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# A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It

Energy & Environment

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The views expressed are those of the author in his personal capacity and not in his official/professional capacities.

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## I. Introduction

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, signed into law in 1970, imposed a requirement for every federal agency to prepare a report called an “Environmental Impact Statement” (EIS) describing the environmental consequences of federal agency proposals for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(c). Importantly, NEPA imposes no duty for federal agencies (or anyone else) to *use* the reports to protect the environment. Rather, “NEPA imposes only procedural requirements on federal agencies ....”<sup>1</sup> What an agency does with an environmental report is left entirely to the agency’s discretion. Thus, the NEPA reports seemed no more important than many other agency reports ordered by Congress that produce nothing except dusty boxes of unread paper. NEPA also created the Council on Environmental Quality<sup>2</sup> (CEQ) within the White House to advise the President on environmental policy.<sup>3</sup> But for NEPA reporting, CEQ is only an observer. NEPA gave neither CEQ nor the President any legal power to tell the federal agencies how to prepare the mandated environmental reports.<sup>4</sup>

Yet, astonishingly, a half century of NEPA implementation has transformed this seemingly-innocuous agency reporting duty into the most costly, burdensome and ineffective environmental law in the history of the United States. “NEPA compliance” now consumes as much as one billion dollars of direct federal expenditures every year, or more (no one knows the exact amount), and demands the full-time work effort of hundreds or thousands of federal employees and contractors (no one knows how many) in every agency of the government. NEPA has also required states, localities and private citizens who seek federal funds or permits to incur additional massive expenditures (no one knows how much) to satisfy federal agency NEPA demands. All this has occurred under an effective cloak of agency silence, with no meaningful oversight or, apparently, even awareness by the Executive Branch or Congress.

How the creation and startling growth of this vast but virtually-unnoticed “NEPA bureaucracy” occurred and, more importantly, how to fix it, are subjects that deserve far more public scrutiny than they have received to date. The aim of this paper is to shine some long-overdue light on these compelling public policy issues.

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<sup>1</sup> *Dep't of Transp. v. Pub. Citizen*, [541 U.S. 752, 756–57 \(2004\)](#) (quoting *Robertson v. Methow Valley Citizens Council*, [490 U.S. 332, 350 \(1989\)](#)).

<sup>2</sup> Originally a three-member body, in 2005 Congress reduced CEQ to a single member called the “Chairman.” [Pub. L. 109–54, title III](#), Aug. 2, 2005, [119 Stat. 543](#).

<sup>3</sup> See [H.R. Rep. No. 91-378](#), 91st Cong., 1st Sess. 9 (1969), reprinted in (1969) U.S. Code Cong. & Ad. News, pp. 2751, 2759; *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (“the Council on Environmental Quality was modeled after the Council of Economic Advisers”).

<sup>4</sup> The statutory mission of the CEQ is “to formulate and recommend national policies to promote improvement of the quality of the environment.” 42 U.S.C. § 4342. A 1970’s scholar noted that “neither NEPA itself nor any legislative history discussed CEQ’s role as involving the issuance of Guidelines [to agencies].” Herbert F. Stevens, *The Council on Environmental Quality’s Guidelines and Their Influence on the National Environment Policy Act*, 23 *Cath. U. L. Rev.* 547 (1974).

## II. The Four Causes of NEPA's Unparalleled 50-Year Transformation

NEPA's surprising 50-year mutation from a seemingly-unimportant federal agency reporting duty into the most expensive, burdensome and ineffective environmental law in history results from four principal factors:

1. In 1977, President Jimmy Carter signed Executive Order 11991<sup>5</sup> commanding CEQ to issue regulations prescribing federal agency NEPA reporting duties, and ordering every federal agency to *comply* with the regulations<sup>6</sup>;
2. In 1978, CEQ responded to the Executive Order by issuing NEPA compliance regulations that were unnecessarily overbroad and unduly complex<sup>7</sup>;
3. Since 1978, environmental advocates have filed as many as four thousand lawsuits seeking to use alleged violations of NEPA or the CEQ regulations to delay or kill federal projects.<sup>8</sup> These lawsuits have produced an ever-growing set of judicial decisions that, cumulatively, have vastly enlarged the already-unreasonable NEPA reporting duties mandated by CEQ; and
4. Judges who reject agency NEPA reports due to ever-expanding study requirements have broadly used court injunctions to delay hundreds or even thousands of federal projects (no one knows the true number), often for years, until submission of a new environmental report, which can then prompt a second round of NEPA litigation, with further delay.<sup>9</sup>

Under the influence of these four factors, today's NEPA compliance commonly imposes five years or more delay on federal projects requiring an EIS, and annually halts thousands of smaller actions for as much as two years or more *even where NEPA does not require an EIS*. As the Nation learned to its chagrin after Congress enacted its \$900 billion stimulus law in 2009, there are no longer any "shovel-ready projects" within the federal enclave. The stimulus law could not be implemented until

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<sup>5</sup> Executive Order 11991 (May 24, 1977).

<sup>6</sup> *Id.* § 2; see *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979).

<sup>7</sup> 40 C.F.R. Part 1500.

<sup>8</sup> The courts began to recognize their power to review federal agency NEPA compliance before the CEQ regulations were adopted in 1978. *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971) is often cited as the first appellate decision upholding the legal reviewability of a federal agency's NEPA compliance. The doctrine was confirmed nationwide in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 319 (1975).

<sup>9</sup> Two other factors also contributed to expanding the judicial role in enforcing NEPA and the CEQ regulations. One was the Supreme Court's decision in *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) holding that injury to a citizen's interest in the environment is sufficient under Article III of the Constitution to confer legal standing to sue upon those challenging violations of environmental laws, including NEPA. Second, citizen litigation under NEPA was bolstered in 1981 by Congress' enactment of the Equal Access to Justice Act, 28 U.S.C. § 2412(d), which allows federal courts to award attorney fees to certain classes of plaintiffs, including non-profit groups such as environmental advocacy organizations, who successfully challenge government action that was not "substantially justified." See *infra* at B(7) and E(4).

federal agencies completed 192,707 NEPA reviews including 841 EISs.<sup>10</sup> In 2011, federal agencies were still completing those NEPA reviews.<sup>11</sup>

The CEQ regulations – which fill over 30 pages of the Federal Register – lie at the heart of NEPA’s unexpected impact. These regulations impose three layers of administrative burden on federal agencies that extend far beyond the words of the NEPA statute.

First, the regulations greatly increase agency cost and time to prepare an EIS by requiring agencies to complete six sequential administrative stages: 1) publish, after public comment, a preliminary review called “scoping” to identify potentially relevant environmental issues<sup>12</sup>; 2) develop “reasonable alternatives” to the proposed action<sup>13</sup> (even alternatives that are illegal<sup>14</sup>); 3) publish a draft EIS for public review and comment<sup>15</sup>; 4) review and respond in writing to the public comments on the draft EIS<sup>16</sup>; 5) publish a final EIS<sup>17</sup>; and 6) announce the agency’s decision in a subsequent separate document called a “record of decision.”<sup>18</sup> In addition, the agency may later have to prepare a supplemental EIS if new information arises relevant to the agency decision.<sup>19</sup> The regulations further burden agencies by requiring the use of unduly broad standards to identify and evaluate environmental impacts.<sup>20</sup>

Second, although NEPA does not require any environmental review for a federal agency action that is not “major” or does not “significantly affect[]” the environment, the CEQ regulations vastly expand NEPA’s reporting burden by nonetheless requiring federal agencies to prepare a completely new environmental report called an “Environmental Assessment”<sup>21</sup> (or EA) – mentioned nowhere in the NEPA text<sup>22</sup> – for *every* proposed federal action (unless the agency has already decided to prepare an EIS, or the action has previously been shown to have no environmental effects and therefore qualifies for a “categorical exclusion” from NEPA compliance).<sup>23</sup> As Judge Richard Posner explained, “[a]n environmental assessment is a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement—which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project—is

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<sup>10</sup> Council on Environmental Quality, The Eleventh And Final Report On The National Environmental Policy Act Status And Progress For American Recovery And Reinvestment Act Of 2009 Activities And Projects (November 2, 2011) at 4.

<sup>11</sup> *Id.*

<sup>12</sup> 40 C.F.R. §1501.7.

