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NEWS & ANALYSIS

The "Action-Forcing" Requirements of NEPA and Ongoing Actions of the Federal Government

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The U.S. Supreme Court most properly held in *Marsh v. Oregon Natural Resources Council*[1] that it would be "incongruous" if "blinders to adverse environmental effects, once unequivocally removed, [were] restored prior to the completion of agency action simply because the relevant proposal has received initial approval."[2] Many "actions" taken by federal agencies are not discrete, one-time events, but rather represent "ongoing actions" to which continuing obligations under the National Environmental Policy Act (NEPA)[3] must attach for the Act's purpose to be realized. In addition, the information and circumstances set out may significantly change during the pendency of an ongoing action, such as during implementation of a plan. The pending case of *Norton v. Southern Utah Wilderness Alliance*[4] provides an opportunity for the Court to reiterate and reinforce its commitment to the application of NEPA to the ongoing actions of the federal government.

In applying NEPA to ongoing actions of federal agencies, at least three of the Act's "action-forcing" devices are potentially applicable—§102(2)(C)'s environmental impact statement (EIS) requirement (with its significance threshold), §102(2)(E)'s environmental assessment (EA) requirement (which has no such threshold), and §102(1)'s requirement for agencies to act in accordance with the policies set out in NEPA (also with no significance threshold).

Southern Utah presents the very paradigm of when NEPA's requirement for a supplemental environmental impact statement (SEIS) applies to the Bureau of Land Management's (BLM's) ongoing actions with respect to wilderness study areas (WSAs), when there exists new information of significant new environmental impact, and when the action has not been concluded by a decision one way or the other as to permanent wilderness designation. At minimum, NEPA's independent and "action-forcing" requirement for an EA applies, which has a lower threshold than does an EIS (and the analysis which may or may not lead to an EIS). Additionally and alternatively, there have been "actions" subject to NEPA covering less than the entire geographic area that is the focus of this case which are themselves subject to NEPA. It may be that they collectively result in cumulative impacts requiring a program EIS. The additional "action-forcing" requirement for federal agencies to administer their policies and laws in accordance with the congressional policies set out in NEPA should guide the BLM.

The Effective Implementation of NEPA Requires That It Apply to the "Ongoing Actions" of the Federal Government

In its most recent decision involving NEPA, the Court stated:

> The subject of post-decision [SEIS] is not expressly addressed in NEPA. Preparation of such statements, however, is at times necessary to satisfy the Act's "action-forcing" purpose. . . . It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval. As we explained in [*Tennessee Valley Authority*] *v. Hill*, although "it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment," up to that point, "NEPA cases have generally required agencies to file [EIS] when the remaining governmental action would be environmentally "significant."[5]

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[Editors' Note: This Article is based on an amicus curiae brief submitted in Norton v. Southern Utah Wilderness Alliance*, No. 03-101 (U.S., on appeal from the U.S. Court of Appeals for the Tenth Circuit). In* Southern Utah*, a district court decision holding that it lacked subject matter jurisdiction to review an environmental group's claims that the Bureau of Land Management violated the Federal Land Policy and Management Act and NEPA by not properly managing off-road vehicle use on federal lands classified as wilderness study areas was reversed and remanded. The brief was filed in support of respondents, on behalf of every surviving former Chair and General Counsel of the CEQ whose service extends back to the enactment of NEPA and the creation of the CEQ during the Nixon Administration. The brief, and this Article, address only the NEPA issues and not others pending before the Court. CEQ Chairs joining in the brief included Russell Train (Nixon Administration), Russell Peterson (Nixon and Ford Administrations), John Busterud (Ford Administration), Charles Warren (Carter Administration), J. Gustave Speth (Carter Administration), Michael Deland (first Bush Administration), Kathleen McGinty (Clinton Administration), and George Frampton (Clinton Administration). The CEQ General Counsels joining in the brief included Gary Widman (Nixon and Ford Administrations), Nicholas C. Yost (Carter Administration), and Nancy Nord (Reagan Administration). The brief was prepared by the law firm of Sonnenschein Nath & Rosenthal LLP on a pro bono basis.*]

1. 490 U.S. 360, 19 ELR 20749 (1989).
2. *Id*. at 371.
3. 42 U.S.C. §§4321-4370d, ELR Stat. NEPA §§2-209.
4. No. 03-101 (U.S., on appeal from the U.S. Court of Appeals for the Tenth Circuit).
5. *Marsh*, 490 U.S. at 371 (internal citation omitted).

The Court's instruction retains its wisdom and controls the NEPA issues before the Court in *Southern Utah*. While the U.S. Court of Appeals for the Tenth Circuit was divided on the Administrative Procedure Act (APA) issues, it ruled unanimously for respondents on the NEPA issue.[6]

The U.S. Congress Intended to Change Agency Priorities With Its Passage of NEPA

NEPA is, in the words of regulations promulgated by the Council on Environmental Quality (CEQ), "our basic national charter for protection of the environment."[7] It establishes policy,[8] and provides means[9] for carrying out that policy.[10] To that end, §102 contains "action-forcing" provisions to ensure that federal agencies act according to the letter and spirit of the statute.[11] By its own terms, NEPA supplements the policies and goals set forth in the existing authorizations of federal agencies.[12]

