RECENT NEPA CASES (2005)

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ABSTRACT
This paper will review substantive NEPA cases issued by federal courts in 2005. The implications of the decisions and relevance to NEPA practitioners will be explained.

Introduction

In 2005, federal courts issued 20 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. These cases involved 10 different departments and agencies. The government prevailed in 13 of the 20 cases (65 percent).

As has been the case in previous years, the U.S. Forest Service was the individual agency involved in the most number of cases (6); the agency prevailed in only 2 of the 6 cases. Also,

- U.S. Army Corps of Engineers was involved in 4 cases and prevailed in all of them.
- The Bureau of Indian Affairs was involved in two cases (both involving casinos) and prevailed in both.
- The Bureau of Land Management was involved in two cases and prevailed in one.
- The U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration, Federal Aviation Administration, and Surface Transportation Board were each involved in one case, and all prevailed.
- The U.S. Navy and the Overseas Private Investment Corporation (with the Export-Import Bank) were also each involved in one case, and both lost.

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

Themes

- Courts wanted to see evidence of meaningful public involvement for environmental assessments
  - *Sierra Nevada Forest Protection Campaign v. Weingardt* (E.D. Cal)
  - *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army* (1st Cir.)
  - *El Dorado County v. Norton* (E.D. Cal)
  - *TOMAC v. Norton* (D.D.C.)
- Courts invalidated NEPA documents that relied on flawed data
  - *Natural Resources Defense Council v. U.S. Forest Service* (9th Cir.)
  - *Native Ecosystems Council v. U.S. Forest Service* (9th Cir. August)
  - *Ecology Center v. Austin* (9th Cir.)
- Courts upheld NEPA documents that considered arguably related actions separately as long as the cumulative impacts were addressed
  - *Methow Forest Watch v. U.S. Forest Service* (D. Or)
  - *El Dorado County v. Norton* (E.D. Cal)

- A court invalidated a NEPA document that did not address connected actions together in the same document, failing to allow the full environmental impacts of the combined projects from being considered in the decisionmaking process.
    - *Hammond v. Norton* (D.D.C.)

- Courts reiterated that a cumulative impact analysis need not consider future actions that are too speculative
    - *City of Shoreacres v. Waterworth* (5th Cir.)
    - *City of Riverview v. Surface Transportation Board* (6th Cir.)
    - *City of Oxford v. Federal Aviation Administration* (11th Cir.)

- A court reiterated that a plaintiff that has only an economic interest in a project does not have standing to bring a NEPA case
    - *Ashley Creek Phosphate Co. v. Norton* (9th Cir.)

NEPA Cases of Note

The following four cases all considered the extent to which public involvement requirements applied to EAs.

Sierra Nevada Forest Protection Campaign v. Weingardt (E.D. Cal. 2005)

The district court held that "although the CEQ regulations do not require the circulation of a draft EA, they do require that the public be given as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA." The scoping notices were not sufficient because they did not contain an analysis of the environmental impacts of the projects.

Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army (1st Cir. 2005)

Although plaintiffs argued that the Army Corps should have issued a draft EA for public comment, the U.S. Court of Appeals held that the agency met the "to the extent practicable" requirement by issuing public notice of the proponent's application, providing a comment period that was later extended to over five months, carrying out two public hearings, noting and responding to public comments in the EA, and conferring with federal and state environmental agencies. "Nothing in the CEQ regulations requires circulation of a draft EA for public comment, except under certain 'limited circumstances.' 40 C.F.R. § 1501.4(e)(2)." Note that court confused the requirement for public involvement in preparing EAs in 1501.4(b) with the requirement to issue a FONSI in draft in special circumstances in § 1501.4(e)(2).

El Dorado County v. Norton (E.D. Cal. 2005)

The district court noted that the CEQ regulation requiring public involvement in EAs to the fullest extent practicable has been interpreted "to mean that 'the public must be given an opportunity to comment on draft EAs and EISs,'" citing *Citizens for Better Forestry*, 341 F.3d at 970 (quoting *Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir. 2002)). The agencies did issue the draft casino EA for public comment and were not required to circulate the FONSI prior to release.

