

OVERVIEW OF THE NATIONAL ENVIRONMENTAL POLICY ACT: ENVIRONMENTAL IMPACT ASSESSMENTS AND ALTERNATIVES¹

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The National Environmental Policy Act ("NEPA" or the "Act"),² requires federal administrative agencies to factor environmental considerations into their discretionary decision-making. The Act directs that federal agencies implement, "to the fullest extent possible," methods and procedures designed to accord environmental factors appropriate consideration.³ This landmark legislation, enacted in 1969, was the progenitor of the "little NEPAs" in many states, such as California, New York and Washington, and has been called "our basic national charter for protection of the environment."⁴

NEPA's goal of ensuring consideration of environmental factors is achieved primarily by requiring preparation and public circulation of environmental impact statements ("EISs") on "proposals for ... major Federal actions significantly affecting the quality of the human environment."⁵ This provision is also the primary vehicle for achieving NEPA's ancillary goal of full public disclosure of the environmental ramifications of federal agency actions. As discussed more fully below, an EIS should explicate the current environmental conditions, the reasonably foreseeable environmental impacts of a proposal, reasonable alternatives to the action and measures to mitigate significant adverse effects. The impact statement provides the decision-maker with information allowing for the consideration of environmental concerns along with other relevant factors. Neither an EIS nor NEPA itself dictates any particular result. NEPA is essentially a procedural statute; it establishes procedural steps, such as the preparation of an EIS, which, once satisfied, do not dictate any particular substantive decision.⁶ Nor does NEPA require the elevation of environmental concerns over other pertinent considerations.⁷ However, no decision on a proposed action subject to NEPA

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² 42 U.S.C. §§ 4321-4370 (1994).

³ 42 U.S.C. § 4332 (1994).

⁴ Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998).

⁵ 42 U.S.C. § 4332(2)(C) (1994). See Foundation on Economic Trends v. Watkins, 731 F. Supp. 530 (D.D.C. 1990) (deprivation of information from agency's failure to comply with NEPA is actionable).

⁶ Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Strycker's Bay Neighborhood Council, Inc. v. Karlen ("Strycker's Bay"), 444 U.S. 223, 227 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. ("Vermont Yankee Nuclear Power"), 435 U.S. 519, 558 (1978).

⁷ Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983); Strycker's Bay, 444 U.S. 223 (1980).
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can be made until full compliance with the Act's requirements is achieved. Thus, the key to compliance with NEPA is satisfaction of its procedural mandates.

This article will present only an overview of NEPA's principal requirements in order to provide an elemental familiarity with the statute. It must be stressed that NEPA has engendered a considerable body of case law as well as voluminous regulations and guidance from a myriad of federal agencies, and each particular proposal must be assessed on an individual basis. Moreover, if NEPA applies to a particular proposal for federal agency action, this invariably means that other federal statutes are likely to become applicable, such as the National Historic Preservation Act⁸ or the Fish and Wildlife Coordination Act.⁹

Such statutes, in turn, trigger the involvement of additional federal agencies in the environmental review of a particular proposal (in the foregoing examples, the Advisory Council for Historic Preservation and the U.S. Fish and Wildlife Service, respectively). And if a proposal requires the preparation of an EIS, the agency review process is likely to be lengthy (measured in terms of years, not months), as well as complex.

Finally, if NEPA is violated, the consequences can be severe. If an agency failed to prepare an EIS when it should have, or an EIS did not adequately assess the environmental consequences of a proposal, courts will not hesitate to invalidate the agency's decision-making.¹⁰

A. The Council On Environmental Quality

The Council on Environmental Quality ("CEQ") is a federal agency with responsibility for oversight of NEPA.¹¹ The CEQ has promulgated regulations implementing NEPA,¹² which are binding on federal agencies so long as compliance is not inconsistent with other statutory requirements.¹³ This agency's interpretation of NEPA is, moreover, entitled to substantial

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at 227.

⁸ 16 U.S.C. §§ 470-470w (1986).

⁹ 16 U.S.C. §§ 661-668 (1986).

¹⁰ See e.g., Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005)(holding that Forest Service's approval of timber harvest without considering the project's impact in light of its interaction with the effects of past, current, and reasonably foreseeable future projects failed to satisfy the requirements of NEPA).

¹¹ 42 U.S.C. §§ 4341-4347 (1994).

¹² See generally, 40 C.F.R. Part 1500 (1996). Do not be misled by the denomination of these rules as "guidelines;" they are regulations with the force of law. Andrus v. Sierra Club ("Andrus"), 442 U.S. 347 (1979).

¹³ The Steamboaters v. FERC, 759 F.2d 1382, 1393 (9th Cir. 1985); Sierra Club v. Sigler ("Sigler"), 695 F.2d 957, 964 (5th Cir. 1983). See 40 C.F.R. § 1500.3 (1987).

deference.¹⁴ Federal agencies are supposed to promulgate their own NEPA regulations.¹⁵ If they do not, the CEQ regulations control.

B. Federal "Actions"

NEPA applies to federal agency proposals for "actions," which include direct agency undertakings, funding, permitting and proposals for legislation. All federal agencies are implicated by NEPA; defense agencies and military projects are subject to the Act, although classified information is exempt from disclosure under the Freedom of Information Act.¹⁶ In limited circumstances, NEPA also applies to certain federal agency actions that occur outside of, or have effects outside of, the United States.¹⁷ Federal actions do not include ministerial action mandated by law.¹⁸ NEPA also allows for an emergency exemption.¹⁹

In addition, certain federal actions have received statutory or judicial exemption from NEPA compliance. U.S. Environmental Protection Agency ("EPA") actions under the Clean Air Act are exempt.²⁰ Certain EPA actions under the Clean Water Act²¹ have also been exempted. Moreover, when remedial actions are taken under the Comprehensive Environmental Response, Compensation and Liability Act (commonly known as "CERCLA" or "Superfund"), there is no need for NEPA compliance.²² EPA permitting pursuant to the Resource Conservation and Recovery Act

¹⁴ Andrus, 442 U.S. at 358; Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983), aff'd, 733 F.2d 605 (9th Cir. 1984).

¹⁵ 42 U.S.C. § 4371(c)(1) (1994); 40 C.F.R. § 1507.3 (1996).

¹⁶ Weinberger v. Catholic Action of Hawaii/Peace Education Project et al. ("Weinberger"), 454 U.S. 139, 146 (1981) (although "virtually all information relating to the storage of nuclear weapons is classified" and thus exempt from public disclosure, NEPA nevertheless requires Navy to assess the impact of deploying nuclear weapons in its own internal environmental review analysis); Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 420 (2d Cir. 1989) (same); Concerned About Trident v. Rumsfeld ("Concerned About Trident"), 555 F.2d 817, 823 (D.C. Cir. 1976).

¹⁷ Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1993) (NEPA applies to federal agency decision to incinerate food waste in Antarctica). But see NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993) (NEPA does not apply to United States military installations in Japan); Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990) (NEPA not applicable to Dep't of Defense extra-territorial action).

¹⁸ See generally, Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995) (collecting cases demonstrating that nondiscretionary agency action is excused from the operation of NEPA). See also National Ass'n of Property Owners v. U.S., 499 F. Supp. 1223 (D. Minn. 1980), aff'd, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982).

¹⁹ 40 C.F.R. § 1506.11 (1996); see Crosby v. Young, 512 F. Supp. 1363, 1386 (E.D. Mich. 1981).

²⁰ 15 U.S.C. § 793(c)(1) (1984); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); see also American Trucking Associations, Inc. v. U.S. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (nothing in NEPA requires EPA in setting National Ambient Air Quality Standards to consider or discuss matters that the Clean Air Act does not already permit or require).

²¹ 33 U.S.C. § 1371(c)(1) (1980).

²² 42 U.S.C. §§ 9601-9657 (1982); Oil, Chemical & Atomic Workers Int'l Union v. Dep't of Energy, 62 F. Supp. 2d 1 (D.D.C. 1999), aff'd, 214 F.3d 1379 (D.C. Cir. 2000) (although Dep't of Energy's ongoing experimental recycling of
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("RCRA") is also not subject to NEPA, as RCRA is the "functional equivalent" and specific counterpart of NEPA.²³

In some instances specific procedures found in other environmental statutes have displaced EIS requirements. Several courts have concluded that the NEPA procedures do not apply, and therefore neither an EIS nor other NEPA documentation is required for federal actions that conserve the environment.²⁴

Two federal circuit courts, however, have come to opposite conclusions over the application of NEPA to designations of critical habitat for an endangered species under the Endangered Species Act ("ESA").²⁵ In Douglas County v. Babbitt,²⁶ the Ninth Circuit ruled that the U.S. Fish and Wildlife Service did not have to comply with NEPA requirements in making critical habitat designations under the ESA for the Northern Spotted Owl. In reversing the district court's holding, the Court found that the procedures under the ESA "displaced" the EIS requirements of NEPA.

The Tenth Circuit, however, declined to follow Douglas County, finding that any designation of critical habitat must also be subject to further environmental analysis under NEPA.²⁷ In 2004, a federal district court similarly rejected the Ninth Circuit's approach, holding that the Fish and Wildlife Service must consider the impacts of its critical habitat designation in accordance with NEPA.²⁸

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thousands of tons of radioactive metals for commercial uses posed "great" and unexamined potential for environmental harm, CERCLA §113(h), which bars citizen challenges prior to the completion of remediation, prevented the district court from ordering DOE to perform an EIS. The court noted that "if recycling were outside the scope of 113(h), the proposed plan is exactly the type of action which would come within the scope of NEPA," and an EIS would clearly be mandated. Id. at 12.) Cf. Schalk v. Thomas, 28 Env't Rep. Cas. (BNA) 1655 (S.D. Ind. 1988).

²³ Alabama ex rel. Siegelman v. U.S. EPA, 911 F.2d 499 (11th Cir. 1990). See also Merrell v. Thomas, 608 F. Supp. 644 (D. Or. 1985), aff'd, 807 F.2d 776 (9th Cir. 1986) (the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") satisfies NEPA and there is no need to superimpose NEPA's procedures on pesticide registration process).

²⁴ Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669 (5th Cir. 1992), cert. denied sub nom., Texas Water Conservation Ass'n v. Dep't of the Interior, 506 U.S. 823 (1992); National Ass'n of Property Owners v. U.S., 499 F. Supp. 1223, 1265 (D. Minn. 1980), aff'd, State of Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981).

²⁵ 16 U.S.C. § 1533 (1985).

²⁶ Douglas County v. Babbitt ("Douglas County"), 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996).

²⁷ Catron County Board of Comm'rs v. U.S. Fish and Wildlife Service, 75 F.3d 1429, 1435-36 (10th Cir. 1996). The Court of Appeals held, as a matter of first impression, that the Secretary of the Interior must comply with NEPA when designating a critical habitat under ESA. The Court based its holding on the belief that the NEPA inquiry had not been duplicated and that the statutes are not mutually exclusive. Id.

