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Martha Sheehy

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# THE DEVELOPMENT AND IMPLEMENTATION OF THE CUMULATIVE IMPACT ANALYSIS REQUIREMENT

Martha Sheehy

## I. INTRODUCTION

The National Environmental Policy Act<sup>1</sup> (NEPA) sets down a comprehensive national policy of fostering and promoting the public's general welfare by creating conditions under which society and nature can exist in harmony.<sup>2</sup> This policy is furthered by a Congressional mandate directing all federal agencies to consider environmental concerns on an equal basis with the more traditional economic and technological concerns.<sup>3</sup> The Council on Environmental Quality (CEQ),<sup>4</sup> established under the authority of NEPA, also furthers this policy through the implementation of regulations.

Since the enactment of NEPA in 1969, courts have been inundated with litigation to determine what is required of a federal agency under NEPA and its corresponding regulations. Included among this flood of litigation has been the issue of whether a federal agency is required to conduct a cumulative impact analysis. While NEPA does not specifically require a federal agency to analyze the cumulative impacts of several actions, the CEQ regulations do require the agencies to consider both connected<sup>5</sup> and cumulative actions<sup>6</sup> in a single Environmental Impact Statement (EIS). Based on these regulations, courts have required cumulative impact analysis when such analysis will further NEPA's policy of considering environmental concerns on an equal basis with the more traditional concerns.<sup>7</sup>

Cumulative impact analysis has become an integral part of fulfilling the Congressional mandates embodied in NEPA. An Environmental Assessment (EA) or an EIS may be deemed inadequate based on an agency's failure to include this type of analysis. Courts are currently faced with determining when a cumulative impact analysis is required. This comment traces the development of the cumulative impact analysis

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1. 42 U.S.C. §§ 4321-4370 (1982 & Supp. III 1985).

2. *Id.* § 4331(a).

3. *Id.* § 4332(2)(b).

4. Congress established the Council on Environmental Quality in 1970 under the mandates of the National Environmental Policy Act. "The Council [is] composed of three members who [are] appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate." *Id.* § 4342.

5. 40 C.F.R. § 1508.25(a)(1) (1986).

6. *Id.* § 1508.25(a)(2).

7. *See, e.g.,* Thomas v. Peterson, 753 F.2d 754, 758-59 (9th Cir. 1985).

requirement and examines, in light of recent case law, the two primary types of actions—cumulative and connected—which trigger the requirement.

## II. DEVELOPMENT OF THE CUMULATIVE IMPACT ANALYSIS REQUIREMENT

NEPA contains no specific reference to cumulative impact analysis. Consequently, agencies have no explicit statutory duty to analyze combined impacts of separate actions. However, NEPA sets forth a policy of environmental protection, requiring federal agencies to further environmental goals by “all practicable means.”<sup>8</sup> Through NEPA, Congress ensured an agency’s consideration of environmental factors by requiring the preparation of an EIS.<sup>9</sup> Based on this EIS requirement, courts interpreting NEPA and the CEQ regulations have imposed a duty to analyze cumulative impacts.

In an early case interpreting NEPA, *Kleppe v. Sierra Club*,<sup>10</sup> the United States Supreme Court held that federal agencies were required to prepare EISs for proposed actions only.<sup>11</sup> This decision limited the scope of NEPA considerably by allowing agencies to escape the EIS requirement until contemplated actions were proposed. However, the Court recognized that in some situations, several related but separate actions must be analyzed in a single EIS.<sup>12</sup> Under *Kleppe*, an agency must consider together the effect of proposals for separate actions “that will have cumulative or synergistic environmental impact upon a region” if those proposals are pending concurrently before the agency.<sup>13</sup> This holding forms the precedential basis for the cumulative impact analysis requirement.

The CEQ followed the lead the Supreme Court established in *Kleppe*. Regulations promulgated by the CEQ after *Kleppe* define two primary circumstances where several actions must be considered together. Under CEQ regulations, “connected actions” and “cumulative actions” require a single analysis to determine the combined impacts of the actions on the surrounding environment.<sup>14</sup> Connected actions are defined as actions which “automatically trigger other actions which may require an EIS; cannot or will not proceed unless other actions are taken previously or

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8. 42 U.S.C. § 4331(b).

9. *Id.* § 4332(2)(c); *see also* *Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976).

