There's been a mini-boom in uranium mining in the United States, in part because of increased interest in nuclear power as a partial response to climate change. Using nuclear power to reduce greenhouse gases has been quite controversial because of the obvious risks that nuclear power poses (exemplified by the Fukushima disaster in Japan).

But uranium mining has its own impacts – both on human health and on the landscape and wildlife. Given those impacts, it's perhaps not surprising that environmental groups have been fighting a range of proposals to open new or reopen preexisting uranium mines near Grand Canyon National Park. The Interior Department responded by closing thousands of acres of federal land near the park to new uranium mining activities. (That decision has been challenged in court by mining companies.) But preexisting mines and mining claims can still operate – and environmental groups have used litigation to try and stop them. In particular, they've argued that the environmental analysis for these mines (which is often decades old) is outdated and needs to be revised. Those arguments have highlighted a serious problem in how courts are considering federal agency obligations to do environmental review.

An important element of any litigation challenging development activity on federal lands is the National Environmental Policy Act (NEPA). NEPA (as probably many of our readers well know) requires federal agencies to publicly disclose the potential environmental impacts of proposed federal actions. Actions here do not just include the federal government directly doing something itself, but also private activities that the federal government authorizes or permits (like uranium mining on federal lands).

Many of the uranium mines that might reopen were first started many years ago, sometimes decades. That means that the initial NEPA review for those mines was begun many, many years ago. In the interim, conditions on the ground might have changed, such that different environmental impacts from the mines might result today compared to what was originally considered in the NEPA review decades ago. Or, we might know more about the risks (and benefits!) of uranium mining than we did decades ago. And finally, the kind of mining operation that is being considered might be different today than decades ago (because of, for example, changes in mining technology). Thus, the original NEPA document might be outdated.

The federal agency that oversees compliance with NEPA – the Council on Environmental Quality – issues regulations that guide how various federal agencies do their NEPA review. To address the problem of stale, outdated NEPA documents, CEQ regulations require federal agencies to update their NEPA analyses through "supplemental" NEPA documents. The courts have generally upheld those requirements.

But in 2004, the Supreme Court significantly trimmed back on the scope of supplemental NEPA obligations in its decision in Norton v. Southern Utah Wilderness Alliance. (Disclosure: I had a very small bit role in the case on the side of SUWA.) In that case, the federal Bureau of Land Management had developed a land-management plan for a desert area in Utah, and done a full NEPA analysis for the plan. Environmental groups argued that, after the adoption of the plan, the NEPA required supplementation because of an unprecedented increase in off-road vehicle use and impacts in the area. The Supreme Court said that because the land-management plan was final, there was no further federal action remaining to occur. Without further federal action to occur, there was no obligation to supplement the NEPA analysis.

The Court's rationale was that there was no point in doing more NEPA analysis because, since federal action was complete, there was no action to be informed by the NEPA analysis. It would have just been paperwork for paperwork's sake. That may (or may not) have been true of the land-management plan at issue in Norton v. SUWA. But the Court's rationale creates a dangerous incentive for agencies. So long as they keep from *doing* anything, and just remain passive bystanders, then they don't need to do any more NEPA analysis or paperwork.

In the context of the uranium mines near the Grand Canyon, that has meant that the agencies have an incentive to not reopen any of the permits or approvals for these decades-old mines. So long as they allow these old permits to remain in force, no more NEPA need be done. But of course, there might be very good reasons to reopen those permits and reexamine whether stricter (or even looser!) regulatory standards should be imposed because of changed circumstances, improved scientific knowledge, or changed technology.

This is a major problem with the current state of supplemental NEPA doctrine, and I'm worried that what we're seeing here is just the tip of the iceberg. The plaintiffs challenging one of these uranium mines have already lost their argument before the Ninth Circuit that NEPA should be supplemented, since the court concluded that there was no subsequent federal action with respect to the mine that would trigger NEPA (pdf of opinion here). Let's hope that there will be a better outcome in the next case.