

## THE FOX IS GUARDING THE HENHOUSE: ENHANCING THE ROLE OF THE EPA IN FONSI DETERMINATIONS PURSUANT TO NEPA

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### I. INTRODUCTION

Federal agencies, which lack environmental expertise, and whose mission is not environmental protection, should not have the power to determine whether their proposed projects will harm the environment. Agencies with environmental expertise, such as the Environmental Protection Agency (EPA), should be involved in the environmental assessment process. Foreseeable adverse environmental impact should result in a judicial finding that any proposed action pursuant to an Environmental Impact Statement (EIS) is arbitrary and capricious.

When enacted in 1969, The National Environmental Policy Act (NEPA)<sup>1</sup> was to be “the most important and far-reaching conservation-environmental measure ever acted upon by the Congress. . . . [It] is a congressional declaration that we do not intend . . . to initiate actions which endanger the continued existence or the health of mankind . . . .”<sup>2</sup> Since its enactment, NEPA has proven to be little more than a procedural hurdle, with no impact on the substantive outcome of proposed federal projects.

Pursuant to NEPA, when a federal agency proposes a project that may have a significant environmental impact, the proposing agency becomes the lead agency, with authority to (a) determine whether any significant environmental impact will result from the project, (b) draft

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1. Nat'l Env'tl. Policy Act of 1969, 42 U.S.C. §§ 4321-75 (1970).
2. 115 CONG. REC. 40,415, 40,416 (1969) (statement of Sen. Jackson).

the EIS, and (c) determine the best alternatives to the project.<sup>3</sup> Even if this federal agency has no environmental expertise, the agency will have authority to decide (a) whether the project will result in a major federal action with a significant environmental impact so that an EIS is required, (b) what other federal agencies, if any, may cooperate and assist in the preparation of the EIS, and (c) whether to continue with the project notwithstanding the disapproval of environmental experts or the predicted adverse environmental impact.<sup>4</sup>

For example, if the Federal Aviation Administration (FAA) proposes an airport expansion, the FAA, as lead agency, has the authority to determine whether the project will have any significant environmental impact. An Environmental Assessment (EA) will be prepared to make this determination.<sup>5</sup> If the FAA decides that its airport expansion project will have no significant environmental impact, then the NEPA process ends, unless this determination is challenged in court. Thus, the federal agencies charged with protecting the environment and our natural resources, such as the EPA, the National Forest Service, the U.S. Fish and Wildlife Service (FWS), and the National Park Service (NPS), would have no input and have no authority to approve or curtail the proposed project. This hypothetical was taken from a 1996 Tenth Circuit case, in which the Court found an FAA Finding of No Significant Impact (FONSI) not arbitrary and capricious, although the determination was made with no input from the EPA, FWS, or other environmental experts.<sup>6</sup>

If the FAA determines that there may be a significant environmental impact, the FAA can decide which, if any, other federal agencies should be allowed to participate in the preparation of the EIS.<sup>7</sup> Even with the participation of other agencies, the FAA may decide that the concerns or objections of these cooperating agencies are less important than the completion of the proposed project. The FAA may proceed notwithstanding the protests of any other agency, and notwithstanding any prediction of environmental harm, no matter how

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3. 42 U.S.C. § 4321 (2005). For a discussion of when an action is a federal action, see *Enos v. Marsh*, 769 F.2d 1363, 1371-72 (9th Cir. 1985), where portions of a joint project between the state of Hawaii and the Army Corps of Engineers were deemed not to be federal action, thus the environmental effects of shoreside facilities funded by the state were held to be properly excluded from the EIS.

4. 40 CFR §§ 1501.4 – 1506.

5. *Id.*

6. *Airport Neighbor's Alliance, Inc. v. United States*, 90 F.3d 426, 433 (10th Cir. 1996).

7. 40 C.F.R. § 1502.9(a).

dire.<sup>8</sup> Courts will defer to these decisions of the FAA, or any lead agency, even if other agencies have expressed concerns, unless the court finds their actions to be arbitrary or capricious.<sup>9</sup> The judicial standard of review is discussed in section II below.<sup>10</sup>

The final EIS is filed with the EPA.<sup>11</sup> The EPA has authority to review the EIS, and may refer issues to the Council on Environmental Quality (CEQ) if the EPA determines that the proposed action is detrimental to public health, welfare, or environmental quality.<sup>12</sup> The EPA is not required to evaluate an EA or FONSI. The author suggests that the EPA and other appropriate environmental protection agencies should be more involved in the NEPA process, particularly in the EA leading to FONSI determinations.<sup>13</sup> If the EPA does not recommend the proposed action, then the lead agency should be prohibited from taking such action. The EPA should have authority to require preparation of an EIS when a FONSI has been issued.

As noted by the Federal District Court of Minnesota, "NEPA does not require, or even contemplate, that decision makers will be completely impartial. In fact, NEPA assumes that institutional biases will exist. . . ."<sup>14</sup> These shortcomings of NEPA were noted and debated in Congress at the time NEPA was enacted. During the Senate debates, Senator Muskie stated:

The concept of self-policing by Federal agencies which pollute or license pollution is contrary to the philosophy and intent of existing environmental quality legislation. In hearing after hearing agencies of the Federal Government have argued that their primary authorization, whether it be maintenance of the navigable waters by the Corps of Engineers or licensing of nuclear power plants by the Atomic Energy Commission, takes precedence over water quality requirements . . .

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8. See Wendy B. Davis and Rebecca Clarke, *Hot Air: Undue Judicial Deference to Federal Aviation Administration Expertise in Assessing the Environmental Impacts of Aviation*, 69 J. AIR L. & COM. 709 (2004) (discussing the environmental harm caused by aviation and the failure of the FAA to prevent such harm, and the deference by federal courts to such FAA decisions).

9. See, e.g., *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 398 F.3d 105, 114 (1st Cir. 2005).

10. See *infra* notes 29-52 and accompanying text (discussing NEPA procedures).

11. 40 C.F.R. § 1506.9.

12. 42 U.S.C. § 7609.

13. The process currently in place for compliance with the Endangered Species Act of 1973, 16 U.S.C. § 1531-1544 (2005), may be an effective model for NEPA. The Act's required consultation with FWS experts, and the creation of the Endangered Species Committee pursuant to 16 U.S.C. § 1536, may serve as an example of a way to ensure knowledgeable environmental evaluation. Further comparison is beyond the scope of this article.

14. *Residents in Protest-I-35E v. Dole*, 583 F. Supp. 653, 661 (D. Minn. 1984).

The proposed compromise language developed for section 102 (c) clearly indicates the extent to which the polluter is involved in determining environmental effects. This language eliminated the requirement that a “finding” be made but provides that environmental impact be discussed as a part of any report on legislation, or any decision to commence a major activity. *The requirement that established environmental agencies be consulted and that their comments accompany any such report would place the environmental control responsibility where it should be.*<sup>15</sup>

The EPA, an “established environmental agency,” as described by Senator Muskie, should have concurrent or dual authority with other federal agencies regarding implementation of actions affecting the environment pursuant to NEPA. At a minimum, the EPA should be required to approve any FONSI. This suggestion may require an amendment to the NEPA statute,<sup>16</sup> or could be implemented by judicial action. EPA involvement in this manner is not without precedent; in the 2003 Fifth Circuit case of *Spiller v. White*, the EPA and Department of Transportation acted as co-lead agencies.<sup>17</sup> The author suggests that this type of dual authority by the EPA with other lead agencies should be required, at least at the stage of preparing an EA that may lead to a FONSI.<sup>18</sup>

As an alternative to amending the statute, a similar result could be achieved if courts were more willing to find agency decisions made without appropriate environmental expertise to be arbitrary and capricious. The party challenging agency action must prove that the agency decision was “arbitrary and capricious.”<sup>19</sup> This standard of high deference to agency determinations was set forth in the leading case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>20</sup> In *Chevron*, the Court considered a review of an EPA order pursuant to the

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15. 115 CONG. REC. S-29052-53 (Oct. 8, 1969) (Emphasis added) (statement of Sen. Muskie).

16. The federal legislature has authority to delegate rulemaking, enforcement, investigatory, and other powers to federal agencies. *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979). The regulatory power of agencies is limited to the express grant of authority in an authorizing or empowering statute, and therefore an amendment to NEPA would be required to implement these suggestions. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988); *Sweet v. Sheehan*, 235 F.3d 80 (2d Cir. 2000); *Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000).

17. *Spiller v. White*, 352 F.3d 235, 239 (5th Cir. 2003).

18. See generally, Patricia E. Salkin, *Integrating Local Waterfront Revitalization Planning into Local Comprehensive Planning and Zoning*, 22 PACE ENVTL. L. REV. 207 (2005) (discussing the need for coordination between state and local government to enhance development of waterfront projects while preserving coastal resources).

19. See *Welch v. U.S. Air Force*, 249 F. Supp. 2d 797, 810 (N.D. Tex. 2003), *vacated by Davis Mountains Trans-Pecos Heritage Ass'n v. FAA*, 116 F. App'x 3, 7, 10 (5th Cir. 2004).

20. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

Clean Air Act.<sup>21</sup> The Court upheld the EPA's interpretation of the Clean Air Act, stating "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ."<sup>22</sup> It is important to note that *Chevron* involved an interpretation of a statute, the Clean Air Act by the EPA, the sole agency charged with administering the statute. Under current law, FONSI determinations, and decisions made pursuant to a NEPA EIS are not decisions made by the EPA as the sole agency charged with administration of NEPA. FONSI determinations are decisions made by diverse lead agencies with missions that may be contrary to the goals of NEPA. Hence, *Chevron* deference is not appropriate in NEPA cases and, in fact, *Chevron* is rarely cited in NEPA suits.<sup>23</sup>

The D.C. District Court has been willing to acknowledge a reduced standard of deference. In *Hammond v. Norton*,<sup>24</sup> the D.C. District stated that it does not "owe any deference to [the Bureau of Land Management (BLM)'s] interpretation of NEPA or CEQ regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to the BLM alone."<sup>25</sup> Because a FONSI determination requires an interpretation of NEPA, other courts should be more willing to grant less deference to lead agencies that lack environmental expertise. A lesser degree of judicial deference may be sufficient to alleviate the problem without overburdening the EPA or increasing the bureaucracy.

Notwithstanding the inapplicability of *Chevron*, courts continue to accord significant deference to lead agency determinations, upholding these decisions unless they are proven to be arbitrary and capricious. This deference is not appropriate because the FAA, the Department of Transportation, and other lead agencies are not experts in environmental protection or preservation, and may have a mission that is contrary to these goals. The lead agency is not required to obtain the approval of the EPA, the FWS, or other appropriate federal or state environmental experts in making these decisions. Any decision made by a lead agency that is contrary to the advice of the EPA should be deemed arbitrary and capricious by the courts.

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21. *Id.* at 840.

22. *Id.* at 844.

23. See generally, Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405 (2005) (suggesting the cost-benefit analysis should be rejected in environmental issues in favor of a trumping approach).

