Shared Sovereignty: The Role of Expert Agencies in Environmental Law

Michael Blumm  
Andrea Lang
Shared Sovereignty: The Role of Expert Agencies in Environmental Law

Environmental law usually features statutory interpretation or administrative interpretation by a single agency. Less frequent is a close look at the mechanics of implementing environmental policy across agency lines. In this article, we offer such a look: a comparative analysis of five statutes and their approaches to sharing decision-making authority among more than one federal agency. We call this pluralistic approach to administrative decisionmaking “shared sovereignty.”

In this analysis, we compare implementation of the National Environmental Policy, the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act, and the Federal Power Act. All of these statutes incorporate the “shared sovereignty” paradigm, although they vary in their interpretation. The first two statutes allow commenting and consulting agencies (we call both “expert” agencies) some authority, often significant, over the decisions of so-called “action agencies.” More decisive authority for expert agencies occur under the Endangered Species Act. And the latter two statutes give expert agencies conclusive decision-making authority.

We think that drafters of future environmental legislation may profit from this comparative analysis of pluralistic agency decisionmaking, and we claim that the environment has benefited from the last several decades of implementing the shared sovereignty paradigm. Our view is that shared sovereignty is—and has been—an integral part of modern environmental law and should continue to be a foundation element in its future.

Table of Contents

I. Introduction .............................................................................................................................................. 2

II. The Role of Expert Comment Agencies Under NEPA ................................................................. 5
   A. Judicial Review of EAs.................................................................................................................. 8
   B. Judicial Review of EIS Adequacy .............................................................................................. 10
   C. Project Modifications by Action Agencies ............................................................................. 12

III. NHPA’s Section 106 Consultation ............................................................................................... 14
   A. NHPA Decisionmaking ........................................................................................................ 14
B. Consultation at the Threshold Stage: Identifying Historical Properties...... 16
   1. Tribal Involvement in Identifying Historical Properties.............................. 17
   2. Deciding Eligibility For Listing in the National Register............................. 20
C. Assessing and Resolving Adverse Effects .................................................. 23
   1. Assessing Adverse Effects .............................................................................. 24
   2. Resolving Adverse Effects .............................................................................. 25

IV. ESA’s Federal Consultation Under Section 7.................................................... 27
   A. ESA Consultation Overview ........................................................................ 28
   B. The Effect of Informal Consultation .............................................................. 30
   C. The Effect of Formal Consultation ................................................................ 34
      1. The Effect of a “No Jeopardy” Finding ..................................................... 34
      2. The Effect of a “Jeopardy” Finding ............................................................ 35

V. The Clean Water Act’s Section 404(c) EPA Veto ............................................ 36
   A. The Scope of EPA’s CWA Section 404 Veto Authority ................................. 36
   B. The Effect of EPA’s Veto Power on Corps Decisionmaking .............................. 41

VI. Conditions and Prescriptions Under the Federal Power Act ......................... 42
   A. Federal Land Manager Conditioning Authority Under Section 4(e) .............. 43
   B. Federal Fishery Manager Conditioning Authority Under Section 18 .......... 47
   C. Recommendations to Protect Fish and Wildlife Under Section 10(j) .......... 48
   D. The Effect of the Energy Policy Act of 2005 on Conditioning Authority ...... 50

VII. Conclusion ....................................................................................................... 54

I. Introduction

There is little question that administrative discretion lies at the center of a good deal of environmental law.¹ Less often recognized, however, is environmental law’s reliance on what we call “shared sovereignty;” that is, divided decision-making authority among more than one agency. Since regulating activities affecting the environment is obviously a complex endeavor—involving difficult scientific questions and cost estimates²—Congress has with some frequency chosen to divide decisionmaking among agencies concerning important environmental resources, with emphasis on historic

preservation, endangered species, wetlands preservation, and fish and wildlife and federal lands protection affected by non-federal hydroelectric projects.

In this article, we look at the implementation of the shared sovereignty policy in the context the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), the Clean Water Act, and the Federal Power Act. Our analysis proceeds from schemes like NEPA and NHPA—which authorize “comment agencies” to perform only an apparently advisory role—to “consulting agencies” in the ESA—whose opinions Justice Scalia has declared to be “virtually determinative”—to the conclusive decision-making authority accorded to “expert agencies” under the CWA and FPA.

We maintain that these examples of shared sovereignty in environmental law—which we believe foster the purposes of all five statutes we studied—make a case for Congress to continue the shared sovereignty paradigm, and for courts to continue to interpret this paradigm as a conscious and sustained congressional effort to curb action agency discretion to proceed with projects in the face of opposition from other federal agencies with statutory decision-making roles. The shared decision-making paradigm thus stands in contrast to the judicial deference accorded agencies under the *Chevron* doctrine, which demands that courts defer to the reasonable interpretations of agencies of

---

3 Although the Clean Air Act has several provisions in its prevention of significant deterioration program that, at least on their face, seem to require some inter-agency decisionmaking between federal agencies or between federal land managers and states, none of these provisions produce the same kind of complex decisionmaking which we describe as shared sovereignty. For more information on these provisions, see John-Mark Stensvaaag, *Preventing Significant Deterioration Under the Clean Air Act: Area Classification, Initial Allocation, and Redesignation*, 41 Envlt. L. Rep. News & Analysis 10008, 10016 (2011) (discussing the PSD program, which allows federal agencies some role in designating and re-designating clean-air areas, but most of the decisions are left to non-federal actors). For example, the opinion of federal land managers in recommending redesignation to class I areas (the most protective clean-air classification) is only advisory. *Kerr-McGee Chem. Corp. v. U.S. Dep't of Interior*, 709 F.2d 597, 601 (9th Cir. 1983) (Kerr-McGee had no standing to challenge a federal redesignation recommendation because the purely advisory opinion of the federal land manager did not result in any injury.).

statutory ambiguity. This paradigm reflects a policy of shared—not exclusive—
decision-making authority, which courts should recognize by continuing to uphold a 
st substantial role for “comment,” “consulting,” and “expert” agencies—to which we often 
collectively refer as expert agencies in this article.

We think that a signature—if overlooked—contribution of environmental law to 
administrative law is its pathbreaking reliance on shared sovereignty as a major decision-
making paradigm. In this article, we explain some of the details of this reliance, which 
we submit is a central feature of modern environmental decisionmaking.

Section I of this article examines the role of comment agencies in influencing 
decisions subject to NEPA procedures, potentially including nearly all federal proposals. 
Comment agency positions have had a discernable influence on judicial interpretations of 
age agency efforts to comply with NEPA, often found inadequate when agency comments are 
critical of the proposal. Section II turns to decisionmaking under the NHPA, which 
involves quite different procedures but which seems to accord more weight to comment 
agencies than does NEPA, since it depends less on judicial interpretation. Section III 
looks to the ESA and its consulting agencies, federal fish and wildlife agencies, whose 
biological opinions are “virtually determinative” of statutory compliance, according to 
Justice Scalia. Consequently, the ESA gives more decision-making authority to its 
consulting agencies than NEPA or NHPA gives to its comment agencies. Sections IV 
and V examine the operation of section 404(c) of the Clean Water Act and sections 4(e)

an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the 
age agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the 
challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect 
legitimate policy choices made by those who do.”) See also generally, E. Donald Elliott, *Chevron Matters: 
How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 

6 See *supra* note 4.
and 18 of the Federal Power Act, two provisions that provide expert agencies determinative decision-making authority, more authority than in the first three provisions. We conclude by suggesting that the shared sovereignty model of environmental law is an appropriate model for administrative law, going forward, as the world increasingly demands multi-faceted ecological, scientific, and economic expertise to make justifiable agency decisions that are in the long-run public interest.

II. The Role of Expert Comment Agencies Under NEPA

NEPA requires agencies proposing “major Federal actions significantly affecting the quality of the human environment” to issue an environmental impact statement (EIS).\(^7\) This seemingly straightforward requirement in fact requires two steps: (1) deciding whether a proposed action will produce any significant environmental effects, and (2) preparing an EIS that sufficiently analyzes and publicly discloses those effects.\(^8\)

In addition, consistent with NEPA’s purpose to foster informed agency decisionmaking,\(^9\) the statute’s implementing regulations call for federal, state, local, and tribal experts to have an opportunity comment at both stages of the process.\(^10\)

Because an EIS is required only for actions that have significant environmental impacts, a threshold question is whether a proposed project’s effects will be significant.\(^11\)

\(^7\) 42 U.S.C. § 4332(2)(C). See also 40 C.F.R. §1508.11 (“Environmental impact statement means a detailed written statement.”).

\(^8\) 42 U.S.C. § 4332(2)(C).

\(^9\) 40 C.F.R. § 1500.1(c).

\(^10\) See 40 C.F.R. § 1501.4 (requiring the action agency to involve “environmental agencies, applicants, and the public, to the extent practicable, in [deciding whether a proposed action will produce any significant environmental effects].”); 40 C.F.R. § 1503.1(a)(1) (requiring the action agency to obtain comments from federal agencies with “special expertise.”); 40 C.F.R. § 1503.1(a)(2) (requiring the action agency to request comments from tribes, states, and local agencies.).

\(^11\) 40 C.F.R. § 1508.27 (agencies must consider both the “context” and “intensity” of an action to determine its significance).
If a proposal does not “normally require an [EIS]” and is not categorically excluded, an agency will usually prepare a shorter Environmental Assessment (EA) to ascertain its potential significance. In an EA, the action agency must analyze and explain the potential environmental impacts of its proposal and either make a “finding of no significant impact” (FONSI) or decide to prepare an EIS.

If the agency finds significant environmental effects, it must prepare an EIS. An EIS is a “detailed written statement” that addresses, among other things, the environmental effects of the proposed action, whether any of these effects can be avoided, and reasonable alternatives to the proposal. Before preparing an EIS, the action agency first conducts a process, called “scoping,” to solicit public comment and identify the potential environmental impacts related to the proposal. Then, the agency writes “in plain language” a draft EIS for agency and public comment. Finally, the action agency prepares a final EIS that addresses all comments made on the draft.

NEPA requires action agencies to consult with expert federal agencies and accept comments from federal, state, and local agencies. The Council on Environmental Quality’s (CEQ) regulations clarify that this requirement provides a role for expert agencies at both the threshold EA stage and the EIS stage of the NEPA process. First, at

---

12 Through notice and comment rulemaking, agencies can promulgate regulations establishing so-called “categorical exclusions” for proposals that never, individually or cumulatively, significantly impact the environment, and therefore require neither an EA nor an EIS. 40 C.F.R. § 1508.4.
13 40 C.F.R. § 1501.4(a-b)
14 Id. § 1508.9
15 Id. § 1508.11
17 40 C.F.R. § 1501.7.
18 Id. § 1502.8.
19 Id. § 1502.9(a)
20 Id. § 1502.9(b).
22 Congress created the CEQ as an executive agency to oversee the implementation of NEPA. 42 U.S.C. § 4342. Its regulations implementing NEPA are found at 40 C.F.R. Parts 1501-1508.
the threshold stage, “[t]he [action] agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments.”

The NEPA regulations require the action agency to list in its EA the “agencies and persons consulted.” Second, at the EIS stage, the regulations encourage early involvement of expert agencies to comment on draft EISs, imposing duties on both the action agency and on federal expert agencies. The action agency must “[o]btain” expert comments, and the expert agencies have a duty to provide them. In addition, action agencies must “request” the comments of relevant state, local, and tribal interests.

Although expert agencies have no direct control over the decisions of NEPA action agencies, their role in the process can indirectly affect the substance of the decision. As one of us suggested in a 1990 article and again in a follow-up 2012 article, expert agency disagreement with an action agency decision makes a reviewing court more likely to find a NEPA violation. Moreover, expert agency comments can lead to an action agency altering or abandoning proposed projects. This Part explores three ways expert agencies can affect NEPA decisionmaking by: (1) influencing judicial

23 40 C.F.R. § 1501.4.
24 Id. § 1508.9(b).
25 Id. § 1502.9(a) (requiring action agencies to produce a draft EIS and to “work with the cooperating agencies and…obtain comments as required in part 1503.”); See also Id. § 1501.1 (“Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.”).
26 Id. § 1503.1(a)(1) (The action agency must “[o]btain the comments of any Federal agency which …special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.”)
27 Id. § 1503.2 (“Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority.”) (emphasis added).
28 Id. § 1503.1(a)(2) (The action agency must request comments from, inter alia, “[a]ppropriate State and local agencies which are authorized to develop and enforce environmental standards…Indian tribes, when the effects may be on a reservation,…and [a]ny agency which has requested that it receive statements on actions of the kind proposed.”)
review of action agency decisions not to prepare an EIS, (2) influencing judicial review on the adequacy of EISs, and (3) prompting action agencies to modify or abandon proposed actions.

