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Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation

Albert I. Herson*

INTRODUCTION

The heart of the National Environmental Policy Act (NEPA) is the requirement that federal agencies prepare and circulate a Comprehensive Environmental Impact Statement (EIS) when proposing any major federal action that will significantly affect the quality of the human environment. An EIS must include a detailed statement of the proposal's environmental impacts and alternatives.

For most project proposals, the regulations issued by the Council on Environmental Quality (CEQ) to implement NEPA establish procedures by which agencies must make the threshold decision of whether an EIS must be prepared. Generally, federal agencies must first prepare an Environmental Assessment (EA). This document is less comprehensive than an EIS but must still provide sufficient information to permit an agency to determine whether a full EIS is necessary. If the EA indicates that the proposal will not significantly affect the environment, the agency may forego preparation of a full EIS and instead prepare a Finding of No Significant Impact (FONSI).

Neither NEPA nor the CEQ NEPA regulations explicitly address the critical issue of how mitigation measures should affect EIS threshold decisions. Under NEPA, mitigation includes avoiding or minimizing environmental impacts; rectifying impacts by repairing, restoring, or rehabilitating the affected environment; reducing or eliminating impacts over...
time through preservation or maintenance; and compensating for impacts by providing substitute resources.\(^7\) Frequently a project as originally proposed will appear to have significant environmental effects, but during the EA process the agency will develop mitigation measures which would render those effects insignificant. In such a case, the critical issue is whether the agency must prepare an EIS or whether it can justify a FONSI by adopting mitigation measures.

CEQ regulations require only that agencies discuss mitigation measures in a full EIS.\(^8\) The regulations do not discuss the issue of whether mitigation measures can justify a FONSI. Federal courts, however, have addressed this issue. Prior to 1982, a majority of decisions upheld the use of mitigation measures to justify FONSI's. Glitzenstein criticized this majority approach in a 1982 article published in this journal, arguing that it violates the letter and spirit of NEPA and excessively entangles courts in substantive agency decisionmaking.\(^9\) Nevertheless, five of six appellate cases addressing the issue since 1981 allowed agencies to justify FONSI's on the basis of mitigation measures discovered during the EA process.\(^10\)

This Article evaluates these recent judicial approaches to project mitigation and recommends that the CEQ NEPA regulations be revised to expressly validate the use of mitigation measures to justify FONSI's, provided that the revisions mandate increased public and agency review. Section I outlines the regulatory framework which governs EA's, FONSI's, and EIS's. Sections II and III evaluate the six recent appellate decisions. Section IV describes and evaluates the proposed revision of the CEQ NEPA regulations.

I

THE REGULATORY FRAMEWORK

A. CEQ Regulations on EA's and FONSI's

The CEQ regulations that implement NEPA bind all federal agen-

\(^7\) Id. § 1508.20.

\(^8\) Id. § 1502.14(f).


\(^10\) In one of the six cases, Steamboaters v. Federal Energy Regulatory Commission (FERC), 759 F.2d 1382 (9th Cir. 1985), the court overturned FERC's decision not to prepare an EA and mentioned that mitigation measures can justify a decision not to prepare an EIS. Id. at 1394. The court did not speak in terms of "FONSI's," however, because FERC did not typically prepare such documents as required by NEPA. FERC's usual practice under its own regulations was only to prepare EIS's when it found significant impact. It rarely prepared either FONSI's or EA's. See Anadromous Fish Law Memo, Mar. 1986, at 1, 10-14. See also Bodi & Erdheim, Swimming Upstream: FERC's Failure To Protect Anadromous Fish in this issue of ECOLOGY LAW QUARTERLY at Section IV A.
cies, except where compliance would be inconsistent with other statutory requirements. Each federal agency must adopt NEPA procedures which comply with or supplement the CEQ regulations.

The CEQ regulations define an Environmental Assessment (EA) as a concise public document that provides sufficient evidence and analysis for determining whether an agency project proposal requires an Environmental Impact Statement (EIS) or a Finding of No Significant Impact (FONSI). An EA must briefly discuss the need for the proposal, possible alternatives as required by section 102(2)(E) of NEPA, and the environmental impacts of each alternative. An agency may prepare an EA on any action at any time in order to assist its planning and decisionmaking. An EA must be prepared unless a proposal is one which normally requires an EIS, or is "categorically excluded" from EA and EIS preparation requirements. Agencies must involve in EA preparation, to the extent practicable, federal environmental agencies, project applicants, and the public.

If an agency decides on the basis of an EA not to prepare an EIS, it must prepare a FONSI. A FONSI is a public document that briefly describes why an action will not have a significant environmental effect, and why an EIS need not be prepared. The FONSI decision and preparation procedure are examples of informal agency decisionmaking subject to judicial review.

The CEQ NEPA regulations do not address whether EA's may include mitigation measures. They are also silent about the role of project mitigation in the preparation of FONSI's.

B. Informal CEQ Advice on Project Mitigation

CEQ addressed the role of mitigation measures in the preparation of EA's and FONSI's in informal advice published in the Federal Register in 1981. In that interpretive statement, CEQ rejected the majority approach, which allows agencies to justify FONSI's with mitigation measures discovered after formulating the original proposal. Instead, it advised that mitigation measures may justify a FONSI "only if they are

12. Id. §§ 1507.1-1507.3.
13. Id. § 1508.9(a)(1).
14. Id. § 1508.9(b).
15. Id. § 1501.3(b).
16. Id. § 1501.4(b).
17. Id.
18. Id. § 1501.4(e).
19. Id. § 1508.13.
imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal." CEQ further advised that mitigation measures developed during the EA process generally do not obviate the need for an EIS; the agency may rely on mitigation measures to justify a FONSI only when the proposal so integrates the measures from the beginning that the project cannot be defined without them. CEQ advised agencies to adopt a broad approach to defining significant impacts and to avoid reliance on the possibility of mitigation as an "excuse" to avoid EIS preparation.

