RECENT NEPA CASES (2010)

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ABSTRACT

This paper will review substantive NEPA cases issued by federal courts in 2010. The implications of the decisions and relevance to NEPA practitioners will be explained.

INTRODUCTION

In 2010, federal courts issued 43 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies: one decision from the U.S. Supreme Court, 23 decisions from the U.S. Courts of Appeal, and 19 decisions from the U.S. District Courts. These cases involved 13 different departments and agencies. The government prevailed in 29 of the 43 cases (67 percent).

Table 1 contains a synopsis of the 2010 substantive NEPA cases, and cases of particular interest are noted below.

STATISTICS

The U.S. Forest Service (USFS) again won first place as the agency involved in the largest number of NEPA cases, with 16 cases. The agency prevailed in 12 of the 16 cases (75 percent). BLM came in a distant second with 6 cases, of which they prevailed in 2 (33 percent).

In addition to the 6 BLM cases, other U.S. Department of the Interior agencies had another 6 cases:

- National Park Service (NPS) – 2 cases, winning 1 and losing 1
- Fish and Wildlife Service (FWS) – 2 cases, winning both
- Bureau of Reclamation (BurRec) – 2 cases, winning 1 and losing 1

The Federal Highway Administration (FHWA) also had 4 cases and prevailed in 3 of them. Another U.S. Department of Transportation agency – the Surface Transportation Board (STB) – was involved in 1 case which it won.

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The National Marine Fisheries Service (NMFS), part of the U.S. Department of Commerce, had 3 cases and prevailed in 2 of them.

The Animal Plant Health Inspection Service (APHIS) had 2 cases (including the one U.S. Supreme Court case) and prevailed in both.

The Army Corps of Engineers (ACOE), the only U.S. Department of Defense agency involved in court decisions this year, had 2 cases of which it won 1.

The Federal Energy Regulatory Commission (FERC), the U.S. Nuclear Regulatory Commission (NRC), and the U.S. State Department were each involved in 1 case and the agencies prevailed in all of them.

THEMES

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

- *Hapner v. Tidwell*, 621 F.3d 1239 (9th Cir. 2010)
- *Sierra Club v. Kimbell*, 632 F.3d 549 (8th Cir. 2010)
- *Rock Creek Alliance v. U.S. Forest Service*, 703 F. Supp.2d 1152 (D. Mont. 2010)
- *Sierra Club North Star Chapter v. LaHood*, 693 F. Supp.2d 958 (D. Minn. 2010)

And invalidated those where the agency failed to do so:

- *Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th Cir. 2010)
- *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, 608 F.3d 592 (9th Cir. 2010)
- *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187 (9th Cir. 2010)
- *Government of the Province of Manitoba v. Salazar*, 691 F. Supp.2d 37 (D.C.C. 2010)

U.S. SUPREME COURT DECISION

A NEPA case came before the U.S. Supreme Court, but the issue raised and the decision reached related primarily to the type of relief available when an agency violates NEPA requirements, rather than to NEPA requirements themselves.

In *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), conventional alfalfa growers and environmental groups brought action against Monsanto, the company that developed a genetically-altered "Roundup Ready Alfalfa (RRA)" plant and APHIS, which had deregulated the altered alfalfa plant before issuing an EIS. The district court held that APHIS violated NEPA when it deregulated RRA without first completing a detailed EIS. To remedy that violation, the court vacated the agency's decision completely deregulating RRA; enjoined APHIS from deregulating RRA, in whole or in part, pending completion of the EIS; and entered a nationwide permanent injunction prohibiting almost all future planting of RRA during the pendency of the EIS process. Monsanto and APHIS appealed, challenging the scope of the relief granted but not disputing that APHIS's deregulation decision violated NEPA. The 9th Circuit affirmed the district court decision, holding that the lower court had not abused its discretion in rejecting APHIS's proposed mitigation measures in favor of a broader injunction.

After finding Monsanto had standing to seek review of the lower court rulings and finding plaintiffs had standing to seek injunctive relief, the Court found that the district court had abused its discretion in enjoining APHIS from effecting partial deregulation and in prohibiting the planting of the altered alfalfa pending the agency's completion of its EIS. Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L. C*., 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641. This test fully applies in NEPA cases. See *Winter v. Natural Resources Defense Council*, Inc., 555 U.S. ----, ----, 129 S.Ct. 365, 172 L.Ed.2d 249. Thus, the existence of a NEPA violation does not create a presumption that injunctive relief is available and should be granted absent unusual circumstances.

The Court found that none of the four factors supported the district court's order enjoining APHIS from partially deregulating RRA during the pendency of the EIS process. Most importantly, respondents could not show that they would suffer irreparable injury if APHIS were allowed to proceed with any partial deregulation, for at least two reasons. First, if and when APHIS pursued a partial deregulation that arguably ran afoul of NEPA, plaintiffs may file a new suit challenging such action and seeking appropriate preliminary relief. Accordingly, a permanent injunction was not needed to guard against any present or imminent risk of likely irreparable harm. Second, a partial deregulation need not cause plaintiffs any injury at all; if its scope is sufficiently limited, the risk of gene flow could be virtually nonexistent. Indeed, the broad injunction entered by the lower court essentially preempted the very procedure by which APHIS could determine, independently of the pending EIS process for assessing the effects of a complete deregulation, that a limited deregulation would not pose any appreciable risk of environmental harm.

The Court also held that the district court erred in entering the nationwide injunction against planting RRA, for two independent reasons. First, because it was inappropriate for the district court to foreclose even the possibility of a partial and temporary deregulation, it follows that it was inappropriate to enjoin planting in accordance with such a deregulation decision. Second, an injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91. If, as plaintiffs concede, a less drastic remedy (such as partially or completely vacating APHIS's deregulation decision) was sufficient to redress their injury, no recourse to the additional and extraordinary relief of an injunction was warranted.

Justice Stevens dissented. Justice Breyer did not participate in the decision.

OTHER NEPA CASES

Cumulative Impact Analysis

- *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897 (7th Cir. 2010): Projects that are "nebulous" or not capable of meaningful analysis when an EIS is being prepared do not need to be considered in a cumulative impact analysis.

- *League of Wilderness Defenders – Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122 (9th Cir. 2010): Cumulative effects analysis was adequate where the agency used an "aggregate effects approach" without details on time, type, place, and scale for past actions. The court also found that the cumulative effects analysis was adequate because it was consistent with Council on Environmental Quality guidelines.

- *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, 608 F.3d 592 (9th Cir. 2010): A cumulative impact analysis that assumed all direct impacts will be avoided and mitigated and that all existing, proposed, and reasonably foreseeable future activities would avoid or mitigate all known and discovered resources is insufficient. Also, in order to prevail, plaintiffs need not show what cumulative impacts would occur. *But see, Center for Environmental Law and Policy v. U.S. Bureau of Reclamation*, 715 F. Supp.2d 1185 (E.D. Wash. 2010) (plaintiffs failed to mention any specific projects that were not considered in the cumulative impacts analysis.)

- *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010): A project need not be final to be "reasonably foreseeable." Interestingly, the court concluded that projects for which notices of intent to prepare an EIS were "too preliminary to meaningfully estimate their cumulative impacts."

- *Sierra Club North Star Chapter v. LaHood*, 693 F. Supp.2d 958 (D. Minn. 2010): Meaningful cumulative impact analysis was conducted where the agency set forth the geographic and time boundaries, summarized the existing condition of each potentially affected resource, summarized the impacts of the proposed project on each resource, identified other current and reasonably foreseeable future actions and their possible impacts on those resources, and discussed the potential for cumulative impacts on the resources and mitigation measures.

