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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE DISTRICT OF NEVADA

7  
8 ROBERT W. HALL, ) Case No.: CV-S-02-1474-KJD-LRL  
9 ) **BASE FILE**  
10 Plaintiff, )  
11 vs. )  
12 GALE A. NORTON, et al., )  
13 Defendants )

14  
15 ROBERT W. HALL, ) Case No.: CV-S-03-0542-KJD-LRL  
16 Plaintiff, )  
17 vs. )  
18 GALE A. NORTON, et al., )  
19 Defendants )  
20

21 **PLAINTIFF'S CONSOLIDATED SUMMARY JUDGMENT**  
22 **POINTS AND AUTHORITIES**

23 **INTRODUCTION**

24 This consolidated action involves the CV-S-02-1474-KJD-LRL, November 15, 2002 and  
25 CV-S-03-0542-JCM-RJJ, June 5, 2003, Bureau of Land Management ("BLM") land auction  
26 sales. Re: CV-S-02-1474-KJD-LRL. As of May 31, 2003, 258 parcels of land totaling 4,892.42  
27 acres were sold pursuant to the Southern Nevada Public Land Act ("SNPLMA"). The SNPLMA  
28 is a major federal action as defined by the National Environmental Policy Act ("NEPA"). The

1 SNPLMA constitutes only a portion of the BLM's Valley activities that must be included in a  
2 NEPA compliant, cumulative impact determination. The Department of the Interior and its  
3 Bureau of Land Management Division have failed or refused to comply with the NEPA  
4 regarding land sales. The result has been BLM's continuing violation of the EPA approved,  
5 1979/81 State Implementation Plan ("SIP") and the National Ambient Air Quality Standards  
6 ("NAAQS") be the simple expediency of ignoring the agency's NEPA, Clean Air Act ("CAA")  
7 and federal Administrative Procedures Act responsibilities.

8 The credibility of Defendants must relate to facts and evidence. Defendants cannot  
9 produce the following documents.

10 1. The documents that support Defendants' claims of NEPA compliant, site specific,  
11 cumulative impact determinations since 1970 are not in the record of this action.<sup>1</sup> Plaintiff  
12 alleges that BLM, NEPA compliant, site specific, cumulative impact determinations do not exist.  
13 (A Resource Management Plan "RMP" environmental impact statement is not a NEPA  
14 compliant, site specific, cumulative impact determination.)

15 2. The public notices that provide evidence that the public was noticed regarding the  
16 scoping, drafting and completion of final NEPA compliant site specific, cumulative impact  
17 documents are not in the record of this action. Exhibit "Q" attached hereto.

18 3. The results of required EPA reviews and comments regarding NEPA compliant,  
19 cumulative impact determination documents are not in the record of this action. Defendants have  
20 not submitted NEPA compliant, cumulative impact documents for EPA review and comments.  
21 That is the reason they are not in the record of this action. See Exhibit "R" attached hereto.

22 4. Evidence of a finally, EPA approved (including a Ninth Circuit Court of Appeals  
23 successful review) Nevada/Clark County State Implementation Plan ("SIP") that meets the 1990  
24 amendments to the Clean Air Act ("CAA") is not in the record of this action. The reason is that  
25 no such document exists.

26 5. Evidence of a checklist showing that each the above-named documents was checked  
27

28 <sup>1</sup> To the extent that Defendants claim that long range, programmatic planning documents such as  
a Resource Management Plan "RMP") are NRPA compliant, site specific, cumulative impact  
determination documents, Defendants misrepresent.

1 against the applicable statutes and regulations. There are no such checklists in the administrative  
2 record of this action.

3 Without evidence that all of these documents are in the administrative record, Defendants  
4 cannot prevail. Prolonging the obvious does not serve the cause of justice. Defendants have  
5 evaded these requirements since the day they were first required. Plaintiff requests that summary  
6 judgment be granted in his favor if the Defendants file a summary judgment motion without  
7 being explicit under Fed. R. Civil P. 11 where all of these documents reside in the administrative  
8 record.  
9

### 10 **November 15, 2002 Land Auction Sale**

11 Re: CV-S-02-1474-KJD-LRL (“N-AR”) Environmental Assessment with Appendices 1-6  
12 (“EA” Number: NV-050-2002-135), Finding of No Significant Impact (“FONSI”) and Decision  
13 Record (“DR”).<sup>2</sup> [N-AR 001996-002118] for a public auction land sale of 50 parcels consisting  
14 of 1,172.50 acres of federal public land in the Las Vegas Valley and pursuant to the Southern  
15 Nevada Public Land Management Act of 1998, Public Law 105-263, 112 Stat 2343  
16 (“SNPLMA”).<sup>3</sup> The DR states in part, “I have determined that the proposed action with the  
17 mitigation measures as described will not have any significant impacts on the human  
18 environment and that an EIS is not required.”<sup>4</sup> [N-AR 002017] See Exhibit “B” of Exhibit “E”  
19 attached to Plaintiff Robert W. Hall’s Motion for Summary Judgment filed in CV-S-02-1474-  
20 KJD (LRL).  
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23 <sup>2</sup> Attached as Exhibit “B” to Petitioner’s November 12, 2002 Points and Authorities in Support  
24 of Motion For an Emergency Preliminary Injunction and Affidavit of Robert W. Hall. [N-AR  
25 001996-002118; 003272-003297]. The November 12, 2002 Points and Authorities was served  
26 with Exhibits “B” – “I” which are in the court record but not in the administrative record. See  
27 Affidavit of Robert W. Hall attached thereto for a description of each exhibit, pp. 4-6.

28 <sup>3</sup> Later reduced to 45 parcels consisting of approximately 1,147.50 acres.

<sup>4</sup> While the land sale was noticed, the **public** was not noticed of the existence of an EA, FONSI  
or DR. The notice of the land sale was made public without clearly noticing the EA or a  
reasonable amount of information regarding the significance of the EA in relation to the National  
Environmental Protection Act (“NEPA”) and Clean Air Act (“CAA”) significance of the  
document. [002917].

1 Petitioner Hall timely filed comments to the EA, FONSI, DR and the proposed  
2 competitive land sale that is the subject of this review on October 15, 2002.<sup>5</sup> [NAR 003026-  
3 003064] Hall filed his complaint on November 8, 2002 with his October 15, 2002 comments  
4 attached as Exhibit “A” thereto.<sup>6</sup> [N-AR 003219-003267]

5 Hall waited for the Defendants’ comment Decision (2710 [NV 056]). Hall did not receive  
6 the comment decision until late in the afternoon of November 13, 2002, one full day before the  
7 land sale auction and the night before the hearing on petitioner Hall’s then pending motion for a  
8 temporary restraining order and preliminary injunction. [N-AR 003299-003311]

9 Petitioner filed a timely comment petition challenging the validity of the land sale and the  
10 SNPLMA land sale process alleging violations of the procedural and substantive requirements of  
11 NEPA, CAA and APA. The petition was also brought pursuant to the judicial review provisions  
12 of the Administrative Procedures Act, 5 U.S.C. § 701-706 (“APA”). Petitioner Hall filed his  
13 Rule 14(a) First Amended Complaint on January 14, 2003. When Hall could not wait any longer  
14 for a comment response, he filed a Rule 65(a)-(b) Motion and Notice of Motion for Emergency  
15 Preliminary Injunction or Temporary Restraining Order (TRO) along with Points and Authorities  
16 in Support of Motion for an Emergency Preliminary Injunction or Temporary Restraining Order  
17 on November 12, 2002. The request for a preliminary injunction or TRO was denied by the  
18 district court at hearing on November 14, 2002. The public land sale auction was held the next  
19 day on November 15, 2002.

20 **June 5, 2003 Land Auction Sale**

21 Re: CV-S-03-0542-JCM-RJJ (“J-AR”) Environmental Assessment with Appendices 1-6  
22 (“EA” Number: NV-050-2003-89) [JAR 000014-000272], Finding of No Significant Impact  
23 (“FONSI”) and Decision Record (“DR”) [J-AR 000258-000259]<sup>7</sup> for a public auction land sale  
24 of 40 parcels consisting of 1,103.76 acres of federal public land in the Las Vegas Valley and  
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26 <sup>5</sup> Comments of the Nevada Environmental Coalition, Inc. and Robert W. Hall (67 FR 55866).

27 <sup>6</sup> Complaint, Emergency Complaint For Judicial Review and to Enjoin, Exhibit “A,” Comments  
28 of the Nevada Environmental Coalition, Inc. and Robert W. Hall.

<sup>7</sup> Exhibit “B” of Exhibit “E” of the exhibits attached to the May 27, 2003 Rule 65(a) & (b)  
Motion for Emergency PI and TRO. See the attached Affidavit of Robert W. Hall, pp. 4-6.

1 pursuant to the Southern Nevada Public Land Management Act of 1998, Public Law 105-263,  
2 112 Stat 2343 (“SNPLMA”).

3 Petitioner filed a May 27, 2003 Rule 65(a) & (b) Motion and Notice of Motion for  
4 Emergency Preliminary Injunction or Temporary Restraining Order, Affidavit of Robert W. Hall,  
5 Points and Authorities in Support of Motion For an Emergency Preliminary Injunction or  
6 Temporary Restraining Order and Exhibits “A” – “P.”. Petitioner filed a Complaint for Judicial  
7 Review and to Enjoin on May 15, 2003. All of the documents filed to date in CV-S-03-0542-  
8 JCM-RJJ are made a part hereof and are adopted herein for all purposes.

9 **Consolidation**

10 Plaintiff has already filed Plaintiff’s Robert W. Hall’s Motion for Summary Judgment,  
11 Plaintiff’s Summary Judgment Points and Authorities, Affidavit of Robert W. Hall and Exhibits  
12 “A” – “P” in CV-S-02-1474-KJD-LRL. That filing is adopted herein and made a part hereof for  
13 all purposes. Combined, the two land auction sales represent 2,276.26 acres and 95 parcels of  
14 land. None of Defendants’ calculations meet any NEPA test since NEPA requires the data  
15 regarding all direct and indirect air pollution activities, not just 2,276.26 acres.

16 **The Issues in Summary Regarding Both Land Auction Sales**

17 Petitioner alleges that the Defendants’ failure to prepare a cumulative impact,  
18 Environmental Impact Statement (“EIS”) for all of their Las Vegas Valley air pollution activities  
19 including and not limited to all SNPLMA land sales, violates the National Environmental Policy  
20 Act of 1969, 42 U.S.C.A. §§ 4321-4370f (“NEPA”)<sup>8</sup>. Petitioner also alleges that Defendants  
21 have violated the Council on Environmental Quality regulations, 40 C.F.R. § 1500.1 et seq.  
22 (2001) (CEQ). Defendants’ land sale public notice and due process procedures violate the  
23 Administrative Procedures Act, 5 U.S.C.A. §§ 702-706 (“APA”). Petitioner alleges that  
24 Defendants’ further failure to conduct a “conformity determination” to ensure that the direct and  
25 indirect air pollution resulting from the development of land sold at competitive land sales does  
26 not disrupt applicable State Implementation Plans violates the Clean Air Act. See 42 U.S.C. §  
27 7506(c). [N-AR 003220-003221]. The SNPLMA is one of several statutes that must be applied

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28 <sup>8</sup> 42 USC 4321 *et seq.*; amended by PL 94-52, July 3, 1975; PL 94-83, August 9, 1975.

1 to SNPLMA land sales. NEPA compliance is the first step either in coordination with the APA;  
2 the CAA is the second step in parallel with the SNPLMA. If at any point the foundation for  
3 NEPA, CAA and APA compliance is legally insufficient, SNPLMA land sales must not proceed  
4 until legally sufficient corrective action is taken. Compliance with the SNPLMA cannot come at  
5 the cost of violating United States environmental laws that were adopted to protect the health and  
6 safety of the residents of the Las Vegas Valley (“Valley”), one of whom is Hall. Hall alleges that  
7 the Defendants have acted without regard to well established United States environmental laws  
8 and therefore, without regard to the related public health and safety issues described in the court  
9 record of this review that impact him directly.

10 Hall alleges that Defendants parse their air pollution activities into “little piece” EAs in a  
11 knowing and willful pattern of avoiding compliance with the environment laws of the nation.  
12 Defendants could easily meet their NEPA obligations by preparing an Excel or Access spread  
13 sheet **listing all of their Las Vegas Valley air pollution**, but choose to do anything but that.  
14 Without NEPA compliance, all subsequent environmental compliance certifications of the  
15 Defendants such as conformity determinations to the state implementation plan (“SIP”) are  
16 misleading. There is no evidence of Defendants’ legally sufficient NEPA, CAA or APA  
17 compliance in the administrative record of this action.

