A Federal Policy of De Facto NEPA Violation: Solar Energy Development on Federal Public Lands

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I. INTRODUCTION

Then-Senator Barack Obama campaigned for the Office of President on a platform of developing a "New Energy for America," by promising to "tackl[e] climate change," invest in "clean energy" and "clean technologies," increase fuel efficiency of vehicles, increase domestic energy independence, and diversify the United States' energy sources.[1] Part of this energy diversification platform included requiring that at least 10% of electricity come from renewable sources by 2012.[2] As of 2012, President Obama accomplished this goal; looking at all energy sectors, – e.g. electricity, transportation, thermal, etc. – renewable energy sources counted for 11.23% of all domestic energy production.[3]

During his first term, President Obama succeeded in highlighting renewable energy[4] by targeting new development of renewable energy sources on federal public lands – those lands owned in trust for the public by the federal government. Overall production from renewable energies (such as hydro, biofuels, wind, solar, geothermal, and biomass)[5] rose by 23.48% during his first term.[6] Within that nearly 23.5% growth in the renewable energy sector between 2008 and 2012, solar energy production increased dramatically, growing by

[1] *Barack Obama and Joe Biden: New Energy for America*, U.S. DEP'T OF ENERGY, http://energy.gov/sites/prod/files/edg/media/Obama_New_Energy_0804.pdf (last visited Nov. 2, 2014).

[2] *Id.* at 6.

[3] *Fossil Fuels Down, Renewables Up During Obama's First Term*, SOLAR NOVUS TODAY (Mar. 28, 2013), http://www.solarnovus.com/index.php?option=com_content&view=article&id=6398:us-review-renewable-energy-use-grew-considerably-during-obamas-first-term&catid=45:politics-policy-news&Itemid=249 [hereinafter *Solar Novus*]. Compare this statistic to the only 9.84 percent when Obama first took office in 2008. *Id.*

[4] Though he increased focus on renewable energy development in his new energy plan, President Obama has also focused on obtaining American energy independence, which has included continuing to "responsibly develop oil and gas resources on public lands" both onshore and offshore on the Outer Continental Shelf. Press Release, U.S. Dep't of the Interior, Secretary Salazar Issues Order to Spur Renewable Energy Development on U.S. Public Lands (Mar. 11, 2009), http://www.doi.gov/news/pressreleases/2009_03_11_releaseB.cfm# [hereinafter *Press Release for Secretarial Order 3285*].

[5] Athena Velie, Melissa Dorn & Paul J. Pantano, Jr., *Navigating the World of Renewable Energy*, 29 No. 5 FUTURES & DERIVATIVES L. REP. 1, 1 (2009) (describing renewable energy as "energy generated from resources that are naturally replenished, such as solar, wind, water, and biofuels . . . among others").

[6] John Hanger, *Energy Facts for Obama's First Term: Gas, Oil, Renewable Energy Production Surge But Coal and Nuclear Drop*, JOHN HANGER'S FACTS OF THE DAY (Apr. 17, 2013, 9:26 PM), http://www.johnhanger.blogspot.com/2013/03/energy-facts-for-obamas-first-term-gas.html; *Solar Novus*, *supra* note 3.

approximately 138%[7] and accounting for roughly 2% of domestic energy production from renewable energy sources in the United States for 2012.[8] The Administration's push for development of renewable energy on public lands in President Obama's first term forced the Department of the Interior ("DOI"), the federal agency charged with managing federal public lands, to quickly adapt its internal policies to the Administration's new goals.[9] DOI has acted through various avenues to streamline approval processes and to identify lands particularly suitable for renewable energy development.[10] However, the expedited processes have highlighted the "difficult balance between promoting clean, renewable energy and ensuring that, in the haste to develop these energy sources, there is not more environmental harm caused in the siting process."[11]

This article argues that as a result of the expedited permitting processes, the DOI has established a *de facto* policy that violates a core tenet of the United States' most essential environmental law, the National Environmental Policy Act ("NEPA").[12] Part I describes the development of DOI and Bureau of Land Management ("BLM") policies that promoted renewable energy development on federal public lands during President Obama's first term. Part II explains the existing case law that governs NEPA challenges. Part III analyzes a case study of the largest of these fast-tracked projects, the Ivanpah Solar Electric Energy Generating project in California, which illustrates how federal policy has resulted in *de facto* violations of NEPA. Finally, this paper concludes by arguing that the push for meeting federal renewable energy quota deadlines and the DOI's accelerated permitting policies for renewable energy development have failed to maintain the "balance between promoting clean, renewable energy and ensuring that . . . there is not more environmental harm caused in the siting process,"[13] resulting in *de facto* NEPA violations such as those observed in the Ivanpah case study, *infra*. These violations include sanctioning the use of unlawfully narrow purpose and need statements as well as failing to meaningfully consider reasonable private land alternatives, in addition to case

[7] *Solar Novus*, *supra* note 3; *Energy in Obama's First Term*, ECOMOTION (Apr. 8, 2013), http://www.ecomotion.us/2013/04/energy-in-obamas-first-term [hereinafter *EcoMotion*]; Hanger, *supra* note 6 (noting that the estimated 138 percent increase in solar generation in the year 2012 is likely "much greater than that impressive number"); *Solar Novus*, *supra* note 3.

[8] *EcoMotion*, *supra* note 7; *Solar Novus*, *supra* note 3.

[9] *New Push for Renewable Energy on Public Lands*, WILDLIFE MGMT. INSTITUTE (2009), http://wildlifemanagementinstitute.org/index.php?option=com_content&view=article&id=381:new-push-for-renewable-energy&catid=34:ONB%20Articles&Itemid=54 (last visited Nov. 2, 2014).

[10] *Id.*

[11] *Id.*

[12] NEPA was the first major federal environmental law enacted in the United States, and while primarily a policy statute that imposes relatively few substantive requirements, it has been "one of the most far-reaching statutes ever enacted." GEORGE BLUM ET AL., 61B AM. JUR. 2D POLLUTION CONTROL, § 82 (2014); *New Push for Renewable Energy on Public Lands*, *supra* note 9.

[13] *New Push for Renewable Energy on Public Lands*, *supra* note 9.

law which expanded agency deference beyond the statute's intent.

II. THE DEVELOPMENT OF FEDERAL RENEWABLE ENERGY POLICY FROM 2008 TO 2012

The recent push for renewable energy development on federal public lands began when Secretary of the Department of the Interior Ken Salazar issued Secretarial Order 3285[14] in March of 2009.[15] The order announced that DOI would prioritize the "production, development, and delivery of renewable energy."[16] Additionally, the order created an energy and climate task force to administer the expansion of renewable energy development by creating renewable energy zones ("REZs") to facilitate the Department's "rapid and responsible" shift towards large-scale solar, wind, geothermal, and biomass energy production.[17]

DOI's second step was to address the backlog of approximately 200 solar energy (and more than 25 wind energy) project applications currently pending by opening four renewable energy permitting offices (in California, Nevada, Wyoming, and Arizona) and creating renewable energy teams for states without offices.[18] Focusing further on the vast potential for solar energy development on federal public lands in the west, Secretary Salazar announced initiatives in June of 2009 that would "fast-track" solar energy development and designate over 670,000 acres of western federal land as Solar Energy Study Areas.[19]

Part of the reason for creating the "fast-track" renewables program[20] was to

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[14] U.S. Dept. of the Interior Secretarial Order No. 3285, § 1 (Renewable Energy Development by Department of the Interior) (Mar. 11, 2009, amended Feb. 22, 2010), *available at* http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageID=5759 [hereinafter *DOI Secretarial Order 3285*] ("[E]stablish[ing] the development of renewable energy as a priority for the Department of the Interior;" nothing that "the Department of the Interior has a significant role in coordinating and ensuring environmentally responsible renewable energy production and development of associated infrastructure needed to deliver renewable energy to the consumer;" "[e]ncouraging the production, development, and delivery of renewable energy is one of the Department's highest priorities," and explaining that "[a]gencies and bureaus within the Department will work collaboratively with each other, and with other Federal agencies, departments, states, local communities, and private landowners to encourage the timely and responsible development of renewable energy and associated transmission while protecting and enhancing the Nation's water, wildlife, and other natural resources").

