The Good, the Bad and the Significant – Beneficial Impacts and NEPA

By

Kristin Ling Smith
U.S. Fish and Wildlife Service
Biloxi, MS
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Introduction

> "NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefit of planned actions must be assessed and then weighed against the environmental costs… The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken."
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> Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm.[1]

Federal agencies generally undertake actions to produce some benefit, either socioeconomic or environmental.[2] These actions may be projects and programs financed, assisted or otherwise conducted by a federal agency directly, or actions may involve regulation or approvals by federal agencies of actions that will be carried out by others.[3] Arguably, even regulatory and approval actions by federal agencies produce a benefit as they are often intended to reduce or mitigate adverse environmental consequences associated with an action.

The National Environmental Policy Act of 1969 (NEPA)[4] requires all agencies to consider the impacts of their actions and to prepare a "detailed statement" for "major federal actions significantly affecting the quality of the human environment."[5] The Council for Environmental Quality (CEQ) regulations[6] implementing NEPA outline criteria to be used by agencies in determining whether the effects of an action may be "significant" and therefore require the preparation of a "detailed statement." There is little differentiation, however, in the language of the Act itself or in the CEQ regulations between effects that are beneficial to the "human environment" and those that may be detrimental.

As a result, NEPA practitioners often disagree on the level of assessment required when actions may result in impacts that the agency considered to be wholly beneficial. While some argue that an Environmental Impact Statement (EIS) is required if the agency determines that *any* impact is significant, regardless of whether that impact is beneficial or adverse, it has also been suggested that a broad exemption from NEPA might apply to "benevolent" federal actions and perhaps an even broader exemption applied to agencies charged with the protection of the environment.[7]

The CEQ regulations provide a streamlined review process, the categorical exclusion, for categories of actions "which do not individually or cumulatively have a significant effect on the

human environment … and for which, therefore, neither an environmental assessment nor an environmental impact statement is required."[8] The regulations also provide an emergency provision for actions that are "necessary to control the immediate impacts of an emergency."[9] Over time, a limited number of additional exemptions from the requirement to prepare a "detailed statement" also have been developed in the courts.[10, 11] These include the "irreconcilable conflict" exemption which may apply when a constraint is imposed under another federal statute,[12] the "inaction doctrine" which has been applied to federal actions that do not alter the physical environment,[13] and the functional equivalency doctrine which exempts certain federal agencies from the procedural requirements of NEPA when compliance would duplicate agency action required by another federal statute.[14]

In *Portland Cement Association v. Ruckelshaus*,[15] the U.S. Court of Appeals for the District of Columbia Circuit addressed the question of whether NEPA is applicable to environmentally protective regulatory agencies and established a narrow exemption for specific Environmental Protection Agency (EPA) actions. However the court held that, "NEPA must be accorded full vitality as to non-environmental agencies."[16] Following this precedent, the functional equivalency doctrine has been applied only to agencies acting under a legislative mandate to protect or benefit the environment, such as the EPA, and then only when specific conditions are met.

NEPA documents prepared by federal agencies often focus heavily on adverse impacts and minimize the discussion of beneficial impacts.[17] The CEQ regulations require and numerous court decisions have held, however, that agencies must analyze and consider both the beneficial and adverse effects of their actions under NEPA.[18, 19] Actions that produce a benefit to the environment should not be considered exempt from NEPA for various reasons. An action cannot be characterized as wholly beneficial until all of its impacts have been considered. The NEPA process provides a framework for considering and documenting all impacts. In addition, no matter the intention of the agency and regardless of the agency's charge to protect the environment, any action that produces a direct, physical modification to the environment is unlikely to be wholly beneficial. Although a maxim of physics, the Third Law of Motion – for every action there is an equal and opposite reaction – has some applicability here as well. A project involving the construction of a highway, for example, will provide benefits such as

increased access, reduced travel and transport time, improved safety, etc. However, the physical construction of the highway may fragment wildlife habitat or human communities. The increased traffic may also produce additional greenhouse gases and other emissions and noise in the local area.

Even an action undertaken specifically to benefit the environment may have undesirable consequences in the short or long term. If, for example, a land management agency implements policies and programs to increase early successional habitat, wildlife species that need this type of open habitat will benefit, while species that require forested habitats will decline. Similarly, the creation of a reservoir within a river system could favor fish species that prefer still water at the expense of riverine fish species. The NEPA process ensures that an agency considers the full range of environmental impacts associated with an action, both beneficial and adverse. Without the detailed analysis required by NEPA, there is no easy way for an agency to conclude that the impact is wholly beneficial or that any unintended adverse consequences, should they occur, are not significant.

