# **2004 NINTH CIRCUIT ENVIRONMENTAL REVIEW: CASE SUMMARIES**

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I. Environmental Quality

A. Clean Air Act

1. Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission, 366 F.3d 692 (9th Cir. 2004).

The Metropolitan Transportation Commission (MTC), which plans, coordinates, and finances regional transportation in the San Francisco Bay Area, appealed a summary judgment [[1]](#footnote-2)1 and preliminary injunction [[2]](#footnote-3)2 issued by the district court in favor of Bayview Hunters Point Community Advocates and seven other community and environmental organizations (collectively Bayview). Bayview had filed a citizen suit pursuant to the Clean Air Act (CAA) [[3]](#footnote-4)3 against MTC and two local transit providers, alleging non-compliance with a provision of the CAA mandated State Implementation Plan (SIP). [[4]](#footnote-5)4 The Ninth Circuit reversed the district court's judgment and injunction, finding that MTC was in compliance with the relevant provisions of the SIP.

The CAA requires each state to adopt a SIP to satisfy National Ambient Air Quality Standards (NAAQS) set by the Environmental Protection Agency (EPA). [[5]](#footnote-6)5 Each SIP must include enforceable measures and timetables for compliance with NAAQS. [[6]](#footnote-7)6 MTC is responsible for developing Transportation Control Measures (TCMs) aimed at reducing hydrocarbon and carbon monoxide emissions within the San Francisco Bay Area as part of the 1982 SIP. One of these measures, TCM-2, dealt with transit ridership levels, and projected air quality improvements associated with a 15% increase in transit ridership from 1982 levels. After several revisions to the 1982 SIP, TCM-2 **[\*510]** remained in the document. However, as of 2001, ridership levels only increased by 12.5% over 1982 levels. As a result, Bayview filed a citizen suit, as authorized by the CAA, to compel MTC to take further measures to reach the 15% ridership increase. [[7]](#footnote-8)7

The district court found that TCM-2 imposed five separate requirements: 1) adoption of five-year plans by the region's major transit operators, 2) adoption by MTC of an overall transit ridership target, 3) implementation of the five-year plans, 4) monitoring of annual ridership gains, and 5) achievement of a 15% transit ridership increase over 1982 levels. The district court concluded that MTC had not met the final 15% transit ridership increase requirement and issued a permanent injunction against MTC, requiring the agency to meet the 15% increase requirement by 2006 and amend its regional transportation plan to specify how it would achieve the transit ridership increase. [[8]](#footnote-9)8

The issue facing the Ninth Circuit on appeal was whether TCM-2 constituted a binding commitment to achieve the 15% increase in public transit ridership. The court began with an analysis of the plain language of TCM-2. It noted that the 15% ridership increase was described as a "target," and that the document did not contain an explicit requirement that the target be achieved. [[9]](#footnote-10)9 Turning to contract law, the court determined that "a promise must be distinguished from … a mere prediction of future events." [[10]](#footnote-11)10 The Ninth Circuit decided the lack of plain language requiring the 15% transit ridership increase "weighs heavily against the conclusion that such an obligation can be imposed based upon TCM-2." [[11]](#footnote-12)11

The Ninth Circuit held that the lack of a clear requirement to attain the 15% transit ridership increase was logical, since such a ridership increase was not within MTC's control, unlike the other four requirements the district court found in TCM-2. The 15% transit ridership increase was dependent upon outside factors such as changing work patterns or individual preferences in relation to public transit, and thus the Ninth Circuit concluded that TCM-2 could not have been intended to impose the 15% transit ridership target as a binding obligation.

The Ninth Circuit then looked more closely at the other provisions of TCM-2 and applied a "basic rule of statutory construction … that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." [[12]](#footnote-13)12 The court understood the other provisions of TCM-2 to mean MTC should meet the 15% transit ridership increase target through improvements in productivity without further substantial investment. However, the Ninth Circuit thought the district court's **[\*511]** injunction would require MTC to take quite different measures, focusing on significant and expensive transit expansion programs. The Ninth Circuit held that such a requirement rendered the 15% provision inconsistent with the other TCM-2 provisions by essentially removing any limitation on the cost of implementing the TCMs.

The Ninth Circuit next looked at whether the 15% ridership increase constituted a specific SIP strategy, or an overall objective or aspirational goal of the SIP. While strategies in CAA implementation plans can be enforced by court order, objectives and goals cannot. [[13]](#footnote-14)13 Although the first four requirements found by the district court were clearly enforceable strategies, the Ninth Circuit held that the 15% transit ridership increase target was a proxy for the emissions reduction goal, and thus unenforceable by a court.

The Ninth Circuit also rejected the district court's determination that "failure to infer an increased ridership obligation would render TCM-2 virtually meaningless." [[14]](#footnote-15)14 The Ninth Circuit pointed out that in the early 1990's MTC had in fact adopted a number of contingency TCMs to address insufficient reductions in emissions necessary to attain NAAQS which, while not increasing transit ridership, had resulted in attainment of overall emissions reduction levels during this period by positively affecting other facets of transportation. [[15]](#footnote-16)15 When the San Francisco Bay Area later fell out of attainment for the ozone NAAQS, the court noted that MTC and other responsible agencies prepared a revised SIP to address the problem. The Ninth Circuit held that the district court had failed to consider this broader regulatory aspect when narrowing in on the failure to achieve the transit ridership increase goal.

The Ninth Circuit held that citizen suits, such as the one brought by Bayview, are appropriate "to enforce specific measures, strategies or commitments designed to ensure compliance with the NAAQS," [[16]](#footnote-17)16 not to "obtain modification of an SIP to conform with [the citizen group's] own notion of a proper environmental policy." [[17]](#footnote-18)17 The court noted that the remedy when an agency fails to achieve overall emissions reductions comes from new TCMs and new strategies, not the alteration of TCM-2's provisions sought by Bayview.

**[\*512]** Finally, the Ninth Circuit dismissed the persuasiveness of an EPA opinion letter agreeing with Bayview's contention that TCM-2 would not be fully implemented until the transit ridership goal of a 15% increase over 1982 levels was met. The court determined the EPA opinion letter would be persuasive only in an ambiguous regulatory situation. [[18]](#footnote-19)18 The Ninth Circuit held that the plain meaning of the SIP was contrary to EPA's opinion letter, and thus the letter was not entitled to deference. [[19]](#footnote-20)19

In conclusion, the Ninth Circuit reversed the district court's summary judgment and permanent injunction in favor of Bayview. The Ninth Circuit held that MTC had met its obligations to increase transit productivity under TCM-2 even though these strategies had not yielded the desired increase in transit ridership.

Judge Thomas dissented from the majority's opinion and would have affirmed the district court's decision. Judge Thomas emphasized the CAA requirement that SIPs be submitted to EPA in an "enforceable form." Therefore, the 15% ridership increase provision, if not binding, was a violation of the CAA. [[20]](#footnote-21)20 Judge Thomas believed that without the 15% ridership increase provision, the remaining strategies were "too attenuated and amorphous" to be realistically enforceable. [[21]](#footnote-22)21 He noted that local agencies would take advantage of a failure to hold them accountable to their goals by "defining their commitments as vaguely as possible in order to avoid constraint and reform." [[22]](#footnote-23)22

2. Grand Canyon Trust v. Tucson Electric Power Co., 391 F.3d 979 (9th Cir. 2004).

The Grand Canyon Trust (Trust) appealed from a district court order granting partial summary judgment on the merits and final summary judgment based on laches to the Tucson Electric Power Company (Tucson Power). Trust had brought an action alleging that Tucson Power violated the Clean Air Act (CAA) [[23]](#footnote-24)23 by constructing and operating a coal-powered electric plant near Springerville, Arizona. The Ninth Circuit vacated the district court orders for partial and final summary judgment in favor of Tucson Power and remanded with instructions to reconsider Tucson Power's motions based on all properly submitted evidence. The Ninth Circuit also denied Tucson Power's motion to strike the Trust's appeal of the award of partial summary judgment as an unappealable interlocutory order.

**[\*513]** In late 1977, Congress amended the CAA to require all new sources of air pollution to implement Best Available Control Technology (BACT) standards. [[24]](#footnote-25)24 Under regulations issued by the Environmental Protection Agency (EPA), facilities that commenced construction prior to March 19, 1979 were not subject to BACT requirements, provided that construction was not discontinued for longer than eighteen months and construction was completed within a reasonable time. [[25]](#footnote-26)25 If, however, construction did not meet the requirements of either commencement within eighteen months or completion within a reasonable time, or if construction was suspended for more than eighteen months, a permit would automatically be invalidated, unless the administrator approved an extension. [[26]](#footnote-27)26

In 1977, Tucson Power applied for a permit to construct two coal-fired power units. The first of these units was ultimately completed in 1985 and the second was completed in 1990. In 2001, Tucson Power announced a plan to build two additional units at the Springerville Plant. Under the plan, the new units would not be subject to environmental assessment in isolation, but rather would be included within a single net or bubble encompassing the entire facility. This would avoid triggering several CAA requirements, provided that the entire plant did not produce a net increase of emissions once Tuscon Power completed the third and fourth units.

The district court held that Tucson Power had commenced construction prior to the statutory deadline by drilling wells at the Springerville site in 1978 and, therefore, granted partial summary judgment to Tucson Power. The district court also granted Tucson Power's motion for final summary judgment on the entire action based on the doctrine of laches.

On appeal, Tucson Power first argued that the district court had lacked subject matter jurisdiction over the action. Tucson Power argued that the Trust's action was essentially seeking review of an EPA ruling and only a Court of Appeals has jurisdiction over review of EPA's final decisions under the CAA. The Ninth Circuit clarified that the Trust's suit was properly characterized as a citizen enforcement action against a third party for alleged violations of the CAA, not a challenge to an EPA ruling. Because the CAA allows citizen suits to be brought in district court for enforcement of permit requirements, the Ninth Circuit held that the Trust's action was properly brought in district court. [[27]](#footnote-28)27

Tucson Power next argued that the Ninth Circuit lacked subject matter jurisdiction to review the award of partial summary judgment pertaining to construction commencement. Tucson Power argued this action was not an "appealable final decision … because it did not dispose of [the Trust's] case in its entirety." [[28]](#footnote-29)28 The Ninth Circuit held that because the Trust had appealed the grant of final summary judgment based on laches, which was an **[\*514]** appealable final order, the court had discretion to reconsider related interlocutory orders. [[29]](#footnote-30)29

The Ninth Circuit vacated the district court's order of partial summary judgment on the issue of when construction commenced, based in part on an EPA investigation concluding that Tucson Power had not begun construction prior to March 19, 1979. EPA did not publish the results of this investigation until after the district court issued its opinion. Nevertheless, the Ninth Circuit decided EPA's expertise on this issue may have persuaded the district court. The Ninth Circuit noted Tucson Power's argument that EPA had since withdrawn its objection, but stated it could not address that contention based on the record before it. Thus, the Ninth Circuit remanded the issue to the district court.

Finally, the Ninth Circuit addressed the Trust's appeal of the grant of final summary judgment to Tucson Power based on the doctrine of laches. The Trust argued that because laches cannot be invoked against the government, it should not be invoked to bar citizen enforcement actions that are substantially similar to governmental enforcement actions. The Ninth Circuit declined to address this specific issue, but vacated the order that the Trust's enforcement actions were barred by laches.

The Ninth Circuit emphasized that the doctrine of laches requires two components: undue delay and prejudice. The Ninth Circuit stated, "[a] lengthy delay, even if unexcused, that does not result in prejudice does not support a laches defense." [[30]](#footnote-31)30 The court then noted that either evidentiary or expectation prejudice will support a laches defense. First, the court looked at whether Tucson Power suffered evidentiary prejudice. This type of prejudice is based on the idea that it may be difficult to ensure justice when, due to the passage of time, evidence has been lost or witness recollections have faded. [[31]](#footnote-32)31 In this case, the Ninth Circuit held that Tucson Power had not suffered evidentiary prejudice because Tucson Power did not present evidence of any inability to defend itself against the Trust's action.

The Ninth Circuit next addressed the question of whether Tucson Power suffered expectation prejudice. The district court found that if the Trust succeeded, Tucson Power would have to replace its original pollution control equipment at the cost of three hundred million dollars. Moreover, because the Trust was seeking civil penalties that accrued daily, the delay in bringing suit served to inflate the potential award of damages. The Ninth Circuit held, however, that in regard to the cost of replacing the equipment, the delay in bringing suit benefited Tucson Power because it recovered a portion of its investment in the plant. The court pointed out that had the Trust "brought this action immediately after construction of each Unit was completed, and had the court held that Tucson [Power] was required to replace the equipment it had just installed, Tucson [Power's] loss would have been total." [[32]](#footnote-33)32

**[\*515]** Regarding Tucson Power's increased penalty liability, the Ninth Circuit noted that Tucson Power might have a statute of limitations defense. In addition, the court held that if the penalties were inequitable, laches was not the appropriate means of correcting that inequity. The Ninth Circuit noted that if the Trust prevailed on remand, the district court had discretion to "consider whether equity requires it to reduce [Tucson Power's] civil penalties." [[33]](#footnote-34)33

Ultimately, the Ninth Circuit denied Tucson Power's motion to strike the Trust's appeal of partial summary judgment as an unappealable interlocutory order. In addition, the Ninth Circuit vacated the district court's orders that awarded partial and final summary judgment to Tucson Power. Finally, the Ninth Circuit remanded with instructions to the district court to reconsider Tucson Power's motion for partial summary judgment on the merits based on all properly submitted evidence.

3. Vigil v. Leavitt, 381 F.3d 826 (9th Cir. 2004).

Several Phoenix residents, Martha Vigil, Andy Blackledge, and Robin Silver (Petitioners), petitioned for review of a final rule promulgated by the Environmental Protection Agency (EPA) implementing the Clean Air Act (CAA). [[34]](#footnote-35)34 The rule approved the State of Arizona's state implementation plan (SIP) for airborne particulate matter in the Phoenix area, and granted a five-year extension of the attainment deadline to 2006. On review, the Ninth Circuit held that EPA's concurrence with Arizona's rejection of reformulated diesel fuel - commonly known as CARB diesel - for use in Phoenix-area vehicles was arbitrary and capricious, and remanded this portion of EPA's decision for further consideration. The Ninth Circuit, however, affirmed EPA's approval of Arizona's general permit rule for agricultural emissions of airborne particulate matter. The Ninth Circuit also remanded EPA's decision to granting the five-year extension of the attainment deadline for further analysis in conjunction with consideration of the CARB diesel fuel issue.

The CAA authorizes EPA to establish national ambient air quality standards for various pollutants. [[35]](#footnote-36)35 EPA has identified airborne particulate matter with a diameter of ten micrometers or less, known as PM-10, as a regulated air pollutant. [[36]](#footnote-37)36 The CAA amendments designated non-attainment areas for PM-10 levels. [[37]](#footnote-38)37 State-prepared plans created for "moderate" non-attainment areas must include assurances that reasonably available control measures will be implemented and that the area will reach attainment by the end of 1994 for both twenty-four hour PM-10 standards and annual PM-10 standards. [[38]](#footnote-39)38 Areas not reaching attainment by this deadline were reclassified as serious non-attainment areas. [[39]](#footnote-40)39 State-prepared plans for serious non- **[\*516]** attainment areas had to implement not just reasonable, but also best available control measures (BACMs), [[40]](#footnote-41)40 and assure the area would reach attainment by the end of 2001. [[41]](#footnote-42)41 The amendments authorized an extension of the 2001 deadline under various conditions. Among these conditions was a finding that the state plan incorporated "the most stringent measures [MSMs] that are included in the implementation plan of any state or are achieved in practice in any state, and can be feasibly implemented in the area." [[42]](#footnote-43)42

This case is the Ninth Circuit's third concerning PM-10 standards in the Phoenix metropolitan area. [[43]](#footnote-44)43 Prior events included EPA's rejection of Arizona's first moderate area PM-10 state implementation plan in 1994, EPA's approval of Arizona's revised plan in 1995, and a Ninth Circuit decision overturning EPA's approval. Subsequently, in 1996, EPA determined that Arizona did not comply with the 1994 statutory deadline and thus reclassified the state as a serious PM-10 non-attainment area. Over the next six years EPA and Arizona worked on plans which culminated in EPA's 2002 final approval of Arizona's state implementation plan for the twenty-four hour PM-10 standards and annual PM-10 standards. EPA specifically found that Arizona's proposed standards met the BACM requirement and the MSM standard. EPA also granted Arizona's request to extend the deadline for attainment of these standards from 2001 to 2006.

The Petitioners filed for Ninth Circuit review of EPA's final approval. Specifically, they challenged EPA approval of: 1) Arizona's general permit rule for agricultural PM-10 emissions, arguing that the rule did not constitute either BACM or MSM; 2) Arizona's refusal to require use of CARB diesel fuels to control emissions, arguing again that the state did not implement either BACM or MSM; and 3) extension of the attainment deadline, which, they argued, constituted an abuse of discretion.

The CAA grants the courts of appeals jurisdiction to review EPA's approval of a state implementation plan. [[44]](#footnote-45)44 The CAA, however, does not specify a standard of review. The Ninth Circuit reviewed EPA's actions under the Administrative Procedure Act, [[45]](#footnote-46)45 specifically whether EPA's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[46]](#footnote-47)46

The court first considered the level of deference to be afforded EPA's decision. Congress gave EPA general rulemaking authority under the CAA, including the authority to promulgate such terms as "reasonably available **[\*517]** control measures," [[47]](#footnote-48)47 "best available control measures," [[48]](#footnote-49)48 and "most stringent measures." [[49]](#footnote-50)49 However, EPA has never formally adopted rules defining these terms. [[50]](#footnote-51)50 Instead, EPA provides only informal guidance in the form of "preliminary interpretations" that "do not bind the States and the public as a matter of law." [[51]](#footnote-52)51 Thus, Chevron's highly deferential standard, given to construction of an ambiguous statute adopted through formal rulemaking, was in this situation inappropriate. [[52]](#footnote-53)52 Instead, the court granted EPA's preliminary interpretations Skidmore deference, finding that the agency's interpretations are "entitled to respect." [[53]](#footnote-54)53 The Ninth Circuit noted its conclusions would have been the same under either standard of deference.

On the substantive issues, the Ninth Circuit first turned to the issue of Arizona's General Permit Rule for Agriculture. Petitioners objected to a provision that required each commercial farmer to implement only one best management practice (BMP) from each of three categories of such practices, thirty-four possible BMPs were spread among the three categories. Petitioners argued this requirement did not qualify as the BACM required for serious PM-10 non-attainment areas, reasoning that the state had determined all thirty-four BMPs to be feasible. Thus, requiring more than one BMP had to be better than the base requirement of one BMP per category.

The Ninth Circuit rejected Petitioners' argument, finding that Arizona's plan and EPA's approval were grounded on EPA's reasonable interpretation of the CAA. Arizona's decision, accepted by EPA, to require implementation of only one BMP per category was based on a cost-benefit analysis of many regional variables such as climate, soil, water availability, and proximity to urban centers. The analysis concluded that these variables, along with the costs associated with implementing multiple BMPs, did not allow imposition of uniform requirements on commercial farmers, but rather, suggested the flexible approach adopted in Arizona's plan. The Ninth Circuit concluded that EPA had reviewed Arizona's explanation with sufficient scrutiny and thus EPA's approval was not arbitrary or capricious.

Next, the Ninth Circuit reviewed EPA's determination that Arizona's General Permit Rule for Agriculture included "the most stringent measures that are included in the implementation plan of any state, or are achieved in practice in any state, and can be feasibly implemented in the area." [[54]](#footnote-55)54 The comparative inquiry into MSMs required two determinations: 1) whether any other regional plan contained more stringent requirements than the Arizona plan, and 2) if so, whether the more stringent requirements were **[\*518]** technologically and economically feasible to implement within Arizona. [[55]](#footnote-56)55 Petitioners asserted that the MSM standard was not met because Arizona's plan did not adopt measures similar to those adopted by California in the South Coast Air Quality Management District (South Coast). The two programs differed in that the Arizona plan required implementation of fewer BMPs than the South Coast plan, and the Arizona plan did not mandate cessation of tilling on high wind days. [[56]](#footnote-57)56 The Ninth Circuit noted that Arizona was bound by the CAA to adopt the South Coast standards only if they could "feasibly be implemented in the area." [[57]](#footnote-58)57 The Ninth Circuit upheld EPA's conclusion that various factors relating to the differences in topography, soil conditions, crops, irrigation methods, and wind conditions made implementation of the South Coast standards infeasible in Arizona.

The Ninth Circuit then reviewed Petitioners' challenge to Arizona's decision to reject the use of CARB diesel, a reformulated diesel fuel required for use in South Coast. Both the court and EPA decided that Arizona's plan properly treated diesel emissions as a significant source of pollutants, and adopted a number of programs that specifically addressed diesel emissions. Arizona, however, provided only one reason for rejection of CARB diesel: lack of information on whether an adequate supply existed for the Arizona market, and excessive fuel costs if supplies were short. Reviewing the plan, EPA did not address Arizona's concerns regarding the cost of CARB diesel, but approved the plan anyway as a BACM on the grounds that Arizona's plan was among the most stringent and extensive programs in the nation.

When considering Arizona's rejection of CARB diesel under the MSM standard, EPA determined that use of the fuel would only minimally reduce PM-10 emissions and "would not contribute to expeditious attainment of the 24-hour [PM-10] standard." [[58]](#footnote-59)58 Arizona, however, did not justify its rejection of CARB diesel with this argument, the rationale emanated entirely from EPA. In light of the fact that the EPA and Arizona rationales for rejection of CARB diesel were dissimilar, the Ninth Circuit found EPA's explanation of its reasoning inadequate, and, therefore, arbitrary and capricious. The court remanded the issue for EPA's further consideration as to whether Arizona's rejection was consistent with either the best available control measures or the most stringent measures.

Finally, the court reviewed Petitioners' claim that EPA abused its discretion in granting the five-year extension. EPA may grant an extension if the state satisfies the MSM standard, if attainment by the original deadline is impracticable, and if the state has complied with all implementation requirements and commitments. [[59]](#footnote-60)59 Petitioners argued the EPA's decision was impermissible for two reasons. First, Petitioners asserted that if all the previously suggested measures were put into effect, Arizona could attain **[\*519]** PM-10 standards. Second, Petitioners argued that Arizona's past failure to meet CAA standards and deadlines made the state ineligible for the extension.

The court had already determined that EPA acted arbitrarily in finding Arizona had achieved MSMs when it rejected the CARB diesel fuel requirements, but acted reasonably in finding Arizona's agricultural PM-10 standards consistent with the most stringent measures test. The Ninth Circuit went on to reject Petitioners' arguments that Arizona was ineligible for an extension. Specifically, the court found Petitioners' second assertion to be an "unreasonable" reading of the law, because a state that had met the previous requirements would not need an extension. [[60]](#footnote-61)60 Nevertheless, the court remanded EPA's grant of the extension to 2006 for further consideration together with the CARB diesel fuel issue and its impact on the MSM determination.

In summary, the Ninth Circuit remanded the CARB diesel fuel rejection for further analysis by EPA. The court also remanded the issue of the five-year extension, contingent upon the sufficient explanation of the EPA's rationale for rejecting a CARB diesel requirement. Finally, the court upheld EPA's decision to approve Arizona's general permit rule for agricultural PM-10 standards.

B. Clean Water Act

1. National Wildlife Federation v. United States Army Corps of Engineers, 384 F.3d 1163 (9th Cir. 2004).

The National Wildlife Federation and other environmental organizations (collectively NWF) sued the Army Corps of Engineers (Corps),alleging violations of the Administrative Procedure Act (APA). [[61]](#footnote-62)61 NWF argued that the Corps' Record of Consultation and Statement of Decision (ROD) regarding the operation of four dams on the lower Snake River failed to address its obligations to comply with Washington State water quality standards (WQSs) for temperature as required by the Clean Water Act (CWA). [[62]](#footnote-63)62 The Ninth Circuit affirmed the district court and held that the Corps had not acted arbitrarily and capriciously.

Washington designated the lower Snake River as suitable for trout and salmon spawning, rearing, and migration. To ensure the suitability of the lower Snake River for those purposes, Washington set a temperature standard that prohibits human activities from causing temperatures to exceed twenty degrees centigrade unless the background temperature already exceeds twenty degrees. In that case, human activities are permitted to increase the temperature by no more than three tenths of one degree centigrade. Beginning in 1994, the Washington Department of Fish and Wildlife (WDFW) expressed concern that the dams on the lower Snake River **[\*520]** were causing frequent violations of the state temperature standard. The National Marine Fisheries Service (NMFS) issued two Biological Opinions (BiOps), in 1995 and 1998. Both BiOps concluded that modifications of the Columbia River Power System, including the four dams at issue in this lawsuit, were needed to ensure the survival of endangered salmon stocks in the Snake River. The Corps adopted the recommendations from both BiOps in its 1995 and 1998 RODs.

Concerned that the RODs did not sufficiently deal with the issue of complying with Washington's water temperature standards, NWF filed suit in 1999, alleging the RODs were arbitrary and capricious. The district court held that the Corps had failed to adequately address its obligation to comply with the CWA and remanded to the Corps for further consideration. The district court also allowed the Nez Perce Tribe to intervene on behalf of NWF, and the Potlatch Corporation and several other industry groups to intervene on behalf of the Corps. In May 2001, the Corps released another ROD, which adopted the recommendations from a 2000 NMFS BiOp. This ROD stated that the Corps had no reliable information upon which to conclude that structural modifications would significantly decrease exceedances of the state WQSs for temperature. The Corps therefore concluded that its operation of the dams had no significant impact on temperatures. NWF filed an amended complaint challenging the 2001 ROD. The district court held that the ROD properly evaluated the obligation of the Corps to comply with state WQSs and that its measures to comply with the Endangered Species Act (ESA) [[63]](#footnote-64)63 were consistent with its obligations to mitigate temperature exceedances under the CWA. Thus, the district court granted summary judgment for the Corps, and NWF appealed.

The Ninth Circuit began by noting that a district court's grant of summary judgment is reviewed de novo. It found the district court had erred by relying heavily on the Corps's compliance with the ESA measures recommended in the 2000 NMFS BiOp. The Ninth Circuit found that compliance with those measures did not ensure that the Corps had complied with the CWA. Therefore, the court addressed NWF's arguments in turn, beginning with the issue of whether the Corps's ROD was arbitrary and capricious in determining that there was nothing more the Corps could do to reduce water temperatures.

NWF presented two main arguments. First, NWF argued the ROD was arbitrary and capricious when it concluded that there were no additional actions the Corps could take to reduce water temperatures in the lower Snake River. Second, NWF argued that the ROD was arbitrary and capricious in concluding the Corps's operation of the dams did not cause water temperatures to exceed Washington State WQSs.