[15] *Press Release for Secretarial Order 3285*, *supra* note 4.

[16] *DOI Secretarial Order 3285*, *supra* note 14 at § 1.

[17] *New Push for Renewable Energy on Public Lands*, *supra* note 9 (quoting *Press Release for Secretarial Order* 3285, *supra* note 4).

[18] *New Push for Renewable Energy on Public Lands*, *supra* note 9 (announcing the opening of these offices in May of 2009).

[19] *Id.*

[20] Steve Black & Neal Kemkar, *The U.S. Department of the Interior's Historic Action in Developing Renewable Energy*, CS028 ALI-ABA 1, 1 (2011) (Steve Back is Counselor to the Secretary of the Interior and Neal Kemkar is Special Assistant to the Counselor to the Secretary of the Interior; this paper was submitted in their official capacities.) [hereinafter *DOI Renewable*

allow renewable energy developers to take advantage of funds available under President Obama's 2009 economic stimulus bill, the American Recovery and Reinvestment Act of 2009 ("ARRA").[21] AARA provided government incentives and favorable financing arrangements to the growing renewable energy sector in order to generate economic activity that would rebuild the flailing economy.[22] Consequently, under the "fast-track" program, BLM identified 29 million acres of public land as areas (in just six southwestern states) with solar energy potential.[23] Focusing early and rapid solar energy development on only the fast-tracked areas, Secretary Salazar stated "[w]e are putting a bull's eye on the development of solar energy on our public lands.[24] In 2007, DOI also issued an instructional memorandum promoting and prioritizing the processing of right-of-way applications for solar development.[25]

BLM's Programmatic Environmental Impact Statement ("PEIS") for solar development facilitated the increased development by conducting an in-depth analysis of the potential impacts of utility-scale solar energy development within the 24 Solar Energy Study Areas.[26] The solar PEIS allowed for faster and more efficient permitting and siting of solar energy projects on federal lands.

Prior to ARRA, the Energy Policy Act of 2005 initiated the push for renewable energy development on federal lands.[27] Enacted by former President George W. Bush, the Act required the Secretary of the Interior to approve at least 10,000 megawatts of non-hydropower renewable energy projects located

Energy History]; *see also* American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

[21] American Recovery and Reinvestment Act, *supra* note 20.

[22] Jeffry S. Hinman, *The Green Economic Recovery: Wind Energy Tax Policy After Financial Crisis and the American Recovery and Reinvestment Tax Act of 2009*, 24 J. ENVTL. L. & LITIG. 35, 36-37 (2009).

[23] *Press Release for Secretarial Order* 3285, *supra* note 4.

[24] *New Push for Renewable Energy on Public Lands*, *supra* note 9.

[25] *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGEMT., INSTRUCTION MEMORANDUM NO. 2007-097, SOLAR ENERGY DEVELOPMENT POLICY (Apr. 4, 2007).

[26] *New Push for Renewable Energy on Public Lands*, *supra* note 9.

[27] Energy Policy Act of 2005, Pub L. 109-58, 119 Stat 594 (2005). Predating even the Energy Policy Act of 2005, Executive Order 13212 states that "agencies shall expedited their review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections." Actions to Expedite Energy-Related Projects, Exec. Order No. 13212, 66 Fed. Reg. 28,357 (May 18, 2001). The Energy Policy Act of 2005 was widely criticized as a broad collection of subsidies for U.S. energy companies, particularly the nuclear and oil industries. Michael Grunwald & Julie Eilperin, *Energy Bill Raises Fears About Pollution, Fraud*, WASH. POST (July 30, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/29/AR2005072901128.html). Additionally, the Act exempted fluids used in the natural gas extraction process of hydraulic fracturing ("fracking") from the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as the "Halliburton loophole." Joshua Dorner, *Cheney's Culture of Deregulation and Corruption*, CENTER FOR AM. PROGRESS (July 9, 2010), http://www.americanprogress.org/issues/green/news/2010/06/09/7900/cheneys-culture-of-deregulation-and-corruption/.

on public lands within ten years of the Act's passage.[28] Taken together, President Obama's campaign promise to radically change U.S. energy policy, the impending drainage of ARRA funds, and the 10,000 megawatt goal for renewable energy resulted in rapid change to DOI renewable energy development policy between 2008 and 2012.

Unfortunately, the fast-tracking polices of DOI and BLM have allowed agencies to circumvent one of the core components of the NEPA environmental impact assessment: the requirement to consider alternatives. This has resulted in rapid development of renewable energy projects on federal public lands without proper consideration of impacts. In 2013, an instructional memorandum issued by BLM explicitly prioritized the development of renewable energy on federal public lands over private lands,[29] analyzed *supra* Part II C. By creating policy that only considers the development of renewable energy on public lands, DOI and BLM are essentially condoning *de facto* violations of the environmental statute because the agencies are not considering a full range of reasonable alternatives.

III. NEPA CASE LAW: STATEMENT OF PURPOSE AND NEED, AND REASONABLE ALTERNATIVES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

BLM approves major solar projects on a case-by-case basis, issuing a right-of-way grant ("ROW") for use of the land under Title V of the Federal Land Management and Policy Act ("FLPMA").[30] As with other applications for the use of public lands, under NEPA, BLM must conduct an environmental analysis of the proposed project and prepare an Environmental Impact Statement ("EIS"), the scope of which is guided by (and in practice must conform to) BLM's statement of purpose and need for the agency action.[31] As stated in the NEPA regulations, "[t]he statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[32]

However, BLM is allowed "considerable discretion" in defining the purpose

[28] *DOI Renewable Energy History*, *supra* note 20, at 1; *see also* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 660 (Aug. 8, 2005) ("It is the sense of the Congress that the Secretary of the Interior should, before the end of the 10-year period beginning on the date of enactment of this Act, seek to have approved non-hydro-power renewable energy projects located on the public lands with a generation capacity of at least 10,000 megawatts of electricity.").

[29] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGEMT., INSTRUCTION MEMORANDUM NO. 2011-059, NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE FOR UTILITY-SCALE RENEWABLE ENERGY RIGHT-OF-WAY AUTHORIZATIONS (Feb. 7, 2011) [hereinafter BLM IM 2011-059].

[30] *DOI Renewable Energy History*, *supra* note 20, at 5; *see generally* 43 U.S.C. §§ 1701 *et. seq* (2012).

