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**OVERVIEW OF THE
NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)**

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CONTROLLING LAW --

Statute enacted by Congress -- 42 U.S.C. §§ 4321-4370d

Regulations written by Council on Environmental Quality (CEQ) -- 40 C.F.R. 1500-1517

Regulations by various agencies (Forest Service, BLM, etc.) -- Generally don't add a whole lot to the CEQ regulations but you may find nuggets that are helpful

Agency policy manuals (Forest Service, BLM, etc.) -- generally not binding or enforceable

CEQ's "40 Most Asked Questions," 46 Fed. Reg. 18,026 (1981) -- nonbinding, "persuasive."

WHAT NEPA IS AND IS NOT

NEPA "IS OUR BASIC NATIONAL CHARTER FOR PROTECTION OF THE ENVIRONMENT." 40 C.F.R. 1500.1(a).

THAT SAID, NEPA IMPOSES PROCEDURAL REQUIREMENTS, BUT NOT SUBSTANTIVE OUTCOMES, ON AGENCY ACTION. Lands Council v. Powell, 379 F.3d 738 (9th Cir. 2004), as amended (9th Cir. 01/24/2005). Even if an agency promises in an EIS to do something, you can't enforce that promise.

Although NEPA does not mandate substantive results, its action-forcing procedural provisions "are not highly flexible, [and] establish a strict standard of compliance." Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971). NEPA includes many requirements that force scrutiny and public discussion of environmental impacts, as further discussed below.

"NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that it has indeed considered environmental concerns in its decisionmaking process." Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1300 (9th Cir. 2003). "In order to accomplish this, NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences." Id. In Lands Council, the Ninth Circuit recently explained:

Congress wanted each federal agency spearheading a major federal project to put on the table, for the deciding agency's and for the public's view, a sufficiently detailed statement of environmental impacts and alternatives so as to permit informed decision making. The purpose of NEPA is to require disclosure of relevant environmental considerations that were given a "hard look" by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm.

TIMING

NEPA "is a procedural statute that requires the Federal agencies to assess the environmental consequences of their actions before those actions are undertaken." Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989 (9th Cir. 2004). It is an "action-forcing device" to ensure that the nation's environmental quality goals are met. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S. Ct. 1835, 1844-45 (1989); 40 C.F.R. 1502.1. Therefore, NEPA procedural requirements be fulfilled "before decisions are made and before actions are taken." 40 C.F.R. 1500.1(b), 1502.5; Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988).

However, the fact that the decision was virtually certain before the NEPA document was written is okay with the Ninth Circuit. Presidio Golf Club v. National Park Service, 155 F.3d 1153 (9th Cir. 1998).

NEPA COVERS "MAJOR FEDERAL ACTIONS"

WHAT IS A "FEDERAL" ACTION? -- Not only when an agency proposes to build a facility itself, but also when an agency permits action by private entities, e.g. lease of land; licenses and permits; approval and funding of highways; incidental take permit under ESA; land exchange (EIS must address private entity's plans to develop). **But see** Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir.), cert. den., 449 U.S. 836 (1980) (power line project not federalized where federal permit required only where line crossed navigable waterway); Save the Bay v. U.S. Army Corps, 610 F.2d 322 (5th Cir), cert. den., 449 U.S. 963 (1980) (pollution discharge permit did not federalize sewage treatment plant); Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996) (federal advisory activity not enough).

PRIOR TO MAJOR FEDERAL ACTIONS, NEPA REQUIRES:

1) AN ENVIRONMENTAL IMPACT STATEMENT (EIS) or

2) ENVIRONMENTAL ASSESSMENT (EA) or

3) Application of a CATEGORICAL EXCLUSION

(NEPA allows each agency to establish categories of actions which normally would not have significant environmental impacts, and are therefore "categorically excluded" from the requirement of preparing an EA or EIS. However, the agency has to provide for analysis of each action to determine whether "extraordinary circumstances" exist that would require NEPA analysis of that particular action (for example, the Forest Service includes as "extraordinary circumstances" for its timber sale CE's "steep slopes or highly erosive soils," or "threatened and endangered species or their critical habitat." 40 C.F.R. 1508.4.)