10. 427 U.S. 390 (1976).

11. *Id.* at 409-10.

12. *Id.* at 409.

13. *Id.* at 410.

14. 40 C.F.R. § 1508.25(a)(1) and (2).

simultaneously; are interdependent parts of a larger action and depend on the larger action for their justification.”<sup>15</sup> “Cumulative actions” are actions “which when viewed with other proposed actions, have cumulatively significant impact.”<sup>16</sup> In either case, “cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”<sup>17</sup> The regulations further specify that a cumulative impact analysis should take into account impacts, whether large or small, from past, present, and reasonably foreseeable future actions which are related or unrelated to the proposed project and regardless of whether the unrelated project is undertaken by a federal or non-federal agency or person.<sup>18</sup>

The regulations promulgated by the CEQ represent a broader interpretation of NEPA than the Court’s holding in *Kleppe*. The Court in *Kleppe* required that related actions be considered together, but also stated that NEPA required an environmental impact statement for proposed actions only.<sup>19</sup> The CEQ expanded NEPA’s language by requiring a single analysis to determine the environmental impacts of related or unrelated actions regardless of whether the actions are past, present or reasonably foreseeable in the future.<sup>20</sup> Unlike the holding in *Kleppe*, the regulations extend the inquiry to actions which are not yet proposed.<sup>21</sup> Ironically, the *Kleppe* decision limited the EIS analysis to proposed actions, yet opened the door for the cumulative impact analysis requirement. Together, the *Kleppe* decision and the CEQ regulations provide the basis for the cumulative impact analysis requirement.

### III. FACTORS CONSIDERED IN REQUIRING A CUMULATIVE IMPACT ANALYSIS

The CEQ regulations require federal agencies to analyze the combined effects of several actions when those actions are connected<sup>22</sup> or cumulative.<sup>23</sup> While the connected actions regulation focuses on the close relationship between actions, the cumulative actions regulation focuses on the cumulative impacts of several separate actions on the environment. Courts thus have two distinct means of requiring a federal agency to conduct a cumulative impact analysis.

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15. *Id.* § 1508.25(a)(1)(i)(ii)(iii).

16. *Id.* § 1508.25(a)(2).

17. *Id.* § 1508.7.

18. *Id.*

19. *Kleppe*, 427 U.S. at 409-10.

20. 40 C.F.R. §§ 1508.7, 1508.25.

21. *Id.* § 1508.25(a)(3).

22. 40 C.F.R. § 1508.25(a)(1).

23. *Id.* § 1508.25(a)(2).

### A. *Cumulative Actions: The Effects of Separate Actions*

NEPA requires the preparation of an EIS for all major federal actions that significantly affect the quality of the human environment.<sup>24</sup> In *Foundation for North American Wild Sheep v. United States Department of Agriculture*,<sup>25</sup> the Court of Appeals for the Ninth Circuit adopted a standard to aid in determining whether an action will create significant impacts which will therefore require the preparation of an EIS. This standard requires an agency to prepare an EIS when an action *may* significantly affect the environment.<sup>26</sup> Courts have subsequently examined the possibility of a significant impact based upon the cumulative impacts of many separate actions rather than upon the impacts of each single action.<sup>27</sup> Based upon the CEQ regulation requiring analysis of cumulative actions,<sup>28</sup> federal agencies may be forced to prepare EISs for actions which, when viewed with other actions, have cumulatively significant impacts.

The comprehensive cumulative impact analysis has been required in the area of oil and gas leasing. In *Conner v. Burford*,<sup>29</sup> a 1985 Montana federal district court decision, the Montana Wildlife Federation brought suit regarding the decision by federal agencies<sup>30</sup> to issue oil and gas leases in the Flathead and Gallatin National Forests. The federal agencies claimed to have complied with NEPA by conducting EAs on the leases to determine whether an EIS was necessary. According to these agencies, subsequent analysis of individual proposals for further activity on the leases would complete compliance with NEPA. Therefore, the federal agencies contended no EIS was needed.<sup>31</sup> The court disagreed, finding that the EA's finding of no significant impact was unreasonable by recognizing that the "leasing stage is the first stage of a number of successive steps which clearly meet the 'significant effect' criterion to trigger an EIS."<sup>32</sup> In strong language, the court held that a "comprehensive analysis of cumulative impacts of several oil and gas development activities must be done before any single activity can proceed. Otherwise, a piecemeal invasion of the forests would occur, followed by a realization of a significant

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24. 42 U.S.C. § 4332(2)(c).