[31] *DOI Renewable Energy History*, *supra* note 20, at 5.

[32] 40 C.F.R. § 1502.13 (2014).

and need of an agency action.[33] Courts have consistently "afforded agencies considerable discretion to define the purpose and need of a project."[34] Yet, BLM must still define the purpose of the project "in a manner broad enough to allow consideration of a reasonable range of alternatives" and cannot "define its objectives in unreasonably narrow terms."[35]

Federal policy regarding A) the narrowing of statements of purpose and need for an EIS and B) the lack of consideration of reasonable alternatives results in *de facto* violations of NEPA, particularly in renewable energy development. Overall, courts have done little to limit agency deference in defining the purpose and need of a project, and have even expanded agency deference in some cases beyond the Congressional intent of the overarching statute.[36] In the context of renewable energy development, this expansion of agency deference can lead to a *de facto* violation of NEPA, as occurred in the Ivanpah case study, *supra* Part III.

A. NEPA Purpose and Need Case Law: courts' expansion of agency deference in defining the statement of the purpose and need in an EIS

Plaintiffs have challenged BLM statements of purpose and need by alleging that the agency is simply adopting the private applicant's purpose without readjusting to account for government policy or statutory standards.[37] Some courts have acknowledged attempts to skirt this NEPA requirement by holding that "BLM may not circumvent this proscription by adopting private interests" in crafting a statement of purpose that is "so narrowly drawn as to foreordain approval of the [project]."[38] As BLM's NEPA Handbook explains, the agency must describe *its* purpose and need, "not [that of] an applicant or external proponent[]," for it "is the BLM purpose and need for action that will dictate the range of alternatives."[39]

The legal rules regarding the purpose and need statement of an EIS are

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[33] "[BLM] may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action," making the EIS a "foreordained formality." Nat'l Parks & Conserv. Ass'n v. U.S. Bureau of Land Mgmt., 606 F.3d 1058, 1071 (9th Cir. 2010) (though BLM is given "considerable discretion" in defining the purpose and need of an agency action in an EIS, it may not define the objectives of its action.).

[34] Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998).

[35] W. Watersheds Project v. Salazar, 2011 U.S. Dist. LEXIS 151556, at *50 (C.D. Cal. 2011) (citing Nat'l Parks & Conserv. Ass'n , 606 F.3d at 1071-72).

[36] *See infra* Part II C.

[37] *See, e.g.*, cases cited *infra* Part II.A.2.

[38] *W. Watersheds*, 2011 U.S. Dist. LEXIS 151556 at *50 (citing *Nat'l Parks & Conserv. Ass'n*, 606 F.3d at 1071-72).

[39] U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK, H-1790-1 at 35 (2008) (emphasis added) [hereinafter BLM NEPA HANDBOOK].

controversial, and frequently litigated. The courts have generally applied a very high level of deference to agency formulations of the statement and purpose, particularly in the Ninth Circuit.[40] For example in *High Sierra Hikers Ass'n. v. U.S. Department. of Interior*, a California District court held that "courts must defer to the agency's proffered statement of purpose in assessing whether the NEPA document sufficiently considered all reasonable alternatives."[41] Courts' deference to agencies' determination of the purpose and need for a project has diminished the prohibition of narrowly framing of the purpose and need so as to exclude reasonable alternatives.[42] For instance in *Muckleshoot Indian Tribe v. U.S. Forest Service*, the Ninth Circuit allowed the agency to implement a narrow purpose and need statement even though it effectually ruled out any alternatives which did not resemble the preexisting project plan.[43] In *Friends of Southeast's Future v. Morrison*, the Ninth Circuit again upheld a narrow purpose statement, which excluded consideration of any alternative to the timber cutting project which would result in less timber to the market.[44]

Because of this high deference standard, there have been only a few cases where courts have held that agencies' statements of purpose and need were unreasonably limited. One example is *Center for Biological Diversity v. U.S. Bureau of Land Management*.[45] There, the court held that the BLM violated NEPA by failing to sufficiently consider a range of alternatives in redesigning an off-highway vehicle route network in a desert conservation area.[46] Each of the alternatives identified in the Bureau's Final Environmental Impact Statement ("FEIS") considered the same off-highway vehicle network, with variations to which routes would be designated "open" versus "limited," but no alternative that considered closing routes to off-highway vehicle use.[47] The court held that by not considering closing routes, BLM's purpose and need statement was

[40] Federal courts in the Ninth Circuit embrace this deference wholeheartedly and consistently refuse to find that an agency's articulated purpose is too narrow. Kettle Range Conserv. Grp. v. U.S. Forest Serv., 148 F. Supp. 2d 1107, 1117 (E.D. Wash. 2001) ("This court is not aware of any case in which the Ninth Circuit found a statement of purpose to be unreasonably narrow.").

[41] High Sierra Hikers Ass'n v. U.S. Dep't of Interior, 848 F. Supp. 2d 1036, 1052 (N.D. Cal. 2012).

[42] *See, e.g.*, Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 812–13 (9th Cir.1999); *Friends of Southeast's. Future v. Morrison*, 153 F.3d at 1066–67; *High Sierra Hikers*, 848 F. Supp. 2d at 1052.

[43] *Muckleshoot*, 177 F.3d at 812-13.

[44] *Friends of Southeast's. Future*, 153 F.3d at 1066–67.

[45] Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 746 F. Supp. 2d 1055 (N.D. Cal. 2009) *vacated in part*, C 06-4884 SI, 2011 WL 337364 (N.D. Cal. Jan. 29, 2011); *cf.* Oregon Natural Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114 (9th Cir. 2008) (invalidating an agency's purpose and need statement as so narrowly defined as to preclude the inclusion of alternatives that would close off highway vehicle routes in a desert conservation area), *opinion amended and superseded on denial of reh'g*, 625 F.3d 1092 (9th Cir. 2010).

[46] *Ctr. for Biological Diversity*, 746 F. Supp. 2d at 1086.

[47] *Id.* at 1087-90.

unlawfully narrow and violated NEPA.

Courts have balanced four underlying principles when evaluating narrowly focused purpose and need statements: (a) reasonableness, (b) the balance between public and private goals, (c) the practical effect of a reasonable purpose and need statement on the consideration of alternatives, and (d) in logging cases, numerically quantifying reasonable alternatives.

1. Reasonableness (or practicality) of the statement of purpose and need

Courts have held that if a purpose and need statement is reasonable, it cannot be found to be unlawfully narrow. In Citizens for Smart Growth v. Secretary of Department of Transportation[48] and City of Carmel-By-The-Sea v. U.S. Department of Transportation,[49] the Ninth and Eleventh Circuits, respectively, addressed similar arguments that the purpose and need statement was unlawfully narrow. However, the courts ultimately upheld the statements in both cases under the rationale that the narrow scope was reasonable.

In *Citizens for Smart Growth*, a citizens group brought an action alleging NEPA violations, *inter alia*, in connection with a bridge construction project. Where the agency action was the creation of a bridge over a river, plaintiffs objected to the agency's purpose and need statement for restricting the siting locations for the bridge only to a specific southern section of the river.[50] The court rejected plaintiff's claim and held that DOT's statement of purpose and need was reasonable: "Although citizens object to FHWA's [Federal Highway Administration] limitation of the scope of the statement to cover only a Southern crossing of the river, we find FHWA's rationale—that an existing bridge across the river serves mainly the central and northern parts of the county—to be reasonable."[51] The court's reliance on the reasonableness test resulted in a significantly narrower statement of purpose and need in the EIS without full consideration of the environmental impacts.