Purpose and Need and Alternatives

- *National Parks and Conservation Association v. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2010): EIS was inadequate because the purpose and need focused on the applicant's needs and unreasonably narrowed the alternatives to be considered. Although agencies are precluded from completely ignoring a private applicant's objectives, "[r]equiring agencies to consider private objectives… is a far cry from mandating that those private interests define the scope of the proposed project."

- *Biodiversity Conservation Alliance v. Bureau of Land Management*, 608 F.3d 709 (10th Cir. 2010): Agency had reasonably refused to give detailed study to a plan that would not meet the project's purposes. "Agencies may not define a project's objectives so narrowly as to exclude all alternatives….[b]ut where a private party's proposal triggers a project, the agency may 'give substantial weight to the goals and objectives of that private actor.'"

- *Weiss v. Kempthorne*, 683 F. Supp.2d 549 (W.D. Mich. 2010): It was appropriate for the agency to consider the applicant's economic goals and to eliminate from serious consideration an alternative that did not meet those goals.

- *Sierra Club North Star Chapter v. LaHood*, 693 F. Supp.2d 958 (D. Minn. 2010): Agency had no duty to analyze the alternatives put forward by plaintiffs because either they did not meet the purpose and need for the project or because they were adequately addressed in the supplemental final EIS. The "detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable."

Climate Change/Greenhouse Gas Emissions

- *Hapner v. Tidwell, 621 F.3d 1239* (9th Cir. 2010): Although plaintiffs argued that the EA should have addressed global warming, the court concluded that because the project involved a relatively small amount of land and it would thin rather than clear cut trees, "the EA adequately considered the Project's impact on global warming in proportion to its significance."

- *North Carolina Alliance for Transportation Reform v. U.S. Department of Transportation*, 713 F. Supp.2d 491 (M.D. N.C. 2010): EIS need not consider climate change where EPA comments did not "suggest the need to study greenhouse gases" and greenhouse gas emission analysis would not be informative or useful for this highway project.

Public Comments

- *Earth Island Institute v. Carlton*, 626 F.3d 462 (9th Cir. 2010): "The Forest Service responded in a sufficiently detailed manner to the range of comments submitted. NEPA requires no more."

Beneficial Impacts

- *Humane Society of the U.S. v. Locke*, 626 F.3d 1040 (9th Cir. 2010): Plaintiffs argued that NMFS' determination under the Marine Mammal Protection Act that sea lions were having a "significant negative impact on the decline or recovery" of listed salmonid populations necessarily implied that the environmental benefits of authorizing the lethal removal of sea lions would have a significant positive impact on the salmonid populations. They contended that this significant beneficial environmental impact triggered the duty to prepare an EIS under NEPA. The court stated that this was a question it did not need to resolve "because even if solely beneficial impacts trigger an EIS, the record does not demonstrate a significant beneficial impact on the human environment in this instance."

Readability

- *National Parks and Conservation Association v. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2010): Relevant discussion of a particular environmental impact was scattered throughout the EIS. "In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form. … Here, the discussion of eutrophication is neither full nor fair with respect to atmospheric eutrophication. A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together…. This patchwork cannot serve as a "reasonably thorough" discussion of the eutrophication issue."

Table 1. Summary of 2010 NEPA Cases

2010 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
U.S. Department of Agriculture		
***Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010)**	USDA - APHIS	**WIN** - Conventional alfalfa growers and environmental groups brought action against Monsanto, the company that developed a genetically-altered "Roundup Ready Alfalfa (RRA)" plant and APHIS, which had deregulated the altered alfalfa plant before issuing an EIS. The district court held that APHIS violated NEPA when it deregulated RRA without first completing a detailed EIS. To remedy that violation, the court vacated the agency's decision completely deregulating RRA; enjoined APHIS from deregulating RRA, in whole or in part, pending completion of the EIS; and entered a nationwide permanent injunction prohibiting almost all future planting of RRA during the pendency of the EIS process. Monsanto and APHIS appealed, challenging the scope of the relief granted but not disputing that APHIS's deregulation decision violated NEPA. The 9th Circuit affirmed the district court decision, holding that the lower court had not abused its discretion in rejecting APHIS's proposed mitigation measures in favor of a broader injunction. After finding Monsanto had standing to seek review of the lower court rulings and finding plaintiffs had standing to seek injunctive relief, the Court found that the district court had abused its discretion in enjoining APHIS from effecting partial deregulation and in prohibiting the planting of the altered alfalfa pending the agency's completion of its EIS. Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L. C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641. This test fully applies in NEPA cases. See *Winter v. Natural Resources Defense Council*, Inc., 555 U.S. ----, ----, 129 S.Ct. 365, 172 L.Ed.2d 249. Thus, the existence of a NEPA violation does not create a presumption that injunctive relief is available and should be granted absent unusual circumstances. The Court found that none of the four factors supported the district court's order enjoining APHIS from partially deregulating RRA during the pendency of the EIS process. Most importantly, respondents could not show that they would suffer irreparable injury if APHIS were allowed to proceed with any partial deregulation, for at least two reasons. First, if and when APHIS pursued a partial deregulation that arguably ran afoul of NEPA, plaintiffs may file a new suit challenging such action and seeking appropriate preliminary relief. Accordingly, a permanent injunction was not needed to guard against any present or imminent risk of likely irreparable harm. Second, a partial deregulation need not cause plaintiffs any injury at all; if its scope is sufficiently limited, the risk of gene flow could be virtually nonexistent. Indeed, the broad injunction entered by the lower court essentially preempted the very procedure by which APHIS could determine, independently of the pending EIS process for assessing the effects of a complete deregulation, that a limited deregulation would not pose any appreciable risk of environmental harm.

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		The Court also held that the district court erred in entering the nationwide injunction against planting RRA, for two independent reasons. First, because it was inappropriate for the district court to foreclose even the possibility of a partial and temporary deregulation, it follows that it was inappropriate to enjoin planting in accordance with such a deregulation decision. Second, an injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91. If, as plaintiffs concede, a less drastic remedy (such as partially or completely vacating APHIS's deregulation decision) was sufficient to redress their injury, no recourse to the additional and extraordinary relief of an injunction was warranted. Justice Stevens dissented. Justice Breyer did not participate in the decision.
***Natural Resources Defense Council v. U.S. Department of Agriculture,* 613 F.3d 76 (2d Cir. 2010)**	USDA - APHIS	**WIN** – Affirming a lower court decision, court of appeals held that APHIS complied with NEPA in adopting new regulations for the importation of unmanufactured wood packaging material into the US because the agency considered all reasonable alternatives. Plaintiffs argued that APHIS should have fully considered a phased-in substitute materials requirement. The court found that APHIS had considered a phase-in requirement. Further, the court held that the agency adequately evaluated a substitute-materials-only alternative and had reasonably explained its decision not to adopt it as the final rule. "Under the facts of this case, APHIS reasonably concluded that while a phased-in substitute-materials-only requirement would provide maximum plant protection with minimal adverse environmental consequences, it is not currently a workable alternative to an urgent problem in need of an immediate response."
***Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th Cir. 2010)**	UDSA - USFS	**LOSS** – USFS prepared an EA to examine livestock grazing and associated resource protection measures. "Because the Forest Service's environmental assessment was based on a nonexistent management indicator species (MIS), its habitat proxy analysis was not reliable. The Forest Service also failed to take the requisite "hard look" at the project as required by NEPA." ""If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project's impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a project," citing *Center for Biological Diversity*, 538 F.3d at 1220 (citations and internal quotation marks omitted). In addition, the USFS justifications for its decision not to supplement the EA in light of new information were unpersuasive. "Given the presence of potential nesting habitat and the corollary effect on that habitat of cattle grazing, the 2004 information impacted the project sufficiently that the [EA] should have been further revised. *See Klamath Siskiyou*, 468 F.3d at 560. We note that a revised [EA] considering the issues addressed above might come to a different conclusion than the original [EA] and necessitate the preparation of an [EIS].
***Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897 (7th Cir. 2010)**	USDA - USFS	**WIN** – Plaintiffs challenged an EIS prepared for a forest management project (Twentymile Project) in the Chequamegon-Nicolet National Forest in northern Wisconsin, arguing that the EIS failed to describe the reasonably foreseeable cumulative effects of another proposed timber sale (Twin Ghost Project). Affirming a lower court decision, the court of appeals found that at the time the EIS was prepared the Twin Ghost project was too nebulous to be discussed in any