24. *Hammond v. Norton*, 370 F. Supp. 2d 226, 239 (D.D.C. 2005).

25. *Id.* at 239.

This article suggests an enhanced role for the EPA and the other agencies that have authority to protect our natural resources, including the FWS, NPS, and others. These agencies should have authority to evaluate the environmental assessments leading to a FONSI and require preparation of an EIS pursuant to NEPA.<sup>26</sup> This paper also suggests that these agencies need more authority in the substantive decision of choice of an alternative action pursuant to the EIS, and the determination of whether the proposed action should proceed based on the conclusions in the EIS. This could be accomplished with an amendment to the statute; however, the Author acknowledges that this would necessitate an increase in the EPA budget and potentially significantly more bureaucratic time and effort for construction projects. It should be noted that the current NEPA procedure may be less cost efficient than the Author's suggestion. Centralization of such environmental analysis in the EPA is likely to result in significant cost savings, although the budget would be shifted from other agencies to the EPA.

Other scholars who have suggested ways to make NEPA more effective, such as monitoring and post-completion evaluation, have grappled with these same problems.<sup>27</sup> Another alternative would be for courts to show less deference to non-environmental lead agencies, and find that lead agency action that is contradictory to the recommendations of the environmental agencies is arbitrary and capricious.

Environmental litigation involves policy issues that are appropriate for courts to decide. Policymaking should not be restricted to the legislature, but rather the enactment of NEPA and other environmental protection statutes should encourage and guide courts in deciding controversies with public policy implications. The courts and the legislature should play complementary roles in environmental protection.<sup>28</sup>

## II. NEPA PROCEDURES

NEPA requires federal agencies proposing major actions

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26. 42 U.S.C. § 4321 (2000).

27. See, e.g., Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 939-40 (2002) (suggesting that follow-up monitoring of actual impacts, adaptive mitigation, and environmental management systems would make NEPA more effective); see also Sinden, *supra* note 23.

28. See Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247 (2000) (advocating for the tort system to play a complementary role in policy making for gun control).

significantly affecting the human environment to prepare an EIS.<sup>29</sup> Agencies will first prepare an EA to determine whether an EIS is required or whether a FONSI is appropriate.<sup>30</sup> There are one hundred times as many FONSI's issued as EIS's, Federal agencies produce approximately 500 EIS's annually, and nearly 50,000 FONSI's, and the ratio is increasing.<sup>31</sup> This indicates that many agencies may be underreporting environmental impact.<sup>32</sup>

Once a FONSI determination has been made, the project may proceed, unless challenged in court by an environmental group or concerned citizens. The Administrative Procedure Act (APA)<sup>33</sup> provides for judicial review of agency action. The Supreme Court set the standard for deference to agency interpretations of the statutes administered by those agencies in *Chevron*.<sup>34</sup> In reviewing a FONSI determination, courts differ on the standard of review. Some early courts applied a "reasonableness" standard to the agency's decision that no EIS was required,<sup>35</sup> asking whether the agency "reasonably concluded that the project will have no significant adverse environmental consequences."<sup>36</sup> A court applying the reasonableness standard is more likely to disagree with a FONSI and require an EIS.<sup>37</sup> More recently, following the Supreme Court decision in *Marsh v. Oregon Natural Resources Council*,<sup>38</sup> most Federal Courts of Appeals, including the D.C., First, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuit Courts, have set aside the determination only if it was "arbitrary and capricious."<sup>39</sup> The Eighth Circuit still applies a "reasonableness"

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29. 42 U.S.C. § 4332(2)(C); *see also* Hanly v. Mitchell, 460 F.2d 640, 643-44 (2d Cir. 1972).

30. 40 C.F.R. § 1501.4(c), 1501.3 (2004).

31. *Id.* at 920.

32. Karkkainen, *supra* note 27, at 909-910.

33. 5 U.S.C. §§ 500-96 (2000).

34. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

35. *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995).

36. *See California v. U.S. Dep't of Transp.*, 260 F. Supp. 2d 969, 972 (N.D. Cal. 2003) (citation omitted).

37. *See, e.g., Natural Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1542 (E.D. Cal. 1991).

38. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989) (applying an "arbitrary and capricious" standard of review).

39. *Town of Cave Creek, Ariz. v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003); *Pearson v. Powell*, 96 F. App'x 466, 467 (9th Cir. 2004); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1330 (9th Cir. 1992); *Citizens for Mobility v. Mineta*, 119 F. App'x 882, 883 (9th Cir. 2004); *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 398 F.3d 105, 114 (1st Cir. 2005); *Soc'y Hill Tower Owners' Ass'n v. Rendell*, 210 F.3d 168, 178-79 (3d Cir. 2000); *Spiller v. White*, 352 F.3d 235, 240 (5th Cir. 2003); *Friends of the Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 506 (6th Cir. 1995); *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 449 (7th Cir. 1985); *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 429 (10th Cir.

standard.<sup>40</sup>

The D.C. Circuit has further explained its analysis of the “arbitrary and capricious” standard, as applied to a FONSI:

First, the agency has accurately identified the relevant environmental concern. Second, once the agency has accurately identified the problem, it must have taken a ‘hard look’ at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that the changes or safeguards in the project sufficiently reduce the impact to a minimum.<sup>41</sup>

A 2003 Fifth Circuit case, *Spiller v. White*, provides an example of EPA involvement in a FONSI determination.<sup>42</sup> *Spiller* involved a gasoline pipeline that had the potential to move 225,000 barrels of gasoline per day across Texas.<sup>43</sup> The pipeline had been used to transport crude oil, but had not been used for several years.<sup>44</sup> The EPA and the Department of Transportation, acting as co-lead agencies, completed an EA and issued a FONSI.<sup>45</sup> The Fifth Circuit found the FONSI was not arbitrary and capricious, because the EA was comprised of over 2,400 pages, including expert analysis on pipeline safety, endangered species, emergency, response, and other matters.<sup>46</sup> The EA incorporated a review of over 6,000 written comments from six public meetings, and the court found it was “more akin to a full-blown EIS.”<sup>47</sup> The FONSI was also predicated on the owner of the pipeline agreeing to mitigation measures to reduce the potential of adverse environmental impact, referred to by

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1996). *N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990). Although the Ninth Circuit courts used a “reasonableness” standard in earlier decisions, more recent cases from this jurisdiction have applied the “arbitrary and capricious” standard. *Compare Duvall*, 777 F. Supp. at 1537 (applying a reasonableness standard) with *Pearson*, 96 F. App’x at 467 (applying an arbitrary and capricious standard); see also Korey A. Nelson, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can’t See the Forest Because There are Too Many Trees*, 17 TUL. ENVTL. L. J. 177, 189 (2003). For a discussion of the rule that a reviewing court may look outside of the administrative record in NEPA cases, see Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929 (1993).

40. *Goos v. ICC*, 911 F.2d 1283, 1291 (8th Cir. 1990).

41. *Town of Cave Creek*, 325 F.3d at 327 (quoting *Sierra Club v. Dep’t of Transp.*, 753 F.2d 120, 126 (D.C. Cir. 1985)).

42. *Spiller*, 352 F.3d at 239.

43. *Id.* at 238.

44. *Id.*

45. *Id.* at 239.

46. *Id.* at 240.

47. *Id.* at 240-41.

the Court as a “mitigated FONSI.”<sup>48</sup> The author suggests that this type of thoughtful analysis and expert consideration should take place before any FONSI is issued.

The author is not suggesting that mitigated FONSI are an alternative solution to EPA involvement. Problems with mitigated FONSI arise when the lead agency suggests mitigation measures that may be sufficient to keep the predicted environmental harm below the level of a “significant environmental impact,” thus avoiding the need for an EIS.<sup>49</sup> Because of the lack of environmental expertise of the lead agency, such predictions are rarely accurate.<sup>50</sup> The involvement of the EPA in drafting an EIS may result in more accurate predictions. Mitigated FONSI lack the analysis of the full range of environmental impact, as well as the possible alternatives that would be detailed in an EIS. Another problem is that the mitigation measures may never be implemented, as NEPA does not require follow-up monitoring.

At a minimum, the EPA should be required to sign off on a FONSI determination, because (a) it is a waste of the resources of our court system to require a judgment to force the agency to prepare an EIS; (b) it is inefficient to expect non-profit environmental citizens groups to bring lawsuits to challenge a FONSI;<sup>51</sup> (c) challenges to a FONSI may be unsuccessful because of requirements of standing and timeliness; and (d) the results of NEPA court challenges are currently politically motivated. The inefficiency of relying on private lawsuits to protect the environment was recognized decades ago, when the legislature enacted environmental laws to replace common law nuisance claims.<sup>52</sup> This section discusses why EPA approval of FONSI determinations will be more effective than reliance on lawsuits by environmental groups for protection of the environment. Private lawsuits are less effective because issues of standing, mootness, and laches may bar these challenges, and

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48. *Id.* at 241.

49. Bradley C. Karkkainen *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 *COLM. L. REV.* 903, 908 (indicating that mitigated FONSI are just another method used to avoid drafting an EIS, and suggesting increased monitoring of environmental harm post-EIS, a suggestion which this author strongly supports, notwithstanding the inevitable increase in costs and bureaucracy).

50. *Id.* at 928, (stating that “fewer than one out of three verifiable predictions correctly forecast both the direction and the approximate magnitude of the environmental impact, while most predictions were simply unverifiable, either through fundamental imprecision or for lack of follow up data”).

51. *See generally*, Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93, 106 (2005) (outlining advantages and disadvantages of private enforcement).

52. *See id.* at 104.

the lack of expertise in preparation of EIS may still be a problem, notwithstanding private legal challenges.

*A. Standing to Challenge NEPA Determinations*

NEPA confers no private right of action. Therefore, plaintiffs challenging a FONSI or the sufficiency of an EIS must prove they have standing.<sup>53</sup> An environmental group must “demonstrate that its interests fall within the ‘zone of interests’ protected by NEPA,” to satisfy the prudential standing requirement.<sup>54</sup> Additionally, the plaintiff must meet the constitutional standing requirements by proving

- (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>55</sup>

In 1990, the Supreme Court held that an environmental advocacy group lacked standing in *Lujan v. National Wildlife Federation*.<sup>56</sup> In *Lujan*, the BLM administered a program that determined which federal lands would be available for commercial uses, including mining.<sup>57</sup> Justice Scalia found no standing to permit review of an entire federal agency program.<sup>58</sup> Justice Scalia further restricted his view of standing two years later in *Lujan v. Defenders of Wildlife*, finding an environmental group lacked standing because they failed to prove they suffered an injury.<sup>59</sup> The court found no imminent injury where members of the environmental group hoped to be able to return to observe endangered species, because the expected harm to such species was merely speculative.<sup>60</sup>

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53. Wyoming v. U.S. Dep’t of the Interior, 360 F. Supp. 2d 1214, 1236 (D. Wyo. 2005); Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 447 (10th Cir. 1996).