Again, in *City of Carmel-By-The-Sea*, the court upheld a narrow purpose and need statement as reasonable.[52] This case concerned the realignment of a state highway, an agency action which was challenged by city and state park groups who contended that the FEIS violated NEPA by unlawfully limiting the scope of the purpose and need statement. There, the court held that the limitation to only a specific level of increase in traffic flow ("Level of Service C") in the purpose and need statement was reasonable, and thus the alternatives which only

[48] Citizens for Smart Growth v. Secretary of Dep't of Transp., 669 F.3d 1203, 1212 (11th Cir. 2012).

[49] City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155-56 (9th Cir. 1997).

[50] *Citizens for Smart Growth*, 669 F.3d at 1212.

[51] *Id.* ("In sum, we find FHWA's consideration of the relevant factors to be sufficient and the Purpose and Need Statement to be not unduly narrow.").

[52] *City of Carmel-By-The-Sea*, 123 F.3d at 1155-60.

considered variations on Level C Service were also reasonable in light of the cited project goals.[53] By analyzing the reasonableness of the purpose and need statement's scope in terms of the practicality and feasibility of alternatives, the court upheld a narrow purpose and need at the expense of full environmental consideration of alternatives.

2. Balancing public and private goals in the statement of purpose and need

Courts have used a second rationale to uphold narrowly defined purpose and need statements where the statement succeeds in balancing public and private goals. In *Friends of Southeast's Future v. Morrison*,[54] the court applied a more nuanced interpretation of the reasonableness rationale for upholding a narrow statement of purpose and need. This case involved a proposed timber sale in Alaska which was challenged on the basis that the EIS' statement of purpose and need was unlawfully narrow because it did not consider a no-action alternative.[55] The court held that the purpose and need statement was reasonable because it balanced private and public goals for the project, and thus consideration of a no-action alternative was "plainly inconsistent with the project's overarching purposes and needs, because whatever other goals it may serve, it would not help to meet timber demands."[56] By rejecting the need for a no-action alternative, the court narrowly interpreted the public goals of the project through the pro-development lens of the defendant and dismissed any public interest in preserving the forest in a pristine state.

Courts have consistently held that the EIS statement of purpose and need for agency action must consider private interests, but must balance them with public goals.[57] The Tenth Circuit acknowledged that "[o]ther circuits have held that agencies must acknowledge private goals" in *Colorado Environmental Coalition v. Dombeck*,[58] an echo of the District Court for the District of Columbia's opinion in *Citizens Against Burlington, Inc. v. Busey*.[59] Requiring agencies to consider private objectives, however, is a far cry from mandating that those private interests define the scope of the proposed project exclusively. Instead, as

[53] *Id.* at 1157.

[54] Friends of Southeast's Future v. Morrison,153 F.3d 1059, 1065-67 (9th Cir. 1998).

[55] *Id.* at 1062-63.

[56] *Id.* at 1066-67 ("The combined teaching of *City of Angoon* [*infra* note 65] and *City of Carmel-by-the Sea* is that the Forest Service's statement of purposes is to be evaluated under a reasonableness standard.").

[57] *See, e.g.*, Colorado Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1175 (10th Cir.1999) ("Agencies ... are precluded from completely ignoring a private applicant's objectives."); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991) ("[T]he agency should take into account the needs and goals of the parties involved in the application.").

[58] *Colorado Envtl. Coal.*, 185 F.3d at 1175 ("Agencies. . . are precluded from completely ignoring a private applicant's objectives.").

[59] *Burlington*, 938 F.2d at 196-97.

the *Burlington* court held, "agencies must look hard at the factors relevant to the definition of purpose . . . Perhaps more importantly [than the need to take private interests into account], an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives."[60] Returning to the legislative intent of the statute will aid agencies in balancing public and private interests and result in agencies engaging in a more robust analysis of the environmental impacts of proposed projects.

3. Analyzing the effect of a reasonable statement of purpose and need on the consideration of alternatives in the EIS

Courts have used circular reasoning to uphold narrow statements of purpose and need by holding that reasonable statements, even if narrow, will not affect the consideration of practicable alternatives.[61] In *City of Angoon v. Hodel*, environmental groups challenged the EIS for a log transfer facility permit because it contained an unlawfully narrow statement of purpose and need. However, the court held that "[w]hen the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."[62] By only considering the ultimate goals of the project, the court began its reasoning with what it was trying to justify in the end by determining that the purpose and need statement was not unduly narrow because it properly considered all alternatives that would fulfill the project's goals. However, restricting the alternatives to only those that fulfilled the project's goals narrowed the EIS' analysis considerably and excluding alternatives that would have less drastic environmental impacts. Problematically, this circular reasoning creates a perverse incentive for agencies to pre-choose one favorable action alternative, and then define the EIS purpose and need so narrowly it excludes any other alternatives. Ultimately, this results in the approval of more projects without the proper consideration of a robust set of alternatives with fewer negative environmental impacts.

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[60] *Id.*; *see also* Nat'l Parks & Conserv. Ass'n v. U.S. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010) ("Our task is to determine whether the BLM's purpose and need statement properly states the BLM's purpose and need, against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives.").

[61] *See* COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, A CITIZEN'S GUIDE TO NEPA: HAVING YOUR VOICE HEARD 1, 16 (2007) ("The purpose and need section . . . serves as the basis for identifying reasonable alternatives that meet the purpose and need.") [hereinafter CEQ CITIZEN'S GUIDE TO NEPA].

[62] City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986) (holding that the development of a purpose and need statement necessarily involve agency judgment to which the court gives deference, that the purpose and need statement was reasonable, and thus the EIS need not consider alternatives outside of the scope of the project).

4. Narrow statements of purpose and need are reasonable in timber logging scenarios when the limitations of alternatives are based on specific, numerical amounts

In timber logging cases, courts have established that a narrowly defined purpose and need statement will be allowed when the limitation of alternatives is based on specified numerical quantities. Case precedent in this vein may be used by agencies as a defense to show that very narrow purpose and need statements have been accepted by courts; however, these cases can be distinguished by showing that numerically quantified narrow purpose and need statements are unique only to timber cases. In *Habitat Education Center, Inc. v. U.S. Forest Service*, plaintiffs argued that a project's purpose was unlawfully skewed towards timber production.[63] In this case, each alternative analyzed in the EIS differed only in the numerical amount of timber logging to be allowed and plaintiffs argued that the alternatives considered did not address any non-timber logging alternatives.[64] However, the court held that the agency's failure to consider a no-action alternative was not a compelling reason to invalidate an EIS with a narrow purpose and need statement.

The court has also upheld purpose and need statements that utilize numerical ranges for logging as reasonable. The district court in *Kettle Range Conservation Group v. U.S. Forest Service* held that although the statement of purpose and need presupposed at least some logging, the purpose was reasonable because it did not restrict the project to a minimum number of board feet of logging or engaging in a particular transaction, leaving "considerable room for the development of alternatives with varying *degrees* of timber harvest."[65] A purpose and need statement that indicates varying degrees of timber harvest was not unlawfully narrow or restrictive.