25. 681 F.2d 1172 (9th Cir. 1982).

26. *Id.* at 1177-78.

27. *See, e.g., Conner v. Burford*, 605 F. Supp. 107, 108 (D. Mont. 1985).

28. 40 C.F.R. § 1508.25(a)(2).

29. 605 F. Supp. 107 (D. Mont. 1985), *appeal docketed*, No. 85-3929 to-3937 (9th Cir. June 21, 1985), *argued* July 11, 1986.

30. The federal agencies involved included the United States Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service. *Id.*

31. *Id.* at 108.

32. *Id.*

and irreversible impact.”<sup>33</sup>

The court in *Conner* relied on the policy underlying NEPA, emphasizing the need to consider potential environmental impact at the earliest possible stage.<sup>34</sup> The court noted that the promise of later analysis is meaningless if wilderness preservation cannot be considered as an alternative to development.<sup>35</sup> The court thus furthered NEPA’s policy of ensuring that environmental concerns are addressed before a federal agency takes action.

The *Conner* decision indicates that cumulative impacts of separate actions must be considered together in a single analysis if such cumulative impacts may cause significant adverse impacts on the environment. As in this case, subsequent analysis of individual proposals may be deemed inadequate. Besides compelling the federal agencies to consider all the leases together in a single EIS, the decision also forced the agencies to consider the environmental impacts of oil and gas development at the leasing stage.<sup>36</sup>

*Bob Marshall Alliance v. Watt*,<sup>37</sup> another Montana federal district court decision, addresses issues similar to those of *Conner*. The Alliance challenged the Department of Interior’s decision to forego preparation of an EIS prior to leasing land for oil and gas exploration and development in the Deep Creek Area of the Lewis and Clark National Forest in Montana.<sup>38</sup> The Deep Creek Area received a perfect wilderness attribute rating under the Forest Service Roadless Area Review and Evaluation (RARE II).<sup>39</sup> The Forest Service assigned the area to the Further Planning category with the provision to manage the area so as to preserve suitability for possible future wilderness designation.<sup>40</sup> In 1981, after examining the EA on the Deep Creek Area, the Regional Forester recommended that the Bureau of Land Management (BLM) lease the area for oil and gas exploration and development. The Regional Forester concluded that the issuance of oil and gas leases would not significantly affect the environment and therefore, preparation of an EIS was not necessary.<sup>41</sup>

The court rejected the Regional Forester’s claim that the act of

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33. *Id.* at 109.

34. *Id.* at 108.

35. *Id.* at 109.

36. *Id.*

37. No. CV-82-015-GF, slip op. (D. Mont. May 27, 1986).

38. *Id.* at 1.

39. RARE II, instituted to evaluate all the roadless areas in the National Forest System, allocates each roadless area to either a Wilderness, Non-Wilderness or a Further Planning category. *Id.* at 4 n.1.

40. *Id.* at 4.

41. *Id.* at 5.

leasing alone does not result in environmental degradation.<sup>42</sup> As in *Conner*, the court in *Bob Marshall Alliance* required a cumulative impact analysis prior to oil and gas leasing.<sup>43</sup> The court noted that procrastination in examining environmental concerns is foreclosed by NEPA.<sup>44</sup> Nonetheless, the Forest Service procrastinated in its examination of environmental concerns by failing to prepare an EIS for the Deep Creek Area oil and gas leasing program.<sup>45</sup> The court relied on the “unassailed principle” that preparation of an EIS at an early stage in the project’s planning ensures that environmental impacts will be considered in the decision making process.<sup>46</sup> Where the Forest Service decision constitutes an irretrievable choice between wilderness use and development, the necessity for early analysis of potential cumulative impacts is clear.<sup>47</sup>

