Logistics Management Institute

Challenges to the Adequacy of Environmental Impact Statements

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Executive Summary

A federal agency becomes subject to the National Environmental Policy Act (NEPA) whenever it proposes a "major action" that will "significantly affect" the environment. As a procedural statute, NEPA compels an agency to follow procedures, rather than prescribing the particular results an agency should achieve. If an agency's proposed action creates potential environmental consequences, then the agency must develop an environmental impact statement (EIS) that informs the public of the agency's plans, specifies the environmental consequences and lays out the agency's plan for dealing with them.

The scope and complexity of the EIS document offers numerous opportunities for outside parties to raise legal challenges over the adequacy of the EIS. This report summarizes the state of law on the subject of EIS adequacy.

Because of the framework established by NEPA, challenges generally aim at showing that prescribed procedures were not followed in a complete and adequate manner, rather than at the merits of the ultimate findings of the EIS. However, the actual procedural requirements are fairly clearly established and it is unlikely that a bona fide effort to complete an EIS would fail to meet the basic procedural requirements. In addition, the judiciary almost always defers to the expertise of the agency, so that agency findings of fact are normally ruled to be conclusive if supported by "substantial" evidence.

Analysis of the cases led to two principal conclusions:

- *Legal challenges are unlikely to succeed if the agency has prepared an EIS in good faith.* Because the procedures are fairly clear, and because courts defer to reasonable agency findings of fact and selection of method, achieving with the minimum standard is not difficult. Even when agency analyses are imperfect, courts have nonetheless upheld them as long as they were developed in good faith, to a reasonable standard, and met procedural requirements.

- *Some plaintiffs cannot be deterred from filing suits.* Many of the cases derive from challenges that are unsupported by law or are based on allegations that are clearly erroneous or disingenuous. At root, such challenges are generally based on opposition to an agency's proposed activities themselves. Such plaintiffs are not seeking an improved EIS; they seek a procedural hook and a sympathetic court that will issue an injunction against an agency's proposed activity using an environmental rationale. A well-prepared EIS, therefore, will prevent such plaintiffs from being successful, but it will not prevent them from bringing suit.

In view of these two conclusions, we advise against the practice of preparing exhaustive EIS documents that are designed not only to win, but to preclude, lawsuits. Such lawsuits cannot be deterred if the intention of the plaintiffs is not to win, but simply to engage in the lawsuits in order to achieve a delay, gain concessions, or obtain publicity. For such plaintiffs, the suit itself (rather than the ultimate ruling) constitutes victory.

Federal agencies in general, including the Army, should consider moving toward a strategy of developing EIS documents that are, in the words of one Army official, "*analytic*, not encyclopedic." Agency EIS documents must follow NEPA procedures, meet reasonable standards, and be developed in good faith, but they need not address every nuance of every issue whether relevant or not. Such EIS documents would help protect the environment, continue to withstand lawsuits, and greatly reduce the cost of preparing EIS documents.

Contents

Preface

This report is a technical summary only. It was prepared to identify the extent to which litigation under NEPA poses a major threat to Army activities. It does not provide detailed analyses of the court rulings. Nor does it establish approaches for the environmental practitioner in preparing NEPA documentation.

Chapter 1
The Legal Context of the National Environmental Policy Act

This report summarizes key National Environmental Policy Act (NEPA) cases to provide environmental practitioners with a baseline to help them prepare environmental impact statements (EISs).

NEPA Requirements in Brief

A federal agency becomes subject to NEPA whenever it proposes a "major action" that will "significantly affect" the environment.[1] NEPA is federal statutory law administered through rules and regulations. The governing regulations are published by the Council on Environmental Quality (CEQ).[2] Individual agencies also publish their own implementing regulations in other Code of Federal Regulations (CFR) sections and in internal instructions or directives.

The purpose of NEPA is to promote a policy encouraging harmony between humans and their environment.[3] The act rests on an underlying policy goal of protecting and promoting environmental quality. As a procedural statute, NEPA compels an agency to follow procedures, rather than prescribing the particular results an agency should achieve.[4] NEPA focuses on processes rather than on environmental results. Other laws, both federal and state, establish specific agencies' environmental performance requirements.

NEPA was designed, in the words of one court, "to prevent an agency from doing something uninformed, rather than something unwise."[5] In other words, a proposed action that has an environmental impact is not precluded, but the agency should make its decisions with complete information. NEPA does this through requiring an agency to engage in a process of assessing a situation to determine whether the potential for an environmental impact exists. CEQ procedures require an agency to take a "hard look" at the potential environmental consequences of its

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[1]National Environmental Policy Act of 1969, § 102, 42 United States Code (U.S.C.) § 4332 (1996).

[2]40 CFR §§ 1500–1508.

[3]*Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 193–94 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) [*hereinafter Citizens*], *citing* National Environmental Policy Act of 1969 § 101(a), 42 U.S.C. § 4331(a) (1991).

[4]*Citizens*, 938 F.2d at 193–94.

[5]*Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) [*hereinafter Methow Valley*].

decisions. If such a potential is found to reasonably exist, then the agency must develop an EIS that specifies the environmental consequences of proposed actions and informs the public of the agency's consideration of the issues.

NEPA requires an agency to include in its EIS an explanation of

- the proposed action;
- the alternatives to the proposed action;
- the proposed action's environmental impact;
- the inevitable, unavoidable, harmful, or adverse consequences that will occur if implementation of the proposal proceeds;
- the nature of the relationship between creating impacts on the environment in the short-term and long-term public productivity to be gained by the action; and
- the resources that will be irretrievably and irreversibly committed should implementation of the proposal proceed.

These elements comprise the EIS. The execution of each stage of the EIS incorporating these elements presents a potential source of litigation. Litigation is sometimes engaged in at stages prior to preparation of an EIS, notably in response to agency decisions that the proposed action does not create a reasonable or significant environmental impact and that therefore *no* EIS is required. However, until that point, the investment of the agency in the project is generally quite small. The cost of developing an EIS tends to be more than $500,000. The scope and complexity of an EIS offers several opportunities for interested parties to enter into litigation.

When an organization subject to NEPA, including DoD, completes an EIS pursuant to law, the EIS must be prepared in a particular manner: one that not only conforms to the letter of all published regulations, but is also in accordance with undocumented, but nonetheless generally accepted, standards of practice. However, a concerned party with "standing" (the right of a person or group to have their legitimate case or controversy heard) may challenge the "validity" (meaning the proper adherence to form and procedure) of an EIS.

LITIGATION STRUCTURE AND PROCESS

Plaintiffs who wish to sue under NEPA must have standing. The plaintiffs involved in NEPA litigation are typically environmental lobby groups, neighborhood associations, local civic organizations, and concerned individuals who took no part in the agency actions at issue. In order to claim that they have standing,

plaintiffs must satisfy a requirement of injury-in-fact, by alleging that the actions in question have caused, or (in the case of NEPA) will cause, these specific plaintiffs an actual or potential injury.

Plaintiffs also must satisfy two other requirements: "causation" (showing that the actions at issue are the responsibility of the defendant) and "redressability" (showing that the court action can remedy the injury).[6] In NEPA cases, plaintiffs often seek "equitable" remedies (i.e., injunctions to prevent or halt construction) rather than "legal" remedies (i.e., money damages).

Having satisfied these requirements, plaintiffs may bring suit, usually in a federal trial court (the district court), although in some cases (e.g., those involving Federal Aviation Administration airport expansion projects), plaintiffs may directly petition the federal appellate courts (circuit Court of Appeals) to review agency actions.

Evidence pertaining to the facts are adduced only in trial courts; appeals courts are not finders of fact. Normally, courts do not substitute their knowledge in contravention of true expertise found elsewhere—such as among the staff of a specialized agency. Agencies are given much discretion. When deciding controversies, agencies' findings of fact are normally conclusive if supported by "substantial" evidence. This point becomes extremely important when considering the course that NEPA cases have taken.

LAW THAT EMERGES FROM CASES

Some consider case law, the opinions of courts, to be the cornerstone of the law. A court hears a controversy and renders a decision. Case law (i.e., "common law") is actual law. The case becomes a precedent for other future controversies. This must be distinguished from statutes passed by the legislature, which are also law. A court's ultimate judgment emanates not only from its assessment of a particular set of facts and the law that should apply to those facts, but also from its interpretation of what that law means.

A full understanding of a body of law primarily evolves from an understanding of cases, statutes, and the agency rules and regulations that flesh out those statutes. Many cases, and particularly cases on appeal, focus on the interpretation of the ambiguities intrinsic to other cases, statutes, rules, and regulations. This is generally what occurs when courts decide whether an EIS is sufficient or insufficient for some particular reason, under a particular set of factual circumstances.

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[6]Daniel R. Mandelker, *NEPA Law and Litigation*, pp.4-15 to 4-16 (1994).

Chapter 2
Opportunities to Challenge Environmental Impact Statements

The first principle to understand in reviewing the case history under NEPA is a simple one: the plaintiffs bear the burden of proving the inadequacy of an EIS.[1] This they attempt to do in a number of ways.

Because NEPA is largely devoted to specifying procedures, the use of NEPA to mount a challenge to an agency's action must be addressed largely to procedural issues. This chapter reviews the range of NEPA-related issues that have been the basis for challenges, in the order in which they normally arise in the typical EIS development process:

- the proposed action;
- alternatives to the proposed action;
- environmental impacts of the proposed action;
- actions to avoid or mitigate those environmental impacts; and
- public involvement in the assessment process.

The rulings have been selected to portray the current state of the law. Cases are referred to in this chapter as if their contents were generally known. Because these key cases address several issues at once, to restate the relevant facts in each section of this chapter would have resulted in an interweaving of case summaries and generalized conclusions that would have been quite hard to follow. The cases used in this chapter are therefore presented in brief form in Appendix A to provide an integrated discussion of all the facts surrounding a case at the same time, and in this chapter the cases are referred to only in the amount of detail needed to illustrate the point under discussion.

In general, a court studies three aspects of an EIS to determine its adequacy:

- Did the agency take a good faith, hard look at the environmental impacts of its proposed project and the alternatives to the project?

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[1] *Sierra Club* v. *Froehlke*, 816 F.2d 205, 213 (5th Cir. 1987).

- Does the EIS contain sufficient detail to enable someone who took no part in the preparation of the EIS to understand the relevant environmental consequences?

- Can the agency make a reasoned choice among the alternatives on the basis of discussion of alternatives in the EIS?[2]

If an agency can meet these tests, it will almost invariably win its case.

STATEMENT OF THE PROPOSED ACTION

The EIS must include a statement of the action that is proposed, to include a rationale for undertaking it and sufficient description of the action to permit the follow-on assessment of whether it will have environmental impacts. Of course, if the action itself is outside the agency's authority, it can be challenged on that basis. If the action to be undertaken is described incorrectly, or in misleading terms, then the associated impact assessment can be considered inadequate. Challenges have questioned an agency's authority to undertake the project in the first place, the process by which the project decision was reached, and whether the definition of the project artificially segments the project to make it appear less significant than is really the case.

Agency Lacks Authority

Plaintiffs may challenge an action (using the information provided in the EIS) in that the agency exceeded its authority. In *State of Missouri ex rel. Ashcroft* v *Dept. of the Army*,[3] (hereafter *Ashcroft II*), the plaintiffs claimed that in formulating the project the Corps of Engineers (COE) had sacrificed flood control, the project's primary purpose, and substituted a power-generating purpose. The court found that flood control was an important, but not the sole, reason for the project.[4] Further, Congress had received COE reports and testimony to support the proposed solution, and then had appropriated funds to finance COE's proposal; this demonstrated Congress' active role in designing and implementing the solution.[5]

Inadequate Decision-Making Approach

Ashcroft II provided additional arguments that, because COE planning and decision-making processes did not use a systematic interdisciplinary approach, the resulting consideration of environmental issues could not have met the standards

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[2] *Id.* at 212.

[3] 672 F.2d 1297 [*hereinafter Ashcroft II*].

[4] *Id.*

[5] *Ashcroft II*, 672 F.2d at 1301.

expected by NEPA.[6] The court observed that COE had engaged a variety of experts in formulating its EIS and that this provided evidence of a systematic, interdisciplinary approach to the assessment.

Improper Segmentation

Plaintiffs may challenge an EIS's adequacy on the grounds that an agency has improperly segmented a project (i.e., treated as separate actions a series of projects that should have been treated as part of a larger proposed action with presumably greater cumulative impacts).

In *Communities, Inc.* v. *Busey,*[7] the plaintiffs alleged that the Federal Aviation Administration (FAA), in treating the destruction of nearby neighborhoods as inevitable, engaged in improper "segmentation," acting as though part of the proposed action was a separate project.[8] The court found that FAA did not engage in segmentation because it *had* provided an environmental analysis related to the loss of the neighborhoods. The court also noted that the local government had demonstrated its commitment to demolition of the neighborhoods whether or not the airport expansion took place.

DISCUSSION OF THE ALTERNATIVES

Plaintiffs most commonly challenge an EIS on the grounds of an inadequate discussion of alternative actions, the "heart of the EIS."[9] The judicial focus on that discussion makes it important for an agency subject to pay close attention to the EIS's discussion of alternatives to the proposed major federal action.

Alternatives may be characterized as either primary or secondary. A primary alternative directly substitutes for the agency's proposed action. In effect, it renders the action unnecessary. A secondary alternative concedes that the agency should execute the proposed action, but in a more environmentally friendly manner (e.g., by changing the location of the project or carrying it out in a different way).[10]

NEPA does not contain a judicial review standard dealing with the adequacy of an EIS. Instead, a court reviewing the adequacy of an EIS uses a common law standard and considers whether the agency has carried out its procedural duty.[11] A reviewing court's role is not to tell the agency what decision it should have made

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[6]*See* National Environmental Policy Act §§ 102(2)(A), (C), 42 U.S.C. §§ 4332(2)(A), (C) (1996).

[7]956 F.2d 619 [*hereinafter Communities*].

[8]*Id.* at 626.

[9]*Citizens*, 938 F.2d at 194, *citing* Council on Environmental Quality (CEQ) Regulations, 40 CFR § 1502.14 (1991) [*hereinafter* CEQ Regulations].

[10]Mandelker, *supra* note 1 at 9-52 to 9-53.

[11]*Id.* at 10–17.

regarding a project, but simply to ensure that the agency has followed proper procedures.[12]

The U.S. Supreme Court has ruled that courts should use the "rule of reason" as a guide in deciding which alternatives the agency must discuss.[13] The rule of reason has been codified in CEQ regulations.[14] Lower courts have interpreted this to mean that agencies *must* consider secondary alternatives, though generally they do not require agencies to consider primary alternatives.[15]

NEPA does not define the meaning or scope of the word "alternatives." However, the law does not expect an agency to consider every conceivable alternative; such a requirement would render development of an EIS unwieldy and virtually useless. Under the requirements of NEPA, the agency must consider only the "reasonable" alternatives. The agency need only briefly discuss other alternatives presented, stating why they were rejected.[16]

In deciding what constitutes a reasonable alternative, an agency must remember that a discussion of alternatives should rest on "some notion of feasibility."[17] The CEQ regulations reiterate the need for an agency to discuss only feasible or reasonable alternatives.[18] Reasonable alternatives are those which are both feasible and nonspeculative.[19] Courts in most NEPA cases limit the discussion of alternatives to those related to the purpose of the proposed action; some courts take the position that limiting the discussion in this way amounts to an application of the rule of reason.[20] As a result, a reasonable alternative is one that "will bring about

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[12]*Citizens*, 938 F.2d at 194, *citing Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97–98 (1983).

