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SUMMARY

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Judicial Review and the National Environmental Policy Act of 1969

The National Environmental Policy Act (NEPA), enacted in 1969, requires federal agencies to integrate environmental considerations into their decisionmaking processes. It also directs agencies to use interdisciplinary approaches in these processes and, for specified actions, to prepare a "detailed statement" about the actions' effects on the human environment. Because NEPA applies to many different kinds of agency actions, including construction, land management, permitting, and funding, it plays a significant role in the administration of many federal programs.

The Council on Environmental Quality (CEQ), an executive branch entity, has issued regulations that instruct agencies on how to comply with NEPA, and many agencies have promulgated agency-specific regulations that supplement CEQ's regulations. Together, these regulations require agencies to prepare different environmental documents depending on the degree to which a proposed action may cause significant effects to the human environment. If a proposed action will not cause significant effects, no further analysis is required. In that case, an agency may also rely on a categorical exclusion to document its determination that the project falls within a category of actions without significant effects. If an agency is unclear about whether a proposed action will have significant effects, it must prepare an environmental assessment (EA). An EA showing no significant effects allows an agency to issue a Finding of No Significant Impact (FONSI), while an EA showing significant effects requires an agency to prepare an environmental impact statement (EIS). An EIS is required for all proposed actions that have significant effects.

The federal courts have been instrumental in guiding agency compliance with NEPA. Although NEPA contains no provision for judicial review, courts allow plaintiffs to challenge agency compliance with NEPA by filing challenges under the Administrative Procedure Act (APA). Plaintiffs often allege that an agency acted "arbitrarily or capriciously" when taking steps to comply with NEPA, and they seek a variety of remedies, including declarations that an agency violated the APA; court orders remanding a decision to the agency for further consideration; and preliminary or permanent injunctions that prevent an agency from implementing disputed actions.

Plaintiffs challenge the steps that agencies take to comply with NEPA in a number of different ways. Some of the more frequently litigated issues are the following:

Improper Type or Level of NEPA Review. Plaintiffs sometimes allege that an agency improperly relied on a categorical exclusion because the proposed action would have significant effects. When agencies prepare EAs and then issue FONSIs, plaintiffs also may allege that the agencies violated the APA by concluding that the project would have no significant effects and that the agencies therefore should have prepared an EIS.

Failure to Prepare a Supplemental Environmental Review. Agencies must prepare supplemental documents to EAs or EISs when they learn of new information or make changes to a proposed action that may affect their decisionmaking process. Plaintiffs challenging an agency's failure to prepare a supplemental environmental document tend to focus on whether such new information or changes are sufficient to trigger an agency's duty to prepare a supplemental document.

Inadequacy of NEPA Review. Plaintiffs often challenge the sufficiency of an agency's analysis of particular effects in EAs or EISs. Sometimes, these challenges allege that an agency violated the APA by failing to obtain or analyze sufficient data. Other challenges focus on the types of effects that CEQ set out in its 1978 regulations—direct effects, indirect effects, and cumulative impacts—and allege that an agency failed to consider one or more of these specific types of effects. Courts often consider claims that agencies failed to consider a reasonable range of alternatives to their proposed actions, as required by NEPA. Plaintiffs also challenge the adequacy of an agency's NEPA compliance by arguing that an agency failed to consult with other relevant federal or state agencies or with public stakeholders.

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Introduction

The National Environmental Policy Act (NEPA), enacted in 1969, generally requires federal agencies to integrate environmental considerations into their decisionmaking processes. Because this requirement applies to a wide range of federal actions, including both the government's own activities and its decisions to allow or to fund other parties' activities, NEPA plays a significant role in the administration of many federal programs.

NEPA directs agencies to use interdisciplinary approaches in considering environmental effects and, for specified actions, requires them to prepare a "detailed statement" about the actions' effects on the human environment. NEPA also created the Council on Environmental Quality (CEQ), an entity within the Executive Office of the President. CEQ oversees agency compliance with NEPA, and, as directed by executive order, has issued regulations used by the agencies for complying with NEPA. Agencies have also created their own regulations that supplement the CEQ regulations.

The federal courts have been instrumental in guiding agency compliance with NEPA. Although NEPA contains no provision addressing the availability of judicial review, courts have long allowed plaintiffs to challenge an agency's compliance with NEPA under the Administrative Procedure Act (APA). This report focuses on the role of the federal courts in reviewing agency compliance with NEPA. First, the report provides an overview of the relevant statutory and regulatory framework. Next, it discusses how judicial review works in the NEPA context. Finally, the report provides an overview of selected issues that arise often in litigation or tend to generate controversy about NEPA.

Statutory and Regulatory Background

NEPA

NEPA imposes a general directive that, "to the fullest extent possible, [] the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance" with the Act.[1] It further directs all federal agencies to

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official . . . .[2]

[1] 42 U.S.C. § 4332(1). National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (1970). For more information on NEPA, see CRS In Focus IF11549, *The Legal Framework of the National Environmental Policy Act*.

[2] *Id*. § 4332(2).

The "detailed statement," now commonly known as an "environmental impact statement" or "EIS," must discuss five types of information:

1. the environmental impact of the proposed action;
2. any adverse environmental effects that cannot be avoided should the proposal be implemented;
3. alternatives to the proposed action;
4. the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
5. any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.[3]

While creating a detailed statement, agencies must consult and obtain comments from other federal agencies with jurisdiction or "special expertise with respect to any environmental impact involved."[4] Agencies must provide copies of the detailed statement and any comments received during the environmental review process to the President, CEQ, and the public.[5]

NEPA also created CEQ within the Executive Office of the President.[6] CEQ comprises three members appointed by the President with the advice and consent of the Senate, and one of the members is designated by the President as Chair.[7] NEPA directs CEQ to, among other things, develop and recommend to the President national policies that further environmental quality; perform a continuing analysis of changes or trends in the national environment; review and appraise programs of the federal government to determine their contributions to sound environmental policy; and oversee implementation of NEPA.[8]

CEQ and Agency Regulations

CEQ has been instrumental in implementing NEPA by developing regulations that provide more details about what agencies must do when creating a detailed statement or taking other actions to comply with NEPA. President Carter ordered CEQ to develop regulations to implement NEPA.[9] The 1978 regulations[10] created the baseline for agencies structuring their own NEPA procedures and regulations. The Trump Administration amended parts of these regulations in 2020.[11] In October 2021, the Biden Administration proposed to reinstate some provisions of the 1978

[3] *Id.* § 4332(2)(C)(i)-(v).

[4] *Id.* § 4332(2)(C).