54. Ocean Advocates v. U.S. Army Corps of Eng’rs, 402 F.3d 846, 859 (9th Cir. 2005).

55. *Id.*

56. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890 (1990).

57. *Id.* at 885-90.

58. *Id.* at 889.

59. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

60. *Id.* at 564; see also Matthew Porterfield, *Agency Action, Finality and Geographical Nexus: Judicial Review of Agency Compliance with NEPA’s Programmatic Environmental Impact Statement Requirement After Lujan v. National Wildlife Federation*, 28 U. RICH. L. REV. 619, 619-20 (1994) (discussing the uncertainty over the implications of *Lujan*). The Court took a somewhat broader view of standing in *Friends of the Earth Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 173 (2000). However, that case involved the Clean Water Act, and has not been extended to NEPA actions.

The Ninth Circuit similarly found a lack of actual injury in *Cold Mountain v. Garber*.<sup>61</sup> The U.S. Forest Service issued a FONSI related to a permit, granted to the Montana Department of Livestock, allowing it to operate a bison-testing facility in the Gallatin National Forest, near Yellowstone National Park.<sup>62</sup> The purpose of the facility was to ensure that bison migrating out of Yellowstone did not carry brucellosis, a bacterial organism.<sup>63</sup> The FWS issued an Incidental Take Statement, anticipating that the facility might cause the reproductive failure of a particular nest of bald eagles, a threatened species.<sup>64</sup> When a second nest of bald eagles failed, environmental groups brought an action alleging NEPA violations and a failure to conform to the limitations of the permit.<sup>65</sup> The Court found that the plaintiff “failed to establish a causal link between any alleged hazing violations and the [second] nest failure.”<sup>66</sup> Involving more environmental expertise in the early stages of a FONSI would alleviate this problem of requiring an actual injury to provide the plaintiff standing.<sup>67</sup>

The Eighth Circuit reached a similar result in *Heide v. FAA*.<sup>68</sup> Petitioners attempted to challenge a FONSI issued by the FAA approving runway procedures near the petitioners’ homes.<sup>69</sup> Because the petitioners lived east of the airport, and the record indicated that this area would not be impacted by the proposed runway procedures, the court found the petitioners had not demonstrated a particular injury and lacked standing.<sup>70</sup> This need to prove a causal link between the agency’s actions and the environmental harm is one more hurdle for the environmental groups challenging NEPA violations. The early involvement of environmental experts in FONSI determinations would address this, because environmental advocate suits would be a less critical environmental protection tool if FONSI were issued only with environmental expertise.

Another element of standing that must be established by the plaintiff is that the agency has taken final action.<sup>71</sup> When the state of

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61. *Cold Mountain v. Garber*, 375 F.3d 884, 890 (9th Cir. 2004).

62. *Id.* at 887-88.

63. *Id.* at 886.

64. *Id.* at 888.

65. *Id.* at 889.

66. *Id.* at 890.

67. *Id.*

68. *Heide v. FAA*, 110 F. App’x 724, 726 (8th Cir. 2004) (unpublished decision).

69. *Id.* at 725-26.

70. *Id.* at 726.

71. *Wyoming v. U.S. Dep’t of the Interior*, 360 F. Supp. 2d 1214, 1236 (D. Wyo. 2005).

Wyoming challenged the Department of the Interior's approval of the state's plan for management of the re-introduction of the gray wolf, the court found the state had no standing because the defendant's letter was not a final agency action.<sup>72</sup>

The NEPA standing requirement contradicts congressional intent and creates an unnecessarily complicated hurdle to environmental protection enforcement. A better policy would be to grant standing to plaintiffs who can prove that they lack the information that NEPA requires agencies to provide to the public.<sup>73</sup>

*B. Finding of No Significant Impact: Challenged Too Late.*

Environmental groups who attempt to challenge FONSI determinations must act promptly. If the proposed project is completed before the challengers file suit, courts are likely to dismiss the challenge, notwithstanding a failure to comply with NEPA. Earlier courts often refused to find a controversy moot, but more recent courts have been more likely to consider a matter beyond review.<sup>74</sup> One troubling example, *Bayou Liberty Assoc. v. United States Army Corps of Engineers*, involved the construction of a Wal-Mart, Sam's Club, and Home Depot complex on 60 acres of wetlands in Louisiana.<sup>75</sup> The entire complex was located in a 100-year flood plain.<sup>76</sup> The Army Corps of Engineers issued a permit for construction after a FONSI.<sup>77</sup> Although the court noted that federal, state, and local agencies participated, there was no indication of EPA or FWS approval or agreement.<sup>78</sup> There can be little doubt that paving 60 acres of wetlands would have significant environmental impact on water quality and quantity, as well as wildlife habitat.<sup>79</sup> Because the environmental group only challenged the Corps'

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72. *Id.*

73. See Adrienne Smith, *Standing and the National Environmental Policy Act: Where Substance, Procedure, and Information Collide*, 85 B. U. L. REV. 633, 638 (2005) (advocating for a theory that an agency harms individual plaintiffs when such plaintiffs are deprived of information that NEPA requires agencies to make public, and therefore such plaintiffs have standing).

74. See, e.g., *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 591 (9th Cir. 1981) (rejecting a mootness challenge); *West v. Sec'y of the Dep't of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000) (finding a challenge to a completed phase of a freeway interchange project was not moot because the project could be modified to reduce environmental impact).

75. *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 395-96 (5th Cir. 2000).

76. Reply Brief of Appellant at 7, *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, No. 98-31260 (5th Cir. June 2, 1999).

77. *Bayou Liberty*, 217 F.3d at 395.

78. *Id.*

79. For a discussion of the ramifications of paving large areas and increasing the rate of

NEPA process after construction of the retail complex was complete, the court found its claims moot and denied relief.<sup>80</sup>

Similar to the *Bayou Liberty* result, the Fifth Circuit declared a FONSI challenge moot because construction was complete in *Springer v. U.S. Marshal*.<sup>81</sup> A 300-inmate prison was constructed in Texas, at a cost of three million dollars, after a brief environmental assessment and FONSI determination, with no EIS.<sup>82</sup> When the mayor of the city in which the prison was located brought an action, challenging the environmental assessment as being in bad faith and inadequate, the court held the case was moot because “when a construction project is complete and operating, plaintiffs can obtain no meaningful judicial relief based on alleged non-compliance with NEPA . . . .”<sup>83</sup>

The Eighth Circuit recently adhered to the decisions in *Bayou Liberty* and *Springer*, finding a FONSI challenge moot in *One Thousand Friends of Iowa v. Mineta*.<sup>84</sup> The Federal Highway Administration reviewed an environmental assessment prepared by the city of West Des Moines and the Iowa Department of Transportation regarding proposed alterations to a highway interchange.<sup>85</sup> Although three sections of the interchange were intended to be relocated, the EA only included two.<sup>86</sup> There was no indication that the EPA or any other environmental experts were involved in the FONSI. The plaintiffs (an environmental group) attempted unsuccessfully to obtain a temporary restraining order. When they appealed the decision, the Eighth Circuit found the challenge moot, because the proposed action had been completed.<sup>87</sup> The court admonished the plaintiffs, stating that they could have “avoided this result by seeking a stay pending this appeal.”<sup>88</sup> The Ninth Circuit has also found FONSI challenges moot where construction was completed.<sup>89</sup>

The Tenth Circuit's approach has been more environmentally friendly, refusing to find a challenge moot if the court can provide a

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runoff, see Wendy B. Davis, *Reasonable Use has Become the Common Enemy: An Overview of the Standards Applied to Diffused Surface Water and the Resulting Depletion of Aquifers*, 9 ALB. L. ENVTL. OUTLOOK 1, 4-5 (2004).

80. *Bayou Liberty*, 217 F.3d at 396.

81. *Springer v. U.S. Marshal*, 137 F. App'x. 657, 659 (5th Cir. 2005); see also *Richland Park Homeowners Ass'n, Inc. v. Pierce*, 671 F.2d 935, 941-92 (5th Cir. 1982).

82. *Springer*, 137 F. App'x. at 658.

83. *Id.*

84. *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 892 (8th Cir. 2004).

85. *Id.*

86. *Id.*

87. *Id.* at 893.

88. *Id.* at 894.

89. *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978).

remedy for failure to comply with NEPA.<sup>90</sup> Where an airport runway had already been expanded pursuant to an FAA FONSI, the Tenth Circuit Court did not find the challenge moot because the court “could order that the runway be closed or impose restrictions on its use until Respondents complied with NEPA.”<sup>91</sup> Similarly, in an earlier case, the Ninth Circuit found that, because of the availability of the remedy of “undoing” the agency’s sale of an airport, the challenge was not moot.<sup>92</sup>

While the above-mentioned courts have found FONSI challenges moot, other courts have denied relief based on statutory deadlines or the doctrine of laches.<sup>93</sup> In *Heide v. FAA*, the Eighth Circuit recently found a petition to review an FAA approval of runway procedures based on a FONSI to be untimely.<sup>94</sup> Petitioners alleged that they did not become aware of the FAA approval until twelve years after the fact. The court found their claim was barred by a sixty-day deadline for petitions for review pursuant to 49 U.S.C. § 46110 (a).<sup>95</sup> A contrary conclusion was recently reached by the Ninth Circuit in *Ocean Advocates v. United States Army Corps of Engineers*, where the court refused to bar the action because of laches, finding that the defendant was not able to prove a lack of diligence.<sup>96</sup> The Court noted that “[l]aches is strongly disfavored in environmental cases,” because the “plaintiff will not be the only victim of possible environmental damage.”<sup>97</sup> To succeed in a laches defense, the defendant must prove that the plaintiff lacked diligence in pursuing the claim, and that such lack of diligence prejudiced the defendant.<sup>98</sup> Because new species were added to the threatened species lists during the time the permit was being considered, and because the defendant had sent letters to the plaintiff indicating that administrative remedies might be available, the court found no lack of diligence.<sup>99</sup>

Many of these FONSI determinations are made by lead agencies without environmental expertise, and the environmental groups that attempt to challenge the decisions are thwarted by a failure to act with

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90. *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 428-29 (10th Cir. 1996).

91. *Id.* at 429; *see also* *National Parks and Conservation Ass’n v. FAA*, 998 F.2d 1523, 1524 n.3 (10th Cir. 1993).

92. *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980).

93. *Save Our Wetlands, Inc. v. U.S. Army Corps of Eng’rs*, 549 F.2d 1021, 1026-29 (5th Cir. 1977); *Sworob v. Harris*, 451 F. Supp. 96, 101-102 (E.D. Pa. 1977), *aff’d mem.*, 578 F.2d 1376 (3d Cir. 1978).

94. *Heide v. FAA*, 110 F. App’x 724, 725 (8th Cir. 2004) (unpublished decision).

95. *Id.*

96. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 862 (9th Cir. 2004).

97. *Id.*; *accord* *City of Davis v. Coleman*, 521 F.2d 661, 678 (9th Cir. 1975).