TOMAC v. Norton (D.D.C. 2005)

The district court held that the agency met the requirements for public involvement for its supplemental EA and revised FONSI. The court held that there had been extensive opportunities for formal and informal public comment in this case and that "FONSIs must be made available for public review, 40 C.F.R. § 1501.4(e)(1), as was done here, but there is no explicit statutory or regulatory requirement that EAs be submitted for public comment" (emphasis in original).

The cases below addressed other important NEPA issues.

Native Ecosystems Council v. U.S. Forest Service (9th Cir. November 2005)
Facts: Plaintiff appealed the district court's grant of summary judgment to the U.S. Forest Service (USFS) in connection with the USFS' approval of the Jimtown Vegetation Project in the Helena National Forest. To lower the potential for a catastrophic fire, the Jimtown Project involved thinning, prescribed burning, and weed management on approximately 1,500 acres in an area of the Helena National Forest prone to high intensity fires. Plaintiff claimed that the USFS violated NEPA by preparing an EA instead of an EIS and by considering only two alternatives—the proposed Jimtown Project and a no action alternative.

Holding: The USFS did not err in preparing an EA instead of an EIS. Although a "hard look" should involve the discussion of adverse impacts, such information does not automatically make the project "highly controversial" or "highly uncertain" for the purposes of determining whether substantial questions exist as to the significance of the effect. "[I]t does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment. We decline to interpret NEPA as requiring the preparation of an EIS any time that a federal agency discloses adverse impacts on wildlife species or their habitat or acknowledges information favorable to a party that would prefer a different outcome."

The USFS' decision to consider only two alternatives--the proposed plan and a no action alternative--did not violate NEPA. "The statutory and regulatory requirements that an agency must consider 'appropriate' and 'reasonable' alternatives does not dictate the minimum number of alternatives that an agency must consider."

National Audubon Society v. Department of the Navy (4th Cir. 2005)
Facts: The Navy proposed to construct and operate an Outlying Landing Field (OLF) at an area designated as Site C in North Carolina. The OLF would support the homebasing, operation, and training of new Super Hornet aircraft. Site C is located within a few miles of a national wildlife refuge which annually provides refuge for tundra swans, snow geese, and other waterfowl. The Navy prepared an EIS. Plaintiffs challenged the sufficiency of the EIS and the failure to prepare a supplemental EIS and sought a preliminary injunction to prevent the Navy from taking further action on the planning and building of the OLF at Site C. The district court issued the injunction, ordering the Navy to stop plans for the facility.

Holding: The U.S. Court of Appeals upheld the lower court decision that the U.S. Navy's EIS was deficient under NEPA and that a supplemental EIS was required, but vacated the permanent injunction preventing the Navy from taking any steps toward planning, development, or construction of the landing field until it fulfilled its NEPA obligations because it was overly broad. "[A] NEPA injunction 'should be tailored to restrain no more than what is reasonably required to accomplish its ends.'…Violation of NEPA is not always cause to enjoin all agency activity while the agency completes the required environmental analysis." In particular, allowing an agency to continue work on a project while its environmental study is pending does not necessarily create the type of option-limiting harm that NEPA seeks to prevent. A court must balance the harms particular to each case in assessing whether an injunction is justified and how far it should reach. Here, the district court erred in enjoining the entire project. On remand, the district court should modify the injunction to allow the Navy to pursue certain specified activities including land acquisition, architectural and engineering work, and permit applications while completing the SEIS.