[5] *Id.*

[6] *Id.* § 4342.

[7] *Id.*

[8] *Id.* § 4344.

[9] Exec. Order No. 11514, 3 C.F.R. 902 (1970 Comp.), as amended by Exec. Order No. 11991, 3 C.F.R. 123 (1977 Comp.).

[10] National Environmental Policy Act—Regulations; Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (codified at 40 C.F.R. pts. 1500-1508).

[11] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (codified at 40 C.F.R. pts. 1500-1508).

regulations that the 2020 rulemaking amended or eliminated.[12] The Biden Administration finalized part of its revisions ("Phase One") in April 2022.[13]

Major Federal Actions

While NEPA applies to all agencies, as discussed above, it imposes requirements on those agencies only when they undertake *major federal actions*.[14] NEPA does not define what qualifies as "major federal actions," prompting one Supreme Court Justice to note that the statute could thus "hardly be termed precise."[15] However, federal courts have interpreted the phrase, and CEQ's 2020 regulations (informed by that case law) listed actions that tend to qualify as major federal actions and those that do not. As CEQ's 2020 rule stated, the list reflects the court decisions regarding whether actions are "major federal actions" that CEQ chose to include in the regulations.[16]

First, the regulations describe what "may" qualify as a major federal action: (1) new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; (2) new or revised agency rules, regulations, plans, policies, or procedures; and (3) legislative proposals.[17]

Second, the regulations list categories of actions that do not qualify or that "tend" to qualify as major federal actions. Categories of actions that do not qualify are

- extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;
- activities or decisions that are nondiscretionary and made in accordance with the agency's statutory authority;
- activities or decisions that do not result in final agency action under the Administrative Procedure Act or another statute that includes a finality requirement;[18]
- judicial or administrative civil or criminal enforcement actions;
- funding assistance solely in the form of general revenue sharing funds with no federal agency control over the subsequent use of such funds;
- nonfederal projects with minimal federal funding or minimal federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project; and

[12] National Environmental Policy Act Implementing Regulations Revisions; Notice of Proposed Rulemaking, 86 Fed. Reg. 55,757 (Oct. 7, 2021).

[13] National Environmental Policy Act Implementing Regulations Revisions; Final Rule, 87 Fed. Reg. 23,453 (Apr. 20, 2022).

[14] 42 U.S.C. § 4332(c) ("major Federal actions significantly affecting the quality of the human environment").

[15] Kleppe v. Sierra Club, 427 U.S. 390, 420-21 (1976) (Marshall, J., concurring in part and dissenting in part).

[16] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,345-43,346 (July 16, 2020).

[17] 40 C.F.R. § 1508.1(q)(2). These lists were amended or included in the Biden Administration's "Phase One" revisions.

[18] Under the Administrative Procedure Act (APA) and some other statutes, an agency action must be "final" before an individual affected by an agency's actions may seek judicial review of the action. The Supreme Court defines as "final" actions that (1) mark the "consummation" of an agency's decisionmaking process and (2) determine rights or obligations or result in legal consequences. Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

- loans, loan guarantees, or other forms of financial assistance where the federal agency does not exercise sufficient control and responsibility over the effects of such assistance.[19]

Categories of proposed actions that "tend" to qualify as major federal actions are

- adoption of official policy, such as rules, regulations, and interpretations adopted under the APA or other statutes;
- implementation of treaties and international conventions or agreements, including those implemented pursuant to statute or regulation;
- formal documents establishing an agency's policies which will result in or substantially alter agency programs;
- adoption of formal plans, such as official documents prepared or approved by federal agencies, which prescribe alternative uses of federal resources, upon which future agency actions will be based;
- adoption of programs, such as a group of concerted actions to implement a specific policy or plan;
- systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive; and
- approval of specific projects, such as construction or management activities located in a defined geographic area, including those approved by permit or other regulatory decision as well as federal and federally assisted activities.[20]

The types of actions that might fall within the scope of major federal actions reach a wide variety of proposals considered by federal agencies. Examples of major federal actions include development of wildlife management plans; issuance of commercial use permits within federally managed lands; construction of new rail lines or facilities; approval of airport layouts; and natural gas pipeline approvals.[21]

Determining Significance: Which Level of Environmental Review Is Appropriate?

Whether a proposed major federal action is expected to cause significant effects on the human environment determines the level of environmental review an agency must complete to demonstrate that it has met the requirements of NEPA. Depending on whether the potential effects are or are not significant, agencies proceed in one of three ways: (1) categorical exclusion; (2) environmental assessment (EA); or (3) environmental impact statement (EIS). In general, agencies' NEPA regulations set out certain types of actions that they consider to be subject to each of these levels of review, based on their experiences and other analyses. CEQ estimates that

[19] 40 C.F.R. § 1508.1(q)(1).

[20] *Id*. § 1508.1(q)(3).

[21] See, e.g., National Park Service, NEPA Handbook, https://www.nps.gov/subjects/nepa/upload/NPS_NEPAHandbook_Final_508.pdf; FERC, Environmental Documents, https://www.ferc.gov/industries-data/natural-gas/environmental-overview/environmental-documents-2022; U.S. Dep't of Transportation, Order 5610.1D, Procedures for Considering Envt'l Impacts (draft), https://www.transportation.gov/office-policy/transportation-policy/dot-order-56101d-procedures-considering-environmental-impacts.

agencies demonstrate NEPA compliance through categorical exclusions for 95% of actions that are subject to NEPA; EAs for approximately 4%; and EISs for 1%.[22]

No Significant Impacts: Categorical Exclusions

When a proposed action will not have significant impacts, an agency may use a categorical exclusion to demonstrate that NEPA does not require detailed analysis. Agencies identify types of actions that normally do not result in significant impacts and thus require no environmental review, and list these categorical exclusions in their NEPA regulations.[23] In these regulations, agencies also include provisions for addressing when actions that typically fall into a categorical exclusion require environmental review due to "extraordinary circumstances."[24] Congress may also identify categorical exclusions in the first instance.[25]

Significant Impacts Uncertain: Environmental Assessment

For proposed federal actions that may have some impacts—but potentially not *significant* impacts—agencies may prepare an EA, although they may proceed directly to an EIS instead. The process of preparing an EA can help an agency determine whether to make a Finding of No Significant Impact (FONSI) or, alternatively, instead prepare a full EIS.[26] While preparing an EA, an agency must involve stakeholders "to the extent practicable."[27] In addition, when a proposed action is similar to those that typically require an EIS or is unprecedented in nature, an agency must release a draft FONSI for public review before making its final determination.[28]

Significant Impacts: Environmental Impact Statement

Proposed actions with significant environmental impacts require an agency to prepare an EIS (i.e., the "detailed statement" required by NEPA).[29] This statement is generally the most comprehensive of the types of environmental review documents that an agency may use to comply with NEPA. Although the CEQ regulations require each EIS to be either (1) less than 150 pages or (2) less than 300 pages for projects of "unusual scope or complexity," unless an appropriate official authorizes a longer page limit,[30] it is common for an EIS to exceed this length.[31]

As detailed above, NEPA requires each EIS to analyze the five types of information listed in the statute. While preparing an EIS, an agency must also submit a draft EIS to the public for review[32]

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[22] U.S. Government Accountability Office, *National Environmental Policy Act: Little Information Exists on NEPA Analyses*, GAO-14-370 at 7 (Apr. 2014) (citing CEQ statistics).