NWF first asserted that the 1995 Columbia River System Operation Review final environmental impact statement (1995 EIS) found that a "natural river operation" method would have caused fewer temperature exceedances than current operational practices. Thus, according to NWF, the Corps acted arbitrarily and capriciously by failing to adopt this method **[\*521]** in the 2001 ROD. The Ninth Circuit rejected NWF's assertions on several grounds. First, the court pointed out that the 1995 EIS recommended a combination of management alternatives instead of the strictly natural river operation method. The court noted that the EIS recognized that the natural river operation method would increase sediment discharge into the lower Snake River, impact other water users, and disturb fish populations existing in the reservoirs. Second, the court noted that the 1995 EIS raised concerns about compliance with existing permits issued under the national pollutant discharge elimination system (NPDES) permitting program if the natural river operation method were adopted. The 1995 EIS also stated that the natural river operation method would not completely cure the problem of temperature exceedances in the lower Snake River.

Finally, the court noted that the major structural modifications required to implement the natural river operation method may not be viable given the original Congressional purpose of constructing and operating the dams for power generation. Because the 1995 EIS itself did not recommend full implementation of the natural river operation method, the Ninth Circuit concluded that the Corps's rejection of that method was not arbitrary or capricious. The Ninth Circuit buttressed this conclusion by pointing out that agency decisions that are primarily scientific or technical, like the operation of the Snake River dams, must be reviewed in a "highly deferential" manner. [[64]](#footnote-65)64

NWF next asserted that a March 1999 e-mail sent to a CWA compliance workgroup, consisting of staff from several federal agencies indicated the Corps could have taken additional steps to decrease water temperatures in the lower Snake River. The Ninth Circuit noted that the email was an informal, draft communication regarding several potential operational changes to reduce temperature at dams within the Federal Columbia River Power System, which itself highlighted that full compliance with temperature standards was unlikely. The Ninth Circuit held that because this was an informal document never adopted by the Corps, it did not support NWF's assertion that the 2001 ROD was arbitrary and capricious for stating that there were no further steps the Corps could take to reduce water temperatures in the lower Snake River.

NWF's second major argument was that the 2001 ROD was arbitrary and capricious because of its conclusion that the Corps's operation of the lower Snake River dams did not cause temperature exceedances. The Ninth Circuit, examining the administrative record, determined that the most comprehensive study regarding water temperatures and dam operations at the time the Corps issued its 2001 ROD was the 1999 "Lower Snake River Juvenile Salmon Migration Feasibility Study" EIS (1999 EIS). The 1999 EIS used a model created by the Environmental Protection Agency (EPA) as well as two models created by private contractors to examine the effects of dam operation on temperatures in the lower Snake River. Two of the three **[\*522]** models indicated that dam breaching would reduce temperature exceedances.

NWF argued that these studies, particularly the EPA study, conclusively established that the Corps's operation of the dams caused temperature exceedances. The Ninth Circuit rejected NWF's argument, noting that the EPA study compared the temperature with the dams in place to the temperature if the dams were breached and concluded that the study did not address the issue of the Corps's operation of the dams. Indeed, the Ninth Circuit held that the EPA study supported the Corps's argument that the existence of the dams caused the temperature exceedances, not the operation of the dams.

The Ninth Circuit emphasized that in reviewing this complex, scientific analysis, the court must defer to the opinions of agency experts so long as they are reasonable. In holding the identification of the cause of the excessive temperatures was "a problem requiring complex scientific analysis," [[65]](#footnote-66)65 the court accorded substantial deference to the Corps. Thus, the court concluded that the Corps's determination was not arbitrary or capricious.

Finally, NWF argued that the Corps's attempt to distinguish between its operation of the dams and the existence of the dams was arbitrary and capricious. NWF argued that because there was no legal distinction between exceedances caused by the operation of the dams and exceedances caused by the existence of the dams, the Corps was violating CWA requirements. The Ninth Circuit rejected this argument on the grounds that the CWA must be construed in a way that does not conflict with the Rivers and Harbors Act, [[66]](#footnote-67)66 which authorizes the building and operation of federal dams. The Ninth Circuit cited Radzanower v. Touche Ross & Company [[67]](#footnote-68)67 for the maxim that "when two statutes are capable of coexistence, it is the duty of the court … to regard each as effective." [[68]](#footnote-69)68 The Ninth Circuit held that both statutes can only coexist if it is the discretionary operation and not the mere existence of the dams that mandates compliance with state WQSs under the CWA. Thus, the Ninth Circuit refused, in essence, to interpret the CWA as requiring the removal of dams constructed sixty years earlier pursuant to the Rivers and Harbors Act.

By determining that the existence of the dams on the lower Snake River, not the Corps's operations of those dams, caused exceedances of Washington's WQSs, the Ninth Circuit concluded that the 2001 ROD was not arbitrary and capricious. In addition, the Ninth Circuit concluded that the 2001 ROD was not arbitrary or capricious or contrary to law when it determined that there were no additional actions the Corps could take to reduce water temperatures in the lower Snake River. Thus, the Ninth Circuit affirmed the district court's judgment.

In dissent, Judge McKeown argued that the majority sidestepped the central issue by failing to require the Corps to produce evidence that no **[\*523]** viable operational alternatives would avoid temperature exceedances in the lower Snake River. He noted that almost all of the data in the administrative record presupposed either removing the dams completely or continuing to operate the dams as they were currently operated. Judge McKeown argued that the Corps completely bypassed the issue of whether or not it could change its operations to decrease violations of state WQSs. Furthermore, he pointed out that the evidence the Corps relied on for its decisions focused on the ESA, not on CWA compliance. Ultimately, Judge McKeown stated that by allowing the Corps to rest on insufficient evidence, the majority subverted the APA by failing to require a rational connection between the agency decision and the administrative record.

In essence, Judge McKeown thought the majority's approach placed the burden on NWF to prove that the Corps could reduce temperature exceedances despite the fact that the APA requires agencies to consider the evidence and proceed rationally. To satisfy the APA, he would have required the Corps to show that its operation of the dams did not cause temperature exceedances. According to Judge McKeown, there was no evidence to support that conclusion, and, therefore, the 2001 ROD did not satisfy the requirements of the APA.

Finally, Judge McKeown emphasized that the studies relied on by the Corps related primarily to its ESA obligations and failed to address independent obligations under the CWA. He argued that insufficient discussion of CWA obligations and possible operational alternatives to reduce temperature exceedances rendered the Corps' decision arbitrary and capricious.

2. Save Our Sonoran v. Flowers, 381 F.3d 905 (9th Cir. 2004).

Save Our Sonoran Inc. (SOS) challenged a section 404 permit [[69]](#footnote-70)69 issued by the United States Army Corps of Engineers (Corps) under the Clean Water Act (CWA), [[70]](#footnote-71)70 and an Environmental Assessment and Finding of No Significant Impact by the Corps pursuant to the National Environmental Policy Act (NEPA). [[71]](#footnote-72)71 The permit allowed Arizona developer 56th and Lone Mountain LLC (Lone Mountain) to fill 7.5 acres of natural waterways as part of the proposed development of a 608-acre desert property with a gated residential community consisting of 794 homes. The district court issued a preliminary injunction ordering cessation of all development on the site, and required a $ 50,000 security bond from SOS. The Ninth Circuit held SOS had standing to bring the action, the district court had acted within its discretion in issuing the preliminary injunction, and the district court acted within its discretion when setting the amount of the security bond.

Lone Mountain first argued that SOS lacked standing to bring this action. The Ninth Circuit reviewed the three factors necessary to allow an organization to sue on behalf of its members: 1) the individual members would have standing to sue, 2) the organization's purpose relates to the **[\*524]** interests being vindicated, and 3) the claims asserted do not require the participation of individual members. [[72]](#footnote-73)72 Lone Mountain only contested one factor: whether any of SOS's individual members had standing to sue. The Ninth Circuit held that affidavits and evidence presented by SOS, showing that its members both owned land in close proximity to the proposed development and would have their wildlife-viewing opportunities impaired, sufficiently established individual standing. The Ninth Circuit further supported SOS's standing by noting that one of Lone Mountain's development objectives was to preserve wildlife-viewing opportunities for project residents and the surrounding community.

The Ninth Circuit next reviewed the district court's grant of a preliminary injunction, which is subject only to limited review and to be reversed only if it "abused its discretion or based its decision on an erroneous legal standard or on a clearly erroneous finding of fact." [[73]](#footnote-74)73 Preliminary injunctions are governed by a multi-factor test which at its essence is "a sliding scale in which the required degree of irreparable harm increases as the possibility of success [on the merits] decreases." [[74]](#footnote-75)74 The Ninth Circuit upheld the district court's determination of SOS's chances of success on the merits and the balancing of hardships between the parties as warranting issuance of the injunction.

The district court made findings of fact that the desert washes ran through the property "the way capillaries run through tissue" with the upland areas "surrounded by washes on every side." [[75]](#footnote-76)75 However, the Corps had decided to limit its jurisdiction and only required NEPA analysis on sixty-six specific sites totaling 7.5 acres where the developer proposed fill and disturbance to a specific water course. The limited Corps action raised questions with the district court as to whether the Corps had followed its own regulations, which state that the Corps must determine impacts not only on jurisdictional waters, but also on "those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant federal review." [[76]](#footnote-77)76 The Corps own environmental assessment concluded that a denial of a permit would prevent the development from going forward in any manner similar to the developer's proposal. In reviewing the district court's findings, the Ninth Circuit agreed that SOS had raised "serious issues that go to the merits of the case" and upheld the district court's determination that an injunction was appropriate. [[77]](#footnote-78)77 The Ninth Circuit additionally noted that two other federal agencies, the United States Environmental Protection Agency and the United States Fish and Wildlife Service, had commented in opposition to the **[\*525]** Corps's issuance of the permit, thus underscoring the significance of these factual disputes on the merits.

Turning to the hardship analysis associated with the preliminary injunction, the Ninth Circuit also found the district court had acted within the scope of its discretion. The court noted that environmental injury such as the disturbance of the desert "can seldom be adequately remedied by money damages and is often permanent or at least of long duration." [[78]](#footnote-79)78 The district court had concluded that, were SOS to prevail on the merits of its claim, the Corps expanded assessment would have a dramatic effect on the nature of the development and thus on the surrounding environment. The environment would be harmed, perhaps permanently, by allowing development to proceed. In approving the district court's balancing of the potential harm to the parties, the Ninth Circuit stated that "this is a classic, and quite proper, examination of the relative hardships in an environmental case." [[79]](#footnote-80)79

Finally, the Ninth Circuit upheld the district court's requirement that SOS provide a $ 50,000 security bond pursuant to Federal Rule of Civil Procedure 65(c). [[80]](#footnote-81)80 Both SOS and Lone Mountain appealed the decision, with SOS arguing that the deposit was too high, and Lone Mountain asserting that it was not enough. The Ninth Circuit noted that a "district court is in a far better position to determine the amount and security required under [Federal] Rule [of Civil Procedure] 65," [[81]](#footnote-82)81 and applied the "abuse of discretion" standard to determine its appropriateness. [[82]](#footnote-83)82 The Ninth Circuit held that the district court's bond was not so high as to thwart SOS's action, and, furthermore, noted that SOS had not provided evidence that the proposed bond constituted an undue hardship. In answer to Lone Mountain's assertion that the bond was too low, the Ninth Circuit noted that Lone Mountain erroneously relied on Sylvester v. United States Army Corps of Engineers [[83]](#footnote-84)83 for the proposition that district courts must set bonds that approximate actual damages. To the contrary, Sylvester did not address the appealability of the bonding order because its decision only required the district court to reconsider the amount of the bond on remand. [[84]](#footnote-85)84 The Ninth Circuit pointed out that Lone Mountain's argument also contradicted the "long-standing precedent that requiring nominal bonds is perfectly proper for public interest litigation." [[85]](#footnote-86)85 Thus, the Ninth Circuit also rejected the contention that $ 50,000 was insufficient security.

**[\*526]** In summary, the Ninth Circuit upheld the district court's decision to grant SOS's motion for a preliminary injunction because its claim had a good chance of success on the merits and long-lasting environmental harm would result if development continued during litigation. The Ninth Circuit also upheld the district court's decision to require a $ 50,000 bond from SOS, and found that SOS had standing to appeal the original Corps decision.

3. WaterKeepers Northern California v. AG Industrial Manufacturing Inc., 375 F.3d 913 (9th Cir. 2004), infra Part V.A.

C. National Environmental Policy Act

1. Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004).

Multiple animal advocacy groups and several citizens challenged the federal government's approval of a whaling quota for the Makah Indian Tribe (the Tribe), claiming violations of both the National Environmental Policy Act (NEPA) [[86]](#footnote-87)86 and the Marine Mammal Protection Act (MMPA). [[87]](#footnote-88)87 The Tribe intervened as a defendant in the district court. The Ninth Circuit held that NEPA required the government to prepare an environmental impact statement (EIS) before approving a quota and that the Tribe was not exempt from MMPA requirements.

The gray whale, a species previously listed as endangered, was removed from the list in 1994 after its population rebounded from near extinction. [[88]](#footnote-89)88 Migrating whales pass through waters near the Tribe's territory on the Olympic Peninsula of Washington State. Non-migratory whales are also in the region, although the parties disagreed on their number and habits. In exchange for ceding much of its land, the Tribe secured whaling rights in its 1855 Treaty with the United States, [[89]](#footnote-90)89 but discontinued whaling in the 1920s. In 1996, however, the Tribe entered into an agreement with the federal government allowing it to begin harvesting whales again based on quotas established by the International Whaling Commission (IWC) and the National Marine and Fisheries Service (NMFS). Litigation ensued from a group of citizens and animal conservation groups, which resulted in a new environmental assessment (EA) by the government. During the same period, the Tribe members began hunting, killing one whale. The plaintiffs filed the instant action, and the district court granted summary judgment to the defendants. The plaintiffs appealed the summary judgment order to the Ninth Circuit.

The Ninth Circuit reviewed the case under the Administrative Procedure Act (APA), [[90]](#footnote-91)90 which allows an agency decision to be overturned **[\*527]** only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[91]](#footnote-92)91 The court first examined the alleged NEPA violation and then turned to the alleged MMPA violation.

NEPA requires federal agencies to prepare a detailed EIS if an agency action "significantly [affects] the quality of the human environment." [[92]](#footnote-93)92 According to Council on Environmental Quality regulations, required factors for agencies to use in deciding whether or not an EIS is necessary address both the "context" and the "intensity" of the action. Context includes "society as a whole … , the affected region, the affected interests, and the locality." [[93]](#footnote-94)93 Intensity of environmental impact is subject to a number of considerations, including the three focused on in the plaintiffs' arguments: impact on public safety, controversy and uncertainty, and precedential effect. [[94]](#footnote-95)94 In order to prevail, the plaintiffs had to show there were "substantial questions whether a project may have a significant effect" on the environment. [[95]](#footnote-96)95

To support their assertion that the proposed whaling posed a danger to public safety, the plaintiffs argued that human safety was endangered by the Tribe's use of high-powered, long-range rifles as well as the possibility of wounded whales harming people and boats in the vicinity. The plaintiffs took issue with the government's reliance on an expert hired by the Tribe to discount such risks in the EA. The Ninth Circuit, however, had previously held that "the government may rely on experts hired by other parties so long as the agency objectively evaluates the qualifications and analysis of the expert." [[96]](#footnote-97)96 In the instant case, the Ninth Circuit held that "the agencies' finding that public safety is not endangered is neither arbitrary nor capricious," and that the issue of public safety alone would not be enough to require federal defendants to prepare an EIS. [[97]](#footnote-98)97

To satisfy the controversy and uncertainty factor, the possible environmental effects of the Tribe's proposed hunt needed to be "likely to be highly controversial" [[98]](#footnote-99)98 or "highly uncertain or involve unique or unknown risks." [[99]](#footnote-100)99 While parties agreed that the Tribe's proposed hunt would have little effect on the larger California gray whale population, at issue was the possible effect such a hunt would have on the local whale population. The Ninth Circuit stated that "the answer to this question … is sufficiently uncertain and controversial to require the full EIS protocol[,]" and that substantial questions existed as to whether killing the number of whales **[\*528]** allowed by the quota "could have a significant impact on the environment." [[100]](#footnote-101)100

Federal defendants attempted to downplay the impact of studies expressing concern over the impact of the Tribe's whaling on the local whale population, first by claiming that the summer (non-migratory) whale population was not genetically different from other California gray whales migrating from Mexico to the Arctic. The Ninth Circuit, however, held that this made no difference in determining whether the proposed hunt would have a significant environmental impact at a local level. The government also implied that whales from the larger Pacific Coast Feeding Aggregation would replace those killed by the Tribe, keeping the local population constant. The Ninth Circuit held that scientific uncertainty as to the likelihood of such replacement left "substantial questions" regarding the impact whaling would have on the local population, "because the EA does not adequately address the local impact of the Tribe's hunt, an EIS is required." [[101]](#footnote-102)101

Precedential effect occurs when a single approved action leads to ensuing actions that may have a cumulative effect on the environment. [[102]](#footnote-103)102 The plaintiffs claimed that granting the Tribe's quota would have set a precedent for future IWC quotas. The Ninth Circuit noted that, due to the ambiguity of the IWC's quota language limiting aboriginal whaling to groups with "recognized" subsistence needs, other countries could "recognize" such a need and approve aboriginal whaling. This, the court held, could lead to an increase in whaling worldwide and have "a significant impact on the environment." [[103]](#footnote-104)103 The court concluded that the possibility of broader use of the aboriginal subsistence exception by other IWC countries warranted the preparation of an EIS.

In addition to their NEPA arguments, the plaintiffs claimed that the federal defendants violated the MMPA, "which prohibits the taking of marine mammals absent a permit or waiver." [[104]](#footnote-105)104 The Tribe did not apply for a permit or waiver, and defendants argued that the MMPA did not apply to the Tribe because of an exemption for the taking of marine mammals governed by international treaties, or, alternatively, because the MMPA did not apply to the Tribe's whaling rights under its treaty with the United States.

The defendants argued that the Tribe's whaling fell under an exemption in the MMPA for marine mammal hunting "expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before [1972] or by any statute implementing any such treaty, convention, or agreement." [[105]](#footnote-106)105 The defendants maintained the 1997 IWC quota approval related back to 1946, when the United States signed the treaty empowering the IWC's regulation of **[\*529]** whaling, [[106]](#footnote-107)106 and the IWC's practice of omitting individual tribe names from its quota schedules prevented the Tribe from being listed in the 1997 schedule.

The Ninth Circuit detailed four inherent problems in applying this exemption to the Tribe's whale hunt: 1) Congress did not intend to exempt subsequent amendments to treaties from the MMPA, and one section of the MMPA required existing treaties to be amended to make them consistent with the MMPA; [[107]](#footnote-108)107 2) the 1997 Schedule did not specifically mention a quota for the Tribe, and "the MMPA unambiguously requires express approval for [the exemption] to apply"; [[108]](#footnote-109)108 3) the IWC schedule provided quotas for aboriginal groups with "recognized" subsistence needs, but it remained unclear whether such needs were to be recognized by the United States or the IWC; and 4) the MMPA exemption did not apply through a statute implementing an international treaty because there was no such statute expressly mentioning the Tribe. As a result, the Ninth Circuit held that the MMPA exemption did not apply to the Tribe, and the federal defendants' statutory interpretation did not merit deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. [[109]](#footnote-110)109

To determine whether it was necessary to apply the MMPA to the Tribe to achieve the statute's conservation purpose, the Ninth Circuit applied its own three-part test. According to the court's Fryberg test, the MMPA would only regulate the Tribe's treaty whaling rights if: 1) the United States has jurisdiction where the whaling occurs, 2) the MMPA applies in a non-discriminatory manner to treaty and non-treaty persons alike, and 3) the application of the statute to regulate treaty rights is necessary to achieve its conservation purpose. [[110]](#footnote-111)110

The Ninth Circuit determined that the first two prongs of the Fryberg test were clearly met: the MMPA applied to all people under United States jurisdiction [[111]](#footnote-112)111 and to all waters within 200 nautical miles of the coastal boundaries of the United States, [[112]](#footnote-113)112 and the MMPA was non-discriminatory because its moratorium on taking marine mammals applied equally to the Tribe and other persons. For the third prong, the necessity of applying the MMPA to the Tribe to achieve its conservation purpose, the Ninth Circuit examined the purposes of the MMPA: to keep marine mammal species at an "optimum sustainable population" [[113]](#footnote-114)113 and as a "significant functioning element in the ecosystem." [[114]](#footnote-115)114 The court held that, if the Tribe's whaling was not subject to MMPA requirements, there would be no way to ensure that the whaling practices would maintain the gray whales' role in the ecosystem. While defendants argued that the Tribe's treaty is the only treaty between the United States and an Indian tribe expressly granting whaling rights, the **[\*530]** court speculated that subordinating the MMPA to the Tribe's treaty rights could cause other tribes to claim similar rights under treaties guaranteeing "hunting and fishing" rights.

The Ninth Circuit also rejected defendants' argument that the conservation prong of the Fryberg test was only needed when the preservation of a species is at issue, noting that the MMPA had a conservation purpose broader than species preservation. Finally, the court examined the treaty language itself, which allowed the Tribe to pursue fishing and whaling "in common with all citizens of the United States." [[115]](#footnote-116)115 Such language, the court reasoned, gave the Tribe the right to kill its "fair share" of whales, which "must be considered in light of the MMPA through its permit or waiver process." [[116]](#footnote-117)116

In conclusion, the Ninth Circuit held that the government's EA was inadequate, that an EIS was required, that neither the federal government nor the Tribe satisfied the MMPA's permit or waiver requirements, and that any further whaling would require a permit or waiver.

2. Cold Mountain v. Garber, 375 F.3d 884 (9th Cir. 2004), infra Part II.A.

3. Ground Zero Center for Non-Violent Action v. United States Department of the Navy, 383 F.3d 1082 (9th Cir. 2004).

The Ground Zero Center for Non-Violent Action (Ground Zero) brought an action challenging the United States Department of the Navy's (Navy) Trident II missile upgrade program (backfit program) at Bangor Submarine Base (Bangor) along Hood Canal in Washington State. [[117]](#footnote-118)117 Ground Zero asserted that the Navy's backfit program violated both the National Environmental Policy Act (NEPA) [[118]](#footnote-119)118 and the Endangered Species Act (ESA). [[119]](#footnote-120)119 After the district court granted summary judgment on all claims, the Ninth Circuit, on appeal, affirmed the district court's judgment. The Ninth Circuit held that NEPA does not apply to presidential directives such as President Clinton's decision to upgrade to Trident II missiles at Bangor. The court also held that the possibility of a catastrophic explosion of the missiles was too remote to trigger an examination of the impacts of an explosion under either NEPA or the ESA.

The Trident II missile is the sixth generation of nuclear weapons arming the Navy's submarine fleet. Bangor was selected in the early 1970s to be one of two home ports for submarines armed with the Trident I missile, predecessor to Trident II. The Navy prepared an Environmental Impact Statement (EIS) in 1974 for the project, which included statements that Bangor could be upgraded to accommodate conversion to a more advanced missile system at a future date. Because the specifications for the final **[\*531]** backfit program developed in 1989 varied from the conversion assumptions in the 1974 EIS, the Navy prepared an Environmental Assessment (EA) reviewing the revised project and issued a Finding of No Significant Impact (FONSI).

In 1994, President Clinton issued a Presidential Decision Directive which scaled back the size of the Trident II program and directed the reduced program to proceed at Bangor. After issuance of the President's directive, the Navy reexamined the prior environmental documents and concluded that they provided satisfactory analysis of the scaled-back program without the need for additional review under NEPA. In addition, after the National Marine Fisheries Service (NMFS) listed two species of salmon in Hood Canal and Puget Sound as threatened in 1999, the Navy prepared a series of Biological Assessments which concluded that the backfit program would have no adverse impact on these species.

Ground Zero filed suit in 2001, alleging violations of NEPA and the ESA, and seeking injunctive relief against the backfit program. The district court granted summary judgment to the Navy on all claims, and Ground Zero appealed to the Ninth Circuit. Ground Zero's appeal focused solely on the potential for an accidental explosion of a Trident II missile at Bangor, and the Navy's failure to address this issue in its environmental review.

The Ninth Circuit reviewed the district court's grant of summary judgment de novo, to determine whether, viewing the evidence in the light most favorable to Ground Zero, there were any genuine issues of material fact, and whether the district court correctly applied substantive law. [[120]](#footnote-121)120 The court reviewed the Navy's decision-making to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[121]](#footnote-122)121

In examining the NEPA issues, the Ninth Circuit reviewed Ground Zero's allegations that the Navy failed to consider the significant environmental impacts which would follow from an explosion of a Trident II or other missile at Bangor. The court determined, however, that the decision to deploy Trident II missiles at Bangor was made by President Clinton, not the Navy. The court held that because NEPA applies to "all agencies of the Federal Government," [[122]](#footnote-123)122 and because the President is not included in NEPA's definition of a "federal agency," [[123]](#footnote-124)123 NEPA did not apply to a Presidential Decision Directive. The Ninth Circuit was not persuaded by Ground Zero's argument that the backfit program was originally devised by the Navy, not the President, noting that the program did not go forward until "the President made a decision as Commander in Chief to site the Trident II missile arsenal at Bangor, whatever had been recommended by the Navy … ." [[124]](#footnote-125)124

**[\*532]** Despite the determination that NEPA did not apply to President Clinton's directive implementing the Trident II backfit program, the Ninth Circuit held that the Navy maintained sufficient discretion over specific operations and facilities modification issues to warrant NEPA analysis. Ground Zero, however, had focused its arguments on accidental missile explosions. The court rejected Ground Zero's assertions that the Navy did not adequately consider the risks of an accidental explosion. The Navy's expert analysis estimated the risk of an accident leading to an explosion at between one in 100 million and one in one trillion. [[125]](#footnote-126)125 The court noted that relevant regulations promulgated by the Council on Environmental Quality (CEQ) require only that "federal agencies must examine the "reasonably foreseeable' environmental effects of their proposed actions when conducting environmental review." [[126]](#footnote-127)126 The Ninth Circuit held that the probability of explosion was "infinitesimal, and such remote possibilities do not in law require environmental evaluation." [[127]](#footnote-128)127

The Ninth Circuit rejected all of Ground Zero's NEPA challenges to the Navy's analysis of explosion probabilities. First, the court discounted Ground Zero's presentation of expert testimony disputing the Navy's risk calculations, noting that "agencies are normally entitled to rely upon the reasonable views of their experts over the views of other experts." [[128]](#footnote-129)128 The court also held that the Navy's planning for catastrophic explosions in its base design under Department of Defense (DOD) regulations did not mandate NEPA analysis of the risk of explosions, since the DOD regulations required a higher level of risk assessment than NEPA. [[129]](#footnote-130)129 Finally, the Ninth Circuit rejected Ground Zero's assertion that the CEQ regulations required the Navy to assess "impacts with catastrophic consequences, even if their probability is low," where the Navy's information on such consequences was incomplete or unavailable. [[130]](#footnote-131)130 The court concluded that the Navy's study provided the necessary information to make a concrete risk determination.