Arkansas Wildlife Federation v. U.S. Army Corps of Engineers (8th Cir. 2005)
Facts: Plaintiffs brought this case against the U.S. Army Corps of Engineers (Army Corps) alleging that the agency had violated NEPA in connection with its Grand Prairie Area Demonstration Project in East Central Arkansas and seeking declaratory and injunctive relief. Both sides moved for summary judgment, and the district court granted judgment to the Army Corps. Plaintiffs argue on their appeal that the cumulative impact analysis in the Final Environmental Assessment (FEA) was inadequate and that a Supplemental Environmental Impact Statement should have been prepared.

Holding: The U.S. Court of Appeals affirmed the lower court's ruling, agreeing that the Army Corps complied with NEPA. The Army Corps prepared an EIS and later an EA to address changes to the original plan. The court held that the EA adequately considered the project's cumulative impacts of past, present, and future actions, and the Corps did not act arbitrarily or capriciously in refusing to prepare a supplemental EIS based on the new information.

"Although other government agencies urged the Corps to wait for the completion of comprehensive studies of the White River basin by other entities, the Act only requires that the Corps consider and respond to the comments of other agencies. [NEPA] does not require the Corps to wait for other agencies to complete their studies, or to accept the input or suggestions of other agencies."

The court also found that "[b]ecause the FEA was properly tiered upon the FEIS and because the FEA provided an updated and adequate analysis of any new environmental impacts, we conclude that the cumulative impacts of the Project were properly considered in compliance with the Act." In addition, the environmental groups challenging the project failed to show that the changes made in the original proposal were substantial.

Ocean Conservancy v. Gutierrez (D.D.C. 2005)
Facts: Two environmental organizations challenged decisions of the National Marine Fisheries Service (NMFS) relating to the treatment of sea turtles under a Fishery Management Plan for the Atlantic Highly Migratory Species Pelagic Longline Fishery. In addition to other claims, plaintiffs argued that the NMFS's June 22, 2004 final Supplemental Environmental Impact Statement failed to comply with NEPA.

Holding: The district court held that the agency's supplemental EIS allowed for sufficient public comment and adequately identified cumulative impacts. In the draft supplemental EIS, a particular alternative was analyzed but found to be ineffective. Based on public comments and a subsequent biological opinion, the agency identified that alternative as its preferred alternative. The court held that NMFS had complied with NEPA's procedural requirements and made a fully informed decision. "In the final analysis, the regulation simply does not require NMFS to 'rework its draft if it later realizes an alternative it preliminarily rejected should be more fully developed.'" With respect to the adequacy of the cumulative impact analysis, the court ruled: "That NMFS *could have* conducted a more comprehensive cumulative impacts analysis does not render its analysis violative of NEPA (emphasis in original)."

Friends of the Earth, Inc. v. Watson (N.D. Cal. 2005)
Facts: Plaintiffs initiated this NEPA action against the Overseas Private Investment Corporation (OPIC), an independent government corporation that offers insurance and loan guarantees for projects in developing countries, and the Export-Import Bank (Ex-Im), an independent governmental agency and wholly-owned government corporation that provides financing support for exports from the U.S. In their complaint, plaintiffs detail climate changes associated with the effects of global warming and allege continuing adverse environmental impact resulting in injury to their members throughout the country. Specifically, they allege that OPIC and Ex-Im have provided assistance to particular projects that contribute to climate change without complying with NEPA. The defendants moved for summary judgment on the following grounds: (1) lack of standing; (2) lack of final agency action; (3) OPIC's organic statute precludes judicial review; and (4) OPIC is not subject to NEPA.

Holding: The district court held that plaintiff environmental groups could go forward with their NEPA claims against OPIC and Ex-Im. Plaintiffs demonstrated they had standing for the following reasons: (1) it is reasonably probable that emissions from projects supported by OPIC and Ex-Im will threaten the groups' concrete interests, (2) OPIC's and Ex-Im's decisions could be influenced by further environmental studies, and (3) the groups demonstrated causation. In addition, "[p]laintiffs' suit does not broadly challenge the day-to-day operations of Ex-Im or OPIC, but rather, challenges those agencies' discrete determinations that the projects they support do not, on a cumulative basis, have a significant environmental impact."