[23] 40 C.F.R. § 1501.4.

[24] *Id.* § 1501.4(b).

[25] *See, e.g.*, 42 U.S.C. § 15492. Congress sometimes also provides direction about how an agency should make categorical exclusion determinations. See, e.g., 49 U.S.C. § 304.

[26] 40 C.F.R. § 1501.5.

[27] *Id.*

[28] *Id.* § 1501.6(a)(2).

[29] *Id.* pt. 1502.

[30] *Id.* § 1502.7.

[31] Council on Envt'l Quality, Length of Envt'l Impact Statements (2013-2018) (June 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2020-6-12.pdf.

[32] *Id.* § 1503.1.

and respond to comments received.[33] Once an agency completes an EIS, it must issue a Record of Decision (ROD), which identifies the agency's decision regarding the proposed action, alternative actions considered, and any mitigation measures that will be implemented.[34]

Supplemental Environmental Review

Although NEPA does not expressly require an agency to perform a supplemental review, the Supreme Court has indicated that NEPA implies such a requirement in some cases.[35] CEQ's regulations codify this requirement. Specifically, agencies must prepare supplemental analyses when major federal action remains to occur and (1) "the agency makes substantial changes to the proposed action that are relevant to environmental concerns" or (2) "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[36] An agency may also prepare a supplemental EIS whenever it determines that doing so furthers NEPA's purposes.[37]

Judicial Review of NEPA: An Overview

NEPA contains no provision addressing the availability of judicial review. Instead, plaintiffs may challenge an agency's compliance with NEPA under the APA.[38] The APA generally establishes how courts review final agency actions, including the appropriate standards of review. Among other things, courts may find an agency action unlawful and set it aside if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39] In the NEPA context, plaintiffs often allege that an agency's actions were arbitrary or capricious, and thus violate the APA. Reviewing courts generally interpret this to mean that they must consider whether an agency took a "hard look" at the environmental consequences of their proposed actions, considered alternatives, and publicly disclosed such information before reaching a final decision.[40] Thus, a court may not "substitute its judgment for that of the agency."[41] In other words, neither NEPA, nor the courts, direct agencies to prioritize certain values over others or to reach specific outcomes. It "prohibits uninformed—rather than unwise—agency action."[42]

[33] *Id.* § 1503.4.

[34] *Id.* § 1505.2.

[35] Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 370-71 (1989) ("The subject of postdecision supplemental environmental impact statements is not expressly addressed in NEPA. Preparation of such statements, however, is at times necessary to satisfy the Act's 'action-forcing' purpose.").

[36] 40 C.F.R. § 1502.9(d)(1).

[37] *Id.* § 1502.9(d)(2).

[38] See, e.g., Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990) ("Respondent does not contend that . . . NEPA provides a private right of action for violations of its provisions. Rather, respondent claims a right to judicial review under § 10(a) of the APA.").

[39] 5 U.S.C. § 706. For more information about the APA, see CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*.

[40] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

[41] Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

[42] Methow Valley Citizens Council, 490 U.S. at 351.

Limits on Judicial Review

The Constitution, the courts, and Congress may limit judicial review of actions taken to comply with NEPA. This section provides an overview of some of these limitations.

Standing

A plaintiff must have standing to bring a case. Article III of the Constitution requires a plaintiff to demonstrate an injury in fact that is caused by the alleged statutory violation and that can be remedied by a court.[43] In the NEPA context, injuries are generally procedural in nature (i.e., a plaintiff is harmed by an agency's failure to follow NEPA procedures), but to meet the Article III injury threshold, a plaintiff must allege that the agency's action will harm the plaintiff's concrete interest and that the relevant procedure is designed to protect that interest. For example, in *Cantrell v. City of Long Beach*, plaintiffs alleged the Navy did not comply with NEPA in proposing to convert a closed naval station to a commercial marine container terminal.[44] The plaintiffs were "birdwatchers," residents of Long Beach and Lakewood, CA, who opposed the Navy's plans.[45] The U.S. Court of Appeals for the Ninth Circuit held that plaintiffs sufficiently alleged an injury by pleading that the naval station was currently home to bird habitats, which plaintiffs enjoyed recreationally as birdwatchers, and that their ability to enjoy the habitats would be impaired by the proposed conversion.[46]

The Constitution also prohibits courts from addressing alleged injuries that are "generalized grievances," as these do not present "cases" or "controversies," as required by Article III.[47] For example, plaintiffs asserting "generalized harm to the forest or the environment" lack a concrete or particularized injury. By contrast, if they assert that harm "affects the recreational or even the[ir] mere esthetic interests," then plaintiffs may satisfy the Constitution's standing requirements.[48]

Finally, plaintiffs must demonstrate that the type of injury alleged falls within the "zone of interests" of the statute invoked.[49] The Supreme Court has held that NEPA protects a broad range of harms, including recreational or aesthetic enjoyment of the environment.[50] However, NEPA does not reach purely economic injuries.[51] As the Third Circuit explained:

> To accept NEPA litigants whose interests accidentally overlap with the statute's intended purpose would not only create a class of plaintiffs far larger than Congress originally intended, it also would serve to distort the effect of NEPA itself.[52]

[43] Friends of the Earth v. Laidlaw, 528 US 167, 180-81 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[44] Cantrell v. City of Long Beach, 241 F.3d 674 (9th Cir. 2001).

[45] *Id.* at 676-77.

[46] *Id.* at 682.

[47] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014).

[48] Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009).

[49] *Id*. at 127-28. The Supreme Court previously described this requirement as part of its "prudential standing" doctrine, but in *Lexmark*, recharacterised the requirement as a question of statutory interpretation. *Id*.

[50] Lujan v Nat'l Wildlife Fed'n, 497 US 871 (1990).