WHEN IS A FEDERAL ACTION "FINAL" AND RIPE FOR NEPA CHALLENGE?

You must wait for the government to finish its decision-making project and issue a "final agency action." See Oregon Natural Resources Council v. BLM, 150 F.3d 1132 (9th Cir. 1998) - Plaintiffs challenged pattern of logging and exchange of old-growth on the eastside of Oregon and Washington pending finalization of the Eastside Ecosystem Management Plan. The court held there was no "final agency action," because there had been no "reasoned consideration" of the request to stop logging and exchanging old-growth (even though BLM had written a letter rejecting such a request by plaintiffs).

Compare Center for Biological Diversity v. Veneman, 335 F.3d 849 (9th Cir. 2003) (failure to amend forest plans -- agency unreasonable delayed -- distinguishing ONRC v. BLM).

On that issue, also take a look at Friends of Southeast's Future v. Morrison, 153 F.3d 1059 (9th Cir. 1998) — Tongass National Forest harvest under a long-term contract — EIS issued for individual timber sale, with stated purpose and need to supply timber to fill the contract. Plaintiff argued EIS was needed for initial harvest schedule, but the court held there was no irretrievable commitment of resources until the individual sales. The Forest Service retained the option of refusing to offer the contract amount and also directed where to log.

If you are arguing that the government needs to supplement an existing NEPA document, you will also need to scrutinize Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004), in which the court held that the claim in that case was not ripe under the "agency action unlawfully withheld" provision of the Administrative Procedure Act.

WHEN IS AN EIS REQUIRED RATHER THAN AN EA? An EIS is required if there are "substantial questions whether a project **may** have a **significant** effect." LaFlamme v. Federal Energy Regulatory Comm'n, 852 F.2d 389, 397 (9th Cir. 1988). An EIS can be avoided only if the federal action **will** have "no significant impact" on the environment. 40 C.F.R. 1501.4(e).

Caselaw -- Here are just a few examples:

Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998) – rejecting EA because "[s]ubstantial questions remain as to the effect that the Miners Creek timber sale will have on the human environment. . . . In light of the failure to provide adequate data to the public, we conclude that an EIS is necessary to explore the substantial questions in respect to whether and what significant effects the sale may have." Moreover, "since the effects of the sale will not be known until the EIS is prepared we cannot know whether the mitigation measures are sufficient." Thus, the court rejected the government's argument that an EIS was not required because all significant impacts would be mitigated.

Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 (9th Cir 2004) (rejecting FONSI due to uncertainty and "common sense" re: several things, e.g. oil spills are an "undeniable" risk; but be careful - this was before the Supreme Court decision in Dept of Transportation v. Public Citizen, ___ U.S. ___, 124 S. Ct. 2204 (June 7, 2004), and the court

cites the Ninth Circuit's overturned decision in that case).

Anderson v. Evans, 314 F.3d 1006 (9th Cir. Dec. 2002) (Makah whaling case) -- "While a notable attribute of the creatures we discuss in this opinion [whales], girth is not a measure of the analytical soundness of an environmental assessment. No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment." Impact on local whale population was sufficiently uncertain and controversial to require full EIS; "take" could exceed allowable level established under Marine Mammal Protection Act; govt's own experts expressed concerns about uncertainty of local effects. "[L]ocal effects are a basis for a finding that there will be a significant impact from the Tribe's hunts." Also precedential effect.

Middle Rio Grande Conservancy District v. Norton, 294 F.3d 1220 (10th Cir. 2002) -- ordering Fish and Wildlife Service to prepare EIS regarding Rio Grande Silvery Minnow critical habitat designation.

See also Forelaws on Board v. Johnson, 743 F.2d 677 (9th Cir. 1984), cert. denied, 478 U.S. 1004 (1986) (long-term contracts for power delivery would have significant impact); Foundation for North American Wild Sheep v. United States Dep't of Agriculture, 681 F.2d 1172 (9th Cir. 1982) (reopening mining road would have significant impact on bighorn sheep); American Horse Protection Ass'n v. Andrus, 608 F.2d 811 (9th Cir. 1979) (horse roundup would have significant environmental impact); Audubon Soc'y of Central Arkansas v. Dailey, 977 F.2d 428 (8th Cir. 1992) (bridge affecting park use would have significant impact).