A. Judicial Review of EAs

Most of the time, action agencies do not prepare an EIS, so the ability of expert agencies to affect the threshold question of whether a proposal may result in any “significant impacts” is quite important. At the threshold EA stage, expert agencies can play a role in the decision to prepare an EIS by making action agency EAs more vulnerable to judicial challenges.

For example, in *Ocean Advocates v. U.S. Army Corps of Engineers*, the Ninth Circuit overturned a Corps decision not to prepare an EIS in part because the Corps failed to adequately consider Fish and Wildlife Service (FWS) comments. BP sought a permit from the Corps to extend its dock at Cherry Point in Puget Sound in order to increase its ability to ship crude oil. The FWS was concerned that the dock would result in increased tanker traffic and a corresponding increased risk of a major oil spill and submitted comments requesting that the Corps prepare an EIS addressing these effects. The Corps issued the permit anyway on the basis of an EA/FONSI, deciding that the permit did not warrant preparation of an EIS. The environmental group, Ocean Advocates, challenged the Corps decision not to prepare an EIS, and the federal district

---

31 The ratio of EAs to EISs is somewhere around 100:1. Wendy B. Davis, *The Fox Is Guarding the Henhouse: Enhancing the Role of the EPA in FONSI Determinations Pursuant to NEPA*, 39 Akron L. Rev. 35, 41 (2006). Of course, this number does not include the projects that qualify for a categorical exclusion or otherwise do not require an EA.

32 *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 865-866 (9th Cir. 2005).

33 Because its project would affect navigable waters, BP needed a permit from the Corps under section 10 of the Rivers and Harbors Act. 33 U.S.C. § 403; *Ocean Advocates*, 402 F.3d at 855.

34 *Id.* at 855-856

35 *Id.* at 856.
court upheld the Corps decision. But the Ninth Circuit reversed because the Corps did not properly consider the FWS’s concern that the proposal would increase tanker traffic and the risk of oil spills, but rather simply echoed BP’s position. The Ninth Circuit concluded that the Corps’ decision not to conduct an EIS was arbitrary. Ocean Advocates illustrates how expert agency comments can lead courts to find NEPA violations.

The volume of adverse expert agency comments may also play a role in judicial review at the EA stage. For example, in Friends of Back Bay v. U.S. Army Corps of Engineers, the Second Circuit ruled that the Corps had to prepare an EIS on permits to build a mooring facility and boat ramp near Back Bay National Wildlife Refuge in Virginia, in part because of the number of public comments opposed to the project. Before issuing the permits, the Corps prepared an EA that concluded the project would produce no significant environmental impact. During public comment on the permit application, the Corps received “over 350 responses, the overwhelming majority of which were in opposition to the project.” The federal District Court for the District of

---

36 Id. at 858.
37 The concern about the risk of oil spills was also echoed by the Lummi Indian Nation and the Nooksack Indian Tribe. Id. at 855. However, in analyzing the decision not to prepare an EIS, the court focused exclusively on the Corps’ failure to consider the FWS comments. Id. at 865-866.
38 BP argued that the increased berthing capacity at the dock would actually decrease the possibility of oil spills by reducing the amount of time tankers spend waiting to dock. Id. at 857.
39 Id. at 871.
40 See also Davis v. Mineta, 302 F.3d 1104, 1123 (10th Cir. 2002) (deciding that a Federal Highway Administration EA was inadequate because it failed to address concerns of the EPA about the effects of a highway construction project); Sierra Club v. Van Antwerp, 661 F.3d 1147, 1157 (D.C. Cir. 2011), as amended (Jan. 30, 2012) (deciding that a Corps EA/FONSI for a mall development project was inadequate because it did not properly address a FWS scientist’s concern about habitat fragmentation).
41 Since the project would involve dredging and filling in navigable waters, the developer sought permits under both section 404 of the Clean Water Act, 33 U.S.C. § 1344, and section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403. Because many projects require both types of permits, the Corps allows the same application to serve for both, and tends to issue them both simultaneously. See 33 C.F.R. Part 325.
43 Id. at 587.
44 Id. at 583.
Columbia decided that the decision not to prepare an EIS was within the Corps’ broad discretion,\textsuperscript{45} but the Second Circuit vacated that decision.\textsuperscript{46} The court seemed particularly concerned that “four respected governmental agencies,” including the FWS, the EPA, and the Virginia Department of Game and inland Fisheries,\textsuperscript{47} opposed going forward with the project as proposed.\textsuperscript{48} The Second Circuit therefore ordered the Corps to prepare an EIS.\textsuperscript{49}

These cases illustrate the effect that expert agencies can have at the threshold EA stage. Previous articles contain numerous other examples of the effect of expert agency comment on judicial review.\textsuperscript{50} Thus, although expert agencies do not make the decision as to whether NEPA requires an EIS on a particular proposal, their comments make it more likely that a reviewing court will conclude that an action agency decision not to prepare an EIS was arbitrary.

B. Judicial Review of EIS Adequacy

Expert agencies, states, and tribes can also play a role when courts review the adequacy of EISs. Expert federal agencies play an especially significant role at the EIS stage, because action agencies have an affirmative duty to seek out expert comments,\textsuperscript{51} and expert agencies have an obligation to provide them.\textsuperscript{52} Although the statute does not

\textsuperscript{45} Id. at 586.
\textsuperscript{46} Id. at 589.
\textsuperscript{47} The mayor of Virginia Beach also commented on the proposal. Id. at 583-584.
\textsuperscript{48} Id. at 590.
\textsuperscript{49} Id.
\textsuperscript{50} See supra notes 29-30.
\textsuperscript{51} See 42 U.S.C. § 4332(2)(C) (“Prior to any detailed statement, the responsible Federal agency shall consult with and obtain the comments of any Federal agency which has…special expertise with respect to any environmental impact involved.”); See also 40 C.F.R. § 1503.1(a)(1) (The action agency must “[o]btain the comments of any Federal agency which …special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.”)
\textsuperscript{52} See 42 U.S.C. § 7609(a) (requiring the EPA to “review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any…major Federal agency action (other than
create a duty to obtain comments from states and tribes, their comments can also affect a court’s decision as to the adequacy of EISs.

The NEPA-imposed duty for action agencies to obtain expert agency comment on draft EISs and to respond to comments in final EISs\(^{53}\) includes an obligation to provide a “meaningful response to serious and considered comments by experts.”\(^{54}\) For example, in *Western Watersheds v. Kraayenbrink*, the Bureau of Land Management (BLM) proposed regulations that would have reduced environmental protection and public comment on federal grazing permits.\(^{55}\) Both the FWS and EPA raised concerns\(^{56}\) about the proposed regulations in their comments.\(^{57}\) When BLM failed to “conduct a studied review and response to concerns about the environmental implications” of its actions in its final EIS, the district court determined that the EIS violated NEPA. The Ninth Circuit affirmed, enjoining enforcement of the new regulations.\(^{58}\)

Comments by states and tribes also may affect a reviewing court’s determination as to the adequacy of EISs. In *Western Watersheds*, for example, both the district court and the Ninth Circuit court found the EIS inadequate not only based on the failure of the action agency to address the concerns of FWS, but also those of the New Mexico

---

\(^{53}\) 40 C.F.R. § 1502.9(b) (the action agency “shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised.”).

\(^{54}\) *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492-93 (9th Cir. 2011).

\(^{55}\) *Id.* at 476.

\(^{56}\) In fact, BLM’s own experts raised the same concerns about the grazing permits. *Id.* at 487.

\(^{57}\) FWS was concerned that “the proposed reduction in public oversight may constrain biologists and range conservationists from recommending and implementing management changes and that ‘[FWS] believe[s] these aspects of the proposed revisions have the potential to be detrimental to fish and wildlife resources.’ *Id.* at 488. State agencies raised similar concerns about the proposed regulations, *Id.*

\(^{58}\) *Id.* at 492 (“When an agency, such as the BLM, submits proposed regulatory changes for public comment and then offers no meaningful response to serious and considered comments by experts, that agency renders the procedural requirement meaningless and the EIS an exercise in ‘form over substance.’”).
Department of Game and Fish, California Department of Fish and Game, Arizona Department of Game and Fish, and other state agencies. \(^{59}\) The Fourth Circuit has also relied on state comments to affirm a district court decision on the adequacy of the Navy’s EIS for a proposed landing field for its aircraft. \(^{60}\) In *Audubon Society v. Dep’t of Navy*, the state wildlife agency’s comments on the EIS expressed concern about accidental bird strikes. \(^{61}\) The district court decided, and the Fourth Circuit affirmed, that the Navy failed to adequately address the state’s concerns in its EIS. \(^{62}\)

Tribal comment played a similar role in *Northern Cheyenne Tribe v. Norton*. \(^{63}\) In that case, BLM prepared an EIS to analyze the effects of developing coal bed methane beds in the Powder River Basin in Montana and Wyoming. \(^{64}\) The Northern Cheyenne Tribe, among others, commented that BLM should consider an alternative that would phase the development of the resources. \(^{65}\) The Ninth Circuit affirmed the district court’s determination that BLM’s failure to consider the tribe’s proposed alternative made the EIS inadequate. \(^{66}\)

### C. Project Modifications by Action Agencies

A largely untold story of NEPA implementation concerns the fact that action agencies often alter or abandon projects as a result of the process itself, before litigation even arises. In an early NEPA case, Justice Marshall noted that the final EIS itself, and any ensuing litigation, is only the “tip of the iceberg, the visible evidence of an

---

\(^{59}\) *Id.* at 492 (“the BLM never seriously considered the concerns raised by… the California Department of Fish and Game, among others, that the 2006 Regulations weaken the ability of the BLM to manage rangelands in a timely fashion”).

\(^{60}\) *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 181 (4th Cir. 2005).

\(^{61}\) *Id.* at 190.

\(^{62}\) *Id.* at 191.

\(^{63}\) 503 F.3d 836 (9th Cir. 2007).

\(^{64}\) *Id.* at 840.

\(^{65}\) *Id.*

\(^{66}\) *Id.* at 844.
underlying planning and decision-making process that is usually unnoticed by the public. Justice Marshall was quoting from a CEQ annual report issued just five years after NEPA’s passage which explained that, quite apart from NEPA litigation, the NEPA process resulted in “scores” of project changes and abandonments in that year alone.  

The CEQ report did not address whether expert agency comments had any hand in the ultimate decision to modify or abandon projects, but it illustrated the potential for such comments to alter action agency decisions outside the context of litigation. This is especially true given the weight reviewing courts give to expert agency comments; Because expert agency concerns about projects make action agency EAs and EISs more vulnerable in court, those comments may encourage agencies to change their projects to address those concerns.

Case law suggests how action agencies may modify their proposals to address expert agency concerns before litigation even arises. For example, in Greater Yellowstone v. Flowers, EPA raised concerns about the environmental effects of building weirs on the Snake River as part of a plan to convert ranch land into a 18-hole golf course and residential area. Although the Tenth Circuit affirmed a district court decision that an EIS was not required, it did so because the Corps had responded to EPA’s comments by adopting monitoring requirements and promising to modify or remove the weirs in the event of unacceptable environmental impacts.  

---

68 Council on Environmental Quality, Sixth Annual Report, 628-632 (1975). (citing projects proposed by the Department of Interior, the former Atomic Energy Commission and its successors, the Corps, the Department of Transportation, and the Department of Housing and Urban Development.)
69 359 F.3d 1257, 1275 (10th Cir. 2004).
70 Id.
case in which expert agency comments resulted in the alteration of an action agency project.

Although arguably the most “procedural” of the statutes we discuss in this article, NEPA is far from being a “paper tiger.”\(^{71}\) In particular, expert federal agencies play a significant role in judicial review at both the EA and the EIS stage, and their comments can prompt an action agency to alter its proposal even absent a court challenge. Reviewing courts can rely on adverse comments made by commenting state agencies and tribes in finding EAs or EISs inadequate. In this way, expert agencies affect substance under NEPA by playing a prominent role in the process prescribed by Congress.

III. NHPA’s Section 106 Consultation

The National Historic Preservation Act (NHPA) requires federal action agencies to consider the effects of proposed projects on “any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”\(^{72}\) This Part explains the decision-making structure established by the NHPA and its regulations and explains the role of expert agencies in NHPA decisionmaking. We also explain how much authority NHPA gives expert agencies at each step in the decision-making process.

A. NHPA Decisionmaking

Congress passed the National Historic Preservation Act (NHPA) in 1966, with the goal of preserving property\(^{73}\) of historical and cultural significance, recognizing that this heritage was irreplaceable, and that urban growth threatened to destroy much of it.\(^{74}\) The

\(^{71}\)See Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (stating that Congress did not intend NEPA to be “a paper tiger.”).