In enacting NEPA, Congress fully appreciated the significance of what it was doing and of the impact the enactment would have on the operations of the federal government. The Act was "the most important and far-reaching environmental and conservation measure ever enacted," said its lead author in the U.S. Senate, Sen. Henry Jackson (D-Wash.).[13] "It is the unanimous view" of the members of the Senate committee that reported out NEPA, "that our [n]ation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the [n]ation faces."[14] The committee found that such conditions presented "a serious threat to the [n]ation's life support system."[15] Indeed, "[t]he [n]ation has in many areas overdrawn its bank account in life-sustaining natural elements."[16] In the committee's words, "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."[17] The U.S. House of Representatives was no less committed to action and to change. "There may be controversy as to how close to the brink we stand," states the House report, "but there is none that we are in serious trouble."[18]

NEPA's impact was equally clear to the president. When signing the bill into law on January 1, 1970, President Richard M. Nixon emphasized the boldness of the bill by declaring it "particularly fitting that my first official act of this new decade is to approve [NEPA]."[19]

While NEPA establishes an environmental policy for the nation, the Act, by its terms, recognizes full well that agencies are required to balance legitimate, and sometimes competing, values that have been given constitutional or statutory national priority. The Act instructs agencies to use all practical means, "consistent with other essential considerations of national policy," to implement the policies set out in the statute.[20] The CEQ itself has been fully aware of and has acted to recognize such other competing essential considerations of national policy. For instance, the CEQ NEPA regulations themselves set out 17 measures that agencies are bound to follow to reduce paperwork[21] and 12 such measures to reduce delay.[22] "NEPA's purpose," after all, "is not to generate paperwork—even excellent paperwork—but to foster excellent action."[23]

The concern that courts not become officious intermeddlers in the environmentally benign day-to-day routines of government is legitimate.[24] That said, the Court should continue to recognize, as it did in *Marsh*,[25] that federal "actions" are often not one-shot events, but rather are ongoing actions, and that NEPA's obligations are not terminated by a past decision, in those cases where the actions are continuing and where environmental impacts exceed earlier projections. An agency's consideration of later-arising circumstances or information regarding the environmental impacts of its actions, while those actions remain ongoing, is essential to fulfilling NEPA's goal of environmentally informed decisionmaking. Compliance with those continuing obligations need not unduly burden agencies because they can use efficient approaches to analyze the effects of new information[26] and can use the various devices available[27] to tier from an earlier document and to focus discussion on the extent to

6. Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 33 ELR 20025 (10th Cir. 2002).
7. 40 C.F.R. §1500.1(a).
8. 42 U.S.C. §4331.
9. *Id*. §4332.
10. "The basic principle of this policy," said Sen. Henry Jackson (D-Wash.), NEPA's U.S. Senate author, "is that we must strive in all that we do, to achieve a standard of excellence in man's relationship to his physical surroundings." 115 Cong. Rec. 40416 (1969) (statement of Sen. Jackson). Senator Jackson recognized, however, that "a statement of environmental policy is more than a statement of what we believe . . . it provides a statutory foundation . . . for guidance in making decisions which find environmental values in conflict with other values." *Id*. "[W]e must consider the natural environment as a whole and assess its quality continuously . . ." stated NEPA's U.S. House of Representatives author, Rep. John Dingell (D-Mich.). *Id*. at 26571 (statement of Rep. Dingell).
11. *See* 40 C.F.R. §1500.1(a); S. Rep. No. 91-296, at 19 (1969); Andrus v. Sierra Club, 442 U.S. 347, 9 ELR 20390 (1979).
12. 42 U.S.C. §4335.
13. 115 Cong. Rec. 40416 (1969) (statement of Sen. Jackson).
14. S. Rep. No. 91-296, at 4 (1969). There exist both a Senate report and a House report (H.R. Rep. No. 91-378, pts. 1 & 2 (1969)) concerning NEPA, along with a conference report employed by the House Managers to explain the conferees' changes to the bill. H.R. Rep. No. 91-765 (1969). Since the "action-forcing" provisions of NEPA originated in the Senate, their legislative history is reflected in the Senate report (and to a lesser extent the conference report) but not in the House report.
15. S. Rep. No. 91-296, at 13.
16. *Id*. at 16.
17. *Id*. at 5.
18. H.R. Rep. No. 91-378, at 4.
19. 5 Weekly Comp. Pres. Doc. 11 (Jan. 5, 1970).
20. 42 U.S.C. §4331(b).
21. 40 C.F.R. §1500.4.
22. *Id*. §1500.5.
23. *Id*. §1500.1(c).
24. Indeed, the CEQ's NEPA regulations require that each agency adopt as part of its implementing procedures "categorical exclusions" whereby categories of actions that do not either individually or cumulatively have significant environmental impacts are identified and excluded from any further examination under NEPA (meaning neither an EA nor an EIS is required). *Id*. §1508.4; *see also id*. §1507.3(b)(2)(ii). The BLM's procedures have no categorical exclusion for increased off-road vehicle (ORV) use.
25. 490 U.S. at 371-74.
26. 40 C.F.R. §§1500.4, 1500.5.
27. *See*, *e.g.*, *id*. §§1502.20, 1508.28 (tiering), 1502.21 (incorporation by reference), 1506.3 (adoption), 1500.4(i), 1502.4, 1502.20 (program documents).

which the new information adds to or changes impacts analyzed earlier. With specific regard to an SEIS requirement, it must be kept in mind that not all new information will trigger an SEIS, only "significant new circumstances or information. . . ."[28] In addition, the ability to use "categorical exclusions" to remove from NEPA's applicability actions that can have no environmental impacts, affords agencies the opportunity to exclude from further study entire categories of environmentally benign activities.[29]

NEPA's "Action-Forcing" Devices Apply Broadly to the Actions—Including the Ongoing Actions—of the Federal Government

As its congressional authors instructed, and as the Court has noted on numerous occasions, NEPA created "action-forcing" procedures to help ensure that its environmental policies are implemented.[30]

The government's brief in *Southern Utah* has devoted special attention to one of those action-forcing devices—the EIS.[31] The EIS, with its statutory threshold of "major federal action significantly affecting the quality of the human environment," is perhaps the most publicized of the action-forcing devices, but it is not the only one. At least two other such devices are relevant, namely, §§102(2)(E) (requiring the examination of alternatives) and 102(1) (requiring adherence to NEPA's policies). Both of these sections of the statute, discussed below, are relevant to the Court's disposition of NEPA issues in *Southern Utah*.