<sup>13</sup> 40 C.F.R. §1502.14.

<sup>14</sup> 40 C.F.R. §1502.14(c).

<sup>15</sup> 40 C.F.R. §1502.9(a).

<sup>16</sup> 40 C.F.R. §1502.9(b).

<sup>17</sup> *Id.*

<sup>18</sup> 40 C.F.R. §1505.2.

<sup>19</sup> 40 C.F.R. §1502.9(c); Robertson, 490 U.S. 332.

<sup>20</sup> 40 C.F.R. §§1508.3, 1508.7, 1508.8, 1508.25, 1508.27.

<sup>21</sup> 40 C.F.R. §1508.9.

<sup>22</sup> [Charles Eccleston and J. Peyton Doub, \*Preparing NEPA Environmental Assessments: A User’s Guide to Best Professional Practices\* \(1<sup>st</sup> Ed. 2012\) at 12.](#)

<sup>23</sup> 40 C.F.R. §1501.3; 40 C.F.R. §1508.4.

necessary.” *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990).<sup>24</sup> By 1993, federal agencies were preparing 50,000 EAs per year,<sup>25</sup> and apparently still do.<sup>26</sup>

Third, as ordered by President Carter’s Executive Order 11991, the CEQ regulations required all federal agencies to obey every word of the 30-page enactment,<sup>27</sup> and seemingly invited courts to review agency NEPA compliance.<sup>28</sup>

By the early 1980’s, the courts, as CEQ hoped, decided that an agency’s failure to follow any requirement of the CEQ regulations in preparing either an EIS or an EA is a sufficient legal justification to invalidate the report, to order the agency to write a new or revised report and – most significantly – to enjoin the planned project until the new report is completed months or years in the future.<sup>29</sup> Since that time, courts have used injunctions to halt, and in many cases effectively kill, as many as two thousand federal projects because a federal agency made a mistake or oversight (sometimes trivial and commonly hypothetical) in preparing an EIS or EA.<sup>30</sup> Not infrequently, courts grant preliminary injunctions to stop a challenged federal project before the case is decided on the merits.<sup>31</sup>

In 2012 the U.S. Chamber of Commerce summarized NEPA’s many harmful effects in testimony before Congress:

NEPA, with its costly and time-consuming environmental reviews and impact statements, historically has been used by environmental activists to stall or prevent many hundreds and perhaps thousands of federal projects since it was signed into law in 1970. Activists do this by obtaining injunctions against proposed projects until the controlling federal agency has prepared a "satisfactory" Environmental Impact Statement (EIS) under NEPA. The lawsuit and subsequent EIS have the effect of delaying a project – often indefinitely – thereby stymieing jobs and economic growth. ... In response to the ongoing threat of litigation, EIS documents have become increasingly costly and lengthy, as have the time frames to complete the NEPA process.<sup>32</sup>

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<sup>24</sup> Like an EIS, an EA must consider alternatives to the proposed action. 40 C.F.R. §1508.9(b).

<sup>25</sup> Environmental Quality, The Twenty-fifth Anniversary Report of the Council on Environmental Quality at 51 (1995).

<sup>26</sup> *Supra* n. 22.

<sup>27</sup> 40 C.F.R. §1500.3.

<sup>28</sup> See 43 Fed. Reg. 55981 (November 29, 1978) (preamble to final NEPA regulations).

<sup>29</sup> See, e.g., *State of Wis. v. Weinberger*, 745 F.2d 412, 428 (7th Cir. 1984); *Stop H-3 Ass’n v. Lewis*, 538 F. Supp. 149, 171 (D. Haw. 1982), *aff’d in part, rev’d in part sub nom. Stop H-3 Ass’n v. Dole*, 740 F.2d 1442 (9th Cir. 1984).

<sup>30</sup> Judicial review of claims under NEPA is available through the Administrative Procedure Act (APA), 5 U.S.C. §706(2).

<sup>31</sup> See, e.g., *Citizens for Responsible Area Growth v. Adams*, 477 F. Supp. 994, 1006 (D. N.H. 1979); *Nat’l Audubon Soc. v. Hodel*, 606 F. Supp. 825, 846 (D. Ak. 1984); *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1407 (9th Cir. 1985). The APA, 5 U.S.C. §705, permits courts to enter preliminary injunctions and temporary restraining orders when appropriate.

<sup>32</sup> <http://www.uschamber.com/issues/energy/chamber-champions-nepa-provision-stimulus-bill-compiles-list-blocked-infrastructure-pr>.

### III. Today's Unique Arena of "NEPA Law"

Many of the most important court decisions favoring NEPA challengers have emanated from the U.S. Court of Appeals for the Ninth Circuit, the largest circuit geographically, containing over 450 million acres of federally-managed lands – three-quarters of the national total, and the venue where roughly half of all NEPA cases are filed.<sup>33</sup> The Ninth Circuit rules in favor of plaintiffs in NEPA cases approximately three times as often as all other judicial circuits combined.<sup>34</sup> This body of Ninth Circuit NEPA decisions has been followed by some other courts,<sup>35</sup> which has tended to make nationwide judicial interpretations in NEPA inflexibly favorable to NEPA challengers:

1. Broadest available scope of judicial review. Judicial review under the APA, 5 U.S.C. §706(2), allows a court to “hold unlawful and set aside agency action, findings, and conclusions [that are] found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... [or] (D) without observance of procedure required by law.”<sup>36</sup>

For NEPA cases, most courts, following the Ninth Circuit, have used Subsection (2)(D)'s “without observance of procedure required by law” standard to review the adequacy of an EIS. The Ninth Circuit explained it chose that standard because it gave courts more power to scrutinize EISs than under Subsection (2)(A)'s “arbitrary and capricious” standard.<sup>37</sup>

2. Heightened compliance standard required for federal agencies to defend a NEPA decision. For almost half a century the Supreme Court's clear instruction to judges for claims under the APA has been “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>38</sup> Yet for NEPA cases the Ninth Circuit (and some other courts) added four additional factors to the standard of judicial review that together require federal agencies to demonstrate a much higher level of compliance with NEPA than with any other statute (all emphasis added): 1) to justify a

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<sup>33</sup> See [https://ballotpedia.org/Federal\\_land\\_ownership\\_by\\_state](https://ballotpedia.org/Federal_land_ownership_by_state) (acreage); Robert L. Glicksman & David E. Adelman, Presidential Politics and Judicial Review, [GWU Law School Public Law Research Paper No. 2017-70](#); [GWU Legal Studies Research Paper No. 2017-70](#), at 4 (Ninth Circuit percentage of NEPA cases).

<sup>34</sup> Robert L. Glicksman & David E. Adelman, *supra* n. 33 at 29 n. 150 (data for 2001-2009).

<sup>35</sup> *Life of the Land v. Brinegar*, 495 F.2d 460 (9<sup>th</sup> Cir. 1973) (followed by six circuits); *Lathan v. Brinegar*, 506 F.2d 677 (Ninth Cir. 1974) (en banc) (followed by nine circuits); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9<sup>th</sup> Cir. 1974) (followed by six circuits); *Warm Springs Dam Task Force v. Dribble*, 621 F.2d 1017 (9<sup>th</sup> Cir. 1980) (followed by six circuits); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9<sup>th</sup> Cir. 1987) (followed by seven circuits).

<sup>36</sup> The other § 706(2) judicial review standards – “contrary to constitutional right, power, privilege, or immunity” and “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” – are rarely invoked in NEPA cases.

<sup>37</sup> “Subsection (2)(A) refers primarily to substantive decisions .... The scope of judicial review in such a case is narrow, if review be available at all. ... On the other hand, subsection (2)(D) provides that we may set aside agency action if we find it to be without observance of procedure required by law. We regard the question whether an EIS complies with the requirements of NEPA as a procedural question, governed by § 706(2)(D). ...” *Lathan*, 506 F.2d at 693. Courts have also decided, somewhat illogically, that an agency's decision not to prepare an EIS is reviewed under the arbitrary and capricious standard. *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 980 (9<sup>th</sup> Cir. 1993).