\(^{72}\) 16 U.S.C. § 470f. The National Register is a list of “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture. 36 C.F.R. § 60.1.

\(^{73}\) Including any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” 16 U.S.C. § 470f.

\(^{74}\) 16 U.S.C. § 470b.
primary mechanism Congress designed to provide this preservation was section 106 of the statute, which (1) requires agencies to consider effects of federal agency “undertakings” on historic properties, and (2) creates an independent federal agency, the Advisory Council on Historic Preservation (the Council), to implement section 106 and to comments on proposed action agency undertakings.76

Like NEPA, there are threshold requirements that trigger NHPA section 106 requirements. First, the federal action agency must decide if the proposed project is a federal "undertaking," which includes actions carried out by federal agencies such as federal funding, or federal permitting.77 Second, the action agency must decide whether any "district, site, building, structure, or object" included in or eligible for inclusion in the National Register is present,78 and whether the project has the “potential to affect” the property.80 Although the statute and its regulations do not require any consultation or comment from states, tribes, or the Council on the “undertaking” or “potential to affect” questions, the regulations do require consultation with states and/or tribes to determine whether there are any historical properties within the scope of the project.83

75 An undertaking is “[a] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y).
77 36 C.F.R. 800.3(a).
78 We refer to “districts, sites, buildings, structures, and objects” as “property” throughout this Part.
79 36 C.F.R. § 800.4.
80 Id.
81 Id. § 800.3(a) (“The [action] agency… shall determine whether the proposed Federal action is an undertaking”);
82 Id. § 800.3(a) (“The [action] agency…shall determine whether the proposed federal action is…a type of activity that has the potential to cause effects on historic properties.”)
83 Id. § 800.4(a)(3) (requiring the action agency to “[s]eek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking’s potential effects on historic properties.
If the answer to the threshold questions is yes, the action agency must engage in section 106 review, including an analysis of effects and an opportunity for the Council to comment.\textsuperscript{84} NHPA imposes no requirement similar to NEPA’s “detailed statement,” so there is no written documentation equivalent to an EA or EIS. Instead, the analysis of potential effects takes place as a dialogue between the action agency and consulted states, tribes, and – if it decides to get involved – the Council.\textsuperscript{85} Thus, NHPA requires action agencies to consult with various parties both at the threshold stage – to determine whether its action triggers section 106 – as well as in analyzing the potential effects of its proposal on historic properties.

B. Consultation at the Threshold Stage: Identifying Historical Properties

Assuming a federal undertaking is the type of project with the potential to affect property, whether there actually is historical property in the area of a project was initially an easy question to answer because the original section 106 applied only to properties actually listed in the National Register. However, in 1976, Congress made this threshold question more complicated by expanding section 106 requirements to “properties eligible for inclusion in the National Register.”\textsuperscript{86} NHPA regulations clarify how an agency must determine whether a potentially affected historic property exists.\textsuperscript{87} The action agency

\textsuperscript{84} 16 U.S.C. § 470f (requiring the action agency to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register” and to provide the Council a “reasonable opportunity to comment.”)

\textsuperscript{85} Pers. Comm. with Amy Cole, Senior Program Officer and Regional Attorney at The National Trust for Historic Preservation, Denver Field Office (Nov. 5, 2014).

\textsuperscript{86} 16 U.S.C. § 470f.

\textsuperscript{87} First, the federal action agency, in consultation with the state and and/or tribal historic preservation officer (SHPO/THPO), must identify the area of potential effects by gathering information from “consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area.” 36 C.F.R. § 800.4(a). Next, the action agency and consulting parties must “take the steps necessary to identify historic properties within the area of potential effects.” Id. at § 800.4(b). Once the agency has identified potentially significant properties, it must then, along with any consulting parties, apply the National Register criteria to decide if the property is eligible for listing. Id. at § 800.4(c)(1). The criteria regard properties as historic if they: (1) are associated with historically significant
must consult with state and/or tribal historic preservation officers (SHPOs/THPOs) as well as tribes that “attach religious and cultural significance to properties,” to decide whether there are any eligible properties within the scope of the project.

Like NEPA, NHPA contemplates that consultation with states and tribes should “commence early in the planning process.” Thus, NHPA also requires consultation even at the threshold stage. Although courts typically defer to the action agency concerning the determination of the “area of potential effects,” consultation plays a much more significant role in determining whether there are properties with historical significance within that area.

1. Tribal Involvement in Identifying Historical Properties

In 1992, Congress amended NHPA to include a provision requiring consultation with tribes to identify historic properties. NHPA’s regulations therefore require action agencies to make a “reasonable and good faith effort” to “identify historic properties events, or (2) historically significant people, or (3) embody a distinctive architecture or historic style, or (4) have or may yield important historical information. The criteria also provide some potential categories of historic properties, including those associated with famous events or people, embody “distinctive characteristics of a type, period, or method of construction, represent the work of a master, or possess high artistic values,” as well as properties having important information about history. 36 C.F.R. § 60.4

88 36 C.F.R. § 800.2(c)(2)(ii)(A). Compare 49 C.F.R. 1501.6(a)(1) (“The lead agency shall…[r]equest the participation of each cooperating agency in the NEPA process at the earliest possible time.)

89 See Valley Cmty. Pres. Comm’n v. Mineta, 373 F.3d 1078, 1090-91 (10th Cir. 2004) (Federal Highway Administration’s determination of the area of potential effects around a highway expansion required a high degree of expertise, and was therefore entitled to substantial judicial deference); See also Safeguarding the Historic Hanscom Area’s Irreplaceable Res., Inc. v. F.A.A., 651 F.3d 202, 215 (1st Cir. 2011) (Federal Aviation Administration’s assessment of the area of potential effects from the construction of an aircraft service center was not arbitrary and capricious since the FAA considered and supported its findings by an investigation).

within the area of potential effects” in consultation with tribes. Although states can and do also play a role in identifying historic properties, NHPA regulations treat tribes as possessing “special expertise,” and courts have ruled that action agencies must give “special consideration” to tribal consultation in identifying historic properties. Notwithstanding this special role tribes have in consultation at the identification stage, the action agency must only “make reasonable and good faith efforts” to consult.

For example, in *Pueblo of Sandia v. United States*, the Forest Service proposed a new management plan for Las Huertas Canyon in New Mexico. The plan area contained pueblo shrines and ceremonial paths, which the tribe uses to gather evergreen boughs for cultural ceremonies. The Forest Service mailed form letters and held meetings to request specific information from the pueblo about historically significant property in the project area, but the tribe would not provide any public information because of the “secrecy which is crucial to Pueblo religious and cultural practices,” although it did confidentially inform the Forest Service that a potentially eligible property existed. Although the district court ruled that the Forest Service had made a “reasonable and good faith effort” to identify historic property, the Tenth Circuit reversed. Because the tribe notified the Forest Service of the existence of a potentially eligible property, and the Forest Service failed to investigate, the Tenth Circuit decided that the agency had not

---

91 36 C.F.R. § 800.4(a-b).
92 See *Id.* § 800.2(c)(1) (“The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”); *See also Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Cal. 2010) (“Indian tribes are entitled to special consideration in the course of an agency’s fulfillment of its consultation obligations.”).
93 36 C.F.R. § 800.4(b)(1).
94 *Id.* at 857-58.
95 *Id.* at 860.
96 *Id.* at 861.
97 *Id.* at 860.
98 *Id.* at 857.
made a reasonable good faith effort and remanded to the Forest Service to comply with NHPA. 99 Moreover, because the Forest Service failed to provide the information from the pueblo to the SHPO, the court also decided that the action agency had failed in its duty to consult with the state.100

On the other hand, some courts have been more hesitant to conclude that an action agency failed to exercise a reasonable good faith effort to consult with tribes in identifying historic properties. For example, in Muckleshoot Indian Tribe v. U.S. Forest Service, the Ninth Circuit reversed a district court decision and ruled that the Forest Service adequately consulted with the Muckleshoot Tribe to identify historic property101 affected by a proposed land exchange in Mt. Baker–Snoqualmie National Forest in Washington State with Weyerhaeuser Company and Burlington Northern Railroad Company.102 In an effort to identify properties of historical or cultural significance that would be affected by the exchange, the Forest Service conducted its own investigation, and also requested information from tribes in the area.103 Because the Muckleshoot Tribe claimed that the Forest Service ignored its assertions that there were other culturally significant properties in the area, the district court decided that the Forest Service had not exercised reasonable good faith effort to consult.104 However, the Ninth Circuit reversed, noting that “[t]he Tribe was unable, or unwilling, to provide information sufficient to persuade the Agency that it should reconsider its decisions,” and that the tribe had missed

99 Id. See also Quechan Tribe, 755 F. Supp. 2d at 1119 (Bureau of Land Management did not adequately consult under NHPA because its “invitation to ‘consult,’… amounted to little more than a general request for the Tribe to gather its own information about all sites within the area and disclose it at public meetings.”).
100 Id. at 862.
101 Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 807 (9th Cir. 1999).
102 Id. at 803.
103 Id. at 806.
104 Id. at 804.
opportunities to reveal more information to the Forest Service. Accordingly, the court decided that “[a]lthough the Forest Service could have been more sensitive to the needs of the Tribe,” it had made a reasonable and good faith effort to identify historic properties. The court distinguished the Pueblo of Sandia decision on the grounds that the Forest Services’ efforts were not “as egregious” as in Sandia because the Forest Service “continued to seek the requested information over time” and conducted its own independent investigation, which represented a reasonable and good faith effort to identify properties.

Consequently, although the NHPA regulations indicate that tribes possess special expertise in identifying sites of historical and cultural significance, the case law suggests that tribes’ ability to influence the identification of historic property is sometimes hampered by their unwillingness to disclose information about such sites, or their failure to comment in time. As acknowledged by the Pueblo of Sandia court, tribes may be “reticen[t] to disclose details of their cultural and religious practices,” and this desire to safeguard sites of religious and cultural significance may undermine their role in NHPA consultation.

2. Deciding Eligibility For Listing in the National Register

105 Id. at 806-807.
106 Id. at 807.
107 Id. See also Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 167 (1st Cir. 2003) (Because the Narrangensett Tribe failed to submit information on property of historic or cultural significant until after the required 30 day review period, the Warwick Sewer Authority made “reasonable and good faith efforts” to identify historic properties when it provided the tribe with information, engaged it about the project and solicited its comments.).
108 Pueblo of Sandia, 50 F.3d at 861. See also Parker & King, Supra note 90, at 8 (“It is important to understand the role that the information being solicited may play in the culture of those from whom it is being solicited, and the kinds of rules that may surround its transmittal. In some societies traditional information is regarded as powerful, even dangerous. It is often believed that such information should be transmitted only under particular circumstances or to particular kinds of people. In some cases information is regarded as a valued commodity for which payment is in order, in other cases offering payment may be offensive. Sometimes information may be regarded as a gift, whose acceptance obligates the receiver to reciprocate in some way, in some cases by carrying out the activity to which the information pertains.”).
Once a state or tribe properly identifies a potentially significant property, NHPA regulations establish another form of consultation involving the federal Keeper of the National Register (Keeper). When an action agency and a state or tribe are unable to agree as to whether an identified property meets the National Register criteria, or if the Council requests it, the Keeper makes a determination concerning its eligibility for listing. The Keeper’s role in determining eligibility for listing is more than that of an expert agency, because the Keeper applies the eligibility criteria absent any NHPA consultation. Thus, the Keeper represents an independent authority whose opinions are conclusive as to eligibility.

