RECENT NEPA CASES (2004)

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ABSTRACT
This paper will review NEPA cases issued by federal courts in 2004. The implications of the decisions and relevance to NEPA practitioners will be explained.

Introduction

In 2004, federal courts issued 26 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. These cases involved 14 different departments and agencies, with the government prevailing in 16 of the 26 cases (60 perent). Two cases were decided in the U.S. Supreme Court.

As has been the case in previous years, the U.S. Forest Service was the individual agency involved in the most number of cases (5); unlike previous years, the agency prevailed in 3 of the 5 cases. Also,

- U.S. Department of Defense agencies were involved in 6 cases and prevailed in 4.
- The U.S. Department of the Interior, and agencies within that department, were involved in 8 cases and prevailed in 3.
- U.S. Department of Transportation agencies were involved in 4 cases and prevailed in 3.
- The Environmental Protection Agency, Federal Communications Commission, and Federal Energy Regulatory Commission were each involved in one case, and all prevailed.

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

Themes

What agencies did right:

- Narrowed the range of reasonable alternatives by using a screening process and reasonable selection standards. *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004).
- Articulated a basis for its analysis and conclusions. *In re Operation of the Missouri River System*, (D. Minn. 2004) (unreported). Also, *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10th Cir. 2004).
- Made a detailed study of the risk and determined the risk to be remote. *Ground Zero Center for Non-violent Action v. United States Department of the Navy*, 383 F.3d 1082 (9th Cir. 2004).
- Gave adequate guidance to the EIS contractor and participated in the EIS preparation. *Communities Against Runway Expansion, Inc. v. Federal Aviation Administration*, 355 F.3d 678 (D.C. Cir. 2004).

What agencies did wrong:

- Failed to provide a statement of reasons why the proposed action would have negligible impacts on the environment, leaving the court unpersuaded that it had taken a "hard look" at potential impacts. *Ocean Advocates v. United States Army Corps of Engineers*, 361 F.3d 1108 (9th Cir. 2004). Also *Pennaco Energy, Inc. v. U.S. Department of the Interior*, 377 F.3d 1147 (10th Cir. 2004); *Western Land Exchange Project v. United States Bureau of Land Management*, 315 F. Supp. 2d 1068 (D. Nev. 2004).

- Did not sufficiently identify or discuss the incremental impact that can be expected from each successive timber sale or how those individual impacts might combine or synergistically interact with each other to affect the surrounding environment. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 968 (9th Cir. 2004).
- Failed to adequately consider the impacts of past actions in a cumulative impact analysis. *Lands Council v. Powell*, 379 F.3d 738 (9th Cir. 2004).
- Did not comply with NEPA when designating critical habitat under the Endangered Species Act. *Cape Hatteras Access Preservation Alliance v. United States Department of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004).
- Failed to conduct any NEPA review before allowing tourist vans through a wilderness area. *Wilderness Watch & Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085 (11th Cir. 2004).
- Failed to prepare an EIS for, and to consider the cumulative impacts of, the issuance of multiyear special use permits to commercial packstock operators in wilderness areas. *High Sierra Hikers Association v. Blackwell*, 381 F.3d 886 (9th Cir. 2004).

And the courts reiterated that:

- The agency is entitled to rely on their own experts as long as their decisions are not arbitrary and capricious. *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004).
- Agencies must use the best available scientific information and are not required to conduct their own studies (when existing studies are available). *Lee v. U.S. Air Force*, 354 F.3d 1229 (10th Cir. 2004).
- The agency is under no obligation to consider each and every alternative but rather it must evaluate a considerable range of alternatives to allow it to make a reasoned decision. *In re Operation of the Missouri River System*, (D. Minn. 2004) (unreported).
- Project alternatives derive from the purpose and need statement. Although an agency cannot define its objective in unreasonably narrow terms, an agency has considerable discretion to define the purpose and need for a project. *Westlands Water District v. United States Department of the Interior*, 376 F.3d 853 (9th Cir. 2004).
- When new information arises following the issuance of a DEIS, it may validly be included in the FEIS without recirculation. *Westlands Water District v. United States Department of the Interior*, 376 F.3d 853 (9th Cir. 2004).
- Documentation of reliance on a categorical exclusion need not be detailed or lengthy; it need only be long enough to convince a court that an agency considered whether a categorical exclusion applied and concluded that it did. *Wilderness Watch & Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085 (11th Cir. 2004).
- The existence of opposition does not automatically render a project controversial. *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004).
- Descriptions in the DEIS were sufficient to provide a "springboard for public comment." A supplemental EIS is only needed where new information provides a seriously different picture of the environmental landscape. *National Committee for the New River, Inc. v. Federal Energy Regulatory Commission*, 373 F.3d 1323 (D.C. Cir. 2004).

Supreme Court Cases

The U.S. Supreme Court handed down two NEPA decisions in its October 2003 term: *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S.Ct. 2204 (2004), and *Norton v. Southern Utah Wilderness Alliance*, 541 U.S. ____, 124 S. Ct. 2373 (2004). Each of these cases is described below, along with the Court's holdings.