CEQ offered two rationales for the policy of discouraging FONSI's justified by mitigation measures. First, it considered the public and agency review required by the more comprehensive EIS process to be "essential to assure that the decision is based on all the relevant factors." Second, mitigation measures included in an EIS are legally enforceable as preserved in the Record of Decision (ROD), a concise public record of the decision which summarizes applicable monitoring and enforcement programs for any project mitigation measure. In contrast, the FONSI process does not guarantee that mitigation commitments will be legally enforceable.

The federal circuit courts of appeals that have considered the question are split on the issue of whether the informal CEQ advice is binding on federal agencies. The Courts of Appeals for the District of Columbia and the Fifth Circuit have recently held that the advice is not controlling authority. However, the First Circuit Court of Appeals has recently interpreted the advice as controlling.

II

RECENT APPELLATE CASES ON PROJECT MITIGATION

Much pre-1982 federal case law concerning the use of project mitigation to justify FONSI's has been reviewed elsewhere. This Section

22. Id.
23. Id.
24. Id.
25. Id.
27. See Cabinet Mountains/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982); Louisiana v. Lee, 758 F.2d 1081 (5th Cir. 1985).
reviews six federal court of appeals cases decided after 1981 pertaining to project mitigation. Five of them adopted the majority approach approving the use of mitigation measures to justify FONSI's, and one did not.

The decisions in these cases incorporate a number of judicial safeguards which some courts have adopted to make effective project mitigation more likely. First, the courts adopting the majority view have generally required agencies to take a "hard look" at environmental consequences when deciding whether or not to prepare an EIS. Second, they have usually imposed upon agencies a heavy burden of proving that mitigation measures will reduce potential environmental impacts to "less than significant" levels. Third, they have enforced CEQ regulations that require EA's for most projects and have closely scrutinized EA's that support FONSI's. Fourth, some courts have required a close nexus between mitigation measures and the proposed project, and firm commitments to implementing mitigation measures that are to be undertaken by parties other than the agency or applicant.

A. Cabinet Mountains

In Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, the District of Columbia Circuit Court of Appeals found, applying an "arbitrary and capricious" standard of review, that the United States Forest Service's decision to base a FONSI on specific mitigation measures was "reasonable and adequately supported." In so doing, the court expressly rejected the informal CEQ advice restricting the use of project mitigation to justify FONSI's.

In Cabinet Mountains, the Forest Service had approved a plan of operations for exploratory drilling in a Wilderness Area which supported a population of grizzly bear, a threatened species under the Endangered Species Act. Prior to approving the drilling plan, the Service had com-

30. At least two district court cases decided since 1981 have also upheld the use of mitigation measures to justify a FONSI. In Smith v. Soil Conservation Service, 563 F. Supp. 843 (W.D. Okla. 1982), the court upheld the Soil Conservation Service's decision not to prepare an EIS for a water retardation dam as reasonable, in part because a mitigation plan to compensate for vegetation loss was adopted in an EA. In Friends of Endangered Species, Inc. v. Jantzen, 596 F. Supp. 518 (N.D. Cal. 1984), the court upheld as reasonable a United States Fish and Wildlife Service decision not to prepare an EIS for a permit allowing the taking of certain endangered species incidental to a development project, in part because the EA included mitigation measures to avoid endangered species impacts.

31. See infra notes 104-106 and accompanying text.
32. See infra notes 107-108 and accompanying text.
33. See infra notes 110-117 and accompanying text.
34. See infra notes 118-122 and accompanying text.
35. 685 F.2d 678 (D.C. Cir. 1982).
36. Id. at 684.
37. Id. at 682-83.
pleted an EA which incorporated a number of measures developed by the United States Fish and Wildlife Service to mitigate impacts on grizzly bear populations. The Forest Service concluded that these mitigation measures would render the project’s environmental impacts less than significant.

In reviewing the agency’s decision not to prepare an EIS, the District of Columbia Circuit applied the standard that the decision will be upheld unless it is arbitrary, capricious, or an abuse of discretion. The Cabinet Mountains court applied four criteria for reviewing the agency’s decision: (1) whether the agency took a “hard look” at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) whether the agency made a convincing case that the expected impacts were not significant; and (4) if there was a truly significant impact, whether the agency “convincingly established” that changes in the project were sufficient to reduce it “to a minimum.” This last criterion permits agencies to justify FONSI’s with mitigation measures only if they meet a heavy burden of proof.

In Cabinet Mountains, the court held that the Forest Service had met its burden of establishing that the proposed mitigation measures rendered the proposal’s impacts less than significant, and it upheld the Forest Service’s decision not to prepare an EIS. The court stated that an EIS must be prepared only if the proposed action will have significant impacts. As long as “specific mitigation measures which completely compensate for any possible adverse impacts stemming from the original proposal” are added prior to project implementation, the statutory threshold for EIS preparation is not crossed. To require an EIS when the agency has established that impacts would be rendered less than significant would “trivialize NEPA” and diminish NEPA’s utility in providing useful environmental information for major federal actions which truly affect the environment.

The District of Columbia Circuit explicitly rejected the CEQ advice

38. The mitigation measures developed by the Fish and Wildlife Service and adopted in the EA comprised seasonal limitations on drilling operations and helicopter flights, rescheduling or elimination of certain timber sales, and seasonal or permanent road closures. Additional Forest Service mitigation measures were the prohibition of overnight camping by mining operation personnel, daily and seasonal limitations on helicopter flights, restriction of helicopter use to specified flight corridors, reclamation of drilling activities in certain areas, and monitoring of operations by Forest Service personnel. Id. at 680, 683.

39. Id. at 680-81.
40. Id. at 681.
41. Id. at 681-82.
42. Id. at 683-84.
43. Id. at 682.
44. Id.
restricting the use of mitigation measures to justify FONSI's. The court acknowledged that CEQ NEPA interpretations are generally entitled to substantial deference, but concluded that in this instance deference was neither required nor appropriate. It called the CEQ advice nonpersuasive and informal, and agreed with the trial court that the basis for the advice was "not at all evident" in the underlying binding CEQ regulations.

