The Continuing Saga of Rippling Puddles, Small Handles and Links of Chains: Wetlands Action Network v. United States Army Corps of Engineers

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I. INTRODUCTION

Historically, wetlands have been perceived as useless impediments to agriculture and development. While wetlands originally constituted 221 million acres of the continental United States, today, only 100.9 million acres remain. Since the early 1970's, wetlands have been recognized for their role in flood prevention through the slow release of excess water. Wetlands protect both surface and groundwater by purifying storm water though the filtration of nutrients, sediments, and pollutants. Additionally, many endangered species depend on wetlands for survival. Although the importance of wetlands as an integral part of the environment is now understood, the federal regulation of wetlands, with its complex history, remains a source of confusion.

This Note focuses on Congress' attempt to define the proper scope of environmental impacts that the United States Army Corps of Engineers (Corps) must consider when granting permits for the discharge of dredged or fill material into United States' waters.

1. See Mark A. Chertok, Federal Regulation of Wetlands, SE98 ALI-ABA 715, 717 (ALI-ABA Course of Study 2000) (reporting "[a]nnual losses between 1985 and 1995 were approximately 117,000 acres; down from an estimated 290,000 acres per year between 1970 and 1980, and an estimated 458,000 acres per year between the 1950s and the 1970s.").

2. See id. (indicating dramatic depletion of wetlands).

3. See id. (explaining perspective of wetlands shifted in early 1970s with realization that both freshwater and tidal wetlands provide important ecological value and also demonstrating that wetlands' role in flood prevention became evident during 1993 flooding along Mississippi River).

4. See id. (noting it has become clear that wetlands provide important wildlife benefits, including nesting, wintering, resting and feeding grounds for numerous species of migratory waterfowl).

5. See id. (observing "estuaries provide critical food sources, spawning grounds and nurseries for coastal fish and shellfish on both coasts.").


The Corps’ authority to grant permits arises under the Clean Water Act (CWA) and is often compared to rippling puddles, small handles, and links of a chain.\(^8\) This Note attempts to determine which, if any, of these metaphors provides a clear rule in determining the proper scope of the Corps’ environmental review.

While Section II of this Note presents the facts of *Wetlands Action Network v. U.S. Army Corps of Engineers*,\(^9\) Section III examines the applicability and effects of the Rivers and Harbors Act, the National Environmental Policy Act of 1969, and judicial decisions construing the extent of the Corps’ jurisdiction.\(^10\) Section IV discusses the Ninth Circuit’s rationale in overturning the lower court’s decision to grant an injunction in *Wetlands Action Network*.\(^11\) Finally, Section V analyzes other options the Ninth Circuit could have employed and Section VI concludes with an assessment of the impact the Ninth Circuit’s decision will have on continued wetlands development.\(^12\)

II. FACTS

The controversy in *Wetlands Action Network* arose from the Corps’ decision to grant Maguire Thomas Partners-Playa Vista Company (MTP-PV) a permit to fill 16.1 acres of federally-delineated wetlands and to mitigate the fill by creating a fifty-one acre fresh-

\(^8\) See 33 U.S.C. § 1344(a) (1994); see also Porterfield, *supra* note 7, at 38. “Section 10 of the Rivers and Harbors Act makes it unlawful to ‘excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . any navigable water of the United States’ without a permit from [ ] Corps.” *Id.* (citation omitted); see also Sylvester v. United States Army Corps of Eng’rs, 884 F.2d 394, 400 (9th Cir. 1989) (indicating that, in viewing environmental effects, image of scattered bits of broken chain is better than image of rippling puddles). “Each segment stands alone, but each link within each segment does not.” *Id.*

Environmental impacts are in some respects like ripples following the casting of a stone in a pool. The simile is beguiling but useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide.

*Id.* For a discussion of the small handle problem, see *infra* note 100 and accompanying text.

\(^9\) 222 F.3d 1105 (9th Cir. 2000)

\(^10\) For a discussion of the facts of *Wetlands Action Network*, see *infra* notes 13-39 and accompanying text.

\(^11\) *See Wetlands Action Network*, 222 F.3d at 1105 (concluding that Corps’ determination did not conflict with applicable regulations).

\(^12\) For a further discussion of alternatives, see *infra* note 96 and accompanying text.
water wetland system. MTP-PV’s enormous project, covering 1,000 acres, proposed to develop residential areas, a marina and numerous commercial developments, including hotels, retail establishments, an entertainment media and technology district, and a Dreamworks® studio. Wetlands Action Network and California Public Interest Research Group (WAN) brought suit in the district court alleging the Corps evaded its legal obligations under CWA and the National Environmental Policy Act (NEPA) by granting MTP-PV a fill permit pursuant to CWA section 404. The district court granted summary judgment in favor of WAN on its NEPA claims, invalidated the permit, and enjoined MTP-PV from beginning any other construction in the area covered by the permit.


DreamWorks has . . . captured the public’s imagination with its lofty plans to build not just a new studio complex but the company town of the future. It has entered the real-estate business with megadeveloper Maguire Thomas Partners — and has received generous tax breaks from the city of Los Angeles, which views the project as a potential economic boon. But the project is already months behind schedule and could be delayed for years.

Id.; see also CEQ, Terminology and Index, 40 C.F.R. § 1508.20 (2000).

‘Mitigation’ includes: (a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (e) Compensating for the impact by replacing or providing substitute resources or environments.

Id.; see also Wetlands Action Network, 222 F.3d at 1105. Wetlands Action Network and California Public Interest Research Group [hereinafter WAN] brought suit in the district court alleging that the Corps failed to meet its responsibilities under NEPA and CWA. See id. at 1109.

14. See Wetlands Action Network, 222 F.3d at 1110 (explaining project caused great deal of dispute because Playa-Vista property is largest remnant parcel of undeveloped land in heavily urbanized portion of Los Angeles County); see also Vest, supra note 13, at 1-2.

The plan entails spending $7 billion to develop a 1,087 acre tract known as Playa Vista, or “Beach View” for the Spanish challenged — one of the last sizable tracts of undeveloped coastal land in the Los Angeles area.

Home to the Ballona Wetlands (which have been more or less dry since 1941, when the Army Corps of Engineers sluiced Ballona Creek into a concrete trench), the land brought little joy to its previous owner, Howard Hughes, another movie producer.

Id.

15. Wetlands Action Network, 222 F.3d at 1109 (discussing district court’s denial of MTP-PV’s motion to intervene as a right in NEPA claims but grant of MTP-PV’s motion in alternative for permissive intervention). See id. The intervention, however, limited MTP-PV’s participation in the NEPA claims to the relief phase. See id.

16. See id. (finding Corps violated NEPA).
MTP-PV had planned to develop the Playa Vista property since 1979.\textsuperscript{17} The proposed project, however, generated great conflict insofar as the Playa-Vista property is the largest remnant parcel of undeveloped land in a heavily urbanized western portion of Los Angeles County.\textsuperscript{18} Before requesting a permit for its activities, MTP-PV met with the Corps and proposed to divide the project into three separate phases, each requiring three separate permit applications.\textsuperscript{19} The first phase included a request for “the authorization to fill 7.8 acres of scattered wetland patches in Areas B, C, and D for mixed-use development.”\textsuperscript{20} This phase also included the creation of a fifty-two acre freshwater wetland complex to mitigate the loss resulting from the fill.\textsuperscript{21} The second phase of the project included the restoration and creation of a salt marsh in one-hundred sixty acres of designated wetlands in Area B.\textsuperscript{22} The third and final phase of the project involved “the development of a marina and the ecological enhancement of the Ballona flood control channel which involves the dredging and filling of 9.8 acres of wetlands in Area A.”\textsuperscript{23} The Corps agreed that dividing the project into three parts was permissible since each proposed phase had an independent purpose.\textsuperscript{24}

MTP-PV sought its first permit from the Corps, in August 1990, to fill 16.1 acres of federally-delineated wetlands as part of Phase I of the project.\textsuperscript{25} In October of 1990, MTP-PV concluded that there

\textsuperscript{17} See id. at 1110 (discussing litigious history of Playa Vista Project).

\textsuperscript{18} See id. The Playa Vista property contains approximately 186 acres of federally delineated wetlands. See id. MTP-PV’s project planned to dredge and fill 21.4 acres of wetlands. See id.

\textsuperscript{19} See id. (indicating MTP-PV and Corps joined to determine proper division of project for permitting purposes).

\textsuperscript{20} See Wetlands Action Network, 222 F.3d at 1111. “For planning purposes, MTP-PV divided the Playa Vista project site into four parcels designated Areas A, B, C, and D.” Id. at 1110. MTP-PV planned mixed-use development for these parcels. See id.

\textsuperscript{21} See id. MTP-PV proposed mitigation to compensate for the 21.4 acres of wetlands that would be dredged and filled during the three phases of Playa Vista project. See id. “The creation of the freshwater wetland system would require filling 7.7 acres of wetlands in Area B for the berm (4.0 acres of which would be restored to wetlands leaving 3.7 acres as permanently filled).” See id.

\textsuperscript{22} See id. Restoring the degraded wetlands and converting uplands to wetlands would create a salt marsh system of about 230 acres. See id.

\textsuperscript{23} Id. at 1110. Of the 9.8 acres, 3.7 consist of a man-made drainage ditch and 8.1 acres are scattered, degraded wetlands. See id. at 1111.

\textsuperscript{24} See id. at 1112 (noting Corps evaluated cumulative impacts of proposed project in Environmental Assessment [hereinafter EA]). For a further discussion of EA, see infra note 67 and accompanying text.

\textsuperscript{25} See Wetlands Action Network, 222 F.3d at 1111. In this phase of the project, MTP-PV proposed to fill eight acres of man-made flood control ditches and degraded wetlands located in seventeen isolated patches across the Playa-Vista prop-
was no environmentally sensitive and practical alternative to building that would result in less significant environmental impacts. On January 2, 1991, the Corps issued a public notice of the permit application, stating that an Environmental Impact Statement (EIS) was not required for the work proposed in Phase I of the project. In keeping with protocol, the Corps requested feedback from the interested public and relevant state and federal resource agencies concerning the proposed development. The responses questioned whether the permit application contained a sufficiently detailed analysis of project alternatives and whether the permit provided a comprehensive evaluation of the cumulative impacts attributable to the entire project.

After several meetings, the Corps ultimately determined that the division of the project into three separate phases was logical.