Department of Transportation v. Public Citizen

In 2001, an international arbitration panel determined that a moratorium on the entry of Mexican motor carriers into the U.S. violated the North American Free Trade Agreement (NAFTA). President Bush subsequently announced that he would lift the moratorium after the Department of Transportation (DOT) issued regulations governing Mexican-domiciled motor carriers seeking to operate within the United States. Congress then prohibited the

Department from expending any funds for licensing or permitting of Mexican-based motor carriers in the U.S. until the Department had issued safety and inspection rules to cover those carriers.

DOT promulgated three regulations governing Mexican motor carriers and, for two of them, prepared EAs that concluded that the regulations would have no significant impact on the environment. DOT did not prepare an EA for the third regulation because it concluded the regulation fell within its categorical exclusion regulations. DOT also did not make conformity determinations under the Clean Air Act for any of the three regulations because it concluded that the regulations fell within exceptions to Clean Air Act requirements.

Following the issuance of the regulations, the President lifted the moratorium, permitting Mexico-domiciled motor carriers to offer cross-border service.

Plaintiff public interest and environmental organizations and trucking unions filed suit in the U.S. Court of Appeals for the 9th Circuit, arguing that the regulations were invalid because DOT failed to comply with NEPA and the Clean Air Act. Specifically, they argued that allowing Mexican trucks to operate in the U.S. would increase air pollution in violation of state standards and would harm residents of border states.

DOT argued that additional Mexican truck and bus traffic and any incidental increases in air pollution would be the result of the President's action in lifting the moratorium rather than as a result of the agency's safety and licensing regulations. Thus, the effects of the traffic would be attributable to the President's exercise of his foreign policy power, not agency rulemaking. Because NEPA and Clean Air Act requirements do not apply to actions of the President, DOT argued that the link between the regulations and any environmental impacts of increased traffic from Mexican vehicles were too attenuated to trigger NEPA or Clean Air Act requirements.

The Court of Appeals rejected that argument, stating that the "distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry" were "illusory." Because the court limited its review to the question of whether DOT had authority to promulgate its regulations without complying with NEPA and Clean Air Act requirements, it found that its decision did not implicate the President's "unreviewable discretionary authority to modify the moratorium" or affect the United States' ability to comply with NAFTA. The court found that DOT had acted arbitrarily and capriciously by failing to prepare EISs and Clean Air Act analyses before issuing the regulations.

In a unanimous opinion authored by Justice Thomas, the U.S. Supreme Court reversed the Court of Appeals, finding that DOT lacked discretion to prevent cross-border operations of Mexican motor carriers and thus was not required to evaluate the environmental effects of such operations. The Court rejected the plaintiffs' argument that DOT was required to examine releases of air emissions as an indirect effect of the issuance of the regulations because, according to the Court, DOT was unable to countermand the President's lifting of the moratorium or otherwise exclude Mexican trucks from operating in the United States. DOT was required by law to register any motor carrier willing and able to comply with various safety and financial responsibility rules, and only the moratorium prevented it from doing so for Mexican trucks. The causal connection between the proposed regulations and the entry of Mexican trucks was insufficient to make DOT responsible under NEPA to consider the environmental effects of entry, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). "It would not, therefore, satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform." Slip opinion at 15.

The Court also declined to address the plaintiffs' argument that the agency should have considered other alternatives that might mitigate the environmental impacts of authorizing cross-border truck operations because the plaintiff had not raised the issue of additional alternatives during the NEPA process:

> "None of the [plaintiffs] identified in their comments any rulemaking alternatives beyond those evaluated in the EA, and none urged [DOT] to consider alternatives. Because [plaintiffs] did not raise these particular objections to the EA, [DOT] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. [Plaintiffs] have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action." Slip opinion at 10.

The Court also held that DOT did not act improperly by not performing a full conformity analysis pursuant to the Clean Air Act, stating that emissions attributable to an increase in Mexican trucks across the border were not indirect emissions because DOT could not control the emissions.

Commentary: The Court's holding is that an agency is not responsible for, and thus is not required to evaluate under NEPA, any direct, indirect, or cumulative environmental impact over which it has no control. While in many circumstances an agency can refuse to act because the environmental impacts of its proposed action would be too great, here DOT only had jurisdiction to enact safety and financial responsibility regulations. It did not have authority to refuse to issue regulations or to refuse, on environmental grounds, to allow Mexican trucks to enter the United States if they met safety and financial responsibility.

The Court also concluded that the informational purpose of NEPA would not be served by evaluating air emissions because no matter what the public said about that analysis, DOT could not act upon those views. This ignores, however, that NEPA documents are prepared for the information of the agency, the public, and Congress. While DOT may not have been able to act upon the information, Congress could have. As CEQ stated in its "40 Most Asked Questions," "[a]lternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies." Question 2b.

The Court also reiterated that members of the public must put forth their concerns regarding the scope and content of a NEPA document during the NEPA process, and not wait for a court proceeding to raise an issue for the first time. Of course this presumes, in the case of an EA, that there is a public comment process in which the public is encouraged to present their concerns.

