RECENT NEPA CASES (2007)

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ABSTRACT

This paper will review substantive NEPA cases issued by federal courts in 2007. The implications of the decisions and relevance to NEPA practitioners will be explained.

Introduction

In 2007, federal courts issued 28 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. These cases involved 13 different departments and agencies. The government prevailed in 12 of the 28 cases (43 percent) – the first time in a number of years where the government did not win the majority of NEPA cases decided.

The U.S. Forest Service (USFS) and the U.S. Army Corps of Engineers (Army Corps) tied for first place as the agencies involved in the most number of cases with 5 each. Both agencies prevailed only once. The Bureau of Land Management (BLM) was involved in 4 cases, prevailing in only 1. The U.S. Department of Energy (DOE) was involved in 3 cases, winning 2 of them. The U.S. Environmental Protection Agency (EPA) (with other agencies) was involved in 2 cases and prevailed both times. The Animal and Plant Health Inspection Service (APHIS) was involved in 2 cases and lost both. The National Highway Traffic Safety Administration (NHTSA) was involved in 1 case and lost. In a stunning upset, the usually successful Federal Aviation Administration (FAA) lost the only case in which it was involved.

The following agencies were each involved in 1 NEPA case, and all prevailed:

- National Oceanic and Atmospheric Administration (NOAA)
- Federal Energy Regulatory Commission (FERC)
- National Park Service (NPS)
- U.S. Department of Transportation (DOT)
- U.S. Nuclear Regulatory Commission (NRC)

Table 1 provides the case citation for and a brief synopsis of each of these cases.

Themes

Interestingly, the themes for 2007 are almost identical to those in 2006 (and before):

- Courts upheld decisions where the agency could demonstrate it had given potential environmental impacts a "hard look."
    - *Citizens for Alternatives to Radioactive Dumping v. United States Department of Energy*, (10th Cir.)
    - *Miccosukee Tribe of Indians v. United States* (S.D.Fla.)
    - *Audubon Naturalist Society of the Central Atlantic States v. United States Department of Transportation* (S.D.Md.)
    - *Natural Resources Defense Council v. Kempthorne* (D.D.C.)
    - *Forest Guardians v. Forest Guardians v. United States Forest Service* (10th Cir.)
    - *Nuclear Information and Resource Service v. NRC* (D.C. Cir.)

- Courts invalidated decisions where the agency failed to give potential environmental impacts a "hard look."
    - *Geertson Seed Farms v. Johanns* (N.D.Cal.)

- *Ohio Valley Environmental Coalition v. United States Army Corps of Engineers* (S.D.W.V.)
- *City of Dania Beach, Florida v. Federal Aviation Administration* (D.C. Cir.)
- *Western Watersheds Project v. Kraayenbrink* (D.Idaho)
- *Oregon Natural Resources Council Fund v. Goodman* (9th Cir.)
- *Center for Biological Diversity v. National Highway Traffic Safety Administration* (9th Cir.)

- Courts invalidated NEPA documents that were not based on best available science or that used faulty scientific methodologies.
  - *Lands Council v. McNair* (9th Cir.)
  - *Environmental Defense v. U.S. Army Corps of Engineers* (D.D.C.)

- Courts invalidated decisions where the agency could not demonstrate that it had applied a categorical exclusion, or considered extraordinary circumstances, at the time the decision was made.
  - *International Center for Technology Assessment v. Johanns* (D.D.C.)

- Courts upheld NEPA documents that properly analyzed the cumulative impact of the proposed action with other projects.
  - *Miccosukee Tribe of Indians v. United States* (S.D.Fla.)
  - *Natural Resources Defense Council v. Kempthorne* (D.D.C.)

- Courts invalidated NEPA documents that failed to fully consider cumulative impacts.
  - *Sierra Club v. United States Army Corps of Engineers* (W.D. Mo.)
  - *Oregon Natural Resources Council Fund v. Brong* (9th Cir.)
  - *Oregon Natural Resources Council Fund v. Goodman* (9th Cir.)
  - *Center for Biological Diversity v. National Highway Traffic Safety Administration* (9th Cir.)