NEPA §102(2)(E) Applies to Require Agencies to Examine Alternatives Even When the Environmental Impacts Are Not Significant

The provision of NEPA requiring an EA, §102(2)(E),[32] applies far more broadly than does that for an EIS; that is, it has a much lower threshold of applicability.[33] In its totality, the pertinent subsection reads: "[A]ll agencies of the [f]ederal [g]overnment shall— . . . (E) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . . ."[34]

In brief, the congressionally imposed duty to develop and to evaluate alternatives is not confined to those instances where there may be "significant" impacts (the EIS threshold), but is far broader (with a lower threshold and a corresponding diminution in the documentation required).[35] Indeed, to take note of the actual practice of agencies throughout the government, the CEQ reports that in a given year approximately 450 EIS are prepared (both draft EIS and final EIS, so approximately 225 actual actions would be involved), while 45,000 EAs are prepared.[36]

In short, a significance threshold does not apply for an EA (but does apply for an EIS).

Section 102(1) Applies to Require Agencies to Administer Their Policies and Laws in Accordance With the Policies of NEPA

Section 102(1) of NEPA provides that "[t]he Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administrated in accordance with the policies set forth in this Act, ..."[37]

While describing the outcome of the House-Senate conference on NEPA, Senator Jackson listed §102(1) among the legislation's action-forcing procedures.[38] Similarly, in an exhibit summarizing the key provisions of the Act, he noted that §102(1) was among "the action-forcing procedures which will help [e]nsure that the policies enunciated in [§]101 are implemented."[39] The version of NEPA originally passed by the House did not contain any action-forcing provisions.[40] It is worth noting, however, that the House

28. *Id*. §1502.9(c)(1)(ii).
29. *Id*. §1508.4.
30. S. Rep. No. 91-296, at 9; Kleppe v. Sierra Club, 427 U.S. 390, 6 ELR 20532 (1976); Andrus v. Sierra Club, 442 U.S. 347, 350, 9 ELR 20390 (1979); *Marsh*, 490 U.S. at 372; Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 19 ELR 20743 (1989).
31. Petitioners' Brief for the Tenth Circuit at 11, 36-38, Norton v. Southern Utah Wilderness Alliance (10th Cir.) (No. 03-101). In the Appendix to its brief, for instance, the government quotes NEPA §102(2)(C), but does not include §102(2)(E), which provides a separate action-forcing provision.
32. The Court, in reviewing the adequacy of an EA, has had occasion to note the distinction between an EA and an EIS. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 10 ELR 20079 (1980). *See* 40 C.F.R. §1508.9.
33. The section of the CEQ's NEPA regulations defining "Environmental Assessment," 40 C.F.R. §1508.9, reads as follows:

> Environmental assessment:
>
> (a) Means a concise public document for which a [f]ederal agency is responsible that serves to:
> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact.
> (2) Aid an agency's compliance with the Act when no [EIS] is necessary.
> (3) Facilitate preparation of a statement when one is necessary.
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by [§]102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

34. 42 U.S.C. §4332(2)(E). Sections 102(2)(C)(iii) and 102(2)(E) (§§4332(2)(C)(iii) and 4332(2)(E)), are the two sections of NEPA that independently impose obligations to study alternatives in the context of an EIS and an EA respectively.
35. An EIS is expected to total fewer than 150 pages (300 for unusually complex proposals), 40 C.F.R. §1502.7, while an EA is a "concise" document, *id*. §1508.9(a), which contains "brief discussions." *Id*. §1508.9(b). The CEQ recommends that EAs not exceed approximately 10 to 15 pages. CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18037 (Mar. 23, 1981), *as amended by* 51 Fed. Reg. 15618 (Apr. 25, 1986).
36. *See* CEQ, Considering Cumulative Effects Under the National Environmental Policy Act 4 (1997), *available at* http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm). *See also* Kern v. BLM, 284 F.3d 1062, 1076, 32 ELR 20571 (9th Cir. 2002) (noting that in a typical year 45,000 EAs are prepared compared to 450 EIS); Native Ecosystems Council v. Dombeck, 304 F.3d 886, 33 ELR 20042 (9th Cir. 2002) (same).
37. 42 U.S.C. §4332(1). (These policies are set forth in NEPA §101 (42 U.S.C. §4331).) The linkage between mandatory procedure and substantive policy criteria has been aptly described "the genius of NEPA." L. Caldwell, Science and the National Environmental Policy Act 74 (1982).
38. 115 Cong. Rec. 40416 (1969) (statement of Sen. Jackson).
39. *Id*. at 40419.
40. *Id*. at 39702 (statement of Rep. Dingell) (noting that the House bill contained no provisions comparable to §102).

conferees shared Senator Jackson's view of the role of §102(1).[41]

The actions required by §102(1) have yet to be fully defined. The section has not received extensive judicial attention.[42] Those courts that have addressed the issue have focused on two features of §102(1). First, it makes environmental policy a part of every agency's mandate.[43] Second, it requires agencies to comply fully with that mandate.[44] Significantly, that requirement is not limited to the EIS process.[45] In other words, agencies must fully comply with NEPA's §102(1) even when there is no major federal action significantly affecting the quality of the human environment.