In addition, the defendants argued that Congress decided not to apply NEPA to OPIC. The defendants point to legislative history indicating that Congress provided that OPIC should follow some procedures to protect the environment. However, absent from the record is any evidence that Congress amended OPIC's statute after OPIC interpreted its statute to displace NEPA. The defendants' only evidence evincing any Congressional intent on this issue was a discussion regarding the deletion of a reference to NEPA, but this discussion occurred at the time when the statute was not yet applicable to OPIC. Based on this record, the court could not conclude that Congress intended NEPA not to apply to OPIC.

Table 1. NEPA Cases Decided in 2005

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Department of Agriculture (U.S. Forest Service [USFS])			
Methow Forest Watch v. U.S. Forest Service	No. 04-114-KI, 35 ELR 20019 (D. Or. Jan. 20, 2005)	Won	**Segmentation, Cumulative Impacts.** The district court held that USFS did not violate NEPA by deciding to evaluate two special use permits for snowmobiling and helicopter skiing in separate EAs. The proposed actions were not related, although there were cumulative impacts. However, the court held that USFS adequately evaluated the cumulative effects of the proposed and existing winter recreation activities.
Sierra Nevada Forest Protection Campaign v. Weingardt	Nos. CIV-S-04-2727, -05-0093, 35 ELR 20151 (E.D. Cal. June 30, 2005)	Lost	**EA Public Involvement.** The district court held that the USFS violated NEPA by failing to provide for effective pre-decisional public involvement in the preparation of the EAs for four logging projects. The USFS argued that issuing a scoping notice and releasing the final EA to the public satisfied the mandatory public involvement requirements. The court noted that, "although the CEQ regulations do not require the circulation of a draft EA, they do require that the public be given as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA." The scoping notices contained no analysis of the environmental impacts of the projects and failed to give the public adequate information to effectively participate in the decisionmaking process. The court enjoined the projects until the USFS complied with NEPA.
Natural Resources Defense Council v. U.S. Forest Service	No. 04-35868, 35 ELR 20160 (9th Cir. Aug. 5, 2005)	Lost	**Flawed Data, Alternatives**. The U.S. Court of Appeals for the 9th Circuit reversed a lower court decision that upheld the USFS land management plan and accompanying EIS for the Tongass National Forest. The court held that the USFS had misinterpreted a 1997 study, which resulted in an average market demand for Tongass timber that was nearly double that which the study had projected. As a result, the EIS was misleading because it presented as fact for decisionmakers and the public twice the market demand and economic benefit attendant to the plan. In addition, the EIS did not consider an adequate range of alternatives in light of a correct interpretation of data that the USFS had on market demand projections for Tongass timber. The EIS also did not consider the cumulative impacts of past and reasonably foreseeable future nonfederal logging in high-volume, old growth forest of the Tongass.
Native Ecosystems Council v. U.S. Forest Service	No. 04-35375, 35 ELR 20166 (9th Cir. Aug. 11, 2005)	Lost	**Flawed Data, Adequacy of EIS**. The U.S. Court of Appeals for the 9th Circuit held that the USFS violated NEPA in approving a wildlife improvement project that involved a timber sale (commercial thinning) within the Helena National Forest. In particular, the court found that the EIS was inadequate because, by using a hiding cover calculation denominator that was inconsistent with that required by the forest plan, the USFS did not take a "hard look" at the project's true effect and failed to inform the public of the project's environmental impact.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Native Ecosystems Council v. U.S. Forest Service	No. 04-35274, 35 ELR 20226 (9th Cir. Nov. 7, 2005)	Won	**Adequacy of EA, Alternatives**. The U.S. Court of Appeals for the 9th Circuit held that the USFS had complied with NEPA for a proposed resource management project in the Helena National Forest. Specifically, the USFS did not err in preparing an EA instead of an EIS. Although a "hard look" should involve the discussion of adverse impacts, such information does not automatically make the project "highly controversial" or "highly uncertain" for the purposes of determining whether substantial questions exist as to the significance of the effect. "[I]t does not follow that the presence of some negative effects necessarily rises to the level of demonstrating a significant effect on the environment. We decline to interpret NEPA as requiring the preparation of an EIS any time that a federal agency discloses adverse impacts on wildlife species or their habitat or acknowledges information favorable to a party that would prefer a different outcome." Further, the court held that the USFS EA contained an "extensive analysis of the cumulative impacts." The USFS' decision to consider only two alternatives--the proposed plan and a "no action" alternative--did not violate NEPA. "The statutory and regulatory requirements that an agency must consider 'appropriate' and 'reasonable' alternatives does not dictate the minimum number of alternatives that an agency must consider."
Ecology Center v. Austin	No. 03-35995, 35 ELR 20248 (9th Cir. Dec. 8, 2005)	Lost	**Adequacy of EIS, Scientific Controversy**. Reversing a lower court, the U.S. Court of Appeals for the 9th Circuit held that the USFS decision to permit logging in critical old-growth forest and post-fire habitats in the Lolo National Forest was arbitrary and capricious. The agency's decision to permit commercial logging in old-growth forest stands as a form of rehabilitative "treatment" violated NEPA. "The EIS discusses in detail only the Service's own reasons for proposing treatment, and it treats the prediction that treatment will benefit old-growth dependent species as a fact instead of an untested and debated hypothesis."
Department of Defense (U.S. Army Corps of Engineers, U.S. Navy)			
Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army	No. 03-2604, 35 ELR 20040 (1st Cir. Feb. 16, 2005)	Won	**EA Public Involvement**. The U.S. Court of Appeals for the 1st Circuit held that the Army Corps had complied with NEPA and CEQ regulations to involve the public in preparing the EA and FONSI. Although plaintiffs argued that the Army Corps should have issued a draft EA for public comment, the court held that the agency met the "to the extent practicable" requirement by issuing public notice of the proponent's application, providing a comment period that was later extended to over five months, carrying out two public hearings, noting and responding to public comments in the EA, and conferring with federal and state environmental agencies. "Nothing in the CEQ regulations requires circulation of a draft EA for public comment, except under certain 'limited circumstances.' 40 C.F.R. § 1501.4(e)(2)." [**NOTE** – the court confuses the requirement for public involvement in preparing EAs in 1501.4(b) with the requirement to issue a FONSI in draft in special circumstances.]