<sup>38</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (5 U.S.C. §706(2)(A)).

decision not to prepare an EIS for an agency action, the agency must “supply a **convincing statement of reasons** why potential effects are insignificant.” [Blue Mountain Biodiversity Project v. Blackwood](#), 161 F.3d 1208, 1211 (9th Cir. 1998); 2) the agency decision must be “**fully informed and well-considered.**” *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986); 3) “the procedural requirements prescribed in NEPA and its implementing regulations are to be **strictly interpreted** ‘to the fullest extent possible’ in accord with the policies embodied in [NEPA].” *State of Cal. v. Block*, 690 F.2d 753, 769 (9th Cir. 1982); *Scherr*, 466 F.2d at 1031; and 4) NEPA compliance “can be achieved only if the prescribed procedures are **faithfully followed; grudging, pro forma compliance will not do.**” *Lathan*, 506 F.2d at 693; *Scherr v. Volpe*, 466 F.2d 1027, 1031 (7th Cir. 1972).<sup>39</sup>

3. Expanded duty to prepare EIS. The courts also substantially enlarged the universe of agency decisions requiring an EIS. While NEPA compels an EIS only for “major actions significantly affecting” the environment, the Ninth Circuit decided, without explanation, that an agency must also prepare an EIS if a plaintiff does no more than present “**substantial questions** whether a project **may have** a significant effect.” [Idaho Sporting Congress v. Thomas](#), 137 F.3d 1146, 1150 (9th Cir. 1998) (emphasis added).<sup>40</sup>
4. “Automatic” NEPA injunction. At least in the districts within the Ninth Circuit, a rule existed for many decades that any violation of NEPA or the CEQ regulations leads almost automatically to an injunction against the agency action that was the subject of the lawsuit. “Our cases repeatedly have held that, absent ‘unusual circumstances,’ an injunction is the appropriate remedy for a violation of NEPA’s procedural requirements. . . . Irreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (citation and quotation omitted).<sup>41</sup> “Only in a rare circumstance may a court refuse to issue an injunction when it finds a NEPA violation.” *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir.

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<sup>39</sup> All of these judicial glosses seem to run counter to the Supreme Court’s conclusion in *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 548 (1978) that “the only procedural requirements imposed by NEPA are those stated in the plain language of the Act.”

<sup>40</sup> This judicial expansion of the statutory EIS duty also seems at odds with *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 548. The CEQ regulations make a similar leap by defining “[a]ffecting” to mean “will or may have an effect on.” 40 C.F.R. § 1508.3.

<sup>41</sup> This doctrine has seemingly survived repeated repudiation in the Supreme Court. In *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987) the Court rejected the Ninth Circuit’s NEPA presumption of irreparable harm as “contrary to traditional equitable principles.” Yet two decades years later the Ninth Circuit still presumed irreparable harm would result from an agency’s failure to prepare an EIS because of “potential irreparable damage to the environment,” *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006), cert. denied, 549 U.S. 1278 (2007); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001), or because of “potential effects . . . to . . . wildlife.” *Id.* The Supreme Court disapproved the *Earth Island Inst.* decision in [Winter v. Natural Resources Defense Council, Inc.](#), 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief”) and again in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). Yet even after these decisions Ninth Circuit courts continue to issue NEPA-based injunctions with no evidence of irreparable environmental harm. See, e.g., *Today’s IV, Inc. v. Fed. Transit Admin.*, 2014 WL 5313943 \*21 (C.D. Cal. Sept. 12, 2014), aff’d sub nom. *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445 (9th Cir. 2016) (injunction granted and affirmed where only irreparable harm was plaintiffs’ loss of “the opportunity to participate in a meaningful, good faith process through which Defendants would consider alternatives” to a proposed road).



1984). The only requirement for an injunction based on violation of a NEPA or CEQ procedural requirement is that the violation must be “substantial.” *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir.1988) (“The proper remedy for substantial procedural violations of NEPA ... is an injunction.”). However, no court has defined what a “substantial procedural violation” of NEPA is, leaving the decision largely to the unbridled discretion of a federal trial judge.

5. “NEPA exception” to bond posting. The Ninth Circuit (followed by some other courts) has created a “NEPA exception” to the Federal Rule of Civil Procedure (Fed.R.Civ.P.) 65 requirement that a party cannot obtain a preliminary injunction or temporary restraining order from a court without posting a bond to cover potential economic harm to the defendant. “[I]t has long been the rule that plaintiffs who seek preliminary injunctive relief in actions to enforce [NEPA] are excused from the general rigor of the [bond posting] requirement.” *Earth Island Inst. v. U.S. Forest Serv.*, 2006 WL 3359192, at \*1 (E.D. Cal. Nov. 20, 2006).
6. Lowered standard of proof of environmental injury required for Article III standing. Courts (not just the Ninth Circuit but also the Supreme Court) have steadily reduced the evidence necessary to prove an environmental injury sufficient to gain legal standing to sue – almost to the point of triviality. All that is currently necessary to gain entry to court based on an environmental injury is for a single litigant to claim in an uncontested court pleading that she or he: has an “interest” in one or more environmental features (*e.g.*, trees, wildlife, streams, *etc.*) of the particular area in controversy; has visited the area in the past as little as one day before filing suit; has a plan to revisit the area in the future; and there is a chance the plaintiff’s environmental interest will be immediately harmed if the challenged federal action proceeds. *Summers v. Earth Island Institute*, 555 U.S. 488, 494 (2009) (standing shown through affidavit alleging one plaintiff “visited the Burnt Ridge site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment”).
7. Expanded access to large government-paid attorney fee awards in NEPA cases. The Equal Access to Justice Act, 28 U.S.C. § 2412(d), allows a federal court to award attorney fees to certain classes of plaintiffs who successfully challenge a government decision that is not “substantially justified.” However, fee payments are generally limited by a statutory cap, adjusted annually for inflation, that currently rests at around \$200 per hour, well below current market rates for many attorneys. The cap reduces the incentive for lawyers to pursue cases on a contingent basis. However, EAJA allows a higher rate in some cases if an attorney possesses “distinctive knowledge or specialized skill.”<sup>42</sup> The Ninth Circuit, alone among the 13<sup>43</sup> circuit courts, has decided that “[e]nvironmental litigation” is a specialty that requires “distinctive knowledge” and is therefore eligible for an EAJA fee award above the statutory

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<sup>42</sup> *Pirus v. Bowen*, 869 F.2d 536, 541 (9th Cir. 1989).

<sup>43</sup> Including the U.S. Court of Appeals for the Federal Circuit.

limit.<sup>44</sup> On that ground courts within the Ninth Circuit commonly award EAJA fees to plaintiffs in NEPA cases at enhanced rates as high as \$650 per hour.<sup>45</sup> Case reviews indicate that many of the attorneys winning market-based EAJA awards had no pre-existing hourly rate (*i.e.* do not bill clients on an hourly basis, if at all) and end up with fee awards far larger than they could in fact command in the private marketplace. The availability of such generous fee awards may be one reason so much environmental litigation is filed in the Ninth Circuit.

8. Refusal to allow any NEPA claim based on economic injury. While courts have used all of these various means to ease the path of citizens with “environmental injury” who wish to pursue federal court challenges under NEPA, many courts have at the same time created a virtually insurmountable barrier to NEPA claims on behalf of parties concerned that NEPA violations will cause them economic harm.<sup>46</sup> The result is that courts generally only hear NEPA claims filed on behalf of environmental advocates.<sup>47</sup> Economic concerns, no matter how justified, are systematically excluded from NEPA litigation.

#### IV. Estimating a 40-Year Total of NEPA Lawsuits and Outcomes

The legal enforceability of the CEQ regulations, together with the many pro-enforcement biases of NEPA law, created an unparalleled opportunity for environmental advocates to use NEPA litigation to block proposals that require a federal permit or approval, or use federal funds. The environmental advocacy world includes among its diverse interests some individuals and organizations opposed to almost every variety of development project in existence – oil and gas drilling and pipeline construction; power plants; highway, rail and airport construction; mining, logging and grazing on federal land; commercial and recreational fishing; harbor improvements; private activities regulated by other federal environmental laws (*e.g.* Clean Water Act; Clean Air Act); even U.S. military exercises. They have not hesitated to use NEPA lawsuits to advance a broad range of public policy objectives in all these areas.

