NEPA'S TRAJECTORY: OUR WANING ENVIRONMENTAL CHARTER FROM NIXON TO TRUMP?

by Sam Kalen

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SUMMARY

Heralded in 1970 as the nation's environmental Magna Carta, the National Environmental Policy Act's (NEPA's) luster seems faded and its future uncertain. While Trump Administration initiatives threaten to diminish further and perhaps even dismantle aspects of NEPA, this Article chronicles how the current assault merely continues NEPA's unfortunate trajectory, examining how the courts, the U.S. Congress, and the executive branch each have whittled away at the Act. NEPA consequently sits at a critical juncture: it could soon fade away or it could hew back toward its original promise. The Article urges the latter path, and proposes two atypical and one oft-recommended changes. First, the Council on Environmental Quality (CEQ) ought to be charged with authority to oversee the development of environmental documents. Next, CEQ ought to require that agencies engage in balancing environmental harms against the benefits of a proposed action. Finally, the NEPA process should better incorporate the post-decision ability to monitor and adapt as new information and effects are understood.

The aspirational promise of environmentally sound decisions embodied by the National Environmental Policy Act (NEPA)[1] has diminished over NEPA's first 50 years. Once heralded in 1970 as the nation's Magna Carta of environmental laws, now upon its 50th anniversary, its luster seems faded, and its future susceptible to the electoral process as well as policymakers' willingness to elevate higher priorities. Today, the obligation of governments to consider environmental threats before engaging in potentially harmful actions is approaching an accepted international norm, with almost 200 jurisdictions incorporating some aspect of environmental considerations into their decisionmaking processes.[2] Here, in the United States, however, our Magna Carta is walking away from the promise announced at its Runnymede. Thirty years ago, Prof. William H. Rodgers Jr. aptly posited that he could envision two futures, one where the statute marched toward having a substantive consequence, and the other where it suffered a slow death.[3] The path since then has been fairly apparent, as we presently find ourselves at the proverbial fork in the road.

The courts, the U.S. Congress, and the executive branch have incrementally whittled away at the Act's dominance. Almost invariably, when economic growth becomes stymied, whether during the 2001 eight-month recession or the 18-month recession in 2008-2009, the federal bureaucracy and environmental approvals—and correspondingly NEPA's application—surface as natural scapegoats, even if market forces offer a better explanation.[4] To be sure,

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1. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
2. *See* Tseming Yang, *The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law*, 70 Hastings L.J. 525 (2019).
3. William H. Rodgers Jr., *Keynote: NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 Envtl. L. 485, 503 (1990). In 2004, former U.S. Department of Justice (DOJ) Assistant Attorney General Lois Schiffer discussed aspects of NEPA's evolution and "possible midlife crisis." Lois J. Schiffer, *The National Environmental Policy Act Today, With An Emphasis on Its Application Across U.S. Borders*, 14 Duke Envtl. L. & Pol'y F. 325, 333 (2004).
4. *See, e.g.*, Hearing Memorandum from Majority Committee Staff to House Subcommittee on Energy and Mineral Resources Members (June 27, 2017), re: Oversight Hearing Entitled Examining Access to Oil and Gas Development on Federal Lands. This memorandum, ignoring economic forces, suggests that oil and gas development on federal lands decreased during the Barack Obama Administration because of the Administration's policies affecting development (e.g., authorizations to drill, or APDs), including its approach toward NEPA: that the "process can be very expensive and time consuming," that the statute has "become a magnet for litigation, with hundreds of NEPA-related lawsuits against the federal government filed or opened each year" (a figure not really supported by the memorandum's citation), and that "the threat of litigation can force all parties involved in preparing NEPA evaluations to go beyond basic NEPA requirements

even NEPA's legislative proponent, Sen. Henry Jackson (D-Wash.), supported modifying NEPA when the perceived urgency of increasing oil production counseled ensuring approval for the Trans-Alaska Pipeline.[5] Similarly, the present exigency of arresting greenhouse gas (GHG) emissions leaves proponents of fast renewable energy deployment wishing for fewer, or at least faster, NEPA processes.[6]

That during the Donald Trump Administration, NEPA would surface as a scapegoat for impeding economic growth was predictable. After all, the first years of the Administration have witnessed almost a tsunami of anti-environmental regulatory initiatives, such as attacking climate science and prior policies with a vengeance[7]; repealing and replacing the Waters of the United States Rule[8]; repealing and replacing the Clean Power Plan[9]; backing away from Clean Air Act (CAA) enforcement efforts[10]; changing the fracking and methane regulations on public lands[11]; exploring abandoning the Barack Obama Administration's efforts to strengthen oil and gas emission standards[12]; affecting the use of science in agency rulemakings[13]; minimizing mitigation requirements[14]; restricting the use of the U.S. Environmental Protection Agency's (EPA's) use of its veto authority for activities in the nation's wetlands[15]; affording states wider latitude in permitting of activities in wetlands[16]; and even allowing oil and gas activity in the once-sacred "1002" lands within the Alaska National Wildlife Area.[17] Given the almost relentless attack on NEPA over the past several decades, it would have been unthinkable for the present Administration to ignore the nation's environmental Magna Carta. And it has not.

From the Oval Office down to federal agencies, NEPA today serves as a lightning rod. An array of different agencies and departments within the Trump Administration have proposed regulatory changes designed to undermine the force of our Magna Carta.[18] This Article examines those changes, but with an eye toward how the statute has unfolded during its first half-century. Unquestionably, the changes being proposed are dramatic, debilitating, and far beyond what any prior administration has even debated. Unfortunately, though, they arguably reflect the culmination of years of assault on our environmental charter.

Part I of the Article therefore begins by discussing the potential hope for Congress' vision for a national environmental charter, and then how the judiciary and Congress quickly blurred that vision. It also portrays the complicity

for fear their initial review will be found insufficient when challenged in court." *Id*. Of course, little information exists on the exact costs associated with NEPA compliance. *See* U.S. Government Accountability Office (GAO), GAO-14-369, National Environmental Policy Act: Little Information Exists on NEPA Analyses (2014). Also, the U.S. Department of the Interior's (DOI's) 2016 report indicates that leasing and drilling increased between 2014 and 2015, and since 2008, it "went up more than 108 percent." News Release, Bureau of Land Management (BLM), BLM Releases Statistics on Oil and Gas Activity on Federal, Indian Lands (Apr. 11, 2016). The BLM oil and gas statistics are available at https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics (last visited Mar. 2, 2020).

5. *See infra* note 77 and accompanying text.
6. The Obama DOI developed programmatic environmental documents designed to streamline the review and approval process for wind and solar projects. A natural tension exists when the desire to deploy renewable energy is affected by the NEPA process. *See* Kelsey Brugger, *NEPA Rewrite Reveals Tension Between Greens, Renewables*, E&E News, Jan. 13, 2020.
7. The Administration has revisited the Obama Administration's automobile standards, backed away from the Paris Agreement, and attacked climate science along with the use of a social cost of carbon. The list is endless, including, for instance, "scrapp[ing]" "an Obama-era policy that called on managers to focus on climate change when making decisions that affect national parks." Rob Hotakainen, *Emails: How Zinke Scrapped Obama's Climate Order*, E&E News, Aug. 6, 2018 (discussing rescission of 2016 Director's Order No. 100). The Administration, moreover, has sought to avoid (unsuccessfully) disclosing documents supporting its position on climate change. *See* Public Emps. for Envtl. Responsibility v. U.S. Envtl. Prot. Agency, 314 F. Supp. 3d 68, 48 ELR 20085 (D.D.C. 2018).
8. Exec. Order No. 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12497 (Mar. 3, 2017); 82 Fed. Reg. 34899 (July 27, 2017); Supplemental Notice of Proposed Rulemaking: Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32227 (July 12, 2018); Proposed Rule, 84 Fed. Reg. 4154 (Feb. 14, 2019); Navigable Waters Protection Rule, Jan. 23, 2020, https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf.
9. Lisa Friedman & Brad Plumer, *E.P.A. Drafts Rule on Coal Plants to Replace Clean Power Plan*, N.Y. Times, July 5, 2018.
10. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618. *See* Sean Reilly, *Pruitt Backs Off Enforcement of Power Plant Program*, E&E News, Dec. 8, 2017. In response to President Trump's Executive Order, *see supra* note 107 and accompanying text, the U.S. Environmental Protection Agency (EPA) identified the New Source Review program as unduly hindering economic development. U.S. EPA, Final Report on Review of Agency Actions That Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783 (2017), *available at* https://www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf.
11. For the waste prevention rule, see BLM, Proposed Rule: Rescission or Revision of 2016 Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 83 Fed. Reg. 7924 (Feb. 22, 2018). For the hydraulic fracturing rule, see BLM, Proposed Rule: Recession of Hydraulic Fracturing on Federal and Indian Lands, 82 Fed. Reg. 34464 (July 25, 2017); BLM, Final Rule: Rescission of 2015 Hydraulic Fracturing on Federal and Indian Lands, 82 Fed. Reg. 61924 (Dec. 29, 2017), *challenged in* Sierra Club v. Zinke, No. 18-cv-00524 (N.D. Cal. filed Jan. 1, 2018) (pending).
12. *See* Sean Reilly, *EPA Taking Comment on Plan to Scrap Oil and Gas Standards*, E&E News, Mar. 8, 2018.
13. U.S. EPA, Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18768 (Apr. 30, 2018). Sixty-eight law professors called EPA's efforts a "significant overstep of EPA's authority and a troubling effort to limit the use of valid, relevant, and rigorously reviewed science in EPA's future decision-making processes." Final EPA-HQ-CA-1028-0259 Comment Letter (Aug. 14, 2018). *See* Sean Reilly, *Coalition Decries Science Plan as Comment Period Nears End*, E&E News, Aug. 15, 2018.
14. Michael Doyle, *Boost for Industry as BLM Shuns Environmental Offsets*, E&E News, July 25, 2018; Michael Doyle, *BLM Ends Compensatory Mitigation*, E&E News, July 24, 2018; U.S. Fish and Wildlife Service, Withdrawal of U.S. Fish and Wildlife Service Mitigation Policy, 83 Fed. Reg. 36472 (July 30, 2018); Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Mitigation Sequence for Wetlands in Alaska Under Section 404 of the Clean Water Act (June 15, 2018). The policy regarding offsets already surfaced in the approval of the Donlin Gold mine in Alaska. *See* Ariel Wittenberg, *Army Corps Shrugs Off EPA, Approves Alaska Wetland Damage*, E&E News, Aug. 16, 2018.
15. *See* Memorandum from E. Scott Pruitt, Administrator, U.S. EPA, to General Counsel, Assistant Administrator, Office of Water, and Regional Administrators, U.S. EPA (June 26, 2018), re: Updating the EPA's Regulation Implementing Clean Water Act Section 404(c).
16. *See* Cecelia Smith-Schoenwalder, *Trump Admin Moves to Let States Handle Permitting*, E&E News, Aug. 7, 2018; *see also* Memorandum from R.D. James, Assistant Secretary, U.S. Army, to Commanding General, U.S. Army Corps of Engineers (July 30, 2018), re: Clean Water Act Section 404(g)—Non-Assumable Waters.
17. *See* Timothy Cama, *Congress Votes to Open Alaska Refuge to Oil Drilling*, Hill, Dec. 17, 2017; Henry Fountain & Lisa Friedman, *Drilling in Arctic Refuge Gets a Green Light. What's Next?*, N.Y. Times, Dec. 20, 2017. *See also* Margaret Kriz Hobson, *Interior's Balash Outlines Plans for ANWR, NPRA-A Development*, E&E News, Aug. 13, 2018.
18. *See infra* notes 169-88 and accompanying text.

of the executive branch, with successive administrations joining the NEPA "streamlining" bandwagon, exploring avenues for reducing the time to complete or even avoid NEPA compliance for types of projects. This part discusses how the Trump Administration is waging an extensive battle against the Act, culminating with the Council on Environmental Quality's (CEQ's) proposal to alter dramatically NEPA's implementation.[19]

The judiciary likely will curb excessive abuses, but Part II suggests the modern judiciary incrementally has whittled away at NEPA as well, by tolerating circumscribed alternatives analysis as a consequence of narrow purpose and need statements, by allowing agencies to defer considering environmental effects until a later stage, by refusing to demand that agencies update environmental documents even when the agency has the discretion to do so, and finally by engaging in a case-by-case equitable consideration of the appropriate remedy in circumstances when an agency violates NEPA.

After years of having the judiciary chisel away at our environmental charter, joined by Congress and the executive branch, recently exemplified by an array of Trump Administration initiatives, we find ourselves at a critical juncture in the Act's evolution. In Part III, I offer some possible paths forward, urging that we begin a conversation about having CEQ rather than federal agencies oversee the preparation of environmental documents. I further suggest that CEQ should require that federal agencies engage in a balancing of environmental harms against the potential benefits of a proposed action. Such a change would hew closer to Congress' original vision. And finally, I add to the chorus of commentators who believe the NEPA process should be infused with enhanced tools for post-decision monitoring and adaptation. Absent these—or at least similar—changes, I fear we are at the cusp of losing our environmental Magna Carta and the path forward will lead us too far away from our Runnymede.

I. Announcing a National Policy

In the summer of 1967, Senator Jackson delivered two speeches announcing his intention to legislate on a national environmental policy.[20] Roughly 2.5 years later, Congress passed NEPA and President Richard Nixon signed the bill into law on January 1, 1970.[21] This occurred during a period of bipartisanship, when regional interests often dictated legislative outcomes rather than party affiliation.[22] Both the Republican White House and the Democratic Senator Jackson agreed on the necessity of having a national environmental policy[23]—one that explicitly provided that agencies would have as their "continuing responsibility . . . [the obligation] to use all practical means, . . . to improve and coordinate Federal plans, functions, programs, and resources" in order to promote environmental protection.[24]

Agencies were instructed to not only "review their present statutory authority" and "policies" to assess whether there are any deficiencies or inconsistencies" that may impede acting in accordance with the "*intent*, *purposes*, and *procedures*" of the Act,[25] but also to "interpret[ ] and administer[ ]" the Act, "to the fullest extent possible," "in accordance with" the Act's "policies."[26] Senator Jackson observed:

> A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. It serves a constitutional function in that people may refer to it for guidance in making decisions where environmental values are found to be in conflict with other values.[27]

This policy proposal animated Senator Jackson and his staff and captured a considerable amount of congressional attention.[28] Conversely, few policymakers focused on what today is described as the "action-forcing" mechanism of the Act, §102(c), where Congress required the preparation of a "detailed statement," now referred to as an environmental impact statement (EIS), for any "proposals for legislation" or "other major Federal actions significantly affecting the quality of the human environment."[29]

19. *See infra* notes 151-88 and accompanying text.
20. 113 Cong. Rec. S36853 (daily ed. Dec. 15, 1967) (speech delivered in Texas, Aug. 28, 1967); 113 Cong. Rec. S36854 (daily ed. Dec. 15, 1967) (speech delivered in Oregon, Sept. 3, 1967). The following year, he published an article on the need for an environmental policy. Henry M. Jackson, *Environmental Policy and Congress*, 28 Pub. Admin. Rev. 303 (1968) (this article was prepared with the assistance of Bill Van Ness and Lynton Caldwell).
21. For a history and a collection of sources discussing the history, see Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 Duke Envtl. L. & Pol'y F. 113 (2010).
22. James M. Turner & Andrew C. Isenberg, The Republican Reversal: Conservatives and the Environment From Nixon to Trump (2018).
23. The purposes of this Act are:
    > To declare a national policy which will 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; and to establish a Council on Environmental Quality.

    42 U.S.C. §4321. Congress also "recognize[d] that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." *Id.* §4321(c).
24. Specifically, to
    > (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.

    Id. §4331(b).
25. *Id.* (emphasis added).
26. *Id.* §§4321, 4331.
27. 115 Cong. Rec. S14860 (daily ed. June 5, 1969).
28. *See* Kalen, *Ecology Comes of Age*, *supra* note 21.
29. Section 102(c) requires that all federal agencies must prepare a "detailed statement" on "the environmental impact of the proposed action; (ii) any adverse environmental effects which cannot be avoided . . .;

Finally, Title II authorized the establishment, in the Executive Office, of the CEQ.[30] CEQ's first chair, Russell Train, testified in 1970 that NEPA "has given hope that our mechanisms of government can respond to the challenge of the problems of the environment."[31] And CEQ would, according to President Nixon, serve as "the keeper of our environmental conscience."[32]

A. *Fifty Years of Struggles*

As the 1970s unfolded, NEPA presented a formidable challenge for both federal agencies and the judiciary. Many agencies, such as the Atomic Energy Commission, were reluctant participants, and it took several years before the Act began to take shape—as some early projects, such as the Tennessee Valley Authority's (TVA's) Tellico Dam project, began to experience the Act in practice.[33] How or whether, for instance, would agencies effectuate Congress' announced policy? Would the judiciary demand that they do so?

When the U.S. Court of Appeals for the Sixth Circuit reviewed TVA's compliance with the Act, it observed how "NEPA represents the first comprehensive response to the environmental concerns that surfaced so dramatically during the 1960s," and the court added how it "was designed 'to assure that all Federal agencies plan and work toward meeting the challenge of a better environment.'"[34] NEPA, the court concluded, had substantive policies that agencies were charged with implementing, through various measures including the obligation to prepare a detailed statement. "[B]y establishing specific procedures to be followed," the court reasoned, it would be "possible for courts to determine objectively whether federal officials have carried out the mandate of Congress to accord a high priority to environmental factors."[35] Early on, other lower federal courts in Washington, D.C., too suggested that NEPA imposed some substantive duties and, consequently, a court could review an agency's failure to engage meaningfully with possible adverse effects from a proposed action.[36]

Perhaps, neither the agencies nor the judiciary were up to the challenge, however. Within a decade, the judiciary blunted Congress' substantive policies.[37] Elsewhere, I explain how Congress likely intended its declaration of policy would have some substantive meaning and yet, because it was drafted before many of our modern principles of judicial review had crystallized, the language failed to address the judiciary's role in policing agency compliance.[38] The U.S. Supreme Court, consequently, concluded the Act only imposes the action-forcing obligation—albeit with a superficial analysis at best.[39] And so NEPA now operates as only a "procedural" statute.

Next, the Court narrowed NEPA's application by facilitating judicially created exemptions. It began when the Court first announced that programmatic challenges to agency policies would not trigger a NEPA claim unless the agency was proposing some identified *action*. When, therefore, plaintiffs sought to force the U.S. Department of the Interior (DOI) to review the cumulative environmental effects from developing federal coal resources in the Northern Great Plains region, the Court opined how an EIS would only be required if there is "a report or recommendation on a proposal for a major federal action," and that the record in the case lacked evidence of any such report or recommendation.[40] That holding now arguably allows agencies to act (or avoid acting) strategically to circumvent the need to update old environmental documents.[41] If, therefore, an agency does not have a continuing obligation or the authority to act on an activity covered by a complete and outdated EIS, courts may struggle with deciding how to force the agency to update its analysis.[42]

(iii) alternatives . . .; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources . . . ." The action-forcing language arguably mirrored earlier technology assessments, as well as, according to one of Senator Jackson's staff members, the process for water resource projects under the 1965 Water Resources Act. Unsigned Notes From Senate Staff (on file with author). Although difficult to know whether true, purportedly when Caldwell presented the idea of an action-forcing mechanism, Senator Jackson's counsel Van Ness told me that it was a pre-arranged proposal that the staff and Caldwell had worked out and they thought it would appear better to have it presented by an academic. Personal Conversation with Bill Van Ness (Dec. 18, 2007). *See also* J. Gus Speth, *The Federal Role in Technology Assessment and Control*, *in* Federal Environmental Law 421, 432-34 (Erica L. Dolgin & Thomas G.P. Guibert eds., West Publishing Co. 1974).