26. See id. MTP-PV proposed to fill the remaining eight acres located in Area B by creating a 51.1 acre freshwater wetland system consisting of twenty-six acres of freshwater marsh and twenty-five acres of freshwater riparian corridor. See id. Four of the latter eight acres are to be restored to wetlands and the remaining four are to be permanently filled to create a berm between the freshwater system and saltwater marsh that MTP-PV plans to restore as part of Phase II of the project. See id.

27. See id. The notice described the complete Playa Vista development and the activity for which the permit was requested. See id. This notice also included a preliminary determination that an EIS would not be needed. See id.

28. See id. The Corps expanded the period for review at EPA’s request from February 2, 1991 to February 15, 1991. See id. The resulting comments came from a variety of sources, such as the general public, environmental groups and both state and federal agencies, including FWS, NMFS, and EPA. See id.

29. See id. MTP-PV submitted comments addressing those issues raised and offered a revised “Practical Alternative Analysis” containing an analysis of five alternatives to the mixed-use development portion of the project and six alternatives to the freshwater wetland system portion. See id. Additionally, MTP-PV put forward three scientific studies to further supplement its analysis: “Biological Value of the Ballona Wetlands System,” “Water Balance for the Proposed Freshwater Wetland System,” and “Water Demand of the Proposed Ballona Freshwater Wetland System.” See id.

30. See Wetlands Action Network, 222 F.3d at 1111-12. In order to address concerns of both public and environmental groups regarding the three permit approach to the project, the Corps met with representatives of FWS, NMFS, EPA, and California Department of Fish and Game. See id. At this meeting, the agencies requested that the Corps delay review and approval of any component of the project until MTP-PV submitted an application for Phase II of the project due to concerns over the three permit approach. See id. at 1111-12. The Corps, however, ignored the agencies’ requests to delay review and approval. See id. Instead, the Corps issued the permit and, on February 25, 1992, sent an informal notice of intent to issue MTP-PV’s permit to NMFS, EPA, and FWS pursuant to CWA § 404(q). See id. After reviewing MTP-PV’s documentation addressing the agencies’ concerns, the Corps found MTP-PV’s responses acceptable, but concluded
Subsequently, the Corps issued a Finding of No Significant Impact (FONSI) on July 1, 1992. The Corps' evaluation of cumulative impacts concluded it was unnecessary to include substantial consideration of the upland development since such development was outside its jurisdiction. Thus, the Corps did not require an EIS and issued the permit on April 20, 1993. MTP-PV subsequently filled, cleared and graded the wetlands in the permit area.

The district court rescinded the permit and found the Corps violated NEPA by improperly limiting the scope of its analysis. The district court further found that even if the scope of the analysis was proper, the Corps' decision to issue an Environmental Assessment (EA) rather than an EIS was arbitrary and capricious. The Court of Appeals for the Ninth Circuit found the district court erred in finding that the Corps violated NEPA. The Ninth Circuit also held that the Corps' decision was neither arbitrary nor capricious. According to the Court of Appeals, the Corps did not have

that MTP-PV must prove in-kind mitigation for the salt marsh habitat lost as a result of the project. See id. EPA, NMFS and FWS made no further objections to Phase I of the project upon receiving the requested technical information. See id.

31. See id. at 1112. The Corps finally decided that no other alternatives would result in any less adverse impact upon the environment. See id.; see also 43 Fed. Reg. 56003, 56004 (Nov. 29, 1978) (defining Environmental Assessment [hereinafter EA] and Finding of No Significant Impact [hereinafter FONSI]). "Due to the relatedness of the three phases, however, Corps found that it would accept mitigation credit for the future projects as part of Phase I, provided that the later phases eventually receive authorization and that 'success criteria' for the freshwater wetland system are met." See Wetlands Action Network, 222 F.3d at 1112. For a further discussion of FONSI and EA, see infra notes 65-67 and accompanying text.

32. See Wetlands Action Network, 222 F.3d at 1112 (noting effect on surrounding areas need not be included in NEPA review of permit application). For a discussion of cumulative impacts, see infra note 75 and accompanying text.

33. See id. (indicating project would not have significant impact on quality of human environment).

34. See id. (stating MTP-PV took action pursuant to issuance of permit).

35. See id. at 1113 (finding that analysis should not have been limited to the impacts of activities covered by permit, but should have been considered impacts associated with whole development project).

36. See id. (explaining that requiring only EA "was arbitrary and capricious because of the untested nature of the freshwater wetlands system, the lack of a fully developed mitigation plan, and the controversy that surrounded the Corps' determination of the permitted activities' nature and effect."). The EA contained an examination of "alternatives to the project including: (1) no action alternative; (2) alternative project designs; (3) the creation of a salt marsh in lieu of the freshwater wetland system; and (4) possible off-site locations." Id. at 1112.

37. See Wetlands Action Network, 222 F.3d at 1122. The Ninth Circuit affirmed the district court's decision to deny MTP-PV's motion to intervene, reversed the district court's grant of summary judgment and remanded to vacate the injunction. See id.

38. See id. at 1118 (commenting upon deference given to agency's determination of jurisdiction).
to issue an EIS considering the environmental consequences of the entire Playa Vista project.\textsuperscript{39}

III. BACKGROUND

Wetlands are broadly defined as "those areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."\textsuperscript{40} Wetlands regulations involve a complex legislative scheme involving a number of federal agencies.\textsuperscript{41}

A. Rivers and Harbors Act

Before 1972, federal control of wetlands was limited to Section 10 of the Rivers and Harbors Appropriation Act of 1899 (Rivers and Harbors Act).\textsuperscript{42} The Rivers and Harbors Act regulates navigable waters of the United States and prohibits dredging, filling, or placing structures in those waters without a permit issued by the Corps.\textsuperscript{43}

\textsuperscript{39} See id. at 1117 (determining federal jurisdiction does not establish enough "control and responsibility" to federalize the entire project).

\textsuperscript{40} Chertok, supra note 1, at 723-24 (citing Corps of Engineers, Department of the Army, Definition of Waters of the United States, 33 C.F.R. § 328.3(b) (2002) and Environmental Protection Agency, Ocean Dumping, Section 404(b)(1) Guidelines for Specification or Disposal Sites for Dredged or Fill Materials, Definitions, 40 C.F.R. § 230.3(t) (2002)) (noting that while CWA does not define "wetlands," Corps and EPA apply same definition of term). Under 33 C.F.R. § 328.3(b), the Corps defines wetlands as:

The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\textit{Id.} Identically, under 40 C.F.R. § 230.3(t), EPA defines wetlands as:

The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

\textit{Id.}

\textsuperscript{41} See id. at 718 (describing backdrop for federal regulation of wetlands); see also Patrick A. Parenteau, Small Handles, Big Impacts: When Do Permits Federalize Private Development?, 20 ENVTL. L. 747, 749 (1990) (discussing Corps and "small handle" problem). For a further discussion of the small handle problem, see infra note 100 and accompanying text.

\textsuperscript{42} See Chertok, supra note 1, at 718 (remarking that jurisdiction under Rivers and Harbors Act "is limited to waters affected by tidal flow or which have been used, or are susceptible to use, for interstate or foreign commerce.").

\textsuperscript{43} See id. at 718-19 (reporting statute intended to protect government's interest in navigability of waterways).
Under the Rivers and Harbors Act, the Corps' jurisdiction is limited to waters affected by tidal flow, waters that have been used for interstate or foreign commerce or those waters susceptible to use in interstate commerce.44

B. Section 404 of the Federal Water Pollution Act

CWA Section 404 provides the primary basis for federal wetlands regulation.45 Enacted in 1972, CWA's federal interest is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."46 Section 404 authorizes the Corps to issue permits to discharge dredged or fill material into waters of its jurisdiction.47 The Corps also has authority to issue "general permits" for categories of similar activities that have a minimal environmental impact when considered either individually or cumulatively.48

44. See Corps of Engineers, Department of the Army, General Regulatory Policies, 33 C.F.R. § 320.1 (1994). The Corps is a highly decentralized organization with authority to administer the regulatory program that approves jurisdictional determinations, permit denials, and declined individual permits. See 33 C.F.R. § 320.1(a)(2) (1994).
45. See 33 U.S.C. § 1344 (1994); see also Chertok, supra note 1, at 719 (noting CWA reflected far broader federal interest than navigation alone).

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

Id.
EPA, however, has regulatory authority under CWA and the Section 404(b)(1) guidelines, which must be satisfied in order for a permit to be issued.\textsuperscript{49} Additionally, EPA has authority to prohibit the disposal of dredged materials at certain sites if there would be an "unacceptable adverse effect" on environmental resources.\textsuperscript{50} EPA may also delegate Section 404 authority to individual states considering permits for discharges into intrastate waters.\textsuperscript{51}

Pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of CWA, the Corps controls a significant number of permitting decisions.\textsuperscript{52} These decisions require a determination of whether to require an EIS for the issuance of a permit for the discharge of dredged or fill material into waters of the United States, extending to wetlands.\textsuperscript{53} In determining whether to grant a permit under Section 404, the Corps applies EPA's Section 404(b)(1) environmental guidelines, requiring a review of both individual and cumulative impacts.\textsuperscript{54} Generally, the Corps denies a permit if a viable alternative to the proposed discharge exists that would cause a diminished effect on the aquatic ecosystem.\textsuperscript{55} Further, the Corps may deny permits if the discharges will cause significant degradation of United States' waters.\textsuperscript{56}

While the Corps and EPA both control the regulation of wetlands, the functions of each agency differ in their enforcement.

\textsuperscript{49} 33 U.S.C. § 1344(b) (1994). The Guidelines state, "[t]he purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material." Environmental Protection Agency, Ocean Dumping, Section 404(B)(1) Guidelines for Specification or Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.1(a) (2000).

\textsuperscript{50} See 33 U.S.C. § 1344(c) (1994); see also Chertok, supra note 1, at 721 (noting EPA has sparingly exercised its "veto" power to prohibit Section 404 permits).

\textsuperscript{51} See Chertok, supra note 1, at 721 (explaining that EPA retains authority to object to State's proposed permit); see also 33 U.S.C. § 1344(g)(1) (1994) (setting forth procedure for state to propose and administer its own permit program).

\textsuperscript{52} See Parenteau, supra note 41, at 750 (defining "navigable waters" as navigable bodies of water and tributaries).

\textsuperscript{53} See Porterfield, supra note 7, at 38 (discussing Corps' jurisdiction over discharge of dredge or fill material into United States' waters pursuant to Rivers and Harbors Act § 10 and CWA § 404).