Assuming it decides to involve itself at this stage of the NHPA process, the role of the Council in determining whether there is a historically significant property within the scope of the project can be crucial, since it can request a conclusive determination from the Keeper. For example, in *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd*, the Surface Transportation Board (STB) permitted a rail carrier to discontinue use of a rail line that Friends argued was a potentially historic property eligible for listing in the National Register. Although the action agency and state initially agreed that the rail line itself was not eligible for listing, the state later changed

109 The Keeper of the National Register a National Park Service official with the authority to officially designate properties as eligible for inclusion in the National Register. 30 CFR §60.3(f)
110 See supra note 87.
111 36 C.F.R. § 800.4(c)(2) (“If the agency official and the [state/tribe] do not agree, or if the Council or the [Keeper] so request, the agency official shall obtain a determination of eligibility from the [Keeper]”).
112 See supra note 67.
113 See Stop H-3 Ass’n v. Coleman, 533 F.2d 434, 441 n. 13 (9th Cir. 1976) (the Keeper’s determination as to the eligibility of property for listing is conclusive); Moody Hill Farms Ltd. Partnership v. United States Department of the Interior, 205 F.3d 554, 558 (2d Cir.1999) (The Keeper has “independent authority” to determine whether a property should be listed as historic.).
its position, leading the Council to request a formal determination by the Keeper.\textsuperscript{115} After issuing an order allowing the discontinuation, the STB argued that because the Keeper’s determination came after a previous agreement that the rail line was ineligible, it did not have to consider the Keeper’s findings.\textsuperscript{116} The Third Circuit disagreed,\textsuperscript{117} deciding that because the Council had brought the Keeper into the process, the action agency could not ignore the Keeper’s independent authority to determine the property’s eligibility for listing.\textsuperscript{118}

Where they disagree with the action agency, the ability of states and tribes or the Council to trigger the involvement of the Keeper gives them leverage in light of the conclusive nature of the Keeper’s findings. Moreover, given that waiting for a formal determination by the Keeper may delay projects, many action agencies are likely to give consulting parties the benefit of the doubt as to whether a property is eligible for listing.\textsuperscript{119} On the other hand, neither the Council nor the states or tribes have any control over the Keeper’s determinations. In addition, formal determinations are apparently not often requested either because consulting parties are not aware of their ability to request them, or because threatening to or actually requesting a formal determination by the Keeper can antagonize other parties, making other parts of section 106 consultation more difficult.\textsuperscript{120} Although rarely requested, the involvement of the Keeper represents a kind of

\begin{flushleft}
\textsuperscript{115} Id. at 256-257.
\textsuperscript{116} Id. at 264.
\textsuperscript{117} See 28 U.S.C. § 2321(a) (granting the court of appeals jurisdiction over “proceeding[s] to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board.”).
\textsuperscript{118} Friends of the Atglen, 252 F.3d at 264.
\textsuperscript{119} Pers. Comm. with Jennifer Richman, Deputy District Council, U.S. Army Corps of Engineers (Oct. 22, 2014). See also Federal Preservation Institute, Patterns in Determinations of National Register Eligibility, 1987-2006, at 1, available at http://www.nps.gov/fpi/Documents/Patterns%20in%20DOE.pdf. (“It may…be that Federal agencies have chosen not to debate National Register eligibility in borderline cases, as formal determinations may delay project execution.”).
\textsuperscript{120} Id.
\end{flushleft}
outside decision-making power that does not exist under NEPA: an agency other than the action agency possesses final decision-making authority, albeit only for the narrow decision of whether an eligible property exists.

C. Assessing and Resolving Adverse Effects

Like NEPA, section 106 of NHPA is a largely procedural statute.\(^{121}\) Just as NEPA requires action agencies to take a “hard look” at the effects of their proposals on the environment,\(^{122}\) NHPA requires federal action agencies to “stop, look, and listen” before proceeding with a project that could affect listed or potential National Register properties.\(^{123}\) Once an action agency has determined that its proposed “undertaking” has the potential to affect an historic property, section 106’s regulations require it consult with SHPOs, THPOs, tribes, and other consulting parties to assess whether the project will result in any adverse effects\(^{124}\) and to “resolve” those effects.\(^{125}\) The “assess adverse effects” step is similar to the EA/FONSI under NEPA, while the “resolve adverse effects” step is similar to the EIS in that the goal is to develop and evaluate alternatives and mitigation measures. However, NHPA and NEPA are quite dissimilar in terms of the process that leads to the decisions, because NHPA requires no formalized document detailing either decision. Consultation at both steps under NHPA instead results in an ongoing dialogue between the action agency and consulted parties, not the formal comments and writings that occur under NEPA.

\(^{121}\) *Friends of the Atlgen*, 252 F.3d. at 263. (NHPA “is a procedural rather than a substantive statute”).


\(^{123}\) *See Narragansett Indian Tribe*, 334 F.3d at 166; *Apache Survival Coal. v. U.S.*, 21 F.3d 895, 906 (9th Cir. 1994).

\(^{124}\) 36 C.F.R. § 800.5(a) (requiring the action agency to “apply the criteria of adverse effect to historic properties within the area of potential effects”).

\(^{125}\) 36 C.F.R. § 800.6(a) (requiring the action agency to “consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”)
1. Assessing Adverse Effects

Adverse effects exist when a project will directly or indirectly alter “any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.”126 Significantly, the regulations stipulate that the action agency “shall consider” the views of “consulting parties”127 and the public in assessing whether the project will result in an adverse effect.128 If the action agency concludes after this consultation that the project will not adversely affect the property, it issues a “finding of no adverse effect.”129 Consulting parties then have the opportunity to either concur with the action agency’s finding,130 resolve disagreements, or request comment from the Council.131 These abilities give consulting agencies under NHPA power that does not exist under NEPA, which requires no concurrence.

Little case law exists on the effect of consulting parties’ concurrence – or lack thereof – on action agency findings of no adverse effects. However, officials from both the Corps and the National Trust for Historic Preservation consider the concurrence power of consulting states and tribes to produce positive results.132 According to one participant, many action agencies consider concurrence from states and tribes as a prerequisite to move forward on a project, and they will actively engage consulting parties to obtain it. Unlike NEPA’s EA/FONSIIs, which can generate extensive written records, NHPA consultation involves “much more talking, and much less writing.”

126 36 C.F.R. § 800.5(a)(1).
127 Consulting parties under NHPA are expert agencies, including the Council, states, and tribes. 36 C.F.R. § 800.2.
128 36 C.F.R. § 800.5.
129 Id. at § 800.5(b).
130 Id. at § 800.5(c)(1).
131 Id. at § 800(c)(2).
132 Richman, supra note 119; Cole, supra note 85.
involving action agencies and consulting parties in an ongoing dialogue to reach agreement on the kinds of adverse effects that a project is likely to have.\textsuperscript{133} This lack of a written record may explain why there is little case law, since there is not much of a record for a court to review. On the other hand, there may be little litigation because consultation under the NHPA may work to reduce conflicts without court intervention.\textsuperscript{134}

Where action agencies and consulting parties disagree about a finding of no adverse effects, the Council may review the action agency’s finding.\textsuperscript{135} A 1999 rule promulgated by the Council gave the Council final decision-making authority as to whether a project would result in an adverse effect on a historic property.\textsuperscript{136} However, the rule was invalidated in 2001 by \textit{National Mining Association v. Slater}.\textsuperscript{137} In that case, the federal district court for D.C. decided that because section 106 of NHPA expressly gives federal action agencies the substantive decision-making authority, the Council exceeded its authority by effectively giving that authority to itself via regulation.\textsuperscript{138} Consequently, current NHPA regulations allow the Council only to issue an advisory opinion to the action agency if it disagrees with the agency’s finding of no adverse effects.\textsuperscript{139} As a result of the \textit{Slater} decision, final decision-making authority on the adverse effects of proposed actions remains with the action agency.\textsuperscript{140}

\section*{2. Resolving Adverse Effects}

\begin{itemize}
\item \textsuperscript{133} Cole, \textit{supra} note 85.
\item \textsuperscript{134} Richman, \textit{supra} note 119.
\item \textsuperscript{135} Id. at § 800.5(b)(ii).
\item \textsuperscript{136} 61 Fed.Reg. 48,580 (1996).
\item \textsuperscript{138} Id. (“Making [a “no adverse effects” determination], however, is the one substantive role that is expressly delegated to the agency in section 106 of the Act. [The Council’s regulations] thereby enable the Council to interfere directly with the agency's responsibility in this respect, and as such, they are impermissible substantive regulations.”).
\item \textsuperscript{139} 36 C.F.R. § 800.5(b)(3)(i).
\item \textsuperscript{140} 36 C.F.R. § 800.5(b)(3)(ii)(B).
\end{itemize}
If the action agency determines that the project will result in adverse effects to an historic property, it must consult with the SHPO/THPO and/or tribe to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate the adverse effects." 141 This duty to evaluate alternatives is similar to that under NEPA, although as in the case of the “assessing adverse effects” stage, the process is quite different and involves much less documentation. 142 If the consulting parties do not concur with the action agency as to how to resolve adverse effects and sign a memorandum of agreement to the effect, consultation terminates and the Council issues a formal comment, which the action agency must take into account before reaching a final decision on the undertaking. 143

As with concurrence on a “no adverse effects” finding, a lack of case law on the effect of consulting parties’ concurrence may reflect NHPA’s efficacy. According to NHPA participants at the Corps and the National Trust for Historic Preservation, few projects receive a formal Council comment, because of the political “black mark” that results from termination. 144 Not only do terminations reflect poorly on action agencies, but action agencies would rather come to some kind of agreement through dialogue with consulting agencies than face the time and expense of seeking and waiting for formal

---

141 36 C.F.R. § 800.6(a); The action agency must also notify the Council of its continuing consultation, 36 C.F.R. § 800.6(a)(1), provide documentation of the consultation process, 36 C.F.R. § 800.6(a)(3), and as notify and provide documentation to the public. 36 C.F.R. § 800.6(a)(4). The Council may join the consultation process if it wishes or if the action agency requests.

142 Under the regulations, the outcome of consultation at this stage is a Memorandum of Agreement (MOA), in which the consulting parties agree to a particular course of action to resolve the adverse effects. 36 C.F.R. § 800.6(b)(1). The only consulting parties which must sign the MOA are the lead agency official, the SHPO/THPO, and (if it has joined the consultation process) the Council. Id. Other consulting parties, called “invited signatories,” do not need to sign the MOA to complete the “resolution of adverse effect” process. Unlike at other stages of the NHPA process, consulting tribes play a lesser role than SHPOs/THPOs, and are not required signatories. 36 C.F.R. § 800.6(c)(2). The MOA “evidences the agency official’s compliance with section 106 and govern[s] the undertaking and all of its parts.” 36 C.F.R. § 800.6(c).

143 36 C.F.R. § 800.7(c).

144 Richman, supra note 119; Cole, supra note 85.
Council comment. Thus, consulting agencies under NHPA appear to have the bargaining power to leverage action agencies into adopting favorable alternatives or mitigation.

In the rare case that a party “terminates” consultation concerning the resolution of adverse effects, the Council must issue a formal comment, which the action agency “shall take into account...in reaching a final on the undertaking.” The effect of this comment is similar to that of an expert agency comment under NEPA, in that the action agency must carefully consider and explain any divergence from Council opinion. However, like NEPA, the resolution of adverse effects is completely non-binding on the action agency, which retains ultimate decision-making authority.

IV. ESA’s Federal Consultation Under Section 7

Section 7 of the Endangered Species Act (ESA) – a statute which has been called “pit-bull” of environmental law – requires federal agencies engaged in actions likely to adversely affect listed species to consult with either the Fish and Wildlife Service (FWS)

---

145 Richman, supra note 119.
146 For example, a preferred mitigation of an action agency may be to make a movie or exhibit to preserve the historical significance of an adversely affected property, while a consulting party may prefer that the agency promise to save or restore other similar property. Whether to pursue one or both of the methods depends on negotiations between the agency and consulting parties as the agency attempts to convince the parties to sign the memorandum of agreement. Cole, supra note 85.
147 36 C.F.R. §800.7(c)(4).
148 See Citizens Alliance, Inc. v. Slater, 176 F.3d 686, 696 (3d Cir. 1999) (“a federal agency undertaking a project affecting historic properties is not obligated to give the [Council’s] opinion so much weight that it is foreclosed from making its own decision, though it must make clear in the record that the [Council’s] comments were taken seriously”)
149 See 36 C.F.R. § 60.2 (“While the Advisory Council comments must be taken into account and integrated into the decision-making process, [final] decisions rest with the agency implementing the undertaking); See also Waterford Citizens Ass’n v. Reilly, 970 F.2d 1287,1290 (4th Cir. 1992) (The “procedural regulatory scheme guides agencies contemplating a project... The final outcome of that process, however, demonstrates the limited obligation of the agency”).
or the National Marine Fisheries Service (NMFS)\textsuperscript{151} to insure that federal proposed actions do not result in jeopardizing the species or destroying critical habitat.\textsuperscript{152} This Part explores the effect of the Service’s opinion during ESA consultation on federal action agency proposals. As under NEPA, expert agency involvement creates a record that makes it more difficult for a court to defer to an action agency’s divergence from expert agency opinion. The structure of the ESA and the role of the Services under the statute makes the effect of their opinions more determinative than those of comment agencies under either NEPA or NHPA.