No comprehensive data exist for the cumulative number of NEPA cases filed in federal court in the 40 years since the CEQ regulations were published. Based on available partial data, a conservative

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<sup>44</sup> *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir.1991).

<sup>45</sup> See *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Turner*, 305 F. Supp. 3d 1156, 1166 (D. Or. 2018); *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 223 F. Supp. 3d 1147, 1154 (D. Or. 2016), appeal dismissed, No. 17-35172, 2017 WL 3751747 (9th Cir. Mar. 30, 2017); *All. for Wild Rockies v. Krueger*, No. CV 12-150-M-DLC, 2014 WL 46498, at \*5 (D. Mont. Jan. 3, 2014); *Malama Makua v. Hagel*, No. CV 09-00369 SOM-RLP, 2013 WL 12284635, at \*6 (D. Haw. Apr. 22, 2013); *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, 2011 WL 5403291, at \*8 (N.D. Cal. Nov. 8, 2011).

<sup>46</sup> “Economic injury alone is insufficient to establish ... standing under NEPA.” *Latin Americans for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 466 (6th Cir. 2014), citing *ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 205 F.3d 403 (D.C. Cir. 2000); *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (“The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions.”); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002).

<sup>47</sup> A recent study found that businesses or business associations were plaintiffs in just 7 percent of all NEPA cases filed between 2001 and 2015. Robert L. Glicksman & David E. Adelman, *supra* n. 33 at 20.

estimate is that environmental advocates have filed at least 4,000 federal lawsuits alleging violations of NEPA and the CEQ regulations.<sup>48</sup>

Only partial data are available on the outcome of these 4,000 cases. CEQ compiled litigation outcomes from 2001 through 2011,<sup>49</sup> during which 1,313 NEPA cases were filed against the government.<sup>50</sup> CEQ found that in this period 442 of the lawsuits resulted in adverse decisions against the government, and another 222 lawsuits ended with settlements involving further government NEPA action of some kind – a total of 664 cases where the plaintiffs achieved total or partial victory. This represents an overall success rate for plaintiffs of 51 percent.<sup>51</sup> If this figure accurately portrays outcomes of the 40-year litigation total (which is unknown), as many as 2,000 government projects may have been delayed or halted due to NEPA litigation.

## V. The Continually Growing Burden and Cost of Federal Agency NEPA

### Compliance

NEPA judicial decisions have over the years required EISs (and EAs) to address a steadily increasing number of environmental issues, and to provide increased depth of analysis on each issue.<sup>52</sup> After only a few years of NEPA litigation, the courts' strict enforcement of NEPA and the CEQ regulations had already begun to trigger criticism of the excessive cost and delay of NEPA compliance. In 1995, CEQ, which serves as NEPA's leading defender within the federal enclave, acknowledged that "frequently NEPA takes too long and costs too much."<sup>53</sup> The continuing judicial

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<sup>48</sup> Between 2001 and 2013, annual CEQ reports on NEPA litigation confirmed the filing of 1,497 NEPA cases, <http://ceq.eh.doe.gov/nepa/nepanet.htm> (links to 2001-2013 annual reports), an average of 115 cases per year. In 2007 the Congressional Research (CRS) observed that "NEPA litigation ... has remained relatively constant since the late 1980s," CRS, *The National Environmental Policy Act: Streamlining NEPA* (2007) at 10, implying a 30-year total (1988-2018) exceeding 3,400. In 1997 CEQ had reported that since 1984 the number of new NEPA cases filed had averaged about 100, *supra* n. 25 at 51, which was a decline from the 1970s, when as many as 189 NEPA cases were filed in a single year. *Id.* Thus, estimating average annual NEPA filings from 1978 to 2018 at 100 cases per year is conservative. Robert L. Glicksman & David E. Adelman, *supra* n. 33, arrived at a similar estimate of annual case filings. *Id.* at 36. Many of these cases remain pending for several years or longer, *id.* at 27 (median length of NEPA cases is two years; 25 percent extend longer than 3.2 years), so the total number of NEPA cases active at any one date is likely in the 200-300 range.

<sup>49</sup> CEQ, 2001-2011 Litigation Surveys (<https://ceq.doe.gov/ceq-reports/litigation.html>).

<sup>50</sup> *Id.*

<sup>51</sup> This figure is supported by similar data CEQ reported to GAO in 2014 showing that in the 20-year period from 1989 to 2008 the Forest Service (perennially the leading NEPA defendant among all federal agencies) lost or settled 46.2 percent, and prevailed on 53.8 percent, of the environmental cases filed against it (most under NEPA). Government Accountability Office, NATIONAL ENVIRONMENTAL POLICY ACT, Little Information Exists on NEPA Analyses, No. 14-369 (2014) (GAO 2014) at 36, citing *J. For.* 112(1):32-40 (<http://dx.doi.org/10.5849/jof.12-094>) at 32. Of the reported cases, 79 percent were filed by plaintiffs seeking less resource use and just 21 percent seeking more resource use (based on statutes other than NEPA). GAO 2014 at 36.

<sup>52</sup> A related factor increasing the length, preparation time and cost of EISs and EAs is federal agencies' understandable inclination to seek to avoid litigation by addressing every imaginable environmental issue in detail, a practice that has been called "defensive NEPA." See Mortimer, M.J., M.J. Stern, R. Malmshiemer, D. Blahna, L. Cerveny, and D. Seesholtz. Environmental and social risks: Defensive NEPA in the U.S. Forest Service. *Journal of Forestry* 109(1): 27-33 (2011).

<sup>53</sup> Environmental Quality, *supra* n. 25 at 7.

expansion of federal agency NEPA duties has been accompanied by steady increases in the burden and cost of federal agency NEPA compliance.<sup>54</sup>

1. Longer duration of time to complete NEPA documents. CEQ anticipated in 1981 that federal agencies should be able to complete most EISs in 12 months or less.<sup>55</sup> Yet due largely to intervening judicial decisions, the average government-wide preparation time for an EIS between 1998 and 2006 (from publishing notice of intent to prepare an EIS to publishing a final EIS) had grown to 3.4 years.<sup>56</sup> In that nine year period, EIS completion time increased by an average of 37 days per year, meaning that EIS preparation time ballooned from 2.9 years in 1998 to 3.8 years in 2006.<sup>57</sup> From 2007 through 2010, average EIS preparation time grew another 107 days (27 per year), raising average EIS preparation time in 2010 to 4.2 years.<sup>58</sup> By 2016, the average government-wide completion time had grown to 5.1 years.<sup>59</sup> All these estimates understate the total length of the NEPA process: they disregard all time an agency expends *before* publishing a notice of intent to prepare an EIS, and also ignore the time the agency needs *after* publication of the final EIS to prepare and release the record of decision required by the CEQ regulations.<sup>60</sup> Thus, it is not surprising that, for example, in 2010 the Interior Department reported that NEPA compliance prior to initiating new Alaska oil and gas development would take 10 years.<sup>61</sup>

Although EAs annually outnumber EISs by a factor of more than 100, very little is known about the time agencies take to prepare EAs. CEQ believed in 1981 that “[f]or cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less ....”<sup>62</sup> That expectation does not

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<sup>54</sup> Additional delay in agency decision-making sometimes also results from the inter-agency consultation process required under section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. §1536(a)(2). After a federal agency initiates consultation with the U.S. Fish and Wildlife Service (for most fish and wildlife), the National Marine Fisheries Service (for certain ocean-going fish), or both on a proposed project that may affect endangered or threatened species or designated critical habitats, the ESA provides no effective deadline for completion of the consultation, yet bars the federal agency from making a final decision on the proposed project until the consultation is concluded.

<sup>55</sup> Council on Environmental Quality, “NEPA’s Forty Most Asked Questions,” 46 Fed. Reg. 18026-18038 (1981).

<sup>56</sup> Piet deWitt and Carole A. deWitt, How Long Does It Take to Prepare an Environmental Impact Statement?, *Environmental Practice* 10:164–174 (2008).

<sup>57</sup> A Federal Highway Administration review of NEPA compliance between 1995 and 2001 found “[t]he average time for preparation and completion of an EIS was 5.1 years, while the median length of time was 4.7 years.” <https://www.fhwa.dot.gov/publications/publicroads/03jul/03.cfm>.

