

Committee on Natural Resources

Rob Bishop, Chairman

Hearing Memorandum

April 23, 2018

To: All Natural Resource Committee Members

From: Majority Committee Staff
Subcommittee on Oversight & Investigations, x5-7107

Hearing: Full Committee oversight hearing titled, *“The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare”*
April 25, 2018, at 2:00 p.m.; 1324 Longworth House Office Building

The Committee on Natural Resources will hold an oversight hearing titled, “The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare” on **Wednesday, April 25, 2018, at 2:00 p.m. in Room 1324 Longworth House Office Building.**

Policy Overview

- Enacted in 1970, the National Environmental Policy Act (NEPA) requires federal agencies to consider environmental impacts of major federal actions. The statute broadly established a formalized federal environmental review process at a time when few other environmental safeguards were in place.
- Although originally intended to increase awareness regarding the effects of federal actions on the environment, NEPA’s vague and ambiguous language has exposed the federal government to excessive litigation and resulted in perverse outcomes for agencies, the environment and taxpayers.
- Increasingly, NEPA has become a weapon of choice by litigation activists to stop, delay, restrict, or impose additional costs on all types of federal actions. This has resulted in the expansion of prolonged environmental reviews, mounting paperwork, detrimental project delays and a range of adverse fiscal and economic impacts.
- Advancing the cycle, the associative costs of NEPA litigation prevent the federal government from undertaking actions or approving major projects in a timely fashion. For example, excessive litigation can negatively affect critical activities relating to national security, energy development, and infrastructure construction.
- The hearing will review these challenges and evaluate reforms to “de-weaponize” NEPA, minimize opportunities for bad faith litigation, and restore the law to its original intent.

Invited Witnesses (in alphabetical order):

Mr. James Coleman

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Horst G. Greczmiel

Former Associate Director, NEPA Oversight
Council on Environmental Quality
Fairfax, VA

Ms. Melissa Hamsher

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Background

The National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 et seq.) has become the weapon of choice for opponents seeking to stop or delay an activity requiring federal action, such as the issuance of a permit or lease. These opponents take advantage of vague and ambiguous language in the original statute to engage in lawfare against federal actions. Broadly defined, “lawfare” is the manipulation of the legal system against an enemy with the intent to damage or delegitimize them, waste their time and resources, or to score a public relations victory.

The National Environmental Policy Act

Signed into law by President Richard Nixon, NEPA has remained virtually unchanged since it went into effect on January 1, 1970.¹ In passing NEPA, Congress adopted a national policy to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.”² To implement this policy, NEPA provided a framework for evaluating “major Federal actions significantly affecting the quality of the human

¹ 91 P.L. 190, 83 Stat. 852.

² 42 U.S.C. § 4321.

environment”³ and created the Council on Environmental Quality (CEQ) in the Executive Office of the President to develop regulations implementing the Act’s requirements.⁴

That framework, the origin of the modern environmental review process, is found in NEPA’s § 102(2). It directs federal agencies to report, “to the fullest extent possible,” the environmental impact of a proposed action prior to its approval.⁵ Utilizing “a systematic, interdisciplinary approach,” agencies are required to report on the unavoidable environmental effects of a proposed action, as well as, alternatives to the proposed action.⁶ The agency’s report must also examine “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” and any “irreversible and irretrievable commitments of resources.”⁷ Agencies must work, in consultation with CEQ, to “insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations.”⁸

The Rise of Environmental Lawfare Under NEPA

NEPA’s drafters and legislative sponsors likely did not anticipate the law’s current impact and scope.⁹ NEPA was intended to raise awareness of how “major Federal actions” significantly affected “the quality of the human environment” at a time when few other environmental regulations were in place.¹⁰ The law sought to improve environmental planning by mandating coordination among federal agencies, information gathering, and the consideration of alternatives.¹¹ To that end, early environmental impact statements were brief, concise documents disclosing the foreseeable major impacts of a proposed action.¹²

However, almost immediately following its passage, litigants and judges seized on NEPA’s vague language to unleash a “flood of new litigation” – litigation seeking judicial assistance to expand the statute’s scope and distort the original intent of the law.¹³ Concerns about the costs and delays of prolonged environmental reviews were summarily dismissed, and “considerations of administrative difficulty, delay or economic cost [would] not suffice to strip [NEPA § 102] of its fundamental importance.”¹⁴

³ 42 U.S.C. § 4332.

⁴ 42 U.S.C. § 4342.

⁵ *Supra* note 3.

⁶ 42 U.S.C. § 4332(A), (C)(i)–(iii).