WHAT IS "SIGNIFICANT"? "[R]equires considerations of both context and intensity:

(a) **Context.** This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. . . . Both short- and long-term effects are relevant.

(b) **Intensity.** . . . The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. . . . Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect . . . sites . . . listed in or eligible to be listed in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. 1508.27. A single one of these factors may suffice to require a full EIS. Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 (9th Cir 2004).

Precedential effect -- See Anderson (Makah whaling case).

Controversy - The existence of a public controversy over the effect of an agency action is one factor in determining whether the impact is "significant." See 40 C.F.R. 1508.27(b)(4) (1991); LaFlamme v. FERC, 852 F.2d 389, 400-01 (9th Cir.1988); Jones v. Gordon, 792 F.2d 821, 828-29 (9th Cir.1986). A federal action is controversial if ""a substantial dispute exists as to [its] size, nature, or effect."" Foundation for North American Wild Sheep v. United States Department of Agriculture, 681 F.2d 1172, 1182 (9th Cir.1982). Thus, in Foundation for North American Wild Sheep, the Ninth Circuit found that the action involved was precisely the type of "controversial action" that required an Environmental Impact Statement. The court referred to the "numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA and all disputing the EA's conclusion." Id. at 1182.

CONTENTS OF AN EA AS OPPOSED TO AN EIS

In an EA an agency must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact," as well as "brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), [and] of the environmental impacts of the proposed action and alternatives." 40 C.F.R. 1508.9. See id. 1502.9(c)(1)(ii). In Kern v. BLM, 284 F.3d 1062, 1075-76 (9th Cir. 2002), the court recently rejected the government's perennial argument that EAs don't require the same components as do EISes:

The importance of analyzing cumulative impacts in EAs is apparent when we consider the number of EAs that are prepared. The Council on Environmental Quality noted in a recent report that "in a typical year, 45,000 EAs are prepared compared to 450 EISs. . . . Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully.

The requirement for analysis of a reasonable range of alternatives applies to EAs as well as EISes. Akiak Native Community v. U.S. Postal Serv., 213 F.3d 1140, 1148 (9th Cir. 2000).

The CEQ regulations do not mandate public review of an environmental assessment. But the regs do require that the agency must, to the extent practicable, include the public as well as the applicants and other federal environmental agencies in the environmental assessment's preparation. 40 C.F.R. 1501.4(b). The FS and other agencies have written regs that say an EA does require public notice & comment; and the CEQ's 40 Most Asked Questions say this as well.

BASIC REQUIREMENTS OF NEPA DOCUMENTS

CLARITY AND READABILITY -- NEPA documents must use "plain language," "provide full and fair discussion of significant environmental impacts," and be "clear, and to the point." 40 C.F.R. 1502.1, 1502.8.

DESCRIPTION OF PURPOSE AND NEED -- NEPA requires the statement of purpose and need in an EIS to reflect the true purpose and need "to which the agency is responding in proposing the alternatives including the proposed action." § 1502.13. See Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999), footnote 7 – the purpose and need cannot be defined so narrowly that only one alternative will work.

DESCRIPTION OF THE AFFECTED ENVIRONMENT – 40 C.F.R. 1502.15.

SCIENTIFIC HONESTY AND RATIONALITY -- The agency must use high quality information and accurate scientific analysis, 40 C.F.R. 1500.1(b), and must disclose "any responsible opposing view." Id. 1502.9(b).

THIS IS A COMMON ACHILLES HEEL OF NEPA DOCUMENTS, BUT THERE IS A RIGHT WAY AND A WRONG WAY TO ATTACK IT

- DO NOT ATTEMPT A BATTLE OF EXPERTS -- "NEPA does not require that we decide whether an [FEIS] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1359 (9th Cir.1994); see also Morongo Band of Mission Indians v. FAA, 161 F.3d 569 (9th Cir. 1998).

