RECENT NEPA CASES (2013)

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ABSTRACT

This paper will review substantive NEPA cases issued by federal courts in 2013. The implications of the decisions and relevance to NEPA practitioners will be explained.

INTRODUCTION

In 2013, the U.S. Courts of Appeal issued 21 decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 21 cases involved 10 different departments and agencies. The government prevailed in 19.5 of the 21 cases (93 percent). The U.S. Supreme Court issued no NEPA opinions in 2013; opinions from the U.S. District Courts were not reviewed. For comparison purposes, Table 1 shows the number of U.S. Court of Appeals NEPA cases issued in 2006 – 2013, by circuit. Figure 1 is a map showing the states covered in each circuit court.

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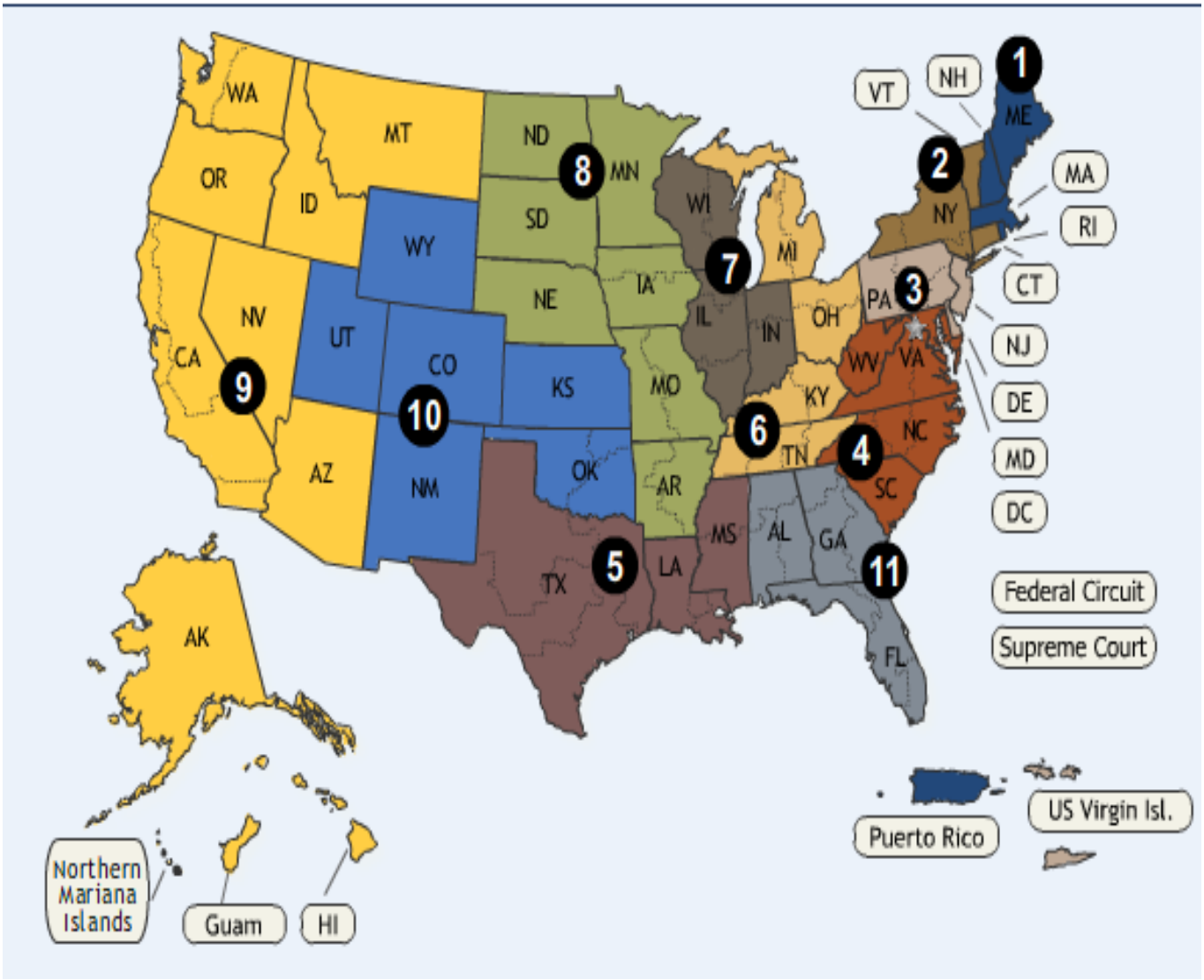
Table 1. Number of U.S. Courts of Appeal NEPA Cases, by year and by circuit

	U.S. Courts of Appeal Circuits												
	Ist	**2nd**	**3rd**	**4th**	**5th**	**6th**	**7th**	**8th**	**9th**	**10th**	**11th**	**D.C.**	**TOTAL**
2006					3		1	1	11	6		1	23
2007	1				1				8	2		3	15
2008	1	1	1					2	13	3	1	2	24
2009	1	3	1	2	1	1		1	13	2		2	27
2010		1				2	1	1	12	4	1	1	23
2011	1		1						12				14
2012	2	1	2	3	1		1		12	3	2	1	28
2013	**2**			**2**		**1**	**1**		**9**	**2**	**1**	**3**	**21**
TOTAL	**8**	**6**	**5**	**7**	**6**	**4**	**4**	**5**	**90**	**22**	**5**	**13**	**175**
	5%	3%	3%	4%	3%	2%	2%	3%	52%	13%	3%	7%	100%

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



STATISTICS

The U.S. Forest Service (USFS) did not achieve first place as the agency involved in the largest number of NEPA cases in 2013, a departure from most previous years. While USFS was involved with two cases (and won both), the U.S. Army Corps of Engineers (ACOE) and the U.S. Bureau of Land Management (BLM) each had five cases. ACOE won four and lost one; BLM won 4.5 and lost 0.5 cases (won on one of two NEPA claims, lost the other).

The other NEPA cases involved:

- U.S. Department of Agriculture (USDA)/Animal Plant Health Inspection Service (APHIS) – one case (win)
- U.S. Department of Defense (DOD)/U.S. Department of the Navy (Navy) – one case (win)
- U.S. Department of the Interior (DOI) – one case (win)
- DOI/National Park Service – one case (win)
- U.S. Department of Transportation (DOT) – one case (win)
- DOT/Surface Transportation Board (STB) – one case (win)
- U.S. Nuclear Regulatory Commission (NRC) – three cases (all wins)

Interesting conclusions from the 2013 cases:

- Continuing the trend from 2012, federal agencies won an even larger percentage of the NEPA challenges brought (86 percent in 2012; 93 percent in 2013).
- 12 of the cases involved environmental impact statements (EIS) and each resulted in a decision in favor of the federal agency.
- The one-and-one-half cases lost involved environmental assessments (EA):
    - *Kentucky Riverkeeper, Inc. v. Rowlette*, ___ F.3d ___ (6th Cir. 2013) – having taken the easier path of preparing an EA instead of an EIS, agency needed to follow applicable regulations by documenting its assessment of impacts.
        - But see, *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 716 F.3d 119 (4th Cir. 2013) – EA prepared by ACOE for a § 404 permit was adequate because the record amply shows the agency grappled with the issues raised; and
        - *Jones v. National Marine Fisheries Service, et al*., ___ F.3d. ___ (9th Cir. 2013) – an EIS is not required anytime there is some uncertainty, but only where the effects of the project are highly uncertain.
    - *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013)) – failure to consider reduced- or no-grazing alternatives in an EA violated NEPA.
- Agency deference is alive and well:
    - *Jayne v. Sherman*, 706 F.3d 994 (9th Cir. 2013) – agency's analysis is entitled to deference given the expertise the agency has in matters of its own budget and how it affects priorities.
    - *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 716 F.3d 119 (4th Cir. 2013) – court may not use review of an agency's environmental

analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency.
    - *WildEarth Guardians et al. v. Jewell, et al.*, ___ F.3d ___ (D.C. Cir. 2013) – court's role is not to "flyspeck" an agency's environmental analysis, looking for any deficiency no matter how minor.
    - *Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) – a lead agency does not violate NEPA when it does not defer to the concerns of other agencies; all that NEPA requires is that the lead agency consider these concerns and explain why it finds them unpersuasive. Further, it is not the role of the court to decide whether an EIS is based on the best scientific method available as long as the agency engages in a reasonably thorough discussion of the impacts.
    - *Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (D.C. Cir. 2013) – the determination as to whether information is new and significant requires a high level of technical expertise requiring the court to defer to the informed discretion of the agency.
- Harmless technical errors do not result in NEPA violations:
    - *Drakes Bay Oyster Company v. Jewell*, ___ F.3d ___ (9th Cir. 2013) (revised opinion issued January 14, 2014) – technical violations did not result in any prejudice to plaintiffs.
    - *International Brotherhood of Teamsters v. U.S. Department of Transportation*, ___ F.3d. ___ (D.C. Cir. 2013) – plaintiffs did not identify any aspect of the program the agency could have designed differently to reduce environmental impacts. Therefore, any technical error was harmless and not grounds for vacating the decision or remanding to the agency.

NEPA issues the courts addressed include:

- Tiering
    - *Hoosier v. U.S. Army Corps of Engineers*, 722 F.3d 1053 (7th Cir. 2013) – there is a difference between segmentation in the pejorative sense and breaking a complex investigation into manageable bits.
    - *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013) – decision requires distinguishing between the level of detail required in a programmatic NEPA document as compared to a site-specific NEPA document.
- Purpose and Need/Applicants
    - *Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) – agency must consider statutory context of the proposed action in addition to a private applicant's objectives, but plaintiffs did not show that adoption of the applicant's goals led the agency to consider a too limited range of alternatives.
    - *Beyond Nuclear v. U.S. Nuclear Regulatory Commission*, __ F3. ___ (1st Cir. 2013) – where the agency is not itself the project's sponsor, consideration of alternatives may accord substantial weight to the preferences of the applicant. Further, in most cases, a reasonable energy alternative is one that is currently commercially viable or will become so in the relatively near term.

- Alternatives
    - *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013)) – failure to consider reduced- or no-grazing alternatives in an EA resulted in a NEPA violation.
    - *WildEarth Guardians v. National Park Service*, 703 F.3d 1178 (10th Cir. 2013) – failure to consider a "natural wolf" alternative in an elk and vegetation management plan did not violate NEPA where the record demonstrates that the alternative would be impractical.
    - *Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) – an EIS need not consider an infinite range of alternatives, only reasonable or feasible ones.
    - *WildEarth Guardians v. National Park Service*, 703 F.3d 1178 (10th Cir. 2013) – agency is not required to consider alternatives that are too remote, speculative, or impractical or ineffective.
- Cumulative Impacts
    - *Kentucky Riverkeeper, Inc. v. Rowlette*, ___ F.3d ___ (6th Cir. 2013) – failure to use past impacts to assess cumulative impacts violated NEPA.
    - *Jones v. National Marine Fisheries Service, et al.*, ___ F.3d. ___ (9th Cir. 2013) – the EA cited publicly available data that was available to plaintiffs and was not deficient. Further, because the majority of plans to widen scope of mining are speculative and have not been reduced to specific proposals, the agency's cumulative impact analysis did not need to include them.
    - *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 716 F.3d 119 (4th Cir. 2013) – agency's analysis was adequate and plaintiff's arguments are reduced to no more than a substantive disagreement with the ACOE.
    - *Montana Wilderness Association v. Connell*, 725 F.3d 988 (9th Cir. 2013) – failure to include a section devoted exclusively to cumulative impacts in the EIS did not violate NEPA where the agency discussed cumulative impacts throughout the document.
- Supplementation
    - *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836 (9th Cir. 2013) – the agency did not violate NEPA when the selected alternative is made of elements from alternatives that were analyzed in the draft EIS and the combination was within the spectrum of previously analyzed alternatives.
    - *Western Watershed Project v. U.S. Bureau of Land Management*, 721 F.3d 1264 (10th Cir. 2013) – combining two analyzed alternatives into a hybrid alternative, with additional environmentally protective features, in the FONSI did not require supplementation or violate NEPA.
    - *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (1st Cir. 2013) – supplementation not required based on conjecture that additional information might arise in the future.
    - *Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (D.C. Cir. 2013) – new and significant information is that which presents a seriously different picture of the environmental impact of the proposed action from what was previously envisioned.

- Mitigation Implementation
    - *Village of Bald Head Island v. U.S. Army Corps of Engineers*, ___ F.3d ___ (4th Cir. 2013) – ACOE's failure to implement its promised mitigation, described in an EIS, was not a final agency action that could be challenged.
    - *Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013) – NEPA does not require the finalization or adoption of mitigation measures but mandates only that the agency engage in a reasonably thorough discussion of mitigation.
- Categorical Exclusions
    - *Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013) – NEPA regulations relating to the scope of EISs do not apply to application of categorical exclusions, even though courts have applied certain EIS requirements to EAs.
- Other
    - *Defenders of Wildlife, et al. v. U.S. Department of the Navy, et al*., ___ F.3d ___ (11th Cir. 2013) – if an agency analyzed all phases of a proposed action in an EIS, there is no requirement that the agency authorize all phases in the resulting ROD.
    - *Drakes Bay Oyster Company v. Jewell*, ___ F.3d ___ (9th Cir. 2013) (revised opinion issued January 14, 2014) – NEPA does not apply to an agency decision to let a permit expire as an environmental conservation effort.

Each of the 2013 NEPA cases, organized by federal agency, is summarized below.