²⁸ Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior, 344 F.Supp.2d 108 (D.D.C. 2004).

Direct federal action typically entails construction,²⁹ the implementation of a program,³⁰ promulgation of regulations,³¹ or a proposal for legislation.³² "Indirect" federal action includes funding and permitting. Federal funding generally involves grants or loans (though revenue sharing is not considered as funding). For example, an application for a Federal Housing Administration mortgage or a Department of Housing and Urban Development grant would trigger NEPA's requirements.³³

A federal agency's failure to act does not generally trigger NEPA requirements,³⁴ unless the agency decision is judicially reviewable.³⁵ Similarly, a federal condemnation action generally is not subject to NEPA.³⁶

Federal permitting actions involve a variety of federal agencies, with one of the most common being the U.S. Army Corps of Engineers ("Corps of Engineers" or "Corps"). This agency administers two of the principal federal permitting programs for activities in the nation's surface water system: "dredge and fill" permits required pursuant to Section 404 of the Clean Water Act³⁷ and permits for work in navigable waterways pursuant to Section 10 of the Rivers and Harbors Appropriations Act of 1899.³⁸ In light of the extent of federal involvement in our society and the broad sweep of many federal statutes and permitting requirements, the careful practitioner must scrutinize proposals for action for potential federal aspects which would trigger the application of NEPA.

²⁹ 40 C.F.R. § 1508.18(b)(4) (1996); Chelsea Neighborhood Ass'n v. U.S. Postal Service ("Chelsea Neighborhood"), 516 F.2d 378 (2d Cir. 1975) (construction of a new facility requires compliance with NEPA).

³⁰ 40 C.F.R. § 1508.18(b)(3) (1996); Kleppe v. Sierra Club, 427 U.S. 390 (1976) (Department of Energy coal mining program).

³¹ 40 C.F.R. § 1508.18(a) (1996).

³² 40 C.F.R. § 1508.18(b)(1) (1996). Proposals for legislation originating with Congress, rather than an agency, are not subject to NEPA. Legislation proposed by the President, rather than by an executive agency, is not "agency" action and is also not subject to NEPA. Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993), cert. denied, 510 U.S. 1041 (1994) (presidential submission of a trade agreement to Congress is not subject to NEPA).

³³ 24 C.F.R. § 50.17 (1993); see Aertsen v. Landrieu, 637 F.2d 12 (1st Cir. 1980).

³⁴ National Trust for Historic Preservation v. Dep't of State, 834 F. Supp. 443 (D.D.C. 1993) (failure to act to prevent alterations to a building did not constitute agency action under NEPA); Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980) (failure to prevent a party's action from occurring cannot constitute agency action within the meaning of NEPA).

³⁵ 40 C.F.R. § 1508.18 (1996).

³⁶ Washington Metropolitan Area Transit Authority v. Fleischman, 113 F.3d 1233 (4th Cir. 1997); U.S. v. 0.95 Acres of Land, 994 F.2d 696 (9th Cir. 1993).

³⁷ 33 U.S.C. § 1344 (1986).

³⁸ 33 U.S.C. § 403 (1986).

C. Determining The Necessity For An EIS

Preparation of an EIS is required for "major Federal actions significantly affecting the quality of the human environment."³⁹ The threshold determination by the relevant federal entity pursuant to this apparently simple phrase has engendered considerable controversy.

Although the phrase contains two criteria -- "major Federal action" and "significantly affecting" -- the test has been narrowed by CEQ to the single criterion of significance; in essence, an action is major if it is significant and, if it is significant, it requires the preparation of an EIS.⁴⁰ The CEQ regulations eliminated previous fine distinctions between "major" and "minor" federal actions, which were primarily predicated upon the extent of federal funding, and instead have focused attention on the degree of environmental impact.

The CEQ regulations, which are frequently supplemented by those of individual federal agencies, set forth the procedure for determining whether a proposed action necessitates preparation of an EIS. The NEPA regulations adopted by federal agencies may simplify the definitional problems presented by the statutory threshold of significance, as they are allowed to identify actions which typically require an EIS and also to specify actions which typically do not (the latter category denominated as "categorical exclusions").⁴¹

Note that these are not hard-and-fast categories; in unusual circumstances, a "categorically excluded" action may still trigger EIS preparation, and an action usually requiring an EIS may not do so.⁴²

If an action is neither a "categorical exclusion" nor one which normally requires an EIS, an environmental assessment ("EA") must be prepared to ascertain the need for an EIS.⁴³

³⁹ 42 U.S.C. § 4332(2)(C) (1994); State of Utah v. Babbitt, 137 F.3d 1193, 1214 (10th Cir. 1998) (BLM inventory of public lands does not constitute a "major federal action significantly affecting the quality of the human environment"); see also State of Michigan v. U.S., 994 F.2d 1197, 1199-1200 (6th Cir. 1993).

⁴⁰ 40 C.F.R. § 1508.27 (1996). There must still, however, be sufficient federal control and responsibility for the action to be considered "federalized." 40 C.F.R. § 1508.18 (1993). See discussion infra, for the definition of "Scope of the Action."

⁴¹ 40 C.F.R. § 1501.4(a) (2) (1996); Heartwood, Inc. v. U.S. Forest Service, 73 F. Supp.2d 962 (S.D. Ill. 1999), aff'd, 230 F.3d 947 (7th Cir. 2000) (NEPA does not require: (1) consultation or approval from the CEQ prior to an agency's adoption of categorical exclusions and (2) the preparation of an EA or EIS prior to implementing the categorical exclusions); City of New York v. Interstate Commerce Comm'n, 4 F.3d 181 (2d Cir. 1993) (discussing application of categorical exclusions).

⁴² 40 C.F.R. § 1508.4 (1996); Committee to Preserve Boomer Lake Park v. U.S. DOT, 4 F.3d 1543, 1555 (10th Cir. 1993) (agency actions that "normally require an EIS do not always require an EIS").

⁴³ 40 C.F.R. § 1501.4(b) (1996). In certain circumstances, agency regulations may require that categorical exclusion be
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The EA document is prepared by the acting federal agency, not by a private applicant.⁴⁴ The EA constitutes the basic record necessary for a determination that an EIS is not necessary -- in federal parlance, a Finding of No Significant Impact ("FONSI").⁴⁵ Each federal agency involved in a proposed action (*i.e.*, which funds, constructs or permits an action) must make its own independent determination of significance.⁴⁶

When reaching a decision on the necessity of an EIS, measures to mitigate adverse impacts can be considered.⁴⁷ Accordingly, the initial design of a project to incorporate mitigation measures may avoid the need to prepare an impact statement.

The regulatory efforts to simplify the determination of significance, however, are generally limited in scope. In many, if not most, circumstances, a proposal will not be susceptible to simple classification. In that event, a variety of issues may arise.

1. Environmental Significance

While NEPA is addressed primarily to "physical effects,"⁴⁸ the term "human environment" goes beyond impacts on earth, air and water. The CEQ regulations provide a very broad definition of the term "human environment,"⁴⁹ which encompasses impacts on the quality of urban life.⁵⁰

The word "affecting" in the key phrase "significantly affecting the quality of the human

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documented.

⁴⁴ Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 669 (7th Cir. 1997) (the Corps may not simply accept the purpose of a project as defined by the project proposer, but has "the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." [citation omitted]).

⁴⁵ 40 C.F.R. § 1508.13 (1996). Some courts have imposed a "per se" EIS rule when an action entails the demolition of a structure on the National Register. Compare WATCH v. Harris, 603 F.2d 310 (2d Cir. 1979), cert. denied sub nom. Waterbury Urban Renewal Agency v. WATCH, 444 U.S. 995 (1979) (need EIS when action entails demolition of a Register-eligible property), with Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982) (declined to apply per se rule). The viability of this per se rule is questionable. See discussion *infra*.

⁴⁶ 40 C.F.R. § 1508.18(a) (1986).

⁴⁷ Jones v. Gordon, 792 F.2d 821, 829 (9th Cir. 1986); Louisiana v. Lee, 758 F.2d 1081, 1083 (5th Cir. 1985), cert. denied, 475 U.S. 1044 (1986); National Audubon Society v. Hoffman, 917 F. Supp. 280 (D. Vt. 1995), aff'd n.op., 132 F.3d 7 (2d Cir. 1997); Sierra Club v. Alexander, 484 F. Supp. 455, 468 (N.D.N.Y.), aff'd, 633 F.2d 206 (2d Cir. 1980).

⁴⁸ Metropolitan Edison Co. v. People Against Nuclear Energy ("Metropolitan Edison"), 460 U.S. 766, 772-73 (1983).

⁴⁹ 40 C.F.R. § 1508.14 (1997).

⁵⁰ Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

environment" is defined by the CEQ to mean "will or may have an effect on."⁵¹ "Effects" not only include direct impacts of an action, but also indirect (or secondary) impacts -- those which are later in time or farther removed in distance from the proposal, but which nevertheless are reasonably attributable to it and reasonably foreseeable in time.⁵² For example, the development of a suburban regional shopping mall is likely to have direct physical effects as well as induce growth in its vicinity -- a "secondary" impact. Similarly, construction of a sewer line with excess capacity could facilitate development, another type of indirect or secondary effect.

The aggregate, or "cumulative impacts," of the proposed action and the effects of other proposed actions should be assessed in the evaluation of environmental significance if the actions are related.⁵³ Actions may be "related" by virtue of a variety of factors, such as being part of an overall federal agency program or within an area of special environmental significance.⁵⁴

The determination of whether an impact would "significantly" affect the environment entails an analysis of context and intensity. "Context" refers to the setting, such as national, regional or local.⁵⁵ "Intensity" refers to the severity of impact, and includes such factors as public health, effects

⁵¹ 40 C.F.R. § 1508.3 (1996). See Sierra Club v. Marsh ("Sierra Club I"), 769 F.2d 868 (1st Cir. 1985), discussed infra.

⁵² 40 C.F.R. § 1508.8 (1996) ("But for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA.) In Dep't of Transportation v. Public Citizen, 541 U.S. 752 (2004), the Supreme Court noted that "NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause," and analogized the determination of whether an environmental effect is caused by an agency action to the doctrine of "proximate cause" in tort law. Id. at 767; see also City of Shoreacres v. Waterworth, 420 F.3d 440, 452 (5th Cir. 2005); League for Coastal Protection v. Norton, 2005 WL 2176910 (N.D. Cal. Aug. 31, 2005) (Department of Interior order to undertake full NEPA analysis after failure to consider long-term environmental impacts of new oil and gas developments in its approval of oil and gas leases).