## 18 **I. LEGAL BACKGROUND**

19 These environmental regulations may best be considered against the historical backdrop  
20 of the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), 42  
21 USC 4321 et seq.; amended by PL 94-52, July 3, 1975; PL 94-83, August 9, 1975 (codified as  
22 amended at 42 U.S.C. § 4321-4370f) (“NEPA”), the Clean Air Act, 42 U.S.C. §§ 7401-7671q  
23 (“CAA”), and the Southern Nevada Public Land Management Act of 1998, Public Law 105-263,  
24 112 Stat 2343 (“SNPLMA”).<sup>9</sup>

### 25 **A. National Environmental Policy Act of 1969**

26 On January 1, 1970, President Richard Nixon signed NEPA into law. Although various  
27 state and federal environmental measures had been in place for decades, this statute marked the  
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<sup>9</sup> See Public Citizen v. Department of Transportation, 316 F.3d 1002 (9<sup>th</sup> Cir. 2003).

1 first nationwide comprehensive approach to regulating the interaction between Americans and  
2 their environment. Prompted by a series of environmental crises in the late 1960s, NEPA's  
3 sweeping reach reflected Congress's conviction that "our Nation's present state of knowledge,  
4 our established public policies, and our existing governmental institutions are not adequate to  
5 deal with the growing environmental problems and crises the Nation faces." S. Rep. No. 91-296,  
6 at 4 (1969).

7       Such broad policy creation was also reflected in the statute's first section, containing the  
8 congressional declaration of purpose:

9       The purposes of this chapter are: To declare a national policy which will encourage  
10       productive and enjoyable harmony between man and his environment; to promote  
11       efforts which will prevent or eliminate damage to the environment and biosphere and  
12       stimulate the health and welfare of man; to enrich the understanding of the ecological  
13       systems and natural resources important to the Nation; and to establish a Council on  
14       Environmental Quality.

15       42 U.S.C. § 4321. To accomplish these ends, Congress imposed extensive procedural  
16       requirements on government action affecting the environment. Paramount among these was the  
17       requirement that all federal agencies shall, "to the fullest extent possible":

- 18       (A) utilize a systematic, interdisciplinary approach which will insure the integrated use  
19       of the natural and social sciences and the environmental design arts in planning and in  
20       decisionmaking which may have an impact on man's environment;  
21       (B) identify and develop methods and procedures . . . which will insure that presently  
22       unquantified environmental amenities and values may be given appropriate  
23       consideration in decisionmaking along with economic and technical considerations;  
24       (C) include in every recommendation or report on proposals for legislation and other  
25       major Federal actions significantly affecting the quality of the human environment, a  
26       detailed statement by the responsible official on—  
27       (i) the environmental impact of the proposed action,  
28       (ii) any adverse environmental effects which cannot be avoided should the proposal be  
29       implemented,  
30       (iii) alternatives to the proposed action,  
31       (iv) the relationship between local shortterm uses of man's environment and the  
32       maintenance and enhancement of long-term productivity, and  
33       (v) any irreversible and irretrievable commitments of resources which would be  
34       involved in the proposed action should it be implemented.

35       Id. § 4332(2). Congress further directed that, again "to the fullest extent possible," "the  
36       policies, regulations, and public laws of the United States shall be interpreted and administered

1 in accordance with the policies set forth in this chapter.” 42 U.S.C. § 4332(1). This unequivocal  
2 command has guided the United States’ environmental policy for more than thirty years, and  
3 pervades every aspect of government decisionmaking.

#### 4 **B. Clean Air Act**

5 Federal air quality legislation dates back to at least the mid-1950s, and the CAA itself to  
6 1963, Pub. L. No. 88-206, 77 Stat. 393, but it was the substantial amendment in 1970, Pub. L.  
7 No. 91-604, 84 Stat. 1713 that gave the Act its modern, far-reaching scope. The Act was  
8 amended again to further broaden its reach in 1977, Pub. L. No. 95-95, 91 Stat. 749, and in 1990,  
9 Pub. L. No. 101-549, 104 Stat. 2399. Before the 1970 Amendments, there existed no federal air  
10 pollution standards, nor mandatory enforcement mechanisms; federal officials could only  
11 encourage states to develop air-quality enforcement programs. All this was dramatically altered  
12 by the 1970 Amendments, which mandated national air quality standards and deadlines for their  
13 attainment. 1970 Pub. L. No. 91-604, § 4, 84 Stat. at 1678-89. These amendments also created an  
14 innovative federal-state partnership structure whereby states were to develop individual  
15 “implementation plans” to attain compliance with federal standards, and the newly created  
16 Environmental Protection Agency (“EPA”) was charged with evaluating, overseeing, and  
17 enforcing state compliance with these plans. *Id.* The 1970 Amendments specifically addressed  
18 for the first time hazardous pollutants and automobile exhausts, bringing these “mobile sources”  
19 within the scope of the EPA’s authority. *Id.* §§ 6-9, 84 Stat. at 1690-700.

20 The 1977 Amendments added an important procedural safeguard: they forbade the  
21 federal government and its agencies from “engag[ing] in, support[ing] in any way or provid[ing]  
22 financial assistance for, licens[ing] or permit[tin]g, or approv[ing], any activity which does not  
23 conform to [an approved state] implementation plan.” 42 U.S.C. § 7506(c)(1). The Act defined  
24 “conformity” broadly to include a restriction on such things as “increas[ing] the frequency and  
25 severity of any existing violation of any standard in any area,” or “delay[ing] timely attainment  
26 of any standard . . . in any area.” *Id.* § 7506(c)(1)(B). This prevented the federal government  
27 from hindering states’ abilities to comply with the Act’s requirements. Finally, the 1990  
28 Amendments vastly increased the list of regulated pollutants, as well as the EPA’s civil and

1 criminal enforcement capabilities.

2 **II. PROCEDURAL HISTORY**

3 Recognizing the need to appear to comply with the regulations implementing NEPA,  
4 Defendants prepare an Environmental Assessment (“EA”) for each land sale evaluating the likely  
5 environmental impact of the competitive land sales. Defendants’ EAs are not routinely noticed to  
6 the public. Each EA is accompanied by a Finding of No Significant Impact (“FONSI”) and  
7 Decision Record (“DR”) where Defendants predictably determine that a full Environmental  
8 Impact Statement (“EIS”) is not required. Parsing their activities into smaller EAs is a direct  
9 violation of NEPA and is seriously misleading.

10 The EA FONSI/DRs in both of the instant land sales include the following statement.  
11 “The decision to proceed with the public land sale does not result in any undue or unnecessary  
12 environmental degradation. I have determined that the proposed action is in conformance with  
13 the 1998 RMP, SNPLMA, FLPMA and other applicable federal public land laws and  
14 regulations.” [N-AR 002017 & J-AR-000258] That statement, and all others like it, is  
15 misleading. Conformity with and to NEPA, CAA and APA are not mentioned in successive  
16 FONSI-DR documents.<sup>10</sup> Defendants do not prepare NEPA compliant EISs establishing  
17 compliance with initial or subsequent NEPA, cumulative impact determination requirements.  
18 Evidence of support for Defendants’ decision is consists of “I have determined” statements. The  
19 Defendants claim that land sales are “exempt” from a CAA conformity determination citing 40  
20 CFR § 51.853(c)(2)(xiv); § 93.153(c)(2)(xiv) without discussing how a major source of air  
21 pollution such as the SNPLMA, which is not simply a piece of paper pushed across a table,  
22 involves air pollution in the first instance. [N-AR 00217-00218] The “exempt” statement is  
23 misleading.

24 As a result, Defendants do not include administrative record evidence of NEPA initial

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26 <sup>10</sup> Claiming conformance or conformity to statutes other than relevant environmental statutes is a  
27 BLM tradition. Their little joke is that those who do not understand environmental law are fooled  
28 into believing that something important happened. Nothing important happened. Another little  
joke is the statement that land sales do “not result in any undue or unnecessary environmental  
degradation.” That begs the question, undue or unnecessary to whom? Do not buy a used car  
from these people.

1 and subsequent cumulative impact statements or CAA conformity certifications. Defendants do  
2 not prepare CAA conformity determinations covering any of the SNPLMA land sales because  
3 the BLM has determined that certain categorical exceptions to the conformity determination  
4 requirements apply to them. They simply pronounce themselves “exempt.”

5 After keeping this thoroughly misleading environmental compliance and conformity  
6 process from the public, Defendants then notice land sales by publication in the local  
7 newspapers, by Web site notice, by direct mail and by publication in the Federal Register. One  
8 example is Vol. 67, No. 169, Notices, pp. 55866-69 “Notice of Realty Action: Competitive Sale  
9 of Public Lands in Clark County, NV,” noticing only the 45 competitive sales for that land sale.<sup>11</sup>  
10 [N-AR 003664-003667] The district court has jurisdiction to review the petitions under 28  
11 U.S.C. § 1331 which provides for review in the district court of appeals of certain administrative  
12 actions.

### 13 **III. STANDING**

#### 14 **A. Applicable Appeals Court Decisions**

15 Defendants admit that the Las Vegas Valley is designated by the EPA as in serious,  
16 cleaner air non-attainment for particle matter ten microns or less (“PM10”) and carbon monoxide  
17 (“CO”). By Congressional enactment and by EPA designation, the Las Vegas Valley is an  
18 unhealthy place to live. Anyone living in a serious non-attainment area risks air pollution health  
19 problems and has standing herein.

20 There are two related actions to this review involving Hall and two Ninth Circuit Court of  
21 Appeals decisions. They are Hall v. Norton, 266 F.3d 969 (9<sup>th</sup> Cir. 2001)<sup>12</sup> and Hall v. EPA, 273  
22 F.3d 1145 (9<sup>th</sup> Cir. 2001). In Norton, the appeals court reversed the district court’s determination  
23 that Hall lacked standing and established Hall’s standing. See Public Citizen v. Department of  
24 Transportation, 316 F.3d 1002, 1016 (9<sup>th</sup> Cir. 2003) citing Hall v. Norton, 266 F.3d 969, 976 and  
25 n. 6 (9<sup>th</sup> Cir. 2001). Hall claims standing herein for the same reasons he was granted standing by  
26 the two related Ninth Circuit appeal decisions.

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28 <sup>11</sup> See Exhibit D attached to Plaintiff’s November 12, 2002 Points and Authorities in Support of  
Motion for an Emergency Preliminary Injunction or Temporary Restraining Order.

<sup>12</sup> Norton was substituted for Babbitt on a change of executives.

1 Petitioner Hall’s complaint allegations are well within the range of injuries to cognizable  
2 interests that may confer standing.” See Hall v. Norton, 266 F.3d 969, 975 (9<sup>th</sup> Cir. 2001); cf.  
3 Natural Res. Defense Council v. Southwest Marine, Inc., 236 F.3d 985, 994 (9<sup>th</sup> Cir. 2000).  
4 Plaintiff has alleged sufficient injury in fact by affidavit testimony in this review.<sup>13</sup> Cognizable,  
5 credible threats include “ ‘increased traffic, pollution, and noise,’ ” Hall v. Norton, 266 F.3d 969,  
6 975 n.6 (9<sup>th</sup> Cir. 2001) (quoting Soc’y Hill Towers Owners’ Ass’n v. Rendell, 210 F.3d 168, 176  
7 (3<sup>d</sup> Cir. 2000)), and “increased auto emissions,” *id.* (citing Sierra Club v. EPA, 129 F.3d 137,  
8 139 (D.C. Cir. 1997)). This jurisprudence is consistent with the Supreme Court’s rule that  
9 “environmental plaintiffs adequately allege injury in fact when they aver that they use the  
10 affected area and are persons ‘for whom the aesthetic and recreational values of the area will be  
11 lessened’ by the challenged activity.” Friends of the Earth, Inc. v. Laidlaw Env’tl. Serv. (TOC),  
12 Inc., 528 U.S. at 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting Sierra Club v.  
13 Morton, 405 U.S. 727, 735 (1972)). Petitioner Hall’s allegations and supporting evidence falls  
14 squarely within the Supreme Court’s rule and satisfies the injury-in-fact requirement. Hall has  
15 already passed the DOI/BLM injury in fact test in Hall v. Norton, 266 F.3d 969, 976 (9<sup>th</sup> Cir.  
16 2001).

### 17 **B. Causation**

18 “Once a plaintiff has established an injury in fact under NEPA, the causation and  
19 redressability requirements are relaxed.” Cantrell v. City of Long Beach, 241 F.3d 674, 682;  
20 accord Hall v. Norton, 266 F.3d 969, 975 (9<sup>th</sup> Cir. 2001) (Petitioners “ ‘seeking to enforce a  
21 procedural requirement the disregard of which could impair a separate concrete interest of  
22 theirs,’ . . . establish standing ‘without meeting all the normal standards for redressability and  
23 immediacy.’ ” (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 & n.7, 112 S.Ct.  
24 2130, 70 L.Ed.2d 351 (1992)). Unlike in an ordinary causation analysis, a petitioner asserting a  
25 procedural injury “need only establish ‘the reasonable probability of the challenged action’s  
26 threat to [his] concrete interest.’ ” Hall v. Norton, 266 F.3d 969, 977 (9<sup>th</sup> Cir. 2001) (quoting  
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28 <sup>13</sup> Affidavit of Robert W. Hall attached to the November 12, 2002 Points and Authorities in Support of Motion for an Emergency Preliminary Injunction or Temporary Restraining Order.