- CITE THE CONCERNS OF SISTER AGENCIES AND INSIDE AGENCY DISSENTERS -- e.g. Interdisciplinary Team which wrote the EIS; U.S. Fish and Wildlife Service; state FWS; EPA. See Ocean Advocates v. United States Army Corps of Engineers, 361 F.3d 1108 (9th Cir 2004) (ignoring FWS undermined adequacy of NEPA analysis). The EIS must disclose and analyze opposing opinions. Center For Biological Diversity v. United States Forest Service, 349 F.3d 1157 (9th Cir. 2003) (failure to disclose opposing scientific opinion violates NEPA); Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992) ("NEPA requires that the agency candidly disclose in its EIS the risks of its proposed action, and that it respond to the adverse opinions held by respected scientists.");

"[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973).

- FOCUS ON DATA GAPS AND FAILURE TO CONNECT THE DOTS -- NEPA requires that the EIS itself "make explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement." 40 C.F.R. 1502.24. Thus, in Idaho Sporting Congress v. Thomas, the Ninth Circuit noted:

allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.

137 F.3d 1146, 1150 (9th Cir. 1998). In Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291 (9th Cir. 2003), the Ninth Circuit held that the government won the battle of experts, but if data were proved on remand to be factually incorrect then plaintiff could win the NEPA argument because of the "scientific integrity" requirement of NEPA.

See also Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980) ("we find no indication in [NEPA] that Congress contemplated that studies or memoranda contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate"); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding EA inadequate where it contained

"virtually no reference to any material in support of or in opposition to its conclusions"; deficiency not cured by support contained in administrative record.).

This is an extension of the general "arbitrary and capricious" standard of review. Although that standard is deferential, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" and the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2866-67 (1983) (citations omitted). "Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action." Bowen v. American Hosp. Ass'n, 476 U.S. 610, 626, 106 S. Ct. 2101, 2112 (1986). See also Sears Sav. Bank v. Federal Sav. and Loan Ins. Corp., 775 F.2d 1028, 1029-30 (9th Cir. 1985) (remanding to agency because record failed to present an adequate basis for agency action; "Although this scope of review is narrow, the Board must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.")

"An agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment." Marble Mountain Audubon Society v. Rice, 914 F.2d 179, 182 (9th Cir. 1990) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21, 96 S. Ct. 2718, 2730 n.21 (1976)).

- POINT OUT THAT DATA GAPS REQUIRE DISCLOSURE OF THE GAPS AND PERHAPS A FULL EIS - an agency "cannot avoid NEPA responsibilities by cloaking itself in ignorance." Fritiofson v. Alexander, 772 F.2d 1225, 1244 (5th Cir. 1985). Uncertainty may require a full EIS. Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 (9th Cir 2004); National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001). "The agency cannot "increase the risk of harm to the environment and then perform its studies. . . . This approach has the process exactly backwards." Nat'l Parks, 241 at 733. "Before one brings about a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges." Id. The agency's conclusions were not "reached by reasoned extrapolation from the data, rather the data were simply insufficient." Id. at 737. "The Parks Service's lack of knowledge does not excuse the preparation of an EIS; rather it requires the Parks Service to do the necessary work to obtain it." Id. at 733.

The existence of incomplete or unavailable scientific information concerning significant adverse environmental impacts triggers the requirements of 40 C.F.R. 1502.22. This provision requires the "disclosure and analysis of the costs of uncertainty [and] the costs of proceeding without more and better information." Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark (SOCATS), 720 F.2d 1475, 1478 (9th Cir. 1983). "On their face these regulations require an ordered process by an agency when it is proceeding in the face of uncertainty." Save Our Ecosystems v. Clark, 747 F.2d 1240, 1244 (9th Cir. 1984).

40 C.F.R. 1502.22 imposes three mandatory obligations on the BLM in the face of

scientific uncertainty: (1) a duty to disclose the scientific uncertainty; (2) a duty to complete independent research and gather information if no adequate information exists (unless the costs are exorbitant or the means of obtaining the information are not known); and (3) a duty to evaluate the potential, reasonably foreseeable impacts in the absence of relevant information, using a four-step process.