⁵³ 40 C.F.R. §§ 1508.8, 1508.27(b) (7) (1996); Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005) (Forest Service violated NEPA in approving timber harvest without considering the cumulative impacts of past, present, and reasonably foreseeable future projects); Lands Council v. Powell, 379 F.3d 738 (9th Cir. 2004) (Forest Service violated NEPA in approving timber harvest without considering the cumulative impacts of past, present, and reasonably foreseeable future projects); Grand Canyon Trust v. FAA, 290 F.3d 339, 346 (D.C. Cir. 2002) (remanding case because agency's environmental assessment of new airport failed to consider cumulative noise impacts to nearby national park; agency ordered to evaluate all noise sources, not just those emanating from proposed new airport); Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372 (9th Cir. 1998) (in reversing the District Court, the Ninth Circuit found that the Forest Service had violated NEPA by failing to provide a sufficient cumulative impact analysis as to the combined effect of a number of proposed timber sales on the depletion of existing old growth habitat); Stewart v. Potts ("Stewart"), 996 F. Supp. 668 (S.D. Tex. 1998) (although the Corps of Engineers alleged that it lacked jurisdiction to consider upland impacts from construction of a golf course, the court held that the Corps was obligated to analyze the cumulative impacts and the indirect consequences of construction of the golf course, and not merely the effects from the filling of wetlands); Shenandoah Ecosystems Defense Group v. U.S. Forest Service, 24 F. Supp.2d 585 (W.D. Va. 1998), aff'd, 194 F.3d 1305 (4th Cir. 1999) (Forest Service adequately considered cumulative impacts of three logging projects in three regions in National Forest).

⁵⁴ Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985).

⁵⁵ 40 C.F.R. § 1508.27(a) (1996).

on unique characteristics or values (such as endangered species, historic resources or wetlands), the degree the effects are likely to be scientifically controversial, the extent to which potential impacts are uncertain or involve unique or unknown risks, the degree to which the action would establish precedent, and whether the proposal threatens to violate legal requirements enacted to protect the environment.⁵⁶

2. EIS Unnecessary For Purely Economic Impacts

In order to have standing to bring a NEPA challenge to an agency action, a plaintiff must establish (i) injury in fact within NEPA's "zone of interests," (ii) causation, and (iii) redressability.⁵⁷ The Supreme Court has noted that the zone of interests protected by NEPA is the "physical environment -- the world around us so to speak."⁵⁸ Accordingly, economic harm alone is insufficient to establish standing under NEPA.⁵⁹ In other words, an agency action must entail impacts that are not purely economic or social in order for an EIS to be required.⁶⁰ The CEQ regulations do not require an EIS for a project with solely economic or social implications.

When such factors are interrelated with natural physical environmental effects, however, the economic or social effects must be addressed if an EIS is required for such action.⁶¹ Several cases on standing illustrate this interpretation of NEPA. In 1997, the Supreme Court, reversing the Ninth Circuit's decision, unanimously held that allegations of economic injury alone were sufficient to confer standing under another federal environmental statute, the ESA.⁶² The Supreme Court concluded that the plaintiffs - ranch operators and irrigation districts - satisfied Article III standing requirements and that the ESA's citizen suit provision abrogated the prudential zone of interest

⁵⁶ 40 C.F.R. § 1508.27(b) (1996).

⁵⁷ Bell v. Bonneville Power Admin., 340 F.3d 945, 951 (9th Cir. 2003).

⁵⁸ Metropolitan Edison, 460 U.S. at 772-73.

⁵⁹ Western Radio Services Co., Inc. v. Espy, 79 F.3d 896 (9th Cir.), cert. denied, 519 U.S. 822 (1996).

⁶⁰ See e.g., Mall Properties Inc. v. Marsh, 672 F. Supp. 561 (D. Mass. 1987), app. dismissed, 841 F.2d 440 (1st Cir. 1988), cert. denied, 488 U.S. 848 (1988) (the only economic effects within the scope of NEPA are those which are proximately related to impacts to or changes in the physical environment).

⁶¹ Compare Metropolitan Edison, supra (psychological impacts not within ambit of NEPA); County of Seneca v. Cheney, 12 F.3d 8 (2d Cir. 1993) (reduction in force at military base not within NEPA because it will not have an effect on the physical environment); and Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976), cert. denied, 429 U.S. 1061 (1977) (loss of jobs does not necessitate preparation of EIS) with Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir. 1999) (loss of revenue for local governments and area businesses within sections of NEPA calling for review of an action's effects on the human environment); and City of Rochester v. U.S. Postal Service, 541 F.2d 967 (2d Cir. 1976) (transfer of employees in connection with relocation of postal facility requires EIS which analyzes urban environmental impacts of the ultimate abandonment of the existing facility in addition to impacts associated with construction of a new facility).

⁶² Bennett v. Spear, 520 U.S. 154 (1997).

standing requirement. According to the Supreme Court, plaintiffs' complaint satisfied standing requirements by alleging that the restriction of water deliveries would adversely affect them.

After the Supreme Court's decision in Bennett v. Spear,⁶³ it was uncertain whether allegations of economic injury alone would suffice to establish standing under NEPA. Because NEPA lacks a citizen-suit provision, a plaintiff must seek review under the APA or other statute. To meet the APA standing requirement, the plaintiff must be "adversely affected or aggrieved ... within the meaning of a relevant statute" by some final agency action.⁶⁴

Relying on Bennett in a recent case, landowners sued the Federal Highway Administration ("FHWA") and other governmental entities under NEPA for, among other things, the agency's failure to prepare an EIS.⁶⁵ The landowners asserted that the Supreme Court's decision supported the conclusion that a NEPA suit may be based solely on a plaintiff's economic injury.⁶⁶ A federal district court in Texas disagreed. The court posited three bases for its holding that the landowners lacked standing to advance their economic concerns. First, the court explained that Bennett interprets the ESA, which has a looser standing threshold than an APA-based NEPA action.⁶⁷ Second, unlike NEPA, the ESA contains explicit reference to economic consequences.⁶⁸ Finally, the court stated that NEPA cases prior to Bennett had consistently found economic injury to be outside NEPA's zone of interest.⁶⁹ The court concluded that because it could not read Bennett as uprooting this established NEPA jurisprudence *sub silentio*, all NEPA claims based on economic harm must be dismissed for lack of subject matter jurisdiction.⁷⁰

For now the law is clear that an EIS is required only to assess agency action when such action may have a significant impact on the physical environment. Accordingly, anticipated impacts that are purely economic or social in nature do not warrant further review under NEPA.

⁶³ Id.

⁶⁴ Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990).

⁶⁵ Hurd Urban Development, L.C. v. Federal Highway Administration, 33 F.Supp.2d 570 (S.D. Tex. 1998).

⁶⁶ Id. at 573.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.; see Arizona Cattle Growers' Assoc. v. U.S. Fish and Wildlife Service, 63 F. Supp.2d 1034 (D. Ariz. 1998), aff'd, 273 F.3d 1229 (9th Cir. 2001) (despite argument that Bennett implicitly overruled this purely environmental test, district court held that representatives of livestock industry lacked standing to bring NEPA claims because their potential economic injuries fell outside NEPA's zone of interests); Kanoa, Inc. v. Clinton, 1 F. Supp.2d 1088 (D. Haw. 1998) (plaintiff, a whale watching business, lacked standing based on its assertion of purely economic interests).

⁷⁰ Id. at 574. Since Bennett, the Ninth Circuit has reiterated its position that economic harms are excluded under NEPA. See Presidio Golf Club v. Nat'l Park Service, 155 F.3d 1153 (9th Cir. 1998) (purely economic interests do not fall within the zone of interests protected by NEPA).

3. Scope Of The Action

a. "Small Handle" Question

The defined scope of federal "action" at issue is critical to the determination of significance. For example, if development of a shopping mall would entail the construction of an outfall pipe in a navigable waterway, requiring a Corps of Engineers permit, the determination of significance -- whether an EIS will be required -- may vary dramatically depending on whether the relevant "action" is deemed to be limited to the outfall pipe or incorporates the construction and operation of the entire shopping mall.

Courts have ruled differently on this question, known as the "small handle" question -- whether agency jurisdiction over a minimal component of an action warrants NEPA review of the entire proposal. In Save the Bay v. U.S. Army Corps of Eng'rs ("Save the Bay"),⁷¹ the Fifth Circuit found that the Corps of Engineers, in determining significance, need only evaluate the environmental effects of an outfall pipe, and could disregard the indisputably significant effects of a large manufacturing facility for which the outfall pipe was necessary. The decisive factor was that the manufacturing facility could have avoided reliance on the outfall pipe (though at considerable expense). In Winnebago Tribe of Nebraska v. Ray ("Winnebago"),⁷² the action was defined as the construction of a power line across a river (1.25 miles), rather than the entire 67-mile power line of which the river crossing was a small but necessary component. In these cases the relevant action for purposes of determining significance was limited to the navigational impediment which provided the basis for Corps of Engineers jurisdiction, and was not construed to encompass the overall project.

In Sierra Club I, the relevant "action" was more broadly defined. In this case, the State of Maine sought to build a causeway leading to a proposed cargo port on Sears Island. The causeway required federal funds, and both the causeway and port required a Corps of Engineers permit. The causeway/port project was to be part of an overall integrated development plan for Sears Island, which plan included the later construction of an industrial park. The First Circuit required the involved federal agencies to consider the impacts of this later phase in determining whether an EIS was needed. Thus, the Sierra Club I court did not limit the "action" to the basis for federal agency jurisdiction, as did the Save the Bay and Winnebago courts. Once the court had broadly defined the "action" to be assessed for environmental effects, it relied primarily on the proposal's growth-inducing potential -- its secondary impacts -- as the basis for holding that an EIS should have been prepared.

⁷¹ 610 F.2d 322 (5th Cir.), cert. denied, 449 U.S. 900 (1980).

⁷² 621 F.2d 269 (8th Cir.), cert. denied, 449 U.S. 836 (1980).

Remarkably, all three cases failed even to acknowledge the Corps of Engineers' then-applicable NEPA regulations, which expressly provided that the agency was to consider not merely the environmental effects of the action providing its jurisdictional basis, but rather the impacts of "the entire project subject to the permit requirement"⁷³ These regulations were amended in 1988 in an attempt to define the scope of a project which should be evaluated in making a determination of significance. The regulations direct the agency to consider not only the environmental effects of the action providing the agency's jurisdictional basis, but also "those portions of the entire project over which the district engineer [i.e., the Corps of Engineers] has sufficient control and responsibility to warrant Federal review."⁷⁴

The Ninth Circuit applied these regulations in Sylvester v. U.S. Army Corps of Engineers ("Sylvester")⁷⁵ to a proposed resort complex, which included both housing and a golf course requiring a Corps of Engineers wetlands permit. The resort complex could not have been built as planned without the wetlands permit for its golf course. However, a resort complex without a golf course could have gone forward without any federal action, so the Corps did not have ultimate control over the environmental impacts of the "nonfederal" housing portion. The Ninth Circuit held that the need for Corps issuance of the golf course permit vested insufficient control over the entire complex to define it as a unified federal action for NEPA purposes.

