

RECENT TRENDS IN CUMULATIVE IMPACT CASE LAW

Michael D. Smith, PhD¹

The Shipley Group
1584 South 500 West, Suite 201
Woods Cross, UT 84010-7436

and

Department of Environmental and Natural Resource Sciences
Humboldt State University
Arcata, CA 95521-8299

ABSTRACT The assessment of cumulative impacts is one of the most difficult tasks a NEPA practitioner faces when preparing an EA or EIS, and it has recently become an increasing focus area of legal challenges. Federal agencies have a very poor track record in this litigation, losing a large percentage of the cases. This presentation will focus on practical steps NEPA practitioners can take to prepare their cumulative impact analyses in a manner that fulfills the requirements of the NEPA Statute and Council on Environmental Quality (CEQ) Regulations and makes them less vulnerable to an unfavorable court decision if legally challenged. A review of recent cases will focus on the pitfalls common to cases where cumulative impact analyses were ruled inadequate, as well as strategies used in cases where the analysis was upheld as adequate.

Introduction

The assessment of cumulative impacts is among the most difficult tasks practitioners face when preparing analyses for the National Environmental Policy Act (NEPA) (Bass, Herson, and Bogdan 2001; Eccleston 1999). According to the Council on Environmental Quality, the entity created by Congress to oversee the NEPA process, cumulative impact assessment may be one of the most critical components of a NEPA analysis as:

Evidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time (Council on Environmental Quality 1997, p. 1).

Although the requirement to consider cumulative impacts did not appear in the original NEPA Statute in 1970, the Council on Environmental Quality (CEQ) NEPA regulations issued in 1973 and substantially revised in 1978 clearly stated a requirement to consider cumulative impacts for all projects undergoing NEPA analysis (Thatcher 1990), and provided the following definition of cumulative impacts in Section 1508.7:

The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

If one really examines what is being required in this definition, it quickly becomes apparent that this is a nearly impossible demand – at least to do comprehensively and perfectly (Thatcher 1990). The reasons for this are many – the major ones being (1) lack of time and resources to effectively analyze the often large spatial and temporal scales needed to analyze *past, present, and reasonably foreseeable future actions* regardless of who is responsible for them; and (2) the lack of sufficient data or methods to analyze some of the impact questions that will arise in such an analysis – such as the lack of quality baseline data or information for a given project area.

Federal agencies struggled with these challenges and others following the creation of the requirement to consider cumulative impacts in all NEPA analyses. In the fifteen-year period following the release of the 1979 version of the

¹ Contact info: Michael D. Smith, Senior Consultant, The Shipley Group, 1584 South 500 West Suite 201, Woods Cross, UT, 84010-7436; phone: (888) 270-2157; fax: (888) 270-2158; email: michael.smith@shipleygroup.com

CEQ Regulations, cumulative impact analyses were often ignored or given very little attention in many agency NEPA documents, and court cases challenging cumulative impacts analyses became increasingly common (Bass, Herson, and Bogdan 2001; Burris and Canter 1997a; Cooper and Canter 1997; Herson and Bogdan 1991; Rumrill and Canter 1997). For example, one study of 89 Environmental Assessments (EAs) prepared by 13 different federal agencies in the first six months of 1992, found that only 35 of the EAs (39%) even mentioned cumulative impacts anywhere in the document. Of the 35 that did mention cumulative impacts, only one-half provided any evidence or rationale for concluding that the project being analyzed would have no significant cumulative impacts (McHold and Holman 1995). Another study of the adequacy of cumulative impacts sections in NEPA documents found that practitioners surveyed said that less than one-half of the NEPA documents their agency produced addressed cumulative impacts, and that less than 5 percent addressed cumulative impacts for each environmental resource analyzed in the document (Burris and Canter 1997b). A general consensus emerged that there was a lack of a clear definition of exactly what a cumulative impacts analysis was supposed to cover, and the proper procedures to follow in preparing one (Canter and Kamath 1995; Kamaras 1993). In the courts, one observer noted that the number of cases where judges had found cumulative impacts analyses inadequate was higher than that for cases involving direct impacts (Mandelker 1992).

In response to requests for more direction and information on how to prepare adequate cumulative impacts analyses, in 1997 CEQ published a comprehensive handbook, *Considering Cumulative Effects Under the National Environmental Policy Act* (Council on Environmental Quality 1997). The handbook provides detailed information for federal agencies on how to conduct a cumulative impact analysis, including sections on scoping, delineating spatial and temporal boundaries, sources for obtaining data, and methods, tools, and techniques for analyzing cumulative impacts. Although Federal Courts do not consider the document to carry the force of law (the preface to the handbook clearly states: “The handbook does not establish new requirements for such analyses. It is not and should not be viewed as formal CEQ guidance on this matter, nor are the recommendations in the handbook intended to be legally binding” (Council on Environmental Quality 1997; p.iii)), it has often been used by agencies to direct their cumulative impact analyses. According to the U.S. Environmental Protection Agency, which has a responsibility to review all NEPA EISs prepared by federal agencies under Section 309 of the Clean Air Act, “CEQ’s handbook offers the most comprehensive and useful information to date on practical methods for addressing cumulative impacts in NEPA documents” (U.S. Environmental Protection Agency 1999; p.1).

Despite the publication of CEQ’s handbook, cumulative impacts assessment remains a source of confusion for many NEPA practitioners, and inadequate cumulative impact analyses remain today a major shortcoming in many NEPA documents. For example, in 2002 Congress responded to complaints about inadequate cumulative impacts analyses by federal agencies of oil and natural gas exploration on Alaska’s North Slope by directing the National Academy of Sciences to prepare their own cumulative impacts analysis for the region (National Academy of Sciences 2003).