\textsuperscript{54} See id. at 39; see also 40 C.F.R. § 230.6(c) (2002). For a further discussion of "cumulative impacts," see infra note 75 and accompanying text.

\textsuperscript{55} See 40 C.F.R. § 230.10(a) (2002); see also Porterfield, supra note 7, at 39-40 (noting CWA § 301 prohibits discharge of "any pollutant by any person" into United States' waters without permit).

\textsuperscript{56} See 40 C.F.R. § 230.10(c) (2002); see also Porterfield, supra note 7, at 40 (finding Corps must follow its own guidelines, requiring consideration of environmental factors in determining whether issuance of permit is in public's interest).
power and jurisdiction. Furthermore, the Corps and EPA are not the only federal agencies involved in wetland regulation. Other federal and state agencies, such as the Fish and Wildlife Service (FWS) and the Natural Resources Conservation Service (NRCS) provide consultation regarding permitting decisions. To further confuse the complex regulatory scheme, CWA assigns state agencies the responsibility of issuing state water quality certifications necessary for discharges requiring a Section 404 permit.

C. National Environmental Policy Act of 1969

Congress passed the National Environmental Policy Act of 1969 in response to the national feeling that "we cannot continue on this environmentally destructive course . . . [for o]ur natural resources . . . are not unlimited." The prime proponent of NEPA, Senator Jackson, called the Act "the most important and far-reaching environmental and conservation measure ever enacted." Senator Jackson hoped the Act would help avert an otherwise inevitable environmental catastrophe.

NEPA provides the framework for determining the steps federal agencies must take in order to assess the environmental consequences of certain actions. NEPA does not require an agency to

57. See Chertok, supra note 1, at 722 (remarking that Corps’ enforcement authority is limited to administrative or judicial actions related to unauthorized discharges and permits previously issued and revealing EPA’s enforcement extends only to state-issued permits).

58. See id. Pursuant to CWA and the Fish and Wildlife Coordination Act, FWS comments upon applications of individual CWA § 404 permits and certain general permits. See id. The Natural Resources Conservation Service nonetheless controls the “Swampbuster” program designed to eliminate the conversion of wetlands for agricultural purposes. See id. State agencies must prepare a state water quality certification for discharges requiring a § 404 permit. See id. Furthermore, the agency responsible for the State’s coastal zone management program must submit a "consistency determination" which the proposed discharge is within a coastal zone. See id.

59. See id. (indicating states may assume same power of permitting discharges into intrastate waters).

60. S. Rep. No. 91-296, at 5 (1969); see also Terence L. Thatcher, Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act, 20 Env’tl. L. 611-12 (1990) (explaining NEPA goals were early methods of identifying environmental consequences of government action and dealing with environmental problems before each reached crisis proportions).


63. See 42 U.S.C. §§ 4321-4332 (1994). NEPA provides in pertinent part:
reach a conclusion that will protect the environment.\textsuperscript{64} Rather, NEPA requires an agency that proposes legislation or government action that may impact the environment to conduct an EA.\textsuperscript{65} The results of the EA determine whether the agency may issue a FONSI, thereby deciding to forego an EIS.\textsuperscript{66} If an agency determines that the federal action will not have a significant effect on the environment through an EA, it must make that decision available to the

\begin{quotation}
The Congress authorizes and directs to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall (A) utilize a systematic, interdisciplinary approach . . . in planning and in decisionmaking which may have an impact on man's environment; (B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations; (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should be implemented.


\textsuperscript{64} \textit{See} \textsuperscript{42} U.S.C. § 4332(2)(F) (1994). All agencies of the federal government shall "recognize the worldwide and long-range character of environmental problems, and where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment . . . ." \textit{Id.}

\textsuperscript{65} \textit{See} id.

\textsuperscript{66} \textit{See} CEQ. Terminology and Index, 40 C.F.R. § 1508.13 (2001). The Federal Register reported:
‘Finding of no significant impact’ means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7 (a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

\textit{Id.}
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Changing (discussing 130 part the C.F.R. 68. economic environmental environments 67. 40 C.F.R. § 1508.9 (2002).


'Environmental Assessment':
(a) Means a concise public document for which a Federal agency is responsible that serves to:
(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
(2) Aid an agency’s compliance with the Act when no environmental impact statement 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.

40 C.F.R. § 1508.9 (2002).


69. See Payne, supra note 68, at 349 (noting two primary purposes of environmental impact statements). Environmental Impact Statements exist to detail possible economic and environmental effects of the proposed federal action on others and to afford sufficient channels for feedback between the federal agency and interested parties. See id.; see also 40 C.F.R. § 1502.19 (2002).

70. See Payne, supra note 68, at 349 (citing Andrea L. Hungerford, Note, Changing the Management of Public Land Forests: The Role of Spotted Owl Injunctions, 24 ENVTL. L. 1995, 1401 (1994)). “The environmental impact statement serves the purpose of providing information to allow ‘agency officials [to] make the best informed decisions based upon an understanding of the environmental consequences of their actions.’” Id.

71. See Porterfield, supra note 7, at 34.
with effects that may be major and which are potentially subject to federal control and responsibility.72

D. The Council on Environmental Quality Regulations

The Council on Environmental Quality (CEQ) promulgates regulations implementing NEPA.73 Under these regulations, a "major federal action" includes decisions by federal agencies approving or granting permits for otherwise private actions.74 CEQ regula-

Each EIS must discuss: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local and short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.


72. For a further discussion of 'major federal action,' see infra note 74 and accompanying text.

73. See Porterfield, supra note 7, at 55.

74. See 43 Fed. Reg. 56,003, 56,004 (Nov. 29, 1978) (defining major federal action). According to the Federal Register:

'Major Federal action' includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal action tend to fall within one of the following categories: (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based. (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive. (4) Approval of specific projects, such as construc-
tions direct agencies to consider the cumulative impacts of the action.\textsuperscript{75} Additionally, CEQ regulations prevent entities from "breaking [the action] down into small component parts," and thus avoiding the requirement of an EIS.\textsuperscript{76} The CEQ regulations further require agencies to consider both the direct and indirect effects of an action.\textsuperscript{77}

E. NEPA and the "Small Handle" Issue

There are many instances in which the action requiring a Section 404 permit is part of a larger proposal.\textsuperscript{78} In \textit{Save the Bay, Inc. v. United States Army Corps of Engineers},\textsuperscript{79} the Court of Appeals for the Fifth Circuit found the Corps was not required to assess the total

\begin{quote}
\textit{Id.}
\end{quote}

\textsuperscript{75} See CEQ, Terminology and Index, 40 C.F.R. § 1508.7 (1978). Under the Code of Federal Regulations:

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

\textit{Id.; see also Thatcher, supra note 60, at 613. The Code continues: Current regulations of the [CEQ] define a cumulative impact as the impact on the environment which results from the incremental impact of the action [being analyzed] when added to the other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. 40 C.F.R. § 1508.7 (1978).}

\textsuperscript{76} Porterfield, \textit{supra} note 7, at 34-35 (discussing CEQ regulations implementing NEPA and announcing criteria agencies must consider when determining whether to grant permit); \textit{see also} 40 C.F.R. § 1508.27(b)(7) (2000) (listing appropriate considerations involved in evaluating severity of environmental impact).

\textsuperscript{77} See Porterfield, \textit{supra} note 7, at 35. Direct effects are those "which are caused by the action and occur at the same time and place." \textit{Id.} By contrast, indirect effects are those "which are caused by the action and are later [sic] in time or farther removed in distance, but are still reasonably foreseeable." \textit{Id.; see also} 40 C.F.R. §§ 1508.8(a), (b) (2000). The regulations further define indirect effects as including "growth inducing effects and other effects related to induce changes in the pattern of land use, population density or growth rate as well as related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b) (2000).

\textsuperscript{78} See Chertok, \textit{supra} note 1, at 749.

For example, a proposal for an apartment complex on uplands may include a marina that requires a § 404 permit. Several cases in the mid-1980's allowed Corps to limit the scope of its NEPA assessment to the aspects of the overall project within its § 404 (or § 10) jurisdiction.

\textit{Id.}

\textsuperscript{79} 610 F.2d 322, 327 (5th Cir. 1980), \textit{cert. denied}, 449 U.S. 900 (1980) (holding NEPA did not require Corps as matter of law to consider construction of entire
impacts of a proposed titanium dioxide manufacturing facility. Instead, the Corps could limit its review to the construction of an outfall pipeline from the facility through nearby wetlands. Similarly, the Court of Appeals for the Eighth Circuit, in *Winnebago Tribes of Nebraska v. Ray,* found that the participants in a power line project were only required to assess impacts of stream crossings and not the impacts of the entire 67-mile transmission line.

In some instances, however, courts have rejected the limited scope of review employed in cases like *Save the Bay* and *Winnebago Tribes.* For example, the Central District of California, in *Colorado River Indian Tribes v. Marsh,* rejected the Corps’ decision to limit its NEPA review of a permit application to the area directly within the Corps’ jurisdiction. The proposed development included a 156 acre residential and commercial complex on the west side of the Colorado River that required stabilization of the riverbank. The Central District of California found that the Corps improperly limited the scope of its inquiry and thus violated NEPA. The discontinuing plant in determining whether or not EIS was necessary with respect to pipeline.

80. See Porterfield, supra note 7, at 42 (illustrating case as one of two opinions issued in 1980 limiting Corps’ NEPA review to waters subject to Corps’ regulatory jurisdiction).

81. See *Save the Bay, Inc.* 610 F.2d at 327; see also Porterfield, supra note 7, at 42 (concluding pipeline construction would not cause significant environmental impacts necessitating preparation of environmental impact statement).

82. 621 F.2d 269 (8th Cir. 1980), cert. denied, 449 U.S. 836 (1980).

83. See id. at 272-73; see also Porterfield, supra note 7, at 43-44 (discussing Eighth Circuit’s affirmation of district court’s decision denying Winnebago Tribe’s request for permanent injunction against construction of sixty-seven mile power line through parts of Nebraska and Iowa).

84. See Porterfield, supra note 7, at 47 (indicating separate inquiries are required to determine whether action is major and whether significant environmental impacts will occur); see also *Colorado River Indian Tribes v. Marsh,* 605 F. Supp 1425, (C.D. Cal. 1985).