Norton v. Southern Utah Wilderness Alliance

The Southern Utah Wilderness Alliance (SUWA) sued the U.S. Bureau of Land Management (BLM) for violating the Federal Land Policy and Management Act (FLPMA) and NEPA by not properly managing off-road vehicle (ORV) use on federal lands that had been classified as wilderness study areas or as having wilderness qualities. SUWA sought relief under the Administrative Procedure Act (APA) claiming that BLM should be compelled to carry out mandatory, non-discretionary duties required by FLPMA and NEPA.

SUWA claimed that current levels of ORV use were impairing the suitability of the wilderness study areas so that they would no longer be appropriate for wilderness designation, and that BLM's failure to ensure non-impairment violated a statutory duty, constituting the violation of a mandatory, non-discretionary duty actionable under the APA, which gives courts authority to compel "agency action unlawfully withheld or unreasonably delayed." SUWA acknowledged that it could not compel BLM to act in any specific way – BLM has discretion to comply with the non-impairment requirement in a variety of ways – but argued that it could sue to compel BLM to act in some way of its choosing that would meet BLM's non-impairment obligation.

BLM argued that all judicial review under the APA is limited to final agency action, or to compel final agency action that has been withheld, and that the day-to-day operations of BLM land management that SUWA is attempting to challenge were outside the concept of final agency action.

Although the U.S. District Court dismissed SUWA's claims, the U.S. Court of Appeals for the 10th Circuit reversed the lower court, holding that "[w]here, as here, an agency has an obligation to carry out a mandatory, non-discretionary duty and either fails to meet an established deadline or unreasonably delays in carrying out the action, the failure to carry out that duty is itself 'final agency action.'"

Before the 10th Circuit, SUWA also argued that BLM's failure to take a "hard look" at information suggesting that ORV use has substantially increased since NEPA studies for the wilderness study areas were issued violated NEPA. SUWA argued that BLM should be compelled to take a hard look at this information and decide whether supplemental NEPA documents should be prepared. The Court of Appeals agreed that BLM could be compelled, dismissing BLM's arguments that it should not be compelled to take a hard look at new information because (1) the agency would be undertaking NEPA analysis in the near future and (2) the agency faced budget constraints.

In a unanimous opinion authored by Justice Scalia, the U.S. Supreme Court reversed the Court of Appeals, holding that an APA claim can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action, as opposed to a broad program, that it is legally required to take. Further, the Court held that while BLM was obligated to not impair the suitability of wilderness study areas for preservation of wilderness, the agency had discretion to decide how to achieve that objective.

With respect to the NEPA claim, the Court noted that supplementation of a NEPA document is required if there are significant new circumstances or new information relevant to environmental concerns and bearing on the proposed action or its impacts (40 CFR § 1502.9). The Court stated that supplementation was required only if there remains a federal action to occur (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)). The action that required the EIS was the approval of the land use plan; once that plan was approved, there was no ongoing "major federal action" that could require supplementation. The Court did state that BLM would be required to perform additional NEPA analyses if a land use plan were amended or revised.

Other NEPA Cases

A few of the other 2004 cases are worthy of additional discussion:

***Washington County, North Carolina v. United States Department of the Navy*, (E.D.N.C. 2004) (unreported)**

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

Holding: The District Court issued the injunction, ordering the Navy to stop plans for the facility. The court found that the balance of harm weighed in favor of plaintiffs and that an injunction would not impose an excessive burden on the Navy. Without a preliminary injunction, the Navy could proceed with land purchases, site planning, and development which would impermissibly bias the site selection process (100 landowners would be permanently displaced). "Once the land acquisition, site preparation, and construction on the OLF begins, the Navy's impartiality will be compromised, and it will be committed to proceeding with the project….Once the Navy moves forward, any consideration of the environmental impact will be less objective given the commitments made on the project and may become a mere formality." Despite the Navy's duty to protect the public, train pilots, and maintain national security, the public interest is not served by compromising environmental due process and proceeding with a project that may violate NEPA. The court also found that the plaintiffs were likely to succeed on the merits of their claims that the Navy failed to take a "hard look" at the direct, indirect, and cumulative impacts of the proposal; failed to take a hard look at the connected, cumulative, and similar actions to the OLF; and failed to prepare a supplemental EIS.

***Friends of Marolt Park v. U. S. Department of Transportation* 382 F.3d 1088 (10th Cir. 2004)**

Facts: Colorado State Highway 82 is a 2-lane highway that serves as the primary means of access to Aspen, Colorado. It borders Marolt Park and all of the project alternatives (except no action) involve taking some amount of land from the park. DOT prepared and circulated a DEIS and then issued a supplemental draft EIS, which identified a preferred alternative called the "phased modified direct" alternative. However, this alternative was rejected in the FEIS – DOT stated that it was eliminated from further consideration because of a lack of support from the community and the Aspen City Council. The "non-phased" alternative was identified as the preferred alternative in the FEIS. Following the issuance of the FEIS, local governments passed resolutions supporting the "phased modified direct" alternative if it could be financed. DOT issued a record of decision approving the two alternative highway improvement plans. Plaintiffs filed suit, arguing that the requirements of NEPA were not met because the alternatives authorized by the record of decision altered the outcome projected by the FEIS without allowing the public an opportunity to comment.

