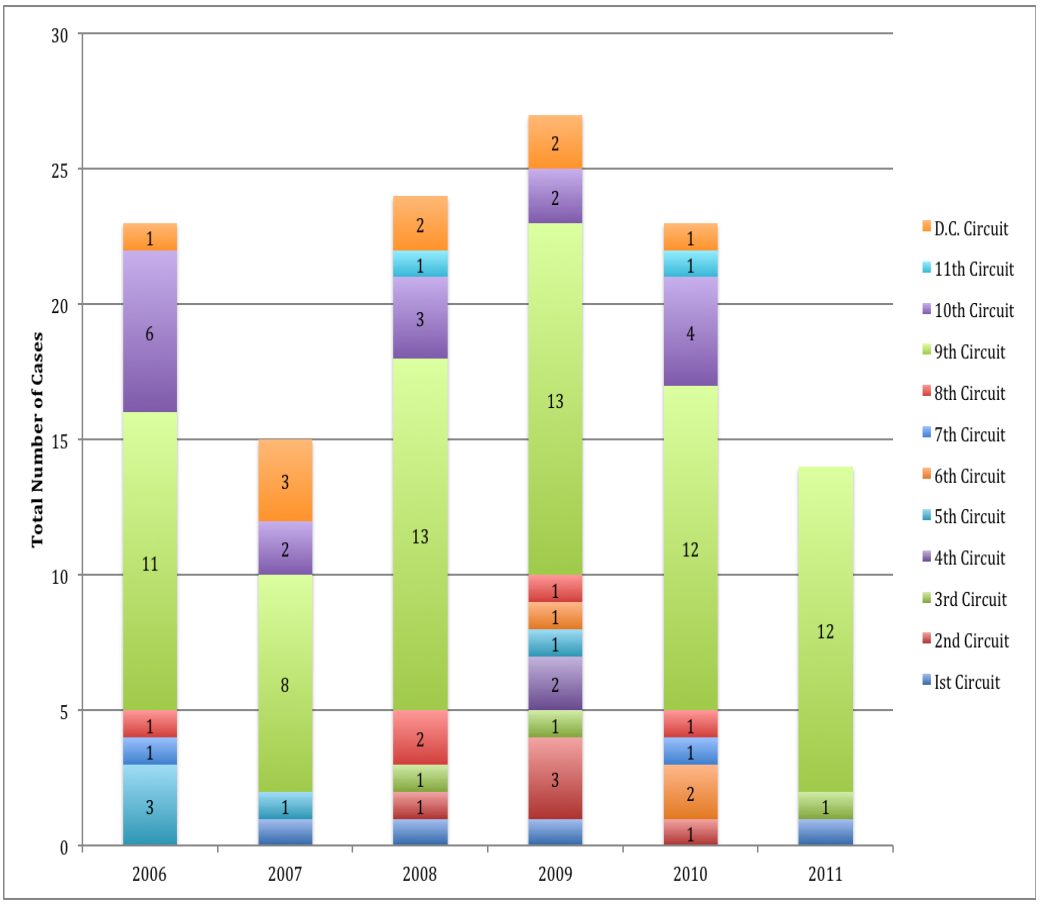

Figure 1: Number of Court of Appeals NEPA Cases 2006 – 2011, by circuit

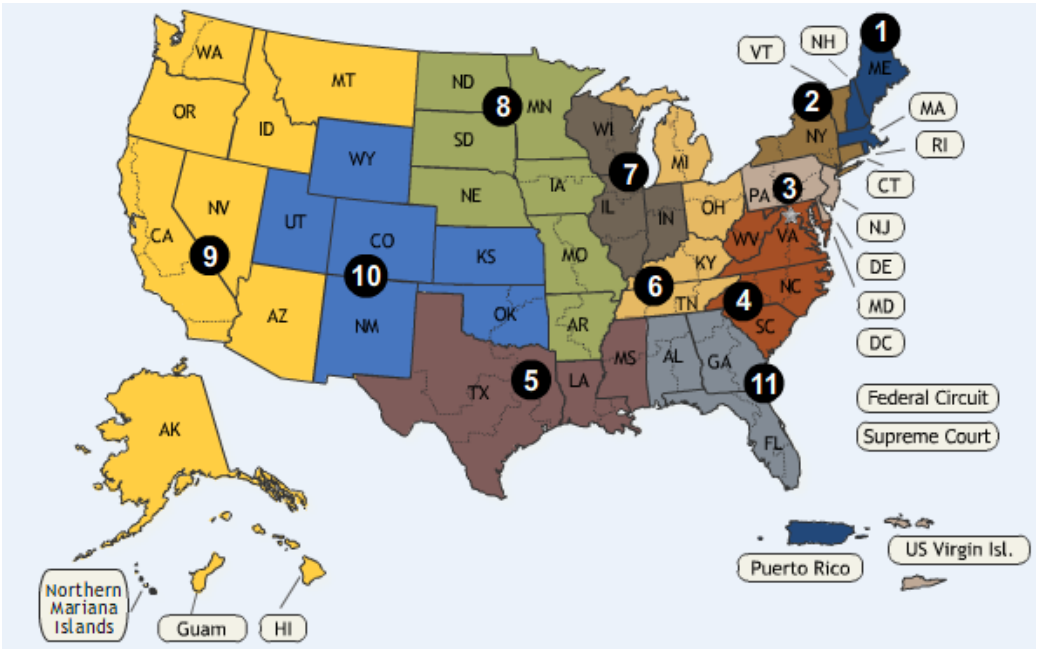

Figure 2. Map of U.S. Circuit Courts of Appeal

Statistics

The U.S. Forest Service (USFS) again won first place as the agency involved in the largest number of NEPA cases, with five cases. The agency prevailed in two of four cases (50 percent) in which the agency took a position (one case involved a third-party intervention and USFS took no position on the issues). Every other agency had only one case:

- Animal Plant Health Inspection Service (APHIS) – loss
- U.S. Department of Energy (DOE) – loss
- U.S. Coast Guard (USCG) – loss
- Bureau of Land Management (BLM) – loss
- Bureau of Reclamation (BoR) – win
- Federal Highway Administration (FHWA) – loss
- Federal Aviation Administration (FAA) – loss
- Surface Transportation Board (STB) – loss
- U.S. Nuclear Regulatory Commission (NRC) – win

Each of these cases is summarized in Appendix A.

Commentary 1 — Ron Bass[5]

Introduction

Although the National Environmental Policy Act (NEPA) and the Council on Environmental Quality's (CEQ's) NEPA regulations have remained stable for many years, the implementation of NEPA by Federal agencies is constantly changing. The following are summaries of some of the key developments affecting NEPA practice from the CEQ, the U.S. Environmental Protection Agency (USEPA), and other Federal agencies that were implemented in 2011-2012.

Summary of New NEPA Regulatory Developments

1. CEQ — Proposed guidance on "*Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*"

On December 7, 2011, the CEQ issued draft guidance that seeks to improve the efficiency and timeliness of environmental reviews conducted by Federal agencies under NEPA. The draft guidance is primarily a refresher on some of the ways that the NEPA regulations already encourage agencies to streamline their environmental reviews. The guidance addresses eight topics:

- Making NEPA documents concise and straightforward
- Integrating NEPA into early project planning efforts
- Conducing early and well-defined scoping
- Improving inter-governmental coordination with state, local and tribal environmental reviews
- Coordinating NEPA with reviews and documents prepared under other applicable laws
- Adopting of other agencies' NEPA documents
- Use of incorporation by reference
- Expediting responses to comments

For each of these topics, the draft guidance makes specific recommendations for streamlining NEPA. The public comment period on the guidance closed on January 27, 2012. CEQ will consider the comments and eventually issue final guidance on this important topic.

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2. CEQ — NEPA Pilot Projects program

http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/nepa-pilot-project

As part of CEQ's broad efforts to modernize and reinvigorate Federal agency implementation of NEPA through innovation, public engagement, and transparency, CEQ issued a solicitation to members of the public and Federal agencies on March 17, 2011, inviting them to nominate projects employing innovative approaches to completing environmental reviews more efficiently and effectively. CEQ will work with the relevant federal agencies to implement up to five selected pilots, and to replicate time- and cost-saving approaches learned from the implementation of the pilots.

CEQ sought nominations of projects that propose improvements to any aspect of the NEPA process that can be replicated to increase efficiency of this process across government, including:

- Simplifying NEPA implementation practices
- Reducing the time and cost involved in preparing NEPA reviews
- Utilizing information technology to improve the efficiency of NEPA implementation
- Improving the effectiveness of public engagement

The nominations period for NEPA Pilot Projects ended on June 15, 2011. On August 31, 2011, CEQ announced the selection of the first NEPA Pilot. CEQ identified two information technology (IT) tools developed by the U.S. Forest Service (USFS) and the National Park Service (NPS) that have significant potential to reduce costs and save time in Federal NEPA implementation.

On October 19, 2011, CEQ announced the selection of the second and third NEPA Pilots. For the second Pilot, CEQ selected a proposal to gather lessons-learned from agencies that have significant experience preparing Environmental Assessments (EAs) and create best practice principles to facilitate more efficient and cost-effective NEPA environmental reviews. For the third Pilot, CEQ selected a project to make a NEPA information technology tool more user-friendly and available to the public.