86. See id. (quoting CEQ, Terminology and Index, 40 C.F.R. § 1508.8 (2000)) (revealing NEPA and CEQ regulations clearly require Corps to consider both direct and indirect effects); see also Porterfield, supra note 7, at 47 (finding *Colorado Indian Tribes* court viewed scope of review in *Winnebago and Save the Bay* as improperly analyzing requirements for EIS review). “[*Winnebago and Save the Bay*] improperly [suggest] that in order to determine whether a federal action triggered the EIS requirement, there must be a separate inquiry into whether the action was ‘major,’ in addition to determining whether the action had significant environmental impacts.” *Id.*

87. See *Colorado River Indian Tribes,* 605 F. Supp. at 1455 (noting developer must obtain permit from Corps in order to stabilize bank and stating approval from County of Riverside cannot be obtained without bank stabilization).

88. See id. (indicating that Corps’ decision to assess only those impacts physically dependent upon activities within its jurisdiction, river and its immediate banks limited review to only primary impacts).
strict court emphasized that direct, indirect, and cumulative impacts of a proposed major federal action must be addressed. \(^\text{89}\) In 1988, the Corps modified its regulations to address the issues raised by these cases. \(^\text{90}\)

In *Thomas v. Peterson*, \(^\text{91}\) the Ninth Circuit found that logging operations and the construction of a road to facilitate logging and timber sales were "connected actions" because "the timber sales [could not] proceed without the road and the road would not be built but for the contemplated timber sales." \(^\text{92}\) On the other hand, in *Morongo Band of Indians v. Federal Aviation Administration*, \(^\text{93}\) the Ninth Circuit found that the Federal Aviation Administration (FAA) did not improperly segment NEPA review of an airport's arrival enhancement project from review of a larger airport expansion project because each project had independent utility. \(^\text{94}\)

F. Control and Responsibility Regulations

At the time of the *Colorado River Indian Tribe* opinion, the Corps operated under a standard that required the Corps' environmental review to consider whether all phases of the project dependent upon the permit could have significant effects on the environment. \(^\text{95}\) In 1984, the Corps proposed to replace that standard with the "control and responsibility" regulation requiring the Corps to

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89. *See id.* The *Colorado River Indian Tribes* Court remarked: It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'

*Id.* at 1434 (quoting City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975)); *see also* Porterfield, *supra* note 7, at 47 (stating NEPA and CEQ regulations clearly require Corps to consider both direct and indirect effects).

90. For a further discussion of the control and responsibility regulations, *see infra* notes 98-104 and accompanying text.

91. 753 F.2d 754 (9th Cir. 1985).

92. *See Wetlands Action Network*, 222 F.3d 1105, 1118 (9th Cir. 2000). "Applying this same analysis, we have rejected claims 'that actions were connected when each of two projects would have taken place with or without the other and thus had 'independent utility.'" *Id.* (quoting Thomas v. Patterson, 753 F.2d 754, 758 (9th Cir. 1985)).

93. 161 F.3d 569 (9th Cir. 1998).

94. *See Wetlands Action Network*, 222 F.3d at 1118 (explaining that expansion project would aggravate problems being addressed by project, but finding project was independent action designed primarily to deal with existing problems and therefore not connected to future expansion project).

95. *See Porterfield, supra* note 7, at 48-49 (discussing Corps' proposal to replace existing standard with "control and responsibility" regulations).
consider an entire project only when there was "sufficient Federal control over or responsibility for the entire project to 'federalize' it for purposes of NEPA."96 Initially, EPA rejected this so-called small handle approach but finally adopted the new regulations in 1988.97

One commentator noted that the small handle approach is best illustrated by circuit courts’ adopting the rationale that no EIS was required unless the permitted activity itself, without the nonfederal portion of the project, could have a significant environmental impact.98 In 1989, the Ninth Circuit decided Sylvester v. United States Army Corps of Engineers,99 interpreting the “control and responsibility” rule to limit the scope of the Corps’ environmental review to its regulatory jurisdiction.100 One expert illustrated Sylvester’s in-

96. Id. at 48 (noting adoption of “control and responsibility” regulations on February 3, 1988).

97. See id. at 48-49 (revealing EPA first objected to proposed rule, but adopted it after slight modifications); see also CEQ Regulations Implementing NEPA, CEQ, Predecision Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory, 40 C.F.R. § 1504 (1995).

98. See Parenteau, supra note 41, at 749-50.

By early 1980, the Corps had succeeded in convincing two U.S. Courts of Appeals — and recently a third — that its regulatory jurisdiction determines the scope of its NEPA obligations. In each of these cases, the circuit courts held that unless the permitted activity itself could cause a significant environmental impact — apart from the nonfederal portion of the project — no EIS would be required. By extension, this logic also would limit the scope of any required EIS to the effects of the specific activity subject to the Corps’ jurisdiction, plus any cumulative or indirect effects that one could tie to the permitted activity.

Id. (referencing Sylvester v. United States Army Corps of Eng’rs, 871 F.2d 817 (9th Cir. 1989); see also Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272 (8th Cir. 1980); Save the Bay, Inc. v. United States Corps of Eng’rs, 610 F.2d 322, 327 (5th Cir. 1980).

99. 884 F.2d 394 (9th Cir. 1989). In Sylvester, a citizen challenged Corps’ decision to grant a developer a Section 404 permit for filling eleven acres of wetlands to construct an eleven-acre golf course as part of a resort in Squaw Valley, California. See id. The district court granted a preliminary injunction, holding that the Corps had erred in limiting its NEPA review to the golf course rather than the entire resort complex. See id.

100. See Parenteau, supra note 41, at 749 (noting “small handle” problem might be best illustrated by way Corps convinced three circuits that its regulatory jurisdiction determines scope of its NEPA analysis). In each of these cases, the courts held that unless permitted activity itself could cause a significant environmental impact, no EIS would be required. See id.; see also California Trout v. Shaefer, 58 F.3d 469 (9th Cir. 1995) (upholding federal agency’s decision to limit scope of NEPA review to impacts associated with fill of wetlands rather than considering impact on downstream fisheries from entire canal project); Enos v. Marsh, 769 F.2d 1363, 1371-72 (9th Cir. 1985) (upholding agency’s decision to exclude impact of non-federal shore facilities for new deep draft harbor from its NEPA analysis); Friends of the Earth v. Coleman, 518 F.2d 323, 328 (9th Cir. 1975) (finding that agency was not required to prepare EIS for state funded projects in partially federally funded airport development before any work could proceed).
terpretation of the “control and responsibility” regulation by hypothesizing:

[A]ssume that a developer plans to build a multifaceted resort, including a hotel, golf course and ski runs. If the golf course is to be built in a wetland area, it needs a Corps of Engineers Section 404 permit. In reviewing the environmental impacts of its decision, the Corps will consider only the effect of the wetland filling for the golf course, but not the effects of the entire resort.101

Essentially, the Sylvester court upheld the foregoing analysis by reversing the district court’s adoption of the “control and responsibility” regulation as a permissible interpretation of NEPA.102 The Sylvester court further held that, under the regulation, the Corps properly limited its environmental review to the wetlands rather than considering the entire resort.103 The Ninth Circuit also noted this approach was permissible as long as the results of an “independent utility” test indicated an insufficient relationship between the two components.104

Notably, the Ninth Circuit, in Sylvester, rejected the metaphor comparing the environmental impacts to “ripples following the casting of a stone in a pool.”105 Instead, the Ninth Circuit adopted the image of a broken chain, “some segments of which contain numerous links, while others have only one or two. Each segment stands alone, but each link within each segment does not.”106 Since

101. See Thatcher, supra note 60, at 634-35 (discussing Corps’ revisions to NEPA regulations).
102. See Sylvester v. United States Army Corps of Eng’rs, 884 F.2d at 394 (9th Cir. 1989).
103. See id. (rejecting argument that regulation was inconsistent with requirement in CEQ regulations that agencies address indirect effects of their proposed actions).
104. See id. (explaining that determination of sufficient relationship is based upon variety of factors, particularly interdependence of upland and jurisdictional components and “independent utility” test); see also Thatcher, supra note 60, at 632.

What can be said about this independent utility theory in light of the law of cumulative impacts, cumulative actions, and connected actions? To begin with, one has to determine whether multiple projects are represented by actual proposals and whether they may have cumulative impacts. If there is no possibility of cumulative impacts and the projects are not connected because they have independent utility, then they need not be considered in the same EIS for any purpose.

Id.

105. Sylvester, 884 F.2d at 400 (remarking that metaphor suggests an impractically broad scope of NEPA review).
106. See id.
the golf course and the rest of the resort could each exist without
the other, they were not "two links of a single chain."\textsuperscript{107} The notion
that one segment of the project could exist without the other im-
plies that the Ninth Circuit applied a "but for" causation test.\textsuperscript{108} 
The "links of chain" metaphor suggests there must be a high level
of proximity as well as a causal relationship between the environ-
mental action and the environmental impacts at issue in order to
warrant review of the federal and non-federal portions of the pro-
ject.\textsuperscript{109} As to federal review of private portions of permit proposals,
\textit{Sylvester} focused on the "causal relationship between the proposed
major federal action and the resulting environmental impacts and
not on the scope of the Corps' regulatory jurisdiction."\textsuperscript{110}