NEPA Cases of Note

- ***Center for Biological Diversity v. National Highway Traffic Safety Administration***, No. 06-71891, 2007 U.S. App. LEXIS 26555, 37 ELR 20281 (9th Cir., Nov. 15, 2007). The Court of Appeals held that federal agencies must assess carbon dioxide emissions and other climate change impacts in environmental review documents prepared under NEPA. The "impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impact analysis that NEPA requires agencies to conduct." NHTSA prepared an EA for a rule setting corporate average fuel economy standards for light-duty trucks. The EA compared the carbon dioxide emissions of the alternatives being considered by NHTSA and a prior rulemaking with emissions under NHTSA's 2004 standard. The EA concluded that, under the new standards, carbon dioxide emissions from light trucks would be reduced by between 2.4 percent to 3.8 percent as compared to the 2004 standards. Based on the reduced growth of emissions, NHTSA concluded that carbon dioxide emissions attributable to the new standards would not result in a significant cumulative impact warranting analysis in a full EIS. The court disagreed and required the preparation of an EIS.

- ***O'Reilly v. United States Army Corps of Engineers***, No. 04-31026, 2007 WL 173936, 37 ELR 20021 (5th Cir. Jan. 24, 2007). The Court of Appeals held that the Army Corps' reliance on a Finding of No Significant Impact (FONSI) was arbitrary and capricious because it relied upon an EA that failed "to articulate how the mitigation measures will render the adverse effects insignificant." "The EA before us lists the potentially significant adverse impacts, and describes, in broad terms, the types of mitigation measures that will be employed. As is evident from our above review of the Corps's treatment of each individual potential impact, however, the EA provides only cursory detail as to what those measures are and how they serve to reduce those impacts to a less-than-significant level. Because the feasibility of the mitigation measures is not self-evident, we agree with the district court that the EA does not provide a rational basis for determining that the Corps has adequately complied with NEPA…The record before us, however, is simply not sufficient to determine whether the mitigated FONSI relies on '. . . mitigation measures which . . .compensate for any adverse environmental impacts stemming from the original proposal' that, unmitigated, would be significant."

The EA also failed "to consider the cumulative effects of the project, area urbanization, and permits issued to third parties." Although the EA acknowledges that there is a potential for cumulatively significant impacts, it states, without explanation, that "mitigation for impacts caused by the proposed project, possible future project phases, and all Corps permitted projects will remove or reduce e[x]pected impacts." The court found this "bare assertion" to be insufficient to explain why the mitigation requirements render the cumulative effects of the project to a less-than-significant level.

However, the court concluded that the Corps did not "engage in improper segmentation of the project by failing to include full analysis of two possible future phases of development in its EA." "To determine whether a single project is improperly segmented into multiple parts, this Circuit applies a four-part test that asks whether 'the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.'" In this case, the current § 404 permit allows only the filling and dredging required to construct Phase I of the planned development. Although the project as originally submitted was a three-phase undertaking, the application as eventually approved included only the first stage. The Corps cites this decrease in scale as one of the project requirements that reduce the project's effects below the level of significance. Although nothing in the record suggested that Phases II and III were impracticable, financially unattractive, or generally not feasible, the court held that Phase I has independent utility and that the other two phases were not proposals and remained in the speculative, planning stages.