Holding: Affirming the lower court's decision on the NEPA claim, the Court of Appeals held that the FEIS "explains the alternatives studied by the USDOT and addresses the environmental impacts of the project at length. Because the ROD supplies a rational connection between the facts and the Agency's decision and because the various environmental impact statements drafted by the Agency, including the final EIS, indicate that the Agency took the required 'hard look' at the environmental impact of its decision, we conclude that the final EIS is adequate." Further, the court found that DOT's failure to issue a supplemental EIS following the passage of the local government resolutions was not irrational since the environmental impacts had already been considered in the supplemental DEIS.

***Heartwood v. United States Forest Service,* 380 F.3d 428 (8th Cir. 2004)**

Facts: Plaintiffs challenge the Forest Service's approval of the Eastwood II Project located in the Mark Twain National Forest in Missouri. The project includes plans to harvest timber. Plaintiffs argue that the EA was insufficient and the Forest Service should have prepared an EIS.

Holding: The Court of Appeals upheld a lower court decision that the Forest Service did not act arbitrarily and capriciously in determining that the project would have no significant impact on the environment. The EA thoroughly considered the potential impacts on endangered and threatened species, biological diversity, vegetation, riparian and soil resources, recreation, and migratory birds, as well as the future health of the forests in the project area.

The court noted that the EA was detailed and lengthy and the Forest Service had conducted scoping and other public involvement activities. Plaintiffs argued that this demonstrated that the agency should have prepared an EIS, and cited the "40 Most Asked Questions" as stating that an EA over 15 pages signals that an EIS may be more appropriate. The agency is not required to prepare an EIS simply because it chose to issue a detailed EA that included EIS-like information about its decision process including a thorough discussion of proposed alternatives. "A rule requiring an EIS whenever an EA is longer than 15 pages would encourage agencies to prepare bare-bones EAs…What ultimately determines whether an EIS rather than an EA is required is the scope of the project itself, not the length of the agency's report. Lastly, the 15-page suggestion is non-binding on this court because it is not a regulation but was merely" guidance.

***EMR Network v. Federal Communications Commission*, 391 F.3d 269 (D.C. Cir. 2004)**

Facts: The FCC regulates a variety of facilities and products that transmit radio signals and, with them, radiofrequency (RF) radiation. At certain levels, RF radiation may have adverse thermal health effects caused by heating human tissue. The FCC had issued guidelines based on the assessment of those effects. Non-thermal effects are also of potential concern, but in its last review of its RF radiation guidelines, the FCC declined to tighten its restrictions. Plaintiffs petitioned the Commission to initiate an inquiry on the need to revise the regulations to address non-thermal effects. The Commission denied the petition and plaintiffs sued, alleging that the FCC violated its duty under NEPA to ensure that agencies consider the environmental impacts of their decisions.

Holding: The D.C. Circuit Court of Appeals upheld the FCC's denial of the petition. Applying the recent U.S. Supreme Court decision in *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), the court stated that the "regulations having been adopted, there is no ongoing federal action…and no duty to supplement the agency's prior environmental inquiries."

The court then addressed whether the refusal to undertake a rulemaking constitutes an improper delegation of its NEPA duties to private organizations and other government agencies. The FCC, in formulating its RF regulations and in deciding whether to reopen the issue of non-thermal effects, did rely on other government agencies and non-governmental expert organizations with specific expertise on the health effects of RF radiation. The court found that this reliance was not an improper delegation of its NEPA duties, but rather a proper use of outside experts. As EPA is the agency with primacy in evaluating environmental impacts, "the FCC's decision not to leap in at a time when EPA (and other agencies) saw no compelling case for action, appears to represent the sort of priority-setting in the use of agency resources that is least subject to second-guessing by courts."

Plaintiffs argued that studies it submitted show that exposure to RF radiation is unsafe at levels too low to cause thermal effects. However, the court concluded that these studies on the non-thermal effects of RF radiation are merely tentative and supported the FCC's position of "watchful waiting."

An aside: Early in its opinion, the court notes that the FCC's earlier rulemaking on the effects of RF radiation had been upheld in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000). Although the FCC had not prepared a formal EIS in making revisions to its RF radiation rules, the court in *Cellular Phone Taskforce* held that the agency had "functionally" satisfied NEPA's requirements "in form and substance." Id. At 94-95. This conclusion is cited favorably by the court in *EMR Network*.

***Citizens Alert Regarding the Environment v. Environmental Protection Agency,* No. 03-5159, D.C. Cir. 2004 (unreported)**

In this case, the court held that the plaintiff's claim that EPA violated NEPA was not ripe for review because EPA was conducting the review and there was no final agency action. The court noted that nonfederal participants in federal actions need not themselves comply with NEPA. Although the municipality arguably jeopardized its federal funding by proceeding with construction before EPA reached a decision on the grant request, nothing in NEPA prevents the municipality from taking that risk.