The Ninth Circuit's declination to "federalize" the entire development in Sylvester is reflected in other Circuit Court decisions. Macht v. Skinner ("Macht"),⁷⁶ involved a 22.5 mile light rail system being planned and funded by the state of Maryland. However, the project received the assistance of federal funding for preliminary engineering studies and environmental impact statements, and required a Corps of Engineers permit to allow the rail line to cross wetlands. Even though the railway could not have proceeded without the permit, the court deemed this collective federal involvement and attendant control insufficient to render the system a unified federal action for NEPA purposes.

In Landmark West! v. U.S. Postal Service ("Landmark West"),⁷⁷ the district court deemed a fairly-significant level of United States Postal Service involvement with a Manhattan development insufficient to render the entire project a federal action. There, the Postal Service leased and operated a post office on the project site and, therefore, had the ability to deprive the

⁷³ 33 C.F.R. Part 230, App. B. § 8(a) (1986).

⁷⁴ 33 C.F.R. § 325, App. B. § 7(b) (1988). The regulations state that the "district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action." Id. The regulations also provide a list of factors to be considered in determining whether there is "sufficient control and responsibility." Id.

⁷⁵ 871 F.2d 817, op. replaced, 882 F.2d 407 (9th Cir. 1989). See also Morgan v. Walter, 728 F. Supp. 1483 (D. Idaho 1989).

⁷⁶ 916 F.2d 13 (D.C. Cir. 1990).

⁷⁷ 840 F. Supp. 994 (S.D.N.Y. 1993), aff'd no op., 41 F.3d 1500 (2d Cir. 1994).

project of valuable street level retail space and to prevent development of half of the site. The developer was therefore compelled to provide a replacement post office in the project. The Postal Service received control over the design and construction of its new facility within the project. Although the project could not have gone forward without the federal agency's agreement to move its facility, and the project had to be designed and configured to accommodate a large post office, the court deemed the federal control insufficient to federalize the non-federal portions of the project.⁷⁸ Thus, for NEPA purposes the action-requiring analysis by the Postal Service was limited to the relocation and leasing of the new post office.⁷⁹

In distinguishing Sylvester and other cases in which Corps jurisdictional disclaimers have been upheld, a district court held that the filling of wetlands and the clearing of upland forest for the construction of a golf course were not distinct projects with separate functions and independent justifications.⁸⁰ The court explained that the golf course proposed was one activity and the tasks necessary to accomplish it, including clearing and fragmentation of forested areas, were so interrelated and functionally interdependent as to bring the golf course project within the jurisdiction of the Corps and, therefore, under the mandate of NEPA.

Although the need for an EIS depends on the level of federal "control" over any "non-federal" aspects of the larger underlying project, the lesson from the cases above is that such a determination is necessarily fact-specific. Furthermore, how a project is designed and defined at the outset may well be determinative.

b. Segmentation

Another important aspect of the scope of the federal action to be assessed is the issue of "segmentation" -- the division of a project, program or decision into component parts or temporal "phases." Segmentation was frequently employed in the context of federal highway funding, where the FHWA would release funds for a small segment of a federal highway and consider only that segment, rather than the entire highway, in determining the need for an EIS. Such divisions of an action have, for the most part, been disallowed by the federal courts, both in highway⁸¹ and other

⁷⁸ Id. at 997, 1005-1008.

⁷⁹ See also Ka Makani O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 960-961 (9th Cir. 2002); Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105 (9th Cir. 2000), cert. denied, 534 US 815 (2001); U.S. v. Southern Florida Water Management District, 28 F.3d 1563, 1572 (11th Cir. 1994), cert. denied sub nom. Western Palm Beach County Farm Bureau v. U.S., 514 U.S. 1107 (1995) ("touchstone" is "federal agency's authority to influence nonfederal activity"); Save Barton Creek Ass'n v. Federal Highway Administration, 950 F.2d 1129, 1138 (5th Cir.), cert. denied, 505 U.S. 1220 (1992); Coalition for a Liveable Westside, Inc. v. U.S. Dep't of Housing and Urban Development, 1997 U.S. Dist. LEXIS 8860 (S.D.N.Y. 1997); Proffitt v. Dep't of Interior ex rel. Lujan, 825 F. Supp. 159 (W.D. Ky. 1993).

⁸⁰ Stewart, 996 F. Supp. at 683.

⁸¹ See e.g., Piedmont Heights Civic Club v. Moreland, 637 F.2d 430 (5th Cir. 1981); Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976); Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973); Clairton Sportsmen's Club v.
(...continued)

contexts as well.⁸²

Under certain circumstances, a federal agency may focus on a single federal action to the exclusion of other federal activities that, if considered, would transform that proposal into a major federal action. According to the CEQ regulations, agencies are only required, for environmental review purposes, to consider "connected actions", which are defined as proposed actions that: "(i) [a]utomatically trigger other actions which may require environmental impact statements; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification."⁸³

A project's "independent utility" is thus essentially determinative of whether it is "connected" to another action in such a way that a collective environmental impact assessment is required under NEPA.⁸⁴ While segmentation *per se* is not unlawful, courts are skeptical of attempts to divide projects into segments in order to circumvent the mandate of NEPA.⁸⁵ The Sierra Club I decision, while not employing the term, reflects rejection of an effort to "segment" a project to avoid acknowledgment of significant environmental impacts.

(...continued)

Pennsylvania Turnpike Comm'n, 882 F. Supp. 455 (W.D. Pa. 1995). But see Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987).

⁸² City of West Chicago, Illinois v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632 (7th Cir. 1983) (NRC license amendment permitting the demolition of contaminated buildings at a uranium milling facility requires EIS which considers the entire decommissioning plan).

⁸³ 40 C.F.R. § 1508.25(a)(1) (1997).

⁸⁴ See Hammond v. Norton, 370 F. Supp. 2d 226 (D.D.C. 2005); Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988) *cert. denied*, 494 U.S. 1004 (1990); Coalition for a Liveable Westside, Inc. v. U.S. Dep't of Housing and Urban Development, 1997 U.S. Dist. LEXIS 8860 (S.D.N.Y. 1997); see also Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1194-95 (9th Cir. 1997) (the slight modification of an existing project in a way which has no effect on the environment, in order to keep open a possibility for a future action, does not make the two projects "connected actions" under NEPA).

⁸⁵ See e.g., Old Town Neighborhood Assn., Inc. v. Kauffman, 333 F.3d 732, 734 (7th Cir. 2003) (enjoining city from seeking federal reimbursement for local street widening project, which plaintiffs alleged was an attempt to circumvent NEPA by completing project without federal involvement and thus avoid preparation of EIS for subsequent, much larger federal highway project that was dependent upon the local street widening); Ross v. Federal Highway Administration, 162 F.3d 1046 (10th Cir. 1998)(where federal government had contributed over \$10 million to highway project and FHWA was heavily involved in planning and construction, state authorities could not circumvent NEPA merely by withdrawing the last segment of the project from federal funding); The New River Valley Greens, et al. v. U.S. DOT, 1998 U.S. App. LEXIS 22127 (4th Cir. 1998) ("[t]he hallmarks of segmentation are where the proposed component action has little or no independent utility or involves such a large and irretrievable commitment of resources that it may virtually force a larger or related project to go forward notwithstanding the environmental consequences"); North Carolina v. City of Virginia Beach, 951 F.2d 596 (4th Cir. 1991) (in determining whether illegal segmentation has occurred, courts ask whether the completion of the first action has "direct and substantial probability of influencing [the] decision" of the second).

Federal courts, however, have permitted segmentation in the highway context where it was demonstrated that there was "independent utility" for the segment, *i.e.*, its sole purpose was not merely as one necessary piece of a larger planned road or network of roads.⁸⁶ The "independent justification" or "independent utility" test has also been applied in non-highway cases.⁸⁷

Another aspect of the definition of "action" is temporal: when is an action a "proposal,"⁸⁸ and thus subject to NEPA, or merely "contemplated", so that the Act does not apply? Where an action, or part of an action, is hypothetical,⁸⁹ or where future stages of a project are indefinite,⁹⁰ NEPA does not apply.⁹¹ Sierra Club I, however, makes it very clear that the federal courts will view with skepticism attempts to characterize planned and definite future stages of an action as "indefinite" in an effort to avoid a determination of significance and the consequential obligation to prepare an EIS.

D. The "Hard Look" Standard

An agency determination that an EIS is not required because a federal action will have no significant impact -- a "FONSI" -- is subject to judicial review as part of a challenge to the agency decision on the proposed action. The burden is on the party challenging the adequacy of the FONSI to demonstrate that it is "arbitrary and capricious."⁹² In determining whether a FONSI is arbitrary and capricious, the role of the reviewing court is not to substitute its judgment for that of the

⁸⁶ See Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 87 F.3d 1242 (11th Cir. 1996); Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 440 (5th Cir. 1981); Citizens for Balanced Environment & Transportation, Inc. v. Volpe, 376 F. Supp. 806 (D. Conn.), *aff'd*, 503 F.2d 601 (2d Cir. 1974), *cert. denied*, 423 U.S. 870 (1975); Conservation Law Foundation v. Federal Highway Administration, 827 F. Supp. 871 (D.R.I. 1993), *aff'd*, 24 F.3d 1465 (1st Cir. 1994).

⁸⁷ See *e.g.*, Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1305 (9th Cir. 2003); Environmental Defense Fund, Inc. v. Armstrong, 356 F. Supp. 131, 139 (N.D. Cal. 1973). Compare Bragg v. Robertson, 54 F. Supp.2d 635 (S.D.W.Va. 1999)(while first phase of project possessed some independent utility, utility alone may not sustain the phasing of operations. The court explained that the intentional splitting of operations to allow commencement of mining operations under a less critical agency review, which delayed more detailed scrutiny until after significant work had begun, was a paradigmatic example of illegal segmentation).

⁸⁸ 40 C.F.R. § 1508.23 (1996).

⁸⁹ Weinberger, supra.

⁹⁰ Montana Ecosystems Defense Council v. Espy, 24 Env'tl. L. Rep. 20501 (9th Cir. 1994); Vieux Carre Property Owners, Residents & Associates, Inc. v. Pierce, 719 F.2d 1272 (5th Cir. 1983).

⁹¹ Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998) (U.S. Forest Service's adoption of a land and resource management plan ("LRMP") was not subject to challenge under NEPA; although the LRMP makes logging more probable, it did not create a legal right to cut trees and, as a result harm was neither imminent nor certain).