The Ninth Circuit upheld an even more restrictive statement of purpose and need in *Friends of Southeast's Future v. Morrison.*[66] The court held that the United States Forest Service ("USFS") had acted reasonably when it issued an EIS with the stated purpose of "providing 89 MMBF of timber to meet market demand," even though the statement of purpose also explicitly foreclosed any and all consideration of an alternative which would provide a lesser amount of timber to the market.[67] These cases illustrate a trend in the courts to authorize narrower statements of purpose and need where the restrictions are numerically defined.

The case study of timber logging illustrates that courts' application of agency

[63] Habitat Educ. Ctr., Inc. v. U.S. Forest Serv., 603 F. Supp. 2d 1176, 1196 (E.D. Wis. 2009).

[64] *Id.*

[65] Kettle Range Conserv. Grp. v. U.S. Forest Serv., 148 F. Supp. 2d 1107,1118 (E.D. Wash. 2001) (emphasis added).

[66] *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998).

[67] *Id.*

deference and the reasonableness standard have been expanded too far, undermining the underlying goals of NEPA and resulting in the lack of meaningful analysis of "alternatives to the proposed action."[68] Yet, the court has done little to limit the agency's deference in defining the purpose and need of a project. When this prior precedent of agency deference is applied in the context of renewable energy development, *de facto* violations of NEPA result, as evidenced by some of the cases described *infra*[69] and the Ivanpah case study, *supra* Part III.

B. NEPA Reasonable Alternatives Case Law: the close relationship between the consideration of alternatives and the statement of purpose and need

Litigants frequently challenge an EIS for failing to consider reasonable alternatives in addition to purpose and need claims, *infra* Part II A. Based on the BLM NEPA Handbook, the "rationale for selection" of a preferred alternative must be included in the agency's record of decision ("ROD").[70] NEPA requires that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives" in order to provide a choice that includes environmentally preferable options "so that reviewers may evaluate their comparative merits."[71] Further, an EIS "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public."[72]

To adequately consider alternatives to the proposed project, BLM "must look at every reasonable alternative within the range dictated by the nature and scope of the proposal."[73] A proposed alternative is unreasonable if it is inconsistent with the purpose of the project.[74] The alternatives should be wide-ranging and include options that may require additional approvals or participation by others besides the lead agency.[75] "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate."[76] An alternative that is consistent with the policy goals of the project and is potentially feasible must be

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[68] 42 U.S.C. § 4332 (C)(iii) (2012); *see also* 40 C.F.R. § 1500.2 (2014) (stating the policy goals of NEPA, some of which are to "emphasize real environmental issues and alternatives" and to "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").

[69] In particular, note City of Angoon v. Hodel, *supra* note 62 and accompanying text.

[70] BLM NEPA HANDBOOK, *supra* note 39, at 95 (citing 40 C.F.R. § 1506.2(b)).

[71] 40 C.F.R. § 1502.14 (2014).

[72] *Id.*

[73] Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998).

[74] *See* N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 978 (9th Cir. 2006).

[75] Sierra Club v. Lynn, 502 F.2d 43, 62 (5th Cir. 1974).

[76] Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1038 (9th Cir. 2008).

analyzed in depth and not "preliminarily eliminated."[77]

However, an alternative need not be considered in the EIS at all if it is deemed to be outside of the scope of the purpose and need of the agency action.[78] Thus, the initial challenge to the statement of purpose and need could be dispositive in resolving a reasonable alternatives issue; any reasonable alternatives argument is directly tied to a preliminary purpose and need argument, as courts have recognized that "the defined purpose and need necessarily dictates the range of 'reasonable' alternatives."[79]

Further, BLM need not address remote or speculative alternatives in the EIS. The majority of case law that has rejected speculative or remote alternatives has done so for the following reasons: the alternative was not "reasonably foreseeable,"[80] not "ascertainable and easily within reach,"[81] "not reasonable or obvious,"[82] or the alternative relied on the creation/existence of future projects that have "not yet been built and no funds have been appropriated for its construction."[83]

Thus, in addition to stating that an alternative is not considered because it is outside the scope of the purpose and need of the project (*infra* Part II A), BLM has many additional avenues that allow it to abstain from considering alternatives, by rejecting them as unreasonable. This broad range of allowable agency justifications severely limits the consideration of those alternatives in a NEPA analysis.

C. Recent Developments in Federal Renewable Energy Policy and NEPA Analysis: BLM Instruction Memorandum 2011-059 and the consideration of private land alternatives

In order to pursue the new federal policy promoting renewable energy development on federal public lands, BLM issued an instructional memorandum, which prioritizes the development of renewable energy on federal public lands over privately owned lands.[84] The relevant text of Instruction Memorandum 2011- 059 reads:

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[77] Muckleshoot Indian Tribe v. U. S. Forest Serv., 177 F.3d 800, 813–14 (9th Cir.1999).

[78] James Allen, *NEPA Alternatives Analysis: The Evolving Exclusion of Remote and Speculative Alternatives*, 25 J. LAND RESOURCES & ENVTL. L. 287, 304 (2005).

[79] City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1156 (9th Cir. 1997) (quoting Citizens against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991)).

[80] Border Power Plant Working Grp. v. Dep't of Energy, 260 F. Supp. 2d 997, 1029-31 (S.D. Cal. 2003).

[81] City of Angoon v. Hodel, 803 F.2d 1016, 1021-22 (9th Cir. 1986).

[82] Laguna Greenbelt, Inc. v. U.S. Dep't. of Transp., 42 F.3d 517, 525 (9th Cir. 1994).

[83] Town of Matthews v. U.S. Dep't. of Transp., 527 F. Supp. 1055, 1058 (W.D.N.C. 1981).

[84] BLM IM 2011-059, *supra* note 29.

> Non-Federal Lands: The BLM will not typically analyze a non-Federal land alternative for a right-of-way application on public lands because such an alternative does not respond to the BLM's purpose and need to consider an application for the authorized use of public lands for renewable energy development."[85]

This memorandum employs the same circular reasoning used in *City of Angoon v. Hodel*,[86] *infra* Part II A 3, creating a perverse incentive to pre-choose the most favorable alternative and fit the statement of purpose and need to that chosen alternative action. Effectively, the BLM instructional memorandum pre-chooses the location (i.e. federal public lands) for renewable energy projects, limiting the scope of alternatives analyzed in the NEPA EIA for specific projects. As we see later in the Ivanpah case study, viable privately owned land alternatives are not analyzed in the project's EIS because those alternatives lie outside of the pre-chosen scope of the project. With this instructional memorandum, BLM provided yet another way for an agency to circumvent the NEPA requirement to consider all reasonable alternatives in an EIS.[87] There is no statutory basis for the limitation promoted in BLM Instruction Memorandum 2011-059; the agency is promoting the *de facto* violation of the federal NEPA statute as a matter of federal renewable energy development policy.

Further, instructional memoranda are only internal agency guidance documents and generally receive no public notice or comment period, despite recent attempts by the U.S. Office of Management and Budget ("OMB") to add additional processes for public oversight of the administrative process.[88] Even though there is little-to-no oversight with regard to agency guidance documents,

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[85] *Id.*

[86] *Hodel*, 803 F.2d 1016.

