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Hammond v. Norton: Taking Action to Preserve the No Action Alternative

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HAMMOND v. NORTON: TAKING ACTION TO PRESERVE THE NO ACTION ALTERNATIVE

I. INTRODUCTION

In 1969, Congress enacted the National Environmental Policy Act (NEPA) to deal with the profound impact of the human presence on the natural environment.\(^1\) Rapidly expanding population growth, mass urbanization and industrialization, as well as great depletions of the country's natural resources were but a few of the problems NEPA sought to address.\(^2\) Recognizing that human actions affecting the environment needed to be heavily regulated, Congress mandated certain requirements so that man and nature could co-exist and safeguard the future for both.\(^3\) To that end, NEPA, which created the Council on Environmental Quality (CEQ), required environmental impact statements (EIS) to be submitted prior to government approval for all acts that may affect the environment.\(^4\)

The primary purpose of an EIS is to ensure that environmental concerns are adequately addressed prior to the implementation of any project that will either enhance or adversely affect the human environment.\(^5\) An EIS must fully discuss all significant environmental impacts of a proposed project.\(^6\) The EIS requirement enables both the public and agency decision-makers to make fully informed judgments based on the anticipated impacts of a project and all reasonable alternatives.\(^7\) An EIS should be fully developed, yet brief, and supported by relevant evidence.\(^8\) An EIS is not simply a formality required by the federal government; rather, it is an impor-

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2. See id. (illustrating need for environmental regulation).
4. See 42 U.S.C. §§ 4321-47 (declaring NEPA's purpose, outlining requirements of Act and establishing CEQ). The CEQ functions as an aid to the Environmental Protection Agency. See id. § 4321. It is an executive agency designed to coordinate and advise on all federal environmental programs. See id.
tant factor in determining the strength of a proposed action in light of its environmental effects.9

Agencies must issue an EIS when parties seek to obtain right-of-way permits over public lands.10 The appropriate agency must then go through several stages of drafting and issue an EIS describing the positive and negative consequences of approving the project.11 Among other requirements, the agency is obligated to discuss possible options to the project in order to compare and contrast the benefits and detriments.12 Not only does the agency have to examine all reasonable options, but it must also include a “no action alternative,” discussing the totality of consequences if the project did not proceed.13

The Mineral Leasing Act14 requires any company seeking to construct, operate or maintain a pipeline on federal lands to obtain a right-of-way from the Bureau of Land Management (BLM).15 The BLM, a subdivision of the Department of the Interior (DOI), is the agency primarily responsible for reviewing applications for rights-of-way across federal property.16 In Hammond v. Norton (Hammond),17 the District Court for the District of Columbia addressed whether the BLM fully developed the EIS no action alternative for a right-of-way application by a petroleum products company.18

The BLM submitted a final draft of the EIS that discussed reasonable alternatives to the proposed project, including a no action alternative.19 Hammond, the plaintiff, brought suit alleging, among other charges, that the BLM had not complied with the no action alternative requirement because the BLM’s treatment of the no action alternative was not fully developed and was given only

9. See id. (explaining role of EIS in approval or denial of proposed actions).
11. See id. (outlining National Environmental Policy Act components).
12. See 40 C.F.R. pt. 1502.14 (discussing requirements for alternatives section of EIS in order to provide basis for comparison among possible alternatives and proposed action).
13. See id. (discussing requirement of “no action alternative” in addition to other feasible alternative actions).
16. See id. at 233 n.2 (discussing establishment and role of BLM).
18. See id. at 232 (noting issue before court).
19. See id. (noting BLM’s procedural steps).
The district court found the BLM fulfilled its obligation to examine reasonable alternatives and dismissed all counts alleging otherwise.\(^{21}\)

This Note will discuss the district court’s decision in *Hammond v. Norton*.\(^{22}\) Section II discusses the facts and procedural history of *Hammond*.\(^{23}\) Section III explains relevant case law, statutory authority and other pertinent background information.\(^{24}\) Section IV discusses the *Hammond* court’s statutory interpretation and its analysis.

