

# PLURALISM AND THE ENVIRONMENT REVISITED: THE ROLE OF COMMENT AGENCIES IN NEPA LITIGATION

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## INTRODUCTION

The National Environmental Policy Act (NEPA)—the “Magna Charta” of environmental law in the United States<sup>1</sup> and a model for other countries worldwide<sup>2</sup>—suffers from high expectations and misunderstood implementation. The statute disappointed many environmental advocates when the U.S. Supreme Court repeatedly denied that it imposed any substantive environmental direction on federal agencies.<sup>3</sup> Instead, the Court has held that NEPA’s requirements are procedural rather than substantive.<sup>4</sup> Thus, courts have interpreted NEPA to require close judicial scrutiny of the agency procedures implementing the statute.<sup>5</sup> These procedures require all

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1. See, e.g., Arthur W. Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace*, 72 COLUM. L. REV. 963, 988 (1972) (explaining that NEPA “has received a very broad interpretation from the courts” and “is viewed as a congressional mandate to agencies to consider environmental goals equally with their traditional objectives”); see also Sam Kalen, *Ecology Comes of Age: NEPA’s Lost Mandate*, 21 DUKE ENVTL. L. & POL’Y F. 113, 118 (2010) (suggesting that the history surrounding NEPA’s passage indicates Congress intended the Act to be more than simply procedural “when it passed the Magna Carta of environmental laws”); 40 C.F.R. § 1500.1(a) (2011) (describing NEPA as the “basic national charter for protection of the environment”).

2. See, e.g., William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States, and the European Community*, 33 COLUM. J. TRANSNAT’L L. 337, 361 (1995) (“It is not without significance or coincidence that many countries, including Canada and the [European Community], have patterned environmental impact laws and policies after NEPA.”).

3. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (“NEPA merely prohibits uninformed—rather than unwise—agency action.”); see also *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989) (“NEPA does not work by mandating that agencies achieve particular substantive environmental results.”). But see Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 342 n.40 (2004) (identifying “legalist critic” proponents who assert that Congress intended for NEPA to impose substantive obligations because statutory provisions such as sections 101(a) and (b) of NEPA “appear[] to be aimed at substantive improvements in environmental results”).

4. See *Methow Valley*, 490 U.S. at 350 (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

5. See, e.g., *id.* (“The sweeping policy goals . . . of NEPA are . . . realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences . . .” (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 409–10)); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97–98 (1983) (“The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions.”); *Citizens*

federal agencies to study the environmental effects of their proposals, evaluate alternative courses of action, and accurately disclose those effects and alternatives to the public.<sup>6</sup> NEPA documents have been challenged in lawsuits, opening the courthouse doors to those alleging that agencies fail to meet NEPA requirements, and producing a mountain of litigation.<sup>7</sup>

The results of NEPA litigation often appear haphazard. Some observers have even likened NEPA's effect to a "common law" of the environment that allows individual judges to second-guess federal agencies' decision making.<sup>8</sup> It is in fact quite conceivable that a reviewing court's opinion of the wisdom of an underlying federal proposal might be reflected in its decision about the sufficiency of the proposal's environmental documentation. Thus, for example, a determination that an environmental assessment is inadequate because the agency failed to give sufficient weight to environmental factors might reflect a court's assessment of whether the proposal is good policy.<sup>9</sup> But the Supreme Court has consistently rejected judicial second-guessing of the substance of agency proposals: according to the Court, NEPA does not equip judges with the authority to reverse agency decisions on their merits.<sup>10</sup>

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to *Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (explaining that a reviewing court must be "searching and careful" in considering "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"); *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (describing "the responsibility of the courts to reverse" if a "decision was reached procedurally without individualized consideration and balancing of environmental factors").

6. See *Methow Valley*, 490 U.S. at 349 (discussing NEPA's procedural requirements). As the *Methow Valley* Court explained:

[NEPA] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.

*Id.*; see also *Baltimore Gas & Elec. Co.*, 462 U.S. at 97 (noting that publication of an EIS provides public assurance that the agency "has indeed considered environmental concerns in its decision-making process").

7. Based on annual surveys of all federal agencies, CEQ statistics show that between 2004 and 2008, an average of 122 new NEPA cases were filed each year, and as many as 251 NEPA cases were pending in 2004. *NEPA Litigation Survey*, NEPANET, <http://ceq.hss.doe.gov/nepa/nepanet.htm> (last visited September 11, 2011).

8. See, e.g., Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 HARV. ENVTL. L. REV. 93, 128 (1999) (explaining that "the common law of NEPA has created an operative system of experts both within and outside the agency").

9. See, e.g., *Karlen v. Harris*, 590 F.2d 39, 43 (2d Cir. 1978), *rev'd sub nom. Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (asserting that the Second Circuit "looked to 'the provisions of NEPA' for 'the substantive standards necessary to review the merits of agency decisions'" and improperly concluded "an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations").

10. See e.g., *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 556 (1978) (explaining that NEPA decisions should only be set aside "for substantial procedural or

NEPA does, however, expressly impose procedural requirements on federal proposals for considering public and governmental comments on them. Under the statute, when evaluating the environmental effects of their proposals, agencies must solicit and consider comments not only from the public, but also from other agencies—particularly those agencies with environmental expertise.<sup>11</sup> Far from being insignificant, comments from other agencies may substantially impact courts' judgments about whether lead agencies have complied with NEPA. In fact, as one of us claimed in a study over two decades ago, the supportive or critical nature of comments from agencies with environmental expertise often predicts the outcome of NEPA litigation.<sup>12</sup> That 1990 article concluded that the nature of agency comments frequently explained why courts did or did not determine that an agency had violated NEPA.<sup>13</sup>

In this article, we update that 1990 study, considering NEPA cases in which courts relied on agency comments to arrive at conclusions about NEPA compliance. In addition to reviewing court rulings that were consistent with the opinions of comment agencies, we assess decisions in which courts mentioned agency comments but arrived at a contrary result to those comments. Thus, our consideration of several decades of NEPA cases is revealing. Two decades ago, agency comments explained a high percentage of the outcomes of NEPA litigation; twenty-some years later, the correlation between agency comments and case outcomes is somewhat less obvious.

Our study proceeds in five parts. Part I provides background on NEPA's requirements for interagency comments, which we refer to as interagency pluralism, and also explains the results of our earlier study. Part II evaluates

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substantive reasons as mandated by statute . . . not simply because the court is unhappy with the result reached"); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (“[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences.”).

11. 42 U.S.C. § 4332(2)(C) (2006) (“Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”). NEPA includes both federal and state agencies within this directive, and probably should be interpreted to also include tribal agencies. 40 C.F.R. § 1503.1(a) (instructing lead agencies to “[o]btain the comments of any Federal agency which has jurisdiction by law or special expertise,” as well as request comments from state and local agencies, Indian tribes, and the public).

12. Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENTL. L. REV. 277, 306 (1990) (“Lead agencies must confront and usually resolve comments from environmental agencies or run a considerable risk of court injunction,” but “projects that do not engender expert agency opposition are unlikely candidates for NEPA violations.”).

13. *Id.* (“[C]ourts have been sensitive to NEPA’s goal of making the views of agencies with environmental expertise more prominent in federal decisionmaking.”).

recent cases in which courts employed agency comments to conclude either that an agency improperly failed to produce environmental impact statements, or that the statement an agency produced was inadequate. Part III then discusses courts' consideration of adverse comments from internal lead agency staff. Part IV assesses cases in which courts held that lead agencies complied with NEPA's requirements, relying in part on interagency comments supporting the lead agency's analysis. Both types of cases are consistent with our thesis that agency comments are often predictive of compliance with NEPA. Part V examines cases where courts made NEPA determinations that were inconsistent with agency comments—a practice that seems to contradict our thesis. Despite the results of these outlier cases, we conclude that comments from agencies with environmental expertise remain an important, if underappreciated, predictor of NEPA case law. Further, we offer some suggestions about what this reiteration should mean for lead agencies, comment agencies, and NEPA litigants.

## I. NEPA'S COMMENT REQUIREMENTS

Seeking to ensure informed decisions,<sup>14</sup> NEPA requires a federal agency to prepare an environmental impact statement (EIS) on any “major federal action[] significantly affecting the quality of the human environment.”<sup>15</sup> This EIS must discuss the environmental impacts of a proposed action, any unavoidable adverse environmental effects, any alternatives, the relationship between short-term uses and long-term productivity, and any irreversible or irretrievable commitments of resources the proposed action would require.<sup>16</sup> Under regulations promulgated by the Council on Environmental Quality (CEQ),<sup>17</sup> an EIS must be “concise, clear, and to the point,” and also “supported by evidence that agencies have made the necessary environmental analyses.”<sup>18</sup>

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14. 40 C.F.R. § 1500.1(c) (2011) (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”).

15. 42 U.S.C. § 4332(2)(C) (2006).

16. *Id.*; 40 C.F.R. § 1502.1 (2011) (requiring an agency to “provide [a] full and fair discussion of significant environmental impacts” such that it will “inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment”).

17. *See* 42 U.S.C. §§ 4342–4347 (2006) (establishing CEQ to oversee implementation of NEPA); *see also* 40 C.F.R. § 1501.1 (2011) (outlining the purposes of the regulations as “[i]ntegrating the NEPA process into early planning . . . [e]mphasizing cooperative consultation among agencies” to avoid adversary comments after an analysis is complete, “[p]roviding for the swift and fair resolution” of dispute, “narrowing the scope of the [EIS]” at an early stage, and “[p]roviding a mechanism for putting appropriate time limits on the [EIS] process”); *id.* § 1507.3 (requiring individual agencies to “adopt procedures to supplement these regulations”).

18. 40 C.F.R. § 1500.2(b) (2011).

An agency may prepare a less detailed environmental assessment (EA) if it is unclear whether a proposal will require an EIS.<sup>19</sup> An EA aims to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS].”<sup>20</sup> In the Ninth Circuit, an agency must prepare an EIS instead of an EA if there are substantial questions “as to whether a project . . . may cause significant degradation of some human environmental factor.”<sup>21</sup> Other circuits have a higher threshold, requiring an EIS if the project *will* significantly affect the environment.<sup>22</sup> To determine whether the expected effects of an agency’s proposal will be significant, CEQ regulations require agencies to consider the context and intensity of the environmental impacts.<sup>23</sup> If an EA reveals that a proposed action will not significantly affect the environment, the agency may issue a finding of no significant impact (FONSI) in a record of decision (ROD) instead of writing an EIS.<sup>24</sup>

Consistent with its environmental purpose,<sup>25</sup> NEPA incorporates commenting opportunities at all stages of the NEPA process and encourages—and sometimes requires—interagency pluralism. Initially, lead agencies must consult with other agencies in making the threshold

19. *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004).

20. 40 C.F.R. § 1508.9(a)(1) (2011); *see also* *Rhodes v. Johnson*, 153 F.3d 785, 788 (7th Cir. 1998) (describing an EA as a “‘rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement—which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project—is necessary’” (quoting *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990))); *River Road Alliance v. Corps of Eng’rs of U.S. Army*, 764 F.2d 445, 449 (7th Cir. 1985) (“[T]he purpose of an [EA] is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an [EIS].”).

21. *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1119 (9th Cir. 2000) (emphasis added) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332), *abrogated on other grounds by* *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176–78 (9th Cir. 2000). *See also* Michael C. Blumm & Keith Mossman, *The Overlooked Role of NEPA in Protecting the Western Environment: NEPA in the Ninth Circuit*, 2 WASH. J. ENV’T. L. AND POL’Y 193 (2012) (describing EIS preparation and the Ninth Circuit’s threshold for requiring an EIS).

22. *See, e.g.*, *Heartwood v. U.S. Forest Serv.*, 380 F.3d 428, 430 (8th Cir. 2004); *Greater Yellowstone Coal.*, 359 F.3d at 1274.

23. 40 C.F.R. § 1508.27 (2011).

24. *Id.* § 1501.4(e); *see also id.* § 1508.13 (describing a FONSI as including the EA, or a summary of it, and other related environmental documents).

25. Specifically, NEPA’s purpose is:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.

National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006); *see also* Blumm & Brown, *supra* note 12, at 305–06 (discussing NEPA’s purpose).

determination of whether to prepare an EIS.<sup>26</sup> Once a lead agency has decided to prepare an EIS, it announces its intent through a process called “scoping.” During this process, the agency solicits comments from the public and other federal, state, and local agencies; the goal of scoping is to identify issues to study in the EIS.<sup>27</sup> Based on the results of the scoping process, the lead agency prepares a draft EIS,<sup>28</sup> which it releases to the public and other government agencies for comment.<sup>29</sup> At this stage, NEPA requires the lead agency to consult with commenting agencies.<sup>30</sup> In addition to the lead agency’s duty to seek comments, some federal agencies have an additional duty to provide comments on certain proposed actions.<sup>31</sup> After evaluating public and governmental comments,<sup>32</sup> the lead agency prepares a final EIS,<sup>33</sup> along with an accompanying ROD.<sup>34</sup>

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26. 40 C.F.R. § 1508.9(b) (2011) (requiring agencies to “include . . . a listing of agencies and persons consulted”).

27. *Id.* § 1501.7 (charging a lead agency with the responsibility to “invite the participation of affected Federal, State, and local agencies” along with “other interested persons”); *see also id.* § 1503.1 (requiring that after preparation of the draft EIS, but before preparing the final EIS, an agency must “[o]btain the comments of any Federal agency which has jurisdiction by law or special expertise” and “[r]equest the comments” of state and local agencies, Indian tribes, and any agency that has requested notice).

28. *Id.* § 1502.9(a).

29. *Id.* § 1503.1(a).

30. 42 U.S.C. § 4332(2)(C) (2006) (“Prior to making any detailed statement, the [lead agency] shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”); *see also* 40 C.F.R. 1500.5(b) (2011) (requiring “interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document”); *id.* § 1502.9(a) (“Draft [EISs] shall be prepared in accordance with the scope decided upon in the scoping process” and “[t]he lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 . . . .”); *id.* § 1503.4 (mandating that agencies preparing final EISs “assess and consider comments both individually and collectively, and shall respond”).

31. 40 C.F.R. § 1503.2 (imposing a mandatory duty for agencies with “special expertise” to comment); *see also* 42 U.S.C. § 7609(a) (2006) (requiring that the EPA “shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions”).

