House Committee on Natural Resources

"The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare."

April 25, 2018 at 2pm

INTRODUCTORY REMARKS

Chairman Bishop, Ranking Member Grijalva, and members of the committee, thank you for inviting me to speak to the House Natural Resources Committee on the National Environmental Policy Act (NEPA), its implementation, and NEPA litigation.

I first became familiar with NEPA near the end of my fourteen-plus year military career when, after receiving my LL.M. in Environmental Law from George Washington University, I was assigned to the U.S. Army Environmental Law Division. There, I worked on NEPA and other environmental reviews and permits on activities including desert training operations, military installation development and expansion, and base closure and realignment. After leaving active military service in 1992, I entered the civilian federal workforce as an attorney advisor at the Coast Guard Environmental Law Division. At the Coast Guard, my work focused on NEPA and other environmental reviews and permits for activities including the disposition of Governor's Island and Coast Guard vessel operations along the Atlantic coast. While at USCG Headquarters, I served a detail to the Council on Environmental Quality (CEQ) during the President George H.W. Bush administration. Several years later, in November 1999, I became the Associate Director for National Environmental Policy Act Oversight at CEQ, overseeing the federal government's implementation of NEPA. I served in that capacity for over 16 years and retired on December 31, 2015.

THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act, NEPA, is often referred to as this country's environmental Magna Carta and is viewed as an essential tool to help agencies plan federal actions responsibly. The Act requires federal agency leaders, the decision-makers, to consider the environmental consequences of their actions before making a decision. NEPA sets forth this nation's policies regarding the environment in Section 101, the Congressional Declaration of National Environmental Policy, where Congress declares:

> *it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.*

The Act goes on to provide important policy goals:

it is the continuing responsibility of the Federal Government to use all practicable means, consist with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –
1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. [1]

Congress passed NEPA by overwhelming bipartisan majorities.[2] Signed into law by President Richard M. Nixon, the Act mandated that federal agencies employ the NEPA process to achieve those policy goals. It also established CEQ to, among other responsibilities, oversee the implementation of NEPA. In 1983, the U.S. Supreme Court made it clear that NEPA has two main goals:

> *First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a "hard look" at the environmental consequences before taking a major action ... Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the "hard look" be incorporated as part of the agency's process of deciding whether to pursue a particular federal action*.[3]

THE NEPA PROCESS

The NEPA process provides an analytical framework fleshed out in the CEQ Regulations Implementing the Procedural Provisions of NEPA Regulations issued in 1978 (CEQ NEPA

[1] 42 U.S.C. § 4331
[2] The House of Representatives adopted NEPA by a vote of 372 to 15. 115 CONG. REC. 19,013 (1969). The Senate passed NEPA by voice vote without recorded dissent. 115 CONG. REC. 26,590 (1969).
[3] *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 100 (1983).

Regulations)[4] NEPA affords the public the opportunity the public and local governmental officials notice and the opportunity to be informed during federal government decision making; giving them a voice in those decisions and allows them to suggest alternatives and further refined and adapted to agency missions and needs in federal agency NEPA Implementing Procedures.[5] During the course of the NEPA process, a federal agency identifies a need for a taking action, develops a proposed action, identifies reasonable alternatives, and analyzes the potential effects of the alternatives.

There are essentially three levels of NEPA review:

- Categorical Exclusion (CE): A CE is a category of actions established, after CEQ and public review, in agency procedures implementing NEPA that is expected not to have individually or cumulatively significant environmental impacts. An action within such a category is excluded from analysis and documentation in an Environmental Assessment or an Environmental Impact Statement provided there are no unusual circumstances associated with the proposed action that warrant further environmental consideration, or, in NEPA terms, that there no extraordinary circumstances. A CE can be concluded with a determination that a proposed action falls within one of the established categories of actions and there are no extraordinary circumstances.[6]
- Environmental Assessment (EA): When a CE is not appropriate, or if the agency has not determined whether a proposed action could cause significant environmental effects, then an EA is prepared. If, as a result of the EA, a finding of no significant impact (FONSI) is appropriate, then the NEPA review process is completed with the FONSI or, when mitigation is included to reduce the intensity of the impacts to a level that is not significant, a mitigated FONSI; otherwise an EIS is prepared.[7]
- Environmental Impact Statement (EIS): When a proposed action is expected to result in significant impacts to the human environment, the agency prepares an EIS, the most intensive level of analysis. The NEPA review process is concluded when a record of decision (ROD) is issued.[8]

The conclusion of the NEPA process provides decision-makers and the public with a "hard look" at the environmental consequences of proposed actions. Recognizing there are many factors in addition to the environment that are considered when making a decision, it is left to agency leaders to decide whether and how to best proceed.