On January 13, 2012, CEQ and the U.S. Department of Transportation (DOT) announced the selection of a fourth NEPA Pilot to implement an innovative, efficient NEPA review process for high-speed passenger rail service in the Northeast Corridor. Through this Pilot project, CEQ and DOT will engage Federal, state and local governments and the public in the environmental review process earlier to set benchmarks that maintain rigorous environmental protections and save time and costs by avoiding conflicts and delays in the later steps of rail-project development.

CEQ intends to share the lessons learned from these projects widely throughout the NEPA community.

3. **White House — *Guidance on Scientific Integrity* (December 17, 2010)**
http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf

On December 17, 2010, the White House (Assistant to the President for Science and Technology and the Director of the Office of Science and Technology Policy) issued a memorandum to the heads of executive departments and agencies related to scientific integrity. This memo was a follow up to the March 2, 2009, Presidential Memorandum articulating six principles central to the preservation and promotion of scientific integrity. Under this memo, the Director of the Office of Science and Technology Policy is responsible for ensuring the highest level of scientific integrity in all aspects of the executive branch's involvement with scientific and technological processes. This guidance has particular relevance to NEPA since the CEQ NEPA regulations also call for scientific integrity in preparing NEPA documents.

4. **White House — Federal Infrastructure Projects Dashboard**
http://permits.performance.gov/

On August 31st, 2011, the President Obama issued a memorandum instructing Federal agencies to accelerate the pace of major infrastructure projects by improving permitting and environmental review processes, and to improve the accountability, transparency, and efficiency of Federal actions. The ***Federal Infrastructure Projects Dashboard*** enables people to track the status of high priority projects across the nation. Through environmental reviews and permit decisions, the Federal government ensures that infrastructure projects are designed and constructed in a manner consistent with protections for public health, safety, and the environment, and that the public is informed about the environmental impacts of proposed projects. At a time when job growth must be top priority, the Federal government has a central role to play in ensuring that our nation's infrastructure projects move as quickly as possible through Federal environmental review and permitting processes.

5. **U.S. EPA — *Amended Environmental Impact Statement Filing System Guidance for Implementing 40 CFR 1506.9 and 1506.10 of the Council on Environmental Quality's Regulations Implementing the National Environmental Policy Act***
http://www.epa.gov/compliance/resources/policies/nepa/amended-eis-filing-guidance-pg.pdf

On January 11, 2011, EPA amended the EIS Filing System Guidelines to help streamline the NEPA process for Federal agencies. Under the new system:

- EPA will now only require four copies of each EIS to be filed
- At least one copy of the entire EIS must be a paper copy; other copies can be on appropriate electronic storage devices, e.g., compact disks (CDs), USB flash drives, or memory cards
- EPA is encouraging agencies to publish their EISs online, and provide EPA with the web address via e-mail to EIS-Filing@epa.gov

- Provides procedures for how to submit EISs should EPA activate a Continuity of Operations Plan (COOP) (e.g., in response to an event that makes it impossible for EPA employees to work in their regular facility)

6. U.S. EPA — *Memorandum of Understanding (MOU) Between the U.S. Department of Agriculture, U.S. Department of the Interior and U.S. EPA Regarding Air Quality Analysis and Mitigation for Federal Oil and Gas Decisions through NEPA.*
http://www.epa.gov/compliance/resources/policies/nepa/air-quality-analyses-mou-2011.pdf

Under this MOU, the signatories are demonstrating their commitment to act collaboratively in order to protect air quality and air-quality-related values (AQRVs) and facilitate the responsible development of oil and gas resources on Federal lands. The MOU will accomplish these goals by providing:

- Commitments by the signatories' respective agencies to collaborate throughout the NEPA process, including providing the Lead Agency with input and assistance early in the process on appropriate analyses and mitigation to address air quality and AQRVs;
- Common procedures for determining which type of air quality analyses are appropriate and when air modeling is necessary;
- Specific provisions for analyzing and discussing impacts to AQRVs and for mitigating such impacts;
- A dispute resolution process to facilitate the timely resolution of differences among the signatories or their respective agencies; and
- Assurances that if the EPA determines the MOU procedures have been followed, it will rate the resulting NEPA analyses of air quality or AQRVs as "adequate" (and not "inadequate or "3")

7. U.S. EPA – New Web Resources for Environmental Justice and NEPA

- U.S. EPA recently launched a web page dedicated to Environmental Justice (EJ) considerations in the NEPA process. This web resource provides links to EJ guidance tools and documents that can be used by NEPA practitioners, including:
- Executive Order 12898, *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, and associated documents
- CEQ and Federal agency guidance on EJ and NEPA, for example:
  - Methodologies that support EJ considerations, including information on use of health impact assessments.
  - Online tools useful for EJ analyses, including EPA's NEPAssist and EJView, and other databases and geographic information mapping tools.

8. Various Agencies — Proposed and Recently Implemented NEPA Procedures/ Regulations – 2010-2012 (Partial list; complete list is available on CEQ's website (http://ceq.hss.doe.gov/current_developments/agency_NEPA_Procedures.html)

Proposed Agency NEPA Procedures

- Federal Highway Administration (FHWA): Notice of amending and extending existing *Memorandum of Understanding Assigning Environmental Responsibilities to Utah*. The MOU assigns to Utah the FHWA's responsibility for determining whether a project is categorically excluded from preparation of an environmental assessment or an environmental impact statement under NEPA and for carrying out certain other responsibilities for conducting environmental reviews, consultations, and related activities for Federal-aid highway projects. Draft published May 27, 2011, with comments requested by June 27, 2011 (76 FR 30995).

- Department of Energy (DOE): DOE proposes to amend its NEPA regulations (10 CFR Part 1021), particularly the categorical exclusions listed in Subpart D, and issued a Notice of Proposed Rule Making that was published in the Federal Register on January 3, 2011 (76 FR 214). The proposed changes are intended to better align the Department's regulations with DOE's current activities and recent experiences, and to update provisions with respect to current technologies and regulatory requirements. The comment period was reopened until March 7, 2011 (76 FR 9981). Additional information is available at http://nepa.energy.gov/1601.htm.

- National Indian Gaming Commission, Department of the Interior (NIGC): NIGC published proposed procedures for implementing NEPA and Executive Order 11514, Protection and Enhancement of Environmental Quality. Published December 4, 2009 with comments due January 18, 2010 (74 FR 63765) and comment period extended thru March 4, 2010 (75 FR 3756).

- Department of Housing and Urban Development (HUD): Amendments to HUD's Environmental Regulations published for comment September 12, 2007 (72 Federal Register 52264).

Recently Adopted Agency NEPA Procedures

- Department of the Interior, Office of Hawaiian Relations (OHR): OHR published procedures for implementing the NEPA by adding Chapter 7 to Departmental Manual 516. Published in draft December 3, 2009 with comments due January 4, 2010 (74 FR 63408); the final was published October 29, 2010 (75 FR 667775).

- Nuclear Regulatory Commission (NRC): NRC published a rule amending its environmental regulations at 10 CFR Part 51 by revising and establishing new categorical exclusions. The proposed regulations were published for public review

and comment on October 9, 2008 (73 FR 59540) and the final was published on April 19, 2010 (75 FR 20248).

- Department of Agriculture, Natural Resource Conservation Service (NRCS): NRCS published categorical exclusions for conservation and watershed rehabilitation activities that address actions, many funded under the American Recovery and Reinvestment Act 2 of 2009, that do not have significant effects on the quality of the human environment and therefore should be categorically excluded from more intensive environmental reviews under NEPA. Draft published July 13, 2009 (74 FR 33319) and final published February 10, 2010 (75 FR 6553).

- Department of Energy (DOE): DOE published a policy statement regarding online posting of certain categorical exclusion determinations. To further transparency and openness in its implementation of NEPA, all categorical exclusion determinations covered by Appendix B, Subpart D of DOE's NEPA Regulations at 10 CFR Part 1021 will be available at http://www.gc.energy.gov/nepa on a regular basis. Categorical exclusions of a classified, confidential, or otherwise sensitive nature will not be posted. Published October 9, 2009 (74 FR 52129).

- U.S. Agency for International Development (USAID): USAID published a directive for new categorical exclusions covering certain internal, domestic activities funded by their Operating Expense (OE) account. These activities include routine internal administrative actions, routine maintenance of domestic facilities, and procurement and deployment of information technology software and systems in existing facilities. USAID is planning on incorporating these CEs into a NEPA regulation for all USAID OE-funded actions later this year. The CEs and NEPA regulation will not apply to activities funded by appropriations through the USAID's program accounts nor will they affect the NEPA procedures for those activities in 22 CFR 216, Environmental Procedures. Published September 9, 2009 (74 FR 46413).

- Department of Energy (DOE): DOE published two variances from certain requirements of their NEPA procedures for American Recovery and Reinvestment Act grant activities.

    a. One variance applies to $156 Million in American Recovery and Reinvestment Act grant activities and the funding decisions for combined heat and power systems, district energy systems, waste energy recovery systems, and efficient industrial equipment. Funding decisions will be made without the DOE-prepared environmental critiques, environmental synopses, and supplemental reviews called for in 10 CFR 1021.216(c) through (h). Instead, DOE NEPA Compliance Officers will participate in a Merit Review Board that evaluates environmental questionnaires prepared by prospective grantees. The Merit Review Board will consider environmental effects when selecting potential projects, and continue to prepare EAs and EISs before commencement of activities that could affect the

environment. In accordance with 10 CFR 1021.343(c), DOE asserts that this variance is in the interest of public welfare by enabling expeditious completion of Recovery Act projects. Published August 18, 2009 (74 FR 41693).

b. The second variance applies to the $2 Billion in American Recovery and Reinvestment Act grant activities and the funding decisions for the Electric Drive Vehicle Battery and Component Manufacturing Initiative. Funding decisions will be made without the DOE-prepared environmental critiques, environmental synopses, and supplemental reviews called for in 10 CFR 1021.216(c) through (h). Instead, DOE NEPA Compliance Officers will participate in a Merit Review Board which will consider environmental effects when selecting potential projects, and continue to prepare EAs and EISs before commencement of activities that could affect the environment. In accordance with 10 CFR 1021.343(c), DOE asserts that this variance will reduce the time needed to process grant applications and is consistent with the requirement for expeditious initiation of Recovery Act activities. Published June 26, 2009. (74 FR 30558).