Given that a NEPA analysis is required when the only significant impacts to the human environment are beneficial, the question then becomes, what level of analysis is required? The CEQ regulations allow agencies to prepare an Environmental Assessment (EA) to inform decision-making and to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact" (FONSI)."[20] An EA is generally not as detailed in content or analysis as an EIS. Agencies routinely prepare EAs for actions when no significant adverse impacts to the human environment are anticipated, resulting in thousands of FONSIs each year. Based on the earlier premise that federal agencies generally undertake an action to produce some benefit, and that some, if not most, of these benefits are significant based on the thousands, millions or even billions of tax dollars being spent, is it appropriate for federal agencies to prepare EAs and FONSIs for actions having only significant beneficial effects on the human environment, or is the preparation of the more detailed EIS required? To examine this question, this paper will review the language contained in the NEPA statute, the CEQ regulations for implementing NEPA, and various court cases addressing the issue.

The Language of NEPA

> "…[A]ll agencies of the federal government shall … include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official…"
>
> National Environmental Policy Act,[21] Section 102

A report prepared by the Duke University Center for Environmental Solutions[22] found that although the terms "adverse effect" and "adversely affect" appear approximately 700 times in federal laws, the federal statutes "give little or no definition or guidance regarding the precise meanings or intended interpretations" of these terms.[23] Likewise, NEPA does not define these terms and generally refers to "effects" or "impacts" without differentiating between those impacts that are beneficial and those that may be adverse. When there is a qualifier for "effects" in the NEPA statute, it is explicit or implied that the effects are negative. As an illustration, although the words "impact", "effects", and the verb "affecting" appear four times in Section 102[24] of NEPA, in only one instance is a qualifier included: "(ii) any *adverse* environmental effects which cannot be avoided should the proposal be implemented." "Adverse" is an important clarifier in this statement; otherwise, the federal agency might be led to avoid beneficial effects, countermanding the intent of NEPA.

In Section 2[25] of NEPA, Congress states that the purposes of the Act are: "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." To achieve these purposes, Title 1, Section 101[26] states, "[t]he Congress…declares that it is the continuing policy of the federal government … to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Verbs such as "promote", "stimulate", "enrich", "foster", "promote", "create and maintain", and "fulfill" imply Congress'

intent that the policy set forth in NEPA will provide benefits to humans and the natural environment.

Section 102[27] of NEPA requires that all agencies of the federal government "include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

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

The lack of a qualifier in item (i) – "the environmental impact of the proposed action" – seems to confirm that Congress intended that an agency consider *all* effects of "major federal actions," but does not resolve the issue of what level of analysis is needed when the only significant impacts are beneficial.

The Council for Environmental Quality (CEQ) Regulations

> "Federal agencies shall to the fullest extent possible:
>
> … (e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.
>
> (f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."
>
> Council of Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act[28]

The CEQ issued regulations[29] in 1978, providing procedural guidelines for implementation of NEPA across all federal agencies. In addition to the EIS and the use of categorical exclusions outlined in the NEPA statute, the CEQ regulations allow agencies to prepare an EA "on any action at any time in order to assist agency planning and decision-making."[30] The EA is used in determining if the agency will prepare an EIS or prepare a finding of no significant impact (FONSI).[31] Therefore, the CEQ regulations allow agencies two options for the preparation of the "detailed statement" when required by NEPA, the EA and the EIS.

The EA is described as "a concise public document" that provides "sufficient evidence and analysis" to guide the agency in determining the need for an EIS.[32] When issuing a FONSI rather than preparing an EIS, the agency must provide "convincing reasons why potential effects are truly insignificant."[33] Agencies have some latitude, established within their agency-specific NEPA regulations and policies, for the format and content of an EA, the amount and level of public input and review, interagency input and review, etc. These same items are prescribed in detail in the CEQ regulations for the preparation of an EIS,[34] which "shall provide full and fair discussion of significant environmental impacts."[35] In theory, the type of document selected by the agency is determined by the anticipated "significance" of the impacts. In practice, however, other factors, such as the resources available, time required to prepare a detailed analysis and public perception of the project, are often important agency considerations as well.

Like the NEPA statute, the CEQ regulations generally refer to "effects" without differentiating between those impacts that are beneficial and those that may be adverse.[36] According to the explanation provided in section 1508.8, "[e]ffects includes ecological (such as the effect on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social or heath, whether direct, indirect or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial."