One of the groundbreaking and most valued aspects of the NEPA process is that NEPA gives a voice to the people. NEPA affords the public and local officials notice of what their government is doing before it happens. NEPA affords them the opportunity to offer reasonable alternatives and to be involved in the analyses that informs federal decisions that impact their communities and livelihoods. One of the most rewarding aspects of being Associate Director for NEPA was the opportunity to work with federal, tribal, state, and local officials, including

[4] 40 CFR parts 1500-1508 available at https://www.ecfr.gov/cgi-bin/text-idx?SID=30655823cf5f0dcb1c5ee59d01883b89&mc=true&tpl=/ecfrbrowse/Title40/40chapterV.tpl
[5] 40 CFR 1507.3. Agency implementing procedures are available at https://www.ecfr.gov/cgi-bin/text-idx?SID=30655823cf5f0dcb1c5ee59d01883b89&mc=true&tpl=/ecfrbrowse/Title40/40chapterV.tpl
[6] 40 C.F.R. § 1508.4
[7] 40 C.F.R. § 1508.9
[8] 40 C.F.R. part 1502.

mayors, county commissioners, governors, tribal councils, and with local citizens who sought a greater voice in how the federal environmental reviews and permits impacted their activities and lives, either as formal partners in the NEPA process or in providing comments on a NEPA review. Many of them told me how important it was that they could participate in this way.

There is a considerable amount of flexibility under the CEQ NEPA Regulations as to how agencies can implement the NEPA process. Under the CEQ NEPA Regulations each department and agency identifies, based on experience and expertise, the anticipated level of environmental review that is typically necessary for undertaking the type of actions it normally undertakes. Those anticipated levels are identified in the agency NEPA procedures that are called for by the CEQ NEPA Regulations and are reviewed and approved by CEQ.[9] In addition, CEQ issues guidance and provides direction on implementing NEPA and the CEQ NEPA Regulations. CEQ also works with agencies to address the challenges they face when implementing those procedures for all manner of Federal decisions (e.g., placement and development of pipelines, transmission lines, bridges, water treatment facilities, military relocations, nuclear material storage, and land management policies and plans).

There is ongoing debate regarding the need for measures to address assertions that NEPA delays federal projects. A good portion of that debate stems from disagreement among stakeholders regarding the degree to which, if any, the NEPA process itself is to blame for federal project delays. Complaints about delays attributed to the NEPA process generally fall into two broad categories: those related to the time needed to complete required NEPA reviews (primarily EISs) and those resulting from NEPA-related litigation.

TIMELINESS

I'll first address the issue of delay that people attribute to the time needed for NEPA reviews and will note the efficiencies available to address key challenges federal agencies face in ensuring the timeliness of NEPA reviews. The perception that compliance with NEPA causes significant delays in approvals of large numbers of proposed actions is simply wrong. Experience taught me that NEPA is not usually the cause, and that delays do not occur in a large number of NEPA reviews.

A multitude of factors, other than NEPA, can affect the timing of federal project delivery. In my experience factors that can cause delay include lack of funding, changes in the design or planning processes, inadequate staff capacity to implement or even oversee the NEPA process, changes in priorities that keep a proposed project from proceeding in the near term, local controversy or local opposition to a project, or delays in other (non-NEPA) permitting or approval processes at the federal, state, tribal, or local level. With regard to the latter, certain federal actions such as highway construction projects and permitting for mining operations, cattle grazing, forest thinning, and energy development may require compliance with other statutory and regulatory requirements which can add time, especially if they are raised late in the environmental review process. This is particularly the case when such review or permitting requires the participation or input of increasing numbers of local, state, tribal, or federal agencies. In addition, agencies responsible for protecting resources are often confronted by

[9] 40 CFR 1507.3(a)

problems with the project's alternatives analysis, incorrect or incomplete information, disagreements or differences of opinion among agencies, poor communication with project proponents and other agencies, or the environmental or biological analyses associated with the project.[10] More often than not, factors other than complying with NEPA or the NEPA Regulations are the reasons for delaying federal projects.