20. See id. at 232-38 (discussing charges brought against defendant). In count one, Hammond alleged the BLM violated NEPA by not jointly considering Williams’s and Equilon’s projects as a single action. See id. at 243-44. The court found for Hammond on this charge, finding the BLM improperly considered the two projects separately in the EISs because the projects had cumulative effects. See id. at 244. In count two, Hammond alleged the BLM’s final EIS failed to consider the purpose and need for the proposed action, which the court found meritless. See id. at 240-41. In count five, Hammond alleged the final EIS failed to consider all adverse environmental effects, but the District Court found the claim lacked merit. See id. at 242. In count six, Hammond alleged the final EIS failed to consider the socioeconomic impact of pipeline construction. See id. at 242-43. The court found this charge erroneous because socioeconomic effects did not result from the project’s environmental impact and were, therefore, outside the scope of NEPA and the BLM. See id. In count seven, Hammond alleged the BLM and the DOI failed to comply with NEPA by failing to evaluate the Williams pipeline in good faith. See id. at 265-66. The court found Hammond offered no proof of this claim. See id. In count eight, Hammond alleged the DOI acted arbitrarily and capriciously in relying on the BLM’s flawed EIS. See id. at 239 n.9. The court did not address this allegation because its substance was raised in other counts. See id. In counts nine and ten of the amended complaint, Hammond alleged it was improper for the BLM and the DOI to allow the project because it adversely affected public and private interests, as well as, public health and safety. See id. at 259. The court found the claims to be irrelevant, as they were not raised in Hammond’s brief. See id. In count eleven, Hammond alleged that FWS acted arbitrarily and capriciously by issuing a defective biological opinion pursuant to the Endangered Species Act. See id. at 264-65. The court found the opinion sufficient. See id. In count twelve, Hammond alleged the BLM was required to prepare a supplemental EIS in response to newly emerging facts. See id. at 254-55. The court determined a supplemental EIS was unnecessary because the additional information referred to by Hammond became known after the BLM submitted the final EIS. See id. In count thirteen, Hammond alleged that Williams was financially unable to complete the proposed project; therefore, a supplemental EIS was needed to determine the consequences of proceeding if Williams could not complete the project. See id. at 256-57. The court found Williams’s financial situation irrelevant under NEPA and the CEQ. See id. In counts fourteen, fifteen and sixteen, Hammond alleged the Forest Plan for the Manti-La Sal National Forest was incorrectly amended, but the court found the amendment sufficient. See id. at 259-63.

21. See id. at 267 (holding BLM’s discussion of alternatives, including no action alternative, sufficient to withstand review).

22. For a discussion of all charges brought in *Hammond* see supra note 20.

23. For a discussion of the facts and procedural history of *Hammond*, see infra notes 28-62 and accompanying text.

24. For a discussion of NEPA, CEQ and pertinent case law see infra notes 63-116 and accompanying text.
of relevant case law in making its decision.\textsuperscript{25} Section V analyzes whether the District of Columbia's determination was proper.\textsuperscript{26} Finally, Section VI evaluates the impact the \textit{Hammond} holding may have on future judicial review regarding compliance with the no action alternative requirement.\textsuperscript{27}

II. Facts

In \textit{Hammond}, the Williams Pipe Line Company (Williams), a petroleum products company, sought to develop and construct a refined petroleum products pipeline from Salt Lake City, Utah to Bloomfield, New Mexico.\textsuperscript{28} Williams applied for a right-of-way permit through the Manti-La Sal and Uinta National Forests in order to construct the pipeline.\textsuperscript{29} The pipeline, which would be approximately 480 miles long, with 260 newly constructed miles, would largely run over private lands.\textsuperscript{30} Approximately ninety-seven miles of pipeline would run over federal lands, including the Manti-La Sal and Uinta National Forests.\textsuperscript{31} Williams sought construction of the pipeline to provide access to the Salt Lake City region, an area that Williams claimed had inadequate means of obtaining petroleum products because of its isolation from the national petroleum products grid.\textsuperscript{32} Williams asserted that Utah's dependence on scarce local oil supplies, coupled with the state's inability to access the national market, created a lack of competition among suppliers.\textsuperscript{33} This lack of competition led to significantly higher prices for petroleum products in Utah compared with the rest of the country.\textsuperscript{34}

Various environmental protection groups, individual landowners and another petroleum products company, Sinclair Oil (collectively Hammond), brought a sixteen count lawsuit against the

\textsuperscript{25} For a narrative analysis of the \textit{Hammond} decision, see infra notes 117-30 and accompanying text.

\textsuperscript{26} For a critical analysis of the \textit{Hammond} decision, see infra notes 131-56 and accompanying text.

\textsuperscript{27} For a discussion of the impact of the \textit{Hammond} decision on future enforcement of EIS requirements, see infra notes 157-64 and accompanying text.

\textsuperscript{28} See \textit{Hammond}, 370 F. Supp. 2d at 232-33 (discussing Williams' proposed pipeline project).

\textsuperscript{29} See \textit{id.} (examining pertinent parts of Williams's right-of-way application).

\textsuperscript{30} See \textit{id.} at 231, 233 (outlining proposed route of Williams's pipeline).

\textsuperscript{31} See \textit{id.} at 233 (discussing amount of pipeline proposed to run over national forests).

\textsuperscript{32} See \textit{id.} at 232-33 (discussing Williams's motivation for proposed project).

\textsuperscript{33} See \textit{Hammond}, 370 F. Supp. 2d at 232-33 (explaining economic and geographical barriers responsible for Utah's above average petroleum product prices).

\textsuperscript{34} See \textit{id.} (explaining Utah's highly priced petroleum products).
Secretary of the Interior and the BLM (collectively Norton). Hammond asserted claims under NEPA, the CEQ and other acts. Hammond sought to enjoin any further action regarding the development and construction of the refined petroleum products pipeline project.