B. A Trilogy of Ninth Circuit Decisions

1. Preservation Coalition

In *Preservation Coalition, Inc. v. Pierce,* the Ninth Circuit Court of Appeals upheld a decision by the United States Department of Housing and Urban Development (HUD) not to prepare an EIS for a downtown urban renewal project. Applying a "reasonableness" standard of review, the court sustained HUD's finding that mitigation measures rendered environmental impacts less than significant, and found that the mitigation measures involved were sufficiently project-related to justify a FONSI.

HUD had entered into a financing agreement with the Boise Redevelopment Agency for an urban renewal project. The Redevelopment Agency had prepared an EA which HUD approved. On the basis of this EA, the Redevelopment Agency concluded that mitigation measures would render the project's environmental impacts less than significant.

The Ninth Circuit, stating that it will overturn an agency's threshold decision not to prepare an EIS only if the agency's action is unreasonable, concluded that the Redevelopment Agency reasonably decided that a FONSI was justified by mitigation measures that were included in the EA. The court emphasized that mitigation measures which justify a FONSI must be project-related. Measures to be taken by public or private third parties (parties other than the federal agency or project applicant) are not sufficiently project-related if they are merely potential actions or if they would be undertaken even without the project. Only "firm commitments" by third parties to implement mitigation measures may be considered in modifying an initial assessment of adverse environmental effects. Such commitments "need not be contractual, [but] must be more than mere vague statements of good intentions."

Applying these tests, the court found certain air quality mitigation

45. *Id.* For a review of the CEQ informal advice, see *supra* text accompanying notes 21-26.
46. 685 F.2d at 683.
47. 667 F.2d 851 (9th Cir. 1982).
48. *Id.* at 857.
49. *Id.* at 858.
50. *Id.* at 862.
51. *Id.* at 860.
measures proposed by the Redevelopment Agency to be insufficiently project-related. For example, increasingly stringent automobile emissions standards were unacceptable mitigation measures. The court noted that even though the standards would substantially mitigate air quality impacts, air quality would be improved even more by implementing the standards without undertaking any renewal project.\textsuperscript{52}

In contrast, the court approved as project-related a number of air quality, noise, and traffic mitigation measures that were to be implemented either by the Redevelopment Authority, the City of Boise, or contractually by the developer. To mitigate air quality impacts, the City of Boise agreed to reduce new parking spots in the redevelopment area, undertake project parking management, provide van-pooling incentives, and implement a program to increase use of mass transit.\textsuperscript{53} The developer contractually agreed to provide pedestrian access to the project, reduce employee automobile use, and provide facilities for bicycle storage.\textsuperscript{54} The Redevelopment Agency and the developer contractually committed to schedule or modify construction activities to reduce noise.\textsuperscript{55} To mitigate traffic impacts, the city agreed to make reasonable and substantial progress in implementing a downtown circulation plan for improving traffic flow around the project.\textsuperscript{56} The court found that, unlike the increasingly stringent automobile emissions standards, these mitigation measures were acceptable because none would have occurred without the project, and because the parties involved had made firm commitments to implement them.\textsuperscript{57}

2. North American Wild Sheep

In \textit{Foundation for North American Wild Sheep v. United States Department of Agriculture},\textsuperscript{58} the Ninth Circuit Court of Appeals held that the Forest Service's decision not to prepare an EIS for a road project violated NEPA because the agency had not taken a "hard look" at the environmental consequences of its action and because the Service had not established the effectiveness of the proposed mitigation measures.\textsuperscript{59} \textit{North American Wild Sheep} also illustrates the application of the "public controversy" criterion for impact significance.

\textsuperscript{52} \textit{Id}. From a technical environmental analysis standpoint, it appears more appropriate to treat such a statutory requirement for future pollution controls as part and parcel of the environmental impact analysis of the original project, rather than as an add-on mitigation measure.

\textsuperscript{53} \textit{Id}. at 860, 861.

\textsuperscript{54} \textit{Id}. at 861.

\textsuperscript{55} \textit{Id}.

\textsuperscript{56} \textit{Id}. at 860, 861.

\textsuperscript{57} \textit{Id}. at 861.

\textsuperscript{58} 681 F.2d 1172 (9th Cir. 1982).

\textsuperscript{59} \textit{Id}. at 1178.
In this case, the Forest Service had reviewed an application for a special use permit allowing reconstruction and use of a road for access to a tungsten mine. The road passed directly through an area occupied by one of the few remaining herds of a sensitive species protected by law, the Desert Bighorn Sheep. The Forest Service had prepared an EA for the permit in which it considered alternatives and included, for the chosen alternative, measures to reduce the impact on the Bighorn Sheep. The Service decided not to prepare an EIS on the basis of mitigation measures included in the EA.60

The court gave several reasons for its conclusion that the Forest Service had failed to take a hard look at the project’s impacts. First, it found that the EA ignored a number of crucial environmental factors which could potentially affect the Bighorn sheep. For example, the EA contained no estimate of expected road traffic.61

Second, the EA did not respond to several specific issues raised by state agencies and the public.62 These issues included the effect that the road would have on the sheep’s use of a mineral lick,63 the sheep’s susceptibility to stress-related diseases,64 and the relevance of an Alaskan study relied on by the Forest Service.65

Third, the court held that an EIS was required because substantial questions remained about the effectiveness of mitigation measures. Therefore, the Forest Service’s decision not to prepare an EIS was unreasonable.66 The court based this conclusion upon its own review and questions raised by scientists and state agencies in response to the initial draft of the EA. It found that the Forest Service failed to demonstrate that providing a locked gate and security guard at the road entrance would reduce the impact of traffic to a less than significant level.67 Also, the court found an insufficient basis for the Service’s conclusion that a monitoring system for impacts on the Bighorn sheep, and repopulation if necessary, would render the impact that the road would have on the sheep less than significant.68

The court of appeals also reversed the Service’s decision because

60. The proposed mitigation measures included seasonal road closure during the lambing season, maintenance of a securely locked gate and a 24-hour guard at the road entrance, closure of the road if monitoring detected a 40% or greater reduction in use of the area by indigenous sheep, and repopulation with Bighorn sheep from other areas, if necessary. Id. at 1180. The effectiveness of these mitigation measures was strongly criticized in public responses to the Forest Service’s original draft of its EA. Id. at 1178-80.
61. Id. at 1178.
62. Id. at 1178-79.
63. Id.
64. Id. at 1179.
65. Id. at 1180.
66. Id.
67. Id. at 1181.
68. Id. at 1181-82.
public controversy remained over the environmental impacts of the road. Under CEQ NEPA regulations, one factor in determining whether a project will significantly affect the environment, and thus require an EIS, is the degree to which environmental effects are likely to be "highly controversial." In North American Wild Sheep, numerous responses to the draft EA from state agencies and the public had disputed the Forest Service's conclusion that mitigation would allow the road to be reopened without significant impacts on the sheep. The court stated that the existence of this controversy made the proposed action "precisely the type of 'controversial' action for which an EIS must be prepared."  