NEPA does take time, and that should be time well spent. For example, NEPA should take time when a proposed action has the potential for significant environmental impacts that an affected community likely may live with for decades if not centuries, depending on the nature of the action. Time taken for the purposes of preparing a sound analysis and adequate public involvement is time well spent. It is also important to understand that citizens need some real time to review documents and write comments.

It is also true the NEPA process is delayed at times for reasons that have nothing to do with the protection of the environment, our communities, or public lands. In my experience, and the experience of many that I have worked with, there are two key reasons for such delays, both are issues of capacity: lack of agency staff with responsibility for NEPA implementation and lack of adequate training. Agency capacity has been severely diminished over the last twenty years. In some agencies, offices have been disbanded; in others, additional responsibilities have been assigned to staff to the point that their capacity for NEPA work is severely diluted. In one of the worst situations I encountered, an agency decided not to fill regional NEPA positions on the theory that "everyone" would do the NEPA work. Just as detrimental is the loss of capacity for NEPA training within the agencies, either through lack of funding for training or through the loss of expertise to provide internal training. For far too many employees, NEPA is an "other duty as assigned."

Additionally, far too many employees with NEPA responsibility are provided only "OJT", on the job training. Regrettably, that training too often relies on how the work has been done in the past rather than focusing on lessons learned and integrating improvements into the agency NEPA process. Staff members who are not fully trained in implementing NEPA often end up doing extra work in an attempt to make sure they are doing the right thing and agency lawyers require more time to ensure there is an adequate record to support the agency decision. An effective NEPA process would ensure sufficient people with knowledge and capacity are in appropriate agency offices.

Compounding the lack of capacity problem is the paucity of information about the implementation of NEPA noted by the Government Accountability Office (GAO) and the Congressional Research Service (CRS) in their 2014 and 2015 reports.[11] However, GAO and CRS have prepared a series of reports, remarkably consistent in their findings, regarding the construction of highway projects and the relationship of environmental laws generally and NEPA specifically to decision-making timeliness. More of this type of analysis is needed if agencies

[10] See, for example, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, CRS 7-5700, R42479, April 11, 2012, p. 36.
[11] *Little Information Exists on NEPA Analysis,* GAO-14-369, April 2014, p. 7-8; *The National Environmental Policy Act (NEPA): Background and Implementation,* CRS RL33152, January 10, 2011, p. 26.

and/or legislators are going to be able to identify the causes of delays and formulate successful approaches to reducing such delays. In short, a number of federal projects have indeed been delayed or stopped but for reasons that have nothing to do with NEPA; unfortunately and unfairly NEPA usually gets the blame.[12] Misplaced blame makes correcting any problem more difficult.

In the years prior to my retirement, the federal agencies intensified their efforts to identify and address the challenges agencies face in preparing timely and effective NEPA reviews. Among the challenges identified were the need for early communication and coordination among all the agencies involved in the environmental review of a proposed action and developing and meeting coordinated timelines. Another key challenge is in identifying and engaging all agencies – federal, tribal, state, and local – as well as the public, particularly the communities likely to be impacted, in order to focus on the issues that need to be addressed during the review and permitting process and the analyses and methods to address those issues.

EFFICIENCIES

Before I turn to recent initiatives, the CEQ NEPA Regulations merit attention. Although they are frequently criticized for their age, such criticism overlooks the value they add to NEPA reviews by focusing on efficiencies and timeliness.

As noted above, the CEQ NEPA Regulations require agencies to establish agency-specific NEPA implementing procedures that allow for the efficient identification of the appropriate level of NEPA review for a proposed action (categorical exclusion [CE], environmental assessment [EA], and environmental impact statement [EIS]). These three levels of NEPA review exemplify the flexibility provided by NEPA is shaping the extent of the environmental analysis to be commensurate with the expected environmental effects. This flexibility has proven itself over time as evidenced by the fact that most federal actions receive only the least rigorous form of environmental review – the CE – and a relatively small number of federal actions receive the most rigorous – the EIS. This is demonstrated by the fact that fewer than 300 final EISs have been published by the agencies each year since 2000.[13] This is also borne out by the results of the Congressionally mandated reporting on the status of NEPA reviews for the hundreds of thousands of federal activities funded under the American Reinvestment and Recovery Act (ARRA).[14]

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[12] See, *The National Environmental Policy Act: Streamlining NEPA*, CRS 7-5700, December 6, 2007 and *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*, CRS 7-5700, R42479, April 11,2012.