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
City of Shoreacres v. Waterworth	No. 04-20527, 35 ELR 20162 (5th Cir. Aug. 8, 2005)	Won	**No Action Alternative, Cumulative Impacts.** The U.S. Court of Appeals for the 5th Circuit held that the no-action alternative analyzed in the Army Corps' EIS was not flawed because it accurately reflected the status quo. The court also held that the Army Corps appropriately decided that the deepening of the Houston Ship Channel was too speculative to warrant consideration as a cumulative impact of the permit.
American Rivers, Inc. v. U.S. Army Corps of Engineers	Nos. 04-2737 et al., 35 ELR 20173 (8th Cir. Aug. 16, 2005)	Won	**Alternatives**. The litigation involved various parties challenge the operation of the Missouri River main stem reservoir system by the Army Corps and associated wildlife assessments produced by FWS. In upholding a lower court decision, the U.S. Court of Appeals for the 8th Circuit found that the Army Corps had adequately explained why its preferred alternative was superior to another evaluated alternative under NEPA. NEPA requires an agency to present the EIS alternatives in comparative form. In this case, the EIS included a detailed comparative analysis of the effects of all five alternatives on a wide range of interests including fish and wildlife resources, flood control, water supply, hydropower, recreation and navigation. This analysis, presented in a series of tables, enables the reader to compare the relative effectiveness of each of the alternatives, as required by NEPA. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). There is no further NEPA requirement to repackage the information in the summary tables into prose one-to-one comparisons of the [preferred alternative] with each of the other alternatives. "We conclude that the comparisons provided in the EIS 'cogently explain why [the Corps] has exercised its discretion in a given manner.'"