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		meaningful way and thus that the cumulative impact analysis was sufficient. "We agree with our sister circuits that an agency decision may not be reversed for failure to mention a project not capable of meaningful discussion." *Environmental Protection Information Center v. United States Forest Service*, 451 F.3d 1005, 1014 (9th Cir.2006) ("although it is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now, if not enough information is available to give meaningful consideration now, an agency decision may not be invalidated based on the failure to discuss an inchoate, yet contemplated, project."); *Town of Marshfield v. FAA*, 552 F.3d 1, 4-5 (1st Cir.2008) (discussion of cumulative impacts of future action not required where "some…action was foreseeable but one could only speculate as to which… measures would be implemented); *City of Oxford v. FAA*, 428 F.3d 1346, 1353 (11th Cir.2005) ("An agency must consider the cumulative impacts of future actions only if doing so would further the informational purposes of NEPA"); *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 182 (3d Cir.2000) ("[P]rojects that the city has merely proposed in planning documents are not sufficiently concrete to warrant inclusion in the [environmental analysis] for the… project at issue here."). Before reaching the merits, the court addressed the USFS claim that plaintiffs had forfeited their argument by not raising it in the administrative proceeding or in the district court. In support of its argument, USFS relied on two cases: *Public Citizen v. United States Dept. of Transp*., 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004), and *Kleissler v. U.S. Forest Service*, 183 F.3d 196 (3d Cir.1999). In *Public Citizen*, the Supreme Court held that plaintiffs had forfeited their argument that the agency failed to consider alternatives because the plaintiffs had not raised new alternatives or urged the agency to consider new alternatives during the administrative process. 541 U.S. at 764. In *Kleissler*, the Third Circuit held that the plaintiff had failed to exhaust his administrative remedies by not presenting certain arguments in writing, instead raising them only informally at certain public meetings. 183 F.3d at 200-02. However, the court found that USFS had waived the forfeiture argument because it did not raise it in the district court.
***Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069 (9th Cir. 2010) (also involves BLM)**	USDA - USFS	**WIN** – The underlying case concerns an effort by Calpine Corporation to develop a geothermal power plant (Fourmile Hill Plant) near Medicine Lake, an area of spiritual significance to the Pit River Tribe and other tribes in the region. In 1988, BLM issued 2 10-year leases to allow drilling, extracting, producing geothermal resources. In May 1998, BLM extended the leases for 5 years. In September 1998, USFS and BLM issued a final EIS for the Fourmile Hill Plant and in May 2000 issued an ROD approving the plant. In 2002, BLM extended the leases for another 40 years. Pit River Tribe sued, alleging the agencies had violated various federal laws during the leasing and development process. Reversing a lower court decision, the court of appeals held in the earlier litigation that the agencies should have prepared an EIS prior to granting the May 1998 lease extensions and that the error was no cured by the later September 1988 EIS. The court held that the NEPA violations constituted a violation of the agencies' minimum fiduciary duty to the Pit River Tribe and that the 5-year lease extensions and subsequent 40-year extensions must be undone. On remand to the district court, the parties disagreed as to whether the agencies had to reconsider only the 1998 lease extensions and any subsequent decisions on the approval of the plant and 40-year extensions or

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		whether there were any lease rights remaining. The instant case addressed the appropriate remedy for the agencies' NEPA violations. "The district court's remand order sought to approximate what would have happened had the agencies used the proper procedures in 1998…. The district court's remand order requires that the agencies' decisions to extend Calpine's leases be 'undone,' void, as if they never happened. On remand, the agencies will now reconsider the relevant decisions, with a proper record and with proper environmental assessments."
***League of Wilderness Defenders – Blue Mountains Biodiversity Project v. Allen,* 615 F.3d 1122 (9th Cir. 2010)**	UDSA - USFS	**WIN** – Plaintiffs challenged the adequacy of an EIS on the Five Buttes Project involving 160,000 acres and 5,522 acres of commercial logging on the Deschutes National Forest. Court held that USFS "sufficiently considered and responded to opposing scientific views" and that the cumulative effects analysis was adequate without details on time, type, place and scale for past actions, instead using an "aggregate effects approach." The court also found that the cumulative effects analysis was adequate because it was consistent with the CEQ guidelines.
***Hapner v. Tidwell,* 621 F.3d 1239 (9th Cir. 2010)**	UDSA - USFS	**WIN** – USFS prepared an EA proposing 3 alternatives for the Smith Creek Project which would authorize logging and prescribed burning to reduce the chance of wildfires and to slow the spread of wildfires. The EA was issued for public comment; a final EA and FONSI were issued. Plaintiffs filed suit, claiming the project violated NEPA. The Service's EA cited the reduction of the risk of wildfires to local residents as a primary purpose of the Project. Plaintiffs argue that the Service violated NEPA by failing to address scientific debate concerning whether forest thinning actually reduces wildfire intensity. While a failure in an EA to discuss and consider evidence contrary to the agency's position would suggest that the agency did not take the requisite "hard look" at the environmental consequences" of its proposed action, in this case the court said that USFS had acknowledged the limits of the benefits that would be provided and did not claim that the project would eliminate wildfires in the area, but only that it would reduce the potential for wildfires. Plaintiffs also argued that the EA should have addressed global warming, but the court concluded that because the project involved a relatively small amount of land and it will thin rather than clear cut trees, "the EA adequately considered the Project's impact on global warming in proportion to its significance." The court also concluded that the EA sufficiently explained that its mitigation measures would minimize, and compensate for, any soil disturbance from the Project.
***Meister v. U.S. Department of Agriculture and U.S. Forest Service*, 623 F.3d 363 (6th Cir. 2010)**	USDA - USFS	**LOSS** - This case concerns USFS' management of recreational activities in the Huron-Manistee National Forests in MI, for which a management plan was issued in 1986. In 2003, USFS announced its intent to revise the plan, held public meetings, solicited public comments, and in 2005 issued a draft EIS that described 3 alternative plans and designated a preferred plan. A final plan, EIS, and ROD were issued in 2006. Plaintiff, after participating in the public comment process and an administrative appeal, filed suit to challenge the plan, arguing that USFS had unreasonably favored gun hunters and snowmobile users. He argued that USFS should have, but did not, consider the alternative of closing certain areas to gun hunting and snowmobiling as a means of resolving a conflict between high-intensity noise and quiet recreational activities. The court concluded that USFS had mischaracterized plaintiff's alternative as a proposal to ban hunting on the forest. "The Service was incorrect to conclude that Meister's proposed alternative fell outside the ambit of the relevant standards here. It seems more likely to us