- Department of Commerce: Proposed Categorical Exclusions published for comment May 26, 2009 (74 FR 24782) and final published July 10, 2009 (74 FR 33204).

- Federal Highway Administration: Notice of Memorandum of Understanding Assigning Environmental Responsibilities to Alaska. Draft published October 14, 2008, with comments requested by November 28, 2008 (73 FR 60750). Final signed on September 22, 2009 http://www.dot.state.ak.us/stwddes/desenviron/index.shtml.

- Federal Transit Administration-Federal Highway Administration, Department of Transportation: Proposed Environmental Impact and Related Procedures - published for comment August 7, 2007 (72 FR 44038) and published as a final rule on March 24, 2009 (74 FR 12517).

9. National Research Council of the National Academies — *Improving Health in the United States: The Role of Health Impact Assessment (*2011)
http://www.nap.edu/catalog.php?record_id=13229

This new guidance document addresses health impact assessment (HIA) and includes discussions of the relationship of HIA to environmental impact assessment under NEPA. HIA is a systematic process that uses an array of data sources and analytic methods and considers input from stakeholders to determine the potential effects of a proposed policy, plan, program, or project on the health of a population and the distribution of those effects within the population. Health impact assessment provides recommendations on evaluating, monitoring, and managing those effects.

10. U.S. DOE — NEPA Lessons Learned Quarterlies 2011: Highlights of "lessons learned"
http://energy.gov/nepa/guidance-requirements/lessons-learned-quarterly-report

Each quarter, DOE issues a NEPA Lessons Learned Quarterly that not only covers developments with the agency, but also contains many articles about the latest NEPA developments throughout the federal government. Many new developments discussed above were featured in the Lessons Learned Quarterlies.

Commentary 2 – Lara Jarrett[6]

Project Management Tips for Professionals Preparing Environmental Documentation

As U.S. business conditions continue to improve, more private industries are considering capital expenditures beyond basic needs and productivity improvements (Norwood and Schools 2012). These improvements often require obtaining resource agency permits and developing environmental documentation. Obtaining these permits requires project managers to ensure the efficiency and quality of environmental documents and to manage the effectiveness of teams of environmental professionals preparing documents such as Environmental Assessments (EAs) and Environmental Impact Statements (EISs).

Project Managers are ultimately responsible for the overall successful planning and execution of a project (ProjectSmart 2012; Business Dictionary 2012). In the current example, the preparation of environmental documentation and other technical reports requires a technically savvy Project Manager with strong communication and leadership skills. Project Managers should be capable of establishing effective work approaches to efficiently mobilize teams, harness resources, and support organization learning. This essay is designed to aid Project Managers (and their teams) by providing recommended best practices for the management of environmental documentation projects. Many of the concepts in this essay were derived from *A Guide to the Project Management Body of Knowledge Fourth Edition* (*PMBOK® Guide*), which is an established standard for the project management profession distributed by the Project Management Institute (PMI 2008). Best practices and key issues for consideration are organized by the major phases of projects as defined by the PMBOK and include the following:

- Chartering: Formal authorization of a project (or one of its phases) by the Sponsor (typically the client or lead agency) and documentation of initial requirements to satisfy stakeholders needs
- Planning: Definition of methods to execute, monitor and control, and close or end project activities
- Execution: Creation of work products and direction of work by the Project Manager or Task Manager

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- Monitoring and Controlling: Evaluation of work progress and other metrics to identify potential issues
- Close-out: Documentation of the Sponsor's acceptance of final work products and organizational learning or "lessons learned"

These steps may occur concurrently or iteratively.

During Chartering, the project Sponsor, customers, or other stakeholders (including key staff) should agree on the overall project statement of work but also discuss how best to ensure successful implementation. General communication strategies, including interaction with the public, should also be conceptually defined. Under this phase, it is suggested that the Project Manager answer the following questions with the Sponsor and project team's input. Stakeholders should be consulted during this process as well.

- *What are the goals of the project? What conditions represent project success (e.g. schedule, budget)? What issues if left unresolved might adversely affect team performance?*
- *What are key risks for the project? How might they affect budget and schedule?*
- *What stakeholder involvement approaches can aid the team in gaining a better understanding of the stakeholders' concerns? Or resolve those concerns?*
- *Are there any unique work approaches that the Sponsor or cooperating agencies require?*

During Planning, the Project Manager, with input from the Sponsor, stakeholders, and team, should develop a Project Management Plan (PMP) reflecting the charter and including a project timeline, budget, quality management plan, any procurement plans, methods for communication within and outside the internal team, staffing, and methods to manage project risk. This may be the Scope of Work (SOW) signed by the Sponsor or it might be a supporting document to organize work as a supplement to the SOW. Questions to address in the PMP include the following:

- *Is the organization of tasks (or Work Breakdown Structure [WBS]) adequate to track individual work elements and assess budget under runs and over runs for major deliverables (e.g., Draft EIS, Final EIS)? Does the WBS support accountability for individual Task Managers?*
- *What is the temporal timeframe for the impact analyses?*
- *Are there any lead or cooperating agencies? If so, who are they and how specifically will the team interact with them?*
- *Who are the quality control reviewers inside and outside of the internal team? How long do they need for their review? What documents should they review – Affected*

Environment prior to Environmental Consequences or concurrently? Are there any special study plans that require their input prior to or during implementation?

- *How will documents be managed? Will document management systems be used to develop documents? How will the administrative record be captured and checked during document production?*

During Execution, the Project Manager's focus shifts to directing and managing the project. Typical activities include acquiring, developing, and managing the team, performing quality assurance reviews, conducting procurements, distributing information, and participating in stakeholder communications. In addition to every day involvement in work efforts, the Project Manager should also consider the following issues during Execution, which may involve changes in work approaches identified in the Planning phase:

- *When will the Project Manager conduct periodic team meetings and stakeholder meetings? Will they be on a regular schedule or around specific tasks or deliverables?*
- *Will Task Managers act as the Project Manager's delegates for specific project activities? How will the Project Manager interact with the Task Managers?*

Concurrent with Execution, Monitoring and Controlling is critical for project success. It allows the Project Manager and Task Managers to identify potential deficiencies and correct them before the overall project success is adversely affected. The following questions can be helpful to defining methods for this phase:

- *Will quality review comments be resolved with Quality Reviewers by individual parties? In large projects, will a Quality Manager be responsible for review tracking?*
- *Have any changes in regulations or guidance or alternatives under consideration affected the analyses of the document?*
- *How will changes in information and work approaches, including change orders, be distributed?*
- *When and how will progress be reported to the Sponsor and other stakeholders?*
- *How will progress be tracked in terms of schedule and budget? Will a tracking Gantt Chart and earned value analysis be used?*
- *Will a Program Control Manager or other professionals provide reports to the Project Manager and Task Managers?*

Following completion of all of the major deliverables, the Project Manager would lead preparation of reports to document completion and acceptance of project deliverables and collecting information on project performance. This Close-out provides an opportunity to evaluate past work and improve future work approaches. At a Close-out meeting, the following questions should be considered:

- *What work approaches were effective? Which approaches might be changed to be more effective?*
- *What are the typical costs and resources needed for future, similar work?*
- *How does the team share that knowledge to aid other teams?*

Ultimately, Project Managers should ask themselves the following questions regarding the team: "*Have I given them what they need to succeed? Are they asking for what they need?"* If the answer is No or Maybe, then the next consideration should be *"What can be done to correct this trend?"* This combination of retrospective evaluation by the Project Manager and effective tools and organization learning should aid organizations responding to environmental business trends and streamlining of environmental documentation in the United States.

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Appendix A – Summary of 2011 NEPA Cases, Lucinda Low Swartz, Esq

Summary of 2011 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
U.S. Department of Agriculture		
Center for Food Safety v. Vilsack, 636 F.3d 1166, 1171 (9th Cir. 2011)	APHIS– **USDA Animal and Plant Health Inspection Service**	**WIN** – Court overturned lower court decision mandating the destruction of Roundup Ready sugar beets planted pursuant to permits issued by the agency. The Court found that plaintiffs had failed to demonstrate irreparable harm and directed that the permits be given full force and effect. In challenging the permits in the lower court, plaintiffs claimed that APHIS violated NEPA by "artificially carving up" the stages of Roundup Ready sugar beet planting and production, rather than performing a single analysis of the crop's impacts as NEPA requires. They asserted standing on the basis of a NEPA procedural injury that threatened the concrete interests of their members, who include organic farmers and consumers. The court stated that "to show a cognizable injury in fact, therefore, Plaintiffs must demonstrate that (1) APHIS violated certain procedural rules; (2) these rules protect Plaintiffs' concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir.2003)." Although the court found that the lower court "properly concluded that these requirements were satisfied," the court stated that plaintiffs must also establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction," citing *Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, --- F.3d ---, 2011 WL 208360, at *3 (9th Cir. Jan. 25, 2011) which relied upon the U.S. Supreme Court's holding in *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008). "Plaintiffs have not demonstrated that the permitted steckling [juvenile sugar beet] plants present a possibility, much less a likelihood, of genetic contamination or other irreparable harm. The undisputed evidence indicates that the stecklings pose a negligible risk of genetic contamination, as the juvenile plants are biologically incapable of flowering or cross-pollinating before February 28, 2011, when the permits expire."