In \textit{Sylvester}, the Ninth Circuit upheld the Corps' decision to
limit its review to the impacts of the golf course construction, rather
than the entire resort complex.\textsuperscript{111} The \textit{Sylvester} court concluded
that a sufficient relationship to constitute one federal action for
NEPA purposes is not created simply because two aspects of a pro-
ject will benefit from each other's presence.\textsuperscript{112}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{107} See id. (finding rest of resort need not be considered in determining
whether to grant CWA \textsection{} 404 permit for golf course).
\item \textsuperscript{108} See Porterfield, supra note 7, at 51 (suggesting that pure "but for"
causation is more consistent with "ripples in the puddle" metaphor that court rejected
as broad and impractical).
\item \textsuperscript{109} See id. at 51 (suggesting it is unclear what, in addition to "but for"
causation, is necessary to bring environmental impacts within private portion of partially
federal project within scope of NEPA).
\item \textsuperscript{110} Id.; see also Thatcher, supra note 60, at 634 (commenting upon revisions
of regulations being viewed as attempt to evade its responsibility to consider cumu-
labive and secondary, or indirect, impacts). The Corps generally has decided to
omit non-federal portions of permitted projects from environmental review. See id.
at 634-35.
\item \textsuperscript{111} See Wetlands Action Network, 222 F.3d 1105, 1116 (9th Cir. 2000) (citing
\textit{Sylvester v. United States Army Corps of Eng'rs}, 884 F.2d 394, 396-97 (9th Cir. 1989)
(finding Corps had no jurisdiction over upland development).
\item \textsuperscript{112} See \textit{Sylvester}, 884 F.2d at 400-01. "We upheld the agency's decision, find-
ing that although the golf course and the entire resort complex 'would benefit
from the other's presence' they were not sufficiently interrelated to constitute a
single 'federal action' for NEPA purposes." Id.; see also \textit{California Trout v. Schaefer},
58 F.3d 469, 471 (9th Cir. 1995) (upholding agency's decision to limit scope of its
NEPA review to impacts associated with fill of wetlands rather than impacts on
downstream fisheries from entire canal project); \textit{Enos v. Marsh}, 769 F.2d 1363,
1371-72 (9th Cir. 1985) (upholding agency's decision to exclude from its NEPA
analysis impact of non-federal shore facilities for new deep draft harbor); \textit{Friends of
the Earth, Inc. v. Coleman}, 518 F.2d 323, 328 (9th Cir. 1975) (finding agency was not
required to prepare EIS for state funded projects in partially federally funded air-
port development).
\end{enumerate}
\end{footnotesize}
Later cases, such as *National Wildlife Federation v. Whistler* and *Morgan v. Walter* followed the lead of *Sylvester*. In *Whistler*, a developer had proposed a residential development with boat access to the Missouri River. There, the Eighth Circuit upheld a lower court decision to allow the Corps to limit its review to the boat access aspect of the project because the residential development was on uplands and "would proceed even without the creation of water access." In *Morgan*, however, the Eighth Circuit relied on the "links of chain" analogy but held that a fish propagation facility could not exist without the stream diversion and required the Corps to evaluate the impacts of both components.

The Federal District Court for the Western District of Washington, in *Alpine Lakes Protection Society v. United States Forest Service*, reached a similar conclusion regarding the implications of *Sylvester*. The district court did not agree with the Forest Service's con-
tention that it was only required to consider the impacts of the actions it directly controlled.121 The Alpine Lakes court claimed, "the question whether the environmental impact of the related action must be considered does not turn on whether that action is federal or non-federal in nature."122

The Western District of Washington found the controlling issue to be the "functional interdependence" of the actions in question and required the Forest Service to consider the environmental impacts of the construction of the road and the planned timber management activities.123 The Ninth Circuit's rejection of the district court's interpretation, in Wetlands Action Network, prevented WAN from overcoming the "small handle" problem due to the Ninth Circuit's rejection of several cases the district court determined as controlling.124

In 1983, the Supreme Court, in Metropolitan Edison Company v. People Against Nuclear Energy (PANE)125 indicated the proper standard of review was analogous to the proximate cause inquiry in tort law, finding that "there must be a reasonably close causal relationship between a change in the physical environment [due to the federal action] and the effect at issue."126 Thus, PANE provides

impacts of the private timber management activities, resulting from the road construction. See id.

121. See id.

122. See id. at 482 (explaining Forest Service must consider impact of logging activities for which proposed access road is to be built when determining whether EA or EIS is required for Big Boulder and noting failure to consider connected action on that basis is arbitrary and capricious).

123. See id. at 482; see also Porterfield, supra note 7, at 53 (relating implication of "functional interdependence"). "Thus, because the only purpose of the road was to make possible the planned timber management activities, the Forest Service was required to consider those activities in determining whether granting the permit would have significant environmental effects." Id.

124. See Wetlands Action Network, 222 F.3d 1105, 1116-19 (9th Cir. 2000) (rejecting district court's interpretation of Thomas and Blue Mountains); see also Thomas v. Patterson, 753 F.2d 754 (9th Cir. 1985) (requiring Forest Service to consider environmental impacts of two related federal actions in single permit); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) (holding CEQ regulations required Forest Service to consider five related timber sales in single NEPA analysis).

125. 460 U.S. 766, 774 (1983) (rejecting claim that Nuclear Regulatory Commission improperly failed to consider psychological harm that might result to members of community from risk of nuclear accident in determining whether to grant permit pursuant to NEPA).

126. Id.; see also Porterfield, supra note 7, at 36 (noting proper standard of review). This analysis is similar to that of proximate cause in tort law in which the plaintiff must demonstrate that the defendant's conduct was not only the factual cause of the injury, but it was also the proximate or legal cause of the harm. See id.
another basis for examining the scope of the Corps’ analysis. The Court concluded that “but for” causation alone is insufficient to require an EIS because it would require consideration of some impacts “simply too remote” from the direct environmental impacts of a major federal action. The Court further noted that the scope of an agency’s inquiries must be manageable to ensure that NEPA’s goal of “a fully informed and well considered decision” is achieved.

IV. NARRATIVE ANALYSIS

The Ninth Circuit, in Wetlands Action Network, affirmed in part and reversed in part the district court’s grant of summary judgment in favor of WAN and remanded the case to the district court to vacate the judgment. The crux of the Ninth Circuit’s analysis

127. See Porterfield, supra note 7, at 36-37 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 42, at 272-73 (5th ed. 1984). Prosser and Keaton describe the standard for proximate cause similarly to the CEQ regulations. See id. According to Prosser and Keaton, “the scope of liability should ordinarily extend to but not beyond all ‘direct’ (or ‘directly traceable’) consequences [of a defendant’s negligence] and those indirect consequences that are foreseeable.” Id. at 36.

128. See Metropolitan Edison Company v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983) [hereinafter PANE] (suggesting but for causation is insufficient to require EIS). The PANE Court revealed:

Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms “environmental effect” and “environmental impact” in § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law.

Id.

129. See id. at 776 (indicating time and resources are simply too limited to extend NEPA as far as Court of Appeals has taken it.)

130. See Wetlands Action Network, 222 F.3d 1105, 1122 (9th Cir. 2000) (noting Ninth Circuit’s holding). The Ninth Circuit affirmed the district court’s decision and found that MTP-PV did not assert a legally protectable interest that relates to the NEPA claims. See id. The district court denied MTP-PV’s motion to intervene as of right and the Ninth Circuit reviewed the court’s ruling as a matter of right de novo. See id. at 1113 (citing Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1493 (9th Cir. 1995)). The Ninth Circuit explained that, according to Federal Rule of Civil Procedure 24(a), to intervene in a cause of action an applicant must claim “an interest relating to the property or transaction which is the subject of the action.” Fed. R. Civ. P. 24(a). The protection of the applicant’s interest must be practically impaired or impeded by the action if the applicant is not allowed to participate in the litigation. See id.; see also Wetlands Action Network, 222 F.3d at 1113. The Ninth Circuit applied the following four-part test to determine whether MTP-PV had a right to intervene:

1. the motion must be timely;
2. the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the action;
focused on its disagreement with the district court’s ruling that the Corps violated NEPA.\textsuperscript{131}

A. Segmentation of the Project and the Independent Utility Test

The district court found that the Corps improperly omitted the uplands portion of the development from the analysis of the Phase I actions involving the wetlands.\textsuperscript{132} WAN successfully argued that the Phase I development would not proceed without the permit and the filling of the wetlands would not be justified without the upland development.\textsuperscript{133} WAN also asserted that the Corps must consider the whole of Phase I as a “federal action” for NEPA purposes.\textsuperscript{134} The Ninth Circuit, however, found that the two activities were interrelated, but could be distinguished as separate actions existing independently of each other.\textsuperscript{135} The court cited precedent

\begin{enumerate}
    \item the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and
    \item the applicant’s interest must be inadequately represented by the parties to the action.
\end{enumerate}

_id._ (citing Sierra Club v. EPA, 995 F.2d 1478, 1481 (9th Cir. 1993)). “The rationale for our rule is that, because NEPA requires action only by the government, only the government can be liable under NEPA.” _id._ at 1114 (citing Churchill County v. Babbitt, 150 F.3d 1072, as amended by 158 F.3d 491 (9th Cir. 1998) (explaining that because private party cannot violate NEPA, it cannot be defendant in NEPA compliance action).

\textsuperscript{131} See Wetlands Action Network, 222 F.3d at 1122 (finding Corps’ determination of scope of NEPA review and its issuance of FONSI was not arbitrary and capricious). The lower court’s injunction was based on finding that the Corps had not followed NEPA guidelines. See _id._

\textsuperscript{132} See _id._ at 1115-16 (discussing Corps’ omission of uplands analysis of Phase I actions). The Corps determined that the EA “need not include substantial consideration of development in the uplands because development could occur in those areas regardless of whether this permit application is granted.” _id._ at 1115. Following this line of reasoning, the Corps only considered the environmental impacts resulting from MTP-PV’s application to fill 16.1 acres of wetlands in constructing Phase I of the development. See _id._

\textsuperscript{133} See _id._ at 1116 (noting importance of permit and upland development). Essentially, WAN asserted that upland development and the permitted activities are functionally interdependent, meaning one can not exist without the other. See _id._

\textsuperscript{134} See _id._ (arguing location and configuration of wetlands to be filled greatly affected design of mixed use development in Phase I and therefore whole project should be treated as federal action).

\textsuperscript{135} See _id._ (finding that “linkage the district court found between the permitted activity and the specific project planned is the type of ‘interdependence’ that is found in any situation where a developer seeks to fill a wetland as part of a large development project.”). The Court noted that “[i]f this type of connection were sufficient to require a finding that an entire project falls within the purview of the Corps’ jurisdiction, the Corps would have jurisdiction over all such projects including those which the Corps’ regulation cite as examples of situations in which the
for upholding an agency's decision to limit the scope of its NEPA review with respect to the federal portions of the activity.\textsuperscript{136}

While the district court found \textit{Wetlands Action Network} distinguishable from \textit{Sylvester}, the Ninth Circuit concluded that the rationale from \textit{Sylvester} should be applied to the instant case.\textsuperscript{137} By rejecting the district court's determination that \textit{Thomas} should control the outcome of \textit{Wetlands Action Network}, the Ninth Circuit found that \textit{Thomas} did not control when the federal agency performing the environmental review was without control over the entire project.\textsuperscript{138} In sum, the Ninth Circuit held that the Corps could find the 16.1 acres directly under its jurisdiction was separable from the remainder of the acreage being developed outside of the Corps' jurisdiction.\textsuperscript{139} The Ninth Circuit further explained that federal jurisdiction over the sixteen acres did not constitute the "control and responsibility" necessary to federalize the entire project.\textsuperscript{140}

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\textsuperscript{136} See \textit{Wetlands Action Network}, 222 F.3d at 1116 (explaining precedent limiting scope of NEPA review). "We have upheld an agency's decision to limit the scope of its NEPA review to the activities specifically authorized by the federal action where the private and federal portions of the project could exist independently of each other." \textit{Id.}

\textsuperscript{137} See \textit{id}. The \textit{Sylvester} Court found that the Corps' grant of a permit to fill eleven acres of wetlands in order to construct part of a golf course that was part of a larger resort complex was proper even though the Corps limited its review to the impacts of the golf course construction. See \textit{id}. The court, in \textit{Sylvester}, justified this decision in that the Corps had no jurisdiction over the upland development. See \textit{id}.