[51] See, e.g., Maiden Creek Assoc. LP v. U.S. Dep't of Transp., 823 F.3d 184, 194 (3d Cir. 2016); Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005).

[52] *Maiden Creek Assoc. LP*, 823 F.3d at 194.

Nonetheless, plaintiffs who allege both environmental and economic injuries may satisfy the "zone of interests" test.[53] Further, plaintiffs who assert environmental injuries, but whose primary motive for bringing a case is economic interest, also "routinely satisfy" this test.[54]

Aside from individuals who bring NEPA cases, organizations often bring cases on behalf of their members. They may do so if (1) at least one of the members has standing; (2) the interests that the organization seeks to protect are germane to its purposes; and (3) neither the claim nor the type of relief sought would require the individual members to actively participate in the litigation.[55]

Statute of Limitations

NEPA does not include a statute of limitations—i.e., a time by which a plaintiff must file a lawsuit. As discussed above, plaintiffs generally bring NEPA claims using the APA. Courts have generally held that the statute requiring civil claims against the United States to be brought within six years applies to APA claims.[56] Congress may legislate other time limitations for NEPA claims if it so chooses. For example, in the Fixing America's Surface Transportation Act, Congress imposed a two-year statute of limitations on certain infrastructure projects that require environmental review under NEPA.[57]

Exhaustion

Courts generally require plaintiffs to raise their issues with the relevant agency during the appropriate comment period for the proposed agency action, and if plaintiffs do not do so, the courts may bar them from later filing a claim involving those issues.[58] Nonetheless, the Supreme Court has suggested that flaws in an EA or EIS "might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."[59] Some federal appellate courts follow the Supreme Court's dicta, allowing some NEPA challenges to move forward even if the issues were not raised during the public comment period.[60]

CEQ's 2020 regulations state that comments on issues not raised during the public comment period "shall be considered unexhausted and forfeited."[61] That was a departure from CEQ's 1978 regulations, which did not expressly limit judicial review of an agency's NEPA compliance to

[53] Centr. S. Dak. Co-op Grazing Dist. v. Sec'y of U.S. Dep't of Agric., 266 F.3d 889, 895-96 (8th Cir. 2001).

[54] Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1287 (D.C. Cir. 2005).

[55] Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972); Sierra Club v. FERC, 827 F.3d 59, 65 (D.C. Cir. 2016) (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

[56] See, e.g., Jersey Hgts. Neighborhood Ass'n v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999); Sierra Club v. Slater, 120 F.3d 623, 630-31 (6th Cir. 1997); Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988). Accord Sierra Club v. U.S. Army Corps of Eng'rs, 446 F.3d 808, 815 (8th Cir. 2006) (noting without deciding that other courts use the six-year statute of limitations). 28 U.S.C. § 2401(a) states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

[57] 42 U.S.C. § 4370m-6; *id*. § 4370m(6) (defining "covered project").

[58] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 553 (1978).

[59] Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 765 (2004).

[60] *See, e.g.*, Friends of Tims Ford v. Tenn. Valley Auth., 585 F.3d 955, 964 (6th Cir. 2009) (allowing a NEPA challenge to proceed because the agency had not shown why the "deficient" EIS "was not so obvious that [plaintiffs] needed to comment to preserve its right to appeal").

[61] 40 C.F.R. § 1503.3(b) (2020).

issues raised through public comment, and may be in tension with the Supreme Court's dicta.[62] In any event, Congress may also legislate on the issue of exhaustion, providing either that potential plaintiffs must or need not comment during administrative proceedings to preserve an issue for judicial review.[63]

Remedies in NEPA Litigation

Plaintiffs ask for a variety of remedies in NEPA litigation. In general, when a plaintiff prevails in a NEPA case, a court grants declaratory relief and may remand the disputed action to the agency. The agency then must either abandon its proposed action or take steps to remedy the APA violations by producing an environmental review that demonstrates that it has complied with NEPA in selecting that action.

Courts often vacate an agency's final action in addition to remanding to the agency, meaning that the agency's original decision is declared void and ineffective. When a court finds that an agency violated the APA, the statute directs the court to "set aside"—i.e., vacate—the agency's action.[64] Thus, in NEPA cases, courts have recognized that vacatur is the "ordinary" remedy.[65]

Nonetheless, courts have created an equitable exception, sometimes ordering remand without vacatur. That remedy allows the agency's original action or decision to remain in place while the agency corrects a deficiency in its NEPA compliance. The leading articulation of this exception is *Allied-Signal, Inc. v. Nuclear Regulatory Commission*.[66] In this case, the D.C. Circuit stated that not all actions that violate the APA must be vacated; rather, the court should consider (1) "the seriousness of the order's deficiencies" and (2) "the disruptive consequences of" vacatur.[67] Applying this test, one court of appeals declined to vacate the Federal Energy Regulatory Commission's environmental review on the ground that the agency was "likely to remedy any deficiencies in its orders on remand, and because vacating the orders would imperil Intervenors' ability to obtain funding necessary to complete the projects in a timely fashion."[68] By contrast, another court of appeals affirmed a district court's decision to vacate a U.S. Army Corps of Engineers' decision on the ground that the Corps had previously failed to remedy APA violations and comply with NEPA.[69]

According to some legal scholars, the use of the "remand without vacatur" remedy has increased since the 1970s, particularly in the D.C. Circuit and primarily in cases involving the Clean Air Act rather than NEPA.[70] Judges and practitioners continue to debate whether that remedy is legal

[62] *See id.* § 1503.3 (2019) (detailing specificity of public and agency comments). It is unclear whether the Biden Administration will seek to amend this provision in its "Phase Two" reforms to CEQ's regulations.

[63] See, e.g., 42 USC 4370m-6(a)(1)(B).

[64] 5 U.S.C. § 706(2).

[65] Black Warrior Riverkeeper v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1290 (11th Cir. 2015) (discussing history of remand without vacatur).

[66] 988 F.2d 146 (D.C. Cir. 1993).

[67] *Id*. at 150-51.

[68] Vecinos para el Bienestar de al Comunidad Costera v. Fed. Energy Reg. Comm'n, 6 F.4th 1321, 1332 (D. C. Cir. 2021).

[69] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032, 1050-53 (D.C. Cir. 2021).