The Ninth Circuit went on to reject Ground Zero's claim that the Navy's actions violated the ESA. Ground Zero asserted that the Navy was required to consult with NMFS regarding potential jeopardy to the Hood Canal and Puget Sound salmon species listed as threatened under the ESA. Because a Presidential directive authorized the backfit program, the Ninth Circuit determined that the Navy had no discretionary control over the project's authorization, and "where there is no agency discretion to act, the ESA does not apply." [[131]](#footnote-132)131 Mirroring its decision on Ground Zero's NEPA claims centering on the risk of an accidental explosion of a Trident II missile, the court held that the Navy was not required to consult with NMFS regarding the minuscule risk of such an explosion. Thus the Ninth Circuit affirmed **[\*533]** summary judgment in favor of the Navy on both the NEPA and the ESA claims.

4. High Sierra Hikers Association v. Blackwell, 390 F.3d 630 (9th Cir. 2004), infra Part II.B.

5. Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989 (9th Cir. 2004).

The Klamath-Siskiyou Wildlands Center (KS-Wild) challenged two timber sales, proposed by the Bureau of Land Management (BLM) in the Cascade Mountains of Southern Oregon, under the National Environmental Policy Act (NEPA). [[132]](#footnote-133)132 KS-Wild asserted that BLM's Environmental Assessment (EA) of each sale failed to address cumulative impacts, and that all four sales within the South Fork Little Butte Creek (SFLBC) watershed should have been discussed in a single NEPA document. The district court granted summary judgment to the BLM, and KS-Wild appealed. The Ninth Circuit reversed the district court's decision on the issue of cumulative impacts, but determined that BLM was not required to prepare a single NEPA document for all four sales within the SFLBC watershed.

In 1998, BLM began planning a conservation and logging project on the entire Little Butte Creek watershed. In 1999, BLM developed a "single silvicultural prescription" for the SFLBC watershed. [[133]](#footnote-134)133 Originally conceived as a single project, BLM split it into four separate, but adjacent, timber-sale projects scheduled for harvest over a four-year period. BLM decided to prepare separate EAs for each project, and went forward with preparation of the first two - for the Indian Soda and Conde Shell projects. Both EAs found no environmental impacts arising from the sales, and as a result BLM issued two Findings of No Significant Impact (FONSI). KS-Wild then filed suit with the district court, which entered summary judgment for BLM. After KS-Wild filed an appeal with the Ninth Circuit, the district court entered an injunction prohibiting timber harvests pending resolution of the appeal.

On appeal, the Ninth Circuit reviewed BLM's actions de novo to determine if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[134]](#footnote-135)134 The court's function was to determine whether BLM had taken the requisite "hard look" at the potential environmental consequences of the proposed action. [[135]](#footnote-136)135 A reviewing court must subject an agency's actions under NEPA to "careful judicial scrutiny," [[136]](#footnote-137)136 but it must not "substitute its judgment for that of the agency." [[137]](#footnote-138)137

KS-Wild's first challenge to the adequacy of BLM's EAs concerned its alleged failure to properly consider cumulative impacts. A cumulative **[\*534]** impact is "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." [[138]](#footnote-139)138 The Ninth Circuit determined the required analysis must include "some quantified or detailed information" unless the agency can provide "justification regarding why more definitive information could not be provided." [[139]](#footnote-140)139

Measuring the BLM EAs' cumulative effects analysis by this standard, the Ninth Circuit determined that the analysis was inadequate because the cumulative effects sections did not provide enough information. Noting that the cumulative impact sections of each EA were virtually identical, the court took a detailed look at the Indian Soda EA as an illustration. The Ninth Circuit found that the cumulative effects analysis in this EA began with a three page table on the Indian Soda project area impacts alone, and was followed by another table with nothing but conclusory statements as to impacts. The court determined the document provided no data by which to justify the conclusions, nor a statement as to why objective data might be unavailable. The Ninth Circuit thus concluded that the analysis "did not satisfy the admonition that 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." [[140]](#footnote-141)140

Reviewing the section of the report titled "Future Foreseeable Actions," the Ninth Circuit found that it contained only a tabulated list of five future area projects and a calculation of potential harvested acres. [[141]](#footnote-142)141 This section contained no description of "the actual environmental effects that can be expected from logging these acres." [[142]](#footnote-143)142 The court was baffled by the EA's comparison of road and fence construction on the Indian Soda site with a site that was not in the SFLBC watershed, while providing no comparison to other logging sites within the watershed. The Ninth Circuit was also unimpressed with the table at the end of the future foreseeable actions section, which contained generalized conclusory analysis, with no specific data or explanations to why such data was unavailable. In addition, this table contained contradictory information stating that, while there would not be effects for a range of environmental factors, half of these factors would in fact be impacted unless "avoided by project design." [[143]](#footnote-144)143 But the court found no information in the EA on the project design measures necessary to avoid these impacts. The Ninth Circuit concluded that this section of the EA included "general statements about possible effects and some risk … insufficient to constitute a hard look." [[144]](#footnote-145)144

The district court found that the appendix of the EA included a cumulative impact analysis. However, the Ninth Circuit determined that the **[\*535]** appendix contained only a boilerplate description of canopy closure calculations, identical in both the Indian Soda and Conde Shell EAs. This description was followed by a section titled "Aquatic Conservation Strategy Objectives" which discussed only the effects of the project at issue, with no cumulative effects analysis. [[145]](#footnote-146)145 The court determined that the appendix contained no useful information about cumulative impacts.

In oral arguments before the Ninth Circuit, BLM asserted that the scant information in the EA was sufficient for the agency specialists to determine what the cumulative environmental impacts would be and that these impacts would not be significant. The court rejected this argument because it held that the purpose of NEPA documents is not only to provide information to agency experts, but to provide information "in plain language … so that decisionmakers and the public can readily understand them." [[146]](#footnote-147)146 Thus the court concluded the lack of hard data would "vitiate[] a plaintiff's ability to challenge an agency action or result[] in the courts second guessing an agency's conclusions." [[147]](#footnote-148)147 Both results, the court held, were "unacceptable." [[148]](#footnote-149)148

The Ninth Circuit summarized its finding that the cumulative impact analysis in the EAs was inadequate with a determination that the "potential for … serious cumulative impacts is apparent here." [[149]](#footnote-150)149 The court noted that a combination of two or four "slight to moderate increases in risk of a higher magnitude [runoff] event" might result in a significant overall risk for the SFLBC watershed. [[150]](#footnote-151)150 The court also took note of Oregon's listing of the SFLBC as not meeting water quality standards under the Clean Water Act, [[151]](#footnote-152)151 and BLM's identification of this area as an important link for northern spotted owl habitat. However, the court determined the EAs provided no quantitative data on the cumulative impacts of the proposed logging on either water quality standards or owl habitat. Thus, the Ninth Circuit held that the EAs' cumulative impact analyses did not satisfy the requirements of NEPA.

Alternatively, BLM argued that even if the EAs did not properly address cumulative impacts, they were "tiered" to other documents which did. [[152]](#footnote-153)152 BLM pointed to two other documents: an EIS for the Medford District's Regional Management Plan (RMP-EIS) and the State of Oregon's Little Butte Creek Watershed Analysis. The Ninth Circuit dismissed this argument. The **[\*536]** court held that the inclusion of general cumulative impact statements, like those found in the RMP-EIS, did not absolve BLM of its responsibility to provide specific cumulative effects information in the EAs. Oregon's watershed analysis was not a NEPA document, and thus "tiering" to this document was impermissible because "tiering to a document that has not itself been subject to NEPA review is not permitted." [[153]](#footnote-154)153

The Ninth Circuit next turned to the second major issue raised by KS-Wild - the question of whether BLM should have evaluated each timber project together in a single document. A single impact statement is required when the projects consist of "proposals … which are related to each other closely enough to be, in effect, a single course of action." [[154]](#footnote-155)154 After disposing of BLM's response that an impact statement is not an EA, the Ninth Circuit reviewed the relevant regulations, which require a single EA where actions are "cumulative." [[155]](#footnote-156)155 The regulations also give an agency the option to prepare a single EA where actions are "similar," unless the combined EA is the "best way" to evaluate environmental effects, in which case a single EA is required. [[156]](#footnote-157)156

Looking at whether the timber sales were "cumulative" actions under the regulations, the Ninth Circuit noted the difficulty in determining the proper resolution of this issue, since the EAs themselves contained insufficient information on this subject. The court looked to past case law and found that a single analysis should be done "when the record causes substantial questions about whether there will be significant environmental impacts from a collection of anticipated projects." [[157]](#footnote-158)157 In absence of the record needed to make this determination, the Ninth Circuit declined to determine conclusively that the timber sales constituted a cumulative action. The court indicated that the issue remained open, pending BLM's required revisions to the EAs.

KS-Wild argued that if the timber sales were not "cumulative" actions, they were "similar" in nature, and since the "best way to assess adequately the combined impacts" was in a single EA, BLM was required to do so under NEPA regulations. [[158]](#footnote-159)158 The Ninth Circuit noted that the "similar actions" language of the regulations allowed an agency more deference than the "cumulative actions" language in deciding whether to combine its analyses. [[159]](#footnote-160)159 If a combined EA is not clearly the "best way" to analyze impacts, then the agency has the discretion not to combine the documents. [[160]](#footnote-161)160 Noting that, although the projects were similar, they would not take place concurrently and would take place on different sites, the court was unable to find that BLM acted arbitrarily in declining to combine **[\*537]** the projects into a single EA. Thus the court concluded that BLM was not required to prepare a single NEPA document for both timber sales, even though the individual cumulative analyses in the two separate EAs under dispute was inadequate and required BLM revision.

While Judge Reinhardt concurred with the court's decision on the inadequacy of BLM's cumulative impacts analysis, he dissented on the issue of the combined document. Judge Reinhardt noted that this was "a single proposal governing the four anticipated projects and the projects constitute cumulative actions under the implementing regulations," thus "requiring a single NEPA analysis." [[161]](#footnote-162)161 Judge Reinhardt pointed to the history of the project, showing a clear intent by BLM to manage the SFLBC watershed under a single silvicultural prescription. He also noted the BLM decision to split the project into four parts was contradicted by its own staff's continued treatment of the four areas as part of a single project. Because the record thus "raises substantial questions that [the proposed agency actions] will result in significant environmental impacts," Judge Reinhardt concluded that the individual actions are cumulative and must be analyzed together. [[162]](#footnote-163)162

6. Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2004).

A coalition of environmental groups (collectively Lands Council) challenged the decision by the United States Forest Service (USFS) to approve a timber harvest in the Idaho Panhandle National Forest (IPNF). The district court granted summary judgment for USFS, and Lands Council appealed. The Ninth Circuit reversed the district court, holding that USFS's timber harvest plan violated National Environmental Protection Act (NEPA) [[163]](#footnote-164)163 standards because it was based upon an incomplete Environmental Impact Statement (EIS). [[164]](#footnote-165)164 In addition, the Ninth Circuit held that the plan did not comply with the mandate of the National Forest Management Act (NFMA) [[165]](#footnote-166)165 to adhere to USFS's own site-specific plan because the EIS addressing these concerns was based on modeling procedures that relied upon antiquated data. [[166]](#footnote-167)166 Thus, the Ninth Circuit reversed the district court's decision and remanded the case with instructions to award summary judgment to Lands Council.

The timber harvest at issue was designed to finance USFS's Iron Honey Project to improve the aquatic, vegetative, and wildlife habitat of the Little North Fork of the Coeur d'Alene River. In April 2000 the draft EIS was released, followed by a notice and comment session, which then gave way to the final EIS in November 2001. The November 2001 EIS included a list of financing alternatives for the Iron Honey Project. The Supervisor of the IPNF selected the Modified Alternative Eight Plan, which calls for the **[\*538]** logging of 17.5 million board feet of lumber from 1,408 acres of the IPNF. After its appeal to the Regional Forester of the IPNF was denied, Lands Council sought review under the Administrative Procedure Act (APA), [[167]](#footnote-168)167 claiming the plan violated the provisions of NEPA and the NFMA. The district court awarded summary judgment to USFS.

The Ninth Circuit reviewed Lands Council's challenge de novo and determined that USFS's plan was an arbitrary and capricious decision because it did not follow the procedural requirements set forth in NEPA and the NFMA. The court looked at NEPA's requirement for an EIS to analyze the project's interaction with the effects of past, current, and reasonably foreseeable future projects to ensure consideration of every important aspect of a proposed plan's environmental impact. [[168]](#footnote-169)168 The Ninth Circuit concluded that USFS did not properly analyze the plan's cumulative impact on two specific areas: 1) prior timber harvests and 2) the impact on Westslope Cutthroat Trout.

The Ninth Circuit reasoned that the EIS did not take the requisite "hard look" at the environmental effects of past timber harvests, and, therefore, gave no real consideration to any project alternatives. [[169]](#footnote-170)169 Although the statement contained a generalized account of the effects of past timber harvests, the Ninth Circuit held that NEPA mandates that the methods and consequences of prior harvests be separately analyzed and applied to the projected impact of this particular harvest. The court specified that 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." [[170]](#footnote-171)170

Lands Council also challenged the EIS's evaluation of the effects of the project on reasonably foreseeable future timber harvests by pointing to the Deerfoot Ridge Restoration Project and a 1998 Geographical Assessment indicating the intention to log the Upper Little North Fork of the Coeur d'Alene. The Ninth Circuit, however, determined the issue moot because the Deerfoot Project took place in another drainage.

Lands Council also argued that the district court erred in refusing to admit new evidence of the risk peak flows caused by rain or snow activity posed to the transport of toxic sediments from the North and South Forks of the Coeur d'Alene River. This effort to supplement the administrative record clashed with the Supreme Court's general rule focusing judicial review of an agency decision on the administrative record at the time of the decision. [[171]](#footnote-172)171 Although the Ninth Circuit had crafted narrow exceptions, it declined to address this issue because USFS had violated NEPA on other grounds.

Additionally, the Ninth Circuit criticized the EIS's reliance upon thirteen-year-old data in addressing the impact of the harvest on the habitat **[\*539]** of Westslope Cutthroat Trout. Furthermore, the agency's counterargument that it used additional relevant data from a survey conducted in 1997 was also deemed not timely enough to conduct proper NEPA cumulative impact analysis. The Ninth Circuit also ruled that the methodology used to calculate the Water and Sedimentation Yields (WATSED) section of the Final EIS violated NEPA's requirement that an agency disclose any incomplete or unavailable relevant data it used. [[172]](#footnote-173)172 The court concluded that the WATSED section lacked key variables necessary to calculate large-scale, high-intensity, short-term peak flows, and USFS had made no effort to disclose the lack of data until the decision was challenged on administrative appeal.

Next, the Ninth Circuit held that USFS's plan violated provisions of NFMA by failing to comply with sections of the IPNF forest plan dealing with health standards for IPNF fisheries and soil quality standards. [[173]](#footnote-174)173 First, the IPNF plan created an eighty percent success rate for fry emergence as a standard to judge fishery health, a standard USFS did not incorporate into its plan. USFS argued the fry emergence standard was replaced by the Inland Native Fish Strategy (INFISH) standard and therefore no longer relevant because INFISH provided more protection for native fish. [[174]](#footnote-175)174 However, the Ninth Circuit disagreed, holding that the INFISH standard supplemented and did not supersede the fry emergence standard because the two provisions contain different triggering variables and different remedies, and therefore, both must be examined in the EIS.

The Ninth Circuit also reviewed USFS's methodology in evaluating whether the project would meet the IPNF standard for limiting detrimental soil conditions to fifteen percent of the project area. USFS estimated the quality of the soil in the activity area by testing different areas of soil and predicting the outcome of the project using a spreadsheet model. The Ninth Circuit determined that USFS must rely on soil taken from the project area and not on a model of soil taken throughout the forest. [[175]](#footnote-176)175

Finally, Lands Council claimed that the project violated the IPNF old growth minimum requirements. The Ninth Circuit rejected Lands Council's argument that the plan would violate the IPNF's ten percent minimum old growth requirement because the forest plan did not intend to harvest any old growth forest. The court added that "if that requirement was not met after this Project, than [sic] it must be that the requirement is not met now, for the proposed timber harvest cut no old growth. If we were to accept the Lands Council's arguments on this score, than [sic] it would prevent any project from taking place." [[176]](#footnote-177)176 The Ninth Circuit also criticized the modeling procedure used by USFS to analyze the project's effect on species requiring old growth forest habitat. NFMA requires USFS to anticipate the harvest's effect on certain Indicator Species whose habitats require old growth **[\*540]** forests. [[177]](#footnote-178)177 However, USFS used a timber stand management reporting system database containing information fifteen years old, including inaccurate canopy closure estimates. [[178]](#footnote-179)178 The Ninth Circuit concluded that the antiquated data underlying the EIS's analysis rendered USFS's estimates of indicator species' habitats unreliable, and, therefore, violated the procedures of NFMA.

In conclusion, the Ninth Circuit reversed the district court's grant of summary judgment to USFS. The Ninth Circuit used its authority to grant summary judgment on behalf of Lands Council, based on its de novo review of the administrative record. [[179]](#footnote-180)179 The decision also affirmed a stay on the timber harvest until USFS complied with the pertinent provisions of NEPA and NFMA.

7. Ocean Advocates v. United States Army Corps of Engineers, 402 F.3d 846 (9th Cir. 2005).

Ocean Advocates, a group of environmental non-profit organizations dedicated to the preservation of the Washington Coast, brought suit against the United States Army Corps of Engineers (Corps) to enjoin its decision to issue and extend a permit to British Petroleum (BP) to build an additional dock on their existing ***oil*** refinery near Cherry Point, Washington. Allowing BP to intervene as defendants in the suit, the district court held that Ocean Advocates satisfied standing requirements to bring the suit, but granted summary judgment against the plaintiffs for their challenges under both the National Environmental Policy Act (NEPA) [[180]](#footnote-181)180 and the Magnuson Amendment [[181]](#footnote-182)181 to the Marine Mammal Protection Act (MMPA). [[182]](#footnote-183)182 On review, the Ninth Circuit affirmed the district court's decision to recognize Ocean Advocates standing in the suit but reversed the district court's grant of summary judgment on the NEPA and Magnuson Amendment challenges.

The Ninth Circuit remanded consideration of the injunctive relief sought by Ocean Advocates to the district court, ordering an evidentiary hearing to consider the dock extension's effect on tanker traffic and the potential harm BP would suffer under an injunction. The Ninth Circuit also instructed the district court to order the Environmental Protection Agency (EPA) to prepare a full Environmental Impact Statement (EIS) considering the project's impact on reasonably foreseeable tanker traffic increases and potential violations of the Magnuson Amendment.

BP began construction of a refinery to process Alaskan crude ***oil*** in the Puget Sound in 1971 at a location ten miles south of Cherry Point, an area of the Washington coastline that contains significant fish and wildlife **[\*541]** resources. Although BP planned to construct two docks on the refinery, it decided to defer construction of the second platform until production at the facility increased. BP attempted to construct the second dock in 1977, but again abandoned this plan after the Corps required the company to re-apply for a permit.

BP renewed its plans to build a separate dock in 1992, and opened its application up for public comment. Although the Fish and Wildlife Service (FWS), Lummi Nation, and Nooksack Tribe raised concerns that increased tanker traffic would increase the chance of ***oil*** spills in the area, BP indicated that the project would reduce traffic. BP argued that the newly constructed north dock would exclusively load refined product, thus reducing the amount of time tankers waited at sea to dock at the refinery, the time when tankers are most vulnerable to a spill. FWS also questioned the new dock's effect on the marbled murrelet, a threatened species under the Endangered Species Act. [[183]](#footnote-184)183 BP countered that the murrelet would only be affected in the unlikely event of an ***oil*** spill. Based on these arguments, the Corps made a Finding of No Significant Impact (FONSI) under NEPA, and granted the permit without an EIS because of the limited damage that would result from the dock's construction.

In 1997, during the construction of the dock, Ocean Advocates asked the Corps to reconsider the FONSI and determine if the permit violated the Magnuson Act, which forbids any facility located on the Puget Sound from increasing its capacity to handle crude ***oil***. The Corps declined to consider these factors, but was asked by the Washington State Department of Natural Resources and Ocean Advocates in 1999 to reconsider the effects that increased tanker traffic would have on the probability of an ***oil*** spill. After again declining these requests, the Corps granted BP's request to extend the permit one year without any public notice or comment. Despite the concerns raised by Ocean Advocates, the Corps relied on its prior determination that the construction of the dock would have no significant cumulative impact on the environment and exempted the project from undergoing an EIS analysis. The Corps relied on BP's claims that 1) the newly constructed platform would only increase the facility's ability to offload refined ***oil***, a situation that placed BP outside the Magnuson Act's limitation on the handling of crude ***oil*** in the Puget Sound; and 2) the construction of the dock would decrease tanker traffic and the overall risk of an ***oil*** spill in the region.

Ocean Advocates brought an action in district court challenging these decisions under both NEPA and the Magnuson Act. The Corps alleged that the plaintiffs lacked standing. Although the district court ruled Ocean Advocates had standing, it granted the Corps summary judgment on the NEPA and Magnuson Act claims. The parties independently agreed to a stipulated injunction limiting BP to the use of only one platform at a time for unloading crude ***oil***.

On appeal, the Ninth Circuit considered the district court's grant of summary judgment de novo, and reviewed the Corps's FONSI and compliance with the Magnuson Act under the arbitrary and capricious **[\*542]** standard of the Administrative Procedure Act (APA). [[184]](#footnote-185)184 The Ninth Circuit affirmed the district court's ruling on Ocean Advocates's standing, but overruled its grant of summary judgment on the NEPA and Magnuson Amendment claims. The Ninth Circuit held that the Corps's FONSI failed to properly assess both the potential increase in tanker traffic created by the new platform and the subsequent effect the increase would have on the chance of ***oil*** spills in the area. In addition, the Ninth Circuit remanded the case to the district court with instructions to determine if the new dock increased the facilities overall capacity to process crude ***oil*** through 1) the capability of the new dock to handle crude ***oil***, 2) the possibility of modifying the new dock to handle crude ***oil***, and 3) the new dock's increase in berthing capacity.

First, the Ninth Circuit assessed whether Ocean Advocates met Constitutional standing requirements. The first requirement is Ocean Advocates's ability to show injury-in-fact. Injury-in-fact is established by showing 1) concrete and particularized harm and 2) actual or imminent harm as opposed to conjectural or hypothetical harm. [[185]](#footnote-186)185 The Ninth Circuit held that members of Ocean Advocates who studied wildlife and engaged in recreational activities at Cherry Point would suffer a "lessened enjoyment" of the area should an ***oil*** spill occur from the increased traffic generated by the new dock. Subsequently, the Ninth Circuit concluded that a plaintiff need not show actual evidence of environmental harm to satisfy injury-in-fact requirements, but may show an increased risk of harm to satisfy this requirement. [[186]](#footnote-187)186

The Ninth Circuit analyzed Ocean Advocates claim for the second requirement of standing, causation, to determine if the injury alleged by Ocean Advocates was traceable to the Corps's actions. [[187]](#footnote-188)187 Here, the Ninth Circuit recognized that tanker traffic generated by the new dock established a causal connection to the increased risk of ***oil*** spill in the Cherry Point region alleged by Ocean Advocates. For the final standing requirement, the Ninth Circuit undertook a redressability analysis that analyzed whether the remedy sought by Ocean Advocates would alleviate their concerns regarding possible ***oil*** spills. The court pointed out that Ocean Advocates did not seek a remedy to prevent construction of the dock, but rather the generation of an EIS and an injunction to limit tanker traffic under the Magnuson Amendment. The Ninth Circuit observed that the EIS might force BP and the Corps to take additional safeguards to guard against increased traffic and cumulative impacts in the region, therefore redressing the plaintiff's injury. [[188]](#footnote-189)188

After considering the constitutional requirements of standing, the Ninth Circuit held that Ocean Advocates met the necessary prudential, organizational, and statutory requirements for standing. In assessing the prudential requirements, the Ninth Circuit held that Ocean Advocates were **[\*543]** within the zone of interest protected by the broad environmental interests of NEPA and the reduction of international tanker traffic expressed in the Magnuson Amendment. [[189]](#footnote-190)189 Next, the Ninth Circuit concluded that Ocean Advocates met the requirements for organizational standing because 1) its members would have standing to sue on their own behalf; 2) the interests at issue in the suit were germane to Ocean Advocates's mission to preserve the oceans; and 3) the substantive claim or remedy sought did not necessitate the participation of any individual member. [[190]](#footnote-191)190 Finally, the Ninth Circuit held that Ocean Advocates met the statutory requirements for standing by finding that the permit issued by the Corps constituted a "final agency action" under the APA and that Ocean Advocates were within the zone of interest of and the Magnuson Act. [[191]](#footnote-192)191

The Ninth Circuit then analyzed the affirmative defense of laches raised by BP to bar the action undertaken by Ocean Advocates. The court stated that BP must show that Ocean Advocates lacked diligence in pursuing this claim and this lack of diligence caused injury to BP. The Ninth Circuit commented that laches was strongly disfavored in environmental cases and largely turns on the individual facts of the case and the discretion of the trial court. The Ninth Circuit chose to judge Ocean Advocates's diligence from the date of the requested permit extension in 2000, not the date of the initial permit grant in 1996.

The Ninth Circuit found the extension date to be the final authorization necessary to construct the dock. For this decision the court relied upon BP's admittance to the Corps that the dock would not be completed within the original permit period, and that the delay was caused by the ESA consultation that evaluated the project's impact on new additions to the threatened species list. Thus, the Ninth Circuit concluded that Ocean Advocates' litigation commenced close in time to the final authorization date of the permit and did not lack diligence. In the alternative, the Ninth Circuit determined that Ocean Advocates's ongoing requests that the Corps re-open BP's permit before the 2000 permit extension, satisfied the plaintiff's burden under the laches doctrine. Ocean Advocates had maintained a continued dialogue with both BP and the Corps as early as 1997 and attempted to resolve their environmental concerns through the administrative process before they litigated the claim. Thus, in the absence of Ocean Advocates's lack of diligence, the court declined to analyze BP's undue prejudice argument.