1 Churchill County v. Babbitt, 150 F.3d 1072, 1078 (9th Cir. 1998)) (emphasis added) (alteration  
2 in original).

3 Thus, constitutionally adequate causation existed at the time Hall’s petition was filed. See  
4 Arizonans for Official English v. Arizona, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170  
5 (1997) (“To qualify as a case fit for federal-court adjudication, an actual controversy must be  
6 extant at all stages of review ....”). The relevant question posed by the complaint is whether  
7 there is a “reasonable probability” that Defendants’ land sales will result in increased pollution  
8 and adverse health effects to Hall. In this instance, the allegation is that the Defendants are the  
9 first step in a chain of causation that has resulted in levels of air pollution beyond that allowed by  
10 Nevada and Clark County’s EPA approved 1979/81 SIP and beyond that allowed by the National  
11 Ambient Air Quality Standards (“NAAQS”) **which are less stringent than Nevada’s very**  
12 **stringent 1979/81 EPA approved SIP requirements.**

13 The court is next required to look at the likelihood of harm to Petitioner Hall if he does  
14 not prevail in this action. If Hall’s petition is denied, several harms described in administrative  
15 record documents will result.<sup>14</sup> [N-AR 000311-000317] Defendants will once again escape  
16 compliance with NEPA, CAA and APA. Defendants will continue to keep their environmental  
17 compliance information or lack thereof from the public which includes Hall, as well as local,  
18 state, regional and other federal agencies. Defendants’ land sales will continue without regard to  
19 their statutory responsibilities. Clark County will continue to fail to meet the more stringent  
20 standards than the National Ambient Air Quality Standards (“NAAQS”) that make up its EPA  
21 approved 1979/81 SIP, the Las Vegas Valley will continue in serious non-attainment for CO and  
22 PM10, then the Defendants’ Valley air pollution will continue to result in major Valley air  
23 pollution and the Valley will continue its runaway growth that continually adds to the current air  
24 pollution problem. The quality of the lives of the citizens of the Las Vegas Valley will continue  
25 to deteriorate. All of this is well known to the Defendants from the administrative documents  
26 identified above. All of this involves a series of serious violations of our nation’s environmental  
27 laws.

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28 <sup>14</sup> See Exhibit O attached hereto.

1 Defendants have not claimed there will be no air pollution. Without prejudice to the fact  
2 that data included in the EA is not only absurdly low, they are not Defendants' data. Clark  
3 County data does not claim to be Defendants' NEPA data. Clark County data are not an answer  
4 to the Defendants' NEPA, initial and subsequent cumulative impact question. Defendants have  
5 failed to produce any of their own data in the form of a list or spreadsheet listing all of their  
6 Valley air pollution activities, a certification by a responsible Defendants' executive that all of  
7 the Defendants' Valley air pollution data are listed and a certified total of that data. No matter  
8 what the Defendants say, there is no Defendants' total of all of their Valley pollution year after  
9 year. There is no complete list of Defendants' valley activities in conjunction with an air  
10 pollution total. There is no evidence of subsequent data keeping the initial cumulative impact  
11 determination current.

12 Clark County data has not been finally approved by the EPA, Clark County data in SIP  
13 submission have been routinely rejected by the EPA and have been vacated and remanded as  
14 being short to the tune of 52,000 acres out of 57,000 acres by the Ninth Circuit Court of Appeals  
15 by the EPA in Hall v. Norton, 266 F.3d 969 (9<sup>th</sup> Cir. 2001), *supra*. Defendants admit that  
16 according to Clark County data, current valley PM10 emissions are 333,132.7 tons of PM10 per  
17 year. Without prejudice, Defendants admit that vacant lands which include bulldozed lands make  
18 up 62% of the PM10 problem in the Valley. [N-AR 002000] County data are not relevant herein  
19 except for the purpose of impeachment.<sup>15</sup>

20 Thus the parties agree that there is air pollution coming from vacant land and  
21 development land. That first step in a chain of causation and the fact that the Las Vegas Valley is  
22 a serious non-attainment for PM10 and CO establishes that the Defendants are responsible for a  
23 significant share of a serious health and safety problem. There is an EPA method for determining  
24 emission factors.<sup>16</sup> [N-AR 000306-000310] Activities that cause too much air pollution are not  
25 permitted. Since NEPA was enacted in 1969, the Defendants have kept cumulative impact  
26 emissions data hidden from the public. That is a sufficient causal link between Defendants'

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27  
28 <sup>15</sup> See Exhibits F-I attached to Plaintiff's November 12, 2002 Points and Authorities in Support  
of Motion For an Emergency Preliminary Injunction or Temporary Restraining Order.

<sup>16</sup> See Exhibit N attached hereto.

1 direct and indirect air pollution acts and Hall’s current and long term injuries.

2 **C. Redressability**

3 The constitutional standing inquiry requires the court to determine whether it possesses  
4 the ability to remedy the harm that a petitioner alleges. In most procedural injury cases involving  
5 environmental analysis, a petitioner “who asserts inadequacy of a government agency’s  
6 environmental studies ... need not show that further analysis by the government would result in a  
7 different conclusion. It suffices that ... the [agency’s] decision could be influenced by the  
8 environmental considerations that [the relevant statute] requires an agency to study.” Hall, 266  
9 F.3d at 977. Thus, Petitioner Hall bears a relatively easy burden. If Defendants conducted the  
10 type of environmental analysis that Hall suggests, their decision could be influenced. Indeed,  
11 Defendants are required by statute to “insure that ... environmental amenities and values ... be  
12 given appropriate consideration in [administrative] decisionmaking.” 42 U.S.C. § 4332(2)(B).

13 As the reviews now stand, if the court grants Petitioner Hall’s petition, Defendants must  
14 total all of their direct and indirect Las Vegas Valley emissions. Once that information is known,  
15 the issue of what happens next will be known. The result could be no change in current activities  
16 if Defendants’ claims are supported, or a reduction of Las Vegas Valley air pollution causing  
17 activities if Hall’s claims are supported. Defendants put all land purchasers on notice of the  
18 existence of this legal action under pressure from Hall so there are no surprises there. [N-AR  
19 004162 (Example.)]

20 **D. Statutory Standing Under the APA**

21 In addition to constitutional standing, a petitioner who:  
22 brings a statutory enforcement action under the [APA] must meet its statutory  
23 requirements for standing. [A petitioner] must establish (1) that there has been final  
24 agency action adversely affecting [it], and (2) that, as a result, it suffers legal wrong or  
25 that its injury falls within the “zone of interests” of the statutory provision the  
[petitioner] claims was violated.

26 Churchill County, 150 F.3d at 1078 (quoting Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871,  
27 882-83 (1990)) (internal citations omitted), as amended, 158 F.3d 491 (9th Cir. 1998). Petitioner  
28 Hall satisfies that requirement. The nature of air pollution on human health is that its health  
effects are cumulative and permanent. The pulmonary health of any person is not transitory. The

1 impact involves both quality of life issues and life itself.<sup>17</sup> [N-AR 000311-000317]

2 As for the next requirement, the Ninth Circuit has held that the APA “require[s] that the  
3 ‘interest sought to be protected by the complainant is arguably within the zone of interests to be  
4 protected or regulated by the statute or the constitutional guarantee in question.’ ” Presidio Golf  
5 Club v. Nat’l Park Serv., 155 F.3d 1153, 1158 (9th Cir. 1998) (quoting Ass’n of Data Processing  
6 Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)). As might be expected, “ ‘NEPA’s  
7 **purpose is to protect the environment, not the economic interests of those adversely**  
8 **affected by agency decisions.**’ ” Id. (quoting W. Radio Servs. Co. v. Espy, 79 F.3d 896, 902-03  
9 (9th Cir. 1996)). (Emphasis added.) Herein, Petitioner Hall is attempting to protect the  
10 environment for the purpose of protecting his health. In fighting for his (and his and his wife’s)  
11 pulmonary health, petitioner Hall is by default, also in a fight for a broad range of public interest  
12 issues, many of which relate directly or indirectly to environmental concerns. Cleaner air in a  
13 non-attainment area is by definition in the public interest.

14 The Southern Nevada Public Land Management Act (“SNPLMA”), does not conflict  
15 with environmental law compliance. The SNPLMA urges the Defendants to move ahead with the  
16 land sales but does not relieve the Defendants of environmental law cumulative impact  
17 compliance and conformity with the EPA approved 1979/81 SIP. The SNPLMA must be  
18 construed to include environmental law compliance. In the alternative, argument to the contrary  
19 does not include citation to any statute that relieves the Defendants of environmental compliance  
20 and conformity responsibilities. Petitioner does not seek to set aside the SNPLMA. He seeks to  
21 bring the two together in harmony. Neither the issues of the validity nor the Defendants’  
22 compliance with the SNPLMA is before the court. The court’s task here is relatively narrow. The  
23 court is asked to review the adequacy of the Defendants’ environmental law compliance and give  
24 the parties a clear and unambiguous judgment decision that complies with NEPA, the CAA and  
25 the APA.

#### 26 **IV. STANDARD OF REVIEW**

27 Review of an agency action to determine its compliance and conformity with NEPA and  
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<sup>17</sup> Exhibit O attached hereto.

1 the CAA provisions at issue is governed by the judicial review provisions of the APA, 5 U.S.C.  
2 §§ 701-706. See Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1176-77  
3 (9th Cir. 2000) (NEPA); City of Olmsted Falls v. FAA, 292 F.3d 261, 269 (D.C. Cir. 2002)  
4 (CAA); see also City of S. Pasadena v. Slater, 56 F. Supp. 2d 1106, 1134-35 (C.D. Cal. 1999)  
5 (CAA review uses same standard as NEPA review). The reviewing court must determine that  
6 agency actions are not “arbitrary, capricious, an abuse of discretion, or otherwise not in  
7 accordance with the law.” 5 U.S.C. § 706(2)(A). In considering whether an agency acted in an  
8 arbitrary and capricious manner, a court “must determine whether the agency articulated a  
9 rational connection between the facts found and the choice made.” Ariz. Cattle Growers’ Ass’n  
10 v. United States Fish & Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001). Furthermore, courts must  
11 “carefully review the record to ‘ensure that agency decisions are founded on a reasoned  
12 evaluation of the relevant factors,’ ” *id.* (quoting Marsh v. Or. Natural Res. Council, 490 U.S.  
13 360, 378 (1989)), and may not “ ‘rubber-stamp ... administrative decisions that they deem  
14 inconsistent with a statutory mandate or that frustrate the congressional policy underlying a  
15 statute,’ ” *id.* (quoting NLRB v. Brown, 380 U.S. 278, 291-92 (1965) (omission in original). In  
16 the context of the SNPLMA, a review must review all SNPLMA actions, not simply the parsed  
17 actions. A review must also find cumulative impact determinations for all of the agency’s actions  
18 going back to 1969. The absence of those determinations highlights the problem. At a minimum,  
19 Hall, the court and the public should have an itemized spread sheet from all of the Defendants’  
20 air pollution actions such as community pits, mineral mining, airport ownership, off road vehicle  
21 racing, and land sales to name only a few such actions.

22 In the context of the procedural environmental requirements imposed by NEPA and  
23 CAA, “[t]he arbitrary and capricious standard requires a court to ensure that an agency has taken  
24 the requisite hard look at the environmental consequences of its proposed action, carefully  
25 reviewing the record to ascertain whether the agency decision is founded on a reasoned  
26 evaluation of the relevant factors.” Wetlands Action Network v. United States Army Corps of  
27 Eng’rs, 222 F.3d 1105, 1114 (9th Cir. 2000) (internal quotation marks omitted), cert. denied, 122  
28 S. Ct. 41 (2001). A reviewing court is not permitted to substitute its judgment for that of the

1 agency, but rather must “ ‘simply ... ensure that [the agency] has adequately considered and  
2 disclosed the environmental impact of its actions.’ ” Am. Rivers v. FERC, 201 F.3d 1186, 1194-  
3 95 (9th Cir. 2000) (quoting Ass’n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.,  
4 126 F.3d 1158, 1183 (9th Cir. 1997)). This means that we “must defer to an agency’s decision  
5 that is fully informed and well-considered,” Blue Mountains Biodiversity Project v. Blackwood,  
6 161 F.3d 1208, 1211 (9th Cir. 1998) (internal quotation marks omitted), but “need not forgive a  
7 ‘clear error of judgment,’ ” *id.* (citing Marsh, 490 U.S. at 378), or credit “conclusions that do not  
8 have a basis in fact,” Ariz. Cattle, 273 F.3d at 1236. There is no requirement to defer to an  
9 agency’s decision process that by design misleads the public.