In a recent survey of NEPA practitioners in the federal government, one of the most important needs identified was for further guidance and training in the analysis of cumulative impacts (Smythe and Isber 2003). The analysis presented here was designed to provide NEPA practitioners with better insight into the requirements for what constitutes an adequate cumulative impacts assessment as revealed by recent case law addressing this issue.

Methods

In order to review recent court decisions concerning cumulative impact analysis issues, all cumulative impact opinions from the Federal Ninth Circuit Court of Appeals were analyzed for the ten-year period 1995-2004. A ten-year period was chosen to capture the increased attention that cumulative impacts challenges have drawn in the courts in recent years, especially the Ninth Circuit (Yost 2001). Appeals Court cases were chosen for analysis because they usually end up being the final word on most NEPA issues. For example, the U.S. Supreme Court reviews less than one percent of all decisions (for all types of decisions, not just those focusing on NEPA or other environmental laws) made by U.S. Appeals Courts, and has only chosen to hear 14 NEPA cases since the Act was passed in 1970. Thus, the Appeals Courts have come to play an important role in settling important policy questions (Scott 2003; Songer and Ginn 2002).

A decision to analyze only opinions from the Ninth Circuit Court of Appeals was made because this court has a reputation for being the most sympathetic to environmental concerns generally (Jones and Taylor 1995; Kasindorf 2003; Malmshemer, Keele, and Floyd 2004), and NEPA concerns more specifically. Thus, if any Appeals Court is

likely setting legal precedent on interpreting the requirement contained in the CEQ Regulations and setting the most stringent standards for cumulative impacts analysis, it is likely the Ninth Circuit. For example, one review of Ninth Circuit cases involving the U.S. Forest Service found that plaintiffs in these cases (most often environmental groups) had much higher litigation success rates than in other Federal Circuit Courts (Jones and Taylor 1995). Others note the decidedly liberal bent of the court, and a recent review of NEPA Appeals Court decisions indicates that the political affiliation of judges plays a key factor in how cases are decided (Klein 2004). It is also the largest federal court circuit which embraces 34 percent of the United States' land area², and includes much of the land administered by the public land management agencies such as the U.S. Forest Service, Bureau of Land Management, and U.S. National Park Service. Thus, a disproportionate number of NEPA cases involving these agencies occurs in the Ninth Circuit. For example, a recent review of all Circuit Court cases involving the U.S. Forest Service between 1970-2001 found 57 percent of the total were heard in the Ninth Circuit (Malmsheimer, Keele, and Floyd 2004). These agencies are some of the most frequently-litigated in NEPA Court cases, and thus much of the case law precedent for these agencies comes from Ninth Circuit Court decisions. For example, many have argued that the U.S. Forest Service has fundamentally altered the way it approaches NEPA analysis based on administrative appeals and court decision outcomes, many of which have come from the Ninth Circuit (Ackerman 1990; Kennedy 1988; Jones and Taylor 1995).

To find relevant cases for the ten-year period 1995-2004, a database search was conducted with LexisNexis using the search terms "cumulative impacts" and "National Environmental Policy Act." Opinions that were not published (since these do not set legal precedent), and those where the facts of the case did not deal with cumulative impact challenges to an agency NEPA document (some of the opinions mentioned the phrase "cumulative impacts" in the text, but did not actually address a challenge to that facet of the NEPA analysis), were excluded from the analysis. A total of 25 opinions were identified for the ten-year period 1995-2004 that addressed allegations of inadequate agency cumulative impact analysis. Each of the 25 opinions were analyzed to determine which agency or agencies served as lead agency(s) for the project, what type of NEPA document was being challenged, what the specific challenge was to the cumulative impact analysis in the NEPA document, and the Court's ruling on the case. These opinions are listed in Table 1, which includes case name and recording information, the year the opinion was decided, the federal agency involved in the legal challenge, the type of NEPA document challenged – Categorical Exclusion, Environmental Assessment (EA), or Environmental Impact Assessment (EIS) – and the final disposition of the cumulative impact analysis challenge.

Results

Several trends emerge from an analysis of the 25 opinions issued by the Ninth Circuit Court of Appeals concerning challenges to the adequacy of federal agency cumulative impacts analyses (Table 1). First, the analysis confirmed the widely-held belief that cumulative impacts challenges are increasing in recent years: 44 percent of the cases (11 of 25) were decided in the final three years of the analysis period (2002-2004), and 20 percent of all decisions came in the final year (5 out of 25 cases). As for the federal agencies involved in the cumulative impacts challenges, the U.S. Forest Service overwhelmingly experienced the highest number of challenges decided by the Court (more than 50%, 13 of 25). The two agencies with the next highest number of challenges – the Bureau of Land Management and the U.S. Army Corps of Engineers – had only three cases decided. The Bonneville Power Administration had two cases decided, while the Federal Aviation Administration, Federal Highway Administration, Minerals Management Service, and the U.S. Fish and Wildlife Service each had only one case decided. As for the type of NEPA documents being challenged for inadequacies in cumulative impact analysis, there were slightly more EISs (13) than EAs (11) being challenged, along with one Categorical Exclusion³

Perhaps of most interest is the question of how the agencies' cumulative impact analyses are standing up under judicial scrutiny. The record is more favorable to plaintiffs – in 60 percent of the cases (15 out of 25) the cumulative

² The jurisdiction of the Ninth Circuit Court of Appeals includes the nine western states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, Nevada, and Washington, and the territories of Guam and the Northern Mariana Islands.