- See also, ***Ohio Valley Environmental Coalition v. United States Army Corps of Engineers***, No. 3:05-0784, 37 ELR 20070 (S.D.W.V. Mar. 23, 2007). The district court found that the Army Corps violated NEPA when it issued four permits to fill headwater streams in conjunction with mountaintop removal coal mining. The decision to issue the permits "will allow the applicants to bury miles of streams and fill their valleys with excess spoil material produced by mountaintop removal mining." The Corps issued a FONSI for the permits rather than preparing an EIS, relying on mitigation to offset significant adverse impacts. The court found that the Corps had "failed to take a hard look at the destruction of headwater streams and failed to evaluate their destruction as an adverse impact on aquatic resources in conformity with its own regulations and policies." Without a proper understanding of the impacts to headwater streams, the Corps has not fulfilled its obligation to take a hard look at the environmental impact of the proposed action, and if the impacts of a proposed action are uncertain, that uncertainty precludes a finding that the impacts are not significant. By inadequately identifying and evaluating the impacts associated with the filling of headwater streams with overburden, the Corps' decision that mitigation measures alleviate those adverse impacts fails. "The significant and adverse impacts of the burying of streams were not adequately considered for the reasons stated above, and, therefore, the finding that the mitigation measures offset those impacts is arbitrary and capricious."

- ***Hale v. Norton***, No. 03-36032, 2007 WL 315338, 37 ELR 20037 (9th Cir. Feb. 5, 2007). The Ninth Circuit agreed with a lower court and the National Park Service (NPS) that it was appropriate for the agency to conduct a NEPA analysis prior to granting property owners' request for an access permit under the Alaska National Interest Lands Conservation Act (ANILCA). The property is completely surrounded by a national park, and the property owners gain access to their property over a 13-mile "abandoned" road. When the house on the property burned down, the property owners sought a permit to bring in a bulldozer over the road. NPS determined that the consideration of the permit required the preparation of an EA. The property owner had sued, arguing that NPS should not prepare an EA, in keeping with ANILCA's requirement to provide "adequate and feasible access."

  - See also, ***Coalition on West Valley Nuclear Wastes v. U.S. Department of Energy***, No. 05-CV-0614-C, 37 ELR 20271 (W.D.N.Y. Sept. 28, 2007). The district court held that the Department of Energy (DOE) did not violate NEPA's policy prohibiting segmentation when it split its waste management and facility closure processes into two separate EISs: a waste management EIS and a closure EIS. "It is clear that short-term waste management and off-site disposal of waste do not "automatically trigger" closure of the Center, and can proceed whether or not closure and decommissioning is accomplished in the future…Furthermore, it is clear to the court that off-site

disposal of LLW has value and utility independent of any later closure activities, and represents a logical and publicly beneficial action even if closure of the site was never to occur…In addition, based on the record presented, the court is satisfied that DOE's decision to proceed with shipment of low-level and mixed low-level radioactive wastes off-site does not have a "direct and substantial probability" of influencing the decision on the pending Completion and Closure EIS." In sum, the court found that the plaintiffs "failed to present any evidence to show or suggest that the DOE's strategy is designed to escape environmental review regarding closure and completion of the WVDP site. To the contrary, the record suggests that the DOE's completion of a thorough EIS on short-term waste management activities within its control, and subsequent completion of another EIS (with NYSERDA as joint lead agency) on the longer-term issues of closure and stewardship involving state-owned property, increases the opportunity for public scrutiny of the potential environmental impacts of long-overdue future activities at the site."

- ***Trout Unlimited v. Lohn***, No. CV05-1128-JCC, 37 ELR 20143 (W.D. Wash. June 13, 2007). The district court found that there was a clear and unavoidable conflict between NEPA and the issuance of a Hatchery Listing Policy Pacific Salmon and Steelhead Trout such that the National Oceanic and Atmospheric Administration was not required to comply with NEPA. "Exemptions from the procedural requirements under NEPA fall into two overlapping categories-the first focuses on a direct conflict between statutory texts, and the second focuses on whether NEPA procedures will be redundant with those provided for under the statute seeking exemption." The policy was a guidance document designed to assist the Secretary of the Department of Commerce in making listing determinations under the Endangered Species Act. Although general statements of policy are usually subject to the procedural requirements of NEPA, the court found that it made "little sense" to require the agency to prepare a NEPA document when the determination as to whether to list the species would be made according to factors in the Endangered Species Act, citing *Pacific Legal Foundation v. Andrus,* 657 F.2d 829, 836 (6th Cir.1981).