## 10 **V. ENVIRONMENTAL ANALYSIS UNDER NEPA**

### 11 **A. Defendants’ Decision Not to Prepare an EIS**

12 By its own terms, NEPA intended to reorganize the priorities of the federal government,  
13 to integrate “environmental amenities and values” alongside more traditional “economic and  
14 technical considerations.” 42 U.S.C. § 4332(2)(B). Congress directed that the statute and its  
15 implementing regulations be used toward this end in government decisionmaking “to the fullest  
16 extent possible.”

17 To achieve its goal of including environmental concerns in government decisionmaking,  
18 NEPA requires that an EIS be prepared for all “major Federal actions significantly affecting the  
19 ... human environment.” 42 U.S.C. § 4332(2)(C) . In certain circumstances, agencies may first  
20 prepare an EA as it did in this instance, in order to make a preliminary determination whether the  
21 proposed action will have a significant environmental effect. See Nat’l Parks & Conservation  
22 Ass’n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. § 1501.4), cert. denied, 122  
23 S. Ct. 903 (2002). “If the EA establishes that the agency’s action ‘may have a significant effect  
24 upon the ... environment, an EIS must be prepared.’ ” *Id.* (quoting Found. for N. Am. Wild  
25 Sheep v. United States Dep’t of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)) (emphasis and  
26 alteration in original). “If not, the agency must issue a Finding of No Significant Impact  
27 (FONSI), accompanied by ‘a convincing statement of reasons to explain why a project’s impacts  
28 are insignificant.’ ” *Id.* (quoting Blue Mountains, 161 F.3d at 1212) (internal citations and

1 quotation marks omitted). (Emphasis added.)

2 Defendants have not complied with NEPA since the law was first enacted in 1969.  
3 Before any action on a “major” or “significant” action, Defendants must first start with preceding  
4 requirements. Defendants have acted in an arbitrary and capricious manner when it failed and  
5 refused to prepare a cumulative impact, NEPA compliant EIS under successive NEPA  
6 requirements to do so. The first, initial NEPA cumulative impact compliance was required in  
7 1969 and since the 1975 NEPA amendments. Subsequent NEPA cumulative impact EISs are  
8 required each time a major federal air pollution action is proposed. This latest Defendants’  
9 failure to comply involves an SNPLMA EIS, a major, federal air pollution action which by  
10 Defendants’ own admissions could involve as much as 54,000 acres of Valley and CAA serious  
11 non-attainment area land.<sup>18</sup> Without compliance with the initial and subsequent requirements that  
12 keep the cumulative impact EIS up to date, there is nothing for an SNPLMA EA or EIS to build  
13 upon. The instant EA and FONSI are misleading in the absence of these initial and subsequent  
14 NEPA EIS documents in the administrative record. Defendants have simply ignored all of their  
15 earlier NEPA cumulative impact EIS requirements. By omission, neither the public nor this court  
16 knows what Defendants’ cumulative air pollution emissions are in the Las Vegas Valley serious  
17 non-attainment areas. Interposing Clark County data for Defendants’ data is misleading.  
18 References in the EA are not reliable or relevant to Defendants’ NEPA compliance issues for an  
19 obvious reason. NEPA federal agency cumulative impact requirements must precede Clark  
20 County data reporting since Defendants’ data is critical to the accuracy of Clark County’s data,  
21 not the other way around. [N-AR 001999-002002]

22 One portion of Defendants’ air pollution actions, the Southern Nevada Public Land  
23 Management Act (“SNPLMA”), is not simply one small land sale as the Defendants would have  
24 the public and the courts believe. There is no NEPA cumulative impact EIS in the administrative

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25  
26 <sup>18</sup> Defendants have argued that the average of land sold, exchanged and developed is less than  
27 54,000 acres. Defendants have failed to produce any evidence that they are restricted by law to  
28 an average per month. Once a cumulative impact document is approved and withstands any  
challenge, Defendants know they could sell 54,000 acres of land in one month or one year if that  
were their choice and there are willing buyers. An environmental document must take that fact  
into consideration.

1 record that lists all of the Defendants' projects in the Las Vegas Valley serious non-attainment  
2 area, computes the air pollution using EPA computer models or emissions factors, and then totals  
3 the air pollution from all the agency's activities in the Valley.<sup>19</sup> [N-AR 000306-000310] There is  
4 no evidence of public disclosure regarding the methods and assumptions Defendants used in  
5 computing data to date. The administrative record shows that Defendants left out all  
6 development emissions data. That improves their ability to comply with federal environmental  
7 laws by a misleading approach to compliance and conformity. "I did not include construction  
8 emissions because they are too speculative and only temporary until the final land use is  
9 implemented."<sup>20</sup> How convenient! Exhibit "P" stands as a clear admission that Defendants  
10 declared only a small and least noxious piece of the agency's direct and indirect air pollution.

11 Defendants have simply bypassed the NEPA cumulative impact requirements in favor on  
12 an inadequate and legally insufficient sliver of an EA that does not credibly report the air  
13 pollution emissions from their big NEPA pie. Defendants idea of public disclosure is to complete  
14 and EA, FONSI, DR and then stick them into a drawer or a file cabinet in their office.  
15 Compliance is claimed with both NEPA and the CAA without any actual compliance,  
16 conformity or administrative record support.

### 17 **1. "Major" Federal Action**

18 Thus, to decide whether an EIS is required, the court must determine: (1) whether the  
19 challenged actions constitute "major" federal actions; and (2) whether they may significantly  
20 affect the environment. With the acreage disclosure alone, Defendants' cumulative actions are  
21 major federal actions that may significantly affect the environment.

22 The Council on Environmental Quality ("CEQ"), a body established by NEPA, 42 U.S.C.  
23 §§ 4342-4347, has issued regulations implementing NEPA. A court must rely on these  
24 regulations to "guide our review of an agency's compliance with NEPA," Native Ecosystems  
25 Council v. Dombek, 304 F.3d 886, 894 n.1 (9th Cir. 2002), and the Supreme Court has held that  
26 they are entitled to substantial deference, Marsh, 490 U.S. at 372. The relevant CEQ regulations  
27

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28 <sup>19</sup> See Exhibit N attached hereto.

<sup>20</sup> See Exhibit P attached hereto.

1 implementing NEPA define “major Federal action[s]” as “actions with effects that may be major  
2 and which are potentially subject to Federal control and responsibility,” including “[a]doption of  
3 official policy, such as rules, regulations, and **interpretations.**”<sup>21</sup> 40 C.F.R. § 1508.18.

4 (Emphasis added.) Defendants dispute Petitioners’ allegations regarding the regulations’  
5 “effects.”

6 Defendants’ parsing of the federal agency’s “little-piece,” air pollution EA actions fails to  
7 meet NEPA cumulative impact standards. Defendants’ past arguments echo their earlier  
8 causation argument. It is equally unavailing here for a similar reason. The CEQ regulations make  
9 clear that the “effects” of federal actions include “[i]ndirect effects, which are caused by the  
10 action and are later in time ... but are still reasonably foreseeable,” 40 C.F.R.. § 1508.8(b), as  
11 well as “[c]umulative impact ... which results from the incremental impact of the action when  
12 added to other ... reasonably foreseeable future actions regardless of what agency (Federal or  
13 non-Federal) or person undertakes such other actions,” 40 C.F.R. § 1508.7.

14 The connection between the SNPLMA and the selling of substantial acreage of Las  
15 Valley land sales and the development air pollution was “reasonably foreseeable” at the time the  
16 EA was prepared and the decision not to prepare an EIS was made. Cf. Native Ecosystems, 304  
17 F.3d at 896 (holding that a memorandum that “evidences a decision to consider ... seriously”  
18 taking certain actions renders those actions “reasonably foreseeable”). To restrict consideration  
19 of the actions’ “effects” in the way Defendants’ argue would contravene not only the plain  
20 language of the CEQ regulations, but also the statutory command of NEPA, that environmental  
21 effects of government action be considered “to the fullest extent possible.” 42 U.S.C. § 4332. In  
22 this instance, Defendants’ have considered the environmental effects of their actions to the least  
23 extent possible.

24 As for the requirement that the federal action be “major,” CEQ regulations tell us that  
25 “[m]ajor reinforces but does not have a meaning independent of significantly,” 40 C.F.R. §  
26 1508.18 , meaning that a federal action is “major” whenever it has “significant” environmental

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27  
28 <sup>21</sup> An “interpretation” of a regulation can and usually does have the same effect as the adoption  
of a new regulation, minus of course, the bothersome APA public notice, hearing and review  
process.

1 effects. See City of Davis v. Coleman, 521 F.2d 661, 673 n.15 (9th Cir. 1975).

2 **2. “Significantly Affecting the Human Environment”**

3 The CEQ regulations also define the crucial term “significantly,” to clarify the situations  
4 in which an agency must prepare an EIS: “Significantly” as used in NEPA requires  
5 considerations of both context and intensity:

6 (a) Context. This means that the significance of an action must be analyzed in several  
7 contexts such as society as a whole (human, national), the affected region, the affected  
8 interests, and the locality. Significance varies with the setting of the proposed action.  
9 For instance, in the case of a site-specific action, significance would usually depend  
10 upon the effects in the locale rather than in the world as a whole. Both short- and long-  
11 term effects are relevant.

12 (b) Intensity. This refers to the severity of impact. ... The following should be  
13 considered in evaluating intensity:

14 (2) The degree to which the proposed action affects public health or safety. ...

15 (4) The degree to which the effects on the quality of the human environment are likely  
16 to be highly controversial.

17 (5) The degree to which the possible effects on the human environment are highly  
18 uncertain or involve unique or unknown risks. ...

19 (10) Whether the action threatens a violation of Federal, State, or local law or  
20 requirements imposed for the protection of the environment.

21 40 C.F.R. § 1508.27. If Defendants’ action is environmentally “significant” according to  
22 any of these criteria, then Defendants erred in failing to prepare an EIS. See Nat’l Parks, 241  
23 F.3d at 731. An examination of these criteria reveals that the challenged regulations are  
24 environmentally “significant,” and an EIS should have been prepared.

25 **(a) Context**

26 The CEQ regulations<sup>22</sup> explain that the proposed federal action must be analyzed  
27 regarding several contexts—national, regional, and local—as well as by looking at the short- and  
28 long-term effects of the proposed action. Measured against this standard, Defendants’ EA is  
woefully inadequate. The EA claims that all land sale air pollution is insignificant and de  
minimis. Defendants do not conduct any analysis at all much less whether these increases may be  
localized in regionally significant areas like the Grand Canyon National Park, the Lake Mead

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<sup>22</sup> See Appendices attached to Petitioner Hall’s November 12, 2002 Points and Authorities in Support of Motion for an Emergency Preliminary Injunction or Temporary Restraining Order.

1 Recreation Area, or in the nearby states of Arizona, Utah and California. [N-AR 001999-002000]

2           Regardless of the law’s “reasonableness” (a question properly addressed by Congress—  
3 not the petitioner), this is precisely what NEPA and the CEQ regulations require. The law  
4 requires Defendants consider the most likely localities to be affected by increased development  
5 dust, increases in vehicular traffic and the various forms of air pollution that Defendants’  
6 activities generate. The calculations apply to all Defendants Valley activities and are not limited  
7 to land sales. Hall’s comments emphasized the EA’s lack of relevant global, agency analysis,  
8 cumulative impact information, legally sufficient conformity determinations or credibility.  
9 Defendants’ failure to meet even minimum requirements reveals a pattern of refusal to comply or  
10 conform, much less take a “hard look” at the environmental effects of their actions or seriously  
11 consider Hall’s comment document.

12           Without prejudice for the purpose of impeachment, Defendants admitted in 1998 that  
13 Valley land development is THE source air pollution in the Las Vegas Valley. Defendants  
14 admitted that approximately 15,325 acres of public lands have been disposed in the Las Vegas  
15 Valley over the last 12 years. Defendants cannot produce a NEPA cumulative impact statement  
16 or a CAA conformity determination dealing with these data.

17           The primary contributor to the cumulative impact to the air resource within the Las  
18 Vegas Valley is public land disposals. Land disposals would indirectly impact the air  
19 resource by providing land that may be developed, resulting in an increased growth rate  
20 within the valley. Pollutant sources and discharge would be expected to increase along  
21 with an increased growth rate. Under this plan, approximately 52,000 acres of public  
lands within the Las Vegas Valley Non-Attainment Area are designated as being  
available for disposal.

22           [N-AR 003492] There were no other public comments during the comment period. The  
23 reason is that the public was not informed of the existence of the EA, FONSI or DR. Defendants  
24 make the absurd statement that the EAs were available at their office as though each member of  
25 the public is supposed to trudge in and out of their offices every working day of the year in order  
26 to know what the Defendants are doing. That is unreasonable.