⁷ 42 U.S.C. § 4332(C)(iv)–(v).

⁸ 42 U.S.C. § 4332(B).

⁹ A. DAN TARLOCK, THE STORY OF CALVERT CLIFFS: A COURT CONSTRUES THE NATIONAL ENVIRONMENTAL POLICY ACT TO CREATE A POWERFUL CAUSE OF ACTION, IN ENVIRONMENTAL LAW STORIES 77, 86–88 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

¹⁰ Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 243-248 (1976) available at: <http://digitalrepository.unm.edu/nrj/vol16/iss2/2>.

¹¹ *Id.*

¹² *Id.* at 259.

¹³ *Calvert Cliffs’ Coordinating Committee, Inc. v. United States Atomic Energy Com.*, 449 F.2d 1109, 1111(D.C. Cir. 1971); see also Richard Epstein, *The Environmental Permit Menace*, DEFINING IDEAS, HOOVER INSTITUTION, Dec. 12, 2016, <https://www.hoover.org/research/environmental-permit-menace>.

¹⁴ *Calvert Cliffs’*, 449 F.2d at 1115.

The most common reasons for litigation over an agency's NEPA review process are that (1) an environmental impact statement (EIS) fails to acknowledge all reasonable alternatives, or (2) the agency's EIS determination was in error.¹⁵ Lawsuits challenging an agency's NEPA review process are rarely successful on their merits. The U.S. Supreme Court heard seventeen NEPA challenges between 1973 and 2010.¹⁶ In all seventeen cases, the Court ruled in favor of the federal agency conducting the environmental review.¹⁷ However, the government's success in defending its environmental reviews in court is a misleading and unhelpful metric.

Whereas litigants rarely succeed in challenging an environmental review on the merits, they have found success in procedural challenges in court.¹⁸ These procedural challenges take advantage of dysfunctional environmental review procedures which came about because of the great ambiguity in the original statute. Excessive NEPA litigation, in this case resulting from the ambiguity and dysfunction, is a form of environmental lawfare.¹⁹ The purpose of bringing such lawsuits is not to vindicate a legal right or secure damages. Lawfare is an attempt to use the courts to damage or delegitimize projects that litigants oppose, or to distract time and resources that would otherwise go to implementing the project, or to win a public relations victory.²⁰ NEPA's broad language, multiple levels of review for a single project and conflicting statutory requirements placed upon various federal agencies provide numerous points of leverage for a project's opponents.

The Impacts of Environmental Lawfare

As former President Barack Obama observed after passing the American Recovery and Reinvestment Act of 2009, "there's no such thing as shovel ready projects" in the United States.²¹ Our environmental review and permitting process takes significantly longer than in other western democracies with comparable environmental protections. Germany, Canada, and Australia are all able to approve most major infrastructure projects within two years.²² By contrast, a major infrastructure or energy project in the United States can undergo a decade of environmental review with no guarantee that the project will ever be approved.²³

¹⁵ COUNCIL ON ENVIRONMENTAL QUALITY, EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 18-20, 43-44 (January 1997) available at <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf>.

¹⁶ Richard James Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1510 (June 2012) available at http://www.law.harvard.edu/faculty/rlazarus/docs/articles/Lazarus_APeekBehindtheCurtain_2012.pdf.

¹⁷ *Id.*

¹⁸ *Id.* at 1525-1536.

¹⁹ Michael T. Johnson & Michael J. Johnson, *Undersea Lawfare: Can the U.S. Navy Fall Victim to This Asymmetric Threat?* 69 NAVAL WAR COLLEGE REVIEW 135 (2016) available at <http://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1122&context=nwc-review>.

²⁰ *Id.*

²¹ Peter Baker, *Education of a President*, NEW YORK TIMES MAGAZINE, Oct. 12, 2012, https://www.nytimes.com/2010/10/17/magazine/17obama-t.html?_r=3&ref=magazine&pagewanted=all%22.

²² PHILLIP K. HOWARD, TWO YEARS NOT TEN YEARS: REDESIGNING INFRASTRUCTURE APPROVALS, COMMON GOOD 5-7 (Sept. 2015) available at https://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf.

²³ James Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 UTAH L. REV. 119, 134-135 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2958448.