[13] In 2012, the last year for which data is posted on the CEQ website, there were less than 200 draft and less than 200 final EIS prepared and filed (available at https://ceq.doe.gov/docs/get-involved/combined-filed-eiss-1970-2012.pdf). The EPA EIS database shows an average of less than 400 draft and final EISs were filed in 2013-2017 (available at https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search).

[14] Public Law 111-5, Section 1609(c): "The President shall report to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days following the date of enactment until September 30, 2011 on the status and progress of projects and activities funded by this Act with respect to compliance with National Environmental Policy Act requirements and documentation."

The ARRA reports from May 2009 through November 2011 covered over 275,000 funded activities for which agencies fulfilled their NEPA responsibilities with over 184,000 CEs, over 7,000 EAs, and less than 900 EISs.[15] This federal government wide data is consistent with information provided by one agency that tracks all of its NEPA reviews. In 2007, the Federal Highway Administration reported that approximately 92% of all highway projects met their NEPA responsibilities with CEs, and approximately 4% were met with EAs and 4% with EISs.[16]

In addition to calling for agency-specific procedures that allow for the efficient identification of the appropriate level of NEPA review, the CEQ NEPA Regulations encourage agencies to reduce paperwork and delay (40 C.F.R. sections 1500.4 and 1500.5). They also provide for tailored time limits (40 C.F.R. section 1501.8); scoping by using an early and open process for identifying those issues that merit detailed analysis (40 C.F.R. section 1501.7); integrating NEPA requirements with other review and consultation requirements to avoid duplication of effort (40 C.F.R. section 1502.25); and eliminating duplication with state and local procedures (40 C.F.R. section 1506.2).

Throughout my time as Associate Director for NEPA at CEQ, I found that the overarching and common objective to improve the efficiency and timeliness of the NEPA process aligned with the goals of many major Administration initiatives. Efforts to improve the timeliness and efficiency of NEPA reviews are now beginning to yield government wide improvements. For example, the Corps of Engineers led the interagency effort that developed an up-to-date "how-to" guide for synchronizing environmental reviews as early as possible.[17] Another interagency effort focused on reducing delay through early engagement and coordination with all agencies that may be involved in the environmental review and permitting of a proposed action as well as the communities that may be impacted is the Unified Federal Review (UFR) initiative. The UFR initiative, led by the UFR Steering Committee[18], establishing an expedited and unified interagency review process to ensure compliance with environmental and historic requirements under federal law relating to disaster recovery projects.[19]

Finally, the continued and increased use of a public, transparent, Permitting Dashboard[20] that tracks agencies' progress in coordinating and meeting major review and permitting milestones incentivizes expeditious preparation and completion of NEPA reviews as well as any other necessary reviews and permitting processes. The Permitting Dashboard also has the potential to identify other factors that impact the efficiency, transparency, and accountability of federal decisions. By providing a fact-base set of data on multiple projects, a public dashboard

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[15] Available at https://ceq.doe.gov/ceq-reports/recovery_act_reports.html

[16] *The National Environmental Policy Act (NEPA): Background and Implementation*, CRS RL33152, January 10, 2011, p. 15-16.

[17] *The Red Book on Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects* available at https://www.environment.fhwa.dot.gov/strmlng/Redbook_2015.asp

[18] Federal Emergency Management Agency, the Department of Homeland Security, the Advisory Council on Historic Preservation, and CEQ.

[19] Unified Federal Environmental and Historic Preservation Review at https://www.fema.gov/unified-federal-environmental-and-historic-preservation-review-presidentially-declared-disasters

[20] www.permits.performance.gov

can identify factors that contribute to delays and allow for more fully informed discussions of whether further changes should be considered and how those changes would interact with the other factors at play in reaching a final decision. The overly simplistic and, I would argue, misleading reliance on simply cost and time, and examples of long or short process times that support a presenter's subjective view of the value of the process are not helpful. The data on a transparent dashboard and other information can then be used identify and develop additional practices to improve the process without undermining the value of the reviews, informed decision-making, and public participation.