\textsuperscript{138} See \textit{id}. at 1117; see also California Trout v. Schaefer, 58 F.3d 469 (9th Cir. 1995) (noting \textit{Thomas} decision should not control when federal agency does not have control over entire project). \textit{Wetlands Action Network} differs from \textit{Thomas} insofar as \textit{Thomas} involved a challenge to the Forest Service's determination that the environmental impacts of two related federal actions were not required to be considered in a single permit. See \textit{Wetlands Action Network}, 222 F.3d at 1117. The Forest Service did not dispute that it needed to assess the environmental impacts of both actions at some point and that it had jurisdiction over both actions. See \textit{id}. In contrast to \textit{Thomas}, the Ninth Circuit found the Corps did not have independent jurisdiction over the parts of Phase I development that did not require the filling of wetlands. See \textit{id}.

\textsuperscript{139} See \textit{Wetlands Action Network}, 222 F.3d at 1117 (concluding record supported Corps' determination that it did not have jurisdiction over upland development). The court indicated that the project could have proceeded without the permit. See \textit{id}. Furthermore, since the project was not financed by federal money, federal regulations did not apply. See \textit{id}.

\textsuperscript{140} See \textit{id}. at 1117 (citing 33 C.F.R. pt. 325 App. B § 7(b)(3)(1995) (noting "control and responsibility" is determined by extent entire project will be within Corps' jurisdiction)). For a further discussion of control and responsibility regulations, see Parenteau, \textit{supra} note 41 and accompanying text.
Next, the Ninth Circuit considered whether the overall wetlands project was improperly segmented into three phases for purposes of granting federal permits.141 The Ninth Circuit found that each of the three phases could exist independently of the other, but warned,

Although federal agencies are assigned the primary task of defining the scope of the NEPA review and their discrimination is to be given ‘considerable discretion,’ connected or cumulative actions must be considered together to prevent an agency from ‘dividing a project into multiple actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact."142

The court explained that, pursuant to CEQ regulations, use of an "independent utility" test determines whether an agency must consider multiple actions in a single NEPA review.143 The Ninth Circuit concluded that the three phases were not connected actions and that each phase had independent utility.144 Accordingly, the Ninth Circuit held that the Corps was not required to consider the three phases of a project in a single NEPA analysis.145

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141. See Wetlands Action Network, 222 F.3d at 1118 (discussing CEQ regulations implementing NEPA requirements that an agency consider "connected actions" and "cumulative actions" within single EA or EIS).

142. Id. (quoting Thomas v. Peterson, 753 F.2d 754, 758 (1985)). The court, in Wetlands Action Network, included in its decision the CEQ regulations for determining whether actions are "connected." The court determined that actions are connected when they:

   (i) Automatically trigger other actions which may require environmental impact statements;

   (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously;

   (iii) Are interdependent parts of a large action and depend on the larger action for their justification.

CEQ, Terminology and Index, 40 C.F.R. § 1508.25 (a) (1) (2002). The court also noted that "[c]umulative actions are those which when viewed with other proposed actions have cumulatively significant impacts." Wetlands Action Network, 222 F.3d at 1118 (citing 40 C.F.R. § 1508.25 (a) (2) (2000)).

143. Wetlands Action Network, 222 F.3d at 1118 (explaining scope of "independent utility" test under CEQ regulations).

144. See id. at 1118-19 (noting Phase 1 can be constructed independently of Phases II and III); see also Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th Cir. 1974) (finding that EIS must cover a whole project when "[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.").

145. See Wetlands Action Network, 222 F.3d at 1118 (concluding that record supports Corps' conclusion).
The Ninth Circuit also rejected WAN’s argument that the Corps should have considered the three phases together as “cumulative actions” pursuant to *Blue Mountains Biodiversity Project v. Blackwood.* The Ninth Circuit distinguished the two cases factually by explaining that the five sales in *Blue Mountains* constituted cumulative actions because they involved a single project and were reasonably foreseeable. The Ninth Circuit opined that requiring the Corps to analyze the environmental impacts of the three phases in a single EA or EIS would be impractical. The court concluded that neither the Ninth Circuit precedent nor the CEQ regulations required the Corps to consider the three phases together as cumulative actions.

B. Determination of Necessity of EIS

Further, the Ninth Circuit reviewed the district court’s determination that the Corps improperly issued a FONSI instead of a complete EIS. The court agreed with the Corps’ decision that a full EIS was not required. The court explained that “[i]f the proposed action will have a significant impact, the agency must prepare an EIS which addresses in detail the purpose and need for the action, the environmental impacts of the action, and alternatives to the action.” The Ninth Circuit further indicated that CEQ’s regulations require agencies to consider the context and intensity of

146. See id. at 1119 (differentiating Wetlands Action Network from Blue Mountains). *Blue Mountains* involved a challenge to the Forest Service’s determination that a single timber salvage sale would not have a significant environmental impact. See *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1215 (9th Cir. 1998).

147. See Wetlands Action Network, 222 F.3d at 1119. The Ninth Circuit distinguished the two cases and explained that, in *Blue Mountains,* the five sales were a cumulative action because they “were part of a single project, were announced simultaneously to a coalition of logging companies, and were reasonably foreseeable.” Id.

148. See id. at 1119 (noting that, in *Blue Mountains,* Corps failed to include in its EA evaluation impacts of whole project).

149. See id. (holding Corps’ analysis proper under CEQ regulations).

150. See id. (noting that, under NEPA, when Corps determines through EA that federal action will not significantly affect environment, FONSI is issued).

151. See id. (disagreeing with trial court’s ruling that sufficient questions were raised about viability of fifty-two acre freshwater wetlands complex to require analysis through full EIS).

environmental impacts when determining impacts' significance.\textsuperscript{153} Among other things, the agency must consider "[t]he degree to which the effects . . . are likely to be highly controversial" and "[t]he degree to which the effects . . . involve unique or unknown risks."\textsuperscript{154}

The district court based its finding that the Corps should have issued an EIS on the conclusion that there were substantial questions regarding the adequacy of the mitigation of the filled wetlands.\textsuperscript{155} The Ninth Circuit, however, decided that the district court's conclusion mischaracterized the evidence found in the administrative record.\textsuperscript{156} The Ninth Circuit also found that the Corps' conclusion that the construction of the freshwater wetlands system would result in a net environmental benefit was based upon relevant and substantial data.\textsuperscript{157} The Ninth Circuit further noted that precedent supported the conclusion that when an agency bases a FONSI upon relevant and substantial data, an alternative scientific opinion does not render the agency's decision arbitrary and capricious.\textsuperscript{158} Finally, the Ninth Circuit found that the Corps took

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\textsuperscript{153} See Wetlands Action Network, 222 F.3d at 1119 (citing CEQ, Terminology and Index, 40 C.F.R. § 1508.27 (2000)).

\textsuperscript{154} Id. (citing 40 C.F.R. §§ 1508.27 (b)(4), (b)(5) (2000)). The Ninth Circuit reviewed three issues in coming to its conclusion that a full EIS was not necessary. See id. These issues included: (1) the untested nature of the freshwater system; (2) mitigating factors; and (3) the public controversy. See id. at 1119-122.

\textsuperscript{155} See id. at 1119 (noting that district court determined lack of EIS was arbitrary and capricious). "An agency must prepare an EIS if 'substantial questions' are raised as to whether a project . . . may cause significant degradation of some human environmental factor." Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (citing LaFlamme v. Fed. Energy Regulatory Comm'n, 852 F.2d 389, 397 (9th Cir. 1988)). Adding to the belief that the Corps should have been required to submit an EIS was the district court's finding that the record demonstrated many discrepancies the Corps made, including ignoring comments, questioning the feasibility of the wetland system, and concluding that the freshwater system would result in an environmental benefit, were not supported by substantial evidence. See Wetlands Action Network, 222 F.3d at 1119-20.

\textsuperscript{156} See Wetlands Action Network, 222 F.3d at 1120 (finding letters from EPA and FWS were requests for information and not contentions that freshwater wetland system was unfeasible). Contrary to the district court's determination, the Ninth Circuit found that the record indicated the Corps considered each of these issues and relied upon substantial evidence to support the freshwater system's viability. See id. at 1120.

\textsuperscript{157} See id. at 1120 (explaining administrative record demonstrated that the Corps "considered, inter alia, the biological needs of the native habitat and wildlife of the region, water quality issues related to the project, the drainage, watershed characteristics, water levels of the area, and possible flooding that may be associated with the freshwater system.").

\textsuperscript{158} See id. (citing Greenpeace Action, 14 F.3d at 1333); cf. Foundation for North America Wild Sheep v. United States Dep't. of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982) (finding that an agency's failure to address "certain crucial factors, consider-
"a hard look at the environmental consequences of allowing MTP-PV to construct the freshwater wetlands system" and that the decision to issue a FONSI was not arbitrary and capricious.\textsuperscript{159}

C. Mitigation Measures

The Ninth Circuit further examined whether the presence of mitigating measures justified the Corps' decision to forego issuing an EIS.\textsuperscript{160} The EA issued by the Corps explained that filling the wetlands would not significantly affect the environment and that any resulting negative impacts would be mitigated by the creation of the fifty-one acre freshwater system.\textsuperscript{161} The Ninth Circuit found WAN's contention that the Corps' decision to issue a FONSI was arbitrary and capricious without merit.\textsuperscript{162}

After a careful review of the record, the Ninth Circuit found that the mitigation measures were developed to a reasonable degree and reviewed by the Corps and other federal agencies at the time the permit was issued.\textsuperscript{163} The special conditions compensated for the absence of a detailed mitigation plan.\textsuperscript{164} The Ninth Circuit also found that WAN exaggerated the need for mitigation and that the record supported the findings that the development would increase the wetland values of the area.\textsuperscript{165} Finally, the court concluded that the Corps did not act arbitrarily or capriciously by not

\textsuperscript{159} See \textit{Wetlands Action Network}, 222 F.3d at 1121.