27           Without prejudice for the purpose of impeachment, Defendants admitted in their 1998  
28 RMP/FEIS that Valley land development is THE source air pollution in the Las Vegas Valley.  
Defendants admitted that approximately 15,325 acres of public lands have been disposed in the

1 Las Vegas Valley over the last 12 years. Defendants cannot produce a NEPA cumulative impact  
2 statement or a CAA conformity determination dealing with these data.<sup>23</sup>

3 The primary contributor to the cumulative impact to the air resource within the Las  
4 Vegas Valley is public land disposals. Land disposals would indirectly impact the air  
5 resource by providing land that may be developed, resulting in an increased growth rate  
6 within the valley. Pollutant sources and discharge would be expected to increase along  
7 with an increased growth rate. Under this plan, approximately 52,000 acres of public  
lands within the Las Vegas Valley Non-Attainment Area are designated as being  
available for disposal.

8 [N-AR 003492] Despite the 1998 admission, Defendants' limited their instant EA  
9 analysis to Clark County general data as opposed to Defendants' own data.<sup>24</sup> The EA authorizes  
10 the sale of 45 parcels consisting of approximately 1,147.50 acres by public auction held on  
11 November 15, 2002. A direct sale of 35.63 acres consisting to two parcels was also offered. With  
12 the addition of the June auction sale data, the acreage and number of parcels has now doubled.

13 No data was presented regarding all of the SNPLMA disposal lands subject to disposal by  
14 competitive or negotiated sale. There was no EA discussion of NEPA cumulative impact  
15 determinations. The data was parsed and has been parsed in order to minimize disclosure to the  
16 public. The Finding of No Significant Impact ("FONSI") regarding just the November sale  
17 included the EA estimated emissions for the development of 4,800 acres of land at 3,838 tons of  
18 PM10 and 2,993 tons of CO while failing to include data for the other "little pieces" of the  
19 SNPLMA. The tonnage doubles with the June auction sales. There is nothing to indicate that the  
20 emissions estimates were derived from EPA approved sources and methods.

21 The EA 2.1 [N-AR 001998] no action alternative failed to include the reduction of the air  
22 pollution that would result or the positive effect on public pulmonary health. More significantly,  
23 the EA offered no agency specific projections of the increase (or decrease) in cumulative air  
24 pollution after 2002, though development of the lands sold and the resulting air pollution effects  
25 are expected to continue beyond the end of last year. That should have prompted Defendants to  
26

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27 <sup>23</sup> Without prejudice for the purpose of impeachment. Chapter 4 – Environmental Consequences,  
28 Las Vegas Proposed RMP/FEIS – May 1998.

<sup>24</sup> [N-AR 001996-00216] Environmental Assessment EA Number: NV-050-2002-135 is not  
dated or signed. The EA was not noticed to the public.

1 conduct a long-term cumulative analysis as required by the CEQ regulations, or at the very least,  
2 to “convincing[ly] ... explain” its absence. Nat’l Parks v. Babbitt, 241 F.3d 722, 730 (9<sup>th</sup> Cir.  
3 2001).

4 **(b) Intensity**

5 **(i) Effect on Public Health and Safety.**

6 Petitioner contends that Defendants must prepare an EIS, in part due to the potential  
7 effect of the cumulative impact air pollution on his (the public’s) health and safety. In addition to  
8 Hall v. Norton, 266 F.3d 969 (9<sup>th</sup> Cir. 2001), other courts have considered “even [the] marginal  
9 degradation of drinking water” to be environmentally significant for purposes of this regulation.  
10 See United States v. 27.09 Acres of Land, 760 F. Supp. 345, 353 (S.D.N.Y. 1991). The same  
11 could easily be said of a “marginal degradation” of the quality of the air we all must breathe.

12 The non-attainment area pollutants at issue are carbon monoxide (“CO”) and airborne  
13 particulate matter (“PM10”). [N-AR 000311-000314] The EA notes that the levels of ozone are  
14 “very close to the three year average standard of .085 ppm.” [N-AR 002001, 000315-000317]  
15 The EA fails to discuss the impact of the cumulative total of all Defendants’ Valley air pollution  
16 will have on the Valley as the land sales continue to accelerate runaway growth. Air pollution is  
17 emitted into the air as part of the exhaust fumes of automotive traffic, and dust from  
18 development and construction. Defendants are not excused from their failure to consider whether  
19 any negative air pollution health effects could be associated with the Defendants’ cumulative  
20 impact air pollution emissions.<sup>25</sup> [N-AR 000311-000317]

21 **(ii) Uncertainty**

22 If the environmental effects of a proposed agency action are uncertain, the agency must  
23 usually prepare an EIS:

24 Preparation of an EIS is mandated where uncertainty may be resolved by further  
25 collection of data, or where the collection of such data may prevent “speculation on  
26 potential ... effects. The purpose of an EIS is to obviate the need for speculation by  
27 insuring that available data are gathered and analyzed prior to the implementation of the  
28 proposed action.”

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<sup>25</sup> Exhibit O attached hereto.

1 Nat'l Parks, 241 F.3d at 732 (quoting Sierra Club v. United States Forest Serv., 843 F.2d  
2 1190, 1195 (9th Cir. 1988)) (internal citation omitted) (omission in original). Defendants must  
3 discuss whether, and to what extent the Defendants' their ever increasing air pollution has kept  
4 and will continue to keep the Valley from reaching cleaner air attainment.

5 Defendants acknowledge and then ignore their responsibilities pursuant to 42 U.S.C §  
6 7506(c), CAA § 176(c). "Under CAA 176(c) and 40 CFR Part 51 Subpart W, a Federal agency  
7 must make a determination that a Federal action conforms to the applicable implementation plan  
8 **before the action is taken.**" [N-AR 001999] (Emphasis added.) Conformity in this instance  
9 must be to the EPA approved state implementation plan ("SIP"), the 1979/81 SIP. There is no  
10 mention of the EPA approved SIP in the EA or in the administrative record. There is no  
11 certification of conformity to the 1979/81 EPA SIP in the administrative record. Certifications to  
12 the "applicable" SIP are as misleading as the Defendants can make them. Defendants have never  
13 lawfully conformed to the applicable EPA approved 1979/81 SIP. That is Defendants' reason for  
14 avoiding NEPA compliance. As previously noted, the 1979/81 SIP is much more stringent than  
15 federal standards, an option states can choose and Nevada did choose. Nevada has not  
16 successfully amended its Clark County serious non-attainment state implementation plan (SIP)  
17 since the Clark County portion of the SIP was first approved in 1979 and amended in 1981.  
18 Defendants' claims of compliance and conformity are empty claims without statutory, regulatory  
19 or factual support. Incredibly, on December 5, 2000, prior to the EPA's taking final action on its  
20 proposed and then pending State of Nevada/Clark County PM10 State Implementation Plan  
21 (SIP) disapproval, the State of Nevada withdrew prior PM10 SIP submittals. With that  
22 withdrawal, Nevada and Clark County also withdrew all of the extensions of time they received  
23 by making the submittals. That makes Defendants' certifications even more worthless.

24 Defendants have relied on a Clean Air Act "exemption" that does not apply to their  
25 NEPA cumulative impact responsibilities. Defendants are grossly misleading when they cite a  
26 June 7, 2001, submitted PM10 SIP that is not the "applicable," lawful, EPA approved SIP. The  
27 2001 submitted SIPs and their air pollution emissions inventories are subject to public comment  
28 which was timely filed, public comment review which is ongoing, the EPA's final decision and

1 if adverse to the petitioner, an appeals court review. References to that SIP are legally wrong,  
2 premature and misleading. That SIP is not finally approved and is not likely to be finally  
3 approved. The public comments for that SIP that are currently under review include thirty-three  
4 pounds of single space on-point discussion, legal argument and evidence indicating that among  
5 other concerns, the submitted SIPs cannot be approved since they are less stringent than the  
6 1979/81 EPA approved SIP, the data therein is not real or credible and cannot be replicated. See  
7 42 U.S.C. § 7416, CAA § 116. Submitted SIPs are not part of the administrative record herein  
8 and Hall objects to any consideration of them. The EPA approved 1979/81 SIP is also not a part  
9 of the administrative record.

10 In the alternative and without prejudice, the 2001 submitted SIP identifies the attainment  
11 demonstration area as the “BLM Disposal Area.” The BLM Disposal Area is a much smaller  
12 area that is not the same as the PM10 serious non-attainment area which coincides with  
13 Hydrographic Area 212. All references to the BLM disposal area or air pollution emissions  
14 estimates related thereto are misleading and Hall objects to them. The only reason for interposing  
15 a “BLM disposal area” in a NEPA and CAA setting is to mislead by using smaller area air  
16 pollution numbers while comparing them with other air pollution data in the larger area in order  
17 to show bogus progress. There is no legally sufficient evidence in the administrative record of  
18 this consolidated action or in law that that supports the use of a submitted and unapproved SIP as  
19 being lawful support regarding NEPA and CAA compliance and conformity. There is a Nevada,  
20 Clark County, EPA approved SIP. Defendants wish it would go away. Defendants took the next  
21 best choice by simply ignoring the EPA approved 1979/81 SIP. [N-AR-001999-002001]

22 **(iii.) Water Issues**

23 Defendants have admitted that we were using up more water than we had in 1998, before  
24 the drought was the serious problem it is now.

25 Records indicate that approximately 67,000 acre feet of groundwater was extracted  
26 from the principal aquifer of the Las Vegas Valley, far exceeding the estimated recharge  
27 of 30,000 acre-feet. ... In addition, to groundwater withdrawals, the Valley used  
28 approximately 293,000 acre feet of Nevada’s allocation of Colorado River water.  
Current projections indicate that consumption use within the Valley may reach its

1 maximum allocation of the Colorado River water much sooner than anticipated.<sup>26</sup>

2 [N-AR 003493]

3 Defendants admit that the Valley has a serious water shortage, serious enough to cause  
4 the Valley floor to subside nearly 6 feet over the years as a result of too much dependence on  
5 shallow aquifers. The fact is that the Valley and the West are currently in the drought of the  
6 century. Land subsidence has reportedly caused an area of North Las Vegas to subside to the  
7 point where the city had to purchase an area of land back for some \$10,000,000. The PM10 SIP  
8 submittal Defendants reference depends upon the availability of water for dust control. There is  
9 no water set aside for dust control in the County drought control plan. The drought shows no  
10 signs yet of capturing the water lost during previous years. That will take years. More  
11 development means more water and sewage hook-ups and increasing demands for water and  
12 sewage treatment the Valley does not have. There is no reasonable discussion, much less NEPA  
13 discussion of the impact of the drought on land sales and vice-versa. For that reason, the failure  
14 to produce an EIS is deficient since the EA does not adequately address water or air pollution  
15 issues. [N-AR 002002-002003]

16 The EA cites Clark County submitted but unapproved data [N-AR 002000] and then  
17 claims that “there is no widely accepted standard emissions factor, the impacts are temporary,  
18 not cumulative and not additive.” Then, in direct conflict, Defendants cite “Construction 23%.”  
19 [N-AR 002000] Well which it? When it serves Defendants’ purpose, the emissions estimate is  
20 accepted. When it does not serve their purpose, the emissions estimate is not widely accepted.  
21 Then, “[T]he emission estimates projected in the following analysis are additive once the land is  
22 developed.” [N-AR-002005] Defendants draw EA conclusions on the basis of emissions  
23 estimates that are not in the administrative record. [Example, N-AR-002006] Another example is  
24 the fact that the emissions estimates are not complete to the extent they do not include all  
25 Defendants’ Valley activities, not simply those the Defendants want to acknowledge. An EIS is  
26 required to resolve these errors, omissions and misleading statements.

27 \_\_\_\_\_  
28 <sup>26</sup> Without prejudice for the purpose of impeachment. Chapter 4 – Environmental Consequences,  
Las Vegas Proposed RMP/FEIS – May 1998.