Next, the Ninth Circuit analyzed whether the Corps put forth an adequate explanation of why construction of the new dock would not have a significant impact on the environment, a determination that exempted the project from an EIS under the NEPA's requirements. The court articulated that NEPA required an EIS for all "major Federal actions significantly affecting the quality of the human environment," [[192]](#footnote-193)192 a standard which **[\*544]** includes projects that raise substantial questions of environmental impact or indicate that a project may have a significant impact. [[193]](#footnote-194)193 The court also evaluated the Corps's decision under The Council on Environmental Quality's regulations that the level of uncertainty or unknown risks to the environment can be a determinative issue when deciding if a project merits an EIS. [[194]](#footnote-195)194 Thus, the Ninth Circuit held that the Corps failed to take the requisite hard look at the possible environmental impact of the project because Ocean Advocates raised "a substantial question as to whether the dock extension may cause significant degradation of the environment." [[195]](#footnote-196)195

The Ninth Circuit revisited the FONSI conducted by the Corps in granting the 1996 permit and held that it failed to provide a convincing analysis of why the project would have no significant impact, but instead simply stated that the project would have no significant impact. The Ninth Circuit held that, although the Corps recounted the considerations that the increase in tanker traffic caused by the new dock might increase the chance of ***oil*** spills, the Corps never fully investigated this possibility because it relied upon BP's determination that the new dock would result in increased efficiency and safety. The court also criticized the Corps'sconclusion that the facility's capacity would not increase with the new dock because the facility had already been functioning at full capacity before the dock was built. The Ninth Circuit described this statement as a "patently inaccurate factual contention" that could not sufficiently support the agency's decision to preclude further analysis under NEPA. The Ninth Circuit also took issue with the Corps's lack of independent analysis of the possibility that the dock would increase traffic, a deficiency that stemmed from the agency's over-reliance on BP's claims. Therefore, the Ninth Circuit determined that the Corps provided no convincing statement of reason in the 1996 FONSI that a comprehensive analysis of environmental impact was unnecessary under NEPA.

The Ninth Circuit found the Corps's 2000 FONSI pertaining to BP's permit extension equally deficient as its 1996 counterpart. Once again, the Ninth Circuit concluded that the Corps did not provide adequate statements for why an EIS was unnecessary. The court particularly criticized the Corps' continued reliance on findings prepared by BP alleging that the new dock would not increase tanker traffic, and that this increase could only be caused by a shift in market forces. The Ninth Circuit determined that the Corps should have undertaken an independent analysis of the potential effects the dock would have on tanker traffic to adequately justify the FONSI.

The Ninth Circuit then held that Ocean Advocates's concerns about tanker traffic presented a substantial question concerning the significance of the impact the project would have on the region. The Ninth Circuit classified this question of traffic as a necessary part of the tanker's severity inquiry. The court indicated that the Corps did not address evidence that use of the **[\*545]** facility had greatly increased since the mid-1980s and that the new dock would double the berthing capacity of the facility. The Ninth Circuit also concluded that although market forces largely determined increases in tanker traffic, the construction of the dock constituted an additional factor that would allow BP to handle an influx of tankers. Thus, the Ninth Circuit found that these factors elevated the risk of an ***oil*** spill in the area brought about by an increase in tanker traffic, a consideration essential to the impact the new dock would have on the area.

The Ninth Circuit next assessed whether the Corps took a fully informed and well considered look at the cumulative impacts the project would have on the Cherry Point coastal region, an analysis of the incremental effects of past, present, and reasonably foreseeable future actions. An adequate cumulative impact analysis should have a detailed analysis of the effects that individually minor, but collectively significant, actions would have on the region. [[196]](#footnote-197)196 Under this standard, the court concluded that the Corps's analysis lacked any detailed assessment of the increase in crude ***oil*** tankers among the rest of commercial and recreational ships in the area. Additionally, the court criticized the Corps's reliance on BP's claim that it had methods of ***oil*** transport available other than sea travel, as well as the Corps lack of analysis pertaining to traffic increase in the area. The Ninth Circuit also found the Corps improperly focused on the potential decrease in the possibility of an ***oil*** spill occurring while the tankers were moored around the facility, while it ignored the greater risk of an ***oil*** spill occurring while tankers traveled to and from the facility. Thus, the Ninth Circuit concluded that the Corps failed to undertake an adequate evaluation of the cumulatively significant impact the project would have on past, present, and future projects in the area.

Next, the Ninth Circuit held that when the effects of a proposed action present uncertain issues in evaluating the risks of environmental impact, the project should be resolved in favor of preparing an EIS. Here, the court held that the Corps should have further evaluated the unknown amount of increase in tanker traffic through an analysis of relevant criteria, and that a lack of knowledge regarding a project's impact did not excuse an agency from preparing an EIS under NEPA. Overall, the Ninth Circuit determined that Ocean Advocates raised substantial questions about the environmental impact of the new dock, and that the Corps responded to this question in an arbitrary and capricious manner. However, the Ninth Circuit declined to decide the issue of the injunctive relief requested by Ocean Advocates, and instead remanded this decision to the district court. The Ninth Circuit instructed the district court to determine whether Ocean Advocates made the requisite showing to merit injunctive relief, and to analyze the potential harm to BP and the public that an injunction might impose.

The Ninth Circuit next analyzed the project's compliance with the plain language of the Magnuson Act which states: "No officer, employee, or other official of the Federal government shall, or shall have authority to issue, **[\*546]** renew, grant … any permit, license, or other authority … in the state of Washington east of Port Angeles which will or may result in any increase in the volume of crude ***oil*** capable of being handled at any such facility." [[197]](#footnote-198)197 First the court noted that the term "any such facility" refers to the past language "terminal, dock, or other facility," and in the present case refers to the capacity of the terminal as a whole, not an individual dock. The court observed that BP may have violated the Magnuson Amendment if it in any way increased the volume of crude ***oil*** capable of being handled at the terminal.

To determine if BP increased the volume, the court examined the capability of the platform to handle crude ***oil***. Reviewing the district court's finding that the platform only handled "petroleum product" and not "crude ***oil***," the Ninth Circuit declared this decision erroneous. Here, the Ninth Circuit disagreed with the district court over the parenthetical description "petroleum product loading/unloading facility" in BP's project description. While the district court relied on this language to limit the dock's ability to handle crude, the Ninth Circuit held that the language did not contemplate a legal limitation on the platform's ability to handle crude ***oil***. The Ninth Circuit concluded that BP may consider the entire terminal as a petroleum product "loading/unloading" facility and that if BP is able to make modifications that may allow the new dock to handle crude ***oil*** in the future, the Corps may have subsequently violated the Magnuson Amendment by approving a facility to handle an increased amount of crude in the Puget Sound.

As an additional consideration, the Ninth Circuit held that the new dock's projected increase in the terminal's overall berthing capacity must be considered in determining whether the permit allowed the facility to handle an increased amount of crude ***oil***. Based on these conclusions, the Ninth Circuit remanded for further consideration of the permit's compliance with the Magnuson Amendment to the district court to determine: 1) if it is "physically possible for the new platform to handle crude ***oil*** today," 2) if it is "physically possible to modify the new platform such that it could handle crude ***oil***, without requiring additional permitting," and 3) if "the modifications authorized by the permit increase the potential berthing capacity of the terminal for tankers carrying crude ***oil***." [[198]](#footnote-199)198

In conclusion, the Ninth Circuit held that Ocean Advocates had standing to pursue their claims. The Ninth Circuit also concluded that the Corps acted arbitrarily and capriciously when it failed to adequately assess the considerations raised by Ocean Advocates concerning the increased tanker traffic in the area and the subsequent risk of ***oil*** spill. Finally, the Ninth Circuit remanded the issue of whether the permit violated the limitations on crude ***oil*** the Magnuson Amendment places on facilities in the Puget Sound.

**[\*547]**

8. Save Our Sonoran v. Flowers, 381 F.3d 905 (9th Cir. 2004), supra Part I.B.

9. Westlands Water District v. United States Department of the Interior, 376 F.3d 853 (9th Cir. 2004).

The Westlands Water District (Westlands) challenged restoration measures issued by the Department of Interior and the Hoopa Tribe (Interior) for the Trinity River in Northern California arguing that procedural requirements of the National Environmental Policy Act (NEPA) [[199]](#footnote-200)199 and the Endangered Species Act (ESA) [[200]](#footnote-201)200 had not been met. Specifically, Westlands alleged that Interior impermissibly narrowed the range of alternatives under NEPA and failed to issue a supplemental environmental impact statement (SEIS) to consider significant new information. The Ninth Circuit held that the original environmental impact statement (EIS) had considered a reasonable range of alternatives and agencies are not required to consider alternatives that are inconsistent with the ultimate policy objective. The Ninth Circuit also held that an SEIS was not required because the agency had not been presented with significant new information. Finally, the Ninth Circuit invalidated two reasonable and prudent measures (RPMs) issued by the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) as contrary to the ESA.

In 1955, Congress concluded that "surplus" water could be diverted from the Trinity River to meet Central Valley irrigation needs without harming the Trinity and Klamath fisheries and thus authorized the construction of the Trinity River Division (TRD) of the Central Valley Project (CVP). Between 1964 and 1997, nearly seventy percent of the river's flow was diverted to the Central Valley. The completion of the TRD blocked 109 miles of upstream spawning habitat, "imposed what was essentially extreme drought conditions for more than thirty years," and created unseasonable temperatures that caused physiological and behavioral problems for anadromous salmonids in the Trinity River system. [[201]](#footnote-202)201

A 1980 study by FWS determined that habitat losses in the Trinity River exceeded eighty percent and the fish population had been reduced by at least sixty percent. In response, Congress passed legislation concerning the Trinity River, notably the Trinity River Basin Fish and Wildlife Management Act [[202]](#footnote-203)202 and the Central Valley Project Improvement Act (CVPIA). [[203]](#footnote-204)203 The CVPIA set a minimum flow of 340,000 acre-feet per year and mandated completion of a Trinity River Flow Evaluation Study (TRFES). The study, which was finished in 1999, recommended a return to flows designed to recreate pre-construction habitat. In 1999, a group of federal, state, and tribal agencies issued a draft EIS, which recommended that the TRFES flows be implemented.

**[\*548]** The following year, NMFS and FWS issued Biological Opinions (BiOps) in accordance with ESA consultation requirements. [[204]](#footnote-205)204 The NMFS's BiOp included a non-discretionary RPM requiring the auxiliary bypass outlets on Trinity Dam to be used to reduce Sacramento River temperatures "as needed," [[205]](#footnote-206)205 and another RPM that required the flow regimes be implemented "as soon as possible." [[206]](#footnote-207)206 FWS issued a BiOp requiring elimination of excessive upstream salt migration in the Sacramento Delta between February and June due to lower water flows in the Sacramento River as a result of decreased Trinity River water diversion.

The district court allowed the Yurok tribe to intervene on behalf of Interior, and several water and utility districts to intervene on behalf of Westlands. The district court enjoined implementation of the recommended flow regimes as well as the two RPMs, mandated that non-flow restoration measures be implemented, and ordered Interior to issue an SEIS to discuss issues that were inadequately addressed in the original EIS. The Ninth Circuit reviewed the grant of summary judgment regarding the EIS's compliance with NEPA and the ESA de novo. The court reviewed NEPA and ESA compliance under the arbitrary and capricious standard.

The first broad issue addressed by the court was compliance with NEPA. NEPA implementing regulations require every EIS to consider the environmental consequences of the proposed action as well as reasonable alternatives to the action. [[207]](#footnote-208)207 The court noted that the analysis of the range of alternatives, determined by the project's purpose, is "the heart of the environmental impact statement," [[208]](#footnote-209)208 and its analysis must begin by determining whether the statement of purpose and need was reasonable. The court also noted that coordination between the implementing statute and an agency's statement of purpose and need can "serve as a guide by which to determine the reasonableness of [the] objectives." [[209]](#footnote-210)209

The district court determined that the agencies had improperly narrowed the geographic scope of the EIS statement of purpose and need by focusing solely on fishery rehabilitation in the mainstem of the Trinity River despite congressional intent to rehabilitate the entire river basin below Lewiston Dam. The Ninth Circuit held that, although the statement of purpose and need did not precisely duplicate the geographic scope of the statutes, it was not arbitrary and capricious. The court pointed to scientific evidence suggesting that the vast majority of propagation occurs on the mainstem and "restoring the fishery in the mainstem is a central, primary part of restoring the fishery in the basin as a whole." [[210]](#footnote-211)210 In light of the importance of mainstem rehabilitation to basin-wide recovery, the court held that the agencies had acted within their discretion.

**[\*549]** The court also addressed whether the statement of purpose and need was impermissibly narrow with regard to consideration of non-flow measures. The court held that the statement of purpose and need was not so narrow that it limited consideration of non-flow measures for three reasons: 1) the court did not find any language in the statement of purpose and need that limited consideration of such measures; 2) the agencies had discretion to determine that habitat improvements would best rehabilitate the fishery; and 3) the agencies had in fact considered several non-flow measures. Thus, the Ninth Circuit held that the scope of the EIS statement of purpose and need was reasonable.

Next the court discussed the range of alternatives analyzed in the EIS. The court noted that an EIS must "rigorously explore … all reasonable alternatives," [[211]](#footnote-212)211 but the "range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project." [[212]](#footnote-213)212 The court noted that the range of alternatives is reviewed under the "rule of reason," which does not require consideration of infinite alternatives, but rather merely reasonable alternatives. [[213]](#footnote-214)213

The EIS evaluated six alternatives and determined that four met the purposes and needs of the project. The court noted that the primary difference between these alternatives was the volume of water discharged into the Trinity River. Westlands argued that the EIS failed to consider non-flow alternatives, such as increased hatchery production and predator control, which would have permitted increased yearly irrigation diversions. The court dismissed this argument because the record showed that non-flow measures were considered as part of each alternative. Westlands also argued that the EIS should have considered integration of non-flow alternatives thereby allowing more water diversion. The court rejected this argument because the Mechanical Restoration Alternative would have achieved that end by imposing aggressive non-flow measures while maintaining the minimum flow set in the CVPIA. [[214]](#footnote-215)214

The court noted that agencies are not required to analyze every possible permutation, but rather are required only to select alternatives that encourage "informed decision-making and informed public participation." [[215]](#footnote-216)215 The court further pointed out that the EIS responded to comments regarding non-flow measures. Thus, the Ninth Circuit held that the EIS considered a reasonable range of alternatives and satisfied the NEPA hurdle.

The second broad issue addressed by the court dealt with the district court ruling requiring an SEIS to address new information presented by several RPMs and the impact of the California energy crisis. The court noted that an SEIS is only required when a project will significantly impact the environment in a manner that has not been considered. In the NMFS BiOp, **[\*550]** one RPM required compliance with temperature requirements in the Sacramento and Trinity Rivers including use of bypass outlets at Trinity Dam when necessary. The district court held that the EIS did not adequately address the demands of the RPM, particularly its impact on power generation.

The Ninth Circuit disagreed with the lower court's assessment, pointing to EIS language stating that use of the bypass outlets would not have a significant impact on Sacramento River temperatures or on chinook salmon mortality, but that use of the bypass outlets would minimally diminish power generation capacity in California. The court held that because the EIS considered the impacts of using the auxiliary outlets on temperature and power generation, and because use of the outlets has always been an option for preventing temperature fluxes, the RPM did not present significant new information requiring an SEIS. The court also held that an SEIS was not necessary to discuss power generation issues, despite the advent of the California energy crisis, because the average loss of .041% power generation per year based on adoption of the preferred alternative was insignificant.

Finally, the court addressed potential ESA violations. First, the court noted that RPM's may only result in minor changes to the proposed plan. The FWS RPM required prevention of salt intrusion in the Delta due to decreased freshwater inflows based on adoption of the preferred alternative. The court held that this non-discretionary RPM was not a minor change and that "redirecting flows in accordance with [it] will affect wildlife … and will likely have broad system-wide effects in the CVP." [[216]](#footnote-217)216 Accordingly, the court affirmed the district court ruling setting aside this RPM. Likewise, the Ninth Circuit affirmed the district court's invalidation of NMFS's second RPM requiring immediate implementation of the flow regime because it altered the appropriate timing of the action thereby violating ESA regulations. [[217]](#footnote-218)217

The Ninth Circuit held that the EIS considered a reasonable range of alternatives, and that an SEIS was not required to discuss the effects of the California energy crisis and use of the bypass outlets to mitigate Sacramento River temperature fluxes. The Ninth Circuit held that the mitigation of saltwater intrusion in the Delta constituted a major change to the proposed plan and was therefore invalid under the ESA. Finally, the Ninth Circuit set aside the RPM requiring immediate implementation of the flow regime because it violated ESA timing regulations.

**[\*551]**

D. Resource Conservation and Recovery Act

1. Safe Air for Everyone v. Meyer, 373 F.3d 1035 (9th Cir. 2004), petition for cert. filed, 60 U.S.L.W. 3475 (U.S. Feb. 2, 2005) (No. 04-1055).

Safe Air for Everyone (Safe Air) appealed a district court dismissal of its complaint against seventy-five individuals and corporations that grow Kentucky bluegrass in Idaho (Growers) for lack of subject matter jurisdiction. Safe Air sued under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA), [[218]](#footnote-219)218 claiming that practice of burning bluegrass residue remaining on the field after harvest (open burning) violated the RCRA prohibition against disposal of solid waste that presents "an imminent and substantial endangerment to health or the environment." [[219]](#footnote-220)219 After converting the district court's dismissal to a grant of summary judgment, the Ninth Circuit affirmed the district court's judgment that Safe Air demonstrated no issues of material fact as to whether grass residue is solid waste under RCRA.

Safe Air is a non-profit corporation whose objectives include stopping the practice of open burning, which, it believes, creates respiratory problems for nearby residents due to high concentrations of pollutants. Growers practice open burning of straw and stubble remaining after Kentucky bluegrass is harvested. Safe Air filed a complaint alleging that Growers' open burning violated RCRA and seeking a preliminary injunction to prevent Growers from engaging in open burning. Growers filed a response opposing Safe Air's preliminary injunction motion and moved to dismiss for lack of subject matter jurisdiction.

After an evidentiary hearing on Safe Air's request for a preliminary injunction, the district court dismissed Safe Air's complaint. The district court concluded that it had no jurisdiction to resolve the RCRA claim because "grass residue did not constitute "solid waste' under RCRA." [[220]](#footnote-221)220 Safe Air appealed to the Ninth Circuit.

Growers' motion to dismiss was filed pursuant to Federal Rule of Civil Procedure 12, [[221]](#footnote-222)221 and the district court granted the motion under Rule 12(b)(1), [[222]](#footnote-223)222 lack of subject matter jurisdiction. On appeal, Safe Air argued that the district court erroneously dismissed the complaint because 1) Growers' motion to dismiss should have been converted to a Rule 56 summary judgment motion [[223]](#footnote-224)223 because the court considered evidence outside Safe Air's complaint; and 2) the issue of whether grass residue is "solid waste" under the RCRA definition was not, as the district court ruled, a jurisdictional issue.

**[\*552]** The Ninth Circuit previously held that it is not necessary to convert a motion to dismiss into a summary judgment motion in order to consider evidence outside of a complaint. [[224]](#footnote-225)224 Under the Supreme Court's standards, a jurisdictional dismissal is justified when a claim "clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." [[225]](#footnote-226)225

The Ninth Circuit previously held that "the question of jurisdiction and the merits of an action are intertwined where "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'" [[226]](#footnote-227)226 In such cases, the court reasoned, it is necessary for a court to decide a case on its merits, [[227]](#footnote-228)227 and a Rule 12(b)(1) dismissal is not appropriate. In this case, the Ninth Circuit decided that the district court erred in applying Rule 12(b)(1) because jurisdictional and substantive questions are so closely intertwined in the "citizen suit" provision of RCRA that jurisdiction depends on the resolution of factual issues decided on the merits. Growers declined to argue that Safe Air's federal claims did not meet any of the Supreme Court's standards for jurisdictional dismissal.

The Ninth Circuit reviewed the district court's order as a grant of summary judgment on the merits in favor of Growers. As a result, the Ninth Circuit considered RCRA in light of case law interpretation and legislative history to evaluate whether Safe Air's complaint contained an issue of material fact regarding whether grass residue is "solid waste." The court reviewed the ruling de novo.

In enacting RCRA, Congress attempted to address "the need to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." [[228]](#footnote-229)228 To prevail under the citizen suit provision of RCRA, Safe Air needed to demonstrate that Growers' open burning constituted the "handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." [[229]](#footnote-230)229 Because Safe Air alleged that the grass residue was solid waste, the Ninth Circuit focused on whether the residue met the definition of "solid waste" in RCRA.

In examining the plain meaning of the statutory language, the Ninth Circuit looked at the RCRA definition of solid waste: "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material." [[230]](#footnote-231)230 Because RCRA **[\*553]** does not define "discarded material," the court considered "discarded" to have its ordinary meaning: to "cast aside; reject; abandon; give up." [[231]](#footnote-232)231

Growers' evidence indicated that they reused the grass residue, rather than discarding it, as part of an ongoing process. Two primary benefits resulted from this reuse: nutrients were returned to the fields, and the open burning process was facilitated. Safe Air conceded that Growers derived benefits from the grass residue, but argued that the primary benefit from open burning was the removal of grass residue, and other benefits were incidental to this removal. The Ninth Circuit, however, held that dismissing benefits as "incidental" did not constitute an effective challenge. The court decided it was bound by RCRA's language requiring that solid waste consist of "discarded" materials, and the reuse of grass residue in a "continuous farming process" precluded the residue from being defined as "solid waste." The court concluded that there was no issue of material fact as to whether grass residue was "discarded material" - the court held that it clearly was "not discarded, abandoned, or given up, and it [did] not qualify as "solid waste' under RCRA." [[232]](#footnote-233)232

In addition, the court examined the holdings of other circuit courts on the definition of "solid waste." The Ninth Circuit's analysis included the following: 1) whether the material in question will be reused or recycled by the industry from which it was generated; [[233]](#footnote-234)233 2) whether the material is actually reused or is only potentially reusable; [[234]](#footnote-235)234 and 3) whether the materials are reused by the party that generated them, rather than another party acting as a salvager or reclaimer. [[235]](#footnote-236)235 Using these factors, the court held that the grass residue would not be considered "solid waste" under RCRA because burnt bluegrass residue is reused by the industry as a fertilizer and as a substance to prevent infestation. Under these standards, the Ninth Circuit held that there was no material issue of fact as to whether the residue was "discarded."

The Ninth Circuit then considered RCRA's legislative history, which it held to reinforce the conclusion that Congress did not intend to prohibit grass residue under RCRA. The House Report indicated that Congress intended to address the problem of waste products filling landfills, and to increase "reclamation and reuse practices" and explicitly excluded "agricultural wastes which are returned to the soil as fertilizers" from the **[\*554]** category of "discarded material." [[236]](#footnote-237)236 Thus, the Ninth Circuit concluded that Kentucky bluegrass residue was not a "solid waste" and that the practice of open burning was not prohibited by RCRA.

Judge Paez concurred as to the review of the district court's dismissal for lack of subject matter jurisdiction as a grant of a summary judgment motion, but dissented from the majority opinion that Safe Air did not demonstrate that grass residue was "solid waste" under RCRA. He found that the majority erred in its application of the ordinary meaning of the word "discarded," which, in his opinion, included the act of removal. Growers did not dispute Safe Air's assertion that the primary objective of burning the fields was the removal of grass residue, within the plain meaning of the word "discarded." Thus, genuine issues of fact existed as to whether the grass residue was "solid waste" under RCRA. Furthermore, Judge Paez concluded that the majority's analysis of sister circuit cases and legislative history (in addition to the ordinary meaning of "discard") was unnecessary. Finally, Judge Paez would have held "that the burning of the post-harvest crop residue constitutes "disposal' of that waste under the RCRA," [[237]](#footnote-238)237 or, in the alternative, it constitutes "treatment" or "handling" of solid waste in violation of the RCRA. [[238]](#footnote-239)238 Judge Paez would have reversed the district court's dismissal and remanded the case for trial.

II. Natural Resources

A. Endangered Species Act

1. Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004), supra Part I.C.

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

Cold Mountain, Cold Rivers, Inc., Buffalo Field Campaign, and Ecology Center (collectively Cold Mountain) appealed a district court decision granting summary judgment to the United States Forest Service (USFS). Cold Mountain challenged a biological assessment by USFS, which reached a decision to issue a Finding of No Significant Impact (FONSI), [[239]](#footnote-240)239 thus granting a permit to the Montana Department of Livestock (MDOL) allowing Montana to operate a bison capture and testing facility. Cold Mountain alleged that the permitted use resulted in a prohibited take of bald eagles, a threatened species protected by the Endangered Species Act (ESA). [[240]](#footnote-241)240 The Ninth Circuit affirmed the district court decision, holding that: 1) Cold Mountain did not present genuine issues of fact to support their allegations of an ESA violation; 2) Cold Mountain's claim for re-initiation of formal consultation was newly raised, and thus not reviewable by the Ninth Circuit; and 3) USFS did not act in an arbitrary and capricious manner or abuse its **[\*555]** discretion by failing to prepare either an Environmental Impact Statement (EIS) or a supplementary Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA). [[241]](#footnote-242)241

In 1995, the USFS, other federal agencies, and MDOL formulated an Interim Bison Management Plan to safeguard Montana livestock from brucellosis, a disease carried by the wild bison within and around Yellowstone National Park. In 1999, in support of the plan, USFS approved a permit for MDOL to operate the Horse Butte Bison Capture Facility in the Gallatin National Forest just west of Yellowstone National Park. Prior to issuing the permit, USFS reviewed its action pursuant to NEPA. [[242]](#footnote-243)242 The area impacted by the proposed capture facility, approximately fifteen square miles, included three bald eagle nesting sites. Bald eagles are a threatened species under the ESA. [[243]](#footnote-244)243 USFS's Biological Assessment (BA), a requirement under its ESA obligations, [[244]](#footnote-245)244 found that the cumulative effect of the facility, along with existing human activities, were "likely to adversely effect" the bald eagles in one of the three nesting sites (Ridge nest). [[245]](#footnote-246)245 After transmitting the BA to FWS for consultation, [[246]](#footnote-247)246 the USFS issued the EA agreeing with the assessment of potential impacts on the Ridge nest.