In the absence of information, the agency must at a minimum include in the EIS:

- (1) a statement that such information is incomplete or unavailable;
- (2) a statement of the relevance of the missing information to evaluating reasonably foreseeable impacts;
- (3) a summary of relevant, existing credible scientific evidence; and
- (4) the agency's evaluation of all reasonably foreseeable impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

40 C.F.R. 1502.22(b) (paraphrased).

The Ninth Circuit determined that "Section 1502.22 clearly contemplates original research if necessary" and held that "NEPA law requires research whenever the information is significant. As long as the information is . . . essential or significant, it must be provided when the costs are not exorbitant in light of the size of the project and the possible harm to the environment." Save Our Ecosystems v. Clark, 747 F.2d 1240, 1244 n.5 (9th Cir. 1984). NEPA "envisions that program formulation will be directed by research results rather than that research programs will be designed to substantiate programs already decided upon." Id.

In adopting the current version of 40 C.F.R. 1502.22(b), the Counsel on Environmental Quality (CEQ) noted:

It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and make those effects known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry." 51 Fed. Reg. 15618 (1986)

NEPA DOCUMENTS MUST DISCLOSE ALL FORESEEABLE IMPACTS

NEPA requires agencies to disclose all significant impacts from projects, whether they are "direct" or "indirect." 40 C.F.R. 1502.16; City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975). "Indirect" impacts include any "reasonably foreseeable" impacts. 40 C.F.R. 1508.8(b), 1502.22.

Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998) (May 13, 1998 - as amended) – the court noted that the EA analysis of impacts to trout was "vague and nonspecific" and buried in a long, vague description of other species, and "[s]ignificantly, the EA does not list trout in the section addressing 'Wildlife.' Therefore, we find that these disclosures are insufficient under NEPA. They do not adequately disclose the existence of a management indicator species, trout, within the boundaries of the sale area and provide no analysis for the public to review."

Growth-inducing effects -- The agency must specifically consider "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. 1508.8(b), 1502.16. See City of Carmel-By-The-Sea v. United States Department of Transportation, 123 F.3d 1142 (9th Cir. 1997); City of Davis (highways induce growth).

Disclosure of catastrophic impacts -- This includes impacts which could have "catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." § 1502.22(b).

But the agency need not consider speculative impacts -- In No Gwen Alliance of Lane County v. Aldridge, 855 F.2d 1380 (9th Cir. 1988), the court rejected plaintiffs' request for a supplemental EIS because the link between the Federal Government action and the impact of nuclear war was purely speculative. In Warm Springs Task Force v. Gribble, 621 F.2d 1017, 1026-27 (9th Cir. 1980), the court held that the risk that an earthquake would cause total failure of a dam was too remote. In Glass Packaging Inst. v. Regan, 737 F.2d 1083 (D.C. Cir. 1984), cert. denied, 469 U.S. 1035 (1984), the court rejected plaintiffs' NEPA claim that the agency needed to look at the possibility of injecting poison through the sides of plastic beverage containers. In Glass Packaging the court said NEPA is not "an administrative incarnation of the policeman's squad car, roving the streets in search of sporadic criminal activity which may occur in the aftermath of an agency action." Glass Packaging, 737 F.2d at 1092. Beware also of Dept of Transportation v. Public Citizen, ___ U.S. ___, 124 S. Ct. 2204 (June 7, 2004) -- holding that because the agency lacked discretion to prevent cross-border operations of Mexican trucks, neither NEPA nor the Clean Air Act required the agency to evaluate the environmental effects of such operations.

CUMULATIVE IMPACT ANALYSIS

As a special category of impacts, the agency must address in its NEPA analysis all foreseeable cumulative actions, "regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. 1508.7. These are all past, present, and "reasonably foreseeable future actions" "which when viewed with other proposed actions have cumulatively significant impacts." *Id.* 1508.7, 1508.25(a)(2). "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* 1508.7.

BE CAREFUL TO KEEP THIS CONCEPT DISTINCT FROM THE REQUIREMENT OF ADDRESSING "CONNECTED ACTIONS" AND THE PROHIBITION AGAINST "SEGMENTATION" OF ACTIONS, which are addressed later in this document.