Terminology

The term "effect" appears 64 times in the CEQ regulations, over half of these in Part 1508, the "Terminology and Index." "Beneficial" appears four times, all of them in Part 1508. "Adverse"

appears 15 times, with the most occurrences in Part 1502, the section describing the requirements for preparing an EIS.

The following statements referencing adverse effects are perhaps the most relevant to this discussion.

- In § 1500.2 the emphasis is on the avoidance of adverse effects while achieving a benefit. Federal agencies are instructed to, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize *adverse* effects of these actions, and to "[u]se all practicable means … to restore and enhance the quality of the human environment and avoid or minimize any possible *adverse* effects of their actions upon the quality of the human environment."
- In § 1502.22 when discussing incomplete or unavailable information related to "reasonably foreseeable significant *adverse* effects on the human environment," the regulations state that the agency must make clear that this information is lacking. There is no such instruction for beneficial impacts.
- Likewise, in § 1506.1, "Limitations on actions during the NEPA process", agencies are prohibited from taking action concerning a proposal that would have an *adverse* environmental impact or limit the choice of reasonable alternatives prior to issuing the record of decision (ROD). There is no prohibition against proceeding with actions having beneficial impacts prior to issuing a ROD. While it is a logical conclusion that an agency should not proceed with an action having adverse impacts before completing the NEPA process, it also seems reasonable that the CEQ would not have chosen to include the qualifier "adverse" in this case if it were expected that an EIS and ROD were indeed required for significant beneficial actions.

Specific references to beneficial effects in the regulations are limited to those actions having both beneficial and detrimental effects, "even if on balance the agency believes that the effects will be beneficial."[37] While these statements are often cited as evidence that preparation of an EIS is required to analyze significant beneficial effects, it is more likely that the language is intended to caution agencies against the argument that analysis of adverse effects is not warranted when the action is considered "on balance" to be beneficial. When taken as a whole, these guidelines

seem to indicate that agencies must consider and disclose beneficial effects, but should focus their NEPA analyses and efforts on the identification and avoidance or minimization of adverse effects.

The Intensity Factors

The CEQ regulations state that "'[s]ignificantly' as used in NEPA requires consideration of both context and intensity."[38] The use of the term "intensity," which is defined as "the severity of the impact,"[39] may be important, as it has been noted by at least one court that "one speaks of the severity of adverse impacts, not beneficial impacts."[40]

The regulations provide 10 factors that "should be considered in evaluating intensity".[41] Courts have held that "[t]he presence of one or more of these factors should result in an agency decision to prepare an EIS".[42] The intensity factors are:

1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.
2. The degree to which the proposed action affects public health or safety.
3. Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
4. The degree to which the effects on the quality of the human environment are likely to be highly controversial.
5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
6. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

8. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
10. Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment.

Beneficial and adverse effects are specifically identified in the first factor – "Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial." As mentioned above, this item highlights an important distinction between effects that are wholly beneficial and those that are "on balance" beneficial. Under this guidance, if an agency determines that any adverse effects may result from an action that is otherwise beneficial, additional analysis may be required through the preparation of an EIS. At a minimum, sufficient analysis is needed to determine what, if any, adverse effects may occur and whether these adverse effects are in themselves significant.

Adverse impacts are also explicitly identified in two additional intensity factors relating to compliance with the National Historic Preservation Act of 1966[43] and Endangered Species Act of 1973.[44] These laws and their associated regulations specifically address adverse impacts to protected resources and require consultation when adverse impacts will result from federal actions. It is likely that the use of the "adverse" qualifier in these cases is directly related to the requirements of the statutes.

The remainder of the intensity factors do not explicitly identify whether impacts are beneficial or adverse. However, the factors to be considered, including public health and safety, unique characteristics of the geographic area, uncertainty and risk, are clearly those where adverse impacts are a concern, while beneficial impacts are to be desired.

The Resources Issue

The CEQ regulations are also clear that agencies are to reduce excessive paperwork and delays in the NEPA process.[45] In general, the preparation of an EIS is resource intensive process, requiring much more time and expense than the preparation of an EA. Preparation of a typical EIS may cost between $250,000 and $2 million, and take between one and six years to complete.[46] Similarly, the time and expense required to prepare EAs are variable, depending upon the complexity of the project. These documents typically cost $5,000 to $200,000, and preparation time ranges from a few weeks to 18 months.[47] As Goho[48] and Swartz[49] discuss, preparing an EIS for a project having only significant beneficial impacts does not reduce excessive paperwork and delays in the NEPA process and could instead be an impediment to the development of beneficial projects.[50]