98. *Id.*

99. *Id.* at 862-63.

sufficient promptness to stop the projects. Reliance on environmental groups to prevent environmental harm is not effective because these challenges may be deemed moot or barred by laches. Prevention of environmental damage would be more certain if the EPA were consistently involved in the environmental assessment process before a FONSI is issued.

*C. Finding of No Significant Impact: Determination Made Without Environmental Expertise.*

NEPA currently allows agencies to determine that their proposed projects will have no significant environmental impact without involving any environmental experts. For example, the Federal Transit Administration and Central Puget Sound Regional Transit Agency issued a FONSI for the construction of a tunnel in Downtown Seattle to be used by buses and trains.<sup>100</sup> The court found the FONSI was not arbitrary and capricious, even though there was no evidence that environmental experts were involved in the determination.<sup>101</sup>

The D.C. Circuit denied a petition to review an FAA FONSI in *Town of Cave Creek, Arizona v. FAA*.<sup>102</sup> The FAA used its own methodology to study the noise impact of changes to arrival and departure routes at the Phoenix Sky Harbor International Airport.<sup>103</sup> Although the Court noted that the FAA “solicited comments from the general public and federal, state, and local agencies,”<sup>104</sup> there was no evidence that the EPA or any other environmental agency was granted cooperating agency status, or participated in any meaningful way. Allowing the lead agency that is promoting the project to determine environmental risks is like allowing the fox to guard the henhouse.

Similarly, the Fourth Circuit, in *North Carolina v. FAA*, held that FAA action was not arbitrary and capricious where the FAA adopted the U.S. Navy’s environmental assessment and issued a FONSI, notwithstanding the suggestions of the FWS that an EIS be prepared.<sup>105</sup> The action involved establishing restricted air space for practice bombing by the Navy on the North Carolina coast.<sup>106</sup> The Court upheld the FAA FONSI even though numerous environmental groups and

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100. *Citizens for Mobility v. Mineta*, 119 F. App’x 882, 883 (9th Cir. 2004).

101. *Id.*

102. *Town of Cave Creek, Ariz. v. FAA*, 325 F.3d 320, 323 (D.C. Cir. 2003).

103. *Id.*

104. *Id.* at 325.

105. *North Carolina v. FAA*, 957 F.2d 1125, 1133-34 (4th Cir. 1992).

106. *Id.* at 1128-29.

agencies indicated environmental concerns. The Fourth Circuit stated, “[a]n agency establishing a rule need not respond to every comment.”<sup>107</sup>

In *California v. U.S. Dept. of Transportation*, the FWS had also requested that an EIS be prepared. The FAA refused to complete an EIS, and instead issued a FONSI; however, unlike the Fourth Circuit in *North Carolina v. FAA*, the Northern District of California found the environmental assessment inadequate.<sup>108</sup> In *California v. U.S. Department of Transportation*, the Town of Mammoth Lakes intended to expand its municipal airport near Yosemite National Park.<sup>109</sup> The FAA adopted the environmental assessment prepared by the town and issued a FONSI.<sup>110</sup> Not only did the FWS request an EIS, but numerous other agencies and environmental groups, including the National Park Service and California Department of Fish and Game, raised concerns that were ignored by the environmental assessment.<sup>111</sup> The Court found that the FAA “unreasonably failed to prepare an EIS” and its “conclusion that the project would have no significant impact on endangered or threatened species strains credulity.”<sup>112</sup> A required sign-off by the FWS or EPA would have prevented this lawsuit by requiring the FAA to prepare an EIS, saving court time and expense.

The First Circuit found a FONSI was not arbitrary and capricious in *Alliance to Protect Nantucket Sound, Inc. v. United States Department of the Navy*.<sup>113</sup> The Army Corps of Engineers issued a permit to construct a 170 foot high data collection tower in Nantucket Sound, for the purpose of evaluating a proposal to build a wind energy plant.<sup>114</sup> The Corps has authority to “prevent obstruction to navigation in the navigable waters of the United States . . .”<sup>115</sup> The Corps is charged with issuing certain permits only after determining that proposed actions will cause only

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107. *Id.* at 1135.

108. *California v. U.S. Dep’t of Transp.*, 260 F. Supp.2d 969, 978 (N.D. Cal. 2003).

109. *Id.* at 970-71.

110. *Id.* at 971.

111. *Id.* at 972-73.

112. *Id.* at 974, 978. For a similar case where an FAA FONSI was criticized by a court, see *Grand Canyon Trust v. FAA*, 290 F.3d 339, 347 (D.C. Cir. 2002). The FAA issued a FONSI, deciding that the construction of a replacement airport near Zion National Park, notwithstanding that the plaintiff’s experts alleged that commercial jet overflights of the Park would result in noise “4 to 23 times as loud as the natural soundscape.” *Id.* at 345. The FAA’s experts indicated that “4 to 15% of visitors . . . would be annoyed by the aircraft” noise. *Id.* at 344. The Court remanded the case, requiring the FAA to evaluate the cumulative noise impact taking into account the data collected by the NPS. *Id.* at 347.

113. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep’t of the Army*, 398 F.3d 105, 108, 115-16 (1st Cir. 2005).

114. *Nantucket Sound*, 398 F.3d at 107.

115. 43 U.S.C. § 1333 (e), (f) (1953).

“minimal adverse environmental effects;”<sup>116</sup> however, the Corps is not an environmental protection agency, and its primary purpose is not preservation of the environment or natural resources. The Corps completed an EA and issued a FONSI, without approval or formal consultation with the EPA or FWS. The court noted there was a public comment period, and the Corps conferred with federal and state environmental agencies.<sup>117</sup> For a project of this scope, a FONSI does not appear rational, yet the First Circuit found it was not arbitrary and capricious.<sup>118</sup>

In another recent case involving an Army Corps of Engineers’ FONSI, *Ocean Advocates v. United States Army Corps of Engineers*, the Ninth Circuit found an EIS was required.<sup>119</sup> The FWS had expressed concerns about the risk of oil spills caused by an oil refinery in Puget Sound.<sup>120</sup> The Court found that the Corps’ reasons for the FONSI were inadequate, where no reasons were stated.<sup>121</sup> Once again, a requirement of FWS or EPA approval of a FONSI would have prevented this waste of court time.

In contrast, the Ninth Circuit recently upheld a FONSI determination in *Pearson v. Powell*.<sup>122</sup> Where the U.S. Forest Service prepared a biological assessment that determined that a construction project would have no effect on an endangered or threatened species, the Court found its FONSI was not arbitrary or capricious.<sup>123</sup> The U.S. Forest Service was not required to consult with the FWS.<sup>124</sup> In *Pearson*, the Forest Service had informally consulted and obtained a letter from FWS. These determinations are particularly troubling because, unless an environmental group challenges the FONSI determination promptly in court, the project may reach a stage where a court will not enjoin the action.<sup>125</sup>

Lead agencies have attempted to circumvent the requirement to prepare an EIS by segmenting the project, so that each section is deemed to have no significant environmental impact. This method was used by

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116. 43 U.S.C. § 1344.

117. *Id.* at 115.

118. *Id.* at 115-16.

119. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 875 (9th Cir. 2005).

120. *Id.* at 855.

121. *Id.* at 866.

122. *Pearson v. Powell*, 96 F. App’x 466, 467 (9th Cir. 2004).

123. *Id.*

124. *Id.*

125. *See supra* notes 93-99 and accompanying text (discussing issues of mootness and defense of laches).

the BLM in *Hammond v. Norton*.<sup>126</sup> The BLM was considering a pipeline project but analysis of a connected pipeline was omitted from the EIS.<sup>127</sup> By segmenting the project, the cumulative impact was not disclosed. The Court found the BLM decision to segment the project to be arbitrary.<sup>128</sup> The decision of the BLM was contrary to the recommendations of the EPA; the EPA “objected to the DEIS . . . and . . . raised the issue of ‘segmentation’ . . . .”<sup>129</sup> If NEPA were modified to require all lead agencies to address EPA objections, this lawsuit would have been prevented.

The foregoing cases illustrate the inefficiencies and waste of court time that have resulted when lead agencies ignore the objections of the EPA or FWS, requiring judicial action to force the lead agency to avoid environmental harm. If the EPA were given more authority in the environmental assessment process, prior to issuance of a FONSI or prior to finalization of the EIS, such judicial intervention would be unnecessary.

#### *D. Environmental Impact Statement Preparation and Sufficiency*

The EPA and other environmental agencies should play an increased role in the preparation of the EIS. NEPA requires the preparation of an EIS when the facts alleged, if true, “show that the proposed project would materially degrade any aspect of environmental quality.”<sup>130</sup> The EIS must include a discussion of the environmental impact of the proposed action and any reasonable alternative actions.<sup>131</sup> The lead agency preparing the EIS must

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 . . . . [S]uch statement and the comments . . . shall be made available to the President, the Council on Environmental Quality, and to the public. . . .<sup>132</sup>

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126. *Hammond v. Norton*, 370 F. Supp. 2d 226, 244 (D.D.C. 2005).

127. *Id.*

128. *Id.* at 245.

129. *Id.* at 235; see also *City of Buffalo v. N.Y. Dep’t of Env’tl. Conservation*, 707 N.Y.S.2d 606, 613-14 (Sup. Ct. 2000) (finding a state agency had improperly segmented a project and therefore a finding of no significant impact under state environmental statute was arbitrary and capricious).

130. *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975) (citations omitted).

131. 42 U.S.C. § 4332(2)(C)(i), (iii) (2005).

132. 42 U.S.C. § 4332(2)(C) (2005).

Mandating consultation and comments is not the same as requiring approval. Many projects proceed over the protests of the EPA and other environmental agencies,<sup>133</sup> and many times consultation is never requested because the lead agency determines that no significant environmental impact is likely.<sup>134</sup> Although the EPA has some authority to review the final EIS and refer concerns to the CEQ,<sup>135</sup> other environmental agencies lack such authority. More importantly, this final review authority is limited to the information contained in the EIS, including the data and analysis prepared by the lead agency. Environmental experts may differ on a lead agency's analysis, testing procedures, and data gathering methods; therefore it is important for environmental experts to be involved earlier in the EIS preparation process.

The EIS may be drafted by an agency that has neither environmental expertise, nor an incentive to evaluate environmental impact with any greater concern than economic benefits. Even a contractor hired to construct a project has been deemed an appropriate party to draft an EIS.<sup>136</sup> An appraiser of the U.S. Department of Housing and Urban Development was deemed to be an appropriate person to prepare an environmental assessment and make a FONSI determination for a proposed low income apartment project.<sup>137</sup> The Navy prepared an EIS proposing sonar testing, which has been proven to cause whales and marine mammals to die by beaching themselves, without any reasonable alternatives included in the EIS.<sup>138</sup> This bias and lack of environmental expertise is an obvious detriment to a meaningful environmental assessment.