In response to the USFS's request for consultation, FWS issued a Biological Opinion (BiOp). The BiOp agreed with USFS's BA on likely impacts to the Ridge nest, but found that the project was "not likely to jeopardize the Pacific Region bald eagle population." [[247]](#footnote-248)247 After incorporating mitigation measures limiting helicopter hazing, shooting, snowmobile use, and other human activities within the impact area, FWS issued an incidental take statement pursuant to the ESA, allowing the project to go forward. [[248]](#footnote-249)248 Based upon the FWS BiOp and its own analysis, USFS then issued the FONSI and the permit.

Cold Mountain sued MDOL, USFS, and other federal defendants, alleging violation of the terms of the permit's restrictions on helicopter hazing activities, resulting in a take of protected bald eagles in violation of the ESA. [[249]](#footnote-250)249 The complaint also alleged violations of NEPA, [[250]](#footnote-251)250 the Migratory Bird Treaty Act, [[251]](#footnote-252)251 the National Forest Management Act, [[252]](#footnote-253)252 and the **[\*556]** Administrative Procedure Act. [[253]](#footnote-254)253 The district court granted summary judgment for MDOL on sovereign immunity grounds. It also granted summary judgment for the federal defendants, concluding that Cold Mountain had not established either a prohibited take of bald eagles or a violation of helicopter hazing restrictions. On appeal, Cold Mountain limited its challenge to alleged violations of the ESA and NEPA.

First, the Ninth Circuit addressed Cold Mountain's contention that USFS's failure to enforce the helicopter hazing restrictions in the permit resulted in a reproductive failure of the Ridge nest, and therefore a violation of the ESA. [[254]](#footnote-255)254 Cold Mountain's claim alleged that USFS was liable for MDOL's violations of the permit. USFS disclaimed liability under such circumstances, noting that any claim making it vicariously liable for MDOL's actions would be unprecedented. The Ninth Circuit did not reach "the novel question of the [USFS]'s liability under the ESA for the actions of its permittees" because it found "no genuine issue for trial." [[255]](#footnote-256)255 Cold Mountain's evidence consisted of materials purporting to demonstrate violation of the hazing restrictions along with generalized scientific studies on the impact of helicopter noise upon bald eagles. The Ninth Circuit determined that this evidence did not address the issue of whether the helicopter noise negatively impacted the reproductive abilities of the Ridge nest bald eagles. Therefore, the Ninth Circuit affirmed the district court's judgment on this issue, holding that Cold Mountain had failed to establish a causal link between MDOL's helicopter hazing activity and the Ridge nest reproduction failure.

The Ninth Circuit then dismissed Cold Mountain's claim that USFS was required to re-initiate formal consultation with FWS after the Ridge nest reproductive failure because that failure exceeded the permissible take under FWS's BiOp. The Ninth Circuit decided that Cold Mountain had raised the issue only as part of its broader ESA claim and not as a separate ground for relief at the district court. Since Cold Mountain's action did not qualify under any of the recognized exceptions to the general prohibition on raising new claims on appeal, [[256]](#footnote-257)256 the Ninth Circuit held that Cold Mountain's re-initiation argument was a new claim and not appropriately raised on appeal.

Finally, the Ninth Circuit reviewed Cold Mountain's contention that USFS violated NEPA by failing to prepare an EIS before issuing the permit for the bison capturing facility or, alternatively, for failing to prepare a supplemental analysis under NEPA after the eagle nest reproductive **[\*557]** failure. [[257]](#footnote-258)257 Cold Mountain asserted that USFS was required to prepare an EIS because substantial controversy was generated by Cold Mountain and other groups prior to the issuance of the permit. The Ninth Circuit standard for "controversy" in a NEPA framework requires "a substantial dispute … as to size, nature, or effect." [[258]](#footnote-259)258 However, the court held that USFS was not required to prepare an EIS before issuing the permit merely because the issue generated controversy. [[259]](#footnote-260)259 The Ninth Circuit noted that Cold Mountain's claims about the controversial nature of the helicopter hazing issue were belied by the fact that none of the criticisms regarding helicopter hazing were raised during the comment period prior to USFS's issue of the FONSI and the permit. USFS analyzed the issues itself, consulted with FWS, and determined that the restrictions justified issuance of the FONSI. With these actions, the court was satisfied that USFS took the "hard look" required by NEPA [[260]](#footnote-261)260 and provided the requisite convincing statement of reasons necessary to meet NEPA requirements.

The court then dismissed Cold Mountain's contention that a supplemental NEPA analysis was warranted by substantial changes or significant new information. The court held that, since Cold Mountain had not substantiated their claim that the helicopter hazing had led to the eagle nest reproductive failure, USFS's obligation under NEPA was fulfilled. In conclusion, the Ninth Circuit affirmed the decision of the district court granting summary judgment to USFS and other federal agency plaintiffs.

3. Gifford Pinchot Task Force v. United States Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004), amended by 387 F.3d 968 (9th Cir. 2004).

The Gifford Pinchot Task Force and other environmental organizations (collectively Task Force) petitioned the Ninth Circuit for review of six biological opinions (BiOps) issued by the Fish and Wildlife Service (FWS), which authorized the incidental "take" of threatened Northern spotted owls in several representative timber harvest projects in the Northwest. The court permitted the American Forestry Resource Council (AFRC) to intervene as a defendant. Task Force argued that the jeopardy and critical habitat analyses conducted by FWS violated the Endangered Species Act (ESA). [[261]](#footnote-262)261

The Ninth Circuit held that the jeopardy analysis conducted by FWS was permissible and within the agency's discretion. Regarding the critical habitat question, however, the Ninth Circuit held that the analysis was fatally flawed because FWS's definition of "destruction or adverse modification" [[262]](#footnote-263)262 equated "recovery" with "survival," resulting in a regulation that impermissibly failed to consider the effects of alterations in critical habitat on species recovery. Moreover, the Ninth Circuit held that the availability of **[\*558]** suitable alternative late successional reserve (LSR) habitat is not an adequate substitute for designated critical habitat. The Ninth Circuit reversed the judgment of the district court and remanded with instructions to grant summary judgment to Task Force on the critical habitat issue.

In 1990, FWS listed the spotted owl as a threatened species under the ESA. In the mid-1990's, largely in response to litigation over the spotted owl, the federal government adopted the Northwest Forest Plan (NFP). The NFP was intended to provide for stability and recovery of owl populations while continuing to allow timber harvests on federal lands. Since approval of the NFP, roughly 300 BiOps have permitted 1080 incidental takes of spotted owls and the degradation or removal of 82,000 acres of critical habitat. Task Force challenged six representative BiOps. Three of the BiOps were programmatic, covering multiple harvests in multiple years. The other three dealt with specific timber projects. Together, the six BiOps addressed over 21,000 acres of critical habitat and the incidental take of an unspecified number of spotted owls. The number is unspecified because several of the BiOps allow for the take of all owls associated with a project without stating how many owls will in fact be taken. The district court denied temporary restraining orders on these projects and ultimately granted summary judgment in favor of FWS.

The Ninth Circuit reviewed the grant of summary judgment de novo, and subjected the agency's action to "arbitrary and capricious" review under the Administrative Procedure Act. [[263]](#footnote-264)263 The court clarified that its review would be narrow, determining only whether FWS had made a "clear error of judgment." [[264]](#footnote-265)264 The court first addressed the jeopardy analysis.

Task Force argued that the analysis conducted by FWS was flawed because it failed to establish an accurate image of the actual risks faced by spotted owls within the reach of the timber harvest projects approved by the BiOps. Specifically, Task Force argued that FWS's failure to count owls, opting instead for a habitat proxy approach, could not ensure accurate owl counts because short-term habitat models - necessary to establish baseline owl numbers as recommended by the drafters of the NFP - had not yet been completed. The court noted that habitat proxy approaches were acceptable if they could "reasonably ensure" accurate results. [[265]](#footnote-266)265 The Ninth Circuit held that because the habitat model developed by FWS "reasonably correlates to the actual population of owls," [[266]](#footnote-267)266 and because deference is due to FWS's scientific expertise, the model was permissible.

Task Force then argued FWS could not support its jeopardy analysis simply by relying on the NFP. The initial BiOp covering the entire NFP did not authorize any incidental takes, leaving the issue for future consideration. In this case, the BiOps relied primarily on the NFP to support the "no jeopardy" conclusions. Task Force asserted that relying on the NFP to support the "no **[\*559]** jeopardy" finding was impermissible because the NFP explicitly left the issue to future BiOps. The court noted that the reliance on the NFP, coupled with a lack of effectiveness monitoring, was "troubling," but nevertheless held that the agency should not be faulted for relying on the NFP because the NFP was based on sound science. Moreover, the BiOps were faithful to the NFP because FWS did site specific analysis. [[267]](#footnote-268)267 In dicta, the court pointed out that, if a habitat monitoring report due in 2004 was not underway, reliance on the NFP would be insufficient.

Task Force then argued the jeopardy analysis was flawed because it did not discuss current trends in the spotted owl population. Moreover, Task Force argued, the baseline used in the analysis was flawed because it did not consider past incidental takes. In addition, Task Force asserted the BiOps did not sufficiently explain how past changes to the environmental baseline and potential future projects justify the no jeopardy conclusion. The Ninth Circuit rejected these arguments as renewed and substantially identical attacks on the habitat proxy approach and reliance on the NFP.

The Ninth Circuit then addressed the critical habitat analysis. Task Force argued the analysis conducted by FWS was impermissible because it relied on an unlawful regulatory interpretation of the term adverse modification. Under the ESA, before a federal project can commence, the consulting agency must ensure that there will be no destruction or adverse modification of the critical habitat of the threatened or endangered species. [[268]](#footnote-269)268 FWS defined destruction or adverse modification as an environmental alteration that "appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." [[269]](#footnote-270)269 The court noted that under Chevron, [[270]](#footnote-271)270 no deference can be afforded to an agency if its interpretation is in conflict with express congressional intent. Therefore, the court held - in line with the Fifth [[271]](#footnote-272)271 and Tenth Circuits [[272]](#footnote-273)272 - that the FWS regulation was flawed because, under its definition, adverse modification would not occur until habitat modification threatens the survival of a species. [[273]](#footnote-274)273 Thus the Ninth Circuit held that the FWS regulation directly conflicted with the statutory language requiring the consulting agency to find an adverse modification if there is an appreciable diminishment in the value of the habitat for survival or recovery.

The court next addressed the issue of whether FWS's regulation constituted harmless error. The court noted that agencies are presumed to follow their own regulations unless such a presumption can be rebutted by evidence to the contrary. [[274]](#footnote-275)274 To meet the burden of harmless error under the **[\*560]** Administrative Procedure Act, [[275]](#footnote-276)275 FWS would have to show that despite its regulation, it nevertheless scrutinized the effects of lost or diminished critical habitat on the recovery of the spotted owl. [[276]](#footnote-277)276 FWS argued that it implicitly considered recovery of the owl in the challenged BiOps. The court rejected this argument and held that because several of the BiOps failed to even mention the word "recovery," and because none of the BiOps addressed recovery in depth, FWS did not overcome the presumption that it followed its own regulation, and thus failed to consider recovery. The Ninth Circuit concluded FWS's flawed regulatory interpretation was not harmless error and thus the critical habitat analysis was impermissible.

Task Force raised four additional challenges. First, it argued that FWS recognized the projects would have adverse effects on critical habitat, but nevertheless decided that this would not result in adverse modification. The court dismissed this argument because FWS's critical habitat analysis was conducted using an impermissible regulatory definition. Second, Task Force argued that FWS's focus on the landscape scale in the three programmatic BiOps masked site specific impacts. Task Force argued that in this case, six million acres of untouched forest on the landscape scale were compared to twenty thousand treatment acres, leading to the erroneous conclusion that the projects did not pose a significant risk to the species. The Ninth Circuit disagreed and held that FWS did consider local effects. Moreover, the Ninth Circuit held that Task Force merely pointed out the risk of using large scale analysis, not that FWS had failed to address any local effects which would be necessary before the court would overturn the agency's decision as arbitrary and capricious.

Third, Task Force argued that the critical habitat analysis conducted by FWS was flawed because it substituted congressionally mandated critical habitat protections for alternative habitat in LSRs. The court held that although aspects of these regimes were meant to serve the same purpose, "suitable alternative habitat … is no substitute for designated critical habitat." [[277]](#footnote-278)277 The court noted that the plain language of the ESA requires an inquiry into whether or not expressly designated critical habitat will be adversely modified by the project. [[278]](#footnote-279)278 Allowing LSR habitat to stand in for critical habitat would "impair Congress's unmistakable aim that critical habitat analysis focus on the actual critical habitat." [[279]](#footnote-280)279 Thus, like the Supreme Court in Tennessee Valley Authority v. Hill, [[280]](#footnote-281)280 the Ninth Circuit held that suitable alternative habitat could not substitute for designated critical habitat.

Finally, Task Force challenged FWS's "amendments" to the BiOps. The court noted that, as a general rule, such "updates" are prohibited because they would allow agencies to issue post hoc rationalizations to support challenged BiOps. Here, the court stated that either FWS produced new information or FWS produced cumulative evidence amassed to support its litigation position. The court held that if FWS produced new **[\*561]** information it should have reinitiated formal consultations, [[281]](#footnote-282)281 and if the evidence was cumulative, it should have been included in the original BiOp. The court held "neither scenario allows for the admission of the new evidence." [[282]](#footnote-283)282

In conclusion, the Ninth Circuit held that the jeopardy analysis conducted by FWS was within the agency's discretion. Regarding the critical habitat analysis, however, the Ninth Circuit reversed the judgment of the district court because FWS had used an unlawful definition of "adverse modification" and its substitution of alternative habitat for designated critical habitat was impermissible. The Ninth Circuit directed the district court to enter summary judgment for Task Force on the critical habitat issue.

4. Westlands Water District v. United States Department of the Interior, 376 F.3d 853 (9th Cir. 2004), supra Part I.C.

B. Wilderness Act

1. High Sierra Hikers Association v. Blackwell, 390 F.3d 630 (9th Cir. 2004).

High Sierra Hikers Association (High Sierra), a group of non-profit organizations dedicated to wilderness preservation and education, petitioned the Ninth Circuit claiming the United States Forest Service (USFS) violated provisions of the Wilderness Act [[283]](#footnote-284)283 by issuing special use permits to commercial packstock operators operating in the John Muir and Ansel Adams Wilderness Areas. On cross appeal, USFS, as well as a group of intervening pack-stock operators (Packers), challenged the district court's holding that USFS failed to comply with the National Environmental Protection Act (NEPA) [[284]](#footnote-285)284 in issuing special use permits. The Ninth Circuit affirmed the district court's holding that USFS violated the provisions of NEPA by failing to conduct a proper cumulative impact analysis. The Ninth Circuit, however, reversed the district court's ruling on the substantive requirements of the Wilderness Act, holding that USFS failed to properly preserve and protect the wilderness areas pursuant to act's guidelines.

The John Muir and Ansel Adams Wilderness Areas, located in the Sierra Nevada mountain range, have historically been open to commercial packstock operators for guided trips into the wilderness. USFS, responsible for managing and distributing special use permits to these wilderness areas, proposed a revised management plan in 1997, and issued a final environmental impact statement (EIS) in August 2000. In April 2000, High Sierra filed suit against USFS, claiming that the new commercial special use permits violated the National Forest Management Act (NFMA), [[285]](#footnote-286)285 the **[\*562]** Wilderness Act, NEPA, and the Administrative Procedure Act (APA). [[286]](#footnote-287)286 USFS amended and finalized its plan in April 2001, after which both sides filed supplemental briefs and filed motions for summary judgment. The district court granted High Sierra's motion for summary judgment on the NEPA claim, finding that USFS needed to assess the cumulative impacts of issuing special-use permits to comply with NEPA. However, the district court awarded summary judgment to USFS for both the NFMA and Wilderness Act claims, holding that USFS had determined the necessity of packstock operations in its EIS, a decision pursuant to the authority granted to the agency under the Wilderness Act and NFMA.

As a review of an administrative agency decision, the Ninth Circuit considered the grant of summary judgment de novo, viewing the case from the same position as the district court. The court first considered the issue of ripeness based upon the APA standard that a plaintiff may only challenge "a specific final agency action which has an actual or immediate threatened effect." [[287]](#footnote-288)287 The Ninth Circuit interpreted the issuance of special-use permits as a final agency action under the APA because a special use permit was a legal document authorizing a particular use. Thus, the court held that USFS's policy carried actual and immediate threats to the preservation of the Wilderness Area.

Next, the Ninth Circuit examined USFS's policy to issue multi-year and special-use permits under NEPA standards which require an EIS for all federal actions significantly effecting the environment. [[288]](#footnote-289)288 A NEPA challenge to an agency decision is normally conducted under an arbitrary and capricious standard. However, in cases where an agency failed to prepare an environmental assessment (EA), as in the present case, the court reviews the agency action under a reasonableness standard. The Ninth Circuit affirmed the district court decision, holding that USFS violated NEPA when it failed to use an EIS to assess the environmental consequences of the of multi-year, special-use permits.

The Ninth Circuit also examined USFS's renewal of special use permits without NEPA review. USFS argued that the agency's one year renewal of special-use permits constituted a categorical exclusion from NEPA requirements. However, the Ninth Circuit rejected this argument, holding that a categorical exclusion cannot be applied in "extraordinary circumstances," including application to any permit affecting a wilderness area. [[289]](#footnote-290)289

The court then addressed USFS's challenge to the scope of injunctive relief issued by the district court. Specifically, USFS argued the requirement that the agency conduct an assessment of the environmental impact of packstock operations by November 5, 2005 was beyond the reviewing court's authority. The Ninth Circuit reviewed the issuance of the injunction **[\*563]** to see whether the district court properly balanced the equities between parties and gave due regard to the public interest, a power in which the district court holds "broad latitude." [[290]](#footnote-291)290 The Ninth Circuit upheld the issuance of injunctive relief on the basis that 1) the agency's special use permit policy would likely cause irreparable injury to sensitive portions of the wilderness area; and 2) Congress has recognized a strong public interest in protecting these areas through the passage of the Wilderness Act.

The Ninth Circuit also held that the scope of the injunction did not improperly intrude upon the agency's discretion. While USFS argued the proper remedy was a remand for the agency to schedule its own plan to comply with NEPA, the Ninth Circuit determined the district court's mandate would ensure that USFS would inject environmental concerns into its new special use permit policy, an action motivated by its past non-compliance with NEPA.

USFS made an additional challenge to the scope of the injunction by arguing the district court's orders violated the Supreme Court ruling in Kleppe v. Sierra Club. [[291]](#footnote-292)291 USFS argued Kleppe required a court to let an agency propose an action before determining how to comply with NEPA. The Ninth Circuit distinguished this situation from Kleppe, holding that the agency had already acted by issuing special-use permits and by implementing the 2001 plan. Hence, the Ninth Circuit held the district court's injunctive relief responded to and did not precede agency action.

Packers also attacked the district court's injunction, arguing they should be completely excluded from the injunction because USFS had prepared Environmental Assessments (EAs) pertaining to the stations from which they operate. The Ninth Circuit dismissed this argument on the basis that NEPA standards require an assessment of the cumulative effects of packstock operations in multiple areas, not just individualized assessments. Moreover, the court reiterated that because the special-use permits constituted a major federal action, an EA was inadequate and a full EIS was required. Thus, the Ninth Circuit affirmed the basis and scope of the district court's order that USFS conduct a cumulative impact assessment by December 2005.

Next, High Sierra challenged the district court's holding that USFS acted within its discretion in issuing special use permits and adhered to the substantive goals of the Wilderness Act to preserve and protect the wilderness character of the land. [[292]](#footnote-293)292 Specifically, High Sierra argued that an agency must establish the number and character of commercial services that are "necessary and proper" before issuing commercial special-use permits. [[293]](#footnote-294)293 The Ninth Circuit found this argument persuasive, stating that USFS failed to address why the extent of such packstock services was necessary in its 2001 Wilderness Plan.

**[\*564]** The Ninth Circuit concluded that the Wilderness Act's allowance of commercial activities "to the extent necessary" is beholden to the overarching purpose of the Wilderness Act to preserve and protect wilderness values of the land. [[294]](#footnote-295)294 The Ninth Circuit interpreted this evaluation of necessity to require a showing that the commercial services were "no more than necessary to achieve the goals of the Act." [[295]](#footnote-296)295 Employing this standard the Ninth Circuit held that although USFS independently addressed 1) the types of commercial services needed, 2) the extent current permits are being used, and 3) the amount of use the land can tolerate, it failed to address these factors together in relation to the ultimate goal of preserving the wilderness character of the land and therefore approved commercial services that violated the "extent necessary" requirement.

Thus, the Ninth Circuit had to consider how much deference to grant USFS in construing the substantive requirements of the Wilderness Act that guide its policy decisions. Although the Ninth Circuit held that the intent of the Wilderness Act was ambiguous due to the conflicting responsibilities bestowed on USFS, it declined to extend Chevron [[296]](#footnote-297)296 deference because the USFS decision to grant special use permits did not have precedential value to subsequent parties and was not acting "with the force of law." [[297]](#footnote-298)297 The court decided to accord the USFS decision respect rather than deference, examining the reasonableness of the decision through factors such as the interpretations, thoroughness, rational validity, consistency with prior pronouncements, and the care used in reaching the decision. [[298]](#footnote-299)298

Applying this standard, the Ninth Circuit concluded that the process used by USFS in interpreting the Wilderness Act was not rational. The court held the methodology in the new management plan failed to comply with the Wilderness Act's restriction on any activity that would impair the land's use as wilderness in the future. Although USFS had documented the damage packstock overuse would bring to trailheads in the wilderness areas, it failed to take appropriate action to protect the wilderness character of the land by lowering the amount of packstock use. Thus, the Ninth Circuit reversed the district court's award of summary judgment to USFS on the basis that the agency failed to adhere to its statutory responsibility.

In conclusion, the Ninth Circuit affirmed the district court's findings that USFS failed to adhere to NEPA's provision by not conducting an EIS. However, the Ninth Circuit reversed the district court's award of summary judgment to USFS regarding the Wilderness Act and remanded the decision to the district court to determine appropriate relief. Additionally, the Ninth Circuit affirmed the injunctive relief fashioned by the district court, holding the injunction ensured compliance with NEPA as well as partially addressing **[\*565]** the substantive requirements of the Wilderness Act. Finally, the Ninth Circuit directed the district court on remand to determine whether remedial relief was required for any environmental degradation resulting from the commercial activities.

C. Forests

1. Gifford Pinchot Task Force v. United States Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004), amended by 387 F.3d 968 (9th Cir. 2004), supra Part II A.

2. Headwaters Inc. v. United States Forest Service, 399 F.3d 1047(9th Cir. 2004), infra Part V.D.

3. Lands Council v. Powell, 395 F.3d 1019 (9th Cir 2004), supra Part I.C.

4. United States v. Adams, 388 F.3d 708 (9th Cir. 2004), infra Part III.

III. Environmental Crimes

1. United States v. Adams, 388 F.3d 708 (9th Cir. 2004).

Barry Adams appealed his misdemeanor conviction for using National Forest System land without obtaining the special-use authorization required for groups of seventy-five or more people under Forest Service regulations. [[299]](#footnote-300)299 Adams was a member of the Rainbow Family, a group that gathers annually in National Forests "to pray for peace and discuss political and environmental issues," [[300]](#footnote-301)300 and he declined to apply for a Forest Service permit for the Rainbow Family's 2000 gathering at Beaverhead National Forest in Montana. The Ninth Circuit affirmed the district court's conviction of Adams.

Approximately 22,000 people, including Adams, attended the gathering in Beaverhead National Forest. USFS cited Adams and two others for not obtaining a permit. After a Magistrate Judge denied his motion to dismiss and conducted a bench trial, Adams was convicted of a misdemeanor. Despite First Amendment arguments by Adams, the district court affirmed the conviction, and Adams appealed. Because the case involved claims of constitutional violations, the Ninth Circuit reviewed the denial of the motion to dismiss de novo.

First, Adams claimed that the agency's regulatory scheme was facially unconstitutional. The Ninth Circuit rejected this argument, relying on its previous examinations of the group-use permit system, including United States v. Linick. [[301]](#footnote-302)301 In Linick, the court held the system was constitutional under the traditional three-part test for regulations on the use of public forums: such regulations must "(1) [be] content-neutral, (2) [be] narrowly **[\*566]** tailored to serve a significant government interest, and (3) leave[] open "ample alternatives for communication.'" [[302]](#footnote-303)302

While conceding the first two prongs of the court's test, Adams argued that USFS regulations did not provide sufficient opportunity for communication. The Ninth Circuit was not persuaded by Adams's argument, citing its decision in Linick against defendants participating in a Rainbow Family gathering under similar circumstances. The Linick court reasoned that, because USFS is required to offer alternative arrangements when possible if a permit application is denied, and because defendants did not show why it was necessary to use National Forest land, there were "ample alternatives for communication," satisfying the third prong. [[303]](#footnote-304)303

The Ninth Circuit discounted as "conclusory" the attempt by Adams to distinguish Linick by claiming that national forests were "vital" for Rainbow Family gatherings. Citing a Third Circuit decision, the Ninth Circuit noted that USFS regulations did not prevent the Rainbow Family from using private, state, or non-Forest Service federal land for its gatherings, nor did they prevent the Rainbow Family from gathering on Forest Service land in groups of less than seventy-five people. [[304]](#footnote-305)304 The Ninth Circuit found that the regulations left open "ample alternatives for communication" and were constitutional.

Second, Adams claimed that, as an individual, he could not be prosecuted for violating USFS's "group use" permit requirement. The court adopted the Third Circuit's reasoning in Kalb, holding that the lack of a formal leadership structure in the Rainbow Family did not prevent the prosecution of group members performing leadership roles. [[305]](#footnote-306)305 Adams also argued that he should not be punished for his mere presence at an event at which improper use occurred. The Ninth Circuit, however, held that Adams, as an organizer of the Rainbow family gathering who was aware that the USFS permit requirement had not been fulfilled, was not a mere attendee, and was therefore subject to prosecution under USFS regulations. [[306]](#footnote-307)306

Finally, Adams claimed that he was selectively prosecuted, an argument that the Ninth Circuit found to be "without merit." [[307]](#footnote-308)307 Relying on evidence that his role as an organizer of the event and his participation in the gathering led to his prosecution, the court held the decision to prosecute Adams was within the government's discretion. Adams further argued that the government's failure to ticket all attendees at the gathering was discriminatory, an argument that the court also rejected. The court held that such a standard would require the government to cite either all violators or none at all, and that the government's choices of whom to prosecute were legal as long as there was no discriminatory purpose or effect.

Finding that the USFS permit scheme was constitutional, that individuals such as Adams were subject to "group use" regulations, and that **[\*567]** Adams was not selectively prosecuted, the Ninth Circuit affirmed the district court's conviction of Adams.