⁹² Inland Empire Public Lands Council v. U.S. Forest Service, 88 F.3d 754, 763 (9th Cir. 1996); Hanly v. Kleindienst, 471 F.2d 823, 827-29 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

agency.⁹³ Rather, the question is whether the FONSI is reasonably supported by the administrative record:

[T]he appropriate role of the court is to ensure that [the agency] has taken a 'hard look' at the environmental consequences which are likely to result from [its action], to be attuned to whether the [agency] has considered the relevant areas of environmental concern, and to assess whether the agency has convincingly documented its determination of 'no significant impact.'⁹⁴

One district court recently granted a preliminary injunction after considering this standard, and enjoined the State of Maryland from killing 525 mute swans pursuant to a depredation permit issued by the Department of the Interior.⁹⁵ The court set aside the FONSI in light of the state's failure to identify the precise locations at which the swans would be killed, the number of birds that would be killed at particular individual sites, or the environmental impacts of those killings on local communities. Plaintiffs therefore were found to have raised a substantial question as to whether the proposed action would have a significant impact warranting preparation of an EIS.⁹⁶

E. The EIS Process

The essential components of an EIS are a discussion of the proposal, its environmental impacts, reasonable alternatives to the proposed action and their consequences, mitigation of adverse impacts and any irreversible commitments of resources.⁹⁷ NEPA allows for the preparation of what

⁹³ In evaluating whether the agency has met this standard, a reviewing court looks to the administrative record before the agency at the time of its decision. Valley Citizens For A Safe Environment v. Aldridge, 886 F.2d 458, 460 (1st Cir. 1989). See Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996) (Army Corps of Engineers violated NEPA by failing to take sufficient "hard look" at problem of zebra mussel infestation).

⁹⁴ Town of Orangetown v. Gorsuch, 718 F.2d 29, 35 (2d Cir. 1983), cert. denied, 465 U.S. 1099 (1984). See City of New York v. Slater, 145 F.3d 568, 571 (2d Cir. 1998); Committee To Preserve Boomer Lake Park v. U.S. DOT, 4 F.3d 1543, 1554 (10th Cir. 1993). See also Sierra Club v. U.S. Forest Service, 46 F.3d 835, 838-39 (8th Cir. 1995) (FONSI must be affirmed if reviewing court finds that agency "took a 'hard look' at the project, identified the relevant areas of environmental concern, and made a convincing case for its FONSI"). But see Hill v. Boy, 144 F.3d 1446 (11th Cir. 1998)(where Army Corps' inaccurate factual assumption that a petroleum pipeline crossing below a proposed reservoir would be relocated was relied on to support a FONSI, the Eleventh Circuit held that Corps failed to properly consider the potential adverse environmental effects of the reservoir project).

⁹⁵ Fund for Animals v. Norton, 281 F. Supp.2d 209, 234 (D.D.C. 2003) (rejecting state's argument that killing of mute swans would not cause adverse environmental impacts because the species is non-native and confers no positive effects on the environment).

⁹⁶ See also Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 865 (9th Cir. 2005)(finding that Army Corps of Engineer's determination of no significant impact in connection with issuance of a permit to allow addition to existing oil refinery dock failed to take the requisite "hard look" under NEPA).

⁹⁷ 42 U.S.C. § 4332(2)(C) (1994).

are denominated "generic" and "programmatic" EISs to discuss related actions in a generalized document. A generic EIS is generally one which discusses a series of related actions in a single document; a programmatic EIS addresses in general terms the environmental effects of long-term, multistep programs. More detailed EISs, for specific aspects of an action, are subsequently undertaken if necessary (e.g., if a generic EIS did not discuss significant site specific impacts of a proposal or a programmatic EIS did not discuss significant site-specific impacts of one phase of a program).

1. Cooperating Agencies

If more than one federal agency has jurisdiction in an action requiring an EIS, a "lead agency" is selected -- generally, the agency with the principal involvement in the proposal or which has taken primary responsibility in the subject area to be studied.⁹⁸ If there is an interagency dispute on this issue, the matter can be brought to the CEQ for resolution.⁹⁹ The lead agency is responsible for the preparation of the EIS and for compliance with NEPA's other procedural requirements.¹⁰⁰ The cooperating federal agency may "adopt" the EIS prepared by the lead agency and utilize that document in its decision-making.¹⁰¹

The NEPA EIS is generally prepared by a federal agency. There are, however, several exceptions to this rule. For example, when a state agency with statewide jurisdiction is an applicant, it may be delegated the responsibility of preparing the EIS.¹⁰² Section 104 of the Housing and Community Development Act authorizes the Department of Housing and Urban Development to delegate in certain programs its NEPA responsibilities, including preparation of an EIS, to local governmental applicants.¹⁰³ An outside consultant may be retained to prepare the document, which must then be independently evaluated by the agency.¹⁰⁴

Even when the federal agency is responsible for preparation of an EIS, it may adopt a report prepared by consultants for an applicant as long as there has been independent evaluation of the contents.¹⁰⁵

⁹⁸ 40 C.F.R. § 1501.5 (1996).

⁹⁹ *Id.* at § 1501.5(e) (1996).

¹⁰⁰ *Id.* at § 1508.16 (1996).

¹⁰¹ *Id.* at § 1506.3 (1996).

¹⁰² 42 U.S.C. § 4332(2) (D) (i) (1994). This amendment was designed primarily to allow state highway agencies, rather than the FHWA, to prepare EISs for proposed federally-funded highways.

¹⁰³ *Id.* at § 5304(g) (1) (1995).

¹⁰⁴ 40 C.F.R. § 1506.5 (1996).

¹⁰⁵ Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Eng'rs, 526 F. Supp. 1063, 1073 (W.D. Pa. 1981), aff'd n.op., 707 F.2d 1392 (3d Cir.), cert. denied, 464 U.S. 915 (1983).

2. Federal-State Cooperation

NEPA does not generally allow an EIS prepared under the auspices of state legislation to substitute for the preparation of a federal EIS. However, if both state and federal agencies are involved in a proposal (e.g., a project requires both state and federal permits), CEQ regulations provide that the agencies may coordinate their efforts and prepare a joint EIS where possible.¹⁰⁶

Counsel face a tactical question where both federal and state actions are involved. On the one hand, a federal agency can consider a state EIS in determining whether the action has a significant impact. Deferral of the federal process might, therefore, be warranted if the state EIS is likely to show an absence of significant impact. On the other hand, the federal process is generally longer, in part because the federal agency usually prepares the EIS. (For example, an EIS prepared by the Corps of Engineers is generally a two- to three-year endeavor.) Thus, if an EIS is likely to be required, a contemporaneous state/federal process might save time. The answer to this and other tactical questions are, of course, project specific.

3. The EIS Stages

The CEQ regulations provide for a staged EIS process, including the scoping of issues and the preparation and circulation of a draft and final EIS.

Initially, notice of an agency's decision to prepare a draft EIS ("DEIS") is published in the Federal Register.¹⁰⁷ In addition, other types of publication (e.g., newspaper notice) may be required by the lead agency. The lead agency may request other federal agencies with special expertise in pertinent environmental areas to be cooperating agencies, and those agencies can be requested to provide assistance in the preparation of the EIS.¹⁰⁸

The "scoping" process takes place at the early stages of the EIS process in order to identify and focus on key questions and, by narrowing the issues, reduce unnecessary paperwork.¹⁰⁹ The CEQ regulations impose an affirmative obligation upon federal agencies to solicit public input as part of the scoping process. Agencies may hold hearings or informal conferences to aid them in determining the primary focus of the EIS and the principal areas of concern and controversy.¹¹⁰

Once the "scope" of the environmental issues has been determined, a DEIS is prepared.

¹⁰⁶ 40 C.F.R. §§ 1501.5(b), 1501.6 (1996).

¹⁰⁷ *Id.* at § 1501.7 (1996).

¹⁰⁸ *Id.* at § 1501.6 (1996).

¹⁰⁹ *Id.* at § 1501.7 (1996).

¹¹⁰ *Id.* at § 1506.6(b) (1996).

Other federal agencies may, as a matter of law, play a role in the preparation of the document. Since the purpose of the DEIS is to inform the public and other agencies as early as possible about the proposed action, and to solicit comments which will assist the lead agency in the decision-making process, it is circulated for commenting to a variety of entities, including other interested federal agencies, state and local agencies and citizens. Federal agencies with expertise in subject areas addressed in the DEIS are supposed to comment.¹¹¹ There is a minimum 45-day period for commenting on the DEIS (measured from the notice of publication in the Federal Register).¹¹²

Public hearings (legislative) on the DEIS are discretionary and generally to be based on the extent of controversy over the environmental effects of the proposal (as opposed, at least in theory, to controversy over the project itself).¹¹³

After the publication and circulation of the DEIS and the closing of any hearing, a final EIS ("FEIS") is prepared. The FEIS includes project changes and new information and, most importantly, must respond to all substantive comments on the DEIS.¹¹⁴ This requirement is critical, because agencies are thus compelled to address outside, extra-agency criticisms and concerns that might otherwise never be raised. Comments are to "receive good faith attention from decision-makers."¹¹⁵ Although a FEIS is subject to circulation requirements similar to those for a DEIS, there is no requirement to respond to comments on that document. The agency must wait until the expiration of at least 30 days from publication of notice of the FEIS in the Federal Register before making a determination on the proposed action.¹¹⁶

An agency decision on the proposal to which an EIS is addressed must be set forth in a Record of Decision ("ROD").¹¹⁷ The ROD articulates the basis for the agency's substantive decision; it should include a discussion of the alternatives considered, including the environmentally preferable alternative, an explanation of practicable mitigation measures to ameliorate impacts that were adopted (or why they were not), and a program to implement any mitigation measures.¹¹⁸

¹¹¹ *Id.* at § 1503.1 (a)(1), (2), (4) (1996).

¹¹² *Id.* at § 1506.10(c) (1996). The CEQ regulations require that no decision can be made until 90 days have elapsed from the time notice of the DEIS was published in the Federal Register. However, if within those 90 days a final EIS is issued, the agency is required to allow not less than 45 days for comments on a DEIS before making a decision.

¹¹³ *Id.* at § 1503.1 (a)(1), (2), (4) (1996).

¹¹⁴ *Id.* at § 1502.9 (1996).

¹¹⁵ *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 554 (9th Cir. 1977). *See also Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (Forest Service must address "reputable scientific criticisms" of its plan).

¹¹⁶ 40 C.F.R. § 1506.10(b)(2) (1996); *see also* 40 C.F.R. § 1506.6(b) (1996) (allows for the consideration of any comments on the FEIS).

¹¹⁷ *Id.* at § 1505.2 (1996).

¹¹⁸ *Id.* at § 1505.2 (a)-(c) (1996).