***Village of Bensenville v. Federal Aviation Administration,* 376 F.3d 1114 (D.C. Cir. 2004)**

Facts: The City of Chicago is initiating a program to modernize O'Hare International Airport. To fund the required EIS, Chicago sought and received FAA approval to impose a $4.50 facility fee on passengers enplaning at O'Hare. The fee would result in a sum of $220 million, to be divided equally between the cost of the EIS and the cost of financing and interest. Three Chicago suburbs sued, alleging that the FAA's decision approving the application violated the Federal Aviation Act, the Administrative Procedure Act, and NEPA.

Holding: The court held that the FAA failed to make a finding, as required by law, that the facility fee will generate only that revenue necessary to fund the EIS. "One thing the parties appear to agree on is that over $110 million for an airport project EIS is an extraordinarily high estimate." The FAA order was remanded to the agency for further consideration.

Table 1. NEPA Cases Decided in 2004

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Department of Defense (U.S. Air Force, U.S. Army Corps of Engineers, U.S. Navy)			
Lee v. U.S. Air Force	No. 02-2306, 354 F.3d 1229 (10th Cir. 2004)	Won	Reasonable alternatives, sufficiency of impact analysis, supplemental EIS: USAF decision to eliminate other sites for beddown of German aircraft in a 1998 EIS was not unreasonable in light of purpose and need for expansion. Earlier EA had identified Holloman AFB as the only potential site for the proposed beddown through a "narrowing process" that used reasonable selection standards. Evidence in the record supported USAF conclusion that the proposed action would not result in a decrease in land values. The noise impact analysis was adequate and the agency was entitled to rely on their own experts as long as their decisions are not arbitrary and capricious. Although agencies must use the "best available scientific information" when assessing environmental impacts, USAF was not required to carry out its own study regarding the impact of low-level overflights on livestock and was entitled to rely on existing studies. USAF adequately addressed the risk of accidents in its 1998 EIS and was not required to prepare a supplemental EIS to address a dry season expected in 2003. http://laws.findlaw.com/10th/022306.html
Greater Yellowstone Coalition v. Flowers	No. 03-8034, 34 ELR 20019, 359 F.3d 1257 (10th Cir. 2004)	Won	Alternatives, decision not to prepare an EIS: Army Corps' conclusion that the proposed action was the least damaging practicable alternative was not arbitrary and capricious; record showed that removing some elements of the project would not be significant relative to the impact on bald eagles of the development as a whole. Decision not to prepare an EIS was not arbitrary and capricious. http://laws.findlaw.com/10th/038034.html
Ocean Advocates v. United States Army Corps of Engineers	Nos. 01-36133, -36144, 361 F.3d 1108 (9th Cir. 2004)	Lost	Cumulative impacts: Army Corps was ordered to prepare an EIS to consider the impact of reasonably foreseeable increases in tanker traffic as a result of the issuance of a permit to extend an existing oil refinery dock. The Corps failed to provide the requisite statement of reasons explaining why the dock extension would have negligible impacts on the environment, leaving the court unpersuaded that it had taken a hard look at potential environmental impacts of the dock extension. An EIS was required because there was a substantial question as to whether the dock extension may cause significant environmental impacts. http://caselaw.lp.findlaw.com/data2/circs/9th/0136133p.pdf

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
In re Operation of the Missouri River System Litigation	No. 03-MD-1555 (PAM), D. Minn. 2004 (unreported)	Won	Alternatives: EIS prepared for the Master Manual for operation of the Missouri River System was not arbitrary and capricious. Implementation of adaptive management approach in which policy choices are made incrementally did not violate NEPA because in the event yhat a major policy change results, the Corps acknowledged that it must comply with NEPA. The Corps articulated a basis for its economic analysis; plaintiff's disagreement with the conclusions is insufficient to render the EIS arbitrary and capricious. An EIS need not be exhaustive, and the Final EIS analyzed a range of reasonable alternatives. The Corps is under no obligation to consider each and every alternative but rather it must evaluate a considerable range of alternatives to allow it to make a reasoned decision. The Final EIS must provide sufficient detail to permit those who did not participate in its preparation to understand and consider the relevant environmental influences involved. An agency's consideration of alternatives need only be reasonable. http://www.nysd.uscourts.gov/courtweb/pdf/D08MNXC/04-04601.PDF
Washington County, North Carolina v. United States Department of the Navy	Nos. 2:04-CV-3-BO(2), -2-(BO)2, E.D.N.C. 2004	Lost	Preliminary injunction issued: U.S. Navy was ordered to stop plans for a practice landing field to be located near a large migratory bird refuge. Balance of harm weighed in favor of plaintiffs but would not impose excessive burden on the Navy. Without a preliminary injunction, the Navy could proceed with land purchases, site planning, and development which would impermissibly bias the site selection process (100 landowners would be permanently displaced). Despite the Navy's duty to protect the public, train pilots, and maintain national security, the public interest is not served by compromising environmental due process and proceeding with a project that may violate NEPA. Plaintiffs alleged the failure to analyze alternatives and assess cumulative impacts; the court found likelihood of success on the merits. http://www.southernenvironment.org/Cases/navy_olf/pi_order.pdf
Ground Zero Center for Non-violent Action v. United States Department of the Navy	No. 02-36096, 34 ELR 20100, 383 F.3d 1082 (9th Cir. 2004)	Won	Adequacy of EA, risk assessment: In an EA for a missile storage upgrade program, the U.S. Navy need not review the probable significant environmental impacts of an accidental explosion of a missile during operations at its submarine base in Bangor, Washington, under NEPA. Because the Navy has only limited discretion in the program's operation (a Presidential decision had sited the missiles at Bangor), and within that discretion the risk of a missile explosion is remote (less than 1 in 1 million), NEPA does not require the Navy to issue an EIS assessing the environmental effects of such an accident at Bangor. "The Navy has made a detailed study of the risk of an accidental explosion, and has determined this risk to be extremely remote. Upon this conclusion, which is well grounded in the record, NEPA requires no more." http://caselaw.lp.findlaw.com/data2/circs/9th/0236096p.pdf