The court in *Bob Marshall Alliance* relied on CEQ regulations, which require single analysis of cumulative actions that significantly affect the environment.<sup>48</sup> The combining of several oil and gas operations in the Deep Creek Area would significantly affect the environment, while any single operation under any one lease would not.<sup>49</sup> As defined by the CEQ, actions “significantly” affect the environment whenever a cumulatively significant impact on the environment can be reasonably anticipated.<sup>50</sup> In leasing the Deep Creek Area, the Forest Service should have reasonably anticipated a cumulatively significant impact on the environment, not from the leases themselves but from the actions performed under the leases.<sup>51</sup> Although the Forest Service attempted to obviate the need for an EIS by breaking the actions down into “small component parts,” the court thwarted any such attempt by finding the EAs on the leases inadequate.<sup>52</sup>

When a potential wilderness area is involved, as in *Conner* and *Bob Marshall Alliance*, much is at stake. Only by considering environmental concerns at the earliest moment can the potential for wilderness be preserved. NEPA’s mandate of ensuring consideration of environmental concerns plays its greatest role when the agency decision is an irretrievable choice between wilderness and development. As the following case illustrates, courts are less likely to require cumulative impact analysis when wilderness values are not at stake.

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42. *Id.* at 15.

43. *Id.* at 18.

44. *Id.* at 17 (citing *Foundation for North American Wild Sheep*, 681 F.2d at 1181).

45. *Id.*

46. *Id.* at 16.

47. *Id.* at 16-17.

48. 40 C.F.R. § 1508.25(a)(2).

49. *Bob Marshall Alliance*, No. CV-82-015-GF, slip op. at 16.

50. 40 C.F.R. § 1508.27(b)(7).

51. *Bob Marshall Alliance*, No. CV-82-015-GF, slip op. at 15.

52. *Id.* at 26.

In *Park County Resource Council, Inc. v. United States Department of Agriculture*,<sup>53</sup> a Wyoming federal district court held that the BLM need not consider the impacts of full field development when issuing an oil lease.<sup>54</sup> Noting that the lands in question were not pristine primitive wilderness areas,<sup>55</sup> the court required analysis of only the one exploratory well in question.<sup>56</sup> The possibilities that oil might be discovered, and that in the future the entire oil field might be developed, were held as mere speculations. If oil was actually discovered and the development of the entire oil field became a real possibility, further study would then be required. But for the present, since only one oil well would be drilled, the EIS need only consider that one well.<sup>57</sup>

The *Park County Resource Council* decision indicates that the mere possibility of future actions will not necessarily trigger the cumulative impact analysis requirement. In *Park County Resource Council*, crucial decisions had already been made years earlier which eliminated any potential for a wilderness area. If requiring a cumulative impact analysis of an agency action will not forward NEPA's goal of early consideration of environmental concerns, that action may not trigger the significant effect prong to the EIS requirement. Consequently, the cumulative impact analysis requirement depends upon the unique factual situation of each case.

Different courts interpret each factual situation differently. *Cabinet Mountains Wilderness v. Peterson*,<sup>58</sup> a decision by the Court of Appeals for the District of Columbia, demonstrates the reluctance of one court to impose the cumulative impact analysis requirement. In *Cabinet Mountains Wilderness*, the Forest Service approved mineral exploration in a wilderness area which provided habitat for the threatened grizzly bears.<sup>59</sup> The Forest Service prepared an EA which pointed out that the cumulative impacts of the drilling in addition to related human activities in the area might significantly affect the environment.<sup>60</sup> To reduce potential adverse consequences, especially to the grizzlies, the Forest Service imposed mitigation measures.<sup>61</sup> The court held that the EA met NEPA's require-

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53. 613 F. Supp. 1182 (D. Wyo. 1985).

54. *Id.* at 1188.

55. *Id.* at 1187.

56. *Id.* at 1188.

57. *Id.*

58. 685 F.2d 678 (D.C. Cir. 1982).

59. *Id.* at 679.

60. *Id.* at 683-84.