[13]*Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978); *see also* Mandelker, *supra* note 1 at 9-38. In a minority of courts, a statutory objectives test is preferred to the rule of reason. The statutory objectives test requires that the "alternatives be defined by the statutory objectives of the legislation under which the federal action was proposed." *Id.* at 9-48. Critics believe the statutory objectives test provides more guidance than the rule of reason.

[14]CEQ Regulations, 40 CFR § 1502.14 (1996).

[15]Mandelker, *supra* note 1 at 9-39, 9-52 to 9-54. The cases that do require agencies to consider primary alternatives have been decided in the Second and Ninth Circuits.

[16]CEQ Regulations, 40 CFR § 1502.14(a) (1996).

[17]*Citizens*, 938 F.2d 190, 195, *citing Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978).

[18]*Citizens*, 938 F.2d at 195, *citing* 40 CFR §§ 1502.14(a)–(c), 1508.25(b)(2) (1991); see *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 *Federal Register*, 18,026 (1981).

[19]*N. Buckhead*, 903 F.2d 1533, 1541, *citing Piedmont Heights Civic Club, Inc.* v. *Moreland*, 637 F.2d 430, 436 (5th Cir. 1981); *see also Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978).

[20]Mandelker, *supra* note 1 at 9-48 to 9-49. *See also* Fisch, "*Citizens Against Burlington, Inc.* v. *Busey*: Defining Reasonable Alternatives to Be Examined in a NEPA-Required Environmental Impact Statement," 22 Real Estate L.J. 32 (1993); Note, "The Narrowing of the Scope of NEPA's Alternatives Analysis," 6 Tul. Envtl. L.J. 179 (1992).

the ends of the federal action."[21] This implies that the goals and purpose of the proposed action define the set of reasonable alternatives that the agency must consider.

Thus, an agency in search of reasonable alternatives may first try to define its goals for the proposed action. When, in doing so, it takes relevant factors into account, these will necessarily direct it to a range of reasonable goals. Relevant factors include the needs and goals of other parties involved in the application[22] and the views of Congress expressed in the enabling legislation giving the agency authority to act and in other relevant statutes. Relevant factors will lead to reasonable goals, which, in turn, will lead to reasonable alternatives.[23]

A court will uphold an agency's choice of goals to be achieved by the proposed action so long as the goals are reasonable. The agency must not define the goals so narrowly that the agency's proposed action provides the only way to achieve them, in effect reducing the EIS to a mere formality. On the other hand, the agency must not define the goals so broadly that the resulting number of alternatives is so large the agency has no hope of considering them all in sufficiently reasonable detail, thus forestalling any further progress on the project.[24]

However, since the agency bears the responsibility for defining the goals of a proposal, the agency must ultimately decide for itself which alternatives to discuss.[25] A court then will uphold an agency's choice of alternatives, so long as the alternatives are reasonable and the agency has considered them in reasonable detail.[26] Thus, the agency should draw guidance from the rule of reason, which suggests "both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them."[27]

As long as an agency acts reasonably in selecting goals, a court will uphold the agency's definition of its goals. As long as an agency selects reasonable alternatives and discusses them in reasonable detail, a court will uphold the agency's discussion of alternatives.[28]

The subsections below summarize some cases that address legal problems emanating from inadequate discussion of alternatives in an EIS.

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[21] *Citizens*, 938 F.2d at 195.

[22] *Id.* at 196 ("When an agency is asked to sanction a specific plan . . . the agency should take into account the needs and goals of the parties involved in the application.").

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 195, *citing Alaska* v. *Andrus*, 580 F.2d 465, 475 (D.C. Cir.), *vacated in part as moot sub. nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978) (emphasis in the original).

[28] *Id.* at 196.

"Missing" Alternatives

Plaintiffs may claim the discussion of alternatives in an EIS is inadequate because alternatives that should have been included in the discussion are missing altogether.

In *Citizens Against Burlington, Inc.* v. *Busey*,[29] the plaintiffs claimed that the EIS was inadequate because it omitted altogether an alternative that the plaintiffs preferred and because FAA had dismissed without explanation some of its own feasible alternatives. The EIS did address in detail only two alternatives: the proposed action and no action.[30] However, in dismissing other alternatives as infeasible or imprudent, FAA had explained itself (although not at length); the evaluation of the alternatives was exhaustively presented in the administrative record, which was the basis for the conclusions of infeasibility. With regard to the plaintiff's own alternative, the plaintiff had the obligation of proving that any proposed alternative would cause less environmental damage and meet the agency objectives: in this case, the proposed alternative would have caused equal damage and did not meet the objectives.

In *Valley Citizens for a Safe Environment* v. *Aldridge*[31] the plaintiffs alleged that the U.S. Air Force (USAF) EIS did not take into account any alternatives other than transferring planes from one base to another.[32] In fact, the USAF had considered several alternatives, but rejected them for documented mission reasons.[33] Although the agency must consider any significant alternative submitted during the public comment period,[34] the only relevant public comments generated were those recommending that the planes take off and land over the water, alternatives already established to be impractical because of operational constraints.[35]

In *Ashcroft II*,[36] the plaintiffs argued that the COE violated NEPA because its EIS did not fully consider reasonable alternatives, specifically operating the generator as a run-of-the-river plant, even though that would produce far less hydropower. The evidence established that the generator would not operate effectively or eco-

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[29]938 F.2d 190.

[30]*Id.* at 198.

[31]886 F.2d 458 (1st Cir. 1989) [*hereinafter Valley Citizens*].

[32]*Id.* at 461.

[33]*Id.*

[34]*Id.* at 462, *citing Roosevelt Campobello Int'l Park* v. *U.S. Env'tl. Protection Agency*, 684 F.2d 1041, 1047 (1st Cir. 1983).

[35]*Valley Citizens*, 886 F.2d at 462, *citing Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978).

[36]*Ashcroft II*, 672 F.2d 1297 (8th Cir. 1982).

nomically at the lower flow rate; therefore, the court ruled that the plaintiffs' alternative was not reasonable.[37]

Discussion of Alternatives Is Too Brief

Plaintiffs may claim an EIS is inadequate because the discussion of alternatives is too brief. CEQ regulations, of course, urge brevity, although not at the expense of sacrificing relevant material.

In *Valley Citizens*,[38] plaintiff argued that the discussion of alternatives was, on its face, too short and did not meet the standard that would have been expected in more routine agency proposals such as construction of a power plant or a bridge. The court noted that USAF was *not* proposing to build a power plant or a bridge, but simply to relocate existing aircraft; it ruled that the facts of each case, not the length of the document, determine the adequacy of the discussion.[39]

In *Holy Cross Wilderness Fund* v. *Madigan*,[40] the plaintiff argued that COE's treatment of two alternatives in its EIS was too brief. The court found that one of the alternatives was a variant of an earlier alternative that COE *had* discussed in detail. The second alternative was speculative and involved too many uncertainties, making it difficult to discuss in detail as well as a reasonable candidate for rejection.[41]

Inadequate Set of Alternatives

Plaintiffs may challenge an EIS on the basis of a claim that the agency has defined the goals of a proposed action too broadly, with the result that analysis in the EIS suffers under the weight of too many alternatives or (more likely) that the agency has defined the goals too narrowly, consequently limiting the number of alternatives considered. Plaintiffs may also challenge an EIS on the basis of a claim that the agency either failed to consider relevant factors (or took into account irrelevant factors) in designing the goals of the proposed action, with the result that the EIS discusses an inappropriate set of alternatives.

In *North Buckhead Civic Association* v. *Skinner*,[42] plaintiffs argued that FHWA defined the needs and purposes of the project so narrowly that the only alternative that could possibly meet them was the one FHWA selected, even though other

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[37]*State of Missouri. ex. rel. Ashcroft* v. *Dept. of the Army*, 526 F.Supp. 660, 674 (W.D.Mo. 1980).

[38]886 F.2d 458.

[39]*Id.* at 463, *citing Manygoats* v. *Kleppe*, 558 F.2d 556 (10th Cir. 1977); *Sierra Club* v. *Lynn*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

[40]960 F.2d 1515 (10th Cir. 1992) [*hereinafter Holy Cross*].

[41]*Id.* at 1528.

[42]903 F.2d 1533.

acceptable and feasible alternatives were available. FHWA had collaborated with several agencies on the project, and had used their models to show that the plaintiff's preferred smaller-scope alternative would not have reached the objective of decreasing congestion and was therefore not reasonable. Nor had plaintiff shown that their alternative was any better, simply relying on an adage that mass transit, in general, causes less harm to the environment than a multilane highway.[43]

In *Northwest Coalition for Alternatives to Pesticides (NCAP)* v. *Lyng,*[44] plaintiffs challenged a Bureau of Land Management (BLM's) plan to use herbicides to control noxious weeds.[45] BLM had considered four alternatives in its EIS, selected the only one that included herbicide spraying because of its flexibility and effectiveness, and cited the minimal adverse impacts of herbicides on animals and non-weed vegetation. The plaintiffs claimed that the EIS documents were inadequate because they failed to include an alternative that would examine the causes of weed growth and seek to control it by manipulating grazing practices, using herbicides only as a last resort. The court ruled that plaintiff's argument was a disagreement over policy, not procedure.

DISCUSSION OF ENVIRONMENTAL IMPACTS

Plaintiffs may attack the adequacy of an EIS on the basis of its discussion of the environmental impacts of the proposed major federal action. NEPA requires an agency to analyze a proposed action's impact on the environment and identify unavoidable adverse consequences of that action and of alternative actions.[46] The CEQ regulations have eliminated the requirement for a "worst-case" analysis,[47] now requiring that the agency summarize "existing credible scientific evidence which is relevant to evaluating the . . . adverse impacts" and evaluate these impacts using generally accepted scientific research methods or theoretical approaches.[48]

When plaintiffs challenge an EIS's discussion of environmental impacts, the court will hold the agency to the "arbitrary and capricious" standard (i.e., invalidating the agency's decision if it has acted in an arbitrary and capricious manner)[49] to ascertain that the agency has taken a hard look at the environmental impacts.[50] The CEQ regulations require an EIS to discuss fully and fairly the proposed ac-

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[43] *Id.* at 1542.

[44] 844 F.2d 588 (9th Cir. 1988) [*hereinafter NCAP*].

[45] *Id.* at 589.

[46] National Environmental Policy Act of 1969, § 102(C), 42 U.S.C. § 4332(C) (1996).

[47] CEQ Regulations, 40 CFR § 1502.22 (1996).

[48] CEQ Regulations, 40 CFR § 1502.22(b) (1996).

[49] Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1996).

[50] *Valley Citizens*, 886 F.2d 458, 459.

tion's significant environmental impacts "in proportion to their significance."[51] However, "if the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[52]

Generally, a court will take a "hard look" at the adequacy of an EIS to determine whether, at the very least, the EIS fully discloses the environmental impacts of the proposed action.[53] When a court rules an EIS inadequate, plaintiffs' remedies include having the agency prepare either a new EIS or a supplemental EIS (SEIS).[54] However, as long as an agency sufficiently identifies and evaluates the environmental impacts of its proposed action, a court will not rely on NEPA to prevent the agency from deciding that the benefits of the proposed action outweigh its environmental costs and going forward with the project.[55]

A cost-benefit analysis normally is part of the evaluation process. While the courts have not interpreted NEPA to require a formal quantified cost-benefit analysis, section 102(2)(B) directing federal agencies to develop procedures "which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations" lends support to the view that NEPA requires some sort of quantified cost-benefit analysis.[56]

Adoption of Another Agency's EIS

Plaintiffs have challenged an EIS as inadequate on the basis of the fact that the agency did not prepare the EIS or supporting data itself, but rather adopted documents of another agency. The CEQ regulations provide that one agency may adopt another's EIS as its own if the adopted EIS is adequate.[57]

In *Holy Cross Wilderness Fund* v. *Madigan,*[58] plaintiff asserted that COE violated NEPA when it issued a permit to construct a water project in a wilderness area without completing a wetlands study. COE made its decision using the partial information available through an earlier U.S. Forest Service (USFS) EIS, and issued the permit on condition that the applicants perform the additional studies and

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[51]CEQ Regulations, 40 CFR §§ 1502.1, 1502.2(b) (1996); *see* National Environmental Policy Act of 1969 § 102(2)(C)(i), (ii), 42 U.S.C. § 4332(2)(C)(i), (ii) (1996).

[52]*Methow Valley*, 490 U.S. 332, 350.

[53]Mandelker, *supra* note 1 at 10–18.

[54]*Id.*

[55]*N. Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1540 (11th Cir. 1990) [*hereinafter N. Buckhead*], *citing Sierra Club* v. *Morton*, 510 F.2d 813, 820 (5th Cir. 1975).

[56]Mandelker, *supra* note 1 at 10–44.

[57]CEQ Regulations, 40 CFR § 1506.3(a) (1992).

[58]960 F.2d 1515.

develop mitigation plans.[59] COE use of the USFS EIS was acceptable because the EIS explicitly considered the impact of the project on wetlands; issuing a conditional permit provided COE with a way to guarantee that the applicants would mitigate the impacts.[60] The court rejected the plaintiff's contractor's notification of the COE that there was insufficient information to determine the project's adverse environmental impact on wetlands as a basis for invalidating the earlier study; it ruled that the agency has "discretion to rely on the reasonable opinions of its own qualified experts" in the event of conflicting views.[61]

In *NCAP*,[62] plaintiff challenged the EIS assessment that a herbicide would have no significant environmental impact, saying that the fact that a herbicide had been registered by the US EPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) did not mean that it had no adverse impacts. The court did concur with the plaintiffs on this point and established that to comply with NEPA, an agency must independently study the safety of the proposed herbicide.[63] In fact, in its EIS, BLM had stated that the EPA and FIFRA data were insufficient and had reviewed other studies. The EIS had also specifically examined the effects of the herbicide by applying the available data.

Incorrect Description of Environmental Impacts

Plaintiffs may challenge the adequacy of an EIS's discussion of environmental impacts of the proposed action by claiming that the EIS incorrectly describes environmental impacts.

In *Valley Citizens*,[64] plaintiff alleged that the USAF had failed to account for increases in levels of nitrous oxide that would result from the proposed action. The court declared that the plaintiff "may not use minor lapses in the statement as an excuse to thwart actions that it believes to be unwise . . . or require of the discussion a degree of detail too exacting to be realized."[65] The court found that the parties had used two different but generally accepted estimating methods. In this case, the court itself was able to resolve the computational differences, but noted that in any case it would have automatically deferred to the proposing agency on the choice of method.[66]

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[59] *Id.* at 1519.

[60] *Id.*

[61] *Id.* at 1527, *citing* 490 U.S. at 378 [*hereinafter Marsh*].

[62] 844 F.2d 588.

[63] *Id.* at 596, *citing S. Or. Citizens Against Toxic Sprays* v. *Clark*, 720 F.2d 1475, 1980 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984).

[64] 886 F.2d 458.

[65] *Id.* at 463–64, *citing Commonwealth of Mass.* v. *Andrus*, 594 F.2d 872, 884 (1st Cir. 1979); *Conservation Law Found.* v. *Andrus*, 623 F.2d 712, 719 (1st Cir. 1979) ("a minor deficiency in an EIS does not entitle the court to disregard the deference the agency is entitled to").