IV. Native American Issues

1. Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004), supra Part I.C.

V. Litigation Issues

A. Civil Procedure

1. Grand Canyon Trust v. Tucson Electric Power Co., 391 F.3d 979 (9th Cir. 2004), supra Part I.A.

2. Headwaters Inc. v. United States Forest Service, 399 F.3d 1047 (9th Cir. 2004), infra Part V. D.

3. Safe Air for Everyone v. Meyer, 373 F.3d 1035 (9th Cir. 2004), supra Part I.D.

4. Save Our Sonoran v. Flowers, 381 F.3d 905 (9th Cir. 2004), supra Part I.B.

5. WaterKeepers Northern California v. AG Industrial Manufacturing Inc., 375 F.3d 913 (9th Cir. 2004), cert. denied, 125 S. Ct. 869 (2005).

WaterKeepers Northern California (WaterKeepers) sued AG Industrial Manufacturing (AG Industrial), alleging discharges in violation of the Clean Water Act (CWA). [[308]](#footnote-309)308 The district court dismissed for lack of jurisdiction, concluding WaterKeepers' intent-to-sue letter did not provide sufficient notice of its claims. The Ninth Circuit held that WaterKeepers provided adequate notice to AG Industrial of its intent to sue under the CWA, reversed the lower court's dismissal for all except WaterKeepers's industrial process water claim, and remanded to the district court.

In June 2000, WaterKeepers sent notice of its intent to sue AG Industrial, a manufacturer of farm equipment for the wine grape industry, for CWA violations, including storm water pollution and the discharge of contaminated non-storm water. The CWA requires private plaintiffs to notify alleged violators of their intent to sue at least sixty days before filing a complaint, [[309]](#footnote-310)309 and a plaintiff must send an intent-to-sue letter that "includes "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, … [and] the date or dates of such violation.'" [[310]](#footnote-311)310 After more than sixty days had elapsed, WaterKeepers filed a suit alleging continuing and recurring violations of the CWA at AG Industrial's facility in Lodi, California. Each side moved for summary **[\*568]** judgment, but, without deciding on the merits, the district court dismissed the suit, concluding that WaterKeepers's intent-to-sue letter did not provide sufficient notice of its claims. The district court also denied AG Industrial's motion for prevailing party attorney fees because WaterKeepers's claims were not "frivolous, unreasonable, or without foundation." [[311]](#footnote-312)311 On appeal, the Ninth Circuit reviewed the adequacy of the intent-to-sue letter de novo.

The Ninth Circuit held that the district court's ruling on notice was inconsistent with its recent decision in San Francisco BayKeeper, Inc. v. Tosco Corporation. [[312]](#footnote-313)312 The Ninth Circuit found the notice letter to be adequate, even though it ""did not provide any specific dates' for the alleged violations." [[313]](#footnote-314)313 The Ninth Circuit held that the allegations in WaterKeepers's letter were as sufficient as those in San Francisco BayKeeper because the allegations in the letters in both cases were equally specific.

AG Industrial argued that the district court's dismissal should be affirmed on four grounds. First, it argued that WaterKeepers's intent-to-sue letter gave insufficient notice of the specific standards that AG Industrial was violating. The Ninth Circuit rejected this argument because the letter listed the contaminants believed to be at AG Industrial's site, explained the contaminant's exposure to rainfall, and listed specific provisions of the state's General Permit under the CWA that allegedly were violated.

Second, AG Industrial argued that WaterKeepers gave insufficient notice of non-storm water discharges. Without providing specific dates, the letter claimed that contaminants were discharged when AG Industrial washed down dirty facilities, machinery, and equipment. The Ninth Circuit, however, relied on San Francisco BayKeeper and held that the letter provided sufficient information to allow the company to identify the dates of alleged violations. [[314]](#footnote-315)314 The Ninth Circuit concluded that AG Industrial was in a better position to know the dates it washed down its facilities and equipment, and WaterKeepers's letter provided the necessary information to identify the dates of alleged violations.

Third, AG Industrial argued that the dismissal of WaterKeepers's prevention, monitoring, and reporting claims should be affirmed because it had cured all violations after receiving the intent-to-sue letter but before WaterKeepers filed its complaint. WaterKeepers argued that the changes made by AG Industrial still did not fulfill the requirements of its General Permit. The Ninth Circuit decided that AG Industrial's new plan did not render WaterKeepers' intent-to-sue letter ineffective. The Ninth Circuit held that, when a notice letter was received, subject matter jurisdiction was established, and no further notice was required, even if the recipient had begun to implement a cure. [[315]](#footnote-316)315

Finally, citing the Supreme Court's decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.(Gwaltney), [[316]](#footnote-317)316 AG Industrial argued **[\*569]** that dismissal should be affirmed because the evidence submitted by the parties for summary judgment showed that WaterKeepers did not file its complaint in "good faith." [[317]](#footnote-318)317 According to AG Industrial, WaterKeepers's claims had to be dismissed because they did not meet the "good-faith" requirement articulated by the Supreme Court in Gwaltney. [[318]](#footnote-319)318 The Ninth Circuit held that Gwaltney did not require an examination of the merits of the parties' summary judgment motions to decide whether the district court had jurisdiction - a good faith allegation alone is sufficient to confer jurisdiction. [[319]](#footnote-320)319

In conclusion, because the Ninth Circuit held that the district court had jurisdiction over nearly all of WaterKeepers's claims, the court also held that AG Industrial was not a prevailing party entitled to attorney fees under the Clean Water Act. The Ninth Circuit reversed the district court's dismissal in part, affirmed the dismissal of WaterKeepers's process water claim, affirmed the district court's denial of attorney fees, and remanded to the district court to reach the merits.

B. Standing and Ripeness

1. Cetacean Community v. Bush, 386 F.3d 1169 (9th Cir. 2004).

The Cetacean Community (Cetaceans), through its self-appointed attorney, appealed dismissal of its complaint against the President of the United States and the Secretary of Defense. Cetaceans alleged violations of the Endangered Species Act (ESA), [[320]](#footnote-321)320 the Marine Mammal Protection Act (MMPA), [[321]](#footnote-322)321 and the National Environmental Policy Act (NEPA), [[322]](#footnote-323)322 by the United States Navy. Cetaceans claimed that the Navy's low frequency active sonar system seriously injured Cetaceans and interfered with their natural activities. The Ninth Circuit affirmed the district court's dismissal.

Cetaceans include "all of the world's whales, porpoises, and dolphins," [[323]](#footnote-324)323 on behalf of whom plaintiffs' counsel filed this action to compel defendants to undertake various actions under the ESA, the MMPA, and NEPA. The defendants filed a motion to dismiss for both lack of subject matter jurisdiction [[324]](#footnote-325)324 and failure to state a claim upon which relief can be granted. [[325]](#footnote-326)325 The district court granted defendants' motion without stating its basis for dismissal, and also held "that the Cetaceans lacked standing under" the various statutes. [[326]](#footnote-327)326 Cetaceans appealed, and the Ninth Circuit reviewed the standing issue de novo.

**[\*570]** Cetaceans argued that the Ninth Circuit was bound by its prior decision in Palila v. Hawaii Department of Land and Natural Resources (Palila IV), [[327]](#footnote-328)327 granting legal status to an endangered bird, [[328]](#footnote-329)328 and that statements to this effect amounted to "a holding that an endangered species has standing to sue to enforce the ESA." [[329]](#footnote-330)329 The defendants, however, argued that the court's statements were merely dicta, not binding precedent for the Ninth Circuit. In the instant case, the district court ruled that the statements in Palila I were dicta, [[330]](#footnote-331)330 and the Ninth Circuit agreed, noting that the plaintiffs in Palila IV included "the Sierra Club and others" who clearly had standing and "brought an action under the [ESA] on behalf of the Palila." [[331]](#footnote-332)331 As a result, the Ninth Circuit decided that its Palila IV ruling did not give standing to endangered species under the ESA and reviewed the issue of standing "as a matter of first impression." [[332]](#footnote-333)332

The Ninth Circuit detailed the two-step process required by the Supreme Court to qualify for standing. First, under Article III of the Constitution, a plaintiff must have an injury in fact caused by the defendant that would be likely to be redressed by a favorable decision. [[333]](#footnote-334)333 Second, if the Article III requirements are met, a court must examine whether the plaintiff has standing under a statute enacted by Congress. [[334]](#footnote-335)334 The Ninth Circuit stated that "Article III does not prevent Congress from granting standing to an animal by statutorily authorizing a suit in its name," [[335]](#footnote-336)335 and went on to consider whether Congress did so in any of the statutes at issue in Cetaceans' complaint: the Administrative Procedure Act (APA), [[336]](#footnote-337)336 the ESA, the MMPA, and NEPA.

Under section 10(a) of the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." [[337]](#footnote-338)337 The Ninth Circuit, noting that when a statute itself did not grant standing to a plaintiff, the statute may be read through the "gloss" of section 10(a) to give standing, considered the effects of section 10(a) in its analysis of the ESA, the MMPA, and NEPA. The ESA included a citizen-suit provision granting standing to "any person" filing a "civil suit on his own behalf" to address a "violation of any provision of this chapter or regulation." [[338]](#footnote-339)338 In defining the "person" who may file suit, the court pointed out that the ESA made no mention of species that the statute was intended to protect. [[339]](#footnote-340)339 **[\*571]** Reading the ESA through the gloss of APA section 10(a) did not change the outcome in the court's view: while the APA granted standing to "persons" suffering ill effects of agency actions, the APA definition of "person" was narrow, excluding animals. [[340]](#footnote-341)340 As a result, the Ninth Circuit held that the ESA did not grant standing to Cetaceans.

The MMPA requires a permit to "harass, hunt, capture, or kill" marine mammals. [[341]](#footnote-342)341 Under the MMPA, both permit applicants and parties opposing such permits are given standing, [[342]](#footnote-343)342 but the statute did not mention potential parties, "such as the Cetaceans," attempting to "compel someone to apply for a … permit." [[343]](#footnote-344)343 The Ninth Circuit held that applying APA section 10(a) to the MMPA did not grant standing to Cetaceans, due to the limited definition of "person." As a result, the Ninth Circuit held that Cetaceans lacked "standing to enforce the permit requirement of the MMPA." [[344]](#footnote-345)344

Under NEPA, "major federal actions significantly affecting the quality of the human environment" require the preparation of an environmental impact statement (EIS). [[345]](#footnote-346)345 The Ninth Circuit looked to the Supreme Court holding that NEPA itself did not grant standing for enforcement, but standing may be obtained through the APA. [[346]](#footnote-347)346 The Ninth Circuit, however, held that it had "seen nothing in either NEPA or the APA that would permit us to hold that animals … have standing to bring suit on their own behalf." [[347]](#footnote-348)347

Finally, Cetaceans argued that if members did not have standing, they were an "association" included in the APA definition of "person," [[348]](#footnote-349)348 and therefore entitled to standing. The Ninth Circuit disagreed, citing a Supreme Court holding that associational standing required that the "members would otherwise have standing to sue in their own right," [[349]](#footnote-350)349 and reiterating that individual animals did not have standing in this case. The court found no intent by Congress to include non-human groups under the term "association" in the APA. Finding no language in the ESA, the MMPA, NEPA, or the APA granting standing to animals, the Ninth Circuit held Cetaceans had no standing, and affirmed the district court ruling.

2. Natural Resources Defense Council v. Abraham, 388 F.3d 701 (9th Cir. 2004).

The Department of Energy (DOE) appealed from a grant of summary judgment favoring Natural Resources Defense Council, who, along with several other environmental and tribal organizations (collectively NRDC), challenged a DOE order governing the disposal of radioactive waste **[\*572]** generated at federal defense facilities. The Ninth Circuit held the challenge was not ripe for review.

In 1999, DOE issued Order 435.1, which was designed to ensure all radioactive waste would be managed to protect workers, as well as public health and the environment. In conjunction with the Radioactive Waste Management Manual and the DOE Implementation Guide, Order 435.1 established management responsibilities for varying levels of radioactive waste. NRDC asserted DOE would construe the order to reclassify high-level waste as waste incidental to reprocessing that required minimized handling protections, thus violating the Nuclear Waste Policy Act (NWPA). [[350]](#footnote-351)350 The district court found the issue ripe and granted summary judgment to NRDC. The Ninth Circuit reviewed the ripeness decision de novo.

The Ninth Circuit pointed out that ripeness is dependent on the "fitness of the issues for judicial decision and … the hardship to the parties of withholding court consideration." [[351]](#footnote-352)351 The court then noted that, although the order was a final agency action, its ability to review NRDC's concerns regarding differences between the definition of high-level waste in the order and the NWPA would be improved with "further factual development." [[352]](#footnote-353)352 The court acknowledged DOE could potentially exploit definitional differences in violation of the NWPA, but there was no indication the agency would do so. Indeed, the manual accompanying Order 435.1 expressly stated high-level waste would be treated in accordance with the NWPA. The Ninth Circuit concluded that because the DOE order did not require the interpretation asserted by NRDC, the issue was not fit for review.

The Ninth Circuit then noted legal hardship was lacking as well. The court pointed out the order did not change or create any legal rights or obligations, nor did it "force NRDC to modify its behavior "to avoid future adverse consequences.'" [[353]](#footnote-354)353 The court concluded there was no realistic danger that NRDC would be adversely affected by waiting for DOE to construe the order and challenging it at that time. Because premature judicial review would interfere with the administrative process and because there was no indication DOE would construe the order in the manner alleged by NRDC, the Ninth Circuit held the issue was not ripe.

**[\*573]**

3. Ocean Advocates v. United States Army Corps of Engineers, 361 F.3d 1108 (9th Cir. 2004), supra Part I.C.

4. Save Our Sonoran v. Flowers, 381 F. 3d 905 (9th Cir. 2004), supra Part I.B.

C. Administrative Law

1. Cetacean Community v. Bush, 386 F.3d 1169 (9th Cir. 2004), supra Part V.B.

2. Headwaters Inc. v. United States Forest Service, 399 F.3d 1047 (9th Cir. 2005), infra Part V.D.

3. Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2004), supra Part I.C.

4. National Wildlife Federation v. United States Army Corps of Engineers, 384 F.3d 1163 (9th Cir. 2004), supra Part I.B.

5. Natural Resources Defense Council v. Abraham, 388 F.3d 701 (9th Cir. 2004), supra Part V.B.

6. Vigil v. Leavitt, 366 F.3d 1025 (9th Cir. 2004), supra Part I.A.

D. Res Judicata

1. Headwaters, Inc. v. United States Forest Service, 399 F.3d 1047 (9th Cir. 2005).

Headwaters, Inc. and the Forest Conservation Council (collectively Headwaters) appealed a district court sua sponte dismissal, on res judicata grounds, of their claim against the United States Forest Service (USFS) for violations of the National Environmental Policy Act (NEPA), [[354]](#footnote-355)354 the Administrative Procedure Act (APA), [[355]](#footnote-356)355 and the National Forest Management Act (NFMA). [[356]](#footnote-357)356 The Ninth Circuit reversed the district court's sua sponte dismissal and remanded the issue of res judicata to the district court for further factual development concerning whether Headwaters was adequately represented during a past suit by the American Lands Council (American Lands).

A coalition of environmental groups and two individuals (American Lands) [[357]](#footnote-358)357 brought suit against USFS on May 13, 1999 for violations of NEPA, NFMA, and the APA for the Beaver-Newt and Silver Fork timber sales in the Rogue River National Forest. In December, before the initiation of any litigation on the merits, American Lands signed a stipulation of dismissal of **[\*574]** the complaint with prejudice, leading the district court to dismiss the action with prejudice. In February 2001, the Klamath-Siskiyou Wildlands Center, a plaintiff in the American Lands action, filed suit against USFS again alleging the same two timber sales violated NEPA, NFMA, and the APA. [[358]](#footnote-359)358 USFS responded with a motion for judgment on the pleadings citing grounds of res judicata. The Kalamath-Siskiyou Wildland Center responded with a rule 60(b) motion alleging the attorney for American Lands did not have the authority to enter into the American Lands settlement agreement. The district court chose to bar Klamath-Siskiyou's action on the grounds of res judicata. Klamath-Siskiyou chose not to appeal the action.

Three days after the court handed down the Klamath decision, Headwaters filed this action against USFS again alleging identical violations of NEPA, NFMA and the APA in the Beaver-Newt and Silver Fork timber sales. However, in contrast to the American Lands action, the Headwaters complaint related its claims to particular endangered species and alleged different interest in, and use of, the forest. The district court dismissed the complaint on the grounds that res judicata barred the claim. On appeal, a three judge panel for the Ninth Circuit initially affirmed the district court's sua sponte dismissal on res judicata grounds, but later issued an amended opinion that reversed the district court's sua sponte dismissal and remanded the question of res judicata to the district court for further factual consideration. [[359]](#footnote-360)359

The Ninth Circuit reviewed the district court decision in light of the elements of res judicata: 1) identity of claims, 2) final judgment on the merits, and 3) privity between parties. The Ninth Circuit first reasoned that the Headwaters complaint shared enough similarities with the previous actions against USFS to bar their claim. The court relied on the similar NEPA, NFMA, and APA violations alleged in the Klamath and American Lands complaints. The three suits also share a similar nucleus of fact, in that all three arose out of the Beaver-Newt and Silver Fork timber sales. The Ninth Circuit concluded that a ruling on the present decision would effect both the American Lands and Klamath decisions.

The Ninth Circuit then reviewed the American Lands and Klamath decisions to determine if a final judgment existed on the merits. The court pointed out a dismissal with prejudice is considered a final judgment on the merits. Because the American Lands court dismissed the case with prejudice, the Ninth Circuit held the decision satisfied the second element of res judicata.

The Ninth Circuit also reviewed a relationship of privity between the previous plaintiffs, the final element of res judiata. The court commented that privity exists when a party's interest is sufficiently related to the interest of a former party so that he or she "represents precisely the same right in respect to the subject matter involved." [[360]](#footnote-361)360 The Ninth Circuit explained that **[\*575]** courts historically defined privity as a limited number of legal relationships in which two parties possess "identical or transferred rights with respect to a particular legal interest." [[361]](#footnote-362)361 The modern definition, however, includes parties who share a relationship of virtual representation, a classification based upon a finding of identical interests and adequate representation. [[362]](#footnote-363)362

The Ninth Circuit then considered the issue of adequate representation, a pre-requisite to determining that privity exists between two or more parties. The analysis of adequate representation protects due process rights of the plaintiff bringing the present suit by ensuring the prior plaintiff sufficiently represented their interests. A finding of adequate representation precludes the present plaintiffs from their day in court. In its analysis, the Ninth Circuit observed that American Lands and Headwaters both sought vindication of a public right to compel administrative agencies to comply with federal law. The court held that this similarity between the cases constituted adequate representation, and declined the opportunity to craft a public rights exception to the doctrine.

The Ninth Circuit subsequently barred non-traditional findings of privity, such as virtual representation, based solely on the pleadings, therefore reversing the district court's sua sponte dismissal of the Headwaters suit. The court indicated that a res judicata claim could only be dismissed sua sponte if the two actions at issue share the same claims and the same parties. Because Headwaters was not a party to the American Lands suit, the Ninth Circuit determined that a finding of virtual representation between the parties demanded factual development beyond the "bare record." [[363]](#footnote-364)363 The court explained that it needed further information concerning Headwaters's notice of the American Lands suit, and indicated that the American Lands court never considered the specific claim raised by Headwaters. The court also commented that the American Lands court did not implement the procedural safeguards of a class action that ensure adequate representation of parties affected by the judgment. [[364]](#footnote-365)364 Finally, the Ninth Circuit indicated that the district court never fully investigated whether American Lands and Headwaters shared organizational ties. Thus, the Ninth Circuit concluded that the district court did not have enough information to determine if the American Lands litigation adequately affected Headwaters's interests.

In conclusion, the Ninth Circuit reversed the district court's grant of summary judgment for USFS. While the majority upheld the district court's findings of identical claims and final judgment on the merits it determined that the district court could not conduct a privity analysis sua sponte because Headwaters was not a party to the previous case. The Ninth Circuit remanded the case to the district court to develop a factual record necessary for an evaluation of adequate representation between the parties.

**[\*576]** Judge Goodwin, concurring, would have instructed the district court to award fees and costs to USFS if the factual record on remand indicated that Headwaters intentionally filed the present suit to prolong the unnecessary litigation.

E. Attorney's Fees

1. Association of California Water Agencies v. Evans, 386 F.3d 879 (9th Cir. 2004).

Fishing and state water agency associations brought an action alleging that the National Marine Fisheries Service (NMFS) violated the Endangered Species Act (ESA) [[365]](#footnote-366)365 by not carrying out the proper economic impact analysis before designating certain lands as critical habitats. Settlement of a related action involving the National Association of Homebuilders (NAHB) vacated NMFS's final rule designating critical habitat, mooting the plaintiffs' action. The plaintiffs moved for attorney fees under the fee-shifting provision of the ESA, and the district court granted the motion. The defendants appealed the attorney fee award. The Ninth Circuit affirmed the district court opinion awarding attorney's fees under the ESA.

NMFS designated lands in California and the Pacific Northwest as critical habitats for endangered species. The plaintiffs alleged the defendants violated the ESA requirement that the Secretary of Commerce balance economic effects against potential benefits before designating areas as critical habitats. [[366]](#footnote-367)366 The defendants settled the NAHB case, entering into a consent decree to vacate and remand its final rule regarding designation of critical habitats before the district court ruled on the plaintiff's summary judgment motion. The consent decree rendered the plaintiffs' case moot and the plaintiffs moved for attorney's fees under the ESA's fee-shifting provision, which allows a court to "award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." [[367]](#footnote-368)367 The district court granted the plaintiffs' motion, awarding $ 304,530 in attorney's fees and $ 13,211.26 in costs. The defendants appealed the award to the Ninth Circuit, which reviewed factual determinations for clear error and reviewed de novo the fee determination.

The defendants contended that the plaintiffs' action was brought under the Administrative Procedure Act [[368]](#footnote-369)368 because defendants had a discretionary duty to conduct an economic impact analysis, rather than a required duty under the ESA. The Ninth Circuit held that the plaintiffs' action was brought under the ESA. Citing the Supreme Court's decision in Bennett v. Spear, [[369]](#footnote-370)369 the court ruled that the suit fell under the fee-shifting provision of the ESA **[\*577]** because the statute, despite leaving some room for discretion, fundamentally required defendants to consider economic impact when designating critical habitats. [[370]](#footnote-371)370 The plaintiffs alleged that the defendants did not perform their duty to conduct an adequate economic analysis under 16 U.S.C. 1533(b)(2). In particular, the plaintiffs took issue with the defendants "incremental effects" analysis, in which the designation of a critical habitat was found to have no economic impact if the only discernible impact came from the listing of a species as endangered, rather than from the designation of a critical habitat. The plaintiffs asserted that their action was "a catalyst in bringing about Defendants' changed interpretation of [] 1533(b)(2) and the remand of the designations." [[371]](#footnote-372)371 Because the action was brought under the ESA, the Ninth Circuit held that the ESA's fee-shifting provision was applicable to the parties in this case.

In applying the ESA's fee-shifting provision, the Ninth Circuit considered the Supreme Court's interpretation of that provision. According to the Supreme Court, the provision is inclusive, allowing fee awards for "partially prevailing parties - parties achieving some success, even if not major success." [[372]](#footnote-373)372 The defendants, however, relied on Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources (Buckhannon). [[373]](#footnote-374)373

In Buckhannon, the Supreme Court limited the definition of "prevailing party" in cases under the Fair Housing Amendments Act [[374]](#footnote-375)374 and Americans with Disabilities Act [[375]](#footnote-376)375 to those who had obtained some form of judicial relief, rather than the plaintiffs who had acted as a catalyst to bring about a desired result. [[376]](#footnote-377)376 The Ninth Circuit rejected the defendants' assertion that the Buckhannon decision precluded the plaintiffs' use of the catalyst theory under the ESA's fee-shifting provision because the plaintiffs were not a "prevailing party." Relying on the Eleventh Circuit's interpretation of Buckhannon in Loggerhead Turtle v. County Council of Volusia County, [[377]](#footnote-378)377 the Ninth Circuit held that, although the catalyst theory could not be applied to statutes allowing fee shifting for a "prevailing party," the catalyst theory could be used under statutes such as the ESA, which allow fee shifting "whenever the court determines such award is appropriate." [[378]](#footnote-379)378

The Ninth Circuit gave three reasons for this determination: 1) "there [was] clear evidence" of Congressional intent to make fee shifting available under a "whenever … appropriate" statute when a plaintiff's goals were advanced by an action; 2) Buckhannon focused on the "prevailing party" wording in the statutes the Supreme Court then considered, but did not mention "whenever … appropriate" statutes such as the ESA; and 3) the **[\*578]** Supreme Court's stated policy reasons for precluding the catalyst theory under "prevailing party" statutes included the desire to prevent defendants from making voluntary changes to avoid attorney fees, while such changes are the goal of citizen suits under the ESA, which allow only equitable relief. [[379]](#footnote-380)379

Finally, the Ninth Circuit held that the district court acted within its discretion in finding that the plaintiffs' action acted as a catalyst in the settlement of the NAHB case, and did not award excessive or unreasonable fees to the plaintiffs. The defendants argued other events contributed to the voluntary remand of the Final Rule, and the district court's finding was clearly erroneous. The Ninth Circuit, however, held it was reasonable for the district court to find the plaintiffs' action had a causal relationship to the voluntary remand of the Final Rule. The defendants also argued that the fee award to the plaintiffs was "excessive and unreasonable." [[380]](#footnote-381)380 The Ninth Circuit, however, held that the plaintiffs' time records adequately supported the fee amount awarded. In conclusion, the Ninth Circuit affirmed the attorney fees and costs awarded by the district court.

2. Ocean Conservancy, Inc. v. National Marine Fisheries Service, 382 F.3d 1159 (9th Cir. 2004).

The Ocean Conservancy, in conjunction with several other environmental organizations (collectively Conservancy), brought suit to stop the National Marine Fisheries Service (NMFS) from conducting scientific research that would have resulted in the taking of endangered sea turtles, thereby violating the Endangered Species Act (ESA). [[381]](#footnote-382)381 The district court denied a preliminary injunction and Conservancy appealed. After the appeal was dismissed, NMFS and an intervening fishery organization, the Hawaii Longline Association (HLA), moved for costs. The Ninth Circuit held that costs should not be awarded.

In an attempt to limit turtle bycatch, NMFS proposed to conduct research into methods other than traditional longline fishing. The research itself, however, was anticipated to result in the taking of turtles under the ESA. [[382]](#footnote-383)382 The district court denied a preliminary injunction, but ordered NMFS to prepare an environmental impact statement (EIS) by July 31, 2003.