32. 40 C.F.R. § 1502.9(b) (2011) (noting that in final EISs, agencies “shall respond to comments” and “discuss . . . any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised”). *See also id.* § 1503.4(a) (stating that a lead agency “shall assess and consider comments . . . and shall respond by one or more of the means listed below, stating its response in the final statement”).

33. *Id.* § 1502.9(b); *see also id.* § 1502.9(c)(i) (explaining that if the proposed action substantially changes in a way “relevant to environmental concerns,” or if new information comes to light about environmental impacts, an agency must prepare a supplemental EIS).

34. *Id.* § 1505.2 (stating that “[a]t the time of its decision” agencies “shall prepare a concise public record of decision” that states the decision and identifies alternatives and factors considered in making the decision, and noting “whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted”).

As mentioned above, our 1990 NEPA litigation survey revealed that courts seriously considered agency comments and consequently evaluated the lead agency's response to agency comments with heightened judicial scrutiny.<sup>35</sup> According to that study, these comments resulted in courts frequently applying greater scrutiny to a lead agency's analysis when the NEPA challenge raised the concerns discussed in agency comments.<sup>36</sup> Similarly, the study indicated that where courts upheld an agency's NEPA analysis, those outcomes often seemed attributable to positive agency comments.<sup>37</sup> The updated case law in this article reinforces the notion that a comment agency's support for, or criticism of, a lead agency action is a good predictor of the outcome of NEPA litigation.

## II. ADVERSE AGENCY COMMENTS AND NEPA VIOLATIONS

This Part examines cases in which courts employed agency comments critical of lead agencies' analyses to conclude that lead agencies violated NEPA. These recent opinions confirm that agency comments criticizing a lead agency's actions often draw exacting judicial scrutiny. The cases in this Part demonstrate that as a result of heightened scrutiny, courts frequently conclude that an agency's EA or EIS violated NEPA by failing to address and respond to issues raised in adverse agency comments, or by failing to sufficiently remedy inadequacies highlighted by adverse comments.<sup>38</sup>

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35. See Blumm & Brown, *supra* note 12, at 306–07 (concluding that NEPA outcomes were often closely correlated with the nature of the agency comments).

36. *Id.* at 292, 296 (explaining that the “threshold cases reveal a decided judicial sensitivity to the comments of agencies with environmental expertise” and “adverse agency comments on the adequacy of an EIS seem to function to overcome the otherwise evident judicial presumption in favor of lead agency findings”).

37. *Id.* at 296–302. Results falling outside of our pluralistic model appeared dependent on the unique facts of each case. *Id.* at 302–06 (noting, for example, that in *Crouse Corp. v. Interstate Commerce Comm'n*, 781 F.2d 1176 (6th Cir. 1986), the Sixth Circuit may have discounted comments from the Tennessee Valley Authority based on that agency's “narrow, proprietary interest[s]” that did not reflect “the perspective of an agency with environmental expertise” and thus did not trigger heightened judicial scrutiny).

38. Some courts remand to the agency for additional reasoning to support the EA, while other courts determine the record is sufficient to require the agency to prepare an EIS. Compare *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1024–35 (9th Cir. 2006) (remanding to the agency because the agency's analysis failed to consider terrorist acts as a factor in its review of a license application to construct a nuclear spent-fuel storage facility), with *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149–50 (9th Cir. 1998) (stating that “if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor,” an agency must prepare an EIS (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992); *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988))).

A. *Adverse Agency Comments at the Threshold Stage*

Litigators have often employed adverse agency comments to emphasize omissions by lead agencies, encouraging judicial determinations that agencies improperly failed to produce EISs. According to some courts, a lead agency's failure to consider recommendations from comment agencies may signal deficiencies in an EA.<sup>39</sup> For example, in *Davis v. Mineta*, a 2002 case from the Tenth Circuit, comments from the Environmental Protection Agency (EPA) highlighted inadequacies in the Federal Highway Administration's EA. The EA concerned federal funding of a five-lane highway construction project proposed by the Utah Department of Transportation and three cities in Utah.<sup>40</sup> The proposed highway would have bisected a park and tripled noise levels in portions of that park, and it would have required a new bridge and the demolition or removal of several historic structures.<sup>41</sup> Private individuals opposing the highway project sought to enjoin its construction, alleging that the agency prepared an inadequate EA and should have produced an EIS instead.<sup>42</sup> The district court denied the plaintiff's motion for a preliminary injunction, concluding that the agency fulfilled its duty under NEPA when it determined that the proposed highway expansion would not significantly increase the rate of development on land east of the Jordan River.<sup>43</sup>

The Tenth Circuit rejected the district court's analysis,<sup>44</sup> focusing on a comment letter submitted by the EPA, determining that the improved transportation facilities—in combination with related federal, state, and private actions—could produce a significant environmental impact.<sup>45</sup>

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39. *See* *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (“[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.”). *See also* *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1192 (9th Cir. 2002) (noting that failure to adequately address concerns of a sister agency “weighs as a factor pointing toward the inadequacy of the EIS”).

40. *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002).

41. *Id.* at 1112.

42. *Id.* at 1109.

43. *See id.* at 1123 (“The district court accepted the agency’s conclusion that the [p]roject would not significantly increase the rate of growth.”).

44. *Id.* at 1123 n.11 (rejecting the district court’s judicial notice of the rate of development in the project area because judicial notice “is only appropriate where the issues are ‘not subject to reasonable dispute,’” and there was “a considerable amount of dispute between the parties” concerning the actual rate of development of the area (quoting FED. R. EVID. 201(b))).

45. *Id.* at 1123 (noting that EPA “opined that [e]nhanced transportation facilities will generate or enhance economic activity and development, and that related federal, state, and private actions may result in significant environmental impact,” thus making the agency’s FONSI unwarranted (citation and internal quotation marks omitted)).



Although NEPA requires agencies to consider growth-inducing effects of a proposed action,<sup>46</sup> the Utah Department of Transportation's EA asserted that the indirect and cumulative impacts of the project would occur regardless of whether the federal highway was expanded.<sup>47</sup> This analysis appeared to ignore EPA's concerns,<sup>48</sup> even though, as the court explained, "EPA's viewpoint on this issue [wa]s undeniably relevant."<sup>49</sup> The court thus concluded that the agency's EA was arbitrary and capricious because, *inter alia*, it failed to consider whether the area's "relatively unspoiled nature"<sup>50</sup> was partly the result of a lack of any major roadway, as suggested by EPA's comments, and that by failing to address this factor, the district court abused its discretion.<sup>51</sup> Consequently, the Tenth Circuit reversed, instructing the district court to enter a preliminary injunction precluding further road construction pending litigation on the merits.<sup>52</sup>

In 2004, the Ninth Circuit reached a similar result in *Ocean Advocates v. U.S. Army Corps of Engineers*. The court based its decision on the Corps's failure to address the U.S. Fish and Wildlife Service's comments on its EA for a permit under section 10 of the Rivers and Harbors Act authorizing an addition to an oil refinery dock in northeast Puget Sound, Washington.<sup>53</sup> The Fish and Wildlife Service submitted comments on the proposed permit that raised concerns about the effect of the new dock on tanker traffic and requested an EIS.<sup>54</sup> In response to these comments, the

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46. 40 C.F.R. § 1508.8(b) (2011) (defining "effects" to encompass "[i]ndirect effects," which "may include growth inducing effects and other effects related to induced changes in the pattern of land use").

47. *Davis*, 302 F.3d at 1123.

48. *See id.* *See also* Plaintiff's Mem. in Opp'n to Dep't of Transp.'s Motion to Strike, *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (No. 2:00-cv-00993), 2007 WL 5355498 (attaching a 2001 letter from EPA in which EPA maintained that its criticisms of FHWA's EA remained unaddressed).

49. *Davis*, 302 F.3d at 1123 (noting that "[w]hile it is true that NEPA 'requires agencies preparing [EISs] to consider and respond to the comments of the other agencies, not to agree with them,' it is also true that a reviewing court 'may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.'" (quoting *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1038 (10th Cir. 2001); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983)).

50. *Id.* at 1123 (explaining that "a map in the record . . . confirms . . . that the 11400 South corridor remains in large part an island of open space in a sea of development").

51. *Id.* at 1123. This failure was in addition to the agency's prejudgment of the NEPA issues, *id.* at 1112, and inadequate consideration of alternatives. *Id.* at 1122.

52. *Id.* at 1126.

53. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865-67 (9th Cir. 2004).

54. *Id.* at 855 (noting that the Fish and Wildlife Service also commented "about the cumulative impact of the construction and operation of the pier when considered together with similar . . . projects" in the region, and that "[the Fish and Wildlife Service] worried that the additional platform would facilitate an increase in tanker traffic and product handling, thereby increasing the likelihood of a major oil spill").

developer claimed that the dock expansion would actually decrease the risk of oil spills by reducing the amount of time ships had to anchor at sea while waiting to dock—a time when ships are most vulnerable to oil spills.<sup>55</sup> The Corps agreed and issued the permit with an accompanying EA/FONSI,<sup>56</sup> as well as a subsequent one-year permit extension.<sup>57</sup> Ocean Advocates subsequently challenged both the permit issuance and the extension, claiming, like the Fish and Wildlife Service, that the Corps should have prepared an EIS on the project rather than an EA/FONSI.<sup>58</sup>

The district court upheld the Corps's permit issuance,<sup>59</sup> and Ocean Advocates appealed.<sup>60</sup> The Ninth Circuit reversed because the Corps failed to provide sufficient reasons for its FONSI in light of the Fish and Wildlife Service's concerns that increased tanker traffic would raise the risk of an oil spill.<sup>61</sup> Although the Corps's EA recited these concerns,<sup>62</sup> the court decided that the Corps never addressed the issue of whether there might be increased tanker traffic, and therefore it was impossible to determine whether the agency considered this potential impact and the related effects.<sup>63</sup> The Ninth Circuit held that since the EA "fail[ed] to provide *any* reason, let alone a convincing one, why the Corps refrained from preparing an EIS," the NEPA analysis was inadequate; accordingly, the court required the Corps to prepare an EIS.<sup>64</sup>

Another case grounded on critical agency comments was *Sierra Club v. Van Antwerp*, a 2011 D.C. Circuit decision concluding that an Army Corps

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55. *Id.* at 856.

56. *Id.* (concluding that "the pier addition 'will not significantly affect the quality of the human environment,' and that an EIS therefore was not required"). Ocean Advocates asked the Corps to reopen the permit to consider the project's cumulative impacts, but the Corps declined. *Id.*

57. *Id.* at 857 (noting that the Corps granted the developer's request in 2000 for a one-year permit extension to allow time to complete the dock construction, despite concerns from the Washington State Department of Natural Resources "that circumstances had changed since the Corps originally granted BP the permit, including the listing of the Puget Sound Chinook salmon and bull trout under the [ESA]").

58. *Id.* at 855.

59. *Id.* at 858 (determining that "NEPA did not require an EIS because the pier extension was intended to alleviate existing tanker traffic and because tanker traffic would increase with or without the dock extension").

60. *Id.* at 854–55.

61. *Id.* at 865.

62. *Id.* (stating that "[t]he Corps recounted the concerns that the [Fish and Wildlife Service] raised, namely increased tanker traffic that would raise the risk of an oil spill").

63. *Id.* at 866 (explaining that "the Corps never explicitly adopted the claim that the project could result in an increase in tanker traffic, leaving [the court] to guess whether [the Corps] took a hard look at, or even considered, this obvious potential impact"). In addition, the court noted that the Corps "relied wholly on BP's claims that the project would reduce oil spills because of containment booms and reduced anchoring time." *Id.*

64. *Id.* at 865, 875; *see also id.* at 871 ("Although construction of the dock extension is now complete, the Corps may impose conditions on [its] operation.").

of Engineers' EA on a Clean Water Act (CWA) section 404 permit to fill wetlands in connection with construction of a mall outside of Tampa, Florida violated NEPA.<sup>65</sup> Environmental groups asserted that the permit and corresponding EA violated NEPA, the CWA, and the Endangered Species Act (ESA).<sup>66</sup> The district court ruled that the Corps failed to comply with NEPA and the CWA, although it rejected the ESA challenge.<sup>67</sup>

The D.C. Circuit reversed the district court on the CWA claim and some of the NEPA and ESA claims<sup>68</sup> because the Corps failed to respond to comments regarding the project's potential effect on the ESA-listed eastern indigo snake.<sup>69</sup> The court determined that the Corps's EA was inadequate because it failed to address the risk of habitat fragmentation on the snake, an issue a Fish and Wildlife Service employee raised in a declaration.<sup>70</sup> The declaration emphasized the importance of the wetlands in question as corridor habitat for the snake.<sup>71</sup> Because the Corps failed to address the effect of habitat fragmentation on the endangered snake, the D.C. Circuit remanded the case to the Corps.<sup>72</sup>

An agency's failure to consider and address adverse comments from other agencies may be more than just evidence of a NEPA violation: it may

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65. *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1150 (D.C. Cir. 2011).

66. *Id.* at 1149 (noting there were multiple defendants, including the heads of the Department of the Interior and the U.S. Fish and Wildlife Service).

67. *Id.* at 1150.

68. *Id.* at 1153–55 (rejecting the environmental groups' claims that the proposed project should be considered significant based on the "unique characteristics of the geographic area" or because it "threatens a violation of Federal, State, or local law or requirements" (quoting 40 C.F.R. § 1508.27(b)(3), (10) (2011)).

69. *Id.* at 1155, 1157 (stating that "[i]n both ESA and NEPA contexts, we . . . find that the Corps failed to adequately address indications of an adverse effect on the indigo snake" and "we reverse [the district court] as to NEPA except insofar as the court required further explanation by the Corps as to potential fragmentation of the indigo snake's habitat"); *see also* 40 C.F.R. § 1508.27(b)(9) (2011) (requiring agencies to consider adverse effects on "an endangered or threatened species or its habitat" as an indication of the intensity of a proposed action).

70. *Van Antwerp*, 661 F.3d at 1156–57 (noting that Dr. Kenneth Dodd was "Staff Herpetologist for the Office of Endangered Species in the [Fish and Wildlife Service] . . . 'primarily responsible for the listing of the' eastern indigo snake," and that "[g]iven [his] expertise and experience, and the seeming logic of his analysis . . . we think his comment qualifies as the sort of 'relevant and significant' public comment to which an agency must respond, lest its action be arbitrary and capricious").