<sup>58</sup> Piet deWitt and Carole A. deWitt, Preparation Times for Final Environmental Impact Statements Made Available from 2007 through 2010, *Environmental Practice* 15:123–132 (2013).

<sup>59</sup> National Association of Environmental Professionals, 2016 Annual Report (available at <http://www.naep.org/nepa-2016-annual-report>).

<sup>60</sup> GAO 2014 at 14. In the case of a proposal by the city of Denver to the U.S. Army Corps of Engineers (USACE) to enlarge its municipal water supply by building a water storage facility, more than three years lapsed between the USACE’s final EIS in 2014 and its issuance of a record of decision approving the request in 2017. <https://cdm16021.contentdm.oclc.org/digital/collection/p16021coll7/id/795>.

<sup>61</sup> Government Accountability Office, *Offshore Oil and Gas Development: Additional Guidance Would Help Strengthen the Minerals Management Service's Assessment of Environmental Impacts in the North Aleutian Basin*, No.10-276 (2010).

<sup>62</sup> GAO 2014 at 32.

appear to have borne out. The Department of Energy (DOE), for example, which discloses its NEPA compliance more fully than any other federal agency, reported that between 2013 and 2016, the average time to prepare an EA ranged from 13 to 24 months.<sup>63</sup>

2. Growing page length of NEPA documents. The page length of EISs has increased dramatically over the past two decades. At DOE the median length of EISs prepared in 1994-99 was 650 pages, but by 2011-16 the median length had grown to 1,600 pages.<sup>64</sup> Six of the DOE EISs in the recent period exceeded 3,600 pages in length including one statement over 11,000 pages.<sup>65</sup>

The trend to longer EISs is government wide. The Federal Emergency Management Agency's 2017 EIS on its national flood insurance program exceeds 2,000 pages.<sup>66</sup> The Federal Energy Regulatory Commission's 2017 EIS on its Atlantic Coast Pipeline and Supply Header Project is more than 2,100 pages long.<sup>67</sup> USACE's 2014 EIS reviewing Denver's proposal to build a new water storage facility is over 11,000 pages in length.<sup>68</sup>

3. Increased cost of NEPA documents. Since 1970 the executive branch of the federal government has ignored NEPA costs regardless of the political party in power. Federal agencies are not required to disclose or even calculate their NEPA costs. No federal entity has any government-wide duty to collect or publish NEPA cost data. The GAO reported in 2014 that "CEQ rarely collects data on projected or estimated costs related to complying with NEPA. EPA [Environmental Protection Agency] officials also told us that there is no governmentwide mechanism to track the costs of completing EISs. Similarly, most of the agencies we reviewed do not track NEPA cost data."<sup>69</sup> GAO reported again in 2018 that for transportation projects "[t]he costs of completing NEPA reviews are unknown according to officials we interviewed."<sup>70</sup> Further, the few agencies that voluntarily report EIS costs only include payments to federal contractors; no federal agency discloses the cost of employing the many "NEPA coordinators" in every agency as well as the employees who actually write the reports. Nor does any federal entity ever report the state, local and private costs of NEPA compliance. Nonetheless, enough pieces of information exist to hint at the vast expenditures now required by NEPA.

The U.S. Forest Service, which as a result of its extensive land management activities is always the largest annual EIS writer in the federal enclave (about 25 percent of the total), estimated in 2007 that the agency was spending **40 percent** of its total direct work budget –

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<sup>63</sup> U.S. Dept. of Energy, NEPA Lessons Learned Quarterly Report (December 2013) at 16; (December 2014) at 13; (December 2015) at 13; (December 2016) at 23.

<sup>64</sup> U.S. Dept. of Energy, NEPA Lessons Learned Quarterly Report (September 2017) at 9.

<sup>65</sup> Id.

<sup>66</sup> <https://www.regulations.gov/document?D=FEMA-2012-0012-0082>.

<sup>67</sup> <https://www.ferc.gov/industries/gas/enviro/eis/2017/07-21-17-FEIS.asp>.

<sup>68</sup> <https://cdm16021.contentdm.oclc.org/digital/collection/p16021coll7/id/795>.

<sup>69</sup> GAO 2014 at 11.

<sup>70</sup> Government Accountability Office, HIGHWAY AND TRANSIT PROJECTS: Evaluation Guidance Needed for States with National Environmental Policy Act Authority at 42 (January 2018).

approximately \$250 million – on environmental planning and assessment documents, primarily under NEPA.<sup>71</sup> In 2013 DOE reported it spent \$94 million on just three EISs,<sup>72</sup> including \$85 million on a single EIS for hazardous waste removal at a federal reservation in Washington State.<sup>73</sup> In 2014 DOE spent \$5 million on three EISs; in 2015 \$12 million on three EISs; in 2016 \$24 million on four EISs. Altogether, DOE spent \$135 million over a four-year period to prepare 13 EISs, an average EIS cost exceeding \$10 million.

According to data reviewed by the Government Accountability Office (GAO) in 2014 (the latest government-wide data available), in the five-year period between 2008 and 2012, federal agencies were estimated (no precise count exists) to have prepared between 1100 and 1150 EISs for federal agency decisions – or roughly 225 annually (range 197-277).<sup>74</sup> An earlier study reported by the National Association of Environment Professionals, a private group, largely confirmed this estimate, finding that between 1998 and 2006, federal agencies completed around 250 EISs annually.<sup>75</sup> Most federal actions avoid an EIS by relying on an EA or a categorical exclusion.<sup>76</sup>

Extrapolation from limited data is, of course, hazardous. But if each of the estimated 225 EISs produced each year average just half the DOE outlay – \$5 million each – the estimated annual cost to the government for EIS preparation would exceed \$1 billion every year. Even if an average EIS costs only \$2 million, the estimated cost would still be \$450 million per year – and that estimate only covers direct contractor costs.

An EA typically costs from \$5,000 to \$200,000, according to Congress' 2003 NEPA Task Force Report to CEQ, *Modernizing NEPA Implementation* (the legislative branch's only published review of NEPA costs), which estimated that a "small" EA typically costs from \$5,000 to \$20,000 and a "large" EA costs from \$50,000 to \$200,000, without defining "small" and "large." GAO 2014 at 12-13. DOE, the only federal agency to report EA costs, experienced even higher EA expenditures in recent years; between 2013 and 2016 DOE spent over \$18 million to prepare 42 EAs – an average cost of \$447,000 for each EA.<sup>77</sup> If 50,000 EAs are prepared each year at a cost of just \$50,000 each, the total government cost would be a staggering \$2.5 billion. Even if only 25,000 EAs are prepared at just \$30,000 each, the total EA cost would still be \$750 million per year. Together, annual federal EIS and

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<sup>71</sup> L. Gaines, *NEPA for the 21<sup>st</sup> Century: A Comparative Analysis of Other Organizations' Environmental Review Structures* (2007).

<sup>72</sup> U.S. Dept. of Energy, *NEPA Lessons Learned Quarterly Review* (June 2013).

<sup>73</sup> GAO 2014 at 14. The \$85 million cost for the EIS only includes work performed by contractors; it does not include the cost of time spent by federal workers on the project. *Id.* at 12.

<sup>74</sup> GAO 2014 at 8; comparable data is presented in Robert L. Glicksman & David E. Adelman, *supra* n. 33 at 11.

<sup>75</sup> Piet deWitt and Carole A. deWitt, *supra* n. 56.

<sup>76</sup> 40 C.F.R. §1508.4 (categorical exclusion). For 192,707 projects funded by the 2009 stimulus law that required NEPA compliance, 96 percent satisfied NEPA through use of a categorical exclusion. *Supra* n. 10 at 4.

<sup>77</sup> U.S. Dept. of Energy, *NEPA Lessons Learned Quarterly Report* (December 2013) at 16; (December 2014) at 13; (December 2015) at 13; (December 2016) at 23.

EA preparation costs easily exceed **\$1 billion**, and could easily reach as high as **\$5 billion** if full costs were ever reported.

Yet even these astonishing figures do not include the losses experienced by the federal government as well as states, localities and private citizens<sup>78</sup> due to project delays required to complete NEPA reports, or the costs of federal projects that are ultimately cancelled due to agency delays or judicial decisions relating to NEPA.<sup>79</sup> Among the factors that lead project delay to increase federal expenditures are inflation, staff turnover, staleness of data as well as the duplication of work already done on the failed environmental document. Delay in completing a federal project also causes non-federal interests to lose all the benefits an earlier-completed project would have provided.