The Courts Weigh In

> "The role of the courts in reviewing compliance with NEPA is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious."
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> *Utah Shared Access Alliance v. U.S. Forest Service* [51]

With some ambiguity present in the NEPA statute and the CEQ regulations, it appears that the question of beneficial effects must be settled by the courts. Beneficial impacts have factored into numerous court decisions. Plaintiffs have challenged that agencies failed to appropriately evaluate beneficial effects or to prepare an EIS when significant beneficial impacts would occur. Several of the resulting court decisions have been viewed as conflicting, and a "circuit court split" is often suggested.[52] A number of the federal courts have recently raised, but ultimately decided not to address, the issue.[53]

The courts' focus in these cases is on the adequacy of the agency's NEPA process and the resulting agency decisions. The standard for judicial review is whether the agency's decision can be found to be "arbitrary and capricious" under the Administrative Procedures Act[54] and whether the agency has taken the requisite "hard look" when examining the potential impacts of the action.[55]

The subject of beneficial effects has arisen in over 30 federal court cases since 1972. A review of the relevant court decisions shows that, in fact, only one case, *Friends of Fiery Gizzard v. Farmers Home Administration*,[56] has directly addressed the question of significant beneficial impacts in the absence of potentially significant adverse impacts. In this case, the court held that an EIS was not required for significant beneficial actions.[57] Additional cases exist where the courts have upheld EAs and FONSIs prepared for actions that resulted in potentially significant beneficial impacts, but the courts did not remark on this issue. [58]

Historical Background

In one of the earliest NEPA cases, *Hanly v. Kleindienst*[59] in 1972, the U.S. Court of Appeals 2nd Circuit stated that "almost every major federal action, no matter how limited in scope, has some adverse effect on the human environment,"[60] but the determination of whether an EIS is required is dependent on the significance of those effects. The court then developed a two pronged test for determining whether an impact is significant, stating that the proposed action should be reviewed "in the light of at least two relevant factors: (1) the extent to which the action will cause *adverse* environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative *adverse* environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area."[61]

The following year, the 5th Circuit Court of Appeals stated in *Save Our Ten Acres v. Kreger*, while upholding the agency's decision that an impact statement was not required, "[o]n the other hand, if the court finds that the project may cause a significant *degradation* of some human environmental factor (*even though other environmental factors are affected beneficially or not at all*), the court should require filing of an impact statement…"[62] Also in 1973, the 5th Circuit Court took up the question of beneficial effects in *Hiram Clark Civic Club v. Lynn.*[63] Although upholding the agency's decision not to prepare an EIS, the court criticized the agency for considering only adverse impacts of their action. The court went on, in dictum, to rhetorically express its view that "Congress was not only concerned with adverse effects, but with all potential environmental effects that affect the quality of the human environment."[64]

Since 1973, a number of cases can be cited where the U.S. District and Circuit Courts expressed opinions regarding beneficial effects. However, as argued by Goho[65] in a recent paper, these cases either involve additional issues (e.g., whether a supplemental EIS was required),[66] an agency's claim that NEPA does not apply to an action that does not directly alter the natural, physical environment (e.g., Critical Habitat designation under the Endangered Species Act),[67] the issue of net beneficial effects,[68] or the court's statements are dicta and, therefore, not binding.[69] In the vast majority of these cases, significant adverse effects to the human environment were alleged or expected to result from the proposed federal action; therefore preparation of an EIS was required regardless of the occurrence of any significant beneficial effects.[70] In other cases, the question addressed by the courts was whether beneficial effects must be considered in the NEPA process, not whether preparation of an EIS was required when significant beneficial effects will occur.[71]

Friends of Fiery Gizzard Decision

Only one court decision, *Friends of Fiery Gizzard v. Farmers Home Administration,*[72] has directly addressed whether an agency must prepare an EIS when significant beneficial effects will occur in the absence of significant adverse impacts.[73] The question of significant beneficial effects was central to this case and is raised in the opening paragraph of the decision: "does the fact that people served by the project will enjoy the benefit of an improved water supply mean that the agency must prepare a full-scale environmental impact statement that would not otherwise be required?"[74] This case involved the development of a water supply reservoir, for which the Farmer's Home Administration prepared an EA and FONSI. The EA concluded that there would be no significant adverse impacts associated with the project and instead projected a beneficial impact of a dependable, sanitary water supply for the town of Tracy City, Tennessee. Suit was brought by several environmental groups, alleging a violation of NEPA on the grounds that the agency was required to prepare an EIS given the finding in the EA that the project would have a significant *positive* effect on the human environment. The plaintiffs' motion for a preliminary injunction was denied by the District Court and appealed to the 6th Circuit.