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		that the Service's decision not to balance these competing uses, and to disregard its own ROS descriptions, is what fell outside the relevant standards. Meister's proposed alternative deserves serious consideration under the National Environmental Policy Act."
***Sierra Club v. Kimbell*, 632 F.3d 549 (8th Cir. 2010)**	USDA - USFS	**WIN** – USFS issued a Land and Resource Management Plan for the Superior National Forest. Sierra Club filed suit, arguing that the USFS assessment of the plan's environmental impacts violated NEPA because it failed to consider the plan's impact on the Boundary Waters Canoe Area Wilderness. Lower court's summary judgment for defendant USFS upheld in the court of appeals. "Our examination of the FEIS convinces us that the Forest Service took an appropriately "hard look" at the environmental consequences of the revised forest plan on the BWCAW." "Considered together, the agency's clear intention to act with neutrality towards the BWCAW, the evaluation of specific impacts to the wilderness area (including certain "edge effects"), and the inclusion of the BWCAW within broader environmental analyses persuade us that the Forest Service took the "hard look" required of it under NEPA. We thus conclude that the Forest Service did not act arbitrarily or capriciously in its development of the FEIS."
***Earth Island Institute v. Carlton,* 626 F.3d 462 (9th Cir. 2010)**	USDA - USFS	**WIN** – This case concerns post-wildfire logging in the Plumas National Forest. USFS initiated the Moonlight-Wheeler Project to remove burned trees posting a safety hazard to traffic in the project area, to recover the value of fire-killed trees, and to reestablish the forest through planting of seedlings. However, snag forest habitat created after a high-intensity fire is important to the black-backed woodpecker, a management indicator species. After plaintiffs challenged the Moonlight-Wheeler project, USFS agreed to re-evaluate the project as part of an EIS underway for non-hazard tree logging. USFS issued a Draft Revised EIS, Revised Final EIS, and ROD. The ROD authorized harvest of fire-killed trees. Plaintiffs filed motion for preliminary injunction to enjoin USFS from implementing the project, which was denied by the lower court. The court of appeals affirmed, finding that plaintiffs were not likely to succeed on the merits of it arguments. In particular, the court held that USFS responded in detail to specific comments raised by plaintiffs and to opposing scientific viewpoints. "The Forest Service responded in a sufficiently detailed manner to the range of comments submitted. NEPA requires no more. *McNair*, 537 F.3d at 1000, 1003. Accordingly, the district court did not abuse its discretion in finding that the Forest Service met its comment period obligations."
***Heartwood v. Agpaoa*, 628 F.3d 261 (6th Cir. 2010)**	USDA - USFS	**WIN** – Plaintiffs challenged a 2004 Forest Plan for the Daniel Boone National Forest because the USFS failed to consider a "no commercial logging" alternative and account for use of herbicides in an EIS and challenged an EA undertaken pursuant to the plan that inadequately addressed the effects of herbicide application. The court of appeals reversed a lower court's decision for the USFS and found that plaintiffs did not have standing to maintain the action. Specifically, "a plaintiff must show: '(1) it has suffered an 'injury in fact' that is (a) concrete and particularized[,] and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.' *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, Inc., 528 U.S. 167, 180-81 (2000). A plaintiff that sues a federal agency must also demonstrate that: (1) its complaint "relate[s] to 'agency action,' which is defined to include 'failure to act'"; and (2) it "suffered either 'legal wrong' or an injury falling within the 'zone of interests' sought to be protected by the statute on which [its]

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		complaint is based." *Ctr. For Biological Diversity v. Lueckel*, 417 F.3d 532, 536 (6th Cir. 2005) (citations omitted). Moreover, associations like Heartwood have yet another set of required showings: '(1) the organization's members would otherwise have standing in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the law suit." *Friends of Tims Ford v. Tenn. Valley Auth*., 585 F.3d 955, 966 (6th Cir. 2009). This mishmash of interrelated but slightly separate requirements—for associations suing because of federal agency action, eight in total—no doubt creates a web of confusion difficult to untangle. Unfortunately, Heartwood seems to have lost sight of the forest of constitutional standing for the trees of associational and agency standing, and it fails to allege with adequate specificity the central element of injury in fact." "We have explained that injury to aesthetic, recreational, or scientific interests may constitute 'concrete injury,' but we have stressed that 'plaintiffs can only suffer a concrete injury if the Forest Service . . . [is] undertaking or threatening to undertake activities that cause or threaten harm to the plaintiffs' protected interests.' *Lueckel*, 417 F.3d at 537. Both Mr. Chaplin and Ms. Schimmoeller's affidavits indicate that the Forest provides them with aesthetic, recreational, and scientific pleasure." The specificity requirement of standing "is assuredly not satisfied by averments which state that . . . [an individual] uses unspecified portions of an immense tract of territory." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). "[E]nvironmental plaintiffs seeking to establish standing must identify particular segments of a river, sections and sub-sections of a forest, or passes in a mountain range that they use and will continue to use, and that agency action will detrimentally affect."
***Lands Council v. McNair*, --- F.3d ----, 2010 WL 5300804 (9th Cir. 2010)**	USDA - USFS	**WIN** – This case challenged a USFS decision to thin 277 acres of old growth forest in the Mission Brush Project in the Idaho Panhandle National Forest on the basis that the project violated NEPA. USFS issued the Mission Brush FEIS and ROD in May 2004. This FEIS was later updated (as a result of litigation) in a Supplemental EIS; a supplemental FEIS and ROD was issued in 2006. The supplemental EIS contained additional information on cumulative effects and the methodologies for analyzing forest conditions, including wildlife analysis and stands of old-growth trees. The SFEIS also evaluated three alternative actions and one no-action alternative. The court affirmed a lower court ruling granting the USFS motion for summary judgment. In ruling for the USFS on the NEPA claims, the court said that plaintiffs had exhausted their administrative remedies before filing suit: "The purpose of the exhaustion doctrine is to permit administrative agencies to utilize their expertise, correct any mistakes, and avoid unnecessary judicial intervention in the process. *Buckingham v. U.S. Dep't of Agric*., 603 F.3d 1073, 1080 (9th Cir.2010). A party forfeits arguments that are not raised during the administrative process. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763-65 (2004). However, a claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir.2002). Accordingly, alerting the agency in general terms will be enough if the agency has been given 'a chance to bring its expertise to bear to resolve [the] claim.' *Id*. at 900. In finding for the USFS on plaintiffs' NEPA claims, the court ruled that it was "within the Forest Service's discretion to rely on its own data and to discount the alternative evidence proffered by Lands Council." In addition, "the Forest Service