4. No evidence of value of NEPA expenditures. Just as surprising as the lack of accurate NEPA cost data is that there is also no evidence that these NEPA expenditures – which are certainly in the billions of dollars – have produced any corresponding benefit for the American people, or indeed any benefit at all. Since environmental impact statements and environmental assessments, no matter how thorough and well-written, only represent information for consideration by agency decision-makers, those decision-makers are free to disregard environmental impacts if they so choose. No assessment of agency decisions has ever been performed – not by a federal agency, or a Congressional committee, or GAO, or CRS, or even by a private group – to measure any environmental benefits resulting from NEPA compliance. As CEQ reported in 1995 (during the Clinton Administration), “millions of dollars, years of time, and tons of paper have been spent on [NEPA] documents that have little effect on decision-making.”<sup>80</sup> For 50 years the American people have been asked to blindly bear NEPA’s costs with no knowledge of either the amount or the value of those expenditures.

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<sup>78</sup> A recurring example of public and private financial loss resulting from NEPA delays is presented by the Forest Service’s attempts to comply with NEPA in order to sell burned timber after a catastrophic forest fire. See, e.g., Government Accountability Office, BISCUIT FIRE RECOVERY PROJECT: Analysis of Project Development, Salvage Sales, and Other Activities (GAO-06-967) (September 2006) at 20, 36. If burned trees are sold promptly to a lumber producer, they retain most of their lumber value, and at the same time their removal may aid the ecological restoration of the burned area. But by the time the Forest Service finishes an EIS or EA on the sale project, and especially if litigation follows, the burned trees will have lost much or all of their commercial value, purchasers offer less for the trees, if they bid at all, which reduces both public and private income, and at the same time ecological restoration may suffer – a lose-lose result for economic and environmental values. *Id.*

<sup>79</sup> Some commentators who have minimized or dismissed the adverse economic impacts of NEPA compliance have limited their analysis to effects on federal agencies, and have ignored impacts on the private sector resulting from delays resulting from NEPA compliance and NEPA litigation. See, e.g., Robert L. Glicksman & David E. Adelman, *supra* n. 33 at 36-38. Those authors also disregarded the ever-increasing agency cost of NEPA compliance, which depletes limited agency budgets, and the growing delays in approval of federal projects due to the lengthening duration of NEPA documentation, which further adds to project costs.

<sup>80</sup> Environmental Quality, *supra* n. 25 at 7.

## VI. How to Fix NEPA

NEPA's problems are not unsolvable. To the contrary, a suite of executive and legislative solutions to these NEPA problems is easily identifiable and readily available, jointly or alternatively, to substantially reduce the costs and burdens currently caused by NEPA as applied by CEQ and interpreted by the courts.

### 1. The President can amend Executive Order 11991.

**Option 1.1: Rescind President Carter's direction that federal agencies "shall comply with" CEQ's NEPA regulations, which will make the CEQ regulations voluntary, and no longer judicially enforceable.**

The CEQ regulations that form the basis for most NEPA lawsuits appear to have a questionable legal provenance. In enacting NEPA, Congress granted CEQ no authority to adopt regulations that legally bind federal agencies (and are thus judicially enforceable), and granted the President no authority to delegate such regulatory power to CEQ.<sup>81</sup> On at least one occasion the government itself admitted that "NEPA did not confer rulemaking authority on the President." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1293 (1st Cir. 1996). Any authority CEQ may have to issue NEPA regulations binding on federal agencies was conferred solely by President Carter's 1977 Executive Order 11991 granting power to CEQ to "[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA]," and requiring federal agencies to "comply with the regulations."<sup>82</sup> Many courts have treated the NEPA regulations as legally-enforceable legislative rules,<sup>83</sup> but without explaining why.

President Carter's grant of binding regulatory power to CEQ in an executive order appears inconsistent with the doctrine that "a President may only confer by Executive Order rights that Congress has authorized the President to confer," *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1375 (Fed. Cir. 2000),<sup>84</sup> or rights derived "from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). "An executive order exceeding the President's statutory or constitutional

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<sup>81</sup> In 1972, before Executive Order 11991, the Second Circuit stated: "[T]he Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA ...." *Greene Cty. Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412, 421 (2d Cir.) cert. denied, 409 U.S. 849 (1972); accord, *Aertsen v. Landrieu*, 637 F.2d 12, 18 (1st Cir. 1980); *Gloucester Cty. Concerned Citizens v. Goldschmidt*, 533 F. Supp. 1222, 1232 (D.N.J. 1982).

<sup>82</sup> The CEQ regulations, at 40 C.F.R. § 1500.3, also claim they are authorized by NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) and section 309 of the Clean Air Act, as amended (42 U.S.C. 7609). Yet NEPA conferred no such authority, see supra n. 81, and neither of the other statutes grants any power at all to CEQ.

<sup>83</sup> See, e.g., cases cited at n. 29 supra.

<sup>84</sup> Citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101 (1949); see *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1197 (D. Utah 2004).



authority is not valid.” *Lennon v. Rubin*, 166 F.3d 6, 8 (1st Cir. 1999) (rejecting executive order banning age discrimination based on statute that prohibits discrimination based on “race, color, religion, sex, or national origin” but not age).

Since Congress never authorized the President to grant CEQ authority to adopt legally binding NEPA regulations, Executive Order 11991’s purported delegation of rulemaking authority to CEQ may well be *ultra vires*, unlawful and unenforceable. The U.S. Court of Appeals for the D.C. Circuit and other courts have expressed doubt about the legal enforceability of the CEQ regulations: “Because the CEQ has no express regulatory authority under [NEPA], – it was empowered to issue regulations only by executive order – the binding effect of CEQ regulations is far from clear.” *Nevada v. Dep’t of Energy*, 457 F.3d 78, 87 n.5 (D.C. Cir. 2006) (citations omitted).<sup>85</sup> On at least one occasion the government conceded “that the law was unclear as to whether CEQ’s NEPA regulations bind [another federal agency which has not formally adopted them].” *Brodsky v. U.S. Nuclear Regulatory Comm’n*, 704 F.3d 113, 120 (2d Cir. 2013).

While obtaining a definitive judicial determination of the legal enforceability of the CEQ regulations would likely take years, there is a far faster route to achieve the same result. With the stroke of a pen, President Trump can amend Executive Order 11991 to remove President Carter’s order directing all federal agencies to “comply with” the CEQ regulations, and instead to give each federal agency discretion to decide whether and how to follow the CEQ regulations. The amended executive order would also allow each agency to decide whether and how to follow its own counterpart NEPA regulations, which the CEQ regulations required every agency to adopt in order to implement the CEQ rules.<sup>86</sup>

Notably, amending Executive Order 11991 would not, and could not, diminish every agency’s duty to follow the commands of the NEPA statute. The need for a “detailed statement” of potential environmental effects for “major” actions “substantial affecting” the environment would remain in force, but the CEQ regulations’ belabored prescription of the required content and process of the statement would no longer be binding. Further, the agencies’ current duty to prepare an EA for non-major or non-significant actions would become optional. In this way, every federal agency would continue to comply fully with the text of the 1970 NEPA statute. No agency would be prohibited from following any of the procedures prescribed in the CEQ regulations (including preparing an EA for a proposed action) if the agency chooses to do so.

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<sup>85</sup> See *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (same); *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 866 (D.C. Cir. 1999) (same); also see *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm’n*, 869 F.2d 719, 725 (3d Cir. 1989).

<sup>86</sup> 40 C.F.R. §1507.3.

The major impact of the amendment would be to eliminate the judicial enforceability of the CEQ regulations, which would almost certainly cause a dramatic reduction in NEPA lawsuits. Neither the content of nor failure to prepare an EA would be subject to judicial review, eliminating as much as half the current NEPA lawsuit universe. Courts could no longer consider whether an EIS properly included every required element and methodology that the CEQ regulations demand. One version of a model executive order is attached to this paper as Attachment 1.