In affirming the lower court's decision that an EIS was not required, the court stated, "[t]he mere fact that the Fiery Gizzard project will have a positive impact on the health and welfare of the

people it serves does not compel the conclusion that the project may not go forward without an environmental impact statement that would not otherwise be required."[75] The court cited §1500.2 (b) of the CEQ regulations, which "direct federal agencies 'to make the NEPA process more useful to decisionmakers and the public,' not less useful; 'to reduce paperwork and the accumulation of extraneous background data,' not expand them; and 'to emphasize real environmental issues and alternatives,' not fanciful ones."[76] The court further differentiated between projects where the only potentially significant issues are beneficial ones and projects where adverse effects are predicted and the agency must "balance" the adverse effects against the beneficial impacts. While there were potential adverse impacts associated with the project in this case, the agency had determined that these were not significant, and the court deferred to the agency's decision.

Conclusions

> "[T]here is growing awareness that routinely requiring such statements would use up resources better spent in careful study of actions likely to harm the environment substantially."
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> *River Road Alliance, Inc. v. Corps of Engineers of U.S. Army*[77]

Friends of Fiery Gizzard v. Farmers Home Administration is the only case to reach the U.S. Courts of Appeals to date which directly addresses the question of whether an EIS is required for an action when the only significant effects are beneficial. However, a number of other cases are frequently cited, perhaps erroneously, in support of preparing EISs when only significant beneficial effects are expected.[78] It appears that, if a Circuit court mentioned beneficial effects anywhere in the decision or discussed them in dicta, the case has been referenced as having some bearing on the question of the level of NEPA analysis required when significant beneficial effects may occur. A careful reading of these cases finds that they address different and distinguishable issues, such as the requirement that beneficial effects must be discussed in a NEPA analysis, or the need to prepare an EIS when the agency decision hinges on the balancing of adverse and beneficial effects. Also, in the vast majority of these cases, the plaintiffs argued that significant adverse effects would also occur, which would have triggered the EIS requirement and factored into the court's decision. Based on this review, there is no "circuit split" regarding the issue of beneficial effects. The only Circuit court decision which has directly

addressed the question of whether preparation of an EIS is required when significant beneficial effects occur in the absence of significant adverse effects, *Friends of Fiery Gizzard*,[79] indicated that an EIS was not required. The common thread that does run through the decisions is that agencies should consider both adverse *and* beneficial effects in decision-making.

Does NEPA apply to projects having significant beneficial effects? Yes, but this does not mean that the preparation of an EIS is automatically required. The CEQ regulations provide agencies with the option of preparing an EA for actions that are not categorically excluded. As noted by the court in *Friends of Fiery Gizzard*, "[i]t was in keeping with this philosophy that the environmental assessment process was devised to screen projects where the preparation of an expensive and time consuming environmental impact statement would serve no useful purpose."[80] It should also be noted that several of the oft-cited early court cases occurred prior to the issuance of the CEQ regulations in 1978. At that point in time, the EIS was the only acceptable "detailed statement" available to meet NEPA requirements.

The NEPA statute and the CEQ regulations for its implementation emphasize the avoidance or minimization of adverse effects in order "to restore and enhance the quality of the human environment."[81] The CEQ regulations further instruct agencies to conduct efficient analyses, through reduced paperwork, interagency coordination, and "integrat[ion of] the NEPA process with other agency planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."[82] As the court has indicated in *Fiery Gizzard*,[83] a requirement to prepare an EIS to analyze in detail a project resulting in only significant beneficial effects would not be consistent with these goals.

Federal agencies should not feel pressured to spend limited time and resources on the preparation of EISs for beneficial projects that do not result in significant adverse impacts, even if the beneficial impacts themselves are determined to be significant. However, NEPA requirements to consider and analyze impacts – both beneficial and adverse – must be fulfilled. Where significant impacts will occur that are wholly beneficial, the NEPA statute, the CEQ regulations and the judicial precedent support the preparation of an EA and finding of no significant impact rather than the more detailed EIS.