The cumulative analysis must be reasonably detailed; "[g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). As the court stated in *Lands Council*:

To this end, we have previously held that NEPA requires adequate cataloguing of relevant past projects in the area. *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 809-10 (9th Cir. 1999) ("[A]n EIS must catalogue adequately the relevant past projects in the area. . . . Detail is therefore required in describing the cumulative effects of a proposed action with other proposed actions.") . . . Stated differently, the general rule under NEPA is that, in assessing cumulative effects, the Environmental Impact Statement must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.

See, e.g., *Muckleshoot* (F.S. had not adequately analyzed cumulative impacts from past and future planned land exchanges in the vicinity); *Blue Mountains Biodiversity Project*, (EA for fire salvage sale; cumulative impacts not adequately addressed); *Carmel by the Sea*, 123 F.3d at 1160-61 (rejecting EIS for highway because it referred in general terms to "development projects" and "ongoing urbanization" rather than identifying projects and impacts); *City of Davis*, 521 F.2d at 667-76 (EIS for road must analyze impacts of private development road is designed to accommodate); *Thomas v. Peterson*, 753 F.2d 754, 758-60 (9th Cir. 1985) (must address together roads and proposed logging which justifies the roads); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) (improper to ignore cumulative impacts of individual logging plans); *Sierra Club v. Penfold*, 857 F.2d 1307, 1320-21 (9th Cir. 1988) (cumulative impacts of mining operations); *LaFlamme v. Federal Energy Regulatory Comm'n*, 852 F.2d 389, 401-02 (9th Cir. 1988) (hydropower projects); *Chelsea Neighborhood Associations v. U.S. Postal Service*, 516 F.2d 378, 388 (2d Cir.1975) (EIS must consider construction of new housing foreseeably spurred by proposed postal facility); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir.1983) (EIS for oil project must consider bulk cargo activities).

NEPA REQUIRES DISCLOSURE OF CONNECTED ACTIONS and PROHIBITS SEGMENTATION OF ACTIONS

NEPA requires that proposals "which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. 1502.4(a); Kleppe v. Sierra Club, 427 U.S. 390, 408, 96 S. Ct. 2718, 2730, 49 L. Ed.2d 576, 590 (1976). A NEPA document is supposed to analyze the impacts of "[c]onnected actions," including actions that are "interdependent parts of a larger action and depend on the larger action for their justification." Id. § 1508.25(a)(1).

Specifically, the courts have time and again rejected segmentation of road projects, and have remanded to the agencies for preparation of a comprehensive NEPA document. See, e.g., Ecology Center of Louisiana v. Coleman, 515 F.2d 860 (5th Cir. 1975); Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975); Indian Lookout Alliance v. Volpe, 484 F.2d 11, 16 (8th Cir. 1973); Thomas v. Peterson, 753 F.2d at 758-60 (EIS for road must address other projects related to the road, such as timber sales); Save the Yaak Comm. 840 F.2d 714 (same).

NEPA REQUIRES ANALYSIS OF A REASONABLE RANGE OF ALTERNATIVES

NEPA requires that an EIS must discuss alternatives to the proposed action, to "provid[e] a **clear basis for choice** among options by the decisionmaker and the public." 40 C.F.R. 1502.14; see also 42 U.S.C. § 4332(2)(E); C.F.R. 1507.2(d), 1508.9(b). The Council on Environmental Quality, which wrote the NEPA regulations, describes the alternatives requirement as the "**heart**" of the environmental impact statement. 40 C.F.R. 1502.14. The purpose of this requirement is "to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means." Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974); Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987), rev'd on other grds, 490 U.S. 332 (1989) (agency must consider alternative sites for a project).

"The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723, 729 (9th Cir.1995).

In Vermont Yankee the Supreme Court assumed that the "need" for the plant was well-documented. But other cases have explained that "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 112 S. Ct. 616 (1991). See also Ayers v. Espy, 873 F. Supp. 455, 467-68 (D. Colo. 1994) (rejecting timber sale EA because Forest Service considered only even-age management); Simmons v. Army Corps of Engineers, 120 F.3d 664, 660 (7th Cir. 1997). In Simmons, a city applied to the

Army Corps for a permit to build a dam, defining the purpose as supplying two water users from a single source. The court noted: "As a matter of logic, however, supplying Marion and the Water District from two or more sources is not absurd--which it must be to justify the Corps' failure to examine the idea at all." *Id.* at 669.