30. 42 U.S.C. §4342.
31. National Land Use Policy, Hearings Bef. Comm. on Interior & Insular Affairs, on S. 3354, U.S. Sen., 91st Cong., 2d Sess., Apr. 28, 1970, 88 (testimony of Russell Train).
32. *See* Richard Nixon, Special Message to the Congress on Environmental Quality (Feb. 10, 1970), https://www.epaalumni.org/userdata/pdf/354_First_Presidential_Messag.pdf.
33. *See* Environmental Def. Fund v. Tennessee Valley Auth., 468 F.2d 1164, 2 ELR 20726 (6th Cir. 1972) (injunction for NEPA violation).
34. *Id*. at 1173.
35. *Id*. at 1175.
36. *See*, *e.g.*, Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971); Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 346 F. Supp. 189, 197-98 (D.D.C. 1972) (three-judge court), *rev'd*, 412 U.S. 699 (1973).
37. For two excellent treatments of the Court's forays into NEPA, see Richard 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 (2012), and Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA's Zero for Seventeen Record at the High Court*, 2012 Ill. L. Rev. 231 (2012). In an earlier article, DOJ lawyer David Shilton effectively defended the Court's treatment of NEPA. *See* David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 Envtl. L. 551 (1990).
38. Kalen, *Ecology Comes of Age*, *supra* note 21.
39. For my perspective on the Court's approach toward NEPA and the Administrative Procedure Act (APA) and how it reached its conclusions about NEPA's scope, see Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 Wm. & Mary Envtl. L. & Pol'y Rev. 483 (2009).
40. *E.g.*, Kleppe v. Sierra Club, 427 U.S. 390, 399-400, 6 ELR 20532 (1976); *see also* Kalen, *The Devolution of NEPA*, *supra* note 39, at 524-31.
41. *E.g.*, Western Org. of Res. Councils v. Zinke, 892 F.3d 1234, 48 ELR 20098 (D.C. Cir. 2018). *See generally* Ellen M. Gilmer, *Court Won't Force Interior to Review Coal Leasing Impacts*, E&E News, June 19, 2018; Amanda Reilly, *Court Rejects Bid to Speed Post-Deepwater NEPA Review*, E&E News, May 5, 2017.
42. *E.g.*, Center for Biological Diversity v. Salazar, 706 F.3d 1085, 1095, 43 ELR 20025 (9th Cir. 2013); Cold Mountain v. Garber, 375 F.3d 884, 34 ELR 20055 (9th Cir. 2004). If an agency retains discretionary authority over an activity covered by an outdated EIS, a court may order the agency to supplement the EIS, as a lower court recently did in connection with changes in the Keystone XL pipeline's route. Indigenous Envtl. Network v.

The Court also exempted agencies from NEPA compliance when doing so would be impossible given other congressional directives.[43] That has now been extended to alleviating the necessity for NEPA compliance when an agency is undertaking a non-discretionary action.[44] Even if an action is non-discretionary, though, NEPA compliance at least serves an information function, possibly allowing parties to press Congress for changes to the agency's lack of authority. Of course, agencies often possess some flexible "authority," and only rarely is there *no* discretion over at least part of an agency's action.

Relatedly, the Court arguably circumscribed NEPA's applicability (but not scope) to only those actions having an impact on the physical environment. The case involved the Nuclear Regulatory Commission's (NRC's) decision to allow restarting Three Mile Island (TMI) Unit 1 (TMI-1) at the nuclear facility following the disaster at TMI Unit 2.[45] The Commission and Licensing Board solicited input on whether to allow evidence of psychological stress during its proceeding to consider allowing the restart.[46] The staff and board accepted it could consider the issue, but took no position on the need for an EIS.[47]

NRC originally split 2-2 on whether to allow evidence of psychological stress during its consideration of allowing the restart to TMI-1.[48] Two of the commissioners believed that NEPA justified such an inquiry, and one observed that, "under NEPA, an agency is also obliged to minimize to the extent reasonably practicable the environmental aftermath of its actions."[49] The tie, however, effectively served as a rejection of the board's recommendation to explore the issue.[50] The Commission staff prepared an "environmental impact appraisal," recommending against preparing an EIS. When an additional member joined the Commission, it affirmed excluding the evidence.[51] A majority of the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit disagreed, and it concluded that the issue fell within NEPA and directed NRC to consider whether a new or supplemental EIS (SEIS) was necessary.[52]

At the Supreme Court, all parties conceded that human health, including psychological health, could be "cognizable under NEPA."[53] People Against Nuclear Energy (PANE) argued the restart would create anxiety in nearby residents, and that anxiety would then affect the human surroundings—such as by prompting relocation (a physical environmental impact).[54] The United States' brief countered with uninformative snippets from the legislative history purportedly supporting a narrow focus on the physical environment, and rejected applying the Act broadly to the "welfare of mankind."[55] Indeed, the United States wrote how NEPA requires both significant environmental effects *and* an environmental impact:

> Thus health effects, like any other class of effects of federal action that may be cognizable under NEPA, are so only to the extent they are *proximately traceable* to the impact of the federal action upon the natural or physical environment, or flow from a physically measurable or discernable variable.[56]

On reply, the government went further and argued, perhaps a bit too opaquely, that "it falsifies the statute to read it as requiring that, whenever the federal government proposes 'environmentally significant action,' the EIS must address all the wide range of important social and economic effects—or even all the important health effects."[57] To be sure, the brief later sought to clarify it was distinguishing between the "trigger" for NEPA application and the "scope" of a NEPA document, but its confusing language likely led the Court to conclude, perhaps too broadly (and agree with the government's causation requirement), that there must be a "reasonably close causal connection" between the effect and the change in the physical environment.

The Court picked up on the government's argument. It emphasized NEPA's means to achieve ends, rather than the ends (or the policy) itself.[58] And those means were assessing the consequence of impacts to the physical environment, and those consequences would include effects that are "proximately related to the change in the physical environ-

U.S. Dep't of State, No. 17-cv-00031, 48 ELR 20144 (D. Mont. Aug. 15, 2018). *See generally* Ellen M. Gilmer, *Court Orders Trump Admin to Study New Route's Impacts*, E&E News, Aug. 16, 2018. *See infra* note 225 and accompanying text (noting recent cases and CEQ clarifying proposal).

43. *E.g.*, Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 6 ELR 20528 (1976). *See generally* Kyle Robisch, *The NEPA Implied Exemption Doctrine: How a Novel and Creeping Common Law Exemption Threatens to Undermine the National Environmental Policy Act*, 16 Vt. J. Envtl. L. 173 (2014). Kyle Robisch notes how the *Flint Ridge* Court resolved the case based on an irreconcilable conflict between NEPA and the agency's governing statutory language and left open whether NEPA would apply to non-discretionary actions when NEPA's relevance might be somewhat diminished. *Id.* at 184-86. Subsequent lower courts, however, have (consistent with holdings under the Endangered Species Act) extended *Flint Ridge* to such circumstances. *Id.* at 185-86. But occasionally, Congress oddly creates a *Flint Ridge* problem when it mandates NEPA compliance within a year, if the agency believes that NEPA compliance is required. *E.g.*, 7 U.S.C. §2814(b) (management of undesirable plants on federal lands).
44. In *Department of Transportation v. Public Citizen*, 541 U.S. 752, 769, 34 ELR 20033 (2004), the Court held that agencies need not prepare an EIS for activities beyond their control. *See also* Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1151, 32 ELR 20304 (D.C. Cir. 2001).
45. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 13 ELR 20515 (1983).
46. People Against Nuclear Energy v. U.S. Nuclear Regulatory Comm'n, 678 F.2d 222, 224, 12 ELR 20546 (D.C. Cir. 1982).
47. *Id.*
48. In re Metropolitan Edison Co., 12 N.R.C. 607, 1980 WL 19292 (1980).
49. *Id.* A majority of commissioners believed the issue was a cognizable issue, however. *Id.* ("Since a majority agree that we may consider psychological stress.").
50. *People Against Nuclear Energy*, 678 F.2d at 224.
51. In re Metropolitan Edison Co., 14 N.R.C. 593, 1981 WL 28490 (1981).
52. *People Against Nuclear Energy*, 678 F.2d 222.
53. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 770, 13 ELR 20515 (1983).
54. Brief for PANE at 51, Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 13 ELR 20515 (1983).
55. Brief for the United States, Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 13 ELR 20515 (1983).
56. *Id.* (emphasis added). The United States' brief only captures aspects of the legislative history and concludes that Congress' focus on ecology limited the Act to the natural environment. *Id.* My review of the personal notes from the congressional staff includes discussion of psychology, which would suggest a broader scope than what the government argued.
57. Reply Brief for the United States, Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 13 ELR 20515 (1983).
58. *Metropolitan Edison*, 460 U.S. at 773.

ment," but not those that are not reasonably close to being caused by the agency's proposed action.[59] The Court narrowed the effects analysis to harms not "too remote from the [changes in] the physical environment."[60] It did this based on its "understanding of the congressional concern,"[61] but with little actual appreciation or inquiry into that concern. It expressed trepidation over how much time and resources examining those effects would take, observing that NEPA's "inquiries must remain manageable."[62] Here, because PANE argued for consideration of the psychological effects from a "risk" of a nuclear accident, that "causal chain" was "beyond the reach of NEPA."[63] This unfortunate case is now being erroneously elevated in importance by CEQ's proposal to narrow the scope of NEPA's effects analysis.[64]

NEPA compliance, moreover, might be avoided in instances where the agency's action purportedly maintains the status quo or where the agency has engaged in a *functional equivalent* type of analysis. The judicially created status quo category for avoiding NEPA compliance is premised upon an assumption that "[a]n action that does not change the status quo cannot cause any change in the environment and therefore cannot cause effects that require analysis in the [environmental assessment] EA."[65] The difficulty, however, is that the concept is analytically flawed and inconsistently understood.

Take, for instance, a growing community that only has so much available land. Out of the land available for development, preserving land X for conserving mule deer might push development in the community toward adjacent land Y, and yet that adjacent land Y might contain a greater and more sensitive array of wildlife and ecological resources. It is hard to categorically conclude, therefore, that conserving land X cannot possibly have any consequences—unless the inquiry only examines land X and not the surrounding areas, and NEPA's effects analysis is not so cabined.[66] To be sure, it is quite likely that the effects of conserving land X might not warrant preparing an EIS, but rather necessitate only an EA, but then it would not be accurate to describe this as an exception to NEPA.[67] It is merely, if applicable, a justification in an EA for avoiding an EIS.[68]

EPA, although delegated responsibility for examining EISs,[69] seemingly fought its application to the Agency's actions, claiming the statute is too vague or inflexible[70] and promoting the idea of functional equivalency. The idea of functional equivalency is now entrenched.[71] And EPA's website boastfully observes:

59. *Id*. at 773-74.
60. *Id*. at 774.
61. *Id*. at 776.
62. *Id*. at 774. Footnote 7 suggests that courts should look to the "legislative intent in order to draw a manageable line." *Id*.
63. *Id*. at 775.
64. *See infra* notes 167-82 and accompanying text.
65. Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of the Interior, 996 F. Supp. 2d 887, 919 (E.D. Cal. 2014), *aff'd in part, rev'd in part*, 655 Fed. Appx. 595, 46 ELR 20064 (9th Cir. 2016). *See also* Tri-Valley CAREs v. U.S. Dep't of Energy, 671 F.3d 1113, 1125, 42 ELR 20043 (9th Cir. 2012) ("If the proposed action does not significantly alter the *status quo*, it does not have a significant impact under NEPA."); Fund for Animals, Inc. v. Thomas, 127 F.3d 80, 84, 28 ELR 20196 (D.C. Cir. 1997) ("Because the new national policy maintained the substantive *status quo*, it cannot be characterized as a 'major federal action' under NEPA."); Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 234-35, 21 ELR 20347 (9th Cir. 1990) (actions preserving status quo do not require an EIS); Sierra Club v. Andrus, 581 F.2d 895, 902, 8 ELR 20490 (D.C. Cir. 1978) ("In general, however, if there is no proposal to change the *status quo*, there is in our view no . . . 'other major Federal action' to trigger . . . NEPA . . ."), *rev'd*, 442 U.S. 347 (1979).
66. The issue, instead, is whether that consequence is speculative, and, if not, then it ought to be analyzed.
67. *E.g.*, *Fund for Animals*, 127 F.3d at 83-84; Sierra Club v. Hassell, 636 F.2d 1095, 1099, 11 ELR 20227 (5th Cir. 1981); Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1003, 9 ELR 20575 (D.C. Cir. 1979). And yet, some courts, when rejecting the argument, nevertheless discuss the doctrine as an exemption from NEPA compliance. *See* Humane Soc'y of the United States v. Johannes, 520 F. Supp. 2d 8, 28 (D.D.C. 2007) ("accordingly is not exempted from NEPA review on this basis").
68. In *Sabine River Authority v. U.S. Department of the Interior*, 745 F. Supp. 388, 21 ELR 20239 (E.D. Tex. 1990), for instance, the court considered whether the U.S. Fish and Wildlife Service's acquisition of a conservation easement warranted preparing an EIS. The agency prepared an EA, and the court found that was sufficient. In doing so, it observed "this case does not alter the environmental status quo; it does not cause any change in the physical environment," and quoted from an earlier case that "leav[ing] nature alone" does not require preparing an EIS. *Id*. at 394. While such a result is doubtless justified, it is unnecessary and confusing to suggest, as the court does when it begins its analysis, that NEPA compliance is only necessary when, under *Metropolitan Edison*, there is a "reasonably close causal relationship" between a physical effect on the environment and the agency's action. *Id*.
69. 42 U.S.C. §7609. *See generally* William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 Ind. L.J. 205, 208 (1989) (discussing history, including the history surrounding §309 of the CAA—affording EPA authority to review EISs); Robert L. Fischman, *The EPA's NEPA Duties and Ecosystem Services*, 20 Stan. Envtl. L.J. 497, 508 (2001) (same); *see also* Martin Healy, *The Environmental Protection Agency's Duty to Oversee NEPA's Implementation: Section 309 of the Clean Air Act*, 3 ELR 50071 (Aug. 1973); Office of Inspector General, U.S. EPA, The EPA's Comments Improve the Environmental Impact Statement Process but Verification of Agreed-Upon Actions Is Needed (2013). The Trump Administration decided to lessen EPA's powerful influence over draft EISs when assigning a low grade—seemingly forcing the Agency to do a better job, when the Administration abandoned EPA's letter grades for draft EISs. Center for Biological Diversity, Environmental Grades Alert Public to Dangerous Projects, https://www.biologicaldiversity.org/campaigns/open_government/pdfs/fact-sheet-EPA-letter-grade.pdf; Memorandum from Brittany Bolen, Associate Administrator, U.S. EPA, to Regional Administrators (Oct. 22, 2018), re: Changes to EPA's Environmental Review Rating Process. *See generally* Nick Sobczyk & Maxine Joselow, *Trump Admin Jettisons Letter Grades for NEPA Reviews*, E&E News, Oct. 25, 2018. EPA, albeit purportedly without intending any substantive change, also placed its NEPA review officer within the associate administrator for the Office of Policy—undoubtedly with the hope of infecting the process with policy-level oversight. U.S. EPA, Amendment of the NEPA Official Under Procedures for Implementing the National Environmental Policy Act, 83 Fed. Reg. 48544 (Sept. 26, 2018).
70. Barry S. Neuman, *Implementation of the Clean Air Act: Should NEPA Apply to the Environmental Protection Agency*, 3 Ecology L.Q. 597 (1973) (examining early case law).
71. *E.g.*, Fund for Animals v. Hall, 448 F. Supp. 2d 127, 134 (D.D.C. 2006); *see also* Western Neb. Res. Council v. Environmental Prot. Agency, 943 F.2d 867, 22 ELR 20062 (8th Cir. 1991); Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n, 869 F.2d 719, 729 n.7, 19 ELR 20907 (3d Cir. 1989); Merrell v. Thomas, 807 F.2d 776, 17 ELR 20317 (9th Cir. 1986); Basel Action Network v. Maritime Admin., 285 F. Supp. 2d 58, 63 (D.D.C. 2003); Amoco Oil v. Environmental Prot. Agency, 501 F.2d 722, 749, 4 ELR 20397 (D.C. Cir. 1974); Maryland v. Train, 415 F. Supp. 116, 6 ELR 20496 (D. Md. 1976). Oddly enough, some courts reference *Amoco Oil*, involving the CAA, but it was that same year that EPA was released from its obligation under NEPA under the CAA. But one of the earliest cases was *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 489 F.2d 1247, 1256, 4 ELR 20031 (D.C. Cir. 1973), where the court invoked an even earlier case involving NEPA's application to actions under the CAA, *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 379, 3 ELR 20642 (D.C. Cir. 1973). In *Portland Cement*, one of the

> [C]ourts have consistently recognized that certain EPA procedures or environmental reviews under enabling legislation are functionally equivalent to the NEPA process and thus exempt from the procedural requirements of NEPA. The purpose of the functional equivalence is avoidance of repetitious analysis in a decisionmaking process that functions in an equivalent way to the NEPA process.[72]

The functional equivalency concept even merges with a harmless error rule, where courts might conclude that a NEPA violation is de minimis because the agency engaged in a similar analysis.[73]

1. Congress Chips Away

Congress too has chipped away at NEPA. When it passed the Environmental Quality Improvement Act of 1970, Congress' findings suggested that our national environmental policy was evidenced by other pollution abatement programs and similar legislative efforts—impliedly hinting that NEPA arguably added little to what already existed.[74] This arguably was a product of the fight over "environmental programs" between Sen. Edmund Muskie (D-Me.) and Senator Jackson. Then, in Senator Muskie's Clean Water Act, Congress excluded certain actions within its ambit.[75] Senator Muskie's distrust of having agencies preparing their own environmental documents led to §309 of the CAA, which assigned EPA (not CEQ) with the task of examining EISs.[76] These early changes merged with the 1970s energy crisis, which justified Congress' decision to limit NEPA challenges to the newly constructed Trans-Alaska Pipeline.[77] It further justified, by 1974, exempting EPA's actions under the CAA from NEPA compliance.[78] And early on, Congress also sanctioned the role of states in the development of NEPA documents.[79]

Subsequent statutes, as noted by the Congressional Research Service, have "modif[ed] the application of the Act or specif[ied] the extent of documents that need to be prepared in particular instances or contexts."[80] Congress, for instance, has allowed for exempting NEPA from decisions involving the construction of border walls,[81] and it has diminished NEPA's effectiveness in addressing aspects of the grazing program on federal lands[82] and promoted specific uses of categorical exclusions (CEs),[83] as well as allowed exemptions for emergencies.[84] Perhaps even more significantly, it has joined with the executive branch to entrench as accepted the mantra of NEPA streamlining.

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most prominent administrative law jurists, Judge Harold Leventhal, considered NEPA's application to EPA. His reasoning seems dubious, because he questioned whether the Act ought to even apply to an agency not then in existence when NEPA was passed (an untenable argument today). *See also* Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 2 ELR 20683 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

72. U.S. EPA, *EPA Compliance With the National Environmental Policy Act*, https://www.epa.gov/nepa/epa-compliance-national-environmental-policy-act (last updated Oct. 26, 2017). The Agency issued a policy for when it will voluntarily choose to comply with NEPA. *See* U.S. EPA, Notice of Policy and Procedures for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents, 63 Fed. Reg. 58045 (Oct. 29, 1998).
73. *See* American Waterways Operators v. U.S. Coast Guard, No. 18-cv-12070-DJC, 2020 WL 360493 (D. Mass. Jan. 22, 2020) (noting earlier decision applying concept, in *United States v. Massachusetts*, 724 F. Supp. 2d 170, 174-75, 40 ELR 20123 (D. Mass. 2010), which the First Circuit in *United States v. Coalition for Buzzards Bay*, 644 F.3d 26, 38, 41 ELR 20183 (1st Cir. 2011), reversed because it was not a harmless error). *Cf.* Diné Citizens Against Ruining Our Env't v. Jewell, 312 F. Supp. 3d 1031, 48 ELR 20066 (D.N.M. 2018) (notice for EA sufficient if environmental issues otherwise clear to the public).
74. Pub. L. No. 91-224, §202, 84 Stat. 114, 114 (1970).
75. 33 U.S.C. §1371(c), ELR Stat. FWPCA §511(c); Pub. L. No. 92-500, 86 Stat. 816, 893 (1972).
76. *See supra* note 69 and accompanying text.
77. Pub. L. No. 93-153, 87 Stat. 576, 585 (1973). *See generally* Henry R. Myers, *Federal Decisionmaking and the Trans-Alaska Pipeline*, 4 Ecology L.Q. 915 (1975) (describing history).
78. Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, 259; 15 U.S.C. §793(c)(1).
79. Pub. L. No. 94-83, 89 Stat. 424 (1975). This Act promoted state-prepared documents if the state preparer "has statewide jurisdiction" and "responsibility for" the action, if the appropriate federal official participates in the process and provides guidance and independently reviews the document, and if, after 1976, "the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity . . ." *Id.*
80. Pamela Baldwin, CRS Report for Congress: Statutory Modifications of the Application of NEPA, No. 98-417A (1998).
81. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42829 (Sept. 12, 2017) (waiver of environmental requirements for border wall near the city of Calexico, California). *See also* In re Border Infrastructure Envtl. Litig., 282 F. Supp. 3d 1092, 48 ELR 20034 (S.D. Cal. 2018). *See generally* Amena H. Saiyid, *Border Wall Lawsuit Challenges Environmental Waiver*, Daily Env't Rep. (BNA), Sept. 6, 2017; Amena H. Saiyid, *No Environmental Compliance Needed for U.S.-Mexico Border Wall*, Env't & Energy Rep. (BNA), Feb. 27, 2018. The numerous border wall waiver provisions are explained in Michael John Garcia, Congressional Research Service, Barriers Along the U.S. Borders: Key Authorities and Requirements (2016); Dinah Bear, Border Wall: Broadest Waiver of Law in American History (2009), http://www.ciel.org/Publications/BorderWall_8Feb09.pdf.
82. *E.g.*, Pub. L. No. 104-19, 109 Stat. 194, 212 (1995); Pub. L. No. 108-447, 118 Stat. 2809, 3103 (2004).
83. *See infra* note 146, explaining the congressionally sanctioned use of exclusions for certain oil and gas activities. CEs, for example, also became instrumental for the Forest Service and DOI's Healthy Forests Initiative, as part of the agencies' fire management policy. *See* Healthy Forests Restoration Act, 108 Pub. L. No. 148, 117 Stat. 1887 (2003); Forest Service and DOI, National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33814 (June 5, 2003); *see generally* Reda M. Dennis-Parks, *Healthy Forests Restoration Act—Will It Really Protect Homes and Communities?*, 31 Ecology L.Q. 639 (2004). Bob Keiter explains how an earlier effort to suspend environmental laws for timber salvage
> eschewed legal accountability: it vested the secretaries of agriculture and interior with sole discretion for determining whether sales met legal environmental requirements; it contained sufficiency language obviating application of . . . NEPA . . . and other environmental law; it prohibited all administrative appeals; and it precluded any judicial review for compliance with the environmental laws.