2013 NEPA Cases		
CASE NAME / CITATION	**AGENCY**	**DECISION / HOLDING**
U.S. Department of Agriculture		
***Center for Food Safety v. Vilsack,* 718 F.3d 829 (9th Cir. 2013)**	USDA/APHIS	**WIN** - This appeal represents another chapter in USDA's regulation of Roundup Ready Alfalfa ("RRA"). RRA is a plant genetically "engineered" or "modified" by the Monsanto Company to be resistant to the herbicide, Roundup. An earlier phase of the litigation concerned the scope of an injunction prohibiting the planting of RRA pending completion of an EIS by APHIS. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761–62 (2010). In this case, the court considers the ROD issued by APHIS, which unconditionally deregulated RRA on the ground that RRA was not a "plant pest" within the meaning of the term in the Plant Protection Act ("PPA"), 7 U.S.C. §§ 7701–7772. Concerned about environmental harms, the plaintiffs in this appeal argue that APHIS's unconditional deregulation of RRA violated the NEPA by unconditionally deregulating RRA without considering the option of partially deregulating the crop, an action that the agency had included in the EIS. The court affirmed the lower court decision in favor of APHIS (all text from the decision): [T]he statute does not regulate the types of harms that the plaintiffs complain of, and therefore APHIS correctly concluded that RRA was not a "plant pest"…. Once the agency concluded that RRA was not a plant pest, it no longer had jurisdiction to continue regulating the plant. APHIS's lack of jurisdiction over RRA obviated the need for the agency to consult with the FWS under the ESA and to consider alternatives to unconditional deregulation under NEPA. See Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 665 (2007). … Nor did the district court err in entering summary judgment in favor of the defendants on the plaintiffs' NEPA claim. That claim rested on the contention that APHIS should have considered partial deregulation as an alternative to full deregulation. NEPA requires that an agency take a "hard look" at the environmental effects of a proposed action that could significantly affect the environment by evaluating all reasonable alternatives to the proposed action. See 40 C.F.R. § 1502.14(a); Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006) (internal quotation marks omitted), abrogated on other grounds by Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 21 (2008). Here, there were no reasonable alternatives to deregulation because the agency lacks jurisdiction to regulate RRA. APHIS was not required to look at alternatives to the unconditional deregulation of RRA absent any jurisdiction to adopt them. See S. Coast Air Quality Mgmt. Dist. v. FERC, 621 F.3d 1085, 1092 (9th Cir. 2010) ("[NEPA] does not expand the jurisdiction of an agency beyond that set forth in its organic statute . . . .") (internal quotation marks omitted) (alterations in original).
***Jayne v. Sherman,* 706 F.3d 994 (9th Cir. 2013)**	USFS	**WIN** - Plaintiffs challenged the United States Forest Service's October 16, 2008 Record of Decision adopting the modified Idaho Roadless Rule, which creates different categories of land within Idaho's 9.3 million acres of "inventoried roadless areas." In upholding the lower court decision in favor of the USFS, the court stated (all text from the decision): After scouring both the administrative and district court records in this case, we

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		conclude that the district court's grant of summary judgment to the defendants was warranted. The inclusive, thorough, and transparent process resulting in the challenged rule conformed to the demands of the law and is free of legal error. Thus, we affirm the district court's judgment in Appeal No. 11-35269, adopt the district court's comprehensive opinion as our own, Jayne v. Rey, 780 F. Supp. 2d 1099 (D. Idaho 2011), and attach it to this opinion as the Appendix. In its decision, the district court had held that (all text from the decision): NEPA required the Forest Service to take a "hard look" at the environmental impacts of the Idaho Roadless Rule. Native Ecosystems Council v. U.S. Forest Service, 418 F.3d 953 (9th Cir. 2005). That "hard look" standard is not satisfied when an agency relies "on incorrect assumptions or data in an EIS." Id. at 964. At the same time, the Court must defer to an agency's determination in an area involving a "high level of technical expertise." Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 954 (9th Cir.2003). In this case, the Forest Service estimated the Rule's impact by relying on data and projections it obtained from each National Forest. This information included (1) logging and road projects since the 2001 Roadless Rule, and (2) "any foreseeable future projects [over the next 15 years] and the likelihood of their implementation based on budget." … An interdisciplinary team of experts examined that data and developed projections for future logging and road building "based on trends from the Existing Plans [provided by the National Forests] and from the 2001 Roadless Rule, and considering the Agency's flat budget trend and high interest in responding to fire risk." Id. After reviewing the report of the interdisciplinary team, the Forest Service concluded that road building > would likely not see an increase in the foreseeable future (next 15 years) because the appropriated budget is flat or declining and there is no indication the trend will change. In addition, there is a backlog of road maintenance; therefore, there is no emphasis on constructing new roads that need to be maintained. If roads are constructed they are likely to be temporary. Consistent with that conclusion, the Forest Service projected over the next 15 years there would be no increase in permanent roads over the 2001 Roadless Rule but an increase in temporary roads from 3 miles to 21 miles. This record shows that the Forest Service's projection of road building was based not only on levels existing under the 2001 Roadless Rule but also on the realities of budgets and the balancing of priorities. While plaintiffs accurately point out that the Idaho Roadless Rule allows more roads, they offer nothing to challenge the Forest Service's assumption that its lean budget will be stretched thin just to cover maintenance of existing roads, and will not allow the construction of any more permanent roads. Moreover, plaintiffs offer no evidence that the projection of an increase in temporary roads from 3 miles under the 2001 Roadless Rule to 21 miles under the Idaho Roadless Rule was arbitrary or capricious. The Forest Service's analysis is entitled to deference given the expertise the agency has in matters of its own budget and how it affects project priorities. Selkirk, 336 F.3d at

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		954.
***Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836 (9th Cir. 2013)**	USFS	**WIN** - This case arises out of the long and contentious process to repair a flood-damaged road in a sensitive area of the Humboldt-Toiyabe National Forest in Elko County, Nevada. Great Old Broads appeals the district court's grant of summary judgment to the USFS on Great Old Broads's claims related to the Forest Service's ROD determining the method for restoring the South Canyon Road as a part of the Jarbidge Canyon Project (the "Project"). The Project was an effort to reestablish the South Canyon Road after flood waters damaged the road in 1995, eliminating vehicle access to the Snowslide Gulch Wilderness Portal in the Jarbidge Wilderness. In April 2003, the Forest Service published a draft EIS that analyzed an Elko County proposal for the South Canyon Road, and six other management alternatives for the Project. In April 2005, the Forest Service issued a draft ROD. The draft ROD did not adopt any of the alternatives analyzed in the draft EIS to form the management alternative selected for the Project (the "Selected Alternative"). Instead, the Selected Alternative was a combination of elements from the several draft EIS alternatives. The Forest Service issued the final ROD and final EIS in April 2005, adopting the Selected Alternative in a form essentially unchanged from the draft ROD. The final EIS analyzed the same seven alternatives considered in the draft EIS and did not add additional analysis of the Selected Alternative. The final ROD included a more detailed explanation of the Selected Alternative. Great Old Broads contends that "combining Alternatives 1, 3, and 4 dramatically changed their environmental impacts, [so] the Forest Service violated NEPA by failing to prepare a supplemental EIS (SEIS)." Affirming the district court decision that no SEIS was required, the court found (all text from the decision): An agency "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). But if after this process, an "agency makes substantial changes in the proposed action that are relevant to environmental concerns," the agency must prepare an SEIS. 40 C.F.R. § 1502.9(c). Great Old Broads points to no specific changes that it deems not adequately analyzed in the final EIS. Instead, Great Old Broads relies on the First Circuit's decision in Dubois v. U.S. Department of Agriculture to argue that an SEIS is required whenever a proposed project constitutes "a different configuration" of previously analyzed elements. 102 F.3d 1273, 1291–93 (1st Cir. 1996). In Dubois, the Forest Service published an EIS analyzing the effects of a proposed ski resort. Id. at 1278. The preferred alternative adapted an analyzed alternative to a smaller parcel of land, eliminating woodland buffer zones between ski trails and proposing an unanalyzed "28,500-square-foot base lodge facility within the existing permit area." Id. at 1292. The First Circuit held that these were "substantial changes from the previously-discussed alternatives, not mere modifications 'within the spectrum' of those prior alternatives." Id. Here, by contrast, the Selected Alternative is primarily made of elements from Alternatives 1, 3, and 4 that were analyzed—as elements—in the final EIS. From that analysis, the Forest Service and the public could assess the cumulative effect of these elements, and the Forest Service could reasonably determine that the

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		combination was "within the spectrum" of previously analyzed alternatives. Great Old Broads alternatively contends that even if the Forest Service correctly decided that an SEIS was not required, it violated NEPA because it did not adequately document that determination in the record. An agency must make a reasoned decision whether an SEIS is required, see Friends of the Clearwater, 222 F.3d at 557, and the Forest Service often presents this threshold determination in a supplemental information report ("SIR"). See Forest Service Handbook 1909.15, ch. 10 §§ 18.1-18.2. Here the Forest Service did not prepare a separate SIR, but it did make a reasoned decision, documented in the record, that an SEIS was not warranted.
U.S. Department of Defense		
***Village of Bald Head Island v. U.S. Army Corps of Engineers*, ___ F.3d ___ (4th Cir. 2013)**	ACOE	**WIN** - The Village of Bald Head Island, a coastal town in North Carolina, commenced this action against the U.S. Army Corps of Engineers to require it, through an order of specific performance and injunction, to honor commitments made to the Village and other North Carolina towns when developing its plans to widen, deepen, and realign portions of the Cape Fear River navigation channel. The Village alleged that when implementing the project, the Corps failed to honor commitments to protect the adjacent beaches against the adverse effects of the project and to restore sand to the beaches, in violation of NEPA, the Coastal Zone Management Act, the Rivers and Harbors Act, Corps Regulation 33 C.F.R. § 337.10, and contract principles. The court upheld the district court's dismissal of the complaint for lack of subject-matter jurisdiction, concluding that the Corps' alleged failure to implement the project in accordance with its commitments was not "final agency action" that was subject to judicial review under the APA (all text from the decision): In June 1996, the Corps prepared an Environmental Impact Statement for the project and scheduled construction to begin in 2000. Before construction began, however, the Corps discovered an area of rock at the bottom of the channel that would require extensive blasting to remove and learned that the planned extension of the channel would cut through a substantial amount of live coral, causing ecological damage. As a result, it proposed several revisions to the project, including a realignment of the channel's entrance closer to Bald Head Island. It also proposed to dispose of beach-quality sand dredged during the project's construction and subsequent maintenance on the adjacent beaches of Bald Head Island and Oak Island, two barrier islands located on either side of the entrance to the Cape Fear River. In connection with these proposed revisions, the Corps issued an Environmental Assessment in February 2000, evaluating the revised project's environmental impacts, as well as its consistency with North Carolina's Coastal Management Plan. The Environmental Assessment included a Sand Management Plan, which described in detail the Corps' plan for depositing dredged beach-quality sand on nearby beaches during construction of the project and predicted the need, after work was complete, to perform "maintenance dredging" every two years. Because a study showed that approximately two-thirds of the sediment at the entrance of

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		the channel came from Bald Head Island and one-third from Oak Island, the Sand Management Plan provided that the dredged beach quality sand would be placed on Bald Head Island in years two and four following the completion of the project and on Oak Island in year six and that this "disposal cycle" would be followed thereafter. The Corps also developed the Wilmington Harbor Monitoring Plan, which established a "routine monitoring program" to observe "the response of the adjacent beaches and the shoaling patterns in the entrance channel" and to use the data derived from those observations to make an "initial assessment of the impacts of the sand management plan on the system." … Both before and after the Corps conducted its Environmental Assessment, the Village of Bald Head Island provided numerous comments to the Corps. … The Village informed the Corps that it would oppose the project and consider legal action unless "it received written agreement from the Corps that the project would include sand management and [beach] protection measures or otherwise would be constructed and operated in a manner so as not to adversely impact Bald Head Island or, if the project caused adverse impacts, the project would be modified and the impacts would be corrected." … [Negotiations with the Corps and the North Carolina Department of Environment and Natural Resources] resulted in the issuance of two letters, one from U.S. Army District Engineer Colonel James W. DeLony, dated June 9, 2000, and the other from Donna D. Moffitt, Director of North Carolina's Division of Coastal Management, dated June 15, 2000. … In August 2000, about six months after the issuance of the Environmental Assessment for the revisions to the project, the Corps issued a Finding of No Significant Impact ("FONSI") (which obviated the need for an Environmental Impact Statement), concluding that the modifications "will not significantly affect the quality of the human environment." The FONSI also stated that the Corps "will comply with the conditions indicated in [Moffitt's] letter." … Following completion of the project in 2002, the Corps also performed maintenance dredging during the winters of 2004-2005, 2006-2007, and 2008-2009. The sand dredged during the first two of those maintenance operations was placed on Bald Head Island, and the sand from the third was placed on Oak Island. But as the winter of 2010-2011 approached, the Corps informed the Village of Bald Island that the Corps' maintenance for that winter would have to be curtailed for budgetary reasons. It reported that it "ha[d] sufficient funding to dredge a portion of the Channel [that winter], but [did] not have the funding for dredging the portion of the Channel nearest Bald Head Island or for disposing of beach-quality sand onto Bald Head Island beaches." In response to the Corps' notice, the Village of Bald Island commenced this action against the Corps…. The Corps contends that the district court correctly concluded that project implementation is not final agency action within the meaning of the APA. It also contends that the Village has not identified a discrete agency action that the Corps was required to take but failed to perform, as required for judicial

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		review of an agency's failure to act under the APA. See Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 64 (2004). It argues that allowing "judicial review of the Village's claims would place a burden on courts to manage ongoing agency actions and would eviscerate Congress' carefully crafted scheme for judicial review." … The Village protests that it is challenging agency action that is circumscribed and discrete. It asserts that it is not "challenging a regional or nationwide dredging program for shipping channels" but, instead, the implementation of "a specific dredging project at a specific coastal site." Yet, by challenging the Corps' ongoing real world physical actions, even at a localized level, the Village is essentially "demand[ing] a general judicial review of the [Corps'] day-to-day operations" in maintaining the channel, the type of review the Supreme Court has explicitly held the APA does not authorize. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 899 (1990); see also SUWA, 542 U.S. at 64, 66-67. We therefore conclude that the Corps' implementation of the Wilmington Harbor Project, including the ongoing periodic maintenance dredging and resulting nourishment of nearby beaches, does not constitute "agency action" within the meaning of the APA.
***Kentucky Riverkeeper, Inc. v. Rowlette*, ___ F.3d ___ (6th Cir. 2013)**	DOD/ACOE	**LOSS** – Plaintiffs sued ACOE alleging violations of, among other things, NEPA during the ACOE's issuance of two nationwide coal-mining waste-discharge permits in 2007. The district court granted summary judgment to the ACOE, and plaintiffs appealed. Reversing the district court in part, the court held (all text from the decision): In 2007, the Corps issued two nationwide general permits (hereinafter the "nationwide permits"): permit 21 and permit 50. Permit 21 authorized surface coal-mining operations to discharge dredged and fill material into waters of the United States (i.e., streams); permit 50 allowed underground coal-mining operations to do the same. Before issuing each permit, the Corps conducted a public notice-and-comment period and completed required environmental analyses, including a cumulative-impacts analysis. Each cumulative-impacts analysis projected the permits' respective environmental impacts before determining that compensatory mitigation would reduce adverse impacts to a minimal level. The Corps disclosed its analyses and findings in each nationwide permit's Environmental Assessment (hereinafter "the Assessment(s)"), prepared for NEPA purposes in lieu of an environmental impact statement. The nationwide permits became effective on March 19, 2007. … Riverkeeper sued the Corps, alleging that the cumulative-impacts analyses prepared for the Assessments authorizing the nationwide permits violated the CWA, NEPA, and the APA. Riverkeeper advanced two primary challenges to the permits' Assessments: (1) that the Corps bypassed a necessary NEPA consideration, the present effects of past permit authorizations, see 40 C.F.R. § 1508.7–.9; and (2) that the Corps failed—in violation of the CWA, NEPA, and the APA—to properly explain how compensatory mitigation would ensure cumulatively minimal impacts. See Ky. Riverkeeper, Inc. v. Midkiff, 800 F. Supp. 2d

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		846 (E.D. Ky. 2011). … To spare agencies the hardship of conducting exhaustive review of every NWP proposal's environmental impact, CEQ authorized agencies to first prepare a less burdensome environmental assessment as a method for determining whether a proposal needed an environmental impact statement. See 40 C.F.R. § 1508.9. The Corps did that here, deeming an EIS unnecessary. Though less demanding than an environmental impact statement, an environmental assessment still required the authorizing agency to consider the environmental impacts of its proposals. See id. § 1508.9(b); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F. 3d 1172, 1215 (9th Cir. 2008) (explaining that environmental assessments "need not conform to all the requirements" of an environmental impact statement) (internal quotation marks omitted). The NEPA regulations provide that environmental assessments "[s]hall include brief discussions of the . . . environmental impacts of the proposed action and alternatives," 40 C.F.R. § 1508.9(b), including "cumulative impact," see id. § 1508.7–.8.2 Cumulative impact refers to "the impact on the environment which results from the incremental impact of the [proposed] action when added to other past, present, and reasonably foreseeable future actions." Id. § 1508.7. The Corps concedes that these regulations required it to assess the impact of past actions, but cites a CEQ advisory memorandum for the proposition that it could satisfy this obligation by considering past actions' impact "in the aggregate." (Appellee Br. At 31–32 (citing Council on Environmental Quality, Guidance on the Consideration of Past Actions in Cumulative Effects Analysis (2005)…. The Ninth Circuit has already adopted this view from the Guidance, see League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1217 (9th Cir. 2008), and we have no qualms agreeing. The Corps' argument runs aground, however, because the Assessment failed to identify any impact—aggregate or otherwise—of past actions. … In our view, two aspects stand out. First, though reviewing agencies retain considerable discretion to determine the "scop[e]" and "relevan[ce]" of past actions, and may "focus[] on the current aggregate effects of past actions without delving into . . . individual past actions," this discretion coincides with their obligation to provide "a concise description of the identifiable present effects of past actions to the extent that they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive and significant relationship to those effects." Id. at 1 (emphasis added). An environmental assessment that omits consideration of past impacts, followed by a conclusory suggestion that past impacts did not matter, cannot be in conformance. This is especially true where the reviewing agency reauthorizes a nationwide permit involving the same type of mining activities that cause the same type of environmental impacts. Second, the Guidance instructs the reviewing agency to "distinguish" the use of past impacts to forecast future impacts from the use of past impacts to assess cumulative impacts.