Southern Utah Presents a Paradigmatic "Ongoing Action" for Which NEPA Requires Supplemental Analysis

As noted above, the Court has most appropriately declared that it would be "incongruous" if blinders to adverse environmental effects, once removed, were restored "prior to the completion of agency action simply because the relevant proposal has received initial approvals."[46] The very paradigm of such an ongoing action is presently before the Court. While some actions, in the nature of "projects," such as dams or highways, are finite, and once built, are complete, other forms of actions, such as programs or plans, may be ongoing and involve less truncated NEPA obligations.[47] Some involve ongoing actions to which, in this Court's words, NEPA obligations continue to apply "when the remaining governmental action would be environmentally 'significant.'"[48] The Court, in *Andrus v. Sierra Club*,[49] most appropriately quoted the Senate report to conclude that "[m]ajor [f]ederal actions 'include the expansion or revision of ongoing programs.'"[50] That report continued to assert that "[t]he policies and goals set forth in [§]101 can be implemented if they are incorporated into the ongoing activities of the [f]ederal [g]overnment in carrying out its other responsibilities to the public."[51]

The CEQ has also emphasized the importance of current and accurate information in NEPA analyses. Specifically, the NEPA regulations state that a supplemental analysis is necessary if "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise.[52]

As this Court has noted and as Congress has recognized, the goals of NEPA "could be incorporated into the everyday functioning of the [f]ederal [g]overnment only with great difficulty." The task, of course, is to recognize NEPA's continuing applicability in those cases where the severity of the impacts remain amenable to agency amelioration while at the same time not attaching NEPA's documentary obligations to the sort of environmentally benign day-to-day routine management activities against which the government in its brief appropriately cautions.

With respect to EIS, the pertinent CEQ regulation, in §1502.9(c), provides direction as to when supplement analysis is required. It states in part:

> (c) Agencies:
>
> (1) Shall prepare supplements to either draft or final [EIS] if:
>
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) *There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts*.
>
> (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.[53]

In 1981, the CEQ offered guidance on the subject of SEIS, which retains its continuing validity:

> As a rule of thumb, if the proposal has not been implemented, or if the EIS concerns an ongoing program, EIS that are more than [five] years old should be carefully reexamined to determine if the criteria in [§]1502.9 compel preparation of an EIS supplement.

41. *See*, *e.g.*, *id*. at 40925 (statement of Rep. Mailliard) (characterizing §102(1) as positive direction to agencies); *id*. at 40926-27 (statement of Rep. Aspinall) (§102(1) "tells the agencies to follow" environmental policy).

42. *But see* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 787-88, 6 ELR 20528 (1976) (interpreting "fullest extent"); Natural Resources Defense Council v. Securities & Exchange Comm'n, 606 F.2d 1031, 1044-49, 9 ELR 20367 (D.C. Cir. 1979) (discussing agency requirements under §102(1)).

43. *See, e.g.*, *Natural Resources Defense Council*, 606 F.2d at 1044; Environmental Defense Fund v. Tennessee Valley Auth., 468 F.2d 1164, 2 ELR 20726 (6th Cir. 1972).

44. *See*, *e.g.*, Sierra Club v. Interstate Commerce Comm'n, 1978 U.S. App. LEXIS 12538 (D.C. Cir. Feb. 21, 1978); Environmental Defense Fund v. Corps of Eng'rs, 492 F.2d 1123, 4 ELR 20329 (5th Cir. 1974).

45. *Natural Resources Defense Council*, 606 F.2d at 1048-49. *See also* Puerto Rico v. Muskie, 507 F. Supp. 1035, 1055-56, 11 ELR 20424 (D.P.R. 1981); Montgomery v. Ellis, 364 F. Supp. 517, 533-34, 3 ELR 20845 (N.D. Ala. 1973).

46. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371, 19 ELR 20749 (1989).

47. As the Court noted in Andrus v. Sierra Club, 442 U.S. 347, 363 n.20, 9 ELR 20390 n.20 (1979), the CEQ regulations provide that "actions tend to fall within" one of several categories, including projects (such as dams or highways), programs (such as the situation described by the Court in Kleppe v. Sierra Club, 427 U.S. 390, 410, 6 ELR 20532 (1976), where multiple proposals with cumulative or synergistic effects must be considered together), policies (such as regulations adopted pursuant to the APA), or plans (such as those which guide or prescribe alternative uses of federal resources). 40 C.F.R. §1508.18(b); *see also id*. §1502.4. As this Court has said: "If environmental concerns are not interwoven with the fabric of agency planning, the action-forcing characteristics of §102(2)(C) would be lost." *Andrus*, 442 U.S. at 350-51. In applying NEPA to such ongoing actions, the CEQ has been acutely sensitive to the need for limits to ensure that while environmental impacts are being considered, their evaluation does not unduly delay the ongoing activities of government. In structuring their NEPA processes agencies are directed, therefore, to employ scoping and tiering and the other methods set out in §§1500.4 and 1500.5 to relate broad and narrow actions and to "avoid duplication and delay." 40 C.F.R. §1502.4(d) (discussing tiering, and other tools designed to ease NEPA's implementation).