\textsuperscript{160} See \textit{id.} (indicating presence of mitigating factors may justify decision to forego EIS and mitigating factors need not completely compensate for adverse environmental impacts). "In evaluating the sufficiency of mitigation measures, we focus on whether the mitigation measures constitute an adequate buffer against the negative impacts that result from the authorized activity to render such impacts so minor as to not warrant an EIS." \textit{id.} (citing \textit{Greenpeace Action}, 14 F.3d at 1332).

\textsuperscript{161} See \textit{id.} (describing Corps approval of incomplete mitigation plan but placing special conditions in permit that MTP-PV was required to meet).

\textsuperscript{162} See \textit{id.} (illustrating WAN's argument that Corps did not effectively evaluate mitigation plan).

\textsuperscript{163} See \textit{id.} (indicating WAN exaggerated deficiencies of mitigation plan found in record).

\textsuperscript{164} See \textit{Wetlands Action Network}, 222 F.3d at 1121. The Ninth Circuit found that the Corps could determine the precise nature of many of the mitigation measures at the time that it made the permitting decision. See \textit{id.; see also Robertson v. Methow Valley Citizens Council}, 490 U.S. 332, 352 (1989). "[I]t would be inconsistent with NEPA's reliance on procedural mechanisms - as opposed to substantive, result based standards - to demand the presence of a fully developed plan that will mitigate the environmental harm before an agency can act." \textit{id.}

\textsuperscript{165} See \textit{Wetlands Action Network}, 222 F.3d at 1122 (finding record supported Corps' conclusion that Phase I would result in little wetland value being lost due to highly degraded nature of wetlands).
requiring an EIS for MTP-PV's application to fill 16.1 acres of degraded wetlands in light of the mitigating value of the freshwater system. The Ninth Circuit further expressed that communication among the Corps' officers did not undermine the Corps' conclusion.

D. Public Controversy Argument

The Ninth Circuit reviewed WAN's final contention that the Corps was required to prepare an EIS due to the public controversy surrounding the decision to build the freshwater system. The court found that the types of objections raised did not render a Corps' permitting decision controversial for NEPA purposes.

In conclusion, the Ninth Circuit restated its findings that MTP-PV did not have a legally protected interest relating to WAN's NEPA claims, that the Corps was justified in issuing the permit without preparing an EIS, and that the Corps' determination of the scope of NEPA review and its issuance of a FONSI was not arbitrary and capricious.

V. Critical Analysis

Wetlands Action Network provides wetlands developers with even greater precedent to argue against attempts to use NEPA to block projects. Had the Ninth Circuit assigned more weight to the district court's decision, an EIS would have been required and

166. See id. at 1122 (indicating Corps need only find that mitigation measures would render any environmental impact resulting from permit activity insignificant in order to issue FONSI.)

167. See id. (holding approval was neither arbitrary nor capricious).

168. See id. "The existence of a public controversy over the effect of an agency action is one factor in determining whether the agency should prepare [an EIS]." Id. (citing Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992); see also CEQ, Terminology and Index, 40 C.F.R. § 1508.27(b)(4) (2002). "A federal action is controversial if a substantial dispute exists as to [its] size, nature or effect." Wetlands Action Network, 222 F.3d at 1122 (citing LaFlamme v. Fed. Energy Regulatory Comm'n, 852 F.2d at 389, 400-01 (9th Cir. 1988) (internal quotation marks omitted)). "The existence of opposition to a use, however, does not render an action controversial. See LaFlamme, 852 F.2d at 401.

169. See Wetlands Action Network, 222 F.3d at 1122 (finding objections that do not pertain to "size, nature or effect" are not controversial for NEPA purposes). The controversial dispute surrounding the effects freshwater system would have on the environment existed, but was resolved in the two-year review process. See id.

170. See id. (summarizing court's findings).

the project would not have been segmented into three phases.\textsuperscript{172} Furthermore, the result would have been more consistent with NEPA goals.\textsuperscript{173} Instead, this decision represents what can best be characterized as the "small handle" problem.\textsuperscript{174}

By following \textit{Sylvestre}, the Ninth Circuit continues to support the standards set forth by the "control and responsibility" regulations which are inconsistent with NEPA's original purpose: to identify the environmental consequences of an action early in the process in order to prevent the problem from escalating into crisis proportions.\textsuperscript{175} An EIS provides the means to understand the gravity of environmental impacts and develop practical, less damaging alternatives.\textsuperscript{176}

In its analysis, the Ninth Circuit chose to follow \textit{Sylvestre} instead of relying on the district court's determination that \textit{Thomas} should guide the decision.\textsuperscript{177} The current regulations allow the continuation of the upland development in the absence of a permit, thereby supporting the assertion that the Corps' regulatory jurisdiction did not include the upland development.\textsuperscript{178}

Scholars suggest that "the jurisdictional interpretation of the control and responsibility standard of Section 7(b) is inconsistent with both the language of the regulation and the examples provided by Corps of how the regulation should be implemented."\textsuperscript{179}

\begin{itemize}
    \item \textsuperscript{172} See \textit{Wetlands Action Network}, 222 F.3d. at 1105 (overruling district court's decision to require EIS).
    \item \textsuperscript{173} For a further discussion of NEPA's intent, see \textit{ supra} note 60 and accompanying text.
    \item \textsuperscript{174} For a further discussion of the small handle problem, see \textit{ supra} note 100 and accompanying text.
    \item \textsuperscript{175} For a further discussion of NEPA's intent, see \textit{ supra} note 60 and accompanying text.
    \item \textsuperscript{176} See \textit{Thatcher}, \textit{ supra} note 60, at 755 (rejecting argument that too-broad application of NEPA would trivialize law and force agencies to expend limited resources foolishly).
    \item \textsuperscript{177} See \textit{Wetlands Action Network}, 222 F.3d at 1118. The Ninth Circuit chose not to follow the \textit{Thomas} decision because the Corps only had independent jurisdiction over the parts of Phase I development that required the filling of wetlands. \textit{See id.}
    \item \textsuperscript{178} See \textit{id.} (observing regulatory jurisdiction over 16.1 acres involved in Phase I development was not sufficient for Corps to assert "control and responsibility" over entire project).
    \item \textsuperscript{179} Porterfield, \textit{ supra} note 7, at 56 (citing 53 Fed. Reg. 3,120 (1988)). The control and responsibility rule states:
    Scope of analysis.
    (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the
\end{itemize}
Scholars further suggest the Corps, under Section 7(b), should consider the upland aspects of shore side facilities that are clearly outside the Corps' regulatory jurisdiction. Neither of these approaches satisfy the need for a consistent and useful rule to determine the scope of the Corps' regulatory jurisdiction. Experts have also indicated that an analysis under NEPA, focusing upon the scope of the federal action that triggers the environmental review, provides less help than an analysis focusing upon the scope of the environmental impacts of the federal action.

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scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.

(2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of the Corps' [sic] jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps' [sic] permit action.

Typical factors to be considered in determining whether sufficient "control and responsibility" exists include:

(i) Whether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project).

(ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

(iii) The extent to which the entire project will be within Corps jurisdiction.

(iv) The extent of cumulative Federal control and responsibility. Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essential products of Federal financing, assistance, direction, regulation, or approval . . . .

Id.; see also Corps of Engineers, Department of the Army, Processing of Department of the Army Permits, 33 C.F.R. pt. 325, App. B § 7(b) (1995).

180. See Porterfield, supra note 7, at 57. Porterfield indicates that, "under [§] 7(b) the relevant inquiry is not whether an environmental impact occurs within waters subject to [ ] Corps regulatory power, but rather whether the overall level of federal involvement in a given project warrants evaluating the environmental impacts of the entire project . . . ." Id.

181. See id. Neither of the enumerated approaches focuses upon the actual matter at issue, namely the scope of the environmental impacts of the federal action. See id.

182. See id.

NEPA requires an agency undertaking an action with potentially significant environmental impacts to consider environmental factors which might otherwise be irrelevant to its decision making process. Thus, focusing on the scope of the Corps' regulatory jurisdiction or the overall level of its substantive involvement in a project is unlikely to provide a useful
A. The Independent Utility Test

The independent utility test provides another mechanism for the Ninth Circuit and other courts to use when finding in favor of developers and against environmental groups. The independent utility test allowed the Ninth Circuit to support the Corps’ finding that the three phases were separable for purposes of evaluating environmental impacts. Without this test, the Corps could have likely asserted enough “control and responsibility” over the development to require an EIS for the entire project. Even though the Ninth Circuit appears justified in deciding that the three phases could be separated given precedent and the independent utility test, it seems that some of the cases should have been construed in a different light.

First, although the Ninth Circuit distinguished Blue Mountains, in holding that five timber sales should be considered as a single project, each of these sales could have been construed as having independent utility since a single sale could certainly exist without the other four. The district court applied this reasoning in Wetlands Action Network and determined that the three phases of the project should be reviewed independently. Applying the independent utility test, the Ninth Circuit, in contrast, concluded that the three phases in Wetlands Action Network were not cumulative actions. “The CEQ regulations implementing NEPA require that an agency consider ‘connected actions’ and ‘cumulative actions’ within a single EA or EIS.” The Ninth Circuit found, however,
that the three phases were not cumulative actions.\textsuperscript{191} The Ninth Circuit, in \textit{Thomas}, predicted that the decision in \textit{Wetlands Action Network}, finding:

> While it is true that administrative agencies must be given considerable discretion in defining the scope of environmental impact statements, there are situations in which an agency is required to consider several related actions in a single EIS. Not to require this would permit dividing a project into multiple "actions," each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.\textsuperscript{192}

The Ninth Circuit repeated the decision it made in \textit{Sylvester} and characterized the actions as multiple actions.\textsuperscript{193} The court’s reasoning, however, is not outrageous given the "independent utility" test and the "control and responsibility" regulations.\textsuperscript{194} Although the court’s analysis may be acceptable according to the current regulations and precedent, the Ninth Circuit’s decisions and the application of regulations has moved away from the original intent and purpose of NEPA.\textsuperscript{195} The Corps might be correct in concluding that the value of the wetlands will be improved through

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\textsuperscript{191} See id. (stating three phases were not supported by CEQ regulations or precedent).