61. Included among the fourteen mitigation measures proposed by the Forest Service were completing the project activities by October 31 of each year, restricting helicopter flights in some areas and at certain times, prohibiting overnight camping by project personnel, closing various roads during feeding periods, and prohibiting the carrying of firearms by the project's personnel. *Id.* at 683.



ments when accompanied by stipulations and safeguards imposed to reduce adverse impacts.<sup>62</sup> According to the court, the Forest Service's decision not to prepare an EIS was reasonable due to the mitigating measures.<sup>63</sup>

On the other hand, a Montana federal district court has consistently refused to allow agencies to forego an EIS based on stipulations and safeguards included in an EA. In *Conner*, this Montana federal district court held that stipulations cannot be used to avoid the EIS when issuing leases; such a practice circumvents the spirit of NEPA.<sup>64</sup> Similarly, in *Bob Marshall Alliance*, the same court held that since the protective stipulations did not resolve the environmental concerns for the Deep Creek Area, an EIS was required in spite of the mitigating measures.<sup>65</sup> The court noted that while an agency may consider mitigation measures that reduce environmental impacts to a minimum when determining whether an EIS is required, the stipulations in the leases at issue did not completely compensate for any possible environmental impacts.<sup>66</sup>

Stipulations and safeguards should not be used to avoid the EIS requirement and therefore to circumvent NEPA's mandate. The courts, as in *Conner* and *Bob Marshall Alliance*, disfavor the preparation of EAs combined with stipulations, instead of an EIS, when the agency action concerns a potential wilderness area. The court in *Bob Marshall Alliance* accurately stated that "the promise of a site specific EIS in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development."<sup>67</sup> On the other hand, the *Cabinet Mountains Wilderness* decision illustrates that an EA accompanied by stipulations which serve to mitigate cumulative impacts may be adequate in some courts. In the Court of Appeals for the District of Columbia, this requirement and the safeguards it offers may be avoided by including stipulations in the EA. However, the *Cabinet Mountains Wilderness* decision undermines NEPA's mandate that major agency actions which significantly affect the human environment must be analyzed in an EIS.

*Conner*, *Bob Marshall Alliance*, and *Park County Resource Council* illustrate key concepts underlying the requirement that cumulative actions be analyzed together. Courts will examine the effects of each action to determine if the actions' cumulative impacts will significantly affect the environment and trigger NEPA's EIS requirement. If a single action will

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62. *Id.* at 684.

63. *Id.*

64. *Conner*, 605 F. Supp. at 109.

65. *Bob Marshall Alliance*, No. CV-82-015-GF, slip op. at 11.

66. *Id.* at 10-11.

67. *Id.* at 20 (citing *California v. Block*, 690 F.2d 753, 762-63 (9th Cir. 1982)).

not significantly affect the environment, but that action accompanied by other past, present, or foreseeable future actions will, the courts may hold that the actions are subject to cumulative impact analysis. Courts will consider policy and the specific facts of each case to determine whether cumulative impacts should be weighed together or separately.

### B. *Connected Actions: The Relationship Between the Actions*

In addition to requiring agencies to consider cumulative actions together,<sup>68</sup> CEQ regulations also require agencies to consider connected actions together in a single EIS.<sup>69</sup> Agencies must analyze the immediate and specific impacts of the proposed project when added to impacts from "past, present, and reasonably foreseeable future" actions which are related to the proposed project.<sup>70</sup> To subject connected actions to cumulative impact analysis, a relationship must be established between the actions. CEQ regulations defining "connected"<sup>71</sup> actions supply some direction for courts considering the interdependence of the agency actions. Under these regulations, projects which "automatically trigger other actions which may require an [EIS]; actions which cannot . . . proceed unless other actions are taken previously or simultaneously,"<sup>72</sup> and proposals that are "interdependent parts of a larger action and depend on the larger action for their justification,"<sup>73</sup> are connected. Courts rely on these CEQ regulations to some extent in considering the connection between agency actions. However, the courts are forced to interpret the regulations by the facts of the individual cases. As a result, case law reflects an expansion of the language of the CEQ regulations.

In *Thomas v. Peterson*,<sup>74</sup> the Court of Appeals for the Ninth Circuit considered CEQ regulations and precedent in determining that certain agency actions required a single analysis. Plaintiffs challenged the Chief of the Forest Service's approval of a timber road in the Jersey Jack area of the NezPerce National Forest in Idaho.<sup>75</sup> The EIS prepared by the Forest Service for the project failed to analyze the cumulative impacts of the road and subsequent timber sales.<sup>76</sup> The court found the Forest Service's EIS insufficient based on CEQ regulations requiring cumulative impact analysis of "connected actions." The timber sales could not proceed without the

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68. 40 C.F.R. § 1508.25(a)(2).

69. *Id.* § 1508.25(a)(1).

70. *Id.* §§ 1508.7, 1508.25.

71. *Id.* § 1508.25(a)(1).