48. *Marsh*, 490 U.S. at 371 (quoting Tennessee Valley Auth. v. Hill, 437 U.S. 153 n.34, 8 ELR 20513 n.34 (1978)).

49. 442 U.S. 347, 363 n.22, 9 ELR 20390 n.22 (1979).

50. S. Rep. No. 91-296 (1969), in explaining the origin of §102(2)(C), stated: "Each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statement, or expansions or revisions of ongoing programs," shall determine whether the proposal would have a significant effect on the environment. *Id*. at 20.

51. *Id*. at 19.

52. *See* 40 C.F.R. §1502.9(c)(1)(ii).

53. *Id*. §1502.9(c) (emphasis added).

> If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact, [an SEIS] must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal.[54]

Of course, where appropriate, EAs, with their lower thresholds of applicability, may need to be prepared to assist agencies in determining whether significant impacts exist.

It is our understanding that no administrative record was prepared in this case (the government having concluded that there was no final agency action to warrant one). The factual underpinnings of the case—the extent of environmental impact caused by off-road vehicles (ORVs) on protected lands—must therefore be gleaned from the opinions of the courts below, the submissions of the parties, the publicly available NEPA documentation, which does bear on the actual impacts in the areas that are the subject of this litigation, and, less directly, by reference to published decisions in other cases involving similar impacts.[55]

The district court noted that the Southern Utah Wilderness Alliance (SUWA) presented expert testimony on "the significant resource damage, including soil erosion and compaction, and destruction of vegetation" attributable to ORVs.[56] The SUWA alleged that "ORV user figures have skyrocketed in the past [10] years."[57] The court noted that the BLM admitted to being "well-aware that ORV-caused damage is resulting from cross-country travel in [WSAs]."[58] The "BLM has recognized that ORV use on public lands generally has increased over the past few years."[59]

The Tenth Circuit in this proceeding[60] noted that the BLM's implementation management plan (IMP) "gives specific attention to ORV use when discussing impairing activity."[61] For example, the plan specified that cross-country ORV use constitutes environmental impairment "because 'the tracks created by the vehicles leave depressions or ruts, compact the soils, and trample or compress vegetation.'"[62] The court concluded that the SUWA's complaint "presents colorable evidence suggesting that ongoing ORV use has or is impairing the disputed WSA's wilderness values."[63]

There were earlier NEPA documents covering at least portions of the geographic area that is the subject of the litigation. For instance, the "Grand Resource Area Proposed Management Plan: FEIS," Moab District, Grand Resources Area (1983), discussed the designation of 1,183,660 acres as open to ORV use, and discussed the impacts on soil and water quality, vegetation, livestock grazing, and recreation, stating: "Soils and Water Quality . . . . Recreational ORV use is expected to increase on 47,840 acres. The severity of the impact would depend on the intensity of use. The effects of ORV activity on the desert environment are serious, long-lasting, and highly visible. . . ."[64] The EIS went on to discuss limiting ORV use on 596,234 acres and the impacts that would have on soil and water quality, vegetation, livestock grazing, transportation, special designation areas, and visual resources and recreation.[65]

More generally, courts in other proceedings have had occasion to deal with ORV impacts—alleged or real—on the environment.[66]

The potential for impact on public lands occasioned by ORVs has twice been addressed by the president, in both instances with the assistance of the CEQ. Two years after

54. 46 Fed. Reg. at 18036, *as amended by* 51 Fed. Reg. at 15618. Courts routinely look to the "Forty Questions" for guidance. *See*, *e.g.*, Davis v. Mineta, 302 F.3d 1104, 1125, 32 ELR 20727 (10th Cir. 2002) ("We apply the 'Forty Questions' here as persuasive authority offering interpretive guidance."); Citizens Against Burlington v. Busey, 938 F.2d 190, 195, 21 ELR 21142 (D.C. Cir. 1991); Sierra Club v. Marsh, 769 F.2d 868, 870, 15 ELR 20911 (1st Cir. 1985).

55. It is not the purpose of this Article to take a position for or against the use of ORVs. Rather it is its purpose to emphasize that the existence of environmental impacts on an ongoing and apparently increasing basis in an area under ongoing federal agency management and under consideration for wilderness designation may and should implicate certain of NEPA's "action-forcing" devices to determine whether there are environmental impacts which would warrant the agency (or Congress or the president) taking action to address those impacts.

56. Southern Utah Wilderness Alliance v. Babbitt, 2000 U.S. Dist. LEXIS 22170, at *12 (D. Utah Dec. 22, 2000).

57. *Id*. at *26.

58. *Id*. at *16.

59. *Id*. at *28.

60. Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 33 ELR 20025 (10th Cir. 2002).

61. *Id*. at 1228 n.7.

62. *Id*. (citing the BLM IMP).

63. *Id*. at 1233.

64. Appellants' Appendix for the Tenth Circuit at 632, Norton v. Southern Utah Wilderness Alliance (10th Cir.) (No. 03-101).