Robert B. Keiter, Keeping Faith With Nature: Ecosystems, Democracy, and America's Public Lands 106 (2003); *see also* Trilby C.E. Dorn, *Logging Without Laws: The 1995 Salvage Logging Rider Radically Changes Policy and the Rule of Law in the Forests*, 9 Tul. Envtl. L.J. 447 (1996); Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and Its Legacy*, 27 Envtl. L. 1035 (1997).
84. *E.g.*, Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., 726 Fed. Appx. 605 (9th Cir. 2018) (mem.). *Cf.* Friends of Animals v. U.S. Bureau of Land Mgmt., No. 16-v-1670, 2018 WL 1612836 (D. Or. Apr. 2, 2018) (removal of horses in emergency fire situation must be limited to the factors creating the emergency when significant environmental effects possible).

2. Toward an Imperious Executive Branch

Notably, since the 1980s, endless conversations ensued about how to "modernize" or "streamline" the NEPA process.[85] The 1980s witnessed, as most today appreciate, a considerable waning of federal agency interest in environmental protection. Not surprisingly, the average number of EISs decreased after its first decade, during the Ronald Reagan and George H.W. Bush Administrations.[86] Prof. Thomas O. McGarity, testifying in 2005, explained how, "[b]y the end of the 1980s, NEPA litigation had slowed down considerably," a trend that reversed course "during the George W. Bush Administration as the rate of NEPA lawsuit filings rose from a historical average of 108 cases per year to 137 in 2001 and 150 in 2002."[87] That upward trend continued throughout the Bush Administration, and with the exception of 2008, the number of NEPA challenges dropped to below roughly 100 annually.[88]

But regardless of numbers, many project proponents professed that NEPA shouldered the responsibility for retarding economic development. This led, for instance, to President George W. Bush establishing a task force for streamlining the review and approval of energy projects.[89] It supported Congress' decision in the Energy Policy Act of 2005 to promote a coordinated and streamlined process for the review of natural gas pipelines as well as the siting of electric transmission facilities.[90]

Not surprisingly, transportation projects, because of their size and perceived economic importance, often elicit from their proponents a request for a streamlined environmental review process, as demonstrated recently with advocates for a high-speed rail system in California.[91] When promoting NEPA streamlining for transportation projects, the Federal Highway Administration (FHwA) explains how some projects falter as a consequence of inadequate approaches toward environmental review.[92] As such, during the recession confronting President Obama upon inauguration, Congress with the new president's assent passed the American Recovery and Reinvestment Act of 2009 (ARRA),[93] an economic stimulus package that included provisions designed to facilitate interagency coordination on NEPA implementation and expediting NEPA review.[94]

Later, shortly before the end of his eight years in office, President Obama signed the Fixing America's Surface Transportation (FAST) Act,[95] setting the stage for the mounting effort to streamline the NEPA process. Designed to "promote the efficient movement of freight and support

85. *E.g.*, NEPA Task Force, Modernizing NEPA Implementation: A Report to the Council on Environmental Quality (2003); Linda Luther, CRS Report to Congress: The National Environmental Policy Act: Streamlining NEPA (2007). The 2003 task force report, for instance, identified the prevalent use of EAs, and the need for guidance on the use of mitigated findings of no significant impact (FONSIs). In 2010, the Obama Administration CEQ issued proposed guidance with the heading of *modernizing* and *reinvigorating* NEPA, including for mitigated FONSIs. Press Release, President Obama White House, White House Council on Environmental Quality Announces Steps to Modernize and Reinvigorate the National Environmental Policy Act (Feb. 18, 2010), https://obamawhitehouse.archives.gov/administration/eop/ceq/Press_Releases/February_18_2010 (addressing GHG emissions, mitigated FONSIs, use of CEs, and enhanced public tools); Memorandum from Nancy H. Sutley, Chair, CEQ, to Heads of Federal Departments and Agencies (Jan. 14, 2011), re: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact. *Cf.* CEQ, Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75628 (Dec. 6, 2010); CEQ, National Environmental Policy Act (NEPA) Draft Guidance, Establishing, Applying, and Revisiting Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 8045 (Feb. 23, 2010); *cf.* 71 Fed. Reg. 54816 (Sept. 19, 2006) (draft guidance on the use of CEs). For CEQ's earlier guidance on exclusions, see Guidance Regarding NEPA Regulations, 48 Fed. Reg. 3426 (July 28, 1983).

86. Philip M. Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA's Progeny*, 16 Harv. Envtl. L. Rev. 207, 225-26 (1992). Philip Ferester adds that, while "the number of EISs prepared rebounded somewhat in 1990, agencies prepared an average of only 455 EISs per year between 1986 and 1990, less than one-third the number of EISs averaged during NEPA's first decade." *Id.* at 226. He similarly found, between 1985 and 1989, a downtrend in the number of lawsuits challenging NEPA compliance. *Id.* at 226-27.

87. *NEPA Litigation: The Caus* 09th Cong. (2005). Rep. Tom Udall (D-N.M.) noted that "in more than 99 percent of those cases where an agency is taking major federal action, NEPA serves to avoid a court fight." *Id.*

88. NEPA.GOV, NEPA Litigation Surveys: 2001-2013, https://ceq.doe.gov/docs/ceq-reports/nepa-litigation-surveys-2001-2013.pdf.

89. Exec. Order No. 13212, Actions to Expedite Energy-Related Projects, 66 Fed. Reg. 28357 (May 22, 2001); Exec. Order No. 13274, 67 Fed. Reg. 59449 (Sept. 23, 2002); CEQ, White House Task Force on Energy Project Streamlining, 68 Fed. Reg. 8607 (Feb. 24, 2003) (notice and request for comment). *High Country News* reported how, in May 2001, "using the pretext of an impending energy crisis, President Bush issued an executive order to expedite oil and gas drilling on public lands," and how, quoting a nongovernmental organization (NGO) representative, "'Streamlining' to us is just a code word for 'steamrolling.'" Laura Paskus, *Bush Undermines Bedrock Environmental Law*, High Country News, Oct. 28, 2002. *See generally* Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. Envtl. L.J. 50, 68-70 (2003).

90. Section 313 of the Energy Policy Act of 2005 established the Federal Energy Regulatory Commission (FERC) as the lead agency responsible for coordinating and funneling federal authorizations and review of natural gas infrastructure projects, while §1221 addressed transmission facilities. Pub. L. No. 109-58, 119 Stat. 594, 688-91, 946-51 (2005). *See also* Memorandum of Understanding on Early Coordination of Federal Authorizations and Related Environmental Reviews Required in Order to Site Electric Transmission Facilities, Between the Department of Energy, Department of Defense, Department of Agriculture, Department of the Interior, Federal Energy Regulatory Commission, Environmental Protection Agency, Council on Environmental Quality, and Advisory Council on Historic Preservation (Aug. 8, 2006). The U.S. Department of Energy (DOE) is likely now preparing its fourth triennial congestion study, which when combined with the effects of exercising authority under §1221 may affect NEPA compliance.

91. Courtney Columbus, *Calif. Looks to Streamline Project's Environmental Reviews*, GreenWire, Aug. 10, 2018 (urging agreement to allow California to conduct the NEPA review).

92. *See* Federal Highway Administration Center for Accelerating Innovation, *Integrating NEPA and Permitting*, https://www.fhwa.dot.gov/innovation/everydaycounts/edc_4/nepa.cfm (last modified Sept. 18, 2017).

93. Pub. L. No. 111-5, 123 Stat. 115 (2009).

94. In CEQ's first report under the ARRA, it observed how "NEPA analyses are informing decisions for expenditure of Recovery Act funds in an environmentally sound manner. No departments or agencies have reported instances of substantial delays related to NEPA reviews." Letter from Nancy H. Sutley, Chair, CEQ, to Sen. Barbara Boxer, Chair, Committee on Environment and Public Works, and Rep. Nick J. Rahall II, Chair, Committee on Natural Resources (May 18, 2009), https://ceq.doe.gov/docs/ceq-reports/may2009/CEQ_Report_to_Congress_May_18_2009_Letter.pdf. That same conclusion existed in the 2011 report for ARRA funds, with "more than 192,705 NEPA reviews" having been completed "and fewer than 210 pending." CEQ, 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 (2011), *available at* https://ceq.doe.gov/docs/ceq-reports/nov2011/CEQ_ARRA_NEPA_Report_Nov_2011.pdf.

95. Pub. L. No. 114-94, 129 Stat. 1312 (2015).

large-scale projects of national or regional significance,"[96] the FAST Act included provisions for "streamlin[ing] the environmental review and permitting process to accelerate project approvals."[97] This bolstered earlier efforts, such as the 2012 Moving Ahead for Progress in the 21st Century Act,[98] and the earlier 1998 Transportation Equity Act for the 21st Century,[99] which itself, James Tripp and Nathan Alley explain, was partly modeled after an ad hoc streamlining process for federally funded highway projects.[100]

To be sure, some of what has just been described sought to address legitimate concerns about the ability to coordinate and timely produce environmental documents. Some of it responds to debatable and yet understandable objections to applying the statute to activities that otherwise might seem unnecessary—such as actions by the wildlife resource agencies under the Endangered Species Act (ESA),[101] or emergency efforts following the ever-increasing natural disasters. But much of it, though, has been motivated by fabricated strawmen—projecting, for instance, that NEPA litigation is unduly dilatory or that the process is unnecessarily time-consuming.

With resources and will, after all, an EIS can be prepared well and timely: Secretary of the Interior Bruce Babbitt illustrated that when he successfully charged his department with fast-tracking an EIS for oil and gas leasing in the National Petroleum Preserve-Alaska.[102] And lest NEPA's detractors forget, the *Deepwater Horizon* spill occurred under a system where no environmental document accompanied the application for the exploratory well that caught fire, and CEQ had long-before blessed abandoning examining worst-case scenarios![103] Also, the disaster illustrated that NEPA documents, at least for activities along the outer continental shelf, had been hastily prepared, with the aid of tiering and the ability to cut-and-paste with modern word processing.[104]

B. The Trump Administration's NEPA

These previous efforts, though, pale in comparison to what the Trump Administration and a Republican-controlled Congress would implement, if they could.[105] With the mantra of promoting economic development and removing alleged obstacles to growth, President Trump's political appointees have joined with Hill Republicans to reduce NEPA's centrality to federal agency decisions. Within days of being sworn in, President Trump issued Executive Order No. 13766, Expediting Environmental Reviews and Approvals of High Priority Infrastructure Projects.[106] This order announced that it would be the policy of the Administration

> to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as improving the U.S. electric grid and tele-communications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges, and highways.[107]

96. H. Rep. No. 114-357, FAST ACT Conference Report to Accompany H.R. 22, 114th Cong., 1st Sess., Dec. 2, 2015, 497 (Joint Explanatory Statement of the Committee of the Conference).
97. *Id.* at 498. The conferees further observed:
> The Act includes important reforms to align environmental reviews for historic properties. In addition, it establishes a new pilot program to allow up to five states to substitute their own environmental laws and regulations for the National Environmental Policy Act (NEPA) if the state's laws and regulations are at least as stringent as NEPA. The Act also requires an assessment of previous efforts to accelerate the environmental review process, as well as recommendations on additional means of accelerating the project delivery process in a responsible manner.

Id.
98. Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012). For one example of how the program works, with agreements with states, see the Tennessee Environmental Streamlining Agreement, https://www.tn.gov/content/dam/tn/tdot/documents/TennesseeEnvironmentalStreamliningAgreement.pdf. This solidified the earlier 2005 Surface Transportation Project Delivery Program, allowing states an expanded role in implementing NEPA. Safe, Accountable, Flexible, Efficient Transportation Act, Pub. L. No. 109-59, 119 Stat. 1144 (2005). *See generally* Jenna Musselman, *SAFETEA-LU's Environmental Streamlining: Missing Opportunities for Meaningful Reform*, 33 Ecology L.Q. 825 (2006) (describing history of transportation project streamlining and explaining how aspects of the law sacrifice environmental considerations). The 2005 streamlining effort included a limited period for judicial review, as well. Pub. L. No. 109-59, §6002(l), 119 Stat. 1144, 1864-65 (2005).
99. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998), *amended by* Pub. L. No. 105-2016, 112 Stat. 685, 834-68 (1998).
100. James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. Envtl. L.J. 74, 98 n.99 (2003).
101. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
102. *See* BLM, Northeast National Petroleum Reserve-Alaska Final Integrated Activity Plan/Environmental Impact Statement, 63 Fed. Reg. 42431 (Aug. 7, 1998) (notice of intent to prepare the EIS was issued only 19 months earlier, before the record of decision).
103. *See* Sam Kalen, *The BP Macondo Well Exploration Plan: Wither the Coastal Zone Management Act?*, 40 ELR 11079 (Nov. 2010).
104. *Id.*
105. In November 2017, the full House Committee on Natural Resources held an oversight hearing on NEPA, purportedly examining ways to improve and modernize the Act, but the press release's title, "NEPA: An Environmental Law Subverted," suggests how then-Chairman Rob Bishop (R-Utah) believes that NEPA unnecessarily constrains economic growth. *See* Press Release, House Committee on Natural Resources, NEPA: An Environmental Law Subverted (Nov. 29, 2017), https://republicans-naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=403475. Later, in April 2018, the full committee conducted another oversight hearing, The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare, once again suggesting that NEPA unnecessarily constrains agency action because it leads to "excessive litigation," and the "expansion of prolonged environmental reviews, mounting paperwork, detrimental project delays and range of adverse fiscal and economic impacts." Memorandum from Majority Staff, House Subcommittee on Oversight and Investigations, to All Natural Resource Committee Members (Apr. 23, 2018), re: Full Committee Oversight Hearing Titled, "The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare." While bills affecting NEPA can make it out of one chamber, their fate in the full Congress remains questionable. *See generally* Jennifer Yachnin, *Panel Debates Measures to Expedite Oil and Gas Development*, E&E News, June 7, 2018; Kellie Lunney, *Panel Approves Bill to Streamline Oil and Gas NEPA Reviews*, E&E News, June 20, 2018. One area where legislative activity on streamlining NEPA processes could survive is for the mining of "critical materials." *See generally* Nick Sobczyk, *Mining Companies Push for NEPA Reforms in Senate NDAA*, E&E News, June 11, 2018.
106. Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 30, 2017).
107. *Id.* The order further directed that the CEQ chairman would "coordinate with the head of the relevant agency to establish, in a manner consistent with law, expedited procedures and deadlines for completion of environmental reviews and approvals for such projects." *Id.* A later order established an advisory council on infrastructure. Exec. Order No. 13805, Establishing

Months later, the White House issued Executive Order No. 13783, Promoting Energy Independence and Economic Growth.[108] This order directs agencies to review their regulations, policies, guidance, and orders to explore where unnecessary obstacles, delays, or costs are hindering the "siting, permitting, production, utilization, transmission, or delivery of energy resources."[109] One aspect of the order included specifically targeting the Obama Administration's guidance on how to address GHG emissions in NEPA documents, as well as the use of a social cost of carbon (SCC) in analyses.[110]

This parade of White House activities continued when, several months later, on August 15, 2017, the president issued Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure.[111] The order opines how "[i]nefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment."[112] As with the earlier order, "[a] key element of the new executive order rolls back standards set by former President Barack Obama that required the federal government to account for climate change and sea-level rise when building infrastructure."[113]

Notably, this directive garnered additional force when the Office of Management and Budget (OMB) a year later issued guidance on accountability standards geared toward affecting actual behavior by agency employees and senior officials.[114] And OMB and CEQ subsequently issued additional guidance to states with NEPA assignment for authorized transportation projects.[115] Finally, along with promoting administrative reforms, the Trump Administration has actively promoted a legislative proposal that would facilitate faster NEPA compliance by legislatively solidifying "a new 'One Agency, One Decision' structure for environmental reviews," ostensibly reducing "redundancies," affording more opportunities to delegate responsibilities to the states, and "[p]roviding for additional provisions to facilitate environmental reviews across

a Presidential Advisory Council on Infrastructure, 82 Fed. Reg. 34383 (July 25, 2017).

108. Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017). On May 8, 2017, the Office of Management and Budget (OMB) released guidance on implementing the review and submission of agency reports. Memorandum from Dominic J. Mancini, Acting Administrator, Office of Information and Regulatory Affairs, OMB, to Regulatory Reform Officers and Regulatory Policy Officers at Executive Departments and Agencies (May 8, 2017), re: Guidance for Section 2 of Executive Order 13783, Titled "Promoting Energy Independence and Economic Growth."

109. 82 Fed. Reg. 16093.

110. *Id*. at 16094-95.

111. Exec. Order No. 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 82 Fed. Reg. 40463 (Aug. 24, 2017).

112. *Id*. The order emphasizes the need for better interagency coordination and the completion of environmental reviews and authorizations for infrastructure projects (broadly defined) within two years. One aspect of the order is to "ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process." *Id*. at 40468. To accomplish this, the order provides additional instructions to the Federal Permitting Improvement Steering Council and CEQ.

In March and early April 2018, 12 agencies signed the Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807. Some of the principal aspects of the memorandum of understanding are the identification of lead agencies, a commitment to a two-year permitting schedule (with concurrent reviews), and active participation and communication with their counterparts and project sponsors. It also addresses how agencies can work with FERC, an independent agency. *Id. See also* Memorandum from Mick Mulvaney, Director, OMB, and Mary Neumayr, Chief of Staff, CEQ, to Heads of Federal Departments and Agencies (M-18-13) (Mar. 20, 2018), re: One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects Under Executive Order 13807 (explaining implementation of the memorandum of understanding and directing agencies to review and revise NEPA procedures if necessary). "Conservatives and energy industry groups have hailed the various proposals [such as this agreement] as a necessary step to reversing the course set by the Obama administration," the trade press reports, while "environmentalists" report that the "agreement ignores the real problem plaguing the president's plan in Congress: a lack of funds." Nick Sobczyk, *Agencies Sign Agreement to Speed Permitting*, E&E News, Apr. 9, 2018.

113. Lisa Friedman, *Trump Signs Order Rolling Back Environmental Rules on Infrastructure*, N.Y. Times, Aug. 15, 2017. Several additional Executive Orders illustrate the White House's penchant for diminishing the effectiveness of environmental regulatory programs. For instance, the White House sought to encourage EPA to reduce red tape and not unduly burden manufacturers when implementing the CAA's regional haze program. *See* Presidential Memorandum for the Administrator of the Environmental Protection Agency (Apr. 12, 2018). *See generally* Sean Reilly, *Trump Order Aims to Accelerate Permitting*, E&E News, Apr. 12, 2018. *See also* Exec. Order No. 13840, Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States, 83 Fed. Reg. 29431 (June 22, 2018); Exec. Order No. 13821, Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America, 83 Fed. Reg. 1507 (Jan. 11, 2018); Exec. Order No. 13817, A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Materials, 82 Fed. Reg. 60835 (Dec. 26, 2017); Exec. Order No. 13795, Implementing an America-First Offshore Energy Strategy, 82 Fed. Reg. 20815 (May 3, 2017); Exec. Order No. 13781, Comprehensive Plan for Reorganizing the Executive Branch, 82 Fed. Reg. 13959 (Mar. 16, 2017); Exec. Order No. 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12285 (Mar. 1, 2017); Exec. Order No. 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12497 (Mar. 3, 2017); Exec. Order No. 13771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (Feb. 3, 2017).