³ Although Categorical Exclusions themselves usually presuppose there is no potential for a project to have significant impacts (including cumulative impacts), in this case (*High Sierra Hikers Ass'n v. Blackwell* 2004; 381 F.3d 886) the plaintiffs challenged the U.S. Forest Service for improperly using categorical exclusion because cumulative impacts were not considered when issuing stock use permits to a number of different operators. The Court ruled in favor of the plaintiffs, and ordered the Forest Service to prepare a detailed cumulative impact analysis in addition to an EA or EIS for future permits. The Forest Service has been criticized recently for abusing categorical exclusions in situations such as this (Moriarty 2004).

impacts analysis conducted by the federal agency was ruled inadequate, while the analysis was upheld 40 percent of the time (10 out of 25 cases). It is interesting to note that in the last three years of opinions, plaintiffs have been even more successful in challenging agency cumulative impacts analysis – they have won 8 out of 11 cases for a 72 percent success rate.

The agency with the most litigation heard by the Ninth Circuit during the analysis period – the U.S. Forest Service – lost 9 of the 13 cases (69%) heard by the Court. The Bureau of Land Management lost all three of their cases heard by the Court, for a 100 percent loss rate, while the U.S. Army Corps of Engineers lost 2 and won 1 case (33% success rate). The Bonneville Power Administration was the most successful agency in court, winning both of their cases (100% success rate).

The most common challenge to the cumulative impacts analyses of agency NEPA documents was that the document contained an inadequate analysis of other past, present, and reasonably foreseeable future actions within the analysis area (Table 2). This issue appeared in 15 of the 25 cases (60%). If agencies lost a court case, this was the most common reason for the Court to rule the cumulative impacts analysis inadequate, which they did in 13 of the 15 analyses (87%) they ruled as inadequate. Agencies won only two cases out of 15 (13%) involving this challenge. The next most common challenge was that the cumulative impacts analysis lacked data and/or a convincing rationale for selection of data and a conclusion that cumulative impacts were insignificant. This challenge appeared in 11 of the 25 cases (44%). Agencies lost seven cases concerning this challenge, making it the second most common reason for losing a case (a factor in 47 percent of the losses). However, agencies won four cases involving this challenge, making it the most common issue in cases won by federal agencies (4 of 10 cases – 40%).

Other challenges that appeared in the cases with less frequency included: (1) The geographic area of analysis was too small. Agencies lost two and won two cases involving this challenge; (2) The project did not include another cumulative action (illegal segmenting). Agencies lost one and won two cases involving this challenge; (3) The data used in the analysis was outdated. Agencies lost one case involving this challenge; (4) An analysis cannot be tiered to a Programmatic NEPA document that has no site-specific analysis. Agencies lost one case involving this challenge; (5) An analysis cannot be tiered to a non-NEPA document. Agencies lost two cases involving this challenge; (6) The analysis did not comply with the CEQ Handbook on assessing cumulative impacts. Agencies won one case involving this challenge; and (7) The temporal period chosen for analysis was too short. Agencies won one case involving this challenge.

The following are brief descriptions of six cases ruled on by the Ninth Circuit which best illustrate many of the key findings reported above in relation cases where the cumulative impacts analysis was found to be inadequate in agency NEPA documents:

■ In *Klamath-Siskiyou Wildlands v. BLM* (2004; 387 F.3d 968) the Bureau of Land Management prepared EAs for two timber sales – the Indian Soda and Conde Shell – in a single watershed in the Cascade Mountains of southern Oregon. The plaintiff challenged that the two projects were illegally segmented, and that each individual EA did not take into account the cumulative impacts of the other timber sale or two additional sales that were planned in the same watershed. Although the Court found that each of the EAs did include a section on cumulative impacts, they ruled that the sections did not contain enough analysis to be legally adequate. According to the Court: “The reader is not told what data the conclusion was based on, or why objective data cannot be provided.” The BLM also argued that the lack of an adequate analysis of cumulative impacts in the EAs is compensated by the fact that they are tiered to two other agency documents. The Court, however, ruled that it is not acceptable for an agency to tier a Resource Management Plan EIS that has no site-specific analysis, nor to a watershed analysis report that is not a NEPA document (tiering can only be done to a NEPA EA or EIS). Although the Court did not order BLM to prepare a single EIS for all four timber sales in the watershed as the plaintiff had desired, they did enjoin the Indian Soda and Conde Shell projects until an adequate cumulative impacts analysis was conducted.

■ In *Lands Council v. Powell* (2004; 379 F.3d 738) the U.S. Forest Service prepared an EIS for the Iron Honey timber harvest and watershed restoration project in the headwaters of the Little North fork of the Coeur d’Alene River on the Idaho Panhandle National Forest. The Court ruled

that the cumulative impacts analysis in the EIS was inadequate for several reasons. First, the EIS failed to properly assess past projects in the vicinity. According to the Court: “The Final Environmental Impact Statement generally describes the past timber harvests, gives the total acres cut, with types of cutting, per decade, and asserts that timber harvests have contributed to the environmental problems in the Project area. But there is no catalog of past projects and no discussion of how those projects (and differences between the projects) have harmed the environment. Apart from a map in the Project file that shows past harvests, with general notes about total acres cut per watershed, there is no listing of individual past timber harvests.” The Court concluded on this point, the EIS “...should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment.” The Court also found that the cumulative impacts assessment of the project’s impacts on Westslope Cutthroat Trout was inadequate because it was outdated (it was thirteen years old). According to the Court: “We do not suggest that all data relied upon by the agency to be immediate, but here the data about the habitat of the Westslope Cutthroat Trout was too outdated to carry the weight assigned to it.” Finally, the plaintiffs argued that the Forest Service used an inadequate scientific methodology in assessing cumulative impacts. Although courts are generally reluctant to overrule agencies’ choice of scientific methods in their analyses, in this instance the Court ruled against the agency due to lack of disclosure of the inadequacies of the model used to analyze sediment impacts to water quality. According to the Court: “The Forest Service’s heavy reliance on the WATSED model in this case does not meet the regulatory requirements because there was inadequate disclosure that the model’s consideration of relevant variables is incomplete. Moreover, the Forest Service knew that WATSED had shortcomings, and yet did not disclose these shortcomings until the agency’s decision was challenged on the administrative appeal. We hold that this withholding of information violated NEPA, which requires up-front disclosures of relevant shortcomings in the data or models.”