72. *Id.* § 1508.25(a)(1)(i)(ii).

73. *Id.* § 1508.25(a)(i)(iii).

74. 753 F.2d 754 (9th Cir. 1985).

75. *Id.* at 755-56.

76. *Id.* at 759.

road, and the road would not be built but for the contemplated timber sales.<sup>77</sup> The court concluded that the road and the subsequent timber sales were “inextricably intertwined,” and thus “connected actions” within the meaning of CEQ regulations.<sup>78</sup>

The court in *Thomas* also relied upon two Ninth Circuit decisions, *Trout Unlimited v. Morton*<sup>79</sup> and *Daly v. Volpe*,<sup>80</sup> in determining that the proposed road and subsequent timber sales were connected actions. In *Trout Unlimited v. Morton*, the Court of Appeals for the Ninth Circuit held that an EIS must cover subsequent stages of development when “[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.”<sup>81</sup> *Daly v. Volpe* resulted in a similar holding when the court determined that environmental impacts of a single highway segment may be evaluated separately from those of the rest of the highway only if the segment had “independent utility.”<sup>82</sup> The court in *Thomas* defined independent utility as “utility such that the agency might reasonably consider constructing only the segment in question.”<sup>83</sup> No evidence indicated that the Jersey Jack road had utility independent from timber sales to justify the road’s construction. The court reasoned that separation of the two actions for purposes of the EIS violated NEPA.<sup>84</sup>

The *Thomas* decision represents persuasive Ninth Circuit precedent regarding the requirement for a cumulative impact analysis when a connected action is involved. The court followed the CEQ regulations and the test for related actions set down in *Trout Unlimited* and *Daly*. The Montana federal district court in *Bob Marshall Alliance* relied heavily on this Ninth Circuit precedent in requiring cumulative impact analysis of subsequent phases of oil and gas leasing plans. The court examined the irrationality test in *Trout Unlimited* and determined that the dependency between leasing and the exploration conducted under the leases is clear. Instituting a leasing program would be irrational if exploration and development were not contemplated.<sup>85</sup> Deeming the actions connected, the court required the Forest Service to conduct a cumulative impact analysis of the leases and subsequent phases of development under those leases.<sup>86</sup>

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77. *Id.* at 758.

78. *Id.* at 759.

79. 509 F.2d 1276 (9th Cir. 1974).

80. 514 F.2d 1106 (9th Cir. 1975).

81. *Trout Unlimited*, 509 F.2d at 1285; see *Thomas*, 753 F.2d at 759.

82. *Daly*, 514 F.2d at 1110 (citations omitted).

83. *Thomas*, 753 F.2d at 760.

84. *Id.*

85. *Bob Marshall Alliance*, No. CV-82-015-GF, slip op. at 15.

86. *Id.* at 18.

In *Vance v. Block*,<sup>87</sup> the same Montana federal district court which decided *Conner and Bob Marshall Alliance*<sup>88</sup> considered whether timber sales need to be considered cumulatively with a proposed paving of a timber road in a non-wilderness area.<sup>89</sup> Although the same judge presided, a different conclusion was reached. In *Vance*, the Save the Yaak Committee sought to enjoin paving operations on a seventeen mile portion of the Yaak River Road, claiming that the EA prepared to analyze the project was inadequate.<sup>90</sup> The court rejected this assertion, holding in favor of the Forest Service.<sup>91</sup>

In determining that an EIS was not required, the court noted that the road had already been in existence for 18 years and that paving the road would not widen it, but would improve drainage.<sup>92</sup> While the paved road would benefit timber haulers, harvesting would continue in the Yaak Area with or without the paved surface.<sup>93</sup> In addition, interests other than those of loggers, such as recreationists and local residents, would also benefit by the paving of the road.<sup>94</sup>

The facts in *Vance*, like *Thomas*, involved the connection of a timber road to timber sales. However, the Montana federal district court distinguished the two cases and held that the *Thomas* precedent did not apply.<sup>95</sup> Unlike *Thomas*, *Vance* involved the paving of an existing timber road. The Yaak area roads in *Vance* had been present for years, while *Thomas*'s Jersey Jack area was roadless. Timber sales in the Yaak area had proceeded and would continue with or without the paved road. The court held that the paving of the road and the timber sales were not so interdependent as to require a cumulative impact analysis.<sup>96</sup>

The requirement that connected actions be considered in a single EIS does not necessarily require agencies to compile an EIS which assesses impacts on the entire project at every stage of development. In *Oregon Natural Resources Council v. Marsh*,<sup>97</sup> the Corps of Engineers failed to consider the cumulative impacts of the entire Rogue River Basin Project when analyzing the impacts of the third dam in the three-dam project.<sup>98</sup>

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87. 635 F. Supp. 163 (D. Mont. 1986).