In February of 1999, Williams and another petroleum company, Equilon, formed a joint venture, creating a third company, Aspen. Under the Aspen banner, Equilon filed for a right-of-way to construct a petroleum products pipeline running from Bloomfield, New Mexico to Odessa, Texas. The Williams and Equilon pipelines were intended to meet at Bloomfield, forming one continuous pipeline from Utah to Texas. Also acting under the newly formed Aspen company, Williams amended its right-of-way application in 1999, naming Aspen as the applicant. Once complete, the full pipeline would connect Salt Lake City to western Texas and, more importantly, to the national petroleum products grid. The pipeline would provide shipping and refinery capabilities not otherwise readily available in Utah.

Over Aspen's objections, the BLM notified Aspen that it intended to create an EIS for purposes of NEPA review. The EIS would reflect the environmental impact of the total project running from Utah to Texas, rather than two separate statements, one for each half of the total pipeline project. Construction could not commence, however, until the BLM approved the total project because both projects were considered a single enterprise. As a re-

35. See id. (noting various plaintiffs).
36. See id. at 232 n.1 (naming plaintiffs). The plaintiffs were Forest Guardians, Living Rivers, the Utah Environmental Congress, Citizens for Safe Pipelines, and Sinclair Oil, a petroleum products company with current presence in Salt Lake City, but based out of Wyoming. See id.
37. See id. at 237 (discussing Hammond's desired remedy).
38. See Hammond, 370 F. Supp. 2d at 233 (outlining joint venture by Williams and Equilon to create continuous pipeline from Utah to Texas).
39. See id. at 233-34 (discussing Equilon's application for right-of-way as part of agreement with Williams under their joint venture, Aspen).
40. See id. (highlighting goal of Williams's and Equilon's joint venture to build one continuous pipeline).
41. See id. at 233 (explaining Williams's right-of-way application amendment).
42. See id. at 232 (explaining pipeline project).
43. See Hammond, 370 F. Supp. 2d at 232 (mentioning benefits deriving from completion of Aspen pipeline project).
44. See id. at 234 (explaining BLM's notification procedure).
45. See id. (discussing how both Aspen pipeline projects would be considered in single EIS due to cumulative effects).
46. See id. (explaining logistical difficulties arising from BLM decision to consider pipeline projects together).
suit of the BLM’s decision, Williams and Equilon dissolved Aspen in March of 2000, and the two separate companies proceeded independently to build their respective halves of the pipeline. 47

Williams then filed another amended right-of-way application with the BLM. 48 The amendment stated that the Williams portion of the pipeline would end at Bloomfield, New Mexico, and Williams would no longer include Equilon’s Texas to New Mexico pipeline as an alternative supply source for its own pipeline, a factor used in determining the separateness of the two projects. 49 Williams’s amended application requested a review independent from any project applied for by Equilon. 50 Equilon also filed an amended right-of-way application for its Texas to New Mexico pipeline project. 51

In February of 2001, the BLM completed a draft of its EIS for the Williams project, independent of the Equilon project. 52 The Environmental Protection Agency (EPA) and other organizations protested segmenting the report. 53 They claimed the EIS failed to consider the impact of the total project which had essentially been changed only in name following Aspen’s dissolution. 54 The BLM released the EIS report over those objections, defending its decision to analyze the projects separately. 55 Hammond asserted that the BLM did not adequately discuss the no action alternative by failing to “rigorously explore and objectively evaluate all reasonable

47. See id. (clarifying Williams’s and Equilon’s decision to forgo joint venture due to BLM’s decision to consider projects in one EIS).
49. See id. at 234 (noting changes made to Williams’s amended application).
50. See id. (mentioning Williams’s efforts to sever ties with Equilon’s proposed project).
51. See id. (explaining Equilon’s amended right-of-way application made in effort to be considered separately from Williams’s pipeline project in ensuing EIS).
52. See id. at 235 (noting BLM’s completion of separate EIS for Williams’s project).
53. See Hammond, 370 F. Supp. 2d at 235 (noting EPA’s objection to segmenting EIS).
54. See id. (discussing EPA’s objection to BLM’s decision to create separate assessments for Equilon’s and Williams’s projects).
55. See id. (discussing BLM’s defense of decision). The BLM defended itself, claiming the Williams project would not automatically trigger other actions requiring an EIS, could operate independently of the Equilon pipeline, and was not an interdependent part of any other project. See id. at 235. The BLM also noted the areas of geographic overlap which would cause an increased environmental impact are minimal. See id.
alternatives" pursuant to NEPA requirements. After several additional approval stages, the BLM ultimately accepted the project proposal.

On October 12, 2001, the DOI issued a Record of Decision granting Williams's application for a right-of-way permit. On November 9, 2001, Hammond filed suit against the DOI, the BLM and their respective officials. Hammond requested that the district court enjoin the Williams pipeline from proceeding as scheduled, pending a reworked EIS and Record of Decision. The court later granted various motions for outside parties to intervene, including Williams, on behalf of the defendants. As part of the district court's holding, it found the BLM's treatment of the no action alternative sufficiently complied with NEPA.