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		considered the wildlife that could be affected by the proposed activities. The Forest Service assessed both capable and suitable habitat, as well as the quality and quantity of habitat necessary to support each species. In reaching its conclusions, the Forest Service relied on 'scientific literature, wildlife databases, professional judgment, recent field surveys, and habitat evaluations.' The Forest Service's methodology was validated as reliable and accurate through site visits of representative capable habitat, with an emphasis on stands considered 'currently suitable.' Indirect and cumulative impacts on the species were investigated and assessed."
***Habitat Education Center v. U.S. Forest Service*, 680 F. Supp.2d 996 (E.D. Wisc. 2010)**	USDA - USFS	**WIN** – Court found USFS supplemental EIS (prepared after court invalidated an earlier EIS) was adequate. In its ruling the court stated that an agency need not consider new alternatives in a supplemental EIS where the new analysis does not undermine alternatives already analyzed. Cumulative impact analysis was sufficient and the court concluded that USFS drew reasonable geographic boundaries.
***Habitat Education Center v. U.S. Forest Service*, 680 F. Supp.2d 1007 (E.D. Wisc. 2010)**	USDA - USFS	**WIN** - Court found USFS supplemental EIS for Northwest Howell timber project in the Chequamegon-Nicolet National Forest (prepared after court invalidated an earlier EIS) was adequate. A new cumulative impacts analysis in supplemental EIS does not require consideration of new alternatives and the supplemental EIS on Howell project need not include cumulative effects of Fishel project where EIS on Fishel project includes such information. The court also concluded that USFS drew reasonable geographic boundaries for purposes of cumulative impacts analysis.
***Wolf Recovery Foundation v. U.S. Forest Service*, 692 F. Supp.2d 1264 (D. Idaho 2010)**	USDA - USFS	**WIN** – The court denied plaintiffs' motion for preliminary injunction for USFS categorical exclusions on special use permit issued to use helicopters to dart and collar gray wolves in the Frank Church Wilderness. The Forest Service did not conduct an EA or EIS but instead found that the activity fell within the terms of two categorical exclusions. Court found that plaintiffs were unlikely to prevail on their claims.
***Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 689 F. Supp.2d 891 (W.D. KY 2010)**	USDA-USFS	**WIN** – The court found that an EA/FONSI was adequate for USFS decision to authorize the Continued Maintenance of Open Lands on the Land Between the Lakes National Recreational Area. The court also concluded that plaintiffs had exhausted their administrative remedies, or exhaustion would have been futile, and that plaintiffs had standing.
***Rock Creek Alliance v. U.S. Forest Service*, 703 F. Supp.2d 1152 (D. Mont. 2010)**	USDA-USFS	**LOSS** – Court held that the USFS decision approving the Revett Silver Company's Rock Creek Mine Project, a proposed underground copper and silver mine located near Rock Creek and the Clark Fork River in the Cabinet Mountain Wilderness on the Kootenai National Forest, was arbitrary and capricious. The mine was approved to take place in two phases: Phase I would involve construction of a preliminary evaluation adit (horizontal entrance to the underground mine) and Phase II would involve the construction of the underground mine, mill, and utility lines. Phase II could not begin until after the evaluation adit was complete, the mine owner submitted relevant information to USFS, and the agency updated its plan of operations accordingly. Plaintiffs claimed the final EIS lacked critical information resulting in an unreliable environmental baseline, that the agency should have considered an alternative that would have approved only the evaluation audit and not the entire project, that USFS unlawfully deferred its mitigation analysis and its environmental baseline and environmental impacts analysis, and that the final EIS failed to review the impacts of discharging mine

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		water to ground water. The court ruled that: • The decision not to consider Phase I as a separate alternative did not constitute a failure to take a "hard look" at the alternatives. The Forest Service reasonably argued that it was required to analyze Phases I and II together because of their contingent nature. • The EIS adequately discussed mitigation measures, noting that NEPA does not impose a substantive requirement that the Forest Service adopt mitigation plans; it imposes a procedural duty upon the agency to discuss mitigation in sufficient detail. *Robertson*, 490 U.S. at 352, 109 S.Ct. 1835. • The Forest Service may not address a deficiency in an EIS through the issuance of a supplemental information report. *Idaho Sporting Congress v. Alexander*, 222 F.3d 562 (9th Cir. 2000). The statements by the Forest Service and the Fish and Wildlife Service in 2003 show the agencies knew at the time that information on bull trout habitat and population was inadequate. The information should have been included in the Final EIS. The agency cannot "update its NEPA study" with a non-NEPA Supplemental Information Report issued four years after the Record of Decision. Court issued summary judgment in plaintiffs' favor on this issue. • Plaintiffs' claim regarding water discharge was premature.
***Alliance for the Wild Rockies v. Bradford*, 720 F. Supp.2d 1193 (D. Mont. 2010)**	USDA-USFS	**LOSS** – Court ruled that the USFS EIS for Grizzly Project, Miller Project, and Little Beaver Project on the Kootenai National Forest, Montana was not adequate. Although agency gave a "hard look" to issue of habitat standards, it did not disclose weaknesses or flaws in study even though the study was the best available scientific information. Further, the analysis of consequences at the Bear Management Unit (BMU) level, rather than a larger scale, was not adequate where agency did not give reasons for choosing BMU scale.
U.S. Department of Commerce		
***Humane Society of the U.S. v. Locke*, 626 F.3d 1040 (9th Cir. 2010)**	DOC - NMFS	**WIN** - In March 2008, the National Marine Fisheries Service (NMFS) authorized the states of Oregon, Washington and Idaho to kill up to 85 California sea lions annually at Bonneville Dam. To comply with NEPA, NMFS prepared an EA, which resulted in FONSI concluding that approval of the states' application would not significantly affect the quality of the human environment. Plaintiffs sued, arguing that the agency's action violated NEPA because it did not prepare an EIS. Plaintiffs first argued that NMFS's determination under the MMPA that sea lions are having a "significant negative impact on the decline or recovery" of listed salmonid populations necessarily implies that the environmental benefits of authorizing the lethal removal of sea lions will have a significant positive impact on these salmonid populations. They contend that this significant beneficial environmental impact triggers the duty to prepare an EIS under NEPA. "This is a question we need not resolve, however, because even if solely beneficial impacts trigger an EIS, the record does not demonstrate a significant beneficial impact on the human environment in this instance. First, just because NMFS has concluded that sea lions are having a significant negative impact on listed salmonid populations does not mean that the agency has also determined that the removal action authorized here will have a significant positive impact on these same populations. Second,

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		even if NMFS concluded that its action would have a 'significant' positive impact on the fish populations involved, that would not necessarily translate into a finding of a significant effect on the quality of the human environment, as required by NEPA: although both statutes speak of significance, the legal standards under the MMPA and NEPA are distinct." In the alternative, plaintiffs contended that NMFS should have prepared an EIS based on significant adverse impacts – the controversial and uncertain nature of the action, the action's potentially deadly consequences for Stellar sea lions that frequent the Bonneville Dam area, and the impacts to local wildlife viewing opportunities if sea lions were removed. The court found none of these persuasive.
***Friends of the East Fork, Inc. v. Thom*, 688 F. Supp.2d 1245 (W.D. Wash. 2010)**	DOC - NMFS	**WIN** – Although the court did not decide NEPA claims against incidental take permits for expansion of gravel mining activities in the East Fork Lewis River because it granted summary judgment against agencies on ESA claims, it did find that the alternatives in the EIS were reasonable, including two no-action alternatives.
***Consolidated Salmonid Cases*, 688 F. Supp.2d 1013 (E.D. Cal. 2010)**	DOC – NMFS	**LOSS** – The court ruled that the issuance and/or implementation of a Biological Opinion (BiOp) with Reasonable and Prudent Alternative (RPA) for the coordinated operations of the federal Central Valley Project (CVP) and State Water Project (SWP) was "major federal action" that would inflict harm on the human environment. Thus, NMFS and/or Bureau of Reclamation should have, but did not prepare an EA or an EIS. "The stakes are high, the harms to the affected human communities great, and the injuries unacceptable if they can be mitigated. NMFS and Reclamation have not complied with NEPA. This prevented in-depth analysis of the potential RPA Actions through a properly focused study to identify and select alternative remedial measures that minimize jeopardy to affected humans and their communities, as well as protecting the threatened species. No party has suggested that humans and their environment are less deserving of protection than the species. Until Defendant Agencies have complied with the law, some injunctive relief pending NEPA compliance is appropriate, so long as it will not further jeopardize the species or their habitat."
U.S. Department of Defense		
***Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers*, 619 F.3d 1289 (11th Cir. 2010)**	DOD - ACOE	**WIN** – Plaintiff challenged the ACOE's replacement of 1 mile of the ground-level Tamiami Trail with a bridge that would allow increased water flow into the Everglades National Park without preparation of an EA or EIS. The court found that the Omnibus Appropriations Act of 2009, which authorized the bridge, implicitly exempted the action from NEPA compliance. "In this case, we hold that the notwithstanding clause of the Omnibus Act, analyzed within its surrounding statutory language, repeals the relevant environmental laws so as to deprive the federal courts of subject matter jurisdiction over the Tribe's suits. The district court's finding that there was an "explicit exemption" from the environmental laws, while yielding the correct result, blurred the lines between the categories of repeal established in the cases. We believe it is correct and clearer to identify as such the general repealing clause that is at work here."
***Sierra Club v. Van Antwerp*, 719 F. Supp.2d 58 (D.D.C. 2010)**	DOD - ACOE	**LOSS** – Court rejected a FONSI on a permit for a 500-acre multi-use development in Tampa, FL located on wetlands which would need to be filled in order for the project to be completed as planned. An EIS should have been prepared where the project "is related to other actions with individually insignificant but cumulatively significant impacts" and there are "unique characteristics" (wetlands and