**Option 1.2: Add traditional executive order language to Executive Order 11991 barring judicial enforcement of the CEQ regulations.**

Executive orders imposing duties on federal agencies normally contain a standard clause barring judicial enforcement of those duties, which typically reads: “This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”<sup>87</sup> Conspicuously, Executive Order 11991 lacks this routine language. To the contrary, the CEQ rules are “mandatory regulations applicable to all federal agencies” because “[t]he President ordered the heads of federal agencies to comply with the regulations . . .” *Andrus*, 442 U.S. at 357-58 (the President’s authority to delegate such power to CEQ was not at issue in the case). The NEPA regulations confirm their intended legal enforceability by explicitly inviting judicial review of agency compliance with the mandatory procedures, and even purporting to describe the types of procedural violations that could justify judicial intervention. 43 C.F.R. § 1500.3 (“it is the Council’s intention that any trivial violation of these regulations not give rise to any independent cause of action”); *see* 43 Fed. Reg. 55981 (November 29, 1978) (preamble to final NEPA regulations).

A limited amendment to Executive Order 11991 could simply add the routine non-enforceability language found in other executive pronouncements, and expressly extend that language to the CEQ regulations. It seems likely that this amendment would, in litigation, be interpreted to preclude litigation premised on violations of the CEQ regulations,<sup>88</sup> although perhaps less certainly than with Attachment 1.

**2. Congress can enact limits on the classes of persons permitted to sue under NEPA.**

Precisely because environmental advocacy groups have so successfully used litigation to delay or kill federal agency projects for the past 40 years, the subject of limiting the scope or

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<sup>87</sup> See, e.g. Executive Order 13807 (August 15, 2017), § 7.

<sup>88</sup> See, e.g., *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 711 F.3d 662, 670 (6th Cir. 2013); *Air Transp. Ass'n of Am. v. F.A.A.*, 169 F.3d 1, 8 (D.C. Cir. 1999); *Meyer v. Bush*, 981 F.2d 1288, 1297 (D.C. Cir. 1993) (“An Executive Order devoted solely to the internal management of the executive branch – and one which does not create any private rights – is not . . . subject to judicial review.”); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965) and 25 other similar cases.

power of judicial review under any environmental law is a perennial Congressional hot-button, guaranteed to stir deep passions on both sides of the issue. Nonetheless, Congressional limitations on judicial review are a powerful tool available to reduce disruptive NEPA lawsuits. A total ban on judicial review under NEPA would be the most effective approach, but also the most controversial. Other potent approaches are available, singly or in concert, to permit some judicial review under NEPA to continue, while lessening the disruptive potential of judicial interference with agency projects. Congress has the power to limit the availability of judicial relief for violations of NEPA under two separate lines of authority.

**Option 2.1: Congress can expressly limit the zone of interests permitted to sue under NEPA.**

While Article III of the Constitution prescribes minimum standards for legal standing to sue,<sup>89</sup> Congress also has the power in any statute to further limit or define the classes of persons who have the right to sue under the statute.<sup>90</sup> Until recently this limitation on the right to sue was termed “prudential standing,” but the Supreme Court has abandoned that label as “misleading.”<sup>91</sup> Regardless of label, the relevant issue is whether “Congress intended to permit the suit.”<sup>92</sup>

**Option 2.2: Congress can limit the availability of judicial remedies under NEPA as a condition of its waiver of sovereign immunity.**

“[B]ecause NEPA creates no private right of action, challenges to agency compliance with the statute must be brought pursuant to the [APA] ....” *Karst Envtl. Educ. & Prot., Inc. v. E.P.A.*, 475 F.3d 1291, 1295 (D.C. Cir. 2007). The APA constitutes a decision by Congress to waive sovereign immunity for the cases authorized by that statute.<sup>93</sup> Congress alone has the power to waive sovereign immunity and must do so expressly.<sup>94</sup> Congress may place conditions on a waiver of sovereign immunity, which “command[] strict adherence.” *Barkley v. U.S. Marshals Serv. ex rel. Hylton*, 766 F.3d 25, 34 (D.C. Cir. 2014).<sup>95</sup>

Congress’ power under these doctrines extends to both balancing and constraining the scope of interests permitted to sue under NEPA. Congress can balance standing

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<sup>89</sup> In *Summers*, 555 U.S. 488, the Court summarized Article III’s requirements for standing sufficient to obtain an injunction from a court: “To seek injunctive relief, a plaintiff must show that he is under threat of suffering injury in fact that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Summers*, 555 U.S. at 493.

<sup>90</sup> *Bank of Am. Corp. v. City of Miami, Fla.*, – U.S. –, 137 S. Ct. 1296, 1302–03 (2017).

<sup>91</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. –, 134 S. Ct. 1377, 1386 (2016).

<sup>92</sup> *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

<sup>93</sup> *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 215.

<sup>94</sup> *Army & Air Force Exch. Serv. v. Sheehan*, [456 U.S. 728, 734 \(1982\)](#).

<sup>95</sup> A court reviewing a federal agency action under the APA must give the APA’s vacatur/remand remedy priority over traditional injunctive remedies. *Monsanto Co.*, 561 U.S. at 165–66.

under NEPA (with an interest-neutral “citizen suit” provision similar to those found in other environmental laws<sup>96</sup>) to put economic injury on equal footing with environmental harm, so the court in any NEPA case can hear from all members of the public who allege sufficient injury.

Congress can also define the minimum environmental injury (or for that matter economic injury) that qualifies a citizen to file a NEPA lawsuit, in order to protect the courts and the public from cases where plaintiffs manufacture their own standing, based on their unchallenged pronouncements, to gain access to the courts to block a federal project.

1. One simple legislative limitation to standing based on environmental injury would be to limit lawsuits to those who can prove they visited the geographic area where a planned federal project will occur before the federal agency announces the proposed action to the public (an announcement that is usually published in the *Federal Register* or in local newspapers). In other words, a litigant would need an established pre-existing connection to a geographic area, not one acquired on the eve of litigation in order to create standing. Such a limitation on standing comports with the courts’ general view that those with a “geographical nexus” to an area potentially threatened with environmental harm have a greater claim to Article III standing than those who live far removed from the area.<sup>97</sup>
2. A potential alternative is to require prospective environmental plaintiffs to offer specific proof that each has the environmental “interest” upon which standing is premised, and has pursued that interest in the geographical area that would be in dispute in the NEPA lawsuit they wish to file. A litigant’s unsupported claim to harbor a hidden mental “interest” in bird-watching or observing trees, for example (either of which is sufficient today for standing), is so generalized as to be impossible to question or refute, essentially inviting contrived applications for standing. It does not seem unduly burdensome to require a bird- or tree-watcher seeking standing to document the specific occasions on which she or he actually pursued that interest in the particular geographical area of concern. Absent such proof, obtaining environmental standing devolves into a mere word-game.

### **3. Congress can adopt a heightened legal standard for injunctive relief in NEPA cases.**

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<sup>96</sup> See, e.g., 16 U.S.C. § 1540(g) (Endangered Species Act).

<sup>97</sup> See, e.g., *S. E. Lake View Neighbors v. Dep’t of Hous. & Urban Dev.*, 685 F.2d 1027, 1039 (7th Cir. 1982); *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (en banc); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445 (10th Cir. 1996); *Pye v. United States*, 269 F.3d 459, 467 (4th Cir. 2001); *LaFleur v. Whitman*, 300 F.3d 256, 271 (2d Cir. 2002); *Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency*, 658 F.3d 460, 466-67 (5th Cir. 2011).

Congress exclusively controls the jurisdiction and power of the inferior federal courts, and may withdraw or amend jurisdiction at any time.<sup>98</sup> Congress has the power to restrict or even eliminate injunctive relief. For example, since 1867 the Tax Injunction Act, 28 U.S.C. § 1341, and its predecessors have prohibited federal courts from enjoining the collection of any state tax “where a plain, speedy and efficient remedy may be had in the courts of such State.” Congress could limit injunctive relief in cases permitted under the APA, and has done so in other situations. The Magnuson-Stevens Fishery Conservation Act, 16 U.S.C. §§1601 *et seq.*, which governs federal fisheries management throughout the nation and is reviewable under the APA, prohibits all preliminary injunctions under 5 U.S.C. § 705. 16 U.S.C. § 1855(f)(1)(A). The 2003 Healthy Forest Restoration Act, 16 U.S.C. §6516 (c)(3), which is designed to expedite projects to improve the ecological health of federal forests and is also reviewable under the APA, limits the courts’ equitable authority to enjoin certain forest restoration projects by directing that “the court reviewing the project shall balance the impact ... of—(A) the short- and long-term effects of undertaking the agency action; against (B) the short- and long-term effects of not undertaking the agency action.” The statute limits preliminary injunctions to renewable terms of 60 days, with each renewal requiring a new review under the mandated balancing test.