- ***The Rattlesnake Coalition v. U.S. Environmental Protection Agency***, No. 05-36097, 37 ELR 20300 (9th Cir. Dec. 7, 2007). The Ninth Circuit affirmed dismissal of an action against EPA and others under NEPA in which an environmental group sought to require the preparation of a NEPA document prior to the implementation of the Missoula Wastewater Facilities Plan Update (MWFPU). "To trigger the application of NEPA, an action must be "federal." … While "[t]here are no clear standards for defining the point at which federal participation transforms a state or local project into major federal action[,]. . . . '[m]arginal' federal action will not render otherwise local action federal." Almond Hill Sch. v. U.S. Dep't of Agric., 768 F.2d 1030, 1039 (9th Cir. 1985). To determine whether a state development plan constitutes a major federal action under NEPA, we look to "the nature of the federal funds used and the extent of federal involvement." Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988). "While significant federal funding can turn what would otherwise be a state or local project into a major federal action, consideration must be given to a great disparity in the expenditures forecast for the [local] and federal portions of the entire program." Ka Makani 'O Kohala Ohana Inc. v. Dep't of Water Supply, 295 F.3d 955, 960 (9th Cir. 2002) (internal quotation marks and citations omitted). Federal decisionmakers must also retain "power, authority, or control over" the state project. Id. at 960-61 ("[This authority] must be more than the power to give nonbinding advice to the nonfederal actor . . . the federal agency must possess actual power to control the nonfederal activity") (quoting Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477, 1482 (10th Cir. 1990) (internal quotation marks and citations omitted)). The creation of the MWFPU was not a federal action; no federal funds were used in its creation. Nor was the implementation of the MWFPU a major federal action – federal funding amounting to just 10 percent of the total estimated expenditures does not federalize a project for purpose of NEPA application. Moreover, a local plan does not become a major federal action subject to NEPA merely upon its approval by a federal agency. The U.S. must maintain decisionmaking authority over the local plan in order for it to become a major federal action.

    - See also, ***Karst Environmental Education & Protection, Inc. v. Environmental Protection Agency***, No. 06-5059, 37 ELR 20025 (D.C. Cir. Jan. 30, 2007). Court of Appeals dismissed environmental groups claims that EPA, HUD, and TVA failed to comply with NEPA for a transit park in Kentucky. Plaintiffs had argued that the "cumulative substantial involvement of federal agencies" in the project "federalized the project from its inception." Although TVA did make a

grant to a transit park tenant, the plaintiffs produced no evidence of continuing TVA authority over the project and the court dismissed the claim against TVA as moot.

- ***Natural Resources Defense Council v. Kempthorne***, No. 07-1709, 37 ELR 20305 (D.D.C. Nov. 30, 2007). The district court denied a request by environmental groups for a preliminary injunction to block the Bureau of Land Management's approval of roughly 90 new wells in a 2,000-well natural gas development in Wyoming. The court found that the plaintiffs had not demonstrated a violation of NEPA. BLM posted the drilling applications in the regional office reading room and posted a notice of the preparation of the EAs on the BLM website, demonstrating that the plaintiffs had a "substantial opportunity" to comment on the proposals before they were approved. Although BLM did not circulate the draft EAs for public comment, the court stated that "neither the applicable regulations, nor relevant caselaw, require such notice and comment." The court also found that BLM adequately considered alternative mitigation measures and did take a hard look at potential impacts, including the cumulative impact of the proposed project in the affected area.