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CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
The Wilderness Society v. U.S. Forest Service, 630 F.3d 1173 (9th Cir. 2011)	USFS	Procedural ruling on who is entitled to intervene in a case involving a NEPA claim. The USFS took no position on whether three groups representing recreational interests were entitled to intervene in this litigation involving whether USFS was required to prepare an EIS for a travel plan designating 1,196 miles of roads and trails for use by motorized vehicles in the Sawtooth National Forest. "Today we revisit our so-called 'federal defendant' rule, which categorically prohibits private parties and state and local governments from intervening of right on the merits of claims brought under the National Environmental Policy Act of 1969 ('NEPA'), 42 U.S.C. §§ 4321 et seq. Because the rule is at odds with the text of Federal Rule of Civil Procedure 24(a)(2) and the standards we apply in all other intervention of right cases, we abandon it here. When construing motions to intervene of right under Rule 24(a)(2), courts need no longer apply a categorical prohibition on intervention on the merits, or liability phase, of NEPA actions. To determine whether a putative intervener demonstrates the 'significantly protectable' interest necessary for intervention of right in a NEPA action, the operative inquiry should be, as in all cases, whether 'the interest is protectable under some law,' and whether 'there is a relationship between the legally protected interest and the claims at issue.' *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir.1993). Since the district court applied the 'federal defendant' rule to prohibit intervention of right on the merits in this NEPA case, we reverse and remand so that it may reconsider the putative interveners' motion to intervene."
Sierra Forest Legacy v. Sherman, 646 F.3d. 1161 (9th Cir. 2011)	USFS	**WIN (mostly)** – This appeal concerns whether the process of establishing management guidelines governing 11.5 million acres of federal land in the Sierra Nevada region complied with both the procedural requirements of NEPA and the substantive restrictions of the National Forest Management Act (NFMA). Plaintiffs had challenged a 2004 Sierra Nevada Forest Plan Amendment and a timber harvesting project approved under that amendment. The district court found that USFS and related federal defendants violated NEPA by failing to consider alternative actions using the same modeling techniques and management priorities, but the court rejected several other NEPA and NFMA claims. The district court ordered USFS to prepare a supplemental environmental impact statement (SEIS) to remedy the NEPA error and

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CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		denied plaintiffs' requests to enjoin implementation of the 2004 Amendment in the interim. Plaintiffs appealed "a largely unfavorable summary judgment against them and a favorable but limited remedial order…." The court of appeals affirmed the district court's decision on the merits of plaintiffs' claims, holding that they had standing to assert a NEPA claim against the 2004 Amendment, but that the SEIS adequately addressed short-term impacts to old forest wildlife and disclosed and rebutted public opposition. The court also found that USFS did not violate NEPA when approving the timber harvesting project because the agency adequately addressed cumulative impacts of the proposed management action. USFS did violate NEPA by failing to update the alternatives from the 2001 Framework SEIS to reflect new modeling techniques used in the 2004 Framework SEIS. The court of appeals did vacate the district court's orders granting a limited remedy and remand for reconsideration of the equities of a substantive injunction without giving undue deference to government experts.
Minard Run Oil Company v. US Forest Service, ___F.3d.___ (3rd Cir. 2011) (2011 U.S. App. LEXIS 19265)	USFS	**LOSS** – This appeal concerns a dispute between the USFS and owners of mineral rights in the Allegheny National Forest (ANF). Although USFS manages the surface of the ANF, mineral rights in most of the ANF are privately owned. Mineral rights owners are entitled to reasonable use of the surface to drill for oil or gas. From 1980 until recently, the USFS and mineral owners had managed drilling in the ANF through a cooperative process. Mineral rights owners would provide 60 days advance notice to the Service of their drilling plans and the Service would issue owners a Notice to Proceed (NTP), which acknowledged receipt of notice and memorialized any agreements between the Service and the mineral owner about the drilling operations. However, as a result of a settlement agreement with environmental groups, the USFS changed its policy and decided to postpone the issuance of NTPs until a multi-year, forest-wide EIS is completed. Mineral owners and related businesses affected by this new policy sought to enjoin the USFS from implementing the policy, which would halt new drilling in the ANF. The District Court issued a preliminary injunction against the

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CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		Service, prohibiting it from making the completion of the forest-wide EIS a condition for issuing NTPs and requiring it to return to its prior, cooperative process for issuing NTPs. The USFS and environmental groups appealed. The Court of Appeals held that NEPA did not apply to the USFS' issuance of NTPs and thus that completion of an EIS prior to issuance of NTPs was not required. "The merits of appellees' first claim turns on whether the issuance of an NTP is a 'major federal action[] significantly affecting the quality of the human environment,' which under NEPA must be preceded by an appropriate environmental analysis. 42 U.S.C. § 4332(C). We have identified three types of agency action that typically constitute 'major federal action': 'first, where the agency itself undertook a project; second, where the agency supported a project by contract, grant, loan, or other financial assistance; and third, where the agency enabled the project by lease, license, permit, or other entitlement for use.' *N.J. Dept. of Envt'l. Prot. and Energy v. Long Island Power Auth.*, 30 F.3d 403, 417 (3d Cir. 1994). But '[f]ederal approval of a private party's project, where that approval is not required for the project to go forward, does not constitute a major federal action.' *Id.*; *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1310 (9th Cir. 1988). Accordingly, the dispositive question is whether mineral owners are required to obtain the approval of the Service, in the form of an NTP, before drilling in the ANF. We conclude that such approval is not necessary." "In sum, the Service does not have the broad authority it claims over private mineral rights owners' access to surface lands. Its special use regulations do not apply to outstanding rights and the limited regulatory scheme applicable to the vast majority of reserved rights in the ANF does not impose a permit requirement. [footnote omitted] Although the Service is entitled to notice from owners of these mineral rights prior to surface access, and may request and negotiate accommodation of its state-law right to due regard, its approval is not required for surface access. An NTP is an acknowledgment that memorializes any agreements between the Service and a mineral rights owner, but it is not a permit. Accordingly, on the record before it, the District Court

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CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		properly concluded that issuance of an NTP is not a 'major federal action' under NEPA and an EIS need not be completed prior to issuing an NTP. *See Sierra Club v. Penfold*, 857 F.2d 1307, 1310 (9th Cir. 1988); *Long Island Power Auth.*, 30 F.3d at 417. The court therefore correctly determined that appellees were likely to succeed on their claim that NEPA does not require the Service to conduct an environmental analysis prior to issuing an NTP."
Russell Country Sportsmen v. U.S. Forest Service, ___F.3d.___ (9th Cir. 2011)	USFS	**WIN** – Court reversed the district court, holding that NEPA does not require the agency "to prepare a supplemental draft environmental impact statement (EIS) where, as here, the final decision makes only minor changes and is qualitatively within the spectrum of the alternatives discussed in the draft EIS." USFS issued a revised Travel Management Plan governing recreational motorized and non-motorized use on 1.1 million acres of the Lewis and Clark National Forest. The draft EIS considered five summer alternatives and three winter alternatives. The most restrictive summer alternative would have allowed motorized use on 1,287 miles of roads and trails. The least restrictive summer alternative would have allowed motorized use on 2,262 miles of roads and trails. Each of the alternatives also would have permitted motorized vehicles within 300 feet of a road or trail for parking (i.e., accessing dispersed campsites), passing or turning around. The final travel plan adopted summer alternative 5, with several modifications, and winter alternative 2. Overall, the plan designated 1,366 miles for motorized recreational use, including 870 miles of routes open year-round and another 496 miles open seasonally. The plan also designated about 304 miles for groomed over-snow motorized travel and permitted over-snow, cross-country (i.e., off-road, off-trail) motorized travel on 483,000 acres between December 1 and May 15. The district court concluded that USFS violated NEPA by adopting restrictions on motorized use that fell outside the range of alternatives considered in the DEIS and by making numerous, significant changes to the DEIS without preparing a supplemental draft environmental impact statement, as required by 40 C.F.R. § 1502.9(c)(1)(i). "An agency can modify a proposed action in light of public

Summary of 2011 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
		comments received in response to a draft EIS. See id. § 1503.4(a). '[A]gencies must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input.' *California v. Block*, 690 F.2d 753, 771 (9th Cir.1982). If the final action departs substantially from the alternatives described in the draft EIS, however, a supplemental draft EIS is required: 'Agencies…[s]hall prepare supplements to either draft or final environmental impact statements if…[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns…' 40 C.F.R. § 1502.9(c) (emphasis added). "Section 1502.9(c) does not define the terms 'substantial changes' and 'relevant to environmental concerns.' The Council for Environmental Quality (CEQ), however, has published guidance on when changes to a proposed action will require preparation of a supplemental EIS. The CEQ guidance provides that supplementation is not required when two requirements are satisfied: (1) the new alternative is a 'minor variation of one of the alternatives discussed in the draft EIS,' and (2) the new alternative is 'qualitatively within the spectrum of alternatives that were discussed in the draft [EIS].' Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations [hereinafter "Forty Questions"], 46 Fed.Reg. 18,026, 18,035 (Mar. 23, 1981) (emphasis added). "The First, Eighth and Tenth Circuits have adopted this CEQ guidance as a framework for applying § 1502.9(c)(1)(i). See *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 705 & n.25 (10th Cir.2009); *In re Operation of Missouri River Sys. Litig.*, 516 F.3d 688, 693 (8th Cir.2008); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1292 (1st Cir.1996).12 We now join them in doing so." Addressing the areas in which the lower court found that the USFS decision had departed from the range of alternatives discussed in the draft EIS, the Court of Appeals ruled that: 1) the overall motorized use miles authorized by the travel plan are within the range of alternatives included in the DEIS. 2) trail closures included in the final plan, although not