3. Steamboaters

In Steamboaters v. Federal Energy Regulatory Commission, the Ninth Circuit held that a decision by the Federal Energy Regulatory Commission (FERC) not to prepare an EIS prior to issuing an exemption order for a hydropower project was fatally flawed for several reasons. First, without explanation, FERC failed to prepare an EA before making its decision. The court held that this failure violated CEQ regulations because the exemption order was not categorically excluded from EIS or EA requirements.

Second, as in North American Wild Sheep, the agency did not adequately explain its decision. Specifically, FERC did not supply a convincing statement of reasons why potential impacts were insignificant. Without such a statement, the court reasoned, a reviewing court could not determine whether the agency took the requisite "hard look" at the project's potential impacts. FERC also neglected to address contrary evidence presented by various agencies and to describe how the proposed mitigation measures would prevent environmental damage.

Third, the court rejected FERC's argument that adopting mitigation measures recommended by federal and state fish and wildlife agencies would obviate the need for an EIS. Instead, the court required the agency to assess independently the project's environmental consequences, and to explain specifically how the measures would in fact mitigate the project's impacts. The court required an explanation because the measures recommended by the fish and wildlife agencies were

69. 40 C.F.R. § 1508.27(b)(4) (1985).
70. 681 F.2d at 1182.
71. 759 F.2d 1382 (9th Cir. 1985).
72. Id. at 1392. See supra note 10.
73. 759 F.2d at 1393.
74. Id.
75. Id.
76. Id. at 1393-94.
77. Id.
78. Id. at 1394.
only general guidelines whose effectiveness depended upon how they were applied and enforced.\textsuperscript{79} Without such an explanation, the court could not determine whether the mitigation measures reasonably supported FERC’s decision not to prepare an EIS.\textsuperscript{80}

C. Louisiana v. Lee

In \textit{Louisiana v. Lee},\textsuperscript{81} the Fifth Circuit Court of Appeals, relying on both \textit{Cabinet Mountains} and \textit{Preservation Coalition}, upheld the United States Army Corps of Engineers’ use of mitigation measures to justify a FONSI. (The case was remanded, however, on other NEPA-related grounds.)

The Corps, after preparing an EA and a FONSI, had renewed six five-year permits allowing private dredging for shells along the Gulf Coast. Before issuing the permit renewals, the Corps had imposed restrictive conditions to reduce potential environmental effects to less than significant levels.

The Fifth Circuit, which had not previously considered the issue, first decided that FONSI’s can be justified by mitigation measures which render environmental impacts less than significant. The court agreed with the \textit{Cabinet Mountains} ruling that the CEQ informal advice on project mitigation is nonbinding.\textsuperscript{82} The court concluded that it was reasonable to assume that the dredging would comply with the Corps’ permit conditions. It emphasized that in this case the mitigation measures were legally enforceable,\textsuperscript{83} rather than merely the “vague statements of good intentions by third parties not within the control of the agency” objected to in \textit{Preservation Coalition}.\textsuperscript{84} Thus, the only “realistic course of action” was for the court to include the mitigation measures in its review of whether the FONSI was justified.\textsuperscript{85}

The court then reviewed the trial court’s decision to uphold the Corps’ FONSI. The district court had ruled against the parties challenging the FONSI because they had not shown that the environment “would be” significantly degraded by the proposed action.\textsuperscript{86} The court of appeals found this burden of proof too onerous, and held that the challengers need show only that the environment “may be” significantly degraded.\textsuperscript{87} It remanded the case to the trial court with instructions to carefully eval-

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} 758 F.2d 1081 (5th Cir. 1985).
\textsuperscript{82} Id. at 1083.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 1084.
\textsuperscript{87} Id. (citing \textit{Save Our Ten Acres v. Kregger}, 472 F.2d 463, 466-67 (5th Cir. 1973)).
uate plaintiffs’ evidence challenging the effectiveness of the Corps’ mitigation measures, and to decide whether the Corps’ decision was reasonable under the lesser burden of proof. \footnote{88 Id. at 1086.}

\section{D. Sierra Club v. Marsh}

\textit{Sierra Club v. Marsh} \footnote{89 769 F.2d 868 (1st Cir. 1985).} is the only recent federal appellate case to disapprove of the use of mitigation to justify FONSI’s. The First Circuit Court of Appeals decided the project mitigation issue without relying on existing federal case law. Instead, it relied on the CEQ informal advice on project mitigation which two other circuits had previously rejected. \footnote{90 \textit{See supra} text accompanying notes 45, 46, and 82.}

In \textit{Sierra Club}, the Federal Highway Administration (FHWA) and the Army Corps of Engineers had prepared or adopted EA’s for a cargo port and causeway that the State of Maine was planning to build on Sears Island. Both agencies concluded that the project would not significantly affect the environment, and both prepared FONSI’s. \footnote{91 769 F.2d at 873.} The agencies justified the FONSI’s, in part, with two types of mitigation measures. First, the Corps determined that the effects of contaminated runoff from the port would be adequately mitigated by a permit requirement that the marine terminal include facilities capable of preventing the discharge of sediment, grease, and oil “to the satisfaction of the Division Engineer.” \footnote{92 Id. at 876.} Second, the FHWA and the Corps suggested that the secondary environmental effects of industrial development that the project would stimulate could be mitigated. \footnote{93 Id. at 880.}