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		The Corps did not do this. It used past impacts to forecast future impacts, but not to assess cumulative impacts. While taking advantage of the more lenient environmental-assessment method (instead of the intensive environmental-impact statement method), the Corps short-circuited the "cumulative impact" analysis by confining its review to an estimate of future impacts. The Corps reasonably relied on data regarding past impacts to project future impacts, but it failed to combine the two to gauge the cumulative impact of reauthorizing permit 21. Its Assessment offered no explanation for this shortcoming. Such limited review not only avoids the NEPA regulation's definition of "cumulative impact," but also the ordinary meaning of "cumulative." See Webster's II New College Dictionary 275 (2d ed. 2001) (defining "cumulative" as "[e]nlarging or increasing by successive addition"). … We find similarly troubling the Corps' defense to Riverkeeper's compensatory mitigation claims under the CWA and NEPA. Citing CWA regulations, Riverkeeper specifically faults the Corps' failure to provide "analysis or documentation" for the Assessment's determination that compensatory mitigation will ensure cumulatively minimal adverse effects. (Appellant Br. at 27–28 (citing 40 C.F.R. §§ 230.7(b), 230.11).) Though the Corps disputes its failure to provide an explanation for its decision, it offers no response to Riverkeeper's no-documentation charge. … Absent from this discussion is any mention of the Corps' factual underpinnings for this determination. Both in its briefing and at oral argument, the Corps relied on its procedures overseeing individual projects' success in mitigating environmental impacts. (Appellee Br. at 52–53; Oral Arg. at 30:40–32:36.) Yet these post-issuance mechanisms do not explain how the Corps arrived at its pre-issuance minimal cumulative-impact findings. … We acknowledge that the Corps may rely on post-issuance mitigation procedures to minimize environmental impacts, but in making a minimal-cumulative-impact finding, it must, at a minimum, provide some documented information supporting that finding. 40 C.F.R. §§ 230.7(a)–(b), 230.11(g). … After opting for streamlined nationwide permitting, the Corps took the easier path of preparing an environmental assessment instead of an environmental impact statement. Having done so, it needed to follow the applicable CWA and NEPA regulations by documenting its assessment of environmental impacts and examining past impacts, respectively. Failing these regulatory prerequisites, the Corps leaves us with nothing more than its say-so that it meets CWA and NEPA standards. We may not supply a reasoned basis for the agency's action that the agency itself has not given. See SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).
***Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 716 F.3d 119 (4th Cir. 2013)**	DOD/ACOE	**WIN** - In connection with a proposed surface coal mine adjacent to Reylas Fork (a stream) in Logan County, West Virginia involving removing mountaintop rock, the ACOE issued a fill permit under Clean Water Act (CWA) § 404, authorizing Highland Mining to place rock overburden into the adjacent valley of Reylas Fork as part of the mining process. The Corps issued the permit without an EIS, finding that the fill would not have a substantial cumulative impact on the water quality in the relevant watershed. Four environmental groups (collectively, the "Environmental Coalition") commenced this action to challenge the fill permit

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		issued under CWA § 404. The Environmental Coalition contends that the Corps, in conducting its analysis for the § 404 permit, "materially misapprehended" the baseline conditions in the relevant watershed, thus corrupting its analysis of the cumulative impact that the mine would have on the streams in the watershed. It also contends that the Corps acted arbitrarily and capriciously in determining that the valley fill would not have a significant cumulative impact on the water quality in the relevant watershed. Upholding the lower court decision in favor of the ACOE, the court found (all text from the decision): … no merit to the Environmental Coalition's claim that the Corps 'misapprehended" the baseline conditions. The Corps considered the relevant factors, evaluating both the impact site and the entire watershed. Only after this evaluation did the Corps reach its informed judgment as to the baseline conditions. For its second argument, the Environmental Coalition contends that the Corps' finding of cumulative insignificance was "arbitrary and capricious" because the Corps irrationally dismissed the strong correlation between surface coal mining activities and downstream biological impairment. … In assessing whether a project's impacts will be significant, the Agency must take a "hard look" at potential environmental consequences. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). "The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms." Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174, 185 (4th Cir. 2005). In this case, the Corps collected the competing views of the Environmental Coalition, the EPA, the WVDEP, and Highland Mining and examined them in some detail, along with the supporting data. … At bottom, the Document reached the conclusion that "the valley fill, sediment pond, and mine through activities, if conducted in accordance with all applicable state and Federal regulations, should not contribute to or result in cumulative significant adverse impacts to the aquatic or human environment within the Dingess Run Watershed." J.A. 256. Thus, contrary to the Environmental Coalition's contention that the Corps failed to take a hard look at conductivity and stream impairment, the record amply shows that the Corps grappled with the issue extensively, rationally finding that (1) the connection between conductivity and stream impairment was not strong enough to preclude a permit and (2) the compromise measures agreed to by the EPA and Highland Mining would successfully mitigate the potential for adverse effects. With the inability to demonstrate that the Corps failed to take a "hard look," the Environmental Coalition's arguments are reduced to no more than a substantive disagreement with the Corps. But our review is limited, and we may not "use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency." Nat'l Audubon

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		Soc'y, 422 F.3d at 185 (citing Robertson, 490 U.S. at 350). The Corps' predictive judgment in this case was based on facts and recommendations, adduced during a lengthy consultation between the Corps, Highland Mining, the EPA, and the WVDEP, and we conclude that this process satisfies NEPA's procedural requirement to take a "hard look." See Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999) ("[A]n agency takes a sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised" (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378-85 (1989))). Because the Corps' analysis satisfied NEPA's procedural requirements, the Corps' finding of cumulative insignificance is neither arbitrary nor capricious. See Aracoma Coal, 556 F.3d at 209.
***Hoosier v. U.S. Army Corps of Engineers*, 722 F.3d 1053 (7th Cir. 2013)**	ACOE	**WIN** – This case involves construction of a proposed highway in Indiana and the issuance of a CWA § 404 permit by the ACOE. As noted by the court (all text from the decision): I-69 is an interstate highway (part of the federal interstate highway system) that when completed will run from Canada to Mexico (and of course in the opposite direction as well) through a number of states including Indiana. At present, however, the highway consists of disjointed segments. One of the breaks is between Indianapolis in central Indiana and Evansville in the extreme southwestern corner of the state. A federal interstate highway (I-70) runs between Indianapolis and Terre Haute. A lesser federal highway, Route 41, runs between Terre Haute and Evansville. [T]hese two highways form the sides of an approximate right triangle. The direct route between Indianapolis and Evansville is the hypotenuse and thus the shorter of the two routes—142 miles rather than 155 miles long. The roads on the direct route (the hypotenuse) tend to be narrow and crowded with truck traffic and to experience an above-average incidence of traffic accidents. The Federal Highway Administration and the Indiana Department of Transportation (the latter a defendant in this suit by environmental groups; the other principal defendant is the Army Corps of Engineers) decided that a worthwhile contribution to the completion of I-69 would be to build an interstate highway on the hypotenuse. The highway would thus be a segment of I-69. … Environmentalists opposed building a highway on the direct route on the ground that it would destroy wetlands, disrupt forests, and also disrupt "karst" ecosystems, unusual landscapes permeated by caves and other formations that provide rich habitats for wildlife, including such endangered and threatened species as the Indiana bat (endangered) and the bald eagle (threatened). … The federal and state highway authorities filed, as they were required to do, Environmental Impact Statements, which concluded that building a new interstate highway on the direct route was preferable to upgrading the indirect route. After a suit contending that the highway would violate the National Environmental Protection Act [sic] failed, Hoosier Environmental Council v. U.S. Dept. of Transportation, No. 1:06-cv-1442-DFH-TAB, 2007 WL 4302642, at *1 (S.D. Ind. Dec. 10, 2007), the highway authorities began addressing the exact location of the highway within the direct route and the placement of structures ancillary to the new highway, such as bridges and culverts. The proposed highway was divided

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		into six sections. Sections 1 through 3 have been built; sections 4 through 6 have not yet been built though section 4 is under construction. Section 3, a 26-mile stretch, is as we said the immediate subject of this case. … The plaintiffs don't disagree with the Corps' conclusion that the plan for section 3 of the highway minimizes the wetland effects of that section. Their objection is to the choice of the direct route (the hypotenuse), of which section 3 is just one slice, over the indirect one. They argue that the Corps failed to consider whether the direct route as a whole, rather than one section of it, would be in the public interest and whether the indirect route (upgraded as we explained earlier) would be a practicable alternative. But the district court found the Corps' analysis adequate to justify the grant of the permit and so awarded summary judgment to the defendants, precipitating this appeal. … So on to the merits, where the first issue is the scope of the Corps of Engineers' duty to consider alternatives to proposed projects that threaten wetlands. Did it adequately consider whether the indirect route was a practicable alternative to the direct route? If it was practicable, and superior from an environmental standpoint, then the "practicable alternative" regulation required the Corps to deny a Clean Water Act permit for the direct route. … Because of the magnitude of the project to fill the I-69 gap between Indianapolis and Evansville, the planning for it has … proceeded in two separate stages, conventionally but unilluminatingly termed "Tier I" and "Tier II." … As the plaintiffs point out, the highway authorities may not shirk responsible analysis of environmental harms by "segmentation," Swain v. Brinegar, 542 F.2d 364, 368-71 (7th Cir. 1976) (en banc); Indian Lookout Alliance v. Volpe, 484 F.2d 11, 19-20 (8th Cir. 1973), that is, by evaluating those harms severally rather than jointly. The environmental harms caused by section 3 are modest when the possibility of re-creating the wetlands destroyed by the section is taken into account. But without an estimate of the environmental harms likely to be caused by all six sections, the Corps of Engineers would be unable to determine the aggregate environmental damage that a highway on the direct route would cause. Yet given the alignment (locational) options within each route (that is, where precisely to locate a highway in each 2000-foot corridor slice) and also the options concerning the number and siting of ancillary structures such as bridges, culverts, and rest areas, an attempt at an exact comparison of the effect on wetlands of all possible alternative routes would have made the Tier I analysis unmanageable. There is a difference between "segmentation" in its pejorative sense, and—what is within administrative discretion—breaking a complex investigation into manageable bits. Klemme v. Sierra Club, 427 U.S. 390, 412-15 (1976). The Federal Highway Administration's Environmental Impact Statement, issued as part of the Tier I analysis, had compared the effects on wetlands of the two corridors. It had found that the indirect route would harm only between 22 and 40 acres of wetlands and the direct route 75 acres. The alignment of the highway and the number and location of ancillary structures could affect these figures, but those determinations were properly deferred to Tier II. …

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		The plaintiffs have not shown that the conclusion the Corps drew from its detailed and highly technical analysis -- that section 3 of the direct route is in the public interest -- was unreasonable. … Anyway the highway agencies' Environmental Impact Statements had covered most, maybe all, of the ground that a public interest analysis would have covered. The plaintiffs argue neither that the project as a whole is contrary to the public interest nor that it was sectioned in order to prevent consideration of its total environmental harms. . .They may be playing a delay game: make the Corps do a public interest analysis from the ground up (along with an all-at-once six-section permit analysis) in the hope that at least until the analysis is completed there will be no further construction, so that until then the highway will end at the northernmost tip of section 3 -- making it a road to nowhere.
***Jones v. National Marine Fisheries Service*, et al., ___ F.3d. ___ (9th Cir. 2013)**	ACOE	**WIN** – The court affirmed the lower court's summary judgment in favor of the ACOE (in this case that also involved the National Marine Fisheries Service [NMFS]) on NEPA grounds in a challenge to the issuance of a permit to Oregon Resources Corporation (ORC) as part of a project to mine valuable mineral sands near Coos Bay, OR. The court found that the ACOE properly considered the risks of hexavalent chromium (Cr+6) generation, properly considered that the risk of hexavalent chromium generation did not warrant an EIS, and properly declined to consider cumulative impacts of future chromium mining. In addition to an ACOE § 404 permit, ORC was required to obtain approvals from a number of state agencies, including the Oregon Department of Geology and Minerals Industry (DOGAMI), the Oregon Department of State Lands, and the Oregon Department of Environmental Quality (DEQ). In its holding, the court stated (all text from the decision): In its NEPA analysis, the Corps considered the potential for increased Cr+6 generation from the proposed mining. Woodlands' public comments on the permit application noted that the chromite sands ORC planned to mine contained benign trivalent chromium (Cr+3), which can oxidize into toxic Cr+6 in the presence of manganese oxide, which is also present at the sites. [Plaintiffs] Woodlands was concerned that ORC's mining project could lead to increased Cr+6 generation, which could, in turn, contaminate ground and surface water. Woodlands submitted expert reports that recommended, among other things, ongoing monitoring during the mining process to ensure that the amount of Cr+6 did not increase. ORC responded to Woodlands' comments and expert reports in a Biological Assessment (BA). The BA suggested that the risk of Cr+6 generation was minimal…. In addition, the Corps and NMFS requested independent technical support from William Mason, a Registered Geologist with the DEQ. Mason examined the information provided by ORC and Woodlands, along with academic literature regarding Cr+6 generation, and summarized his findings in a memorandum (Mason Memorandum). The Mason Memorandum noted that the conditions at the mining sites favored Cr+6 attenuation rather than generation…. As a result of these recommendations [in the Mason Memorandum], DOGAMI notified the Corps that it would require ongoing Cr+6 monitoring as part of ORC's permit from that agency, and explained that it would require suspension of mining and/or other measures if the monitoring showed an increase in Cr+6 levels. The

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		ORC Section 404 Permit issued by the Corps required ORC to comply with all conditions of the DEQ and DOGAMI permits. Based on this information from the DEQ and DOGAMI, the Corps concluded that the risks associated with the generation of Cr+6 would not "have a significant impact on the quality of the human environment." In addition to examining the potential for Cr+6 generation, the Corps considered the possibility that ORC would engage in future mining beyond the sites included in the Section 404 permit application, noting that ORC had suggested that it intended to mine for mineral sands along the Oregon coast "from Cape Arago to Port Orford." The EA also noted that ORC had removed from the Section 404 permit application two sites that had already been surveyed, one of which, Section 33, had already been granted a mining permit by DOGAMI. The record also reflects, however, significant challenges to developing any of the mining sites that had been identified by ORC. … Woodlands argues that the Corps failed to comply with NEPA because (1) contrary to NEPA regulations, the EA "contains only narratives of expert opinions," Klamath- Siskiyou Wildlands v. BLM, 387 F.3d 989, 996 (9th Cir. 2004) (citations omitted)); (2) the uncertainty surrounding Cr+6 generation rendered the FONSI arbitrary and capricious; and (3) the Corps' failure to consider the environmental impacts of widespread mineral sands mining was arbitrary and capricious. We reject Woodlands' arguments. "NEPA documents are inadequate if they contain only narratives of expert opinions." Klamath-Siskiyou, 387 F.3d at 996. "[A]llowing the [Agencies] to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which [an Agency] expert derived her opinion." Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998). In both Klamath and Sporting Congress, the EAs "fail[ed] to provide the public with a basis for evaluating the impact of the [agency action]" because they did not include data that would permit the public to evaluate the agency decisions. Idaho Sporting Cong., 137 F.3d at 1150. Woodlands contends that the EA is deficient for the same reasons. Woodlands' argument, however, ignores that an agency may incorporate data underlying an EA by reference. See City of Sausalito v. O'Neill, 386 F.3d 1186, 1214 (9th Cir. 2004) (quoting 40 C.F.R. § 1502.21). Here, the Corps did just that. The EA cited to publically-available data provided by ORC and discussed in the Mason Memorandum. The Mason Memorandum, a thorough study of the issues surrounding Cr+6 generation, includes data from numerous test wells drilled at the mining sites, as well as a review of academic literature related to Cr+6 generation and attenuation. That is all NEPA requires, and the EA was thus not deficient as were those at issue in Klamath or Sporting Congress. See Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 956 (9th Cir. 2008)….