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		included in any alternatives, were "minor variation[s]" within the spectrum of the alternatives discussed in the DEIS. 3) a modified dispersed camping rule included in the final plan lessened environmental impacts in comparison to alternatives discussed in the DEIS and was a minor variation. The court disagreed with the USFS argument that a change to a proposed action that only lessens environmental impact can never be a change that is "relevant to environmental concerns" for purposes of § 1502.9(c)(1(i), and said only that a modified alternative that lessens environmental impacts may tend to show that the new alternative is a minor variation and that no supplemental EIS is required. The court noted that "A new alternative, however, may lessen environmental impacts and yet fall outside the range of alternatives discussed in a draft EIS. Supplementation may be required, for example, when modifications to a proposed action, although lessening environmental impacts, also alter the overall cost-benefit analysis of the proposed action."
Montana Wilderness Association v. McAllister, 666 F.3d 549 (9th Cir. 2011)	USFS	**LOSS** – Court of Appeals affirmed the lower court decision finding that the USFS' adoption of a travel management plan for the Gallatin National Forest was arbitrary and capricious and thus violated the Administrative Procedure Act. Plaintiffs had argued that USFS violated NEPA by failing to adequately disclose and analyze the impact of the travel management plan on the study area's wilderness character. Holding that the Montana Wilderness Study Act of 1977 required USFS to ensure that current users of a wilderness study area were able to enjoy the wilderness character of the area as it existed in 1977 pending a congressional decision on whether to designate the area as wilderness, the court also held that the EIS prepared for the travel management plan did not include " 'a statement of the relevance of incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment.' 40 C.F.R. § 1502.22(b)(2)." Specifically, the court stated that USFS' "failure to appreciate the relevance of the historical increase in volume of use for purposes of its Study Act analysis also resulted in a failure to comply with NEPA

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		regulations requiring acknowledgment that relevant data are unavailable or incomplete." Although USFS lacked complete historical data that would allow it to quantify the volume of use increase precisely, the court held that the agency could not ignore increased volume of use altogether. The court ruled that the USFS must "take a fresh look at its decision and determine, after taking into account all of the impacts of increased motorized use volume, whether the motorized use restrictions it imposes are adequate to maintain 1977 wilderness character for the enjoyment of current users." "Our holding does not require the Service to do the 'impractical' or the 'nearly impossible,' as the Service protests. Although the Service must ensure that the study area's overall 1977 wilderness character is not degraded, there is no requirement that it replicate 1977 conditions precisely. We recognize that the Service's attempt to maintain 1977 wilderness character, including 1977 opportunities for solitude, may necessarily be approximate and qualitative. "We also acknowledge that the Service does not possess complete historical data illustrating changes in the volume of recreational use in the study area over time. But the proper response to that problem is for the Service to do the best it can with the data it has, not to ignore the volume of use increase completely. Agencies are often called upon to confront difficult administrative problems armed with imperfect data. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ('It is not infrequent that the available data do not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.'); *Natural Res. Def. Council, Inc. v. EPA*, 529 F.3d 1077, 1085 (D.C.Cir.2008) (describing the agency's efforts to evaluate health risks caused by certain industrial chemicals despite 'gaps in the data' by backfilling certain data points with 'environmentally protective defaults'). Our decision requires only that the Service grapple with the problem the statute defines." "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an

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		environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking….In addressing § 1502.22, the Service noted that historical data tracking changes in the volume of recreational use within the study area could not be obtained, but concluded that such data were not necessary in any event. This conclusion was apparently based on the Service's faulty determination that it was not obligated to maintain the study area's 1977 wilderness character, including 1977 opportunities for solitude, for the benefit of current users….As we have explained, the historical increase in volume of use is relevant to the Study Act analysis, contrary to the Service's reasoning. We accept the parties' agreement that if historical volume of use data are relevant to the Study Act analysis, they are also relevant for purposes of NEPA analysis, and thus are 'relevant to reasonably foreseeable significant adverse impacts' under § 1502.22. We therefore hold that the Service incorrectly determined that historical volume of use data are irrelevant for § 1502.22 purposes."
U.S Department of Energy		
California Wilderness Coalition v. U.S. Department of Energy, 631 F.3d 1072 (9th Cir. 2011)	DOE	**LOSS** – The court ruled that DOE failed to undertake any environmental study for its designation of national interest electric transmission corridors (NIETC) as required by NEPA. DOE had designated the corridors pursuant to the Energy Policy Act of 2005 which required DOE to designate such corridors in consultation with the affected states. Designation of an NIETC makes available a fast-track approval process to utilities seeking permits for transmission lines within the corridor and gives an applicant the right to acquire rights-of-way through eminent domain. After public meetings, DOE issued an order formally designating two NIETCs in 2007. In response to comments asserting that DOE was required to prepare a programmatic EIS, DOE stated that the designation of an NIETC does not significantly affect the quality of the human environment and that such designation is not a proposal that falls within the purview of NEPA. Contrary to DOE's position, the 9th Circuit noted their "precedents hold that an agency cannot merely assert that its decision will have an insignificant effect on the environment, but "must adequately explain its decision.'

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		Alaska Ctr., 189 F.3d at 859." "We are compelled to reject DOE's assertion because (1) its conclusory statement does not allow us to determine whether DOE took a 'hard look' at the potential environmental consequences; and (2) although the effects of the NIETCs may be uncertain and difficult to quantify, the potential consequences of such effects are significant enough to undermine DOE's conclusory determination that no EA need be prepared." Specifically, although the designation of an NIETC does not allow for the siting of a particular transmission facility (which would be subject to NEPA review), case law provides that agency action may constitute a major federal action even though the program does not direct any immediate ground-breaking activity (e.g., *Forelaws on Board v. Johnson*, 743 F.2d 677 (9th Cir. 1984)). The court also rejected DOE's assertion that the environmental impacts of NIETCs are speculative and that an agency action that has only speculative environmental impacts is not a major federal action. "Both the intent and impact of the NIETCs support the conclusion that they constitute major Federal action. They create "National Interest" corridors to address national concerns. The NIETCs cover over 100 million acres in ten States. Moreover, they create new federal rights, including the power of eminent domain, that are intended to, and do, curtail rights traditionally held by the states and local governments….In sum, we hold that the NIETCs are final agency actions that constitute major Federal actions. With respect to DOE's argument that the designation of NIETCs have no meaningful environmental impacts because they do not approve any specific sites, the court found that "[t]his perspective fails to appreciate that a decision to encourage, through a number of incentives, the siting of transmission facilities in one municipality rather than another has effects in both municipalities in terms of the values of land and proposed and potential uses of land. The effects may be difficult to measure and may be determined ultimately to be too imprecise to influence the Designation, but this is precisely the type of determination that only can be intelligently made after the preparation of at least an EA."

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		The court also pointed out that DOE had prepared a programmatic EIS for its designation of the West-wide Corridors for federal lands in 11 western states in 2007. Finally, the court stated that "[w]e cannot accept DOE's unsupported conclusion that its final agency action that covers ten States and over a 100 million acres does not, as a matter of law, have some environmental impact. … If the smaller West-wide Corridors are worthy of a PEIS, as detailed in the statement's executive summary, then a much larger NIETC is also presumptively worthy of an EA or EIS. In any event, DOE has failed to present the documentation necessary to allow us to determine that there are no environmental impacts or that DOE took a 'hard look' at the environmental impacts."
U.S. Department of Homeland Security (DHS)		
U.S. v. Coalition for Buzzards Bay, 644 F.3d 26 (1st Cir. 2011) (2011 U.S. App. LEXIS 9927)	U.S. Coast Guard	**LOSS** – Reversing the lower court decision, the Court of Appeals held that the USCG (formerly part of DOT and now part of the DHS) had failed to comply with NEPA in promulgating regulations that preempt a Massachusetts state law with respect to tank vessels operating in Buzzards Bay, MA. Specifically, USCG determined that its proposed action (promulgation of the rule) fell within a categorical exclusion and, for that reason, did not prepare an EA or an EIS. The court concurred that the proposed action fell within USCG categorical exclusions, but noted that "the applicability of a CE does not automatically relieve an agency of the obligation to prepare either an EIS or an EA." USCG had identified ten extraordinary circumstances exceptions which, if applicable, may trump a CE and require it to prepare an EIS or an EA. Further, USCG may not rely upon a CE if its proposed action triggers any of the extraordinary circumstances exceptions described in an incorporated DOT order. According to the court, "[t]he Coast Guard attempts to put a new gloss on the extraordinary circumstances described in its NEPA procedures. It claims the right to do so in consequence of its reassignment from the DOT to the Department of Homeland Security (DHS), which occurred in 2003. This reassignment, the Coast Guard implies, rendered its preexisting NEPA compliance procedures subject to creative interpretation (at least to the extent that they conflict with the DHS's own regulations)….Under the guise of this creative interpretation, the Coast Guard rips out the heart of its own exceptions….For