The First Circuit held that the agencies’ decisions not to prepare EIS’s failed a “reasonableness” standard of review. \footnote{94 Id. at 871-72.} It based this holding primarily on the agencies’ failure fully to consider secondary environmental effects of the industrial development of Sears Island that the causeway and port would stimulate. \footnote{95 Id. at 881-82.}

The court also rejected the agencies’ use of mitigation measures to justify FONSI’s. It cited as authority the informal CEQ advice, which stipulates that mitigation measures that justify FONSI’s must be “imposed by statute or regulation, or submitted . . . as part of the original proposal.” \footnote{96 Id. at 880 (quoting 46 Fed. Reg. at 18,038 (Forty Questions)). For a discussion of the CEQ advice, see \textit{supra} text accompanying notes 21-28.} The court characterized the Corps’ plan to issue permits only upon satisfaction of certain conditions as a mere “promise” to mitigate environmental impacts in the future, and it rejected the argument
that such a promise renders impacts less than significant. The court also rejected the agencies' argument that their EA's indicated that secondary environmental impacts could be mitigated. Because the agencies' EA's did not describe specific measures that would mitigate the project's secondary impacts, the court stated that it could not judge whether the measures complied with the CEQ advice.

The principal issue in Sierra Club v. Marsh was whether the agencies had to consider secondary environmental effects at all, and not whether mitigation rendered secondary (or direct) impacts less than significant. Nevertheless, because the First Circuit appears to have resuscitated the highly restrictive CEQ advice, this case has important implications for the project mitigation issue.

III
EVALUATION OF RECENT APPELLATE CASES
ON PROJECT MITIGATION

A. Judicial Safeguards Developed by the Courts

As the preceding review of the cases indicates, the majority view is that an agency need not prepare an EIS if, prior to a project's implementation, the agency develops mitigation measures that would render potentially significant impacts less than significant. Courts that adopt this view have found that requiring an EIS under such circumstances would "trivialize" NEPA and be unrealistic.

The minority view, articulated in the CEQ informal advice and adopted by the First Circuit in Sierra Club v. Marsh, is that an agency must prepare an EIS whenever an action as originally defined may have significant impacts, unless mitigation is imposed by law or included in the original proposal. One rationale for this view is the belief that only the comprehensive EIS process ensures that effective mitigation measures will be adopted and enforced. However, the courts that apply the majority approach have employed a number of judicial safeguards to assure effective, enforceable project mitigation.

1. Hard Look Doctrine and Heightened Judicial Inquiry

Three of the five majority view cases reviewed above—Cabinet

97. 769 F.2d at 877. The court's observations regarding mitigation of direct runoff impacts were dicta, however, because the court "doubted" that deficiencies in the Corps' direct impact analysis alone would constitute grounds for reversing the Corps' FONSI. Id.
98. Id. at 880.
99. Id.
100. Id. at 881-82.
101. Cabinet Mountains, 685 F.2d at 682.
102. Lousiana v. Lee, 758 F.2d at 1083.
103. See supra notes 25-26 and accompanying text.
Mountains, North American Wild Sheep, and Steamboaters—expressly applied the hard look doctrine to agency decisions not to prepare an EIS. This doctrine, recognized by the Supreme Court in Kleppe v. Sierra Club, requires heightened judicial review of whether an agency took a "hard look" at environmental consequences when making NEPA threshold decisions. Courts applying the hard look doctrine to agency decisions not to prepare an EIS have done so under both the "reasonableness" and the less stringent "arbitrary and capricious" standard of review.

Neither Preservation Coalition nor Louisiana v. Lee expressly invoked the hard look doctrine. But neither court showed great deference to an agency's decision to justify FONSI's with mitigation measures, and their careful scrutiny was consistent with the hard look doctrine.

2. Heavy Burden of Proof on Agency

Consistent with the hard look doctrine, courts adopting the majority view impose a heavy burden of proof on agencies by requiring them to show that mitigation measures will effectively render environmental impacts less than significant. This was most clearly demonstrated in Cabinet Mountains and Louisiana v. Lee.

In Cabinet Mountains, the Court of Appeals for the District of Columbia Circuit required the agency to have "convincingly established that changes in the project sufficiently reduced [significant impacts] to a minimum." In Louisiana v. Lee, the Fifth Circuit held that when an agency is confronted with evidence challenging the effectiveness of proposed mitigation measures, the agency must be "reasonable in concluding that there is no possibility" of significant impacts.

3. Requirements for EA Preparation and Appropriate FONSI Findings

The EA and FONSI process, although less comprehensive in scope than the EIS process, nevertheless provides for some public, agency, and judicial review of the effectiveness of project mitigation measures. The court in Preservation Coalition characterized EA's as an established part of the NEPA process that allows federal agencies with limited resources to focus on truly environmentally important actions. An EA that is incorporated into a FONSI must include the project's environmental impacts, alternatives, and mitigation measures.

104. See supra notes 41, 59, and 74 and accompanying text.
107. 685 F.2d at 682.
108. 758 F.2d at 1085.
109. 667 F.2d at 858. The court noted that federal agencies prepared 30,000 EA's annually, as opposed to 1000 EIS's. Id.
The cases reviewed above illustrate that courts require an agency to prepare an EA that provides sufficient evidence to substantiate justification of a FONSI by mitigation measures. EA's must normally be prepared because CEQ NEPA regulations require them for federal actions which are not categorically excluded from EA or EIS requirements.\textsuperscript{110} *Steamboaters* illustrates how courts enforce the CEQ regulations. In that case, the court held that FERC's failure to prepare an EA violated CEQ NEPA regulations and that FERC did not show how project mitigation rendered potential impacts less than significant.\textsuperscript{111}

Also, the EA process provides at least the potential for public review of agency proposals and public consideration of the efficacy of proposed mitigation measures. CEQ regulations require agencies to involve the public in EA preparation "to the extent practicable."\textsuperscript{112} *Cabinet Mountains* and *North American Wild Sheep* illustrate how some agencies satisfy this general requirement by voluntarily circulating draft EA's for public comment prior to preparing final EA's.\textsuperscript{113}