III. BACKGROUND

Prior to approving projects and proposals, NEPA requires all federal agencies to consider the environmental impacts of proposed actions, as well as reasonable alternatives to those actions. In order to comply with NEPA, agencies prepare EISs to discuss fully the proposed actions in light of the actions' potential environmental impacts. NEPA charged the CEQ with monitoring agencies' compliance under the Act.

Congress instituted the CEQ as an executive agency under NEPA. The CEQ monitors NEPA compliance among federal agen-

56. See id. at 241 (discussing Hammond's allegation that BLM did not comply with NEPA requirements); 40 C.F.R. pts. 1502.13, 1502.14 (noting requirements of reasonable alternatives section of EIS).
57. See Hammond, 370 F. Supp. 2d at 236 (discussing requirement of Fish and Wildlife Service and United States Forest Service approval prior to final approval of project).
58. See id. at 237 (noting DOI's approval of right-of-way application).
59. See id. (filing complaint for declaratory and injunctive relief based on claims under NEPA, APA, Mineral Leasing Act, Endangered Species Act and Forest Management Act).
60. See id. (noting Hammond's request for relief).
61. See id. (noting court's grant for Williams to intervene as defendant and Carol Parker and Citizens for Safe Pipelines, Inc. to intervene as plaintiffs).
62. See Hammond, 370 F. Supp. 2d at 242 (holding BLM's no action alternative was sufficient to comply with NEPA).
63. See 42 U.S.C. § 4332 (discussing purpose and requirements of NEPA).
64. See id. (explaining NEPA's EIS preparation requirement).
65. See id. (discussing mission of CEQ under NEPA).
cies, including the amount of detail required for environmental assessments. It manages federal environmental efforts and works with federal agencies to develop environmental policies and initiatives.

The CEQ defines the requirements of an EIS:

[An EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. . . . Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses.

The CEQ also requires that an EIS contain a statement that “present[s] the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” This section, the heart of the EIS, must include information that thoroughly explores and objectively assesses all reasonable alternatives. The section must illustrate each option thoroughly, including the alternative of no action, in order to allow reviewers to compare the alternatives on their comparative merits.

No action alternatives are further discussed through the CEQ procedures, which establish NEPA to implement the CEQ requirements. The inclusion of a no action alternative is designed to aid the reader in comparing the beneficial and adverse impacts of no action against the various other plans proposed by the applicant and the agency. “A description of the environmental setting shall be included in the ‘no action alternative’ for the purpose of provid-

68. See supra note 65 and accompanying text (describing role of CEQ).
70. See 40 C.F.R. pt. 1502.14 (discussing EIS requirement for alternative plans to be illustrated for purposes of comparison with proposed action).
71. See id. (noting purpose of expounding alternatives to proposed action).
72. See id. (outlining requirements for alternative action section of EIS, with emphasis on alternative of no action).
74. See 40 C.F.R. pt. 6.203(c) (discussing benefit of having no action alternative for basis of comparison with proposed action and other alternative actions).
ing needed background information.”\textsuperscript{75} The level of detail regarding the affected environment must be proportionate with the complexity and importance of the relevant issues.\textsuperscript{76}

Furthermore, the CEQ, in conjunction with the EPA, provides some guidance as to what the no action alternative discussion should entail.\textsuperscript{77} A no action alternative is a discussion of all anticipated outcomes and their ensuing environmental and financial implications if the proposed project does not occur.\textsuperscript{78} It then compares the no action alternative to all other alternatives by weighing all necessary and reasonable predictions of the no action alternative.\textsuperscript{79} For example, if a project to build a railroad is denied, a road may be built in its place and would be considered the result of taking no action.\textsuperscript{80}

The “rule of reason” governs which alternatives must be discussed in an EIS and to what extent.\textsuperscript{81} NEPA requires the agency to weigh all reasonable alternatives and come to a fully informed decision.\textsuperscript{82} Agency decisions are reviewed under the arbitrary and capricious standard of judicial review, pursuant to the Administrative Procedure Act (APA).\textsuperscript{83} The following cases are illustrative of the wide body of case law dealing with the requirements of a no action alternative pursuant to NEPA.\textsuperscript{84}

In *Westlands Water District v. United States Department of Interior* (*Westlands*),\textsuperscript{85} California municipal water agencies and power districts brought an action against the DOI before the Ninth Circuit, challenging the administration of a federal water project that would redirect water away from municipal canals and dams.\textsuperscript{86} The plain-
tiffs claimed the DOI failed to comply with NEPA and the CEQ's EIS requirements. The court analyzed the effectiveness of the DOI's EIS and held the standard for a court's NEPA analysis is whether an EIS's discussion of possible project alternatives allows the reader to make an informed decision.