NEPA LITIGATION

Opponents of NEPA often incorrectly blame NEPA litigation for project delays. Just as the number of required EISs is proportionately low, so too are the number of lawsuits brought and the even lower number of cases that succeed against the federal government. The number of NEPA cases began to decline in the mid-1970s and has remained relatively constant since the late 1980s.[21] Out of the tens of thousands of federal actions that require environmental reviews under NEPA, only a small fraction is challenged in lawsuits. Although litigation may have had a larger impact in the past, the total number of NEPA-related cases in the past two decades has been proportionately very small when compared with the total number of federal actions requiring some level of environmental review under NEPA. Furthermore, the main reason that plaintiffs filed suit was, and continues to be, their claims that an EIS or EA is inadequate (e.g., information was incomplete or the document did not sufficiently analyze the direct, indirect, and cumulative effects of an action).[22] Plaintiffs are typically required to show that the agency was made aware of their concerns during the NEPA process itself rather than "ambushing" the agency for the first time in court.

Critics of NEPA often contend that the Act produces too much wasteful litigation. Such criticism overlooks the essential role the courts play by ensuring NEPA is enforced. When federal agencies' NEPA compliance falls short, litigation brought by aggrieved parties is often the only recourse to ensure an adequate NEPA review and sufficient public engagement for a particular project or activity. Agency personnel and industry representatives sometimes complain about the pressure that the Act places on agencies to do thorough and defensible environmental reviews, lamenting the creation of "bullet-proof" EISs. In my experience there are indeed excessive documents, but it is not required by courts. Rather it comes from agencies "throwing in the kitchen sink" instead of focusing their attention on the issues that matter.

Removing or limiting the opportunity for judicial review will not guarantee more focused or concise analyses. It is more likely that without the enforcement mechanism provided by the courts, federal agency EISs would devolve into rote documents or checklists making NEPA a hollow and worthless exercise. Such an outcome further reduces the opportunity for public involvement in agency decisions that affect them and leads to less informed and effective agency decision-making.

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[21] See Council on Environmental Quality, *Environmental Quality: 25th Anniversary Report,* 1996, p. 51, available at https://ceq.doe.gov/publications/effectiveness_study.html

[22] Litigation Surveys for 2001 through 2013, available at https://ceq.doe.gov/ceq-reports/litigation.html

The courts' rulings in NEPA cases have clarified many of the basic principles for conducting environmental impact analyses under the Act. The application of those principles to the circumstances of a particular federal project, however, is inevitably case-specific and fact driven. It is thus not surprising that the courts confront certain difficult recurring issues – such as the appropriate level of NEPA review, adequate analysis of cumulative impacts, or whether a federal agency has properly determined its action will not have significant effects on the human environment – whenever they are confronted with a new proposed project or activity.

The criticism that NEPA generates huge volumes of litigation is also not accurate. In my experience, and according to several surveys of NEPA litigation, the number of cases filed is proportionately very small in comparison to the thousands of federal actions decided upon in a given year. As shown in the table below, according to CEQ litigation reports for 2001 -2013, there are few cases filed and few cases where a proposed project or activity is stopped from proceeding pending further action by either the court or the agency.[23]

Year	Number of NEPA cases filed	Number of injunctions/remands
2001	136	30
2002	148	40
2003	140	32
2004	167	32
2005	118	43
2006	108	72
2007	86	49
2008	132	35
2009	97	23
2010	87	16
2011	94	21
2012	88	10
2013	96	14

NEPA actually generates a relatively small volume of litigation with concerned parties typically filing about 100-150 NEPA lawsuits per year. The proportionately low percentage of cases filed was further confirmed when the Forest Service, in support of its Environmental Analysis and Decision-Making Initiative, compiled data between fiscal years 2009-and the first quarter of 2017 and found that it was sued on less than 3% of all projects.[24]

Given the broad range of members of the public with interests affected by federal actions, the types of plaintiffs bringing NEPA suits include states and state agencies, local governments,

[23] See https://ceq.doe.gov/ceq-reports/litigation.html. See also P.E. Hudson & Lucinda Low Swartz, *2016 NEPA Cases*, NAEP Annual National Environmental Policy Act (NEPA) Report, National Association of Environmental Professionals, June 2017, p. 31-32 (This paper reflects a consistently low number of annual appellate NEPA case decisions ranging from 14 to 28 a year, and an 11 year total of fewer than 250).

[24] *Forest Service Environmental Analysis and Decision-Making Initiative*, USFS, 2017, available at https://vimeo.com/237902205 at 52:24

business groups, individual property owners, and Indian tribes, and public interest groups. This last category, public interest groups, comprise the largest number of plaintiffs and range in size from small local citizen groups organized around a particular issue or project to large environmental organizations.