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		purposes of this case, the Coast Guard attempts to nullify plainly stated provisions of its own longstanding NEPA procedures — and judicial deference to agency interpretations cannot be stretched so far." The Coast Guard took the position during the rulemaking process that the document that included the incorporated DOT order was part of the regulatory mix. It never provided the public with any hint that either its reassignment to the DHS or the DHS's policies had effected a change in its procedures. Given USCG's continued reliance on materials predating its reassignment to the DHS, the absence of any explicit disavowal of the incorporated DOT order, and its failure to integrate the DHS regulations into its procedures, the court held that the NEPA determination in this case must give full effect to the content of the DOT instruction. One of the ten extraordinary circumstances exceptions in the DOT instruction is for proposed actions that are "likely to be highly controversial in terms of . . . public opinion." Although in its checklist USCG answered "no" without elaboration, the court found that this "bare-boned negative response" was arbitrary and capricious. "The record in this case belies the Coast Guard's conclusory determination that its proposed action was not likely to be highly controversial within the meaning of its own procedures and guidelines." "The short of it is that, during the time when rulemaking was underway, there was ferocious and widespread opposition to the Coast Guard's approach to the regulation of oil barges in Buzzards Bay. The Coast Guard knew of this opposition and also knew that much of it implicated the not implausible fear that environmental harm would ensue should the protections afforded by the [state law] be eliminated and the proposed federal standards adopted. In the idiom of the Coast Guard's own procedures, 'the potential significance of the proposed action's effects on the environment' was great." The court also found that this NEPA violation was not "harmless error" as the lower court had found. Contrary to other cases where some environmental analysis had been prepared, here the court noted "the Coast Guard did not

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		perform any environmental analysis at all. Indeed, it made no site-specific appraisal of the potential environmental effects of its proposed action. For ought that appears, it took no 'hard look' at the situation. It gave the matter the barest of glances and, in the parlance of the *Save Our Heritage* court, made no "reasoned finding." 269 F.3d at 61."
U.S. Department of the Interior		
Western Watersheds Project v. Kraayenbrink, 632 F.3d 472 (9th Cir. 2011)	BLM	**LOSS** – the Court of Appeals upheld a lower court decision, finding that BLM violated NEPA by failing to take a "hard look" at the environmental impacts of revised grazing regulations. The 2006 regulations decreased public involvement in public lands management, put new limitations on the BLM's enforcement powers, and increased ranchers' ownership rights to improvements and water on public lands. After the lower court enjoined the enforcement of the regulations, BLM ceased defending them, but intervenors maintained the appeal of the lower court decision. "Because we agree with the district court that the BLM violated NEPA and the ESA in adopting the 2006 amendments, we affirm the court's grant of summary judgment to Plaintiffs as to these claims. We also affirm the district court's permanent injunction enjoining the BLM regulations as set forth in the Federal Register of July 12, 2006, amending 43 C.F.R. Part 4100 et seq." The court did vacate the district court's decision with respect to FLPMA. "Plaintiffs argue that the BLM failed to take a 'hard look' at the significant environmental impacts of the 2006 Regulations. In particular, they fault the BLM for failing to respond to concerns raised by its own experts, FWS, the Environmental Protection Agency (EPA), and state agencies that the following changes would have significant environmental consequences: (1) reduction in public oversight and consultation in the management of grazing on public rangelands; (2) delayed enforcement, elimination of the Fundamentals of Rangeland Health as enforceable standards, and increased monitoring requirements prior to enforcement of the Standards and Guidelines; and (3) expansion of private rights to permanent structures and water on public lands. With respect to each of these three revisions, we review the comments and concerns raised by the public and interested

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		agencies in response to publication of the draft EIS." "An agency considering 'major federal actions significantly affecting the quality of the human environment' has an obligation under NEPA to prepare an EIS that in 'form, content and preparation foster[s] both informed decision-making and informed public participation.' *Native Ecosystems Council v. United States*, 418 F.3d 953, 958 n.4, 960 (9th Cir. 2005) (internal quotation marks omitted). The 'hard look' 'must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made,' *Metcalf*, 214 F.3d at 1142, and the final EIS must include a 'discussion of adverse impacts that does not improperly minimize negative side effects.' *Earth Island Inst. v. U.S. Forest Serv*., 442 F.3d 1147, 1159 (9th Cir. 2006), abrogated on other grounds by *Winter v. Natural Res. Defense Council, Inc*., 129 S. Ct. 365, 375 (2008). 'Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.' 40 C.F.R. § 1500.1(b). '[G]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.' *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (internal quotation marks omitted)." "Here, the BLM failed to address concerns raised by its own experts, FWS, the EPA, and state agencies. For example, the BLM offered no reasoned analysis whatsoever in support of its conclusion--which is in direct conflict with the conclusion of its own experts and sister agency, FWS--that there will be no environmental effect caused by both the across-the-board reduction in public involvement in management of grazing on public lands and the elimination of public input into particular management decisions." In addition, "[t]he Final EIS does not consider the environmental impact on the over 25 million acres of affected public rangelands of the requirement, under the 2006 Regulations, that monitoring data be collected by the agency prior to bringing an enforcement action. By failing to consider the impact of the 2006 Regulations on over 25 million acres of

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		affected public rangelands, the BLM 'entirely failed to consider an important aspect of the problem,' and, therefore, its no effect conclusion was arbitrary and capricious. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), abrogated on other grounds by *Winter*, 129 S. Ct. at 375. Furthermore, the BLM failed to consider the combined and synergistic effects of the proposed amendments. See *Or. Natural Res. Council*, 492 F.3d at 1132 (explaining that one of the 'specific requirements under NEPA is that an agency must consider the effects of the proposed action in the context of all relevant circumstances, such that where several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS' (quotation marks omitted))."; "We agree with the district court that the BLM violated the procedural requirements of NEPA and failed to take a 'hard look' when it failed to consider the combined effects of the 2006 Regulations. See *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) ('NEPA requires that where several actions have a cumulative or synergistic environmental effect, this consequence must be considered in an EIS.'). Finally, we note that the Final EIS offers no reasoned explanation for the BLM's change of policy from the 1995 Regulations. '[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.' *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)." "BLM makes substantial reductions in the avenues for public input because, as the BLM explains, such input is at times 'inefficient' and 'redundant.' Appendix FEIS at 37. The BLM's rationale falls short of the requirements of NEPA and the APA. The BLM has failed to consider relevant factors, failed to articulate a rational connection between the facts put forth by agency experts and the choices made, and changed course from current policy without a reasoned explanation. In short, the BLM's Final EIS has not provided a 'full and fair discussion' of the environmental impacts of the proposed regulatory changes, 40 C.F.R. § 1502.1, impairing both the

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		ability of the BLM to reach a reasoned decision and the ability of the 'larger audience' to play an effective role in the decisionmaking process. See *Dep't of Transp*., 541 U.S. at 768. Therefore, we conclude that the BLM has failed to take a 'hard look' at the environmental impacts of the 2006 Regulations as required by NEPA, and its conclusion in the Final EIS that the proposed action would have no significant environmental impact is arbitrary and capricious under the APA. We affirm the district court's grant of summary judgment to Plaintiffs."
Center for Environmental Law and Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011)	BoR	**WIN** – Environmental groups challenged a proposed incremental drawdown of water from Lake Roosevelt in Washington, alleging that the EA prepared was untimely and inadequate with respect to cumulative effects, indirect effects, and reasonable alternatives. The district court granted summary judgment to the defendants, holding that the NEPA documents thoroughly accounted for the project's cumulative impacts, that the EA's discussion of alternatives was sufficient in light of the long collaborative process between stakeholders that led to the drawdown project, and that the NEPA review was timely because BoR retained the discretion to move forward with the project or not. On appeal, the 9th Circuit stated that plaintiffs' most significant challenge was the cumulative effects analysis in the EA. However, the court found that the agency had adequately addressed such impacts: "Although we agree with [plaintiffs] that the portion of the EA exclusively devoted to cumulative effects is conclusory and unenlightening, reading the EA as a whole reveals that Reclamation understood and accounted for the cumulative effects of past projects." The court noted that the agency did not discuss the cumulative impacts of one reasonably foreseeable project known as the Odessa Subarea Special Study. However, the agency "committed itself to scrutinizing the cumulative effects of the Special Study with the drawdown project before implementing any action resulting from the Special Study. Under our precedents and the circumstances presented here, this procedure does not violate NEPA. Our review reveals no other deficiencies in the substance of the EA, and although Reclamation took several steps toward implementing the drawdown project before drafting the EA, it scrupulously adhered to NEPA's timing requirements. We therefore affirm the district court."