In *Westlands*, the EIS examined possible effects on the sustainability of local fish populations and preservation of water quality standards. The no action alternative discussion illustrated how inaction would affect the environment and how the plans already in existence would also affect the environment through their continued operation. The Ninth Circuit reasoned that the alternatives were adequate because they promoted informed decision-making based on the DOI's forecasts regarding the environmental impacts of the proposed project. In addition, the court held that the alternatives were thorough enough to satisfy NEPA requirements.

In *Greater Yellowstone Coalition v. Flowers* (*Greater Yellowstone Coalition*), the petitioners, an environmental advocacy group, asked the Tenth Circuit Court of Appeals to set aside a building permit, alleging the Army Corps of Engineers (Corps) did not adequately explore alternatives to the project proposal. The developer planned to build a golf course and residential community on a large tract of a privately owned ranch. The Corps determined that the no action alternative actually would have had a greater detrimental environmental impact than the proposed action because if the proposed action were not approved, the entire ranch would be sold and developed into residential communities. Although having a less detrimental effect on bald eagles living on the property, the no action plan would result in greater reductions to the wildlife habitat than if the proposed plan or one of its alternatives were

87. *See id*. at 860 (describing allegations against DOI).
88. *See id*. at 868 (establishing requirement that alternatives section must facilitate reader to make informed decision).
89. *See id*. (discussing EIS's consideration of wildlife and environmental effects).
90. *See Westlands*, 376 F.3d at 869 (discussing how no action would affect environment).
91. *See id*. at 872 (noting factors making no action alternative valid).
92. *See id*. (holding EIS's no action alternative sufficient where it allowed for informed decision making).
93. 359 F.3d 1257 (10th Cir. 2004).
94. *See id*. at 1262-63 (noting petitioner's arguments).
95. *See id*. at 1264 (discussing plan to develop land, which necessitated EIS).
96. *See id*. at 1266 (considering consequence of no action alternative).
allowed to proceed.\textsuperscript{97} The no action plan considered the impact on animals and the surrounding environment, and it compared no action with the other alternative proposals.\textsuperscript{98} The Tenth Circuit held the no action plan was adequately detailed and the level of effort and documentation involved in its creation were consistent with the proposal's expected environmental impact.\textsuperscript{99}

In \textit{Communities Against Runway Expansion, Inc. v. FAA (Communities Against Runway Expansion),}\textsuperscript{100} various advocacy groups opposed an airport expansion and petitioned for review of a Federal Aviation Administration (FAA) order approving the construction of a new runway and improvement of an existing taxiway.\textsuperscript{101} The District of Columbia Circuit Court described the steps the agency took in its evaluation of all alternative plans, including the no action alternative.\textsuperscript{102} The final EIS considered several studies of the runway's effect on the environment and the commercial aspects of the airport's business.\textsuperscript{103} Factors specifically considered included: ground traffic; expected delays with and without the runway; noise pollution increases if the plan were accepted; and the effect of noise pollution burdens on residents adjacent to the airport based on their socioeconomic status.\textsuperscript{104} Thus, the discussion of alternatives took into account the no action alternative compared with various other plans and how, in each scenario, the proposal would affect both environmental and economic concerns.\textsuperscript{105}

In \textit{Lee v. United States Air Force (Lee),}\textsuperscript{106} ranchers and livestock-raising associations sought review of a United States Air Force decision to allow additional German Air Force aircrafts access to the

\textsuperscript{97} See \textit{id}. at 1266-68 (discussing detrimental effects of no action alternative compared with proposed action and other proposed alternative plans).
\textsuperscript{98} See \textit{Greater Yellowstone Coalition, 359 F.3d} at 1267 (listing criteria considered in no action plan section of Corps' EIS).
\textsuperscript{99} See \textit{id}. at 1270 (holding no action alternative section sufficient because it considered impact on wildlife and ecosystem, and it expounded sufficiently to facilitate reader to compare with other proposed actions).
\textsuperscript{100} 355 F.3d 678 (D.C. Cir. 2004).
\textsuperscript{101} See \textit{id}. at 681-83 (discussing environmental impact of runway expansion).
\textsuperscript{102} See \textit{id}. at 682-83 (listing steps FAA took to comply with no action alternative requirement). The petitioners failed to allege properly substantive flaws in the FAA's final EIS, and thus were not entitled to relief. See \textit{id}. at 681.
\textsuperscript{103} See \textit{id}. at 682-83 (describing final EIS).
\textsuperscript{104} See \textit{id}. (discussing factors such as pollution, economic effects and foreseeable repercussions if no action taken).
\textsuperscript{105} See \textit{Cmtys. Against Runway Expansion, 355 F.3d} at 682-83 (holding no action alternative sufficient because it considered environmental and economic effects to facilitate comparison between no action and proposed action).
\textsuperscript{106} 354 F.3d 1229 (10th Cir. 2004).
local Air Force base.\textsuperscript{107} The District Court for the District of New Mexico upheld the Air Force's decision.\textsuperscript{108} The plaintiffs appealed to the Tenth Circuit, arguing, among other things, that the EIS was defective for failing to expound adequately the possible project alternatives.\textsuperscript{109}