71. *Id.* at 1156–57 (explaining that Dr. Dodd's comment asserted "the project site was an important 'wildlife corridor' linking protected areas to the north and south," that "movements over large areas of fragmented habitats expose Eastern Indigo Snakes to increased road mortality," and that "the Corps had failed to consider how the project would adversely affect the snake through 'fragmentation' of its 'habitat in lands near the site as a result of impacts to the site and the wildlife corridor connecting these lands'").

72. *Van Antwerp*, 661 F.3d at 1157 ("[T]he Corps must make some determination on the issue of habitat fragmentation, both for ESA and NEPA purposes").

serve as the basis for a NEPA violation. For example, in the 2008 decision of *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the Ninth Circuit concluded that the National Highway Traffic Safety Administration (NHTSA) violated NEPA by failing to address substantial questions raised by comments—including comments from numerous states<sup>73</sup>—regarding the significance of a rule that set corporate average fuel economy (CAFE) standards for light trucks.<sup>74</sup> Multiple states, cities, and public interest organizations had petitioned for the review of NHTSA’s rule, alleging violations of the Energy Policy and Conservation Act, as well as NEPA.<sup>75</sup> The Ninth Circuit determined that the EA was inadequate, in part because the petitioners raised substantial questions as to whether the CAFE rule may have a significant impact on the environment as shown by evidence in the state agencies’ comments, and NHTSA failed to respond.<sup>76</sup>

The court relied on “compelling scientific evidence” from studies referred to in comments from state agencies that demonstrated the potential for “positive feedback mechanisms in the atmosphere” that “may change

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73. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1187 (9th Cir. 2008) (“NHTSA received over 45,000 comments on the NPRM and Draft EA from states, consumer and environmental organizations, automobile manufacturers and associations, members of Congress, and private individuals.”); *see also* Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 Fed. Reg. 17,566, 17,578 (Apr. 6, 2006) (codified at 49 C.F.R. pts. 523, 533 and 537) (“The Attorneys General for California, Massachusetts, New York, Connecticut, New Jersey, Maine, Oregon, Vermont, and the New York City Corporation Counsel . . . stated that the agency is obligated to perform an environmental impact statement.”).

74. *Ctr. for Biological Diversity*, 538 F.3d at 1187, 1223 (“The states . . . generally argued that . . . [NHTSA’s] FONSI is arbitrary and capricious” because, among other things, it “provided no foundation for the important inference NHTSA draws between a decrease in the rate of carbon emissions growth and its finding of no significant impact.” (quoting *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982)) (internal quotations omitted)).

75. *Id.* at 1180–81 (listing “[e]leven states, the District of Columbia, the City of New York, and four public interest organizations” as petitioners). *See also* Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 Fed. Reg. 17,566–78. The petitions, submitted directly to the circuit courts of appeal, were consolidated in the Ninth Circuit. *See* Brief for the Respondents at 1–3, *Ctr. for Biological Diversity*, 538 F.3d 1172 (Nos. 06-71-891, 06-72317, 06-72641, 06-73807, 06-73826), 2007 WL 1096332, at \*1.

76. *Ctr. for Biological Diversity*, 538 F.3d at 1221 (concluding that “[p]etitioners presented evidence that continued increase in greenhouse gas emissions may change the climate in a sudden and non-linear way” and thereby “raised a ‘substantial question’ as to whether the CAFE standards for light trucks . . . ‘may cause significant degradation of some human environmental factor’” (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998))); *id.* at 1225 (noting that although the agency “acknowledge[d] that carbon emissions contribute to global warming, and it does not dispute the scientific evidence that Petitioners presented concerning the significant effect of incremental increases in greenhouse gases,” NHTSA failed to justify its conclusion that a small increase in carbon dioxide emissions is not significant); *see also id.* at 1220–22 (describing NHTSA’s FONSI that was “based primarily on [a] conclusory assertion—contradicted by evidence in the record” as “markedly deficient”).

the climate in a sudden and non-linear way.”<sup>77</sup> That evidence raised a substantial question as to whether the CAFE rule might have a significant impact on the environment.<sup>78</sup> In addition, the court noted that the petitioners satisfied the “controversy” factor for significance<sup>79</sup> based on the numerous comments that criticized the agency’s analysis,<sup>80</sup> including comments from at least eight different states’ Attorneys General and five state agencies.<sup>81</sup> Because NHTSA failed to provide a reasoned response to the evidence presented in comments from multiple state agencies, the Ninth Circuit ruled that the EA was inadequate and ordered NHTSA to prepare either a revised EA or an EIS.<sup>82</sup>

As with failures to address commenting agencies’ specific concerns, some courts have held that a large volume of critical comments from agencies may be sufficient to require an EIS. For example, in *California v. U.S. Department of Transportation*, the Northern District of California ruled that the Department of Transportation (DOT) should have prepared an EIS for Mammoth Mountain Ski Area’s proposed expansion of its local airport to accommodate the growing ski area because numerous adverse comments from both state and federal agencies raised serious concerns

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77. *Id.* at 1220–22 (noting that the evidence included a 2001 report from the Intergovernmental Panel on Climate Change (IPCC Third Assessment Report), a technical summary from an IPCC working group, State comments citing an essay that reviewed 928 peer-reviewed scientific papers, and The Climate Change Futures Report published by the Center for Health and the Global Environment at Harvard Medical School); *see also id.* at 1189 (“Commenters also submitted to NHTSA numerous scientific reports and studies regarding the relationship between climate change and greenhouse gas emissions and the expected impacts on the environment.”).

78. *Id.* at 1220.

79. 40 C.F.R. § 1508.27(b)(4) (2011) (stating that “[s]ignificantly as used in NEPA requires considerations of both context and intensity,” and observing that “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial” is a factor in evaluating intensity).

80. *Ctr. for Biological Diversity*, 538 F.3d at 1222 (observing that over 45,000 comments were submitted in response to NHTSA’s proposed rule, and that “[t]he entire dispute between Petitioners and NHTSA centers on the *stringency*” of the CAFE standards).

81. *See also* Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 Fed. Reg. at 17,566, 17,578 (Apr. 6, 2006) (codified at 49 C.F.R. pts. 523, 533, and 537) (listing comments from the Attorneys General for California, Massachusetts, New York, Connecticut, New Jersey, Maine, Oregon and Vermont, as well as comments from the New York State Department of Environmental Conservation, New Jersey Department of Environmental Protection, Northeast States for Coordinated Air Use Management, Pennsylvania Department of Environmental Protection, California Air Resources Board, Connecticut Department of Environmental Protection).

82. *Ctr. for Biological Diversity*, 538 F.3d at 1223–25 (“In light of the evidence in the record, it is hardly ‘self-evident’ that a 0.2 percent decrease in carbon emissions . . . is not significant, [but] . . . [i]nstead of providing the required ‘convincing statement of reasons,’ NHTSA simply asserts that the insignificance of the effects is ‘self-evident.’” (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998)).

about the adverse effects of the expansion.<sup>83</sup> State and federal agencies, environmental organizations, and individuals commented<sup>84</sup> on the town of Mammoth Lakes' draft EA that considered the potential effects of the expansion.<sup>85</sup> Following issuance of a final EA,<sup>86</sup> the state of California continued to express concerns about the airport expansion project.<sup>87</sup> In response, the town issued a supplemental EA.<sup>88</sup>

California and the Sierra Club challenged the supplemental EA in separate suits, alleging that DOT violated NEPA by approving the town's EA and supplemental document.<sup>89</sup> The district court ruled that the agency failed to "address each of the issues raised by the various state and federal agencies,"<sup>90</sup> including comments from the federal Bureau of Land Management (BLM) and the California Department of Fish and Game, and oral objections of the U.S. Fish and Wildlife Service.<sup>91</sup> The district court also concluded that DOT failed to evaluate the controversial proposed

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83. *California v. U.S. Dep't of Transp.*, 260 F. Supp. 2d 969, 978 (N.D. Cal. 2003) (explaining that the town proposed the expansion because it "was concerned that it was losing skiing visitors to resorts with regularly scheduled commercial air service" and hoped to "increase substantially the number of visitors to the region").

84. *Id.* at 973 n.4 (listing "comments from various state and federal agencies that question the conclusion that the airport project would have no significant environmental impact," including comments from the Bureau of Land Management, National Park Service, California Department of Transportation, California Regional Water Quality Control Board, California Department of Fish and Game, and Long Valley Fire Protection District).

85. *See id.* at 971 ("[T]he Town published a draft [EA] for this expansion project . . . conclud[ing] that there would be 'no significant environmental impact caused by the expansion of the airport that could not be satisfactorily mitigated.'" (quoting Administrative Record 88 at 1)); *see also* 42 U.S.C. § 4332(2)(D) (2006) (explaining that "[a]ny detailed statement required . . . for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official," so long as the state agency or official has statewide jurisdiction and responsibility for the action, and the responsible federal official participates in preparation of the statement and independently evaluates the statement).

86. *California*, 260 F. Supp. 2d at 971 (explaining that the Department of Transportation and Federal Aviation Administration adopted the town's final EA and signed a FONSI for the project).

87. *See id.* at 971 n.1 (observing that the EA addressed only "the likelihood of birds being struck by aircraft and the impact of the project on the sage grouse").

88. *Id.* at 971 (noting that the town issued a document to "address[] a few of [the] concerns, in a document, which though titled 'Errata,' supplement[ed], rather than correct[ed], the []EA").

89. *Id.*

90. *Id.* at 973 (stating that although "[t]he FONSI states that the []EA was 'coordinated with' these concerned governmental agencies," the record "demonstrates that the []EA ignored or did not adequately treat their concerns" (citing 40 C.F.R. § 1508.9(a)(1); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (1998))).

91. Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J., *California v. U.S. Dep't of Transp.*, 260 F. Supp. 2d 969 (N.D. Cal. 2003) (No. 302CV04621) 2003 WL 25762966; *see also California*, 260 F. Supp. 2d at 973 n.4 (listing additional comments that questioned the finding of no significant impact from the National Park Service, California Department of Transportation, California Regional Water Quality Control Board, California Department of Fish and Game, and Long Valley Fire Protection District).

airport expansion's effects on the quality of the human environment.<sup>92</sup> Even though "some agencies assented to the project" based on the town's response to comments in the supplemental EA, that support did "not alter the fact that substantial questions were raised" concerning the EA/FONSI that should have motivated the DOT to prepare an EIS.<sup>93</sup> The court explained that although mere opposition to a project is generally insufficient to require preparation of an EIS, a large number of comments from federal and state agencies that raise serious substantive concerns could amount to a significant effect, triggering preparation of an EIS.<sup>94</sup>

Even where NEPA's procedures do not require an EA or EIS, adverse agency comments have raised questions about categorical exclusions (CE) to NEPA that encourage courts to require additional analysis from the lead agency. CEQ's NEPA regulations define a CE as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect."<sup>95</sup> For example, in *Sierra Club v. Bosworth*, the U.S. Forest Service promulgated a "fuels" CE authorizing so-called fuel-reduction timber sales and prescribed burn projects in national forests.<sup>96</sup> The Forest Service developed the fuels CE to expedite projects aimed at reducing wildfire risks.<sup>97</sup> The Sierra Club alleged that the agency violated NEPA by failing to prepare either an EA or EIS on timber sales and prescribed burns affecting between 1,000 and 4,500 acres exempted from individual analysis under the fuels CE.<sup>98</sup> The district court ruled for the Forest Service because NEPA does not require an EA or EIS for promulgation of a CE, and it concluded that the Forest Service's reasoning for developing the CE was rational.<sup>99</sup>

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92. *California*, 260 F. Supp. 2d at 972–73.

93. *Id.* at 973 n.5 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (1998)).

94. *Id.* at 973–74 ("[T]he volume of comments from and the serious concerns raised by federal and state agencies specifically charged with protecting the environment support a finding that an EIS was required in this case.").

95. 40 C.F.R. § 1508.4 (2011).

96. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1021, 1026 (9th Cir. 2007) (describing the Forest Service as referring to logging and prescribed burning as "fuels reduction").

97. *Id.* at 1019 (explaining that the Forest Service developed the fuels CE "in response to [an initiative] announced by President Bush . . . to ensure more timely decisions . . . in reducing the risk of catastrophic wildfires by restoring forest health").

98. *Id.* at 1019–20. Projects covered by the fuels CE would be subject to less stringent requirements, such as submission of a project file, decision memo, project description, justification for application of the fuels CE, a finding that no extraordinary circumstances exist, and a description of public involvement. *Id.*

99. *Id.* at 1022.

The Ninth Circuit reversed the district court and concluded that the Forest Service's failure to adequately explain its decision to promulgate the fuels CE was arbitrary and capricious. The court concluded that the Forest Service promulgated the fuels CE before requesting and reviewing data on fuels treatment projects from all regional foresters, even though the scoping process requires such requests and reviews as a prerequisite.<sup>100</sup> Moreover, the court ruled that the agency failed to conduct a cumulative impact analysis<sup>101</sup> or consider the extent to which the environmental impacts associated with the CE were controversial or uncertain.<sup>102</sup> On the latter issue, the Ninth Circuit focused on comments from federal and state agencies, including the federal Fish and Wildlife Service, the Arizona Game and Fish Department, and the California Resources Agency.<sup>103</sup> The court concluded that these comments raised questions of uncertainty concerning the potential effect of the fuels CE.<sup>104</sup> According to the court, the large number of comments, including "strong criticism from several affected Western state agencies," reflected "controversy" within the meaning of the

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100. *Id.* at 1025–27 (concluding that although the Forest Service was not required to conduct an EA or EIS for the CE, the agency "failed to demonstrate that it made a 'reasoned decision' to promulgate" the fuels CE because it based its decision on an inadequate record, and explaining that the "Forest Service inappropriately decided to establish a categorical exclusion for hazardous fuels reduction before" requesting information regarding fuels treatment projects from all Regional Foresters because the "determination that a [CE] was the proper path to take should have taken place *after* scoping [and] reviewing") (emphasis in original); *see also* 40 C.F.R. § 1501.7 (2011) (describing "scoping" as "an early . . . process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action").

101. *Sierra Club*, 510 F.3d at 1027–29 ("The Forest Service concedes that no cumulative impacts analysis was performed," which is required "[i]n order to assess significance properly.>").

102. *Id.* at 1030; *see also* 40 C.F.R. § 1508.27(b)(4–5) (2011) (defining "significantly" as a measure of a project's context and intensity, and defining "intensity" to include "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" and "[t]he degree to which the possible effects on the human environment are highly uncertain").