Table 1. NEPA Cases Decided in 2007

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Department of Agriculture (Animal Plant Health Inspection Service [APHIS], U.S. Forest Service [USFS])			
International Center for Technology Assessment v. Johanns	*03-cv-00020-HHK, 473 F. Supp. 2d 9, 37 ELR 20044 (D.D.C. Feb. 5, 2007)*	L	**Categorical exclusions.** Court of Appeals held that APHIS violated NEPA when it permitted field tests to be conducted without preparing an EA or EIS. The agency failed to determine whether the tests were categorically excluded from NEPA.
Geertson Seed Farms v. Johanns,	*No. 06-01075, 2007 WL 518624, 37 ELR 20047 (N.D. Cal. Feb. 13, 2007)*	L	**Hard look.** District court found that the agency failed to take a "hard look" at the environmental impacts of its decision to deregulate genetically engineered alfalfa (glyphosate-tolerant alfalfa). Substantial questions exist as to whether the deregulation will lead to the transmission of the engineered gene to organic and conventional alfalfa. Plaintiff argued that if the deregulation occurred, they could no longer sell their crop as organic. Further, 75% of alfalfa exported is exported to countries that do not allow the import of glyphosate-tolerant alfalfa. The agency prepared an EA and issued a FONSI, concluding that any environmental impact would be insignificant because APHIS would not have any further regulatory authority and that organic and conventional farmers were responsible for developing a plan to ensure their crops did not include any genetically engineered alfalfa. The court ruled that APHIS must prepare an EIS.
Navajo Nation v. United States Forest Service	*Nos. 06-15371 et al., 2007 WL 737900, 37 ELR 20062 (9th Cir. Mar. 12, 2007)*	L	**Human health risk**. Court of Appeals held that the agency's EIS was inadequate with respect to its discussion of the risks posed by possible human ingestion of artificial snow made from treated sewage effluent. The USFS had approved a ski resort expansion and the use of treated sewage effluent on a mountain sacred to Native American tribes.
Lands Council v. McNair	*No. 07-35000, 37 ELR 20160 (9th Cir. July 2, 2007)*	L	**Best available science**. Court of Appeals found plaintiffs had shown a likelihood of success on the merits in arguing that the USFS failed to prove the reliability of its scientific methodology with respect to wildlife habitat restoration for a proposed selective logging of 3,829 acres of forestland in Idaho. Plaintiffs also showed a likelihood of success on their claim that the USFS failed to include a full discussion of the scientific uncertainty surrounding its strategy for improving wildlife habitat.
Forest Guardians v. United States Forest Service	*No. 07-1020, 37 ELR 20184 (10th Cir. July 20, 2007)*	W	**Hard look**. Court of Appeals upheld a lower court's decision that the USFS had complied with NEPA for a logging project within the Rio Grande National Forest. In addition, the environmental groups forfeited their claim because they failed to adequately present the claim in their administrative appeal.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Oregon Natural Resources Council Fund v. Goodman	*No. 07-35110, 2007 WL 2756971, 37 ELR 20247 (9th Cir. Sept. 24, 2007)*	L	**Hard look, cumulative impacts**. Court of Appeals held the USFS violated NEPA in approving a proposed expansion of a ski area in national forests because the agency failed to properly evaluate the impact of the proposal on a sensitive species. The court found that the agency's conclusion that the project would not negatively impact the Pacific fisher was passed on an analysis of habitat in the proximity of the project rather than on the documented local populations and failed to discuss in detail the projects impact upon the fisher as part of its cumulative impact analysis.
Sierra Club v. U.S. Forest Service	*No. 05-16989, 37 ELR 20297 (9th Cir. Dec. 5, 2007)*	L	**Categorical exclusions**. Court of Appeals reversed a lower court's grant of summary judgment for the USFS, finding that the agency had failed to follow proper procedures for establishing a categorical exclusion for fuel reduction project of up to 1,000 acres, including demonstration that the proposed categorical exclusion will not individually or cumulatively have a significant impact on the environment.
Department of Commerce (National Oceanic and Atmospheric Administration)			