The court held that the Air Force had complied with NEPA requirements regarding adequate alternatives, including a no action alternative, in the proposal's EIS.\textsuperscript{110} The court noted that NEPA and the CEQ do not require an agency to analyze environmental consequences of alternatives that the agency has rejected as too remote, speculative, impractical or ineffective as long as it is done in good faith.\textsuperscript{111} The court added, however, that NEPA and the CEQ require that all agencies explore rigorously and evaluate objectively all reasonable alternatives.\textsuperscript{112}

Moreover, Air Force regulations specify "'[r]easonable' alternatives are those that meet the underlying purpose and need for the proposed action and that would cause a reasonable person to inquire further before choosing a particular course of action."\textsuperscript{113} Although United States Air Force regulations are not binding on civilian courts, the language is indicative of NEPA and CEQ standards.\textsuperscript{114} Further, the Tenth Circuit noted that NEPA requires an EIS to include a proposed action's expected impact on categories such as "ecological, aesthetic, historical, cultural, economic, social, and health . . . whether direct, indirect, or cumulative."\textsuperscript{115} The court found the Air Force's EIS adequately discussed the proposal's expected impact on economics, noise pollution and local livestock.\textsuperscript{116}

\begin{itemize}
\item 107. See id. at 1233 (seeking injunction to prevent additional air plane access to air base, claiming noise and traffic would disrupt environment).
\item 108. See id. at 1233-34 (affirming Air Force's decision).
\item 109. See id. at 1234 (describing plaintiff's argument).
\item 110. See id. (holding defendant complied with no action alternative requirement).
\item 111. See Lee, 354 F.3d at 1238 (explaining level of analysis required for alternatives).
\item 112. See id. (requiring agencies to develop all reasonable alternative actions, including no action at all).
\item 113. See id. (quoting 32 C.F.R. pt. 989.8(b) (2005)) (describing requirements for alternative to be considered reasonable alternative).
\item 114. See supra note 69 and accompanying text for a discussion of EIS purposes.
\item 115. See Lee, 354 F.3d at 1240 (citing 40 C.F.R. pt. 1508.8 (2004)) (noting which categories must be considered when rendering EIS).
\item 116. See Lee, 354 F.3d at 1240-46 (holding defendant sufficiently complied with alternative action requirement by considering economic and environmental impacts).
\end{itemize}
IV. NARRATIVE ANALYSIS

In *Hammond*, the District Court for the District of Columbia held that the BLM's final EIS adequately addressed the no action alternative. In counts three and four of Hammond's complaint, Hammond argued that the "reasonable alternatives" an agency must consider in preparing an EIS must include the possibility of taking no action and that the BLM did not adequately discuss the no action alternative. Hammond further argued, somewhat circularly, that the BLM should have adopted the no action alternative because it was the only reasonable choice in light of Hammond's argument that the Williams pipeline project should not proceed.

The District Court began its analysis by noting that the standard of review regarding an agency finding is the arbitrary and capricious standard, pursuant to the APA. The district court then stated that a reviewing court may deem agency actions arbitrary or capricious if an agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Despite strong language indicating deference to the agency decision, a reviewing court must undertake a thorough and in-depth review of the agency action to determine if the agency based the action on relevant factors or made a clear error in judgment. If the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made," then a reviewing court will uphold the agency's decision.

118. See *id.* (discussing Hammond's allegation that BLM insufficiently explained no action alternative).
119. See *id.* (discussing Hammond's claim that project was not economically or environmentally sound and no action alternative was only solution).
120. See *id.* at 238-39 (discussing relevant standard of review). Under the APA, "a reviewing court may only set aside agency actions, findings, or conclusions when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." See *id.* at 238 (quoting 5 U.S.C. § 706(2)(a) (2000)).
The district court stated that the BLM's discussion of the no action alternative for the Williams pipeline "proceed[ed] by recapitulating the possible negative effects of pipeline construction, and by extension, the environmental effects that would not have oc- cur[red] absent pipeline construction." The court concluded that the need for petroleum products required approval of the Williams project. The court noted the Williams project was necessary to ensure projected petroleum product deficits did not increase annually, as was projected without the Williams pipeline. The court held that the EIS sufficiently discussed, although briefly, the costs and benefits of no action with enough specificity to allow meaningful comparison with other alternatives.

The district court also held that the DOI did not act arbitrarily or capriciously in approving the project based on the final EIS. The court noted that a court should not substitute its own judgment based on policy considerations when the agency's ruling is fully informed. Accordingly, the court held the BLM sufficiently expounded the no action alternative and the DOI properly approved it, pursuant to the requisite standard of review.