103. *Sierra Club*, 510 F.3d at 1031 (noting, among other concerns, that the Fish and Wildlife Service stated "that reconstruction of decommissioned roads or creation of temporary roads could . . . contribute to increased sedimentation rate in streams," the Arizona Game and Fish Department stated "that fuel reduction activities have a higher likelihood of affecting the environment than rehabilitation/stabilization activities," and the California Resources Agency "commented that the Forest Service has not evaluated the impacts of under story treatments on native plants and animals").

104. The court focused on concerns in the agency comments, even though *Sierra Club* did not mention the agency comments in its appellate brief. Reply Brief of Appellants *Sierra Club & Sierra Nevada Forest Prot. Campaign*, *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007) (No. 05-16989) 2006 WL 2378632. Yet *Sierra Club* did cite to the comments in its summary judgment memorandum. *See* Plaintiff's Mem. of Points and Auths. In Support of Motion for Summary J., *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007) (No. 204-cv-02114) 2005 WL 6166847 (noting that comments from the Council on Environmental Quality and the Fish and Wildlife Service expressed concern about the Forest Service's data review and methodology, as well as comments from several States that opposed the CE based on the direct and cumulative environmental impacts).



CEQ regulations,<sup>105</sup> and thus the court required the Forest Service to address the comments prior to promulgating the CE.<sup>106</sup>

### B. Inadequate Environmental Impact Statements

As shown above, adverse agency comments may result in heightened scrutiny of an EA.<sup>107</sup> Adverse agency comments should play an even larger role in challenges to the adequacy of an EIS than an EA because both the lead agency conducting the NEPA analysis and non-lead expert agencies have explicit statutory duties to seek out or provide comments on an EIS.<sup>108</sup> Thus, a lead agency's failure to address adverse comments would seem to violate an express provision of the statute.

An agency's complete failure to address agency comments likely makes an EIS inadequate. An illustration is *Western Watershed Project v. Kraayenbrink*, where environmental organizations alleged that the BLM failed to take the required "hard look" at the environmental effects of revised federal grazing regulations in its EIS.<sup>109</sup> In 2006, BLM promulgated eighteen amendments to its grazing regulations, including changes that reduced public involvement, limited the agency's enforcement power, and increased ranchers' rights to both improvements and water located on public lands.<sup>110</sup>

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105. *Sierra Club*, 510 F.3d at 1032 (citing almost 39,000 comments).

106. *Id.*; see also *id.* at 1034 (noting that the court ultimately remanded the case to the district court to enter an injunction precluding implementation of the CE until the Forest Service adequately assessed its significance).

107. Although the plain language of NEPA does not require lead agencies to consider adverse agency comments for an EA, the CEQ's regulations implementing NEPA do mandate that an "agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. § 1501.4(b).

108. See 42 U.S.C. § 4332(2)(C) (2006) ("Prior to any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."); see also *id.* § 7609(a) (requiring the EPA to "review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the [EPA], contained in any . . . major Federal agency action (other than a project for construction) to which section 4332(2)(C) of this title applies").

109. *W. Watershed Project v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2010) (concluding that BLM's EIS was inadequate because the agency offered "no reasoned analysis whatsoever in support of its conclusion" that ran counter to comments raised by the U.S. Fish and Wildlife Service, EPA, and state agencies).

110. *Id.* at 479–81 (explaining that the 2006 regulations "narrow the definition of 'interested public' and remove the requirement that the BLM consult, cooperate, and coordinate with the 'interested public' with respect to various management decisions;" reduce the number of enforceable standards; extend the time for BLM to take corrective action measures from 12 to 24 months; increase the monitoring required before BLM may enforce; create shared ownership between permittee and the government over permanent range improvements; and grant permittees, rather than the United States, water rights on public lands).

The district court ruled that BLM violated NEPA and enjoined BLM from enforcing the regulations.<sup>111</sup> The Ninth Circuit affirmed, centering much of its analysis on BLM's failure to address adverse comments from federal and state agencies, as well as BLM's own experts.<sup>112</sup>

Responding to criticism over reduced public involvement, the court determined that "BLM offered no reasoned analysis whatsoever in support of its conclusion—which [was] in direct conflict with the conclusion of its own experts and sister agency, [the U.S. Fish and Wildlife Service]."<sup>113</sup> As the court explained, BLM also failed to address allegations that the new regulations would "weaken the ability of the BLM to manage rangelands in a timely fashion," a claim made by both the Fish and Wildlife Service and the California Department of Fish and Game.<sup>114</sup> The Ninth Circuit agreed with the district court that BLM failed to address the concerns raised by several adverse agency comments, and thus concluded that the agency's EIS failed to take a "hard look" at the environmental consequences of the proposed amendments.<sup>115</sup>

Similarly, in *Center for Biological Diversity v. U.S. Forest Service*, the Ninth Circuit decided that the Forest Service violated NEPA, even though the agency revised its EIS on proposed amendments to forest land and management plans to protect northern goshawk habitat in its Southwest Region in response to adverse agency comments by the U.S. Fish and Wildlife Service and state wildlife agencies.<sup>116</sup> According to the court, the Forest Service's EIS failed to disclose and address responsible opposing scientific viewpoints, in violation of NEPA's requirements.<sup>117</sup> In 1995, the

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111. *Id.* at 477; *see also* *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1312–17 (D. Idaho 2008) (concluding the BLM violated NEPA for various reasons, including that its EIS "improperly minimize[d] the negative side effects of limiting public input" and lacked "evidence that the BLM considered [the] substantial criticisms [of the proposed regulatory changes] before publishing the proposed rules").

112. *W. Watersheds Project*, 632 F.3d at 492; *see also id.* at 479 (describing critical comments from three consecutive BLM interdisciplinary teams, all of which the BLM ignored or "deleted without comment" (citing *W. Watersheds Project*, 538 F. Supp. 2d at 1308)).

113. *Id.* at 492.

114. *Id.*

115. *Id.* at 493 ("BLM gave short shrift to a deluge of concerns from its own experts, [the Fish and Wildlife Service,] the EPA, and state agencies . . . [because] BLM neither responded to the considered comments . . . nor made responsive changes to the proposed regulations." (citing *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000))).

116. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003).

117. *Id.* at 1167 (explaining that the agency's adjustment to alternatives in response to the concerns in the comments did not resolve the agency's additional obligation to respond to responsible opposing views); *see also* 40 C.F.R. § 1509(b) ("[F]inal environmental impact statements shall respond to comments . . . The agency shall discuss . . . any responsible opposing view which was not adequately discussed in the draft statement.").

Forest Service's EIS and ROD on the proposed amendments<sup>118</sup> drew adverse agency comments concerning the question of whether the northern goshawk is a habitat generalist<sup>119</sup> or specialist,<sup>120</sup> and the implications of that determination.<sup>121</sup> Environmental groups challenged the NEPA analysis, alleging that the Forest Service's EIS failed to adequately justify its conclusion that goshawks are habitat generalists in the face of agency comments indicating the hawks might actually be habitat specialists.<sup>122</sup> The district court denied the challenge, and the environmental groups appealed.<sup>123</sup>

On appeal, the environmentalists made three allegations: (1) the Forest Service failed to provide a reasoned analysis of the agency comments maintaining that northern goshawks are habitat specialists; (2) the agency failed to discuss or respond to specific scientific studies casting doubt on its conclusion that identified northern goshawks as habitat generalists; and (3) the Forest Service failed to respond to reasonable scientific views.<sup>124</sup> The Ninth Circuit agreed with the environmentalists.<sup>125</sup> Although the Forest Service received several rounds of adverse comments from the U.S. Fish and Wildlife Service and the state wildlife departments of Arizona and New Mexico,<sup>126</sup> the agency omitted the adverse comments from the final EIS.<sup>127</sup>

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118. *Ctr. for Biological Diversity*, 349 F.3d at 1164.

119. *Id.* at 1161 (explaining that a "habitat generalist" is a species that occupies "a mosaic of forest types, forest ages, structural conditions, and successional stages . . . throughout the Southwestern Region's coniferous, deciduous, and mixed forests").

120. *Id.* at 1164 (noting that a "habitat specialist" is a species that needs a particular type of habitat; in this case, the adverse agencies commented that the northern goshawk needs "a habitat that provides mature, tall trees or old-growth stands").

121. *See, e.g., id.* at 1161 (highlighting the importance of the proper classification of the northern goshawk's needs because "[o]n the basis of these conclusions, [the Service makes] recommendations describing the desired balance of forest age classes, or vegetation structural stages" for the forest plans in the Southwest Region, which then implicates whether the sensitive species receives adequate protection). For example, if the northern goshawk is a habitat generalist, the species would prefer "a wide range of forest types." *Id.* at 1162. In contrast, if the northern goshawk is a habitat specialist, the species would prefer "foraging in mature, close-canopied forests." *Id.* at 1161.

122. *Id.* at 1165.

123. *Id.* at 1160.

124. *Id.* at 1165.

125. *Id.* at 1167-69.

126. *See id.* at 1161, 1163, 1164-65 (describing comment letters from Arizona Game and Fish Department and the Fish and Wildlife Service "presenting scientific evidence refuting the Service's conclusion" that goshawks are habitat generalists in response to the Forest Service's scoping notice); *see also id.* at 1163 (noting that Arizona's and New Mexico's wildlife agencies submitted a joint comment, and Crocker-Bedford, a certified wildlife biologist employed by the Forest Service, submitted a comment, all challenging the conclusion that goshawks are habitat generalists and stating "that '[s]ome of the issues previously identified . . . are being emphasized again in these comments because . . . they were not adequately addressed or evaluated in the [Draft] EIS'").

The court concluded that because the federal and state agencies' comments cited evidence that directly challenged the scientific basis upon which the EIS relied, the Forest Service had to disclose the existence of the comments and respond to the concerns that they raised.<sup>128</sup> The agency's failure to do so made the EIS inadequate.<sup>129</sup>

Thus, as demonstrated in *Center for Biological Diversity v. U.S. Forest Service*, adverse agency comments may serve to focus a court's attention on the inadequacies of an agency's NEPA analysis. As another example, in *National Parks & Conservation Association v. Bureau of Land Management*, agency comments critical of BLM's EIS on a land exchange concerning a proposed landfill spotlighted BLM's failure to sufficiently address the landfill's potential for eutrophication.<sup>130</sup> The proposed landfill was to be located on a former mining site near Joshua Tree National Park.<sup>131</sup> Several parties, including the National Parks Conservation Association (Association), challenged the land exchange, but BLM and the Interior Board of Land Appeals approved it despite adverse comments from The National Park Service.<sup>132</sup> The Association challenged BLM's EIS in district court,<sup>133</sup> and the district court judge ruled in favor of the Association on some of its NEPA claims.<sup>134</sup>

A split Ninth Circuit panel then affirmed the district court, ruling that BLM's EIS failed to sufficiently address the potential for eutrophication.<sup>135</sup> The dissent thought that BLM sufficiently examined the eutrophication

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127. *Id.* at 1168 (explaining that the Forest Service redacted a portion of the Arizona Game and Fish Department's comment that presented scientific evidence refuting the Forest Service's conclusion, thus failing to disclose and discuss a responsible opposing view).

128. *Id.* at 1167 (explaining that the Fish and Wildlife Service, along with other interested parties, "identif[i]ed] scientific evidence and opinions contradicting the Service's conclusion that northern goshawks are habitat generalists," a conclusion on which the Forest Service's final EIS relied).

129. *Id.* at 1168. According to the court, the Forest Service's summary response to comments in the draft EIS "fail[ed] to identify and discuss the concern" because it did "not mention or even allude to the habitat specialist/generalist debate." Any discussions recorded in the planning record likewise did not resolve the agency's failure to comply with NEPA's disclosure requirements at the EIS stage.

130. *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1073–74 (9th Cir. 2009), *cert. denied*, 131 S.Ct. 1783 (2011); *see also id.* at 1070 n.8 (explaining that "[e]utrophication, in this context, refers to the introduction of nutrients to the desert environment" through "two potential pathways: (1) landfill waste material; and (2) nitrogen-bearing airborne emissions").

131. *Id.* at 1062.

132. *Id.* at 1063.

133. *Id.* at 1065.

134. *Id.* at 1063–64 (stating that the district court granted summary judgment in the Association's favor because "BLM failed to take a 'hard look' at potential impacts on Bighorn sheep and the effects of nitrogen enrichment on the nutrient-poor desert environment").

135. *Id.* at 1074.

issue,<sup>136</sup> but the majority relied on comments from the National Park Service to conclude that BLM failed to adequately address eutrophication.<sup>137</sup> Although the Park Service had entered into an agreement to resolve the project's adverse environmental effects,<sup>138</sup> the court relied on the Park Service's comments raising concerns about eutrophication as evidence that it was a "serious issue."<sup>139</sup> The Ninth Circuit majority consequently rejected BLM's contention that the EIS addressed eutrophication in various sections,<sup>140</sup> concluding that the EIS was inadequate because it failed to discuss eutrophication.<sup>141</sup>

In *Northern Cheyenne Tribe v. Norton*, the Ninth Circuit also looked to adverse agency comments as evidence of an EIS's inadequacy. There, the tribe and environmentalists claimed that BLM's EIS on a proposed permit for coal bed methane development in the Powder River Basin in Montana and Wyoming failed to consider a phased development alternative proposed in federal and state agency comments.<sup>142</sup> In 2002, responding to an increased interest in coal bed methane as an alternative source of energy, BLM issued a draft EIS analyzing development of coal bed methane resources in the Powder River Basin.<sup>143</sup> The EPA, the Montana Department of Fish, Wildlife and Parks, and the Northern Cheyenne Tribe of Indians all commented that BLM should study a phased development alternative in addition to the five alternatives it did consider.<sup>144</sup> BLM claimed that its final EIS addressed the commenters' concerns, and that the adverse effects of

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136. *Id.* at 1088 (Trott, J., dissenting).

137. *Id.* at 1073–74, 1074 n.14.

138. *Id.* at 1077 (describing the agreement, after three rounds of adverse comments from the National Park Service, that provided "a comprehensive, long-term monitoring and mitigation program, which runs for the life of the project and is specifically tailored to detect and to address any unforeseen impacts" on Joshua Tree National Park from the proposed landfill and associated operations).