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999) — a very important case. Panel included Judge Fletcher, but the opinion was "per curiam." Land exchange between Forest Service and Weyerhaeuser with an EIS. The court held that the agency had not considered an adequate range of alternatives, as it only considered the "no action" alternative and two nearly identical exchange alternatives. The court noted that both deed restrictions and outright purchase were feasible alternatives to a land exchange, and these alternatives needed to be addressed. See Footnote 7 of that opinion, explaining that the purpose and need cannot be defined so narrowly that only one alternative will work.

Whose burden is it to come up with the alternatives? Many years ago, in Vermont Yankee, the Supreme Court stated that commenters are required to come forward with alternatives. But in City of Carmel-By-The-Sea v. United States Department of Transportation, 123 F.3d 1142 (9th Cir. 1997), the Ninth Circuit had a different approach:

The Federal Highway Administration and Caltrans argue throughout that their cumulative impact discussion, however brief, passes muster in the absence of a direct challenge by the plaintiffs to a specific action that the Final Environmental Impact Statement/Report fails to consider. That is, the Federal Highway Administration and Caltrans contend that Carmel fails to meet its burden of proof to show what other projects the Final Environmental Impact Statement/Report failed to consider. But the Federal Highway Administration and Caltrans failed first; they did not properly describe other area projects or detail the cumulative impacts of these projects. The Federal Highway Administration and Caltrans bear this burden under the National Environmental Protection Act. See City of Davis [v. Coleman], 521 F.2d 661 (9th Cir. 1975), 521 F.2d at 671 ("Compliance with [the National Environmental Protection Act] is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.")"

The Seventh Circuit has also noted, "[w]hat other alternatives exist we do not know, because the [government] has not looked." Simmons v. United States Army Corps of Engineers, 120 F.3d 664, 670 (7th Cir. 1997).

THE GOVERNMENT MAY USE "TIERING" TO STREAMLINE NEPA ANALYSIS

NEPA allows tiering to other NEPA documents in certain situations to help agencies "eliminate repetitive discussions of the same issues." 40 C.F.R. 1502.20; see 1508.28. But NEPA requires that an EIS include discussion of all site-specific environmental impacts from a project even when tiering. § 1502.20. When one NEPA document is tiered to another, the Court must review the two documents together to determine the "sufficiency of the environmental analysis as a whole." Southern Oregon Citizens Against Toxic Sprays v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983), cert. denied, 469 U.S. 1028, 105 S. Ct. 446 (1984). See Blue Mountains Biodiversity Project (tiering inadequate, as site-specific impacts were not addressed).

The agency can't tier to non-NEPA documents, and the support for the government's legal arguments must be found in the EIS. National Parks & Conservation Association v. Babbitt, 241 F.3d 722 (9th Cir. 2001). See also Sierra Club v. Hodel, 848 F.2d 1068, 1096 (10th Cir. 1988) (refusing to "synthesize studies and trial evidence" which the agency argued were "the functional equivalent of an EIS"; "Environmental study is for the agency to conduct in the field, not for the judiciary to construct in the courtroom. The sufficiency of NEPA review must depend on the completeness of the studies themselves."); Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) ("[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA's EIS requirements.").

SUPPLEMENTATION --NEPA requires a supplemental EIS when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." § 1502.9(c)(1)(ii). But see the Norton v. SUWA 2004 Supreme Court decision, discussed above (new information not sufficient to trigger supplementation).

"[T]he decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." Marsh v. ONRC, 490 U.S. 360, 374, 109 S. Ct. 1851, 1859 (1989). "A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. . . . [W]hen new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of significance as to require formal NEPA procedures." Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023-24 (9th Cir. 1980). A change in information, requiring NEPA supplementation "need not be strictly environmental . . . ; the test is whether the new information so alters the project's character that a new 'hard-look' at the environmental consequences is needed." . . . [I]nformation "that does not seriously change the environmental picture, but that nevertheless affects, or could affect, the decisionmaking process, is subject to the procedural requirements of NEPA." Natural Resources Defense Council v. Lujan, 768 F. Supp. 870, 886-87 (D.D.C. 1991).