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
National Audubon Society v. Department of the Navy	No. 05-1405, 35 ELR 20183 (4th Cir. Sept. 7, 2005)	Lost	**Injunction**. The U.S. Court of Appeals for the 4th Circuit upheld a district court decision that the U.S. Navy's EIS for the construction of an aircraft landing field in North Carolina was deficient under NEPA and that a supplemental EIS was required, but vacated the lower court's permanent injunction preventing the Navy from taking any steps toward planning, development, or construction of the landing field until it fulfilled its NEPA obligations as overly broad. The landing field would lie within five miles of the Pocosin Lakes National Wildlife Refuge, the winter home for nearly 100,000 waterfowl. In preparing the EIS, the Navy failed to evaluate how its actions would affect "the unique biological features of this congressionally protected area." "The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms….The Navy's effort fell short in both regards." Thus, the district court properly ordered the Navy to prepare a supplemental EIS. However, "a NEPA injunction 'should be tailored to restrain no more than what is reasonably required to accomplish its ends.'…Violation of NEPA is not always cause to enjoin all agency activity while the agency completes the required environmental analysis." In particular, allowing an agency to continue work on a project while its environmental study is pending does not necessarily create the type of option-limiting harm that NEPA seeks to prevent. A court must balance the harms particular to each case in assessing whether an injunction is justified and how far it should reach. Here, the district court erred in enjoining the entire project. On remand, the district court should modify the injunction to allow the Navy to pursue certain specified activities including land acquisition, architectural and engineering work, and permit applications while completing the SEIS.
Arkansas Wildlife Federation v. U.S. Army Corps of Engineers	No. 04-35446, 35 ELR 20257 (8th Cir. Dec. 20, 2005)	Won	**Cumulative Impacts.** The U.S. Court of Appeals for the 8th Circuit held that the Army Corps complied with NEPA in connection with its plan to preserve an aquifer in the Grand Prairie Region in Arkansas. The Corps prepared an EIS and later an EA to address changes to the original plan. The court held that the EA adequately considered the project's cumulative impacts of past, present, and future actions, and the Corps did not act arbitrarily or capriciously in refusing to prepare a supplemental EIS based on the new information. "Although other government agencies urged the Corps to wait for the completion of comprehensive studies of the White River basin by other entities, the Act only requires that the Corps consider and respond to the comments of other agencies. [NEPA] does not require the Corps to wait for other agencies to complete their studies, or to accept the input or suggestions of other agencies." The court also found that "[b]ecause the FEA was properly tiered upon the FEIS and because the FEA provided an updated and adequate analysis of any new environmental impacts, we conclude that the cumulative impacts of the Project were properly considered in compliance with the Act." In addition, the environmental groups challenging the project failed to show that the changes made in the original proposal were substantial.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Department of the Interior (Bureau of Indian Affairs [BIA], Bureau of Land Management [BLM], Fish and Wildlife Service [FWS])			
El Dorado County v. Norton	No. S-02-1818 GEB DAD, 35 ELR 20014 (E.D. Cal. Jan. 10, 2005)	Won	**Segmentation, Adequacy of EA, Alternatives, EA Public Involvement**. In a case involving EAs prepared by BIA and National Indian Gaming Commission for the proposed construction of a hotel and casino on an Indian reservation and an interchange and access road connecting the reservation to the highway, the district court held that the decision to segment review into two EAs did not violate NEPA. Two EAs were prepared because of jurisdictional considerations (California had jurisdiction over the interchange and access road). In addition, the interchange EA incorporated the casino EA by reference and considered the cumulative impacts of the project as a whole. The court also found that the EA adequately addressed potential environmental impacts and reasonably concluded that the impacts would not be significant such that an EIS was not required. "Both agencies made informed decisions in issuing FONSIs for the projects and the decisions were not arbitrary or capricious." With respect to alternatives, the stated purpose of the proposed actions was to "improve the tribal economy by providing a sustained and viable economic base." The court held that the agencies only needed to consider alternatives that are reasonably feasible and related to the purpose of the project and that the agencies' consideration of the tribe's specific goals (including its desire to take advantage of the unique opportunities provided by the Indian Gaming Regulatory Act) in determining the range of alternatives was not arbitrary or capricious. Moreover, the plaintiff did not offer any reasonably feasible alternatives that the agencies failed to consider. Finally, the court noted that the CEQ regulation requiring public involvement in EAs to the fullest extent practicable has been interpreted "to mean that 'the public must be given an opportunity to comment on draft EAs and EISs.'" The agencies did issue the draft casino EA for public comment and were not required to circulate the FONSI prior to release.