65. *Id*. at 632-33. *See also* San Rafael: Proposed Resource Management Plan/FEIS Moab District, San Rafael Resource Area (1991) at RMP-45 (projecting an assessment of ORV accessible road needs); Appellants' Appendix for the Tenth Circuit at 109, 129, *Southern Utah* (No. 03-101), EA No. UT-050-089-084-EA; Off-Road Vehicle Implementation Henry Mountains Planning Area (1990) (projecting low ORV use); *id*. at 683, EA UT-040-0-121, Off-Road Vehicle Designation Kanab Resource Area (1980) ("[d]esert soils are particularly vulnerable to damage from ORV use"); *id*. at 687 ("no type of land can withstand sustained ORV use without some damage"). We understand from the record and the briefs of respondent SUWA that there have been marked increases in ORV use in at least some of the areas involved since these earlier NEPA documents were prepared. For example, the BLM manager for the Henry Mountains area "admitted in his deposition testimony that" there had been a "very noticeable" and marked increase in ORV use in this area. *See* Appellants' Opening Brief for the Tenth Circuit at 23, Norton v. Southern Utah Wilderness Alliance (10th Cir.) (No. 03-101). In addition, the BLM issued an "emergency ORV closure" for "portions of the San Rafael Swell" and explained the necessity of the closure in part because "ORV use in the San Rafael Swell has increased tremendously" since the 1991 San Rafael EIS was completed. *See* 65 Fed. Reg. 15169-70 (Mar. 21, 2000). Also, the BLM field office manager for the Behind the Rocks area admitted that there has been a "significant increase" in ORV use since the mid-1990s in the area. *See* Appellants' Opening Brief for the Tenth Circuit at 24, *Southern Utah* (No. 03-101). Finally, at the preliminary injunction hearing in the district court, a BLM assistant manager testified that "there has been a substantial increase in the off-road activity in the Indian Creek area" since the 1991 San Juan road management plan was finalized. *Id*.

66. *See*, *e.g.*, Mausolf v. Babbitt, 125 F.3d 661, 28 ELR 20057 (8th Cir. 1997) (upholding National Park Service (NPS) closure of portion of park to snowmobiles based on impact on gray wolf); Northwest Motorcycle Ass'n v. Department of Agric., 18 F.3d 1468, 24 ELR 21303 (9th Cir. 1994) (upholding U.S. Forest Service decision to close forest to ORVs based on damage to trails and species); Sierra Club v. Clark, 774 F.2d 1406, 16 ELR 20409 (9th Cir. 1985) (upholding BLM decision to allow ORV use in WSA after an EIS was prepared); Fund for Animals v. Norton, 294 F. Supp. 2d 92, 34 ELR 20010 (D.D.C. 2003) (appeal pending) (setting aside NPS rule allowing 950 snowmobiles a day into Yellowstone Park, quoting agency environmental studies of adverse impact on wildlife, air quality, natural surroundscapes, and natural odors).

NEPA's enactment, President Nixon signed Executive Order No. 11644 to limit the use of ORVs on public lands.[67] In his February 8, 1972, message to Congress on the environment, the president noted that the use of ORVs "is dramatically on the increase" and "[t]oo often the land has suffered as a result."[68] Several years later, President Jimmy Carter signed Executive Order No. 11989,[69] which tightened those limitations, finding in his message to Congress on the environment of May 24, 1977, that "[u]ncontrolled, [ORVs] have ruined fragile soils, harassed wildlife, and damaged archeological sites."[70]

NEPA applies to the ongoing actions of the BLM in its continuing management of areas under consideration for wilderness designation where "significant new circumstances or information relevant to environmental concerns" is present—such as a significant increase in ORV use with a resulting potential for significant increase in environmental impact.[71] While the record is sparse, the allegations of the plaintiffs below (respondents before this Court) would appear, if true, to pass the threshold of significance for an SEIS under §102(2)(C).[72] At a minimum, §102(2)(E) would apply, as it requires an examination of alternatives arising from "unresolved conflicts" concerning "alternative uses of available resources." The resulting EA may or may not then lead to an EIS. The requirements of §102(1) are similarly controlling upon the ongoing actions to be taken by BLM. We suggest the matter be remanded, with appropriate direction to prepare an SEIS or, at minimum, to prepare an EA to determine whether such an EIS is needed. In its supplemental document the agency need not examine the impact of ORVs de novo, but need only supplement what it had done before.[73]

Even if No Supplemental Analysis Were Required for the Entire Ongoing Action, NEPA Is Nevertheless Applicable for Other Reasons

There Have Been "Actions" Involving Less Than the Entire Geographic Area at Issue Here That Clearly Implicate NEPA

In addition to the "on-going action" discussed above, this case presents more discrete, narrower "actions" that clearly trigger NEPA coverage (though not necessarily an EIS). Specifically, the BLM has issued several recent decisions regarding ORV access to various geographic areas at issue in this case.[74] For the Indian Creek Canyon Corridor, the BLM issued vehicle and camping restrictions limiting all motor vehicle and mountain bike travel to "existing roads and trails."[75]

In 2000, the Kanab Field Office adopted a land use plan amendment for the Moquith Mountain area.[76] The plan amendment focused on numerous concerns, including sensitive species and vehicle management, and "[o]ver 95[%] of the WSA is closed to [ORV] use."[77] The Moab Field Office released an "interim" restriction order that revised "open" travel designations and limited ORV use to existing roads and trails on approximately 245,642 acres.[78] The restriction order also closed other specified locations to vehicle access.[79] The Price Field Office also completed the San Rafael Route Designation Plan. The plan analyzed vehicle access issues under the purview of the Price Field Office, including the seven WSAs covered by the March 2000 closure order. It authorizes continued ORV travel along 677 miles of "secondary [ORV] routes" and closes 468 miles of routes to vehicle access.[80]