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Department of the Interior (Bureau of Land Management, Fish and Wildlife Service, National Park Service)			
Pennaco Energy, Inc. v. United States Department of the Interior	No. 03-8062, 34 ELR 20072, 377 F.3d 1147 (10th Cir. 2004)	Lost	Adequacy of analysis: Court upheld Interior Board of Land Appeals decision that BLM had failed to comply with NEPA. IBLA concluded that the NEPA analyses BLM relied on did not address coal bed methane development and did not address two of the three parcels at issue. The IBLA concluded that the existing NEPA analyses did not demonstrate that BLM took a "hard look" at the environmental impacts of the proposed coal bed methane development and that additional NEPA documents were needed. The administrative record supported this conclusion and the IBLA's decision was not arbitrary or capricious. http://laws.findlaw.com/10th/038062.html
Western Land Exchange Project v. United States Bureau of Land Management	No. CV-N-02-0343-DWH (RAM), 315 F. Supp. 2d 1068 (D. Nev. 2004)	Lost	Preliminary injunction issued: BLM prevented from allowing a land sale for a planned residential community until an EIS was completed. The EA raised substantial questions on the extent of individual and cumulative impacts on threatened and endangered species. Irreparable harm could occur without an injunction and balance of harms favors the plaintiffs. [URL not available]
Norton v. Southern Utah Wilderness Alliance	No. 03-101, 34 ELR 20034, 124 S. Ct. 2373 (2004)	Won	Supplementation: BLM did not fail to take a hard look at whether to supplement its EIS to take increased off road vehicle use into account since there was no ongoing major federal action that could require supplementation. http://laws.findlaw.com/us/000/03-101.html
Klamath-Siskiyou Wildlands Center v. Bureau of Land Management	No. 03-35461, 34 ELR 20127, 387 F.3d 968 (9th Cir. 2004)	Lost	Cumulative impacts: BLM's EAs for two timbers sales in the Cascade Mountains in Oregon violated NEPA. The EAs did not sufficiently identify or discuss the incremental impact that can be expected from each successive timber sale, or how those individual impacts might combine or synergistically interact with each other to affect the surrounding environment. In addition, the EAs cannot be tiered to a regional management plan without specific information about the cumulative effects, nor can they be tiered to a non-NEPA watershed analysis. Yet whether the impacts were cumulative and similar was an open question; therefore, the court declined to require BLM to evaluate each individual timber project in a single EA. http://caselaw.lp.findlaw.com/data2/circs/9th/0335461p.pdf
Westlands Water District v. United States Department of the Interior	Nos. 03-15194 et al., 34 ELR 20054, 376 F.3d 853 (9th Cir. 2004)	Won	Reasonable alternatives, supplementation: Project alternatives derive from purpose and need statement. Although an agency cannot define its objective in unreasonably narrow terms, an agency has considerable discretion to define the purpose and need for a project. Here, the purpose and need statement does not improperly foreclose consideration of any possible restoration measures. The range of alternatives considered achieved the goals intended by NEPA of open, thorough public discussion promoting informed decisionmaking and satisfied the rule of reason. When new information arises following the issuance of a DEIS, it may validly be included in the FEIS without recirculation. http://caselaw.lp.findlaw.com/data2/circs/9th/0315194p.pdf