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		Woodlands next argues that significant uncertainty as to the likelihood and effect of Cr+6 generation renders the Corps' FONSI and subsequent failure to prepare an EIS arbitrary and capricious. Although uncertainty is inherent in any environmental decision, an EIS is not required "anytime there is some uncertainty, but only [where] the effects of the project are highly uncertain." Ctr. For Biological Diversity v. Kempthorne, 588 F.3d 701, 712 (9th Cir. 2009) (internal quotations omitted). Here, three separate agencies examined ORC's project and concluded that the risk of Cr+6 generation was minimal for two primary reasons: (1) There was no causal mechanism that would lead to increased Cr+6; and (2) the chemical makeup of the site favored Cr+6 attenuation rather than Cr+6 generation. Woodlands, however, argues that the Mason Memorandum established that a lack of site specific data rendered any conclusions regarding Cr+6 generation highly uncertain and that this uncertainty required the Corps to conduct a full EIS before granting the Section 404 Permit. See Nat'l Parks and Conservation Ass'n v. Babbitt, 241 F.3d 722, 732 (9th Cir. 2001). We disagree. … In context, it is clear that the Mason Memorandum established that Cr+6 generation is unlikely to occur at the site. Rather than recommending additional studies in order to address remaining uncertainty, the Mason Memorandum made clear that the site specific nature of Cr+6 attenuation means that the only way to ensure that Cr+6 does not reach harmful levels is to monitor how Cr+6 behaves once mining begins. … Woodlands also argues that it was inappropriate for the Corps to "rely on monitoring [in] dismiss[ing] potential impacts." The Corps cannot rely on monitoring and mitigation alone in reaching a FONSI. See N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1084–85 (9th Cir. 2011). This argument, however, misrepresents the role of monitoring in the Corps' decision here. In Northern Plains, the Bureau of Land Management (BLM) informed the Surface Transportation Board (Board) that there was insufficient data regarding the effects of the proposed project on sage grouse. Id. at 1084. In response, the Board proposed to conduct sage grouse surveys during the project's operation, as well as proposing "pre-construction surveys" to determine the extent of sage grouse habitat in the project area. Id. We concluded that the Board's actions were arbitrary and capricious because (1) without data on sage grouse populations the agency could not carefully consider whether the project would have a significant environmental impact and (2) the lack of data available to the public during the EIS process deprived citizens of the opportunity to participate in the decision-making process. Id. at 1085. Here, by contrast, the Corps, relying in part on the Mason Memorandum, concluded that Cr+6 generation due to ORC's mining project was unlikely given the site conditions. … Woodlands argues that the Corps failed to analyze the cumulative impacts of ORC's mining project, pointing to ORC's plans to widen the scope of mining in the future. But, the majority of these plans are speculative and have not been reduced to specific proposals. Woodlands also claims that the three alternative sites considered in the EA as possible future projects require the Corps to perform a cumulative impact analysis.

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		In Northern Plains, we determined that the Board's decision to consider only five years of cumulative impacts was arbitrary and capricious. N. Plains, 668 F.3d at 1079. Our decision was based on the fact that the BLM had previously prepared an EIS that projected the growth of mining activity over the next 20 years. Id. at 1078–79. In light of this study, we found that projects outside of the five year time frame were "reasonably foreseeable," and that the Board's failure to analyze the cumulative effects of these projects was arbitrary and capricious. Id. at 1079. Here, by contrast, there is no reliable study or projection of future mining in this case. ORC's general statements regarding a desire for increased mining give no information as to the scope or location of any future projects or even how many such projects ORC contemplates pursuing. The general plans for expanded mining recited by Woodlands thus do not require a cumulative impacts analysis. See id.; Envtl. Protect. Info. Ctr. v. Forest Serv. (EPIC), 452 F.3d 1005, 1014 (9th Cir. 2006). The three sites excluded from the application, Section 33, Shepard, and Westbrook, all face significant logistical hurdles to development. … Under these circumstances, the Corps was not required to consider the cumulative impact of speculative widespread mining for mineral sands on the Oregon coast.
***Defenders of Wildlife, et al. v. U.S. Department of the Navy, et al.,* ___ F.3d ___ (11th Cir. 2013)**	Navy	**WIN** - Plaintiffs filed suit against the Navy, challenging the Navy's decision to install and operate an instrumented Undersea Warfare Training Range (USWTR) in waters fifty nautical miles offshore of the Florida/Georgia border in waters adjacent to the only known calving grounds of the endangered North Atlantic right whale. The court concluded that plaintiffs had not identified any provision in NEPA requiring an agency to authorize all phases of a proposed action evaluated in an EIS at the time it issued a ROD. Therefore, the court found that it was not an independent violation of NEPA, warranting reversal of the district court's judgment, for the Navy to enter into a construction contract after it signed an ROD authorizing construction and after having its NEPA analysis upheld by the district court. Accordingly, the court affirmed the district court's judgment that the Navy complied with NEPA. In this decision, the court found (all text from the decision): Appellants confine their NEPA claim on appeal to the argument that the Navy violated 40 C.F.R. § 1506.1(a) by signing a contract for construction of the USWTR before it has issued an ROD for operations on the USWTR. Appellants make this argument even though the Navy had issued an ROD for its construction of the USWTR. … Under the plain language of Section 1506.1(a), Appellants' argument fails. The action taken by the Navy that Appellants challenge as violative of Section 1506.1(a)—signing a contract for construction of the USWTR—did not occur before the Navy signed an ROD concerning that construction, but after, and Section 1506.1(a) only precludes agency action taken before the agency signs an ROD. Yet, Appellants take issue with the fact that the ROD only authorized half of the entire proposal for the range. Indeed, the ROD states that "[a]t this time the Navy is implementing only a portion of the proposed action, a decision to move forward with installation of the USWTR." The ROD further states that any "decision to implement training" at the USWTR "will be based on the updated analysis of

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		environmental effects in a future [EIS] in conjunction with appropriate coordination and consultation with the [NMFS] and after compliance with applicable laws and executive orders including the [MMPA], the [ESA], the [NEPA] and the Coastal Zone Management Act (CZMA) as they relate to the operation of the proposed USWTR." Id. The Navy has stated that it will prepare a second ROD that specifically authorizes operations based on updated environmental data, prior to operations ever commencing on the USWTR. In Appellants' view, the Navy prejudiced its future decision to approve operations on the USWTR by proceeding with the $127 million construction of the USWTR prior to an ROD approving operations. Once construction starts, Appellants argue, the Navy's future NEPA process will become nothing more than an attempt to "rationalize or justify decisions already made." Andrus v. Sierra Club, 442 U.S. 347, 351 n.3, 99 S. Ct. 2335, 2338 n.3, 60 L.Ed.2d 943 (1979). But Appellants have presented no authority mandating that an agency must authorize all stages of a project in one ROD. Indeed, the EIS is "[a]t the heart of NEPA," Dept. of Transp. v. Pub. Cit., 541 U.S. 752, 757, 124 S. Ct. 2204, 2209, 159 L.Ed.2d 60 (2004), rather than the ROD, which is merely a means of documenting the agency's final decision on a proposed action that required an EIS. While a fundamental NEPA principle is that connected actions be analyzed together in one EIS, see 40 C.F.R. § 1508.25(a), Appellants have conceded that the Navy's EIS analyzed both phases of the USWTR, and nothing in NEPA reiterates this "anti-segmentation" principle with regard to an ROD. … In sum, Appellants have not pointed to any provision in NEPA requiring an agency to authorize all phases of a proposed action evaluated in an EIS at the time it issues an ROD. We thus find that it is not an independent violation of NEPA, warranting reversal of the district court's judgment, for the Navy to enter into a construction contract after it signs an ROD authorizing construction and after having its NEPA analysis upheld by the district court. The district court's judgment that the Navy complied with NEPA is due to be affirmed.
U.S. Department of the Interior		
***Drakes Bay Oyster Company v. Jewell*, ___ F.3d ___ (9th Cir. 2013) (revised opinion issued January 14, 2014)**	DOI	**WIN** - Court of Appeals affirmed the district court's order denying a preliminary injunction challenging the Secretary of the Interior's discretionary decision to let Drakes Bay Oyster Company's permit for commercial oyster farming at Point Reyes National Seashore expire on its own terms. The court held that plaintiffs were not likely to succeed on the merits of their claims. One of the claims involved a challenge to an EIS prepared to examine the potential environmental impacts associated with the operation and the closure of the oyster farm. With respect to the NEPA claim, the court held (all text from the decision): Under NEPA, an agency is required to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The government urges that its decision to let Drakes Bay's permit expire is not a "major Federal action[]," but rather is inaction that does not implicate NEPA. Drakes Bay responds that the term "major Federal actions" includes failures to act, 40 C.F.R. § 1508.18, and that NEPA applies to decisions concerning whether to issue a permit.

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		Here, the Secretary's decision to let Drakes Bay's permit expire according to its terms effectively "denied" Drakes Bay a permit. We have held that "if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action." Ramsey v. Kantor, 96 F.3d 434, 444 (9th Cir. 1996) (emphasis added). But we have never held failure to grant a permit to the same standard, and for good reason. If agencies were required to produce an EIS every time they denied someone a license, the system would grind to a halt. Our case law makes clear that not every denial of a request to act is a "major Federal action." We have held, for example, that no EIS was required when the federal government denied a request to exercise its regulatory authority to stop a state's program killing wildlife. State of Alaska v. Andrus, 591 F.2d 537, 541 (9th Cir. 1979). … We are skeptical that the decision to allow the permit to expire after forty years, and thus to move toward designating Drakes Estero as wilderness, is a major action "significantly affecting the quality of the human environment" to which NEPA applies. 42 U.S.C. § 4332(2)(C). "The purpose of NEPA is to 'provide a mechanism to enhance or improve the environment and prevent further irreparable damage.'" Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995) (quoting Pacific Legal Foundation v. Andrus, 657 F.2d 829, 837 (6th Cir. 1981)). The Secretary's decision is essentially an environmental conservation effort, which has not triggered NEPA in the past. For example, in Douglas County, we held NEPA did not apply to critical habitat designation under the Endangered Species Act ("ESA") because it was "an action that prevent[ed] human interference with the environment" and "because the ESA furthers the goals of NEPA without demanding an EIS." Id. at 1505, 1506 (emphasis added). Because removing the oyster farm is a step toward restoring the "natural, untouched physical environment" and would prevent subsequent human interference in Drakes Estero, id. at 1505, the reasoning of Douglas County is persuasive here. The Secretary's decision to allow the permit to expire, just like the designation under the ESA, "protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose." Id. at 1507. … Ultimately, we need not resolve whether NEPA compliance was required because, even if it was, the Secretary conducted an adequate NEPA review process and any claimed deficiencies are without consequence. The government produced a lengthy EIS, which the Secretary considered and found "helpful." Although the Secretary acknowledges that compliance with NEPA was less than perfect, Drakes Bay is unlikely to succeed in showing that the errors were prejudicial. … Drakes Bay points to "technical" violations, specifically, the Secretary's failure to publish the EIS more than thirty days before he made his decision and the Secretary's framing the extension denial in the form of a Decision Memorandum rather than a Record of Decision. Drakes Bay has shown no prejudice from these claimed violations. See Nat'l Forest Pres. Grp. v. Butz, 485 F.2d 408, 412 (9th Cir. 1973) (declining to reverse where NEPA timing and EIS requirements were not

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		strictly followed but the agency "did consider environmental factors" and the "sterile exercise" of forcing agency to reconsider "would serve no useful purpose"); see also City of Sausalito v. O'Neill, 386 F.3d 1186, 1220 (9th Cir. 2004) (declining to reverse based on violation of deadline for ESA biological assessment where no harm was shown). Drakes Bay puts considerable stock in its claims that the final EIS was based on flawed science and that the absence of the thirty-day comment period denied it an opportunity to fully air its critique, specifically with regard to conclusions regarding the "soundscape" of the estero. Nothing in the record suggests that Drakes Bay was prejudiced by any shortcomings in the final soundscape data. Drakes Bay sent the Secretary its scientific critique before he issued his decision. The Secretary specifically referenced that communication and stated that he did not rely on the "data that was asserted to be flawed." The Secretary was well aware of the controversies on the specific topics that Drakes Bay criticizes and his statement was unambiguous that they did not carry weight in his decision. Drakes Bay's suggestion that the Secretary could not have made the informed decision that NEPA requires without resolving all controversies about the data is unsound. NEPA requires only that an EIS "contain[] a reasonably thorough discussion of the significant aspects of the probable environmental consequences." Seattle Audubon Soc. v. Espy, 998 F.2d 699, 703 (9th Cir. 1993) (internal quotation marks and citation omitted). Drakes Bay is not likely to succeed in showing that the final EIS was inadequate, even assuming NEPA compliance was required.
***Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013)**	DOI/BLM	**WIN** – Plaintiffs contend that BLM violated NEPA by permitting Denison Mines Corp to restart mining operations at the Arizona 1 Mine in 2009 after a 17-year hiatus, under a plan of operations that BLM approved in 1988. The Arizona 1 Mine is a uranium mine located in Mohave County, Arizona. In 1984, Energy Fuels Nuclear, Inc. submitted to BLM a plan for uranium exploration activities on mining claims it owned in Mohave County, Arizona. On October 4, 1984, BLM approved the exploration plan. Four years later, in 1988, Energy Fuels submitted to BLM a plan of operations to develop and operate a portion of its mining claims as the Arizona 1 Mine. BLM reviewed the proposed plan of operations, took into account public sentiment, and prepared an environmental assessment of the mining activities' impact. After a detailed review, on May 9, 1988, BLM approved the plan, determining that the proposed mining operations at the Arizona 1 Mine would not "cause any undue or unnecessary degradation of public lands" or "significantly affect the quality of the human environment." The plan of operations contained a portion governing the interim management of the Arizona 1 Mine "in the event of an 'extended period of non-operation before mining is completed.'" Such a shutdown, the interim management portion of the plan stated, was, though unanticipated, a "possibility." Once the plan of operations was approved, Energy Fuels actively developed the Arizona 1 Mine until a severe drop in uranium prices made mining at the site economically unjustifiable. As a result, Energy Fuels ceased mining activities at the Arizona 1 Mine in 1992 and placed the mine on "standby and interim management status." In May 1997, while mining operations remained on hold, International Uranium Corporation, USA, acquired the Arizona 1 Mine. In 2007,