TOMAC v. Norton	No. 01-0398, 35 ELR 20063 (D.D.C. Mar. 24, 2005)	Won	**EA Public Involvement, Adequacy of EA, Cumulative Impacts.** In a case involving a proposed casino on Native American land, the district court held that BIA met the requirements for public involvement for its supplemental EA and revised FONSI. The court held that there had been extensive opportunities for formal and informal public comment in this case and that "FONSIs must be made available for public review, 40 C.F.R. § 1501.4(e)(1), as was done here, but there is no explicit statutory or regulatory requirement that EAs be submitted for public comment" (emphasis in original). In addition, the court held that BIA's supplemental EA and revised FONSI adequately considered secondary impacts from growth and development associated with the casino, relied on appropriate air quality standards, and adequately addressed water and sewer impacts. The court also held that BIA had properly considered the casino's cumulative impacts.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Hammond v. Norton	No. 01-2345 (PLF), 35 ELR 20100 (D.D.C. May 13, 2005)	Lost	**Segmentation.** The district court held that BLM violated NEPA by improperly segmented its analysis of a petroleum pipeline construction project from New Mexico to Utah. The pipeline segment did not have independent utility from another proposed pipeline project from Texas to New Mexico. In fact, the two pipelines had originally been proposed as one project. Agreeing with the plaintiffs, the court held that BLM improperly limited the scope of the EIS by "allowing the impact of the [Texas to New Mexico] project to be considered in a separate environmental review process and preventing the full environmental impacts of the combined projects from being considered adequately in the [New Mexico to Utah] ROW decision-making process." The court concluded that BLM acted arbitrarily in deciding, on the basis of the information in the administrative record at the time BLM prepared the FEIS, that the two projects were not "connected" actions. The court remanded the matter to BLM for the preparation of a Supplemental EIS addressing only the issue of whether the two pipeline projects are "connected actions" under 40 C.F.R. § 1508.25(a)(1). "If BLM concludes that the actions are not connected, it shall substantiate with concrete evidence, beyond that already set forth in the administrative record, the claim that the [New Mexico to Utah] pipeline has 'independent utility' from the [Texas to New Mexico] project, or other circumstances indicating with reasonable clarity that the [New Mexico to Utah] pipeline will not rely on the proposed [Texas to New Mexico] pipeline as a source of petroleum products."
Ashley Creek Phosphate Co. v. Norton	No. 04-35640, 35 ELR 20171 (9th Cir. Aug. 22, 2005)	Won	**Standing**. The U.S. Court of Appeals for the 9th Circuit held that the plaintiff, the Ashley Creek Phosphate Co., had no environmental stake in the phosphate mining project at issue, which was some 250 miles from the phosphate Ashley Creek controlled. The plaintiff's only interest was an economic one: if the project did not go forward, Ashley Creek speculated that it might become an alternate supplier of phosphate. Because it had shown neither an injury in fact nor an interest within the zone of interests protected by NEPA, Ashley Creek lacked standing to bring the NEPA challenge.
Environmental Information Protection Center v. United States Fish and Wildlife Service	No. C 04-04647 CRB, 35 ELR 20233 (N.D. Cal. Nov. 10, 2005)	Won	**Major Federal Action**. The district court district court dismissed plaintiff's NEPA claims against FWS and NOAA Fisheries concerning logging activity on private lands in Humboldt County, California, and denied their motion to preliminarily enjoin a lumber company's logging activities at the site. Plaintiff argued that the agencies must issue a supplemental EIS for the project, but the complaint did not allege any proposed or ongoing "major federal activity" that would trigger such a duty. The major federal actions that required the EIS in the first place were the adoption of the habitat conservation plan (HCP) and issuance of the incidental take permit (ITP), and those actions were complete. The agencies' "adaptive management" under the HCP and ITP did not constitute a major federal action requiring NEPA analysis and documentation.