[87] 40 C.F.R. § 1502.14 (2014).

[88] On January 18, 2007, OMB published its Final Bulletin for Agency Good Guidance Practices ("GGP Bulletin"), "requir[ing] each agency to have adequate procedures for public comments on significant guidance documents and to address complaints regarding the development and use of significant guidance documents EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, BULLETIN NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE AND PRACTICES (Jan. 18, 2007), http://www.whitehouse.gov/sites/default/files/omb/ memoranda/fy2007/m07-07.pdf. The GGP Bulletin explains that agencies must establish 1) public access and feedback for "significant guidance documents" with regard to internet access and avenues for public feedback, as well as 2) notice and public comment in the Federal Register for "economically significant guidance documents." *Id.* at 21. As a part of internet access and avenues for public feedback, each agency must maintain a current, electronic list of its "significant guidance documents" in effect. *Id.* Currently, the DOI website states that "The BLM has no documents that qualify as either a significant guidance document or economically significant guidance document under Executive Order 12866 and OMB Memorandum M7-07 [i.e. the *GGP Final Bulletin*]," *available at* http://www.doi.gov/notices/guidancedocuments.cfm. This makes sense because the *GGP Final Bulletin* specifically excludes (among other documents) "purely internal agency policies" from the definition of "significant guidance document." *Id.* Thus, BLM Instructional Memorandum No. 2011-059 was not subject to public notice and comment, likely because it is an internal agency document.

some courts still interpret them as agency action and award them deference.[89] Though the administrative law issues implicated by courts' conferral of deference upon agency guidance documents without public notice or comment are outside the scope of this article, the deeply troubling consequence is that an agency is able to formulate its policies so as to proscribe certain project alternatives as outside the scope of federal policy,[90] effectively limiting the analysis of reasonable alternatives required under NEPA.

IV. CASE STUDY OF *DE FACTO* NEPA VIOLATIONS CAUSED BY THE PUSH FOR RENEWABLES DEVELOPMENT ON FEDERAL PUBLIC LANDS AT THE IVANPAH SOLAR ELECTRIC GENERATING FACILITY

One of the first fast-tracked solar projects to break ground was Bechtel and BrightSource Energy's Ivanpah solar energy project in California.[91] Located in the Mojave Desert approximately 50 miles northwest of Needles, California and about five miles from the California-Nevada border,[92] the project began

[89] When challenged in court (usually under the Administrative Procedure Act ("APA")) agency guidance documents do not automatically receive *Chevron* deference. Sam Kalen, *Guidance Documents and the Courts*, 57 ROCKY MT. MIN. L. INST. 5-1, 5-11 (2011). However, the Supreme Court in *Skidmore v. Swift* held that informal documents could be "entitled to respect" to the extent that those interpretations have the "power to persuade." Skidmore v. Swift & Co., 323 U.S. 134, 138, 140 (1944). Further, the Court's decision in *U.S. v. Mead Corp.* suggested that notice-and-comment rulemaking is not necessarily a prerequisite for *Chevron* deference. United States v. Mead Corp., 533 U.S. 218, 230-31 (2001) ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."); *see also, e.g.*, Vill. of Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650 (D.C. Cir. 2011) (*Chevron* deference applied in absence of notice-and-comment rulemaking); *c.f.* Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–257 (1995) (citing longstanding precedent concluding that "[t]he Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws."). Most recently, in *Christensen v. Harris County*, the Court held that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant *Chevron*-style deference." Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000). Thus, when an agency "elects to proceed without following informal notice-and-comment requirements, it accepts the risk that it might either receive less than *Chevron* deference or not be able to rely subsequently upon its guidance document as a justification for a decision in a particular case." Kalen, *supra*, at 5-11. If the guidance document is challenged in court, "the principal issues [under the APA] are whether the document should have been promulgated in accordance with informal notice-and-comment procedures, whether the document is a final agency action that is reviewable, and whether the matter is ripe for judicial review." *Id.*

[90] Namely, the promotion of renewables development on public lands over private land alternatives explicit in a BLM internal agency guidance document. BLM IM 2011-059, *supra* note 29.

[91] *DOI Renewable Energy History*, *supra* note 20, at 3.

[92] *BrightSource Projects: Ivanpah Solar Project Overview*, BRIGHTSOURCEENERGY.COM, http://www.brightsourceenergy.com/ivanpah-solar-project (last visited Sept. 21, 2014).

construction in October of 2010, and opened in February of 2014.[93] The Ivanpah Solar Electric Generating System ("ISEGS") employs LPT solar thermal technology, which is different than the traditional photovoltaic ("PV") panels typically seen on solar generating facilities.[94] It occupies 3,500 acres (approximately five square miles) in California's sunlit Mojave Desert and employs 347,000 sun-tracking mirrors to direct beams of highly concentrated solar radiation at three 450-foot-tall water tanks.[95] The resulting steam is then harnessed to drive a conventional turbine and generate electricity.[96]

Advocates of BrightSource's LPT 550 solar thermal technology have argued that the technology is less destructive to habitat than photovoltaic solar facilities located in desert habitat because solar PV requires large amounts of flat land.[97] At the Ivanpah project, however, installation of the LPT towers required significant disruption of the desert habitat; the native vegetation was cleared to make way for the LPT towers, and could likely result in the erosion of desert soils.[98] A Final Staff Assessment of the project conducted by the California Energy Commission found that the removal of native vegetation and the anticipated erosion make the project's desert habitat areas unsuitable for most plant and wildlife.[99] Additionally, in 2012 the National Parks Conservation Association ("NPCA") issued a highly critical report on the project, listing concerns with water usage, damage to visual resources, and impacts on important desert species.[100]

In February of 2014, the Ivanpah Solar Generating Facility commenced operation as the largest concentrated solar thermal power plant in the world.[101] However, just two months later, the national media erupted with reports of large numbers of gruesome bird-deaths caused by birds flying through the laser beams of highly concentrated solar radiation or crash landing onto the reflective

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[93] *Ivanpah Project Facts*, BRIGHT SOURCE ENERGY http://www.brightsourceenergy (last visited Nov. 26, 2014); Press Release, Bright Source Energy, World's Largest Solar Thermal Power Project at Ivanpah Achieves Commercial Operation (Feb. 13, 2014), http://www.brightsourceenergy.com/ivanpah-achieves-commercial-operation#.VGjUGPl4pcQcom/stuff/contentmgr/files/0/8a69e55a233e0b7edfe14b9f77f5eb8d/folder/ivanpah_fact_sheet.10.12.pdf.

[94] *That "Other" Solar Tower Technology*, CLEAN TECHNICA (Aug. 5, 2011), http://cleantechnica.com/2011/08/05/that-other-solar-tower-technology/.

[95] Garrett Hering, *4 reasons the Ivanpah plant is not the future of solar*, GREENBIZ (Feb. 19, 2014), http://www.greenbiz.com/blog/2014/02/19/largest-solar-thermal-plant-completed-ivanpah.

[96] *Id.*

[97] *Id.*

[98] *Ivanpah Mitigation: Net Gain or Loss?*, MOJAVE DESERT BLOG (Apr. 18, 2013), http://www.mojavedesertblog.com/2013/04/ivanpah-mitigation-net-gain-or-loss.html.