139. *Id.* at 1074 n.14 ("The dissent's contention that eutrophication is 'not a serious issue' is at odds with the analysis of both the National Park Service and the IBLA.")

140. *Id.* at 1073 (noting that "[i]n determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form" and in this case "[a] reader . . . would have to cull through entirely unrelated sections of the EIS and then put the pieces together" to gain the relevant information).

141. *Id.* at 1074 ("This patchwork cannot serve as a 'reasonably thorough' discussion of the eutrophication issue.")

142. *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 840 (9th Cir. 2007).

143. *Id.* at 840.

144. *Id.* (explaining that the draft EIS "analyzed five alternatives in detail," but that "[t]he commenters suggested that BLM should study an additional alternative, which they called 'phased development'"); *see also* *N. Plains Res. Council v. U.S. Bureau of Land Mgmt.*, 2005 U.S. Dist. LEXIS 4678, at \*22 n.5 (explaining that EPA commented that "we suggest that the range of alternatives include a phased development alternative" because "[t]here may be significant impacts related to constructing oil and gas infrastructure due to the 'boom and bust' nature of the coal-bed methane development" (internal quotations omitted)).

existing oil and gas leases issued under a 1994 resource management plan were not subject to challenge in this EIS.<sup>145</sup>

The district court decided that BLM's EIS was generally sufficient, but ruled that the agency's failure to consider the proposed phased-development alternative identified in agency comments made the EIS inadequate.<sup>146</sup> The court therefore issued an injunction limiting development until BLM revised its EIS.<sup>147</sup> All parties appealed,<sup>148</sup> but the Ninth Circuit affirmed, holding that the district court's partial injunction—which was based on BLM's failure to consider phased development urged by the government agencies—was not an abuse of discretion.<sup>149</sup>

Another case that relied on adverse agency comments was *Utahns for Better Transportation v. U.S. Department of Transportation*, a 2002 decision by the Tenth Circuit ruling that an EIS on a proposed four-lane highway along the eastern shore of the Great Salt Lake (the Legacy Parkway) was inadequate.<sup>150</sup> In that case, Utah's Department of Transportation received authorization from the Federal Highway Administration to connect the Legacy Parkway to the interstate highway system, and also obtained a CWA section 404 permit from the U.S. Army Corps of Engineers to fill wetlands in the construction zone.<sup>151</sup> With these federal approvals, the Utah Department of Transportation prepared an EIS on the project, which the Federal Highway Administration and the U.S. Army Corps adopted.<sup>152</sup>

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145. *N. Cheyenne Tribe*, 503 F.3d at 840 (“BLM’s primary response . . . is that ‘existing oil and gas leases’ approved pursuant to a 1994 resource management plan included the rights to explore and develop coal bed methane, and the time for challenging the 1994 decision was passed.”).

146. *See N. Plains Res. Council*, 2005 U.S. Dist. LEXIS 4678, at \*20–22, 29 (observing that “[p]hased development, such as controlling the number of rigs operating in an area of developing one geographic area at a time, as suggested by . . . EPA and the Montana department of Fish, Wildlife and Parks . . . would not hinder [the] goal” of “determin[ing] what options, including mitigating measures, ‘will help minimize environmental and societal impacts related to [coal bed methane] activities’” and thus the phased development alternative should have been considered in the EIS (quoting BUREAU OF LAND MGMT., DEP’T OF THE INTERIOR, FINAL STATEWIDE OIL AND GAS ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED AMENDMENT OF THE POWDER RIVER AND BILLINGS RESOURCE MANAGEMENT PLANS 1–2 (Dec. 2002))).

147. *N. Cheyenne Tribe*, 503 F.3d at 841 (explaining that the “injunction prohibited coal bed methane development on 93% of the resource area until BLM completed a revised [EIS],” essentially allowing “the ‘phased development’ alternative to proceed while BLM decided whether to adopt it”).

148. *Id.* at 842 (noting that the environmentalists and tribe argued that “the district court was obligated to enjoin all coal bed methane development, not just development on 93% of the resource area”).

149. *Id.* at 844–46 (“[T]he [EIS] basically complied with NEPA, except for its failure to consider phased development . . . [and] the partial injunction fully remedies this failure.”).

150. *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1192 (10th Cir. 2002).

151. *Id.* at 1161 (explaining that the project required approval from both the Federal Highway Administration and the U.S. Army Corps of Engineers “[b]ecause the Legacy Parkway will connect to the interstate highway system and will require filling in 114 acres of wetland”).

152. *Id.* at 1161–62

A local organization challenged both the federal authorization of the Legacy Parkway and the EIS.<sup>153</sup> The district court denied the challenge, ruling that the EIS satisfied NEPA and that the Federal Highway Administration's ROD did not violate the Administrative Procedure Act.<sup>154</sup> The local group appealed to the Tenth Circuit, which subsequently reversed the district court, holding that the EIS failed to consider the effects that the highway would have on wildlife.<sup>155</sup> In so ruling, the court relied in part on comments from the U.S. Fish and Wildlife Service and the Utah Department of Wildlife Reserve.<sup>156</sup> The court decided that the EIS's limited scope of wildlife effects analysis—which the U.S. Fish and Wildlife Service highlighted—was not sufficient to address the adverse effects of the project on migratory birds.<sup>157</sup>

Similarly, in *National Audubon Society v. Department of the Navy*,<sup>158</sup> adverse comments from federal and state agencies emphasized inadequacies in the Department of the Navy's EIS on a proposed landing field for its aircraft within five miles of a national wildlife refuge—a winter home for almost 100,000 waterfowl.<sup>159</sup> Two counties and several environmental groups sued, claiming that the Navy violated NEPA by failing to adequately assess the environmental effects of its decision to build the landing field near the refuge.<sup>160</sup> The district court agreed with the plaintiffs, enjoining the project until the Navy adequately assessed the effects of the proposed landing field on migratory waterfowl.<sup>161</sup>

The Fourth Circuit affirmed, concluding that the Navy failed to take a “hard look” at the environmental effects of the proposed landing field, especially in light of the project's close proximity to the wildlife refuge.<sup>162</sup> The court focused on adverse federal and state agency comments,

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153. *Id.* at 1162.

154. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 180 F. Supp. 2d 1286, 1291 (D. Utah 2001).

155. *Utahns for Better Transp.*, 305 F.3d at 1192.

156. *Id.* at 1179 (noting that the lead agencies considered the effects of the highway on wildlife only within 1,000 feet of the proposed right of way, “even though [the Fish and Wildlife Service] presented evidence to the [agencies] that roads can cause significant effects to bird populations as far as 1.24 miles from roadways”).

157. *Id.* (“[L]imiting the wildlife impact analysis so that migratory birds are beyond its scope renders the [EIS] inadequate.”).

158. *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 174 (4th Cir. 2005).

159. *Id.* at 181.

160. *Id.* at 183.

161. *Id.* at 181.

162. *See id.* at 187 (emphasizing that by identifying the nearby region as a national wildlife refuge, “Congress has expressly found [that the region] . . . provides unique opportunities for observing and interpreting the biological richness of the region's estuaries and wetlands”).

particularly those from the U.S. Fish and Wildlife Service<sup>163</sup> and the North Carolina Wildlife Resources Commission.<sup>164</sup>

First, the court decided that the Navy's four winter site-visits and month-long radar study failed to show that the agency took a "hard look" at the location and concentration of waterfowl in the vicinity of the proposed project, as emphasized by Fish and Wildlife Service comments that requested long-term studies.<sup>165</sup> Second, in deciding that the Navy's evaluation of a so-called "bird aircraft strike hazard"<sup>166</sup> was insufficient, the court cited negative comments from the U.S. Fish and Wildlife Service, the North Carolina Wildlife Resources Commission, and the Department of the Interior.<sup>167</sup> Third, based partly on comments from the North Carolina Wildlife Resources Commission and the Fish and Wildlife Service,<sup>168</sup> the court concluded that the Navy failed to provide adequate support for its conclusion that adverse effects on waterfowl would be minor.<sup>169</sup> Finally, the court relied on the Fish and Wildlife Service's comments<sup>170</sup> in deciding that the Navy's cumulative impacts analysis was inadequate because it failed to consider the combined effect of the military operating area and the landing field.<sup>171</sup> Consequently, the Fourth Circuit ruled that the Navy failed to conduct the required "hard look" and adequately consider mitigation measures.<sup>172</sup>

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163. *Id.* ("[T]he Fish and Wildlife Service specifically commented that long-term data was necessary because bird populations vary annually and even within a single migratory season.")

164. *Id.* at 190 (stating that the North Carolina Wildlife Resources Commission and the Department of the Interior criticized the analysis of Bird Aircraft Strike Hazard effects).

165. *Id.* at 187, 189 (noting that the Fish and Wildlife Service "specifically commented that long-term data was necessary because bird populations vary" annually and seasonally; the four "site visits never developed into the careful investigation that a 'hard look' contemplates"; and the Navy conceded the month-long radar study did not alone provide an adequate assessment of the potential environmental harm).

166. *See, e.g., id.* at 189–90 (explaining that "bird aircraft strike hazard" is a measure of bird-aircraft encounters which may result in damage to the aircraft and sometimes pilot death or serious injury). The court noted the importance of properly evaluating bird hazards because "thousands of bird-aircraft encounters are reported in the United States every year," and "[i]n addition to posing obvious risks to the safety of military aviators," the bird-aircraft encounters are an environmental issue. *Id.* at 190.

167. *Id.* at 190–92.

168. *Id.* at 193 (noting the comments provided scientific studies confirming that "snow geese are susceptible to aircraft disturbance").

169. *Id.* at 192 (observing that "[t]he Navy's cursory review of relevant scientific studies . . . further illustrates its failure to take a hard look at the environmental impacts" on the region).

170. *Id.* at 197 (stating that "[t]he Fish and Wildlife Service has expressed concern about harm that the proposed [military operating area] by itself would cause to resident waterfowl . . . creating cause for concern regarding what would happen when the effects of the [military operating area] and [proposed additional landing field] are combined").

171. *Id.* at 197–98 (explaining that a "holistic view of the [EIS] makes [it] particularly apparent" that the cumulative impact analysis was deficient).

172. *Id.* at 202–03 (rejecting the district court's "sweeping injunction" and instead instructing the district court to narrow the injunction to permit some activity by the Navy while it revised the NEPA analysis).



The foregoing cases demonstrate that agency comments critical of a lead agency's NEPA analysis may have a significant influence on judicial review of an EIS. The Ninth Circuit has routinely concluded that a lead agency's failure to consider or address adverse agency comments may itself serve as the basis for a NEPA violation.<sup>173</sup> Even where the lead agency's response—or failure to respond—to adverse comments is not itself the basis for a NEPA violation, the fact that other agencies are critical of the lead agency's analysis often signals to the court that a NEPA analysis is deficient.<sup>174</sup>

### III. ADVERSE COMMENTS FROM LEAD AGENCY STAFF

Like concerns raised by comment agencies, adverse comments from an agency's own staff may attract a court's attention because they reflect internal agency disagreement. Even if an agency responds to adverse comments from its own staff, some courts have held that responses not adequately addressing those comments can render an EIS insufficient.

For example, in 2012 the Ninth Circuit determined in *Pacific Rivers Council v. U.S. Forest Service* that the Forest Service's EIS on 2004 revisions to the Sierra Nevada National Forest Plan was inadequate because it failed to consider the environmental consequences of the revisions on individual species of fish—an issue raised in comments from the Forest Service's own staff.<sup>175</sup> In January 2001, the Forest Service had issued an EIS recommending revisions to the forest plan to “conserve and repair the aquatic and riparian ecosystems,” among other goals.<sup>176</sup> In November 2001, under a new administration,<sup>177</sup> the Chief of the Forest Service directed the

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173. See *W. Watershed Project v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2010); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1227 (9th Cir. 2008); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003).

174. *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1150 (D.C. Cir. 2011); *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1074 (9th Cir. 2009), *cert denied*, 131 S.Ct. 1783 (2011); *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 840 (9th Cir. 2007); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1031 (9th Cir. 2007); *Nat'l Audubon Soc'y*, 422 F.3d at 187–89; *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 866 (9th Cir. 2004); *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1180 (10th Cir. 2002).

175. *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1028, 1033–34 (9th Cir. 2012) (noting the omission “was specifically brought to the attention of the Forest Service in the letter written by its Washington staff” in the Office for Watershed, Fish, Wildlife, Air and Rare Plants, yet “the Forest Service ‘entirely failed to consider’ environmental consequences of the 2004 [revisions] on individual species of fish”).

176. *Id.* at 1015–16

177. *Id.* at 1015 (“[U]nder the administration of newly elected President Bush, the Chief of the Forest Service asked for a review of the 2001 Framework.”).

regional forester to amend the forest plan revisions to address fire-related issues and reduce the adverse effects on various permit holders.<sup>178</sup> In 2004, the Forest Service issued a new EIS and ROD on the forest plan revisions that reflected “substantial differences” from the 2001 revisions, authorizing more logging and logging-related activities while reducing grazing restrictions.<sup>179</sup> Pacific Rivers Council then challenged the 2004 EIS, alleging that it did not sufficiently analyze the environmental consequences for fish and amphibians.<sup>180</sup>

The district court ruled in favor of the Forest Service, but the Ninth Circuit reversed, concluding that the 2004 EIS violated NEPA by failing to address the environmental effects that the 2004 revisions had on fish.<sup>181</sup> The court observed that the Forest Service’s own staff had criticized the draft version of the 2004 EIS for omitting a discussion of the effects that logging and logging-related activities have on fish.<sup>182</sup> However, the agency failed to respond to those concerns in its final EIS.<sup>183</sup> In fact, the 2004 EIS was devoid of any discussion of how logging impacts fish,<sup>184</sup> even though the

178. *Id.* at 1016 (stating that the Chief of the Forest Service “directed the Regional Forester to reevaluate the 2001” amendments to consider fire related issues as well as “to ‘reduce the unintended and adverse impacts’ on grazing permit holders, recreation users, and local communities”).

179. *Id.* at 1017–19 (explaining that the revisions resulted in amendments that allow “harvesting of substantially more timber,” “harvesting of larger trees,” “substantial[] increases [to] the total acre-age to be logged,” additional logging roads, and reduced grazing restrictions).

180. *Id.* at 1020.

181. The Court explained:

[T]he complete lack of such analysis of the likely impact on individual species of fish in the 2004 EIS, and the lack of any explanation in the 2004 EIS why it is not “reasonably possible” to perform some level of analysis of such impact, we have no choice but to conclude that the Forest Service failed to take the requisite “hard look.”