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U.S. Department of Transportation		
Southeast Alaska Conservation Council v. Federal Highway Administration, 649 F.3d 1050 (9th Cir. 2011)	FHWA	**LOSS** – The Court of Appeals held that a lower court decision granting summary judgment to plaintiffs was correct. This case involves an EIS prepared by FHWA and the Alaska Department of Transportation for the Juneau Access Improvements Project, which was proposed to improve surface access between Juneau and communities in southeast Alaska. After issuing a draft EIS in 1997 and considering comments for 2 years, the Alaska governor directed ADOT to discontinue most work on the EIS because the preferred alternative was too costly. In 2002, a new governor ordered completion of the EIS, but since more than 3 years had passed since the issuance of the draft EIS, ADOT and FHWA determined that a supplemental draft EIS should be prepared to address changes in project alternatives and potential environmental impacts. The supplemental draft EIS analyzed 10 alternatives. SEACC submitted comments asking that a "Better Ferry Service Alternative" be considered. The agencies issued a Final EIS in 2006 and in the response to comments dismissed the suggested alternative because it would require taking vessels from other parts of the system. After issuance of a ROD selecting a surface road and ferry terminal alternative, Plaintiff SEACC filed suit arguing that FHWA had violated NEPA by refusing to consider a reasonable alternative that called for improved ferry services using existing resources and that the agency's justifications for not considering the alternative were arbitrary. The lower court granted SEACC's motion for summary judgment, vacated the ROD, and enjoined all construction of the project until a valid EIS was issued. The State of Alaska, as an intervenor, appealed the decision; the federal defendant's appeal was voluntarily dismissed. In upholding the lower court's decision, the Court of Appeals found that "The district court therefore properly concluded that it was arbitrary for the FHWA to refuse to consider reassigning vessels as a project alternative on the basis that it would increase costs and reduce services elsewhere when the chosen project alternative could have been rejected for the same reason. By failing to examine a viable and reasonable alternative to the proposed project, and by not providing an adequate justification for its omission, the EIS issued by the FHWA violated NEPA."

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Barnes v. U.S. Department of Transportation, ___F.3d ___ (9th Cir. 2011)	FAA	**LOSS** – Plaintiffs challenge an order of the FAA concerning the proposed construction by the Port of Portland of a new runway at Hillsboro Airport (HIO). The FAA issued an EA/FONSI. Plaintiffs argued that the decision not to prepare an EIS was unreasonable for several reasons: (1) the FAA failed to consider the indirect effects of increased aircraft operations; (2) the context and intensity of the project requires that the FAA prepare an environmental impact statement; (3) the FAA failed to take a hard look at the cumulative effects of the project; and (4) the FAA failed to consider a reasonable range of alternatives. As a preliminary matter, the FAA argued that plaintiffs waived their NEPA arguments because they failed to raise them during the public comment period on the EA. The court recognized that "[p]ersons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)). The agency, however, bears the primary responsibility to ensure that it complies with NEPA and an EA's flaws 'might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.' *Public Citizen*, 541 U.S. at 765. This court has interpreted the 'so obvious' standard as requiring that the agency have independent knowledge of the issues that concern petitioners. '*Ilio 'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006). Our review of the record of the hearing held by the [defendants] and the written materials submitted by petitioners persuades us that they raised some, but not all the arguments they raise now….In sum, [plaintiff]s' comments sufficiently raised the argument that the EA should have considered the indirect effects of increased demand for aviation activities due to increased capacity. Furthermore, the EA's failure to address this argument is a flaw 'so obvious' that petitioners did not need to preserve it by raising it in their comments. [Plaintiff]s' arguments that the EA did not consider a reasonable range of alternatives and the impacts of a new control tower are both

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		waived and unpersuasive. They preserved their arguments that an EIS should have been prepared because the context and intensity of the project is significant and that the cumulative impacts analysis was deficient for failing to address zoning changes related to the airport and neighboring properties." With respect to the alternatives analysis, plaintiffs had recommended that monies "earmarked for aviation be redirected 'towards high-speed rail and environmentally sustainable transportation alternatives that provide protection for urban and rural communities from the negative impacts of aviation.' An EA, however, need only discuss alternatives that advance the purpose of the project. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246-47 (9th Cir. 2005). Here, the purpose of the project is 'to reduce congestion and delay at HIO in accordance with planning guidelines established by the FAA.' [Plaintiffs'] recommendations of alternative modes of transportation failed to alert the agencies to the argument that the range of alternatives to the project actually discussed in the EA was not reasonable." On the merits, the court concluded that the FAA was required to consider the environmental impact of increased demand resulting from the HIO expansion project. However, the court found that the "context and intensity" of the project did not independently require an EIS. The court rejected plaintiffs' argument that the EA was deficient because its analysis of greenhouse gases was not specific to the locale, stating that "the effect of greenhouse gases on climate is a global problem; a discussion in terms of percentages is therefore adequate for greenhouse gas effects." The court also stated that the project's greenhouse gas effects are not "highly uncertain" as plaintiffs had argued, but rather that "there is ample evidence that there is a causal connection between man-made greenhouse gas emissions and global warming. See *Massachusetts v. E.P.A.*, 549 U.S. 497, 508-10, 521-23 (2007) (discussing state of the science)…." "[T]he EA includes estimates that global aircraft emissions account for about 3.5 percent of the total quantity of greenhouse gas from human activities and that U.S. aviation accounts for about 3 percent of total U.S. greenhouse gas emissions from human sources. Because HIO represents less than 1 percent of U.S. aviation

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		activity, greenhouse emissions associated with existing and future aviation activity at HIO are expected to represent less than 0.03 percent of U.S.-based greenhouse gases. Because this percentage does not translate into locally-quantifiable environmental impacts given the global nature of climate change, the EA's discussion of the project's in terms of percentages is adequate." With respect to cumulative impacts, the court noted that the FAA had failed to consider the effects of two recent zoning changes impacting HIO. But because it appeared that the zoning changes would not be implemented, the court found this failure was "harmless error." In sum, the court remanded the case to the FAA with instructions to consider the environmental impact of increased demand resulting from the HIO expansion project, if any.
Northern Plains Resource Council, Inc. v. Surface Transportation Board, ___F.3d ___ (9th Cir. 2011)	STB	**LOSS** – The case arises out of three applications by the Tongue River Railroad Company, Inc. (TRRC) to build a 130–mile railroad line in Southeastern Montana to haul coal. The STB, or its predecessor, approved each of the three applications (individually, TRRC I, II, and III). The court held that the STB failed to take the requisite "hard look" at certain material environmental impacts inherent in TRRC II and III prior to approving those applications and thus remanded the decision back to the agency. In 1989, TRRC applied to construct and operate a 41-mile railroad (TRRC II) which was intended to connect with TRRC I to create a combined railroad line of 130 miles in order to bring coal from Wyoming's Powder River Basin to a mainline in Miles City, WY and then to other destinations in the Midwest. In addition to the preferred route proposed by the applicant, the agency analyzed the "Four Mile Creek Alternative" (which was 10 miles longer than TRRC's preferred route) because of concerns regarding potential environmental impacts. In 1996, the STB approved TRRC II, utilizing the Four Mile Creek Alternative with numerous mitigation conditions. Denying a TRRC petition for reconsideration proposing a new "Western Alignment" alternative in 1997, the STB stated that TRRC could file a new application for the Western Alignment. In 1998, TRRC filed a new application to build the Western Alignment instead of the Four Mile Creek Alternative (TRRC III). A Draft Supplemental EIS for TRRC III was issued in October 2004; the Final Supplemental EIS (including updates to the environmental reviews for TRRC I and II) was issued in

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		2006. The STB approved the construction and operation of the Western Alignment, along with numerous mitigation measures, in October 2007. Plaintiff environmental groups appealed the STB decision to the 9th Circuit claiming that the agency failed to adequately consider cumulative impacts, did not provide adequate baseline data to assess the impacts of the railroad, relied on "stale data," improperly limited the geographic scope of the direct impacts analysis and focused only on the railroad's right of way, erred by not creating a single EIS for all of the TRRC applications, and violated NEPA when it tiered its EIS to five other site-specific EISs. The court "reverse[d] and remand[d] on (1) the Board's cumulative impact analysis in TRRC III as to the reasonably foreseeable coal bed methane projects, the Otter Creek Coal Mine, and water quality analysis; (2) the adequacy of the baseline data in TRRC III as to the pallid sturgeon, sage grouse, fish and aquatic life, other wildlife, and sensitive plants; and (3) the Board's reliance on stale data, consistent with the analysis outlined above in Section I. We affirm the Board as to Petitioners' other environmental claims." As a preliminary matter, the court stated that "[w]hile we afford deference to the judgment and expertise of the agency, the agency must, at a minimum, support its conclusions with studies that the agency deems reliable. Lands Council, 537 F.3d at 994. The agency must 'explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable.' Id. The agency will have acted arbitrarily and capriciously when 'the record plainly demonstrates that [the agency] made a clear error in judgment in concluding that a project meets the requirements' of NEPA." "NEPA imposes a procedural requirement on federal agencies to 'take [ ] a 'hard look' at the potential environmental consequences of the proposed action.' Or. *Natural Res. Council v. Bureau of Land Mgmt*., 470 F.3d 818, 820 (9th Cir.2006) (quoting *Klamath–Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt*., 387 F.3d 989, 993 (9th Cir.2004)).'