[66] *Id.* at 466, *citing Commonwealth of Mass.* v. *Andrus*, 594 F.2d at 886.

Inadequate Scientific Method

Plaintiffs may claim that an EIS's discussion of environmental impacts is inadequate because it uses an inadequate scientific method to assess the impacts.

In *Burlington*,[67] the plaintiff argued that FAA had made up its own methodology in lieu of using the methodology established by EPA for calculating noise impacts. Although this was true, the FAA had described its method and, at EPA's request, had added a second method. Additionally, the fact that EPA participates in the preparation of an agency's EIS, as it did here, does not signify that the agency must take orders from EPA, rather that the agency need only take EPA's suggestions seriously, as FAA did in this case.[68]

In *Valley Citizens*,[69] plaintiff challenged the scientific method that the USAF used to estimate the numbers of people affected by increased noise. The USAF had estimated the impact using National Academy of Science (NAS) guidelines; the plaintiff's expert witness alleged that these estimates ignored or understated certain effects. The court found that many other federal agencies—including the EPA and FAA—used and endorsed the NAS methodology; it was also discovered that the NAS guidelines did in fact address plaintiff's concerns. Procedurally, the plaintiff's expert had merely criticized USAF's methodology, without suggesting an alternative, and the issue had not been raised during the comment period on the draft EIS.[70] Finally, the discretion to choose an EIS methodology rests with the proposing agency.

In *Communities*,[71] plaintiffs argued that FAA made an arbitrary and capricious choice of methodology when measuring the noise impact of the project. The court pointed out that selection of a particular scientific testing method was a matter falling within an agency's discretion.[72] The court also noted that EPA criticism of an agency's methods did not necessarily indicate that the agency erred, especially where (as in this case) the agency then attempted to use an EPA-sanctioned method but found that method lacking. Even so, the court would not presume to tell FAA which method was better.[73]

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[67]938 F.2d 190.

[68]*Id.* at 200.

[69]886 F.2d 458.

[70]*Id.* at 469.

[71]956 F.2d 619.

[72]*Id.* at 624, *citing Citizens*, 938 F.2d at 201; *Valley Citizens*, 886 F.2d at 469; *C.A.R.E. Now, Inc.* v. *Fed. Aviation Admin.*, 844 F.2d 1569, 1573 (11th Cir. 1988); *Suburban O'Hare Community* v. *Dole*, 787 F.2d 186, 197 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986).

[73]*Communities*, 956 F.2d at 624.

In *North Buckhead Civic Association* v. *Skinner*,[74] plaintiff alleged that figures in the administrative record did not support the traffic projections and environmental studies in the EIS.[75] Actually, the traffic projections were drawn from modeling systems of another agency and industry standards, which the plaintiff argued did not account for the effects of mass transit. Further, the plaintiff argued that the EIS failed to evaluate environmental impacts outside the project's immediate construction area (the EIS did, however, incorporate by reference other studies about the impact outside the project corridor). The court ruled that the plaintiff bears the burden of proving that the data's underlying assumptions were wrong. Additionally, the plaintiff failed to suggest any other acceptable methodology or specify the errors in the assumptions. The court left the decision on study methods to the discretion of the agency.[76]

Failure to Take a "Hard Look" at Environmental Impacts

Plaintiffs may challenge the adequacy of an EIS's discussion of environmental impacts by claiming the agency failed to take a good faith, hard look at the environmental impacts associated with the project.

In *Sierra Club* v. *Froehlke*,[77] the plaintiff and COE agreed that a water project would create an adverse impact on marsh life but they disagreed on the severity of the effect. Plaintiff did not perform studies to support their claims, but rather used educated speculation.[78] Even without that, the court characterized the dispute as a "scientific disagreement among experts" not reviewable by the courts.[79] A difference of opinion among experts by itself does not render an EIS inadequate.

Plaintiff also argued that COE should have conducted mathematical modeling of the project's effect on salinity levels (this is ironic in that plaintiffs had not done any modeling at all); COE had decided that the change in salinity was expected to be so small that mathematical modeling "would have been a waste of time and money."[80] The courts do not require an agency to use every scientific technique available when studying the environmental impacts of a proposed action because doing so would engage the court in "the kind of nit-picking courts should avoid."[81]

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[74]903 F.2d 1533.

[75]*Id.* at 1535–36.

[76]*Id.* at 1543.

[77]816 F.2d 205.

[78]*Id.* at 213–14.

[79]*Id.* at 214.

[80]*Id.*

[81]*Id.*

In *Ashcroft* v. *Dept. of the Army*,[82] (hereafter *Ashcroft I*), plaintiffs argued that the EIS did not adequately portray the environmental impact of the proposed solution, particularly erosion effects. The district court agreed that erosion stood out as the project's most important potential downstream environmental effect.[83] Experts at trial disagreed as to whether aerial photographs showed erosion or simply an absence of plant cover.[84] In any event, the EIS had addressed an increase in erosion and was ruled to be adequate.

Facts Omitted/Misrepresented in Bad Faith to Favor One Alternative

Plaintiffs may claim that the discussion of environmental impacts in an agency's EIS is inadequate because facts have been omitted or misrepresented, making one alternative appear more attractive than the others.

In *Town of Fenton* v. *Dole*,[85] plaintiffs alleged that the EIS omitted the potential for impacts to farmland. In fact, although several Federal agencies objected to the action alternative because the draft EIS had suggested adverse effects on commercial farmland, the land in question was confirmed by the state agricultural agency to have only "hobby farm" status and hence not to be protected farmland; nonetheless, the record of these objections was retained in the final EIS. The court agreed that the EIS must not sweep potential problems under the rug;[86] however, in this case the EIS comment process had resulted in a correction to faulty data, as it was intended to do.

Discussion of Specific Environmental Impacts Missing

Plaintiffs may challenge an EIS on the grounds that its discussion of environmental impacts is inadequate because it simply lacks (as opposed to trying to obfuscate) a discussion of certain environmental impacts.

In *Valley Citizens*,[87] plaintiff argued that an EIS lacked a discussion of environmental impacts associated with a transfer of planes to one of the five bases addressed in the study. However, all of the alternative bases failed to meet the non-environmental criteria and would not have been used, even assuming no adverse environmental impact whatsoever. USAF's EIS did discuss the reasons for elimi-

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[82]672 F.2d 1297.

[83]*Ashcroft I*, 526 F.Supp. 660, 660–61.

[84]*Id.* at 671.

[85]792 F.2d 44 (3d Cir. 1986) [*hereinafter Fenton II*].

[86]*Id.* at 574, *citing Sierra Club* v. *United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983).

[87]886 F.2d 458.

nating the five alternative locations; during the public comment period, no one had suggested that USAF elaborate on its reasoning in greater detail.[88]

In *Communities*,[89] plaintiffs argued that the EIS omitted the adverse environmental impacts of re-opening a road in the future. The proposed action plan outlined in the FEIS called for closing a road for at least 10 years, and provided no indication of intent to reopen or rebuild the road. The court ruled that if an event is so remote as to be unlikely to occur, an agency does not have to address the issue in its EIS.[90]

Plaintiffs also alleged that FAA failed to take into account the adverse environmental impacts associated with the destruction of three neighborhoods called for by the airport expansion project; however, the city had begun its program of urban renewal (which included the demolition) long before anyone contemplated expanding the airport.[91]

DISCUSSION OF ACTIONS TO AVOID OR MITIGATE ACKNOWLEDGED ENVIRONMENTAL IMPACTS

The final step in the preparation of an EIS document is to establish the ways that acknowledged environmental impacts will be avoided or compensated for (mitigated). This discussion, obviously, attracts a great deal of attention since it acknowledges the potential for impact. Plaintiffs may try to challenge the adequacy of an EIS on the basis of its lack of a mitigation plan or the adequacy of the plan that is presented.

In *Robertson* v. *Methow Valley Citizens Council*,[92] the plaintiffs argued that the EIS lacked a specific mitigation plan. A discussion of mitigation measures is required by CEQ regulations; [93] however, CEQ regulations do not require an agency to develop and adopt a complete plan of mitigation. The court pointed out that a mitigation plan might fall under the jurisdiction of some other agency, hindering the ability of the proposing agency to act unless the other agency developed and adopted a mitigation plan, too.[94] In *Communities*,[95] plaintiffs made the identical argument;, the court invoked *Robertson* as a precedent and held that an agency need not include a complete plan of mitigation in its EIS.[96]

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[88]*Valley Citizens*, 886 F.2d at 462.

[89]956 F.2d 619.

[90]*Id.* at 626.

[91]*Id.*

[92]490 U.S. 332.

[93]*Methow Valley*, 490 U.S. 332, 351.

[94]*Id.* at 352.

[95]956 F.2d 619.

[96]*Id.* at 625–26.

RESPONSE TO PUBLIC INVOLVEMENT

Because the purpose of NEPA is to ensure that federal agencies make informed decisions with full consciousness of relevant environmental issues, there are several provisions for the involvement of the public and of other organizations during the impact assessment process. Agencies must therefore provide adequate notice, must provide a vehicle for input, and must demonstrate some degree of responsiveness to the inputs received. Failure to do so can be the subject of challenges to the EIS.

Failure to Prepare a Supplemental EIS in Response to Comment

According to the CEQ regulations, an agency must prepare a Supplemental EIS (SEIS) either when the agency makes a substantial change to the proposed action or when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[97] An agency must also prepare an SEIS if changes to the proposed action introduce significant environmental impacts not addressed in the EIS.[98] The rule of reason, and the arbitrary and capricious standard of the Administrative Procedure Act, govern an agency's decision to prepare an SEIS, much as they do an agency's decision to prepare an EIS.[99] An agency applying the rule of reason must look at "the value of the new information to the still pending decision-making process."[100] When a matter involves a factual dispute whose resolution requires technical expertise in analyzing relevant documents in the record, a court, in its search for an answer, will defer to an agency's discretion. Thus, as long as an agency does not act in an arbitrary or capricious manner in deciding to forego preparation of an SEIS, the court will not set aside the agency's decision.[101]

Plaintiffs may challenge an EIS's adequacy on the basis of an agency's failure to prepare a supplemental EIS (SEIS).

In *Marsh* v. *Oregon Natural Resources Defense Council*,[102] plaintiffs argued that COE should have prepared an SEIS following the revelation of new information (an internal memorandum from COE scientists indicating some non-concurrence with the earlier findings, and a study by the plaintiff indicating some impacts not addressed in the original EIS).[103] In fact, COE did not learn of the existence of a

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[97]CEQ Regulations, 40 CFR § 1502.9(c)(1) (1996).

[98]*Id.* at 62.

[99]*Marsh*, 490 U.S. at 373; Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1996).

[100]*Marsh*, 490 U.S. at 374.

[101]*Id.* at 377.

[102]490 U.S. 360 (1989).

[103]*Id.* at 368.

dissenting opinion until after the lawsuit had been filed; soil surveys had generated no pretrial concern; and the plaintiffs' impact allegation was not based on new facts but only on speculation using an unvalidated model.[104] The Supreme Court ruled this to be not a factual dispute but a dispute over the agency's expertise.[105]

In *Hickory Neighborhood Defense League* v. *Skinner,*[106] plaintiff challenged failure to prepare an SEIS after plaintiffs had identified historic buildings in addition to those noted in the EIS. The EIS had, however, dealt directly with the adverse impact of the project on two of the listed properties, and more generally had addressed impacts on the historic buildings, environment, economy, and history of the area.

Failure to Consult With, or Improperly Excluding, Other Appropriate Agencies

Plaintiffs may challenge the adequacy of an EIS on the grounds that the agency did not consult with, or obtain input from, other appropriate agencies—or excluded an agency that should have participated in the process.

In *Ashcroft I,*[107] plaintiffs argued that COE failed to consult with and obtain the comments of related federal agencies.[108] The record showed that COE *had* consulted with and obtained comments from the appropriate federal, state, and local agencies, and their comments on the draft EIS were included in the FEIS, together with COE's response to those comments.[109] This is the most obvious of several examples from which one can conclude that the plaintiffs do not have to have either a supportable case or regard for obvious facts in order to make allegations and file lawsuits.

In *North Buckhead,*[110] plaintiff claimed FHWA had improperly excluded an agency, the Urban Mass Transit Agency (UMTA), that should have been part of the EIS development process. Although that agency had initially participate in the scoping and review, and provided comments, it later withdrew from the process as an EIS sponsor because it did not have the time and did not have jurisdiction. In this case, FHWA had invited UMTA into the process, and continued to cooperate with the local government (which did have jurisdiction over the issue).[111]

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[104] *Id.* at 379–81.

[105] *Id.* at 376.

[106] 893 F.2d 58 (4th Cir. 1990) [*hereinafter Hickory*].

[107] 672 F.2d 1297.

[108] *See* National Environmental Policy Act §§ 102(2)(A), (C), 42 U.S.C. §§ 4332(2)(A), (C).

[109] *Ashcroft I,* 526 F.Supp. at 676.

[110] 903 F.2d 1533.

[111] *Id.* at 1545.

Improper Notice or Failure to Give Notice

Under the CEQ regulations, an agency proposing an action must fulfill the following scoping (i.e., notice) requirements:

- Publish notice of the project.[112]
- Ask the public to participate in scoping the project.[113]
- Encourage public meetings to discuss project goals.[114]

Plaintiffs may claim that an agency's EIS is inadequate because plaintiffs, due to improper notice, were not given sufficient opportunity to participate in the NEPA process.

In *NCAP*,[115] plaintiff claimed BLM failed to give them adequate notice of public hearings on the EIS by failing to issue a personal invitation; although they were able participate in the SEIS, that did not make up for their lack of participation in the FEIS.[116] The court sided with plaintiff in this instance because plaintiff had been a party in prior litigation seeking to enjoin BLM's actions and so was clearly an interested party. However, the EIS was not set aside because the court also found that, despite the tardy invitation, plaintiff *did* participate in the FEIS, as evidenced by the fact that the FEIS incorporated its July 1985 comments.[117]

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[112]CEQ Regulations, 40 CFR § 1508.22 (1996).

[113]CEQ Regulations, 40 CFR § 1501.7(a)(1) (1996).

[114]CEQ Regulations, 40 CFR § 1501.7(b)(4) (1996).

[115]844 F.2d 588.

[116]*NCAP*, 844 F.2d at 594.

[117]*NCAP*, 844 F.2d at 596.

Chapter 3
Conclusions and Recommendations

In this chapter, we review the reasons for plaintiffs' challenges and the general findings of law related to the adequacy of EIS preparation. We also provide general conclusions and a recommendation for federal agency NEPA policy.

SUMMARY OF CHALLENGES

Plaintiffs can challenge the adequacy of an agency's EIS on many different grounds. The most common grounds include the following:

- Improper development (i.e., statement) of the overall project, including lack of authority, inaccurate description, deceptive segmentation of the project, and lack of a planning process that incorporates environmental goals.

- Inadequate discussion of alternatives, including claims that alternatives are missing, the alternatives discussion is too brief, or that the agency has improperly defined the project's goals or scope so that only one alternative (i.e., the agency's) satisfies the requirements.

- Inadequate discussion of environmental impacts, including claims that the agency has incorrectly described environmental impacts; used an inadequate scientific method; failed to take a good faith, hard look at the environmental impacts; or has omitted or misrepresented facts in bad faith so as to favor one alternative over all others.