Some orders subtly favor relaxed regulation, such as a task force for rural America and agriculture that would, among other things, avoid affecting property rights for activities on the public lands and "remove barriers to economic prosperity and quality of life in rural America." Exec. Order No. 13790, Promoting Agriculture and Rural Prosperity in America, 82 Fed. Reg. 20237 (Apr. 28, 2017). Others are more blatant, such as the order directing reconsideration of President Clinton's and President Obama's national monument designations. Exec. Order No. 13792, Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20429 (May 1, 2017). *But cf*. Exec. Order No. 13834, Efficient Federal Operations, 83 Fed. Reg. 23771 (May 22, 2018) (promoting energy efficiency at federal facilities).

114. Memorandum from Mick Mulvaney, Director, OMB, to Heads of Executive Departments and Agencies 2 (M-18-25) (Sept. 26, 2018), re: Modernize Infrastructure Permitting Cross-Agency Priority Goal Performance Accountability System:

> All Federal agencies with environmental review, authorization, or consultation responsibilities for infrastructure projects must modify their Strategic Plans and Annual Performance Plans under the Government Performance and Results Act (GPRA) Modernization Act of 2010 to include agency performance goals related to the completion of environmental reviews and authorizations for infrastructure projects consistent with the new [Cross-Agency Priority] Goal to Modernize Infrastructure Permitting.

115. Memorandum from Russell T. Vought, Acting Director, OMB, and Mary Neumayr, Chairman, CEQ, to the Secretary of Transportation (M-19-11) (Feb. 26, 2019), re: Guidance on the Applicability of E.O. 13807 to States With NEPA Assignment Authority Under the Surface Transportation Project Delivery Program.

the applicable Federal Agencies."[116] In lieu of legislation, however, the Administration already has initiated efforts to expand the FAST Act's Federal Permitting Improvement Steering Council, by increasing its funding and resources.[117] This would allow this council to serve as the "process cop," according to its boss.[118]

Indeed, at the altar of ostensible economic growth, NEPA "streamlining" now occupies an increasing dimension of how this process-oriented statute ought to operate. Expanding upon years of allegations that NEPA retards economic growth by unduly delaying projects, federal agencies seem eager to follow President Trump's marching orders in Executive Order No. 13783. This generally means exploring avenues for reducing the time for NEPA compliance, whether through enhanced coordination among federal and state agencies, truncating the scope of review, or merely establishing a limited time for environmental considerations.

When, therefore, the U.S. Department of Commerce released, in the summer of 2018, its strategic plan, one component of the plan focused on coordinating and streamlining federal environmental permitting.[119] The U.S. Department of Transportation (DOT) proposed a 150-page limit for EISs, unless the project is "of unusual scope or complexity," as well as time frames for document completion and acceptance of the One Federal Decision process.[120] The U.S. Army Corps of Engineers (the Corps) similarly has initiated efforts to better coordinate and streamline its approval for activities occurring at Corps facilities.[121] Even the Federal Communications Commission (FCC) focused on streamlining when it sought to roll back aspects of NEPA's application to certain wireless projects.[122]

More pronounced efforts are occurring within the two principal land-managing agencies. In response to the Executive Order, the U.S. Forest Service (the Service) initiated efforts for swiftly dispensing with environmental analysis for oil and gas operations on forest system lands. It started with exploring how it could, among other things, utilize more CEs and enhance its interagency memoranda of agreements.[123] It next issued an advanced notice that it was soliciting input on "modern[izing] and streamlin[ing]" its "analytical and procedural requirements."[124] To expedite permitting, the Service identified "[s]everal areas of [its] current regulations . . . where potential revisions may expedite energy-related projects by streamlining internal processes related to environmental review and permitting."[125] The purported reason for doing all this is that the Service lamented that NEPA compliance allegedly adds several years (five to 10 years) to oil and gas project decisionmaking—with an average time of about 3.6 years.[126] An accompanying Forest Service notice triggered a similar review process for environmental review of mining operations under the 1872 hard-rock mining law.[127]

Naturally, some environmentalists, along with Colorado Gov. John Hickenlooper, decried these actions.[128] Undeterred, the Service released a proposed rule in July 2019,

116. White House, Draft Pre-Decisional and Deliberate-Do Not Distribute: Infrastructure Legislative Outline (undated, released in January 2018). *See generally* Nick Sobczyk, *"Discussion Draft" Would Make Big Changes to NEPA*, E&E News, Jan. 29, 2018. The Administration released its *Legislative Outline for Rebuilding Infrastructure in America* shortly thereafter. *See* https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf. *See generally* Nick Sobczyk, *Trump Proposes Sweeping Changes to NEPA*, E&E News, Feb. 12, 2018.
117. *See* Stephen Lee, *Tiny Office That Speeds Environmental Permits to Get Bigger*, Bloomberg Env't, Jan. 16, 2020.
118. Kelsey Brugger, *Trump Admin Boosts Obscure Permitting Agency*, E&E News, Jan. 17, 2020.
119. *See* U.S. Department of Commerce, Helping the American Economy Grow: Strategic Plan 2018-2022, https://www.commerce.gov/sites/commerce.gov/files/us_department_of_commerce_2018-2022_strategic_plan.pdf.
120. Office of the Secretary of Transportation, Notice, Interim Policies on Page Limits for National Environmental Policy Act Documents and Application of the One Federal Decision Process to DOT Projects, 84 Fed. Reg. 44351 (Aug. 23, 2019).
121. *See*, *e.g.*, Army Corps of Engineers, Notice of Availability: Report on Potential Actions to Reduce Regulatory Burdens on Domestic Energy Production, 82 Fed. Reg. 56192 (Nov. 28, 2017); Department of the Army, CECW-ZB Circular No. 1165-2-220 (draft Jan. 23, 2018). The Corps also is examining, pursuant to the Executive Order, its nationwide permits under the §404 wetlands program. *See* Office of the Assistant Secretary of the Army for Civil Works & Office of the General Counsel, U.S. Army, Review of 12 Nationwide Permits Pursuant to Executive Order 13783 (2017), *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/6902.
122. *See* Nick Sobczyk, *Regulators Roll Back NEPA for Wireless Projects*, E&E News, Mar. 22, 2018; Nick Sobczyk, *NEPA Rollback Now Official for Small Wireless Projects*, E&E News, May 3, 2018; FCC, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 83 Fed. Reg. 19440 (May 3, 2018). The D.C. Circuit held that the agency's abdication of its responsibilities under NEPA and the National Historic Preservation Act was arbitrary and capricious. United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC, 933 F.3d 728, 49 ELR 20136 (D.C. Cir. 2019).
123. *See* Report Prepared Pursuant to Executive Order 13783—Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 50580 (Nov. 1, 2017); U.S. Department of Agriculture (USDA), USDA Final Report Pursuant to Executive Order 13783 on Promoting Energy Independence and Economic Growth (2017), *available at* https://www.fs.fed.us/sites/default/files/eo-13783-usda-final-report-10.11.17.pdf. One specific recommendation was that the Service would combine its NEPA analyses with its forest plan decisions, presumably to remove an extra step. The Service indicates that it is unnecessarily creating two studies, "but the agency has over 2,500 [expressions of interest] for oil and gas leasing on 2.8 million acres that cannot be processed because the leasing analysis is outdated. If the processes were combined in areas where there is historical oil and gas development, much of this backlog would be eliminated." USDA, USDA Briefing Paper: Topic: EO 13783 Response Report Implementation—USDA Top 3 Priorities (2017), *available at* https://www.fs.fed.us/sites/default/files/eo-13783-usda-priorities-10.11.17.pdf. In January 2018, moreover, the Forest Service began soliciting comments for how to streamline NEPA compliance. Forest Service, Advance Notice of Proposed Rulemaking: National Environmental Policy Act Compliance, 83 Fed. Reg. 302 (Jan. 3, 2018) ("goal of increasing efficiency of environmental analysis"). For an earlier examination into the Forest Service's use of CEs, see *Management by Exclusion: The Forest Service Use of Categorical Exclusions: Oversight Hearing Before the Subcommittee on National Parks, Forests, and Public Lands, of the House Committee on Natural Resources*, 110th Cong. (2007).
124. Forest Service, Advance Notice of Proposed Rulemaking: Request for Comment, Oil and Gas Resources, 83 Fed. Reg. 46458 (Sept. 13, 2018).
125. *Id.*
126. *Id.* A GAO report for hard-rock mining suggests these numbers are off. *See* GAO, GAO-16-165, Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More (2016) (between 2010 and 2014, average processing time was two years).
127. Forest Service, Advance Notice of Proposed Rulemaking, Locatable Minerals, 83 Fed. Reg. 46451 (Sept. 13, 2018). The Service is developing an EIS to change its regulations for expediting permitting. *See* Bobby Magill, *Forest Service Studying Impacts of Rule to Speed Mining Permits,* Bloomberg Envt., Mar. 31, 2020.
128. Pamela King et al., *Forest Service Proposes Expediting Energy Permitting*, E&E News, Sept. 12, 2018.

which seeks to reduce the average time for NEPA compliance, increase the use of exclusions as well as determinations of NEPA adequacy (DNAs), and promote "focused involvement" by "responsible officials."[129] In their comments on the proposal, many in the academic community warned that the proposal runs "afoul of the basic premise of NEPA."[130]

DOI has waged an even more robust battle to alter how the agency implements NEPA. Former DOI Secretary Ryan Zinke commented on how the Bureau of Land Management (BLM) "completes more than 5,000 documents to comply with" NEPA, at a cost of about $48 million annually, and how "[s]ome of those funds and staff could be better applied toward completing work on the ground and creating economic opportunities."[131] Within months of President Trump's oath as the 45th president, then-deputy secretary (now secretary) of DOI, David Bernhardt, released during his first week in office an order purporting to change how DOI would develop NEPA documents.[132] One change eliciting media attention was the notion (now uniformly part of the Administration's proposals) that EISs generally should be 150 pages, with complex projects allowed an extra 150 pages.[133] He later noted how DOI was experimenting with accelerating project reviews, by developing a "pilot program for a new approval process aimed at reducing reviews of proposals."[134]

BLM, moreover, was tasked with reviewing its NEPA and land management planning processes, with an eye toward, effectively, streamlining these processes.[135] By September, BLM had developed its *Report in Response to Secretarial Memorandum on Improving Planning and NEPA Processes and Secretarial Order 3355*. The report identified "more than 100 actions to carry out" the order's directives.[136] The agency identified a model EA, purporting to demonstrate how short and concise EAs could be prepared, although the EA arguably has several flaws.[137] The Western Governors' Association lauded efforts to reduce "duplication of analysis" and improve the process with cooperating agencies, but lamented how the report's "recommendations for shorter planning and environmental review timelines do not consider the need for greater consultation, cooperation and coordination with states."[138] More recently, BLM brazenly suggests it is considering excising NEPA compliance from its land management planning processes.[139] If that were to occur, it would be one of the statute's biggest blows, albeit likely violating the Act.

Such an extraordinary proposal, however, illustrates the agency's current disdain toward NEPA, often cloaked behind the impartial rhetoric of streamlining. For example, lurking behind an August 2019 memorandum to National Park Service (NPS) officials could be a hope that NPS officials will avoid using NEPA to thwart proposals.[140] The memorandum, Coordination and Communication on External Review and Comments, seemingly seeks to engage NPS officials early in NEPA processes and promote working with other agencies and state and local groups, but subtly it does something else: limits the agency's comments to matters that are within their "jurisdiction" or "special expertise." For comments that may relate to areas

129. Forest Service, Proposed Rule: National Environmental Policy Act (NEPA) Compliance, 84 Fed. Reg. 27544, 27545-46 (June 13, 2019). For the use of DNAs, see *infra* notes 206-09 and accompanying text.
130. Law Professors' Comments on Proposed Rule, National Environmental Policy Act (NEPA) Compliance (84 Fed. Reg. 27544 (June 13, 2019)) 2 (Aug. 25, 2019).
131. Memorandum from Ryan Zinke, Secretary, U.S. Department of the Interior, to Acting Director, BLM (Mar. 27, 2017), re: Improving the Bureau of Land Management's Planning and National Environmental Policy Act Processes, *reprinted at* 82 Fed. Reg. 50551 (Nov. 1, 2017).
132. Secretarial Order No. 3355, Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (Aug. 31, 2017). Further guidance explained how each agency would report information on the time lines for preparing EISs and circulated a template for waivers of the time and page limitations. Memorandum from David Bernhardt, Deputy Secretary, U.S. Department of the Interior, to Assistant Secretaries, Heads of Bureaus and Offices, and NEPA Practitioners (Apr. 27, 2018), re: Additional Direction for Implementing Secretary's Order 3355; Memorandum from David Bernhardt, Deputy Secretary, U.S. Department of the Interior, to Assistant Secretaries, Heads of Bureaus and Offices, and NEPA Practitioners (Apr. 27, 2018), re: NEPA Document Clearance Process; Memorandum from David Bernhardt, Deputy Secretary, U.S. Department of the Interior, to Assistant Secretaries, Heads of Bureaus and Offices, and NEPA Practitioners (Apr. 27, 2018), re: Compiling Contemporaneous Decision Files; Questions and Answers Related to Deputy Secretary Memorandums (Memos) Dated April 27, 2018 (June 22, 2018); Memorandum from David Bernhardt, Deputy Secretary, U.S. Department of the Interior, to Assistant Secretaries, Heads of Bureaus and Offices, and NEPA Practitioners (June 11, 2018), re: Standardized Intra-Department Procedures Replacing Individual Memoranda of Understanding for Bureaus Working as Cooperating Agencies, *available at* https://www.doi.gov/elips/browse.
133. Michael Doyle, *Order Limits Most NEPA Studies to a Year, 150 Pages*, E&E News, Sept. 6, 2017. *See*, *e.g.*, *supra* note 119 (describing proposal by DOT).
134. Jennifer Yachnin, *Department Tests Ways to Speed Project Reviews—Bernhardt*, E&E News, July 2, 2018 (noting how DOI was exploring "cutting review times from 100 days to just 18 days").
135. The directive challenges the agency to "restore order, focus, and efficiency" by exploring solutions that would, among other things, "[r]educ[e] duplicative and disproportionate analyses; . . . [f]oster greater transparency in the NEPA process, including proper accounting of timeframes, delays, and financial cost of NEPA analyses." 82 Fed. Reg. at 50552. Congress, in exercising its authority under the Congressional Review Act, effectively rescinded BLM's Planning 2.0 regulation, and DOI subsequently indicated that it would explore new planning efforts designed to make the process more efficient. *See generally* Scott Streater, *Zinke Orders BLM "Back to the Drawing Board" on Land Use, NEPA*, E&E News, Apr. 18, 2018.
136. Pamela King, *BLM Document Reveals Ambitious NEPA Overhaul*, E&E News, Aug. 14, 2018.
137. With only 17 pages of substantive information, the EA reviews five applications to drill on BLM subsurface estate (surface estate is in private ownership) in a known oil and gas region in California. The description of the no-action alternative is only two sentences, as is the description of the effects of that alternative; most of the document discusses complying with other preexisting regulatory or other requirements, with the discussion of "Environmental Impacts" limited to roughly two pages and the "Cumulative Impacts" reduced to three paragraphs—with such assurances as "the cumulative effects of drilling hundreds of oil wells every year in the Valley is not significant because any increase in emissions is fully offset during the air permitting process." BLM Bakersfield Office, U.S. Department of the Interior, Environmental Assessment: Aera Energy LLC, Midway-Sunset; Five APDs B104A, B104i, BL105A, B105i, W107 on Metson Lease, Programmatic Project #818, at 17 (DOI-BLM-CA-C060-2016-009-EA).
138. Letter from Western Governors' Association, to Ryan Zinke, Secretary, U.S. Department of the Interior (Jan. 23, 2018), https://janiceforidaho.com/wp-content/uploads/blm_streamlining_final.pdf.
139. *See* Rebecca Betsch, *BLM Weighs Cutting Environmental Review When Crafting Public Lands Plans*, Hill, Feb. 4, 2020.
140. Memorandum from David Vela, Acting Deputy Director, Operations, NPS, to Regional Directors, Associate Directors, and Assistant Directors, NPS (Aug. 13, 2019), re: Coordination and Communication on External Review and Comments.

touching on administration priorities, such as energy projects, the memorandum outlines a process for senior management review.[141]

That the Administration would undermine years of stakeholder engagement in the land planning and NEPA processes supporting the Obama Administration's Greater Sage-Grouse Initiative equally demonstrates little regard for the Act.[142] In that instance and others, the Administration touted the need for energy resource development and ensuring that NEPA did not "unnecessarily" hamper exploration, development, and production.[143] NEPA's application to oil and gas activities on federal lands may equally suffer when DOI signaled how it would revert to a more streamlined NEPA process during the leasing process,[144] and how it would solicit "input on how the Agency can make its planning and NEPA review procedures timelier, less costly, and more responsive to local needs."[145] This could include streamlining oil and gas leasing by possibly relying more forcefully on prior NEPA analyses,[146] or enhanced use of the congressionally sanctioned CE for certain applications to drill.[147]

DOI also short-circuited the programmatic EIS for the federal coal program by removing the Obama Administration's moratorium on new coal leases until a modern NEPA document could be finalized.[148] The Obama Administration had placed a moratorium on new federal coal leases, pending an analysis of the program and its effects on GHG emissions. For years, concerns had been raised that the national program was not sufficiently accounting for the adverse effects of coal mining, including its direct, indirect, and cumulative effect on climate change, and its failure to secure a fair value for the American public.[149] The Obama Administration responded by issuing the moratorium and developing a programmatic EIS that would examine the host of issues—precisely NEPA's objective.[150] When the Trump Administration abandoned this effort, the court rebuffed litigation to secure its survival.[151]

A possible dénouement for diminishing NEPA surfaced within CEQ itself. In June 2018, the Administration released a generic advance notice of proposed rulemaking (ANPR).[152] CEQ explained it was soliciting

141. *Id*.

142. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants: 12-Month Finding on a Petition to List Greater Sage-Grouse (*Centrocerus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59858 (Oct. 2, 2015). The 2015 planning process examined land management plans across 11 states and spanned several years and BLM/Forest Service offices and land use plans. The Trump Administration then initiated in October 2017 a new round of NEPA inquiry, with merely a 45-day public scoping comment period. 82 Fed. Reg. 47248 (Oct. 11, 2017). *See also* BLM, Potential Amendments to Land Use Plans Regarding Greater Sage-Grouse Conservation: Scoping Report (2018). *E.g.*, BLM, Notice of Availability of the Colorado Draft Resource Management Plan Amendment and Draft Environmental Impact Statement for Greater Sage-Grouse Conservation, 83 Fed. Reg. 19808 (May 4, 2018). The Administration capitalized on a somewhat questionable district court decision rejecting aspects of the prior administration's NEPA compliance. Western Expl., LLC v. U.S. Dep't of the Interior, 250 F. Supp. 3d 718, 47 ELR 20055 (D. Nev. 2017), *appeal pending and stayed*, No. 17-16220 (9th Cir. 2017). The 2019 changes to the plans were then stayed in October 2019. In response, the agency announced plans to supplement its NEPA analysis. Western Watersheds Project v. Schneider, 417 F. Supp. 3d 1319, 49 ELR 20171 (D. Idaho 2019). *See* Scott Streater, *BLM Plans to Update Obama-Era Revisions*, E&E News, Jan. 22, 2020.