PROHIBITION ON ACTIONS DURING NEPA PREPARATION

NEPA prohibits agencies from making "irreversible and irremediable commitment of resources" while they are preparing NEPA analyses. 40 C.F.R. 1502.2(f); Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1986); see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056-57 (9th Cir. 1994), cert. den., 115 S. Ct. 1793 (1995) (identical language in ESA). "The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they 'retain[] a maximum range of options.'" Conner, 848 F.2d at 1446.

See also 40 C.F.R. 1506.1 -- until the agency issues the Record of Decision for a NEPA document, "no action concerning the proposal shall be taken which would: (1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives." However, in ONRC v. BLM, the court held that 1506.1 did not bar action pending preparation of a regional ecosystem planning EIS, because the (outdated) Resource Management Plans had programmatic EISes.

INJUNCTIONS

The Ninth Circuit and other courts have often enjoined government action pending completion of new or supplemental EISs. The Ninth Circuit upheld injunctions against logging in old-growth forests pending completion of a regional supplemental EIS, in Seattle Audubon Society v. Espy, 998 F.2d 699, 704 (9th Cir. 1993), and Portland Audubon Soc. v. Babbitt, 998 F.2d 705 (9th Cir. 1993). In the district court opinion in the latter case, the court noted that an injunction was necessary because the purpose of a supplemental EIS "is to ensure that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." Portland Audubon Society v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992) (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S. Ct. 1851, 1857-58 (1989)). See also Earth Island Institute v. United States Forest Service, 351 F.3d 1291 (9th Cir. 2003) (logging may be enough for injunction, depending upon facts).

See also North Carolina v. Virginia Beach, 951 F.2d 596, 605 (4th Cir. 1992), the court specifically relied upon 40 C.F.R. 1506.1(a)(1), NEPA's prohibition on interim actions, in upholding an injunction against construction of a pipeline until the Federal Energy Regulatory Commission completed its NEPA review.

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999) – The deeds had already been exchanged, but the court enjoined Weyerhaeuser for any activity on the land until the government had complied with NEPA (and the NHPA, regarding protection of sacred Native American sites).

REVIEW IS BASED ON THE ADMIN. RECORD, with exceptions. Therefore a citizen who wishes to bring a lawsuit under NEPA must work on "stuffing" the record during the public comment period as much as possible, with habitat info, wildlife sightings and studies, water info, photos, tree measurements – anything that the government itself may not be gathering in the NEPA process.

The Court can go beyond the administrative record in order to review the background of the proceedings "or to determine whether the agency considered all the relevant factors." Thompson v. U.S. Dept. of Labor, 885 F.2d 551, 555 (9th Cir. 1989). See Ass'n of Pacific Fisheries v. EPA, 615 F.2d 794, 811 (9th Cir. 1980) ("post-decision studies can be deemed a clarification or an explanation of the original information before the Agency, and for this purpose it is proper for us to consider them").

It is especially likely in NEPA cases that the requisite "carefully, searching" judicial review will require examination of documents outside of the administrative record, because in NEPA cases "a primary function of the court is to insure that the information available to the decision-maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored." Animal Defense Council v. Hodel, 840 F.2d 1432, 1437 (9th Cir. 1988), amended, 867 F.2d 1244 (9th Cir. 1989) (citation omitted). Thus, the Court may look beyond the record to investigate "an allegation that an EIS has failed to mention a serious environmental consequence." National Audubon Society v. Forest Service, 4 F.3d 832, 841 (9th Cir. 1993) ("Forest Service completely ignored the roadless nature of the timber sales.").

CHANGES IN AGENCY POSITION AFTER THE DECISION IS MADE ARE UNACCEPTABLE "POST HOC" RATIONALIZATIONS -- this is a general rule in admin. law (Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 156-57, 111 S. Ct. 1171, 1179, 113 L. Ed.2d 117 (1991)).