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		International Uranium merged with Denison. During the period following the cessation of mining activities at the Arizona 1 Mine, Energy Fuels, International Uranium, and later Denison, followed the interim management portion of the 1988 plan of operations. Among other things, the companies maintained buildings, mine shafts, gates, fences, and signage for the mine. The companies also maintained a surety bond for reclamation and paid utilities, property taxes, BLM maintenance fees, and insurance premiums. Additionally, the companies sent employees and contractors to the mine to ensure that the mine complied with the 1988 plan of operations. Likewise, throughout the interim period, BLM conducted field inspections at the Arizona 1 Mine. In 2007, Denison advised BLM of its intention to restart mining operations at the Arizona 1 Mine. At Denison's urging, Mohave County obtained a "Free Use Permit" from BLM to extract gravel to maintain an employee access road to the mine. BLM determined that issuance of the gravel permit to the county fell within a categorical exclusion. Before mining resumed in full, in November 2009, plaintiffs filed their initial complaint in district court against BLM, arguing that Denison could not begin operations under the 1988 plan of operations because the 17-year cessation of mining activities rendered that plan ineffective. The district court denied a motion for preliminary injunction, holding that the 1988 plan of operations had not become ineffective and that BLM did not have to prepare a supplemental NEPA analysis prior to Denison recommencing mining operations. Center for Biological Diversity v. Salazar, No. CV-09-8207-PCT-DGC, 2010 WL 2493988 (D. Ariz. June 17, 2010). After further proceedings, the district court held for BLM on all claims, except that BLM "provided no more than a 'cursory statement' of no cumulatively significant impacts in applying the categorical exclusion" when issuing Mohave County the "Free Use Permit" to remove gravel and remanded the issue to the BLM. A short time later, BLM provided further explanation as to its use of the categorical exclusion. The district court found that BLM had presented a rational explanation for its use of the categorical exclusion. Accordingly, the district court concluded that use of the categorical exclusion as to the gravel permit was not arbitrary and capricious. The district court thus granted summary judgment on the categorical exclusion issue in favor of BLM. Plaintiffs appealed the grants of summary judgment to BLM on all NEPA counts. The court of appeals upheld the lower court decision (all text from the decision): Appellants next contend that BLM violated NEPA by failing to supplement the 1988 environmental assessment BLM conducted in connection with the approval of the 1988 plan of operations. Essentially, Appellants contend that the 1988 NEPA analysis became stale and outdated, necessitating supplemental review of the Arizona 1 Mine's environmental impact.

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		NEPA requires that federal agencies perform environmental analysis before taking any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Thus, whether NEPA is triggered depends on whether there is a new, proposed "major Federal action." … Supplementation of a prior NEPA environmental analysis is only required where "there remains major Federal action to occur." Norton v. S. Utah Wilderness Alliance (SUWA), 542 U.S. 55, 73 (2004) … Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989) (whether supplementation should occur "turns on the value of the new information to the still pending decisionmaking process . . . and if the new information is sufficient to show that the remaining action will affec[t] the quality of the human environment in a significant manner or to a significant extent not already considered"). Undoubtedly, the approval of the 1988 plan of operation was a "major federal action" triggering NEPA's requirements. See SUWA, 542 U.S. at 73. Nevertheless, as in SUWA, "that action [wa]s completed when the plan [wa]s approved." Id.; see also Cold Moutain v. Garber, 375 F.3d 884, 894 (9th Cir. 2004). Before that action was complete, BLM performed the requisite environmental analysis. Accordingly, as far as the 1988 plan of operations is concerned, appropriate NEPA review took place and "[t]here is no ongoing 'major Federal action' that could require supplementation," SUWA, 542 U.S. at 75. Appellants argue, however, that BLM's issuance of a gravel permit to Mohave County, requirement that Denison obtain a new air quality control permit, and approval of an updated reclamation bond each constituted a prerequisite to mining and thus, "major Federal actions" triggering supplementation of the 1988 environmental analysis. While it is true that each of the above actions potentially constituted a "major Federal action" that would have required NEPA analysis—a question we address below as to the gravel permit and reclamation bond—none of those actions affected the validity or completeness of the 1988 approval of the Arizona 1 Mine's plan of operations nor did they prevent Denison from mining under that plan. These additional, independent actions thus did not trigger NEPA supplementation of the 1988 environmental analysis. In sum, "because the [1988 plan of operations] has been approved . . . [BLM's] obligation under NEPA has been fulfilled." Cold Mountain, 375 F.3d at 894. … While BLM required Denison to update its reclamation bond before recommencing mining operations, that action did not consist of an "[a]pproval of [a] specific project[]." Id. BLM approved the Arizona 1 Mine plan of operations in 1988. That plan, as explained above, has not been invalidated or modified since that time. It thus continues in effect and controls activities at the mine. The plan of operations contains a reclamation portion. … BLM's update of the Arizona 1 Mine reclamation bond consisted of the ministerial tasks of feeding reclamation data from the 1988 plan into BLM's "SHERPA" software program, comparing SHERPA's reclamation estimate with that of Denison, and then accepting Denison's proposed bond amount, which was greater than BLM's SHERPA calculation. Such post-project-approval functions are the type of monitoring and compliance activities that this court has determined do not trigger NEPA's requirements. See Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988); San

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		Francisco Tomorrow v. Romney, 472 F.2d 1021, 1025 (9th Cir. 1973). … Appellants also challenge BLM's application of the categorical exclusion to its issuance of the Free Use Permit to Mohave County for extraction of gravel from the Robinson Wash. … Application of a categorical exclusion is not an exemption from NEPA; rather, it is a form of NEPA compliance, albeit one that requires less than where an environmental impact statement or an environmental assessment is necessary. Id. Appellants contend that BLM unlawfully limited the scope of NEPA analysis in invoking this categorical exclusion by failing to analyze adequately "indirect" and "cumulative" impacts of the gravel permit, as well as the impact of "connected actions" under 40 C.F.R. § 1508.25. Section 1508.25 provides that in "determin[ing] the scope of environmental impact statements," an agency must consider, among other things, "[c]onnected actions," and "indirect" and "cumulative" environmental "impacts" to the proposed action. By its plain language, however, this regulation applies only to environmental impact statements. Id. Appellants, in a footnote, contend that although section 1508.25 explicitly applies to environmental impact statements, it should also apply to all actions under NEPA, including the application of a categorical exclusion. In support of this argument, Appellants point to a number of decisions of this court in which we have applied requirements for environmental impact statements to environmental assessments. See Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1076 (9th Cir. 2002); Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp., 113 F.3d 1505, 1509 (9th Cir. 1997); S. Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983). Appellants contend that for the same reason that this court has applied certain environmental impact statement requirements to environmental assessments, the requirements of 1508.25 should also apply to application of categorical exclusions. We have explained, however, that where a proposed action fits within a categorical exclusion, full NEPA analysis is not required. Wong v. Bush, 542 F.3d 732, 737 (9th Cir. 2008). … Moreover, application of section 1508.25's requirements to categorical exclusions is inconsistent with the efficiencies that the abbreviated categorical exclusion process provides. See 40 C.F.R. §§ 1500.4(p), 1500.5(k); Utah Env't Congress v. Bosworth, 443 F.3d 732, 741 (10th Cir. 2006). Accordingly, we conclude that section 1508.25's requirements do not apply to BLM's categorical exclusion analysis in this case. … We conclude that BLM appropriately found that issuance of the gravel permit fell into a categorical exclusion and adequately explained why the permit had no "cumulatively significant" environmental effects preventing application of the categorical exclusion.

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***Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013)** **See also, *Montana Wilderness Association v. Connell*, 725 F.3d 988 (9th Cir. 2013), below**	DOI/BLM	**WIN & LOSS** – The court of appeals affirmed in part and reversed in part the district court's summary judgment in favor of the agencies in a challenge to BLM's management of grazing within the Upper Missouri River Breaks National Monument in Montana. In accordance with the Antiquities Act, President Clinton designated the 375,000-acre area as a national monument in 2001 (Proclamation No. 7398). The Monument was established for the purpose of protecting big horn sheep, essential winter range for sage grouse; habitat for prairie dogs; one of the few remaining fully functioning cottonwood gallery forest ecosystems on the Northern Plains; large concentrations of antelope and mule deer; spawning habitat for the endangered pallid sturgeon; perching and nesting habitats for hawks, falcons and eagles; habitat for great blue heron, pelican and a wide variety of waterfowl; habitat for 48 fish species; archeological and historical sites, from teepee rings and remnants of historic trails to abandoned homesteads and lookout sites used by Meriwether Lewis; and remnants of a rich Native American and pioneer history scattered throughout the Monument. Specifically, the court held that BLM's Breaks Monument EIS complied with NEPA by taking a hard and careful look at grazing impacts, but that the EA for the Woodhawk Allotment, located within the Monument, violated NEPA by not considering a reasonable range of alternatives that included a no- or reduced-grazing option. The court of appeals remanded the case to the district court to order BLM to remedy the deficiencies in the EA for the Woodhawk Allotment or to prepare a more detailed EIS. From the decision: Western Watersheds's underlying concern is that the Breaks Resource Plan, the Breaks EIS, and the EA for the Woodhawk Allotment ignore the detrimental impacts of livestock grazing on Monument objects, especially riparian areas, cottonwood gallery forest ecosystems, and sage-grouse habitat. Livestock have grazed in the Breaks Monument area since the late 1800s. BLM acknowledges that livestock grazing can significantly affect the protected biological objects of the Monument. Overgrazing reduces habitat quality for the greater sage-grouse, which can cause increased predation on nests or nest desertion. In riparian areas, grazing degrades water quality, affecting fish and other aquatic species. BLM studies have found hot-season grazing to be a significant cause of the lack of cottonwood and willow regeneration along the Missouri River. … We next review whether the Breaks EIS complied with NEPA. Western Watersheds contends that the Breaks EIS violates NEPA in several ways: (1) it improperly determined that programmatic changes to BLM's grazing policies were outside the scope of the Breaks EIS; (2) it did not consider a no-grazing or reduced-grazing alternative; and (3) it did not take a "hard look" at grazing impacts. We conclude that the Breaks EIS did not violate NEPA. … BLM did not violate NEPA by excluding changes to its grazing practices from the scope and purpose of the Breaks Resource Plan. Because the Breaks Resource Plan was developed to implement the Proclamation's objectives, those objectives guide our analysis of the reasonableness of the purpose outlined in the EIS. See

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		Westlands Water Dist., 376 F.3d at 866 ("Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS."). We have already determined that BLM's interpretation of the Proclamation to allow the continued use of its grazing management was reasonable under FLPMA and the Proclamation. Based on that analysis, BLM also reasonably defined the scope and purpose of the Breaks Resource Plan in the EIS. Western Watersheds does not show that NEPA mandates a different conclusion. It was also reasonable for the Breaks EIS to exclude detailed consideration of a no-grazing or reduced-grazing alternative. An EIS need not consider in detail an alternative that does not meet the purpose of the project. See City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986) ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."). But if an alternative is eliminated from detailed study, the agency must "briefly discuss [its] reasons" for doing so. 40 C.F.R. § 1502.14(a). Here, the EIS explained why it excluded from detailed review two alternatives that would reduce or eliminate grazing. The EIS considered but eliminated two reduced-grazing alternatives: (1) an alternative to identify lands as not available for livestock grazing and (2) an alternative to reduce or phase out livestock grazing. BLM rejected the first alternative because the Proclamation did "not require nor suggest" the need to restrict grazing and the existing Lewistown Standards could be used "to mitigate conflicts with Monument uses and values." Similarly, BLM excluded the second alternative because there was "no documented need to reduce or phase out livestock grazing based on the Proclamation and Standards for Rangeland Health." Given the scope and purpose of the Breaks Resource Plan, these explanations satisfy NEPA's brief discussion requirement. See League of Wilderness Defenders – Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1072–73 (9th Cir. 2012) (concluding that the Forest Service did not err by eliminating from detailed review two alternatives that would not meet the purpose of the proposed action). We conclude that at the programmatic level of NEPA review, it was reasonable for BLM to decline to analyze in detail an alternative that would change grazing management levels throughout the entire Monument. … Western Watersheds also argues that the Breaks EIS should have disclosed as a cumulative impact that BLM destroyed over two-thousand acres of sage-grouse habitat in 1979 through sagebrush spraying. We disagree. NEPA requires an agency to consider the cumulative impact of the current action "when added to other past, present, and reasonably foreseeable future actions." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214–15 (9th Cir. 1998). Although in some situations discussion of the environmental impact of a thirty-year-old project might be useful and relevant, we conclude that it is not here. The EIS took a "hard look" at environmental impacts on sage-grouse without discussing the 1979 spraying. BLM to decline to analyze in detail an alternative that would change grazing management levels throughout the entire Monument. Western Watersheds also contends that the Breaks EIS did not take a "hard look" at grazing impacts. They argue that the Breaks EIS did not adequately analyze

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		these impacts and that it inappropriately tiered to other NEPA documents. The record leads us to opposite conclusions. NEPA requires agencies "to take a 'hard look' at how the choices before them affect the environment, and then to place their data and conclusions before the public." Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1099 (9th Cir. 2008). This "hard look" requires a "full and fair discussion of significant environmental impacts" in the EIS. 40 C.F.R. § 1502.1. "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." W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 491 (9th Cir. 2011) (citations and alterations omitted). … In concluding that BLM complied with NEPA in developing the Breaks EIS, we distinguish between the two different levels of agency planning and management: programmatic and site-specific. See id. When an agency develops an EIS for a programmatic plan like the Breaks Resource Plan, the EIS "must provide 'sufficient detail to foster informed decision-making,' but 'site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development.'" Id. (quoting N. Alaska Envtl. Ctr. v. Lujan, 961 F.2d 886, 890–91 (9th Cir. 1992)). Our conclusion that the Breaks EIS contains sufficient analysis for informed decision-making at the programmatic level does not reduce or minimize BLM's critical duty to "fully evaluate[]" site-specific impacts. See id. Stated another way, BLM's decision to exclude broad changes to its grazing management throughout the Monument in the Breaks Resource Plan does not avoid its critical obligation to consider changes to grazing preferences at the site-specific stage. We consider whether the EA for the Woodhawk Allotment complied with NEPA. Western Watersheds challenges BLM's finding of no significant impact and argues that BLM should have prepared a full EIS before issuing the renewed permit. It also contends that BLM did not consider a reasonable range of alternatives because the EA did not consider (1) a no-grazing alternative or (2) an alternative that incorporated the potential-natural-community standard. Western Watersheds further expresses concern that the EA tiers to outdated NEPA documents. --- We are troubled by BLM's decision not to consider a reduced- or no-grazing alternative at the site-specific level, having chosen not to perform that review at the programmatic level. Although we have held above that the decision not to consider these alternatives in the Breaks Resource Plan did not violate NEPA, this decision has deprived BLM of information on the environmental impacts of the unconsidered alternatives. At the site-specific level, then, BLM is operating with limited information on grazing impacts. It is at this stage, when the agency makes a critical decision to act, that the agency is obligated fully to evaluate the impacts of the proposed action. See 'Ilio'ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1097 (9th Cir. 2006) (explaining that if an agency does not consider reasonable alternatives at the programmatic stage, then it has an "obligation" to consider such alternatives at the site-specific stage). The analysis in the Breaks EIS was sufficient for the proposed programmatic action, but the proposed permit