[70] Stephanie J. Tatham, *The Unusual Remedy of Remand Without Vacatur*, Administrative Conference of the United States at 30-36 (Jan. 3, 2014), https://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20Final%20Report.pdf.

and appropriate, however, because it is in tension with the APA's textual instruction that courts "set aside" unlawful agency actions and because it is inconsistently granted by the courts.[71]

In some cases, parties request permanent injunctive relief in addition to the types of remedies discussed above. Vacatur often has the same practical effect as a permanent injunction in that, once an agency's final decision is set aside, an agency cannot proceed with the proposed action. However, while vacatur generally leaves an agency free to make a new decision without further court supervision, an injunction may provide a more specific direction to an agency prohibiting it from proceeding with part or all of a proposed action until the agency comes into compliance with NEPA.[72] In choosing between those two remedies, the Supreme Court has stressed there is no "thumb on the scales" in favor of an injunction.[73] Instead, the Court affirmed that the traditional requirements for permanent injunctive relief apply in the NEPA context:

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[74]

CEQ data on NEPA litigation from 2001 to 2011 indicates that the number of injunctions varied significantly, although never reaching above 18 per year (**Table 1**).[75]

Table 1. NEPA Litigation Injunctions, 2001-2011

Preliminary Injunctions Granted Per Year		Permanent Injunctions Issued Per Year	
Year	**Number**	**Year**	**Number**
2001	5	2001	0
2002	4	2002	8
2003	4	2003	2
2004	6	2004	1
2005	18	2005	7
2006	8	2006	16
2007	10	2007	18
2008	6	2008	10
2009	2	2009	15
2010	5	2010	4
2011	5	2011	3

Source: Created by CRS with data from CEQ.

[71] *See id.* at 9-18.

[72] *See, e.g.*, Minn. Pub. Interest Research Grp. v. Butz, 358 F. Supp. 584 (D. Minn. 1973) (issuing injunction after Forest Service indicated it would continue to log approximately 3,000 acres despite the court's ruling that the Service's EIS on the logging project was deficient).

[73] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157 (2010).

[74] *Id.* at 156-57 (quoting eBay Inc. v. MercExchange L.L.C., 547 U.S. 388, 391 (2006)).

[75] CEQ, *NEPA Litigation Surveys: 2001-2013*, https://ceq.doe.gov/docs/ceq-reports/nepa-litigation-surveys-2001-2013.pdf. CEQ did not report on whether courts granted any requests for permanent injunctions in 2012 or 2013.

When plaintiffs file a complaint, they sometimes request a preliminary injunction, which is an order prohibiting an agency from implementing the action in dispute while the litigation is ongoing.

The Supreme Court most recently addressed what a party seeking a preliminary injunction must demonstrate in *Winter v. Natural Resources Defense Council*. In that case, the Court emphasized its "frequently reiterated standard" for obtaining a preliminary injunction:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.[76]

Selected Issues in NEPA Litigation

NEPA litigation involves a wide range of agencies and raises issues involving agency choices and determinations. This section provides an overview of selected issues raised in NEPA litigation that may be of interest to Congress.

Confirming When NEPA Review Is Required

Courts must occasionally address what happens when an agency is faced with a potential conflict between NEPA and other statutory mandates. As discussed above, the requirements of NEPA apply "to the fullest extent possible."[77] In other words, as the Supreme Court has held, NEPA was not intended to repeal any other statute by implication. Thus, when "a clear and unavoidable conflict in statutory authority exists, NEPA must give way."[78] Such a conflict may exist, for example, if the period for implementing a statutory mandate is too short for an agency to complete environmental review under NEPA.[79]

Related to this point, an agency need include in its environmental analyses only those alternatives it has discretion to select. As the Supreme Court described, agencies should be guided by a "rule of reason" when taking steps to comply with NEPA, and such a rule is not served by requiring agencies to evaluate the effects of actions it lacks legal authority to prevent.[80] In *Department of Transportation v. Public Citizen*, the Supreme Court considered whether the Federal Motor Carrier Safety Administration (FMCSA) failed to satisfy NEPA by not considering the environmental effects related to increased entry of trucks from Mexico into the United States. The Court held that the FMCSA did not violate NEPA because the agency lacked any statutory ability to regulate or prevent the cross-border traffic, which had been ordered by the President in response to a ruling from an arbitral panel convened under the North American Free Trade Agreement.[81]

Some courts also hold NEPA does not apply when an agency's actions to comply with other statutes are "functionally equivalent" to NEPA. This requires courts to assess, on a case-by-case basis, what an agency must take into account when complying with other statutes, especially

[76] *Winter*, 555 U.S. at 20-21.

[77] 42 U.S.C. § 4332(2).

[78] Flint Ridge Dev. Corp. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 788 (1976).

[79] *Id*. at 788-89 ("inconceivable" that an agency could comply with NEPA within 30-day deadline for issuance of statement of record under Disclosure Act).

[80] Dep't of Transp. v. Pub. Citizen, 541 U.S. 762, 767-68 (2004).

[81] *Id*. at 768; see also Ala. Wilderness League v. Jewell, 788 F.3d 1212, 1225-26 (9th Cir. 2015).

environmental effects or considerations.[82] Other courts do not use the "functional equivalent" approach, instead asking whether another statute has "displaced" NEPA.[83]

Assessing Significance of Impacts

Plaintiffs sometimes challenge an agency's assessment of whether an action will have significant impacts, arguing that an agency inappropriately relied on a categorical exclusion or should have prepared an EIS instead of an EA.

Use of Categorical Exclusions

When an agency relies on a categorical exclusion (CX) to determine that further NEPA analysis is not required, plaintiffs may argue that the agency (1) improperly used a CX for a specific action or (2) created an improperly scoped CX.

In disputes involving challenges to specific uses of CXs, plaintiffs have raised different theories under the APA. For instance, in some cases, plaintiffs have alleged that an agency failed to document its determination to use a CX. In *Wilderness Watch & Public Employees for Environmental Responsibility v. Mainella*, plaintiffs alleged that the National Park Service's decision to use a CX to authorize tourist operation of motor vehicles on protected "wilderness areas" violated the APA because the agency failed to document its decision.[84] The Park Service argued it did not need to document its decision because requiring any such written evidence would "defeat the purpose of the exclusion."[85] The Eleventh Circuit rejected that argument, holding that the agency's failure to provide any documents to indicate why use of a CX was appropriate made it "difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious."[86]

In other cases, plaintiffs challenge whether an agency reasonably determined that no "extraordinary circumstances" existed that would have prevented the agency from relying on a CX. For instance, in *Alaska Center for the Environment v. U.S. Forest Service*, the Forest Service relied on a CX to issue one-year licenses for commercial helicopter activities in National Forest lands.[87] Plaintiffs sued, alleging that such activities would have significant environmental impacts and fell within the "extraordinary circumstances" exception to the CX.[88] The Ninth Circuit affirmed the district court's decision that the Forest Service acted arbitrarily and capriciously when issuing certain licenses because it merely restated the CX and failed to provide reasons for why the CX applied.[89]

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[82] See, e.g., Envtl. Def. Fund, Inc. v. Envtl. Protection Agency, 489 F.2d 1247 (D.C. Cir. 1973) (holding FIFRA the functional equivalent of NEPA since the statute required the agency to take environmental effects into account and consider public comments about such effects). See also Pac. Legal Fndtn. v. Andrus, 657 F.2d 829, 834 (6th Cir. 1981) (discussing lower court practice applying the "functional equivalent" test).