Trout Unlimited v. Lohn	*No. CV05-1128-JCC,37 ELR 20143 (W.D. Wash. June 13, 2007)*	W	**Statutory conflict**. District court found that there was a clear and unavoidable conflict between NEPA and the issuance of a Hatchery Listing Policy Pacific Salmon and Steelhead Trout such that NOAA was not required to comply with NEPA. The policy was a guidance document designed to assist the Secretary of the Department of Commerce in making listing determinations under the Endangered Species Act. Although general statements of policy are usually subject to the procedural requirements of NEPA, the court found that it made "little sense" to require the agency to prepare a NEPA document when the determination as to whether to list the species would be made according to factors in the Endangered Species Act.
Department of Defense (U.S. Army Corps of Engineers)			
O'Reilly v. United States Army Corps of Engineers	*No. 04-31026, 2007 WL 173936, 37 ELR 20021 (5th Cir. Jan. 24, 2007)*	L	**Mitigation.** Court of Appeals invalidated EA for the issuance of a permit to dredge and fill wetlands for a residential project because it failed to articulate how mitigation measures would render adverse impacts insignificant. The EA also failed to consider cumulative effects of the project, area urbanization, and permits issued to third parties. The court did find that the agency did not improperly segment the project when it did not consider 2 possible future phases of development because the other two phases were not proposals and remained in the speculative, planning stages.
Ohio Valley Environmental Coalition v. United States Army Corps of Engineers	*No. 3:05-0784, 37 ELR 20070 (S.D.W.V. Mar. 23, 2007)*	L	**Hard look; mitigation.** District court held agency violated NEPA when it issued a FONSI for the issuance of 4 permits to fill headwater streams in conjunction with mountain top removal coal mining. The court ruled the agency failed to take a "hard look" and failed to explain how the proposed mitigation would replace what would be lost.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Sierra Club v. United States Army Corps of Engineers	*No. 03-04254-CV-C-SOW, 37 ELR 20170 (W.D. Mo. May 24, 2007)*	L	**Cumulative impacts.** District court held that the Army Corps violated NEPA by preparing an EA instead of an EIS for proposed levee work along the Missouri River. The EA failed to consider the cumulative impact of the proposed levee combined with other flood control structures and thus the agency's conclusion that the proposal would not impose significant environmental impacts was arbitrary and capricious.
Miccosukee Tribe of Indians v. United States	*No. 02-22778, 37 ELR 20196 (S.D. Fla. July 30, 2007)*	W	**Alternatives, cumulative impacts.** District court held that the Army Corps' supplemental EIS for a water and flood control project in southern Florida complied with NEPA in that its alternatives analysis and no action alternative were appropriate and the SEIS sufficiently analyzes cumulative impacts.
Environmental Defense v. U.S. Army Corps of Engineers	*No. 04-1575, 37 ELR 20243 (D.D.C. Sept. 13, 2007)*	L	**Best available science.** District court held that the Army Corps authorization of a flood control project violated NEPA because the agency resorted to manipulating models and changing definitions in order to make the project seem compliant with NEPA when it was not. The Corps was ordered to restore the disturbances created by preliminary construction.
Department of Energy (including Federal Energy Regulatory Commission)			
Citizens for Alternatives to Radioactive Dumping v. United States Department of Energy	*No. 04-2314, 37 ELR 20098 (10th Cir. May 3, 2007)*	W	**Best available science**. Court of Appeals found that DOE had provided "careful and reasoned" explanations for its modeling and was not arbitrary and capricious in its review of geological data. The lower court's decision denying a lawsuit to enjoin the Waste Isolation Pilot Plant was upheld.
Natural Resources Defense Council v. Department of Energy	*04-04448, 37 ELR 20103 (N.D. Cal. May 2, 2007)*	L	**Controversy.** District court found that DOE should have prepared an EIS rather than and EA/FONSI for the remediation of Area IV of the Santa Susana Field Laboratory in California. The remediation is not categorically excluded from NEPA by virtue of DOE's characterization of it as a cleanup action. The decision is highly controversial and DOE's remediation decision presents possible effects on the environment that are highly uncertain or involve unique or unknown risks.