In addition to a lack of environmental expertise in the lead agency, another problem with the drafting of the EIS is the use of professional

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133. See, e.g., *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 292 (D.C. Cir. 1988); *Center for Biological Diversity v. Fed. Highway Admin.*, 290 F. Supp. 2d 1175, 1182 (S.D. Cal. 2003); *North Carolina v. FAA*, 957 F.2d 1125, 1135 (4th Cir. 1992) (upholding the FAA FONSI despite a suggestion by the FWS that an EIS should be prepared).

134. See, e.g., *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 892 (8th Cir. 2004); *Citizens for Mobility v. Mineta*, 119 F. App'x 882, 883 (9th Cir. 2004); *Bayou Liberty Ass'n, Inc. v. U. S. Army Corps of Eng'rs*, 217 F.3d 393, 395 (5th Cir. 2000).

135. 42 U.S.C. § 7609 (2005).

136. *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 686 (D.C. Cir. 2004).

137. *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935, 938-39 (5th Cir. 1982).

138. *Natural Res. Def. Council v. Evans*, 279 F. Supp. 2d 1129, 1138 (N.D. Cal. 2003); see also Julie G. Yap, Comment, *Just Keep Swimming: Guiding Environmental Stewardship Out of the Riptide of National Security*, 73 *FORDHAM L. REV.* 1289, 1291 (2004) (discussing the balance between national security issues and environmental harm).

authors, where the lead agency hires a consultant for the purpose of paper compliance. The hired expert may be more skilled in paper compliance than in the management and mitigation of harm to the environment. It is not reasonable to expect a hired contractor to undermine the desires of its employer by emphasizing adverse environmental harm or criticizing the proposed project.<sup>139</sup>

The EIS must consider all foreseeable direct and indirect effects, and the consideration given must amount to a “hard look” at the environmental effects.<sup>140</sup> NEPA has not been applied as a substantive statute, and so long as the environmental damage is identified and evaluated, the agency is not prohibited from deciding that its goals outweigh the environmental costs.<sup>141</sup> NEPA “prohibits uninformed—rather than unwise—agency action.”<sup>142</sup> While the EIS must consider alternatives to the proposed action, it need not consider all of the alternatives, only those that are reasonable in light of the stated purpose of the project.<sup>143</sup> Courts will defer to the decision of the lead agency, requiring challengers to these determinations to prove that they were arbitrary and capricious.<sup>144</sup> In the leading case of *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*,<sup>145</sup> the U.S. Supreme Court stated: “The role of a court in reviewing the sufficiency of an agency’s consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.”<sup>146</sup>

In the *Vermont Yankee* case, the Supreme Court upheld the decision to license a nuclear reactor, although the hearing conducted in preparation of the EIS did not address disposal of the 100 pounds of hazardous waste that would be produced annually.<sup>147</sup> The Supreme Court overturned the Circuit Court of Appeals finding that the rejection of energy conservation was arbitrary and capricious, holding that the

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139. See Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act’s Substantive Law*, 20 J. LAND RESOURCES & ENV’T L. 245 (2000).

140. See *Communities Against Runway Expansion*, 355 F.3d at 685.

141. See, e.g., *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1035-36 (10th Cir. 2001); see generally *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

142. *Custer County Action Ass’n*, 256 F.3d at 1034 (citations omitted).

143. See, e.g., *Alliance for Legal Action v. FAA*, 69 F. App’x 617, 622 (4th Cir. 2003).

144. See, e.g., *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1216 (11th Cir. 2002).

145. *Vt. Yankee Nuclear Power Corp. v. National Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

146. *Id.* at 555.

147. *Id.* at 538.

agency's decision must be upheld if the agency employed at least the minimum procedures required by the statute.<sup>148</sup> Justice Rehnquist cautioned the Court against imposing "upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."<sup>149</sup>

NEPA does not provide effective protection for the environment.<sup>150</sup> It merely creates a procedural hurdle that wastes agency time and resources, with no corresponding assurance that environmental harm will be prevented. This problem is particularly apparent when airport projects are involved. The FAA has been successful in convincing courts that airline safety, convenience, and the prevention of commercial flight delays are more important than any resulting damage to the environment. Courts have accorded such a high degree of deference to the FAA's determinations that the environmental protection laws have been rendered meaningless.<sup>151</sup> Whether the goal of airport expansion is to prevent delays in commercial flights<sup>152</sup> or to provide training opportunities for military pilots,<sup>153</sup> courts support FAA decisions despite significant environmental impact. For example, courts have upheld FAA orders that (1) threatened significant disturbance of livestock or migratory birds;<sup>154</sup> (2) allowed hundreds of acres of wetlands to be filled

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148. *Id.* at 548.

149. *Id.* at 549.

150. *See generally*, Jason J. Czarnecki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 STAN. ENVTL. L. J. 3, 5 (2006) (questioning "whether formally including environmental factors in decision-making documents, but paying them no real heed, violates the 'arbitrary and capricious' standard of the APA").

151. Petitioners are often denied a voice in court to review FAA orders, as when the Second Circuit determined that it lacked jurisdiction to review FAA approval of an airport layout plan in *Comm. to Stop Airport Expansion v. FAA*, 320 F.3d 285, 286-87 (2d Cir. 2003). The court found that its jurisdiction was limited to the review of orders with respect to aviation safety duties, and that the approval of an airport layout plan fell under a separate part of the statute that did not specifically grant jurisdiction to the Court of Appeals, leaving jurisdiction exclusively to the district court. *Id.* at 287.

152. *See* *Communities Against Runway Expansion v. FAA*, 355 F.3d 678, 682 (2d Cir. 2004).

153. *See* *Lee v. U. S. Air Force*, 354 F.3d 1229, 1234 (10th Cir. 2004).

154. *Id.* at 1244; *see also* *Welch v. U.S. Air Force*, 249 F. Supp. 2d 797, 802 (N.D. Tex. 2003). *Welch* held the FAA's order sufficient to satisfy the NEPA requirements. *Id.* at 850. However, in a consolidated appeal of three separate challenges to the FAA in this matter, the Fifth Circuit abrogated portions of the *Welch* decision. *Davis Mountains Trans-Pecos Heritage Ass'n v. FAA*, 116 F. App'x 3, 7, 10 (5th Cir. 2004). For example, the Fifth Circuit refused to overturn the lower court's determination that the EIS adequately considered the impact to livestock and birds, but held the EIS inadequately addressed the economic impact of low-level Air Force flights on the community. *Id.* at 10. The court required the FAA to further study and address this impact in a supplemental EIS. *Id.* at 16.

in;<sup>155</sup> (3) created a noise level that was expected to cause some people to be “highly annoyed;”<sup>156</sup> and (4) increased the noise level at historic national parks.<sup>157</sup> NEPA would have more of a substantive impact if courts gave less deference to the decisions of the FAA and other non-environmental lead agencies.

The Fifth Circuit has set forth three criteria to determine whether an EIS is adequate:

- (1) whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives;
- (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and
- (3) whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action.<sup>158</sup>

Even within this deferential framework, courts should conclude that the lead agency did not take a hard look at the environmental consequences whenever the appropriate environmental experts were not involved. Alternatively, Congress should amend NEPA to require that environmental considerations take priority over concerns of mere convenience or economy.<sup>159</sup> This balancing of environmental and other considerations has policy implications that could be addressed by both the legislature and the courts.

President George W. Bush has sought to undermine even the limited impact of NEPA by an executive order.<sup>160</sup> The order acknowledged the importance of transportation infrastructure projects and created an Interagency Task Force within the Department of Transportation to assist agencies in expediting environmental review and streamlining the process of issuing permits.<sup>161</sup> The order undermines the NEPA requirement that agencies take a “hard look” at environmental impacts. An expedited review is necessarily a more cursory review,

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155. See *Alaska Ctr. for the Env't v. State*, 80 P.3d 231, 235 (Alaska 2003).

156. See *Welch*, 249 F. Supp. 2d at 840.

157. See *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 53 (1st Cir. 2001).

158. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

159. See generally *Sinden*, *supra* note 23 (suggesting the cost-benefit analysis should be rejected in environmental issues in favor of a trumping approach).

160. Exec. Order No. 13,274, 67 Fed. Reg. 59,449 (Sept. 18, 2002).

161. *Id.*

lacking in-depth analysis and reducing the likelihood of an accurate prediction of impact. It is particularly damaging to the effectiveness of NEPA considering that the Supreme Court has held that if a statutory deadline for a project is too short for an agency to prepare an EIS, then no EIS is required.<sup>162</sup> The impact of this executive order has yet to be realized, but the order, in effect, gives the FAA the opportunity to ignore important environmental ramifications for the sake of mere convenience.

For NEPA to have any real effect, the EPA and other environmental experts must be involved in both the EA and EIS preparation.

#### *E. Supplementing the EIS*

EPA involvement in supplementing an EIS would also render NEPA more effective. Once a final EIS has been filed, additional information may become available that changes some aspect of the project. If “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns,” or if there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” a Supplemental EIS (SEIS) must be filed.<sup>163</sup> The agency is required to supplement when “the subsequent information raises new concerns of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary.”<sup>164</sup> If the proposed agency action is implementation of a plan, once the plan is in effect, there is no obligation to supplement the EIS because there is no proposed action.<sup>165</sup>

As in deciding whether to prepare an EIS, the standard of review for the decision to supplement the EIS is not consistent among the courts. The U.S. Supreme Court has held that “arbitrary and capricious” is the appropriate standard of review, in *Marsh v. Oregon Natural Resources Council*.<sup>166</sup> In *Marsh*, the Army Corps of Engineers prepared a final EIS, as well as a supplement, describing the impact of the Elk Creek Dam on fishing, elk and deer populations, and water quality.<sup>167</sup> After construction was one-third complete, environmental groups sought

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162. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 777 (1976).

163. 40 C.F.R. § 1502.9 (c) (1); *see also Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004); *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004).

164. *Wyoming v. U.S. Dep't of the Interior*, 360 F. Supp. 2d 1214, 1237 (D. Wyo. 2005) (quoting *Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984)).

165. *Id.* at 1238.

166. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-76 (1989).

167. *Id.* at 366.

review of the failure to file a SEIS reflecting information that became available at a later time, indicating the cumulative effects of three dams in the Rogue River Basin.<sup>168</sup> The Supreme Court decided that the Army Corps was not arbitrary or capricious in deciding not to file a SEIS because the new information was either not significant, or the portions that were significant were not new or accurate.<sup>169</sup> The Court also noted that “the difference between the ‘arbitrary and capricious’ and ‘reasonableness’ standards is not of great pragmatic consequence.”<sup>170</sup> The Court described its inquiry as a determination of whether “the decision was based on a consideration of the relevant factors, and whether there has been a clear error of judgment,” requiring the agency to take a “hard look” at the new information to determine whether supplementation was necessary.<sup>171</sup> The Court noted that the First, Fifth, Ninth, and Eleventh Circuits adopted a reasonableness standard, while the Seventh Circuit agreed with the arbitrary and capricious standard.<sup>172</sup> Since the *Marsh* decision, several courts, including the Ninth Circuit, have adopted an arbitrary and capricious standard for evaluating the decision to supplement an EIS.<sup>173</sup>

When the BLM auctioned three oil and gas leases in the Wyoming Powder River Basin to extract coal bed methane, relying on existing EISs relating to conventional oil extraction, the Tenth Circuit reviewed the decision using the arbitrary and capricious standard.<sup>174</sup> The Court explained that the agency action would be deemed arbitrary unless supported by substantial evidence, defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>175</sup> The Tenth Circuit found that there was substantial evidence that the unique environmental concerns of coal bed methane development rendered the existing EIS inadequate.<sup>176</sup>

In *Norton v. Southern Utah Wilderness Alliance*, the BLM was able to avoid supplementing an EIS by proving that no ongoing major federal

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168. *Id.* at 368.