[83] See, e.g., San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 650-51 (9th Cir. 2014) (Section 7 of the Endangered Species Act does not displace NEPA requirements and agency must comply with both statutes).

[84] 375 F.3d 1085, 1094 (11th Cir. 2004).

[85] *Id.*

[86] *Id.* See also California v. Norton, 311 F.3d 1162 (9th Cir. 2002).

[87] 189 F.3d 851 (9th Cir. 1999).

[88] *Id.* at 854.

[89] *Id.* at 859.

As noted above, plaintiffs sometimes seek to invalidate an agency's *adoption* of a CX. In *Sierra Club v. Bosworth*, the plaintiffs alleged that the Forest Service violated by the APA by categorically excluding all fuel reduction projects of up to 1,000 acres and burn projects of up to 4,500 acres.[90] The Ninth Circuit concluded that the Forest Service's CX violated the APA because the Service (1) collected data only to justify, rather than assess, the appropriateness of a CX; (2) failed to explain why the cumulative effect of each project would not have significant environmental effects; and (3) failed to specify criteria for each project that would ensure they had no significant environmental effects.[91]

Use of EA/FONSI Instead of EIS

Agencies and plaintiffs sometimes disagree about whether an agency should have prepared an EIS in instances when an agency had prepared an EA, concluded that the project would not result in significant environmental effects, and then issued a FONSI.

Some plaintiffs assert that an agency failed to take the requisite "hard look" by reasonably assessing the evidence before it. For example, in *O'Reilly v. U.S. Army Corps of Engineers*, the Fifth Circuit considered whether the Corps reasonably issued an EA and FONSI when it had allegedly failed to explain how mitigation measures would offset environmental damage.[92] The Fifth Circuit found that "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," and thus the agency did not comply with NEPA.[93] By contrast, in *Spiller v. White*, the Fifth Circuit upheld a FONSI for a project approving use of a pre-existing pipeline to transport petroleum products, subject to specific mitigation measures.[94] Specifically, the court found that the "exhaustive and extensive" EA demonstrated that the agencies adequately considered and explained the proposed mitigation measures and how such measures could offset the environmental impacts caused by the pipeline's use.[95]

Other disputes involve questions about an agency's reliance on certain types of information. As discussed above, one of NEPA's objectives is to ensure that agencies are informed about the environmental consequences of their actions. Litigation thus arises about whether an agency inappropriately relied on outdated information. In *Native Ecosystems Council v. U.S. Forest Service*, the Forest Service had prepared an EA for a resource management plan covering parts of the Helena National Forest as a means of reducing the number of high-intensity, stand-replacing fires. Based in part on a 1996 EIS it had prepared for a larger-scale version of the newly proposed resource management plan, the Forest Service concluded that the management techniques would not create significant environmental impacts. Plaintiff argued that the Forest Service erred in relying on the 1996 EIS in part because subsequent data showed that the 1996 project eliminated one pair of goshawks (a bird species inhabiting the area). The Ninth Circuit rejected plaintiff's claim, finding that the Forest Service took a "hard look" by considering this fact against other

[90] 510 F.3d 1016 (9th Cir. 2007).

[91] *Id*. at 1026-33.

[92] 477 F.3d 225 (5th Cir. 2007).

[93] *Id*. at 234.

[94] 352 F.3d 235 (5th Cir. 2003).

[95] *Id*. at 241-44.

data showing that goshawks change nesting sites each year and nest near logged sites before concluding that the proposed project would not have significant effects on the goshawks.[96]

Courts that determine an agency violated the APA when issuing a FONSI must decide whether to remand with the specific instruction to prepare a new EA or a full EIS. As explained by the Fifth and Ninth Circuits, a deficient EA does not necessarily warrant such an instruction. Rather, such an instruction may be warranted if "the evidence in a complete administrative record demonstrates that the project or regulation may have a significant impact."[97] By contrast, when a court cannot determine whether a proposed action will have significant impacts, it may remand with instructions for the agency to comply with NEPA through the appropriate environmental review process.[98] For example, in *O'Reilly v. U.S. Army Corps of Engineers*, the Fifth Circuit remanded with instructions to prepare a new EA or an EIS, as appropriate, because the court could not determine, based on the agency's deficient explanations, whether or not the proposed mitigation measures would eliminate significant environmental effects.[99]

Supplemental Environmental Review

Plaintiffs sometimes claim that an agency failed to prepare an appropriate supplemental environmental review. These disputes tend to center on whether new information or changes to a proposed action trigger additional NEPA requirements. For example, in *DuBois v. U.S. Department of Agriculture*, the Forest Service issued a permit for expansion of a ski facility in a national forest, approving "Alternative 6" in the final EIS.[100] Plaintiffs challenged the permit, arguing that Alternative 6 appeared for the first time in the final EIS and represented a substantial change from the original proposal and other alternatives listed in the draft EIS, thus requiring the Forest Service to prepare a supplemental EIS. The First Circuit agreed with plaintiffs, finding that Alternative 6 was sufficiently different from the other alternatives considered in the EIS that "public commenters might have pointed out, if given the opportunity—and the Forest Service might have seriously considered—wholly new problems posed."[101] Based on these findings, the court ordered the Forest Service to prepare a supplemental EIS.

Adequacy of an EA or EIS

Plaintiffs sometimes challenge the procedural or substantive adequacy of an EA or EIS, with issues ranging from an agency's alleged failure to consider certain effects or alternative proposals to an agency's alleged failure to consult adequately with the public.

Failure to Adequately Consider Effects in an EA or EIS[102]

In some cases, plaintiffs allege that an agency failed to analyze adequately all relevant effects in an EA or EIS and therefore violated the APA. In these cases, courts review the agency's analysis

[96] *Id*. at 1243-44.

[97] Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1225 (9th Cir. 2008); see also O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 239 (5th Cir. 2007).

[98] *Id*.

[99] *O'Reilly*, 477 F.3d at 240-41.

[100] 102 F.3d 1273 (1st Cir. 1996).

[101] *Id*. at 1292-93.