*Id.* at 1034.

182. *Id.* at 1017 (describing a letter from Forest Service staff in the Washington D.C. Office for Watershed, Fish, Wildlife, Air and Rare Plants, that stated “[t]here needs to be a discussion of the effects of the new alternatives on riparian ecosystems, streams, and fisheries” and based on the proposed action alternatives, “there is a high likelihood that there will be significant and measurable direct, indirect, and cumulative effects on the environment, which need to be analyzed and disclosed in this document”).

183. *Id.* at 1017 (“The Forest Service issued the 2004 EIS . . . without adding the discussion of ‘riparian ecosystems, streams and fisheries’ that the staff letter had said was needed.”). The court specifically noted that:

The explicit promise to analyze effects ‘on species dependent on aquatic habitats’ . . . and the absence of any such analysis . . . is puzzling. . . . [especially because] it was a mistake that was specifically brought to the attention of the Forest Service in the letter written by its Washington staff.

*Id.* at 1028. The court also looked to the analysis in the 2001 EIS, which did address the effect of the forest plan revisions on fish and amphibians. *Id.*

184. *Id.* at 1025 (“In stark contrast to the 2001 EIS, the 2004 EIS contains *no analysis whatsoever* of environmental consequences of the 2004 [revised amendments] for individual species of fish.” (emphasis added)).

2004 revisions permitted increased logging and logging-related activities that would exacerbate adverse effects on fish and amphibians.<sup>185</sup> Because of this omission and the lack of any reasoning for not supplying the missing analysis,<sup>186</sup> the Ninth Circuit held that the Forest Service's EIS violated NEPA.<sup>187</sup>

Similarly in *Davis Mountains Trans-Pecos Heritage Ass'n v. Federal Aviation Administration*, the Fifth Circuit ruled that the Federal Aviation Administration (FAA) failed to address its own studies and did not follow its own procedures for responding to comments, making its EIS on a proposed bomber-training initiative inadequate.<sup>188</sup> The Davis Mountains Trans-Pecos Heritage Association and others alleged that the EIS, prepared by the U.S. Air Force and adopted by the FAA, violated NEPA by failing to analyze the effects of "wake vortices" (trails of disturbed air) on ground structures.<sup>189</sup> The Fifth Circuit consolidated two district court decisions, along with a direct appeal from an FAA order.<sup>190</sup> The court then ruled that the EIS violated NEPA because it did not adequately address the effects of wake vortices on ground structures.<sup>191</sup> The court also concluded that the EIS

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185. *Id.* at 1017; *see also id.* at 1025 (noting that "[o]f particular importance, the 2004 [revisions] allow[] an additional 4.9 billion board feet of green and salvage timber harvesting during the first two decades, much of it conducted nearer streams, compared to the 2001 [amendments]").

186. *Id.* at 1030 (stating that "[t]he Forest Service has provided almost the opposite of an explanation, for it promised such an analysis and then failed to provide it").

187. *Id.* at 1034 ("[T]he Forest Service 'entirely failed to consider' the environmental consequences of the 2004 [revisions] on individual species of fish . . . [but] did take a hard look at environmental consequences on amphibians in the 2004 EIS, in compliance with NEPA.>").

188. *Davis Mountains Trans-Pecos Heritage Ass'n v. Fed. Aviation Admin.*, Nos. 02-60288, 03-10506, 03-10528, 2004 WL 2295986, at \*18-19 (5th Cir. Oct. 12, 2004). The "Realistic Bomber Training Initiative (RBTI)" proposed to "provide airspace and ground-based assets for realistic and integrated B-52 and B-1 Bomber flight training within 600 miles of Barksdale and Dyess Air Force Bases," and included an operations area and training route for pilots to practice low-altitude navigation and maneuvers. *Id.* at \*6-7; *see also id.* at \*18-19 (remanding to the Air Force and FAA "to prepare a supplemental EIS which adequately addresses wake vortex impacts and FAA comments as required by CEQ and Air Force regulations"); *id.* at \*6 n.\* ("[P]ursuant to 5th Cir. R. 47.5, the Court determined [the] opinion should not be published and is not precedent except" for the doctrine of *res judicata*, collateral estoppel, or law of the case).

189. *Id.* at \*11 (explaining that the petitioners alleged "wake vortices damage ground structures like the windmills used by ranchers to provide water to livestock and wildlife").

190. *Id.* at \*7 n.2.

191. *Id.* at \*11-13 (explaining that "[t]he Air Force is entitled to rely on its own qualified experts' reasonable opinions in determining the significance of impacts," but because the Air Force relied on documents that did not present "a reliable picture of the impact of wake vortices on surface structures," the EIS "misinform[ed] both public participation and the Air Force's conclusion" and "thus this portion of the EIS is inadequate"); *see also id.* at \*11-12 (rejecting an e-mail from the Boeing Company that alluded to a Boeing study because "the e-mail alone cannot provide an adequate basis for the Air Force's conclusion," and rejecting the Air Force's estimates from a graph that "came from a 1949 aerodynamics text by James Dwinnell" because "the Air Force did not include the equation or its inputs in the EIS or administrative record").

failed to comply with the Air Force's own NEPA regulations by not satisfactorily responding to FAA comments.<sup>192</sup> In reaching its decision, the Fifth Circuit relied on comments by the FAA's own expert.<sup>193</sup>

Both *Pacific Rivers Council* and *Davis v. FAA* demonstrate that even if a lead agency responds to agency comments that criticize its analysis, the lead agency can still violate NEPA by failing to adequately respond to internal concerns. Critical comments from expert agencies may raise judicial awareness to specific issues in the lead agency's EIS, and adverse comments from an agency's own staff may have the same effect. This is a sensible result, considering that the agency deference is in large part based on agency expertise.<sup>194</sup> When an agency's own staff critiques the analysis in an EIS—such as the letter from the Forest Service's staff in *Pacific Rivers Council*—or concedes inadequacies in the analysis—like the Air Force's own expert in *Davis v. FAA*—courts have taken those concerns seriously.

#### IV. FAVORABLE AGENCY COMMENTS

Just as agency comments critical of a lead agency's analysis may influence courts to conclude that the analysis violates NEPA, agency comments that support a lead agency's analysis are likely to lead courts to find compliance with NEPA. This Part discusses cases where agency comments that agree with lead agencies' analysis influenced judicial reasoning.

In 2003, in *Mid States Coalition for Progress v. Surface Transportation Board*, the Eighth Circuit upheld the Surface Transportation Board's EIS on a proposal to construct a rail-line extension to rehabilitate existing rail lines in Minnesota and South Dakota and to construct a new rail line to reach coal mines in Wyoming's Powder River Basin. The EIS

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192. *Id.* at \*13–14 (explaining that “Air Force regulations . . . provide that an EIS must include ‘responses to comments on the Draft EIS by modifying the text and referring in the appendix to where the comment is addressed or providing a written explanation in the comments section,’” but the FAA “did not refer in the appendix to where the FAA’s comments were addressed or provide any written explanation” and “neglect[ed] much of its responsibilities under [its own] regulation” (quoting 32 C.F.R. § 989.19(d))).

193. *Id.* at \*12 (noting that “the Air Force’s own expert, Dr. Ojars Skujins, admit[ed]” that the bombers could generate wind speeds much higher than that predicted in the EIS, and “that the chart generated by the Air Force based on the . . . equation [created by another FAA expert] is ‘oversimplified’ and ‘does tend to underestimate the maximum vortex strength’”).

194. See *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (“[T]he well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944))).

was based in part on comments from EPA that supported the project.<sup>195</sup> The city of Rochester, among other petitioners,<sup>196</sup> alleged that the Surface Transportation Board improperly calculated the ambient noise and failed to account for different noise levels in urban as opposed to rural areas.<sup>197</sup> The district court upheld the board's calculations, concluding that the agency supported its analysis "by explaining that noise is not additive."<sup>198</sup> The court relied on comments from EPA that supported the lead agency's reasoning to conclude that the board properly decided not to separately measure ambient noise for every community located along the proposed rail project.<sup>199</sup>

Even if other agencies do not comment in support of a lead agency's analysis, as occurred in *Mid States Coalition for Progress*, courts may rely on a lack of critical agency comments to justify the adequacy of the NEPA analysis. For example, in *Theodore Roosevelt Conservation Partnership v. Salazar*, the D.C. Circuit upheld BLM's EIS and ROD on a proposed management plan for natural gas development in Wyoming.<sup>200</sup> Several environmental groups claimed that BLM's EIS and ROD violated NEPA by using an outdated method for estimating the amount of pollutants the proposed drilling activities and related development would emit.<sup>201</sup> The district court upheld BLM's EIS because it determined that calculating the project's effect on ozone levels is a complicated measurement and that the

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195. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 532 (8th Cir. 2003) (describing the proposal "to construct approximately 280 miles of new rail line . . . and to upgrade nearly 600 miles of existing rail line in Minnesota and South Dakota").

196. *Id.* at 534 (listing the city of Rochester, the Mayo Foundation, and Olmstead County as petitioners).

197. *Id.* at 536 (explaining that the EIS "used noise levels in rural South Dakota as its baseline for ambient noise" but that Rochester argued "since the ambient noise levels in an urban area are higher, it was arbitrary . . . to use the lower rural levels").

198. *Id.*

199. *Id.* at 537 (noting that EPA "has stated that 'adding a 60 decibel sound to a 70 decibel sound only increases the total sound pressure level less than one-half decibel'" and "[e]ven if we credit Rochester's estimate that its own ambient noise level is 59 decibels, that would add less than one-half decibel to those receptors that [the lead agency] has determined will experience average train noise of 70 decibels").

200. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 502–03 (D.C. Cir. 2010) (explaining the project was "designed to manage the resources of more than 270,000 acres of publicly and privately owned land in south-central Wyoming"). *See also id.* at 505 (describing the area as "contain[ing] valuable oil and natural gas deposits, provid[ing] habitat to many species of wildlife, suppl[ying] grazing land for local ranchers' herds, and support[ing] various human endeavors such as big game hunting and wildlife observation"); *id.* (noting that the ROD "anticipates the Bureau approving approximately 2000 new natural gas wells in the project area over the span of 30 to 50 years").

201. *Id.* at 510 (stating that the environmental groups maintained that the Scheffe method, a calculation "developed in 1988" used by the BLM to "estimate[] the effect the proposed development would have on ozone concentrations," was outdated).

choice of calculation methods is one properly left to the agency's expertise.<sup>202</sup> The D.C. Circuit also rejected the environmentalists' claim because BLM explained its use of the older model,<sup>203</sup> and NEPA does not require agencies to use the best scientific methods available.<sup>204</sup> Further, the court noted that the federal and state agencies contacted for comment declined to make any judgment about BLM's use of the old model.<sup>205</sup>

Courts are thus more likely to uphold a lead agency's NEPA analysis if other agencies have commented in support of its analysis. The *Theodore Roosevelt Conservation Partnership* decision suggests that courts may even interpret an agency's decision not to comment as indicating the adequacy of the lead agency's analysis. The outcomes of these cases are consistent with our thesis that agency comments will trigger heightened judicial scrutiny.

#### V. OUTCOMES CONTRARY TO AGENCY COMMENTS

Adverse agency comments do not always cause courts to find NEPA violations. In this Part we explain cases in which, contrary to our thesis, a court made a NEPA determination that was inconsistent with adverse agency comments. Although some cases diverge from our thesis that courts afford heightened scrutiny to concerns raised by adverse agency comments, most do not actually undermine the theory. In fact, some of the cases demonstrate that inter-agency comments prompt the lead agency to address the inadequacy of its environmental analysis. Adverse agency comments can help a lead agency avoid a NEPA violation by putting it on notice of deficiencies in its environmental analysis. Thus, even cases where adverse agency comments do not cause courts to find a NEPA violation support the overarching conclusion that adverse comments warrant close scrutiny from lead agencies, litigants, and courts.

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202. *Id.*; see also *Theodore Roosevelt Conservation P'ship v. Salazar*, 605 F. Supp. 2d 263, 273–74 (D.D.C. 2009) (“[Ozone] formation is a complex atmospheric chemistry process that varies greatly due to meteorological conditions and the presence of ambient atmospheric concentrations of many chemical species . . . . Choosing a more accurate method of analysis is precisely the type of decision best left to agency expertise.” (citations and internal quotation marks omitted)).

203. *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 510.

204. *Id.* at 511 (clarifying that CEQ regulations “require[] agencies to ensure the scientific integrity of their environmental impact statements” but do “not require that an agency employ the best, most cutting-edge methodologies”).

205. *Id.* (“Before undertaking the analysis, the [BLM] contacted various interested agencies, including the Environmental Protection Agency, the National Park Service, and the Wyoming Department of Environmental Quality, . . . [n]one objected to using the Scheffe method.”).

*A. Upholding an Environmental Assessment Despite Adverse  
Agency Comments*

Adverse agency comments that do not expressly contradict or challenge a lead agency's analysis can support a court decision finding NEPA compliance. For example, *Wetlands Action Network v. U.S. Army Corps of Engineers* involved a challenge to the Army Corps of Engineers' EA on a CWA section 404 permit to fill wetlands for a residential development, and to mitigate the resulting adverse effects by creating a freshwater wetland system.<sup>206</sup> The Ninth Circuit determined that comment letters from the Fish and Wildlife Service and EPA did not explicitly question the feasibility or benefits of the proposed freshwater system, and thus did not raise questions of uncertainty that might require an EIS.<sup>207</sup> In response to its proposed permit, the Corps received comments from the Fish and Wildlife Service, the National Marine Fisheries Service, and EPA, among other agencies.<sup>208</sup> However, after multiple meetings between the Corps and various federal and state agencies,<sup>209</sup> as well as modifications to permit conditions, the federal agencies decided not to object to the permit.<sup>210</sup> Environmental groups sued, claiming that the Corps violated both the CWA and NEPA when it issued the permit based on the corresponding EA/FONSI.<sup>211</sup> The district court ruled that the Corps violated NEPA because the proposed mitigation was not tested or fully developed, and there was significant controversy about the nature and effect of the proposed activity.<sup>212</sup>

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206. *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1110 (9th Cir. 2000), *abrogated on other grounds by* *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176–78 (9th Cir. 2000) (describing the proposed project to dredge and fill 21.4 acres of wetlands to build “residential areas, a marina, and numerous commercial developments,” and mitigate the adverse effects of creating a “52-acre fresh water wetland complex”).