The FONSI process provides an additional opportunity for public review. CEQ regulations require that a FONSI include the EA or a summary of it\textsuperscript{114} and be made publicly available.\textsuperscript{115} Furthermore, if the project is of a type that would normally require an EIS or is without precedent, the FONSI does not become final until after the agency allows thirty days for public review, and the agency can take no action until after this period.\textsuperscript{116}

*North American Wild Sheep* highlights the importance of public review when an agency proposes mitigation measures to justify a FONSI. In that case, public responses criticized a draft EA circulated by the Forest Service prior to its decision not to prepare an EIS. The court rejected the Service's decision because these public responses raised substantial questions regarding the effectiveness of the proposed mitigation measures, creating public controversy about the project's environmental effects.\textsuperscript{117}

4. *Nexus Between Mitigation Measures and the Project*

In three cases that employed the majority approach, the courts required a close nexus between mitigation measures and the proposed project. The Ninth Circuit, in *Preservation Coalition*, required that mitigation measures be project-related, and the court rejected the use of

\textsuperscript{110} See supra text accompanying note 16.
\textsuperscript{111} 759 F.2d at 1393-94.
\textsuperscript{112} See supra note 17 and accompanying text.
\textsuperscript{113} See supra notes 35 and 58 and accompanying text.
\textsuperscript{114} 40 C.F.R. § 1508.13 (1985).
\textsuperscript{115} Id. § 1501.4(e)(1).
\textsuperscript{116} Id. § 1501.4(e)(2).
\textsuperscript{117} See supra text accompanying notes 67-70.
mitigation measures to justify a FONSI where these measures would have occurred in the absence of the project. The court also held that mitigation measures cannot justify a FONSI unless they are implemented directly by the federal agency, the project applicant, or “firmly committed” third parties. The Fifth Circuit, in *Louisiana v. Lee*, apparently agreed with *Preservation Coalition*, but did not state an explicit rule.

The District of Columbia Circuit agrees with the Ninth Circuit, but apparently restricts the ability of third parties to mitigate projects. In *Cabinet Mountains*, the District of Columbia Circuit required an agency to convincingly establish that “changes in the project” reduced environmental impacts to a minimum. Thus, the court apparently insists that FONSI’s be justified only by project changes proposed by the federal agency or project applicant, because third parties cannot independently “change” a proposed project. California has adopted a similar approach to project mitigation when agencies prepare “mitigated Negative Declarations” under the California Environmental Quality Act (CEQA).

**B. Criticisms of the Majority Approach and Judicial Responses**

Glitzenstein, in his 1982 article, advanced several thoughtful criticisms of the majority approach. First, he suggested that the majority approach relies too heavily on judicial scrutiny of project alternatives. Second, he stated that the approach permits “judicial compulsion” of substantive agency decisions, rather than relying on the EIS process to assure that environmental consequences are incorporated into agency decisions. Third, Glitzenstein argued that the majority approach violates an interpretation of NEPA under which an EIS becomes necessary the moment that a project as originally proposed may have significant environmental impacts. 

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118. See supra note 51 and accompanying text.
119. Id.
120. See supra note 84 and accompanying text.
121. 685 F.2d at 682.
122. CAL. PUB. RES. CODE §§ 21000-21176 (West 1986). Under the CEQA Guidelines, a Negative Declaration (analogous to a federal FONSI) may be prepared if an Initial Study (analogous to a federal EA) identifies potentially significant effects, but revisions in the project proposal made by or agreed to by the applicant would avoid the effects or mitigate them to the point where clearly no significant effects would occur, and if there is no substantial evidence that the project as revised may have a significant environmental effect. CAL. ADMIN. CODE tit. 14, R. 15070 (1983). Changes in the project must be made by or agreed to by the project applicant before the proposed Negative Declaration is released for public review. Id.
123. Glitzenstein labeled the majority approach of allowing project mitigation to justify FONSI’s as the “significant impacts approach”; courts following this approach permit agencies to issue FONSI’s as long as effective mitigation measures have been imposed on a project. See Glitzenstein, supra note 9, at 261. Glitzenstein criticized the “significant impacts” approach on a number of grounds and advocated the “process” approach, wherein courts require agencies to prepare an EIS whenever a project as originally proposed may have significant environmental impacts, notwithstanding later mitigation. Id. at 262-80.
124. Id. at 263-64.
125. Id. at 267.
environmental impacts. Fourth, he noted that the approach is inconsistent with NEPA’s fundamental objectives of integrating environmental concerns into the decision process at an early stage because it does not ensure public and outside agency review of project alternatives and mitigation measures.

Courts that adopt the majority approach have not explicitly responded to these criticisms. As the remainder of this Section indicates, a close reading of the majority cases suggests that the first three objections are not fatal. The fourth criticism, however, is serious enough to suggest a revision of the CEQ NEPA regulations to mandate greater public and agency review of FONSI’s justified by mitigation measures.

The first criticism mentioned above is the concern that allowing mitigation measures to justify FONSI’s will require excessive reliance on judicial scrutiny. Courts that apply the relatively strict “reasonableness” standard of review may become entangled in technical details better left to agency discretion. On the other hand, courts that apply the less strict “arbitrary and capricious” standard may defer excessively to agency determinations.

In the decisions reviewed above, courts adopting the majority approach have avoided both of these pitfalls. Courts that applied the “reasonableness” standard avoided entanglement in technical considerations by applying the hard look doctrine, placing a heavy burden of proof on the agency to justify its decision, and relying on criticisms raised by the public and other agencies. A greater risk is that courts which adopt the “arbitrary and capricious” standard will be overly deferential to agency determinations. However, the Cabinet Mountains court avoided excessive deference under the “arbitrary and capricious” standard by also employing the hard look doctrine and imposing a heavy burden of proof on the federal agency. If other courts of appeal employing the “arbitrary and capricious” standard follow this lead, excessive deference may not be a serious concern.