[102] This section was prepared by CRS Legislative Attorney Adam Vann.

to determine whether the agency's decision to limit or exclude consideration of particular effects was arbitrary or capricious. Plaintiffs frame these claims in a variety of ways.

For example, some plaintiffs argue that an agency's evaluation of a particular effect was insufficient because the agency lacked enough data to make a reasoned decision. The Tenth Circuit considered this type of claim in *Colorado Environmental Coalition v. Dombeck*. In that case, plaintiffs argued that the Forest Service failed to gather sufficient data about the effects of expansion of a ski area on the lynx population and failed to disclose in the EIS that such information was unavailable.[103] The Tenth Circuit disagreed with plaintiffs, holding that the record demonstrated that the Service collected and analyzed the "best available data" while also explaining the data's limitations, and held that plaintiffs' claim amounted to nothing more than an effort to impose additional data gathering requirements on the agency.[104]

Other cases involve allegations that an agency failed to assess the *cumulative impacts* of proposed actions. Cumulative impacts "result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[105] Agencies retain some discretion as to how to make these assessments, and the courts examine whether the methodology or explanation was reasonable. For example, the Sixth Circuit concluded that the U.S. Army Corps of Engineers could reasonably look at the effects of prior permits for mining activities that discharged dredged or fill material into U.S. waterways "in the aggregate" as a method of performing a cumulative impacts analysis.[106] The court concluded, however, that the Corps did not comply with the cumulative impact analysis requirement because the Corps described its methodology but then "failed to identify any impact—aggregate or otherwise—of past actions."[107] By contrast, the Ninth Circuit upheld a Bureau of Reclamation EA with regard to its consideration of past events that may have cumulative impacts on the proposed action. Specifically, the court held that although the agency's discussion in the "cumulative effects" part of the EA was vague and cursory, the EA overall included "quantified or detailed information" relevant to cumulative impacts and satisfied NEPA's requirements.[108]

Another set of cases involves allegations that an agency failed to consider all relevant *indirect effects* arising from a proposed action. Recent federal litigation involving indirect effects has addressed how agencies should consider the effects of climate change in their NEPA analyses. In 2017, the D.C. Circuit issued a significant decision assessing the Federal Energy Regulatory Commission's duty to consider the climate-change-related impacts of upstream and downstream activities associated with a proposed pipeline.[109] In *Sierra Club v. FERC*, the court reviewed

[103] 185 F.3d 1162 (10th Cir. 1999).

[104] *Id*. at 1172-73.

[105] 40 C.F.R. § 1508.1(g)(3). CEQ's 1978 definition of *cumulative impact* was substantively the same as the definition currently in force, and adopted by the Biden Administration. The 1978 definition, which was applied by the courts in the decisions discussed here, states as follows: cumulative impacts are "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." 40 C.F.R. §§ 1508.7, 1508.9(b) (1978).

[106] Ky. Riverkeeper, Inc. v. Rowlette, 714 F.3d 402, 408 (6th Cir. 2013).

[107] *Id*.; see also Nat. Res. Defense Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988) (holding Secretary of the Interior failed to discuss any cumulative impacts in FEIS).

[108] Ctr. for Envtl. Law and Pol'y v. U.S. Bur. of Reclamation, 655 F.3d 1000, 1008-09 (9th Cir. 2011).

[109] When an agency approves a project, the "upstream" and "downstream" impacts of that project are those that will result from the project and other activities that may increase as a result of the project. For example, in a case involving approval for an offshore oil and drilling pipeline, the Ninth Circuit described these effects as follows: "Upstream emissions are those that result directly from the project itself (e.g., construction and operation),

FERC's decision to issue a certificate of public convenience and necessity for the proposed Southeast Market Pipelines Project and the Sabal Trail pipeline. Environmental groups and landowners challenged the decision, arguing among other things that the EIS prepared by FERC "failed to adequately consider the project's contribution to greenhouse-gas emissions."[110] The court agreed:

> [G]reenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. The EIS accordingly needed to include a discussion of the "significance" of this indirect effect, as well as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."
>
> Quantification would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals. Without such comparisons, it is difficult to see how FERC could engage in "informed decision making" with respect to the greenhouse-gas effects of this project, or how "informed public comment" could be possible.[111]

Two years later, the same court elaborated on agencies' obligation to evaluate upstream and downstream impacts on climate change in *Birckhead v. FERC*.[112] In this case, a number of local stakeholders challenged FERC's decision to issue a certificate of public convenience and necessity for the construction and operation of a natural gas compression facility in Tennessee. The court dismissed that claim on procedural grounds, but nonetheless noted that agencies must attempt to obtain information needed to fulfill their statutory obligations, which in that case included consideration of indirect upstream and downstream environmental effects related to the proposed facility.[113]

The same court considered FERC's responsibility to evaluate climate change impacts during a NEPA review in *Vecinos para el Bienestar de la Comunidad Costera v. FERC*. In that case, the D.C. Circuit heard a challenge to FERC's decision to issue certificates for the construction and operation of three export LNG terminals and associated pipeline facilities in Texas. FERC concluded in its EISs that it had been "unable to determine the significance of the Project's contribution to climate change" because "there is not universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment" of a particular project.[114] The petitioners claimed, among other things, that in that situation CEQ regulations require an agency to "include within the environmental impact statement … [t]he agency's evaluation of such impacts based on theoretical approaches or research methods generally accepted in the scientific community."[115] The court agreed, finding that FERC was required to use the social cost of carbon or some other generally accepted methodology to assess the impact of the projects' greenhouse gas emissions.[116]

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and downstream emissions are those that result from the consumption of the oil produced by the project (e.g., heating homes or fueling cars)." Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 735 (9th Cir. 2020).

[110] Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017).

[111] *Id*. at 1363.

[112] 925 F.3d 510 (D.C. Cir. 2019).

[113] *Id*. at 520.

[114] Vecinos para el Bienestar de la Comunidad Costera v. FERC, 6 F.4th 1321, 1328 (D.C. Cir. 2021).

[115] *Id*. at 1328.