\textbf{A. ESA Consultation Overview}

Before exploring the effects of federal consultation under the ESA, a brief explanation of how the consultation process functions is necessary because, as under other statutes, avoiding the consultation requirements of the statute provides safe harbor for an action agency. The ESA requires action agencies to consult the relevant Service when two threshold requirements are met: (1) there is a discretionary agency action,\textsuperscript{153} and (2) the action “may affect” a listed species or critical habitat.\textsuperscript{154}

The statute defines the first triggering requirement—“agency action”—broadly to include any action “authorized, funded or carried out” by any federal agency.\textsuperscript{155} Courts have recognized that there is “little doubt” that Congress intended “agency action” to have broad applicability.\textsuperscript{156} However, the ESA regulations confine the definition of

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{151}] For effects on listed terrestrial and freshwater species, the action agency must consult with the FWS; for effects on listed marine species, the action agency must consult with the NMFS. Throughout the rest of this article, we refer to FWS or NMFS “the Service” or the “relevant Service.”
\item[\textsuperscript{152}] 16 U.S.C. § 1536 (1988)
\item[\textsuperscript{153}] 50 CFR § 402.03.
\item[\textsuperscript{154}] 50 CFR § 402.14(a).
\item[\textsuperscript{155}] 16 U.S.C. § 1536 (emphasis added).
\item[\textsuperscript{156}] See, e.g., \textit{Karuk Tribe of California v. U.S. Forest Service}, 681 F.3d 1006, 1020 (9th Cir. 2012).
\end{enumerate}
\end{footnotesize}
“agency action” to those actions that are discretionary, and the Supreme Court upheld those regulations in 2007, in National Ass’n of Homebuilders v. Defenders of Wildlife. The discretionary act requirement of the ESA regulations is similar to that of NEPA, which also requires an agency action to be discretionary before an action agency must fulfill the procedural requirements of that statute.

The second triggering requirement – that the action “may affect” a listed species – requires the action agency to inquire of the relevant Service as to whether there are any listed species or critical habitat within the scope of the proposed action. Once the action agency has formally requested information from the relevant Service, the action agency must determine whether its proposal “may affect” that species or its critical habitat. To avoid consultation, the action agency must conclude that its action will have no effect on the species or critical habitat that is within the project area. However, at least in the Ninth Circuit, the “may effect” threshold is a low bar. In fact, according to

---

157 50 C.F.R. § 402.03.
158 551 U.S. 644, 673 (2007). In Homebuilders, environmental groups challenged EPA’s approval of the state of Arizona to administer the NPDES program under the Clean Water Act. Id. at 653. EPA argued that because the statute required it to hand over NPDES permitting authority, its action was non-discretionary, and thus no consultation with the Services was necessary. Id. at 654. The Supreme Court agreed with EPA, deferring to the regulation as a reasonable interpretation of section 7 of the ESA. Id. at 673.
160 16 U.S.C. § 1536(c)(1), see also Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985) (“it is not the responsibility of the plaintiffs to prove, not the function of the courts to judge, the effect of a proposed action on an endangered species when the proper procedures have not been followed.”)
162 Karuk Tribe of California v. U.S. Forest Service 681 F.3d 1006 (9th Cir. 2012) In Karuk Tribe, the Forest Service approved several mining activities in the Klamath River Basin without engaging in consultation, explaining that they would have no effect on either endangered coho salmon or coho salmon critical habitat in the area. Id. at 1013. The federal district court did not reach the “may effect” question, deciding that the Forest Service’s approval of the mining activities did not constitute “agency action” under the ESA, and a divided Ninth Circuit affirmed. Id. at 1017. In an en banc rehearing, the Ninth Circuit reversed, ruling that the Forest Service’s approval was final agency action, and that because the mining could affect coho salmon or their habitat, the activities “may affect” them. Id. at 1029. But see Newton
that court, “[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.” Thus, although an action agency can avoid consulting with the Services by simply concluding its action will have no effect on any listed species, that finding may be vulnerable to challenge in court.

Once an agency action triggers consultation, the agency must consult the relevant Service through either formal or informal consultation. In informal consultation, whose purpose is to determine the need for formal consultation, an action agency assesses the likely effect of its actions on listed species. If the agency determines that the action is not likely to adversely affect a listed species or critical habitat, the Service must concur with that determination in order for the project to proceed without formal consultation. Without concurrence, formal consultation begins, which culminates in a biological opinion (BiOp) from the relevant Service to determine whether the proposed action is likely to jeopardize the continued existence of a listed species. There are therefore two decisions the Services can make that affect an action agency’s ability to proceed with a project: (1) a concurrence or non-concurrence in informal consultation, and (2) a “jeopardy” or “no jeopardy” finding in a formal consultation BiOp.

B. The Effect of Informal Consultation

_Cnty. Wildlife Ass’n v. Rogers_, 141 F.3d 803, 811 (8th Cir. 1998) (upholding the Forest Service’s conclusion that timber sales and associated road construction would have no effect on listed bald eagles).

163 _Id._ at 1027, quoting _California ex rel. Lockyer v. U.S. Dep’t of Agric._, 575 F.3d 999, 1018 (9th Cir. 2009).

164 See _supra_ note 157. See also Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 FR 19926-01 (“The threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to “insure” under section 7(a)(2). Therefore, the burden is on the Federal agency to show the absence of likely, adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from the formal consultation obligation.”).

165 The agency either analyzes potential effects in a biological assessment if the action also qualifies as a “major construction activity” under NEPA (50 C.F.R. § 492.12), or by way of informal communications with the Services. 50 C.F.R. § 402.13.

166 _Id._ § 402.14(b)(1).

167 _Id._ § 402.14(a).

168 _Id._ § 402.14(g)(4).
Because the Services must concur in an action agency’s “not likely to adversely affect” decision, the Services have the final say as to whether to proceed to formal consultation. The fact that action agencies must obtain concurrence makes the Services more powerful than consulting agencies under NHPA, whose concurrence is not required for an action agency to move forward with a project. Moreover, even if the relevant Service concurs with a “not likely to adversely affect” decision, action agencies must re-initiate consultation under certain circumstances.

The concurrence requirement puts a fair amount of authority in the hands of the Services because it takes time to produce a BiOp, making formal consultation potentially costly and time-consuming. The threat of having to engage in formal consultation and wait for a BiOp gives the Services leverage to trade their concurrence for changes in the design of the project. Thus, what seems like a purely procedural requirement can in fact result in substantive project changes. This ability to affect substance through process makes the ESA quite similar to NEPA and NHPA.

Given the ability of the Services to influence the substance of proposed actions due to their concurrence authority, it was perhaps not surprising that the Bush

---

169 Under NHPA, consultation may always be “terminated,” and the action agency can proceed once it has received an advisory comment from the Council. Although action agencies in practice will seek to avoid this outcome, See supra note 143 and accompanying text, the concurrence is nevertheless non-conclusive under NHPA.

170 The effect of a concurrence concludes an action agency’s ESA obligations only as long as (1) no “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,” (2) there is no modification to the action “that causes an effect to the listed species or critical habitat that was not considered . . .”, and (3) no “new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. 402.16(b)-(d). Although by its terms this regulation applies only to formal consultation, the Ninth Circuit applied it to informal consultation in Forest Guardians v. Johanns, 450 F.3d 455, 458 (9th Cir. 2006) (requiring the Forest Service to re-initiate consultation because it did not adhere to criteria established during informal consultation).


172 See supra Parts II (NEPA) and III (NHPA).
Administration twice unsuccessfully attempted to replace the need for a Service concurrence by promulgating so-called “counterpart” regulations. First, as a part of the Administration’s “Healthy Forest Initiative,” in 2003, the Services sought to allow what the regulations referred to as “alternative consultation agreements” to satisfy the section 7 consultation requirement for actions under the National Fire Plan. Second, less than one year later, in 2004, the Services attempted to promulgate joint counterpart regulations that would have allowed EPA and the Department of Agriculture to enter into alternative consultation agreements for actions regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Both sets of regulations would have authorized action agencies to make a unilateral “not likely to adversely affect” determination under certain circumstances, thereby removing the need for a concurrence from the Services.

Courts struck down both sets of regulations. First, the federal District Court for the Western District of Washington decided, in Washington Toxics Coalition v. U.S. Dep’t of Interior, that the FIFRA counterpart regulations were inconsistent with the plain language of the ESA. The court explained that because “the ‘in consultation with’

173 50 C.F.R. § 402.04.
175 Under an alternative consultation agreement, as long as action agencies receive training adequate to make “not likely to adversely affect” determinations, the Services could allow the action agency to make that decision.
178 The FIFRA counterpart regulations allowed alternative consultation agreements for discretionary EPA actions under FIFRA. 50 C.F.R. § 402.42(a). The Healthy Forest regulations authorized such agreements for National Fire Plan projects. 50 C.F.R. § 402.33(a).
179 457 F. Supp. 2d 1158, 1180 (W.D. Wash. 2006).
language [in the ESA] is paired with ‘with the assistance of the Secretary, …[a not likely to adversely affect] determination is not to be unilaterally made.’” In 2012, in *Defenders of Wildlife v. Salazar*, the federal District Court for the District of Columbia struck down the National Fire Plan’s counterpart regulations, though on narrower grounds. The D.C. court found the adoption of the regulations to be arbitrary and capricious because there was “no rational explanation to justify adoption of [the] regulations.”

As a result of these two decisions, the fate of future attempts to create counterpart regulations is quite unclear. The ESA regulations still authorize the promulgation of counterpart regulations, but these provisions may not survive judicial review. If a future reviewing court adopts the *Washington Toxics* court’s approach of focusing on the language of the ESA consultation requirements, future attempts to give decision-making authority entirely over to an action agency will likely be unlawful. On the other hand, if a court were to take the *Defenders of Wildlife* approach, the agencies could perhaps be able to justify counterpart regulations as necessary to avoid delays in project approvals due to wildlife agency concurrences.

These attempted regulatory amendments reflect the important role played by the Services’ concurrence authority. The ability to use this authority to subject action agency proposals to formal consultation gives the consulting Service considerable influence over the shape of the ESA process.

180 Id. at 1179.
182 Id. at 186. An additional reason the court gave for striking down the 2003 regulations was that they failed to define what constitutes a “National Fire Plan project.” Id. at 187.
183 50 C.F.R. § 402.04.
184 See supra notes 179-180 and accompanying text.
185 See supra notes 181-182 and accompanying text.
C. The Effect of Formal Consultation

During formal consultation, the relevant Service either determines that the action agency’s proposal will jeopardize the continued existence of a listed species, or that it will not. Thus, there are two sides to the coin in terms the effects of the Service’s decision on an action agency: (1) what an action agency must do when the relevant Service makes a “no jeopardy” finding, and (2) its duties when the relevant Service makes a “jeopardy” finding.

1. The Effect of a “No Jeopardy” Finding

A Service’s “no jeopardy” finding does not conclude an action agency’s ESA obligations. Because the statute places the final responsibility for ESA compliance with the action agency rather than the Services, an action agency’s decision to rely on a “no jeopardy” BiOp must not be arbitrary and capricious. Courts have made clear that an action agency may not “simply rubber stamp . . . the consulting agency’s analysis.” At the same time, however, an action agency “need not undertake a separate, independent analysis.” In fact, according to the Ninth Circuit, “even when the [Service’s] opinion is based on ‘admittedly weak’ information, another agency's reliance on that opinion will

186 16 U.S.C. § 1536(a)(2) (the “agency shall, in consultation with and with the assistance of [the Services], insure that any action…is not likely to jeopardize the continued existence of [a listed] species.”) (emphasis added).
187 City of Tacoma, Washington v. F.E.R.C., 460 F.3d 53, 75 (D.C. Cir. 2006) (FERC’s reliance on a “no jeopardy” BiOp was not arbitrary or capricious because it had no additional information that the Service did not have, and “expert agencies are in the best position to make discretionary factual determinations about whether a proposed agency action will create a problem for a listed species and what measures might be appropriate to protect the species.”) See also Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv., 637 F.3d 259, 266 (4th Cir. 2011) (“When a court of appeals reviews the EPA’s reliance on a BiOp, it…determine[s]…whether the EPA’s reliance was arbitrary and capricious.”).
188 Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990) (“A federal agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS BiOp must not have been arbitrary or capricious.”).
189 Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin., 175 F.3d 1156, 1161 (9th Cir. 1999) (rejecting an industry challenge to the Bonneville Power Administration’s reliance on a NMFS “jeopardy” BiOp and deciding that reliance on a “jeopardy” BiOp should receive the same judicial deference on review as reliance on a “no jeopardy” BiOp).
satisfy its obligations under the Act if a challenging party cannot point to ‘new’ information.”190 The result of these interpretations is that although the final responsibility for ESA compliance lies with the action agency, a “no jeopardy” finding by the Services is strong evidence that a project will comply with the substantive requirements of the ESA.