169. *Id.* at 385.

170. *Id.* at 377 n.23 (citation omitted).

171. *Id.* at 378 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

172. *Id.* at 377 n.23.

173. *See, e.g.*, *Cold Mountain v. Garber*, 375 F.3d 884, 892 (9th Cir. 2004).

174. *Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004).

175. *Id.* (citation omitted).

176. *Id.* at 1159.; *see generally* Wendy B. Davis, *Coalbed Methane: Degassification, Not Ventilation, Should be Required*, 2 APPALACHIAN J. L. 25 (2003) (discussing the environmental issues in coalbed methane development).

action was proposed.<sup>177</sup> The environmental-group plaintiff alleged that the BLM failed to manage the increased use of off-road vehicles in wilderness areas where use had increased after the approval of a land use plan.<sup>178</sup> The U.S. Supreme Court found that the approval of the land use plan was a major federal action; however, once the plan was approved, there was no ongoing major federal action that would require a supplement to the EIS.<sup>179</sup> As a result, the polluter, and not the agencies charged with protection of our natural resources and environment, has the power to decide when to update or expand on an EIS. The Author suggests that the EPA and other appropriate environmental protection agencies should have more authority in these determinations.

#### *F. History of NEPA Court Actions*

Prior to the administration of President George W. Bush, the decreased priority of environmental concern exhibited by the public and environmental advocacy groups was evidenced by the decrease in the number of EIS's filed: from 1,949 in 1971 to only 513 in 1992.<sup>180</sup> The number of lawsuits related to NEPA decreased from 189 in 1974 to 81 in 1992.<sup>181</sup> This trend was reversed during the first two years of the George W. Bush administration, with 137 NEPA suits filed in 2001 and 150 in 2002.<sup>182</sup> It appears that the lack of presidential concern for environmental matters has caused a corresponding increase in the activism of environmental groups and citizens.

#### *G. Impact of the Political Affiliation of the Court*

The political affiliation of the administration that appointed the judge deciding the case affects the outcome of NEPA cases. Between January 2001 and June 2004, there were 217 federal district court NEPA cases, with environmental plaintiffs achieving success 59.2% of the time when appearing before a Democrat appointed judge, and only 28.4% of

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177. Norton v. S. Utah Wilderness Alliance, 124 S.Ct. 2373, 2385 (2004).

178. *Id.* at 2377-78.

179. *Id.* at 2385.

180. See Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 NATURAL RES. & ENVIRONMENT 3, 71 (1995).

181. *Id.*

182. Jay E. Austin, John M. Carter II, Bradley D. Klein, Scott E. Schang, *Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act*, ENVIRONMENTAL LAW INSTITUTE at 6 (Nov. 2004), available at <http://www.endangeredlaws.org/downloads/JudgingNEPA.pdf> (last visited Oct. 25, 2005).

the time when appearing before a Republican appointed judge.<sup>183</sup> During the same period, only 107 NEPA cases were filed with the Circuit Courts of Appeals.<sup>184</sup> Environmental plaintiffs had a success rate of 35.3%; however “environmental NEPA plaintiffs were nearly six times more likely to prevail before majority Democrat-appointed panels . . . than before majority Republican-appointed panels.”<sup>185</sup> It is also significant to note that in every U.S. Supreme Court NEPA case found by this Author, the Court upheld the decision of the federal agency and decided against the environmental plaintiffs.<sup>186</sup> This is likely due to the “arbitrary and capricious” standard and the high level of deference granted by the Court to agency decisions.

The administration and the courts should give greater priority to the prevention of irreversible environmental harm, regardless of any political party affiliation. An increased role in the NEPA process by the EPA and other environmental agencies would make the process less politically sensitive, by halting the process after EPA objection rather than resorting to judicial intervention.

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183. *Id.* at 8.

184. *Id.* at 9.

185. *Id.*

186. *See, e.g.*, *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975) (finding that the EIS prepared by the Interstate Commerce Commission satisfied NEPA); *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776 (1976) (finding that the Department of Housing and Urban Development (HUD) was not required to prepare an EIS before filing a disclosure statement); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (finding that a lead agency has broad discretion to determine when a proposal for action exists); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978) (finding that the Nuclear Regulatory Commission (NRC) complied with NEPA); *Andrus v. Sierra Club*, 442 U.S. 347 (1979) (finding that EIS was not required for appropriation requests by federal agencies); *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (finding the HUD’s decision on location of low-income housing project was not a NEPA violation because environmental factors may be outweighed by other factors); *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139 (1981) (finding Navy was not required to prepare EIS); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (finding that EIS did not need to address psychological health); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983) (upholding NRC’s environmental analysis); *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (holding that the government could permit timber harvesting in national forest); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989) (finding that decision not to supplement EIS was not arbitrary and capricious); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (finding mitigation measures in EIS were sufficient); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990) (holding that NEPA does not provide a private right of action.); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that plaintiffs lacked standing to challenge ESA regulation); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992) (permitting timber sales in old growth forests); *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726 (1998) (allowing clear-cutting in National Forest, and finding case was not ripe for review); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) (finding that no federal agency action was proposed therefore no supplemental EIS was required).

Of course, industry and modern commerce necessarily have a negative impact on the environment and consume natural resources; however, a minimization of that harm must become more of a political priority. Global warming, extinction of species, and other dire consequences will result unless the legislature, and the courts, give more weight to environmental preservation.

### III. NEPA COOPERATING AGENCIES

The EPA and other environmental agencies could have more influence as cooperating agencies. In preparing an EIS pursuant to NEPA, the lead agency proposing the action is required to invite the participation of federal agencies, states, local governments, and Indian tribes that the agency determines may be affected by the proposed action.<sup>187</sup> The lead agency is also required to assign preparation of portions of the EIS to these cooperating agencies.<sup>188</sup> The participation of and delegation to these cooperating agencies must be meaningful. The U.S. District Court of Wyoming has found a failure to comply with NEPA where the U.S. Forest Service did not provide maps indicating the affected areas to the State of Wyoming and other cooperating agencies in a timely manner, thus preventing any meaningful participation.<sup>189</sup> Notwithstanding the requirement that agencies be allowed to participate, many cooperating agencies merely adopt the findings of the lead agency. Such adoption is permitted, so long as the cooperating agency undertakes "an independent review of the statement," and determines that the cooperating agency's "comments and suggestions have been satisfied."<sup>190</sup>

This requirement of participation by cooperating agencies does not ensure significant protection of the environment. The lead agency proposing the action has the discretion to grant or deny cooperating-agency status.<sup>191</sup> In addition, the lead agency is not required to give weight to the recommendations or opinions of the cooperating agencies.

The lack of effect of the cooperating agency process is demonstrated in a 2003 District Court of Wyoming case.<sup>192</sup> The Court

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187. 40 C.F.R. § 1501.7 (a) (1) (2004); *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1219 (D. Wyo. 2003).

188. 40 C.F.R. § 1501.7 (a) (4), (6); *Wyoming*, 277 F. Supp 2d at 1219.

189. *Wyoming*, 277 F. Supp 2d at 1219.

190. 40 C.F.R. § 1506.3(c); *see also* *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002).

191. 40 C.F.R. 1508.5; *Wyoming*, 277 F. Supp 2d at 1221.

192. *Wyoming*, 277 F. Supp 2d at 1219.

found that the National Park Service, as lead agency, acted arbitrarily and capriciously in denying ten states the status of cooperating agency, because the lead agency did not provide any reason for its decision.<sup>193</sup> In a later decision, this same court also found a lack of meaningful participation where the cooperating agencies were not informed of the lead agency's decision regarding a preferred alternative action before preparation of the EIS.<sup>194</sup> The National Park Service, as lead agency, had decided to ban snowmobiles in national parks, which the court found was a "prejudged, political decision."<sup>195</sup>

Where the Federal Highway Administration proposed to construct an 11.2-mile toll road that "cuts across the habitat of many endangered and threatened species" in San Diego County, the EPA as a cooperating agency, expressly stated "we recommend you deny the permit."<sup>196</sup> The EPA further noted

there has never been a comprehensive analysis of the number of local interchanges needed by the three local entities . . . , nor a comprehensive analysis of their proposed siting [sic] such that adverse impacts to water of the United States can be avoided and minimized to the fullest extent possible.<sup>197</sup>

Notwithstanding the concerns expressed by the EPA, the federal agency with the most expertise in this area, the Southern District of California Court found that the Federal Highway Administration's EIS, which recommended completion of the project notwithstanding these concerns, contained a "reasonably thorough evaluation," and therefore the project was allowed to proceed.<sup>198</sup> This is precisely the behavior that could be prohibited if the EPA were given dual authority as lead agency, or more of an approval role with veto power. If NEPA is to have any real effect as an environmental statute, then the agencies with environmental expertise must be given authority to prevent projects that will harm the environment.<sup>199</sup>

Another example of ignoring the concerns of the EPA occurred when the Secretary of the Interior prepared an EIS proposing the leasing

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193. *Id.* at 1221.

194. *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1262 (D. Wyo. 2004).

195. *Id.*

196. *Center for Biological Diversity v. Fed. Highway Admin.*, 290 F. Supp. 2d 1175, 1182, 1187 (S.D. Cal. 2003).

197. *Id.* at 1187.

198. *Id.* at 1187-88.