143. One order directed that DOI agencies examine their policies for removing burdens on energy production, and further questioned the Obama Administration's use of landscape-level mitigation—often developed in conjunction with a NEPA process. *See* Secretarial Order No. 3349, American Energy Independence (Mar. 29, 2017), *reprinted at* 82 Fed. Reg. 50555 (Nov. 1, 2017). And another order for leasing on the outer continental shelf promoted developing and implementing "a streamlined permitting approach for privately-funded seismic data research and collection." Secretarial Order No. 3350, America-First Offshore Energy Strategy (May 1, 2017), *reprinted at* 82 Fed. Reg. 50560, 50561 (Nov. 1, 2017). *See also* Secretarial Order No. 3351, Strengthening the Department of the Interior's Energy Portfolio (May 1, 2017), *reprinted at* 82 Fed. Reg. 50564, 50565 (Nov. 1, 2017) ("[p]romoting efficient and effective processing" of "energy-related" decisions, and "[i]dentifying regulatory burdens"); Secretarial Order No. 3354, Supporting and Improving the Federal Onshore Oil and Gas Leasing Program and Federal Solid Mineral Leasing Program (July 6, 2017), *reprinted at* 82 Fed. Reg. 50573 (Nov. 1, 2017) (same). Even as the agency was litigating the president's ability to diminish a national monument, it nevertheless changed the relevant management plan to allow for additional energy development. *See* Brady McCombs, *Trump Administration Moves to Open Two Utah Monuments for Mining and Drilling*, Time, Feb. 7, 2020.

144. Office of the Secretary, Final Report: Review of the Department of the Interior Actions That Potentially Burden Domestic Energy, 82 Fed. Reg. 50532, 50536 (Nov. 1, 2017). Secretary Zinke, to promote oil and gas interests, ordered that BLM not only adhere to a quarterly lease sale schedule, but also issue new permits within 30 days. *See* Jennifer Yachnin, *Zinke Orders 30-Day Oil and Gas Permit Approvals*, E&E News, July 6, 2017; Ellen M. Gilmer, *Enviros Push to Block Trump Oil and Gas Policy*, E&E News, July 10, 2018.

145. 82 Fed. Reg. at 50538.

146. *See generally* Ellen M. Gilmer, *Critics Pounce on NEPA Streamlining Tool for Leasing*, E&E News, Mar. 13, 2018.

147. *See* Mike Lee, *Oil States See Chance to Speed U.S. Drilling Permits*, E&E News, May 9, 2018; Pamela King, *Royalty Panel Recommendations Could Rehash NEPA Controversy*, E&E News, June 1, 2018. Pamela King explains how Congress, in the 2005 Energy Policy Act, adopted a provision (§390) for the use of CEs for applications to drill on public lands, which then became subject to a 2010 settlement agreement limiting its use. *See generally Energy Policy Act of 2005: BLM's Use of Section 390 Categorical Exclusions for Oil and Gas Development: Hearing Before the Subcommittee on Energy and Mineral Resources of the House Committee on Natural Resources*, 112th Cong. (2011) (statement of Mark Gaffigan, Managing Director, Natural Resources and Environment, GAO) (GAO-11-941T); GAO, GAO-09-872, Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns With Categorical Exclusions for Oil and Gas Development Under Section 390 of the Act (2009). *See also* Megan J. Anderson, *The Energy Policy Act and Its Categorical Exclusions: What Happened to the Extraordinary Circumstance Exception?*, 28 J. Land Resources & Envtl. L. 119 (2008).

148. Secretarial Order No. 3348, Concerning the Federal Coal Moratorium (Mar. 29, 2017), *reprinted at* 82 Fed. Reg. 50553 (Nov. 1, 2017).

149. *See*, *e.g.*, White House, The Economics of Coal Leasing on Federal Lands: Ensuring a Fair Return to Taxpayers (2016); GAO, GAO-14-140, Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information (2013); Juliet Eilperin, *Powder River Basin Coal Leasing Prompts IG, GAO Reviews*, Wash. Post, June 24, 2012. In the summer of 2017, GAO reported how raising royalty rates could increase revenue upwards of $141 to $365 million per year after 2025, while only marginally decreasing production. GAO, GAO-17-540, Oil, Gas, and Coal Royalties: Raising Federal Rates Could Decrease Production on Federal Lands but Increase Federal Revenue (2017). Issues surrounding coal leasing are far from new, with the Obama Administration reacting to systemic problems. *See* GAO, GAO/RCED 94-10, Mineral Resources: Federal Coal-Leasing Program Needs Strengthening (1994).

150. *See* BLM, U.S. Department of the Interior, Federal Coal Program: Programmatic Environmental Impact Statement—Scoping Report vol. 1 (2017), *available at* https://eplanning.blm.gov/epl-front-office/projects/nepa/65353/95059/114965/CoalPEIS_RptsScoping_Vol1_508.pdf.

151. Western Org. of Res. Councils v. Zinke, 892 F.3d 1234, 48 ELR 20098 (D.C. Cir. 2018). Another court, however, held that the decision lifting the moratorium required NEPA compliance. Citizens for Clean Energy v. U.S. Dept. of the Interior, 384 F. Supp. 3d 1264, 49 ELR 20066 (D. Mont. 2019).

152. CEQ, Advance Notice of Proposed Rulemaking: Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28591 (June 20, 2018).

input on "potential revisions to update the regulations and ensure a more efficient, timely, and effective NEPA process."[153] When CEQ released this ANPR, the trade press reported how it was "developed in accordance with President Trump's Aug. 15, 2017, executive order, which sought to limit NEPA review to two years" and "environmentalists are already sounding the alarm about what they see as one of the biggest attempts yet to weaken environmental requirements."[154]

Some, such as the Coalition to Protect America's National Parks, immediately responded by cautioning that any major changes to the regulations will only "weaken" NEPA's capacity to ensure sound decisionmaking. "We believe there could be improvements in the regulations regarding the timing of multi-agency decision-making. . . . The CEQ regulations could be strengthened to require the result of agency coordination, consultation and public disclosure *prior* to a final EIS."[155] Others, like the Shoshone-Bannock Tribes, expressed favor for a one-stop federal decisionmaking process for providing comments. The Shoshone-Bannock Tribes also added, "Evaluating alternatives just to avoid being sued is nonsense."[156]

The current CEQ subsequently confirmed its seeming antipathy for robust NEPA analyses when it first proposed muting how climate change is treated in NEPA documents, and then followed through with its initiative to revamp its regulations. Even though GHGs and the resulting effects from climate change pose an existential threat to the human environment, such that anthropologists generally agree we are now in an Anthropocene era (characterized by human's dominance in their ability to influence the planet), CEQ's proposed June 2019 guidance relegates the importance of analyzing how proposed actions may affect climate change.[157] Admittedly, CEQ's draft guidance arguably is less about NEPA and more about attacking climate science. After all, the Trump Administration has waged a war on climate science,[158] while energy markets, industries, and the world population acknowledge scientific reality. Not surprisingly, therefore, CEQ's draft guidance straddles implicitly acknowledging how the judiciary will demand that NEPA documents include GHG emission effects, while seeking to diminish the role of those effects in the analysis. It does this, first, by ignoring CEQ's guidance issued during the Obama Administration, addressing how agencies ought to address GHG emissions in NEPA documents,[159] which the Trump Administration withdrew on April 5, 2017.[160]

Second, CEQ's proposed new guidance discounts the utility of employing an SCC metric. The SCC is an analytical tool for estimating the economic cost to society of incrementally adding an additional ton of carbon into the atmosphere. Simply put, it "is a metric designed to quantify and monetize climate damages, representing the net economic cost of carbon dioxide emissions."[161] The Obama Administration convened the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG), producing a technical document estimating the SCC through 2050.[162] Although EPA previously acknowledged that an SCC is "meant to be a comprehensive estimate of climate change damages and includes, among other things, changes in net agricultural productivity, human health, property damages from increased flood risk and changes in energy system costs, such as reduced costs for heating and increased costs for air conditioning," and as such is "a useful measure," "it does not currently include all important damages."[163] Even though it omits including all costs, "the U.S. government has since 2008 used estimates of the [SCC] in federal rulemakings to value the costs and benefits associated with changes in [carbon dioxide] emissions."[164] The Trump Administration almost immediately disbanded the IWG and, when calculating the economic costs of GHG emissions in rulemakings, it now employs a ridiculously low cost for one ton of carbon dioxide (or carbon dioxide equivalent).[165]

It should have been expected that this antipathy toward employing some useful metric for analyzing the SCC would surface in CEQ's draft NEPA guidance. CEQ's proposed guidance directs that an SCC is not required—and even suggests it is not useful because "an agency need not weigh the effects of the various alternatives in NEPA in a monetary cost-benefit analysis using any monetized [SCC] estimates and related documents."[166] Trump's EPA earlier

153. *Id.*
154. Nick Sobczyk, *White House Plots Update to NEPA Guidelines*, E&E News, May 7, 2018.
155. Comments on the Council on Environmental Quality Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, Docket No. CEQ-2018-0001, July 17, 2018.
156. *Id. See also* Shoshone-Bannock Tribes Comments Regarding the Proposed Changes to CEQ Regulations, Docket No. CEQ-2019-0003, Mar. 10, 2020 (encouraging only incremental improvements).
157. CEQ, Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions: Request for Comment, 84 Fed. Reg. 30097 (June 26, 2019).
158. Coral Davenport & Mark Landler, *Trump Administration Hardens Its Attack on Climate Science*, N.Y. Times, May 27, 2019.
159. CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51866 (Aug. 1, 2016).
160. CEQ, Notice of Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16576 (Apr. 5, 2017). *See generally* Thein T. Chau, *Implications of the Trump Administration's Withdrawal of the Final CEQ Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews*, 30 Geo. Envtl. L. Rev. 713 (2018).
161. Iliana Paul et al., Institute for Policy Integrity, The Social Cost of Greenhouse Gases and State Policy 1 (2017).
162. Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (2016).
163. U.S. EPA, EPA Fact Sheet: Social Cost of Carbon (2016), *available at* https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf.
164. National Academies of Sciences, Engineering, and Medicine, Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide 1 (2017).
165. *See* Brad Plumer, *Trump Put a Low Cost on Carbon Emissions. Here's Why it Matters*, N.Y. Times, Aug. 23, 2018.
166. 84 Fed. Reg. at 30098. The draft further suggests that, even if an economic analysis is deployed for rulemakings, it ought to be "appended" presumably rather than incorporated into the NEPA document, and other economic

echoed this perspective, when it wrote the Federal Energy Regulatory Commission (FERC) in July 2018 that "EPA notes that NEPA and the [CEQ] implementing regulations do not require FERC or other agencies to monetize costs and benefits of a proposed action."[167]

CEQ's draft promotes having agencies cabin how they examine whether GHG emissions are caused by an agency's action. Under the banner of promoting the "rule of reason"—an oft-used phrase in NEPA judicial opinions—agencies would need to project the direct and indirect GHG emissions (and, consequently, assess the climate effects), only when those emissions are "significant" and practicably capable of being quantified and, further, there is a "sufficiently close causal relationship . . . between the proposed action and the effect"; a "but for" test is "not sufficient."[168] Finally, the proposed guidance suggests that agencies may avoid a robust cumulative impacts analysis for GHG emissions, a judgment CEQ is attempting to solidify in its proposed overhaul of the agency's general regulations.[169]

This draft GHG guidance has since been eclipsed by CEQ's proposed NEPA regulatory changes. At the 50th anniversary of NEPA, President Trump proclaimed that the statute's goals remain the same as they were in 1970, and while the "environmental review process" "has become increasingly complex and difficult to navigate," his Administration "remains committed to improving the environmental review and permitting process while ensuring environmental protection."[170] Yet, in January 2020, CEQ released its proposed regulatory changes that would, if adopted, undermine NEPA compliance.[171] To say these proposals are sweeping is an understatement.

To name just a few[172]: they would remove the language echoing Congress' purpose and objective in passing NEPA[173]; they purportedly would codify or extend erroneous case law and potentially circumscribe NEPA applicability[174]; they would cabin the effects analysis by removing cumulative impacts and constraining the scope of effects to those that are reasonably foreseeable and causally connected to the action in a narrow sense—furthering the objective of avoiding analyzing the effects from GHG emissions[175]; they would enlarge the opportunity for tiering and incorporation by reference[176]; and they would alter how much federal funding is necessary before a project triggers NEPA.[177] They would solidify the One Federal Decision process and agency timeliness and coordination protocols,[178] and confirm the importance of shorter environmental documents.[179] The alternatives analysis, the heart of an EIS, would be narrowed by proposed changes involving the purpose and need statement.[180] Also, private applicants would be afforded a greater ability to help craft parts of an environmental document. Previously, private applicants could fund an independent third-party consultant to prepare a draft document, provided enough assurances of independence were in place. That would now be expanded to allow the applicant itself to prepare the document—albeit subject to independent review and approval by the agency.[181] Some suggest this could lead us into "uncharted territory."[182] Finally, a number of changes would likely stifle judicial review.[183]

As one reporter opined, "[t]he proposal promises to narrow environmental requirements, opening the door to more cursory reviews of planned projects like power plants, pipelines and visitor centers at national parks."[184] It errone-

monetization efforts ought not trigger the need for including GHG economic monetization. *Id*.

167. Letter from Brittany Bolen, Associate Administrator, Office of Policy, U.S. EPA, to Kimberly D. Bose, Secretary, FERC (July 25, 2018). Earlier, when FERC abandoned using an SCC in its analysis for deciding whether to approve the Southeast Market Pipelines Project, Sens. Sheldon Whitehouse (D-R.I.) and Michael Bennett (D-Colo.) told the Commission its "decision is inconsistent with a series of court rulings on this issue and with the science and economics that underpins the SCC developed by" the IWG "on the SCC." Letter from Sens. Sheldon Whitehouse and Michael F. Bennett, to Neil Chatterjee, Chairman, FERC (Nov. 8, 2017).
168. 84 Fed. Reg. at 30098. "When an agency determines that the tools, methods, or data inputs necessary to quantify a proposed action's GHG emissions are not reasonably available, or it otherwise would not be practicable, the agency should include a qualitative analysis . . ." *Id*.
169. *See infra* note 174 and accompanying text.
170. Presidential Message on the 50th Anniversary of the National Environmental Policy Act (Jan. 1, 2020), https://www.whitehouse.gov/briefings-statements/presidential-message-50th-anniversary-national-environmental-policy-act/.
171. CEQ, Notice of Proposed Rulemaking: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020).
172. The purpose here is not to review this proposal in detail, nor comment on its efficacy, but instead to illustrate the Administration's overall approach toward NEPA. For a summary of the changes, see James M. McElfish Jr., Environmental Law Institute, Practitioners' Guide to the Proposed NEPA Regulations (2020), https://www.eli.org/research-report/practitioners-guide-proposed-nepa-regulations.
173. 85 Fed. Reg. at 1693-94.
174. *Id*. at 1695 (threshold applicability analysis). CEQ also would constrain any potential obligation to update outdated NEPA documents. Even when an analysis is woefully outdated, CEQ would not apply NEPA's supplementation obligation "[i]f there is no further agency action after the agency's decisions," relying on *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 34 ELR 20034 (2004). *Id*. at 1700. *See infra* note 225 (claims like those involving predator control in Wyoming, or levee operations in the Gulf Coast, would by regulation be foreclosed).
175. 85 Fed. Reg. at 1707-08.
176. *Id*. at 1699.
177. *Id*. at 1709.
178. *Id*. at 1691; *see also id*. at 1698 (lead and cooperating agencies).
179. *Id*. at 1687-88, 1700.
180. *Id*. at 1701. *See* Daniel R. Mandelker, *The National Environmental Policy Act: A Review of its Experience and Problems*, 32 Wash. U. J. L. & Pol'y 293, 305-07 (2010) (noting importance of the purpose and need).
181. 85 Fed. Reg. at 1725 (proposed §1506.5).
182. Stephen Lee, *Legal Scholars, White House Spar Over Environmental Permitting Bid*, Bloomberg Env't, Jan. 16, 2020.
183. The regulations would codify an exhaustion (or waiver) requirement, ensuring that commenters present their issues to the agency if they wish later to challenge an issue in court. 85 Fed. Reg. at 1693. That then is coupled with a "completeness of the summary" along with a brief comment period on that summary and "certification" by the agency that it has considered the relevant issues (such as submitted alternatives) and corresponding "conclusive presumption." *Id*. at 1691-93, 1703 (for consideration of alternatives). This is designed to affect judicial review. A NEPA violation, moreover, would not presumptively lead to either a stay by the agency (and there is a new proposal for agency consideration of stays) or an injunction absent a showing of irreparable harm. *Id*. at 1694. Harmless errors (albeit already accepted by some courts) would be tolerated. *Id*. CEQ, further, is subtly suggesting that agencies require bonds when a party seeks a stay. *Id*.
184. Jean Chemnick, *How Trump's NEPA Overhaul Could Affect 3 Projects*, E&E News, Jan. 16, 2020. *See also* Dylan Brown, *Mining Industry Hopes NEPA Rules Net Faster Permits*, E&E News, Jan. 10, 2020 (the proposed rules "would dramatically accelerate [NEPA] reviews for mines and land leases"). NEPA compliance for mining projects also could be accelerated once they qualified for the FAST Act process. Dylan Brown, *Feds Ease NEPA Process for Major Mining Projects*, E&E News, Jan. 16, 2020.

ously purports to do so consistent with the Act's legislative history: CEQ, for instance, would now elevate the word "major" and separate it from the "significantly affecting" language,[185] contrary to one of the drafters telling me he afforded no independent importance to the word "major" when it was added.[186] U.S. House of Representatives Speaker Nancy Pelosi (D-Cal.) responded by saying that "no longer [would the Administration] enforce NEPA."[187] And the general counsel of CEQ, when the Council's regulations were drafted during the Carter Administration, posits that the judiciary may upend aspects of these changes—if they are finalized—such as constraining an analysis of GHG emissions.[188] An industry attorney even warned that businesses should "Run Like Heck" away from trusting these proposals will survive.[189]

II. Today's Judiciary and NEPA

Ultimately, the federal judiciary will preside over the efficacy of the alterations to NEPA implementation by CEQ and agencies such as DOI, the Forest Service, or FERC. While many judges exercise vigilance in checking an agency's failure to take a hard look at the environmental consequences of proposed actions, lower federal courts nonetheless have tweaked NEPA's force even as a procedural statute. The following, therefore, discusses how the lower federal bench continues to hold agencies accountable when those agencies shirk their obligation to take the requisite hard look. On balance, though, the modern judiciary has done little to encourage robust NEPA compliance. Indeed, one—albeit limited—study suggests that political ideology is likely to predict the outcome of a NEPA challenge.[190] This suggests that, with the federal bench being shaped dramatically by President Trump's appointments,[191] the prospects for greater judicial scrutiny seem fanciful.[192]

Several decisions over the past few years illustrate how courts generally continue to demand that agencies, at the very least, purport to take the requisite *hard look*. This occurs, for instance, when agencies fail to provide a meaningful explanation of identified significant impacts.[193] For instance, as the Trump Administration's executive branch agencies curtail any meaningful examination of how climate change may impact a proposed action or how the action may affect climate change, directly, indirectly, or cumulatively through increased GHG emissions, the federal bench is not shy on instructing those agencies to revisit their environmental documents.[194] This is evident most visibly with the treatment of climate change when approving activities associated with coal leasing and mining.[195] But it also surfaced with FERC's treatment of climate change when approving new interstate natural gas pipelines under the Natural Gas Act.[196] Even as the Trump Administration seeks to shutter meaningful consideration of climate change (both through the guidance and its regulatory overhaul), precedent ought to cabin the Administration's ability to succeed.

But seemingly subtle, yet potentially significant, changes in NEPA implementation are likely to prevail.