2. The Effect of a “Jeopardy” Finding

The effect of a Service’s “jeopardy” finding on an action agency’s authority to continue with a project is much clearer than a “no jeopardy” finding. When an action agency relies on an expert agency’s “jeopardy” finding, a reviewing court will apply the same standard it applies to an expert agency’s “no jeopardy” finding,191 meaning that an action agency need not conduct its own independent review to determine if the jeopardy analysis is accurate.192 As long as no party presents new information, an action agency may properly rely on the Service’s finding.193

On the other hand, action agencies will have a difficult time proceeding with a project in the face of a “jeopardy” BiOp. Writing for a unanimous Supreme Court in Bennett v. Spear, Justice Scalia stated that “jeopardy” findings are “virtually determinative,” and that while a BiOp “theoretically serves an advisory function, in reality it has a powerful coercive effect on the action agency.”194 Thus, although the ESA

---

190 Pyramid Lake Paiute, 898 F.2d at 1415; see also City of Tacoma, 460 F.3d. at 75. (adopting the Pyramid Lake rule and applying it to conclude that FERC reasonably relied on a FWS BiOp because the challenging party presented no new information).
191 Aluminum Co., 175 F.3d at 1161.
192 Id.
193 Id.
194 520 U.S. T 169-170 (1997) (plaintiffs had standing because their injuries were fairly traceable to the FWS due to the coercive effects of BiOps on action agencies).
technically places final decision-making authority in the hands of the action agency,\textsuperscript{195} in practice it may not be possible for an action agency to articulate good reasons for disregarding the expert Service’s biological opinion that will survive judicial review.\textsuperscript{196} The “virtually determinative” effect of BiOps under the ESA appears to give expert agencies a much larger substantive role in decisionmaking than expert agencies have under NEPA and NHPA. Although all three statutes rely on judicial review (or the threat of judicial review) to affect action agency decisions, the likelihood that a court will side with the expert agency appears to be greater under the ESA than the other two statutes.

V. The Clean Water Act’s Section 404(c) EPA Veto

In contrast to the three statutes examined above, the Clean Water Act (CWA), in section 404(c), gives real decision-making power to an expert agency, in this case EPA, in the context of permits issue by the U.S. Army Corps of Engineers (Corps). This Part first explains the dynamics of EPA’s authority under section 404(c) to veto Corps-issued permits for discharges of dredged or fill material, and then discusses the limits of that authority. Second, we explain how the CWA’s delegation of decision-making authority to EPA gives that agency more power to affect the Corps’ decisions than any of the statutes explored so far.

A. The Scope of EPA’s CWA Section 404 Veto Authority

Section 404 authorizes the Corps to issue permits\textsuperscript{197} “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”\textsuperscript{198} However, section

\textsuperscript{195} 16 U.S.C. § 1536(a)(2).
\textsuperscript{196} Bennett, 520 U.S. at 169-170.
\textsuperscript{197} The statute also authorizes EPA to approve states to assume authority over issuing section 404 permits for waters that are not traditionally navigable, if the state meets certain requirements, Id. at § 404(g-h), although only Michigan and New Jersey have assumed this authority. 40 C.F.R. §§ 233.70, 233.71.
404 gives EPA the authority to veto Corps permits if EPA determines that the discharge “will have an unacceptable adverse effect on water supply, fish and wildlife, and recreation” clearly giving EPA the final decision-making authority as to whether to veto a Corps permit. Vetoes are subject to public notice and comment as well as consultation with the Corps. Courts have broadly interpreted both the “why” and the “when” of EPA’s veto authority under section 404(c), although they have raised questions about the breadth of the CWA’s jurisdiction, which may have an effect on future 404(c) actions, the “where” of EPA’s veto authority.

Courts have consistently deferred to EPA concerning the factors it may consider in its 404(c) veto decisions. Section 404(c)’s “unacceptable adverse effect” standard includes no express definition in the statute, so EPA has relied on the 404(b)(1) guidelines that the statute requires the Corps to use in issuing permits. Under the

---

199 33 U.S.C. § 1344(a). The statute exempts discharges from “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.” A 2014 guidance document issued by the Corps and EPA attempted to interpret narrowed the “normal farming” exception narrowly, but Congress intervened, ordering the agencies to withdraw it in the 2015 Appropriations Act. Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 112 (2014).
199 33 U.S.C. § 1344(c). For histories of the implementation of section 404 actions, see Amy Oxley, No Longer Mine: An Extensive Look at the Environmental Protection Agency’s Veto of the Section 404 Permit Held by the Spruce No. 1 Mine, 36 S. Ill. U. L.J. 139, 140 (2011).
200 Id.
201 See infra notes 219-221 and accompanying text.
203 The section 404(b)(1) guidelines prohibit the Corps from issuing a 404 permit when (a) there is a practicable alternative available that would have a less adverse effect on the ecosystem, (b) the proposed discharge will violate state water quality standards, toxic effluent standards, the Endangered Species Act or fail to protect marine sanctuaries under the Marine Mammal Protection Act, (c) the discharge will “cause or contribute to significant degradation of the waters of the United States,” or (d) the applicant has not taken “appropriate and practicable steps [which would] minimize potential adverse impacts of the discharge on the aquatic ecosystem” 40 C.F.R. § 230.10.
204 See Bersani v. U.S. E.P.A., 674 F. Supp. 405, 414 (N.D.N.Y. 1987), aff’d, 850 F.2d 36 (2d Cir. 1988) (EPA’s decision to rely on section 404(b)(1) guidelines to determine an “unacceptable adverse effect” under section 404(c) was a reasonable interpretation of the statute).
section 404(b)(1) guidelines, EPA need not, as the Corps regulations require, balance “public interest” factors in making 404(c) decisions. Thus, while the Corps’ “public interest review” may allow economics to trump environmental concerns, the EPA’s ability to veto permits based solely on the section 404(b)(1) guidelines allows it to overturn Corps permit decisions based solely on environmental concerns.

Second, the D.C. Circuit’s 2013 opinion in *Mingo Logan Coal v. EPA* raised the question of how far EPA’s authority to veto extends temporally. In *Mingo Logan*, the Corps issued a permit in 2007 to a coal company for fill discharges in connection with its mountaintop mining operations in West Virginia. EPA did not exercise its veto authority over this permit until 2011, four years after the Corps issued the permit. The D.C. District Court decided that section 404(c) did not authorize EPA to revoke existing permits, but the D.C. Circuit reversed on the ground that section 404(c) expressly states that “whenever [EPA] determines…that the discharge…will have an unacceptable adverse effect.” Consequently, the court concluded that section 404 “imposes no temporal limit on the Administrator's authority” to veto a Corps permit.

The D.C. Circuit’s decision that EPA possesses retrospective authority to veto permits, and its emphasis of the word “whenever” in the statute, has led some

---

205 The Corps’ regulations have long imposed on the agency a “public interest review” under which the “benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments.” 33 C.F.R § 320.4.
206 *See James City Cnty., Va. v. E.P.A.*, 12 F.3d 1330, 1336 (4th Cir. 1993) (EPA did not need to consider the need of the public for water before vetoing a permit to construct a dam and reservoir, and may base its veto solely on environmental harms).
208 *Id.* at 610.
209 *Id.* at 611.
211 *Mingo Logan Coal Co.*, 714 F.3d at 613.
commentators to wonder whether EPA possesses prospective veto power as well, even though the section 404(c) regulations have explicitly provided for such vetoes since 1979. EPA appears poised to exercise that authority concerning the highly controversial Pebble Mine Project, a proposed gold and copper mine in Alaska’s Bristol Bay watershed, even before the company filed a permit application. In mid-2014, EPA issued a notice of proposed determination that it would prospectively restrict (that is, “veto”) discharges associated with the mine that would result in a loss of streams, a loss of wetlands, lakes or ponds, or alter streamflow. After a public comment period that generated over 155,000 comments, the agency had promised a decision by early 2015, although that decision has been delayed by a preliminary injunction. The threat of an EPA veto at Pebble Mine, coupled with the judicially approved EPA veto of the permit in

---

212 See, e.g., Lisa A. Kirschner, *EPA’s Clean Water Act Section 404 Veto Authority*, Nat. Resources & Env’t, Fall 2013, at 54, 55.
213 40 C.F.R. § 231.1 (“[EPA] may also prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state.”).
215 The notice of proposed determination contains numerical limits on the loss of streams, wetlands, and streamflow alterations. See Id.
216 Announcement To Extend the Period To Evaluate Public Comments Received on the Proposed Determination for the Pebble Deposit Area, Southwest Alaska, 79 Fed. Reg. 56365 (Sep. 19, 2014).
217 The federal district court in Alaska issued a preliminary injunction to prevent EPA from making a final 404(c) decision until it can rule on a Federal Advisory Committee Act claim. See Bristol Bay Native Corporation, *Court issues injunction delaying EPA process on Pebble*, Pebble Watch, Nov. 24, 2014. The claims in that case arise from EPA’s failure to disclose certain information, rather than a challenge to EPA’s veto authority generally. If EPA proceeds to exercise its veto authority, the agency will face an almost certain court challenge as to whether it may veto a project with neither a permit application nor an issued permit. In fact, the company proposing the mine already challenged EPA’s authority to veto the project, but because EPA had not yet issued a final determination, the court held there was no “final agency action” available for judicial review. *Pebble Limited Partnership v. U.S. EPA*, No. 3:14-cv-0097-HRH, at 14-15 (D. Alaska, Sep. 26, 2014).
Mingo Logan, has led critics to call for Congress to amend the CWA to impose a temporal limit on EPA’s veto authority.218

EPA’s authority to protect wetlands extends only as far as the Corps’ CWA jurisdiction: if the CWA doesn’t give the Corps jurisdiction to issue a permit for a wetland for a proposed fill, EPA obviously has no veto authority.219 In early 2014, EPA and the Corps proposed a rule that would categorically include all tributaries (including tributaries of tributaries) and all waters adjacent to them within the jurisdiction of the CWA because they have a de facto “significant nexus” to navigable waters.220 Although the Corps and EPA claimed that the rule did not expand their authority under the CWA, the effect of rule would likely make it easier for the Corps and EPA to assert jurisdiction over some wetlands without having to undertake a fact-intensive analysis.221 That would save administrative resources, even if it did not make more wetlands jurisdictional, and if

218 See, e.g., Oxley, supra note 199. (“changes must be made to section 404 to limit the EPA's ability to veto existing permits, to encourage the agency to act before a permit is issued, and to instill trust in the current permitting system”); Jason Bailey, Clean Water Act, Section 404 Applicants: May the Odds Be Ever in Your Favor, 3 Am. U. Bus. L. Rev. 457, 485 (2014) (“Congress should provide additional guidance as to how and when the EPA can invoke its section 404(c) veto power”). On June 12, 2014, Congressman Bob Gibbs of Ohio introduced a bill that would restrict EPA’s veto authority to after the Corps has processed an application and before it issues a final permit. Regulatory Certainty Act of 2014, H.R. 4854, 113th Congress (introduced in House 2014).

219 The Clean Water Act gives the Corps and EPA jurisdiction over “navigable waters,” defined as “waters of the United States.” 33 U.S.C. § 1362(7). According to the Supreme Court’s fractured decision in Rapanos v. U.S., wetlands must have a surface connection (according to the plurality opinion) or a “substantial nexus” (Justice Kennedy’s concurrence) to a navigable-in-fact water to be jurisdictional under the statute. Rapanos v. United States, 547 U.S. 715, 767 (2006). Although EPA released guidance concerning how to determine whether a water is jurisdictional, the result of Rapanos is that jurisdictional determinations often require fact-intensive case-by-case analyses. See Sackett v. E.P.A., 132 S. Ct. 1367, 1375 (2012) (Alito, concurring) (“Far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff.”).


221 While farmers maintained that the proposed rule exceeded statutory authority, environmental groups claimed that the proposal failed to extend categorical jurisdiction over many ecologically important wetlands, in particular prairie potholes in the Great Plains, which provide important habitat for waterfowl in the region. See Annie Snider, EPA Science advisers back contentious rule proposal, Greenwire, Sept. 30, 2014.
the rule made more wetlands jurisdictional, the result would expand the scope of EPA’s veto authority.

B. The Effect of EPA’s Veto Power on Corps Decisionmaking

The most obvious way for EPA to affect a Corps permit is to veto it, thereby prohibiting a permit applicant from discharging dredged or fill material into navigable waters. This authority gives EPA the last administrative word on the permit decision,\textsuperscript{222} distinguishing section 404(c) from the statutes like NEPA and the ESA, where the final decision remains in the hands of the action agency.\textsuperscript{223}

Despite this apparently broad EPA authority to veto Corps-issued permits under section 404(c) of the CWA, the agency has exercised this power only thirteen times in the 43 years since Congress enacted section 404, and (somewhat surprisingly) just three times since 1990.\textsuperscript{224} Nevertheless, the threat of an EPA veto provides EPA leverage similar to that exercised by the Services under the Endangered Species Act. In fact, a threat under the CWA is likely a more powerful threat than under the ESA, because a section 404(c) veto is actually determinative, rather than “virtually” so, in Justice Scalia’s words.\textsuperscript{225} Thus, the Corps is more likely to heed EPA’s concerns in permit decisions.\textsuperscript{226} This authority gives EPA influence over Corps decisions as to whether to issue permits as

\textsuperscript{222} See James City Cnty., 12 F.3d at 1336 (“Ultimately… recognizing the EPA's expertise and concentrated concern with environmental matters, Congress gave the final decision whether to permit a project to that agency.”).