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		renewal at the site-specific level demands more. Where modification of grazing practices is not considered at a programmatic level for the full Monument area, it is all the more important that agency actions on site-specific areas give a hard and careful look at grazing impacts on Monument objects. … [T]he EA process for the Woodhawk Allotment was deficient in its consideration of alternatives insofar as it did not consider in detail any alternative that would have reduced grazing levels on the Allotment in light of the Monument's protected objects. BLM cannot ignore the Proclamation's goal of protecting Monument objects when it determines the reasonable range of alternatives for NEPA review of site-specific actions. We make no decision of substance on how a balance should be struck by BLM, but we conclude that the agency's procedural efforts to explore alternatives in the EA did not satisfy NEPA. Because we reverse on this issue, we do not reach Western Watersheds's arguments that BLM should have considered a potential natural- community standard or that BLM should have prepared an EIS for the Woodhawk Allotment.
***Western Watershed Project v. U.S. Bureau of Land Management*, 721 F.3d 1264 (10th Cir. 2013)**	DOI/BLM	**WIN** – This case involved a challenge to a BLM decision to grant a 10-year grazing permit to LHS Spilt Rock Ranch for four federal public land allotments in central Wyoming. BLM issued a 102-page EA that acknowledged serious ecological problems on the rangeland. The EA considered five alternatives to address these problems, but only three were analyzed in detail. Two alternatives, referred to as "No Action" and "No Grazing," were briefly considered but rejected without detailed analysis. Several months after the EA was issued, BLM issued a FONSI, finding that renewal of the Split Rock grazing permit would not significantly affect the environment. BLM then issued a Notice of Proposed Decision, which did not match any of the alternatives described in the EA. Instead, it combined Alternatives One and Two by eliminating the most environmentally protective features of each, but did incorporate other protective features such as fencing, deferred rotation, and shorter grazing season. Upholding the lower court decision finding the EA met the hard look requirement, the court held (all text from the decision): We review de novo the district court's grant of summary judgment for BLM. State of New Mexico, 565 F.3d at 704-05 (10th Cir. 2009). Although the district court's decision is not afforded deference, BLM's decision must be: "Our inquiry under the APA must be thorough, but the standard of review is very deferential to the agency." Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers, 702 F.3d 1156, 1165 (10th Cir. 2012) (quotations omitted). "A presumption of validity attaches to the agency action and the burden of proof rests with" WWP. Morris v. U.S. Nuclear Regulatory Comm'n, 598 F.3d 677, 691 (10th Cir. 2010) (quotations omitted). Our deference is most pronounced in cases where, as here, the challenged decision involves "technical or scientific matters within the agency's area of expertise." Utah Envtl. Congress v. Bosworth, 443 F.3d 732, 739 (10th Cir. 2006). This deference means we may set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). … WWP illustrates its critique of BLM's Proposed Decision with this analogy:

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		> I want to increase my savings so I formulate two plans. In Plan A I will forgo a planned vacation, but continue eating lunch every day at Cafe Milano in downtown Tucson. In Plan B I will forgo eating at Cafe Milano, but will go on vacation. I decide to adopt a Hybrid Plan that partakes of both: I will keep eating at Cafe Milano every day, and also go on vacation. Aplt. Br. at 53. Under this analogy, two alternative plans to save money are combined to create a hybrid plan that lacks the most effective features of either alternative and is therefore likely to be less successful in advancing the goal of saving money. But this analogy demonstrates a critical problem with WWP's argument: It calls into question the wisdom of BLM's Proposed Decision, but not whether BLM could predict its effects. As we explain above, the relevant question is whether the impact of the Proposed Decision can be reasonably predicted from the EA's analysis, not whether it is the best possible decision. See State of New Mexico, 565 F.3d at 707. NEPA "merely prohibits uninformed—rather than unwise—agency action." Id. at 704 (quotations omitted). Moreover, even though the Proposed Decision omits environmentally protective features from Alternatives One and Two, it nevertheless adds other features that are more environmentally protective than historical practice—features that were analyzed in the EA, such as fencing, herding, rest rotation, and fewer grazing days. Our review of the EA and the Proposed Decision indicates that BLM analyzed the various components of the plan sufficiently to meet NEPA's hard look requirement and did not act arbitrarily or capriciously.
***Montana Wilderness Association v. Connell*, 725 F.3d 988 (9th Cir. 2013)** **See also, *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013), above**	DOI/BLM	**WIN** – In this second challenge to BLM's Resource Management Plan for the Upper Missouri River Breaks National Monument (see Western Watersheds Project v. Abbey, 719 F.3d 1035 (9th Cir. 2013), above), the court of appeals held that BLM had complied with the Federal Land Policy and Management Act and NEPA, but had violated the National Historic Preservation Act by failing to conduct Class III surveys with respect to roads, ways, and airstrips that have not been the subject of such surveys. In accordance with the Antiquities Act, President Clinton designated the 375,000-acre area as a national monument in 2001 (Proclamation No. 7398). The Monument was established for the purpose of protecting big horn sheep, essential winter range for sage grouse; habitat for prairie dogs; one of the few remaining fully functioning cottonwood gallery forest ecosystems on the Northern Plains; large concentrations of antelope and mule deer; spawning habitat for the endangered pallid sturgeon; perching and nesting habitats for hawks, falcons and eagles; habitat for great blue heron, pelican and a wide variety of waterfowl; habitat for 48 fish species; archeological and historical sites, from teepee rings and remnants of historic trails to abandoned homesteads and lookout sites used by Meriwether Lewis; and remnants of a rich Native American and pioneer history scattered throughout the Monument. With respect to the NEPA claims, the court held (all text from the decision): Here, MWA argues that BLM failed to take a hard look at cumulative effects by neglecting to analyze how a host of activities authorized by the RMP (including six

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		airstrips, over 400 miles of roads and jet boats), in conjunction with grandparented activities already occurring in the Monument (especially oil and gas development and livestock grazing), may cumulatively impact objects of the Monument, including (1) the "most viable" elk herd in Montana; (2) one of the "premier" big horn sheep herds in the continental United States; and (3) the Upper Missouri National Wild and Scenic River (UMNWSR). At the most basic level, MWA faults the FEIS because it does not include sections devoted exclusively to cumulative impacts on elk, bighorn sheep and opportunities for solitude in the UMNWSR. MWA properly points out that a NEPA analysis should be informed by the laws driving the federal action being reviewed. See Or. Natural Desert Ass'n v. BLM,625 F.3d 1092, 1109 (9th Cir. 2010) ("[B]ecause 'NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,' the considerations made relevant by the substantive statute driving the proposed action must be addressed in NEPA analysis." (citation omitted) (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978))). The Proclamation and the Antiquities Act focus on the protection of "objects," so MWA suggests that the FEIS should have included sections – including cumulative impact analyses – devoted to each of the Monument's objects. An agency, however, has discretion in deciding how to organize and present information in an EIS. See League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008) (holding that an agency "is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate. It is not for this court to tell the [agency] what specific evidence to include, nor how specifically to present it."). Here, BLM structured the FEIS around specific subjects – air quality; cultural resources; fish and wildlife; geology and paleontology; soils; vegetation; visual resources; water; forest resources; lands and realty; livestock grazing; oil and gas; recreation; transportation; fire management; wilderness study areas; social conditions; and economic conditions – rather than around the objects of the Monument. Although the FEIS does not include sections devoted exclusively to elk, bighorn sheep, the UMNWSR and other objects of the Monument, the FEIS discusses these objects throughout. Bighorn sheep, for example, are discussed not only in the section addressing impacts on fish and wildlife, but also in the sections on livestock grazing, oil and gas, transportation, social conditions and economic conditions. BLM's decision to structure the FEIS in this fashion was within the agency's discretion. Whether BLM complied with NEPA thus turns on the substance of the FEIS rather than its form: the question boils down to whether BLM took a hard look at impacts on the UMNWSR, elk and bighorn sheep. We conclude that BLM did so.
***WildEarth Guardians et al. v. Jewell, et al.,* ___ F.3d ___ (D.C. Cir. 2013)**	DOI/BLM	**WIN** - Antelope Coal LLC (Antelope Coal) filed an application with BLM requesting that a tract of federal land adjacent to Antelope Coal's existing mine in the Wyoming Powder River Basin be offered for competitive lease sale to interested parties. BLM prepared an EIS, which spans nearly five hundred pages and includes the BLM's responses to public comments on the draft EIS. The BLM solicited further public comment on the FEIS and issued written responses to the

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		comments it received. On March 25, 2010, the BLM issued the ROD, approving Antelope Coal's application and dividing the land into two tracts (the West Antelope II tracts), each to be offered for lease by competitive bidding. Antelope Coal won the bidding for both leases and the leases became effective in 2011. Plaintiffs challenged BLM's decision to approve the West Antelope II tracts for lease, arguing that the FEIS and ROD were deficient in several respects. The district court granted summary judgment to the defendants, finding that the plaintiffs lacked standing to raise one of their arguments and that their remaining arguments failed on the merits. The court of appeals concluded that, while plaintiffs did have standing, their merits arguments fall short. Accordingly, the court affirmed the judgment of the district court. In its decision on the NEPA issues, the court stated (all text from the decision): We apply the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., to the merits of the Appellants' NEPA and FLPMA challenges and review de novo the district court's grant of summary judgment. Theodore Roosevelt I, 616 F.3d at 507; Nevada v. Dep't of Energy, 457 F.3d 78, 87 (D.C. Cir. 2006); see 5 U.S.C.§ 706(2)(A). In doing so, we are mindful that our role is not to" 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." Nevada, 457 F.3d at93. Rather, it is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." City of Olmsted Falls, Ohio v. FAA, 292 F.3d 261, 269 (D.C. Cir. 2002) (quoting Balt. Gas & Elec., 462 U.S. at 97–98). In short, "an agency must take a 'hard look' at the environmental effects of its proposed action." Theodore Roosevelt Conservation P'ship v. Salazar (Theodore Roosevelt II), 661 F.3d 66, 75 (D.C. Cir. 2011); accord Balt. Gas & Elec., 462 U.S. at 97. While the Appellants raise numerous challenges to the sufficiency of the FEIS, we find none has merit and consider only two worthy of discussion. We turn first to the Appellants' argument that the BLM did not take a hard look at the effect of its leasing decision on global climate change. In the FEIS, the BLM discussed at length the prevailing scientific consensus on global climate change and coal mining's contribution to it. The BLM estimated the greenhouse gas (GHG) emissions that occurred at the Antelope Mine in 2007 and projected emissions for a typical year of operations if the West Antelope II tracts are also leased. It projected that, with the addition of the West Antelope II tracts, Antelope Mine would account for only .63 per cent of state-wide emissions of carbon dioxide equivalent (CO2e). At the same time, the BLM noted that several factors made any projection about future emissions speculative. First, the BLM does not authorize mining through the issuance of a coal lease; rather, a mining permit must be obtained from the Wyoming Department of Environmental Quality with oversight from an independent federal agency, the Office of Surface Mining, and therefore mitigation measures can be imposed at a later stage. … The BLM further assumed that mining would continue at existing production rates and the coal would continue to be used to generate electricity by coal-fired power plants. Finally, the BLM identified considerable uncertainty about regulatory and technological developments that could affect future emissions. The Appellants allege several inadequacies in the BLM analysis but they are of the flyspecking variety. …

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		Next we consider the Appellants' argument that the BLM failed to take a hard look at the effect the lease developments would have on local ozone levels. … In the FEIS, the BLM noted that the area around the West Antelope II tracts is in attainment—i.e., in compliance with NAAQS—for all pollutants. … The BLM projected that by 2010 emissions of NO2 would remain well below NAAQS; further, the FEIS included an extensive discussion of the current and projected emissions of NOx and NO2. … The projection of NO2 emissions was based on modeling done for the Powder River Basin Coal Review, "a regional technical study . . . to help evaluate the cumulative impacts of coal and other mineral development in the PRB." … No separate projection, however, was made for ozone. As the BLM explained, it addressed ozone in its discussion of NOx emissions because NOx is one of the main ingredients in the formation of ground level ozone and NO2, in turn, is a type of NOx. The BLM also noted that further modeling would be done at the permitting stage to ensure compliance with state and federal air quality standards. … We conclude that the BLM satisfied its obligations under NEPA. " 'The NEPA process involves an almost endless series of judgment calls,' and 'the line-drawing decisions necessitated by the NEPA process are vested in the agencies, not the courts.' " Duncan's Point Lot Owners Ass'n, Inc. v. FERC, 522 F.3d 371, 376 (D.C. Cir. 2008) (quoting Coal. On Sensible Transp., Inc. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987)) (alterations omitted). It may have been possible or even prudent for the BLM to separately model future ozone levels but we think that, given the limitations on such modeling and the critical role NOx plays in ozone formation, the BLM's projections and extensive discussion of NOx and NO2 emissions suffice.
***WildEarth Guardians v. National Park Service*, 703 F.3d 1178 (10th Cir. 2013)**	DOI/NPS	**WIN** - This appeal concerns WildEarth Guardians' challenge to NPS' elk and vegetation management plan for Rocky Mountain National Park (RMNP), established in 1915. The Rocky Mountain National Park Enabling Act (RMNP Act) bans hunting or killing wildlife within the park, with very limited exceptions. The park has always had a substantial elk population. But most elk predators, especially wolves and grizzly bears, were exterminated in the park area prior to its establishment, and Congress's decision to ban hunting in RMNP allowed the park's elk population to grow without constraint. In April 2006, NPS released a draft EIS that considered five alternative elk and vegetation management plans: (1) the current plan (the no-action alternative); (2) rapid reduction of the elk population, which the agency identified as its preferred alternative; (3) gradual reduction of the elk population; (4) a combination of managed killing and elk contraception; and (5) a combination of managed killing and the reintroduction of a small number of intensively managed gray wolves. A final EIS was prepared in 2007. WildEarth challenged the final EIS, contending the NPS violated NEPA by failing to include the reintroduction of a naturally reproducing wolf population as one of the alternatives considered in the EIS. The court found that the record supports the agency's decision to exclude consideration of a natural wolf alternative from its EIS (all text from the decision): WildEarth's sole NEPA claim is that the NPS deviated from NEPA's required procedure by declining to consider the natural wolf alternative in its