[1] *Calvert Cliffs' Coordinating Commission v. Atomic Energy Commission*, 449 F.2d 1109, 1123 (D.C. Cir. 1971).
[2] As used in this context, the "benefit" may be to the natural environment (e.g., improved water quality or increased endangered species habitat), or it may be to humans (e.g., economic benefits, such as an increase in jobs or a new retail center, or social benefits, such as improved safety or the creation of a recreational area). No implication is intended that detrimental effects do not result from federal agency actions.
[3] See 40 CFR § 1508.18, "major federal action."
[4] 42 USC § 4321-4370.
[5] *Ibid.,* Section 102.
[6] 40 CFR Parts 1500-1508 (1978).
[7] For example, see *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981), and *Texas Committee on Natural Resources v. Bergland*, 573 F. 2d 201 (5th Cir. 1978).
[8] 40 CFR § 1508.4, "categorical exclusion."
[9] 40 CFR § 1506.11, "emergencies."
[10] Kendal, K. (2004). The Long and Winding Road: How NEPA Noncompliance for Preservation Actions Protects the Environment. *Brooklyn Law Review*. 69, 663-688.
[11] Yokoyama, J. (2010). NEPA "Exemption" on the Grounds of ESA's Functional Equivalency – Proposal on the Circuit Split Issue of NEPA Applicability to ESA Procedure. Retrieved from https://lawlib.wlu.edu/lexopus/works/720-1.pdf.
[12] For examples of the "irreconcilable conflict" exemption, see *Pacific Legal Foundation v. Andrus*, *op. cit.*, 841, in which the court held, "that a statutory conflict exists between ESA and NEPA which relieves the Secretary [of the Interior] of the burden to prepare an impact statement before listing any species as endangered or threatened" and *Flint Ridge Development Corporation v. Scenic Rivers Association*, 426 U.S. 776 (1976) in which the U.S. Supreme Court allowed the Department of Housing and Urban Development an exemption from NEPA requirements on the grounds that the time required to prepare an EIS was inconsistent with the time constraints under the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.).
[13] For an example of the "inaction doctrine," see *Douglas County v. Babbitt*, 48 F.3d 1495, 1507 (9th Cir. 1995) in which the court held that the U.S. Fish and Wildlife Service was exempt from filing an EIS before designating critical habitat for an endangered species pursuant to the Endangered Species Act for reasons including, "NEPA does not apply to actions that do not change the physical environment."
[14] For examples of the functional equivalency doctrine, see *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), and *Environmental Defense Fund Inc. v. Environmental Protection Agency*, 489 F.2d 1247 (D.C. Cir. 1973), in which the court held that EPA was not required to comply with NEPA when adherence to other procedural standards produced a functionally equivalent analysis. The court's opinion in *Portland Cement* provides an interesting review of information from the Congressional Records related to the question of whether NEPA is applicable to environmentally protective regulatory agencies.
[15] *Portland Cement Association v. Ruckelshaus, op. cit.*
[16] *Ibid*., 387.
[17] The tendency of agencies to focus primarily on adverse effects may result from a perception among some NEPA practitioners that only adverse effects should be analyzed, or an agency may decide to expend limited resources on the analysis of what are seen as the most "important" or

controversial impacts. A concern that the identification of significant beneficial effects will require a more in-depth, time consuming and expensive NEPA process (i.e., the preparation of an EIS rather than an EA) may also be a factor. The CEQ regulations require the analysis of all effects, beneficial as well as adverse, although there is an emphasis on the identification and avoidance or minimization of adverse impacts.

[18] Cosco, J.M. (1997). NEPA for the Gander: NEPA's Application to Critical Habitat Designations and Other "Benevolent" Federal Actions. *Duke University Environmental Law and Policy Forum*. 8, 345-385.

[19] See Chapter 3: The National Environmental Policy Act in Glickman, R.L., Markell, D.L., Mandelker, D.R., Tarlock, A.D., & Anderson, F.R. (2003). *Environmental Protection: Law and Policy*, 4th edition. New York, NY: Aspen Publishers.

[20] 40 CFR § 1508.9, "environmental assessment."

[21] 42 USC § 4321-4370.

[22] Stansell, K, and Marvelli, M. (2005). Adverse Effects and Similar Terms in U.S. Law: A Report Prepared by the Duke Center for Environmental Solutions for the Dose Response Specialty Group of the Society for Risk Analysis (SRA). Retrieved from http://www.sra.org/drsg/docs/Adverse_Effects_Report.pdf.

[23] *Ibid*., 3.

[24] 42 USC § 4332.

[25] 42 USC § 4321.

[26] 42 USC § 4331.

[27] 42 USC § 4332.

[28] 40 CFR § 1500.2.

[29] 40 CFR parts 1500-1508.

[30] 40 CFR § 1501.3.

[31] 40 CFR § 1501.4 and § 1508.9.

[32] 40 CFR § 1508.9.