■ In *Ocean Advocates v. U.S. Army Corps of Engineers* (2004; 361 F.3d 1108) plaintiffs challenged the Corps’ EA analyzing a permit application from British Petroleum to build an addition to an existing oil refinery dock in Cherry Point, Washington. The Court ruled that cumulative impacts analysis in the EA was inadequate because it did not properly consider other reasonably foreseeable future actions. The Corps concluded that any increase in crude oil tanker traffic would result from “market forces,” not the dock addition or other projects. The Court ruled this conclusion was incorrect since it relied solely on a letter from British Petroleum “claiming that it had many options other than sea travel for transporting crude and refined oil to and from the refinery.” According to the Court: “This finding fails to convince us that the Corps took a ‘hard look’ at the cumulative effects of the project, excludes the requisite quantified or detailed information necessary to support this finding, and neglects to explain why the Corps could not provide better or more specific information.”

■ In *Muckleshoot Indian Tribe v. U.S. Forest Service* (1999; 177 F.3d 800) the Forest Service prepared an EIS for the Huckleberry Mountain land exchange on the Mt. Baker-Snoqualmie National Forest in Washington. Plaintiffs alleged that the cumulative impacts analysis in the EIS failed to account for both a previous land exchange in 1984 and a future proposed land exchange in the project vicinity. The Forest Service argued that the future exchange was “remote or highly speculative,” but the Court disagreed by noting that the Forest Service had prepared a summary document describing the future exchange one year prior to the Huckleberry EIS, and that the Secretary of Agriculture had announced the future exchange five months prior to the release of the EIS. The Court also ruled that the cumulative impacts analysis was inadequate due to lack of adequate data and rationale, despite the fact that the EIS contained 12 sections entitled “cumulative effects.” In one of these sections, the EIS stated: “The Forest Service would manage for non-harvest uses an additional 16,735 acres of young forest and non-forest vegetation. Most of this acreage...would over time develop greater species diversity and stand structure.” The Court concluded that: “This statement notably contains no evaluation whatsoever of the impact on natural resources of timber harvesting on the lands transferred to Weyerhaeuser, nor does it assess the possible impacts that such harvesting could have upon surrounding areas. The

statement focuses solely on the beneficial impacts the exchange will have on lands received by the Forest Service.”

■ In *Neighbors of Cuddy Mtn. v. U.S. Forest Service* (1998; 137 F.3d 1372) the Forest Service prepared an EIS for the Grade/Dukes timber sale on the Payette National Forest in Idaho. The Court ruled that the cumulative impacts analysis was inadequate in the EIS because it failed to properly take into account other proposed timber sales in the project vicinity. According to the Court: “In the original EIS, USFS included a section describing the cumulative effects on wildlife habitat. Other than general statements regarding the pileated woodpecker and old-growth habitat, USFS provided no detail regarding the extent to which the proposed sales would cumulatively impact and reduce old-growth habitat. USFS failed to mention the old growth trees that would be destroyed by the three other proposed sales, and whether the sales would affect the same pileated woodpecker home ranges that would be affected by the Grade/Dukes sale. The sole reference to future sales stated that they would ‘propose to treat additional old-growth habitat.’” The Court concluded: “General statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.”

■ In *Blue Mountains Biodiversity Project v. Blackwood* (1998; 161 F.3d 1208) the U.S. Forest Service prepared an EA for the Big Tower post-wildfire timber sale on the Umatilla National Forest in eastern Oregon. The Court ruled that cumulative impacts analysis was inadequate because it failed to consider four other timber sales proposed in the same watershed. The Court ruled that all five sales were “cumulative actions” and should have been considered in a single EIS. According to the Court: “Together, the sales would yield 40-55 million board feet logged from the same watershed, require approximately 20 miles of road construction and involve tractor-skid logging on steep slopes. No document explores the collective impact of these projects. Although the EA purports to rely on the Forest Service’s ‘Tower Fire Ecosystem Analysis,’ that study assessed only the impacts of the fire on the watershed not the additional impacts of logging several thousand acres and building several miles of roads. It does not substitute for a meaningful cumulative impacts analysis of the actual logging projects.” The Court concluded: “Here, however, all of the proposed sales were reasonably foreseeable. They were developed as part of a comprehensive forest recovery strategy. In fact, all five sales were disclosed by name to a coalition of logging companies, along with estimated sale quantities and timelines even before the Big Tower EA was completed.” The Court agreed with the plaintiffs that all five timber sales should have been evaluated in a single EIS.

The following brief descriptions of three cases illustrate the most common reasons why the Court ruled in favor of the agencies in challenges to their cumulative impacts analyses:

■ In *Edwardsen v. U.S. Department of Interior* (2001; 268 F.3d 781) the Minerals Management Service prepared an EIS for the Northstar off-shore oil development in the Beaufort Sea off the north coast of Alaska. Plaintiffs challenged that the cumulative impacts analysis in the EIS was inadequate because it failed to comply with the methodologies set forth in the 1997 CEQ handbook document on cumulative impacts. The Court rejected this claim in noting that CEQ’s document serves as “guidance” and is not legally binding, and the real issue of the Court to decide is not whether the analysis conforms to the guidance document, but rather whether it comprises a sufficient and adequate analysis for the project.