V. CRITICAL ANALYSIS

The Hammond court erroneously found the BLM satisfied its duty to provide a fully shaped no action alternative. During its discussion of the no action alternative, the district court directly stated that the BLM's final EIS only recapitulated the possible negative effects of going forward with the Williams pipeline project between Salt Lake City and Bloomfield. There is no evidence in the record that the final EIS discussed what the consequences of no action would be on the environment with any level of detail, outside its obvious assertion that the project's anticipated impact would not

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125. See id. at 241-42 (noting court's purpose for approving project).
126. See id. (discussing economic repercussions of not proceeding with pipeline project).
127. See id. at 242 (holding alternative action section of EIS provided enough detail to facilitate meaningful reader comparison among proposed actions).
128. See id. (finding DOI did not act arbitrarily or capriciously in relying on final EIS).
129. See Hammond, 370 F. Supp. 2d at 239-40 (holding courts should pay great deference to agency decision when agency is fully informed).
130. See id. at 241-42 (discussing court's findings).
131. See id. at 239-40 (stating district court's holding).
132. See id. at 241 (analyzing BLM's no action alternative).
occur.\textsuperscript{133} The final EIS, however, did discuss the economic consequences of proceeding with the no action alternative, which included a projected diesel gasoline deficit by the year 2013 and deficits in other petroleum products starting in 2001, leading to significant petroleum deficits by the year 2020.\textsuperscript{134}

The \textit{Hammond} EIS is sufficiently similar to the \textit{Westlands} EIS to render the \textit{Hammond} holding erroneous.\textsuperscript{135} The EIS in \textit{Westlands} provided a complete discussion of the no action alternative when it discussed the effects on local wildlife and the environment, including the fish population and the water quality.\textsuperscript{136} Unlike the \textit{Hammond} EIS, the \textit{Westlands} EIS discussed how a lack of action would affect the environment and how existing plans would continually affect the environment if the proposal was not instituted.\textsuperscript{137} Therefore, the \textit{Westlands} court properly held the FWS and National Marine Fisheries Service’s treatment of alternatives to the proposal, including the no action alternative, was sufficient because the discussions promoted informed decision-making and thoroughly illustrated the ramifications of not allowing the proposal or any other action to proceed.\textsuperscript{138} Unlike the no action alternative in \textit{Hammond}, the \textit{Westlands} discussion included probable outcomes if no action were taken, which facilitated an intelligent comparison between taking no action and approving the project proposal.\textsuperscript{139} This distinction is critical in finding the \textit{Hammond} analysis of the BLM’s no action alternative section cursory and incomplete.\textsuperscript{140}

The \textit{Hammond} EIS is also distinguishable from the fully developed EIS prepared in \textit{Greater Yellowstone Coalition}.\textsuperscript{141} Specifically, the Corps in that case considered how no action would lead to different use of the land and have greater detrimental environmental

\begin{itemize}
\item \textsuperscript{133} See \textit{id.} (illustrating court’s inattention to no action alternative’s failure to discuss environmental effects).
\item \textsuperscript{134} See \textit{id.} at 241-42 (discussing economic effects of no action alternative in final EIS).
\item \textsuperscript{135} For a description of the EIS in \textit{Westlands}, see supra notes 89-90 and accompanying text.
\item \textsuperscript{136} See \textit{Westlands Water Dist. v. United States Dep’t of the Interior}, 376 F.3d 853, 868 (9th Cir. 2004) (illustrating comprehensive impacts on environment).
\item \textsuperscript{137} See \textit{id.} at 869 (discussing components of no action alternative in \textit{Westlands}).
\item \textsuperscript{138} See \textit{id.} at 872 (discussing elements that led court to hold no action alternative sufficient).
\item \textsuperscript{139} See \textit{id.} at 868-69 (noting why no action alternative was appropriate).
\item \textsuperscript{140} For a discussion of the shortcomings of the \textit{Hammond} court’s analysis of the no action alternative, see infra notes 151-54 and accompanying text.
\item \textsuperscript{141} See \textit{Greater Yellowstone Coal. v. Flowers}, 359 F.3d 1257, 1267 (10th Cir. 2004) (discussing elements of no action alternative section found within case).
\end{itemize}
impacts. Instead of creating a golf course and using the land only partially for residential purposes, the developers could take no action and sell the entire lot for residential use. Not only did the Corps consider the effect on the actual land, but it also considered the effect on indigenous animal populations. The Tenth Circuit held the no action plan was adequately detailed, the level of detail in the discussion was proportionate to the proposal's expected environmental impact and the no action alternative adequately took into account the ramifications of taking no action. In contrast, the district court in Hammond found the BLM's final EIS provided an adequate no action alternative even though it did not examine the impact on local wildlife and other non-economic consequences on the land if the proposal were not approved.