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Department of Transportation (Federal Aviation Administration, Surface Transportation Board)			
City of Riverview v. Surface Transportation Board	398 F.3d 434 (6th Cir. 2005)	Won	**Adequacy of EA**. The U.S. Court of Appeals for the 6th Circuit held that the agency had reasonably concluded that, as long as certain conditions were met, the project would have no significant impact on the human environment. The agency was not required to consider the environmental impacts of future actions that were too speculative. The agency also that the agency fully evaluated air quality and noise impacts and reached reasonable conclusions. With respect to potential traffic impacts, the agency imposed mitigation which "reflects that it undertook the requisite hard look mandated by NEPA and, from that analysis, reached a reasonable decision."
City of Oxford v. Federal Aviation Administration	No. 04-13934, 35 ELR 20219 (11th Cir. Oct. 31, 2005)	Won	**Adequacy of EA**. The U.S. Court of Appeals for the 11th Circuit held that the FAA fulfilled its obligations under NEPA in approving revisions to a municipal airport's layout plan. In preparing its EA for the project, the FAA properly restricted its cumulative impact analysis to foreseeable future actions and provided sufficient oversight over the contractor that prepared the EA.
National Oceanic and Atmospheric Administration (National Marine Fisheries Service [NMFS])			
Ocean Conservancy v. Gutierrez	394 F.Supp.2d 147 (D.D.C. 2005)	Won	**Alternatives**. The district court held that the agency's supplemental EIS allowed for sufficient public comment and adequately identified cumulative impacts. In the draft supplemental EIS, a particular alternative was analyzed but found to be ineffective. Based on public comments and a subsequent biological opinion, the agency identified that alternative as its preferred alternative. The court held that NMFS had complied with NEPA's procedural requirements and made a fully informed decision. "In the final analysis, the regulation simply does not require NMFS to 'rework its draft if it later realizes an alternative it preliminarily rejected should be more fully developed.'" With respect to the adequacy of the cumulative impact analysis, the court ruled: "That NMFS *could have* conducted a more comprehensive cumulative impacts analysis does not render its analysis violative of NEPA (emphasis in original)."
Overseas Private Investment Corporation (OPIC) and Export-Import Bank (Ex-Im)			
Friends of the Earth, Inc. v. Watson	No. C 02-4106 JSW, 35 ELR 20179 (N.D. Cal. Aug. 23, 2005)	Lost	**Standing**. The district court held that plaintiff environmental groups could go forward with their NEPA claims against OPIC and Ex-Im for providing assistance to projects that contribute to climate change without complying with the statute. Plaintiffs demonstrated they had standing: (1) it is reasonably probable that emissions from projects supported by OPIC and Ex-Im will threaten the groups' concrete interests, (2) OPIC's and Ex-Im's decisions could be influenced by further environmental studies, and (3) the groups demonstrated causation. In addition, "[p]laintiffs' suit does not broadly challenge the day-to-day operations of Ex-Im or OPIC, but rather, challenges those agencies' discrete determinations that the projects they support do not, on a cumulative basis, have a significant environmental impact."