- Inadequate discussion of the plans for avoidance or mitigation-identified impacts.

- Inadequate efforts to develop, or respond to, external information, including allegations that the agency has improperly failed to prepare a supplemental EIS; has failed to consult with and obtain input from other appropriate agencies that should have been included in the NEPA process or improperly excluded these relevant agencies; and has failed to provide adequate notice of public NEPA hearings on the EIS.

SUMMARY OF CASE RULINGS

Case rulings on the above issues can be summarized as follows:

Agency Action Proposals and EIS Preparation Decisions

- The rule of reason and the arbitrary and capricious standard of the Administrative Procedure Act govern an agency's decision to prepare an EIS and/or an SEIS.[1] The arbitrary and capricious standard governs an agency's decision not to supplement an EIS.[2] That is, an agency's decision is arbitrary and capricious if the agency fails to consider all relevant facts or if it makes a clear error of judgment.[3]

- Congressional involvement through hearings or fund appropriation demonstrates that the agency is not exceeding its authority.[4]

- Allegations of bad faith require a factual demonstration of gross negligence or improper intent.[5]

Discussion of Goals and Alternatives

- As long as an agency acts reasonably in selecting goals and alternatives and discusses them in reasonable detail, a court will uphold the agency's definition of goals and discussion of alternatives.[6]

- In seeking to re-establish a rejected alternative (an action not taken), plaintiffs must present good reasons to claim that the agency erred in its non-environmental conclusions and that environmental factors should have played a role, particularly if there are no objections during the public comment period.[7]

- An agency need not prepare an exhaustive evaluation of reasonable alternatives in its EIS discussion of alternatives—all that is required is that the agency compile enough information to enable it to make a reasoned choice among the alternatives.[8] However, "the EIS must set forth sufficient information for the general public to make an informed evaluation, and for

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[1] *Marsh*, 490 U.S. at 373; Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1996).

[2] *Hickory*, 893 F.2d 63, *citing* 490 U.S. 375 [*Marsh*].

[3] *Id* at 63, *citing Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

[4] *Ashcroft II*, 672 F.2d at 1301.

[5] *Id.* at 1301.

[6] *Citizens*, 938 F.2d 196.

[7] *Valley Citizens*, 886 F.2d at 462, *citing Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978).

[8] *Ashcroft I*, 526 F. Supp 1302.

the decision-maker to fully consider the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action."[9] In short, the EIS must not sweep potential problems under the rug.

- An agency is limited to detailed discussion of alternatives that are feasible.[10] If an alternative is incompatible with a project's timeframe requirements, then it is remote and speculative, rather than reasonable, and a brief discussion of it will suffice for NEPA purposes. If an event with the potential to have a harmful impact on the environment is so remote as to be unlikely to occur, an agency does not have to address the issue in its FEIS.[11] An agency has a duty to consider only alternatives that are reasonable *at the time* the study is performed, as well as any significant alternative submitted during the public comment period.[12]

Evaluation of Impacts

- The rule of reason provides appropriate guidance throughout the entire EIS, down to the selection of a scientific method.[13] The comment period on the draft EIS is the appropriate time for objecting to methodology.[14]

- EPA participation means only that the preparing agency must take EPA's suggestions seriously.[15]

- "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive."[16] Or, a "scientific disagreement among experts" is not reviewable by the courts.[17]

- The plaintiff bears the burden of proving by a preponderance of the evidence that the data's underlying assumptions are wrong.[18] A court "may not use minor lapses in the statement as an excuse to thwart actions that it

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[9]*Fenton*, 792 F.2d 574, *citing Sierra Club* v. *United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983).

[10]*Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978).

[11]*Communities*, 956 F.2d 626.

[12]*Valley Citizens*, 886 F.2d 462, *citing Roosevelt Campobello Int'l Park* v. *U.S. Env'tl. Protection Agency*, 684 F.2d 1041, 1047 (1st Cir. 1983).

[13]*Citizens*, 938 F.2d at 200.

[14]*Valley Citizens*, 886 F. 2d 469.

[15]*Citizens*, 938 F.2d at 200.

[16]*Holy Cross*, 960 F. 2d 1527, *citing* 490 U.S. 378 [*Marsh*].

[17]*Sierra Club*, 816 F.2d 214.

[18]*North Buckhead*, 903 F. 2d 1543.

believes to be unwise . . . or require of the discussion a degree of detail too exacting to be realized."[19]

- The fact that a product is licensed does not mean that it is free from impacts. An agency must study the safety of the proposed use.[20]

Other Issues

- An agency need only include a "reasonably complete discussion of possible mitigation measures" in the EIS, not a detailed mitigation plan.[21]

- An agency may execute related actions (such as issue permits) without elaborate additional studies if a relevant EIS states that the activity would have minimal effects.[22]

- An agency must notify directly all known interested parties and relevant national groups.[23] However, if they are not notified but manage to participate, this omission does not invalidate the process.[24]

CONCLUSIONS

Analysis of the cases leads to two principal conclusions:

- *Legal challenges are unlikely to succeed if the agency has prepared an EIS in good faith.* Because courts will defer to reasonable agency statements of fact and selection of methods, the challenges to agency activities must be framed in terms of the procedures that were followed in developing the EIS. But the procedures are fairly clear, and achieving the minimum necessary standard is not difficult. Even when agency analyses are imperfect, courts have nonetheless upheld them as long as they were developed in good faith, to a reasonable standard, and met procedural requirements. Given some effort by the government to perform an environmental assessment in good faith, plaintiffs are seldom successful.

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[19] *Valley Citizens*, 886 F.2d 463–64, *citing Commonwealth of Mass.* v. *Andrus*, 594 F.2d 872, 884 (1st Cir. 1979); *Conservation Law Found.* v. *Andrus*, 623 F.2d 712, 719 (1st Cir. 1979) ("a minor deficiency in an EIS does not entitle the court to disregard the deference the agency is entitled to").

[20] *NCAP*, 844 F.2d 596, *citing S. Or. Citizens Against Toxic Sprays* v. *Clark*, 720 F.2d 1475, 1980 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984).

[21] *Holy Cross*, 960 F.2d 1523 (10th Cir. 1992) [*citing Methow Valley*, 490 U.S. 332, 352].

[22] *Methow Valley*, 490 U.S. at 357.

[23] CEQ Regulations at 40 CFR §§ 1501.7 and 1506.6 (1996).

[24] *NCAP*, 844 F.2d 596.

- *Some plaintiffs cannot be deterred from filing suits.* Many of the cases derive from challenges that are unsupported by law or are based on allegations that are clearly inaccurate or disingenuous. At root, such challenges are generally based on opposition to an agency's proposed activities themselves. Such plaintiffs are not seeking an improved EIS; they are seeking a procedural hook and a sympathetic court that will issue an injunction against a proposed activity using an environmental rationale. A well-prepared EIS, therefore, will usually prevent such groups from being successful, but it will not prevent them from bringing suit.

RECOMMENDATIONS

In view of these two conclusions, we advise against the practice of preparing exhaustive EIS documents that are designed not only to win, but to preclude, lawsuits. Such lawsuits cannot be deterred if the plaintiffs are opposed to the proposed action regardless of the environmental issues, because even without actually winning the suit they can still achieve their objectives: to achieve a delay, gain concessions, or obtain publicity. For such plaintiffs, the suit itself (rather than the ultimate ruling) constitutes victory, and therefore deterring the suit is impossible.

Federal agencies in general, including the Army, should consider moving toward a strategy of developing EIS documents that are, in the words of one Army official, "*analytic*, not encyclopedic." Agency EIS documents must follow NEPA procedures, meet reasonable standards, and be developed in good faith, but they need not address every nuance of every issue whether relevant or not. Such EIS documents would help protect the environment, continue to withstand lawsuits, and greatly reduce the cost of preparing EIS documents.

Appendix A
Case Summaries

ASHCROFT V. DEPT. OF THE ARMY (I)

Issue

State of Missouri ex rel. Ashcroft v. *Dept. of the Army*,[1] involved a Corps of Engineers (COE) project to operate a hydroelectric generator at a dam. The plaintiffs argued that COE violated NEPA by failing to determine downstream effects and to assess adequately in its EIS the environmental impact of the proposed solution. In particular, plaintiffs argued that the EIS and SEIS were inadequate because they failed to assess properly the project's erosion effects. The plaintiffs also argued that COE violated NEPA because COE failed to consult with and obtain the comments of related federal agencies.[2]

Facts

In the district court's opinion, erosion stood out as the project's most important downstream environmental effect. On the basis of the evidence presented at trial, the district court found that the project was causing several erosion processes. These effects included (1) erosion of the silty clay loam that forms the river channel as a result of all flood waters being directed into one channel; (2) soil plucking, a process in which water levels rise at the start of hydropower production and then remove the top layer of soil from the riverbanks and deposit it downstream; and (3) bank slumping, a condition created when water levels fall rapidly as hydropower production ends, causing the waterlogged soil along the riverbanks to fall into the river.

Experts at trial disagreed about the project's downstream erosion effects. Plaintiffs' expert testified that, in his opinion (based largely on aerial photographs), the dam had increased downstream erosion by 1,000 percent.[3] COE's expert, on the other hand, testified that the channel merely *appeared* to be badly eroded because the continually changing water levels would not enable revegetation of the banks. The aerial photographs showing an absence of plant cover made the erosion seem worse than it actually was.

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[1] 526 F.Supp. 660, 660–61 [*hereinafter Ashcroft I*].

[2] *See* National Environmental Policy Act §§ 102(2)(A), (C), 42 U.S.C. §§ 4332(2)(A), (C).

[3] *Id.* at 671.

The record showed that COE had consulted with and obtained comments from the appropriate federal, state, and local agencies. As evidence of this, the court pointed out COE's correspondence with the Department of the Interior Fish and Wildlife Service and the U.S. Environmental Protection Agency, as well as the Missouri Department of Conservation and other agencies whose comments on the draft EIS were included in the final EIS (FEIS), together with COE's response to those comments.[4]

Ruling

The district court found that, contrary to plaintiffs' allegations, both the EIS and the SEIS addressed the increase in erosion that would result from the hydropower-generation project. The court did not find credible the testimony of plaintiffs' expert with regard to the increase in erosion. Thus, the court concluded that the EIS and SEIS adequately discussed not only the erosion problem, but also the adverse effects of the dam on downstream water quality (including increased turbidity), and fish and wildlife.[5]

The court found that COE had consulted with the appropriate agencies; the point to be made here is that the plaintiffs do not have to have a supportable case or stick to the facts in order to make allegations and file lawsuits.

The EIS was ruled to be adequate.

ASHCROFT V. DEPT. OF THE ARMY (II)

Issue

This case is the appeal phase of *Ashcroft I.* In *State of Missouri ex rel. Ashcroft* v. *Dept. of the Army*,[6] plaintiffs—the State of Missouri, several state agencies, and a class of riparian landowners—presented a new range of arguments, covering most of the issues available. They alleged bad faith on the part of the agency in that it exceeded its authority to act and in that it did not accurately describe the nature of the project. They argued that COE violated NEPA because its planning and decision-making processes did not use a systematic, interdisciplinary approach and, as a result, its consideration of the issues could not have been adequate.[7] They also alleged that the EIS did not fully consider reasonable alternatives, specifically, operating the generator as a run-of-the-river plant that would produce far less hydropower.

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[4] *Id.*. at 676.

[5] *Id.* at 672.

[6] 672 F.2d 1297 (*hereinafter Ashcroft II).*

[7] *See* National Environmental Policy Act §§ 102(2)(A), (C), 42 U.S.C. §§ 4332(2)(A), (C) (1996).

Facts

Plaintiffs claimed COE acted in bad faith when COE several times upwardly revised the size of the generator to be built. Plaintiffs also challenged the EIS and the underlying project on grounds that COE violated NEPA and the Administrative Procedures Act in making changes whose scope exceeded what was authorized by Congress.[8] The court considered the issues of lack of good faith and exceeding congressional authority sufficiently similar to justify discussing them together.

As evidence of COE's bad faith, plaintiffs presented the following facts:

- COE had an inexperienced employee study the river.
- COE committed a gross error in estimating the river's flowage.
- COE expanded the size of the generator several times.

As evidence that COE exceeded congressional authority, plaintiffs claimed that COE sacrificed flood control, the project's primary purpose, and substituted a power-generating purpose.

Ruling

The court rejected the assertion that the changes in scope served as evidence of bad faith because the facts did not demonstrate gross negligence or improper intent.[9] The decision to generate power did not exceed the scope of congressional authority because flood control was an important, but not the sole, reason for the project.[10]

Indeed, the court accepted the conclusion of other courts that COE possessed broad discretion to make changes to proposed flood-control projects—otherwise, changes in circumstances would render rigid plans obsolete.[11] In this case, as soon as COE discovered it had overestimated the channel capacity of the river below the dam and therefore needed to adjust its plans, it presented Congress with reports and testimony to support its proposed solution. Congress then appropriated funds to finance COE's proposal, demonstrating its active role in designing and implementing the solution. Thus, the court concluded, COE did not exceed congressional authority when it altered the project; its EIS was adequate.[12]

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[8] *Id.* at 1300.

[9] *Id.* at 1301.

[10] *Id.*

[11] *Id., citing United States* v. *2,606.84 Acres of Land in Tarrant County, Tex.*, 432 F.2d 1286, 1292 (5th Cir. 1970), *cert. denied*, 402 U.S. 916 (1971).

[12] 672 F.2d at 1301.

An agency that engages a variety of experts in formulating its EIS evidences a systematic, interdisciplinary approach. COE had engaged various professionals to prepare the EIS, including "biologists, hydrologists, geologists, experts in cultural resources, real estate experts, ecologists and design engineers."[13] Thus, the court disagreed with plaintiffs, finding that COE did use a systematic, interdisciplinary approach to prepare the EIS and to make its decision to implement the proposed solution.

An agency need not prepare an exhaustive evaluation of reasonable alternatives in its EIS discussion of alternatives—all that is required is that the agency compile enough information to enable it to make a reasoned choice among the alternatives.[14] Based on its examination of the EIS and the district court's opinion, the court of appeals concluded that evidence produced at trial established that the generator would not operate effectively at the lower run-of-the-river rate because operating the generator for baseload production would be far less economical than operating it for peaking. As a result, plaintiffs' alternative was not reasonable and did not have to be included in the EIS.[15]

The court of appeals affirmed the lower court's decision that the EIS was adequate.

CITIZENS AGAINST BURLINGTON, INC. V. BUSEY

Issue

In *Citizens Against Burlington, Inc.* v. *Busey*,[16] an alliance of residents living near the Toledo airport claimed that the discussion of alternatives in an EIS was inadequate because alternatives that should have been included in the discussion were missing altogether (one of which being the one that the plaintiffs presented as an alternative). Additionally, it claimed that the Federal Aviation Administration (FAA) had failed to discuss all reasonable alternatives and dismissed without explanation some other feasible alternatives that it had developed itself. Finally, the plaintiff argued that FAA had made up its own methodology in lieu of using the methodology established by EPA for calculating noise impacts.

Facts

The FAA intended to issue an order approving the Toledo-Lucas County Port Authority's airport expansion project.

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[13] *Ashcroft I* at 676.

[14] *Id.* at 1302.

[15] 672 F.2d at 1302.

[16] 938 F.2d 190.