City of Fall River v. Federal Energy Regulatory Commission	*Nos. 06-1203, -2146, 37 ELR 20268 (1st Cir. Oct. 26, 2007)*	W	**Conditional approval**. Court of Appeals denied plaintiffs' motion to reverse FERC's conditional approval of a liquefied natural gas terminal because the agency's decision was conditional and project approval is not ripe for review.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Coalition on West Valley Nuclear Wastes v. U.S. Department of Energy	*No. 05-CV-0614-C, 37 ELR 20271 (W.D.N.Y. Sept. 28, 2007)*	W	**Segmentation.** District court held that DOE did not violate NEPA's policy prohibiting segmentation when it split its waste management and facility closure processes into two separate EISs. Related projects may be segregated if each project is of sufficient length to address environmental effects of a broad scope and where the projects have independent utility or significance. DOE's decisions regarding its low-level radioactive wastes do not have a direct and substantial probability of influencing its decision on facility closure, and therefore may be considered separately. Additionally, because DOE's strategy is not a means of evading NEPA review, it is also not a basis to find a breach of the agency's contractual obligations under the 1987 Stipulation.
Department of the Interior (Bureau of Land Management [BLM], National Park Service [NPS])			
Hale v. Norton	*No. 03-36032, 2007 WL 315338, 37 ELR 20037 (9th Cir. Feb. 5, 2007)*	W	**Application of NEPA**. Court of Appeals held that NPS acted reasonably in requiring an request for an access permit under the Alaska National Interest Lands Conservation Act (ANILCA). The property is completely surrounded by a national park, and the property owners gain access to their property over a 13-mile "abandoned" road. When the house on the property burned down, the property owners sought a permit to bring in a bulldozer over the road. NPS determined that the consideration of the permit required the preparation of an EA. The property owner had sued, arguing that NPS should not prepare an EA, in keeping with ANILCA's requirement to provide "adequate and feasible access." The court found that there is no conflict between NEPA's requirements and the ANILCA requirement of "adequate and feasible access."
Western Watersheds Project v. Kraayenbrink	*Nos. CV-05-297-E-BLW, -06-275-E-BLW, 37 ELR 20147 (D. Idaho June 8, 2007)*	L	**Hard look.** District court held that BLM violated NEPA when it revised its nationwide grazing regulations, which generally loosened restrictions on grazing, because it did not take the requisite "hard look" at the environmental effects of the revised regulations.
Oregon Natural Resources Council Fund v. Brong	*Nos. 05-35062, -35063, 37 ELR 20187 (9th Cir. July 24, 2007)*	L	**Cumulative impacts.** Court of Appeals upheld a lower court's decision that BLM's EIS for a proposal to log approximately 1,000 acres of protected land in Southwest Oregon after a major forest fire did not contain an adequate cumulative effects analysis.
Wilderness Society v. Wisely	*No. 06-cv-00296, 37 ELR 20215 (D. Colo. Aug. 6, 2007)*	L	**Alternatives**. District court held that BLM violated NEPA for its decision to lease 32,000 acres of land in Colorado for oil and gas development. BLM prepared an EA, but did not adequately explain why one particular alternative was not analyzed.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Natural Resources Defense Council v. Kempthorne	*No. 07-1709, 2007 WL 4218929, 37 ELR 20305 (D.D.C. Nov. 30, 2007)*	W	**Hard look, public involvement, cumulative impacts.** District court denied a request by environmental groups for a preliminary injunction to block the Bureau of Land Management's approval of roughly 90 new wells in a 2,000-well natural gas development in Wyoming. The court found that the plaintiffs had not demonstrated a violation of NEPA. BLM posted the drilling applications in the regional office reading room and posted a notice of the preparation of the EAs on the BLM website, demonstrating that the plaintiffs had a "substantial opportunity" to comment on the proposals before they were approved. Although BLM did not circulate the draft EAs for public comment, the court stated that "neither the applicable regulations, nor relevant caselaw, require such notice and comment." The court also found that BLM adequately considered alternative mitigation measures and did take a hard look at potential impacts, including the cumulative impact of the proposed project in the affected area.