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		ecologically critical areas). "'[i]f any 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* agency action is taken.' *Grand Canyon Trust*, 290 F.3d at 339 (emphasis in original). Significance is determined by evaluating both the context of the action and the intensity of the impact. 40 C.F.R. § 1508.27. Intensity refers to the severity of the impact. …Under NEPA, if '*any* significant environmental impact *might* result' from an agency's actions, an EIS is required. *Grand Canyon Trust*, 290 F.3d at 339 (second emphasis added). Significance is determined by evaluating both the context of the action and the intensity of the impact and intensity refers to the severity of the impact. The criteria in NEPA's regulations for evaluating significance of environmental impacts highlight the need for an EIS because the [proposed development] site satisfies at least several of the criteria. *See Fund for Animals v. Norton*, 281 F.Supp.2d 209, 235 (D.D.C.2003) ("[O]ne or more significance factors can justify setting aside a [Finding of No Significant Impact]."). "The Corps presents the Court with no "rational connection" between the record and its decision to not prepare an EIS. See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856. Therefore, Plaintiff's motion for summary judgment regarding its NEPA claim is granted."
U.S. Department of the Interior		
***National Parks and Conservation Association v. Bureau of Land Management*, 586 F.3d 735 (9th Cir. 2010)**	DOI – BLM	**LOSS** – BLM prepared an EIS for a land exchange that would allow for the development of a 4,600-acre landfill on a former mining site near the Joshua Tree National Park in CA. The court held that the EIS was inadequate because the purpose and need focused on the applicant's needs and unreasonably narrowed the alternatives to be considered. "Other circuits have held that agencies must acknowledge private goals. Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1175 (10th Cir. 1999) ("Agencies . . . are precluded from completely ignoring a private applicant's objectives."); Burlington, 938 F.2d at 196 ("[T]he agency should take into account the needs and goals of the parties involved in the application."). Requiring agencies to consider private objectives, however, is a far cry from mandating that those private interests define the scope of the proposed project." Although finding that the discussion of impacts to bighorn sheep was sufficient, the court held that the EIS contained no specific discussion of eutrophication and that the relevant sections were scattered throughout the EIS. "In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form. *Block*, 690 F.2d at 761. Here, the discussion of eutrophication is neither full nor fair with respect to atmospheric eutrophication. A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together…. This patchwork cannot serve as a "reasonably thorough" discussion of the eutrophication issue."

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***Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, 608 F.3d 592 (9th Cir. 2010)**	DOI-BLM	**LOSS** – Plaintiffs argued that BLM's approval of an amendment to a plan of operations for an existing mineral exploration project in Nevada violated NEPA and other statutes. The project is located on the ancestral lands of the Te-Moak Tribe, which was well documented. The court concurred with the lower court's dismissal of the other claims, but reversed the decision denying plaintiff's motion for summary judgment on the NEPA claims. BLM prepared an EA and issued a FONSI conditionally approving the amendment and requiring the applicant to provide detailed maps prior to surface disturbing activities and to follow specific avoidance measures to protect cultural resources. Plaintiffs challenged BLM's FONSI on the grounds that (1) BLM failed to take a "hard look" at the amendment's cultural and environmental impacts because it approved all three phases of the amendment without obtaining sufficient information about each particular phase of exploration activities; (2) BLM did not conduct sufficient analysis of reasonable alternatives; and (3) BLM did not conduct sufficient analysis of cumulative impacts. After finding for defendants on the first two issues, the court held that BLM failed to include a proposed mining operation located within the "cumulative effects area" identified by BLM. "An EA's analysis of cumulative impacts 'must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.' *Lands Council*, 395 F.3d at 1028. 'General 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.' *Neighbors of Cuddy Mountain*, 137 F.3d at 1380. '[S]ome quantified or detailed information is required. Without such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide.' Id. at 1379." The EA failed to include the required "quantified or detailed information." The EA's discussion of the amendment's direct effects in lieu of a discussion of cumulative impacts is inadequate. The EA concludes that "[n]o incremental cumulative effects would occur to cultural resources as a result of the proposed project." To reach this conclusion, the EA reasons that all of the impacts from the expanded exploration activities will be avoided or mitigated and that all "[e]xisting, proposed, and reasonably foreseeable activities would avoid or mitigate all known and discovered resources." The court found this discussion, and the entire cumulative impacts section, to be "conclusory" and "vague." "We conclude that in order for Plaintiffs to demonstrate that the BLM failed to conduct a sufficient cumulative impact analysis, they need not show what cumulative impacts would occur. To hold otherwise would require the public, rather than the agency, to ascertain the cumulative effects of a proposed action. See id. Such a requirement would thwart one of the 'twin aims' of NEPA—to 'ensure[ ] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.' *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)"

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***Biodiversity Conservation Alliance v. Bureau of Land Management*, 608 F.3d 709 (10th Cir. 2010)**	DOI-BLM	**WIN** - In this appeal, environmental and citizens' groups challenged a 2003 BLM resource management plan amendment allowing natural gas development in Wyoming's Powder River Basin. Plaintiffs argued that BLM violated NEPA when it refused to study in detail their proposal to phase development in the Basin over decades. Affirming the lower court, the court of appeals found that the agency had reasonably refused to give detailed study to a plan that would not meet the project's purposes. "Our review of a decision not to consider a particular alternative is informed by a rule of reason and practicality. *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 432 (10th Cir.1996). The Bureau may eliminate alternatives that are 'too remote, speculative, impractical, or ineffective,' or that do not meet the purposes and needs of the project. *New Mexico ex rel. Richardson*, 565 F.3d at 708-09 & n. 30 (citation omitted). Agencies may not define a project's objectives so narrowly as to exclude all alternatives. *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir.2002). But where a private party's proposal triggers a project, the agency may 'give substantial weight to the goals and objectives of that private actor.' *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.,* 297 F.3d 1012, 1030 (10th Cir.2002)." The court found that the plaintiffs' phased development alternative would not help meet national energy needs, would not meet other project purposes, and would not help identify environmental impacts. "In sum, the Bureau reasonably concluded that phased development was impractical and would not meet the project's purposes. This ground is an adequate basis for the Bureau's decision."
***Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010)**	DOI - BLM	**WIN** – BLM prepared an EIS for the Atlantic Rim Natural Gas Field Development Project, which was designed to manage the resources on 270,000 acres of public and private land in south-central WY. After issuing the ROD, BLM began authorizing specific applications for permission to drill wells that were consistent with the project. Each approval was accompanied by an EA/FONSI. Plaintiffs challenged the EIS, ROD, and subsequent drilling permits arguing they were issued in violation of NEPA and other statutes. Affirming a lower court decision, the court of appeals held, among other things, that BLM was not required to address the cumulative impacts of two other potential development projects near the Atlantic Rim Project. "We agree with the district court that the incipient notion of the two projects expressed in notices of intent to prepare an EIS for each did not establish reasonable forseeability of the incremental impact of those projects in connection with the Atlantic Rim Project for purposes of § 1508.7. The history of the Atlantic Rim Project itself demonstrates that projects in their infancy have uncertain futures....Granted, a project need not be finalized to be 'reasonably foreseeable' under 40 C.F.R. § 1508.7. But neither was it arbitrary and capricious for the Bureau to omit from its cumulative impact analysis other projects for which nothing had been completed except notices of intent, each published after the Atlantic Rim Project's draft EIS had been released. The Bureau did not violate NEPA by concluding that these projects were too preliminary to meaningfully estimate their cumulative impacts in the Atlantic Rim Project EIS." The court also upheld the project's adaptive management plan did not violate NEPA's mandate to discuss possible mitigation measures in the EIS and ROD. "We agree with the district court that 'although the plaintiffs are dissatisfied with the level of protection provided under the current mitigation plan, the record clearly reflects that BLM analyzed and considered various alternatives and put in place measures far more stringent than those included in the original proposal.' *TRCP*, 605