■ In *Churchill County v. Norton* (2001; 276 F.3d 1060) the U.S. Fish and Wildlife Service prepared an EIS for acquiring water rights from private landowners in the Lahontan Valley of west-central Nevada. Plaintiffs argued that the cumulative impacts analysis in the EIS was inadequate because it lacked quantitative data and specifics about impacts of other reasonably foreseeable future actions in the project vicinity. The Court ruled in favor of the Fish and Wildlife Service, and noted that while the cumulative impacts analysis was not perfect, it met the standard for legal sufficiency. According to the Court: “In each of the fifteen subsections identified in the WEIS [Water Rights Acquisition EIS], the Service discussed the predicted impacts and provided its best assessment of what might happen and how the Service and other

agencies would likely respond. In addition, the Service summarized the potential cumulative impacts of the above actions and activities if the 'preferred alternative' were not selected, then summarized the potential impacts of the actions and activities if the Service adopted the preferred alternative." The Court concluded: "Plaintiffs have pointed out errors and missing information in the WEIS. We could certainly 'fly-speck' this chapter of the WEIS and find instances where the inclusion of quantitative data would benefit the Service and the public. As with the programmatic EIS discussed above, if we were preparing the WEIS, we might insist on additional detail. That is not our role, of course. Rather, we review the legal sufficiency of the WEIS. We conclude that the Fish and Wildlife Service has taken the requisite 'hard look' at the cumulative environmental impacts of the action alternatives and has not violated NEPA."

■ In *Selkirk Conservation Alliance v. Forsgren* (2003; 336 F.3d 944) the U.S. Forest Service prepared an EIS for an easement and road-building project for a private timber company on the Colville National Forest in eastern Washington. The plaintiffs alleged that the Forest Service's cumulative impact analysis was inadequate for several reasons. First, they argued that the geographic scope chosen for the analysis was too narrow as it excluded a timber sale on an adjacent National Forest that bordered the watershed boundary of the project area. The Court dismissed this argument, and said that using the larger area in the analysis would actually make for a less effective analysis since it would make the total impacts of the project seem smaller because they would be spread over a larger area. The Court concluded that: "the EIS would be a more accurate document if it did not consider the Idaho Panhandle National Forest Activity in the EIS's cumulative impact analysis." In reaching this conclusion, the Court emphasized that the EIS initially considered adding this project to the analysis, but explained thoroughly their rationale for why they decided to leave it out. The plaintiffs also argued that the Forest Service used an improper temporal scope for their analysis. In reaching their judgment on this issue, the Court noted that while the Forest Service could have picked a longer time frame than the three-year period they examined, they did not act "arbitrarily and capriciously in selecting that time frame." According to the Court: "The selection of scope of an EIS is a delicate choice and one that should be entrusted to the expertise of the deciding agency. NEPA does not impose a requirement that the Forest Service analyze impacts for any particular length of time...A ten-year study may have been preferable in this case. Or even a five-year study. But the three-year study chosen by the Forest Service was not unreasonable. Although the Forest Service had *some* information for ten years, and *some more* information for five years, it had *the most* information for the next three years." Thus, the Court acknowledged that the Forest Service had made a reasonable choice, and had clearly provided a rationale for it, in deciding that analysis was adequate.

Discussion and Conclusion

The purpose of this analysis was to examine recent trends in case law regarding cumulative impacts assessment. An examination of rulings from the Ninth Circuit Court of Appeals for the period 1995-2004 revealed that cumulative impacts litigation is increasing, with 20 percent of the cases decided in the year 2004 alone. The U.S. Forest Service has experienced by far the most litigation, with over 50 percent of the total Court opinions in the analysis period. EISs and EAs were nearly equally vulnerable to challenge, with slightly more cases involving EISs than EAs.

As for how the cumulative impacts analyses in the agency NEPA documents are holding up under judicial scrutiny in the Ninth Circuit Court, the record is decidedly in the plaintiffs favor. Challengers were victorious on their claims of inadequate analysis in 60 percent of the cases decided in the ten-year analysis period. In recent years, the success rate for challengers has risen even more, to victories in 8 out of 11 cases (72%). The federal agency with the worst record was the Bureau of Land Management, which lost all three of their cases (100%), while the U.S. Forest Service lost 69 percent (9 of 13) of their cases and the U.S. Army Corps of Engineers lost 66 percent (2 of 3) of their cases. The Bonneville Power Administration was the most successful agency, winning 100 percent (2 of 2) of their cases.

The most common reason plaintiffs used to challenge an agency's cumulative impacts analysis was that there was not an adequate analysis of all past, present, and reasonably foreseeable future actions. This challenge was present in

60 percent of all the cases in the analysis period, and it turned out to be the most common reason agencies lost the case: in 15 of the cases involving this issue, agencies lost 13 or 87 percent. The second most common reason that agencies lost a case were when challenges were made to the adequacy of the data and rationale used in the analysis. Agencies lost 7 out of 11 (64%) of these cases.

So, what can a NEPA practitioner learn from these results? At first glance, it may not appear too promising that the trend in the Ninth Circuit Court is toward more litigation over cumulative impacts analyses, and that federal agencies are losing a significant percentage of those cases. When coupled with the fact that cumulative impacts analyses are often the most difficult to prepare in many NEPA documents, and that preparing a “perfect” analysis is likely impossible for the reasons mentioned earlier, the prospects for both avoiding litigation or emerging from it successfully in the future do not appear very bright. However, these results suggest that this may be an incorrect assumption. Even though federal agencies have a poor track record in recent cumulative impacts litigation, in nearly all cases they are not losing these court cases because their cumulative impact analyses are not perfect, but rather because they either have *no cumulative impact analysis at all in their NEPA document, they leave out obvious or critically important other past, present, and especially reasonably foreseeable future projects in their analysis area, or the analysis consists solely of undocumented assertions/conclusions of no impacts without any supporting analysis or rationale to back up that claim.* These results, therefore, reveal some key lessons for practitioners desiring to improve their cumulative impacts analysis and to increase the likelihood that they will withstand a legal challenge should one arise:

Lesson #1 – Consider cumulative impacts for each resource you are analyzing, and carefully search out, document, and analyze all past, present, and reasonably foreseeable future actions. This was the most common reason agencies were challenged, and the Court ruled against the agency in nearly every one of these challenges. Agencies should also carefully consider whether other projects ongoing in their project area might comprise “cumulative actions,” as plaintiffs were successful in several cases involving this challenge.