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		environmental impact statement. WildEarth argues the wolf alternative fit the purpose and need of the proposed action, and thus required the NPS to consider it in an EIS. Agencies must consider alternatives to any project that might have a significant effect on the quality of the human environment. 42 U.S.C. § 4332(2)(C)(iii). But agencies need not consider every possible alternative to a proposed action, only "reasonable" alternatives. 40 C.F.R. § 1502.14(a); New Mexico, 565 F.3d at 703. A "rule of reason" applies to an agency's decision to prepare an EIS, as well as the agency's choice of alternatives to include in its analysis. DOT v. Public Citizen, 541 U.S. 752, 767 (2004). In other words, agencies are not required to consider alternatives they have "in good faith rejected as too remote, speculative, or . . . impractical or ineffective." Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1039 (10th Cir. 2001). "Alternatives that do not accomplish the purpose of an action are not reasonable, and need not be studied in detail by the agency." Citizens' Comm. To Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1031 (10th Cir. 2002) (internal quotation and citation omitted). Agencies must "briefly discuss the reasons" for eliminating unreasonable alternatives from an EIS. 40 C.F.R. § 1502.14(a). WildEarth acknowledges that NEPA does not require an agency to consider impractical alternatives, but it argues the natural wolf alternative was practical. In particular, WildEarth points to studies, emails, and other documents in the record discussing the benefits of this alternative. …While the record supports some benefits to a natural wolf option, that is not what guides us. What guides us is a rule of reason, where the agency explains its decision to take certain proposed options off the table because of a lack of practicality. The NPS did that here. The agency found the natural wolf alternative would be impractical despite some marginal upside, and the record supports that decision.
U.S. Department of Transportation		
***International Brotherhood of Teamsters v. U.S. Department of Transportation*, ___ F.3d. ___ (D.C. Cir. 2013)**	DOT	**WIN** - Pursuant to statute, the Federal Motor Carrier Safety Administration authorized a pilot program that allows Mexico-domiciled trucking companies to operate trucks throughout the United States, so long as the trucking companies comply with certain federal safety standards. Two groups representing American truck drivers, the Owner–Operator Independent Drivers Association and the International Brotherhood of Teamsters, contend that the pilot program is unlawful. In denying the plaintiffs' petition for review and holding for the federal agency, the court held (all text from the decision): [T]he Teamsters contend that the agency violated the National Environmental Policy Act, which requires agencies to analyze the environmental impact of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). In this case, the Act required the agency to prepare a document called an Environmental Assessment. See 40 C.F.R. § 1501.4(b). The agency did so.

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		In Department of Transportation v. Public Citizen, the Supreme Court held that the agency was not responsible under NEPA for evaluating the environmental effects of the President's decision to allow Mexican trucks on U.S. roads. See 541 U.S. 752, 765–70 (2004). The Teamsters accept that holding. But they try to argue that the agency still had discretion to restrict the pilot program so as to mitigate the environmental impacts. The Teamsters identified several alternatives the agency should have pursued. But, as the agency has explained, the short and dispositive answer to the Teamsters' argument is that the agency lacks authority to impose the alternatives proposed by the Teamsters and those alternatives would go beyond the scope of the pilot program. See Final Environmental Assessment of the Pilot Program on NAFTA Long–Haul Trucking Provisions, Docket No. FMCSA–2011–0097, at 6, 7–10 (Sept.2011) (describing agency's discretion and rejecting alternatives the agency lacks discretion to implement). In addition, the Teamsters contend that the agency released its environmental analysis too late. An agency's analysis must be released "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). The Teamsters argue that the agency violated this requirement because it published its Environmental Assessment after it had already issued a final notice of intent to proceed with the pilot program. However, the Teamsters have not identified any aspect of the pilot program that the agency could have designed differently to reduce the environmental impacts, and the agency completed its Environmental Assessment before authorizing any Mexico-domiciled trucking companies to operate under the program. Any technical error was therefore harmless and not grounds for vacating or remanding. See Nevada v. Department of Energy, 457 F .3d 78, 90 (D.C.Cir.2006).
***Alaska Survival, et al. v. Surface Transportation Board*, 705 F.3d 1073 (9th Cir. 2013)**	STB	**WIN** – The case involved STB's decision authorizing Alaska Railroad Corporation (ARRC) to construct about thirty-five miles of new rail line between Port MacKenzie, located in Alaska's Cook Inlet, and the railroad's main line, located near Wasilla, Alaska. Plaintiffs challenged, among other things, STB's compliance with NEPA. With respect to the NEPA claim, the court held (all text from the decision): Petitioners raise a second issue of whether the STB's EIS complied with NEPA. They contend that the STB violated NEPA by adopting an unreasonable purpose and need statement, refusing to consider an alternative route without an access road, and inadequately assessing the project's adverse effect on wetlands. We disagree. 1. Purpose and Need Statement Petitioners argue that the STB erred by adopting a purpose and need statement focused exclusively on the goals stated by ARRC. They contend that the STB did not take into consideration public goals when defining the purpose and need. Respondents assert that the purpose and need statement properly focused on both the STB's enabling statute and ARRC's goals. We agree with Respondents, and we hold that the STB did not act arbitrarily or capriciously by generating the

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		purpose and need statement based on the statutory context and ARRC's objectives. A statement of purpose and need must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13 (2012). Courts review purpose and need statements for reasonableness giving the agency considerable discretion to define a project's purpose and need. Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 866 (9th Cir.2004). A purpose and need statement will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained. See NPCA, 606 F.3d at 1070. "Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS." Westlands Water Dist., 376 F.3d at 866. An agency must look hard at the factors relevant to definition of purpose, which can include private goals, especially when the agency is determining whether to issue a permit or license. NPCA, 606 F.3d at 1070–71. Petitioners contend that the STB failed to articulate a purpose and need that reflected the agency's perspective. They argue that STB erred when it adopted ARRC's asserted goals without considering the "public convenience and necessity" under § 10901. Petitioners are correct that an agency must consider the statutory context of the proposed action and any other congressional directives in addition to a private applicant's objectives. NPCA, 606 F.3d at 1070; see also League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1070 (9th Cir.2012) (considering statutory context to determine reasonableness of purpose and need statement). But when granting a license or permit, the agency has discretion to determine the best way to implement its statutory objectives, see Westlands Water Dist., 376 F.3d at 867, in light of the goals stated by the applicant, see Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C.Cir.1991) ("Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be."). We must consider whether the purpose and need statement is reasonable in light of the ARRC's stated goals and the statutory context of the ICCTA. See NPCA, 606 F.3d at 107 … Next, Petitioners argue that by "thoughtlessly adopt[ing]" ARRC's narrow goals, the STB considered an impermissibly narrow range of alternatives. But Petitioners do not show that the STB's adoption of ARRC's goals led the agency to consider a too limited range of alternatives. They do not demonstrate that the purpose and need statement resulted in the agency's failure to consider a non-access-road alternative nor do they point to any other deficiency in the alternatives considered in the FEIS. See Westlands Water Dist., 376 F.3d at 867–68 (reversing the district court's finding that the purpose and need statement was unreasonable when the statement did not improperly foreclose consideration of alternatives). The FEIS considered twelve build alternatives and one no-action alternative. The range of alternatives considered was sufficient to satisfy both the private and public objectives underlying the purpose of the project and to enable the STB to make an informed decision to grant the exemption. See City of Angoon v. Hodel,

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		803 F.2d 1016, 1022 (9th Cir.1986) (concluding that the EIS was adequate when the alternatives discussed enabled the agency to make an informed decision). 2. No–Access–Road Alternative Petitioners contend that the STB impermissibly refused to consider an alternative rail design without a full-length access road adjacent to the rail line. They assert that a no-access-road alternative was a viable and reasonable option that should have been examined in the EIS. Respondents assert that the STB properly determined that a no-access-road alternative was not reasonable because an access road is necessary for modern rail line construction and maintenance. We conclude that the STB complied with NEPA when it determined that a no-access-road alternative was not feasible. NEPA requires an EIS to describe and analyze "every reasonable alternative within the range dictated by the nature and scope of the proposal." Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir.1998). Consideration of alternatives "is the heart of the [EIS]," and agencies should "[r]igorously explore and objectively evaluate all reasonable alternatives" that relate to the purposes of the project and briefly discuss the reasons for eliminating any alternatives from detailed study. 40 C.F.R. § 1502.14 (2012); see also Se. Alaska Conservation Council v. Fed. Highway Admin., 649 F.3d 1050, 1056 (9th Cir.2011). "The [EIS] need not consider an infinite range of alternatives, only reasonable or feasible ones." Carmel–By–The–Sea, 123 F.3d at 1155. But failure to examine a reasonable alternative renders an EIS inadequate. Friends of Southeast's Future, 153 F.3d at 1065. Those challenging the failure to consider an alternative have a duty to show that the alternative is viable. City of Angoon, 803 F.3d at 1021–22. We perceive several flaws in Petitioners' contention that the agency acted arbitrarily and capriciously by refusing to consider a no-access-road alternative. First, Petitioners merely contend but do not show that a no-access-road alternative is a feasible option that should have been considered by the STB. Id. Such an allegation begs the question of whether a no-access-road alternative is a feasible option. How could a railroad line effectively be built through rugged and undeveloped terrain without an access road for equipment and moving of supplies and personnel? Would a temporary access road cause more environmental harm in the Susitna wetlands than a permanent one? Without evidence to the contrary, we defer to the STB's technical expertise regarding modern railroad construction. See NPRC, 668 F.3d at 1075. Second, Petitioners rely heavily on EPA's comments expressing concern about the need for an access road. They seem to argue that because the EPA called the necessity of an access road into question, the STB is obligated to consider a no-access-road alternative based on NEPA's mandate that STB consult with other agencies. They further contend that the concerns raised by the EPA and other agencies should reduce the deference we afford to the STB. But a lead agency does not violate NEPA when it does not defer to the concerns of other agencies. Akiak Native Cmty. v. U.S. Postal Serv., 213 F.3d 1140, 1146 (9th Cir.2000). All that NEPA requires is that the lead agency consider these concerns and explain why it

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		finds them unpersuasive. Id. The STB satisfied that burden here. Not only did the STB respond to EPA's concerns in the FEIS, it also addressed these concerns in its EM. We conclude that there is no error in STB's reliance on ARRC's explanation of modern railroad construction and maintenance practices to answer the EPA's concerns. It was reasonable for the STB to gather information about rail construction from the entity that will build the rail line. Moreover, Petitioners cite no case law for their assertion that we should not give deference to the STB's decision. We conclude that STB did not act arbitrarily or capriciously in declining to consider the no-access-road alternative. 3. Wetlands Delineation and Mitigation Lastly, Petitioners contend that the STB relied on improper methodology for its wetlands delineation. Petitioners further argue that the EIS did not provide sufficient detail about the wetlands impacts of the rail line, leading to insufficient discussion of mitigation measures. Respondents counter that they employed accepted wetland-delineation methodology that yielded detailed information and that the discussion of wetlands mitigation in the FEIS was sufficient under NEPA. We agree with Respondents. An EIS must contain a "reasonably complete discussion of possible mitigation measures." Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th Cir.2000) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)). "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.' " Carmel–By–The–Sea, 123 F.3d at 1154 (quoting Robertson, 490 U.S. at 352). Perfunctory descriptions or mere lists of mitigation measures are insufficient. Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir.1998). Petitioners take issue with the STB's use of "rapid assessment" survey methods, aerial photography, and computer generated information system data. They point to comments from both the National Marine Fisheries Service (NMFS) and the EPA that called for site-specific examinations. Although we have held that the use of stale data based on aerial surveys does not constitute a "hard look" under NEPA, NPRC, 668 F.3d at 1086–87, we are not convinced that the STB's chosen methodology was deficient. Petitioners point to no evidence that the data was stale. Nor do they demonstrate how the methodology employed led to insufficient data on which to base mitigation measures. The record shows that the methodology used for wetlands delineation was performed in accordance with the Army Corps of Engineers' delineation manual. Although NMFS and EPA expressed concern with the wetlands delineation and the information on the functions of wetlands, the record does not show that the STB's reliance on this methodology was arbitrary and capricious. It is not the role of this court "to decide whether an [EIS] is based on the best scientific methodology available." McNair, 537 F.3d at 1003 (internal quotations omitted) (alterations in original). As long as the agency engages in a "reasonably thorough discussion," we do not require unanimity of opinion among agencies. Carmel–By–The–Sea, 123 F.3d at 1151 (internal quotations omitted).

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		Petitioners contend that the STB's analysis of wetland-damage mitigation is too cursory to meet NEPA's "hard look" requirement. They argue that the STB did not consider bridging streams and elevating track to minimize the need for filling of streams and wetlands as urged by the EPA. The STB responded to the EPA's concerns by explaining that the prohibitively high cost of constructing an elevated track makes it infeasible and discussing in the FEIS the positive and negative environmental impacts of bridges and culverts. The EM further addressed the EPA's concerns by reiterating the high costs of elevated track and noting that the EPA did not present any evidence that an elevated track was feasible. Petitioners likewise present no evidence of the feasibility of the elevated track. We cannot say that failure to consider this alternative is improper without evidence showing the feasibility of the alternative. City of Angoon, 803 F.3d at 1021–22. Further, although we give special weight to criticism from other federal agencies, see Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1122 (9th Cir.2004), the EPA's criticisms alone are not sufficient to invalidate the discussion of environmental impacts and mitigation measures that is found in the record. See Carmel–By–The–Sea, 123 F.3d at 1154–55. Petitioners further argue that the STB impermissibly referred to mitigation measures as a "future prospect" to be handled by ARRC. NEPA does not require the finalization or adoption of mitigation measures but mandates only that the agency engage in a "reasonably thorough" discussion of mitigation. Carmel–By–The–Sea, 123 F.3d at 1151, 1154. The FEIS contains a lengthy discussion of measures to mitigate impacts on water resources, which includes removing debris from wetlands as soon as practicable and constructing the railroad to maintain natural water flows by installing bridges or using equalization culverts. Further, the STB's authorization of the exemption was conditional to ARRC's adoption of one hundred mitigation measures, including ensuring that bridges and culverts are designed and maintained in accordance with NMFS guidance and implementing best management practices to be imposed by the Army Corps of Engineers under the Clean Water Act § 404 permit, which ARRC must obtain before construction. Nothing about the discussion of mitigation measures is perfunctory. And we see no error in the STB's reliance on § 404's substantive requirements as mitigation measures when the agency otherwise complied with NEPA's requirement of a reasonably thorough analysis. See Carmel–By–The–Sea, 123 F.3d at 1152.
Independent Agencies		
***Beyond Nuclear v. U.S. Nuclear Regulatory Commission*, __ F3. ___ (1st Cir. 2013)**	USNRC	**WIN** – NextEra, operator of the Seabrook Nuclear Power Plant in New Hampshire, applied on May 25, 2010, to renew the Seabrook operating license, which will otherwise expire on March 15, 2030. With its application, NextEra submitted an environmental report. That report discussed the feasibility of alternative sources of electric energy. As part of the licensing process, NRC issued a decision denying the admission of a contention by Beyond Nuclear, the New Hampshire Sierra Club, and the Seacoast Anti–Pollution League (collectively "BN"), which questioned and sought a hearing on the conclusion in the environmental report by NextEra that offshore wind electric generation was not a reasonable alternative to the extended licensing of Seabrook. NRC's denial of admission of a contention meant that BN was not entitled to have a hearing on the merits about their contention that generation of electricity from offshore wind was a reasonable alternative