Conservancy appealed and the Ninth Circuit temporarily enjoined the research. Meanwhile, NMFS requested an extension of the EIS deadline. Because NMFS conceded that it could not conduct the challenged research before the completion of the EIS, it moved to dismiss the appeal as moot. In an unpublished opinion, the Ninth Circuit dismissed the appeal as moot, but issued instructions with its order. These instructions prohibited longline fishing research until the EIS and a new Biological Opinion were completed. The instructions also provided that if NMFS did issue a new research permit in accordance with the instructions, Conservancy would be permitted to **[\*579]** amend its complaint. NMFS and HLA moved for costs under Federal Rule of Appellate Procedure 39(a)(1). [[383]](#footnote-384)383

The Ninth Circuit first pointed out that Rule 39(a)(1) awards costs unless the "law provides … otherwise." [[384]](#footnote-385)384 The court noted, by way of analogy, that the ESA has been found to override Federal Rule of Civil Procedure 54(d) allocating costs to the prevailing party. Thus, because the ESA awards costs "where appropriate" the Ninth Circuit held that the federal law should override Rule 39. [[385]](#footnote-386)385 The Ninth Circuit determined that costs were not appropriate here because costs are appropriate only if the litigation is frivolous. [[386]](#footnote-387)386 The court decided Conservancy's litigation was not frivolous because it likely resulted in mooting the case, thereby suspending NMFS's research until an EIS was completed. This suspension was a large part of the relief sought by the Conservancy. [[387]](#footnote-388)387

Moreover, the Ninth Circuit had dismissed the appeal with instructions essentially enjoining the research NMFS wished to pursue. These factors led the court to conclude that, although the appeal was dismissed, Conservancy appeared to be the prevailing party. [[388]](#footnote-389)388 Thus, the Ninth Circuit denied NMFS's motion for costs because Conservancy's suit was not frivolous.

F. Preemption

1. Air Conditioning and Refrigeration Institute v. Energy Resources Conservation and Development Commission, 397 F.3d 755 (9th Cir. 2005).

The Air Conditioning and Refrigeration Institute, joined by several other appliance manufacturing associations (collectively Appliance Associations), brought suit alleging that regulations adopted by California's Energy Resources Conservation and Development Commission (Commission) were preempted by the federal Energy Policy and Conservation Act (EPCA). [[389]](#footnote-390)389 The Ninth Circuit, reversing the district court, held that the Commission's regulations were not preempted by the EPCA.

The regulations at issue required appliance manufacturers to submit information about their appliances to the Commission and to mark those appliances with energy performance data. [[390]](#footnote-391)390 In addition to the substantive regulations, there were also procedural regulations requiring compliance with marking and disclosure requirements. [[391]](#footnote-392)391 Appliance Associations argued **[\*580]** that the California regulations were superseded by the EPCA which expressly preempts:

any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if … such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under [this title]; or … such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under [this title.] [[392]](#footnote-393)392

The district court held that the Commission's regulations were preempted by the EPCA and therefore enjoined enforcement of the regulations.

The Ninth Circuit reviewed the preemption decision de novo and the district court's injunction under an abuse of discretion standard. The Ninth Circuit first noted that only express preemption was at issue. The court then stated that it would use a two step process to determine express preemption. First, the court would look to the text of the EPCA to "identify the domain expressly pre-empted by that language." [[393]](#footnote-394)393 Second, it would probe congressional intent using the text itself, as well as the structure and purpose of the Act and legislative history. The Ninth Circuit began its preemption analysis with two fundamental presumptions: "That Congress did not intend to supplant state law," and that preemptive provisions should be narrowly construed. [[394]](#footnote-395)394 The court then went on to address the Appliance Associations' arguments, beginning with whether the data submittal regulations were preempted.

The Commission's data submittal regulations required appliance manufacturers to provide the Commission with the name of the manufacturer, the brand name and model number, as well as energy testing statistics for every appliance sold in California. [[395]](#footnote-396)395 The Ninth Circuit compared the required information with the clause in the EPCA that expressly preempted state regulations that require "disclosure of information" related to energy use and efficiency. [[396]](#footnote-397)396 The court then noted that the phrase, "disclosure of information" was used twice in the preemption clause and referred both times to disclosure to consumers at the point of sale.

The court pointed out that "disclosure of information" was not used in the EPCA to refer to requirements that manufacturers submit data to the Department of Energy (DOE), but "instead, Congress used the phrase "submit information or reports.'" [[397]](#footnote-398)397 Finally, the Ninth Circuit stated that **[\*581]** Congress, remembering the ***oil*** embargo of the early 1970s, intended through the EPCA to inform consumers of the energy efficiency of their appliances. Indeed, according to the court, the legislative history and subsequent amendments to the Act were concerned only with disparate state procedures for testing and labeling. Thus, the Ninth Circuit held that, based on the structure of the act and its legislative history, Congress only intended to preempt state disclosure to consumers, not disclosure to state agencies.

The Ninth Circuit next addressed Appliance Associations' argument that federal law preempted the appliance-marking regulations adopted by the Commission. [[398]](#footnote-399)398 Those regulations required appliances to be marked with the manufacturer's name, the brand name, model number, and date of manufacture. [[399]](#footnote-400)399 The court held that the EPCA only preempted provisions that provide "for the disclosure of information with respect to any measure of energy consumption or water use." [[400]](#footnote-401)400 The EPCA defined energy consumption to include energy use, energy efficiency, or "other measure of energy consumption." [[401]](#footnote-402)401 The Commission's regulation did not require manufacturers to mark appliances with energy use or energy efficiency information, so the court focused on the remaining undefined phrase: "other measure of energy consumption." [[402]](#footnote-403)402 Using the canon of statutory construction ejusdem generis - meaning that an item in a list will be interpreted to be of the same type or class as the other items listed - the court held that "other measure of energy consumption" did not encompass the requirements of the Commission's regulation because it would have broadened the terms preceding the phrase. [[403]](#footnote-404)403

The court next focused on the phrase "with respect to" to determine if that expanded the scope of preemption of state marking requirements. [[404]](#footnote-405)404 The court noted that the relationship between what the Commission's regulations required - such as labeling appliances with the brand name - and "measures of energy consumption" was "indirect, remote, and tenuous." [[405]](#footnote-406)405 Therefore, the court concluded that the marking requirements were not preempted by the EPCA.

The court also held that the section of the State's regulations requiring compliance with federal marking requirements was not preempted by EPCA. Because the regulations required nothing more than compliance with federal rules, the court held that it was not "other than information required" under federal law. [[406]](#footnote-407)406 The court noted that identical state requirements are not preempted because those regulations "merely provide[] another reason for **[\*582]** manufacturers to comply with existing identical requirements under federal law." [[407]](#footnote-408)407

Appliance Associations also objected to the Commission's marking regulation that required marking of commercial and industrial equipment. The court noted that the preemption provision of EPCA, [[408]](#footnote-409)408 the latest amendment to EPCA, gave DOE the power to preempt inconsistent state regulations. Specifically, preemption exists where the "state regulation requires disclosure of information … other than information required" under federal law. [[409]](#footnote-410)409 The court held that because DOE had not established federal regulations, state regulations were not "other than required" under federal law. Thus, DOE's inaction did not preempt the state regulation.

Finally, Appliance Associations argued that California's procedural regulations for enforcing the State's marking and information gathering regulations must be preempted because they unlawfully enforce federal requirements. The court noted that the substantive provisions could not be enforced without the procedural provisions. Thus, because the substantive provisions were not preempted, the procedural provisions must stand as well. In conclusion, the Ninth Circuit upheld the submission, marking, and procedural regulations and vacated the district court's injunction against enforcement of those regulations.

In dissent, Judge Noonan took issue with the majority's holding limiting "disclosure of information" to consumers. He suggested that disclosure is a broad term which necessarily encompasses the information submitted to the Commission. Moreover, he suggested that the phrase "other than information required under federal law" must apply to any state requirements in the absence of federal requirements. He argued that because DOE did not promulgate any requirements, requirements adopted by the Commission are necessarily "other than" the federal regulations.