Lesson #2 – Do not make unsubstantiated claims about cumulative impacts in your analysis. Such assertions when not backed up with data and/or the rationale for them were the second-most common reason analyses were challenged, and plaintiffs were successful in a high percentage of these cases.

Lesson #3 – You do not need to have a “perfect” analysis of cumulative impacts in order to survive a legal challenge. In several of the cases analyzed, the Court emphasized that they did not require such a standard. For example, in one case the Court noted some minor errors and misinformation in an agency’s cumulative impact analysis, but concluded their role is not to “fly-speck” agency analyses. The important point is to always make some attempt to address cumulative impacts where appropriate in your analysis, even when information and data may be missing or sparse, or when it is difficult to analyze the impacts of future actions. When information is missing, sparse, or unavailable, make sure you fully explain the situation and your rationale for your conclusion based on this limited information.

Lesson #4 – Do not tier your cumulative impacts analysis to either a Programmatic NEPA document that does not contain site-specific analysis or to a non-NEPA document. The Court has clearly said this practice violates NEPA, and ruled against federal agencies in every case involving this issue.

Despite fears from some that the Ninth Circuit may be pushing the requirements of NEPA out beyond the boundaries of what Congress and the CEQ intended for cumulative impacts assessment, this analysis of cases from the past decade of Ninth Circuit Court of Appeals decisions reveals no such effort. When federal agencies lost in court, in all cases it was because they simply didn’t follow the requirements stated in the CEQ Regulations. In sum, a simple recipe for preparing a legally-adequate cumulative impacts analysis emerges clearly from this analysis: (1) Make sure cumulative impacts are considered for all relevant resources; (2) make sure all relevant past, present, and reasonably foreseeable future actions which may impact the resources you are analyzing are identified and analyzed; (3) make sure that analysis includes some facts, data, and rationale to back up the conclusions made about cumulative impacts. If federal agencies follow this recipe, they will go a long way toward meeting the requirements

of the NEPA Statute and CEQ Implementing Regulations regarding cumulative impacts analyses, and thus they are much more likely to be successful in future litigation on this issue whether in the Ninth Circuit Court of Appeals or any other federal court.

References

- Ackerman, S. 1990. "Observations on the transformation of the forest service: the effects of the national environmental policy act on U.S. Forest Service decision making." *Environmental Law* 20(2):703-734.
- Bass, R.E., A.I. Herson, and K.M. Bogdan. 2001. *The NEPA Book: A Step-by-Step Guide on how to Comply with the National Environmental Policy Act*. Point Arena, CA: Solano Press.
- Burris, R.K. and Larry W. Canter. 1997a. "Cumulative impacts are not properly addressed in environmental assessments." *Environmental Impact Assessment Review* 17(5):5-18.
- 1997b. "A practitioner survey of cumulative impact assessment." *Impact Assessment* 15 (June):181-194.
- Canter, L.W., and J. Kamath. 1995. "Questionnaire checklist for cumulative impacts." *Environmental Impact Assessment Review*. 15:311-339.
- Cooper, T.A. and L.W. Canter. 1997. Documentation of cumulative impacts in environmental impact statements." *Environmental Impact Assessment Review* 17:385-411.
- Council on Environmental Quality. 1997. *Considering Cumulative Effects Under the National Environmental Policy Act*. Washington, D.C.: Council on Environmental Quality.
- Eccleston, C.H. 1999. *The NEPA Planning Process: A Comprehensive Guide with Emphasis on Efficiency*. New York, NY: John Wiley & Sons.
- Herson, A.I. and K.M. Bogdan. 1991. "Cumulative impact analysis under NEPA: recent legal developments." *The Environmental Professional* 13:100-106.
- Jones, E.S., and C.P. Taylor. 1995. "Litigating agency change: the impact of the courts and administrative appeals process on the forest service." *Policy Studies Journal* 23(Summer):310-336.
- Kamaras, G. 1993. "Cumulative impact assessment: a comparison of federal and state environmental review provisions." *Albany Law Review* 57(1):113-143.
- Kennedy, J.J. 1988. "Legislative confrontation of groupthink in U.S. natural resource agencies." *Environmental Conservation* 15(2):123-128.
- Klein, B. 2004. "Judges' party affiliations predict outcome of NEPA cases." *The Environmental Forum* September/October:33.
- Malmsheimer, R.W., D. Keele, and D.W. Floyd. 2004. "National forest litigation in the US Court of Appeals." *Journal of Forestry* March:20-25.
- Mandelker, D.R. 1992. *NEPA Law and Litigation, 2nd Edition*. New York, NY: Clark Boardman Callaghan.
- Moriarty, K.H. 2004. "Note: circumventing the National Environmental Policy Act: agency abuse of the categorical exclusion." *New York University Law Review* 79:2312- 2390.
- National Academy of Sciences. 2003. *Cumulative Environmental Effects of Oil and Gas Activities on Alaska's*

North Slope. Washington, D.C.: National Academies Press.

Rumrill, J.N. and L.W. Canter. 1997. "Addressing future actions in cumulative effects assessment." *Project Appraisal* 12(4):207-218.

Scott, K.M. 2003. "An exploration of the motivations of court of appeals judges" Paper presented at the Annual Meetings of the Midwest Political Science Association, April 3-6, Chicago, IL.

Smythe, R., and C. Isber. 2003. "NEPA in the agencies: a critique of current practices." *Environmental Practice* 5(4):290-297.