1 The EA provides no basis for claiming the PM10 will be reduced as the Valley continues  
2 with runaway growth. The EA provides no basis for the use of PM10 and CO factors that have  
3 no identified lineage. A competent person cannot replicate these data with the information given.  
4 These EA emissions estimates are not based upon an ascertainable methodology. The EA then  
5 cites a newspaper article in support of the premise that more Valley land development would  
6 result in less haze, apparently the result of the entire Valley finally being paved over. The issues  
7 of PM10 air pollution in the interim, and more short and long term ozone and nitrogen oxide air  
8 pollution air pollution as vehicular traffic increases as a result of land sale development appears  
9 to have escaped the EA's author. [N-AR 002007-002008]

10 **c. RMP/FEIS Issues and Ninth Circuit Rule 36-3 Impeachment.**

11 Without prejudice for the purpose of impeachment, Petitioner Hall objects to the  
12 inclusion of any references herein to the PRMP or RMP/FEIS. The Las Vegas Resource  
13 Management Plan ("RMP"), Record of Decision ("ROD") and Final Environmental Impact  
14 Statement ("FEIS") claim compliance with the Federal Land Policy and Management Act  
15 (FLPMA) of 1976 (43 CFR 1600). [N-AR 003501] The development of the plan began in 1990  
16 and was sent to the public for review in May of 1992. A supplement was released to the public in  
17 May of 1994. The Proposed Plan and Final Environmental Impact Statement was developed and  
18 sent to the public for the 30 day protest period in June of 1998. The final resolution of fourteen  
19 letters of protest was completed in September of 1998. [N-AR 003502] The Record of Decision  
20 noticed the public that the "decisions described in this record of decision are not appealable in  
21 accordance with BLM regulation 43 CFR 1610.5-2(b)." [N-AR 003501] That statement is  
22 misleading. For that reason alone, the RMP/FEIS does not comply with or conform to NEPA,  
23 CAA, or APA, environmental statutes which are appealable. To the extent that Defendants claim  
24 otherwise herein, the entire RMP/FEIS becomes immediately appealable herein. Should that  
25 environmental law compliance claim be made by the Defendants herein and the court accepts  
26 that claim, Hall alleges that the public notices involving the PRMP, RMP and FEIS process were  
27 misleading and remain misleading. Should the court accept any part of that claim, Hall requests a  
28 hearing on that issue and leave to again amend his complaint.

1 In their EA, Defendants discuss a Resource Management Plan (“RMP”) in the section  
2 regarding 1.2 Conformance with Applicable Land Use Plan without attaching the complete  
3 RMP/FEIS administrative record in the administrative record of this review. [N-AR 001996] See  
4 also the comment Decision. [N-AR 003307] In the E. Air Quality discussion, Defendants discuss  
5 a formula taken from the RMP that makes assumptions regarding a PM10 emissions formula  
6 without any explanation as to the source of the assumptions. [N-AR 002005] Later, the  
7 RMP/FEIS is cited again as a guide for emissions estimates. [N-AR 002008] The FONSI and  
8 Decision Record (“DR”) claim conformance with the 1998 RMP. [N-AR 002017] The December  
9 12, 2002 Decision dismissing petitioner’s original protest states, “Disposal of federal land  
10 conforms with the BLM’s Las Vegas Resource Management Plan and Environmental Impact  
11 Statement approved in 1998 (1998 RMP/EIS).” [N-AR 003299] “The cumulative impacts  
12 analysis in the EA tiers to the cumulative impacts analysis in the 1998 RMP/FEIS.” ... **“Tiering  
13 from the RMP does not subject it to comment or judicial review.”** [N-AR 003301] (Emphasis  
14 added.) ”The EA tiers to the 1998 RMP/FEIS simply to prevent repetitive discussions and  
15 incorporates by reference, general and relevant specific information from the broader EIS, a  
16 practice that is routinely followed by federal agencies and supported by NEPA. Finally, the  
17 decisions associated with the 1998 RMP/FEIS will not change as a result of this tiering, but  
18 rather the proposed action will implement a small portion of the BLM’s land disposal objectives  
19 already analyzed in the 1998 RMP/EIS.”... “In its RMP/EIS, BLM estimated PM10 emissions  
20 that would result from land disposal actions in the Valley. The estimation was based on an  
21 average disposal rate of 1,277 acres over the twenty-year life of the RMP. BLM estimated an  
22 emission factor of 0.19 ton per acre-year based on the total number of developed acres in the Las  
23 Vegas Valley and emissions of PM10 Valley-wide. The RMP estimates cumulative emissions for  
24 future land development, and includes emissions following completion of construction.” “A  
25 broad, programmatic analysis such as the RMP/EIS allows estimations and generalizations that a  
26 site-specific analysis does not.” [N-AR 003302] “Since the RMP/EIS was produced, the  
27 knowledge of air pollution issues in the Las Vegas Valley has increased.” ... “In addition, BLM  
28 is in the process of preparing an Air Quality Study which will promote a means to further refine

1 the analysis of PM10 emissions in the RMP/EIS.” [N-AR 003303] “However, SNPLMA does  
2 not exempt the specific disposal actions it authorizes from NEPA analysis. **Therefore, BLM**  
3 **considered the impacts of a land disposal program in the 1998 RMP/EIS, together with**  
4 **other BLM actions in the Valley, and prepared the appropriate site-specific NEPA analysis**  
5 **for each sale under SNPLMA.”** [N-AR 003307] (Emphasis added.) “BLM projects that  
6 approximately 25,540 acres of federal public land and approximately 54,000 acres of private  
7 land will be developed over 20 years in its RMP/EIS.” ... “The RMP/EIS analyzes disposal of  
8 only 25,540 acres because that was the acreage determined to be feasible for BLM to dispose  
9 over 20 years.” ... “The BLM tiered the environmental analysis of the proposed action to the  
10 1998 RMP/EIS cumulative impacts section and calculated site specific emissions for potential  
11 future development of 1,183.13 acres.” [N-AR 003308]

12 The EA cites the RMP and its EIS as support for these site specific land sales after  
13 noticing the public that “decisions described in this record are not appealable” and after arguing  
14 the opposite regarding site specific issues in the Ninth Circuit Court of Appeals.<sup>27</sup> [N-AR  
15 002011-002012] In related actions, Defendants have consistently argued that the FEIS that is a  
16 part of the RMP merely supported a general, programmatic plan which did not authorize any  
17 action related to site specific air pollution. Defendants now argue the opposite herein. Going  
18 opposite ways in two different courts is not favored pleading.

19 Petitioner objects to any tiering or reference to the RMP/EIS in the context of any site  
20 specific NEPA, CAA and APA review for the following reasons. 1. The complete RMP/EIS and  
21 its administrative record was not made a part of the administrative record herein. Without a  
22 complete administrative record herein, Defendants have waived any claimed right to make the  
23 RMP/FEIS a part of this review. Defendants included only the ROD and the Las Vegas Resource  
24 Management Plan and Chapter 4 – Environmental Consequences in the administrative record of  
25 this review. 2. There is no evidence that the RMP/FEIS was ever noticed to the public for  
26 comment and hearing **for the purpose of supporting and approving Defendants’ site specific**  
27 **air pollution actions.** 3. There is no evidence of a public notice and notice of hearing noticing

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28 <sup>27</sup> See Exhibits J-L attached hereto.

1 the public that the Defendants intended to use the RMP and FEIS as any part of a NEPA site  
2 specific or cumulative impact determination. 4. In the alternative, the RMP/FEIS is not an  
3 agency cumulative impact determination involving **all** of the Defendants' Valley air pollution  
4 activities. 5. There is no evidence Defendants ever produced evidence of a required NEPA  
5 cumulative impact EIS foundation, compliance or conformity prior to the 1998 RMP/FEIS.

6 **d. Defendants' RMP/FEIS Impeachment Discussion**

7 Defendants' Answering Brief for the Federal Appellees in the prior RMP appeal includes  
8 numerous Defendant statements that are opposite to Defendants' statements herein, *supra*. Hall  
9 v. Abbey, 32 Fed. Appx. 920, 2002 WL 506108 (9<sup>th</sup> Circuit (Nev.) (Not selected for publication  
10 in the Federal Reporter) (Mar. 28, 2002). Hall argues as permitted by Ninth Circuit Rule 36-  
11 3(b)(i) and (ii). Exhibit J (herein). Excerpts from Federal Appellees' answering brief are included  
12 herein for the purpose of Defendants' impeachment as permitted by Ninth Circuit Court of  
13 Appeals rules.

14 As one example, Defendants argued that,  
15 ... the district court concluded that the RMP fell under the rubric of 'planning' and,  
16 thus, was categorically exempted from the conformity regulations." Id. 23. "... the court  
17 held that BLM's 'consideration of air quality in the EIS complie[d] with NEPA's  
18 requirements and [wa]s appropriate to the general scope of land-use planning in the  
19 RMP.

20 Exhibit "J, 24. Other Defendant RMP statements include the following.

21 The Plan, however, does not propose or approve any of these actions, with the  
22 exception of the designation of Areas of Critical Environmental Concern ("ACEC"),  
23 which will result in no pollution emissions. Thus Mr. Hall's claims are premature. The  
24 time to challenge an emissions-generating action addressed in the Plan is after a specific  
25 action or project is actually proposed for implementation and BLM has taken a final  
26 agency action with respect to that action.

27 Id. 26.

28 Mr. Hall fails to understand that there is a fundamental distinction between a general,  
programmatic plan, such as the Las Vegas RMP/FEIS, and a subsequent specific  
proposal to approve an actual land management action that may have impacts on air  
quality and, thus, may require a conformity determination. Here, as the district court  
found, the Las Vegas RMP/FEIS, is a "Plan" that merely identifies and evaluates  
potential land management actions. Moreover, it specifically states that if any action

1 identified in the Plan were actually proposed for implementation, further planning  
2 would be required, including preparation of project-specific plans, environmental  
3 analyses under NEPA, and air quality conformance determinations as applicable under  
the CAA.

4 Id. 27.

5 In this case, as the district court properly determined, the agency's final approval of the  
6 Las Vegas RMP/FEIS merely formalized the ACEC designations but did not approve  
7 any pollutant-generating activities.

8 Id. 30-31.

9 Mr. Hall's challenge is not ripe for review.

10 Id. 32. (Footnote omitted.)

11 Likewise, the RMP/FEIS does not extinguish Mr. Hall's authority to object to any  
12 specific action in the Plan that might ultimately be pursued. If Mr. Hall wishes to  
13 challenge a specific action, he may do so at the time any one of the actions is actually  
proposed for implementation.

14 Id. 34. (Emphasis added.)

15 A person with standing who is injured by a failure to comply with the NEPA procedure may  
16 complain of that failure at the time the failure takes place, for the claim can never get riper. Kern  
17 v. United States BLM, 284 F.3d 1062 (9<sup>th</sup> Cir. 2002).

18 Defendants have argued that Hall had to challenge a final, site specific decision. This is  
19 that challenge. The appeals court found Hall's RMP/FEIS challenge premature. Hall was  
20 counseled by means of an unpublished decision to wait for final, site specific decisions involving  
21 agency activities that generate air pollution emissions. This is the point, and probably the only  
22 point where Hall may practically challenge Defendants' site specific air pollution activities.

23 Without prejudice to a pending Ninth Circuit Court of Appeals appeal, the district court's  
24 April 1, 2003 order in the remanded Hall v. Norton, CV-S-97-1146-LDG (RJJ)<sup>28</sup> case makes it  
25 clear that "the RMP/FEIS does not extinguish Mr. Hall's legal authority to object to any specific  
26 action in the Plan that might ultimately be pursued. If Mr. Hall wishes to challenge a specific  
27

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28 <sup>28</sup> Exhibit M attached hereto.

1 action, he may do so at the time any one of the actions is actually proposed for implementation.”  
2 There is no evidence before this court that the PRMP or RMP/FEIS documents were ever the  
3 subject of APA public notice, an opportunity to for public comment and appeal if necessary on  
4 the issue of whether those documents are legally sufficient for NEPA cumulative impact, site  
5 specific purposes. Defendants’ attempt to bring them into this review through the back door  
6 without making that administrative record and their past protection from appeal or review subject  
7 to challenge is legally wrong. See also December 12, 2002 Hall’s comment Decision references,  
8 *supra*. [N-AR 003308]

9 Finally, Hall makes much of the fact that the federal defendants introduced into the  
10 litigation the findings of the RMP/FEIS completed in May 1998 in which the BLM  
11 revised the gross total of land available for disposal to 52,021 acres, clarified the 1,277  
12 acre per year estimated rate of disposal, and calculated cumulative impacts based on  
13 that estimate. **As Hall contends, and as the federal defendants concede, this study  
14 was not a part of the administrative record of the proposed action that was  
15 originally challenged by Hall, and may not be used to support in determining  
16 whether the BLM properly considered the cumulative impacts of the Del Webb  
17 land exchange.** The federal defendants’ claim that reference to the RMP/FEIS was  
18 made to rebut Hall’s assertion that the BLM relies upon small EAs to avoid  
19 consideration of the cumulative impacts of land disposals. Its relevance is limited,  
20 therefore, to that rebuttal. In any event, the court finds that Hall has not been prejudiced  
21 by the introduction of the RMP/FEIS in this litigation. Even though this court included  
22 discussion of the PRMP/FEIS in its denial of Hall’s motion for preliminary injunction,  
23 such reference was made to further clarify the assessment made in the Del Webb EA.  
24 The PRMP/FEIS was not dispositive in the court’s ruling on the preliminary injunction,  
25 and is of no consequence to the ruling on the instant motion....