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		F.Supp.2d at 275 (quoting *NRDC*, 525 F.Supp.2d at 122). By setting forth both fixed mitigation measures and an adaptive management plan, the Record of Decision amply fulfills NEPA's mandate to discuss mitigation measures. We can require no more."
***Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187 (9th Cir. 2010)**	DOI - BLM	**LOSS** – Plaintiffs challenged BLM's 2006 amendments to its grazing regulations on which, among other things, decreased public involvement in public lands management, put new limitations on BLM's enforcement powers, and increased ranchers' ownership rights to improvements and water on public lands. Plaintiffs argued that BLM violated NEPA by failing to take a "hard look" at the environmental effects of the regulations. Court of appeals upheld a lower court finding that BLM had violated NEPA by (1) failing to take a "hard look" at the environmental consequences of the proposed changes and to respond adequately to concerns and criticisms raised by the agency's own experts, FWS, and other agencies; (2) failing to consider adequately the combined effects of the regulatory changes; and (3) failing to offer a reasoned explanation for why BLM was changing its grazing management policies, particularly given that BLM sought to reduce public participation and roll back environmental protections. NOTE that in 2008, BLM dismissed its appeal and no longer sought to challenge the district court's judgment or defend the regulations. However, the intervenor organizations representing ranchers maintained their appeal.
***Center for Biological Diversity v. U.S. Department of the Interior,* 623 F.3d 633 (9th Cir. 2010)**	DOI - BLM	**LOSS** – The court invalidated an EIS for a land exchange that would transfer open pit copper mining land out of federal ownership such that it would not be subject to the Mining Act of 1872. BLM prepared the EIS but concluded that the impacts of the mining would be the same under the proposed action and no action alternatives. Plaintiffs argued that mining impacts would be much worse under private ownership than on land managed by the federal government because BLM would have to approve a mining plan of operations that included mitigation and monitoring, and challenged the adequacy of the EIS. The court held the EIS was inadequate because it failed to include a meaningful comparison of alternatives.
***Government of the Province of Manitoba v. Salazar*, 691 F. Supp.2d 37 (D.C.C. 2010)**	DOI - BurRec	**LOSS** – Court held that an EIS prepared by the BurRec was not adequate for the Northwest Area Water Supply Project, a joint venture between the U.S. and North Dakota that would draw water from Lake Sakakawea and transfer it across the continental divide in a 45-mile pipeline for use in Minot, ND and surrounding areas. BurRec was ordered to take a "hard look" at (1) the cumulative impacts of water withdrawal on the water levels of Lake Sakakawea and the Missouri River, and (2) the consequences of biota transfer into the Hudson Bay Basin, including Canada.

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***Center for Environmental Law and Policy v. U.S. Bureau of Reclamation,* 715 F. Supp.2d 1185 (E.D. Wash. 2010)**	DOI - BurRec	**WIN** – The court rules that an EA/FONSI for Lake Roosevelt Incremental Storage Releases Project, also known as the Lake Roosevelt Drawdown Project, which would divert water from Lake Roosevelt, the reservoir formed behind Grand Coulee Dam, for irrigation use in the Odessa Subarea was adequate. The court found that analyzing only the proposed action and no action alternative was reasonable where the EA was tiered to programmatic EISs that had analyzed "at least two of the alternatives suggested" by plaintiffs, and other alternatives would not meet the need for "a variety of water supply options and distribute the water to a variety of end uses" as stipulated in state law. Further, the EA adequately addressed the issue of induced growth which was subject to multiple factors and "is speculative at this stage." Incorporation by reference is appropriate in an EA, "so long as it sufficiently summarizes the relevant portions of those documents, as this final EA does." Plaintiffs failed to mention any specific projects that were not considered in the cumulative impacts analysis. Finally, it was not a NEPA violation for the agency to negotiate a water rights permit prior to completing EA/FONSI, because the permit did not commit agency to a specific choice of action.
***Forest Guardians v. U.S. Fish and Wildlife Service,* 611 F.3d 692 (10th Cir. 2010)**	DOI - FWS	**WIN** – Court found that an EA/FONSI was adequate to support a FWS decision regarding the reintroduction of a nonessential experimental population of endangered Northern Aplomada Falcons into southern New Mexico. In reaching this decision, the court looked beyond the administrative record to examine whether the agency had impermissibly committed itself to a course of action before beginning the NEPA process and concluded it had not. "Predetermination occurs only when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis – which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action." Here, the court found that "[a]t most, the evidence demonstrates that the FWS had a preferred alternative and that The Peregrine Fund shared that preference." "NEPA does not require agency officials to be 'subjectively impartial.' *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army*, 470 F.2d 289, 295 (8th Cir.1972). An agency can have a preferred alternative in mind when it conducts a NEPA analysis. 40 C.F.R. §1502.14(e); *see also Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin*., 126 F.3d 1158, 1185 (9th Cir.1997) (noting that 'an agency can formulate a proposal or even identify a preferred course of action before completing an EIS'). 'The test of compliance ... then, is one of good faith objectivity rather than subjective impartiality.' *Envtl. Def. Fund, Inc.*, 470 F.2d at 296. However, 'the comprehensive 'hard look' mandated by Congress and required by [NEPA] must be timely, and it 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; *accord Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F.Supp.2d 1249, 1257-58 (D.Wyo.2004)."
***Defenders of Wildlife v. Salazar*, 698 F. Supp.2d 141 (D.D.C. 2010)**	DOI - FWS	**WIN** – Court found EIS for management of National Elk Refuge in Jackson Hole, WY adequate. The adaptive management strategy "adequately addressed the possible environmental impacts and mitigation measures."