Songer, D.R., and M.H. Ginn. 2002. "Assessing the impact of presidential and home state influences on judicial decisionmaking in the United States courts of appeals." *Political Research Quarterly* 55(2):299-328.

Thatcher, T. 1990. "Understanding interdependence in the natural environment: some thoughts on cumulative impact assessment under the national environmental policy act." *Environmental Law* 20:611-647.

U.S. Environmental Protection Agency. 1999. *Consideration of Cumulative Impacts in EPA Review of NEPA Documents*. Washington, D.C.: U.S. Environmental Protection Agency, Office of Federal Activities.

Yost, N.Y. 2001. "Legal update: recent NEPA case law." Paper presented at the National Association of Environmental Professionals California Chapter NEPA Workshop, Oakland, CA, May 10.

Table 1. Published cases in the Ninth Circuit Court of Appeals dealing with substantive cumulative impacts challenges, 1995-2004

Case	Lead Agency	Type of NEPA Document	Project	Court Decision
Oregon Natural Resources Council v. Marsh (1995; 52 F.3d 1485)	U.S. Army Corps of Engineers	EIS	Construction of a dam on a tributary of the Rogue River, Oregon	Cumulative impacts analysis ruled inadequate
Inland Empire Public Lands Council v. USFS (1996; 88 F.3d 754)	U.S. Forest Service	EIS	Timber sales on the Kootenai National Forest, Idaho	Cumulative impacts analysis ruled adequate
City of Carmel-by-the-Sea v. USDOT (1996; 95 F.3d 892)	Federal Highway Administration	EIS	Expansion of CA State Highway 1 near Carmel, California	Cumulative impacts analysis ruled inadequate
Northwest Environmental Defense Center v. BPA (1997; 117 F.3d 1520)	Bonneville Power Administration	EA	Water contracts for the Columbia River Basin, Pacific Northwest	Cumulative impacts analysis ruled adequate
Association of Public Agency Customers v. BPA (1997; 126 F.3d 1158)	Bonneville Power Administration	EIS	Replacement of long-term power sales contracts in Pacific Northwest	Cumulative impacts analysis ruled adequate
Neighbors of Cuddy Mt. v. USFS (1998; 137 F.3d 1372)	U.S. Forest Service	EIS	Timber sale on the Payette National Forest, Idaho	Cumulative impacts analysis ruled inadequate
Idaho Sporting Congress v. Thomas (1998; 137 F.3d 1146)	U.S. Forest Service	EA	Timber sale on the Targhee National Forest, Idaho	Cumulative impacts analysis ruled inadequate
Morongo Band of Mission Indians v. FAA (1998; 161 F.3d 569)	Federal Aviation Administration	EA	Change of approach flight paths to Los Angeles International Airport, California	Cumulative impacts analysis ruled adequate
Blue Mts. Biodiversity Project v. Blackwood (1998; 161 F.3d 1208)	U.S. Forest Service	EA	Post-wildfire timber sales on the Umatilla National Forest, Oregon	Cumulative impacts analysis ruled inadequate
Muckleshoot Indian Tribe v. USFS (1999; 177 F.3d 800)	U.S. Forest Service	EIS	Land exchange on the Mt. Baker-Snoqualmie National Forest, Washington state	Cumulative impacts analysis ruled inadequate
Wetlands Action Network v. USACE (2000; 222 F.3d 1105)	U.S. Army Corps of Engineers	EA	Wetland fill permit for private development project on the coast of Southern California	Cumulative impacts analysis ruled adequate
Edwardsen v. USDO (2001; 268 F.3d 781)	Minerals Management Service	EIS	Off-shore oil development in the Beaufort Sea, Alaska	Cumulative impacts analysis ruled adequate
Churchill County v. Norton (2001; 276 F.3d 1060)	U.S. Fish and Wildlife Service	EIS	Water acquisition project in the Carson Valley, Nevada	Cumulative impacts analysis ruled adequate
Hall v. Norton (2001; 266 F.3d 969)	Bureau of Land Management	EA	Land exchange in Las Vegas, Nevada	Cumulative impacts analysis ruled inadequate
Neighbors of Cuddy Mt. v. Alexander (2002; 303 F.3d 1059)	U.S. Forest Service	EIS	Timber sale on the Payette National Forest, Idaho	Cumulative impacts analysis ruled adequate
Native Ecosystems Council v. Dombeck (2002; 304 F.3d 886)	U.S. Forest Service	EA	Timber sale on the Gallatin National Forest, Montana	Cumulative impacts analysis ruled inadequate
Idaho Sporting Congress v. Rittenhouse (2002; 305 F.3d 957)	U.S. Forest Service	EIS	Timber sale on the Boise National Forest, Idaho	Cumulative impacts analysis ruled inadequate
Kern v. USBLM (2002; 284 F.3d 1062)	Bureau of Land Management	EA	Timber sale in Coos Bay District, Oregon	Cumulative impacts analysis ruled inadequate
Selkirk Conservation Alliance v. Forsgren (2003; 336 F.3d 944)	U.S. Forest Service	EIS	Easement for private logging on inholdings within the Colville National Forest, Washington state	Cumulative impacts analysis ruled adequate
Earth Island Institute v. USFS (2003; 351 F.3d 1291)	U.S. Forest Service	EIS	Post-wildfire timber sale on the Eldorado National Forest, California	Cumulative impacts analysis ruled inadequate

Table 1 continued.