26 See Exhibit K herein. The RMP/FEIS is either moot to this site specific review and must  
27 be disregarded by the court, or Defendants’ tiering to the RMP/FEIS makes it part of this review  
28 subject to challenge. Defendants’ administrative record includes only Chapter 4 of the May 1998  
PRMP/FEIS [N-AR 003438-003497] the Record of Decision (ROD) for the Approved Las  
Vegas Resource Management Plan and Final Environmental Impact Statement [N-AR 003498-  
003511], and Appendix A, Las Vegas Resource Management Plan. [N-AR 003513-003549], but  
not the PRMP or a clearly labeled and clearly noticed FEIS in the instant administrative record.  
The following is an excerpt from Exhibit K (consisting of the cover page and pages 4-5 of the  
unpublished, Ninth Circuit Memorandum in Hall v. Abbey, 32 Fed. Appx. 920, 2002 WL

1 506108 (9<sup>th</sup> Circuit (Nev.)) (Not selected for publication in the Federal Reporter) (Mar. 28,  
2 2002).

3 Re: Hall v. Abbey, No. 01-15117 (CV-98-01645-RLH), (March 28, 2002) attached  
4 hereto. Exhibit L is a copy of Ninth Circuit Rule 36-3 regarding unpublished opinions. This  
5 submission is for the purpose of Defendants impeachment.

6 (2) To the extent that Hall seeks to make a substantive challenge to the RMP, the  
7 requirements for standing are more stringent than those where a procedural attack is  
8 levied, and, here, Hall fails to come up to the mark. His difficulty lies in the fact that the  
9 RMP itself cannot have the effect of degrading air quality. That is, while he expresses  
10 fears that, somehow, air quality will be affected, those fears are based on his mere  
11 conjecture. That is insufficient. See Los Angeles v. Lyons, 461 U.S. 95, 107 & n.8, 103  
S.Ct. 1660, 1668 & n.8, 75n L.Ed. 2d 675 (1983). As the EPA has recognized, the  
possibility that a plan will itself result in degradation of air quality is so remote as to be  
de minimis. See 40 C.F.R. § 51.853(c)(2)(xii).

12 By the same token, the issue is not ripe because Hall will not incur any hardship if he is  
13 required to wait until the BLM proposes to take specific action, the courts would surely  
14 benefit from the development of a specific record regarding any specific action, and the  
15 agency might well refine its approaches when it focuses on a specific problem. See  
16 Ohio Forestry, 523 U.S. at 732-37, 118 S.Ct. at 1670-72. Should the BLM pursue some  
17 specific action in the future, [fn.5, E.g., the specific land transaction that it proposed in  
18 Hall I, 266 F.3d at 972-74.] the regulations provide that Hall, and any other person  
“adversely affected by a specific action being proposed to implement some portion of  
[the RMP] ... may appeal such acts ... at the time the action is proposed for  
implementation.” 43 C.F.R. § 1610.5-3(b). Thus, any substantive attack lies aborning.  
(Emphasis added.)

19 The Ninth Circuit Court of Appeals made it clear that this review is the proper time and  
20 place to challenge the instant site specific action and all the support thereto claimed by the  
21 Defendants. Once again Defendants are attempting to parse the basis for their actions in order to  
22 avoid NEPA, CAA and APA compliance.

### 23 **(iii) Threat of Illegality**

24 Plaintiff asserts that Defendants failed to conform to Nevada’s 1979/81 EPA approved  
25 SIP regulations which are more stringent than federal standards. While Nevada has submitted  
26 subsequent SIP submittals, none have been finally approved either by the EPA or the Ninth  
27 Circuit Court of Appeals.

28 In its determination of whether its proposed action is significant, an agency must consider

1 “[w]hether the action threatens a violation of Federal, State, or local law or requirements  
2 imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b)(10); accord Sierra Club  
3 v. United States Forest Serv., 843 F.2d 1190, 1195 (9<sup>th</sup> Cir. 1988). In Sierra Club, the court  
4 faulted the Forest Service’s EA for its failure to consider, or even mention, California’s water  
5 quality standards, which might have been threatened by proposed timber sales. The requirement  
6 is applicable to the air pollution and water quality standards at issue herein. Defendants had an  
7 obligation to consider whether their regulations might violate these rules and failed to do so.  
8 Plaintiff points out that Defendants’ actions could violate NEPA, the CAA and the APA thus  
9 further triggering the illegality prong of the significance analysis, see *infra*. This further  
10 strengthens Hall’s claim that Defendants’ actions are environmentally significant for NEPA  
11 purposes.

12 **(iv) Controversy**

13 “Controversy” sufficient to require preparation of an EIS occurs “when substantial  
14 questions are raised as to whether a project ... may cause significant degradation of some human  
15 environmental factor, or there is a substantial dispute [about] the size, nature, or effect of the  
16 major Federal action.” Nat’l Parks v. Babbitt, 241 F.3d 722, 736 (9<sup>th</sup> Cir. 2001) (internal citations  
17 omitted and alterations in original). The evidence establishing such a controversy must be  
18 brought to the agency’s attention while the agency is conducting its deliberations, not post hoc.  
19 See *id.* Thus, the controversy requirement is two-fold: Petitioner must show that there was a  
20 “substantial dispute” about Defendants’ actions and that this dispute raised “substantial  
21 questions” about their validity. The burden then shifts to Defendants to provide a “convincing”  
22 explanation why no controversy exists. See *id.*

23 The “controversy” EA and FONSI were not noticed to the public. When Hall found out  
24 about the EA and FONSI, he filed an October 15, 2002, thirty-nine page comment document that  
25 brought the issues herein to the agency’s attention.<sup>29</sup> [N-AR 003026-003064] Petitioner’s  
26 comment document satisfies the first requirement. Petitioner has successfully argued and  
27

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28 <sup>29</sup> See Defendants’ Exhibit F attached to Federal Defendants’ Opposition to Plaintiff’s Request  
For Emergency Relief.

1 prevailed in two Ninth Circuit Court of Appeals appellate decisions, both of which put  
2 Defendants on notice even before their deliberations that their approach to NEPA, CAA and  
3 APA compliance and conformity was procedurally and substantively deficient. The Valley's  
4 runaway growth is the number one controversy in the Valley. Runaway Valley growth has  
5 created a public protest fire that the instant land sales continue to fuel. Defendants' EA includes  
6 a news article that attests to the controversial issue of runaway growth versus air pollution.<sup>30</sup>  
7 Runaway growth is also the controversial issue connected with the current drought of the century  
8 and the increasing shortage of water in the Las Vegas Valley.

9 Without prejudice, when the public was noticed by newspaper notices such as with the  
10 PRMP/FEIS, controversy was evident. When the PRMP was released for public comment in  
11 May of 1994, the BLM received over 400 comment letters. When a supplement involving only  
12 very narrow, non-controversial issues was released in June of 1998 that excluded PRMP  
13 comment, only fourteen letters of protest were received. Defendants learned their lesson when  
14 they received more than 400 comment letters. From that point on, opportunities for public  
15 comment were restricted. [N-AR 003502]

16 **(e) Convincing Statement of Reasons**

17 Petitioner has successfully demonstrated that Defendants' Valley air pollution activities  
18 may have a "significant" environmental impact, mandating the preparation of an EIS. Defendants  
19 have failed to demonstrate that their EA contains anything close to the statutorily required  
20 "convincing statement of reasons" sufficient to support a decision not to prepare an EIS.

21 Defendants' argument ignores NEPA which requires that "all agencies of the Federal  
22 Government shall ... include in every ... major Federal action significantly affecting the quality  
23 of the human environment, a detailed statement by the responsible official on ... the  
24 environmental impact of the proposed action." 42 U.S.C. § 4332(2). By not considering  
25 additional alternatives (such as, for example, curtailing some Valley air pollution activities or  
26 \_\_\_\_\_

27 <sup>30</sup> See, Exhibit B, Defendants last page to the Environmental Assessment EA Number: NV-050-  
28 2002-135 attached to the Affidavit of Robert W. Hall, Exhibits and Appendices, all attached to  
Petitioner Hall's November 12, 2002 Points and Authorities in Support of Motion for an  
Emergency Preliminary Injunction or Temporary Restraining Order.

1 proposing a slower schedule of land sale auctions), Defendants further failed to abide by NEPA's  
2 statutory command to prepare a "detailed statement . . . on . . . alternatives to the proposed  
3 action." 42 U.S.C. § 4332(2)(C). By not considering additional alternatives (such as, for  
4 example, curtailing some Valley air pollution activities or proposing a slower schedule of land  
5 sale auctions), Defendants further failed to abide by NEPA's statutory command to prepare a  
6 "detailed statement . . . on . . . alternative to the proposed action." 42 U.S.C. § 4332(2) (C); see  
7 also 40 C.F.R. § 1508.25(b)(2) (defining "[a]lternatives" to include "[o]ther reasonable courses  
8 of actions [sic]"). Indeed, the CEQ regulations state that consideration of alternatives "is the  
9 heart of the environmental impact statement." 40 C.F.R. § 1502.14. "The rule of reason guides  
10 'both the choice of alternatives as well as the extent to which the Environmental Impact  
11 Statement must discuss each alternative.' " Am. Rivers v. FERC, 201 F.3d 1186, 1200 (9<sup>th</sup> Cir.  
12 2000) (quoting City of Carmel-by-the-Sea v. United States Dep't of Transp., 123 F.3d 1142,  
13 1155 (9<sup>th</sup> Cir. 1997)). " '[F]or alternatives which were eliminated from detailed study, [an  
14 agency must] briefly discuss the reasons for their having been eliminated.' " Id. (quoting 40  
15 C.F.R. § 1502.14(a)) (emphasis omitted). Thus, in preparing their EIS, Defendants should  
16 explore a wider range of alternatives.

## 17 **B. Categorical Exclusion of the Certification Rule**

18 Plaintiff alleges that Defendants acted arbitrarily and capriciously in failing to conduct  
19 any NEPA compliant environmental analysis in fulfillment of their NEPA cumulative impact and  
20 the CAA conformity determination requirements. Defendants contend that land sales fall within  
21 an exception to the generally applicable requirements of CAA regulations. The CEQ regulations  
22 allow categorical exclusion of actions "which do not **individually or cumulatively** have a  
23 significant effect on the human environment and which have been found to have no such effect  
24 in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. §  
25 1508.4 (citing 40 C.F.R. § 1507.3). " 'Cumulative impact' is the impact on the environment  
26 which results from the incremental impact of the action when added to other past, present, and  
27 reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or  
28 person undertakes such other actions. Cumulative impacts can result from individually minor but

1 collectively significant actions taking place over a period of time.” An agency may not pick and  
2 choose when calculating cumulative impacts. The agency must first meet the NEPA definition of  
3 cumulative impacts by listing all of their Valley air pollution activities without casting out any,  
4 total the impacts initially from the enactment of NEPA, and then supplement the requirement on  
5 a regular basis depending upon whether projects are significant or major in nature. The document  
6 must then be signed by the responsible executive. NEPA requirements are independent but  
7 supplement CAA requirements.

8 To the extent that initial and subsequent NEPA cumulative impact determinations  
9 identify all of the Defendants’ Valley activities, the issue of “categorical exclusion” is  
10 determined. 40 C.F.R. § 1508.4 clearly states, that categorical exclusions do not apply where  
11 the air pollution emissions “cumulatively have a significant effect on the human environment.”  
12 The only way to know whether air pollution emissions cumulatively have a significant impact is  
13 to list them all, calculate the air pollution emissions using EPA methods, and then total them.

14 Agencies are required to develop guidelines as to which of their actions do or do not  
15 require the preparation of an EA or an EIS. See 40 C.F.R. § 1507.3. Defendants’ actions must be  
16 examined to determine whether the NEPA cumulative impact determination requirement and the  
17 CAA conformity certification requirement falls within those categories of actions that it has  
18 “found to have no [environmental] effect.” 40 C.F.R. § 1508.4.

19 There is no categorical exclusion that is even plausibly capable of encompassing the  
20 continuing sales of thousands of acres of Valley land for development in a serious non-  
21 attainment area for PM10 and CO. In effect, Defendants are arguing that, even though the NEPA  
22 cumulative impact and CAA conformity certification requirements are not subject to any of  
23 Defendants’ categorical exclusions, they should be categorically excluded from the EA/EIS  
24 requirement because they have no significant environmental impact. Defendants arrive at that  
25 conclusion in the administrative record absence of evidence of NEPA compliance, in the absence  
26 of evidence of APA public notice and hearings, and in the absence of legally insufficient CAA  
27 conformity certifications. Defendants argue in the absence of an accounting of all their Valley  
28 activities, in the absence of their Valley air pollution emissions totals, in the absence of a

1 responsible executive's signature, in the absence of APA public oversight, notice and hearings,  
2 and in the absence of credible CAA conformity determinations.