185. 85 Fed. Reg. at 1709.
186. Personal Conversation with Bill Van Ness (Dec. 18, 2007).
187. Kelsey Brugger, *Trump Unveils Landmark Rewrite of NEPA Rules*, E&E News, Jan. 9, 2020.
188. *See* Chemnick, *supra* note 184.
189. *"Run Like Heck" From Relying on NEPA Update: Industry Lawyer*, Bloomberg Env't, Feb. 7, 2020 (comments from long-time NEPA attorney Thomas C. Jensen). Robert Glicksman and Alejandro Camacho explain how the proposed changes are "antithetical to the core goals of NEPA." Robert L. Glicksman & Alejandro E. Camacho, *Trump Card: Tarnishing Planning, Democracy, and the Environment*, 50 ELR 10281, 10281 (Apr. 2020).
190. Jay E. Austin et al., Environmental Law Institute, Judging NEPA: A "Hard Look" at Judicial Decisionmaking Under the National Environmental Policy Act 1 (2004) (reviewing cases from 2001-2004). The study also charts the number of NEPA cases annually from 1974 through 2001, with a minor gap between the late 1990s and 2001, and laments how the number of NEPA challenges rose during the study period. *Id*. at 6.
191. *See* Cori Petersen & Charles (C.J.) Szafir, *Trump Is Remaking the Federal Judiciary at a Historic Rate*, RealClear Pol., Jan. 4, 2020.
192. One recent study concludes that environmental plaintiffs are "almost twice as likely to prevail before a district judge appointed by a Democratic president as one appointed by a Republican." David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 Ariz. St. L.J. 3, 9 (2018).
193. *E.g.*, American Wild Horse Pres. Campaign v. Zinke, No. 1:16-cv-00001-EJL, 2017 WL 4349012 (D. Idaho Sept. 29, 2017). For instance, in *Southeast Alaska Conservation Council v. U.S. Forest Service*, 2020 WL 1190453, 50 ELR 20057 (D. Alaska March 11, 2020), the court rejected the Service's attempt to avoid analyzing site-specific impacts by performing effectively a programmatic analysis without contemplating further NEPA review at the site-specific level.
194. *E.g.*, San Juan Citizens All. v. U.S. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 1244, 48 ELR 20096 (D.N.M. 2018) ("The failure of BLM to quantify and analyze the impacts of the downstream greenhouse gas emissions requires remand of this case."); AquaAlliance v. U.S. Bureau of Reclamation, 287 F. Supp. 3d 969, 1032 (E.D. Cal. 2018) ("the [final EIS/final environmental impact report] fails to address or otherwise explain how this information about the impacts of climate change can be reconciled with the ultimate conclusion that climate change impacts to the Project will be less than significant"). *But cf.* High Country Conservation Advocates v. U.S. Forest Serv., 333 F. Supp. 3d 1107 (D. Colo. 2018) (court concluded agency examined the issue sufficiently); Center for Biological Diversity v. U.S. Bureau of Land Mgmt., Nos. 2:14-cv-00226-APG-VCF and 2:14-cv-00228-APG-VCF, 2017 WL 3667700 (D. Nev. Aug. 23, 2017) (BLM adequately considered climate change).
195. *E.g.*, WildEarth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222, 47 ELR 20115 (10th Cir. 2017); Western Org. of Res. Councils v. U.S. Bureau of Land Mgmt., No. CV 16-21-GF-BMM, 2018 WL 1475470, 48 ELR 20044 (D. Mont. Mar. 26, 2018); Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074, 47 ELR 20101 (D. Mont. 2017), *amended in part, aff'd in part*, No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017), *and later op*., 350 Montana v. Bernhardt, 2020 WL 1139674, 50 ELR 20055 (D. Mont. Mar. 9, 2020) (rejecting requirement for using a SCC, and for additional GHG emission impacts). *See also* Dylan Brown, *Judge Gives BLM Deadline to Study Leasing Impacts*, E&E News, Aug. 3, 2018. Because the existing NEPA analysis for the federal coal program fails to take a hard look at climate change, and because the court refused to order updating the document, see *Western Organization of Resource Councils v. Zinke*, 892 F.3d 1234, 48 ELR 20098 (D.C. Cir. 2018), the individual site-specific decisions must address climate change. *See generally* Ellen M. Gilmer, *Court Corners Trump Admin on Coal's Climate Impacts*, E&E News, Mar. 26, 2018.
196. *E.g.*, Sierra Club v. Federal Energy Regulatory Comm'n, 867 F.3d 1357, 47 ELR 20104 (D.C. Cir. 2017). *See* Sam Mintz, *EPA Advises FERC on Measuring Greenhouse Gases*, E&E News, June 22, 2018; Ellen M. Gilmer, *Senate Dems Take FERC to Task for Climate Policy Shift*, E&E News, June 13, 2018; Ellen M. Gilmer, *FERC and Climate Change: Where Are We Now?*, E&E News, June 5, 2018; Ellen M. Gilmer, *Enviros Decry FERC's Climate Stance but Can't Get to Court*, E&E News, June 1, 2018; Ellen M. Gilmer, *FERC Splits on Climate Review, Reapproves Sabal Trial*, E&E News, Mar. 15, 2018. Earlier FERC cases appeared to confirm FERC's approach. *Compare* Sierra Club v. Federal Energy Regulatory Comm'n, 827 F.3d 36, 46 ELR 20117 (D.C. Cir. 2016), *and* Sierra Club v. Federal Energy Regulatory Comm'n, 827 F.3d 59, 46 ELR 20116 (D.C. Cir. 2016), *with* Sierra Club v. Federal Energy Regulatory Comm'n, 867 F.3d 1357, 47 ELR 20104 (D.C. Cir. 2017).

Agencies are increasingly more astute in their use of programmatic decisionmaking, tiering, and reliance on prior environmental analysis, all of which streamline the NEPA process.[197] NEPA documents require an agency to identify the purpose and need for the proposed action,[198] but savvy drafters can cabin an alternatives analysis by crafting a reasonably circumscribed purpose and need statement. Tailored purpose and need statements allow agencies to avoid analyzing far-fetched alternatives, and ensures that agencies consider the "needs and goals of the parties."[199] But too-tailored statements might narrow the alternatives analysis such that only one option satisfies the purpose and need. For instance, instead of identifying the goal as simply developing a natural gas field, it would be identifying the purpose and need as drilling three wells on A, B, and C sites and allowing three gathering pipelines along the following X, Y, and Z routes in producing natural gas from the field. This might impermissibly "define the objectives of [the] action in terms so unreasonably narrow that only one alternative from the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality."[200]

After stating how an EA's alternatives analysis is "less rigorous" than one in an EIS, one judge observed how "[a]n agency enjoys considerable discretion in defining the purpose and need of a project," and decided to review the exercise of that discretion under a "reasonableness standard."[201] With that standard, a purpose and need statement that narrows the discussion to a particular energy source—utility-scale solar rather than rooftop solar—might be palatable under modern NEPA analysis.[202] It seems more likely that an agency will be chastised for presenting an inadequate alternatives analysis and yet avoid being told that it impermissibly narrowed the alternatives analysis through its purpose and need statement.[203] Even the deficient Keystone XL pipeline NEPA document did not cross the border into an unreasonably narrow purpose and need statement.[204] CEQ's proposed changes would further diminish the function of a purpose and need statement, potentially then further cabining the heart of the NEPA document—the alternatives analysis.

Next, for projects that involve staged decisionmaking, when site-specific impacts are not identifiable until a later stage, courts often afford agencies flexibility in deferring site-specific analysis.[205] Oil and gas leases are prototypical.

197. *E.g.*, Final Guidance for Effective Use of Programmatic NEPA Reviews, 79 Fed. Reg. 76986 (Dec. 23, 2014); Effective Use of Programmatic NEPA Reviews, 79 Fed. Reg. 50578 (Aug. 25, 2014) (notice of draft guidance). The idea of tiering, or building off an earlier document, has been a part of CEQ's regulations. 40 C.F.R. §§1500.20, 1500.28 (2019); CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended; NEPA Task Force, *supra* note 85. *See generally* Douglas Lind, *The Tiering of Impact Statements—Can the Process Be Stopped Halfway?*, 20 Urb. L. Ann. 197 (1980). But anecdotally, parties began exploring its utility more robustly after the 1980s, such as in the analysis prepared by a consulting firm and law firm for the American Association of State Highway and Transportation Officials. PB Americas, Inc. & Perkins Coie LLP, Guidelines on the Use of Tiered Environmental Impact Statements for Transportation Projects (2009), http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25(38)_FR.pdf.

198. 40 C.F.R. §§1508.9(b), 1502.13 (2019); 42 U.S.C. §4332(2)(E). Agencies may treat the purpose and need statement differently. For instance, the Corps has a long history of examining an applicant's purpose in the context of considering a §404 (wetlands) permit application, while BLM examines its own purpose and need when considering an applicant's proposal.

199. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196, 21 ELR 21142 (D.C. Cir. 1991).

200. Citizens for Smart Growth v. Secretary of the Dep't of Transp., 669 F.3d 1203, 1212, 42 ELR 20034 (11th Cir. 2012). *See also* Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 73, 41 ELR 20345 (D.C. Cir. 2011) (cannot "compel[ ] the selection of a particular alternative"); Utah Envtl. Cong. v. Bosworth, 439 F.3d 1184, 1195, 36 ELR 20072 (10th Cir. 2006) (cannot "foreclose reasonable consideration of alternatives"); City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155, 27 ELR 21428 (9th Cir. 1997) ("an agency cannot define its objectives in unreasonably narrow terms").

201. Our Money Our Transit v. Federal Transit Admin., No. C13-1004 TSZ, 2014 WL 3543535 (W.D. Wash. July 16, 2014), *aff'd*, 689 Fed. Appx. 504 (9th Cir. 2017) (unpublished mem. op.) (observing how the state and agency had explored more than 50 alternatives prior to preparing the EA). *See also* Little Traverse Lake Prop. Owners Ass'n v. National Park Serv., 883 F.3d 644, 656, 48 ELR 20030 (6th Cir. 2018) ("considerable discretion"); Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 579, 46 ELR 20106 (9th Cir. 2016) (noting agency deference); Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 1084, 43 ELR 20016 (9th Cir. 2013) (same); League of Wilderness Defs. Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1069, 42 ELR 20162 (9th Cir. 2012) (same); National Parks & Conservation Ass'n v. U.S. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010) (same); Environmental Def. Ctr. v. Bureau of Ocean Energy Mgmt., No. CV 16-8418 PSG (FFMx), 2018 WL 5919096, 48 ELR 20194 (C.D. Cal. Nov. 9, 2018) ("considerable discretion"). Indeed, while critical of NEPA compliance and ruling against the agency on other related issues, one court found this deferential standard a significant hurdle. Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074, 47 ELR 20101 (D. Mont. 2017). Another court observed how "[o]ur Circuit has made clear that it is the prerogative of the agency to define the purpose of a rulemaking, and I must uphold an agency action 'so long as the objectives that the agency chooses are reasonable.'" Alaska v. U.S. Dep't of Agric., 273 F. Supp. 3d 102, 117 (D.D.C. 2017), *appeal pending*.

202. Protect Our Cmtys. Found. v. Jewell, No. 13CV575 JLS (JMA), 2014 WL 1364453 (S.D. Cal. Mar. 25, 2014), *aff'd*, 825 F.3d 571, 580-81, 46 ELR 20106 (9th Cir. 2016).

203. *See*, *e.g.*, Audubon Soc'y of Portland v. U.S. Army Corps of Eng'rs, No. 3:15-cv-665-SI, 2016 WL 4577009, 46 ELR 20146 (D. Or. Aug. 31, 2016) (following an earlier case, '*Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 36 ELR 20204 (9th Cir. 2006), upholding narrow purpose and need statement but concluding that agency failed to assess reasonable alternatives satisfying that purpose and need), *appeal dismissed*, Nos. 16-35889 and 16-35953, 2017 WL 5125727 (9th Cir. Feb. 6, 2017). *See also* Honolulu Traffic.com v. Federal Transit Admin., 742 F.3d 1222, 44 ELR 20029 (9th Cir. 2014) (purpose and need not too narrow because shaped by federal legislation); Public Emps. for Envtl. Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 122, 44 ELR 20058 (D.D.C. 2014) (purpose and need for energy facility not unreasonably narrow); *Protect Our Communities Found.*, 825 F.3d at 580 (same). *Cf.* Backcountry Against Dumps v. Chu, 215 F. Supp. 3d 966, 979 (S.D. Cal. 2015) (rejecting too narrow purpose and need).

204. Indigenous Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 573, 48 ELR 20191 (D. Mont. 2018):

> No error exists in the Department's purpose and need statement. The Department possesses broad discretion to define the purpose of its actions. The Department may consider private interests as part of its purpose and need. . . The Department reasonably stated that it sought to determine whether approval of the permit would serve the national interest. The Department's purpose and need statement further proves reasonable when it considered both TransCanada's private interests and the Department's own requirements for issuing cross-border permits.

stay granted in part, Nos. CV-17-29-GF-BMM and CV-17-31-GF-BMM, 2019 WL 652416, 49 ELR 20024 (D. Mont. Feb. 15, 2019), *appeal dismissed and remanded by* Nos. 18-36068, 18-36069, 19-35036, 19-35064, and 19-35099, 2019 WL 2542756 (9th Cir. June 6, 2019).

205. *See*, *e.g.*, Native Vill. of Point Hope v. Jewell, 740 F.3d 489, 498, 44 ELR 20016 (9th Cir. 2014); Center for Biological Diversity v. U.S. Bureau of Land Mgmt., Nos. 2:14-cv-00226-APG-VCF and 2:14-cv-00228-APG-VCF, 2017 WL 3667700, at *9 (D. Nev. Aug. 23, 2017). But "Defendants cannot kick the can down the road and hold off considering the significant impacts of its decision" when those impacts will not be addressed later in a

Modern courts are quite willing to allow agencies to defer any site-specific environmental impacts until the actual exploration or production stage, provided the agency retains the discretion to preclude all surface-disturbing activities.[206] While I believe that objectively such tools for removing unnecessary environmental analysis may be worthwhile, in the hands of the Trump Administration they may prove destructive.

Courts seemingly tolerate varying approaches for agency "determinations of NEPA adequacy" (DNAs)—that is, when an agency concludes that a prior NEPA analysis is sufficient to allow an agency action to proceed without further NEPA compliance.[207] Several environmental nongovernmental organizations, for instance, believe that at least in one instance BLM's use of a DNA was the "elephant in the room." BLM's handbook expressly allows the use of a DNA when an activity's effects already have been considered in a prior environmental document and nothing since warrants supplementation.[208] The Forest Service too is now proposing to employ DNAs as well, a decision that many academics believe violates NEPA.[209] Their prior use apparently had been limited to actions associated with the same or a derivative activity. Yet, when the Utah State Office relied on a DNA to approve eight lease sales in the Canyon Country District, the environmental community claimed that broad prior environmental analysis allegedly supporting the DNA did not "share the same (or similar) purpose and need as the DNA," nor did "they contain the requisite site-specific direct, indirect, and cumulative impact analysis," and specifically did not account for any site-specific impacts to cultural resources.[210]

The duty to supplement is often informed by a court's reluctance to demand additional analysis absent a strong showing of substantial changes or circumstances, a signal emanating from *Marsh v. Oregon Natural Resources Council*.[211] In *Marsh*, the Court recognized the need for supplementation even after a proposal "has received initial approval."[212] The Court held that the judiciary ought to defer to the "expert," or "specialist" judgment by agencies when those agencies determine that nothing of significance has occurred since the preparation of the environmental document that would warrant supplementation.[213]

The caveat is that courts still must ensure the agency took the requisite "hard look"[214] and "carefully review[ ] the record and satisfy[ ] themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance of the new information."[215] "Under this standard," one court observed, "an agency is not required to make a new assessment under NEPA every time it takes a step that implements a previously studied action, so long as the impacts of that step were contemplated and analyzed by the earlier analysis."[216] When, however, the change in circumstances is dramatic, a court could order further NEPA compliance—and yet, that resulting additional inquiry may seem somewhat preordained.

For instance, President Trump championed the Keystone XL pipeline, after the Obama Administration had denied the company a presidential border-crossing permit. Supported by the new president, TransCanada subsequently reapplied and received a border-crossing permit in January 2017, with a record of decision in March 2017.[217] Even though the company rerouted its proposed Keystone XL pipeline to accommodate an alternative Nebraska-approved route through that state (referred to as the main-

site-specific analysis. American Wild Horse Pres. Campaign v. Zinke, No. 1:16-cv-00001-EJL, 2017 WL 4349012 (D. Idaho Sept. 29, 2017).

206. *See* Fisheries Survival Fund v. Jewell, No. 16-cv-2409 (TSC), 2018 WL 4705795, 48 ELR 20174 (D.D.C. Sept. 30, 2018). *See also* Northern Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 36 ELR 20141 (9th Cir. 2006). *Cf.* Conner v. Burford, 848 F.2d 1441, 18 ELR 21182 (9th Cir. 1988); Sierra Club v. Peterson, 717 F.3d 1409, 1414-15, 13 ELR 20888 (D.C. Cir. 1983); Wyoming Outdoor Council v. Bosworth, 284 F. Supp. 2d 81, 92-93 (D.D.C. 2003).

207. *E.g.*, Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp., 113 F.3d 1505, 27 ELR 21169 (9th Cir. 1997); Friends of Animals v. U.S. Bureau of Land Mgmt., No. 16-v-1670, 2018 WL 1612836 (D. Or. Apr. 2, 2018) (accepting BLM's use of the DNA process, yet concluding that agency did not ensure that it took the requisite hard look); *see also* Bark v. Northrop, No. 3:13-cv-00828-AA, 2018 WL 1598662 (D. Or. Mar. 31, 2018) (whether to supplement analysis due to discovery of bumblebee).

In *Northern Alaska Environmental Center v. U.S. Department of the Interior*, No. 3:18-cv-00030-SLG, 2018 WL 6424680, 48 ELR 20202 (D. Alaska Dec. 6, 2018), DOI relied upon the NEPA analysis in an integrated activity plan and accompanying EIS to conclude in a "cursory" and then subsequently expanded DNA that further NEPA analysis was unnecessary when issuing specific leases in the National Petroleum Reserve-Alaska. The planning EIS did not include any parcel-specific information, and the U.S. Court of Appeals for the Ninth Circuit had held that such detailed site-specific information was unnecessary in the planning EIS. The plaintiffs failed to allege that supplementation of that EIS was necessary; that doomed their case when the court held that no EA or EIS was necessary for the lease sale. *See also* Natural Res. Def. Council v. Zinke, No. 3:18-cv-00031-SLG, 2018 WL 6424687 (D. Alaska Dec. 6, 2018) (related case dismissed on procedural grounds). *See generally* Pamela King, *Judge Rules Against Enviros in NPR-A Leasing Lawsuits*, E&E News, Dec. 7, 2018.

208. BLM, National Environmental Policy Act Handbook (H-1790); U.S. Department of the Interior, Departmental Manual Part 516 ch. 11 sec. 11.6.

209. Law Professors' Comments on Proposed Rule, *supra* note 130, at 7.

210. Letter from Southern Utah Wilderness Alliance et al., to Ed Roberson, Utah State Director, BLM (Jan. 2, 2018), re: Protest of the Bureau of Land Management Canyon Country District's Competitive Oil and Gas Lease Sale to Be Held on or Around March 20, 2018, https://utah.sierraclub.org/sites/utah.sierraclub.org/files/SUWA%20et%20al%20-%20Protest%20of%20March%202018%20Lease%20Sale%20DNA%20%281-2-2018%29.pdf. With respect to cultural resources, the NGOs claimed that new information about previously undisclosed archeological sites had emerged and that prior "broad level NEPA documents [did] not evaluate potential site specific impacts to satisfy NEPA's hard look mandate." *Id*. In *Triumvirate, LLC v. Bernhardt*, 367 F. Supp. 3d 1011 (D. Alaska 2019), the court did reject reliance on a DNA where "BLM did not consider [at all] the changed circumstances" since the earlier environmental analysis. *Id*. at 1027.

211. 490 U.S. 360, 19 ELR 20749 (1989).

212. *Id*. at 371.

213. *Id*. at 377-78.

214. *Id*. at 385.

215. *Id*. at 377-78.

216. Mayo v. Reynolds, 875 F.3d 11, 16, 47 ELR 20143 (D.C. Cir. 2017). The D.C. Circuit suggested an SEIS would be unnecessary even when there was a change in the project absent the change presenting a "'seriously' different picture of environmental impacts" and the measure at issue was a "central" piece. Friends of the Capital Crescent Trail v. Federal Transit Admin., 877 F.3d 1051 (D.C. Cir. 2017) (changed mitigation after the record of decision to reduce costs).