<u>Case</u>	<u>Lead Agency</u>	<u>Type of NEPA Document</u>	<u>Project</u>	<u>Court Decision</u>
Cold Mountain v. Garber (2004; 375 F.3d 884)	U.S. Forest Service	EA	Permit for bison testing facility on the Gallatin National Forest, Montana	Cumulative impacts analysis ruled adequate
Ocean Advocates v. USACE (2004; 361 F.3d 1108)	U.S. Army Corps of Engineers	EA	Permit for dock expansion for oil tanker terminal in Washington state	Cumulative impacts analysis ruled inadequate
Lands Council v. Powell (2004; 379 F.3d 738)	U.S. Forest Service	EIS	Timber sale/watershed restoration project on the Idaho Panhandle National Forest	Cumulative impacts analysis ruled inadequate
Klamath-Siskiyou Wildlands Center v. BLM (2004; 387 F.3d 968)	Bureau of Land Management	EAs	Two timber sales in southern Oregon	Cumulative impacts analysis ruled inadequate
High Sierra Hikers Ass'n v. Blackwell (2004; 381 F.3d 886)	U.S. Forest Service	Categorical Exclusion	Permits for packstock outfitters on the Inyo and Sierra National Forests, California	Cumulative impacts analysis ruled inadequate

Table 2. Key reasons for challenges to NEPA documents and case outcome for Ninth Circuit Court of Appeals cases dealing with substantive cumulative impacts challenges, 1995-2004.

Case	Key Challenge(s)	Court Decision
Oregon Natural Resources Council v. Marsh (1995; 52 F.3d 1485)	(1) Inadequate analysis of other projects in the project vicinity	EIS ruled inadequate
Inland Empire Public Lands Council v. USFS (1996; 88 F.3d 754)	(1) Geographic area of analysis too small	EIS ruled adequate
City of Carmel-by-the-Sea v. USDOT (1996; 95 F.3d 892)	(1) Inadequate analysis of other projects in the vicinity (2) Analysis lacked data/rationale	EIS ruled inadequate
Northwest Environmental Defense Center v. BPA (1997; 117 F.3d 1520)	(1) Computer modeling analysis flawed (2) No analysis of reasonably foreseeable future project	EA ruled adequate
Association of Public Agency Customers v. BPA (1997; 126 F.3d 1158)	(1) Inadequate analysis of other projects in the project vicinity	EIS ruled adequate
Neighbors of Cuddy Mt. v. USFS (1998; 137 F.3d 1372)	(1) No analysis of three timber sales proposed in the project vicinity (2) Analysis lacked data/rationale	EIS ruled inadequate
Idaho Sporting Congress v. Thomas (1998; 137 F.3d 1146)	(1) Analysis lacked data/rationale	EA ruled inadequate
Morongo Band of Mission Indians v. FAA (1998; 161 F.3d 569)	(1) Project did not consider another cumulative action (illegally segmented)	EA ruled adequate
Blue Mts. Biodiversity Project v. Blackwood (1998; 161 F.3d 1208)	(1) No analysis of four other timber sales proposed in the same watershed	EA ruled inadequate ; EIS needs to be prepared for all five projects (cumulative actions)
Muckleshoot Indian Tribe v. USFS (1999; 177 F.3d 800)	(1) No analysis of another land exchange in project vicinity (2) Analysis lacked data/rationale (3) Analysis cannot be tiered to a non-NEPA document	EIS ruled inadequate
Wetlands Action Network v. USACE (2000; 222 F.3d 1105)	(1) Other actions not considered as cumulative (project illegally segmented)	EA ruled adequate
Edwardsen v. USDOJ (2001; 268 F.3d 781)	(1) Cumulative impacts analysis does not comply with methodology stated in CEQ Handbook (2) Analysis lacked data/rationale	EIS ruled adequate
Churchill County v. Norton (2001; 276 F.3d 1060)	(1) Analysis lacked data/rationale	EIS ruled adequate
Hall v. Norton (2001; 266 F.3d 969)	(1) No analysis of 57,000 acres of future disposal lands in the project vicinity	EA ruled inadequate
Neighbors of Cuddy Mt. v. Alexander (2002; 303 F.3d 1059)	(1) Analysis lacked data/rationale	EIS ruled adequate
Native Ecosystems Council v. Dombek (2002; 304 F.3d 886)	(1) Inadequate analysis for other projects proposed in the analysis area (2) Geographic area chosen for analysis too small	EA ruled inadequate
Idaho Sporting Congress v. Rittenhouse (2002; 305 F.3d 957)	(1) Geographic area chosen for analysis too small	EIS ruled inadequate
Kern v. BLM (2002; 284 F.3d 1062)	(1) Inadequate analysis of other "reasonably foreseeable future actions" in the project vicinity	EA ruled inadequate
Selkirk Conservation Alliance v. Forsgren (2003; 336 F.3d 944)	(1) Geographic area chosen for analysis too small (2) No analysis of adjacent timber sales (3) Temporal period of analysis too short	EIS ruled adequate
Earth Island Institute v. USFS (2003; 351 F.3d 1291)	(1) No analysis of a reasonably foreseeable future action	EIS ruled inadequate
Cold Mountain v. Garber (2004; 375 F.3d 884)	(1) Analysis lacked data/rationale	EA ruled adequate

Table 2 continued.

Ocean Advocates v. USACE (2004; 361 F.3d 1108)	(1) Inadequate analysis of other projects proposed in the project vicinity (2) Analysis lacked data/rationale	EA ruled inadequate
Lands Council v. Powell (2004; 379 F.3d 738)	(1) No analysis of other timber harvests in project vicinity (2) Analysis lacked data/rationale (3) Data used in the analysis was outdated	EIS ruled inadequate
Klamath-Siskiyou Wildlands Center v. BLM (2004; 387 F.3d 968)	(1) No analysis of other timber sale in same watershed (2) Analysis lacked data/rationale (3) Analysis cannot be tiered to a programmatic NEPA document that has no site-specific analysis (4) Analysis cannot be tiered to a non-NEPA document	EAs ruled inadequate
High Sierra Hikers Ass'n v. Blackwell (2004; 381 F.3d 886)	(1) No consideration of cumulative impacts of other permits in project area	Categorical Exclusion ruled inadequate