Projects related to energy and natural resource development are the most frequent targets of environmental lawfare. In those cases, opposition groups usually advertise their intent to use lawsuits challenging the adequacy of an agency's NEPA review as a continuation of their ideological opposition to the challenged activity.²⁴ Environmental lawfare also occurs against renewable energy projects and the infrastructure needed to make them economically viable.²⁵ Likewise, military training activities have faced decades of NEPA lawsuits.²⁶

The impact that environmental lawfare has on federal decision making is often compared to that of malpractice suits on doctors' medical decisions.²⁷ In an attempt to immunize NEPA reviews from lawsuits, agencies experience "analysis paralysis."²⁸ NEPA's mandate to "use all practical means" to consider "the fullest extent possible" the environmental impact of a proposed action, with little other guidance, present inherent conflicts for federal agencies. Instead of limiting review to material impacts, agencies attempt to evaluate every potential impact or hypothetical factual scenario no matter how minimal or unlikely.²⁹ In a 2014 report, the Government Accountability Office (GAO) found that:

One lawsuit can affect numerous federal decisions or actions in several states, having a far-reaching impact. In addition to CEQ regulations and an agency's own regulations . . . preparers of NEPA analyses and documentation may be mindful of previous judicial interpretation in an attempt to prepare a "litigation proof" EIS. CEQ has observed that such an effort may lead to an increase in the cost and time needed to complete NEPA analyses, but not necessarily to an improvement in the quality of the documents ultimately produced.³⁰

This phenomenon is reflected in the increasing cost, length, and complexity of environmental reviews. In their 2015 Annual NEPA Report, the National Association of Environmental Professionals (NAEP) found that the average EIS preparation time – from notice of intent to prepare to final EIS – was between 3.7 and 5 years.³¹ This was the longest average preparation time recorded by NAEP since reporting began in 1997 and exceeded the previous

²⁴ See Press Release, Center for Biological Diversity, *Lawsuit Challenges Fracking Plan for Ohio's Only National Forest* (May 2, 2017) available at https://www.biologicaldiversity.org/news/press_releases/2017/wayne-national-forest-05-02-2017.php/.

²⁵ Adam J. White, *Green Power, Red Lights*, THE WEEKLY STANDARD, Feb. 28, 2011, <https://www.weeklystandard.com/green-power-red-lights/article/550417>.

²⁶ Johnson, *supra* note 19 at 8-15.

²⁷ Howard, *supra* note 22 at 13-14.

²⁸ TODD A. MORGAN & JOHN BALDRIDGE, UNITED STATES DEPARTMENT OF AGRICULTURE, UNDERSTANDING COSTS AND OTHER IMPACTS OF LITIGATION OF FOREST SERVICE PROJECTS: A REGION ONE CASE STUDY 15 (May 5, 2015), available at <http://www.bber.umd.edu/pubs/forest/BBERLitigationRpt2015.pdf>.

²⁹ Howard, *supra* note 22 at 14-15, 22.

³⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 20-21 (Apr. 2014), available at <https://www.gao.gov/assets/670/662546.pdf>.

³¹ RON LAMB ET AL., NATIONAL ASSOC. OF ENVTL. PROFESSIONALS (NAEP), ANNUAL NEPA REPORT 2015 OF THE NATIONAL ENVIRONMENTAL POLICY ACT PRACTICE 13 (Karen Johnson ed., August 2016) available at https://ceq.doe.gov/docs/get-involved/NAEP_2015_NEPA_Annual_Report.pdf.

high by 132 days.³² The average EIS preparation time in 2015 was 675 days longer than it was in 2000.³³ A 2003 CEQ NEPA taskforce, the only source available on government wide environmental reviews costs, estimated that in 2003 the average EIS cost \$2.9 million and the average environmental assessment (EA) cost ranged from \$5,000 to \$200,000.³⁴

CEQ regulations state that a final EIS should be less than 150 pages.³⁵ For proposals of unusual scope or complexity, CEQ recommends that the final EIS still be less than 300 pages.³⁶ Environmental Assessments should “[b]riefly provide sufficient evidence and analysis” for determining whether an EIS is merited.³⁷ CEQ’s 1981 guidance recommended that EAs should be between 10-15 pages long.³⁸ In reality, EISs, and even some EAs, now range into the thousands of pages. The Navy’s 2017 draft EIS for its Hawaii-Southern California Training and Testing Range spans four volumes totaling over 3,000 pages.³⁹ The final EIS for the now-abandoned Cape Wind Energy Project was 800 pages, excluding its 14 appendixes.⁴⁰ The final EA for a project that raised the roadway of the Bayonne Bridge in New Jersey, which used the existing bridge right of way to avoid the costs, delays, and environmental impact of building a new bridge, took five years to complete and totaled 10,000 pages with appendixes.⁴¹