FAA originally had identified 20 different alternatives (one of which was the plaintiff's). FAA eliminated alternatives that combined different geometric configurations, construction at another airport in Toledo, or changes in traffic patterns, because they were too costly. FAA also eliminated an alternative proposing to build the cargo hub in another city because it ignored the project's goals. This left FAA with only two alternatives to consider in detail in the EIS: the proposed action and no action. The five alternatives referred to were variants on the "build" proposal; all but one of these were eventually eliminated leaving only the proposed action and no action as the alternatives.[17]

FAA devoted half of the EIS's impacts discussion to the effects of the increase in noise levels, the airport expansion project's most significant environmental consequence.

Ruling

The court of appeals found FAA's discussion sufficiently thorough: For each alternative, FAA provided a graphic configuration, an engineering analysis, and reasons why the alternative was infeasible or imprudent. The alternatives were also thoroughly evaluated in the administrative record, which fully explained why FAA had concluded certain alternatives were infeasible. The administrative record showed that FAA rejected these alternatives because they presented severe engineering difficulties, exorbitant costs, safety hazards, operational difficulties, or disruptions to landfills and to areas sensitive to noise. The record also showed that each alternative was rejected due to the unique problems associated with it and because it would not promote the goal of increased airport capacity.[18]

Plaintiffs bear the burden of offering cognizable alternatives to a proposed agency action whenever protected historic and park resources are at stake.[19] An alternative that would cause a substantially equal amount of damage to protected resources does not meet the definition of a cognizable alternative.[20] Thus, an agency may reject even an (arguably) feasible alternative if the alternative entails unique problems, imposes extraordinary costs, or causes community disruption. Since plaintiff's proposed alternative would have caused substantially equal damage, plaintiff failed to meet its burden; FAA had no obligation to consider *Citizens* alternative in detail.

As long as an agency acts reasonably in selecting goals and alternatives and discusses them in reasonable detail, a court will uphold the agency's definition of goals and discussion of alternatives.[21] In an opinion by Judge (now Justice)

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[17] *Id.* at 198.

[18] *Id.* at 627.

[19] Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 303 (1996).

[20] *Communities*, 956 F.2d at 625.

[21] *Id.* at 196.

Clarence Thomas, the court found that FAA had considered the appropriate factors, had selected reasonable goals, and had acted reasonably in eliminating three of the alternatives and discussing in detail only the two that would meet the goals. Therefore, the court found, FAA had complied with NEPA requirements; FAA's EIS was adequate.[22]

The court considered FAA's discussion of the noise impact complete and fair for the following reasons:

- FAA described its methods for studying and assessing the effects of increased noise levels.
- At EPA's request, FAA added a second method for assessing the noise.
- FAA discussed the social, psychological, physical, and structural impacts of the increased noise levels.
- FAA used both mathematical equations and text to explain the results of its studies.
- FAA illustrated its results with graphs, maps, charts, and tables.

Although the discussion of environmental impacts did not estimate the number of people who would be kept awake if the airport expanded, this was not a fatal flaw because FAA had used the "rule of reason" as its guide. The rule of reason provides appropriate guidance throughout the entire EIS, down to the selection of a scientific method.[23] "FAA proceeded to mold a body of data, dissect it, and display it in comprehensible forms," without acting capriciously in selecting a scientific method or in formulating its conclusions.[24]

Moreover, the mere fact that EPA participates in the preparation of an agency's EIS, as it did here, does not necessarily signify that the agency must take orders from EPA. Rather, the agency need only take EPA's suggestions seriously, as FAA did in this case, adding EPA's method to its own.

The court held that FAA used an adequate scientific method in the EIS, resulting in an adequate discussion of impacts that met the requirements of NEPA.[25]

The court found FAA's EIS adequate and affirmed the order approving the airport expansion plan.

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[22] *Id.* at 198.
[23] *Id.* at 200.
[24] *Id.* at 201.
[25] *Id.*

COMMUNITIES, INC. V. BUSEY

Issue

In *Communities, Inc.* v. *Busey,*[26] an airport expansion case, plaintiffs allegedthat the FAA violated NEPA by segmenting (acting as though part of the proposed action was a separate project) the analyses of hazardous wastes and transportation,[27] and additional segmentation in ignoring the destruction of neighborhoods as inevitable (also viewed as omitting an adverse impact).[28] Further, they alleged that FAA made an arbitrary and capricious choice of methodology when measuring the noise impact of the project, and that the EIS was incomplete because it lacked a complete plan of remediation or mitigation.[29]

Facts

This case involved plaintiffs' petition to have the court review an FAA order approving the Toledo-Lucas County Port Authority's airport expansion project. The plan, which contemplated building two new runways, entailed expanding the airport's boundaries and demolishing and clearing several residential neighborhoods, and commercial and industrial sites, as well as realigning a major thoroughfare.[30]

The Toledo airport was located near a park used for jogging, camping, skiing, and bird watching; it also had a preserve of savanna oak trees. The major concern associated with the project was noise. After a preliminary study on noise compatibility, the Toledo-Lucas County Port Authority hired a contractor to prepare an environmental assessment and an EIS.[31] FAA made public a draft EIS and held a public hearing that generated a great deal of public comment (more than 300 letters). FAA then published the FEIS containing the following information:

- Chapter 1 described the role Congress intended FAA to play in a project such as this one and detailed FAA's authority to approve the Port Authority plan.
- Chapter 2 reviewed details of the Port Authority plan, set forth the applicable federal laws and regulations, briefly described alternative actions, explained why these alternatives would not be discussed in greater detail, and concluded that FAA needed to discuss only two alternatives: either approving the Port Authority plan or taking no action.

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[26]956 F.2d 619 [*hereinafter Communities*].

[27]*Id.* at 625.

[28]*Id.* at 626.

[29]*Id.* at 625.

[30]*Id.* at 621.

[31]*Id.* at 192.

- Chapter 3 discussed the environment affected by the Port Authority plan.

- Chapter 4 outlined the environmental consequences of each of the two alternatives. FAA's EIS outlined more than 20 significant potential environmental impacts posed by the airport expansion project, including the effects on people's homes and neighborhoods; air, water, and soil quality; cultural, architectural, and archeological resources; disposal of sewage; traffic; wetlands; and flora and fauna.[32]

- Chapter 5 summarized the environmental impacts.

- Chapter 6 listed the names of the parties who prepared the EIS.

- The Appendix contained scientific data, interagency correspondence, letters from the public concerning the draft EIS, a transcript of the public hearing, and written comments submitted after the hearing.

After publishing the FEIS, FAA issued an order approving the Port Authority's airport expansion plan.[33] In deciding the alternatives that needed to be discussed, FAA considered several factors. First, FAA took relevant statutes into account. In consulting the relevant statutes, FAA considered the views of Congress regarding airport development. Congress expressed a policy to relegate decisions about where to locate airports to the free market, rather than leaving such decisions in the hands of the government. Moreover, by statute, Congress granted FAA a mandate to encourage the establishment of cargo hubs. FAA also examined the reasons why the Toledo-Lucas County Port Authority, a party involved in the application for approval of the EIS, wanted to establish Toledo as a cargo hub. These included creating jobs, contributing to the economy, attracting businesses to the area, and generally benefiting the area economically.[34]

In this case, out of more than 20 alternatives originally envisioned, including plaintiffs' proposal, FAA's FEIS selected two alternatives for consideration: its own proposed airport expansion plan and the "no-action" plan. Working papers broke the two chosen alternatives into five categories having a reasonable expectation of implementation. From the five categories, FAA selected five runway configurations and evaluated them in detail, with costs and environmental effects outlined in the contractor's technical reports. The five configurations were then depicted in the FEIS.

Next, FAA considered the project's goals. FAA defined the goals as assisting Toledo in growing into a cargo hub and revitalizing the local economy. Defining the goals thus enabled FAA to eliminate in-depth discussion of three of the five

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[32] *Id.* at 199.

[33] *Id.* at 193.

[34] *Id.* at 197–98.

alternatives because they could not accomplish these goals. FAA eliminated alternatives that combined different geometric configurations, construction at another airport in Toledo, or changes in traffic patterns, because they were too costly. FAA also eliminated an alternative proposing to build the cargo hub in another city because it ignored the project's goals. This left FAA with only two alternatives to consider in detail in the EIS: its own proposal and no action.[35]

The proposed action plan outlined in the FEIS called for closing a road. The road would not be reopened or rebuilt for 10 years or more. In fact, FAA had no concrete plans to reopen or rebuild the road at any time.

Ruling

The court found that FAA did not engage in segmentation because it had in fact performed an environmental analysis related to the loss of the neighborhoods. Furthermore, the court found that even if FAA had not performed this analysis, the neighborhood demolition plan had "independent utility."[36] By this, the court meant that the local government had demonstrated its commitment to demolition of the neighborhoods by buying up properties in the neighborhoods—whether or not the airport expansion took place, the neighborhoods would be demolished. Therefore, the court held, FAA did not violate NEPA; its EIS was valid and adequate.

Plaintiffs had tried a second approach to that issue, claiming that in accepting the destruction of the neighborhoods as a given, FAA was failing to analyze known adverse environmental impacts. FAA did not discuss the destruction of the neighborhoods, but simply incorporated that possibility into the no-action alternative—because demolition of these neighborhoods was scheduled to proceed regardless of whether or not the airport was expanded, despite the State Supreme Court's determination that the city acquired the neighborhoods in an unconstitutional manner. According to the court, FAA was justified in incorporating the neighborhood demolition into the no-action place because the city had begun its program of urban renewal (which included the demolition) long before anyone contemplated expanding the airport, and more-over, thus far, more than two-thirds of the urban renewal program had been completed.[37] Thus, the court held that FAA did not fail to take adverse environmental impacts into consideration.

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[35] *Id.* at 198.

[36] *Id.* at 627, *citing Historic Preservation Guild* v. *Burnley*, 896 F.2d 985, 990–92 (6th Cir. 1989).

[37] *Id.*

The court pointed out that selection of a particular scientific testing method was accepted as being a matter falling within an agency's discretion.[38] The court also noted that EPA criticism of an agency's methods did not necessarily indicate that the agency erred. This was especially true where the agency, like FAA in this case, prompted by EPA criticism, did use another method to collect and analyze data, yet still found that method lacking. The court would not presume to tell FAA which method was better because this lay outside its constitutional role and sphere of expertise.[39] Therefore, the court upheld FAA's methodology and the adequacy of its EIS.

If an event with the potential to have a harmful impact on the environment is so remote as to be unlikely to occur, an agency does not have to address the issue in its FEIS.[40] Here, the court found that, because of the speculative nature of the road's reopening, the FEIS did not require a discussion of the adverse environmental impacts associated with reopening the road. Therefore, the discussion of environmental impacts in FAA's EIS was adequate.

In light of the Supreme Court's decision in *Robertson* v. *Methow Valley Citizens Council*, the Sixth Circuit rejected plaintiffs' argument and held that an agency need not include a complete plan of mitigation in its EIS.[41]

FAA's EIS was ruled to be adequate.

HICKORY NEIGHBORHOOD DEFENSE LEAGUE V. SKINNER

Issue

In *Hickory Neighborhood Defense League* v. *Skinner*,[42] plaintiff, an environmental nonprofit corporation, challenged the adequacy of an EIS on the basis of an agency's failure to prepare an SEIS.

Facts

The case involved a highway project sponsored by the Department of Transportation (DOT) and the Federal Highway Administration (FHWA).[43] Following com-

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[38] *Id.* at 624, *citing Citizens*, 938 F.2d at 201; *Valley Citizens*, 886 F.2d at 469; *C.A.R.E. Now, Inc.* v. *Fed. Aviation Admin.*, 844 F.2d 1569, 1573 (11th Cir. 1988); *Suburban O'Hare Community* v. *Dole*, 787 F.2d 186, 197 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986).

[39] *Communities*, 956 F.2d at 624.

[40] *Id.* at 626.

[41] *Id.* at 625–26.

[42] 893 F.2d 58 (4th Cir. 1990) [*hereinafter Hickory*].

[43] *Id.* at 58.

pletion of the FEIS, several properties located in the construction zone obtained formal listing in the National Register of Historic Places. Plaintiff argued that FHWA violated section 102 of NEPA, as well as DOT regulations, which provide that the agency must prepare an SEIS if new information comes to light or if circumstances change such that a significant environmental impact is likely. An agency must also prepare an SEIS if changes to the proposed action introduce significant environmental impacts not addressed in the EIS.[44]

Ruling

The arbitrary and capricious standard governs an agency's decision not to supplement an EIS.[45] That is, an agency's decision is arbitrary and capricious if the agency fails to consider all relevant facts or if it makes a clear error of judgment.[46]

The court found that because the EIS dealt directly with the adverse impact of the project on two of the listed properties, the EIS had adequately considered the project's impact on the historic buildings, as well as on the environment, the economy, and the history of the area.

Ruling on Appeal

The court of appeals found substantial evidence in the record to support the agency's determination that the FEIS adequately took into consideration the project's impact on the environment, the economy, and the history of area. Thus, in the opinion of the court of appeals, the record supported the agency's decision not to supplement the EIS. Therefore, the court of appeals affirmed the lower court's decision and held that FHWA's EIS was adequate and an SEIS was unnecessary.[47]

HOLY CROSS WILDERNESS FUND V. MADIGAN

Issue

In *Holy Cross Wilderness Fund* v. *Madigan*,[48] plaintiff, a nonprofit organization formed to protect a designated wilderness area in the state of Colorado, asserted that COE issued a permit to construct a water project in a wilderness area before wetlands studies had been completed; that COE used inadequate documentation prepared earlier by the U.S. Forest Service (USFS); and that the treatment of two alternatives was too brief.

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[44] *Id.* at 62.

[45] *Id.* at 63, *citing Marsh*, 490 U.S. at 375.

[46] *Id* at 63, *citing Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

[47] *Hickory*, 893 F.2d at 63.

[48] 960 F.2d 1515 (10th Cir. 1992) [*hereinafter Holy Cross*].

Facts

The case involved a project proposing to provide the applicants—two cities—with additional water by diverting water from two creeks into a reservoir using surface diversion structures and underground tunnels.[49]

The project involved two agencies: the USFS, whose participation was necessary to obtain an easement on the construction site, and COE, whose participation was necessary to obtain a dredge-and-fill permit for construction.[50] USFS performed an environmental assessment and then issued a draft EIS analyzing six alternatives. After more than 20 public hearings, USFS issued its FEIS and record of decision, in which it concluded that the project would not have a significant impact on the wetlands.[51] Consequently, USFS granted the land-use easement permitting the project to proceed.

The project then needed a dredge-and-fill permit from COE. Before it could issue this type of permit, COE itself had to comply with NEPA. In COE's opinion, the USFS EIS probably did not fully consider the project's impact on wetlands. Therefore, COE had the EIS reviewed independently.

The reviewers recommended that COE obtain more information because USFS had not presented sufficient information to support the claim that the project would not affect the wetlands. COE hired contractors, who found that the project had the potential to create significant adverse environmental impacts. The contractors recommended COE conduct additional studies and develop a mitigation plan if the additional studies showed the project would adversely affect the wetlands, in addition to monitoring the wetlands before and after construction.