207. *Id.* at 1119–21.

208. *Id.* at 1111 (discussing comments from the Fish and Wildlife Service, the National Marine Fisheries Service, and EPA that “expressed concern that . . . the notice of intent and the permit application did not contain a sufficiently detailed analysis of project alternatives and did not provide a comprehensive evaluation of the cumulative impacts attributable to the entire development project”).

209. *Id.* at 1111–12 (noting that “the Corps met with representatives of the [Fish and Wildlife Service, National Marine Fisheries Service], EPA, and the California Department of Fish and Game” in November 1991 and April 1992).

210. *Id.* (observing that the developer “agreed to inclu[de] . . . various special permit conditions proposed by [the National Marine Fisheries Service] and the EPA” and “EPA, [the National Marine Fisheries Service, and the Fish and Wildlife Service] decided not to object further to the issuance of the permit”).

211. *Id.* at 1109.

212. *Id.* at 1113 (“The district court found that the Corps had violated NEPA by improperly limiting the scope of its analysis . . . [and] the Corps decision to issue an EA rather than an EIS was arbitrary and capricious.”).

The Corps appealed. The Ninth Circuit reversed, rejecting the district court's emphasis on adverse agency comments as raising a substantial question about the adequacy of the mitigation measures and stating that the district court mischaracterized the substance of those comments.<sup>213</sup> Closely analyzing the Fish and Wildlife Service and EPA comments, the court decided that they only requested additional information, instead of questioning the feasibility of the freshwater wetland system as a mitigation measure.<sup>214</sup> To the extent that the agency comments raised concerns about the feasibility of the freshwater system, the court concluded that the Corps adequately considered those concerns, and therefore the court found no NEPA violation.<sup>215</sup>

Similarly, in *Greater Yellowstone Coalition v. Flowers*, the Tenth Circuit affirmed the district court's decision rejecting a challenge to an EA on a proposed housing development and golf course authorized by a Corps of Engineers' permit along the Snake River in Wyoming.<sup>216</sup> The circuit court explained that the comments from EPA and the Forest Service did not directly challenge the Corps's analysis in the EA.<sup>217</sup> Environmental groups claimed that the Corps should have prepared an EIS on the permit for the development near bald eagle nesting territory.<sup>218</sup> In challenging the Corps's FONSI, the environmental groups pointed to comments from EPA and the Forest Service.<sup>219</sup>

The district court upheld the Corps's EA and FONSI because the agency completed "extensive examination of . . . potential impacts and responses to comments."<sup>220</sup> The Tenth Circuit affirmed, concluding there was no substantial uncertainty or controversy that would trigger the need for an EIS.<sup>221</sup> The court identified the agency comments as expressing general concerns about the project's effects and some of the data relied on

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213. *Id.* at 1110, 1120.

214. *Id.* at 1120 (stating that EPA requested information such as "an evaluation of the quantity and quality of wildlife habitat the freshwater marsh would provide" and a "[d]etermination of the contaminants which would enter the freshwater marsh if surface run-off, remediated groundwater and/or reclaimed wastewater were used," and that the Fish and Wildlife Service's comment "suggested that the plan for the freshwater system be revised to allow for urban runoff to be diverted around the system, but it did not express any opinion on the feasibility of the system").

215. *Id.* ("[T]he Corps considered each of these issues and relied on substantial evidence in making its determination that the freshwater system was feasible").

216. *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1279 (10th Cir. 2004).

217. *Id.*

218. *Id.* at 1263–64 (explaining that the proposed development required a section 404 permit to place twelve weirs in a river to stabilize the bank and prevent erosion).

219. *Id.* at 1275.

220. Answering Brief of the Fed. Defendants–Appellees at 21–22, *Greater Yellowstone Coalition*, 359 F.3d 1257 (No. 03–8034) 2003 WL 23723859.

221. *Greater Yellowstone Coal.*, 359 F.3d at 1275.



in the EA, but “[n]either comment provide[d] ‘evidence . . . [that] cast serious doubt upon the reasonableness of [the Corps’s] conclusions.’”<sup>222</sup> The Tenth Circuit noted that the Corps addressed these comments by adopting monitoring requirements that forced the agency to modify the proposed plan if there were any unacceptable adverse effects on the eagle population.<sup>223</sup> The fact that the Corps addressed the concerns in adverse agency comments, thereby avoiding a NEPA violation, supports the thesis that adverse agency comments receive considerable judicial deference. The difference in this case was that the lead agency responded by modifying its proposal. As a result, the environmental groups failed to show that the Corps should have prepared an EIS despite agency comments critical of the Corps’s FONSI.<sup>224</sup>

Even if adverse agency comments directly question a lead agency’s analysis, courts may uphold the EA so long as the lead agency considers and addresses those comments. For example, in *Akiak Native Community v. U.S. Postal Service*, Alaska Native communities challenged the U.S. Postal Service’s EA for a hovercraft demonstration project.<sup>225</sup> Despite criticism from the U.S. Fish and Wildlife Service and the Alaska Department of Fish and Game, the Postal Service issued an EA and FONSI.<sup>226</sup> The communities lost their challenge to the Postal Service’s EA in district court.<sup>227</sup> They appealed, emphasizing comments from the Fish and Wildlife Service as evidence that “the EA’s conclusions were faulty.”<sup>228</sup>

The Ninth Circuit affirmed the district court’s decision in favor of the Postal Service, explaining that the agency “is not required . . . to defer to the

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222. *Id.* (quoting *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001)); *see also id.* (explaining that “[w]hile EPA raised general concerns about the impact of the weirs and the U.S. Forest Service geomorphologist criticized aspects of the Ayres report, we do not believe these comments obligated the Corps to evaluate the impact of the weirs further in an EIS”).

223. *Greater Yellowstone Coal.*, 359 F.3d at 1276–77 (“In light of the evident difficulty in predicting eagle reactions before [the project] begins, the Corps could justifiably determine that these mitigation measures ‘constitute an adequate buffer’ against adverse impacts to bald eagles.” (quoting *Weltands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1121 (9th Cir. 2000))).

224. *Id.* at 1277.

225. *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1143 (9th Cir. 2000) (explaining that the Postal Service proposed “an experimental program that delivers non-priority mail by surface hovercraft instead of by fixed-wing aircraft to eight remote Alaska Native villages on the Kuskokwim River and two of its tributaries”).

226. *Id.* (noting that the Fish and Wildlife Service and the Alaska Department of Fish and Game “disagreed with the [EA’s] conclusion that the impacts on fish, wildlife, and subsistence activities would be insignificant”).

227. *Id.*

228. *Id.* at 1146 (“Plaintiffs suggest that the [EA’s] analysis does not support the [FONSI] because . . . the [Fish and Wildlife Service], an agency with expertise in environmental issues, suggested that the [EA’s] conclusions were faulty.”).

Fish and Wildlife Service's conclusions."<sup>229</sup> Instead, "NEPA requires only that the responsible agency 'consider [] these comment agencies' initial concerns, address[] them, and 'explain[] why it found them unpersuasive.'"<sup>230</sup> The court ruled that because the EA "carefully analyze[d] [the potential long-term disturbance of roosting waterfowl, as raised by the Fish and Wildlife Service's comments] and conclude[d] that a *short-term* disturbance of roosting is the *probable* impact,"<sup>231</sup> such an effect would not be significant, and the Postal Service adequately addressed any concerns.<sup>232</sup> Just as the adverse agency comments triggered heightened scrutiny from the lead agency in *Greater Yellowstone Coalition*,<sup>233</sup> in this case the Fish and Wildlife Service's adverse comments elicited a focused response from the Postal Service that apparently addressed the comment agency's concerns, thus avoiding a NEPA violation. The Ninth Circuit concluded that the EA "mustered sufficient record support" for its FONSI and upheld the agency's decision not to prepare an EIS.<sup>234</sup>

### B. Adequate EIS Analysis Despite Adverse Comments

Although somewhat rare, there are a few cases that uphold a lead agency's EIS as sufficient even though adverse agency comments criticized aspects of the EIS's analysis. These cases are not, however, completely contrary to the notion that adverse agency comments generate increased scrutiny because in each of the cases discussed below the lead agency seriously considered the adverse comments. These decisions do seem to afford less importance to adverse agency comments, but at a minimum the agency comments require close consideration from both the lead agency and the reviewing court.

Some courts have upheld a lead agency's EIS in the face of adverse agency comments so long as the lead agency cogently addressed those comments. For example, in *Custer County Action Ass'n v. Garvey*, the Tenth Circuit upheld the FAA's EIS on proposed special use airspace changes to the National Airspace System in Colorado<sup>235</sup> even though BLM,

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229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 1147.

233. *See supra* notes 216–24 and accompanying text.

234. *See Akiak Native Cmty*, 213 F.3d at 1146–47 (“[D]eference is accorded agency environmental determinations not because the agency possesses the substantive expertise, but because the agency’s decision-making process is accorded a ‘presumption of regularity.’” (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971))).

235. *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 (10th Cir. 2001).

the Department of the Interior, and other agencies submitted comments concerning potential adverse effects on sensitive wilderness areas in the vicinity.<sup>236</sup> Numerous environmental and other groups<sup>237</sup> challenged the FAA's EIS,<sup>238</sup> claiming that the EIS failed to sufficiently analyze adverse effects on wilderness areas in the vicinity of the proposed airspace changes. The groups cited adverse comments by BLM and other agencies for support.<sup>239</sup>

The Tenth Circuit recognized that although NEPA "requires agencies preparing environmental impact statements to consider and respond to the comments of other agencies," it does not force agencies "to agree with them."<sup>240</sup> Because the FAA considered the adverse agency comments, but reasonably concluded that the adverse effects would not be significant, the court upheld the EIS's analysis of the anticipated impacts on nearby wilderness areas.<sup>241</sup>

The Tenth Circuit's reasoning in *Custer County* may reflect particular sensitivity to matters of national security, since the court explained that "[w]e recognize the action at issue here technically is not military action," but noted that "the FAA is instructed to determine whether airspace is necessary to national defense in consultation with the Defense Department."<sup>242</sup> The court also observed that "[u]nder these circumstances, we believe the political question doctrine precludes us from second-guessing or interfering with the FAA's decision [that] the [proposed special-use changes are] necessary to provide airspace for military training."<sup>243</sup> Consequently, the Tenth Circuit determined that despite the adverse agency comments, the FAA did not violate NEPA because it

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236. *Id.* at 1038 (stating that petitioners pointed to agency comments concerned about potential adverse effects of the proposed change on "the unique natural, quiet, aesthetic, visual and recreational resources associated with certain wilderness areas" and "criticizing . . . FAA for not fully analyzing those impacts").

237. Petition for Writ of Certiorari, *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001) (No. 01-652) 2001 WL 34116045, \*ii (listing the petitioners as Custer County Action Association; National Airspace Coalition; The Wilderness Society; Custer County Airport Authority; The Board of County Commissioners of Custer County, Colorado; La Veta Peace of Air Alliance; Huerfano Valley Citizens Alliance; Wolf Spring Ranchers, Inc.; and Custer County Bison).

238. *Custer Cnty. Action Ass'n*, 256 F.3d at 1027.

239. *Id.* at 1038.

240. *Id.*

241. *Id.* ("[T]he record in this case verifies that the agencies identified possible noise impacts . . . including [impacts on] wilderness areas . . . and reasonably determined, after considering public and agency comment alike, that any impact on these areas would be insignificant," so "we therefore uphold" the EIS).

242. *Id.* at 1031.

243. *Id.* (noting that the court is "free to review whether, in making that decision, the FAA acted within the scope of its powers, followed its own regulations, and complied with the Constitution").

considered the agency comments but reasonably came to a different conclusion, and because the national security issues warranted greater deference to the FAA's decisions.

Ensuing Tenth Circuit decisions have limited *Custer County*, giving less deference to lead agency reasoning that is inconsistent with agency comments that are critical of an EA or EIS. For example, in *Davis v. Mineta*,<sup>244</sup> the Tenth Circuit noted that while "NEPA 'requires agencies preparing [EISs] to consider and respond to the comments of the other agencies, not to agree with them,'"<sup>245</sup> "it is also true that a reviewing court 'may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent expertise.'"<sup>246</sup> Consequently, later decisions of the Tenth Circuit balance deference to a lead agency's response to adverse comments with deference to a comment agency's area of expertise.

Later district court cases within the Tenth Circuit have likewise moved away from the reasoning in *Custer County*. Some courts have applied the Tenth Circuit's language from *Custer County* but added additional reasoning for upholding the lead agency's NEPA analysis despite critical agency comments. For example, in *WildEarth Guardians v. U.S. Forest Service*, the district court upheld the Forest Service's EIS on proposed drainage wells and a ventilation shaft to minimize methane gas levels in a proposed expansion of the West Elk Mine in Colorado, even though the analysis ignored EPA comments suggesting an alternative to venting the methane directly into the atmosphere.<sup>247</sup> WildEarth claimed that the Forest Service violated NEPA by failing to consider the capture of methane gas emissions because capturing methane was a reasonable alternative to venting, and because it would reduce methane levels within the mine, as indicated by the EPA's comments.<sup>248</sup> The district court rejected WildEarth's claim not only because the Forest Service coherently addressed the EPA's concerns,<sup>249</sup> but also because the Forest

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244. *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002).

245. *Id.* at 1123 (quoting *Custer Cnty. Action Ass'n*, 256 F.3d at 1038).

246. *Id.* (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983)).

247. *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1227–28 (D. Colo. 2011); *id.* at 1228 (describing EPA comments that "acknowledged the safety concerns relating to venting of methane but recommend[ing] that the . . . EIS 'identify the magnitude of the emissions and discuss alternatives,' specifically capture of the gas" because of the "significance of methane as a potent greenhouse gas and the success of [other] effort[s] in adding capture technology to a number of active coal mines").

248. *Id.* at 1236; *see also id.* at 1238 (explaining that WildEarth "not[ed] that the EPA suggested ways of addressing the leasing challenges").

249. *Id.* at 1238 ("Forest Service met with and engaged in information exchanges with the EPA and investigated EPA's suggestions.").