[99] *Siting Cases: Ivanpah*, CAL. ENERGY COMM'N, http://www.energy.ca.gov/sitingcases/ivanpah/ (last visited Sept. 21, 2014).

[100] Chris Clarke, *Group Calls For Strict Limits on Solar Power Near National Parks*, KCET REWIRE (Sept. 8, 2012), http://www.kcet.org/news/rewire/government/solar-peis/parks-group-calls-for-solar-limits.html.

[101] Hering, *supra* note 95.

mirrors, which water-birds mistake for lakes (the "fake lake effect").[102] The Wall Street Journal reported that "regulators are having second thoughts about approving new solar projects due to growing evidence tower-and-mirror solar technology is killing birds."[103]

These media reports prompted the U.S. Geological Survey to send in biologists to make an accounting of avian casualties at the Ivanpah Solar Generating Facility. In April of 2014, USGS biologists found 97 birds killed or mortally injured at the plant – a record number of reported deaths for the Ivanpah facility.[104] However, those searches covered only 20% of the facility, meaning estimated deaths could reasonably be 5 times higher – not even taking into account injured birds that fall outside the plant's fenced-in-premises or those that are eaten by scavengers before survey crews can find them.[105] Based on USGS accountings, the Associated Press estimates that up to 28,000 birds per year could be killed by the facility.[106]

BrightSource Energy has paid $1.8 million dollars to compensate for bird deaths to be used to fund programs to spay and neuter domestic cats which kill over 1.4 billion birds a year, though opponents say that this would do nothing to aid the desert-dwelling birds impacted by the facility.[107] BrightSource Energy is also funding research from three companies for potential solutions to minimize wildlife casualties at the plant and a full year-long study of the plant's impacts on wildlife.[108] Biologists say that there is no known feasible means to minimize the number of birds killed.[109]

A. Legal Arguments Against Ivanpah

Groups challenged the controversial Ivanpah project's EIS by filing suit in the district court for the Central District of California on August 10, 2011.[110] In this

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[102] *Id*.

[103] Cassandra Sweet, *The $2.2 Billion Bird-Scorching Solar Project*, WALL ST. J. (Feb. 12, 2014), http://online.wsj.com/news/articles/SB10001424052702304703804579379230641329484.

[104] Chris Clarke, *April Was Bad Month for Birds at Ivanpah Solar*, KCET (May 26, 2014), http://www.kcet.org/news/rewire/solar/concentrating-solar/aprilwas-bad-month-for-birds-at-ivanpah-solar.html.

[105] *Id*.

[106] Eric Zerkel, *New Solar Power Plants are Incinerating Birds*, WEATHER CHANNEL (Aug 18, 2014), http://www.weather.com/news/solar-plants-birds-20140818.

[107] Ellen Knickmeyer & John Locher, *Solar Plants in Mojave Desert Scorch Birds Mid-Air*, ASSOCIATED PRESS (Aug. 18, 2014), http://bigstory.ap.org/article/emerging-solar-plants-scorch-birds-mid-air.

[108] Zerkel, *supra* note 106.

[109] Knickmeyer & Locher, *supra* note 107.

[110] W. Watersheds Project v. Salazar, 2011 U.S. Dist. LEXIS 151556. The opinion cited stems from the denial of a preliminary injunction, which was appealed to the Ninth Circuit and affirmed. The case ultimately returned to the district court, which issued a final opinion in 2012 granting summary judgment for Salazar (Department of the Interior). W. Watersheds Project v. Salazar, 993

case (*West Watersheds Project v. Salazar*), environmental groups argued that the purpose and need statement expressed in the agency's EIS was merely a reflection of the private applicant's goals, and thus, unlawfully narrow so as to "impermissibly curtail[] the EIS' consideration of alternatives that serve the public's – rather than the applicant's – interests."[111] The lower court did not address whether the purpose and need statement included in the EIS was too narrow in its preliminary injunction analysis. However, the court asserted that "[n]othing prevents an agency from expressly incorporating goals stated elsewhere in its EIS into a statement of purpose and need," explaining that there the purpose and need statement incorporated goals stated in the Federal Land Policy and Management Act ("FLPMA"), Executive Order 13212, the Energy Policy Act of 2005, the DOI Instruction Memorandum 2007-097, and Secretarial Order 3285.[112]

The court essentially adopted the government's argument that though "it might not have been appropriate for BLM to have framed a purpose and need that responded only to *private* interests and goals," the agency did "address those *agency* goals and congressional directives that inform its actions."[113] In the end, the court in *West Watersheds* allowed for greater agency deference in defining the statement of purpose and need in the EIS following prior case precedent described *supra* Part II.

West Watersheds illustrates the way in which the FEIS's statement of purpose and need may dictate the range of 'reasonable' alternatives that must be addressed in a FEIS. The circular reasoning employed by the court in allowing the narrow statement of purpose and need allowed the federal government to circumvent its NEPA obligations to consider reasonable alternatives.[114] The environmental groups alleged that "[c]ontrary to these NEPA requirements, the EIS fails to analyze a reasonable range of alternatives," specifically, the Ivanpah Dry Lake alternative and the Harper Lake private land alternative.[115]

F. Supp. 2d 1126 (2012).

111 Brief for Plaintiff at *17, *W. Watersheds*, 2011 U.S. Dist. LEXIS 151556.

112 *W. Watersheds*, 2011 U.S. Dist. LEXIS 151556 at *51; *see also* Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 812–13 (9th Cir. 1999) (upholding as "reasonable" statement of purpose, that "taken in complete isolation, would appear too narrow," because it expressly incorporated adequate policy goal).

113 Brief for Defendant at *10, *W. Watersheds*, 2011 U.S. Dist. LEXIS 151556; s*ee* Nat'l Parks & Conserv. Ass'n v. U.S. Bureau of Land Mgmt., 606 F.3d 1058, 1070-73 (9th Cir. 2010). BLM's NEPA handbook says the "purpose and need statement for an externally generated action must describe the BLM purpose and need, not an applicant's or external proponent's purpose and need." BLM NEPA HANDBOOK, *supra* note 39, at 35.

114 *See* CEQ CITIZEN'S GUIDE TO NEPA, *supra* note 61, at 16 ("The purpose and need section . . . serves as the basis for identifying reasonable alternatives that meet the purpose and need."), http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/planning/planning_docs.Par.53208.File.dat/A_Citizens_Guide_to_NEPA.pdf

115 Brief for Plaintiff at *17, *W. Watersheds*, 2011 U.S. Dist. LEXIS 151556.

Environmental groups argued that these alternatives were improperly dismissed by BLM without appropriate analysis in the FEIS.[116] However, the court reiterated that "[t]he choice of alternatives in an FEIS that an agency chooses to analyze is governed by the 'rule of reason,'" and that an "Environmental Impact Statement need not consider an infinite range of alternatives, only reasonable or feasible ones."[117] Accordingly, the court held that the FEIS need not analyze the underlying rationale for dismissing the alternatives at all, since they were "unreasonable." Because an alternative does not need to be analyzed if that alternative is unreasonable[118] (defined as inconsistent with the purpose of the project)[119] the Ivanpah court upheld the FEIS, stating that "[a] lake bed prone to flooding for weeks or months at a time is not consistent with the ISEGS project's purpose of operating an electrical generating facility," and that "[t]he Harper Lake private land alternative was infeasible and inconsistent with the project's purpose . . . [to] expedit[e] the development of alternative energy projects."[120] Under the "rule of reason," the FEIS need not explain *why* alternatives were dismissed (the environmental group's argument) since it was clear that the alternatives were not "reasonable" in light of the project's stated purpose.