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		Judicial review of agency decision-making under NEPA is limited to the question of whether the agency took a 'hard look' at the proposed action as required by a strict reading of NEPA's procedural requirements.' *Bering Strait Citizens for Responsible Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir.2008) (citing *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir.2001)). Through these procedural requirements, NEPA seeks to make certain that agencies 'will have available, and will carefully consider, detailed information concerning significant environmental impacts, and that the relevant information will be made available to the larger [public] audience.' *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.* ., 545 F.3d 1147, 1153 (9th Cir.2008) (citations and internal quotation marks omitted)." Cumulative impacts: "Petitioners contend that the Board's cumulative impact analysis in TRRC III ignores the combined impacts of future coal bed methane (CBM) well development and coal mining projects that will also come into being in Southeastern Montana. Petitioners further contend that the Board failed to account for the combined effects of the referenced projects and the likely effects on air quality, wildlife, and water quality of the proposed construction and operation of the TRRC railroad. We agree with Petitioners' contentions concerning the cumulative foreseeable effects of CBM wells and the Otter Creek Coal Mine." The court disagreed with the STB decision to limit its cumulative impact analysis to 5 years (3 years for construction of the railroad and 2 operational years). The STB partially justified its use of the 5-year timeframe because it had used a similar timeframe in the past, but did not explain why its default timeframe should necessarily apply in this case. Also, projects need not be finalized before they can be considered to be reasonably foreseeable. Baseline data: "Petitioners also contend that the TRRC II and III EIS documents do not provide adequate baseline data to assess the impacts of the railroad. Petitioners take issue with the Board's analysis concerning the pallid sturgeon, sage grouse, fish and aquatic resources, other wildlife, and sensitive plants. Because the TRRC III FSEIS does not provide baseline data for many of the species, and instead

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		plans to conduct surveys and studies as part of its post-approval mitigation measures, we hold that the Board did not take a sufficiently 'hard look' to fulfill its NEPA-imposed obligations at the impacts as to these species prior to issuing its decision." "NEPA requires that the agency provide the data on which it bases its environmental analysis. See Lands Council, 537 F.3d at 994 (holding that an agency must support its conclusions with studies that the agency deems reliable). Such analyses must occur before the proposed action is approved, not afterward. See *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 400 (9th Cir.1988) ('[T]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.') (internal citation and quotation marks omitted). '[O]nce a project begins, the 'pre-project environment' becomes a thing of the past" and evaluation of the project's effect becomes "simply impossible.' Id." "We recognize the Board's extensive mitigation efforts. However, such mitigation measures, while necessary, are not alone sufficient to meet the Board's NEPA obligations to determine the projected extent of the environmental harm to enumerated resources before a project is approved. Mitigation measures may help alleviate impact after construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem." Reliance on "stale data": "Petitioners also contend that the Board relied on stale data in making its TRRC III environmental impacts analysis. Board admits that it was unable to conduct on-the-ground surveys as part of the EIS process. The Board cites the rough terrain, rural location, and limited access due to private property as the reasons that it was unable to conduct on-the-ground surveys. The Board

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		instead relied on aerial surveys and photography, along with data from TRRC I and TRRC II. We agree with Petitioners that the Board's reliance on this data does not constitute a 'hard look' under NEPA." Geographic scope: "The Board did not arbitrarily limit the geographic scope to the railroad's ROW. The impact analysis was limited to the area surrounding the ROW for the study of land use, noise and vibration, and cultural resources because these disturbances are limited and not expected to travel far…. For other resources such as fish and wildlife, however, the Board did not limit the scope to the area surrounding the ROW." Connected actions: "[T]he timing of the TRRC applications precluded them from being filed as a single EIS. The railroad approved in TRRC I had independent utility in and of itself. The TRRC II and TRRC III applications do not have much utility outside of TRRC I. Nevertheless, when the Board approved TRRC II and TRRC III, it did incorporate the findings of the previous EISs and looked at the total environmental impact of the entire 130–mile railroad line even though it did not prepare one single comprehensive EIS." Tiering: "The Board contends that it did not impermissibly tier any other site-specific EISs but relied on the EISs only for general background information. We agree….The Powder River I, Montco Mine, CX Ranch, Tongue River Reservoir Dam, and coal-bed-methane production wells EISs are site-specific EISs that do not fall into either situation where tiering is permitted. However, Petitioners fail to explain what aspect of the TRRC environmental analysis directly relies on the incorporation of these other EISs. Thus, we reject Petitioners' contention that the Board engaged in illegal tiering."
Independent Agencies		
San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 635	USNRC	**WIN** – This case involved an NRC ruling (a) denying plaintiff San Luis Obispo Mothers for Peace (SLOMFP) request for a closed adjudicatory hearing on contentions challenging NRC's decision not to prepare an EIS for a proposed interim spent fuel storage installation (ISFSI) at the Diablo Canyon

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F.3d 1109 (9th Cir. 2011)		nuclear power plant in CA and (b) rejecting SLOMFP's contentions regarding the adequacy of NRC's supplemental EA (SEA) for the proposal. The 9th Circuit upheld the agency rulings. In an earlier case (*San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)), the court had concluded that NRC had unreasonably interpreted NEPA by refusing to consider the environmental impacts of potential terrorist attacks in its NEPA analysis for the Diablo Canyon ISFSI. Rejecting NRC's argument that security considerations resulted in "some kind of NEPA waiver," the court deemed its EA inadequate and remanded the case to the agency for further proceedings. On remand, NRC ordered its staff to prepare a revised EA addressing the likelihood and potential consequences of a terrorist attack at the ISFSI site. After issuing a draft, the agency issued a Final SEA and FONSI in August 2007. "[T]he SEA describes the NRC Staff's consideration of the 'potential radiological impacts of terrorist acts on spent fuel storage casks,' despite the Commission's belief that the probability of such an act is 'very low.' " "Responding to public comments, the SEA also notes…that: (1) the specific threat scenarios and source terms were 'sensitive information that cannot be disclosed publicly'; (2) Staff selected 'plausible' threat scenarios based on information gathered from federal agencies and the intelligence community; (3) a revised dose estimate, not an 'early fatalities' indicator, was used to assess environmental impact; and (4) while the probability of an attack could not be readily quantified, it could be 'qualitatively assessed to be acceptable.' " In a hearing request to NRC, SLOMFP submitted 5 contentions challenging the adequacy of the SEA, all of which were eventually denied by the agency. SLOMFP then petitioned the 9th Circuit for review. In denying the petition, the court held that "[T]he NRC's refusal to grant SLOMFP a closed hearing and access to sensitive information was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. Neither NEPA nor

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		the AEA requires such a hearing, and the NRC did not abuse its discretion by concluding that holding one would present unacceptable security risks. Furthermore, in its SEA, the NRC considered the relevant factors and reasonably concluded that an EIS is not necessary." NRC's Refusal to Grant a Closed Hearing. "Throughout the proceedings, SLOMFP sought 'identification and access to any security studies or other data relied upon by the NRC in reaching its [FONSI] conclusion.' Understanding that its request could involve classified or sensitive information, [SLOMFP] sought protected access to these materials in a 'closed' hearing. The NRC refused. SLOMFP contends that the NRC's refusal to grant its repeated requests for access to sensitive information in a closed hearing violated NEPA and the AEA. Because NEPA requires the NRC to 'engage environmental considerations to the fullest possible extent in its decision-making process,' and the AEA entitles parties 'to participate in the agency hearing process,' SLOMFP believes the NRC violated its statutory obligations and misread the Supreme Court's decision in [*Weinberger v. Catholic Action*]. We disagree. Neither NEPA nor the AEA requires a closed hearing, and the NRC did not abuse its discretion by concluding that holding one would present unacceptable security risks." "*Weinberger's* animating principle applies. As we explained in *Mothers for Peace, Weinberger* held 'that the Navy was required to perform a NEPA review and to factor its results into its decisionmaking even where the sensitivity of the information involved meant that the NEPA results could not be *publicized or adjudicated.'* 449 F.3d at 1034 (emphasis added). The same is true of the FOIA-exempt materials the NRC used in its NEPA process here. The NRC may satisfy NEPA even as it withholds FOIA-exempt materials; it 'must consider environmental consequences in its decisionmaking process, even if it is unable to meet NEPA's public disclosure goals by virtue of FOIA.' *Weinberger*, 454 U.S. at 143, 146." NRC's Discretionary Judgment. "Throughout the proceedings below, the NRC maintained that: (1) information the Commission must *consider* in its NEPA decisionmaking may be withheld from *public disclosure* under FOIA exemptions,

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		under *Weinberger;* (2) the NRC has a statutory obligation under the AEA to protect national security information; (3) meaningful hearings on the range of 'conceivable' terrorist scenarios could not be conducted 'without substantial disclosure of classified and safeguards information on threat assessments and security arrangements'; and (4) 'any benefit to be gained in this case from further disclosure is outweighed by the risks inherent in disseminating security-related information, even under a protective order.' The NRC's orders reasonably interpret NEPA, the AEA, and its own regulations." The court was "mindful" of the U.S. Supreme Court's admonition against imposing additional procedures on agencies' NEPA decisionmaking, citing *Vermont Yankee*. Instead the court must determine whether the agency complied with the procedures mandated by the relevant statutes. The court concluded that NRC had done so in this case with respect to a decision not to provide a closed hearing. <u>Adequacy of the SEA</u>. "SLOMFP challenges the SEA's adequacy under NEPA. The essence of its argument is that 'the NRC should have considered a group of credible attacks which could result in severe impacts and in fact required preparation of an EIS,' and that the Commission failed to do so by improperly selecting terrorist attack scenarios and refusing to consider a scenario presented by SLOMFP." However, the court found that "NRC screened 'plausible' threat scenarios on the basis of information from law enforcement and intelligence agencies. Staff confirmed this at oral argument, assuring the Commission that 'credibility' of attacks, not 'early fatalities, was the screening criterion." Calling into question NRC's rejection of a contention because it would be "impracticable" to adjudicate the range of alternate scenarios, the court agreed with the Commission that hearings on the issue would require substantial disclosure of classified and safeguards information. Citing *Weinberger v. Catholic Action*, the court found NRC's decision not to litigate was reasonable.