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Cape Hatteras Access Preservation Alliance v. United States Department of the Interior	No. 03-217 (RCL), 34 ELR 20136, 344 F. Supp. 2d 108 (D.D.C. 2004)	Lost	NEPA and ESA: The court invalidated FWS' designation of critical habitat in North Carolina for the wintering piper plover. In addition, the court found that FWS was required to comply with NEPA when designating critical habitat, specifically rejecting the finding in *Douglas County v. Babbitt* , 48 F.3d 1495 (9th Cir. 1995). http://www.elr.info/litigation/vol34/34.20136.pdf
Wilderness Watch & Public Employees for Environmental Responsibility v. Mainella	No. 03-15346, 34 ELR 20038, 375 F.3d 1085 (11th Cir. 2004)	Lost	Failure to comply with NEPA, categorical exclusion: NPS violated NEPA when it failed to conduct any formal NEPA review prior to its decision to run tourist vans through a wilderness area. The action did not qualify as a categorical exclusion and there was no evidence that NPS determined that an exclusion applied at the time it agreed to transport visitors. Thus, NPS resorted to the exclusion as a post hoc rationalization. Documentation of reliance on a categorical exclusion need not be detailed or lengthy; it need only be long enough to convince a court that an agency considered whether a categorical exclusion applied and concluded that it did. Also, the impact to a wilderness area was an extraordinary circumstance which would make a categorical exclusion inapplicable. http://caselaw.lp.findlaw.com/data2/circs/11th/0315346p.pdf
Voyageurs National Park Association v. Norton	No. 03-2911, 34 ELR 20082, 381 F.3d 759 (8th Cir. 2004)	Won	Compliance with NEPA: In 1991, NPS promulgated a regulation to determine yearly opening and closing dates for the use of frozen bays of the Voyageurs National Park to recreational snowmobiling and to temporarily close trails for safety and environmental reasons. Nothing in the administrative record established that the NPS was arbitrary or capricious in carrying out its NEPA obligations in conjunction with the 1991 opening of the bay areas to motorized-recreational use. In 1992, NPS exercised its discretion to temporarily close 17 bays to snowmobiling and these closures were renewed annually until 1996 when 6 were reopened. The other 11 were reopened to snowmobilers in 2001. NPS was not required to conduct a full NEPA review before deciding it will not renew its annually made decision to close some of the bays. http://www.elr.info/litigation/vol34/34.20082.pdf

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Department of Transportation (Federal Aviation Administration, Federal Highway Administration, Federal Motor Carrier Safety Administration)			
Friends of Marolt Park v. U. S. Department of Transportation	No. 02-1480, 34 ELR 20093, 382 F.3d 1088 (10th Cir. 2004)	Won	Adequacy of EIS, supplementation: DOT analyzed alternative modifications to a state highway. In the FEIS, DOT eliminated one alternative from further consideration saying that it was not supported by the local community. The local councils later passed resolutions supporting that alternative if the preferred alternative could not be implemented. DOT issued a record of decision approving the two alternative highway improvement plans. The court found that this did not violate NEPA because the record of decision supplied a rational connection between the facts and DOT's decision, and because the EIS indicated that the DOT took the required "hard look" at the environmental impact of its decision. DOT's failure to issue a supplemental EIS was not irrational since the environmental impacts had already been considered in the EIS. http://laws.findlaw.com/10th/021480.html
Communities Against Runway Expansion, Inc. v. Federal Aviation Administration	No. 02-1267, 355 F.3d 678 (D.C. Cir. 2004)	Won	Contractor EIS preparation, environmental justice analysis: FAA did not violate NEPA by using a contractor to prepare an EIS because the selection did not compromise the objectivity or integrity of the environmental review, the contractor signed a disclosure statement, and FAA gave adequate guidance and participation in the EIS preparation. Contractor was not obligated to produce its draft work product to anyone outside the agency. Environmental justice study was reasonable and adequately determined that noise would not increase if the proposed action were undertaken. http://pacer.cadc.uscourts.gov/docs/common/opinions/200401/02-1267a.pdf
Village of Bensenville v. Federal Aviation Administration	No. 03-1068, 34 ELR 20061, 376 F.3d 1114 (D.C. Cir. 2004)	Lost	Cost of an EIS: The court granted a petition to review an FAA order to impose a $4.50 passenger fee to fund an EIS being prepared for the modernization of O'Hare International Airport. The FAA did not find that the fee would generate only the revenue necessary to fund the EIS. The fee would result in over $110 million. The FAA order was remanded to the agency for further consideration. http://www.elr.info/litigation/vol34/34.20061.pdf
Department of Transportation v. Public Citizen	No. 03-358, 34 ELR 20033, 541 U.S. 752, 124 S. Ct. 2204 (2004)	Won	Indirect effects, public participation: Agency did not violate NEPA when it failed to evaluate the environmental impact of increased cross-border operations of Mexican motor carriers in its EA because any environmental impact would be the effect of lifting a 19-year moratorium (a Presidential action), not of the implementation of the regulations. Plaintiffs also forfeited any objection to the EA on the ground that it did not adequately address alternatives because they never identified that issue in their comments on the rules or identified any other alternatives. http://laws.findlaw.com/us/000/03-358.html