4. The EIS

a. Specific Types Of Environmental Effects

In preparing the EIS, the federal agency must take a "hard look" at the environmental impacts of a proposal, alternatives capable of achieving the basic objective and measures to mitigate adverse impacts.¹¹⁹

As noted earlier, the CEQ regulations broadly define the terms "environment" and "effect"; these definitions are generally applicable to the scope of an EIS as well as to the determination as to whether such a document must be prepared. The EIS must also consider "cumulative impacts" -- the total of impacts from the action under consideration as well as those from reasonably foreseeable actions.¹²⁰ Cumulative impacts of a shopping center would include, for example, traffic generated by a proposed office facility along the same access routes.¹²¹

b. The Calculus Of The Impacts

Preparation of an EIS is tempered by a "rule of reason," so that not every conceivable impact must be examined.¹²² Upon judicial review, courts determine whether the EIS contains a "reasonably thorough discussion of the probable environmental consequences."¹²³ The extent to which a particular impact needs to be assessed corresponds with its importance.¹²⁴ In addition, only impacts which bear a "reasonably close causal relationship" to the change in the physical

¹¹⁹ Britt v. U.S. Army Corps of Eng'rs, 769 F.2d 84, 90 (2d Cir. 1985) (an agency charged with preparing an EIS must demonstrate that it has taken a hard look at the environmental consequences); Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 588 (9th Cir. 1985), rev'd on other grounds, 485 U.S. 439 (1988)(mitigation measures cannot merely be listed in an EIS; they must also be discussed); Maryland Wildlife Fed'n v. Dole, 747 F.2d 229 (4th Cir. 1984) (reasonable alternatives must be considered but not every alternative conceivable to the mind of man).

¹²⁰ 40 C.F.R. § 1508.7 (1996). National Audubon Society v. Dep't of Navy, 2005 WL 2140794 (4th Cir. Sept. 7, 2005) (Navy's EIS for proposed landing field failed to consider the cumulative impacts of reasonably foreseeable nearby military operating areas); Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999) (EIS did not adequately address cumulative impact of land exchange between Forest Service and private landowner); City of Carmel-By-The-Sea v. U.S. DOT, 123 F.3d 1142, 1160 (9th Cir. 1997) (EIS must "catalogue adequately the relevant past projects in the area," and must also include a "useful analysis of the cumulative impacts of past, present and future projects"); see also Resources Limited, Inc. v. Robertson, 35 F.3d 1300 (9th Cir. 1994); Chelsea Neighborhood, 516 F.2d at 388.

¹²¹ See e.g., Grand Canyon Trust v. FAA, 290 F.3d 339, 346 (D.C. Cir. 2002) (agency's environmental assessment of new airport must consider cumulative noise impacts to nearby national park from all noise sources, not just those emanating from proposed new airport).

¹²² Sigler, 695 F.2d at 970; Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, 684 F.2d 1041, 1047 (1st Cir. 1982).

¹²³ Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 958 (9th Cir. 2003).

¹²⁴ 40 C.F.R. § 1502.15 (1996).

environment need be assessed.¹²⁵ An agency need not consider wholly speculative impacts, even where the consequences could be severe.¹²⁶ An agency also need not consider effects it has no ability to prevent due to its limited statutory authority over the proposed action.¹²⁷

The lead agency cannot, however, avoid full disclosure. Thus, the EIS must reflect reasonable scientific views which are not those of the responsible agency.¹²⁸

Federal agencies, however, act in full compliance with NEPA when they rely on their own experts' studies of adverse environmental impacts.¹²⁹ The fact that an environmental group's experts reach a contrary conclusion from that reached by the agency's experts does not render the agency's decision arbitrary and capricious.¹³⁰ But where an agency ignores the recommendations of its own experts, courts have found such an action to be arbitrary and required a new or supplemental EIS.¹³¹

When information is relevant but unavailable, CEQ regulations provide that the EIS evaluate the reasonably foreseeable impacts based upon generally accepted theoretical approaches or research methods.¹³² These CEQ regulations require disclosure of the effect of low probability/high consequence occurrences, when the analysis of potential impacts is supported by credible scientific evidence and not predicated on conjecture.¹³³ Federal agencies, therefore, are obliged to describe environmental impacts when there are substantial uncertainties

¹²⁵ Metropolitan Edison, supra.

¹²⁶ San Francisco Baykeeper v. U.S. Army Corps of Eng., 219 F. Supp.2d 1001, 1025-26 (N.D. Cal 2002) (NEPA does not require agency to consider impacts of invasive species introduction into local waterway, because there is no methodology for foreseeing the arrival of such species and no credible scientific evidence that such impacts will occur).

¹²⁷ Transportation Dep't v. Public Citizen, 541 U.S. 752 (2004)(Federal Motor Carrier Safety Administration (FMCSA) did not violate NEPA by failing to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers since the President, not the agency, held the power to authorize cross-border operations and FMCSA lacked the authority to prevent the entry of Mexican trucks).

¹²⁸ Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011 (2d Cir. 1983); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).

¹²⁹ Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283 (4th Cir. 1999).

¹³⁰ Id. at 288-89 (agencies took a sufficient "hard look" at issue of zebra mussel infestation that could result from proposed dam project and the agencies did not act arbitrarily and capriciously in relying on study of their own expert to conclude that the proposed project did not present an unreasonable risk).

¹³¹ Idaho Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957 (9th Cir. 2002) (holding that Forest Service's use of the "home range" scale of analysis when considering habitat depletion was arbitrary, in light of its own experts' conclusion that cumulative effects "must be addressed at a landscape scale").

¹³² 51 Fed. Reg. 15,625 (1986), amending 40 C.F.R. § 1502.22(b) (1986).

¹³³ Id.; see Robertson v. Methow Valley Citizens Council ("Methow Valley"), 490 U.S. 332 (1989).

as to the proposed action; however, the EIS need not employ a "worst case analysis."¹³⁴

c. Alternatives

An EIS must consider alternatives to a proposed action; indeed, this analysis has been deemed the "linchpin" of the document.¹³⁵ The alternatives to be discussed are subject to the "rule of reason" noted above; in general, the EIS need only discuss a range of those alternatives which are sufficient to permit a reasoned choice.¹³⁶ The scope includes, as a general matter, alternative sites, designs, sizes and technologies. The alternatives to be assessed should serve the essential purpose of the action, although that goal may be attained by means which go beyond the jurisdiction of the acting agency and indeed, in some cases, of the applicant.¹³⁷ The "no action" alternative must always be considered so that a baseline is available against which the decision-maker can compare the comparative effects of the proposal and alternatives to it.¹³⁸

NEPA requires the EIS for a federal permitting action to discuss alternative sites not owned or controlled by a private applicant as long as these sites would allow achievement of the basic goals of the proposal.¹³⁹ For example, the Corps of Engineers' NEPA regulations require an EIS to discuss alternative sites which are neither within the agency's jurisdiction nor available

¹³⁴ See Methow Valley, 490 U.S. at 355 (citing 51 Fed. Reg. 15,625 (1986)).

¹³⁵ Dubois v. U.S. Dep't of Agriculture, 102 F.3d 1273, 1286-1287 (1st Cir. 1996); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697-98 (2d Cir. 1972). NEPA requires an alternatives analysis, even if no EIS is prepared, when there are "unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1982). A variety of other federal statutes require an analysis of alternatives: for example, Section 404 of the Clean Water Act requires an analysis of practicable alternatives to the proposed discharge that could achieve basic project goals without being situated in, or involving a discharge into, waters of the U.S. (such as wetlands). 40 C.F.R. § 230.10(a) (1986). An analysis of alternatives to avoid historic or archeological impacts on sites on or eligible for listing on the National Register of Historic Places is required under the National Historic Preservation Act, 16 U.S.C. § 470(f) (1978). The National Highway Act, 49 U.S.C. § 303(b) (1986), requires that a federal highway cannot affect public parklands or historic sites unless there is no feasible and prudent alternative. See also, Executive Order No. 11988, Floodplain Management, 42 U.S.C. § 4321 (1986).

¹³⁶ Airport Neighbors Alliance, Inc. v. U.S., 90 F.3d 426 (10th Cir. 1996); Monroe County Conservation Council, Inc. v. Adams, 566 F.2d 419, 425 (2d Cir. 1977), cert. denied, 435 U.S. 1006 (1978); Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988); Ayers v. Espy, 873 F. Supp. 455 (D. Colo. 1994). To be considered reasonable, a prospective alternative must be capable of achieving the basic project goal. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991); see also Hells Canyon Alliance v. U.S. Forest Service, 227 F.3d 1170 (9th Cir. 2000) (holding that Forest Service does not have to consider alternative not likely to be implemented and inconsistent with basic policy objectives for managing forest area).

¹³⁷ Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

¹³⁸ Id.; 40 C.F.R. § 1502.14(d) (1996).

¹³⁹ Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, 684 F.2d 1041, 1046-47 (1st Cir. 1982).

to a permit applicant, but which would nonetheless achieve the basic project goal.¹⁴⁰

Alternative sizes and configurations of an action should be considered to limit adverse environmental impacts to the maximum extent practicable.¹⁴¹ For example, if a proposed development would require filling of floodplains, attempts should be made to situate the development, or to modify its design, so as to eliminate or minimize that impact. Modifications in roadway configuration could reduce traffic and associated air quality and noise effects. Alternative technologies which would achieve the goals of an action could, by way of illustration, include the recycling or composting rather than the landfilling or incineration of municipal solid waste.¹⁴²

d. Mitigation

The analysis of alternatives is one means of mitigating or avoiding adverse environmental impacts. In order to ensure that environmental impacts have been sufficiently evaluated, an EIS must contain a "reasonably complete discussion" of measures to mitigate impacts.¹⁴³ Omission of such a discussion would "undermine the 'action-forcing' function of NEPA."¹⁴⁴ This EIS requirement, like others, is subject to a "rule of reason"; not each and every adverse impact must be mitigated, but a "hard look" must be given to the potential mitigation of significant impacts.¹⁴⁵

In National Audobon Society v. Hoffman ("Hoffman"),¹⁴⁶ the Second Circuit held that the Forest Service violated NEPA and that its determination that preparation of an EIS was unnecessary was arbitrary and capricious. The court explained that the proposed mitigation measure was not supported by substantial evidence. Furthermore, the court found there was no assurance of the efficacy of the proposed measure because the Forest Service had not conducted any study of its likely effects, proposed any monitoring to determine the effectiveness of the proposed mitigation, or considered alternatives in the event of its failure.¹⁴⁷

Despite the fact that NEPA does not impose a substantive requirement that a mitigation

¹⁴⁰ 33 C.F.R. Part 325, App. B § 9(b)(5) (1988).

¹⁴¹ 40 C.F.R. § 1508.20(a), (b) (1996).

¹⁴² But see Resources Limited, Inc. v. Robertson, 35 F.3d 1300 (9th Cir. 1994) (alternatives that are unlikely to be implemented need not be considered where adequate alternatives have been evaluated).

¹⁴³ Methow Valley, 490 U.S. at 351-52. Methow Valley allows agencies considerable latitude in addressing mitigation. Although an EIS must discuss reasonably available mitigation measures, it need not include final detailed plans or ensure the implementation of off-site measures by third parties.

¹⁴⁴ Id.