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		source of baseload energy to the relicensing of Seabrook. NextEra's environmental report, among other things, addressed four alternative sources of energy to renewing Seabrook's license that it deemed viable, reasonable alternatives: natural gas-fired generation; coal-fired generation; a new nuclear plant; and power purchases. The report also discussed wind power, of which NextEra is the leading generator in North America, but concluded it was not a reasonable alternative as a source of baseload electricity during the relevant period of time. It is on that point that petitioners sought a full hearing before the Commission. The environmental report stated that "[f]or the purposes of this environmental report, alternative generating technologies were evaluated to identify candidate technologies that would be capable of replacing Seabrook Station's nominal net base-load capacity of 1,245 MWe," and that it "accounted for the fact that Seabrook Station is a base-load generator and that any feasible alternative to Seabrook Station would also need to be able to generate base-load power." Thus, any reasonable alternative would need to generate baseload power. NextEra's report relied on the NRC's Generic Environmental Impact Statement for the proposition that wind power is not suitable for baseload generation because of its intermittent nature. That intermittent nature meant that there had to be energy storage mechanisms. Energy storage mechanisms are too expensive to resolve the problem of intermittency and the technology for the generation of offshore wind energy is "not sufficiently demonstrated at this time." NRC correctly stated the standard for admission of a contention under NRC's rules of practice—that a petitioner must present "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." That meant NextEra's environmental report only needed to consider (1) baseload-power alternatives, not non-baseload alternatives, and (2) only such alternatives "likely to exist" during the renewal period. The Commission explained that, because of the difficulty inherent in predicting the viability of technologies decades in advance, in most cases reasonable alternatives are those that are "currently commercially viable, or will become so in the relatively near term." In finding for the agency, the court held (all text from the decision; footnotes omitted): BN suggests that by requiring an alternative energy source to provide baseload power, the NRC defined the objectives of the proposed actions so narrowly that it engaged in "outcome-controlled rigging." See Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C.Cir.1991) (stating agency cannot make objectives so narrow that outcome is a "foreordained formality"). That is not the case, for reasons both of law and common sense. NEPA requires only consideration of reasonable alternatives. See, e.g., Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 837 (D.C.Cir.1972). That means "the concept of alternatives must be bounded by some notion of feasibility," Vt. Yankee, 435 U.S. at 551, which includes alternatives that are "technically and economically practical

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		or feasible," Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 69 (D.C.Cir.2011) (quoting 43 C.F.R. § 46.420(b)) (internal quotation marks omitted). Moreover, an agency need only consider alternatives that will "bring about the ends" of the proposed action, Busey, 938 F.2d at 195, and where the agency is not itself the project's sponsor, "consideration of alternatives may accord substantial weight to the preferences of the applicant," City of Grapevine v. Dep't of Transp., 17 F.3d 1502, 1506 (D.C.Cir.1994) (quoting Busey, 938 F.2d at 197–98) (internal quotation mark omitted). NextEra operates a baseload power generator at Seabrook, and despite BN's "outcome-controlled rigging" argument, BN's own brief concedes it was "permissible" for the NRC to consider the goal of providing baseload electrical power. Thus, BN does not challenge the NRC's decision, in considering the feasibility of an alternative energy source, to focus on whether such an alternative source could supply baseload power. Cf. Envtl. Law & Policy Ctr. v. NRC, 470 F.3d 676, 684 (7th Cir.2006) (upholding baseload generation as appropriate goal). BN then attempts an argument that the NRC was required to consider what alternatives might look like in forty years time. Not so. Here again the NRC has taken a sensible course. The NRC stated that "[a]ssessments of future energy alternatives necessarily are of a predictive nature," and that "the applicant—and the agency—are limited by the information that is reasonably available in preparing the environmental review documents ." Because of the inherent difficulty in predicting decades in advance the viability of technologies not currently operational and years away from large-scale development, "in most cases a 'reasonable' energy alternative is one that is currently commercially viable, or will become so in the relatively near term." The NRC acknowledged the need for prediction, and made a rational decision that in most instances the best predictor of viability of an alternative in the distant future is the near term viability of the alternative. It did so in compliance with the law. The duty under NEPA is to "study all alternatives that 'appear reasonable and appropriate for study at the time' of drafting the EIS." Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1047 (1st Cir.1982) (quoting Seacoast Anti–Pollution League v. NRC, 598 F.2d 1221, 1228 (1st Cir.1979)).10 Forecasting should be based on "existing technology and those developments which can be extrapolated from it." Natural Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 639–40 (D.C.Cir.1976), rev'd on other grounds, Vt. Yankee, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460.11 This aspect of the NRC's framework does provide a "hard look" at alternatives. Substantial deference is required when an agency adopts reasonable interpretations of its own regulations, and we must accept the agency's position unless it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)) (internal quotation marks omitted). Because the NRC's elaboration of its admissibility standard was generally reasonable and consistent with both 10 C.F.R. § 2.309(f)(1)(vi) and NEPA, BN's challenge to the standard fails.

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***Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (1st Cir. 2013)** **See also, *Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (D.C. Cir. 2013), below**	USNRC	**WIN** - NRC rejected the Commonwealth's claims that the environmental findings in the EIS prepared under NEPA were inadequate in light of the damage to the Fukushima Daiichi ("Fukushima") nuclear power plant in Japan in March of 2011. The Commonwealth argues that the Commission's failure to file a supplemental analysis on the environmental impacts of relicensing in light of purported new and significant information learned from Fukushima violated its obligations under NEPA and NRC regulations. The NEPA claims made by Massachusetts to the NRC go to whether, in light of Fukushima, the EIS was adequate in its environmental assessments of: (1) spent fuel pool fires; and (2) core damage events. The court of appeals denied the Commonwealth's petition for review of the NRC decision (all text from the decision): NEPA's EIS requirement serves two purposes. First, "it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)) (internal quotation marks omitted). Second, it provides assurance that the agency will inform the public that it has considered environmental concerns in its decisionmaking process. Id. (citing Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 143, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981)). Put differently, NEPA seeks to guarantee process, not specific outcomes. Town of Winthrop v. FAA, 535 F.3d 1, 4 (1st Cir.2008). In short, NEPA requires the agency to take a "hard look" at the environmental consequences of a major federal action. Balt. Gas & Elec. Co., 462 U.S. at 97, 103 S.Ct. 2246. It is significant to this petition that the NRC assesses environmental impacts through two different procedures. One, for site-specific impacts, is done in the course of the individual plant relicensing. The other, for impacts that are generic to all plants of a particular type, is done through rulemaking rather than individual licensing proceedings. The Commonwealth confuses the two, and attempts to raise in the petition seeking review of the relicensing issues which both belong in generic rulemaking, see Massachusetts v. United States, 522 F.3d 115, 127 (1st Cir.2008) (environmental impacts of spent fuel pools dealt with through rulemaking), and are in fact being addressed in that rulemaking. As to relicensing, the NRC requires an applicant to submit an environmental report with its relicensing application. 10 C.F.R. § 51.53(c)(1). That was done here in 2006. The report for a license renewal must analyze the environmental impacts of the proposed action and include a severe accident mitigation alternatives ("SAMA") analysis. Id. § 51.53(c)(3)(ii)(L). The SAMA analysis, in the most basic sense, is a cost-benefit analysis that addresses whether the expense of implementing a mitigation measure not mandated by the NRC is outweighed by the expected reduction in environmental cost it would provide in a core damage event.5 See Duke Energy Corp., 56 N.R.C. 1, 7–8 (2002) ("Whether a SAMA may be worthwhile to implement is based upon a cost-benefit analysis—a weighing of the cost to implement the SAMA with the reduction in risks to public health, occupational health, offsite and onsite property."). …

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		Going back to these relicensing proceedings, in certain instances where an EIS has been prepared, and the relicensing has not yet occurred, the emergence of new information will require federal agencies to supplement an EIS. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 372–73, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). Even so, to ensure that the agency decisionmaking process is not delayed unnecessarily, supplementation of the EIS is not required every time new information arises. Id. at 373, 109 S.Ct. 1851. Rather, a supplemental EIS only need be prepared if there are "significant new circumstances or information." Town of Winthrop, 535 F.3d at 7 (quoting 40 C.F.R. § 1502.9(c)(1)) (emphasis omitted); see also 10 C.F.R. § 51.92(a)(2) (requiring final EIS be supplemented with "new and significant" information). That means new information must "paint[ ] a dramatically different picture of impacts compared to the description of impacts in the EIS." Town of Winthrop, 535 F.3d at 12; see also Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir.1984) (supplementation required where new information "provides a seriously different picture of the environmental landscape"). Entergy's relicensing application included an environmental report containing a SAMA analysis. The analysis included scenarios dealing with complete loss of offsite power, various sorts of operator failures during core damage events, the possibility of hydrogen build up in a core damage event leading to an explosion, and the use of filtered vents. The environmental report did not address the environmental impacts of spent fuel pool accidents because the NRC had adopted a generic EIS on that issue. Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Comm'n, NUREG–1437, 1 Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Main Report (May 1996). … On June 2, 2011, slightly less than three months after Fukushima, Massachusetts moved to admit a contention and to reopen the Pilgrim record, arguing that Fukushima revealed new and significant information that the environmental impact analysis and SAMA analysis needed to address. The Commonwealth contended that Fukushima showed: (1) the likelihood of spent fuel pool accidents was higher than estimated in the existing EIS; and (2) the frequency of core-melt accidents was also higher than estimated in the existing EIS, and relatedly, in light of new information on a variety of matters concerning core damage events, certain mitigation measures that the SAMA analysis ignored or rejected might be cost-effective. … The record shows that the NRC gave a hard look to the information Massachusetts presented to it, and it engaged in reasoned decisionmaking in explaining why it refused to reopen the record and why it denied the contention. The NRC did not need to wait to grant the relicensing based on conjecture that additional information might arise in the future. Indeed, the NRC gave assurances that if such information did arise, and resulted in new requirements, those requirements would, under its normal procedures, be applied to Pilgrim. … In denying Massachusetts's waiver petition, the NRC permissibly reasoned that Massachusetts did not show that the spent fuel pool issues in its contention were

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		unique to Pilgrim. Rather, they applied to all nuclear power plants and would be more appropriately handled through rulemaking. We add that onsite storage of spent fuel is one of the issues being considered in the Commission's post-Fukushima review of lessons learned, as the Commission itself has noted.
***Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission,* ___ F.3d ___ (D.C. Cir. 2013)** **See also, *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission*, ___ F.3d ___ (1st Cir. 2013), above**	USNRC	**WIN** - This case arises from actions taken by NRC approving (1) an application by Southern Nuclear Operating Company ("Southern") for combined licenses to construct and operate new Units 3 and 4 of the Vogtle Nuclear Power Plant and (2) an application by Westinghouse Electric Company ("Westinghouse") for an amendment to its already-approved AP1000 reactor design on which the Vogtle application relied. In 2009, after a contested evidentiary hearing in which plaintiffs participated, NRC granted Southern an early site permit for Vogtle Units 3 and 4. In 2008, Southern applied for combined licenses. A second contested proceeding was held in which plaintiffs participated. The application for the early site permit was supported by an EIS; the application for combined licenses was supported by the initial EIS and an updated EIS. After the close of the combined-license hearing record, Petitioners sought to reopen the hearing to litigate contentions relating to the nuclear accident at the Fukushima Dai-ichi complex in Japan on March 11, 2011. In the wake of the Fukushima accident, NRC commissioned a Task Force to reevaluate nuclear safety regulations in the United States. After the Task Force recommendations were issued and approved by NRC, Petitioners pursued various actions to compel the agency to supplement its EIS and to delay any action on the combined license and AP1000 design rulemaking proceedings until after the agency had implemented the Task Force recommendations. Plaintiffs contended that Vogtle's EIS violated NEPA because it did not address allegedly new and significant environmental implications of the Task Force's recommendations after Fukushima. NRC ruled that plaintiffs' challenges were premature, that the agency's existing procedural mechanisms were sufficient to ensure licensees' compliance with not-yet-enacted regulatory safeguards, and that the licensing and rulemaking proceedings could continue without delay. In late 2011, NRC issued its rule approving the AP1000 amended design, and in 2012 it authorized issuance of the combined licenses. Plaintiffs then filed the petitions for review giving rise to this action. Petitioners raise three principal contentions for consideration by the court. First, Petitioners claim that NRC abused its discretion in refusing to reopen the hearing record in the Vogtle licensing proceeding. Second, plaintiffs assert that NRC unreasonably denied them a right to participate in a mandatory hearing at which NRC technical staff confirmed that the Fukushima accident had not presented new and significant information that would require a supplemental EIS for Vogtle. Finally, plaintiffs argue that NRC abused its discretion in approving the AP1000 reactor design without first supplementing the AP1000 EA that contained important information regarding "Severe Accident Mitigation Design Alternatives" applicable to Vogtle. The court found no merit in these contentions and denied the petitions for review. In its ruling, the court held (all text from the decision): Petitioners failed to indicate any environmental data that were not considered in the EIS. Because Petitioners failed to point to any specific shortcoming in the EIS,

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		NRC reasonably found Petitioners' contentions insufficient to support a contested hearing. … Under NEPA, NRC is obligated to undertake a supplemental EIS only when presented with "substantial changes in the proposed action that are relevant to environmental concerns" or "new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" after the EIS is assembled. 10 C.F.R. § 51.92(a)(1)-(2); see also id. § 51.72(a)(1)-(2). "New and significant" information presents "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned." Hydro Res., Inc., 50 N.R.C. 3, 14 (1999); see also Marsh, 490 U.S. at 374 (looking to "the value of the new information to the still pending decisionmaking process" and requiring a supplemental EIS only if the new information is sufficient to show environmental effects "in a significant manner or to a significant extent not already considered"). The determination as to whether information is either new or significant "requires a high level of technical expertise"; thus, we "defer to the informed discretion of the [Commission]." Marsh, 490 U.S. at 377. Petitioners contend that the Task Force recommendations give rise to an obligation to supplement the Vogtle EIS because the recommendations may alter NRC regulations in the years ahead. Thus, in Petitioners' view, the Vogtle licenses necessarily must be delayed until the recommendations are finalized. We rejected a similar line of reasoning in Union of Concerned Scientists: > Information raised in the environmental reports does not amount to a new material "issue" simply because it adds marginal weight to the case of an opponent or a proponent of a license; the reports instead raise a new "issue" only when the argument itself (as distinct from its chances of success) was not apparent at the time of the application. Although the concepts of new issues and new evidence are analytically distinct, we recognize that in practice they can converge – the demarcation line may depend on how the "issue" is stated. Still, whether an actual new "issue" is raised is a matter for the NRC to determine in the first instance and is reviewed deferentially. 920 F.2d at 55. … In this case, NRC's original EIS for Vogtle considered precisely the types of harm that occurred as a result of the Fukushima accident. The EIS considered consequences and mitigation of severe accidents involving reactor core damage and the release of fission products. Without an explanation from Petitioners as to what specific "new and significant" environmental information NRC failed to consider, or what deficiency in the existing EIS it failed to rectify, NRC reasonably found that Petitioners' contentions did not warrant a contested hearing. Petitioners' attempts to rely on future safety concerns in lieu of present environmental risks do not create an obligation for further NEPA review.