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U.S. Forest Service			
Trout Unlimited v. U.S. Department of Agriculture	No. 96-WY-2686-WD, 320 F. Supp. 2d 1090 (D. Colo. 2004)	Won on NEPA issues	Incomplete information, supplementation: Forest Service did not violate NEPA because information missing from the EIS for the renewal of a special use permit was not essential to a reasoned decision. A Supplemental EIS was not required because changes to the permit did not significantly affect the environment. [URL not available]
Cold Mountain v. Garber	No. 03-35474, 34 ELR 20055, 375 F.3d 884 (9th Cir. 2004)	Won	Adequacy of EA: The Forest Service's EA properly evaluated the impact of the issuance of a permit to operate a bison capture facility in Montana and solicited public comment before issuing the permit and a FONSI. The existence of opposition does not automatically render a project controversial. http://caselaw.lp.findlaw.com/data2/circs/9th/0335474p.pdf
Heartwood v. United States Forest Service	No. 03-3267, 34 ELR 20083, 380 F.3d 428 (8th Cir. 2004)	Won	Adequacy of EA: Court upheld a lower court decision that the U.S. Forest Service's decision to approve harvesting timber in the Mark Twain National Forest did not violate NEPA. The Forest Service did not act arbitrarily and capriciously in determining that the project would have no significant impact on the environment. The EA thoroughly considered the potential impacts on endangered and threatened species, biological diversity, vegetation, riparian and soil resources, recreation, and migratory birds, as well as the future health of the forests in the project area. The agency is not required to prepare an EIS simply because it chose to issue a detailed EA that included EIS-like information about its decision process including a thorough discussion of proposed alternatives. http://caselaw.lp.findlaw.com/data2/circs/8th/033267p.pdf
High Sierra Hikers Association v. Blackwell	Nos. 02-15504 et al., 34 ELR 20084, 381 F.3d 886 (9th Cir. 2004)	Lost	Failure to comply with NEPA: Forest Service failed to prepare an EIS on the issuance of multiyear special-use permits to commercial packstock operators in the John Muir and Ansel Adams Wilderness Areas. The court held that this was a "major federal action" and that the Forest Service's failure to prepare an EIS violated NEPA. An EIS would be required particularly to address the cumulative impacts of the special-use permits. In addition, the Forest Service impermissibly characterized the one-year renewals of special-use permits as "categorical exclusions" outside the purview of NEPA. The Forest Service's own NEPA regulations preclude the use of a categorical exclusion for an action in a wilderness area. http://caselaw.lp.findlaw.com/data2/circs/9th/0215504ap.pdf

Case Name	Citation/ Federal Court	Agency Won/Lost	NEPA Issue/Holding
Lands Council v. Powell	No. 03-35640, 34 ELR 20073, 379 F.3d 738 (9th Cir. 2004)	Lost	Cumulative impacts: The Forest Service failed to take the requisite "hard look" under NEPA with respect to prior timber harvests and the project's impact on the Westslope cutthroat trout in an EIS for a timber harvest approved by the Forest Service as part of a watershed restoration project in the Idaho Panhandle National Forest. The cumulative impact analysis "should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment." In addition, a lack of up-to-date evidence on the habitat of the Westslope cutthroat trout prevented the agency from making an accurate cumulative impact assessment. http://caselaw.lp.findlaw.com/data2/circs/9th/0335640p.pdf
Environmental Protection Agency			
Citizens Alert Regarding the Environment v. Environmental Protection Agency	No. 03-5159, D.C. Cir. 2004 (unreported)	Won	Ripeness, limitations on actions before decision: Claim that EPA violated NEPA was not ripe for review because EPA was conducting the review and there was no final agency action. Nonfederal participants in federal actions need not themselves comply with NEPA; although the municipality arguably jeopardized its federal funding by proceeding with construction before EPA reached a decision on the grant request, nothing in NEPA prevents the municipality from taking that risk. [URL not available]
Federal Communications Commission			
EMR Network v. Federal Communications Commission	No. 03-1336, 34 ELR 20148, 391 F.3d 269 (D.C. Cir. 2004)	Won	NEPA compliance: The D.C. Circuit upheld the FCC's refusal to undertake rulemaking tightening the restrictions governing the nonthermal effects of radiofrequency radiation. The FCC's decision not to initiate an inquiry neither violated NEPA nor was otherwise an abuse of discretion. The "regulations having been adopted, there is no ongoing federal action." The FCC's reliance on other government agencies and non-governmental expert organizations with specific expertise on the health effects of radiofrequency radiation is not an improper delegation of its NEPA duties. And studies on the nonthermal effects of radiofrequency radiation are merely tentative and support the FCC's position of "watchful waiting." http://www.elr.info/litigation/vol34/34.20148.pdf
Federal Energy Regulatory Commission			
National Committee for the New River, Inc. v. Federal Energy Regulatory Commission	No. 03-1111, 34 ELR 20047, 373 F.3d 1323 (D.C. Cir. 2004)	Won	EIS sufficiency; supplementation: FERC complied with NEPA in approving an application for a certificate of public convenience and necessity to construct a pipeline extension through southwest Virginia and North Carolina. FERC's process for examining potential environmental impacts involved a "hard look" and any deficiencies in the DEIS were cured by the FEIS. Descriptions in the DEIS were sufficient to provide a "springboard for public comment." A supplemental EIS is only needed where new information provides a seriously different picture of the environmental landscape. [URL not available]