¹⁴⁵ Northwest Indian Cemetery Protective Ass'n v. Peterson ("Northwest Indian Cemetery"), 764 F.2d 581, 588 (9th Cir. 1985), rev'd on other grounds, 485 U.S. 439 (1988).

¹⁴⁶ 132 F.3d 7 (2d Cir. 1997).

¹⁴⁷ Id. at 17.

plan be adopted, the discussion is not an entirely theoretical exercise; the CEQ regulations mandate that reasonable mitigation measures developed during the EIS process be incorporated into an approved action.¹⁴⁸ The failure to adequately discuss mitigation, like the failure to address other required elements of an EIS (e.g., reasonable alternatives), can result in a judicial determination that the impact statement is deficient,¹⁴⁹ and the reiteration of the environmental review process.

e. Environmental Justice

One area where NEPA's environmental review process remains largely unexamined is environmental justice. Premised on the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964,¹⁵⁰ environmental justice involves a combination of civil rights and environmental advocacy.

Section 601 of Title VI, as amended by the Civil Rights Restoration Act of 1987, forbids intentional discrimination on the basis of race, color or national origin in any program or activity conducted by a recipient of federal funding. EPA, like other federal agencies that act as a conduit for federal funds flowing to states and in some cases municipalities, has adopted regulations under Section 602 of Title VI that prohibit discriminatory effects on minorities, irrespective of intent.¹⁵¹ The potential availability of Title VI to environmental litigants has raised powerful and contentious issues in facility permitting under federal and state environmental laws.

However, it is somewhat unsettled as to whether a private right of action exists under EPA's Title VI regulations. The Supreme Court recently held in Alexander v. Sandoval ("Sandoval")¹⁵² that there is no private right of action under federal agencies' Title VI regulations. This decision appears to effectively overrule the prior decision in South Camden Citizens in Action v. New Jersey Department of Environmental Protection ("South Camden Citizens"),¹⁵³ in which the court found a violation of EPA's Title VI regulations. A subsequent federal decision in that case, however, held that the decision in Sandoval did not prevent the plaintiffs from bringing a claim of disparate impact discrimination in violation of EPA's Title VI

¹⁴⁸ 40 C.F.R. § 1502.16(h) (1996). See Methow Valley, *supra*.

¹⁴⁹ Northwest Indian Cemetery, *supra*.

¹⁵⁰ 42 U.S.C. §§ 2000d, 2000d-1.

¹⁵¹ EPA's Title VI regulations prohibit a recipient of federal funds from "us[ing] criteria or methods of administering its program which have the effect of subjecting individuals to discrimination...." 40 C.F.R. § 7.35(b) (1998). The regulations further prohibit a recipient of EPA funds from choosing "a site or location of a facility that has the purpose or effect [of discrimination]." *Id.* § 7.35(c).

¹⁵² Alexander v. Sandoval ("Sandoval"), 532 U.S. 275 (2001)

¹⁵³ South Camden Citizens in Action v. New Jersey Dep't of Envntl. Protection, 145 F. Supp. 2d 446 (D.N.J. 2001)

regulations under 42 U.S.C. § 1983.¹⁵⁴ On appeal, the Third Circuit considered whether, following Sandoval, plaintiffs could maintain their action under § 1983 for disparate impact discrimination in violation of Title VI and its implementing regulations.¹⁵⁵ The Third Circuit held that unless the applicable statute created an enforceable interest under § 1983, a regulation promulgated under the statute would not, by itself, create such an interest. Accordingly, inasmuch as Title VI proscribed only intentional discrimination, the court found that under such facts, plaintiffs lacked a right enforceable through a § 1983 action under the EPA's disparate-impact discrimination regulations. Therefore, the district court's injunction, premised on § 1983, was reversed and remanded. Thus, the issue of whether a private party may be able to proceed with a claim for violation of EPA's Title VI regulations under 42 U.S.C. § 1983 remains murky.

Environmental justice concerns, which are increasingly gaining political, as well as legal, attention, were also the topic of a 1994 Executive Order issued by President Clinton.¹⁵⁶ Whether a mechanism exists for enforcing Executive Order 12898, however, is subject to debate. The Order states that it does not create any private right of action and does not provide any right to judicial review of any action by the United States or its agencies and officers.¹⁵⁷

EPA released its "Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses" in April 1998.¹⁵⁸ This document purports to serve as an agency guide for incorporating environmental justice goals into EPA's preparation of EISs and EAs under NEPA. According to the Guidance Document, "analyzing and addressing environmental justice may assist in determining the distributional effects of environmental impacts on certain populations."¹⁵⁹

A decision by the Nuclear Regulatory Commission ("NRC") applying Executive Order 12898 in a nuclear facility licensing proceeding suggests that implementing environmental justice and equity analysis under the Order will be accomplished as part of the traditional environmental

¹⁵⁴ See South Camden Citizens in Action v. New Jersey Dep't of Env'tl. Protection, 145 F. Supp. 2d 505 (D.N.J. 2001).

¹⁵⁵ South Camden Citizens in Action v. New Jersey Dep't of Env'tl. Protection, 274 F.3d 771 (3d Cir. 2001), cert. denied, 536 US 939 (2002).

¹⁵⁶ Executive Order 12898 (Feb. 11, 1994) directs federal agencies to conduct their programs, policies and activities that affect human health or the environment in a manner that does not have discriminatory effects on minority or low-income persons.

¹⁵⁷ Id. at Section 6-609.

¹⁵⁸ EPA, "Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses" (April 1998), available at <http://les.epa.gov/oeca/ofa/ejepa.htm>.

¹⁵⁹ Id. at 7.

impact review process under NEPA.¹⁶⁰ The proceeding involved an application by Louisiana Energy Services for a license to construct and operate the first privately owned uranium enrichment facility in the United States. A local group opposed issuance of the license on environmental and safety grounds. The Atomic Safety and Licensing Board ultimately denied the license, pointing to environmental justice concerns as well as insufficiencies in the EIS. The Board called for a new and complete NRC staff investigation into alleged racial discrimination in the facility's siting and for revised NEPA review of the facility's disparate impact on the local communities.

In its decision the NRC reversed the Board's requirement of an investigation into racial discrimination in siting, but agreed with the Board's ruling concerning disparate impact.¹⁶¹ The Commission explained that disparate impact analysis is the primary tool for fostering environmental justice under NEPA. Moreover, NRC identified as its goal "to identify and adequately weigh, or mitigate, effects on low income and minority communities that become apparent only by considering factors peculiar to those communities."¹⁶²

Moreover, a recent Court of Appeals decision held that an agency's environmental justice analysis in its NEPA evaluation is properly subject to "arbitrary and capricious" review under the APA. In Communities Against Runaway Expansion, Inc. v. FAA,¹⁶³ the D.C. Circuit reviewed a claim that the FAA's environmental justice analysis in its review of environmental impacts associated with proposed runway improvements at Boston's Logan Airport was arbitrary and capricious. The City of Boston argued that the FAA's choice of "comparison population" was unreasonable, because the agency should have used the greater Boston metropolitan area rather than only Suffolk County, as the metropolitan area would have the greatest exposure to significant noise impacts.¹⁶⁴ In response, the FAA argued that Boston was precluded from bringing its claim because the FAA's environmental justice analysis was undertaken pursuant to Executive Order 12898 and a 1997 Department of Transportation Order, both of which expressly state that they do not create a private right of action.¹⁶⁵ The D.C. Circuit, however, rejected the FAA's position, stating that since the FAA exercised its discretion to include environmental justice as a consideration in its NEPA evaluation, its analysis was reviewable under the APA standard.¹⁶⁶ Nevertheless, the court determined that Boston's claim failed on its merits since the

¹⁶⁰ In re Louisiana Energy Services (Claiborne Enrichment Center), 1998 NRC Lexis 7, Docket No. 70-3070-ML (April 3, 1998).

¹⁶¹ 1998 NRC Lexis at 48.

¹⁶² 1998 NRC Lexis at *48-9.

¹⁶³ 355 F.3d 678, 689 (D.C. Cir. 2004).

¹⁶⁴ Id. at 688.

¹⁶⁵ Id. at 689.

¹⁶⁶ Id.

FAA's methodology was reasonable and adequately explained.¹⁶⁷

NEPA is useful to environmental justice litigants because it requires federal agencies to take a hard look at specific consequences of major federal actions. Where an action affecting the physical environment also has economic or social impacts, the EIS must address those impacts.¹⁶⁸ As a result, an environmental justice plaintiff can utilize NEPA to demand that the agency take a hard look and focus its attention on the economic and social consequences of its actions.¹⁶⁹

Exactly what impact NEPA will have on the environmental justice movement remains to be seen. Independent of the merging of environmental justice and equity elements into environmental impact review, however, advocates in federal court and before EPA will undoubtedly continue to advance environmental justice claims under Title VI.¹⁷⁰ EPA's role will continue to be predicated on its status as a significant provider of federal funds to states and municipalities for environmental programs and projects.

5. Tiering

NEPA also authorizes the "tiering" of EISs. This process involves the preparation of a "generic" EIS, which addresses a large-scale proposal, and then the subsequent preparation of environmental documentation pertaining to specific components of the proposal. These specific elements evolve as the planning process proceeds, and are susceptible to a much more detailed and specific environmental evaluation than was possible when the generic EIS was prepared. The subsequent document is an EA if the generic EIS addresses adequately the environmental effects of the specific component. If the generic EIS does not address appropriately these impacts, an EIS is required. That EIS is targeted on the specific environmental impacts that were not fully discussed in the generic EIS.

The same process is available for large-scale programs. In those circumstances, a

¹⁶⁷ Id.

¹⁶⁸ 40 C.F.R. § 1508.14 (1997).

¹⁶⁹ See Goshen Road Environmental Action Team v. U.S. Dep't of Agriculture, 176 F.3d 475 (4th Cir. 1999) (unpublished op.) (the construction of a wastewater treatment facility in North Carolina in a predominantly African-American community held not to violate NEPA or Title VI); The South Bronx Coalition for Clean Air, Inc. v. Conroy, 20 F. Supp.2d 565 (S.D.N.Y. 1998) (the court dismissed NEPA claim, finding insufficient federal control over challenged project to construct and operate solid waste transfer station in The Bronx, and also dismissed disparate impact claim under Title VI).

¹⁷⁰ In Seif v. Chester Residents Concerned For Quality Living, 524 U.S. 974 (1998), the U.S. Supreme Court was expected to decide whether citizens could enforce EPA's discriminatory effects regulations through a private right of action challenging a state permit. Having dismissed the case following revocation of the challenged permit for unrelated reasons, the Supreme Court has seemingly left open the question of whether a private right of action exists to enforce EPA's Title VI regulations, and virtually assured that this issue will emerge again.

"programmatic" EIS is prepared, and is then followed by either an EA or EIS for specific program elements.