Rather than conduct the studies, COE instead adopted the USFS EIS and issued the applicants a dredge-and-fill permit on the condition that they perform the additional studies themselves and develop mitigation plans. The applicants complied. Their studies found the project would not precipitate the loss of wetlands. The applicants then generated much public input to develop thorough mitigation plans.[52]

Ruling

An agency need only include a "reasonably complete discussion of possible mitigation measures" in the EIS.[53] In an earlier case, the Supreme Court declined to hold that an agency must develop and adopt a complete mitigation plan before

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[49] *Id.* at 1518.

[50] *Id.* at 1518–19.

[51] *Id.* at 1518.

[52] *Id.* at 1519.

[53] *Id.* at 1523, *citing Methow Valley*, 490 U.S. 332, 352.

taking action.[54] Moreover, NEPA does not insist on the development of a complete plan of mitigation as a substantive requirement.[55]

The CEQ regulations list the steps an agency should take when faced with incomplete or unavailable information. If the cost of obtaining information about the adverse environmental impacts is not excessive, then the agency should obtain the information. On the other hand, if the cost is exorbitant or if the means to obtain the information are not available, then "the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty."[56]

An agency must supplement the EIS if (1) it contemplates substantial changes in the proposed action or (2) significant new circumstances or information come to light.[57] When considering an agency's decision regarding supplementation, the court applies the Administrative Procedure Act standard of review, which requires the court to determine whether an agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[58]

In this case, the court found USFS's EIS adequate and COE's adoption acceptable because the EIS explicitly considered the impact of the project on wetlands and the conclusion reached in the EIS (i.e., no significant adverse impact on wetlands) was not unreasonable, made in bad faith, or subjective. This conclusion necessarily led to the absence of a detailed mitigation plan in the EIS because an agency that reaches, in good faith, a conclusion of no significant adverse impact does not then need to consider a mitigation plan to counteract the adverse impacts it does not believe will occur.[59]

The court found that, because COE issued a conditional permit, the agency did not need to include more information in the FEIS. By issuing a conditional permit, COE assumed the adverse environmental impacts would come to pass. Stipulating conditions provided COE with a way to guarantee that the applicants would mitigate the impacts. Thus, COE did not breach the regulations that guide an agency faced with missing or unavailable information; therefore, it did not violate NEPA.[60]

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[54]*Methow Valley*, 490 U.S. 332.

[55]*Holy Cross*, 960 F.2d at 1522, *citing Methow Valley*, 490 U.S. at 352–53.

[56]CEQ Regulations, 40 CFR § 1502.22 (1996).

[57]*Holy Cross*, 960 F.2d at 1523.

[58]Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Holy Cross*, 960 F.2d at 1521, *citing Roanoke River Basin Assn* v. *Hudson*, 940 F.2d 58, 61 (4th Cir. 1991), *cert. denied*, 502 U.S. 1092, 112 S.Ct. 1164 (1992); *Bowles* v. *Army Corps of Engrs*, 841 F.2d 112, 116 (5th Cir.), *cert. denied*, 488 U.S. 803 (1988); *Friends of the Earth* v. *Hinz*, 800 F.2d 822, 830–31 (9th Cir. 1986); *Sierra Club* v. *Army Corps of Engrs*, 701 F.2d 1011 (2nd Cir. 1983).

[59]*Holy Cross*, 960 F.2d at 1526.

[60]*Id.*

The court also found that COE did not act in an arbitrary or capricious manner in declining to issue an SEIS after the contractor informed COE that there was insufficient information to determine the project's adverse environmental impact on wetlands. According to the court, "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive."[61] Here, the experts had different views about the project's impact on wetlands:

- USFS FEIS: no impact on wetlands
- COE Reviewing Lab: USFS no-impact conclusion debatable, more studies needed
- Applicants' report (which included a mitigation plan): no wetlands loss; report issued in accordance with conditional permit
- Plaintiffs' experts: high probability of adverse environmental impact.

Thus, COE acted reasonably in deciding not to supplement the EIS. Also, the fact that COE issued a conditional permit stipulating that there be no loss of wetlands demonstrated that COE's decision not to supplement the EIS was reasonable. The SEIS, like the EIS, is supposed to ensure that an agency makes an informed decision and involves the public. Here, there was no need for an SEIS because COE issued a permit that ensured there would be no loss of wetlands. Finally, the fact that mitigation was considered throughout the process of permit review constituted still more evidence of COE's reasonableness.[62]

Although the fact that COE issued a permit that would lead to mitigation admittedly made this case unusual in that this did not represent "the normal order of events," it was not arbitrary or capricious either. COE was permitted to adopt USFS's EIS as its own because, under the regulations, one agency may adopt another's EIS as its own if the adopted EIS is adequate, as it was in this case.[63] COE took a hard look at the environmental impacts of its proposed action and did not violate NEPA. The court therefore held that USFS and COE did not violate NEPA; their FEIS was adequate.[64]

Upon examining the record, the court of appeals found that Plan D bore a striking similarity to Plan 4, which COE *had* discussed in detail. The sole difference between the two plans consisted of the fact that Plan D would have made use of an existing reservoir, whereas Plan 4 would have required building a new reservoir.

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[61] *Id.* at 1527, *citing* 490 U.S. at 378.

[62] *Holy Cross*, 960 F.2d at 1527.

[63] CEQ Regulations, 40 CFR § 1506.3(a) (1992), *cited in Holy Cross*, 960 F.2d at 1526.

[64] *Holy Cross*, 960 F.2d at 1525.

Even though using an existing reservoir would have been more environmentally sound than building a new one, COE's reasons for rejecting Plan 4 (the high costs and significant utility consumption associated with pumping water) were the same ones it would have used to reject Plan D. Plan 4, which COE did discuss in detail, acted as an augmented version of Plan D. The court further found COE's discussion of the water-trade alternative reasonably adequate because this alternative was speculative and involved too many uncertainties, making it a reasonable candidate for rejection.[65] Thus, the court held, COE acted reasonably in refraining from discussing the two alternatives in greater detail.

The EIS was ruled to be adequate.

MARSH V. OREGON NATURAL RESOURCES DEFENSE COUNCIL

Issue

In *Marsh* v. *Oregon Natural Resources Defense Council*,[66] a case involving a COE project to construct a dam, four Oregon nonprofit corporations argued that COE did not prepare an SEIS following the revelation of new information.[67]

Facts

According to the CEQ regulations, an agency must prepare an SEIS either when the agency makes a substantial change to the proposed action or when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[68] The rule of reason and the arbitrary and capricious standard of the Administrative Procedure Act govern an agency's decision to prepare an SEIS, much as they do an agency's decision to prepare an EIS.[69] An agency applying the rule of reason must look at "the value of the new information to the still pending decision-making process."[70] When a matter involves a factual dispute whose resolution requires technical expertise in analyzing relevant documents in the record, a court, in its search for an answer, will defer to an agency's discretion. Thus, as long as an agency does not act in an arbitrary or capricious manner in deciding to forego preparation of an SEIS, the court will not set aside the agency's decision.[71]

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[65] *Id.* at 1528.

[66] 490 U.S. 360 (1989) [*hereinafter Marsh*].

[67] *Id.* at 368.

[68] CEQ Regulations, 40 CFR § 1502.9(c)(1) (1996).

[69] *Marsh*, 490 U.S. at 373; Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1996).

[70] *Marsh*, 490 U.S. at 374.

[71] *Id.* at 377.

Plaintiffs tried to characterize the dispute in this case as a legal one (i.e., a dispute over the application of a legal standard to settled facts). They argued that COE should have prepared an SEIS based on the information contained in two documents: an internal memorandum suggesting the dam would unfavorably affect downstream fishing because it would increase the water temperature, and a soil survey that indicated a downstream turbidity rate higher than that reported in the FEIS.[72] However, the Supreme Court found, instead, a factual dispute over the agency's expertise.[73]

Ruling

The court found that these documents did not constitute significant new information and, as a result, did not necessitate the preparation of an SEIS because the experts who drafted the internal memorandum did not consider the matter of sufficient importance to inform COE of its contents immediately. In fact, COE did not learn of the memorandum's existence until after the lawsuit had been filed. Similarly, the soil survey generated no pretrial concern. Also, as COE pointed out, allegations that an increase in water temperature would unfavorably affect fishing was not based on fact but only on speculation because the model on which the allegations were predicated failed to account for the dam's potential beneficial effects and, not having been validated, was uncertain in its ability to make predictions.[74]

Moreover, COE relied not only on its own expertise but on that of two independent, disinterested scientists it had hired who questioned the methodology and conclusions in the studies that were the basis of the internal memorandum in controversy.[75] The new information had an exaggerated importance, and COE, having taken the required hard look at that information, saw no need to prepare an SEIS. COE's decision may have been subject to the criticism of some other expert, but it was not a clear error in judgment, nor was it arbitrary and capricious.[76]

Thus, the court found COE's EIS adequate and its decision not to supplement valid.

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[72] *Id.* at 378.

[73] *Id.* at 376.

[74] *Id.* at 379–81.

[75] *Id.* at 383.

[76] *Id.* at 385.

NORTH BUCKHEAD CIVIC ASSOCIATION V. SKINNER

Issue

In *North Buckhead Civic Association* v. *Skinner,*[77] plaintiff, a neighborhood organization, sought an injunction to halt a Federal Highway Administration (FHWA) project to construct a multilane highway (which plaintiff opposed), with a heavy-rail transit system (which plaintiff did not oppose) on the median. Plaintiff argued that FHWA defined the needs and purposes of the project so narrowly that the only alternative that could possibly meet them was the one FHWA selected, while summarily dismissing an alternative that included a heavy rail but excluded the highway construction (a "no-build/heavy-rail" alternative).

Plaintiff also alleged that the figures in the administrative record did not support the traffic projections and environmental studies in the EIS; that in relying on other data sources the FHWA performed an inadequate review of the traffic and environmental data; and that FHWA had improperly excluded a relevant agency from participating in development of the EIS.[78]

Facts

FHWA collaborated with several agencies on the project. One of those agencies, the Georgia Department of Transportation, used traffic projections to reject a no-build/heavy-rail alternative. These projections, which had also played a part in other major projects in the region, drew upon current traffic patterns and future forecasts created by the computer modeling systems of another agency, the Atlanta Regional Commission (ARC). On the basis of the data, ARC predicted a growth trend, assumed it would continue, assumed further that the improvements would be made, and then made another projection. ARC also used a national industry standard manual, the *Transportation Research Board Capacity Manual*, to estimate the likely capacity of the roads. Plaintiff challenged these assumptions on the grounds that they did not account for the effects of mass transit.

Consequently, FHWA's EIS considered in detail only two alternatives: (1) a multilane highway with heavy rail and (2) no action. FHWA's traffic studies showed that plaintiff's alternative (the no-build/heavy-rail option) would have increased capacity without decreasing congestion, resulting in just as much congestion as the no-action alternative. FHWA did not need to discuss the no-build/heavy-rail (no-highway) alternative in detail because it was not a reasonable alternative—no evidence existed to show that it could address the traffic congestion problem. On the other hand, a great deal of evidence in the administrative record showed that the no-build/heavy-rail alternative would do nothing to resolve the congestion

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[77]903 F.2d 1533.

[78]*Id.* at 1535–36.

problem. Since the no-build/heavy-rail alternative did not meet the project's needs and purposes in their entirety, FHWA rejected it and had no need to discuss it in detail.

The plaintiff also observed that the EIS did not evaluate the environmental impacts of heavy-rail extensions at the station outside the project's immediate construction area. However, the EIS evaluated the impacts of the heavy rail/highway combination where the road and rail routes paralleled each other. Also, the EIS incorporated by reference other studies about the impact of the station outside the project corridor, and witnesses testified that the agencies used the EIS and these studies to reach a decision.

Under NEPA regulations, a cooperating agency is "any Federal agency other than a lead agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal . . . for legislation or other major Federal action significantly affecting the quality of the human environment."[79] An agency with jurisdiction by law (i.e., one that has authority to approve, veto, or fund a proposal) *must* be invited to participate in the NEPA process as a cooperating agency, whereas an agency with special expertise (i.e., one that has statutory responsibility, mission, or related expertise) *may* be invited to participate as a cooperating agency.[80] The Federal Administration Highways Act (FAHA), like NEPA, requires that the various levels of government concerned with a project play a role in developing and articulating the project's needs and purposes.

FHWA had asked the Urban Mass Transit Administration (UMTA) to participate in order to obtain federal funds for the railway and construction. Initially, UMTA did participate in the scoping and review, and it commented on the draft EIS.[81] UMTA later withdrew and declined a listing on the EIS as a cooperating agency because it did not review or comment on the methodologies used or the supporting technical documents. Plaintiff claimed that, if UMTA had participated more, then the no-build/heavy-rail alternative would have received more serious attention.

Ruling

The court stated that there might be good reasons under NEPA for an agency to consider seriously an alternative that did not entirely meet a project's goals. For example, one alternative could meet only part of a goal but could have a smaller environmental impact than another alternative that met the entire goal but with a much greater impact. In such an event, the advantages of pursuing the former alternative might be sufficient to justify calling it a "reasonable" alternative.

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[79]CEQ Regulations, 40 CFR § 1508.5 (1996).

[80]23 CFR § 771.111(d) (1996).

[81]*Id.* at 1544.

Nonetheless, the court found that plaintiff had not shown that such was the case here. Plaintiff merely repeated the old adage that mass transit, in general, causes less harm to the environment than a multilane highway. Without addressing its truth, the court considered this a policy question best left to the legislature and too general an issue for the judiciary.[82] Therefore, the court held, FHWA's EIS was adequate, despite the lack of a detailed discussion of the no-build/heavy-rail alternative.

The court concluded that plaintiff failed to show the projections were unreasonable. Moreover, the court held that, since the agency's method had a rational basis and was applied in a consistent, objective way, the lower court did not err in its decision that the EIS had adequately considered all significant impacts using a valid scientific method. As a result, FHWA's EIS was adequate.

Ruling on Appeal

Affirming the lower court decision, the court of appeals denied an injunction to halt the project.

The court of appeals observed that the plaintiff bears the burden of proving by a preponderance of the evidence that the data's underlying assumptions were wrong and that, as a result, the lower court's findings were clearly erroneous. Here, plaintiff not only failed to meet that burden, but also did not suggest any other acceptable methodology or specify what they believed the errors in the assumptions to be. The court, recognizing its lack of expertise in this area, properly left the decision to the discretion of the agency.[83]

FAHA's constraints required FHWA to cooperate with the local government. In approving the project, FHWA met this requirement and thus did not violate the law.[84] In this case, UMTA did not have jurisdiction by law because the local rail agency decided to use local, rather than federal, funds. Thus, UMTA's participation was not mandatory. Moreover, the discretion to use UMTA's special expertise lay with FHWA because FHWA used the same numbers for its projections that UMTA would have used. Therefore, there was no NEPA violation when FHWA permitted UMTA to withdraw from the EIS.[85]

The court of appeals concluded that the EIS was adequate under NEPA.[86]

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[82] *Id.* at 1542.

[83] *Id.* at 1543.

[84] *N. Buckhead*, 903 F.2d 1533, 1542.

[85] *Id.* at 1545.

[86] *Id.* at 1546.

NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES (NCAP) V. LYNG

Issue

In *Northwest Coalition for Alternatives to Pesticides (NCAP)* v. *Lyng,*[87] plaintiff, a collection of environmental organizations, challenged the Bureau of Land Management's (BLM's) use of herbicides to control noxious weeds on Oregon public lands.[88] The plaintiff challenged BLM's assertion that the herbicide posed little threat, and claimed BLM failed to give them adequate notice of public hearings.