[116] *Id*. at 1329. See also Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723 (9th Cir. 2020). Cf. 350 Montana v. Bernhardt, 443 F. Supp. 3d 1185, 1196 (D. Mont. 2020) (holding agency was not required to use the social cost of

Failure to Consider Alternatives

NEPA requires agencies to consider alternatives to their proposed actions as part of the environmental review process. Courts and CEQ often refer to this requirement as the "heart" of the environmental review.[117] Agencies need not analyze every idea; rather, "the concept of alternatives must be bounded by some notion of feasibility."[118] Thus, agencies must exercise "common sense" when determining which proposals to include in an EIS, and courts will not find an EIS insufficient "simply because the agency failed to include every alternative device and thought conceivable by the mind of man."[119]

Challenges to an agency's consideration of alternatives to the proposed action arise in a variety of ways. Some case law requires the courts to determine whether an agency impermissibly narrowed the purpose of its project to predetermine what reasonable alternatives to the proposed action existed. For example, in *Simmons v. U.S. Army Corps of Engineers*, the Seventh Circuit held that the Corps unreasonably narrowed the range of feasible alternatives by defining the project's purpose as "supplying two users (Marion and the Water District) from a single source—namely, a new lake."[120] The court found that the Corps failed to study and therefore to appropriately justify whether addressing water shortage problems in Marion and the Water District was well-served by a single-source project, and thereby improperly narrowed the parameters of the project and its consideration of alternatives only to single-source options.[121] By contrast, the Ninth Circuit in *Muckleshoot Indian Tribe v. U.S. Forest Service* held that the agency did not improperly narrow the scope of the project and thereby unreasonably limit the alternatives it considered. There, plaintiffs alleged that the statement of purpose—to "consolidate ownership and enhance future resource conservation and management by exchanging parcels of National Forest System and Weyerhaeuser land"—impermissibly predetermined the contours of the project and dictated the alternatives that the agency could consider.[122] The Ninth Circuit agreed that the statement of purpose read in isolation might impermissibly restrict the range of alternatives. However, the court concluded that the narrow statement was part of the agency's broader, more general objective of "creat[ing] consolidated land ownership patterns where consistent management mandates, policies and objectives apply across large blocks of land."[123]

In other cases, plaintiffs have contended that an agency failed to assess adequately the alternatives on their merits. For instance, plaintiffs sometimes argue that an agency improperly refused to include or improperly eliminated from consideration a proposed alternative that would meet the agency's stated purpose. The Ninth Circuit rejected such an argument in *Northern Alaska Environmental Center v. Kempthorne*. In that case, the court held that the Bureau of Land Management (BLM) reasonably refused to analyze an alternative proposed by the Audubon

carbon protocol when agency gave reasons that the protocol was too indeterminate to be helpful for decisionmaking).

[117] See, e.g., 40 C.F.R. § 1502.14(f) (1988); CEQ, *A Citizen's Guide to the NEPA* 16 (Dec. 2007) ("The identification and evaluation of alternative ways of meeting the purpose and need of the proposed action is the heart of the NEPA analysis."); Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1243 (10th Cir. 2011); City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 194 (D.C. Cir. 1991).

[118] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Defense Council, Inc., 435 U.S. 519, 551 (1978).

[119] *Id*.

[120] 120 F.3d 664, 666-67 (7th Cir. 1997).

[121] *Id*. at 667.

[122] 177 F.3d 800, 811 (9th Cir. 1999).

[123] *Id*. at 812-13.

Society in the EIS because (1) BLM determined that its inclusion "was inconsistent with the [Nuclear Waste Power Act] project and statutory mandates," and (2) BLM included aspects of the Audubon Society's proposal in the preferred alternative, suggesting the agency carefully evaluated the proposal.[124] By contrast, the Tenth Circuit held that the Department of Transportation violated the APA by removing an alternative proposal from the EIS, ostensibly because of its high costs, without providing a verified cost estimate to support its conclusion.[125]

Insufficient Consultation with the Public

In addition to encouraging informed agency decisionmaking, one of NEPA's purposes is to provide for public disclosure and participation. Plaintiffs sometimes allege that an agency failed to consult with the public to the extent that NEPA requires for a particular decision.

In general, claims involving the consultation requirements for EISs allege that an agency denied the public a meaningful opportunity to comment by (1) failing to give sufficient information about the project; (2) failing to disclose certain aspects of a proposed action; or (3) failing to provide timely disclosures. For example, in *State of California v. Block*, California challenged the U.S. Forest Service's EIS for classifying roadless national forest management land into three management categories, arguing that the Service failed to provide adequate opportunity for public comment because it did not disclose all contours of the proposed action until the final EIS.[126] The Ninth Circuit agreed, holding that the agency's final proposed action was so different in substance from the alternatives considered in the draft EIS that the public could not have provided meaningful input on the proposed action before the final EIS.[127] Similarly, in *Idaho v. Kempthorne*, the federal district court held that the Forest Service violated the APA when preparing an EIS for a rule to preserve roadless forest system land because (1) the Service did not present maps or other concrete data to the public during the public comment period and (2) Service officials "were ill-prepared to answer the questions and concerns of the general public" during hearings.[128]

In preparing an EA, an agency must involve the public to the extent practicable,[129] and cases involving EAs likewise raise questions about the sufficiency of an agency's disclosure of information. For example, in a challenge to the U.S. Army Corps of Engineers' EA for proposed surface mines that required the Corps to issue dredge and fill permits, a federal court held that the Corps failed to disseminate significant and "substantive information concerning compensatory mitigation" in public notices about the EA.[130]

Because preparation of an EA requires agencies to involve the public only to the extent practicable, however, agencies retain greater discretion as to when and how to fulfill this mandate. In *Theodore Roosevelt Conservation Partnership v. Salazar*, the D.C. Circuit considered whether BLM satisfied its obligation to involve the public while preparing EAs for natural gas drilling permits. The D.C. Circuit stressed that an agency "need not include the public in the preparation of every EA"; rather, an agency may involve the public at different stages as

[124] 457 F.3d 969, 978 (9th Cir. 2006).

[125] Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1164-65 (10th Cir. 2002).

[126] 690 F.2d 753, 769-70 (9th Cir. 1982). This case involved CEQ guidelines about public consultation, which were later incorporated into CEQ's 1978 regulations.

[127] *Id.* at 772.

[128] 142 F. Supp. 2d 1248, 1260-61 (D. Idaho 2001).

[129] 40 C.F.R. § 1501.5(e); *id.* § 1501.4(b) (1978).

[130] Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs, 674 F. Supp. 2d 783, 809-10 (S.D. W. Va. 2009).

appropriate.[131] Applying this flexible standard, the court upheld BLM's public involvement for several reasons. First, BLM posted notices of its intent to prepare EAs for the permits, and even though it did not expressly seek comments, plaintiffs had ample time to submit comments before BLM issued final EAs, according to the court. Second, BLM provided copies of the draft EAs to plaintiffs when they requested copies and responded to comments from plaintiffs in the final EAs.[132]

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[131] 616 F.3d 497, 519 (D.C. Cir. 2010).

[132] *Id*. at 519-20.