G. Jurisdiction

1. Grand Canyon Trust v. Tucson Electric Power Co., 391 F.3d 979 (9th Cir. 2004), supra Part I.A.

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1. 1 Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n (Bayview I), 177 F. Supp. 2d 1011, 1033 (N.D. Cal. 2001). [↑](#footnote-ref-2)
2. 2 Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n (Bayview II), 212 F. Supp. 2d 1156, 1170 (N.D. Cal. 2002). [↑](#footnote-ref-3)
3. 3 Clean Air Act, 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-4)
4. 4 Id. 7410(a)(1). [↑](#footnote-ref-5)
5. 5 Id. 7409(a), (b). [↑](#footnote-ref-6)
6. 6 Id. 7409(a)(2)(A). [↑](#footnote-ref-7)
7. 7 Id. 7604(a). [↑](#footnote-ref-8)
8. 8 Bayview II, 212 F. Supp. 2d at 1170-1171. [↑](#footnote-ref-9)
9. 9 Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n (Bayview III), 366 F.3d 692, 698 (9th Cir. 2004). [↑](#footnote-ref-10)
10. 10 Id. [↑](#footnote-ref-11)
11. 11 Id. [↑](#footnote-ref-12)
12. 12 Id. at 700 (quoting Hughes Air Corp. v. Public Utilities Comm'n, 644 F.2d 1334, 1338 (9th Cir. 1981)). [↑](#footnote-ref-13)
13. 13 See, e.g., Trustees for Alaska v. Fink, 17 F.3d 1209, 1212 (9th Cir. 1994) (noting that TCMs in a SIP must be "submitted to the EPA in an enforceable form" and that a SIP is "not enforceable apart from specific TCM strategies"); Action for Rational Transit v. West Side Highway, 699 F.2d 614, 616 (2d Cir. 1983) (holding that the "aims and goals of the SIP are not enforceable apart from the specific measures designed to achieve them"). [↑](#footnote-ref-14)
14. 14 Bayview III, 366 F.3d at 702 (citing Bayview I, 177 F. Supp. 2d 1011, 1027 (N.D. Cal. 2002)). [↑](#footnote-ref-15)
15. 15 For examples of cases litigating the previous failure to achieve NAAQS and resulting contingency TCMs, see Citizens for a Better Env't v. Deukmejian, 731 F. Supp. 976 (N.D. Cal. 1990); Citizens for a Better Env't v. Deukmejian, 746 F. Supp. 1448 (N.D. Cal. 1990); Citizens for a Better Env't v. Wilson, 775 F. Supp. 1291 (N.D. Cal. 1990). [↑](#footnote-ref-16)
16. 16 Bayview III, 366 F.3d at 703 (quoting Conservation Law Found., Inc. v. Busey, 79 F.3d 1250, 1258 (1st Cir. 1996)). [↑](#footnote-ref-17)
17. 17 Id. (quoting Wilder v. Thomas, 854 F.2d 605, 614 (2d Cir. 1988)). [↑](#footnote-ref-18)
18. 18 Id. (citing Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv., 307 F.3d 1214, 1219 (9th Cir. 2002)). [↑](#footnote-ref-19)
19. 19 See Christensen v. Harris County, 529 U.S. 576, 588 (2000) (finding that "deference [to an agency's interpretation of its regulation] is warranted only when the language of the regulation is ambiguous"). [↑](#footnote-ref-20)
20. 20 Bayview III, 366 F.3d at 704 (citing Clean Air Act, 42 U.S.C. 7502(c)(6) (2000), stating that "such plan provisions shall include enforceable emission limitations, and such other control measures, means, or techniques"). [↑](#footnote-ref-21)
21. 21 Id. [↑](#footnote-ref-22)
22. 22 Id. at 705. [↑](#footnote-ref-23)
23. 23 Clean Air Act, 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-24)
24. 24 Id. 7475(a)(4). [↑](#footnote-ref-25)
25. 25 Prevention of Significant Deterioration of Air Quality, 40 C.F.R 52.21(i)(2)(ii) (2003). [↑](#footnote-ref-26)
26. 26 Id. 52.2(i)(1)(ii)(c). [↑](#footnote-ref-27)
27. 27 42 U.S.C. 7604(f)(3), (4). [↑](#footnote-ref-28)
28. 28 Grand Canyon Trust v. Tucson Elec. Power Co. (Grand Canyon Trust), 391 F.3d 979, 986 (9th Cir. 2004) (internal quotations omitted). [↑](#footnote-ref-29)
29. 29 Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 257 F.3d 1071, 1075 (9th Cir. 2001). [↑](#footnote-ref-30)
30. 30 Grand Canyon Trust, 391 F.3d at 988. [↑](#footnote-ref-31)
31. 31 Id. [↑](#footnote-ref-32)
32. 32 Id. at 989. [↑](#footnote-ref-33)
33. 33 Id. [↑](#footnote-ref-34)
34. 34 Clean Air Act, 42 U.S.C. 7401-7671q (2000). [↑](#footnote-ref-35)
35. 35 Id. 7408(a), 7409(a). [↑](#footnote-ref-36)
36. 36 National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. 50.6 (2000). [↑](#footnote-ref-37)
37. 37 42 U.S.C. 7407(d)(4)(b) (2000). [↑](#footnote-ref-38)
38. 38 Id. 7513(a). [↑](#footnote-ref-39)
39. 39 Id. 7513(b)(2). [↑](#footnote-ref-40)
40. 40 Id. 7513a(b)(1)(B). [↑](#footnote-ref-41)
41. 41 Id. 7513(c)(2). [↑](#footnote-ref-42)
42. 42 Id. 7513(e). [↑](#footnote-ref-43)
43. 43 See Ober v. United States Envtl. Prot. Agency, 84 F.3d 304, 309 (9th Cir. 1996) (finding that the state must independently examine and implement ""reasonably available control measures' targeting the 24-hour standard" even if the state showed that it could not feasibly meet the standards for allowable annual levels of PM-10); Ober v. Whitman, 243 F.3d 1190, 1198 (9th Cir. 2001) (finding that EPA could designate some sources of PM-10 as de minimis). [↑](#footnote-ref-44)
44. 44 42 U.S.C. 7607(b)(1) (2000). [↑](#footnote-ref-45)
45. 45 Administrative Procedure Act, 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-46)
46. 46 Id. 706(2)(A). [↑](#footnote-ref-47)
47. 47 42 U.S.C. 7513a(a)(1)(C) (2000). [↑](#footnote-ref-48)
48. 48 Id. 7513a(b)(1)(B). [↑](#footnote-ref-49)
49. 49 Id. 7513(e). [↑](#footnote-ref-50)
50. 50 Vigil v. Leavitt, 381 F.3d 826, 834 (9th Cir. 2004). [↑](#footnote-ref-51)
51. 51 Id. (quoting State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clear Act Amendments of 1990, 59 Fed. Reg. 41,998, 41,999 (Aug. 16, 1994)). [↑](#footnote-ref-52)
52. 52 Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984). [↑](#footnote-ref-53)
53. 53 Vigil, 381 F.3d at 835 (referencing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). [↑](#footnote-ref-54)
54. 54 42 U.S.C. 7513(e) (2000). [↑](#footnote-ref-55)
55. 55 Vigil, 381 F.3d at 839 (construing Clean Air Act, 42 U.S.C. 7512(e) (2000)). [↑](#footnote-ref-56)
56. 56 Id. [↑](#footnote-ref-57)
57. 57 Id. (quoting 42 U.S.C. 7513(e) (2000)). [↑](#footnote-ref-58)
58. 58 Id. at 845 (quoting Approval and Promulgation of Implementation Plans; Arizona-Maricopa County PM-10 Nonattainment Area; Serious Area Plan for Attainment of the PM-10 Standards, 67 Fed. Reg. 48,718, 48,725 (July 25, 2002)). [↑](#footnote-ref-59)
59. 59 7513(e). [↑](#footnote-ref-60)
60. 60 Vigil, 381 F.3d at 846. [↑](#footnote-ref-61)
61. 61 Administrative Procedure Act, 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-62)
62. 62 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-63)
63. 63 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-64)
64. 64 Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs , 384 F.3d 1163, 1174 (9th Cir. 2004) (citing Baltimore Gas & Elec. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983)). [↑](#footnote-ref-65)
65. 65 Id. at 1177. [↑](#footnote-ref-66)
66. 66 River and Harbor Act of 1945, 33 U.S.C. 603(a), 544(b) (2000). [↑](#footnote-ref-67)
67. 67 426 U.S. 148, 155 (1976). [↑](#footnote-ref-68)
68. 68 Id. at 155. [↑](#footnote-ref-69)
69. 69 Federal Water Pollution Control Act, 33 U.S.C. 1344 (2000). [↑](#footnote-ref-70)
70. 70 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-71)
71. 71 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-72)
72. 72 Save Our Sonoran, Inc. v. Flowers (Save Our Sonoran), 381 F.3d 905, 910-11 (9th Cir. 2004) (citing Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000)). [↑](#footnote-ref-73)
73. 73 Id. at 912 (quoting United States v. Peninsula Communications, Inc., 287 F.3d 832, 839 (9th Cir. 2002)). [↑](#footnote-ref-74)
74. 74 Id. (quoting Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097, 1100 (9th Cir. 1998)). [↑](#footnote-ref-75)
75. 75 Save Our Sonoran v. Flowers, 227 F. Supp. 2d 1111, 1114 (D. Ariz. 2002). [↑](#footnote-ref-76)
76. 76 Processing of Department of the Army Permits, 33 C.F.R. pt. 325, app. B 7(b)(1) (2000). [↑](#footnote-ref-77)
77. 77 Save Our Sonoran, 381 F.3d at 914. [↑](#footnote-ref-78)
78. 78 Id. (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987)). [↑](#footnote-ref-79)
79. 79 Id. at 915. [↑](#footnote-ref-80)
80. 80 Federal Rule of Civil Procedure 65(c) mandates that the applicant of a restraining order or a preliminary injunction pay a court determined sum "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). [↑](#footnote-ref-81)
81. 81 Save Our Sonoran, 381 F.3d at 915 (quoting Barshom-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999)). [↑](#footnote-ref-82)
82. 82 Id. [↑](#footnote-ref-83)
83. 83 884 F.2d 394 (9th Cir. 1989). [↑](#footnote-ref-84)
84. 84 Save Our Sonoran, 381 F.3d at 916 (quoting Sylvester, 884 F.2d at 397 n.2) [↑](#footnote-ref-85)
85. 85 Id. (citing Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985)). [↑](#footnote-ref-86)
86. 86 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-87)
87. 87 Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1421h (2000). [↑](#footnote-ref-88)
88. 88 Final Rule to Remove the Eastern North Pacific Population of Grey Whale From the List of Endangered Wildlife, 59 Fed. Reg. 31,094 (June 16, 1994). [↑](#footnote-ref-89)
89. 89 Anderson v. Evans, 371 F.3d 475, 483 (9th Cir. 2004) (discussing Treaty of Neah Bay, Jan. 31, 1855, U.S.-Makah Tribe of Indians, 12 Stat. 939, 940). [↑](#footnote-ref-90)
90. 90 Administrative Procedure Act, 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-91)
91. 91 Id. 706(2)(A). [↑](#footnote-ref-92)
92. 92 National Environmental Policy Act of 1969, 42 U.S.C. 4332(C) (2000). [↑](#footnote-ref-93)
93. 93 40 C.F.R. 1508.27(a) (2004). [↑](#footnote-ref-94)
94. 94 Id. 1508.27. [↑](#footnote-ref-95)
95. 95 Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998)). [↑](#footnote-ref-96)
96. 96 Anderson, 371 F.3d 475, at 488-89 (9th Circ. 2004) (citing Friends of Earth v. Hintz, 800 F. 2d 822, 834-35 (9th Cir. 1986)). [↑](#footnote-ref-97)
97. 97 Id. at 489. [↑](#footnote-ref-98)
98. 98 40 C.F.R. 1508.27(b)(4) (2004). [↑](#footnote-ref-99)
99. 99 Id. 1508.27(b)(5). [↑](#footnote-ref-100)
100. 100 Anderson, 371 F.3d at 489-90. [↑](#footnote-ref-101)
101. 101 Id. at 492. [↑](#footnote-ref-102)
102. 102 40 C.F.R. 1508.27(b)(6) (2004). [↑](#footnote-ref-103)
103. 103 Anderson, 371 F.3d at 493. [↑](#footnote-ref-104)
104. 104 Id. at 494 (citing Marine Mammal Protection Act, 16 U.S.C. 1372(a) (2000)). [↑](#footnote-ref-105)
105. 105 16 U.S.C. 1372(a)(2) (2000). [↑](#footnote-ref-106)
106. 106 International Convention for the Regulation of Whaling, 62 Stat. 1716, 1717-19 (1946). [↑](#footnote-ref-107)
107. 107 16 U.S.C. 1378(a)(4) (2000). [↑](#footnote-ref-108)
108. 108 Anderson, 371 F.3d at 496. [↑](#footnote-ref-109)
109. 109 467 U.S. 837 (1984). [↑](#footnote-ref-110)
110. 110 Anderson, 371 F.3d at 497 (citing United States v. Fryberg, 622 F.2d 1010, 1015 (9th Cir. 1980)). [↑](#footnote-ref-111)
111. 111 16 U.S.C. 1372(a)(1) (2000). [↑](#footnote-ref-112)
112. 112 Id. 1362(15). [↑](#footnote-ref-113)
113. 113 Id. 1361(2). [↑](#footnote-ref-114)
114. 114 Anderson, 371 F.3d at 498 (quoting 16 U.S.C. 1361(2) (2000)). [↑](#footnote-ref-115)
115. 115 Treaty of Neah Bay, Jan. 31, 1855, U.S.-Maka Tribe of Indians, 12 Stat. 939, 940.. [↑](#footnote-ref-116)
116. 116 Anderson, 371 F.3d at 501. [↑](#footnote-ref-117)
117. 117 Hood Canal is a salt-water arm of the Pacific Ocean separated from the open seas by the Olympic Peninsula. [↑](#footnote-ref-118)
118. 118 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-119)
119. 119 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-120)
120. 120 United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003). [↑](#footnote-ref-121)
121. 121 Administrative Procedure Act, 5 U.S.C. 706(2)(A) (2000). [↑](#footnote-ref-122)
122. 122 42 U.S.C. 4332(2) (2000). [↑](#footnote-ref-123)
123. 123 40 CFR 1508.12 (2004). [↑](#footnote-ref-124)
124. 124 Ground Zero Center for Non-Violent Action v. United States Dep't of the Navy (Ground Zero), 383 F.3d 1082, 1089 (9th Cir. 2004). [↑](#footnote-ref-125)
125. 125 Id. at 1090. [↑](#footnote-ref-126)
126. 126 Id. at 1089 (citing 40 C.F.R. 1502.16, 1508.8(b) (2004)). [↑](#footnote-ref-127)
127. 127 Id. at 1090. [↑](#footnote-ref-128)
128. 128 Id. (citing Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989) and Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992)). [↑](#footnote-ref-129)
129. 129 Id. at 1090-91. [↑](#footnote-ref-130)
130. 130 Id. at 1090 (citing 40 C.F.R. 1502.22 (2004)). [↑](#footnote-ref-131)
131. 131 Id. at 1092 (quoting Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998)). [↑](#footnote-ref-132)
132. 132 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-133)
133. 133 Klamath-Siskiyou Wildlands Ctr v. Bureau of Land Mgmt. (KS-Wild), 387 F.3d 989, 992 (9th Cir. 2004). [↑](#footnote-ref-134)
134. 134 Administrative Procedure Act, 5 U.S.C. 706(2)(A) (2000). [↑](#footnote-ref-135)
135. 135 KS-Wild, 387 F.3d at 993. [↑](#footnote-ref-136)
136. 136 Id. [↑](#footnote-ref-137)
137. 137 Id. (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)). [↑](#footnote-ref-138)
138. 138 40 C.F.R. 1508.7 (2004). [↑](#footnote-ref-139)
139. 139 KS-Wild, 387 F.3d at 993-94 (quoting Neighbors of Cuddy Mountain v. United States Forest Serv. (Neighbors of Cuddy Mountain), 137 F.3d 1372, 1379-80 (9th Cir. 1998)). [↑](#footnote-ref-140)
140. 140 Id. at 994 (quoting Neighbors of Cuddy Mountain, 137 F.3d at 1380). [↑](#footnote-ref-141)
141. 141 Id. [↑](#footnote-ref-142)
142. 142 Id. at 995. [↑](#footnote-ref-143)
143. 143 Id. [↑](#footnote-ref-144)
144. 144 Id. (quoting Ocean Advocates v. United States Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir. 2004)). [↑](#footnote-ref-145)
145. 145 Id. [↑](#footnote-ref-146)
146. 146 40 C.F.R. 1502.8 (2005). [↑](#footnote-ref-147)
147. 147 KS-Wild, 387 F.3d at 996 (quoting Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998)). [↑](#footnote-ref-148)
148. 148 Id. [↑](#footnote-ref-149)
149. 149 Id. [↑](#footnote-ref-150)
150. 150 Id. [↑](#footnote-ref-151)
151. 151 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-152)
152. 152 See 40 C.F.R. 1508.28 (2005) (defining "tiering" as "the coverage of general matters in broader environmental impact statements (such as national programs or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared"). [↑](#footnote-ref-153)
153. 153 KS-Wild, 387 F.3d at 998 (quoting ***Kern*** v. Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002)). [↑](#footnote-ref-154)
154. 154 40 C.F.R. 1502.4(a) (2005). [↑](#footnote-ref-155)
155. 155 40 C.F.R. 1508.25(a)(1), (2) (2004). [↑](#footnote-ref-156)
156. 156 Id. 1508.25(a)(3). [↑](#footnote-ref-157)
157. 157 K-S Wild, 387 F.3d at 999 (citing Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998); Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985)). [↑](#footnote-ref-158)
158. 158 40 C.F.R. 1508.25(a)(3) (2004). [↑](#footnote-ref-159)
159. 159 K-S Wild, 387 F.3d at 1001. [↑](#footnote-ref-160)
160. 160 Id. [↑](#footnote-ref-161)
161. 161 Id. [↑](#footnote-ref-162)
162. 162 Id. at 1002. [↑](#footnote-ref-163)
163. 163 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-164)
164. 164 40 C.F.R. 1508.7 (2004). [↑](#footnote-ref-165)
165. 165 National Forest Management Act of 1976, 16 U.S.C. 472a, 521b, 1600, 1611-14 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). [↑](#footnote-ref-166)
166. 166 16 U.S.C. 1604(a) (2000). [↑](#footnote-ref-167)
167. 167 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-168)
168. 168 See National Environmental Policy Act of 1969, 42 U.S.C. 4332(c) (2000) (describing required provisions of an Environmental Impact Statement). [↑](#footnote-ref-169)
169. 169 See 42 U.S.C. 4321 (2000) (stating the policy and purpose of NEPA's procedural requirements). [↑](#footnote-ref-170)
170. 170 Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir. 2005). [↑](#footnote-ref-171)
171. 171 Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). [↑](#footnote-ref-172)
172. 172 40 C.F.R. 1502.22 (2004). [↑](#footnote-ref-173)
173. 173 National Forest System Land and Resource Management Act, 16 U.S.C. 1604 (a)-1604(e) (2000). [↑](#footnote-ref-174)
174. 174 Inland Native Fish Strategy, 60 Fed. Reg. 43,758 (Aug. 23, 1995). [↑](#footnote-ref-175)
175. 175 Kettle Range Conservation Group v. United States Forest Serv., 148 F. Supp. 2d 1107, 1127 (E.D. Wash. 2001). [↑](#footnote-ref-176)
176. 176 Lands Council, 395 F.3d at 1019, 1036 (9th Cir. 2005). [↑](#footnote-ref-177)
177. 177 Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 971-74 (9th Cir. 2002). [↑](#footnote-ref-178)
178. 178 Lands Council, 395 F.3d at 1036. [↑](#footnote-ref-179)
179. 179 See Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir. 1995) ("De novo review of a district court judgment concerning a decision of an administrative agency means we review the case from the same position as the district court."). [↑](#footnote-ref-180)
180. 180 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-181)
181. 181 Magnuson Amendment, 33 U.S.C. 476 (2000) (amending Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1421h, Pub. L. No. 95-136, 91 Stat. 1168). [↑](#footnote-ref-182)
182. 182 Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1421h (2000). [↑](#footnote-ref-183)
183. 183 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-184)
184. 184 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-185)
185. 185 Friends of the Earth v. Laidlaw Envtl. Servs. (Laidlaw), 528 U.S. 167, 180-81 (2000). [↑](#footnote-ref-186)
186. 186 Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000). [↑](#footnote-ref-187)
187. 187 Ecological Rights Found. v. Pac. Lumber Co. 230 F.3d 1141, 1152 (9th Cir. 2000). [↑](#footnote-ref-188)
188. 188 Hall v. Norton, 266 F.3d 969, 977 (9th Cir. 2001). [↑](#footnote-ref-189)
189. 189 Clarke v. Sec. Indust. Ass'n, 479 U.S. 388, 399 (1987). [↑](#footnote-ref-190)
190. 190 Laidlaw, 528 U.S. at 181 (2000) (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). [↑](#footnote-ref-191)
191. 191 Churchill County v. Babbitt, 150 F.3d 1072, 1078 (9th Cir. 1998). [↑](#footnote-ref-192)
192. 192 National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C) (2000). [↑](#footnote-ref-193)
193. 193 Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149-1150 (9th Cir. 1998) (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)). [↑](#footnote-ref-194)
194. 194 National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001). [↑](#footnote-ref-195)
195. 195 Ocean Advocates v. United States Army Corps of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005). [↑](#footnote-ref-196)
196. 196 ***Kern*** v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002) (quoting Churchill County v. Norton, 276 F.3d 1060, 1072 (9th Cir. 2001)). [↑](#footnote-ref-197)
197. 197 The Magnuson Amendment, 33 U.S.C. 476(b) (2000). [↑](#footnote-ref-198)
198. 198 Ocean Advocates, 402 F.3d at 874-875. [↑](#footnote-ref-199)
199. 199 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-200)
200. 200 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-201)
201. 201 Westlands Water Dist. v. United States Dep't of Interior (Westlands), 376 F.3d 853, 862 (9th Cir. 2004). [↑](#footnote-ref-202)
202. 202 Trinity River Basin Fish and Wildlife Management Act, Pub. L. No. 98-541, 98 Stat. 2721 (1984). [↑](#footnote-ref-203)
203. 203 Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4714 (1992). [↑](#footnote-ref-204)
204. 204 16 U.S.C. 1536(b)(4)(C)(i)-(ii) (2000). [↑](#footnote-ref-205)
205. 205 Westlands, 376 F.3d at 874. [↑](#footnote-ref-206)
206. 206 Id. at 876. [↑](#footnote-ref-207)
207. 207 40 C.F.R. 1502.14 (2004). [↑](#footnote-ref-208)
208. 208 Id. [↑](#footnote-ref-209)
209. 209 Westlands, 376 F.3d at 866. [↑](#footnote-ref-210)
210. 210 Id. at 867. [↑](#footnote-ref-211)
211. 211 40 C.F.R. 1502.14(a) (2004). [↑](#footnote-ref-212)
212. 212 Laguna Greenbelt, Inc. v. United States Dep't of Transp., 42 F.3d 517, 524 (9th Cir. 1994). [↑](#footnote-ref-213)
213. 213 Westlands, 376 F.3d at 868 (citing Carmel-By-The-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1995)). [↑](#footnote-ref-214)
214. 214 Central Valley Project Improvement Act, Pub. L. No. 102-575, 3406(b), 106 Stat. 4600, 4714 (1992). [↑](#footnote-ref-215)
215. 215 Westlands, 376 F.3d at 872 (quoting California v. Block, 690 F.2d 753, 767 (9th Cir. 1982)). [↑](#footnote-ref-216)
216. 216 Id. at 876. [↑](#footnote-ref-217)
217. 217 Endangered Species Act Consultation Procedures, 50 C.F.R. 402.14(i)(2) (2003). [↑](#footnote-ref-218)
218. 218 Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901-6992k (2000) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992). [↑](#footnote-ref-219)
219. 219 Id. 6972(a)(1)(B). [↑](#footnote-ref-220)
220. 220 Safe Air for Everyone v. Meyer (Safe Air), 373 F.3d 1035, 1038 (9th Cir. 2004). [↑](#footnote-ref-221)
221. 221 Fed. R. Civ. P. 12. [↑](#footnote-ref-222)
222. 222 Fed. R. Civ. P. 12(b)(1). [↑](#footnote-ref-223)
223. 223 Fed. R. Civ. P. 56. [↑](#footnote-ref-224)
224. 224 Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). [↑](#footnote-ref-225)
225. 225 Bell v. Hood, 327 U.S. 678, 682-83 (1946). [↑](#footnote-ref-226)
226. 226 Safe Air, 373 F.3d at 1039 (quoting Sun Valley Gas, Inc. v. Ernst Enters. (Sun Valley), 711 F.2d 138, 139 (9th Cir. 1983)). [↑](#footnote-ref-227)
227. 227 Sun Valley, 711 F.2d at 139. [↑](#footnote-ref-228)
228. 228 Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901(a)(4) (2000). [↑](#footnote-ref-229)
229. 229 Id. 6972(a)(1)(B). [↑](#footnote-ref-230)
230. 230 Id. 6903(27) (emphasis added). [↑](#footnote-ref-231)
231. 231 1 The New Shorter Oxford English Dictionary 684 (4th ed. 1993). [↑](#footnote-ref-232)
232. 232 Safe Air, 373 F.3d at 1045. [↑](#footnote-ref-233)
233. 233 See, e.g., Am. Mining Cong. v. United States Envtl. Prot. Agency (AMC I), 824 F.2d 1177, 1190 (D.C. Cir. 1987) (The Resource Conservation and Recovery Act of 1976 "reveals clear congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned"). [↑](#footnote-ref-234)
234. 234 See Am. Mining Cong. v. United States Envtl. Prot. Agency (AMC II), 907 F.2d 1179, 1186 (D.C. Cir. 1990) (rejecting the claim that the "potential reuse of a material prevents the agency from classifying it as "discarded'"). [↑](#footnote-ref-235)
235. 235 See United States v. ILCO, Inc., 996 F.2d 1126, 1131-32 (11th Cir. 1993) ("It is necessary to read into the word "discarded' a congressional intent that the waste in question must finally and forever be discarded."). [↑](#footnote-ref-236)
236. 236 H.R. Rep. No. 94-1491, at 2-3 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6240. [↑](#footnote-ref-237)
237. 237 Safe Air, 373 F.3d at 1053 (Paez, J., concurring in part and dissenting in part). [↑](#footnote-ref-238)
238. 238 Resources Conservation Recovery Act of 1976, 42 U.S.C. 6972(a)(1)(B) (2000). [↑](#footnote-ref-239)
239. 239 Terminology and Index, 40 C.F.R. 1508.13 (2004). [↑](#footnote-ref-240)
240. 240 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-241)
241. 241 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-242)
242. 242 Id. [↑](#footnote-ref-243)
243. 243 50 C.F.R. 17.11 (2004). [↑](#footnote-ref-244)
244. 244 See 16 U.S.C. 1536(c) (2000) (requiring a biological assessment if an agency's action is likely to affect an endangered or threatened species). [↑](#footnote-ref-245)
245. 245 Cold Mountain v. Garber, 375 F.3d 884, 888 (9th Cir. 2004). [↑](#footnote-ref-246)
246. 246 50 C.F.R. 402.14(a) (2003) (requiring formal consultation with the relevant agency of expertise when the acting agency's decision may affected a listed species or its critical habitat). [↑](#footnote-ref-247)
247. 247 Cold Mountain, 375 F.3d at 888. [↑](#footnote-ref-248)
248. 248 See 16 U.S.C. 1536(o)(2) (2000). Incidental takes are allowed if they are "not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of such species which is … critical." Id. 1536(a)(2). The incidental take statement must "[set] forth the terms and conditions … that must be complied with by both the federal agency or applicant … ." Id. 1536(b)(4)(iv). [↑](#footnote-ref-249)
249. 249 See 50 C.F.R. 17.31-17.32, 17.41(a)(1) (2003) (regarding rules prohibiting the taking of species deemed threatened under the Endangered Species Act). [↑](#footnote-ref-250)
250. 250 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-251)
251. 251 Migratory Bird Treaty Act, 16 U.S.C. 703-708 (2000). [↑](#footnote-ref-252)
252. 252 National Forest Management Act of 1976, 16 U.S.C. 472a, 521b, 1600, 1611-1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). [↑](#footnote-ref-253)
253. 253 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-254)
254. 254 Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1)(B) (2000). [↑](#footnote-ref-255)
255. 255 Cold Mountain, 375 F.3d at 890. [↑](#footnote-ref-256)
256. 256 Cold Mountain, 375 F.3d at 891 (citing Bolker v. Comm'r, 760 F. 2d 1039, 1042 (9th Cir. 1985)). There are three exceptions: "[1] in the "exceptional' case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, [2] when a new issue arises while appeal is pending because of a change in law, [3] or when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." Id. [↑](#footnote-ref-257)
257. 257 40 C.F.R. 1501.4 (2000); 40 C.F.R. 1502.9(c)(1)(i)-(ii) (2003). [↑](#footnote-ref-258)
258. 258 Cold Mountain, 375 F.3d at 893 (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992)). [↑](#footnote-ref-259)
259. 259 Id. at 893 (citing Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F. 3d 1105, 1122 (9th Cir. 2000)). [↑](#footnote-ref-260)
260. 260 Id. [↑](#footnote-ref-261)
261. 261 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-262)
262. 262 50 C.F.R. 402.02 (2003). [↑](#footnote-ref-263)
263. 263 Administrative Procedure Act, 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-264)
264. 264 Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42-43 (1983). [↑](#footnote-ref-265)
265. 265 Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 972-73 (9th Cir. 2002); Ariz. Cattle Growers' Assoc. v. United States Fish and Wildlife Serv., 273 F.3d 1229, 1239 (9th Cir. 2001). [↑](#footnote-ref-266)
266. 266 Gifford Pinchot Task Force v. United States Fish & Wildlife Serv. (Task Force), 378 F.3d 1059, 1066 (9th Cir. 2004). [↑](#footnote-ref-267)
267. 267 Id. at 1068. [↑](#footnote-ref-268)
268. 268 Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2) (2000). [↑](#footnote-ref-269)
269. 269 50 C.F.R. 402.02 (2003). [↑](#footnote-ref-270)
270. 270 Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). [↑](#footnote-ref-271)
271. 271 Sierra Club v. United States Fish and Wildlife Serv., 248 F.3d 1277, 1283 (5th Cir. 2001). [↑](#footnote-ref-272)
272. 272 New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv. (New Mexico Cattle Growers), 245 F.3d 434, 441-42 (10th Cir. 2001). [↑](#footnote-ref-273)
273. 273 See Sierra Club v. United States Fish & Wildlife Serv., 245 F.3d 434, 441-42 (5th Cir. 2001); New Mexico Cattle Growers, 248 F.3d at 1283, n.2. [↑](#footnote-ref-274)
274. 274 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). [↑](#footnote-ref-275)
275. 275 Administrative Procedure Act, 5 U.S.C. 706 (2000). [↑](#footnote-ref-276)
276. 276 Task Force, 378 F.3d at 1072; 5 U.S.C. 706 (2000). [↑](#footnote-ref-277)
277. 277 Task Force, 378 F.3d at 1076. [↑](#footnote-ref-278)
278. 278 Endangered Species Act 16 U.S.C. 1536(a)(2) (2000). [↑](#footnote-ref-279)
279. 279 Task Force, 378 F.3d at 1076. [↑](#footnote-ref-280)
280. 280 437 U.S. 153, 171-72 (1978). [↑](#footnote-ref-281)
281. 281 50 C.F.R. 402.16 (2003). [↑](#footnote-ref-282)
282. 282 Task Force, 378 F.3d at 1077. [↑](#footnote-ref-283)
283. 283 Wilderness Act, 16 U.S.C. 1131-1136 (2000). [↑](#footnote-ref-284)
284. 284 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-285)
285. 285 National Forest Management Act of 1976, 16 U.S.C. 472a, 521b, 1600, 1611-1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). [↑](#footnote-ref-286)
286. 286 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-287)
287. 287 High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004) (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-94 (1990)). [↑](#footnote-ref-288)
288. 288 42 U.S.C. 4332 (2000). [↑](#footnote-ref-289)
289. 289 High Sierra Hikers Ass'n, 390 F.3d at 641. [↑](#footnote-ref-290)
290. 290 Id. at 641 (citing Natural Res. Def. Council v. Southwest Marine, Inc. 236 F.3d 985, 999 (9th Cir. 2000)). [↑](#footnote-ref-291)
291. 291 427 U.S. 390 (1976). [↑](#footnote-ref-292)
292. 292 Wilderness Act, 16 U.S.C. 1133(b) (2000). [↑](#footnote-ref-293)
293. 293 High Sierra Hikers Ass'n, 390 F.3d at 646. [↑](#footnote-ref-294)
294. 294 16 U.S.C. 1133(d)(5). [↑](#footnote-ref-295)
295. 295 High Sierra Hikers Ass'n, 390 F.3d at 647. [↑](#footnote-ref-296)
296. 296 Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984) (holding that courts must defer to reasonable agency interpretations of a governing statute when the terms of the statute are ambiguous). [↑](#footnote-ref-297)
297. 297 High Sierra Hikers Ass'n, 390 F.3d at 647. [↑](#footnote-ref-298)
298. 298 Wilderness Society v. United States Fish & Wildlife Servs., 353 F.3d 1051, 1067 (9th Cir. 2003). [↑](#footnote-ref-299)
299. 299 36 C.F.R. 251.51, 261.10(k) (2004). [↑](#footnote-ref-300)
300. 300 United States v. Adams, 388 F.3d 708, 709 (9th Cir. 2004). [↑](#footnote-ref-301)
301. 301 195 F.3d 538, 540 (9th Cir. 1999). [↑](#footnote-ref-302)
302. 302 Adams, 388 F.3d at 710-11 (quoting Linick, 195 F.3d at 543). [↑](#footnote-ref-303)
303. 303 Linick, 195 F.3d at 543. [↑](#footnote-ref-304)
304. 304 United States v. Kalb, 234 F.3d 827, 833 (3d Cir. 2000). [↑](#footnote-ref-305)
305. 305 Id. at 831. [↑](#footnote-ref-306)
306. 306 36 C.F.R. 261.10(k) (2004). [↑](#footnote-ref-307)
307. 307 Adams, 388 F.3d at 712. [↑](#footnote-ref-308)
308. 308 Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (2000). [↑](#footnote-ref-309)
309. 309 Id. 1365(b)(1)(A). [↑](#footnote-ref-310)
310. 310 WaterKeepers N. Cal. v. AG Indus. (WaterKeeprs), 375 F.3d 913, 916 (9th Cir. 2004) (quoting 40 C.F.R. 135.3(a) (2004)). [↑](#footnote-ref-311)
311. 311 Id. at 915 (quoting Razore v. Tulalip Tribes, 66 F.3d 236, 240 (9th Cir. 1995)). [↑](#footnote-ref-312)
312. 312 309 F.3d 1153 (9th Cir. 2002). [↑](#footnote-ref-313)
313. 313 WaterKeepers, 375 F.3d at 917 (quoting San Francisco BayKeeper, 309 F.3d at 1159). [↑](#footnote-ref-314)
314. 314 San Francisco BayKeeper, 309 F.3d at 1158-59. [↑](#footnote-ref-315)
315. 315 Natural Res. Def. Council v. Southwest Marine, Inc., 236 F.3d 985, 997 (9th Cir. 2000). [↑](#footnote-ref-316)
316. 316 484 U.S. 49 (1987). [↑](#footnote-ref-317)
317. 317 Id. at 64. [↑](#footnote-ref-318)
318. 318 Id. [↑](#footnote-ref-319)
319. 319 Id. [↑](#footnote-ref-320)
320. 320 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-321)
321. 321 Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1421h (2000). [↑](#footnote-ref-322)
322. 322 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-323)
323. 323 Cetacean Cmty. v. Bush (Cetacean II), 386 F.3d 1169, 1171 (9th Cir. 2004). [↑](#footnote-ref-324)
324. 324 Fed. R. Civ. P. 12(b)(1). [↑](#footnote-ref-325)
325. 325 Fed. R. Civ. P. 12(b)(6). [↑](#footnote-ref-326)
326. 326 Cetacean II, 386 F.3d at 1172 (citing Cetacean Cmty v. Bush (Cetacean I), 249 F. Supp. 2d 1206 (D. Haw. 2003)). [↑](#footnote-ref-327)
327. 327 852 F.2d 1106 (9th Cir. 1988). [↑](#footnote-ref-328)
328. 328 Id. at 1107. [↑](#footnote-ref-329)
329. 329 Cetacean II, 386 F.3d at 1173. [↑](#footnote-ref-330)
330. 330 Cetacean I, 249 F. Supp. 2d at 1210. [↑](#footnote-ref-331)
331. 331 Palila IV, 852 F.2d at 1107 (emphasis added). [↑](#footnote-ref-332)
332. 332 Cetacean II, 386 F.3d at 1174. [↑](#footnote-ref-333)
333. 333 Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc. (Laidlaw), 528 U.S. 167, 180-81 (2000). [↑](#footnote-ref-334)
334. 334 City of Sausalito v. O'Neill, 386 F.3d 1186, 1199 (9th Cir. 2004). [↑](#footnote-ref-335)
335. 335 Cetacean II, 386 F.3d at 1176. [↑](#footnote-ref-336)
336. 336 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-337)
337. 337 Id. 702. [↑](#footnote-ref-338)
338. 338 Endangered Species Act of 1973, 16 U.S.C. 1540(g)(1)(A) (2000). [↑](#footnote-ref-339)
339. 339 Id. 1532(13). [↑](#footnote-ref-340)
340. 340 5 U.S.C. 551(2), 701(b)(2) (2000). [↑](#footnote-ref-341)
341. 341 16 U.S.C. 1362(13), 1371(a)(1) (2000). [↑](#footnote-ref-342)
342. 342 Id. 1374(d)(6). [↑](#footnote-ref-343)
343. 343 Cetacean II, 386 F.3d at 1178. [↑](#footnote-ref-344)
344. 344 Id. [↑](#footnote-ref-345)
345. 345 National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C) (2000). [↑](#footnote-ref-346)
346. 346 Cetacean II, 386 F.3d at 1179 (citing Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 882 (1990)). [↑](#footnote-ref-347)
347. 347 Cetacean II, 386 F.3d at 1179. [↑](#footnote-ref-348)
348. 348 Administrative Procedure Act, 5 U.S.C. 551(2) (2000). [↑](#footnote-ref-349)
349. 349 Laidlaw, 528 U.S. at 181. [↑](#footnote-ref-350)
350. 350 Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101-10270 (2000). [↑](#footnote-ref-351)
351. 351 Natural Res. Def. Council v. Abraham, 388 F.3d 701, 705 (9th Cir. 2004) (citing Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003)). [↑](#footnote-ref-352)
352. 352 Id. [↑](#footnote-ref-353)
353. 353 Id. at 706 (citing Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733-34 (1998)). [↑](#footnote-ref-354)
354. 354 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370e (2000). [↑](#footnote-ref-355)
355. 355 Administrative Procedure Act, 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-356)
356. 356 National Forest Management Act of 1976, 16 U.S.C. 472a, 521b, 1600, 1611-1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). [↑](#footnote-ref-357)
357. 357 Am. Lands Alliance v. Williams, No. 99-967-AA (D. Or. 1999). [↑](#footnote-ref-358)
358. 358 Klamath-Siskiyou Wildlands Ctr. v. United States Forest Serv., N. 01-3018-HO (D. Or. 2001). [↑](#footnote-ref-359)
359. 359 Headwaters Inc. v. United States Forest Serv., 382 F.3d 1025 (9th Cir. 2004), withdrawn and superceded by 399 F.3d 1047 (9th Cir. 2005). [↑](#footnote-ref-360)
360. 360 In re Schimmels, 127 F.3d 875, 881 (9th Cir. 1991) (quoting Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 94 (5th Cir. 1977)). [↑](#footnote-ref-361)
361. 361 Headwaters, Inc. v. United States Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005). [↑](#footnote-ref-362)
362. 362 Irwin v. Mascott, 370 F.3d 924, 929-32 (9th Cir. 2004). [↑](#footnote-ref-363)
363. 363 Id. at 930. [↑](#footnote-ref-364)
364. 364 Fed. R. Civ. P. 23(a)(4). [↑](#footnote-ref-365)
365. 365 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-366)
366. 366 Id. 1533(b)(2). [↑](#footnote-ref-367)
367. 367 Id. 1540(g)(4) (emphasis added). [↑](#footnote-ref-368)
368. 368 Administrative Procedure Act, 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-369)
369. 369 520 U.S. 154, 172 (1997). [↑](#footnote-ref-370)
370. 370 16 U.S.C. 1533(b)(2) (2000). [↑](#footnote-ref-371)
371. 371 Ass'n of Cal. Water Agencies v. Evans, 386 F.3d 879, 884 (9th Cir. 2004). [↑](#footnote-ref-372)
372. 372 Ruckelshaus v. Sierra Club, 463 U.S. 680, 688 (1983) (emphasis in original). [↑](#footnote-ref-373)
373. 373 532 U.S. 598 (2001). [↑](#footnote-ref-374)
374. 374 Fair Housing Amendments Act of 1988, 42 U.S.C 3601, 3610-3614 (2000). [↑](#footnote-ref-375)
375. 375 Americans with Disabilities Act of 1990, 42 U.S.C. 12101-12102, 12111-12117, 12131-12134, 12141-12150, 12161-12165, 12181-12189, 12201-12213, 47 U.S.C. 225 (2000). [↑](#footnote-ref-376)
376. 376 Id.; Buckhannonon, 532 U.S. at 601. [↑](#footnote-ref-377)
377. 377 307 F.3d 1318 (11th Cir. 2002). [↑](#footnote-ref-378)
378. 378 16 U.S.C. 1540(g)(4) (2000); Loggerhead Turtle, 307 F.3d at 1325. [↑](#footnote-ref-379)
379. 379 Loggerhead Turtle, 307 F.3d at 1325-26. [↑](#footnote-ref-380)
380. 380 Evans, 386 F.3d at 887. [↑](#footnote-ref-381)
381. 381 Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000). [↑](#footnote-ref-382)
382. 382 Id. 1532(19). [↑](#footnote-ref-383)
383. 383 Fed. R. App. P. 39(a)(1). [↑](#footnote-ref-384)
384. 384 Id. [↑](#footnote-ref-385)
385. 385 16 U.S.C. 1540(g)(4) (2000). [↑](#footnote-ref-386)
386. 386 Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1094 (9th Cir. 1999). [↑](#footnote-ref-387)
387. 387 Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Serv. 382 F.3d 1159, 1162 (9th Cir. 2004). [↑](#footnote-ref-388)
388. 388 Id. [↑](#footnote-ref-389)
389. 389 Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (codified as amended in scattered sections of 42 U.S.C.). [↑](#footnote-ref-390)
390. 390 Cal. Code Regs. tit. 20, 1607(b)-(d)(2) (2005). [↑](#footnote-ref-391)
391. 391 Id. [↑](#footnote-ref-392)
392. 392 42 U.S.C. 6297 (2000). [↑](#footnote-ref-393)
393. 393 Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n (ACRI), 397 F.3d 755, 758 (9th Cir. 2005) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 484) (1996) (internal quotations omitted). [↑](#footnote-ref-394)
394. 394 ACRI, 397 F.3d at 759 (Lohr, 518 U.S. at 485). [↑](#footnote-ref-395)
395. 395 Cal. Code Regs. tit. 20, 1606 (2005). [↑](#footnote-ref-396)
396. 396 42 U.S.C. 6297(a)(1) (2000). [↑](#footnote-ref-397)
397. 397 ACRI, 397 F.3d at 760 (quoting 42 U.S.C. 6296(d) (2000)). [↑](#footnote-ref-398)
398. 398 Cal Code Regs. tit. 20, 1607(b)-(d)(2) (2005). [↑](#footnote-ref-399)
399. 399 Id. [↑](#footnote-ref-400)
400. 400 42 U.S.C. 6927(a)(1) (2000). [↑](#footnote-ref-401)
401. 401 Id. 6291(8). [↑](#footnote-ref-402)
402. 402 ACRI, 397 F.3d at 764. [↑](#footnote-ref-403)
403. 403 Id. [↑](#footnote-ref-404)
404. 404 Id. at 764-65. [↑](#footnote-ref-405)
405. 405 Id. at 765 (quoting Californians For Safe & Competitive Dump Truck Transp. v. Mendonca 152 F.3d 1184, 1189 (9th Cir. 1998)) (internal quotations omitted). [↑](#footnote-ref-406)
406. 406 42 U.S.C. 6297(a)(1) (2000). [↑](#footnote-ref-407)
407. 407 ACRI, 397 F.3d at 765 (quoting Lohr, 518 U.S. at 495) (internal quotations omitted). [↑](#footnote-ref-408)
408. 408 Energy Policy and Conservation Act, 42 U.S.C. 6316(a)-(b) (2000). [↑](#footnote-ref-409)
409. 409 Id. 6297(a)(1)(b). [↑](#footnote-ref-410)