Facts

BLM considered four alternatives in its EIS:

- an integrated pest management plan using manual, mechanical, biological, and herbicidal methods to control weeds;
- the same as the first alternative, but without aerial herbicide spraying;
- manual, mechanical, and biological but no herbicidal methods; and
- no action.

BLM chose the first alternative, the only one to include herbicide spraying, for its flexibility and effectiveness because of the following:

- Herbicides are known to reduce weeds by 85 to 94 percent. The spread of weeds must be arrested because weeds, if left to spread to agricultural lands, overcome useful plants—diminishing the supply of food for livestock, wild animals, and even people.
- Herbicides are known to have only minimal adverse impacts on animals and nonweed vegetation. These effects are not permanent, occur only in localized areas, and pose no unreasonable risk to human health. Thus, the benefits of herbicides outweigh their costs.

In the FEIS, BLM explained that it had rejected the second alternative because it did not permit the best method (i.e., aerial spraying), for treating terrain of this type and size. BLM rejected the third alternative because (1) it did not make use of the most effective tool recommended by professionals (i.e., herbicides); (2) it would thwart BLM's mission, the prevention of weed-caused damage; and (3) due

[87]844 F.2d 588 (9th Cir. 1988) [*hereinafter NCAP*].

[88]*Id.* at 589.

to its higher cost per acre, it would reduce the size of the area BLM could treat. BLM rejected the last alternative because it ignored BLM's statutory duty to control noxious weeds. The FEIS also discussed the environmental impacts, including the visual, cultural, and social aspects of each alternative on the air, soil, water, vegetation, animals, fish, wilderness areas, economic welfare, and human health.[89]

As a result of this analysis, BLM selected the first alternative, which used four different weed-control methods. BLM defined the scope of the project as weed control and eradication; grazing management was beyond the scope of the project. Furthermore, since other publicly known BLM programs featured the manipulation of grazing practices, including it in this project would have duplicated efforts.

BLM had not blindly adopted the herbicide selected for the project on the basis of the U.S. Environmental Protection Agency (EPA) approval without independent study. In its EIS, BLM stated that the EPA and FIFRA data were inadequate and, as a result, BLM had to review many studies. Furthermore, the SEIS examined the effects of the herbicide on human health, wildlife, and the environment by applying the EPA data. BLM's EIS also expected that the relevant state and district officials would conduct a site-specific analysis.

Under the CEQ regulations, an agency proposing an action must fulfill the following scoping (i.e., notice) requirements:

- Publish notice of the project.[90]
- Ask the public to participate in scoping the project.[91]
- Encourage public meetings to discuss project goals.[92]

Plaintiff argued that BLM violated these regulations by failing to issue a personal invitation. Plaintiff claimed that as a result of this, they were prejudiced because BLM did not allow them to participate until too late in the process, and their participation in the SEIS did not make up for their lack of participation in the FEIS.[93]

Ruling

Plaintiff claimed both the FEIS and the SEIS were inadequate because they failed to include an alternative that would examine the causes of weed growth and seek to control it by manipulating grazing practices, using herbicides only as a last

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[89] *Id.* at 592.

[90] CEQ Regulations, 40 CFR § 1508.22 (1996).

[91] CEQ Regulations, 40 CFR § 1501.7(a)(1) (1996).

[92] CEQ Regulations, 40 CFR § 1501.7(b)(4) (1996).

[93] *NCAP*, 844 F.2d at 594.

resort. Under NEPA, parties may debate procedure, but not policy. An agency has the right to adopt a policy as long as its decision is not arbitrary and capricious or unlawful. In the court's opinion, plaintiff's argument amounted to nothing more than a disagreement between plaintiff and defendant over policy.

The mere fact that an alternative would require legislative action does not mean the alternative may be excluded automatically. The range of alternatives in an EIS must enable the agency to make a reasoned decision. On the other hand, the amount of detail in the discussion of each alternative depends on the nature and scope of the action the agency is proposing.[94] In this case, because plaintiff and defendant disagreed over the scope of the project, and because the scope determined which alternatives were viable and reasonable, plaintiff and defendant consequently disagreed about which alternatives were viable and reasonable.

The court found that BLM had acted reasonably in rejecting the alternative involving grazing manipulation, with the use of herbicides as a last resort. BLM did consider this alternative briefly, but it was rejected. According to the regulations, the discussion of reasons for rejecting an alternative may be brief.[95]

In response to plaintiff's claim that BLM failed to consider the causes of weeds, BLM pointed out that it had considered the causes in the EIS and mentioned grazing as one of the causes, but not the primary cause, of noxious weeds, which also grow in areas where no grazing takes place. In BLM's opinion, for this project to succeed, time was of the essence. Therefore, BLM was justified in rejecting plaintiff's time-consuming alternative.

Moreover, the BLM considered the grazing alternative to an adequate degree and did not have to discuss it in further detail because (1) it did not bear a reasonable relationship to the project's purpose (i.e., immediate weed eradication); (2) BLM considered low-level herbicide use in its other alternatives; and (3) the grazing alternative was too remote. The goal of this project was short-term weed eradication. BLM was undertaking a long-term study of the causes of weeds as part of a separate project. Thus, the limitation of the analysis in this case was reasonable. Therefore, the discussion of alternatives was reasonable.[96]

The court agreed with plaintiffs that the mere fact that EPA has registered a herbicide under FIFRA does not necessarily mean that an agency may rely on the herbicide as suitable for NEPA purposes. To comply with NEPA, an agency must independently study the safety of the proposed herbicide.[97] On the basis of the available information and its own independent analysis, BLM reasonably con-

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[94]*Id., citing Cal.* v. *Block*, 690 F.2d 753, 761 (9th Cir. 1982).

[95]CEQ Regulations, 40 CFR § 1502.14(a) (1996); *see also NCAP*, 844 F.2d at 592.

[96]*NCAP*, 844 F.2d at 594.

[97]*Id.* at 596, *citing S. Or. Citizens Against Toxic Sprays* v. *Clark*, 720 F.2d 1475, 1980 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984).

cluded that the risk level associated with the herbicide was acceptable.[98] Therefore, the court held, BLM did not improperly adopt EPA's registered herbicide; its EIS was adequate.

Ruling on Appeal

The court of appeals, affirming the lower court's decision, found BLM's FEIS and SEIS adequate. According to the court, BLM was "entitled to be 'arguably wrong'" in its decision.[99] The Supreme Court has held that an agency is limited to discussing alternatives that are feasible.[100] If an alternative is incompatible with a project's timeframe requirements, then it is remote and speculative, rather than reasonable, and a brief discussion of it will suffice for NEPA purposes.

On the factual issue, the court of appeals sided with plaintiff and found that BLM, by failing to notify plaintiff, violated the regulations.[101] Specifically, the court found that BLM should have notified plaintiff personally because plaintiff, a party in prior litigation seeking to enjoin BLM's actions, was an interested party. Also, plaintiff, comprised of regional branches of national associations involved in a regional action, was not, strictly speaking, a local group and, therefore (arguably), were entitled to receive notice as a national group.

The court of appeals found that plaintiff failed to show prejudice.[102] The court agreed with plaintiff that participation in the SEIS could not make up for lack of participation in the FEIS. For example, the topics under discussion may have varied, such that if plaintiff had had an opportunity to participate in the FEIS, it might have been able to influence SEIS discussions. In this case, however, plaintiff *did* participate in the FEIS, as evidenced by the fact that the FEIS incorporated its July 1985 comments. BLM completed the FEIS in December 1985. Plaintiff corresponded further with BLM in January and February 1986; BLM issued its record of decision in April 1986. In June 1986, BLM notified plaintiff of its intent to issue an SEIS. Plaintiff participated amply and did not suffer prejudice.

The court of appeals affirmed the lower court's decision and held that notice was proper; BLM's EIS was adequate.[103]

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[98] *NCAP*, 844 F.2d at 596.

[99] *Id.* at 598, *citing Northwest Coalition for Alternatives to Pesticides* v. *Lyng*, 673 F.Supp. 1019, 1025 (D. Or. 1987), *citing Oregon Env'tl. Council* v. *Kunzman*, 817 F.2d 484, 496 (9th Cir. 1987).

[100] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978).

[101] In particular, BLM violated CEQ Regulations, 40 CFR §§ 1501.7 and 1506.6 (1996).

[102] *NCAP*, 844 F.2d at 596.

[103] *Id.*

ROBERTSON V. METHOW VALLEY CITIZENS COUNCIL

Issue

In *Robertson* v. *Methow Valley Citizens Council*,[104] a case involving a USFS project to develop a ski resort, plaintiffs, a collection of citizens groups, argued that the EIS lacked a mitigation plan. The court considered whether, under NEPA, the EIS needed to contain a complete mitigation plan and whether USFS can issue a special-purpose permit.[105]

Facts

By statute, USFS had the authority to manage the national forestland for the purposes of recreation; timber harvesting; and range, fish, and wildlife resources management.[106] Because of this grant of authority, USFS had the authority to, and did, issue permits, such as special-use permits to ski resort operators on federal land. A decision to grant such a permit constituted a major federal action, which triggered NEPA and required an EIS.[107]

NEPA requires an agency proposing an action to prepare a detailed statement concerning the unavoidable adverse environmental impacts of that action. This requirement implies a need to discuss mitigation.[108] In addition, CEQ regulations require an agency to discuss mitigation measures in several places: when defining the scope of the EIS,[109] when discussing alternatives to the proposed action,[110] when discussing the consequences of the proposed action,[111] and when explaining the final decision.[112]

Although USFS regulations did not require an agency to discuss off-site mitigation measures, both NEPA and the CEQ regulations required an agency to discuss in detail both on-site and off-site mitigation steps.[113] USFS regulations merely required an application for a special-use permit to include measures to protect the

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[104]490 U.S. 332.

[105]*Id.* at 335–36.

[106]Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. § 528 (1996); see also National Forest Management Act of 1976, 16 U.S.C. § 1600 et seq. (1996).

[107]*Methow Valley*, 490 U.S. at 336.

[108]National Environmental Policy Act of 1969 § 102(C)(ii), 42 U.S.C. § 4332(C)(ii) (1996); *see also Methow Valley*, 490 U.S. at 351–52.

[109]CEQ Regulations, 40 CFR § 1508.25(b) (1996).

[110]CEQ Regulations, 40 CFR § 1502.14(f) (1996).

[111]CEQ Regulations, 40 CFR § 1502.16(h) (1996).

[112]CEQ Regulations, 40 CFR § 1505.2(c) (1996).

[113]*Methow Valley* at 358.

environment and also required an authorization for a special-use permit to state conditions and terms that would protect the environment.[114]

Ruling

A discussion of possible mitigation steps that can be taken to counteract adverse environmental impacts is an "important ingredient of an EIS."[115] Consideration of possible mitigation measures in the EIS is necessary for the agency and other interested parties to gauge the severity of any adverse environmental consequences. An agency that fails to discuss mitigation measures in its EIS necessarily has not taken an adequate hard look at the environmental consequences of its proposed action.

Upon considering these requirements, the court observed that discussing mitigation measures differ markedly from developing and adopting a complete mitigation plan. Moreover, the CEQ regulations do not require an agency to develop and adopt a complete plan of mitigation because doing so would undermine NEPA's procedural status. Furthermore, the court pointed out, a mitigation plan might fall under the jurisdiction of some other agency, hindering the ability of the proposing agency to act unless the other agency developed and adopted a mitigation plan, too.[116] Therefore, the court, upon reviewing the requirements of NEPA, held that the proposing agency need not develop and adopt a complete plan of mitigation.[117]

The court then turned to the question of whether FS could issue a special-use permit when it had not formulated a complete mitigation plan.[118] Because the project's environmental impacts were minimal and easy to mitigate, the USFS's proposed mitigation measures—promptly revegetating "disturbed" areas, and locating and building service roads away from water bodies and deer areas—were not too vague or underdeveloped. The court therefore held that USFS did not violate its own regulations, because its EIS stated that the resort development would have minimal on-site effects that would be easy to mitigate.[119] Thus, USFS had authority to issue a permit even though it had not formulated a complete mitigation plan; its EIS was adequate.

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[114]36 CFR § 251.54(e)(4) (1996).

[115]*Methow Valley*, 490 U.S. 332, 351.

[116]*Id.* at 352.

[117]*Id.*

[118]*Id.* at 335.

[119]*Methow Valley*, 490 U.S. at 357.

SIERRA CLUB V. FROEHLKE

Issue

In *Sierra Club* v. *Froehlke,*[120] plaintiff, an environmental lobby, alleged that an agency failed to take a good faith, hard look at the environmental impacts of a project. The case involved a COE water project. It should be noted that this is one of the few cases that actually addresses potential environmental impacts and the adequacy of the EIS in dealing with them.

Facts

The water project, authorized by Congress in 1962, had five purposes: (1) controlling salinity, (2) supplying water, (3) enhancing the development of fish and wildlife, (4) navigation, and (5) recreation. The project was already in progress when Congress passed NEPA in 1969, necessitating that COE draft an after-the-fact EIS. A reviewing court, having deemed this EIS inadequate, granted an injunction to freeze the project and ordered COE to prepare an SEIS. Instead, COE decided to reduce the scope of the project and drafted a new EIS in July 1979.

Two years later, COE sent its FEIS to the Board of Engineers for Rivers and Harbors (BERH) for review. BERH thought the fact that COE's new EIS deleted two of the original purposes (enhancing the development of fish and wildlife and navigation) might raise a policy issue that would require COE to seek congressional reapproval for the project. To assist interested parties in determining whether this was indeed the case, COE prepared an internal report, the *Supplemental Information to the Post-Authorization Change Report* (SIPACR). The SIPACR recalculated the project's economic benefits and concluded it would in fact enhance fish and animal life and aid navigation. Thus, the reformulated project preserved the original five purposes, obviating the need for congressional approval.[121]

However, before COE had had an opportunity to circulate the SIPACR internally, Congress cited this report in legislation approving the project. As an internal document, the SIPACR had never undergone the public review required under NEPA. Consequently, COE released the document to the public for review and comment, and later issued a report containing comments on both the original EIS and the SIPACR as well as COE's responses. COE then approved the project and issued its record of decision.[122]

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[120]816 F.2d 205.

[121]*Id.* at 208.

[122]*Id.* at 209.

Plaintiff argued that COE failed to take a good faith, hard look at the environmental consequences of the proposed action. At a public hearing, plaintiff alleged that the water project would reduce the flow of fresh water into the marshes, increasing their salinity and decreasing the inflow of sediments, creating an adverse impact on marsh life. COE disagreed with plaintiff's assessment of the severity of the effect. Whereas plaintiff argued that the increase in salinity would be accompanied by severe consequences, COE argued that the change would be gradual and mild. Plaintiff did not perform studies to support their claims, but rather used educated speculation.[123] COE, on the other hand, "thoroughly examined this question," and indeed came to the same conclusion as plaintiff, but differed in their assessment of the severity of the effect.

Ruling

A court studies three aspects of an EIS to determine its adequacy:

- Did the agency take a good faith, hard look at the environmental impacts of its proposed project and the alternatives to the project?
- Does the EIS contain sufficient detail to enable someone who took no part in the preparation of the EIS to understand the relevant environmental consequences?
- Can the agency make a reasoned choice among the alternatives on the basis of discussion of alternatives in the EIS? [124]

In this case, the court, addressing the issue of salinity, characterized the dispute as a "scientific disagreement among experts" not reviewable by the courts.[125] A difference of opinion among experts by itself does not render an EIS inadequate. In the court's opinion, plaintiff's objections to COE's assessment of the effect of the water project on nutrient flows amounted to nothing more than a dispute over methodology. The court concluded that a dispute over proper methodology alone constituted insufficient grounds to judge an EIS inadequate.