Second, some critics are concerned that judicial approval of FONSI’s justified by mitigation measures indirectly encourages mitigated projects, and in effect compels agencies to find ways to mitigate projects

126. Id. at 271-78. CEQ in its informal advice on project mitigation apparently agrees with this interpretation of NEPA and recommends that FONSI’s justified by mitigation measures be prepared only if the mitigation measures are imposed by statute or regulation (and thus are implicitly part of the original proposal), or expressly submitted as part of the original proposal; see 46 Fed. Reg. at 18,038 (Forty Questions).

127. See Glitzenstein, supra note 9, at 264-66. CEQ in its informal advice on project mitigation shares this concern, asserting that public and agency review of mitigated projects is “essential to assure that the decision is based on all of the relevant factors.” See 46 Fed. Reg. at 18,038 (Forty Questions).

128. See infra Section IV B.

129. See supra text accompanying notes 104-108.

130. See supra text accompanying notes 104 and 107.
rather than going through the full EIS process. However, the five cases that employed the majority approach did not compel the agencies to adopt particular mitigation measures. The courts that upheld FONSI's justified by mitigation measures found only that the agencies had adequately demonstrated the efficacy of proposed mitigation measures.\textsuperscript{131} The courts that reversed such FONSI's did not order the agencies to adopt specific alternative measures to justify their FONSI's, but rather rejected the agencies' justifications as unconvincing.\textsuperscript{132}

Third, some critics argue that NEPA should be interpreted as requiring EIS preparation the moment that a project as originally proposed creates significant environmental impacts. This interpretation is subject to question, though, because all courts which employ the majority approach disagree with this suggested requirement by definition. None of these courts, however, has explicitly addressed the specific arguments favoring this alternative interpretation of NEPA.\textsuperscript{133}

IV

REGULATORY REFORM

A. Protecting the Environment

In Preservation Coalition, the court observed that, as a practical matter, using mitigation measures to justify FONSI's better enables federal agencies to focus their limited resources on proposed actions which will have truly significant environmental impacts.\textsuperscript{134} As a policy matter, the majority approach thus may very well increase the number of environmentally acceptable projects, a result that would be consistent with NEPA's underlying purpose of "promot[ing] efforts which will prevent or eliminate damage to the environment."\textsuperscript{135} This policy rationale has not been explicitly recognized by recent majority cases and deserves further emphasis.\textsuperscript{136}

Neither NEPA nor the CEQ NEPA regulations require an agency that prepares an EIS to render potentially significant impacts less than significant. An agency meets its NEPA responsibilities by merely disclosing in full the project's environmental effects, potential mitigation measures, and alternatives to the project.\textsuperscript{137} In contrast, to justify a

\textsuperscript{131} See supra text accompanying notes 35-57 and 81-88.
\textsuperscript{132} See supra text accompanying notes 58-80.
\textsuperscript{133} For a discussion of both interpretations, see Glitzenstein, supra note 9, at 271-78.
\textsuperscript{134} 667 F.2d at 858.
\textsuperscript{135} 42 U.S.C. § 4321 (1982).
\textsuperscript{136} This rationale was recognized in an earlier project mitigation case, Maryland-National Capital Park and Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973). In that case, the court observed that the use of FONSI's justified by mitigation could, in the case of siting construction projects, successfully minimize environmental damage; the court "encouraged" this possibility. See id. at 1040 n.11.
\textsuperscript{137} 40 C.F.R. § 1502.16 (1985). Agencies must, in Records of Decision for cases requir-
FONSI by using mitigation measures, an agency must render all potentially significant impacts less than significant. Moreover, the effectiveness of project mitigation is subject to close judicial scrutiny.

Agencies confronted with NEPA threshold decisions also know that the EIS process involves considerably more expense and delay than the FONSI process. The full EIS process includes the steps of scoping, preparing the Draft EIS, circulating the Draft EIS, preparing responses to comments which will be included in the Final EIS, circulating the Final EIS, and publishing a Record of Decision. Furthermore, after an agency prepares an EIS, it can make no decision on a proposed action until ninety days after publication of the notice of availability of the Draft EIS, or thirty days after the publication of the notice of availability of the Final EIS, whichever is later. In contrast, the FONSI process entails only incorporation of the EA and, under some circumstances, a thirty-day public review period.

Thus, the majority approach offers federal agencies a powerful incentive—avoiding the costs and delays associated with a full EIS—to design projects which mitigate environmental impacts to less than significant levels. Of course, the mere opportunity to prepare FONSI's justified by mitigation does not guarantee increased environmental consciousness in decisionmaking. For example, an agency which is willing to mitigate a project at the EA and FONSI stage might voluntarily impose the same, or even more effective, mitigation measures if a full EIS were prepared. Nevertheless, given the opportunity to prepare FONSI's justified by mitigation, some agencies may choose to devote resources to environmental protection and mitigate immediately, rather than to undergo the more costly and time-consuming EIS process.

The minority approach offers no such incentive for effective project mitigation. Denied the option of justifying a FONSI with mitigation measures, an agency less than fully committed to environmental goals might choose to forego mitigation and instead prepare a minimal EIS that merely "goes through the motions" of disclosing a project's environmental effects and its potential mitigation measures and alternatives.

138. Id. § 1501.7. Scoping is the process of determining the scope of issues to be addressed and identifying the significant issues related to a proposed action. Id.
139. Id. § 1502.9(a).
140. Id. § 1502.19.
141. Id. § 1502.9(b).
142. Id. § 1502.19.
143. Id. § 1506.10(b).
144. Id.
145. See supra note 116 and accompanying text.
B. Public and Agency Review

As suggested in Section III B, the majority approach to project mitigation survives all but one criticism. The full EIS process assures comprehensive public and agency input on project alternatives and mitigation measures at an early stage in project planning. In contrast, the majority approach does not guarantee public review of all EAs and FONSI's, and in some instances may well result in decisions which ignore relevant factors. Without formal consultation, agencies and the public may have no chance to suggest less damaging project alternatives and more effective mitigation measures. Fuller public and agency review of FONSI's justified by mitigation measures would help assure that close NEPA threshold decisions are made correctly.