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***Weiss v. Kempthorne*, 683 F. Supp.2d 549 (W.D. Mich. 2010)**	DOI - NPS	**WIN** – The court ruled that the EA/FONSI for development of a golf course in Benton Harbor, Michigan as part of the Harbor Shores project was adequate. In addressing plaintiff's claims regarding alternatives, the court found that it was appropriate for the agency to consider the applicant's economic goals and to eliminate from serious consideration an alternative that did not meet those goals. The court also held that EAs prepared by NPS and ACOE did not improperly segment the proposed action because there was "no indication" that the separate EAs "allowed the agencies to avoid" an EIS. Although it did not include the entire Harbor Shores project in its EA, the scope of the NPS EA was adequate because "NPS and the Corps have already conducted a review of the entire project in accordance with their respective jurisdictional authorities."
***Recent Past Preservation Network v. Latschar*, 701 F. Supp.2d 49 (D.D.C. 2010)**	DOI - NPS	**LOSS** – Programmatic EIS not sufficient for NPS decision to remove the historic Gettysburg Cyclorama Center on Ziegler's Grove in Gettysburg National Park. The agency could not rely on a general management plan EIS for a site-specific decision. Although there is a 6-year statute of limitations to bring NEPA claims and the ROD was signed in 1999, the court held that the ROD issuance had not started the clock because the agency had not yet solicited bids for the project by November 2008.
U.S. Department of State		
***Sierra Club v. Clinton*, 689 F. Supp.2d 1147 (D. Minn. 2010)**		**WIN** – This case involved the State Department issuance of permits to build and operate the Alberta Clipper Pipeline from Canada to Wisconsin. The court did not reach the merits of the case but noted that the "but for" test is not enough to establish that other projects are connected or cumulative and that plaintiffs were not likely to be able to show a reasonably close causal relationship between development of the Canadian tar sands and the AC Pipeline. The court also ruled that the ACOE and USFS had properly engaged the State Department in the preparation of an EIS for the project and that the EIS was not required to analyze "alternatives such as energy efficiency, renewable energy, clean technologies, and demand-side management."
U.S. Department of Transportation		
***Slockish v. U.S. Federal Highway Administration*, 682 F. Supp.2d 1178 (D. Or. 2010)**	DOT - FHWA	**LOSS** – This case involved a highway-widening project on Highway 26 in Oregon. The court allowed the case to proceed, finding that it was sufficient if one plaintiff had established standing and that the case was not moot if there was ongoing harm to plaintiffs' interests and where controversy remained live.
***Sierra Club North Star Chapter v. LaHood*, 693 F. Supp.2d 958 (D. Minn. 2010)**	DOT - FHWA	**WIN** – This case involved a proposed bridge that would cross the Lower St. Croix River near Oak Park Heights, Minnesota. Although finding that a related NPS Section 7 evaluation was arbitrary and capricious, the court rejected all of plaintiff's NEPA claims and found that the FHWA EIS prepared for the project demonstrated the agency had given a "hard look" to environmental impacts. Specifically, the court ruled that the agency had no duty to analyze the alternatives put forward by plaintiffs because either they did not meet the purpose and need for the project or that adequately addressed them in the supplemental final EIS. "Overall, while Sierra Club 'points to some alternatives that might have been considered or discussed more fully, the `detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable.'' *Laguna Greenbelt, Inc. v. U.S.*

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		Dept. of Transp.,42 F.3d 517, 528 (9th Cir.1994) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,435 U.S. 519, 551, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)). The SFEIS discusses an appropriate range of reasonable alternatives sufficient to satisfy NEPA." The court also found that the FHWA adequately addressed the indirect impacts of the proposed bridge ("The Court holds that FHWA's indirect effect analysis was sufficient. … It identified indirect effects and mitigation measures to minimize those effects.") and that the FHWA adequately addressed cumulative impacts ("When read as a whole, FHWA's cumulative impacts analysis is a reasonable assessment, considering the relevant factors, which satisfies the 'hard look' requirement under NEPA."). With respect to the cumulative impact analysis, the court stated that "The analysis sets the geographic and time boundaries of the cumulative impacts assessment. It then summarizes the existing condition of each potentially affected resource. The analysis summarizes the impacts from the Proposed Bridge on each potentially affected resource and identifies other current and reasonably foreseeable future actions and their possible impacts on those resources. Finally, the analysis discusses the potential for cumulative impacts on the resources and mitigation or minimization measures. This approach constitutes a 'meaningful cumulative impact analysis.' *Grand Canyon Trust v. FAA*,290 F.3d 339, 345 (D.C.Cir.2002)."
***Sierra Club v. Federal Highway Administration*, 715 F. Supp.2d 721 (S.D. Tex. 2010)**	DOT - FHWA	**WIN** – Court found FHWA EIS for construction of Segment E, a 15-mile stretch of new highway in northwest Houston projected to be part of a 180-mile loop around Houston known as the Grand Parkway, was adequate. The court reiterated that there is no "minimum number of alternatives that an agency must consider" and that, in this case, the agency had "provided a reasonably complete discussion of possible mitigation measures."
***North Carolina Alliance for Transportation Reform v. U.S. Department of Transportation*, 713 F. Supp.2d 491 (M.D. N.C. 2010)**	DOT - FHWA	**WIN** – Court found an FHWA EIS for construction of Winston-Salem Northern Beltway around the city of Winston-Salem, North Carolina was adequate, ruling that it need not consider climate change where EPA comments did not "suggest the need to study greenhouse gases" and greenhouse gas emission analysis would not be informative or useful for this highway project.
***Commuter Rail Division v. Surface Transportation Board*, 608 F.3d 24 (D.C. Cir. 2010)**	DOT - STB	**WIN** – Canadian Pacific RR and Dakota, Minnesota & Eastern RR applied to the STB for approval of a merger in which a CPRR subsidiary would acquire DME and its subsidiary. STB approved the acquisition. Sierra Club challenged STB decision to defer preparation of an EIS until CPR decided whether to proceed with construction of a line connecting DME's track in SD to coal mines in WY. Court found Sierra Club had no standing to bring the claim. Sierra Club claimed Article III standing as the representative of two of its members. "An organization has representational standing to litigate on behalf of its members 'if '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'' *Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1134-35 (D.C.Cir.2005) (quoting *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996)) (internal quotation omitted). Sierra Club fails the first prong of this test because it has not shown that either of the two members has standing in his own right. The 'irreducible constitutional

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		minimum of standing contains three elements': (1) injury-in-fact, (2) causation, and (3) redressability.' *Jackson County, N.C. v. FERC*, 589 F.3d 1284, 1288 (D.C.Cir.2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (internal quotation omitted). Thus, to demonstrate standing, 'a petitioner must allege (1) a personal injury-in-fact that is (2) fairly traceable to the defendant's conduct and (3) redressable by the relief requested.' *Int'l Bhd. of Teamsters*, 429 F.3d at 1134 (internal quotations omitted). Sierra Club has not made the required showing because neither Snyder's declaration nor Clauson's declaration alleges an injury that was caused by the Board's decision in this case."
Independent Agencies		
***South Coast Air Quality Management District v. Federal Energy Regulatory Commission*, 621 F.3d 1085 (9th Cir. 2010)**	FERC	**WIN** – North Baja Pipeline applied for a certificate of public convenience and necessity with FERC for the expansion and modification of its existing pipeline system to allow for transport of foreign-sourced natural gas from Mexico into the Basin Region of southern CA, in the jurisdictional area of the South Coast Air Quality Management District. In 2007, FERC issued an EIS. Plaintiff argued the EIS only examined the environmental impact relating to the construction and operation of the new pipeline itself, and failed to consider the impact of the emissions resulting from the eventual use of the pipeline's gas by consumers in the Basin and to adopt measures to mitigate that impact. Finding that FERC adequately considered this impact in its EIS, the court did not resolve the issue of whether the agency was required to do so. "[I]n its EIS, FERC explicitly considered the environmental impact of downstream emissions and imposed what it reasonably believed to be effective measures to mitigate the impact."
***Morris v. U.S. Nuclear Regulatory Commission*, 598 F.3d 67 (10th Cir. 2010)**	NRC	**WIN** – In 1997, NRC (with BLM and BIA) issued a final EIS for in situ leach uranium mining on 4 sites in New Mexico proposed by Hydro Resources, Inc.(HRI). NRC issued a license to HRI in 1998. Plaintiffs argued that NRC failed to comply with NEPA because of the manner in which the agency considered airborne radiation at one of the sites. "Under NEPA, [o]ur job is not to question the wisdom of the agency's ultimate decision or its conclusion concerning the magnitude of indirect impacts. Rather, our job is to examine the administrative record, as a whole, to determine whether the agency made a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision-making." Based on excerpts from the FEIS, the court concluded that the NRC did consider the cumulative effects of airborne radiation from past mining as well as that expected from HRI's proposed operations. Plaintiffs also argued that the FEIS, in addressing the effects of the past mining operations, erroneously treated the airborne radiation already being emitted from the debris as naturally occurring rather than as man-made background radiation. "Even if it did so, the FEIS still adequately considered the cumulative impact from all of these sources of airborne radiation, regardless of how the NRC characterized that airborne radiation."