On Wednesday, the Ninth Circuit decided a NEPA case that discusses two interesting issues. But what's most striking isn't what the court did discuss but what it *didn't* mention : the fact that last year's NEPA amendments speaks directly to one of those issues. Apparently the word that NEPA was extensively amended a year ago hasn't yet reached the federal courts.

I'll start with some background on the case and then explain what the court did or didn't do. First, some legal background: NEPA generally requires that an agency prepare an environmental assessment — a kind of streamlined environmental impact statement — when the agency believes that a project won't have a significant environmental impact. However, it can avoid even this streamlined process when it has issued a categorical exclusion (CE). A CE is a regulation saying that a particular category of actions normally do not have significant environmental impacts. However, even if a project is covered by a CE, the agency has to consider whether there are extraordinary circumstances, meaning that unlike most projects in the category, this one could have significant impacts .

This week's Ninth Circuit case involved a company drilling to determine whether there was gold underground in an area of the Inyo National Forest. The project had two phases: the drilling itself and restoration activities. In this case, the fact that restoration was considered necessary suggests that the first phase of the project might do some real damage and that the second phase was necessary to avoid more permanent harm. The drilling was covered by a CE — let's call this CE #1 — but CE #1 applied only to mineral exploration taking less than a year. Counting restoration, the drilling project would take more than a year. So the Forest Service used a separate categorical exclusion — CE #2 — covering habitat restoration for that part of the project. (It didn't think of CE #2, however, until after public comment was received.) The Forest Service concluded that there was little likely impact on surface or ground water from the project and that any effect on the endangered sage grouse would be minimal — thus, there were no extraordinary circumstances justifying more environmental review.

The upshot was that two issues were before the Ninth Circuit: (1) whether an agency can cover different parts of the same project with separate CEs in order to exempt the entire project from environmental review., and (2) whether failure to do a required environmental review can be harmless error.

Relying on Forest Service regulations, the majority concluded that an agency could not combine two different CEs for the same project. They (and their dissenting colleague) were apparently unaware that similar language is now part of the statute itself, not merely regulations issued by an agency.

After the 2023 amendments, Section 111(1) of NEPA now defines a CE as "a category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment within the meaning of section." And section 106(a)(2) says that an agency doesn't need an environmental assessment "if the proposed agency action is excluded pursuant to *one* of the agency's categorical exclusions." It seems clear that the action — a combination of drilling and restoration — does not fit "*one* of the agency's categorical exclusions."

It also makes sense to disallow combining categorical exclusions. Even if no single part of a project has a significant environmental impact, that doesn't mean that the combined impact is insignificant. Courts have long opposed agency efforts to dodge NEPA's requirements by segmenting projects into small pieces and assessing each of them separately. Moreover, as this case shows, projects that would require use of multiple CEs are less likely to be the kind of straightforward, routine action that CEs are designed for, as shown by the fact that 1500 comments were filed with the agency.

What about harmless error? The groups opposing the project, including the Sierra Club, did argue that there were potentially significant impacts. The agency considered these objections and rejected them in the course of finding that no extraordinary circumstances were present. If the agency would have made the same findings in an environmental assessment, where's the problem?

The majority said that the agency's justification for avoiding the NEPA process was wrong, and that refusing to do an environmental assessment was such a basic violation of NEPA that it could not be considered harmless. The dissent, on the other hand, says that the Forest Service had plainly taken as close a look at the environmental issues as it would have in an environmental assessment. (If that's true, one wonders, why didn't the Service just do an environmental assessment in the first place?) For that reason, the dissent argues, any procedural error by the agency was harmless.

The dissent doesn't have a bad argument, but thereare some differences between what the agency did and the environmental assessment process that could be significant. The Service did solicit public input, but the regulations governing environmental assessments require fuller opportunities to participate. Instead, "agencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments." Asking the public whether it agrees with use of a CE isn't the same as involving them along with governments at all levels in the preparing an assessment.

This matters because we can't be sure whether a fuller process would have led to additional evidence or changed the agency's conclusions. People who are asked to comment on whether an agency should bother looking at a project's environment impacts *at all* might not see a need to supply as much detailed evidence as they would when the agency is actively looking into environmental impacts.

In addition, an environmental assessment would have required a Finding of No Significant Impact (FONSI), which would also have had to discuss alternatives to the proposal. None of the judges cites any discussion of alternatives by the agency. We don't know if there were other, less sensitive, locations that might have been used. If there had been an environmental assessment, the agency would have had to discuss that.

The idea of using categorical exclusions is to quickly resolve cases where there's no real question about environmental impacts. In this case, it looks like the process took about as long as a genuine environmental assessment. In fact, the agency did originally say an environmental assessment was needed, but the company complained and the agency quickly reversed itself. (Is it a coincidence that this was the Trump Administration?) Maybe the agency should have stuck with its original position rather than shortcutting the process in its haste to approve the mining project.