199. *See generally*, Sinden, *supra* note 23.

of the outer continental shelf for oil and gas deposits, although five states and several environmental groups objected to the project.<sup>200</sup> In an opinion written in part by Circuit Judge (now Justice) Ruth Bader Ginsburg, the Court found that the EIS failed to include an adequate analysis of the cumulative impacts of the program on migratory salmon and whales.<sup>201</sup> Because the whales and salmon would have to swim through different areas “with no respite from the harmful effects” of the oil and gas drilling, the court found that the cumulative impacts required further analysis, rather than the mere conclusory remarks in the EIS.<sup>202</sup> The EPA had expressed serious concern to the Secretary over the lack of cumulative impact considerations.<sup>203</sup> If the EPA were given dual authority, or the power to veto the proposed action, this lawsuit could have been prevented and the court would not have been burdened with this decision. The project would have been curtailed until the EPA was satisfied. The court refused to review other portions of the EIS, finding that the Secretary of the Interior’s EIS was adequate on other issues.<sup>204</sup>

In a recent case, the Air Force proposed to designate air space in Texas for low-altitude maneuvers, including B-52 and B-1 Bomber flight training. The FAA was designated as a cooperating agency, but there was no evidence that the EPA, FWS, or any other environmental agency was also designated.<sup>205</sup> The FAA merely adopted the Air Force’s EIS.<sup>206</sup> A non-profit group of farmers and ranchers challenged the EIS, alleging that the Air Force did not follow its own handbook in determining the impact of low-altitude flights on livestock, and ignoring the plaintiff’s experts’ opinions on the subject.<sup>207</sup> The court deferred to the Air Force’s determinations and discretion, even though the Air Force data contained significant mistakes.<sup>208</sup> The Air Force had mistakenly referred to surface wind speeds generated by B-52 aircraft flying at 300 feet above the ground, relying on data from a Boeing aircraft study that referred to surface winds from flights at 30,000 feet above the ground.<sup>209</sup> Although the court remanded for a supplemental EIS on other grounds, there was no mention of the need for, or reasonableness of, obtaining the

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200. *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 293 (D.C. Cir. 1988).

201. *Id.* at 297-99.

202. *Id.* at 297-98.

203. *Id.* at 298.

204. *Id.* at 318-19.

205. *Davis Mountains Trans-Pecos Heritage Ass’n v. FAA*, 116 F. App’x 3, 7 (5th Cir. 2004).

206. *Id.* at 10 n.22.

207. *Id.* at 9.

208. *Id.* at 10.

209. *Id.* at 12 n.27.

input of the FWS or EPA as to the noise or other impact on livestock.<sup>210</sup>

The lack of an environmental agency as a cooperating agency was evident in the case of *Sierra Club v. U.S. Army Corps of Engineers*.<sup>211</sup> The Federal Highway Administration was the lead agency for a project to construct the Suncoast Parkway in Florida.<sup>212</sup> The Army Corps of Engineers was a cooperating agency, and several state and federal groups participated in an “informal partnering process.”<sup>213</sup> The U.S. Fish and Wildlife Service expressed concern that the project would impact two listed species, the Florida scrub jay and the red-cockaded woodpecker, but this agency determined that the project would not impact the eastern indigo snake, another listed species.<sup>214</sup> The Sierra Club was concerned that the project would also impact the Florida panther and three plant species, but the FWS determined, via an informal consultation, that these species would not be adversely affected.<sup>215</sup> The court found that the Corps complied with the Endangered Species Act and NEPA.<sup>216</sup> The filling and dredging of wetlands can be predicted to have a significant impact on local plants, animals, and ecosystems, and the deference and authority granted to a highway department as lead agency in developing an environmental plan is not appropriate.

Other cases have involved a failure to approve of the proposed project by the EPA, as a cooperating or non-lead agency, where the lead agency continued to forge ahead with the project and the court approved the project notwithstanding the expressed concerns of the EPA.<sup>217</sup> A stronger role for the EPA as a cooperating agency would prevent these results.

The Author acknowledges that participation of the EPA is not a guaranty that all environmental damage will be prevented. The participation of the EPA did not prevent potential environmental harm in a 1982 Eleventh Circuit case.<sup>218</sup> The EPA was a cooperating agency, with the Nuclear Regulatory Commission (NRC) as lead, in the construction of the Clinch River Breeder Reactor project in

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210. *Id.* at 7

211. *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209 (11th Cir. 2002).

212. *Id.* at 1216.

213. *Id.* at 1217.

214. *Id.* at 1218.

215. *Id.*

216. *Id.* at 1223.

217. *Alaska v. Andrus*, 580 F.2d 465, 468, 487 (D.C. Cir. 1978); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 200, 206 (D.C. Cir. 1991); *Hammond v. Norton*, 370 F. Supp. 2d 226, 235 (D. D.C. 2005).

218. *Natural Res. Def. Council v. Zeller*, 688 F.2d 706, 708 (11th Cir. 1982).

Tennessee.<sup>219</sup> The EPA allowed the NRC to begin construction before completion of the EIS, notwithstanding a known adverse impact on endangered or threatened fish species.<sup>220</sup> The Court found that NEPA allowed the EPA to approve such preliminary site preparation before completion of the EIS process, denying a preliminary injunction sought by the Sierra Club and others.<sup>221</sup> An enhanced role for the EPA will not always curtail new projects, and does not guarantee that no additional environmental harm will occur; however, such participation is likely to have a beneficial impact on the environment.

#### IV. AUTHORITY OF LEGISLATURE TO DELEGATE DUAL AUTHORITY

Both Federal and State legislatures have the power to grant dual authority to more than one agency. Therefore, Congress may revise NEPA to grant dual authority to the EPA and the appropriate lead agency.

##### A. Federal

Nothing in the U.S. Constitution requires that legislative authority be delegated only to a single agency. An investigating agency may cooperate and share information with other agencies.<sup>222</sup> An example of dual authority is where the administrators of the FAA and the EPA are required to consult with one another before either approves a testing procedure or process inconsistent with the emissions regulations pertaining to air pollution caused by jet aircraft engines, and to determine whether such action requires rulemaking.<sup>223</sup> The EPA currently has dual authority with OSHA for investigation of major chemical accidents.<sup>224</sup>

Another example of dual authority is the cooperation among federal agents in investigation of crimes. In a 1986 Southern District of California case, many defendants were charged with narcotics-related

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219. *Id.* at 712.

220. *Id.* at 712-13.

221. *Id.* at 711.

222. *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145-46 (D.C. Cir. 1987). Notwithstanding this permissible cooperation, an agency may not be used as an information gathering arm of another agency. *United States v. Lasalle Nat'l Bank*, 437 U.S. 298, 317 (1978); *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 169 (3d Cir. 1986).

223. 14 C.F.R. § 34.3(a) (2004). *See generally*, Davis and Clarke, *supra* note 7.

224. Memorandum of Understanding Between EPA and OSHA on Chemical Accident Prevention (Dec. 1996), *available at* Donald Stever, Law of Chemical Regulation and Hazardous Waste, Appendix 7N, 7N-4 (2005).

offenses.<sup>225</sup> Defendants filed “numerous motions to suppress evidence derived from electronic surveillance.”<sup>226</sup> The Court held that use of agents from agencies other than the Federal Bureau of Investigation (FBI) to monitor communications was permissible, where the FBI was given authority to intercept communications in orders.<sup>227</sup>

While cross-agency cooperation and sharing of federal resources are commendable, the ease with which judicial review and approval of joint monitoring can be obtained, along with the procedural precision demanded in Title III, suggest that cross-agency monitoring based only on cross-agency investigative cooperation not be viewed as the ‘normal’ procedure.<sup>228</sup>

The Justice Department and the Securities and Exchange Commission were permitted by the D.C. Circuit to investigate possible violations simultaneously, where the Court found such dual authority to be required for effective law enforcement.<sup>229</sup> In criminal investigations, dual authority raises additional concerns; where Worker’s Compensation Commission attorneys were appointed as assistant prosecutors in criminal cases alleging fraud and abuse, the court required that those attorneys must not be involved in the civil investigation process of the agency, to prevent improper exchanges of information.<sup>230</sup> These concerns do not arise in civil cases, where exchanges of information can lead to greater efficiency and effectiveness.

The EPA regulates food-safety issues arising from plants that have been genetically modified to produce their own pesticide.<sup>231</sup> The Food and Drug Administration (FDA) also addresses similar food-safety issues for genetically modified plants, which could have resulted in inefficient overlap of agency resources; however, the FDA has expressly waived its authority in this area.<sup>232</sup>

The above examples indicate that dual authority between federal

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225. U.S. v. Orozco, 630 F. Supp. 1418, 1429 (S.D. Cal. 1986).

226. *Id.*

227. *Id.* at 1531.

228. *Id.* n.15.

229. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980).

230. West Virginia v. Angell, 609 S.E. 2d 887, 894 (W.Va. 2004).

231. 7 U.S.C. § 136 (bb) (providing that the potential beneficial or adverse effects of the pesticide on human health and the environment must be included in the registration of such plants). See generally, Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167 (2004).

232. Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984, 23,004-05 (May 29, 1992).

agencies is permitted and has been effective; nonetheless there are admittedly potential problems such as inefficiency and wasted resources. The benefits of an enhanced role of the EPA in NEPA far outweigh these potential problems.

### B. State

States have also considered the issues of dual agency authority. A Wisconsin Court held in 1941 that a statute was not rendered uncertain, even though two agencies were vested with the same power. Notwithstanding that the court recognized that conflict or confusion may result from a potential concurrent exercise of the power.<sup>233</sup> The statute involved the creation and re-definition of school districts.<sup>234</sup> The court noted that under the statute, any action by the school board would be subject, and subordinate, to any conflicting order of the superintendent.<sup>235</sup> No conflict or confusion had arisen at that time; therefore the issue was not before the court.<sup>236</sup>

Dual authority is also an issue in state environmental protection statutes.<sup>237</sup> After NEPA was enacted, twenty-eight jurisdictions adopted their own version of environmental impact reporting statutes, sometimes referred to as State Environmental Protection Acts or SEPAs.<sup>238</sup> Similar to NEPA, some state environmental statutes do not require approval of state environmental agencies. Instead, they merely require that the environmental agencies be allowed to comment. For example, in New York, the state environmental agency is allowed to comment, but the project may go forward notwithstanding the protests or lack of approval of the environmental agency.<sup>239</sup> Cooperating agencies that do not have jurisdiction to fund, approve, or directly undertake the proposed action have "the same ability to participate in the review process as a member of the public."<sup>240</sup> An agency that has jurisdiction to fund, approve, or directly undertake the action, defined as an "involved agenc[y]," may impose substantive conditions following the filing of the final EIS by the lead agency, if the conditions are "practicable and reasonably related to

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233. School Dist. No. 3 of Town of Adams v. Callahan, 297 N.W. 407, 415 (Wis. 1941).

234. *Id.* at 411.

235. *Id.* at 415.

236. *Id.*

237. See Nicolas A. Robinson, *SEORA's Siblings: Precedents from Little NEPAs in the Sister States*, 46 ALB. L. REV. 1155, 1157-58 (1982).

238. See Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 436 (2003); Robinson, *supra* note 237.

239. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11(a).

240. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2(t).

impacts identified in the EIS or the conditioned negative declaration.”<sup>241</sup> After these comments and conditions are received, the lead agency must issue a written findings statement.<sup>242</sup> Environmental plaintiffs may not obtain judicial review of a proposed action until after the public hearing on the draft EIS and the filing of the final EIS and written findings statement.<sup>243</sup> Where a neighborhood group argued that a draft EIS was deficient, lacking critical analysis to such an extent that meaningful comment at the public hearing before the findings statement would not be possible, the court found the matter was not ripe for judicial review.<sup>244</sup> These procedural requirements can prevent effective review and comment by environmental agencies and others, as it did in a case regarding a New York City subway extension and development of the Hudson Yards area.<sup>245</sup>

Under the New York statutory framework, it is possible for a project to proceed, notwithstanding the protests of the environmental protection agencies. For example, in 2004, a town in New York, acting as lead agency, approved a subdivision proposal for the construction of 116 homes.<sup>246</sup> The New York State Department of Environmental Conservation (NYDEC) requested an injunction because the project was likely to kill or disturb tiger salamanders, a listed endangered species.<sup>247</sup> Although the welfare of the species was considered during the environmental review, the town decided to allow the subdivision notwithstanding the potential harm.<sup>248</sup> The court granted a permanent injunction, finding that the NYDEC had authority to prevent any activities within 1,000 feet of the pond that would harm the salamanders.<sup>249</sup> It is a significant waste of state funds and court time to require the NYDEC to bring an action in court to carry out its function. If the NYDEC were required to approve the EIS, or to have equal authority with any lead agency proposing an action, then the project

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241. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.3(b).

242. N.Y. Comp. Codes R. & Regs. tit. 6, § 617.11(a).

243. *Hell's Kitchen Neighborhood Ass'n v. New York City Dep't of City Planning*, 6 Misc. 3d 1031(A), 2004 WL 3218419 (Sup. Ct. N.Y. County Sept. 21, 2004) (unpublished decision).

244. *Id.*

245. The New York version of NEPA presents another procedural hurdle for plaintiffs, requiring that the plaintiff “demonstrate that they stand to suffer an injury that is environmental and not solely economic in nature should the agency decision be upheld.” *Wall Street Garage Parking Corp. v. Lower Manhattan Dev. Corp.*, 5 Misc. 3d 1027(A), 2004 WL 2889747 (Sup. Ct. N.Y. County Nov. 3, 2004) (unpublished decision).

246. *State v. White Oak Co., LLC*, 787 N.Y.S.2d 333, 335 (2004).

247. *Id.* at 334.

248. *Id.* at 335.

249. *Id.* at 334.

would have been curtailed without resort to the courts.

Where a town zoning board granted a variance for development of a deer farm without preparation of an EIS, the court granted the neighbors' petition for annulment of the variance because the Town did not adequately consider the environmental impact.<sup>250</sup> This illustrates the need for environmental agencies to be involved in the early phases of assessment, in determinations of whether an EIS is required.

Although there is precedent in New York for the use of co-lead agencies for completion of an EIS, there is no requirement that one of the co-lead agencies be charged with protection of the environment or natural resources.<sup>251</sup> The New York State Department of Environmental Protection was a co-lead agency with the Department of City Planning in a case involving a rezoning and grant of special permits for a development project.<sup>252</sup> Although a neighborhood group challenged the EIS, the court upheld the action.<sup>253</sup> Similar to the deference shown to federal agencies, New York state courts uphold agency decisions unless they are found to be arbitrary and capricious.<sup>254</sup> Where a New York town did not prepare an EIS but merely a short form environmental assessment before approving a subdivision that would expand wetlands, the court denied petitioner's allegations that the town did not effectively consider the environmental impact.<sup>255</sup> The court found that "the Legislature has left the agencies with considerable latitude in determining environmental impacts . . . ."<sup>256</sup> The court further stated, "experts and other interested agencies engaged in lengthy and meaningful consideration" of the environmental impacts, therefore the decision to not prepare an EIS was not arbitrary.<sup>257</sup>

#### V. LIMITATIONS ON JOINT ADMINISTRATIVE AUTHORITY

In *United States v. LaSalle National Bank*, the U.S. Supreme Court found that inter-agency cooperation was proper, unless an agency either exceeded its authority or interfered with another agency's

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250. *Fleck v. Town of Colden*, 792 N.Y.S. 2d 281, 284-85 (2005).

251. *Id.* (authorizing the Metropolitan Transportation Authority and City Planning Commission as co-lead agencies, notwithstanding the requirement in N.Y. Comp. Codes R. & Regs. tit. 6, § 617.6 (b) that there be a single lead agency).

252. *Coalition Against Lincoln West v. City of New York*, 86 N.Y. 2d 123, 129 (1995).

253. *Id.* at 128-29.

254. *Ellsworth v. Town of Malta*, 792 N.Y.S. 2d 227, 229 (2005).

255. *Id.* at 230.

256. *Id.*

257. *Id.*

responsibilities.<sup>258</sup> *LaSalle* involved two IRS summonses served upon a bank and its vice president pursuant to a civil penalty investigation.<sup>259</sup> The Department of Justice (DOJ) later commenced a criminal prosecution against the bank and its employee.<sup>260</sup> The court found that the summonses were enforceable if issued by the IRS in good faith, before the recommendation to the DOJ, and if the IRS did not abandon the pursuit of civil tax collection.<sup>261</sup> EPA involvement in preparing the EA will not exceed EPA authority, because environmental protection is the mandate of the EPA. Such enhanced involvement of the EPA will not interfere with the lead agency's responsibilities because all federal agencies are responsible for minimizing environmental harm pursuant to NEPA.

## VI. PROBLEMS WITH DUAL AUTHORITY

The sharing of authority between government agencies is not without problems. Additional communication between the EPA and the lead agency will be necessary if the EPA has an enhanced NEPA role. Arguably, such communications could leave a paper trail to assist plaintiffs opposing the proposed agency action; however, communication among agencies will not result in additional disclosures to opposing parties because intra-agency communications and opinions are protected from disclosure.<sup>262</sup> Courts have held that the purpose of this exemption is to foster and encourage cooperation among agencies and discussions which would be inhibited if the results of those discussions were disclosed.<sup>263</sup> This issue should not be determinative in enhancing the EPA's role in NEPA.

If an agency duplicates the work of another agency, cost inefficiencies will result. In addition to the duplicative costs of joint authority, a failure to share information may result in undue burden on the industry being regulated, and could result in more serious consequences when important information fails to reach the party capable of preventing harm. For example, the EPA reviews the herbicide

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258. *In re Grand Jury Subpoena Duces Tecum* Dated Jan. 17, 1980 (General Dynamics Corp., Inc.), No. H-80-29, 1980 WL 1422 (D. Conn. May 19, 1980) (unpublished decision); *United States v. LaSalle National Bank*, 437 U.S. 298, 313-14 (1978).

259. *LaSalle National Bank*, 437 U.S. at 301.

260. *Id.* at 313.

261. *Id.* at 318.

262. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149-50 (1975); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir.1980).

263. *Sears Roebuck*, 421 U.S. at 150-152.

that will be applied to genetically modified plants, but the Animal and Plant Health Inspection Service (APHIS), part of the U.S. Department of Agriculture, reviews the genetically modified herbicide-tolerant plants themselves, and these two agencies do not coordinate their review.<sup>264</sup> This type of inefficiency will need to be monitored and minimized if the EPA's role in the NEPA process is enhanced.

Dual authority can be most problematic where the two entities having authority reach conflicting conclusions. For example, the potential for transgenic cotton to cross with wild cotton in the United States was studied by both the EPA and APHIS. APHIS concluded that there was no significant expectation that the two varieties of cotton would cross; whereas the EPA found that such a risk existed in southern Florida, parts of Arizona, and Hawaii.<sup>265</sup>

A New Jersey case provides another example of inconsistent conclusions between state agencies. The plaintiff casino operator alleged that the state Department of Community Affairs (DCA) construction safety regulations for casinos conflicted with the Casino Control Commission's (CCC) regulations.<sup>266</sup> Noting the sensitivity of the issue, the court declined to decide, instead remanding the issue back to both agencies, stating "[i]f, or when, a true conflict emerges, we are confident that the DCA and the CCC will coordinate regulation in the overall public interest."<sup>267</sup> If the EPA role in NEPA is enhanced, such coordination will be important.

Conflicting conclusions in the NEPA process could most beneficially be addressed by allowing the EPA to require an EIS overriding the lead agency's issuance of a FONSI, thereby granting the EPA greater authority than the lead at this stage in the process. After the EIS is completed, the lead agency may have greater authority to

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264. Council on Environmental Quality & Office of Science and Technology Policy, *Case Study No. III: Herbicide-Tolerant Soybean 49*, at 17-18 (2001) (stating that although APHIS and EPA are working on coordinating efforts, currently there are no formal exchanges between the two agencies on this subject), available at [http://www.ostp.gov/html/ceq\\_ostp\\_study4.pdf](http://www.ostp.gov/html/ceq_ostp_study4.pdf) (last visited Oct. 25, 2005). See also Mandel, *supra* note 231 at 2241.

265. John H. Payne, *USDA/APHIS Petition 97-013-01P for Determination of Nonregulated Status for Events 31807 and 31808 Cotton: Environmental Assessment and Finding of No Significant Impact* (1997), available at <http://www.agbios.com/docroot/decdocs/01-290-028.pdf> (last visited Oct. 25, 2005); Zigfridas Vaituzis, Doug, Gurian-Sherman, Chris Wozniak, Robyn Rose, Gail Tomimatsu, & Mike Mendelson, *EPA, BT Plant-Pesticides Biopesticides Registration Action Document IIC10* (2000), available at [http://www.epa.gov/oscpmont/sap/2000/october/brad3\\_enviroassessment.pdf](http://www.epa.gov/oscpmont/sap/2000/october/brad3_enviroassessment.pdf) (last visited Oct. 25, 2005).

266. *Atlantic City Showboat, Inc. v. Dep't of Cmty. Affairs*, 751 A.2d 111, 112-13 (N.J. Super. Ct. App. Div. 2000).

267. *Id.* at 112.

determine which alternative action is best; however, the choice of an alternative with predictable adverse environmental impact should be *per se* arbitrary and capricious.

## VII. CONCLUSION

The Author suggests that the courts should find any FONSI issued by a federal agency pursuant to NEPA to be arbitrary and capricious if the EPA has not expressly agreed with the determination. If courts accorded the appropriate level of deference to lead agencies, recognizing the lead agency's lack of environmental expertise, and lack of incentive to give priority to environmental concerns, an amendment to NEPA would not be required. Because the courts currently use an "arbitrary and capricious" standard, granting significant deference to lead agencies, an amendment to NEPA may be required to give effect to the suggestions herein.

At a minimum, the EPA and other environmental agencies such as the FWS and NPS should be involved in the EA, and perhaps have authority as co-lead agencies to prepare an EIS and decide whether the project will proceed, or which alternative to choose. Although this enhanced role of the EPA may require a corresponding increase in the EPA budget, this change is necessary to make NEPA effective, and not merely a procedural hurdle. Without these suggested changes, NEPA creates a burden on regulated projects, requiring lengthy and expensive preparation of EAs and EISs, without a corresponding positive impact on environmental protection. Centralization of environmental analysis in the EPA should result in greater accuracy and efficiency. Any potential additional costs and bureaucracy of enhanced EPA involvement are worth it to carry out the intent of NEPA.