C. Proposal To Revise the CEQ Regulations

Because the advantages of the majority approach outweigh its disadvantages, CEQ should resolve the split among the circuits by amending its NEPA regulations to explicitly validate the use of mitigation measures to justify FONSI's. The revised regulations should incorporate the safeguards developed by the courts to ensure mitigation effectiveness. In addition, the revisions should require mandatory public and agency review of all FONSI's justified by mitigation.

I. Public and Agency Review

Greater review by the public and by other agencies would assure full comment on project alternatives and mitigation measures and remedy the majority approach's primary flaw. The revisions to the CEQ regulations should specifically require agencies to circulate FONSI's justified

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146. See supra text accompanying notes 104-120.

147. One could argue that in the absence of such revision the existing CEQ regulations already require mandatory public review of FONSI's justified by mitigation. Under 40 C.F.R. section 1501.4(e)(2), when an action is one which “normally requires” an EIS, a thirty-day public review period is currently required before a FONSI becomes final and action may be taken. Arguably, an original proposed action with potentially significant impacts prior to mitigation is always, by definition, an action which normally requires an EIS, and thus every mitigated FONSI must be circulated for thirty days prior to agency action.

The CEQ informal advice on mitigated FONSI's appears to have adopted this view. In the limited circumstances in which CEQ advises that mitigated FONSI's are appropriate, CEQ advises that agencies should always make the FONSI and associated EA available for thirty days of public comment before taking action. 46 Fed. Reg. at 18,038 (Forty Questions), citing 40 C.F.R. § 1501.4(e)(2). The courts have yet to decide whether these public review recommendations of the CEQ advice represent controlling authority.

Alternatively, it may be argued that because agencies are generally free to define the point in time at which a “proposal” for action exists, agencies may define this time as being after mitigation has been added to the proposal. See Glitzenstein, supra note 9, at 271-78. If this view is taken, 40 C.F.R. section 1501.4(e)(2) does not currently require mandatory public review of FONSI's justified by mitigation since mitigated proposals would tend not to “normally require an EIS.”
by mitigation measures to all federal agencies with jurisdiction or special expertise in areas related to the project's possible environmental impacts. This would assure that lead agencies receive the benefit of outside agency knowledge.

To assure meaningful public review, CEQ should require agencies to allow thirty days for public review of any proposed FONSI justified by mitigation measures, and to consider public comments before approval of a final FONSI and a project. The existing CEQ regulations do not extend this far. They require a thirty-day public review for proposed FONSI's only if the action is without precedent or normally requires an EIS.

2. Adequate Information

One potential problem with mandatory public review of FONSI's supported by mitigation measures is the danger that the public and reviewing agencies may lack the information or expertise necessary for effective review. This problem could be compounded if an agency were to limit the scope of the EA and FONSI to only the chosen alternative and mitigation measures and omit the others that it considered when preparing the EA. Two factors limit the magnitude of this problem.

First, many EA's supporting FONSI's already must include a consideration of alternatives to a proposed action. The CEQ NEPA regulations require that EA's discuss the environmental impacts of alternatives as required by section 102(2)(E) of NEPA. Section 102(2)(E) requires agencies to analyze alternatives "in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Many federal proposals potentially involve such unresolved resource use conflicts, and EA's on such proposals must therefore analyze project alternatives.

Second, many outside agencies that review NEPA documents are, in fact, qualified to evaluate alternatives and mitigation measures. Currently, agencies must circulate EIS's to federal agencies that have "jurisdiction by law or special expertise with respect to any environmental impact involved" to assure that lead agencies have the benefit of outside expertise. The suggested regulatory revisions would extend this requirement to FONSI's supported by mitigation measures.

148. Alternatively, each federal agency could independently amend its NEPA procedures to validate FONSI's justified by mitigation measures and provide for such mandatory public review. Prior amendment of the CEQ NEPA regulations, however, would assure consistent and uniform treatment of FONSI's justified by mitigation measures among all federal agencies.


150. Id. §§ 1508.9.

3. Burdens on Federal Agencies

The proposed mandatory public review of all FONSI's justified by mitigation measures would not unduly increase existing burdens on federal agencies. In California, state and local agencies apparently have little difficulty in providing such mandatory public review for proposed “mitigated Negative Declarations” prepared pursuant to CEQA.152

Even with mandatory public review, the FONSI process would still entail considerably less expense and delay than the EIS process. Instead of the full EIS process—preparing the Draft EIS, responding to comments, preparing and circulating the Final EIS, and publishing the Record of Decision153—the FONSI process requires only incorporation of an EA. Moreover, the proposed thirty-day comment period is considerably shorter than the waiting period required by the EIS process.154 Federal agencies, after considering the comments, could finalize a FONSI and act on a project immediately following this period.

CONCLUSION

In the absence of clear statutory or regulatory requirements, most federal appellate courts which have considered the matter allow agencies to justify FONSI's with mitigation measures that reduce impacts to less than significant levels. This majority approach provides agencies with time and cost incentives to mitigate a project's significant impacts.

Courts adopting the majority approach have developed safeguards to help assure effective project mitigation, but they have not addressed a number of potential legal and policy problems associated with FONSI's justified by mitigation. However, these problems do not appear to be serious, with the exception of the lack of full public and agency review of FONSI's justified by mitigation.

To provide clear guidance to federal agencies, CEQ should revise its NEPA regulations to validate the use of mitigation measures to justify FONSI's. The revised regulations should incorporate judicially developed safeguards to ensure mitigation effectiveness. More importantly, they should provide for mandatory public review of all FONSI's justified by mitigation to give agencies the benefit of public and outside agency advice about the impacts of the project and its alternatives, and about mitigation measures.

152. See supra note 122. California mandates public review of all proposed Negative Declarations, whether or not they have been “mitigated.” CAL. ADMIN. CODE tit. 14, R. 15073 (1983). In the case of proposed mitigated Negative Declarations, mitigation must be made by or agreed to by the project applicant prior to public review. Id. R. 15070.
153. See supra notes 138-144 and accompanying text.
154. See supra note 144 and accompanying text.