Finally, unlike the Hammond EIS, the Communities Against Runway Expansion EIS adequately considered the project proposal's economic and environmental effects. In the final EIS's no action alternative section, the agency contemplated how the effects of not building an additional runway at the airport would contribute to higher traffic rates at other runway sites and increase noise pollution for those areas. The court contrasted the result of barring the proposal with the traffic and noise pollution projections if the FAA were to implement the proposal. The final EIS complied with NEPA and CEQ regulations by providing enough information in the no action alternative for an informed basis of comparison with the original proposal and the alternative plans. This is markedly different from the district court's approach in Hammond, where the court was satisfied with the no action alternative discussion because it made the obvious point that if the proposal were not approved, the projected environmental impact of the proposal

142. See id. at 1266 (discussing possible effect of no action).
143. See id. (discussing environmental impacts in wake of no action compared to proposed action).
144. See id. (considering impacts on land and wildlife).
145. See id. at 1273 (holding alternative action section requirement fulfilled).
148. See id. (discussing logistical problems arising from not building additional runway as well as noise pollution effects).
149. See id. (comparing effects of proposed action with effects of no action).
150. See id. (holding no action alternative sufficient because it provided enough information for informed basis of comparison).
would not occur.151 The BLM's final EIS in *Hammond* did not take into account, as the FAA did in *Communities Against Runway Expansion*, how barring the proposal would cause other consequences, aside from the obvious lack of direct consequences associated with the action.152

The critical difference between the above cases and *Hammond* is that the *Hammond* court only required a finding of the economic impact within the no action alternative and not the environmental impact.153 The *Hammond* court did not properly analyze the no action alternative because it did not require the BLM to discuss the environmental impact if no action was taken, aside from the obvious effect of the proposed action not occurring.154 The district court should have required the BLM to discuss the environmental repercussions beyond the simplistic statement that the proposed action would not occur.155 As in *Greater Yellowstone Coalition*, where no action would have led to greater land development, the no action alternative in *Hammond* should have considered the effects that would arise collaterally if the Williams project were not approved.156

VI. IMPACT

By dismissing Hammond’s claim that the BLM’s no action alternative was not sufficiently developed, the *Hammond* court broke from case precedent and relaxed the requirements for discussion of no action alternatives within an EIS.157 The decisions and reasoning in the above-cited cases, along with CEQ and NEPA requirements, require no action alternatives to be sufficiently exposited to allow meaningful comparison between the proposal, the alterna-


152. See id. (noting inadequacy of BLM’s no action alternative in *Hammond*).

153. See id. (discussing BLM’s no action alternative and economic consequences of no action).

154. See id. (discussing why illustration of negative effects of project necessarily shows what no action alternative would prevent).

155. See Cmty. Against Runway Expansion, 355 F.3d 678 (D.C. Cir. 2004) (describing environmental and economic impact of no action); see also *Lee v. United States Air Force*, 354 F.3d 1229 (10th Cir. 2004) (discussing economic, political and environmental impact of no action); see also *Westlands Water Dist. v. United States Dep’t of the Interior*, 376 F.3d 853 (9th Cir. 2004) (finding no action alternative sufficient where it allowed informed decision-making).

156. See generally *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257 (10th Cir. 2004) (discussing environmental impact of future projects on land because of denial of current project).

157. For a discussion of the *Hammond* court’s failure to follow precedent, see *supra* notes 151-54 and accompanying text.
tives and the no action alternative.\textsuperscript{158} Although the \textit{Hammond} court decided the case on different grounds, the court’s treatment of the no action alternative requirement will provide a basis for future courts to evaluate no action alternatives.\textsuperscript{159}

The \textit{Hammond} court weakened environmental policy by allowing a relaxed interpretation of the requirements for the no action alternative.\textsuperscript{160} If no action alternative standards are not strictly enforced, agencies issuing an EIS may not fully consider whether a proposed action is detrimental to the environment.\textsuperscript{161} Additionally, if no action alternatives are not adequately expounded, agencies may not fully consider whether taking no action would actually adversely affect the environment more than accepting a project proposal.\textsuperscript{162}

The no action alternative requirement is equally as important as every other facet of an EIS because it provides a basis for the relevant agency and reviewing courts to determine if a proposed action is beneficial now and in the future.\textsuperscript{163} The \textit{Hammond} court effectively lowered the level of analysis required for examining no action alternatives, and if this becomes a trend, EISs will fail to serve their purpose of providing the reader with a comprehensive basis for comparing the effects of a proposed project with \textit{all} reasonable alternatives.\textsuperscript{164}

\textit{James McTigue}

\begin{itemize}
\item \textsuperscript{158} See \textit{Hammond}, 370 F. Supp. 2d at 242 (discussing purpose of no action alternative).
\item \textsuperscript{159} For a discussion of the other counts alleged in \textit{Hammond} and their resolutions, see \textit{supra} note 20.
\item \textsuperscript{160} For a discussion of the effects of lowering standards of no action alternatives, see \textit{supra} notes 151-54 and accompanying text.
\item \textsuperscript{161} See 40 C.F.R. pt. 1502.14 (discussing purpose of no action alternative and other alternatives).
\item \textsuperscript{162} See \textit{id.} (noting EIS requirements).
\item \textsuperscript{163} See \textit{Hammond}, 370 F. Supp. 2d at 242 (discussing value of no action alternative for comparing proposals).
\item \textsuperscript{164} See 40 C.F.R. pt. 1502.1 (detailing purpose of EIS).
\end{itemize}