[33] *Maryland-National Capital Park & Planning Commission v. US Postal Service*, 487 F. 2d 1029 (D.C. Cir. 1973); also quoted by *Lower Alloways Creek Township v. Public Service Electric & Gas Co*., 687 F. 2d 732 (3rd Cir. 1982), *The Steamboaters v. FERC*, 759 F. 2d 1382 (9th Cir. 1985), *Save the Yaak Committee v. Block*, 840 F. 2d 714 (9th Cir. 1988), and *Blue Mountains Biodiversity Project v. Blackwood*, 161 F. 3d 1208 (9th Cir. 1998).

[34] See 40 CFR Part 1502.

[35] *Ibid.,* §1502.1.

[36] Effects and impacts as used in the CEQ regulations are synonymous. See 40 CFR § 1508.8. In the regulations, the use of the term "impact" is generally avoided unless used in "environmental impact statement" or referencing language directly from the NEPA statute.

[37] See 40 CFR § 1508.8 and § 1508.27 (b)(1).

[38] 40 CFR § 1508.27.

[39] *Ibid*., § 1508.27(b).

[40] *Friends of Fiery Gizzard v. Farmers Home Administration*, 61 F.3d 501 (6th Cir. 1995).

[41] 40 CFR § 1508.27 (b).

[42] See *Public Service Co. of Colorado v. Andrus*, 825 F. Supp. 1483, 1495 (D.C. Idaho 1993), *Public Citizen v. Department of Transportation*, 316 F.3d 1002 (9th Cir. 2003), and *Humane*

Society of the United States v. Department of Commerce, 432 F. Supp. 2d 4, 13 (D.C. D.C. 2006).
[43] 16 U.S.C. § 470 et seq.
[44] 16 U.S.C. §1531 et seq.
[45] See 40 CFR § 1500.4 and § 1500.5.
[46] NEPA Task Force. (2003). The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation, section 6.1.1. Retrieved from http://ceq.hss.doe.gov/ntf/report/index.html.
[47] *Ibid*.
[48] Goho, S.A. (2012). NEPA and the "Beneficial Impact EIS". *William and Mary Environmental Law and Policy Review*. 36, 367-404.
[49] Swartz, L.L., Esq. (2001). Triggering the Environmental Impact Statement Requirement Under the National Environmental Policy Act: Do Beneficial Impacts Count? Retrieved from http://www.lucindalowswartz.com/images/Beneficial_Impacts.pdf.
[50] Also see statement in *Cronin v. US Dept. of Agriculture* [919 F. 2d 439, 443 (7th Circuit 1990)] that the preparation of a full-fledged EIS "has been the kiss of death to many a federal project."
[51] *Utah Shared Access Alliance v. U.S. Forest Service*, 288 F.3d 1205, 1208 (10th Cir. 2002), internal quotation marks omitted; quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983).
[52] For example, see *Humane Society v. Locke*, 626 F.3d 1040, 1056 n.9 (9th Cir. 2010) and *Decker v. U.S. Forest Service*, 780 F. Supp.2d 1170, 1179 n.2 (D. Colo. 2011).
[53] See *Humane Society v. Locke*, 626 F.3d 1040 (9th Cir. 2010), and *Coliseum Square Association v. Jackson*, 465 F.3d 215 (5th Cir. 2006).
[54] 5 U.S.C. § 551 et seq.
[55] Atkinson, S.F., Canter, L.W., & Ravan, M.D. (2006). The influence of incomplete or unavailable information on environmental impact assessment in the USA. *Environmental Impact Assessment Review*. 26(5), 448-467.
[56] *Friends of Fiery Gizzard, op. cit.*
[57] Goho, *op. cit*.
[58] For example, see *Utah Shared Alliance v. US Forest Service*, 288 F.3d 1205 (10th Cir. 2002), *Utah Environmental Congress v. Russell*, 518 F. 3d 817 (10th Cir. 2008), and *Jackson County, North Carolina v. FERC*, 589 F. 3d 1284 (D.C. Cir. 2009).
[59] *Hanly v. Kleindienst*, 471 F.2d 823 (2nd Cir. 1972).
[60] *Ibid*., 830.
[61] *Ibid.*, 830-831; emphasis added.
[62] *Save Our Ten Acres v. Kreger*, 472 F. 2d 463, 467 (5th Cir. 1973), emphasis added; also quoted in *City & County of San Francisco v. United States*, 615 F. 2d 498 (9th Cir. 1980), *LaFlamme v. FERC*, 852 F. 2d 389 (9th Cir. 1988), *Greenpeace Action v. Franklin*, 14 F. 3d 1324(9th Cir. 1992), and *Blue Mountains Biodiversity Project v. Blackwood*, 161 F. 3d 1208 (9th Cir. 1998).
[63] *Hiram Clark Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973).
[64] *Ibid.*, 427.
[65] Goho, *op. cit.*