\textsuperscript{223} See supra Parts II (NEPA), III (NHPA), and IV (ESA).


\textsuperscript{225} Bennett, 520 U.S. at 169-170 (1997) (Under the ESA, although the decision as to whether an action results in “jeopardy” to a listed species rests in the hands of the action agency, a Service “jeopardy” finding is “virtually determinative” in judicial review of the action agency’s decision).

well as the conditions the Corps includes in those permits. The rather unconditional power of EPA to veto Corps permits, may explain why there have been so few vetoes, as the 404(c) authority gives EPA the last word on interpreting the 404(b)(1) guidelines. EPA can thus affect the action agency’s decision indirectly, just as expert agencies do under the ESA and, to some extent, under NEPA and the NHPA.

The ability to veto permits retrospectively, ratified by the D.C. Circuit in its Mingo Logan decision, illustrates EPA’s authority to exert oversight over ongoing authorized discharges even after the Corps has issued a 404 permit. The 404(c) ability to veto Corps permit decisions assigns to EPA substantive decision-making authority not possessed by any of the expert agencies in the statutes discussed above. This clear authority – the possibility of an EPA veto – gives EPA a decision-making influence over the Corps more powerful than that possessed the Services under the ESA.


The Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to issue non-federal hydropower licenses on navigable waters. The Act, originally an achievement of the Progressive Conservation Era, gives resource agencies, including federal land managers and fishery agencies, the ability to issue

---

227 Id.
228 See supra note 193.
229 For example, during the four years between the Corps’ issuance the permit to Mingo Logan Coal Company and EPA’s veto, EPA sent a letter to the Corps requesting that it suspend, revoke, or modify” Mingo Logan’s permit based on “new information and circumstances ... which justify reconsideration of the permit.” Mingo Logan Coal Co. 714 F.3d at 610-11, quoting Letter from EPA, Region III to Corps, Huntington Dist., at 1 (Sept. 3, 2009). The Corps responded that it would not do so, possibly because it did not think EPA had the power to veto permits after issuance. However, now that the D.C. Circuit has confirmed that EPA does possess retrospective veto authority, similar letters may convince the Corps to modify an existing permit.
conditions, prescriptions, and recommendations under three different provisions. This Part explains each of these, analyzing the effect of expert agency participation on FERC licensing.

A. Federal Land Manager Conditioning Authority Under Section 4(e)

Section 4(e) of the Federal Power Act authorizes federal land managers to issue conditions on non-federal hydropower licenses in order to adequately protect the federal “reservation” upon or within which a hydropower project is located. As the case law discussed below demonstrates, section 4(e) authority is broad enough to grant land managers real decision-making power. And, although conditioning authority under this provision is geographically limited to licensed projects on reservations, land managers have a fair amount of discretion in their exercise of that power.

The seminal court interpretation of section 4(e) was the Supreme Court’s 1984 decision in *Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, & Pala Bands of Mission Indians*, which clarified the effect of federal land manager conditions, as well as the geographical limits of that authority. In *Escondido*, several Indian tribes challenged FERC’s re-issuance of a license to the Escondido Mutual Water

---

233 The Act defines “Reservations” to include “national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws.” 16 U.S.C. § 796(2). The Interior Solicitor has concluded that the definition includes BLM lands (because they have been reserved from disposal since the 1930s), even though BLM lands generally have no reserved water rights. George Coggins et al., *Federal Public Lands and Resource Law* 622 (7th Ed. 2014) (citing a 2001 Solicitor’s Opinion).
234 16 U.S.C. § 797(e) (“licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations”). The language of this section was included in the original 1920 Federal Water Power Act. Pub. L. No. 66-280, 41 Stat. 1063 (1920).
Company to continue to operate a dam and canal on and near several Indian reservations.\textsuperscript{236} The dam and canal diverted the San Luis Rey River to provide water to the San Diego County cities of Vista and Escondido, depriving the reservations of water.\textsuperscript{237} The federal land manager, the Bureau of Indian Affairs, proposed a series of conditions in order to protect the reservations’ use of water,\textsuperscript{238} but FERC issued the license without most of the conditions. FERC thought that the FPA did not require it to include all of the land manager’s conditions in its license.\textsuperscript{239} The tribes argued that the plain language of the statute—that licenses “shall be subject to and contain such conditions as the [federal land manager] shall deem necessary for the adequate protection and utilization of such reservation”\textsuperscript{240}—required FERC to accept, without modification, the federal land manager’s conditions.\textsuperscript{241} The Supreme Court agreed with the tribes, ruling that “[t]he mandatory nature of the language chosen by Congress appears to require that [FERC] include the [land manager’s] conditions in the license even if it disagrees with them.”\textsuperscript{242} Thus, the Court decided that federal land manager’s conditions were “mandatory,” and FERC had to include them in its licenses.

On the other hand, the Supreme Court interpreted the statutory language “within any reservation” to impose geographical limits on land managers’ section 4(e) conditioning authority. Although three of the reservations at issue in \textit{Escondido} contained physical elements of the hydropower project, the other three did not.\textsuperscript{243} The licensee argued that the statute authorized land manager conditions only for licenses “within”
reservations. The Ninth Circuit had decided that “within” was ambiguous, and therefore could include water rights associated with reservations as well as the land within reservations. But the Supreme Court reversed the Ninth Circuit on this issue, deciding that the statutory term “within” meant that the project must be physically within the reservation boundaries.

At least one court since Escondido has interpreted the decision to give federal land managers broad authority over hydroelectric licensing if any part of a project lies within a federal reservation. In City of Tacoma v. FERC, the D.C. Circuit ruled that even a small part of a hydropower project, such as power lines or access roads, triggers 4(e) conditioning authority. In addition, the court upheld land manager conditions were not even related specifically to the power line or access road but concerned the project as a whole, including any condition “reasonably related to protecting the reservation.”

Thus, as long as some part of the project touches part of a reservation, federal land managers have considerable authority to impose mandatory license conditions on hydropower projects.

Also at issue in City of Tacoma was the timing of federal land managers’ ability to impose conditions on the “Cushman Project,” a major hydroelectric project on the

---

244 Id. at 780. See also 16 U.S.C. § 797(e) (“licenses shall be issued within any reservation …and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations”) (emphasis added).
245 Escondido, 466 U.S. at 784.
246 City of Tacoma, Washington v. F.E.R.C., 460 F.3d 53, 66 (D.C. Cir. 2006) (interpreting the Supreme Court’s statement in Escondido that “[I]t is clear that Congress concluded that reservations were not entitled to the added protection provided by the proviso of § 4(e) unless some of the licensed works were actually within the reservation,” to mean that “’some’ means ‘some’; it does not mean ‘all,’ or even ‘lot.’”)
247 Id. at 67.
Skokomish River in Washington.\textsuperscript{248} FERC had attempted to put a time limit on land managers’ conditioning authority,\textsuperscript{249} and argued that because that time limit was exceeded for the Cushman Project, it need not include the conditions. The D.C. Circuit decided that imposing a strict time limit exceeded FERC’s statutory authority, stating that “[a]lthough FERC makes the final decision as to whether to issue a license, FERC shares its authority to impose license conditions with other federal agencies.”\textsuperscript{250} In so ruling, the court recognized that licensing under the Federal Power Act established a shared decision-making paradigm among federal land managers and FERC.\textsuperscript{251}

Thus, section 4(e) of the Federal Power Act, like section 404(c) of the Clean Water Act, explicitly recognizes shared decision-making power. Unlike NEPA, the NHPA, and the ESA, where the expert agency can indirectly affect the action agency’s decision through judicial review or the threat of such review, the FPA affirmatively delegates decision-making authority to land managers. Moreover, unlike under 404(c), where the ultimate choice that EPA has is whether to veto a Corps permit, under the FPA land managers can affect the licensing decision in many different ways, since any conditions land managers promulgate must appear in the FERC license. Thus, these agencies can directly alter the construction of licensed projects. However, just as the jurisdictional prerequisite of “navigable waters” limits EPA’s Clean Water Act vetoes,

\textsuperscript{248} Id. at 64. See also 18 C.F.R. § 3.34(b)(“All comments (including mandatory ... terms and conditions or prescriptions) on an application for ... [a] license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice...”).

\textsuperscript{249} 18 C.F.R. § 4.34(b) (“All comments (including mandatory and recommended terms and conditions or prescriptions) on an application for exemption or license must be filed with the Commission no later than 60 days after issuance by the Commission of public notice declaring that the application is ready for environmental analysis.”)

\textsuperscript{250} City of Tacoma, 460 F.3d at 65.

\textsuperscript{251} However, the power to issue conditions is not unconfined. Land managers’ conditions must be “reasonably related to [the goal of adequate protection and utilization of reservations], otherwise consistent with the [Federal Power Act], and supported by substantial evidence.” Escondido 466 U.S. at 778.
the geographical boundaries of federal reservations confines land managers’ section 4(e) conditioning authority.

B. Federal Fishery Manager Conditioning Authority Under Section 18

Section 18 of the Federal Power Act authorizes federal fishery managers to prescribe “fishways” at licensed projects. 252 Although Congress established section 18 authority early a century ago in 1920,253 the provision was a sleeper until 1999, when, in American Rivers v. FERC, the Ninth Circuit used the reasoning in Escondido to decide that section 18 prescriptions, like section 4(e) conditions, are mandatory.254

In American Rivers, environmentalists challenged FERC’s decision to relicense several hydropower facilities in on the McKenzie River in Oregon because FERC failed to include prescriptions submitted by fishery managers.255 FERC maintained that because it had fully explained its reasoning for rejecting the prescriptions, it had no duty to include them in the license.256 As the Supreme Court decided in Escondido in the section 4(e) context, the Ninth Circuit ruled that section 18 contains “a clear congressional delegation” of authority to federal fishery managers.257

Moreover, the American Rivers court decided that FERC may not “reclassify” mandatory section 18 prescriptions into non-mandatory recommendations under section

252 16 U.S.C. § 811 ([FERC] shall require the construction, maintenance, and operation by a licensee at its own expense of … such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate). After some controversy, See Blumm & Nadol, supra note 232, Congress explicitly defined “fishway” in the Energy Policy Act of 1992 to mean “any structure, facility, device, or structural or non-structural measure used for the safe and timely passage of all life stages of migratory or non-migratory fish, or both, either upstream or downstream, through, over, or around the project works of a hydroelectric power project.” Energy Policy Act of 1992 (EPA), Pub. L. No. 102-486, § 1701(b), 106 Stat. 3008.
253 Id.
254 201 F.3d 1186, 1211 (9th Cir. 1999).
255 Am. Rivers, 201 F.3d at 1190.
256 Id. at 1206.
257 Id. at 1207.
10(j) of the statute, discussed below. FERC argued in *American Rivers* that the Services’ prescriptions issued under section 18 were not actually “fishway prescriptions,” and therefore could be rejected as non-binding section 10(j) recommendations. But the Ninth Circuit determined that FERC “may not modify, reject, or reclassify any prescriptions submitted by the Secretaries under color of section 18. Where the Commission disagrees with the scope of a fishway prescription, it may withhold a license altogether or voice its concerns in the court of appeals.” Thus, section 18 prescriptions constitute another affirmative delegation of decision-making authority to expert agencies, one reviewable only by a court of appeal, not by FERC.