Even the tiny fraction of NEPA actions that give rise to court suits overstates the significance of litigation because only a few of these suits result in court orders blocking government action. According to data compiled by CEQ, injunctive relief was not given in the majority of NEPA cases. The term "permanent injunction" is misleading in this context because such a final court order imposes only a temporary delay until the agency revises its environmental review to comply with NEPA and takes that information into account in reviewing the proposed action. Further, the courts have ordered a remand of certain issues to the federal agency in only a relatively small number of cases and remands also provide the agency the opportunity to revise the NEPA review.

Some argue that the high percentage of cases won by the federal agencies indicates that litigation is abused. While it is true that in a substantial percentage of cases the courts have ruled in favor of the defendant agencies and uphold the agency NEPA work, it is equally true that there are a good number of cases where the courts have found – despite courts' deference to the federal agencies' NEPA work – that plaintiffs' challenges had merit.

NEPA's critics also routinely disparage the motivations of plaintiffs who challenge agency environmental reviews. The rules of civil procedure require counsel in any litigation to certify, based on reasonable inquiry, that the action is not brought for any improper purpose, such as to harass or to cause unnecessary delay or needless cost, and that the claims presented have a sound basis in fact and law. I am not aware of any court sanctioning a NEPA plaintiff for bringing a frivolous complaint, or for filing suit for improper purpose, such as mere delay.[25]

Litigation is expensive and time-consuming. In my experience it is generally the last resort that citizens, local governments (such as county commissioners) and conservation groups invoke after they have been unsuccessful in getting the agency to address their serious concerns during the NEPA review. Moreover, environmental plaintiffs understand that they face an uphill battle as NEPA requires only reasonable, good-faith consideration and disclosure of environmental consequences and that a federal court will not substitute its judgment for that of the agency on the wisdom of a proposed project. They also appreciate that courts will almost always give the federal agency the opportunity to revisit and revise its NEPA review. Consequently, for plaintiffs, a successful outcome occurs when the agency is required to correct the NEPA review by fully evaluating and disclosing the environmental impacts of a proposed action which may lead to a different, more environmentally-sensitive approach – for example, adoption of an alternative with less environmental impact, or commitment of additional mitigation. Litigation seeking a better outcome is based on the belief that identification and

[25] See also Robert G. Dreher, *Testimony Before the Task Force on Updating the National Environmental Policy Act, Committee on Resources, Hearing on NEPA: Lessons Learned and Next Steps*, November 17, 2005, available at https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1100&context=cong.

disclosure of environmental consequences will have an environmentally beneficial effect on government decision making, just as Congress envisioned when it enacted NEPA.

LITIGATION EXAMPLES ADDING VALUE

The following are summaries of some cases where NEPA litigation led to a better outcome. As I stated earlier, cases can be found when NEPA takes too long or litigation delays a project; however, outliers do not tell the whole story. Actions taken to change the NEPA process or access to the courts that do not address the real causes of delay are both premature and ill-advised. I strongly believe key factors causing delays include the lack of capacity and resources. The cases below provide examples of the value provided by a legal remedy when a federal agency's NEPA process is insufficient or inadequate.[26]

Colorado: Canyons of the Ancients National Monument

The Canyons of the Ancients National Monument in southwestern Colorado contains over 6,000 archaeological sites representing Ancestral Pueblan and other Native American cultures. As a result of the designation, the existing oil and gas leases on the land were permitted to run their course but would not be renewed. On the eve of the lease's expiration, the lessees proposed a new seismic exploration project for the land. However, the Bureau of Land Management's (BLM) Environmental Assessment was allegedly based on inadequate cultural resource surveys, and, as a result, allowed exploration on the edges of several sensitive sites and artifacts. In an effort to protect these irreplaceable areas, a coalition of groups led by San Juan Citizens Alliance filed suit in federal district court and were granted an emergency injunction. Negotiations between all stakeholders ensued, with conservation groups, BLM, and the lessees coming to the table to work out a compromise. The result of the negotiations structured an exploration project that enabled lessees to obtain the seismic information they needed while avoiding the National Monument's most significant cultural features and fragile habitats. All in all, it was a win-win that balanced energy exploration with cultural resource protection, and exemplifies effective multiple-use management of the public lands.[27]