217. Notice of Issuance of a Presidential Permit to TransCanada Keystone Pipeline, L.P., 82 Fed. Reg. 16467 (Apr. 4, 2017); *see generally* Congressional Research Service, Keystone XL: Greenhouse Gas Emissions Assessments in the Final Environmental Impact Statement (2017) (describing history).

line alternative route), a route that would be longer, go through several new counties and water bodies, and even add an additional pumping station, the Administration balked at agreeing to additional environmental analysis.[218] And although the court ordered it to do so, it initially did not vacate the decision authorizing the presidential permit; the Administration responded how it could complete the analysis in a mere six weeks.[219]

Almost immediately, the Administration noticed its intent to prepare an SEIS,[220] followed quickly by notice of availability of a draft SEIS.[221] Two months later, the district court issued a seemingly broad injunction against any activities that might further the construction or operation of the pipeline, until the State Department prepared an adequate supplemental SEIS to the 2014 SEIS.[222] When TransCanada and the United States requested clarification on the injunction, the court marginally modified the injunction language (allowing surveying, permitting, design, and planning) and continued to prohibit most preconstruction activities—observing that "[e]nvironmental concerns with respect to the NEPA process outweigh TransCanada's pecuniary interest," and that allowing some preconstruction activities to continue might "skew" the State Department's analysis by creating a "risk" of "bureaucratic momentum."[223]

Of course, a supplementation obligation further assumes the agency has yet to take *any* action in furtherance of its environmental document. Once the Court in *Norton v. Southern Utah Wilderness Ass'n* seemingly narrowed available remedies for parties seeking to compel agency action, lower courts have been loath to force supplementation apart from reviewing an accompanying current agency decision. When, for instance, the Trump Administration discontinued the Obama Administration's programmatic EIS for the federal coal program, the plaintiff argued an obligation existed to continue with the update because the old EIS was too outdated.[224] The court held that no agency action existed and, as such, it could not review the claim.[225] Similar claims for supplementation have surfaced, with no meaningful victories, yet.[226]

Yet, several decisions suggest that, regardless of a NEPA violation, the resulting remedy resides within the court's equitable power. Scholars who acquiesce to NEPA's role as a process-oriented statute nevertheless often urge that courts engage in a robust hard-look review under the Administrative Procedure Act (APA) and assume the result of such an engagement is to avoid environmental harm until the agency complies with its obligations—even if only procedural.[227] Congress specifically directed that federal agencies prepare their NEPA documents before "any irreversible and irretrievable commitment[ ] of resources which would be involved in the proposed action should it be implemented."[228] Arguably, this ought to mean an adequate NEPA document, not one that a court has found insufficient.[229]

When, for instance, the Oglala Sioux Tribe challenged the NRC's somewhat flagrant abuse of NEPA, the D.C. Circuit chastised the agency and noted "[t]he statute's requirement that a detailed environmental impact state-

218. Indigenous Envtl. Network & N. Coast River All. v. U.S. Dep't of State, No. 17-cv-00031, 48 ELR 20144 (D. Mont. Aug. 15, 2018). The government and TransCanada argued that supplementing NEPA was unnecessary, because the State Department already had completed the NEPA analysis and issued a presidential permit—and, as such, lacked sufficient residual authority to require further analysis. The court disagreed, adding that an agency must "prepare a post decision supplemental EIS when a project has not been fully constructed or completed" and that, here, the government "retain[ed] a meaningful opportunity to evaluate" the new alternative route. *Id*.

219. Ellen M. Gilmer, *Trump Admin Plans Fast Timeline for Fresh Pipeline Review*, E&E News, Sept. 6, 2018.

220. 83 Fed. Reg. 46989 (Sept. 17, 2018).

221. 83 Fed. Reg. 48358 (Sept. 24, 2018). This schedule generally followed the proposed schedule the government filed with the court and noted how the agency already had begun drafting an EA and would simply "pivot" from that EA to an SEIS. Defendants' Proposed Schedule for Completing a Supplemental Environmental Impact Statement, Indigenous Envtl. Network v. Northern Plains Res. Council, No. 17-00029-BMM (filed D. Mont. Sept. 4, 2018). This prompted the environmental plaintiffs to question whether sufficient time was being allocated to complete an adequate supplemental document. They further noted that TransCanada expected to begin some construction activities in early 2019, well before meaningful judicial review could occur. Plaintiffs' Response to Defendants' Proposed Schedule for Completing a Supplemental EIS at 2, Indigenous Envtl. Network v. Northern Plains Res. Council, No. 17-00029-BMM (filed D. Mont. Sept. 12, 2018).

222. The court directed supplementation of aspects of the 2014 SEIS, concluding that the cumulative impacts analysis should include the combined GHG effects from Keystone and the Alberta Clipper pipeline expansion; that the effects analysis on the risk of oil spills failed to consider recent studies (which could have affected mitigation); and that the analysis of cultural impacts was deficient, and further that the about-face on the treatment of climate impacts lacked a "reasoned explanation," although rejecting challenges to the purpose and need statement, the alternatives analysis, and the market analysis (Keystone's failure to impact the rate of tar sands extraction). Indigenous Envtl. Network v. Northern Plains Res. Council, No. 17-00029-BMM (D. Mont. Nov. 8, 2018). President Trump almost immediately ridiculed the decision as political and a "disgrace." Nick Bowlin, *Trump Calls KXL Ruling "A Disgrace,"* E&E News, Nov. 9, 2018.

223. Indigenous Envtl. Network v. Northern Plains Res. Council, No. 17-00029-BMM (filed D. Mont. Dec. 7, 2018). TransCanada requested the court modify the injunction and allow some preconstruction activities (e.g., project planning, project development, permit application and compliance, landowner contacts, and surveying). Defendant-Intervenors' Motion to Amend the Court's Order on Summary Judgment, Indigenous Envtl. Network v. Northern Plains Res. Council, No. 17-00029-BMM (filed D. Mont. Nov. 15, 2018). The United States further clarified with the court that environmental review activities by the government could proceed. Defendants' Response to Defendant-Intervenors' Motion to Amend the Court's Order on Summary Judgment, Indigenous Envtl. Network v. Northern Plains Res. Council, No. 17-00029-BMM (filed D. Mont. Nov. 29, 2018). The Ninth Circuit eventually dissolved the injunction and directed that the case be dismissed as moot. Indigenous Envtl. Network v. U.S. Dep't of State, Nos. 18-36068, 18-36069, 19-35036, 19-35064, and 19-35099, 2019 WL 2542756 (9th Cir. June 6, 2019).

224. Western Org. of Res. Councils v. Zinke, 892 F.3d 1234, 48 ELR 20098 (D.C. Cir. 2018).

225. *Id.*

226. *See* Harrison County, Mississippi v. Mississippi River Comm'n, No. 19-00986 (S.D. Miss. filed Dec. 23, 2019) (claiming that agency must supplement); Delbert Hosemann, in His Official Capacity as Secretary of State and Trustee of the Public Tidelands Trust v. U.S. Army Corps of Eng'rs, No. 19-00989 (S.D. Miss. filed Dec. 30, 2019); Center for Biological Diversity v. U.S. Dep't of Agric. Animal & Plant Health Inspection Serv. Wildlife Servs., No. 19-00020 (filed D. Wyo. Jan. 29, 2019) (settled a claim, on August 8, 2019, that agency must update analysis for predator control).

227. *See* Jason J. Czarnezki, *Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 Stan. Envtl. L.J. 3 (2006).

228. 42 U.S.C. §4332(c).

229. Some courts suggest that deficiencies in the NEPA analysis are problematic only when they undermine NEPA's goals of an informed decision and informed public input. *See* Fuel Safe Wash. v. Federal Energy Regulatory Comm'n, 389 F.3d 1313, 1323 (10th Cir. 2004); Custer Cty. Action Ass'n v. Garvey, 256 F.3d 1024, 1035, 31 ELR 20804 (10th Cir. 2001).

ment be made for a 'proposed' action makes clear that agencies must take the required hard look *before* taking that action," adding further that "[n]othing in NEPA's text suggests that the required environmental analysis of a 'proposed' action is optional if a party does not prove that 'irreparable harm' would result from going forward before the agency completes a valid EIS."[230] Quite simply, then, if NEPA's principal objective is to ensure that an agency looks before it leaps, when judges allow the agency to leap while revisiting the NEPA analysis, the residual benefits of the NEPA process are further weakened.

But that is what is now occasionally tolerated. Upon finding a violation, a court is likely to ask the parties to brief the appropriate remedy. For instance, during a court's review of BLM's NEPA compliance for a large water pipeline, the Nevada District Court observed how, "even if an agency violated NEPA, that does not mean a remedy is necessarily warranted," and instead, the court "must then consider whether any error 'materially' impeded NEPA's goals—that is, whether the error caused the agency not to be fully aware of the environmental consequences of the proposed action."[231]

Similarly, for instance, when BLM violated NEPA for leasing coal, oil, and gas in the Powder River Basin, the court concluded by observing that it was "appropriate under the circumstances to seek guidance from the parties as to the nature and scope of the appropriate remedies to address the NEPA violations."[232] That may lead to vacating the NEPA document as well as the underlying agency approval.[233] But it may not.[234] For the Powder River Basin leases, though the court enjoined any new or pending leases "until the Federal Defendants produce remedial analyses that comply with its obligations under NEPA," it concluded that it would be "inequitably inappropriate to the scope of the instant action" to vacate the entire record of decision (for two resource management plans).[235]

When a court faulted BLM for failing to adequately assess GHG emissions attributed to a master plan and corresponding approval of applications for permits to drill natural gas wells, the court instructed the parties to confer

230. Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n, 896 F.3d 520, 48 ELR 20126 (D.C. Cir. 2018). *See* Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n, 879 F.3d 1202 (D.C. Cir. 2018) (while questioning the efficacy of NRC's NEPA process, concluding that "there was no harm and no foul" and thus no need for remand, following *Friends of the River v. Federal Energy Regulatory Commission*, 720 F.2d 93, 13 ELR 21020 (D.C. Cir. 1983), rather than *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 46 ELR 20119 (D.C. Cir. 2016)).

In *Hopper*, the D.C. Circuit observed that, upon finding a NEPA violation, the court's task is to undertake a "'particularized analysis of the violations that have occurred,' 'the possibilities for relief,' and 'any countervailing considerations of public interest,' including 'the social and economic costs of delay'" when deciding whether to halt a project. And there, the court merely vacated the NEPA analysis for the proposed offshore Cape Wind facility but did not otherwise vacate its lease or other regulatory approvals. In yet another case, however, the U.S. District Court for the District of Columbia indicated that the circuit's precedent provided that "the standard violation for a NEPA violation is vacatur," although "courts have discretion to depart from the presumptive remedy and remand to the agency without vacating" and should apply the 1993 test (employed in *Hopper*) from *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Friends of the Capital Crescent Trail v. Federal Transit Admin., 263 F. Supp. 3d 144, 149 (D.D.C. 2017), *rev'd*, 877 F.3d 1051 (D.C. Cir. 2017).

231. Center for Biological Diversity v. U.S. Bureau of Land Mgmt., Nos. 2:14-cv-00226-APG-VCF and 2:14-cv-00228-APG-VCF, 2017 WL 3667700 (D. Nev. Aug. 23, 2017), *appeal dismissed*, Nos. 17-17152, 17-17252, and 17-17263, 2017 WL 7036679 (9th Cir. Dec. 21, 2017). When the court held that the Corps violated NEPA when issuing a permit to the Dakota Access pipeline, it requested briefing on the appropriate remedy. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 255 F. Supp. 3d 101, 47 ELR 20035 (D.D.C. 2017). And later it concluded that vacatur would be inappropriate because the Corps could likely substantiate its conclusion that the project would not have serious impacts. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 282 F. Supp. 3d 91 (D.D.C. 2017). It added, however, "[c]ompliance with NEPA cannot be reduced to a bureaucratic formality, and the Court expects the Corps not to treat remand as an exercise in filling out the proper paperwork *post hoc*." *Id*. at 109. Subsequently, the court found the agency's response inadequate and ordered the preparation of EIS, while once again asking for separate briefing on the remedy. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 2020 WL 1441923, 50 ELR 20070 (D.D.C. March 25, 2020).

232. Western Org. of Res. Councils v. U.S. Bureau of Land Mgmt., No. CV 16-21-GF-BMM, 2018 WL 1475470, 48 ELR 20044 (D. Mont. Mar. 26, 2018) (failed to consider climate change impacts if decreased leasing acreage at planning stage and not deferring to leasing stage). *See also* Western Watersheds Project v. U.S. Dep't of Agric. Animal & Plant Health Inspection Serv. Wildlife Servs., 320 F. Supp. 3d 1137, 48 ELR 20104 (D. Idaho 2018) ("Typically, the Court, having granted summary judgment on the ground that an EIS should have been prepared, would remand the matter to the agency to prepare an EIS. In this case, however, the parties have indicated they desire further input on remedies."); AquaAlliance v. U.S. Bureau of Reclamation, 312 F. Supp. 3d 878 (E.D. Cal. 2018) (describing difficulty parties had in discussing remedy phase, discussing factors for consideration and then vacating agency decision); *see also* Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining, No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017).

233. *E.g.*, San Juan Citizens All. v. U.S. Bureau of Land Mgmt., 326 F. Supp. 3d 1227, 48 ELR 20096 (D.N.M. 2018) (vacated and remanded leasing decision, although not issuing injunction); Oregon Natural Desert Ass'n v. Zinke, 250 F. Supp. 3d 773, 775 (D. Or. 2017) ("I find the seriousness of BLM's error outweighs the disruptive consequences resulting from vacatur."). During the remedy phase in a successful NEPA challenge, one district court observed that it believed the typical remedy in the District Court for the District of Columbia was to vacate the underlying decision, upon applying the typical *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), precedent. Memorandum Opinion on Vacatur at 2, Public Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv., 177 F.3d 146, 46 ELR 20065 (D.D.C. 2016) (No. 14-1807) ("A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations.").

In the highly visible challenge to the Keystone XL pipeline, once the court concluded that aspects of the NEPA compliance were insufficient and vacated the record of decision and enjoined any construction activities, Indigenous Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 48 ELR 20191 (D. Mont. 2018), the parties then sought to modify the remedy and the court refused to allow any construction-related activities to proceed as well as certain preconstruction activities (ones that raised the fear of "bureaucratic momentum"). Indigenous Envtl. Network v. U.S. Dep't of State, 369 F. Supp. 3d 1045, 1050, 48 ELR 20203 (D. Mont. 2018). Notably, the court observed, "Environmental concerns with respect to the NEPA process outweigh TransCanada's pecuniary interest." *Id*. at 1052. Eventually, when the parties appealed, the case was dismissed and remanded with instructions to vacate judgment and dismiss the matter as moot. Indigenous Envtl. Network v. U.S. Dep't of State, Nos. 18-36068, 18-36069, 19-35036, 19-35064, and 19-35099, 2019 WL 2542756 (9th Cir. June 6, 2019).

234. *E.g.*, Friends of Animals v. U.S. Bureau of Land Mgmt., No. 2:16-cv-1670-SI, 2018 WL 3795222 (D. Or. Aug. 9, 2018) (NEPA violation but not vacating agency decision); Backcountry Against Dumps v. Perry, No. 3:12-cv-03062-L-JLB, 2017 WL 3712487 (S.D. Cal. Aug. 29, 2017) (considering remedy for NEPA violation and declining to issue injunction). In one instance, a court found that environmental considerations favored maintaining the status quo while the agency complied with NEPA. Western Expl., LLC v. U.S. Dep't of the Interior, 250 F. Supp. 3d 718, 47 ELR 20055 (D. Nev. 2017) (holding that BLM violated NEPA when issuing certain sage-grouse management plans). A NEPA violation may also be treated as a harmless error. *E.g.*, Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy, 860 F.3d 1244 (9th Cir. 2017).

235. Order of July 31, 2018, Western Org. of Res. Councils v. U.S. Bureau of Land Mgmt., No. 16-00021, 48 ELR 20044 (D. Mont. Mar. 26, 2018).

"and attempt in good faith to reach an agreement as to remedies," and failing that, they could "submit briefs."[236] Failing to reach agreement, roughly six months later, the parties submitted briefs. BLM argued that, when "NEPA documents are sufficient except for a few discrete deficiencies, courts regularly remand for additional consideration or explanation of only those discrete issues," rather than vacating the entire decision.[237] The agency, moreover, attached an affidavit describing what the estimated indirect GHG emissions would be from the projected production from the oil and gas wells, and, with that estimate, noted that the projected emissions would not be substantial enough to warrant vacating BLM's decision.[238] The court agreed—albeit "[m]indful of Plaintiffs' legitimate argument that compliance with NEPA should precede all related operations," and instead simply suspended any approved authorizations to drill (APDs) and the approval of any further APDs "pending the completion of this analysis."[239]

One consequence of waiting to address the remedy is that it may be too late. When, for example, the D.C. Circuit held that the Corps "failed to make a 'convincing case'" for its finding of no significant impact (FONSI) assessing the impact of a transmission line project crossing the historic James River, it directed the district court to vacate the permit for the transmission line and order the preparation of an EIS.[240] Both the Corps and the transmission line developer sought rehearing on the scope of the remedy, urging the court to remand without vacating the permit—noting that construction of the line already had been completed. The court curtly chastised the parties for failing to inform it of this fact prior to issuance of its opinion, and then sent it back to the district court to consider whether vacatur would be appropriate.[241] The plaintiffs argued persuasively to the district court that throughout the litigation, the defendants maintained that the developers' construction activities would "in no way hinder" plaintiffs' "ability to obtain a meaningful remedy if it prevailed on the merits," and further the appropriateness of a vacatur.[242] But the district court applied a familiar test under the APA for deciding on the appropriate remedy, weighing the "seriousness" of the deficiency against any "disruptive consequence" from a vacatur, concluding that while here there arguably was a serious deficiency, the consequences of vacatur on a project already constructed would be too disruptive.[243]

After all, NEPA is enforceable only through a cause of action under the APA. The APA correspondingly affords courts wide latitude in fashioning a remedy. And the Administrative Conference of the United States and most courts accept that a violation does not necessarily require vacating the underlying agency decision.[244] So too, if vacating the underlying decision is not a presumptive remedy for a NEPA violation, then it dovetails with the judicial framework for assessing the need for injunctive relief.

Upon finding a NEPA violation, the lower court in *Monsanto Co. v. Geertson Seed Farms* ordered the Animal and Plant Health Inspection Service to prepare an EIS before the agency acted on Monsanto's petition to deregulate Roundup Ready alfalfa.[245] When examining the lower court's remedy, the Court averted back to its 2008 holding in *Winter v. Natural Resources Defense Council, Inc.*,[246] where the Court clarified that the "traditional four-factor test" would apply "when a plaintiff seeks a permanent injunction to remedy a NEPA violation."[247] The *Monsanto* Court, moreover, apparently sought to blunt any notion of a presumption in favor of injunctive relief, when it stated that "[n]o such thumb on the scales is warranted," and that "a court must determine that an injunction *should* issue under the traditional four-factor test."[248]

236. Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1247, 49 ELR 20044 (D. Colo. 2019).
237. Federal Respondents' Remedies Brief at 5, Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 49 ELR 20044 (D. Colo. 2019) (No. 17-02519). The government invoked the following examples: United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996); Avello v. Securities & Exch. Comm'n, 454 F.3d 619, 627 (7th Cir. 2006); West Virginia v. Environmental Prot. Agency, 362 F.3d 861, 869, 872 (D.C. Cir. 2004); South Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior, No. 3:08-CV-00616-LRH-WGC, 2012 WL 13780, at *2 (D. Nev. Jan. 4, 2012), *aff'd sub nom*. Te-Moak Tribe of W. Shoshone Indians of Nev. v. U.S. Dep't of the Interior, 565 Fed. Appx. 665, 44 ELR 20076 (9th Cir. 2014). Oddly or perhaps disingenuously, only one case involved NEPA!
238. Federal Respondents' Remedies Brief, *supra* note 237, at 8.
239. Order of Dec. 10, 2019, at 4-5, Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 49 ELR 20044 (D. Colo. 2019) (No. 17-02519).
240. National Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1089, 49 ELR 20036 (D.C. Cir. 2019).
241. National Parks Conservation Ass'n v. Semonite, 925 F.3d 500, 49 ELR 20095 (D.C. Cir. 2019).
242. Plaintiff's Opposition to Defendants' Motions for Remand Without Vacatur at 2, National Parks Conservation Ass'n v. Semonite, No. 17-01361, 2019 WL 5864737 (D.D.C. Nov. 8, 2019).
243. National Parks Conservation Ass'n v. Semonite, No. 17-01361, 2019 WL 5864737 (D.D.C. Nov. 8, 2019). *Cf*. Thomas O. McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 Envtl. L. 569, 591-95 (1990) (discussing mootness for post-completion cases).
244. Administrative Conference of the United States, Recommendation No. 2013-6, adopted Dec. 5, 2013. *See generally* Ronald M. Levin, "*Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 52 Duke L.J. 291 (2003). In *Shineski v. Sanders*, 556 U.S. 396, 406-07 (2009), Justice Stephen Breyer reviewed the APA's "prejudicial error" concept and noted how the Court had accepted that as a "harmless error" rule. For an interesting treatment of the question of vacatur post-*Geertson*, see Nate Hausman, Monsanto Co. v. Geertson Seed Farms: *Breathing a Sigh of Relief*, 25 Tul. Envtl. L.J. 155 (2011). An excellent student note captures the dilemma courts confront when merging traditional equitable relief under the APA with statutory environmental violations, observing how the judiciary's attempt to apply legal formalism on the equity side perhaps impedes sounder decisions on the environmental side. Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 Harv. Envtl. L. Rev. 205 (2011). A more recent article conversely suggests that, contrary to what some cases in this Article suggest, courts vacate orders too often. Richard Epstein, *The Many Sins of NEPA*, 6 Tex. A&M L. Rev. 1, 12-20 (2018).
245. 561 U.S. 139, 40 ELR 20167 (2010).
246. 555 U.S. 7, 39 ELR 20279 (2008).
247. *Monsanto Co.*, 561 U.S. at 157.
248. *Id*. at 158. The Court added that permanent injunctions are "drastic and extraordinary" remedies, "which should not be granted as matter of course" and "[i]f a less drastic remedy . . . was sufficient . . . no recourse" to such remedies is necessary. *Id*. at 165. The remedy question involved, in part, whether the agency could allow some planting and harvesting of the Roundup Ready alfalfa pending the completion of an EIS—and the Court explained that, until the agency decided to partially deregulate the product, the lower court could not effectively remove that option from the agency's toolbox. *Id*. at 160-61.