Service provided reasoning for its own determination and deferred to BLM, the agency with final authority over the leasing decisions.<sup>250</sup>

Other district courts have applied the reasoning in *Custer County*, but not with dispositive effects. For example, in *Wyoming Outdoor Council, Powder River Basin Resources Council v. U.S. Army Corps of Engineers*, the district court rejected an Army Corps EA on a CWA section 404 general permit for discharges associated with oil and gas development partially due to adverse agency comments.<sup>251</sup> Several environmental groups,<sup>252</sup> relying on comments submitted by the EPA and the U.S. Fish and Wildlife Service, claimed that the Corps violated NEPA by failing to consider the cumulative impact of the proposed general permits on non-wetland resources and water quality.<sup>253</sup> Although the district court cited the Tenth Circuit's reasoning in *Custer County*, the court still relied on the adverse agency comments to support its conclusion that the Corps failed to evaluate the cumulative impacts on non-wetland resources.<sup>254</sup> Hence *Custer County* appears to have a limited effect within the Tenth Circuit.

On the other hand, in *Fuel Safe Washington v. Federal Energy Regulatory Commission*, the Tenth Circuit rejected a challenge to the Federal Energy Regulatory Commission's (FERC) EIS on a proposed natural gas pipeline and ancillary facilities in northwest Washington despite adverse agency comments.<sup>255</sup> The company alleged that FERC's EIS was deficient because it failed to address concerns raised by the EPA and the Washington Department of Ecology concerning the scope of alternatives.<sup>256</sup> FERC responded by expanding its discussion of alternatives,<sup>257</sup> but the EPA still had concerns that the EIS did not contain a sufficient range of reasonable

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250. *Id.* (“[T]he record shows that the Forest Service considered the EPA’s suggestions but made its own determinations in consultation with the BLM . . . . There was significant evidence on the record . . . that capture of the methane . . . was a remote and impractical option . . .”).

251. *Wyo. Outdoor Council, Powder River Basin Res. Council v. U.S. Army Corps of Eng’rs*, 351 F. Supp. 2d 1232, 1238, 1243 n.2 (D. Wyo. 2005).

252. *Id.*

253. *Id.* at 1243 n.2 (explaining that the environmental groups “asked the [c]ourt to overturn the Corps’ FONSI based in part on the comments submitted to the Corps by the [EPA] and FWS regarding the potential cumulative impacts of [the general permit]”).

254. *Id.* (“In this case, the comments provided by EPA and FWS lend further support to the [c]ourt’s determination that the Corps’ failure to evaluate cumulative impacts to non-wetland resources was arbitrary and capricious.” (quoting *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002))).

255. *Fuel Safe Wash. v. Fed. Energy Regulatory Comm’n*, 389 F.3d 1313, 1319–22 (10th Cir. 2004) (noting that FERC orders are reviewable by circuit courts, and in this case the company petitioned for review in the Ninth Circuit but was transferred to the Tenth Circuit).

256. *Id.* at 1326 (noting that EPA submitted comments on the draft EIS criticizing FERC’s evaluation of alternatives as perfunctory).

257. *Id.* (“In response to [EPA’s comment], FERC expanded its discussion of several of the alternatives.”).

alternatives, such as alternative Canadian routes.<sup>258</sup> Nevertheless, the Tenth Circuit ruled that the EIS was adequate.<sup>259</sup> The court explained that the EPA's comments did not expressly challenge FERC's analysis,<sup>260</sup> and ultimately deferred to FERC's reasoning, concluding that there was no NEPA violation.<sup>261</sup>

Although a lead agency's complete failure to respond to adverse comments by other agencies will often produce a judicial determination that an EIS is inadequate, that result varies, and a few courts have upheld an EIS even in the face of adverse agency comments. For example, in *Natural Resources Defense Council, Inc. v. Federal Aviation Administration*, the Second Circuit upheld the FAA's EIS on a proposal to close an existing airport and construct a new airport, even though it appeared that the FAA failed to address and discuss adverse agency comments.<sup>262</sup>

Several environmental groups challenged the FAA's EIS on the project for failing to: (1) adequately evaluate the alternatives; (2) consider indirect and cumulative effects; and (3) disclose scientific evidence that the proposed mitigation efforts were not likely to offset the anticipated loss of wetlands.<sup>263</sup> The Second Circuit denied their petition, even though adverse agency comments from the EPA and the Fish and Wildlife Service supported the environmental groups' claims.<sup>264</sup> The court did not analyze the FAA's failure to address agency comments.<sup>265</sup> This result might have

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258. *Id.* at 1324; *see also id.* at 1326 (citing a second letter from EPA that stated “we remain concerned that the approach used to develop the EIS has inappropriately eliminated reasonable alternatives, in both the United States . . . and Canada, that could meet the stated purpose and need for the project” and “[w]e do not believe that the EIS has provided sufficient or compelling reasons for the elimination of alternatives presented” (quoting 8/22/02 Letter from EPA to FERC, R. Vol. IV)).

259. *See id.* at 1326 (“FERC clearly considered and responded to EPA's comments on the [draft] EIS . . .”).

260. *Id.* (“EPA does not challenge the need for the proposed pipeline, but prefers that this need be met by expanding an existing system.”).

261. *Id.* at 1327.

262. *Natural Res. Def. Council v. Fed. Aviation Admin.*, 564 F.3d 549, 551 (2d Cir. 2009); *see id.* at 552, 554 (explaining that the proposed closure and new construction were required to comply with new FAA safety standards for runways, and that “[w]hile the FAA found that a new airport at the [proposed] [s]ite would have a significant adverse effect on natural resources, it nevertheless approved the project because it found that no prudent alternative existed”).

263. *Id.* at 556 (noting that the environmental groups alleged the EIS failed to adequately evaluate project alternatives, “consider the indirect and cumulative effects,” and “disclose scientific evidence” that the mitigation efforts are unlikely to be effective).

264. *Id.* at 560 (“Although, as [EPA] pointed out, the FAA might have improved its FEIS by including a ‘complete watershed build-out analysis . . . for the West Bay alternatives,’” the FAA’s “discussion of runoff impacts on the West Bay watershed [wa]s not so lacking in detail that it fail[ed] to comply with NEPA’s procedural requirements”).

265. *See, e.g., id.* (“Even if the [EIS] could have been improved by analyzing induced impacts separately from cumulative impacts, [citing EPA comment letter supporting as much], NEPA does not require separate analyses.”).

been due to a history of Second Circuit deference to lead agency analysis.<sup>266</sup> Equally plausible, however, is that the court failed to analyze the adverse comments because the environmental groups never alleged that the FAA's failure to respond to the agency comments violated NEPA.<sup>267</sup>

One case that appears to be an outlier is the Eighth Circuit's decision in *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, in which the court deferred to the lead agency's determination as to which agency comments warranted a response.<sup>268</sup> The Army Corps prepared an EIS on a proposed plan to conserve water in the Alluvial and Sparta Aquifers in Mississippi and Arkansas.<sup>269</sup> Environmentalists alleged that the EIS violated NEPA by failing to adequately consider the cumulative impacts of a proposed large irrigation system that the Corps claimed would increase efficiency and thereby conserve water.<sup>270</sup> The environmentalists pointed to comments from the EPA, U.S. Fish and Wildlife Service, and other government agencies that criticized the Corps's cumulative impact analysis because it failed to consider the results of ongoing comprehensive studies by other agencies in the same region as the Alluvial and Sparta Aquifers.<sup>271</sup> The Eighth Circuit dismissed the comments and instead relied on the Corps's judgment.<sup>272</sup> The court decided that NEPA "only requires that the Corps consider and respond to the comments of other agencies" but "does not require the Corps to wait for other agencies to complete their studies . . . or to accept the input or suggestions of other agencies."<sup>273</sup> Thus, the Eighth Circuit upheld the Corps's EIS.<sup>274</sup>

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266. See, e.g., *id.* ("NEPA 'requires agencies preparing [EISs] to consider and respond to comments of other agencies, not to agree with them.'" (citing *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1038 (10th Cir. 2001)); *id.* ("[T]he FAA, not the EPA, bore the ultimate statutory responsibility for actually preparing the [EIS], and under the rule of reason, a lead agency does not have to follow the EPA's comments slavishly—it just has to take them seriously." (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991))).

267. See, e.g., Petitioners' Reply Brief at 20–21, *Natural Res. Def. Council v. Fed. Aviation Admin.*, 564 F.3d 549 (2d Cir. June 18, 2007) (No. 06-5267-ag), 2007 WL 6926588 (highlighting comments from EPA and the Fish and Wildlife Service as evidence that FAA's alternatives analysis was inadequate, but never actually arguing that the FAA failed to address or discuss those agency comments).

268. *Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1101 (8th Cir. 2005).

269. *Id.* at 1099.

270. *Id.* (describing the "Grand Prairie Project" as a plan "to allow continued irrigation of the agricultural region while preserving the Alluvial Aquifer" by "increasing agricultural efficiency of water usage," reducing "water withdrawals," adding "farm reservoirs," constructing "a system that would pump excess water from the White River into the Grand Prairie region," and "various environmental improvement[s]").

271. *Ark. Wildlife Fed'n*, 431 F.3d at 1101 (observing that "other government agencies urged the Corps to wait for the completion of comprehensive studies" of the river basin).

272. *Id.* ("It is up to the Corps to decide which comments of other agencies are of value to its projects, and [the court is] hesitant to second guess its judgment.") (internal citations omitted).

273. *Id.* (citing *Env'tl. Def. Fund, Inc. v. Hoffman*, 566 F.2d 1060, 1068 (8th Cir. 1977); *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1038 (10th Cir. 2001)).

The results of these cases seem inconsistent with our thesis because although agency comments criticized the lead agency's analysis, the reviewing courts did not find NEPA violations. In some cases, such as *Wetlands Action Network*<sup>275</sup> and *Greater Yellowstone Coalition*,<sup>276</sup> the courts determined that the adverse agency comments did not actually challenge the lead agency's analysis. In other decisions, where the adverse comments did directly challenge the lead agency's analysis or conclusions, such as *Akiak Native Community*<sup>277</sup> and *Custer County*,<sup>278</sup> so long as the lead agency addressed the commenting agency's concerns, the court rejected the NEPA challenge. Thus, assuming an adverse agency comment directly challenges the lead agency's analysis, these decisions support the notion that agency comments warrant close attention from the lead agency. Where the lead agency seriously considers adverse agency comments, some courts impose less exacting judicial review.

#### CONCLUSION

This review of recent NEPA cases largely reaffirms the 1990 study's conclusion that courts are sensitive to comments from expert agencies in reviewing NEPA implementation. At both the threshold stage and the EIS stage, the case law discussed in this article illustrates the influence of adverse agency comments on judicial review of NEPA challenges. Sometimes adverse comments serve as the basis for the finding of NEPA violations by focusing the reviewing court's attention on particular inadequacies in a lead agency's analysis; sometimes they induce the lead agency to revise its analysis or alter its proposal. In either case, the practical effect is that adverse agency comments usually trigger heightened scrutiny of proposals through the NEPA process. Whether the reviewing court or the lead agency conducts the review, the fact that adverse agency comments elicit greater scrutiny is consistent with congressional intent.<sup>279</sup>

Comments from agencies and the corresponding heightened judicial scrutiny are thus a powerful yet undervalued vehicle that both commenting agencies and litigants may use to achieve NEPA's goal of improved environmental protection through informed decisionmaking. In order to

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274. *Id.*

275. *See supra* notes 206–15 and accompanying text.

276. *See supra* notes 216–24 and accompanying text.

277. *See supra* notes 225–32, 234 and accompanying text.

278. *See supra* notes 235–46 and accompanying text.

279. *See, e.g.*, 42 U.S.C. § 4332(2)(C) (2006) (mandating that lead agencies “shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact”).



continue to fulfill this goal, agencies must devote resources to commenting in an era of budget shortfalls.<sup>280</sup> The EPA<sup>281</sup> and federal fish and wildlife agencies, such as the Fish and Wildlife Service and National Oceanic and Atmospheric Administration, have a special role in making NEPA work effectively.<sup>282</sup> Moreover, states—which often claim to be ignored by federal agencies<sup>283</sup>—should see that their own agencies could gain significant influence through the NEPA commenting process.<sup>284</sup> Tribal governments should see the same opportunity, as evidenced by the comments submitted in the *Northern Cheyenne* case.<sup>285</sup>

Litigants also need to understand the potentially crucial role adverse agency comments play in NEPA lawsuits.<sup>286</sup> Environmental groups should encourage federal, state, and tribal agencies to comment throughout the NEPA process because those comments may later prove decisive in ensuing NEPA litigation. Failure to employ agency comments strategically may help explain some of the case law that seems inconsistent with our thesis that adverse agency comments can be crucial to the results of NEPA litigation. Potential NEPA plaintiffs need to be alert to the possibilities that adverse agency comments can provide. But in order to do so, they must play a proactive role throughout the NEPA process—and long before they file suit. If interested parties opt to participate in the NEPA process, they can encourage critical agency comments and help to fulfill NEPA's goal of making environmental analysis more precise, thereby improving environmental decisionmaking. Interagency pluralism remains a largely undervalued and under-used but extremely powerful means for both litigants and commenting agencies to affect the NEPA process.

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280. See, e.g., Sidney A. Shapiro, *Paul Verkuil and Pragmatic Adjustment in Government*, 32 CARDOZO L. REV. 2459, 2479 (2011) (noting that “EPA has been particularly challenged” because “it has roughly the same budget in constant dollars that it had in 1984,” yet since that time “Congress has passed ambitious amendments to every major environmental law, giving the agency considerably more work to do”).

281. See *supra* note 31 and accompanying text.

282. See *supra* note 30 and accompanying text.

283. NEPA TASK FORCE, THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION 28 (Sept. 2003) (“Several State agencies commented that State expertise is sometimes ignored by Federal lead agencies, and that State data and information were not adequately used in the NEPA analysis.”).

284. See 40 C.F.R. § 1503.1(a)(2)(i) (directing lead agencies to “[r]equest the comments of . . . [a]ppropriate State and local agencies which are authorized to develop and enforce environmental standards”).

285. See *supra* notes 142–45, 147–49 and accompanying text; 40 C.F.R. § 1503.1(a)(2)(ii) (directing lead agencies to “[r]equest the comments of . . . Indian tribes, when the effects may be on a reservation”).

286. Compare *Mid States Coal. for Progress v. Surface Transp. Bd.*, *supra* notes 195–99 and accompanying text, with *Nat'l Audubon Soc'y v. Dep't of Navy*, *supra* notes 158–72 and accompanying text.