These actions, while confined to discrete geographical portions of the whole area at issue in the litigation, are themselves "actions" within the meaning of NEPA. Indeed, the U.S. Solicitor General conceded that agency decisions regarding ORV use are subject to §706(1) of the APA.[81] In *Ohio Forestry Ass'n v. Sierra Club*,[82] the Court noted that land use plans that "close a specific area to off-road vehicles . . . can result in immediate concrete injury to a party with interest in the use of off-road vehicles in that area," thereby permitting immediate judicial review. The Court ultimately held that the *Ohio Forestry* plaintiffs did not have a justiciable claim under the APA. But at the same time, the government conceded that if the *Ohio Forestry* plaintiffs' claim had been "that the plan was allowing motorcycles into a bird-watching area or something that like [sic], that would be immediately justiciable."[83]

The Various Separate "Actions" Described Could Constitute a "Program" Requiring Comprehensive Examination Under NEPA

The subsidiary actions described above each individually a potential NEPA trigger, together could constitute a program under NEPA that would also implicate NEPA's obligations.[84] "Only through comprehensive consideration of

67. Executive Order No. 11644, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended in* 42 U.S.C.A. §4321.

68. *See* CEQ, Environmental Quality: 1972, at 379 (1973).

69. 42 Fed. Reg. 26959 (May 25, 1977).

70. CEQ, Environmental Quality: 1977, at 356 (1978).

71. *See* 40 C.F.R. §1502.9(c).

72. 42 U.S.C. §4332(2)(C).

73. We suggest an analogy to another case involving an agency's ongoing activity (or inactivity) resulting in a continuing course of environmental degradation. As the U.S. Court of Appeals for the Fifth Circuit held in Louisiana v. Lee, 758 F.2d 1081, 15 ELR 20609 (5th Cir. 1985), *cert. denied*, 475 U.S. 1044 (1986), a periodic permit renewal "will not maintain a status quo, but rather will continue a course of environmental disruption begun years ago." *Id*. at 1086. The court directed the trial court on remand to compare the environmental impact if the ongoing activity were allowed to continue for another five years with the projected condition if it were halted now. *Id*.

74. With two exceptions, the briefs and documents cited do not show NEPA compliance. As stated in the Brief for Respondents, Utah Shared Access Alliance et al. (USAA) at 6: "BLM has also issued numerous project level decisions affecting vehicle access to specific areas targeted in SUWA's preliminary injunction motion."

75. 63 Fed. Reg. 110 (Jan. 2, 1998).

76. 65 Fed. Reg. 19921 (Apr. 13, 2000).

77. USAA Brief, *supra* note 74, at 7.

78. 66 Fed. Reg. 6659-61 (Jan. 22, 2001).

79. *Id*.; USAA Brief, *supra* note 74, at 8.

80. USAA Brief, *supra* note 74, at 8. *See also* Environmental Assessment (Jan. 31, 2002), *at* http://www.ut.blm.gov/sanrafaelohv/ea/ea1contents.htm.

81. *Id*.

82. 523 U.S. 726, 738-39, 28 ELR 21119 (1998).

83. *Id*. at 739.

84. *See* 40 C.F.R. §1508.18(b)(3) (an action includes the "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allo-

pending proposals can the agency evaluate different courses of action."[85]

Whether such a "program" exists is a factual question for a lower court to determine. However, should the lower court find that such a program exits based on facts including those discussed above, then the agency's failure to evaluate the environmental impacts of the program could violate NEPA.

Section 102(1) Commands Agencies to Pay Heed to NEPA

As discussed above, NEPA §102(1) requires that agencies interpret and administer the policies, regulations, and public laws of the United States in accordance with NEPA's policies.

The BLM appears not to have heard that command. It suggests that the Tenth Circuit's holding is "particularly troubling in light of [that] court's suggestions that [the] BLM's resource constraints could not provide any justification for denying . . . relief."[86] Apparently, the BLM fears that NEPA will be invoked "to reorder agency priorities for the allocation of scarce resources,"[87] a possibility that it characterizes as "inimical to the effective functioning of government and to the separation of powers."[88]

We recognize that judicial second-guessing of administrators is generally poor policy. But agency disregard of congressional direction is much worse. Congress has declared that §102(1) was designed "to make it clear that each agency of the [f]ederal [g]overnment shall comply with the directives set out in [§102] unless the existing law applicable to such agency's operations" expressly prohibits or makes full compliance with one of the directives impossible.[89] The BLM's brief identifies no statute or regulation that expressly prohibits the BLM from allocating its resources so as fully to comply with NEPA. Nor has it identified any existing law that would render such an allocation impossible. The Court should reaffirm *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*[90] by refusing to allow the BLM to use "resource allocation" to excuse its failure to comply with NEPA.

Petitioners' argument that noncompliance should be excused because the BLM may perform NEPA analyses in the near future is similarly unavailing. Specifically, petitioners assert that the SUWA is not entitled to relief because the BLM will conduct NEPA analyses "as circumstances permit . . . in connection with its contemplated revision of land use plans."[91] The vagueness of this language only confirms that the BLM is not committed to complying with NEPA in the near future. Even if it were, the idea that such a commitment would preclude liability for the BLM's current failure to comply contradicts the Court's interpretation of §102 in *Flint Ridge*.[92] It also conflicts with Congress' clear intent that agencies fully comply with NEPA unless existing law prohibits compliance or renders it impossible, for no such law exists here.[93] Furthermore, the argument runs counter to precedent in the courts of appeal holding that the fulfillment of future obligations does not excuse a current failure to act.[94]

The CEQ's NEPA Regulations Treat "Inaction" Reviewable as "Action" Under the APA as "Action" for Purposes of NEPA's EIS Requirement

The CEQ's regulations consider unlawful inaction by an agency to be an "action" for purposes of NEPA.[95] The Tenth Circuit held that the BLM's "inaction" with regard to ORV damage to the WSAs constitutes "agency action unlawfully withheld or unreasonably delayed" under the APA.[96] If the Court upholds that determination, such "inaction" also constitutes an "action" under NEPA.