\textsuperscript{192} \textit{Thomas v. Patterson}, 753 F.2d 754 (9th Cir. 1985); see also Thatcher, \textit{supra} note 60, at 630 (noting courts often go too far by claiming same results could be reached by requiring cumulative action or cumulative impact analysis).

If actions are connected, CEQ regulations require that they be considered in one EA or EIS for purposes of analysis and decision, just like cumulative actions. This is true, however, even if not all of the connected actions have ripened into proposals as in \textit{Thomas v. Peterson}. The requirement to bundle all cumulative actions into one EIS arises only when those actions are proposed actions. Thus, if a future plan is not connected to other actions and is not yet actually proposed, it need not be included in an environmental review of a pending proposal for decision making purposes.

\textit{Id.}

\textsuperscript{193} For a further discussion of the \textit{Sylvester} decision, see \textit{supra} notes 99-112 and accompanying text.

\textsuperscript{194} For a further discussion of "control and responsibility" regulations, see \textit{supra} note 179 and accompanying text.

\textsuperscript{195} For a further discussion of NEPA’s purpose, see \textit{supra} note 74 and accompanying text. Allowing the project to be segmented led to the conclusion that an EIS did not need to be prepared for Phase I of the project. See \textit{Wetlands Action Network}, 222 F.3d at 1118–19 (discussing segmentation of the project).\end{flushleft}
the mitigation process, but should be more cautious with scarce natural resources and require an EIS to be completed.196

B. Reasonably Foreseeable Impacts Test

Rather than relying on the tests described above, perhaps courts should borrow from the law of torts and focus on the concept of "reasonable foreseeability" of consequences that will result from federal actions.197 Scholars have intimated that CEQ regulations mandated this standard similar to the "reasonably close causal relationship" rule the Supreme Court applied in PANE.198 Under this approach, the Corps would be required to address reasonably foreseeable significant environmental impacts of the proposed permit in an EIS.199 Accordingly, the first step in determining whether a potential impact necessitates analysis pursuant to NEPA, is to determine whether granting the permit is the "but for" cause of the environmental impact.200

The Ninth Circuit, in Sylvester, and the Supreme Court, in PANE, both found that requiring an evaluation of all the possible environmental impacts of a proposed federal action would be too broad and impractical.201 Later, the Ninth Circuit, in Wetlands Action Network, also asserted that agencies are not required to do the impractical.202 Therefore, the "reasonable foreseeability" approach is a practical way for the Corps to determine if a significant impact

196. See Wetlands Action Network, 222 F.3d at 1119 (noting "NEPA does not require the government to do the impractical and that the agency’s determination of the scope of an EIS is entitled to deference . . . ").

197. See Porterfield, supra note 7, at 58 (remarking that once some federal involvement is established, focus should be on scope of federal issue).

198. See id. (indicating standard is simple when "reasonably foreseeable" impacts are determined).

199. See id.

200. See id. (focusing on impact of reasonable foreseeability standard).

201. See id. (citing PANE, 460 U.S. 776, 777-78 (1983); Sylvester v. United States Army Corps of Eng’rs, 884 F.2d 394, 401 (9th Cir. 1989)).

202. See generally Wetlands Action Network, 222 F.3d 1105 (9th Cir. 2000).
will result from a permitted action.\textsuperscript{203} If the impact is not reasonably foreseeable, the Corps does not have to address that impact in an EIS on the proposed permit.\textsuperscript{204} Furthermore, the "reasonable foreseeability" test is more efficient than the "links of chain" test adopted in \textit{Sylvester} and applied in \textit{Wetlands Action Network}.\textsuperscript{205} The "links of chain" test does not address whether the impacts of a private action, functionally interdependent of a federal action, must be considered in an EIS on the federal action.\textsuperscript{206} Had the Ninth Circuit, in \textit{Wetlands Action Network}, been required to use a "reasonable foreseeability" approach, the district court's decision to require an EIS might have been upheld.\textsuperscript{207} Instead, the Corps was able to review the environmental impacts of the federal portion of the project without considering the non-federal portion of the project.\textsuperscript{208} The "reasonable foreseeability" approach can help diffuse the confusion surrounding the uncertainty of the proper scope of environmental review by focusing on "the real issue — the scope of the environmental impacts of the action."\textsuperscript{209}

\section*{VI. Impact}

Had the Ninth Circuit considered cumulative or indirect effects, instead of implementing the "control and responsibility" regulations alone, the "small handle" problem in this instance would have been diminished. As one expert lamented,

The irony in the "small handle" logic is that the larger a project gets the smaller the scope of the Corps' NEPA

\textsuperscript{203} See Porterfield, \textit{supra} note 7, at 59 (characterizing approach as logical since Corps cannot consider environmental impacts of permitting decisions it cannot reasonably foresee).

\textsuperscript{204} See id. (noting this standard would usually result in same end as that in Corps' permitting regulation).

\textsuperscript{205} For a further discussion of the test adopted in \textit{Sylvester}, see \textit{supra} notes 99-112 and accompanying text.

\textsuperscript{206} See Porterfield, \textit{supra} note 7, at 60.

Unlike the reasonable foreseeability standard, however, the links of chain approach does not directly address which environmental impacts of a federal action must be covered in an EIS. Instead, it concentrates on the proximity of the functional relationship of the federal action to associated private action in order to determine whether the impacts of the private action should be considered in an EIS on the federal action.

\textit{Id.}

\textsuperscript{207} For a further discussion of the "reasonable foreseeability" approach, see \textit{infra} notes 202-04 and accompanying text.

\textsuperscript{208} See Porterfield, \textit{supra} note 7, at 62 (asserting limitation on review does not compromise NEPA's goal of informed decision making).

\textsuperscript{209} \textit{Id.} The "reasonable foreseeability" standard provides a practical limitation on federal review of environmental impacts. See \textit{id.}
analysis becomes, at least theoretically. This could lead to the very situation the concept was supposed to avoid – where the Corps is preparing an EIS on projects with less significant impacts simply because its jurisdictional basis is proportionately larger than it might be in other cases involving larger projects with greater impacts.\(^{210}\)

The Ninth Circuit's decision follows the legacy of *Sylvester*, promulgating the idea that the Corps is only required to review those environmental impacts over which it exercises "sufficient control and responsibility."\(^{211}\) This allowed the cumulative effects of a golf course and a resort to be reviewed separately.\(^{212}\) This approach is counterintuitive since the environmental impacts of a golf course or a resort considered separately are significantly less substantial than the environmental impacts of the construction of each facility considered together.\(^{213}\)

Similarly, in *Wetlands Action Network*, the Corps was allowed to segment the massive proposal into three phases because they could proceed independently of each other.\(^{214}\) Furthermore, the Corps was not required to prepare an EIS to determine the environmental impacts of the wetlands and upland development due to insufficient "control and responsibility" over the upland development.\(^{215}\) As a result, the environmental effects of the three phases of the project together would not be evaluated except through a preliminary EA.\(^{216}\) Whether or not the Corps has sufficient control or responsibility does not change the fact that there will eventually be massive development covering over 1,000 acres.\(^{217}\)

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210. Parenteau, *supra* note 41, at 757 (suggesting question be framed as one of cumulative or indirect impacts since effects must be considered regardless of Corps' jurisdiction).

211. See Porterfield, *supra* note 7, at 62 (noting current uncertainty surrounding scope of Corps environmental review).

212. See *Sylvester v. United States Army Corps of Eng's*, 884 F.2d 394, 394 (9th Cir. 1989) (finding resort and entire complex would benefit from the other's presence, but were not sufficiently related to constitute a single "federal action" for NEPA purposes).

213. See Porterfield, *supra* note 7, at 62 (referring to impacts that projects or industrial facilities may have on environment).

214. See *Wetlands Action Network*, 222 F.3d at 1122 (concluding district court erred in finding issuance of permit without preparing EIS violated NEPA).

215. See *id.* at 1116 (holding linkage between "permitted activity and specific project planned is the type of "interdependence" that is found in any situation where a developer seeks to fill a wetland as part of an extensive development project.").

216. See *id.*

217. See *id.* (allowing 21.4 acres of federal wetlands to be developed without examination of cumulative impacts).
With decisions like *Wetlands Action Network*, courts are moving farther from NEPA’s original purpose.\(^{218}\) While the three phases of this project have independent utility, the final outcome will be a multifaceted complex that serves many needs but has significant cumulative negative impacts on the environment.\(^{219}\) This decision, as well as others like it continually evade NEPA goals.\(^{220}\) If the courts persist in following this line of reasoning, the problems NEPA was created to prevent will undoubtedly continue.\(^{221}\) One expert poignantly addressed the bottom line, averring:

Nowhere are we looking at the cumulative impacts of a lost acre this week in San Francisco Bay, another ten acres in Grays Harbor, a hundred in the Willamette Valley, a dozen in the Frazier River Valley, an oil development on a molting lake on Alaska’s north slope. It all harkens back to our inability to see the beauty, the life, the elegance of mud and to understand what glops and hisses at our feet is connected by invisible threads of consequence to the creatures that glide so purposefully across our skies each spring and fall. We are slowly strangling the flyway. One day, we may look out over an endless plain of concrete and asphalt and glass and find that we have drained the skies.\(^{222}\)

_Elizabeth A. Roche_

\(^{218}\) See Thatcher, *supra* note 60, at 646. The primary purpose of NEPA today is to gather information. In that informational task, however, NEPA is to be all-encompassing. The whole purpose of NEPA is to put to the test those who do not believe that a five acre fill matters. Congress passed NEPA out of concern that our limited natural resources are being lost in “small but steady increments.” It is only if we conduct a cumulative impact review that we will know whether the developers or the local bird watchers are right. The result should not be prejudged as a way to avoid preparation of an EIS.

*Id.*

\(^{219}\) For a further discussion of the MTP-PV project, see *supra* note 15, and accompanying text.

\(^{220}\) See Parenteau, *supra* note 41, at 748-49. Essentially, the courts have been making ad hoc subjective judgments about ‘how much’ federal participation is needed to federalize a nonfederal project. This is understandable because the courts have had very little ‘law to apply . . . .’ In the absence of clear legal standards, the facts have controlled the outcomes of cases.

*Id.*

\(^{221}\) See Thatcher, *supra* note 60, at 647.

\(^{222}\) See *id.* (indicating that cumulative impacts of small state action must be reviewed to understand environment).