A typical example of tiering occurs with respect to U.S. Forest Service (of the Department of the Interior) planning and programs. The Forest Service often proposes forest management plans for very large geographic areas. EISs are invariably prepared for such proposals. After approval of the overall management plan, the Service then proposes specific plans for much smaller areas. If the impacts of these smaller-scale plans are adequately addressed in the programmatic EIS, only an EA need be prepared. In contrast, if these subjects are not adequately addressed, a "site-specific" EIS would be prepared.¹⁷¹

6. Supplementation

Where there are significant new circumstances or significant new information relating to the proposal or its impacts, supplementation of the EIS (either a draft or final) is necessary.¹⁷² The requirement to supplement applies so long as there is a meaningful opportunity for the deciding agency to weigh the prospective benefits of the proposal against its environmental impacts.¹⁷³ Supplementation follows the same procedure and employs the same standards applicable to the preceding document.¹⁷⁴ Investigation, however, may show that new information is not significant.¹⁷⁵ Judicial review of such a determination by an agency is limited to an "arbitrary and capricious" standard.¹⁷⁶

F. Judicial Review

Judicial review of agency compliance with NEPA must await a determination on the

¹⁷¹ See e.g., Big Hole Ranchers Ass'n Inc. v. U.S. Forest Service, 686 F. Supp. 256 (D. Mont. 1988). See generally Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346 (9th Cir. 1994). See also Churchill County v. Norton, 276 F.3d 1060, 1081 (9th Cir. 2001), cert. denied, 123 S.Ct 101 (2002) (rejecting challenge that broad-ranging water-rights act mandated programmatic EIS for agency's proposed acquisition of specific water rights, because the diverse actions under the act were not connected to or have synergistic or cumulative effects with the proposed action).

¹⁷² Marsh v. Oregon Natural Resources Council ("Marsh"), 490 U.S. 360 (1989); Idaho Sporting Congress, Inc. v. Alexander, 222 F.3d 562 (9th Cir. 2000); Village of Grand View v. Skinner, 947 F.2d 651 (2d Cir. 1991); Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981).

¹⁷³ Marsh, 490 U.S. at 371; Friends of the Clearwater v. Dombeck, 222 F.3d 562 (9th Cir. 2000); See also Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) (Bureau of Land Management's refusal to supplement its land use plans to account for increased off road vehicle use did not violate NEPA because there was no ongoing "major Federal action" after the initial land use plan was approved).

¹⁷⁴ 40 C.F.R. § 1502.9(c)(4) (1996); see Marsh, 490 U.S. at 372-73.

¹⁷⁵ Friends of the Bow v. Thompson, 124 F.3d 1210 (10th Cir. 1997); Village of Grand View v. Skinner, 947 F.2d 651 (2d Cir. 1991); Warm Spring Dam Task Force v. Gribble, 565 F.2d 549, 533 (9th Cir. 1977).

¹⁷⁶ Marsh, 490 U.S. at 377; Portland Audubon Society v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

ultimate proposal; commencement of a lawsuit asserting the failure to prepare an EIS or the inadequacy of such a document prior to a decision approving the action would be premature.¹⁷⁷ On the other hand, a lawsuit should be commenced before reliance on the decision would allow the successful invocation of a laches defense (e.g., commencement of construction).¹⁷⁸

The standard of review for the types of NEPA decisions that are frequently the subject of litigation are generally the same in theory -- the arbitrary and capricious standard -- but different in application.

Most courts apply the arbitrary and capricious rather than the reasonableness standard to an agency's determination not to prepare an EIS,¹⁷⁹ particularly since the Supreme Court in Marsh held the former standard applicable to whether a supplemental EIS was necessary. Realistically, however, regardless of the theoretical standard of review, the agency will have the practical burden of demonstrating that its decision not to prepare an EIS was reasonable, particularly where the plaintiff has established a deficiency in the administrative record.¹⁸⁰

An EIS must be prepared with "objective good faith" and take a "hard look" at environmental consequences and alternatives.¹⁸¹ This apparently rigorous standard, however, is tempered by application of the "rule of reason"; this rule provides extensive latitude to agencies in determining the substance of the EIS, including, most importantly, the depth of discussion of environmental effects and the scope of reasonable alternatives.¹⁸² To sustain a challenge to an EIS, a plaintiff must prove a fundamental flaw; the identification of numerous small errors - "flyspecking" the EIS -- will not be sufficient.¹⁸³ The already difficult burden placed upon a party challenging the

¹⁷⁷ See Kleppe v. Sierra Club, 427 U.S. 390, 401-02 (1976) (there must be a proposal for a major federal action, not merely a contemplated action). See also Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980) (Congress did not expect agencies to prepare impact statements until federal action was confirmed).

¹⁷⁸ Save Our Wetlands, Inc. v. U.S. Army Corps of Eng'rs, 549 F.2d 1021 (5th Cir.), cert. denied, 434 U.S. 836 (1977).

¹⁷⁹ See e.g., Greenpeace Action v. Franklin, 982 F.2d 1343, 1349-50 (9th Cir. 1992).

¹⁸⁰ Marsh, *supra*. The Court noted that the difference between the "'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence." *Id.* at 377 n. 23.

¹⁸¹ Britt v. U.S. Army Corps of Eng'rs, 769 F.2d 84, 90 (2d Cir. 1985); Sierra Club v. Espy, 822 F. Supp. 356 (E.D. Tex. 1993), *rev'd on other grounds*, 18 F.3d 1202 (5th Cir. 1994).

¹⁸² Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-96 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991); Carolina Env'tl. Study Group v. U.S., 510 F.2d 796, 798 (D.C. Cir. 1975). The "rule of reason" similarly applies to review of an environmental assessment and issuance of a FONSI. Utah Environmental Congress v. Bosworth, 2005 WL 1995583, *10 (10th Cir. Aug. 19, 2005).

¹⁸³ National Audubon Society v. Dep't of Navy, 2005 WL 2140794,*6 (4th Cir. Sept. 7, 2005); Churchill County v. Norton, 276 F.3d 1060, 1081 (9th Cir. 2001) ("We certainly could 'fly-speak' [the EIS] and find instances where the inclusion of quantitative data would benefit the [agency] and the public ... [t]hat is not our role, of course"), cert. denied, 123 S.Ct. 101 (2002); Sierra Club v. Adams, 578 F.2d 389, 393 (D.C. Cir. 1978); Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974).

adequacy of an EIS is usually exacerbated by the submission of the voluminous agency record which invariably accompanies EIS preparation.

Although judicial review is generally limited to the administrative record (the identification of which can itself be the subject of dispute), there are exceptions.¹⁸⁴ Initially, more latitude in going beyond the record is accorded to a challenge to a determination that an EIS is not necessary (a FONSI) than to the adequacy of the impact statement if it is prepared.¹⁸⁵ In addition, evidence outside the administrative record can be permitted to prove the failure to consider relevant areas of concern, either in the context of a FONSI or the adequacy of an EIS.¹⁸⁶

The lawsuit should not be the first time at which alleged inadequacies in an EIS are identified; the party should have participated meaningfully in the administrative process.¹⁸⁷

As stated by the Supreme Court in the landmark Vermont Yankee litigation:

[I]ntervenors who wish to participate [must] structure their participation so that ... it alerts the agency to [their] position and contentions....

[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made...; it must show why the mistake was of possible significance in the results...¹⁸⁸

Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."¹⁸⁹

¹⁸⁴ See Hoffman, 132 F.3d at 14-16 (courts should be more willing to go outside the administrative record in considering NEPA challenges).

¹⁸⁵ Public Service Co. of Colorado v. Andrus, 825 F. Supp. 483 (D. Idaho 1993).

¹⁸⁶ Missouri Coalition for the Environment v. U.S. Army Corps of Eng'rs, 866 F.2d 1025 (8th Cir. 1989), cert. denied, 493 U.S. 820 (1989); County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1384 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); Public Service Co. of Colorado, supra (looking beyond administrative record to evaluate sufficiency of an environmental assessment).

¹⁸⁷ Vermont Yankee Nuclear Power., 435 U.S. at 553-54.

¹⁸⁸ Id.

¹⁸⁹ Id.

The remedy for a successful challenge to the sufficiency of an EIS is usually, but not always, revocation of the agency decision and an injunction pending the preparation and issuance of an adequate impact statement.¹⁹⁰ The severity of the remedy makes it all the more imperative that the EIS be thorough and complete and that there has been scrupulous compliance with NEPA's procedural requirements.

Some courts have suggested that a NEPA violation provides, ipso facto, the basis for issuance of a preliminary injunction.¹⁹¹ The vitality of this jurisprudence is doubtful in light of the Supreme Court decisions in Weinberger v. Romero-Barcelo¹⁹² and Amoco Production Co. v. Village of Gambell,¹⁹³ both of which hold that the violation of federal environmental legislation does not yield automatic imposition of injunctive relief.¹⁹⁴

The First Circuit in Sierra Club II reiterated this position that a likely NEPA violation does not automatically justify an injunction. The court did note, however, that the irreparable injury necessary to warrant injunctive relief can arise from the risk that the decision makers have committed themselves to a course of action without having before them the likely environmental effects of their actions.¹⁹⁵

As explained by the First Circuit:

[T]he harm at stake in a NEPA violation is harm to the environment, not merely to a legalistic 'procedure,' nor, for that matter, merely to psychological well-being. The way that harm arises may well have to do with the psychology of decision makers, and perhaps a more deeply rooted human psychological instinct not to tear down projects

¹⁹⁰ Concerned About Trident, 555 F.2d at 823.

¹⁹¹ See e.g., California v. Bergland, 483 F. Supp. 465, 498 (E.D. Calif. 1980), aff'd in part and rev'd in part sub nom. California v. Block, 690 F.2d 753 (9th Cir. 1982) (once a substantial NEPA violation has been shown, an injunction should issue without detailed consideration of traditional equity principles).

¹⁹² Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)

¹⁹³ Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987)

¹⁹⁴ See High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004) (an injunction does not automatically issue upon a finding that an agency violated NEPA; if environmental injury is sufficiently likely the balance of harms will usually favor the issuance of an injunction to protect the environment); Conservation Law Foundation, Inc. v. Busey, 79 F.3d 1250, 1272 (1st Cir. 1996); Sierra Club v. Marsh ("Sierra Club II"), 872 F.2d 497, 500 (1st Cir. 1989) (a likely NEPA violation does not automatically call for an injunction; the balance of harms may point the other way); see also Fund for Animals, Inc. v. Lujan, 962 F.2d 1391 (9th Cir. 1992) (an injunction against the state defendants for a NEPA violation would be inequitable under the circumstances presented).

¹⁹⁵ Sierra Club II, 872 F.2d at 501 (citing Commonwealth of Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983)).

once they are built.¹⁹⁶

In sum, not only do material violations of NEPA typically result in injunctive relief, but the framework provided by NEPA suggests that real environmental harm may be avoided through sufficient foresight and deliberation.

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¹⁹⁶ Id. at 504.