88. *Conner, Bob Marshall Alliance and Vance* were all decided by the Honorable Judge Paul G. Hatfield, United States District Court for the District of Montana, Great Falls Division.

89. *Vance*, 635 F. Supp. at 165.

90. *Id.* at 166.

91. *Id.* at 166-68.

92. *Id.* at 167.

93. *Id.*

94. *Id.*

95. *Id.* at 167-68.

96. *Id.* at 168.

97. 628 F. Supp. 1557 (D. Or. 1986).

98. *Id.* at 1563.

Plaintiffs claimed that this omission violated NEPA, asserting that the cumulative impacts of the entire project must be analyzed cumulatively at this final stage.<sup>99</sup> The court rejected this contention.<sup>100</sup>

The court in *Marsh* recognized the necessity for a single EIS for a prospective project consisting of connected actions to assess adequately the cumulative impact of the entire project.<sup>101</sup> "However, the Rogue River Basin Project [was] nearly complete. To retrospectively compile a single EIS on the entire project would be illogical."<sup>102</sup> The appropriate method of assessing the environmental consequences of the third dam, according to the court, is to analyze the cumulative impact of this dam when added to the existing components of the project. The opinion in *Marsh* indicates that cumulative impacts of connected actions need not be analyzed if such analysis serves no purpose; NEPA's policy of considering environmental factors at an early stage is not carried out by retrospective analysis of connected actions.

If deemed connected or interdependent, multiple actions may require a single analysis. Such cumulative impact analysis may be required for past and present related actions whether or not those actions by themselves triggered NEPA's EIS requirement.<sup>103</sup> Analysis of the effects of future actions that are reasonably foreseeable may also be required, even if those future actions standing alone may never necessitate an EIS.<sup>104</sup> However, the *Vance* and *Marsh* decisions indicate that cumulative impact analysis of past, present, and reasonably foreseeable future actions is restricted to some degree. The connection between the actions must be identifiable, and the analysis must serve a purpose.

#### IV. CONCLUSION

Cumulative impacts analysis is not specifically mandated by NEPA. However, in the absence of cumulative impact analysis, agencies could circumvent NEPA's mandate to consider environmental concerns on the same basis as traditional concerns. Agencies could decide to analyze each action separately which, when viewed together, significantly affect the environment. To compel agencies to comply with NEPA's mandate, courts interpreting NEPA and the CEQ regulations have required that cumulative impacts be analyzed in a single EIS.

For the most part, courts addressing the requirement of cumulative

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Fritiofson v. Alexander*, 772 F.2d 1225, 1245 (5th Cir. 1985).

104. *Id.*

impact analysis have acted logically. When an agency's action constitutes a choice between wilderness use and development, as in *Conner* and *Bob Marshall Alliance*, courts require comprehensive cumulative analysis prior to the first stage of development. Where agency action does not threaten wilderness status, the courts look at the facts to determine whether a cumulative impact analysis is required. If the nature of the agency's proposal suggests that future development will certainly follow, and that such future development will significantly affect the environment, the courts will require a cumulative impact analysis. Thus, in *Thomas*, the Court of Appeals for the Ninth Circuit held that a proposed road and subsequent timber sales were "inextricably intertwined," and must be considered together. Just a year later in *Vance*, a Montana federal district court held that the paving of an existing road and subsequent timber sales were not intertwined, and did not require a single analysis. *Thomas* and *Vance* demonstrate that the nature of the proposal plays an important role in the courts' decisions.

The courts may require cumulative impact analysis for either of two reasons—either the relationship between separate actions, or the results of separate actions may require that the actions be considered together. In requiring cumulative impact analysis on either of these bases, courts are enforcing NEPA's policy of fostering and promoting the general welfare by creating conditions under which society and nature can exist in harmony.