[66] Examples of cases that involved issues other than whether an EIS is required for significant beneficial impacts include: *Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981); *National Wildlife Federation v. Marsh*, 721 F.2d 767 (11th Cir. 1983); *Sierra Club v. Froehlke*, 816 F.2d 205 (5th Cir. 1987), and *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197 (1st Cir. 1999). The issue and ruling in each of these cases involved the need to prepare a supplemental EIS. In addition, the first three cases involved potential adverse impacts. The Fifth Circuit Court later stated in *Coliseum Square Association v. Jackson (op. cit.,* 239), regarding *Environmental Defense Fund v. Marsh*, "Moreover, the other case in this circuit touching on the question can be distinguished on the grounds that it determines only whether an EIS need *discuss* positive benefits"(emphasis added).

[67] Examples of cases that involved the question of whether an agency's action is exempt from NEPA because the action does not directly alter the natural, physical environment include: *Pacific Legal Foundation v. Andrus, op. cit.*, 837, *Douglas County v. Babbitt, op. cit.*; and *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996). The first case involves the listing of species, and the others involve the designation of Critical Habitat under the ESA. For reviews of these cases, see papers by Cosco, *op. cit.*, and Kendal, *op. cit.*

[68] Examples of cases holding that an EIS must be completed even if "on balance" the agency believes the project will be beneficial include: *Smith v. City of Cookeville*, 381 F.Supp. 100 (M.D. Tenn. 1974); *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997 (S.D. Cal. 2003); *Fund for Animals v. Norton*, 281 F.Supp.2d 209 (D.C. D.C. 2003); *Environmental Protection Information Center v. Blackwell*, 389 F. Supp. 2d 1174 (N.D. Cal. 2004); and *High Country Citizens' Alliance v. Norton*, 448 F.Supp.2d 1235 (D. Colo. 2006). In these cases, the courts ruled that the agency should prepare an EIS due to the potential for significant adverse effects, even though the agency believed that net effect would be beneficial. Goho (*op. cit*., 379) places *Natural Resources Defense Council v. Grant* [341 F.Supp. 356 (E.D. NC 1972)] in the category of "exempt from NEPA" discussed above, but in my opinion this case is more appropriately categorized as one in which the agency attempted the "on balance" argument.

[69] Examples of cases in which the courts included dicta regarding significant beneficial effects and the need for an EIS include: *Hiram Clark Civic Club v. Lynn*, 476 F.2d 421 (5th Cir. 1973); and *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985). The courts did not hold in either of these cases that the agency had to prepare an EIS for an action expected to have significant beneficial impacts. In addition, any statements that were made with regard to this issue were only dicta.

[70] For an interesting example involving both beneficial and adverse impacts, see *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007) and 538 F.3d 1172 (9th Circuit, 2008). In these cases, the court held that EAs prepared by the National Highway Traffic Safety Administration (NHTSA) for corporate average fuel economy standards ("CAFE") standards for light trucks were inadequate because the environmental significance of carbon dioxide emissions and the cumulative effect of those emissions on global warming were not assessed. The NHTSA had merely quantified the expected amount of carbon dioxide emitted under "unreformed" and "reformed" standards. Although the NHTSA argued that its action would decrease the growth of carbon emissions from the baseline approach (a beneficial effect), the court favored the petitioners' argument that the

evidence presented a substantial question of whether a significant adverse impact on the environment would result instead.

[71] For example, see *Environmental Defense Fund v. Marsh, op. cit.*, 993, and discussion of this case in *Coliseum Square Association v. Jackson, op. cit.*, 239.

[72] *Friends of Fiery Gizzard, op. cit.,* 501.

[73] Goho, *op. cit.*

[74] *Friends of Fiery Gizzard, op. cit*., 501.

[75] *Ibid.*

[76] *Ibid.*

[77] *River Road Alliance, Inc. v. Corps of Engineers of U.S. Army*, 764 F.2d 445, 451 (7th Cir. 1985).

[78] Some of the most frequently cited cases include *Environmental Defense Fund v. Marsh, Douglas County v. Babbitt, Environmental Protection Information Center v. Blackwell*, and *Sierra Club v. Froehlke; op. cit.* for all listed.

[79] *Friends of Fiery Gizzard, op. cit*.

[80] *Ibid.*

[81] 40 CFR § 1500.2

[82] 40 CFR § 1501.2.

[83] *Friends of Fiery Gizzard, op. cit*.