Florida: Scripps Research Institute Florida

In October 2003, Palm Beach County and Scripps Research Institute jointly developed plans for a Biotechnology Research Park to be built on the Mecca Farms site – a 1,919-acre parcel in rural western Palm Beach County bordered by wetlands and conservation areas. In addition, Mecca's wetlands drain into the Loxahatchee River, a nationally designated Wild and Scenic River and an essential component of the Everglades Ecosystem. In order to develop the area, Palm Beach County and Scripps sought approval of a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers to fill wetlands at the Mecca Farms. The Corps issued the permit in 2005 based upon an EA concluding there were no significant environmental impacts associated with filling the wetlands. However, the Corps' EA – designed to identify any

[26] Examples of NEPA success stories and benefits not including litigation are available at https://ceq.doe.gov/get-involved/success_stories.html

[27] *New Energy Project at Monument*, Los Angeles Times, August 13, 2002, available at: http://articles.latimes.com/2002/aug/13/nation/na-drill13; *Energy Exploration Approved in Colorado Monument*, Institute for Agriculture and Trade Policy, September 25, 2002, available at: https://www.iatp.org/news/energy-exploration-approved-in-colorado-monument.

significant impacts a project may have on both the environment and public health – had been limited to only 25 percent of the 1,919 acre Mecca Farms site. Environmental groups – who had brought the matter to the Corps' attention during the agency process – challenged the adequacy of the EA under NEPA. In 2005, a District Court held that the Corps' issuance of the permit had violated both the National Environmental Policy Act and Clean Water Act and ordered preparation of a new environmental review before the project could proceed. During the ensuing evaluation process, Palm Beach County and Scripps decided to relocate the research park to a new location that minimized environmental impacts and saved money by utilizing existing access roads. The grand opening of the new facility took place on February 26, 2009, and today the Scripps Florida Research Institute operates a state-of-the-art biomedical research facility focusing on neuroscience, cancer biology, medicinal chemistry, drug discovery, biotechnology, and alternative energy development employing more than 500 research staff.[28]

Minnesota: Central Corridor Light Rail

The Central Corridor Light Rail is a 10.9-mile light rail transit line connecting downtown Minneapolis and St. Paul. Running along University Avenue for most of the route, the project included construction of 18 new stations. In January 2011, the NAACP filed suit against the U.S. Department of Transportation (DOT) and the Metropolitan Council (the regional transit authority) claiming that the final environmental impact statement for the project was inadequate, in part because it failed to analyze the short-term impact of project construction on surrounding businesses. Specifically, the businesses were concerned with the project's removal of street parking, which would prevent customers from patronizing their stores. In response, the DOT used the NEPA process to hold town meetings, hearings, and otherwise engage the community, resulting in a supplemental EIS that suggested a range of mitigation measures to help small businesses resulting in providing help to small, affected local businesses in the corridor cope with the impacts of construction and loss of street parking.[29]

Washington State: Huckleberry Land Exchange

Under the proposed Huckleberry Land Exchange, the U.S. Forest Service would trade nearly 7,000 acres of mature and old-growth forest in Washington's Mt. Baker-Snoqualmie National Forest, including a portion of the Muckleshoot Tribe's historic Huckleberry Divide Trail, for about 30,000 acres of high-elevation land held by Weyerhaeuser Timber Company. Citizen groups and the Muckleshoot Indian Tribe challenged this proposal. The court found that the Forest Service violated NEPA by failing to consider an adequate range of alternatives and by neglecting to analyze the cumulative impacts of the proposed exchange. As a result, the Forest Service improved their analysis and altered their plans for carrying out the exchange. Ultimately, the Huckleberry Land Exchange went forward with a better design that protected old-growth forest and culturally and recreationally important public lands.[30]

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[28] *Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 404 F.Supp.2d 1352 (2005). Available at: https://www.courtlistener.com/opinion/2315811/florida-wildlife-federation-v-us-army-corps-of-engineers

[29] *St. Paul Branch of NAACP v. U.S. DOT*, 764 F. Supp. 2d 1092 (2011); see also https://metrocouncil.org/Transportation/Projects/Light-Rail-Projects/Central-Corridor/Environmental.aspx

[30] *Muckleshoot Indian Tribe v. Forest Service*, 177 F. 3d 800 (9th Cir. 1999); see also http://elawreview.org/case-summaries/muckleshoot-indian-tribe-v-united-states-forest-service