Precisely because the purpose and need language in the Ivanpah FEIS cited specific "direction and policies" which could be "incorporate[ed] . . . in [the] EIS statement of purpose and need," the court held that the plaintiff did "not demonstrate a likelihood of prevailing on th[e] claim" that BLM had inadequately defined a public a purpose and need for the ISEGS project.[121] Thus, the court rejected the request for a preliminary injunction, and declared "BLM's stated policy goal [for ISEGS] – encouraging renewable energy development on BLM lands – is reasonable."[122]

Also implicated in the Ivanpah case is the idea that it is impermissible for the agency to simply echo the private applicant's project goals in the FEIS's

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[116] *Id.* Environmental groups argued that BLM failed to consider alternatives "that are practical or feasible" and not just "whether the proponent or applicant likes or is itself capable of carrying out a particular alternative," as mandated by NEPA. EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, MEMORANDUM TO AGENCIES: FORTY MOST ASKED QUESTIONS CONCERNING CEQ'S NATIONAL ENVIRONMENTAL POLICY ACT REGULATIONS (March 23, 1981), http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf; 40 C.F.R. §§ 1502.14, 1506.2(d) (2014).

[117] *W. Watersheds*, 2011 U.S. Dist. LEXIS 151556, at *54-55 ("The 'rule of reason' guides both the choice of alternatives as well as the extent to which the Environmental Impact Statement must discuss each alternative . . . .") (citing City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991); 40 C.F.R. § 1502.14(a)-(c) (2014)).

[118] *See* Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985).

[119] *See* N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 978 (9th Cir. 2006).

[120] *W. Watersheds*, 2011 U.S. Dist. LEXIS 151556, at *55-56.

[121] *Id.* at *51 (ultimately rejecting the plaintiff's request for preliminary injunction).

[122] *Id.*

purpose and needs section without incorporating relevant government "direction and policies."[123] However, the court found this sub-argument by plaintiffs unpersuasive, as the purpose and need statement references "direction and policies" incorporated into the purpose and need statement in the Ivanpah FEIS, upheld by the court as reasonable.

B. Ivanpah Today

Stories in The Wall Street Journal, The New York Times, the San Francisco Chronicle, and Reuters report that the landmark project may be "both the first and last of its kind," as insufficient capacity for energy storage, the project's overall economic cost, and poor public image from bird-casualties stunt the growth of the concentrated solar radiation energy industry.[124] The plant cost more to build than a similarly-sized facility utilizing more traditional photovoltaic panels, particularly as prices for the rival PV technology have fallen over the past few years.[125] Furthermore, the facility has become a safety hazard affecting over 40 million airline passengers per year as pilots face blinding glare flying over the Mojave Desert.[126] The Federal Aviation Administration has issued warnings for pilots who fly in and out of Las Vegas, where blinding reflections affect pilots for a radius of six miles around the facility.[127]

Bookended by impacts to the endangered desert tortoise on the front-end, and avian-casualties, economic feasibility and FAA safety concerns as of late, BrightSource Energy's latest project – a similarly-designed but even larger concentrated solar generating facility in Palen, California (near the Coachella Valley)– is even more controversial.[128] The fate of the Palen Solar Electric Generating Facility is uncertain, particularly because it would sit between the Colorado River and the Salton Sea, a major commuting zone for migrating birds.[129]

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[123] *Id.* (affirming the proclamation in Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058,1071-72 (9th Cir. 2009), that "BLM may not circumvent this proscription [to consider a reasonable range of alternatives] by adopting private interests" when delineating a statement of purpose that is "so narrowly drawn as to foreordain approval of the [project].").

[124] Hering, *supra* note 95.

[125] Sweet, *supra* note 103; *see also* Rob Wile, *Ivanpah California's Record-Breaking New Solar Plant Is Already Irrelevant*, BUSINESS INSIDER (Feb. 18, 2014), http://www.businessinsider.com/ivanpah-solar-plant-already-irrelevant-2014-2.

[126] Ernest Istook, *Blinded by the glare of green energy — a threat to over 40 million airplane passengers*, WASHINGTON TIMES (Aug. 20, 2014), http://www.washingtontimes.com/news/2014/aug/20/istook-ivanpah-solar-energy-project-a-glaring-dang/?page=all.

[127] *Id.*

[128] Michael Howard, *Solar Thermal Plants Have a PR Problem, and that PR Problem is Dead Birds Catching on* Fire, ESQUIRE (Aug. 20, 2014), http://www.esquire.com/blogs/news/solar-plant-dead-birds-081914.

[129] *Id.*

However, the recent precedent upholding narrow statements of purpose and need should give the public cause for concern. The *West Watersheds* case for the Ivanpah project illustrates the adverse environmental impacts that may result from insufficient NEPA analysis as well as the difficulties opponents face when challenging these statements in court. The Palen project may present another example of the court's willingness to allow federal agencies to circumvent NEPA analysis similar to the Ivanpah project.

V. CONCLUSION

The push for fulfilling renewable energy quotas by the 2012 deadline and the DOI's accelerated permitting policies for renewable energy development have failed to maintain the "balance between promoting clean, renewable energy and ensuring that . . . there is not more environmental harm caused in the siting process,"[130] resulting in *de facto* NEPA violations. The Ivanpah Solar Electric Energy Generation Facility is evidence of the perverse effect that the push for the development of solar energy on public lands has had on agency's EIS analysis. The *de facto* NEPA violations of unlawfully narrow purpose and need statement as well as failure to meaningfully consider reasonable private land alternatives were sanctioned by federal renewable energy policies, and affirmed by case law which expanded agency deference. The erosion of the EIA requirements of NEPA led to irresponsible federal policies which fast-tracked solar energy development on federal public lands.

In the case of Ivanpah, this federal policy leads to the premature rejection of a private land alternative. Because the purpose of the Ivanpah project was to increase renewable energy development on public lands, the already degraded desert habitat of privately owned lands was rejected simply because it was outside the scope of the project's purpose. This resulted in a *de facto* policy of NEPA violation that was promoted as a part of federal renewable energy development on federal public lands, essentially sanctioned by BLM internal agency guidance, namely IM 2011-059.

This article discusses two major issues with the status of federal policy regarding renewable energy development on federal public lands. First, courts have allowed agency deference to erode the NEPA requirements put in place by Congress to safeguard the U.S. citizenry and the environment from undue environmental degradation from agency actions. Second, and more egregious, the federal government has established a *de facto* policy promoting the development of renewable energy on federal public lands over private land alternatives, which undermines the NEPA requirement that all feasible and reasonable alternatives be considered.

Regardless of whether these federal policies are only articulated in internal

[130] *Id.*

agency guidance documents and may not hold the force of law in a court, they guide agency direction. By promoting *de facto* and government sanctioned erosion of NEPA requirements, environmental statutes have lost enforcement authority, and the federal government's push for development of renewables on public lands illustrates the failure of federal agencies to strike the appropriate balance between promoting American energy independence and responsible development and growth in the renewable energy sector.