3 Defendants' determination that a particular action falls within one of its categorical  
4 exclusions is subject to review under the arbitrary and capricious standard. Alaska Ctr. for Env't  
5 v. United States Forest Serv., 189 F.3d 851, 857 (9th Cir. 1999); see also California v. Norton,  
6 311 F.3d 1162, 1176 (9th Cir. 2002). "[A]n agency's interpretation of the meaning of its own  
7 categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent  
8 with the terms used in the regulation." Alaska Ctr., 189 F.3d 851, 857. Defendants have failed to  
9 identify any particular categorical exclusion applicable to NEPA cumulative impact or credible  
10 CAA conformity certification requirements. Defendants may not lawfully do so post hoc.  
11 California v. Norton, 311 F.3d 1162, 1175 (9<sup>th</sup> Cir. 2001). Even if it could, any claim that one of  
12 these exclusions applied would be contrary to the plain text of the Defendants' FONSI-DR, and  
13 thus is "inconsistent with the terms used in the regulation," and not entitled to deference. Thus,  
14 Defendants acted in an arbitrary and capricious manner by failing to prepare an EIS for the  
15 NEPA cumulative impact and CAA conformity certification requirements and then determine on  
16 that basis whether to prepare an EIS.

## 17 **VI. CONFORMITY DETERMINATION UNDER THE CAA**

18 Without prejudice to his NEPA claims, Petitioner also contends that Defendants acted  
19 arbitrarily and capriciously in failing to conduct a legally sufficient conformity determination  
20 under the CAA. The CAA requires EPA to establish air quality standards for certain pollutants,  
21 42 U.S.C. § 7409, and it has done so with respect to CO and PM-10, the serious non-attainment  
22 area pollutants most at issue here, 40 C.F.R. § 50.6, 7, 11. Each state, in turn, is required to adopt  
23 and submit for EPA approval a State Implementation Plan ("SIP") for each pollutant. 42 U.S.C.  
24 § 7410(a)(1). Each state is divided into "air quality control regions," which are classified as  
25 "attainment" or "nonattainment" with respect to each pollutant for which there exists an air  
26 quality standard. *Id.* § 7407. SIPs must contain emissions limitations and other measures  
27 designed to bring "nonattainment" regions into attainment. 42 U.S.C. § 7410(a)(2). To ensure  
28 compliance with these plans, the CAA contains a "conformity" requirement, mandating that

1 “[n]o department, agency, or instrumentality of the Federal Government shall engage in, support  
2 in any way or provide financial assistance for, license or permit, or approve, any activity which  
3 does not conform to [a SIP].” 42 U.S.C. § 7506(c) (1).

4 Most federal actions affecting levels of pollutants in nonattainment regions require that  
5 the responsible agency conduct a “conformity determination.” See 40 C.F.R. §§ 51.850-860 and  
6 40 C.F.R. §§ 93.150-.160. Defendants claim they are exempt from the requirement. In making  
7 that claim, they refuse to mention the two regulatory air pollution limits they must meet in order  
8 to be exempt. See 40 C.F.R. § 51.853(c) (1) and 40 C.F.R. § 93.153(c) (1) [a]ctions where the  
9 total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of  
10 this section (the maximum emissions for PM10 are 70 tons/year and for CO are 100 tons/year);  
11 and (2) “[a]ctions which would result in no emissions increase or an increase in emissions that is  
12 clearly de minimis. See 40 C.F.R. § 51.853(c)(2) and 40 C.F.R. § 93.153(c)(2). Even the  
13 truncated, parsed EAs in the administrative record admit air pollution tonnage well in excess of  
14 the tonnage limits they must meet in order to qualify for exemption. If and when they comply  
15 with NEPA, the CO and PM10 tonnage numbers will be huge. The BLM is the major source of  
16 PM10 air pollution in the Las Vegas Valley.

17 See 40 C.F.R. § 51.853(c)(2)(xix) and 40 C.F.R. § 93.153(c)(2)(xix). All of the claimed  
18 “exemptions” must in fact be de minimis and/or below 70 tons of PM10 or 100 tons of CO per  
19 year. SNPLMA land sale actions are not exempt. In the alternative, Defendants have the burden  
20 of proving that direct land sales and land auction sales of land expressly sold for development do  
21 not produce PM10 or CO air pollution that exceeds 70 and 100 tons per year respectively.  
22 Defendants cannot show the air direct and indirect air pollution is de minimis in order to qualify  
23 for the exemption since their own environmental assessment (“EA”) data show that the resulting  
24 air pollution far exceeds 70 of PM10 or 100 tons of CO a year. Defendants also have the burden  
25 of demonstrating that there would be no “emissions increase.” In view of the fact that Defendants  
26 have never complied with NEPA cumulative impact requirements, a reconstruction of the data  
27 going back to 1970 of all the BLM’s Valley activities would easily show substantial BLM  
28 cumulative increases on the average every year. In demonstrating compliance, Defendants may

1 not resort to parsing their activities into piles and piles of EAs. 40 C.F.R. § 51.853 (c)(2)(xiv)  
2 without prejudice to the fact that Defendants’ air pollution activities in the Las Vegas Valley  
3 involve a lot more than land sales.

4 The CAA mandates that each state be divided into “air quality control regions,” which  
5 are evaluated individually as to their compliance with air quality standards. The Las Vegas  
6 Valley is located in an area where three states border Nevada. They are Arizona, Utah and  
7 California. There are also several Class I recreation areas nearby including the Grand Canyon. 42  
8 U.S.C. § 7407. Thus, proper CAA analysis must be conducted at the local and regional levels.  
9 The national emissions analysis in Defendants’ EA is inadequate to comply with the CAA.  
10 Because Defendants are required to perform a new, more thorough region-by region  
11 environmental analysis to achieve compliance with NEPA, it should also determine, as a result of  
12 their new analysis, whether the emissions resulting from their actions will truly fall below the  
13 levels established in 40 C.F.R. § 51.853(b)(1) and 40 C.F.R. § 93.153(b)(1). Cf. Olmsted Falls,  
14 292 F.3d at 270-73 (holding that petitioners did not meet their burden of proof on whether a  
15 conformity determination was required by simply suggesting that it was an “open question”  
16 whether the emissions limits would be exceeded).

17 Second, Defendants’ claim that by listing “land sales” as a type of action that results in  
18 no emissions’ increase or an increase in emissions that is clearly de minimis,” 40 C.F.R. §  
19 51.853(c)(2) and 40 C.F.R. § 93.153(c)(2), the EPA intended to exempt all federal land sale  
20 actions from the requirements of the CAA. Petitioner responds that (1) since NEPA was first  
21 enacted in 1969, Defendants have failed and refused to meet the NEPA requirements for a  
22 cumulative impact EIS, an entirely separate, preceding requirement, (2) the Southern Nevada  
23 Public Land Management Act of 1998, Public Law 105-263, 112 Stat 2343 (SNPLMA) is a  
24 major, NEPA, federal action involving a cumulative total of direct and indirect emissions that are  
25 a significant and major source of air pollution when they come from the air pollution caused by  
26 the bulldozing and development of anywhere from at 25,000 to 54,000 Valley acres, (3) the  
27 instant Defendants’ EA is one of series of “little piece” EAs that the Defendants have used in  
28 order to avoid NEPA and subsequent CAA compliance and conformity from the time when both

1 statutes were enacted (1970), (4) NEPA requires that the Defendants' own up to all of their  
2 Valley direct and indirect, cumulative air pollution emissions from all of their Valley direct and  
3 indirect air pollution, and (5) at all times relevant, public notice, hearings, public involvement  
4 and public oversight had little or no priority with the Defendants. By these omissions, the  
5 Defendants avoid admitting to the public, other agencies and the courts that they are the first step  
6 in a chain of causation that results in a slow, cumulative deterioration of the quality of life of the  
7 Valley's citizens that may also cause their deaths.

8         A careful reading of the EPA regulations, keeping the statutory purpose in mind,  
9 dispenses with Defendants' erroneous, albeit novel, assertion. The first striking element is that  
10 "land sales" are listed as a type of "[a]ction[ ] which would result in no emissions increase or an  
11 increase in emissions that is clearly de minimis." Id. If the EPA drafters truly intended to exempt  
12 all federal actions from the conformity determination requirement, they certainly would have  
13 been aware that some federal land sale actions do in fact result in an increase in emissions (or an  
14 increase that is not merely de minimis). Indeed, the EPA regulations specify that there are two  
15 kinds of emissions, "direct emissions" and "indirect emissions." See 40 C.F.R. § 51.852; 40  
16 C.F.R. § 93.152. Indirect emissions are defined as: those emissions ... that ... [a]re caused by the  
17 Federal action, but may occur later in time ... from the action itself but are still reasonably  
18 foreseeable. "Caused by" was used to refer to "emissions that would not otherwise occur in the  
19 absence of the Federal action." Id.

20         Effects. "Indirect effects may include growth inducing effects and other effects related to  
21 induced changes in the pattern of land use, population density or growth rate, and related effects  
22 on air and water and other natural systems, including ecosystems." ... "Effects and impacts as  
23 used in these regulations are synonymous. Effects includes ecological (such as the effects on  
24 natural resources and on the components, structures, and functioning of affected ecosystems),  
25 aesthetic, historic, cultural, economic, social, or health, whether direct or indirect, or cumulative.  
26 Effects may also include those resulting from actions which may have both beneficial and  
27 detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40  
28 C.F.R. § 1508.8.

1 Finally, it is relatively easy to imagine federal actions or “policies” that could have  
2 drastic effects on emissions of regulated substances as the SNPLMA does. Even assuming that it  
3 is possible the EPA intended these regulations to exclude such actions from the ambit of the  
4 CAA’s statutory requirements, such a reading would conflict with the basic command of the  
5 statute: “No department, agency, or instrumentality of the Federal Government shall engage in,  
6 support in any way or provide financial assistance for, license or permit, or approve, any activity  
7 which does not conform to [a SIP].” 42 U.S.C. § 7506(c)(1). “A federal regulation in conflict  
8 with a federal statute is invalid as a matter of law.” Watson v. Proctor (In re Watson), 161 F.3d  
9 593, 598 (9th Cir. 1998) (citing Chem. Mfrs. Ass’n v. Natural Res. Defense Council, Inc., 470  
10 U.S. 116, 126 (1985)) (emphasis in original). Consequently, the Supreme Court has held that an  
11 agency’s interpretation of a regulation that conflicts with the plain language of the statute is  
12 entitled to “no deference.” Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158, 171 (1989). Thus,  
13 we read the EPA regulation, to preserve its validity, so that the categorical exception  
14 encompasses only the “development and issuance” of federal regulations, not the substantive  
15 results of their promulgation and implementation. This conclusion does not conflict with  
16 Environmental Defense Fund, Inc. v. EPA, 82 F.3d 451 (D.C. Cir.) (per curiam), as amended, 92  
17 F.3d 1209 (D.C. Cir. 1996). In Environmental Defense Fund, the D.C. Circuit examined the  
18 validity of EPA regulations that caused a situation nearly identical to issues herein, and  
19 specifically concluded that the “de minimis” exceptions were “an appropriate exercise of the  
20 EPA’s authority, inherent in the statutory scheme.” Id. at 467. In examining the regulations, the  
21 court considered the conclusion “that the categorical exemptions are de minimis [to be] entirely  
22 self-evident; the EPA has concluded that these activities ‘would result in no emissions increase  
23 or an increase in emissions that is clearly de minimis,’ and we neither see nor would expect to  
24 find any evidence to the contrary.” Id. (quoting 40 C.F.R.) The Environmental Defense decision  
25 analyzed 40 C.F.R. § 51.850-.860, which concerned CAA conformity determinations of SIPs  
26 with DOT programs under Title 23 of the United States Code or the Urban Mass Transportation  
27 Act, 49 U.S.C. §§ 5301-5338, neither of which are implicated in this case. Had the D.C. Circuit  
28 been reading the BLM regulations in the manner Defendants suggest, it certainly “would expect

1 to find” at least some evidence tending to contradict such a premise. The D.C. Circuit suggests  
2 that it would have invalidated the EPA regulation as conflicting with the CAA had the language  
3 or context suggested such a broad reading of the regulation. Petitioner requests that the court  
4 decline Defendants’ suggestion to read the EPA regulation in a way that would tend to  
5 undermine its validity.

6 **VII. CONCLUSION**

7 Defendants have failed and refused to comply with our nation’s long-established  
8 environmental laws regarding NEPA, CAA and APA requirements regarding their Las Vegas  
9 Valley direct and indirect air pollution emissions. Key documents discussed herein are missing  
10 from the administrative record. The absence of any one of them triggers NEPA and 42 U.S.C. §  
11 7506(c), CAA 176(c) prohibitions. Petitioner has more than met the threshold for summary  
12 judgment in his favor.

13 DATED: August 22, 2003, Las Vegas, Nevada.

14  
15 /s/ Robert W. Hall  
16 ROBERT W. HALL, Petitioner Pro Se  
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