III. Stabilizing NEPA's Path

We can, of course, maintain our current path and acquiesce to a plodding whittling away at NEPA. This seems the easiest solution. And it is perhaps the most politically palpable option: it affords opportunities for both NEPA advocates and opponents to secure minor victories. Some projects might be shelved or altered through the NEPA process, while others might be delayed or abandoned following NEPA litigation. Conversely, congressional riders, streamlining efforts, regulatory changes, and agency agnosticism or antipathy will continue to erode the promise of environmentally sound decisions.

I accept how this path of least resistance may appear inevitable to most, quite possibly because of a perceived barrier to forging any consensus for an alternative scenario. Succumbing to such determinism, however, is untenable. The world's population is increasing, GHGs are changing the face and future of our planet, and our land and water resources are confronting the challenges of human desires along with increasing wastes and uses, all as technology and its effects challenge us at each new juncture. Decisions, particularly those by the federal government, cannot therefore ignore taking the requisite *hard look* at environmental consequences—and hopefully avoiding significant adverse effects. That invariably necessitates accepting that NEPA documents must address the direct, indirect, and even the cumulative impacts of agency actions that increase GHG emissions.[249] But rejecting the Trump Administration's effort to cabin NEPA's utility to help arrest rising GHG emissions is not a sufficient future for a statute that is now 50 years old.

To be sure, an alternative future that affords NEPA a substantive mandate is what I and others suggest Congress intended,[250] but it is naive to presume it is currently achievable. The past 50 years demonstrate, if anything, that NEPA's lofty objective presents a practical political problem—one that NEPA's drafters simply avoided. As such, calls for making NEPA's mandate even more explicit[251] seem unlikely to garner enough present support. The Trump Administration's proposal to remove NEPA's policy objectives from the governing regulations only underscores that currently preserving the status quo might be a sounder strategy. Indeed, only by, for instance, preserving the current language in CEQ's regulations about NEPA's policy objectives as articulated by Congress could a subsequent administration exercise its discretion to infuse NEPA's national environmental objective with greater force.[252] And it seems critical that the option for following Congress' objective when it passed NEPA remain available for a future administration.

Instead, for today, a third option is to forge an interim consensus around a few structural changes. Prof. Jamison Colburn, for instance, urges pragmatic steps toward improving how NEPA could address climate change.[253] He suggests that incorporating estimates of the effects of increased GHG emissions from particular agency decisions "will do precious little to inform the public or its leaders about the choices federal agencies are confronting."[254] But he posits how, at our current juncture, NEPA moving forward may "either remain marginalized and unimportant to mitigating climate disruption," or it could "become a vital key to doing so very quickly."[255] The latter could occur if agencies imbue their NEPA processes with a more robust approach toward analyzing meaningful alternatives.[256] Dan Tarlock too would demand greater judicial oversight of a corresponding duty on agencies to consider environmentally preferable alternatives to a proposed action.[257] That they could easily do with political will, but it would be far from sufficient absent other alterations. Agencies must receive clear guidance for improvements, ones the judiciary can meaningfully monitor.

At the outset, however, it is worth acknowledging how NEPA is often unfairly maligned. Little empirical evidence suggests that the NEPA process unduly delays agency action.[258] Profs. David Adelman and Robert Glicksman provide an empirical analysis that most agency decisions are covered by a CE or an EA.[259] That is not even account-

249. *See generally* Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 Harv. Envtl. L. Rev. 109 (2017); Alejandro E. Camacho et al., *Mitigating Climate Change Through Transportation and Land Use Policy*, 49 ELR 10473 (May 2019).

250. *See*, *e.g.*, Environmental Law Institute, Rediscovering the National Environmental Policy Act: Back to the Future (1995); Andreen, *supra* note 69; George Cameron Coggins, *Some Suggestions for Future Plaintiffs on Extending the Scope of NEPA*, 24 U. Kan. L. Rev. 307 (1975); Kalen, *Ecology Comes of Age*, *supra* note 21; Joel Mintz, *Taking Congress's Words Seriously: Towards a Sound Construction of NEPA's Long Overlooked Interpretation Mandate*, 38 Envtl. L. 1031 (2008); Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 Envtl. L. 533 (1990).

251. *See* Ferester, *supra* note 86, at 230 ("Congress should strengthen NEPA's substantive mandate").

252. *See* Jamison E. Colburn, *The Risk in Discretion: Substantive NEPA's Significance*, 41 Colum. J. Envtl. L. 1, 5 (2016) (arguing that executive interpretative discretion could justify a more powerful NEPA). Professor Colburn observes that "[t]he regulations equivocate throughout on differentiating threats from probabilities and on the management of uncertainty at NEPA section 102(2)(C)'s threshold." *Id*. at 26. Colburn's detailed analysis of how CEQ's policy choices have muted the effectiveness of threshold determinations is bolstered by recent proposals to enhance the use of DNAs and CEs, resulting in a failure "to keep pace with our attention to risk's best treatments." *Id*. at 33. He urges that agencies should incorporate risk-focused strategies into their NEPA analyses—and they could be commanded to do so by an Executive Order. *Id*. at 40-41, 49-50. Another objection he raises is that he believes NEPA implementation favors site-specific analysis over broader (or programmatic) impacts—and uses older scholarship that bemoans lack of programmatic analysis. *Id*. at 46. That concern, however, may overlook how agencies over the past decade have used more programmatic analyses and deferred site-specific analysis until later documents.

253. Jamison E. Colburn, *A Climate-Constrained NEPA*, 2017 U. Ill. L. Rev. 1091 (2017).

254. *Id*. at 1104.

255. *Id*. at 1110.

256. "NEPA," as he notes, "demands that agencies select and analyze the most meaningful alternatives given the factual contexts they face and the statutory priorities under which they operate," *id*. at 1129, and rather than be constrained by manufactured purpose and need statements the "[a]lternatives analysis" should be "freed from self-referential purpose/need statements and the causal constraints of some discrete agency action." *Id*. at 1121.

257. A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. Land Use & Envtl. L. 213, 250 (2004).

258. Adelman & Glicksman, *Presidential*, *supra* note 192, at 7.

259. *Id*. at 7, 24. The academic environmental law community explained to CEQ that only approximately 1% of all actions require an EIS, with most actions complying with the Act through the use of CEs or EAs. Comments on the Council on Environmental Quality ANPR Update to the Regula-

ing for the likely increase in the use of DNAs. Ted Boling similarly notes how it is the land planning agencies that typically do the most EISs, and that there has been an increase in the use of CEs (perhaps too many, he suggests) as well as mitigated FONSIs.[260] And the land planning process for land managing agencies such as the Forest Service skews the time to complete the EIS.

When, therefore, CEQ laments about the average time for an EIS being roughly 4.5 years,[261] that ignores how today EISs are now performed for the larger, more complex actions, such as land planning or large energy projects, which have other corresponding processes that affect the timing for the agency's action.[262] We can grossly surmise, moreover, that only about 30% of agencies' decisions involving NEPA are challenged, and most are upheld.[263] As such, according to Adelman and Glicksman, only roughly one-quarter of EISs and only a small percentage of EAs and CEs are litigated.[264] A former CEQ official noted how "there are few cases filed and few cases where a proposed project or activity is stopped from pending further action by either the court or the agency."[265] Along with debunking the recurring myth surrounding NEPA's impact on the timing of agency decisions, little evidence suggests that NEPA unreasonably burdens financially either federal agencies or private applicants.[266]

Although the attacks on NEPA may be overstated, an attorney for the Environmental Defense Fund aptly observed several years ago that "[s]ome measure of reform . . . is necessary" but it ought to occur within the executive branch, not Congress or the courts.[267] The Obama Administration, in fact, responded by ushering in several constructive reforms: it developed policies for efficient environmental compliance, such as coordinated reviews, reliance on mitigated FONSIs and CEs, and using programmatic EISs to help promote a greater use of EAs or other less lengthy EISs.[268] How to make the resulting environmental documents and the process more meaningful, therefore, is the challenge we now confront before the promise for our national environmental charter fades away.

To do that, I suggest it worth initiating a meaningful discourse about a few structural and substantive changes. Structurally, almost uniformly participants involved in the NEPA process acknowledge how the most significant driver for timely and meaningful NEPA compliance is leadership—driving the timetable, ensuring adequacy of resources, providing *objective analysis* of potential consequences, and having the capacity to direct agency coordination.[269] Senator Muskie believed that objectivity could only occur if an independent agency oversaw the process; Senator Jackson conversely trusted action agencies could perform the task. Fifty years of implementation suggests

tions for Implementing the Procedural Provisions of the National Environmental Policy Act, Docket No. CEQ-2018-0001 (Aug. 2018) [hereinafter Academic Comments]. One hundred and eighteen law professors also wrote the House Committee on Natural Resources in April 2018, providing the empirical information about NEPA compliance and litigation. Letter from 118 Law Professors to Rep. Rob Bishop, Chairman, Raúl Grijalva, Ranking Member, and Committee Members, House Committee on Natural Resources (Apr. 24, 2018) ("The data refute critics' claims that a systemic crises exists with respect to either NEPA implementation or litigation. Instead, they reveal reviews relying on either a CE or EA, and that NEPA litigation is rare."). In 2014, GAO calculated that agencies use CEs and EAs for more than 95% of their actions. GAO, GAO-14-370, National Environmental Policy Act: Little Information Exists on NEPA Analyses 8-9 (2014).

260. Ted Boling, *Making the Connection: NEPA Processes for National Environmental Policy*, 32 Wash. U. J.L. & Pol'y 313, 320, 322, 326 (2010). Boling adds that, prior to the Obama Administration, agencies issued roughly 500 draft, supplemental, and final EISs annually. *Id*. at 320.

261. 85 Fed. Reg. at 1687.

262. Academic Comments, *supra* note 259 (discussing which agencies and preparation times). The Academic Comments state:

> According to EPA and CEQ data for the period 1998 through 2015, four federal agencies issued more than 50% of the EISs published nationally. During this period, the U.S. Forest Service (USFS) accounted for 24%, the Bureau of Land Management (BLM) accounted for 8%, the U.S. Army Corps of Engineers (USACE) accounted for 10%, and the Federal Highway Administration (FHWA) accounted for 12%.

Id. Conversely, DOE between 1994 and 2016 completed just 175 EISs, with "a median time of 29 months from notice of intent (NOI) to final EIS." DOE, *Measuring DOE's EIS Process*, Nat'l Envtl. Pol'y Act: Lessons Learned Q. Rep., Sept. 2017, at 1. Notably, for EISs involving applicant proposals, the median time decreased to 21 months (about one-third quicker than DOE-involved projects). *Id*.

263. Boling, *supra* note 260, at 325 (reviewing cases between 2001 and 2008). More recent data suggest that agencies issue less than 190 EISs annually, with less than 100 NEPA challenges annually (and only roughly one-half of those involve an EIS). Academic Comments, *supra* note 259. *See also* Adelman & Glicksman, *Presidential*, *supra* note 192, at 17 (roughly 185-200 EISs issued annually, and providing the most thorough data on which agencies); David E. Adelman & Robert L. Glicksman, *The Limits of Citizen Environmental Litigation*, 33 Nat. Resources & Env't 17, 18-19 (2019) (roughly 104 NEPA cases annually).

In an analysis of Forest Service cases based on the interaction of different types of statutory claims, the agency prevailed in 64% of its cases—with many of those alleging violations of NEPA (71.5% of the cases included NEPA claims), the National Forest Management Act, and the Endangered Species Act. Amanda M.A. Miner et al., *Twenty Years of Forest Service Land Management Litigation*, 112 J. Forestry 32 (2014). Out of the 445 cases decided on the merits, the agency prevailed in roughly 61% of those cases. *Id*. at 36. By comparison, the agency only prevailed in 51.8% of cases with Endangered Species Act challenges. *Id*.

264. Adelman & Glicksman, *The Limits*, *supra* note 263, at 19; Academic Comments, *supra* note 259. *See also* Comments [by undersigned law professors] on the Council on Environmental Quality NPRM Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, Docket No. CEQ-2019-0003 (March 2020).

265. *The Weaponization of the National Environmental Policy Act and the Implementation of Environmental Lawfare: Hearing Before the House Committee on Natural Resources*, 115th Cong. 9 (2018) (testimony of Horst G. Greczmiel, Former Associate Director for NEPA Oversight, CEQ). Moreover, outlier cases that proceed to litigation often produce a more informed outcome. *Id*. at 11.

266. Academic Comments, *supra* note 259; *see also* Adelman & Glicksman, *Presidential*, *supra* note 192, at 18.

267. Tripp & Alley, *supra* note 100, at 77-78. They proposed greater coordination among agencies and further observed how "decisionmakers are left with an unwieldly document that is of little help in practical planning because useful details become lost amid the clutter." *Id*. at 87, 90; *see also* Comments of James T.B. Tripp, Senior Counsel, Environmental Defense Fund, Docket No. CEQ-2018-0001/13246 (July 26, 2018).

268. Memorandum from Nancy H. Sutley, Chair, CEQ, to Heads of Federal Departments and Agencies (Mar. 6, 2012), re: Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act.

269. *E.g.*, DOE, *Shorter EIS Completion Times: A Closer Look*, Nat'l Envtl. Pol'y Act: Lessons Learned Q. Rep., Sept. 2017, at 7 (noting "management attention"). "Agencies should coordinate and collaborate better, deadlines should be imposed; perhaps litigation should be made more difficult." Chris Thomas et al., *NEPA Streamlining Yet Again: Will the Diet Work This Time?*, 33 Nat. Resources & Env't 34, 36 (2019). Consequently, streamlining proposals naturally focus on some form of "coordinated environmental review or compliance process" with some lead agency identified. Luther, *supra* note 85, at 11.

Senator Muskie may have been right. Consequently, I would explore developing a reorganization plan that elevates CEQ's role and restructures units within the executive branch.

To begin with, NEPA compliance could be overseen by a new unit within CEQ. This unit could be charged with coordinating, tracking, and ensuring objectivity in the environmental analysis, presumably with less agency bias creeping into the process. Each federal agency would have a corresponding NEPA compliance officer (and staff) in this CEQ unit, employed by and under the direction of CEQ, and they in turn could have supervisory authority over a corresponding NEPA compliance office within each department or agency. This would not only obviate the need for the FAST Act Permitting Council, but it could perform a more substantive function by ensuring that all environmental documents, EAs or EISs, are substantively sufficient, robust, and effectively allow for an informed decision. Agency or departmental employees would remain primarily involved in drafting NEPA documents, but accountability for their sufficiency would reside within a new CEQ unit.

Next, NEPA must hew closer toward its original objective—sounder, not just informed agency decisions. This could be accomplished with a progressive CEQ, willing to direct that agencies engage in a balancing of the environmental consequences of an agency action against its potential benefits. When Justice John Paul Stevens once said "although 'it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment,'" he effectively intimated that perhaps agencies did so (or should do so).[270] Indeed, the most prominent early lower court decision required such a balancing.[271]

Contemporary observers acknowledged that NEPA's future path likely would be shaped by the judiciary; it would be "what the courts and environmental lawyers, governmental and private, will make of it."[272] Left out of that litany was CEQ—since afforded substantial deference on its understanding of the Act.[273] Consequently, nothing precludes CEQ from imposing such a balancing requirement, regardless of whether it also could or ought to seek to upend Supreme Court precedent and afford NEPA substantive effect (albeit again what I believe the drafters intended). NEPA, after all, directs that agencies interpret and administer their programs with the objective of furthering the Act's *policies*,[274] surely sufficient authority for CEQ to warrant imposing a procedural balancing obligation.[275]

Finally, Congress through NEPA sought to translate the science of ecology into national policy,[276] and as principles of ecology have evolved over the past 50 years so too should one of NEPA's underlying assumptions. It is widely recognized that, when Congress passed NEPA, many ecologists apparently believed nature operated in an equilibrium—a "balance of nature" paradigm. That suggests we could take a picture of the environment today and project how a proposed activity would affect the environment—immediately and over a longer future. Today, we instead talk about how nature is chaotic. And this suggests our ability to project effects on the environment is problematic, particularly in an age when climate change alters our ability to rely on historical trends.

Many scholars today urge as an alternative that the NEPA process must be iterative, not a one-time analysis without the ability to monitor and adapt as new information about effects become apparent. Even the Bush Administration-era 2003 NEPA Task Force acknowledged the need for some adaptive management program.[277] Consequently, CEQ, through regulatory changes, ought to engage the affected public and regulated community in how best to induce agencies into structuring their programs to accomplish continuous monitoring and adaptation in a manner that preserves sufficient regulatory certainty.

These three proposals, if implemented, could infuse NEPA with sufficient vitality to alter its unfortunate trajectory further away from its lofty ideals.

IV. Conclusion

In 1969, President Nixon charged his Cabinet Committee on the Environment with "ensur[ing] that . . . Federal policies and programs" would "take adequate account of environmental effects"[278]; and the following year, he reiterated that "[t]he Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment" and take "measures needed to direct their policies, plans and programs so as to meet national environmental goals."[279] Much has been accomplished in the environmental realm during the ensuing 50 years. "Departments and agencies that previously had not considered environmental protection and sustainable development as part of their missions," opines Boling, "now have

270. Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 372, 19 ELR 20749 (1989) (when quoting from *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)).

271. Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971). *See generally* 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 (Richard J. Lazarus & Oliver A. Houck eds., Foundation Press 2005).

272. Kalen, *The Devolution of NEPA*, *supra* note 40, at 501 (quoting R. Frederic Fisher, and discussing other observers).

273. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 322, 374, 19 ELR 20743 (1989); Andrus v. Sierra Club, 442 U.S. 347, 358, 9 ELR 20390 (1979).

274. *See supra* notes 20-32 and accompanying text.

275. In this context, mitigation would have a greater role because it would not only be considered, but necessarily utilized as part of a balancing calculation. Even the 1995 Unfunded Mandates Reform Act required a cost-benefit assessment (including effects on "the natural environment") for covered significant regulatory actions. 2 U.S.C. §1532; Pub. L. No. 104-4, §202(a), 109 Stat. 48, 64 (1995).

276. *See* Kalen, *Ecology Comes of Age*, *supra* note 21.

277. NEPA Task Force, *supra* note 85, at 44 (Chapter 4, Adaptive Management and Monitoring).

278. Exec. Order No. 11472, 34 Fed. Reg. 8693 (June 3, 1969).

279. Exec. Order No. 11514, 35 Fed. Reg. 4247 (Mar. 7, 1970).

environmental programs and goals."[280] Although lamenting how the Court excised NEPA's substantive mandate, Nicholas Yost adds that the Act's "procedural provisions have been extraordinarily successful in achieving their somewhat constrained goals."[281]

Undoubtedly, many projects have been altered or mitigation measures employed, resulting in environmentally sound decisions attributable to NEPA.[282] Some catastrophes may even have been averted. But in the Anthropocene, our planet still is imperiled, our species are at a heightened risk of extinction, our droughts are increasing, wildfires are spreading, too many water bodies remain at risk, states and local communities rather than the federal government must impose bans on deleterious products and fossil fuels, and yet we appear destined to eschew having the spirit of our environmental Magna Carta materialized. We must, instead, head back toward the policies announced at our environmental Runnymede.

280. Boling, *supra* note 260, at 320.
281. Yost, *supra* note 250, at 534.
282. *See* John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 Nat. Resources & Env't (forthcoming 2020); Environmental Law Institute, NEPA Success Stories: Celebrating 40 Years of Transparency and Open Government (2010).