**C. Recommendations to Protect Fish and Wildlife Under Section 10(j)**

Section 10(j) authorizes state and federal fish and wildlife agencies, “fishery agencies,” to make recommendations to FERC to provide for adequate protection, mitigation, and enhancement of fish and wildlife affected by hydropower projects. Section 10(j) applies to recommendations involving project operations rather than structures. Under section 10(j), once fishery agencies provide recommendations for fish

---

258 *Id.* at 1210.
259 See *infra* Part VI.C.
260 The prescriptions rejected by FERC, which all involved structures rather than project operations, included “imposition of fish mortality standards at the fish screens of Leaburg and Walterville and at the Leaburg rollgates; construction of tailrace barriers; delays in raising the Leaburg Lake water level; delays in the construction of diversion structures at Walterville; the salvage of fish prior to any new construction at Walterville's tailrace; annual inspection of the Walterville tailrace; agency control over final design and monitoring of fishways; and agency enforcement of the licensee's duty to maintain fishways in efficient operating condition” *Am. Rivers*, 201 F.3d at 1209, n. 11.
261 *Id.* at 1192.
262 *Id.* at 1210. The FPA gives jurisdiction over FERC licenses “the United States Court of Appeals for any circuit wherein the licensee or public utility to which the [license] relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia…” 16 U.S.C. § 825l(b).
263 Like 4(e) land-manager conditions, fishery agency prescriptions must be consistent with the law and supported by substantial evidence. *Wisconsin Power & Light Co. v. F.E.R.C.*, 363 F.3d 453, 461 (D.C. Cir. 2004).
and wildlife, if FERC does not include these recommendations as conditions of the relicensing, it must publish findings that (1) the recommendations would be inconsistent with the purposes of the FPA, and (2) that the conditions FERC does include would adequately protect, mitigate, and enhance fish and wildlife.\textsuperscript{265} In \textit{American Rivers}, the Ninth Circuit recognized that “[s]ection 10(j) and section 4(e), the provision at issue in \textit{Escondido}, set forth very different roles for [FERC] to play in the hydropower relicensing process” and concluded that 10(j) does not confer final conditioning authority on resource agencies.\textsuperscript{266} Section 10(j) is thus more like NEPA, the NHPA, and the ESA, which do not give final decision-making authority to the expert agency, but instead reserves it to the action agency.

Nevertheless, as in the case of expert agency consultation or comment under NEPA, the NHPA, or the ESA, \textit{American Rivers} court recognized that FERC must afford “significant deference” to recommendations under section 10(j).\textsuperscript{267} In fact, the statute contemplates that FERC “shall attempt to resolve any…inconsistency [between fishery recommendations and FPA purposes and requirements], giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies.”\textsuperscript{268} Thus, for FERC to reject a fishery agency’s recommendations, it must adequately explain, with the requisite deference, its reasons for doing so.

For example, in \textit{Idaho Rivers United v. FERC}, state and federal fishery agencies recommended that hydroelectric dams not create reservoirs for future power generation,

\textsuperscript{265} Id.
\textsuperscript{266} \textit{Am. Rivers}, 201 F.3d at 1204.
\textsuperscript{267} Id. at 1205.
\textsuperscript{268} 16 U.S.C. §803(j)(2).
but instead let the river run free in a so-called “run-of-the-river” project. Fishery agencies issued these recommendations under section 10(j) rather than section 18 because they involved project operations rather than structures. When FERC declined to include these recommendations in its license conditions, environmentalists sued. The court upheld FERC’s decision not to include fishery agency’s section 10(j) recommendations because FERC had adequately explained its reasoning for not including them, illustrating that even though fishery agency recommendations play a role in judicial review, section 10(j) leaves final decision-making authority with the action agency, in sharp contrast to sections 18 and 4(e).

D. The Effect of the Energy Policy Act of 2005 on Conditioning Authority

The Federal Power Act (FPA) was significantly amended in 2005 by the Energy Policy Act (EPAct), which added procedures with the potential to affect the process by which resource agencies exercise their FERC license-conditioning authority. The EPAct left the decision-making structure of the Federal Power Act intact, but enabled licensees to pursue two procedures to challenge agency prescriptions and conditions:

---

269 189 F. App’x 629, 631 (9th Cir. 2006).
270 Id. at 633.
271 Section 401 of the CWA likewise gives final decision-making authority to states with respect to conditions necessary to maintain state water quality standards for federal permits that may result in discharges to navigable waters (e.g. hydropower projects). 33 U.S.C.A. § 1341. States must certify such projects before FERC may license them, and the Supreme Court has recognized that such certifications can include conditions related to minimum stream flow requirements necessary to protect a fishery. PUD No. 1 of Jefferson Cnty. v. Washington Dept of Ecology, 511 U.S. 700, 712 (1994). FERC is obligated to include such conditions, regardless of whether it thinks they are reasonably related to water quality. Am. Rivers, Inc. v. F.E.R.C., 129 F.3d 99, 106 (2d Cir. 1997).
272 Resource agencies include federal land managers under section 4(e) and fishery agencies under sections 18 and 10(j).
(1) authorizing parties to relicensing proceedings to request trial-type hearings\(^{275}\) and (2) allowing licensees to propose alternative conditions and prescriptions.\(^{276}\)

The EPAct amended sections 4(e) and 18 to allow any party to relicensing proceedings to request an up to 90-day-long “trial-type hearing” before an administrative law judge (ALJ) to resolve disputed issues of material fact related to conditions or prescriptions.\(^{277}\) The apparent goal of the amendments was to allow licensees to require the development of a more complete administrative record, including documentation of the reasons supporting the mandatory conditions of expert fishery agencies. However, a 2010 Government Accountability Office (GAO) report determined that in the five years between the passage of the EPAct and 2010, only three hearings of a total of 103 eligible projects produced an ALJ decision, less than three percent.\(^{278}\) Licensees requested hearings for only 18 projects, most of which resulted in a settlement agreement.\(^{279}\) Of the issues decided in the three hearings that resulted in an ALJ decision, most of the findings favored the resource agency, not the licensee.\(^{280}\)


\(^{276}\) 16 U.S.C. § 823d.

\(^{277}\) 16 U.S.C. § 797(e); 16 U.S.C. § 811. The amendments directed the resource agencies to promulgate rules establishing procedures for these trial-type hearings, which the Departments of Agriculture, Commerce, and Interior did the same year. Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 FR 69804-01 (Nov. 17, 2005). The regulations require the resource agency to first file its proposed conditions or prescriptions with FERC, along with the supporting rationale. 7 C.F.R. § 1.620. Within 30 days of the initial filing, any party to the relicensing can request a hearing before an ALJ. \textit{Id} at §1.621. To do so, the party must identify a disputed issue of material fact and provide a list of witnesses and exhibits. \textit{Id}. The resource agency has 45 days from the initial filing deadline (of the proposed conditions) to respond, provide its own list of witnesses and exhibits, consolidate hearings with substantially similar disputes, and refer the case to the ALJ. \textit{Id} at §1.624. The discovery period, hearing, and final decision must all take place within 90 days of the referral notice. \textit{Id} at §1.660.


\(^{279}\) \textit{Id}. at 13

\(^{280}\) In those three hearings, the parties raised 37 separate issues of material fact to the ALJs. ALJs ruled for the agency on 25 of those issues, for the licensee on six, and split decisions for the remaining six. \textit{Id}. at 13. Despite the number of issues decided against the licensee, apparently no licensees challenged any of the findings in these trial-type hearings in court.
Notwithstanding the tendency of ALJs to rule in a resource agency’s favor, hearings may have the effect of producing more favorable conditions for licensees. This is likely because trial-type hearings are expensive and time-consuming: agencies estimate that the three hearings that occurred between 2005 and 2010 cost a total of $3.1 million.\textsuperscript{281} In GAO interviews with various stakeholders about the new trial-type hearings, the licensees explained that resource agencies were more willing to negotiate potential conditions and prescriptions to avoid requests for trial-type hearings.\textsuperscript{282} On the other hand, many resource agency officials thought that the threat of expensive trial-type hearings increased pressure to issue agreeable conditions and produced less favorable conditions from their perspective.\textsuperscript{283} Thus, even though licensees infrequently requested hearings, the threat of hearings may affect resource agency decisions concerning appropriate FPA conditions and prescriptions.

The EPAct also added section 33 to the FPA, which enables licensees to propose alternative conditions to the resource agencies.\textsuperscript{284} The GAO found that licensees proposed alternative conditions in only 24 percent of relicensing proceedings between 2005 and 2010.\textsuperscript{285} The report determined that although resource agencies have rejected all of the specific licensee-proposed alternatives, the agencies nevertheless modified

\begin{itemize}
\item \textsuperscript{281} \textit{Id.} at 16.
\item \textsuperscript{282} \textit{Id.}
\item \textsuperscript{283} \textit{Id.}
\item \textsuperscript{284} 16 U.S.C. § 823d(a). Section 33 also allows licensees to offer alternative prescriptions to those offered under section 18. 16 U.S.C. § 823d(b). The procedures are the same for alternative section 18 prescriptions as they are for section 4(e) conditions. Section 33 requires the secretary of the relevant resource agency to determine if the licensee’s proposed alternative condition is either less costly or results in more electrical productivity than the Secretary’s condition. 16 U.S.C. § 823d(a)(2); 16 U.S.C. § 823d(b)(2). The agency then may submit either its original condition or the proposed alternative to FERC, along with an explanation of the basis for its decision. 16 U.S.C. § 823d(a)(4); 16 U.S.C. § 823d(a)(4). FERC may refer the dispute to its Dispute Resolution Service instead of automatically accepting them, if it determines that the condition would be inconsistent with the purposes of the FPA. 16 U.S.C. § 823d(a)(5); 16 U.S.C. § 823d(b)(5). Nevertheless, the opinion of the Dispute Resolution Service is only advisory, and the resource agency may chose not to accept FERC’s recommendations. \textit{Id.}
\item \textsuperscript{285} GAO Report. Hydropower Relicensing, supra note 278, at 7.
\end{itemize}
many of their original conditions in settlement negotiations with the licensees.\textsuperscript{286} Although the agencies explained why they rejected the proposed alternatives, they offered no explanations for how and why the settlement negotiations resulted in modified final conditions.\textsuperscript{287} Perhaps the reason for resource agencies’ willingness to alter conditions was to avoid the time and expense of the formal written statement required if they reject a licensee’s proposed condition. In other words, resource agencies may have traded more favorable conditions for the licensee’s agreement to withdraw proposed alternatives.\textsuperscript{288} It therefore seems that the proponents of the 2005 procedural amendments to the FPA’s conditioning authority may have achieved their objectives of reducing the economic effects of resource agency conditioning authority through the opportunity to negotiate conditions with resource agencies.

Thus, although the FPA’s structure for mandatory conditions remains intact following the EPAct, the 2005 amendments to the FPA seem to have produced less protective hydroelectric license conditions.\textsuperscript{289} The threat of trial-type hearings and the potential drain of resources as a result may have pressured agency officials into settling with licensees to modify conditions. As the GAO report concluded, the settlements lack transparency because agencies do not explain how and why the proposed alternatives end up producing conditions different from those originally proposed.\textsuperscript{290} However, despite the fact that the new procedures appear to at least indirectly favor the licensees, the licensees invoked the additional procedure in only 25 of the 103 relicensing proceedings between

\begin{flushright}
\textsuperscript{286} \textit{Id.} at 12. It does not appear that any of the proposed alternatives resulted in a referral to FERC’s Dispute Resolution Service. \\
\textsuperscript{287} \textit{Id.} \\
\textsuperscript{288} \textit{Id.} at 20. \\
\textsuperscript{289} \textit{Id.} at 15. \\
\textsuperscript{290} \textit{Id.} at 12.
\end{flushright}
2005 and 2010, less than one-quarter of the license proceedings. Moreover, at least as of 2010, the use of the procedures appeared to be declining.

VII. Conclusion

Shared sovereignty is a principle deeply embedded in environmental law. Congress enacted all of the statutes examined in this article in the decade between 1966 and 1973, except for the principal FPA provisions, which date from 1920s (although their implications for shared sovereignty did not become evident until the 1980s). Moreover, at least as of 2010, the use of the procedures appeared to be declining.

The shared sovereignty paradigm helps to explain what otherwise might seem to be haphazard results from NEPA litigation, since courts have shown they are influenced by the comments of agencies with environmental expertise. It also is at work in the involvement of states, tribes, the Council, and the Keeper in NHPA consultation, although that statute’s structure promotes preservation of historic properties with less reliance on litigation than under NEPA. Shared sovereignty also characterizes the federal consultation processes established by the ESA, in which fish and wildlife agencies have a “virtually determinative” in assessing the statutory compliance of action agencies. In the case of Clean Water Act vetoes under section 404(c) and fish and

---

291 Id. at 2.
292 Id. at 9.
294 See supra Part II.
295 See supra Part III.
296 See supra Part IV.
wildlife prescriptions under the Federal Power Act, the expert agencies have an even greater role in permit and license decisions.297

Although the type of sovereignty shared in our study varied quite a bit—from apparently advisory to virtually determinative to actually determinative—the notion that a pluralism of federal opinion improved decisionmaking was a consistent theme. In the 21st century, continuing the shared sovereignty principle that was laid down over four decades ago seems wise, given the complex scientific, economic, and ecological issues at the root of modern environmental law.

297 See supra Part V (404(c) permit vetoes), Part VI (FPA licensing).