We take no position on the proper implementation of the APA and other issues presented by this litigation. We note the provision within §1508.18 only to indicate that were the Court to affirm the Tenth Circuit with respect to its interpretation of the APA, certain NEPA obligations would follow. Of course, the converse does not necessarily follow. Section 1508.18, in defining what constitutes "major federal action," deals only with the threshold requirement for an EIS under §102(2)(C). It does not affect the lower threshold for an EA prepared under §102(2)(E).

The Government Concedes That Citizens Can Request Particular Actions From Agencies, Thereby Implicating NEPA

The government alleges that "the appropriate course" for citizens concerned "that an agency is not administering a program in accordance with statutory requirements" is to

cating agency resources to implement a specific statutory program or executive directive"); *id*. §1502.4 (scope of EIS); *id*. §1502.20 (tiering); *id*. §1508.23 ("a proposal may exist in fact as well as by agency declaration that one exists"); Kleppe v. Sierra Club, 427 U.S. 390, 409, 6 ELR 20532 (1976) (noting "general agreement" with the basic premise that §102(2)(C) may require a comprehensive impact statement, for instance where several proposed actions are pending at the same time). The comprehensive EIS dealing with multiple proposals has come to be known as a "program" or "programmatic" EIS.

85. *Kleppe*, 427 U.S. at 410.

86. Petitioners' Brief, *supra* note 31, at 39.

87. *Id*. The government's choice of wording is particularly unfortunate in light of NEPA's requirement for the analysis of alternatives to any proposal "which involves unresolved conflicts concerning alternative uses of available resources; . . . ." 42 U.S.C. §4332(2)(E) (§102(2)(E)).

88. Petitioners' Brief, *supra* note 31, at 40.

89. 115 Cong. Rec. 40418 (1969) (statement of Sen. Jackson explaining the intent of Senate participants in the conference committee considering NEPA); *see also id*. at 39703 (1969) (statement of Rep. Dingell explaining the intent of House conferees); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 785, 6 ELR 20528 (1976).

90. 426 U.S. 776, 6 ELR 20528 (1976).

91. Petitioners' Brief, *supra* note 31, at 40.

92. *Flint Ridge*, 426 U.S. at 785.

93. *See* 115 Cong. Rec. 40418 (1969) (statement of Sen. Jackson); *see also id*. at 39703 (1969) (statement of Rep. Dingell).

94. *See* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 23 ELR 21142 (9th Cir. 1993).

95. *See* 40 C.F.R. §1508.18 (defining "major federal action" in part, "[a]ctions include the circumstance where the responsible officials fail to act and that failure is reviewable by courts or administrative tribunals under the [APA] or other applicable law as agency action"). In Ramsey v. Kantor, 96 F.3d 434, 444-45, 27 ELR 20158 (9th Cir. 1996), the U.S. Court of Appeals for the Ninth Circuit found that a "mandatory obligation" to review certain plans sufficient to make the failure to disapprove those plans a major federal action under NEPA. *Id*. (citing 40 C.F.R. §1508.18). Thus, the Ninth Circuit concluded that the Secretary of Commerce's failure to disapprove the plans rises to the level of major federal action for purposes of NEPA. *Id*.

96. Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1229, 33 ELR 20025 (10th Cir. 2002).

"request particular action from the agency."[97] The government concedes that the agency's action on this request would then constitute final agency action, and would be reviewable under §706(2) of the APA.[98]

While acknowledging—and appreciating—the government's concession, we note that the proffered avenue of relief, while welcome, can be extraordinarily time-consuming.[99]

Conclusion

In short, NEPA is a vital and crucial tool that agencies use to evaluate the environmental impacts of their actions—both projects and programs. The Court should recognize, as it did in *Marsh*, that not all federal actions are one-time events, with one-time NEPA responsibilities. Many involve sequences of ongoing action that involve ongoing responsibilities under NEPA. The Court should reaffirm the principle that during the course of an ongoing federal action, the government's obligation to take a hard look at environmental consequences is not terminated by a single decision or NEPA document if those consequences exceed earlier projections and the agency action is a continuing one. Agency consideration of later arising circumstances or information regarding the environmental impacts of its actions, while those actions remain ongoing, is essential to fulfilling NEPA's goals of environmentally informed decisionmaking.

97. *See* Petitioners' Brief, *supra* note 31, at 36.

98. *Id*. In its Reply Brief for Petitioners, supporting its application for a writ of certiorari, the government stated:

> If a party such as SUWA believes that an agency should take final agency action to implement a statutory standard, the party may petition the agency for a rulemaking. *See*, *e.g.*, 5 U.S.C. §553(e). If the petition is denied, the party may seek judicial review under 706(2) based on the agency's explanation and the administrative record. And if the agency delays unreasonably in responding to such a petition, Section 706(1) may come into play to compel the agency to respond, although not how to respond.

Reply Brief, at 10.

99. If an agency is truly responsive, the government's suggestion can be a most welcome one. If, however, an agency chooses neither to act nor decline to act upon a proposal, courts have traditionally been, understandably, reluctant to mandate speedy action on the part of often burdened agencies. *See*, *e.g.*, Fund for Animals v. Norton, 294 F. Supp. 2d 92, 113, 34 ELR 20010 (D.D.C. 2003) (a reasonable time for an agency decision could encompass months, occasionally a year or two).