Plaintiff argued (ironically, in view of its own lack of studies) that COE should have conducted mathematical modeling of the project's effect on salinity levels. COE rejected this methodology on the grounds that the change in salinity was expected to be so small that mathematical modeling "would have been a waste of time and money."[126] The courts do not require an agency to use every scientific technique available when studying the environmental impacts of a proposed action because doing so would engage the court in "the kind of nit-picking courts

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[123] *Id.* at 213–14.

[124] *Id.* at 212.

[125] *Id.* at 214.

[126] *Id.*

should avoid."[127] Here, the court found that COE acted properly in rejecting this methodology.

Ruling on Appeal

The court of appeals reversed the lower court's decision and vacated the injunction granted to plaintiff. The court held that COE took the required good faith, hard look at the environmental consequences of its proposed action. Therefore, COE had not violated NEPA procedure, and its FEIS was adequate for NEPA purposes.[128]

TOWN OF FENTON V. DOLE

Issue

In *Town of Fenton* v. *Dole*,[129] the plaintiffs, a town and its concerned citizens groups and individuals in New York state, argued that the FEIS contained insufficient facts on which to base an informal decision to select a route, and that by omitting or misrepresenting facts, it caused one alternative to appear superior to all others. As a result, the FEIS inadequately considered the adverse environmental impacts of the proposed action, so the agency could not possibly have made a fully informed decision in selecting an alternative.[130]

Facts

The case involved a joint project of the DOT and FHWA to construct an interstate highway connector. Of the four alternatives to the proposed action, three involved construction at different sites and one was a no-action plan.[131]

Specifically, plaintiffs argued that the FEIS made one alternative appear distinctly unattractive by stating that it would have a negative impact on agricultural land. As a result, several federal agencies (including the Departments of Agriculture and the Interior and the U.S. Environmental Protection Agency) in their comments on the draft EIS objected to this alternative because of its adverse effects on commercial farmland.

However, the land in question was not farmland. By the time the EIS was finalized, the error incorrectly designating the land in question as commercial farmland had been corrected to reflect the land's "hobby farm" status. Moreover, the FEIS

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[127] *Id.*

[128] *Id.*

[129] 792 F.2d 44 (3d Cir. 1986) [*hereinafter Fenton II*].

[130] *Id.* at 562.

[131] *Town of Fenton* v. *Dole*, 636 F.Supp. 557, 563 (N.D.N.Y. 1986) [*hereinafter Fenton I*].

included a letter from the state agricultural agency verifying this change. However, the FEIS did not eliminate the federal agencies' original comments objecting to the purported loss of agricultural land.

Ruling

According to the district court, "the EIS must set forth sufficient information for the general public to make an informed evaluation, and for the decision maker to fully consider the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action."[132] In short, the EIS must not sweep potential problems under the rug. In this case, the agency had left in the original information along with the correction information.

The court of appeals, in deciding whether the agency had acted in good faith in preparing the EIS and whether the EIS contained sufficient information for the agency to make a competent decision, found that inclusion of these comments in the FEIS was *not* misleading because they referred to agricultural land in general, rather than to the designation of specific land areas as commercial or hobby farm.[133] In a per curiam opinion, the court of appeals affirmed the district court, holding that DOT–FHWA's EIS was adequate.[134]

VALLEY CITIZENS FOR A SAFE ENVIRONMENT V. ALDRIDGE

Issue

In *Valley Citizens for a Safe Environment* v. *Aldridge*,[135] plaintiff alleged that the discussion of alternatives in the U.S. Air Force's (USAF's) EIS was, on its face, too short and did not discuss a number of alternatives.

The plaintiffs also alleged that the USAF EIS failed to describe properly the potential negative effects of the aircraft relocation project on air quality, and challenged the scientific method that the USAF used to estimate the numbers of people who would be adversely affected by the increased noise levels.

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[132] *Id.* at 574, *citing Sierra Club* v. *United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983).

[133] *Fenton I*, 636 F.Supp. at 574-75, *citing County of Suffolk* v. *Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

[134] *Fenton II*, 792 F.2d at 45.

[135] 886 F.2d 458.

Facts

The case involved a U.S. Air Force (USAF) project to transfer cargo planes from one base to another.

The plaintiff alleged that USAF's EIS did not take into account alternatives to transferring the planes.[136] In deciding among alternative bases at which to house the planes, USAF used several important non-environmental criteria: (1) the condition of the physical facilities at alternative locations, (2) the potential for recruiting reserve units in the area, (3) the additional necessary construction expenses (4) the existing activities at the bases, and (5) the fuel systems capacity. The EIS described how each of the locations initially under consideration did not meet these five essential non-environmental criteria, either because they entailed excessively high construction costs or had too low a potential for recruiting staff, or some combination of the two.[137] The plaintiff also claimed that the EIS lacked a discussion of the environmental impacts associated with a transfer of planes to one of the five bases.

Plaintiff alleged an inaccurate description in the EIS of the increases in levels of nitrous oxide that would result from the proposed action, and provided an alternate model to demonstrate that the EIS failed to account for these increases.

USAF's EIS identified an increase in noise as a significant environmental consequence that would interfere with speech, sleep, and land use. Using National Academy of Science (NAS) guidelines, USAF estimated the number of people who would be highly annoyed by the noise. Plaintiff argued that the NAS guidelines produced an inaccurate estimate because they used average noise levels, which failed to take into account the fact that a loud noise heard every second day, as in this case, would be more annoying than a softer noise that occurs daily. Plaintiff introduced expert testimony to support the claim that USAF erred in its methodology.[138]

Ruling

The district court held that under NEPA, a proposing agency has a duty to consider only alternatives that are reasonable *at the time* the study is performed, as well as any significant alternative submitted during the public comment period.[139] In *Valley Citizens*, the only relevant comments generated were those recommending that the planes take off and land over the water. However, USAF

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[136] *Id.* at 461.

[137] *Id.*

[138] *Id.* at 467–68.

[139] *Id.* at 462, *citing Roosevelt Campobello Int'l Park* v. *U.S. Env'tl. Protection Agency*, 684 F.2d 1041, 1047 (1st Cir. 1983).

pointed out that this was possible only under two of the alternatives, which were both impractical in terms of cost and other non-environmental considerations.

Only the individual facts and circumstances of each case can assist the court in determining the reasonableness or adequacy of the discussion of alternatives, not the length of the discussion on paper. The nature of the proposed action is just one of the facts and circumstances a court takes into consideration.[140] Forcing every EIS to fit a mold could have the effect of unnecessarily stopping an agency from performing a critical action in a timely fashion. It may even prevent the NEPA process from protecting the environment. To illustrate its meaning, the court observed that certain actions that look reasonable in a crisis situation (e.g., when deploying troops to various parts of the country in preparation for trouble abroad), may not look reasonable when a similar sense of urgency does not exist (e.g., when building a power plant next to a national park).[141]

In response to plaintiff's argument that the discussion of alternatives was too brief, the court pointed out that the fact remained that USAF was *not* proposing to build a power plant or a bridge, but to relocate its aircraft. Under these circumstances, USAF's discussion of alternatives was reasonable; its EIS therefore was adequate.

A court "may not use minor lapses in the statement as an excuse to thwart actions that it believes to be unwise . . . or require of the discussion a degree of detail too exacting to be realized."[142] The court studied the record to determine whether the emissions increases were significant, without relying on minor deficiencies in the EIS to overrule the agency's decision. The court began its analysis by examining USAF's method for calculating the emissions in its EIS, and then discussed the mistakes, highlighted by plaintiff, in the calculation. The court then presented figures representing the amounts of nitrous oxide unaccounted for in the EIS from sources such as engine testing, cargo flights, and sortie emissions.[143]

The court noted that two equally acceptable methods exist for estimating sortie emissions. USAF chose one, plaintiff the other. As a result, each party obtained widely differing estimates. Since neither methodology was incorrect, under normal circumstances, the court would have automatically deferred to the proposing agency.[144]

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[140] *Id.* at 463, *citing Manygoats* v. *Kleppe*, 558 F.2d 556 (10th Cir. 1977); *Sierra Club* v. *Lynn*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

[141] *Valley Citizens*, 886 F.2d at 463.

[142] *Id.* at 463–64, *citing Commonwealth of Mass.* v. *Andrus*, 594 F.2d 872, 884 (1st Cir. 1979); *Conservation Law Found.* v. *Andrus*, 623 F.2d 712, 719 (1st Cir. 1979) ("a minor deficiency in an EIS does not entitle the court to disregard the deference the agency is entitled to").

[143] *Valley Citizens*, 886 F.2d at 464–65.

[144] *Id.* at 466, *citing Commonwealth of Mass.* v. *Andrus*, 594 F.2d at 886.

However, plaintiff claimed that its method accounted for an entire 5-hour sortie while USAF's method omitted "circling time." USAF could have claimed that a circling-time allowance was unnecessary because the two takeoffs, two landings, and 18 touch-and-go operations accounted for the entire 5-hour period of a sortie. However, USAF did not actually make this claim for the record. Therefore, the court had to "take the facts . . . as a reasonable trier of fact *might* find them," without deferring to USAF.[145] The court then reasoned that two takeoffs, two landings, and 18 touch-and-go operations in all likelihood took up nearly the whole 5 hours. As a result, the court found that the trier of fact could reasonably conclude that factors other than the omission of circling time accounted for the difference in the two estimates.[146]

The court also found that plaintiff's initial figures, which formed the basis for their estimates, contained amounts that should not have been included because they were based on incorrect assumptions. Leaving out these amounts and using plaintiff's method, the court recalculated plaintiff's estimate and compared it with USAF's. The difference between the two estimates was a much smaller figure than that claimed by plaintiff.

Next, to decide whether the emissions figure itself was significant, the court compared it to the total annual nitrous oxide emissions for the region, rather than considering it in absolute terms or comparing it to the initial figure. The court concluded the figure was insignificant because the difference between it and the total regional emissions was very small. Moreover, a cost-balancing trade-off existed, since other types of emissions would decrease at the same time nitrous oxide emissions increased.[147] Thus, using information contained in the parties' briefs, the court concluded that the increased emissions were not "significant." The court held that the discussion of environmental impacts in USAF's EIS was therefore adequate.[148]

The court rejected plaintiff's argument for several reasons: First, many other federal agencies—such as the Department of Housing and Urban Development, EPA, and FAA—used and endorsed the same methodology as USAF, making it the standard. Second, plaintiff's expert merely criticized USAF's methodology, without suggesting an alternative. Third, NAS guidelines did in fact address plaintiff's concerns about averaging because they assigned a heavier weight to the days with louder noise levels. In addition, during the comment period on the draft EIS—the appropriate time for objecting to this methodology—plaintiff failed to raise the issue. The court stated that "the place to attack standard methodology . . . is before the agency, not before a reviewing court."[149] Finally, the discre-

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[145] *Valley Citizens*, 886 F.2d at 466 (emphasis in the original).

[146] *Id.*

[147] *Id.* at 467.

[148] *Id.* at 464.

[149] *Id.* at 469.

tion to choose an EIS methodology rests with the proposing agency, in this case USAF. Since plaintiff did not challenge the methodology during the public comment period and, since it was a generally accepted standard, USAF's use of this methodology in its EIS was reasonable.

The court found that USAF had good reason to omit the particular impacts from its EIS discussion associated with transferring planes to one of the five bases. First, USAF had no intention of sending its planes to these locations because these places failed to meet the nonenvironmental criteria. Indeed, whether any of these locations would have had minimal environmental impact made no difference to USAF's decision. USAF thought, properly in the court's opinion, that it would have served no purpose to discuss the environmental impacts of each of the five alternatives when USAF was willing to dismiss them for operational reasons, even assuming no adverse environmental impact whatsoever.

In addition, the CEQ regulations require the proposing agency to discuss briefly why it has eliminated alternatives.[150] Here, USAF's EIS did briefly discuss the nonenvironmental reasons for eliminating the five alternative locations. The court found this part of the discussion reasonable on its face. Furthermore, during the public comment period, no one had suggested that USAF elaborate on its reasoning in greater detail.[151] Thus, the court concluded, USAF acted reasonably in omitting from its EIS a discussion of the environmental impacts of transferring the planes to one of the five bases; its EIS was adequate.

Ruling on Appeal

Whether an EIS discussion of alternatives is reasonable or adequate depends upon the circumstances of the case. The nature of the proposed action is one of those circumstances.[152] In an opinion by Judge (now Justice) Breyer, the court of appeals affirmed the district court decision granting summary judgment in favor of USAF, finding USAF's response adequate. According to the court, unless plaintiff had a good reason to claim USAF erred in its non-environmental conclusions and that environmental factors should have played a role in selecting a site, they could not criticize the EIS discussion of these conclusions, particularly in light of the fact that no one raised this subject during the public comment period.[153] Thus, the court held, USAF's alternatives selected for discussion were reasonable and its EIS was adequate.[154]

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[150]CEQ Regulations, 40 CFR § 1502.14(a) (1996).

[151]*Valley Citizens*, 886 F.2d at 462.

[152]*Valley Citizens*, 886 F.2d at 463, *citing Manygoats* v. *Kleppe*, 558 F.2d 556 (10th Cir. 1977); *Sierra Club* v. *Lynn*, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

[153]*Valley Citizens*, 886 F.2d at 462, *citing Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978).

[154]*Valley Citizens*, 886 F.2d at 459.

The court of appeals, finding the discussion of environmental impacts adequate, affirmed the lower court's decision and found USAF's EIS adequate.[155]

[155]*Id.* at 468–69.

Appendix B
Glossary

ARC	Atlanta Regional Commission
BERH	Board of Engineers for Rivers and Harbors
BLM	Bureau of Land Management
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
COE	Corps of Engineers
DoD	Department of Defense
DOT	Department of Transportation
EIS	environmental impact statement
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAHA	Federal Administration Highways Act
FEIS	final environmental impact statement
FHWA	Federal Highway Administration
FIFRA	Federal Insecticide, Fungicide and Rodenticide Act
FS	Forest Service
NAS	National Academy of Science
NCAP	Northwest Coalition for Alternatives to Pesticides
NEPA	National Environmental Policy Act
SEIS	supplemental environmental impact statement
SIPACR	Supplemental Information to the Post-Authorization Charge Report
UMTA	Urban Mass Transit Administration
USAF	U.S. Air Force
U.S.C.	United States Code
USFS	United State Forest Service

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NEPA requires federal agencies to consider environmental consequences prior to undertaking major actions. If such consequences may exist, the agency must develop an environmental impact statement (EIS). This report summarizes key cases portraying the state of the law on EIS adequacy. Challenges to an EIS are procedural rather than environmental because agency findings are normally ruled to be conclusive. Many plaintiffs really seek any excuse to delay or prevent a proposed activity; therefore, adherence to procedure wins cases but cannot deter them. The present federal strategy of expensive over-documentation in order to preclude lawsuits should be replaced with a strategy that encourages adequate documentation to protect the environment, accepting the fact that lawsuits will sometimes be used to buy delays in undertaking major actions.

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