Litigation or the threat of litigation can be a means of extracting concessions from the project’s lead agency or private sector proponents.⁴² With many large infrastructure projects, proponents simply prefer to pre-emptively settle with groups opposed to the proposed action rather than face the delays and the uncertainties of litigation.⁴³ In 2007, the City of Los Angeles pledged \$100 to \$150 million towards environmental initiatives after a coalition of environmental groups threatened to file a lawsuit challenging a proposed port expansion.⁴⁴ This

³² *Id.*

³³ *Id.*

³⁴ COUNCIL ON ENVIRONMENTAL QUALITY, EXEC. OFFICE OF THE PRESIDENT, MODERNIZING NEPA IMPLEMENTATION 20 (Sept. 2003), available at <https://ceq.doe.gov/docs/ceq-publications/report/finalreport.pdf>.

³⁵ 40 CFR § 1502.7.

³⁶ *Id.*

³⁷ 40 CFR § 1508.9(a)(1).

³⁸ COUNCIL ON ENVIRONMENTAL QUALITY, EXEC. OFFICE OF THE PRESIDENT, FORTY MOST ASKED QUESTIONS CONCERNING CEQ’S NATIONAL ENVIRONMENTAL POLICY ACT REGULATIONS 27 (Mar. 1981), available at <https://www.energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>.

³⁹ UNITED STATES NAVY, DEPARTMENT OF DEFENSE, DRAFT ENVIRONMENTAL IMPACT STATEMENT/OVERSEAS ENVIRONMENTAL IMPACT STATEMENT FOR HAWAII-SOUTHERN CALIFORNIA TRAINING AND TESTING (Oct. 2017), available at <https://hstteis.com/Documents/2017-Hawaii-Southern-California-Training-and-Testing-Draft-EIS-OEIS/Draft-EIS-OEIS>.

⁴⁰ BUREAU OF OCEAN ENERGY MGMT., DEPARTMENT OF THE INTERIOR, CAPE WIND ENERGY PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT (Jan. 2009), available at <https://www.boem.gov/Cape-Wind-FEIS/>.

⁴¹ Howard, *supra* note 22 at 13-14.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Memorandum of Understanding Between the State of California, The Office of the Mayor of the City of Los Angeles, and the City of Los Angeles Harbor Department Creating a Partnership to Reduce Greenhouse Gases and Support the Port of Los Angeles Clean Air Action Plan (Dec. 2007) available at http://ag.ca.gov/globalwarming/pdf/Port_of_Los_Angeles_Agreement.pdf; see also Melissa Lin Perrella, *A Decade of Progress at Southern California Ports*, NRDC EXPERT BLOG (Oct. 1, 2012) available at: <https://www.nrdc.org/experts/melissa-lin-perrella/decade-progress-southern-california-ports>.

is in addition to a \$60 million settlement that the port reached with environmental groups in 2003 over a different port expansion project.⁴⁵

The American Society of Civil Engineers estimates that, from 2016 to 2025, the total cost of modernizing our infrastructure systems will be \$4.59 trillion.⁴⁶ The current environmental review process can be a significant driver of increasing uncertainty, complexity, and escalating costs for improving these systems.⁴⁷ The result provides opportunities for environmental lawfare which perpetuates the cycle by stifling innovation essential to growing our economy. This undesirable cycle continues to move us farther from NEPA's stated goal of fostering a "productive and enjoyable harmony between man and his environment."⁴⁸

NEPA's current environmental review process discourages companies from investing in new and more efficient infrastructure given uncertain risks and costs.⁴⁹ Infrastructure modernization will therefore become impossible without reforming and de-weaponizing NEPA so that projects permitted by law can undergo an effective and efficient environmental review.

⁴⁵ Deborah Schoch, *Port Project Suit Settled: Officials Earmark \$60 million to curb the environmental impact of the new terminal*, LOS ANGELES TIMES (Mar. 6, 2003), <http://articles.latimes.com/2003/mar/06/local/me-port6>.

⁴⁶ AMERICAN SOCIETY OF CIVIL ENGINEERS, 2017 INFRASTRUCTURE REPORT CARD: A COMPREHENSIVE ASSESSMENT OF AMERICA'S INFRASTRUCTURE 8, available at <https://www.infrastructurereportcard.org/wp-content/uploads/2017/10/Full-2017-Report-Card-FINAL.pdf>.

⁴⁷ Howard, *supra* note 22 at 13-14.

⁴⁸ *Supra*, note 2.

⁴⁹ James Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 79 OHIO STATE L. J. ___ (forthcoming 2018) (on filed with author).