One way to reduce the harmful impacts of NEPA lawsuits is for Congress to legislate a new standard for the grant of an injunction to remedy violations of NEPA or the CEQ regulations (should they remain enforceable), which would limit injunctive relief to cases posing a serious risk of actual environmental harm. One form of such language could be: “An agency error or omission in any statement required by 42 U.S.C. § 4332(c) [or the CEQ regulations if they remain enforceable] shall not be a ground for injunctive relief under 5 U.S.C. § 706(2) or otherwise unless the party seeking relief proves that the error or omission is likely to result in specifically-identified serious and irreparable environmental damage.”

#### **4. Congress can impose a project-based statute of limitations.**

Currently the only applicable statute of limitations for a NEPA claim is the general six-year limitation in 28 U.S.C. §2401(a), which starts to run after a federal agency completes its NEPA review (itself lasting an average of two to five years) and makes a decision to approve a project. A suit filed six years after agency approval of a project, and lasting two years or longer in court (as a majority of NEPA cases do), could result in a judge issuing an injunction against operation of the project as much as 10-15 years after the agency began its NEPA review. An injunction on even the smallest point could require the agency to redo its entire EIS or EA, since the 10-15 year old data would likely no longer be timely. After the new environmental review is complete, the agency would have to make an entirely new decision whether to approve the project. This additional review would likely add another two to five years to the agency decision-making process. Thus, an agency could find itself

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<sup>98</sup> *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922); Joseph L. Lewinson, *Limiting Judicial Review by Act of Congress*, 23 Cal. L. Rev. 591 (1935).

deciding whether to approve a project that has already been in operation for a decade. And ... if the agency again approves the project, it could face an entirely new round of NEPA litigation and potentially another injunction a decade in the future. This is litigation approaching the scale of a temporal marathon – a *26 year* amble in and out of court.

Few but the most die-hard environmentalists could endorse this approach to dispute resolution. Society cannot possibly be served by imposing decades-long uncertainty over federal agency decisions. Such uncertainty will likely lead to increased project cost and potentially reduce or eliminate private investment, resulting in serious financial losses for the private sector, and the denial of the public benefit that the project would provide.

One way to shorten this litigation marathon is with a project-based limitation on injunctive relief – which would run from the date the proponent agency starts its environmental evaluation of the project. If an agency armed with the necessary information conducts an environmental review that lasts, say, five years, before approving an agency project, the remedy of injunctive relief should no longer be available to a reviewing court even if a violation of NEPA or the CEQ regulations is found.

**5. Congress can strengthen Fed.R.Civ.P 65(c) to make bond posting a mandatory prerequisite to any preliminary injunctive relief or restraining order in a NEPA case, and extend the bond to protect losses suffered by non-parties.**

Currently, Fed.R.Civ.P. 65(c) directs that “[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. ...” As noted, courts have eviscerated this requirement for NEPA cases by discerning a “NEPA exception” such that a bond is rarely if ever required. As a result, NEPA litigants normally bear no financial responsibility for their litigiousness, regardless of the cost to others or the public.

An amendment to Fed.R.Civ.P. 65(c) could end the “NEPA exception” and require the posting of security in every case that adequately protects non-parties as well as parties. Model language could be: “[t]he court may not issue a preliminary injunction or a temporary restraining order until the movant gives security in an amount sufficient to pay the costs and damages that may be sustained by any party found to have been wrongfully enjoined or restrained, or by any member of the public who wrongfully suffers economic or financial loss as a result of such preliminary injunction or restraining order.”

**6. Congress can place exclusive venue for all NEPA cases in the District of Columbia.**

NEPA has no special venue provision, meaning that the general venue rules of 28 U.S.C. §1391(e) apply to give a plaintiff a choice of several venues for judicial review of federal agency action, generally including the plaintiff’s residence or the location of any real property involved in the case. The result of these venue choices has been that about half of all NEPA cases have been filed in the Ninth Circuit, which scholars have labelled an “outlier” among

U.S. courts of appeals due to its unusually high percentage of plaintiff victories in NEPA cases.<sup>99</sup>

Venue selection creates tension between convenience for citizens suing the government and the desire for uniform legal interpretations and outcomes throughout the country. For a wide range of cases involving judicial review of federal agency action, Congress has resolved this conflict in favor of national uniformity by conferring exclusive venue on the District of Columbia Circuit, which hears more judicial review appeals than any other circuit court in the country.<sup>100</sup> The judges within the D.C. Circuit are widely considered to have the greatest expertise in administrative law and in the principles of judicial review of agency action.<sup>101</sup>

This option holds promise as a way to achieve greater uniformity in NEPA litigation without sacrificing citizens' right to challenge government action in court. While uniformity could of course be achieved by unifying review in any single court, the D.C. Circuit with its national focus is the only venue that could effectively serve as a host for nationwide NEPA litigation. Congress can enact an amendment to Title 28 of the United States Code giving the courts of the District of Columbia exclusive jurisdiction over all NEPA cases.

#### **7. Congress can amend EAJA to limit attorney fees in NEPA litigation.**

Amending the Equal Access to Justice Act to exclude expertise in environmental litigation as “distinctive knowledge” that can permit a court to award attorney fees based on market-based enhanced hourly rates would have two beneficial effects: it would restore uniformity to judicial interpretation of EAJA (eliminating the anomalous Ninth Circuit rule favoring environmental litigators), and could reduce the economic incentive for lawyers to pursue NEPA cases in the hopes of winning a large attorney fee award far exceeding their actual hourly billing rate. At the same time the amendment would maintain EAJA as a worthwhile scale-balancing tool for litigants who want to hire private lawyers but cannot afford to do so.

## VII. Conclusion

In recent decades NEPA has imposed tens of billions of dollars of unnecessary cost on the American economy with no proven corresponding environmental benefit. Tools exist to fix the problem. All that is missing is leadership to do so.

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<sup>99</sup> See Robert L. Glicksman & David E. Adelman, *supra* n. 33 at 35, 39.

<sup>100</sup> See Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of The D.C. Circuit*, 23 *Cornell Journal of Law and Public Policy* 131, 150-52.

<sup>101</sup> Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, *CORNELL JOURNAL OF LAW AND PUBLIC POLICY* [Vol. 23:131 at 142-44 (2013)].

## Attachment 1

### **Removing Legal Enforceability of Council on Environmental Quality Regulations Under the National Environmental Policy Act; Reviewing and Revising Those Regulations**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to streamline Federal agency compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., and to aid in the creation of American jobs, reduce delays in vital federal projects, save taxpayer dollars and make government more efficient and effective without harming the environment, it is hereby ordered as follows:

Section 1. Executive Order 11514, as amended by Executive Order 11991, is revised by deleting section 2(g) thereof. Executive Order 11991 is revised by deleting section 2 thereof.

Section 2. Executive Order 11514, as amended by Executive Order 11991, is revised to add the following sentence at the end of section 3(h):

Federal agency implementation of the regulations authorized by this Order, as amended, is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, entities, officers, employees or agents, or any other person.

Section 3. Executive Order 11514, as amended by Executive Order 11991, is revised to add Section 5 as follows:

Section 5. General Provisions.

(a) Nothing in this Executive Order, as amended, shall be construed to impair or otherwise affect: (i) authority granted by law to an agency, or the head thereof; or (ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This Executive Order, as amended, shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This Executive Order, as amended, and any action by the Council or a Federal agency based on this Executive Order, as amended, including the issuance, amendment or implementation of regulations to Federal agencies under section (3)(h), is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, entities, officers, employees or agents, or any other person.

Sec. 4. General Provisions.



(a) Nothing in this order shall be construed to impair or otherwise affect: (i) authority granted by law to a department or agency, or the head thereof; or (ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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THE WHITE HOUSE,

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