Department of Transportation (including Federal Aviation Administration [FAA], National Highway Traffic Safety Administration [NHTSA])			
City of Dania Beach, Florida v. Federal Aviation Administration	*No. 05-1328, 37 ELR 20108 (D.C. Cir. May 11, 2007)*	L	**Final agency action.** Court of Appeals ruled that the FAA should have followed its NEPA environmental review procedures prior to the issuance of a letter that changed runway use procedures at Fort Lauderdale-Hollywood International Airport. Plaintiffs argued that the new procedures caused increased noise, soot, and exhaust fumes over residential areas. FAA unsuccessfully argued that the letter was not a reviewable final action because it "merely explains the existing procedures and dos not actually change the manner in which the runways will be used."
Audubon Naturalist Society of the Central Atlantic States v. United States Department of Transportation	*No. AW-06-3386, 37 ELR 20295 (S.D. Md. Nov. 8, 2007)*	W	**Hard look; major federal action.** District court granted summary judgment to federal defendants upholding the adequacy of an EIS prepared for a major proposed highway in suburban Washington, D.C. The EIS used an appropriate statement of purpose and need and did not unreasonably limit alternatives. Approval of contracts involved in last 2 segments of the project do not amount to a "major federal action" requiring supplementation.
Center for Biological Diversity v. National Highway Traffic Safety Administration	*2007 U.S. App. LEXIS 26555 (9th Cir., Nov. 15, 2007).*	L	Court of Appeals held that federal agencies must assess carbon dioxide emissions and other climate change impacts in environmental review documents prepared under NEPA. The "impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impact analysis that NEPA requires agencies to conduct." NHTSA prepared an EA comparing carbon dioxide emissions of the alternatives being considered by NHTSA and a prior rulemaking with emissions under NHTSA's 2004 standard. The EA concluded that, under the new standards, carbon dioxide emissions from light trucks would be reduced by between 2.4 percent to 3.8 percent as compared to the 2004 standards. Based on the reduced growth of emissions, NHTSA concluded that carbon dioxide emissions attributable to the new standards would not result in a significant cumulative impact warranting analysis in a full EIS. The court disagreed and required the preparation of an EIS.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
U.S. Environmental Protection Agency			
Karst Environmental Education & Protection, Inc. v. Environmental Protection Agency	*No. 06-5059, 37 ELR 20025 (D.C. Cir. Jan. 30, 2007)*	W	**Major federal action.** Court of Appeals dismissed environmental groups claims that EPA, HUD, and TVA failed to comply with NEPA for a transit park in Kentucky. Plaintiffs had argued that the "cumulative substantial involvement of federal agencies" in the project "federalized the project from its inception." Although TVA did make a grant to a transit park tenant, the plaintiffs produced no evidence of continuing TVA authority over the project and the court dismissed the claim against TVA as moot.
The Rattlesnake Coalition v. U.S. Environmental Protection Agency	*No. 05-36097, 37 ELR 20300 (9th Cir. Dec. 7, 2007)*	W	**Major federal action**. Court of Appeals affirmed a lower court's dismissal of an action by plaintiffs to require the preparation of a NEPA document prior to the implementation of the Missoula Wastewater Facilities Plan Update (MWFPU). The creation of the MWFPU was not a federal action; no federal funds were used in its creation. Nor was the implementation of the MWFPU a major federal action – federal funding amounting to just 10 percent of the total estimated expenditures does not federalize a project for purpose of NEPA application. Moreover, a local plan does not become a major federal action subject to NEPA merely upon its approval by a federal agency. The U.S. must maintain decisionmaking authority over the local plan in order for it to become a major federal action.
U.S. Nuclear Regulatory Commission (NRC)			
Nuclear Information and Resource Service v. NRC	*No. 06-1301, 37 ELR 20308 (D.C. Cir. Dec. 11, 2007)*	W	**Hard look.** Court of Appeals denied plaintiffs' claim that NRC had violated NEPA for the approval of a license to operate a privately owned facility to produce enriched uranium as fuel for nuclear reactors. The EIS was sufficient in that it adequately considered the environmental consequences of waste disposal.